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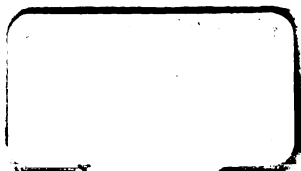
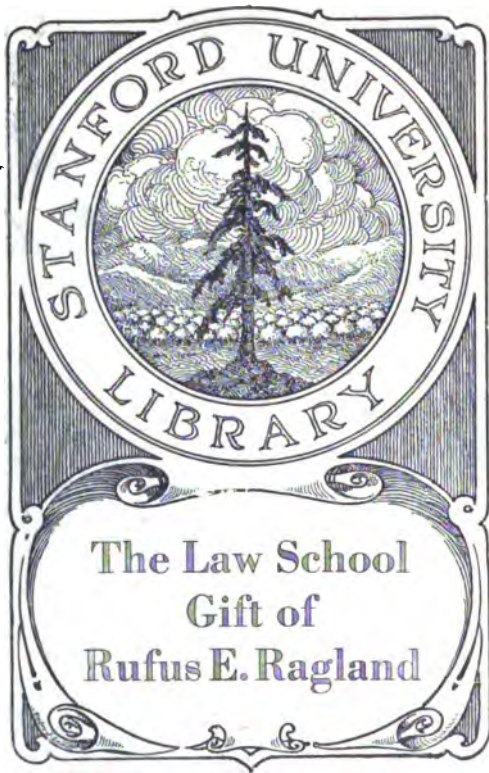
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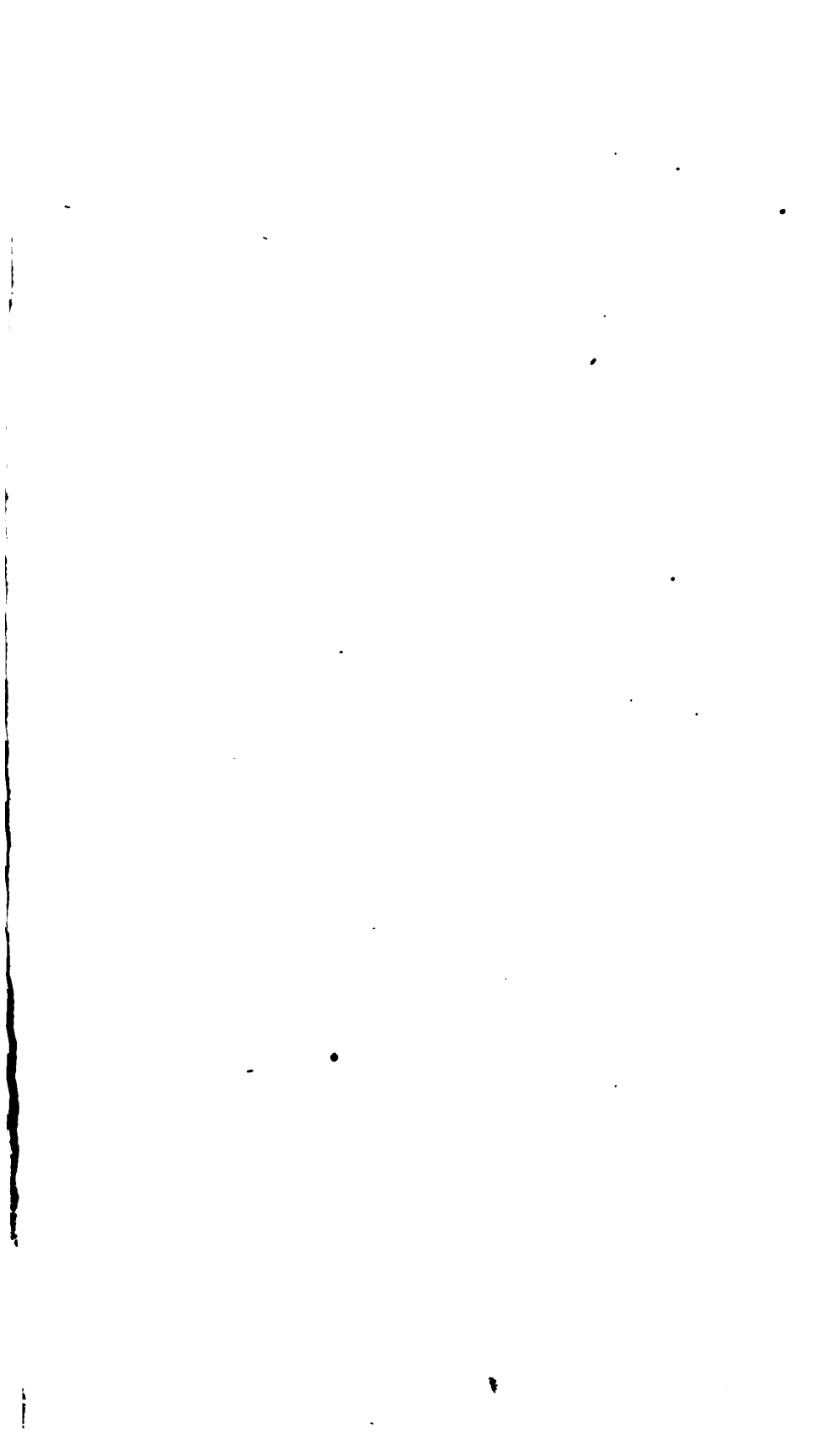
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Alfred Gould

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



IN THREE VOLUMES.



VOL. III.



NOTES

ON

LORD COKE'S FIRST INSTITUTE,

OR

COMMENTARY UPON LITTLETON.



By FRANCIS HARGRAVE, Esq.

AND

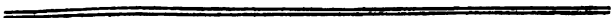
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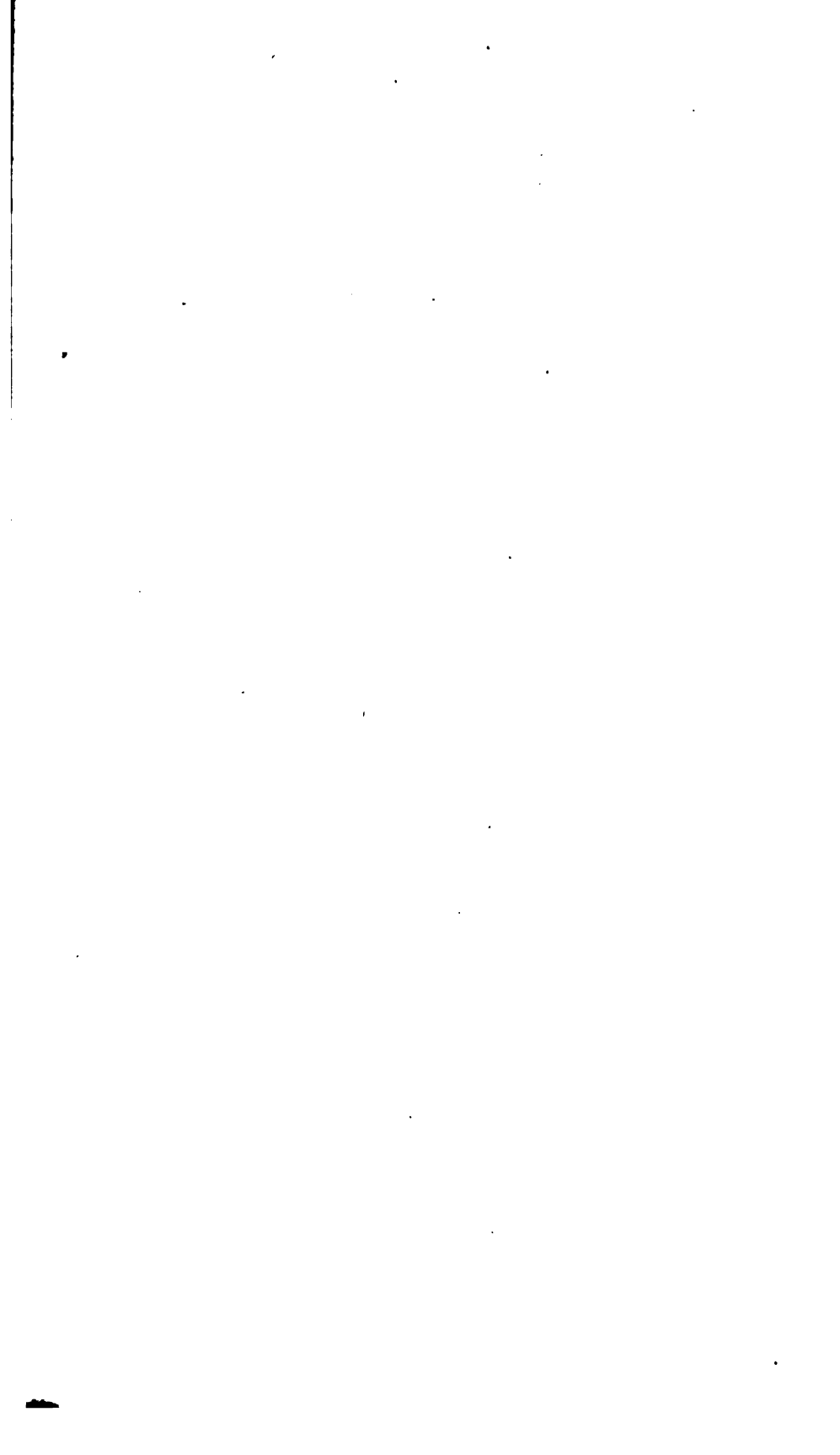
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NOTES
ON THE
FIRST PART
OF THE
INSTITUTES
OF THE
LAW OF ENGLAND.

Chap. 1.

Fee simple.

Sect. 1.

[1. a.]

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

[Note 1.]

[2. a.]

(1) An annuity of inheritance is held to be forfeitable for treason as an *hereditament*, 7 Co. 34. b. yet being only *personal*, it is not an hereditament

[Note 2.]

ditament within the statute of mortmain of the 7 E. 1. st. 2. nor is it in-
tailable within the statute *de donis*. See post. 2. a. b. & 20. a.

[2. b.]

[Note 3.] (1) Therefore on a covenant to stand seised, an use will arise for an alien. Godb. 275. But by *act of law*, as by *decent*, he cannot even *take* for the benefit of the king. 7 Co. Calvin's case, 25. a. Post. 31. b. and 1 Ventr. 417. See in Dy. 283. b. the case of a feoffment to an alien and another to uses.

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

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

[Note 6.] (4) If an alien purchases a copyhold, it is said that it shall escheat to the lord. Dy. 2. b. in marg. but see 1 Mod. 17. and All. 14.

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

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

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

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

[Note 11.] (12) Fitzherbert argues strongly, that a noncompos may plead his disability to avoid his own acts as well as an infant. Fitz. Nat. Br. 202. See post. 247. a. & b. much curious learning on the subject, and also 2 Blackst. Com. ed. 5. p. 291. where the progress of the opinions on this subject is critically stated.

[3. a.]

[Note 12.] (1) Adjudged acc. in Chancery. 2 Vern. 385. and 3 Atk. 72. But the

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

(4) Acc. as to churchwardens, Finch's law, 8vo. ed. 178. See [Note 13.]
 Keilw. 32. a. But by 9 Geo. 1. c. 7. they are enabled to purchase a workhouse for the poor; and by custom, in some places, as in London, the parson and churchwardens are a corporation to purchase lands. Cro. Jam. 532.

[3. b.]
 (1) The several reports of the case cited by lord Coke in the margin differ very much. According to Noy and Moore, it was held by all but Popham, that the remainder was good, though the bastard was not born till after creating it; and Rolle represents the case as if the opinion had been for the remainder. But Croke agrees with lord Coke, and writes, that a majority of the judges held the remainder void; though in deed it appears by his report, that the party at length claiming as *lawful issue*, it became unnecessary to decide what would be the effect of a remainder to an unborn bastard. The only modern case I meet with on the subject is one, in which lord chancellor Macclesfield inclined against such a remainder, even though to a child *en ventre sa mere*. 1 P. Wms, 529. However, the doctrine doth not seem fully settled. If the objection against the limitation to a bastard not *in esse* is *uncertainty of description*, it must certainly fail where he is described by the *mother only*; and even where the *father* is named, it may sometimes be possible to ascertain him also sufficiently, as well where the limitation precedes, as where it follows the bastard's birth. See Bro. Grant. 17. 2 Ro. Abr. 43, 44. But if the objection is a *policy of law*, which, for the encouragement of marriage, creates a *disability* of providing for illegitimate children before they are born, then lord Coke's doctrine is true in its full extent. See Cro. Eliz. 510. Which of these is the true principle of objection, is left to the judgment of the learned reader. [Note 14.]

(4) Acc. Scamler's case, and 1 Ro. Abr. 731. J. and Cro. Eliz. 636. [Note 15.]
 But the case in March. 43. is *contra*; and there mr. justice Jones affirms, that Scamler's case was also *contra*. However, in Cro. Cha. 556. lord Coke's doctrine seems admitted where the office is not granted so as to be exerciseable by a *deputy*.

(5) Acc. 11 Co. 4. a. W. Jo. 264. 2 Lev. 245. and Cas. temp. Talb. [Note 16.]
 99. but *contra* where it has been the usage so to grant, W. Jo. 311. Hardr. 257. 2 Ventr. 188. and it is said that the king may so grant without any usage. March. 42. 4. Mod. 280. Dy. 295.

(7) But it seems, that this doctrine is now become inapplicable; for [Note 17.]
 there is no longer any legal establishment for *professed* persons in *England*,

land, and our law never took notice of *foreign professions*. See post. 132. b. 2 Ro. Abr. 43. C. Wright's Ten. 28. 1 Salk. 162.

[4. a.]

[Note 18.] (1) Since sir Edward Coke's time, the rate of interest has been gradually reduced to 5 per cent. See 21 Ja. 1. c. 17. 12 Cha. 2. c. 13. and 12 Ann. st. 2. c. 16. But a greater rate of interest is still allowable in Ireland and our Plantations. It has been doubted whether the 12 Ann. did not extend to money lent on lands in Ireland or our Plantations, where the mortgage is executed in Great Britain; but the 14 Geo. 3. c. 79. declares all such securities made previously to that act to be valid, notwithstanding the 12 Ann. where the interest is not more than the established rate of the particular place; and that all *future* securities of a like kind shall also be valid, where the interest is not more than 6 per cent. It is impossible in the compass of a note to cite the numerous cases on the statutes of usury. One of the most remarkable for the great learning and variety of the arguments is that of the earl of Chesterfield and Janssen, 1 Atk. 301. and 2 Ves. 325.

[Vide *Ord on Usury*, where the cases are well digested and arranged. In an edition of this work lately published, the *American* cases, as well as the recent decisions in *England* and *Ireland*, are incorporated.]

[4. b.]

[Note 19.] (1) *Contra* Keilw. 118. and Palm. 174. Also in 1 Vent. 393. it is argued by North attorney-general, that *vesture* of land means *all* the profits. But 4 Leo. 43. and Ow. 37 are with sir Edward Coke. Indeed his interpretation is conformable to the use of the word in some ancient deeds, and seems warranted by 4 E. 1. st. 1. s. 4. and 13 E. 1. st. 2. c. 25. s. 10. It also appears most agreeable to the derivation of the word, which is from *vestio*. See Cow. Interpret. ed. 1727. voc. *Vestura* and *Vesture*. Note, the difference taken in Palm. 175. between *vesturam terra, primam vesturam terra*, and *primam vesturam terra* from one quarter to another; and between such grants by the *king*, and those by a *subject*. As to prescribing for *sola vestura*, see post. 122. a.

[Note 20.] (2) Acc. post. 122. a. but see *contra* by lord ch. j. Holt, in 2 Salk. 637. The truth is, that the authorities on this subject are very numerous, and seem contradictory. Some agree with sir Edward Coke; according to others, one having a *several* fishery *must* be owner of the soil; and again some hold, that a *several* fishery and the soil *may* be in *different* persons, but that they shall be *presumed* to be in the same person till the contrary is pleaded. Besides the books cited in the margin, see 17 B. 4. 6. b. 10 H. 7. 26. Bro. Præcipe 33. and Dav. 55. b.

[5. b.]

[Note 21.] (1) *Contra* as to the garden, Keilw. 57. Mo. 24. Dal. in N. Bendl. 29. But see acc. post. 56. a. and b. Plowd. 171. 2 Co. 32. 2. Saund. 401. S. p. adj. acc. in case of a devise. 3 Leon. 214. and Cro. Eliz. 89. See acc. 2 Cha. Cas. 27. See further Litt. Rep. 6. where the court held that the devise of a messuage was not sufficient to pass two acres four miles distant from the messuage, though occupied with it. In Keilw. 57. a difference is taken between *messuage* and *domus*; and it is there said, that *messuage* extends to the *curtilage*, though not to the *garden*, but that *domus* only comprehends buildings. Also in some of the cases cited, particularly that from Plowden, the grant was of a *messuage* with the *appurtenances*; on which *latter* word some stress seems to have been laid.

[Note 22.] (4) This differs from the common acre, because each perch usually contains 16 feet and an half. In some places the custom is to measure by

by a perch of 24 feet and, in others by one of 20 feet. See Crompt. on Courts, 222.

[6. a.]

(1) Here *fold-course* seems to be understood for land used as a *sheep-walk*; but the word has various other senses. Sometimes it signifies land to which is appurtenant the sole right of folding the cattle of others. Sometimes it means merely *such* right of folding. It is also used to denote the right of folding on another's land, which is called *common of foldage*. See in W. Jo. 375. and Cro. Cha. 432. a case, in which *common of foldage* was claimed; and 2 Ventr. 139. one in which the right of folding the cattle of others is prescribed for. [Note 23.]

(3) See further as to *hereditament*, ante 3 Plowd. 58. Mo. 176. 3 Co. 2. Dy. 523. b. pl. 30. With the word *hereditament* lord Coke ends his laborious enquiries about the names, by which things will pass in grants and other conveyances. His etymologies and explanations of the several words are certainly open to many observations, besides the few made by the editor of this edition. But the omission on his part proceeds from the nature of his undertaking, which confines him to narrow limits. To supply his unavoidable deficiencies in this instance, and for the sake of recommending assistances which are too much neglected, he refers the student to the Glossaries which are so peculiarly adapted for the libraries of such as study English law, history, and antiquities. Of these a good list is given in a tract by Dr. Thomas Barlow, intitled *Directions for the Study of the English History and Antiquities*, and published in 1742 by Dr. Taylor, with his Commentary on the Decemviral Law *De inopie Debitore in partes dissecando*. To this list of Glossaries should be added, Du Fresne's Glossary *ad Scriptores Med. et Infim. Latin ed. Par. 1733*, the *Glossarium Novum* by Charpentier, *ed. Par. 1766*, the Glossary by Dr. Kennet, at the end of his *Parochial Antiquities*, that at the end of Wilkins's *Leg. Anglo-Saxon*, and Lye's *Dict. Sax. & Gothic. Latin. ed. 1772*. [Note 24.]

(4) See Cro. Eliz. 347. Cro. Cha. 442. Noy 145. In all of these books it is said, that in the case of conveyances to uses the possession of deeds appertains to the *feoffee* or *covenantee*, and not to *cestui que use*; and the reason given is, that it was so at common law; and the statute of uses, though it transfers the legal estate to *cestui que use*, doth not transfer the deeds. But this doctrine seems questionable. [Note 25.]

(6) See further as to *bockland* and *folkland*. Reliq. Spelm. 12. 39. and Dalrymp. Feud. Prop. 9. In this last book the very spirited writer attempts a new distinction between the two kinds of land, and to shew that *bockland* or *thane land* was *feudal*, and that *folk* or *reveland* was *allodial*. [Note 26.]

[6. b.]

(1) But according to the modern cases, it is the *infamy* of the *crime*, and not of the *punishment*, which disqualifies from being a witness; and therefore persons stigmatized by an *infamous* punishment, such as being set on the pillory, are admissible witnesses, unless the punishment was inflicted for forgery, perjury, or any species of the *crimen falsi* or any other crime of an infamous nature. See further on this subject, Gilb. Law of Evid. 142. the Law of Nisi Prius, 1st ed. 413. and 1 Wils. part 2. p. 18. [Note 27.]

(3) But now it is settled, that all persons professing to believe in a God, though neither believing in the Old or New Testament, may be witnesses, if sworn according to the ceremonies of their own religion. [Note 28.]

See

See in 1 Atk. 19. 2 Eq. Cas. Abr. 397. and 1 Wils. part 1. p. 84. the great case of Omichund and Barker, in which lord chancellor Hardwicke, assisted by the two chief justices and the chief baron, determined that the deposition of one who was of the *Gentoo* religion should be read in evidence.

[In the *King v. Taylor, Peake's Ca. 11*, a witness being called by the prosecutors, the counsel for the dft. asked him, first, whether he believed in *Jesus Christ*; and afterwards, whether he believed in the *Holy Gospels*? BULLER, J. ruled, that both questions were improper; and said the proper question was, whether he believed in God, in the obligation of an oath, and a future state of rewards and punishments. In a late case before the *Supreme Court of Connecticut*, this doctrine was fully recognized. The governing principle is, that no testimony is to be received in a court of justice but under the sanction of an oath, and it is absurd to administer an oath to a man who disregards its obligation. At the same time, the utmost liberality is exercised, towards every person not excluded by this principle, whatever may be his religious creed, whether *Christian, Mahomedan or Pagan*, or whether he disbelieves them all, being sworn according to that form of an oath which he holds to be obligatory. In the case alluded to, it was made a question, whether the disqualification of the witness could be proved from his declarations out of court concerning his opinions and principles? The question was decided in the affirmative. It was also decided, that the witness could not be admitted to deny or explain in court the declarations imputed to him, as it would be incongruous to admit a man to his oath for the purpose of learning from him whether he had the necessary qualifications to be sworn. *Curties v. Strong*, 3 Day.—Vide *Peake's Ev. 149, third Lond. edit.*]

[Note 29.] (6) There are many exceptions to this rule, as well at common law, as under acts of parliament. See Gilb. Law of Evid. 135. Law of Nisi Prius, 1st ed. 435. See further as to admitting or refusing the evidence of the wife or husband against each other, in Cas. B. R. temp. Hardwicke, 265. Rep. of Cas. B. R. temp. Hardw. 140. 1 Atk. 451. 2 Kel. 62.

[The principle on which the general rule is founded, seems to be twofold: first, that of public policy, having for its object the preservation of peace in families; and secondly, that of unity of interest.

The first is applicable,

1. Where one of the correlates is offered to give evidence *tending to criminate the other*. *Mary Grigg's case*, T. Raym. 1; *Broughton v. Harftur*, 2 Ld. Raym. 752; *The King v. The Inhabitants of Cliviger*, 2 Term Rep. 263. It is evident, that interest in the event of the suit is not the governing principle in these cases; for the parties were third persons, and not the correlates of the witnesses offered; nor could any verdict between these parties be given in evidence against such correlates.

2. Where one of the correlates is offered to give evidence *prejudicial to the interests of the other*, in a suit to which the latter is a party. *Barker v. Sir Woolston Dixie*, Ca. temp. Hardw. 264; *Bentley v. Cook*, Trin. 24 Geo. 3. B. R. cited 2 Term Rep. 265, 269. The principle of policy above mentioned is, in these cases, expressly stated as the ground of decision.

3. Where *confessions* of one of the correlates prejudicial to the interests of the other are offered in a suit to which the latter is a party. *Hall v. Hill*, 2 Sra. 1094; *Anonymous*, 2 Chan. Ca. 39. Here it is evident, that unity of interest is not the governing principle; for the confessions of the party against his interest would undoubtedly be good evidence.

The

The Second principle is applicable where one of the correlates is offered as a witness for the other. *Rex v. Frederick and Tracy*, 2 *Str.* 1095 ; *Davies v. Dinwoody*, 4 *Term Rep.* 678 ; *Peake's Ev.* 181, *third Lond. edit.*

It is not inconsistent with either of these principles to admit the wife, in an action between third persons, to give in evidence facts, which impute no crime to the husband, but which, if proved in a civil suit against him, would subject him to damages. It was upon this ground, that the case of *Williams v. Johnson*, 1 *Str.* 504, and the late case of *Baring v. Reeder*, 1 *Hen. & Mun.* 154, before the *Supreme Court of appeals in Virginia*, proceeded. An extract from the able opinion of Judge ROANE, in the case last cited, will place this subject in a clear point of view. "I take the rule on this subject to be, that in *civil* actions, where the husband is *no party*, the wife may be called as a witness even to facts, which, if proved in *another* action to which the husband is a *party*, and by evidence other than her own, may go to charge him. The unavailing testimony of the wife, in such case, entirely impotent as it relates to the husband, producing to him no loss, and consequently existing in him no displeasure, will not violate the reason of that policy, which in respect to the harmony to be desired in the marriage state, has given rise to the rule in question." 1 *Hen. & Mun.* 168.]

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

[Note 30.]

[That the objection fails, as affecting the *competency* of the witness, whether he has repaid the money borrowed or not was finally settled by the case of *Smith, q. t. v. Prager*, 7 *Term Rep.* 60. The principle of that decision, however, had been previously established in *Abraham, q. & v. Bunn*, 2 *Burr.* 2251, and *Bent v. Baker*, 3 *Term Rep.* 27 ; and has since been sanctioned, and rendered familiar, by numerous decisions in *England* and in this country.]

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

[Note 31.]

requisite judgment, accuracy, and nicety, until the task is undertaken by one of our own country, who hath been regularly trained in the study of the English law, and is familiarly acquainted with all the writers on our law, constitution, and history.

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

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

[7. b.]

[Note 34.] (2) This title was given to Henry by Pope Leo X. in consequence of the king's publishing his book, in defence of the seven sacraments, against Martin Luther, and dedicating it to the pope. Coll. Eccl. Hist. v. ii. p. 11 to 17.

[Note 35.] (5) Though Henry the 8th and Edward the 6th had both used the title of king of Ireland, yet pope Paul the 4th, dissembling notice of it, conferred the same title as a *new* one upon Philip and Mary, in order that the world might deem their use of the title merely the effect of his power. Heyl. Hist. Reform. 69, 70.

[8. a.]

[Note 36.] (1) If the *father* in this case is to be supposed a *natural-born* subject at the birth of the issue, the child would now be also a *natural-born* subject by force of the 7 Ann. c. 5. and 4 Geo. 2. c. 21. But the children of persons attainted of, or liable to the penalties of treason, or in the service of a foreign state in enmity with Great Britain, are excepted from the benefit of this provision. See the 25 Ed. 3. st. 2. which declares, that at common law, the children of the king, wherever born, may inherit. The same statute enables children born abroad to inherit, if at their birth *both* their parents are within the king's allegiance, and their mothers pass the sea with the licence of their husbands. Amongst the MSS. in Lincoln's-Inn library there is a very learned dialogue between two serjeants, on the 25 E. 3. See lib. no. 80. See also post. 128. b. 129. and Cro. Cha. 601.

[Note 37.] (2) In the case of Collingwood and Pacc, the court denied this to be law; and held, that the sons of aliens were inheritable to each other. See in 1 Sid. 193. and 1 Vent. 413. the very elaborate speech by lord chief justice Hale, on giving the judgment of the court. Also now by the 11 and 12 W. 3. c. 6. natural-born subjects may derive a title by descent through their parents, though aliens; but the 25 Geo. 2. c. 40. confines the benefit of the former statute to such heirs as shall be living and capable of taking at the death of the person last dying seised, unless such heirs happen to be daughters, and there is afterwards a son or another daughter, for which cases the statute makes a special provision.

(5) The

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

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

(8) See 11 and 12 W. 3. c. 4. which disables persons educated in the popish religion, or professing it, from inheriting, but in respect of themselves only, if they do not conform within six months after the age of 18; and provides, that till they do conform, their protestant next of kin shall enjoy. By the same statute papists are disabled from taking lands by purchase, which should have been mentioned before. For cases on the construction of this statute, see 1 Stra. 267. 2 P. Wms. 3. 6. and 132. 3 P. Wms. 46. 1 Atk. 526. 528. 2 Atk. 210. 3 Atk. 155. 457. 2 Ves. 398. 1 Wils. part. 1. p. 176. Rep. Cas. B. R. temp. Hardw. 149. Cas. B. R. temp. Hardw. 91. and Vin. Abr. *Devise*, I. 7. pl. 4. and 5. [Note 40.]

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

[8. b.]

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

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

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

be

be a *dangerous precedent*, and something very like the exercise of a dispensing power.

[Note 45.] (4) According to many authorities, *heir* may be *nomen collectivum*, as well in a deed as a will, and operate in both in the same manner as *heirs* in the *plural* number. See 2 Ro. Abr. 253. See also 1 Ro. Abr. 832. K. pl. 1, 2. Godb. 155. T. Jo. 111. Cro. Eliz. 313. Robins. Gavvelk. 95, 96. Burr. 4. part v. 1. p. 38. & Vin. Abr. *Devise*, U. a. pl. 13. & *Parole*, H.

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

[9. a.]

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

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

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

(2) The

[9. b.]

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

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

[10. a.]

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

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

by purchase under a limitation to the *heirs female*, the person claiming must be both *heir* and *f. male*. See also the note, in which it is attempted to justify lord Coke for that doctrine, and to explain the qualifications with which it ought to be understood.

[10. b.]

[Note 54.] (1) In the preceding page, lord Coke begins his comment on that part of Littleton which describes the course of *descent* by the common law of England; and this seems to be a proper place for referring the student to some valuable writings published since lord Coke's time on the same subject. See Hal. Hist. C. L. c. 11. Wright's Ten. 174. Gilb. Ten. 2. Dalrymp. Feud. Prop. 4th ed. c. 5. p. 159. and Blackst. Law of Descents. To the first and last of these books it is that we principally call the attention of the student; though it must be confessed, that, in all of them, the history of the law is so learnedly and critically traced, and the feudal principles, on which it chiefly depends, are so clearly unfolded, that a subject, in itself dry and abstruse, becomes not only plain and intelligible, but even agreeable and interesting. Mr. R. Robinson's *Discourse concerning the Law of Inheritance in Fee simple* is another treatise on the same subject, which should not be passed over without notice. Many parts of it are ingeniously written: but unfortunately the author has chiefly exerted his talents in inventing a new kalendar of consanguinity, the explanation of which employs a very considerable part of the work; and by always referring to this, and by introducing a number of arbitrary terms, which are only intelligible as he explains them, he involves his subject, before too much embarrassed with difficulties, in still greater perplexity.

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

[11. a.]

[Note 56.] (1) In Ratcliffe's case, 3. Co. 40. the reasons given for excluding lineal ascent are, *first*, that fathers and mothers are not of the blood of their children; *secondly*, that the exclusion is agreeable to the Jewish law, as prescribed to Moses by God himself; and *thirdly*, that it tends to avoid that confusion and diversity of opinions in the case of descents, of which the allowance of lineal ascension by the *civil* law is said to be the occasion. Lord Coke himself controverts the *first* of these reasons, by the words of Littleton in the Section here commented upon, and by the case of administration, in which the father or mother is preferred as

nearest

nearest of blood to their children, and also by the case of a remainder to the son's nearest of blood, under which description the father is entitled to take by purchase. But as to the two other reasons, lord Coke rather appears to adopt them. However, neither of them seems satisfactory. The inference from God's precept to Moses is unwarranted, unless it can be shewn that it was promulgated as a law for mankind in *general*, instead of being, like many other parts of the Mosaical law, a rule for the direction of the Jewish nation *only*. Besides, by the Jewish law the father did succeed to the son in exclusion of his brothers, unless one of them married the widow of the deceased, and raised up seed to him. See Blackst. Law Tracts, v. 1. p. 182. 8vo. ed. and Seld. de Succes. Erzor. c. 12. there cited. The argument from the supposed confusion and uncertainty which might arise, if lineal ascent should be permitted, is not less liable to objection; because lineal *ascent* might be governed by the same rules as lineal *descent*; and what is the difference between the two, that should create more confusion and uncertainty in the one case than in the other? Our modern writers account for our law's disallowance of lineal ascent in a very different way; and according to them, it in a great measure originated from the nature of ancient feudal grants, which, like estates tail, being confined to the first feudatory and his descendants, necessarily excluded his father and mother, and all paramount them, and also his collateral relations. How this rule in *practice* became extended so as to exclude lineal ascent *universally*, without confining it to the cases to which the feudal reason for the rule is applicable, and yet at the same time is so construed as to let in all collateral relations, and even the father himself collaterally, and by the medium of others, is not now very easy to explain, though this has been attempted. See Wright's Ten. 180. and Blackst. Law Tracts, v. 1. p. 183. 8vo. ed. See also a learned note on the subject in *Littleton avec Observat. par M. Houard*. This edition of Littleton is in 2 vol. 4to. and was published at Rouen in 1766.

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

[11. b.]

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

(4) Here lord Coke is silent as to the right to the intermediate profit from the death of the father. In the case of *Basset and Basset*, 10 W. 3. Hardwicke held, that a posthumous son, claiming under a remainder in a settlement, was by construction of the 10 and 11 W. c. 16. which preserves remainders for posthumous children, where no estate is limited to trustees, for that purpose, intitled to the mean profits. See 1. 203. But in the same case lord Hardwicke seems to have taken it for granted, that on a *descent* the mean profits belong to the uncle; for [Note 59.]

for he directed, that the profits of the *estate descended* should be accounted for by the uncle only from the birth of the posthumous son. See post. 55. b. where lord Coke puts the case of a daughter's being intitled against a posthumous brother to corn sowed before his birth; which seems to shew, that lord Coke did not consider the posthumous child as intitled to any mean profits on a descent. See also Wils. Rep. vol. 2. p. 526. where lord ch. j. De Grey, in delivering the opinion of the court of C. P. on a question whether a *posthumous son* was *actually seized*, denies that the posthumous son, in the case of a descent, can be intitled to any profits received before his birth, and cites 9 H. 6. 25. as an authority in point.

[12. a

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

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

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

doctrine is agreeable to lord Hale's argument when he gave judgment in *Collingwood* and *Pace*, cited ante fol. 8. a. n. 2. and also confirms the observation hazarded in n. 5. fol. 8. a.

[12. b.]

(2) But here lord Coke must be understood to speak of two distinct conveyances in fee; the *first* passing the use as well as the possession to the feoffee, and so completely divesting the feoffor of all interest in the land; and the *second* regranting the estate to him. For if in the first feoffment the use had been expressly limited to the feoffor and his heirs, or if there was no declaration of uses, and the feoffment was not on such a consideration as to raise an use in the feoffee, and consequently the use resulted to the feoffor, in either case he is in of his *ancient use*, and not by purchase. Adj. acc. 3. Lev. 406. and 2 Salk. 59. and see acc. post. 15. a. and 22. b. What shall be a *purchase*, and break the *descent*, so as to entitle the *paternal* heir to a preference over the *maternal* heir, particularly in the case of a devise to the heir, the student may inform himself by the authorities cited in Vin. Abr. *Heir*, W. 1. 2. to which add *Batley* and *Trevillian* Mo. 278. *Hind* and *Lyon* 3 Leon. 64. 70. and *Dy.* 124. *Hainsworth* and *Pretty* Cro. Eliz. 833. 919. *Brown* and *Taylor* Cro. Cha. 38. *Clark* and *Smith* 1. Salk. 241. and 1 *Lutw.* 793. *Smith* and *Trig.* 8. *Mod.* 23. and 1 *Stra.* 487. *Ratcliffe's case* 1 *Stra.* 267. *Martin* and *Strachan* 1 *Wils.* Part. 1. p. 66. and *Hurst* and the earl of *Winchelsea* Bur. 4. pt. v. 2. p. 879. In this last case, a feme covert by force of a power appointed by *will* to her heir in fee, but charged the land with debts and legacies; and it was adjudged in B. R. that the heir took by *descent*, and that the appointment had no other operation than making the estate subject to the debts and legacies. One leading principle, which this and the other authorities seem clearly to establish, is, that whenever a *devise* gives to the heir the same estate in *quality* as he would have by *descent*, he shall take by the *latter*, which is the title most favoured by the law; and that merely charging the estate with debts or legacies will not break the descent. This is only one of the many useful propositions, which might be extracted on the subject as the result of the long list of cases before cited, if this was the proper place for a discussion so nice and difficult.

[Note 63.]

[13. a.]

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

[Note 64.]

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

[Note 65.]

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

[Note 67.] (5) *But if the eldest son purchases land, and it descends to the youngest son, and he dies without heir of the part of the father, it shall descend to the heir on the part of the mother; because they have one and the same mother.* Hal. MSS.

[Note 68.] (7) *A. infeoffs B. attainted of treason to the use of C. the king shall have the land discharged of the use.* Hal. MSS. and Pim's case, M. 27 Eliz. is cited from Moore. See Mo. 196. But note, that according to Moore, B. at the time of the conveyance to him, had only committed treason, and was not attainted till after; and it was by relation to the time of committing the offence, that the case was construed to be the same as if the conveyance had been to a person actually attainted. The doctrine in Pim's case sounds peculiarly harsh; for first the legal estate in the land was given to the queen by a constructive relation, and then she was deemed to hold the land discharged of the use, because the king cannot be a trustee. However, it is but justice to mention that, the case being represented to queen Elizabeth, she, much to her honour, granted the land to *cestuique use* by patent. As to the king's holding land discharged of all uses and trusts where the legal estate vests in him, and the sense in which that doctrine is to be understood, see Vin. Abr. *Uses*, C. where most of the authorities on the subject are stated or referred to.

[Note 69.] (8) *But if the party appears on an appeal, and the plaintiff counts, and the defendant is convicted by verdict or confession, it is all one.* Hal. MSS.

[13. b.]

[Note 70.] (1) *Nota, if one be attainted by outlawry or confession of a felony, which is precedent to the feoffment of the party attainted, the feoffee may falsify the attainder by traverse to the felony or to the time of the felony. But if he be attainted by verdict, it seems that he cannot falsify by traverse to the felony; but he may traverse the time of the felony, for that is not material; for if he be guilty on another day, the jury ought to find him guilty.* Hal. MSS. which cites 3 Inst. 230.

[Note 71.] (2) *Vid. tamen Mich. 20 Jac. C. B. Johnson and Morris, that it shall escheat.* Hal. MSS. which also cites 21 E. 4. 1. and 21 H. 7. 9. See further on this subject, Godb. 211. and Mo. 283. which are with lord Coke. But the case of *Johnson and Norway*, in Winch. 37. which seems to be the same as that cited by lord Hale, is against the donor, though it is not mentioned in Winch that the judges finally decided the point. See also contra lord Coke, the case of *Southwell and Wade*, in 1. Ro. Abr. 816. A. pl. 1. and S. C. in Poph. 91.

[Note 72.] (3) *But if the land purchased by the middle brother was holden of the elder brother, who accepts homage of him, the land shall descend to the younger brother by 13 E. 1. Avowry 235.* Hal. MSS.

[14. a.]

[Note 73.] (2) See in Robins. Gavelk. an elaborate dissertation on the origin, antiquity, and universality of partible descents. The author pursues his subject amongst the Jews, Greeks, and Romans, and afterwards amongst most

most of the modern nations in Europe, and then proceeds to enquire into the state of our own law of descents before the Conquest. See page 20. See also lord Hale's learned researches into the history of the law of descents in his Hist. of the C. L. c. 11, p. 206.

(3) The exclusion of the half blood by our law is variously accounted for. Sir Martin Wright considers it as a consequence of the rules established for restricting the succession to the descendants of the first feudatory, in conformity to the strict notion of feuds. See Wright's Ten. 184. where the exclusion of lineal ascent is excused on the same principle. See also Blackst. Law Tracts, v. 1. p. 213. 8vo ed. where the feudal reason is explained more at large, though the author admits that the practice goes much further than the principle will warrant. Others there are, who insist, that the true reason, why the brothers of different venters cannot inherit to each other, is the aversion our Saxon ancestors had to second marriages, which they are said to have deemed at best but a permitted fornication. But this unfavourable idea of the *vota iterata* was not peculiar to the Saxons, or any other descendants of the ancient Germans. See Tayl. Elem. Civ. L. 294. [Note 74.]

(5) But daughters by different femes, though they cannot inherit to each other, may inherit together to their father, because the descent is immediate from the father. See R. Robins. Disc. on Inher. 2d ed. p. 37. and Bro. Abr. Descent, pl. 20. and 1 Ro. Abr. 627. [Note 75.]

(6) So brother of half-blood shall not have error on fine levied by the elder brother, though, if there had not been such fine, the land would descend to him. Hal. MSS.—Nota, if A. purchases a reversion expectant on an estate for life, and dies without issue, regularly his brother of the half-blood shall not be heir to him; because though when there is a mesne seisin, he ought to make himself heir to him who is last actually seised; yet when there is not such a mesne seisin, he ought to make himself heir to him in whom it first vests by purchase. Yet see M. 1. Car. C. B. Cro, no. 16. Hodgekinson and Wood. A. having issue B. a son by one venter, and C. by another, devises to B. and the heirs male of his body, remainder to the heirs male of the body of the devisor and to the heirs male of their bodies, remainder to the devisor's right heirs, and dies. B. dies without issue. Ruled, that C. shall take as heir male of the devisor, because it is quasi an entail according to Littleton, sect. 30. But it seems, that the fee shall descend to him, since it is a void demise of the fee simple, and doth not vest by purchase in the eldest son, but by descent. Hal. MSS. [Note 76.]

[14. b.]

(4) Yet the remainder was in the elder brother to give or forfeit. 24 E. 3. 30 Hal. MSS. [Note 77.]

(5) See Dy. 10. b. 11. a. Finch, 8vo ed. 21. and 2, And. 146. Note that lord Coke must be understood to mean uses before the statute for transferring uses into possession, or uses not executed by the statute; for uses within the statute are legal estates. [Note 78.]

(6) So of a copyhold before admittance. 4 Co. 22. b. Hal. MSS. See acc. Dy. 291. b. Fineh, 8vo ed. 21. [Note 79.]

[15. a.]

(2) Adj. acc. Mo. 125. But it is said to be otherwise, if the lease is of a copyhold, unless made by surrender. 3 Leon. 69. and 4 Leon. 38. [Note 80.]

(3) Yet

[Note 81.] (3) Yet in pleading, it shall not be said seisin in demesne. Defendant avows, because I. S. was seised in his demesne of fee and granted rent; plaintiff replies, that a long time before the said I. S. leased to him for years. It is not a plea without traversing the seisin in demesne. T. 9. Car. B. R. Weedon's case. Hal. MSS.

[Note 82.] (4) See accordingly, though the lord seise the land in socage as guardian in chivalry. 11 Ass. 6. 34 Ass. 10. See 12 Eliz. Dy. 292. so as to copyholder or tenant at will. Quere of tenant by sufferance. Hal. MSS.—In Jenk. 242. it is said, that the entry of a devisee for years will make a *possessio fratris*. See Vin. Abr. *Descent*, K. pl. 34. See further on this subject in the case of Newman and Newman. Wils. vol. 3. p. 516.

[Vide post. 29. a. note 3.]

[Note 83.] (5) Nota, M. 24. Car. B. R. between Ames and Cooke, ruled that in such case seisin of rent doth not make *possessio fratris*. Hal. MSS.—See S. C. acc. All. 88.—S. p. adjudged acc. Trin. Term. 1657. between Piper and Masters, MS. Rep. by Glyn J.

[Note 84.] (7) So it is, if father makes lease for life, and afterwards recovers against him by default, and dies, and the eldest son enters, against whom the lessee recovers per quod ei deforcat. 8 Ass. 6. If wife recovers dower by erroneous judgment against the elder brother and dies, the sister shall have error; and if she reverses the judgment, she shall hold against the brother. 7 H. 5. 4. Son barred by false verdict in mortd' ancestor; the sister shall have attaind and reverse the judgment; but afterwards the brother shall enter. Kelw. 119. b. Hal. MSS.

[15. b.]

[Note 85.] (1) If it was an advowson in gross. But seisin of a manor is good seisin of advowson, common, &c. appendant or appurtenant. 18 H. 6. 24. Hal. MSS.

[Note 86.] (3) Accordingly adjudged in parliament H. 16. Car. Cro. n. 4. Lord Gray's case, which was a barony by writ; and there agreed, that where lord Gray being baron by writ is created earl of Kent to him and his heirs male of his body, and he has issue two sons by several venters, and the eldest has issue a daughter, the barony shall go to the daughter, and the earldom to the younger brother, and doth not draw the barony to it. But if it was a feudal title of honour, as of the earldom of Arundel or barony of Berclay, there *possessio fratris* should hold well; because the title is annexed to the land.—So of an office of dignity, and eâ ratione the office of high chamberlain of England descended to the earl of Linsey of the whole blood, and departed from the line male of the earl of Oxford; and adjudged accordingly in parliament. Hal. MSS.—See lord Gray's case at large in Coll. Proc. on claims of Bar. 195. and the case about the office of lord chamberlain, in same book, 173. and W. Jo. 96.

[Note 87.] (4) Nota, by the common law, the king is a corporation, and purchases made by him after assumption of the crown vest in a politic capacity. Hence, if an usurper purchases lands, and the right heir resumes the crown, he shall have the purchases, et è converso, an usurper shall have the purchases made by a rightfull king so long as he has the crown. So it happened in the cases of M. 4. H. 5. M. 6. E. 4. R. 3. H. 7.

H.7. *But nota, purchases made before accession of the crown, or descents from collateral ancestors after accession of the crown, vest in a natural capacity; and therefore in the re-ademption of the crown by Edward 4. there was a special act to give to the king all the possessions of Hen. 6. But such lands are qualified and affected differently from those of other persons. They will pass by letters patent only, and without Every; and the grants of them shall not be avoided by nonage, et similiter. As to acquisitions by conquest by the king of England, they are annexed to his crown as his purchases are, as Ireland, Man, Berwick, Calais, and the New Plantations, the ancient territories of Normandy, Aquitaine, Anjou. And also many other lands, which descended in England from collateral ancestors, though in their original vested in a natural capacity, yet partly by attainder, partly by long continuance united to the crown, partly by occupation, were in some manner annexed to the crown, and will go with it. Yet see Rot. Parl. 13 R. 2. n. 32. dux Lancastrix creatus dux Aquitanix cum mero et mis-
to imperio tenend. de rege ut rege Francix.—Hall. MSS.*

[16. a.]

(1) *So it is, though he be an alien, as hastened in the case of king James. The reason is, because the king is a corporation.* [Note 88.] Hal. MSS.

(2) See this subject very fully and learnedly considered in the case of the dutchy of Lancaster, Plowd. 212. in which it was held that a lease of dutchy land was not avoidable by reason of the nonage of Edw. 6. and in the case of Willion and Berkley, Plowd. 223. in which a remainder to the king and the heirs male of his body was held to be an estate tail within the statute *de donis*, in the same manner as if the limitation had been to a subject, and not to be a fee simple conditional. See further 7 Mod. 78.

[16. b.]

(2) *Baron by writ takes grant of the same barony by patent. This determines his barony by writ. Otherwise it is, if the barony by writ was suspended.* 11 Co. Lord Delaware's case. Hal. MSS.—But the doctrine of extinguishing a barony by writ by acceptance of a patent-barony seems questionable; for it supposes a right to surrender the barony by writ. See in Show. Parliam. Cas. 1. Lord Purbeck's case, in which the house of lords adjudged, that the dignity of a viscount could not be surrendered by a fine. [Note 90.]

(3) This doctrine is certainly true with respect to baronies by writ; because, as lord Coke observes, the blood of the person summoned is not ennobled, till he takes his seat in parliament. But the case of nobility by letters patent is different, for by them the creation is perfect, and the blood is ennobled without sitting; and therefore, in lord Banbury's case, the court of king's bench held that a peerage claimed under letters patent is not triable by the record of parliament, but must be questioned by pleading *non concessit*. See the King and Knolly's, 1 L. Raym. 10. [Note 91.]

(4) *Nota, as to precedence of foreign dukes, earls, &c. it differs not, though they have not voice in parliament. But a Scotch or Irish earl summoned to parliament here is as an English earl, as the earl of Angus. See the case of the dutchess of Suffolk.* Hal. MSS.—See further as to precedency in general, 4 Inst. 361. and Prynne on 4 Inst. 323. and as to the precedency of Irish peers, see a tract by the late earl of Egmont. [Note 92.]

(6) But

- [Note 93.] (6) But in some books it is said, that if a woman noble by birth marries one of inferior nobility, she shall be stiled by the dignity of her second husband. Dutchess of Suffolk's case, *Ow.* 82. See *S. C. O. Bendl.* 37.
- [Note 94.] (7) It has been supposed that a man may be noble during the life of another. *52 H. 6. 29.* by Danby.
- [Note 95.] (8) *As to the degree of baronet, it is parcel of the name; and therefore capias against I. S. or I. S. knight, where he is baronet, cannot take I. S. baronet. Noy. n. 382. Sir Richard Lucy's case. Tr. 10 Car. B. R. Cro. n. 6. Sir Henry Ferrer's case. The king cannot create a dignity with a meane between baron and baronets. 9 Jac. 12 Co. n. 51. Hal. MSS.—See Noy. 87. Cro. Cha. 371. and 12 Co. 81.*

[17. a]

- [Note 96.] (1) As to the form of a *count* or *declaration*, and all other particulars concerning it, see *Com. Dig. Pleader C.* The whole of lord chief baron Comyns' work is equally remarkable for its great variety of matter, its compendious and accurate expression, and the excellence of its methodical distribution; but the title *Pleader* seems to have been the author's favourite one, and that in which he principally exerted himself.

- [Note 97.] (2) See further on the antiquity and dignity of serjeants at law, *Blackst. Com.* 5th ed. v. 1. p. 24. and v. 3. p. 26. and the books there cited, particularly *Fortesc. De Laud. Leg. Ang.* c. 50. *Spelm. Gloss.* 335. *Pref. to 10 Co. 2. Inst.* 214. *Dugd. Orig. Jurid.* and a tract by the late mr. serjeant Wynn, which was printed in 1765. To these add *Waterh. Comment. on Fortesc.* 136, 137. and 547. to 563. where the author is so full and explanatory on the same subject, that what he has collected may very well be deemed a treatise upon it. Mr. Waterhouse, though a very prolix as well as extravagant writer, one who too frequently exhausts himself, and disgusts his readers, by tedious, useless, and ill-timed digressions, appears to have been a man of considerable learning; and his collections relative to the antiquities of our law, may sometimes be resorted to with great advantage, and may very much facilitate the labours of more judicious and able enquirers.

- [Note 98.] (3) *Vide the diversity between count and plea in some cases. In debt for rent the plaintiff shall count, that he leased without shewing seisin or seisin in demesne. 21 H. 7. 26. So in Formedon, quod I. S. dedit. 3 E. 3. 35. 5 E. 3. 16. 3 E. 3. 59. 15 E. 4. 17. But in counting descent in writ of entry, he ought to plead seisin, and in pleading a gift in taile he ought to alledge seisin in demesne. 18 H. 6. 24. 15 E. 4. 17. Hal. MSS. See further on pleading seisin in demesne, post. 17. b.*

[17. b.]

- [Note 99.] (2) And yet in *34 H. 6. 34.* one pleads, that the king was seised in his demesne as of fee of an advowson in gross.—See also *26 E. 3. 64. b.* where in a writ of right of advowson by an abbot against the countess of Ormond, the plaintiff counts, that one *R.* was seised in his demesne as of fee and right, and it was held good. If a church be impropriate, the impropriator may plead seisin in his demesne as of fee. *Plowd.* 503.

- [Note 100.] (3) *Advowson assets. Recovery in value for advowson shall be 12 d. for every mark [the church is worth by the year]. 8 E. 2. Recovery in value, 11. Hal. MSS. The words between the brackets are added from*

from Fitzh. Abr. As to an advowson's being assets and valuable, see post. 374. b. and the note there given on the subject.

(4) *Office de ballivâ parci vel hundredi not demesne, yet the esplees* [Note 101.] shall be laid. 7 E. 3. 63. 8 E. 3. 55. *Corody not demesne.* 17 E. 2. *Nuper obiit* 12. *Tithes whether demesne,* Dy. 85. One grants a rent charge, the grantee brings annuity, and declares of a grant *virtute tujus fuit seisisus in dominico suo ut de feodo.* By some this is electing to have it as a rent charge, 3 E. 6. Dy. 65. But ruled contra, and the pleading good in substance. M. 43, 44 Eliz. B. R. Case of dean of Rochester. *Noy, n.* 162. M. 11 Car. B. R. Cro. n. 24. *Sprint and Hickett,* 2 Bulst. 148. Hal. MSS. The dean of Rochester's case is in *Noy* 37. 2 And. 506. & Ow. 73.—A man entitled to a road pleads seisin of it *in dominico suo ut de feodo et in jure.* 3 H. 6. 7. In *nativo habendo esplees* alledged, and yet the count for the villein only *de feodo et jure.* 39 H. 6. 32.—Where a reversion depends on an estate for years, there pleading either seisin in demesne as of fee, or seisin as of fee, will be good; but if the reversion be on an estate of freehold, only seisin in demesne can be pleaded. Plowd. 191. a. See accord. Dy. 101. in *Culpepper's* case. It is said, that a reversion or remainder belonging to the king's tenant *in capite* formerly entitled the king to wardship, though the statute 17 E. 2. *de prerogativa regis*, cap. 1. speaks of lands of which the tenant dies seised *in dominico suo ut de feodo.* Stanf. Prærog. 8. a. Plowd. 11. See further as to pleading seisin in demesne, ante 17. a. n. 3. Stanf. Prærog. 8. a. 14. a. Doctrin. Plac. 287. & Com. Dig. Plader C. 35.

(5) But note that this diversity doth not hold in the case of a rectory; [Note 102.] for in *Holland's* case, 4 Co. 75. the pleading was *ad medietatem rectorie*, whereas it should have been *ad rectoriam medietatis*, and yet it was taken by the court to be the same in effect

[18. a.]

(1) Accordingly in *Smith's* case, 10 Co. 135. b. it was agreed, that [Note 103.] *quare impedit fræsentrare ad medietatem ecclesie*, shall only be when there are two several patrons and two several incumbents of distinct parts of the same church; but in that case the court implied as much, because the count alledged a seisin *de advocacione medietatis*. In *Windsor's* case, Cro. Eliz. 686. where the count was of the *advowson of two parts*, the court held the declaration to be bad; but then it was, because by other parts of the declaration it appeared, that the church was entire, and that there was but one incumbent, and consequently that the plaintiff's title was to *two parts of the advowson*, and not to an *advowson of two parts*.

(4) See acc. Cro. Eliz. 519. Hob. 323. and W. Jo. 6.—*The king shall* [Note 104.] *be said to be in, in point of reverter, and shall avoid leases by tenant in tail.* Plowd. 552. Tr. 2 Car. Rot. 730. and adjudged H. 3 Car. Hutt. n. and *Crook n. 4. sir Thomas Holt's* case. A tenant for life, remainder to B. his son and heir apparent in tail, remainder to A.'s right heirs. A. grants rent charge to C. and his heirs, A. and B. levy fine to the use of A. and his heirs, A. infeoffs D. and dies having issue B.; and ruled, that D. shall hold charged, for by the fine he has a fee consolidated in him; which *quare.* For M. 10 Jac. B. R. *Bulstr. n. 35. in Errington's* case. A. and B. his wife tenants in tail special, remainder to the right heirs of A. have issue a son and a daughter; the son by indenture makes lease for 40 years to commence after the mother's

ther's death, the father being dead; the son dies without issue; the daughter levies a fine to I. S. the mother dies; and although this lease is partly derived out of the fee simple, and by the fine I. S. had a consolidated fee, yet, because the daughter was not liable to the lease, consequently the consuee shall not be liable to the lease so long as the tail continues. *Vid. M. 6 Jac. B. R. n. 22. Nedham's case. Tenant in tail, remainder to the king, is attainted of treason. The king shall not be in, in point of remainder, but as long as the tail continues shall be in under tenant in tail, and subject to his charges, and so it differs from Walsingham's case, where the king had the reversion. Paradine's case. Hal. MSS.—See sir Thomas Holt's case in Hutt. 96. and Cro. Cha. 103. and Errington's case in 2 Bulstr. 42. As to Nedham's case and Paradine's case, I take them to be the same, and the reader will find it reported by the name of Poole and Nedham, Yelv. 149.*

[18. b.]

[Note 105.] (1) In *Plowd. 11. Saunders arguendo* says, that one may have land by purchase three ways, by bargain or gift for money, by gift without any recompence, and by way of remainder.

[Note 106.] (2) *The abbot of Fountains of the order of Cistercians before the council of Lateran makes a feoffment, and the land escheats to him after the council of Lateran. It seems, that he shall not be charged with tithes, because it is not a purchase. Quære, M. 7 Jac. B. R. Dickson and Waller. Hal. MSS. It was decreed by the general council of Lateran in 1215, that the privilege of exemption from tythes, enjoyed by the Cistercians and other religious orders, should not extend to lands purchased after that council. Ne occasione privilegiorum suorum ecclesie ulterius pregraventur, decernimus, ut de alienis terris et a modo acquirendis, &c. decimas persolvant, &c. Gibs. Cod. 1st ed. 2. v. p. 700, 701. This explains the case cited by lord Hale.—An escheat in appearance participates of the nature both of a purchase and a descent; of the former, because some act by the lord is requisite to perfect his title, and the actual possession of the land cannot be gained till he enters or brings his writ of escheat; of the latter, because it follows the nature of the seignory, and is inheritable by the same persons. But strictly speaking an escheat is a title neither by purchase nor descent. It should be considered, that though the lord must do some act to put himself into the actual possession; yet his title to take possession commences immediately on the want of a tenant, and this title is vested in him without waiting for his own deed or agreement, and as much by mere act of law as the title of an heir is in the case of a descent; and therefore both titles are equally excluded from being purchases. On the other hand, escheat is not a title by descent; for the lord takes in his capacity of lord of the seignory of which the land escheated was holden, and not as heir or by right of blood. Nor is it any objection to this way of considering the title by escheat, that the land escheated will be inheritable in the lord as land by purchase, where he has the seignory by descent; for the reason of this is, not that the escheat is either a purchase or descent, but because the escheat follows the seignory, from which the right to it is derived, as an accessory to its principal. According to this view of the subject, instead of distributing all the several titles to land under purchase and descent, it would be more accurate to say, that the title to land is either by purchase, to which the act or agreement of the party is essential, or by mere act of law, and under the latter to consider first descent, and then escheat, and such other titles not being by descent, as yet like them accrue by mere act of law. See on this subject Blackst. Comment. ed. 5. v. 2. p. 241. and 201.*

(5) See

(5) See acc. 12. Co. 104. where it is said that afterwards the heir of [Note 107.] the person, in honour of whom the tomb is erected, shall have the action.

(6) Heir-looms by custom cannot be alienated by *devise*. See post. [Note 108.] 185. b. and 1 Vern. 273.

(7) However, personal property may be devised or limited in strict settlement to one for life, with remainder to sons and daughters in tail, so as to be transmissible like heir-looms; but the goods will be the absolute property of the first tenant in tail, and be conformable to all the other rules concerning executory devises, and cannot render the property unalienable longer than lives in being, and 21 years after. [That personal property may be devised to one for life, with remainder over, has been settled in *Connecticut* upon very mature consideration. *Griggs v. Dodge*, 2 Day 28; *Taber v. Packwood*, 2 Day 52. It does not appear from any reported case, that the point has been judicially discussed in any other state.] For cases of heir-looms by devise and settlement, see Gower and Grosvenor, Barnard. Ch. Rep. 54. Wyth and Blackman, 1 Ves. 196. Duke of Bridgewater and Egerton, 2 Ves. 121. Boon and Cornforth, 2 Ves. 277. and Trafford and Trafford, 3 Atk. 347. —See further on the subject of heir-looms, Blackst. Com. 5th ed. v. 2. p. 427. and Vin. Abr. *Heir-loom*.

[19. a.]

(2) Where the gift was special to one of the heirs of his or her body [Note 110.] by a particular person, the course of descent was in *some* degree changed by the having issue; for after issue had, by construction of law the land became descendible to all the heirs of the donee's body, whether they were the donee's issue by the person named in the gift, or by any other person; and also liable to the curtesy or dower of a *second* husband or wife. See acc. Pain's case, 8 Co. 35. b. and Berkley's case, Plowd. 247. and the next note. Lord Coke infers, that this was the common law from that part of the statute *de donis*, or of Westminster the second, which enacts, that *from thenceforth* neither the *second* husband nor the issue of a second marriage shall have any thing in the case of such a conditional gift. *Nec habeat de cetero secundus vir hujusmodi mulieris aliquid in tenemento sic dato per conditionem post mortem uxoris sue per legem Angliæ, nec exitus de secundo viro et muliere successionem hereditariam*. That at common law the having of issue thus enlarged the course of descent, where the gift was of an *express* conditional fee to a man and woman and the heirs of their two bodies, all the authorities agree; but it is said, that the issue of a second marriage could not inherit where the gift was in *frank-marriage*, which was an *implied* conditional fee to the donees and the issue between them; and yet at the same time we are told, that in this latter case the *second* husband might have curtesy. See 2 Inst. 356. It will be difficult to give a reason, why a gift to husband and wife and the issue between them should be so distinguished from a gift in frank-marriage, or why the husband should have curtesy, where the issue by him could not inherit. See the next note, where lord Hale seems to doubt this doctrine.

(3) *If gift be to husband and wife and the heirs of their bodies, the issue by the second marriage inherits.* 8 Rep. *Paine's case*. It seems, that a gift in frank-marriage goes to the heirs between the donees only; but a gift to husband and wife, and to the heirs of their bodies, goes to the heir of the body of the survivor for want of issue between them.

Vid.

Vid. tamen *Plowd. Comment.* 251. Hal. MSS.—Lord Hale must be here understood to speak of gifts at common law.—See the preceding note.

[Note 112.] (4) In 1 Ro. Abr. 841, it is said, that if land had been given to one and his heirs *males* of his body, and afterwards he had issue a male and a *female*, and afterwards the male died, the *female* should have inherited the land. 18 E. 3. 46. 18 Ass. 58. are cited as authorities to prove this to have been the common law in respect to fees conditional. But lord Coke's doctrine here is *contra*, and serjeant Rolle refers to it as being so; and in respect to estates in tail male it has been long settled, that a female cannot inherit by conveying her descent through a male. See post. 25. a. and b.

[Note 113.] (5) In another book lord Coke says, that a *formedon in descender* lay not at *common law*. See 2 Inst. 33. But this seeming contradiction may perhaps be reconciled, by observing, that in the latter book lord Coke is commenting on that part of the statute *de donis*, which gives a *formedon in descender* notwithstanding alienation by the donees, where the gift was to husband and wife, and to the issue between them, or in frank-marriage. In such a case the alienation by the donees certainly bound the issue at common law, and consequently before the statute they could not have a *formedon in descender*. But in the case here put by lord Coke the wife *only* was the donee, and her alienation was merely by *deed*, which during coverture was insufficient to bind either her or her issue. However, it is proper to mention, that according to some authorities the writ of *mortd'auncestor* was the proper remedy for the issue at common law, and that the only case, in which the issue could have a *formedon in descender* before the statute, was, where by reason of some special circumstances he could not have an assise of *mortd'auncestor*. To illustrate this the following case has been given. A man hath issue a son by one wife, she dies, and he marries again, and land is given to him and his second wife and the heirs of their bodies, and they have a son, and afterwards they both die, and then a stranger abates. Here it is said, that the son by the second wife could not have *mortd'auncestor*, because one point of that writ is to enquire who is next heir to the father, and the son by the first wife is the heir to the father; and therefore, that *formedon in descender* lay at common law for this special case, because otherwise the son by the second wife would have been without remedy for the freehold. See *Plowd.* 239.

[19. b.]

[Note 114.] (1) But lord Coke in another book says, that though such alienation bound the issue, yet it did not bar the king's possibility of reverter, as it would that of common persons. See the earl of Cornwall's case cited post. 370. b. and in Holt's case, 9 Co. 132. b.

[Note 115.] (3) But in Godbolt's report of Franklin and Cooper, it is said to have been resolved, that tenant in tail might stand seised to an use expressed, but that an use could not be averred. Lord Bacon also gives it as his opinion, that an estate tail may be to uses *since* the statute for executing uses, and controverts the reasons for doubting it *before*. Bac. Law Tracts, 8vo ed. 347. See a great number of authorities on this subject in Vin. Abr. *Uses C.*

[20. a.]

[Note 116.] (1) See in W. Jo. 96. and Collins's Claims of Bar. 183. an account of the original grant and intail of the office of earl Marshall, by Crew chief justice in his argument of the case about the office of *great chamberlain* of

of England. In this last case the right to the great chamberlain's office was contested between an *heir male* claiming under an intail 9 Eliz. by one of the *Vere* family, who was then seised of the office in fee, and the *heir-general* claiming under the limitations of the original grant from the crown. Crew chief justice spoke in the house of lords for the *heir male*; but a majority of the other judges, amongst whom was Doderidge, gave their opinion for the *heir-general*, upon the principle, that this high office, like a title of honour, was inherent in the blood of the first grantee, and incapable of alienation.

(2) *But if the tail be barred by collateral warrantie, detinue will lie* [Note 117.] for the charters. Hal. MSS.—See 9 E. 4. 52. b.

(3) *There are many titles of dignity without any place.* Hal. MSS. [Note 118.]—In the King and Knolly's, 1 L. Raym. 13. lord chief justice Holt says, that naming a place is not essential to the creation of a dignity, and mentions the earldom of *Rivers* as an instance. But it has been held, that if the king grants a dignity to one and the heirs male of his body, without naming any place, the grantee shall have a fee conditional, and not an estate tail, as he would have if a place had been mentioned. See 12 Co. 81. where this was adjudged in the case of a baronet. However, though dignities and titles of honour having relation to some place are intailable by the crown as tenements within the statute *de donis*, yet neither the donee nor his issue can bar the intail, by fine, recovery, or any other means, as may be done in the case of other intailable things. See lord Purbeck's case, Show. Parl. Cas. 1. and Collins's Claims of Bar. 293. in which it was adjudged, that the surrender of a dignity to the crown by fine was void.—Note, that in lord Purbeck's case his counsel distinguished between ancient honours, as being feodary and officary and having relation to a place, from *modern* dignities, as being merely titular and personal, notwithstanding the formality of naming a place in the creation; and from thence infer, that the latter are not within the statute *de donis*.

(4) See the case of the earl of Stafford and Buckley, 2 Vcs. 170. in which lord chief justice Hardwicke held, that an annuity in fee, granted by the crown out of the 4 1-2 per cent. duties payable for exports and imports at Barbadoes, was merely a personal inheritance, and not intailable within the statute *de donis*. According to a manuscript note of the same case, lord Hardwicke, in giving his opinion, said, that an annuity out of the revenue of the *post-office* or *excise* savours no more of the realty than money.

(5) Two things seem essential to an intail within the statute *de donis*. [Note 120.] One requisite is, that the *subject* be land or some other thing of a *real* nature. The other requisite is, that the *estate* in it be an *inheritance*. Therefore neither estates *pur auter vie* in lands, though limited to the grantee and his heirs during the life of *cestui que vie*, nor *terms for years*, are intailable any more than *personal chattels*; because as the latter, not being either interests in things *real* or of *inheritance*, want *both* requisites; so the two former, though interests in things *real*, yet not being also of *inheritance*, are deficient in *one* requisite. However, estates *pur auter vie*, terms for years, and personal chattels, may be so settled, as to answer the purposes of an intail, and be rendered unalienable almost for as long a time, as if they were intailable in the strict sense of the

the word. Thus estates *pur auter vie* may be devised or limited in strict settlement by way of *remainder*, like estates of inheritance; and such as have interests in the nature of estates tail may bar their issue and all remainders over by *alienation* of the estate *pur auter vie*, as those, who are strictly speaking tenants in tail, may do by *fine* and *recovery*: but then the having of issue is not an essential preliminary to the power of alienation in the case of an estate *pur auter vie* limited to one and the heirs of his body, as it is in the case of a conditional fee, from which the mode of barring by alienation was evidently borrowed. The manner of settling terms for years and personal chattels is different: for in them no *remainders* can be limited; but they may be intailed by *executory devise* or by deed of *trust*; as effectually as estates of inheritance, if it is not attempted to render them unalienable beyond the duration of lives in being and 21 years after, and perhaps in the case of a posthumous child a few months more: a limitation of time, not *arbitrarily* prescribed by our courts of justice, but wisely and reasonably adopted in analogy to the case of freeholds of inheritance, which cannot be so limited by way of remainder as to postpone a complete bar of the intail by fine or recovery for a longer space. It is also proper to observe, that, in the case of terms of years and personal chattels, the *vesting* of an interest, which in reality would be an estate tail, bars the issue and all the subsequent limitations, as effectually as fine and recovery in the case of estates intailable within the statute *de donis*, or a simple alienation in the case of conditional fees and estates *pur auter vie*; and further, that if the executory limitations of personality are on contingencies too remote, the whole property is in the first taker. Upon the whole, by a series of decisions within the last two centuries, and after many struggles in respect to personality, it is at length settled, that every species of property is in *substance* equally capable of being settled in the way of intail; and though the modes vary according to the nature of the subject, yet they tend to the same point, and the duration of the intail is circumscribed *almost* as nearly within the same limits, as the difference of property will allow. As to the intail of estates *pur auter vie*, see 2 Vern. 184. 225. 3 P. Wms. 262. 1 Atk. 324. 2 Atk. 259. 376. 3 Atk. 464. and 2 Ves. 681. As to the intail of terms for years and personal chattels, see Manning's case, 8 Co. 94. Lampett's case, 10 Co. 46. b. Child and Bailey, W. Jo. 15. Duke of Norfolk's case, 3 Cha. Cas. 1. a case in Carth, 267. and one in 1 P. Wms. 1. See also Fearn's Essay on Conting. Rem. and Exec. Dev. 2d ed. p. 122. to the end. Mr. Fearn's work is so very instructive on the dry and obscure subject of remainders and executory devises, that it cannot be too much recommended to the attention of the diligent student.—Note, it was resolved in the 40 Eliz. that the statute *de donis* doth not extend to the Isle of Man; because the statute is *general*, and the Isle of Man is not *especially* named. See 4 Inst. 284. 2 And. 115. and 2 Ves. 350. See also ante 9. a. where the following note by lord Hale in respect to the case of the Isle of Man, there mentioned by lord Coke to have been adjudged in 40 Eliz. should have been introduced; though, as it partly relates to the statute *de donis*, it may come in here without any impropriety.—Nota, *William earl of Salisbury got Man from the Scots, and granted it to William Scrop. Hen. 4. claimed it by conquest from him, granted it comiti Northumbrie, and on his attainder granted it to sir John Stanley and his heirs; and in this case ruled. 1. That Man is not parcel of England. 2. That it is bound by statutes of England where especially named, otherwise not. Therefore the statutes de donis, of uses, of wills, not in force*

there; and it descends to the coheirs of Ferdinando, and not of his brother William earl of Derby. Hal. MSS.—As to the intail of copyholds, see post. 60. a.

[20. b.]

(2) *But devise to one et hæredibus legitimè procreatis is tail.* H. [Note 121.] 43. EL C. B. rot. 1408. *Moor's case* 711. but contra by act executed. 7 Rep. 41. b.—*Dormer's case.* If lands be limited by deed to the use of I. S. and hæredum masculorum suorum legitimè procreatorum, remainder over, it is a fee simple; but if it be hæredum masculorum de se, or in English, the heirs of him lawfully begotten, especially where there is a remainder over, it is tail. 7 Rep. 41. *Bedell's case.* *Dormer's case* H. 38 Eliz. B. R. rot. 739. Hal. MSS.

(3) 10 E. 3. 19. *Adjudged accordingly.* Hal. MSS. But it is held, [Note 122.] that, where the words were in *posterum procreandis*, sons born before shall be excluded on account of the peculiar force of *in posterum*. Adj. M. 26 Eliz. B. R. 3 Leon. 87.

[21. a.]

(1) *Where the estate in the premises shall be corrected by the habendum, if there happen to be a clause of warranty;* 2 E. 2. *Peoffments* 94. *Dedi Adamz de B. unam carucat. cum C. filiã meã in liberum maritagium, habendum Adamz et hæredibus suis faciend. forinse cum servitium; and warranty to Adam et hæredibus suis in perpetuum. After the death of Adam and his wife, their issue bring mortd'auncestor; and ruled, that it doth not lie, but formedon, because taile,* 10 E. 3. 25. *Sciatis me dedisse Edmundo et Aliciã filiã meã et hæredibus suis in liberum maritagium, habendum et tenendum dictis E. et A. et hæredibus suis in liberum maritagium. If the gift be before the statute de donis, it is only frank-marriage; if after the statute, it is tail with fee expectant.* Vid. 10 H. 6. 16.—19 H. 6. 74. *Gift to A. and if he dies without heir of his body revert to the donor, it is not tail; but if it was by devise, it is tail.*—Hal. MSS.

(2) The resolution in 8 Co. 54. b. is, that here the words *heirs of the body* in the *habendum* qualify the word *heirs* in the *premises*, and therefore that there shall be an estate tail without any fee expectant. See acc. Mo. 26. In the case in Cro. Jam. 476. and 2 Ro. Rep. 19. 23. such words were adjudged to pass tail and fee expectant. But the case was attended with circumstances particularly shewing an intention to pass both: for there was a reservation of tenure to the lord paramount, which could not be, if only an estate tail passed to the donee and the reversion had remained in the donor, for then the tenure must have been of the donor. Also there was a warranty to the grantee and his *heirs*. However, the court intimated, that their opinion would have been the same, if these special circumstances had not occurred. See further as to the operation of the *habendum* in explaining and qualifying the *premises*, post. 183. and the note on lord Coke's doctrine against *abridging* the latter by the former, post. 299. a. See also Vin. Abr. *Grants* I. K. L. M. and N.

(3) In a note in 1 P. Wms. 57. lord keeper Wright puts the case of a [Note 125.] gift by deed to one and his *heirs*, and if he die without *issue*, remainder over, and holds, that the latter words restrain the former, and convert the fee into a tail.

(4) 7 E. 3. 64. *Land given to husband and wife, and the heirs of the body of husband, and if the husband and wife die without heirs between* [Note 126.]

tween them lawfully begotten, remainder over. It is only a tail general in the husband. Dy. 171. Devise to A. and the heirs male of his body, and if he die without heirs of his body, remainder over, it is only tail male.—Vid. M. 9 Jac. inter *Walsof and Derby*. Devise to A. in fee, and afterwards by the same will devise of the same land to B. in fee, they are joint-tenants. Vid. 13. R. 2. brief 645. Land given to the father and the heirs of his body, remainder to his son in tail. It seems, the son has election to claim by descent or purchase. (It seems the remainder is void, because included in the first estate.) Hal. MSS.

[Note 127.] (7) Dedi et concessi Johanni White in liberum maritagium Johannæ filiz meæ habendum dicto Johanni cum hæredibus suis in perpetuum de capitali domino feodi; and warranty to him and his heirs. Ruled, that it is neither tail nor frank-marriage, but fee simple only in the husband, and nothing in the wife. M. 23 and 24 El. C. B. *Webb and Porter*. Vid. contra 32 E. 1. *taile 25*. but 45 E. 3. 20. agrees. Hal. MSS.—See acc. the same case in Ow. 26. and Godb. 18. The same case is cited in Mo. 643. pl. 888.

[21. b.]

[Note 128.] (1) 14 E. 2. *Aiel 1*. Reversion granted by two in frank-marriage. Vid. 4 E. 3. 4. 26 E. 3. *tail 27*. Hal. MSS.

[Note 129.] (2) But see the contrary of this Pasch. 40 Eliz. C. B. *lord Barclaye's case*, n. 11. and all the books here cited prove, that it is at least an estate tail, although no tenure, and it is accordingly adjudged 17 E. 3. 65. Vid. H. 43. El. Br. rot. 140. between lord Barclaye and the countess of Warwick. Hal. MSS.—See S. C. in Mo. 643. Cro. Eliz. 635. and 1 Ro. Abro. 750. but the point of frank-marriage is not reported in the two latter books.

[Note 130.] (3) 13 H. 4. *Meane 74*. 30 E. 3. 24. Gift in frank-marriage salvo forinseco servitio good, and the donee shall hold in chivalry. Hal. MSS.

[22. a.]

[Note 131.] (2) Lord Coke seems to lay too much stress on Littleton's use of *nota*, &c. and other words of a like kind. In the edition by Lettou and Machlinia, &c. is frequently omitted, and *item* is very often put where the other editions have *nota*, and *vice versa*. This shews how very uncertain it is, whether any peculiar force ought to be attributed to such words. Indeed, where they really come from Littleton himself, they must in general be too slight a foundation for any considerable inference.

[Note 132.] (3) *The issue in tail attained in vitâ patris*; after the death of the father the donor cannot enter, but the issue if pardoned may enter, and hold as special occupant, subject to the charges of the father. 29 Ass. 61.—Hal. MSS.

[Note 133.] (4) In the case of Richards and lady Bergavenny, 2 Vern. 325. the court held a limitation to lady Bergavenny and such heir of her body as should be living at her death, with a remainder over, to be an estate tail. But see further on this subject ante fol. 8. b. n. 4. where several authorities are referred to, in order to enable the student to find in what case heir in the singular number ought to be construed *nomen collectivum*.

(3) Casus

[22. b.]

(3) *Causus Com. Bedford M. 34, 35 Eliz. Poph. n. 8. Feoffment to [Note 184.] the use of the feoffer for 40 years, remainder to B. in tail, remainder to the right heirs of the feoffer. It is the old reversion, and the feoffer may devise it; for the use returned to the feoffer for want of consideration to retain it in the feoffee till the death of the feoffer. Hal. MSS.—See the earl of Bedford's case in Poph. 3. Vid. 27 E. S. 8. 4 H. 6. 20. 42 Ass. 2. 9 E. 3. 14. 10 E. 3. 48. Lands granted by A. by fine for the life of A. remainder to A.'s right heirs. It is a reversion in A. and he may grant it. Hal. MSS. Dy. 237. Fine to husband, as that which he and his wife have of his gift, which render to the consor for life, remainder to the right heirs of the husband. It is a void remainder, and the wife survivor shall have it for life. Hal. MSS.*

(4) *Where heir shall be purchaser Vid. fol. 9. b. 11 H. 6. 13. De- [Note 135.] vice to B. for life, remainder to C. in tail, remainder to the next heir of the devisor and the heirs of his body, it is a purchase in the heir. Quere, there if it had been heirs—Archer's case, 1 Rep. 66. b. Devise or conveyance to A. for life, remainder to his next heir male, and to the heirs male of the body of such heir male, it is a purchase in the heir, because in the singular number, and the limitation is applied to it.—Vid. 1. Rep. 104. Shellie's case. Use limited for life to A. remainder to the heirs male of the body of A. and the heirs male of the body of such heirs male. It is a limitation, and A. has a tail executed. But if the ancestor takes estate for years, remainder limited to the heirs male of his body, it doth not vest in the ancestor. Accord. hic fol. 13. Hodgkinson's case. Hal. MSS.—See Hodgkinson's case from lord Hale's MSS. at the end of n. 6. ante 14. a.*

[23. a.]

(1) *See further on this subject the several books cited ante 12. b. in [Note 136.] n. 2, to which add Prec. in Cha. 222. 319. and Plowd. 545. and note f. in the English translation of Plowden. It may be an useful hint to observe, that the English edition of mr. Plowden's Commentaries, which most deservedly bear as high a character as any book of Reports ever published in our law, has a great number of additional references and some notes; and that both of these are generally very pertinent, and shew great industry and judgment in the editor.*

(2) *And therefore gift in tail saving the reversion tenend' de capi- [Note 187.] talibus dominis feodi per servitia debita is void, and the donee shall hold of the donor, as he holds over. 6 E. 3. 28. 45 E. 3. 27. 2 E. 4. 5. 4 H. 6. 20. Champernon's case. Vid. 27 H. 8. 18.—Hal. MSS.*

(3) *But if tenant by chivalry makes gift in tail rendering rent only, [Note 138.] the tenure shall be chivalry, but the rent accumulative. Vid. hic 52. Dy. 52. Keilw. 125.—Hal. MSS.*

(4) *Quere of this case, for the new reversion is held in chivalry. [Note 139.] Vid. 4 H. 6. 21. by Balth. B. holds of A. in chivalry, and gives in tail to C. who makes lease to R. for life, and dies. The issue of C. shall be in ward to A. not to B. the donor.—Hal. MSS.*

(6) *And therefore after the fourth degree the issue shall have for- [Note 140.] medon and count of a gift in frank-marriage; but the warranty and acquittal are gone. 12 H. 4. 9. Vid. 10 E. 3. 25. 4 E. 3. 5. Attornment by donee in frank-marriage.—Hal. MSS.*

[Note 141.] (1) *Nota, by the intent of Littleton in same cases before the fourth degree passes from the donor there may be intermarriage, and yet the land shall be holden quit till it be passed. A. gives land in frank-marriage with the daughter of his sister, the issue of A. and the donee may intermarry after the fourth degree, yet the fourth degree shall not be passed quoad the tenure. Vid. pag. sequent. A. gives to the daughter of N. in frank-marriage, C. and the issue of N. may intermarry, because they are in quinto gradu consanguinitatis, yet this is only the first degree quoad the privilege of tenure. Hal. MSS. There is something apparently wanting in the state of lord Hale's latter case; for it is not expressed who C. is, and how C. and the issue of N. are related in the fifth degree. But this accidental omission may be easily supplied, and the doctrine will be equally intelligible by only supposing the consanguinity to be as lord Hale's case requires.*

[Note 142.] (3) A *G. and A. are in the fourth degree per utramque legem, N. and K. are in the fourth degree by the canon law, but in the eighth degree by the civil law. N. and C. are in the fourth degree by the canon, in the fifth by the civil law. Vide pro computatione graduum consanguinitatis juxta utramque legem Caus. 35. quæst. 5. pars 2. in Decret. Juxta jura canonica.—*

C . . .	B . . .	D	
:	:	:	
H . . .	E . . .	L	
:	:	:	
I . . .	F . . .	M	
:	:	:	
K . . .	G . . .	N	

I. Ascendentium et descendentium quot sunt personæ, de quibus quæritur, computatis intermediis, primâ demptâ, tot sunt gradus inter eas. II. Pro collateralibus. Collateralium in lineâ æquali quoto gradu quis distat à stipite communi, toto distant inter se vel sibi attinent. Collateralium in lineâ inæquali quoto gradu remotior distat à communi stipite, toto inter se distant.—Juxta jus civile.—I. In lineâ rectâ ascendentium et descendentium quot sunt personæ, de quibus quæritur, computatis intermediis unâ demptâ, tot sunt gradus inter eas. II. Collateralium. 1. In lineâ æquali, quoto gradu qui distat a communi stipite, toto duplicato distant inter se, vel sibi attinent; nam quælibet persona facit gradum. 2. In lineâ inæquali, quot sunt personæ, stipite dempto tot sunt gradus.—Nota in contractibus matrimonialibus computatio canonica est recepta, et hoc per decretalem Innocentis tertii in concilio generali.—Hal. MSS.

[24. a.]

[Note 143.] (2) *The following passages from the canon law are in Hal. MSS.—* Extrav. de consang. et affin. c. 9. *Vir. qui à stipite quarto gradu mulieri, quæ ex alio latere distat quinto, licitè copulatur.—Nota, antiquitus usque ad septimam generationem nullus de suâ cognatione ducat uxorem. Decret. 2. Causa 52. quæst. 2. can. 11. . Sed in concilio generali sub Innocentio 3^o prohibitio copulæ conjugalæ quartum consanguinitatis et affinitatis non excedat, viz. in collateralibus; sed in directè ascendentibus prohibetur contractus matrimonialis in infinitum. Extrav. de consanguinitat. &c. can. 8.—See further as to the prohibition of marriages for affinity or consanguinity in Tayl. Elem. Civ. L. 314. Inst. lib. 1. tit. 10. Dig. lib. 23. tit. 2. Cod. lib. 5. tit. 4. Nov. 74. Gibs. Cod. Jur. Ecclesiast. Anglican. 1st ed. v. 1. p. 494. Burn. Eccles. L. tit. Marriage. Vin. Abr. Marriage E.*

[24. b.]

[Note 144.] (2) *And see such special heir is in by descent, and shall have his age, 24 E. 3. 60.—Hal. MSS.*

(3) A.

(3) *A. hath issue a son and a daughter. The daughter marries B. [Note 145.] and has issue two daughters. A. devises to his son; but if he die without issue my land shall go to my right heirs of my name and posterity, and dies. The son dies without issue. Ruled, that the land shall not go to the uncle, for though of his name, he is not heir, for the issue of the daughter is heir. H. 11 Jac. C. B. Counder and Clerke, Mo. 363. and Hob. 29. Hal. MSS.—See the same case in 1 Brownl. 129.—*This case of Counder and Clerke is apparently cited by lord Hale in confirmation of lord Coke's position as to the necessity of being *heir* as well as *female*, in order to take by *purchase* under a limitation to the *heir female*; and it is observable, that there is not one word in lord Hale's note intimating the least disapprobation of the doctrine. However, it so happens, that in more modern times the propriety of this doctrine has been questioned by very respectable persons, who have treated it as equally unsupported by reason and authorities of law. But perhaps this censure of lord Coke may have been too hasty; and it may be doubted, whether there is a passage in all his works more capable of standing the severest test of modern criticism. Therefore the remainder of this note shall be employed in the defence of lord Coke's doctrine, and in explaining the qualifications with which it ought to be understood; and for this purpose it shall be formally examined, first as a reasonable rule of construction, and secondly by the authorities and determined cases.

When land is given to the *heirs female of the body* of one, either not having *any* preceding estate, or not having a preceding estate of *freehold*, the words cannot be construed as giving an inheritable quality to an estate already vested and limiting the course of descent, but necessarily must operate on the first taker as a *descriptio personæ* and *name of purchase*; and lord Coke's doctrine means nothing more, than that those claiming under such a description should *fully* answer to it, and consequently that such as have only *half* of the description should be excluded. Now it is to be considered, that the description consists of *two* parts, one requiring that the donee should be *heir*, the *other* that the donee should be *female*; and if being *heir* without being *female* will not give a title, why on the other hand should being *female*, without being also *heir*, be sufficient? It is not a solid objection to lord Coke to say, that his construction is strict, literal, and founded on a rigid adherence to the proper and technical sense of words; because it is reasonable to presume in favour of the established sense of all words, unless there are *other* words or some special circumstances to shew a *different* sense in the mind of the person using them, and lord Coke apparently intends to put a case in which *neither* occur. But it has been observed, that where *heirs female of the body* are words of *limitation*, a female may take by *descent* as *special heir*, though not *heir general*; and it is asked, why should not the same person be equally capable of taking by *purchase*? This objection is plausible, but not unanswerable. Where *heirs female of the body* are words of *limitation*, they are necessarily used to regulate the *succession* in a *special* manner, which object of the donor cannot be attained without a continual exclusion of *heirs general* when they happen to be males; and this establishment of a *new* kind of heirship is a ground for presuming that the donor by *heirs* means, not those who are so by the *general* law of descent, but those who are so according to the *special* course of descent he professes to introduce. But where *heirs female* are only words of *purchase*, they are used to describe who shall take the estate at *one* particular time and in *one* instance, and establishing a *new* course of succession is not the object in view; and it not being so, the ground of presumption, which governs the former case, is wanting.

wanting. But it may be insisted, that, in the case put by lord Coke, *heirs female of the body* have a *double* effect, and after operating as words of *purchase*, operate a *second* time as words [24. E of *limitation*, and being allowed to point at an *heir special* in their *latter* application, ought to have the same construction in the *former*; for in such a case it would be strange to suppose, that *heirs female* were used in two different senses. This is refining on the objection made to lord Coke's doctrine, and placing it on a stronger light than it hitherto appears to have been urged. But even in this shape the objection would not prove any thing absurd in lord Coke's *general doctrine*, and would only shew that he had chosen an improper example for its illustration, and that he should have stated a case in which *heirs female* can only operate as words of *purchase*, as where a gift is made to the *heirs female of the body of A. and their heirs, or the heirs of their bodies*. So much for the propriety of lord Coke's doctrine independently of authorities; but if it is compared with them, it will appear still more defensible, and by them it is even applied to the same sort of case as is stated by him. The necessity of being *actually heir* in the strict sense of the word, to take by *purchase* under that description, appears by authorities of three kinds. The first order of cases consists of those, by which it has been settled, that if land is given to *A.* for life, with remainder to the *heirs, or heirs of the body of B.* and *A.* dies before *B.* or *B.* is attainted of felony, and afterwards dies before *A.* the remainder becomes void. In the former case it is so, because *B.* being living at the determination of the particular estate, no person can then answer to the description of his heir, for *non est heres viventis*. In the latter case it is so, because *B.*'s attainer, by corrupting his blood, prevents his having an heir. Now in both these cases there is as much reason for departing from the rigid sense of the word *heirs*, and presuming in favour of an *heir apparent* in the *first* case, and of such person as would be heir if there was not an attainer in the *second*, as there is for presuming in favour of an *heir special* in the case of a gift to the *heirs female*; and yet the doctrine is so fixed by authorities, that the judges of modern times have not yet deviated from it even in the case of *last wills*, except when induced to adopt a less strict construction by some *additional* words strongly expressive of using *heirs* in a *special* sense, as where land is devised to the *heir male of A. now living*. See post. 378. Hussey's case, Bro. Abr. Done 61. the case of James and Richardson Pollexf. 457. that of Burchett and Durdant, 2 Ventr. 311. Darbison and Beaumont in Vin. Abr. Devise U. b. pl. 5. but more accurately in 1 P. Wms. 229. and Fortesc. Rep. 18. and that of Frogmorton and Wharrey Wils. vol. 2. part. 3. page 125. and 144. See further Vin. Abr. Remainder I.—Another series of authorities, conformable to lord Coke's doctrine, consists of cases, in which it has been agreed, that where *heir* is a word of *purchase*, the *heir* at common law shall take *Gavelkind* or *Borough-English* land, unless the *customary* heir is expressly mentioned, though if used as a word of *limitation*, the *customary* heir shall take without being named. See Bro. Abr. Discent 59. See also ante 10. a. and n. 4. there, and the case of Starkey and Starkey, Trin. 19 G. 2. in the Exch. 5. N. Abr. 404. This rule in respect to *customary* land is a very cogent argument for lord Coke in point of authority; for the property, which is the *subject* of the gift, furnishes a very colourable pretence for preferring the *customary* heir; and the peculiar descent of the land by *force* of the *custom* in the person who thus takes by *purchase* is precisely the same sort of argument for the *customary* heir, as those who differ from lord Coke draw from the *special* descent by *force* of the gift where *heirs female of the body*

body are words of limitation. On a nice comparison it will be found, that the analogy between the gift of the customary land to heirs, and the gift of common law land to heirs female of the body, is almost perfect; for in both cases the words operate first as words of purchase, and then as words of limitation; and as in the latter case the heir female by purchase must be the heir at common law, and the heir by descent must be a special heir, according to the course of descent prescribed by the donor, so in the former case the heir by purchase is the heir at common law, and the heir by descent is the heir special according to the custom. —But the authorities of the third kind are those, which occur in respect to gifts to heirs male or female, and therefore apply more closely. Of these the earliest is John Farringdon's case, 9 H. 6. 23. and 11 H. 6. 12. in which one question was, whether a great grandson could take by purchase under a remainder devised to the testator's next heir male and the heirs male of his body, the great-grandson's mother, who was the testator's heir general, being alive when the estates precedent to the remainder determined. The case was argued twice, but there is an adjournment in the Year Book, and what was the opinion of the court is not any where mentioned; but there is reason for supposing, that it was against the remainder; for in 20 H. 6. 44. Newton, then a judge, though he had before argued as counsel for the remainder in Farringdon's case, lays it down as clear law, that if land is given to A. for life, remainder to the right heirs male of the body of B. to hold to them and their heirs for ever, the son of a daughter of B. being his heir, may take notwithstanding he makes out his description through a female; and Fortescue, chief justice, assents to the position. This construction of heirs male of the body as words of purchase, being attended to, will be found almost necessarily to be a clear authority with lord Coke; for it shews, that as words of purchase they describe males being also heirs general, whereas as words of limitation it is agreed they have a different import, and signify such males as shall be heirs special according to the particular course of descent marked out by the donor, though they do not happen to be heirs general; which distinction is the whole amount of lord Coke's doctrine. But the next authority, which is in Bro. Abr. Done 61. applies more directly. There lord Brooke, after mentioning the difference taken by Ellerker in Farringdon's case between descent and purchase, adds in confirmation of it, that by Hare, master of the Rolls, an ancient apprentice, there is a difference between a gift in possession to a man and his heirs female, &c. and a gift to a stranger the remainder to the heirs females of another, for there heirs in deed must be when the remainder falls, and otherwise the remainder is void for ever. The same doctrine is in Plowd. Quær. 87. and 133. and the very learned author illustrates it by a case, the same as that stated by lord Coke. In Quære 87. the words of the book are, If a remainder is appointed to the right heirs female of the body of I. S. who dies, having a son and daughter, the remainder shall be void; because the daughter cannot have it, in regard that she is not heir, though she be female. The next authority is Shelley's case, which arose between the second son of Edward Shelley and a posthumous son of Edward's deceased eldest son. One point was, whether the second son could take by purchase, under a remainder to the heirs male of Edward's body, and the heirs male of the bodies of such heirs male, in which case his estate would not have been divested by the birth of the posthumous son of his brother, the eldest son having left a daughter, who at Edward's death was his heir general. Judgment was given against the second son; but from the report of lord Coke and More, it seems not to have been absolutely requisite to have decided whether the second son could take by

fur-

[24. b.] *purchase*; for the judges held, that on account of the preceding use for life to Edward, the remainder operated as words of limitation, though Edward died before the use to him could arise, and that so the second son took in course and nature of a *descent*, till the birth of his brother's posthumous son, who then became entitled. See Mo. 140. and 1 Co. 106. However, lord Dyer in his report of the case places the remainder in *both* points of view, and besides observing that by *descent* the second son could only take the remainder till the birth of his elder brother's posthumous son, also says, that *he could not have it as a purchaser, because he was not heir of the body of his father, for the daughter of the eldest son was heir general, and the second son was not heir male of the body of his father unless he was heir as well as male.* These words from lord Dyer, when it is considered that he was one of the judges on whose opinion Shelley's case was decided, and that they are introduced to explain the reason of the judgment, are very strong evidence, that the judges in Shelley's case gave their sanction to lord Coke's doctrine, in the *full* extent of it, that is, in the case of a gift where *heirs male of the body* were both words of purchase and of limitation; and lord Dyer's authority ought to have the greater weight, because he is not contradicted by any other report of the same case; not even by lord Anderson, who was counsel for the second son, for he only takes notice of lord Coke's account of the reasons of the judgment, by observing that they were not mentioned in court. See 1 And. 71. Accordingly mr. serjeant Rolle cites Shelley's case as having determined the point. See 2 Ro. Abr. 416. F. pl. 5. Ashenhurst's case, Mich. 7 Jam. is the next authority, and in that land was devised to executors till 900l. should be raised for the preferment of the testator's three daughters, and afterwards to his right heirs males for ever, and one Beard was found by special verdict to be the *heir male*; but the court of king's bench held that he could not take the remainder, because the three daughters were the *heirs general*, and in Easter 17 James the judgment was affirmed in the exchequer chamber. This case is the stronger, because it arose on a will, and the testator, in the devise to his *heirs male*, mentions his *heirs general*, which no doubt was urged as a circumstance to shew that the testator meant a *special* kind of heir, and might have warranted a departure from the strict sense of *heir* without overturning lord Coke's general rule. See Hob. 34. and Palm. 50. *Couden* and *Clerke* already stated from lord Hobart at the beginning of this note, is another case where a *devise* to *heirs male* could not take effect, because the *heirs general* were *females*; and this judgment appears to have been also affirmed on error in B.R. See Jenk. Cent. 294. There are several modern determinations to the same purpose. In *Southcott* and *Stowell*, which was adjudged about the 29 of Cha. 2. one having two sons covenanted to stand seised to the use of the eldest in special tail male, remainder to the heirs male of the covenantor, or according to one report of the case the heirs male *of his body*, and for want of such issue to his own right heirs. The eldest son dies leaving a son and daughter; the covenantor dies, and then the son of the covenantor's eldest son; and the question was, whether the second son or the daughters of the eldest son should have the estate. The court determined in favour of the second son, because the grandson survived the grandfather, and being *heir general* as well as *male* could take either by *purchase* or *descent* on his death, and therefore it was immaterial whether an estate for life arose to the covenantor by implication or not; but it was agreed by the whole court, and even by the counsel for the second son, that if the grandson had not survived, the second son could not have taken by *purchase*, because his nieces would have been

heirs general, and consequently he could not have been complete heir. See 1 Freem. 216. 225. 1 Mod. 226. 237. 2 Mod. 207. and 3 Kebl. 704. In 1695 lord keeper Somers, in the case of *Starling and Elrick*, decreed against one, who claimed to take by purchase under a devise to *heirs male*, because a *female* was the *heir general*. See Prec. in Chanc. 54. The case of Ford and lord Ossulston, which was determined in Mich. 7 Ann. by the king's bench, is still stronger; for in that one Ford having issue three sons and a daughter, and also a brother, devised to his three sons successively in tail male, with remainder to his own right heirs male for ever, and the three sons being dead without issue, the whole court held, that the brother could not take as male heir, 1. because a devise to heirs male operates as a limitation to *heirs male* of the body, and the brother could not be heir male of the devisor's body: 2. because the remainder to the heirs male were words of purchase, and by purchase the brother could not take as heir male, his niece being the heir at common law; and so jealous was lord chief justice Holt of departing from the established doctrine, that notwithstanding the special circumstances in the case of Pybus and Mitford, which will presently be stated, he doubted the authority of that case. See 3 Salk. 336. 11 Mod. 189. and Vin. Abr. *Devise* U. b. pl. 2. in marg. The doctrine was thought to be so firmly settled by this last case, that in 1722 lord ch. Macclesfield, in Dawes and Ferrers, which was a case similar to that of Ford and Ossulston, interrupted the counsel for the person claiming as *heir male*, by saying that *he would not suffer the bar to dispute what was the land-mark and foundation of the law*; adding, that in the case of Ford and lord Ossulston the point had been determined on trials at bar in every court in Westminster Hall, and appeared to be so very plain a case, that in the king's bench the plaintiff's own counsel would not ask a special verdict. See 2 P. Wms. 1. and Prec. in Chanc. 54. However, it was not thought proper to acquiesce in this opinion of lord Macclesfield, and a bill of review being brought to reverse his decree, lord ch. Hardwicke directed a case for the opinion of the king's bench: but the four judges of that court followed lord Macclesfield, and the person under whom the claim was made not being *heir general*, they, in February 1743, certified, that *he could not take by the description of right heir male*. See the certificate in Vin. Abr. *Devise* W. b. in a note on pl. 13. Such is the list of grave authorities which confirm lord Coke's doctrine as to the necessity of being *very heir*, in order to take by purchase under the description of *heir male* or *heir female*, whether of the body or not; and if they wanted aid from his name, it will scarce be denied by the coldest of his admirers, that his private opinion on a point of law he had so fully considered, will even in these times, when perhaps we are too apt to decry those ancient authors whose writings are still the grand sources of information and instruction, be no mean addition to their weight. However it must be confessed, that there are some cases, in which the doctrine has been deviated from; but all of them, except one, are determinations since his time, and besides, most of them may rather be deemed *exceptions* to lord Coke's *general rule*, than proofs of its *non-existence*. The earliest of these is a case in the time of Elizabeth, and cited by lord Hale in *Pybus and Mitford*, 1 Ventr. 381. A son of the testator's brother was admitted to take under a devise to the testator's *heir male*, though he left three daughters; but the reason was, because the testator introduced the devise with taking notice that his brother had left a son, and that he himself had three daughters who were his *right heirs*, and he also gave the daughters 2000*l.* on condition not to trouble the *heir*. In this case the *special intent of heir male* is so marked by the *other words*, as clearly to take it out of the general rule; and that lord Hale meant to cite it as

[24. b.] an *exception* appears from his saying, that it is not inconsistent with *Counden and Clerke*. See 1 Ventr. 382. *Bowman and Yates*, 1 Cha. Cas. 145. is another case which was determined on *special* circumstances; for the son of a second marriage was allowed to take a rent charge under a limitation to heirs male by a second wife, though not strictly heir, there being a son of the first wife, because the settlement was apparently made as a provision for the issue of the second marriage. The case of *Pybus and Mitford*, adjudged 36 Ch. 2. is liable to a similar observation. One, who had issue two sons by two different wives, covenanted to stand seised to the use of the heirs male of his body by his second wife. The point determined by three judges against one was, that an use arose to the covenantor for life, and that so the limitation to his heirs male on the body of his second wife being a remainder in tail special executed in him, his son by the second wife took by *descent* as *special* heir; but Hale, chiefjustice, held, that the son of the second wife, though not heir-general, might have taken by purchase, and according to *Ventris, Wild*, justice, was of the same opinion, though another book mentions, that in this respect all the three other judges differed from lord Hale. See 1 Freem. 370, 371. But the reasoning of lord Hale shews, that he did not mean to shake Coke's *general* doctrine, and that he founded himself on the special penning of the deed; and he distinguished it, by observing that the limitation was to the heirs by the second wife, and that the covenantor had taken notice in the deed that another was his *heir general*, there being a proviso, that if the son by the first wife should after the death of the son by the second wife, and within five years after attaining 21, pay 1200*l.* for the covenantor's younger children, the uses should cease; and for these two reasons he thought the deed sufficient to describe a *special* heir. See *Pybus and Ventr.* 1. *Mitford* 372. 1 Freem. 351. 369. *Raym.* 228. 1 Mod. 121. 159. 3 Keb. 129. 239. 316. 338. and 2 Lev. 75. in which last book the case is most fully stated. In *Wall and Baker Trin.* 8 W. 3. the circumstances were still more special; for according to lord Cowper's state of the case the testator expressly directed, that if his heir should be a female his heir male should pay to his heirs female 12*l.* a year out of his lands; words manifestly implying that by *heir male* was meant a *special* kind of heir in contradistinction to the *heir general*. See 1 Stra. 41, 42. Hitherto Lord Coke's general rule as to being both heir and female to take by purchase seems unimpeached. But it must be owned, that there is a case in which the doctrine, after a very solemn discussion, received a most severe attack from a judge of the highest authority. This happened in the famous case of *Brown and Barkham* determined by lord chancellor Cowper; who held a younger brother to be capable of taking as heir male under a devise to the heirs male of the body of the testator's great-grandfather, though the daughter of an elder brother was *heir general*, and instead of founding his decree on *special* circumstances, which were not wanting in the case, most expressly denied lord Coke's distinction between descent and purchase. See *Prec. in Cha.* 442. 461. *Gild. Rep.* 116. 131. and 1 Stra. 35. But lord Cowper's decree, notwithstanding his high character, was not acquiesced in; for in November 1741 the same case was brought, by bill of review, before lord chancellor Hardwicke, who indeed decreed in favour of the same person, but was far from following lord Cowper in his reasons. He admitted lord Coke's distinction to have been long ago established, and professed to determine wholly on the special circumstances, without the least intention of impeaching the general rule. In giving judgment he divided the case into two questions: 1st, whether it was an established rule, that he who claims as heir male by purchase must be general heir

as well as nearest male descendant ; 2dly, whether the apparent intent of a testator to the contrary may not create an exception to the general rule. According to a very good note of the case lord Hardwicke's words on the first question were these : *As to the first of these questions, it cannot be denied, but that the distinction between an heir male of the body to take by descent, who is the nearest male descendant of the party claiming through males, and to take by purchase, who must be heir as well as a male descendant of the body, has been long ago established. The statute de donis established the first, and the second has been laid down by lord Coke in his Comment upon Littleton, and is taken from his argument in Shelley's case and Dyer's report of that case, and he has been followed by some later authorities. Lord Cowper argued strongly against this rule ; but as his argument is well known and very common, I shall not now take notice of it. If this doctrine had been res integra at the time of his decree, or was so now, I am so fully convinced of the unreasonableness of it that I would never establish it. But when a rule of law has long prevailed, it ought to be supported, though it be not strictly agreeable to natural reason ; for in many instances it is more material that the law is settled than how it is settled. But as I think that this case may be determined without determining this question, I shall leave the rule unimpeached, and found my decree on the second question.* He then proceeded to consider the second question, and after stating several authorities to shew there might be exceptions to the general rule, he pointed out the particular circumstances which he relied upon in the case before him, and on account of them only affirmed lord Cowper's decree. Lord Hardwicke's guarded manner of expressing himself on this last case amounts to a full acknowledgment of the general rule, and is the strongest authority to prove its existence, because he avowed his dislike of it.—Upon the whole, it is submitted to the learned reader, that the general rule of being heir general to take as heir male or female by purchase may be defended as a reasonable rule of construction, where the words merely operate as words of purchase, and more particularly if the superadded words of limitation are to heirs general, as where land is given to the heirs female of the body of one and the heirs of their bodies ; that the authorities before and in the time of lord Coke fully warranted him in advancing the rule in its full extent, that is, where the words operate as words both of purchase and limitation ; that the rule has been confirmed by many cases since lord Coke's time ; and lastly, that as lord Cowper's opinion is the single direct authority in any printed book against the rule, and it has been acted upon and acknowledged in several subsequent cases, it ought still to be observed, where the construction rests singly on the words *heirs female*, and they stand unexplained by any other words or circumstances.

[25. a.]

(1) It is very unusual to create an estate in tail female, and I have [Note 146.] seen an argument, in which it has been attempted to prove, that the law of England will not allow of a descent through females only, even in the case of estates tail ; but other authors as well as Littleton and Coke mention such descents, nor did I ever hear any authority cited to support the contrary doctrine. See Plowd. Quær. 87. and 133.

[25. b.]

(2) *If husband and wife are divorced à vinculo, they are only tenants for life ; for the law doth not presume that they will marry again.* 7 H. 4. 16. 3 H. 6. 43. Hal. MSS.

(4) *Here*

[Note 148.] (4) *Here it cannot be tail, for the uncertainty which of them he will marry first. But if a gift was to A. and B. a feme sole and to the heirs of their bodies, remainder to A. and C. a feme sole and to the heirs of their bodies, it is tail.* Hal. MSS.

[26. a.]

[Note 149.] (1) In pleading seisin of such an estate in husband and wife, it shall be alledged, that they were seised together and to the heirs of the body of the wife in her right; and not that they were seised of the freehold or fee tail. Per Fitzherbert, 27 H. 8. 21. b.

[Note 150.] (3) Vid. *Hob. case 113. page 84. Gift to husband and wife for their lives, and after their decease to the heirs of the body of the husband procreant super corpus of the wife, is tail only in the husband, and the wife hath only for life; and it is the same with hæredibus of the husband de corpore of the husband on the wife procreant.* Skete and Oxenbridge. So Tr. 6 Jac. B. R. *Repps and Bonham. Land limited to husband and wife for their lives, and after their decease hæredibus of the body of the wife by the husband to be begotten; it is tail only in the wife. But it was agreed, that if it had been to the heirs which the husband should beget on the body of the wife, or to the heirs of the body of the wife and of the body of the husband to be begotten, it had been tail in both.*—8 R. 2. tail 32. *Gift to the husband and wife and to the heirs of the bodies issuing, and if the wife, obierit sine hæredibus, yet tail in both.* 12 E. 3. *Variance 77.* 9 E. 3. 64. *ibid.* 93. *Land given to husband and wife and to the heirs of the body of the husband, and if husband and wife obierit sine hæredibus inter eos procreatis, remainder over; yet it is tail general in the husband only.*—*Land given to the husband and wife and to the heirs of the husband of the body of his wife to be begotten; it is only tail in the husband.* Hic sect. 29. *Yet if gift be to the husband and wife and to the heirs of the body of the wife by the husband to be begotten, the tail is only in the wife. His heirs appropriate in the first case, of the body in the second case.*—Hal. MSS. *But where the gift is to the wife only, and to the heirs of the body of the husband, then the tail is not in either, of which lord Hale gives the following case as an instance.*—Nota, P. 1651. *Sir Leventhorpe Franck's case. Land given to the wife for life, remainder to the heirs of the body of the husband on the body of the wife to be begotten. Ruled, that it is not tail executed omnino in the wife, but a contingent remainder in the heir of the husband's body, it being limited to the heirs of the husband's body; and that as the wife died in the life of her husband, the remainder was void.* Hal. MSS.—The same case is reported by the name of *Gossage and Tayler in Styl.* 325. but there the remainder is differently expressed; for it is not to the heirs of the bodies of both in direct terms, but it is to the use of the heirs to be begotten upon the body of *Susanna by Leventhorpe her husband*; which most probably were the words of the remainder; for *Glyn's* argument in favour of the wife's having an estate tail appears to have been founded on the remainder's not pointing expressly to the heirs of either.—After *Sir Leventhorpe Franck's* case, lord Hale puts a *quere*, and then adds—V. 3. E. 3. *Formedon 8. Land given to I. S. et uxori suæ quam postea desponsaverit et hæredibus de corporibus eorum; the wife takes nothing, because not known at the time; but it is a tail in the husband. Yet nota, hæredibus de corporibus; if the wife had taken an estate, it had been a tail in both.* Hal. MSS. According to this case the tail is in the husband, though the wife takes no estate and the tail is expressly to the heirs of the bodies of both. But this is more than was contended for by the counsel for the wife's estate tail in *Gossage and Tayler*, who admitted

mitted the contrary to have been settled by the case in Dy. 99. pl. 64. and by Lane and Pannell, which is in 1 Ro. Rep. 238, 317. and 438. See also contra post. Sect. 352. and the case of Frogmorton on the demise of Robinson against Wharrey in Wils. vol. 2. page 125. and 144. where, on a surrender of copyhold lands to A. whom the surrenderor intended to marry, and to the heirs of their two bodies, it was adjudged, that the wife took for life with a contingent remainder to the heirs of the bodies of her and her husband.

[26. b.]

(1) *So gift to A. and the heirs which her husband shall beget of her* [Note 151.] *body is tail in the wife; and yet it is not said her heirs nor heirs of her body.* 41 E. 3. 24. Hal. MSS.

(2) *Nota, in Littleton's case the son takes by purchase, and in Mandeville's case he takes by purchase jointly with the mother. But if the gift had been to Roberge and to the heirs of her body by the husband begotten, or to the heirs of her body and of the body of the husband begotten, it seems tail only in the wife.* Quære and vid. 12 H. 4. 102. by Thirninge, Litt. sect. 352. and 1 Rep. Shellie's case. 104. Hal. MSS. [Note 152.]

(3) *And therefore, though Maud had been of the half blood, she* [Note 153.] *should have taken.* Hic Hodgkinson's case cited fol. 14. sect. 6. M. 30, 31. Eliz. B. R. Morris and Maule W. Vid. H. 31. W. n. 23. Hal. MSS. —See ante fol. 14. a. n. 6.

(4) *Where one named after the habendum shall take.*—H. 13 Jac. [Note 154.] *Brookes and Brookes. In customary grant by copy, one not named in the premises, being named in the habendum, may take a present estate.* Venit I. S. et cepit de domino, habendum to him and his wife is good. *In frank-marriage a wife shall take, though named only in the habendum.* Hic sect. 17. 4 E. 3. 4. 5 E. 3. 17. Brief 703.—*So it seems in render by fine to B. habendum to B. and C. his wife.* 8 E. 3. 31. 24 E. 3. 58.—*So by a deed by way of remainder, a stranger to the deed, though not named in the premises, shall take.* Hic fol. 183. sect. 283. 8 E. 3. 50. *But otherwise regularly one shall not take a present interest jointly with another, unless he be party to the deed and named in the premises.* 8 B. 2. Feoffments hic. fol. 378. sect. 721. 3 H. 6. 18. 27. 16 E. 2. Ass. 371. Trin. 16 Jac. rot. 1089. Greenwood and Tyler. Hob. 314. *But if by deed indented or toll A. grants the manor of S. habendum to B. et hæredibus, it is good though he was not named in the premises.* Hal. MSS.—See the case of Brookes and Brookes cited by lord Hale in Cro. Jam. 434. and 2 Ro. Abr. 66, 67. and Vin. Abr. Grant K. a. in which two last books there are many other cases relative to the same subject. See further ante 7. a. where lord Coke writes, that if A. gives land to hold to B. and his heirs, it is good, though he is not named in the premises; to which lord Hale adds—*But gift in the premises to A. habendum to A. and B. is void as to B.* M. 25. Eliz. Ow. Vid. ante 6. a. Plowd. Comment. 156. Throgmorton's case. Hal. MSS. See also ante where lord Coke describes the office of the habendum, on which lord Hale gives the following annotation—*It is not necessary to repeat the thing granted, it being sufficient that it is named in the premises.* H. 44. Eliz. B. R. Hill and Giles adjudged. *One not named in the premises shall not take by the habendum, unless, First, in case of frankmarriage, hic sect. 17. Secondly, in case of grant by copy. T. 15 Jac. B. R. Brooke's case. Cro. Jam. 434. Thirdly, in case of a remainder. Lease to husband and wife habendum to the husband*
for

for 10 years; the wife takes nothing. T. 31. El. Mo. So lease of the scite of a rectory and all tithes appertaining to it habendum the scite cum pertin' for 20 years, the tithes pass only at will. H. 28. El. Mo. 222. *Carye's case*. Grant to A. and B. habendum to A. for years, remainder to B. for years, is good; but lease of two acres to A. and B. habendum one acre to A. for years, the other to B. for years, is bad. T. 4 Eliz. Vid. Hob. 172. Hal. MSS.—See *contra* to this last case, Mo. 26. by *Brown arguendo*. For other instances of differences between the *premises* and *habendum*, particularly where the former has been *joint* and the latter *several*, see Mo. 43. 247. 880.

[27. a.]

[Note 155.] (1) Yet gift to A. and his heirs of the body of B. his wife, who is dead, is tail. 12 H. 4. 1. *Rationem diversitatis quære*, for the second son is his heir of the body of the father. Hal. MSS.

[Note 156.] (5) In the case on the title to the earldom of Oxford decided in parliament 1 Cha. 1. the judges held, that a limitation of the earldom to Aubrey de Vere and his heirs males, being by act of parliament, was sufficient to raise a fee simple descendible to males only. See W. Jo. 100

[Note 157.] (6) Lord Hale adds the following instances of *special* limitations. *King Henry the Third* dedit manerium de Penreth et Sourby Alexandro regi Scotiæ et hæredibus suis regibus Scotiæ; and *Alexander* having daughters, of which one was married to the Earl of Hunt, died, not having any heir king of Scotland, et eâ de causâ King E. 1. recovered *seisin*, and the coheirs of Alexander were excluded. *Lib. parl. E.* 1. 134. 308. The hospital of Saint Katharine was founded by queen Eleanor, w. *te* of Hen. 3. reserving the patronage sibi et reginis Angliæ pro tempore existentibus, et eo titulo regina Philippa uxor E. 3. habet patronatum. *Claus. 7. E. 3. parte 2. m. 2.* Hal. MSS.

[27. b.]

[Note 158.] (2) See acc. 2. Inst. 302. But yet he cannot have action of waste against another, for he cannot count *ad exhæredationem*; and it is said, that tenant in tail loses his action of waste, if he becomes tenant in tail after possibility of issue extinct pending the writ. See Bro. Abr. *Waste* pl. 14. 59, 60. 2 Ro. Abr. 825. pl. 5. Mo. 18. and post. 53. b. Note also that it is said, that though such tenant is not punishable for waste, yet if he cuts down trees, they are not his property. 4 Co. 63. As to this difference between being dispunishable for waste in felling trees and having the property in them, see 1 P. Wms. 528. See also 2 P. Wms. 241. where it is said by the court, that if tenant for life cuts down timber, it belongs to those who at the time of its being severed were seised of the first estate of inheritance.

[28. a.]

[Note 159.] (7) Cordall's case Cro. Eliz. 315. is to the contrary; for there land was devised to A. for life, remainder to his first and other sons in tail male, remainder to the heirs of A.'s body, and according to Croke, who mentions the case as reported to him by lord Coke, it was resolved, that A.'s estate tail was not executed for the possibility of the mean estate's interposing, but was so disjoined during A.'s life, that his wife could not be endowed. But see Cas. B. R. temp. Hardw. 17. where lord Hardwicke says, that Cordall's case has been several times denied to be law.

(8) Sic nota remainder supported, without particular estate, by the possibility that issue may be born. But if such tenant levies a fine, now this remainder is destroyed, because the estates are confounded. Hal. MSS.—Here it is proper to add, that there is a difference between subjoining the inheritance to the particular estate by the same conveyance as limits the intermediate contingent remainder, and an accession of one to the other by a *distinct* and *subsequent* act or conveyance; for in the latter case the contingent remainder is destroyed, though not in the former. See acc. Purefoy and Rogers, 2 Saund. 380. It has even been adjudged, that in the latter case the *descent* of the inheritance on the person having the particular estate will destroy the contingent remainder, where the descent has been *subsequent* to the commencement of the particular estate. See *Kent and Harpool*, 1 Ventr. 306. T. Jo. 76. *Hooker and Hooker Cas.* in B. R. temp. Hardw. 13. But a descent of the fee on tenant for life will not hurt the contingent remainder, where the particular estate and the descent take place at the *same time*, and are derived from the *same person*; as where land is devised to *A.* for life, remainder over on a contingency, and at the devisor's death the reversion descends upon *A.* as his heir. See acc. Archer's case, 1 Co. 96. Plunkett and Holmes, 1 Lev. 111. and Boothby and Vernon, 9 Mod. 147. The case of Wood and Ingersole, Cro. Jam. 260. seems *contra*; but see the observation on the last case in T. Jo. 79. and Pollexf. 481. It would be a great omission not to apprise the student, that the subject of this note is fully gone into by mr. Fearn in his *Essay on Contingent Remainders*. See page 111 to 118 of the second edition, where the author most learnedly and ingeniously states the several distinctions, explains the reasons on which they depend, and endeavours to reconcile all the cases on this nice subject.

[28. b.]

(1) *Husband and wife tenants in special tail; the husband was attainted of treason, or levies fine with proclamations; the husband dies, having issue by the wife: the issue cannot inherit, and yet to many purposes the wife surviving is tenant in tail after possibility, for if she makes lease for 21 years according to the statute, it shall bind the conscience, or if it is for three lives, it shall not be a forfeiture.* H. 22. Jac. Rot. Crocker and Kelsey. *Hob. Rep. Melton's case.* Vid. 9. *Rep. Beaumont's case.* It seems, she cannot suffer recovery after. Quære. Vid. *this case of Beaumont afterwards debated.* H. 13. *Cha. B. R. in Baker and Willis Cro. Cha.* 476. The case of Crocker and Kelsey is in W. Jo. 60. Hutt. 84. Cro. Jam. 688. Bridgm. 27. 2 Ro. Rep. 490. 498. 1 Ro. Abr. 843. pl. 3. and O. Bendl. 139. 143. Beaumont's case is in 9 Co. 138. b. and Melton's case is in *Hob.* 254. Note, that in the case of Crocker and Kelsey, the question was on the operation of a lease for 21 years not warranted by the 32 H. 8. the ancient rent not having been reserved; but the issue in tail having levied a fine during the wife's life, it was adjudged that the lease was good; but it seems to have been agreed, that the wife, notwithstanding the husband's death, was tenant in tail, so as to be capable of making leases within the statute. Indeed, this latter point had been adjudged in a former case, which is in *Godb.* 102. See too 4 *Leon.* 57. As to the former point, besides the books already cited, see 2 *Sid.* 62.

[29. a.]

(3) But entry is not always necessary to give seisin *in deed*; for if the land is in lease for years, curtesy may be without entry or even receipt of rent, the possession of the lessee for years being deemed the

pos-

[29. a.]

possession of the husband and wife. See the case of De Grey and Richardson, 3 Atk. 469. Lord Coke's doctrine about seisin for a *possessio fratris* is the same. See ante 15. a. In n. 4. there the case of Newman and Newman is cited, from Wils. vol. 3. p. 516. but no hint being given of the point adjudged, it may be proper to add here, that in that case the court construed the possession of a mother to be a possession for an infant her son as his guardian by law, she being next of blood to whom the inheritance could not descend, and held it a sufficient seisin to exclude the daughters by a former *venter*.

[So in the case of *Doc ex dem. Barnett & al. v. Keen*, 7 Term Rept. 386, it was held, that an entry generally by the mother as guardian in socage of an infant daughter constituted a sufficient seisin in the latter to exclude the heir of the half blood.]

[Note 163.] (4) *Whether it be an advowson in gross or appendant.* A. seised of a manor, to which an advowson is appendant, dies, having issue a daughter, who takes husband and dies before entry into the manor. It seems, that the husband shall not be tenant by the curtesy of the advowson, nor of the rents incident to the manor, because he had not seisin of the principal. Hal. MSS.

[Note 164.] (5) According to Perkins, the husband shall have curtesy in an advowson, though he suffers the ordinary to present by lapse on an avoidance in his wife's life-time. Perk. Sect. 468. But such a case is not within lord Coke's reason for allowing curtesy of an advowson without seisin *in deed*; nor do I find any authority to support the doctrine, besides Mr. Perkins's name. That indeed, on account of the learning and ingenuity displayed in his *Profitable Book* on the laws of England, ought in *general* to have considerable weight; though one, who wrote soon after Mr. Perkins, describes him to be a man that writeth of diverse titles of our law rather subtilly than soundly. Fulb. Paral. 40. a. See also a more particular character of Mr. Perkins in Fulb. Prepar. 28. a.

[Note 165.] (6) Here an use *before or not executed* by the 27 H. 8. must be meant; for an use within that statute is a legal estate. See acc. 2 And. 75. 147. and by lord Coke himself in Cro. Jam. 201. See also 1 New Abridgm. 660. But though in strictness of law there cannot be curtesy of trusts, yet since lord Coke's time our courts of equity have allowed curtesy both of trusts and of other interests, which, though in *law* mere rights and titles, are deemed *estates in equity*, and made to conform to many of the rules and consequences incident to estates in *law*. See in 1 Atk. 603. the case of Cashborn and English, in which lord ch. Hardwicke decreed curtesy of an *equity of redemption*. See S. C. more fully reported in Vin. Abr. *Curtsey* E. pl. 23. However, a wife in *point of benefit* may have a trust of inheritance, which may be so declared as to prevent curtesy, as by directing the profits during the wife's life to be paid for her *separate* use; for in such a case the intention to exclude the husband from curtesy is manifest, and he cannot have an equitable seisin. 3 Atk. 715. It is also proper to remark, that though *curtesy* out of a trust is allowed, yet *dower* has been refused; a partiality not easy to be reconciled with reason, however settled by the current of authorities. But as to this see post. 51. b.

(7) Mr.

(7) Mr. Perkins makes a *quare*, whether, if a woman seised in fee [Note 166.] makes lease for *life*, reserving rent to her and her heirs, the husband shall not have curtesy in the rent during the lease; but he seems to admit, that the husband shall not have curtesy of the land itself, unless the lease determines before the wife's death. Perk. Sect. 467. See post. 32. a. where in a like case lord Coke says, that the wife shall not have dower. But if a rent is incident to a reversion expectant on an estate tail, the husband shall have curtesy of the rent till the tail determines. Post. 30. a.

[29. b.]

(1) *So nota till issue the husband cannot use the title of his wife's* [Note 167.] *dignity; but afterwards he may. So adjudged by Hen. 8. in the case of Wimby, who claimed the title of lord Talboys in right of his wife.* Hal. MSS.—This annotation shews, that in the opinion of lord Hale a title of honour admits of curtesy. But lord Coke, after stating *two* precedents, one of curtesy in a title of honour, and another of curtesy in an office of honour, avoids making the least inference, and professedly leaves the reader to his own judgment; from which reserve it may be conjectured that he had his doubts. In fact, the point had been several times controverted in lord Coke's time. About the year 1580 Richard Bertie claimed the barony of Willoughby in right of his lady Catharine, duchess of Suffolk, he having had issue by her. The claim was referred by queen Elizabeth to lord Burghley, and two other commissioners, as was also a claim of the same dignity by Peregrine Bertie, the son and heir of the duchess of Suffolk by Richard Bertie. At one time the precedents urged for the husband were thought to make an impression on the commissioners; but finally they made a report in favour of the son, who was accordingly admitted to the dignity in the life-time of his father. See Coll. Proceed. on Claims of Baron. 1. to 23. But notwithstanding this case, two other claims of a like kind were made within a few years after, the first about 1586 by sir Thomas Fane, in right of his wife Mary, the daughter and heir of Henry lord Bergavenny, and the second about 1604 by Sampson Lennard, in right of his wife Margaret lady Dacres. Of the event of the *former* claim, I do not find any account; but as to the *latter*, it appears that king James referred it to commissioners, and that lady Dacres dying before any decision, the affair was compromised in 1612 by the king's granting precedency to the husband as eldest son of lord Dacres. The letters patent giving this precedency recite, that the commissioners *had found baronies on the like right conferred on the husband in several families, and in this particular barony of Dacres three several precedents.* There are other expressions equally remarkable for a studied ambiguity, such as leave undecided whether the pretension to the wife's title was deemed a claim of *favour* or of *right* from the crown, and appear calculated to avoid an adjudication of the point; and in this unsettled state of things, it is not surprising that lord Coke should be so cautious of advancing any positive doctrine on the subject. I cannot learn that there have been any claims of dignities by curtesy since lord Coke's time, and from the want of modern instances of such claims, and from some late creations, by which women have been made peeresses, in order that the families of their husbands might have titles, and yet the husbands themselves continue commoners, it seems as if the prevailing notion was against curtesy in titles of honour. However, I have not yet discovered whether this great question has ever formally received the judgment of the house of lords.—For the particulars of Wimby's case, cited by lord Hale, see Coll. Claims of Bar. 11. 44. and 72.

(2) Lord

[Note 168.] (2) Lord Coke means, that the husband shall not be tenant by the curtesy of the *seigniorie*, it being suspended during the *whole* time of the marriage by the lease of the *tenancy* to the wife. See further as to the effect of *suspension* on curtesy in Perk. sect. 459, 460, 461, 462.

[Note 169.] (3) The husband could not have curtesy in respect of the *fee*, because that was defeated by the son's recovery in the formedon; nor in respect of the *tail*, because the wife's feoffment *before* the marriage had discontinued the *tail*, and consequently there could be no seisin of it *during* the marriage. This seems to be the *rationale* of the case put by lord Coke.

[Note 170.] (5) Vid. Pasch. 9 E. 1. rot. 4. Si habuit exitum, qui auditus fuit clamare seu vocem edere infra quatuor parietes; quia fuer non fuit visus nec auditus clamare ab hominibus masculis, licet per feminas nominatus fuit Johannes. *Therefore husband not tenant by the curtesy.* H. 5. E. 1. rot. 1. Wighorn. Hal. MSS.—I cannot guess what lord Hale's view could be in citing this record, unless it was to shew, that anciently in the case of curtesy the having *male* issue born alive could be proved by *men* only; which must be confessed to have been a most unaccountable peculiarity.

[30. a.]

[Note 171.] (1) On the other hand, curtesy by the custom of Gavelkind is subject to several disadvantages; for it is only of a *moiety* of the wife's land, and it *ceases* if the husband *marries again*. See Robinson Gavelk. b. 2. c. 1. where the learned author suggests, that some have doubted whether there is any such variance between the common law and the custom, and therefore undertakes to prove it by authorities on record.

[Note 172.] (2) *So if it was a rent de novo granted in tail, and the wife dies without issue, the husband shall be tenant by the curtesy.* Hal. MSS.

[Note 173.] (4) 4 E. 2. Cui in vita 15. 34 E. 1. ibid. 30. 10 E. 3. 11. 22. H. 6. 24. *If husband intitled to be tenant by the curtesy aliens and retakes estate to him and his wife, by which the wife is remitted, he shall not be tenant by the curtesy.* Contra, *if it was before issue had.* 9 H. 7. 1. Vid. T. 7. Jac. Ley n. 11. *Sparrey's case.* Hal. MSS.—See Ley's Rep. 9.

[Note 174.] (5) Pat. 11 H. 3. m. 3. Cùm consuetudo et lex Angliæ sit, quòd si aliquis desponsaverit aliquam hæreditatem habentem, et ex eâ prolem habuerit, cujus clamor auditus fuerit infra quatuor parietes, et vir supervixerit uxorem, habebit totâ vitâ suâ custodiam hæreditatis uxoris, licet ea hæredem habuerit ex primo viro, qui plenæ ætatis est; præceptum est, quòd eadem lex observatur in Hiberniâ. Hal. MSS.—The same extract from the patent roll of 11 H. 3. is given in Hal. Hist. C. L. 180.

[80. b.]

[Note 175.] (2) Mr. serjeant Hawkins makes a *quære* of this, observing that the fee and freehold were in the wife, and that the wife of an idiot shall have dower. Hawk. Abr. of Co. Littl. 42. It has been also remarked, that there is not any concurrence of titles between the king and the husband; the husband's title by curtesy not being *consummate* till the death of the wife, when the king's title determines. See Plowd. 264. Engl. ed. in a note by the Editor. However, note the reasoning in Plowden. See also 8 Co. 170. where it is adjudged, that though in the case of idiotcy the office for *some* purposes has relation to the time when the idiot's estate commenced, yet the king is only entitled to the profits from

from the finding of the office ; which, as it may have some influence on the point of curtesie, is proper to be attended to.

(4) *If disseisee enters on disseisor's heir, and makes feoffment on [Note 176.] condition, and enters for condition broken, and the heir enters, the right is revived. Vid. 19 H. 6. 43. Hal. MSS.*

(7) *Nota, in tenancy in dower the wife shall be said to be in by the [Note 177.] husband. 36 H. 6. Dower 30. But tenancy by the curtesie is in the Post. 5 E. 2. Entry 66. Hal. MSS.*

(8) The following note is by the editor of the eleventh edition of lord [Note 178.] Coke's Commentary.—(The reason why the law gave the wife dower will appear, if we consider how the law stood anciently ; for by the old law, if this provision had not been made, and the party at the marriage had made no assignment of dower, the wife would have been without any provision, for the personal estates even of the richest were then very inconsiderable ; and before trusts were invented, which is but lately, the husband could give his wife nothing during his own life, nor could he provide for her by will, because lands could not be devised, unless it was in some particular places by the custom, till the statute of Hen. 8.)

[31. a.]

(2) *Claus. 26 H. 3. m. 15. Mulier ratione tenuræ in dotem non debet [Note 179.] venire coram justiciariis itinerantibus ratione, communis summonitionis. But yet she shall be attendant to the heir for a third part of the service, for which he is attendant over. Tenant in frank-marriage in the fourth degree dies ; his issue endows his mother ; she shall be attendant as the issue is, and shall not hold acquitted. So if A. gives to B. in tail rendering during his life 5s. and afterwards 10s. the wife of B. endowed shall hold of the heir by a third part of 10s. But if there be tenant by 5s. and mesne hold over by 10s. and tenant dies without heir, his wife shall be attendant to the mesne only for the third part of 5s. Kilo. 124. 129. Hic fol. 46. lease by tenant in tail avoided by the issue, yet revived against tenant in dower. Hal. MSS.*

(4) *Lessee for life surrenders to him in reversion on condition, and [Note 180.] enters for the condition broken ; yet the wife of the reversioner shall be endowed. Noy n. 284. Ormond's case. Hal. MSS.—See Noy 66.*

(6) *17 E. 3. 65. hic fol. 42. Vid. 6 E. 3. 43. contra. Nota the case [Note 181.] 5 E. 3. Vouch. 249. A. gives in tail to B. his eldest son, who dies, the wife of B. is endowed of the third part of the whole. A. dies, his wife brings dower against the wife of B. she vouches the heir of her husband by reason of the reversion, and adjudged that he shall warrant. But quare if she shall recover in value the third part of the whole, or only the third part of two parts. It seems only the third part of two parts, by reason of the eviction. Therefore quare if in this case the seisin of B. be not fully avoided. Suppose that the wife of A. had first recovered, during her life the wife of B. cannot demand dower, except of the two parts which were in the hands of the heir. Hal. MSS.*

[31. b.]

(3) *If tenant for life makes a feoffment in fee, and dies, the wife shall [Note 182.] not be endowed. 3 H. 4. 6. 14 H. 4. 13. Yet if tenant at will makes feoffment, and dies, his wife shall be endowed. Cited by Jones 9 Cha. to have*

have been adjudged 34 Eliz. in *Moseley and Taylor*. Hal. MSS.—See W. Jo. 317.

[Note 183.] (3 a) That there cannot be dower of a trust, see *Forrest*. 138. 2 Atk. 525. See further 3 P. Wms. 700.

[See also *Colt v. Colt*, cited 3 P. Wms. 708 ; *Bottomly v. Fairfax*, *Prec. Chan.* 336 ; *Ambrose v. Ambrose*, 1 P. Wms. 321 ; *Chaplin v. Chaplin*, 3 P. Wms. 229 ; 1 Bla. Rep. 138, 161 ; *Dixon v. Saville* & al. 1 Bro. Ch. Rep. 326. In the late case of *Claiborne v. Henderson*, 3 Hen. & Mun. 322, before the Supreme Court of Appeals in Virginia, all the learning upon this point was brought into review, and the principles as well as cases discussed. The court decided against the right of dower in a trust estate at common law.]

[Note 184.] (5) Pat. 1 E. 1. m. 17. Præsertim cum hujusmodi mulieribus castra, quæ fuerunt virorum suorum, et quæ sunt de guerra, vel etiam homagia et servitia aliquorum, quæ sunt de guerra, in dotem non debuerunt, nec consueverunt assignari, ideo salvis nobis castris et homagiis prædictis, &c. Hal. MSS.

[Note 185.] (6) Vid. a whole manor rescised, because it was caput baroniæ, though assigned by the husband. Claus. 20 H. 3. m. 20. pro uxore Roberti Fitzwalter. Hal. MSS.—But this doctrine must be understood to be applicable only to baronies by tenure, of which it is said there is not any now remaining except Arundel ; and therefore creating a person baron by a title taken from a principal mansion-house in his possession will not make the house caput baroniæ, and so exclude the wife from dower out of it, because such a barony is merely titular, and a titular barony cannot have caput baroniæ. Adj. in lady Gerrard's case, 1 L. Raym. 72. and other books. See *Mad. Bar. Angl.* 10.

[Note 186.] (7) Vid. 24 E. 3. 28. 59. Tenant in tail has issue A. and B. and leases to A. for years and releases to him and his heirs with warranty, and A. takes C. to wife and dies, having issue D. tenant in tail dies, D. dies, and C. recovers dower against B. Adjudged. Hal. MSS.

[Note 187.] (9) Nota, anciently a woman alien was not dowable ; but by special act of parliament not printed, Rot. Parl. 8 H. 5. n. 15. all women aliens, who from thenceforth (desores au avant) should be married to Englishmen by licence of the king, are enabled to demand their dower after the death of their husbands, to whom they should in time to come be married, in the same manner as English women. But this act did not extend to those married before, and therefore in Rot. Parl. 9 H. 5. n. 9. there is a special act of parliament to enable Beatrice, countess of Arundel, born in Portugal, to demand her dower. Hal. MSS.—See acc. 1 Ro. Abr. 675.

[32. a.]

[Note 188.] (3) But the assignment is good, though tithes of the third yard-land be assigned. M. 9 Jac. C. B. *Kettleby's case*.—Hal. MSS.

[Note 189.] (4) 25 E. 3. 46. But she shall be endowed of rent reserved in tail so long as the tail continues. 10 E. 3. 27. hic fol. 30.—Hal. MSS.

[Note 190.] (5) P. 8 Jac. C. B. n. 23. *Fulgeam's case* Noy n. 280. *Whitley and Beat* a proviso in the writ of scisin quod tenens non expellatur. But see 27 H. 8. If tenant for years be received and his term is allowed, cesset executio durante termino. Yet the law vests the actual possession in

in him who recovers ; and nota here she shall recover damages according to the value of the rent. P. 22. Jac. C. B. P. 16 E. 3.—Hal. MSS.

(6) Yet demand of land and common pro omnibus averiis, without [Note 191.] saying *eidem spectant*, is good after verdict, and shall not be intended common without number. P. 9 Car. B. R. Prewet and Drake Crook n. 3.—Hal. MSS. See Cro. Cha. 300. W. Jo. 315.

(7) But she shall not have emblements. Dy. 316.—Hal. MSS. [Note 192.]

(8) Vid. 1 H. 5. 11. 17 E. 3. If feoffee improves by buildings, yet [Note 193.] dower shall be as it was in the seisin of the husband. 17 M. 3. Dower 192. 31 E. 1. Vouch. 288. For the heir is not bound to warrant, except according to the value as it was at the time of the feoffment, and so the wife would recover more against the feoffee than he would recover in value, which is not reasonable.—Hal. MSS. See further Hugh. Comment. on Orig. Writs 196.

(9) 18 E. 4. 29. Vid. acc. Noy n. 433. and n. 467. Powel and [Note 194.] Weekes in case of divorce *causâ adulteri*. Yet dower lies. Vid. acc. 10 E. 3. 15. in case of divorce *ex voto castitatis*. Yet this in some cases dissolves the marriage *extunc*. 45 E. 3.—Hal. MSS. See Powel's case acc. Godb. 145. But according to Rolle's report it was adjudged, that the divorce for adultery was a bar of dower. 1 Ro. Abr. 681.

(10) Dy. 107. Where issue is joined on reconciliation after elopement, advantage shall not be had except of one elopement. Vid. Lib. [Note 195.] Pari. 30. E. 1. John Comoy's grant of his wife. *Noveritis me tradidisse et demisisse spontaneâ meâ voluntate domino Willielmo Paynell militi Margaretam uxorem meam ; et concedo, quod Margareta cum prædicto Willielmo remaneat pro voluntate ipsius Willielmi. Afterwards William and Mary lived together, and John died. Ruled 1. that this was a void grant : 2. that it did not amount to a licence, or at least was a void licence : 3. that after elopement there shall not be any averment, quod non fuit adulterium, though William and Mary after the death of John intermarried. So she was barred of dower. Nota they produced a sentence of purgation of adultery in the ecclesiastical court ; yet not allowed against such presumption.* Hal. MSS. See Comoy's grant of his wife at length in 2 Inst. 435. and in marg. of Dy. ed. 1688. fol. 106. b. See S. C. cited in 1 Ro. Abr. 680. See further Vin. Abr. Dower P. and R. Hugh. Comment. Orig. Writs 190.

[32. b.]

(1) Nota, if the sheriff doth not return *per metas et bundas*, it is ill, [Note 196.] unless certain closes are assigned by name. M. 44, 45. El. C. B. Husband makes lease for years, and dies, the heir says to the wife, I endow you of the third part of all the lands whereof your husband was seised. Ruled, 1. This is a good endowment, though not by *metes and bounds*. Otherwise where the sheriff assigns dower. 2. This assignment shall bind the lessee, and they shall hold in common. Tr. 1651. B. R. Cough and Lambert. Hal. MSS. See further as to assignment of dower post. 34. b.

(2) Where the wife shall hold charged. First, 19 E. 3. Quare Im- [Note 197.] pedit 154. Husband seised of the manors of A. B. and C. to which several advowsons are appendant, grants the next avoidance of the three advowsons, and dies. The heir assigns the manor of A. to the wife,
with

with the advowson of A. which becomes void. The grantee shall present, for assignment of common right is of the third part of every manor and the third presentment of every church. Otherwise if the dower had been assigned to her ad ostium ecclesie. Secondly, If the husband had granted a rent charge, then in the former case the wife shall hold it discharged, for she may distrain in the other two manors, and for the same reason the wife of the heir shall not have dos de dote. But thirdly, if he had granted a rent out of the manor of A. and this manor had been assigned, she should hold charged. 5 E. 2. Avowry 206. Husbands feoffee grants rent charge to the wife, the husband dies, the third part of the land charged is assigned in dower. The rent shall be apportioned, and shall not issue wholly out of the residue. Hal. MSS. See further Vin. Abr. Dower D. a.

[Note 198.] (4) Vid. quoad damages in dower. First, What shall be said to be a dying seised. Husband makes feoffment to the use of himself for life, remainder to his son in tail, and dies seised: the wife shall not have damages, because he doth not die seised of the inheritance, which descends to the son. T. 6. Car. And therefore finding that the husband dies seised without saying of what estate is ill. M. 5. Car. Bromley and Littleton. Secondly, How the inquiry shall be of the dying seised and damages. If judgment be by confession or default, a writ shall issue to deliver seisin and inquire of damages; but if it be by verdict, the same jury shall inquire of the dying seised and damages; but if it be omitted, it may be supplied by writ of inquiry. Thirdly, What the damage shall be. Nota, before the statute of Merton no damages in dower, and by that statute the wife shall have damages, viz. the value of the third part de tempore mortis usque judicium, and by the statute of Gloucester 6 E. 1. c. 1. costs as well as damages. Therefore the judgment quoad the land may be affirmed in writ of error and the judgment for damages be reversed, because they are several in their nature, 22 E. 4. 46. and error lies after judgment for seisin and before judgment for damages. T. 24 Car. B. R. Dudney and Glyde. The damages in dower are 1. the value de tempore mortis: 2. damna occasione detentionis dotis, which are usually assessed severally. But if they are mixed together by the verdict, yet it is good. T. 5 Car. C. B. Hawes's case. Judgment to recover seisin by default, and writ to enquire of the value; the jury assess the value to the taking of the inquisition, and judgment given for them, and affirmed good in writ of error; so that the judgment intended by the statute of Merton is not the first judgment, but the second. T. 1649. Thynne and Thynne. Hal. MSS. See in Barn. Not. 2d ed. p. 234. Penrice's case, according to which damages should be computed only to the awarding of the writ of inquisition. But Walker and Nevil 1. Leon. 56. and the case cited by lord Hale, are contra.

[33. a.]

[Note 199.] (1) If the tenant comes the first day, and acknowledges the action, and avers that he was at all times ready to render dower, the demandant may take judgment immediately, and then there shall only be recovery of seisin, et nihil de misa quia venit primo die. But if the demandant would have damages, she may aver, that she requested her dower and the tenant did not endow her, and then the judgment for damages and value shall wait till the issue is tried. N. Entries Dower in Judgment 4. Hal. MSS.

[Note 200.] (3) Ratio istius casus videtur, because the wife ought to account to the heir for the whole. But if the heir be in ward in chivalry and the
ward.

wardship is granted to the wife, or if the wife has estate for years, and after the years expired, or the full age, she brings dower, it seems that the heir shall not be charged pro tempore, because she has a good estate to her own use. The reason is, because the statute of Gloucester, that every one shall render for his time, doth not extend to this case. H. 8 Jac. C. B. Casus Archiepisc. Ebor. Hal. MSS.

(5) Sic nota, the wife has election to be endowed of the last seisin; [Note 201.] and therefore if husband and wife levy fine and take back estate to the husband in fee, the wife shall have dower of the second seisin; but otherwise it is in the case of a husband intitled to be tenant by the curtesy, ut videtur. Hic. fol. 30. a.—Hal. MSS.

(8) Philips in his reading holds, that if the wife be attainted, and then the husband purchases land and aliens it again, and then the wife is pardoned, she shall have dower of the land which was purchased and aliened during the time she was not dowable. And he cited Mansfield's case adjudged 28 Elizabeth. In that case a jointure was conveyed to the wife before the coverture, and during the coverture the husband purchased other lands and aliened them again and died, the land which the wife had in jointure was evicted, and the wife had dower of the land which was purchased and aliened by her husband at the time when she was barred of her action of dower. So if wife clothes, and husband purchases lands and aliens them, and then the wife is reconciled, she shall have dower of those lands. MS. Comment. on Litt. penes editorem, supposed to have been written before the publication of lord Coke's Commentary.—See the list of readers of the Middle Temple in Dugd. Orig. Jurid. by which it appears that Mr. Philips was autumn reader in 38 Eliz.—See further Plowd. Quær. 181. and 204.

(10) Vid. M. 9 and 10 E. 1. coram rege Rot. 24. Ebor. *A. contracts per verba de præsenti with B. and has issue by her, and afterwards marries C. in facie ecclesiæ. B. recovers A. for her husband by sentence of the ordinary, and for not performing the sentence he is excommunicated, and afterwards enfeoffs D. and then marries B. in facie ecclesiæ, and dies. She brings dower against D. and recovers because the feoffment was, per fraudem, mediate between the sentence and the solemn marriage, sed reversatur coram rege et concilio quia prædictus A. non suit seisitus during the espousals between him and B. Nota, neither the contract nor the sentence was a marriage. Quoad marriage infra annos nobiles, nota infra Sect. 104. It is only sponsalia de futuro quoad other purposes, Dy. 105. 313. 369. 47 E. 3. Action sur le statute 37. Whether husband shall have trespass de tali uxore abductâ.* Hal. MSS.

(11) Nota obiter. When A. per judicium ecclesiæ recuperasset aliquam in uxorem, vel in divortium celebratum inter A. & B. his wife, and she is married to C. et postea ad prosecutionem A. sententia divortii reversatur by appeal, a writ directed to the sheriff shall issue out of chancery on the sentence there certified. Claus. 19 H. 3. m. 1. pro Wilhelmo de Treyor. Claus. 20 H. 3. m. 9. pro Wilhelmo de Dautesy. Claus. 21 H. 3. m. 17. pro Roberto de Halsted. And vid. M. 9 and 10 E. 1. ubi supra. Et cum eundem Willelmum, si in militiâ suâ ulterius perseverasset, ad executionem dictæ sententiæ regia potestas tenebatur compelli, si a loci diocesano fuisset super hoc requisitus. Hal. MSS.

(6) The

[33. b.]

[Note 205.] (6) *The reason is, because, post carnalem copulam, the husband cannot be professed without the consent of the wife.* Extrav. de conversi-one conjugatorum cap. 2. et per totum. Nec è converso. Hal. MSS. See New Abr. *Marriage E. 3.* Vin. *Dower K.* and Treat. on Dow. in Gilb. Law of Uses 401.

[Note 206.] (7) Vid. 15 H. 3. *Prescription 57.* Custom of the town of Saloft, that the wife shall have a moiety of socage, but if the husband has socage and chivalry, the wife shall have only a third part. Hal. MSS.

[Note 207.] (10) Accordingly adjudged that she cannot waive. H. 24 Eliz. Rot. 1515. C. B. P. 43 Eliz. *Davers and Selby T. 30 Eliz. C. B. Rot. 157.* Hunt and Gilbert. Hal. MSS.—See the former case in Cro. Eliz. 825. and the latter in Mo. 260. 1 Leon. 133. Gouldsb. 108. Cro. Eliz. 121. and Sav. 91. See further on the subject in Robins. Gavelk. 179. and Hugh. on Orig. Wr. 160.

[Note 208.] (11) By the custom of some places the wife shall have the whole of her husband's lands in dower. See Fitz. N. Br. 150. p.

[34. a.]

[Note 209.] (1) Post affidavitonem et carnalem copulam sunt quasi husband and wife, and gift by him to the wife is void. 16 H. 3. *Feoffments 117.* 13 E. 1. ibid 113. Hal. MSS.

[Note 210.] (2) This explanation of *affiance* or *sponsalia* is conformable to the strict sense of the word amongst the civilians and canonists; but our law books, as Mr. Swinburne long ago observed, use *affiance* and *marriage* promiscuously for one and the same thing, and lord Coke apparently supposes Littleton by *affiance* to mean *marriage*; for lord Coke says that dower *ad ostium* ever is *after* marriage, without professing to contradict Littleton. See Swinb. on Spousals. 2 Perk. sect. 442.

[Note 211.] (3) But though dower *ad ostium* cannot be till *after* marriage, yet it seems that such endowment cannot be made at any time after, but must be *immediately after*. See Perk. sect. 442. where the time of assigning dower *ex assensu patris* is so explained. But Mr. Perkins adds a case, in which, according to some ancient books, dower *ex assensu patris* made 8 weeks after the marriage was held good. Perk. sect. 443. See further Hugh. on Orig. Wr. 167. and note p. in 2 Blackst. Comment. 5th edit. 134.

[Note 212.] (4) Vid. 9 H. 3. *Dower 190.* Dower *ad ostium* ecclesiz of a moiety of all lands which he has or may have. He purchases lands afterwards, and the dower good for them. Hal. MSS.

[34 b.]

[Note 213.] (1) Vide contra adjudged supra. Hal. MSS. See Lambert's case, ante 32. b. n. 1. See S. C. in 1 Ro. Abr. 682. X. pl. 3. and Sty. 276. in both of which books the case is so explained as to make it consistent with lord Coke's general doctrine as to the manner of assigning; for according to them the court held, that the assignment of the third part in common would have been bad, if the wife and heir had not by mutual assent waived the assignment by metes and bounds, and that it would have been error if the sheriff had so assigned.

[Note 214.] (5) 24 H. 3. *Dower 189.* A man endows his wife of all the lands which his mother then had in dower; the mother and husband die; the wife

wife brings a writ of dower, ad ostium ecclesie, and recovers. Sic nota, that the wife may have action or enter. MSS. Comm. on Litt.— See acc. post. 35 b.

(5) *If the sheriff reduces to certainty by metes and bounds, though* [Note 215.] *the demandant refuses, yet she may afterwards enter.* 10 Eliz. Dy. 278. Hal. MSS.

(9) *But see 2 H. 5. 12. The heir assigns dower of lands of which* [Note 216.] *the husband was seised; but the wife not dowable: she is tenant in dower.* 30 E. 1. Briefe 884. *If wife be endowed, and afterwards exchanges with the heir for other lands which were the inheritance of the husband, she shall be said to be tenant in dower of the lands so taken in exchange, and her entry shall be said to be by the husband.* Per omnes justiciarios. Hal. MSS.

(10) *P. 33 Eliz. Wentworth's case. A conditional assignment of rent* [Note 217.] *doth not bar dower.* Hal. MSS.

[35. a.]

(1) *This case of assignment of dower, by one of two, or more jointe-* [Note 218.] *nants must be understood to be, where the husband has been solely seised during the coverture, and afterwards conveys or devises the land to two jointly, and dies; for the wife of a jointenant is not dowable.* See post. Sect. 45.

(2) *9 E. 3. 38. Husband and wife are jointenants of land, of which* [Note 219.] *the wife of I. S. is dowable: the husband alone assigns; it is good, and shall bind the wife.* 7 H. 6. 33. Hal. MSS.—See Perk. sect. 399. and Keilw. 128. b.

[35. b.]

(6) *Where a deed ought to be shewn. Vid. 12 H. 7. 12. 9 H. 7. 15.* [Note 220.] *9 E. 4. 53. 4 H. 7. 10. 14 H. 8. 18. 18 H. 8. 9. F. N. B. 210. E. in formidon. Dr. Leyfield's case 10 Rep. Where a thing cannot pass without deed in respect of the nature of the things, as herbage common in gross, &c. one ought to shew deed. So in respect of the quality of the lessor, as count or plea of demise of abbot with consent of convent. T. 36 Eliz. Goffe and Thurston, mayor and commonalty P. 5 Jac. B. R. Garmons and Kenton, master and fellows of a college. P. 9 Jac. Lord Norris's case B. R. But yet count in ejectment of demise by husband and wife is good without shewing deed, though wife cannot demise without deed, as it seems. Dy. 91. when one declares on a deed, where it is not necessary. Count in ejectione firmæ on demise per scriptum indentatum without shewing, and yet good. M. 42, 43 El. B. R. Hall and Mather; and it seems that defendant shall not have oyer. Count in debt for rent on demise of the reversion in scriptis hic in curia prolatis, yet the other shall not have oyer of the testament. 1651 Fitton's case. A. covenants with B. to stand seised to the use of C. his son: the son may plead this deed without shewing it, because the estate is executed by the statute. H. 11 Car. B. R. Crook n. 12. Stockman and Hampeon. M. 5 Jac. C. B. So it seems, if it was with the party himself. M. 6 Jac. C. B. Debt on obligation by commissioners of bankrupt good without shewing deed. H. 6 Car. B. R. Crook n. 5. Gay and Fielder. Hal. MSS. See further on shewing of deeds and oyer in Com. Dig. Pleader O. P. Wils. vol. 1. part 1. page 121. vol. 2. page 1. and Sheph. Touchst. 73. but most fully in Vin. Abr. Faits, M. a. to M. a. 32.*

(7) Where

[Note 221.] (7) Where to plead *non est factum*. Dy. 112. *In case of sigillum avulsum before issue, one may plead non est factum.* 7 H. 6. 18. *If a deed be suspicious by rasure or avulsion of seal, the party on oyer of deed may demur, and put it into the judgment of the court, or plead non est factum.* T. 40. El. B. R. Rot. 202. *Obligation with conditions to save harmless against Tracey with a blank : a stranger after delivery fills up the blank with a christian name by consent of the obligor ; yet adjudged to avoid the deed, because material. But if the addition is not material, as the addition of a county, and it be by a stranger, it doth not avoid the deed, though if by the party himself, it doth avoid it.* Vid. H. 43 Eliz. Cam. Scacc. *the case of Fox and Markham.* Vid. Noy. fo. 112. n. 487. *A. B. and C. are bound jointly and severally : the seal of A. is torn off ; in debt against B. he may plead non est factum. But if A. B. and C. covenant severally, and the seal of A. is torn off, it will not avoid against the others.* 5 Rep. 23. *Vide where by rasure of the deed the interest is lost. Where a thing may pass without deed, as in case of feoffment or lease, though the deed be rased, the interest continues.* H. 10 Car. B. R. Crook n. 8. *Miller and Manwaring.* *But if lease by abbot and convent be interlined by lease, the interest is destroyed.* H. 9 Eliz. Rot. 1056. *Bendl. Arden and Michell.* Hal. MSS.—See further as to pleading *non est factum* to a deed, Sheph. Touchst. 74. and Vin. Abr. *Faits*, N. a. and as to rasure and alteration of deeds and breaking off seals, Sheph. Touchst. 68, 69. Vin. *Faits*, T. to Z. and Com. Dig. *Fait*, F.

[36. a.]

[Note 222.] (5) *Nota, if dean and chapter seal a deed, it is their deed immediately ; but if at the same time they make letter of attorney to deliver it, this is not their deed till delivery.* T. 21 Jac. B. R. rot. 662. *Hayward and Fulcher.* Hal. MSS. *As to the former point, see acc. Dav. 44. 2 Leon. 97. and Cro. Eliz. 167. and as to the latter point the case cited by lord Hale in W. Jo. 170. and Palm. 504. according to which the court was divided in opinion.*

[Note 223.] (6) *The obligor seals obligation, and throws it upon the table without other circumstances ; this is not a delivery. But if he throws it towards the obligee, or if the obligee immediately takes it, and the obligor says nothing, it is a delivery.* M. 29 and 30 Eliz. Rot. 636. *Staunton and Chambers.* Hal. MSS.—See S. C. in Ow. 95. Cro. Eliz. 122. Dy. ed. 1688. fo. 92. b. in marg.

[The nicest questions with regard to the delivery of a deed arise in cases where the instrument is not committed immediately to the grantee, but to a *third person*, to be delivered over, upon the performance of some condition, or the happening of some event. These cases are divisible into two classes : first, where the instrument is delivered as the *deed* of the grantor ; secondly, where it is delivered as his *escrow*.

In the first class of cases, it is the deed of the grantor *presently*, and the third person is a trustee of it for the grantee. The title, however, is not consummate in the grantee until he obtains possession of the deed ; and then it will take effect, by relation, from the time of the delivery to the third person. But the performance of the condition, or the happening of the event, is not essential to the perfection of the grantee's title. *Perkins*, sect. 143, 144 ; *Bushell v. Passmore*, 6 Mod. 217 ; *Wheelwright v. Wheelwright*, 2 Mass. Rep. 447 ; *Belden v. Carter*, 3 Day —.

In the second class of cases, the instrument is not the grantor's deed, until delivery over by the third person to the grantee, after the condition has been performed, or the event has happened. Here, performance of the condition, or the happening of the event, is essential to any title in the grantee; and, if he obtain possession of the instrument, without this requisite, the grantor may avoid it by a plea of *non est factum*. *Perkins*, sect. 137, 138, 142; *Shep. Touchst.* 59; 2 *Mass. Rep.* 452.

It being admitted, that a deed delivered as an escrow has taken effect, it becomes an important question, at what time it took effect. The general answer is, at the time of the second delivery. 2 *Mass. Rep.* 453.

But to this rule there are exceptions founded on necessity, *ut res valet*. The following instances, collected from books of authority, are stated by chief justice PARSONS, in delivering the opinion of the court in *Wheelwright v. Wheelwright*:

1. If a *feme sole* seal a writing, and deliver it as an escrow, to be delivered over on condition, and she afterwards marry, and the writing be then delivered over on performance of the condition, it shall be her deed from the first delivery; otherwise her marriage would defeat it. *Perkins*, sect. 140, 141.

2. *A.* delivers a deed, as an escrow, to *J. S.* to deliver over on condition performed, before which *A.* becomes *non compos mentis*; the condition is then performed, and the deed delivered over; it is good, for it shall be *A.*'s deed from the first delivery. 13 *Vin. Abr. tit. Fairs.* (O) pl. 3. cites *Br. Lect. Stat. Lim.* 150.

3. Lessor makes a lease by deed, and delivers it as an escrow, to be delivered over on condition performed, before which lessor dies, and after it is delivered over on condition performed, the lease shall be the lease of the lessor from the first delivery. 3 *Co.* 35 b. 36. a.

4. If a man deliver a bond as an escrow, to be delivered over on condition performed, before which the obligor or obligee dies, and the condition is after performed: here there could be no second delivery, yet it is the deed of the obligor from the first delivery, although it was only inchoate; but it shall be deemed consummate by the performance of the condition. 5 *Co.* 85.]

[36. b.]

(1) *Rent granted by parol out of the same land of which she is dowerable, bars; not if out of other land.* 1 *Mar. Dy.* 91. *Sturge's case.* Hal. MSS.—See *Cro. Eliz.* 128. But though a collateral satisfaction is not pleadable at law in bar of dower, yet acceptance of a term of years, or of a sum of money, or of any other kind of collateral satisfaction, in lieu of dower, is a good bar in equity. See *Lawrence and Lawrence*, 2 *Vern.* 365. and note that lord Somers's decree against the wife in that case, which was afterwards reversed by lord keeper Wright, and finally in the house of lords was objected to, not on account of any doubt of dower's being barrable in equity by a collateral satisfaction, but merely because the devise to the wife was not expressed to be in satisfaction of dower. See further as to bar of dower in equity by collateral satisfaction. 1 *Eq. Cas. Abr. Dower B.* and 9 *Mod.* 152.

(3) But *quere* whether a court of equity will not confine her to one, and compel her to elect which she will have. See the references in note 1. *supra*, and the case of *Visett and Longdon* cited in *Jordan and Savage New Abr. Jointure*, B. 6.

(5) But

[Note 236.] (5) But though this may be true at law, yet it is now settled, that a trust estate, being equally certain and beneficial as what is required at law, or even an agreement to settle lands as a jointure, is a good equitable jointure in bar of dower. See the case of Jordan and Savage reported in New Abr. *Jointure*, B. 5.

[Note 227.] (6) 10 Eliz. Dy. 266. Hal. MSS.—But though a devise cannot at law be averred to be in satisfaction of dower, if the will is silent, yet sometimes our courts of equity have been induced by *special* circumstances to consider such devises as a satisfaction; and it has therefore been decreed, that the wife should make her election to waive her dower and accept under the will, or to waive the will and take her dower. In Lawrence and Lawrence 2 Vern. 365. lord chancellor Somers made such a decree; because he inferred an intention to give in bar of dower, from the testator's having devised the residue of his *whole* estate to another. But this decree was reversed by lord keeper Wright, and the reversal was afterwards affirmed in the house of lords, [3 Bro. *Parl. Ca.* 483, *Tomlins' edit.*] and this is said to have settled the doctrine. [This doctrine has received an additional sanction in the late cases of *French v. Davis*, 2 Ves. jun. 572, and *Strahan v. Sutton*, 3 Ves. jun. 249, before the master of the rolls in England, and *Webb v. Evans*, 1 Binn. 565, before the *Supreme Court of Pennsylvania*.] 1 Eq. Cas. Abr. *Dower*, B. pl. 2. and see acc. Prec. in Chanc. 133. Vin. Abr. *Devise*, T. c. pl. 45. 2 Atk. 427. 3 Atk. 8. 436. See also the case of Broughton and Errington adjudged in Dom. Proc. 8th March 1773. [Reported in 7 Bro. *Parl. Ca.* 461, *Tomlins' edit.* being a case of a devise to a *jointress*. For other cases, in which it has been held that a devise of other lands, or of personal property, by a husband to his wife, will not operate as a bar, or in satisfaction of a jointure settled upon her, either before or after the marriage. See *Hooke v. Grove*, 2 Eq. Ca. Abr. 218. pl. 4. S. C. 5 Vin. Abr. 293, pl. 40. S. C., 4 Bro. *Parl. Ca.* 593, *Tomlins' edit.* *Eastwood v. Vinke*, 2 P. Wms. 613. *Probert v. Morgan and Clifford*, 1 Atk. 440, and *Prime v. Stebbing*, 2 Ves. 409.] However, notwithstanding the doctrine on which the case of Lawrence and Lawrence was finally decided, and the frequent recognition of that case, devises have been since frequently deemed a satisfaction of dower, on account of very strong and special circumstances; as where allowing the wife to take a double provision would have been quite inconsistent with the dispositions of the will. On this latter principle lord chancellor Northington is said to have decided for a satisfaction of dower in the case of Arnold and Kempstead, which was heard in July 1764 [Reported *Ambl.* 466.], and lord chancellor Camden, in the case Villareal and lord Galway [Reported *Ambl.* 682.], which was heard soon after the former case. [See also *Jones v. Collier & al.* *Ambl.* 730; *Wake v. Wake*, 3 Bro. Ch. Ref. 255; S. C. 1 Ves. jun. 335; *Pearson v. Pearson*, 1 Bro. Ch. Ref. 292; *Boynston v. Boynton*, 1 Bro. Ch. Ref. 445.]

[Note 228.] (7) *Though she be within age ut videtur she cannot waive.* Hal. MSS.—The important question, whether a jointure on an infant before marriage may be waived, was not quite settled till the case of Drury and Drury, which was heard before lord chancellor Northington in Hilary 1 Geo. 3. The points determined by lord Northington in that case were, 1. That the statute of 27 H. 8. which introduced jointures, extends to adult women only, infants not being particularly named; and therefore that notwithstanding a jointure on an infant, she may waive the jointure and elect to take dower: 2. that a covenant by the husband that his heirs, executors, or administrators, shall pay the wife an annuity for her life.

life, in full for her *jointure* and in bar of dower, without expressing that it shall be charged on any *particular* lands or be secured out of lands *generally*, is not a good *equitable* jointure within the statute: 3. that a woman, being an infant, cannot, by any contract previous to her marriage, bar herself of a distributive share of her husband's personality in case of his dying intestate. From this decree by lord Northington there was an appeal to the house of lords, and after hearing the judges *seriatim* on the question whether a jointure on an infant could be waived, on which they were divided in opinion, the decree was *wholly* reversed. See the printed cases in the house of lords of the year 1762. Before *Drury* and *Drury*, the only *judicial* opinions as to the effect of a jointure on an infant were sir Joseph Jekyll's in *Cray* and *Willis* against its barring, and lord Hardwicke's in *Seys* and *Price* and in *Harvey* and *Ashley* to the contrary. See *Vin. Dower*, Q. 4. pl. 18. *Barnard. Ch. Rep.* 117. and 3 *Atk.* 607.

[37. b.]

(2) *But videtur, that after the third part set out by the sheriff she may enter immediately before the writ returned. Yet as to the damages the writ ought to be returned, because another judgment is to be given.* [Note 229.]
M. 19 Jac. B. R. *Howard versus Cavendish.* Vid. 10 *Eliz. Dy.* 172.—
Hal. MSS.

[38. b.]

(1) *Nota Pasch. 1653. B. R. Ruled, 1. Grantee of wardship of the land may, though it be by court of wards.—2. Yet court of wards cannot assign dower by commission, but it ought to be by writ de dote assignanda out of chancery. Accord. M. 35, 36 Eliz. C. B. case of viscountess Boudon.—3. But lessee for years of land by the guardian cannot assign dower.—4. But if the king leases the land during minority of the heir rendering rent, whether he be a committee to assign dower dubitatur. Videtur quod non, but there ought to be dedimus vel committimus custodium: 2 E. 3. 13. Husband of ward in right of his wife, and dower against the husband only. Nota H. 8 Jac. C. B. Nicholson and Gower. 1. After full age and before livery, dower lies against the heir, and cannot be assigned by the king. 2. Judgment in dower against the heir in wardship shall bind the heir, but not the guardian.—Hal. MSS.* [Note 230.]

(2) *For voucher in wardship in dower.—1. If the heir be in wardship of guardian in chivalry, though he be in wardship of many, there ought to be voucher of all having the heir in wardship, because every one may make defence, and every one shall lose proportionably. But several writs lie against several guardians. 16 E. 3. Briefe 657.—2. If the heir be in wardship of one or many guardians in socage, one may vouch the heir in wardship or may vouch at large as it seems, and not as in wardship, because the guardian has the land only to the use of the infant.—3. If the heir be in wardship of the demandant in chivalry, he ought to vouch in wardship of the demandant; but if he be in wardship of the demandant in socage, there it is in the election of the scoffee to vouch in wardship of the demandant. Registr. Judicial. 54. But he may plead in bar and pray that she shall be endowed de plus beale as well as guardian in chivalry. 21 E. 3. 28, 25 E. 3. 21.—4. But if A. having 4 acres in socage and 2 acres in chivalry, makes scoffment of 2 acres of socage with warranty, and dies, the heir within age, and dower is brought by the wife of A. against the scoffee, dubitatur if he may vouch the heir in wardship of the guardian in chivalry only, or ought to*

so vouch in wardship of the demandant and of guardian in chivalry, or if he shall only plead in bar that she may endow herself de plus beale. But whether the voucher be in wardship of guardian in chivalry only, or of guardian in chivalry and demandant guardian in socage, the guardian shall turn all the loss on the demandant as it seems. Reg. Judic. 54. 21 E. 3. 28. 25 E. 3. 51.—Hal. MSS. There is an obscurity in the third part of this annotation by lord Hale, which the editor on translating found himself unable to remove. See further on the subject in Hugh. on Orig. Wr. 166.

[39. a.]

- [Note 232.] (6) Where judgment shall be against heir, and where against vouchee.—1. Where the heir of the husband is vouched as having assets in the same county, and the demandant acknowledges it, judgment shall be for the demandant against the heir, and that the tenant shall go in peace, if he has assets in the same county, and if not, judgment against the tenant, and for him over in value. But if it is agreed that he has not assets in the same county, but only in a foreign county, then judgment shall be against the tenant, and for him over in value. 6. E. 3. 11.—2. If he has assets for part in the same county, vide conditional judgment for that part. 2 E. 3. Vouch. 213. 25 E. 3. 52.—3. If the tenant vouches the heir of the husband having assets in the same county, and the voucher is counterpleaded, or if the demandant deditt the assets, &c. then, it seems, judgment shall be for demandant immediately against the tenant, and for him over in value. But it seems that the demandant may pray conditional judgment, if the heir counterpleads the assets with warranty. Quære and vide 16 E. 3. Vouch. 85. 3 E. 3. Judgment 165. 18 E. 3. 38. 55.—4. But if tenant vouch I. S. who vouches the heir of the husband having assets in the same county, still no judgment conditional shall be given. 18 E. 3. 36. Contra. 2 E. 3. Vouch. 213.—Hal. MSS. See further Hugh. Orig. Wr. 163.

[39. b.]

- [Note 233.] (3) Dower *de la plus beale*, being merely a consequence of tenures by knight's service, is virtually abolished by the statute which converts such tenures into socage. See 12 Ch. 2. c. 24.

[41. a.]

- [Note 234.] (3) S. C. acc. Dy. 140. b. and N. Bendl. 55. But Dyer observes, yet nota that the land aliened before the treason committed was not subject to any forfeiture or escheat; and adds, that Brown serjeant *fuit valde iratus propter iudicium predictum*. Also in Sav. 54. there is a case of attainder of the husband for treason, in which two judges for the reason mentioned in Dyer were inclined to Vavisor's opinion; but the case of sir John Gates's wife being cited, the court held that the demandant was not intitled to dower. In this latter case the wife afterwards had dower; but then it was allowed to her on account of the reversal of her husband's attainder. See 3 Inst. 315.

- [Note 235.] (4) Here lord Coke expressly makes dower *ex assensu patris*, as well as the dowers at common law and *ad ostium ecclesie*, liable to be defeated at common law by the husband's treason or felony. Ante 37. a. But some have inclined to think that the 5 & 6 E. 6. c. 11. which so far repeals the 1 E. 6. c. 2. and revives the common law, as to take away the wife's dower in case of treason by the husband, doth not extend to dower *ex assensu patris*. This will appear from the following extract from a valuable manuscript, which has been already cited. *It seems that dower ex assensu patris shall not be lost by the statute of 5 E. 6. by attainder of*

of the husband for treason; for the wife is in by the father and not by the husband, and if action be brought for the land, it shall be against the husband and wife. *Contra* of dower ad ostium ecclesie. *Quære* tamen of the former case *ex assensu patris*. MSS. Comment. on Littl. *pen. Edit.*—In Plowden's *Queries*, 181, a like question is started as to the effect of the husband's attainder of felony on dower *ex assensu patris*; before the 1 E. 6. c. 2. changed the common law and saved the wife's dower; but Mr. Plowden argues against the wife. See further ante 35. b. where lord Coke mentions, that according to some opinions the wife lost dower *ex assensu patris*, if after assent the father was attained of treason or felony.

(5) In Winch 27. there is a loose note of a case, in which, notwithstanding the 1 E. 6. c. 2. for preserving dower in cases of treason or felony by the husband, Winch inclined to think, that attainder of the husband for felony prevented the wife's dower, where the wife of a copyholder for life was dowable by custom. But the reasons of this opinion, which seems strange, do not appear. [Note 236.]

[41. b.]

(1) Who shall be occupant.—*A. makes lease to B. for one hundred years, and afterwards ousts him and makes lease to C. for the life of D., B. re-enters, C. dies; B. shall not be occupant against his will, for so his term would be drowned.* H. 6. Jac. C. B. Rawlin's case. *Lessee for another's life makes lessee at will, who continues in possession after the death of the lessor: he is an occupant. If A. lessee for another's life, makes lessee for years, who is possessed, and A. dies, it seems that lessee for years shall be occupant against his own will, though he doth not enter; but if the lessee for years makes lease at will, and then A. dies, lessee at will shall be occupant, though he claims to the use of the lessee for years, or though lessee for years enters on lessee at will and claims to be occupant. But riding over the ground to hunt or hawk doth not make an occupant.* Vid. Dy. 328. H. 15 Jac. B. R. Rot. 356. *Stellicorn and Hayes, and M. 10 Jac. Bulstr. n. 6: Chamberlain and Ewer. A. lessee for life of B. makes lease to C. for 20 years, rendering 5l. C. makes lease to D. for 10 years, rendering 3l. A. dies: D. is occupant, yet he shall pay the rent of 3l. to C. and C. shall pay the rent of 5l. to D. for D.'s term is prevented from merging by the intervenient reversion in C. but D. has the freehold in reversion expectant on C.'s term, and the rent incident to it.* Hal. MSS.—See *Stellicorn and Hayes* in 2 Ro. Rep. 123. and *Cro. Jam. 554. and Chamberlain and Ewer* in 2 Bulstr. 11. 2 Ro. Abr. 151. E. pl. 3, 4. and *Palm. 42.*

(2) In some books it is asserted, that there cannot be an occupant of estates created by law, without distinguishing between a *general* and a *special* occupant. *Cro. Eliz. 58. 1 Bulstr. 135. 2 Ro. Rep. 123.* Probably the assertion was meant to be confined to the former, for as to the latter, the authorities seem decisive in favour of the heir's taking a special occupant, if named in granting over curtesy, or any other estate created by law. See 27 Ass. pl. 31. *Plowd. 28. and 556. and Palm. 32.* But even the doctrine against *general* occupancy of estates created by law comes merely from persons arguing as counsel, who neither explain why it should not be, nor cite any authorities, except 15 E. 3. *Fitzh. Abr. Scire Facias* pl. 17. which appears foreign to the purpose. [Note 238.]

(3) Lord Hale adds, *nor of a copyhold.* Hal. MSS.—See acc. 2 L. *Raym. 1000. and the reason why* in 6 Mod. 66. As to things lying in

grant,

grant, lord Coke in mentioning them must be understood to mean *general* occupancy only; for he writes in another place, that if *heirs* are named in the grant of a rent *pur auter vie*, they shall take, though formerly this was doubted. See post. 388 Dy. 186. ed. 1689. in marg. 1 Bulstr. 155. Mo. 625. 664. and Godb. 172.

[Note 240.] (4) Vid. M. 44, 45 Eliz. B. R. *Salter's case*. *Rent granted to one, his executors and administrators, pur auter vie, and the grantee dies; it shall not go to the administrator as special occupant, but determine by the death, unless there has been an assignment.* Hal. MSS. See S. C. in Cro. Eliz. 901. Noy 46. Yelv. 9. and Mo. 664. See also S. P. acc. 2 Ro. Abr. 151. G. pl. 3. However, some have thought that executors and administrators, if named in the grant, might take an estate *pur auter vie*, though a *freehold*, even before the 29 Ch. 2. c. 3. and 14 G. 2. c. 20. by which they are now intitled. See 3 Atk. 466. The authority relied on is Dy. 328. b.

[Note 241.] (5) The title by *general* occupancy is now universally prevented by the 29 Ch. 2. c. 3. s. 12. and the 14 G. 2. c. 20. s. 9. The first statute enacts, that estates *pur auter vie* shall be devisable, and if not devised, chargeable in the hands of the heir as assets by descent, where the estate falls on him as special occupant; and if he is not intitled as such, shall go to the grantee's executors or administrators, and be assets. On this statute a doubt arose, whether it operated further than by making such estates devisable and assets for debts; and in one case it was adjudged that the administrator took the surplus of such estates after payment of debts, if not devised, for his own benefit, as in the place of a *general* occupant. See 12 Mod. 103. This gave occasion to the second statute, which expressly makes the surplus in case of intestacy distributable as personal estate. See further as to occupancy 2 Blackst. Comment. 258. an elaborate argument by lord chief justice Vaughan, Vaugh. 187. Vin. Abr. *Occupancy and Estates*, R. a. 3 Com. Dig. *Estates*, F. and New Abr. *Estate for life*, B.

[42. a.]

[Note 242.] (1) 1 E. 3. 15. Vid. 41. Ass. 2. *A. tenant for life, remainder to B. in tail, remainder to C. in fee; A. enfeoffs B. and his wife, and their heirs; B. dies without issue; now there is a forfeiture, and C. may enter.* Hal. MSS.

[Note 243.] (6) *A. leases to B. till A. makes I. S. bailly of his manor: adjudged a freehold.* H. 37. El. *Butler and Ridgeley*. Vid. 1 Rep. *Bredon's case*. *Rent granted to A. for life if B. or C. shall so long live. But if there be an estate with such conditional limitation, it ought to be pleaded with the limitation, and continuance shall be averred; for otherwise it fails.* Vid. Dy. 192. Hal. MSS.

[Note 244.] (7) *But feoffment to the use of A. for life, remainder to the use of B. his executors and assigns, till ten pounds should be levied out of the profits, ruled to be a chattel.* Hal. MSS.

[Note 245.] (9) Hic sect. 283. *But if termor for years devises his house generally, without shewing what estate, the whole term passes.* 14 Eliz. Dy. 307. Hal. MSS.

[Note 246.] (11) Vid. 8 E. 3. 3. *A. lessee for life, makes lease to B. and C. on condition that if they die leaving A. then the land shall revert to A.*
without

without determining any estate certain in the grant. All the estate passes under the condition, for in præcipe A. was not received on default of B. and C. Hal. MSS.

[42. b.]

(1) Mr. Barrington calls this a *supposed* statute, because the intervention of the commons is not mentioned; and the introductory part seems to justify the observation; for the style is like that of an ordinance of the king in council; the words being that the king *cum prelati nobilibus et clericis et aliis sibi assistentibus deliberationem habuit et tractatum; de quorum unanimo consilio ordinavit*. See Observat. on Ant. Stat. 2d ed. 206. However, the 23 E. 3. appears to have been always treated as a statute, and Fitzherbert, in his commentary upon the writ founded upon it, calls it by that name. Fitzh. Nat. Br. 167. B. [Note 247.]

(2) That is, if the lease was for the life of the lessee it would be a discontinuance for life, and the tenant in tail would thereby raise in himself a new reversion in fee, and the release, by passing such new reversion in fee to the discontinuee, would merge his estate for life and make it a fee executed; which enlargement of the estate for life would proportionably enlarge the discontinuance for life, and so make it a discontinuance in fee, as much as the first conveyance by the tenant in tail had been for that estate. See further on this subject, post. Sect. 620. [Note 248.]

(4) There is an important difference between the deeds of femes covert and infants. Those of the former are always void; but those of the latter are sometimes void, and sometimes only voidable. As to the distinction between *void* and *voidable* in the case of deeds by infants, see a case in Burr. 4. part. 3. fol. 1794, in which the court held a conveyance by lease and release by an infant to be voidable only. See further post. Sect. 259. [Note 249.]

[43. a.]

(1) *And in case of corporation aggregate, as dean and chapter, the lease is void against the dean who makes the lease.* M. 13 Car. B. R. Lloyd and Gregory. *But it is otherwise in the case of a sole corporation, for there it is void only against the successor.* M. 44 Eliz. C. B. Saunders's case. Hal. MSS.—See the observation on the case of Lloyd and Gregory, post. 45. a. As to conveyances by corporations before the restraining statutes, see post. 44. a. and 103. a. [Note 250.]

(2) This assertion has been controverted, as repugnant to the feudal notions of alienation, and inconsistent with any reasonable construction of the statute *quia emptores terrarum*. Wright's Ten. 155. Dalrymple. Hist. Feud. Prop. 80. and Sulliv. Lect. 418. In fact the history of our law with respect to the powers of alienation, before the statute of *quia emptores terrarum*, is very much involved in obscurity. See Bract. lib. 2. cap. 19. where the author inquires, *si ille, cui datum est, rem datam ulterius dare possit*. See also Bract. lib. 2. cap. 5. and Staundf. Prærog. cap. 7. [Note 251.]

(3) *Nota, for seisure of serjeanties aliened without licence, it seems that it was the ancient law.* Vid. Roger Hoveden 783. *It was one of the articles inter capitula coronæ R. 1. de serjantiis alienatis, and so it still continues.* Claus. 7 Johan. m. 11. *precept to seise serjantias theinagia et dengagia tent. de honore Lancaster alienat. post. primam coronation.* H. 2. Vid. T. 7 E. 1. coram rege Gilbertus de Clare comes Gloucester [Note 252.]

chester impeached for alienation made to his father. Vid. 24 E. 3. 71. special custom to alienate without licence. Videtur per Rot. Parl. 29 E. 3. n. 19. quoad other tenures than serjanties, the prerogative began in the time of Edward the first. Nota, it seems, that the statute of quia emptores takes away licences and pardons of alienation in case of tenure of a subject. Yet see 14 H. 4. 4. recordare longum for custom of the honour of Gloucester, and Rot. Parl. 38 H. 6. n. 29. pro ducatu Cornubiæ ubi such a custom Rot. Parl. 8 E. 2. m. 7. in scedula pendente dorso. "Accord est et assensu per archevesques, evesques, abbes, priores, countes et barons, et autres du realme, in parlement, le roy summons a Westminster octab. Hill. 8 E. 2. que eux desormes nul fine demandront ne prendront des frankhomes, pur entrer terres et tenements que sont de leur fee, issint totes voyes que per tiel feoffments "ils ne soient pas eloignes de leur services ne leur services dedits."—Hal. MSS. From lord Hale's observing, that the crown's right of seizure for alienation of serjeanties without licence still continues, it seems, that his note on the subject was written before the 12 Cha. 2. c. 24. which converts tenures by knight service into socage, and takes away fines of alienation. See post. 43. b. n. 2.

[Note 253.] * (4) Nota pro carta de libertatibus.—Carta regis Johann. proclamata 19 Junii, 17 Johann. apud Runimede, Pat. 17 Johann. m. 33. dorso. Carta de libertatibus sub H. 3. magna scilicet de libertatibus, et minor sive de foresta, proclamantur 8 Maii, 9 H. 3. prima pars claus. 9 H. 3. m. 14. dorso interrupt. et cancell. Matth. Paris sub anno 1227. pag. 336. but afterwards confirmed by H. 3. Rex confirmat "omnes libertates, &c. contentas in cartis quas fecimus cum minoris ætatis essemus tam in magna carta quam in carta de foresta." Cart. 21 H. 3. n. 4. confirmatur per stat. Marlbr. cap. 5. et tunc primum devenit statutum, viz. 52 H. 3. Hal. MSS.—See a most accurate history of the *magna charta* of king John and that of Hen. 3. in the introductory discourse to Mr. Justice Blackstone's valuable edition of the charters.

[43. b.]

[Note 254.] (2) Fines for alienation are taken away as well from the king as from all others by the 12 Cha. 2. chap. 24. But the statute saves fines for alienation due by the customs of particular manors, other than fines for alienation of lands holden of the king *in capite*.—See further on the subject of alienation 2 Inst. 65. 501. Vin. Abr. tit. *Alienation*. Sulliv. Lect. page 159. and 418. and the book cited in fol. 43. a. note 2.

[44. a.]

[Note 255.] (1) Vid. 29 Eliz. *Case of the bishop of Chester, who had anciently used to have a counsel who had a fee. This grantable by the bishop with consent of dean and chapter. Nota, though it be not an office of time which, &c. yet grantable, if of necessity, as in the case of the bishop of Gloucester founded within time of memory. M. 1 Car. C. B. Crook n. 8. Cook and Young. Vide that it is holden, that though it be a new office, yet if necessary, and the fee is reasonable, being confirmed it shall bind the successor; and vide the grant of ancient office and fee, with the addition of a new fee, which notwithstanding seems good, because the office is ancient. M. 2 Car. C. B. Crook n. 7. Gee's case. If it had been usual to grant an ancient office to one only, a grant to two is not good. But if it has been once granted to two, or granted in reversion before the statute 1 Eliz. then it shall be intended to have been usually so granted, and such grant to two, or in reversion, shall bind the successor. T. 8 Car. B. R. Crook n. 2. Walker and Lamb. M. 8 Car. B. R. Crook n. 19. Young and Steele, concerning the official and commissary*

missary of the bishop of Lincoln and the register of the bishop of Rochester. Hal. MSS. Ley 75. is contrary to Gee's case cited by lord Hale.—See further as to the grant of offices by ecclesiastical persons, New Abr. *Offices*, D. See also in Burr. part 4. vol. 1. page 219. the case of sir John Trelawney and the bishop of Winchester, in which the court held, that an office and fee which existed before the 1st of Eliz. are not within the restraint of that statute, but that they may be granted as before the statute, and that the utility or necessity of the office is not more material since than it was before.

(2) *Quoad leases by husband and wife. Husband and wife seised to them and the heirs of the body of the husband make lease for three lives, rendering the antient rent; husband dies: this shall not bind the wife. Adjudged, because the statute speaks of the wife's inheritance.* H. 14 Eliz. C. B. n. 5. D. D. *Husband and wife jointly seised by purchase to them and their heirs; the husband alone during the coverture makes lease, rendering the antient rent: dubitatur if it shall bind the wife, because the proviso, which requires the wife's joining, speaks only of husband seised in right of his wife, finitur per compositionem.* M. 1 Carr. C. B. Crook n. 15. *Smith and Trinden.* Hal. MSS. [Note 256.]

(4) *Vid. 7 Eliz. Dy. 246. Lease for 20 years to begin at next Michaelmas seems good.* Hal. MSS.—See further as to the time when such leases should begin, and the difference between *from the day of making* and *from the making.* New Abr. *Leases*, E. rule 2. and post. 47. b.

[44. b.]

(1) *Feme covert tenant for life; reversion in tail; husband surrenders; tenant in tail leases for three lives; the wife dies. Adjudged, that this is a good lease to bind the issue.* *Sydenham and Cofe* cited by *Popham.* Mo. 783. Hal. MSS. [Note 258.]

(3) *But if tithes have been usually let to farm, they cannot be leased for life to bind the successor: but they may be leased for 21 years, rendering the ancient rent, and it shall bind the successor.* Mo. 778. T. 2 Jac. B. R. *Adjudged in Denny's case, and the rent goes with the reversion.* Nota, *it was the case of the precentor of Paul's.* Hal. MSS.—See New Abr. *Leases*, E. rule 5. where many authorities are cited to prove this difference between leasing tithes for life and for years, and that in the latter case the lease will bind the successor because he may have debt for the rent, which will not lie for him on a freehold lease. But the distinction is no longer of any importance; for the 5 G. 3. c. 17. makes leases of tithes and other incorporeal hereditaments by ecclesiastical persons, whether for lives or for years, as good as if the leases were of corporeal hereditaments, and gives action of debt to the successor, for rent reserved on freehold leases.

(4) *Lease by the king during vacancy of bishoprick will not enable.* [Note 260.] P. 19 Jac. B. R. *Denny's case.* Vid. *Dy.* 271. Hal. MSS.

(6) *Prebend makes lease for years, reserving the running of a colt, rendering rent. A new lease, rendering the same rent, without reserving the running of a colt, adjudged good; because quoad this is neither reservation nor exception. But if lease be of a manor except the woods rendering rent, and after the expiration of it there is a new lease rendering the same rent without such exception, the second lease is bad.* T. 18 Jac. B. R. *case of precentor of Paul's.* Hal. MSS.

(7) Vid.

[Note 262.] (7) Vid. for leases by bishop tenant in tail, &c.—*A. seised in tail of a manor, of which three acres parcel of the demesnes had been usually demised at 5s. rent, and the residue not, demises the three acres and also the manor habendum for 21 years, rendering for the three acres and all other the premises therewith demised 5s. and for the manor 5l. This is good to bind the issue for the three acres, but not for the residue.* H. 37 Eliz. *Tanfield and Rogers.*—*The bishop of G. seised of a manor, of which one tenement was usually demised for life at 5s. rent and the manor usually at 10s. rent, makes lease of the tenement for three lives, rendering 5s. and afterwards leases the whole manor for three lives to another rendering rent, and dies. Ruled, 1. That the reversion of the tenement passes by the lease of the manor. 2. And therefore that the lease of the manor quoad the tenement shall not bind the successor, because then there would be six lives in being for the tenement, and the lessee would be dishonourable of waste. 3. It seems that the lease of the manor is also voidable, because the rent issues also out of the tenement. (Quere of this, for here the rent as well for the tenement as for the manor is reserved on the second lease, so that though the tenement should be evicted the intire rent for the manor would continue.) 4. But it was agreed, that the lease of a copyhold manor usually demised, or of a manor consisting of demesnes copyholds and services usually demised, is good to bind the successor. 5. The lease is only voidable by the successor; and therefore, if he accepts the rent, it is good against him.* M. 20 Jac. C. B. *Bishop of Gloucester against Wood,* M. 5 Car. C. B. *Sheir und Penter on lease by the bishop of Exeter.* Hal. MSS.

[Note 263.] (8) *Prebend simple or prebend with office, as is precentor, is enabled by the statute 32 H. 8. Adjudged Bro. Leases 62. M. 36, 37 Eliz. Watson and Major.* T. 18 Jac. case of *precentor of Paul's.* Hal. MSS.

[Note 264.] (9) *Nota, these disabling statutes extend only to their own possessions. The archdeacon of Ely 12 Eliz. makes lease for 50 years, which after the statute 13 Eliz. is confirmed by the bishop and dean and chapter. Ruled, that this is a good lease to bind the successor, though after the statute 1 Eliz. and though confirmed after the statute 13 Eliz. H. 37 Eliz. Rot. 882. sir Edward Denny's case.* Hal. MSS.

[45. a.]

[Note 265.] (2) *Nota, the statute 13 Eliz. chap. 10. quoad tenements in cities is altered by the statute 14 Eliz. chap. 11. which permits leases of them for 40 years; and therefore it has been ruled, that covenants for renewing leases of messuages in cities are not prohibited by the statute 18 Eliz. chap. 11. which only restrains leases against the statute of 13 Eliz. Hob. case 352. Crane and Taylor.* Hal. MSS. See Hob. 269.

[Note 266.] (4) *Nota, lease for three lives by bishop, not warranted by the statute, is not voidable against himself, but shall bind him.* M. 44, 45 Eliz. C. B. D. D. n. 32. *Saunders's case.* And it is not void, but only voidable against the successor, for if he accepts the rent, the lease is good against him. M. 8 Car. C. B. *Crook n. 21. Owen and Apth-Rees.* But lease by *A. dean of B. and his chapter, not warranted, is void immediately against A. himself. Adjudged so, because the corporation is aggregate.* M. 13 Car. B. R. *Lloyd and Gregory.* Hal. MSS.—*The case of Lloyd and Gregory is reported in Cra. Cha. 502. W. Jo. 405. 1 R. Abr. 728. and 2 R. Abr. 495. But none of these*

books

books mention the point to which lord Hale cites the case. See New Abr. *Leases*, H. where several authorities besides that of lord Coke are cited to shew, that a lease by a corporation aggregate, though not warranted by the statutes, is good for the time of the person who was head of the corporation when the lease was made. See also ante 43. a. n. 1.

(7) *And therefore where the declaration in ejectment was of a joint demise of A. and B. and on the evidence it appeared that they were tenants in common, the plaintiff failed.* M. 3 Jac. *Blakaster's case*. Noy n. 43. Hal. MSS. See Noy 13.

[45. b.]

(1) Heretofore some made a difference between leases by infants [Note 268.] with reservation of rent and those without, and thought that the former were only voidable, but that the latter were absolutely void. New Abr. *Leases*, B. But in a late case this distinction was denied, and it was said, that leases whether with or without rent, if made by *deed*, are voidable only. Burr. 4. part v. 3. page 1806.

(2) But if livery is made on such a lease, perhaps it may be sufficient [Note 269.] to pass a freehold to the lessee during the life or incumbency of the lessor. See New Abr. tit. *Leases*, L. 2.

(3) *But vid. Noy fol. 143. n. 635. Lease from three years to three years till the expiration of ten years shall be a lease for nine years, and the law rejects the last year, because not computed by three.*—Hal. MSS. See New Abr. tit. *Leases*, L. 3. page 433.

[46. a.]

(1) See 2 Blackst. Comment. 5th edit. p. 142. It is there observed, [Note 271.] that it appears by Mr. Maddox's collection of ancient instruments in his *Formulare Anglicanum*, that the law against leases for more than 40 years, if it ever existed, was soon antiquated; and several instances of leases for a longer term, as early as the reign of Richard the second, are referred to.

(2) *Yet videtur, that the recoverer shall have wast.* 27 H. 8. 7. [Note 272.] *Keitw.* 108. *But reversioner being received in default of tenant for life, no judgment against tenant for life, if a good bar pleaded.* Hal. MSS.

(4) *Vid. 27 H. 8. 7. 21 H. 7. 25. Grantee of rent charge for years might falsify recovery against terre-tenant.* Hal. MSS.

(5) *Vid. 24 E. 3. 54. If parceners be of two acres, and one leases one acre, which on writ of partition is allotted to the other, the lease is wholly avoided.* Hal. MSS.

[46. b.]

(1) *Vid. 21 E. 3. Grants 58. Appropriation without licence, and ea de causa it seems a disappropriation.* Hal. MSS.

(2) *But if it was lease in presenti by tenant in tail, and the issue before entry levies fines, the conusee shall not avoid the lease, for the lease was only voidable, and the land passes in degree of reversion.* *Vid. Dy. 51. 7. Rep. 9. carl of Bedford's case.* Hal. MSS.

(3) *Vid. tamen one Evans's case, in which it was adjudged that the wife shall have the rent. Cited by Houghton.* 16 Jac. *Quære and vid.*

7 H. 6. 2 T. 16 Jac. *Blaxton and Heath*. 2 Poph. n. 38. Hal. MSS.—By 2 Poph. lord Hale means the additional cases at the end of Popham's Reports. See Poph. 125. For Blaxton and Heath, see Poph. 145.

[Note 278.] (4) *If part of a term be granted by husband on condition, it seems that the condition is gone by his death. Quære. A ward changes the property of such a term. Dy. 183. Hal. MSS.—See the case in Marg. Dy. 183.*

[Note 279.] (5) *Vide Husband of wife termor may have petition of right alone. 37 Ass. pl. 11. If husband is guardian in right of his wife, dower lies against the husband alone; for there can be no voucher there against the ward's right. 2 E. 3. 13. 15. 47 E. 3. 9. Hal. MSS.*

[Note 280.] (6) *Vid. 50 E. 3. Judgment for husband in quare impedit for the wife's advowson; the husband dies; the wife presents. Hal. MSS.*

[Note 281.] (8) *Vid. for date and day of the date hic fol. 6. a. and the note there. Hal. MSS.—In fol. 6. a. lord Hale gives the following note. Date and day of the date the same in point of computation. 5 Rep. But in point of interest, date is taken inclusive, day of the date exclusive, in many cases. T. 9 Jac. B. R. Bulstr. n. 177. A. on the second of August 1 Jam. makes an obligation to B. and afterwards, on the same day, B. releases all actions usque datum scripti: the obligation is discharged, because date is delivery. Otherwise, if it had been to the day of the date. T. 9 Car. B. R. Rooke and Richards. Condition of obligation to stand to an award, so that it be made within four days after the date: a good award may be made the same day; and so it seems if it be day of the date. M. 1653. Street's case. Stiles 382. Obligation dated 2 January; release, dated 1 January, of all actions usque diem hujus presentis temporis, but delivered 3 January: presentis tempus is the date, and so the obligation stood. P. 7 Jac. Hal. MSS.—See further as to the difference between date and day of the date, Com. Dig. Estates, G. 8. Bargain and Sale, B. 8. Temps A. and Vin. Abr. Estate, Z. a. Time, A. and Wils. vol. 1. part 2. page 165. and the next note.*

[A late case before the Supreme Court of Connecticut turned upon the construction of the expression "prior in date," as applicable to two policies of insurance, executed on different parts of the same day. The Court decided, that it was equivalent to prior in time. *Brown v. Hartford Marine Insurance Company*, 3 Day.]

[Note 282.] (9) *Vid. for commencement of lease, M. 10 Jac. Rot. 75. Hob. case 32. Moor and Musgrave. A. by indenture dated 4 May, 10 Jac. to hold from the feast of the annunciation last past for the term of 21 years next ensuing the date hereof fully to be complete and ended. In ejectment plaintiff counts on this lease, as a lease to hold from the feast for 21 years extunc prox sequent. and agreed to be good. But see T. 24 Car. B. R. Cornish and Cawsey. Lease by indenture of 25 of March 15 Car. to have and to hold from and after the day of the date of these presents for the term and time of seven years from henceforth next and immediately ensuing, shall commence in computation from the delivery, and in point of interest from the date. Stiles 118. Hal. MSS.*

[Note 283.] (10) *For misrecital a lease shall commence immediately. 6 Rep. bishop of Bath's case.—The cart of Oxford by deed dated 10 Feb. 27 H. 8.*

H. 8. demises to A. for 21 years; and afterwards by indenture reciting that he by indenture dated 10 Feb. 28 H. 8. had demised to A. for 21 years, demises the same land to B. habendum for 31 years from and after the expiration, surrender, or forfeiture of the said lease. It was ruled, that B.'s lease should commence in computation immediately, because A.'s lease was misrecited. H. 10 Car. B. R. Crook. n. 8. Miller and Marwaringe. But if in case of such a misrecital, the habendum be from and after the demise and indenture made to A. and it is not said the said demise, then the second lease shall commence after the true lease, notwithstanding the misrecital. M. 1 & 2 P. & M. Rot. 648. Mount and Hodgken, Bendl. n. 71. Hal. MSS.—See Cro. Cha. 397. and N. Bendl. 38. See further as to the commencement of leases and the effect of misrecitals in that respect, Sheph. Touch. 272. New Abr. Leases, L. and Vin. Abr. Estate, Z. a. and Grant, R. 4.

[47. a.]

(1) Lord Coke confines the rule to common persons, because the king [Note 284.] may reserve rent out of an incorporeal inheritance; the reason of which is, that he by his prerogative can distrain on all the lands of his lessee. 4 New Abr. 192 & 339.

(2) The case of a lease by *deed* is put, because in general things incorporeal will not pass without deed. Post. 48. a. 49. a. 169. a. and ante 9. a.

(3) 12 H. 4. 17. Vid. supra fol. 44. b. the case of the precentor of *Paul's*, according to which rent on lease for years of tithes is incident to the reversion. Hal. MSS. See ante 44. b. n. 3.

(4) That the common law did not allow debt for rent on freehold [Note 287.] leases whilst they continued is certain, though the reason is not quite so clear. See 3 Blackst. 233. It has been accounted for by suggesting, that the remedies by *cessavit* and distress were deemed sufficient securities for the rent and services. See Gilb. on Rents 93. and Gilb. on the Action of Debt in his Cas. in L. and Eq. 370. But it may be proper to observe, that the *cessavit* seems to have been first given by the 6 E. 1. c. 4. though the lord's right of seizing the land for subtraction of services, which continued till it was taken away by the 52 H. 3. c. 22. was a remedy in some respects similar, and furnishes occasion for the same observation. See 2 Inst. 295, and Wright's Ten. 197. Note that the 8 Ann. c. 14. now gives debt for rent on a lease for life; on which statute Mr. serjeant Hawkins queries, whether it doth not extend to leases of incorporeal hereditaments. Hawk. Abr. of Co. Litt. 73.

(5) And after the particular estate determined, distress may be made [Note 283.] for all arrears. 10 E. 4. 3. Hal. MSS.

(7) Lease for years by indenture, and lessee covenants to pay 5l. a [Note 289.] year; this is a reservation. Dy. 276. H. 6 Car. B. R. Crook n. 1. Drake and Munday. But if there be reddendo rent, and the lessee covenants to pay two capons, there it seems to be only covenant. M. 40, 41 Eliz. Bruerton's case. Hal. MSS.—See Cro. Cha. 207. and Hardr. 326.

(8) Rent, reserved to him and his assigns during the term, or to him, [Note 290.] his executors and assigns during the term, determines by the lessor's death. T. 2 Car. B. R. Noy n. 412. 12 Co. n. 20. and Hil. 32 Eliz. Richmond's case. Hal. MSS.—See Noy 96. 12 Co. 35. and Cro. Eliz.

217.—

217.—But notwithstanding the cases here cited by lord Hale, it was adjudged, whilst he was chief justice of the king's bench, that the words *during the term* are of themselves sufficient to carry the rent to the heir, if the lessor is seised in fee, and he concurred in the judgment. See the case of Sacheverell and Frogatt East. 23 Cha. 2. in 2 Saund. 367.

[Note 291.] (9) *Rendering rent to him, his heirs, executors and administrators, good, and it shall go to the heir. Drake's case supra. Rendering rent to him or his successor's good, and the successor shall have it. 5 Rep. Hal. MSS.*

[Note 292.] (11) But deer kept in a private inclosure may be distrained. See 3 Blackst. Com. 8. where the case of Davis v. Powel, C. B. Hil. 11 G. 2. is cited.

[Note 293.] (12) Some have thought, that a horse, on which one is riding, may be distrained for *damage feasant*. 2 Keb. 596. 1 Sid. 440. But the opinion was extrajudicial, and may be questioned; for 1 Ro. Abr. 664. A. pl. 4. and the case of 7 E. 3. Fitzh. Abr. Avowry 199. are directly *contra*. See also n. 13. *infra*. and Cro. Eliz. 549. 596. Some also have inclined to think that horses drawing a cart loaded with corn, though one is riding in the cart, may be distrained for rent, and for that purpose may be severed from the cart, if the person distraining doth not chuse to take the cart with the corn, as well as the horses, all of which, as it seems, are equally liable to the distress. See 2 Keb. 529. 596. 1 Vent. 36. and 1 Sid. 422. 440. in which latter book the reporter makes a query, whether the man's being on the cart should not privilege the whole team.

[To an action of trespass for seizing and leading away the plaintiff's horse, upon which he was riding, the defendant pleaded that he distrained the horse *damage feasant* in the defendant's ground, and impounded him; to which plea there was a demurrer. Lord KENYON, Ch. J. in delivering the opinion of the Court, said, "This distress cannot be supported. All the authorities upon this point are collected together in the notes in *Hargr. Co. Litt.* 47. a. and the clear result of them is, that such a distress is illegal. If it were permitted to a party to distrain a horse, while any person is riding him, it would perpetually lead to a breach of the peace." *Story v. Robinson* & al. 6 *Term Rep.* 138. In the *Countess of Bindon's case*, *Moor* 214. it is said, "That if a man be riding upon a horse, the horse cannot be distrained; but if he hath another horse, on which he rides sometimes, this spare horse may be distrained."]

[Note 294.] (13) *If ferrets and nets in a warren be taken damage feasant, it is good. But if they are in the hands of a man, they cannot be distrained any more than a horse on which a man is; nor can they be distrained, if they are out of the warren. 2 E. 2. Avowry 182. 7 E. 3. ibid. 199. Hal. MSS.—See Vin. Abr. Distress, A.*

[Note 295.] (14) *If A. brings yarn to his neighbour's house to weigh, it cannot be distrained by the lord. Noy n. 298. Burley and Read. Vid. 15 E. Avowry 216. Hal. MSS.—See Noy 68. and S. C. in Cro. Eliz. 549. and 596. [On the same ground it was held, that a stocking frame was not distrainable for rent, while the weaver was using it, though there were no other distress on the premises. *Simpson v. Hartopp, Willes* 512. Though it seems to have been taken for granted, that wearing apparel cannot be distrained while it is in use, yet it has been held, that if it be*

put

put off, even for the purpose of rest, or to be washed, it may be distrained. *Bisset v. Caldwell*, *Peake's Ca.* 36; S. C. 1 *Esq.* 207, in *notis*; *Banes v. Smith*, 1 *Esq.* 206.] For other cases in which things, the property of strangers, are privileged from distress, for the sake of trade and commerce, see *Francis and Wyatt*, 4 Burr. v. 3. p. 1498. In that case the question was, whether a person's chariot, which stood at a common livery stable, could be distrained for rent due from the keeper of the livery stable; and the court after two arguments appearing to be strongly inclined in favour of the distress, the owner of the chariot afterwards declined bringing the question to a third argument, which had been ordered by the court.

(16) But now by the 2 W. and M. c. 5. sheaves, or cocks of [Note 296.] corn, or corn loose or in the straw, or hay in any hovel, stack or rick, or otherwise on the land, may be distrained for rent on demise, lease or contract.

(17) Sheep are equally privileged with *averia caruca*, and cannot be [Note 297.] taken, if any other distress can be found. See further 2 Inst. 133, 134. and the case cited in n. 18.

(18) But it has been adjudged, that beasts of the plow may be taken [Note 298.] for the poor's rate under the 43 Eliz. because the remedy given by that and other statutes for compelling the payment of particular rates or sums of money, though called a distress, is in effect an execution. 4 Barr. v. 1. p. 579. See acc. Saund. on 22 Ch. 2. against conventicles 39. which is referred to in Com. Dig. *Distress*, C. but not cited in the case in 4 Burr.

[47. b.]

(1) At common law corn growing could not be distrained, because it [Note 299.] adheres to the freehold. 1 Ro. Abr. 666. H. pl. 4. But now by the 11 G. 2. c. 19. landlords are empowered to distrain all sorts of corn, grass, or other product growing on the estate demised, and to cut and gather them when ripe.

(2) *If they escape for want of inclosure by him who ought to repair*, [Note 300.] *they are not distrainable.* Adj. 14 Eliz. Dy. 317. *The lord cannot distrain beasts which escape, when they are gone out of the land, though they are within view.* Vid. 41 E. 3. 26. 14 H. 7. 8. 20 H. 7. 10. 15 H. 7. 17. 2 E. 4. 6. Hal. MSS.—See the next note.

(3) This doctrine has been objected to as too general; and several [Note 301.] distinctions are taken, the sum of which seems to be, that if a stranger's beasts escape into another's land by default of the owner of the beasts, as by breaking the fences, they may be distrained for rent immediately, without being levant or couchant; but that if they escape there by default of the tenant of the land, as for want of his keeping a sufficient fence, then they cannot be distrained for rent or service of any kind till they have been levant and couchant, nor afterwards by a landlord for rent on a lease, unless on notice the owner of the beasts neglects to remove them; though it is said that such notice is not necessary, where the distress is by the lord of the fee for an ancient rent, or by the grantee of a rent charge. See this subject argued upon at large in the case of *Kimp and Cruwes*, 2 Lutw. 1573.

[See a further illustration of this subject in 2 *Wms. Saund.* 285, note 4, and 389. a. note 7.]

(4) And

- [Note 302.] (4) And now by the 11 G. 2. c. 19. s. 10. persons distraining for rent may impound the distress on any convenient part of the land chargeable with the rent.
- [Note 303.] (5) Vid. 30 E. 26. *where defendant pleads that he found the cattle sans nul manner de fermure ne serrure n'autre engine.* Hal. MSS.
- [Note 304.] (6) *For one cannot distrain the same day the rent grows due; but it must be the day after.* 21 H. 6. 40. Vid. 14 H. 4. 31. Hal. MSS.—By the 8 An. c. 14. rent may be distrained for after determination of the lease in the same manner as before, if the distress is made within six calendar months afterwards, and during the continuance of the landlord's title and the possession of the tenant from whom the arrears are due.
- [Note 305.] (7) See further as to distress 3 Blackst. Comment. 6. & 145. and in the several Abridgments, titles, *Distress* and *Replevin*, and also Gilbert's Treatise on the Law of Replevins. [To which may be added Williams' notes to Saunders, and a late "*Treatise on the Law of Distresses*, by James Bradley, of Lincoln's Inn," in which the whole law on this subject is systematically arranged.] See also 2 W. & M. c. 5. 8 An. c. 14. 4 G. 2. c. 28. & 11 G. 2. c. 19. These statutes have made great alterations in the ancient law of distress, particularly by empowering persons, who distrain for rent of any kind, to sell the distress for payment of the rent in arrear, if the tenant or owner fails to replevy with sufficient security, within five days after taking of the distress and giving the tenant notice of the cause. This improvement of the remedy by distress was first introduced by the 2 W. & M. c. 5. with respect to rents due on demise or contract, and afterwards by the 4 G. 2. c. 28. was extended to rents seck, rents of assise, and chief rents. Before these two statutes, the remedy by distress was very imperfect; for the distress was merely taken *nomine hanc* to compel satisfaction, and could not be sold or used for the profit of the person distraining, except in case of the king, and in some few other instances. Most of the other changes made by the statutes since lord Coke's time, have been incidentally hinted at in the preceding notes.
- [Note 306.] (9) *Nota this diversity. In pleading a lease one ought to say, that the lessor was seised and demised; but in count in debt for rent it is good without alledging seisin.* 20 E. 3. Barr. 132. 21 H. 7. 32. Hal. MSS.
- [Note 307.] (11) *Et videtur, that by purchase of the land, that is turned into a lease in interest, which before was purely an estoppel.* Vid. tamen P. 3 Car. C. B. Crook n. 2. *Isham and Morris.* Hal. MSS.—See Cro. Cha. 109.
- [Note 308.] (12) Vid. 4 H. 6. 7. *If disseisor makes lease for years by indenture to disseisor, he shall not have assise during this lease.* Hal. MSS.
- [Note 309.] (13) 30 E. 3. 21. Vid. 14 H. 6, 22, per curiam. *But if it be estoppel by matter of record, as by fine, &c. it continues after.* 2 E. 4. Hal. MSS.
- [Note 310.] (3) But since the introduction of uses and trusts and the statute of 27 H. 8. for transferring the possession to the use, the necessity of livery of seisin

seisin for passing a freehold in corporeal hereditaments has been almost wholly superseded, and in consequence of it the conveyance by feoffment is now very little in use. Before the statute of uses equitable estates of freehold might be created through the *medium* of trusts without livery, and, by the operation of the statute, *legal* estates of freehold may now be created in the same way. Those who framed the statute of uses evidently foresaw that it would render livery unnecessary to the passing of a freehold, and that a freehold of such things as do not lie in grant would become transferrable by *parol* only, without any solemnity whatever. To prevent the inconveniences which might arise from a mode of conveyance so uncertain in the proof, and so liable to misconstruction and abuse, it was enacted in the same session of parliament, that an estate of freehold should not pass by bargain and sale only, unless it was by indenture inrolled. See 27 H. 8. c. 16. The objects of this provision evidently were, first, to force the contracting parties to ascertain the terms of the conveyance by reducing it into writing; secondly, to make the proof of it easy, by requiring their seals to it, and consequently the presence of a witness; and lastly, to prevent the frauds of secret conveyances, by substituting the more effectual notoriety of inrollment for the more ancient one of livery. But the latter part of this provision, which, if it had not been evaded, would have introduced almost an universal register of conveyances of the freehold in the case of corporeal hereditaments, was soon defeated by the invention of the conveyance by lease and release, which sprung from the omission to extend the statute to bargains and sales for terms of years; and the other parts of the statute were necessarily ineffectual in our courts of equity, because these were still left at liberty to compel the execution of trusts of the freehold, though created without deed or writing. The inconveniences from this insufficiency of the statute of inrollments are now in some measure prevented by the 29 Ch. 2. c. 3. which provides against conveying any lands or hereditaments for more than three years, or declaring trusts of them, otherwise than by writing. See post. 121 b.

(5) 43 Ass. 10. 18 H. 6. 16. *A. makes charter of feoffment to uses to B. and B. being on the land, A. says, I am content you shall have this house and land according to the deed made to you; it is not livery, because it imports only assent and is future.* H. 6 Jac. Maund's case. Ley n. 3. Hal. MSS. See Ley 2. [Note 311.]

[48 b.]

(1) *Charter of feoffment habendum a die datas, Ruled, 1. If livery be made the same day secundum formam cartæ, it is void. 2. If it was after the day by the feoffor himself, it is good. 3. If there be letter of attorney to deliver seisin in the deed, or it was at the same time, and it is delivered after the day, yet it is not good, because the authority was given at a time when it was a void charter. But 4. If letter of attorney be made after the day, and livery is made according to the deed, it is good.* Hob. 314. Greenwood and Tiler. T. 3. Car. Owen and Price. C. B. H. 3 Jac. Rot. 216. B. R. Hennings and Paucharden. So there diversity between this and a grant of a reversion habendum from day to come, for attornment after the day doth not aid the grant. 55. Buckler's case. Hal. MSS.—See Cro. Jam. 563. and 153.

Adjudged, that feoffee being absent cannot take livery, nor feoffee being absent make livery, by attorney by parol. T. 1659. Grend and Badbourne. But a lease for years may be delivered by attorney parol, as has been often adjudged. Hal. MSS. [Note 313.]

(3) Vid.

[Note 314.] (3) Vid. 8 E. 2. *Feoffments* 111. *Livery by the lord of any part of the manor without going to it; but contra if not parcel.* Hal. MSS.

[Note 315.] (4) *Nota, the case of 38 Ass. 2. A. makes feoffment to B. within the view, and afterwards marries her, and afterwards claims to the use of the wife; it is a good execution of the livery. 38 E. 3. 11. Vid. 42 E. 3. Feoffments 54. Livery good, though the land is not within view.* Hal. MSS.

[Note 316.] (6) H. 22 Car. B. R. *Hinde's case.* M. 4 Jac. B. R. *Sparks and Darcy.* 37 Eliz. *Brown's case.* *Charter of feoffment of lands in the hands of the king with letter of attorney to make livery, and afterwards the feoffor sues ouster maine, and the attorney makes livery; it is good. 25 Eliz. Feoffment on condition which is broken; feoffor makes charter of feoffment and letter of attorney to deliver seisin, the attorney enters and makes livery; it is good. Dick's case.* Hal. MSS.

[Note 317.] (7) P. 40 Eliz. B. R. *A. tenant for years; the reversion is granted to B. for life, remainder to C. in tail, remainder to D. in fee; D. by deed enfeoffs A. and one E. and makes livery: it was ruled to be void, because there was not any surrender, and A. was in possession and could not take by livery. Ede. and Knotsford. A. tenant for years, remainder to the king for years, remainder to B. in fee; B. enters and ousts A. and makes livery; it is good, notwithstanding the meane remainder for years to the king; but it would have been otherwise, if the king's remainder had been for life.* Hal. MSS.

[Note 318.] (8) *But nota, if the lessee consents, livery is good, though he be upon the land. Tr. 40 Eliz. Shephard and Gray. A. makes lease for years, and afterwards makes charter of feoffment with letter of attorney to enter and take possession and seisin for him, and such seisin and possession to deliver; the attorney makes livery with the consent of the lessee, he being in the land; and it was ruled good. P. 1651. Wegg and Villers.—Lessee for years consents that feoffor shall make livery, and afterwards goes out of the country, leaving servants on the land; the feoffor enters and makes livery; it was ruled good. But it was ruled, that if lessee be absent, livery by lessor by consent of servants is void, they being upon the land. T. 7 Jac. C. B. n. 45. D. D. Black-leach and Small. But if A. be lessee of White Acre by one demise, and of Black Acre by another demise, of the same lessor; or if there be lessee of White Acre and Black Acre by one demise, and he makes lease for years of Black Acre, and lessor enters on Black Acre, and makes livery, though A. be on White Acre, it is good. 2 Rep. Bettisworth's case.* Hal. MSS.

[49. a.]

[Note 319.] (1) Where land shall pass by one way or the other at common law.—*Termor for years makes charter of feoffment by the word dedi, with letter of attorney in the same deed to deliver seisin, and afterwards livery is made, yet it is a forfeiture, and the term shall not be said to pass first by the delivery of the deed, as it seems. Dy. 362.—Grant to a tenant at will shall enure as a confirmation. Dy. 269.—29 Eliz. B. R. I. conard's case. If A. makes lease for years to B. and afterwards makes charter of feoffment to B. bring in possession with the words dedi et concessi, with letter of attorney to deliver seisin; before livery, he may use the deed as a confirmation in fee, and after livery as a feoffment.*

offment. And there it was also agreed, that if by indenture in consideration of money A. bargains and sells to B. with letter of attorney, and the deed is inrolled, it is a good bargain and sale.—17 Eliz. Lessee for life and he in remainder in fee make charter of feoffment, and letter of attorney to make livery, which is made accordingly, it is good, and the remainder shall not be said to pass by delivery of the deed.—Where one shall have election to take by statute or common law. Vid. Dy. 302. Grant of reversion to a brother averred to be pro fraterno amore.—2 Rep. *vir R. Heyward's case.* Demisi or concessi taken either as lease or bargain and sale. 7 Rep. *Bedell's case.* Grant to a son. T. 15 Car. B. R. entered H. 11 Car. Rot. 459. Father gives and grants to his son and his heirs, habendum after the death of the father; and no consideration of blood or marriage is mentioned in the deed: an estate shall not arise by way of use. Nota videtur, that there was a letter of attorney in the deed. P. 1657. *Jackson's case.* A. by indenture for love and affection grants to B. a rent in esse, habendum to B. for life, remainder to the use of C. in tail, remainder to the use of A.'s right heirs, and attornment was made, but not till after the death of A.; and it being found that B. was cousin, it was ruled, that an estate should arise by way of use without attornment.—Where one may elect one way or the other by statute.—Vid. 7 Rep. *Bedell's case.* If father, in consideration of money, bargains and sells to his son, there ought to be an inrollment. But if A. for natural love to his son, and also for money, grants to the son, the land shall pass without inrollment, because the consideration of love is expressed. M. 1649. *Wats and Dicks,* B. R. Hal. MSS.—See further as to electing in what way an estate shall pass, Yelv. 124. the case of *Crossing and Scudamore,* 1 Vent. 137. and 1 Mod. 175. and *Barker and Keat* in 2 Mod. 249. See also Vin. Abr. *Uses,* B. a. and the observation in *Hawk. Abr. of Co. Litt.* 83.

(4) For this see 2 Rep. 56. *Buckler's case.* Fine by disseise extinguishe his right, and shall enure to the disseisor. But see this denied M. 13 Car. B. R. *Crook n. 7. Fitzherbert's case.* Hal. MSS.—See Cro. Cha. 483. and S. C. W. Jo. 397. In this last book it is said, that the judges did not deliver any opinion on the point. See further W. Jo. 317. Cro. Cha. 305. and *Gouldsb.* 162.

(6) Vid. 5 Rep. *Peryman's case.* Hal. MSS.—See 5 Co. 84. In *Peryman's case* the Jury found, that in the manor of Portchester there was a custom, according to which all alienations of lands within that manor, by writing, feoffment, or last will, were void, unless presented to be a good custom. In the same case mention is made, that by the custom of Lidford Castle in Devonshire, a freeholder of inheritance cannot pass his freehold, except by surrender into the lord's hands. As to this latter kind of custom, in consequence of which the estates subject to it have been called *customary freeholds,* see post. 59. b. and *Blackst. Law Tracts,* 8vo. ed. vol. 1. p. 144.

[49. b.]

(5) Nota, if the lease for years with the remainder over be by deed, [Note 322.] the deed ought not to be delivered till livery made; for otherwise the livery is bad. H. 2 Eliz. *Helyar's case.* Vide *Bendl. n. 130.* Hal. MSS. See N. Ben. 85. and S. C. Mo. 14. 1 And. 8.

[50. a.]

(1) Vid. 11 Eliz. Dy. 283. *Cestui que use of three acres by three several feoffments in one county makes charter of feoffment of all and livery*

livery in one of the acres, it is pursuant to the statute, and passes all. Hal. MSS.—The statute meant is the 1 R. 3. c. 1. which empowers *cestui que use* to make effectual feoffments and conveyances against his feoffees in trust; and the case cited was of a feoffment before the 27 H. 8. for transferring uses into possession. It is stated, that the livery was made by attorney, and that was the cause of the doubt; it being said, by some, that the statute of R. 3. ought to be construed strictly, and to be confined to conveyances made by the *cestui que use* in his own person. See Bro. *Feoffment to Uses*, 28.

[Note 324.] (2) Vid. *Dy. 246. 22 H. 6. 10.* If a manor extends into two counties, livery in that part of the manor which is in one county doth not pass that which is in the other county. So it is with respect to disseisin. Hal. MSS.—But Mr. Perkins holds, that livery of parcel of such a manor in one county will pass the parcel in the other county. Perk. sect. 227. However, he admits, that if one be disseised of two acres in different counties, entry into the acre in one of the counties, though made in the name of both acres, will not extend to the acre in the other county. Perk. sect. 229.

[50. b.]

[Note 325.] (1) It is observable, that Littleton expresses himself concerning an exchange as of a transaction between *two*; and in a late case the court held, that an exchange in the strict legal sense of the word cannot be between *three*, the principles of it not being applicable to more than two *distinct* contracting parties, for want of the mutuality and reciprocity on which its operation so entirely depends. For, 1. The consideration of an exchange and of the implied warranty incident to it is the receiving something with warranty from the *same* person, to whom something with warranty is given; but if there could be *three* distinct parties, each would give to one and receive from another. 2. The implied condition of re-entry is, that re-entry may be made on him whose title fails; but if there could be three parties to an exchange, then each person would be liable to re-entry for the fault of another's title as well as of his own. See the case of Eton college in Wilson, v. 2. part 3. page 483. and post. n. 1. in 51. a. and n. 2. in 51. b.

[Note 326.] (2) But now by force of the statute of 29 C. 2. c. 3. a writing is necessary, if the exchange is of freeholds, or of terms for years, being for more than three years.

[Note 327.] (4) But in one of the books cited by lord Coke, the opinion is, that both of the things exchanged ought to be *in esse* at the time of the exchange. See 9 E. 4. 21.

[51. a.]

[Note 328.] (1) Here *four* persons are named as parties to an exchange. But this is not irreconcilable with the opinion mentioned in note 1. of fol. 50. b. that an exchange cannot be between more than *two distinct* parties; because, though *four* persons are named, yet they constitute only *two distinct* parties; for in point of interest the two jointenants are the conveying parties on the *one* side, and the two tenants in common are the conveying parties on the *other*, and consequently there is the same reciprocity as if the transaction was between *two* persons only. The same observation applies to any number of persons, if so conjoined in the mutuality of giving and receiving in exchange as to make only *two distinct relative* parts.

(2) See

(2) See 2 Inst. 269.—But if the king makes exchange, it seems that [Note 329.] it should be by writing *recorded*; because he can neither give nor take land without matter of record. See Lane 31. 60. Vin. Abr. Z. c. A. d. B. d.

[51. b.]

(2) See ante 50. b. n. 1. and 3. and the case of Eton College there [Note 330.] cited. In that case one reason given, why an act of parliament was not suffered to operate as an exchange, was the want of that word in the act.

(3) *Contra in surrender or partition.* 11 H. 4. 61. Hal. MSS.— [Note 331.] But see the case of Zouch against Parsons, 4 Burr. v. 3. page 1806. where lord Mansfield in delivering the opinion of the court seems to incline strongly in favour of construing an infant's surrender, if made by deed, as voidable only. In Zouch and Parsons it became necessary to consider what was the true ground for holding the acts of infants as voidable only, whether the *solemnity of the instrument*, or the *semblance of benefit* to the infant on the face of the deed. As to the former ground, the court thought fit to approve of Mr. Perkins's distinction, according to which all such grants, gifts, or deeds of an infant, as do not take effect by delivery of his hand, are void, and those which do are voidable. See Perk. sect. 12. But the court decided the case principally on the latter ground, and held a lease and release by an infant to be voidable, because the consideration of the conveyance and other circumstances shewed, that the act was right and proper, and apparently not in the least to his prejudice. See further as to the deeds of infants, ante 45. b. note 1. and post. 171. b.

[52. a.]

(2) In another place lord Coke cites a passage from the Miroir, [Note 332.] which excludes both infants and femes covert from being attorneys. Post. 128. a. But that is quite reconcilable with the doctrine here; for there *publick* attorneys for prosecuting suits at law are meant, whose office cannot be properly executed without considerable knowledge and discretion; but here lord Coke, in the first part of the sentence, confines himself to *private* attorneys to deliver seisin, which is an act so merely ministerial, that it may be done by the most ignorant. See the case of Earle and Greenough in 3 Atk. 695. and 1 Ves. 298. One question in that case was, whether a power of disposing of real estate could be well executed by an infant feme covert of the age of 19; and lord ch. Hardwicke determined against the execution of the power, 1. because he thought in general that *such* a power could not be well given to an infant, the disability of infancy being stronger than that of coverture; 2. because in the particular case it did not appear, that the power was intended to be given during infancy, the power being given *notwithstanding coverture*, without the least notice of *infancy*; and 3. because it was a power coupled with an interest, the infant having a trust in equity for life, together with the trust of the inheritance subject to the power.

(3) *Adjudged accordingly of livery to one feoffee.* T. 1651. B. R. [Note 333.] Trotman's case. Vide M. 31, 32 Eliz. C. B. Trevillian's case. A. seised of two acres, makes lease of one acre to B. for years, and afterwards makes charter of feoffment of both acres and letter of attorney to B. and C. conjunctim et divisim, to make livery; B. makes livery in one acre and C. in another, and adjudged good. Entered M.

30, 31

30, 31 Eliz. Rot. 2908. Vide *Bendl. n. 15. M. 32, 33 Eliz. 1868. Hal. MSS.*

[Note 334.] (4) *Yet vide if lessee for years makes feoffment and livery, though lessor be on the land, it seems to be a forfeiture. Dy. 362, 363. 14 H. 7. Hal. MSS.*

[Note 335.] (6) *If A. brings præcipe of C.'s land against B. and recovers, and C. is made sheriff, and habere facias seisinam comes to him, he may return the special matter on account of the mischief. 13 H. 4. 15. 7 H. 6. 33. Hal. MSS.*

[Note 336.] (7) *So it is of livery by the lord. H. 4 E. 6. Mo. n. 41. Trevillian's case supra. Hal. MSS.—See note 3.—By the case of livery by the lord, it is meant, that if tenant makes feoffment of his tenancy, and the lord as attorney makes livery, it shall not extinguish his seignior. Mo. 11.*

[Note 337.] (9) *Vid. 11 H. 4. 3. If there be feoffment on condition and letter of attorney to make livery accordingly, and livery is made absolutely, it is void and a disseisin. So è converso 12 Ass. 24. 26 Ass. 39.—H. 38 Eliz. B. R. Poph. n. 2. Slaning's case. A. seised of the manors of B. and C. and also of a mill in possession of I. S. by force of a lease for years, makes charter of feoffment, with letter of attorney to enter into the said manors, and all other the said lands and tenements, and seisin thereof to take, and after such possession and seisin taken, such seisin and possession to deliver, &c. according to the form and effect of the deed. The attorney makes livery in the manors of C. and B. but not of the mill, nor doth I. S. attorn. Ruled, that the mill doth not pass, but that the livery of the manors was well executed. Hal. MSS.*

[52. b.]

[Note 338.] (2) *Vide these diversities. A. makes letter of attorney to B. C. and D. conjunctim & divisim, to make livery. If two make livery it is void, because it is neither conjunctim nor divisim. 27 H. 8. 6. But if one makes livery in one parcel, and another in another parcel, it is good. M. 31, 32 Eliz. Trevillian's case. But if two make livery in presence of the third, he not saying any thing, it seems good. Dy. 63. But if authority be to six or any two of them to do an act, there, if it be done by three, it is good. 5 Rep. 91. Hoe's case. So where one devised, that his executors, or any one of them, might sell his land, and made three executors, and one died, and the other two sold, it was ruled good; for it is not so strict as conjunctim et divisim. M. 37, 38 Eliz. C. B. the case of Townsend and Whales. But if warrant be by sheriff to three bailiffs, conjunctim et divisim, execution by two is good, because it is the execution of justice. M. 44, 45 Eliz. King and Hobbs. Hal. MSS.—See ante 52. note 3. to which part this note more properly belongs. See also infra, note 6.*

[Note 339.] (3) *So such attorney may deliver seisin with assent of lessee for years, he being on the land. Adjudged P. 1651. B. R. Wegg and Vilters. Hal. MSS.—See ante 48. b.*

[Note 340.] (6) *If A. and B. jointenants in fee make charter of feoffment to C. and D. with letter of attorney to deliver seisin, and B. or C. dies, it is good as to the survivor. M. 32, 33 Eliz. W. 68.*

(7) *Vid. letter of attorney to deliver seisin after the feoffor's death* [Note 341.] in 40 Ass. 38. *Nota, by devise or by special custom authority may be created executory after the party's death. Lease to A. for life, remainder to B. for life. A. dies, videtur that livery cannot be made to B.* P. 31 Eliz. B. R. W. n. 4. *Peirce and Leverage.* Hal. MSS.

(9) *But it seems that livery cannot be made till the new mayor is made.* Hal. MSS. [Note 342.]

[53. a.]

(2) *On writ of waste in lands, one cannot assign waste for cutting of trees, because for that the writ should be in boscis.* Tr. 6 Eliz. More n. 200. Hal. MSS. [Note 343.]

(3) *But the bare suffering them to be uncovered, without rotting the timber, is not waste.* P. 9 Jac. C. B. *Knoll's case.* *Converting two chambers into one, or à converso, or converting an hand-mill into a horse-mill, is waste.* H. 4 Jac. C. B. *Graves's case.* Hal. MSS. [Note 344.]

(4) *But if an house built de novo was never covered in, it is not waste to abate it.* 40 Ass. 12. Vid. 21 H. 6. 46. 26 E. 3. 26. Dy. 36. Hal. MSS. [Note 345.]

(5) It is said, that a tenant for years during his term may take away chimney-pieces, and even wainscot, if put up by himself. See 1 Atk. 477. and 3 Atk. 13. and note there the distinction taken as to fixtures between the several cases of heir and executor, of tenant for life and him in remainder, and of landlord and tenant. [Note 346.]

(7) 12 H. 4. 5. Hal. MSS.—The 6 An. ch. 31. which was at first temporary, but is now made perpetual, enacts, that no action shall be prosecuted against any person, in whose house any fire shall accidentally begin, with the proviso that the act shall not defeat any agreement between landlord and tenant. See post. 53. b. and n. 5. there. [Note 347.]

(8) *If B. lessee of warren, by charter or prescription, ploughs the land, it is waste.* *Contra if it be only land stored with conies, and not a legal warren.* P. 40 Eliz. C. B. *Moyle's case.* C. C. n. 21. and T. 40 Eliz. n. 11. Vid. *Noy n. 312. Moyle's case. Stopping and digging coney-burrows not waste in a warren.* Hal. MSS.—See *Noy 70.* [Note 348.]

(10) *Beech and white-thorn may be timber by the custom of the country, and it is waste to cut them.* M. 9 Jac. *Palmer's case.* Hal. MSS. [Note 349.]

(11) *But cutting up of quick-sets is not waste, if it preserves the spring.* M. 9 Jac. C. B. *Palmer's case.* *Cutting of ash under the growth of 20 years not waste.* M. 41, 42 Eliz. C. B. Hal. MSS. [Note 350.]

[53. b.]

(1) *Nota, though mines be open at the time, one cannot take timber to use in them.* T. 16 Jac. *Darcey's case.* Hutt. 19. *Hob. n. 298.* Hal. MSS. [Note 351.]

(3) *Because he is bound to repair, though he doth hold the bank.* 46 E. 3. *Waste 91.* Vid. T. 6 Eliz. *Mo. n. 173.* Hal. MSS. [Note 352.]

(4) *Tenant cannot make rails, where none were before.* Dy. 332. [Note 353.] Hal. MSS.

(7) *Fine*

[Note 354.] (7) *Fine to the use of A. for life, remainder to B. in fee, with power for A. to make leases for three lives; A. makes lease accordingly, and the lessee commits waste; A. and B. shall join in waste.* T. 4 Car. C. B. *Sacheverell's case.* Hal. MSS.

[Note 355.] (10) *Waste amongst tenants in common.—A. makes lease to B. for years of two parts of a messuage; B. commits waste. It was ruled that waste lies, and shall be assigned in the intirety, but that the recovery should be of only two parts of the damages and of two parts of the place wasted.* P. 35 Eliz. *Poph. n. 2. Warnford's case.* Hal. MSS.

[Note 356.] (11) *Some have thought, that at common law waste did not lie against tenant by the curtesy.* See 2 Inst. 301.

[54. a.]

[Note 357.] (5) *But though action of waste doth not lie in this case on account of the intermediate remainder for life, yet a court of equity will interpose by injunction to prevent waste.* See 3 Atk. 95. and 210.

[Note 358.] (10) *It ought to be to the value of 40d. at least.* *Noy n. 18. Thore and Thomas.* Hal. MSS.—See *Noy 4.*—As lord Hale makes so frequent a reference to *Noy's Reports*, it may not be amiss to apprise the student, that, though the book is known by the name of that very learned lawyer, yet there is not the least reason to suppose, that such a loose collection of notes was intended by him for the public eye. In an edition of *Noy's Reports penes editorem*, there is the following observation upon them in manuscript. *A simple collection of scraps of cases made by serjeant Size from Noy's loose papers, and imposed upon the world for the reports of that vile prerogative fellow Noy.* This account of *Noy's Reports*, which was probably written soon after the first publication in 1656, though expressed in terms inexcusably gross, contains an anecdote not altogether useless.

[54. b.]

[Note 359.] (1) *But if lessee covenants to repair, and doth not repair, waste will not lie.* 29 E. 3. 43. 21 H. 6. 6. *Dy. 198.* Hal. MSS.

[55. a.]

[Note 360.] (1) 21 H. 6. 37. *Lease for years with proviso that lessor may enter at his will is a lease at will.* Per Past.—21 H. 6. 37. *A. grants to B. that he may sow A.'s land, which is done accordingly; yet A. shall have the emblements, because B. hath not an interest.* Per Past. Hal. MSS.—See acc. as to the former case, 14 H. 8. 12. and by *Yelverton* justice in *Litt. Rep. 235.* and *Hctl. 128.*

[Note 361.] (3) *See further as to the manner in which an estate at will may be created by act of the parties, or arise by act of law,* Vin. Abr. *Estate*, S. b. and T. b. Com. Dig. *Estatcs*, H. 1. 2. In 4 Burr. v. 3. page 1609. it is said, that in the country leases at will in the strict legal notion being found extremely inconvenient, exist only *notionally*. But this observation I presume means, not that estates at will may not arise now as well as formerly, but only that it is no longer usual to create such estates by *express* words, and that the judges incline strongly against *implying* them. See 2 Blackst. Comment. 147.

[Note 362.] (4) 9 E. 3. 24. *is according to Littleton's diversity, and so is the 11 H. 4. 90.* *But lessee at will in such case of entry of the lessor before sowing shall not have the costs of plowing and manuring.* Hal. MSS.—See

—See S. C. acc. in Bro. Abr. *Emblements*, pl. 7. and *Tenants by Copie*, pl. 3.

(5) *But if lessor covenants that lessee for years shall have the emblements which are growing at the end of the term, there the property of the corn is well transferred to the lessee, though it be not severed during the term. Hob. case 175. Grantham and Hawley.—Hal. MSS. See Hob. 132.* [Note 363.]

[55. b.]

(1) *If lessee for life of a hop-ground dies in August before severance of the hops, the executor shall have them, though growing on ancient roots. Adjudged M. 13 Car. B. R. Crook n. 13. Latham and Atwood. Hal. MSS.—See Cro. Cha. 515.* [Note 364.]

(2) *A. seized in fee sows the land, and devises to B. for life, remainder to C. in fee, and dies before severance. Ruled, 1. The executor of A. shall not have the emblements. 2. If B. dies before severance, his executor shall not have them, but they shall go to him in remainder. But, 3. if the devise had been only to B. and B. had died, there the executor of B. should have had the corn, though B. did not sow. M. 20 Jac. C. B. n. 22. Spencer's case. Winch. 51. M. 5 Jac. C. B. Skele and Arnold. Vid. Hob. 132. Hal. MSS.—See acc. as to the first point, Cro. Eliz. 61. Yet it seems agreed, that executors shall have the corn growing as against an heir. See Hob. 132. 3 Salk. 160. 1 Ventr. 187. 3 Atk. 16. the opinion of Saund. ch. j. in Lill. Pract. Reg. tit. *Emblements*, and the year-books cited in Com. Dig. *Biens*, G. 2. It is not easy to account for this distinction, which gives corn growing to the devisee, but denies it to the heir; though it has been attempted. See Gilb. Law of Evid. 250.* [Note 365.]

(3) *Whether executor of tenant in dower shall pay rent on the statute of Merton, vid. Keilw. 125. Hal. MSS.—This annotation by lord Hale requires explanation. By the statute of Merton 20 H. 3. c. 2. the widow may devise the corn on the land she holds in dower, which, as some of our most ancient writers have thought, she could not do before; but the statute saves customs and services due in respect of the land which the widow held in dower. Now in the case of Keilway it is asserted, that under this statute the wife's executors may retain the land till they can reasonably carry the corn out of the land; and this I apprehend gave occasion to the query, whether the executors shall not pay rent. See 2 Inst. 80, 81.* [Note 366.]

(5) *But it is said, that if the land was sown before the marriage, the wife shall have the corn. 1 Ro. Abr. 727. pl. 17.* [Note 367.]

(7) *In Skele and Arnold, M. 5 Jac. C. B. n. 5. D. D. the court was divided on the point, whether the wife should have the emblements; but it was adjudged, that she should not. But in P. 26 El. C. B. n. 4. E. E. in Brewster's case, it was adjudged, that the wife shall have them. Hal. MSS.—See Skele and Arnold in 1 Ro. Abr. 727. pl. 16. Noy 149. and Dy. 316. a. in marg. and further on the subject in the books cited Vin. Abr. *Emblements*, pl. 16. and Com. Dig. *Biens*, G. 2.* [Note 368.]

(8) *See ante 11. b. and n. 4. there in respect to intermediate profits, [Note 369.] where an estate vested is divested by the birth of a posthumous child. To the observation in that note it may be useful to add, that there is an important*

important distinction as to mesne profits between real estate and personality. The law will not permit the freehold of land, except in certain special cases, to be in abeyance; and therefore, where an estate is to arise on a contingency, the freehold must vest in some person in the *mean time*, either in the heir or some other person who takes subject to the contingency; and that person, whoever he is, has the right to the *mesne* profits for his own benefit, unless they are otherwise disposed of by *express* provision of the parties, as in the case of trustees to preserve contingent remainders, who are generally directed how to apply the profits they receive, or by act of parliament, as by the 10 and 11 W. 3. c. 16. which preserves contingent remainders for posthumous children, where there are no trustees for that purpose, and gives such children the estate, *in the same manner as if they were born in the life-time of the father*, and is *therefore* construed to carry the profits from the father's death. But the case of personality is different, for the right to that may be in suspense and contingency, and *generally* during the time it continues so the profits accumulate till the vesting of the capital happens, and then are added to that and belong to the same person. See 3 P. Wms. 305. 2 Atk. 473. and Fearn. on Conting. Rem. 2d ed. 173.

[Note 370.] (11) According to *some of the ancient authorities*, the disseisor shall have the emblements, if the disseisee's entry is *after severance*. See many books cited on this subject in Vin. Abr. *Emblements*, 54. The more modern cases are with lord Coke. See Dy. 31. b. Dal. 30. Mo. 24. and 11 Co. 51. b.

[Note 371.] (13) Vid. 11 H. 6. 28. *by Cotte, lessor's granting a rent charge doth not determine his will, nor are the lessee's cattle distrainable. Whether the will be determined, if lessor or lessee be outlawed, see 6 H. 6. 20. 5 Rep. 116.* Hal. MSS.—Rolle makes a *quere* on the case of the rent charge. The doubt seems reasonable, for the lease at will and the rent charge clash with each other. If the grantee has the remedy by distress, that makes the tenant's chattels liable to seizure for money not due by his contract. On the other hand, if the grantee of the rent charge cannot distrain, he is left without that remedy, which by the grant is expressly given to him. See 1 Ro. Abr. 860. As to the case of outlawry, see Vin. Abr. *Estate*, Z. b. pl. 1. In 2 Ventr. 248. one of the books cited, lord Hale says, that outlawry is not a determination till seizure.

[Note 372.] (14) Nota, *If lessee at will is ousted by a stranger, he may re-enter, and continue tenant at will; but if he accepts of a new lease from a stranger after such ouster, it has been holden, that his re-entry will not re-vest the estate in the ancient lessor.* Hal. MSS. See Vin. Abr. *Estate*, A. c.

[Note 373.] (15) *So if lessee says, that he will not hold any longer, it is not a determination of the will, unless he waives the possession.* 20 H. 7. Kiltw. 65. Hal. MSS.

[Note 374.] (16) *If there is tenant at will rendering rent at Michaelmas, and lessor determines the will before Michaelmas, he shall not have any rent. But it has been holden, that if lessee at any day before the rent-day determines his will, yet lessor shall have the rent incurring the next day after such determination of the will.* Per Fenner and Williams; Yelverton contra M. 3 Jac. *Carpenter and Collins*, Yelv.

73. 20 H. 7. *Keitw.* 65. is accord. if lessor doth not enter before the rent-day. Hal. MSS.—See All. 4. in which book there is an opinion by Rolle conformable to that of Fenner and Williams. Also in 1 Sid. 339. it is said to have been agreed by the court, that if land be leased at will, and the rent is reserved half-yearly or quarterly, the lessee cannot determine his will two or three days before the rent-day, because that would be a fraudulent determination.

[56. a.]

(2) On special damage action on the case lies for not repairing, as well as for a nuisance in the highway. P. 1657. C. B. *Adjudged* 18 E. 4. Hal. MSS. [Note 375.]

[56. b.]

(2) Also an action on the case will lie for damages arising from the neglect to repair. See Fitzh. N. B. R. ed. 1730. p. 296. note a. [Note 376.]

[But in *Loring v. Bacon*, 4 *Mass. Reps.* 575. where the defendant owned the lower floor of a dwelling-house, and the cellar under it; and the plaintiff owned a chamber over it, and the remainder of the house; the roof being so out of repair, that unless repaired, no part of the house would be comfortably occupied, the plaintiff seasonably requested the defendant to join with him in repairing it, which he neglected to do; the plaintiff then made the necessary repairs, and brought *assumpsit* for the labour and materials, and for money laid out and expended; it was held by the *Supreme Court of Massachusetts*, that the action was not maintainable. In this decision the court were professedly guided by the common law. They cited and commented upon *Co. Litt.* 56. b. *Keilway* 98. b. *pl.* 4. *Fitz. N. B.* 295, 296. and *Tenant v. Goldwin*, 6 *Mod.* 314.]

[57. a.]

(1) Action on the case doth not lie for permissive waste, 5 *Rep.* 13. [Note 377.]

b. Hal. MSS.—The case cited by lord Hale is that of the countess of Salop, who brought action on the case against her tenant at will for negligently keeping his fire, that the house was burnt; and the whole court held, that neither action on the case nor any other action lay; because at common law and before the statute of *Gloucester* action did not lie for waste against tenant for life or years, or any other tenant coming in by agreement of parties, and tenant at will is not within the statute. But the doctrine that no action lies should be understood with some limitation; for if tenant at will stipulates with his lessor to be responsible for fire by negligence or for other permissive waste, without doubt an action will lie on such *express* agreement. The same observation holds with respect to tenants for life or years before the statute of *Gloucester*; for though the *law* did not make them liable to any action for waste, yet it did not restrain them from making themselves liable by agreement. [In a late case before the court of *Common Pleas*, the sole question was, whether an action on the case would lie for permissive waste. It was urged that, as there was no doubt that an action on the case would lie for acts of commission, there was no reason why such an action should not be maintainable for neglect amounting to waste at law; that the foundation of the action was, that an injury was done to the reversion by the default of the tenant, and the reversion was equally injured, whether the dilapidations were occasioned by commission or neglect. But Sir JAMES MANSFIELD, Ch. J. and the other Judges, thought such action an innovation, and were not disposed to encourage it. His lordship remarked, that if it were maintainable, it might be brought against a tenant at will who omitted to repair a broken glass.

Gibson

Gibson v. Wells, 1 *New Rep.* 290.] It may be of use here to add something on the progress of the law as to the accidental burning of houses, so far as regards landlord and tenant. At the common law lessees were not answerable to landlords for accidental or negligent burning; for as to fires by accident, it is expressed in *Fleta*, that *fortuna ignis vel hujusmodi eventus inopinati omnes tenentes excusant*; and lady Shrewsbury's case is a direct authority to prove, that tenants are equally excusable for fires by negligence. See *Fleta*, lib. 1. cap. 12. Then came the statute of *Gloucester*, which, by making tenants for life and years liable to waste without any exception, consequently rendered them answerable for destruction by fire. Thus stood the law in lord Coke's time; but now by the 6 Ann. ch. 31. the ancient law is restored, and the distinction introduced by the statute of *Gloucester* between tenants at will and other lessees is taken away; for the statute of Anne exempts all persons from actions for accidental fire in any house, except in the case of special agreements between landlord and tenant. See ante 53. a. and note 7. there, and 53. b. and note 5. there. So much relates to tenants coming in by act or agreement of parties. As to tenants of particular estates coming in by act of law, as tenant by the curtesy, tenant in dower, and also before the statute for taking away military tenures, guardian in chivalry, these, or at least the two latter, being at common law punishable for waste, were therefore responsible for losses by fire; unless indeed they were answerable for waste voluntary only, and not for waste permissive, which is a distinction I have not yet met with in any book. If then tenant by the curtesy and tenant in dower were by the common law responsible for accidental fire, it may some time or other become necessary to determine whether they are within the statute of queen Ann. The statute in expression is very general, the words being, that no action shall be prosecuted against any person in whose house any fire shall accidentally begin; and it seems calculated to take away all actions in cases of accidental fire as well from other persons as from landlords. Note, that it has been doubted on the statute of Ann, whether a covenant to repair generally extends to the case of fire, and so becomes an agreement within the statute; and therefore, where it is intended that the tenant shall not be liable, it is most usual in the covenant for repairing expressly to except accidents by fire.—Note also, that the distinction which is taken as to waste at common law, between tenants coming in by act of law and tenants whose estates accrue by act of parties, will not universally hold: for tenants by statute-merchant and statute-staple, though they come in by process of law, are not punishable for waste. 6 Co. 37. Perhaps the reason of this may be, that it is in the power of debtors to prevent the commencement of these estates, or to determine them by paying the debts for which creditors have such estates, and also that the tenants of such estates are accountable for all profits they make beyond the amount of the debts due to them.

[Note 378.] (2) Yet if a stranger cuts trees, the tenant at will shall have action, as shall also the lessor, regard being had to their several losses. 2 H. 4. 12. 19 H. 6. 45. Hal. MSS.

[Note 379.] (3) Lessee at will makes lease for years, and the lessee enters. Ruled on solemn argument, 1. That it is only a disseisin at election, and not prima facie. 2. That admitting it to be a disseisin, the lessee at will is the disseisor, and has gained the freehold, and not the lessee for years. Pasch. 9 Car. B. R. *Blunden and Baugh*. Hal. MSS.—See S. C.

S. C. in W. Jo. 315. Cro. Cha. 302. Litt. 297. 372. and 1 Ro. Abr. 661. See also Mr. Atkins's case in 4 Burr. vol. 1. p. 60. in which the curious doctrine of *disseisin by election* is most elaborately explained.

(4) *A. lessee for 20 years, makes lease to B. for ten; B. continues in possession after expiration of the lease for ten years, and commits waste. A. may have either trespass or action on the case, because he is chargeable over in waste.* P. 6 Car. B. R. Crook n. 7. *West and Treude.* Hal. MSS.—See Cro. Cha. 187. and S. C. W. Jo. 224.

[57. b.]

(1) *But in his count in debt against lessee at will, he ought to shew that he entered; but otherwise it is as to lessee for years.* 21 H. 8. 1 Dy. 14.—*Debt lies against copyholder for his rent.* Adjudged M. 10 Car. B. R. *Hitcham's case.* Hal. MSS.—*Hitcham's case* is in 1 Ro. Abr. 374. P. pl. 1. and 374. Q. pl. 3. But from Rolle's report of the case, and from some subsequent authorities, it seems doubtful whether debt will lie for rent against a copyholder, particularly unless the lord has conveyed away the manor, and so lost the remedy by distress. See Carth. 92. and Gilb. Ten. 3d Lond. ed. 308.

(2) As to holding over, see 4 G. 2. c. 28. by which every tenant for life or years, or other person claiming under or by collusion with such tenant, who shall wilfully hold over after determination of the term, and demand made in writing of delivery of the possession, by the landlord or him in reversion or remainder, is made liable to the payment of double the yearly value of the lands detained. This statute only took in cases in which the landlord gave notice to quit, and therefore the deficiency was supplied by the 11 G. 2. c. 19. which extends the provision for double rent to the holding over after the tenant's giving notice to quit. See a case on this latter statute in 4 Burr. v. 3. page 1603. See also 6 Ann. c. 18. s. 1. against holding over by guardians or trustees of infants, and by husbands seised in right of their wives, and by all others having particular estates determinable on any life or lives.

(5) *If the heir accepts rents from him, he is tenant at will to the heir.* 10 E. 4. 18. *Tenant for years surrenders, and still continues possession, he is tenant at sufferance or disseisor at election.* Dy. 62. Hal. MSS.

(6) *And if guardian in such case dies seised, the entry of the heir tolls.* 7 H. 4. 42. per Cul. Hal. MSS.

[58. a.]

(1) *Nota, these words, ad voluntatem domini are material to express copyhold; for if these words be omitted in pleading, it shall be intended that the estate is a customary freehold.* M. 7 Car. B. R. Crook n. 7. *Hughes's case.* Hal. MSS.—See Cro. Cha. 219. See further as to customary freehold, post. 59. b. and note 1. there.

(2) This author, whom lord Coke cites on several occasions, according to sir William Dugdale, wrote a book on *tenures of the king*, but did not perfect it. Dugd. Orig. Jurid. 1st ed. 56. I imagine that this book is the work referred to by lord Coke; but whether it is in print, or lord Coke cites it from a manuscript, I have not yet been able to learn.

(4) See

[Note 387.] (4) Sec acc. Cro. Cha. 367. But the lord may take a surrender out of the manor, because that may be done out of court; and so may the steward, if there is a special custom, or according to latter authorities without. See 1 Salk. 184. and post. 59. a.

[Note 388.] (5) *A steward de facto is sufficient.—The king constitutes A. and B. stewards of a manor by patent sub sigillo scaccarii; A. holds courts; and though the appointment ought to have been sub magno sigillo, and both ought to have holden the courts, yet it was ruled, that grant by one was good. So it is as to the lord's clerk or an under steward. P. 22 Eliz. Scacc. Hal. MSS.—The doctrine in this case seems confirmed by the cases and authorities cited in Vin. Abr. Steward, F. G. J. K. and Com. Dig. Copyhold, C. 5. Note also particularly what is expressed in Co. Copyhold, sect. 45. in respect to the law's not being nice in examining the imperfections of the steward's authority, where his acts are ordinary and necessary, and not of a judicial kind.*

[58. b.]

[Note 389.] (3) *Guardian in socage may grant copies in his own name, nor can the heir hold courts during the interest of the guardian. T. 1 Jac. Rot. 883. C. B. Shoptland and Ridler. Noy n. 372. Clare's case. Hal. MSS.—See the former case acc. in Cro. Jam. 55. 98. 1 Ro. Abr. 499. pl. 4. Ow. 115. Godb. 143. 4 Leon. 238. See also acc. 2 P. Wms. 122.*

[Note 390.] (4) *Custom to grant copies in reversion after estates for life. Ruled, that dominus pro tempore may make such grants; and they will bind, though the particular estate doth not determine during his interest. P. 41 Eliz. B. R. n. 27. C. C. Guy and Rey. Hil. 26 Eliz. Sir Peter Carew's case. More 147. Vide tamen H. 14 Eliz. ibid. 95. the case of Com. Oxon. contra Hal, MSS.—Accord. that the lord pro tempore may grant in reversion, where reversions are grantable by copy. See Cro. Eliz. 66. 2 P. Wms. 122. and the case of Lade and Barker in 2 New Abr. 684. See also the subject enlarged upon in Gilb. Ten. 3d Lond. edit. 204.*

[Note 391.] (5) *If copyholder surrenders to disseisor to the use of I. S. disseisor may admit him, if the surrenderor be a copyholder in fee; but otherwise it is, if he be only copyholder for life, as it seems, for it is a new grant. P. 41 Eliz. B. R. Martin and Rew. Hal. MSS.—See Gilb. Ten. 3d Lond. edit. 201.*

[Note 392.] (6) *If heir before assignment of dower grants copies, it will not bind the wife. P. 28 Eliz. B. R. Rous and Artois. Hal. MSS.—See further as to the persons by whom copyhold estates may be granted, in Vin. Abr. Copyhold, G. and Com. Dig. Copyhold, C. 3.*

[Note 393.] (7) *What thing destroys the custom of granting a copyhold. One is lessee for life or tenant in tail of a manor; a copyhold escheats; and lessee or tenant in tail makes lease for years of the copyhold. Though quoad himself the custom is gone, yet quoad the issue or reversioner the custom is not gone. So it is in case of a husband seized in right of his wife. P. 38 Eliz. B. R. Conesby and Ruskey. And accordingly agreed per curiam, P. 1650. in Cremer and Burnet. But vid. contra M. 14 Car. B. R. Crook n. 52, in Lee's case. Copyholder surrenders to the use of the lord, who makes a lease of the manor and of this tenement by name. Ruled, that the tenement is still grantable by copy;*

copy; for it passes with the manor, and so continues demisable. Tr. 10 Car. Crook n. 4. *Lee and Boothby*.—The king is seized of a copyhold manor, the copyhold escheats, and the king makes lease for years. Ruled, that though the lease is good, yet after the term the copyhold is grantable by copy, because the grant doth not inure to a double intent in the case of the king. P. 1650. *Cremer and Burnet*. Hal. MSS.—See *Conesby and Ruskey* in Cro. Eliz. 459. *Cremer and Burnet* in Sty. 266. and 2 Ro. Abr. 196. pl. 34. and *Lee's case* in Cro. Cha. 521. W. Jo. 449. and 1 Ro. Abr. 498. pl. 1. See also the observations on the two latter cases in Vin. Abr. *Prerogative*, G. c. pl. 3, 4. See further on the destruction of copyhold estates in Com. Dig. *Copyhold*, B. 3. and L. and Vin. Abr. *Copyhold*, R.

(9) *Tithes are grantable by copy*. P. 43 Eliz. B. R. *Sands and Drury per curiam*. Hal. MSS.—See as to the case here cited by lord Hale, Vin. Abr. *Copyhold*, E. pl. 1. See also as to things grantable by copy, Vin. Abr. *ubi supra*, and Com. Dig. C. 1.

[59. a.]

(1) *Parceners of copyhold cannot make partition without the lord's licence*. P. 41 Eliz. B. R. *Fuller and Terry*. Hal. MSS.—The same case is in 1 Ro. Abr. 509. pl. 1, 2. but the points there are different.

(2) *If copyhold is granted to A. and B. who are admitted, A. may release to B. without fine or surrender. Adjudged* P. 19 Jac. entered H. 16 Rot. 735. C. B. *Wase and Pretty*. So he may release condition. T. 2 Jac. But if he release to disseisor, it is holden void; but he may release all his right to him who is admitted. M. 5 Car. C. B. per curiam. Hal. MSS.—See acc. *Wase and Pretty* in Winch. 3. and s. p. acc. by the court in Hetl. 150. See further as to the effect of a release on a copyhold, Vin. Abr. *Copyhold*, Z. a. and Com. Dig. *Copyhold*, I. i.

(3) But according to Rolle, though livery is not made, the feoffment is a forfeiture, if there be a letter of attorney to deliver seisin, because then the feoffee may at any time perfect the conveyance; and he thinks that lord Coke ought to be understood with this distinction. 1 Ro. Abr. 508. pl. 12, 13. However, the distinction in Rolle may be doubted, for the criterion of forfeiture of a copyhold by alienation seems to be the actual passing of an unlawful estate to the lord's prejudice, and in the case of the feoffment no interest can pass till livery; nor is it strictly true, that the feoffee may at any time perfect the conveyance, for it is possible, that before livery the feoffor may revoke the power of attorney, or the attorney may die or refuse to execute his authority. See further on this subject, 3 Leon. 109. and Godb. 269.

(4) The plural number is here significant; for a lease for one year is not a forfeiture, such lease by copyholder being, as lord Coke in another place writes, warranted by the general custom of the realm. 4 Co. 26. See also acc. 9 Co. 75. b. W. Jo. 249. and Litt. Rep. 233. See also 1 And. 192. and Mo. 272. and 679. by which it appears that it was once doubted, whether to warrant a lease for one year without the lord's licence a particular custom was not necessary.—The following annotation is by lord Hale. Vid. as to forfeiture by lease or alienation. A. is seise of a manor for five years; copyholder grants, bargains and sells his copyhold to A. and his heirs. Ruled, that this amounts to a full surrender; and if after the term he who hath the fee of the manor admits A. or his heir, it amounts to a new grant. T. 21 Jac. C. B. *Hassel*

sel and Hamerton.—Copyholder in fee makes lease for a year, and so de anno in annum during the life of the copyholder except one day at the end of every year; and this was adjudged to be a forfeiture; and so if it was by covenant, for it amounts to a lease for two years, and the exception of a day doth not aid the case. Vid. 10 Jac. B. R. *Bulstr.* n. 201. *Hamlen and Hamlen.* T. 10 Jac. *ibid.* n. 232. *Luttrell and Weston.*—Copyholder makes lease by indenture for one year, and same day by another makes another lease for one year to commence after the former, and so a third lease by a third indenture for one year after the second, and then surrenders to the steward to the use of the lord. Ruled, 1. Though this be by several indentures, and two days interpose between the end of one lease and the beginning of another, it is a forfeiture. 2. The covin is apparent, though it was not found. 3. Though he surrenders to the lord not having notice, the lord shall be adjudged to be in point of forfeiture, and shall avoid the leases. M. 7 Car. B. R. n. 15. *Matthew and Whetton.* Hal. MSS.—See the first case cited by lord Hale in Winch. 66. W. Jo. 41. and Hutton 65. though in these books the name is different. See the second case in 1 Bulstr. 189. the third in 1 Bulstr. 215. and the fourth in Cro. Cha. 233. W. Jo. 249. and 1 Ro. Abr. 508. pl. 10.—It is observable, that according to the third case cited by lord Hale a mere covenant that the lessee shall enjoy for a second year is a forfeiture; but the second case and other authorities are to the contrary; because, though in general a covenant amounts to a lease, yet it seems harsh to give such a construction, where a lease amounts to a forfeiture, and the intention of the parties may have effect by way of agreement. See Cro. Jam. 311. and 2 Keb. 267. See further as to leases by copyholders and forfeiture on that account, New Abr. tit. *Leases*, I. 6. Vin. Abr. *Copyhold*, G. c. H. c.

[Note 399.] (6) Nota, by Rolle surrender into the hands of the stewards, though out of the court, is good without custom. M. 24 Car. B. R. *Baker and Denham.* Hal. MSS.—See acc. 1 Ro. Abr. 500. pl. 3, 4. Leon. 111. 1 Salk. 184. Some make a distinction between stewards by deed and stewards by parol, and think, that only the former can take surrenders out of court. Godb. 142. and 1 L. Raym. 159. But this distinction has been frequently denied, and indeed seems unsupported by any good reason. Cro. Jam. 526. Com. Rep. 85.

[59 b.]
[Note 400.] (1) M. 9 Jac. C. B. n. 5. D. D. *Wilde and Francis.* Adjudged accordingly, and the admittance is tenendum, but not ad voluntatem domini. Hal. MSS.—Vid. acc. ante 49. a. and note 6. there, and also the books cited in Blackst. Law Tr. 8vo ed. v. 1. p. 144. From these authorities it appears, that estates held by copy of court-roll, but not at the will of the lord, have been deemed freehold estates as well by others as by lord Coke, and in order to distinguish them from the ordinary kind have been denominated *customary freeholds*. In consequence of the prevalence of this notion, a considerable number of such tenants some few years ago claimed a right of voting as *freeholders* at the election of knights of the shire. This gave occasion to a short but most excellent treatise on the subject, in which the learned author traces the origin of lands held in this peculiar way, and proves by the most clear and forcible arguments, that, though these tenures in some respects resemble freeholds, they are in truth nothing more than a superior kind of copyhold. Soon after the publication of this treatise, the doctrine inserted in it received confirmation from an act of parliament, declaring, that no person holding by copy of court-roll should be entitled to vote at the election

election of knights of the shire. See Blackst. Law Tr. 8vo ed. v. 1. p. 105. and 31 G. 2. c. 14.

(2) *Copyholder for life surrenders to the use of D. the lord accepts [Note 401.] the surrender and admits D. for his life, who dies. Adjudged that the surrenderor shall not have the land, but the lord, for he who surrendered had not any reversion. But if copyholder surrenders to the use of B. there on B.'s death the surrenderor shall have, for he hath the remainder.* M. 6 Car. B. R. Crook n. 10. *King and Lord.* Hal. MSS.—See Cro. Cha. 204. and S. C. 1 Ro. Abr. 504. 2 Ro. Abr. 462. See 9 Co. 107. Vin. Abr. *Copyhold*, P. 6 Mod. 68. 1 Salk. 188. and Gilb. Ten. 3d Lond. ed. 257.

(6) *Nota, ruled, that action on the case doth not lie against the lord [Note 402.] who refuses to admit, but the remedy is to compel him in chancery.* P. 13 Jac. B. R. Crook n. 1. *Ford and Hoskins.* Hal. MSS.—See Cro. Jam. 368. and S. C. Mo. 842. 2 Bulstr. 336. But it is said to have been adjudged, that though *surrenderree* cannot have action on the case against the lord for refusing to admit, yet the *surrenderor* may. 3 Bulstr. 217.

(8) See Vin. Abr. *Copyhold*, W. b. See also much curious learning [Note 403.] on this subject in the case of the earl of Bath and Abney in 4 Burr. vol. 1. page 206. In that case the court held, that the executor of a copyholder, for a long term of years, was compellable to be admitted and to pay a fine. The great point of the case was, whether a fine became due on every change of the tenant, or on change of the estate only.

[60. a.]

(1) 1. *What shall be a reasonable fine. Two years and an half of [Note 404.] racked rent adjudged unreasonable; and a year and an half is sufficient.* T. 6 Car. B. R. Crook n. 8. *Dow and Golding.* Two years value of racked rent adjudged unreasonable. 2. *He, who would take advantage of a forfeiture for non-payment of a fine uncertain, ought to assess a reasonable fine, and prefix a day and place within the manor for payment of it. Otherwise non-payment is not a forfeiture.* 3. *If it be doubtful, whether the fine be reasonable or not, non-payment is not a forfeiture.* M. 6 Jac. C. B. n. 5. *D. D. Willowe's case.* Vide tamen, for if in truth it be reasonable, non-payment at the day prefixed has been held a forfeiture. M. 1650. *Parker's case.*—Custom, that copyholder shall pay a fine of two years rent or under, held good. M. 10 Jac. B. R. 2 Bulstr. n. 23. *Allen and Abraham.* But M. 36, 37 Eliz. A. B. n. 148. in *Green and Bury*, it was ruled void for the uncertainty. Hal. MSS.—See the first case in Cro. Cha. 196. the second in 13 Co. 3. the third in 2 Bulstr. 32. and the fourth in 2 Ro. Abr. 265. pl. 1. Note, that in the case in which two years rack rent was deemed an unreasonable fine, the admittance was on an alienation and not on a descent, and that on a descent two years value is generally understood to be reasonable. See Rep. temp. Finch 464. See further on the quantum of fines, tit. *Copyhold*, in Vin. Abr. X. b. Com. Dig. H. 4. and New Abr. I. 3. and the case of the earl of Bath and Abney in 4 Burr. vol. 1. page 206.

(2) Vid. hic fol. 59. a. *A. surrenders to the use of B. clearly the [Note 405.] land is bound by the surrender, but B. hath nothing in the land till admittance.* M. 8 Car. B. R. *Burgoin and Spurling.* But if the *surrenderree*

rendered dies, his heir shall be admitted. If the lord accepts rent of B. it is a good admittance. M. 24 Car. B. R. Baker and Denham. A. surrenders to the use of B. who before admittance surrenders to the use of C. and C. is admitted. Ruled, that C. takes nothing, for B. who surrenders hath not any interest to surrender till admittance. 24 Eliz. Alderman Dixe's case. M. 6 Jac. B. R. m. n. 6. Wilson and Woodhall. But yet it hath been ruled good, for the admittance of C. shall be implied to be an admittance of B. first, and so there shall be priority. M. 24 Car. B. R. Baker and Denham. P. 41 Eliz. C. B. Colchin and Colchin. Vid. T. 15 Jac. B. R. 2 Poph. 5. Hal. MSS.— See the first case in Cro. Cha. 273. & 283. and 1 Ro. Abr. 473. & 500. the second in Sty. 145. the fourth case in Yelv. 144. the fifth in Cro. Eliz. 662. and 1 Ro. Abr. 499. pl. 1. See further as to the subject of the cases in this annotation, Com. Dig. *Copyhold*, F. 11. and Vin. Abr. *Copyhold*, U. W. Y. and Q. b.

[In the recent case of *Doe ex dem. Tofield v. Tofield*, 11 East 246, it was determined by the Court of *King's Bench*, that the surrenderee of a copyhold could not surrender out of court to the use of his will before his admittance, such surrender being absolutely void, and not capable of being made valid by his subsequent admittance. Lord ELLENBOROUGH, in delivering judgment, went into a critical examination of all the authorities bearing upon the point including the preceding note, upon which his lordship commented very particularly.]

[Note 406.] (3) *It has often been adjudged accordingly; and in such case surrender is not a discontinuance, but there may be a bar by custom either by surrender or recovery, but not without custom. M. 2 Car. C. B. Crook n. 4. P. 37 Eliz. Clun and Turner. P. 1651. B. R. Franklyn and Myn. Hal. MSS.—* See the case of M. 2 Cha. in Cro. Cha. 42. See also post. 60. b. and note 1. and 2. there.

[60. b.]

[Note 407.] (1) See 2 Ves. 603. the case of Carr and Singer, in which three judges against Willes chief justice held, that where copyholds are intailable, and the custom has not prescribed any mode of barring, the intail may be barred by surrender. But Willes chief justice thought, that in such a case recovery was the proper mode. Note the three ways of barring intails of copyholds mentioned in this case; namely, recovery, surrender, and forfeiture and regrant.

[Note 408.] (4) *But trespass lies not against the lord for cutting trees. Hill. 10 E. 1. Rot. 3. Casus prioris of Anthony. But now the law is changed. Hal. MSS.*

[61. a.]

[Note 409.] (2) In Cro. Cha. 597. there is a case, in which it was pleaded, that the custom was to surrender by a *knife*, and therefore that a surrender by the *verge* was void. This custom being alledged before the council of the marches of Wales, they proceeded to try it. On moving this matter in the *King's Bench*, a prohibition was granted, because the custom was only triable at the common law; but it is not mentioned what the court thought of the operation of the surrender.

[61. b.]

[Note 410.] (1) But a patent is necessary to the making of stewards of the king's manors. See further title *Stewards of Courts* in Vin. Abr. F. and Com. Dig. *Copyhold*, R. 5.

(1) But

[62. a.]

(1) But vide Trin. 7 Car. B. R. Rot. 373. *Adjudged M. 8. Crook n.* [Note 411.]
 27. *Burgoin and Spurling.* A. surrenders to the steward out of court to the use of B. on condition, and before the next court surrenders to the steward to the use of C. in fee; the condition is performed, and then he surrenders to the use of D. in fee by the hands of the steward; and at the next court all are present. Ruled, that C. shall have the land, for by the surrender the interest is bound, but the estate doth not pass till presentment, but remained fully in A. and so the surrender to C. is good, when the surrender to B. is avoided by performance of the condition before the court. Hal. MSS.—See note 2. in 60. a. See also as to the commencement of the surrenderee's estate, Jefferey's case in Wils. vol. 1. part 2. page 13. In that case one having surrendered to the use of his will devised a copyhold to Miss Jeffereys in fee; and she being attainted of felony and hanged before admittance, the question was, whether her interest in the copyhold was such as to intitle the lord by forfeiture. The whole court inclined against the lord, but did not give an absolute opinion.

[63. a.]

(1) Formerly it was a question, whether waste *permissive* was a forfeiture by the *general* law in respect to copyhold estates, and according to a case in Noy a *special* custom is necessary. Noy 51. But the principal authorities are with lord Coke. See Ow. 17. 1 Ro. Abr. 508. pl. 16. and the case of Eastcourt and Weekes in 1 Lutw. 799. 1 Freem. 516. and 1 Salk. 186. In this last case the causes of forfeiture were making a lease without licence, and want of repairs, and it appears to have been agreed by all, that *permissive* waste was a forfeiture; and the great point was, whether, after the death of one of two coparceners, who were seised of the manor at the time of the forfeiture, it was not too late to enter and take advantage of it. Three judges held that it was because, according to them, lease and waste do not operate like alienations by fine, recovery, or feoffment with livery, which are *immediate* forfeitures, and extinguish the copyholder's estate without any act by the lord, but are only forfeitures at the election of the lord in whose time they happen, and unless he enters the copyholder's estate continues; and they thought, that the right of election was not in its nature either divisible or descendible, and therefore that in the case of coparceners all must join in the election, and if one of them dies, it is too late to make it. But Powel, justice, differed. He assented to the distinction between forfeitures operating by immediate extinguishment of the copyhold and forfeitures at the lord's election, and agreed that waste *permissive* was of the latter kind; but then he thought, that the lease for years without licence was as much an extinguishment of the copyhold as an alienation for a greater estate; and he seemed to be of the same opinion as to waste *voluntary*. Note, that Powel took another distinction between waste *voluntary* and waste *permissive*, and said, that if waste *permissive* is repaired before the lord's entry, the forfeiture is purged, and advantage cannot be taken of it. Note also, that in the case Treby, ch. j. doubted whether lord Coke's doctrine, that if there be two coparceners of a reversion, and waste is committed, and one of them dies leaving a daughter, the aunt and niece shall join in the law. See ante 53. b. and 1 Lutw. 803. This observation of Treby ought to have been mentioned before.

(2) But

[Note 413.] (2) But the court of chancery will sometimes relieve against a forfeiture for waste, and compel the lord to re-admit, on receiving satisfaction for the injury he has sustained. Such relief is particularly given, where the waste is committed through ignorance, or where the waste is merely *permissive*, and there has not been an obstinate perseverance in neglecting to repair after notice. 1 Cha. Cas. 95. and Prec. in Chanc. 568. Another instance, in which relief against forfeiture for waste is said to be proper, is where the lessee of a copyholder commits waste without his direction or privity. Toth. Cha. 237. But in this latter case it may be doubted, whether the waste is a forfeiture. See Mo. 49.

NOTES
ON THE
SECOND BOOK OF THE FIRST PART
OF THE
INSTITUTES
OF THE
LAWS OF ENGLAND.

Chap. 1.

Homage.

Sect. 85.

[64. a.]

(1) **I**T is scarce possible to have a just and proper idea of our law of tenures, the greater part of which is founded on principles strictly feudal, without the aid of some previous information concerning the origin of feuds in general, and the time and manner of their introduction into this country. This interesting subject seems to have entirely escaped the attention of lord Coke; for though he writes so learnedly and minutely in explaining the nature of each tenure, and its fruits and incidents, yet there is not any thing like an historical illustration with the least reference to the *general* doctrine of feuds, or to the means by which they were established in England; a silence the more unaccountable, because the subject exercised the pens of several cotemporary writers; and the great antiquary of our English laws, sir Henry Spelman, had actually published the first part of his Glossary, in which he discourses largely on feuds, near two years before the first edition of the Commentary on Littleton. To supply the deficiency here imputed to lord Coke, as far as the compass of an annotation will allow, it shall be attempted to state shortly some of the principal opinions which occur on the subject, and to refer to some of the books in which they are respectively advanced or controverted.

[Note 1.]

As to the first institution of feuds, some writers deduce them from the earliest ages of the world, and suppose that the idea of giving land on the terms of doing military service for it, which, it must be confessed, was the grand principle of the feudal system, must have been common to the most ancient nations, when they emigrated to form new settlements, and was the natural result of such a situation. See Niell. Disputat. Feud. cited in Voet ad Pandect. lib. 38. Digres. de Feud. 1 Gen. 47. But this opinion has been generally disapproved of as fanciful, and founded on a narrow and incomprehensive notion of feuds, and depending on resemblances too faint and remote to warrant a just comparison. Itter. de Feud. Imper. c. 1. s. 2. Spelman. Posthum. 2.

Others think that they discover the origin of feuds in the institution of *patron* and *client* by Romulus on the first founding of the Roman state. Zasius Epit. Feud. &c. cited in Itter. de Feud. Imper. c. 1. s. 3. But the slightest examination shews this connexion to have been widely different from that between *lord* and *vassal*; the latter merely arising from *land*, and, according to the strict and pure notion of feuds, being ever accompanied with services of a *military* kind and also with a *jurisdiction*; which circumstances are quite foreign to the former, and seem of themselves so essentially to distinguish the two, as to render the labour of seeking for other differences wholly unnecessary. See Bodin. de Repub. lib. 1. c. 7. Crag. Jus. Feud. lib. 1. Dieges. 5. et Duck. de Us. Jur. Civ. c. 6.

Others again have suggested, that the grants of forfeited lands to the veteran soldiers of Sylla, Julius Cæsar, and the Triumvirs in the latter times of the Roman republick, gave rise to feuds. But it has been sensibly observed by a very ingenious writer, that such lands were given, not on the condition of *future*, but as rewards for *past*, military services, and after the donation of them were of the nature of other Roman estates. Sullivan's Lectures, 251. See also Clark. Connect. of Roman, Saxon and English Coins, 440.

Some compare the *coloni et glebæ adscriptitii*, of which there is such frequent mention both in the Theodosian code, and in that of Justinian, with feudatories. But nothing can be more strongly marked than the distinction between the two, for the former were adstricted to the soil, were employed in cultivating it, and in performing other *rural* services for the owner, and, in short, approached nearer to *slaves* than to *freemen*, *soldiers* and *feudal tenants*. See Itter. Feud. Imper. cap. 1. sect. 3. 5.

One civilian of the first character seems to deduce fiefs from the *procuratores prædiorum*, the *emphyteuticarii*, and others of a similar description, who are well known to the Roman law. Cujac. Observ. lib. 8. c. 14. and de Feud. lib. 1. princip. But it should be recollected, that the *procuratores prædiorum* were properly only bailiffs and servants to the owners of the land, and that the *emphyteuticarii* were merely occupiers of land under contracts of hiring; and therefore one may differ from the great author of this opinion, without forgetting the respect justly due to so high an authority. In truth, the possessions of the *former* do not appear to have been like *any* fief, and those of the *latter* at the utmost only come near to a resemblance of fiefs of the *prædial* and *improper* kind, such as our *socage* tenure, and other deviations from the original feudal establishments. Consequently, it is not in the least probable that pure and genuine fiefs, which were the price of *military* service only, and gave rise to the great system of tenures, should be the offspring of such parents.—The same observation may be applied to the *prædia stipendiaria*, which some writers cite, from the books of the Roman law, as instances

instances of fiefs, but which were, as I apprehend, only a species of the *emphyteusis*, or land let to hire. See *Itter. de Feud. Imp. cap. 1. sect. 3. 5.* Heinecc. *Syntagm. Antiq. Rom. lib. 3. tit. 3. s. 13.* and the word *stipendiaria* in the Lexicons of the Roman Law.

As to the *soldarii*, who were the companions and followers of the princes and chieftains amongst the *ancient Gauls*, and are by some writers considered as feudal vassals, their attachment was independant of land; and this of itself is sufficient to shew, that the connexion was not the same as that which is the result of *tenure*. However, it may be proper to observe, that a like sort of union between the princes of the *ancient Germans* and their *comites* is agreed by those who refer the origin of fiefs to a much later period, to have been one of the many causes which accelerated the progress of fiefs. *Itter. de Feud. Imper. cap. 1. sect. 4. 5.*

Another opinion as to the beginning of fiefs is, that the use of them may be dated from the time of the emperor Alexander Severus, who, about the middle of the third century, granted out large districts taken from the enemy on the frontiers of the Roman empire to the *duces limitanci* and others of his officers and soldiers, under the conditions of military service, and on those terms declared the land transmissible to heirs. *Seld. Tit. of Hon. 2d ed. c. 1. s. 23. p. 332.* *Duck. de Us. Jur. Civ. lib. 1. c. 6.* *Itter. de Feud. Imper. c. 1. s. 3.* and *Clarke's Connect. Rom. Sax. and Engl. Coins, 440.* These grants, and some few others of a like kind, which are attributed to succeeding Roman emperors, give the semblance of probability to the conjecture of those who consider the feudal establishments, so common in the subsequent times, as mere imitations of these examples and extensions of the same policy; and, it must be owned, that they at least seem to justify Mr. Selden in observing that some use of fiefs may very properly be referred to the time of Alexander Severus.

But that opinion, which seems to have the most probability and is adopted by the generality of the best writers, particularly those of the present times, attributes the origin of the feudal establishments principally to the northern nations, which in the fourth and fifth centuries over-ran the western part of the Roman empire, and at length out of its ruins formed the principal of the various states and governments, into which we now see Europe divided. Many reasons might be adduced in favour of this opinion, and to evince that pursuing the history of these nations, from their first successful irruptions into the Roman empire, is the only true way of exploring the source of the feudal institutions; but this is not the place for a minute discussion of a subject so extensive and difficult.

¶ [See this note continued at the commencement of Mr. Butler's notes, beginning 191. a.]

[64. b.]

(1) Nota, in ancient times by *hommes* or *men*, homagers, whom we now call freeholders, were intended; as in grants that he and his men should be free from toll. 14 H. 6. 12. 12 Ass. 35. 33 E. 3. 88. 31 E. 3. Barr. 261. Hal. MSS.—In the famous controversy, which began between Dr. Brady and others some few years before the revolution, about the origin of the House of Commons, one point in dispute was the sense of the words *homines* and *liberè tenentes*, as used in writs of summons to parliament, before the reign of Henry the third, and in other ancient records; the doctor endeavouring to confine the word to the king's tenants *in capite*, and his competitors, on the other hand, being as strenuous to comprehend within the description of *homines* any free subjects of

[Note 2.]

of the king, and within that of *liberè tenentes* all freeholders in general, whether they held immediately of the king or not. See voc. *Liberi homines* in the Gloss. at the end of Brad. Introd. to English Hist. Tyrrel. Biblioth. Politic. 300. 308. 322. 326. 352. 369. 537. and lord Lyttlet. Hen. 2. 8vo ed. vol. 3. p. 337. However, Mr. Tyrrel allows the word *homines* to be equivocal, and to vary in the sense according to the occasion on which it is used.

[65. a.]

[Note 3.]

(1) According to this position, of which the truth is undeniable, all the lands in England, except those in the king's hands, are feudal. This universality of tenures, if not quite peculiar to England, certainly doth not prevail in several countries on the continent of Europe, where the feudal system has been established, and it seems that there are some few portions of allodial land in the northern part of our own island. In France they still have their *franc-aleu*, which is the name by which allodial land is distinguished, as well as their *fiefs*; and, in some provinces, such as Provence, Languedoc, and others, which not having any *coutume* or system of customary law, adopt the *written* or *Roman* law, the country is so far from being wholly feudal, that all inheritances are presumed to be quite free from feudal dependance till the contrary is proved, and therefore are called *franc-aleu sans titre*, that is, free without the possessors being obliged to prove them so. Instit. Droit. Franc. par Argou, l. 2. c. 3. Decis. Nouv. par Denisart, tit. *Franc-aleu* and *Droit-ecrit*. Even in Normandy, from which country our ancestors borrowed at least some parts of our law of tenures, and where the feudal policy with its utmost rigours is supposed to have been so early and so completely introduced, a remnant of allodial land is still to be found, and their reformed *coutumier* expressly divides their estates into *franc-aleu* and *tenures*. Littlet. par Houard, v. 1. 196. and Cout. Reform. Norman. par Berrault. Art. 102. The German and Dutch lawyers make the like distinction with respect to lands in their countries; and they must almost necessarily have a considerable proportion of allodial land, as the rule of their courts of justice is to presume in favour of it, whenever the quality of the land appears doubtful. Heinecc. Elem. Jur. Germ. lib. 2. tit. 1. s. 35. Dar. Inst. Jur. Priv. German. sect. 705, 706. and Voet. ad Pandect. lib. 38. Digres. de Feud. sect. 4. As to Scotland, lord Stair expresses himself rather ambiguously on the subject; for he says that there remains *little of allodial land in Scotland*, but in a few lines after observes, that the glebes of the clergy, which seem to come nearest to *allodials*, are more properly *mortified*, or, as we should call them, *mortmain fees*. Sta. Inst. b. 4. t. 3. s. 4. However, other respectable authors rank the manses and glebes of the Scotch clergy amongst things allodial; and write as if they thought that the law of fiefs had not yet pervaded the Orkneys. Ersk. Princ. Law Scot. 126. Ess. Brit. Antiq. 19.

[Note 4.]

(3) Vid. *As to the homage by the king of England to the king of France for the dutchy of Aquitain, &c. It was doubted whether the homage ought to be liege; but at length it was resolved, that it should be liege; and for that purpose writs patent were made by the king of England, settling it in this way, viz. that the king of England, duke of Guyen, should hold his hands between the hands of the king of France, and he who should speak for the king of France should address his words to the king of England, duke of Guyen, and should say thus, Do you remain a liege man of the king of France, my lord who is here, as duke of Guyen and peer of France, and promise to bear him faith*
and

and loyalty? say yes; and that the said king, duke, and his successors, dukes of Guyen, should say yes; and that then the king of France should receive the said king of England and duke to the said homage and faith, and with a kiss saving his right and the other's. 1 Pars Pat. 5 E. 3. m. 19.—For the homage done to the Pope by king John, see *M. Paris* 237. Hal. MSS.—For a full account of the circumstances which attended Edward's homage for Guienne, &c. see 1 Tind. Rap. fol. ed. 412. See also Froiss. l. 1. c. 25. and 4 Rym. Fœd. 383. to 390. there cited, and Du Fresn. Glos. voc. *Homagium*. Mr. Tindal in a note on Rapin observes; that liege or full homage is done with head bare and sword ungirt, as if that was the thing which chiefly distinguished homage *ligeum* from homage *non ligeum*. But in truth that *formality* was incident to *both*, and the difference between the two was of a more *essential* kind, and Philip de Valois of France and our Edward the Third knew this, or probably there would not have been so much difficulty in adjusting the ceremony between them. Homage *ligeum* was without any saving or exception of the faith due to king or other lords; but homage *non ligeum* had such an exception. The former properly came from the *subject to the sovereign*; the latter from *one subject to another*. The former generally and in strictness included allegiance as a subject, and could not be renounced; though sometimes, when done by one who was himself a sovereign prince, as a mark of feudal dependance, in respect, not of his *whole* dominions, but only of a *part* of them, it was not understood with so much latitude; but the latter never imported any thing more than a connexion in the way of tenure, which the *homager* might at any time free himself from by renouncing the land he was invested with. See Du Fresn. Gloss. voc. *Hominium et Ligeus*, and Spelman. Gloss. voc. *Homagium et Ligantia*.

[65. b.]

(4) *Infant casts essoin of being in the king's service for another.* 21 E. 3. 33. *He shall do fealty.* 24 E. 3. 63, 64. Hal. MSS.—In casting an *essoïn de servitio regis*, the *essoïnor*, that is, he who casts the *essoïn* for the absent person, must swear to the truth of the *essoïn*; which explains the object of the case cited by lord Hale. See 2 Inst. 314. See further as to the swearing of an infant, post. 158. a.

[Note 5.]

[66. a.]

(1) Arguments from inconvenience certainly deserve the greatest attention, and where the weight of other reasoning is nearly on an equipoise ought to turn the scale. But if the rule of law is clear and explicit, it is in vain to insist upon inconveniences; nor can it be true that nothing which is inconvenient is lawful, for that supposes in those who make laws a perfection which the most exalted human wisdom is incapable of attaining, and would be an invincible argument against ever changing the law.

[Note 6.]

(3) Lord Coke's translation of the word *gens* is erroneous; for as Mr. Madox justly remarks, though the *Roman* word *gens* signifies sometimes a *nation*, and sometimes a *family*, and *gens* is *Romanick* or *bastard Roman*, and derived from *gens*, yet like many other *Romanick* words it acquired a new import, and according to that denotes *men* or *persons*. See *Mad. Bar. Angl.* 167. and *Hist. Excheq.* in Pref. p. 13.

[Note 7.]

[66. b.]

(1) This express saving of the faith due to the king was formerly of consequence, being calculated to prevent that entire dependance of the tenant on his immediate lord, the idea of which in times when the feudal

[Note 8.]

dal institutions were in their full vigour, operated very strongly, and tended to depress the authority of the sovereign. See a sensible note on this subject in Litt. par Houard, v. 1. p. 114. and 121. In another place lord Coke cites an instance of an information on the part of the crown against a bishop, for receiving homage from his tenants without any saving of the faith due to the king; but it doth not appear by the extract which lord Coke gives of the record, how this contempt of the royal authority was punished. See ante 65. a.

[Note 9.]

(2) Vid. F. N. B. 257. *Husband alone doeth fealty before the having of issue. Nota, before issue the avowry for homage shall be on the husband and wife, and not only on the wife.* 29 E. 3. 15. *But after issue the avowry for homage shall be on the husband. But till the lord have notice of the having issue, he may avow upon both.* 7 E. 4. 27. *The husband only shall do the homage, quia si dominus adiret prælium, vir consecutus esset eum, non mulier.* 13 E. 1. *Avowry* 234. Hal. MSS.

[67. a.]

[Note 10.]

(1) Lord Coke in another place, where he explains for what purposes a parson hath a fee, and for what an estate for life only, says, that he may receive homage, and cites Bro. Abr. temps E. 1. *Encumbent* 19. But the book referred to agrees with the doctrine here.

[Note 11.]

(2) This seems to be the same as is now called 17 E. 2. st. 2. and is printed in our statute books by the title of *Modus faciendi homagium ad fidelitatem*. But Mr. Madox with reason observes, that it is not a statute, but only a precedent of the form of doing homage. *Mad. Bar. Angl.* 272. A like remark is made by Mr. Barrington. See *Observat. on Ant. Stat.* 2d ed. p. 159.

[67. b.]

[Note 12.]

(1) See post. 100. b.—The statute of 12 Cha. 2. c. 24. which was made to free the subject from the burthen of *knight's service*, and the oppressive consequences of tenures *in capite*, amongst other provisions, wholly discharges all tenures from the incident of homage; not because homage itself was any grievance, but because, though not *wholly* yet it was more *properly* an incident to knight's service, which the statute abolishes. But, whilst homage continued, it was far from being a mere ceremony, for the performance of it, where it was due, materially concerned both lord and tenant in point of *interest* and *advantage*. To the lord it was of consequence, because, till he had received homage from the heir, he was not intitled to the wardship of him and of his land; unless the lord had the seigniorship for life or years only, in which case he could not take homage, and therefore was allowed wardship without. *Dominus* (as Magna Charta expresses it) *non habeat custodiam ejus, nec terra sua, antequam homagium ceperit*; which words, it is said, import, not that the lord could not have the wardship of the heir unless he had actually received homage from the ancestor, but only that he could not have it till it was received from the heir. See 9 H. 3. cap. 3. and 2 Inst. 10. To the tenant the homage was scarce of less importance; for anciently *every* kind of homage when received, but not before, bound the lord to acquittal or warranty, that is, both to keep the tenant free from distress, entry or other molestation for services due to the lords paramount, and to defend his title to the land against all others; though in subsequent times this implication of acquittal and warranty became peculiar to homage *auncestrel*. See post. fol. 100. a. 101. a. 2 Inst. 11. Such being the effect of homage, it was necessary to provide the

the means of compelling the tenant to *do* and the lord to *receive* it; and accordingly our law gave the remedy by *distress* for the *former* purpose, and the writ *de capiendo homagio* for the *latter*. Post. 105. a. 2 Inst. 11. However, when it was settled, that *implied* acquittal and warranty were only incident to homage *ancestral*, the writ *de capiendo homagio* fell into disuse; for it did not lie in the case of other homage, the reason of the law, which gave it to the tenant that he might entitle himself to acquittal and warranty, having ceased with respect to *that*, and homage *ancestral* being very rare, if not entirely worn out, in the time of lord Coke. See 2 Inst. 11.—See further on the effect of homage in Littlet. par Houard, v. 1. p. 519. Mad. Baron. Angl. 269. and Sulliv. Lect. 128. particularly the latter book. See also as to homage in general, Spelm. Gloss. voc. *Hominium*, and Du Fresn. Gloss. voc. *Hominium et Vassalaticum*, and post. 68. b.

(2) Tenant at will should be added to the exception. See post. 93. [Note 13.] Also according to 5 H. 5. 12. and 10 H. 6. 13. tenant for years is not compellable to do fealty; but Littleton, Sect. 132. is expressly with lord Coke. See too the other authorities cited in the margin, and an observation on the 10 H. 6. 13. in Kitch. on Courts, ed. 1592. fol. 132. a.

[68. a.]

(1) In some countries on the continent of Europe homage and fealty are blended together so as to form *one* engagement, being so *intire* that one cannot be without the other; and therefore foreign jurists frequently consider them as synonymous. But lord Coke, notwithstanding his saying that fealty is a *part* of homage, apparently doth not mean to confound them; for in our law, whilst *both* continued, they were in some respect distinct; and though fealty was an incident to homage and ought always to have accompanied it, yet fealty, as lord Coke himself tells us, might be by itself, being sometimes done where homage was not due and would have been improper; and in the two next sections Littleton strongly marks the difference between the two. In short, by our law homage was inseparable from fealty, but fealty was not so from homage. See ante 67. b. post. 150. b. 151. a. and Wright's Ten. 55. note (o) and Du Fresn. Gloss. voc. *Hominium et Fidelitas*. [Note 14.]

(2) This is not strictly accurate; for the words *So help me God and the saints*, which constitute the oath, and are therefore of the essence of fealty, were not comprehended in the form of homage, nor were the words *I will lawfully do to you the customs and services which I ought to do to you at the terms assigned*. Another difference between the two in point of expression was, that the person doing fealty did not say, *I become your man*, words so significant of the nature of the engagement by homage. Also in fealty there is not any exception of faith to the king or other lords, which seeming to be intended as a qualification of the peculiar words of homage, *I become your man*, might perhaps, on that account, be thought unnecessary in fealty. [Note 15.]

(3) See ante 65. a. and note 1. in 66. b. and post. n. 1. in 68. b.—In note 1. of 66. b. it is observed, that it doth not appear by the extract from the record of the bishop of Exeter's case, what punishment was inflicted on the bishop for receiving homage without the exception of faith to the king. But this was a mistake, for the extract mentions the suit to have been for 10,000*l.* and so Dr. Sullivan states it to have been; though in his book no authority is vouched. See Sulliv. Lect. 129. It is observable, that there is a want of reference to authorities through the whole [Note 16.]

whole of the same ingenious book ; a deficiency very much to be lamented, as it renders that work, which is particularly valuable for the copiousness of the author's historical deductions in respect to fiefs, much less useful than it would otherwise be.

[Note 17.] (5) *Vid. fealty done by attorney.* Patricius de Graham miles regis Scotiæ sacramentum fidelitatis fecit regi Angliæ in nomine ipsius regis Scotiæ pro omnibus terris de Penreth Tindal et Sourby. Parl. E. 1. 137. Hal. MSS.—This amongst us is a singular instance of fealty by attorney, and certainly by our law was an irregularity ; for, even in Bracton's time, homage could not be done by attorney, and much less could an oath be taken in that way. See *supra*. However, in some countries they are not so strict, particularly in France, where both homage and fealty may be done by proxy, if the lord gives his consent, and by the custom of some of the French provinces without. See tit. *Foy et Homage*, in Denis. Nouvel. Decis.

[68. b.]

[Note 18.] (1) The form of the *old* oath of allegiance may be seen in the books cited in the margin ; but it has been changed by several statutes made since the Revolution, and these indulge Quakers with signing a declaration of fidelity, instead of taking the oath. See Burn's justice tit. *Oaths*, and Com. Dig. tit. *Allegiance*. In lord Hale's History of the Pleas of the Crown, there is a very learned dissertation on the old oath of allegiance, in which his lordship explains how it differs from the oath of fealty to the king by reason of tenure. He also discourses largely on the subject of homage, and points out the several distinctions between *homagium simplex*, *homagium ligum*, and *homagium mixtum*. See 1 Hal. Hist. P. C. 61. to 75. This curious part of lord Hale's works did not occur till it was too late to give the benefit of it to the notes in the Chapter of Homage.

[Note 19.] (4) Mr. Lambard, who published the first edition of the Anglo-Saxon Laws, informs his reader, that those called Edward the Confessor's, were printed from two manuscripts, and that one of them was very ancient, but the other not so old ; and it appears that this strange tale, about king Arthur's consolidating the whole island of Britain into one kingdom, was not in the more ancient manuscript. See Lamb. Archaionom. 124. a. A learned writer on British antiquities, who appears to have taken great pains to point out the real transactions of Arthur, though a warm advocate for great part of his history, doth not profess to vouch for this tradition concerning him. See Whitak. Manchest. 4to ed. v. 1. p. 31.

[Note 20.] (5) The law with respect to fealty continues the same as when lord Coke wrote ; for it is not varied as I apprehend by the 12 Ch. c. 24. or any other statute made since his time. But it is no longer the practice to exact the performance of fealty. In the case of copyholders, it is become a thing of course on admitting them to enter a respite of fealty ; but with respect to such as hold by other tenures, it is never thought of. However, it may not be amiss to remember, that the title to fealty still remains ; that it is due from all tenants except tenants by frankalmoigne and such as hold at will or by sufferance, and if required, must be *iterated* on *every* change of the lord, it differing in this respect from homage, which, except in special cases, is only due *once* ; that the receiving of it is at least attended with the advantage of preserving the memory of tenures, which, though perhaps sufficiently done in the case

of

of *copyholds* by the admittances and by the payment of fines and quit-rents and continual render of other services, may be very necessary in cases where fealty is the only service due; and lastly, that the law for compelling the performance of fealty has provided the remedy by distress, which is an inseparable incident to all services due by *tenure*, and in the case of fealty cannot, as it is said, be *excessive*. See ante 68. a. and post. 103. b. 104. a. b. 152. b. and Kitch. ed. 1592. fo. 70. b. and 131 b. 2 Inst. 107. and 4 Co. 8. b.—See further as to fealty, Sulliv. Lect. 68. where the oath of fealty is learnedly commented upon, and the words *fideltas ad sacramentum* in the Gloss. by Spelman and Du Fresne.

(7) In a former place, a doubt is expressed as to the book by Ockam [Note 21.] to which lord Coke so frequently refers. See ante 58. note 2. But on looking into the Dialogue of the Exchequer I find the passage here attributed to Ockam *verbatim* in the chapter *quid sic scutagium*, which lord Coke himself cites a little above in this page; from which it seems very plain, that by Ockam's book lord Coke means that Dialogue. Mr. Madox, who first published the Dialogue of the Exchequer, thinks that it was written or finished soon after the 24th year of Hen. 2. and that Richard, bishop of London, the son of Nigell, who was bishop of Ely and treasurer to Hen. 1. was the author; and this opinion he supports with his usual learning and accuracy. See Dissertat. Epist. ad fin. Mad. Hist. Exch. What was lord Coke's reason for attributing this Dialogue to Ockam, it is not easy to guess.—Note, that there seems to be great confusion in most books, when the *Black Book*, the *Red Book*, and the *Dialogue of the Exchequer* are mentioned; and this proceeds from the want of a settled distinction between the *three*. Even bishop Nicholson, to whose labours all who study either our history or the antiquities of our laws, are so greatly indebted, expresses himself with inaccuracy on the subject of these three books. He writes as if he took the *Black Book* and the *Dialogue* to be the same; for writing of the former he says, *Mr. Madox, who has given us a correct edition of this treatise, is of opinion that Richard Nigelli filius, &c. was the author*. Nichols. Engl. Histor. Libr. 2d ed. p. 215. But this is a misconception of Mr. Madox's words, the sum of his account being, that the *Dialogue* is both in the *Red* and *Black Book*, but is only a part of each, and that though Alexander de Swereford was *compiler* of the *Red Book*, not he, but Richard, son of Nigell, was author of the *Dialogue*. As to the name of the compiler of the *Black Book*, Mr. Madox is wholly silent. Another thing proper to mention is, that it seems uncertain whether the *Black* and *Red Book* are not, in point of contents, the same. Mr. Hearne, who first published a copy of the *Black Book*, thinks that they partly differ and partly agree in their contents, but he doth not write quite positively, or pretend to say, that he had seen the two originals in the Exchequer. Hearn. Lib. Nig. ed. 1771. Præf. 17. As to Mr. Madox, he is silent on the subject.

[69. a.]

(2) T. 21 E. 1. Rot. 26. Ebor. coram rege. *Eight acres make an oxgang in the fields of Doncaster. Hic fol. 5. a. Vid. Seld. Tit. Hon. pars 2. c. 5. s. 4. In Cranfield 48 acres make a yard-land, and 4 yard-lands make a hide; so that oxgang yard-land and hide or plow-land are altogether uncertain according to the diversity of places.* Hal. MSS.—See further infra and also ante 5. a. and note 11. there. In fol. 5. lord Hale gives the following note on the uncertainty of the word *oxgang*.—Breve de unâ bovâtâ marisci is ill, 13 E. 3. Briefe 241. Hal. MSS.—See infra a like case as to the uncertainty of *virgata*. [Note 22.]

(7) Nota

[Note 23.] (7) Nota quoad preceptum de militibus faciendis variatim se habet census communis militaris. Omnes laici qui tenent integrum feodum militis fiant milites. 1 pars Claus. 9 H. 3. m. 24. dors. Claus. 16 H. 3. m. 4 dorso. Postea fiant milites qui habent 15l. per annum vel feodum militis. Rotulo respect. militiæ 40 H. 3. tempore E. 1. Qui habent viginti librat. fiant milites. Rot. hundredi 3 E. 1. Et sic continuavit usque 2 E. 2. et postea. Sed demum qui habent 40. librat. terræ fiant milites. Claus. 6 E. 2. m. 27. Et sic continuavit usque 17. regis Caroli. Vid. Rot. Parl. 18 H. 6. n. 43. 28 H. 6. n. 12. and Vid. Claus. 6 E. 2. m. 27. 19 E. 2. m. 4. 9 E. 3. m. 17. -Hal. MSS.—Before and in the time of Charles the First it was apprehended, that the king might lawfully compel all men, who were of full age, and seised of lands to the value of 40l. a year, either to take upon them the order of knighthood, or to pay fines for being excused. An attempt to exercise this power, which lord Coke himself allows to have been a prerogative of the crown, was one of the many expedients used by that unfortunate prince to raise a revenue without the aid of parliament; and it terminated accordingly, for it was the occasion of a statute, which provided against the *future* exercise of any such power. See 16 Cha. 1. c. 20. 2 Inst. 593. Blackst. Comment. ed. 5. v. 1. p. 404. and v. 2. p. 61. and Barringt. Ant. Stat. 2d ed. 144.

[69. b.]

[Note 24.] (1) 4 E. 2. Avowry 200. Viginti virgatæ terræ faciunt unum feodum militis. M. 13 & 14 E. 1. Rot. 17. Glouc. Quadraginta carucat. terræ faciunt unum feodum militis. 8 E. 3. 49. Duodecim carucatæ et duæ bovata terræ faciunt unum feodum militis. Vid. apud Matth. Paris in Vitis 23. Abbatum fol. 131. Abbas Sancti Albani debet rigi sex milites. Et ibi recensentur numeri hidarum ad quodlibet feodum militis. Alibi quinque, alibi sex, alibi septem hidæ faciunt feodum militis. Hal. MSS.—See further as to the contents of a knight's fee, post. 76. a. and 83. b. and 2 Inst. 596.

[Note 25.] (2) Vid. Seld. Tit. Hon. parte 2. c. 5. s. 26. ubi autoritas authoris libri modi tenendi parl. et ista opinio de certâ proportionem annui valoris feodi militaris, baroniæ, et comitatûs, optimè refutantur. Vid. infra 83. b. Hal. MSS.—The *modus tenendi parliamentum*, according to the title as given in lord Coke's preface to his ninth book of Reports, imports to be an account of the manner of holding the English parliaments in the time of Edward the Confessor, and that it was approved of by the first William, and conformed to in his time and in that of his successors. To this *modus* lord Coke frequently refers as to a most undoubtedly genuine piece of antiquity; and in his fourth Institute he tells us, that Henry the second, after having conquered Ireland, sent a transcript of this *modus* into that country as a model for parliaments there; and that in the reign of Henry 4. this transcript, which is known by the name of the *Irish modus*, fell into the hands of sir Christopher Preston, and was then exemplified by *inspeximus* under the great seal of Ireland. But notwithstanding all this, the reasons of Mr. Selden and Mr. Prynne, of whom the former supposes it to have been an imposture of the time of Edward the third, and the latter makes it an invention as late as the 31 H. 6. seem to furnish insurmountable objections against the authority of the *English modus*; and so convinced of their force was an able advocate for the existence of the commons as a constituent part of parliament before the 49 Henry 3. that he candidly gives up its antiquity, though if it could have been defended, it would have decided the controversy in his favour, for it expressly mentions citizens and burgesses as well

well as knights of the shire. See 4 Inst. 12. Seld. Tit. Hon. 2d ed. part 2 c. 5. s. 26. Pryn. on 4 Inst. 1. and Tyr. Biblioth. Polit. 270. 406. However Dr. Dopping, bishop of Meath, who in 1692 first published the *Irish modus*, feebly endeavours to defend the antiquity of the supposed transcript in the time of Hen. 2. and two other writers, deservedly of great credit, seem inclined the same way. See Moly. Case of Ireland; and Harr. edit. of Ware's Hist. and Antiq. of Irel. 84. Mr. Selden mentions, that in his time there were many copies of the *English modus*; but I am not aware that any one is in print.—As to lord Coke's account of the computation of reliefs by the yearly revenue, which lord Hale observes to have been also refuted by Selden, see post. 83. b.

(3) Vid. sæpissimè temporibus H. 2. R. 1. Johann. H. 3. 1 E. 2. Scutagium pro exercitu regis in Ireland, Wales, Poictou, Bretagne, Normandy, Gascony, &c. though territories of the king. Quoad escuage nota. Though in some cases the subject was chargeable for defence of the realm, yet clearly for foreign invasion none were chargeable but by tenure, and therefore service of chivalry was called forinsecum servitium. Rot. parl. 20 E. 3. n. 13. 21 E. 3. n. 16. 44. 25 E. 3. n. 23. 5 R. 2. n. 67. &c. 1 H. 5. n. 17. 5 H. 5. pars 2. n. 9. The first thing requisite to escuage was the proclamation and summons of service, which prefixed the day and place of rendezvous of the army, and commanded the lords, &c. nominatim, and others by proclamation, quòd ad diem et locum veniant ad regem cum equis et armis et toto servitio regi debito, which is called summonitio servitii vel summonitio exercitus. Claus. 1 E. 2. m. 2. Claus. 3 E. 2. m. 1. Claus. 7 E. 2. m. 14. et sæpissimè alibi. Vide pro scutagiis captis occasione diversarum expeditionum. Tempore H. 2. scutagium bis assessum ante annum quintum, tertium scutagium 7 H. 2. pro exercitu Tholosæ duas marcas, quartum pro eodem exercitu unam marcã, quintum 18 H. 2. pro exercitu Hiberniæ 20s. sextum pro exercitu Galloway 20s. Tempore Richardi primi, primum scutagium pro exercitu Walliæ anno secundo ad 10s. secundum anno sexto ad 20s. pro quodlibet feodo pro redemptione regis, tertium 8 R. 1. pro exercitu Normanniæ ad 20s. Tempore Johannis anno primo scutagium assessum ad duas marcas, secundum anno tertio pro exercitu Normanniæ ad duas marcas, tertium consimile pro consimili, quartum consimile pro consimili, quintum consimile pro consimili, sextum consimile pro consimili, septimum consimile, octavum anno duodecimo regis pro Hiberniâ duas marcas, nonum anno decimo tertio pro exercitu Walliæ ad duas marcas, decimum pro exercitu Scotiæ, undecimum anno decimo sexto Johannis pro exercitu Bretoniæ ad tres marcas sed non solutum. Nota temporibus Henrici tertii scutagium Ludowici duas marcas anno secundo, Byham 10s. anno quinto, Montgomery duas marcas anno octavo, Bedford duas marcas anno octavo, Kerry duas marcas anno decimo tertio, Bretanny 40s. anno decimo quarto, Pictaviæ 40s. anno decimo quinto, Elam 20s. anno decimo sexto, Gascoigny 40s. anno vicesimo secundo, Guyen 40s. anno vicesimo nono, Walliæ 40s. anno quadragesimo secundo. Hal. MSS.—For a more particular account of the scutages assessed in the several reigns mentioned by lord Hale, see Mad. Hist. Exch. chap. 16. where the whole subject of escuage is fully explained from the records. See also post. 72. a. and b.

[70. b.]

(3) Lord chief justice Hale, in a manuscript treatise on the *Jura Corona*, gives it as his opinion, that the bishops do not hold their possessions *per baroniam*, and that they sit in the house of peers by custom and usage, and not as barons by tenure. But the propriety of this doctrine

trine has been ably controverted by a writer of very great eminence now living. See Warburt. *Alliance between Church and State*, 4th edit. 149.

[71. a.]

[Note 28.]

(1) Vide pro assistâ armorum.—27 H. 2. Quicumque habet feodum unius militis, habeat loriam cassidem clipeum et lanceam. Quicumque liber laicus habuerit in catallo vel reddito ad valentiam sexdecim marcarum, habeat loriam lanceam clipeum et cassidem. Quicumque liber laicus habuerit in catallo ad valentiam decem marcarum, habeat haubergellum et capelet ferri et lanceam. Omnes burgenses, et tota communia liberorum hominum, habeant wanbais, et capelet ferri, et lanceam. Et si quis hæc arma habens obierit, arma sua remaneant hæredi; et fiat inquisitio de his, qui has habent facultates, et faciant eos jurare ad ista arma habenda, et ad ea tenenda in servitio regis. Hoveden 614. *This assise continued till the time of king John, and then was a little altered. And this assise made in the time of king John was repeated and again commanded, and men were compelled to be sworn to it.* Claus. 14 H. 3. m. 5. dorso. *Commissioners were assigned to cause men to be sworn and assised to arms, as they were sworn in the time of king John, in this form.* Quisquis habet feodum militis integrum, habeat loriam; qui habet dimidium feodi militis, habeat haubergellum; qui habet catalla ad valentiam quindecim marcarum, habeat loriam; qui habet catalla ad valentiam decem marcarum, habeat haubergellum; qui habet catalla ad valentiam decem librarum, habeat capellum ferreum perpunctum et lanceam; qui habet ad valentiam viginti solidorum, habet arcum et sagittas. In quâlibet villâ sit unus constabularius, in quolibet burgo plures, ad quorum summonitionem omnes ad arma jurati in wardâ suâ conveniant ad imbreiandum distinctè nomina et arma singulorum, ita quod singuli habeant prompta sua arma ad defensionem regni. *This assise, as it seems, continued till the 26 of Hen. 3. and then another assise was ordained. In Claus. 26 Hen. 3. pars 2. m. 10. many articles are ordained, which differ little from the statute of* [71. a.] *Winton. Amongst others there is this article.* Singuli vicecomites, cum duobus militibus ad hoc assignatis, faciant cives, burgenses, liberos homines, villanos, et alios à quindecim ad sexaginta annos, assideri et jurari ad arma secundum quantitatem terrarum et catallorum, scilicet, ad quindecim librata terræ, unam loriam unum capellum ferreum gladium cultellum et equum; ad decem librata terræ, unum haubergellum capellum ferreum gladium lanceam et cultellum; ad quinque librata terræ, unum perpunctum capellum ferreum gladium lanceam et cultellum; ad quadraginta solidos et amplius ad quinque librata, gladium arcus sagittas et cultellum; qui minus habet quàm quadraginta solidos, falcem gisarmas et cultellos et alia minuta arma; ad catalla sexaginta marcarum, unam loriam capellum gladium et equum; ad catalla quadraginta marcarum, unum capellum haubergellum gladium et cultellum; ad catalla decem marcarum, gladium cultellum arcum et sagittas; ad catalla quadraginta solidorum et infra decem marcas, falces gisarmas et alia minuta arma. Omnes item alii, qui possunt habere, arcus et sagittas habeant. In singulis civitatibus et burgis jurati ad arma sint intendentes majori, vel ballivis ubi non sunt majores. In singulis villis aliis constituentur unus vel duo constabularii secundum numerum inhabitantium. In singulis verò hundredis unus capitalis constabularius, ad cuius mandatum omnes jurati ad arma de hundredo conveniant, et ei sint intendentes ad faciendum ea quæ spectant ad conservationem pacis. Omnes verò constabularii capitanei intendentes sint vicecomiti et duobus militibus prædictis, ad veniendum ad mandatum eorum, et faciendum per præcepta eorum

eorum ea quæ spectant ad conservationem pacis nostræ, &c. *And so two knights were assigned in every county to perform the premises. The next assise of arms was in the 13 of Edw. 1. by the statute of Winton, which commands, that every one shall be sworn to armour according to the value of their lands and goods, viz. from lands of fifteen pounds and chattels of 40 marks, ad haubergellum capellum ferreum gladium cultellum et equum; from land of 10l. and goods of 20 marks, ad haubergellum capellum ferreum gladium et cultellum; from land of 5l. ad gladium cultellum et capellum ferreum; from 40s. to land of 5l. ad gladium cultellum arcum et sagittas; et qui minus, juratur ad gissarmas cultellos et alia minuta arma; et qui minus habuerit quàm viginti marcas bonorum, habeat gladios cultellos et alia minuta arma; et omnes alii arcum et sagittas; et in quolibet hundredo duo constabularii eligantur ad faciendum visum armorum. This assise was observed in the times of Edward the 1st and Edward the 2d. In 9 E. 2. the statute of Winton was put into execution, sub pœnâ forisfacturæ omnium bonorum et catallorum pro primâ vice, et secundâ vice sub pœnâ captio- nis terrarum in manus regis et imprisonment corporum; and it was also commanded, quòd citra sestum, &c. in formâ prædictâ armati parati sint ad proficiscendum cum rege versus Scotos cum victualibus necessa- riis pro quadraginta diebus, suorum et aliorum de partibus suis sumpti- bus provideadis. Vid. Claus. 9 E. 2. m. 25. dorso. This assise received some change about the 8 of E. 3. and in Claus. 8 E. 3. m. 3. dorso, there is the following precept. Proclamationem facias, quòd omnes de bal- livâ tuâ, qui habent quadraginta librata terræ vel redditus, licet milites non sunt, equitaturâ et armis competentibus juxta statum suum, viz. unusquisque eorum pro se et altero ad minus; et omnes, qui habent viginti librata terræ, cum equitaturâ et armis pro seipsis ad minus, fa- ciant sibi provideri; et illi, qui minus habent, assideantur juxta statutum Wintoniz. But in progress of time the statute of Winton fell into disuse, and commissions issued to array men juxta status sui exigen- tiam et facultates. Vid. Claus. 43 E. 3. m. 24. et sæpissimè. This com- mission was afterwards regulated and confirmed in parliament. Rot. Parl. 5 H. 4. n. 24. And now the statute of Winton is repealed by the 21 Jam. chap. 28. But this doth not relate to military service, and is only a certain military provision for the peace of the kingdom, and concerned burghesses and sockmen as well as tenants by knight's ser- vice. And according to this difference, the commission of array ex- tended both to tenants by knight's service, and others; but the writ which is called summonitio servitii respected tenants by knight's ser- vice only. And as to this latter, 1. It is to be observed, that the service was estimated by the number of fees; and so he, who held per baroni- am vel comitatum, was attendant only according to the number of knight's fees by which the barony or earldom was held, as clearly ap- pears in Selden's Titles of Honour, part 2. cap. 5. sect. 26. where it is mentioned, that the barony de Veteri Ponte was holden by 5 knights' fees, and that Clifford, who had married one of the coheirs, acknow- ledged the service of two knights and an half. 2. On summons of the army on service at a place and day certain, every knight by himself, or his deputy, came before the constable and marshal, and presented the number of his fees and the persons by whom they were to be performed and their names, which were registered before them. 3. He who held by a whole knight's fee ought to perform his service by one knight, or by himself in person, or per duos servientes sive armigeros, who in value are equal to a knight. Seld. ubi supra. So he, who held by the moiety of a knight's fee, might perform all the service either 40 days*

per servientem, or 20 days per seipsum vel militem. And so it was done by the abbot of saint Alban, who held six knights' fees of the king, and performed the service per duos milites galeatos et legi militari decenter armatos et octo armigeros, four of whom were equites cum lineis et ferreis armis muniti, and two were ballistarii; and they were presented to the constable and marshal, and in constabulariis positi, that is, listed in their several companies. And note, that hi milites et servientes were at their own proper expences in going, staying for 40 days, and returning. Note also, that the 40 days are accounted from the day prefixed for the assembling of the army in the destined place, wherever it shall be, whether in the kingdom or out of the kingdom; and the day and place of the assembly of the army were prefixed in the writ de summonitione servitii. Observe, that great fines were frequently imposed on those, who were deficient in doing their service on the summons of the army. Vid. Claus. 27 H. 3. parte 1. m. 12. Thomas de Berclay was fined 60 marks for default of service in transfretando cum rege. Claus. 16 E. 2. m. 36. The barons of the exchequer were commanded to compound with the archbishops, bishops, religious men, and others, for the remission of their service in the next army summoned at Newcastle on the vigil of St. James next ensuing, and to take for a fine forty pounds for every fee, and so pro rata. By Pat. 13 E. 2. it was directed that twenty pounds should be taken for a fine on every fee of a knight who should make default. Vid. Fines 7 E. 2. m. 4, 5. On the summons of service for the army of Scotland, it was proclaimed, that ecclesiastical persons and women should do their service at the day, or come before A. and B. and pay a fine, viz. twenty marks for every fee. So observe, that they were not fines imposed, but voluntary fines. Hal. MSS.—In reading the preceding annotation by lord Hale, it is very requisite to attend to the distinction between the two subjects of it. The *first* part of the annotation, which states the progressive changes in the assise of arms between the 27 of Hen. 2. and the 21 of Jam. 1. and refers to the commissions of array during the same period, is applicable to the *general* military service all the king's subjects are liable to for the internal defence of the realm. The *remainder* relates to the performance of that *particular* military service, which was due by reason of tenure, and might be required on *foreign* expeditions. With respect to the *latter* it may be sufficient to add, that military service by tenure was wholly abolished by the 12 Cha. 2. c. 24. which in *express* terms discharges all estates from services on *voyages royal*, and that long before this statute it had fallen into disuse, as appears from there not being any instance of assessing escuage since the reign of Edward the second. As to the *former*, lord Hale ends his historical deduction about the assise of arms and commissions of array with the 21 of James; but the reader will find the same subject very accurately continued to the present times, together with some particulars relative to the previous period not adverted to by lord Hale, in an admired work, to which we have such frequent occasion to refer. See 1 Blackst. Comment. 5th edit. 411. It is observable, that lord Hale avoids taking the least notice of the great contest between Charles the first and the long parliament about the king's power over the *militia*, which arose in consequence of some commissions of array issued by him, and was the immediate prelude to the civil wars in his reign. Of the arguments used by each party on this occasion, there is a very full account in Rushworth. See 4 Rushw. 655.

(1) But

[71. b.]

(1) But though formerly our kings did *actually* sit in the court of king's bench, and the law still intends that the king is present there, yet the *judicature* belongs to the judges *only*, as lord Coke elsewhere observes. 4 Inst. 73. See further on the subject 3 Blackst. Comm. 5th ed. 41. and Mad. Hist. Excheq. fol. ed. 58. 64. 68. and 553. [Note 29.]

(2) From the whole of lord Coke's observations here and his preface to his eighth book of Reports, it seems to have been his opinion, that the *court of common pleas* was not only a *distinct* court at the time of making the Magna Charta of the 9th of Hen. 3. but also existed as such before the Conquest. But according to Mr. Madox, whose inquiries into the subject were certainly more minute and particular, the origin of the *court of Common Pleas* is of a much later date. He so far agrees with lord Coke, as to admit, that the *Magna Charta* of Henry the 3d rather *confirmed* than *erected* the *bank* or *Common Pleas*, and that such a court was in being several years before the *Magna Charta* of the 17th of king John, though it was then first made *stationary*. But in other respects lord Coke and Mr. Madox differ widely; for the latter thinks, that for some time after the Conquest there was *one* great and supreme judicature called the *curia regis*, which he supposes to have been of *Norman* and not *Anglo-Saxon* original, and to have exercised jurisdiction over *common* as well as *other* pleas; that the *common pleas* and *exchequer* were gradually separated from the *curia regis*, and became jurisdictions wholly distinct from it; and that the separation of the *common pleas* began in the reign of the first Richard, or early in the reign of John, and was completed by Henry the third. See Mad. Hist. Excheq. fol. ed. 63. and the chapter on the division of the king's courts 539. See further 3 Black. Comment. 5th ed. 37. 4 Inst. 99. Lamb. Archeion, ed. 1635. p. 24. to 34. and the books cited in Pryn. on 4 Inst. 52. [Note 30.]

[72. b.]

(1) The Magna Charta of king John provides, that escuage shall not be imposed, except by the consent of parliament; but some respectable writers think that it was an arbitrary payment before. Blackst. Comment. 5th ed. v. 2. p. 74. Wright's Ten. 128. 133. [Note 31.]

(3) Vid. Claus. 26 H. 3. part 2. m. 10. dors. Rex vicecomiti. Præcipimus, quòd de omnibus feodis militum quæ tenentur de tenentibus de nobis in capite, qui brevia nostra non tulerint de habendo scutagio suo, et similiter de feodis militum quæ tenentur de wardis in manu nostrâ, scutagium nostrum colligi facias, ita quòd habeas ad satisfaciendum, &c. Hal. MSS. [Note 32.]

(4) According to Mr. Madox's account, it seems that the lord, though he did not go in person, or send a deputy, was entitled to escuage from his tenants, if he paid or was duly charged with escuage to the king; and perhaps lord Coke did not mean to intimate the contrary. Mad. Hist. Excheq. fol. ed. 469. See however note 5. *infra*. [Note 33.]

(5) It seems that if *A.* held land of the king by 4 knights' fees, and *A.* before the statute of quia emptores had created divers mesnalties and reserved 20 knight's fees, and *A.* had done the king's service, he should have had the escuage of 20 fees. But if *A.* did not do the king's service, the king should have had the escuage of 4 fees, and also of 20 fees, or at least of 16. Vid. Rot. Parl. 8. m. 4. dorso, et lib. Parl. [Note 34.]

14 E. 2. petitiones magnatum inde. Claus. 16 H. 3. m. 17. Rex vicecomiti Cornubiæ præcepit, quod nullum distringat nisi pro tot feodis, quod regi tenetur reddere. Hal. MSS.

[73. a.]

[Note 35.] (2) From this and the next preceding section it seems, that notwithstanding Littleton's expressing himself in other places as if *escuage* was distinct tenure or service, he did not consider it as such. Escuage must be either *certain* or *uncertain*, and Littleton expressly writes, that being the *former* it is *socage*, and being the *latter* it is *knight's service*. This tends to confirm the propriety of the observation by Mr. Madox, who will not allow escuage to be a tenure or service of itself, and insists that, wherever it was payable, like homage and fealty, it was a mere *incident* to tenure. See note 2. of fol. 64. a. However, a late learned judge was not satisfied with considering *escuage* in this limited way, and endeavours to shew, that though in general escuage uncertain was a fine or sum of money payable as a commutation for personal service, yet anciently a payment in money, bearing a certain proportion to the escuage assessed from time to time on tenants by knight's service, and on that account called escuage, was sometimes a service originally reserved, and then escuage was itself the tenure, and so denominated to distinguish it from the genuine and proper tenure by knight's service. See Wright's Ten. 121. to 127. But this distinction, it is allowed, is not hinted at by Littleton; and it is even conjectured, that in his time it might be lost in the *general* notion of *escuage*, to which only Mr. Madox meant to apply his animadversion on Littleton and Coke for considering it as a tenure. See further 2 Blackst. Comm. 5th ed. 75.

[74. a.]

[Note 36.] (1) It is very clear, that escuage was due for service *out of the realm*, which was the reason of its being called *servitium forinsecum*; but I do not find it precisely ascertained by any writer, whether it could be claimed on *all foreign* expeditions, or whether it was confined to expeditions into *particular* countries. When indeed on the creation of the tenure the personal service, in lieu of which escuage became payable, was *expressly* limited to *certain* places, there could be no room for doubt; but the difficulty is to know, what the construction of the law was, when knight's service was reserved *generally*. Littleton mentions only Scotland, other writers add Wales; but in general *both* are named merely as instances. Lord Coke observes as much, and says, that escuage was also due on expeditions into Ireland, Gascony, Poictou, &c. *if the tenure was to go into those countries*: but there is a shortness in this manner of expression, which leaves an obscurity; for the words do not explain what the rule of law was, when no place was named. See ante fol. 69. a. One ancient author *absolutely* restrains escuage to Scotland and Wales, and in direct terms excludes *all other* territories. Old Ten. tit. *Escuage*. But of this restriction it is sufficient to say, that the records concerning escuage, which mention Ireland, Normandy, Poictou, Bretagne, and Thoulouse, as well as Scotland and Wales, are full evidence to the contrary. See the records cited by lord Hale in note 3. of fol. 69. b. and also Seld. Notes on Hengham, 12mo. ed. 114.

[74. b.]

[Note 37.] (1) The office of high constable became extinct in the reign of Henry the eighth by the attainder of Stafford duke of Buckingham, in whom it was hereditary; and since his death there hath not been any permanent high constable, the practice having uniformly been to keep the office vacant, except on particular occasions. In consequence of this it hath frequently

frequently been a subject of great controversy, whether during the vacancy of the office of high constable, the jurisdiction incident to the court of chivalry can be exercised by the earl marshal only. Lord Coke's manner of stating sir Francis Drake's case imports, that an appeal could not be prosecuted against him for want of a high constable; and Dr. Duck, in his excellent treatise on the use and authority of the civil law, says, that the judges, being consulted by Elizabeth, were of that opinion. Duck, lib. 2. cap. 8. pars 3. s. 16. In the reign of Charles the first the lord keeper and judges of the King's Bench were advised with on a like occasion, and held that the earl marshal could not take an appeal without a high constable; and accordingly the king appointed the earl of Lindsey twice to the office; once to try an appeal by lord Rea against Mr. Ramsey for treason committed in Germany; and a second time to try an appeal by the widow of William Wise against William Holmes for the murder of her husband in the island of *Terra Nova* in America. See Rushw. vol. 2. p. 106. 112. and Duck ubi supra. Hitherto only the right of the earl marshal to *criminal* judicature had been denied; but in 1640 the house of commons went further, for they resolved that the *earl marshal can make no court without the constable*. See Rushw. vol. 3. p. 1056. However, notwithstanding this declaration of the law by the house of commons, the court of King's Bench soon after the restoration distinguished between the several branches of jurisdiction belonging to the court of chivalry, and held, that as to matters relative to *arms and honour* the court may be before the earl marshal only, but that as to matters of ordinary justice touching *life and limb* there must be a high constable as well as an earl marshal. 1 Lev. 230. But in a subsequent case before the house of lords, the counsel arguing against the earl marshal insisted *generally*, that by himself he could not hold *any court*; though it doth not appear from the printed report whether the judgment, which was there given against the jurisdiction of the earl marshal, was founded on that proposition, or on the other points of the cause. Such is the state of the authorities against the judicature of the earl marshal without a high constable. See Dr. Oldis's case, Show. Parliam. Cas. 58. On the other hand, many strong arguments, drawn from the practice immediately after the attainder of the last hereditary high constable down to the latter end of the reign of James the first, as well as from the opinions of judges and others of high name, have been urged in its favour. These are well digested in a letter written soon after the revolution by Dr. Plott to lord Somers whilst he was attorney-general, and appear to have been collected by his desire. See Hearn. disc. of Emin. Antiq. 2d edit. vol. 2. p. 250. One authority much relied on by Dr. Plott is an opinion of the lord keeper, the master of the rolls, and a great number of the privy council, in the 20th of James the first, who after a solemn hearing declared, that the earl marshal had all the powers of judicature without the high constable during the vacancy of that office. Upon report of this to the king, he issued his commission under the great seal to Thomas, earl of Arundel, the then earl marshal, which, after reciting that the earl marshal had delayed to proceed in some causes before him on account of doubts of his authority, contains the following strong declaration of his judicial power. *We held it fit, says the king, in a case of so great weight to proceed with extraordinary deliberation, and having now, both by ourself and the whole body of our council, received ample satisfaction by many and clear proofs, that the constable and marshal were joint judges together, and several in the vacancy of either, we do hereby*

authorise

authorisc, will and command you our earl marshal, that from henceforth you proceed, in all causes whatsoever, whereof the court of constable ought properly to take cognizance, as judicially and definitively as any constable or marshal of this realm, either jointly or severally, heretofore have done. A more explicit recognition of the earl marshal's jurisdiction could not be penned, nor one more full and unreserved; for it declares his judicial power to extend to all causes whatsoever of which the court of the constable and marshal ought properly to take cognizance, without one exception. How it happened, that so soon after this solemn hearing and declaration concerning the earl marshal, the lord keeper and judges of the king's bench should advise the king that lord Rea's appeal could not be taken without a high constable, seems very extraordinary and unaccountable. To attribute their advice to that jealousy of jurisdictions conforming so much to the civil law, which our judges of the courts of common law sometimes may have indulged to an illiberal excess, would be unjust; because we are not now possessed of the reasons assigned for the opinion thus given to the crown; and on the other hand, the same want of information greatly lessens its weight and authority. Having thus exhibited a view of the controversy about the earl marshal's judicial powers, it may be proper to apprise the reader, that there is not the least intention of advancing any opinion in respect to it, further than by observing upon the distinction between the cases of *honour* and *arms*, and those of *life* and *limb*, so far as it is founded on the 1 Hen. 4. c. 14. Though that statute provides, that *all appeals to be made of things done out of the realm shall be tried and determined before the constable and marshal*, yet it is apparent from the other parts of the same statute, that it was made, not to declare or regulate by whom the judicature of the court of chivalry should be exercised, but *when* appeals should be brought *there* and *when* in the courts of common law, and further to put an end to the bringing appeals in parliament; and therefore it seems wholly unwarrantable to lay any stress on the statute's incidentally mentioning constable as well as marshal, who, as all agree, are *joint judges* when *both* offices are full. As to the mode of trial in the case of appeals in the court of chivalry, some have apprehended, that it is ever by duel, if the party appealed elects that mode, and the appellant is not privileged from the duel by age, sex or profession. But this, though it *may be* very true in respect to appeals in the courts of common law, is a mistaken notion as to appeals in the court military; for *there* duel is only the *ultimate* trial; and never resorted to unless there is a want of sufficient testimony to prove the offence, and even then it is said to be in the discretion of the court to grant or refuse the duel. See Rushw. v. 2. p. 113. In lord Rea's appeal against Ramsey in the 7 Cha. 1. being the last in which the *duel* was directed, the day of combat was prorogued; and in the mean time the king signifying his desire of not having the affair decided by duel, the court met and committed both the appellant and appellee till they should give security to the satisfaction of the king not to attempt any thing against each other, and immediately afterwards was dissolved by a revocation of the commission which had been granted for trial of the appeal. Rushw. v. 2. p. 127.—Before we leave this subject, it may not be amiss to hint the necessity of having the *criminal* jurisdiction of the court of chivalry, which is really of importance, duly regulated and reformed. From the preceding account it appears to be doubtful who can lawfully act as the judges; and besides, the want of a trial by jury may be deemed a reasonable objection to the form of proceeding; and in consequence of these two circumstances the *criminal* jurisdiction of the court of chivalry hath long been in a dormant state, and is likely

likely to continue in it, unless the legislature applies a remedy. This it would be easy to effect; for nothing more would be necessary, than to ascertain who should constitute the court in cases of appeals, to abolish the present mode of trial, and to substitute in its room the trial by jury on a plan like that, which has already been adopted by statute in respect to the *criminal* jurisdiction [of the admiralty court. However, it must not be taken for granted, that this court is the *only* jurisdiction for the trial of crimes committed in *foreign* countries, or that without resorting to it, there would be an absolute defect of justice in the case of *all* such crimes. For, 1. the 33 of Hen. 8. c. 23. provides, that treason, misprision of treason and murder, in whatever place committed, whether *within the king's dominions or without*, shall be triable before commissioners of *oyer and terminer*, to be appointed for that purpose; and this statute, we are told, stands unrepealed as to murder, and hath accordingly been sometimes put into use. 2. As to treasons and misprisions of treason committed out of the realm, they by the 35 H. 8. c. 2. are triable either before the king's bench or commissioners. See 1 Hal. Hist. Pl. C. 283. It is also provided by the 26 of H. 8. c. 13. that the crimes made treason under that statute, or being so before, if committed *out of the realm*, shall be indictable before commissioners and tried in the king's bench; but it is doubtful whether this statute is now in force. See farther as to the high constable and earl marshal, post. 106. a. and 391. b.—Note, as to *escuage*, it is *expressly* taken away by the 12 Cha. 2. c. 24. and had fallen into disuse long before; for there is no instance of parliament's assessing it since the reign of Ed. 2. See ante 72. b.

[76. a.]

(1) The aids *pur faire fitz chevalier et pur file marier* are *expressly* abolished by the 12 Cha. 2. c. 24.—They were incident to socage as well as knight's service. 2 Inst. 233. See further as to *aids*, Wright's Ten. 40. 145. and 2 Blackst. Comment. 63.

[Note 38.]

[77. a.]

(1) Rot. Parl. 11 H. 6. n. 57. Simile pro ducatu Cornub. Rot. Parl. 18 H. 6. n. 42. Ryley's *escheat* m. 4 and 5 E. 1. Rot. 20. Nota, *as to the ancient honor of Peverel, the tenure of that is in capite, but some new additions to the honor are not so.* P. 7 Jac. Ley 7. *Clark's case.* Vid. tamen P. 17 Jac. Churche's case, Ley 52. *for there it was found, that tenure of the honor of Peverel is tenure in capite, as to the manor of Woodham Mortimer.* Hal. MSS.—By a tenure *in capite* in this note, lord Hale means a tenure of the king *ut de coronâ* in contradistinction to a tenure of him *ut de honore*. In the time of lord Coke it was the fashion to denominate the *former* a tenure *ut de personâ regis*; and as to the *latter*, it was not allowed to be a tenure *in capite*. But Mr. Madox very justly animadverts on lord Coke and his cotemporaries, as well for calling any tenure of the king a tenure *ut de personâ* by way of distinction, as for not allowing a tenure *ut de honore* to be a tenure *in capite*. He observes, that *all* tenures of the king are *of his person*, and that in order to distinguish accurately between lands *originally* holden *immediately* of the king and those holden *immediately* of him in consequence of the escheat of an honor or barony, we should call the tenure of those of the *first* description a tenure *ut de coronâ*, and that of the *second* a tenure *ut de honore*. Further he insists, that tenure *in capite* of the king is holding *immediately* of him without the interposition of any *mesne* lord, and consequently that a tenure of the king *ut de honore* is equally *in capite* with a tenure *ut de coronâ*, though in other respects there certainly are very important differences between the

[Note 39.]

the two, such as render it highly necessary to preserve a distinction. See *Mad. Baron. Angl.* 163.

[78. a.]

[Note 40.] (2) *Grandfather enfeoffs the father and his son in fee, and dies. The father being of full age shall sue livery of the third part of a moiety. Trin. 8 Jac. Ley 21. Crawley's case. But if feoffment be to daughter and her husband, they ought to sue livery of the whole, for both are children within the statute. M. 9 Jac. Ley 41. Bacon's case, et ibid. 43. Cleer's case. Hal. MSS.*

Note 41.] (3) *Lands are given to husband and wife and the heirs of the husband. Husband and wife join in a fine come ceo to the use of the husband and wife, and to the heirs of the body of the husband, remainder over. The husband dies. The wife shall not sue livery, because it was originally a purchase to the husband and wife, and she had not a greater estate afterwards. T. 15 Jac. Ley 51. Menfield's case. Hal. MSS.*

[79. a.]

[Note 42.] (2) Lord Coke's manner of expressing himself on the operation of the *preamble* in the construction of statutes is very observable. Instead of saying *generally*, that the preamble should controul the *enacting* clauses, or of limiting precisely how far it shall have that effect, which would have been attempting to make a line where one cannot be drawn, he cautiously says, that it is a *good mean* to find out the intention. The authorities referred to in 4 *New Abr.* 645. will serve to explain by instances, what sort of influence the preamble ought to have in expounding statutes. See also *Hatt. on Stat.* 53.

[Note 43.] (3) It seems more proper to consider *twelve* as the age of discretion for *women*; for lord Coke himself a few lines lower states *that* to be *their* time for agreeing or disagreeing to a marriage. See the note as to the age at which infants may make a will of personalty, post. 89. b.

[79. b.]

[Note 44.] (1) But now the agreement after *twelve* or *fourteen* would not be binding on the infant, if the marriage was without *banns* or by *licence* and *without consent of parent or guardian*, and the infant was not a widow or widower; for the 26 *Geo. 2. c. 33.* makes all such marriages void. In reading this statute, it should be attended to, that the clause for annulling the marriages of infants without the consent of parents or guardians is restricted to marriages by *licence*; so that the marriage of an infant without such consent may still be good, where *banns* are regularly published, unless a dissent is openly declared by the parent or guardian in the church or chapel at the time of publishing, in which latter case the statute makes the *banns* void. As to marriages without either *licence* or *banns*, which are usually termed *clandestine*, they are universally annulled by the statute. Note that Scotland is excepted out of the 26 *Geo. 2. c. 33.* In consequence of this, so much of the act as was calculated to defeat the marriages of minors without the consent of parents or guardians, hath been frequently evaded by going into Scotland to be married there and returning into England immediately afterwards. Indeed the validity of such marriages was once questioned; and though in *general* marriages are governed by the law of the country in which they are celebrated, yet it was doubted whether the *lex loci* ought to be applied to a case accompanied with circumstances so strongly marking the intent to evade the law of England. See *Burr.* 4 part. vol.

2. page 1079. But this point seems now fully settled in favour of the Scotch marriages by a late decision of the court of *arches*, which was afterwards confirmed in the court of *delegates*. However it may not be amiss to recollect, that there have been persons of authority who will not allow such cases of apparent evasion of the law of any country to fall within the principle on which the *lex loci* is indulged. There is a strong passage to this effect in the works of a Dutch author, whose writings on the *civil* law are much esteemed. *Ego ita existimo*, says Huber, after putting a case in which the law of one Dutch province against the marriage of minors without the consent of guardians was evaded by running away into another province having a different law, *hanc rem manifestè pertinere ad eversionem juris nostri, ac ideo non magistratus heic obligatos è jure gentium ejusmodi nuptias agnoscere et ratas habere. Multòque magis statuendum est, eos contra jus gentium facere videri, qui civibus alieni imperii suà facilitate, jus patriis legibus contrarium, scientes volentes impertiuntur*. See the digression *de conflictu legum diversarum in diversis imperiis* in Huber. *Prælect. Jur. Rom.* page 538. In this digression the reader will find a very informing dissertation on the *lex loci*, and the principles by which the application of it ought to be regulated, expressed clearly and illustrated by a variety of cases, more particularly such as relate to testaments, marriages, and contracts in general. See also the printed Argument against Slavery in the case of *Sommersett the Negro*, which was determined in B. R. Trin. 11 Geo. 3. p. 67. to 75. It is there attempted to prove by principles of reason as well as by authorities, that the *lex loci* is not applicable in the instance of *slavery*, and that though a negro is brought from a country in which he was *legally* a slave, yet he ceases to be so and gains his freedom to all intents, the moment his master carries him into one where domestic slavery is not permitted.

[As the right derived from contract is of a transitory nature, and follows the person from country to country, it becomes important to ascertain with precision by what laws it is to be expounded and enforced. The general rule is, that as to the construction the *lex loci* is to govern; but that the remedy must be pursued according to the *lex fori*. In support of the first branch of this proposition the reader is referred to the following authorities; *Foubert & ux. v. Turst & al.* 1 Bro. Parl. Ca. 129. *Toml. edit. York Buildings v. Meers*, 5 Vin. Abr. 511, tit. Contract and Agreement, E. pl. 22. *Burrows v. Jemino*, 2 Stra. 733, per lord chancellor King. *Jewson v. Read*, Lofft 138, per lord Mansfield. *Crawford v. Wilten*, Lofft 154, per Aston, J. *Alves v. Hodgson*, 7 Term Ref. 241. *Inglis & al. v. Usherwood*, 1 East 516. *Male v. Roberts*, 3 Esp. Ref. 164. *Talleyrand v. Boulanger*, 3 Ves. jun. 447. *Melan v. the Duke de Fitzjames*, 1 Bos. & Pull. 138. *Conframp & al. v. Bunch*, 4 Dal. 419. *Winthrop v. Pehoon*, Bay 461. S. C. 2 Hall's Amer. Law Journ. 235. *Dixon's executors v. Ramsay's executors*, 3 Cranch 319. *Powers v. Lynch*, 3 Mass. Ref. 77.

The second branch of the proposition above stated is supported by the following authorities: *Duplein v. De Roven*, 2 Vern. 540. *Melan v. the Duke de Fitzjames*, 1 Bos. & Pull. 142. *Imlay v. Ellefsen*, 2 East 455. *Lodge v. Philips*, 1 Johns. Ca. 139. *Nash v. Tupper*, 1 Caines 462. *Smith v. Spinolla*, 2 Johns. 198. *Pearsall v. Dwight*, 2 Mass. Ref. 84. *Dixon's executors v. Ramsay's executors, ubi supra*.

But where a contract is to be performed in a different country from that in which it was made, or was entered into with a view to the laws of a different country, it has been held that the *lex loci* will not govern its construction. *Robinson v. Bland*, 2 Burr. 1077. S. C. 1 Bla. Ref.

231. *Sir John Champant v. lord Ranelagh*, *Prec. Ch.* 128. *Randall's assignees v. Van Rensselaer*, 1 *Johns.* 94. *Thompson v. Ketcham*, 4 *Johns.* 285. *Warren v. Lynch*, 5 *Johns.* 239.

The opinion suggested in the preceding note, that the *lex loci* does not operate where there has been an evident intent to evade the laws of the country in which the parties are domiciled, has been sanctioned by a solemn decision of the *Supreme Court of New-York*. *Jackson v. Jackson*, 1 *Johns.* 424.

Where the contract does not, by its terms, specify the place of performance, it is to be determined from the residence of the parties, from their situation in other respects, from the nature of the transaction, and the object of the contract. *Phipps v. Earl of Anglesea*, 3 *Vin. Abr.* 209. *pl.* 8. *Van Schaick v. Edwards*, 2 *Johns. Ca.* 355. *Powers v. Lynch*, 3 *Mass. Rep.* 77.

The right of succession to personal property *ab intestato* being also of a transitory nature, and the domicile of the intestate being frequently in one country, and the property in question situated in another, it has been a subject of much judicial inquiry whether in *such cases* the *lex domicilii* or the *lex rei sitæ* is to govern.

The *Court of Session in Scotland* has repeatedly decided in favour of the latter. *Purves v. Chisholm*, 1 *Haddington* 320. *Henderson's Bairns v. Debtors*, *Durie* 88, 9th December 1623. *Melville v. Drummond*, *Id.* 723, 16th July 1634. *Craig v. lord Traquair*, *Decisions during usurpation*, 6th June 1656. *Lewis v. Shaw*, *Gilmour and Stair*, 19th January 1665. *Bisset v. Brown*, *Dirleton* 10, 19th July 1666. Archbishop of *Glasgow v. Bruntsfield*, *Harcarse*, March 1683. *Dryden v. Elliot and Ainslie*, *Id.* March 1684. *Duncan v. Murray*, mentioned in *Kilkerran's* report of *Brown's* case in 1744. *Lorimer v. Mortimer*, 1st February 1770, mentioned in the reports of some of the later cases. *Elcherson v. Davidson*, *Ogilvy*, 13th January 1778. *Henderson v. M^lLaen*, decided the same day. *Morris v. Wright*, *Fac. Coll.* 18th January 1785. See also lord *Stair's Institutes*, *b. 1. t. 1. § 16.* and lord *Bankton*, *b. 1. t. 1. § 82, 83.*

But in *England* it is settled by the highest judicial authority, that the *lex domicilii* of the intestate is to govern, without regard to the actual *situs* of the property. *Balfour & al. v. Scott*, 6 *Bro. Parl. Ca.* 550. *Toml. edit.* *Bruce v. Bruce*, *Id.* 566. *Hog v. Lashley*, *Id.* 577. *Bemphde v. Johnstone*, 3 *Ves. jun.* 198. *Ommancey v. Douglas*, there cited by lord *Rosslyn* in giving judgment. *Somerville v. lord Somerville*, 5 *Ves. jun.* 750.

The most distinguished jurists and civilians on the continent of *Europe* also maintain, that the *lex domicilii* ought to govern. *Vattel*, *lib. 2. c. 8. § 110.* *Voet. Comment. lib. 38. tit. 17. § 34.* *Denisaert. Collect. de Jurisprud. voce Domicile*, *s. 3, 4.* *Huber, Praelect. tom. 2. lib. 1. tit. 3. § 15.* *Target's* opinion on the dutchess of *Kingston's* will, 1 *Collect. Jurid.* 323.

In this country the *lex domicilii* has been recognized, not only as applicable to succession *ab intestato*, but as regulating a testamentary disposition. *Deesbate v. Berquier*, 1 *Bin.* 336.]

[Note 45.] (2) See acc. Swinb. on Spousals 34. But though the rule, which where one of the parties is under the age of discretion makes the contract of marriage equally voidable by *both*, is admitted with respect to *actual* marriages, yet the civilians and canonists are not agreed, that it holds as to contracts of marriage *per verba de presenti* without solemnization. Some think, that such contracts have the full effect of a contract

tract *per verba de presenti* on the person who is of the age of discretion, and that it is only in the power of the *younger* party to assent or dissent on attaining the age of discretion. But according to others, *both* parties are in the same situation, and as it can only have the force of a contract *per verba de futuro* as to the younger party unless it is ratified at the age of discretion, so in the mean time it shall not have a grater effect on the *elder*, and consequently unless the contract is ratified by *both* when the *younger* party attains the age of discretion, it will not avoid the subsequent marriage of *either*. Swinburne adopts this last opinion. See Swinb. on Spous. 36. But this doctrine of reciprocity where one of the parties is an infant or under the age of discretion, however true it may be in its application to actual marriages or to contracts of marriage *per verba de presenti*, must not be considered as extending to other contracts with an infant, not even contracts of marriage *per verba de futuro*; for in them the person of full age may, it is said, be bound at all events by our law, and yet as to the infant the contract may be *voidable*. Accordingly in the case of *Holt and Ward* the court held, that if a man of full age enters into a contract of marriage with a woman of 15 *per verba de futuro*, and afterwards marries another woman, an action on the case lies against him for breach of his promise. See 2 Stra. 850. & 937. & S. C. in *Fitz-Gibb*. 175. 275. 1 Barnad. 208. 247. 333. 2 Barnad. 12. 173. 176. As to the effect of the 26 of G. 2. c. 33. on *precontracts* of marriage, see note 4.

(4) It seems that *precontract* is now no longer a cause for dissolving [Note 46.] a marriage in England; for it appears *impliedly* taken away by 26 G. 2. c. 33. which enacts, that there shall be no suit in the ecclesiastical court for compelling the celebration of marriage by reason of any contract, whether *per verba de presenti* or *per verba de futuro*, entered into after the 25th of March 1754. It is observable, that the statute mentions contracts of marriage by *future* as well as those by *present* words; but notwithstanding this, it is far from being clear, that matrimony could ever be compelled in the ecclesiastical court on a contract of the former kind otherwise than by *admonition*, and probably it was included in the statute merely from caution. See 2 Stra. 938.

[80. a.]

(1) The 15 G. 2. c. 30. annuls the marriages of all persons, who, [Note 47.] after being found lunaticks on inquisition by commission under the great seal, or, after being committed to the care of trustees by act of parliament, shall marry without the chancellor's declaring them of sane mind. Before this act there could be no doubt as to the validity of the marriages of lunaticks, where it could be clearly proved, that they were married in their lucid intervals. One should think, that there could be as little room to doubt their incapacity of contracting marriage whilst in an actual state of insanity, if our books were not remarkably silent on the subject, and it was not also said, that by our law an idiot *à nativitate*, in whom the general incapacity of making contracts appears to form as strong an objection as occurs in the case of a madman, may consent to marriage. This doctrine, as to idiots, however strange it may appear, is mentioned as a point adjudged in one case, and seems confirmed by allowing dower to the wife of an idiot, and by questioning the right of an idiot's husband to courtesy merely, where on account of an office finding the wife's idiotcy and the descent of land to her after the marriage, it is apprehended that there is a concurrence of titles between the king and the husband. See 1 Ro. Abr. 357. and ante fol. 30. b. and note 2. there. By the Roman law, persons continually mad, lunaticks except during

during the intervals of sanity, and ideots, were all equally incapable of marriage. See Brouwer. de jur. connubior. lib. 2. cap. 4.

[80. b.]

[Note 48.]

(1) The word *bigamy* is frequently used to describe the crime of marrying a second wife during the life of the first; but the proper name for this offence in our law is *polygamy*, and with us a *bigamist* is a man who either marries a widow or after the death of his first wife marries a second time, in consequence of which he formerly could not claim the benefit of clergy. This denial of the benefit of clergy to bigamists was in consequence of some ancient papal constitutions and canons of councils against admitting bigamists into holy orders; a prohibition, which, however speciously defended by texts of scripture, wholly originated from the injurious policy of the church of Rome in discouraging the marriages of the clergy, and led the way to the complete establishment of celibacy amongst them. See Levit. c. 21. v. 13, 14. 1 Tim. c. 3. v. 12. Summa Concil. per Mirand. fol. 4. a. 119. a. 168. b. 230. b. Bingham. Antiq. Christ. Ch. b. 4. c. 5. Tayl. Elem. Civ. L. 295. and the word *Bigamus* in the index to the Corp. Jur. Canon ed. Pithæor. However, the exclusion of bigamists from the benefit of clergy was not entirely accomplished till the council of Lyons ended the doubts which before prevailed, by positively declaring bigamists *omni privilegio clericali nudatos*. It appears, that this constitution was immediately received in England; for the statute of 4 E. 1. *de bigamis* takes notice of it, and explains how it should be construed, by directing that it should be understood to comprehend bigamists *before*, as well as those who became so *after*. See 4 E. 1. c. 5. 2 Inst. 273. 2 Hal. Hist. Pl. C. 372. 2 Hawk. Pl. C. b. 2. c. 33. s. 5. and Barringt. on Ant. Stat. 2d ed. 73. When the benefit of clergy, by being allowed to all who could read, was extended to laymen as well as persons in orders, the reason for ousting bigamists of clergy in great measure ceased; but notwithstanding this, the exception of bigamy continued till it was taken away by the statute of Edw. 6.—The pointing out exactly the appropriated sense of the word *bigamy* in our law was the more necessary, because very sensible writers have been inattentive to it. We find a remarkable instance of this in the quarto edition of the Statutes, the editor of which, in a note on the 4 E. 1. c. 5. refers to the 1 Jam. 1. c. 11. as making *bigamy* a felony.

[81. b.]

[Note 49.]

(2) In the famous case of Ashby and White, in which the question was, whether an action on the case would lie against a returning officer for refusing a vote at the election of a member of parliament, one objection made to the action was, that it was of the first impression; and the words of Littleton, in explaining why any action could not be maintained on the statute of Merton against a guardian for disparagement, were much relied upon by judge Powys as an authority directly in point. But lord chief justice Holt answered this objection by citing many instances of allowing new actions; and therefore in this particular judge Powell concurred with Holt, though they differed on the principal question. See 2 L. Raym. 944. 946. and 957. It might also have been observed, that Littleton is only stating the opinion of others, and that he concludes with a *quare*; and further, that in the case put by him the question was merely, whether the proper remedy was by *action* or by *entry*. However, it must be confessed, that the novelty of an action may frequently be fairly urged as a strong *presumptive* argument against its lying; more particularly where the *right*, which is the foundation of the action, is admitted, and the *mode of relief* is the only thing controverted, as was the case in Ashby and White.

(1) Sec

[83. a.]

(1) See ante 76. a. Lord Coke there cites a passage from Domesday-book, in which reliefs are mentioned; and from this early use of the word, and from the terms of a law of Edward the Confessor, and of two laws of Canute, some have inferred, that reliefs were known to the Saxons. This circumstance is much relied on by those who insist, that feudal tenures were established in England before the Conquest; and therefore sir Henry Spelman, who supports the contrary opinion, is very full in his observation on this part of the subject. The sum of what he advances is, that Domesday-book at the utmost only proves the use of reliefs after the Conquest, which is not denied; that the supposed law of Edward the Confessor is either not genuine or belongs to William Rufus; that *heriot*, which is the word used in the original language of the laws of Canute, is improperly translated *relief*; and lastly, that however it might suit with the policy of the Normans to assimilate *reliefs* to *heriots*, there were the most essential differences between the two. According to sir Henry Spelman, the heriot was paid out of the goods of the deceased possessor of the land, the relief by the heir, out of his own *patre*; the heriots at all events, the relief only in case of taking up the lands in succession. These two of the differences taken by Spelman are particularly stated here; because they apply to heriots and reliefs as they are now distinguishable. See the Treat. on Feuds in Spelm. Posthum. 31. It is observable, that Bracton marks the distinction between reliefs and heriots very strongly, and in terms partly corresponding with the idea of Spelman; for after treating at large on reliefs Bracton adds, *est quidem alia fræstatio, quæ nominatur herietum, et quæ nullam comparationem habeat ad releuium; scilicet, ubi tenens, liber vel servus, in morte suâ dominum suum, de quo tenuerit, respicit de meliori averio suo, vel de secundo meliori, secundum diversam locorum consuetudinem; quæ quidem fræstatio magis fit de gratiâ quàm de jure, et quæ hereditatem non contingit.* See Bract. lib. 2. cap. 36. fo. 86. a. See further as to heriots, post. 185. b. [Note 50.]

(2) See acc. Ley on Wards and Liv. fol. ed. 17. W. Jo. 133. The distinction is not merely *nominal*; for lord Coke in another place assigns it as a reason, why a relief is not within the limitation of 50 years prescribed by the 32 H. 8. c. 2. in the case of avowry or consance for *suit* or *service*. 2 Inst. 95. Note, that in the book last cited *forty* years are mentioned as the limitation in the 32 H. 8. but Mr. Ruffhead, in his edition of the Statutes says, that in the *record* the time is *fifty* years. [Note 51.]

(3) But it is said, that if the relief is claimed, not by reason of tenure, but by *custom*, there must be a prescription for the distress to warrant it. See W. Jo. 133. [Note 52.]

[83 b.]

(5) This annuity is therefore called *creation-money*, and the grant of it usually expressed, that it was assigned in order to enable the grantee the better to sustain his newly-acquired dignity. Mr. Madox gives us various instances of such annuities; and it appears, that they were not confined to earls; for one of the letters patent in his book is a grant of 10*l.* a year by Hen. 6. out of the crown revenues in Cumberland to sir Thomas Percy on creating him baron of Egremont. See Mad. Baron. Anglic. 142. In Dyer 2. a. notice is taken of an annuity of this kind, and it is there said to be so annexed to the dignity as not to be alienable. See further as to creation-money, Camd. Britann. ed. 1772. p. 125. [Note 53.]

[84. a.]

[Note 54.] (2) *So in the case of the king, the father shall have the custody of the body and the marriage.* 7 Jac. Cur. Ward. *Ley n. 2. Unton's case.* Hal. MSS.—See Ley 1.

[85. a.]

[Note 55.] (1) By the 12 Cha. 2. c. 24. tenure by *knight's service*, whether of the king or of a common person, together with all its oppressive fruits and consequences, as also those of *socage in capite*, is wholly taken away; and every such tenure is converted into *free and common socage*. The same statute enacts, that all tenures which should afterwards be created by the king, should be in *free and common socage* only. Nothing can be more full in expression than this act; for besides *generally* abolishing tenure by knight's service, and the consequences peculiar to that tenure and *socage in capite*, it descends into *particulars* with a redundancy of words, which can only be accounted for by the extreme anxiety to extirpate completely the evils the legislature had under contemplation, for which purpose it might be deemed most safe to attack them in every shape. We have already observed in some former notes, that homage, escuage and the aids *pur filc marier*, and *pur faire fitz chivalier* are expressly mentioned. It remains to add, that the statute, after taking away the court of wards and liveries, enumerates wardships, liveries, primer seisin or ousterlemains, values and forfeitures of marriages, and fines, seisures and pardons for alienation, and sweeps away the whole. But the act preserves rents certain, heriots, suits of court, and other services incident to common socage and fealty; and also fines for alienation due by the customs of particular manors, unless such fines are for lands *in capite*. Reliefs for lands, of which the tenure is converted into common socage, are also saved in some instances; for the clause which preserves *rents certain*, provides that such relief shall be paid *in respect of such rents*, as is paid on the death of a tenant in common socage. From this clause it seems, that there can be no relief out of lands which the statute changed into *socage*, unless where a quit rent is also payable; and the reason of thus expressing the act will appear by considering, that a year's rent is the relief for lands holden by common socage, and consequently is never due out of lands which are not subject to a rent, unless by special custom, or express reservation. See post. Sect. 126.

[86. a.]

[Note 56.] (1) Mr. Somner disapproves of this etymology, as not large enough to comprehend *all* the services of the tenure by socage, which may be, and sometimes are, totally unconnected with the plough. According to him, *socage* is derived from the Saxon word *soc*, which signifies *liberty* or *privilege*, and with *agium* added to denote the *agenda* or service imported a free or privileged tenure; and this derivation is preferred by a writer of great judgment. Somn. Gavelk. 133. and 2 Blackst. Comment. 5th ed. 80. However, sir Martin Wright, though he confesses the ingenuity of Mr. Somner's derivation, endeavours to justify Littleton's, and thinks that the objection to it is obviated, when it is considered, that in the case of *socage-tenures* plough-service was the most ancient and usual reservation; to which observation one may add, that the propriety of a denomination is not always the proper test of etymologies. Wright's Ten. 143. It seems indeed, that both derivations have their share of probability, which is as much as can be expected on a subject so very uncertain.

(2) This

(2) This explanation of *Thane-land* and *Reve-land* is opposed by [Note 57.] sir Henry Spelman, who investigates the subject very minutely. See Spelm. Posthum. 38, 39. In a former note we had occasion to hint at sir John Dalrymple's opinion on the same subject, and on the nature of the difference between *bock-land* and *folk-land*. See ante 6. a. note 6. Since the writing of that note, a tract, intitled *A Discourse on the Bock-land and Folk-land of the Saxons*, hath been printed, the professed object of which is to examine and confute the notions advanced by sir John Dalrymple. This tract, being at present only distributed amongst the author's friends, is difficult to be procured, and is mentioned here for the sake of such readers as may be curious to explore this dark and controverted subject. See further Fearn. Legigraphic Chart of Landed Propert. ante 6. b. 7. a. 58. a. and 2 Whitak. Hist. Manchest. 154.

[87. a.]

(1) According to Fitzherbert, such a tenure was *knight's service*. [Note 58.] This he infers from the form of a writ of livery sued out by an heir on attaining his full age, where he held of the king *as of an honor* in the king's hands by the service of rendering the rent of ten shillings a year towards guarding the castle of Dover; and Fitzherbert endeavours to account for the tenure being knight's service, by suggesting, that the service might *anciently* have been guarding the castle, and that in modern times the king might take a rent in lieu of castle-guard; which taking of a rent, says Fitzherbert, would not alter the nature of the tenure. Fitzherb. Nat. Br. 256. However, this opinion of the reverend judge is not delivered absolutely, but is accompanied with a *quere*; and indeed it seems very liable to exception. For—1. The form of the writ relied upon appears quite consistent with *socage in capite*; suing of livery by the heir at full age having been incident to that tenure as well as to *knight's service in capite*, unless the heir was under fourteen at the death of the ancestor. See ante 77. a.—2. The propriety of the writ, in the case to which it is applied, may be suspected; for suing of livery by the heir, except in some few special cases distinguished by a kind of prescription of which lord Coke speaks doubtfully, was confined to tenure *in capite*, or, to use the phrase preferred by Mr. Madox, *ut de coronad*, whereas the writ in Fitzherbert represents the tenure to have been *ut de honore*. See ante 73. a.—3. Fitzherbert's reason for considering the tenure as knight's service seems unwarranted by the terms of the writ. He supposes the service reserved to be castle-guard, and the rent to be merely taken by the king as a commutation in money; but the writ expressly states the rent to be the service.—4. If Fitzherbert, by saying that the king took the rent for the castle-guard, means that the latter was so changed into the former, that the castle-guard could no longer be demanded, then his idea of the tenure's continuing to be castle-guard and in chivalry, is contradicted by sir William Capell's case cited in lord Coke's report of Luttrell's case; for in that the court held, that by such a perpetual change of the service the tenure was converted into socage. See 4 Co. 88. a.—5. The authority of Littleton is clearly against Fitzherbert's notion; and according to the opinion of the former, a case in which the service reserved was a yearly rent in money for guard of the castle of Dover, was adjudged early in the reign of Charles the first. See Litt. Rep. 47. However it should not be concealed, that in this last case the court seemed inclined to think, that under *special* circumstances there might be a change of the castle-guard into rent by consent of the king and his tenant without altering the tenure, where evidence could be given of the manner in which the change was effected.

(1) Here

[87. b.]

[Note 59.] (1) Here the word *heir* is significant; for it seems to import, that guardianship in socage can be of *heirs* only. However, though it was always clear, that guardian in *chivalry* could only be on a *descent*, yet some have doubted whether wardship in *socage* might not be where the infant was in by *purchase*. This point was agitated so late as the 28th and 29th of Charles the second, when the Court held, that guardianship in socage was equally confined to a descent with guardianship in *chivalry*. 2 Mod. 176. Vin. Abr. *Guardian*, I.

[That this guardianship ceases when the infant arrives at the age of fourteen, so far as to entitle the infant to enter and take the land to himself, has been recognized as established law by the *Supreme Court of New-York*, *Byrne v. Van Hoesen*, 5 *Johns*. 66. If, however, no other guardian succeeds, the former guardianship will continue. *Ibid.*]

[88. b.]

[Note 60.] (2) Mr. serjeant Hawkins supposes an elder brother to purchase land, and the land to descend to his younger brother being under 14; in which case the infant's paternal and maternal relations are equally of the blood of the first purchaser, and therefore equally capable of inheriting to them; and then Mr. serjeant asks, who shall be guardian in socage. Hawk. Abr. of Co. Litt. Perhaps there may be some difficulty in solving this question. If Littleton's rule be understood *strictly*, there cannot be any guardian in socage in such a case, unless the next friend is a father or mother, or other lineal ancestor, or of the half blood; for all of the other relations may by possibility succeed as immediate heirs to the son. But if the next of blood on either side may be guardian, the mother's blood must be preferred, because they are the *most remote* from the succession.

[Note 61.] (3) Guardian *per cause de ward*, is, where one infant in wardship is guardian of another infant, in which case the wardship of the first infant intitles his guardian to the wardship of the second. But it seems, that only guardian in *chivalry* and in *socage* could be guardian *per cause de ward*. See 2 Ro. Abr. 35. 40. and Vaugh. 184.

[Note 62.] (5) This point appears to have been adjudged *contra* in lord Coke's time, though it is not taken notice of by him. See Swan's case, 2 Ro. Abr. 40. Ow. 128. Mo. 635. Cro. Eliz. 825. and 2 And. 171. However, as lord Coke here decides against the half blood, the question was revived after the restoration; but the case did not produce any opinion of the court. T. Jo. 17. The rule as expressed by lord Coke certainly excludes the half blood; because he extends it to *all* possibility of descent. But if the judgment in Swan's case was right, the rule should be confined to all possibility of *immediate* descent.

[Note 63.] (6) Lord Chancellor Macclesfield very much disapproved of the rule of our law, which gives the guardianship in socage to the next of kin to whom the land *cannot* descend. He would not allow the exclusion of the heir to the land to be founded on reason, but deemed it the offspring of barbarous times and the effect of a cruel presumption. Therefore, when he was applied to on a like principle, for an order to remove a lunatick from the custody of Mr. justice Dotmer, who was the lunatick's uncle and next in remainder to him, but had with the consent of the *nominal* committee of the lunatick's person taken care of him for many years, and treated him with the greatest tenderness, under these circumstances his lordship refused to make such an order. 1 P. Wms. 260.

See

See also 9 Mod. 142. and Cary's Rep. 137, 138. But notwithstanding this censure by one most deservedly of high authority, the rule of our law in respect to guardianship in socage, considered as one settling the right by *nearness of blood* without regard to *personal qualifications*, which was the point of view in which lord Coke and those he follows extolled it, is surely very defensible; for it gives the custody of the infant's person to those, who in point of *nearness of blood* have equal pretensions to the trust, without the same temptation in point of *interest* to abuse it. However, in justification of the Roman law it should be remembered, that their order of succession made it impossible to adopt a distinction like that of our law in the case of guardianship in socage; for by the Roman law, the relations both of the *father's* and *mother's* blood, being in equal degree, were equally capable of inheriting; and the emperor Justinian having wholly destroyed the distinction between the *agnati* and *cognati*, there could not be *proximity of blood* without *proximity to the succession*. Novell. 18. c. 4, 5. Such being the difference of the two laws in point of succession, it is rather unfair to make a comparison between them in point of guardianship. Besides, *nearness of blood alone* is at best a very exceptionable rule for settling the right of guardianship. It must frequently give a title to those, who are in every respect the least qualified for a trust so delicate and important. Nearness of blood ought to be greatly regarded; particularly in the case

[88. b.] of parents, whose title by nature is so strong, that to wrest from them the custody and education of their children, except when there is any gross misconduct or the most apparent incapacity, would be very inhuman indeed. But personal qualities, situation of life, interest in the succession, and other circumstances, whether operating for or against, should also be attended to; and hence arises the necessity of a *discretionary power* in the choice of guardians. On this principle in many countries in Europe the father is now intrusted with the power of assigning guardians for his children by testament, and for want of a testamentary guardian, some great magistrate or judicial officer is authorized to nominate; and in other countries guardians are wholly dative by a magistrate. Groenweg. de Leg. Abrogat. lib. 1. tit. 15. Voet Comment. ad Pandect. l. 26. 1, 2, 3. 1 Strah. Dom. 264. Stair's Inst. of Law of Scotl. 3d ed. 46. In effect, our law, as changed by statutes and regulated by the modern practice of the court of chancery, conforms very much to these modes of prescribing who shall have the guardianship. But this subject will be more fully opened in the succeeding notes.

(9) Lord Coke should not be understood to assert that a guardian by nature is not accountable for the profits of the infant's estate; that being a doctrine which seems inconsistent with the nature of every other kind of guardianship except guardianship in chivalry. It is therefore presumed, that lord Coke's meaning was, that the father shall be deemed guardian in *socage*; because in that character the law makes him accountable to the son for the *value of his marriage* as well as for the *profits of his lands*; whereas in the character of guardian by *nature*, he is only accountable for the *latter*. [Note 64.]

(11) Ante 74. b. Though guardianship in *chivalry* is now taken away by act of parliament, it may be useful to recollect some *general things* concerning it; and for the ease of the student in that respect, the following particulars, selected principally from the Chapter of Knight's Service, are brought into one point of view.—Guardianship in chivalry could only be where the estate vested in the infant by *descent*.—All *males* [Note 65.]

males under 21 at the ancestor's death were liable to it; but not *females*, unless they were then under 14.—It extended, not only to the *person* of the infant, but also to all such of the infant's *lands* or *tenements* as were within the guardian's seignory; and if the king was guardian in respect of a tenure *in capite*, then to the *whole* of the infant's estate, of whomsoever holden, whatever the tenure, and whether lying in tenure or not.—If the infant heir held lands by knight's service of several lords, each lord had the wardship of the land within his seignory; and as to the body, the wardship of it belonged to that lord, of whom the tenure was most ancient, he being stiled the lord by *priority*, and the others lords by *posteriority*. But this must be understood with an exception of the king; for if any lands of the infant were holden of the king by knight's service *in capite*, he was intitled to the wardship both of the infant's *body* and all his lands held of the crown *in capite*, or of others by knight's service.—It continued over males till *twenty-one*, over females till *sixteen* or *marriage*.—When it determined, if the tenure was of a *subject*, the heir might enter on the lord *immediately*; but if the king had the wardship, then the heir was not intitled to take possession of the land without suing to the crown for livery, which was a process both nice and expensive. See ante 77. a.—It had a preference with respect to the custody of the infant's body over every other species of wardship, except only that of the *father* where the infant was his *heir apparent*; even the *mother* being excluded.—It intitled the lord to make a sale of the marriage of the infant, subject only to the restriction of not *disparaging*; and if the infant refused the marriage tendered by the lord, or married *after* such a tender and against the lord's consent; in the former case, the infant was liable to the payment of a sum equal to the value of the marriage, that is, to the profit which the lord might have made by the sale of it; in the latter case, the heir *female* paid the same sum as for a refusal, but the heir *male* was charged the *double* value, which was called a forfeiture of marriage.—The guardian in chivalry was not accountable for the profits made of the infant's land during the wardship, but received them for his own private emolument, subject only to the *bare* maintenance of the infant. At least it doth not appear in any work we have seen, what means were provided for enforcing the guardian out of the profits of the estate in wardship to support and educate the infant in a style and manner suitable to his rank and fortune.—Lastly, guardianship in chivalry, being deemed more an *interest* for the *profit* of the *guardian* than a *trust* for the *benefit* of the *ward*, was saleable and transferable, like the ordinary subjects of property, to the best bidder, and if not disposed of was transmissible to the lord's personal representatives. Thus the custody of the infant's person, as well as the care of his estate, might be devolved upon the most perfect *stranger* to the infant, one prompted by every pecuniary motive to abuse the delicate and important trust of education, without any ties of blood or regard to counteract the temptations of interest, or any sufficient authority to restrain him from yielding to their influence. This explication of the nature of wardship in chivalry, general as it is, may well excite a strong idea of the horrid evils necessarily incident to it. On the first reflection it is natural to wonder, how it happened, that a species of guardianship so constituted on principles repugnant to the voice of nature, so founded in inhumanity, so retarding to the progress of science and literature amongst persons of high birth and with great hereditary estates, and so seemingly replete with mischiefs, both public and private, should, in a country distinguished for continual struggles to preserve the valuable and to annihilate the oppressive

oppressive parts of its constitution, be patiently endured for several centuries after the conquest, and even remain unreformed by any effectual checks to soften its rigour, till it was wholly taken away at the restoration. Perhaps, however, on further consideration of the subject, the wonder may in some measure cease; for the facility of evading guardianship in chivalry, which could only be on a *descent*, may account both for its being so long submitted to, and for its producing consequences less extensively pernicious than seem almost necessarily incident to it. Various modes of preventing the *descent* were practised. One was enfeoffing the heir in the ancestor's life-time; and another was enfeoffing strangers on condition to pay a sum, far exceeding the value of the land, at a time so fixed as to correspond with the heir's coming of age, who might then enter for breach of the condition. See stat. Marlebridge 52 Hen. 3. c. 6. and 2 Inst. 109. When these modes were declared to be fraudulent, and therefore checked by the statute of Marlebridge, a third, still more fit to attain the same end, succeeded; for *uses* and *trusts* being invented, and guardianship in chivalry being only of *legal* estates, it became the fashion to make feoffments to uses, as well for

[88. b.] preventing wardship, as for avoiding reliefs and forfeitures, and indirectly exercising the power of devising; and thus the heir taking only the use of the land on a descent, instead of becoming *legal tenant*, he of course escaped being in wardship. This evasion continued in practice till 4 Hen. 7. when the legislature thought proper once more to interfere in favour of the lord, and made the heir of *cestuy que use* equally liable to wardship in chivalry with the heir of one dying seized of the *legal* estate. See 4 Hen. 7. c. 17. Ante 84. b. and 2 Inst. 110. Indeed for some time after 4 Hen. 7. there seem to have been no other means of preventing wardship in chivalry, than the ancestor's making a lease for life with remainder to his *heir apparent* in fee. But this protection of wardship in chivalry was soon followed by a great diminution of its profits; for, in the succeeding reign, the statute of wills gave the power of devising so as to deprive the lord of the wardship in *two-thirds* of the land holden by knight's service; in which contracted state this odious species of guardianship was suffered to languish, till it was intirely abolished by the famous statute of Charles the second, together with the other oppressive appendages of military tenures. 2 Inst. 110, 111. The curious reader may see further on this subject in Smith's Commonwealth, Engl. ed. b. 3. cap. 5. Staunf. Prærog. 4 Inst. 188. Ley on Wards and Liv. et ante passim in the Chapter of Knight's Service and the books there cited, the titles *Garde* and *Guardian* in the Abridgements, Crompt. Jurisd. of Co. 112. a. to 125. and Mad. Excheq. fol. ed. 231.

(12) Many of our books, especially some of modern date, are very indiscriminate, when they mention guardianship by *nature*. Sometimes the father is styled guardian by nature of his *heir apparent for the time* in general terms, such as at first appear to intimate, that by our law no other ancestor, except the father, not even the mother, is intitled to the guardianship in that right; and accordingly lord chief baron Comyns makes this inference from the language of the books, though, as we conceive, too hastily. See Com. Dig. *Guardian*, C. 3. Co. 38. a. 6 Co. 22. b. there cited. At other times we are told that, the father being dead, the mother may have a writ of trespass *quare consanguineum et heredem cepit*; which imports that she may also be guardian by nature of her heir apparent. But then the silence in one book as to other ancestors, and the express exclusion of the grandfather in another book

[Note 66.]

book without the necessary explanation, tend to an opinion that all ancestors, except the father and mother, are really excluded. Ante 84. b. 6 Co. 22. b. However, in another place we find that no such opinion was intended to be conveyed; and we are informed that the grandfather and other ancestors may be guardians by nature of their heirs apparent, as well as the father and mother; though being liable to be postponed to others, where the *father* is not, both they and the mother have a title distinguishable from *his* in point of inferiority. 3 Co. 38. a. Further, some modern books do not confine guardianship by nature to *heirs apparent*, but denominate the father and mother the natural guardians of *all* their children; and sometimes even the parents of illegitimate issue seem to have been treated as their natural guardians. 1 Ves. 158. 2 Atk. 15. 70. 9 Mod. 117. Sometimes also the guardianship of *female* children under sixteen, as given to the father and mother by the statute of Philip and Mary, is said to be *jure natura*. 4 & 5 Phil. & Mar. c. 8. and 3 Co. 38. b. This various and indefinite manner of expression concerning guardianship by nature must create the most distressing confusion in the midst of students; and for their benefit, therefore, we shall attempt to rescue the subject from a part of the obscurity in which it is involved, by offering some few distinctions calculated to reconcile the seeming contrariety of the books, so far as they are capable of being made consistent with each other. 1. It seems that not only the father, but also the mother, and every other ancestor, may be guardians by nature, though with considerable differences, such as denote the superiority of the father's claim. The father hath the *first* title to guardianship by nature, the mother the second; and as to other ancestors, if the same infant happens to be heir apparent to two, as to both a paternal and a maternal grandfather, perhaps in this equality of rights priority of possession of the infant's person may decide the preference, according to the general rule in *aquali jure melior est conditio possidentis*. But this difference merely respects the order of succession to guardianship by nature. But whilst the tenure by knight's service continued, there was another difference, which more strongly marked the superiority of this guardianship when claimed by the father; for he was intitled to the custody of the infant's person, even against the lord in chivalry; but the mother and other ancestors were not allowed to have the same preference. It is by this last diversity that lord Coke in another place reconciles the books, which appear to exclude the mother and all other ancestors except the father from guardianship by nature; it being observed by him, that they only apply to cases in which the right to the infant's person was in contest with the lord in chivalry. 3 Co. 38. b. Ratcliffe's case. 2. According to the *strict* language of our law, only an *heir apparent* can be the subject of guardianship by nature; which restriction is so true, that it hath even been doubted, whether such a guardianship can be of a daughter, whose heirship, though denominated *apparent*, yet, being liable to be superseded by the birth of a son, is in *effect* rather of the *presumptive* kind. 3 Co. 38. b. Ante 84. a. Therefore, when *guardianship by nature* is extended to children in *general*, or to any besides such as are *heirs apparent*, it is not conformable to the legal sense of the term amongst us, but must be understood to have reference to some rule independent of the common law. Thus, when in chancery the father and mother are styled the *natural* guardians of *all* their children born in marriage, or of *any* of their illegitimate issue, we should suppose those who express themselves so generally to refer to that sort of guardianship which the order and course of nature, as far as we are able to collect it by the light of reason, seem to point out and to mean,

that

[88. b.] that it is a good rule to regulate the guardianship by, where *positive* law is silent, and it is in the discretion of the lord chancellor to settle the guardianship. So too when lord Coke says that the custody of a *female* child under *sixteen*, to which the father, and after his death the mother, is intitled by the provisions of the statute of the 4 and 5 Philip and Mary, is *jure nature*, we should understand him to mean, not that such a custody was a *guardianship by nature* recognized by our common law, but merely that it was a *statutory* guardianship adopted by the legislature, in conformity to the dictates of nature, and upon principles of general reasoning. But though what our law calls guardianship by nature is thus confined to the *heir apparent*, yet we must not from thence conclude, that parents have not a right to the custody of their *other* children; for our law gives the custody of them to their parents till the age of *fourteen* by the guardianship of *nurture*; which species of guardianship, though it differs from *that by nature*, not only in *name*, but also in *duration* and some other particulars, as will appear by the next note, is founded on a like conformity to the order of nature. It being thus explained who are intitled to the guardianship by *nature*, and what infants are its objects, we shall conclude with some few other particulars concerning it.—This guardianship continues till the infant attains the age of *twenty-one*.—The books inform us, that it extends no further than the custody of the infant's *person*; a peculiarity we did not sufficiently advert to, when we were writing a preceding note, which in the last sentence is unguardedly expressed, as if receiving the profits of lands might be part of the office of guardian by nature. See ante note 8. Carth. 386. Ante 84.—It yields as to the custody of the person to guardianship in socage, where the title to both guardianships concur in the same individuals, as they *necessarily* do in the case of father or mother, if lands held by a socage tenure descend on the heir apparent being an infant, and *may* in the case of other ancestors; the reason of which is explained elsewhere. See note 8. But guardianship in socage ending at *fourteen*, we presume, that after that age the father, or other ancestor, having a like title to both guardianships, becomes guardian by nature till the infant's age of *twenty-one*. See Carth. 384.—Lastly, the father may disappoint the mother and other ancestors of the guardianship by nature, by appointing a testamentary guardian under the statutes of Philip and Mary and of Charles the second, which will be the subject of a subsequent note. See infra, note 14.

(13) Here we shall bring into one point of view some few *general* [Note 67.] things relative both to guardianship by *socage* and *that by nurture*.

Guardianship by *socage*, like the one in *chivalry*, springs wholly out of *tenure*. Therefore the title to it cannot arise, unless the infant is seized of lands, or other hereditaments *lying* in tenure, holden by socage. Ante fol. 87. b.—Like guardianship in *chivalry*, it is deemed to take place on a *descent* only; though some have argued to the contrary. Ante note 1, fol. 87. b.—The title to this guardianship is in such of the infants next of blood, as cannot have by descent the socage estate, in respect of which the guardianship arises, by descent, without any distinction between the *whole* and *half* blood. If there are two or more in equal degree, he who first gains possession of the heir, shall have the custody of him; except where they happen to be brothers or sisters, or to be the infant's lineal ancestors, the law preferring the *eldest* in the former case, and the father or other *male* ancestor in the latter. But if the infant derives lands by descent both *ex parte paternâ* and *ex parte maternâ*, in which case it may be possible not to find any next of kin incapable

incapable of inheriting to the infant, the next of kin on either side, first seising the infant, is intitled to the custody of his person, and the custody of the lands coming *ex parte paternâ* goes to the maternal heir, and so *vice versâ*, as to the lands coming *ex parte maternâ*. Should, however, the infant derive lands by descent in such a way, as lets in both the paternal and maternal blood successively to the inheritance, but with a preference of the former; as where the infant derives lands by descent from a brother who was the first purchaser, and there is no next of kin but such as may inherit from the infant, it seems unsettled who should have the guardianship.—If the person intitled to be guardian in socage is himself under custody of a guardian, the latter is intitled to the custody of both; to the former in his own right, and to the latter *pur cause de ward*, that is, in right of his wardship of the former.—Being wholly for the infant's benefit, and not in any respect for the guardian's profit, it is not a subject either of alienation, forfeiture or succession, as wardship in chivalry was; and consequently if the guardian in socage becomes incapable or dies, the wardship devolves upon the person next in degree of kindred to the infant, not being inheritable to him. Fitzherbert indeed, in his *Natura Brevium* cites two cases of Edward the third; in which guardian in socage granted the wardship to a stranger, and the grant was awarded good. F. N. B. 143. P. The same author too in his Abridgment gives another case of the same reign, according to which a lease of guardianship in socage was pleaded. Fitzh. Abr. *Garde* 161. But possibly these cases import only that a guardian in socage may place the body of the infant under the custody of another, and that such placing will be a good answer to an action for ravishment of the ward; not that the guardianship itself may be transferred by bargain and sale. However, should these ancient authorities not bear the former construction, they seem sufficiently answered by the *doctrine* and *practice* of later times; for in them the acknowledged qualities of guardianship in socage being, that it is a *personal* trust wholly for the infant's benefit, and neither transmissible by succession nor devisable, are not consistent with its being assignable; and we have lord chief justice Vaughan's authority for saying, that even in his time *common experience* proved the contrary. See Plowd. 293. Vaugh. 181. See too post. 90. b. note 1.—It extends not only to the *person* and *socage* estates of the infant; but also to his hereditaments *not lying in tenure*; and even to his copyhold estates, unless there is a special custom for the lord's appointing a guardian of them. Ante 87. b. and Egleton's case, 1 Ro. Abr. 40. See also Hutt. 17. and 2 Lutw. 1181. But whether the guardian in socage is intitled to take into his custody the infant's *personal* estate, we have not yet been able to ascertain by any express authority. However, we are inclined to think, that *personalty* is included, except where by the custom of a particular place it happens to be liable to a different custody: our idea being, that the custody of the infant's person draws after it the custody of every species of property, for which the law hath not otherwise provided. This idea receives some countenance from the instances of *copyholds* and of *hereditaments not lying in tenure*; for including which, it will be difficult to account by any other reason, than the one we give for including *personalty*. It is also strongly confirmed by the manner in which the 12 of Cha. 2. c. 24. regulates the powers of the guardian which it enables a father to appoint. After authorizing such guardian to take the custody of the infant's *personal estate*, as well as of his *lands, tenements and hereditaments*, it provides, that he may bring such *action or actions in relation thereunto, as by law a guardian in common socage might do*: words almost necessarily importing, that the

[88. b.] the *personal* estate is equally an object of the custody of guardian in socage with the infant's real property. Yet we must apprise the reader, that there is an expression of lord chief justice Vaughan, in his Reports, which conveys, or seems to convey, a different opinion; for, speaking of the guardian under the statute of Charles the second, he says, *this new guardian hath the custody, not only of the lands descended or left by the father, but of lands and goods any way acquired or purchased by the infant, which the guardian in socage had not.* Vaugh. 186.—It is superseded both as to the body and lands, if the father exercises his power of appointing a testamentary or other guardian, according to the statute of the 12 Cha. 2. See chap. 24.—Regularly it ends, when the infant, whether male or female, attains fourteen; though some say, that this must be understood only where another guardian, either by election of the infant or otherwise, is ready to succeed, and that the guardianship in socage continues in the mean time. Andr. 313.

[This doctrine has been recently recognized by the *Supreme Court of New-York. Byrne & ux. v. Van Hoesen, 5 Johns. 66.*—It has been determined both in the *English* courts, and in those of our own country, that where the mother of an infant son, who is heir to his father's estate, continues in possession after her husband's death, the law will consider her as guardian in socage to her son; especially where there is no act or declaration of her's inconsistent with that character *Goodtitle ex dem. Newman v. Newman, 3 Wils. 516. Jackson v. Vredenburg, 1 Johns. 163. Byrne & ux. v. Van Hoesen, ubi supra. Jackson ex dem. Davy v. De Walts. 7 Johns. 157.*]

As to guardianship by *nurture*, it only occurs where the infant is without any other guardian; and none can have it, except the father or mother. 8 E. 4. 7. b. Br. *Guard. 70. 3 Co. 38.*—It extends no further than the custody and government of the infant's person, and determines at fourteen in the case both of males and females. *Ibid.*—Lord chief baron Comyns refers to *Fleta*, as if according to that ancient book *grandfathers* and *great grandfathers* might be guardians by *nurture*. Com. Dig. v. 3. p. 421. But the passage cited doth not point at this *species* of guardian, it describing the *patria potestas* in general, and being apparently borrowed from the text of the Roman law; nor will it bear the least application to guardianship, as our own law regulates it.

(14) The direct object of the 4 & 5 Ph. & M. was to prevent the taking away or marrying maidens under sixteen against the consent of their parents. But the statute prohibited it in terms which implied, that the custody and education of such females should belong to the father and *mother*, or the person appointed by the former. It is observable on this statute, that though the title is confined to maidens being *inheritors*, and the preamble speaks only of such as be heirs apparent, or have real or personal estate, yet the enacting part mentions maidens under sixteen *generally*. For other cases on this statute besides Ratcliffe's, see Poph. 204. Cro. Cha. 465. 1 Sid. 362. 2 Mod. 128. 3 Mod. 84. 168. [Note 68.]

(15) There is now another statute in respect to the appointment of guardians; for the 12 Cha. 2. c. 24. after taking away guardianship in chivalry, enables the father by deed or will, attested by two witnesses, to appoint who shall be guardians of his children after his decease. The substance of this parliamentary regulation is, 1. That the father shall have the power, though under *twenty-one*. 2. That he shall have it as to *all* his children under *twenty-one* and unmarried at his decease, or born. [Note 69.]

born after. 3. That he may appoint any persons except popish recusants. 4. That the appointment may be either in possession or remainder. 5. That he may appoint the guardianship to last till twenty-one, or for any less time. 6. That the appointment shall be effectual against all claiming as guardians in socage or otherwise. 7. That the guardian so appointed shall have ravishment of ward on trespass, and recover damages for the ward's benefit. 8. That such guardian shall have the custody of the infant's estate, both real and personal, and have the same actions in relation to them as a guardian in socage. 9. That the statute shall not prejudice the custom of London, or any other city or corporate town.—For cases on the construction of this statute, see tit. *Guardian*, in Vin. Abr. and Com. Dig. and the continuation of the latter book. The nature of this new kind of guardianship, which the statute professedly models after that in socage, except as to duration, is particularly discussed in Bedell and Costable, Vaugh. 177. and in lord Shaftesbury's case, 2 P. Wms. 102. Gilb. 172.

[Note 70.]

(16) Another species of customary guardianship is, where by the special custom of a manor the lord names, or is himself the guardian of an infant copyholder. See 2 Com. Dig. 399. The nature of this guardianship depends wholly on the custom of the particular manor; and though it is not expressly saved by the 12 Cha. 2. yet it has been held, that the father's appointment of the custody of his child under that statute will not extend to copyhold estates. Church and Cudmore, 2 Lutw. 1181. 3 Lev. 395. and Comberb. 253.—But besides the several kinds of guardians enumerated by lord Coke, and those we have already mentioned in addition, there are *four* others which still remain to be noticed.

The *first* of these is guardian by election of the infant himself. But the right of making such an election only arises, when, from a defect of the law, the infant finds himself wholly unprovided with a guardian. This may happen to be the case, either *before* fourteen, when the infant has no property such as attracts a guardianship by tenure, and the father is dead without having executed his power of appointing a guardian for his child, and there is no mother; or *after* fourteen, when the custody of the guardian by socage terminates, and from the want of the father's appointment, there is no other ready to succeed to the trust, and to take care of the infant or his property. Lord Coke only takes notice of such an election where the infant is *under fourteen*, and as to this omits to state how and before whom it should be made, nor have we yet met with any prior or cotemporary writer who supplies the defect. Ante 87. b. As to a guardian after *fourteen*, it appears, from the ending of guardianship in socage at that age, as if the common law deemed a guardian *afterwards* unnecessary. However, since the 12 of Cha. 2. enabling the father to appoint a guardian to his children till twenty-one, it has been usual, for want of such a guardian, to allow the infant to elect one for himself; and according to one book this practice seems to have prevailed in some degree before the restoration. Phil. Tenend. non Tollend. 199. Such election is said to be frequently made before a judge on the circuit. 1 Ves. 375. But we do not conceive this form to be essential. The last lord Baltimore, when he was turned of *eighteen*, having no testamentary guardian, and being under the necessity of having one for some special purposes relative to his proprietary government of Maryland, named a guardian by deed. This mode was adopted by the advice of two eminent barristers; for though one of them at first doubted whether the administration of the government of the province was not devolved upon the crown during the infancy, yet he

[88. b.] he afterwards retracted this idea, and concurred in thinking that the guardian named by the infant might act as lord proprietor.

Indeed it seems as if there was no prescribed form of an infant's electing a guardian *after* fourteen any more than there is before; and therefore election by *parol* might perhaps be sufficient, though it would be wrong to trust to a mode so unsolemn. But we do not wonder at the deficiency; because guardianship by election of the infant is of very late origin, it being, we believe, not only unnoticed by any writer before lord Coke, except Swinburne, but there still being no cases in print to explain the powers incident to it, or whether the infant may change a guardian so constituted by himself. Swin. Testam. ed. 1590. fol. 97. b. Even lord Coke, we see, though professing to enumerate the different sorts of guardianship, and though he had before mentioned this latter one, omits it here; whence it may be probably conjectured that, in his time, it was in strictness scarcely recognized as legal.

The *second* is guardian by appointment of the lord chancellor. How this jurisdiction was acquired by him is not easy to state. The usual manner of accounting for it appears to us quite unsatisfactory. See Gilb. Eq. Rep. 172. Saying, that his jurisdiction over idiots and lunatics is undoubted, furnishes an argument against his having any over infants; for he derives the former from a *separate commission* under the sign manual, but there is not any such to warrant the latter. The writs of *ravishment of ward* and *de recto de custodia* prove as little: for were not these returnable in the courts of common law, or, though they had not been so, how doth a jurisdiction to decide between contending competitors for the right of guardianship, prove a power of appointing a guardian, where it happens that one is wanting? The writs *de custode admittendo*, in the register, only relate to guardians *ad litem*. Reg. Br. Orig. 198. a. The assertion, that the appointment of guardians belonged to the chancellor before the erection of the court of wards, remains to be proved; or at least we, after a diligent search, do not find any authority in print. The passage referred to in *Fleta* and the doctrine in *Beverley's case*, 4 Co. by no means warrant the use made of them; for in neither is any notice taken of *infants*. Though the case of infants, as well as of idiots and lunatics, should be admitted to belong to the crown, yet something further is necessary to prove that the chancellor is the person constitutionally delegated to act for the king. It is no wonder, therefore, that lord chancellor Hardwicke took occasion to disapprove of comparing the court's jurisdiction over infants with that over idiots and lunatics. 2 Atk. 315. As to the writs relative to the appointment and removal of guardians in the register, they merely relate to *suits*; which is of very different consideration from *general guardians*. See Index to Reg. Brev. Orig. tit. *Custodes*. Nor will it answer the purpose, to attempt including guardianship in the idea of *trusts*, which are the peculiar objects of equitable jurisdiction, as it must be seen that this is an overstrained refinement; for though guardianship in the *common* acceptance of the term *trust* may be properly so denominated, yet it as surely is not so in the *technical* sense in which our lawyers use the word, and Chancery exercises a jurisdiction over trusts; for, in this latter, trusts are invariably applied to *property*, especially *real estates*, and not to the *person*. However, we must not be understood by these remarks to controvert the *present* legality of the jurisdiction thus exercised in Chancery over infants; our intent being simply to shew that such jurisdiction is not, *as far as yet appears*, of *ancient* date; and that, though it is now unquestionable, yet at first it seems to have been an usurpation, for which the best excuse was, that the case was not otherwise sufficiently provided for. Our conjecture, as to the late commencement

mencement of this branch of jurisdiction in Chancery, is strengthened by some precedents, which have been obligingly communicated to us by a respectable gentleman in the register's office. According to these, the first instance to be found of a guardian appointed by the chancellor, *on fiction without bill*, was in 1696, in the case of Hampden. But since that time the court of Chancery hath exercised the power of appointing guardians, without its being once called into question. Therefore, in the case of lady Teynham against Mr. Lennard, which was heard on an appeal to the lords in 1724, the counsel for the respondent very properly stated it as a thing fixed, that the lord chancellor was intrusted with that part of the crown's prerogative which concerned the guardianship of infants. 1 Brown Cas. in Parl. 544. Under the same idea too, the last marriage act refers to the chancellor for the appointment of a guardian to consent to marriage, where the infant is without a guardian and the mother is not living. 26 G. 2. c. 33. s. 11.

The *third* kind of guardian, not hitherto mentioned, is guardian by *appointment of the ecclesiastical court*. The right of appointing guardians for the personal estate, and, if there is no other guardian by tenure or otherwise, for the person also is, we understand, claimed by the ecclesiastical court. Swinburne takes notice of such a guardian; but confines his observations, on the appointment and his extent of power, to the custom within the province of York. Swinburne on Testam. 1st. ed. 99. b. In a case, first before the king's bench in lord Hale's time, he admitted the right of the ecclesiastical court to appoint a curator of the personal estate; and after his death the court inclined to the same opinion. 2 Lev. 162. T. Jo. 90. In another case soon after, the court of king's bench allowed the right as to the infant's *portion*, but denied it over the *person*. 3 Keb. 384. In the next case on the subject, the question as to the right was largely debated on a plea in prohibition. This alleged that by the common law used and approved in England, if any person by his will devises any goods to his children, the ordinary, before whom the will is proved, hath used to commit the custody of the sons and their portions till fourteen, and of the daughters and their portions till twelve, except where they are in the custody of any other by reason of any tenure, or by the father's appointment; and if any person detained such infants or their portions, 'the ordinary hath also used to compel the delivery of them by ecclesiastical censures. 2 Lev. 217. But on a demurrer this plea was overruled, and the prohibition ordered to stand; the latter being founded on the libel in the suit in the ecclesiastical court, which had stated the right in a more *extensive* way; for the libel was, that by the ecclesiastical law, every person having the tuition of any infant under age, by the will of the father or *per judicem competentem*, ought to have the custody of the infant and suit in the ecclesiastical court for the detainer. After this case we find nothing on the subject for a long time. But, in a case of the late king's reign, Lee justice casually takes notice of the ecclesiastical court's appointment without objection, saying, that the course of the spiritual court is, that if the infant is under seven years, they chuse a curator, but if he is seven he chuses. Fitzgib. 164. However, in a loose note of a still later case, lord chancellor Hardwicke is made to say, that only guardians *ad litem* can be appointed by the ecclesiastical court. 14 Vin. Abr. 176. pl. 7. in a note. In another case, the report of which is more to be relied upon, the same respectable judge reprobated it, as a presumption in the ecclesiastical court to appoint a guardian of the *person* and *estate*, and declared their appointment of any, except when a suit was depending, to be an interference with his power as chancellor; and so displeased was he in the instance before him,

him, as to conclude with recommending to the attorney general to consider whether a *quo warranto* would not lie against the ecclesiastical court. 3 Atk. 631. Under a like apprehension of the subject, the late chief justice of the king's bench, in Miss Catley's case, spoke of the appointment by the ecclesiastical courts as confined to guardians *in litem*, and therefore as perfectly insignificant. 4 Burr. v. 3. p. 1436. These authorities being brought before the reader, we shall leave him to his own judgment, with this further information only, that, in the warm debates in parliament about the last marriage act, this species of guardianship is said to have been incidentally discussed.

The *fourth* kind of guardian, not yet enumerated, is the guardian *ad litem*. But of this *special* guardian it may suffice for the present purpose to observe, that the power of appointing such is incident to all courts; and that the king *may*, as it is said, by letters patent appoint a guardian to prosecute or defend for an infant in suits generally, though such appointments have been long out of use. F. N. B. 27 L. See further as to guardian *ad litem* post. 135. b.

In the preceding notes about guardianship we have purposely confined ourselves to the subject exclusive of the *royal family*. Their case is too delicate to warrant our touching on the subject without better materials than we are at present possessed of. Therefore we can only refer to the arguments in the case on the king's right in respect to the education and marriage of his grand-children, which was referred to the judges in the reign of George the First. See Fortesc. Rep. 401. & post. 133. b. note 1.

[89. a.]

(1) S. p. acc. ante 17. b. post. 120. a. S. p. acc. as to guardian by nurture. Cro. Jam. 99. In another work lord Coke extends the doctrine so far, as to say that the infant shall present, *whatsoever his age* may be. 3 Inst. 156. But some suppose the guardian to have the right of presenting in the name of the infant. Others again admit the right of the infant *in general*, but add, that if the infant be of such tender years as not to have any discretion, then the guardian should present for him. See Vin. Abr. *Guardian*, Q. pl. 2. But the law seems now settled in the full extent of lord Coke's opinion by a determination of lord chancellor King. In a cause before him an advowson had been conveyed to trustees on trust to present such person as the grantor, his heirs or assigns should by deed appoint; and on the principle that an infant of *any* age may present, his lordship confirmed an appointment by an infant-heir, though it appeared that the child was not a year old, and that the guardian guided the child's pen in making his mark, and putting his seal. 2 Eq. Cás. Abr. *Infant*, B. pl. 3. Vin. Abr. *Collation*, A. pl. 10. Wats. Clergym. L. ed. 1740. p. 140. See also 3 Atk. 710.—However, though this decision may remove all doubts about the *legal* right of an infant of the most tender age to present, still it remains to be seen, whether the want of discretion would induce a court of equity to controul the exercise, where a presentation is obtained from an infant without the concurrence of the guardian.

[Note 71.]

(2) But against a testamentary or other guardian, whose authority doth not determine till the infant is twenty-one, or *being a female*, attains that age or *marries*, the infant cannot have account of account before; for the rule of the *common law* is, that account shall not lie whilst the guardianship continues. However, in *equity* the infant may by *strochein amy* sue his guardian for an account during the minority. 2 Vern. 342. 2 P. Wms. 119. 1 Ves. 91. 3 Atk. 625.

[Note 72.]

(3) Therefore

- [Note 73.] (3) Therefore a guardian cannot be charged in account as a *receiver*; because then he would lose his costs and expences; these it is said being in *general* allowed only to *guardians* and *bailiffs*, and not to *receivers*. Post. 172. a.
- [Note 74.] (4) The rule seems expressed too *generally*; lord Coke elsewhere telling us, that a receiver, who is one of the *three* denominations of accountants known to our law, cannot charge for costs and expences, except in some special cases in favour of trade and merchandise. Post. 172. 1 Freem. 378.
- [Note 75.] (5) The rule is the same as to trustees, though for their greater security it is usual to insert *special* provisions in the instrument creating the trust. 2 Cha. Cas. 2.
- [Note 76.] (6) But the *hire* is not the *only* or *principal* ground on which the carrier is liable; for factors, though they also receive a reward, are not so, except for *negligence* or by reason of a *special* undertaking. The great cause of the laws charging the carrier is the *public employment* he exercises. 1 Ld. Raym. 917. 1 Salk. 143. 12 Mod. 487.
- [Note 77.] (7) This is by the *common law* or *general* custom of the realm; and to recite it in the declaration, as is sometimes the practice both with respect to inn-keepers and carriers, seems not only unnecessary but even rather improper; because it tends to confound the distinction between *special* customs, which ought to be pleaded, and the *general* custom of the realm, of which the courts are bound to take notice without pleading. Accordingly it seems admitted in several books, that describing the defendant to be a *common carrier*, without any thing more, is sufficient. Hob. 18. 1 Sid. 245. Hard. 485. 3 Mod. 227. Wils. v. 1. part. 1. page 281.
- [Note 78.] (9) This doctrine was denied by the court in the great case of Coggs and Barnard; and it is now understood, that acceptance of goods to be kept *generally* is merely an undertaking to keep them as the party receiving keeps his own. 2 L. Raym. 911.—In Coggs and Barnard the action was for so negligently carrying some hogsheads of brandy that one of them was staved; and on motion in arrest of judgment, the court held that a *sufficient consideration* appeared in the declaration, though it was wholly grounded on a *special undertaking* to carry safely, without stating, either that the defendant was to have *hire*, or that he was a *common carrier*.
[As to the character and liability of a common carrier, see 1 *Selw. N. P. Chap. X.* where all the cases on this subject are collected and arranged.]
- [Note 79.] (10) Lord ch. j. Holt thought this reason insufficient, and justly as it seems. Other bailees have a property, that is, a *special* and *limited* one; and what hath the pawnee more? The only difference is in the *degree*; the pawnee's property, though not *absolute*, being rather more *enlarged*, and for some purposes a *beneficial* one. 2 L. Raym. 916. Com. Dig. tit. *Mortgage*, and Vin. Abr. tit. *Pawn*. But whatever the difference may be in point of property, it is become immaterial so far as regards the use made of it by lord Coke; because now *general* bailees of goods are not deemed any farther chargeable for the loss of them than pawnees.

[89. b.]

(1) In the case here stated, the not informing *B.* what was in the chest is relied on as the material circumstance; but the modern doctrine would make it unnecessary to resort for aid from it, as according to that *B.* would not be chargeable, though he had known the contents of the chest. However, there are cases which turn upon the giving of such information. All. 93. 1 Ventr. 258. Carth. 486. 1 Stra. 145. Law of Nisi Prius ed. 1775. p. 71. [Note 80.]

(2) Here lord Coke joins losses by shipwreck and lightning and other like inevitable accidents with those by stealing; but other authorities make a distinction, and according to them, neither carriers nor masters of ships are responsible for losses by *acts of God* or of the *king's enemies*. 2 Bulst. 280. 2 L. Raym. 918. Vin. Abr. tit. *Master of a Ship*, B. pl. 12. [Note 81.]

(3) The *old* doctrine about bailment will be found at large in Southcote's case, which is cited by lord Coke in the margin. For the *modern* doctrine, the student should consult the famous case of Cogg's and Barnard already cited. Lord chief justice Holt's argument in that case, as reported by lord Raymond, particularly merits attention; it being a most masterly view of the whole subject of bailment. Another important case connected with the same subject is that of Lane and Cotton, in which three judges against Holt held, that action on the case will not lie against the Master of the General Post-Office for the loss of a letter with exchequer bills in it. 12 Mod. 472. See further the following books, which are citations from a note by the editor of the 11th edition. —21 E. 4. 55. 4 E. 3. 6. 2 H. 7. 11. Palm. 548. W. Jo. 179. Grot. de Jur. Bell. l. 2. c. 12. s. 13. Puffend. de Jur. Nat. l. 5. c. 4. s. 6, 7. and Dom. Loix Civ. l. 1. c. 5. s. 2. t. 6. s. 3. t. 7. s. 3. [Note 82.]

(6) There is a great abundance of irreconcilable opinions in our books about the earliest age at which a will may be made of *personal* estate. Here lord Coke states 18 to be the age; though the reasons and authorities in favour of that time do not appear.—Others mention 17, that being the age at which an administration during the minority of an executor determines. 1 Vern. 255. 2 Vern. 558. But this opinion was probably founded on an idea, that our spiritual courts make no difference between the time for acting as an executor and the time for making a will, which is clearly a mistaken notion. However, it receives some countenance from the decisive manner in which a late chancellor of the first authority mentions 17, and the ambiguous terms in which he speaks of an earlier age. 1 Ves. 303. 3 Atk. 709.—According to others 15 is the age for *males*, if the party can be proved of sufficient discretion; but we are not informed why, and therefore little respect is due to this opinion, if *that* can be deemed one, which in fact was nothing more than a loose *dictum*. 2 Vern. 469.—Others doubt whether any time before 21 is not too early; because none can be administrators till they have attained that age. 1 Vern. 326. The reasons usually assigned for not granting administration to any person under 21 are, that an administrator being created by statute his age shall be according to the common law, and that the statute of distribution requires the security of a bond from an administrator, which an infant cannot give. See the books cited in Vin. Abr. *Executors*, L. 3. pl. 6. This latter reason against an infant's being administrator is the most forcible; but both seem equally inapplicable to the other point; the power of making a will of personal estate. [Note 83.]

estate not being derived from or regulated by any statute, and the giving of a bond being foreign to the case of a testator.—In Perkins *four* is said to be the age for making a will of personalty; but though this is the time mentioned in the old as well as the new editions of his book, yet, as Swinburne well observes, it appears to be an error of the press by omission of the figure x. and most probably xiii. was the age intended. Perk. sect. 503. Swinb. Testam. part 2. sect. 2. Off. of Ex. ca. p. 18.—The last opinion on the subject, and that most to be relied upon, distinguishes between *males* and *females*, making the *testamentary* power to commence in the former at 14, and in the latter at 12. At these ages the Roman law allowed of testaments, and the civilians agree that our ecclesiastical courts follow the same rule; and to them we ought principally to resort for information on testamentary subjects; because these being so peculiarly of spiritual consance, they speak more *ex tripode juridico*, to use the phrase of a great author, than our common lawyers. Swinb. on Testam. part 2. sect. 2. Godolph. Orph. Leg. 276. 2 Strab. Dom. 11. Har. Justin. Instit. l. 2. t. 12. s. 1. But the doctrine is not sustained by the authority of civilians only. Some respectable books, written by common lawyers, mention 12 and 14 for the same purpose; prohibitions have been refused by the king's bench, when applied for to restrain the ecclesiastical courts from allowing wills made at such early ages; and there are instances, in which the doctrine hath been recognized and adopted by the court of Chancery. Off. of Ex. cap. 18. Sheph. Touchst. 403. T. Jo. 210. 2 Show. 204. Comb. 50. Prec. in Cha. 316. Gilb. Eq. Rep. 74. Mos. 5. To conclude this point, it may be added, that as on the one hand the rule of the ecclesiastical courts, in holding 12 and 14 to be ages at which males and females, according to the difference of sex, first have the power of making wills of personalty, seems now well established; so on the other hand it is in some degree consonant to the doctrine of our common law; for though that is silent as to the age for wills of personalty, these being the subjects of a different law, yet it adopts the same standard of 12 and 14 for other purposes, and so far deems them the ages of discretion, as to give infants of those ages the power of choosing guardians, and to presume that they are *doti capaces* in respect to crimes. 1 Hal. II. P. C. 22.

[90. a.]

[Note 84.] (1) That is, whether he took the profits as guardian; for if he assumed to take them in that character, he shall answer for them accordingly, though he was not guardian *de jure*.

[Note 85.] (4) This reason requires some explanation. It is not, that *choses in action* are in their nature incapable of transmission to executors; for the contrary is known to be law, and some instances of it are here given; but it is, because in the case of a *chose in action*, so peculiar as a right of presentation, the law favours the king more than the bishop's executors, and therefore gives the king, as having in his custody the temporalities of the vacant bishoprick, that presentation, which executors in general are entitled to when they are opposed to an heir. See post. 388. Bro. Abr. *Presentation* 34. Wats. Clergym. L. ed. 1747. p. 72. But then it may be asked, why the king should not have a like preference, in the case of the bishop's being entitled to a wardship by knight's service in right of his fee and dying *before* reducing it into possession by seizure. The answer may be, that the law distinguishes between an *interest both of profit and trust*, as wardship by knight's service is, and one *merely of trust*, such as a presentation. The law gives the former to the bishop's executors, for the benefit of his personal estate. It gives the latter

ter to the king; because the presentation to a vacant church cannot lawfully be sold; and as the bishop's personal estate cannot derive any profit from the presentation, the law deems it more proper to follow the temporalities of the see to which the advowson belongs. In a subsequent part of the Commentary, where it is said, that the bishop's executors shall not present, because nothing can be taken for a presentation, lord Coke seems to hint at something of this kind. Post. 388. a. However, as a like reason might be urged against executors in favour of an heir, it is most safe to rely on the right of the king as settled by *authorities and long practice*.—This preference of the king's title by prerogative is carried so far, that even *presentation and institution* in the life-time of the bishop will not prevail, unless there hath been also an *induction*. Vin. Abr. *Presentation*, C. a. E. a. Wats. Clergym. L. ed. 1747. p. 73.

[90. b.]

(1) Fitzherbert cites two authorities, which make guardianship in socage grantable. F. N. B. 143. P. But Littleton's opinion militates strongly to the contrary; for if such a trust is so *personal* as not to be transmissible to executors, why should it be so to grantees? Accordingly in the arguing of a modern case it seems to have been taken for granted, that guardianship in socage cannot be assigned. Gilb. Eq. Rep. 177. [Note 86.]

(2) Littleton must be understood to mean, that at *common law* account did not lie against executors; for in his time it did lie under several statutes against an executor *in general*, though they were deemed not to extend to the executor of guardian in socage. See the next note. [Note 87.]

(3) This rule of the common law, which did not allow of actions of account *against* or *for* executors, had some exceptions. The *latter* part of the rule did not extend to the executors of *merchants*; and the king was not within *either* part. F. N. B. 117. 11 Co. 90. a. It should also be remarked, that though at the common law executors in general were not compellable to account, yet if they consented to settle an account, they were liable to an action of *debt* for the balance. F. N. B. page 267. of 4to ed. in lord Hale's notes. [Note 88.]

(4) The 13 E. 1. c. 23. gave an account to executors; but this being construed to describe *immediate* executors only, other statutes were made to extend the remedy to the executors of executors and to administrators. 25 E. 3. st. 5. c. 5. 31 E. 3. c. 11. 2 Inst. 404. Ante 98. b. [Note 89.]

(5) Acc. Cott. Abr. Rec. 131. But now by 4 Ann. c. 18. s. 27. actions of account lie against the executors and administrators of every *guardian* bailiff and receiver. [Note 90.]

[91. b.]

(1) But here we must understand Littleton to be speaking of a relief due on the descent of a fee simple in fee tail *in possession*; for if only a *remainder or reversion* expectant on an estate for life descends on the heir, the relief is not leviable till the death of the tenant for life. Keilw. 83. b. Kitch. ed. 1592. fo. 146. b. As to the descent of a remainder or reversion expectant on an estate tail, it seems doubtful whether a relief is payable at *any* time in respect of such a descent. Keilw. 84. a. [Note 91.]

[92. b.]

(2) Abjuration, according to the *ancient* use of the word, had the effect of an attainder; because it was necessarily accompanied with the confession of a felony. But this kind of abjuration is not now in force; the privilege [Note 92.]

privilege of sanctuary, of which it was consequential, having been taken away by a statute of James the First. See 21 Jam. c. 28. s. 7. 2 Inst. 629. and 2 Hawk. Pl. C. b. 2. c. 32. However, the word *abjuration* is still in use in our law for *some* purposes. For—1. Some statutes, in order to secure the *established religion*, require persons convicted of certain kinds of *recusancy* to abjure the *realm*, on pain of being adjudged guilty of a *capital felony*; and the word in this sense is similar to the ancient *abjuration*, and is attended with a like effect. 35 Eliz. c. 1. and 2. 13.—2. In order to secure the *succession of the crown*, as settled at and since the revolution, other statutes make all persons who refuse to take the oath prescribed for abjuring the *Pretender* and his descendants, liable to various penalties and forfeitures; but this kind of *abjuration* differs both in *object* and *effect* from the ancient one. 13 W. 3. c. 6. 1 An. st. 1. c. 22. 1 G. 1. st. 2. c. 13. 6 G. 3. c. 53.

[93. a.]

[Note 93.] (1) Tenure *at will* should be also excepted. See the next section and ante 67. b. note 2. 68. b. n. 5. However, even to tenure *at will* fealty may be incident by the custom of a manor; and so generally, if not universally, it is to *copyhold* tenures. 10 H. 6. 13. 20 H. 6. 3. Kitch. on Co. ed. 1592. fol. 132.

[Note 94.] (2) The reason is plain. Socage relief, being a year's rent, cannot be calculated, if an annual rent is not payable. See ante 85. a. note 1. But as by *custom*, or by *express reservation* on creating the tenure, a payment wholly different from and unconnected with the yearly rent may be due for relief; so it may be presumed, that by the same means a relief may be payable, where there is no yearly rent; because the relief is ascertained, without reference to a yearly rent, in both cases equally. See Kitch. on Co. ed. 1592. fo. 103. Here it may not be amiss to advert to some other differences between the several kinds of relief payable by socage-tenants. 1. The *proper* socage-relief, that is, the relief incident to the tenure by socage by the *general* custom of the realm, is a year's rent, and consequently can never be payable, except where there is an annual rent; but the *improper* socage-relief, that is, the relief due either by *special* custom or by *express* reservation, may be *more* or *less* than the annual rent, or may be payable, where there is no annual rent. 2. The socage-relief by *common law* is only payable on a *descent* and by a *natural* person; but the two other reliefs may be due, where the tenant comes in by *purchase*, or where he takes as a *sole corporation* by *succession*. Ante 84. a. 2 Ro. Abr. 517, 518. 3. If the relief claimed is one at *common law*, it is presumed to be due, till the contrary appears; that is, unless it can be proved, that the relief hath been released, or that the tenure was reserved with an *express exemption* from relief. 3 Lev. 145. Vin. Abr. *Evidence*, A. b. 28. pl. 5. But if the relief be claimed by *special custom* or *special reservation*, the *onus probandi* must necessarily fall upon the lord. 4. If the relief is by the *common law*, it is merely a fruit *incident to the service*; but if the relief is by *express reservation*, it is a *part of the service*. This distinction, however nice it may appear, may be deemed an *essential* one. Relief, when only an *incident to the service*, is not within the limitation of 50 years prescribed for seisin of it by the 32 H. 8. c. 2. as hath been observed in a former note; nor will acceptance of rent estop the lord afterwards from claiming such a relief. Ante 83. a. note 2. Cro. Eliz. 885. But the law seems to be to the contrary in both these particulars, where the relief is *part of the service*. 5. If the relief is by the *common law*, or by *special reservation*, the remedy by distress follows of course;

course; but it is said, that for relief by *special custom*, distress is not warranted without a prescription. W. Jo. 133.—These differences between the *three* kinds of socage-reliefs lie scattered in the books; and thus bringing them into one point of view may be useful. The learned reader will judge of their propriety. The diligent student may add to their number. See further C. Copyhold, chap. 2. Survey Dial. 4th edit. 95. and the case of Hungerford and Havyland in W. Jo. 132. 2 Bulst. 323. Latch. 37. 94. 129. 2 Ro. Rep. 370. O. Bendl. 180.

[93. b.]

(3) It may be proper to conclude this Chapter of Socage, by pointing out the several changes made in the tenure of socage by the statute of the 12 Cha. 2. c. 24. so often mentioned. 1. It takes away the aids *pur fe marier* and *pur faire fitz chevalier*, which were incident to all socage-tenures. 2. It relieves socage *in capite* from the burden of the king's *primer seisin* and of *fines of alienation to the king*; to both of which *socage in capite* was equally liable with tenure by *knight's service in capite*, though not so to *wardship*. 3. It extends the father's power of appointing guardians by deed or will, which by the 4 and 5 Phil. and Mar. (the first statute conferring such a power) was restricted to *female* children, to children of *both* sexes, and thus supplied the means of still further preventing guardianship in socage.—In all other respects the tenure in socage seems to be under the same circumstances, and attended with the same consequences, as it was before the restoration. But the statute of Charles the Second goes further than the mere alteration of socage; and having thus reformed and improved this favourite tenure, in the next place provides for the extension of it throughout the kingdom. This the statute effectually secures, by converting into socage all tenures by knight's service, and by taking from the crown the power of creating any other tenure than socage in future.

[Note 95.]

[94. a.]

(3) Here bishops are styled suffragans in respect of their relation to the archbishop of their *province*; but formerly each archbishop and bishop had also his suffragan, to assist him in conferring orders and in other *spiritual* parts of his office within his *diocese*. These in our ecclesiastical law are called suffragan bishops, and resemble the *chorepiscopi* or *bishops of the country* in the early times of the christian church. How this *inferior* order of bishops may be elected and consecrated is regulated by the 26 H. 8. c. 14. but notwithstanding this statute, it is not usual to appoint them.—They should not be confounded with the *coadjutors* of a bishop; the *latter* being appointed in case of the bishop's infirmity to superintend his *jurisdiction* and *temporalities*; neither of which was within the interference of the former. See fully on this subject in Gibs. Cod. 1st ed. v. 1. p. 155.

[Note 96.]

(5) This is a mistake; for the statute, by which precedency is principally regulated, gives the bishop of Durham place between the bishop of London and the bishop of Winchester. See 31 H. 8. c. 10. s. 3.

[Note 97.]

(6) The office of king's almoner is usually given to the archbishop of York, with the title of lord high almoner.

[Note 98.]

[94. b.]

(3) In *general* a corporation aggregate cannot take or pass away an interest in land, or even do any acts of importance, without deed; but there are several exceptions to the rule. See ante 66. b. Vin. Abr. *Grants*, D. a. *Corporation*, K. Com. Dig. *Franchises*. F. 12, 13, 14. New Abr. *Corporation*, E. 3.

[Note 99.]

(4) Contra

[Note 100.] (4) Contra 1 Ro. Abr. 832.—Also in the following annotation by lord Hale, which he gives at the bottom of fol. 8. b. several authorities are cited to the contrary. Vid. 7 E. 3. 41. 11 H. 4. 84. *Gift to abbot and monks passeth fee simple. If an abbot makes lease reddendo rent nobis, it cures to the successor.* 20 H. 6. 8. *Land granted to the abbot of S. and his heirs is only for life.* 9 H. 5. 9. Hal. MSS.—See further the authorities cited in Vin. Abr. *Estate*, L. pl. 1.

[Note 101.] (5) Acc. ante 8. b. But some take a distinction between describing a sole corporation both by his *natural* and *politick* name, and describing him by his *politick* name only; and it has been resolved, that a visitatorial power, granted to the bishop of Ely over Trinity College, Cambridge, in the *latter* way, ought to be construed as a grant to the bishop of Ely *for the time being*, and therefore extended to *successors*. This point was adjudged in Dr. Bentley's case. See 2 Stra. 913. Fitz. Gibb. 308. 312. 1 Barnard. 453.

[95. a.]

[Note 102.] (1) Various kinds of deans, besides deans of chapters, are known to our law; and it requires more divisions than one to distinguish them properly. Considered in respect of the *difference of office*, deans are of *six* kinds. 1. Deans of *chapters*, who are either of cathedral or collegiate churches; though the members of churches of the latter sort may more properly be denominated *colleges* than *chapters*. 2. Deans of *peculiars*, who have sometimes both jurisdiction and cure of souls, as the dean of Battel in Sussex; and sometimes jurisdiction only, as the dean of the Arches in London, and the deans of Bocking in Essex and of Croydon in Surrey. 3. *Rural* deans. 4. Deans *in the colleges* of our universities, who are officers appointed to superintend the behaviour of the members and to enforce discipline. 5. *Honorary* deans, as the dean of the Chapel Royal at St. James's, who is so styled on account of the dignity of the person over whose chapel he presides. As to the chapel of St. George, Windsor, there being canons as well as a dean, it is something more than a mere chapel, and, except in name, resembles a collegiate church. 6. Deans of *provinces*, or, as they are sometimes called, deans of bishops. Thus the bishop of London is dean of the province of Canterbury, and to him as such the archbishop sends his mandate for summoning the bishops of his province, when a convocation is to be assembled; which perhaps may account for calling the dean of the province dean of the bishops. What the other parts of his office are, the books we have been able to consult do not explain; nor do they mention whether there is a dean for the province of York. See Lyndw. Oxf. ed. 317. Gibs. Synod. Anglican. 17. Ante 94. a.—Another division of deans, arising from the nature of the office, is into deans of *spiritual* promotions and deans of *lay* promotions. Of the former kind are deans of peculiars with cure of souls, deans of the royal chapels, and deans of chapters; though as to these last a contrary opinion formerly prevailed. Perhaps too rural deans may be added to the number. Of the latter kind are deans of peculiars without cure of souls, who therefore may be and frequently are persons not in holy orders.—In respect of the manner of appointment, deans are, 1. *Elective*, as deans of chapters of the *old* foundation; though they are only so nominally and in form, the king being the real patron, which will appear from the next note but one. 2. *Donative*, as those deans of chapters of the *new* foundation, who are appointed by the king's letters patent, and are installed under his command to the chapter, without resorting to the bishop either for admission or for a mandate of installment; if that

that mode of promoting *still* prevails in respect to any of the new deaneries. See the next note but one. Deans of the royal chapels are also *donative*, the king appointing to them in the same way. So too may deans of peculiars without cure of souls be called; as the dean of the *Arches*, who is appointed by commission from the archbishop of Canterbury; but this must be understood in a large sense of the word *donative*, it being most usually restrained to *spiritual* promotions. 3. *Presentative*, as some deans of peculiars with cure of souls, and the deans of *some* chapters of the *new* foundation if not of *all*. Thus the dean of *Battel* is presented by the patron to the bishop of Chichester, and from him receives institution. Thus too the dean of Gloucester is presented by the king to the bishop with a mandate to admit him and to give orders for his installment. See the next note but one. 4. *By virtue of another office*, as the bishop of London is dean of the province of Canterbury, and the bishop of St. David is dean of his own chapter.— Again in respect of the manner of holding, deans are so *absolutely* or *in commendam*. But this division applies only to *spiritual* deaneries.— In thus pointing out the several denominations of deans we have attempted a more comprehensive as well as a nicer *general* discrimination and arrangement, than the books usually resorted to furnish; though to them we are indebted for most of the materials, and to them we refer the student for a competent idea of the nature of each kind of deanery. See *Decanus* and *Deanery* in Spelm. Gloss. Cow. Dict. Ayl. Parerg. Nels. Rights of the Clerg. Burn. Eccles. L. and the Index to Gibs. Cod.

(2) But the name of chapter is not confined to *cathedrals*, the prebendaries and canons of *collegiate* churches being also styled chapters; though rather improperly, as we have before hinted. [Note 103.]

(3) The *new* deaneries and chapters to *old* bishopricks are *eight*; [Note 104.] namely, Canterbury, Norwich, Winchester, Durham, Ely, Rochester, Worcester, and Carlisle. The new deaneries and chapters to *new* bishopricks are five; namely, Peterborough, Chester, Gloucester, Bristol, and Oxford. See Will. Cathedr.

(4) In this account of the *old* and *new* deaneries, many particulars, [Note 105.] relative to the manner of coming to the possession of them, are omitted; and therefore we shall add some *general* things historically in respect to both. As to the *old* deaneries, it will be very difficult to trace the subject, with any tolerable degree of precision, higher than the reign of king John, or to ascertain what was the *legal* mode of constituting deans of chapters before. If our ancient chronicles are to be depended upon, nothing could be more variable than the practice for several reigns after the conquest. Thus in the church of York, we find sometimes the archbishop collating to the deanery, sometimes the king conferring, and sometimes the chapter electing; and it is probable that a like uncertainty prevailed in other cathedrals. See Drake's Antiqu. York 557. to 565. 1 Will. Surv. Cathedr. 64. At length however, after many struggles, the *elective* mode of constituting deans, as well as bishops, abbots, and priors, was established throughout the kingdom; for king John by a charter of the 16th of his reign grants, *ut de cetero, in universis et singulis, ecclesiis et monasteriis, cathedralibus et conventualibus totius regni nostri Anglie, libera sint in perpetuum electiones quorumcunque prelatorum majorum et minorum*; and deans of chapters clearly fall within the description of *minor prelates*. See king John's charter

ter in 1 Coll. Eccles. Hist. Append. No. 33. and as to the word *prelatus*, consult Lyndw. Oxf. ed. 41. and 217. But notwithstanding [95. a.] the strong terms in which the freedom of canonical election is provided for by this charter, and the repeated confirmation of it by various statutes, the election of a dean by the chapter is by long practice converted into a mere form, and the king is in reality as much the patron of the *old*, as he is both in name and substance of the *new* deaneries. For two centuries past at least, the king's *conge d'élire*, which by the charter of John must precede every election of a prelate and was in use long before, hath been invariably accompanied with the king's *letter missive*, as it is styled, recommending a particular person, whom the chapter of course elect their dean. In the case of the *old bishopricks*, which are filled in the same form, the election of the person named by the crown is secured by a statute of the 25th of Henry the eighth, which compels the chapter to yield to the recommendation by the pains of a *premunire*, and, if they refuse, authorizes the king to appoint a bishop by letters patent. See post. 134. a. But no such statute hath been yet made in respect to the *old* deaneries; and therefore the right of the crown over them rests wholly on the charter of king John and the subsequent practice. Here then it may be asked, how the crown, without the aid of a statute, can enforce its claim of patronage; and what are the means, by which the nomination would be made effectual if the chapter should disregard the royal recommendation, and persevere in a *free* exercise of the right of electing? This question may be resolved, by considering, that even the charter of king John requires the king's confirmation of the choice made by the chapter; and therefore by refusing to confirm he may always prevent the effect of their election. Nay it hath been said, that the election is so wholly a ceremony as not even to be essential, and that even before any act of parliament to dispense with it the king might nominate to the *old* bishopricks by letters patent, without resorting to the chapter for the form of their concurrence; and the *old* deaneries are within the same reason. See the case of Revan O'Brian in Cro. Jam. 552. Palm. 22. and 2 Ro. Rep. 101. 130. and s. c. cited in F. N. B. 4to ed. 396. note a. This doctrine, it must be owned, notwithstanding the positive terms in which it was asserted, and the reverence due to the judges by whom it was recognised, seems as repugnant to the *letter* of king John's charter, as the mode of electing in conformity to the *letter missive* certainly is to the genuine *spirit* and intention. But the latter having the sanction of a practice too ancient to be now drawn into question, it can be of little use to deny the former; and accordingly in the reign of Charles the first we find some instances, in which the king actually appointed to some of the *old* deaneries by letters patent without the least appearance of opposition on the part of the chapter. See Rym. Fæd. vol. 8. part 3. page 166. vol. 9. part 1. p. 82. To fix the time when the *letter missive*, in respect either to the *old* deaneries or the *old* bishopricks, first came into use; to explain how from a mere recommendation it grew into a royal mandate; and more particularly to determine, whether it operated as such before the reformation, or whether *that*, in consequence of the assertion of the king's supremacy, was the *æra* of implicit obedience to it; might be both curious and useful. Probably the *letter missive* was not *generally* used, to control the freedom of election, till after the time of Edward the first. At least Mr. Prynne, hostile as he was to canonical election, he deeming it an usurpation to the prejudice of the royal prerogative, gives us a *conge d'élire* of Edward the first for the election of a bishop, which concludes with a recommendation to the chapter in *general* terms to chuse a person duly qualified;

qualified; but he takes no notice of its being accompanied with a *letter missive*; a circumstance which, had it occurred, would scarcely have escaped his observation. See 3 Pryn. Rec. 1255. The earliest precedent of such a letter we have hitherto met with since the charter of king John, is of the year 1347, when Philip de Weston is said to have been elected to the deanery of York on exhibiting a letter from Edward the third. Drak. Antiq. York, 563. Another instance of a *letter missive* relative to the same deanery occurs in 1544; Henry the eighth signifying it to be his pleasure that Dr. Wooton should be elected, and the chapter electing him accordingly. Drak. Antiq. York, 565. and Append. 81. These few facts may give *some* idea of the gradation, by which the crown hath possessed itself of the complete patronage of the old deaneries. We are not prepared for a more ample discussion; and if we were, this would not be the proper place for a subject so extensive. —As to the deans of the *new* foundation, though the king nominates by letters patent, yet *some*, if not *all*, of the *new* deans of *cathedral* churches are now deemed *presentative*, and not *donative*, the practice being to present the letters patent to the bishop for institution and a mandate of installment. It hath indeed been a question, whether they are *donative* or *presentative*; for the understanding of which we shall shortly state the principal facts on which the case, so far as relates to the deanery of Gloucester, depends. The new deaneries were erected by Henry the eighth under power given by act of parliament, which also authorized him to make statutes for their regulation by *letters patent* or *writing under the great seal*. In the charter for founding the deanery of Gloucester, being one of the *new* foundation, the king reserved the nomination of the deans to himself, and directed that the deans and chapters should be governed according to such rules and statutes as the king should appoint by *indenture*. The king afterwards, by commissioners named for the purpose, formed a body of statutes, amongst which one required, that the king should upon every vacancy nominate a dean by letters patent, and that he should be presented to the bishop, and being instituted by him should be admitted by the chapter. The commissioners signed these statutes; but they were neither under the *great seal* nor *indented*; and on account of this deviation both from the act of parliament and the commission, they were considered as invalid, and powers were given by other acts to Mary and Elizabeth successively to form other statutes. However nothing final being done under these powers, *some* of the statutes framed by Henry the eighth's commissioners, for want of others more regularly made, were adopted, but the particular statute which made the deanery *presentative*, was never practised *after* the restoration; and only in one instance *before*, the deans being constituted by mere grants from the crown. In this state of things came the 6 Ann. c. 21. which established *such* of the statutes of the cathedral and collegiate churches founded by Henry the eighth, as had been usually received and practised in the government of the same respectively since the restoration, and were not inconsistent with the constitution of the church of England or the laws of the land. But this act, made to remove doubts, created a very important one; which was, whether the act confirmed the *whole* body of statutes where *any* of them had been practised since the restoration, or only such statutes or parts of statutes as had been *individually* received. Amongst other cases which depended on the solution of this doubt, one was the mode of constituting the dean of Gloucester; for if receiving a part of Henry the eighth's statutes necessarily was followed with a confirmation of the whole, then the cathedral church of

crown, though it usually is? The facts we have stated shew, that in England some deaneries are *nominally elective* under the *royal conge d'élire*, and the rest *really presentative* or *donative* by the crown; and that the only two deaneries of the Welsh cathedrals are *collative* by bishops. Nay, if it can be proved, that election under a *conge d'élire* from a *bishop*, instead of one from the *king*, is an established mode of appointing to any deanery in Ireland, we do not see any legal objection to it *merely as a mode*, however *singular* it may be. The argument from foundership will also for the *most part* be found inconclusive. Several of the English *old* deaneries were certainly endowed by bishops, either with their own private possessions, or by dismembering those of their respective sees; and yet *all* are *elective* under a *conge d'élire*, not from *bishops*, but from the *king*. 1 Stilling. Eccles. Cas. 341. But should a case ever happen, in which there is neither *charter usage* nor *statute* prescribing a rule, then some general principle of law must be appealed to for a direction; and in such a case, which is barely a possible one, *foundership* seems to be the *true* and indeed *only* criterion of the title to the patronage and right of constituting. It is feared, the reader will think, that we have dilated too much on the *modes of constituting* deans of *cathedral* and *collegiate* churches; but as there is little of *digested* matter upon the subject in other books, this may excuse us for detaining him so long here. For the *different* instruments and other *forms* made use of in appointing deans both of *old* and *new* chapters in England, see 2 Ought. Ord.—Note, that on *promotion* to a bishoprick, deaneries, as well as other spiritual preferment, becoming void after *consecration*, and in consequence of it, the king being by *prerogative* intitled to the next turn, therefore in this particular instance the *English* deaneries of the *old* foundation are not even *nominally elective*.

[97. a.]

[Note 106.] (3) It seems, however, that it is not now the practice of the crown to exert this right of incumbering bishops with pensions and corodies. Should the student wish for any particular information concerning either, whether belonging to the king or to a common person, they not being peculiar to the former, the more ancient books must be resorted to; as those of modern date, except bishop Gibson's *Codex*, either wholly pass over the subject, or treat of it very slightly. See Fitz. N. B. 230. to 232. and title *Corody*, in Fitz. Abr. Bro. Abr. Ash. Prompt. and the Index to Gibs. Cod.

[98. b.]

[Note 107.] (1) This observation on *general* or *public* statutes points at *two* important rules distinguishing between them and *particular* or *private* statutes.—According to the *first*, which relates to their several *degrees of notoriety*, the judges may and ought to take notice of *public* acts without pleading; but *private* acts *must* be pleaded. But there are some exceptions to *both* parts of this rule. See Law of *Nisi Prius*, ed. of 1775. p. 222. and 1 Sid. 209.—The *second* rule imports a difference in the *mode of trial*; for the existence of a *public* act must be tried by the judges, who are to inform themselves in the best manner they can; but a *private* act may be put in issue, and shall be tried by the *record*. See Hal. Hist. C. L. 15. and Com. Dig. *Parliament*, R. 5.—A *third* difference, which hath been taken between a *general* and a *particular* act, is, that the *latter* will not bind *strangers*, though it is without a *saving* of their rights. However well founded this last difference may be, it certainly is usual in *modern private* acts, to insert a special saving clause, explaining how far the rights of strangers are intended to be affected.—A *fourth* difference relates to *offering sta-*
tutes

tutes in evidence to a jury; for it is said, that a *public* act, printed by the *king's printer*, or other person authorized by the crown, is good evidence to a jury; but that of a *private* act, there must be either an *exemplification under the great seal*, or a *coffy sworn to be compared with the parliament roll*. Some authorities, however, do not correspond with this last difference; and others except out of it *private* acts concerning a whole county. See Vin. Abr. *Evidence*, A. b. 1. Law of Nisi Pri. ed. 1775. p. 225. 1 Stra. 446. It should also be remarked, that there is a difference between proving private acts to a jury, and proving them on the issue of *nul tiel record*, which never goes to a jury; nothing less than *exemplification under the great seal* being sufficient in the latter case. 2 Salk. 566. For these and other differences between *general* and *particular* statutes, see further in Vin. Abr. *Statutes*, D. E. 2, 3. and Hatt. Treat. on Stat. cap. 2. p. 11. Though the book last cited is published with the name of sir Christopher Hatton, lord chancellor to queen Elizabeth, some doubt whether he was really the author. Nichols. Engl. Histor. Libr. 2d ed. 192. However it is at all events a treatise well worth consulting. As to the different forms of statutes, besides the Prince's case in 8 Co. see Pryn. on 4 Inst. 13. Hal. Hist. Com. L. 13. Vin. Abr. *Statutes*, A. Com. Dig. *Parliament*, R. 3. and the Preface to Ruffhead's edit. of Stat.

[99. a.]

(1) Here lord Coke explains the king's power of granting licences to alien in mortmain, notwithstanding the old statutes against such alienations, on a principle which makes the licence rather the waiver or remission of a forfeiture, than a dispensation. The licence being considered in the former way, it is attributing to the king no greater power as lord paramount, than subjects, being mesne lords, may exercise in respect of the forfeitures to which they are entitled on alienations in mortmain. In other words, it is construing the statutes so as not to bring the case of a licence within them; and consequently dispensation became unnecessary. It should also be remembered, that the king's power of granting such licences seems recognised by a statute of Edward the third. See 18 E. 3. st. 3. c. 3. However, the pretended power of suspending statutes by regal authority, without consent of parliament, being declared illegal at the revolution; and it having been usual to grant licences to alien in mortmain in a manner, which imported an exercise of suspending or dispensing power, that is, with a *non obstante* of the statutes of mortmain and *quia emptores*; under these circumstances a jealousy of any thing, in the least connected with an assumption of dispensing power, might have influenced many to have confounded such licences with dispensation; and therefore it was deemed prudent to give them a parliamentary sanction. See 7 and 8 W. 3. c. 37. It is observable, that the statute made for this purpose authorizes the king to grant mortmain licences, without any regard to the person of whom the lands were held; and declares, that they shall not be subject to *any* forfeiture. Before this last act the king's licence only prevented the forfeiture to himself; and if there was any mesne lord, he might take advantage of the mortmain statutes, notwithstanding the royal licence. See Fitzh. Nat. Br. 221. O. But the act of William seems to be expressed so, as to *extend* the operation of the king's licence, and to render it effectual *universally*, by preventing a forfeiture to other lords as well as to the king himself. Another thing deserving of notice is, that the statute is quite silent as to the writ of *ad quod damnum*; which anciently was thought an essential preliminary to the licence, in order that the king might know what prejudice would arise to himself or others from granting

[Note 108.]

ing it. Fitzherbert indeed tells us, that in his time it was become a common practice to purchase licences to alien in mortmain without suing an *ad quod damnum*, and instead of it to add to the patent, granting the licence, special words to signify that it should be good without any writ. But he adds, that it seems dubious, whether such patents were good, if they turned out to be prejudicial and disadvantageous to the king or others. See Fitzherbert N. B. 222. D. Whether since the statute of William writs of *ad quod damnum* previous to licences from the crown to alienate in mortmain are necessary, may deserve consideration; for which purpose it may be material to enquire what the practice hath been.—Since writing the former part of this note, we are well informed, that writs of *ad quod damnum* have not been usual on granting mortmain licences since the statute of William.

[100. b.]

[Note 109.] (1) There is not any thing in the 12th of Charles the second, which in the least varies the tenure in *frankalmoigne*, it being expressly saved by the statute. See 12 Cha. 2. c. 24. s. 7. Indeed had the saving been omitted, we do not see, how any of the other provisions in the statute could have affected this tenure; and therefore it is presumed, that the saving was merely the effect of an abundant caution. The statute adds, that it shall not subject tenures in frankalmoigne to *any greater or other services*; but what was intended to be guarded against by these latter words is not very obvious.

[105. a.]

[Note 110.] (1) The statute of 12 Cha. 2. having taken away *all tenure by homage in general* words, without any exception either express or implied of *homage auncestrel*, the latter, though not particularly named, yet, as being one species of homage, was virtually included. See 12 Cha. 2. c. 24. s. 1, 2. But most probably it had expired before the statute; for lord Coke doubted, whether even in his time there was any relique of this tenure. Ante 100. b. An early extinction of homage auncestrel is easily accounted for, by recollecting, that a *double prescription*, one in the lord's blood and another in the tenant's, or a *privity of succession time out of mind*, which was much the same in effect, was essential to homage auncestrel; and consequently, that if one alienation either of the seigniorship or the tenancy had been made within time of memory, the *homage auncestrel* was destroyed, and it became *simple homage*. In a former note we had occasion to make a general observation on the reason for discharging tenures from *homage*, and on the advantages arising from it, whilst it remained, both to the lord and tenant, particularly to the latter, where the homage was *auncestrel*. Ante 67. b. note 1. We have only to add here, that though amongst us homage of *every kind*, so far as it relates to tenures, is now wholly at an end, yet so intimately blended are the various branches of one system, and in subjects of jurisprudence so dependant is a knowledge of the *present* state of things on a reference to the *ancient* one, that the remnant of tenures in this country can never be duly comprehended, without the aid of a general outline, as well of homage and its effects, as of the other perished parts of the same venerable structure.

[105. b.]

[Note 111.] (1) *Generally* the service of *grand serjeanty* was of such a kind as necessarily to be *within* the realm; but *some* services, which amount to grand serjeanty, might be due *out of* the realm as well as *within*, and both Littleton and Coke give us instances of such reservations. See Sect. 153. b. here, and post. 106. b.

(2) Here

[106. b.]

(2) Here lord Coke shews, that escuage, though usually an incident [Note 112.] to knight's service, is not always so; that is, that knight's service *may* be without escuage. On the other hand, escuage, if *uncertain*, which we must understand it to be when mentioned *generally*, cannot be without knight's service. To express this in fewer words, escuage is inseparable from knight's service, but knight's service is not so from escuage. This tends to confirm what we observed in a former note, that escuage ought to be considered rather as an incident to the tenure by knight's service, than as a distinct tenure. However, it at the same time seems to point out the reason for calling some tenures by knight's service tenures by escuage; because such a denomination distinguished that species of knight's service, to which escuage was incident, from *cornage*, *castle-guard*, and such other tenures by knight's service as were not liable to escuage. We think this a more satisfactory way of justifying Littleton against the censure of Mr. Madox for using the term of *tenure by escuage*, than resorting to the distinction suggested by sir Martin Wright; who, as we have formerly hinted, attempts to prove, that though generally escuage was an incident to tenure by knight's service, yet sometimes it was a tenure of itself. Ante 73. note 2. But still we must confess the justice of Mr. Madox's animadversion, so far as it applies to the calling *homage* and *fealty* tenures; because the former being incident to every species of knight's service, except where the tenant was exempt from it by profession, and the latter being an incident to all tenures except tenures at will or at sufferance, it could answer no purpose of discrimination thus to denominate any tenure. In fact, it was not the practice to call any tenure a tenure either by fealty or by homage, except in the case of homage *auncestrel*; and though Littleton begins his account of tenures with homage and fealty, yet we may very well suppose his previous explanation of them and escuage, or at least of the former, to have been made merely as an introduction to the description of knight's service. We should not be thus prolix in observing on a controversy, which is more verbal than any thing else, if it was not for the sake of convincing the reader, that however properly Mr. Madox guards against confounding the incidents of a tenure with the tenure itself, still it would be an injustice both to Littleton and Coke to impute any such misconception to them; and therefore, that so far as Mr. Madox's animadversion hath this tendency, respectable as his writings are, it ought to be rejected. Indeed it is highly improbable, that grave and learned authors, like Littleton and Coke, to both of whom, particularly the former, the whole doctrine of tenures was so much more familiar than it can possibly be in modern times, when the *practice* in respect to tenures is confined to a very narrow circle, and we are mere *theorists* as to the greater part of the subject, should adopt an error so fundamental.

[107. a.]

(2) This passage seems rather to imply, that wardship and marriage [Note 113.] were not incident to tenure by *cornage*, when it was of the king, and therefore called grand serjeanty. But this was not the meaning of Littleton, as appears from a subsequent section, in which he is more explicit, and expressly tells us, that *all* tenures by grand serjeanty were liable both to ward and marriage. See Sect. 158.

(5) Particular respect is due to the opinions of ancient times on the [Note 114.] subject of tenures; but in the instance of the case here mentioned to be put to the judges, their resolution seems so inconsistent with the nature

nature of grand serjeanty, as described both by Littleton and Coke, that it may be allowable to doubt the propriety of the opinion. Littleton states the doing the service to the king in *proper person* as a thing essential to grand serjeanty; and lord Coke enumerates it amongst the special properties of this tenure, with the exception only of performing the service by deputy when the tenant himself is incapable. Ante 106. b. But if this be so, how can a service, expressly reserved to be done by *any person*, fall within the description? It is observable indeed, that Littleton recites the opinion of the judges without the least approbation; and that even they themselves, when pressed to declare what the relief ought to be, whether *5l.* as for a tenure by escuage, or a *year's value of the lands* as for a grand serjeanty, avoided answering; from which hesitation it seems, as if they were not disposed to adhere to the first opinion in all its consequences. On the other hand, if the tenure in question was not *grand serjeanty*, but mere *knight's service*, it tends to prove, that though the personal service, in lieu of which escuage was payable, was *in general* due only on *foreign expeditions*, yet by *special reservation* it might be due *within the realm*. However, reserving service in war within the realm was a thing so unusual in *practice*, that the service, for which escuage was a commutation, was called *servitium forinsecum*; a denomination which, according to lord Hale, is founded on the circumstance of its being due *out of the realm*. See ante 69. b. note 3. In a former note on escuage, we adopted lord Hale's opinion as to the reason of calling knight's service *servitium forinsecum*; because we thought his conjecture a probable one. Ante 74. a. note 1. But the reader should recollect, that others explain the denomination in a different way. Ante 74. b.

[Note 115.] (6) On many occasions it may be of importance thoroughly to understand the phrase of *infra*, or, as according to classical style it ought to be, *intra quatuor maria*; for there are various subjects, as well of the *law of nations*, as of *municipal law*, which are necessarily connected with it. Of the former kind are the *sea-dominion* claimed by our king, and its incidental rights; especially the right of salutation by striking of the flag and lowering the top-sail to our ships of war; a ceremony, which, however, it may be construed by foreigners as a mere *compliment*, is considered by ourselves as a *recognition* of sovereignty. Of the latter sort are the doctrine concerning *essoins de ultra mare*, and all those cases which turn upon the *allegation of being beyond sea*; as questions of legitimacy, of outlawry, and on the statutes of limitation particularly may. But notwithstanding the necessity of knowing, for such a variety of purposes, what is the sense of the term of being *within the four seas*, we do not find the subject sufficiently enlarged upon either by lord Coke, or indeed scarce any other writers deserving of being called *original*; except Mr. Selden, who is very copious upon it; and sir Philip Medows, who, though not so favourable to our claim of *sea-dominion*, nor so generally known as the former, is well intitled to notice. See Seld. Mar. Claus. lib. 2. per tot. but more particularly in cap. 1. and 24. and Medow's Observat. concerning the Dominion, &c. of the Seas, in a small tract, which was published in 1689. In this scarcity of information on the subject, it may be acceptable to the reader to be assisted in his enquiries by a short but pointed view of the subject; for which purpose we shall first mention the origin of the phrase of the *four seas*, and explain its most general and extended sense.

[107. b.] The appellation of the *four seas* takes its rise from the four parts into which the sea encompassing Great Britain, by reference to the four cardinal

cardinal points of the globe, is divided. All these parts, taken together, are sometimes called the *British seas*; but considered separately, each varies in its denomination with the coasts of the island. To the *West* our sea is by ancient writers called *Vergivian*, not only including the sea between Great Britain and Ireland, but extending over the Atlantic ocean, which washes the western coast of the latter; and this western part of our sea is subdivided; for so much as runs between England and Ireland is called *St. George's Channel*, or the *Irish sea*; and the sea on the west coast of Scotland is sometimes named the *Caledonian*, *Drucalcedonian*, or *Scottish sea*, and sometimes the *North sea*. On the *North* side of our island there is also the *Scottish* or *North sea*. To the *East* we have the *German ocean*, which is bounded principally by the opposite coasts of Germany and the United Provinces. Lastly, to the *South* there is the *British Channel*, or *sea*, as some denominate it; which runs along the *French coast*, and comprehending the bay of Biscay, ends with the northern coast of *Spain*. See Seld. Mar. Claus. lib. 2. cap. 1. and the introductory account of the British ocean prefixed to the description of Ireland, in Cam. Britan. Such is the description of the four seas, as we have it principally from Mr. Selden. But it should be observed, that the description is framed with a view to the whole island of Great Britain, as in Mr. Selden's time it became united under the government of the same king; and not to *England* as distinct from *Scotland*, according to the sense of our English law-books before the reign of James the first; for in them the four seas were understood with more restriction, and to be those which encompassed England only. See Meadows's Observ. on the Domin. of the Seas, 11. Seld. Mar. Claus. lib. 2. cap. 31. and Justice's Treat. on Sea-Laws, 1st ed. 165. Another thing, very necessary to be attended to is, the very large and comprehensive terms of the description, so far as they regard the *West* and *North* parts of the British seas; the former seeming to reach to the eastern shore of the continent of America, and the latter to be in some measure without any certain limits. Even the two other parts do not seem to be marked out with that nice precision, the want of which, as the reader will readily conceive, may under some circumstances be the cause of considerable embarrassments, both in transactions with foreign states, and in the exercise of judicial authority amongst ourselves. See Seld. Mar. Claus. lib. 2. c. 30, 31, 32. The difficulties arising from this uncertainty will be best understood, by considering what the extent of the phrase of the *four seas* is in some particular instances. But this illustration shall be attempted in another place, where lord Coke gives the opportunity of resuming the subject. See post. 244. a.

[108. a.]

(1) The tenure by grand serjeanty still continues, though it is so regulated by the 12 of Cha. 2. as to be made in effect *free and common socage*, except so far as regards the merely honorary part of grand serjeanty; for the first part of the statute, which destroys the incidents to tenures by knight's service, of which grand serjeanty was the highest species, is expressed with a generality sufficient to reach grand serjeanty; but then a proviso follows, by which the *honorary* services of this tenure are expressly saved. It is observable, that the proviso for this purpose is penned with an inaccuracy, which leads to a very mistaken idea of the incidents to grand serjeanty. The honorary services are preserved with a cautious exception of several burthensome properties, such as *marriage wardship* and *voyages royal*; to which are added *escuage* and the *aids pur faire fitz chevalier et file marier*, though these latter were certainly quite foreign to grand serjeanty. See ante

[Note 116.]

105.

105. b. From this undistinguishing mode of expression, and from the confusion and redundancy so conspicuous in most parts of the statute, we are inclined to infer, that those, who attribute the frame of it to lord chief justice Hale, found themselves on a loose report, very injurious to the memory of that shining ornament of his profession. See Gilb. Eq. Rep. 176.

[Note 117.] (2) In a former note we mentioned Mr. Madox's disapprobation of calling any tenures of the king *by way of distinction* tenures *ut de personâ*. We shall here explain his reasons for rejecting the phrase more fully. The phrase seems *unnecessary*; for that of *ut de coronâ* fully answers the same purpose of distinction. It also seems *injudicious*, and to tend to an erroneous idea of tenures; because it supposes that *some* tenures are *not* of the *person*, whereas in truth *all are*, and none can hold feudally of an *inanimate* thing, or otherwise that of a man's person. Mad. Baron. Angl. 167. This is the substance of Mr. Madox's objections to the phrase; and we still think, that in strict propriety of speech his animadversion on those who use it is justifiable. However, in justice to lord Coke it should be remembered, that he was not the inventor of the phrase; Mr. Madox himself tracing its origin to the latter end of the reign of Henry the eighth.

[Note 118.] (3) Mr. Madox is not less adverse to thus distinguishing tenure *in capite* from tenure *ut de honore*, than to the distinction of *ut de personâ*; nor are his reasons less convincing. Tenure *in capite*, in its genuine sense, signifies a tenure of another *sine medio*, that is, immediately, and without the interposition of any mesne or intermediate lord; and therefore when an honor or other seigniority came into the hands of the crown by escheat or otherwise, its tenants were as much tenants *in chief* to the king, as those who were so by original grant from the crown. In proof of this Mr. Madox selects from ancient records a great variety of instances between the 8th of Richard I. and the 20th of Henry VI. in which tenures *ut de honore* are *expressly* styled tenures *in capite*; and as Mr. Madox adds no instances of a later time than Henry the eighth and queen Elizabeth, in which the words *in capite* are omitted, it may be conjectured, that the error complained of by Mr. Madox originated soon after the time of Henry the sixth. Mad. Baron. Angl. 181. The design of excluding tenures *ut de honore* from the description of *tenures in capite* was to distinguish those estates, which were held of the king by a tenure originally created by the king, from those held of him him by a tenure commencing by the subinfeudation of a subject; between which there were many differences in point of incident very essential both to the lord and tenant. Mad. Baron. Angl. 12. But it should have been recollected, that the distinction aimed at was already marked, with equal sufficiency and more correctness, by denominating tenures of the first sort tenures *ut de coronâ*, and those of the second tenures *ut de honore*. The influence of this mistaken notion of tenancy *in capite* is very evident, as well throughout the statute of Charles the second for taking away the oppressive fruits of knight's service and tenure *in capite*, as in those grants from the crown, which in the *tenendum* are expressed to be *ut de honore et non in capite*. See Mad. Excheq. fol. ed. 432. But great as this error about tenure *in capite* may be, lord Coke is excuseable for conforming in his language to it; because before his time it had been adopted by the legislature. See 37 H. 8. c. 20. s. 2, 3, 4. 1 E. 6. c. 4. s. 1, 2, & 3. and Mad. Baron. Angl. 233.

(4) The

(4) The first book of Mr. Madox's *Baronia Anglica* is principally [Note 119.] employed in explaining the nature of an *honor*. He objects to the propriety of the statutes of Hen. 8. referred to by lord Coke; and as they only create *titular* honors, and therefore cannot give a just idea of the nature of the *genuine* honor, which is a *land barony*, blames lord Coke for his reference. Mad. Bar. Angl. 8, 9, 10: and 236.

(5) See Mad. Baron. Angl. 238, 239. where the learned author observes on the inaccuracy of language in the 12 Cha. 2. about tenure *in capite*. The title of the act expresses, that it was made for taking away tenure *in capite*; and the first enacting clause proceeds on the same idea. But had the act been accurately penned, it would simply have discharged such tenure of its oppressive fruits and incidents; which would have assimilated it to *free and common socage*, without the appearance of attempting to annihilate the *indelible* distinction between holding *immediately* of the king, and holding of him through the *medium* of other lords. See ante note 3.

[108. b.]

(1) The tenure of petit serjeanty is not named in the 12 of Cha. 2. [Note 121.] but the statute is not without its operations on this tenure. It being necessarily a tenure *in capite*, though in effect only so by socage, *livry* and *primer seisin* were of course incident to it on a descent; and these are expressly taken away by the statute from every species of tenure *in capite*, as well *socage in capite* as *knight's service in capite*. See ante 77. a. But we apprehend, that in other respects *petit serjeanty* is the same as it was before; that it continues in denomination, and still is a dignified branch of the tenure by socage, from which it only differs in name, on account of its reference to *war*.

(4) Mr. Madox cautions his readers against this derivation of *borough*. [Note 122.] Mad. Firm. Burg. 2. His reason, we presume, was, that *borough* was a word far more ancient than the practice of sending burgesses to parliament. However, it is possible that some boroughs might be denominated towns, till they were allowed to chuse representatives in parliament; and that they acquired the name of *boroughs* from the circumstance of having that privilege. If any *towns* did become *boroughs* in this way, it in *some degree* accounts for lord Coke's explication of the word, though it will not wholly justify him as an etymologist.

[109. b.]

(2) This implies, that unless a borough is *corporate*, it *cannot* be a [Note 123.] city. But if this was lord Coke's idea, it is not quite accurate; for though in general the description may be true, yet it is not universally so. Westminster is a *city*, and also a *borough*, so far at least as the sending members to parliament can entitle it to that denomination; and yet it certainly is not corporate. Mr. Madox mentions Westminster as a borough *not corporate*; and we ourselves have seen papers in the archives of the dean and chapter of Westminster, which confirm his idea. Mad. Firm. Burg. 49. This fact is material to another purpose. Westminster not being corporate, and yet having, as we apprehend, first sent members to parliament in the reign of Edward the sixth, is an instance, that the inhabitants of a town may acquire the right of having representatives in parliament *within time of legal memory* without being incorporated, and therefore seems inconsistent with the doctrine of lord chief justice Holt on this subject in Ashby and White. See 3 Pryn. Brev. Parl. sect. 7. p. 188. 1 Will. Notit. Parl. 7. and 21. of the preface. Car. Rights of Elect. part 2. page 233. 1 Stow's Survey, Stripe's ed. of 1720.

1720. p. 8. and 10. of the second appendix, and 2 Dougl. Hist. of Cas. of Controv. Elect. 296, 297, 298. It is with great pleasure that we cite Mr. Douglas's work, as it affords the opportunity of congratulating the student on the accession of a collection of excellent reports on the law of parliamentary election, accompanied with an instructive historical preface, and very judicious annotations. This is the only work of the kind, except one lately published from Mr. Glanville's manuscript: and they are both particularly valuable, on account of their tendency to diffuse the knowledge of a branch of law, which before was too much confined to the narrow circle of a few favourites in possession of the practice.

[Note 124.] (3) This is rather an unapt example of the truth of lord Coke's position; for Westminster, as we have already stated, is *not* a borough incorporate. See supra, note 2. As to Westminster's being a city, it became so by *express creation*, and not *singly* by making it the see of a bishop, however sufficient *that* of itself might have been; the letters patent, which erected the bishoprick, ordaining, *quod tota villa nostra Westmonasterii extunc et deinceps in perpetuum sit civitas, ipsamque civitatem Westmonasterii vocari*. See the letters patent in 1 Burn. Reform. page 246. of the Appendix.

[110. a.]

[Note 125.] (1) The latter part of this etymology is justly exploded; but it is some excuse for lord Coke, that it did not first come from him, it being to be found in preceding authors of eminence. See Lamb. Archeion in the chapter of *Parliament*, and 1 Whittl. on Parliament 174. A learned writer of the present time suggests, that perhaps *parliament* may be a compound of *parly* and *ment*, two Celtick words, the former answering to *parler* in French, and the latter signifying *abundance*, and both together importing the same as *great talk* amongst the Indians of North America. Barringt. Obs. on Ant. Stat. 2d ed. 56. But though we do not doubt that there are two such words in the Celtick language, we are scarce more satisfied with this derivation, than with that expressed by lord Coke. The opinion adopted by Mr. Lambard seems far the most probable; and this is, that *parliament* is not a compound word, but *simply* derived from the French verb *parler*, with the addition of *ment* in the termination; which mode of converting *verbs* into *nouns* as well as into *adverbs* is common in the French tongue. Lamb. Archeion in the chap. of *Parliament*. A like practice prevailed in the formation of the Roman language; and thence the true source of derivation for *testamentum*, and other similar Latin words; though an injudicious desire to render them more significant and expressive of the qualities of the subjects to which they are applied, than their true deduction would warrant, gave birth to a forced and fanciful kind of etymology, like that now so properly rejected in the instance of the word *parliament*. This false taste in respect to etymology is of a very ancient date; nor were lord Coke and his cotemporaries more chargeable with it, than some of the most admired and pure classical writers of antiquity, not excepting even Cicero. See Menag. Jur. Civil. Amœn. cap. 39. particularly in his observations on the word *testamentum*, and Tayl. Elem. Civ. L. 7. It seems to have originated from not attending to the real office of etymology, and confounding it with the definition of the subject to which a word is applied; two things quite distinct in their nature, though it frequently happens that they reflect light on each other.

[Note 126.] (2) For a history of the origin and constitution of the parliament in Scotland before the union of the two kingdoms in the reign of queen Ann,

Ann, and of the change made by the establishment of one parliament for Great Britain, see the Treatise on the Laws of Election for Scotland, with which Mr. Wight hath lately obliged the public.

(3) Mr. Lambard guesses, that the word *parliament* was introduced [Note 127.] here soon after the conquest. He cites *Westminster the first*, as the most ancient statute in which he had observed the word to be used; though from a passage in the statute of Edward the second, mentioning *parliaments* in the times of that king's *progenitors*, he infers, that the word had been adopted several reigns *before*. Lamb. Archeion, cap. *Parliament*, and Westm. 1. 3 E. 1. and Articuli Cleri 9 E. 2. One of Mr. Prynne's arguments against the great antiquity of the *modus tenendi parliamentum* is the frequent use of the word *parliament*; he insisting that it was never applied to denote the *great council of the nation* in any of our ancient records or writings prior to the reign of Hen. 3. See Pryn. on 4 Inst. 2. See further Brad. Introduct. to Engl. Hist. 71.

(4) In the controversy about the origin of the *Commons* in parliament, [Note 128.] Mr. Tyrrel contends, that anciently *commune consilium* sometimes denoted an assembly distinct from parliament, and one composed of fewer persons; and particularly, that the *commune consilium* mentioned in the clause of king John's *Magna Charta*, about assessing *escuage*, which enumerates only archbishops, bishops, abbots, counts, and the greater barons, was of this sort. Tyrr. Biblioth. Politic. 311. 314.

(5) Lord Coke in another place repeats the expression, that *for matters of law the judges are the king's counsel*. [Note 129.] Post. 304. a. But he omits explaining whether they are so called, on account of their *judicial* opinions in the king's courts, of their opinions in parliament, when advised with by the lords, or any *extra-judicial* opinions the king may be intitled to demand from them. As to the latter, they were not favoured by lord Coke, as appears by his behaviour in the great case of *Comendams* in the reign of James the first, when the king severely reprimanded the judges for disobeying his mandate to postpone proceeding in a cause concerning the prerogative till they were consulted by him. Though lord Coke was deserted by the other judges, who asked pardon for having remonstrated against the king's command; and though the privy council decided that the command was agreeable to law; yet lord Coke bluntly refused either to retract or apologize. See lord Coke's life in the Biog. Britan. One thing much relied on by those who justified the king's order was, the oath of the judges, which is printed in the statute book as a statute of Edward the third, and expressly requires them to *counsel the king in his business*. See 18 E. 3. stat. 4. But what is thus called a statute lord Coke denies to be one, and indeed very properly; for it has not the least resemblance of a statute, being simply the form of an oath. 3 Inst. 146. 224. However, it must be admitted that there are various instances of the king's consulting the judges, and of their giving their opinions *extra-judicially*. Several of these instances are referred to in the Reports of lord Fortescue, who endeavours to shew, that even the case of ship-money the *extra-judicial* opinion first given was demned, not because it was extra-judicial, but because it was grossly contrary to law. Fortesc. Rep. 386. 389. Rushw. vol. 3. Append. 212. Some instances of such consultations have happened since the revolution, particularly some few years after in sir John's Fenwick's case, and in the reign of George the first, when it was made a question whether the coronation and marriage of the prince of Wales's children belonged to the

the king or to their father, and still more recently in the case of admiral Byng during the last reign. See Fortesc. Rep. 385. But however numerous and strong the precedents may be in favour of the king's *extra-judicially* consulting the judges on questions in which the crown is interested, it is a right to be understood with many exceptions, and such as ought to be exercised with great reserve; lest the rigid impartiality so essential to their *judicial* capacity should be violated. The anticipation of *judicial* opinions on causes *actually depending* should be particularly guarded against; and therefore a wise and upright judge will ever be cautious how he *extra-judicially* answers questions of such a tendency. So far one may venture to qualify the right; because even the house of lords have declined taking the opinion of the judges for a reason of this sort, though their attendance on that assembly is confessedly for assisting the lords in matters of law. See Fortesc. Rep. 384, 385. But it would be a presumption in us, if we were to be more particular on a subject of so much delicacy, by attempting to mark the bounds to a right, the extent of which we do not find clearly ascertained by precedent or authority. See further on this subject. Fost. 199. 241.

[Note 130.] (6) The statutes of Edward the third cited by lord Coke in the margin require a parliament to be holden once every year; but it seems doubtful, whether they were meant to limit the duration of each parliament, or merely the intermission of holding parliaments. The 16 Ch. 2. c. 1. which directs that the sitting of parliaments shall not be discontinued above three years, is certainly for the *latter* purpose, and therefore still continues in force, notwithstanding the modern statutes for making parliaments first triennial, and afterwards septennial, these being for the *former* purpose. See 6 W. & M. c. 2. 1 Geo. 1. c. 38.

[110. b.]

[Note 131.] (1) Another thing essential to a good custom is, that it be *reasonable*; which doctrine, together with the other *general* rules concerning customs, is well explained and applied in the famous Irish case of *Tanistry*, reported by sir John Davies. See Dav. 31. b.

[Note 132.] (2) This doctrine about the restriction of customs to places of a particular denomination will appear more satisfactory, by considering the reason of having some restraint, and the nature of that which lord Coke points out as the established one. The policy of some restraint is founded on the uncertainty and confusion which would ensue from an infinite diversity of customs, if every place, however small and inconsiderable, should be allowed to set up special customs, in direct opposition to the general custom of the realm. On this principle the privilege of having *special* customs, derogating from the common law, is in general denied to *inferior* places, such as *upland towns*, not being either *cities* or *boroughs*, and *hamlets*; though it is allowed to *larger* or more important districts, such as *counties*, *manors*, *hundreds*, *honors*, *cities*, and *boroughs*. The *special* cases, hinted at by lord Coke as an exception to this restraint, seem to be those, in which the custom tends to advance some right recognized by the common law. Thus a town's having a church, being a right at common law, a custom for a way to or repairing the church, operates by rendering the exercise of that right more effectual. See Robins. Gavelk. 32. & 225. However, the case of dower by custom, mentioned by lord Coke in the Chapter on Dower, seems to be an instance within the exception, without being within the reason of it. But of this example lord Coke writes doubtfully; for, after inferring from the text of Littleton, that customary dower may be within a *town*,

town, he observes, that it is safer to allege it within a *manor*. See ante §3. b.

(3) But this extension of Borough English to the *collateral* line must [Note 133.] be specially pleaded. See Robins. on Gavelk. 38. 43. 93. and in the Appendix.

(4) See acc. as to the estates *tail* in Gavelkind land, though expressly [Note 134.] limited to the heirs male of the body at common law, Dy. 179. b. See also ante fol. 10. a. note 3. But as Borough English may be *extended* by special custom, so may it be *restrained*; and therefore the customary descent may be confined to *fee simple*. See Appendix to Robins. Gavelk. and March. 54. there cited.

[111. a.]

(1) Accord. ante 30. a. All the differences between curtesy and [Note 135.] dower of gavelkind land and the same estates at common law are minutely explained and commented upon in Mr. Robinson's book on gavelkind. See page 155. and 159.

(3) But now, by the 29 Cha. 2. c. 3. a will of *lands* devisable by *custom* is not good, unless it is in writing, and signed and attested in the same manner as a will of lands devisable by *statute*. See post. 111. b. *Nuncupative* wills of *personalty*, except those of soldiers in actual service and mariners at sea, are also newly regulated by the same statute.

(5) But it was formerly much controverted, whether a rent *charge* in [Note 137.] case, issuing out of such lands, and having commenced *within time of memory*, was within the custom of devising; and it was not settled to be so, till the case of Randal and Jenkins in the time of lord Hale. See 1 Mod. 112. and Robins. on Gavelk. 79. to 84. As to rents *service*, they of course followed the nature of the reversion or seigniority to which they were incident; nor was there any doubt as to the custom's extending to *other* rents, if they had existed *immemorially*.

[111. b.]

(1) The *testamentary* power over *land* was certainly in use among [Note 138.] our Anglo-Saxon and Danish ancestors; though it seems to have been rather adopted from the remnant of the Roman laws and customs they found here, than brought from their own country: for as Tacitus, writing of the ancient Germans, says, *successores sui cuique liberi et nullum testamentum*. Spelm. Posthum. 21. 127. After the Norman conquest, the power of devising land ceased, except as to *socage* lands, in some particular places, such as cities and boroughs, in which it was still preserved; and also except as to *terms for years* or *chattel interests* in land, which, on account of their original imbecility and insignificance, were deemed *personalty*, and as such were ever disposeable by will. This limitation of the testamentary power proceeded, partly from the solemn form of transferring land by livery of seisin introduced at the Conquest, which could not be complied with in the case of a last will; partly from a jealousy of death-bed dispositions; but principally from the general restraint of alienation incident to the rigours of the feudal system, as it was *established*, or at least *perfected*, by the *first William*: See Wright's Ten. 172. In the reign of Edward the first, the statute of *Quia emptores* removed in great measure this latter bar to the exercise of testamentary power; that is, in respect to all *freeholders*, except the king's tenants *in capite*. But the two former obstructions still continued to operate; though indeed this was in *name* and *appearance*

ance only; for soon after the statute of *Quia emptores*, feoffments to uses came into fashion, and last wills were enforced in Chancery as good declarations of the use; and thus through the medium of uses the power of devising was continually exercised in effect and reality. But at length this practice was checked, not accidentally, but designedly, by the 27th of Hen. 8. which, by transferring the possession or legal estate to the use, necessarily and compulsively consolidated them into one, and so had the effect of wholly destroying all distinction between them, till the means to evade the statute, and, by a very strained construction, to make its operation dependant on the intention of parties, were invented. However, the bent of the times was so strong in favour of every kind of alienation, that the legislature, in a few years after having interposed to restrain an indirect mode of passing land by last wills, expressly made it devisable. This great change of the common law was effected by the statutes of the 32 and 34 of Henry 8. which taken together gave the power of devising to all having estates in fee simple, except in joint-tenancy, over the whole of their socage land, and over two-thirds of their lands holden by knight's service. The operation of these statutes was further extended by the conversion of knight's service into socage in the 12 Cha. 2. But still copyhold lands, and also, as the best opinion seems to have been, estates *pur autre vie* in freehold lands, remained undevisable. On the one hand, they were not devisable at common law; because they came within the description of real estate. On the other hand, they, or at least the former, are not within the statutes of Henry 8. these requiring, that the tenure should be socage, which a copyhold is not; and that the party should have an estate in fee-simple, which is more than a *tenant pur autre vie* can be said to have. See as to copyhold lands, 2 Ro. Rep. 383. and as to estates *pur autre vie* in freehold lands, Cro. Eliz. 804. Mo. 625. 1 Saund. 261. 1 Salk. 619. This defect of provision in the statutes of wills is now supplied as to estates *pur autre vie* by the 29 Cha. 2. c. 3. which makes them devisable in the same manner as estates in fee simple. But no provision is yet made in respect to copyhold estates; and therefore the power of devising is now indirectly exercised over these by an application of the doctrine of uses, similar to that which was anciently resorted to in respect to freehold lands; for the practice is, to surrender to the use of the owner's last will; and on this surrender, the will operates as a declaration of the use, and not as a devise of the land itself. See 2 Ro. Rep. 383. 2 Atk. 37. Gilb. on Uses 36. From this deduction it appears, that the testamentary power is now exerciseable, either directly or indirectly, over land of every tenure now in use, and also over every sort of interest in land, which, not being fettered with intails, can be transferred by alienation taking effect in the owner's lifetime.

Note 139.] (3) But a statute made since lord Coke's time requires a number of forms, besides writing, in a will of lands or tenements devisable by the statute of wills; for by the statute against frauds and perjuries a will of such property is void, unless it is signed by the testator, or by some person for him, in his presence and by his direction, and is also attested and subscribed in his presence by three witnesses. See 29 Cha. 2. c. 3. Also by the last-mentioned statute the same forms are required, as well in devises by custom as in those of estates *pur autre vie*. But these regulations do not extend to copyhold estates and terms for years; the statute of frauds and perjuries, so far as it regulates devises of land, being expressly confined to the three former kinds of devises. As to copyholds, a devise of them operates only as a declaration of uses on the surrender

surrender to the use of the will; and therefore if the form required by the surrender, which is usually nothing more than a testamentary declaration in writing, is observed, it is sufficient without any witness; and even a *nuncupative* will of copyholds was an effectual declaration of the uses, where the surrender was silent as to the form, till the 29 Cha. 2. required all declarations of trusts to be in *writing*. See 2 Atk. 37. and Barnad. Ch. Rep. 9. In respect to *terms for years*, they, falling within the description of personal estate, are disposable by will accordingly. But this must be understood with some distinction. Thus if they are terms, not in *gross*, but vested in trustees to attend the inheritance, they so follow the nature of the latter, that if the owner devises the land generally by a will not so attested as to pass the inheritance, not even the trust of the term will pass. See 2 P. Wms. 236. Also as to terms in *gross*, though a testator being possessed of such may transmit them by the same unsolemn kind of will as other personalty, yet he cannot create them by will, without observing all the forms essential to a devise of real estate; because the interest, in right of which the testator creates the term, is *real estate*, and creating the term is a *partial* devise of it. Besides appointing new forms of executing wills of real estate, the 29 of Cha. 2. prescribes how devises shall be revoked.

(4) Whilst the power of devising depended wholly on the statutes of [Note 140.] Henry the eighth, it was frequently of importance to resort to the custom of devising, as being most beneficial for the devisee. The power by custom might be larger than the *statutory power*; the former sometimes enabling to devise the *whole*, where the latter could only be exercised over *two parts*. 2 Sid. 153. There was also an essential difference between the two powers in the *mode of execution*; for a will in *writing* was conceived to be necessary to a devise under the *statutes*, but a *nuncupative* will might be sufficient under the *custom*. 2 Sid. 154. But these differences do not now subsist any longer. As on the one hand the 12 of Cha. 2. by communicating to all freehold lands the qualities of the tenure by *common socage*, has rendered the power of devising the *whole* under the statutes of Henry the eighth *universal*; so on the other hand the 29 of Cha. 2. against frauds and perjuries, requires the same solemnities of writing, signing, and attestation to a devise by custom, as to one under the statutes. See ante note 1. and note 3. of preceding page. The two powers of devising being thus assimilated, and made for the most part commensurate, it can *seldom* happen that it should be necessary to call the power by *custom* in aid; though it is *possible*, as where the custom enables an infant of fourteen, or a feme covert, neither of which is capable of devising under the statutes. As to the *infant*, see 37 Hen. 6. 5. Perk. sect. 504. 2 And. 12. 5 Co. 84. and as to the *feme-covert*, 5 Com. Dig. 14. where it is said, that by the custom of London she may devise to her husband, but without citing any authority.

[112. a.]

(1) This was the point adjudged in sir Edward Clere's case; and [Note 141.] though, as the *whole* of the land is now devisable, the doctrine of that case is no longer of consequence in respect to the extent and exercise of the power of devising, yet it may be material for other purposes; for it comprehends a *general* rule, settling how an act shall operate, where it may take effect in two ways, that is, either as the execution of a power derived from *interest*, or as the execution of a power not arising from *interest*, but *specially reserved*. In the great case of *Commendams* the doctrine is well explained by lord Hobart, and finely applied. Hob. 160.

[Note 142.] (2) The distinction here made, between a feoffment *to the use of a last will*, and one *to such uses as the feoffor should appoint by last will*, seems extremely subtle. However, lord Coke reports it as adopted by the judges in sir Edward Clere's case; and, according to Moore, the same point was adjudged in Battey and Trevilian. Mo. 278. But then, as to the former of these cases, the opinion on this point must have been extra-judicial, the feoffment having been *to such uses as should be appointed by will*, and not *to the use of the will itself*; and as to the latter case, it went off finally on another point. The reasoning in support of the distinction will be found post. 271. b. and more at large in Mo. 516.

[Note 143.] (6) Acc. post. 187. b. It is agreed in the books, that a wife may, without her husband, execute a *naked authority*, whether given before or after coverture, and though no special words are used to dispense with the disability of coverture; and in the case put by lord Coke the devise gives no more. The rule is the same, where both an *interest* and an authority pass to the wife, if the authority is *collateral* to and doth not flow from the interest; because then the two are as unconnected, as if they were vested in different persons. Rep. temp. Finch 346. As to a feme covert may without her husband convey lands in execution of a mere *power* or *authority*, so may she with equal effect in performance of a *condition*, where land is vested in her on condition to convey to others. W. Jo. 137, 138. The reason, why in these instances the wife may convey without her husband, seems to be, that he can receive no prejudice from her acts, but a great one might arise to others, if his concurrence should be essential. Yet if the legal estate of lands is vested in a married woman on trust for another, some hold that she cannot pass it to *cestui que trust*, unless the husband joins; and therefore that, if she makes feoffment or fine without him, the first will be void, the latter voidable. This was the opinion of judge Jones in the case of Daniel and Upley; but the judges Whitlock and Dodridge dissented from Jones, and held, that the husband's joining was not any more requisite than in the other cases. W. Jo. 137. Perhaps however Jones's opinion may be most conformable to strictly legal doctrine; and his thus distinguishing a *trust* from a *power* and a *condition* may be accounted for. Trusts are properly the subjects of consideration for the courts of equity only; and though in them the legal estate is made subservient to the trust, yet the courts of law take notice of trusts for very few purposes; nor will it be easy to find an authority for departing from any rule about the effect of legal conveyances, merely in respect of their being a performance of trusts. See further as to acts by a feme covert without her husband, under the titles *Baron and Feme*, *Executor* and *Administration*, in the Abridgements.

[112. b.]

[Note 144.] (1) There is a great contrariety in the books, on the effect of two inconsistent devises in the same will. Some hold with lord Coke, that the second devise revokes the first. Plowd. 541. Others think, that both devises are void on account of the repugnancy. Ow. 84. But the opinion supported by the greatest number of authorities is, that the two devisees shall take in moieties. The authorities for and against lord Coke's opinion are well collected and arranged in a note in the English edition of Plowden. See page 541.—Also amongst those who think that both devises shall operate, there is some difference as to the manner in which the two devisees ought to take. In some of the old books it is said generally, that there shall be a jointenancy. But according to the modern

modern opinion, and, as it seems, the best, there will be a jointenancy or a tenancy in common, according to the words used in limiting the two estates: by which we presume it is meant, that if the two estates given by the will have the unity or sameness of interest in point of quantity essential to a jointenancy, the devisees shall be join-tenants, but otherwise shall be tenants in common. See 3 Atk. 493.

(2) The distribution here meant probably was giving money to the church to have masses for the testator's soul; a superstition very common in the time of Littleton, and then not inconsistent with any law. Afterwards indeed uses and trusts of land for such purposes were restrained by the 23 of Hen. 8. c. 11. commonly called the statute of *superstitious* uses, though not *wholly*, the statute allowing them, if they were not appointed for more than twenty years, and without any limitation of time in the instance of cities and towns corporate having customs to devise in mortmain. But now we apprehend, that, independently of the statute of Henry the eighth, devises of this kind could not have effect: for either they would be void by the mortmain statutes, or, when not within the reach of any of them, would be deemed superstitious by our courts of equity; which would therefore direct the money to be applied to some use really charitable, at the court's discretion; or, should the determined cases not be thought strong enough to warrant the exercise of a discretion so large, would consider the devisee as a trustee for such as would be entitled if there was no devise. See the cases referred to in Vin. Abr. *Charitable Uses*, D.

[113. a.]

(2) What my lord Coke advances in this and the preceding folio, [Note 146.] about the effect of a will devising that executors shall sell land, is open to a variety of observation.—He first supposes, that such a devise passes no *interest* or estate to the executors, but merely a *power* or *authority*; and thence he infers, that, like common naked authorities, it will not survive. But these positions seem at least controvertible, having been expressly contradicted by decisions since lord Coke's time: and though both should be admitted to be true in point of *law*, they would not avail in a court of *equity*; as this jurisdiction, notwithstanding the extinction of the power at law, would compel its execution in favour of those for whose benefit the power was given. As to the power's not surviving for want of an interest, lord Coke himself, both here and in other places, concedes, that if one *devises lands to be sold by his executors*, an *interest* will pass. See post. 181. b. 236. a. Now such a devise so resembles *devising that executors shall sell the land*, as to give the distinction made between them the appearance of too curious and overstrained a refinement; such as rather consists in the formal arrangement of words, than of any thing substantial. But the subtlety of the distinction is not the only objection to it; lord Hale, whilst he was chief baron of the exchequer, referring to a case, in which it was adjudged against the distinction. Hardr. 419. However, it has been adopted in cases since the first publication of the Coke upon Littleton. Thus in the case of Lovell and Barnes, in the 12th of Charles the first, though the judges held that such a power of selling given to *two* executors survived, yet they disavowed founding themselves on the will's passing an interest. See W. Jo. 352. and Cro. Cha. 382. Nay, even in a case of much later date, lord chancellor King acted as if he deemed the distinction settled at law; for he directed the heir to join in a sale, in which his concurrence would otherwise have been unnecessary. See Yates and Compton, 2. P. Wms. 308. In respect to the operation

of such a devise, considered as mere authority, the strict notion about *naked powers* is certainly with lord Coke; and [113 a.] some of the old books, besides those cited by him, very much favour its application to the case of executors. Dy. 119. ed. 1688. the case in marg. and Mo. 61. But there are some respectable authorities the other way: for Perkins is of opinion, that the power of selling may be exercised by the surviving executor; and Brook infers the same doctrine to be the point adjudged in a case of Edward the third; and further it was held accordingly, by three judges in the reign of Charles the first, on a reference to them out of chancery. Perkins sect. 550. Bro. Abr. *Devise* 50. and the case of Lovell and Barnes, Cro. Cha. 382. W. Jo. 352. This latter opinion seems most likely to conform to the meaning of a will in cases of this sort; for it can scarcely be imagined, that a testator, when he entrusts his executors with a power of selling land, should mean to have those, for whose benefit he directs the sale, disappointed by the death of one of the persons invested with an authority, which the survivor is equally capable of executing. Perhaps too it may be possible to justify the opinion, by proving a power of selling thus given to executors to be something more than the case of a naked power. Where a naked power is vested in two or more *nominatim*, without any reference to an office in its nature liable to survivorship, as an executorship is, it without doubt would be a contradiction of the general rule to allow the power to survive. But where a power of selling is given to *executors*, or to persons *nominatim* in that character, it is not wholly irreconcilable with the rule, to deem a surviving executor a person within the description; for by the death of one executor the whole character of executors becomes invested in the survivor, and the power being annexed to the executors *ratione officii*, and the office itself surviving, why should not the power annexed to it also survive, as well as where it survives by reason of being coupled with an interest? This manner of accounting for the opinion, that a power of selling annexed to an executorship may survive, is only a conjecture, hazarded for the sake of reconciling a particular case with a general rule; the reasons which influenced those who adopted the opinion not appearing in any book we have seen. However, the conjecture is agreeable to the manner in which lord Hale, in a manuscript note on a Coke upon Littleton we have been favoured with, is represented to have considered the power's surviving when given to *two* executors, as in the case of Lovell and Barnes. The words of the note are these: *Hales chief baron says it is so, because they were to sell by reason officii; yet the law stands, that authorities shall not survive; and perhaps it had been otherwise, if he had ordered his land to be sold by A. and B. not being named executors, and one of them had died, for that seems to be a personal trust.* The conjecture also receives great countenance from some books, in which it is said, that such a power of selling given to *executors* shall *pass* to their executors and administrators; for if an authority, not being coupled with an interest, becomes *transmissible* in the way of succession *in infinitum*, till executed, by reason of its being given to executors, much more may it *survive* for a like reason. Kelw. 44. 2 Brownl. 194. If indeed the doctrine in the books we refer to is well founded, it will prove a power of selling land given to executors capable both of *transmission* and *survivorship*. But whether lord Coke's notion of the power's not surviving, or the opposite one, most conforms to *strictness of law*, is not now of any great importance; as such a power, though extinct at *law*, would certainly be enforced in *equity*. This has long been the practice of our courts of equity; these rightly

rightly deeming the purpose, for which the testator directs the money arising from the sale to be applied, to be the substantial part of the devise, and the persons named to execute the power of selling to be mere trustees; which brings the case within the general rule of equity, that a trust shall never fail of execution for want of a trustee, and that if one is wanting, the court shall execute the office. The relief is administered by considering the land, in whatever person vested, as bound by the trust, and compelling the heir, or other person having the legal estate, to perform it. There are many printed precedents of thus executing not only powers actually extinct at law, or supposed to be so, but also such as, in point of law, either for want of the will's naming by whom they should be executed, or because those named had died before the testator, never could exist or take effect. Some of these precedents are as early as the reign of Charles the first. See Locton and Locton 2 Freem 136. and 1 Cha. Cas. 179. Garfoot and Garfoot 1 Cha. Cas. 35. Gwilliam and Rowel Hardr. 204. Pitt and Pelham 2 Freem. 134. 1 Cha. Rep. 238. and 1 Cha. Cas. 176. T. Jo. 25. 1 Lev. 304. See also Max. of Eq. 57. and Vin. Abr. *Devise*, Q. e. and S. e. Nor do the courts of equity appear ever to have confined this relief, as they certainly do many kinds of aid, to persons of particular and favoured descriptions, such as wife, children, or creditors; for though, in some of the old cases, the persons relieved were of one or other of these descriptions, yet in others nearly of the same time the parties are not stated to have fallen within either of them; and we have not heard of any case, in which relief has been refused on that account. See Locton and Locton, already cited, and the case of Tenant and Browne cited 1 Cha. Cas. 180. The reason of not favouring particular persons in this instance will appear evident, when it is considered, that testamentary powers to sell are deemed to be in the nature of trusts, and trusts are executed in equity for all persons indiscriminately.—Lord Coke next takes for granted, that if there is a devise to *A. for life, and that after his decease the lands shall be sold by the testator's executors*, they cannot sell the reversion, but must wait till the death of the wife; and the case cited from Bro. Abr. *Devise* pl. 1. countenances this opinion. But in one report judge Haughton argues that the words, *after the decease of the tenant for life*, mean only to mark the determination of his estates, *not to limit the time for sale*, and therefore, that a sale may be in his life-time; and in another judge Clench expresses himself almost to the same purpose. 2 Bulst. 125. Godb. 46. There is also a case against lord Coke in 2 Leon. 220. and the point is doubted in Cro. Cha. 382.—See further in respect to such devises, Vin. Abr. K. e. to S. e.

[115 a.]

(2) The statute mentions formedons in remainder and reverter, and limits them to fifty years; but omits formedon in descender. [Note 148.] Nor is the latter deemed to be comprehended within the clause of the statute relative to writs of right; for a formedon is not in the strict sense a writ of right; though it certainly is in the nature of one, the mere right being equally triable in both. Accordingly, in the case cited by lord Coke from Dyer, three judges held, that a formedon in descender was not within the statute. The other judge doubted. See also the additional case in the margin of Dy. ed. 1688. fol. 278. a. But as the 21 Jam. 1. c. 16. requires formedons of every kind to be brought within twenty years after the descent of the title, this defect of the former statute is now of no consequence.

(4) The

[Note 149.] (4) The reason is plainly this. The limitation in the 32d of Henry the eighth is wholly referable to seisin; the statute requiring a seisin within a certain time, according to the nature of the writ; that is, sixty years for writs of *right*, fifty for *possessory* writs founded on an *ancestor's* possession, thirty for *possessory* writs founded on the party's own possession, and so on. Now the limitation being thus dated from a seisin, it would be absurd to extend the statute to actions, in which seisin, not being issuable, can never become the subject of evidence or trial.

[Note 150.] (5) This was the point adjudged in sir William Foster's case, cited by lord Coke in the margin; and there is a much earlier adjudication of the same effect in Moore. See Mo. 31. The reason of this exemption of rents created by *deed* out of the statute is of the same kind as is explained in note 4; the statute pointing at rents, to which the title is by *seisin*. But according to sir William Jones, such exemption should be understood with this qualification; that the *certainly* of the rent should appear in the deed; because otherwise the *quantum* or *quality* of the rent is no more ascertained by the deed, than if there was not one existing. Therefore, if the rent is created by reference to something out of the deed, as by reserving such rent as the person reserving pays over, without expressing what that is, and the latter rent not having commenced by deed, is one, of which seisin is the proper proof; in such a case, seisin, as sir William Jones thought, is equally requisite to both rents, and consequently both ought equally to be deemed within the limitation of the 32 of Hen. 8. See W. Jo. 238.

[Note 151.] (6) It was doubtful whether the several writs, here mentioned in respect to advowsons and wardship, were not within the statute of Henry the eighth; and to remove this doubt a statute of Mary cited by lord Coke was made, declaring that the former statute should not extend to them. The reasons of that statute are fully explained in Plowden. See fol 371. But so far as regards *advowsons*, this statute of Mary is no longer of any use; it being enacted by the 7th of Anne, c. 18. that no usurpation shall displace the estate of the patron, and that he may be present on the next avoidance, as if there had not been any usurpation: which provision in effect takes away all limitation of suits about the right of patronage. See 3 Blacskt. Comm. 5th ed. 250.

[Note 152.] (7) See further as to the statute of 32 Hen. 8. Brooke's reading upon it. Since the 32 of Hen. 8. there have been various statutes for limitation of the time for bringing actions; of which the principal and general one is the 21 of Jam. c. 16. See tit. *Temps* in Com. Dig. and tit. *Limitation* in the other Abridgments.

[Note 153.] (8) This rule about *affirmative* statutes is very common in the books. See the references in the margin of Plowd. Engl. ed. 112. In another place lord Coke lays down a like rule as to their not taking away the *common law*, but with more particularity; for his words are, that a *statute made in the affirmative, without any negative expressed or implied, doth not take away the common law.* 2 Inst. 200. This seems to be the justest way of stating the rule both as to common law and customs. See further Plowd, 114. and the references in the margin of Engl. edit. Hatt. on Stat. 83. 4 Com. Dig. 339. 432. Elmes's case 1 And. 71. and Dy. 473. pl. 13. and Jones and Smith 2 Bulstr. 36.

(9) This

(9) This appears to be a good rule ; for if a statute is merely declaratory of the common law, the latter should be construed as it was before the recognition by parliament ; and consequently its operation should not be extended to the destruction of prescriptions and customs, which were before allowable. As to the use of *negative* words in such a case, they may either arise from the subject; or be a *mode* of expressing what the common law is ; in either of which cases, there cannot be any colour of reason for giving more effect to *negative* than belongs to *affirmative* words. In short, to say that a statute *merely declaratory* of the common law, being expressed in negative words, shall operate on subjects to which the common law is not applicable, seems to be a direct contradiction ; for how can a statute be *merely declaratory*, if it is in *any* degree *introductive of a new law* ? However, there are books, in which lord Coke's distinction, in respect to negative statutes declaratory of the common law, is denied. See W. Jo. 270, 271. 289. If those who oppose his opinion had meant only to say, that in the instances, by which he illustrates his rule, the negative words of the statutes not only import something more than a declaration of the common law, but were also intended to annihilate all particular customs clashing with it, or that on other accounts the instances were not apt, there might possibly be some colour for their dissenting from lord Coke. But what is professed to be controverted is the distinction itself ; which, as we understand it, seems to be perfectly unexceptionable. [Note 154.]

(10) It is observable that *Magna Charta* distinguishes between *turns* or the *leets* of *sheriffs* and the *view of frank-pledge* ; limiting the *former* to *twice* a year, and the *latter* to *once*. In the more ordinary sense *frank-pledge* and *leet* are synonymous ; as appears from the style of *turns* and other *leets*, which in court rolls are usually denominated *curia* or *visus franci plegii*. But when *free-pledge* is used, as in *Magna Charta*, it should be understood in a *strict* and *particular* sense ; according to which it meant only that part of the business of a court leet, which related to the taking of sureties or free-pledges for every person within the jurisdiction ; a practice which had fallen into disuse long before lord Coke's time. See 8 H. 7. 4. and 2 Inst. 72. [Note 155.]

(11) Adjudged acc. 2 Leon. 28. But it may be doubted, whether [Note 156.] the prescription for holding a leet oftener than twice a year, when examined into, will appear a fit example to prove the rule, that negative statutes in affirmance of the common law may be prescribed against. The only words of *Magna Charta* which relate to the holding of *turns* or *leets* are these: *Nec aliquis vicecomes, vel ballivus, faciat turnum suum per hundredum, nisi bis in anno ; et non nisi in loco consueto, videlicet semel post Pascha et iterum post festum Sancti Michaelis ; et visus de franco plegio tunc fiat ad illum terminum Sancti Michaelis sine occasione*. See Blackst. ed. of Magn. Chart. But this provision or declaration seems wholly confined to the *turns* or *leets* of *sheriffs*, and not to include the *leets* of *private persons* ; though it must be owned there are some authorities to the contrary. Acc. Bro. Abr. *Lease* 23. and the opinion of *Periam* in 2 Leon. 74. *Contra* 2. Hal. Hist. Pl. C. 71. and the opinion of *Rhodes* 2 Leon. 74. See also 2 Hawk. Pl. C. 56. Therefore, should this provision in *Magna Charta* be only an affirmance of the common law, which, as we shall mention in the next note, is a point controverted, the instance would still be liable to exception. See 2 Hawk. Pl. 56. But the strongest objection is, that, in the same chapter of *Magna Charta*, there is a *general* and express reservation of

of ancient liberties; there being added this qualification, *ita scilicet quòd quilibet libertates suas, quas habuit et habere consuevit tempore regis Henrici avi nostri, vel quas postea serquisiuit*: which words, even in the opinion of those who extend *Magna Charta* to all leets, suffice to save prescriptions. 2 Leon. 75. What renders lord Coke's thus applying the case of leets the more remarkable is, that he himself, in his Second Institute, when commenting on this part of *Magna Charta*, agrees, that *leets* of private persons, so far as regards the negative words of *Magna Charta*, are not within it, and takes particular notice of the reservation of ancient liberties. 2 Inst. 72. See further 4 Com. Dig. 122. Perhaps lord Coke might intend to assert, that, notwithstanding *Magna Charta*, it is lawful to prescribe for holding a sheriff's tourn oftener than twice a year; which indeed seems to be admitted by judge Rhodes, who construed *all leets* to be within *Magna Charta*. But we do not observe that the authorities lord Coke cites mention any such prescription.

[Note 157.] (12) Some think that *Magna Charta*, so far as regards the time for holding tourns, and leets, was introductive of a new law. See 2 Hawk. Pl. C. 56.

[Note 158.] (13) The 34 E. 1. is not printed in the modern editions of the statutes. Indeed it seems doubtful whether it is entitled to the denomination; for lord Coke in another of his works treats it as an ordinance, and to prove it such cites Fitzherbert's *Natura Brevium*. 4 Inst. 298. F. N. B. 167. A. See also 12 Co. 23. If it be true that the 34 E. 1. is only an ordinance, lord Coke's case should be put on the 1 E. 3. st. 1. c. 2. or the *Charta de Foresta* of the 9 H. 3. c. 4. both of which laws provide to the same effect as the 34 E. 1. and are certainly acts of parliament. See also a like negative provision in the *consuetudines et assisa de forestâ*, printed as a statute of uncertain time in Ruffh. ed. Append. 25. and cited by Noy in W. Jo. 270. 291.

[Note 159.] (15) It having been denied by persons of considerable respect, that such a prescription is good, we shall give some account of the state of the arguments for and against it.—The general ground on which lord Coke asserts the prescription to be lawful is, *first*, that a statute, though expressed in negative words, yet, if it is a mere affirmation or declaration of the common law, may be prescribed against; and *secondly*, that the statutes against cutting down trees in a forest, without view of the forester, are *negative* statutes of this sort. As to the *first* of these propositions, we have endeavoured to evince its reasonableness in a former note; in which also the reader is referred to the various authorities on the subject, for the purpose of shewing, that they greatly preponderate in favour of lord Coke. See note 13. In respect to the *second* proposition, the authorities not only support it, but are so uniform, that we do not find it any where controverted. See note 14. The *particular* argument for the prescription consists principally of various allowances of it at *eyres of the forest*, and of two express adjudications of the point on demurrers in *courts of common law*. The cited instances of *allowances* are not few; for, besides the three cases of *Henry de Percy*, *Thomas lord Wake of Liddel*, and *Gilbert de Acton*, here mentioned by lord Coke, he in his *Fourth Institute* cites another, which was in the 8th of Edward the third, on a claim by *Thomas Pickering* and *Margaret his wife*. See 4 Inst. 297. The cases at common law are *Sellinger's* and *lord Hatton's*. The former is stated by lord Coke to have been before

before the exchequer in the time of Elizabeth, and to have been adjudged upon *argument and long advisement*; and probably is the same case he here cites as one of the 16th of Elizabeth. See 4 Inst. 297. and 12 Co. 22. The *latter* is taken notice of by judge Croke, who reports lord Coke to have cited it as a judgment on demurrer in the king's bench. Cro. Jam. 155. To these authorities we may add an *extra-judicial* opinion of all the judges on being consulted by James the first; the words of which seem to imply, that a custom for cutting wood in the king's forests without view of the forester may be good. See the third resolution of the judges in 4 Inst. 299. It is said too, that in a case of the 19 of E. 1. between the *prebend of Chichester* and the *earl of Arundel*, issue was joined on such a custom; from which it may be inferred, that in those ancient times the goodness of the custom was not doubted. W. Jo. 290.—On the other hand lord Lovelace's case, whose claim came before an eyre in the 8th of Charles the first, is a direct decision against the allowance of a prescription for cutting wood without view of the forester; and in that case lord chief justice Richardson, when this part of the Commentary upon Littleton was referred to, denied lord Coke's *general doctrine* about negative statutes declaratory of the common law. W. Jo. 270. Two other adjudications, to the like effect, appear to have been made at eyres in the same reign; one of which was on a claim by the tenants of the manor of Bray, who, in proof of the custom they alledged, offered in evidence an inquisition of the reign of Edward the second. W. Jo. 289, 290. 348. The principle on which Noy, attorney-general, argued in these cases, was a general one, that negative statutes, such as those which occur against cutting wood in the king's forest without licence, cannot be controuled by custom or prescription. To prove this he appealed to a case from a year-book of Henry the sixth; which he considered as directly in point, and as a judgment that tithes of timber cannot be prescribed for against the statute of *sylva cadua*, though only an *affirmance* of the old law, merely because the statute is *negative*. See W. Jo. 270. 290. and 25 E. 3. c. 3. The year-book reported to have been cited by Noy is the 20th of Hen. 6, but we do not meet with any case of that year relative to the statute of *sylva cadua*, and therefore the 9 of Hen. 6. 56. which is to the point, was probably meant; though, if it was, it contains no *judgment*, but only a *query*, which Brooke, in abridging the case, by mistake calls the reporter's *opinion*. Bro. *Prescription* 2. Noy also cited the earl of Arundel's case from a record of the 16 of Edward the second, as a decision, that a prescription to cut wood against the forest statutes was not good. W. Jo. 270. As to the cases urged against him, he observed, that the case between the *prebend of Chichester* and the *earl of Arundel* was of a *chace*, and the statutes only related to *forests*; that in *Percy's* case the forest was *not in the hands of the crown* when the statutes were made; and that the case of the reign of Elizabeth, which lord Coke reports from lord Popham, was of a *chace*, of which the king was seized *in right of his duchy of Lancaster*. W. Jo. 290; 291. It is observable, however, that Mr. Noy leaves the two cases of lord Wake and *Gilbert de Acton* wholly unanswered, though they were cited against him. As to the other authorities we have stated for a prescription against the *forest* statutes, or those against *negative* statutes in *general*, being declaratory, they do not appear to have been urged against Mr. Noy. But besides the authorities relied on by Noy, there is one more; for judge Croke, after taking notice of the judgment for the prescription in lord *Hatton's* case, reports Popham to have said, that *it was adjudged otherwise about the same time in the exchequer*. Cro. Jam. 155.

However, this is irreconcilable with lord Coke's representation of the judgment of the *exchequer*, both here and elsewhere, unless we suppose him to mean a different case.—Having thus brought together and digested what we found scattered in the books on this much litigated subject, we shall dismiss it, leaving the reader to his own judgment, with this single remark. If the *greater* number of authorities, which, unless the cases we have referred to are mistated or misunderstood, is in favour of the prescription, shall be thought to be of *equal* or *nearly of equal* weight with the *more modern* decisions on the other side; then probably, as the subject strikes us, the good sense of lord Coke's distinction as to negative statutes, together with a consideration of the multiplicity of books which favour his *general* doctrine, will so strongly turn the scale in this *particular* instance of forest-law, as scarce to leave any doubt. Indeed, it was for the sake of explaining how far the *general* doctrine may be affected by the decision on this point of *forest-law*, that we have detained the reader so long upon it.

[116. a.]

[Note 160.] (1) We do not observe that there is any thing in the statute of Charles the second for taking away military tenures, which in the least varies the tenure by burgage. For further information about *burgage* and *boroughs*, see Brad. on Bor. Mad. Firm. Burg. Squire's Anglo Sax. Gov. 1st ed. tit. *Boroughs* in the index, and Wright's Ten. 205.

[117. a.]

[Note 161.] (1) This rule about *slaves* holds in *some degree* in respect to *apprentices* and *servants*, particularly the former; though with a great difference in point of extent and application. All acquisitions of property real and personal made by the villein, in whatever way arising, with no other exception than what is allowed of to prevent prejudice to third persons, belonged to his lord; because an incapacity to acquire any thing for his own benefit was one of the harsh characteristics of the villein's condition. But the relation of the apprentice and servant to his master is more mild and limited; for it only imports, that the master shall be intitled to their personal labour during the term stipulated, either in a particular way, or generally, according to the nature of the service or apprenticeship. Consequently the master cannot claim any other acquisitions, than such as are the result of that labour. What the apprentice or servant earns by his labour, whilst he remains with the master, or is actually working for him, falls so clearly within this principle, that there can be no room for doubt. Nor can there be any, where the apprentice or servant is employed by another person with the knowledge and consent of the master, without any circumstances indicating a waiver of their earnings. The books contain several adjudications founded upon this latter idea. Most of them indeed relate to apprentices in the *seafaring* way; whose wages and prize-money as seamen, though earned whilst in another service, have been recovered by those to whom they were bound. But the principle which governs them seems to apply to apprentices and servants in *general*. See 6 Mod. 69. 12 Mod. 415. Comberb. 450. 1 Stra. 582. 1 Barnad. Rep. 312. 1 Ves. 48. 83. Some of the cases go so far, as to give the master a right to the wages or earnings, whether the service is performed by the apprentice *with or without the master's licence*; and even though the earnings accrue in a *trade* or *service* different from that to which the apprentice is bound. 6 Mod. 69. 12 Mod. 83. 1 Ves. 83. But though the rule should be so large in respect to *apprentices*, it may be doubted whether it is equally so in the case of *other* servants. There is a case of the reign of James the first, in which a judgment against the master appears to be principally

principally founded on the want of his consent and privity to the retainer. Cro. Jam. 653. 2 Rol. Rep. 269. Independently too of authority, the master's proper remedy in all cases, except those in which the servant is intentionally employed on his master's account, seems to be an action either against the employer for loss of service, if he knew of the first retainer, or against the servant himself for breach of his contract; such a case rather importing the master's right to damages for injury sustained by the consequences of the second retainer, than a right to the profits accruing from it. We have already mentioned, that most of the cases, which occur in the books, relate to the apprentices of watermen and seafaring persons. It may therefore be proper to add, that in 31 Geo. 2. c. 10. one object of which is to regulate the pay of seamen in the royal navy, there is a provision, that in particular cases the master shall not be intitled to the wages of his apprentice. See sect. 10. Note also the 17th section in the 2 and 3 Anne c. 6. from which it seems as if the framers of that law doubted whether the master of an apprentice, who goes into the royal navy, would be intitled to his wages without an express provision.

(3) The cause meant is, that the 27 of H. 8. transfers uses into possession. See lord Coke's note on sect. 115. fol. 84. b. [Note 162.]

[117. b.]

(3) From our law's thus permitting a person to be a villein by *acknowledgment* in a court of record, some have argued, that it is a legal mode of *creating* personal bondage; with a view to prove, that there is not any thing so repugnant in our law to domestic slavery as is generally imagined, and thence to lay a foundation for more easily inferring the lawfulness of importing slavery from our colonies. But in another place we have had occasion to object to this way of considering the acknowledgment, and to explain, why it should be deemed merely a confession of that immemorial antiquity in the villein's slavery, which was otherwise necessary to be proved. See the editor's *Argument in the case of Someraett, a Negro*, 60 to 65. and Hob. 99. [Note 163.]

(4) The words *if it be pleaded* are material; for *in evidence before a jury the copy* of a record will be a sufficient proof of its existence and contents. See Law of Nis. Pri. 226. ed. 775. Com. Dig. tit. *Certiorari*. [Note 164.]

[119. a.]

(1) See acc. 41. b. 57. b. 90. b. 118. a. 294. b. and for instances, Plowd. [Note 165.] 243.—But the rule of *nullum tempus occurrit regi* is subject to various exceptions, both at *common law* and by *statute*.—1. There are many cases in which the subject may make title against the king by *prescription*, as to treasure trove, waifs, estrays, and such other things as may be seized without matter of record. Ante fol. 114. a. and b.—2. In some cases the king's right *necessarily* fails for want of exertion in due time, either because the *subject* of his right *determines* before he claims it, or because it is *especially limited in point of time* by its creation. An instance of this is, where the land of tenant for life is found to be forfeited, and he dies before seizure by the king; for it is then too late to seize for the king, who, as Standford expresses it, hath *surceased his time*, the estate forfeited being determined, and the right of entry being in him in reversion. Staundf. Prærog. 32. b. The law is the same, where the king is intitled to the *next* presentation; in which case, if another presents, and the incumbent dies, the king cannot have the second or any subsequent presentation. This was the opinion of Browne justice against
Weston

Weston in Willion and Berkeley, Plowd. 243. 249. and was so adjudged in Baskerville's case, 7 Co. 28. a. Lord chancellor Egerton finds fault with the doctrine of this last case; but his objections do not appear in the least satisfactory. See his observations on lord Coke's Reports 8.—3. Sometimes lapse of time drives the king to a *suit*. Thus by the statute of the 13th of Rich. the second, and according to lord Coke by the *common law*, if the king presents to a benefice already full with an incumbent, the king's presentee shall not be received by the ordinary, till the king has *recovered* his presentment by due process of law. 13 R. 2. st. 1. c. 1. Staundf. Prærog. 32. b. 2 Inst. 358. Post. 344. b. See also Cro. Jam. 385. 4 H. 4. c. 22. Gibs. Cod. 1st ed. 802.—4. There are several statutes, which wholly extinguish the king's title, if not exerted within a limited number of years. By a statute of the 14th of Edward the third, the king lost his presentment, where he was intitled, by having in his hands the temporalities of a bishoprick, or the lands of a person within age, unless he presented within three years after the voidance. But this statute was soon repealed. See 14 E. 3. st. 3. c. 2. 25 E. 3. st. 3. c. 2. 2 Gibs. Cod. 1st ed. 800. The chief statutes, for limiting the king's title to a certain time, now in force, are the 21 of Jam. 1. c. 2. and the 9 of Geo. 3. c. 16. By the *former* the king is disabled from claiming any manors, lands, or hereditaments, except liberties and franchises, under a title accrued 60 years *before the beginning of the then session of parliament*, unless within that time there has been a possession under such title. But the efflux of time rendering this provision continually more ineffectual, the *latter* statute introduced one of a permanent kind, by limiting the king to sixty years *before the commencement of the suit or proceeding for recovery* of the estate claimed. See further a Commentary on the 21 Jam. in 3 Inst. 188. See also something relative to the rule of *nullum tempus occurrit regi*, in Hob. 152. 154. 347.

[119. b.]

[Note 166.] (2) But now by the 9 Ann. c. 16. s. 9. the grant of a reversion is perfect without attornment.

[120. a.]

[Note 167.] (1) Though the person presented is not privy to the simony, yet the presentation is void, the statute making no distinction in this respect, but giving the turn to the king as a punishment of the patron. Adjudged 12 Co. 100. Agreed 12 Co. 73.

[Note 168.] (2) The effect of the difference between *void* and *voidable*, in the instance of a simoniacal presentation, may be seen in Windsor's case, 5 Co. 102. and Winchcombe's case, Hob. 165. the judgment in both turning upon it.

[Note 169.] (3) Adjudged accordingly in the king against the bishop of Norwich, Hob. 75. Cro. Jam. 385. In sir Arthur Ingram's case on the 5 E. 6. against the sale of offices, there was a like decision, that the king could not dispense with the disability created by statute. Post. 234. a. Hob. 75. Cro. Jam. 385. 3 Inst. 154. When the famous case of sir Edward Hales, in the reign of James the second, was argued, these two cases were urged, to prove that the king could not dispense with the disability for not taking the oaths and sacrament according to the 25 Cha. 2. usually called the test act; and lord Coke himself in his Third Institute applies them to a like case on the 5 Eliz. in respect to the oath of supremacy. 3 Inst. 154. The principal judicial authority relied on for the dispensation was the case in the year-book of 2 H. 7. 6. b. in which, notwithstanding the statutes making void a grant of the office of sheriff for
more

more than a year, the judges are represented to have held a grant for life with a *non obstante* to be good. But trusting to such an authority only exposed the weakness of the cause it was intended to sustain. The book cited, so far from containing any judgment of the point, ends with an adjournment of the case, accompanied with this remarkable declaration, that both judges and counsel agreed what they had then said *should be taken for nothing*. As far too as appears, the grant in question might have been adjudged good, on the ground of being within an exception of the statutes. The king also had been specially enabled by the 9 H. 5. c. 5. to dispense with the statutes for four years, on account of the wars and a pestilence. But, lastly and principally, it was an insuperable objection to the authority of this case, that the 23 H. 6. to remove all doubts, provides, that the king's grant for more than a year should be *void*, notwithstanding any *non obstante*. What respect could be due to a *judicial opinion*, declaring a dispensation *good*, which the *legislature* itself had positively enacted should be *void*? Yet it is not to be concealed, that in the report of Calvin's case, lord Coke justifies the king's dispensation in this instance, on the principle of its being beyond the power of parliament to take away his right to the service of his subjects. Calvin's case, 7 Co. 15. This strange language is the more unaccountable, as it is inconsistent with his own doctrine here, and in the case on the statute against the sale of offices.

(4) But by the bill of rights, 1 W. & M. it was declared, that *from* [Note 170.] *the then session* of parliament, no dispensation with any statute should be valid, unless such statute allows it, and except in such cases as should be specially provided for the then session. 1 W. & M. sess. 2. c. 2. s. 12. The occasion of this excellent provision was the equally extravagant and unwarrantable exercise of the dispensing power by James the second, who, having procured the sanction of a judicial opinion to a dispensation with the test act in favour of sir Edward Hales, madly proceeded to a suspension of the principal laws for the support of the established religion; an excess, in which, monstrous as it was, several of the judges, to the great scandal of Westminster-hall, gave him countenance, the priests of the temple of justice treacherously aiding to pollute it, instead of manfully opposing the sacrilege. Till the time of this prince the doctrine of dispensation was received with very important qualifications; of which the principal were these.—1. It was said, that the king could not dispense with the common law; though lord chief justice Vaughan seems to deny this position. Dav. 75. 3 Inst. 154. Vaugh. 334.—2. It appears to have been generally agreed, that the king could not dispense with a statute, which prohibited what was *malum in se*.—3. *Malum prohibitum* was not deemed universally dispensable with; for some held the king could not dispense with a statute, if the prohibition was *absolute*, and not *sub modo*, as under a penalty to the king, or, as others express it, where the statute was made for the *general good*, and not with a view merely to the king's profit or interest.—4. None contended that the royal dispensation could diminish or prejudice the property, or private right of the subject.—5. It was understood, that the king could dispense, *not generally*, but only in favour of *particular persons*, and, according to some, for these only in *particular instances*.—But some of these distinctions had great uncertainty and subtlety in them, and were so open to controversy, that they only tended to create embarrassment; and though the others greatly restricted the largeness of the claimed prerogative, yet they were far from obviating the chief objection to so formidable a pretension. Had the boundary of the dispensing

dispensing power been ever so clearly marked, still it was wise and prudent to annihilate it. So far as it resembled the power of repealing laws, it was an intolerable corruption, wholly irreconcilable with the first principle of our constitution, by which the power of legislation cannot be exercised by the king, without the two houses of parliament. So far as it did not fall within this idea, it was unnecessary: for those acts, which were the fruits of it, might have derived their force from other acknowledged powers of the crown, such as the right of waiving penalties and forfeitures belonging to itself, and the prerogative of pardoning.—It is worthy notice, that the *declaration of rights*, which the lords and commons made on tendering the crown to William and Mary, distinguishes between *suspending* laws by regal authority, and *dispensing* with them. The former, being a *general* and *absolute* abrogation for a time, is condemned without any exception; but the latter, being only a *special exemption* of certain individuals, is merely declared illegal, *as it had been exercised of late*. Also the *bill of rights*, though it declares against the *future* exercise of a dispensing power in any case, except where the king is specially authorised by act of parliament, yet contains a proviso saving from prejudice all prior charters, grants, and pardons. 1 W. & M. sess. 2. ch. 2. sect. 12. & 13. If the condemnation of the dispensing power for the *time past* had been unqualified, it might have destroyed the titles under numberless subsisting grants from the crown, the validity of which it was deemed most equitable to leave to the decision of the courts of justice in the ordinary way.—Such as wish to go more deeply into the controversy about the dispensing power may find the following references useful.—For the history of dispensations, see Dav. 69. b. Pryn. on 4 Inst. 128. to 133. Atkyns on power of dispens. with pen. stat.—For the cases on the subject, see the case of the merchants of Waterford in 2 R. 3. 11. 1. H. 7. 2. the sheriff's case in 2 H. 7. 6. b. the doctrine in 11 H. 7. 11. b. 12. a. Grendon and the bishop of Lincoln. Plowd. 502. case of the aulnager, Dy. 303. Calvin's case 7 Co. 15. the prince's case 8 Co. 29. b. case of the taylors. of Ipswich 11 Co. 53. case of monopolies *ibid.* 84. Irish case of commendam Dav. 68. case of customs 12 Co. 18. the cases cited ante note 3. Colt and Glover v. the bishop of Litchfield, or English case of commendam Mo. 898. 1 Rol. Rep. 151. Hob. 206. Evans and Kiffins v. Askwith W. Jo. 158. Palm. 457. Latch. 31. 233. Noy 93, 2 Rol. Rep. 450. case of clerk of the court of wards Hob. 214. Needler and the bishop of Winchester Hob. 230. Lord Wentworth's case Mo. 713. case of dispensation with 3 Jam. 1. c. 5. against a recusant's holding an office Hardr. 110. cases of dispensation with statutes against retailing wine without licence, namely Young and Wright 1 Sid. 6. Thomas and Waters Hardr. 443. 2 Keb. 425. Thomas and Boys Hardr. 464. Thomas and Sorrell Vaugh. 330. 1 Lev. 217. 1 Freem. 85. 115. 128. 137. 2 Keb. 245. 280. 322. 372. 416. 790. 3 Keb. 76. 119. 143. 155. 184. 223. 233. 264. sir Edward Hale's case on the test act of 25 Cha. 2. in 2 Show. 475. Comberb. 21. State Tri. v. 7. p. 612. 4 Bac. Abr. 179. and case of the seven bishops in the reign of Jam. 2. State Tri. 4th ed. v. 5. p. 303. Of these cases, Thomas and Sorrell and Sir Edward Hale's are the principal. The former was argued with the greatest solemnity in the exchequer chamber, the delivery of the opinion of the judges, of whom the majority was for the dispensation, taking up a day in four several terms. The latter was treated with less form; but gave occasion to some considerable publications on the subject; particularly lord chief justice Herbert's account of the authorities on which the judgment was given in sir Edward Hale's case, mr. Atwood's answer to it, and a tract by

by lord chief baron Atkyns against the king's power of dispensing with penal statutes. In a manuscript report of sir Edward Hale's case, sir Bartholomew Shower is mentioned to have applied to lord chief baron Atkyns. But we have not yet met with any such piece. Mr. Hume's state of the arguments for and against the dispensing power, though written with an evident bias in favour of the crown's prerogative, is worth consulting. Hume's Hist. 8vo. ed. v. 8. p. 242. 254. See also Tyrr. Bibliothec. Politic. 589 to 597.—For the proceedings in parliament after the Revolution, in respect to sir Edward Hale's case and the dispensing power, see Gray's Deb. v. 9. p. 297. to 307. 314. to 332., 336. to 344. 396. Chandl. Deb. of the Lords, v. 1. p. 394.

[121. a.]

(1) This, though a just description of fines, considered according to [Note 171.] their original and still apparent import, yet gives a very inadequate idea of them in their modern application. In Glanville's time they were really amicable compositions of *actual* suits. But for several centuries past, fines have been only so in *name*, being in *fact* *fictional* proceedings, in order to transfer or secure real property by a mode more efficacious than ordinary conveyances. What the superiority of a fine in this respect consists of will best appear, by stating the chief uses to which it is applied.—One use of a fine is *extinguishing dormant titles*, by shortening the usual time of limitation. Fines, being agreements concerning lands or tenements solemnly made in the king's courts, were deemed to be of equal notoriety with judgments in writs of right; and therefore the common law allowed them to have the same quality of barring all, who should not claim within a year and a day. See Plowd. 357. Hence we may probably date the origin and frequent use of fines as feigned proceedings. But this puissance of a fine was taken away by the 34 E. 3. and this statute continued in force till the 1 R. 3. and 4 H. 7. which revived the ancient law, though with some change, proclamations being required to make fines more notorious, and the time for claiming being enlarged from *a year and a day* to *five years*. See 34 E. 3. c. 16. 1 R. 3. c. 7. 4 H. 7. c. 24. The force of fines on the rights of strangers being thus regulated, it has been ever since a common practice to levy them merely for better guarding a title against claims, which, under the common statutes of limitation, might subsist, with a right of *entry* for twenty years, and with a right of action for a much longer time.—Another use or effect of fines is barring estates tail, where the more extensively operative mode by common recovery is either unnecessary or impracticable. The former may be the case, when one is tenant in tail with an immediate reversion or remainder in fee; for then none can derive a title to the estate except as his *privies* or *heirs*, in which character his fine is an immediate bar to them. The latter occurs, when one has only a remainder in tail, and the person, having the freehold in possession, refuses to make a tenant to the præcipe for a common recovery, which would bar all remainders and reversions; for, under such circumstances, all which the party can do is to bar those *claiming under himself* by a fine. How this power of a fine over estates tail commenced, has been *vexata quæstio*. The statute *de donis*, after converting fees conditional into estates tail, concludes with protecting them from fines, there being express words for that purpose. But the doubt is, when this protection was withdrawn, whether by the 4 H. 7. or the 32 H. 8. It is a common notion, into which some of our most respectable historians have fallen, that the 4 H. 7. was the statute which first loosened entails; and thus opening the door for a free alienation of landed property has been attributed to the deep policy of the prince

prince then on the throne. See Hume's History 8vo ed. v. 3. p. 400. But this is an error proceeding from a strange inattention to the real history of the subject. Common recoveries had been sanctified by a judicial opinion in Taltarum's case, as early as the twelfth of Edward the fourth: and from them it was that intails received their death wound; for, by this fiction of common recoveries, into the origin of which we mean to scrutinize in some other place, every tenant in tail in possession was enabled to bar intails in the most perfect and absolute manner; whereas fines, even now, being only a *partial* bar of the issue of the persons who levy them, must in general be an inefficacious mode. In respect to the 4 H. 7. it was scarce more than a repetition of the 1 R. 3. the only object of which indisputably was to repeal the statute made the 34 E. 3. in favour of non claims, and against them to revive the ancient force of fines, but with some abatement of the rigour in point of time and other improvements, as we have already hinted; a provision of the utmost consequence to the security of titles. Accordingly lord Bacon, whose discernment none will question, in his life of Henry the seventh, commends the statute of the 4th of his reign, merely as if aimed at non claims. Bac. Hen. 7. in Ken. Comp. Hist. 2d ed. v. 1. p. 596. Nor indeed could there have been the least pretence to extend the meaning of the law further, if it had not been for some ambiguous expressions in the latter end of it. Like the 1 R. 3. after declaring a fine with proclamation to be an universal bar, it saves to all, except *parties*, five years to claim after the proclamation of it. But this saving did not suit the case of the issue in tail, or of those in remainder or reversion; because during the life of the immediate tenant in tail, these could have no right to the possession, and it was possible that he might live more than five years from the proclamation of the fine. The framers of the 4 H. 7. foresaw this; and therefore like the 1 R. 3. it contains an additional saving of five years for all persons, to whom any title should come *after* the proclamation of the fine by force of any intail subsisting *before*; words, which as strongly apply to the issue of the tenant in tail levying a fine, as to those in remainder or reversion. Had therefore the 4 H. 7. stopped here, what the learned and instructive observer on our ancient statutes writes would be strictly just, that, instead of destroying estates tail, the statute expressly saves them. Barrington Ant. Stat. 2d ed. p. 337. But a subsequent part of the statute, in declaring how a fine shall operate on such as have five years allowed, if they do not claim within that time, expresses, that they shall be concluded *in like form as parties and privies*; and another clause, in regulating who should be at liberty to aver against a fine *quod parties nihil habuerunt*, saves this plea for all persons, with an exception of *privies* as well as *parties*. From these two clauses, though the former of them was copied from the 1 R. 3. grew a doubt, whether the statute did not enable tenant in tail to bar his issue by a fine. The arguments for it were, that the issue were *privies* both in blood and estate; and that if the statute meant to bind them, when the tenant in tail had *not any estate* in the land at the time of the fine, it was highly improbable, there should be a different intention, when he really had one. 2 Show. 114. On the other hand it might be said, that as the word *privies* in the statute *de modo levandi fines* and in the 1 R. 3. was not deemed sufficient to reach heirs in tail, and to control the statutes *de donis*, why then should the same word in the 4 H. 7. include them; more especially when it was considered, that it was as much the professed scope of the 4 H. 7. as it was of the 1 R. 3. to revive the operation of fines against non claims, and that both contained the same express saving for persons claiming

claiming under intails? 2 Inst. 517. Pollexf. 502. By such contrariety of reasoning, the judges in the 19 H. 8. became divided in opinion; three holding that the 4 H. 7. was not a bar to the issue, and four that was. See 19 H. 8. 6. b. Dy. 2. b. pl. 1. Br. Abr. Fines, 1. 121. Bro. N. C. 144. Pollexf. 502. To remove the doubt the legislature passed the 32. H. 8. by which the heirs in tail are expressly bound. 32 H. 8. c. 26. But the last statute, though entitled an exposition of the 4 H. 7. and though made to operate *retrospectively*, contained several exceptions, particularly one of fines of lands, of which the reversion is in the crown. Consequently room was still left for contesting the effect of the 4 H. 7. independently of the 32 H. 8. and in the reign of Charles the second a case arose, which made a discussion of the point almost unavoidable. It was the case of the earl of Derby against one claiming under a fine by the earl's father, who was tenant in tail with reversion in the crown, and so within an exception in the 32 H. 8. Two points were made, of which the first was, whether this fine, thus depending wholly on the 4 H. 7. was a bar to the issue in tail; and on adjournment of the case into the exchequer chamber, eight judges against three held, that the fine of tenant in tail was a bar to the issue before the 32 H. 8. great stress however being laid by those of this opinion on the exposition of the former by the latter. See Murrey on the demise of the earl of Derby against Eyton and Price, Pasch. 31. Cha. 2. in Scacc. T. Raym. 260. 286. 319. 338. Pollexf. 491. Skinn. 95. 2 Show. 104. T. Jo. 237. It is observable, that both lord-keeper North and lord chief-justice Saunders, the lateness of whose promotions prevented their publicly giving their opinions, concurred with the majority of the judges in the construction of the 4 H. 7. and further, that Pollexfen, who as counsel argued most ably for the earl of Derby the issue in tail, afterwards declared his private sentiments to be against the earl on that statute. But it should be adverted to, that, though the majority of the judges were against lord Derby on this point, they gave judgment for him on a secondary one, which was, that the intail, being of the gift of the crown, fell within the protection of the 34 H. 8. Therefore their opinion on the 4 H. 7. finally proved to be wholly extra-judicial. But we do not know of any case, in which the controversy has been again agitated.—A third effect of fines is, passing the estates and interests of married women in the inheritance or freehold in lands and tenements. Our common law bountifully invests the husband with a right over the whole of the wife's personalty, and entitles him to the rents and profits of her real estate during the coverture. It further gives him an estate for his own life in her inheritance, if the husband is actually in possession, and there is born any issue of the marriage capable of inheriting. But the same law, which confers so much on the husband, will not allow her, whilst a feme-covert, to enlarge the provision for him out of her property, or to strip herself of any claims which the law gives her on his. On the contrary, jealous of his great authority over her, and fearful of his using compulsion, it creates a disability in her to give her consent to any thing, which may affect her right or claims after the coverture, and makes all acts of such a tendency absolute nullities. By the rigour of the ancient law, we take this rule to have been so universally applicable, that a married woman could in *no* case bind herself or her heirs by any *direct* mode of alienation. But accident gave birth to two *indirect* modes; namely, by fines and common recoveries. Though it might be proper to incapacitate the wife from being influenced by the husband to prejudice herself by any conveyances or agreements during the coverture, yet justice to others required, that such as might have any claim on the wife's free-

hold or inheritance, should not be forced to postpone their suits [121. a.] till the marriage was determined; for if they should, then, to the use the words of Bracton, in explaining why the husband's infancy would not warrant the parol to demur in a suit for the wife's land, *mulier implacitata de jure suo si propter minorem etatem viri posset differre judicium, ita posset qualibet mulier in fraudem nubere*. Bract. lib. 5. tract. 5. c. 21. fo. 423. a. Probably it was on this principle, the common law allowed a judgment against husband and wife in a suit for her land to be as conclusive as if given against a feme sole; which was carried so far, that, till the statute of Westminster the second, even judgment against them, on default in a *possessory* action for the wife's freehold, drove the wife after the husband's death to a writ of right to recover her land. 2 Inst. 342. From enabling the husband and wife to defend her title, and making the judgment on such defence to be conclusive, permitting them to compound the suit by a final agreement of record, in the same manner as other suitors, was no great or difficult transition; more especially when it is considered, that in the case of *femes-covert* fines are never allowed to pass, without the court's secret examination of them apart from their husbands, to know whether their consent is the result of a free choice, or of the husband's compulsive influence. Such, we conceive, is the true source, whence may be derived the present force of fines and common recoveries as against the wife who joins in them; for, whatever in point of bar and conclusion was their effect, when in suits really *adverse*, of course attended them, when they were *feigned*, and in that form gradually rose into modes of alienation, or as the more usual phrase is, *common assurances*. The conjecture we have thus hazarded, to illustrate how it happens that a married woman may alienate her real rights by fine, though not by any instrument or act strictly and nominally a conveyance, leads to proving, that the common notion of a fine's binding *femes-covert* merely by reason of the *secret examination* of them by the judges is incorrect. If the *secret examination of itself* was so operative, the law would provide the means of effectually adding that form to ordinary conveyances, and so make them conclusive to *femes-covert* equally with a fine. But it is clearly otherwise; and, except in the case of conveyances by *custom*, there must be a *suit* depending for the freehold or inheritance, or the examination being *extrajudicial* is ineffectual. In the Second Institute lord Coke represents this to be the *general* law, and, amongst many other authorities cited to prove it, refers to a case of Hen. 7. reported by Kielwey, in which, whether the examination of a *feme-covert*, on the inrollment of a bargain and sale to the *king*, sufficed to bind her was largely debated. 2 Inst. 673. Kielw. 4. a. to 20. a. The just explanation therefore of the subject is, that the *pendency of a real action* for the *freehold* of the land, in consequence of previously taking out an original writ, without which preliminary even at this day a fine is a nullity, should be deemed the *primary* cause of the fine's binding a *feme-covert*; and that the *secret examination* of her, on taking the acknowledgment of the fine, is only a *secondary* cause of this operation. Such are the *three* chief effects, by reason of which fines, no longer used, according to their original, as recorded agreements for conclusion of *actual suits*, have been changed into and are still retained as *feigned* proceedings; and being thus accommodated to answer purposes, to which ordinary conveyances cannot be applied, it is no wonder that they should not only be considered as a species of conveyance, but also be deemed a principal guard to the titles to real property, and as such be ranked amongst the most valuable of the common assurances of the realm. In this digression on the properties

ties of a fine, we have purposely omitted to consider its operation, either as an *estoppel*, except so far as it may be said to be one to the issue in tail by force of the 4 H. 7. and 32 H. 8. or as a *discontinuance*, or lastly in respect of the conusor's *warranty*, which is always inserted in it. The virtues of a fine, in the three points of view we have examined it, namely, to extinguish dormant titles, to bar the issue in tail, and to pass the interests of *femes-covert*; these constitute the more *peculiar* qualities, on account of which it is most usually, if not always, resorted to. As to the three other effects, it may be enough to observe here, that they are equally incident to feoffments, or any other deeds having warranties annexed. The distinct consideration of them is reserved for another occasion.

(2) If binding the *parties*, or even *privies*, exclusive of heirs in tail, [Note 172.] was the only effect of a fine, it would scarce be preferable to less solemn agreements; for, without doubt, they are so far binding. The most distinguishable properties of a fine are, barring *strangers* unless they claim within five years, barring the *issue in tail immediately*, and binding *femes-covert*, as we have explained in the foregoing note.

[121. b.]

(2) But by the 17 E. 2. *de prerogativa regis*, the king's grant of a [Note 173.] manor will not pass an advowson appendant, without express mention of it. Yet there are some cases, which have been deemed not within the reason of the statute; such as the crown's *restitution* of lands to wards at their full age and to the heirs of idiots, or of temporalities to new bishops. Staundf. Prærog. 43. a. Doler. Advows. 36. Even words of *reference* have been held sufficient; as where the king granted a manor with all its appurtenances, as fully as the same came to and were possessed by the crown, and an advowson was appendant to the manor. Adjudged in Whistler's case, 10 Co. 63. a.—It is agreed in our old books, that before the statute *de prerogativa regis*, the king's grant of a manor would pass an advowson appendant, without naming it, or so much as using the word *appurtenances*. Staundf. Prærog. 42. a. 10 Co. 64. a. But in the history of Westmoreland, lately published by Mr. Nicholson and Dr. Burn, the record of a case of *darrein presentment* of the 15 E. 1. is cited, in which the court adjudged, that a grant of the manor of Burgh, with its *appurtenances*, being from the crown, would not pass the advowson of the chapel, though appendant to the manor; and thence the 17 E. 2. is concluded to be only declaratory of the common law. See vol. i. p. 564, 565. The case appealed to seems full in point. But then there is a strong current of authorities the other way; for the case of 43 E. 3. 23. is to the contrary, and so are the instances of things appendant not within the statute. Staundf. Prærog. 42. a. 10 Co. 64. a.

(6) *Adjunctum* is rather a term of the logicians. The *accessorium* [Note 174.] of the civil law answers best to our terms of *regardant*, *appendant*, *appurtenant*, and *incident*. How these differ from that, which is *part* or *parcel* of a thing, is explained in judge Doderidge's Treatise on Advowsons. See p. 38.

(7) This position is not universally true. It sometimes fails as to [Note 175.] things appurtenant. *Return of writs* or a *leet* may be appurtenant to an *hundred*; so may *waif* and *stray* to a *leet*; and yet in these instances *both* subjects are *incorporeal*. Ante 121, a. 8 H. 7. 1, 2, 3. Rast. Entr. 128. The true test seems to be, the propriety of relation between the

the *principal* and the *adjunct*; which may be found out by considering whether they so agree in nature and quality, as to be capable of union without any incongruity. See 1 Vent. 386.

[122. a.]

- [Note 176.] (1) Acc. Dy. 70. b. and two adjudged cases in marg. of ed. 1688. Acc. also by Dyer in 2 Leon. 222. The same point was agitated in *Long* and *Heming*, 31 Eliz. of which case the reports differ so much, that it is difficult to say what was decided by the court. But it rather seems to have ended with an opinion consonant to lord Coke's. Sav. 103. Cro. Eliz. 209. 1 Leon. 207. 4 Leon. 216. Doder. Advows. 42.
- [Note 177.] (2) This may at first seem to clash with the doctrine before, that *appendants are ever by prescription*. Ante 121. b. n. 4. But they may be reconciled; for, as appendancy cannot be without prescription, the former always *implies* the latter; and, therefore, if one pleads common appendant, it is unnecessary to add the usual form of prescribing.
- [Note 178.] (4) But not if there is a *grant* to shew; common appurtenant being claimable by *grant*, as well as by *prescription*. Adj. Cro. Cha. 482.
- [Note 179.] (5) It has been denied, that common in *gross* can be *sans nombre*, 1 Saund. 346. But see Fulb. Prepar. 70. a. and the books there cited.
- [Note 180.] (6) For the cases about *sola vestura*, see ante 4. b. n. 1. As to *separalis pastura*, whether a prescription for it can be made against the owner of the soil has been the subject of argument, in three different cases since lord Coke's time. In the first the court of common pleas was equally divided. North and Cox, Mich. 20 Cha. 2. Vaugh. 251. 1 Lev. 253. In the second the court of king's bench inclined to think such a prescription good; but the demurrer, on which the point arose, being over-ruled by consent, in order to try the fact, and a verdict being found against it, a decision of the question of law became unnecessary. Potter and North, Easter 21 Cha. 2. 1 Vent. 383. 1 Saund. 347. 1 Lev. 268. But in the third case, which was on a motion to arrest judgment, the whole court of king's bench adjudged for the prescription. Hopkins and Robinson, East. 23 Cha. 2. Pollexf. 13. 1 Mod. 74. a. 2 Saund. 324. 2 Liv. 2. Since this last case lord Coke's doctrine seems to have been generally acquiesced in.
- [Note 181.] (7) According to this passage, ownership of the soil is not necessarily included in a *several fishery*, and *common of fishery* and *free fishery* are the same thing. But one, whose works will be admired as long as a good taste for literary compositions, or gratitude for the pleasure and instruction derived from them, shall have any influence, gives a very opposite explanation; for, according to him, ownership of soil is *essential* to a *several fishery*; and a *free fishery* differs both from *several fishery* and *common of fishery*: from the former, by being confined to a *public river*, and not *necessarily* comprehending the soil; from the latter, by being *exclusive*. 2 Blackst. Com. 8. ed. 39. But we doubt whether this distinction may not be in a great degree questionable.—1. In respect to a *several fishery*, where is the inconsistency in granting the *sole* right of fishing, with a reservation of the soil and its other profits? Bracton expressly takes notice of such a grant; for his words are, that one may *servitutum imponere fundo suo, quod quis possit piscari cum eo, et ita in communi, vel quod alius per se ex toto*. Bract. fo. 208. b. There are also numerous other authorities for it, the old books of entries agreeing,

agreeing, that one may prescribe for a *several fishery* against the owner of the soil; to which should be added, the three cases of Elizabeth cited by lord Coke. See Lib. Intrat. 162. b. 163. a. Rast. Entr. 597. b. and the books cited under the letter *d* in fol. 4. b. and under *m* here, and the cases referred to under the * on the other side. Nor do we understand why a *several piscary* should not exist without the soil, as well as a *several pasture*, as to which latter we have already shewn the doctrine to be settled. Supra note 6. The chief reasons which occur against lord Coke seem to be these.—Several writs, never applicable except to the soil, lie for a piscary; such as a *precipe quodd reddat, monstraverunt de rationalibus devisis*, and *trespass*, which latter writ is particularly insisted upon by lord chief justice Holt. Dav. 55. b. Hugh. Comm. Orig. Wr. 11 W. Jo. 440. 1 Ventr. 122. 2 Salk. 637. Skinn. 677. *Suum liberum tenementum* is a good plea to trespass for fishing in a *several piscary*. 17 E. 4. 6. 18 E. 4. 4. 10 H. 7. 24. 26. 28. The soil will pass, as it is said, by the grant of a piscary. Plowd. 154.—But all these objections may be repelled.—The writs relied on will not always lie for a piscary. Thus, if a *precipe quodd reddat* is brought of a piscary in the water of another person, the writ is bad, and a *quodd permittat* is the proper remedy. Fitz. Abr. Briefe 861. F. N. B. 23. l. and note b. of the 4to ed. Besides, in the cases of actions for trespass in a *several piscary*, or at least in some of them, the writ seems in effect to state a *several piscary* in the *plaintiff's own soil*, which therefore proves nothing as to the sense of *several piscary* without further explanation. Reg. Br. Orig. 95. b. Carth. 285. Skinn. 677. The plea *liberum tenementum* may be replied to by prescribing for a *several piscary*. See the books before cited as to such a prescription. Though the grant of a piscary generally may, perhaps, pass the soil, yet it will not, if there are any words to denote a different intention; as where one seised of a river grants a *several fishery* in it, which is the case put by lord Coke in another place; and much less will the soil pass, when there is an express reservation of it. Ante 4. b. and n. 2. there.—Hence, as it should seem, the arguments are short of the purpose; for at the utmost they only prove, that a *several piscary* is *presumed* to comprehend the soil, till the contrary appears, which is perfectly consistent with lord Coke's position, that they may be in different persons, and indeed appears to us the true doctrine on the subject.—2. Both parts of the description of a *free fishery* seem disputable.—Though, for the sake of distinction, it might be more convenient to appropriate *free fishery* to the franchise of fishing in *public* rivers by derivation from the crown; and though in other countries it may be so considered, yet, from the language of our books, it seems as if our law practice had extended this kind of fishery to *all* streams, whether *private* or *public*, neither the register nor other books professing any discrimination. Ro. 93. b. Fitzh. N. B. 88. g. Fitzh. Abr. Ass. 422. 4 E. 4. 28. 17 E. 4. 6. b. 7. a. 7 H. 7. 13. b. Cro. Cha. 554. 1 Ventr. 122. 3 Mod. 97. Carth. 285. Skinn. 677. Again, it is true, that in one case the court held *free fishery* to import an *exclusive* right, equally with *several piscary*, chiefly relying on the writs in the Reg. 95. b. and the 43 E. 3. 24. But then this was only the opinion of two judges against one, who strenuously insisted that the words *libera ex vi termini*, implied *common*, and that many judgments and precedents were founded on lord Coke's so construing it. 2 Salk. 637. Carth. 285. That the dissenting judge was not wholly unwarranted in the latter part of his assertion appears from two determinations, a little before the case in question. See *Upton and Dawkins*, 3 Mod. 97. and *Peake and Tucker*, cited in Carth. 286. in marg. We may add to this the three cases

cases cited by lord Coke as of his own time; and that there are passages in other books which favour his distinction. See Cro. Cha. 554. 17 E. 4. 6. b. 7. a. 7 H. 7. 13. b.—These remarks on *several* and *free fishery* may serve the student as a notice of the doubts on the subject, and also assist in any future discussion for removing them; which, in truth, is the whole scope of the annotation.

[Note 182.] (2) This replication was given by the 37 E. 3. c. 16. before which statute the plea of being a villein to a stranger to the writ could not be denied.

[123. a.]

[Note 183.] (2) *Siens*, or, according to the modern spelling, *cion*, signifies the *shoot* of a tree, and is derived from the French word *scion*, which is the same as *surculus* in Latin.

[Note 184.] (3) According to Fitzherbert, the marriage enfranchises the woman *for ever*; and he cites as an authority Britton, who considers it as a negligence in the lord not to have prevented the marriage. F. N. B. 78. G. Brit. 79. b. But Bracton, in the passage cited by lord Coke two or three lines further, confines the enfranchisement to the coverture, and there are several authorities which concur with him. Bro. *Villenage* 23. Pasch. 33 E. 3. Statham tit. *Villenage*. Fitz. Abr. *Villenage* 21. 30. 46. Lord Coke was aware of this contrariety in the books; for in a subsequent part he takes notice of it, but calls the opinion, that the enfranchisement ceases with the coverture, the better one. Post. 136. b. 137. b. However, he inclines to except the case of the nief's marrying with her own lord. But even this is denied by Perkins. Perk. sect. 314. It is a strong argument against this latter writer, that, in other cases of *constructive* manumissions, though in some the ground of inference was not so strong as the lord's marriage with his nief, the enfranchisement was *perpetual*. It is a still more forcible reason, that reviving the slavery of the lord's death, if he left an heir by his nief, would have necessarily induced the *unnatural* consequence of making the mother the slave of her own issue.

[Note 185.] (4) It was unnecessary to resort to this reason to prove the issue of such a marriage free; the rule of our law being, that the child shall follow the father's condition; consequently, whether the nief was *free* or *bond*, during the coverture, made no difference to her issue.

[Note 186.] (5) In the chapter of dower lord Coke represents a nief marrying a free-man to be dowable. Ante 31. a. But this passage from Bracton is direct to the contrary. Perkins distinguishes, allowing dower to the nief from a *stranger*, but not from her *lord*. Perk. sect. 314.

[Note 187.] (6) Here lord Coke omits explaining what effect the marriage of a villein with a free-woman has on his condition. As Britton writes, if the villein marries his own *lady*, it enfranchises him for ever. Brit. 78. b. If the marriage is with any other woman, it is clear, from Littleton's declaring the issue villeins, that the father remained a slave as before.

[Note 188.] (7) This difference between our and the civil law is the subject of the chapter in Fortesc. de. Laud. Leg. Angl. cited in the margin

gin. See also mr. Selden's and mr. Gregor's notes in the 8vo. ed. of 1775.

(8) This point was so held in *Worseley's case* of 23 Eliz. in *Dyer*, [Note 189.] which lord Coke refers to in the margin. According to *Dyer*, judge *Periam* was of a contrary opinion. But *Anderson*, who reports the same case, informs us, that the judges were agreed. 1 And. 75. In the queen against an illegitimate son of sir *John Perrot*, and in *Frampton* against *Gerrard*, two subsequent cases of the same reign, the judges recognized the doctrine. 2 Rol. Abr. 785. 791. and Mo. 735. However, it should be observed, that though a bastard is not a *son* for whom the consideration of blood will raise an use, yet, on an estate otherwise effectually passed, an use may be as well declared to a bastard being *in esse*, and sufficiently described, as to another person; and so *Rolle* in his *Abridgement* states the law to be, but at the same time cites the case of *Frampton* and *Gerrard* as determined to the contrary. 1 Ro. Abr. 791. *Gilb. on Uses* 207. The reason why the use to the bastard is bad in the first instance, and good in the second, depends on the common, but perhaps obscure, distinction between uses raised by the transmutation of the possession, as on a feoffment, grant, fine, or common recovery, and those raised without, as a covenant to stand seised, or bargain and sale; or, to express it in more intelligible terms, between declaring uses on a possession or estate actually transferred to a third person, and declaring them on a possession or estate retained in the party himself. In the former case the estate is passed completely from the grantor or donor, without the aid of a court of equity; and therefore it is immaterial, whether the use declared on the estate is gratuitous or not, it being sufficient that the grantee or donee receives it coupled with a trust or use. But in the latter case, the transaction rests in covenant or agreement between the covenantor or bargainer and the *cestui que use*; and if the covenant or agreement was not founded on the consideration of blood, or a valuable consideration, such as marriage or money, our courts of equity, which, till the 27 of H. 8. had the sole cognizance of uses, would not interpose to compel the performance. In fewer words, chancery would enforce uses annexed to a perfect gift, however gratuitous they might be, but not those resting only on a naked contract, without even so much as the consideration of blood to maintain them. The authorities in proof of this distinction are abundant; nor do we know of any seeming to impeach it, except the single case of *Frampton* and *Gerrard* already cited from *Rolle*, which, if it did turn on such a point, is sufficiently controled by other cases to make the doctrine indisputable. Mo. 102. Ow. 40. 1 Leon. 197. 1 Co. 176. b. W. Jo. 346. Cart. 143. 12 Mod. 161. *Gilb. on Uses* 113. 207. Add to this the disfavour of our law to bastardy, in not recognizing any but legitimate blood to be a good consideration, and the whole secret of the rule as to uses to bastards will be disclosed. On a covenant to stand seised, an use will not rise to a bastard; because, the use depending on contract, some consideration is requisite, and lawful blood and marriage are the two considerations peculiar to such a covenant, which necessarily excludes bastardy. But on bargains and sales of land, in which the essential consideration to raising an use is money or a price, or on any conveyances, on which the estate being passed out of the grantor, and therefore not depending on his contract, uses may be declared without any consideration, bastards stand precisely on the same footing with other persons, and are equally capable of having uses limited to them. To give the sum of this elucidation in one sentence, where the use will not rise without

without the consideration of *blood*, if derived through any but the pure channel of marriage, however near the blood [123. b.] may be, will not avail.

[Note 190.] (1) Lord Hale, in a note on a passage about legitimacy in fol. 8. a. gives a fuller extract of this case from the record than is here expressed. His words are these: Trin. 18 E. 1. Coram rege, rot. 13. Bedford, et M. 22. 23 E. 1. rot. 2. *In assise by John Radwell against Henry son of Beatrice, who was wife of Robert Radwell, quia comperitum est, quod dictus Henricus fuit natus per 11 dies post 40 septimanas, quod tempus est usitatum mulieribus pariendi, ex quo prædictus Robertus non habuit accessum ad prædictam Beatricem per unum mensem ante mortem suam, præsumitur dictum Henricum esse bastardum, ideo judgment for the plaintiff.* Hal. MSS.—If this state of the case is correct, lord Coke's is erroneous in several particulars of consequence. 1. He is short in not expressing that the record mentions *forty weeks*, and so leaving it to be deemed an *inference* of his own, as which it hath been accordingly treated. 2. He exceeds the record, by representing it to style *that time* the *latest* for a woman's going with child, when the record only calls it the *usual* period. 3. He wholly omits the husband's having had *no access to the wife for one month before his death*; a fact very material, it being very easy to allow *eleven days* after the *usual* time, but requiring a strong case to warrant extending such liberality to nearly *six weeks*. 4. The word *presumitur*, which lord Coke passes over, is of importance; for it indicates, that, notwithstanding the great excess of time, it was conceived to create only a *presumption* for the bastardy; and consequently, if very cogent circumstances to account for the protraction of the birth, and in favour of the wife's chastity, had occurred, the judgment might have been for the legitimacy. So far we had advanced, when, on looking into Rolle's Abridgement, we found the same ancient case of Radwell more at large than either in lord Coke or lord Hale. But Rolle agrees with the former, as well in respect to the record's not mentioning the *forty weeks*, as to its stating the birth to be eleven days after the *latest time in law for a woman's going with child*; and as from Rolle's particularity he seems to have most minutely attended to the record, his authority, till the whole record appears, seems most decisive. However, the two last particulars, in which lord Coke differs from lord Hale, still remain, to which Rolle adds these further circumstances: that the *husband languished of a fever a long time before his death*; that on the taking of an inquisition afterwards in the court of a lord, of whom he held lands by knight's service, *the wife swore she was not pregnant*, and to prove it uncovered herself in open court; and that, in consequence of all this, the lord received a *collateral* relation as heir. The words describing the wife's exposure of her person are remarkable; for the record states, that she, being interrogated, *juramento asserbat, se non esse pregnantem; et, ut hoc omnibus manifestè liqueret, vestes suas ad tunicam exuebat, et in plend curià sic se videri permisit.* 1 Ro. Abr. 356. pl. 3. and 18 E. 1. rot. 13. in B. R. there cited. It reflects great discredit on the lord's court, which permitted such a gross indecency; and still more on the king's judges, who suffered it to be recorded as one of the grounds for a verdict before them. How laudably contrariant is the proceeding on the writ *de ventre inspiciendo*. This remedy for the heir against the pretence of pregnancy, so well known to be of earlier date than the reign of Edward the first, as it was framed in the times of Bracton, Britton, and Fleta, delicately requires the widow to be inspected by a jury *of her own sex*; and though in subsequent times the sheriff was ordered to *summen*

summon a jury composed both of men and women, yet still the *search* was to be made by the latter only. Bract. 69. a. Brit. 165. b. Flet. lib. 1. c. 15. Reg. Br. Orig. 227. a. What harsh ideas of the times might we be led to adopt, if the early introduction of the writ *de ventre inspiciendo* did not demonstrate that the unseemly record we are observing upon was a *singularity*, and so many other testimonies of a more advanced refinement in judicial proceedings did not concur to rescue the age of our English Justinian from the suspicion of a *general practice* of such barbarism. Let us then suppose the record to be as it is in Rolle; which is the more probable to be the truth, because a contemporary judge, who reports its having been *produced* on a trial of legitimacy, represents it much in the same way. Cro. Jam. 541. But still it will not warrant lord Coke's inferring from it, that *forty weeks* constitute the latest time our law allows for a woman's going with child. On the contrary, no particular time being mentioned, what period was meant must be found out through some other *medium*; and as the record states *other* unfavourable circumstances besides the excess of time, and that the *jury presumed* against the child's being the issue of the deceased husband, it seems fair to suppose, that the law was understood not to be so strict in the time alluded to, whatever that time might be, as indiscriminately to condemn as illegitimate all children not born within it, but rather to consider every excess, unless very extraordinary indeed, as only raising a presumption against them. This construction is clearly most consistent with the terms of the record in question. In the next note we shall attempt to satisfy the reader that the rule resulting from it is most conformable to other precedents and authorities, as well as to the reason of the thing. After the case of Radwell from the record of E. 1. lord Hale gives the four following cases:—Rot. Parl. 9 E. 2. m. 4. Gilbert de Clare comes Clouc. obiit 30 Junii 7 E. 2. in parlamento tent. quindena Hil. 9. E. 2. *the sisters and coheirs pray livery. Matilda, quæ fuit uxor comitis, pretends to be big by the earl, which was accordingly found per inquisitionem. The coheirs reply, that, si comitissa prægnans esset, tantum tempus elapsum est, ut secundum cursum pariendi non potest dici imprægnari a comite. Yet they could not obtain livery till Pasch. 10 E. 2. but the question hung in deliberation.*—Note 18 R. 2. *where a woman in such a case, immediately after the death of the first husband, took a second husband, and had issue born forty weeks and eleven days after the death of the first husband, and it was held to be the issue of the second husband.*—M. 17. Jac. B. R. *Also, and Stacey. Andrews dies of the plague. His wife, who was a lewd woman, is delivered of a child forty weeks and ten days after the death of the husband. Yet the child was adjudged legitimate and heir to Andrews, for partus potest protrahi ten days ex accidente.*—M. 4. Car. in Cur. Ward, and afterwards P. 5. Car. B. R. *Thecar marries a lewd woman, but she doth not cohabit with him, and is suspected of incontinency with Duncomb; Thecar dies; Duncomb within three weeks after the death of Thecar marries her; two hundred and eighty-one days and sixteen hours after his death she is delivered of a son. Here it was agreed, 1. If she had not married Duncomb, without question the issue should not be a bastard, but should be adjudged the son of Thecar. 2. No averment shall be received that Thecar did not cohabit with his wife. 3. Though it is possible that the son might be begotten after the husband's death, yet, being a question of fact, it was tried by a jury, and the son was found to be the issue of Thecar.* Hal. MSS.—Lord Hale's case of E. 2. appears very extraordinary, the time from 30 June, 7 E. 2. when the earl of Gloucester died, to the quin-

dene of Hilary, or 29 Jan. 9 E. 2. when the livery to his sister was further postponed in parliament, being within one day of a [123. b.] *year and seven months*; which is a much later date for the delivery of a live child than the most liberal in their calculations have hitherto assigned. However, on reading the printed copy of the original record, in the rolls of parliament lately published, we find lord Hale's note quite accurate. See Rot. Parl. v. 1. p. 353. As to the case of R. 2. it confirms the doubt we have elsewhere stated of the opinion, that, if a widow marries again, and has a child within nine months after the death of the first husband, the child may choose his father; and is an authority for deciding according to the proof of the woman's condition when her first husband died. Ante fo. 8. a. note 7. Terms of the Law, first edit. tit. *Bastard*, and Cowel Inst. lib. 1. t. 9. Lord Hale's two other cases are reported in several books, Alsop and Stacey being in Cro. Jam. 541. Godb. 281. Palm. 9. 1 Ro. Abr. 356. and Thecar's in Cro. Jam. 685. Winch. 71. Litt. Rep. 177.

[Note 190*.] (2) If our law was really as strict in point of time as is here represented, it would not sufficiently conform to the course of nature. The physicians, it is true, generally call *nine* months, each being of thirty days, the *usual* period for a woman's going with child. But then they allow that, as a delivery may be accelerated by accidental causes, so it is frequently protracted, not only for *ten days* beyond the nine months, but to the end of the *tenth* month, and sometimes for a considerably longer time. See Zacch. Quæst. Medico-legal. lib. 1. tit. 2. Justice, therefore, requires, that, in the case of posthumous children, an excess of the usual time should not operate further than by raising a proportional *presumption* against the legitimacy. The Roman law was very liberal in this respect; for the *decemviri* allowed that a child may be born in the tenth month; and though a law of the Digest excludes the eleventh, yet the emperor Adrian, after consulting with the philosophers and physicians, decreed even for this, where the mother was of good and chaste manners. See Dig. 1. 4. 12. Paul. Sentent. lib. 4. t. 9. s. 5. Nov. 39. c. 2. t. 17. with Gothofred's learned notes on those two texts of the Roman law. Cod. lib. 6. t. 29. leg. 2. Aul. Gell. lib. 3. cap. 16. Huber. Prælect. in Dig. lib. 1. tit. 6. A like liberal discretion probably prevails in most countries in Europe; for an instance of which we appeal to a writer of great authority, who reports a decision by a majority of judges in the supreme court of Friesland, by which a child was admitted to the succession, though not born till three hundred and thirty-three days from the day of the husband's death, which period wants only three days of *twelve lunar* months. Sand. Decis. lib. 4. tit. 8. Definit. 10. Nor will our own law, notwithstanding what lord Coke advances, if the authorities are duly collected and considered, be found deficient on this interesting subject. Indeed there is a passage in Britton, which gives countenance to lord Coke's limitation of forty weeks; for this writer excludes from the inheritance posthumous children not born within forty weeks from the husband's death. Britt. 166. a. However, even this writer seems to extend in some degree beyond the forty weeks; unless he meant to make the wife's conception exactly of equal date with the husband's death, which surely is not a very reasonable construction. But without dwelling on such a nicety, it is sufficient that the principal of the few other authorities in our books are against so rigid a rule. Bracton is very cautious, illegitimizing only the issue born so long after the husband's death as to create an improbability of its being his child, without naming any fixed period. Bract. lib. 5. fo. 417. b. As to the determined cases,

cases, the only authorities of this sort we meet with are enumerated in the preceding annotation; and these, duly weighed, will not be found, it is apprehended, to warrant lord Coke's conclusion. In Radwell's case the finding against the issue is expressed to have been grounded merely on *presumption*; and besides, if we construe the record properly, the presumption arose from proof of the husband's non-access to the wife for a month before his death. The case of 9 E. 2. is an instance of allowing so much time beyond forty weeks, that it seems too strong to have much weight; but so far as it can claim any, it counts against lord Coke. The case of 18 Rich. 2. at first seems full for lord Coke's rule, the child, though born only *eleven* days beyond the *forty weeks*, having been declared not the issue of the deceased husband. But when it is further considered, there will be found nothing to prove a *positive general rule*; for it was very special, the widow having married a second husband the day after the death of the first, so that the question was not of legitimacy, but merely to which husband the issue belonged. One of the two only remaining cases considerably extends the time beyond the forty weeks; for in *Alsoft* and *Stacey*, the first of them, the issue was found legitimate, notwithstanding the lapse of forty weeks and *ten days*, and the lewd character of the wife; and even as to *Thecar's* case, which is the other of them, the issue having been born two hundred and eighty-two days, there was an excess of the forty weeks, though but a trifling one. The precedents, therefore, so far from corroborating lord Coke's limitation of the *ultimum tempus pariendo*, do, upon the whole, rather tend to shew that it hath been the practice in our courts to consider *forty weeks* merely as the more *usual* time, and consequently not to decline exercising a discretion of allowing a longer space, where the opinion of physicians or the circumstances of the case have so required.—In the course of our inquiries into the subject of this note, we were curious to know the general sentiments of that eminent anatomist, Dr. Hunter, on three interesting questions. These were, what is the *usual* period for a woman's going with child, what is the *earliest* time for a child's being born alive, and what the *latest*. The answer, which he obligingly returned through a friend, we have liberty to publish; and it was expressed in the words following. 1. *The usual period is nine calendar months; but there is very commonly a difference of one, two, or three weeks.* 2. *A child may be born alive at any time from three months; but we see none born with powers of coming to manhood, or of being reared, before seven calendar months, or near that time. At six months it cannot be.* 3. *I have known a woman bear a living child, in a perfectly natural way, fourteen days later than nine calendar months, and believe two women to have been delivered of a child alive, in a natural way, above ten calendar months from the hour of conception.*

[125. a.]

(2) Both in civil and criminal suits the common law is very nice in [Note 191.] requiring every issuable fact to be alleged, not only within a *county*, but also within a *parish, town, or hamlet*, or for want of either of these, some other *known place* of the same county, not being a *hundred*, which probably was excluded as *too large* a division; and if this rule was not observed, it might be pleaded in abatement, or otherwise taken advantage of, by either party, according to the stage of the suit. Cro. Eliz. 260. Thel. Dig. Br. lib. 2. c. 15. to 18. Com. Dig. *Abatement*, H. 13. *Pleader*, C. 20. The necessity of having the county named is very obvious; as otherwise it could not be known whether the court had jurisdiction, who was the proper officer to direct the process of the court to, or whence the jury was to come, and consequently the cause could not

go on. Nor is it difficult to account for stating a *particular place* in the *county*. One reason might be, that, if there was no other explanation of the case where the cause of action or ground of defence arose, than by reference to the extensive limits of a county, the allegation might fail in that certainty so essential to its being either well understood or properly controverted; and the rule, so far as it may have this foundation, still continues unchanged. But the other and principal reason was, that, if issue was taken on the fact alleged, it might be tried by a jury of the *visne* or neighbourhood, which our ancestors conceived to be more likely to be qualified to investigate and discover the truth, than persons living at a distance from the scene of the transaction. For this purpose the *venire facias* always directed the sheriff to summon a jury from the neighbourhood of the *parish* or *place*, within which the fact to be tried was alleged; and this was not mere form; for it was the sheriff's duty to attend to the direction; and if *at least four* of the hundred, in which the place was situate, were not included in the panel returned by him, it was a good cause of challenge to the *array* or *whole panel*; or, if four such persons did not attend to be sworn, the *holls*, or particular jurors, might be challenged for the same default. Post. 157. a. 48 E. 3. 30. 48 Ass. 5. 7 H. 4. 46. 21 E. 4. 59. b. Nay, so very essential did the common law deem the having some of the neighbours on the jury, that, if the *visne* appeared on the record to be from a wrong place, whether in consequence of the party's alleging the fact in a place not proper for a *visne*, or of the court's mis-awarding it, in both cases it was equally a mis-trial, and a good ground for a motion to arrest the judgment or for reversing it by error. Cro. Eliz. 260. Hob. 5. But thus restricting every *visne* to a particular part of the county, though well intended, was followed with great inconveniences. It encouraged the losing party, after a trial, to make trivial objections to the *visne*, in order to disappoint his adversary of the fruits of a just verdict; and either because the rules for laying the *visne* were in themselves vague, or because they were perverted by an over-curious interpretation, such objections not only became very common, but often succeeded, as appears from the profusion of cases and learning to be met with on the subject in our reports. See Roll. Abr. and Vin. Abr. tit. *Trial*. At length the grievance became so intolerable to suitors, that parliament interposed to relieve them; for which purpose several statutes were made. The 21 Jan. c. 13. gives aid after verdict, where the *visne* is *partly* wrong, that is, where it is awarded out of too many or too few places in the county named. The 16 & 17 Cha. 2. c. 8. goes further; and cures the defect of the *visne* *wholly*, so that the cause was tried by a jury of the proper county, without any regard to the part of the county from which the jury came. Still, however, either party was at liberty to object to the default of hundredors at the trial, which was found to be very troublesome, on account of the difficulty of always having four jurors so qualified. The 4 & 5 Ann. c. 16. therefore directs, that every *venire facias* shall be awarded from *the body* of the county in which the action is triable. But these statutes do not extend to *indictments*, or other *criminal suits*; nor has any act been yet made to include any such, except the 24 G. 2. c. 18. which only applies to actions on penal statutes. Why a regulation so convenient should be thus confined principally to civil cases seems unaccountable. However, though the ancient law continues in force, as to trials for crimes, yet it hath been long deviated from in practice; lord Hale taking notice, that, even during his time, he never knew an instance of a challenge, for want of hundredors, in treason or felony; and the sheriffs, as we are well informed, now always summoning juries
from

from the county at large, without the least regard to the *visne* of each indictment. 2 Hal. Hist. Pl. C. 272. Under such circumstances, retaining the form of a *visne* from the particular place of the county in which the crime is alleged, merely serves to create delay and embarrassment in the distribution of criminal justice, whenever an accused person may chuse captiously to exert his right of challenging for default of hundredors.

[126. a.]

(1) The cases to this point disagree; but the most modern are with [Note 192.] lord Coke. See Vin. Abr. *Trial*, S. a. 2.

(2) The case cited from the Year-Book of 41 E. 3. is a direct authority to this purpose. However, it may be doubted whether the doctrine continues to be law. At least it fails in principle, if it is founded on the notion that the presumption of the husband's being the father of every child the wife bears or conceives during the marriage cannot be repelled by evidence to the contrary. Such a position indeed is asserted more than once by lord Coke in the present work, and may be met with in other books. Post. 244. a. 373. a. Vin. Abr. *Bastard*, A. 2. & B. But it never was an universal rule, lord Coke and all the authorities agreeing, that if the husband is beyond sea during the whole time of the wife's going with child, the issue is a bastard. Nor is the position in any degree true at present; for ever since Pendrel's case in the 5 Geo. 2. it has been settled, that not only proof of being out of the kingdom, but also every other kind of evidence tending to prove the impossibility or even improbability of the husband's being the father, is admissible. 1 Blackst. Comment. 5th edit. 457. 2 Stra. 925. 3 P. Wms. 365. Bott's Poor Laws, 2d ed. 105. Our books do not state on what grounds Pendrel's case was determined. But very ancient authorities are not wanting to justify over-ruling the doctrine which prevailed in lord Coke's time. Bracton, taking notice of the presumption that marriage proves legitimacy, adds, *et semper stabitur huic præsumptioni, donec probetur contrarium, ut, ecce, maritus probatur non concubuisse aliquandiu cum uxore, infirmitate vel aliâ causâ impeditus, vel erat in eâ invalidudine ut generare non possit.* Bract. fo. 6. a. In another place the same author is still more explicit, for he states it to be a violent presumption against the child's legitimacy, if the husband is proved, *propter aliquam infirmitatem, vel frigiditatem, vel aliam impotentiam cocundi, permultum tempus non concubuisse cum uxore; or si probetur, quòd extra regnum vel provinciam per biennium et ultra longè extiterit, quòd vehementer præsumi possit, quòd ad uxorem accessum habere non potuit.* Bract. fo. 63. b. There are also other passages to a like effect both in Bracton and Fleta. Bract. fo. 70. b. 278. a. Flet. Lib. 1. c. 15. It is worthy remark too, that not only these limitations of the rule of *pater est quem nuptiæ demonstrant*, but even the words of them, are in a great degree borrowed from the text of Justinian. See Dig. lib. 1. tit. 6. l. 6. But this by no means ought to lessen their value with our common lawyers. On the contrary, it should be deemed an additional reason for referring to them; because the trial of general bastardy belongs to the ecclesiastical courts, and these, in this instance, as well as in others, are much swayed by the authority of the Roman law. See further on this subject Godolph. Repertor. Canon. 477. Bryd. Law of Bastard. 83. Voet ad Pandect. lib. 1. tit. 6. sect. 6. Ayl. Parerg. tit. *Bastardy*, and the same title in the Abridgements.

(1) In

[127. a.]

[Note 194.] (1) In very ancient times amercements were a considerable object in our law, as appears by the *Great Charter's* prohibiting their exorbitancy, and the writ of *moderata misericordia* for relieving against excessive amercements in courts not being of record. F. N. B. 75. a. But so far as regards amercements on judgments in civil suits in the king's courts of record, they have long been mere form. Yet in lord Coke's time it was error to omit the entry of them. 5 Co. 49. a. Now indeed, by the 16 & 17 Cha. 2. c. 8. such an error is amendable.

[Note 195.] (2) Since lord Coke's time, *premeditated* maiming, accompanied with *laying in wait*, has been made a *capital felony*. See 22 and 23 Cha. 2. c. 1. commonly styled the *Coventry act*.

[127. b.]

[Note 196.] (2) It has been well observed, that *defence*, as applied in our law pleadings, means, not a *justification*, which is the ordinary signification, but a *denial*. 3 Blackst. Comm. 8th ed. 296. Had this occurred to the author of the book on *real actions*, he would not have been at a loss for the reason of the *tenant's defending the demandant's right* in a writ of right. Booth on Real Actions 112.

[128. b.]

[Note 197.] (1) Whether the common law gives process of outlawry against crimes, being merely *constructive* breaches of the peace, was questioned in a late case before the king's bench on a *libel*. But the chief justice, in delivering the court's judgment, spoke at large, to prove, that such process lies against crimes *universally*. Mr. Wilke's case, 4 Burr. v. 4. page 2537. However, the reasoning, on which this opinion is grounded, stands opposed by a former judgment of the common pleas on a prior case relative to the same gentleman. 2 Wils. 151. But it was adopted by both houses of parliament, when, in his case, they resolved, that privilege of parliament doth not extend to *libels*. See Annual Reg. for 1764. The arguments for the contrary opinion are forcibly expressed in a protest by some of the lords, who were against making such a resolution. Journ. Dom. Proc. 29 Nov. 1763.

[Note 198.] (2) Ubi natus in partibus transmarinis *shall not be an alien*. See Hill. 13 E. 1. rot. 1. Hal. MSS.

[129. a.]

[Note 199.] (1) But now by the 12 & 13. W. 3. c. 2. naturalized persons are incapacitated from being of the privy council, members of either house of parliament, or enjoying any office or place of trust, civil or military, or from having any grant of lands or other hereditaments. The 1 G. 1. goes still further; for it enacts, that no bill of naturalization shall be received without a clause to this effect. 1 G. 1. st. 2. c. 4. s. 2. But when any foreigner, distinguished by eminence of rank or services, is naturalized, it is usual, first to pass an act for the repeal of these statutes in his favour, and then to pass an act of naturalization, without any exception.

[Note 200.] (2) This imports a special act of parliament to be necessary. But whatever the law might be in lord Coke's time, now, by several modern statutes, persons born beyond sea, if their fathers, or paternal grandfathers, were natural-born subjects, are likewise made so, though with an exclusion of some unfavoured persons. 7 Ann. c. 3. 4 G. 2. c. 21. 13 G. 3. c. 21. See ante fo. 8. a. note 1.

(1) Here,

[129. b.]

(1) Here, as also generally where lord Coke mentions *professed* [Note 201.] persons, he must, we conceive, be understood to write as of the law before the dissolution of monasteries, and the consequent establishment of the protestant faith. See *ante* 3. b. note 7.

(2) *Et nota it shall be tried by the record, if he be in amity or not, viz. a proclamation of war. But a proclamation prohibiting commerce, as anciently between the emperor and the queen, doth not disable a German in a personal action.* Trin. 41 Eliz. C. B. Hall. MSS. [Note 202.]

(3) But now, on declaring war, the king usually, in the proclamation [Note 203.] of war, qualifies it, by permitting the subjects of the enemy resident here to continue so long as they peaceably demean themselves; and, without doubt, such persons are to be deemed alien friends, in effect.

(4) *A female alien shall have dower.* Rot. Parl. 8 H. 5. n. 15. 9 H. 5. n. pro comitissâ Arundell. Hal. MSS.—See *ante* 31. b. note 9. [Note 204.]

[130. a.]

(1) A respectable writer, considering women as not requisite in a [Note 205.] camp, thinks, that here lord Coke mistakes *protections* for *essoins*. Barr. on Ant. Stat. Ir. ed. 154. But, as we apprehend, those who have been accustomed to a camp-life will bear testimony to the necessity of each of the three capacities mentioned by lord Coke.

[131. b.]

(2) Since lord Coke's time protections have fallen wholly into disuse; [Note 206.] lord Cutts, a famous officer in the reign of William the third being the last person indulged with one, of whom our Reports take notice. 3 Blackst. Comm. 8th ed. 289. & 3 Lev. 332. However, it is still usual in acts of parliament to guard against the use of protections, in suits to which persons acting under the authority of the legislature are parties.

[132. a.]

(1) See acc. 2 Co. 48. b. Blackst. Comm. 8th ed. v. 1. p. 132. v. 2. 121. But by lord Coke's observing here, that *natural* is added to [Note 207.] *oust all scruples*, it seems as if he did not conceive it to be absolutely necessary.

[133. a.]

(2) The whole record of Weyland's case is amongst the collection [Note 208.] of Parliamentary Records lately published; and by this it appears, that lord Coke is not very accurate in the *words* of his extract. 1 Parl. Rec. 66. Amongst other deviations from the record, one is, that he mentions *two or three like cases* to have been recited, whereas in the record the *only one* taken notice of is that of Matilda the wife of Robert Cisor, in the reign of Henry the third.

(3) But though it is not a civil death, yet for the time the effect is the [Note 209.] same to the wife; and therefore it is equally necessary, that she should have a right to sue alone. For the authorities on this subject, see 4 Vin. 152. 1 Com. Dig. 18.

[The question, in what cases a feme-covert may sue and be sued as a feme-sole, has of late been much considered. A classification of those cases may be useful.

1. Whatever

1. Whatever, in contemplation of law, amounts to a *civil death* of the husband, will, of course, devolve on the wife the rights and liabilities of a feme-sole. Thus, in *England*, abjuration of the realm and entering into religion formerly had, and perpetual banishment still has, this effect. In this country, a sentence of imprisonment for life would be attended with the same result.

2. Where the husband has been transported for a term of years, and has not returned, whether the term of his transportation has expired or not. *Sparrow, v. Carruthers*, cited 2 *Bla. Rep.* 1197, 1 *Term Rep.* 7, 1 *Bos. & Pull.* 359; *Carrol v. Blencow*, 4 *Esp.* 27.

3. Where the husband is an *alien*, and has left the country. *Walford v. Duchesse De Pienne*, 2 *Esp.* 554; *Franks v. Duchesse De Pienne*, 2 *Esp.* 587; *De Gaillon v. Victoire Harel L'Aigle*, 1 *Bos. & Pull.* 357, connected with the observation of *Heath, J.* in *Farrer v. Countess of Granard*, 1 *New Rep.* 80; *Burfield v. Duchesse De Pienne*, 2 *New Rep.* 380.

In Lord *Mansfield's* time it was held, that where a separation had taken place between the husband and wife, and a competent maintenance had been paid to her, she might be considered as a feme-sole. *Ringstead v. Lady Lanesborough*, lately reported in *Laws on Pleading in Assumpsit* 552; *Barwell v. Brooks*, reported also in the same book, *h.* 560; *Corbett v. Poelnitz*, 1 *Term Rep.* 5. It was soon afterwards held, that adultery of the wife, and separation, without a separate maintenance, would not subject her as a feme-sole. *Gilchrist v. Brown*, 4 *Term Rep.* 766. But where the case does not fall within one of the three classes above specified, it is now perfectly settled, that though there has been a separation, and a competent maintenance paid to the wife, though she has appeared as a feme-sole, and contracted as such, and though the husband resides in a foreign country, the wife cannot sue or be sued as a feme sole. *Marshall v. Rutton*, 8 *Term Rep.* 545; *Mac Namara & ux. v. Fisher*, 3 *Esp.* 18; *Marsh v. Hutchinson*, 2 *Bos. & Pull.* 226; *Farrer v. Countess Dowager of Granard*, 1 *New Rep.* 80; *Boggett v. Frier & al.* 11 *East.* 301.]

[Note 210] (4) *Vid. Mich.* 9 & 10 *E.* 1. *Rot.* 46. *A wife shall have a writ of deceit against her husband, who levies a fine in her name.*—*Vid. Rot. Parl.* 3 & 4 *E.* 4. n. 42. *Special act to enable the duchess of Exeter to act as a single woman during the life of her husband, who was attainted of treason.* *Hall MSS.*—See the act in *Ro. Parl.* v. 5. p. 548.

[133. b.]
[Note 211.] (1) We have searched in vain for the parliamentary roll of 8 Hen. 6. cited in the margin, as an authority for this position. It is neither amongst the printed Statutes at large, nor amongst the Rolls of Parliament lately published. Yet it is taken notice of as a statute in the Abridgement of Parliamentary Records. *Cott. Rec.* 589. In another of lord Coke's works, he cites it as of the 8 Hen. 6. See 2 *Inst.* 18. But we cannot find any such statute in print. It is not meant by this to doubt the existence of such a statute. We only apprize the reader of the inaccuracy in the reference to it. For the doctrine of marriages of the *royal family*, we refer the curious reader to the opinion of the judges in the reign of George the first, when they were consulted on the prerogative claimed by the king over his grand-children; and to the debates, whilst the act of the present reign for regulating the future marriages of the royal family was under the consideration of parliament. See *Fortesc. Rep.* 401. 12 *Geo.* 3. c. 11. *Ann. Reg.* for 1772, and the

the two Protests of the Dissentient lords in Journ. Dom. Proc. 3. March 1772.

[134. a.]

(1) Mr. Washington, one of the writers against the dispensing power in [Note 212.] the reign of James the second, insists, that in the Saxon times bishopricks were conferred in parliament; and that the king's investiture was subsequent to such election. For proof of this position, one of his chief authorities is the following passage in Ingulphus: *A multis annis ante retroactis nulla erat electio prelatorum mere libera et canonica; sed omnes dignitates, tam episcoporum quam abbatum, regis curia pro sua complacencia conferebat.* Ingulph. Hist. fol. 509. b. Observat. on Eccles. Juris. 24. Another instance relied on is the election of Wulstan bishop of Worcester, which Matthew Paris describes in the words following: *Ustanus, electo ad archiepiscopatum Eboracensem Aldredo, unanimi consensu, tam cleri quam totius plebis, rege insuper, ut quem vellent sibi, eligerent presulem et animarum pastorem, annuente, in episcopum ejusdem loci eligitur.* Matth. Par. Hist. 20.

(2) After some struggles, Henry gave up the point of investiture; [Note 213.] but, according to Mr. Washington, elections of bishops continued as before till king John's time; and he says there are precedents of many bishops elected in parliament in the reigns of Stephen and Henry the second. Observat. on Eccles. Jurisd. 33. and 2 Spelm. Concl. 42 & 119.

(3) 31 H. 8. c. 9. & 1 E. 6. c. 2. But the former statutes only [Note 214.] relates to the new bishopricks erected by Henry. See Rastall's 3d ed. of Stat.

(4) But notwithstanding the repeal of the 1 E. 6. the election of bishops is, as that statute emphatically expresses it, mere *shadow, colour, and pretence*; for by the 25 of Hen. 8. if they do not elect the person recommended by the king's *letter missive*, which accompanies his *congé d'élire*, they incur the penalties of a *præmunire*. See s. 7. There is no such statute now in force, in respect to deaneries, which we have observed in a former note; and yet the election to the *old* deaneries is in practice controled by the king's letter missive, as much as the election to bishopricks. See ante 96. a. note 3. It is probable, therefore, that the *letter missive* is of considerably greater antiquity as to both, than the statute of Henry the eighth. Ibid.

(5) This was once doubted; for the 1 Ma. st. 2. c. 20. which repealed the 1 Edw. 6. was, by an oversight, as it seems, wholly abrogated by the 1 Jam. 1. c. 25. instead of being abrogated merely so far as relates to the marriage of priests. At length, however, the judges held, that the 1 E. 6. c. 2. was virtually repealed by the 1 & 2 Ph. & M. c. 8. and 1 Eliz. c. 1. See Tracts by Antiq. Soc. v. 3. p. 416. 12 Co. 7. —It is observable, that lord Coke, in this his account of the patronage of bishopricks, omits distinguishing those of the *old* foundation from those of the *new*. But this is material, the latter being still *donative* by letters patent, according to the statute of 31 H. 8. which authorised their erection. See 31 H. 8. c. 9. in Rastall's edition of the statutes.—As to the *Irish* and *Welsh* bishopricks, about which lord Coke is silent, the former, by force of the Irish statute of 2 Eliz. c. 4. are made *donative* by the king's letters patent; but what the latter are, we cannot at present inform the reader, Mr. Browne Willis's *Survey of the Cathedrals*, which

is the only book we are possessed of on the subject, not stating how the Welsh bishops are created.

[134. b.]

[Note 217.] (1) Acc. ante 70. b. & 97. a.—We have already taken notice, that, according to lord Hale, the title, by which bishops sit in parliament, is, not having *baronial* possessions, but *usage* and *custom*; and that his notion had been ably controverted by bishop Warburton. Ante 70. b. n. 2. However, on further investigating the subject, we incline to concur with lord Hale. But then it is with some little addition. In the Anglo-Saxon times the bishops certainly were admitted to sit in parliament; and as this was prior to their holding their estates by a baronial tenure, it could not then be on account of their baronies; nor will it be easy to suggest any other probable reason for their presence during that period, than an usage founded on the propriety of having the heads of the church to guard it from injury, and to assist the other members of the legislature in their deliberations on religion and other ecclesiastical concerns. At the Conquest, as all agree, the possessions of the bishops were converted into baronies; and for a long time after they were summoned to parliament as barons by tenure. But it is no less certain, that, for many centuries past, they have been called to sit, without any regard to their temporal possessions or the tenure by which they are holden; which is more especially true in the instance of the new sees erected by Henry the eighth, the bishops of these never having had any estates by baronial tenure, and consequently having no claim to be called to parliament, otherwise than as prelates of the church, and by reason of the usage, which had so long before prevailed in respect to their order. If all this be so, then, though the bishops once sat in parliament for their baronies, yet lord Coke's position, which imports that they still sit by the same title, is not strictly accurate; but we should rather adopt lord Hale's idea of their sitting by usage as more applicable to the present circumstances. Perhaps, indeed, lord Coke only meant to refer to the more ancient reason of their being summoned to parliament, and thence to infer, that in presumption of law they are still deemed to be called on the same account; in which case there is little more than a difference of words between him and lord Hale. As to bishop Warburton's hypothesis on this subject, we still think that he shews great ability; but at the same time we cannot help owning, that he appears to us to have too much indulged in speculation, more adverting to what struck him as the most rational and proper grounds of admitting the bishops into the house of lords, than to the fact of the real title. He represents the bishops to sit as *barons by tenure*, so far as regards the *judicial* capacity of the lords, and as *prelates of the church*, so far as the lords act in a *legislative* character. But the fact on which he builds the first part of his distinction fails him; because, for the reasons already stated, the bishops no longer have baronies by tenure, nor have had any for several centuries past. Besides, independently of this, the whole of the speculation seems to us unfounded in any sufficient authority, and consequently the mere offspring of modern refinement; our simple and unlettered ancestors, when they laid the foundation of the English parliament, not being likely to have acted under the influence of a policy so deep, as the nice distinction thus attributed to them necessarily supposes. At present we have only to add further on this curious and difficult subject, that, as we have touched it so slightly, our observations should be understood as intended to convey only a general idea. Should the reader have occasion to penetrate more deeply into the subject, he must consult the several pieces published in 1679, on the controverted

verted question, whether the bishops can vote in the preliminary steps of a bill of attainder; particularly the tracts by bishop Stillingfleet and Mr. Hunt for the right, and those by lord Hollis against it. See 1 Burn. Hist. fol. ed. 460. 2 Stillingfleet's Eccles. Cas. 228. Hunt's Argument for the Right of the Bishops in Capital Cases, 128. Hollis's Remains, 122.—See further Seld. tit. Hon. ed. 1678. p. 697. Staundf. Pl. C. 153.

[135. a.]

(1) Writ of summons in a common recovery was made returnable in a month from the day of Easter, which happened to be *Sunday*; and the tenant in tail, who was vouchee, died the same day. The judgment was reversed; because it could not be given till the day after the vouchee's death, and then it came too late. *Swan and Broome*, 4th part Burr. v. 3. p. 1596. But though *Sunday* is not *dies juridicus* for giving judgment or awarding judicial process, yet it is for some other purposes, as for exhibiting an information on the 5 & 6 E. 6. against ingrossing. W. Jo. 156. [Note 218.]

(2) In consequence of the abbreviation of Michaelmas term, by the 24 Geo. 2. c. 48. these two days do not now fall within it. [Note 219.]

[135. b.]

(1) Acc. Fitzh. N. B. 27 H. At common law, infants could neither sue nor defend, except by *guardian*; by whom was meant, not the guardian of the infant's person and estate, but either one admitted by the court for the particular suit on the infant's personal appearance, or appointed for suits in general by the king's letters patent, F. N. B. 27 H. & L. Sty. 369. Bro. Gardein, pl. 11. & 17. But this rule was found inconvenient, it sometimes happening that an infant was secreted by those having the legal custody of him, and so prevented from applying to have a guardian *ad litem* appointed. Hence was seen the necessity of permitting any person to litigate for the infant's benefit, who should be disposed to risque the expence. On this principle the statute of Westminster the first enables any one to sue as *prochein amy* for an infant in an assise, where the infant himself is essoigned by his guardian, or otherwise disturbed from suing the assise. 3 E. 1. c. 49. 2 Inst. 261. The statute of Westminster the second extended this provision, by permitting the *prochein amy* to sue in *all* actions; and though in this statute, as well as in the former, eloinment of the infant was mentioned, yet by construction it is not deemed necessary, but the *prochein amy* may sue, whether that circumstance occurs or not, it being considered merely as an instance of the necessity of the case, and as such only taken notice of by those who framed the statute. 13 E. 1. c. 15. 2 Inst. 390. But notwithstanding these statutes, as there is not any thing in them which prohibits the suing by guardian, we presume that it remains as lawful as it was before. It is, therefore, probable, that Fitzherbert and lord Coke, when they tell us that an infant *shall* sue by *prochein amy*, did not mean to exclude the election of suing either in that way or by guardian. That Fitzherbert did not mean this appears from his afterwards mentioning, without disapprobation, a case of debt, in which suing by guardian was allowed. Coke too, in his report of Rawlyns's case, says, that, on search, many precedents of infants suing by guardian were found; nor in that case was any objection grounded on its being a suit by guardian. 4 Co. 53. b. But whether we construe the meaning of these two judges rightly or not, a case occurred in which the point is said to have been so adjudged. *Young v. Young*, W. Jo. 177. However, the reader should at the same time be apprized, that, according to another report of the same case, the court delivered no opinion on the

the point, whether an infant may sue by guardian. Cro. Cha. 86. See further on this subject Palm. 295. & Vin. Abr. *Guardian and Ward*, N. 7.—What we have hitherto advanced as to suing by *prochein amy* applies to the courts of common law only. As to our courts of equity, the usual practice in them is, to sue for infants by *prochein amy*, and to defend by guardian. But it is said, that they may sue in either way. Pract. Reg. in Chanc. 296.

[139. a.]

[Note 221.] (1) But lord Dyer held the nonsuit not peremptory, if another *quare imphedit* was brought within the six months. Dall. 81, 82. Perhaps, however, he only meant to assert this in the case of a nonsuit *before* appearance. As to lord Coke's doctrine, other authorities for it may be added to those he cites. See 1 Brownl. 161. 2 Salk. 559.

[139. b.]

[Note 222.] (1) But Brooke says that the *award* to account is a *judgment*, and therefore that a man cannot be nonsuited after such award. Bro. Abr. *Nonsuit*, pl. 17. 21 E. 3. 7. Rolle to the same purpose cites 3 H. 4. 7. 21 E. 3. 7. 21 H. 6. 26. 1 H. 7. 1. b. See 2 Ro. Abr. 131. However, he adds that the 27 E. 3. 87. and Co. Litt. are *contra*. Lord Coke's opinion is particularly warranted by Metcalfe's case in the Eleventh Report, which, as he here explains, proceeded on the distinction between an *interlocutory* and a *final* judgment.

[It has been held that, after a *plea of tender*, the plaintiff cannot be nonsuited. 2 H. Bla. 377. *Harding v. Spicer*, 1 Camb. 327. But there may be a nonsuit after payment of money into court. *Elliot v. Callow*, 2 Salk. 597. *Burstable v. Horner*, 7 Term Rep. 372. *Jennings v. Tucker*, 1 H. Bla. 90. *Gutteridge v. Smith*, 2 H. Bla. 374. *Hitchcock v. Tyson*, 2 Esp. 481, in notes. *Smith v. Whale*, 2 Esp. 607. And see the reporter's note in 1 Campb. 327.]

[140. a.]

[Note 223.] (3) The case cited by lord Coke from the Book of Assises consists of various articles enquired of by a jury in the court of king's bench; and the seventeenth of these relates to those *who receive persons under their patronage, taking from them certain yearly fees, by gift, rent, or in the name of chevage, to maintain them in wrong or right*. Lambard, in treating of unlawful assemblies, describes the offence of chevage from the Book of Assises, and takes notice of it as still inquirable. Lamb. Eirenarch. ed. 1602. p. 163.

[Note 224.] (4) This was the common etymology when lord Coke wrote; and it was countenanced by Mr. Lambard in the explication of words prefixed to his Anglo-Saxon laws. Lamb. de Prisc. Anglor. Leg. voc. Terra ex Scripto. But the latter afterwards inclined to a more probable derivation, conjecturing that *gavel* signified *rent*, and so *gavelkind* imported land of such a *kind* as to yield *rent*. Lamb. Perambulat. of Kent, ed. 1596. p. 529. Mr. Somner pursues the same idea, and expatiates to support it. Somn. Gavelk. 1st ed. 3. It is rather surprising that lord Coke did not hit upon a like derivation, as elsewhere he describes *gavel* or *gabel* to signify *rent*. Post. 142. a.—See further to this point Robins. on Gavelk. 1.

[140. b.]

[Note 225.] (1) This extension of the custom of *gavelkind* to *collaterals* prevails universally in Kent. See Robins. on Gavelk. 92.

[Note 226.] (2) There are six other statutes for disgavelling particular lands in Kent besides the 31 H. 8. though that is the only statute in print. They are

are mentioned in Mr. Robinson's book on Gavelkind, and the learned writer is very full in his explanation as well of them as of the 31 H. 8. especially observing that they are construed to alter only the partible quality of the customary descent to males, which agrees with lord Coke's manner of mentioning the 31 H. 8. See Robins. on Gavelk. p. 75.

(3) The reader will find the chief instances of special kinds of Bo- [Note 227.] rough-English brought together in Mr. Robinson's book on Gavelkind. See Append. p. 6.

[141. a.]

(5) Acc. 4 Inst. 358. So much of the Irish statutes of 40 E. 3. as re- [Note 228.] lates to abolishing the Brehon law, is in Dav. on Ireland, fol. ed. 28. The other heads of these statutes are also given in the same book, p. 44. What were the most exceptionable parts of the Brehon law or Irish customs are explained *ibid.* 36. in Spens. Irel. 1st ed. 4. and Ware's Antiq. of Ireland, Harris's ed. 69.

[141. b.]

(1) Some think that the laws of England were introduced into Ireland [Note 229.] before this charter of John by his father Henry the second. This opinion is strongly enforced by the testimony of an historian of the reign of Henry the third; for Matth. Paris, writes that *rex Henricus, antequam ex Hiberniâ rediret, apud Lismore concilium congregavit, ubi leges Angliæ sunt ab omnibus gratanter receptæ, et, juratorid cautione præstitâ, confirmatæ.* Molyn. Case of Irel. Lond. ed. of 20. p. 24. and Matth. Par. ad. ann. 1172. vit. H. 2. *ibid.* cit. The other authorities to establish the same fact are well collected by Mr. Harris, in his edition of Ware's Antiquities of Ireland. See p. 78. See further, 1 Lel. Hist. Irel. 76. & Vaugh. 293.

(2) From citing this passage of the year-book of Richard the Third, [Note 229^a.] according to which English statutes do not bind Ireland, and from this manner of mentioning the same passage in his 12th report, one might infer, that lord Coke was of that opinion. 12 Co. 111, 12. But in Calvin's case, referring to the same year-book, he explains it to mean, where Ireland is not *specialy named*; and so he states the rule to be in the 4th Institute. 7 Co. Calvin's case, 22 b. 4 Inst. 350, 351. Here also he cites the year-book of 1 Hen. 7. which controls the year-book of R. 3. Lord Coke's explanation in Calvin's case evinces his sentiments more strongly; because Ireland, if considered as quite distinct in government from England, would have been a more apt instance to support his doctrine in favour of the post-nati of Scotland. We do not, however, mean by this to offer any opinion on the controversy about the political connexion between England and Ireland. It is a subject of too much importance and delicacy, as well as of too much extent, to be discoursed of in a note. See 6 Geo. 1. c. 5. 22 G. 3. c. 53. and 23 G. 3. c. 28. The first of these statutes asserts the legislative power of Great Britain over Ireland, and also the appellat jurisdiction. By the two latter both are annihilated.

(4) The statute for taking away military tenures leaves the tenure [Note 230.] by villenage as it was before; one of the provisoes declaring, that the act shall not be construed to *alter or change any tenure by copy of court-roll, or any services incident thereunto.* 12 Cha. 2. chap. 24. s. 7.

[142. a.]

(2) But though in old deeds *gavelet* may often signify *rent*, and this [Note 231.] use of the word may best agree with its origin, yet it is not the only legal

legal signification. On the contrary, the word is now most usually applied to a remedy or process, peculiar in denomination to Kent and London, by which the lord of the fee, when his tenant is in arrear for rent or service, may force him to pay the arrears and damages, by seizing the land and holding it till payment. In Kent this remedy is founded on immemorial usage, Mr. Robinson learnedly deducing it as well from the general law of fiefs as from the practice of our Anglo-Saxon ancestors; and the passages cited by another eminent writer, intreating of forfeiture by *cesser*, tending to the same point. Robins. on Gavelk. 243. Wright's Ten. 197. The *gavelet*, thus prevailing by the custom of Kent, may be used whether there is a sufficient distress on the land or not, but is restricted to gavelkind tenure. Robins. on Gavelk. 243. To London a writ of the same denomination was given for rent-service generally by the 10 of Edward the second, which is therefore called the statute of *gavelet*. But by the words of the statute this latter *gavelet* only lies where the lord cannot obtain payment by distress. From this account of the *gavelet* in Kent and London it appears, that sir Henry Spelman was well justified, when, after giving the etymon of *gavelet*, and describing it sometimes to signify the tenure of *gavelkind*, he adds, *gaveletum juris etiam processus est huic dicitur tenuræ, casu quo tenens redditus & servitia ultra modum subducit; quod et Londoniensibus ceditur statuto an. 10 Edwardi 2. de gaveleto*. Spelm. Gloss. voc. *Gaveletum*. We take notice of this passage from Spelman, because the learned and ingenious observer on our ancient statutes seems to have misunderstood the *gavelet* thus described; for though the word originally imported *rent*, yet our explanation shews that it also means a *process for the recovery of rent*, technically called *gavelet*, both in Kent and London. See Barr. on Ant. Stat. 2d ed. 149.—Besides the two remedies thus called *gavelet*, there is another very similar one for rent-service in all parts of the kingdom; and this is the writ of *cessavit*, which is regulated by, if it did not wholly originate from, the statutes of Gloucester and Westminster the second. 6 E. 1. c. 4. 13 E. 1. st. 1. c. 21. 41. But lord Coke, in his comment on the statute of Gloucester, mentions his having read the record of the proceedings on a *cessavit* in the reign of king John. 2 Inst. 295. Yet this seems strange, because, in the reign of this prince, the lord of the fee had a much more easy way of recovering his tenant's land for default of service, than by a *cessavit* in the court of the king; namely, a distress of the land by a process of seizure in his own court. The latter mode continued till the 52 of Hen. 3. took it away, by prohibiting distress of the freehold, except by the king's writ, and so leaving the tenant's chattels as the only subject for the lord's distress. It was this alteration of the old law, which, as we apprehend, gave occasion to introducing the *cessavit* by the statutes of Gloucester and Westminster; nor at the utmost can we account for an earlier use of the *cessavit* than the 52 of Hen. 3. Perhaps, therefore, lord Coke's case of king John was nothing more than a process of *cesser* in the lord's court, and he might only call it a *cessavit*, by reason of the resemblance between the proceedings on the writ of *cessavit* in the king's court and those on the process of *cessavit* in the court of the lord.—These remedies of *gavelet* and *cessavit* are now fallen wholly into disuse, Mr. Lambard not remembering an instance of resorting to the customary *gavelet* of Kent in his time, and the cases in our books on both the *gavelets* and the *cessavit* being all of ancient date; from which it may be presumed, that distress of the tenant's goods is now usually a very sufficient, or at least a preferable remedy. Lamb. Perambulat. ed. 1596. p. 554. Nor, whilst the others continued in use, were they applic-
able,

cable, except when the tenure was in fee. Booth on Real Act. 133. But, in imitation of them, it hath long been the practice to reserve a power of re-entry for non-payment of rent on granting leases for lives or years; and the legislature have also interposed against lessees, as well to obviate the difficulty from the niceties of an entry for forfeiture at common law, by enabling landlords to recover possession by ejectment in a special manner, as to qualify and prevent an abuse of the tenant's remedy of injunction in equity. 4 Geo. 2. c. 28. Further, on a like principle of convenience, a summary jurisdiction is given to justices of the peace, enabling them to restore the possession to the landlord, where the tenant deserts the premises in lease, without leaving a sufficient distress. 11 G. 2. c. 19. See further as to the *cessavit*, and other remedies for subtraction of services, 3 Blackst. Comm. 8th ed. 230.

[143. a.]

(1) In a preceding note lord Coke asserts, that reservation is *always* [Note 232.] of a thing newly created out of the land demised. Ant. 47. a. But here is more qualified in expression, and allows the word to be *sometimes* used to *except* part of the thing granted. However, the former is the more technical use of the word, *exception* being a more proper term than *reservation* for the latter purpose. The learning on this subject will be found under the title *Reservation* in Viner's Abridgement.

[143. b.]

(3) The *indenting*, or cutting *in modum dentium*, which is usually at [Note 233.] the top, ever supposes two parts, being made in order that the parts, when joined, may be authenticated by the sameness of the cutting. See as to the use and origin of indenting charters in England, Mad. Formul. Anglican. p. 28, 29. of the dissertation prefixed.

(4) Mr. Madox objects to lord Coke's treating the *chirographum* as [Note 234.] altogether the same thing with the *indenture*; because anciently many *chirographa* were not *indented*, but cut in the rectilinear form. Mad. Formul. Anglic. Dissert. p. 29. In fact, the name of *chirograph* properly belonged to those deeds, which were at first of two parts, written on the same paper or parchment, with the word *chirographum*, in capital letters, between the two parts, and were afterwards divided, by a cut through the middle of those letters; and thus, whether the cutting was *indented* or in a straight line, such deeds were equally *chirographa*. Ibid. 28, 29. Cangii. Gloss. voce *chirographa*. Spelm. Gloss. voce *indentura*. Mabill. de Re Diplom. lib. 1. c. 2. Some, indeed, apply this explanation to the *syngrapha*, and only describe the *chirographa* as deeds of one part, and so called from being written with the party's own hand. Lyndw. tit. de offic. Archidiacon. c. 1. in not. But the same persons allow, that *sometimes syngrapha* and *chirographa* are used promiscuously; and in the opinion of others they are more commonly so applied. Ibid. & Mad. ubi supra. Both the *chirograph* and the *indenture*, then, usually importing to be a deed of two parts, they are so far the same; and we do not apprehend that lord Coke meant to carry the resemblance further. Consequently, he is not affected by Mr. Madox's observation, which seems to suppose, though too hastily, that lord Coke had considered the *chirograph* and the *indenture* as wholly the same.

(5) The true meaning of *fee-farm* is a perpetual farm or rent; the name being founded on the *perpetuity* of the rent or service, not on the *quantum*. See Mad. Firm. Burg. 3. Here, indeed, lord Coke seems to intimate the contrary, by confining the denomination of *fee-farm* to rents at least equal to the fourth part of the value of the land; and the word

is explained in a like manner by sir Henry Spelman and the author of the book of *Old Tenures*, with this difference only, that the latter restricts the value to a *third*. See Spelm. Gloss. voce *feodi-firma*, and Old Ten. tit. *fee-firme*. But it would be wrong to understand any of these writers as intending *absolutely* and *universally* to exclude all rents of *less* value; for the word *fee-farm* most certainly imports every rent or service, whatever the *quantum* may be, which is reserved on a grant in fee; and so lord Coke himself agrees in another work, citing Britton and other books for authorities. 2 Inst. 44. Britt. 164. b. The sometimes confining the term of *fee-farm* to rents of a certain value probably arose, partly from the statute of Gloucester, which gives the *cessavit* only where the rent amounts to one-fourth of the value of the land, and partly from its being most usual on grants in *fee-farm* not to reserve less than a third or fourth of such value. See 6 E. 1. c. 4. F. N. B. 210. C. Ant. 142. a. note 2.—After the statute of *quia emptores* granting in *fee-farm*, except by the king, became impracticable; because the grantor parting with the fee is by operation of that statute without any reversion, and without a reversion there cannot be a rent-service, as Littleton himself writes in section 216. Yet I have seen a modern grant in fee of a large estate in Ireland, reserving a perpetual rent of great value. But such rent, considered as a *fee-farm* rent, I thought clearly void. However, as in the case I allude to, the conveyance contained a power for the grantor and his heirs and assigns to distrain for the rent when in arrear, and also a power to enter and receive the profits till all arrears should be paid, the rent might be good as a rent-charge: and so on being consulted I held it to be.—Since writing the preceding part of this note, a most valuable collection of new reports has been published; and in one of the cases the learned reporter has given a note relative to *fee-farm* rents, which well deserves attention. See the case of *Bradbury v. Wright*, in Mr. Douglas's Rep. of Ca. in B. R. 602. However, I so far differ from the last-mentioned note, as to continue of opinion, that the term of *fee-farm* is not properly applicable to any rents, except *rents service*.

[144. b.]

[Note 236.] (1) Formerly it was doubted, whether an annuity was assignable, though *assigns* were mentioned in the grant; the argument being, that it was a mere personal contract, and therefore a *chose in action*. See the cases in 2 Vin. Abr. 515. and 3 Vin. Abr. 151. But in a case in C. B. 3 Cha. 1. this objection, which in strictness of law carried force with it, was over-ruled. *Gerard v. Boden*, Hetl. 80. It seems too, that naming *assigns* is not essential to the making an annuity assignable, the principle of the objection to its being so being the same, whether *assigns* are mentioned or omitted. However, Perkins, in the special case of an annuity *pro consilio impendendo*, requires naming of *assigns*. Perk. s. 101. Even then, too, he questions the annuity being assignable. But this was settled in *Maund's case*, 7 Co. 28. b. one point resolved being, that express words would make such an annuity assignable.

[Note 237.] (2) The reason is, because our law presumes that it is not intended to include the heir in the obligation, where he is not named; and consequently, in the case supposed by lord Coke, it is too late to elect to make the rent-charge an annuity after the death of the grantor. See post. 383. b. 384. b. 386. a. 10 Co. 128. a. Vin. Abr. *Annuity*, B. But this reasoning fails in application, if the grantor of the annuity is a body politic, and as such hath perpetual continuance. Therefore, an annuity granted by the king will bind his heirs and successors, though not named, his political

litical capacity never dying, but having continuance in his successor; and so it was adjudged the 15th of Elizabeth, in sir Thomas Wroth's case. Plowd. 455.

[145. a.]

(3) But if the grant be to hold one acre for life, and the other in fee, [Note 238.] and donee makes feoffment of *one* acre only, it is an election to have the fee of that; and this being lawful, nothing is forfeited. Perk. s. 78. Plowd. 6. b.

[145. b.]

(1) This is explained to be intended only in respect to the county [Note 239.] court; for, in the king's bench, the bailiff is not liable to a fine; and therefore it has been held, that there one may make conusance and claim property by a bailiff. Adj. in Hamstead v. Oldham. 1 Lev. 90. and 2 Keb. 441.

(2) But, in favour of liberty, the law permits two to join in suing the [Note 240.] writ *de homine replegiando*. F. N. B. 66. F.

[146. b.]

(1) At first this may seem contradicted by the statute of 32 H. 8. c. [Note 241.] 37. according to the recital of which the executors of tenant for life of a rent-charge had no remedy at common law for arrears due to their testator. But lord Coke in another place observes, that the preamble of 32 H. 8. should be understood to apply, not to tenant for his life only, but to tenant *pur autre vie*, so long as *cestui que vie* lives. Post. 162. a.

[147. a.]

(4) How the remedy by assise is affected, where the rent issues out [Note 242.] of the land in several counties, is explained by lord Coke, post. fol. 153. b. 154. a.

(5) See post. 148. a. and 349. a. where the same doctrine is express- [Note 243.] ed; but it is added, that the grantee shall have a writ of annuity.

[148. a.]

(1) Acc. Dy. 253. a. for there is a case, in which it was held, that a [Note 244.] rent-charge should go to the heir, though heirs were not mentioned, except in the clause of distress.

(5) But Hobart, who, *arguendo*, puts the like case, observes, that the [Note 245.] tenant is not compellable to attorn. Hob. 25.

(4) This seems a mistake; at least I cannot find any passage of the [Note 246.] kind in Littleton. In one copy which I have of the Coke upon Littleton, the whole of this passage is struck through with a pen; and in another it is scored under as doubtful.

[148. b.]

(1) This position is denied by lord Hale and the court of king's bench, [Note 247.] in the case of Hodgkins v. Robson and Thornborow, Mich. 27 Cha. 2. See the report of that case in 1 Vent. 277. 2 Lev. 143. and Pollexf. 141.

(2) Acc. in Ascough's case, 9 Co. 135. b. and there the reason is ex- [Note 248.] pressed, namely, that one coparcener shall not be prejudiced by the tortious act of the other. See also acc. post. 188. a.

(4) So also by the tortious act of the lessee a condition may be appor- [Note 249.] tioned; though in general it is not divisible by act of the parties. Post. 275. a. & 4 Co. 120. a. 8 Co. 79. b.

[Note 250.] (5) What services shall be extinguished by the lord's purchase of part of the land, and what shall be apportioned or remain, is explained much at large in Talbot's case, 8 Co. 105. and in Bruerton's case, 6 Co. 1.

[149. a.]

[Note 251.] (3) A learned observer on the Coke upon Littleton, whose MSS. notes I have, objects to it as against reason, that the lord should lose his service from the third jointenant. However, the Year-Book of E. 4. cited by lord Coke, is an authority for the position; and further it should be considered, that the case supposed is of an *entire* rent, that is, of one incapable of division.

[150. b.]

[Note 252.] (3) This only shews, that the tenant cannot be made liable to two several distresses by *act of his lord*. But on *act of law*, it is otherwise, of which lord Coke gives an instance, post. 164. b.

[Note 253.] (4) This passage, being shortly expressed, may to some be obscure. The case intended is that of lord mesne and tenant, where the rent from the tenant to the mesne is greater than the latter pays to the lord, and the lord purchases of the tenant; the consequence of which is, that the mesne becomes entitled to the surplusage rent from the lord, namely, to so much as the rent from the tenant to the mesne exceeds the rent to the lord from the mesne. See W. Jo. 234. and post. Sect. 234. and fol. 154. b. and 309. b.

[151. a.]

[Note 254.] (3) So if land, to which common is appendant or appurtenant, be recovered in assise of novel disseisin, it is a tacit recovery of the common also. Post. 154. b. It is the same on recovery of a manor, to which a villein is regardant. Post. 306. b. So remitter to the principal is remitter to the accessory. Post. 349. b. All this is agreeable to the rule, that *accessorium sequitur suum principale*, which is cited in the next folio. See 152. a. and the case of trees in 11 Co. 49. b.

[Note 255.] (4) Of recovery *without title*, where used to mean a *common* recovery, see ant. 104. a. Of recovery *without title*, as distinguished from a *common* recovery, read post. 362. a.

[151. b.]

[Note 256.] (2) This distinction of incidents is made before fol. 93. a. For examples of incidents inseparable, see infra, and also ant. 99. a. b. 113. b. 150. b. 151. a. Bro. Nouv. Cas. pl. 7.

[Note 257.] (5) Lord Coke only means, that a reversion cannot be without fealty, and its inseparable concomitant, the remedy of distress. In respect to present profit, a reversion may be dry and fruitless during the particular estates, and until it comes into possession. To a reversion of this latter kind lord Coke himself gives the description of dry and fruitless, ant. 111. b. Hence it appears, that the word *seck* is used by our lawyers in two senses. According to one it signifies *want of remedy by distress*, as Littleton expounds the word in Section 218. In another, it imports *want of present fruit and profit*, as in the case of the reversion without rent or other service except fealty.

[152. a.]

[Note 258.] (6) This reason is unexceptionable in respect to services, which in their nature are inseparable from the reversion, such as fealty. But it

it fails in respect to the rent, which lord Coke has before represented to be a separable incident, ant. 151. b. The true construction of the grant supposed seems to be, that it is sufficient to pass the rent as a rent seck, but that for the other services it is void. It should be recollected too, that this construction is conformable to one by lord Coke on a similar case, which he states and explains in fol. 150. b. See the top of the page there.

[152. b.]

(1) In the preceding case lord Coke states the doctrine upon it as a [Note 259.] mere *dictum*; and by his marginal reference to the chapter of Confirmation, he apparently reserves his own opinion for a future occasion. Afterwards, when he resumes the subject, he holds, that, on account of *want of privity* between the lord paramount and the tenant paravail, *confirmation* from the former to the latter cannot abridge the services due to the mesne, and so alter the tenure between the mesne and the tenant paravail. Post. 305. b.

(2) Lord Coke, in a subsequent part of his Commentary, gives a different [Note 260.] decision of this case; for there he holds that the lord cannot extinguish the mesnality by *confirmation* to the tenant paravail, there being *no privity* between them. Post. 305. b. But this is not any contradiction of himself; because here he is apparently giving the *dictum* of others.

(3) It deserves consideration, whether the *release* of lord paramount [Note 261.] is not as insufficient to pass the seignory to the tenant paravail, as a *confirmation*, both being conveyances in which *privity* is required. See post. Sect. 461.

(4) The reason of this is elsewhere explained to be, that the seignory [Note 262.] being extinct for the fee-simple, it cannot remain for the particular estate either for life or in tail. See post. 312. b. Quick's case, 9 Co. 129. b. a case in Gouldsb. 149. and Bingham's case 2 Co. 92.

(6) It sounds harshly, to prefer a mischief to an inconvenience, the [Note 263.] greater evil to the lesser. But the true construction of the rule obviates this objection; for it certainly means, as lord Coke's addition explains, that the law prefers a *private* mischief to a *public* inconvenience.

(7) The same maxim is cited post. 319. a. In Wingate's Maxims [Note 264.] 327. there is a great variety of cases for illustration of the rule.

[153. a.]

(1) If the rent may be distrained for, can it be properly called seck? [Note 265.] Littleton, in Sect. 218. describes a rent to be seck, because distress is not incident to it. But if lord Coke is right here, a rent may be seck, and yet be distrained for. According to the resolution of the king's bench in W. Jo. 234. the rent, in a case such as is supposed by Littleton, is *quasi* a rent-service distrainable of common right. In other words, the distress is given, or rather saved, by the law, to prevent the mesne from being prejudiced by acts between lord and tenant, to which the mesne is no party. This brings the case to a resemblance of a rent reserved for equality on a partition between coparceners; which by the implication of law is a rent-charge without aid of any clause of distress, and therefore called by Littleton a rent-charge distrainable of common right. See post. Sect. 253.

(4) Acc.

[Note 266.] (4) Acc. Bro. Abr. *Executions* 143. Yet it has been said, that the reversion itself is not extendable. Bro. Nouv. Cas. pl. 227. See as to this 1 Ro. Abr. 888. pl. 6. and 7. Mod. 40. and Carth. 126.

[153. b.]

[Note 267.] (2) Acc. as to condition of re-entry, post. 301. a. acc. whether the condition be for re-entry or a sum *nomine pena*, 7 Co. 28. b. Hob. 82. 207. But the case of Thyn v. Cholmley, Mo. 347. is *contra* as to a sum *nomine pena*.

[Note 268.] (7) For other descriptions of disseisin besides those given or referred to by lord Coke, see post. 377. a. 6 Co. 58. The ancient authors cited by lord Coke, particularly Bracton and Fleta, are very full in explaining the various modes of disseisin. The additional marginal references to 4 Leon. and Cro. Cha. are to cases about disseisin by *election*, as to which see post. 306. b. and 323. a. See also the case of Taylor on demise of Atkyns v. Horde, 1 Burr. 60. In this last case it was attempted to support a common recovery by supposing the tenant to the praecipe to have gained a freehold by disseisin. The nature of a disseisin was therefore elaborately investigated by the counsel. Lord Mansfield, also, who had been recently made chief justice of the king's bench, and delivered the courts opinion in a very distinguished argument, expatiated on the same subject, in order to repel the arguments for a freehold by disseisin in the case before the court, by shewing, that the doctrine in our books about disseisins chiefly applies to disseisin by a person electing, and for the sake of certain remedies to suppose himself disseised. There will probably be occasion to refer to some points of the learning displayed in the course of this famous case in a subsequent part of the present work; especially where Littleton writes concerning disseisins by *election*. See post. Sect. 588.

[154. a.]

[Note 269.] (2) Fitzherbert in the place cited in the margin is a direct authority for this. But according to Finch, more than two counties cannot join. Finc. Descript. del. Com. L. 59. a. See further on trial by two or more counties, 21 Vin. Abr. 103.

[Note 270.] (7) So where lands and *tenements* are devisable by custom of a borough, both rent-charge and rent-service are within the custom. Post. Sect. 585. But sometimes the word *tenement* is used in a more limited sense, and to exclude rents and other incorporeal hereditaments, as by Littleton in writing of descents to toll entries. See post. Sect. 385.

[Note 271.] (11) This is an additional reason against a writ of *redisseisin*; because that writ requires that the coroners be taken to see it executed, and they are not officers of the court of ancient demesne. The same reason applies more strongly in respect of the sheriff; for the writ is directable to him, and he is judge as well as officer in it. See Kitch. 96. a. & Fulwood's case, 4 Co. 65. a. See also Dalt. Sher. 33. b. where the sheriff's duty in executing the writ of *disseisin* is explained.

[154. b.]

[Note 272.] (1) So if a feme commits a *redeisseisin*, and *afterwards* is married, the writ lies against both; because in that case the husband is named, not as the actor, but only in conformity to the law, which will not suffer the wife to be sued alone, and to satisfy the damages. Hob. 96.

[Note 273.] (4) The reason is, because the alteration is made by the act of others, namely, of the lord paramount and tenant paravail. Acc. 4 Co.

9. a. and b. in *Bevill's case*. See ant. Sect. 232. post. 309. b. ant. 152. b.

[155. a.]

(3) In a *Coke upon Littleton* in my possession there is the following [Note 274.] marginal note on the necessity of having 12 jurors.—“In the manor of *Penryn Farrein* in Cornwall, there was a custome to try an issue with six jurors; and this custome was adjudged no good custome, as *Rolle* chief justice affirmed in *Mich. terme 1652*.” The printed books also furnish two cases against such a custom; in the first of which cases *Rolle* appears to have argued for it, and to have noticed that there was a multitude of records in twenty several courts in Cornwall proving its prevalency. See *Freydmock v. Perryman*, Cro. Cha. 259. 1 Ro. Abr. 564. and *Aike et Aimon v. Hunkin*, 1 Sid. 235. However, in some special cases the jury may be less than twelve; and in some must or may be more.—1. They may be less. Thus it may be in Wales under the provision of the statute of 34 & 35 H. 8. concerning Wales, which allows of six. See 34 & 35 H. 8. c. 26. s. 74. Cro. Cha. 259. 1 Sid. 253. and 3 G. 2. c. 25. s. 9. So also it is in some special cases in England, as 6 or 8 in inquiry of damages on default, and in inquiry of waste, though this latter has been questioned and even denied. *Spelm. Gloss. voce jurata*. Fitz. N. B. 107. C. Dunc. Trials per pais, cap. 6. 1 Ventr. 113. Finch. Law 400. Further there is in *Glanvil* a writ for a jury of 8 to inquire into the age where infancy is alledged. *Glanv. lib. 13. c. 14, 15, 16*.—2. Instances, in which the law allows or requires more than twelve, are, attain, in which there must be 24, the great assize, in which there must be 16, the grand jury for indictments, which usually consist of some number between 12 and 23, and writ of inquiry of wastes, in which 13 have been allowed. Finch. Law 484. *Spelm. Gloss. voce jurata*. 2 Hal. Hist. Pl. C. 161. and Cro. Cha. 414.

[155. b.]

(2) See post. 157. a. ant. 125. a. n. 2. This qualification is now [Note 275.] become unnecessary in civil cases, the 4 An. c. 16. s. 6. & 7. directing that in them the jury shall be taken from the body of the county. See ant. 125. a. n. 2. and a learned tract by the late mr. serjeant *Wayme*, intitled, a Dissertation on the writ *de non panendis in assisis et juritis*. See also 2 Inst. 447. & 561.

(5) This *deccantatum*, as lord chief justice *Vaughan* calls it, on account of its frequency in the books, about the respective provinces of judge and jury, hath, since lord *Coke's* time, become the subject of very heated controversy, especially on prosecutions for state libels; some aiming to render juries wholly dependent on the judge for matters of law, and others contending for nearly a complete and unqualified independence. On the trial of *John Lilburne* for treason, in 1649, high words passed between the court and him, in consequence of his stating to the jury that they were judges both of law and fact, and citing passages in the *Coke upon Littleton* to prove it. 2 State Tr. 4th ed. 69. and post. 228. a. In the case of *Penn and Meade*, who in 1670 were indicted for unlawfully assembling the people and preaching to them, the jury gave a verdict against the directions of the court in point of law, and for this were committed to prison. But the commitment was questioned; and, on a *habeas corpus* brought in the court of common pleas, it was declared illegal; lord chief justice *Vaughan* distinguishing himself on the occasion by a most profound argument in favour of the rights of a jury. *Bushell's case*, 1 Freem. 1. and *Vaugh.* 135. However, the contest did not cease, as appears by sir *John Hawles's* famous dialogue between a barrister

barrister and a juryman, which was published in 1680, to assert the claims of the latter against the then current doctrine decrying their authority. Since the revolution, also, many cases have occurred, in which there has been much debate on the like topic. See King v. Poole, in Cas. B. R. temp. Hardwicke 23. Franklin's case, 9 State Tri. 275. Peter Zenger's, *ibid.* Owen's case, 10 State Tr. p. 196. of Append. and Woodfall's case, 5 Burr. 261. By attending to the cases before referred to, it will be easy to trace the progress of this controversy on the limits of the jury's province.

In respect to my own ideas on this subject, they are at present to this effect :

On the one hand, as the jury may, as often as they think fit, find a general verdict, I therefore think it unquestionable, that they so far may decide upon the law as well as the fact, such a verdict necessarily involving both. In this I have the authority of Littleton himself, who hereafter writes, that *if the inquest will take upon them the knowledge of the law upon the matter, they may give their verdict generally.* Post. Sect. 368. and fol. 228.

But on the other hand I think it seems clear, that questions of law generally and more properly belong to the judges ; and that, exclusively of the fitness of having the law expounded by those who are trained to the knowledge of it by long study and practice, this appears from various considerations.—I. If the parties litigating agree in their facts, the cause can never go to a jury, but is tried on a demurrer ; it being a rule, and I believe without exception, that issues in law are ever determined by the judges, and only issues of fact are tried by a jury. Ant. 71. b.—II. Even when an issue in fact is joined, and comes before a jury for trial, either party, by demurring to evidence, which includes an admission of the fact to which the evidence applies, may so far draw the cause from the cognizance of the jury ; for in that case the law is reserved for the decision of the court from which the issue of fact comes, and the jury is either discharged, or at the utmost only ascertains the damages. Ant. 72. a. Dougl. Rep. 127. 213. Buller's Nisi Pri. 2d edition, 313.—III. The jury is supposed to be so inadequate to finding out the law, that it is incumbent upon the judge who presides at the trial to inform them what the law is ; and, as a check to the judge in the discharge of this duty, either party may, under the statute of Westminster the 2d, c. 31. makes his exception in writing to the judge's direction, and enforce its being made a part of the record, so as afterwards to found error upon it. See post. 2 Inst. 426. Trials per Pais, 8th ed. 222. 466. Case of Fabrigas and Mostyn, in xi. State Trials. Case of Money and others v. Leach, 3 Burr. 1742. Buller's Law of Nis. Pri. 2d ed. 315.—IV. The jury is ever at liberty to give a special verdict, the nature of which is to find the facts at large, and leave the conclusion of law to the judges of the court from which the issue comes. Formerly indeed it was doubted, whether in certain cases, in which the issue was of a very limited and restrained kind, the jury was not bound to find a general verdict. But the contrary was settled in Downman's case, 9 Co. 11. b. and the rule now holds both in criminal and civil cases, without exception. See post. 227. b. Stanndf. Pl. C. 165. a. Major Oneby's case, 2 L. Raym. 1494.—V. Whilst attaints, which still subsist in law, were in use, it was hazardous in a jury to find a general verdict, where the case was doubtful, and they were apprized of it by the judges ; because, if they mistook the law, they were in danger of an attaint. Post. 228. a. Hob. 227. Vaugh. 144. 2 Hal. Hist. Pl. C. 310. Gilb. Com. Pl. 2d edition, 128.—VI. If the jury find the facts specially, and add their conclusion

as to the law, it is not binding on the judges; but they have a right to control the verdict, and declare the law as they conceive it to be. At least this is the language of some most respectable authorities. Staundf. Pl. C. 165. a. Plowd. 114. a. b. 4 Co. 42. b. Hal. Hist. Pl. C. v. 1. p. 471. 476, 477, and v. 2. p. 302.—VII. The courts have long exercised the power of granting new trials in civil cases, where the jury find against that which the judge trying the cause, or the court at large, holds to be law, or where the jury find a general verdict, and the court conceives, that, on account of difficulty of law, there ought to have been a special one. *King v. Poole*, Cas. B. R. temp. Hardwicke 26. Though too, in criminal and penal cases, the judges do not claim such a discretion against persons acquitted, the reason I presume is in respect of the rule that *nemo bis punitur aut vexatur pro eodem delicto*, or the hardship which would arise from allowing a person to be twice put in jeopardy for one offence; and if this be so, it only shews, that on that account an exception is made to a general rule. 4 Blackst. 8th ed. 361. 2 L. Raym. 1585. 2 Stra. 899. 4 Co. 40. a. and Wingate's Maxims, 695.

Upon the whole, as my mind is affected with this interesting subject, the result is, that the *immediate* and *direct* right of deciding upon questions of law is entrusted to the judges; that in a jury it is only *incidental*; that in the exercise of this incidental right the latter are not only placed under the superintendance of the former, but are in some degree controllable by them; and therefore, that, in all points of law arising on a trial, juries ought to shew the most respectful deference to the advice and recommendation of judges. In favour of this conclusion the conduct of juries bears ample testimony; for to their honour it should be remembered, that the examples of their resisting the advice of a judge in points of law are rare, except where they have been provoked into such an opposition by the grossness of his own misconduct; or betrayed into an unjust suspicion of his integrity by the misrepresentation and ill practice of others. In civil cases, particularly where the title to *real* property is in question, juries almost universally find a special verdict, as often as the judge recommends their so doing; and though in criminal cases special verdicts are not frequent, it is not from any averseness to them in juries, but from the nature of criminal causes, which generally depend more upon the evidence of facts than any difficulty of law. Nor is it any small merit in this arrangement, that in consequence of it every person accused of a civil crime is enabled by the general plea of *not guilty* to have the benefit of a trial, in which the judge and jury are a check upon each other; and that this *benefit* may be always enjoyed, except in such small offences as are left to the summary jurisdiction of a justice of the peace; which exception, from the necessity of the times, is continually increasing, but which, however, cannot be too cautiously extended to new objects.—Thus considered, the distinction between the office of judge and jury seems to claim our utmost respect. May this wise distribution of power between the two long continue to flourish, unspoiled, either by the proud encroachment of ill-designing judges, or the wild presumption of licentious juries.

It would be wrong to conclude this note, without referring the reader to the very forcible reasoning on the same subject, in a modern work, which contains much general legal instruction elegantly conveyed. See "EUMOMUS, or Dialogues concerning the Law and Constitution of England," vol. 3. p. 196.

(6) See further on the origin of English Juries, Spelm. Gloss. voc. [Note 276.*] *jurata*, Dissertat. Epistolar. in Ling. Septentrion. Thesaur. Hicckes. Stiernh.

Stiernh. de jure Sueon. et Goth. vetust. lib. 1. c. 3. and Dr. Pettingal's Enquiries into the Use and Practice of Juries amongst the Greeks and Romans.

[156. a.]

- [Note 277.] (1) In the case of Mounson and West, 1 Leon. 88. it was argued, that affinity was a challenge to the *favour* only; and to this two judges inclined at first; but after time taken to consider the point, it was adjudged to be a *principal* challenge by three judges, the fourth hesitating.
- [Note 278.] (2) Having issue living by the wife, though she is dead, is sufficient to continue the husband's affinity. Nor is it necessary that the issue should be inheritable to the land, where land is the subject of the action. Both of these positions I infer from the case of Mounson and West before cited from 1 Leon. 88.
- [Note 279.] (3) By a statute of the late king no challenge can now be taken to any pannel for want of a knight in it. See 18 G. 2. c. 18. s. 4. This provision is made in *general* terms; but the recital which precedes it is confined to the inconveniencies of such challenges where *peers* are parties.
- [Note 280.] (4) Acc. Keilw. 102. a. But lord Coke is of a different opinion; for he expressly allows challenges for *favour* to prisoners in treason and felony, and consequently so far against the king. 2 Hal. Hist. Pl. C. 271. Though, too, lord Coke's doctrine should be admitted, the reason he gives for it, which is almost in the words of the case of 22 E. 4. cited in the margin from Fitzherbert's Abridgement, seems rather unsatisfactory. But a better principle to found the rule upon was not unobvious; namely, that, from the extensive variety of the king's connexions with his subjects, through tenures and offices, if *favour* to him was to prevail as an exception to a juror, it might lead to an infinitude of objections, and so operate as a serious obstruction to justice, in suits in which he is a party.
- [Note 281.] (5) Lord Coke having immediately before expressed, that the array shall not be challenged for *favour* against the king, he must be here understood to consider *being a vadelet, or other menial servant of the crown*, as a *principal* challenge to the array; for otherwise he would be inconsistent; unless, indeed, he is supposed in the first instance to state a general rule, and in the second an exception to it, which, as his words are, would be a strained construction. It is also strong evidence of lord Coke's intending to give this challenge to the *array* as a principal one, that he elsewhere represents *being a servant of either party*, where the suit is between subjects, as a principal challenge both to the array and to the polls. See *supra*, and also *post*. 157. b. However, lord Hale will not allow this sort of exception to a juror to be more than a challenge to the *favour* in trials for treason or felony; citing for authority, from Fitzherbert's Abridgement, a case in 3 H. 6. which is a decision in point by the whole court; to which may be added, the *dictum* in the Year-Book of 4 H. 7. 3. Also the practice since lord Hale's time seems to have accorded with his doctrine, there being subsequent instances in print, in which such an exception, when taken to the polls, has been disavowed, but not one, I believe, of its being received. The instances of disallowing the exception as a principal challenge, to which I shall refer, are Mr. Hampden's trial in the king's bench, Hill. 36 Cha.

2. for a misdemeaner, and sir William Parkyns's, at the Old Bailey, in 1695, for high treason. See State Tri. 4th ed. v. 3. p. 825. and v. 4. p. 633. In the former the point was sharply argued on challenges, by mr. Hampden, of two jurors, for having offices in the king's forest; and as the counsel for mr. Hampden relied on lord Coke and on Rolle's Abridgement of the Case of 22 E. 4. here cited by lord Coke in the margin, as the ground of his doctrine, so the court adjudged against the exception as a principal challenge, on the authority of the case of 3 H. 6. cited by lord Hale. In the latter, sir William Parkyns challenged two for being servants of the king; but was informed by lord Holt, that it was no cause of challenge. The first of these instances was a direct adjudication; but, however, it loses part of its weight, in consequence of having occurred in an ill time, whilst lord Jefferies presided in the king's bench, and of being accompanied with ungracious and unbecoming language from him, in respect to both Coke and Rolle. The second was rather an extra-judicial opinion; because the counsel for the crown consented to put by the jurors objected to, on the ground of being king's servants, unless there should be a defect of other jurors, which did not happen. But lord Holt declared against the challenge in the most absolute and unreserved terms, as if it would not bear arguing.

[156. b.]

(1) *Nota, on writ of right, the pannel returned by the four knights* [Note 281.] *shall not be challenged, but challenge ought to be taken before the four knights before the pannel made.* H. 30. El. B. R. Pigott and Clarke. Hal. MSS.—See acc. post. 158. a. 294. a. Mo. 67. and Gouldsb. 23.

(4) But, according to the construction made of this statute or ordinance, the king is not bound to shew cause of challenge, till all the pannel is called over, and not then, unless from challenges, or otherwise, the jury is incomplete. See State Tri. 4th ed. v. 3. p. 468. v. 4. p. 423. v. 5. p. 195. See further on this point sir John Hawles's Remarks on Trials, in State Tri. 4th ed. v. 3. p. 169.

[157. a.]

(4) And now by the 4 An. c. 16. and 24 G. 2. c. 18. the jury must be taken from the *body of the county*, in actions or suits in the king's courts of record at *Westminster*, and in actions or informations on penal statutes. But appeals of felony or murder, and indictments or presentments of treason, felony, murder, or other matter, are excepted from this provision; and, therefore, in them hundredors are still in strictness necessary.—It is observable, that the 24 G. 2. by which this alteration was made, as to actions on penal statutes, names the counties palatine of *Lancaster, Chester, and Durham and Wales*, as well as *Westminster*. But in the 4 of An. only the latter place is mentioned.—See further on the subject of hundredors, ant. 125. a. note 2. to which add 1 P. Wms. 207. and a case on the 4 An. in mr. serj. Wynne's Miscell. Law Tracts, 60.

[157. b.]

(6) *Yet labouring a jury, though it be but to appear*, is afterwards [Note 284.] stated to amount to the crime of *maintenance* in a third person. Post. 369. a. Here, indeed, the author qualifies the *labouring* to appear, by supposing it to be to *do his conscience*. But this addition of words seems a slight ground for a difference of construction.

(8) Staundford is of the same opinion, citing for authorities, from Fitz- [Note 285.] herbert's Abridgement, the cases of 11 R. 2. & 4 H. 5. here referred to by lord Coke. Staundf. Pl. C. 163. a. However, the benefit of *premp-
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tory challenges on *collateral* issues, in capital cases, has been denied by the practice of later times. Case of Okey and others, East. 14 Cha. 2. 1 Lev. 61. Johnson's case, Mich. 2 G. 2. Fost. 46. Mr. Ratcliffe's case, Mich. 20 G. 2. Fost. 40.—In the report of the case last cited, lord Hale is referred to as an authority for disallowing such challenges. But lord Hale is not absolute in his opinion; and Staundford, whom lord Hale cites, not only writes with a *quere* in the part so cited, but in a subsequent passage gives an opinion in favour of the challenge. Staundf. Pl. C. 158. a. 163. a.

[158. a.]

[Note 286.] (1) It has been questioned, whether outlawry in a *personal* action is sufficient to disqualify from being a juror; and in sir William Withepole's case, Mich. 3 Cha. 1. the court of king's bench was divided on this point. Cro. Cha. 135. W. Jo. 198. and Ley's Rep. 81.

[158. b.]

[Note 287.] (2) This is one instance of the examination called a *voir dire*; for as a witness is on a *voir dire* to try an objection to his competency to give evidence, so a juror may be sworn, in like manner, to try the cause of challenge to him. It is thought fit to take notice of this; because, in some of our books, the *voir dire* is described as if confined to the challenge of a witness, and only used to distinguish such a partial swearing of a witness from swearing of him *in chief*. For instances of examining jurors on a *voir dire*, see Francia's case, State Tri. 4th ed. v. 1. p. 59. and mr. Townley's, in Fost. 7. But in both of these the challenge, not being *to the favour*, was examined into by the court, without triors.

[Note 288.] (3) Some seem to understand it as a general rule, that challenges of jurors are excluded, where the inquest is for information merely, or, not being so, is without an issue joined between the parties; as in inquests of office before sheriffs, coroners, and escheators, and in writs of inquiry for damages. Office of Executor, ed. 1676. p. 240. 1 Ro. Abr. 660. Umfrev. Lex. Coronator. 174. 183. and in the Introd. 51. Probably lord Coke here means to advert to this doctrine, and to give the *proprietas probanda* and the writ to inquire of waste, both of which are inquests without any issue joined, as instances of exception to it. Broke adds another exception; for in abridging the case of waste from the Year-Book of 2 H. 4. 3. he observes, that the law is the same on a writ of redisseisin. Bro. Error 31.—As to the rule itself for thus excluding challenges, be it well or ill founded, the sheriff, or other officer taking the inquest, certainly ought not to accept any jurors but such as are legally qualified; and if such are received, it seems a just ground for quashing the proceeding, or for error, according to the nature of the case. See sir William Withepole's case, reported in W. Jo. 198. Cro. Cha. 134. and Ley 81. and noticed in 2 Hal. H. P. C. 60.

[159. a.]

[Note 289.] (2) This is the number mentioned in the writ to the sheriff, and also in the oath of the four knights. Booth on Real Act. 96, 97. But in Mo. 67, it is said, that sometimes *fourteen* have been returned. In *King v. Dryden*, being the case cited above, in the margin, from Cro. Cha. 511. *twenty* were returned by the four knights; on which it became a question, whether *twelve only* should have been returned, and whether the surplusage did not vitiate the whole return. But no adjudication appears in Croke's Reports. However, in 2 Ro. Abr. 674, where the same case is shortly reported, it is mentioned, that the court held the return good, it being observed, that several precedents were cited in favour of such a return;

return; and that it resembled the case of a common *venire*, on which it was usual to return *twenty-four*, though the writ is restrained to *twelve*.

(4) Since lord Coke's time a *third* remedy for tithes, where they are of small value, has been given; for, by the 7 & 8 W. 3. c. 6. tithes under 40s. may be recovered, in a summary way, before two justices of the peace; and by the 7 & 8 W. 3. c. 34. which was at first temporary, but is now made perpetual, tithes under ten pounds are made recoverable from *Quakers* in the same way. In London, tithes by the 37 H. 8. c. 12. are recoverable before the lord mayor, with an appeal to the lord chancellor. To these various modes of proceeding for tithes should be added, the equitable remedy by bill, either in chancery or the exchequer; both of which courts have long entertained suits for tithes. Formerly, however, the jurisdiction of chancery, in this respect, was questioned, it being so far from settled in lord Coke's time, that there are instances of controverting it, even since the restoration. 1 Freem. 303. 2 Cha. Cas. 237. But as to the exchequer, tithes are said to have been anciently cognizable there; though this is contradicted by lord chancellor Nottingham, who dates the origin of the proceeding by English bill, and, consequently, that court's equitable jurisdiction over tithes, from the statute of Hen. 8. erecting the court of augmentation. Hardr. 236. 1 Freem. 303. and 33 H. 8. c. 39. This equitable interference of chancery and the exchequer with tithes is generally considered as merely *incidental* and *collateral*; namely, as a consequence of their jurisdiction in account and in enforcing discovery. 3 Blackst. Com. 9th ed. 437, and the reasons of the appellant in *Whitehead and others v. Travis and others*, Dom. Proc. January, 1779. But some give a broader foundation to this branch of exchequer jurisdiction; and in respect of extra-parochial tithes, which are part of the ancient inheritance of the crown, they insist, that suits for tithes must ever have fallen within the compass of the exchequer's *direct* and *substantive* jurisdiction, as a court of revenue. See the case of respondent in the appeal before cited, and Hard. 117. Perhaps it is upon this idea, as well as on account of the greater frequency of suits for tithes in the exchequer, that lord Hardwicke calls that court the proper jurisdiction for them. 3 Atk. 247. Yet, I confess, it seems to me, that the antiquity of the exchequer jurisdiction, in the particular case of *extra-parochial* tithes, is no proof of a jurisdiction as to tithes in general. See further, as to the jurisdiction of chancery and exchequer over tithes, Rayner's Cases at large, Introd. xiv. and Vin. Abr. tit. *Dismes*.

[159. b.]

(1) In Dy. 144. b. the reporter questions this same statute or ordinance, and on the same ground as is expressed in the prince's case, cited by lord Coke; namely, that the king and the lords are named without the commons. But the editor of the last edition of Dyer gives a note, tending to obviate the objection thus taken. The 8 H. 6. c. 29. is also supported as a statute by mr. serjeant Hawkins and mr. Ruffhead, in the prefaces to their respective editions of the statutes at large. The latter of these urges two strong arguments in favour of the 8 H. 6. c. 29. exclusive of the general argument for *presuming* the assent of the commons, of which in the next note. According to the first, the roll containing the 8 H. 6. has a general preface, which mentions the assent of the commons, in terms referrible to all the chapters of that year. The second is, that the 22 H. 8. c. 10. expressly refers to the 8 H. 6. c.

29, as a statute, and, therefore, that the latter has been legislatively recognized.

[Note 292.] (2) Acc. 4 H. 7. 18. a.¹ Mo. 824. and the prince's case, 8 Co. 20. a. In 4 Inst. 25. lord Coke also describes a statute as having the consent of king, lords, and commons, and an ordinance as made by only one or two of them.—But mr. Prynne is very angry with lord Coke, for thus distinguishing between an ordinance and a statute. He first attacked the difference in his *Irenarches Redivivus*; and there he is very copious in his arguments and instances against it. But mr. Prynne did not rest here; for he continued the subject in various subsequent publications; namely, in his preface and index to what is called Cotton's Abridgement of the Records, and in his Animadversions on the 4th Institute. See the latter book, p. 13. But in all these works, particularly his *Irenarches Redivivus*, he appears to me to labour the point, in a manner which indicates a very considerable misapprehension of lord Coke. It is manifest, from his lordship's words here, that he did not mean to deny that the term of *ordinance* might not be, or was not frequently, applied to statutes; for he here adduces instances of such an application. His chief intent was to guard against universally and indiscriminately so considering all ordinances in parliament. But mr. Prynne, not connecting what is here said by lord Coke with his words in the 4th Institute, but looking to the latter only, tediously and provokingly argues as if lord Coke had denied that an ordinance could be, or was, in any case, a statute. Not content with fighting this imaginary proposition, mr. Prynne runs into the contrary extreme of asserting, that acts of parliament and ordinances are universally and invariably the same. Thus the true questions arising on the subject were, in great measure, lost sight of, or, at least, were so obscured, by being complicated with foreign and needless discussion, as not essily to strike the reader. The real topics for debate with lord Coke, and those which should have been pointedly attended to, were, first, whether the term of ordinance was ever, in fact, applied to a provision made, during the time of parliament, by only one or two of the three branches of the legislature; and, secondly and principally, whether naming only one or two parts of the legislature doth exclude the presumption of the third's having assented. As to the former of these questions, it is rather verbal; and therefore I will here only observe upon it, that using the word *ordinance* in the manner stated by lord Coke, seems well enough to answer the purpose of discrimination; that the word may have been frequently so applied in ancient times, notwithstanding the numerous examples of a contrary application, so industriously collected by mr. Prynne; that lord chief justice Crew partly adopts lord Coke's idea; that mr. Prynne himself, in his later writings, though he still denies lord Coke's distinction, brings forward and acknowledges precedents, which tend, in some degree, to affirm it; and that calling the acts of the parliament, in the reign of Charles I. without the royal assent to them, *ordinances*, seems to have originated from lord Coke's differences between an ordinance and a complete statute. See W. Jo. 103. Prynne's Index to Cott. Abridgm. of Rec. title *ordinances*, and his Animadv. on 4 Inst. 13. As to the second question, besides what may be found in mr. Prynne's pieces, it has been distinctly considered by mr. serjeant Hawkins and mr. Ruffhead, both of whom, in the prefaces to their several editions of the statutes, anxiously oppose lord Coke's idea of not presuming the assent of lords or commons, where the record names one, but omits the other. The general purport of the reasons urged by the former is, the various, irregular, and sometimes inexplicit penning

penning of the more ancient statutes, the allowed force of several statutes in which only the king is named, and the long reception of others which do mention the king and lords without the commons. The latter editor pursues the like topics more at large, but, as it seems to me, in terms less guarded; some passages of his preface being such as may encourage a hasty and unlearned reader to fall into the unwarrantable supposition, that the right of assent in the commons is disputable even as late as the reign of Richard the second, rather than induce him to *presume* the fact of their assents having been given. See further on this subject, and for the various sense of the word *ordinance*, 2 Whitelocke on the writ of Parliament, Elsyng on Parl. last ed. 26. and Barringt. on Ant. Stat. 4th ed. 46.

[160. b.]

(3) In a Coke upon Littleton I have with MSS. notes, it is objected to [Note 293.] considering replevin here as a disseisin, that bringing a replevin is a course of law, and that neither an express denial of a rent-service, nor keeping the land without any thing distrainable by law upon it, amounts to a disseisin. Yet the annotator allows, that there is an ancient pleading in assise to warrant the doctrine, the material words of which he gives at length.

(4) See several authorities accordingly cited in the case of the six [Note 294.] carpenters, 8 Co. 146. b. and 147. a. There too lord Coke states the diversities, in point of effect, between tender on the land before distress, tender after distress and before inclosure, and tender after inclosure. See also Hob. 207.

[161. a.]

(1) It is so provided by the statute of Marlebridge, chap. 15. But [Note 295.] the king is excepted. See the commentary on that statute in 2 Inst. 131. Some distresses also by the subject are not within this provision, of which there are instances given, with the reasons, in 2 Inst. 133, and lord Hale's notes on F. N. B. 90. A.

(3) But such arrest, *virtute officii*, being made on a just ground of sus- [Note 296.] picion of felony, the party rescues himself at his peril; for, according to lord Hale, if in the attempt to make the rescue he is upon necessity slain, it is no felony in the officer; and on the same principle, if the officer is killed, it will be murder. 2 Hal. H. P. C. 85, 86, 87, 92, 93. The obvious reason is, that the law makes it a duty in the sheriff and certain other officers to arrest for felony on just suspicion; and therefore rescue from such arrest is resistance of a lawful authority. If this be so, lord Coke is here too unqualified in expression. See further, on this point, Fost. 270. 1 Burn's Justice, tit. *Arrest*, and Dougl. Rep. 345.

(4) Acc. Dy. 285. a. 4 Co. 146. b. 1 Bulstr. 141. But on this rule it [Note 297.] may be asked, whether the law of England is so defective as to furnish no remedy for the injury of being harassed by vexatious and groundless suits, or, to use the language of the Roman law, no penalty to restrain the *temeré litigantes*? It may be answered, that the rule is not to be understood so largely; for certainly there are various provisions, the object of which is to discourage the commencement of suits from an unjust or improper spirit of litigation.

I. By the ancient law no person could prosecute a civil action without having, in the first stage of it, two or more persons as pledges of prosecution;

tion; and if judgment was given against the plaintiff, or he deserted his suit, both he and they were liable to amercement [161. a.] to the king, either for not prosecuting, or *pro falso clamore*; and hence the clause of *si fecerit te securum*, in writs summoning the defendant to answer. *Mirr. c. 1. s. 3. c. 2. s. 24. Ant. 126. b. 127. a.* Originally these pledges were, or ought to have been, real and responsible persons; and the amercement of them and their principal was an actual branch of royal revenue; the ascertainment of the sum to be paid as an amercement being sometimes by the jury impannelled to try the issue, and sometimes by a jury summoned for that special purpose by the coroner, on receiving an estreat of the amercement. *F. N. B. on the writ of miserata misericordia, 75. K. Griesley's case, 8 Co. 39. a. Beecher's case, 8 Co. 61. a.* But this guard at length lost all its vigour, and even so early as the reign of Edward the fourth appears to have evaporated into mere form. *18 Ed. 4. 9. b. pl. 19.* However, as a form it still continues; and if omitted, was a ground either for a demurrer or for a writ of error, till the legislature interposed by two different statutes, the last of which has been so liberally construed, as scarce to make it possible to take advantage of the non-return or non-entry of pledges in any stage of a *civil* suit. See *3 Bulst. 61.* and the case of *Hussey v. Moore* on a *penal* statute, *ibid. 275.* where the subject of pledges is most learnedly investigated. See also *Fortesc. Rep. 330. 1 Wils. 226. 2 Wils. 142.*

II. As the amercement leviable on a plaintiff and his pledges belonged wholly to the king, in respect of and by way of penalty for troubling his courts improperly, it became necessary to have a distinct provision in favour of defendants who were unjustly sued; and for this purpose the legislature introduced costs in their favour. The first law giving costs to a defendant is said to be the statute of Marlebridge, c. 6. which gave an action to the lord, where he was defrauded of wardship by his tenant's collusively enfeoffing his heir within age, but at the same time directed that the feoffee should have his damages and costs, where he was maliciously impleaded. *52 Hen. 3. c. 8. and 2 Inst. 112.* This provision for one particular case was, but not till after a long interval, followed by various statutes of a *general* kind, under which, at this day, a defendant is almost universally entitled to costs, where the suit terminates against the plaintiff. See *22 H. 8. c. 15. 4 Jan. 1. c. 3. 8 Eliz. c. 2. 13 Cha. 2. st. 2. c. 2. 8 & 9 W. & M. c. 11. 4 & 5 An. c. 16.* to which add *Law of Nisi Pri. ed. of 1775. chap. 8. p. 328. mr. serjeant Sayer's Law of Costs, c. 8, 9, & 10. and mr. Crompton's Pract. of K. B. and C. P. common-placed, 2d ed. v. 2. p. 461.* But the statutory provisions are confined to suits in the king's courts of common law. However, our courts of equity supply this seeming defect, by the exercise of a discretion in awarding costs to a defendant, which is constantly done as often as they think, that, from the want of equity in the plaintiff, or on any other account, he ought to have costs.

III. Where two or more conspire to harass any person by a false and malicious suit, whether *criminally* or *civily*, it is a crime punishable by indictment, or the parties injured may sue for damages by writ of conspiracy; and both of these remedies lie at common law, that part of the statute or ordinance of *articuli super chartas*, which gives remedy against conspirators by writ out of chancery, being, according to both *Stauford* and *lord Coke*, only an affirmance of the common law. *Staufd. P. C. 172. 2 Inst. 561, 562.*

IV. There is also a remedy for a *false* and *malicious* prosecution, though the aggravation of a conspiracy or confederacy is wanting, and the injury comes from one only; for in such a case the party prosecuted

cuted may have an action upon the case for damages. I apprehend too that such action lies, as well where the vexation is practised by a *civil* suit, as where it is carried on through the medium of a criminal process. F. N. B. 114. D. Indeed the numerous cases to be met with in the books are chiefly for criminal prosecutions. See 1 Vin. Abr. 17. to 35. and the case of *Farmer v. Dalling*, 4 Burr. 1971. But there seems to be no reason for distinguishing between the writ of conspiracy and an action upon the case in this respect; and exclusively of other authorities which may probably be found upon a search, lord Hobart, mr. serjeant Rolle, and lord Holt, all concur in the idea, that where a *civil* suit is commenced falsely and maliciously, and for the mere purpose of vexation, it is actionable. See Hobart's argument in *Waterer v. Freeman*, Hob. 205. 266. Rolle's words in *Sty. 379.* and Holt's argument in giving judgment in *Savill v. Roberts*, reported in 12 Mod. 208. 1 L. Raym. and other books, and the case of an action for falsely and maliciously suing out a commission of bankruptcy, in 1 Blackst. Rep. 427. However, from the language of a case in *Dyer*, and of another in lord Coke's Reports, I doubt whether actions on the case for false and malicious prosecutions were in general allowed in the reign of Elizabeth. Dy. 285. a. 4 Co. 14. b.

[There can be no longer a doubt whether an action on the case for a vexatious civil suit, as well as for a malicious criminal prosecution, will lie.

Of late years, instances of the former have been scarcely less frequent than of the latter. The principles by which both forms of action are governed are the same. Three requisites are indispensable to entitle the plaintiff to recover: malice, want of probable cause, and damage.

1. Malice is either express or implied. With reference to this subject, it is said to be express, where it is proved by circumstances which usually indicate malice; and it is said to be implied, where it is inferred from the want of probable cause.

It has been held, that if an indictment was found by the grand jury, it is necessary for the plaintiff to prove express malice. *Savil v. Roberts*, 1 Salk. 15; S. C. 1 Ld. Raym. 381. So where the indictment was quashed, without an acquittal by the jury. *Per Burnet, J. in Hunter v. French*, *Willes* 520. It has also been ruled at *Nisi Prius*, that where the prosecution complained of was not for a felony, but for a misdemeanor only, evidence of express malice must be given. *Per Foster, J. in Litwal v. Smallman*, *Selw. N. P.* 1057, *in notis*.

Malice may be implied from want of probable cause, where it is directly and positively shewn, and is not itself an inference from the plaintiff's acquittal, or from the defendants having abandoned the prosecution. *Per Lord Mansfield* and *Lord Roselyn*, in *Johnstone v. Sutton*, 1 Term Rep. 545; *per Lord Mansfield*, in *Parrot v. Fishwick*, 9 East 362, note (b); and *per Lord Ellenborough* and *Le Blanc, J.* in *Purcell v. Macnamara*, 9 East 363, 364. But want of probable cause, though ever so fully shewn, affords only presumptive evidence of malice, which may be repelled by other circumstances. *Gibson v. Charters*, 2 Bos. & Pull. 129. That malice is not to be implied from the mere proof of the plaintiff's acquittal, for want of the prosecutor's appearing when called, was directly decided in *Purcell v. Macnamara*, 9 East 361.

2. Want of probable cause, though it may sometimes imply, is never implied from malice. If a prosecution be not groundless, the law will not inquire into the motives of the prosecutor. *Anonymous*, 6 Mod. 25,

73; *Golding v. Crowle*, *Bul. N. P.* 14; *Farmer v. Darling*, 4 *Burr.* 1974; *Johnstone v. Sutton*, in error, 1 *Term Ref.* 510. S. C. in *Dom. Proc.* 1 *Bro. Parl. Ca.* 76, *Toml. edit.* *Incedon, v. Berry*, 1 *Camfb.* 203, in *notis*; *White v. Dingley*, 4 *Mass. Ref.* 433.

But the question has arisen, what shall amount to a probable cause? Where the defendant exhibited an information against the plaintiff before the sub-commissioners of excise, for not entering goods or paying the duty, and the goods were condemned, but that judgment was afterwards reversed on appeal, and the goods restored, it was held, that the condemnation by the sub-commissioners evinced a probable cause, *Reynolds v. Kennedy*, 1 *Wils.* 232. In *Smith v. Macdonald*, 3 *Esq.* 7, Lord Kenyon said, that if the acquittal of the plaintiff was the result of deliberation, and the evidence offered to the jury at the trial was sufficient to cause them to pause, he should hold it a probable cause. In another case, where the prosecution complained of was for an assault, and it appeared that the party prosecuted in fact made an assault, though the other party struck the first blow, his Lordship held, that there was probable cause for the prosecution, and non-suited the plaintiff. *Fish v. Scott, Peake's Ca.* 135. A very nice point, involved in the general question under consideration, arose in a late case before the *Supreme Court of Connecticut*. The suit complained of as malicious and groundless was an action of slander. The defendant in that action admitted the speaking of the words, but justified, on the ground that they were true, and obtained a verdict. It was contended, that the speaking of the words shewed conclusively a probable cause. After the case had been twice argued by counsel, and time taken to advise, the Court decided, that as this justification amounted to a denial of the cause of action, it no more admitted a probable cause than the plea of "not guilty." *Sterling v. Adams*, 3 *Day*.

It has also been made a question, whether the abandoning of the prosecution before trial does not, *prima facie*, admit want of probable cause? This question has been decided in the negative on very satisfactory grounds. *Purcell v. Mucnamara*, 1 *Camfb.* 199; *Wallis v. Alpine*, 1 *Camf.* 204, in *notis*.

That when the facts are ascertained, whether they amount to a probable cause or not, is a question of law, see *Candell v. Loudon*, cited 1 *Term Ref.* 520; *Golding v. Crowle*, *Bul. N. P.* 14; *Johnstone v. Sutton*, 1 *Term Ref.* 545. This is also evident from the cases above cited, in which the question has been decided by the Court.

3. The damage necessary to entitle the plaintiff to a recovery in this form of action, may have been sustained by him, either 1. in his person, by imprisonment, 2. in his reputation, by the scandal, or 3. in his property, by the expense. *Savil v. Roberts*, 1 *Salk.* 13; *Jones v. Gwynn* or *Givin*, *Gilb. Ref.* 185; *Chambers v. Robinson*, 2 *Str.* 691; *Wicks v. Fentham*, 4 *Term Ref.* 247; *Smith v. Hixon*, 2 *Str.* 977, more fully reported in *Ca. temp. Hardw.* 54.

In an action for a vexatious suit, it was held by the *Supreme Court of Connecticut*, that the plaintiff might shew, as grounds of special damage, his peculiar situation and circumstances at the time such vexatious suit was brought. *Nichols v. Bronson*, 2 *Day*, 211.]

V. In some special cases, a plaintiff failing in his action is exposed to the *direct* and *immediate* punishment of fine and imprisonment, by the court in which he sues, without the benefit of a jury to assess the fine, or the circuitry of a separate prosecution to try the malice. This is the law in certain actions which are of a high nature, where the injury

jury of which the defendant is accused concerns life or limb, or is otherwise of an atrocious kind, as in appeals of felony or mayhem, and in attain; for in all these the plaintiff may be fined and imprisoned by the court, if he be barred or nonsuited, or if the writ abates by his own default. Beecher's case 8 Co. 60. a. It is the same, where the action, though not of so high an order, is *apparently* vexatious; for on this principle, a plaintiff, who sues the same person in two different courts for the same cause, may be fined. *Ibid.* and 14 H. 7. 7.—The result, as to the law at present, and since pledges of prosecution have become a mere formality, seems to be this. No man is actionable for *merely suing*, whether in a criminal or civil form, however false the suit may be in foundation; nor is otherwise punishable, except in the case of a civil suit, by the payment of costs. But if the suit be *malicious*, as well as *false*, it is on that account punishable; sometimes by indictment or information, as in the case of a conspiracy; sometimes by immediate fine and imprisonment in the court in which the malicious suit is carried on, as in appeals of felony, or mayhem, or in attain; and sometimes by action of the party sued, as where a damage can be proved, or where, from the grossness or criminality of the charge or imputation, the law supposes a damage to be inevitable.—Such are the various provisions of our law, to deter men from becoming *plaintiffs* or complainants without justifiable cause. As to the provisions against obstinate or vexatious *defendants*, these being rather beyond the principle, for explanation of which this note was begun, and the note itself being already so extended, I shall be content with observing, that, exclusively of the finding of damages and award of costs against such defendants, there is in some few cases of a very special nature, a power in the court to punish their misbehaviour by fine and imprisonment. See Dy. 67. a. & b. Beecher's case 8 Co. 59 & 60.—See further, on the general subject of this note, Cow. Inst. Jur. Anglic. lib. 4. tit. 16.

[162. a.]

(4) This passage of lord Coke has been cited to prove, that he was of opinion against extending the *remedy* of the statute to the executors of a tenant for his own life, who before the statute were entitled to action of debt, but could not distrain. See *Hool v. Bell* in 1 L. Raym. 172. But I think, that lord Coke was misunderstood. He appears to me to have merely intended to guard against an error of law, into which the generality of the *preamble* of the statute might lead uninformed persons; the preamble reciting that the executors of *tenants for life* had no remedy, without distinguishing what kind of tenants for life; whereas in truth the executors of tenant for *his own life*, and also the executors of tenant *pur autre vie*, after death of *cestui que vie*, had remedy by action of debt before the statute. That it was not the meaning of lord Coke to restrict the benefit of the statute to cases in which there was no remedy before, and on that account to exclude the executors of tenants for their own lives from the remedy of distress given by the statute, is to me clear; because he himself states, both in a preceding and in a subsequent paragraph, that the statute sometimes operates by adding a remedy to that before existing at common law. See further as to this point, post. note 1. in 162. b.

[162. b.]

(1) This doctrine is impugned by the court's resolution in *Turner v. Lee*, Cro. Cha. 471. for according to that case the statute of H. 8. only applies, where the common law gives no remedy. To this construction also the preamble of the statute affords countenance. How-

ever in a case in Cro. Eliz. 332. it seems to have been taken for granted, that the statute did not operate thus restrictively; and in *Hoole v. Bell*, 1 L. Raym. 172. it was adjudged, that the statute being remedial extends to the executors of *all* tenants for life, as well to those executors who previously to the statute were entitled to action of debt, as to those executors who had no remedy whatever. Ever since too this last case, I apprehend the law to have been taken accordingly. See further as to this construction, ant. 162. a. note 4.

[Note 300.] (6) The only clause in the statute of Cha. 2. for converting military into common socage tenures, which seems to affect rents, is a proviso to preserve rents certain, and to make the reliefs on them universally the same as on the death of tenant in common socage. See 12 Cha. 2. c. 24. s. 5. and as to the difference between relief for knight's service, and relief for common socage, ant. Sect. 112 and 126, with the commentary thereon. But various other statutory provisions relative to rents have been made since lord Coke's time; and as these are very material to the recovery of rents, it may not be amiss here to take a general review of the chief of them, though some have been incidentally noticed before in the chapters on *tenants for years* and *tenants at will*.

I. There are several statutes, which extend the remedy for arrears of rent by action of debt. By the 8 Ann. c. 14. debt is given for rents on leases for a life or lives *during their continuance*, which the common law denied Ant. 47. a. note 4. The 11 G. 2. c. 19. gives action on the case to executors of a lessor or landlord, being only tenant for his own life, where he dies before or on a rent-day, and by his death the lease determines, in which case the lessee or under-tenant by the common law might have avoided paying any rent. And by the 5 G. 3. c. 17. which enables ecclesiastical persons to lease tithes and other incorporeal inheritances, debt is given for recovery of rent on such leases. Ant. 47. a. note 4.

II. Other statutory provisions extend the remedy for rents by distress to cases to which it was before inapplicable, particularly to *rents seck*. Thus the 4 G. 2. c. 28. on account of the tediousness and difficulty of the remedy for rent seck, and also rents of assise and chief rents, (though why these two latter were added I do not understand) enables distraining for such rents, where they have been duly answered for three years, within twenty years before the first day of the then session of parliament, *or where created afterwards*, as in case of rent on a lease. So too the 4 Ann. c. 14. gives distress for arrears of rent *after determination* of any lease, whether for life or lives, for years or at will, but with a proviso, that the distress be within six calendar months after such determination, and during continuance of the landlord's title and possession of the tenant indebted; whereas by the common law the power of distress ceased with the tenure.

III. Other statutory provisions have variously improved the remedy of distress for rents, where it is applicable; namely, by enabling the sale of the property distrained, and so giving to it the effect of an execution, by making new subjects of property distrainable, by newly regulating the mode of impounding distresses, by authorising to distrain in *any place* things fraudulently carried off the premises to evade distress, and by preventing the avoidance of the *whole* distress for a mere informality or irregularity in *part* of the process. See 2. W. & M. c. 5. 8 An. c. 14. 4 G. 2. c. 28. and 11 G. 2. c. 19. to which add 3 Blackst. Com. 9th ed. 6 to 15. where the effect of these statutes is admirably

rably incorporated into his view of the law of distresses with his usual excellence of order.

IV. The 8 An. c. 14. s. 1. secures to landlords to the amount of a year's rent where so much or more is in arrear, in preference to persons seizing goods on the land in lease under an execution; but this favour is granted with a proviso to prevent prejudice to the crown in recovering and seizing debts, fines, and forfeitures.

NOTES

ON THE

THIRD BOOK OF THE FIRST PART

OF THE

INSTITUTES

OF THE

LAWS OF ENGLAND.

Chap. 1.

Of Parceners.

Sect. 241.

[163. a.]

[Note 1.] (1) **I**N the vellum MSS. of Littleton, belonging to the public library at Cambridge, there is the following argument or introduction to this third book :

“En cest tierce liver ascun chose sera dit a toy, mon fitz, de parceners, de jointenantez, de tenantez in comen, de estatez de terrez et tenementez sur condition, de discentez que to lount entrez, de continuell clayme, de releissez et confirmationz, de garrantiez liniall et collaterall et de garrantiez que comensont per disseisin, de attornament, de *surrenderons*, de discontinuance, de remitterez, de *tenant per elegit*, de *tenant per estatut merchant*, de *tenant per estatut de la staple*, &c.”

On this addition to the printed copies of Littleton, sir William Jones, who kindly favoured me with the readings from the two Cambridge manuscripts, writes this observation.—“It is very remarkable, that in this argument a chapter is promised concerning *surrenders*, of which Littleton has not expressly and separately treated. The word *surrenderons*, which is abbreviated by the transcriber, seems completely to have puzzled a former owner of the manuscript. He says in the margin, *ceste parole est en auter fragment que jeo ay : quere ce que il signifie*. Since then *surrenders* are mentioned in two manuscripts as one of the heads of the third book ; it is not improbable, that the author intended to have written a distinct chapter concerning
“them,

"them, as he did write concerning tenants by ELEGIT, and by STATUTE MERCHANT and STAPLE"—See Sect. 324. where Littleton refers to a Chapter on *electis*.

[163. b.]

(4) See ant. 25. b. 26. b. and post. 196. b. 374. b. Here lord Hale introduces the following note.—*Donee in tail on condition not to discontinue. Donee has issue two daughters. One discontinues. The donor may enter. R. 26 Eliz. C. B. sir W. Moore's case. Hal. MSS.*

[Note 2.]

[164. a.]

(1) But in the writ *de partitione faciendâ* the younger sister shall not have her age against the elder. Post. 171. a.

[Note 3.]

(2) In a former note I have much at length, and as I fear tediously, endeavoured to support lord Coke in this doctrine. Ant. 24. b. note 3. But since the writing of that note a case has been published, in which the court of king's bench after three arguments decided against applying the rule to a *will*. See Willes and others v. Palmer and others, 5 Burr. 2615: In another case also, which was three times argued, the court of exchequer, as I understand, refused to apply the rule to a *marriage-settlement*. Evans on demise of Burtenshaw v. Weston, determined in a special verdict in Scaccar. Mich. 1774. or Hill. 1775. This latter case had been previously determined in B. R. in a case reserved in an ejectment in which Mr. Burtenshaw was defendant, and there too the case was argued three times. In both courts the judgment was against Mr. Burtenshaw. But the question on the construction of *heirs female of the body*, considered as words of purchase, was only a secondary point; and whether it was debated in B. R. or not, I am not at present informed. After such authorities, it can be scarcely necessary to guard the reader against incautiously adopting my private ideas.

[Note 4.]

[165. a.]

(1) This same case of the earl of Huntingdon and lord Mountjoy is reported in Godb. 17. 1 And. 307. and Mo. 174. Lord Anderson gives the opinion of the judges as it was certified in writing to the privy council; but this certificate takes no notice of the point of *indivisibility*; nor is it one of the questions stated by lord Anderson to have been referred to the judges.—In Mo. 707. the same case is cited *arguendo*; and there four judges are represented to have been equally divided in opinion as to the first point mentioned by lord Coke. But according to Anderson, the difference of opinion was only whether any remedy was furnished by law for the interest reserved to lord Mountjoy by the proviso. As to this latter point, see 8 Co. 46. Noy. 145.

[Note 5.]

(4) In 2 Ro. Abr. 254. the case of 23 H. 3. relative to the earldom of Chester, is mentioned as if the daughters might have been coparceners of the *dignity* itself, and not merely of the *possessions of the earldom*. How the earldom of Chester became annexed to the crown in the reign of Hen. 3. on the death of John Scot the last earl leaving three sisters his coheirs, is explained in 1 Dugd. Bar. 45. See further on this point of indivisibility Bract. 76. b. Brit. 187. Flet. 313. and Dav. Rep. 61. b.

[Note 6.]

(6) This doctrine about the abeyance of titles of honour, and their being revived by the royal nomination, though our books furnish little matter on the subject, is undoubtedly law; and there are many instances of an exertion of this prerogative. One of the most remarkable took

[Note 7.]

took place during the present reign in the person of the late mr. Norborn Berkley, who in 1764 was called to the house of peers in right of the old barony of Botetourt, after an abeyance of several centuries, and was allowed to sit according to the antiquity of that barony. See Cas. in Dom. Proc. for 1764. Another instance in the present reign is the case of Sir Francis Dashwood, late lord Despenser; for in 1763 he was called to the antient barony of that name in right of his deceased mother, who was eldest sister and one of the coheirs of an earl of Westmoreland, on whose death that barony had become in abeyance; and being so summoned he took his seat as premier baron in place of lord Abergavenny, who before possessed that distinction.

[Note 8.]

(7) The first of these cases was in 1596, and the second in 1616. Both are now in print, having been published from manuscripts of the time by mr. Collins in his claims concerning baronies, &c. See p. 24, & 162. It must not be inferred from the purpose for which lord Coke cites them, that the descent of a barony to a female, where in the creation it was not confined to heirs *male*, was controvertible. The points debated in those cases were of another kind. In Sampson Leonard's the question was, whether the husband can be tenant by the courtesy of a title of honour. See my observation as to that point ant. 29. b. note 1. That of lord Ros depended on the effect of superadding an earldom in tail *male* to one having a barony before descendible to heirs *general*, it being contended, that the former should attract the latter in point of descent so as to be inseparable whilst the earldom continues.

[Note 9.]

(8) In a late contest about the office of *great chamberlain*, which arose in consequence of the late duke of Ancaster's leaving two sisters his co-heiresses, one of whom was married to mr. Burrell, the then attorney-general made a report in conformity to the doctrine here stated by lord Coke as to the office of high constable; and this report, of which I have a copy, contains a very learned investigation of the subject. But afterwards when the case came before the lords, the judges gave it as their opinion, *that the office belongs to both sisters; that the husband of the eldest is not of right entitled to execute it; and that both sisters may execute it by deputy to be appointed by them, such deputy not being of a degree inferior to a knight, and to be approved of by the king.* See Journ. Dom. Proc. 25 May 1781. the printed cases of the several claimants, and the Parl. Reg. for 1780-1, v. 4. 258 to 297.

[165. b.]

[Note 10.]

(1) The claim of a like privilege as appurtenant to a manor is mentioned in Crompt. Jurisd. Co. 192. b. See further concerning the office of *woodward* in Manwood's For. Laws by Nelson, 389.

[Note 11.]

(2) It is observable in this partition, that no provision is made in respect to the office of *woodward*, and privilege of having the bark of felled trees, which were appurtenant to the manor. In a former place lord Coke states the partition of a manor to which an advowson was appendant, and explains what the effect is on the advowson, where from want of any particular agreement between the parties it is left to the law to regulate how the advowson shall be disposed of. Ant. 122. a.

[Note 12.]

(4) The reference in the margin to fol. 46. a. is to an instance of the difference in point of effect on the lessee for years of a coparcener, between partition by writ and partition without.

(2) Acc.

[166. b.]

(2) Acc. P. 18 E. *Quare Impedit* 176. Post. 186. b. 3 Co. 22 b. [Note 13.]
 2 Inst. 365. 2 Ro. Abr. 346. Mallory's *Quare Impedit* 145. Three judges also held accordingly, East 23 Eliz. in *Harris & Hales v. Nichols*, Cro. Eliz. 18. But Anderson chief justice doubted, whether a grantee should have the privilege. In *Keilway* there is a case of 18 Hen 7. in which Frowike chief justice is made to give it to the grantee of the eldest sister, only where it has been once exercised by herself. But he afterwards doubted his own distinction, and seemed to incline to the grantee's right generally; in consequence of which the report concludes thus: *Stude bene et quere*. Keilw. 49. Upon the whole therefore it seems, that the point is not quite settled; and to determine it properly would require a very careful examination of the numerous cases cited by lord Coke here and in the Second Institute. See 7 Ann. c. 18.—I was led into this note by a reference to the case from Cro. Eliz. in a Coke upon Littleton of the late mr. Beversham Filmer, and by an opinion of the same very learned gentleman, in which he represents the point to be doubtful, and therefore dissuaded accepting the title to the next presentation of an advowson belonging to three sons as heirs in gavel-kind, unless they would all join in the grant. The eminence of mr. Filmer as a barrister, more especially in the conveyancing line, will, I presume, fully justify me for thus introducing his name. The doubts of a lawyer so profound and correct, as he was universally allowed to be, will ever claim high respect; and it is with peculiar pleasure, that I take this opportunity of expressing the veneration with which I hold him in my remembrance.

[167. a.]

(2) So too execution of dower is not prevented by a lease for years subsisting at the husband's death. Ant. 32. a. How lessee for years is affected by such a partition, is before explained by lord Coke in fol. 46. a. [Note 14.]

[167. b.]

(1) But according to Bro. Nouv. Cas. 108. the lord should have notice of the partition. [Note 15.]

(2) Acc. ant. 67. b. post. 175. a. 195. a. But this sort of partition is not a partition in the sense in which Littleton writes of partitions, nor in the common sense of the word. He means the division of the land itself; whereas what lord Coke here calls a partition is a mere severance of the unity of title, which operates, as Littleton afterwards states, by making a tenancy in common. See Sect. 309. [Note 16.]

(3) These words, enjoining the partition to be made *in the presence of the parties*, shew that the proceeding before the sheriff is quite open. So too, as it seems, should be the execution of a commission of partition issued by chancery as a court of equity, such commission being in nature of a writ at common law for the like purpose. But I understand, that there have been instances of treating the commission of partition as a close proceeding, and that on that idea it has been sometimes the practice to annex an oath of secrecy to the commission. This practice, I presume, has grown from not attending to the difference between commissions to divide lands and commissions to examine witnesses merely. In the latter sort of commission an oath to keep the depositions secret is expressly required by an order of chancery of the 9th of February 1721; and exclusively of the order the proceeding implies secrecy, [Note 17.]

cy, the depositions being ever kept close under the seal till leave is obtained to divulge them by the passing of publication. But neither the language nor spirit of this order is applicable to commissions of partition, which, like the writ of partition, ought to be *openly* executed.

[168. a.]

[Note 18.] (2) The difference between an *interlocutory* judgment or award and a *final principal* or *final* judgment is here pointed at; as to which see *Metcalf's case*, 11 Co. 30. both questions in it depending on the distinction. See also office of Exec. ed. 1676. chap. 17. p. 279. [It has been decided by the supreme court of *Massachusetts*, that where commissioners, agreed upon by the parties, are appointed by the court to make partition, pursuant to a statute of that state, the interlocutory judgment, *quod partitio fiat*, is unnecessary. *Symonds v. Kimball*, in error, 3 *Mass. Rep.* 299.] How the *civil* and *canon* laws distinguished between *interlocutory* and *definitive* sentences, especially in point of appeal, and between sentences *merely interlocutory*, and *interlocutory* sentences having the effect of *definitive*, may be collected in some degree by consulting Voet. ad Dig. lib. 42. tit. 1. s. 4. Perez. in Cod. lib. 7. tit. 62. Wood's Civ. L. 8vo. ed. 379. and Gilb. Chanc. c. 10. As to the difference between interlocutory and final decrees or orders in our courts of equity, see Pract. Reg. in Chanc. 122. and 153. and *Nosle v. Foot* in Dom. Proc. 12 March 1739. On the same subject in our ecclesiastical courts, see 1 Ought. Ord. and Comett's Prac. of Spirit. Co. 3d edit. 229 to 250. These references may assist inquiry; but a far more extended information will be necessary before the distinctions can be well ascertained, and the use of them, in point of *appical conclusion*, or otherwise, be fully understood.

[Note 19.] (4) Concerning the dispute about the authenticity of these laws, see notes 3. and 4. ant. 68. b. to which add Preface to 8 Co. Rep. 1 Tyrr. Hist. b. 6. p. 103. *Ibid.* v. 2. p. 62. Brad. Introd. to Eng. Hist. 260. and a note by the late bishop of St. David, Dr. Squire, in his book on the Anglo-Saxon Gov. in Engl. ed. of 1753, p. 219. Mr. Selden's opinion of these laws was, that "as the ordinary copies are, and as they speak in the published volume of Saxon laws, they are not without many mixtures of somewhat later transcribers." Seld. on Tithes, ed. 1618. p. 225. A like temperate caution concerning these laws is interposed by sir Henry Spelman and Mr. Somner. Spelm. Gloss. 3d ed. 67. Reliq. Spelm. 61. Somn. on Gavelk. 101. But Dr. Brady is not content with this; for, moved by that excess of party spirit, which is so destructive of truth, and so much tarnishes his learned writings on the English history, he indiscriminately and passionately rejects the whole body of these laws. His words in one place are as follow: "The factious bishops and churchmen, and the seditious and dissolute barons, made a noise for king Edward's laws. But what they were it is now a hard matter to know. Those put forth under his name with Mr. Lambard's Saxon laws were none of his. They are an incoherent farce and mixture, and a heap of nonsense, put together by some unskilful bishop, monk or clerk, many years after his death, to serve the ends and designs of the present times." General Pref. to Brad. Eng. Hist. xxx. See further Wright Ten. 65. note (i).

[Note 20.] (5) The passage here cited from the laws of Edward the Confessor seems rather a remark by the copier or translator of the law, than a part of the law itself; and perhaps it is on this account that Lambard distinguishes this passage in the printing by an *Italic* letter. But whether

ther the passage is to be deemed part of the law or not, the comparison it draws of the Roman denominations of their territorial government and officers in Britain with those of the Saxons, seems to me quite imaginary. At least I am not able to find any trace of authority to prove such an use or application of the words "*consulatus consul* and *vice-consul*" amongst the Romans whilst Britain was a part of their empire, as this extract supposes.

(6) This agrees with the idea of sir John Spelman, in his life of Alfred, and of Mr. St. Amand, in his Essay on the Legislative Power of England. Dr. Stuart, in his Historical Dissertation on the English Constitution, makes some additional remarks in support of the same opinion. See 2d ed. of this latter book, 250. [Note 21.]

(7) The remark above, in note 5. on the former extract from Lambard's Anglo-Saxon Laws equally applies to this second one. As to the origin and office of sheriffs, see further Preface to 3 Co. Rep. Dav. Rep. 60. Dalt. on Sher. Spelm. Gloss. *vocibus comites comitatus et vicecomes*, Seld. tit. Hon. ed. 1681. p. 627. 2 Henry's Hist. Gr. Brit. 242. a note by lord Fortescue in his ancestor's book on absolute and limited monarchy, 112. and Stuart's Hist. Dissert. on Engl. Const. 2d ed. 241. [Note 22.]

[169. a.]

(2) Here I shall subjoin to Littleton's explanation of the different modes of express partition the following notices for the aid of students: [Note 23.]

I. Since Littleton's time a statute has been made for newly regulating the proceedings on a writ of partition, with a view to render them less dilatory and more effectual; and this statute equally extends to parceners, join-tenants, and tenants in common. See 8 & 9 W. & M. c. 31. What the form of proceeding under the writ of partition was before, is explained in Flet. lib. 5. c. 9. Bract. lib. 2. c. 33. Brit. c. 71, 72, 73. and Booth on Real Actions, 244.

II. Partition by *release* between co-parceners, which I do not observe to be noticed by Littleton or Coke, is mentioned in 2 Fulbeck's Paral. fol. 57. b.

III. There is a partition by *judgment* exclusive of that on the *partitio facienda*. An instance of it is stated in 6 Co. 12. b.

IV. Littleton hereafter adds to the forms of partition explained by him in this chapter, one other form; namely, partition by throwing into hotchpot, which is the subject of sect. 266.

V. Besides the writ of partition mentioned by Littleton, there was another also issuing out of chancery, which was called a writ of livery and partition. It applied, where land holden of the king *in capite* descended to two or more as co-parceners, in which case they could not have livery of their land from the crown without a partition, the reason of which is explained in Staundf. Prerog. 24. b. 81. b. The various forms of this writ of partition may be seen by consulting F. N. B. 256. F. 259. C. 261. B. C. and Reg. Orig. 316, 317. It differed from the common writ *de partitio facienda* in almost every respect. *That* was directed to the sheriff, *this* to the escheator: *that* was returnable in the common pleas, *this* in chancery: *that* was executed with a jury, *this* without: *that* was given for the benefit of the party suing it, *this* grew out of a policy to increase the number of the king's tenants *in capite* for his advantage: the partition in *that* was confirmed by a judgment of the court, on return of the writ, the partition in *this* had no such solemnity added to it; and lastly, the partition on *that* was conclusive on the parties, though infants, and all claiming under them, but the partition on

this was open to subsequent inquiry, and if unequal avoidable by *seire facias* in chancery, or a *partitio facienda* at common law. See Staundf. Prerog. and Fitzh. N. B. in the places before cited, and post. 171. a. & b. See further on the force of such partition in chancery 29 Ass. pl. 3. Bro. Abr. Jurisdiction 114. partition pl. 10. But this species of partition under the writ of livery is no longer in force: for it was a mere incident to livery; and livery being taken away by the 12 Cha. 2. c. 24. as one of the great grievances from tenure *in capite*, all writs of livery of course are, as a very learned writer has forcibly expressed it, *uno statu dispersed*. See mr. serjeant Wynne's observat. on F. N. B. in his Miscellany of Law Tracts, p. 51.

VI. Another kind of partition in chancery unnoticed by Littleton was, where two persons succeeded as co-parcenary heirs to land holden of the king *in capite*, and one of them being within age was in ward to the crown; for then the king's committee of the infant heir might assent to make partition with the other co-parcener, in which case the writ for livery to the co-parcener of full age, recited that with such assent the king had assigned certain estates for the purparty of such co-parcener, and directed the escheator to give livery accordingly. F. N. B. 260. B. This mode of partition in chancery is also at an end from the same cause as the writ of partition and livery.

VII. A new compulsory mode of partition has sprung up, and is now fully established; namely, by decree of chancery exercising its *equitable* jurisdiction on a bill filed praying for a partition: in which case 'tis usual for the court to issue a commission for the purpose to various persons, who proceed without a jury. How far this branch of equitable jurisdiction, so trenching upon the writ of partition, and wresting from a court of common law its ancient exclusive jurisdiction over this subject, might be traced by examining the records of chancery, I know not. But the earliest instance of a bill for partition I observe to be noticed in the printed books is a case of the 40 Eliz. in Tothill's Transact. of Chanc. title *partition*. According to the short report of this case, the court interposed from necessity in respect of the minority of one of the parties, the book expressing that on that account he could not be made party to a writ of partition; which reason seems very inaccurate; for, if lord Coke is right, that writ doth lie against an infant, and he shall not have his age in it, and after judgment he is bound by the partition. See post. 171. b. But probably in lord Coke's time this was a rare and rather unsettled mode of compelling partition; for I observe, in a case in chancery of the 6 Cha. 1. which was referred to the judges on a point of law between two co-parceners, that the judges certified for issuing a *writ of partition* between them, and that the court ordered one accordingly; which, I presume, would scarce have been done if the decree for partition and a commission to make it had then been a current and familiar proceeding with chancery. 1 Cha. Rep. 49. However, it appears by the language of the court in a very important cause, in which the grand question was, whether the lord chancellor here could hold plea of a trust of lands in Ireland, that in the reign of James the Second bills of partition were become common. 1 Vern. 421. 2 Cha. Cas. 189. For other reported cases on bills of partition, see Toth. Transact. tit. *partition*, 1 Cha. Rep. 235. 3 Cha. Rep. 29. 2 Cha. Cas. 214. 237. 2 Vern. 232. 1 P. Wms. 446. 2 P. Wms. 518. As to the forms of a commission of partition, see 1 Prax. Alm. Cur. 3d ed. 93. 94. Clerk's Tutor in Chanc. 3d ed. 360. and 2 Harrison's Chanc. last ed. 396. For cases in which chancery interposes by awarding commissions to ascertain boundaries, which subject in some degree connects with commissions of partition, see Tothill 84. 126. 150. Nels. Ch. Rep. 14. 121. 1 Cha. Rep. 41. 63. 259. Rep. temp.

temp. Finch, 131. 186. 210. Car. Rep. 107. 17. 96. 239. 462. 1 Cha. Cas. 145. 1 Vern. 359. 456. 2 Vern. 38. and 1 Ves. 453. To these add Fitzh. N. B. 133, on the writ *de perambulatione faciendâ*, which being considered may perhaps throw some light on the origin of this branch of equitable jurisdiction; and concerning the modes of *partition* by our law see the cases under that title in Fitzh. Abr. Bro. Abr. and Viner.—Concerning partition by the Roman law, see Fulbeck, in his pallellel of the civil, canon and English Laws, b. 2. p. 57. This neglected but ingenious writer extracts from the Roman law three actions having the like object with our writ of partition. These are the action *de familiâ heriscundâ*, the action *pro socio*, and the action *de communi dividendo*. He applies the first to partition amongst co-heirs, the second to that amongst join-tenants, and the third to that amongst tenants in common; an assimilation in which he is partly followed by lord Stair in respect to the law of Scotland. Stair's Instit. 48. The second and third of these Roman actions are treated of in lib. 10. tit. 2. & 3. of the Digest, tit. 1. of the same book, being upon the action *finium regundorum*, which partly answers to our bill in equity for ascertaining boundaries. It is remarkable also, that Fleta represents the three Roman actions last mentioned as a part of our law. Flet. lib. 5. c. 9. p. 309. See further as to the Roman law about *partition*, 1 Dom. Civ. L. by Strah. 326. For partition according to the French law, see tit. *partage* in their books; and for the like subject in the Scotch law, see concerning the *obligation of division*, *heirs*, *portioners*, *commonities* and *writs of division*, in Stair's Instit. 48. 477. 169. 576. and in Erskine's Instit. 468.

[169. a.]

(3) In 1 Atk. 542. there is a case in equity, in which lord Hardwicke allows of a *parol* agreement for a partition. See infra note 4. and 1 Vern. 472.

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[Note 5.]

(4) Here the eleventh edition of this book has a note questioning whether such *parol* grant would be good now in respect of the 29 Cha. 2. c. 3. and mr. serjeant Hawkins in his Abridgment makes a like question. See supra note 3.

[Note 25.]

[170. a.]

(1) This case of Littleton turns upon the *inequality* of the partition; for, if the parts are equal, it binds notwithstanding infancy. Ant. 166. a. Post. 173. b.

[Note 26.]

(3) In a Coke upon Littleton I have, with MS. notes and references, the annotator is for excluding from such an estoppel as is here stated a partition in *pais*. His note is thus expressed: "If two make partition in *court of record*, when one of them had no right, he thereby shall gain a moiety by estoppel or conclusion. Bro. Nouv. Cas. pl. 306. But "otherwise I conceive of a partition in *pais*; though the book speaketh generally; and upon this difference you shall read a like case in "this booke, fol. 46. a."

[Note 27.]

(4) Acc. Dr. & Stud. dial. 1. c. 19, where *mulier fuisne* sues livery with *bastard eigne*. See Bro. Abr. *entrie congeable* 31. and *discent* 9. But it is said, that this sort of estoppel will not bind in chancery. Cary's Rep. 26. See further 2 Co. 4. b. Cro. Cha. 110. Pollexf. 67. and 3 Com. Dig. 278.

[Note 28.]

[171. a.]

(2) In 1 Atk. 541. there is a case, in which lord chancellor Hardwicke is represented to say, th a partition by agreement between two

[Note 29.]

husbands

husbands will not bind the inheritance of their wives. But, notwithstanding this high authority, I take the doctrine of Littleton and Coke, that such a partition will bind the wives *unless it be unequal*, to be clear law, and for the cogent reason here given by the latter. See acc. F. N. B. 62. F.

[171. b.]

[Note 30.] (2) Acc. 6 Co. 4 b. But there the reason given for an infant's not having his age in partition is different, namely, that *both* co-parceners are in possession. In the Year-Book of 9 H. 6. 6. b. the reason is expressed to be the *prejudice which otherwise there might be to the infant*.

[Note 31.] (5) Not even though a special power is given to him, though it is otherwise with a feme covert. So held by lord chancellor Hardwicke in a case in 1 Ves. 298. and 3 Atk. 695. See Mo. 512. But by the 7 An. c. 17. an infant having a real estate only as a trustee or under a mortgage is enabled to convey under the direction of the court of chancery or the court of exchequer. However, this act is deemed not to extend to trusts merely constructive. 2 P. Wms. 549. 3 P. Wms. 387. Another exception to an infant's not being able to alien land arises from the custom of particular places, as the custom of Kent in respect to gavelkind lands, which may be aliened by an infant on attaining 15. See the late Mr. Robinson's excellent Treatise on Gavelk. 193. and Mo. 512.

[Note 32.] (6) But an infant may before 21 dispose of personal estate by last will, though it is controverted at what age this testamentary power begins to attach in infants. On this point I have heretofore expressed my notions at length. See note 6. of fo. 89. b.

[172. a.]

[Note 33.] (2) Acc. 1 Ro. Abr. 729. pl. 8. Mo. 679. Cro. Eliz. 920. Godb. 219. But lord Coke's words imply, that a single bond, that is, one *without a penalty*, being given for necessities, may be good against an infant; and so it hath been frequently adjudged. See March 145. 1 Ro. Abr. 729. pl. 8. and 1 Lev. 86.

[See *Williamson v. Watts*, 1 *Camph.* 552. and the note subjoined by the Reporter.]

[Note 34.] (8) But now one jointenant or tenant in common may have account against the other as bailiff for receiving more than his share of profits, though there is no appointment of him as bailiff. See 4 An. c. 16. s. 27. See too 1 Leon. 219.

[172. b.]

[Note 35.] (1) Acc. ant. 68. b. and 78. b. See also 128. a.—Another exception is, that he may be sworn as a witness at 14, and *before* if he appears to understand an oath, or rather as it is expressed by lord Hale, hath competent discretion. 11 Mod. 228. 2 Hal. H. P. C. 271.—Also according to lord Hale in some cases of exigence, as in rape, an infant of tender years may be examined without oath.—In 1 Stra. 700. there is a case in which an infant of 7 years was refused. There too the point about examining infants as witnesses is ably argued. The same point was touched upon incidentally in the great case of Omichund and Barker, before lord chancellor Hardwicke, about receiving a Gentoo's evidence; which I more particularly refer to here, because in it lord Hale's doctrine of admitting infants to give evidence in criminal cases *without oath* is said to have been over-ruled at the Old Bailey after mature deliberation, and also by lord Raymond. 1 Atk. 29. See 1 Hal. Hist. P. C.

Lib. 3. Of Parceners by Custome. Sect. 259—265.

C. 302. 634. and 2 Hal. H. P. C. 279. and Lamb. Just. 24. 1602. p. 85.

(4) Acc. F. N. B. 62. M.—Here lord Hale's MS. makes a question, whether such partition be void or voidable, being made by husband, and cites M. 30. 31. Eliz. B. R. Morris and Maule. [Note 36.]

[173. a.]

(3) Lord Coke may be here presumed to mean a *lineal* warranty; because hereafter he allows, and in his time it was the common learning, that *collateral* warranty would bar the issue in tail without recompence. Post. 374. b. [Note 37.]

(4) In a Coke upon Littleton I have with MS. notes, there is the following remark.—“*Quere* of this; for I think the formedon must be brought in the name of the issue and the surviving parcener, and then the parcener to be summoned and severed, and then the issue to make a special count and shew the partition.” [Note 38.]

[173. b.]

(2) This word, which is so uncommon that I cannot find it noticed in any dictionary I have seen, is apparently used for *reckoned*. Lord Coke seems to borrow it from Littleton's use of the word *rette* at the beginning of the Section here commented upon. [Note 39.]

[174. a.]

(1) So it is of an exchange. Hob. 152. Calthrope's reading on lord and copyholder 92. 1 Ro. Abr. 815. [Note 40.]

[175. b.]

(3) But by the 34 and 35 H. 8. gavelkind descent of lands in Wales is expressly taken away, and all lands there are made descendible to the eldest son according to the common law of England. See that statute c. 26. s. 91. and 128. Also in Kent various estates have been made descendible according to the common law by special statutes for this purpose. See Robins. on Gavelk. 75. [Note 41.]

(4) But according to a very accurate writer on *gavelkind* this doctrine must be restrained to the special descent of *gavelkind* and *Borough English* lands, which is considered as the essence of both; and therefore the other customs incident to *gavelkind* and *Borough English* land must be *specialty* pleaded. See Robins. on Gavelk. 41. For this difference several authorities are cited; namely, as to *gavelkind*, a case in Cro. Cha. 562. another in 1 Lev. 79. 1 Sid. 137. and Raym. 76. and a third in 2 Sid. 153. and as to *Borough English*, a case in 1 Salk. 243. I the rather introduce these references because mr. Robinson's treatise is become very scarce. [Note 42.]

(5) This word means *equality*, being derived from the adjective *par*, and made a substantive by the addition of *agium*. Read more concerning the termination of *agium* ant. 86. a. See also as to *disparagatio*, ant. 80. a. [Note 43.]

[176. a.]

(1) The *gavelkind* descent of lands in Ireland was an incident to the custom of *taniistry*, and as such fell to the ground with its principal in consequence of a solemn judgment against the latter in a case of the fifth of James the First. For this case, which is excellently reported by sir John Davis, who was attorney-general in Ireland at the time, see Dav. Rep. 28. But in the reign of queen Anne, the policy of weakening [Note 44.]

ing the Roman Catholic interest in Ireland was the cause of an Irish statute to make the lands of papists descendible according to the gavel-kind custom, unless the heir conformed within a limited time. See Robins. on Gavelk. 17. However now by an Irish statute of the present reign the descent of the lands of papists is again reduced to the course of the common law. Irish St. of 17 & 18 G. 3. c. 49. s. 1.—Lord Coke, from his supposing that the Brehon law of partibility, except as to Bastards, remained in Ireland, seems not to have been aware of the case of tanistry. Indeed, what he writes in this respect was before that case, more applicable to Wales than Ireland: for the statute of Wales cited in the next passage confirms the partible descent of lands there amongst males, with an exception excluding bastards, whereas I doubt whether there is any evidence of confirmation of the Brehon law with such an exception. See ant. 141. a. where lord Coke himself takes notice of a total abolition of the Brehon law.

[176. b.]

[Note 45.] (3) Though *pueri* more commonly means *boys*, yet it is plain that here it comprehends children of both sexes; because afterwards *liberi* is used for the same purpose. The word is used in the same large sense in the writ *de rationabili parte bonorum*; and therefore Fitzherbert observes, that the son and daughter may join in that writ. F. N. B. 122. C. Also this large sense of *pueri* is warranted both by this application of the word in the Roman law, and by its derivation from the Greek word *παῖς*, which is masculine or feminine according to the article before it. To this effect Justinian's Digest, in the title *de verborum significatione*, gives the following extract from the Commentary of the Roman lawyer, Julius Paulus, on his famous predecessor Sabinus. *Pueri appellacione etiam puella significatur: nam et feminas puerperas appellant recentes ex partu; et Græcè παῖδες communitur appellatur.* See Dig. lib. 50. tit. 16. leg. 163. a: d Menag. Jur. Civil. Amœnitates, cap. 39. voce *puerpera*, where that learned French writer expatiates on the etymology of *puer*. I have been induced to give this explanation of the word *puer* by a case in our own law-books, which actually turned upon the question, Whether a *daughter* could take lands under that description. The case arose on a remainder in a settlement made by a man on his first marriage *seniori puero* of the husband and the heirs of his body; and this was decided by two judges against one to entitle a daughter and only child of the first marriage in preference to the son of a second. Dy. 337. b. However there is a much earlier case on the construction of *pueri*, in which it was interpreted to exclude *females*. Hob. 33, and the case there cited from 30 Ass. 47. and 30 E. 3. 27. But now indeed, when legal instruments are so universally expressed in the English tongue, it is not probable that any dispute should arise in our courts of justice about the interpretation of this Latin word.

[Note 46.] (5) The places usually named as those in which the customary division of personalty on a death prevailed, and so in favour of wife and children restrained the testamentary power to a third or a moiety, are these: the province of York, the city of London, and various districts of Wales. But since lord Coke's time several statutes have been made to remove this restraint in each of these different places; and under those statutes the *whole* of the personal estate is now disposeable by last will in them through England and Wales, with this exception however, that there is still no statute affecting either the city of Chester, which is part of the province of York, or such other places not within that

that province, or London or Wales, as may have such a custom; though whether there be any such places, I am uncertain. See for the province of York 4 W. & M. c. 2. and 2 and 3 An. c. 5, for London 11 G. 1. c. 18, and for Wales 7 & 8 W. 3. c. 38. Indeed sir William Blackstone treats the testamentary power over personal estate as now prevailing through *all* England. 2 Blackst. Comm. 9th ed. 493. But if there be no other statutes than those he cites, being the same as are before mentioned, I take this to be a mistake so far at least as regards the city of Chester. The fact is, that both the cities of York and Chester were excepted in the 4 of W. & M. and that the 2 & 3 An. take away the exception as to the city of York only. As too the statutes, which subject the custom of dividing the personal estate of deceased persons to the testamentary power, do not name any places in England, except London, and the province of York, it follows, that the local custom of any other part of England on this subject is not disturbed by any statutory provision. It now only remains to add here, that though the testamentary power is thus extended over the whole personalty, notwithstanding the customs within London or the province of York, or within any part of Wales, yet in the case of an intestancy the customs of those places still operate, there being a special provision to save them and all other peculiar customs in the statute of Cha. 2. for distributing the personal estates of intestates. See 22 & 23 Cha. 2. c. 10. See further as to the statutes about these customs in the latter part of note 9. *infra*.

(5) In Swinburne on Testaments there is a curious dissertation explaining the custom of the province of York in respect to filial portions; and in the course of it, the question, What sort of advancement shall exclude a child, is considered at large. This valuable part of Swinburne is not in the first edition; but was afterwards added by him. It is otherwise as to many additions in the latter editions of his book; these being full of enlargements coming from others, but printed without discriminating them from Swinburne's own work. This manner of treating authors in new editions is ever dissatisfactory and unjustifiable; but in respect to law books, it is peculiarly inconvenient, the weight and authority of these so much depending on the character of the author. To Swinburne on this subject add the title *wills* in dr. Burn's Eccles. Law, in the course of which it is learnedly attempted to give the result of every thing to be met with on the subject in Swinburne's book or elsewhere.

[Note 47.]

(6) Acc. 2 Inst. 33. But in this point some of great respect differ from lord Coke. Fitzherbert in his commentary on the writ *de rationabili parte bonorum* contends, that the distribution, which excludes the testamentary power from one third or one moiety of the personal estate, was in his time the *general* law of the land, and therefore needed not a special custom to support it. He is followed by Swinburne in the same idea, and even by our great modern commentator on the law of England, who cites Finch's law to prove, that the general law was taken to be as represented by Fitzherbert as late as the reign of Charles the First. However mr. justice Blackstone states, that about this period the general law insensibly changed; which amounts to an admission that lord Coke's doctrine of the necessity of a special custom for the *rationabili parte bonorum* became perfectly established within a few years after his advancing it, and that this was so without the aid of any statute. It is observable also, that mr. justice Blackstone considers Bracton and Fleta as clear

[Note 48.]

clear authorities against lord Coke. But mr. Somner, whose very learned and extended discussion of this subject seems to have escaped the author of the Commentaries, though not inclined to an entire agreement with lord Coke, cites various passages of the same ancient authors, from which it appears, that their writings in this respect are contradictory. See in Somn. Gavelk. 91. a dissertation on the question, *Whether the writ DE RATIONABILI PARTE BONORUM, was by the common law, or by custom.* Nor is it a slight testimony of its being settled law in lord Coke's time not to allow of the writ *de rationabili parte bonorum* without a special custom, that mr. Somner, whose book before cited was finished as early as 1647, though not published till the Restoration, observes on the order of partition under this writ, that it was then, and *that not lately*, antiquated and vanished out of use in Kent and other counties, surviving only in the province of York and some few cities.

[Note 49.] (7) What under the custom of the province of York ought to be deemed a reasonable advancement sufficient to bar the right to a filial portion, is largely discoursed upon in Swinburne on Testaments, part. 3. sect. 18. For the cases since Swinburne's time, see Eq. Cas. Abr. 160, 161. 11 Vin. Abr. 198. Burne's Eccles. L. tit. *wills*.

[Note 50.] (8) Mr. Somner writes doubtfully on the preceding doctrine, and makes it questionable, whether the child advanced may not waive his former portion, and elect to take benefit of the customary partition in the way of hotchpot. Somn. Gavelk. 91. By others the doctrine is absolutely denied in another form, by insisting, that the advancement must be equal to the customary share; and that, if the child advanced can prove the advancement to be less, then such child on the terms of throwing the advancement into hotchpot is entitled to the benefit of the customary partition, notwithstanding any declaration of the father to the contrary. Green's Priv. Lond. 52, 53. But in a case before lord chancellor Somers, the mayor and aldermen of London certified the custom in terms not wholly agreeing either with lord Coke or with the differences from him before stated. According to this certificate, though the advancement shall not be equal to the customary share at the father's decease, yet the child so advanced shall be excluded from any further part of the customary estate, unless the father shall by his last will or some other writing signed with his name or mark declare the value of such advancement; in which case the child advanced, bringing the advancement into hotchpot, shall, notwithstanding the father's declaration of having fully advanced the child, have as much more as will make the advancement a full customary share. This certificate was considered by lord Somers as conclusive of the question; and has been since referred to by lord chancellor Hardwicke, as settling the point. See the case of Chase v. Box in 1 L. Raym. 484. & 1 Eq. Cas. Abr. 154, in which latter book this certificate from the city is given at length. See also lord Hardwicke's words in 1 Ves. 16. and those of Fortescue master of the rolls in 3 Atk 45. Being therefore taken as the rule of future decision, the certificate demands particular attention. The result with respect to its operation upon the several ideas, which, as is before stated, have prevailed concerning this point of the custom, may be thus stated.—Mr. Somner's notion, of a *general* right of election in the child advanced to waive his advancement and claim the customary share, seems to fall to the ground; there being no election, except where the father under his hand ascertains the advancement by confessing what its value was, and

ing soascertained it can be proved to be less than what the custom gives.—The opinion, that the advanced child is universally at liberty to prove his customary share greater than the advancement, and so intitle himself to the benefit of the customary partition, seems to fail; because the terms of the certificate appear to admit no other evidence to ascertain what the value of the advancement was, than the father's hand-writing; though it must be confessed, that excluding other evidence is scarce to be satisfactorily accounted for, unless the common reason of the difficulty of taking an account of such advancements shall be deemed a sufficient one.—As to lord Coke's representation of the custom, this also receives some qualification from the beforementioned certificate: for though it leaves him perfectly right, where the father is silent about the advancement, yet it crosses lord Coke's opinion of the effect of the father's declaring the advancement to be in full, and makes such declaration inoperative where the advancement admitted by the father's hand-writing is not *actually* full and adequate.

(9) Here lord Coke extends the putting into hotchpot so as to make it [Note 51.] for the benefit both of the executors in respect of the testamentary third and of the wife for her third part. But Salkeld reports it as the opinion of sir Edward Northey, that the custom requires the advanced share to be brought into hotchpot for the benefit of other children only; and therefore that in case of there being no other child besides the advanced one, such child shall have his full orphan's part without any regard to what has been already received. Salk. 426. See further concerning this custom of London a discourse in justification of it in 2 Stow's Surv. of Lond. Strype's ed. of 1720. first Append. 61. and the statute of 11 G. 1. c. 18. For the cases on the custom and the statute of 11 G. 1. concerning it, see Eq. Cas. Abr. 150. to 160. the title *custom of London* in New Abr. Viner's Abr. and 2 Eq. Cas. Abr. Com. Dig. tit. *guardian* G. 2. and the Contin. in same part, and Burn's Eccl. L. tit. *wills*. Add to these March. 107. Forrest. 130. Barnard. Ch. Rep. 430. 2 Atk. 43, 523. 644. and 3 Atk. 213. 616. See also Flet. l. 2. p. 125.—Note, that though the 11 G. 1. c. 18. enables making a will of the whole personalty notwithstanding the custom, yet this is with the exception of freemen agreeing by writing upon or in consideration of marriage or otherwise to be subject to the custom. In this respect therefore there is a difference in the form of the statute alteration of the custom as to London and the alteration as to Wales and the province of York, the statutes as to these two latter not providing for an agreement to abide by the custom. Perhaps however it may be doubted, whether an *express* provision was necessary to create such an exception; but on this point I do not mean to offer any opinion.

(10) See on the *collation of goods* Dig. Lib. 37. tit. 6. 1 Dom. Civ. [Note 52.] L. by Strah. 687.—The Roman law in respect to the collation of goods deserves the particular attention of the English lawyer; as our statute for distribution of the personal estate of intestates contains a like provision to prevent children advanced in the life-time of the intestate from having double portions, which was apparently borrowed in some degree from the *collatio bonorum*, and may therefore be considerably influenced in the construction by the rules of the Roman law and the doctrine of the civilians on that title. See 22 & 23 Ch. 2. c. 10. s. 5. Forrest. 276. See also for the cases in general on this part of the statute of distribution,

tribution, 11 Vin. Abr. 189. 2 Com. Dig. 145. Continuation of same book 176. and Eq. Cas. Abr. 248.

[180. a.]

[Note 53.] (2) Notwithstanding lord Coke's censure of the text here, it agrees with the print of the two earliest editions, neither the edition by L. and M. nor the Rohan one having any of the words added by lord Coke, except *ent* before *enfeoffe*. But I think that his addition seems requisite to the sense intended to be conveyed by Littleton, as well for the reason assigned by lord Coke, as because otherwise Littleton's description of jointenancy might be construed to exclude an estate in *fee*, which certainly could not be his intention. Probably, therefore, the omission of an estate in fee was an error in the manuscript from which Littleton was first printed. The addition of an estate in fee to Littleton's description of jointenancy was first introduced by Rastell, in his edition of 1534, which I was first led to observe by a note I was favoured with from mr. justice Blackstone.

[180. b.]

[Note 54.] (1) See ant. 169. b. post. 183. b. Hob. 171. and Shephard's Common Assurances 389. In the two latter books, especially in Hobart, there is a variety of curious matter expounding the nature and use of a *scilicet*, and how far it may qualify the *premisses* or *habendum* in a conveyance. See also 1 P. Wms. 18. and the case of a bond to two with a *scilicet* severing the money between them in Dy. 350. Lord Hobart seems to consider the *scilicet* as a sort of *ancillary* clause, which may explain, but cannot operate in absolute contradiction of the *premisses* or *habendum*. In a Coke upon Littleton I have, the learned annotator considers the *scilicet* as less potent than the *habendum*, observing upon the case here stated by lord Coke, that though the *scilicet* cannot sever the joint estate given in the *premisses* and the *habendum*, yet that the *habendum* might so control the *premisses*. He therefore holds, that if the grant of ten pounds had been to *A.* and *B.* *habendum* to *A.* till he be married, and to *B.* till he be advanced to a benefice, there they would be tenants in common. This nice distinction between the *habendum* and the *scilicet* in point of effect I leave to the consideration of the learned reader.

[Note 55.] (2) See post. 186. a.—Lord Coke in his Reports qualifies this by adding *till office found under the great seal.* 5 Co. 52. b. But if the natural-born subject survives the alien, and then the king's title is found by office, shall it by relation to the creation of the jointenancy defeat the subject's title by survivorship? The words of lord Coke, both here and in the fifth report, are ambiguous. His first words here favour the surviving jointenant. But his subsequent introduction of the rule of *nulum tempus occurrit regi*, with the qualification in the fifth report, tends to a different conclusion. Though too lord Coke takes notice of a joint purchase by an alien and a subject, yet there is not enough to solve the difficulty. See post. 288. a. See as to this point of relation in offices finding the king's title, W. Jo. 78. and Nichols's case, Plowd. 481.

[Note 56.] (4) But infants and femes covert are exceptions to this rule; for commandment before, or agreement after, is not sufficient to make them disseisors, but it must be by their actual entry or their own proper act. Post. 357. b. F. N. B. 179. G. 3 H. 4. 17. a. Also in the case of persons of full age, if a disseisin to the use of another be accompanied with a forcible entry, his *subsequent* agreement, though it makes him a disseisor, shall not charge him with the force on the statute of 3 H. 4. actual entry being necessary for that purpose. Ant. 16. a. & b.

(7) Why

(7) Why disseisin of tenant for life makes a fee in the disseisor is thus accounted for by lord Hobart, with his usual peculiarity and energy of phrase. "A grant to *J. S.* and his heirs during the life of *J. D.* is "no fee, but a special occupancy, as is resolved in Chudleigh's case. "But a disseisin of an estate for life by necessity, in law makes a *quasi* fee; because wrong is unlimited, and ravens all that can be gotten, "and is not governed by terms of the estates, because it is not contained "within rules." Hob. 323. [Note 57.]

[181. a.]

(1) Acc. 277. b. To what lord Coke has written on *disseisin by procurement*, a learned annotator, in a Coke upon Littleton I have, adds the following references relative to *procurers of trespass*, namely, 11 H. 7. 6. a. 12 H. 7. 14. a. 21 H. 7. 22. a. 13 H. 7. 13. a. [Note 58.]

[181. b.]

(3) In a former part I have ventured to make a doubt of this, and to contend that the power to sell being given to the executors, *by reason of an office and interest*, which do go to the survivor, may well survive with them. See ant. note 2. to 113. a. [Note 59.]

[182. a.]

(1) And this benefit of survivorship takes place on a lease for years to two, though one of the lessees dies before entry. Ant. 46. b. [Note 60.]

[182. b.]

(2) *Vid. Hil. 35 Eliz. B. R. rot. No. 96. Perkins & Pecke, Dy. 12. 41 E. 3. 21. 21 H. 6. 40. 40 Ass. 45 E. 3. 2.—Hil. 37 Eliz. Dickson v. Marsh B. R. rot. No. 103. Devise to eldest son and another for life. Held that they are jointenants, though the fee descends; but male. Hal. MSS. See as to the latter case Cro. Jam. 260.* [Note 61.]

[183. a.]

(2) But it is otherwise on a *surrender*; for that enures to both jointenants of the reversion. Post. 192. a. See further Perk. sect. 80. [Note 62.]

[184. a.]

(1) Yet in fol. 20. b. lord Coke allows a present estate tail in a case of *double possibility* equal to that here supposed; namely, the case of a gift to the husband of *A.* and the wife of *B.* and the heirs of their bodies. See further on this head Vin. Abr. tit. *possibility*, and Fearné on Conting. Rem. 3d ed. 176. [Note 63.]

[184. b.]

(1) Acc. F. N. B. 204. E. So also such heir shall have a writ of entry in *consimili casu*, where the surviving tenant for life aliens in fee. F. N. B. 207. B. [Note 64.]

(2) See ant. 182. b.—There is a seeming difficulty in this passage. But I conceive lord Coke's meaning to be, that, though for some purposes the estate for life of the jointenant having the fee, is distinct from and unmerged in his greater estate, yet for granting it is not so, but both estates are in that respect consolidated notwithstanding the estate of the other jointenant; and therefore that the fee cannot, in strictness of law, be granted as a remainder *eo nomine*, and as an interest distinct from the estate for life. This explanation is confirmed by a note in a Coke upon Littleton I have, in which it is strongly observed, that "the "two estates, viz. for life and in fee, or rather one knotted estate, are "so confounded together in one person, that he cannot sever them and "make them distinct estates, for he cannot grant the estate for life, re- "serving to himself the fee simple, nor can he grant the fee simple and "reserve [Note 65.]

“reserve the estate for life, but he may pass away all his interest by “feoffment, or he may forfeit all.” See Bro. Nouv. Cas. pl. 115. It also much agrees with the language of lord Coke’s report of Wiscot’s case, especially where he observes, that when an estate is made to three and the heirs of one, *he, who hath the fee, cannot grant over his remainder, and continue in himself an estate for life, for which lord Coke cites 12 E. 4. 2. b. See 3 Co. 61. a.* Besides, if the passage here should be understood to signify, that the jointenant having the fee could not in *any* form pass away the fee subject to the estate of the other jointenant, it would not only be contrary to the power of alienation necessarily incident to a fee simple, but would be inconsistent with lord Coke’s own doctrine in a subsequent part of his commentary. See the case of an estate to father and son and the heirs of the father. Post. 367. b. See also post. Sect. 578. Indeed lord Coke’s position, thus qualified, appears to have a strictness in it, which with some may perhaps render it questionable. However, he seems justified by the words of the year-book, which he cites as his authority; for they are, that, *if two have land to them and the heirs of one, he who hath fee cannot grant the reversion of his companion to another; but, if both alien, all passeth.* See further as to grant of a remainder or reversion by one having a present and previous estate, Sheph. Touchstone 237. and Sheph. Common Assur. 12, 13.

[Note 66.] (6) Yet the husband’s alienation of term itself, or of any part of it, binds the wife surviving. Post. 351. a. The reason of this difference is explained, post. 185. a. It is also well explained in Finch’s L. 98. and in the New Abridgement, tit. *baron et feme* C. 2. See further 1 Vern. 396.

[Note 67.] (3) For this same reason a wife shall not have dower out of lands of which her husband was jointenant. Ant. 37. b. See post. 385. a. a case of warranty depending on the same principle.

[Note 68.] (1) Therefore, in Fitzwilliam’s case, 6 Co. 32. it was argued, that the indulgence of the law, in connecting two times to make one instant time, cannot be extended to *three* times. See post. 298. a. a case in which priority of time in an instant is allowed, for sake of saving the remainder in fee of a rent from the effect of a suspension of the particular estate.

[Note 69.] (3) This same maxim is cited, post. 229. b. and 364. b. In Wingate’s Maxims, 752. there is a variety of cases collected to illustrate the application of this rule. Other rules immediately connected with this are, that *communis error facit jus*, and *res judicata pro veritate habetur*, and also that *minime mutanda sunt quæ certam interpretationem habuerunt*, as to which see post. 365. a. Hob. 147. Wing. Max. 758. and ant. 52. b. in the margin.—In a late ecclesiastical case of great importance, in which bonds of resignation were condemned by the supreme court of appellat jurisdiction, these four maxims appear to me to have included the chief topic of argument in favour of such bonds.

[Note 70.] (6) Acc. more fully 2 Inst. 365. According to F. N. B. 34. the law is the same between coparceners, which agrees with lord Coke’s doctrine about them in 2 Inst. 365. and post. 243. a. See further the case of usurpation of a right of presenting, ant. 149. a. See also the case of atterment to one or two jointenants, post. Sect. 566. Add. 5 Co. 97. b.

(2) Ant.

[187. a.]

(2) Ant. 169, a.—In a Coke upon Littleton I have, there is the following note on the extent of the statutes of 31 and 32 H. 8. “Adjudged by St. John chiefe justice, and Windham and Archer justices, Hillary 1659, in the common bench, in the cause between Major and the lord Coventry, that a tenant by elegit may have a writ of partition by the statute of 32 H. 8. and it is within the meaning thereof.” This is followed with a reference to Cro. Cha. 44. where it is said, that the statute doth not extend to copyholds. [Note 71.]

[188. a.]

(13) See *contra* as to an estate at *common law*, the case of a gift to one and his children, ant. 9, a. The reason of the difference is, that in the case of the *use* the estate is vested and settled in the feoffees till the future use comes in to *esse*. See further as to this difference and the reason of it, 1 Co. 100. b. 101. a. and Dy. 274. b. [Note 72.]

[189. b.]

(3) Here joint words are construed to make several estates in respect of the *several capacities of the donees*. In a former part, *vesting at several times* makes joint words to operate severally. Ant. 88. a. and Mr. Justice Wyndham's case, 5 Co. 7. a. there cited in a note. A few passages further, lord Coke gives an instance of joint words passing two entire things to two grantees, in consequence of the *several quality of the things granted*. Post. 190. the case of a corrody. See further as to the effect from several capacities in the grantees, post. 191. b. and ant. 183. b. near the end. [Note 73.]

[190. a.]

(1) Lord Coke cites no authority for this. But in 8 E. 4. 17. there is a case, which tends to confirm and explain his doctrine as to a corrody's not being grantable to more than one. The case arose on grant of a corrody by Hen. 6. to two, and the longer liver, where one was dead, the question being, whether, during the life of the survivor, this was sufficient to justify the prior of Friswith, on whom the corrody was chargeable, in refusing a new grantee, sent by Edward the fourth. Upon this case NELE serjeant argued for the king, that a *corrody which is for one man cannot be given to two, for two men cannot have the maintenance of one man*; and thence he inferred that the grant to the two was void. But the judges distinguished; for they all said, *that if the corrody be to have certain bread and certain service, this may be granted to twenty men, &c. as to have 20 breads or six gallons of ale, &c. but that a corrody to sit every day in the hall of the prior, and to be served as the men of the prior are, this cannot be granted to many, for every one of them would have as much as one had heretofore, which would not be reason, &c.*—I was carried to this case in the year-book of E. 4. by a reference in Fitzherbert's *Natura Brevium*, which, in the commentary on the writs *de corrodio habendo et de annua pensione*, contains a great variety of learning on this antiquated subject. See F. N. B. 230. F. [Note 74.]

(2) In a former part lord Coke explains the reason of this to be, that no chattel can go in succession, in the case of a sole corporation, no more than a lease for years to one and his heirs can go to heirs. Ant. 46. b. But there are exceptions to this rule. The king is mentioned as one by lord Coke, ant. 90. a. Another is, where there is a special custom, as the care of the chamberlain of London, for orphanage monies. Fulwood's case, 4 Co. 65. a. to which add Arundel's case, Hob. 64. and ant. fo. [Note 75.]

fo. 9. a. note 1. there, 90. a. and the case of a bond to a lay person and an abbot in F. N. B. 120. B.

[190. b.]

[Note 76.]

(4) In a case in the king's bench, during lord Holt's time, the question was, how the surrender of a copyhold to the use of three sons and two daughters, *equally to be divided*, and their *respective* heirs, ought to be construed; and this passage of the Coke upon Littleton was much relied upon, by two of the judges, as an authority to shew, that the words *equally to be divided* imply a *tenancy in common*. But lord Holt, who was for a *jointenancy*, observed, that no such matter appears in the case of 21 E. 4. here cited by lord Coke, in the margin, as his authority, and that he was not positive therein, but only wrote it as his conjecture. 1 P. Wms. 19. in the case of Fisher v. Wigg, which is also reported in Salk. 391. Com. 88. 92. 12 Mod. 296. and 1 L. Raym. 622. In the two latter books and in P. Williams, this case is reported very much at large; and as the arguments on each side are very elaborate, it is an authority fit to be resorted to, wherever the doubt is, whether there shall be a tenancy in common or jointenancy. See also the case of the earl of Anglesea v. Ram, in Dom. Proc. Sept. 1727. Barker v. Gyles, 2 P. Wms. 280. and 3 Brown Parl. Cas. 297. Hall v. Digby and others, 4 Brown Parl. Cas. 224. Hawes v. Hawes, 1 Wils. 165. and Gaskin v. Gaskin, Mich. 18 G. 3. B. R. in mr. Henry Cowper's Reports, just published. In this last case the word *equally* was deemed sufficient to create a tenancy in common in a *will*; and lord Mansfield declared the opinion of the two judges who differed from Holt to be the better and more liberal one; and mr. justice Aston noticed, that *equally to be divided* had been adjudged a *tenancy in common* even in a *deed*. I am happy in having this early opportunity of citing a collection of reports, which promises so much new and useful information to the profession. See further as to the words sufficient to make a tenancy in common, particularly the cases in equity on the subject, 2 Com. Dig. 175. and continuation to the same work 201.

[The End of Mr. Hargrave's Notes.]

IN the concluding paragraph of the preface to the 13th edition of this work, the present editor requested the attention of the public, to the circumstances, under which, he engaged in it. With a renewal of the same request, he now presents the reader with the following *Attempt to complete Mr. Hargrave's Annotation on Feuds*, at the beginning of the Second Book. In doing this, he will endeavour, [Note 77.]

- I. To give a succinct account of the different nations, by whom they were established :
- II. A succinct account of their nature, and particularly of those peculiar marks and qualities, which distinguish them from other laws :
- III. Some account of the principal written documents, which are the sources, from which, the learning respecting them, is derived :
- IV. Some account of the principal events, in the early history of the feuds of foreign countries :
- V. And an historical view of the revolutions of the feud in England.

But as his researches are intended merely by way of supplemental annotation on Littleton, and as the work of that author treats of real property only, his observations will be principally directed, through every branch of his inquiry, to the influence of the feudal law, on that species of property. But this, he means, should be particularly the case, when he treats of the feudal jurisprudence of England. Under that head, he will offer some general observations,

(1st,) On the time, when feuds may be supposed to have been first established in England ; (2dly,) On the fruits and incidents of the feudal tenure ; and, (3dly,) On the feudal polity of this country, with respect to the inheritance and alienation of land : Under this head he will attempt to state the principal points of difference between the Roman, and the feudal jurisprudence, in the articles of heirship. (4thly,) the order of succession ; and, (5thly,) the absolute and unqualified property of the subject of the civil law, and the limited and qualified property of the feudal tenant, in their respective possessions. (6thly,) He will then attempt to shew the means, by which some of the general restraints upon the alienation of real property, introduced by the feud, have been removed ; (7thly,) He will treat of entails. (8thly,) He will endeavour to shew the means by which the restraints created by entails were eluded or removed. Having thus treated of that species of alienation, which, being the act of the party himself, is termed voluntary alienation ; (9thly,) he will afterwards treat of that species of alienation, which, being forced on the party, is termed involuntary. Under this head he will briefly consider the attachment of lands for debt ; first, in regard to its effect upon them, while they continue in the possession of the party himself ; then, in regard to its effect upon them, when in the possession of the heir or devisee ; and afterwards, in regard to the prerogative remedies for the recovery of crown debts. (10thly,) He will then offer some observations on testamentary alienation ; and (11thly,) conclude by a detail of some of the principal circumstances in the history of the decline and fall of the feud in this country.

I. THE

I. THE FEUDAL LAW WAS ESTABLISHED by those nations who overturned the Roman empire. The first of [191. a.] these were the Vandals, the Suevi, and the Alani. They inhabited the countries bordering on the Baltic. About the year 406, they made an irruption into Gaul; from Gaul, they advanced into Spain; about the year 415, they were driven from Spain by the Visigoths, and invaded Africa, where they formed a kingdom. About the year 431, the Franks, the Allemani, and the Burgundians penetrated into Gaul. Of these nations, the Franks became the most powerful; and having either subdued or expelled the others, made themselves masters of the whole of those extensive provinces, which, from them, received the name of France, Pannonia and Illyricum, were conquered by the Huns: Rætia, Noricum, and Vindelicum, by the Ostrogoths; and these were, some time after, conquered by the Franks. In 449, the Saxons invaded Great Britain. The Heruleans marched into Italy, under the command of their king Odoacre, and in 476, overturned the empire of the West. From Italy, in 493, they were expelled by the Ostrogoths. About the year 568, the Lombards issuing from the Mark of Brandenburg, invaded the higher Italy, and founded an empire, called the kingdom of the Lombards. After this, little remained in Europe of the Roman empire, besides the Middle and Inferior Italy. These, on the final division of that empire, between the sons of Theodosius, in 395, had fallen to the share of the emperor of the East, who governed them by an officer called the exarch, whose residence was fixed at Ravenna, and by some subordinate officers, called dukes. In 743, the exarchate of Ravenna, and all the remaining possessions of the emperor in Italy, were conquered by the Lombards. This, as it was the final extinction of the Roman empire in Europe, was the completion, in that quarter of the globe, of those conquests which established the law of the feud.

The nations, by whom these conquests were made, came, it is evident, from different countries, at different periods, spoke different languages, and were under the command of separate leaders; yet they appear to have established, in almost every state, where their polity prevailed, nearly the same system of laws. This system is known by the *appellation of the feudal law*.

II. Sir Henry Spelman, after Cujas, defines a fief to be, "A right which the vassal hath in land, or some immoveable thing of his lord's, to use the same, and take the profits thereof, hereditarily, rendering unto his lord such feudal duties and services, as belong to military tenure; the mere propriety of the soil always remaining to the lord." This definition appears accurate and comprehensive: and an analysis of it may point out those PECULIAR AND CHARACTERISTICK MARKS, WHICH DISTINGUISH THE FEUDAL LAW FROM EVERY OTHER LAW. 1st, Where the soil, and the right to the profits of the soil, meet in the same person, he may be said to have an absolute and unmixed estate in his land. This absolute and unmixed estate, the subject of every kingdom, not governed by the feudal polity, so far as respects the relation between sovereign and subject, appears to possess. But, by the feudal law, with respect to the relation between the sovereign and the subject, the right to the soil, and the right to the profits of the soil, were separate; the tenant being invested with the latter, the sovereign continuing to be intitled to the former. This right to the profits was of the most extensive nature; it gave the tenant, except for the purpose of alienation, the complete power or dominion over the land, during the term of his tenure. Thus his estate and interest, as to the right of ownership, far exceeded that of the usufructuary

fructuary in the civil law, to which it has sometimes been compared, as the usufructuary had a mere right to the ordinary profits of the usufruct, and was not permitted to make any change in it, even for its amelioration. It approached nearer to the estate of the *emphyteuta*, in the same law, as the *Dominium directum* was absolutely vested in him. It approached, perhaps, still nearer to the estate of a *cestuy que trust* in our law, which has been termed a feudal idea, grafted on Roman jurisprudence. The precise nature of it, is no where, perhaps, better explained than in lord Stair's Institutes. "It is," says his lordship, "essential to a fee, and common to all kinds thereof, that there must remain a right in the superior, which is called *Dominium directum*, and without all a right in the vassal, called *Dominium utile*: the reason of this distinction, and terms thereof, is, because it can hardly be determined, that the right of property is either in the superior or vassal alone, so that the other should only have a servitude upon it; though some have thought superiority but a servitude, to wit, the perpetual use and fruit; yet the conciliation and satisfaction of both, have been well found out in this distinction, whereby neither's interest is called a servitude; but by the resemblance of this distinction in law between *jura et actiones directæ*, and those, which for resemblance, were reductive thereto, and therefore called *utiles*, the superior's right is called *Dominium directum*, and the vassal's *Dominium utile*, and without these the right cannot consist." This right in the vassal to the use and profits of the land, while the direct dominion of the land remained in the lord, was, with respect to the relation between the sovereign and the subject, a new and original point of connexion, and one of those marks which distinguish the feudal, from every other law.—

2. Another of these marks, is, that, immoveable or real property only, was admitted to be held in feudality, or in other words, to be the substance of a fief. Wherever the conquerors, we speak of, established themselves, they seized, whatever they desired of the property of the conquered, and the general allotted it to the superior officers of the army, and these again divided it, in smaller parcels, among the inferior officers. The moveable, as well as the immoveable, property of the conquered, was seized and divided by the conquerors; but moveable property, from its fluctuating and perishable nature, was ill calculated to serve, either as the sign, or the subject, of a permanent connexion. This was particularly the case in those days, when it had in no point of view acquired, or was considered susceptible of, those artificial modifications, or other durable qualities, in the intendment of law, which it now possesses. Land, therefore, or immoveable property, alone, became the subject of feudal tenure. As the notions of men respecting property increased, the modifications of it were also multiplied, and all of them were considered as susceptible of feudality. Thus every species of right or servitude, to which land is subject, was given in fee. At an early period of the feudal law, we find mention of fiefs *de camera* and *cavena*. The former was a pension granted by the lord to be paid out of his treasury; the latter was a quantity of corn, or other grain, granted by the lord, to be delivered out of his granary. In progress of time, money charged upon land was, in some countries, held to be feudal; and even mere money was, at last, in some countries, held by the feudal obligation, and treated as a fief. Whether money thus held, be, strictly speaking, a fief, has been the subject of much discussion. Thomasius, whose writings, in the course of this enquiry, have been found highly valuable, treats a pecuniary feud as a chimera, and seems inclined to doubt its existence. Sir Thomas Craig thus expresses himself, on this question.

question. "The *dominium directum* of a fief must necessarily remain in the lord; the *dominium utile*, must necessarily be granted to the feudatory. When the *dominium utile* of a moveable is granted, the profits of it must necessarily belong to the usufructuary. But the profits of a moveable proceed from the use which is made of it. Now the use which is made of a moveable, either consumes it or not. In the first case, the fief is necessarily extinguished; for it is impossible that a moveable in continual use, should not, by that very use of it, be consumed, and the lord thereby deprived of it, without any fault on his part, against his will, and even without his knowledge. But if the moveable be not consumed by use, but may be preserved, the vassal has no profit from it. I know many writers of great authority hold, that there may be a fief of moveables, by way of analogy to an usufruct of those things, which are consumed by use, where the fruit and the profits belong to the vassal, the propriety remains with the lord. But in this case, the propriety, (to use the expression) is not of the individual thing, but of a thing of the same genus or species. And therefore Cujas justly observes, that, properly speaking, these are not fiefs. For natural reason cannot be altered by civil power. We are therefore of opinion, that there cannot be a fief, though there may be a *quasi* fief of a moveable. But even a *quasi* fief is not allowed by the law of Scotland. For though stipulations are frequent amongst us, that, for the use of money, a certain yearly sum, or a certain quantity of grain be allowed; yet this should not be honored with the name of fief, as he to whom the payment is to be made, can never be said to die seized of the fee of that money." But at the first establishment of fiefs, land or immoveable property, in the narrowest sense of that word, was the subject of a fief. That this species of property, to the utter exclusion of every species of moveables, should be a point of connexion between the sovereign and the subject, is another distinctive mark of feudality. To this it is owing, that while in this country, and in every other country whose jurisprudence is of a feudal extraction, the difference between real and personal, or immoveable and moveable property, is so strongly marked, and the legal qualities and incidents of the two species of property, are, in so many important consequences, utterly dissimilar, the distinction between them in the civil law, except in the term of prescription, is seldom discoverable.—

3. The remaining point of difference between the feudal polity and the polity of other states is, the nature of the relation between the chief and the vassals. This is particularly distinguishable by six circumstances: 1stly, The relation between them was purely of a military nature; 2dly, Behind the sovereign and his immediate feudatories, there followed a numerous train of arrere vassals, or sub-feudatories, between whom and the first or immediate feudatory, there subsisted a relation nearly similar to that between him and the first or chief lord; 3dly, This relation was territorial, and was not considered to arise from the general allegiance due from a subject to a sovereign, but from an implied obligation supposed to be annexed to the tenure of the fee; 4thly, The right of administering justice was an appendage of this military relation, and originally commensurate to it in its territorial extent; 5thly, The lord was not allowed to alien the fee without his tenant's consent, nor the tenant, without the consent of his lord; and 6thly, Though in point of dignity, of rank, and of honor, the lord, according to the ideas of those times, enjoyed a splendid pre-eminence over his vassals, his power over them was, comparatively speaking, extremely small. Thus, therefore, the supposed preservation of the *dominium directum*,

or real ownership, to the lord, after he had parted with the beneficial ownership, or *dominium utile*, to the tenant; the exclusion of moveable property, from serving either as the sign or the subject of the relation between the sovereign and the feudatory; and the military nature of this relation, including in it the other circumstances before noticed, should be considered as three principal points which distinguish the law of feuds from every other law. To these the book of fiefs, and Cujas, and after them, sir Henry Spelman, add the hereditary nature of fiefs; and it is observable, that Littleton in his explanation of the word *fee*, says, it is the same as inheritance, without adverting to any other quality of a fief. But, as fiefs were not allowed to go in a course of descent, till after a considerable period of time, from their first introduction, and, as they might always be granted for a less estate, than an estate of inheritance, there seems to be no reason to suppose this descendible quality is essential to their nature. We have therefore omitted it.

Besides these, (which may be considered as the *essentials* of a fee,) there are qualities, which every fee should possess, to answer the notions originally entertained of this species of property. Thus, fiefs should be granted without price; to persons duly qualified; and the services should not be fixed to any particular mode or time of service. A fief possessing the essential and secondary qualities, we have noticed, was considered to be a *proper* fief. The absence of any of the qualities, reckoned essential, necessarily precluded the feudal tenure. But any, or all of the qualities reckoned merely proper, might be dispensed with, at the discretion of the parties, without precluding the tenure, according to the maxim, *Modus et conventio vincunt legem*. This introduced the distinction between proper and improper fiefs. But, wherever the feudal tenure was admitted, the fief was presumed to be a proper fief, till the contrary was shewn, and it could only be shewn by referring to the original investiture. Thence the maxim, in these cases, *Tenor investitura est inspiciendus*.

III. With respect to the PRINCIPAL WRITTEN DOCUMENTS, WHICH ARE THE SOURCES, FROM WHICH THE LEARNING OF FOREIGN FEUDS IS DERIVED: These may be divided into CODES OF LAWS, CAPITULARIES, AND COLLECTIONS OF CUSTOMS. It was long after the first revival of letters in Europe, that, the learned engaged in the study of the laws or antiquities of modern nations. When their curiosity was first directed to them, the barbarous style in which they are written, and the rough and inartificial state of manners they represent, were so shocking to their classical prejudices, that they appear to have turned from them, with disgust and contempt. In time, however, they became sensible of their importance. They were led to the study of them, by those treatises on the feudal laws, which are generally printed at the end of the Justinianean collection. These are of Lombard extraction. This naturally gave rise to the opinion, that, fiefs appeared first in Italy, and were introduced there, by the Lombards. From Italy, the study of jurisprudence was imported into Germany: this opinion accompanied it there. At first it appears to have universally prevailed. But, when a more extensive knowledge of the antiquities of the German nations was obtained, there appeared reason to call it in question. Many thought the claims of other nations, to the honor of having introduced the feudal polity, were better founded. Some ascribed them to the Franks; others, denying the exclusive claim of any nation in particular, ascribed them to the German tribes in general; and asserted, that the outline of the law of feuds is clearly discoverable in the habits,

habits, manners, and laws of those nations, whilst still inhabitants of the Hercynian wood. The *time* when feuds [191. a.] first made their appearance, has equally been a subject of controversy. The *word* itself is not to be found in any public document, of acknowledged authenticity, before the 11th century.

The most antient, and one of the most important *CODES OF LAW*, in use among the feudal nations, is the *Salic law*. It is thought to derive its appellation from the Salians, who inhabited the country from the Leser to the Carbonarian wood, in the confines of Brabant and Hainault. It was written, probably in the Latin language, about the beginning of the 5th century, by Wesogastus, Bodogastus, Salogastus, and Windogastus, the chiefs of the nation. It received considerable additions from Clovis, Childebert, Clotaire, Charlemagne, and Lewis the Debonnaire. There are two editions of it. These differ so considerably, that they have been treated as distinct codes. The Franks who occupied the country upon the Rhine, the Meuse and the Scheldt, were known by the name of the Ripuarians, and were governed by a collection of laws, which, from them, was called the *Ripuarian law*. These laws seem to have been first promulgated by Theodoric, and to have been augmented by Dagobert. The punishments inflicted by the Ripuarian law, are more severe than the punishments inflicted by the Salic; and the Ripuarian law mentions the trial by judgment of God, and by duel. Theodoric also appears to have first promulgated the law of the *Alemanni*. The law of the *Burgundians* is supposed to have been promulgated about the beginning of the 5th century; that nation occupied the country which extends itself from Alsace to the Mediterranean, between the Rhone and the Alps. This was the most flourishing of the Gallic provinces invaded by the Germans; they established themselves in it, with the consent of the emperor Honorius. An alliance subsisted, for a considerable time, between them and the Romans; and some parts of their law appear to be taken from the Roman law. One of the most antient of the German codes is that, by which the *Angliones* and the *Werini* were governed. The territories of these nations were contiguous to those of the Saxons; and the Angliones are generally supposed to be the nation, known in our history by the name of the Angles. A considerable portion of the law of the *Saxons* has reached us. The *Goths* also had their laws, which were promulgated by the Ostrogoths, in Italy; by the Visigoths, in Spain. The Goths were dispossessed of their conquests in Italy by the Lombards. No ancient code of law is more famous than the *law of the Lombards*; none discovers more evident traces of the feudal polity. It survived the destruction of that empire by Charlemagne, and is said to be in force, even now, in some cities of Italy. These were the principal laws, which the foreign nations, from whom the modern governments of Europe date their origin, first established, in those countries, in which they formed their respective settlements. Some degree of analogy may be discovered between them, and the general customs, which, from the accounts of Cæsar and Tacitus, we learn to have prevailed among them, in their supposed aboriginal state. A considerable part also of them is evidently borrowed from the Roman law, by which, in this instance, we must understand the Theodosian code. This was the more natural, as, notwithstanding the publication of the Ripuarian and Salic codes, the Roman subjects in Gaul, were indulged in the free use of the Theodosian laws, especially in the cases of marriage, inheritance, and other important transactions of private life. In their establishments of magistrates and civil tribunals, an imitation of the Roman polity is discoverable among the Franks; and,

and, for a considerable time after their first conquests, frequent instances are to be found, in their history, of a deference, and in some instances even of an acknowledgment of territorial submission, to the emperors of Rome.

In the course of time, all these laws were, in some measure at least, superseded by the *CAPITULARIES*. The word capitulary is generic, and denotes every kind of literary composition divided into chapters. Laws of this description appear to have been promulgated by Childebert, Clotaire, Carloman, and Pepin. But no sovereign seems to have promulgated so many of them, as Charlemagne. That monarch appears to have wished to effect, in a certain degree, an uniformity of law throughout his extensive dominions. With this view, it is supposed, he added many laws, divided into short chapters or heads, to the existing codes, sometimes to explain, sometimes to amend, and sometimes to reconcile or remove the difference between them. They were generally promulgated in public assemblies, composed of the sovereign and the chief men of the nation, as well ecclesiastics as secular. They regulated, equally, the spiritual and the temporal administration of the kingdom. The execution of them was intrusted to the bishops, the counts, and the *missi regii*. Many copies of them were made, one of which was generally preserved in the royal archives. The authority of the capitularies was very extensive; it prevailed in every kingdom, under the dominion of the Franks, and was submitted to, in many parts of Italy and Germany. The earliest collection of the capitularies, is that of Angese, abbot of Fontenelles. It was adopted by Lewis the Debonnaire and Charles the Bald, and was publicly approved of in many councils of France and Germany. But, as Angese had omitted many capitularies in his collection, Benedict the Levite, that is, the deacon of the church of Mentz, added three books to them. Each of these collections was considered to be authentic, and, of course, appealed to as law. There have been subsequent additions made to them. The best edition is that of Baluze in 1677. A splendid republication of this edition was begun by monsieur de Chiniac in 1780; he intended to comprise it in four volumes. Two only, have yet made their appearance. In the collections of antient laws, the capitularies are generally followed by the *formularia*, or forms of forensic proceedings and legal instruments. Of these, the formulare of Marculphus is the most curious. The formularia generally close the collections of antient laws. With the Merovingian race, the Salic, Burgundian, and Visigothic laws expired. The capitularies remained in force, in Italy, longer than in Germany; and in France, longer than in Italy. The incursions of the Normans, the intestine confusion and weakness of government under the successors of Charlemagne, and, above all, the publication of the decretum of Gratian, which totally superseded them in all religious concerns, put an end to their authority in France.

They were, in some measure, succeeded by the *CUSTOMARY LAW*. It is not to be supposed, that, the codes of law, of which we have been speaking, entirely abrogated the usages or customs of the countries, in which they were promulgated. Those laws only were abrogated by them, which were contrary to the regulations they established. In other respects, the codes not only permitted, but, in some instances, expressly directed, that, the antient usages should remain in force. Thus, in all the countries governed by the antient codes, there existed, at the same time, a written body of law, sanctioned by public authority, and usages or customs, admitted to be of public authority, by which those cases were governed, for which the written body of law contained no provision. Af-
ter

ter the antient codes and capitularies fell into desuetude, these customs multiplied. By degrees, written collections were made [191. a.] of them. Some of these were made by public authority; others were the collections of individuals, and depended therefore, for their weight, on the private authority of the individuals, by whom they were made, and the authority, which they insensibly obtained, in the courts of justice. Collections of this nature, committed to writing by public authority, form a considerable part of the law of France, and are a striking feature of the jurisprudence of that kingdom. The origin of them may be traced to the beginning of the Capetian race. The monarchs of that line, in the charters, by which they granted fiefs, prescribed the terms, upon which they were to be held. These they often abridged, enlarged, and explained, by subsequent charters. They also published charters of a more extensive nature. Some of these contained regulations for the possessions of their own domain; others contained general regulations for the kingdom at large. In imitation of these, the great vassals of the crown granted their charters, for the regulation of the possessions held of them. In the same manner, when allodial land was changed to feudal, charters were granted for the regulations of the fiefs; and, when villeins were enfranchised, possessions were generally given them, and charters were granted to regulate their possessions. Thus each seignory had its particular usages. Such was their diversity, that, throughout the whole kingdom, there could hardly be found two seignories, which were governed, in every point by the same law. With a view more to ascertain, than to produce an uniformity in, these usages, though the latter of these objects was not quite neglected, Charles the Seventh and his successors, caused to be reduced to writing, the different local customs, which prevailed throughout the kingdom. In 1453, some time after Charles the Seventh had expelled the English from France, he published an ordonnance, by which he directed, that, all the customs and usages, should be committed to writing, and verified by the practitioners of each place, then examined and sanctioned by the great council and parliament: and that the customs, thus sanctioned, and those only should have the force of laws. Such were the obstacles in the way of this measure, that, forty-two years elapsed before the customs of any one place were verified. From that time, the measure lingered, till the reign of Lewis the Twelfth; it was then resumed. About the year 1609, it was completed. The customs of Paris, Orleans, Normandy, and some other places, were afterwards reformed. Those of Artois and Saint Omer were reformed within the last hundred years. The manner of proceeding, both in reducing the customs, and reforming them, was, generally speaking, as follows. The king, by his letters patent, ordered an assembly of the three states of each province. When this assembly met, it directed the royal judges, greffiers, maires and syndics to prepare memoirs of all the customs, usages, and forms of practice, they had seen in use, from of old. On receiving these memoirs, the states chose a certain number of notables, and referred the memoirs to them, with directions to put them in order, and to frame a cahier, or short minute of their contents. This was read at the assembly of the states, and it was there considered, whether the customs were such, as they were stated to be, in the cahier. At each article, any deputy of the states was at liberty to mention such observations as occurred to him. The articles were then adopted, rejected, or modified, at the pleasure of the assembly. They were then taken to parliament and registered. The customs of each place, thus reduced to writing and sanctioned, were called the *coutumier* of that place. These coutumiers

miers were formed into one collection, called the *Coutumier de France*, or the *Grand Coutumier*. The best edition of this, is by Richebourgh, in four volumes in folio. It contains near one hundred collections of the customs of provinces, and two hundred collections of the customs of cities, towns or villages. Each coutumier has been the subject of a commentary. Five and twenty commentaries have appeared, (some of them voluminous,) on the coutumier of Paris alone. Of these commentaries, that of Doumolin has the greatest celebrity. *Les Etablissements de St. Louis*, hold a high rank, for the wisdom, with which they are written, and the curious matter they contain. The *Coutumier de Normandie*, for its high antiquity, and the relation it bears to the feudal jurisprudence of England, is particularly interesting to an English reader. Basnage's edition, and his learned commentary upon it, are well known. But the most curious of all collections of feudal law, is that entitled, *Assizes de Jerusalem*. In 1099, the object of the first crusade, was effected by the conquest of Jerusalem. Godfrey de Bouillon, who was elected king of Jerusalem, but refused the title, called an assembly of the states of his new kingdom. The patriarch, the chief lords, their vassals, and the arrere vassals attended. With general consent, the collection in question was framed, under the title of "*Les Loix, Statuts & Coutumes, accordées au Royaume de Jerusalem, par Godefroi de Bouillon, l'an 1099; par l'avis du Patriarche et des Barons.*" As this collection was made at a general assembly of feudal lords, it may naturally be supposed to contain, some of the wisest and most striking rules, by which, the feudal polity of Europe was then regulated. But, as the principal personages, who engaged in that crusade, came from France, it may be considered, as particularly descriptive of the laws and usages of that country. Such are the principal sources of the feudal jurisprudence of the kingdom of France. It remains to take notice of some of the chief compilations by which the feudal polity of other kingdoms, is regulated. The authority, or at least the influence, which the capitularies, had on these, has been already noticed. After these, the attention is naturally directed to that collection, which, probably in the reign of Frederick the second, Hugolinus, a Bononian lawyer, compiled from the writings of Obertus of Otto and Gerhardus Niger, and from the various customary laws, then prevailing in Italy, and added under the title, *Decima Collatio, to the Novels*. It is to be found in most editions of the *Corpus Juris Civilis*. In the edition of Cujas it is divided into five books; the first contains the treaties of Gerhardus Niger; the second and third, those of Obertus of Otto; the fourth is a selection from various authors; the fifth is a collection of constitutions of different emperors respecting feuds. To these is added the Golden Bull of the emperor Charles the fourth. Authors are by no means agreed, either in the order, or division, of this collection. Several editions have been published of it. In that published by Joannes Calvinus or Calvus at Franckfort, in 1611, there is a collection of every passage, in the canon law, that seems to relate to the law of feuds. As this edition is scarce, and it may happen, that, some English reader may be desirous of seeing all these passages, the following short account of Calvinus or Calvus's selection of them, is transcribed from Hoffman's, *Dissertatio de Unico Juris feudalis Longobardici Libro. — Jurisprudentiam feudalem, sex libris comprehensam, sive potius consuetudines feudorum, secundum distributionem Cujacianum, edidit, et sub titulo libri feudorum VI. addidit quidquid alicujus de hac materia momenti, in universo corpore juris canonici expressum invenerat; hoc est totum titulum decretalium Gregorii IX. sive capitula,*

Insinuatione

Insiuatione 1. *Et ex parte tua*, 2. *X. de feudis, horro cap. ceterum*, 5 *et novit*, 13 *de Judiciis, cap. Quæ in Ecclesia-* [191. a.]
rium, 7 *de Constitutionibus, cap. Ad aures*, 10 *In quibusdam*, 12 *et Gravem*, 13 *De Panis, cap. Gravem*, 53 *de Sent. excomm. cap. Ex tranmissa*, 6 *et verum*, 7 *de foro competente eorumque summaria*. The next treatise to be mentioned is, the Treatise de Beneficiis, generally cited under the appellation of *Auctor vetus de Beneficiis*. It was first published by Thomasius at Hale 1708, with a dissertation on its author, and the time when it was written. He considers it to be certain, that, it was written after the year 800, and before the year 1250, and conjectures, that, it was not written before the emperor Otho, and that, it was written, before the emperor Conrad the Second. To these must be added the *Jus Feudale Saxonicum*; which seems to be a part of, or an appendix to, a treatise of great celebrity in Germany, intitled the *Speculum Saxonicum*. The *Jus Feudale Saxonicum*, is said by Struvius, to have been translated, by Goldastus, from the German, into the Latin language, for the benefit of the Poles. It is supposed to have been published, between the year 1215, and the year 1250. The *Speculum Suevicum* seems to have been composed, in imitation of the *Speculum Saxonicum*, probably, between the year 1250, and the year 1400. To this is added the *Jus Feudale Allemanicum*, composed about the same time, and probably by the same author. But none of these collections acquired the same authority, as the books of the fiefs. They were known by the name of the Lombard law. By degrees they were admitted, as authority by most of the courts, and taught in most of the academies of Italy and Germany. Like the civil and canon law, they became the subject of innumerable glosses. Those of Columbinus were so much esteemed, that, no one, it is said, ventured to publish any after him. About the end of the 13th century, James of Ardezene published a new edition of the Gloss of Columbinus, and added, under the title of *Capitula Extraordinaria*, a collection of adjudged cases, on feudal matters. This was inserted in some of the latter editions of the *Corpus Juris*. About the year 1430, Mincuccius de Prato veteri, a Bononian lawyer, by orders of the emperor Sigismond, gave a new edition of the Books of the Fiefs, with the Gloss of Columbinus. These were confirmed by the emperor Sigismond, and afterwards by the emperor Frederick the 3d, and publicly taught in the university of Bononia. Such are the principal sources of the feudal jurisprudence of foreign countries.

IV. THE EARLY HISTORY OF THE FEUDS OF FOREIGN COUNTRIES is involved in a considerable degree of obscurity. That in the time of Pepin the feudal polity arrived at a degree of maturity and consistence, is certain. It must, therefore, have previously had, its rise and progress. Some vestiges of these are discoverable in the scanty materials which have reached us, of the history and antiquities of those early times. We find mention in them of the leuds,—of lands entrusted (commendati) by the king to his followers—of estates, which, on account of the infidelity, or the cowardice of the proprietary, or his placing himself under another lord, the king takes from him, and restores to the fisc. There is also mention of the pares comitum, and the fideles, and of reinvesting the leudes, who had been unjustly deprived of their possessions. At first kings alone granted fiefs. They granted them to laymen only, not to ecclesiastics; and to such only who were free, and probably to the most important only of their followers. They were not granted, for any certain, or determinate period of time; they were not transmissible to the descendants of the grantee; they were resumable

able on the bad conduct of the vassal, without the sovereign's being obliged to show the cause of the resumption, or having recourse to any judicial process. The vassal had no power to alienate them. Every freeman was subject to the obligation of military duty; this was the case, in a more particular manner, of the feudal tenants; they were to attend the sovereign on horseback, and in complete armour, that is, with the breast-plate, the shield, the spear, the helmet, and the sword. They were to guard his life, member, mind and right honour. They were first called *homines*, *fideles*, *leudes*, *antrustiones*; to all these the appellation of *vassals* succeeded. It appears, that, in early times, the feudal tenants were numerous. A considerable part, however, of the subjects were free from the feudal tenure. The lands held by these, were called allodial. The proprietors of them, were under the general obligation of military service, and were subject to general taxation. Their particular nature was chiefly discernible in this, that they differed from the villeins, as they were freemen; and from the feudal tenants, as their possessions were from the first hereditary. For, originally, the crown itself was, not in the sense, in which we now use the word, hereditary. A marked preference was always shewn, both by the sovereign and the nation, to the royal lineage. But by each, the strict line of hereditary descent, was occasionally interrupted, by calling to the throne a remote relation, to the prejudice of the actual heir. The government was monarchical; but strongly controlled by the people. Twice a year, the people, or as they were afterwards called, the *states*, assembled. The first of these general assemblies, was held originally in the month of March, afterwards in the month of May; and always in open air. Hence, from the time of meeting, the expression *le champ de Mars*, afterwards *le champ de Mai*. The second assembly was held in the autumn. It was divided into two classes. The first comprized the bishops, the abbots, the dukes, the counts, and the elders of the nation; and all of them had deliberative voices in the assembly. The second contained the magistrates, and the inferior officers; but these attended only to receive the orders of the assembly. The king proposed the subjects of debate, by his referendary; the members of the first class deliberated upon them; the king pronounced the decision. The acts were reduced to writing, under the name of capitularies, and the execution of them was entrusted to the members of the second class. The governors of provinces were called dukes; the counts were subordinate to them, and administered justice, in the districts committed to their care. The *missi regii* were commissaries appointed by the king, to attend to the general administration of justice, throughout the nation. Next to the counts were the barons, or the chief land owners; then followed the general body of freemen; after these came the artisans, the labourers, and the villeins. The general administration of affairs, was entrusted to the almoner, who was at the head of the clergy. The referendary and chancellor were the chief counsellors of state: then followed the chamberlain, the count of the palace, the high steward, the butler, the constable, the marshal, the four first huntsmen, and the grand falconer. Such appears to be the general outline of the feudal government, during the Carlovingian line. That line was extinguished, in France, by the accession of the Capetian line, in Germany, by the accession of the house of Saxony, and in Italy by the usurpation of the dukes. Soon after, or perhaps some time before this event, fiefs became hereditary. Even the offices of duke, count and margrave, and the other high offices of the crown, were transmitted in the course of hereditary descent: and not long after, the right of primogeniture was universally

versally established. It first took place, in the descent of the crown, but was soon admitted by every branch of the [191. a.] feud. This stability of possession was an immense addition to the power of the crown vassals. It enabled them to establish an independency of the crown. They usurped the sovereign property of the land, with civil and military authority over the inhabitants. The possessions, thus usurped, they granted out to their immediate tenants, and these granted them over to others, in like manner. By this means, though they always professed to hold their fiefs from the crown, they were in fact absolutely independent of it. They assumed, in their territories, every royal prerogative: they promulgated laws; they exercised the power of life and death; they coined money; fixed the standard of weights and measures; granted safeguards; entertained a military force; and imposed taxes, with every other right supposed to be annexed to royalty. In their titles, they styled themselves dukes, &c. "by the grace of God," a prerogative avowedly confined to sovereign power. It was even admitted, that, if the king refused to do the lord justice, the lord might make war against him. In the ordonnances of St. Lewis, ch 50. is this remarkable passage: "If the lord says to his liege tenant, Come with me, I am going to make war against my sovereign, who has refused me the justice of his court: upon this, the liegeman should answer in this manner to the lord: I would willingly go to the king to know the truth of what you say, that he has denied you his court. And then he shall go to the king, saying to him in this manner: Sir, the lord in whose legiance and fealty I am, has told me you have refused the justice of your court; and upon this I am come expressly to your majesty, to know if it is so; for my lord has summoned me to go to war with you. And thereupon, if the king answers, that he will do no judgment in his court, the man shall return immediately to his lord, and his lord shall equip him and fit him out, at his own expence; and if he will not go with him, he shall lose his fief by right. But if the king answers, that he will hear him, and do justice to the lord, the man shall return to him, and shall say: Sir, the king has said to me, that he will willingly do you justice in his court. Upon which, if the lord says, I never will enter into the king's court, come, therefore, with me, according to the summons I have sent you; then the man shall say, I will not go with you; and he shall not lose his fief for his not going." This shews how powerful and absolute the great vassals were. The same motive which induced the vassals of the crown to attempt to make themselves independent of the crown, induced their tenants to make themselves independent of them. This introduced an ulterior state of vassallage. The king was called the *Sovereign Lord*; his immediate vassal was called the *Suzereign*; and the tenants holding of him were called the *arrere* vassals. Between these and the sovereign, the connexion was very small. In those reigns even, when the power of the monarch was greatest, his authority over the *arrere* vassals was faint and indirect. Of this the history of Joinville presents a striking instance: Previously to the departure of St. Lewis on the crusade, he summoned an assembly of his barons to attend him, and required them to swear, that, on the event of his decease during the expedition, they would be loyal and true to his son. Joinville, his historian, a feudatory of the count of Champagne, though he possessed a most enthusiastic veneration for the king, and the warmest attachment to his person, refused, on account of his vassallage to the count, to take the oath; his words are, "*Il le me demanda, mais je ne.vox faire point de serement, car je n'estoie pas son home.*" The consequence was, that

that in every kingdom there were as many sovereigns, with the power and ensigns of royalty, as there were powerful vassals. With respect to *France*, Hugh Capet acquired the crown of that kingdom, by availing himself of the extreme weakness to which it was reduced by the system of subinfeudation. After he acquired the throne, he used his utmost efforts to restore it to its ancient splendor and strength. His successors pursued his views with undeviating attention and policy; and with so much success, that, previously to the accession of Lewis the 13th, the seventy-two great fiefs of France were united to the crown, and all their feudal lords attended, at the states general in 1614, the last that were held, till the late memorable assembly of them in 1789. This system of reunion was completed by the accession of the provinces of *Lorraine* and *Bar* to the crown of France, in 1735. See *Abregé Chronologique de Grands Fiefs de la Couronne de France*. Paris 1729. Like France, *Spain* was broken into as many principalities as it contained barons. In the course of time, they were all absorbed in the more powerful kingdoms of *Arragon* and *Castile*; and, by the marriage of *Ferdinand*, the sovereign of *Arragon*, with *Isabella*, the sovereign of *Castile*, they were all united to descend in the same line. No such re-union took place in the empire. Under the immediate successors of *Charlemagne*, it was broken into innumerable principalities, never to be reunited. If we allow for the difference of public and private manners, it presents the same spectacle at this day, as the other states of Europe presented formerly, but, which is now peculiar to itself—a complex association of principalities more or less powerful, and more or less connected with a nominal sovereignty in the emperor, as its supreme feudal chief. In *England* no such dismemberment as that we have been speaking of, took place; nor did the nobles ever acquire, in *England*, that sovereign, or even independent power, which they acquired in *Spain*, *Germany*, or *France*. The power and influence of some of the English nobles were certainly great, and sometimes overshadowed royalty itself. But, it is evident that *Nevil*, the great earl of *Warwick*, and the nobles of the house of *Percy*, the greatest subjects ever known in the country, were, in strength, dignity, power, and influence, and in every other point of view, greatly inferior to the dukes of *Brittany* or *Burgundy*, or the counts of *Flanders*. The nature of this note neither requires nor allows, a further deduction of the public history of the feuds of Europe: the four circumstances we have mentioned,—the heirship of fiefs, the right of primogeniture, the intermediate sovereignty of the crown vassals, and the introduction of subinfeudation, completed the triumph of the feud over monarchy. Here the historical deduction naturally closes. The *Carlovingian* family is the important link, which connects antient with modern history, *Roman* jurisprudence with the codes of the *German* tribes, and the law of civil obligation, with the law of tenure.

V. It remains to say something of the REVOLUTIONS OF THE FEUD IN THE JURISPRUDENCE OF OUR OWN NATION.

(1.) AS TO THE TIME WHEN IT WAS INTRODUCED. Whether feuds prevailed in *England*, before the *Norman* conquest, has been the subject of much dispute. In 1607, an event happened, which occasioned the question to be discussed, with a profusion of learning. Several estates within the counties of *Roscommon*, *Sligo*, *Mayo*, and *Galway*, being unsettled as to their titles, king *James* the 1st, by commission, under the great seal, authorized certain commissioners, of whom sir *Henry Spelman* was one, to make grants of these estates. In exercise of this authority, the commissioners made a grant of lands in *Mayo* to lord

lord Dillon. King Charles the 1st issued a commission, to enquire into defective titles: and orders were given, that all [191. a] persons who had any of the estates in question by letters patent from the crown, should produce the letters, or an inrolment of them, before the lord deputy and council. In pursuance of these orders, the letters patent to lord Dillon were produced. It was found, that the lands were granted by them "to the lord Dillon and his heirs, to hold by knight service, as of his majesty's castle of Dublin." It was admitted, that the commissioners had exceeded their commission, in reserving a *mean* tenure, to the prejudice of the crown, when they ought to have reserved, either an express tenure, by knight service in capite, or not to have mentioned any tenure; in which case, the law would have implied a tenure in capite. The question, therefore, was, whether the deficiency of the tenure so far affected the grant, as wholly to destroy the legal effect of it; or whether the letters patent might not be good, as to the land, and void only as to the tenure. The case was argued, several days, by counsel, on both sides, and was afterwards referred to the judges. They were required by the lord deputy and council, to consider of it, and to return their resolution. The judges disagreeing in opinion, it was thought necessary, for public satisfaction, to have it argued solemnly by them all. This was done accordingly. Those who contended for the validity of the letters patent, urged, among other arguments, that tenures in capite were brought into England, by the conquest, but, that grants were by the common law; and, being more ancient than tenures, must, of necessity, be distinct from the thing granted. From this, they inferred, that though the reservation were void, the grant itself might be good. In the course of their arguments on this point, they observed, that sir Henry Spelman was mistaken, when, in his Glossary, under the word *Feudum*, he referred the original of feuds to the Norman conquest. This drew from him a reply. He published it under the title, "Of the Original Tenure by Knight Service in England." In this work, he argues, with great learning and strength of argument, that tenures, such as they were granted, in the letters patent, by himself and the other commissioners, in Ireland, were not in use before the conquest. He distinguishes between what he calls the *servitia militaria* and the *servitutes militares*. He contends, that the grievances and servitudes of fiefs, as wardships, marriages, &c. which to that day, he says, were never known to other nations, governed by the feudal law, were introduced by the conqueror. But he seems to concede, that, in a general sense, military service and feuds were known to the Saxons. In this middle opinion, he appears to be followed by two very great authorities, lord Hale, and sir William Blackstone. Almost all writers, however, are agreed, that, in the reign of the conqueror, the feudal law was completely established. Upon the whole, the most probable conjecture appears to be, that, evident traces of something similar to the feud, may be traced in the Saxon polity; that it was established, with its concomitant appendage of fruits and services, by the Norman barons, in the possessions, which were parcelled out among them, by the conqueror; and that, about the middle of his reign, it was formally and universally established by law. This universality of tenure, is, perhaps, peculiar to England. In other kingdoms, those parts of the lands, which were permitted to remain in the hands of the natives, and a considerable part of those, which the conquerors parcelled out among themselves, were not originally subject to tenure. In the earliest age, however, of the feudal law, some advantages attended tenure, and frequently occasioned the conversion of allodial into feudal property. But in

in the anarchy which followed the removal of the Carolingian dynasty, there was an end of all political government: so that almost all persons found it advantageous to enter into the feud. To effect this, they delivered up their lands, sometimes to the sovereign, sometimes to some powerful lord, and sometimes to the church, on condition to receive it back in feudality. Lands, thus delivered and returned, received the appellation of *feuda data et oblata*. Some portion of lands, however, still remained free. Of this the proportion differs in the countries on the continent. In some, the courts presume it to be feudal, till it is proved to be allodial. In others, the presumption is in favour of its allodality. See before 63. a. note (1). But with us, in the eye of the law, tenure is universal; that is, the *dominium directum* of all the lands in the kingdom is in the crown; the *dominium utile* of them is in the tenant.

V. (2.) AS TO THE FRUITS AND INCIDENTS OF THE FEUDAL TENURE. These in the original simplicity of the feud, were reducible to two: on the part of the lord, to the obligation of warranty, that is, to defend the title of his tenant against all others, and, when subinfeudation was introduced, to the further obligation of acquittal, that is, to keep the tenant free from molestation, in respect of the services due to the lords paramount: On the part of the tenant, to an obligation, of giving his lord his aid, that is, his military assistance, and services in defence of the feud. But this primitive simplicity of reciprocal obligation, was soon destroyed. Different sorts of tenures were established, and the fruits and incidents of them were multiplied. A detail of these does not seem to be required, in this place; especially as a full and masterly account of them has been already given by Mr. Justice Blackstone.

V. (3.) The branches of feudal jurisprudence, which principally concern the tenures of Littleton and Sir Edward Coke's commentary, and which, therefore, may be thought such as at once call for and limit the present investigation, are those, which relate to the inheritance and alienation of the feud.—With respect to the INHERITANCE OF THE FEUD, it may be observed, that, at the same time, that succession itself prevails in every civilized country, the principle, by which it is governed, and the order in which it proceeds, are, every where, different. The principle and order of the feudal succession, are peculiar to that system of polity. Nothing, perhaps, will shew these in so strong a light, as bringing them into contrast, with the doctrines of inheritance in the civil law. It has been already observed, that, in the Roman law, the distinction between real and personal property, except in the term of prescription, is seldom discoverable: but, that in the feudal law, the legal incidents and qualities of the two kinds of property are entirely dissimilar. This is no where more striking, than in the article of inheritance. The Roman law of inheritance embraces both kinds of property, equally; the feudal law of inheritance, is, most strictly, confined to real property, and, (it was almost said,) turns with disdain, from all property of the personal kind. By the Roman law, the heir was a person instituted by the party himself, or, in default of such institution, appointed by the law, to succeed both to his real and personal property, and to all his rights and obligations: In the feudal law, he is a person related in blood to the ancestor; and, in consequence of that relationship, entitled, either, merely by act of law, or, by the concurrent effect of law and the charter of investiture, to succeed, at the ancestor's decease, to his real or immoveable property, not given away from him by will. In the civil law, he was considered, as representing the person of the deceased; in consequence of that supposed representation, the law cast on him, the property and rights of the deceased,

ed, and fixed on him, all the deceased's charges and obligations. [191. a.] Thus, by a fiction of the law, the person of the ancestor was continued in the heir, so, that, in all religious, moral, and civil rights and obligations, the heir, in the language of the Roman lawyers, was *eadem persona cum defuncto*. In the feudal system, he succeeded to the real property, only, of the ancestor; and this, not under any supposed representation to him, or in consequence of any supposed continuation of his person, but as related to him in blood, and, in consequence of that relationship, as a person designated, by the original feudal contract, to succeed to the fief. By the civil law, every person was considered as capable of instituting an heir; where the party died without instituting an heir, the law introduced a necessary heir. Hence, the distinction in that law, between the *heredis sui, necessarii, nati, and facti*. In the feudal law, it was an acknowledged maxim, that, God only can make an heir. Hence the opposite maxim of the feuds, *solus Deus potest facere heredem, non homo*. By the Roman law, in consequence of the fiction, that, the heir was the same person with the deceased, he was bound to acquit all the deceased's obligations, not only, so far as the property derived by him from the ancestor extended, but, in their utmost extent. The first indulgence granted to the heir, was, that, the prætor allowed him, a certain time, in which, he might deliberate, whether he would accept the succession or not; at the expiration of which, he was obliged, either, absolutely to accept, or, absolutely to renounce, the inheritance. Justinian established still further, in favour of the heir, a liberty of accepting the inheritance, with, what was termed, the benefit of an inventory, that is, a condition, that, he should not be liable beyond the value of the property of the deceased. Nothing of this was known in the polity of the feudal association. In the intendment of that law, the heir, as it has been observed before, came under the original feudal contract: He claimed nothing as a gift from the ancestor: He derived all from the original donor: He could not, therefore, be liable, to any of the obligations of the ancestor. Another maxim of the Roman law was, that the representation of the heir to the ancestor, did not take effect, till he determined his election to accept the succession, by what was termed, an *additio hereditatis*. In the feud, the law cast the right of heirship on the heir, immediately upon the ancestor's decease; and though, when the doctrine of alienation was introduced, the ancestor, by disposing of all his property, might render his right of heirship perfectly nugatory, so far as related to the property of which the ancestor died seised; yet, upon this account, he was not less, the ancestor's heir. Thus, by the Roman law, as fixed by Justinian, it was at the party's option, whether he would, or would not, be invested with the character of heir. The feud left him no option; it forced the heritable quality on him; and the dead man, in the language of that law, gave seisin to the living, and forced on him the character of heir. Hence the maxim and expression of the feud, *le mort saisit le vif*. From the supposed representation, in the Roman law, of the deceased, by the heir, it became a maxim of that law, that, no person could die testate, as to part of his property, and intestate as to the other part. The consequence of this was, that, whoever succeeded as heir, whether he took the entirety, or a fractional part only of the property of the testator, was held, in consequence of that heirship, to continue the person of the ancestor. In the feudal law, after testamentary alienation was allowed, the contrary maxim ever prevailed; the party might die testate as to one part of his property, and intestate as to another. To sum up the contrast in a few words;—by the Roman law, the heir was a person appointed indiscriminately,

discriminately, by the law or the deceased, to represent him; and, in consequence of that representation, was entitled to his property and bound by his obligations. In the feudal law, the heir was a person of the blood of the ancestor, appointed, by the original contract, to the succession, or at least invested with a capacity of succession; and, in consequence of that succession, was supposed, more by the general notions of mankind, than by the notions of the feudal polity, to represent the ancestor. By the Roman law, the heir succeeded to the property of the ancestor, in consequence of his civil representation of him, and supposed continuation of his person: In the feudal law, he acquired a notional representation to the ancestor in consequence of the feudal succession. In the Roman law, real and personal property were equally the subject of inheritance:—in the feudal law, inheritance was confined to real property. The Roman heir claims, as such, all from the person last possessed, and nothing from the original donor: the feudal heir, claims, as such, all from the donor, and nothing from the person last possessed.

V. (4.) The same difference prevailed in these laws, with respect to the ORDER OF SUCCESSION. By the Roman law, as it was finally settled by the Novels, on the decease of an intestate, the descendants, of whatever degree, were called to the succession, in exclusion of all other relations, whether ascendants or collaterals, and without regard to primogeniture, or preference to sex. Where the intestate left no descendants, such ascendants as were nearest in degree, male or female, paternal or maternal, succeeded to his estate, in exclusion of the remoter heirs, and without any regard to representation; but, with this exception, that, where the deceased left brothers and sisters, of the whole blood, beside ascendants, all succeeded in equal portions, *in capita*; and here, if, besides ascendants, the deceased left brothers' and sisters' children of the whole blood, the children succeeded to their parents' share, by representation, *in stirpes*. Where the intestate left no descendants, and no ascendants, the law called the collaterals to the succession, giving a preference to the whole blood. By the law of the code, if no one was left in the descending, ascending, or collateral lines, the husband succeeded to the estate of the wife, and the wife to that of the husband. This was altered by the law of the Novels. In default of a legal heir, the estate became a *res caduca*, and the fiscus or exchequer succeeded. Such appears to be the general outline of the Roman law, respecting successions. The feudal regulations respecting successions, differed from it, in almost every respect. Originally fiefs were granted to be held at the will of the donor, and were, therefore, resumable at his pleasure; then they were granted for a year certain; then, for the life of the grantee; then, to such of the sons of the grantee, as the donor should appoint. Then, all the sons, and in default of sons, the grandsons were called to the succession of the fief: in the process of time, it was opened to the 4th, 5th, 6th, and 7th generations, and afterwards to all the male descendants, claiming through males, of the first grantee; and, at last, was suffered to diverge generally to collaterals. But this, as to such collaterals as were not lineal heirs of the first donee, was effected through the medium of a fiction completely and peculiarly feudal. When a person took by descent, his brothers, though in the collateral line of relationship to him, were in the direct course of lineal descent from the ancestor. In proportion as the descent from the ancestor was removed, the number of persons thus claiming collaterally from the last, and lineally from the first taker, was proportionably multiplied. In the course of time, the first taking ancestor was forgot, and then,

then, it was presumed, that all who could claim collaterally [191. a] from the person last in the seisin of the fee, were of the blood of the original donee. On this ground, in latter times, when, upon the grant of a fief, it was intended, that, on failure of lineal heirs, the fief should diverge to the collateral line, it was granted, to be held with the incidents and properties, with which the donee would have held it, had it vested in him by descent, in a line of transmission from a distant and forgotten ancestor: and, among them, that of transmissibility to collaterals.— This general heirship of fiefs, in the male line, was introduced, in France, soon after the succession of the Capetian line, and, in Italy and Germany, during the period in which the empire was possessed by the house of Franconia, and the earlier emperors of the house of Suabia. A similar progress in the descent of lands, may be traced in the jurisprudence of our own country. The policy of most feudal countries, has shewn some preference of the whole blood to the half blood, and a great unwillingness to admit females into the fief. In England, there has been a more rigid exclusion of half blood, and a less rigid exclusion of the female line, from the feudal succession, than is to be found in the law of almost any other country governed by the feudal polity. To us also, it seems to be peculiar, to exclude the parent, and all others in the ascending line, from the immediate succession to the fief. But, the most striking point of difference between the Roman and the feudal course of succession, is the prerogative allowed by the latter to primogeniture. To the eldest son, the Roman law shewed no preference; wherever the feudal polity has been established, he has been allowed several important prerogatives. In England primogeniture obtained in military fiefs, as early as the reign of William the Conqueror, but, with this qualification, that, where the father had several fiefs, the *frimum patris feudum* only belonged to the eldest son. In the reign of Henry the 2d, primogeniture prevailed absolutely in military fiefs, and in the reign of Henry the 3d, or soon afterwards, the same absolute right to the succession by primogeniture, obtained in socage lands. Thus, in all countries where the feud has been established, a marked distinction in the order of succession, has, in direct opposition to every principle and practice of the Roman law, been shewn to primogeniture. *Usu*, says Zoesius, *ad omnia feuda serpsit, ut vel ex asse majori cedant, vel major præcipuum aliquod in eis habeant*. But, it is observable that a total exclusion of the younger sons is, perhaps, peculiar to England. In other countries, some portion of the fief, or some charge upon it, is, in many cases, at least, secured by law, to the younger sons. In some places, this is secured to them for their lives only; in others their descendants succeed to it. Still the eldest son, in the eye of the law, represents the fee. In Spain the patrimony is divided into fifteen shares. Three shares, that is, a fifth of the whole, are first subtracted; afterwards four shares, or a third of the remaining twelve shares. This fifth and third, as they are called, are termed a *majoratus*, and are at the free disposition of the parents; the remaining shares are appropriated to the children. The *majoratus* may be, and generally is entailed upon the eldest son of the family, but a greater portion of the patrimony cannot be settled on him, without leave from the crown. The singular nature of this provision, has occasioned a particular mention of it by most feudal writers; it was therefore thought proper to notice it in this place. Any further mention of the particular customs respecting primogeniture, appears unnecessary.

V. (5.) Another striking point of difference between the Roman and the feudal polity, with respect to real property, is, the contrast between

THE ABSOLUTE DOMINION OVER THE INHERITANCE, with which the Roman law invested the heir, and the numerous and intricate fetters with which the feudal jurisprudence (of England particularly) has permitted it to be bound. The Roman law (it has been already stated, at some length) permitted a person to appoint his heir, and invested him, on the testator's decease, with all his rights and obligations. Before Justinian introduced the benefit of the inventory, as the heir, by accepting the inheritance, subjected himself to all the testator's debts, the office was sometimes refused, as dangerous. This gave rise to the vulgar, the pupillar, and the quasipupillar substitution. The vulgar substitution was, where the testator appointed one to be his heir, and, if he refused, substituted another in his place. These conditional substitutions might be extended to any number of heirs. When they were made, the heirs instituted under them, were called, in succession, to accept or refuse the inheritance. When once an heir accepted the inheritance, it vested in him absolutely, and all the subsequent substitutions then entirely failed. The pupillar substitution was, where a father substituted an heir to his children, under his power of disposing of his own estate and theirs, in case the child refused to accept the inheritance, or died before the age of puberty. The quasi-pupillar substitution was, where the children past puberty, being unable, from some infirmity of mind or body, to make a testament for themselves, the father, in imitation of the pupillar substitution, made a testament for them. In all these cases, it is evident the dominion over, and substance of the inheritance were preserved entire and unqualified. In two instances, and in these only, the Roman law admitted an exception to their integrity. The first was in the case of an usufruct; where a right was given to one person, to use and enjoy the profits of a thing belonging to another. The second was the case of a *fidei commissum*, when the inheritance was disposed, in whole, or in part, to an heir, in trust, that he should dispose of it to another. But neither of these devises suspended the absolute vesting of the inheritance. An usufruct could not be extended beyond the life of the usufructuary. The *fidei-commissarius*, (the person beneficially interested in the inheritance,) could compel from the *heres fiduciarius* (the trustee), a transfer of the inheritance immediately on the accruer of his right. Thus, the property and dominion of the inheritance absolutely vested in him in equity, with an immediate right to compel a legal transfer of it. In this manner, by the Roman law, the heir succeeded, in every case, to the absolute property of the inheritance, and to all the rights and obligations of the ancestor. It should, however, be observed, that this account of the simplicity of the Roman law, with respect to the tenure, if it may be so called, of property, applies to it only, in the state of simplicity in which it was placed, by the Trebellian and Pegasian decrees. In a further part of this annotation, we shall have occasion to mention the alteration occasioned by the introduction of *fidei-commissary* substitutions. These are to be considered as a departure from the genuine spirit of the Roman law, in the doctrine respecting inheritances. See *Huberi Praelectiones ad Inst. lib. 2. tit. 23. § 18*. From that spirit, nothing could be more different, with respect to the tenure and modifications of property, than the regulations of the feudal law. According to these, the heir derived his title no otherwise through his ancestor than from the necessity of mentioning him in his pedigree. This enabled him to describe himself as an object to whom the succession was originally limited. Thus, he was a nominee in the original grant; he took every thing from the grantor, nothing from his ancestor. The consequence was, that, while the absolute or ultimate

ownership was supposed to reside in the lord, the ancestor, and the heirs, took equally as a succession of usufructuaries, [191. a.] each of whom, during his life, enjoyed the beneficial, but none of whom possessed, or could lawfully dispose of, the direct or absolute dominion of the property. Thus, while, by the Roman law, and the law of almost every other country, property is vested in the possessor solely and absolutely, every species of feudal property is necessarily subject to the three distinct and clashing, though concurrent rights of the lord, the tenant, and the heir. It follows, that, by the original principles of the feudal law, *fiefs could neither be aliened* nor charged with debts, and in direct contradiction to almost every other system of law, the feudal system of polity made land unalienable, and absolutely took it out of commerce.

V. (6.) *THE VARIOUS MODES WHICH HAVE BEEN USED, IN THE COUNTRIES WHERE THE FEUD HAS BEEN ESTABLISHED, TO ELUDE, OR OVERTHROW, THE RESTRAINTS UPON ALIENATION*, form one of the most important parts of feudal learning. The mode by which this has been effected in England, is peculiar to itself. It has been the principal occasion of the striking difference to be observed in the feudal jurisprudence of England, and that of other countries. One artifice to elude the feudal restraint upon alienation, seems to have been resorted to by every nation where the feudal policy has been established,—that of *subinfeudation*. Its effect in aggrandizing the vassals, and rendering them independent of the throne has been already noticed. It also served as an indirect mode of transferring the fief. It was inhibited in England, to all but the king's vassals, by the statute *quia emptores terrarum*; 18 Edward 1st; and this inhibition was extended to the king's vassals by the statute *de prerogativa regis*, 17 Edw. 2. c. 6. In most other countries it is still allowed, under some restrictions. The chief of these are, 1st. That it must be a real subinfeudation, and not a sale, or other transaction, under the appearance or colour of a subinfeudation; 2d. That the sub-vassal must be of equal, or at least of suitable rank and circumstances. And 3dly. The conditions, so far as the lord is interested in them, must be the same as those upon which the original investiture is granted. In other respects the feudal history of alienation has varied. As it now stands, in almost every country, the lord's consent must be had. But in some it still continues a matter of favour, in others it is a matter of right, to which the tenant is always entitled, on paying certain fines to the lord. The principal of these are the *quint* and the *lods et ventes*. These the lord claims on every sale. In other cases, where the fief is transferred from one to another, the lord claims the *relevium* or *droit de rachat*, which, generally, is one year's produce of the fief. In many countries, where the tenant sells his fief, the lord has a *jus retractus* or *retrait feodal*, by which he has a right to become himself the purchaser of the fief, on reimbursing the stranger the price paid by him for the purchase of it, and the costs attending the purchase. In many countries, also, the right of the heir is consulted by giving him the *retrait lignager*, by which, when a fief is sold, a relation of the vendor, within a certain degree of parentage, may entitle himself to repurchase the fief by an offer of the purchase money, interest, cost and expences, or as it is termed in the writ, *offre de bourse, deniers, loy-aux courts a parfaire*. Such is the general history of alienation in foreign countries. The history of alienation in England is very different. A liberty of alienating lands of purchase, at least where the party had no son, is allowed by a law of Henry the 1st, and expressly recognized by

by a law of Henry the 2d. Some time afterwards, it obtained generally, with little or no limitation. The indirect mode of aliening, through the medium of subinfeudation, the restraint of it, by *magna charta*, and its total abolition by the statutes *quia emptores* and *de prerogativa regis*, have been already noticed.

V. (7.) But while the restraints upon alienation, so far as it was contrary to the general principles of the feudal tenure, were thus gradually removed, the policy and private views of individuals, found means to impose new restraints upon it. This was done by the introduction of conditional fees at the common law, and afterwards by the INTRODUCTION OF ENTAILS. We shall consider this species of limitation of property, with a view to the different modes of it, which have been admitted by the Roman law, and by the laws of France, Spain, Germany, Scotland, and England. With respect to the *Roman law*, we have, already had occasion to notice its simplicity, in the inheritance of property, as it was settled by the Trebellian and Pegasian decrees, and its alteration, in this respect, by the introduction of the fidei-commissa. These gave rise to successive fidei-commissary substitutions. By multiplying these, and by prohibiting each substitute from aliening the inheritance, property was absolutely taken out of commerce, and fixed, in a settled and invariable course of devolution, in particular families. There is reason to suppose this mode of altering property, was never common, and the policy of Justinian soon interfered to check it. By the 159th Novel, he restrained fidei-commissary substitutions to four degrees, including the party himself, who instituted the substitution. With the third substitute, therefore, the power of the testator expired, the absolute dominion vesting absolutely in him. This, in some measure, restored the law to its primitive simplicity. A similar progress is discoverable in the history of *French Jurisprudence* respecting Substitutions. The law of France appears to have generally admitted perpetual substitutions. The ordonnance of Orleans, in 1560, restrained them to two degrees, exclusive of the institutant. That ordonnance not having a retrospective operation, and the inconvenience arising from prior substitutions being greatly felt, the ordonnance of Moulins, in 1566, restrained all substitutions, anterior to the ordonnance of Orleans, to the fourth degree exclusive of the institutant. The ordonnance of 1747 fixed the law on this important branch of real property. It was framed with great deliberation, by the chancellor d'Aguesseau, after taking the sentiments of every parliament in the kingdom, upon forty-five different questions proposed to them on the subject. These questions, and the answers of the parliaments, have been published under the title, *Questions concernant les Substitutions*, Toulouse 1770. The ordonnance of 1747 confined substitutions, with some exceptions, to two degrees, and directed the degrees to be computed, by the individuals, in whom the substitution vested. Upon this, it was held, that, if the testator appointed several persons jointly, to the inheritance, they formed, together, but one degree; if he appointed to it several persons, successively, though in the same degree of kindred, as brothers or sisters, each person in whom the succession vested, formed one degree. The mode of settlement used in *Spain*, by what is termed a Majoratus has been already noticed. In *Germany*, the restraints imposed by the feudal law, on the alienation of property confined by the original investiture, to a particular channel of descent, still prevail; so that the same intricate entails subsist with them, as with us; without those modes of eluding them which the laws of England have sanctioned. *The tailzies or entails of Scotland* appear still more intricate. The least restrictive of these is called a Simple Destination. It is defeasible and attachable by creditors, so that it amounts to no more, than a designation

designation who is to succeed to the estate, in case the temporary possessor neither disposes of it, nor charges it. The next degree [191. a.] of tailzie, is a tailzie with prohibitory clauses. The proprietor of an estate of this nature cannot convey it gratuitously, but he may dispose of it for onerous causes, and it may be attached by creditors. The substitutes, however, as creditors by virtue of the prohibitory clause, may by a process in Scotland, termed an inhibition, secure themselves against future debts or contracts. The third and strictest degree of tailzie, is a tailzie guarded with irritant and resolute clauses. This is a complete bar to every species of alienation, voluntary or involuntary. The efficacy of these clauses, both against the heir, and the creditors of the tenant in tail, aliening, was established in 1662, by a solemn decision of the judges of Scotland, in the case of the viscount Stormont against the creditors of the earl of Anandale; and that decision was sanctioned by a statute of the Scottish parliament in 1685. This mode of entail appears to be greatly discouraged by the judicature of the country; and modes of eluding it have been discovered, and allowed in their courts of justice. With respect to *English entails*, we have taken notice of the maxim of the Roman law, that, no man can name an heir to succeed to his heir; and, of the opposite maxim of our law, that, God only can make an heir, not man. The latter maxim was understood, with this qualification, that, though the party could not introduce a person into the heirship of the fief, who was not originally capable of inheriting the fief, by being of the blood of the donee, still he might give a preference to a particular class of persons, falling within that description, and might exclude others. Thus, in England, according to sir William Blackstone, (lib. 2. c. 7. s. 2.) as in all other countries, where fiefs have prevailed, they might originally be limited to the male, either in preference to, or in utter exclusion of, the female descendants of the party. In the same manner, they might be limited to a male and his descendants, by a particular wife, or to a female and her descendants by a particular husband, or to both the parents and the heirs of both their bodies. These, at the common law, were all termed, *Estates in fee simple conditional*. The condition, from which these estates took their appellation, did not prevent the fee from vesting in the donee, immediately upon the gift; it only authorized the donor to re-enter, if the party had not issue, or, if, having issue, the issue afterwards failed, and neither the donee, nor the issue aliened. Upon this principle, it was considered to suspend the power of absolute alienation, till the birth of issue. But upon the birth of issue, the party had the same power of alienation over the conditional fee, as he had over an absolute fee. The statute *de donis conditionalibus* took away this power. It did not, however, affect the estate of the donee, in any other respect. The consequence of this was, that, a tenant in tail was as much seized of the inheritance, after the statute *de donis*, as a tenant in fee simple conditional, was, before it. Thus, therefore, an estate, of inheritance remained in the donee; but, a particular description of heirs only being entitled to take, under it, it received the appellation of an *estate tail*, that is, an estate docked, cut off, or abridged, in contradistinction from the estate in fee simple absolute. Thus, the fee was preserved to the issue, while there was issue to take it, and was preserved to the donor, when the issue failed. This reversionary right of the donor was soon found to be susceptible of the same modifications, as a present estate, and, therefore, limitations, either of the whole reversion, or of partial estates out of it, were made to strangers. It frequently happened, that, after a limitation to one series of heirs, another series of heirs were

were substituted, to take the fief, on the failure of the first series. The first person, then, to whom this subsequent series was limited, was made the stock, or *terminus*, of this subsequent line of inheritance. In these cases, the substitute did not take in quality of heir to the last taker, but as a new purchaser under the original donor. Thus, in direct opposition to every genuine principle of the Roman law, endless substitutions were introduced, not only of individuals, but of whole lines of descendants, and the estate being thus unalienably preserved to the issue, there was a still more pointed opposition, to the maxim of the Roman law, that, the heir necessarily succeeded to the obligations of the deceased.

V. (8.) These new restraints upon property were never favourably received, and various ARTIFICES WERE USED TO ELUDE THEM. One of these, was carried into execution through the medium of a *discontinuance*. It has been observed, that though the statute *de donis* took away the power of lawful alienation, it did not suspend the vesting of the fee. The alienation, therefore, of the donee tenant in tail, was no forfeiture; and the alienee, as he took his conveyance from a person seised of the fee, was considered as coming in, under a lawful transfer of the inheritance. Now, it was an established rule of law, that, whenever any person acquired a presumptive right of possession, his possession was not to be defeated by entry. The consequence of this was, that, in these cases, the alienation was unimpeachable during the life of the alienor, and, after his decease, the heir could not assert his title by the summary process of entry, but, was driven to the expensive and dilatory process of a formedon; this was termed a discontinuance. The expense and delay attending a formedon frequently prevented the tenant in tail, from resorting to it, to assert his right. In the course of time the period for asserting it elapsed, and thus, therefore, virtually, the discontinuance proved a bar to the entail: Another mode of eluding estates tail was, by *warranty*. When lands were conveyed from one to another, the grantor, for the greater security of the grantee, usually warranted, that is, entered into a covenant, to defend the possession to the grantee, and, in case of eviction, to make him a recompence. This obligation of the ancestor was considered to be a covenant real, and therefore, on his decease, descended to the heir. Thus, it frequently happened, that, on the death of the ancestor, his contract of warranty descended on the person, who would, otherwise, be entitled, as his heir, to the lands warranted, so that, the obligation of warranty, and the right to the lands warranted, met in the same person. The consequence of this was, that, as heir in tail, he was entitled to the lands; as heir general, he was bound to defend the title of his ancestor's alienee; thus, if, on the one hand, he was entitled to recover the lands, the alienee was entitled, on the other, to recover an equivalent recompence from him. To prevent this circuitry, it was held, that, the obligation to warranty, precluded him from claiming the lands warranted. Against this, in some cases, the statute *de donis*, provided. The general doctrine was, that, where the heir claimed, as heir, the lands warranted, he was bound by the warranty, in those cases only, where he inherited from the ancestor, fee simple lands of equal value; but where he claimed as purchaser, he was bound by the warranty, though no such lands descended upon him. This is the meaning of the maxim, that, warranty, when lineal, is a bar with assets; and when collateral, is a bar without assets, to the right of the tenant in tail, on whom it devolved. By these artifices, the force of entails was eluded. In the progress of time, methods were discovered, by which the law allowed

lowed them, to be absolutely destroyed. The first of these [191. a.] has received the name of *common recovery*. In the language of the courts, a recovery is the effect of a sentence, in a solemn judgment, whereby the party is restored to a former right. In the particular language of our courts, when applied to judgments in adversary actions, it is the effect of a sentence, by which, in a suit instituted for the recovery of an estate claimed by the party, judgment is given him, that he shall recover it, according to his claim. In a suit of this nature, when really adversary, the judgment whether given after defence, or upon default, equally bound the right to the land. Of this, tenants in tail availed themselves, to deliver their estates from the entails to which they were subject. They permitted the entailed lands to be recovered against them, on a fictitious process, but, with a secret confidence, reposed in the recoveror, that, after the recovery was completed, he should reconvey the lands, to the party in fee simple; and in the mean time, permit him to take the profits of them. Another mode, by which the destruction of entails was allowed to be effected, was the application of the legal operation of *fincs*. In the notion of our courts, a fine is a compromise, with the leave, and under the sanction of the court, of a real action, for the recovery of land. It is common to all courts of justice, to permit suits commenced in them, to be compromised, and to give their sanction to the compromise. In the civil law, and in the feudal law of other countries, this species of compromise is termed a transaction. The process itself, therefore, we have in common with them. But, it is peculiar to our law, to use it as a mode of eluding the restraints imposed by the law of the land, on the alienation of real property. A writ is brought against the tenant in tail, by which the party suing out the writ, demands the lands, against the tenant, on his supposed previous agreement or covenant, to convey the land to him. The tenant is understood to be satisfied with the justice of the claim, and therefore applies for the licence of the court, to make the matter up. This is granted. The parties thereupon enter into a concord or agreement. By this, the tenant acknowledges the lands to be the right of the demandant. This acknowledgment, being made with the leave, and under the sanction, and entered on the records, of the court, had the effect of a judgment. Of this process, tenants in tail availed themselves, to bar their estates tail, in the same manner they did of judgments: they procured a fictitious suit to be instituted against them, and settled it, by a fictitious compromise, in which they acknowledge the right to be in the demandant; with the same secret confidence reposed in him, that he should hold the estate in trust for them, and convey it according to their directions. Thus, through the medium of a collusive suit and judgment, which are now called a common recovery, in one instance, and of a collusive suit and compromise, which are now called a fine, in the other, entails were totally defeated. It is unnecessary, here, to trace the steps by which this has been effected. Common recoveries were originally a deceit upon courts of justice. When the sanction of the courts was first given them, it was done indirectly, with great caution, and some degree of artifice. It was not till the reign of Edward the 4th, that, they obtained the unequivocal sanction of a solemn decision of a court; and it was a much later period, before their effects were recognized by the legislature of the country. The introduction of fines was effected in a much bolder manner. The statute *de donis* had said fines should be null; the statute of the 4 of Henry 7, or at least that of the 32 of Henry 8, said they should be valid. The different effects of a fine and a recovery do not fall within this enquiry.

(Mr. Cruise's valuable treatises upon them are well known.) It seems sufficient to observe, generally, that a fine is binding on the issue in tail only; a recovery is binding both on the issue and those claiming in reversion or remainder. A still more summary and easy opening of entails has been granted by the legislature, in favour of the crown, by 3 Hen. 8. c. 39. and in favour of the creditors of traders, by the 21 Jac. 1. c. 19. whereby the commissioners are authorized to sell the bankrupt's intailed lands.

V. (9.) The alienation hitherto spoken of, except that referred to in the last observation, has been confined to cases where it is the act of the party himself; and is, therefore, termed voluntary alienation. But in many cases it is produced by the act of law against the party's own will. In these cases it is termed INVOLUNTARY ALIENATION. Here its effects must be considered, with respect to the party himself, his heir, and the special prerogative of the king. In every instance the genius of the feud appears. *With respect to the party himself*, the tendency of the feud to secure to the lord the services of the tenant, and to take landed property from commerce, has been noticed. It was a consequence of those principles, that the party was not at liberty to subject either himself or his lands to the payment of his debts. When, therefore, at the common law, a person sued a recognizance or judgment for debt or damages, he could neither take the body nor the lands of the debtor, except in some special instances, into execution. He could only take in execution his goods and chattels and the profits of his lands. For those the law gave him the *feri facias*, by which the sheriff was commanded to cause the sum or debt recovered, to be made out of the goods and chattels of the debtor; and the *levari facias*, by which the sheriff was ordered to seize the debtor's goods, and receive the rents and profits of his lands till the creditor was satisfied. Thus, at the common law, neither the person nor the lands of the debtor could be attached for debt. But, by the 25th Edw. 3d. c. 17. the body of the debtor was made liable, by a writ of *capias ad satisfaciendum*, to imprisonment till the debt was satisfied; and the statute of Westminster 2. 13th Edw. 1st. ch. 18. granted the writ of *elegit*, by which the defendant's goods and chattels are delivered to the creditor at an appraised value; and, if these are not sufficient, then the moiety or one-half of the freehold lands of the debtor, are delivered to the creditor, to be retained till the debt is levied, or the debtor's interest in the land is expired. Afterwards, under the statute *de mercatoribus*, 13 Edw. 1. the merchant might cause his debtor to appear before the mayor of London, or any of the other persons mentioned in the act, and there acknowledge his debt. This was called a recognizance. If the debt was not paid at the time appointed, the recognizance was held to be forfeited, and the body, lands and goods of the debtor were to be delivered to the merchant creditor in execution, to compel payment of the debt. The process by which this was done was called an *extent*, because the sheriff was to cause them to be appraised, to their full or extended value, before he delivered them to the creditor. By the statute of the 27 Edw. 3d, c. 9. a similar process for the recovery of debts was provided for those whose debts were acknowledged before the mayor of any of the towns where the staple was held. These securities are generally known by the short appellation of statutes merchant and statutes staple. From their nature, they were at first appropriated to the commercial part of the community. By the 23d Henry 8. a similar security, by a recognizance in the nature of a statute staple, was extended to the community at large. The laws respecting bankrupts seem now to have
made

made the landed property of merchants and other tradesmen generally subject to their debts. The statutes respecting [191. a.] fraudulent conveyances and devices have proceeded some way towards making lands generally liable. It may not be improper to close this account of involuntary alienation by an account of involuntary alienation in the Roman law, as it is succinctly stated in the Digest, lib. 42. tit. 1. *Primo quidem res mobiles animales pignori capi jubent, mox distrahi: quarum pretium si suffecerit, bene est; si non suffecerit, etiam soli pignora capi jubent et distrahi. Quod si nulla moventia sint, a pignoribus soli initium faciunt. Quod si nec que soli sunt, sufficienti, vel nulla sint soli pignora, tunc pervenieter etiam ad jura. Si pignora que capta sunt, emptorem non inveniant, rescriptum est ut addicantur ipsi cui quis condemnatus est. Addicantur autem ea quantitate que debetur.*

With respect to the heir,—it has been observed, as one of the most striking peculiarities of the feudal system, that the heir claimed nothing from the ancestor, but came in under the original feudal contract. The consequence was, that, originally, though on the decease of the debtor, the executor was answerable, as far as he had assets, the heir was not answerable in respect of the lands descended. But, after the free alienation of land was allowed, the attachment of it, in the hands of the heir, for the debt of his ancestor, followed as a necessary consequence. But, here again, the principle of the feudal law introduced a distinction which, with some qualifications, prevails at this day; that the assets in the hands of the executor are liable generally to the ancestor's debts, of every kind, but the assets in the hands of the heir are liable only to debts of record and debts by specialty, in which the heir is named; to the former, in respect of the lien which the process of the court created on the lands themselves; to the latter, on the supposition that the heir was comprehended in the original contract. For the ancestor's debts by simple contract, in opposition to the Roman law, and to the most obvious principles of natural justice, the heir still remains not liable. As to involuntary alienation, *in respect to the king*, it has been observed, that, in the case of a common person, the body of the debtor was not liable to execution; but, in the case of the king, it was different; for, at the common law, the body of the king's debtor is generally supposed to have been always liable to execution. Yet it seems singular, that, when the statute of *magna charta* restrained the king from seizing a man's land for debt, it should leave him at liberty to seize his person. In the course of time, however, it is certain that the body of the debtor might be seized, and that, after the law made it liable for the debts of the subject, the king had these special prerogatives, that he could protect his debtor against the suits of his other creditors; and that, at the common law, he had a right to the custody of his debtor's person, in another prison, at the suit of the subject. By the common law also, all the goods and chattels of the king's debtor might be sold for the payment of his debts. But the most important of the prerogatives of the crown, at the common law was, that, in the king's case, execution issued, not only against the goods and chattels, but against the lands of the debtor. Another important prerogative was, in the case of rent, for which the king might distrain on any of the lands of the debtor. He had other important prerogatives, with respect to priority and preference in execution, and satisfaction of his debts, a minute investigation of which does not fall within the subject of this discussion. These extensive prerogatives have been considerably increased by the statute law of the realm. By the 33d Henry 8. c. 39. all obligations

tions made to the king are to have the same force, and to be attended with the same remedies to recover them as a statute staple. By the 13 Eliz. c. 4. the lands of treasurers, receivers, and other accountants to the crown, were made liable to execution for debts to the crown, in the same manner as if the party had acknowledged a recognizance under the statute of Henry 8. A doubt arose upon this statute, whether a sale might be made under it, after the death of the accountant or debtor. To remedy this, the explanatory statute of the 27th Eliz. c. 3. was past, by which a power of sale, after the death of the debtor, was expressly given. Afterwards, by an act made in the 39th year of queen Elizabeth, this explanatory act was repealed, and a new exposition was made of the statute of the 13th Eliz. with various new provisions. But the act of the 39th Eliz. being only temporary, and having expired early in the reign of James the 1st, the explanatory act of the 27th of Eliz. was revived; but it fell into disuse, and when it came to be examined, on occasion of the late exertions made for the recovery of the crown debts, it was found defective. This gave rise to the act of the 25th of his present majesty, c. 35. by which the court of exchequer is authorized, on the application of his majesty's attorney general, in a summary way, by motion, to order the estates of crown debtors, which should be extended by any writ of extent, or *diem clausit extremum*, to be sold for the payment of the debts. Thus the law appears to stand at present, on the involuntary alienation of land, with respect to the debts due to the crown.

V. (10) AS TO TESTAMENTARY ALIENATION; the influence of feudal principles on this branch of alienation is still strongly felt. It has been observed, that, by the Roman law, a will was an appointment of an heir; and he was considered, at the death of the testator, as universal successor to all the property, rights and obligations of the deceased. Testamentary alienation, like every other alienation, was prohibited by the genius and law of the feuda. By what steps it prevailed here, is so happily and so concisely explained, in a note of the present editor's most learned predecessor in this work (note (1) to page 111. b.) as to render any deduction of it unnecessary in this place. To a perusal of that note the reader is therefore invited. It remains to observe, that, after the testamentary power over land was introduced, a *devise of lands* was not considered to operate as an appointment of a party to be a general heir of the testator, as in the Roman law; but was considered to operate as a legal conveyance of the lands themselves. See lord Mansfield's argument in *Hogan v. Jackson*, Cowp. 299. In consequence of this, many of the requisites to other legal instruments are requisite in wills. Thus, as to the efficacy of a deed for the transfer of real property, it is necessary that the grantor should have the seisin of the lands conveyed; so, to the efficacy of a will, it is necessary, that, at the time of making his will, the deviser should have the seisin of the lands devised, or at least that kind of inchoate seisin or title which is conferred by a contingent remainder. The consequence of which is, that, while a Roman will operates on all the property of the deceased, without any regard or distinction as to the property acquired by the testator, before or after the making of his will; by the law of England, a will cannot operate on any freehold lands, of which, at the time of making of the will, the party has not this species of seisin. Another consequence of the notion, that a will affecting lands, is merely a species of conveyance, is, that, as by the law of England, a fee simple cannot be created without words of inheritance in the original donation or grant, so by the same law, *words of inheritance are equally necessary to the*

creation of a fee by will. The only difference is, that certain technical words are required by law, to the creation of an [191. a.] estate in fee, by deed; but in wills they may be dispensed with, and supplied by any words sufficiently denoting the intention of the testator. Here the subject appears to draw to a conclusion.

V. (11) The reader has been presented with some of the most striking circumstances in the history and principles of the feudal law, particularly so far as they affect the landed property of this country. It remains only to state some of the most striking circumstances, IN THE GENERAL HISTORY OF ITS DECLINE. It has been shewn, that the peculiar ingredient of the feud was the connexion between, and the reciprocal obligations of, the lord and the tenant. Whatever interrupted or relaxed this connexion and reciprocity of obligation, had a direct tendency to overturn the feud. One of the earliest circumstances of this tendency was, the *general prohibition of the practice of subinfeudation*. This, however salutary in a general view, loosened the tie which united the feudal association, by preventing the chain of dependance and subordination consequent to the practice of subinfeudation; and which, it is evident from the general principles of the feudal law, and the history of other nations, operated, in the strongest manner, to cement and perpetuate the feud. Another circumstance of the same tendency was the *introduction of the tenure of escuage*. This enabled the tenants by knight's service to send persons to serve in the king's armies in their stead, and in process of time, to make a pecuniary satisfaction to the lord in lieu of it. This substitution of money for personal attendance, was diametrically opposite to every feudal principle. Accordingly all writers have considered it as a degeneracy of the tenure of knight service. A further circumstance of the tendency we are speaking of, was the *prevalence of the socage tenure*. It is probable that the number of these tenures was not great till a considerable time after the Norman conquest; and perhaps the increase of them was not rapid till some time after the introduction of escuage. From a comparative view of the different natures of the military and socage tenures, it is easily seen how much stronger the feudal connexion was under the former, than it was under the latter. The tenure in burgage was a species of socage tenure. Under this, chiefly, the commercial part of the community classed themselves. Nothing could be more opposite to the nature of the feudal tenure, than the wealth, the independence and the peaceful habits of life which usually attend the pursuits of commerce. Thus, as the general tenure of socage prevailed, the connexion between the lord and the tenant proportionally relaxed. But one of the most important circumstances, in the history of the decline of the feud, is the *introduction of uses*. By these the legal estate of the land was in the *feoffee*. In fact, therefore, there never was a vacancy in the tenure. But the ownership and beneficial property of the land being absolutely vested in the *cestui que use*, there was no point of connexion between him and the lord. Besides, when a feoffment was made to uses, it seldom happened that the feoffment was made to a single person. The *feoffees* were numerous, and, when their number was reduced to that of one or two persons, a new feoffment was made to other feoffees to the subsisting uses. In the mean time the ownership of the land was transmitted and aliened at the will of the *cestui que use*. It is evident that, while the fief was held in this manner, there was a wide separation between the lord and the tenant. It must also be observed, that, where there was a feoffment to uses, the fruits of tenure incident to purchase became seldom due, and those incident to descent almost never accrued

to the lord. Now, when a person took by purchase, the lord was only entitled to the trifling acknowledgment of relief: when he came in by descent, the lord was entitled to the grand fruits of military tenure, wardship and marriage. From these observations, it is clear how great a fraud was practised upon the lord by the introduction of uses. A fief thus circumstanced, presented an apparent tenant to the lord, but it was almost barren of every fruit and advantage of tenure, and the land itself was entirely subtracted from the feud. Hence we find, that, among the mischiefs recited in the preamble to the statute of uses, the loss to the lord of the fruits of tenure is particularly insisted on. It does not fall within the nature of these observations, to mention the steps which were taken to extirpate uses. One of them was the statute of the 1 Richard the 2d. c. 9. which gave an action to the disseizee, both against the feoffee and the cestui que use. It is observable that the *senatus consultum Trebonianum* gave the same right of action against the *heres fidei commissarius*. Unquestionably the object of the statute of the 27 of Henry 8. was to effect a total extirpation of uses. But, as they were preserved under the appellation of trusts, the emancipation was permitted to continue. While the relation between the lord and the tenant was great, this emancipation was a serious mischief. As the relation is now exceedingly small, it is, in this respect, scarcely felt. In the case of *Burgess v. Wheate*, 1 Blackst. Rep. 123. lord Mansfield endeavoured to establish the right of the crown, to the benefit of a trust, which failed for want of an heir, by attempting to fix on trusts, the feudal incident of an escheat. In the discussion of the question the analogy appeared unnatural, and the case was decided against the crown. A better ground in favour of the claim of the crown, might, perhaps, have been found, by resorting to its acknowledged prerogative, of being entitled to the *bona vacantia*, or every species of property, of which no owner is discoverable. At length it became evident to general observation, that the principle of military tenure was gone; and that its incidents were more burthensome than advantageous, either to the lord or the tenant, so that all ranks of men seem to have desired its abolition. The legislature of England proceeded in it with the circumspection, which the magnitude of the object required. It was brought regularly before parliament, in the 18th year of king James the First, at his majesty's recommendation. In the 4th Inst. 203. lord Coke mentions this circumstance, and particularizes the outlines of the plan then in agitation. It bears a striking similitude to that which was afterwards adopted. At length the 12 Cha. 2. c. 24. was passed; which enacts "That the court of wards and liveries, and all wardships, liveries, primer seizin and ousterlemains, values and forfeitures of marriages, by reason of any tenure of the king or others should be totally taken away: and that all fines for alienation, tenures by homage, knight's service and escuage, and also aids for marrying the daughter, of knighting the son, and all tenures of the king in capite, should be likewise taken away: and that all sorts of tenures held of the king or others, should be turned into common socage; save only tenures in frankalmoign, copyholds and the honorary services (without the slavish part) of grand serjeantry."

It remains to make some mention of the writers, of whose assistance the author, in framing this note, has principally availed himself. Some of these he has noticed in the course of the annotation; and to sir Henry Spelman he must here repeat his acknowledgments. With respect to the other writers to whom he is under obligations;—at the head of these he must notice the feudal writers of his own country, particularly sir
William

William Blackstone, lord Kaimes, sir John Dalrymple, sir Martin Wright, doctor Robertson and doctor Gilbert Stuart. [191. a.]—After these he must acknowledge a general obligation to three foreign works, which, in every part of the annotation, have been highly useful to him, the *Thesaurus Feudalis* of Jenichen, in three quarto volumes, published at Frankfort on the Main in 1750: the *Historica Juris* of Struvius, in one quarto volume, published at Jena in 1728: and Voet's *Digressio de Feudis*, subjoined to his Commentary on the 38th book of the Pandects.—Under the first division of the annotation he has been greatly assisted by Koch's *Tableau des Révolutions de l'Europe dans le Moyen Age*, 2 vols. octavo, Strasburgh, and Paris 1790; the early parts of Pfeffel's *Abregé Chronologique de l'Histoire and du Droit Public d'Allemagne*, 2 vols. octavo, Paris 1788; and in a particular manner, by D'Anville's *Etats formés en Europe après la Chûte de l'Empire Romain*, 1 vol. quarto, Paris, 1771. Under the second division, he is principally indebted to lord Stair's Institutions of the Law of Scotland, lib. 2. tit. 3. and to a dissertation of Lynkerus de *Feudo Pecuniario*, published in Jenichen's Collection, 3d vol. sect. 38th.—Under every part of the 3d division he has particular obligations to the *Selecta Feudalia* of Thomasius, octavo, published at Halle in 1728. In his account of the German codes, he has received great assistance from Brunquellus's *Historia Juris Romano-Germanici*, octavo, Amsterdam 1728, part 4; and Heinneccius's *Historia Juris*, lib. 2. His account of the capitularies is taken from these works and from Baluzius's preface to his edition of the capitularies. His account of the customary law is taken from Fleury's *Histoire du Droit François*, and the article *Coutume*, sent by Monsr. Henrion to the French Encyclopedia. Mr. Gibbon, (3d vol. page 583, note 1.) has, with his usual energy, thus mentioned and characterized four writers, the three last of whom the editor has frequently had occasion to consult, under the 4th division: "In the space of thirty years 1738—1765) this interesting subject (the history of the invasion of Gaul) has been agitated by the free spirit of the count de Boulainvillers (*Memoire Historique sur l'Etat de la France*, particularly tom. 1. page 15. 40.); the learned ingenuity of l'abbé Dubos (*Histoire Critique de l'Etablissement de la Monarchie Française dans les Gaules*, 2 vols. 4to); the comprehensive genius of the president de Montesquieu (*Esprit des Loix*, particularly l. 28. 30. 31); and the good sense and diligence of the abbé de Mably (*Observations sur l'Histoire de France*, 2 vols. 12mo)." The last work being considered as unfavourable to monarchy, was opposed by a work entitled *Principes de Morale, de Politique, et de Droit Public; puisés dans l'Histoire de notre Monarchie, ou Discours sur l'Histoire de France, dédiés au Roi, par M. Moreau, Historiographe de France. A Paris, de l'imprimerie royale, 1777, 24 vols. 8vo.*—Under this head he has also received great assistance on the subject of the history of France from the president Henault, and from the *Théorie des Matières Feodales et Censuelles, par Monar. Hervé, 5 vols. 8vo. Paris 1785.*—For what he has said respecting the feudal history of Germany, he is chiefly indebted to Mr. Dornford's excellent translation of Professor Putter's *Historical Development of the Present Constitution of the Germanic Empire*, and Struvius's *Elementa Juris Feudalis*, Jena, 8vo. 1745.—In his account of the substitutions of the civil law, he found what is said on these subjects, in the *Praelectiones* of Huberus, 3 vols. 8vo. *Trajecti ad Rhenum*, particularly useful.—The little he has said on the Spanish fiefs he has taken from Molina de *Hispaniorum Primogeniis, fol. Colonia, 1601:* and Zoënius's *Juris Feudalis analytica Expositio, 8vo. Lovanii 1663.* He might

might perhaps have had something more satisfactory on this head, had he been able to procure *Girardus Ernestus de Frankinau's Sacra Themiſis Hispanie Arcana*, Hanover, 1703-4. In a few instances he has taken what he hopes will be thought a pardonable liberty, of inserting, in the present annotation, some passages from his notes to the subsequent part of the work. These, however, will be found preserved in their original situation.

(1) Here lord Coke speaks only of a jointenancy for life; in which case the words, *and the survivor of them*, are merely words of surplusage; as, without them, the lands, upon the death of one jointenant, go to the survivor. But, in the creation of a jointenancy in fee, particular care must be taken not to insert these words. For the grant of an estate *to two and the survivor of them, and the heirs of the survivor*, does not make them jointenants in fee; but gives them an estate of freehold during their joint lives, with a contingent remainder in fee to the survivor.—Whether, during their joint lives, the fee continues in the grantor, or is in abeyance; and whether the grantees can convey their estate; and what is the proper mode of conveyance to be used for this purpose; are points which have been much agitated, and which, perhaps, are not yet quite settled. They were all mentioned in the case of *Vick v. Edwards*, 3 P. Will. 372. In that case lands were devised to B. and C. and the survivor of them, and the heirs of such survivor, in trust to sell: lord chancellor Talbot held, that the fee was in abeyance; that the trustees, joining in a fine of the premises, might make a title to a purchaser, by way of estoppel; and that the heirs joining might be of use, as it would supply the want of proving the will; but that, in every other respect, it would be void. Five years before this case was heard, the duchess of Marlborough, having contracted to purchase an estate from the devisees in trust of sir John Wittewronge's will, where the devise was worded in a manner similar to that upon which the case of *Vick v. Edwards* arose, application was made to Parliament for an act to enable the trustees to convey the estate to her. In the preamble of the act it is mentioned, "That the devise of the premises by the will of sir John Wittewronge was not effectual in the law to vest the absolute fee simple thereof in the trustees therein named, there being, by the words of the will, no fee vested but upon a contingency of survivorship, and which could not vest or take effect till after the death of two of the trustees." But, notwithstanding the case of *Vick* and *Edwards*, it seems now to be the prevailing opinion, that, in these cases, the fee is not in abeyance, but remains pending and subject to the contingency, in the grantor and his heirs, particularly if the estate of the trustees is created by a deed deriving its effect from the statute of uses, and that, if it be created by will, it descends, at the decease of the testator, upon his heir at law.—In support of which it is said, that the whole fee must be supposed to be in the grantor at the time of the conveyance; that so much of it as he does not part with continues in him; that, in this case, there is something undisposed of, viz. the intermediate estate, till, by the death of one of the parties, the remainder vests and is executed in the survivor; that, therefore, this intermediate estate continues in the grantor, as part of his old reversion; that the law never supposes the fee to be in abeyance, unless where it is necessary to recur to that construction, for preserving some estate or right; and that, in the present case, no such necessity exists. The cases of *Carter and Barnardiston*, 1 P. W. 505. *Purefoy v. Rogers*, 2 Saund. 380. and many other cases of authority, strongly favour this latter opinion.—The same reasoning goes to prove, that, where there is
a devise

a devise to the effect in question, the reversion in fee, during the suspense of the contingency, descends on the heir at law.—As to the question, Whether the contingent remainder, in this case, can be conveyed? it may be observed, that, supposing the reversion remains in the donor, if he and the donees join together in a common conveyance, by lease and release, or bargain and sale, the estate for life of the donees will merge in the reversion, the contingent remainder be destroyed, and the fee effectually conveyed to the purchaser.—It will be the same, in the case of a devise to this effect, if the heir at law and the devisees in trust join in the conveyance.—But, supposing the fee to be in abeyance;—or, admitting it to remain in the donor; or, in case of a will, to descend on the heir, and supposing him not to join;—lord Talbot, by what he is reported to have said in the case of *Vick v. Edwards*, seems to have thought, that the trustees joining in a fine might still pass a good title to the purchaser. But this doctrine is open to objection. See *mr. Fearne's Essay on Contingent Remainders*, 4th edit. 522. Perhaps the liberality of succeeding times may think a common conveyance, by lease and release, or bargain and sale, sufficient in these cases to pass the fee, without either a fine or recovery.

In the case of *Goodtitle v. Layman*, in K. B. Trinity Term, 12 Geo. 3. there was a devise to three persons as jointenants and the survivors and survivor of them, and the heirs and assigns of such survivor for ever, the court of king's bench held it to be a jointenancy in fee.—See *mr. Fearne's Cont. Rem.* 4 ed. 524.—In the matter of *Harrison*, an infant, 3 Ans. 857. a mortgagee devised all his property to three trustees and the survivor and survivors of them, and the heirs, executors and administrators of such survivor, upon certain trusts, the court was of opinion, that the fee descended on the heir, until, by the death of two of the trustees, it should vest in the survivor. But it is observed by the reporter, that there was no trust to sell, nor any trust which, by necessary implication, carried a fee to the trustees.

A material objection to taking the conveyance by fine from the trustees, lies in those cases, where the heir at law is not a party.—For, if the trustees are supposed to be jointenants for life, with a contingent remainder in fee to the survivor, their fine may be supposed to be a forfeiture of their own estate, to be a destruction of the contingent remainder to the survivor, and to give the heir an immediate right of entry.—To prevent this, it has been advised, that the trustee should demise the estate to the purchaser, or to a trustee for him, for a long term of years; and that each trustee should covenant, that, if he should be the survivor, he will convey the fee:—and to have that agreement established by a decree of the court of chancery.—If there are outstanding terms, they should be assigned to a trustee for the purchaser.

[Note 79.]

(1) Upon the death of either of the lessees, one moiety of the estate goes to the surviving lessee or his assignee, and the reversioner may enter upon the other moiety. See *Dy. 67. sir W. Jones 55. 2 P. Will. 740.* But this is to be understood, where the jointenants are for life; for, if the jointenants are in fee, and the jointure is severed, the right of survivorship is wholly taken away, and their shares go to their respective heirs. So, if there be jointenants of a term of years, and the jointenancy is severed, their shares go to their respective personal representatives. See 1 *Salk. 158.* It should also be observed, that the case put by *Littleton* supposes the jointenant to let his estate for his own life only: for, if he let it for a longer term than for his own life, or if he let for the life of any other person, it is a forfeiture. See 4th *Leon. 236.*

[192. a.]

[193. a.]

(1) In this case, the release passes a fee without the word heirs, because it refers to the whole fee which they jointly took and are possessed of by force of the first conveyance. Tenants in common cannot release to each other; for a release supposes the party to have the thing in demand; but tenants in common have several distinct freeholds, which they cannot transfer otherwise than as persons solely seised.

[Note 80.]

[194. b.]

(3) The 42d and 44th chapters of Britton contain much curious learning on the estate of a disseisor, and on the difference of his situation before and after he acquires an established possession, and before and after he acquires a title to his estate, and on the consequential differences of the situation and remedies of the disseisee in these respects. These chapters throw some light upon sir Edward Coke's Commentary on this Section.

[Note 81.]

[195. b.]

(1) When lands are given, in undivided shares, to two or more, for particular estates, so as that, upon the determination of the particular estates, in any of those shares, they remain over to the other grantees, and the reversioner or remainder-man is not let in till the determination of all the particular estates, the grantees take their original shares as tenants in common, and the remainders limited among them on the failure of the particular estates, are known by the appellation of cross remainders.—These remainders may be raised both by deed and will: in deeds, they can only be created by express words, but in wills, they may be raised by implication.—In the case of *Gilbert v. Witty*, Cro. Jac. 655. it was said by justice Dodderidge, that cross remainders should never be raised by implication between more than two. This doctrine received some countenance from what was said by the courts in the cases of *Cole v. Levingstone*, 1 Ventris 224. *Holmes v. Meynell*, sir Thomas Raymond 452. and some other cases. But it seems entirely exploded by the cases of *Burden v. Burville*, B. R. East. Term. 13 Geo. 3. duke of Richmond v. earl of Cadogan, determined in the court of chancery in May 1773. *Wright v. lord Cadogan*, Holford, and others, B. R. Easter Term 1774. Cowp. 31. and some other subsequent cases. It seems however to be admitted in these cases, that, to raise cross remainders between more than two, stronger implication is required, than to raise them between two only.—This general outline of the doctrine of the raising cross remainders by implication, is supported by the late case of *Atherton v. Pye*, which was sent from the court of chancery to the court king's bench, for the opinion of the judges. See 4 Durn. and East, 710.—In the limitations of cross remainders, two circumstances particularly should be attended to; one, that, the clauses by which they are created, should not be so expressed, as to make it necessary, that, the party taking under them should be alive at the time of the decease and failure of issue of the other.—The case of *Watts v. Wainright*, 5 Durn. and East, 427. is important upon this head.—In that case there was a limitation by deed "to such child or children that Mary Abell should thereafter have, as tenants in common, if more than one, in tail general; and, in case any such child or children should die without issue of his, her, or their body or bodies issuing, then the part or parts, of him, her, or them so dying without issue, should go and remain to the use of the surviving child or children of the said Mary Abell, and the heirs of his, her, or their re-

[Note 82.]

"spective

“ spective bodies issuing: And so, *toties quoties*, as any of the said children should die without issue, till there should be only one child left: And in case all the said children should die without issue, or, if the said Mary Abell should have no issue of her body, then, to the use of Robert Abell, his heirs and assigns for ever.” Mary Abell married Mr. John Wainright, and died, leaving three children, John, Mary, and Robert. Mary married Mr. Wat’s, and died, leaving issue, an eldest son, and two other children. John married, and afterwards died without issue. The question was, Whether, as Mary died in her brother’s life-time, and consequently did not at his decease sustain the description of a surviving child, her eldest son became entitled to a share of John’s third part?—The court thought the word “surviving” was referable, not only to the children, but, to the whole life of the heirs of their bodies; and, upon that ground, held the eldest son entitled. In *Doe and Toquett v. Worsley*, 1 East 416, the general doctrine, that, in deeds, cross remainders can only be raised by proper words of limitation, was confirmed.—Another circumstance to be attended to in these limitations, is, that they should be so expressed, as to pass, not only the original share of the party, but the shares surviving or accruing to him, or his issue, on the decease, and failure of issue of any other of them. For the surviving or accruing share may be considered as a distinct limitation, and may consequently be thought not to remain over, unless this is signified. The same observations apply to the trusts of personal estate. On the last head, see *Perkins v. Micklethwaite*. 1 Peer Williams, 274. and the cases there collected by Mr. Cox.

[199. b.]

[Note 83.] (1) But now, by the stat. of the 4th Ann. chap. 16. sect. 27. actions of account may be maintained by one joint tenant and tenant in common, his executors and administrators, against the other, as bailiff, for receiving more than comes to his share and proportion, and against the executors and administrators of such jointenant or tenant in common; and the auditors appointed by the court, where such action shall be depending, are empowered to administer an oath, and examine the parties touching the matters in question, &c. See also 1 Leo. 219.

[Note 83.] (1) *M. 26 & 27 Eliz. per cur.* If one coparcener in tail levies a fine to another sur cousans de droit, &c. it does not enure by way of release, but by way of grant, and it will be a discontinuance and alteration of the estate without execution, because one parcener may enfeoff another, and this is a feoffment of record. But one may release to another, and it enures per mitter le droit.—Ld. Nottingham. MSS.

[201. a.]

[Note 84.] (1) *The doctrine of conditions* is derived to us from the feudal law. The rents and services of the feudatory are mentioned by feudal writers, as conditions annexed to his fiefs. If he neglected to pay his rent, or perform his service, the lord might resume the fief. But the payment of rent and the performance of feudal service were, for a long period of time, the only conditions that could be annexed to a fief; and, the latter, whether expressed or not, was always presumed by the law;—being incident to, and inseparable from, the estate of the feudatory.—In this sense they are called conditions in law, or implied conditions.—Afterwards, when other conditions were introduced, the estates to which they were annexed were ranked among improper fiefs.—See Sir Thomas Craig *De Jure Feudali*, lib. 2. diæg. 4. sect. 1, 2, 3. Conditions of this last sort, were called express, or conventional conditions. By an application, in some respects very much forced, of the original

original principle of conditions, that, on the non-performance of them, the lord might resume his fief, conditional fees at common law, and some other modifications of landed property, were introduced as estates upon condition. These are often of such a nature, as to make it more natural that a stranger should have the estate on the non-performance of the condition, than the donor;—and, that the lord, instead of being confined to his right of resumption, should have it in his power to compel the performance of the condition, or recover from the donee a compensation, or satisfaction, for the breach of it. But, as all these estates were introduced as estates upon conditions, the law, where it still considers them as conditions, and except where it has been altered by act of parliament, confines the donor's remedy to the resumption of the estate, and gives that remedy only to the donor and his heirs.—Considered in this sense, the word Condition, has, in our law, a much more contracted meaning than it has in the civil law; where it signifies, generally, all those pactions, or agreements, which regulate that which the contractors have a mind should be done, if a case, which they foresee, should come to pass. This is the definition of Domat, *lib. 1. tit. 1. sect. 4.*

[201. b.]

(1) By special consent of the parties, a re-entry may be for default of payment of rent without demand of it. 5 Rep. 40. b. [Note 85.]

(3) The prior of St. John Jerusalem made a lease for years, reserving rent, with a condition of re-entry, and afterwards surrendered the prior and all its possessions to the king. The judges were of opinion, that the king, by reason of his prerogative, might take advantage of the condition without demand, though the prior himself could not. 5 Rep. 56. a. b. [Note 85.]

[202. a.]

(2) Yet the rent is not due till the last minute of the natural day; for if the lessor dies after sun-set and before midnight, the rent shall go to the heir and not to the executors. 1 Saund. 287. Salk. 578. (*Note to the twelfth edition.*) [Note 87.]

(3) For there is a material difference between a reservation of a rent payable on a particular day, or within a certain time after, and a reservation of a rent payable at a certain day, with a condition that if it be behind by the space of any given time, the lessor shall enter. In both cases, a tender on the first, or last day of payment, or on any of the intermediate days, to the lessor himself, either upon, or out of the land, is good. But, in the former case, it is sufficient, if the lessee attend on the first day of payment, at the proper place; and, if the lessor do not attend there to receive the rent, the condition is saved. In the latter case, to save the lease, it is not sufficient that the lessee attends on the first day of payment, for he must equally attend on the last day. 10 Rep. 129. a. Plow. 70. a. b. and Cropp v. Hambleton, Cro. Eliz. 48.—It is to be observed, that it was once doubted, whether proof of actual entry and ouster was necessary in ejectment, brought on breach of a condition of re-entry.—It was afterwards settled, that it was not, but that, notwithstanding the confession of the re-entry, the demand of the rent must be proved. Anon. 1 Vent. 248.—Little v. Heaton, 2d Lord Raym. 750. and 1st Salk. 259. and see 3 Burr. 1896, 1897. But now, by the 4 Geo. 2. c. 28. sect. 2. landlords or lessors, having a right by law to re-enter, for non-payment of rent, may, without any formal demand, or re-entry, serve a declaration in ejectment for the recovery of

the demised premises; and shall recover judgment and execution, in the same manner as if the rent in arrear had been lawfully demanded, and re-entry made. And if the lessee or tenant permits execution to be executed on such judgment, without paying the rent and arrears, and full costs, and without filing any bill or bills for relief in equity, within six calendar months after such execution executed, he shall be barred and foreclosed from all relief in law or equity, except by writ of error for reversal of such judgment.—By the same statute, sect. 4th, if the tenant, at any time before the trial in ejectment, pays or tenders to the lessor or landlord the whole rent in arrear, with the costs, or pays such arrears and costs into court, the proceedings in ejectment shall cease, and the tenant shall be relieved in equity, and hold the lands demised according to the old lease, without any new lease. In *Archer v. Snapp*, A.D. 341. lord chief justice Lee observes, that both the courts of law and the courts of equity had, previous to this statute, exercised a discretionary power of staying the lessor from proceeding at law, in cases of forfeiture for non-payment of rent, by compelling him to take the money really due to him. The same observation is made in *Bull. Ni. Pri.* 97. See 2 *Salk.* 597. 8 *Mod.* 345. 10 *Mod.* 383. and 2 *Vern.* 103. 1 *Wilson* 75. 2 *Stra.* 900. So, in a *cessavit*, the defendant, by tendering the arrears, and giving security, might free himself. See *Pigot on Com. Rec.* 62.

[202. b.]

[Note 89.] (1) This is seemingly contradicted by the authorities cited in the margin. In that taken from lord Coke's Reports, it is said, that "If the lord grants his seignior on condition, and the tenant pays the rent to the grantee, and afterwards the condition is broken, and the lord distrains for the services, upon rescous made he shall have assise, for the scisin before is sufficient.—The case reported in the margin from the Book of Assises is to the same effect.—But it is to be observed, that, when the lord distrains, this distress amounts to a new entry. This may serve to reconcile the apparent contradiction, in this instance, between the Commentary and the authorities cited in the margin.

[Note 90.] (2) It may be further observed, 1st. That as the entry of the feoffee on the feoffee for a condition broken defeats the estate to which the condition was annexed, so it defeats all rights and incidents annexed to that estate, as dower, &c. and all the mesne incumbrances of the feoffee. See 1 *Roll. Abr.* 474. 2dly, That every condition must defeat the entire estate, and that a condition cannot be so framed, as to make one and the same estate in any lands cease as to one person, and remain as to another, or cease for one time, and revive afterwards. 6 *Rep.* 40. b. 41. a. 3dly, That a condition annexed to land, cannot be apportioned by any of the parties themselves, so as to become void as to one part of the land, and to remain good as to the other. Thus, in the case cited by lord Coke, 4 *Rep.* 120. a. b. a lease was made for twenty-one years, of three manors, rendering rent for manor *A.* 6l. for manor *B.* 5l. and for manor *C.* 10l. to be paid on a place out of the land, with a condition of re-entry into all the three manors, for default of payment of the rents. The lessor granted the reversion of part of manor *A.* to one and his heirs; and afterwards granted the reversion of another part to another and his heirs; it was adjudged, that the second grantee should not enter for the condition broken, because the condition was entire, and, by the severance of part of the reversion, was destroyed in all. But a condition may be apportioned by act in law. See the instance put by lord Coke, post, 215. a. 4thly, That part of a condition may be good

good, and another part of it may be void in law ; as, if a person makes a gift in tail to the donor's eldest son, remainder to his youngest son in tail, with a condition that, if the eldest son alien in fee, his estate shall cease, and the lands should remain to the second son in tail ; that part of the condition, which prohibits the alienation made by tenant in tail, is good in law, but that part of it, which says that, upon such alienation, the lands shall remain over, is void, and the donor may re-enter. See Litt. Sections 720, 721, 722, 723, and the Commentary page 379. b. And see post. 223. b. note 1. 379. b. note 1. *Sthly*, That, if *A.* be tenant for life, remainder in contingency, remainder to *B.* in tail, and *A.* before the contingency happens, surrender his estate to *B.* his surrender bars the contingent remainder. But, if he surrenders on condition, and before the contingency happens, the condition is broken, and *A.* enters on the estate, the contingent remainder is revived. See Thompson v. Leach, 1 Lord Raym. 313.

[203. a.]

(1) But there must be a previous actual demand, in the same manner as where the condition is general. Hob. 82. 133. Hobart was of opinion, that the feoffor, to entitle himself to enter by way of penalty, should demand the rent not only on the day when it became due, but on the day after. Hob. 208. [Note 91.]

(2) This is so, though the condition be, that the feoffer, his heirs and assigns, may enter ; and his interest goes to his executor. But he may maintain an ejectment. 1 Saun. 112. 1 Sid. 344, 345. T. Raym. 135. 158. [Note 92.]

(3) Care must be taken, with respect to conditions, or powers of entry, to distinguish between a general condition that the lessor shall re-enter ; a special condition that he may enter and hold until payment or satisfaction ; and a power of entry, limited by way of use. I. *A general condition that the lessor shall re-enter* is the subject of the foregoing Section. II. *A special condition that he may enter*, is the subject of the present Section. The distinction when the profits taken by the lessor after entry are, and when they are not, to be in satisfaction of the rent, is not admitted in equity, for the courts of equity will always make the lessor account to the lessee for the profits of the estate, during the time of his being in possession of it, and decree him, after he is satisfied the rent in arrear, and the costs, charges and expenses attending his entry and detention of the lands, to give up the possession to the lessee, and deliver and pay him the surplus of the profits of the estate and the money arising thereby. III. *A power of entry limited by way of use*. This takes its effect from the Statute of Uses ; as, if *A.* by feoffment, lease and release, fine, or common recovery, conveys an estate to *C.* and his heirs, to the use, intent, and purpose, that *B.* may receive out of the lands so conveyed a certain annual sum ; and to this further use, intent, and purpose, that if such annual sum, or any part of it, be unpaid by a certain time, it shall be lawful for *B.* and his assigns to enter upon, and hold possession of the land, and receive the rents and profits of it, until the arrears are satisfied : here, as soon as the rent is in arrear, an use, which is served out of the original seisin of the feoffee, releasee, conusee or recover, springs up and vests in the person to whom the power is given. This use is immediately transferred into possession by the statute. He has consequently a right to take and keep that possession till the purpose for which it is executed is satisfied, and then the use determines. By virtue of this estate he may make [Note 93.]

make a lease for years to try his title in ejectment, either, to obtain the possession of the lands, if it be withheld from him, or, to restore it, if it be disturbed or divested; and if he assigns the annual sum, this right of entry, and preception of the rents and profits of the lands charged with the payment of it, passes with it to the assignee. But a distinction must be made between this case and that of a grant of a rent to be issuing out of certain lands, with a proviso, declaration or covenant, that if the rent be in arrear, the grantee may enter, &c. Here there is no seisin in any person, out of which an^e use can arise to the grantee on non-payment of the rent; and therefore possession is not in him till he makes an actual entry. But an interest vests in him when the rent becomes in arrear, and he may reduce it into possession by ejectment. See *Haverhill v. Hare*, Cro. Jac. 510. 2 Roll. Rep. 2. Poph. 126. 147. 3 Bulstr. 250. *Jemmett v. Cowley*, Sid. 223. 262. 344. Raym. 135. 158. Saund. 112.

[203. b.]

[Note 94.]

(1) Acc. 1 Roll. Abr. 410. L. 30. though it stands indifferent whether it be the speaking of the grantor or grantee; for in that case it shall be referred to the grantor, as no condition can be reserved or made, but on the part of the donor, lessee or feoffor. Dyer 6. And it is immaterial in what part of the deed the word proviso stands, and though there be covenants before or after. 2 Rep. 70, 71. 1 Roll. Abr. 407. Dyer 311. But when it does not introduce a new clause, and only serves to qualify or restrain the *generality* of a former clause, *it is not a condition*. Moore 307. 707.—We should carefully distinguish between a *condition*, a *remainder*, and a *conditional limitation*. I. We have seen that a *condition* defeats the whole estate; that none but the donor or the heir can take advantage of, or enter for, the breach of it; and that, when he enters, he is in as of his old estate. Such is the case put by Littleton of a feoffment in fee, reserving a yearly rent, with a condition that, if the rent be behind, it shall be lawful for the feoffor and his heirs to enter. II. A *remainder* is defined by lord Coke, ant. 143. to be “a remnant of an estate in lands or tenements, expectant on a particular estate, created together with the same, at the same time;” so that it waits for, and only takes effect in possession on, the natural expiration or determination of the first estate: as, if a man limits an estate to *A.* for life, and after his decease to *B.* in fee, this is a remainder: it does not defeat, but it expects the natural end and expiration of the first estate limited to *A.* for his life; and when that event happens, not the heir, but a stranger has the advantage of it. III. A *conditional limitation* partakes of the nature both of a condition and a remainder. It is to be observed, that it was understood by the old lawyers, that whenever either the whole fee, or a particular estate, as an estate for life, or in tail, was first limited, no condition or other quality could be annexed to this prior estate to defeat it, and pass the estate to a stranger; for, as a remainder, it was void, being an abridgement or defeasance of the estate first limited; and, as a condition, it was void, as no one but the donor or the heirs could take advantage of a condition broken, and the entry of the donor or his heirs unavoidably defeated the livery, upon which the remainder depended. On these principles, it was impossible, by the old law, to limit by deed, if not by will, an estate to a stranger, upon any event which went to abridge or determine an estate previously limited. But the expediency and utility of such limitations, assisted by the revolution effected in our law by the statute of uses, at length forced them into use, in spite of the maxim of law, that a stranger cannot take advantage of a condition. These limitations are now become frequent, and

and their mixed nature has given them the appellation of conditional limitations: they so far partake of the nature of conditions, as they abridge or defeat the estates previously limited; and they are so far limitations, as, upon the contingency taking place, the estate passes to a stranger. Such is the limitation to *A.* for life, in tail, or in fee, provided, that when *C.* returns from Rome, it shall from thenceforth remain to the use of *B.* in fee. See *mr. Fearne's Essay on Contingent Remainders*, p. 7. Of late, however, it has been frequently argued, that the difference between a remainder, and what is generally understood by a conditional limitation, is merely verbal. See 10 *Mod. Rep.* 423. *mr. Douglas's* note to page 727. of his Reports, and *mr. Fearne's* reply in the last edition of his *Essay*, p. 11.—In addition to what has been mentioned in the concluding note on 202. b. respecting the principle, that when a feoffor enters for a condition broken he is in as of his former estate; it may be observed, that when a tenant for life joins with a remainder-man in suffering a common recovery, it is sometimes practised, as a precaution against letting in the incumbrances of the remainder-man, to annex a condition to the estate of the bargainee or releasee, who is made tenant to the præcipe, on the non-performance of which his estate is to become void. For, if *A.* be tenant for life, with remainder in tail to *B.* and *B.* executes leases, confesses judgments, or otherwise encumbers his estates; and afterwards *A.* and *B.* join in suffering a common recovery, all the incumbrances of *B.* are immediately let in upon the fee gained by the recovery; and that fee, and every estate derived out of it, are subject to them. To avoid which, *A.* the tenant for life, by lease and release, or by bargain and sale enrolled, conveys the estate to the intended tenant to the præcipe, to hold to him and his assigns during the joint lives of him and the grantor or bargainor; with a declaration, that such grant and release, or bargain and sale is made, to enable the grantee or bargainee to be tenant of the freehold in the proposed recovery; and a declaration of the uses to which it is intended the recovery shall enure. Then a proviso is inserted, that, if the bargainee or releasee do not, within six months, pay the tenant for life 100,000*l.* or some other very large sum of money, the bargain and sale, or grant and release, shall be void; and that it shall be lawful for the bargainor or grantor to enter, as in his former estate. The money is not paid at the day appointed; and thereupon the bargain and sale, or grant and release, is void, and the bargainor or grantor becomes seised of his ancient life estate. But, though the bargain and sale becomes void, yet, as, at the time of suing the original writ and the præcipe, the bargainee or releasee was tenant of the freehold, the subsequent cesser or determination of his estate does not impeach the recovery. For, if the person against whom the præcipe is brought, be, at the time when the præcipe is sued, or at any time before judgment, actual tenant of the freehold, it is immaterial what becomes of it afterwards. This doctrine has been carried so far, that where a tenant to the freehold was made by a fine, and the fine has been reversed, yet the recovery was held good. (See *Lloyd v. Evelyn*, 1 *Salk.* 568. and see 1 *Shower's Rep.* 347. *Hob.* 262. *Noy* 136. 1 *Mod.* 218.) The recovery therefore, in this case, is good; the freehold upon which it was suffered is determined; and the bargainor or grantor comes in of his original estate, and of course avoids all the leases, judgments, and other incumbrances of the tenant in tail. The reason why the conveyance is made to the bargainee or releasee during the joint lives of him and the grantor or bargainor, is, to preserve his powers, by leaving the reversion in him. —For, supposing *A.* to be tenant for life, with the usual powers of leasing,

ing, jointuring, and charging; remainder to trustees to preserve contingent remainders; remainder to *A.*'s first and other sons in tail male; remainder to his daughters as tenants in common in tail, with cross remainders in tail between them, if more than one, with remainders over; *A.* and his daughters may suffer a common recovery; and it will be good against *A.* and his daughters, and their issues in tail, and the remainders over. But the estates tail of the sons, being prior to the estates of the daughters, and being supported by the estate of the trustees for preserving contingent remainders, are not, whether vested or contingent, at the time of the recovery affected by it.—But if *A.* granted his whole life estate to the tenant to the præcipe, it *might* be apprehended, that the powers relating to his estate, whether appendant or in gross, would be extinguished thereby (see *Edwards v. Slater*, *Hardress* 410. and *King v. Melling*, 1 *Ventris* 225.) and a limitation or grant of new powers would be void against the sons and the heirs male of their bodies. To prevent this question being made, *A.* the tenant for life, conveys an estate to the intended tenant to the præcipe, only during his (the tenant) and the grantor or bargainor's joint lives. This continues the old reversion in the grantor or bargainor, and preserves the powers relating to his original state.—It is customary in these cases to declare, that the recovery shall enure in the first place, for corroborating, strengthening, and confirming the estate for life of the grantor or bargainor, and all other estates precedent to the estate in tail meant to be destroyed, and all powers and privileges annexed to such estate for life, and other precedent estates.—The mode of suffering recoveries on a conditional estate of freehold, was in use so early as the end of the last century.

[205. a.]

[Note 96.]

(1) Few parts of the law lead to the discussion of more extensive or useful learning than the law of mortgages. The nature of these notes neither requires nor admits of more than some few general observations upon the origin of mortgages:—what constitutes a mortgage;—the different estates of the mortgagor and mortgagee, and the nature of an equity of redemption.—1st, As to the origin of mortgages;—from what is said of them in this chapter, it appears that they were introduced less upon the model of the Roman *ignus*, or *hypotheca*, than upon the common law doctrine of conditions.—2nd, As to what constitutes a mortgage;—no particular words, or form of conveyance, are necessary for this purpose. It may be laid down as a general rule, and subject to very few exceptions, that, wherever a conveyance or assignment of an estate is originally intended as a security for money, whether this intention appears from the deed itself, or by any other instrument, it is always considered in equity as a mortgage, and redeemable; even though there is an express agreement of the parties, that it shall not be redeemable, or, that the right of redemption shall be confined to a particular time, or to a particular description of persons. See *Newcomb v. Bonham*, 1 *Vern.* 7. 214. 2 *Ca. in Chanc.* 58. 159. *Howard v. Harris*, 1 *Vern.* 33. 190. 2 *Ca. in Chanc.* 147. *Talbot v. Braddy*, 1 *Vern.* 183. 394. *Barrel v. Sabine*, 1 *Vern.* 268. *Manlove v. Bell*, 2 *Vern.* 84. *Jennings v. Ward*, *ibid.* 520. *Price v. Perrie*, 2 *Freemen* 258. *Francklyn v. Fern*, *Barnard. Cha.* 30. *Clinch v. Wetherby*, *Cas. temp. Finch*, 376. *Cooke v. Cooke*, 2 *Atk.* 67. *Mellor v. Lees*, 2 *Atk.* 494. *Cottrell v. Purchase*, *Cas. temp. Talbot*, 61. *Endsworth v. Griffith*, 1 *Bro. Par. Ca.* 149. *Floyer v. Lavington*, 1 *P. W.* 268. In many of these cases the courts have found it necessary, not only to apply their general principles, but to determine the fact, whether the conveyance was intended as an absolute sale, or as a security for the money. If the money paid by

by the grantee was not a fair price for the absolute purchase of the estate conveyed to him; if he was not let into the immediate possession of the estate; if, instead of receiving the rents for his own benefit, he accounted for them to the grantor, and only retained the amount of the interest; and if the expence of preparing the deed of conveyance was borne by the grantor; each of these circumstances has been considered by the courts as tending to prove that the conveyance was intended to be merely pignoratitious.—3d, As to the nature of the estates of the mortgagor and mortgagee;—it was not, till lately, accurately settled. It was formerly contended, that the mortgagor, after forfeiture of the condition, had but a mere right to reduce the estate back to his own possession, by payment of the money. It is now established, that the mortgagor has an actual estate in equity, which may be devised, granted, and entailed; that the entails of it may be barred by fine and recovery; but that he only holds the possession of the land, and receives the rents of it, by the will or permission of the mortgagee, who may by ejectment, without giving any notice, recover against him or his tenant. In this respect the estate of a mortgagee is inferior to that of a tenant at will. In equity, the mortgagee is considered as holding the lands only as a pledge or security for payment of his money. Hence a mortgage in fee is considered only as personal estate in equity, though the legal estate vests in the heir, in point of law. Hence also a mortgagee, though in possession, will, in case of a living vacant, be compelled in equity to present the nominee of the mortgagor to it,—even though nothing but the advowson is mortgaged to him. On the same principle there is a *possessio fratris*; and tenancy by the curtesy, of an equity of redemption. *Casborne v. Scarfe*, 1 Atk. 603. *Keeche v. Narne*, Doug. 21. *Moss v. Gallimore*, *ibid.* 266. *Amherst v. Dawling*, 2 Vern. 401. *Gally v. Selby*, Stran. 403. *Gardner v. Griffith*, 2 P. Will. 404. *Mackenzie v. Robinson*, 2 Atk. 559.—In this light the legislature has viewed the different estates of mortgagor and mortgagee in the statutes of the 7th of Will. and M. c. 25. and 9 Ann. c. 5.—4th, As to the nature of an equity of redemption;—originally there was no right of redemption in the mortgagor. Lord Hale, in the case of *Rose Carrick v. Barton*, 1 Chan. Ca. 219. says, that in the 14th year of Richard II. the parliament would not admit of redemption. See the printed Rolls, vol. 3, p. 259. It was, however, admitted not long after. But, after its admission, if the money was not paid at the time appointed, the estate became liable, in the hands of the mortgagee, to his legal charges, to the dower of his wife, and to escheat; and it was an opinion, that there was no redemption against those who came in by the post. This introduced mortgages for long terms of years. These are attended with this particular advantage, that, on the death of the mortgagee, the term and the right in equity to receive the mortgage debt vest in the same person: whereas, in cases of mortgages in fee, the estate, on the death of the mortgagee, goes to his heir, or devisee, and the money is payable to his executor or administrator. This produces a separation of rights, that is often attended with great inconvenience, both to the mortgagor and mortgagee. On the other hand, in case of mortgages for years, there is this defect, that, if the estate is foreclosed, the mortgagee will be only entitled for his term.—To guard against which, it has been thought advisable to make the mortgagor covenant, that, on non-payment of the money, he will not only confirm the term, but convey the freehold and inheritance to the mortgagee, or as he shall appoint, discharged of all equity of redemption. The difference between a trust and an equity of redemption, is observed by lord Hale, in the case of *Powlett and the Attorney-*

Attorney-general Hard. 465. It frequently happens, that mortgagees in fee and trustees devise their real estates, by very general words, and that a doubt arises, whether the estates held by them in trust, or by way of mortgage, pass under that devise.—The case of Marlow v. Smith, 2 P. Williams, 198, is an authority in support of their passing by such a devise.—The same point was also decided in a case called the Attorney-general v. Philips, heard in Chancery on the 16th of November 1767.—There, a general devisee of this description, by a trustee, was construed to pass lands held by him in trust for a charity.—It may, however, be observed, that, though, where the expression is general, and there is nothing to restrain the generality of it, there is ground to contend that trust estates and lands in mortgage will pass; yet, where the devise is of such a description as to be incompatible with the nature of estates held upon trust or in mortgage, it may be sufficient to restrain the generality of the expression.—Thus, if a person seised of lands held by him in trust or mortgage, devises all his estates to various uses in strict settlement, as it is impossible to suppose the testator could mean the estates in question to pass in that manner, it may perhaps be held, that, they do not pass. So, if a mortgagee in fee devises all his personal estate to *A.* and appoints him executor, and devises his real estate to *B.* there seems, in many cases of this description, great reason to contend he did not intend the lands in mortgage should pass to *B.* But, if a person devises all his real and personal estate to another, and appoints him executor, there seems reason to suppose, that he intended the legal fee of the mortgage should vest in him.—But, as the case of Marlow v. Smith, and the Attorney-general v. Philips, are decisive, it seems prudent, in all cases of this nature to require the concurrence both of the heir and devisee.—And, to prevent any question of this kind from arising, it is advisable, that in wills there should be an express devise of the estates held by the testator in trust or mortgage.

[205. b.]

[Note 97.] (1) *V. T. 15. Jac. After covenant to stand seised to the use of B. and his heirs, with proviso of revocation on payment to B. and his assigns; B. dies; he may tender to the heir and revoke. Allen's case, Ley, 55. b. Hal. MSS.*

[206. a.]

[Note 98.] (1) Lord Coke here considers the effect of impossible conditions. 1st. Where they are possible at the time of their creation, but afterwards become impossible; and he distinguishes that impossibility which is produced by the act of God, and that which is produced by the act of the party. 2dly. When they are impossible at the time of their creation. 3dly. When they are against law, either as *mala prohibita*, or *mala in se*. 4thly. When they are repugnant to the grant by which they are created, or to the estate to which they are annexed. It should be observed, that a condition is then only considered in the eye of the law as impossible at the time of the creation, if it cannot, by any means, take effect. Such is the case put by lord Coke, that the obligee shall go from the church of St. Peter at Westminster to the church of St. Peter at Rome, within three hours. But, if it only be in an high degree improbable, and such as is beyond the power of the obligee to effect, it is not then considered as impossible. See the cases of this nature in 1 Roll. Abr. 419, 420.—It is said, that if the condition of a bond be to pay a certain sum, or to do any other act, out of his majesty's dominions, the condition is void, and the bond is single, because the performance of it cannot be tried. See 21 Edw. 4. 10.—It was upon a similar principle, that

that if a man professed himself a monk in a religious house beyond seas, it was no disability, because the fact could not be tried. For the only method which the law had, to know if a man was professed, was to issue a writ in the king's name to the bishop of the diocese, commanding him to certify, if such a monk was professed, in such a house, in such a place, within his diocese. But this method could not be used with respect to foreign professions, as the bishop was not bound to obey the king's writ, and might certify either true or false, without subjecting himself to punishment. For this reason, no notice was taken in our law of foreign profession.—Thus L. Rolle, 2 Abr. 43. says, “If an Englishman goes into France, and there becomes a monk, he is, notwithstanding, capable of a grant in England; for that such profession is not triable; and so for that all profession is taken away by the statute; and, by our religion, now received, such vows and professions are held void. I have heard,” continues he, “that this was in 44 Eliz. in one Ley's case, resolved accordingly by all the justices in Chancery-lane.”

[206. b.]

(1) It is observed in 1 P. W. 189, that “all instances of conditions against law, in a legal sense, are reducible under one of these three heads; either, to do *malum in se*, or *malum prohibitum*: 2dly, to omit the doing of something that is a duty; 3dly, to encourage such crimes and omissions. And such conditions as these, the law will allow, and without any regard to circumstances, defeat.” It is not within the plan of these notes to enumerate, or discuss, the various instances in which the conditions of bonds have been held unlawful at law, or in equity. Those which chiefly deserve consideration are such as relate to, 1st, Bonds given for procuring marriages, or what is usually called marriage brokage. See *Hall v. Potten*, 3 Levinz. 411. Shower's Par. Cas. 76. Brown's Par. Cas. 60. *Scribblehill v. Brett*, Brown's Parl. Cases 57. *Heat v. Allen*, 2 Vern. 588. *Cole v. Gibson*, 1 Ver. 503. 2dly, Bonds restraining the obligor from a free exercise of a trade. Here, if the restraint be qualified, so as only to take in a particular place, and the breach of the condition tends apparently to the detriment of the obligee, and a consideration is given by the obligee to the obligor for executing the bond, the condition will not be impeached either at law or in equity. See 1 P. W. 190, 191. 10th Mod. 133. 3dly, Bonds of resignation. The validity of these bonds, and the propriety of their being supported, considered as a matter of policy, was most elaborately and ably discussed in the great cause of the bishop of London Fytche, heard on appeal in the house of lords in May 1783. A state of this case, and of the arguments and speeches of the lords, prelates, and judges who spoke, when it was heard before the lords, is to be found in Mr. Cunningham's *Law of Simony*.—It seems to be settled, that, if a bond is given with a condition to do several things, and only some of them are against law; the bond shall be good as to the doing the things agreeable to law, and only void as to those which are against law. *Norton v. Sims*, Hob. 14. *Mosdell v. Middleton*, 237. *Pearson v. Humes*, 229. *Chesman v. Nainby*, 2. lord Raymond 1456.

[Note 99.]

[207. a.]

(1) Here the performance of the condition is excused by the default of the feoffee or obligee, viz. by tender and refusal. It is also excused. 1. By his absence in those cases where his presence is necessary for the performance of the condition. 2. By his obstructing or preventing the performance. And 3. By his neglecting to do the first act, if it is incumbent on him to perform it. See the cases in 1 Roll. Abr. 457, 458.

[Note 100.]

It is also excused, in some cases, by his not giving notice to the feoffee or obligee. See 1 Roll. Abr. 463, 467, 468.

[Note 101.] (2) In the 10th, 11th, and 12th editions, there is, in the margin, a reference to 3 Cro. 755; but there is no such page in that volume of Croke. Most probably it is misprinted for 1 Cro. 755. *Cotton v. Clifton*, where it was held, "that, where an obligation is made, and afterwards a defeasance is made thereof, if he pays a less sum, there, if he pleads the defeasance, and the tender of the lesser sum, he need not to say, *tout temps priet*; for, by the tender, he was discharged of all; but otherwise it is of an obligation, with a condition to pay a lesser sum."

[Note 102.] (3) None of the authorities in the margin go to this point. In *Pla 156*, it is laid down, that a lease and release may be pleaded as a feoffment; and 1 *Finch 48*, and 2 *Finch 68*, it is said, that, a lease and release amounts to a feoffment. But this must be understood with some qualifications, as the operation of a feoffment is, in some instances, much more forcible, and of course may be much more beneficial to the person entitled to the benefit of the condition, than the operation of a lease and release. The nature of a feoffment will be considered in one of the notes to the Chapter of Releases.—With respect to the difference adverted to in the notes, between the operation of a lease and release, and the operation of a feoffment; it is immaterial whether, by the lease, is understood a bargain and sale for years under the statute, or a lease at common law, with an actual entry by the lessee. In either case, though the lessor had the possession, yet, unless he was seized of the freehold, when he executed the lease, his release would not vest an estate of freehold in the releasee. But his feoffment, if he had but a mere possession, would vest the freehold in the feoffee. In the same manner, if tenant for life enfeoffs for fee, it divests the whole inheritance, and is a forfeiture of his estate. But nothing of this is produced by a release grounded on a previous lease, either at common law or by the statute.

[207. b.]

[Note 103.] (1) See the account given in *Bla. Com.* vol. i. ch. 7. of his majesty's prerogative respecting the coin of the kingdom: and see 5 *Mod. 7. 2. Sal. 466*. For the etymology of the word *Sterling*, see *Du Cange* and *Spelman's Glossaries*, under the word *Esterlingus*; and *Mr. Leake's Historical account of English Money*, page 20. *Guineas* took their name from the gold brought from *Guinea* by the *African company*, who, as an encouragement to bring over gold to be coined, were permitted, by their charter, to have their stamp of an elephant upon the coin made of the *African gold*.—By a proclamation of the 22d of *December 1717*, the *guinea*, which till then had been current for 21 shillings and sixpence, was reduced to 21 shillings, and half *guineas*, double *guineas*, and five pound pieces in proportion.

[Note 104.] (3) And if, at the time of the feoffment, a purer or more weighty money were current, and, before the day of payment coin of a baser alloy is established by proclamation, a tender of the sum in that coin is good. *Dav. Rep. 18. Note to the 11th edition.*

[208. a.]

[Note 105.] (1) In the same manner, equity permits all persons to redeem, who have any estate or interest in the equity of redemption of the mortgagor;

gagor; as tenant for life, remainder-man or reversioner, jointress, tenant by the curtesy, by *elegit*, statute merchant or staple, &c. All these may redeem; and volunteers are equally admitted to redeem, as purchasers for a valuable consideration. *Howard v. Harris*, 1 Vern. 193. 2 Eq. Cas. Abr. 594. The tenant for life and jointress contribute towards the redemption of the mortgage debt. In 1 P. Williams 650. the reporter states, that he mentioned to the court, that the life estate, (especially in the case where the tenant for life had the remainder in fee,) might be valued at two-fifths, which had been done in some cases; yet the court said, how equitable soever that might be, it was not the practice, for which reason it would be dangerous, and create uncertainty to go out of the rule; and the register said, he had never known a life valued at more than one-third.—But the remainder man or owner of the inheritance must come in to redeem in the life of the tenant for life, or jointress; for he cannot, after their decease, compel a contribution from their assets. 1 P. Williams 650. *Cornish v. Mew*, 1 Cha. Ca. 271. Prece. Cha. 62. *Howell v. Price* 424.—In what cases *the doweress will be permitted to redeem* is a question, which involves in it many points of great nicety. The law requires a legal seisin in the husband; and it is a settled point, that the wife cannot be endowed of a trust estate. Upon this principle, it was generally understood, that the wife was not entitled to her dower out of an estate, which, at the time of her marriage, was subject to a mortgage in fee. But this, perhaps, was never formally determined, till the case of *Dickson v. Onslow*, decreed by lord Loughborough, and the other lords commissioners, on the 13th of November 1783, against the wife, without hearing the counsel for the heir. But the case is different with respect to mortgages for terms of years. It may be observed here, 1st. That, at common law, if a lease be made for a term of years, rendering rent, the wife is entitled to her dower of a third part of the reversion by metes and bounds, and to a third part of the rent; and execution will not cease during the term. 2dly. If the husband makes a gift in tail, rendering rent, as the rent is payable out of, or in respect of, an estate of inheritance, the wife will be endowed of a third part of the rent. 3dly. If the husband makes a lease for life, rendering rent, the wife is not entitled to her dower of the rent, because it is not payable, in this case, out of, or in respect of, an estate of inheritance. 4thly. If the husband makes a lease for years, reserving no rent, then judgment will be given for the wife, with a *cesset executio* during the term. This, if the term be of long duration, deprives her, virtually, of her dower. 5thly. If a person purchases an estate of inheritance which is in mortgage for a term of years, whether he only purchases the equity of redemption, or discharges the mortgage, the wife of the vendor will not be entitled to her dower in equity. 6thly. If a person dies seised in fee, subject to a term of years, if the term be a term in gross, for securing the payment of a sum of money, the widow, by discharging the money secured by it, or paying one third of the interest, will be entitled to dower. 7thly. If the term be an outstanding satisfied term, she will also be entitled to her dower against the heir. Ante. 32. a. Bro. Abr. Dower 44. 60 89. 1 Roll. Abr. 678. *Bodmin and Vandebendy*, Shower's Cases in Parliament, 69. *Brown v. Gibbs*, Precedents in Chancery 97. *Wray v. Williams*, *ibid.* 151. *Dudley v. Dudley*, 241. *ibid.* 201. *Banks v. Sutton*, 2 P. Williams 700. *Hill v. Adams*, 2 Atkyns 208. Amb. 6. under the name of *Swannock v. Liford*.—The last of these cases applies particularly to the position contained under the 5th division,—that in the case of a purchaser, the wife will not be relieved in equity, against an outstanding term of years.—

[Note 105.] As this circumstance frequently occurs in practice, and the general doctrine of terms of years, as they affect dower, is [208. a.] very important, we present the reader with a manuscript note of lord Hardwicke's argument, on making his decree in the case last-mentioned, where he enters very largely, and with his usual ability, both on the general doctrine, and its application to the point in question.

“ Lord CHANCELLOR.—Plaintiff's husband, being seized of a freehold estate, subject to a term of one thousand years standing out in a mortgage, by virtue of a mortgage made by his father, conveys the inheritance to defendant for a valuable consideration; and, at the time of this conveyance, defendant takes an assignment of the term in mortgage, in the name of trustees, to wait and attend upon such inheritance: and now the plaintiff brings her bill against defendant the purchaser, for dower, praying to be admitted to redeem this mortgage term, and to have it out of the way; and, upon payment of her proportion of the mortgage money, to be let into her dower immediately, that she might not wait till the determination of the term.—Question is, Whether the court ought to decree this, under the present circumstances of the case? I cannot say but, that the decree already made at the rolls for plaintiff the widow, is absolutely consistent with the mere reason of the thing, if it was not to be considered originally, and settled; but, as this must depend, not only upon the precedents of the court, but the practice of conveying titles to estates, upon which the precedents themselves were settled, I do not wonder that a decree of this kind should be made by a judge, who was not absolutely conversant in such precedents of the court, and the distinctions taken therein. But, upon consideration of them, and the great authority relied upon, of lady Radnor and Vandebendy, Show. P. C. I am of opinion, that the decree ought to be reversed. And, if it should not, would it not be going directly contrary to that great authority, and the reasons upon which it is founded, and make such uncertainty in this court in regard to purchases, that the subject would not know what to rely upon?—The wife here claims her dower, subject to a term originally standing out in a mortgage. The consequence of that is, that, in law, though she might have brought her writ of dower, and recovered judgment, yet she could not have had the benefit of it till after the determination of the term; for the judgment would be, with a *cessat executio* till that time. This was the wife's legal remedy; and, that being so, she comes into this court upon the foundation of her general right of dower, to be delivered from that restriction which the law imposes upon her, from having the benefit of it, till such determination of the term, and to be admitted to redeem this term, which is now not in the hands of the mortgagee, but of the purchaser, as being assigned to attend upon the inheritance, and for the other purposes before mentioned: and, though the assignment is not in the words “to protect the inheritance from dower, or mesne incumbrances,” yet it is always so understood; otherwise there would be no use in taking the term in the name of a trustee.—It is admitted by the defendant, in case things had stood as they were at the time of the marriage, viz. that the term had been in the mortgagee, and inheritance in the husband, as heir, or purchased from him by the purchaser without assignment of the term, as here, the wife, as entitled to dower, might then have come here to redeem the mortgage, to have the benefit of coming at her dower immediately, by paying off the mortgage money, or keeping down the interest for the benefit of the heir or purchaser. And even this was, (when originally settled) going a good way in favour of a doweress, though it was consistent with the reason of the thing;

thing ; for, as she was entitled to dower, and as a mortgage is only a redeemable interest, it is fit the equity of redemption should follow the nature of the interest in the estate ; and she to be endowed, and the heir at law to be entitled to the inheritance subject to such dower, was giving the wife a real benefit arising from her dower, and not a mere nominal one, as it would be at law, where there is an outstanding term ; for, when the law says, she shall have judgment for dower, but with a *cessat executio* till the determination of the term, that is in fact to say, she shall have no dower, and therefore this court, as against the heir, but not the purchaser of the term and inheritance, gives her the benefit of her dower, by removing the term. And, if all the cases of tenancy in dower and curtesy likewise were now originally to be considered, it might as well be left upon the strength of the law, for it is undoubtedly a mere legal title that the one has, as well as the other ; and there is no contract of the party's intervening. Therefore, if a woman marries, and the husband is in possession of an estate, or, if a man marries, and the woman is in possession of an estate, each party knows that, at the time of the marriage, their estates are liable and subject, on the one side, to a tenancy by the curtesy, and, on the other, to dower, and to all mesne incumbrances and terms ; and there is no harm to say, that both shall take their chance. The commiseration, in respect to dower, has arisen from the determinations in favour of tenancy by the curtesy ; and indeed, the distinction made between dower and tenant by curtesy is founded upon very slight reasons ; but, however, it has been so established. The great point, in this case, depends upon the determination in the case of lord Radnor and Vandebendy, in Show. P. C. and Preced. Chan. and that was thus : (I mention it from lord Somers's own notes)—It was sent to the master, in order to state the case, who stated it :—That, Charles earl of Warwick, upon the marriage of his son, settled his estate, as to part, in jointure to his lady, and part, upon the son in tail, and part, upon himself in tail ; and, upon failure of issue male, then to trustees for 99 years, to be disposed of by the said earl, either by deed or will, and, for want of such appointment, the term was declared to be for the next in remainder, and to be attendant upon the inheritance ; and, as to a third part of a moiety of the estate, it was limited to lord Bodmyn in tail. The son died without issue ; and then the earl, according to his power of appointment, charges the estate with some annuities, some of which were determined at the time of the purchase in question, and some were continuing ; and then the trust term, which was merely such, was to be attendant upon the inheritance. Vandebendy purchases of lord Bodmyn, plaintiff's husband, that part of the estate limited to him ; and took, not only a conveyance, but a recognizance in two statutes, in very considerable sums, to indemnify the estate from incumbrances, and against the wife's dower, and for suffering a recovery, and took an assignment of the term. Vandebendy afterwards conveys to sir John Rotheram, which occasioned it to be called in Preced. Chanc. 65. by the name of lady Radnor v. Rotheram.—Lady Radnor brought bill to have the benefit of dower against Vandebendy, (who purchased of lord Bodmyn her husband,) and to set this term out of the way ; and, by the decree before made, lord Jefferys inclined to give relief, and did set the term out of the way, and direct she should bring dower at law ; but lord Somers reversed that decree ; and, upon appeal to the house of lords, the reversal was affirmed. There was great doubt in this court, and so in the house of lords ; and there was a great inclination in the house to reverse that decree of lord Somers ; but, when the counsel came to the bar, the lords asked, Whether it was usual

[Note 105.] usual for conveyancers to convey term for years to attend the inheritance, to prevent dower? and the counsel, with great [208. a.] candor, saying it was, the lords affirmed lord Somers' decree. The point that weighed in the judgment was, that this was the case of a purchase for valuable consideration; that, in making conveyances, purchasers relied upon that method of taking a conveyance of the inheritance to themselves, and an assignment of the term standing out to a trustee, to attend it; that the outstanding term was prior to the title of dower in the wife, and, therefore, purchasers have relied upon that, as a bar to such dower; so that this court and house of lords were of opinion, that, if they were not to permit that to be so, it would be to overturn the general rule, which had been established and practised by many titles to estates, and tend to make such titles precarious for the future. And, as to what was said in the case of *Brown and Gibbs*, *Preced. Chanc.* 99. viz. that, though there was a purchaser, in the case of lord Radnor and Vandebendy, yet, that the court did not go upon that reason—I do not know who reported that to be the saying of the court; but this I know, that that was the only reason for the determination there; and that is plain, for Vandebendy, the purchaser, having purchased for a valuable consideration, lord Somers did rely upon that greatly; for he said, it has been always looked upon, that a term, purchased in by such a person to protect the inheritance against dower, &c. has been sufficient for that purpose; and therefore, it would not only be a new thing to determine it should not, but of very great consequence, and greater than what appears at first view, besides what has been already mentioned, and especially, since practitioners have all along advised this method, whereby many persons have been purchasers in that way; and there cannot be a stronger argument against altering this method by any determination, than to say, it was never done: but the argument by the counsel was of another nature; for they said, that judgment has been given for dower in all ages, and, in the case of a term, as in the present case, she might come into this court, to have the benefit of her dower, notwithstanding such term. Ever since this case, it has always been said that the court is bound by it; and, on the other hand, I have heard it often said by the court, that they will go no farther. And therefore, to have the benefit of a determination, every person's case must be exactly and strictly the same with that. I am of the same opinion too, and will not go any further than that case does. So that, then the question comes to be this, Whether there is any distinction between this case and that? It is said, that, there the purchaser was allowed to protect himself, by taking in the term attendant upon the inheritance, because that was a satisfied term, which, in the consideration of this court, was become part of the fee; that he purchased the whole estate of the husband, and, therefore, an old term, such as that was, has been allowed to be so assigned, to protect the inheritance; but that, in this case, the husband had nothing in the term, because he was owner of the inheritance subject to it, and to the equity of redemption of it; and, for that, at the time of the purchase, the term was in mortgage, and standing out, and the money advanced still due upon it, that it was a security separate from the husband's inheritance, and the purchaser took it from the mortgagee only and not from the husband. But, I think, that makes no difference here from that of Vandebendy. If there is any difference, it is against the plaintiff, and makes the case much stronger in favour of the present purchaser. It is difficult to say, upon the state of the case, that the term there was a satisfied term at the time of the purchase. I rather think it was not; for lord Somers states

states it, that the earl Warwick, who had the power of appointing the trust term, did appoint it, by charging it with some annuities, which were to commence a year after, and that some of them were continuing, and some of them determined, and, I think, after the purchase made; and, if that was so, this was not a satisfied term, but still subsisting to pay those annuities, which were incumbrances continuing upon the terms; so that Vandebendy, who took the assignment of the term, took it subject to the trust so continuing on it, in like manner as the purchaser here took the term, subject to the mortgage, and the money due thereon. Therefore, the distinction endeavoured to be made between the case there being a satisfied term, and this being a mortgage term, not satisfied, fails. But, supposing the term had been satisfied, how would that make any difference? It is true, that would then have been a trust for the husband, and his heirs, and he would have it as part of his ownership and dominion over the estate; and, consequently, it would be subject to dower, as against the husband. For, if husband dies, and there is a satisfied term continuing, the wife would be entitled to come into this court, against the heir, to set that term out of the way, in order to have the benefit of her dower; and that is expressly so said in the case of Banks and Sutton, 2 Wms. 700. by the master of the rolls, and he cites a case to that purpose: and undoubtedly she would, without paying any thing. And if, in the present case, the husband had made no conveyance to the purchaser, and the mortgage had continued in the mortgagee, or his assignee, and the equity of redemption had descended on the heir, she would have been entitled likewise to dower against him, by redeeming the term, and paying her proportion of the mortgage money, or by keeping down the interest. But, if a term for years is in mortgage, and a person purchases the inheritance of the husband, and takes an assignment of the term from the mortgagee, by paying off the money, not only to have the trust of the term as a security, but to protect the inheritance so purchased, would it not be hard to take away the benefit of it from him? Shall it be said, that he shall have a less inheritance by taking in a mortgage term in that manner, by actually paying off the mortgage money, than if he had taken an old satisfied term, for which he never paid any thing? Therefore, if the term, in lady Radnor's case, had been a satisfied one, that would have been so far from distinguishing that case from this in favour of the plaintiff, that it would have been rather stronger in favour of the purchaser; for here, he paid a consideration for the outstanding term, and there, would have been nothing paid for such satisfied term. But, it is said, that this purchase of the mortgage was from the mortgagee, and not from the husband. If that was so, I do not know that this would make any difference, because the husband here joined in the assignment of the mortgage. But what results from this case is, that, it was part of the agreement of all the parties, (the husband joining) that the term should be purchased in, by the purchaser of the estate, to attend his inheritance; and that is the very trust declared by the deed. It has been admitted here, that, if the husband had paid off the mortgage himself, after the coverture, and taken an assignment of the term in mortgage, in trust for him and his heirs, to attend the inheritance, (in which case it would have then become a satisfied term; and after this, a purchaser had purchased from him, and paid him the whole money, and taken a conveyance of the inheritance from him, and an assignment of the term from the trustees, that would have been very well, and within the case directly of lady Radnor. What

[Note 105.] is the difference, then, in the reason of the thing, whether the husband pays off the mortgage himself, and takes assignment of the term, in trust for himself and his heirs, and then sells to a purchaser the inheritance, who takes the term from the trustees; or, when the purchaser comes, and purchases the inheritance from the husband, and pays off the mortgage, and takes an assignment of the term to himself: Is the case the less strong for that? It is rather stronger.—It is admitted that, if this had been an old satisfied term, standing out attendant upon the inheritance, and a purchaser had purchased from the husband, and had taken in this term, that would have protected the inheritance. That, if a man, before marriage, conveys his estate privately, “without the knowledge of his wife, to trustees in trust for himself and his heirs in fee that will prevent dower. So, if a man purchases an estate after coverture, and takes a conveyance to trustees, in trust for himself and his heirs, that will put an end to dower: so, if he takes an estate in jointenancy, or a conveyance to himself for a long term of years. But, it is objected, that, the act done here by the purchaser, at the time of his purchase, he having notice of the marriage, will put the wife in a worse condition than she would have been in originally, if the purchaser had not intervened; since then, there would have been a redeemable mortgage, (the equity of redemption being in the husband), and the husband dying, she would be entitled to redeem such mortgage, and then, to have had dower; and therefore, by the purchaser’s knowing of the title of dower, by reason of the marriage, he would have put her into a worse condition, which in equity he ought not to have done; and this ought not to alter her right. But this does not differ from the common case. For, in this case, suppose the husband had, before the purchase, redeemed the mortgage, and taken an assignment of the mortgage term, in trust for himself and his heirs, to attend the inheritance; and, after that, the purchaser had purchased from him, and taken an assignment of such attendant term, in trust to him and his heirs, would not that have altered the wife’s right to dower, though without that intervention of the purchaser? She would be entitled to her dower, as against the heir; so likewise, in the case of an old term attending upon the inheritance in trust; but this purchase prevents the descent of the estate to the heir, and therefore it is not to be said, that the purchasers have put the wife in a worse condition, by the intervention of their purchase; but, because conveyancers did rely upon the assignment of the term to trustees to protect the inheritance, as sufficient for that purpose, it was determined as has been mentioned; and I do not see how the present case can differ from that of an old term to attend the inheritance. But the present point is, that here the term was in the mortgagee, and the inheritance in the husband. The term will stand on the way of dower at law, and the purchaser comes in upon that foot, pays his money, and relies upon that term to protect his purchase; and therefore, I think, this is strictly within the reason of the case of lady Radnor and Vandebendy, and all the other cases grounded upon it. Another distinction made is, that here is an express covenant taken from the husband against the dower of his wife; for the covenant is, that the purchaser should enjoy the estate free from incumbrances, &c. and from all dowers, &c. and particularly the dower of the plaintiff; and then there is a covenant for farther assurance: and, that this shews, that the purchaser relied upon this covenant as his security to indemnify him against dower; and, that it is plain, without question, this is notice of the dower. A man may reasonably

reasonably take a covenant against such right of dower, and yet rely upon the security of the trust term besides, and may take such covenant against any damages, in respect to any suits by the wife for dower. The purchaser did not purchase here subject to his wife's dower, for he paid a price for the estate exclusive of it. If the estate in his hands had been subject to the dower, then the covenant against it of the husband's would not have signified. But, however, be that as it will, it is similar to that of Vandebendy; for there, the purchaser took two statutes, with (defeazance,) to indemnify the estate from incumbrances, and the wife's dower, and to suffer a recovery; and it was insisted upon there, by the counsel, as is here: but lord Somers said, though a man does take such security, which he does to prevent any damages that may arise, yet that does not preclude him from any favour he is entitled to. Another consideration in this case is, length of time; for the purchase was made in 1711. The husband died in 1719, and the plaintiff, the widow, never brought dower, or the present bill, till 1737; and it appears, that defendant, the purchaser, has since made great improvement upon the estate, and therefore it would be very hard, especially after the several cases determined in favour of purchasers, even if there was a hair's breadth of a distinction between this case and that of lady Radnor and Vandebendy, to suffer the plaintiff now to come here for dower. It is said, about 10 years ago plaintiff did claim her dower of the present defendant, which amounted to notice to him of such dower, (which he did not want.) But, however, the making a claim, and then not proceeding directly upon it, shews, that plaintiff was conscious of her right, but would not proceed; and the purchaser must think, by her delaying so to do, that she would not, and that might be an inducement for him to make such improvements as he has done. Therefore, upon the whole, I think the decree ought to be reversed, and the bill to be dismissed; but I will not give costs."

In the above case, Chute, Clarke, and Weldon for plaintiff, cited Attorney-general and Scot. lord Talbot's time. See 2 Wms. 651. in the margin. Lady Radnor and Vandebendy, Show. P. C. 69. Preced. Chan. 65. 97. 133. 2 Wms. 632.

Attorney-general, Brown, Gapper, and Murray contra, cited the above cases and Mitchell and Reynolds, at the Rolls, 1730, "Bill was brought for dower, and case was, the husband in 1710, had made a mortgage for 500*l.* for the term of 1,000 years, which was assigned to J. S. after the marriage of plaintiff, to secure a farther sum. The husband mortgages another estate in fee, and both these mortgages were assigned to defendant; and, in 1725, defendant came to an account with the husband, and likewise came to an agreement with him for the purchase of the estate, for the mortgage sum only. Accordingly, the husband conveyed the equity of redemption. One question arose, relating to the estate mortgaged in fee; and another, in respect to the mortgage for years. And as to the mortgage for years, the master of the rolls said, the doweress should have dower out of a term of years, where the inheritance was in the husband, as against the heir of the husband, or against a volunteer; but it is settled, that she shall not as against a purchaser for a valuable consideration; and cited the case of lady Radnor and Vandebendy. And he said likewise what was mentioned before, in the principal case, relating to the method of conveyances; but that he could not look upon defendant here as a purchaser, because he could not look upon the method here taken between him and husband as a purchase, the agreement for the purchase being for the

mortgage money only; therefore relieved the widow. But said, that he would not relieve her as against a purchaser."

In the late case of *Maudrell v. Maudrell*, 7 Ves. jun. 567. and 10 Ves. jun. 246, the doctrine, which is the subject of this note, received full investigation.

[208. b.]

[Note 106.] (1) It has been long settled in equity, that *mortgage money is to be paid, not to the heir, but to the executor*. And this holds though the mortgage be in fee; though the condition be for payment to the mortgagee, his heirs or executors; though there is no want of assets; and though there be no bond given, or covenant entered into by the mortgagor, for payment of the money; and whether the mortgage be forfeited or not, at the death of the mortgagee; for equity considers a mortgage as part of the mortgagee's personalty. See the argument of lord keeper Finch in *Thornborough v. Baker*, 1 Cha. Ca. 285. and see 2 Cha. Ca. 50, 51. 187. 224. 2 Vent. 348. 351.—This follows from the principle, that in equity the lands are only considered as a pledge or security for the money lent, and the money is the principal, if not the sole object. In adopting this rule, courts of equity appear to have been guided by the same reasoning, which in former times made courts of law consider the estates of tenant by statute merchant and tenant by statute staple merely as chattel interests. These, from their uncertain nature, ought to have been considered as freehold; but being, as Mr. Justice Blackstone observes, a security and remedy provided for personal debts, to which debts the executor is entitled, the law has therefore thus directed their succession; as judging it reasonable, from a principle of natural equity, that the security and remedy should be vested in them, to whom the debts, if recovered, would belong. 2 Bla. Com. ch. 10. sect. 5. Still however the mortgage is considered as forfeited in law, and the mortgagor can only recover the mortgaged lands back, by the aid of equity.—As it is among the maxims of equity, that whoever claims equity must do equity; and that in payment of debts, equality is the highest equity; it has been settled, that, if *the equity of redemption of lands of a mortgagor in fee descends upon the heir, it is equitable assets in his hands*; and debts by specialty and simple contract are paid in equal proportion. But, if *the equity of redemption of lands of a mortgagor for years descends upon the heir, it is legal assets*, and the debts are then paid according to their legal priority: yet, in this latter case, if the creditor is obliged to pray the aid of equity, the court will direct simple contract and specialty creditors, notwithstanding the assets are legal, to come in proportionably; and if there is not sufficient to pay all, the loss to fall equally on all.—See 29 C. 2. §. 10, 11. 3 & 4 W. & M. c. 14. *Bennet v. Box*, 1 Cha. Cases 12. *Wollenstone v. Croft and Long*, ib. 32. *Trevor v. Perryor*, ib. 148. *Hexon v. Wythan*, ib. 248. Anonymous, 2 Cha. Ca. 54. *Girling v. Lee*, 1 Vern. 63. *Child v. Stephens*, ib. 101. *Morgan v. lord Sherrard*, ib. 293. *Cole v. Warden*, ib. 410. *Plunknett v. Kirk*, ib. 411. *Sawley v. Gower*, 2 Vern. 61. Anonymous, ib. 405. *Wilson v. Fielding*, ib. 763. *Car v. countess of Burlington*. 1 P. W. 228. the creditors of sir Charles Cox, 3 P. W. 341. and see 1 Roll. Abr. 920. Hob. 265. It also follows, from the above circumstance of the mortgaged lands being considered in equity as a security or pledge for the mortgage debt, that, after the legal forfeiture, it continues as much a debt as before: Hence, *in general, the personal estate of the mortgagor is, upon his decease, to be applied in discharge of the mortgage*: and this holds equally in favour of the heir, of a general devisee, or *heres factus*; and of a devisee of particular lands;

lands; and whether there is, or is not, a bond or covenant for payment of the money. *Cope v. Cope*, 1 Salk 450. *Howell v. Price*, Prec. in Cha. 433. *Pockley v. Pockley*, 1 Vern. 36. *Lord Winchelsea v. Norcliffe*, 1 Vern. 485. *Bartholomew v. May*, 1 Atk. 489. *Galton v. Hancock*, 2 Atk. 530. This doctrine has been frequently extended to the case of a devise of lands in trust, to pay off debts; where (particularly if the personalty is bequeathed to the executor) the courts, notwithstanding an express devise of a real estate for the payment of debts, have directed the personalty to be first applied in payment of them. See *Gower v. Mead*, Prec. in Cha. 2. *Dolman v. Smith*, *ibid.* 256. 2 Vern. 117. *Hall v. Brooker*, Gilb. Rep. 70. See also *Bamfield v. Wyndham*, Prec. in Cha. 101. *Wainwright v. Bendloe*, Gilb. Rep. 12. *Stapleton v. Colville*, Ca. temp. Talbot 202.—*In some cases, however, the courts have considered the land as the primary fund, and the personalty merely as auxiliary.* The personal estate is then only a surety for the land, and will have the same equity as the land is entitled to, when it is pledged as a surety for a personal debt. This doctrine is most pointedly and happily stated, explained, and exemplified by Mr. Cox in his note under page 664 of the first volume of his edition of *Peere Williams*.—It does not appear, that the courts of equity have fixed any determinate period of time to be such a length of possession as to bar the mortgagor's right of redemption: but as, in the courts of law, twenty years is a bar to an entry or ejectment; the courts of equity (consistently with their general system, that the rules and practice of their courts should bear an analogy to the rules and practice of the courts of law) have inclined to allow *the same period of twenty years to be a bar to a redemption*.—See *Cook v. Arnham*, 3 P. W. 283. and the note of the editor at the end of that case.

[Upon the same principle the period of *fifteen* years has been established in *Connecticut* as the length of possession, which, generally, shall bar the mortgagor's right of redemption, as by the statute of that state *fifteen* years is a bar to an entry or ejectment. *Skinner v. Smith*, 1 Day 124; *Stat. Con. tit. XCVII. c. 3. s. 2.* But though it should appear from the bill to redeem, that the mortgagee has been more than fifteen years in possession, yet he cannot demur, but must insist on the length of time, in his answer, in order to give the mortgagor an opportunity to shew on the hearing, that he was under some disability which will save his rights. *Bulkley v. Bulkley*, 2 Day 263.]

[209. a.]

(1) But by the 39 H. 8. c. 39. if any person be indebted to the king [Note 107.] by recognizance, obligation, or other specialty, and die, his heir shall be charged therein, though the word "heir" be not comprised in such recognizance, &c. In the case of sir Gerard Fleetwood, 8 Rep. 171. lord Coke observes, that the freehold and inheritance of the king's debtor are bound from the time of the debt accrued. If the observation be just, it must by the common law have been immaterial with respect to the king, whether the heir was named in the specialty or not.

[210. a.]

(1) *Hob. 9. Pease and Styleman*.—*A man was bound to pay 20l. [Note 108.] to such a person as he (the obligee) should by his will appoint. The obligee made J. S. his executor, but made no other appointment. It was resolved, upon demurrer, that the executor should not have the 20l. for he is only an assignee in law, who takes to the use of the testator: but here the condition is in favour of an actual assignee, who takes to his own use. The devise of a fine leases to the devisee for 99 years,*

99 years, with condition, if the lessee pays to the lessor, his heirs and assigns, that the uses limited to the lessee and his heirs, by an indenture, should cease: the lessor dies. Lord Nottingham was of opinion, that the uses should not cease by payment to the administrator of the lessor, because he may be an assignee in deed, as here. 11 May, 1659, *sir Andrew Young*.—Lord Nott. MSS. notes.—*Howe v. Whitebank*. Upon a fine, the use of land was limited to *A.* for 80 years, with a power to *A.* and his assigns to make leases for three lives, to commence after the determination of that term. *A.* assigned over to *B.* *B.* died, having made his will, and appointed *C.* his executor. *C.* assigned over to *D.*: *D.* in pursuance of the power, made a lease for life. The question was, whether *D.* was such an assignee of *A.* as to have a power to make this lease; or whether it should extend only to the immediate assignees of *A.*? The doubt in this case was the greater, as there had been a descent upon an executor. The case of *Pease and Styleman* was cited, where it was said, that an executor or administrator should not in some cases be said to be a special assignee. But all the court seemed to incline to the contrary, and that *D.* should be called an assignee, well enough for the purpose of making the leases in question, and that so should any person that came to the estate under the first lessee, though there should be twenty mesne assignments. And afterwards, in the Michaelmas term following, judgment was given accordingly.—1 Freem. 476.

[210. b.]

[Note 109.] (1) If *A.* recites by his deed, that whereas he is indebted to *B.* in 100l. and he covenants with *B.* that the 100l. shall be paid and delivered to *B.* or his assigns, at Rotterdam, in Holland, by *C.* without any suit at law, upon the first requisition which shall be made of it; in this case, the demand may be in any other place besides Rotterdam; for though payment is to be made at Rotterdam, yet the demand may be made in any place; and if the demand be made in England, or at Dort, which is 10 miles from Rotterdam, it is good, for he ought to have reasonable time to pay it after the demand, having respect to the distance of the place. But if the demand should be limited to Rotterdam, perhaps he would never come there, and so the covenant would be of no effect.—*Mich.* 1650. between *Halsted* and *Vanleyden*, adjudged upon a special verdict. 1 Roll. Abr. 443.—In *Brownlow* 46. it is laid down, that, if money be appointed by will to be paid, and no place limited for the payment, there must be a request to pay the money, and the executor is not bound to seek him to whom it is to be paid.

[211. a.]

[Note 110.] (1) *Otherwise when the lease is void; for there no acceptance of rent afterwards can make it have continuance.* Post. 215. a. Lord Nott. MS.

[211. b.]

[Note 111.] (1) Though he received part of the rent, he may re-enter for the residue that is unpaid. 10 H. 7. 24. a.

[Note 112.] (2) Upon the marriage of lord Anglesea with a daughter of lady Dorchester, a term of years was limited in his lordship's Irish estates, for raising 12,000l. for the portions of the daughters. There was but one daughter of the marriage. It was made a question, whether the portion was to be paid in England, without any deduction or allowance for the exchange from Ireland to England? It was determined in Chancery, that the portion ought to be paid in England, where the contract

was

was made and the parties resided, and not in Ireland; because it was a sum in gross, and not a rent issuing out of land. Vin. Abr. vol. 5. 209.

[212. b.]

(1) It hath been formerly doubted, Whether the defendant, in such a [Note 113.] case, ought not to plead specially? See 1 Cro. 142. S. C. 1 Ander. 198. S. C. Mo. 267. S. C. Ow. 45. Savil. 96. 1 Leon. 311. But now this point is settled; for *per 4 Anne, cap. 16. sect. 12.* if the obligor, his heirs, executors, and administrators, have, before the action brought, paid to the obligee, his executors or administrators, the principal and interest due by the condition of the bond, though such payment was not strictly made according to the condition, yet it may be pleaded in bar of such action, and shall be as effectual a bar thereof, as if the money had been paid at the day and place, according to the condition, and had been so pleaded. *Note to the 11th edition.*

[213. a.]

(1) In Roll. Rep. 296. it is said, that the reason why a collateral [Note 114.] thing cannot be satisfied with money, or other collateral thing, is, because the collateral thing is not due, and so no contract can be made of it till the day of payment; and that the reason why money may be satisfied by a collateral thing, is, because it is of certain value.

[213. b.]

(1) *Flo. 107. If a man leases, rendering rent to the heir, it is [Note 115.] void; for the heir takes as purchaser, and is quasi a stranger. Hob. 130. Oats v. Frith. Father seised in fee and son join in a lease to commence after the death of the father, rendering rent to the son, and dies, the reservation was adjudged void; for tho' the son proves heir by the event, that does not mend the case: but if the reservation had been to the heir of the lessor, omitting the lessor, it would have been good; for tho' the rent never was in the father to demand, yet the son would take it; not as a purchaser, but as a rent inherent in the root of the reversion which he has by descent from his father; and in this sense the rent itself was in the father, viz. to release (by the word rent, but not action) tho' not to ask. So note the difference (says Hobart) when in such a lease the rent is reserved to the heir first, omitting the ancestor, which is good, and where an annuity or warranty is granted against the heir, omitting the ancestor, which is not good. It appears in the case of Littleton, that tho' the reservation to a stranger be bad to carry any rent to the stranger, yet it will be good to the lessor, and that not only during his life, but generally during all the term; for when it is said, rendering to I. S. the words I. S. shall be void, in the same manner as if he had said, rendering rent generally: because, 1st, If a man leases, rendering rent to him and a stranger, it is good to him clearly, and void to the stranger. 31 Ass. 30. 2dly, When a man leases, rendering rent to him and his heirs general, yet the law will direct it to an issue who is not his heir general, merely for congruity's sake. Dyer 115. b. *sir Thomas Wyatt's case, and before 12 b. Difference between a lease reserving rent to I. S. and a lease upon condition, that I. S. shall re-enter, if the rent be in arrear, for there neither shall enter: not I. S. because he cannot by law; not the lessor, because there are no words to give re-entry to any beside I. S. But in the case of Doctor and Student, feoffment upon condition, that he shall pay 20l. to I. S. and that otherwise I. S. shall re-enter; there, tho' I. S. cannot re-enter, the feoffor can, for there the condition was created**

created by the first words : and tho' he intends the advantage of this to I. S. it does not signify. So 28 H. 8. Dyer 33. Devise to the prior of St. B. so that he pays to the Dean and Chapter of St. Paul's, and that if he does not so, the Dean and Chapter shall have it, that is, a void condition to make it a remainder, but it is good for the devisor to re-enter. Difference between a rent upon a lease and a rent upon a feoffment ; in the last case rent would be void to a stranger, and yet not good to the feoffor, because the law does not create it, and it is not so reserved ; but the case of a feoffment is like to a grant of rent to I. S. and that if it be in arrear that I. D. shall distrain, there the distress is of no value, 40 Ass. 26. But here the words are sufficient to create a rent, and in an entire clause, part may be void. 4 E. 4. Obligation to I. S. payable to I. D. it is good to I. S. Difference where the repugnancy of words appears, as here, and where it does not: as a release of all actions which I have as executor, and I have none as executor ; this is void, because it does not appear. 22 H. 7. Kel. 83. b. Cestuy que use leases, rendering rent to himself, and dies ; the heir shall have the rent. Yet in 5 H. 7. 5. b. the rent, with the reversion, goes to the feoffees, though reserved to the cestuy que use ; yet in law the feoffees are donors ; so it is, in effect, the feoffee's lease, rendering rent to the cestuy que use, it is good for themselves, which is stronger. Sir Geo. makes a feoffment to the use of himself for life ; remainder to William Huntley his son and heir apparent and his heirs : sir Geo. and William join in a lease for years, rendering rent to sir Geo. his heirs and assigns : sir Geo. dies. Resolved, that the reservation and the rent are determined ; for William is not in as heir, and therefore he cannot have the rent. Huntley's case, Palm. 485. Lord Nott. MSS.

[214. a.]

[Note 116.] (1) The principle which gave rise to this rule is, that rent is considered as a retribution for the land, and is therefore payable to those who would otherwise have had the land.—It is to be observed, that remainder-men in a settlement, being, at first view, neither feoffors, donors, lessors, nor the heirs of feoffors, donors, or lessors, there seems to have been, for some time after the statute of uses, a doubt, whether the rents of leases made by virtue of powers contained in settlements, could be reserved to them. In Chudleigh's case, 1 Rep. 139. it is positively said, that if a feoffment in fee be made to the use of one for life, remainder to another in tail, with several remainders over, with a power to the tenant for life to make leases, reserving the rent to the reversioners, and the tenant for life accordingly makes leases, neither his heirs nor any of the remainder-men shall have the rent. But in Harcourt v. Pole, 1 Anders. 273. it was adjudged, that the remainder-men might distrain in these cases. And in sir Thomas Jones, 35. the *dictum* in Chudleigh's case is denied to be law. The determination in Harcourt v. Pole will appear incontrovertibly right, if we consider that both the lessees and remainder-men derive their estate out of the reversion, or original inheritance of the settlor ; and therefore the law, to use sir Edward Coke's expression in Whitlocke's case, 8 Rep. 71. will distribute the rent to every one to whom any limitation of the use is made.

[215. a.]

[Note 117.] (1) Because the acceptance of rent cannot make a new lease, and the old one was determined ; but the acceptance of the rent is a sufficient declaration, that it is the lessor's will to continue the lease, for he is not entitled to the rent but by the lease. *Note to the 11th edition.*
And

And see *Symson v. Butcher*, Dougl. Rep. 51.; and the case of *Wynn v. Humphreys*; and *Carter v. Butcher*, reported in the notes of that case.

(2) Attornment being taken away per 4 & 5 Ann. c. 16. the law seems [Note 118.] to be otherwise now. *Note to the 11th edition.*

[215. b.]

(1) *It has also been held upon this statute, that if a man makes a lease for years upon condition, that if the rent should be in arrear, it should be lawful to the lessor and his assigns to re-enter, and then the lessor assigns the reversion over, and the lessee attorns, and the lessor dies, the grantee shall not take advantage of the condition for want of these words "his heirs," in the reservation of the condition; the condition being that he and his assigns shall enter. By Brown, serj. who moved the case in C. B. ex relatione T. Hurst.—It appears therefore, that this reservation of condition is to be resembled to such a reservation of rent as is mentioned before, in page 47. a. which determined by the death of the lessor; but that nevertheless the grantee shall have advantage of the condition, during the life of the grantor, by the 32 H. 8. Infra 215. b. So note, the grantee of part of the reversion in the whole shall take advantage of a condition; for to this purpose the grantee of a reversion for life or years is an assignee within the 32 H. 8. who may enter; which nevertheless is very different in the case of a warranty; for a lessee for life, who has but part of the estate in the whole, is not assignee for voucher. Infra 385. b. On the other hand, the grantee of the whole estate in reversion in part is not an assignee within the 32 H. 8.: as if the reversioner in fee of 4 acres grants 2 acres in fee, the grantee cannot enter; which also is very different in the case of warranty, for the feoffee of 2 acres is an assignee for voucher. Infra 315. a.—Lord Nott. MSS.*

[216. a.]

(2) The necessity which there was in the old law, that there should always be some person to do the feudal duties, to fill the possession, and to answer the actions which might be brought for the fief, introduced the maxim, that the freehold could never be in abeyance. See 2 *Wilson, Bond v. West*, 165. But it was admitted, that there were some cases in which the inheritance, when separated from the freehold, might be so. The question agitated in the Commentary upon this and the following Section, arises from the difficulty of ascertaining where the freehold, in the case mentioned by Littleton, is to be. By the livery, it is taken out of the grantor; it must therefore vest in the feoffee. Yet it seems difficult to conceive how it could be in the grantee, consistently with the term of years. The opinion adopted by Littleton and sir Edward Coke is conformable to what is said in lord Strafford's case, 8 Rep. 73. b.—It is to be observed, that though by conveyance at common law the freehold necessarily passes out of the grantor; and that if there is not some person in being in whom it can immediately vest, the conveyance is void; that is not the case with respect to wills, conveyances under the statute of uses, trusts in equity, or grants of rents *de novo*. For, as to wills;—there is no immediate transfer of the freehold, as, upon the death of the testator, it vests in the heir to answer the lord's services and the stranger's writs. As to conveyances under the statute of uses;—till there is some person in being in whom the use can vest, the possession is not altered, but continues in the feoffor and his heirs. See 1 *Inst.* 23. As to executory trusts, the legal estate immediately vests and continues in the trustee: and as to rents *de novo*, the tenant continues in possession of the land out of which they issue. However, it is to be observed, that in

cases of wills, uses, and trusts, if it be inconsistent with the estates *expressly* declared, that the freehold should remain with the party (as if he has a term of years *expressly* given him,) the law will not give him, by *implication*, an estate of freehold. See *Pybus v. Mitford*, 1 Vent. 352. *Adams v. Savage*, 2 Salk. 679. *Penhay v. Hurrell*, 2 Vern. 370. *Speed v. Davis*, 2 Salk. 675. In the same manner, if a person limits his estate to such uses as he shall appoint; and in the mean time, and until he makes an appointment, to the use of himself and his heirs; or if he limits it to the use of himself for life, and after his decease, to such uses as he shall appoint, and for want of appointment, to the use of his right heirs;—in both of these cases, the settlor and his heirs have a qualified and determinable fee, until, by an exercise of the power of appointment, an use vests in the person to whom it is appointed; or till by the death of the settlor, without exercising his power, the exercise of it becomes impossible. To this fee dower is clearly incident. If the settlor makes an appointment, a new use springs up and vests in the appointee; and the fee originally limited to the settlor ceases; and with it the right of the wife to her dower out of it: and from that time, the use appointed under the power takes effect, in the same manner as if it had been inserted in the original deed, in the place of the power. But, if no appointment is made, the fee, from being qualified and determinable, becomes simple and absolute. It may be objected, that in the second of these cases, an estate for life is expressly limited to the settlor, and that the fee is therefore put in abeyance. But in the case of *Leonard Lovie*, 8 Rep. 78. where the estate was devised to Leonard Lovie expressly for his life, without impeachment of waste, and afterwards to such uses as he should appoint, and after several intermediate remainders to the use of his right heirs, it was resolved, that the fee vested in him till the appointment was made. See also *sir Edward Clere's case*, 6 Rep. 18. It may also be objected, that a limitation to such uses as a person shall appoint, is incompatible with, or rendered void by, the subsequent limitation of the fee to him, as the ownership of the fee carries with it every power of appointment. But it is to be observed, that the owner of the fee cannot convey the inheritance, but by deed sealed and delivered. Now he may limit a fee, under a power, by a mere instrument in writing, and without any of those forms or ceremonies which the law requires for passing real property; which, clearly, is a power not included in the ownership of the fee. It must, however, be noticed, that, as a power of appointment is liable to be suspended and destroyed, and as the existence of the power is the only circumstance which precludes the wife from her dower, in the case I have mentioned there always must be a possibility of danger in taking a title which depends upon it. Yet in some cases the possibility is so small as not to deserve attention. Some remarks on the mode generally used for barring the wife's dower will be offered in the course of these annotations. The doctrine which is the subject of this note has received a full investigation in the late case of *Maundrell v. Maundrell*, 7 Ves. jun. 567. and 10 Ves. jun. 246. and is very ably discussed by Mr. Sugden, in his *Practical Treatise of Powers*, p. 266.

[218. a.]

[Note 120.] (2) Acc. 1 Rep. 174. a. as to the general principle; but the particular case there was, that *A.* covenanted to stand seised to the use of himself for life, with several remainders over; with a power of revocation.—By an exercise of this power, he revoked the uses; and it was held, that the antient uses were determined, without entry or claim, because he himself was tenant for life of the land, and he could not enter upon himself;

himself; and no claim was necessary, as an express revocation was as strong as any claim could be.—See the following page.

(3) The entry, or claim, may be made either by the party himself, [Note 121.] or by a stranger, by his order. 2 Cro. 57.

[218. b.]

(2) No person is entitled to an action of waste against a tenant for [Note 122.] life, but he who has the *immediate* estate of inheritance in remainder or reversion, expectant upon the estate for life. If between the estate of the tenant for life who commits waste, and the subsequent estate of inheritance, there is interposed an estate of freehold, to any person *in case*, then during the continuance of such interposed estate, the action of waste is suspended; and if the first tenant for life dies during the continuance of such interposed estate, the action is gone for ever. But though, while there is an estate for life interposed between the estate of the person committing waste, and that of the reversioner or remainder man in fee; the remainder-man cannot bring his action of waste; yet, if the waste be done by cutting down trees, &c. such remainder-man in fee may seize them; and if they are taken away, or made use of, before he seizes them, he may bring an action of trover. For, in the eye of the law, a remainder-man for life has not the property of the thing wasted; and even a tenant for life in possession has not the absolute property of it, but merely a right to the enjoyment or benefit of it, as long as it is annexed to the inheritance, of which it is considered a part, and therefore it belongs to the owner of the fee. See Ant. 53. b. 5th Rep. Pagett's case. Udal v. Udal, Alleyne 81. 3 P. W. 267. Bewick v. Whitehead, 22 Vin. Abr. 523. 2 Eq. Ca. Abr. 727. Rolt v. Somerville, 3 Atk. 757.

(3) For till entry it doth not appear; the feoffor having power at his [Note 123.] election to void or continue the estate of the feoffee, which he will do.

Note to the 11th edit.

[219. a.]

(1) So where a feoffment was made on condition that the feoffees [Note 124.] re-ineffed the feoffor and his wife in tail, the remainder to the right heirs of the husband; the husband died, the wife married a second husband; the feoffees enfeoffed the second husband and his wife, for her life;—the remainder to the right heirs of the first husband; it was held that the condition was well performed. Br. Abr. tit. Cond. pl. 33. And see *ibid.* 70. Pl. 291.

(2) *Note, if land be given to the wife, and the heirs of the husband [Note 125.] of his body begotten, the wife shall have the estate for life, subject to waste.—Sup. 26. b.; therefore such conveyance is not by force.* Lord Nott. MSS.

(3) It is with great pleasure we present the reader with the follow- [Note 126.] ing observations on this passage. Lord chief-justice Wilmot, in his argument in the giving judgment in the case of Frogmorton, on demise of Robinson v. Wharrey, 2 Blackst. 728. remarks: "When an estate is limited to a husband and wife, and the heirs of their two bodies; the word Heirs is a word of limitation, because an estate is given to both the persons, from whose bodies the heirs are to issue. But when it is given to one only, and the heirs of two, (as to the wife and the heirs of her and *A. B.*) there the word Heirs is a word of purchase; for no estate tail can be made to one only, and the heirs of the body of that person and another. This appears from Litt. Sect.

“ 352. according to the true reading collected from the original editions. “ The common editions make the estate *cy pres*, therein mentioned, to “ be, to the widow and *les heirs de corps sa baron de luy engendres* ; “ which is not as near as might be to the original estate intended, if the “ husband had lived ; *viz.* to the husband and wife, and the heirs of their “ two bodies. But the original edition by Lettou and Macklinia, in “ Littleton’s life-time, and the Rohan edition, which is the next (both “ which my brother Blackstone has) read it thus : *les heirs de les corps* “ *de son baron et luy engendres* : which is quite consonant to the original “ estate ; and this estate to the widow for life, and the heirs of the body “ of her husband and herself begotten, Littleton, in the same section, “ declares not to be an estate tail. The same is held in Dyer 99.—in “ Lane and Pannell, 1 Roll. Rep. 438. and in Gossage and Taylor, Style “ 325. which, from a manuscript of lord Hale, in possession of my bro- “ ther Bathurst, appears to have been first determined in Hil. 1651 ; “ which accounts for some expressions of lord chief-justice Rolle, in “ Style’s case, which was in T. Pasch. 1652.”

[219. b.]

[Note 127.] (1) Mr. serj. Hawkins observes here, that the omission of the privilege of being without impeachment of waste, shall not give the heir of the feoffor, for whose benefit it was omitted, a re-entry, which would defeat the estate of the wife. P. 307. 2 Rep. 82. a.

[220. a.]

[Note 128.] (1) The privilege given by the words without impeachment of waste, is annexed to the privity of estate ;—so if the person to whom that privilege is given, changes his estate, he loses the privilege. 11 Rep. 83. b. Latch. 270.—It has been held that the intent of this clause is only to enable the tenant to cut down timber and open new mines, and that it does not extend to allow destructive or malicious waste ; such as cutting down timber which serves for the shelter or ornament of the estate. See Vane v. Lord Bernard, 2 Vern. 738. Packington v. Packington, 5 Bac. Abr. 491. Rolt v. Lord Sommerville, 2 Ab. Eq. 759. Aston v. Aston, 1 Vin. 264. Peers v. Peers, 1 Vin. 521. 2 Atk. 283.

[220. b.]

[Note 129.] (1) *See whether there is a difference between an obligation and feoffment with condition to re-enscuff.—Obligation on condition to give to the baron and feme and the heirs of the body of the feme before a certain day ; and before the day the feme dies. The court was divided whether he ought to make it cy pres, in 8 Jac. B. R. Rot. 303. Roger and Scudamore, T. 37.—P. 4 E. 6. Bendl. n. 56. Obligation on condition to encsuff B. and C. and their heirs before such a day, and before the day B. dies, the obligation is discharged, Sir Ant. Brown’s case. But this case was denied by the whole court. T. 40 El. C. B. C. C. n. 16. Obligation with condition that the obligor or his heirs should encsuff the obligee and his heirs before a certain day ;—before the day the obligee dies : it was ruled that he should encsuff the heir. T. 40 El. C. B. Hone v. May, C. C. n. 16.—Lord Hale’s MSS.*

[222. b.]

[Note 130.] (2) As to deeds, Burglary v. Ellington, Brownlow’s Rep. 191. The court held that, when a deed is perfect and delivered as his deed, then no verbal agreement made after may be pleaded in destruction or alteration thereof ; but, when the agreement is parcel of the original contract, and may well stand with the deed, and is not in terms repugnant to it, then such verbal agreement may be pleaded. As, if a man for money mortgage land to B. by deed being of greater yearly value than the

the interest money, and before the sealing of the deed it was agreed by word, that the mortgagor should have and receive the profits, not the mortgagee, this is good and usual in such cases, and *B.* may plead the verbal agreement to avoid the danger of usury. But if it had been expressed within the deed, that the mortgagee should have the profits, and the deed was delivered accordingly, then no agreement, covenant, or assignment of the profits could keep it, but that it was an usurious contract, and consequently the deed and mortgage void.

[223. a.]

(1) *A devise in fee, on condition not to alien but to I. S. whether* [Note 131.] *void? See Muichamp's case, Bridg. 132.—Lord Nott. MSS.*

[223. b.]

(1) A power of suffering a common recovery, and of levying a fine [Note 132.] within the statutes of 4 Hen. 7. and 32 Hen. 8. is so inseparably inherent to the estate of a tenant in tail, that any condition or proviso restraining or prohibiting it, is held to be repugnant to the nature of the estate, and therefore void. But it does not vitiate the grant of the estate tail to which it is annexed; because (to use an expression of lord Hobart) a condition annexed to an estate given is a divided clause from the grant, and therefore cannot frustrate the grant preceding it, neither in any thing expressed, nor in any thing implied, which is, of its nature, incident to and inseparable from the thing granted. Hob. 170. But this doctrine does not extend to a feoffment, a fine at common law, or any other alienation which works a discontinuance, and is therefore considered in the law as tortious. A proviso restrictive of an alienation of this nature may be annexed to an estate in tail, either as a condition to determine the estate, and give the donor and his heirs a right of re-entry, or by way of limitation, to make the estate of the tenant in tail cease, and the lands remain over to a third person. But in these cases the estate in tail must be made to cease absolutely; for a proviso to make it void only during the life of the tenant in tail is void. See Litt. sect. 720, 721, 722, 723. Scholastica's case, Pl. 403. Corbett's case, 1 Rep. 83. b. *Jermyn v. Arscot*, cited in 1 Rep. 85. *Mildmay's case*, 6 Rep. 40. *Mary Portington's case*, 10 Rep. 37. b. The courts however have allowed both conditions and covenants, restraining or prohibiting lessees for life or years assigning their estates without the consent of the lessors. See *Strange 405. Blencowe v. Bugby*, 3 Wilson 234. In *Hunter v. Galliers*, Term Reports, vol. 2. 133. a proviso in a lease for 21 years that the landlord should re-enter on the tenant's committing any act of bankruptcy whereon a commission should issue, was held to be good. In *Davidson v. Foley*, Brown's Reports in Cha. 2. vol. 203. the reader will find a curious instance of a trust under which two persons are become virtually entitled to a very considerable annuity, at the same time that the trust is so framed as to exclude their creditors from having any charge or lien upon the annuity, either at law or equity. The illusory nature of estates and trusts of this description raises a powerful objection to them on the ground of policy; nor are they perhaps, quite reconcilable to some of the fundamental principles of our law. Serious consequences, it is presumed, would ensue their coming into general, or ever frequent, use.

[224. a.]

(1) But this is altered by the 4 and 5 Ann. c. 16. whereby all [Note 133.] collateral warranties by ancestors, who have no estate of inheritance in possession in the land warranted, are made void against their heirs. The restraints which at different times have been laid on the free alienation of property, and the methods used to set them aside, form one of the
most

most interesting parts of the history of every nation in which the feudal institutions have prevailed. So far as the history of England is concerned in them, they have been discussed with great accuracy by sir William Blackstone, vol. 2. chap. 7. and sir John Dalrymple, in his History of the Feudal Law, chap. 3. and 4. The introduction of recoveries, and the circumstances which led the way to them, are accurately stated and explained by mr. Cruse, in his most excellent Essay on the Law of Recoveries. The restraints on the alienation of property are much greater in Scotland than they are in England. There, if a *tailzie* is guarded *with irritant and resolutive clauses*, the estate intailed cannot be carried off by the debt or deed of any of the heirs succeeding to it, in prejudice of the substitutes. This degree of tailzie differs from that of a *tailzie with prohibitory clauses*. The proprietor of an estate of this nature cannot convey it gratuitously, but he may dispose of it for onerous causes, and it may be attached by his creditors; yet the substitutes, as creditors by virtue of the prohibitory clause, may by a process, called in the law of Scotland an *Inhibition*, secure themselves against future debts or contracts. A third degree of tailzie used in Scotland is called a *simple Destination*. This amounts to no more than a designation who is to succeed to the estate, in case the temporary proprietors of it make no disposition of it; for it is defeasible, and attachable by creditors. See Ersk. Inst. 238. 360.

[Note 134.] (2) Britton, in his chapter on *Conditional Purchases*, observes, that "if any purchase to him and his wife, and to the heirs of them lawfully begotten, the donees have presently but an *estate of freehold* for the term of their lives, and *the fee accrue to their issue*, if they had not issue before; and if they had no issue, then *the fee remains on the person of the donor until they have issue*, and the purchase returns to the donor, if the purchaser has no offspring, or if they have issue and that issue fails." But lord Coke in his 2d Inst. 333. observes, that Britton takes the condition to be precedent, but that the donees had, at the common law, a fee simple conditional immediately by the gift. As a proof of this, he mentions, that if a gift was made to a man and the heirs of his body, and before issue, he had *before the stat. de donis* made a feoffment in fee, the donor could not enter for the forfeiture, but that the feoffment would have barred the issue had afterwards.

[225. a.]

[Note 135.] (1) If the condition of the obligation be in the disjunctive, and gives the obligor liberty to do one thing or another, at his election, and one of the things becomes impossible, the obligation, in some cases, will be saved. See the distinctions taken in Laughter's case, Cro. Eliz. 398. Baker v. Moiscoomb, *ibid.* 864. Baskett v. Baskett, 2 Mod. 200.—Ant. 145.

[225. b.]

[Note 136.] (1) 'Tis to be presumed, that an interlining, if the contrary is not proved, was made at the time of making the deed. 1 Keb. 21. *Note to the 11th edit.* On the rasure, or interlining of deeds, breaking or defacing the seals of deeds, and cancelling deeds, see 1 Wood's Conv. 808, 809. Com. Dig. Faits. T. 1. 2.—and Vin. Abr. Faits, T. U. U. 2. X. X. 2. It is to be observed, that the cancelling of a deed does not divest the estate from the persons in whom it is vested by the deed. 1 Rep. in Cha. 100. and Gilb. Rep. 236.

(1) *This*

[226. a.]

(1) *This is the reason of this case, for now he claims above the condition, and therefore need not shew the deed.* [Note 137.]
Infra, 227. b. Lord
 Nott. MSS.

[229. a.]

(1) In addition to what has been observed in note 4. to page 143. b. [Note 138.] it may be remarked, that all deeds were formerly called charters.— Before the indenting of them came into use, when there were more parties than one interested in them there were as many parts of them taken as there were parties interested, and one part was delivered to each of the parties: these multiplied parts were called *Charta paricle*, or *paricola*. The *Charta paricle* or *paricola*, were superseded, in a great measure, by the *Charta partita*. One part of the *Charta partita* was written on a piece of vellum or parchment, beginning about the middle and continuing to the end of each side. This prevailed as early as the times of the Saxons, as appears by the will of *Æthelwyrd*, a nobleman of Kent, dated in 958; by that of prince *Æthelstan*, eldest son of king *Ethelred* the 2d; by a charter of archbishop *Eadsi*, made about the year 1045; and by other Saxon documents preserved in the library of Mr. Astle; in all which the parchments are cut in straight lines. Straight lines continued to be generally used until the latter end of the reign of king Henry III. Afterwards the cut through the parchment was made in a waiving or undulating line; and the practice of writing an intermediate sentence, or drawing an intermediate figure, was generally disused, and the word *Cyrographum* adopted. In process of time it became the practice to indent this line in small notches or angles. This practice begun with the lawyers, as early as the reign of king John; but was not adopted by the ecclesiastics till a much later period. This made the intermediate writing or drawing unnecessary; and it seems to have been abandoned about the reign of Edward III. But the practice of indenting deeds in the intermediate line, remained in use till the close of the 14th century; it then seems to have declined; yet the practice of cutting a waiving or undulating line at the top of the parchment, on which every deed that is not a deed poll is written, has ever since continued. If the deed contains more than one skin of parchment, only the first skin of parchment is indented. Foreign diplomats contend, that when the parchment on which a deed is written, is cut through the intermediate word or figure in a straight line, it is properly called *Chirographum*; that when it is cut through the intermediate word or figure in a waiving line, it is properly called *Charta undulatoria*; and that it is then only properly called *Charta indenta*, or *indentuta*, when it is cut through the intermediate word or figure in a waiving line, and that waiving line is indented or notched in the manner I have mentioned. But with us, every deed the top of which is cut in the undulating or waiving manner I have mentioned, is called an indenture. See Mr. Madox's Preface to his *Formulare*, and the *Nouveau Traité de Diplomatique*, vol. 1. 351.

(2) This was called *charta de una parte*. Some deeds must be indented to be valid for the purposes for which they are used, as bargains and sales by the stat. 27 H. 8. c. 16. leases by persons seised in tail in right of their wives, or ecclesiastical persons, by 32 H. 8. c. 28 a bargain and sale of a bankrupt's estate by the 13 El. c. 7.—and see 43 EL. c. 18. [Note 139.]

(3) When the several parts of an indenture are interchangeably executed by the several parties, that part or copy which is executed by the grantor, [Note 140.]

grantor, is usually called the original, and the rest are called counterparts; tho' of late it is most frequent for all the parties to execute every part, which renders them all originals. 2 Bla. Com. ch. 20 s. 1.

[230. b.]

[Note 141.] (1) So, where three were enfeoffed by deed, and there were several covenants in the deed on the part of the feoffees, and only two of the feoffees sealed the deed, the third entered and agreed to the estate conveyed by the deed, he was bound in a writ of covenant by the sealing of his companions. 2 Roll. Rep. 63.—In 38 Ed. 3. p. 9. it is said, that if land is leased to two for years, and only one puts his seal, but the other agrees to the lease, and enters, and takes the profits with him, he shall be charged to pay the rent, though he has not put his seal to the deed; but if there is a condition comprised in the deed which is not parcel of the lease, but a condition in gross, if he does not put his seal to the deed, tho' he is party to the lease, he is not party to the condition.

[231. a.]

[Note 142.] (1) In *Solter v. Hedgely*, Carth. 76. lord chief justice Holt held, that a party to a deed cannot covenant with one who is no party to it;—but that one who is no party to a deed may covenant with one who is a party, and oblige himself by sealing of the deed.

[231. b.]

[Note 143.] (1) But after, though the jury find the deed not to be the deed of the party, yet will not the court on motion detain the same, but will order it to be delivered to the party that brought it into court. 2 Sid. 131. Vid. Salk. 215. *Note to the 11th edition.*

[232. a.]

[Note 144.] (1) 26 H. 6. T. Barre 37. *Obligee made an acquittance to one obligor, which was dated before the obligation, but was delivered afterwards; the other obligor pleads this in bar, and it was adjudged a good plea in bar. Nota, each was bound in the entirety, therefore it was joint and several. 34 H. 6. So in the case of the king, if he releases to one of the obligors, the other shall take advantage. 5 Rep. 56. contra.—And as a release in deed to one obligor discharges the other, so of a release in law, as 8 Rep. 136. Needham's case. A woman obligee marries the obligor, that is another sort of discharge. 264. b.—But 17 Car. B. R. two were bound jointly and severally. The plaintiff sued both, and afterwards entered a retraxit against one; whether that discharged the other was the question. Berkley said it was, for it amounts to a release in law, as the plaintiff confesses thereby that he had not cause of action, and therefore he cannot have judgment, as in Hickmot's case, 9 Rep. and retraxit is a bar to an action and the plaintiff by his own act has altered the deed from joint to several, and therefore the other shall have advantage of it. Cro. Inst. contra; for a retraxit is only in the nature of an estoppel; and therefore the other shall not have advantage; neither is it a release, though it be in the nature of a release; and if the obligee sues both, and then covenants with one not to sue farther, that is in the nature of a release, but the other shall not take advantage of it; and in 21 H. 6. it is said, that there must be an actual release to one obligor to discharge the other. See March. Rep. 165.—Pas. 18. Car. Hannan v. Roll. The obligee releases to one obligor; the other, in consideration of the forbearance, undertakes to pay, and in an action upon the case the matter was found specially; and Rolls argued, that the debt was not absolutely discharged,*

ed, but only sub modo, viz. if the other can have the release to plead, and because the forbearance was a good consideration. But the court was of opinion, that the debt was absolutely discharged, and therefore the consideration was insufficient.—See Hobart, Rep. 70. Parker v. sir John Lawrence. In trespass against three, they divided on the pleading. Judgment against one. Then he entered a noli prosequi against the two others; it was held to be no discharge to him against whom judgment was had; for as to him, the action was determined by the judgment, and the others are divided from him, and not subject to the damages recovered against him;—but a noli prosequi, or non-suit before judgment against one, would discharge all. Lord Nott. MSS.

[232. b.]

(1) It is to be observed, that the king was always an exception to [Note 145.] this rule; for he might always either grant or receive a *chose in action* by assignment.—The reason why, by the strict rules of the common law, a *chose in action* cannot be assigned or granted over, was, that it was thought to be a great encouragement to litigiousness if a man were allowed to make over to a stranger his right of going to law. But this nicety is now disregarded; though, in compliance with the antient principle, the form of assigning a *chose in action* is in the nature of a declaration of trust, and an agreement to permit the assignee to make use of the name of the assignor, in order to recover the possession. And therefore, when, in common acceptation, a debt or bond is said to be assigned over, it must still be sued in the original creditor's name; the person to whom it is transferred being rather an attorney than an assignee: and our courts of equity, considering that in a commercial country almost all personal property must necessarily lie in contract, will protect the assignment of a *chose in action*, as much as the law will that of a *chose in possession*. Dyer 30. Br. Ab. tit. Chose in action. 3 P. W. 199. 2 Bla. Com. Ch. 30.

[233. a.]

(1) Since sir Edward Coke's time, several statutes have been passed; [Note 146.] particularly 25 Car. 2. cha. 2. 13 & 14 W. 3. ch. 6. &c-1 An. ch. 22. by which all persons admitted into offices civil or military are to take the oaths of allegiance and supremacy, otherwise they forfeit their offices, and incur other penalties.

[233. b.]

(1) But this must be understood of an alienation which divests the [Note 147.] remainder or reversion, as a feoffment, fine, or common recovery: but a conveyance by lease and release, or bargain and sale, is no forfeiture. Neither is it a forfeiture of the particular estate, if the reversioner, or remainder-man in fee, joins with the tenant for life or years in making the alienation; nor is his grant of an advowson, remainder, or any thing else which lies in grant, a forfeiture. But if a tenant for life or years claims the fee, as by joining the *mise* upon the mere right; or if he affirms the fee to be in a stranger, as by accepting a fine *sur consuance de droit come ceo* from a stranger, it is a forfeiture. See post. 251. b. 252. a.

[234. a.]

(1) For the recovery relates to the time of the waste done, which is [Note 148.] paramount to the grant, but it does not relate to the time of making the estate, to avoid charges by force of this condition in law, unless in the case of a lease for years, which is of necessity to have the place wasted.—Lord Nott. MSS.

(1) It

[235. b.]

[Note 149.] (1) This passage exposed sir Edward Coke to much censure.—It was struck out of the third and every following edition to the ninth.—It was restored to its place in that edition, and is to be found in all the subsequent editions.—The following account is given of this circumstance in Burn's Ecclesiastical Law, vol. 3. p. 402. 3d edit.—“There are several degrees, which, although not expressly named in the Levitical law, are yet prohibited by that, and by the statute of 32 H. 8. c. 38. by parity of reason. Hence, in the case of Wortly and Watkinson, a consultation was granted, where one had married the daughter of the sister of his former wife; which (as sir John King laid the argument) is the same degree of proximity, as the nephew's marrying his father's brother's wife; and this being expressly prohibited, the other by parity of reason is so likewise; as it had been declared E. 16. Ja. in Pennington's case, before the High Commissioners. Which point was again argued T. 1 An. in the case of Snowling and Nursey, and consultation granted as before, notwithstanding the case of Richard Parsons, mentioned by lord Coke, 1 Inst. 235. in which it was first determined not to be within the Levitical degrees, and prohibition granted; but a consultation being awarded on debate, two years after, that case is said to have been expunged out of the First Institute, by order of the King and Council. And this was the very point in which (presently after the making of the act) lord Cromwell desired a dispensation for one Massey, who was contracted to his sister's daughter of his late wife; but the archbishop denied it, as contrary to the law of God, and gave for reason, that as several persons are prohibited, which are not expressed, but understood by like prohibition in equal degree; so in this case, it being expressed that the nephew shall not marry his uncle's wife, it is implied, that the niece shall not be married to the aunt's husband. Gibs. 412, 413. Much less can it be doubted, whether the like rule concerning parity of reason, doth not forbid the uncle to marry his niece, which, though not expressly forbidden, is virtually prohibited in the precept that forbids the nephew to marry the aunt; nor is it of moment to alledge, that the first is a more favourable case, as the natural superiority is preserved; since the parity of degree, which is the proper rule of judging, is the very same. Gibs. 413. But where in the case of Harrison and Burwell, T. 20 C. 2. in the spiritual court, one had married the wife of his great uncle, this was declared not to be within the Levitical degrees; and accordingly, after the opinion of all the judges taken by the king's special command, a prohibition was granted, Gibs. 413.—*Note, the case of Richard Parsons, T. 2 Ja. Ro. 1032 where a man may marry the daughter of his wife's sister, which is in the editions of 1628. and that of 29, and is here left out. See Moor 1266, Mann's case, 33 Eliz. in the case of the widow of one Rennington, who claimed a widow's estate, but was denied because she was niece to the former wife of Rennington, who had done penance for the incestuous marriage; but it was resolved she should have her widow's estate, because there was never any divorce had in the life of her husband, though there was cause. Hob. 181. in the case of Howard v. Bartlett. 2 Inst. 683. 1 Cro. 228. Vaugh. 302. Hill v. Gred, 3 Lev. 364. Vide auxy 2. Jones p118. 5 Mo. 161. and B. Stillingfleet's Life, 121.—Lord Nott. MSS.*

[236. a.]

[Note 150.] (1) 1 Co. 25. b. *Porter's case. Breach of condition assigned, because he has not performed within convenient time, viz. 8 years.—Ant. 113. cont. that where lands are devised to executors to sell, and one refuses,*

refuses, yet it is within 21 H. 8. though it be an interest, and though the words of the statute are, where lands are willed to be sold by executors, which gives only a power; so there was a difference between them.—49 E. 3. 17. The case was, a woman seised of lands in London devised them to be sold by her executors, and died without an heir; that devise prevented the escheat which the king pretended to have, and the executors could enter and sell, therefore more than a bare authority passed. Yet in 1651, on evidence at the bar, between Wilkinson and White, this case was started; and lord chief justice Rolls doubted of this opinion, because, he said, it was only a descent, according to the words of Littleton; and that it appeared to him, that when lands are devised to be sold by executors, there no interest passes, as in the last clause here.—Lord Nott. MSS.

[236. b.]

(1) A power of revocation may be defeated by a defeasance made at [Note 151.] the same time, or any time after. 1 Rep. 113.—See Carth. 64. But if a thing executory on its commencement be after executed, it cannot be defeated by a subsequent defeasance. 5 Rep. 90. b. In the case of *Cottrel v. Purchase*, lord Talbot said he should always discourage the practice of drawing an absolute deed, and making a defeasance, as it wore the face of fraud.

[237. a.]

(1) Some observations will be made in the notes to the chapter of Releases, on Powers of Revocation, and other Powers deriving their effect from the statute of uses.——A reference was made, in note 1. p. 216. a. to this place, for some observations on the doctrine of *Conditions precedent, and Conditions subsequent*. In 1 Eq. Ca. Ab. 108. it is observed, “That conditions precedent are such as are annexed to estates, and must, at law, be punctually performed, before the estate can vest. A condition subsequent is, when the estate is executed; but the continuance of such estate dependeth on the breach or performance of the condition. Though this distinction is often mentioned in courts of equity, yet the prevailing distinction there is to relieve against conditions, where compensation can be made, whether they be precedent or subsequent.” This observation is illustrated and confirmed by the cases collected under the title of Conditions precedent and subsequent, in Mr. Viner’s Abridgment;—and see Francis’s Maxims of Equity, p. 44. and Kaims’s Princ. of Eq. 51. 81. ed. 1760.—One of the most material points of discussion, respecting the doctrine and different operations at law and in equity of Conditions precedent and Conditions subsequent, arises from those cases where *Conditions are annexed to Devises, making them void on the marriage of the devisee without consent*. These cases have frequently been discussed in our courts. All the learning upon them is to be found in the case of *Harvey v. Aston*, Com. Rep. 726. 1 Atk. 361. and *Reynish v. Martin*, 3 Atk. 330.—The doctrine of Conditions precedent and subsequent also, frequently applies to cases arising on the *vesting of portions and legacies made payable at a future time*. There are few points of legal learning upon which the cases in the books are more numerous, or seemingly more discordant. Perhaps the following distinction may serve to enable the reader to reconcile them. I. It was laid down, in the case of *Pawlet v. Pawlet*, 2 Vent. 366, 367. that where a legacy is *charged upon real estate*, if the person entitled to it dies before the day of payment, it sinks into the land for the benefit of the owner of the inheritance. In *Hall v. Terry*, 1 Atk. 502. and *Van v. Clarke*, 1 Atk. 510. lord Hardwicke seems to have thought himself bound by this rule, and decreed those cases accordingly.

—But in *Lowther and Condon*, 2 Atk. 130. *Sherman v. Collins*, 3 Atk. 319. *Hodgson v. Rawson*, 1 Ves. 44. his lordship departed from this rule; and perhaps the general rule, as it now stands, is,—That when a legacy is given, charged upon a real estate, and payable at a future time, and there are no express words in the will to make it immediately a vested interest; there, if a stronger implication to the contrary does not arise from the other parts of the will, the court, from its inclination to favour the heir, considers its being so charged, and so payable, as circumstances amounting to an implication, that the testator's intention was, that it should not vest till the time in which it is made payable. Most clearly it is in the testator's power to make it immediately vested and transmissible, though charged upon a real estate, and payable at a future time, by using express words to indicate his intention that it should be so;—and if this can be done by express words, there cannot, it should seem, be any reason why it may not be equally done by implication. Therefore, if there are any circumstances or expressions, in a will, from which the implication, that it was the testator's intention to make it immediately a vested legacy, is stronger than the implication to the contrary, which arises from its being charged upon a real fund, and payable at a future day, it is to be considered as a vested and transmissible interest, notwithstanding those circumstances. One of the circumstances, which the courts have considered as affording very strong ground to imply the testator's intention to be, that the legacy should be immediately vested and transmissible, though the payment is postponed to a future time, is where the payment is postponed for reasons that are not personal to the legatee, but arise or seem to be calculated with a view to the circumstances of the fund.—Upon this ground lord Hardwicke seems in a great measure to have decided in the cases cited above of *Lowther v. Condon*, *Sherman v. Collins*, and *Hodgson v. Rawson*.—See also *King v. Withers*, Ca. Temp. Talbot 117. *Butler v. Duncombe*, 1 P. W. 457. *Pittfield's case*. 2 P. W. 513. *Hutchins v. Foy*, Com. 716. *Godwin v. Munday*, 1 Bro. Cha. Rep. 191.—II. Where the legacy is charged upon personally only; there, if the legatee dies before the day of payment, his personal representatives become entitled to the legacy; unless it is to be collected from the testator's will, that he intended the contrary.—In the construction of bequests of this nature, there is an established distinction between a gift of a legacy to a man, at, or if, or when he attains 21 (or any other future event of a similar nature), and a legacy payable to a man at, or if, or when he attains 21.—In the first case, the attaining 21 is held to be individually applicable as much to the substance as to the payment of the legacy, and therefore the legacy is held to lapse by the death of the legatee before the time. In the second case, the attaining 21 is held to refer, not to the substance, but to the payment only of the legacy, and therefore, here the legacy is held not to lapse by the death of the legatee before the time.—It has been held to be an exception to this distinction, where the testator has disposed of the intermediate interest either to a stranger, or to the legatee. And the distinction does not hold where the legacy is a charge upon real estate.—III. With respect to legacies charged on a mixed fund, consisting both of real and personal estate;—if the legatee dies before the time of payment, it seems to be settled, that the legacy should sink in the land, in all cases of this nature where it would be held to sink in the land if the fund consisted of real estate only; but this is only so far as it is necessary to resort to the real estate; for in these cases the legacy is still vested as to the personal estate, in all cases where it would be vested, if the fund consisted of personal estate only.

only. See *Sherman v. Collins*, 3 Atk. 320. 1 Ver. 48. 2 P. W. 612. and Mr. Coxe's excellent note on the last case.

Since the publication of the last edition of these annotations, the doctrine of conditions, as applicable to legacies, has been fully and ably explained by Mr. Roper, in his *Treatise upon the Law of Legacies*, in two volumes octavo.

For the difference between the common-law doctrine of conditions, and that of the civil law and canon law, see the second part of *Fulback's Parallel*, 7th Dialogue.

In the former part of these notes, some observations were made on the leading points of the doctrine of mortgages. The reader will find every thing relating to that comprehensive subject, collected with great industry and ingenuity, in a recent publication on the *Law of Mortgages*, by Mr. Powell.

[238. a.]

(1) The outlines of the doctrine contained in this Chapter are thus [Note 153.] summarily mentioned by Lord Chief Baron Gilbert, in his *Law of Tenures*, p. 21:—"When any man is disseised, the disseisor has only the naked possession, because the disseisee may enter and evict him; but against all other persons the disseisor has a right, and in this respect only can be said to have the right of possession, for in respect to the disseisee he has no right at all. But when a descent is cast, the heir of the disseisor has *jus possessionis*, because the disseisee cannot enter upon his possession and evict him, but is put to his real action, because the freehold is cast upon the heir."

(2) And so are the donees and feoffees of the disseisor, for they come [Note 154.] by title, though 'tis a defeasible one. *Note to the 11th edition.*

[239. a.]

(1) The different degrees of title which a person dispossessing another [Note 155.] of his lands acquires in them in the eye of the law (independently of any anterior right), according to the length of time and other circumstances which intervene from the time such dispossession is made, form different degrees of presumption in favour of the title of the dispossessor; and in proportion as that presumption increases, his title is strengthened; the modes by which the possession may be recovered vary; and more, or rather different proof is required from the person dispossessed, to establish his title to recover. Thus if A. is disseised by B. while the possession continues in B. it is a *mere naked possession*, unsupported by any right, and A. may restore his possession, and put a total end to the possession of B. by an *entry* on the lands, without any previous action; if B. dies, the possession descends on the heir by act of law. In this case the heir comes to the land by a lawful title, and acquires in the eye of the law an apparent *right of possession*; which is so far good against the person disseised, that he has lost his right to recover the possession by entry, and can only recover it by an *action at law*. The actions used in these cases are called *Possessory Actions*, and the original writs by which the proceedings upon them are instituted, are called *Writs of Entry*. But if A. permits the possession to be withheld from him beyond a certain period of time without claiming it, or suffers judgment in a possessory action to be given against him by default, or upon the merits; in all these cases, B.'s title in the eye of the law is strengthened, and A. can no longer recover by a possessory action, and his only remedy then is by an *action on the right*. These last actions are called *Droiturel Actions*, in contradistinction to *Possessory Actions*. They are the ultimate resource of the person disseised; so that if he fails to bring

bring his writ of right within the time limited for the bringing of such writs, he is remediless, and the title of the dispossessor is complete. The original writs by which *droiturel* actions are instituted are called Writs of Right. The dilatoriness and niceties in these processes, introduced the Writ of Assize. The invention of this proceeding is attributed to Glanville, chief justice to Henry II. (See Mr. Reeves's History of the English Law, Part I. ch. 3.) It was found so convenient a remedy, that persons, to avail themselves of it, frequently supposed or admitted themselves to be disseised by acts which did not in strictness amount to a disseisin. This disseisin, being such only by the will of the party, is called a *disseisin by election*, in opposition to an *actual disseisin*: it is only a disseisin as between the disseisor and the disseisee, the disseisee still continuing the freeholder as to all persons but the disseisor. The old books, particularly the Reports of Assize, when they mention disseisins, generally relate to those cases where the owner admits himself disseised. (See 1 Burr. 111. and see Bract. lib. 4. cap. 3.) As the processes upon writs of entry were superseded by the assize, so the assize and all other real actions have been since superseded by the modern process of ejectment. This was introduced as a mode of trying titles to lands in the reign of Henry VII. From the ease and expedition with which the proceedings in it are conducted, it is now become the general remedy in these cases. Booth, who wrote about the end of the last century, mentions real actions as *then* worn out of use. It is rather singular that this should be the case, as many cases must frequently have occurred in which a writ of ejectment was not a sufficient remedy. Within these few years past some attempts have been made to revive real actions: the most remarkable of these are the case of Tissen v. Clarke, reported in 3 Wils. 419. 541. and that of Carlos and Shuttlewood v. lord Dormer. The writ of summons in this last case is dated the 1st day of December 1775. The summons to the four knights to proceed to the election of the grand assize, is dated the 22d day of May 1780. To this summons the sheriff made his return; and there the matter rested. The last instance in which a real action was used, is the case of Sidney v. Perry. All these were actions on the right. That part of sir William Blackstone's Commentary which treats upon real actions, is not the least valuable part of that excellent work.

[Note 156.] (2) Booth, in his Real Actions 171. makes the first degree to consist in the original wrong; but sir Henry Finch 262. and Mr. Justice Blackstone, vol. 3. ch. 10. agree with sir Edward Coke. Abatement, disseisin, escheat, recovery, election, succession, dower, judgment, and a third, and every subsequent feoffment, are in the Post. Finch *ibid*.

[Note 157.] (4) *But it will not take away the entry of a stranger; for as to him it is but the estate for life still, a fictitious, not true descendible estate.* Lord Nott. MSS.

[Note 158.] (5) This is by reason of the king's prerogative, that he cannot be disseised. See Hob. 322.

[239. b.]

[Note 159.] (1) *See 1 Rep. 140. temp. Edw. The eldest son before entry died without issue, the youngest will pay two reliefs, for the death of his father and the death of his brother; for they both were tenants to the lord. So note, the death of a person seized of a scisin in law, is a discent to entitle the lord to relief.—By Thorp and Wilby, the grandfather leased for life and died.—The father makes a feoffment of Black Acre*

Acce with warranty, the son shall not render in value the term of which the reversion descends upon him, because the father had only a scisin in law. 24 E. 3. 47. L. Nott. MSS.

(2) The necessity that there should be a tenant to do the feudal duties, and the notoriety of title which the disseisor acquired by being permitted to continue during his life in the peaceable possession of the fee, and to die seised of it, are the grounds upon which the law is induced to defend the possession of the heir of the disseisor from the entry of the disseisee, and to leave the disseisee to his remedy by action. But when the disseisor parts with the freehold, there is a vacancy in the possession; and the possession of the disseisor, and consequently the notoriety of it, is lost. Thus the principles which apply to the discent of an estate in possession, do not apply to the discent of an estate in remainder or reversion expectant on an estate of freehold. But they apply when the particular estate is only for years; a tenant for years being considered merely as the bailiff of the freeholder, and to hold the possession for him. [Note 160.]

(3) But suppose the disseisor in this case had conveyed the estate to the use of himself for life, remainder to the use of his first and other sons in tail, with the immediate reversion or remainder to himself in fee, and that he died without issue living at the time of his decease; it seems to be a question, whether he is to be considered as seised in fee at the time of his decease, so as to entitle his wife to dower. See Cordall's case, Cro. El. 315. Hooker v. Hooker, Cas. temp. Hardw. 13. Duncomb v. Duncomb, 3 Lev. 447. In the latter case, between the estate of the tenant for life, and the limitation to his first and other sons, there was interposed an estate to trustees during the life of the tenant for life, for preserving the remainder to the sons. This was held to be a vested estate, and that it prevented the wife from dower; and lord Hardwicke in Hooker v. Hooker admitted this reasoning. The passage in the text and the three cases cited above were mentioned, and great stress laid upon them, in the case between the heir and next of kin of the late lord Thomond. In that case, lord Thomond being tenant for life, with remainder to his first and other sons in tail male, with the immediate reversion expectant thereupon to himself in fee, paid off a sum of 18,000l. charged upon the estate under the trusts of a term of years; and afterwards died intestate, and without issue. Now it is a rule in equity, that when a person having a partial estate in land, is entitled to a sum of money charged upon it, his right to the money does not necessarily merge in the land, but he may keep it as a subsisting charge on the estate; and in some cases, if he makes no particular disposition of it in his life-time, it goes upon his decease to his personal representative. See Morgan v. Jones, Bro. Cha. Ca. 206. Upon this ground, it was contended that lord Egremont, upon whom the estate descended at lord Thomond's decease as his heir at law, took the estate charged with the 18,000l. for the benefit of the intestate's representatives. To this it was answered, that though lord Thomond was, at the time of his decease, seised of an estate for life, with the immediate reversion in fee; yet as he had no children living at the time of his decease, and his heir at law immediately upon his decease took the lands in fee simple in possession by descent, he was to be considered as seised of an estate in fee simple in possession, and consequently that the 18,000l. was to be considered as merged in the inheritance. But lord chancellor Bathurst, before whom the cause was heard, was of opinion, that lord Thomond was to be considered [Note 161.]

sidered as seised only for life, and that of course his lordship's personal representatives were entitled to the 18,000*l*.

[240. a.]

[Note 162.] (1) When the lord comes to the land by escheat the law only casts the freehold upon him for want of a tenant. The disseisee, notwithstanding the disseisin, continues the rightful tenant; and as, by his entry, he fills the possession, the lord's title, which was only good while a tenant was wanting, must necessarily be at end.

[Note 163.] (2) Though by the disseisin a tortious possession is acquired, it is so in the present case, only as between the disseisor and the disseisee, and does not affect the estate of the feoffor on condition; the condition being so inseparably annexed and inherent to the land; as to bind it, in whose hands soever it comes. See *Ow. 141*.

[240. b.]

[Note 164.] (1) The assertion, that a woman in this case has no remedy by action, may, perhaps, be disputed, as the writ *causâ matrimonii prælocuti* extends to all the degrees. See the writ in the Register. Booth's Real Actions 197. and Fitz. Nat. Br. 205.

[Note 165.] (2) Acc. the case of *Mattheson v. Trott*, *Owen 141*. 1 *Leo. 209*. But the reason given in the Commentary, that the devisee, in this case, has no remedy by action, is not well founded, if what sir Edward Coke observes in page 111. a. be true, that the devisee may either enter or have his writ *ex gravi querelâ*. Upon this head, the judges Anderson and Walmesley seem to differ on the case above cited. Whatever may be the case with respect to a discent, a fine levied by the heir at law, is a bar to a devisee after five years non-claim. *Hulm v. Heylock*, *Cro. Car. 200*. It is also a bar to a title of entry for a condition broken, or a right or title of entry upon any other account. *Mayor of London v. Alsford*, *Cro. Car. 575*. 1 *Jones 452*. See mr. Cruise's Essay on Fines, 146 147.

[Note 166.] (3) *Hainsworth v. Pretty*, *Cro. Eliz. 919*. Thomas devised to Richard, his eldest son, in fee, upon condition that he should pay to his other children the sums appointed to them according to the intent of his will; and on refusal, that his younger sons and daughters should have it to them and their heirs. Richard refused payment, and died; and Thomas, his son, entered, and the younger sons and daughters entered upon him: it was contended, that the descent upon Thomas took away the entry of the younger sons and daughters; but the court held the contrary. For it was not as a descent by a stranger after a devise, before the entry of the devisee, which, perhaps, might take away their entry, because it was not then an immediate devise; but it was *quasi* a devise upon a limitation, or upon a condition broken, which no descent should take away or prejudice.

[241. a.]

[Note 167.] (1) The dowress holds of the heir; but by the institution of the law, she is in of the estate of her husband; so that after the heir's assignment, she holds by an infeudation from the immediate death of her husband. Hence it is that dower defeats descent, because the lands cannot be said to descend as demeane which are in tenure; and the assignment of dower being in the nature of infeudation, and taking place immediately from the death of the husband, there are only two thirds which descended as demeane. *Gilb. on Dower 395*.—See ant. 31. b.

(2) The

(2) The doctrine contained in this section seems to apply to the cases of a recovery suffered by the heir, before the assignment of dower. [Note 68.]

(3) So note, though the donee, being an abater, did an act to which he was compellable, yet it is not as good as if he had been actually compelled. *Supra*, 35. Lord Nott. MSS. [Note 169.]

(4) Sir Edward Coke, in this passage, and in a former part of his Commentary, puts several cases on the continuance of the wife's dower after the fee charged with it is determined. Perhaps the following distinctions and observations will assist in clearing up the complex and abstruse points of learning in which this question is involved. I. In those cases where the fee is evicted by title paramount, the dower and courtesy necessarily cease upon the eviction. Such is the case put by Littleton in the section before us. II. When the donor enters for breach of condition; as his entry absolutely defeats the estate of the tenant on condition, so it defeats his wife's right of dower, and the husband's right of courtesy, and all other charges brought upon the estate, either by the donee's own act, or by act of law. See note 2. fo. 202. b. III. If a person seised in fee tail, or any other determinable fee, conveys in fee, the wife's right of dower, and the husband's courtesy, can only be commensurate with the estate of the grantee, and must necessarily cease whenever that estate ceases. See 10 Rep. 97. b. 98. a. IV. As to estates in fee simple conditional at the common law, and estates tail under the statute *de donis*;—the wife was entitled to her dower, and the husband to his courtesy, out of them, after the failure of the issues. But it may be observed, that though it now is difficult to avoid considering estates in fee simple conditional in any other light than as estates originally granted to the donee, and to the heirs general, or to some particular heirs of his body; and the estate of the donor, as that of a reversioner expectant on the failure of these heirs; yet this restriction to particular heirs, and exclusion of others, is understood to be produced, not by any limitation of persons introduced into the grant, but by a condition supposed to be annexed to it, that if there were no such heirs, or being such, if they afterwards failed, and the donee did not alien the estate, it should be lawful for the donor and his heirs to enter.—This entry, therefore, was not an entry upon the natural expiration of a previous estate, but for a condition broken; in which case, as in all others where entry is made for breach of a condition, the right of the wife to her dower, and the husband to his courtesy, if the general rule were adhered to, would be defeated. But for reasons now rather to be guessed than demonstrated, this case was made an exception from the general rule. So with respect to the right of the wife of tenant in tail to her dower, and the husband to his courtesy, after the failure of the issues in tail; the statute *de donis* introduced no new estate, but only preserved estates limited as conditional fees to the issues inheritable under them, by preventing the tenants of such conditional fees from alienating or disposing of them; and as they preserve the estates, so they preserve the incidents belonging to them, and, among others, the right of the wife to her dower, and the husband to his courtesy. V. If a person makes a gift in tail, reserving rent; after failure of the issues in tail, the rent will not be continued, either for the dower of the wife, or the courtesy of the husband. *Plow. Com.* 155. VI. As to limited fees;—by which, in this place, are to be understood those fees which are qualified, not because the estate of the grantor is limited—(such as those which are classed under the third distinction)—but those which being created by a person seised in fee simple,

ple, are by the original grant by which they are created, only to continue till a certain event; as a grant to A. and his heirs, tenants of the manor of Dale, or to A. and his heirs, while there shall be heirs of the body of B.:—or those fees which are originally devised or limited in words importing a fee simple or fee tail absolute and unconditional, but which, by subsequent words, are made determinable upon some particular event (see Note 1. 203.):—as to fees of this description, it should seem by the case cited in the Note to F. N. B. 149 G. and the cases of *Flavell v. Ventrice*, Roll. Abr. 676. and *Sammes v. Payne*, 1 Leo. 167. 1 And. 184. 8 Rep. 34. *Goulds*. 81. that where the fee, in its original creation, is only to continue to a certain period, the wife is to hold her dower, and the husband his courtesy, after the expiration of the period to which the fee charged with the dower or courtesy is to continue; but that where the fee is originally devised in words importing a fee simple, or fee tail absolute and unconditional, but by subsequent words is made determinable upon some particular event; there, if that particular event happens, the wife's dower and the husband's courtesy cease with the estate to which it is annexed. Such appears to be the distinction established by the foregoing cases. But a different doctrine as to cases of the latter description, seems to have been laid down in the case of *Buckworth v. Thirkel*, determined in Trinity term, 25 Geo. 3. in the court of king's bench. There Joseph Sutton the testator devised his estates to trustees, upon trust to pay the rents and profits of them for the maintenance and education of Mary Barrs, till she arrived at twenty-one, or was married: "And from and after the said Mary Barrs should have attained her age of twenty-one years, or should be married, he gave and devised all the said lands and premises to the said Mary Barrs, her heirs and assigns for ever; but in case the said Mary Barrs should happen to die before she arrived at the age of twenty-one years, and without having issue of her body lawfully begotten; then, from and after the decease of the said Mary Barrs without issue, as aforesaid, he gave and devised all of his said estates unto his grandson Walter for life," with several remainders over. Mary Barrs married Solomon Hansard, and had issue a son, who died in her life; and afterwards Mary Barrs died under twenty-one. In this case, the court were unanimously of opinion, that on the decease of Mary Barrs, her husband became entitled by the courtesy to the estates for his life, and that, subject thereto, the devisees over became entitled to them by way of executory devise.—*Collect. Jurid.* vol. 1. 332. 3 Bos. and Pull. 652. the ground upon which the court appears to have formed their opinion on it, is, an analogy they supposed it to bear to the case of estates in fee simple conditional, and estates tail; in both of which dower and courtesy continue after failure of the issues; and in both of which the wife's being seised of a fee, to which the issue might by possibility inherit, entitles the husband to courtesy. Some observations have been offered above to shew that the continuation of dower and courtesy in the cases of estates in fee simple conditional, was an exception to a general rule (dower and courtesy, in all other cases of conditions, being defeated by the entry for the condition broken); and that the same reasoning may be applied to the continuation of dower and courtesy out of an estate tail, after the failure of issue. It may therefore seem singular that the court, on this occasion, should prefer reasoning by way of analogy from the only admitted *exception* to the general rule, to reasoning by analogy from the *general rule* itself:—it is the more singular, as the general case of estates on condition approached nearer to the case than under consideration of the court, than the particular case of estates in fee simple

simple conditional, or estates tail; for the distinguishing feature of the devise which gave rise to the case before the court (as of all devises of that description) is, that after the whole fee is first devised, it is made defeasible by a subsequent clause. Now neither an estate in fee simple conditional, nor an estate tail, has any such defeasible quality or incident annexed to it; but this quality forms the very essence of all other estates upon condition.—With respect to the application of the maxim, that where the issue may by possibility inherit, the husband shall have his courtesy (and so *vice versa* of dower); in every place in the books where that is mentioned, it is to introduce an enquiry whether the wife, being in the actual seisin of an estate, was in fact seised of an estate, the *quality* of which was such, that the issue of the husband might inherit it, but never with a view to shew that the *quantity* of the estate was such, that it might endure so long as to be inheritable by the issue. On the contrary, when the wife's estate is evicted by title paramount, or by an entry for the breach of a condition, in both cases the issue might have inherited; but the husband would be entitled to his courtesy in neither, after the eviction or entry. Another difference between the case of an estate in fee simple made defeasible by a subsequent executory limitation or devise, and that of an estate in fee simple conditional, or an estate tail, is, that an estate in fee simple, made defeasible by an executory limitation or devise, cannot, by any means whatever, be discharged by the first taker, or devisee, from the operation of the subsequent limitation or devise; but an estate in fee simple conditional may immediately after the birth of a child, and an estate tail immediately after marriage, be destroyed, and a fee simple absolute acquired, by the husband and wife joining in a fine or common recovery.—The case is the same with respect to the wife's right of dower.—Besides, the quality we are speaking of is not sufficient of itself to entitle the husband to courtesy, or the wife to dower; it is only one of many incidents which the estate ought to have to give that title.—On the subject discussed in this note much useful learning will be found in *Goodhill v. Goodhill*, 1 Bos. and Pull. 192. *Doe on the demise of Hutton*, 3 Bos. and Pull. 643. *Doe v. Willis*, 4 Durn. and East, 39. and *Maundrell v. Maundrell*, 7 Ves. jun. 567. 10 Ves. jun. 246.

[241. b.]

(1) Conformably to this it was held by lord Holt in the case of [Note 171.] *Carter v. Tash*, 1 Salk 241. that a discent which tolls entry ought to be an immediate discent; and therefore if a feme disseisores take husband, and hath issue and dies, and after the husband dies, the discent of the issue does not take away entry, because the interposition of tenant by the courtesy does impede it, and that coverture to avoid a discent ought to be continual from the time of the disseisin to the discent; for if a feme be sole at the time of the disseisin, or of the discent, or any time intermediate, her entry is not preserved, because she had an opportunity to enter and prevent the discent: as if a feme covert is a disseisee, and after her husband dies she takes a second husband, and then the discent happens, this discent shall take away the entry of the feme: and upon this last point the plaintiff in that case was nonsuited.

[242. a.]

(1) For when the disseisor enfeoffs the father, it is presumed to be [Note 172.] done in order afterwards to come in by discent, and the act of law shall not give sanction to the wrong of the party; nor shall any man by his own wrong, however cunningly contrived, give to himself a right; for when the heir by the discent gains a *jus possessionis*, he is supposed

innocent of the wrong of his ancestor, but here he is partner of his guilt. See Gilb. Ten. 27, 28.

[242. b.]

[Note 173.] (1) When a younger brother enters in this case, he does not enter to get a possession distinct from that of the elder brother, but to preserve the possession in the family, that nobody else abates. Gilb. Ten. 28.

[243. a.]

[Note 174.] (2) At the common law, if the youngest son were found heir, the eldest might have an office; the doubt was, whether it should be tried which of them was heir by immediate interpleader, or at the full age of him that was first found heir: but the 2d and 3d Ed. 6. ch. 8. hath remedied it, and given an interpleader immediately, on traversing the first office, which cannot be, unless the party who traversed had an office found for himself. 7 Co. 44. a. b. Kenn's case.

[243. b.]

[Note 175.] (1) *Hob. 120. Smale v. Dales.* The contrary is held, that one co-hercener cannot be disscied without actual ouster, and claim shall not alter the possession. Lord Nott. MS.

[Note 176.] (2) *Sir Henry Spelman verbo Bastard rejects this derivation, and holds it to be a pure Saxon word Bastart. viz. impurè natus, ut apud nos, Upstart dicitur homo novus. Lord Nott. MS.* In Germany, and with us, (who derive many of our customs and political opinions from the Germans) bastardy was always a circumstance of ignominy. But in Spain, Italy, and France, bastards were in many respects on an equal footing with legitimate children. During the first and second races of the kings of France no difference appears to have been made between their legitimate and illegitimate offspring. The same seems to have been the case of the offspring of all the sovereign princes and higher ranks of nobility in France. Their acknowledging a natural child to be their child, was considered as tantamount to any formal act of legitimation. But the natural children of all others persons were considered as villeins. After the accession of the Capetian line, the condition of bastards was altered for the worse in many respects. Those of royal parentage were excluded from the throne, and were no longer held to be of blood royal. They were only permitted to bear the arms of France, with a bar. A similar change took place with regard to the bastards of the princes and nobility. By an ordinance of the year 1600, it was declared, that the children of nobility should not be considered even as gentlemen, unless they obtained letters of nobility. On the other hand, the bastards whose parents were of a lower order, instead of being considered villeins, as before, began about the commencement of the 16th century to be considered as free men, and except as to the right of receiving and transmitting succession, they are now, in France, on an equal footing with their fellow subjects. See *Ouvres de Chancelier D'Aguesseau*, t. 7. p. 881. *Dissertation dans laquelle on discute les principes du droit Romain et du droit François par rapport aux Bâtards.*

[244. a.]

[Note 177.] (1) *Filius naturalis à vulgo barbarorum opponitur legitimo. Sed revera opponitur filio adoptivo, in quo sensu Tiberius vocat Drusum filium suum naturalem. Cal. Lex. verb. nat. filius. Spurii Latini et Græci sine patre. Ib.—Lord Nott. MS.* Jure pontificio nostro dicuntur qui

qui ex adulterino concubitu, manseres qui ex scorto, spurii exitus qui sacris initiati sunt, aut religionem professi sunt.—Ib.

(2) It is now held that the husband's being within the four seas, is [Note 178.] not conclusive evidence of the legitimacy of the child, and it is left to a jury to consider whether the husband had access to his wife. See 3d P. W. 275, 276. *Pendrell, v. Pendrell*, 2 Stra. 925. So evidence may be given, that the husband's habit of body was such, as to make his having children an impossibility. *Lomax v. Holmden*, 2 Stra. 940. See also 1 Roll. Abr. 358. 1 Salk. 123. But the rule laid down by lord Coke, was once generally received. In *Jenk. c. 10. pl. 18.* it is said, "that if the husband be in Ireland for a year, and the wife in England during that time has issue, it is a bastard; but it seems otherwise now for Scotland, both being under one king, and make but one continent of land."—See ant. note 2. to p. 126.

[244. b.]

(1) In the case of *Pride v. the earls of Bath and Montague*, it was [Note 179.] held, that the rule that a person shall not be bastardized after his death, is only good in the case of bastard eigne and mulier puisne. 1 Salk. 120.

(2) *Nota. 2 Inst. 96, 97. On the statute of Merton, Pope Alexander III. (ann. 1160. 6 H. 2.) ordained, that children born before matrimony, where matrimony follows, should be as legitimate as those born after marriage, quia ecclesia tales habet pro legitimis.—Constitutio pontifica, or the canon law, est intelligenda solummodo de filiis natis ex coitu, qui poterunt esse conjugales; qui verò ex damnato coitu nascuntur, scilicet ex coitu incestuoso vel adulterino, cujusmodi coitus non poterat esse uxorius, tamen nunquam legitimari possunt per subsequens matrimonium. Ratio est quia matrimonium subsequens ex fictione legis retrahitur ad tempus susceptionis liberorum, ut legitimitati habeantur legitime suscepti (i. e.) post contractum matrimonium. Fictio autem juris nunquam admittitur contra naturam et bonos mores. Quapropter lex non potest fingere matrimonium fuisse cum eis, cum quibus nuptiæ non potuerunt esse per leges; quia in fictionibus translationis requiritur habitas extremorum à quo et ad quem. Ideoque leges civiles et decretales olim matrimonium inter adulteros prohibebant, contractumque dirimebant. Jam verò ista prohibitio locum non habet, nisi in mortem prioris conjugis alteruter fuerit machinatus, vel prematurè, dum adhuc viveret, de contrahendo post mortem ejus connubio pacta fuerit fides. Secundò notandum est quòd subsequens matrimonium legitimos facit quoad spiritualia, non quoad temporalia, quia Papa non potest legitimize, quoad temporalia, extra sui ipsius dominica, scilicet extra terras quæ sunt de patrimonio sancti Petri, quod Papa Innocentius III. confitebatur (ergo Anglia non est ex patrimonio sancti Petri quicquid fecerit Rex Johannes). Et Sanchez quem Clemens III. valde laudavit, apertè dicit, si proles habita sit ex concubitu omnino fornicano, eam non posse pontificem, quoad temporalia et secularia, legitimize. All this was said and proved out of ancient authors by a learned advocate, whose discourse is printed at large in the modern arrets collected by Mons. de Maison. Arrest 20. And there the principal case was, the uncle, in the life of his wife, had a child by his niece and god-daughter, on promise of marriage when time should serve: the wife dies, and then the uncle had other children, and ten years after, by dispensation from the pope, containing a clause of legitimation of the children born before, marries her. Res. The pope's dispensation was void as to any legitimation, which*

*which, whether it were because the marriage were within the Levitical degrees, or because of spiritual kindred, or because against the council of Trent, a general council being held by the Sorbonne to be above the pope, appears not; but may be for all these reasons, or for none of them, but only because the *puer* cannot legitimate in temporals. 2dly, That the children of this marriage should have pensions to live on, which may seem to approve the dispensation as to the marriage. 3dly, That no such be granted for the future. Ibid. 360. Romani filios naturales tantùm non alio juro habuerunt quàm peregrinos. Theodosii & Arcadii principatu temperata fuit legum severitas, ac deinde Zenonis lege obtinuit, ut naturales liberi consequentibus cum matre nuptiis justis ac legitimi haberentur. Bodinus de Repub. lib. 1. cap. 4. p. 29. Sed nota, quòd ante Zenonis tempora, viz. per legem Divi Constantini, nati ante matrimonium, fiebant legitimi per matrimonium subsequens; quod tamen explicatur in eodem codice, viz. per matrimonium legitimantur liberi naturales modò procreati sint muliere liberâ, & cujus matrimonium non est legibus interdictum. Vid. Mons. de Maisons, Arrest 20. page 259.—Lord Nott. MS.*

[245. a.]

[Note 181.] (1) Both by the civil and canon law, children born before marriage are made legitimate by the subsequent marriage of their parents. This was established in the civil law by the emperor Constantine, and confirmed by the emperor Justinian. It was established in the canon law by a constitution of pope Alexander the third, in 1160. This legitimation is a privilege or incident inseparably annexed to the marriage; so that both though the parents and the children should waive or refuse it, the children nevertheless would be legitimate. But it holds in these cases only where, at the time of the birth of the children, it was lawful for both parents to intermarry; for if the father were married to another woman at the time of the birth of the children, and afterwards his wife died and he married the mother of the child, the child would not be legitimated by this subsequent marriage. Children thus legitimated are on an equal footing with the legitimate children; and if they die before the marriage of their parents, still they are considered as legitimate, and transmit their legitimacy to their issue: but, whether they are considered legitimate from the time of the marriage of their parents, or whether their legitimacy by their parents' marriage has a relation back only to the time of their birth, is a point warmly disputed by the civilians and canonists. The prevailing opinion seems to be, that they are to be considered as legitimate from the time of their birth to all purposes but those in which to consider them as such would operate to the detriment of a third person. Thus, if there be a natural-born child, and the father afterwards marries and has sons; his wife dies, and he marries the woman by whom he had the natural child; it seems to be the better opinion, that the child legitimated by the subsequent marriage does not acquire the right of progeneriture over the sons of the first marriage. The doctrine of legitimacy by a subsequent marriage was never admitted into the English law; and the refusal of the noblemen of our nation to admit it, on the occasion mentioned in sir Edward Coke's Commentaries, is spoken of by sir William Blackstone and other writers as a memorable instance of their jealousy of the civil law, and their firmness in opposing foreign innovations. The doctrine of legitimation prevails, with different modifications, in France, Germany, and Holland. By an arret d'audience of the 21st of June, 1668, it was adjudged, that if a person marries in England a woman by whom he had children previous to the marriage, the children born in France are legitimated by it, and acquire all

all the rights of legitimacy under the French law. See c. 10. C. de Natur. lib. Nov. 89. c. 8. Vinn. in Inst. t. 1. t. 10. a. 13. Hein. Elem. Jur. de Legitimatione. Traité des Successions par le Brun, ed. 1776. lib 1. c. 2. s. 1. d. 1. l. 2. c. 2. s. 1. n. 13. and sir John Fortescue, c. 39. Till the statute of Merton, the question whether born before or after marriage, was examined before the ecclesiastical judge, and his judgment was certified to the king or his justices, and the king's court either abided by it or rejected it at pleasure. But, after the solemn protest made by the barons at Merton against the introduction of the doctrine of the civil and canon law in this respect, *special bastardy* has been always triable at common law; and *general bastardy* alone has been left to the judgment of the ecclesiastical judge, who in this case agrees with the temporal. 2 Inst. 99. Reeves's Hist. of the English law, 85. 201. and see ant. note 2. to page 136. a. If the reader wishes to become acquainted with the doctrine of the Roman law on marriage, and the legitimacy and illegitimacy of children, he will find it succinctly and perspicuously stated, in Pothier Traité de Contrat de Mariage, Partie 1. c. 2. In the 3d chapter of the same work, he discusses the celebrated question, "de l'autorité de la Puissance Seculière sur le Mariage." He concludes that chapter with the following sentence, "Par tout ce qui vient d'être dit, il ne peut rester aucun doute que la puissance séculière a le droit de faire des loix sur les mariages, dont l'inobservation les rende absolument et entièrement nuls, non seulement quant aux effets civils, mais même quant au lien, et qui les empêchent en conséquence de pouvoir servir de matière au sacrement de mariage." The same doctrine is laid down by Sanchez in his famous Treatise de Matrimonio, Lib. 7. disp. 3. n. 3. where he says, "Absque dubio dicendum est posse principem secularem ex genere ex natura suæ potestatis, matrimonii impedimenta dirimentia fidelibus sibi subditis ex justâ causâ indicere. . . Nec obstat principis secularis potestati, matrimonium esse sacramentum, quia ejus materia contractus civilis: qua ratione perinde potest ex justâ causâ illud irritare, ac si sacramentum non esset, reddendo personas inhabiles ad contrahendum, & sic invalidum contractum." Doctor Launoï in his treatise, Regia in Matrimonium Potestas, cites numberless passages to the same effect, from divines of all countries and all schools. The article Empêchemens de Mariage, in the Encyclopédie Méthodique, lately published at Paris, establishes the same doctrine in these words: "Le mariage forme actuellement un tout composé de deux parties soumises à deux puissances qui influent sur son existence, avec cette différence cependant, qui l'église est obligée de se soumettre aux empêchemens établis par le prince, et que ceux établis par l'église ne peuvent avoir lieu qu'autant qu'ils sont admis par le prince."

[245. b.]

(1) A contrary doctrine seems to be asserted in Dyer, 94. b.

[Note 182.]

(2) He need not enter hastily after his full age, but may do it two or three years or more after his full age, but caveat that he do not permit a discent after his full age before his entry, for then it will toll his entry. 1 Rep. 140.

[246. a.]

(1) This and many other passages in this work, respecting the operation and force of the acts of infants, were fully considered in the cases of Zouch v. Parsons, 3 Burr. 1794.; and May v. Hook, heard before lord chancellor Bathurst, in 1773.—There being no printed account of the last case,

[Note 184.]

case, it may not, perhaps, be unacceptable to the reader to find an account of it here.—Ann May and her two sisters were, under their father's will, seised of a considerable freehold estate; and possessed of a considerable leasehold estate, as joint-tenants. Previous to the marriage of Ann May with John Hook the defendant, she being then an infant, by articles of agreement dated the 28th of October 1761, and made between her of the first part, John Hook of the second part, and trustees of the third part, it was covenanted and agreed, that the leasehold estates should be assigned to John Hook for his own use and benefit; and that the freehold estates should be settled on him for life; and then on her for life; remainder to their first and other sons successively in tail male; remainder to their daughters, as tenants in common in tail; remainder to John Hook in fee. And he covenanted to pay 100 l. to the trustees upon trust to pay Ann Hook, if she survived him, the interest of it for her life, and after her decease to divide it among the children.—Afterwards Ann May died under age. The question was, Whether these articles were in equity a severance of the joint-tenancy? Lord Chancellor Bathurst, when he made his decree in this cause, observed, that the first point attempted to be established by the counsel was, that, had Ann May been of full age when she entered into the articles, they would have amounted to a severance: but that no determination to that effect had ever been made:—That the co-joint-tenants were not, in this case, to be considered as volunteers, as they claimed by title paramount; and that their situation approached nearer to that of issue in tail, who claimed *per formam doni*, than to that of an heir at law, who claims only under his ancestor:—That the utmost which the infant could do would be an avoidable act; and that, of course, it would be in the discretion of the court either to give or refuse their assistance to it; and, by a parity of reason, it must always be in their power to model his contracts at their pleasure:—That the contract, in the present case, was not such as the court would uphold. Had the infant lived to come of age, and a bill been filed against her for a performance of the articles, the court would have set them aside, and referred it to a master to draw new proposals for a proper settlement:—That as the contract was not such as would have bound the infant herself *à fortiori* it should not bind the co-joint tenants:—That it would be a strange doctrine, that any act of an infant, which is by its nature avoidable, should sever the joint-tenancy, as if that were allowed, it would always be in the power of the infant to say whether the joint-tenancy should be severed or not; then, if any of the co-joint-tenants should die under age, the infant might avoid his own act, by pleading *infra etatem*, and resort to his title of survivorship, which would be a great injustice and hardship on the co-joint-tenants.—On these grounds his lordship was of opinion, that the articles did not amount in equity to a severance of the joint-tenancy.

[246. b.]

[Note 185.] (1) *Scotch Pleading, anno 61. case 5. fages 69 and 70, and sir Thomas Stewart's case.* Fatui sive idiotæ sunt illi tantùm, qui omni ratiocinatione et judicio carent, tardi, bardi, moriones, macærones, qui inopiâ caloris et spirituum laborant. Furor est dementia cum ferociâ, et horrendâ actionum vehementiâ. Fromanus de jure furiosorum, p. 6. Furor dividitur in continuum; ubi animus continuâ mentis agitatione semper accenditur; et interpolatum seu intervallatum; qui dilucida habent intervalla; quorum furor habet inducias, et quos morbus non sine laxamento aggreditur; qui testamentum facere possunt; & quos furor stimulus suis variatis vicibus accendit. *In these fury and madness is but an ague or a disease; in the others, it is temperament and complexion. Again, among those*

those who have lucid intervals, it may be fit to distinguish between those who have only remissionem seu adumbratam quietem, and those who have intermissionem seu resipiscentiam integram. Two witnesses deposing sanz menti, are preferred and believed before an hundred touching fury and madness. Melancholy and hypochondriac vapours are like storms at sea, which, though they disturb for a while, yet they do not hinder the returning to the former calm; semel furibundus, semper furibundus prazsumitur; and therefore where the question is of a fact done lucido intervallo, which may be either by remission or intermission, it is not enough to shew the act was actus sapienti conveniens, for that may happen many ways; but it must be proved to be actus sapientis, and to proceed from judgment and deliberation, else the presumption continues. Lord Nott. MS.

[247. a.]

(2) Lord Hobart observes in the case of Needler v. bishop of Winchester, that in these cases "the law finds these persons not so disabled, nor admits the averment of such disablement, because it is certified by invincible and indisputable credit of the judge, that they were perfect and able persons. And so here is a law policy that doth not cancel the law of nature, but doth only bound it in point of form and circumstance; it being better to admit a mischief in particular, even against the law of nature, than an inconvenience in general: and it is not the law of nature to admit any improbable surmise against authentic record or evidence." Hob. 224.—Sir Ed. Coke observes, post. 380. b. that the only mode by which an infant can reverse a fine levied by him, is by appearance in court during his infancy, and being inspected by the judges; non testium testimonio, aut juratorum veredicto, sed judicis inspectione solummodo: the judges may, however, inform themselves in cases of this kind by means of witnesses, church books, or any other kind of evidence. It appears a great hardship that infants should not be permitted to reverse their fines after they attain their full age; and it seems unaccountable that the law, which will not permit them to do it after they attain their full age, should permit them to do it before that age. The objection, that no averment can be made against any fact which is upon record, applies as much to them before their attaining their full age as after. But the contrary has been too often established to be now called in question. See Ann Hungate's case, 12 Rep. 122. Warscomb v. Carrell, ib. 124. Herbert Parrat's case, 2 Vent. 30. Hutchinson's case, 3 Lev. 36. Requishe v. Requishe, Bulstr. p. 2. 320. Sarah Gufforth's case, 12 Mod. 444. With respect to the fines levied by ideots and lunatics, see 12 Rep. 124. Hugh Lewis's case, 10 Rep. 42. b. But infant trustees within the stat. 7 Ann. c. 19. may both levy fines and suffer common recoveries. See 3 Atk. 479. 559. Com. Rep. 615. Barnes's Cases of Pract. 217. See also Fitz. Nat. Bre. 202 where much argument is used, to shew that a non compos may plead his disability to avoid his own acts as well as an infant; and 2 Blac. Com. ed. 5. p. 291. But in Stroud v. Marshal, Cro. Eliz. 398, debt upon obligation, the defendant pleaded, that at the time of the obligation made, he was *de non sane memory*: and it was thereupon demurred, and adjudged to be no plea; for he cannot save himself by such a plea, and the opinion of Fitzherbert was held not to be law.

[In Connecticut the law on this subject has been settled by a decision of the Supreme Court in conformity to the opinion of Fitzherbert. Webster v. Woodford, 3 Day 90. That decision was soon afterwards recognized by the Circuit Court of the United States in the district of Connecticut.

ticut, September Term. 1808, in the case of Owen v. Mann, MS. Vide ante 2. b. note 12.]

[248. a.]

[Note 187.] (1) Lord Coke seems in this place to have given a wrong translation of Littleton. In this and the next section, Littleton puts the case of a person disseised by an infant, who aliens the land in fee, and the alienee dies the *infant disseisor* being still under age. A descent is thereby cast, which takes away the entry of the disseisee; but the alienation being made by an infant, is voidable by his entry, and if the descent happens during his infancy, it does not affect his right of entry. He may therefore enter notwithstanding the descent; and, if he does enter, the right of entry of the disseisee is revived. It is obvious, that the point of this case is, not that the heir of the alienee is an infant within age, as Lord Coke translates it, but that at the time of the descent, the infant disseisor still continues an infant. The words, *estant l'enfant deins age*, should therefore be translated, "the infant being under age."

[249. a.]

[Note 188.] (1) A lease is considered as a covenant real, that binds the possession of lands into whose hands soever it comes, if the lands be not evicted by a superior title; yet the termor has not the freehold in him, but holds the possession as bailiff of the freeholder, *nomine alieno*, by virtue of the obligation of the covenant. Now then, if the termor enters before the descent, he reverts the freehold in the disseisee, who has the right of possession; but if he enters after the descent, then he can only hold in the name of the freeholder, who has the present right of possession, which is the heir of the disseisor. Gilb. Ten. 35.

[Note 189.] (2) *Hob. 322, 323. sir William Elvis's case. This very case was the principal point; and there, by Hobart, Warburton, and Winch, it was adjudged contra, that usurpation by the grantor puts the grantee out of possession, and gets all that was granted out, Hutton dissentiente. But it appears that this case is good law, and that Hutton erravit. Hil. 12. Car. C. B. Legge v. Archer. A man leased an advowson for years, and then presented; this was ruled to be no usurpation, but plenarij pro hac vice: this case is cited l. 8. usurpation 5. idque ratione frivolity, ut inter coparceners, and because it is against his own act. 8 Ref. Dampfort's case. Lord Nott. MS.*

[249. b.]

[Note 190.] (1) *If tenant by elegit is interrupted in taking the profits of the land, by reason of war, he shall not hold over, but it shall be in disadvantage of the tenant by elegit. 19 E. 1. Execution 246. 4 Ref. 82. b. In Lib. Rubb. Scacc. fol. 241. tempus guerræ duravit à quarto die Apl. 48 H. 3. usque ad 17 Sep. an. 49. apud Winter post bellum de Evesham pax proclamata fuit. Nota H. 3. 19 die Oct. anno ejusdem 16. fuit apud Wall. An. 40. fuit apud Oxon. 48. apud Dudl. 14 Maij. an. 49. fuit apud Evesham. Et tamen sunt placita de Rich. 16 H. 3. de banco. Tr. 16. H. 3. Et assisa magna 40 H. 3. 48 H. 3. M. 40. H. 3. P. 48. H. 3. P. 49. H. 3. Et placita coram rege à 32. usque 40 H. 3. Tr. 4. H. 3. 26 et 27 E. 1. Ent. R. T. Rot. 5. Goods were seized for debt to the king: the sheriff returned, that the Scots entered hostiliter, by reason of which they could not be taken: Rule, Fiat inde inquisitio, & interim pacem habeat de demandâ. Noy MS. 384.—3 Inst. 52. See the case of the earl of Lancaster put at large. Nota, that in 14 E. 3. F. scire facias 122. there is no intimation at all of the matter; but on the record*

record of this case, as is to be seen in the manuscript Rep. of Coke 428. the case was thus; Henry Lancaster granted to the abbot of Rumsay and his successors, quòd si ex tunc aliquo tempore vel aliquà occasione guerræ in regno Angliæ feriam suam amitterent, ita quòd nihil inde percipere possunt, quieti essent ejusdem anno et tempore de formâ suâ prædictâ 50l. And upon scire facias for the arrears of that rent, which was in court for three years, viz. 11, 12, and 13 E. 3. the abbot pleaded these charters, and said, that guerra fuit tam super mare quàm super terram inter dominum regem et illos de Franciâ, ita quòd mercatores ad dictas nundinas nec venerunt ut solebant, nec ipse abbas aliquod proficuum de iisdem nundinis per idem tempus percepit nec percipere possit, quod paratus fuit verificare juxta tenorem chartæ prædictæ; and it was resolved, quòd utrùm terra sit guerrina, &c. prout hic notatur. Then it follows in the said manuscript: Nota, quòd guerra dicitur in hoc regno esse, quando exercitum justitiæ in curiis et placeis regis impeditur. And Coke adds a short note: Ceo tryal de guerre in cest realm; et ex hoc semble que ne fuit guerre inter E. 4. et H. 6. car exercitum justitiæ non impeditum fuit, come appiert per les reports de 10 E. 3. et 49 H. 6. nec temps H. 3. hic supra, nec temps Car. 1. Lord Not. MSS.*

(2) This perhaps is not quite accurate, as the words of the writ of [Note 191.] mandamus are these: *Quis terras et (tenementa del tenant del roy) a tempore mortis jusdem tenentis occupavit et exitus et proficua inde percepit.* F. N. B. 253. B. Nov. lib. intrat. fol. 402. c. and vid. Stat. de Bigamis, cap. 4.

[250. a.]

(1) By the statute of limitations, 21 Jac. 1. c. 16. it is enacted, that no [Note 192.] entry shall be made by any man upon lands, unless within twenty years after his right shall accrue.—By the 4th and 5th Ann. c. 16. it is enacted, that no entry shall be of force to satisfy the statute of limitations, or to avoid a fine levied of lands, unless an action be thereupon commenced within one year after, and prosecuted with effect.

[250. b.]

(1) It has been observed in the notes to the chapter of Discents, that [Note 193.] the reasons for which the law protected the possession of the heir of the disseisor from the entry of the disseisee, were, the notoriety and presumptive right of possession which the disseisor acquired by his being permitted to hold during his life, the peaceable possession of the lands; and the necessity that there should be a tenant to do the feudal duties; and by way of a punishment on the tenant for his neglect in not asserting his right. But none of these reasons could exist, where the tenant entered upon the lands, and made his claim for them; as by doing so he prevented the presumption in favour of the title of the disseisor; made a tender to the lord of his feudal services; and did all that was in his power to restore his possession. But to entitle the disseisee to enter on the heir of the disseisor, notwithstanding the descent upon him, this claim must have been made within a year and a day next preceding the descent. Lord chief baron Gilbert, in his commentary upon this chapter, observes, that the notion of laches, in not claiming for a year and a day, is taken out of the feudal law, it being the period of time within which the feudal services must be required. It is a space of time which is prescribed for the performance of different acts in our law, and in

* The Editor has not been able to discover what the manuscript is to which lord Nottingham alludes in this place.

all laws derived from the feudal institutions. It seems only to import the space of a complete year. Thus in the fourth law of Charlemaigne it is said, *Cujuscunque hominis proprietas ob crimen quod idem habet commissum in bannum fuerit misca, & ille re cognitâ ne justitiam faciat venire distulerit, annuamque et diem in eo banno esse permiserit, ulterius eam non acquirat, sed ipsa fisco nostro societur.*—In the laws of king Pepin it is said, *De rebus forfactis, que per diversos comitatos sunt, volumus ut ad palatium pertineant, transacto anno et die.* In the Vieux Coutumier de Normandie it frequently occurs. Something similar is to be found in the Roman law, in which a person who was bound to pay a sum of money in two months, was considered to acquit himself from the obligation, if he paid the money on the 61st day. See Pasquier, les Recherches de la France, lib. 4. cap. 32. *De l'an et jour que l'on destra és matièrès de retraicts lignagers et de la complainte.*—In Plo. Com. 359. a lord chief justice Dyer is said to have defined claim to be a challenge of the ownership, or propriety, that he hath not in possession, but is detained from him by wrong.

[251. a.]

[Note 194.] (1) Except for the special purposes mentioned by Littleton and sir Edward Coke, and a few other instances, the lessor, if the lessee for life were disseised, could not enter. But he might maintain an assize. In that case, however, though he recovered the freehold which was de-vested out of him, he recovered no damages, because those were supposed to be a compensation for the loss of possession, which loss was sustained not by him, but by the tenant for life. 15 H. 7. 4.—The lessor might enter upon the lessee to examine whether he had committed waste, or to view repairs. Bro. Trespas. 16. 97. 208. And if the lessee impeded his entry, the lessor might bring an action on the case. Cro Jac. 478.—Express covenants, that it shall be lawful for the lessor to enter and view the lands demised, are now usually inserted in leases.—For the entry of reversioners, or remainder-men to avoid a fine, see Margaret Podger's case, 9 Rep. 106.

[251. b.]

[Note 195.] (3) So in the case of a lease for life, the tenant may plead it in bar; but in the case of a lease for years, or an estate by tenant by statute or *elegit*, the defendant shall not plead in bar, as to say, *assisa non*, but justify by force of the lease; and conclude, *issint sans tort*; and if the tenant of the freehold be not named, he shall plead, *not tenant de franc tenement noimé en le bref*: and in the case of a feoffment with a warranty, he must rely on the warranty. See ant. 238. b. 239. a.

[252. a.]

[Note 196.] (1) But though this acceptance amounts to a forfeiture, it does not divest the estate of him in remainder or reversion. 9 Rep. fol. 106. b.

[252. b.]

[Note 197.] (1) The entry for a condition broken has been discussed in the preceding chapter, and the commentary and notes upon it. With respect to entries for avoiding fines, there were four modes of avoiding a fine at the common law; two by matter of record, and two by acts *in pais*. Those by matter of record were, a real action commenced within a year and a day after the fine was levied, and an entry of a claim on the record at the foot of the fine itself, in this manner, *talis venit et affirmat claimum suum*. Those by acts *in pais* were a lawful entry upon the land by the person who had a right; and if that could not be done, a continual claim. But by the statute of 4 H. 7. all those who are affected by a fine must pursue their title by way of action, or lawful entry: so that a claim entered

entered on the record of a fine would now be ineffectual. The actual entry must be made by the person who has a right to the lands, or some one appointed by him, either by preceding command or subsequent assent, within five years. See Plowd. 355. 359. 2 Inst. 518. 3 Rep. 91. 2 Bla. Rep. 994.—By the statute of 4 Ann. c. 16. sect. 16. it is enacted, "That no claim or entry to be made of or upon any lands, tenements, or hereditaments, shall be of any force or effect to avoid any fine levied, or to be levied, with proclamations, according to the form of the statute in that case made and provided, in the court of common pleas; or in the courts of sessions in any of the counties palatine, or in the courts of grand sessions in Wales, shall be a sufficient entry or claim within the statute of limitations, unless upon such entry or claim an action shall be commenced within one year next after the making of such entry or claim, and prosecuted with effect."

[254. b.]

(1) Even where a declaration in ejectment is delivered, though the defendant appears to it, and confesses lease, entry, and ouster, yet, to avoid a fine, there must be an actual entry. This was very solemnly determined in the king's bench, in the case of *Berrington v. Packhurst*: and by the lords on appeal in 1758. See 2 Stra. 1086. 4 Bro. Par. Cas. 353. This doctrine has since been twice expressly recognized;—first, in the case of *Wigfall v. Broydon*, 3 Burr. 1895; and afterwards in the case of *Goodright v. Cator*, Doug. 460. In that case, lord Mansfield states the distinction to be, that where entry is necessary to complete the landlord's title, there the confession of lease, entry, and ouster is sufficient; but that where it is requisite in order to rebut the defendant's title, actual entry must be made. The latter is the case where a fine is to be avoided. [Note 198.]

[257. a.]

(1) Perhaps this passage is not quite accurate. Till the reign of Richard II. the party disseised, if his attempt were made soon after the disseisin, might recover his possession by force; but by a statute passed in the fifth year of that reign, it was enacted, that none from thenceforth should make any entry into lands and tenements, but in cases where entry was given by the law; and in that case, not with a strong hand, nor with a multitude of people, but only in a peaceable and easy manner; and that persons convicted of doing the contrary should be punished by imprisonment, to be ransomed at the king's pleasure. By a statute passed in the fifteenth year of the same reign, it was enacted, that upon complaint of any such forcible entries to the justices of peace, they should take sufficient power of the county, and go to the place where such force was made; and if they found any that held such place forcibly, after such entry made, they should be taken and put into the next gaol, there to abide convict by the record of the same justices, until they had made fine and ransom to the king. By this it appears, that Littleton is equally wrong in his account of the punishment inflicted by that statute, and the offence it intended to correct. These statutes of the reign of Richard II. have been confirmed, explained, and in some respects extended by the stat. 4 H. 4. ch. 8. 8 H. 6. ch. 9. 23 H. 8. ch. 4. 31 Eliz. ch. 11: and 21 Jac. 1. ch. 15. See Burn Just. vol. II. 181. It should be observed, that in case an action is brought on these statutes, if the defendant make himself a title, which is found for him, he shall be dismissed without any enquiry concerning the force; for howsoever he may be punishable at the king's suit, for doing what is prohibited by statute, as a contemner of the laws and disturber of the peace, yet he shall [Note 199.]

shall not be liable to pay any damages for it to the plaintiff, whose injustice gave him the provocation in that manner to right himself. See 1 Haw. 141. 3 Burr. 1698. 1731.

[Note 200.] (3) By the common law there must be *three* persons at least to constitute a riot. By the 1 Geo. 1. c. 5. *twelve* persons at least must be unlawfully assembled, to be within that act. By the 13 Car. 2. st. 1. c. 1. not more than *twenty* names are to be signed to a petition to the king, or either house of parliament, for any alteration of matters established by law in church or state; and no petition is to be delivered by a company of more than *ten* persons. By the bill of rights, or declaration delivered by the lords and commons to the prince and princess of Orange, Feb. 13, 1688, and afterwards enacted in parliament, when they became king and queen, the fifth article is, "That it is the right of the subjects to petition the king, and that all commitments and prosecutions for such petitioning are illegal." Sir William Blackstone expressly says, that the right of the subject to petition, as declared by this statute, is under the regulations of the 13 Car. 2. But a question may be made, whether the declaration contained in the bill of rights was not, in this particular, a repeal of the 13 Car. 2.

[257. b.]

[Note 201.] (1) The 21 Jac. 1. c. 15. provides a remedy for lessees for years. Tenants by copy of court roll, guardians in chivalry, tenants by elegit, statute merchant, or statute staple, if they be ousted by force, or withheld by force out of their lands, or tenements. Till then, if a man entered by force on a copyholder, the lord, as the freehold and inheritance were supposed to be in him, might bring against the person entering a writ of forcible entry, or might indict him. Upon restitution to the lord, the copyholder might enter.

[258. a.]

[Note 202.] (1) Where there is a complete execution of a power, and something, *ex abundanti*, added, which is improper, there the execution shall be good, and only the excess void; but where there is not a complete execution of a power, or where the boundaries between the excess and execution are not distinguishable, it will be bad. See *Alexander v. Alexander*, 2 Vez. 644. On this doctrine, so far as it relates to the doctrine of powers deriving their effect from the statute of uses, see Mr. Powell's very useful Treatise upon Powers.

[259. b.]

[Note 203.] (1) A writ of error properly lies, where false judgment is given in any court which is a court of record. It was formerly held, that, by the common law, no amendment could be permitted, unless within the very term in which the judicial act so recorded was done. But the courts now allow of amendments at any time while the suit is depending.—After the termination of the suit the judgment can only be reversed by writ of error. From the inferior courts it lies to the king's bench and common pleas;—from the common pleas to the king's bench;—from the king's bench to the house of lords. To amend errors in a base court, not of record, a writ of false judgment lies.—A writ of error only lies upon *matter of law*. There is no method of reversing an error on the determination of facts but by an attainor or a new trial. See *Bl. Com.* 3 vol. c. 25. s. 3. *F. N. B.* 20. 4 *Inst.* 21.

[260. a.]

[Note 204.] (1) The public records of the kingdom are considered to relate to the proceedings of the houses of parliament, the court of chancery, the courts of

of common law, and the revenue. A general table of them, distinguished under these different heads, is to be found in the appendix to the report from the committee appointed to view the Cottonian library. See the report and the appendix, page 183. The rolls or records of parliament have been published in the course of his present majesty's reign, in six volumes folio, under the immediate auspices of the house of peers. This extensive and laborious undertaking is executed with the greatest accuracy: it presupposes no common share of antiquarian and diplomatic learning in the gentlemen concerned in it. A part of it was the work of the late mr. Morant; all the rest was completed by mr. Astle, the keeper of the records in the Tower, and mr. Topham, of Lincoln's-Inn. It should be observed, that the proceedings of the legislature till the reign of Edward I. were exceedingly irregular, and greatly defective in point of form. They are sometimes penned so as to appear to come from the king alone; sometimes as issued jointly by the king and lords; sometimes the assent of the commons is, and sometimes it is not, expressed; sometimes the authority for passing the acts is mentioned; and sometimes the acts are in the form of charters.—The first summons of the knights of shires to parliament, extant on record, is in the 49th year of Henry III.—The first regular summons directed to the sheriff for the election of citizens and burgesses, is in the 23d of Edward I.—In that reign the proceedings of the legislature assumed a more regular form; but far removed from that in which they appear at present. The consent of the commons to the levying of taxes for the king gave them great weight. They took advantage of this circumstance to obtain a remedy for the grievances they had to complain of.—In the reign of Edward III. the mode of presenting their petitions, and of receiving their answers, was regularly practised. If the petition and the answer to it were of such a nature as to require an express and new provision to be made for it, the king, with the assistance of his council and of the judges, framed, for such petition and answer, an act, which was usually entered on the statute roll; but if an express and new provision were not required, the petition itself and the king's answer to it were entered on the parliament roll, and then usually stiled an ordinance.—Alterations and improvements gradually took place: but it was not till the reign of Henry VI. that these petitions of the commons were reduced, in the first instance, into the body of the bill.

[261. a.]

(1) The *Jus MARIS* of the king may be considered under the two- [Note 205.] fold distinction, of the *right of jurisdiction*, which he exercises by his admiral, and his *right of propriety or ownership*.

WITH RESPECT TO THE RIGHT OF JURISDICTION, the subject is elaborately discussed by mr. Selden, in his *Mare Clausum*, a noble exertion of a vigorous mind, fraught with profound and extensive erudition. In the first part of it, he attempts to prove, that, the sea is susceptible of separate dominion. In this, he has to combat the opposite opinion of almost all the civilians, and particularly the celebrated declaration of one of the Antonines (L. 9. D. De Lege Rhodiâ) "*Ego quidem mundi dominus, lex autem maris, &c.*" by which the emperor has been generally considered to have disclaimed any right to the dominion of the sea. For a different interpretation of this law, mr. Selden argues with great ingenuity. In this, he is followed, in some measure, by Bynkershoock, in his treatise *De Lege Rhodiâ de Jactu, Liber Singularis*, in the 2d vol. of the edition of his works published by Vicat, Col. Allob. 1761.—Mr. Selden, in the second part of his work, attempts to shew, that, in every period of the British History, the kings of Great Britain have

[*Note 265*] have enjoyed the exclusive dominion and property of the British seas, in the largest extent of those words, both as to the [261. a.] passage through and the fishing within them.—He treats his subject methodically, and supports his position with the greatest learning and ingenuity.—The reader will probably feel some degree of prepossession against the subject of this claim; but he will find it supported by a long and strong series of arguments, not only from prescription, from history, from the common law, and the public records of this country, but even from the treaties and acknowledgments of other nations. Here he is opposed by Bynkershoek, in his *Dissertatio de Dominio Maris*, also published in the second edition of his works. But it will be a great satisfaction to the English reader to find, how much of the general argument used by Mr. Selden, is conceded to him by Bynkershoek. Even on the most important part of the argument, the acknowledgment of the right by foreign princes, Bynkershoek makes him considerable concessions; “*Plus momenti,*” says he, “*adferre videntur gentium testimonia, quæ illud Anglorum imperium agnovere. De confessionibus loquor non injuria extortis, sed libere et sponte factis. Esse autem hujusmodi quædam confessiones, nequiquam negari poterit.*”—After this acknowledgment, corroborated as it is by other arguments used by Mr. Selden, many will think his positions completely established. The chief objection made by Bynkershoek, to the right of the crown of England to the dominion of the sea is, the want of uninterrupted possession, as he terms it, of that dominion. “So long as a nation has possession of the sea, just so long,” says Bynkershoek, “she holds its dominion. But to constitute this possession, it is necessary that her navies should keep from it the navies of all other nations, and should themselves completely and incessantly navigate it, avowedly in the act or for the purpose, of asserting her sovereignty to it.” This, he contends, has not been done by the English; on this ground therefore he objects to their right of dominion of the English sea; and on the same ground he objects to the right of the Venetians to the dominion of the Adriatic, and to the right of the Genoese to the dominion of the Ligustic. But this seems carrying the matter too far.—If it be admitted (of which there unquestionably are many instances) that the sovereign power of a state may restrain her own subjects from navigating particular seas, she may also engage for their not doing it, in her treaties with other nations. It can never be contended, that after such a treaty is entered into, the acts of possession mentioned by Bynkershoek are necessary to give it effect and continuance, unless this also makes a part of the treaty. It is sufficient, if the acts of possession are so often repeated, as is necessary to prevent the loss of the right, from the want of exercise of it. In those cases, therefore, where the treaty itself, establishing the exclusive dominion we are speaking of, is produced, the continued and uninterrupted possession mentioned by Bynkershoek cannot be necessary. But public rights, even the most certain and incontestible, depend often on no other foundations than presumption and usage. The boundaries of territories by land, frequently depend on no other title. Then, if Bynkershoek be right in his position, that the sea is susceptible of dominion, should not mere prescription and usage in this, as in any other case, be sufficient to constitute a right? Upon what ground are the continued and uninterrupted acts of possession, mentioned by Bynkershoek, required to constitute a title in this, more than in any other case of public concern!—If this be thought a satisfactory answer to the objection made by Bynkershoek, the remaining difference between him and Mr. Selden, respecting the right of the British monarch

to this splendid and important royalty, will be inconsiderable.—It is to be added, that mr. Selden's treatise was thought so important to the cause, in support of which it was written, that a copy of it was directed to be deposited in the admiralty. Those who wish to procure it, in an English translation, should prefer the translation published in 1633, by a person under the initials of J. H. to that by Marchmont Needham. On this subject (with the exception of sir Philip Medows) subsequent writers have done little more than copy from Selden. The subject, however, is far from being exhausted. The system adopted by sir Philip Medows, in his *Observations concerning the Dominion and Sovereignty of the Seas*, printed in 1689, is more moderate than mr. Selden's.—He calls in question, at least indirectly, a material part of mr. Selden's positions, and places the right of the kings of England to the dominion of the sea upon a much narrower ground. He confines it to a right of excluding all foreign ships of war from passing upon any of the seas of England, without special license for that purpose first obtained;—in the sole marine jurisdiction, within those seas; and in an appropriate fishery. He denies that the salutation at sea, by the flag and top-sail, has any relation to the dominion of the sea; and he asserts, that, it was never covenanted in any of the public treaties, except those with the United Netherlands, and never in any of these till the year 1654; he contends it is not a recognition of sovereignty, but at most an acknowledgment of pre-eminence. His treatise is deservedly held in great estimation. The late sir Thomas Parker, chief baron of his majesty's exchequer, in a manuscript note in his hand-writing, thus expresses himself respecting it: "This is a most curious and excellent treatise; and though mr. Selden's *Mare Clausum* is a learned and ingenious work, and will be ever popular with Englishmen, yet sir Philip Medows's rules, for ascertaining the limits of the sea, seem to be founded on more solid and prudential reasons, than mr. Selden has offered, in his book. Thomas Parker, 14 Sep. 1744."

With respect to THE KING'S RIGHT OF PROPERTY OR OWNERSHIP, it is so fully discussed by lord Hale, in his excellent treatises *de Jure Maris*, and *de Portibus Maris*, published by mr. Hargrave, that, little more is necessary in this place, than to state a few of the leading positions of that distinguished writer.—It may, however, be useful to premise, that where, in enquiries of this kind, it is said, that a person is entitled to the right or property in question, *by common right*, but that it *may* belong to another, it is intended to say that, the right or property in question is by the common law annexed to the particular capacity of the party, or to some property of which he is owner: yet that it is not so inseparably or inalienably annexed to this capacity or ownership, but that the party *may* transfer it to another. So that in all these cases the presumption is in favour of him to whom the right or property is said to belong by common right; yet this does not exclude the possibility of its belonging to another. To another, therefore, it may belong; but, if he claims it, he must prove his title to it. On the other hand, the party to whom it belongs of common right is under no obligation of shewing his title to it; to him, in the intendment of the law, it belongs, till there is proof of the contrary. To exemplify this doctrine, the lord of a manor is lord of the soil of the manor of common right; that is, if it be admitted or proved, that, he is lord of the manor, his right to the soil so far necessarily follows, that, it is not incumbent on him to produce any proof of it. He may, therefore, of common right, dig for gravel, unless it is to the prejudice of his tenants. But this right is not inseparable or inalienable from the seignory. The lord may grant it to the tenants; to the

the tenants, therefore, it *may* belong. But if they claim it, it is incumbent on them to prove their title to it. There are [261. a.] two ways of doing this; one by shewing the grant from the lord; the other by prescription; that is, by proving an immemorial usage of it, which, in the eye of the law, always presupposes a grant. Now prescription is shewn by producing repeated and unequivocal instances of the immemorial usage or exercise of the right contended for. The tenants, therefore, in the case we have mentioned, if they cannot produce the original grant, must, to make out their title to dig for gravel, produce repeated and unequivocal instances of their having done it immemorially. If they do this, they establish their title. But though the lord is not called upon, in the first instance, to prove his title, to the right in question; yet when it is claimed by others, he may disprove their claim, by shewing he has done acts inconsistent with it. Thus, if on the one hand, the tenants can prove by repeated instances, that they have exercised the right in question of digging for gravel, the lord may, on the other, shew that, in all or a considerable number of these instances, the parties have been presented at his court, or otherwise punished for the acts in question; and this will instantly destroy the effect of the evidence in their favour arising from the instances adduced by them. In the same manner, the lord may shew that, they have dug only in one particular spot of the waste, at particular times, or for a particular purpose, by this, he may circumscribe their right, as to the place, time, and manner of its enjoyment.—In cases of this nature, it sometimes happens, that the party claims to be exempted from an obligation or servitude to which, of common right, he is subject. To establish this, he must either produce the release of the right, or produce that kind of evidence, which will establish a presumption, that it was released, though the instrument by which it was released, cannot be produced. Non-user is one of the circumstances most frequently urged to establish the presumption of a release.—But here, an important distinction is to be made, between those cases, where non-user is brought as a bar under the statutes of limitation, and those, where it is brought as evidence to prove a release. In the first case, it is an absolute bar to the claim, and there, the strongest evidence of the previous existence of the right, is of no avail; in the second, it is only argumentative evidence of the supposed release of the right, and like all other evidence, may be repelled, by stronger evidence to the contrary.—It should also be observed that, though it is said, that prescription pre-supposes a grant, and non-user pre-supposes a release, it is not, that, strictly speaking, the courts always in these cases really believe, that, such a grant, or such a release, are actually executed; but because, for the sake of the general principle of quieting possessions, they will not permit them to be disturbed by claims long dormant, and therefore determine in the same manner as they would determine, if the very instrument of grant or release were produced. The principles of which we have here endeavoured to give an outline, are to be found in the cases of the mayor of Hull v. Horner, Cowp. 102. and Eldridge v. Knott, ib. 214.—Lord Mansfield's arguments in delivering the judgment of the court in these cases, as they are reported by Mr. Cowper, afford a striking display of the comprehensive and luminous understanding, the beautiful arrangement, and the familiar, but elegant enunciation of the most refined and complex doctrines of the law, for which he was so deservedly eminent.—This being premised;—*with respect to the propriety or ownership of the sea*, and its soil, it may be considered under these three distinct divisions, the high seas, the shore or the land between high water mark and

and low water mark, and the soil and franchise of ports.—As to the *high seas and their soil*; the right of fishing in the sea and its creeks and arms, is originally lodged in the crown, as the right of depasturing is originally lodged in the owner of the waste whereof he is lord; the king has therefore, *of common right*, the primary right of fishing;—yet, the people of England have also, by common right, a liberty of fishing in the sea and its creeks or arms, as a public common of piscary. Yet, in some cases, the king may enjoy a propriety exclusive of their common of piscary. He also *may* grant it to a subject, and consequently a subject *may* be entitled to it by prescription. (Lord Hale, *de Juris Maris*, page 11.)—As to the *soil between high water mark and low water mark*, at ordinary tides, this of *common right* belongs to the king.—It *may* however belong to a subject, by grant or prescription. Sometimes it is parcel of the adjacent manor: Sometimes of the adjacent vill or parish: Sometimes it belongs to a subject in gross: Still however it belongs of common right to the king: It is therefore incumbent on the subject to prove his right. This may be done by producing the grant.—(Hale, *ib.* ch. 4, 5, 6. Sir Henry Constable's case. 5 Rep. 107.) But as it is part of the possessions of the crown, *jure coronæ*, it does not pass by general words; and therefore to establish a right to it under the grant, it must contain such words, as either expressly or by necessary implication convey the soil.—If the grant cannot be produced, it can no otherwise be proved, than by prescription, that is, as we observed before, by repeated unequivocal and immemorial usage.—*As to ports*, there is a very material and important distinction between the franchise of a port and the property of its soil.—As to the franchise: by the common law, a port is the only place where a subject is permitted to unlade customable goods.—This privilege constitutes what is called the franchise of a port.—To create the franchise of a port is part of the royal prerogative. But this does not in anywise affect the propriety of the soil. It may be considered as a striking instance of the respect of the law of England for private property, that though it entrusts the king with the prerogative of originating ports, and though the use of the adjacent soil is essentially necessary to the existence of a port, the law does not permit the king to take any part of the soil from the owner; so that, if the soil is not the property of the king, it is necessary to secure the property of the shore beforehand, for the purposes of the port. The franchise belongs to the king of common right, but by charter or prescription, it may be, and frequently is, the right of the subject.—The soil generally belongs to the owner of the port; but it is going too far to say, that it belongs to him of common right. The mere grant of a port would not in a modern charter pass the soil, but perhaps it would be sufficient in an ancient charter, to pass it, if no evidence to the contrary could be shewn, and it certainly would be considered as sufficient to pass it in an ancient charter, if accompanied with the additional circumstance of immemorial usage.—Having thus shewn in whom the soil of the shore and of ports belongs by common right, it remains to state succinctly the nature of the evidence by which the right to it may be proved to exist in another. It may be done by shewing that he, and those under whom he claims, have immemorially, frequently, and without restriction to any part of the soil, dug gravel, fetched away sea weed or sand, or embanked against the sea. If it is claimed to be part of a manor, the right of commonage for the cattle of the lord and the tenants, the prosecution and punishment of purprestures in the court of a manor, its being included in the perambulations, and every other act by which the right to the soil of inland property is established, may be given in

evidence in support of it. The right to wreck of the sea or royal fish by prescription, *infra manerium*, is a strong presumption for the shore's being parcel of the manor; lord Hale's expression is very strong—"Perchance," says his lordship, "the shore is parcel almost of all such manors as by prescription have royal fish or wrecks of the sea within their manor." *Ib.* 27.—But it should be observed, that, though wreck frequently is parcel of a manor, it is a royal franchise. Like other royal franchises, it belongs of common right to the crown. But by grant or prescription it may, and in fact frequently does, belong to a subject, sometimes in gross, but oftener as parcel of his manor, parish, or vill adjacent to the sea.

[262. a.]

[Note 206.] (1) If a disseisor at the common law, before the statute of non-claim, had levied a fine or suffered judgment in a writ of right, until execution sued they were not bars, for the year shall be accounted after the transmutation of the possession by execution of the fine or recovery. 1 Rep. 97.

[Note 207.] (2) Every part of the law relating to fines and common recoveries has been stated and explained by Mr. Cruise, in his *Essays upon those subjects*, in a manner that equally recommends them to the student, and the most learned and experienced practitioners. Besides the obligations which the Editor has to him upon this account in common with the rest of the profession, he acknowledges with equal pleasure and gratitude the particular obligations he has to him for the assistance he has derived from them in the course of this work.

[264. a.]

[Note 208.] (1) At common law, lands could not be transferred by one person to another but by feoffment, with livery of the seisin. This produced a notoriety of the transmutation of the possession. This notoriety was in some measure effected by a disseisin; but that was only a tortious possession, liable to be defeated by the disseisee. Thus the disseisor had the possession; the disseisee the right. To complete the title of the disseisor, it was necessary he should acquire the right. This could not be done by a feoffment, as that was a transfer of the possession; but it was effected by a release, which in some respects operates as an actual transfer of the right; in others, as an acquittal or discharge from it. The different degrees of title in the disseisor, his heir, or feoffee, and the different natures of the rights of the disseisee, make it necessary that releases should be adapted to the different situation of the parties, and give them, as the circumstances of the parties vary, a different effect and operation.

[264. b.]

[Note 209.] (1) What Sir Edward Coke observes respecting obligors and obligees holds equally between all other creditors and debtors; but it must be attended with the following observations. A debt is only a right to recover the amount of the debt by way of action; and, as an executor cannot maintain an action against himself, or against a co-executor, the testator, by appointing the debtor an executor of his will, discharges the action, and consequently discharges the debt. Still, however, when the creditor makes the debtor his executor, it is to be considered but as a specific bequest or legacy, devised to the debtor to pay the debt, and therefore, like other legacies, it is not to be paid or retained till the debts are satisfied; and if there are not assets for the payment of the debts, the executor is answerable for it to the creditors. In this case, it is the same whether the executor accepts or refuses the executorship.

On

On the other hand, if the debtor makes the creditor his executor, and the creditor accepts the executorship, if there are assets, he may retain his debt out of the assets, against the creditors in equal degree with himself; but if there are not assets, he may sue the heir, where the heir is bound. See *Wankford v. Wankford*, 1 Salk. 229. *Selwin v. Brown*, 4 Bro. Cas. in Par. 179. For. 243. Vin. vol. 8. p. 198. 2 Eq. Cas. Abr. 861. note at (Q.)

(2) In the case of *Smith v. Stafford*, Hob. 216. the husband promised [Note 210.] the wife before marriage that he would leave her worth 100 l. The marriage took effect, and the question was, whether the marriage was a release of the promise. All the judges but Hobart were of opinion, that, as the action could not rise during the marriage, the marriage could not be a release of it. The doctrine of this case seems to be admitted in the case of *Gage v. Acton*, 1 Salk. 325. 12 Mod. 290. The case there arose upon a bond executed by the husband to the wife before the marriage, with a condition making it void if she survived him, and he left her 1,000 l. Two of the judges were of opinion, that the debt was only suspended, as it was on a contingency which could not by any possibility happen during the marriage. But lord chief justice Holt differed from them: he admitted that a covenant or promise by the husband to the wife to leave her so much in case she survives him is good, because it is only a future debt on a contingency which cannot happen during the marriage, and that is precedent to the debt; but that a bond debt was a present debt, and the condition was not precedent, but subsequent, that made it a present duty; and the marriage was consequently a release of it. The case afterwards went into chancery. The bond was taken there to be the agreement of the parties, and relief accordingly decreed. 2 Vern. 481. A like decree was made in the case of *Cannel v. Buckle*, 2 P. W. 243.

(3) *If the obligor make the obligee his executor, the obligee may retain; but that is not applicable to the case put here. Therefore he may make an executor at 17; tamen supra 89. b. it is said that it is at 11. It should seem that the case here is understood of 17 complete, et supra 89. of 18 beginning; and thus the passages agree. D'Avila His. King of France is major at 14 beginning. Thus it seems that puberty, which by the civil law holds from 14 to 18, is understood of 18 beginning; and thus our law agrees with the civil law, impuberi non licet testari before 17 complete, and 18 beginning.* Lord Nott. MSS.

[265. a.]

(1) To prevent maintenance, and the multiplying of contentions and suits, it was an established maxim of the common law, that no possibility, right, title, or any other thing that was not in possession, or vested in right, could be granted or assigned to strangers.—A right in action could not be transferred even by act of law; nor was it considered as transferred to the king by the general transferring words of an act of attainder. (See the marquis of Winchester's case, 3 Rep. 2. b.)—But a right or title to the freehold or inheritance of lands might be released in five manners.—1. To the tenant of the freehold in fact, or in law, without any privity.—2. To him in remainder.—3. To him in reversion.—4. To him who had right only in respect of privity; as, if the tenant were disseised, the lord, notwithstanding the disseisin, might release his services to him.—5. To him who had privity only, though he had not the right; as, if tenant in tail made a feoffment in fee, after this feoffment no right remained in him; yet, in respect of the privity only, the donor might release

release to him the rent and services.—6. So, if the terre-tenants and the person entitled to the right or possibility joined in a grant of the lands, it would pass them to the grantee discharged from the right or possibility. See 10 Rep. 49. b.—But the common law is altered in the above instances in many respects.—On the assignment of things in action, see ante note 1. to p. 232. b. A contingent remainder in real estates can only be transferred by a fine or a common recovery, in which the remainder-man comes in upon the voucher.—Contingent interests in terms of years, and other personal estates, have been held to be assignable by deed for a valuable consideration. See Mr. Fearn's Essay on Contingent Remainders. The passage in the text was cited by lord chief justice Trever, in delivering his opinion on the case of Arthur v. Bokenham, (Fitzgib. 234.) with an observation, that the doctrine laid down there by Littleton had never been contradicted.

[Note 213.] (2) This doctrine was fully investigated in the case of *Dormer v. Fortescue*, Vin. vol. 18. fol. 413. 3 Atk. 135. Bro. Par. Cas. v. 4. 353. 405. The case there was, that an estate was limited to the use of *A.* for 99 years, if he should so long live; and after his decease, or the sooner determination of the estate limited to him for 99 years, to the use of trustees and their heirs, during his life, upon trust to preserve the contingent remainders; and after the end or determination of that term, to the use of *A.*'s first and other sons successively in tail male, with several remainders over. *A.* having a son, they joined in levying a fine and suffering a common recovery, in which the son was vouched. If the trustees took a vested estate of freehold during the life of *A.* the recovery was void, there not being a good tenant to the præcipe; but if they took only a contingent estate, the freehold was in the son, and of course there was a good tenant to the præcipe. Upon this point the case was argued in the court of king's bench, and afterwards on appeal before the house of lords, where all the judges were ordered to attend. Lord chief justice Lee, when the cause was heard in the king's bench, and lord chief justice Willes, in delivering the opinion of the judges in the house of lords, entered very fully into the distinction between contingent and vested remainders.—They seem to have laid down the following points. That a remainder is contingent, either where the person to whom it is limited is not *in esse*; or where the particular estate may determine before the remainder can take place: but that in every case where the person to whom the remainder is limited is *in esse*, and is actually capable, or entitled to take on the expiration, or sooner determination, of the particular estate, supposing that expiration, or determination, to take place at that moment, there the remainder is vested. That the doubt arose, by not adverting to the distinction between the different nature of the contingency, in those cases where the remainder is limited to a person *in esse*; but the title of the remainder-man to take depends on a collateral or extraneous contingency, which may or may not take place during the continuance of the preceding estate; and those cases where the preceding estate may endure beyond the continuance of the estate in remainder. Thus if an estate is limited to *A.* for life, and after the death of *A.* and *I. S.* to *B.* for life, or in tail; there, during the life of *I. S.* the title of *B.* depends on the contingency of *I. S.* dying in the lifetime of *A.* This being an event which either may or may not take place during the continuance of the preceding estate, *B.*'s estate is necessarily contingent. But then, supposing *I. S.* to die; still it remains an uncertainty whether *B.*'s estate will ever take place in possession; for if the remainder be limited to *B.* for life; there if *B.* dies in *A.*'s lifetime,

lifetime, *A.*'s estate would endure beyond the continuance of the estate limited in remainder. The same would be the case if the remainder over were limited to *B.* in tail, and *B.* was to die in *A.*'s lifetime without issue.—Yet, in both cases, it was agreed that *B.* took, not a contingent but a vested remainder. Hence they inferred that it was not the possibility of the remainders over never taking effect in possession, but the remainder-man's not having a capacity or title to take, supposing the preceding estate at that instant to expire, or determine, and its being uncertain whether he will ever obtain that capacity or title, during the continuance of the preceding estate, that makes the remainder contingent. Upon these grounds they determined that the trustees took a vested remainder, and that the recovery therefore was void. The doctrine established in the case of *Dormer and Fortescue* is laid down by *sir Edward Coke*, 10 Rep. 85.; where he, with great accuracy of expression, observes, that where it is dubious and uncertain whether the use or estate limited in future shall ever *vest in interest* or not, then the use or estate is in contingency; because, upon a future contingent, it may either vest or never vest, as the contingent happens. And see 1 Rep. 137. b.

[265. b.]

(1) Ant. 186. it is laid down that a man may warrant more than [Note 214.] passes from him. In *Fitzg. 234.* lord chief justice Trevor observes, that the reason why the feoffment prevails against the father, is, that by the disseisin he had acquired possession, and might make a feoffment, and the operation of a feoffment is to bar future and contingent rights.

(3) In the king's bench, where the proceeding is by bill, the bail is [Note 215.] not bound in a certain sum to the plaintiff, but only undertakes that the defendant shall pay the condemnation money, or render his body to prison; so that they are but in the nature of jailors to the defendant: but in the common pleas, the bail are bound to the plaintiff in a certain sum. 5 Rep. 70. 10 Rep. 51.

[266. a.]

(1) These may be subdivided, with respect to the disseisor, into that [Note 216.] bare, naked, possession which he acquires by the disseisin, and the estate by title which his heir acquires by the discent; and, with respect to the disseisee, into that right of possession which he can restore by entry, and the bare right which he can only recover by action.

[266. b.]

(1) It may not, perhaps, be improper in this place, to attempt a short [Note 217.] explanation of some words familiar both in the ancient and modern law. *Seisin* is a technical term denoting the completion of that investiture by which the tenant was admitted into the tenure, and without which no freehold could be constituted or pass. It is a word common as well to the French as to the English law. It is either in deed, which is, when the person has the actual seisin or possession; or in law, when after a discent the person on whom the lands descend, has not actually entered, and the possession continues vacant, not being usurped by another. When lands of inheritance are carved into different estates, the tenant of the freehold in possession, and the persons in remainder or reversion, are equally *in* the seisin of the fee. But in opposition to what may be termed the expectant nature of the seisin of those in remainder or reversion, the tenant in possession is said to have the actual seisin of the lands. The fee is entrusted to him. By any act which amounts to a disaffirmance by him of the title of those in the reversion, he forfeits his

his estate, and any act of a stranger which disturbs his estate is a disturbance of the whole fee. *Disseisin* seems to imply the turning the tenant out of his fee, and usurping his place and relation. It has been observed in a preceding note, that persons, to avail themselves of the remedy by assise, frequently supposed or admitted themselves to be disseised, when they were not; and that this was called *disseisin by election*, in opposition to an *actual disseisin*. To constitute an actual disseisin, it was necessary that the disseisor had not a right of entry; (or, to use the old law expression, that his entry was not congeable;) that the person disseised was, at the time of the disseisin, in the actual possession of the lands; that the disseisor expelled him from them by some degree of constraint or force; and that he substituted himself to be tenant to the lord. But how this substitution was effected, it is difficult, perhaps impossible, now to discover. From what we know of the feudal law, it does not appear how a disseisin could be effected without the consent or connivance of the lord: yet we find, the relationship of lord and tenant remained after the disseisin. Thus, after the disseisin, the lord might release the rent and services to the disseisee; might avow upon him; and, if he died, his heir within age, the lord was entitled to the wardship of the heir. See Litt. Sect. 454. and the commentary upon it. It should be observed, that a disseisin did not disturb rent issuing out of land, the seisin of the rent being considered as a separate and distinct seisin from that of the land. 1 Rep. 133. b. A *discontinuance* is the effect of a disseisin, when, on certain events, the person disseised has lost his right of entry upon the disseisor, and can only recover by action. The word *freehold* is now generally used to denote an estate for life, in opposition to an estate of inheritance. Perhaps, in the old law, it meant rather the latter than the former. It is known that fees were held originally at the will of the lord; then, for the life of the tenant; that afterwards they were descendible to some particular heirs of the body of the tenant; then, to all the heirs of his body; and that in succession of time the tenant had the complete dominion or power over the fee. The word *freehold* always imported the whole estate of the feudatory, but varied as that varied. Hence we find the freeholder represented the whole fee, did the duty to the lord, and defended the possession against strangers. See Feud. L. 1. tit. 25. l. 2. t. 1. 2. Craig. lib. 2. tit. 2. 1 Inst. 31. 153. Litt. Sect. 59. 279. 592. Britton, cha. 32. and sir Ed. Coke's Commentary upon those Sections; and the case of Taylor on the demise of Atkins v. Horde, 1 Burrow, 60, and post. note 1. to page 330. b.

[Note 218.] (2) But a common recovery vests no freehold in deed or in law before execution served. See Moor 141.

[267. a.]

[Note 219.] (1) Releases may enure four manner of ways.—1st, *Per mitter le droit*, where a person is disseised, and he releases to the disseisor, his heir or feoffee.—2d, *Per mitter l'estate*, viz. when two or more are seised by a joint title of the same estate, as by a contract, or by descent, as jointenants or coparceners, and one of them releases to the other, this enures *per mitter l'estate*.—3d, *Per l'élargir*, is where the possession and inheritances are separated for a particular time, and he who hath the reversion or inheritance, releases to the tenant in possession all his right and interest. Such release is said to enlarge his estate, and to be equal to an entry and feoffment, and to amount to a grant and attornment.—4th, *Per extinguishment*, where the releasee cannot have the thing *per mitter le droit*, yet the release shall enure by way of extinguishment

tinguishment against all manner of persons; as when the lord grants the seigniority to his tenant, such releases absolutely extinguish the rent, &c. although the releasee be only tenant for life. Ant. 193. b. and see post. 273. b.

[267. b.]

(1) *If they grant a rent-charge of 20s. which in law amounts to a rent-charge of 40s. as two grants, for otherwise non est casus. When two tenants in common grant a rent, that is, several estates in one land, and yet they are several grants, therefore quære of this diversity. Plo. Que. pl. 315. contra. Lord Nott. MSS.* [Note 220.]

(2) *For Plowd. in his Quære 315. if tenant for life grants rent, and the grantee purchases the reversion, the rent remains during the life of the tenant for life. Lord Nott. MSS.* [Note 221.]

[268. a.]

(2) But the opinion of the 48 E. 3. 9. seems to the contrary; because, when the tenant pleads the disseisin, to compel the lord to avow upon him, it is strange that the lord, by his own act of acceptance, should maintain his avowry, and destroy the feudal contract. Gilb. Ten. 64, 65. [Note 222.]

[269. b.]

(1) On the continuance of the right of the entail in the tenant in tail after a feoffment made by him, see the case of lord Sheffield v. Radcliffe, Hob. 334. and see Duncombe v. Wingfield, *ibid.* 252. [Note 223.]

(2) For the lord could not introduce the heir into the feud contrary to the express alienation of the ancestor. Gilb. Ten. 67. [Note 224.]

(3) By acceptance of rent from the assignee, the lessor loses his action of debt against the first lessee, but he may still maintain an action of covenant against him. 1 Saund. 240, 241. 2 Saund. 302. [Note 225.]

[270. a.]

(2) But this must be understood of a lease at common law; for if it be so framed as to be a bargain and sale under the statute, the possession is immediately executed in the lessee, so that no entry is necessary. See the note page 271. b. and Cro. Car. 110. 2 Ventris 35. [Note 226.]

(3) By this passage it appears, that what sir Edward Coke observes a few lines before, that a release which enures by enlargement cannot work without a possession, must be understood to mean, not that an actual estate in possession is necessary, but that a vested interest suffices, for such a release to operate upon. By comparing this with what is said in note 1. 271. b. of the operation of a lease and release, it will be seen, that not only estates in possession, but estates in remainder and reversion, and all other incorporeal hereditaments, may be effectually granted and conveyed by lease and release: but it is an inaccuracy to say, that the releasee, in these cases, is in the *actual possession* of the hereditaments; the right expression is, that they are *actually vested* in him, by virtue of the lease of possession, and the statute. [Note 227.]

[270. b.]

(1) A tenant at will is he who enters and enjoys the land by the express or implied consent of the owner, without there being any obligation on the part either of the lessor or lessee to continue it for any certain or determinate term. A tenant by sufferance is he who, having entered and obtained possession by title, continues the possession, after his title is ended, by the laches of the lessor. The former is in by the consent of
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of the owner of the lands; this creates a privity between them. A tenant by sufferance is in only by the laches of the owner; so that there is no privity between them. Both these estates differ from that of a tenant from year to year, the tenant of which may determine it at the end of any year; but after a new year is begun, the tenure cannot be determined either by the lessor or lessee till the end of the year. See 1 lord Raymond, 707, 708. 2 Salk. 413. 3 Salk. 222. If a person holds by lease, and the term expires, the lease itself is notice of the expiration of the term, and the lessor may enter on the lessee without further notice, unless for double rent, under the 4 Geo. 2. sect. 1. in which case there must be a previous demand in writing. Where the tenant holds by will, the modern determinations are, that there must be a previous notice; but this notice varies according to the custom of the place, and the nature of the hereditaments in lease.

The editor has been favoured with the following note of an important determination on this point. York, Lammas Assizes 1773. Richard Roe ex. D. Chr. Brown, against Ann Wilkinson. Ejectment for two messuages and other premises at North Cowton. Thomas Beaver proved that he, by the lessor of the plaintiff's order, delivered a notice in writing to the defendant, on the 10th of February, which notice he received from lessor of plaintiff. The notice was as follows: "10th February, 1793. "Ann Wilkinson, Take notice, that you are to quit and yield up the "possession of the dwelling-house, stable, shop, and coal-house, with "their appurtenances, situate at North Cowton, which you rent under "me, on the 13th day of May next. Yours, Chr. Brown." Thomas Masterman deposed, that for 30 years he had been bailiff at North Allerton, the market town for Cowton; that it was the usage to give half a year's notice in case of lands, but had known a great many given to quit houses at North Allerton at Candlemas for May Day, and submitted to. This place is about eight miles from North Allerton. Verdict for plaintiff, subject to judge Gould's opinion. The question was, This being the case of a house and buildings only, under 10*l.* *per annum*, viz. only 5*l.* 5*s.* *per annum*, and the year expiring at May Day, old style, Whether in an holding from year to year, the above notice was sufficient, or whether it ought not to have been given half a year before the expiration of the year? 22d January 1774. Before judge Gould at his chambers, mr. Davenport for plaintiff argued, that a week's notice to a tenant at will was sufficient, that the defendant was tenant at will; that the custom in London required only three months notice for tenements under 10*l.* a-year; that the same custom was in general observed every where; and it was reasonable and agreeable to late determinations; that the custom of the country was in this case proved in favour of plaintiff, and cited the following cases; 13 Hen. 8. fo. 16.—59. Year Book. Brook, title Leases, pl. 53. Keilway, 163. Co. Lit. 68. See title Tenant at will, 55. a. 69. Allen, 4. Sir Thomas Bowes's case. 2 Raymond, 1008. 2 Jones, Timberly and Gregg, and How. Salk. 413, 414. 3 Burrow, 1603. Timmins v. Rowlinson. Viner, 406. tit. Estate. Mr. Lee, for defendant, argued, there was not, according to modern determinations, any such estate as an estate at will; every tenant being a tenant for a year or more; and that the rent was immaterial and custom local; and expatiated on the hardship of poor tenants, if turned out on short notice; and cited Brook, tit. Leases, fo. 61. Yelverton, 73. 74. In April following, mr. justice Gould delivered his opinion to mr. Davenport thus, "I have consulted all the "other judges, and we are all of opinion that six months notice to quit "is necessary in all cases, whether of houses or lands, under or above "5*l.* *per annum*, unless where there is a particular custom to the con-
"trary:

“trary; and the custom at North Allerton was too far distant from North Cowton to affect the inhabitants there, unless proved to extend to that place also.” Judgment for defendant.

[271. a.]

(1) This is to be understood when there is no particular estate in the land; but if there be a term *in esse*, and one enters claiming the term, he shall not be a disseisor, but an action of debt or waste shall lie against him, and one may be executor *de son tort* of a term. 3 Lev. 35. [Note 229.]

(2) P. 9 Car. C. B. on the argument of the case of *Blundell and Baugh*, [Note 230.] commonly called the *Earl of Nottingham's case*, justice Barclay said, that he whom lord Coke calls in this place an abator must be taken for a disseisor, as he had actually possession by the possession of the guardian. Lord Nott. MSS.—See Cro. Ca. 302. Litt. Rep. 372. 1 Vent. 55. 80.

[271. b.]

(1) Many references have been made, in the foregoing notes, to this part of the work, for some observations on conveyances at common law, and those which derive their effect from the statute of USES. It appeared advisable to collect them into one continued note, that the difference between the two modes of conveyance might appear in a stronger light; and to prevent a necessity of frequently repeating those general principles and illustrations, which otherwise must have been introduced on every occasion, where any point of this nature seemed to require an explanation. On the same ground it seemed advisable to anticipate some passages, which otherwise would have had a place in a subsequent part of the notes. [Note 231.]

I. FEOFFMENTS and GRANTS were the two chief modes used in the common law for transferring property. The most comprehensive definition which can be given of a *feoffment* seems to be, a conveyance of corporeal hereditaments, by delivery of the possession upon, or within view of the hereditaments conveyed. The delivery of the possession was made on, or within view of, the land, that the other tenants of the lord might be witness to it. No charter of feoffment was necessary; it only served as an authentication of the transaction; and when it was used, the lands were supposed to be transferred, not by the charter, but by the livery, which it authenticated. Soon after the Conquest, or perhaps towards the end of the Saxon government, all estates were called fees. The original and proper import of the word feoffment is, the grant of a fee. It came afterwards to signify, a grant with livery of seisin of a free inheritance to a man and his heirs, more respect being had to the perpetuity, than the feudal tenure of the estate granted. In early times, after the Conquest, charters of feoffment were various in point of form. In the time of Edward I. they began to be drawn up in a more uniform style. The more ancient of them generally run with the words *dedi, concessi, or donavi*. It was not till a later period that *feoffavi* came into use. The more ancient feoffments were also usually made in consideration of, or for, the homage and service of the feoffee, and to hold of the feoffor and his heirs. But after the statute *quia emptores*, feoffments were always made to hold of the chief lords of the fee, without the words *pro homagio et servitio*. Sir Edward Coke mentions in page 6. a. that there are eight necessary parts in a feoffment. The fifth, sixth, and seventh of these are not to be found in many of the ancient charters. When the land comprised in the feoffment descended from the ancestor, or by usage retained the property of the ancient bock-land, of not being alienable from the kindred, the ancient feoffments were often expressed to be made with the assent of the feoffee's wife, his heir or

[Note 231.] his heirs. In ancient charters there was inserted a general warranty: in that, the phrase was much varied. The oath [271. b.] of the party was often added to it, and sometimes a clause, that if the feoffor's title was evicted, he should give other lands of equal value. Sometimes these clauses extended to a second eviction; and sometimes the feoffor obliged himself, if he should make default in warranting the lands granted, to make restitution to the feoffee. The proper limitation of a feoffment is to a man and his heirs; but feoffments were often made of conditional fees (or of estates tail, as they are now called) and of life estates; to which may be added, feoffments of estates given in frank-marriage and frankalmoigne. To make the feoffment complete, the feoffor used to give the feoffee seisin of the lands: this is what the feudists called investiture. It was often made by symbolical tradition; but it was always made upon, or within view of, the lands. When the king made a feoffment, he issued his writ to the sheriff, or some other person, to deliver seisin: other great men did the same. This gave rise to powers of attorney. (See the preface to Mr. Madox's Formulæ.) A *grant*, in the original signification of the word, is a conveyance or transfer of an incorporeal hereditament. As livery of seisin could not be had of incorporeal hereditaments, the transfer of them was always made by writing, in order to produce that notoriety in the transfer of them, which was produced in the transfer of corporeal hereditaments, by delivery of the possession. But, except that a feoffment was used for the transfer of corporeal hereditaments, and a grant was used for the transfer of incorporeal hereditaments, a feoffment and a grant did not materially differ.—Such was the original distinction between a feoffment and a grant. But, from this real difference in their *subject matter*, a difference was supposed to exist in their *operation*. A feoffment visibly operated on the *possession*; a grant could only operate on the *rights* of the party conveying. Now, as possession and freehold were synonymous terms, no person being considered to have the possession of the lands but he who had himself, or held for another, at least an estate of freehold in them, a conveyance which was considered as transferring the possession must necessarily be considered as transferring an estate of freehold; or, to speak more accurately, as transferring the whole fee. But this reasoning could not apply to grants; their essential quality being that of transferring things which did not lie in possession; they therefore could only transfer the right; that is, could only transfer that estate which the party had a right to convey. It is in this sense we are to understand the expressions which frequently occur in our law-books, where they describe a feoffment to be a *tortious*, and a grant to be a *rightful*, conveyance. Thus, from a difference in the *quality* of the hereditaments conveyed by those two modes of conveyance, a difference has been considered to exist in their *operation*. A great part of Mr. Knowler's celebrated argument, in the case of Taylor on the demise of Atkins v. Horde, turns on this distinction. See 1 Burr. 92. This appears to have been the outline of conveyances at the common law.

II. The introduction of *USES* produced a great revolution in the transfer and modification of landed property. Without entering into a minute discussion of the difference between uses at common law, and uses since the statute of 27 H. 8. it is sufficient to state the following circumstances. Uses at the common law were, in most respects, what trusts are now. When a feoffment was made to uses, the legal estate was in the feoffee. He filled the possession, did the feudal duties, and was, in the eye of the law, the tenant of the fee. The person to whose use he was seised, called by the law-writers the *cestuy que use*, had the beneficial

cial property of the lands, had a right to the profits, and a right to call upon the feoffee to convey the estate to him, and to defend it against strangers. This right at first depended on the conscience of the feoffee: if he withheld the profits from the *cestuy que use*, or refused to convey the estate as he directed, the *cestuy que use* was without remedy. To redress this grievance, the writ of subpoena was devised, or rather adopted from the common-law courts, by the court of chancery, to oblige the feoffee to attend in court, and disclose his trust, and then the court compelled him to execute it. The uses were established.—They were not considered as issuing out of, or annexed to the land, as a rent, a condition, or a right of common; but as a trust reposed in the feoffee, that he should dispose of the lands, at the discretion of the *cestuy que use*, permit him to receive the rents, and in all other respects have the beneficial property of the lands. Yet an use, though considered to be neither issuing out of nor annexed to the land, was considered to be collateral to it, or rather as collateral to the possession of the feoffees in it, and of those claiming *that* possession under them. Hence the disseisor, abator, or intruder of the feoffee, or the tenant in dower, or by the courtesy of a feoffee, or the lord entering upon the possession by escheat, were not seized to an use, though the estates in their hands were subject to rents, commons and conditions. They were considered as coming in by a paramount and extraneous title; or, as it is called in the law, *in the post*, in contradistinction from those who, claiming under the feoffee, were said to be *in the fier*. Thus between the feoffee and *cestuy que use*, there was a confidence in the person and privity in estate. (See Chudleigh's case, 1 Rep. 120. and Burgess and Wheat, 1 Bla. 123.) But this was only between the feoffee and *cestuy que use*. To all other persons the feoffee was as much the real owner of the fee, as if he did not hold it to the use of another. He performed the feudal duties; his wife was intitled to dower; his infant heir was in wardship to the lord; and, upon his attainder, the estate was forfeited. To remedy these inconveniencies, the statute of 27 H. 8. was passed, by which the possession was divested, out of the persons seized to the use, and transferred to the *cestuys que use*. For, by that statute, it is enacted, that, "when any person shall be seized of any lands to the use, confidence, or trust of any other person or persons, by reason of any bargain, sale, feoffment, fine, recovery, contract, agreement, will, or otherwise; then, and in every other such case, the persons having the use, confidence, or trust, should from thenceforth be deemed and adjudged in lawful seisin, estate, and possession of and in the lands, in the same quality, manner, and form, as they had before in the use."

III. There seems to be little doubt, but that the intention of the legislature, in passing this act, was utterly to annihilate the existence of uses, considered as distinct from the possession. But they have been preserved under the appellation of trusts. The courts hesitated much before they allowed them under this new name. On the one hand, it had clearly been the intent of the legislature to destroy them, while they continued uses at the common law; on the other hand, motives of equity, or rather of compassion, and the general bent of the nation, pleaded strongly in their favour. The latter prevailed. Thus (to use the expression of lord Hardwicke, 1 Atk. 591.) a statute, made upon great consideration, and introduced in a solemn and pompous manner, has had no other effect than to add, at most, three words to a conveyance. Besides this,—one of the chief inconveniencies produced by trusts was, the secret method they afforded for the transfer of property.—The statute intended to restore the notoriety of the old common-law conveyances.

[Note 231.] conveyances. So far from effecting it, the existence and transfer of fiduciary, or trust estates, has continued. SECRET [271. b.] MODES OF TRANSFERRING THE POSSESSION itself have been discovered, and have totally superseded that notorious and public mode of transferring property, which the common law required, and the statute intended to restore; and MANY MODIFICATIONS OR LIMITATIONS OF REAL PROPERTY have been INTRODUCED IN CONSEQUENCE OF THE STATUTE OF USES, which the common law did not admit. An attempt will be made to give the reader a succinct view of these points, by some observations: First, on the nature of the estates of the feoffee and the *cestuy que use*, since the statute of uses: Secondly, on the limitations and modifications of landed property unknown to the common law, which have been introduced under the statute of uses: Thirdly, on the mode by which conveyances to uses operate: Fourthly, on the doctrine of powers deriving their effect from the statute of uses. Fifthly, on uses not executed by the statute. It is to be premised, that what is here said of a feoffee to uses is equally to be understood of a release, conusee, or recoveror, who stands seized to uses.—III. 1. *As to the estates of the feoffee and the cestuy que use*;—the statute unites the possession to the use, so that the very instant the use is raised, the possession is joined to it; and the use and the possession are thereupon immediately consolidated, and become convertible terms. Thus, had all uses been vested either in possession or in right, no estate or interest of any kind could have been left in the feoffee. But uses are frequently limited in contingency, to serve which, as they come *in case*, it is necessary that there should be a seisin somewhere. When this case was first considered by the lawyers, it was found difficult to discover any mode of reasoning, consistent with the system generally received on the doctrine of uses, by which that seisin could be supposed to exist any where; or what the precise nature of it was. This was the great difficulty in Chudleigh's case. There the following case was put: Suppose a feoffment is made to the use of *A.* during his life, remainder to the use of his sons successively in tail, and, for want of such issue, to the use of *B.* in fee; is there any, and what seisin, to serve the uses limited to the sons of *A.*?—in whom does that seisin exist?—and how does it operate? Upon this point the judges seem, by the accounts which have come to us of that case, particularly sir Edward Coke's and lord chief justice Popham's, to have held very different opinions. All agreed, that to the execution of an use under the statute, it was indispensably necessary that there should be a person seized to the use; an use in possession, reversion, or remainder; and a *cestuy que use in case*. From these positions some of the judges in that case inferred, that the whole use was executed in *A.* and *B.* in a manner that left *nothing* of the ancient seisin in the feoffees; and that the contingent use, when it came *in case*, was executed out of the first livery, and the original estate of the feoffees. Others held, that an *actual estate* in remainder was vested in the feoffees, to serve the contingent uses as they arose. But both these systems were found to be open to unanswerable objections. For, with respect to the first, one of the requisites indispensably necessary to the execution of an use, under the statute, is, that there must be a person seized to the use, at the time of the execution of it. Now, if the whole original seisin was divested out of the feoffees, there would not, when the son of *A.* was born, be any person seized to his use;—or, in other words, there could be no seisin to that use. This would make the estates limited to the sons of *A.* and all other contingent remainders, void in their creation, for want of a seisin to feed them, when they come *in case*.
—With

—With respect to the latter system,—it is to be observed, that under the limitations upon which the case arose, *A.* took an estate for life in possession, and *B.* took an estate in remainder in fee;—and that previous to the birth of *A.*'s children, there was no use vested in any person, which separated those two estates. Those uses, therefore, were commensurate to the whole fee, and admitted no opening for any intermediate vested use. Besides, the feoffor neither limited, nor intended to limit, any such intermediate use to the feoffees. Thus, on the one hand, the objection to supposing that nothing of the old seisin remained in the feoffees, on the other, the objection to supposing that any use or legal estate remained in them, made it difficult to conceive what estate or seisin could be in them, to serve the contingent use. To clear up this difficulty it was observed, that the possession was not executed by the statute, but in the same manner, and to the same extent, in which the use was limited. Now, in the case we have mentioned, the use was limited, and consequently the possession executed, to the use of *A.* during his life, remainder to *B.* in fee, but subject to the possibility of *A.*'s having sons, and their becoming entitled to the use, and consequently to the possession, for an estate or estates in tail. Thus, during the suspense of the contingent use, the feoffees had a possibility of possession, untouched and unaffected by the statute, as there was no use *in esse*, to which it could be executed. The moment the use came *in esse*, the feoffees would be entitled at common law to the possession, to the use, or, as we should now call it, in trust for the *cestuy que use*; but by the operation of the statute, the possession is instantaneously divested from the feoffees, and executed in the *cestuy que use*. Thus, by supposing a possibility of seisin, but no actual seisin or use to remain in the feoffees during the suspense of the contingent use, a sufficient seisin is provided to serve the contingent use when it comes *in esse*, without interfering with, or breaking in upon, the legal fee.—III. 2. With respect to the limitations and modifications of landed property, unknown to the common law, which have been introduced under the statute of uses; the principal of these are known by the general appellation of springing or secondary uses. No estate could be limited upon or after a fee, though it were a base or a qualified fee; nor could a fee or estate of freehold be made to cease as to one person, and to vest in another, by any common-law conveyance. But there are instances where, even by the common-law, these secondary estates seem to have been allowed, when limited, or rather when declared, by way of use. See Jenk. Cent. 8. case 52. After the statute of uses, the judges seem to have long hesitated whether they should receive them. In Chudleigh's case it was strongly contended, that it would be wrong to make "any estate of freehold and inheritance, lawfully vested, to cease as to one, and to vest in others against the rule of law, and that no estates should be raised by way of use but those which could be raised by livery of seisin at the common law." The courts, however, admitted them. After they were admitted, it was found necessary to circumscribe them within certain bounds; because, when an estate in fee simple is first limited, there is no method by which the first taker can bar or destroy the secondary estate, as it is not affected either by a fine or common recovery. It is now settled, that when an estate in fee simple is limited, a subsequent estate may be limited upon it, if the event upon which it is to take place be such, that if it does happen, it must necessarily happen within the compass of one or more life or lives in being, and 21 years and some months over. It was long before the courts agreed upon this period. In *Buckwork v. Thirkill*, 1 Collect. Jurid. 332. lord Mansfield mentioned that it was

[Note 231.] was not settled till his time. It is observed in note 5. to p. 20. [271. b.] a. "that this period was not arbitrarily prescribed by our courts of justice with respect to the limitation of personal estates, but wisely and reasonably adopted in analogy to the cases of freehold and inheritance, which cannot be limited by way of remainder, so as to postpone a complete bar of the entail, by fine or recovery, for a larger space." The same analogy has been observed with respect to these secondary fees, when limited upon an estate in fee simple. But the reason which induced the courts to adopt this analogy, with respect to these estates when limited upon an estate in fee simple, does not hold when they are limited upon or after an estate in tail; because when they are limited upon or after an estate in tail, the tenant in tail, by suffering a common recovery before the event takes place, bars or defeats the secondary estate, and acquires the fee simple, absolutely discharged from it. See *Page v. Haywood*, 2 Salk. 570. 1 Lev. 35. *Goodman v. Cook*, 2 Sid. 103. Hence, if the secondary estates we are speaking of are limited upon or after an estate in tail, they may be limited generally, without restraining or confining the event or contingency upon which they are to take place to any period. Thus, if an estate be limited to *A.* and his heirs; and if *B.* (a person *in esse*) dies, without leaving any issue of his body living at the time of his decease; or having such issue, if all of them die before any of them attain the age of 21 years, then to *C.* and his heirs; here the limitation to *C.* is limited after a previous limitation in fee simple; and it is a good limitation, because the event upon which it is to take place, must, if it does take place, necessarily take place within the period of a life in being, and 21 years and a few months. But if the estate were limited to *A.* and his heirs; and after the decease of *B.* and a total failure of heirs or heirs male of the body of *B.* to *C.* and his heirs; here, as the secondary use is limited after a previous limitation in fee simple, and the event on which the fee limited to *C.* is to take place is not such as must necessarily happen within the period we are speaking of, (for *B.* may have issue, and that issue not fail till many years after the expiration of 21 years after *B.*'s decease), the limitation to *C.* and his heirs is void. But suppose the estates were limited to *A.* for life, then to trustees and their heirs during his life, for preserving contingent remainders; then to *A.*'s first and other sons successively in tail male; with several remainders over; with a proviso, that if *B.* dies, and there should be a total failure of heirs or heirs male of his body, the uses limited to *A.* and his sons, and the remainders over, shall determine, and the lands remain and go over to *C.* and his heirs; here the limitation to *C.* and his heirs is limited upon or after previous limitations for life, or in tail; and the event upon which it is so to take effect may possibly not happen till after a period of one or more life or lives in being, and 21 years. But so far as it is limited on an event which may happen during the continuance either of one or more life or lives in being, it is within the bounds we have mentioned; and so far as it is limited upon an event which may happen during the continuance of the estate of the tenants in tail, or after them, the first tenant in tail in possession by suffering a recovery, before the event happens, may bar the limitations over, and thereby acquire an estate in fee simple; and therefore the limitation over to *C.* and his heirs, is good.—III. 3. With respect to the *mode by which conveyances to uses operate*. It is to be observed, that to raise an use under the statute, the possession or seisin to serve the use must be in some person distinct from the *cestuy que use*; the statute requiring that the person seised to the use, and the person to whom the use is limited, should be different persons; so that if the

the possession is conveyed, and the use limited to the same person, at least if the use is limited in fee simple, that is not an use executed by the statute, but the party is in by the common law. For the statute of uses mentions those cases only, where "any person or persons stand seised to the use of any other person or persons." Thus in the case of *Jenkins v. Young*, Cro. Car. 231. 245. lands were given to two, *habendum* to the use of them and the heirs of their two bodies: It was argued, that the estate out of which the use should rise was but for their lives, and that therefore, on the death of the *cestuys que vie*, the use limited upon their estate was determined: but the court held, that where an estate is limited to one, and the use to a stranger, the use should not be more than the estate out of which it was derived; but that when the limitation is to two, *habendum* to the use of them and the heirs of their bodies, it was no limitation of the use, nor was the use to be executed by the statute. So in *Gilb. Rep. p. 17.* it is expressly said, that if a fine be levied to a man and his heirs, to the use of him and his heirs, he shall take by the common law, and not by way of use. And see *Dyer 186.* and *Ant. 22. b.* and *Bac. Uses, ed. 1785. p. 63. Com. 313. Skin. 209.* Now the possession or seisin on which the use is declared must either remain in the party, or be transferred to some third person. This is the meaning of those passages in the books, where it is said that uses are either raised by transmutation of the possession, or without such transmutation. A bargain and sale, and a covenant to stand seised, operate on the possession of the bargainor or covenantor. A feoffment, fine, and common recovery, operate on the possession of the feoffee, conusee, or recoveror. A lease and release has a mixt operation; the lease having the operation of, and being in fact, a bargain and sale under the statute, and the estate of the releasee being extended or enlarged to an estate of inheritance by the operation of the release at common law. For with respect, first, to a bargain and sale, and a covenant to stand seised; a bargain and sale is considered as a real contract, whereby the bargainor for some pecuniary consideration bargains and sells, that is, contracts to convey the lands to the bargainee. A covenant to stand seised to uses, is where a man covenants to stand seised of them to the use of his wife, his child, or kinsman. But it is to be observed, that the words bargain and sell are not appropriated to the former, nor the words covenant to stand seised appropriated to the latter of these conveyances. If a person for a pecuniary consideration covenants to stand seised to the use of the purchasor, it is a bargain and sale, and if inrolled, is valid and effectual, as a bargain and sale under the statute of uses, to convey the estate to the purchasor. In the same manner, if a person for natural love and affection bargains and sells his lands to the use of his wife, it is a covenant to stand seised, and as such, without inrollment, vests the estate in the wife. 7 Rep. 40. b. 2 Inst. 672. 1 Leo. 25. 1 Fent. 137. 1 Mod. 175. 2 Lev. 10. In the case of a bargain and sale, the bargainor stands seised to the use of the bargainee; in the case of a covenant to stand seised, the covenantor stands seised to the use of the parties intended to be benefited. In both, the possession or seisin remains in the party; and the statute draws it from them, and executes it in the *cestuys que use*. Secondly, with respect to a feoffment, fine, and common recovery; the transfer or transmutation of the possession from the feoffor, conusor, and recoveree to the feoffee, conusee, or recoveror, is effected solely by the operation of these conveyances or assurances at the common law; and if the use is declared to the feoffee, conusee, or recoveror, in fee simple, the conveyance is completed at the common law, in the same manner as if the statute of uses had never passed.

[Note 231.] passed. It is only when the use is declared to a third person, that the statute has any operation; and then, by the [271. b.] operation of the statute, the possession previously transferred or transmuted to the feoffee, conusee, or recoveror, by the operation of the feoffment, fine, and common recovery, at the common law, is divested from the feoffee, conusee, or recoveror, and vested in the *cestuys que use* by the statute. Thirdly, as to the conveyance by lease and release. The form of that conveyance is originally derived to us from the common law, and it is necessary to distinguish in what respect it operates as a common-law conveyance, and in what it operates under the statute of uses. At the common law, where the usual mode of conveyance was by feoffment with livery of seisin, if there was a tenant in possession, so that livery could not be made, the reversion was granted, and the tenant attorned to the reversioner. As by this mode the reversion or remainder of an estate might be conveyed without livery, when it depended on an estate previously existing, it was natural to proceed one step further, and to create a particular estate, for the express and sole purpose of conveying the reversion; and then, by a surrender or release, either of the particular estate to the reversioner, or of the reversion to the particular tenant, the whole fee vested in the surrenderee or releasee. It was afterwards observed, that there was no necessity to grant the reversion to a stranger; and that if a particular estate was made to the person to whom it was proposed to convey the fee, the reversion might be immediately released to him; which release, operating by way of enlargement, would give the releasee the fee. In all these cases, the particular estate was only an estate for years; for, at the common law, the ceremony of livery of seisin is as necessary to create an estate of freehold, as it is to create an estate of inheritance. Still an actual entry would be necessary on the part of the particular tenant; for, without actual possession, the lessee is not capable of a release, operating by way of enlargement. But this necessity of entry, for the purpose of obtaining the possession, was superseded, or made unnecessary, by the statute of uses: for, by that statute, the possession was immediately transferred to the *cestuy que use*: so that a bargainee under that statute is as much in possession, and as capable of a release before or without entry, as a lessee is at the common law after entry. All, therefore, that remained to be done, to avoid, on the one hand, the necessity of livery of seisin from the grantor, and, on the other, the necessity of an actual entry on the part of the grantee, was, that the particular estate (which, for the reasons abovementioned, should be an estate for years) should be so framed, as to be a bargain and sale within the statute. Originally it was made in such a manner as to be both a lease at the common law, and a bargain and sale under the statute. But as it is held, that where conveyances may operate both by the common law and statute, they shall be considered to operate by the common law, unless the intention of the parties appears to the contrary, it became the practice to insert among the operative words, the words *bargain and sale*, (in fact, it is more accurate to insert no other operative words), and to express that the bargain and sale or lease is made to the intent and purpose, that thereby, and by the statute of uses, the lessee may be capable of a release. The bargain and sale, therefore, or the lease for a year, as it is generally called, operates, and the bargainee is in the possession, by the statute. The release operates by enlarging the estate or possession of the bargainee to a fee: this is at the common law, and if the use be declared to the releasee in fee simple, it continues an estate at the common law; but if the use is declared to a third person, the statute

statute again intervenes, and annexes or transfers the possession of the release to the use of the person to whom the use is declared. It has been said, that the possession of the bargainee, under the lease, is not so properly merged in, as enlarged by the release: but, at all events, it does not, after the release, exist distinct from the estate passed by the release. As the operation of a lease and release depends upon the lease, or bargain and sale, the grantor must be a person capable, at law, of being seised to an use, otherwise the release will be void for want of possession in the release. By some very respectable authorities it has been said that a corporation cannot be seised to an use. Pop. 72. 1 Co. Rep. 127. a. Bacon Stat. of Uses 357. Pl. 102. 538. Jenk. Cent. 195. 2 Vez. 399. Gilb. Uses 5. 170. 285. Shep. Touchs. 508. A contrary doctrine, so far as relates to the conveyances of corporations by bargain and sale, seems to be laid down in *sir Tho. Holland v. Botie*, 1 Leo. 183. 2 Leo. 121. 3 Leo. 175. And see 13 H. 7. fol. 9. pl. 5. To avoid doubt upon this subject, it seems advisable that corporations should convey by feoffment, or by a lease and release, with an actual entry by the lessee, previous to the release; after which the release will pass the reversion. It may also be observed, that, in *exchanges*, if one of the parties die before the exchange is executed by entry, the exchange is void. Ant. 50. b. But if the exchange be made by lease and release, this inconvenience is prevented, as the statute executes the possession without entry, and all incidents annexed to an exchange, at common law, will be preserved.

—III. 4. The next consideration is, upon the doctrine of *powers deriving their effect from the statute of uses*; but the nature of these Notes requires, that what is said on this head should be confined to some general observations upon the mode by which powers operate; and the relation which the deeds by which they are executed, bear to the deeds by which they are created. As to the first, all powers of this kind are, in fact, powers of revocation and appointment: indeed, every declaration of an use may, in some respect, be considered as an appointment of the use or uses to which the feoffee is to stand seised: but the word appointment is generally applied to those cases, where either the power of appointment is first reserved, or given, with a subsequent limitation of uses, to take place until, and in default of, the appointment; or where the uses are first limited, and a power is afterwards given to some person to limit other uses. As the uses limited under this power cannot operate but by the postponing, abridging, or defeating the prior uses, it is usual in some cases, to precede the power of appointment by a power of revocation. But this is immaterial. The powers of leasing, jointuring, charging, selling, and exchanging, usually inserted in marriage settlements, are powers of revocation and appointment. All of them postpone, abridge, or defeat, in a greater or less degree, the previous uses and estates, and appoint new uses in their stead. As soon as the uses created by them spring up, they draw to them the estate of the feoffee: and the statute executes the possession. But it must be observed, that these powers do not operate as a conveyance of the possession of the estate, but as a limitation of the use. Hence, if a person, having a power of appointment, appoints the estate to *A.* and his heirs, to the use of *B.* and his heirs, the use is executed in *A.* and his heirs, and *B.* takes only an equitable fee. Thus, suppose a marriage settlement framed in the usual manner, and with the usual power of selling and exchanging reserved to the feoffees; in these cases, it is sometimes expressed, that it shall be lawful for the feoffees to grant, bargain, sell, and convey. But, whatever are the words made use of, they can only operate as a limitation of the use; and the vendee will take the legal

[Note 231.] estate. If the feoffees make a conveyance by lease and re-lease, there is no doubt but it will be effectual; it will operate, however, as an appointment; the releasee will take the legal estate, and if the release is made to uses, the intended cestuys que use will have only equitable estates. To explain this more fully, it is to be observed, that those uses which are not vested either in possession or right, immediately on the execution of the deed, are termed future uses, and are said to arise, either by the act of God, or the act of the party. Mr. Booth in his printed opinion, at the end of Mr. Hillyard's edition of Sheppard's Touchstone, gives an explanation of this distinction, which, if his expressions are understood in the sense in which it is evident he intended using them, will be found perspicuous and exact. "It is wholly immaterial," he says, "how, or by what means, the future use comes *in case*, whether by means of some event provided for, in case it happened, in the creation of the uses, which event may be called the act of God; or by means of some work performed by any certain person, for which provision was likewise made, in the creation of the uses, which may be called the act of man; in either case, the statute operates the same way; for the instant the future use comes *in case*, either by the act of God, or by the act of man, the statute executes the possession to the use, and the cestuy que use is deemed to have the same estate in the lands as is marked out in the use, by the deed that created it. When the use arises from an event provided for by the deed, it is called a future, a contingent, an executory use; when it arises from the act of some agent or person nominated in the deed, it is called a use arising from the execution of a power. In truth both are future or contingent uses, till the act is done; and afterwards they are, by the operation of the statute, actual estates. But till done, they are in suspense, the one depending on the will of heaven whether the event shall happen or not, the other on the will of man. Whilst these last are in suspense, they are called powers." According to this explanation, the uses raised by limitations to first and other sons, or to such first or only son who shall attain twenty-one, or to the survivor of *A.* and *B.* or to the right heirs of *I. S.* or to *C.* if *A.* dies in the life-time of *B.* &c. &c. are all uses arising by the act of God; as they are events designated by the original deed, but which, though designated by the party, depend, for their effect, on the will of Providence. On the other hand, where there are limitations to such uses as *A.* shall appoint, or to such of the children of *A.* as *A.* shall appoint; or, where a power is given to *A.* to jointure, to charge with portions, to mortgage, to lease, to sell, or to exchange; in all these cases, the persons, and the estates and interests, are to be designated by the party. He designates the persons, the children, the mortgagee, the lessee, the vendee, and exchangee. These, therefore, are said to arise by the act of the party. From this explanation it is evident, that there is no material difference in the quality of the uses; the difference is, in the act which produces them. In the latter case, the party has the power of raising them, and it is in that sense, that the word power is used in this place. Now, if an estate is conveyed to *A.* and his heirs, to the use of *B.* for life, remainder to his first and other sons, successively, in tail male; upon the birth of the first son, the possession is executed in him by the statute. Suppose the estate were conveyed to *A.* and his heirs, to the use of *B.* for life, remainder to such uses generally, or to such son of *B.* as *B.* shall appoint, and *B.* appoints to the use of his first son. Immediately upon the appointment, the use is executed in the son. Then how does this appointment operate? Clearly not as a conveyance. For *B.* had only a life estate, and consequently

quently could not convey an estate tail to his own son ; it operates therefore as a designation of the person to take the use : his right to make this designation is termed a power of appointment, the exercise of it is termed an appointment, the person taking under it is termed the appointee. This may be made more clear, by considering how it would have stood on a limitation of uses at common law, before the statute of uses. Till that statute, a conveyance to *A.* and his heirs, to the use of *B.* for life, with remainder to such uses, or to such of his sons as he should appoint, was tantamount to what now is a conveyance unto and to the use of *A.* and his heirs, in trust for *B.* for life, remainder in trust for such persons, or for such of his sons, as he shall appoint. When, at common law, an appointment was made to the use of the first son, the trustee stood seised at common law, to the use, or, as we should now call it, in trust, for that first son ; he thereupon became the *cestuy que trust*. Since the statute has executed the use, where the son takes under an appointment of this nature, the use is executed in him, and he is the *cestuy que use*. Thus, at the common law, an appointment operated to substitute one *cestuy que trust* in the room of another. Since the statute, an appointment operates to substitute one *cestuy que use* in the room of another. The conclusion is, that wherever a party, having a legal estate, conveys it to a person and his heirs, to such uses as that person or any other person shall appoint, and an appointment is made, it operates not as a conveyance of the land, but as an appointment of the use, and consequently the appointee takes the use or legal estate. Therefore, as has been observed before, if a person having a power of appointment appoints to *A.* and his heirs, to the use of *B.* and his heirs, the legal estate is in *A.* In the same manner, if a person having a power of selling and exchanging conveys the estate to *A.* and his heirs, to the use of *B.* and his heirs, the legal estate is equally in *A.* by the exercise of the power. It is generally true, that the use created under the power takes effect in the same manner, as if in the deed containing the power it had been inserted instead of the power : thus, suppose an estate conveyed to the use of *A.* for life, remainder to such uses as *B.* should appoint, and in default of appointment, to the use of *B.* and his heirs : *B.* appoints the estate to *C.* for life ; remainder to his first and other sons in tail male. After this appointment is made, it is the same as if the estate had been originally limited to the use of *A.* for life, remainder to the use of *C.* for life, remainder to *C.*'s first and other sons in tail male ; remainder to *B.* and his heirs. So, if the estate is limited to *A.* for life ; remainder to the use of his first and other sons in tail male, with power to *A.* to appoint a rent charge to his wife, with usual remedies and a term of years for securing the same, and to charge the estate with portions, and to create a term of years for securing the same, and he exercises these powers ; it is the same, as if, in the original settlement, the estate had been limited to the use of *A.* for life, remainder to the use and intent that the wife might receive her jointure, and distrain, and enter upon and take possession of the estate, in case the same should be in arrear ; and, subject thereto, to the use of trustees for a term of years for further securing the rent charge ; remainder to the use that the lands in question may be charged with portions, and, subject thereto, to the use of trustees for a term of years for raising the portions ; remainder to *A.*'s first and other sons successively in tail male. The relation, therefore, which the deed by which the power of appointment is executed, has to the deed by which the power is created, holds so far as the use thus appointed derives its effect from, and is served by or out of, the original seisin of the donee,

[Note 231.] uses, remainder, fee-fine, or release; and as it precedes and takes place of all the uses limited, subsequent or sub- [271. b.]
 ject to the power. In this sense it clearly has a relation to the deed by which it is raised. But it has no other relation in point of time. In the case of the duke of Marlborough v. lord Godolphin, 2 Vez. 61. lord Sunderland left the interest of 30,000l. to his wife for her life, and the principal, after her decease, to such of her children as she should by deed or will appoint. By her will she appointed 2,000l. to mr. Spencer and 1,500l. to lady Morpeth, who both died in her life-time. It was contended, that the appointment related back to the time of lord Sunderland's will, which relation would over-reach the death of the two parties, who were alive at the time of the death of the testator, lord Sunderland; and then it would be considered as vesting in them in their lives. But lord Hardwicke denied this. He admitted that an use, taking effect by virtue of an execution of a power, was taken under the authority of that power, but *not from the time of its creation*; and he exemplifies this distinction by appointments of uses; in which case, says his lordship, if a feoffment is executed to such uses as the feoffor shall appoint by will; when the will is made, it is clear the appointee is in by the feoffment, but has nothing from the time of the execution of the feoffment, so as to vest the estate in him; and he thereupon decreed these legacies to have lapsed by the death of the legatee in the life-time of the testator. This shews how much it is necessary to qualify the general expressions above alluded to. It also reconciles them with a known circumstance attending powers of this nature, with which it is otherwise difficult to reconcile them, viz. that by an execution of a general power, a person may limit estates which he could not limit by the deed in which the power is contained. By a general power of appointment is understood that kind of power, which enables the party to appoint the estate to any persons he thinks proper; and, in this sense, it is opposed to a qualified or particular power, which enables the party to appoint to or among particular objects only; as a power of appointing to his children, or the children of any other person. A general power of appointment has no tendency to a perpetuity, as, from its very nature, it enables the party to vest the whole fee in himself, or in any other person, and to liberate the estate entirely, from every species of limitation inconsistent with that fee. In fact therefore giving a person such a power is nearly the same as giving him the absolute fee. The only difference is, that it enables him to do, through the medium of a seisin previously created, that which, if the fee had been actually limited to him, he might do by a conveyance of the land itself; so that in both cases his power of alienation is of the same extent. But, in the case of a particular or qualified power, where the objects are limited, the case is entirely different. The limitation of the objects takes the land out of commerce, and of course has a tendency to that perpetuity, which the English law of real property does not admit. The consequence therefore is, and by a series of cases it now appears to be settled, that where the power is general, estates for life, with remainders over, may be limited under them to persons not *in esse* at the time of the execution of the original deed, in the same manner, and to the same extent, as if, instead of being derived out of the seisin of the feoffees of the original deed, and in that point of view as making a part of that deed, the uses and estates so limited were created by an original, substantive, independent, and integral conveyance. On the other hand, in the case of a particular or qualified power, that is, where the objects are qualified, as a power of appointing to the children of the party himself, though perhaps

perhaps it may enable him to appoint life estates to children unborn at the date of the deed creating the power; yet, if it enables him to appoint life estates to those children, it certainly does not authorize him to extend the appointment to the children of these children, so as to make them take by purchase, nor to appoint any other estate, which might not have been created by the very deed creating the power. In all cases therefore of particular or qualified powers, both in the creation and the exercise of them, care should be taken to ascertain, that the uses which the party is empowered to raise under them, or actually assumes to raise under them, when he comes to exercise the power, are such as the deed creating the power might itself have raised. It may, however, be proper to add, that between deeds and wills there is this material distinction: a deed takes effect immediately on the execution of it;—a will is ambulatory, and waits for its effect till the testator's decease. In enquiring therefore into the legality of the limitations we are speaking of, the reference, in the case of a deed, should be to the time of its execution; but the reference, in the case of a will, should be to the death of the party. If, therefore, in a deed exercising such particular power of appointment, there is a limitation for life to a person unborn, with remainders over to his sons in strict settlement, these remainders over will be void, and will not be helped though a son is born on the following day. In the case of a will it is different. If the son is born in the party's life, he is capable of a limitation to himself for life, with remainders over to his sons in strict settlement. In cases of this nature, there is another material distinction between deeds and wills. In deeds, technical expressions are, in some cases, absolutely necessary, so that they cannot be supplied by others, however forcible or clear; in other cases they have a determinate sense appropriated to them by law, in which, and in no other, the law permits them to be construed. In wills there is a greater latitude of construction: technical expressions are never necessary, and every expression is construed in the sense in which the testator appears to have designed to use it, so that, when his intention is once discovered, whether he uses technical language or not, and if he uses it, whether he uses it in a proper or an improper sense, his will is construed solely with a view to what appears to be his obvious meaning, and not according to the rigid or technical import of his expressions. Another rule in the construction of wills, which is admitted in a much greater latitude than it is in the construction of deeds is, that, when a testator's general intent appears, the court, in order to give it effect, will sacrifice to it a particular intention inconsistent with it. Now, in the cases we are speaking of, where the limitations are construed to import a life estate to an unborn son, and successive estates tail by purchase to the sons of that son, there, in a deed, the latter limitations suspend the inheritance from vesting beyond the period allowed for its suspension by the rules of law, and are therefore void. But, in the case of wills, the law will not construe these expressions thus rigidly. From the manifest tenor of the devises we are speaking of, it must appear to be the intention of the party, that all the issue, (male or female, as the case may happen) should take the estate. This is his general intention: besides this he appears to intend, that they should take the estate in that manner, which, if allowed, must necessarily give estates by purchase to the sons of the unborn son. This is his particular intention; but it cannot be effectuated, being contrary to law. To allow it therefore would subvert his general intention. The court therefore, to give effect, as far as the law admits, to the testator's will, sacrifices the particular to the general intent; and conformably to this principle, as the general intent can only

[Note 231.] be answered by giving an estate tail to the unborn son, the court will construe the devise to import an estate tail to [271. b.] him. This construction, by making the sons of the unborn son take by descent, sacrifices the testator's intent that they should take by purchase; but by letting in all the issue, preserves his general intent, that all the issue should take—see *Dymock v. Applin*, 4 Term Rep. 82. *Humberstone v. Humberstone*, 1 Peere Williams 332.; *Chapman v. Browne*, 3 Burr. 1634; *Nicholl v. Nicholl*, 2 Black. Rep. 1159; *Pitt v. Jackson*, 11 Bro. Ch. Cases, 51; and *Robinson v. Hardcastle*, 2 Term Rep. 241. To this point the ultimate decree in the great case of *Hopkins v. Hopkins* is very important. As the points in that case involve some of the most interesting doctrines of the law of uses, and the printed account of them is to be found only in separate and detached cases, taken by different reporters, and in different stages of the cause, and as no account has yet appeared in print of the final decree, it was thought the following succinct account of the whole case would be acceptable to the reader, and would not be considered as misplaced in the present Note.—The case was, that Mr. Hopkins by his will devised his estates to the use of trustees and their heirs, in trust for Samuel Hopkins, (the son of John Hopkins the testator's cousin, and his heir at law,) for his life; remainder to his first and other sons successively in tail male; and for want of such issue, “in case his
 “said cousin John Hopkins should have any other son or sons of his body
 “lawfully begotten, then in trust for all and every of such other son
 “and sons, respectively and successively, for their respective lives; with
 “the like remainders to their several sons, successively and respectively,
 “as are therein before limited to the issue male of the said Samuel Hop-
 “kins, son of the said John Hopkins; and for default of such issue,
 “then in trust for the first and every other son of the body of Sarah, the
 “eldest daughter of his said cousin John Hopkins, lawfully to be begotten,
 “successively and according to priority of birth, for their respective
 “lives; with remainders to the heirs male of the body of every such
 “son, respectively and successively, the elder and the heirs male of his
 “body to take before the younger and the heirs male of his body issuing;
 “and for want of such issue, then in trust for the first and every other
 “son of the body of Mary, the second daughter of his said cousin John
 “Hopkins, lawfully to be begotten, successively and respectively, accor-
 “ing to priority of birth, for their respective lives; with remainders to
 “the heirs male of the bodies of every such son, respectively and suc-
 “cessively, the elder and the heirs male of his body to take before the
 “younger and the heirs male of his body issuing; and for want of such
 “issue, then in trust for the first and every other son of the body of Eli-
 “zabeth, the third daughter of his said cousin John Hopkins, lawfully to
 “be begotten, successively and respectively, according to priority of
 “birth, for their respective lives; with the like remainders to the heirs
 “male of the body of every such son, respectively and successively, the
 “elder and the heirs male of his body to take before the younger and
 “the heirs male of his body issuing; and for want of such issue, then
 “in trust for the first and every other son of the body of Hannah, the
 “youngest daughter of his said cousin John Hopkins, lawfully to be be-
 “gotten, successively and respectively, according to priority of birth, for
 “their respective lives; with the like remainders to the heirs male of
 “the body of every such son, respectively and successively, the elder
 “and the heirs male of his body to take before the younger and the heirs
 “male of his body issuing; and for want of such issue, and in case his
 “said cousin John Hopkins should have any other daughter or daughters
 “lawfully begotten, then in trust for the first and every other son of every
 “such other daughter, respectively and successively, according to priority

" rity of birth, for their respective and successive lives; with the like
 " remainders to their several and respective heirs male successively,
 " the elder and the heirs male of his body to take before the younger
 " and the heirs male of his body issuing; and in default of such issue,
 " then in trust for the first and every other son of his cousin Hannah
 " Dare, the then wife of Francis Dare, and daughter of his uncle Samuel
 " Hopkins, deceased, lawfully begotten or to be begotten, successively
 " and respectively, according to priority of birth, for their respective
 " lives; with the like remainders to the heirs male of the body of every
 " such son, respectively and successively, the elder and the heirs male of
 " the body of every such son respectively to take before the younger and
 " the heirs male of his body issuing; and for want of such issue, then
 " in trust for James Bennett, the only son of his cousin Sarah Alloway,
 " then the wife of William Alloway, and another daughter of his said
 " uncle Samuel Hopkins deceased, by mr. Bennett her former husband,
 " for his the said James Bennett's life; with remainder to his first and
 " every other son, lawfully to be begotten, successively, according to
 " priority of birth, and the heirs male of every such son, respectively
 " and successively, the elder and the heirs male of his body to take be-
 " fore the younger and the heirs male of his body issuing; and in default
 " of such issue, then in trust for his own right heirs for ever." With a pro-
 viso, that whoever should come to his estate should take his surname and
 coat of arms: and a proviso, disposing of the rents during the minorities
 of the devisees:—And, after giving a great number of legacies, he gave
 the rest and residue of his personal estate to his executors, in trust that
 the same should be by them, or the survivors of them, with all convenient
 speed laid out in the purchase of messuages, lands, and tenements of
 inheritance in England, to be conveyed to the executors and their heirs,
 upon the several trusts and for the same purposes as were thereby
 declared touching the estates he was then seised of, and which he had
 devised. And the testator appointed sir Richard Hopkins, John Rudge,
 and James Hopkins, executors of his will. And after his decease it was
 proved by sir Richard and mr. James Hopkins. Samuel Hopkins, the
 son of John Hopkins, the testator's cousin, died in the testator's life.
 After the testator's death, John Hopkins, the cousin and heir of the tes-
 tator, and his four daughters, the said Sarah, Mary, Elizabeth, and
 Hannah Hopkins, and also Amey Hopkins, another daughter of John
 Hopkins, the cousin, born after making the said will, exhibited a bill in
 chancery against sir Richard Hopkins, John Rudge, and James Hopkins,
 and against John Dare, Francis Dare, and Philip Dare, infants, (children
 of Hannah Dare) and also against the said James Bennett: stating
 amongst other things, the will of mr. Hopkins; and praying that the ex-
 cutors might account for the testator's personal estate, and the rents
 and profits of his real estate, and that such of those profits as did not
 pass by his will, together with the legacy given to John Hopkins the
 cousin, might be paid to him, and that the residue of the said testator's
 personal estate, after payment of his debts, legacies, and funeral ex-
 pences, might be placed out in proper purchases, according to the direc-
 tions in the testator's will; and in the mean time be improved at inter-
 rest. In Hilary term 1732, sir Richard Hopkins and James Hopkins filed
 a cross bill against the complainants, to have the trusts of the will car-
 ried into execution, and for an account of the real and personal estate
 of the testator. On the 25th October 1733, by a decree in these causes,
 by the master of the rolls, it was declared among other things, that the
 plaintiff John Hopkins was entitled to the rents and profits of the tes-
 tator's real estate accrued since his decease, till some person should
 come

[Notes 231.] come in being, that should be entitled to an estate for life, according to the limitations in the said will; and that he was in [271. b.] like manner entitled to the surplus produce of the said testator's personal estate, after payment of the annual sums charged thereon by the said testator's will; and that the residue of the personal estate was to be laid out in the purchase of lands, with the approbation of the master; and settled to the same uses and upon the same trusts as the real estate, devised by the said testator's will, stood settled; and that until such purchase could be found out, the personal estate should be put out at interest upon government or other securities, with the approbation of the master, in the names of sir Richard Hopkins and James Hopkins, upon the trusts of the will, and the surplus rents and profits of the estates devised to sir Richard Hopkins and James Hopkins, and the estates to be purchased as aforesaid, and also the surplus produce of the said personal estate, until such purchase was made, was to be paid to John Hopkins, the testator's cousin, until some person should come in being, that should be entitled to an estate for life, according to the limitations of the testator's will. On the 18th November 1734, the cause came before lord chancellor Talbot upon an appeal; and the decree was affirmed, with the addition, that the words "in possession" should be inserted in the decree in two places next after the clause "until some person should come in being, that should be entitled to an estate for life."—The report of this cause in Cas. in Eq. temp. Talbot 44. reaches the period of the cause. By the decrees made on these parts of it, the two following important points were settled; that during the suspense, which, by the death of Samuel Hopkins in the testator's life-time, took place during the life of John until he had another son, or until, by his decease without other issue, (if that event had happened,) the possibility of his having another son would have determined, the limitations enured as executory devises; and that, during such suspense, the rents and profits of the real estate being undisposed of by the testator, (his disposition of them having effect only during the minorities of the persons actually entitled,) belonged to the heir at law.—Here the cause was left by lord Talbot's decree.—In June 1736, John Hopkins had a second son named William, who died in the following December.—Upon this, the eldest son of Hannah Dare having attained 21, and being the first tenant for life *in esse*, brought his bill to have a settlement made by the trustees, in which settlement he insisted to be made immediate tenant for life.—In this stage of the business it was argued, that the estate having become vested in the second son of John Hopkins (the testator's cousin) and by his death without issue, the suspense of there being a future child of John Hopkins being again renewed, the ulterior limitations must operate as contingent remainders, and that as there was no estate to support them, they were absolutely void, and the heir at law of course entitled to the estate. In answer to this, it was contended, that the subsequent limitations might be supported as so many distinct executory devises; but that, if it was necessary to consider them as contingent remainders, they were good in their original creation, and supported by the legal fee outstanding in the trustees. These points came before lord Hardwicke in 1738, and his lordship was of opinion, that the preceding freehold being once vested, the ulterior devises thereupon operated as contingent remainders; and having once become such, no subsequent event could make them enure as executory devises; so that they were thenceforth to be considered as contingent remainders; and his lordship was of opinion, that the legal fee in the trustees was sufficient to support them. Mr. Atkyns's report of this case, 1 vol. 579, embraces this stage of

of it. After this there is no printed account of this important case. From the proceedings of the cause, it appears, that John Hopkins, the cousin of the testator, died without issue male, and without having had any son except Samuel and William.—Sarah Hopkins had one daughter, who died an infant and unmarried; and afterwards Sarah died.—Mary had a son and a daughter, who both died without issue; and afterwards Mary herself died.—Elizabeth, the third daughter, intermarried with Benjamin Bond, esquire, by whom she had issue one son, named Benjamin Bond Hopkins, he having taken upon him the name and arms of Hopkins, in pursuance of the directions for that purpose contained in the testator's will.—Hannah, the fourth daughter, intermarried with William Hallet, esquire, and died, leaving one only child, named Hannah. Amey, the youngest daughter of John Hopkins, the cousin, died an infant, and without issue. John Dare also died, leaving one son, also named John Dare; and Francis Dare also died.—In 1772, Mr. Benjamin Bond Hopkins suffered a recovery of the estates, and declared the use to himself in fee simple. In Michaelmas term in the same year, he filed a supplemental bill in chancery against the trustees of the real and personal estate of the testator John Hopkins, and his heirs at law and devisees in remainder, and prayed thereby that the real estates might be conveyed to him and his heirs. On the 8th July 1774, the cause was heard before lord chancellor Bathurst, and his lordship thereupon finally ordered, that the trustees should convey the real estates to Benjamin Bond Hopkins and his heirs, or as he should appoint.—In the execution of powers, too rigid an adherence to the form prescribed cannot be observed: but it is not necessary that the words, or even the form of the power, should be used, if the material circumstances of the power are pursued, and the party appears to have had the subject of his power in contemplation. By a series of acknowledged authorities it is settled beyond all doubt, first, that, to a valid exercise of a power, a reference to or notice of that power is not necessary, if it sufficiently appears that the party intends exercising it: Secondly, that it is considered as sufficient evidence of the party's intention to exercise the power, if his intention appears to be to do that act, which his power authorizes him to do, but which he is not authorized to do without resorting to his power. Thus, where tenant for life, with several remainders over in strict settlement, and with a general power of revocation and new appointment, conveys to a purchaser by lease and release, bargain and sale, or feoffment, without noticing his power, it is a valid, but a very informal and improper execution of the power; for the party cannot vest the fee in the purchaser without resorting to his power, it is therefore evident he intends exercising it; and consequently, if the formalities prescribed by the power are pursued, it will be considered as a substantial execution of the power. Still it is necessary that it should appear to be the intention of the party to exercise the power; and therefore, generally speaking, it is necessary he should mention the property which is the subject of the power. See *sir Edward Clere's case*, 6 Rep. 17. 12 Mod. 469. *Guy v. Dormer*, *sir Tho. Raymond*, 294. *Snape v. Turton*, 2 Roll. Abr. 263. *Fitawilliam's case*, Moore 681. *Tibbett v. Lee*, Hob. 312. *Fitzgerald v. lord Fauconberg*, Fitzgibbon 215. *Tomlinson v. Dighton*, 1 P. W. 149. *Jenkins v. Heyrick*, Hard. 395. 1 Lev. 150. *Campbell v. Leach*, Amb. 740. *Molton v. Hutchinson*, 1 Atk. 558. and *ex parte sir George Caswall*, *ibid.* 559.—In all cases, however, where there is an informal execution of a power, it operates in the mode in which the power operates, not in the mode in which the deed, the form of which is used, would operate. If, therefore, a person having a power of appointment conveys

[Note 231.] under his power of leasing, he may afterwards revoke all but the leases. It is however to be observed, that when a power [271. b.] is exercised for a valuable consideration, in such a manner as shews it to be the intention and agreement of the parties that the use created under it should not be over-reached by the execution of another power, it is contrary to equity that it should be thus over-reached, and, consequently, the unexecuted powers may be so far affected, both at law and in equity, as to be subject to the use created under the executed power. To avoid all disputes upon these heads, it is necessary to express very clearly what uses are and what uses are not, intended to be over-reached by the execution of the powers, both as to the uses actually limited by the settlement itself, and as to the uses to be limited under the powers contained in that settlement. In a marriage settlement the wife and the children of the marriage are the first objects. Unless therefore the parties intend the contrary, all the powers of charging with money should be declared to be subject and without prejudice to the provisions made for the wife and children. With respect to the other powers, the principal of these are the powers of leasing and of selling and exchanging. As it is equally for the benefit of the persons entitled in remainder or reversion as of the tenant for life, that the estate should be properly let out upon leases, there is no reason why the estate of the wife, or any other person claiming in remainder or reversion, should be made paramount to the leases. With respect to the powers of selling and exchanging, the jointure of the wife and the portions of the children may be transferred to the estates to be acquired under those powers, and to the money arising from the sale of the estate, till the new estate is purchased: it is also to be observed, that the sales and exchanges cannot be made without the parents' consent. There seems therefore no reason for exempting any of the uses, except the leases, from the exercise of that power; but, with respect to the leases, these, from their nature, cannot be transferred to the lands to be acquired under the powers, and consequently these should not be subject to the powers of selling and exchanging. The same objection lies, in a certain degree, to powers of raising money by way of mortgage. No person would advance money on mortgages of this nature, if they were to be made subject to the general powers of sale or exchange; and therefore, to prevent all doubt on this head, it should be declared, that the powers of selling and exchanging should be subject to mortgages previously made, unless it shall be with the consent of the mortgagee; and that, in the case of such consent, the lands to be purchased or taken in exchange may be mortgaged to them for their security.—It often happens that powers are given to parties, to be exercised by them when in the actual possession of the estate. In some cases this is done without adverting sufficiently to the situation and probable wants of the parties. Suppose an estate devised by the husband to his wife for her life, remainder to her son for his life, with remainder over in strict settlement; with powers to the son, when in possession, to jointure and charge with portions. During the mother's life the son is not in possession, and consequently is not in a situation to exercise those powers. Now, though it may be improper, and contrary to the intention of the parties, that the jointure to be made by the son should charge the mother's estate, during her life, against her consent, there can be no reason why it should not charge the estate with her consent; neither is there any objection to the son's being enabled to exercise the power in her life-time, provided the jointure does not take effect, so as to be payable, or to charge the estate, till after her decease. It seems therefore
advisable,

advisable, that, in cases of this nature, the son should be entitled to exercise the powers, with the mother's consent, during her life, or to exercise them, subject to her life estate. Sometimes, when the difficulty in question has arisen, it has been attempted to put the party in a situation to exercise the power, by accelerating his possession of the estate. In one case it is clear that this will answer the object intended, that is where *A.* is tenant for life, with the immediate remainder (without any limitation to trustees) to *B.* for life, with a power for *B.* to jointure, when in possession. Here, if *A.* surrenders to *B.* *B.* is, to all purposes, in possession of the estate, and therefore in a situation to exercise his powers. But where there is an intermediate estate, this never can be relied on. If it is expressed in the deed, as it generally is, that it shall be lawful for the party to exercise the power when in possession, under the limitations, and there is a limitation to trustees to preserve the contingent remainders, the first tenant for life can in no wise put the second tenant for life in possession of the estate but by an actual conveyance of his life estate: consequently the party will then be in possession, not by virtue of the limitations of the deed, but by the act of the first tenant for life. For, instead of being tenant in possession for his own life only, as he would be, if he was in possession under the limitations in the deed, he is tenant in possession for the life of another person, with a remainder for his own life; so that he has two estates, which are perfectly distinct, and under the limitations of the settlement he is only tenant for life in remainder. Where these words therefore are inserted, it seems clear the party is not in possession within the words or meaning of the deeds, and consequently not in a situation of exercising his power. Where these words are not inserted, it may be contended that they ought to be implied.—Before we proceed to the last head of this annotation, of the uses not executed by the statute, the following observations are offered on *USES OF RENTS*.—These are executed by the statute; so that, where lands are conveyed to *A.* and his heirs, to the use, intent, and purpose that *B.* or that *B.* and his heirs, may receive a rent, the rent is executed. When therefore lands are conveyed to *A.* and his heirs, to the use, intent, and purpose that *B.* and his heirs may receive a rent, with a declaration that *B.* and his heirs shall stand seised of the rent, to the use of *C.* for life, with remainder over, the rent is executed in *B.* and then *C.* and the remainder-men take only the trust of the rent. If the estate be conveyed to *A.* and his heirs, to the use that *B.* may receive a rent for life; and after his decease, to the use that his first and other sons successively, and the heirs of their respective bodies, may receive the rent; these, it may be contended, are distinct rents; and therefore the rent to the second son may be considered too remote, as being a new rent limited to take effect after an indefinite failure of the issue of the first son. Objections also may be made to recoveries suffered by the father and son, as the tenant to the præcipe being made by the father, he will not be seised of that rent, in which the son's intail subsists. The way therefore to limit the rent is, to grant a rent to a stranger and his heirs, that he may re-grant them to the intended uses.

III. 5. The remaining subject for observation is, *what uses are not executed by the statute*. First, as to uses created by *wills*, it is to be observed, that lands were not deviseable at common law, otherwise than by local customs of particular places, except through the medium of a previous feoffment to uses. The *cestuy que use* might dispose of the use by will: the court of chancery considered the will as a declaration of the use, and compelled the feoffees to convey the lands accordingly.

But

[Note 231.] But when by the statute of the 27th Henry VIII. the possession was annexed to the use, as the use thereby became [271. b.] merged in the land, this indirect power of devising lands was absolutely lost. The 32 and 34 Hen. VIII. gave a power to devise the whole of lands held in socage, and two-thirds of lands held by knight's service. The 12 Car. II. converted knight's service into socage; so that now all landed property, except that which is of the tenure of copyhold, is devisable. But as the statute of uses preceded the statutes of wills, it does not necessarily extend to them. It is true that the statute of uses speaks of persons seised to uses by virtue of wills; but this must apply either to those lands which were devisable by custom;—as when a person seised of lands devisable by custom devised them to *A.* and his heirs, to the use of *B.* and his heirs;—or to uses at common law;—as where a feoffment was made to *A.* and his heirs, to the use of *B.* and his heirs, and *B.* devised the use. To uses of this description the statute extended; but it is difficult to conceive how uses created under the testamentary power given by the statutes of wills can be within the statute of uses. It is said that, though the law will not force the operation of the statute of uses upon devises, to which it is the testator's intention it should not extend; yet it will apply it to those cases to which it is his intention it should extend. This opinion makes it depend entirely on the will of the testator, whether the statute of uses shall or shall not operate upon the devises of his will. Thus, if a devise is made to the use of *A.* for life, with remainders over, if it were to be considered as a limitation under the statute of uses, it would be void, for want of a seisin to serve the uses. It cannot therefore be the testator's intention that it should operate under that statute; consequently the law will not force it under that statute, but leave it solely to its effect under the statutes of wills. But suppose a devise to *A.* and his heirs, to the use of *B.* and his heirs, that would be good, to give the legal fee to *B.* as a limitation under the statute of uses. The testator therefore might intend, and the form of the devise shews he did intend, to raise an use under that statute, and the law, in conformity to his intentions, extends its operation to the devise. But against this it may be argued, that a statute can never be considered as relating to any thing which did not exist at the time of its passing; and therefore, as lands were not devisable till some years after the statute of uses, the statute of uses cannot extend to uses created by devise: that in wills the testator's intention is chiefly considered; and as, by a devise to *A.* and his heirs, to the use of *B.* and his heirs, the testator shews it to be his intention that *B.* should have the legal fee, the law will put that construction on the devise, and give it that operation. At the end of Mr. Hillyard's edition of Shepherd's Touchstone, there is a very learned opinion of the late Mr. Booth on the doctrine of uses. In two copies which the editor has seen of this opinion, made immediately under the eye of Mr. Booth, and delivered by him to the persons in whose custody they now are, and also in a copy of it bequeathed by Mr. Booth, with his other valuable law manuscripts, to Mr. Holliday, the following note is added to it.—“P. S. Powers under wills are not like powers under conveyances operating by way of use. “The execution of a power under a devise is not the limitation of a use; no, not where the devise is to uses: as where there is a devise “to *J. S.* and his heirs, to the use of *A.* for life, remainder to *B.* in tail, “with power for *A.* to limit a jointure, or lease, or charge; here there “will be no seisin in *J. S.* consequently no such use in *A.* or *B.* as is “executed by the statute of uses; consequently, the execution of the “power is no use; it operates as a devise under the statute of wills.”—

See *Popham v. Barnfield*, 1 Vin. 79. *Barchet v. Durdant*; 2 Vent. 313. *Broughton v. Langley*, Salk. 679. Gilb. Uses, 281.—But whether a devise to uses operates solely by the statute of wills, or by that statute jointly with the statute of uses, is, except in a very few cases, a matter rather of speculation than of use; as it is now settled that an immediate devise to uses, without a seisin to serve those uses, is good; and that where the estate is devised to one, for the benefit of another, the courts execute the use in the first or second devise, as appears to suit best with the intention of the testator. 2dly, *With respect to copyhold estates*, the statute of uses does not extend to them, as it is against the nature of the copyhold tenure that any person should be introduced into the estate without the consent of the lord. Gilbert's Tenures, 170. 3dly, *With respect to leases for years*;—these estates are not executed by the statute. But this must be understood of leases actually in existence at the time of their being assigned to the use. Therefore, if *A.* possessed of a lease for years, grants it over, or assigns it, to *B.* and *C.* to the use of *D.* all the estate is in *B.* and *C.* and *D.* only takes a trust or equitable estate. But if *A.* being seised of lands in fee, makes a feoffment to the use of *B.* and *C.* for a term of years, this term is served out of the seisin of the feoffee, and is executed by the statute.—It is the same if he bargains and sells the estate, of which he is seised in fee, for a term of years. Gilb. Uses, 198, Dyer 369. 2 Inst. 671.—Such are the general outlines of the doctrine of uses; one of the most important parts of the law, as all the landed property of the kingdom is, either directly or indirectly, regulated by it. It is to be observed, that one of the chief objects, both of the legislature and the judicature of this kingdom, in their regulations upon this subject, has been, on the one hand, to guard against those restraints upon alienation, which are incompatible with the welfare of a free and commercial people; and on the other, to admit of reasonable settlements and provisions being made for wives and children, and the general wants of families. Experience seems to shew that they have accomplished their object. This fully answers the objections which foreigners make to the nature of our family-settlements, that we exclude the ancestor, whose character is known to us, from the disposal of the property; and intrust it to the children, with whom we cannot but be perfectly unacquainted.—So detrimental has an unqualified and unlimited power of settlement been found even in France, that it has been made a question there, whether it would not be for the advantage of the nation at large, that all settlements and trusts should be abrogated. This question, so far as it related to moveables, was, by the order of Louis XV. proposed in the year 1744 by the Chancellor D'Aguesseau to all the parliaments and superior councils of France. See *Questions concernant les Substitutions, avec les Réponses de tous les Parlemens et Cours Souverains du Royaume, et les Observations de M. le Chancelier d'Aguesseau sur les dits Réponses.* Toulouse, 1770. And see also *Commentaire de l'Ordonnance de Louis XV. sur les Substitutions, par Mons. Furgole.* Paris, 1767.

It is hoped that the importance of the subject will be thought a sufficient apology for the great length of the foregoing note. Lord chief baron Gilbert's Essay upon Uses and Trusts, considered in the only light in which it can be considered with justice to its author, as an unfinished sketch, is intitled to great commendation. It certainly contains several most profound and learned observations, but in many instances is very defective and erroneous. The want of a comprehensive and systematic treatise upon it, which was mentioned in the former edition of this

this note, is now supplied by Mr. Saunders's *Essay on the Nature and Laws of Uses and Trusts*. The account given in that work of the Doctrine of Uses, as it stood before the stat. of 27 H. 8. is particularly interesting.

[272. a.]

[Note 232.] (1) By 32 H. 8. inhabitants of corporate towns worth 40s. in goods, may try felonies in sessions and gaol deliveries for such towns, and this is not repealed by subsequent statutes concerning jurors. 1 Ven. 366. The 4th and 5th W. and M. c. 24. requires that all trials in the courts at Westminster, or before the judges of *nisi prius*, oyer and terminer, or gaol delivery, or general sessions of the peace, must be by jurors, each worth 10l. *per annum*, of freehold or copyhold in the same county, if the trial be in England; and by jurors worth 6l. *per annum*, if in Wales; and talesmen must have 5l. *per annum* in England, and 3l. *per annum* in Wales, excepting strangers returned *propter medietatem lingue*.—But by the 14th and 15th Ann. c. 16. no hundreders are required, except in prosecutions criminal, and on penal statutes, because in other cases the *venire* shall be *de corpore comitatûs*.

[273. a.]

[Note 233.] (1) Here Littleton treats of releases which operate by enlargement of the estate of the releasee. To make releases operate in this manner, it is necessary that the releasee, at the time the release is made, should be in actual possession of, or should have a vested interest in, the lands intended to be released; that there should be a privity between him and the releasor; and that the possession of the releasee should be notorious. Hence a tenant by *elcigii*, or statute-merchant, is not capable of a release that is to operate by enlargement. But a tenant in dower or by the courtesy are capable of that species of release, as they have notoriety of possession and privity of estate, with respect to the releasor. See Roll. Abr. 400, 401. and Gilb. Ten. To the circumstance requiring the possession of the releasee to be notorious, the statute of uses furnishes an exception, exemplified in the effect which is allowed to the conveyance by bargain and sale for a year, and a release to enlarge that estate. At the common law, till entry or attornment, the lessee was not capable of a release. A bargainee has a vested interest immediately after the execution of the bargain and sale, without any entry, attornment, or other act of notoriety whatsoever.

[Note 234.] (2) Because no person is intitled to an action of waste but he who has an estate immediate in remainder or reversion, expectant on the estate of the person committing waste. See ant. note 2. to page 218. b.

[273. b.]

[Note 235.] (1) By the release the tenant for life in remainder obtains the immediate remainder in fee.

[Note 236.] (2) Here the release operates by *mitter l'estate*; which is, where two persons come in by the same feudal contract, as joint-tenants or coparceners, and one of them releases to the other the benefit of it. In releases which operate by this last mode, the releasee being supposed to be already seised of the inheritance by virtue of the former feudal contract, and the release only operating as a discharge from the right or pretension of another seised under the same contract, words of inheritance in the release are useless; but where the release operates by enlargement, the releasee having no such previous inheritance, and feifs being either for life or in fee, as they are originally granted, the release gives

gives the estate to the releasee for his life only, unless it be expressly made to him and his heirs.

[274. a.]

(1) Here Littleton treats of releases which operate by *mitter le droit*. [Note 237.] Releases of this kind must be made either to the disseisor, his feoffee, or his heir. In all these cases the possession is in the releasee; the right is the releasor; and the uniting the right to the possession completes the title of the releasee: but the different degrees of title in the disseisor, his feoffee, or his heir, give the releases made to them different operations. They all agree in this respect, that no privity is required, or indeed can, from the nature of the case, exist between them and the releasor.

[274. b.]

(1) All releases *per mitter le droit* also agree in this, that words of [Note 238.] inheritance are not necessary in releases which operate by *mitter le droit*; as the disseisor to whom, or to whose feoffee or heir, that release is made, acquires the fee by the disseisin, and therefore cannot take it under the release. In this respect they differ from releases by enlargement.

[275. a.]

(1) Here Littleton shews the operation of a release *per mitter le droit*, [Note 239.] when made to the feoffee of the disseisor. The feoffee is in by title; his estate cannot be divested or disaffirmed, but by an act equal to that which created it. A release does not affect his possession or title, but discharges it from the right of the releasor; so that whether the whole fee is in the feoffee, or carved out into particular estates, it remains unaltered by the release, except as it is discharged by it from the right of the releasor.

[275. b.]

(1) Here the release is to the disseisors themselves. They have only [Note 240.] a bare possession, preceded by no previous conveyance, and founded on no right or title, and therefore the release of the disseisee who has the right passes the right to the disseisor to whom it is made, and his holding out his companion is an act of notoriety equal to that by which the joint estate by disseisin was originally acquired. Thus the possession of each of the estates being founded on an equal degree of title, the disseisor to whom the release is made, having the right, must be preferred to him who has none: so that, in this case, the release is tantamount to an actual entry and feoffment.

[276. b.]

(1) This is upon the same principle, that, where the title to the pos- [Note 241.] session is equal, the party who obtains the right shall be preferred.—So, by the modern law, where the equity of the parties is equal, he who has the law is to be preferred.

[277. a.]

(1) Littleton having treated of releases *per mitter le droit*, when [Note 242.] made to the disseisors themselves and their feoffees, now treats of their operation, when made to the heir of the disseisor. In note 1. to page 239, it was observed, that a disseisor has a mere naked possession, unsupported by any right, and that the disseisee may restore his possession, and put a total end to the possession of the disseisor, by entry. But, though the feoffee of the disseisor comes in by title, still the right of possession remains in the disseisee, and he may equally enter on the feoffee as on the disseisor; so that a release *per mitter le droit* gives both to the disseisor and his feoffee the right of possession and the right

of property: but if the disseisor dies, the entry of the disseisee is taken away, and a presumptive right of possession is in the heir; so that the release of the disseisee only passes the right of property.

[277. b.]

[Note 243.] (1) The observations made on note 1. to page 275. a. note 1. to page 276. b. and the note to the preceding page, apply to the cases put by Littleton in this and the following Section, and by sir Edward Coke in his commentary. The whole of the doctrine contained in this chapter is particularly well explained by lord chief baron Gilbert in his treatise on tenures.

[Note 244.] (2) *The reason of this case in the book here cited is, that the condition is like a covenant between them; and he is estopped from claiming it otherwise; and the diversity following seems to warrant this.* Post. 278. b.—Lord Nott. MSS.

[283. a.]

[Note 245.] (1) *Yet if the matter be pleaded specially, that is not cause of demurrer, though it amounts to the general issue, because it has no colour of matter in law, as was adjudged by justice Walmesley.* Hob. 127.—Lord Nott. MSS.

[285. a.]

[Note 246.] (1) *5 Car. B. R. Sir John Bodvill's case. Resolved contra; scilicet, that it was a mere personal action, and not mixt; et ideo, annuity in Wales by bill lies well; where, if it had been mixt, the action ought to have been brought by original, per 34 H. 8. ca. 6. upon argument by the court on error brought.* Cro. 170. L. Nott. MSS.

[285. b.]

[Note 247.] (1) *Hob. 163. accord. whether the action be brought against the disseisor only, or against him and the tenant; but if the same person be disseisor and tenant, then he may plead a release of actions real.* L. Nott. MSS.

[290. a.]

[Note 248.] (1) *B. R. Greville and Bracebridge's case.—Nota, P. 1656, the point of a special verdict was as follows: The consor leased for years and died, his heir within age, whether the execution (which was admitted on all sides to be void against the infant), was good to bind the term for years. Glyn, chief justice, and the court, and also Wyndham, at the bar, denied peremptorily the case of lord Coke to be law, unless it is understood that the marriage was held before the statute; for then it is true that it shall not be extended, sed non quia est privilegium for the infancy of the heir; but because the wife is in by her husband, and therefore has the better possession, and thus comes in haramount to the statute; but if the statute was before the marriage, then clearly the dower of the wife is extendible; for the endowment breaks the descent, and she is in by her husband of a possession charged, and there is no prejudice to the infant heir; so that the freehold is out of him, without any rent being incident to his reversion. Nota, the possibility that the wife might die during the minority, and before the extent was satisfied, was not regarded. And nota, M. 6, 7 Eliz. C. B. in Egerton's Reports (cited by Noy, in his lecture in Lincoln's Inn), a like case was adjudged. Feme tenant in tail confessed a judgment, took husband, and died. The baron was tenant by the curtesy, and the statute was extended, and then he surrendered to the heir, and was extended still, and well, per curiam, for the reversion was not prejudiced. And afterwards, Trin. 1656. resolved, that an extent lay well*

well against the lessee, because the infancy of the heir is a personal privilege. (Quare, if the rent is gone. It seems so; but the rent was not regarded.) Lord Nott. MSS.

[290. b.]

(1) In a former note an attempt was made to give the reader an [Note 249.] *Elementary Outline of the Doctrine of Uses*; an attempt will now be made to give him a like ELEMENTARY OUTLINE OF SOME LEADING POINTS IN THE DOCTRINE OF TRUSTS AFFECTING REAL PROPERTY. An extract from 1 Eq. Ca. Abr. 383. seems a proper introduction to it.

I. By the 27 Hen. 8. cap. 10. it was provided, that the use and possession should always be united; by declaring, that, "where any persons were or should be seised of any lands, &c. to the use of, or in trust for any other person, by reason of any bargain or sale, feoffment, fine, recovery, contract, agreement, will, or otherwise, by any means whatsoever, cestuy que use, or he to whose use the lands were settled, in fee simple, fee tail, for life, years, or otherwise, or he who had any use in reversion or remainder, &c. should be deemed to be in possession of the land, to all intents and purposes; and where one was seised of lands, to the use or intent that another should have a yearly rent out of the same lands, cestuy que use, or he to whose use the rent was granted, should be deemed in possession thereof, viz. of the rent, and of like estate as he that had the use." But, notwithstanding this statute, there are three ways of creating a use or trust, which still remain as at common law; and this use or trust is a creature of the courts of equity, and subject only to their controul or direction. First, where a man seised in fee, raises a term of years, and limits it in trust for *A.* &c. this the statute cannot execute, the termor not being seised. 2dly, Where lands are limited to the use of *A.* in trust to permit *B.* to receive the rents and profits, for the statute can only execute the first use. 3dly, Where lands are limited to trustees, to receive and pay over the rents and profits to such and such persons, for here the lands must remain in them to answer those purposes; and these points were agreed to in *Trinity term, 1700, per curiam, in Simson v. Turner.*

II. THE BEST DEFINITION OF A TRUST IN EQUITY is that which is given by the old writers of an use at common law; viz. "A confidence which is not issuing out of the land, but a thing collateral, annexed in privity to the estate and to the person touching the land, *scil.* that *cestuy que use* shall take the profits, and that the terre-tenant shall make estates according to his direction." These are the words used in *Chudleigh's case, 1st Rep. 121. a. b.* for the definition of an use. Thus, he who hath a trust hath neither *jus in re* nor *jus ad rem*; but only a confidence and trust, for which he hath no remedy at the common law, but only a remedy by a subpoena in chancery. This is the important distinction between trusts and commons, rents, and such like hereditaments. These follow the lands, into whosoever hands they come; and therefore, if a person is disseised, dispossessed, abated, or intruded upon, still the land in the hands of the disseisor, dispossessor, abator, or intruder, is subject to the rent, common, &c.—But, generally speaking, it is otherwise with respect to a trust, unless the estate of the disseisor, &c. from his having notice of the trust, or upon some other ground, is, in the consideration of a court of equity, considered as charged with the trust.

III. This doctrine is considered as particularly important, in its influence on limitations to TRUSTEES FOR PRESERVING CONTINGENT REMAINDERS, and as it is the foundation of the doctrines of equity on cases arising

[Note 249.] arising from the destruction of those remainders by the trustee. This was discussed at great length in Chudleigh's case, [290. b.] 1 Rep. 120. a. The doctrine laid down in that case, with respect to the destruction of contingent uses at common law, appears to be, that, to the standing seised of an use at common law, two things were necessary; one, that the estate upon which the uses were declared should subsist; this was called privity of estate: the other, that the party so standing seised should have notice of the use; this was called privity to the person. If either of these failed, the use was gone. Whenever, therefore, a person seised of a life estate in possession, in trust for another, conveyed by fine, feoffment, or recovery, the person taking under that conveyance acquired, in consequence of the forcible nature of those modes of conveyance, a new estate, and thereby the privity of estate was necessarily lost. But if a person having a fee conveyed that fee, then the privity of the estate remained. Still, if the grantee had not notice of the trust, the privity to the person was gone. In the latter instance, however, this important distinction was made, that, if the grantee was not a purchaser for a valuable consideration, the law implied notice; that is, presumed him to be acquainted with the use; this continued the privity to the person. Thus stood the doctrine of the destruction of contingent remainders at the common law. The statute of uses made no difference, as to the legal consequences of this doctrine, in those cases where the trustee had an estate for life only. If he conveyed by fine, feoffment, or recovery, the grantee necessarily took an estate in fee simple. This, as was observed before, was a new estate. Privity in estate therefore failed. But in those cases where the whole fee was conveyed to the trustees, to several uses in strict settlement, it was executed in the *cestui que use*; and then, where no use was limited to the trustees themselves, nothing remained in them, so that, in this respect, there was no difference between them and strangers to the deed. An actual estate might, however, be limited to them. Of this practitioners avail themselves, to support contingent remainders, and prevent their being destroyed. This gave rise to the limitation, now so frequently inserted in wills and settlements, of an estate to trustees for preserving contingent remainders. To present this pointedly to the reader's observation, it may be useful to state succinctly the gradual progress of settlements. The *first attempt at a settlement* appears to be, the creation of an estate in fee simple conditional. This had two effects, that of suspending the absolute power of alienation till the birth of issue, and that of preserving the inheritance in a particular line of succession, so as to make it devolve through a particular line of heirs, in exclusion of others. Bracton mentions, lib. 18. that, by this mode of limitation, the estate might be settled by a person on his eldest son, and the heirs of his body,—and if he had no heirs, or having heirs, if they afterwards failed, then to his second son, and the heirs of his body, with like limitations to his other sons successively, and their respective issue; and in default of all these, to the party himself, and his heirs. This appears the most extended and complicated plan of settlement which could be effected through the medium of this mode of limitation. Then came the statute *de donis conditionalibus*. That statute took away the power of alienation of the tenants in fee simple conditional, and thereby preserved the fee to the issue, and the reversion to the donor. This naturally gave rise to the complex modification of property, to which the reversion of an estate, out of which an estate tail is first carved, is now subject. By this mode of settlement land was at once completely taken out of commerce, and involved in the intricate fetters

fetters of multiplied entails. This may be considered as *the second stage of settlements*. But entails were again subjected to the alienation of the tenant in tail, by the introduction of common recoveries, about the reign of Ed. 4. and the introduction of fines, by the statutes of 4 H. 7. and 32 H. 8. To prevent this, in some measure, women seised of estates tail, of the gift of their husbands, were prohibited by the 11 H. 7. ch. 20. from alienating these estates; and husbands, seised in the right of their wives, were prohibited from alienating those estates by the 32 H. 8. ch. 28. To bring their estates within the protection of these statutes, it became usual to limit the husband's estates to the husband and wife, and the heirs of the body of the wife by the husband, —and to limit the wife's estates to the husband and wife, and the heirs of the husband by the wife. The consequence of this was, that the estate was secured to the parents during their lives, and was secured to the issue against the act of either parent. Nothing short of the concurrent act of both parents could deprive the issue of the estate. A more rational system of settlement (particularly after the statute of the 32 H. 8. ch. 28. had enabled tenants in tail to lease), could not perhaps be devised. The estate might be limited to the male or the female line, at the pleasure of the parties. It was protected against the caprice or extravagance of one of the parties, so long as the other refused to co-operate in unfettering the intail, while there was a provision for unforeseen events, by their co-operation during their joint lives; and, during the life of the surviving parent, the same effects might be produced by the co-operation of that parent and the issue; and after the decease of both parents, the estate was restored to the issue, with a complete power of alienating it. It may be a question, whether, even now, this mode of settlement be not the most proper for all those cases, where, by reason of the smallness of the property, or any other circumstance, the intricate system of settlement now in use is not proper. This may be described as *the third stage of settlements*.—A *fourth* was effected, by limiting life estates to the parents, with remainders to their unborn children by purchase. This was introduced, soon after it was discovered how completely estates tail of every description were subject to the alienation of the tenant in tail by fine or recovery. But it did not soon become general. It was obvious, that, in every case where the parent was himself the immediate reversioner, and in every case where, the parent not being the immediate reversioner, the concurrence of the immediate reversioner could be procured, the unborn children were at the mercy of the parent. This gave rise to the introduction of trustees for preserving contingent remainders. This limitation is supposed to have been first discovered and introduced into practice by sir Orlando Bridgman, during the time of the usurpation. Whatever doubts may formerly have been entertained on this head, it is now settled beyond the reach of controversy, that, under a limitation of this description, the trustees take a vested estate of freehold. The interposition of this estate prevents the tenant for life from surrendering to him in the reversion, and if he aliens his estate by any of those modes of conveyance, which would otherwise destroy the contingent remainders, and by a necessary consequence be a forfeiture of the estate, it authorizes the trustees to enter for the forfeiture. This, to use one of the explanatory expressions inserted in these limitations, “prevents the contingent remainders from being defeated or destroyed.”—Such are the circumstances which appear to have given rise to this most frequent and important limitation, and the effects it produced; and thus it stands with respect to the alienation of the tenant for life, without the concurrence
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[Note 249.] or co-operation of the trustees. With respect to those cases [290. b.] where the trustees co-operate in the alienation, it is obvious the estate of these trustees is that which we have before mentioned, of a person seised of a life estate in trust for another; and conformably to what we have before observed upon the alienation of a person so seised, his fine, feoffment, or common recovery, acquires him an estate by disseisin, and vests the estate so acquired by him in the purchaser. Here then the privity of estate fails; but courts of equity again interfere. This alienation of the trustees is evidently a breach of their trust. If, therefore, the conveyance be without consideration, and without express notice, the court implies notice. If it be with notice, then, whether with or without consideration, the courts make the purchaser hold the lands upon the trusts to which they were subject in the hands of the trustees. But if the conveyance is for a valuable consideration, and without notice, then the courts punish the breach of trust, by decreeing them to purchase lands of equal value to those, of which, by their breach of trust, they have deprived the parties, and to settle them to the uses and upon the trusts of the lands conveyed. See *Mansel v. Mansel*, 2 Peere Will. 678. *Pye v. Gorge*, 1 P. Wms. 128. and Mr. Fearn's *Essay on Contingent Remainders*, fol. 241, &c. It only remains to observe, that, though the destruction of contingent remainders, by the trustee, is punished in the manner we have mentioned; still, where there is a bare tenant for life for his own benefit, with remainders over in contingency, if he destroy the contingent remainders, it is no breach of trust, for where there is no trust, there cannot be a breach of trust; there is no ground consequently for a court of equity to interfere in that case. It is therefore left to its legal consequences. Titles however depending on the validity of an act of this nature can never be recommended. The power of tenant for life to destroy contingent remainders is *strictissimi juris*. It certainly therefore can never expect favour,—or any thing beyond mere support. It is to be observed, that it has not yet been decided, whether a legal estate of freehold created by one deed will support contingent remainders created by another. The prevailing opinion appears to be, that, if ever this point should come before a court, the decision will be for the affirmative. It sometimes happens that contingent remainders are limited to the sons of a person who has himself no life estate. Where this is done, it is proper to direct in what manner the rents shall be applied during the suspense of the contingent remainder, and the vacancy of a person beneficially entitled. This may be done by directing the trustees, during that vacancy or suspense, to pay the rents to the persons next entitled for the time being, under the uses or trusts of the instrument, to a vested remainder in the estates, but without prejudice to the estate of the children afterwards coming in existence. If, no such direction is given, the settler and his heirs would probably be considered as intitled to the then intermediate profits, as an undisposed part of the inheritance. The *fifth and ultimate* stage of settlements appears to have been effected by the introduction of powers under the statute of uses. By these, as complete a dominion over the property which is the subject of the settlement is given to the party, and his trustees, as if it were not the subject of settlement; at the same time that the property or its value is completely secured to the parties, to their issue, and to all other claimants. Considered in this point of view, the plan and effects of a marriage settlement, as such settlements are now usually framed in England, are very striking; and will bear a comparison with the marriage contracts of any other country. These, generally speaking, either fetter the property so much as to

to take it entirely out of commerce, as is done by the *tailzies of Scotland with irritant and resolute clauses*, or, like their settlements of what is called *simple destination*, leave it so much under the controul and direction of the parents, as to give little security for its safe transmission to the issue.

IV. *Trustees either are such by the express or implied declaration of the party, or are made such by a court of equity.*—In a court of equity it is sufficient that the trust appears; and if the party creating the trust has not appointed his own trustee, the court of equity will follow the legal estate, and decree the person in whom it is vested to execute the trust. See ant. 113. note 2. it being a rule, which admits of no exception, that a court of equity never wants a trustee.

V. Another rule, which admits of no exception, is, that *equity acts upon the person, and not upon the thing*. The consequence is, that if the estate, of which the party is actually seised, is not commensurate to the trust, equity cannot enlarge it. Supposing therefore *A.* to be seised of an estate in fee simple, in trust for *B.* and his heirs, and that *A.* conveys the legal estate to the use of *C.* for life, with remainders over; *C.* and the remainder-man would be trustees for *B.* and *B.* being entitled to the whole equitable fee, would be entitled to a conveyance of it to him. If, therefore, the modifications of the legal estate be such as enable parties to convey the fee, a conveyance must be made by the same means as if it were a conveyance for a valuable consideration. Consequently, if any of the parties should be seised in tail, a fine, or recovery, as the case happens, would be necessary; and if the tenant in tail should happen to be an infant, the infant cannot convey, without levying a fine or suffering a recovery. The stat. 7 Ann. chap. 19. authorizes infants to convey in the manner therein mentioned, under the direction of the court of chancery. This has been held to extend to their levying fines and suffering recoveries, where the nature of their estates have required these assurances to perfect the conveyances. See 3 Atkyns 164. 479. and 559. Com. Rep. 615. Barnes 217. But sometimes the modifications of the legal estate are such, that even fines and recoveries are not sufficient to convey a fee. In this case application to parliament is necessary.

VI. It is sometimes doubtful, *whether an estate be legal or equitable*. The leading authorities upon this point are *Burchet v. Durdant*, 2 Vent. 312. *Broughton v. Langley*, 2 Salk. 679. *Shepherd's Touchstone*, 483. *Simson v. Turner*, 1st Equity Cas. Abr. 383. *Lady Jones v. Say and Sele*, 8 Vin. 262. *Silvester v. Wilson*, 2 Term Rep. 444. and *Thong v. Bedford*, 1 Bro. Cha. Cases, 313. The result of these cases seems to be, 1st, That a devise to *A.* and his heirs, in trust for *B.* and his heirs, without any ulterior words, is an use executed by the statute in *B.* and so also would be a devise to *A.* and his heirs, in trust to permit *B.* and his heirs to receive the rents and profits. 2dly, That a devise to *A.* and his heirs, with directions to dispose of the estate, or of the rents, in such a manner as necessarily requires the legal estate should reside in him, will of course vest the legal estate in him. 3dly, There seems ground to contend, that a mere devise to *A.* and his heirs, upon trust to receive the rents and pay them over to *B.* should give the legal estate to *A.* To this the case of *Silvester v. Wilson* nearly approaches. 4thly, Where an estate is given to *A.* and his heirs, upon trust to dispose of the rents in a particular manner during the life of *B.* and after the decease of *B.* to stand seised of the lands, to the uses therein mentioned; there, as the nature of the trust does not require that the legal estate shall reside in *A.* for a longer term than the life of *B.* the court will not consider

[Note 249.] sider the use to be executed in him for a longer term than the life of *B.* but will consider the use as executed in the trustee during the life of *B.* and afterwards in the cestuy que use. 5thly, Where there is a limitation to one for life, remainder to trustees and their heirs, for preserving contingent remainders, and the estate of the trustees is not restrained to the use of the tenant for life; in a deed the trustees would certainly be considered as taking the whole fee. But in a will, as the nature of their trust requires that they should take the legal estate only during the life of the tenant for life, and the subsequent devise is generally introduced by the words, "and after the death of the tenant for life," there seems reason to contend, they should be considered as taking the legal estate for the period of his life only; that being evidently the testator's intention, which in wills has so powerful an operation in controuling the legal operation of the words. See *Shapland v. Smith*, 1 Bro. Ch. Ca. 75. and *Boteler v. Allington*, *ibid.* 72.

VII. There is a *distinction between powers and trusts*. Devises are sometimes framed in such a manner as to make it uncertain whether the legal estate is vested by them in the trustees, upon trust to dispose of it according to the directions of the testator, or whether the legal estate is suffered to descend upon the heir at law, or is devised to others, with a power to the persons mentioned for that purpose by the testator to dispose of it. This is very important, and sometimes not clearly to be ascertained. See ante fo. 113. a. note 2. on the devise of an estate to be sold by executors, where it vests the estate in the executors, and where it merely gives a power to sell it. It is observable, that, where there is a devise to executors to sell, the statute of 21 H. 8. makes it lawful for one of the executors to sell without the other; and in *Bonifant v. Greenfield*, Cro. Elis. 80. it was decided, that this statute extends equally to those cases where the legal estate is devised to the executors, as to those where a mere power is given to sell. But the taking of the conveyance from one executor only is liable to objections. One is, that the other executor may have previously sold; in which case the first vendee would be preferred. The other arises, where the will expressly requires that all the trustees should join in the receipt for the purchase money.

VIII. By the stat. 29 Cha. 2. cap. 3. sec. 8. it is provided, "*That all declarations and creations of trust in lands or hereditaments must be in writing; signed by the party, or by his last will in writing, or else void, except trusts arising by implication of law, and transferred and extinguished by acts of law.*" A person purchasing land in the name "of another" has always been held to be within this description. But it has also been held, that this implied trust may be rebutted by circumstances in evidence; and therefore, where a father has purchased in the name of a son, or a grandfather in the name of a grandson, it has often been held to be intended as an advancement for the son or grandson, and not as a trust for the purchaser. This construction of trusts by a court of equity is conformable to the construction of uses by the courts of law. There a feoffment without consideration, when no use was declared, was always held to operate to the use of the feoffor. But when it was to a son or grandson, the consideration of blood intervened, and it was held to operate to the use of the son or grandson. This doctrine is often resorted to in the case of grants of copyholds, where the son of a grantee is a nominee. There the implication in favour of the son is not so strong, as there is a necessity of mentioning some life, for the purpose of filling up the estate. Yet in these cases, with some exceptions (see particularly *Lane v. Dighton*, Amb. 409.) it is considered

so far an advancement for the child, that it is incumbent on the person claiming against the child to shew that it was not so intended. In the case of Dyer and Dyer, heard in the exchequer, Nov. 20, 21, and 27, 1788, this doctrine was very fully entered into, and explained with the greatest learning and perspicuity, by the then chief baron Eyre. Watkins on Copyholds, 216.

IX. The favour which is shewn to old tenants, by granting them a renewal of their leases, preferably to a stranger, has given them, in the eye of the law, an interest beyond their subsisting term; and this interest is generally termed their *tenant right of renewal*. This is particularly applicable to leases from the crown, from the church, from colleges, or from other corporations. In these cases, it often happens that the situation of the parties is such, that there are successive renewals of the lease, or successive enlargements of it, by reversionary grants. On the one hand, the property is more valuable to the actual tenant than any other person; he can therefore afford to pay more for the renewal than another. On the other, there is a natural partiality in the lessors to the present tenants, particularly if they, or those under whom they claim, have long been tenants of the land in question. These circumstances have produced what is called tenant right. Attempts have been made to establish an obligation in landlords to renew, but they have not succeeded. The renewal, therefore, is still a matter of favour and of chance; but is so far valuable, that it enhances the price of the property on sales. Provisions for renewal are inserted in mortgages and settlements; and the right of parties to this chance of renewal is guarded by courts of equity. In mortgages of this species of property, where this chance of renewal exists, there should always be inserted in the mortgage deed a covenant from the mortgagor, for the renewal of the lease, and for vesting such new lease in the mortgagee; with an agreement, that, if the mortgagor neglects to renew, it shall be lawful for the mortgagee to renew, and that the fine and expences of renewal shall be a charge upon the premises, and bear interest. In settlements also there should be a power authorizing the trustees, from time to time, to renew the leases, and for that purpose to raise money by mortgage. Where these provisions are not made, the fine and expences are to be paid by the persons having the actual life interest, and those entitled afterwards, each contributing proportionably to their respective interests. If the actual tenant for life advances the whole of the money, and dies, without having been repaid it, the whole is a charge upon the leasehold premises, and the personal representatives of the tenant for life are entitled to claim the whole. But if the leasehold is charged with annuities, the annuitants are not bound to contribute. See *Pickering v. Bowles*, 1 Brown's Chan. Ca. 197. and the cases there cited, and *Nightingale v. Lawson*, *ibid.* 440. As to the protection afforded by the courts of equity to persons entitled to this tenant right, courts of equity have so far recognized the tenant right to be a real benefit, and, as such, entitled to their protection, as to decree, that new or reversionary leases (gained by undue means or supposition of the tenant right of renewal), should be for the benefit of the persons interested in the ancient leases; and consequently, that those who obtain such new leases, and were thereby legally possessed of them, should be trustees for that purpose. The cases on this head may be divided into three classes. The first, where the renewal has been obtained by persons having no beneficial interest in the old lease, and no connexion with the lessee, and has been obtained by a suggestion of what was false, or a suppression of what was true. The second, where the parties obtaining the renewal

[Note 249.] have no beneficial interest, but are connected with the old lessee, as guardians, trustees, or executors. The third, where [290. b.] the persons renewing have only partial and limited interests, as tenants for life, mortgagors, or mortgagees; in all these cases the parties renewing have been uniformly declared trustees for the persons beneficially interested in the ancient lease, either wholly or in part, according to the particular circumstances of the case: the court presuming that the new lease was obtained by means of the connexion with, or reference to, the interest in the ancient lease. The cases on the doctrine of the tenant right of renewal are numerous. One of the most important of them is that of *Rawe v. Chichester*, Amb. 715. Another very important case on this learning, is that of *Lee v. Vernon*, heard on appeal to the house of lords, 11 May 1776. The reasons for the appellant in that case were drawn up by the present editor's most learned predecessor in this work, and from them most of the preceding observations under this head are extracted. See the late case of *White v. White*, 4 Ves. jun. 33. 9 Ves. jun. 554.

X. It frequently happens, that, *where a real estate is limited in strict settlement, and a leasehold for years or other personal estate is intended to be settled upon corresponding trusts*, the settlement is made by assigning the leasehold estate to trustees, and declaring they shall stand possessed of it, upon such trusts as are previously declared of the real estate, or as near thereto as may be, or as the rules of law and equity will permit. This should never be done. The nature of real and personal estate is so different, as to make it almost impracticable to frame such a set of trusts, as will, in every possible event, or even in the common contingencies, carry the personal estate in the same course of devolution as the real estate; and the modes of doing it are so various, that hardly two professional men would agree upon the same plan. The best method, therefore, is, to insert a complete set of limitations for the personal estate. If, however, from the smallness of the property, it is thought advisable to do it by way of reference to the limitations of the real estate, a declaration may be inserted, expressing that the leasehold or personal estate shall not vest absolutely in any child or children of any tenant for life, unless or until he, she, or they shall attain the age of twenty-one years, provided however that such child for the time being may, during his minority, be entitled to the rents and interest. The nature of leasehold for lives is much more analogous to that of estates of inheritance; and therefore, generally speaking, may be settled by reference to previous limitations of the fee simple estate. The short mode of reference may be used in the power of sale usually inserted in settlements, where the parties are authorized by it to purchase leaseholds for years. See *Foley v. Burrell*, 1 Bro. Cha. Cases, 274;—and *D. of Newcastle v. Lady Lincoln*, 3 Ves. jun 387.

XI. It was observed before, that one of the principal objects of the legislature, in passing the statute of uses, was to restore, in some measure, the notoriety of the old common law conveyances; but that their views, in this respect, were almost totally defeated, by the introduction of conveyances by lease and release, and by the preservation of uses under the appellation of trusts. The legislature has, at different times, made attempts to remedy the mischief arising from the secret transfer of property, to which this statute has given rise. Among these attempts may be reckoned the statutes against fraudulent conveyances and devises, 13 Eliz. c. 5. 27 Eliz. c. 4. and 3 W. & M. c. 14. but particularly the statute of 29 Car. II. c. 3. commonly called the Statute of Frauds and Perjuries, which provides against conveying any lands or hereditaments

hereditaments for more than three years, or declaring trusts of them, otherwise than by writing. See ant. 48. a. not. 3. With the same views have been passed the acts for registering deeds respecting lands in the West, East, and North Ridings of the county of York, and in the county of Middlesex.—2 & 3 An. c. 4. 6 Ann. c. 35. 7 Ann. c. 20. and 8 Geo II. c. 6. Upon a similar principle was passed the salutary and beneficial act of the 17th of his present majesty, c. 26. for registering the grants of life annuities. With respect to the last statute, it is to be wished, that the legislature would enable persons redeeming or re-purchasing annuities granted by them to enter an account of such redemption or re-purchase upon the register; for as it is an impeachment of a person's credit, that annuities of this nature should be recorded against him, it is but reasonable, that, when he has redeemed or re-purchased them, that should be as publicly known and ascertained as his grant of them. But for want of some regulation of this kind, persons lie under the imputation of being subject to the payment of annuities, after they are liberated from them. On the statute of the 29 Car. II. c. 3. the courts have decided, that it was made with a design to prevent, either in marriage or in any other treaties, uncertainty, perjury, and contrariety of evidence, the cases not liable to these inconveniencies are not within it, See 1 Eq. Ca. Ab. 19. The courts seem to have favoured a like equitable construction of the statutes for the registration of deeds. Thus, in the case of *Le Neve v. Le Neve*, 1 Vez. 64. lord Hardwicke decreed, that if a deed respecting lands, in any of the register counties, is not registered, and afterwards the same lands are sold or mortgaged by a deed properly registered; if the person claiming under the second deed has notice of the first deed, the person claiming under the first deed, though it is not registered, shall be preferred to him. The general doctrine of these decisions is founded on principles both just and equitable, when applied to particular cases; yet it may be doubted whether a more rigid adherence to the letter of these statutes, particularly that of the 29 Car. II. c. 3. would not have been more beneficial to the public, The French shewed a much more rigid and pertinacious adherence to the letter of their laws respecting the registration of deeds and wills. By laws of that kingdom, as antient as the 16th century, particularly, an ordonnance of Henry II. of the year 1553, it was ordered, that all wills and deeds, containing substitutions of estates, should be registered within a particular period of time. If they were not registered within that time, the court seem to have doubted whether they were binding, even on the parties in whose favour the substitutions were made; but it was always settled, that the substitutions were of no force against creditors or purchasers. Several points of the laws respecting substitutions being unsettled, and the laws respecting them being different in different parts of the kingdom, they were all reduced into one law, by the celebrated ordonnance of August 1747. That ordonnance was framed by the chancellor D'Aguesseau, after taking the sentiments of every parliament in the kingdom upon forty-five different questions proposed to them upon the subject. The thirty-ninth question is, "Whether a creditor or purchaser, having notice of the substitution, before his contract or purchase, is to be admitted to plead the want of registration?" All the parliaments, except the parliament of Flanders, agreed that he was; that to admit the contrary doctrine would make it always open to argument, whether he had or had not notice of the substitution; that this would lead to endless uncertainty, confusion, and perjury; and that it was much better that the right of the subject should depend upon certain and fixed principles of law; than upon rules and constructions

[Note 249.] constructions of equity, which must be arbitrary, and consequently uncertain. The ordonnance of August 1747 was [290. b.] framed accordingly. Those who have commented upon that ordonnance lay it down as a fixed and undeniable principle, that nothing, not even the most actual and direct notice, countervails the want of registration; so that if a person is a witness, or even a party, to the deed of substitution, still, if it is not registered, he may safely purchase the property substituted, or lend money upon a mortgage of it. See *Questions concernant les Substitutions, Toulouse, 1770, and Commentaire de l'Ordonnance de Louis XV. sur les Substitutions, par M. Furgole, à Paris, 1767.*

XII. The courts have in part remedied the mischief arising from the admission of trusts, with respect to the *cestuy que trust*, by making persons paying money to trustees, with notice of the trust, answerable, in some cases, for the proper application of it. Lord Mansfield, in his very distinguished argument in the great case of *Burgess v. Wheate*, observes, "that the *cestuy que trust* is actually and absolutely seized of the freehold, in the consideration of a court of equity; that the trust is the land, in that court; and that the declaration of the trust is the disposition of the land." It is, perhaps, to be wished, that the operation and consequences of trusts had been confined to the trustee and *cestuy que trust*. There is no doubt but the doctrine in question is, in many instances, of great service to the *cestuy que trust*, as it preserves his property from the peculations and other disasters, to which, if it were left solely to the discretion of the trustee, it would necessarily be subject. Yet it may be questioned, whether the admission of it is not, in general, productive of more inconvenience than real good. For in some cases, if the *cestuy que trust* is an infant, or otherwise incapable of giving assent to the payment of the money to the trustee, the persons paying it cannot be indemnified against the trustees' misapplication of it, but by paying it under the sanction of a court of equity. This retards, and often absolutely impedes the progress of business, involves the parties in an expensive and intricate litigation, and puts them to a very great, and, in other respects, an useless expence. To avoid this, it is become usual to insert a clause in deeds or wills, that the receipts of the trustees shall, of themselves, discharge the persons to whom they are given from the obligation of seeing to the application of the money paid by them. In some instances, without any clause of this nature, a person paying money to a trustee is not answerable for the misapplication of it, though he has notice of the trust. Perhaps the following distinctions and observations will be found of use towards obtaining an accurate knowledge of the rules of equity upon this complex subject.—*1stly, With regard to personal estate*, it is every where admitted, that if a testator, possessed of personal estate only, dies indebted, having by his will directed his estates to be sold for the payment of his debts, whether he specifies them or not, the mortgagee or purchaser of any part of his personal assets is not bound to see to the application of his mortgage or purchase money. See *Elliott and Meryman, Barnardiston Rep. in Cha. page 78.* But if he charges a specific part of his personalty with the payment of a specific debt or legacy, it seems to have been a matter of doubt how far the purchaser of that specific part was answerable. In the case of *Bill v. Humble, 2 Vern. 444.* the master of the rolls decreed, that a mortgagee of a term of years from an executor (which term of years was specifically bequeathed) was not answerable for the misapplication of the purchase-money.—This decree was reversed in the house of lords in 1703-4; but from the account

account given in Viner, 7 vol. 43. pl. 13. and 18 Vin. 121. pl. 11. there is reason to suppose the reversal was founded on particular proof of fraud. Two cases in Peere Williams, Ewer v. Corbett, and Bunting v. Stonard, vol. 2. p. 148. and 150. coincide with the master of the rolls against the house of lords: And see Gilbert's Reports, 113. Mead v. lord Orrery, 3 Atk. 235. Ithil v. Bears, 1 Vez. 315. Plow. Com. 543. 545. It should, however, be observed, that the principle on which the courts have founded their opinion, that the purchaser or mortgagee of any part of the testator's assets, specifically bequeathed, is not answerable for the misapplication of his purchase or mortgage money, is, that the whole of the personal estate being bound to pay the debts of the testator, that specific part (though specifically charged) is liable with the rest: it has therefore been held, that the purchaser must *not* have notice that there are no debts, or that the debts are paid. With the latter doctrine the modern practice of the profession accords. It has been carried so far, that, even where an executor has sold or mortgaged his testator's property for his own debt, it has been held good. The reason of these cases is, that the property of the testator vests absolutely in the executor, both at law and in equity; so that the demand of the creditors and legatees are personal upon the executor; they are no lien upon the property in his hands, or in the hands of the assignees from him; the executor is entrusted with the disposition of the property; and no third person, therefore, should be implicated in it. It seems clear, from Ewer v. Corbett, that, though by such notice of there being no debts, or of the debts being paid, the purchaser makes himself answerable for his purchase or mortgage money; yet he is not bound, previously, to enquire and satisfy himself that there are debts unpaid, or that the parts of the assets not specifically bequeathed are sufficient to pay the debts and legacies. *2dly*, With respect to *the devise of a real estate for the payment of debts*: It must first be observed, on the authority of the cases of Cutler and Coxeter, 2 Vern. 302. French and Chichester, 2 Vern. 568. and 2 Vez. 590. that if a person charges both his real and personal estates with the payment of his debts, the personal estate must be first applied; and that it is therefore immaterial, whether the testator charges the personal estate in the first instance, or not.—Now, if a person devises a real estate to trustees, to sell, for the payment of his debts, all the books agree (see particularly the case above cited of Elliott v. Merryman, Spalding and Shalmer, 1 Vern. 301. Culpepper v. Aston, 2 Chan. Cases, 115. 221. 1 Vez. 173. and 215. Cottrell v. Hampson, 2 Vern. 5. Smith v. Guyon, 1 Bro. Ca. in Cha. 186.) that if the debts are specified or scheduled, the purchaser or mortgagee *is* bound to see to the application of his money; but that if they are not specified or scheduled, he *is not* bound to see to such application. *As to legacies*—they, from their nature, must be considered as specified or scheduled debts; how far, in those cases where the trust does not extend to the payment of debts, the purchaser of a real estate is bound to see the money applied in discharge of the legacies, is often a subject of discussion and doubt, even with the most experienced practitioners.—But, if the trust is, to sell for the payment both of debts and legacies, then the trust to pay the debts intercepts the trust to pay the legacies, and as the purchaser is not bound to see to the payment of the former, he necessarily is not bound to see to the payment of the latter. Thus in Jebb v. Abbott, heard in Chancery on the 9th February 1782, lord chancellor Thurlow said, that where debts and legacies are charged on lands, the purchaser will hold free from the claims of the legatees; for not being bound to see to the discharge

[Note 249.] discharge of debts, he cannot be expected to see to the discharge of legacies, which cannot be paid till after the [290. b.] debts. The present lord chief justice of the king's bench, who was counsel in the cause, assented to this position, and said it had been so determined by lord Hardwicke. Probably the case alluded to by him was that of *Rogers v. Skillicorne*, since reported by Mr. Ambler; see his Rep. fol. 188.—In *Beynon v. Gollins*, in the sittings after Hilary term 1788; the testator had charged his estate with the payment of his just debts generally, and with a legacy of 800*l.* for his daughter for life, and after her death for her children. The trustee had joined in a conveyance of part of the estate to a purchaser, and permitted the 800*l.* to come into the hands of the daughter's husband, and it was wasted. The bill was brought by the wife and children, to have the legacy made good by the purchasers of the estate, and against the trustee. It was dismissed against the purchasers. Upon the hearing for further directions, it was pressed by Mr. Ambler, that the trustee should pay the costs of the purchasers. But lord Thurlow refused this, saying, that, as there was a general charge of debts, the purchasers were not liable to see to the application of the purchase money in payment of the 800*l.* and that, if the plaintiff thought fit to make unnecessary parties, the trustees ought not to pay the costs of such parties, but that they must receive them from the plaintiff.—Lands are sometimes devised to trustees, upon trust to raise as much money as the personal estate shall fall deficient, in paying the testator's debts and legacies. It seems to be the general opinion, that a purchaser or mortgagee is not bound, in this case, to enquire whether the real estate is wanted or not. It is a nicer case, where the lands are not devised to the trustees, but a mere power is given them to sell, for the purpose of raising as much money as the personal estate shall fall short in paying. To the valid execution of such a power, the deficiency of the personal estate seems to be a requisite circumstance. It may, therefore, be contended, that, if there be not the deficiency in question, the power is not well executed, and a necessary consequence of this appears to be, that, if the purchaser cannot give legal evidence of this deficiency, he cannot make out his title under the power. To prevent questions of this nature from arising, it is usual to insert in all instruments declaring trusts of personal estate, and in all instruments by which real or personal estates are vested in trustees, upon trust to raise money by sale or mortgage, a clause, expressly discharging the purchasers or mortgagees from the obligation of seeing to the application of the money paid by them. A clause of this nature should seldom be omitted. Where the trust is to raise, by sale or mortgage of the real estate, so much money as the personal estate is deficient in producing, it seems advisable to extend this clause a degree further, by expressly discharging the purchaser or mortgagee from the obligation of enquiring whether the personal estate has been got in and applied, and by expressly authorizing the trustees to raise any money they think proper by sale or mortgage, though the personal estate be not actually got in or applied. For it frequently happens, that the getting in of the personal estate is attended with great delay and difficulty; during which the real estate cannot, perhaps, be resorted to. This will be obviated effectually by inserting a clause to the above effect. It should, however, be accompanied with a further direction, that so much of the personal estate, and of the money raised under the trust, as shall remain after answering the purposes of the trust, shall be laid out in land, to be settled on the devisees of the real estates.—It frequently happens, that money secured upon mortgages is made the subject of marriage settlements,

ments, and assigned upon various trusts. In this case, there should always be a separate deed, by which the mortgage money and the estate in mortgage should be assigned to the trustees of the settlement, with a declaration that their receipt for the mortgage money shall be a discharge to the parties paying it. In making the assignment by a separate deed, an advantage is given to the mortgagor, by his being kept from being implicated with the trusts of the settlement, and by having that deed in his custody which preserves the chain of the title, and which he probably otherwise would not have: an advantage also is given to the persons interested in the settlement, from having the contents and operation of the settlement kept from the knowledge of the mortgagor and those claiming under him.—In all these cases it should be observed, that the doctrines of equity, with respect to the obligation of seeing to the application of money, are involved in many nice distinctions. Great care therefore should be taken to prevent any questions arising upon them, by inserting the clauses above mentioned, and by such other precautions as the circumstances of the case require. On the general doctrine of seeing to the application of purchase money, see Mr. Sugden's chapter on the subject, in his Practical Treatise of the Law of Vendors and Purchasers.

XIII. *As to the manner in which courts of equity have attempted to prevent the mischiefs arising from the admission of trusts, with respect to the public at large:—*This has been effected, in some measure, by its having been laid down as a general rule, that in any competition of claims, where the equity of the parties is equal, he who has the law shall prevail. See Francis's Maxims of Equity, 61. If a person has the legal estate or interest of the subject matter in contest, he must necessarily prevail at law over him whose right is only equitable, and therefore not even noticed by the courts of law. This advantage he carries with him so far, even into a court of equity, that if the equitable claims of the parties are of equal force, equity will leave him who has the legal right in full possession of it, and not do any thing to reduce him to an equality with the other, who has the equitable right only.—Perhaps the following illustration of this very important rule of equity, by an enquiry into the doctrines of courts of equity respecting *terms of years, attendant upon the inheritance*, will not be unacceptable to the reader.—At common law, leases for years were not supposed to transfer any property to the lessee, and were generally of very short duration; for as they tended to prevent the crown of its forfeitures, and the lord of the fruits of his tenures, they were viewed with a very jealous eye. Besides, the possession of the lessee was considered as the possession of the freeholder; and if his lease was defeated or disturbed, though he could recover for damages, he had no means to recover the possession. Moreover, leases for years were subject to be absolutely defeated, either by a real or fictitious recovery against the freeholder; but in the reign of Henry IV. or, at least, in that of Henry VII. the courts resolved, that the lessee should not only recover damages, as a recompence for the loss of the possession, but should also recover the possession itself. Afterwards the 21st Hen. 8. c. 15. protected the lessee against the effect of fictitious recoveries. These alterations of the common law gave the lessee for years an interest and stability which he had not before. Still, in the eye of the law, particularly before the demolition of the military tenures, terms of years were in every respect, except pecuniary emolument, far inferior to estates of freehold. This stability on the one hand, and subordinate state of property on the other, made them very proper and convenient modifications of property, for securing money or any other charges upon

[Note 249.] upon the fee, or for giving a partial or temporary right to the profits or beneficial property of the land, in those cases [290. b.] where the owner wished to have, not only the remainder or reversion, but the actual freehold. Hence we find mortgages for long terms of years very frequent in the reign of queen Elizabeth. Now, according to our notions of mortgages, if the mortgage debt is not paid at the time appointed, the estate mortgaged is absolutely forfeited to, and becomes the property of, the mortgagee, at law; but courts of equity permit the mortgagor to redeem, on payment to the mortgagee of his principal, interest, and costs. Still this is merely a right in equity, the legal estate continuing in the mortgagee. Thus, if an estate be demised for a term of years, with a proviso making the term void on payment of a sum of money with interest, before or upon a certain day, the condition is not considered at law as complied with, unless the money is paid on or before that very day; if it is not paid then, the estate belongs at law to the mortgagee, for the remainder of the term. A court of equity allows the mortgagor to redeem it, by paying the principal, interest, and costs, after that time. But this subsequent payment, though it gives the mortgagor the equitable right to the estate, does not affect the legal continuance of the term. In this respect our law differs from the civil law; in which a mortgage is considered only as an accessory of the debt; and payment at any time, by annulling the debt, extinguishes the mortgage. To apply this doctrine to terms of years. After payment of the mortgage debt, the term of years for which the mortgage is made is, at law, in the mortgagee; but, in equity, the mortgagor is entitled to the benefit of it. By an analogy to the case of mortgages, when terms of years are created for securing the payment of jointures, portions for children, or for any other purpose, they do not determine, without a special provision for this purpose, by the performance of the trusts for which they are raised. Thus, in all these cases, the legal interest during the continuance of the term is in the trustee; but the owner of the fee is entitled to the equitable interest, or rather to all the benefit or advantage which can be made of the term during its continuance. As the courts of common law held, that the possession of the lessee for years was the possession of the owner of the freehold, courts of equity held, that where the tenant for years was but a trustee for the owner of the inheritance, he should not oust his *cestuy que trust*, or obstruct him in doing any act of ownership, or in making any assurances of his estate. In these respects, therefore, the term is consolidated with the inheritance. It follows the descent to the heir, and all the alienations made of the inheritance, or of any partial estate or interest carved out of it, by deed, by will, or by act of law. *Whitchurch v. Whitchurch*, 2 P. W. 236. 9 Mod. 124. *Gilb. Rep.* 168. *Villiers and Villiers*, 2 Atk. 7. *Hoole v. Sales*, 2 Wils. 339. *Goodtitle on the demises of Norris and others v. Morgan and David*, 1 Term Rep. 755. Still, though the trust or benefit of the term is annexed to the inheritance, the legal interest of the term remains distinct and separate from it at law, and the whole benefit and advantage to be made of the term arises from this separation. For if two persons, or more, have claims upon the inheritance under different titles, a term of years attendant upon it is still so distinct from it, that if any one of them obtains an assignment of it, then (unless he is affected by any of the circumstances which equity considers as fraudulent) he will be entitled, both at law and in equity, to the estate, for the whole continuance of the term, to the utter exclusion of all the other claimants. This, if the term is of long duration, absolutely deprives all the other claimants of every kind of benefit in the land. Supposing, therefore, *A.* purchases

purchases an estate, which, previous to his purchase, had been sold, mortgaged, leased, and charged with every kind of incumbrance to which real property is subject; in this case *A.* and the other purchasers, and all the incumbrancers, have equal claims upon the estate. This is the meaning of the expression, that their equity is equal. But if there is a term of years subsisting in the estate, which was created prior to the purchases, mortgages, or other incumbrances, and *A.* procures an assignment of it in trust for himself, this gives him the legal interest in the lands during the continuance of the term, absolutely discharged from, and unaffected by, any of the purchases, mortgages, and other incumbrances, subsequent to the creation of the term, but prior to his purchase. This is the meaning of the expression in assignments of terms, that they are to protect the purchaser from all mesne incumbrances. But it is to be observed, that *A.* to be entitled in equity to the benefit of the term, must have all the following requisites: he must be a purchaser for a valuable consideration; his purchase must, in all respects, be a fair purchase, and free from every kind of fraud; and at the time of his purchase, he must have no notice of the prior conveyance, mortgage, charge, or other incumbrance. It is to be observed, that mortgages, lessees, &c. are purchasers in this sense, to the amount of their several charges, interests, or rights. If any person of this description, unaffected by notice or fraud, takes a defective conveyance or assignment of the fee, or of any estate carved out of it, defective either by reason of some prior conveyance, or of some prior charge or incumbrance; and if he also takes an assignment of a term to a trustee for himself, or to himself, where he takes the conveyance of the inheritance to his trustee; in each of these cases he is entitled to the full benefit of the term; that is, he may use the legal estate of the term to defend his possession during the continuance of the term, or, if he has lost the possession, to recover it at common law, in preference to all claimants prior to his purchase, but subsequent to his term. All this was laid down and explained by lord Hardwicke, in the case of Willoughby and Willoughby, in *Cha. Trin.* 30 Geo. 2. 1756. 1 Term Rep. 763. Upon the same principles was decided the case of Stanhope v. earl Verney, before lord Northington, in chancery, July 27, 1761. The case there was, that Henry Sayer, being seised in fee of certain estates subject to an outstanding term of years, in Rigby and Eyre, by indentures of lease and release, bearing date the 4th and 5th days of June 1732, conveyed them to lady Dysart and her heirs, for securing the payment of 1,000*l.* and interest, and covenanted to produce the deeds respecting the terms of years. Afterwards Rigby and Eyre assigned the term to Cunningham and Clayton, in trust for Sayer, his heirs and assigns; and then Sayer, by indenture dated the 19th day of Dec. 1732, conveyed the same estates to Mrs. Nash (under whom lord Verney claimed) by way of mortgage, for securing to her 3,000*l.* and interest, with a declaration that Cunningham and Clayton should stand possessed of the term in trust for her, and the deeds respecting it were delivered to her, and neither she nor the trustees had notice of the mortgage to lady Dysart. Lady Dysart brought an ejectment; lord Verney defended and set up the term, with a declaration of the trust of it in favour of Mrs. Nash, under whom he claimed. Upon this lady Dysart brought her bill in equity. The question was, which should be preferred? lady Dysart, who had the first declaration of the trust of the term, or lord Verney, who had the subsequent declaration of the trust, but had the custody of the deed.—Lord Northington held, that a declaration of trust in favour of an incumbrancer was tantamount to an actual assignment, unless a

[*Note 2d.*] subsequent incumbrancer, *bond fide*, and without notice, procured an assignment; and that the custody of the deeds respecting the term, with a declaration of the trust of it in favour of a second incumbrancer, was *equivalent to an actual assignment*; and therefore gave him an advantage over the first incumbrancer, which equity would not take from him.—The protection afforded by terms of years, against what are called *mesne incumbrances*, makes it safe, in some cases, to dispense with a *search for judgments*. But this is never prudent where there is any reason to apprehend notice of them will be proved, or will be attempted to be proved, on the party or any of his agents in the business. Besides, no term or other outstanding estate should be relied on, unless proof can be obtained easily, and at a small expence, of the instruments and acts in law, which must be proved to establish the creation and deduction of the term. It should also be ascertained, that its situation is such as enables the party entitled to it to avail himself of it in ejectionment. This does not always appear sufficiently attended to. Generally speaking, it is true that the possession of the *cestuy que trust* is the possession of the trustee. But it is equally true, that the extent and application of this rule are by no means settled. Great care, therefore, should be taken, in these cases, where the outstanding estate is relied on as a protection against *mesne incumbrances*, that the possession of the actual *terre-tenants* has not been such as to deprive the persons, in whom the outstanding estate or interest is vested, of their entry.—The advantages to be derived from terms of years being so considerable, it is an object of great consequence to ascertain, when it is safe for the purchaser to leave them in the trustee in whom he finds them, and when it is necessary or prudential to require them to be assigned to a trustee of his own.—But it is more easy to say where it is unsafe, than to say where it is safe, for him to be satisfied without such an assignment of it.—*1st*, It may be laid down, as a general rule, that whenever a term has been raised for securing the payment of money, as the assignment of it, by the trustee for the person intitled to receive, to a trustee for the person obliged to pay, the money, is the best possible evidence of the payment of the money, it may be reasonably required as such.—*2dly*, In case a term of years has been assigned to attend the inheritance, if, upon a purchase (taking it in the above extensive sense) *all* the deeds (as well originals as counterparts) by which the term was created or assigned, are delivered to the purchaser, and he is satisfied that the trustee, in whom it is then said to be vested, has made no prior assignment of it, and that the vendor has not charged the estate with any intermediate incumbrance; it is difficult to say what possible use can be made of the term against him, or what good can be answered by requiring an assignment of it to a trustee of his own, unless it be to satisfy the requisitions of those to whom he may afterwards have occasion to mortgage or sell the estate.—*3dly*, But if any of the deeds respecting the term are not delivered to the purchaser, or if he is not satisfied of the trustee's not having previously assigned it, or of the vendor's having made no intermediate incumbrance, it seems prudent to require an actual assignment of it to a trustee for him.—Few general rules, besides these, can be laid down upon this subject:—and these must, from their nature, be subject to an endless variety of modifications. In all cases of this description it is infinitely better to err by an excess of care, than to trust any thing to hazard. There is no doubt but the precautions used for the security of purchasers appear sometimes to be excessive, and satisfactory reasons cannot always be given for requiring some of them: yet the more a person's

son's experience increases, the more he feels the reason and real utility of them ; and the more he will be convinced, that very few of the precautions required by the general practice of the profession are without their use, or can be safely dispensed with.—On the protections afforded to purchasers, by terms for years and other outstanding estates, see 16th chapter of Mr. Sugden's Treatise on the Law of Vendors and Purchasers.

XIV. It is to be observed, that, in most cases, particularly those which relate to real property, courts of equity have generally endeavoured, that their decisions should bear the strictest possible *analogy to the decisions of courts of law*, in cases of a similar or corresponding impression. All the canons of law respecting the descent or inheritance of legal estates in lands have been applied to trust or equitable estates. Some of these, as the exclusion of the half blood, of the ascending line, of the paternal line from the maternal inheritance, and the maternal line from the paternal inheritance, are, evidently, of feudal extraction, and are generally supposed to be contrary to reason and equity: yet they have been admitted, without any limitation, into the equitable code of England. There is the same division in equity, as there is at law, of estates of freehold and inheritance, of estates of freehold only, and of estates less than freehold; of estates in possession, remainder, or reversion, and of estates several and estates undivided. It has been observed before, that every species of property is in substance equally capable of being settled in the way of entail; and that the utmost term allowed for the suspension, either of real or personal property, from vesting absolutely, is that of a life or lives in being, and twenty-one years after, and perhaps in the case of a posthumous child a few months more. The analogy between law and in equity is, in this instance, complete. It may be laid down, without any qualification, that no nearer approach to a perpetuity can be made, through the medium of a trust, or will be supported by a court of equity, than can be made by legal conveyances of legal estates or interests, or will be admitted in a court of law.—In these leading rules we find the analogy holds. In some instances it fails. Courtesy has been admitted.—Dower, though a more favoured claim, has been refused in equitable estates. An equitable estate is, by its nature, incapable of livery of seisin, and of every form of conveyance which operates by the statutes of uses. In the transfer, therefore, of equitable estates, these forms of conveyance have been dispensed with, and a mere declaration of trust in favour of another has been held sufficient to transfer to him the equitable fee.—On the other hand, trust estates are, by their nature, equally incapable of the process of fines or recoveries. Yet fines are levied and recoveries are suffered of them; and fines and recoveries are as necessary to bar entails of equitable estates, as they are to bar entails of legal estates. In the case of a feme inheretrix, law and equity agree in vesting the fee in the husband, in her right, during their joint lives, and subject to that, in preserving it to the wife: where the feme is possessed of personal property, the law, speaking generally, vests it absolutely in the husband, or, at least, gives him the power of acquiring the absolute property of it. Courts of equity have, in many cases, abridged the right of the husband to the personal property of the wife, and qualified his power over it.—In fixing the term for the redemption of mortgages, and in many other cases, an analogy to the term for bringing ejectments has frequently influenced the decisions of the courts; in other cases, an analogy to the term for ejectments, or the terms for bringing other writs, has not been attended to; and in some instances the courts have not considered

[Note 249.] considered themselves bound even by the statutes of limitation. *Smith v. Clay*, 3 Bro. Cha. Rep. 639.—But the cases [290. b.] where the analogy fails are not numerous; and there scarcely is a rule of law or equity of a more ancient origin, or which admits of fewer exceptions, than the rule, that equity followeth the law.

XV. Having offered these observations on some of the leading points in the doctrine of Trusts, a few remarks on THE GENERAL HISTORY OF TRUSTS will terminate the annotation.—Two circumstances, in particular, gave them rise; (1st.) The first was, *the want, in many instances, of a judicial process to enforce the performance, or to recover satisfaction for the non-performance, of several obligations arising in cases of trusts*, which were supposed, (and certainly in many cases with reason), to be founded on the common rules of natural morality and justice, but which, being unassisted by the common law, often depended for their effect on the conscience or honour only of a person, whose interest it was to leave them unperformed. Thus, in the case of real property, (to which these annotations are naturally confined), the transfer of land, in the simplicity of the common law, commenced and terminated in the single fact of the transfer. Of the contract to make it, of an agreement to hold the lands, or apply the profits of them, for a particular purpose, the law took no notice. The parties, therefore, beneficially interested in the performance of any such contract or agreement, were without remedy. Yet, in all these cases, a duty was considered to arise, which, though unnoticed by law, was felt, and admitted by all, to be an honourable, a moral, and a conscientious obligation. Cases of a similar description frequently arose. In all of them a right was thought to exist, for which the courts of law had provided, and for which the feudal policy could, from its nature, provide no remedy.—For this grievance, the courts of common law affording no redress, a remedy was necessarily sought from another hand, and a resort to the chancellor was, from the peculiar nature of his office, his character and habits, extremely natural. (2.)—*This natural resort to chancery, for redress in cases of trusts*, may be considered as the other principal circumstance, to which they owe their rise.—A description of persons, probably in a subordinate rank of life, was known in the Roman law, by the appellation of *Cancellarii*, as early as the period of the first Caesars.—In the Byzantine court, the chancellor was an officer of the highest distinction. In the courts of the emperors of the West, and almost in all the sovereignties, into which that empire broke, upon its fall, mention is made of an officer of the same name and character. An officer of the same description, (but in the early times often found under the appellation of the *Referendary*), occurs in the historical monuments of almost every country in Europe, where the feudal polity has prevailed. It was so much considered an appendage of sovereignty, that, after the usurpation of the vassals, every noble who pretended to sovereign power appears to have had his chancellor. To this, the actual chancellors of bishops and palatines probably owe their origin. See *Gothofred's Notes ad Leg. 3. de Assess. of the Codex Theodosianus*, and the edition, by the Maurish monks of Du Cange, art. *Cancellarius*. With respect to our own country,—in *Hob. 63.* it is observed, that the court of chancery is as antient as the kingdom itself. *Lord Coke, 4 Inst. 78.* maintains, that the British and Saxon kings had their chancellors, and courts of chancery.—*Mr. Selden, Off. Can. Sect. 1.* says, the first authentic mention of a chancellor is of the year 920, and that many of the Saxon lineage, before the conquest, had their chancellors. With us, as in almost every other country, whose jurisprudence is of feudal

feudal extraction, the office of chancellor originally was, to supervise all public instruments which had the king's signature, to keep them in his custody, and, after the custom of sealing deeds came in use, to have the charge of the king's official seal. 3 Blackst. Com. c. 4. s. 8. To administer justice is every where an appendage of royalty. This was the case in the feudal system, on principles peculiar to itself. There, the military command, and the administration of justice in the feud, were always united in the same person, and extended over the same territory. But subordination and habits of obedience were often wanting in the feud. From the boisterous spirit of that government, it must frequently happen that the judicial sentences of the courts would fail of effect, if they were not actually executed by the military power:—the military power was under the direction of the chief:—to him, therefore, for his military aid, wherever the party had to contend with a powerful adversary, it was necessary to recur, in order to secure the effect of a judicial sentence. This was actually purchased by fines, and became one of the most splendid and lucrative prerogatives of sovereignty. The crown was always attentive to secure to itself the exclusive use of it. This was principally effected by its assuming an exclusive right of issuing the writ, which, from its being the beginning or foundation of the suit, is called the original writ. This answered the double purpose, of shewing that all power of judicature originated with the king, and of securing to him the proper fines. See Gilbert's *Forum Romanum*, p. 10. and Phillips on *Fines for Original Writs*. This original writ is a mandatory letter from the king on parchment, sealed with his great seal, directed to the sheriff of the county where the injury is committed, or supposed to be committed, requiring him to command the wrong-doer, or party accused, either to do justice to the complainant, or else to appear in court, and answer the accusation against him. 3 Blackst. Com. 8th ed. p. 373. In the early period of our law, injuries, which were the subject of judicial process, were few, and, being few, were well known. In the course of time, the forms of injuries were multiplied, and new writs, of course, became necessary. Where this was the case, it was usual to petition parliament, and proper remedies were given for the peculiar cases; but these petitions multiplying, it was enacted, by the statute of Westminster 2. 13 Edw. 1. ch. 24. that where, in one case, a writ should be found in the chancery, and in a like case, falling under the same right, and requiring like remedy, no precedent of a writ could be produced, the clerks in chancery should form a new one. This act, undoubtedly, gave the chancellor a great degree of power, and in the exercise of it he usurped such an extent of remedial authority, that, to use Mr. Reeves's expression (*History of the Eng. Law*, 8vo edit. fo. 191.) every sort of relief seemed within his jurisdiction. It must be added, that, as the chancellor was generally an ecclesiastic, every species of injury, arising from a supposed breach of a religious, a moral, or a conscientious obligation, seemed properly to fall within his cognizance.—Such was the office of chancellor, and such the character of the persons by whom it was generally filled, about that period of time, when the injuries we have been speaking of may be supposed to have become frequent. To the chancellor, therefore, in cases of this description, it was natural to have recourse. Still, however, while he confined himself to the forming of new writs, his proceedings must fail of effect, as the utmost he could do, was, to send the parties to the courts of law, where, as those courts could not take cognizance of the supposed injury, it was vain to send them. He did not, therefore, rest here; but introduced a new judicial power into the jurisprudence of England, by the invention, or rather

rather by a new application, of the writ of subpoena. This writ compelled the party to appear in court: a petition was, thereupon, lodged in chancery, containing the articles, to which he was obliged to answer upon oath. In the case, therefore, of a trust, the party was obliged to disclose it, and the court then decreed him to carry it into execution. This gave rise, or at least stability, to equitable estates. Nothing could be more contrary, than estates of this description to the genius of the feudal law. Hence they frequently were a subject of complaint; and the statute of uses, evidently, was intended to extirpate them entirely. They have, however, been preserved. The consequence has been, that though they were, originally, a fraud upon tenure; though, in every stage of their progress, they were a subject of alarm and jealousy; though their existence is a direct violation of the statute of uses, and though the courts of law profess, in most cases, (if the expression may be allowed), a legal ignorance even of their existence, still they form a considerable part of the jurisprudence of the country; they affect and regulate, directly or indirectly, almost all the real, and a great proportion of the personal, property of the kingdom; they have a judicature, and a form of process, of their own; and these, in many instances, control even the courts of law. To this, nothing has contributed more, than the exalted abilities of many of the great personages who have presided in the courts of equity. The splendid panegyrick pronounced by Mr. Justice Blackstone, (3 vol. 8th edit. 544), on lord chancellor Nottingham, by whom the present expanded system of equitable jurisprudence and jurisdiction was built, is universally known, and the justice of it universally acknowledged. The profound and comprehensive knowledge of every branch of law and equity, which the earl of Hardwicke brought with him to the office of chancellor, and his luminous and copious display of it, in the infinite variety of causes which came before him, during the long period of his administration of that office, and which, by their number, surround, almost entirely, the whole system of equity, will serve for information and precedent to the latest period of English law. The present times have to boast of lord chancellor Thurlow, the might of whose mind supported a throne, in its state of vacillation, and equally commanded the reverence of his bar, the peerage, and the kingdom.

[291. b.]

[Note 250.] (1) *Nota the diversity. If A. releases to B. all his demands generally, or all his demands out of the manor of D. there rent and common is released, whether present or future: but if he releases to B. all demands which he has upon him, there no rent or common, present or future, is released, quia release est tantum personal. Trin. 5. Ja. Hancock v. Field.—Adjudged contra, that a release of all demands is not a bar to a covenant before breach;—but it is agreed, that it bars warranty, for that lies properly on demand, because he may have warrantia chartæ. So also reservation of rent, by indenture, is a covenant in law, viz. covenant real; for it runs with the land, and does not lie, after a duration, but against the tenant of the land: and it is agreed, that by a release of all demands a covenant real is released; for the rent itself, upon which the covenant in law rises, is released: so 14 H. 8, 9. But however the law may be of covenants real, it seems to be contrary of covenants personal;—and so there is good difference. Sed forsan, these passages are not to be understood of covenants before the breach, though covenants before the breach are expressæ.* Ld. Nott. MSS.

(2) But a release of all demands does not discharge rent before it is due, if it be a rent incident to the reversion; for the rent at the time was not only not due, but the consideration, viz. the future enjoyment of the lands, for which the rent was to be given, was not executed. 1 Sid. 141. 1 Lev. 99. 3 Lev. 274. Note to the 12th edition. [Note 251.]

[295. a.]

(1) *Otherwise of a counsellor at law, for he cannot bring any action; for he is not compellable to be counsellor, and his fee is honorarium, not a debt.* Ammianus, lib. 3.—Lord Nott. MSS.—At Rome the functions of the bar were divided between, I. The Patrons, or Orators; II. The Advocates, who attended to inform or instruct the patrons upon the points of law which arose in the cause; III. The Procurators; And, IV. the Cognitors. The two last nearly resembled the Attornies of our courts. Besides these, were the *Juris-consulti*, who gave their opinions and advice upon matters of law. Till the time of Augustus every person had this liberty; but he confined it to some particular individuals selected by him, and made a regulation, that in future no one should enjoy that privilege but under the authority of the prince. The opinions of the *Juris-consulti*, called the *Responsa Prudentum*, were of great weight; and a considerable part of the Roman law is founded upon them. See Gravina *de Ortu et Progressu Juris Civilis*, lib. 1. sect. 42, 43, 44. In the summary of the Roman Law, taken from Dr. Taylor's Elements of the Civil law, page 26, it is observed, that the *Responsa Prudentum* seem to amount to what we call Precedents, or Reports; that it is common to them both to be the determinations of lawyers to explain law: but that there is this difference between them, that our precedents owe their authority to their being the judgment of the court; but the *Responsa Prudentum*, though admitted as law, were nothing more than the private opinions of lawyers. See Cod. lib. 1. tit. 17. and the Cod. Theo. lib. 1. tit. 4. with the notes of Gothofred. It is supposed, that, in the early days of the Roman Empire, the practice of the law was merely honorary; but it soon became an object of gain. The Cincian law, which was passed about the time of the second Punic war, was intended to revive the primitive custom of honorary advocacy. But it was so often evaded, that the emperor Claudius thought it more advisable to moderate, than to attempt to destroy entirely, the salaries or emoluments of advocates. He accordingly inhibited them from taking a larger fee than ten sesterces, about 80l. 14s. 7d. English. The advocates, however, thought it an indignity, that their fees should be considered as wages, and therefore dignified them by the honourable title of presents, or gratuities; but as they might demand, and even maintain an action for their fees, this distinction was merely nominal. See Gothofred *de Salario*, and Dr. Beever's History of the Civil law, page 444. In England the fees of counsel are honorary, in the strict acceptation of the word. Thus in *Moor v. Row*, Cha. Rep. 38. a counsellor brought a bill for fees due to him from the defendant, a solicitor. The defendant demurred; the demurrer was allowed, and the bill dismissed. Sir John Davies thus expresses himself upon this subject, in his preface to his reports, pag. 22. 23. "The fees to counsellors are not in nature of wages, or pay, or that which we call salary, or hire, which are duties certain, and grow due by contract, for labour or service, but what is given him is honorarium, not merces; being a gift which gives honour as well to the taker as the giver: nor is it certain or contracted; for no price, or rate, can be set upon counsel, which is invaluable and inestimable, so as it is more or less, according to the circumstances, namely, the ability of the client, the worthiness of the counsellor, the weightiness
" of

“ of the cause, and the custom of the country. It is a gift of such a nature, that the able client may not neglect to give it without ingratitude, for it is but a gratuity, or taking of thankfulness; yet the worthy counsellor may not demand it without doing wrong to his reputation, according to that moral rule, *multa honesta accipi possunt quæ tamen peti non possunt.*” In France, the Roman law respecting the fees of advocates formerly prevailed. Many instances are found in their law books, of advocates bringing actions for their fees, and recovering upon them: but this has long fallen into disuse. In the contest, in 1775, between mr. Linguet and the Order of Advocates, one of the charges against him was, that he had written to the duke d’Aiguillon, to demand his fees; and threatened him with an action for them; and that his demands upon the duke had been referred to arbitration. See *Journal Historique du Retablissement de la Magistrature*, tom. 7. p. 190. Ordonnances have been made at different times, enjoining the advocates to subscribe, at the foot of their pleadings, a receipt for their fees: but the advocates never would obey them. The leading ordonnance upon this head is that of Blois. In 1602, the parliament of Paris gave an arret, enforcing the observance of that ordonnance. This gave the advocates so much offence, that three hundred of them renounced their profession upon it, with the usual formalities. This put an entire stop to the proceedings of the courts of justice. The matter was afterwards settled; and the ordonnance of Blois, in this respect, and the subsequent ordonnances enforcing it, are now considered as virtually repealed. See Loysel, *Dialogue des Avocats*; and *Menagii Juris Civilis Amenitates*, cap. 18.

[295. b.]

[Note 253.] (1) A confirmation is an approbation of, or assent to, an estate already created; by which the confirmor strengthens and gives validity to it, as far as it is in his power. It has this operation only with respect to estates voidable or defeasible; but it has no operation upon estates which are absolutely void. Such words may be used in a confirmation as may increase or enlarge the estate; but that, as lord chief baron Gilbert observes, is by the force of those words, and, strictly speaking, is foreign to the confirmation. Gilb. Ten. 75.

[296. a.]

[Note 254.] (2) For in this case, if the lessor released to the lessee for years, without using any further words, the operation of the release would be, to enlarge the estate of the lessee by giving him an estate of freehold for his life. Now to make releases operate in this manner, it is necessary, not only that the releasee, at the time the release is made, should be in the actual possession of, or have a vested interest in, the lands intended to be released, but that there should be a privity between him and the releasor. In the case mentioned by Littleton, there is no privity between the donor and the lessee of the donee for life. A release therefore from the donor to the lessee would be void. But a confirmation by the donor is good, and gives a stability and permanency to the estate of the lessee during the whole term, which would otherwise determine by the decease of the donee. Ante 272. a. 273. b.

[296. b.]

[Note 255.] (1) It is to be observed, that a disseisor acquires by the disseisin a tortious fee simple, notwithstanding at the time he makes the disseisin he claims a less estate; it being a rule, that a disseisor cannot qualify his own wrong.

(1) The

[297. a.]

(1) The distinctions taken here by sir Edw. Coke are, that a confirmation to a tenant of freehold or inheritance cannot be so worded, as to have a less operation than that of confirming his whole estate; consequently, a confirmation to such a tenant, either of the lands, or of his estate in them, for any term or period, is a confirmation of his whole fee. A disseisor always acquires by the disseisin a tortious fee simple; a confirmation therefore to him, however qualified, is a confirmation of his whole fee. It is otherwise in the case of a term of years. A confirmation may be made of part of the term only. The reason of this difference is, that an estate of freehold or of inheritance is considered as integral and indivisible. But as years are several, the term which is composed of them is necessarily fractional and divisible, and may, consequently, be confirmed in part only, by using proper expressions for this purpose. If a person confirms *the estate* of the tenant for years for part of the term, as the word estate signifies all the interest or term of years which the tenant has, the subsequent words are not considered as qualifications of the former words, but as absolutely repugnant to them; and as both cannot stand together, the law prefers the first, which are the principal, to the other, which are only secondary. [Note 256.]

[297. b.]

(1) For though a man cannot contract with his wife, or transfer any interest to her, yet she may, by construction of law, take benefit of a release made by him to a third person, and enuring by way of extinguishment. Hawk. Abr. [Note 257.]

[298. a.]

(2) A rent is an incorporeal hereditament, and susceptible of the same limitations as other hereditaments. Hence it may be granted or devised, for life or in tail, with remainders or limitations over. But there is this difference between an intail of lands and an intail of rent; that the tenant in tail of lands, with the immediate reversion in fee in the donor, may, by a common recovery, bar the intail and the reversion; whereas the grantee in tail of a rent *de novo*, without a subsequent limitation of it in fee, acquires, by a common recovery, only a base fee, determinable upon his decease, and failure of the issues in tail; but if there is a limitation of it in fee, after the limitation in tail, the recovery of the tenant in tail gives him the fee simple. This was resolved in the cases of *Smyth v. Farnaby*, Carter 52. Sid. 285. and 2 Keb. 29. 55. 84. *Weeks v. Peach*, Lutw. 1244. and *Chaplin v. Chaplin*, 3 P. Wms. 229. And see Lutw. 1218. 1224. The reason of this difference is, that it would be unjust that the conveyance of a grantee of a rent should give a longer duration or existence to the rent, than it had in its original creation. It is true, that the barring of an estate tail in land is equally contrary to the intention of the grantor. But a rent differs materially from land. The old principles of the feudal law looked upon every modification of landed property, which was considered to be against common right, with a very jealous eye. Now, a rent-charge was supposed to be against common right, the grantee of the rent-charge being subject to no feudal services, and being a burthen upon the tenant who was to perform them. Upon this principle the law, in every instance, avoided giving by implication a continuation to the rent, beyond the period expressly fixed for its continuance. Thus, if a tenant in tail of land die without issue, his wife is entitled to dower for her life out of the land, notwithstanding the failure of the issue; but the widow of a tenant in tail of rent is not entitled to her dower against the donor. So if a rent is granted to a man and his heirs generally, and he dies without an heir,

the rent does not escheat, but sinks into the land. It is upon this principle, that when there is not a limitation over in fee, a tenant in tail of rent acquires, by his recovery, no more than a base fee. But if there is a limitation in fee, after the particular limitation in tail, the grantor has substantially limited the rent in fee; and, therefore, it is doing him no injustice that the recovery should give the donee, who suffers it, an estate in fee simple. The case of *Chaplin v. Chaplin* was, that lady Hanby, the grandmother of Porter Chaplin, being seised in fee, conveyed diverse lands, to the use and intent that the trustees named in the deed should receive and enjoy a rent-charge of 30l. per ann. to them and their heirs, with power to distrain for it, and to enter and hold the land on non-payment for 40 days; and then the rent was declared to be to the use of Porter Chaplin in tail; remainder to the use of the same person who had the land in fee. It is stated to have been afterwards disclosed to the court, that the legal estate of the rent in fee was in the trustees. But it is worthy of the attention of the reader, that it was not necessary that any new matter should be adduced to disclose this to the court, as it appears on the face of the deed: for a conveyance to *A.* and his heirs, to the use and intent that *B.* and his heirs may receive a rent out of the estate, gives *B.* the legal fee of the rent; so that if it is afterwards declared, that *B.* and his heirs are to stand seised of the rent to uses, the intended *cestuys que use* take only trust or equitable estates. If, therefore, it is intended to limit a rent in strict settlement, it is necessary to do it by way of grant at common law, to some person and his heirs, to the uses intended to be limited. This gives the grantee the mere seisin to the uses, and the uses declared upon it will be executed by the statute.

[Note 259.] (3) Formerly the doctrine of the necessity, that the remainder should vest at the very instant of the determination of the particular estate at farthest, was extended to the case of a posthumous son. In the case of *Reeve v. Long*, 1 Salk. 227. an estate was limited to *A.* for life, remainder to his eldest son in tail; *A.* died, leaving his wife *enacint*. She afterwards had a son. It was adjudged that the son, not being *in case* at the time of the determination of the particular estate, could not take under the limitation. This judgment was afterwards affirmed in the court of king's bench; but it was reversed in the house of lords, against the opinion of all the judges. To obviate all doubts respecting the law in this case, the statute of 10 Will. III. c. 16. was passed, by which it was enacted, that where any estate is, by marriage, or any other settlement, settled in remainder to children, with remainders over, any posthumous child may take, in the same manner as if born in the father's life-time. It is singular that this statute does not expressly mention limitations or devises made by wills. There is a tradition, that, as the case of *Reeve v. Long* arose upon a will, the lords considered the law to be settled by their determination in that case; and were unwilling to make any express mention of limitations or devises made in wills, lest it should appear to call in question the authority or propriety of their determination. Besides, in the above case of *Reeve v. Long*, the words of the act may be construed, without much violence, to comprize settlements of estates made by will, as well as settlements of estates made by deed.

[299. a.]

[Note 260.] (2) The nature of the estate which the husband acquires by marriage in his wife's real property will be explained in a note to fol. 325. b. With respect to his interest in her chattels real and choses in action, an accurate,

accurate, and, so far as it goes, a masterly, explanation of it is given in Bacon's Abridgment, vol. 1. fol. 268. It is much to be lamented that the author did not go more fully into the subject. Mr. Viner has collected most of the cases respecting it with his usual industry.—But since the publication of that useful compilation, several cases have been determined, by which the law upon it has been greatly illustrated and explained, and, in some instances, altered. An attempt will be made to give a succinct view of it, in a note to fol. 351.

[299. b.]

(1) It is necessary to distinguish between the cases mentioned by Littleton and sir Edward Coke, in this and the preceding chapter, where an estate for life is enlarged to an estate in fee, by the *release or confirmation* of the reversioner or remainder-man, and those cases where a person, being seised of an estate for life, the inheritance is afterwards conveyed or devised to his right heirs, by a subsequent deed or will. It appears by the case of Moore v. Parker, 1 Lord Raym. 37. 4 Mod. 316. Skinn. 558. and Fonnereau v. Fonnereau, Doug. Rep. 1 vol. 470. that the estate of the ancestor is not affected by the subsequent conveyance or devise to his right heirs. For though it is a rule, that, where the ancestor, by any gift or conveyance, takes an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs, in fee or in tail, "*the heirs*," in such cases, are words of limitation of the estate, and not words of purchase; yet this applies only to those cases where both the limitations are by the same instrument. In some cases the freehold of the ancestor has resulted to him by implication; but still the deed, from which that implication resulted, was the deed in which the limitation to his heirs was expressed; so that the implied estate of freehold, and the expressed estate of inheritance, arose at the same time, and under the same deed, which brings it within the general rule. But suppose an estate is limited to *A.* for life; remainder to such uses as *B.* shall appoint, and afterwards *B.* in the life-time of *A.* appoints the estate to *A.*'s right heirs; it is difficult to say, whether, in that case, the estates will unite or not. This case has sometimes occurred in practice, but has not yet been the subject of any judicial determination. To prove the union of the two estates, it may be contended, that the deed by which the power is executed must be considered as a part of the deed by which the power is given; that the use limited by the execution of the power derives its effect, and is fed, by the seisin of the releasees or feoffees of the deed containing the power; that the uses limited in the original deed, to take effect in default of an execution of the power, are subject to that power; that the uses limited under, or by virtue of the power, precede and take place of them, in the same manner as if in the original deed, not the power, but the use executed by virtue of the power, had been inserted; and that though the uses vest at different times, yet they may be considered as virtually created at the same time. So that, in fact, it exactly resembles the case put, post. 378. b. that if lands be given to two, during their joint lives, with the immediate remainder to the right heirs of him who shall die first, there both the estates are created at the same time, but the inheritance does not vest till a subsequent period; yet sir Edward Coke expressly says, that the heir, in that case, takes by descent. So that the case before us seems to unite all the qualities requisite for the union of these estates; as both the limitations are made by the same grantor, are created at the same time, and are contained in the same deed. But these arguments are open to some objections, particularly with respect to the position, that both the limitations

ations are made at the same time. See ant. 276. contin. note 1. p. 271. b.
 —Since the publication of this note in the former editions of this work, the subject has received a masterly investigation by Mr. Fearne. See his Essay on Contingent Remainders, 4th edit. page 99.

[300. a.]

[Note 262.] (1) If a man seized of a rent-charge in fee grants it over to a feme sole for a term of years, and the tenant attorns, and she marries during the term, and the grantor confirms the rent to the husband and wife for their lives, or in fee, they become joint tenants for life or in fee of the rent, and need no new attornment. Vaugh. 46.

[Note 263.] (2) Tenant in tail makes a lease for life, now he hath gained a new fee by wrong, and afterwards he grants a rent charge, or makes a lease for years, and afterwards tenant for life dies, he shall not avoid his charge or lease, although he be in of another estate, because he had a defeasible possession and ancient right, the which, if they be in several hands, should be good; as the lease of one, and the confirmation of the other, and being in one hand, shall be as much in judgment of law. 7 Rep. 14. a.

[300. b.]

[Note 264.] (1) A prebendary, after admission and institution, and before induction or instalment, granted an annuity for him and his successors, and the bishop confirmed it; it was resolved, that a writ of annuity lay not in that case, because the confirmation, being made before the induction, was void. Plow. 528. a.

[301. b.]

[Note 265.] (2) But a lease and release cannot be pleaded as a grant of the reversion. Noy 66.

[302. b.]

[Note 266.] (1) Tenant for life, and he in the remainder in fee, make a lease for years by deed indented; the lessee, being ejected, declared upon the demise made by the tenant for life and the remainder-man; and adjudged against the plaintiff; for, living the tenant for life, it is only the lease of the tenant for life and the confirmation of the remainder-man; and he ought to have so declared, 1 Inst. 45. b. So if two joint-tenants, two tenants in common, or tenant for life, and he in the remainder, join in the grant of a copyhold, one fine only is due, and it shall enure as one grant only; so if a surrender be made, and after a common recovery is had by plaint, in the nature of a writ of entry, for better assurance—one fine only shall be paid. Co. Copyholder, 162, 163.

[303. a.]

[Note 267.] (1) This is altered by 4 Ann. cap. 16. sect. 4 & 5. by which it is enacted, that it shall be lawful for any defendant or tenant, in any action or suit, or for any plaintiff in replevin, in any court of record, with the leave of the same court, to plead as many several matters thereto as he shall think necessary for his defence; but it is thereby also provided, that if any such matter, upon a demurrer joined, be judged insufficient, costs shall be given at the discretion of the court; or if a verdict shall be found upon any issue in the said cause for plaintiff, or the defendant, costs shall be also given in like manner, unless the judge, who tried the said issue, shall certify that the defendant, tenant, or plaintiff in replevin, had a probable cause to plead such matter, which upon the said issue shall be found against him.—Note to the 11th edition.

(1) B

[304. a.]

(1) *It is natural to plead first to the jurisdiction, and afterwards to the writ of the count.* Nota, *The briefs ranked before the count, 17 Edw. 3. 74. Nota, Upon default in the count, the judgment shall be that the brief shall abate.* 3 Hen. 6. 41. 9 Hen. 6. 10. *Brooke Count 78. Vide 303. b. Therefore, as it seems, it is more proper to reserve the exception to the writ for the last place, if the first fails. In special cases the order of pleading is not observed; as, for example, a defendant in debt, in the custody of the sheriff, was permitted to plead a plea in abatement of the writ before any count was made, and before any of the other defendants came in.* 3 Hen. 6. *Fitz. Debt. 20. Lord Willoughby and other defendants in assise, against Wimbiish, pleaded in abatement of the writ before any count was made.* *Plowd. Com. 73.*
—Lord Nott. MBS.

[305. b.]

(1) 3 Inst. 47. A saving will serve for any thing that is implied in the judgment, as in case of felony to save the wife's dower; but a saving will not serve against the express judgment, for that should be repugnant, as saving the life of the offender should be void.

[307. b.]

(1) To give a confirmation this effect, in the case of a lease at common law, the lessee must have previously made an actual entry. But no entry is necessary for the purpose, if the lease is a bargain and sale under the statute.

[308. a.]

(1) So 3d Wilson 234. Henry Blencowe and Mary his wife, seised in fee, demised to William Alder for 21 years, with a proviso for re-entry on default of payment of the rent, or breach of any of the covenants. Among other covenants, there was one from William Alder,—“that he should not assign, transfer, or set over, or otherwise do or put away the indenture of demise, or the premises thereby demised, or any part thereof, to any person or persons whomsoever, without the consent of the said Henry Blencowe and Mary his wife, their heirs and assigns, in writing, under his, her, or their hands and seals, first had and obtained for doing thereof.”—William Alder, without any licence, demised to John Busby for 14 years.—It was held, that there was no *privity of contract* between the original lessor and Rugby, the under-lessee. So that it was an under lease, and not an assignment; and therefore no breach of the covenant. And see Strange 405. See also Gregson v. Harrison, 2 Term. Rep. P. 425. Kinnersley v. Orpe and another, Dougl. 56.

[309. a.]

(1) Sir Martin Wright and many other writers have laid it down as a general rule, that by the old feudal law the feudatory could not alien the feud without the consent of the lord; nor the lord alien or transfer his seigniority without the consent of his feudatory: for the obligations of the lord and his feudatory being reciprocal, the feudatory was as much interested in the conduct and ability of the lord, as the lord in the conduct and ability of his feudatory; and that as the lord could not alien, so neither could he exchange, mortgage, or otherwise dispose of his seigniority, without the consent of his vassal. See sir Martin Wright's Introduction to the Law of Tenures, 30, 31.—It is certain that this doctrine formerly prevailed in England. But, in general, it does not appear to have prevailed (at least in an equal extent) in other countries. It seems there to have been admitted, that the lord might transfer the
whole

whole fee, without the consent of the vassal, and that the vassal immediately, by such a transfer, became the tenant of the new lord.—It seems also to have been admitted, that the lord might transfer to another the beneficial fruits of the tenure, without the consent of the vassal. But it was a great question whether the lord could transfer his vassal to another, without the vassal's consent, unless by transferring the *whole fee*.—See Basnage *Commentaire de la Coutume de Normandie, des Fiefs et Droits Feodaux*, art. 204.—This necessity, which subsisted in our old law, that the tenant should consent to the alienation of the lord, gave rise to the doctrine of attornment.—At the common law, attornment signified only the consent of the tenant to the grant of the seignior; or, in other words, his consent to become the tenant of the new lord. But after the statute *quia emptores terrarum* was passed, by which subinfeudation was prohibited, it became necessary, that when the reversioner or remainder-man after an estate for years, for life or in tail, granted his reversion or remainder, the particular tenant should attorn to the grantee; as the particular tenant must, otherwise, have held of the remainder-man, and he of the chief lord; by which a new tenure would be created.—The necessity of attornment was, in some measure, avoided by the statute of uses, as by that statute the possession was immediately executed to the use;—and by the statute of wills, by which the legal estate is immediately vested in the devisee.—Yet attornment continued after this to be necessary in many cases. But both the necessity and efficacy of attornments have been almost totally taken away by the statutes of 4 and 5 Ann. c. 16. and 11 Geo. 2. c. 19. By the former of those statutes it was enacted, “That all grants and conveyances of any manors or rents, or of the reversion or remainder of any messuages or lands, should be good, without attornment of the tenants; provided that no such tenant should be damaged by payment of rent to any such grantor or conusor, or by breach of any condition for non-payment of rent before notice given him of such grant by the consee or grantor.” By the latter statute it was enacted, “That the attornments of tenants to strangers claiming title to the estate of their landlords should be absolutely null and void, to all intents and purposes whatsoever, and that the possession of their respective landlord or landlords, lessor or lessors, should not be deemed or construed to be any wise changed, altered, or affected, by any such attornment or attornments; provided that nothing therein contained should extend to vacate or affect any attornment made pursuant to, and in consequence of, some judgment at law, or decree, or order of a court of equity, or made with the privity and consent of the landlord or landlords, lessor or lessors, or to any mortgagee, after the mortgage is become forfeited.”—Till the passing of these statutes, the doctrine of attornment was one of the most copious and abstruse points of the law. But these statutes having made attornment both unnecessary and inoperative, the learning upon it is so useless, that Mr. Viner has inserted nothing respecting it in his voluminous compilation but an extract from lord chief baron Gilbert.—Mr. Bacon has not the article Attornment in his work; and the learning and industry of lord chief baron Comyn have furnished him with little material upon it, that is not to be found either in Littleton or sir Edward Coke.

[310. b.]

[Note 273.] (1) Here the fee is supposed to vest immediately in the grantee: but when an estate is granted upon a condition precedent, the estate does not vest, even by way of relation, till the performance of the condition. Pl. 482. b.

(1) This

[315. a.]

(1) This is only to be understood of a rent at common law: but if [Note 274.] the rent is limited, as an use under the statute;—as if lands are conveyed by lease and release to *A.* and his heirs, to the use that *B.* may receive out of them an annual rent; the statute immediately executes the use of the rent in *B.*

[316. b.]

(1) Two reasons are given for this. One is, that the possession of [Note 275.] the tenant for years is the possession of the immediate freeholder. See Brediman's case, 6 Rep. 56. b. The other reason is, that as the termor for years holds of the reversioner, and pays the services to him, so the tenant for life holds also of him.—Thus, as both hold estates of the reversioner, either of them may attorn.

[318. b.]

(1) In these cases, the tenant for life enters only for a partial estate; [Note 276.] he therefore only partially defeats the operation of the feoffment; so much of the fee as he does not defeat necessarily remains in the feoffee.

[320. a.]

(1) The distinction in these cases seems to be, that the grantee is [Note 277.] intitled, before attornment, to what the lord may seize; but not to any thing which lies in action.

[325. a.]

(1) *I. As to discontinuances in general:*—In note 1. p. 239. a. it was observed, that in the case of a disseisin, while the possession remains in the disseisor, it is a mere naked possession, unsupported by any right; and that the disseisee may restore his possession, and put a total end to the possession of the disseisor, by an entry on the land, without any previous action; but that, if the disseisor dies, the heir comes to the possession of the estate by a lawful title. It was the same, by the old law, if the disseisor aliened; the alienee came in by a lawful title. By reason of this lawful title, the heir, in the first instance, and the alienee in the second, acquires a *presumptive right of possession*, which is so far good, even against the person disseised, that he loses by it his right to recover the possession by entry, and can only recover it by an action at law. When the right of entry is thus lost, and the party can only recover by action, the possession is said to be *discontinued*. This is the general import of the word *discontinuance*; but, in its usual acceptation, it signifies the effect of alienations made by husband seized *jure uxoris*; by ecclesiastics seized *jure ecclesie*; or by tenants in tail; those being the three instances adduced by Littleton of a discontinuance. But other cases, where the party having the right could not restore his possession by entry, and was therefore left to his remedy by action, were also, in Littleton's time, termed discontinuances. Thus, before the statute of the 11 H. 7. c. 20. the alienations of a woman seized of an estate in dower, or of an estate of the gift of her husband, or of any of his ancestors, were said to be a discontinuance; and before the statutes of 32 H. 8. c. 31. and 14 El. c. 8. recoveries suffered by tenants for life, or tenants by the courtesy, or tenants in tail, after possibility of issue extinct, or even by the feoffee of tenant for years, worked a discontinuance. See sir William Pelham's case, 1 Rep. 14. It is to be observed, that there is a material difference between the situation or title of the alienee of any person, whose alienation makes a discontinuance, and the situation or title of the heir or alienee of a disseisor; for the heir and alienee of a disseisor immediately claim under a person coming in by a wrongful title, and their estates, though not defeasible by entry, are immediately

mediately defeasible by action. But the alienee of every person, whose alienation is said to be a discontinuance, claims by a person having a lawful estate, and the estate of the alienee is unimpeachable during the life of the discontinuor. It should also be observed, that a discontinuance extends to those cases only, where a person is dispossessed of an estate of freehold; and where, though he has lost his right of entry, he *can* still recover the possession by action. At the common law, if there was a term for years, and the tenant of the freehold suffered a common recovery by covin, it was a good bar to the termor; for, not having the freehold, he could not falsify the recovery, so that all his term and interest in the land was lost, and his only remedy was an action of covenant against the lessor. His possession, therefore, or rather his interest, was absolutely lost, not merely interrupted. Even after the statutes of Gloucester, and the 21 H. 8. c. 15. which preserved the interest of the termor for years against a common recovery, as the possession of the termor for years is considered in the law as the possession of him who has the next estate of freehold, the recovery is never said to discontinue the estate of the termor for years; the expression discontinuance being applied solely to those cases where the *freehold* is divested. The peculiar import of the word discontinuance, where applied to the cases mentioned by Littleton, is shortly, but forcibly, expressed by mons. Honard, who explains the word discontinuance "*Interruption du droit, qu'on a sur un fonds, par la vente qu'un autre chargé de conserver ce droit, en a faite.*" See *Anciennes Loix des François*, 2 vol. 435. Our doctrine of discontinuance bears some analogy to the doctrine of interruption in the civil law.—There, interruption, when applied to the real property, signifies the ousting of a person from the possession of his land. From that time he ceases to be the possessor of it; and if he does not renew his possession, but permits the dispossessor to retain it, he absolutely loses his right to it, and the disseisor is said to acquire it by prescription. It is observable, that, by the laws of the Twelve Tables, possession during two years formed a prescription for land; one year, for personal estate. Dio. Sic. 20. In 3 Rep. fol. 8. b. 9. a. Lord Coke observes, that the reason why the law will not permit a person who is in by judgment of law to have his possession disturbed by the disseisor, is, "to take away the multiplicity and infiniteness of suits, trials, recoveries and judgments, in one and the same case; and therefore, in the judgment and policy of the law, it was thought more profitable to the commonwealth, and more for the honour of the law, to leave some without remedy, and to put others to their writ of right, without any respect of coverture, &c. than that there should not be any end of actions and suits."

[325. b.]

[Note 279.] (1) II. *As to discontinuances by ecclesiastical persons*:—It is generally supposed that ecclesiastical persons were permitted to acquire real estates as early as the reign of the emperor Constantine. The tenth century is commonly considered as the period when donations to them were most frequent and considerable. Very soon after they were permitted to acquire, they were restrained from alienating, their property. See Dec. Gra. Cas. 12. Q. 2. c. 3. Long leases, made by ecclesiastical persons, are declared to be null by the Council of Trent, Sess. 25. de Ref. ch. 11. For the learning relating to the leases made by ecclesiastical persons, the editor begs to refer to the much admired collections on this subject in Bacon's Abr. vol. 3. tit. Leases, supposed to be extracted from a manuscript of Sir Geoffrey Gilbert. It is to be observed, that bishops and abbots were supposed to have the possession *in feo*, and might

might therefore alien in fee; but parsons were considered to have no more than a *life* estate. See Gilb. Ten. 110.

(2) III. *As to discontinuances by persons seized jure uxoris*:—It is [Note 280.] generally supposed that women, by reason of their incapacity to perform military duty, were not originally admitted to succeed to *proper* fiefs: so that if the fief, by its original constitution, were descendible to the females, it was, upon that very account, ranked among *improper* fiefs. See Craig de Jure Feud. 48. 50. 236. Stry. Ex. Jur. Feud. cap. 4. 2. cap. 15. 2. 3. By the Salic law, the females were excluded from succeeding to estates, either lineally or collaterally.—It may not be improper to mention here, that there are two different codes of this law. One of them is supposed to have been collected before christianity was received into France.—The other is of a later date; and appears to be a republication of the former, with considerable alterations, both in substance and phraseology; and with several new regulations, supposed to have been made by the princes who filled the throne of that kingdom after the introduction of christianity. The former code contains the following clause: “*De terrâ verò Salicâ in mulierem nulla portio hereditatis transit; sed hoc virilis sexus acquirit; hęc est, filii in hereditate succedunt.*” In the latter, it is expressed in this manner: “*De terrâ autem Salicâ, nulla portio hereditatis mulieri veniat, sed ad virilem sexum tota hereditas perveniat.*” But in the course of time women were admitted, generally, to succeed to all fiefs; and even the Salic law lost all its force, except as to the succession to the crown, in which respect it has been invariably observed, from the earliest period of the French monarchy to the present time. This exclusion of females and their descendants from the crown is now universally agreed to be a fundamental law of that monarchy.—Even in the dispute between Philip Valois and Edward the Third, the validity of the law, *as to the daughters themselves*, was never questioned: the only dispute was, whether it extended to the *male descendants of the daughters*. Edward the Third contended it did not; but the decision of the assembly which was held upon this affair, at Paris, and which was composed of the chief nobility, prelates, and burghers of the kingdom, being against him; and the wars which were undertaken in support of his right proving unfavourable to the English; it is now settled beyond all controversy, that the descendants of the daughters are excluded from the throne of France, as much as the daughters themselves. In consequence of this doctrine, Henry the IVth succeeded to the throne, at the distance of twenty-one degrees from his immediate predecessor. See Rapin’s Dissertation on the Salic Law, and *Le Brun Traité des Successions*, l. 2. c. 2. § 2.—This exclusion from the throne of France did not prevent women succeeding there to every other dignity, so as even to become peers of France. Many instances are upon record of their personally presiding in their own courts, even over judicial combats; of their being summoned to, and sitting in, the court of peers; and, what is considered as the highest of honours, of their assisting as peers at the consecration of the king. Thus Mahaut, the countess of Artois, assisted not only at the trial of Robert of Flanders, but at the ceremony of the coronation of Philip the Long, and, with the other peers, supported his crown. In England, the celebrated Ann, countess of Pembroke, Dowager of Montgomery, had the office of hereditary sheriff of Westmoreland, and exercised it in person. At the assizes at Appleby she sat with the judges on the bench. The reader will find the revolutions of the laws and usages of France, in this respect, stated with the most exactness

[Note 280.] learning and perspicuity by the Chancellor D'Aguesseau (then attorney-general) in his pleading in the great cause of the duke of Luxemburgh, tom. 3. p. 643. and in his *Requete sur la Mouvance du Comté de Soissons*, tom. 6. p. 1. & *Observations sur les Pairies*, tom. 7. p. 598. *Proces verbal de ce que s'est passé au Parlement de Paris en 1716, au sujet d'une accusation de duel, intentée par le Procureur general du Roi contre un Pair de France, qui n'avoit pas encore été reçu en Parlement.* Ib. 616. and see also *Droit Public de la France*, par mons. Bouquet, p. 332. The cause of the duke of Luxemburgh gave rise to the edict of 1711. By that edict it was declared, that in the letters for the erection of peerages, whether granted before that time, or to be granted afterwards, the words heirs and successors should only comprise male children, descended from him in whose favour the peerage was first erected, and males descended from males, without the intervention of a female: That those clauses which expressly comprised females should be considered as having a condition annexed to them, that the female becoming entitled under them should marry no person without the consent of the king, signified by letters patent addressed to the parliament of Paris: That in these letters patent the peerage should be confirmed to the husband and his male descendants; and that the peer in whose favour the peerage of his wife was thus confirmed, should take his rank only from the day of his reception in parliament, under the letters patent. In the same manner the duchy and peerage of Aubigny was granted, in 1684, to the duchess of Portsmouth, the duke of Richmond her son, and his heirs male; but the letters patent by which this grant was made were not registered; for want of which, though the title of duke of Aubigny had always been admitted by the court of France, and the dukes and duchesses of Richmond had always been allowed, at Versailles, the honours attached to that dignity, the peerage was not admitted by the parliament. In 1779, his grace the present duke of Richmond obtained letters patent, confirming those of 1684, but with a clause that neither his grace, nor any of the heirs male of his grandfather, the first duke of Richmond, should be received in parliament, until the possessor should be of the religion, and reside in the kingdom, of France; and that the rank of the peerage should take place from the date of the reception. These last letters patent have been duly registered; but his grace's rank and precedence will not begin till his reception. In the mean time the registry of the peerage in parliament is a recognition of it, and entitles his grace to all the other advantages, honours, and privileges annexed to the dignity. These, when the estate is considerable, are of very great importance. There are in France other peers, whose ancestors have neglected to be received in parliament, and who, being unwilling to take a rank lower than that which the date of their peerage would give them, decline to be received there now. It is said the duc de Bouillon, the duc d'Elbeuf, the duc de Montbazou, and the duc de Valentinois, are in this predicament. Some of them claim to be older than the duc de Usez, who, by his ancestors having been first received, is now, in fact, the first duke in France.—Both in England and in France females originally communicated their titles and dignities to their husbands. Many instances of this are to be found in the arguments on the claim of mr. Bertie to the barony of Willoughby. But this has long since ceased; and we may apply to this circumstance the remark contained in the former part of this work, respecting curtesy in titles of honour, that from the late creations by which, women have been made peeresses, in order that the issue of their husbands might have titles, yet the husbands themselves continue commoners, it

seems that this right in women to communicate peerages to their husbands is considered as extinct. See ant. 29. b. not. 1.—But though, by our law, a woman does not now communicate her rank or titles of honour to her husband, yet the freehold, or the right of possession, of all her lands of inheritance, vests in him immediately upon the marriage, the right of property still being preserved to her. 1 Inst. 351. a. 273. b. And see *Pothier Traité des Fiefs*, vol. 1. p. 123. This estate he may convey to another. An incorrect statement in the book called *Cases in Equity*, during the time of lord Talbot, fol. 107. of what was delivered by his lordship in the case of *Robinson v. Cummins*, seems to have given rise to a notion that the husband could not make a tenant to the præcipe of his wife's estate, for the purpose of suffering a common recovery of it, without the wife's previously joining in a fine; but it now seems to be a settled point that he can. Mr. Cruise, in his *Essay upon Recoveries*, p. 38. has given an accurate statement of lord Talbot's observations upon this subject, which, in substance, and almost in words, is agreeable to a manuscript report of the same case, in the possession of the editor. The same must be concluded from general reasoning.—For the interest which the husband takes in his wife's chattels, real and personal, see 351. note.

[326. b.]

(1) IV. *As to discontinuances by tenants in tail with respect to their issue*:—It is to be observed, that though the estate of the tenant in tail, as to his right of possession, or rather as to his beneficial property in the lands, has a duration for the term of his life only; yet, in the eye of the law, he is considered as seised of an estate of inheritance. To understand this, it should be remembered, that, in the case of a fee simple conditional at common law, the condition, from which that estate took its appellation, did not suspend the fee from vesting in the donee, immediately by the gift. Thus, we find, that, if he aliened before he had issue, it not only was no forfeiture, but, if afterwards he had issue, it was a bar to them. See *Plo.* 239. 2 *Inst.* 333. But the condition, though it did not prevent the fee from vesting in the donee, suspended his power of alienation. To that power it was considered to be a condition precedent, that the donee should have issue born. The statute extinguished the power; but did not affect the estate of the feudatory in any other respect: so that a tenant in tail was as much seised of the inheritance, after the statute *de donis*, as a tenant in fee simple conditional was before it. Hence, if he made a feoffment, it did not, during his life, affect or prejudice the issue. Thus his alienation was, primarily, a lawful transfer of the freehold; the alienee came in by right; and his estate could not be impeached during the life of the donee. In conformity to the established rule of the common law, that whenever any person acquired a presumptive right of possession, his possession was not to be defeated by entry, however slender or unlawful the title of the grantor himself might be, the statute *de donis* did not absolutely nullify the alienations of the donee in tail, but enabled the issue to defeat them by the formedon in the descender.—It is generally said that the writ of mortd'ancestor was the only remedy, at the common law, for the issue; against the alienations of his ancestor, and that the formedon did not lie till the statute *de donis*. This must be understood with the two following qualifications. 1st, A writ of mortd'ancestor could certainly be maintained against an abator; but as one of the three points in that writ, to be enquired of by a jury, was, *si frater vel mater fuit seiscitus*, or *seiscita, in dominio suo ut de feodo, die quo obiit*, it could not be maintained against a disseisor. See *Booth* 207. 2d, In one case a formedon

don was certainly admitted at the common law; that was, when a man had issue a son, and his wife died, and he afterwards took another wife, and land was given to him and his second wife, and to the heirs of their two bodies begotten, and there was issue of that marriage, and both the wife and the father died, and a stranger abated; there, the issue of the second marriage could not maintain a writ of mortd'ancestor; for one part of the writ is to enquire, *si factens sit proproinquior heres*, to which description no issue of the second venter could answer, while there was a son of the first venter. See Plo. 239. Booth 141. 207. Ant. 19. a. n. 5.

[327. a.]

[Note 282.] (1) V. *As to alienations by tenants in tail, with respect to the reversioner*:—Upon the death of tenant in fee simple conditional without issue, if the estate was withheld from the reversioner, either by the alienee of the tenant in tail, or by an abator, the reversioner was entitled, at the common law, to a formedon in the reverter. It has been observed before, that if tenant in fee-simple conditional at the common law aliened before he had issue, and afterwards had issue, the issue was barred by the alienation; but it does not seem clear whether the alienation in that case barred the reversioner. See Plo. 235. Ant. 19.—In general, when the ancestor aliened, it was with warranty; in that case, the warranty descended upon the issue in tail, and therefore prevented his claiming against the alienation of his ancestor. But nothing of this nature could be opposed to the reversioner.

[Note 283.] (2) VI. *As to discontinuances by tenants in tail, with respect to those in remainder*:—It has been observed before, that all estates of inheritance were, at common law, either fees simple absolute, or fees simple conditional; and that tenants in fee simple conditional were, after the birth of issue, permitted to alien the fee, upon a supposition, that, by the birth of issue, the condition was performed. The statute *de donis* declares this to be manifestly contrary to the form and intent of the gift, and therefore requires, that from thenceforth the will and intent of the donor should be observed, and the fee revert to him, for want of issue. This statute did not create any new estate, but, by disaffirming the supposed performance of the condition, preserved the fee to the issue, while there were issue to take it, and the reversion to the donor, when the issue failed. An estate of inheritance therefore remained in the donee; but only a particular description of heirs being entitled to take under it, it received the appellation of an estate tail, that is, an estate docked, cut off, or abridged, in contradistinction from the estate of fee simple absolute, which remained in the donor. Wright's Tenures, 186. Plo. 251. The expression estate tail does not occur in the statute *de donis*; but it is to be found in a statute of the same year. See Stat. West. cap. 4. The statute *de donis*, by thus securing the reversion to the donor, produced another material alteration in the law. For, by the common law, no remainder could be limited upon, or after, an estate in fee simple absolute or conditional; but when estates in fee simple conditional were reduced to estates tail, remainders after them were permitted: and by analogy to what was done for the issue and the reversioner, a formedon in the remainder was given to the remainder-man;—not, however, expressly, but by inference.—For the remainder-man after an estate tail being by the discontinuance in the same mischief with the issue or the reversioner in tail, an equitable construction of the statute brought him within the like remedy.—Five years after the enacting of the statute *de donis*, the statute *quia emptores terrarum* was passed; by which all persons were enabled to dispose of their lands; but the feoffees were to hold

hold them immediately of the chief lord. Upon this statute, the [Note 283.] courts took the following distinction, with respect to estates tail, and other particular estates; that where a person seised in fee granted for life, or in tail, reserving the reversion to himself, the grantees of the particular estates held of the reverser, and he of the chief lord: but, where a person granted for life, or in tail, with the remainder over in fee, both the tenants of the particular estates, and the remainder-man, held of the chief lord. 2 Inst. 505.—Care must be taken to distinguish between a remainder limited after an estate tail, and a conditional, or contingent use, limited upon, or after such an estate. See page 203. b. note 1. and page 274. a continuation of note 1. 271. b.—There are few occasions where greater nicety, or skill, is required, in limiting uses of this kind, than in the two following cases.—The first is, when a person, being seised of two estates, wishes to raise two families; and with this view intends that one of the estates (which shall be called here the family estate) shall be settled on his eldest son and his issue; and for want of such issue, on his younger sons, successively, and their respective issue; and that the other estate (which shall be called here the second estate) shall be settled on his second son, and his issue; and for want of such issue, on his other subsequent sons, successively, and their respective issue. In this case, by the death of the eldest son without issue, the family estate would descend on the second son, or his issue. This union of the two estates would effectually defeat the settlor's intention. To guard against it, therefore, it is necessary to provide, that, if by the death of the first son, and failure of issue of his body, the family estate descends upon the second son, or any other younger son, or any issue of their bodies, the second estate shall, in that case, shift from the person upon whom the family estate descends, to the person next in remainder.—The other case is, when a person limits his estate in strict settlement, with an injunction that the several persons taking under the settlement shall use his name and bear his arms. These being cases of difficulty, the rules of law respecting them not having been settled till lately, and the forms for carrying them into execution being in general very imperfect, the following observations, it is imagined, may be properly introduced here.—1st, *As to clauses for shifting the second estate, on the accession of the family estate.* From what has been said before, it is clear, that the provisos and injunctions, in these cases, are shifting or secondary uses; and the point now before us presents us with a curious and striking view of the gradual progress of the doctrines of our courts respecting them.—One of the most remarkable adjudications on this subject is the duke of Norfolk's case; 3d Ca. in Cha. The case there was, that Henry earl of Arundel conveyed his estates to the use of himself for his life; and, after his decease, to the use of trustees for 200 years; and, after the expiration of that term, to the use of Henry Howard, his second son, in tail male; remainder to Charles Howard, and his other subsequent sons, successively, in tail male; with a declaration that the term of 200 years was limited in trust to attend the inheritance, so long as Thomas Howard, the settlor's eldest son, or any issue male of his body, should live; but with a proviso, that if by his death without issue male living at his decease, or by a subsequent failure of that issue male, the earldom of Arundel should descend on the second son, then the trust should cease as to the second son, and the heirs male of his body; and the trust should then be, for the benefit of the third son, and the heirs male of his body. The eldest son died without issue, in the life-time of the second son; upon this the difficulty arose. The question was, whether the executory trust for the benefit of the third son was not too remote?

It

[Note 283.] It is clear, that the event upon which the trust was to take effect for the benefit of the third son must, if it took place at all, [327 a.] necessarily take place within the compass of one life; it being, that by event of the death and failure of issue of the first son in *the second son's life-time*, the second son should become intitled to the earldom of Arundel. The law upon this head is, *now*, so clearly settled, that if a settlement were to be made now to this effect, all the parties interested would immediately acquiesce in it. But it was *then* a point so much questioned, that few cases have been heard in the courts, either of law or equity, in which there has been a greater difference of opinion. Lord Nottingham, before whom it was heard, was assisted by the three chief justices. His lordship held the trust to be good. But the three chief justices differed from his lordship; and his lordship's decree was afterwards reversed by lord keeper North: but the house of lords, on appeal, reversed the reversal; and affirmed lord Nottingham's decree. Thus, by this case, it was solemnly adjudged, that an executory trust of a term of years was good, if so framed as to take effect within the compass of *one life in being*. This reasoning extended, by analogy, to executory devises of legal estates; and to all shifting and secondary uses, whether created by deed, or will.—The next advance in limitations of this nature was to extend them to a period within the compass of *one or more life or lives in being, and twenty-one years after*. Upon this principle was determined the case of *Lloyd v. Carew*, Prec. in Cha. 72. Show. Cases in Par. 137. In most cases, till within these thirty years, the clauses in deeds or wills by which these purposes were intended to be effected were framed upon this plan; so that the event upon which the estate limited to the second son was to shift from him and his issue to the subsequent sons and their issue, viz. the accession of the family estate was confined to the contingency of its happening within the above period of one or more life or lives in being, and twenty-one years. Afterwards, as it was observed that a common recovery suffered by tenant in tail barred all limitations subsequent or collateral to his estate, it was concluded, that there was no necessity to confine the event, upon which the estate was to shift, to any particular period of time; and therefore it is now usual to express it generally, that if any of the younger sons, or of the heirs male of their bodies, shall come into possession of the family estate, (without limiting the period, when this happens, to any particular time) the second estate shall shift from the person so becoming intitled to the family estate, and go to the persons next intitled in remainder. An instance of this kind may be seen in an act of parliament, passed in the year 1758, intitled, “An act to enable Charles Bagot, now called Charles “Chester, and his sons, to take the surname of Chester.” 2dly, *As to clauses injoining persons, to whom estates are limited in strict settlement, to take the name and use the arms of the settlor*. This, in some respects, is nicer than the former clause; because, in the former clause, the intention of the settlor generally is, that the second estate upon the accession of the family estate shall pass, not only from the person himself upon whom the family estate descends, but from his issue; but, in the case now under consideration, it generally is not the intention of the settlor, that the issue shall be prejudiced by the non-compliance of his parent with the condition or requisition annexed to his estate. Now suppose an estate is limited to *A.* for life, remainder to trustees and their heirs, during his life, to preserve the contingent remainders, remainder to *A.*'s sons successively in tail male; with a proviso, enjoining *A.* and his sons, and the heirs male of their bodies, when they become seised in possession of the estate, to take the name and bear the arms of the settlor; otherwise

otherwise the estates limited to them to determine : in this case, if *A.* [Note 283.] the first taker, should not comply with the condition or requisition annexed to his estate, before the birth of a son, his estate would determine, and the contingent remainders limited to his sons would either be void, or be preserved by the limitation to the trustees. The former would be intirely contrary to the intention of the settlor ; the latter also would be contrary to his intention, so far, as by the words usually inserted in limitations of this nature, the person refusing to comply with the condition would be intitled to the rents of the estate during his life ; and, if those words were not inserted, the rents, being undisposed of, would belong to the heir at law of the settlor. To prevent this, it is proper to direct, that the trustees for preserving the contingent remainders shall, after the cesser or determination of the estate for life, and during the suspence and contingency of the then next expectant remainder, stand and be seised of the estate limited to them ; in the first place, to preserve the contingent remainders till they come *in esse* ; and in the next place, during the suspence of such remainder, upon trust to pay the rents to those who would be intitled to the estate, if the persons taking under the contingent remainders then in suspence were dead. It may not, perhaps, be unacceptable to the reader to be presented with the following clauses, in which all the above circumstances seem to be attended to. It must be supposed, that the estate is previously limited to *A.* (a feme sole) for her life, with a power to limit a rent-charge to any person whom she may marry, for his life, with a limitation to *C.* and *D.* and their heirs, during her life, to preserve the contingent remainders ; remainder to her sons successively in tail male ; remainder to her daughters, as tenants in common in tail, with cross remainders in tail between them ; with several remainders over : then the proviso in question immediately follows ; “ Provided always, and it is hereby agreed and declared between and by the parties to these presents, that the person or persons whom the said *A.* shall marry ; and every person who by virtue of the limitations herein before contained, or of this proviso, shall become intitled to the possession, or to the receipt of the rents and profits of the manors and other hereditaments hereby released, or expressed and intended so to be, shall and do, within the space of one year next after they respectively shall so marry, or so become intitled to the possession, or to the rents and profits of the said manors and other hereditaments as aforesaid, take upon him and them respectively, and use in all deeds, letters, accounts, and other writings, whereto or wherein they respectively shall be party or parties, or which they respectively shall sign, the surname of Browne only, and take and use no other surname ; and quarter the arms of Browne with their own respective family arms ; and also shall and do, within the space of one year next after they respectively shall so marry, or so become intitled, as aforesaid, apply, sue for, and endeavour to obtain an act of parliament, or a proper licence from the crown, or take such other means as may be requisite or proper to enable or authorize him, or them, respectively, to take and bear the said surname and arms : and that, in case any such person and persons shall refuse or neglect to take such surname and arms, and to take and use the steps, or means, which shall be requisite or proper to enable and authorize him or them so to do, within the said space of one year ; then, if the person so refusing or neglecting shall be the husband of the said *A.* the limitation herein before contained, to the use of the said *A.* shall cease, determine, and be utterly void ; and any annual sum, which, by virtue of the power for that purpose herein before contained, the said *A.* shall limit or appoint, to the

[Note 283.] “ the use of, or on trust for, or for the benefit of, such husband so refusing or neglecting, and the powers or remedies, [327. b.]
 “ and terms of years which she shall limit, or create for securing the same, shall cease, determine, and become utterly void ; and that if
 “ the person so refusing or neglecting shall be any other than the husband of the said *A.* the limitation herein before contained of the said manors and other hereditaments, to the use of him or them so refusing or neglecting, shall cease, determine, and become utterly void :
 “ and that the same manors and other hereditaments shall, in such cases, immediately thereupon go to the person next beneficially intitled in remainder, under the limitations herein before contained, in the same manner as if the person or persons, whose estate shall so cease, determine, and become void, being tenant or tenants for life, was or were dead, or, being tenant or tenants in tail, was or were dead without issue inheritable under such intail ;—without prejudice, nevertheless, to any jointure or jointures, portion or portions, annual sum or annual sums of money, lease or leases, or demise or demises, which, previous to such cesser or determination, shall have been granted or demised of, or charged upon, the said manors and other hereditaments, hereby released, or expressed and intended so to be, or any part thereof, in pursuance of any of the powers hereinafter contained :
 “ (except as to any annual sum, and the powers or remedies, and terms of years for securing the same, which shall have been granted, limited, or appointed by the said *A.* in pursuance of the power herein after for that purpose contained.) And it is hereby further agreed and declared, between and by the parties to these presents, that the cesser or determination of the estate of the said *A.* or of any other tenant for life, by force of the proviso herein before contained, shall not operate to exclude, prevent, or prejudice any of the contingent remainders herein before limited to her, his, or their son or sons, daughter or daughters, or any other person or persons ; but that the remainder limited to the said *C.* and *D.* and their heirs, during the life of the said *A.* or such other tenant for life, shall, after such cesser or determination, take effect and continue, for preserving such contingent remainders, and giving them effect as they may arise. And that immediately from and after such cesser or determination of such preceding estate for life, and during the suspence and contingency of such then expectant remainder, the said *C.* and *D.* their heirs and assigns, shall receive, pay and apply the rents and profits of the said manors and other hereditaments, which would belong to such tenant for life, if such cesser or determination had not taken place, unto the person or persons, for the intents and purposes, and in the manner to, for, and in which, the same rents and profits would be, or would have been payable and applicable respectively, under and by virtue of the limitations and provisos herein before contained, in case such tenant for life was actually dead ; so that immediately from and after such cesser or determination, the issue of the said *A.* or of such other tenant for life, intitled for the time being, under the limitations aforesaid, to the said manors and other hereditaments, in remainder immediately expectant on the decease of the said *A.* or of such other tenant for life, may be intitled to the rents and profits of the said manor and other hereditaments, for his and their own proper use and benefit respectively, during the life of the parent, as if such parent were dead ; and that in case no such issue be in existence, then, during the vacancy or contingency of such issue, the person next intitled for the time being, under the limitations aforesaid, to a vested remainder

“det in the said manors and other hereditaments, expectant on the de-
 “cease of the said A. or of such other tenant for life, and failure of
 “such issue of her or his body, shall and may be entitled to the said
 “rents and profits, for his and their proper use and benefit respectively,
 “but without any exclusion of, or prejudice to, the estate, interest, or
 “right, of any such issue afterwards coming into existence, but only
 “from the time of the birth of such issue respectively.”

[330. a.]

(1) VII. *As to the modes of conveyance which work a discontinuance*, it may be laid down as a general rule, that no alienation which is not made by livery of seisin, or what is equivalent to it, can work a discontinuance. It has been observed before, that the usual mode of conveyance, at the common law, was a *feoffment*; that feoffments were formerly made without writing; and that when writing came into use, the transmutation of the property was effected, not by the writing, but by the livery which it authenticated. A *fine* is often defined to be a feoffment upon record, the cosutor's acknowledgment upon record of the right of the cosusee to the lands being considered as tantamount to actual livery. The fines, therefore, which are said to be executed, in contradistinction from those which are said to be executory, give the cosusee the immediate possession of the land; and those which are called executory enable him to recover it immediately, by an *habere facias seisinam*.—A *common recovery* is the judgment of a court of record, that the demandant shall recover against the tenant; upon which he may immediately sue out the *habere facias seisinam*. Considering, therefore, fines and recoveries only as common assurances, the acknowledgment upon record in the former, and the judgment to recover in the latter, are supposed to equipoise the notoriety of livery. Hence, both a fine and a common recovery are of force to work a discontinuance. With respect to *releases*,—where the person whose estate is discontinued releases to the alienee, his release must be considered as operating *pur mitter le droit*. Now it has been observed in a former place, that releases by persons disseised may be made either to the disseisor, his feoffee, or his heir: and that, in all these cases, the possession is in the releasee, the right in the releasor, and that the union of the right to the possession completes the title of the releasee, the notoriety of the disseisin countervailing the livery. But this can only be understood of those cases where the releasor has the fee simple. In both cases the possession of the disseisor is equally notorious; but where the releasor, as in the instance brought by Littleton, has only a partial estate in the lands, he has not in him the right of possession, and cannot, of course, transfer or cede it to another. Hence, though the release of a disseisee, who before the disseisin was seised in fee-simple, completes the title of the disseisor, the release of a disseisee, who before the disseisin had only an estate tail, does not complete his title, and therefore does not amount to a discontinuance.—With respect to *conveyances which operate by the statute of uses*; it is clear that there cannot be a discontinuance, where the possession remains with the party; for in those cases the possession is not disturbed, nor can there be any livery of seisin, or any thing tantamount to it;—but it is equally clear, that, if the uses are raised by a transmutation of the possession, that transmutation may produce a discontinuance. This, in fact, is only repeating what has been observed before; for it is not the creation or limitation of the use, but the operation upon the possession, that produces the discontinuance.—Upon these grounds, therefore, a bargain and sale, a covenant to stand seised, and a lease and release, cannot work a discontinuance; but

[Note 284.]

a feoffment executed, a fine levied, or a recovery suffered to uses, have that power. See page 275. contin. of note, 271. b.—But if a warranty is annexed to a bargain and sale, covenant to stand seised, or release, it may produce a discontinuance. This will be better understood after perusing our author's chapter on Warranty. At present it is sufficient to observe, from lord chief baron Gilbert's Ten. 120. that a release with warranty works a discontinuance; for at common law the warranty was a voluntary covenant of the force of a feudal contract, repelling the warrantor from claiming the land, and obliging him to defend it; and though the statute takes away the force of such covenants, that they shall not bar the issue, yet the issue must claim in the method the statute prescribes, viz. by action; and, therefore, it works a discontinuance, since the issue, in such case, cannot recontinue but by action only.

[330. b.]

[Note 285.]

(1) What possession is required in the feoffor, to make his feoffment an *actual disseisin* of the freehold not merely a disseisin, which is such at the election of the party, has been, of late, a subject of much discussion; and it is therefore supposed that the following attempt at a full investigation of the very abstruse, but not useless, learning upon the subject, will not be unacceptable to the reader. By the doctrine of the feudal law, no person who had an estate of less duration and extent than for his own life, or for the life of another man, was considered to be a freeholder; and none but a freeholder was considered to have the possession of the land. It is true, that estates were sometimes held for terms of years. In that case the possession of the termor was considered to be the possession of the freeholder;—but still the termor held the possession, though he held it for the freeholder; and the freeholder, by trusting the termor with it, exposed himself to lose it by the termor's negligence or treachery. If the termor left the possession vacant; if he permitted himself to be disseised of it; if he undertook to alien it either by act *in pais*, or by matter of record; if he claimed the fee; or if he affirmed it to be in a stranger;—in all these cases the freeholder exposed himself to the loss of the possession, as much as if they were his own acts. Thus the termor held the possession, but he was said to hold it *nomine alieno*, in contradistinction to the freeholder himself, who was said to hold it *nomine proprio*. Hence Britton expressly defines an estate of freehold to be “the possession of the soil by the freeholder;” and the author of the Doctor and Student says, “that the possession of “the land is called in the law of England the franktenement or freehold.” Britton. C. 52. Doct. and Stud. b. 2. d. 22. So nearly synonymous in those days was the possession to the freehold. In this manner the possession of the termor differed from that of a mere bailiff, who had no possession. The same principles obtained with respect to the transfer of the freehold. Nothing further was necessary than a delivery of the possession, or, as it is called by our law-writers, livery of seisin. The freehold could be transferred by no other means. But here a difference is to be observed with respect to the effect of the livery of a termor for years (such as was mentioned before), and the livery of a mere bailiff. On account of the solemnity upon which the entry of the termor into the lands was grounded, the connexion between him and the reversioner, and his actually holding the possession of the land (though he held it for the freeholder), the livery of the former was a transfer of the possession; but the livery of the latter was absolutely without effect. In process of time involuntary alienation, or alienation arising from attachment for debt, was admitted. This produced the
estates

estates of tenants by elegit, by statute-merchant, and statute-staple. Long leases for years also came into use, and more settled and accurate notions were had of tenancies by sufferance and at will. All these were considered to be in the same situation as the termor for years. Their possession was held to be the possession of the immediate freeholder; but as they *had*, or rather *held*, the possession, and were in by the act of the freeholder in some cases, and by his privity or forbearance in all, they were considered to be *in* as of the seisin of the fee. It sometimes happened that persons had the possession who had not the right; such were tenants by disseisin, deforcement, abatement, or intrusion. Still, as they had the possession, they might, by livery of it, transfer it to another. Thus, by the old feudal law, on the one hand, the freehold could not be transferred but by livery of seisin: on the other, livery of seisin could not be made by any person who had the possession, without transferring the freehold. This transfer of the fee was called a feoffment. No writing was necessary for this purpose; and when charters came into use, the transfer of the fee was supposed to be produced (as has been already observed) not by the charter, but by the livery which it authenticated. But the material variation, with respect to the form of transferring property by livery, was, that originally it was usual to make the feoffment on the land before the peers of the court, who subscribed the charter of feoffment with their names, and the entry of the feoffee upon the land was afterwards recorded in the lord's court: but in progress of time the feoffment was allowed to be good, though it were attested by strangers only; and the recording of the feoffee's entry was dispensed with. This, undoubtedly, lessened, very considerably, the solemnity and notoriety of feoffments: and we have an opinion of the highest authority, delivered with much consideration and infinite ability, in a case of the highest moment, that it had a very great effect on their operation and efficacy, with respect to the circumstance before us.—The case alluded to is that of Taylor, on the demise of Atkyns, v. Horde and others, 1 Burr. 60. 5 Bro. Par. Ca. 247. Cow. 689.—As a minute and accurate statement and examination of the doctrines laid down in that case will serve greatly to illustrate the point now under consideration, they shall be presented here to the reader. The case, so far as it relates to the points in question, was, that sir Robert Atkyns was tenant for life; remainder to dame Ann Atkyns, his wife, for life; remainder to sir Robert Atkyns (his eldest son, by a former marriage) in tail male: remainder to mr. John Tracey and his younger brothers, successively, in tail male; remainder to mr. Richard Atkyns and his heirs. Upon the death of sir Robert, the father, dame Ann, his widow, entered upon the lands. In Trinity term 1710 an ejectment was brought in the court of common pleas, against her ladyship, by John Phillips, upon the several demises of sir Robert Atkyns, the son, and of Joseph Walker, to whom several terms of years attendant upon the inheritance had been assigned, in trust for sir Robert, the son. A verdict was found for the plaintiff, and he recovered *terminum suum predictum*, and had an *habere facias possessionem*. It is to be observed, that no account of the case states the grounds upon which this verdict was found for the plaintiff. Most probably it was merely in consequence of the terms of years which had been assigned to him. On the 1st of January 1710, John Phillips, the plaintiff, surrendered the terms to sir Robert, the son; and, on the 17th of the same month, sir Robert made a feoffment of the estates in question, with livery of seisin, to James Earle and his heirs. In the deed of feoffment it was declared that the feoffment was made, that James Earle might become perfect tenant of the freehold, in order

for

[Note 285.] for the suffering of a common recovery; which recovery, it was thereby declared, should enure to the use of sir Robert [330. b.] Atkyns, the son, and his heirs. The recovery was suffered in Hilary term 1710. Sir Robert died on the 9th of November 1711, without issue, and intestate. His nephew, mr. Robert Atkyns, was his heir at law. In Hilary term 1711 an ejectment was brought against him by lady Atkyns; and in Easter term 1712 a general verdict was given for her. She died in the month of October following. Upon her death mr. Robert Atkyns entered, and continued in possession of the estate till the 16th of March 1753, when he died, leaving issue only two daughters; Ann, the wife of mr. Horde; and Elizabeth, the wife of mr. Chamberlayne. The death of sir Robert Atkyns, the son, without issue, necessarily brought into question the validity of the recovery suffered by him; for, if it were good, it destroyed his estate tail, and all the remainders expectant upon it; and mr. Robert Atkyns, his nephew, and, after his decease, mrs. Horde and mrs. Chamberlayne, his only children, became entitled to the estates, as his heirs at law. But if it were not a good recovery, then, upon the decease of dame Ann Atkyns, mr. John Tracey became seized in tail of the lands devised by the testator's will, with the several remainders over.—In the year 1752 an ejectment was brought against mr. Robert Atkyns, and mr. and mrs. Horde, and mr. and mrs. Chamberlayne, by Cyprian Taylor, on the demise of mr. John Tracey, who, in consequence of a direction contained in sir Robert Atkyns, the father's will, had taken the name of Atkyns. The jury found a special verdict. The case was argued four times before the judges of the court of king's bench. A point arose, whether, supposing the recovery to be bad, the plaintiff's ejectment, not having been brought within twenty-one years after his title accrued, was not barred by the statute of limitations. The court was of opinion it was barred by that statute. The case afterwards went to the house of lords: all the judges were ordered to attend: their opinion was asked upon the point arising from the statute of limitations; it agreed with that of the judges of the court of king's bench: the judgment of the court was therefore affirmed. Afterwards mr. John Tracey Atkyns and all his brothers died without issue; and then, supposing the recovery to be void, mr. Edward Kinsey Atkyns, the then heir at law of mr. Richard Atkyns, became entitled to the estate. He claimed under a new title, and was not therefore bound by the statute of limitations. An ejectment was delivered by him in Hilary term 1777. This brought the question of the validity of the recovery once more before the court. It is to be observed, that though, when the case came before the court upon the ejectment brought by mr. John Tracey Atkyns, the matter went off on the point arising from the statute of limitations, yet the questions arising upon the validity of the recovery were most elaborately argued by the bar: and lord chief justice Mansfield, when he gave the judgment of the court, entered into a very minute discussion of them, and gave his opinion very fully and decisively upon them all: so that what was said upon this subject, when the case came before the court in 1777, was, in general, only a repetition of what was said upon it on the former occasion. As lord Mansfield's speech, in the report given of it by sir James Burrow, contains the most methodical and comprehensive state of the arguments and opinions intended to be discussed in this place, it is here particularly referred to.—His lordship stated the question to be, Whether Earle was a good tenant of the freehold? He observed, that to prove he was a good tenant of the freehold, it was necessary to shew, either that sir Robert Atkyns, by the entry under the judgment in ejectment in 1710, acquired
the

the freehold by disseisin; or that, supposing he did not acquire the freehold, he acquired the possession, and by his feoffment vested an estate of freehold in Earle. His lordship denied both of these positions. As to the first, he laid it down, that the disseisin, to be effectual in this case, must be an actual disseisin, not a disseisin which was merely such at the election of the party. No case, therefore, or other authority from the books respecting disseisins, was applicable to the present case, if it did not relate to an actual disseisin. He then proceeded to explain the nature of an actual disseisin. He defined seisin to be a technical term, to denote the completion of that investiture by which the tenant was admitted into the tenure: disseisin, therefore, must mean the turning the tenant out of his tenure, and usurping his place and feudal relation. He observed, that originally no tenant could alien without licence of the lord; and that, when the lord consented to the alienation, the only form of conveyance was by feoffment, before the peers of the court, with the lord's concurrence, and with the ceremonies of homage and fealty. That a disseisin differed from a dispossession. It was something more. The effect of it was to make the disseisor tenant to every demandant, and freeholder *de facto*, in spite of the true owner. That, on the one hand, the lord must know upon whom to call as his tenant; on the other hand, the stranger must know against whom to bring his præcipe. A dispossession, therefore, did not amount to a disseisin, if it were not forcible, that is, against the will of the real owner; and if it were not such, as, both with respect to the lord and to strangers, introduced the disseisor into the tenure. These, he said, were the consequences of an actual disseisin. A disseisin by election was attended by none of these circumstances. In that case, the disseisor was neither tenant to the lord nor the stranger;—he was merely a disseisor at the will of the disseisee, who might, if he thought the process of assise a more eligible remedy than any of those to which he might have recourse, without disclaiming his seisin, resort to it, and, for that purpose, choose to be considered as disseised. From this description of the nature and consequences of the two different kinds of seisin, his lordship inferred that sir Robert's entry was not an actual disseisin. Supposing it a real proceeding, a termor might recover against the disseisor, or against the feoffee of the lessor; the possession he recovered enured to himself, or for his own benefit, during his term:—subject to that it enured to, or for the benefit of the persons who had the right to the freehold; that is, to the lessor, if he continued the owner of the fee; to his alienee, if he had infeoffed; to the heir or feoffee of his disseisor, if he had been disseised, and his entry taken away.—Then, suppose the proceeding to be merely fictitious, the judgment only entitled the party to recover the possession, without prejudice to the right. Now, by the special verdict, it appears he had no right to the possession: he had therefore a possession, without prejudice to the right. He was not *in* as particular tenant; there was no privity of seisin; he had only a naked possession.—But, says his lordship, the case is still stronger: the true owner cannot even elect to make a person in possession under a judgment in ejectment a disseisor: the entry is not *injustè & sine judicio*, but under authority of a court of justice. The true owner might enter upon a disseisor. But after a judgment in ejectment, an actual entry would not be permitted. Upon this reasoning his lordship establishes his first position, That sir Robert Atkyns did not acquire, by his entry, an actual estate of freehold by disseisin. This brought his lordship to the second question, Whether the feoffment to Earle vested an estate of freehold in him by disseisin? Here his lordship concluded, from the principles laid down by him in his discussion of the

[Note 285.] the first question, that the feoffment did not amount to an actual disseisin, but was such merely at the will of dame Atkyns. [330. b.] In this part of the question he says, that except the special case of fines with proclamation, which; he observed, stands upon distinct grounds, and the construction of the stat. of 4 Hen. VII. c. 24. for the sake of the bar, he could not think of a case where the true owner, whose entry is not taken away, might not elect, by choosing a possessory remedy, to be deemed as not having been disseised. The judges of the king's bench, in the opinion delivered by them in 1774, express themselves still more strongly on this head. They say, that "where the books speak of feoffments in fee by tenants for years, and that the fee simple passes thereby, it is to be understood of those feoffments of old, attended with livery, and actual transmutation of the possession from one man to another; that feoffments, from having been the only conveyance of land for a long term of years, have languished into mere form, and are nothing now more than a common conveyance; that their grandeur and efficacy is lost; and that without actually transferring of the estate from one man to another, they mix with the community of all other assurances: that the name of these feoffments, and the remembrance of them, remains, and survives them, however imperfectly, after the practice of making them, and consequently their solemnity, is quite at an end." Lord Mansfield afterwards considered the case in a third point of view, which was, That a tenant in tail in remainder could not, by the established law of the land, suffer a common recovery, without the consent and concurrence of the immediate tenant of the freehold. Now, says his lordship, the law will never permit that to be effected by wrong, unfair, or indirect means, which cannot be effected by right, fair, and direct means: but sir Robert could not, by right, fair, or direct means, suffer a common recovery, in the life of dame Ann, without her concurrence; he never had her concurrence; it follows, that his recovery must have been covinous, and therefore void. Upon these grounds, the court were of opinion, 1st, that sir Robert Atkyns the son, by his entry under the verdict in 1710, was not an actual disseisor, and therefore had not in him any actual estate of freehold: 2dly, that his feoffment to Earle gave Earle an estate of freehold only at the election of dame Atkyns, but did not give him an actual estate of freehold: and, 3dly, that the whole transaction was fraudulent, and therefore void.—The doctrine upon which the first of these points turns is not immediately the subject of the present enquiry. But some of the principles laid down by the court, in giving their opinions on the 2d and 3d points, will be investigated here, under two general questions. I. *What estate in the lands a feoffor must have, to give the feoffment efficacy.*—It seems to be admitted by the court, in the case referred to, that, originally, no greater estate was required to be in the feoffor than mere possession. This they attribute to the solemnities originally attending both the admission of tenants into the tenure, and the transfer of the fee. But it seems to be their opinion, that since most, if not all, of these solemnities have been dispensed with, the peculiar efficacy of a feoffment has been lost. This has certainly been the case in one very remarkable instance. Lord chief-baron Gilbert, in his Treatise of Tenures, p. 43. observes, "that the feoffee of the disseisor that came in by title, after a year and a day was expired, was anciently held to have right of possession, and to put the disseisee to his writ of entry, because the feoffee came in by title. Hence, writs of entry against the feoffee in the *per* and *cui*:—but this was not held so in respect of disseisors, because they, themselves being the wrong-doers, had no law in their favour, lest it should

“should encourage such injuries. But afterwards, as feoffments became more secret, and nothing paid to the lord, then they thought it too hard such feoffments should alter the right of possession; and therefore they construed the feoffee, that came in by his own act, to be a wrong-doer, and not to alter the right of possession.” But it will be difficult to find another instance in which feoffments have lost their efficacy. The arguments brought to prove that they have lost their efficacy in creating an estate of freehold, when it is not in the feoffor at the time of the feoffment, are, 1st, that livery is not made now with the solemnity with which it was made formerly;—2dly, that the passages in the books which speak of feoffments by tenants for years, and others having estates less than freehold, creating estates of freehold in the feoffee, by disseisin, are to be understood as referring only to a disseisin by election.—*As to the first objection*, It seems to be every where admitted, that the feoffments we are speaking of *once* had the operation and efficacy in question; and that this operation and efficacy is ascribed to them in numberless passages in our law books: so that the great, if not the only, difficulty is, to shew that, at the time when it is universally agreed feoffments had this operation and efficacy, they were made with no other forms and solemnities than those with which they are made now. It is certain, that the custom of making livery before the peers of the court, and recording the entry of the feoffee in the records of the lord’s court (if it were ever absolutely necessary) was dispensed with very soon after the Conquest, and was fallen completely into disuse at so early a period as that of Henry II. so that in this reign, and from thence to the present time, no other ceremony in making feoffments was used, than that which is now practised, of the feoffor and feoffee coming upon the land, either in person or by attorney, and there the feoffor, in the presence of witnesses (all other persons being out of the land) delivering the possession of it to the feoffee. The form of making feoffments in the reign of Henry II. is minutely described in Bracton, lib. 2. cap. 18. *Item, non valet donatio, nisi subsequatur traditio, tunc demum, cum donator plenam fecerit seisinam donatorio per se si presens fuerit, vel per procuratorem, & literas si absens fuerit, ita quod charta donationis & litera procuratorie coram vicinis, ad hoc specialiter convocatis, legantur in publico, & etiam cum donator corpore & animo recesserit a possessione.* This is the account given by Bracton of the mode of making feoffments in his time. He makes no mention of the presence of the *parcs curie* being necessary; or of its being necessary to record the entry of the feoffee in the lord’s court; or of any other ceremony besides those now practised. Hence we find that the account given by sir William Blackstone, book 2. chap. 2. § 3. of the present mode of making feoffments, is no more than a transcript of the passage cited above from Bracton. The next thing to be shewn is, that as the ceremony of making feoffments has been the same during all this period, the courts of judicature, and the writers upon our laws, have, during all this period, agreed in ascribing to them the effect and operation in question. Their language in this respect is perfectly uniform, that no freehold is required in the feoffor, and that however tortious or slender his possession may be, his feoffment, necessarily and unavoidably, gives an estate of freehold to the feoffee. Nothing can be more decisive on this subject than the following passages, transcribed from Bracton:—*Poterit autem res esse omnino aliena, & ex toto, quantum ad jus & proprietatem, & feudum, & liberum tenementum, usum-fructum, & nudum usum; & aliquis possuerit se in seysinam, per disseysinam, vel per intrusionem, cum morte invenerit rem vacantem. Et si talis, dum ita fuerit in seysinu, donationem fecerit, valebit quantum ad ipsum, & feoffatum suum, & alios,*
qui

[Note 285.] *qui jus non habent, ut prius dictum est, donec per illum, qui jus habet, revocetur. Item poterit esse aliena, quantum ad* [390. b.] *omnia prædicta, et alicujus in possessione existentis, quoad nudum nomen, vel quoad hoc, quod servitute[m] habeat in r.; quoad unum fructum percipiendum, sive ad certum terminum vel ad voluntatem. Item quoad hoc, quod habeas custodiam, vel curam, vel hujusmodi; in quibus casibus, si dum sic fuerit in seysina, quali quali, donationem fecerit, statim fit res data accipientes, quoad dantem & accipientem, & quoad alios, qui jus non habent. Sed quoad verum dominum, nunquam erit liberum tenementum, nisi ex longu & pacifica seysina, & unde si investimenti post tale feoffamentum posset versus dominum ponere se in seysinam, omnes quoscunque tenere posset exclusos a possessione.—Sed quid dicitur de eo qui nullam omnino seizinam habuit, nec aliquam juris scintillam, si donationem fecerit de re quam alius tenet, per se ipsum vel per alium nomine suo, non faciet rem accipientis, cum ipse nihil teneat, quia non potest plus juris ad alium transferre quam ipse habet, nec plus valebit ista donatio quam valeret si aliquis transiens per aliquod manerium ab aliquo possessum, dicerit socii suo viatoria De illi tale manerium, quod talis possidet, quia nihil aliud esset dicere quam dare ei plenam pignatam ex nihilo, cum possessio non sit vacua.—Bract. lib. 2. c. 14.—Si fiat donatio de re aliena.—So, in another place: Item licet liberum tenementum non habuerit, potest facere quod, dum tamen in seizina fuerit aliqua justè de causâ, sicut ad terminum annuum, vel ratione custodie. Idem erit, si nullam justam causam habuerit, ut si per intrusionem vel disseizinam; et cum sit in seizina alius donare poterit, licet non cum effectu et alius per donationem facere liberum tenementum, quod quidem ipse non habuerit.—Ibid. lib. 2. c. 5. § 4.—*

It seems to be clear from these passages, that, in Bracton's time, every person who had the possession, however slender his possession might be, as termor for years, tenant at will, or guardian; or however tortious his possession might be, as a disseisor or intruder; was nevertheless considered to be in the seizin of the fee, and might by livery transfer it to another. Bracton frequently repeats this doctrine, and illustrates it by many examples in the course of the second book.—Such is the account given by Bracton of the operation of feoffments; and as the account given by him of the form of feoffments has been contrasted with the account given of it by sir William Blackstone, the reader is desired to contrast the above account given by him of the operation of feoffments with the account given of it by sir Edward Coke, ant. 48. b. and 49. a. He expresses himself to the same effect in his 2d Inst. fol. 413. Commenting on the statute of Westminster 2. cap. 2. he observes, that though the act speaks of an alienation by feoffment by a tenant for years, yet it extends to tenants by statute-merchant, statute-staple, tenant at will, and tenant by sufferance; because all these have a possession. But he observes, that it is otherwise of a bailiff, for he has no possession at all.—Several other authorities will be offered to prove this point, in a subsequent part of this note; one more authority only shall be mentioned here. Mr. Knowler, in his argument for the defendant in the case above referred to, seems, with reason, to lay great stress upon it. It is 10 Ed. IV. 8, 9. In trespass, the defendant said that one *M.* was seised in his demesne as of fee, and leased to him for his life. The plaintiff said that, long before *M.* had any thing in the land, *D.* was seised in fee, and leased to *E.* for life; that *D.* died, and thereupon the reversion descended upon *Jane* his daughter, who married *M.* that *M.* granted the reversion to the defendant for life; that the tenant attorned; that *M.* died, and then *Jane* granted the reversion

reversion to the plaintiff, and the tenant attorned; whereupon he (the plaintiff) entered, and was seised till the defendant made the trespass without this, that *M.* whom the defendant supposes to have leased to him, was seised in his demesne as of fee. It is to be observed, that the leases mentioned here, being for lives, were necessarily created by livery. The question before the court therefore was, Whether want of seisin in a feoffor was a good plea? All the judges held it was not; and that the plaintiff should have pleaded generally *ne lessa fias*. And Littleton expressly says there, that if a man pleads a feoffment, it is no plea, to say that the feoffor had nothing at the time; he can only plead *n'enfeoffa fias*.—Here then we have the most decisive evidence, that from the reign of Henry II. to the present time, the courts of judicature and the writings of the professors of the law are perfectly agreed, in considering feoffments as made with the same ceremonies, and attended with the same efficacy and operation. It follows from this, that it can be no argument against their having the efficacy and operation contended for in the particular instance now in question—that at a period anterior to that mentioned here, they were made (if that really was the case) with more notoriety and ceremony than they are now.—As to the second objection, that the passages in the books which speak of tenants for years, and others having estates less than of freehold, creating estates of freehold in the feoffee by disseisin, are to be understood as referring only to a disseisin by election;—lord Mansfield, on his entering into this part of the argument, observes, that the precise definition of what constituted that disseisin, which made the disseisor the tenant to the demandant's *præcipe*, though the right owner's entry was not taken away, was once well known, but that it is not now to be found. Most unquestionably there are many cases in which it would now be difficult, perhaps impossible, to say, with certainty, whether they amounted to an actual disseisin, according to the doctrine of the old law; yet surely many cases may be stated, which by the most conclusive and satisfactory reasoning may be shewn to be actual disseisins, according to that law. Perhaps the following observations may serve to establish a general rule for distinguishing those acts which amount to actual disseisins, from those which are such only at the election of the party. By a disseisin at the election of the party, is not to be understood an act which in itself is a disseisin, but which the party supposed to be disseised may, if he pleases, consider as *not* amounting to a disseisin: on the contrary, every act which is susceptible of being made a disseisin by election is no disseisin, till the party in question, by his election, makes it such. It follows therefore, that every act which is said by the writers to produce an immediate disseisin necessarily implies an actual disseisin. Now we find, that the disseisins produced by feoffments instantly gave the feoffee, against every person but the disseisee, an *immediate* estate of freehold, with all the rights and incidents annexed to it. To this effect Bracton writes, lib. 2. ch. 5. § 3. *Item valida poterit esse donatio statim ab initio inter quasdam personas, et invalida et suspensa quantum ad alias personas, ut si quis rem alienam dederit alicui, ut supra dictum est.* Hence we find every where, that the wife of the feoffee became *immediately* intitled to her dower; the husband of the feoffee became *immediately* intitled to his curtesy; and the descent upon the heir of the feoffee *immediately* took away the entry of the disseisee. This is the constant language of the books, when they speak generally of disseisins. Now the books make no difference, whether the feoffment is made by a person seised of an estate of freehold, or by a person having only the bare possession, as tenant for years, at will, or by sufferance. The

[Note 285.] description given by Bracton, in the passages cited from him, answers every notion given by lord Mansfield of an actual disseisin. [330. b.] Bracton says, that immediately upon the feoffment the estate becomes the property of the feoffee, as between him and the feoffor, and every other person, except the rightful owner; that a long and uninterrupted possession, of a certain duration, will make the title of the feoffee good even against the rightful owner; that, to prevent this, the donor must restore his own seisin.—Here then is what his lordship so justly considers as necessarily requisite to form an actual disseisin—a person who has expelled the tenant from his fee, and usurped his feudal place and relation; a tenant to the *præcipe* of every demandant, though the true owner's right of entry upon him is not taken away. If the feoffee in this case were only a disseisor at the election of the disseisee, it would follow, that he was not a disseisor till the right owner made him such by his election, and, therefore, that the fee would not be in him, if the rightful owner did not elect to make him a disseisor. According to this doctrine, if the feoffee of tenant for years, or any other person making a feoffment without an estate of freehold in him, died in the life of the rightful owner of the estate, the estate would not be subject to dower or curtesy, nor would the entry of the rightful owner be taken away. But we find, that in all cases in which our law-writers treat of disseisins made by feoffments, they consider it as a matter of course, that the estate of the feoffee immediately became an estate of freehold, with all the qualities and rights of a freehold estate annexed to it. A similar argument lies from the relation in which such a feoffee stood with respect to strangers. Bracton observes, that he immediately acquired the seisin of the fee as against strangers; which could not be, if he were only a disseisor at the election of the party. It has been observed before, that the books make no difference between feoffments made by persons having estates of freehold, and feoffments made by persons having estates less than freehold. Bracton expressly mentions guardians, tenants for years, by sufferance, at will, by disseisin, or intrusion, as persons whose feoffments are attended with the effect described above. So does sir Edward Coke, in the passage cited from the second Institute. So Perkins, sect. 222. "If lessee for years enfeoffe a stranger, the lessor being upon the land, yet the land shall pass by the feoffment; but perhaps, if he continues upon the land, claiming the same after the feoffment, this countervails an entry for a forfeiture: and the reason why it passed by such a feoffment is, because the lessor had nothing to do, to meddle with the possession of the land during the term." So Dyer, 362. b. A termor for 1000 years made a feoffment, by the words *dedi, concessi, et feoffavi*. It was made a doubt, whether the lands passed by the feoffment, so that the lessor might enter for the forfeiture; or whether the term passed by the first words. The very doubt shews that it was taken for granted, that without those words the freehold would vest in the feoffee. In the margin of that case it is said, that in the case of Read and Morpeth v. Errington (reported in Cro. Eliz. 322.) it was held, that the lessee for years might make a feoffment notwithstanding the presence of the lessor; and that it was a forfeiture of the lease; for though the lessee had the possession, and might dispose of it, yet the lessor might enter for the forfeiture. Thus, in the case of Blundell v. Baugh, sir William Jones 315. the judges held, that when tenant at will makes a lease rendering rent, and he enters and pays rent, that is no disseisin, but at the election of the first lessor; for, say they, it never shall be a disseisin, unless there be the claim of a stranger by entry to have the freehold, or unless the owner of the land waives the occupation of

of the land, or brings an action, or otherwise declares his intention, that he takes it by disseisin. Here the two kinds of disseisin are contrasted^d in the most direct and positive manner. The judges also, in the case of *Blundell v. Baugh*, cited *Matthew Taylor's case*, 34 Eliz. C. B. Tenant at will, or for years, makes a feoffment in fee, and dies, his wife brings dower against the feoffee, who pleaded *ne unque seisis que dower*: but the whole court was against him; for in the instant the fee was gained: In 12 Edw. IV. 12. ant. 31. b. Cro. Jac. 615. that doctrine is controverted, on the ground that the seisin of the feoffor was but momentary: but this proves the position attempted to be established here; for if the feoffment in this case only gave a freehold at the election of the reversioner, the feoffor had no seisin. The same doctrine seems to be laid down very expressly by lord Hardwicke. Having occasion to mention a fine levied by tenant at will, he says, "If they meant a wrong thereby, they must have taken another method; as this could not work a disseisin on the trustees, and turn their estate to a right, while they were tenants at will to the trustees. This way indeed they might do it, according to the distinction taken in several cases, particularly in *Dormer and Parkhurst*, if they executed a feoffment on the land; because it is a feoffment on livery, which is a notoriety to the trustees, and puts it on them to make entry to avoid." In the same manner; 3 Atk. 339. his lordship says, "If a man enters as my tenant, he does not gain such a possession to levy a fine thereon, unless he continues in possession; for a wrong doer, to gain a possession by disseisin, must not step on the land, and withdraw, and leave the rightful owner in possession, which would be sufficient to give a seisin on a feoffment, but not to levy a fine."—In every stage of our law, the most modern as well as the most ancient, the peculiar operation of a feoffment, as to the divesting of estates, destruction of contingent remainders, and extinction of powers, has been recognised. Citations and arguments to prove the point before us, might be easily multiplied; but they shall be concluded here, by some observations upon the allowed effect of a fine levied by a tenant for years, or even by a tenant at sufferance, who has previously made a feoffment. No point of our law is more clearly settled, than that unless some one of the parties to a fine has an estate of freehold in the lands, of which it is levied, it is totally void, as to all strangers, and may be avoided at any time by the plea, *quod partes finis nihil habuerunt*. Now, supposing a tenant for years to make a feoffment, and the feoffee afterwards to levy a fine, it is clear that the fine would be without effect, unless the feoffment gave him an estate of freehold. In the case of *Whaley v. Tancred*, 1 Vent. 241. sir Thomas Raymond, 219. 1 Leo. p. 2. 52. it was settled, that where a fine is levied in this manner, the fine will bar the lessor at the end of five years after the expiration of the term. This would never be the case, unless the feoffment had previously created an estate of freehold.—In the case of *Doe v. Prosser*, Cowp. 217. lord Mansfield expressed himself as follows:—"It is very true, that I told the jury they were warranted by the length of time, in this case, to presume an *adverse* possession and *ouster* by one of the tenants in common of his companion; and I continue still of the same opinion. Some ambiguity seems to have arisen from the term *actual ouster*," as if it meant some act accompanied by real force, and as if a turning out by the shoulders were necessary. But that is not so. A man may come in by a rightful possession, and yet hold over *adversely* without a title. If he does, such holding over under circumstances will be equivalent to an *actual ouster*. For instance, length of possession during a particular estate, as a term of one thou-

—and

[Note 285.] “ sand years, or under a lease for lives, as long as the lives
 “ in being, gives no title. But if tenant *pur autre vie* hold [330. b.]
 “ over for twenty years after the death of *cestuy que vie*, such holding
 “ over will in *rejection* be a complete bar to the remainder-man or re-
 “ versioner; because it was *adverse* to his title. So in the case of te-
 “ nants in common: the possession of one tenant in common, *eo nomine*,
 “ as tenant in common, can never bar his companion; because such pos-
 “ session is not adverse to the right of his companion, but in support of
 “ their common title; and by paying him his share, he acknowledges
 “ him co-tenant: nor indeed is a *refusal to pay*, of *itself*, sufficient,
 “ without denying his title. But if upon demand by the co-tenant of his
 “ moiety, the other *denies to pay*, and *denies his title*, saying he claims
 “ the whole and will not pay, and continues in possession, such posses-
 “ sion is adverse and *ouster* enough.” By the adverse possession men-
 tioned in this case, his lordship never could mean a disseisin at the elec-
 tion of the party. What is there to distinguish it from an actual dis-
 seisin?—Upon the whole, therefore, it is submitted to the learned read-
 er’s consideration, 1st, that, as feoffments have not been made from the
 reign of Henry the II. to the present time, with any other solemnities
 than those with which they are made at present, every operation and
 efficacy, which has been constantly and uniformly allowed or ascribed to
 them by the courts of judicature, or writers of authority cotemporary
 with or subsequent to that monarch’s reign, down to the present time,
 ought, notwithstanding the objection that they are not now made with
 some of the solemnities with which they are said to have been made in
 their very earliest institution, to be allowed and ascribed to them now:
 2dly, that by the passage cited from Bracton, and the other authorities
 cited or referred to in the course of this note, it appears, that the dis-
 seisin produced by feoffments must be understood to be an actual disseisin,
 and not a disseisin merely at the election of the party: 3dly, that in ma-
 ny of these authorities it is most expressly mentioned, and that in all of
 them it must be implied, that however slender, bare, or tortious, the
 possession of the feoffor is, his feoffment necessarily and unavoidably
 vests the freehold in the feoffee, till the disseisee by entry or action re-
 stores his possession: 4thly, (to apply this abstruse and antiquated learn-
 ing to the present subject matter of business) that copy-holders, tenants
 for years, by *eligit*, statute-merchant, statute-staple, at will, or by suf-
 ferance, are all considered to have the possession of the estate, and that
 they may by feoffment vest an actual estate of freehold in the feoffee:
 5thly, that a fine may be levied of, or a common recovery suffered upon,
 this estate of freehold: 6thly, that the feoffment so executed, the fine so
 levied, and the recovery so suffered, are immediately good against every
 person except the rightful owner: and, 7thly, that in process of time
 they become good against the owner himself.—To ascertain the exact
 period of time, when fines levied by persons of this description will
 be a bar to the rightful owner, would be too great an extension of this
 note, the length of which already requires an apology.—As to the se-
 cond objection, that the feoffment of sir Robert Atkyns was founded in
 fraud, and was therefore void, it is to be observed, that however that
 reasoning applied to the particular case before the court, it does not ap-
 ply to the general question discussed in this note, which presupposes
 previous possession in the feoffor, free from every circumstance of fraud;
 either fair and innocent, or acquired by the open and notorious circum-
 stances of disseisin, abatement, intrusion, or deforcement. Sir Robert
 Atkyns acquired his possession by the entry made by him under the
 verdict obtained by him in 1710. He lost it by the verdict given for
 dame

dame Ann Atkins in 1712. It may, therefore, be said (and the fact really was) that he obtained the verdict given for him in 1710, and consequently the possession under it, by a *pretended* title. He had not a fair or innocent possession. He did not acquire his possession by disseisin, intrusion, abatement, or deforcement; it did not descend upon him; it did not come to him by act of law; he was not in the seisin of the fee by virtue of any gift or demise from the freeholder: he obtained his possession by the judgment of a court of law, under the colour of a pretended title. Thus, in the language of the law, his original possession was founded in fraud, practice, and stratagem. And, to use an expression of the judges, 3 Rep. 78. a. "the common law does so abhor fraud and covin, that all acts, as well judicial as others, which of themselves are just and lawful, yet, being mixed with fraud and deceit, are, in judgment of law, wrongful and unlawful."—In Burr. 117. great stress was laid on the resolution of the judges in Fermor's case. The case there was, that Thomas Smith being seised in fee of several lands, and holding others by copy of court-roll, and others for a term of years, and others at will (all of them lying in the same vill), made a feoffment with livery of all those held by copy, for years, and at will, to one Chappell for life, and afterwards levied a fine. The question was, Whether the fine was a bar to the owners of the fee, at the expiration of the first five years? It appeared that Smith continued in possession of the land, and paid the rents. See 3 Rep. 77. 1 And. 170. Cary 20. Cro. Eliz. 86. The judges were of opinion that the feoffment was fraudulent. Upon an examination of the different reports of the case, it will be found, that his *continuing in the possession* of the land, and *paying rent after* he made the feoffment, were the chief circumstances which induced the court to consider the feoffment to be fraudulent. The same may be observed of the case of White v. Bacon, Saville 126. The continuing in the possession of the land after the conveyance has always been considered, in our law, as a badge of fraud. Fermor's case therefore only proves, that if a tenant for years, after making a feoffment, continues in the possession of the land, and pays rent for it, the possession acquired by him under the feoffment is fraudulent; and therefore a fine, and every other act which derives its effect from that possession, is void. But Fermor's case does not apply to the general question of the operation of a fine levied by tenant for years, who has previously executed a feoffment, when the case is not affected by circumstances of fraud. The case mentioned before, in this note, of Whaley v. Tancred, is directly in point, that a fine so levied by lessee for years is a bar to the lessor after five years from the expiration of the lease. And with respect to the feoffor's remaining in the possession, if by the deed declaring the uses of the fine it is expressed that the fine should enure to his use, the possession will be invested in him by the statute of uses.—The editor begs leave to conclude with an observation of lord Hardwicke (3 Atk. 631.) which seems to him to sanction, in some measure, the general reasoning contained in this note:—"If it is a mere legal title, and a man has purchased an estate which he sees himself has a defect upon the face of the deeds, yet the fine will be a bar, and not affect him, with notice, so as to make him a trustee for the person who had the right, because this would be carrying it much too far; for the defect upon the face of the deeds is often the occasion of the fine's being levied." The doctrine contended for in this note seems, to the editor, to receive some countenance from the arguments and decision in Goodright v. Forrester, 8 East's Reports, 552.

[331. a.]

[Note 286.] (1) The livery, in this case, is *secundum formam chartæ*; and therefore, according to sir Edward Coke's doctrine, ante 48. a. its operation and effect are restrained to the quantity and quality of the effectual estate contained in the deed. Thus, says he, if a man makes a lease for years by deed, and delivers seisin according to the form and effect of the deed, yet he has but an estate for years, and the livery is void. The expression in the text, that tenant in tail cannot grant, or alien, or make any rightful estate of freehold to another person, but for the term of his own life, is not to be understood literally, that the grantee has but an estate for life, and that his estate is *ipso facto* determined by the death of the tenant in tail: all that is meant by it is, that his estate is certain and indefeasible no longer than the life of the tenant in tail; for, upon the death of the tenant in tail, it is defeasible by the issue, either by action, or by entry or claim on the land, at his election. Still it has a continuance till it is so defeated by the issue. In note 1. ante 326. b. it has been explained upon what principle, in the case of a tenant in tail conveying by feoffment, it was held, that the statute *de donis* did not absolutely nullify the alienation, but only took away the entry of the issue, and reduced him to his remedy by formedon. Upon similar principles, in the case of a tenant in tail conveying by bargain and sale, release, covenant to stand seised, or any other mode of conveyance operating by way of grant, it has been held, that the statute does not nullify the conveyance, but reduces the issue in tail to his entry; or, if he prefers it, to his action, to avoid it. Thus, the grantee hath a base fee; his wife is entitled to her dower during the continuance of the fee; and if the grantee commits waste, the tenant in tail, having no reversion, has no right of action against him. 3 Rep. 84. b. 10 Rep. 96. See Machel v. Clarke, 2 Salk. 619. Farresley 18. Com. 119. Lord Raym. 778. Goodright on the demise of Tyrrell v. Mead and Shilson. 3 Burr. 1703. The passage, therefore, in Littleton, must be understood in this qualified sense, otherwise it is inaccurate. This was observed by lord chief justice Holt, in the case of Machel v. Clarke, and by lord chief justice Hobart, in the case of Sheffield v. Ratcliff, Hob. Rep. 338, 339.

[331. b.]

[Note 286.*] (1) Sir William Blackstone, in his account of a forfeiture, 3 Com. c. 10. observes, that it is *nomen generalissimum*; being a much larger and more comprehensive expression than any of the former, and signifying the holding of any lands or tenements to which another person has a right; so that it includes as well an abatement, an intrusion, a disseisin, or a discontinuance, as any other species of wrong whatsoever, whereby he that hath a right to the freehold is kept out of possession. But, as contradistinguished from the former, it is only such a detainer of the freehold from him that hath the right of property, but never had any possession under that right, as falls within none of those injuries. A forfeiture may also be grounded on the non-performance of a covenant real: as if a man seised of lands covenants to convey them to another, and neglects or refuses so to do, but continues possession against him, this possession being wrongful is a forfeiture. And hence, in levying a fine of lands, the person against whom the fictitious action is brought, upon a supposed breach of covenant, is called a forfeitant. Mons. Houard, *Anc. Loix des François*, tom. 1. p. 654. mentions, that Du Cange refers to the laws of Alfred and other kings of England precedent to the Conquest, for an explanation of the word forfeiture; but he ought to have observed, that it was not introduced into the Latin translation of those laws till after the introduction of

of the Norman customs into England; that *deforce* is an old French word, and that *fortia* is taken for force in the 28th formula of Marculphus.

[332. a.]

(1) VIII. *That nothing which lies in grant can be said to be discontinued.*—[Note 287.] The term discontinuance is used to distinguish those cases, where the party whose freehold is ousted can restore it by action only, from those in which he may restore it by entry. Now, things which lie in grant cannot either be divested or restored by entry. The owner, therefore, of any thing which lies in grant, has, in no stage, and under no circumstances, any other remedy but by action; consequently the distinction in question can never be applicable to him. It is true that the books often mention both disseisins and discontinuances of incorporeal hereditaments; but these disseisins and discontinuances are only at the election of the party, for the purpose of availing himself of the remedy by action.—Some observations on disseisins of this description are inserted in note 285. commencing at page 330. b.—But a disseisin or discontinuance of corporeal hereditaments necessarily operates as a disseisin or discontinuance of all the incorporeal rights or incidents which the disseisee or discontinuee has himself, in, upon, or out of, the land affected by the disseisin or discontinuance.

[332. b.]

(1) It is frequently said in our law-books, that a fine has no operation upon any estate or interest which is not previously divested or turned to a right; but this expression, considering it strictly, is inaccurate. By turning to a right, it is generally meant that the person whose possession is usurped *cannot restore it by entry*, and can only recover it by action. See note 1. ant. 239. a. But, in the present case, the expression, turned to a right, must be understood in a more general sense. The import of it is, that the parties to the fine, or some of them, have in them, at the time of their levying the fine, or acquire by it, a possession adverse to, and inconsistent with, the estate or right intended to be barred; the real owner, therefore, at the time of levying the fine, or by its operation, is disseised of his possession, but the right still remains in him. In this general sense his possession may be said to be turned to a right; but this right may be such as enables him to restore his possession by mere *entry*, without his resorting to an action. See 2 Atk. 631. In another sense it is inaccurate, as it seems to imply, that the turning to a right is produced by the operation of the fine; but, generally speaking, this is not the case. Every disseisin, intrusion, or abatement, turns the estate to a right, in the sense in which that expression is explained above. If the disseisor, intruder, or abator, afterwards levies a fine, it operates by the statute, after a non-claim of five years, as a bar to the right of the person whose estate is disseised, intruded upon or abated. But its operation in these cases is merely as a bar, the ouster of the possession or divesting of the right being previously effected by the disseisin, intrusion, or abatement. In some cases, however, it does not operate only as a bar. As if tenant for life levies a fine, it is a forfeiture of his estate; and if the reversioner does not enter within five years after the forfeiture, or, at the furthest, within five years after the death of the tenant for life, he is barred of his remedy to recover. Wherley and Tancred, 1 Ventris 241.

[333. a.]

(1) IX. It has been observed before, that no conveyance by tenant in tail can operate as a discontinuance, unless it is created by livery, or by that

that which, in the eye of the law, is tantamount to it.—Littleton now proceeds to lay down, that to make a discontinuance, the conveyance must be *of such an estate as in its original creation may, by possibility, endure beyond the life of the tenant in tail.* When the estate so created is at an end, the discontinuance also is at an end.

[Note 290.] (2) *Nota, a proviso on 32 Hen. VIII. that the lease shall be made in both their names, where the inheritance is in the woman. And see Cro. Car. 22. Smith v. Trender, where there is a quere, whether it ought to be so where the inheritance is in both.*—Lord Nott. MSS.

[333. b.]

[Note 291.] (1) All this is a consequence of the doctrine laid down in the last page. If the remainder or reversion is created at the same time as the particular estate, it necessarily must be created by the same livery. If it is created at a subsequent time, then, to continue the discontinuance after the determination of the particular estate, the reversion or remainder must be executed in possession during the life of the tenant in tail. The entry of the reversioner or remainder-man in this case is tantamount to a second livery.

[334. b.]

[Note 292.] (1) The estate of the lessee for years not being created by livery does not displace the possession, and consequently does not disturb the descent of the inheritance upon the issues inheritable to the estate. It is otherwise where the lease is for life. That is created by livery, and therefore displaces the possession, and gives the tenant in tail a tortious estate in fee simple, in reversion immediately expectant upon the life-estate of his donee;—that reversion must therefore descend on the daughter as heir general.

[335. a.]

[Note 293.] (2) X. *As to discontinuances made to, or with the concurrence of, the remainder-man or reversioner*:—The feoffment of tenant in tail to the immediate remainder-man or reversioner in fee has the operation of a surrender. In this light it cannot be considered to pass a greater estate than the grantor may lawfully convey: it does not, therefore, work a discontinuance. But if it is made to a stranger, *the mere concurrence of the remainder-man or reversioner* does not prevent the discontinuance, either with respect to the issues in tail, or his own remainder or reversion, even though the tenant in tail die without having issue. Thus, in *Baker v. Hacking*, 3 Cro. 387. 405. *J. C.* being tenant in tail, with the immediate reversion in fee to *R. C.* both of them joined in a feoffment to *A.* for life. *R. C.* made his will and died; and then *J. C.* died without issue. It was admitted, that if it were a discontinuance of the reversion, the deviser, not being seised, had no power to devise. Sir Geo. Croke was of opinion, that as there was no issue of the tenant in tail, his feoffment was no discontinuance of the reversion: he considered it as the lease of the tenant in tail during his life, and afterwards the lease of the reversioner; and that the reversioner's joining shewed it was not the intention of the parties to displace his estate. But the three other judges held it to be a discontinuance, on the ground that the effect of a discontinuance is immediate, and does not depend on the tenant in tail having, or not having, issue.—They were also of opinion, that if the reversion in fee, instead of being in a stranger, had been in the tenant in tail himself, the feoffment would have been a discontinuance, as well of his own reversion, as of the estate of the issue in tail.—But where the tenant for life and reversioner join in the conveyance, each of them is considered

considered to pass his own estate : the tenant for life, the freehold ; the reversioner, the inheritance. Hence, if tenant for life, remainder in tail, remainder in fee, join in a fine, it is no discontinuance to the remainderman in fee. This was resolved in *Peck v. Channell*, 1 Cro. 827, 828. on the ground, that none shall make a discontinuance, but he who is seised of an estate tail in possession.

[337. b.]

(1) A *surrender* differs from a release in this respect, that the release [Note 294.] operates by the greater estate's descending upon the less :—a surrender is the falling of a less estate into a greater. As there is necessarily a privity of estate between the surrenderor and the surrenderee, no livery of seisin is necessary to perfect a surrender. See 2 Bla. Com. Ch. 20. —In *Thompson v. Leach*, 2 Salk. 618, the court held, that a surrender immediately divests the estate out of the surrenderor, and vests it in the surrenderee ; for this is a conveyance at common law, to the perfection of which no other act is requisite but the bare grant ; and that, though it be true that every grant is a contract, and there must be an *actus contra actum*, or a mutual consent, yet that consent is implied ; that a gift imports a benefit ; that an assumpsit to take a benefit may well be presumed ; and that there is the same reason why a surrender should vest the estate before notice or agreement, as why a grant of goods should vest a property ; or sealing of a bond to another in his absence should be the obligee's bond, immediately, without notice.

(2) This doctrine, that to give a surrender legal effect, the surrenderee must have the immediate estate in remainder or reversion expectant on the estate of the surrenderor, evidently applies to the common case of a tenant for life, with remainder to trustees during his life, to preserve contingent remainders. It is now settled beyond doubt, that the estate of the trustees is a vested estate of freehold. It must therefore necessarily prevent a surrender from the tenant for life to the ulterior-remainder-man. In cases of limitations to the father for life, remainder to his sons successively in tail, it was the practice formerly, particularly where it was intended to suffer recoveries with a single voucher, to make the father convey his estate to the son. This was sometimes done by surrender. To this there could be no objection, where there was no limitation to trustees to preserve. But in those cases, where such a limitation was introduced, it necessarily failed to operate as a surrender, for the reason above mentioned. It has, however, been contended, that, though in this case the deed was void as a surrender, it would operate as a covenant to stand seised. That an assurance, where there is a proper consideration, will operate as a covenant to stand seised, though the words used in the deed point at a different mode of assurance, is placed beyond doubt, by many authorities both ancient and modern. But between those cases and that now under consideration there is this striking difference ; that in all those cases the estate vested in the party would be the same both in quantity and quality, whether the deed operated in the mode imported by the language of the deed, or in any other mode. But in the case under consideration, if the deed operated by way of surrender, the party would take one kind of estate ; if it operated by way of covenant to stand seised, he would take another. For if it could operate by way of surrender, the father's life estate would be immediately extinguished, and the son would become tenant in tail in possession : if operated by way of covenant to stand seised, the father's life estate would immediately, by the statute of uses, be transferred to the son, and he would become tenant for life of his father,

remainder to trustees to preserve, remainder to himself in tail. Then supposing him to die without issue in the father's life time, if the deed operated by way of surrender, the person intitled in remainder next expectant upon the estate tail of the son would be intitled to enter immediately; but if the deed operated by way of covenant to stand seised, there would be an estate of special occupancy during the father's life, and the next remainder-man would not be intitled to take until the father's decease. To this it may be replied, that the object of the parties was, that the son should by virtue of the deed become seised of the lands for a particular purpose. It is found, that it cannot have that effect, if its mode of operation be that which the parties themselves intended; but that, if the deed is held to operate in another mode, it will accomplish the object of the parties. The courts therefore, it may be said, conformably to their usual practice of effectuating the intent of parties, when it can be done, will construe the deed to operate in that mode of assurance in which it can take effect, and consequently consider the deed to operate by way of covenant. It is observable, that when the tenant to the præcipe in a recovery is made by bargain and sale, it sometimes happens that the bargain and sale is not inrolled. But frequently in these cases the lands are out upon leases for years, or in the hands of tenants at will; where this is the case there seems room to contend, that the deed, though void as a bargain and sale for want of inrolment, may operate as a grant of the reversion expectant on these particular estates.

[338. a.]

[Note 295.] (1) By the stat. 29 Cha. II. c. 3. sect. 3. no lease, &c. either of freehold or term of years, or any uncertain interest, not being copyhold or customary interest, shall be *surrendered*, unless it be by deed or note in writing, signed by the party *surrendering* the same, or his agents, thereunto lawfully authorized by writing, or by act and operation of law. Upon this statute it was held, by lord chief-baron Gilbert, in *Magenis v. Macculloh*, Gilb. Ca. in Eq. 236. that a lease for years cannot be surrendered by cancelling of the indenture without writing; because the intent of that statute was to take away the manner they formerly had of transferring interests to lands by signs, symbols, and words only; and therefore, as a livery and seisin on a parol feoffment was a sign of passing the freehold, before the statute, but is now taken away by the statute; so the cancelling of a lease was a sign of a surrender, before the statute, but is now taken away, unless there be a writing under the hand of the party. [But where the lessee has voluntarily surrendered his lease to be destroyed without writing, and afterwards claims under it, though his interest will not thereby be divested, yet he can recover no more land than what he can prove with absolute precision and certainty to have been covered by such lease. Every difficulty and presumption will be turned against him. *Jackson ex. dem. Butler & al. v. Gardner & Johnson*, 394.] In *Farmer v. Rogers*, 2 Wils. p. 27, it was held, that the statute does not make a deed absolutely necessary to a surrender; for it directs it to be made either by deed or *note in writing*; and when it is made by a note in writing, there is no occasion for any stamp duty, it not being a deed. But see 48 Geo. III. c. 149. sch. part 1.

[Note 296.] (2) For the first lease and the second cannot subsist together, and the parties, by making a contract of as high a nature for the same thing, tacitly consented to dissolve the former; for without the dissolution of that, the lessor could not grant to the lessee that interest which

was already passed from the lessor to the lessee by the first lease. *Note to the 11th edition.*

[338. b.]

(4) Mergers were never favoured in courts of law, and still less in [Note 297.] courts of equity. Hence, even in a very early period of the equitable jurisdiction of the court of chancery, it was admitted, that a fine or feoffment to lessee for years, to the use of a stranger, did not extinguish the term; because the *cestui que use* had no method to compel the execution of it, but through the medium of the court of chancery; and the court would not compel him to execute it, to his own prejudice, during the continuance of the term. The statute of uses expressly saves the rights of the feoffee to the use; this preserves him the benefit of any terms which may be vested in him. Even where a term for years was made a tenant to the *franchise*, it was determined, that the momentary freehold vested in him, for the purpose of making him tenant, did not extinguish the term. Cro. Jac. 643. It has by some been said dangerous to make feoffees or releasees to uses trustees for terms of years, if they are also trustees for preserving contingent remainders; for if they should have occasion to enter for the forfeiture of the tenant for life, it may be made a question, whether, at least in law, that would not be a merger of their term. A complete and profound treatise on the abstruse doctrine of Merger is much wanted. The profession will hear with pleasure that they are to be favoured with one by Mr. Preston, the author of the *Essay on the Quantity of Estates*.

[342. b.]

(1) In the course of these notes, frequent mention has been made of [Note 298.] the necessity which there was at the old law, that there should always be an immediate tenant of the *freehold*, and of the reasons upon which this necessity was grounded; but these reasons did not apply, in the same degree, against the suspence of the *inheritance*. Hence, tho' for the reasons mentioned, it was an established maxim, that the freehold never could be in suspence, or, as it is generally called, in abeyance, it was admitted that the inheritance might. But this suspence or abeyance of the inheritance could not but be considered with a very jealous eye; for tho' fiefs, in their original constitution, were not hereditary; still, when they had once become hereditary, the consequences of their becoming such were so numerous, and affected materially so many other parts of the feudal system, that, tho' it was always admitted that the inheritance might be suspended, it was agreed, that the suspence of it should be discountenanced and discouraged as much as possible, and allowed upon none but the most pressing and urgent occasions. The chief reasons of the aversion of the old law to the suspension of the inheritance are set forth in two late masterly and profound publications, Sir William Blackstone's *Argument on the Case of Perryn and Blake*, and Mr. Hargrave's *Observations on the Rule in Shelly's case*.—To these reasons the modern law has added her marked and unremitting of every restraint upon alienation; it being clear, that no restraint upon the alienation of property would be more effectual than the admission of a suspence of the inheritance.—The same principles have, in some degree, given rise to the well-known rule of law, that a preceding estate of freehold is indispensably necessary for the *support* of a contingent remainder; and they influence, in some degree, the doctrines respecting the *destruction of contingent remainders*. Mr. Fearn's excellent *Essay upon these subjects* makes any farther investigation of them here quite unnecessary: but perhaps the reader will not be displeased with the following short discussion of a subject intimately connected with them;—*the suspension and extinction*

[Note 298.] *extinction of powers*, deriving their effect from the statute of uses, or the statute of wills. Those powers which are given to mere strangers, that is, to persons who were not owners of the land, at the execution of the instrument creating the power, and who do not take, under it, either a present or a future estate or interest in the land, are said to be *collateral* to the land:—those which are reserved to the owner of the land, or to a person deriving under the instrument creating the power either a present or future estate or interest in the land, are said to be *relating* to the land: and these again are subdivided into two classes, powers *annexed* to the estate in the land, and powers *in gross*. The former are, where a person has an estate in the land, and the estate to be created by the power is to take effect in possession during the continuance of the estate to which the power is annexed: such is the power usually given in settlements to tenants for life, when respectively in possession, to make leases. —Powers in gross are, where the person to whom they are given has an estate in the land; but the estate to be created under, or by virtue of the power, is not to take its effect till after the determination of the estate to which it relates: such are the powers usually inserted in settlements to jointure an after-taken wife.—I. *As to powers collateral to the land*,—it is said, that a release, fine, feoffment, or common recovery, will not extinguish or destroy them. See ante 265. b. Albanie's case, 1 Rep. 110. b. Digges's case, 1 Rep. 173. a. Moore 605. The reason why a release does not extinguish them is said to be (ante 265. b.) that collateral powers are not in the nature of rights or titles, and cannot therefore, from their nature, be released. 2dly, That where powers are given or reserved to any person having any estate or interest, either present or future, in the land, the exercise of these powers is considered as advantageous to him; and there is no reason why he should not be allowed to depart with, or exclude himself from the benefit of them: but that, when they are given to strangers, they are intended for the benefit of some third person; and therefore the extinction of them is supposed to be injurious to some person intended to be benefited by them. With respect to their not being destroyed by feoffment, fine, or recovery; every man, it is said, is estopped from claiming any estate contrary to his own feoffment; but if a stranger, with a power of revocation, makes a feoffment, levies a fine, or suffers a recovery, and afterwards revokes, the person claiming the estate under the revocation is in immediately by, and makes his title immediately from, the original settlor or deviser, and not by or from the feoffor, conusor or recoverer: he is not therefore bound or estopped by any act of the feoffor, conusor, or recoverer. Thus, by the old law, if *cestui que use* devised that his feoffees should sell his land, and died, and his feoffees made a feoffment over; yet it was held, that the feoffees might sell against their own feoffment, because the power to sell was merely collateral to the right to the land, and the vendee took nothing by the feoffment. II. *As to powers relating to the land*.—Such of those powers as are in the nature of powers *annexed to the estate* may, it is agreed, be extinguished by release, feoffment, fine, or common recovery. These powers also are liable to be extinguished or suspended by any of the conveyances which are said not to operate by transmutation of the possession, as bargains and sales, leases and releases, and covenants to stand seised: for whoever has any estate in the land may convey that estate to another; and it would be unjust that he should afterwards be admitted to avoid, or to do any thing in derogation from his own grant.—Any assurance of this nature, therefore, which carries with it the whole of the grantor's estate, is a total destruction of the powers appendant to that estate; and, by parity of reason, any such assurance as carries

carries with it only a part of the estate (as a term for years, or an estate for life) suspends, during the continuance of that estate, the exercise of the power, or, at least, the estate to be raised by it : and any such assurance, which induces only a charge upon the estate (as a grant of a rent) necessarily subjects the estate created by the power to that charge. With respect to such of the powers relating to land as are said to be *powers in gross* :—As the estates raised by them do not fall within the compass of the estate to which they are said to relate, there does not seem to be any reason why any alteration in that estate should affect them. Hence, if tenant for life, with a power to jointure an after-taken wife, conveys a life estate by bargain and sale, lease and release, or covenant to stand seised, this conveyance will not affect the power of making a jointure. If he even makes a conveyance in fee by any of these assurances, as it is not their operation to pass a greater estate than the grantor has a right to convey, the power in gross is not affected by it ; but if he conveys by fine, feoffment, or recovery, as these assurances not only pass the estate of the grantor, but convey a tortious fee, they necessarily disturb the whole inheritance, and consequently divest the seisin, out of which the uses to be created by the power are to be fed. They therefore operate in extinction of the power. A power in gross may also be released to any of those in remainder :—And if the whole fee is in the terre-tenant, subject to the power ; as where an estate is limited to *A.* for life, remainder to such uses as he shall by deed or will appoint, remainder to *A.* in fee ; there, if *A.* conveys the whole fee by lease and release, his power of appointment, notwithstanding it is in the nature of a power in gross, is totally extinguished. See *Ca. Temp. Talbot* 41.—It should be observed, that in mentioning above the effect of a feoffment, fine, or common recovery, the expression is, that powers *may* be extinguished by those conveyances. But it is not intended to imply, either with respect to powers collateral or powers relating to the lands, that those conveyances necessarily and unavoidably extinguish the powers in all cases. In some cases they do not. Thus, in the earl of Leicester's case, 1 Vent. 278. *A.* being tenant for life, with power to revoke by deed or will, executed a deed, whereby he covenanted to levy a fine to several uses, and afterwards levied a fine accordingly ; it was held, that the deed and fine (taken together) were a good execution of the power, and not an extinction of it. Afterwards, in *Herring v. Brown*, Carth. 22. 1 Vent. 368. 371. *Skin.* 35. 184. where *A.* being tenant for life, with power of revocation, levied a fine, and afterwards declared the uses, it was contended, that the fine was an extinction of the power ; and to distinguish that case from the earl of Leicester's case, it was said, that in the former case the deed preceded, in the latter it was subsequent to the fine. In the former case, it was said the power was executed, and an estate created by the deed, so that no estate remained forfeitable by the fine ; but that, in the latter case, the fine being first levied, was *ipso facto* a forfeiture of the estate, and the subsequent deed could not, by any intendment of law, revive the power. Three judges against one, in the king's bench, were of this opinion. But error was afterwards brought in the exchequer-chamber to reverse their judgment ; and it was accordingly reversed, by five judges against two, on the ground, that the fine, and the subsequent deed declaring the uses thereof, were but one and the same conveyance.—These cases shew, that where a person is tenant for life, with a general power of revocation, a fine and a deed, declaring the uses of it, will be construed as a good exercise of the power. The principles of these cases may be extended much farther in argument ; but it is by no means advisable to do it in practice. In

Carthew 23. it is expressly said, that if an estate is granted to one for life, who afterwards levies a fine *sur conuzance de droit*, and declares the uses to himself for life, remainder in fee to the grantor or lessor, this is a forfeiture, notwithstanding the declaration of the use.—On the learning of powers, mr. Sugden has lately favoured the public with an excellent treatise.

[347. b.]

[Note 299.] (1) I. *As to the general doctrine of remitter* :—In note 1. p. 239. a. notice was taken of the different degrees of title, which a person dispossessing another of his lands acquires in them in the eye of the law, independently of any anterior right : That if *A.* is disseised by *B.* while the possession is in *B.* it is a mere naked possession, unsupported by any right ; and that *A.* may restore his possession and put a total end to the possession of *B.* by an entry on the land, without any previous action : but that if *B.* dies, the possession descends on his heir by act of law. That, in this case, the heir comes to the possession of the land by a lawful title, and acquires in the eye of the law an apparent right of possession, which is so far good against the person disseised, that he has lost his right to recover the possession by entry, and can only recover it by an action at law. That the actions used in these cases are called possessory actions ; but that if *A.* permits the possession to be withheld from him beyond a certain period of time, without claiming it, or suffers judgment in a possessory action to be given against him by default ; or if, being tenant in tail, he makes a discontinuance ; in all these cases, *B.*'s title is strengthened, and *A.* can no longer recover by a possessory action, and his only remedy there is, by an action on the right. That these last actions are called *droiturel* actions, and that they are the ultimate resource of the person disseised.—Now, if in any of these three different stages of the adverse title, the disseisee, without any default in him, comes to the possession of the estate by a defeasible title, he is considered to be in, not as of his new right, but as of his ancient and better right ; and consequently the right of the person, who, supposing the disseisee still to be in as of his defeasible estate, would be entitled to the lands, upon the ceaser or determination of that estate, is gone for ever. In these circumstances, the disseisee is said to be *remitted* to his ancient estate. The principal reason for his being remitted is, that the person so remitted cannot sue or enter upon himself ; so that in these cases, where the possession is recoverable by entry, the remitter, has the effect of an entry ; and in those cases, where it is recoverable by action, it has the effect of a judgment at law. But there is no remitter, where he who comes to the defeasible estate comes to it by his own act, or his own assent. Hence, the defeasible estate, to intitle the party to be remitted, must be made to him during infancy or coverture, or must come to him by descent, or act of law : neither is there any remitter, where the ancient estate is recoverable neither by action, nor by entry. So that in those cases where the disseisee is beyond the three stages mentioned in the beginning of the note, if he afterwards comes to the estate by a defeasible title, he remains seised as of that estate, and is not remitted to his more ancient title. These are the doctrines of the common law respecting remitter. But they are greatly altered by the statute of the 27 Hen. VIII. That statute executes the possession to the party in the same plight, manner, and form, as the use was limited to him : It operates only with respect to the first taker, and therefore the issue of the issue is remitted. By the statute of 32 Henry VIII. it is enacted, that no fine, feoffment, or other act by the husband, of the wife's lands, shall be any discontinuance ; but that the wife and her heirs, and such others to whom the right shall appertain

tain after her decease, shall, notwithstanding such fine, or other act, lawfully enter into her lands, according to their rights and titles therein. This takes from the wife, and those claiming under her, the effect of the statute of the 27 Hen. VIII. so that she has her election to take by the 27 Hen. VIII. or to enter by the 32 Hen. VIII. upon which she shall be remitted. See *Duncombe v. Wingfield*, Hobart 254.—Sir W. Blackstone, 3 Com. Cha. 10. observes, that the doctrine of remitter might seem superfluous to an hasty observer, who perhaps would imagine, that since the tenant hath now both the right, and also the possession, it little signifies by what means such possession shall be said to be gained. But the wisdom of our ancient law determined nothing in vain. As the tenant's possession was gained by a defective title, it was liable to be overturned, by shewing that defect in a writ of entry; and then he must have been driven to his writ of right to recover his just inheritance; which would have been doubly hard, because, during the time he was himself tenant, he could not establish his prior title by any possessory action: the law, therefore, remits him to his prior title, and puts him in the same condition as if he had recovered the land by writ of entry. Without the remitter, he would have had *jus et seisinam* separate, a good right, but a bad possession; now, by the remitter, he hath the most perfect of all titles, *juris et seisinæ conjunctionem*.

(1) I. Here the ancient right and the defeasible estate *come together*. It is immaterial whether they come by descent or by act of law. See the instances brought by Littleton afterwards, Sect. 665, 666. and 678. [Note 300.]

[348. b.]

(1) II. Here the ancient right *comes after* the defeasible estate. [Note 301.]

[349. b.]

(1) III. By what sir Edward Coke says here, and in other parts of [Note 302.] this Chapter, it appears, that there is *no remitter to a bare title to an immediate right, or to a bare right of action, nor in those cases where the freehold does not accrue to the right*. It is upon the last ground, that where tenant in tail makes a discontinuance, the issue in tail is not remitted; neither is there a remitter to a term for years. Hence, if lessee for years to commence at a future day enters before that day (which is a disseisin) and continues in possession till the term commences, he shall not be remitted, for the disseisor acquires by the disseisin an estate of freehold; which, though it be tortious, the law will not divest from him for a term which is of no account. See 2 Roll. Abr. 420. l. 25. Com. Dig. vol. 5. 417, 418, 419, 420.

[350. a.]

(1) IV. By this and the following section it appears, that if *part of* [Note 303.] *the estate* comes to the right, it is remitted for that part.

[351. a.]

(1) *On the interest, which the husband takes in the chattels real and things in action of his wife*.—Some observations have been offered to the reader in a former part of this work, upon the nature of the estate which the husband takes in his wife's lands of freehold or inheritance. See ante 325. b. note 2. The following observations are now submitted to his consideration, upon the nature of the interest which the husband takes in his wife's chattels real and things in action. I. *Where the husband survives his wife*:—At the common law no person had a right to administer; it was in the breast of the ordinary to grant administration to whom he pleased, till the statute of the 21 of Henry VIII. which gave it to the next

of

[Note 304.] of kin; and, if there were persons of equal kin, whichever took out administration first, was entitled to the surplus. The [351. a.] statute of distribution was made to prevent this injustice, and to oblige the administrator to distribute. In those cases, where the wife was entitled only to the trust of a chattel real, or to any chose in action, or contingent interest in any kind of personalty, it seems to have been doubted, whether, if the husband survived her, he was entitled to the benefit of it or not. See the commentary above, and 4 Inst. 87. Roll. Abr. 346. All. 15. Wytham v. Waterhouse, Cro. Eliz. 466. 3. Rep. in Cha. 37. and Gilb. Ca. in Eq. 234. By the 22 and 23 Car. II. c. 10. administrators are liable to make distribution; but as the act makes no express mention of the husband's administering to his wife, and as no person can be in equal degree to the wife with the husband, he was not held to be within the act. To obviate all doubts upon this question, by the 29 Car. II. c. 3. § 25. it is declared, that the husband may demand administration of his deceased wife's personal estate, and recover and enjoy the same, as he might have done before the statute of the 22 and 23 of that reign. Upon the construction of these statutes, it has been held, that the husband may administer to his deceased wife, and that he is entitled for his own benefit to all her chattels real, things in action, trusts, and every other species of personal property, whether actually vested in her and reduced into possession or contingent, or recoverable only by action or suit. It was however made a question, after the statute 29 Car. II. c. 3. § 25. whether, if the husband, having survived his wife, afterwards died during the suspense of the contingency upon which any part of his wife's property depended, or without having reduced into possession such of her property as lay in action or suit, his representative or his wife's next of kin, were entitled to the benefit of it. But, by a series of cases, it is now settled, that the representative of the husband is entitled as much to this species of his wife's property, as to any other; that the right of administration follows the right of the estate, and ought, in case of the husband's death, after the wife, to be granted to the next of kin to the husband (see Mr. Hargrave's Law Tracts, 475); and that if administration *de bonis non* of the wife is obtained by any third person, he is a trustee for the representative of the husband. See Squibb v. Wynne, 1 P. W. 378. Cart v. Reeve, ib. 382. [The doctrine here laid down has been fully recognized by the Supreme Court of New York in the late case of *Whitaker v. Whitaker*, 6 Johns. 112.]

II. With respect to such part of the wife's personalty as is not in her possession, as debts owing to the wife, contingent interests, money owing to the wife in case of intestacy, these are a qualified gift by law to the husband, on condition that he reduce them into possession during the coverture; for if he happen to die in the lifetime of his wife, without reducing such property into possession, she, and not his representatives, will be entitled to it. Roll. Abr. 342. 350. Moor 452. Gold. 160. 2 Vent. 141. [In *Vaughan & ux. v. Wilson*, 4 Hen. & Mun. 452. the wife being entitled to some personal property to which she had succeeded *ab intestato*, a bill was filed by husband and wife to recover it, the husband died first, and the wife afterwards, pending the suit; and it was held, that the right survived to her, and on her death, the suit should not be revived in the name of his administrator.] His disposing of it to another is the same as reducing it into his own possession. Thus, if a baron be possessed of a term, or the trust of a term, in the right of his wife, he may dispose of it, except in the case of a trust term, where the trust is created by herself previously to the marriage: and it should seem that the husband's power of disposition over his wife's contingent personal estate

estate can extend only to such part as he may probably become possessed of during the marriage, and not to any part of her estate which depends upon a contingency that cannot possibly happen during his life; as if a lease be made to the husband and wife during their lives, with remainder to the executors of the survivor, and the husband disposes of the term and dies, the disposition will not bar the wife; for, during the coverture, she had a possibility only and no interest. Ant. 46. b. 1. Roll. Abr. 343. pl. 15. Lane, 54, 55. Ch. Ca. 225. Vern. 7. 182. Vern. 270. Eq. Ca. Ab. 58. Pre. Ch. 519. 1. Roll. Ab. 344. 2 Roll. Abr. 48. Poph. 5. 4 Leon 185. Godb. 139. Cro. Eliz. 841. Hutt. 17.

This interest of the husband in, and his authority over, the personal estate of the wife, is, however, considerably modified by equity, in some particular circumstances. A settlement made upon the wife in contemplation of marriage, and in consideration of her fortune, will entitle the representatives of the husband, though he die before the wife, to the whole of her goods and chattels, whether reduced into possession or not during the coverture. Gilb. Eq. Rep. 100: but it seems to be the better opinion, that, in cases where the provision for the wife is not made in consideration of her fortune, or is made in consideration of a particular part only of it, the husband will not, in the first case, be entitled to the wife's choses in action, unless he survive her; and, in the second, to no more than is comprised in the contract. Pre. Ch. 63. Amb. 692. 2 Ves. jun. 607. 2 Ves. 676. But it seems doubtful whether a settlement made after marriage will not entitle the representatives of the husband to such estate, in preference to the wife. See Lanoy v. Duke of Athol, 2 Atk. 444, and see 4. Ves. jun. 15.

III. If the husband be obliged to resort to a court of equity to recover the choses in action of the wife, or any property which he cannot recover without the assistance of the wife, the court will not interfere, unless he will submit to dispense equity before it be administered to him; or, in other words, equity will not act on his behalf, unless he submit to make a competent settlement on his wife, when no settlement has been made; but if the wife consent in court, or, being abroad, before proper commissioners there, that the husband shall receive her fortune, he will be ordered payment of it accordingly. 2 P. Will. 641. 3 P. Will. 12. 202. 2 Atk. 67. 2 P. Will. 638. 2 Ves. 60. 2 Bro. C. C. 663. 3 Bro. C. C. 195. But see 2 Ves. 579. The equity of the wife to compel the husband to make a settlement is merely personal; so that, if he survive his wife, the children, though unprovided for by settlement, cannot oblige him to make provision for them out of it. Amb. 509; and, except in a strong case of the husband's misbehaviour, as 3 Atk. 21. and Like v. Beresford, 3 Ves. jun. 506. a court of equity will not interfere with the husband's right to receive the income during the coverture, though the wife resist the application, 2 Ves. 562. 4 Ves. jun. 15. 20. 798.

IV. *Whether the wife's equity will prevail against the assignee of the husband for a valuable consideration has been a subject of frequent discussion; See 1 P. Will. 459. mr. Cox's note. One of the last cases on this point is Macaulay v. Phillips, 4 Ves. jun. 19. in which the Master of the Rolls thus expressed himself: "Many cases upon this point have "been before me, which have put me under the necessity of considering "very much the right of the wife, and I am clearly of opinion the doubt "respecting the assignment of the husband, for a valuable consideration, "of the wife's equitable interest, was not well founded, with the single "exception, perhaps, of a trust for a term for years of land, upon which, "perhaps, there may be some doubt; but, subject to that, I am clearly "of opinion, an assignment for a valuable consideration will not bar the*

“equity of the wife; and it would be strange if it did, since, in the courts of law, with regard to an action brought against executors by the husband for a legacy due to his wife, it is determined, that an action does not lie, and the reason given is, that it would totally defeat the wife’s equity. It would be whimsical then that the assignment by the husband, for a valuable consideration, should put that assignee in equity in a better situation than the husband himself is at law. The guard of this court upon the wife’s interest would be very singular, if the husband, not being entitled at law, might assign it for a valuable consideration to another person, who would be entitled in equity. I am clearly of opinion it was only a doubt, and it never was decided that the husband could, by such assignment, or any other means, deprive her of her equity.” Mr. Roper, to whose useful *“Treatise on the Revocation and Republication of Wills and Testaments, together with Tracts upon the Law concerning Baron and Feme,”* the editor is indebted for a considerable part of the present note, observes, that the reason why the trust of a term is probably made an exception to the rule, depends upon the disposition of such a term being good at law, and in order to preserve an unity of decision in both tribunals; and that for the same reason it seems that an assignment by the husband of his wife’s mortgage term will bind her.

Assignees in law are bound by this equity of the wife to have a settlement made for her benefit. The principal cases, in which the doctrine has come into consideration, have arisen in consequence of the husband’s bankruptcy, and are systematically arranged and ably discussed by Mr. Montagu in his *Digest of the Bankrupt Laws*, 1 vol. 199. The result of them, in his words, is, that “the wife’s property, which vests in the husband by operation of law, and of which the assignees under a commission of bankruptcy against the husband can obtain possession only by the intervention of a court of equity, or of an ecclesiastical court, is not distributable under the commission, till there is a sufficient settlement upon the wife out of his or some other fund:—but whether property which the assignee can recover at law is subject to a provision for the wife, seems not to be finally settled. The extent of the provision is either left to the liberality of the creditors, or determined upon a reference to the Master, or fixed by the Chancellor.”

[351. b.]

[Note 305.] (1) But they shall go to the administrator *de bonis non*; for should they go to the husband, the creditors, legatees, &c. of the deceased would be thereby wronged. *Note to 11th edition.*

[352. a.]

[Note 306.] (1) The reasons why estoppels are allowed seem to be these: No man ought to alledge any thing but the truth for his defence, and what he has alledged once is to be presumed true, and therefore he ought not to contradict it; for as ’tis said in the 4 Inst. 272. *allegans contraria non est audiendus*. Secondly, as the law cannot be known till the facts are ascertained, so neither can the truth of them be found out but by evidence; and therefore ’tis reasonable that some evidence should be allowed to be of so high and conclusive a nature, as to admit of no contradictory proof. *Note to the 11th edition.*

[353. a.]

[Note 307.] (1) V. From this passage, and others mentioned both by Littleton and Coke, it appears to be a general rule, that *the remitter shall take effect, though the estate which made the remitter is voidable*; as if it be taken from an infant, a feme covert, or upon condition. See *Com. Dig.* vol. 5. 415.

(1) Since

[353. b.]

(1) Since Littleton wrote, several statutes have been passed, which [Note 308.] have given rise to a great extension of the doctrine respecting alienations by husbands of their wives estates. These are chiefly the statutes of the 4 H. 7. respecting the force and effect of fines, the 27 H. 8. for transferring uses into possession, and the 32 H. 8. for preserving the estates of wives against the alienations of their husbands. The reader will find the effect of these statutes upon the doctrine of remitter investigated, in a very copious and masterly manner, in lord chief-justice Hobart's account of his argument on giving judgment in the case of *Duncomb v. Wingfield*. See his Rep. page 254.

[354. b.]

(1) VI. Thus it may be laid down as another general rule, that a [Note 309.] remitter to the particular estate, is a remitter to him in the reversion or remainder. See Com. Dig. vol. 5. 417.

[355. a.]

(1) Co. MSS. 215. *ft.* 33. *Eliz. Elmer v. Thackers.* The case was [Note 310.] this, *Elmer and his wife, tenant in dower, brought quod ei deforceat versus W. Thacker, who pleaded, that 30 Eliz. he brought waste against the demandants, who appeared, and upon nihil dicit W. Thacker recovered damages and had judgment. The demandants replied, nul wast fait. The tenant demurred in law; and these points were moved, 1st, Whether quod ei deforceat lies upon recovery by default against tenant in dower in waste. 2d, Admitting that it does, whether quod ei deforceat lies upon the recovery by nihil dicit, as this case is. As to the second point, the whole court resolved clearly, that quod ei deforceat does not lie; for in as much as the judgment upon nihil dicit is after appearance, there the default is not the cause of the judgment; and the statute says, per defaultam: and for this reason judgment was given against the demandant, as appears afterwards in page 356. But as to the 1st point it was objected, that quod ei deforceat does not lie upon default of tenant in dower in waste, as is the case here; for if it should lie in this case, he shall avoid the verdict of twelve men, which was not the intention of the statute, but only to relieve the tenant where he makes default; therefore, in as much as the tenant, notwithstanding the default, might give evidence to the jury, then every person in policy might make default, if afterwards he might prevail upon evidence to have quod ei deforceat: and the reason of *F. N. B.* is, that the verdict has found waste, 2 Hen. 2. If in waste the jury find falsely, attain lies, and 21 Hen. 6. 56. 34 Hen. 6. 12; so where the assise is awarded for default, yet the tenant may have attain, if it be found against him by false oath. 17 Ed. 2. Attain 89. 34 Hen. 6. 7. Prior recovers in waste, and has a writ of enquiry in waste, and the sheriff returns the waste 20 marks, and awards that he shall recover the place wasted, and treble damages, and that he shall have execution for the damages immediately, licet cesset execution for the thing wasted till the collusion should be enquired into, therefore the damages are the principal; for it is no where found that execution should be awarded of the accessory before the principal: and for this reason, 12 Rich. 2. Estreptement 6. judgment shall not be given in the estreptement, because it is only the accessory, until judgment shall be given in the principal plea. And in *Elmer's case*, ante 355. it was resolved, that this writ lies upon recovery by default in waste against tenant in dower, or any other tenant for life.—Lord Nott. MSS.*

(1) Sir

[355. b.]

[Note 311.] (1) Sir Edward Coke, in his commentary on the statute of Gloucester, 2 Inst. 286. observes, that regularly in personal and mixed actions damages were to be recovered at the common law; but that in real actions no damages were to be recovered at the common law, because the court could not give the demandant that which he demanded not; and the demandant in real actions demands no damages either by writ or count. The assise was a mixed action; and therefore, if upon the trial the demandant made out his title, his seisin, and his disseisin by the tenant, he had judgment to recover his seisin and his damages for the injury sustained. But the damages in these cases were awarded against the disseisors only, and not against their alienees or tenants. The statute of Marlbridge, 52 Hen. III. c. 16. gave damages in a writ of mortaucestor against the chief lord. The statute of Gloucester, 6 Ed. I. was a considerable extension of the law of damages. It ordained, that if the disseisor should alien the lands, and should not have whereof damages might be levied, the person into whose hands the tenements came should be charged with the damages, so that each should answer for the time he held them; that the disseisee should recover damages on a writ of entry *sur disseisin* against him who was found tenant against the disseisor; that damages should for the future be recovered in a writ of mortaucestor, as in one of novel disseisin; and also in writs of cosinage, aiel, and besajel; and, generally, that damages should in all cases be rendered, where the land was recovered against a man upon his own intrusion, or his own act. The statute then mentions, that till that time damages had been taxed only to the value of the issues of the land: it was therefore provided, that a demandant in future should recover the costs of the writ purchased, together with the damages, not only in the above instances, but generally in cases where he was entitled to recover damages. Though this statute only mentions the costs of the writ, the construction of it has been extended to the whole expence of carrying on the suit. Before this statute the justices in eyre used, where the plaintiff obtained a verdict, to compute the expences of the suit, and, in assessing damages, assessed a sum sufficient to satisfy that expence as well as the damages. The statute of Marlbridge gave costs in particular cases to the defendant; so that it is a mistake to say, that the statute of Gloucester was the first statute by which costs were given. See Sayer's Law of Costs, p. 3. The general law of costs still rests on the statute of Gloucester; so that where costs were not recoverable before that statute, they are not recoverable now, unless in those cases where they have been given by some subsequent statute.

[357. a.]

[Note 312.] (1) VII. *The remitter defeats the wrongful estate immediately without entry*; yet where both estates are waivable by a wife, without prejudice to a third person, she may waive which she pleases. But if a third person is interested, she must take her ancient estate. Thus, if there be a feoffment to the husband and wife in tail, remainder to *A.* the husband discontinues, and takes back an estate to him and his wife in tail, remainder to *B.* though the wife in respect to herself may take either the original estate tail, or the estate tail created by the feoffment, both the estates being after marriage; yet she ought to take the first, being for the benefit of *A.* the rightful remainder-man. Hob. 71. 255.

(1) VIII.

[358. a.]

(1) VIII. *The remitter defeats entirely the wrongful estate, and* [Note 313.] *consequently every thing annexed to or issuing out of it.* See ant. Sect. 659, 665, 666. and post. Sect. 686, 687. But an estate made of the land itself by him who is remitted, as a lease for years, is not defeated by the remitter.—See Com. Dig. vol. 5. 416.

[360. a.]

(1) Here *Littleton* begins to treat of *remitter to bodies politic.* [Note 314.]

[365. a.]

(1) The doctrine of *warranty* was formerly one of the most interesting and useful articles of legal learning; but the effect and operation of warranties having, by repeated acts of the legislature, been reduced to a very narrow compass, it is become in most respects a matter of speculation rather than of use. In some instances, however, warranties have still a powerful influence on our landed property; and there is no part of our jurisprudence to which the ancient writers have more frequently recourse, to explain and illustrate their legal doctrines. Hence abstruse, and in most respects obsolete, as the learning respecting it unquestionably is, it continues to deserve the attention of every person who wishes to obtain accurate notions of those branches of our laws, which are more immediately connected with the doctrines that respect the alienation of landed property.

In the civil law warranty is defined, the obligation of the seller to put a stop to the eviction and other troubles which the buyer suffers in the property purchased. Eviction is defined to be the loss which the buyer suffers, either of the whole thing that is sold, or of a part of it, by reason of the right which a third person has to it. The other troubles are those which, without touching the property of the thing sold, diminish the right of the purchaser; as if any one pretends a right to the usufruct of the lands sold, to a rent issuing out of them, to a service, or any other thing of the like nature. The buyer being thus evicted or troubled in his possession, has his recourse to the seller to warrant him. This warranty is either *in law*, being that security which every seller is bound to give for maintaining the buyer in the free possession and enjoyment of the thing sold, although the sale makes no mention of it; or *in deed*, being that kind of particular or conventional warranty, which the seller and buyer regulate among themselves. See *Domat*, l. i. tit. 2. § 10. By the practice of *the Roman law*, the buyer might, immediately after the eviction or trouble, give notice of it to the seller, who then, if he thought proper, might make himself a party to the action, and defend it; but till the sentence was pronounced, the buyer could not bring his action of warranty against the seller: and the action was brought before the judge of the place in which the seller was domiciliated. But the practice is different in the courts of law *in France*. There the buyer, when he gives notice of the action to the seller, may bring his action of warranty against him before the judge before whom the original action is brought; and if he cannot defend the action, the judge condemns him to indemnify the seller, by the same sentence by which he pronounces in favour of the plaintiff in the original cause. See *Pothier Traité des Contrats de Vente*, partie 2. c. 1. sect. 2. art. 5. §. 2. The first warrantor may call upon another to warranty; he in the same manner may call upon a third. But, to prevent the delays which must unavoidably ensue from multiplying warranties, a fourth warrantor is not permitted to intervene, except in particular circumstances. The degrees also must be observed. Each person must vouch his own immediate warrantor,

[Note 315.] rantor, as it is not lawful for him to vouch any of the ulterior warrantors. After the warrantor has entered into the war- [365. a.] ranty, the person warranted may either proceed in his defence jointly with the warrantor, or leave the cause to him solely. The sentence binds them both equally. If the person against whom the action is brought be evicted or troubled in his possession by the sentence of the judge, he has a claim upon the warrantor for a complete indemnification. Sometimes the precise sum to be paid by way of indemnity is fixed and agreed to by the parties upon the making of the contract; but penal obligations of this nature are greatly discountenanced by the laws of France. It is always in the breast of the judge to moderate or encrease them; but they cannot be encreased either by the express contract of the parties, or the equity of the judge, to more than double of the property evicted. See *Traité des Evictions et de la Garantie Formelle, par Mons. Berthelot*, 2 vol. oct. Paris, 1781.

The warranty treated of by Littleton in this Chapter is evidently of *feudal extraction*, being derived from the obligation which the lord was under, by that system of polity, to defend his tenant's title to the land against all claimants. If the tenant was evicted, the lord was bound to make him a recompence, by giving him lands of equal value to those evicted from him. The doctrine and practice of warranty in the early ages of the feudal law is thus set forth in the book of the Fiefs, tit. 25. It is there stated that a vassal held a fief from the lord, and being disturbed in his possession of it, called upon the lord to defend him. The lord refused to appear before the judge, by which the vassal lost his cause. The vassal thereupon demanded a recompence from the lord. The lord said in answer that the vassal never held the fief, nor received the investiture of it from him. The vassal replied, that he held the fief from the lord, and had been invested with it by him; that he had called upon the lord to defend the possession on the trial, and that the lord did not then deny the lands being held of him. All this the vassal proved by proper witnesses. Upon this case it was held, that when a vassal is disturbed in the possession of his fief, if he calls on the lord to defend him, and it appears on the trial that the lord invested him with a fief that did not belong to him, the lord is bound either to give him another fief of equal value, or the price of it in money; and that he is bound to do this as soon as it clearly appears that the vassal will be evicted of the fief; but that if the lord denies that the fief is held of him, and that the vassal, or any of his ancestors, were invested with it by him, and the vassal proves those facts, either by an instrument, properly authenticated, or by the peers of the court, the lord must give him another fief; or may be put to his oath, that neither the vassal nor any of his ancestors held the fief from, or were invested with it by him, or any of his ancestors. If the lord does this, he is to be acquitted.—Sir Martin Wright seems to question whether the lord's obligation to protect or defend the feudatory made him anciently liable upon eviction (without any fraud or defect in him) to compensate the loss of the fief. He observes, that it can hardly be imagined that while feuds were precarious, and held at the will of the lord, or, indeed, that while they were generously given, without price or stipulated render, the lord should be subject to such a loss; especially since it is likely that the lord's obligation upon eviction rather prevailed upon the reason of contracted and improper feuds, than from the nature of a pure original feud. He observes, that none of the antient feudists make any such distinction, but that all of them suppose the lord's obligation upon eviction to have been general; yet he asserts they must be understood to speak of the times in which

which they wrote, when improper feuds chiefly prevailed. See Intro-duc. to the Law of Tenures, p. 38, 39, 40.—Upon a principle similar to that upon which this distinction is grounded, it seems to have been formerly made a question by the writers on the feudal laws of the German and Italian states, whether investiture alone, without any express promise or undertaking on the part of the lord, entitled the tenant to claim an equivalent from the lord, in case of eviction. Rosentall, a German feudist of great authority, has stated this question, and the authorities upon which the two opposite opinions respecting it are founded. He mentions it to be his own opinion, that investiture alone, without any promise, entitled the tenant to an equivalent; and he says, that the greatest part of those who maintain the opposite opinion admit that the lord, though he has made no promise, is bound to give an equivalent, if the fief were originally granted for services done; or otherwise, in the way of remuneration. See *Rosentall Tractatus et Synopsis totius Juris feudalis*, Coll. Allob. 1610. vol. 1. 469, 470.—In a more recent publication, expressly on the subject of gratuitous fiefs, it is held, that the lord is bound to defend the fief, and to give the tenant an equivalent, if it is evicted from him. The author states the objection made by sir Martin Wright; and in answer to it observes, that the feudal contract and connexion between the lord and tenant is such, as distinguishes it from a voluntary donation, and necessarily includes this obligation upon the lord. See *Petri Schultzii Dissertatio de Feudo Gratia in Jenichen Thesaurus Juris feudalis*, Francofurti ad Mænum, tom. 2. 556. 567, 568. It should seem that with us, anciently, every kind of homage, when received, but not before, bound the lord to acquittal and warranty; that is, to keep the tenant free from distress, entry, or other molestation, for services due to the lords par amount, and to defend his title to the lands against all others; but that, in subsequent times, the implied acquittal and warranty were peculiar to that species of homage which is known by the appellation of homage ancestrel. See ant. 67. b. note 1. 105. a. note 1. In another material quality, the warranty annexed to homage ancestrel differed from express warranty. In the case of express warranty, the heir was chargeable only for those lands which he had by descent from the ancestor who created the warranty. But in the case of homage ancestrel, the tenant was not driven to recover in value only those lands which the lord had from that ancestor who created the warranty; that would be impossible, as it was essential to homage ancestrel, that the seigniori should have been created before time of memory. It being therefore impossible to ascertain which lands descended from the ancestor who made the grant, the lord charged all the lands. See ant. 102. b. But defence and recompence were not the only benefits which the tenant derived from the lord's warranty; it rebutted or repelled the lord from claiming the land itself, or any profit or right from it, but those which under the feudal contract were due to him as lord, according to the fundamental maxim of the doctrine of fiefs, *Homagium repellit perquisitum*. Such appear to be the outlines of the system of warranty in the early ages of the feudal law. The practice of subinfeudation necessarily occasioned a considerable extension of it. That practice arose, in a great measure, from the attempts, which, in every kingdom where the feudal polity has prevailed, the higher tenants or vassals have made to render themselves independent of the crown. In France, towards the end of the Carlovingian race of their monarchs, the dukes or governours of provinces, the counts or governours of towns, and even the subordinate officers of state, taking advantage of the weakness of the royal authority, made hereditary in their families the lands, titles, and offices,

[Note 315.] offices, which till then they had enjoyed for life only. They usurped the sovereign propriety of the land, with civil and [365. a.] military authority over the inhabitants: they granted out the lands to their immediate tenants, and these granted them over to others. By this means, though they always professed to hold their fiefs from the crown, they were in fact absolutely independent of it. They exercised in their territories every royal prerogative; they promulgated laws; they had the power of life and death; they coined money; fixed the standard of weights and measures; granted safeguards; entertained a military force; and imposed taxes; with every other right supposed to be annexed to royalty. It was even admitted, that if the king refused the lord justice, the lord might make war against him. In the ordinances of St. Lewis, ch. 50. is this remarkable passage; "If the lord says to his liege tenant, Come with me, I am going to make war against my sovereign, who has refused me the justice of his court: upon this the liegeman should answer in this manner to the lord: I would willingly go to the king, to know the truth of what you say, that he has denied you his court. And then he shall go to the king, saying to him in this manner: Sir, the lord, in whose liegeance and fealty I am, has told me that you have refused him the justice of your court; and upon this account I am come expressly to your majesty to know if it is so; for my lord has summoned me to go to war with you. And thereupon, if the king answers that he will do no judgment in his court, the man shall return immediately to his lord, and his lord must equip him, and fit him out at his own expence; and if he will not go with him, he shall lose his fief by right. But if the king answers that he will hear him, and do justice to the lord, the man shall return to him, and shall say: Sir, the king has said to me, that he will willingly do you justice in his court. Upon which, if the lord says, I never will enter into the king's court, come therefore with me, according to the summons I have sent you; then the man should say, I will not go with you; and he shall not lose his fief for his not going." This shews how powerful and absolute the great vassals were. The same motive, which induced the vassals of the crown to attempt to make themselves independent of the crown, induced their tenants to make themselves independent of them. This introduced an ulterior state of vassalage. The king was still called the *sovereign lord*; his immediate vassal was called the lord *suzereign*; and the tenants holding of him were called the *arriere* vassals. Hugh Capet owed the crown of France to the extreme weakness to which this system of subinfeudation had reduced the crown of France; but after he had acquired the throne, he used his utmost efforts to restore it to its ancient splendour and strength. His successors pursued the same plan with undeviating attention and consummate policy. It was completed by the union of the provinces of Lorraine and Bar to the crown of France in 1735. See *Abregé Chronologique des Grands Fiefs de la Couronne de France*, Paris 1759. But as to the common incidents of feudality, subinfeudation still prevails in France. In some parts of France, certain portions of the fief descend on the younger children: they are said to hold them of the eldest son by *parage*. The eldest son, however, represents the whole fee, and does homage for it; and is therefore bound to warranty the younger children from the claims of the lord for his rents and services. Subinfeudation prevails also in Germany. But it must be attended with three circumstances. 1st, It must be a real subinfeudation, and not a sale, or other transaction, under the appearance or colour of a subinfeudation. 2d, The sub-vassal must be, if not of equal, at least of suitable rank and

and circumstances. 3d, the conditions, so far as the lord is interested in them, must be the same as those upon which the original investiture is granted. See *Dissertatio de Subfeudis Imperii, Mich. Hen. Grönerii, in Jenichen Theo. Feud. t. 1. p. 382. Dissertatio de Feudis Latæ Xaverii Neumann de Pucholtz, quid transeat in vassallum per concessionem feudi, vel subfeudi, ibid. t. 3. 512. Rosenthal Tract & Synopsis totius Juris Feud. tom. 1. 549.*—In England, the practice of subinfeudation was totally inhibited by the statute made in the 18th year of Edward I. commonly called the statute *quia emptores terrarum*. In the preamble to that statute it is recited, that, by the practice of subinfeudation, the chief lords had lost their escheats, marriages, and wardships: it was therefore enacted, that it might be lawful for every free man to alien all or any part of his lands, to be held not of himself, but of the superior lord, by the same services and customs by which the tenant himself held them. This statute, though evidently passed in compliance with the desires of the greater lords, and designed by them to encrease their power and extend their influence, had a very contrary effect; and was probably one of the chief causes which prevented their acquiring that independent and almost sovereign power, which was obtained during the feudal polity by the princes of Italy, Germany, and France. Hence, though the power and influence of the nobles of England were very great, and sometimes such as overshadowed royalty itself, yet they were inferior in every respect to that of the higher nobility of foreign countries. It is evident, that Nevil, the great earl of Warwick, and the nobles of the house of Percy, (the greatest subjects ever known in this country) were, neither in strength, dignity, power, or influence, or in any other point of view, equal to the dukes of Brittany or Burgundy, or the counts of Flanders. Besides the general influence of the statute *quia emptores terrarum*, it had a particular influence both on the practice and the doctrine of warranty. The free alienation of property which it authorized necessarily put an end to the homage ancestrel, and consequently to the implied warranty annexed to it. To remedy this, if the lord aliened, the tenants, before they attorned to the new lord, required a new warranty from him; if the tenant aliened, it was with an express clause of warranty. This gave the new tenant the benefit of the lord's obligation to warranty the old tenant: as the new tenant might vouch the old tenant, and he in his turn might deraign the lord. This subject will be pursued, and an attempt will be made to investigate and explain the grounds of the distinction between lineal and collateral warranty, in note 1. 373. b.

[366. b.]

(1) As to *warranties commencing by disseisin*:—Lord chief baron [Note 316.] Gilbert divides warranties into two sorts; first, those commencing by disseisin or wrong; and secondly, binding warranties. The first are, where the ancestor that makes the warranty is partner to the wrong; and such warranties are not obliging, because it cannot be presumed that one who is so unjust, as to do wrong, will be so just as to leave a recompence to his heir; wherefore such contracts are wholly rejected as collusive, and founded on no consideration. In the *Ancien Coutumier de Normandie*, ch. 96. it is said, that in a writ of *nouvelle disseisin* there is no vouching to warranty; because it is not to be suffered that any one should retain the possession of another, either by himself, or by the means of another, or that he should disturb it by his foolish hardihood; and whoever does so ought to restore it.

[367. a.]

[Note 317.] (1) The editor, in note 1. to page 330, a. has (he fears too prolixly) attempted to explain the difference between actual disseisin and disseisin by election, and to prove that the disseisin produced by a feoffment, however slender or tortious the estate of the feoffor may be, is an actual disseisin. It is submitted to the reader, that what he has said on that subject is confirmed by what Littleton says in this Section, and lord Coke's commentary upon it. The discussion, in the note above referred to, of the operation of a feoffment, and the discussion in note 1. p. 271. of the operation of conveyances deriving their effect from the statute of uses, will, perhaps, assist the reader in forming accurate notions of the difference in the operations and effect of feoffments, fines, common recoveries, bargains and sales, releases and wills.

[367. b.]

[Note 318.] (1) It is greatly to be regretted, that sir Edward Coke has not expressed himself more fully on the subject hinted at by him in this note, the defeating of the warranty by the heir's entry or claim in the ancestor's life-time. It is thus mentioned by lord chief-baron Gilbert, Ten. 135. The heir was presumed to receive a recompence, and therefore was barred, if he did not claim during the life of his ancestor; and this was the more reasonable, because such recompences were anciently in lands, which did of right descend to the heir; and if the ancestor did alien them, the heir must claim his own during the life of his ancestor, otherwise he could never claim it, inasmuch as this was the whole time of limitation for the heir to challenge his own in this case; and if he slipped that time, he was barred for ever, inasmuch as there might be secret conveyances to alien the recompence for the benefit of the heir, which might turn to the prejudice of the purchaser.

[368. b.]

[Note 319.] (1) Whether an attorney's laying out money for his client be maintenance, see *Pierson v. Hughes, Freeman, 71. 81.*—By the ancient Roman law, there were few cases in which a person was admitted to plead by an attorney, according to the rule, *Nemo alieno nomine lege agere potest.* Recourse was therefore had to a fiction at law, by which it was supposed that the property of the thing in contest was made over to the attorney. The consequence was, that the proceedings were carried on in the name of the attorney, and even the sentence passed upon him. Hence he was called the *dominus litis.* See *Boehmer de dominio litis, l. 12. Pothier Pandecta Justinianæ, lib. 3. tit. 3. § 2.*

[370. a.]

[Note 320.] (1) As to the distinction between lineal and collateral warranty:—By the definitions given in this place of lineal warranty, it appears to be distinguished from collateral warranty chiefly by this circumstance, that he on whom it descends might possibly have claimed the land as heir to him that made the warranty, and whether he claims as heir lineal, or as heir collateral, the warranty is equally lineal. But he must claim as heir; for if an estate is limited to the sons of any person successively in tail, and the eldest son aliens with warranty, and dies without issue, the second son is heir at law to the eldest son: he does not however claim as heir, but as purchaser, and therefore the warranty is collateral to him. So, if an estate is limited to the father for life, and after his decease to his sons successively in tail, and the father aliens with warranty, and dies, the warranty descends on his eldest son and heir; but as he claims as purchaser, not as heir, the warranty is collateral to him. But though he must claim as heir, it is not necessary

cessary he should make his title *immediately* as heir to him, (see Sect. 706.) neither is it necessary he should derive from him alone. See Sect. 714.—An attempt will be made, note 2, page 372. b. to explain the real distinction between lineal and collateral warranty.

[370. b.]

(1) The king was in this case barred of the possibility of reverter descending to him *in jure coronæ*, by warranty and assets from a subject descending on his body natural; for in all likelihood those lands will descend to the same person to whom the crown will descend, and consequently will be a good recompence for the loss of the crown lands; but in the case of the parson, his successor can have no benefit of what the predecessor has in his natural capacity. Hawk. Abr. 474. [Note 321.]

[372. b.]

(1) 29 H. 8. Dy. 32. accord, tail barred, but not discontinued, because the reversion is in the king: so note, the issue is barred by 4 H. 7. Hob. 382. for 32 H. 8. cap. 36. was not then made. Note also, that 32 H. 8. cap. 36. excepts tenant in tail by gift of the king. Lord Nott. MSS. [Note 322.]

(3) Nota, 34 H. 8. is not of force in Ireland, therefore the knowledge of the common law in these points is necessary there.—B. being tenant in tail by gift of king H. 8. of the manor of T. an. 14 Eliz. contracted with A. to convey it to him and his heirs in consideration of a sum of money, and the manner of assurance was this: queen Eliz. in May 14 Eliz. grants her reversion to C. and D. and their heirs; June 14 Eliz. B. suffers a recovery to the use of C. and D. and their heirs; and in the same term B. and A. levy a fine of T. to C. and D. which they grant, and render to A.; and afterwards, in the same term, reconvey the reversion by fine, &c. to queen Eliz. And now whether this estate to A. was a gift in tail ex provisione from the queen, within the statute of 34 H. 8. c. 20. was the question between E. heir of the body of A. and F. who claimed by the fine levied by the father of the said E. whose daughter he had married; and it was held by Berkeley that it was not, 1st, because the grant of the reversion to C. expresses no intent of the queen to create an estate tail to A.: 2d, when the estate tail of B. was docked by the recovery, and upon the fine levied, C. rendered the tail to A. he might have rendered the fee simple if he had willed; and he was the donor of the estate tail, not the queen, except of the reversion afterwards reconveyed: 3d, this reversion reconveyed was not in the queen her original reversion, but a new reversion expectant upon the tail of A. (for the former tail was docked) wherefore A. cannot bar the reversion in the queen, but he may bar his own issue notwithstanding, 34 H. 8.: 4th, because, altho' gift in tail by a subject may be a provision of the king within the statute, nevertheless the intent should appear, which is not the case here. Hales made two questions. I. What shall be said a provision by the king within this statute, and this is question of law. II. Whether this shall be said to be such a provision, which is matter of fact. To the first it seems, that if the queen be merely instrumental in procuring an estate tail to be settled, but that the estate itself does not proceed either from the charge, or from the bounty of the crown as a reward for service, it is no provision within this statute; and therefore it is to be seen, if in this case the entail was upon contract between subject and subject, and if the queen were merely instrumental to perfect the conveyance and save her own reversion, which is the second question, and a question of fact. To the second, that this is not such a provision, there are these presumptions. 1st, Nothing

Nothing appears of record that such provision was intended, which by Coke is here held to be necessary (but Hale doubted hereof.) 2d, No land, money, or other consideration, moved the queen to procure B. to grant this estate tail to A. 3d, It does not appear that the queen took notice of any service done by A. or of any favour intended by her to him. 4th, If the queen had intended a provision within the statute, she might have caused C. to convey the fee simple first to herself, and then have granted to A. in tail. 5th, If it was intended that A. should have an entail, which should not be a provision within the statute, no one can contrive any other way than this to effect it. 6th, It appears that A. was to purchase, and that the queen should not be prejudiced, nor any other person which is effected.—*Nota*, At the common law, if the king grant lands in fee simple conditional, it was doubted if done post prolem suscitatem might have aliened to bar his issue, Riley, 438. supra 19. b. but clearly not to bar possibility of reverter in the king; no, not though the alienation were with warranty collateral, unless assets descended to the king. Ante 19. b. and 370. in margine. Sed unde alienation without warranty or assets bars subject donor, 4 H. 6. Rot. Parl. n. 51. Commons petition that proffisors who buy lands of the king, tenant in tail, may enjoy them against the king. Resp. le roy s'avisera.—*Note* also, after Westm. 2. and before 34 H. 8. recovery or fine barred the tail of gift by the king, not the reversion to the king; so that by the wisdom of the common law, where the king raised the family, a kind of perpetuity was intended: for every man was discouraged to purchase from the donee, for no act of his could bar the king's reversion or possibility of reverter, which was a good way to preserve the memory of the king's bounty. When this would not do, upon the dissolution of monasteries, the crown having much land to bestow, began now to provide, by 34 H. 8. that no alienation should bar the entail: for there needed no law for the reversion, and no other way could preserve the memory, &c.: and yet this is often eluded by a temporary grant of the reversion by the king, and a reconveyance, &c.—Lord Nott. MSS.

[373. a.]

[Note 324.] (1) 11 Car. Cro. obiter in *Wyat's case*, tenant in tail, reversion in the king, is disjoined, entry of the issue is barred; which perhaps is so here, because in both cases the tail is not barred.—Lord Nott. MSS.

[Note 325.] (2) Cro. Car. 430. Jones cited the case according to the report in this place; but it seems he was misled by this book. See the note immediately following.—*It seems to some that the case of Strafford and Dover* above quoted is not law; for in 2 Rep. 11. Magd. Coll. case; it is adjudged, that the fine does not bar the college, not being parties, because the 13 Eliz. makes void all acts which it suffers, and such sufferance extends to the act in which they are not parties, by sir Ortl. B.—And sir F. Moore 467. reports the same case: and there by *Walmaley* it is said, that this issue is only bound in the time the fine is levied, but no other issue, and this by 34 H. 8.; hence it seems, that sir F. Moore or lord Coke have misreported the case, for they are contrary to each other. *Note*, Mr. Palmer told Hen. Finch, afterwards lord Nottingham and chancellor, that he attended Walter chief baron upon a reference, and that Walter denied the above case, and said, that the roll was contra, and the judgment there contra to his report, and that he and Palmer went to the house of lord Coke, then living, and shewed him the roll contra to his report in this place, and that he acknowledged, it, and said, that

that he trusted to serjeant Bridgman's report: whence it appears, that sir F. Moore's report is the better, and there he reports it to have been, 39 Eliz. Ro. 1914.—Lord Nott. MSS.

(3) This is to be understood of an acquittance under hand and seal, [Note 326.] which is an estoppel; for if it be not under seal, the law will admit of proof to the contrary: but an avowry for the last day's rent is no discharge for the former; for by the avowry the avowant says so much is due, but discharges nothing, no other rent being mentioned in the avowry, but that for which he acknowledges the taking the goods. See 1 Sid. 44. 1 Lev. 43. 1 Saund. 285, 286. Lutw. 1173. *Note to the 11th edition.*

[373. b.]

(1) However, it hath been effected in our days; for by 4 Ann. cap. [Note 327.] 16. sect. 21. all warranties since the first day of Trinity Term, anno dom. 1705, by any tenant for life, of any lands, tenements, or hereditaments, coming or descending to any person in reversion or remainder, are void and of no effect; and all collateral warranties made since then of any lands, tenements or hereditaments, by any ancestor who had no estate of inheritance in possession, the same is void against the heir. *Note to the 11th edition.*

(2) The reader will recollect, that, previously to the statute *de donis*, [Note 328.] all estates were held either in fee simple, in fee simple conditional, for life, or for years; and that estates tail, in the light in which we now consider them, had not then an existence. If a person seised *in fee simple* aliened his estate, the alienation was certainly binding both upon his lineal and his collateral heirs; his warranty therefore had effect, so far as it entitled the alienee to vouch the heir of the warrantor, and, in case of eviction, to claim a recompence from him, if any real assets descended upon him from the ancestor: but with respect to the repelling or rebutting of the claim of the heir to the estate itself, as the alienations of tenant in fee simple bound the heirs as effectually without the warranty as with it, the warranty, in that respect, could have no operation.—As to the warranties of persons seised of estates held in *fee simple conditional*, it has been observed before, p. 326, b note 1. that the condition from which that estate took its appellation did not suspend the fee from vesting in the donee immediately by the gift; and therefore, if he aliened before he had issue, it not only was no forfeiture, but, if afterwards he had issue, it was a bar to them. Hence the warranty of a tenant in fee simple conditional had the same effect with respect to his issue, as the warranty of tenant in tail in fee simple had upon those who claimed from him; that is, with assets, it intitled the warrantee to vouch the issue as heirs at law of the ancestor; but in other respects it had no operation, as the issue was bound by the alienation of the ancestor, as effectually, with warranty as with it. With respect to the donor or reversioner, the alienations of tenant in fee simple conditional could not be binding on him without assets, because he claimed to be in by title paramount.—As to the alienations of tenant *for life, or for years*: in most cases they must have been void, as commencing by disseisin. In those cases, where they were not void upon that account, it is to be observed, that before the statute of uses an estate of freehold could not be created without livery of seisin; and that as the livery of seisin of tenant for life or for years was a forfeiture of the estate, the reversioner or remainder-man might enter immediately for the forfeiture; but if he did not enter during the life of the

[Note 328.] the person aliening, the warranty estopped him from entering afterwards. The reader will recollect, that if a disseisor, abator, or intruder, died in the possession of the estate, his heirs so far acquired a presumptive title to the estate, that the disseisor could no longer restore his possession by entry, but was reduced to his action. By analogy to this reasoning, and a rational extension of the principles on which it was founded, the law supposed that the remainder-man or reversioner would have entered for the forfeiture of the tenant for life or years, if an equivalent were not given him: it was therefore presumed, that if he did not enter during the life of such particular tenant, he had received from him an equivalent; and this presumption being admitted, he could not afterwards, with any colour of justice, be allowed to claim the estate itself. Such were the effects and operation of warranty at the common law. The first material alteration in it was by the statute of Gloucester, 6 E. 1. ch. 3. by which it was enacted, that the warranty of the father, tenant by the courtesy, either in the life of his wife, or afterwards, should not be a bar to the heir without assets. The next statute which made any material alteration upon the effect and operation of warranty was the statute *de donis*. An attempt has been made in note 1. page 326. b. and notes 1 and 2 to page 327. a. to explain in what manner, and by what construction of law, estates tail derived their origin from that statute. It is obvious, that if the warranty of tenant in tail, without assets, had been permitted to be a bar of the estate tail, it would have been in the power of every tenant in tail to have evaded that statute, and barred his issue. By a kind of analogy, therefore, to what the legislature had done in passing the stat. of Gloucester, the judges, in their construction of the statute *de donis*, held, that the warranty of tenant in tail, without assets, should not bind his issue; but by the same analogy, and to prevent the circuitry which would arise, if the issue had been permitted to recover the estate from the alienee, and the alienee to recover the assets from the issue, they held the issue bound by warranty with assets.—With respect to those in remainder or reversion—it is to be observed, that the statute *de donis* extends only to the alienations of tenants in tail; the alienations, therefore, of tenants for life, with warranty, remained as they did at the common law, and therefore bound all upon whom the warranty descended, either with or without assets. Neither did the statute *de donis* restrain the alienations of tenant in tail, except so far as they prevented the land descending upon the issue at his death, or reverting to the donor for want of issue in tail. There is nothing in it, which, either directly or indirectly, restrains the tenant in tail from barring a remainder-man in tail, by his warranty descending on him, unless perhaps it should be considered that every particular estate in remainder is carved out of, and a part of the reversion, and consequently equally entitled to protection. As to a remainder-man in tail, therefore, the operation of warranty, in rebutting the heir, remained as it was before the statute; it barred him both with and without assets. This is laid down and explained with great learning and force of argument by lord chief justice Vaughan, in his argument in *Bole v. Horton*. See his Reports, p. 360. The case there was, that William Vesey devised to John Vesey, his eldest son, and the heirs male of his body; and, for want of such issue, to Wm. Vesey, another of his sons, and the heirs male of his body; and for want of such issue, to his own right heirs. John, upon his father's death, entered, and died, leaving issue only two daughters: Wm. then entered, and aliened with warranty, and

and died without issue. The question was, whether the warranty rebutted the daughters. Lord chief justice Vaughan was of opinion, that the warranty, not being accompanied with assets, would not have barred his own issues in tail, if there had been any, or the two daughters, who claimed the reversion, both issues in tail and the reversioners being protected by the statute *de donis*: but he admitted, that if there had been any intermediate remainder in tail, the warranty would have rebutted all who claimed under that remainder, a remainder in tail not being under the protection of the statute. The only point before the court in this case was, upon the operation of the warranty to rebut the reversioners. Upon this the court was divided: the chief justice and justice Archer were for the demandant; and justice Wyld and justice Atkins for the tenant.—The next statute, which restrained the operation of warranty, was 11 Henry 7. ch. 20. by which the warranty of the wife of her husband's lands, either with or without her succeeding husband, was held to be void. The last statute which has been enacted for the purpose of restraining the operation of warranty is the 4 and 5 Ann. ch. 16. by which all warranties of tenant of life are declared void; and all collateral warranties of any ancestor, who has not an estate of inheritance in possession, are declared void against the heir. But this statute does not extend to the alienation of tenant in tail in possession. The consequence is, that even at this day, if a tenant in tail in possession discontinues his estate with warranty, it is a bar with assets to his issue, and without assets to those in remainder. Supposing, therefore, the common case of a limitation to the first and other sons successively in tail male; if the first son, when in possession, levies a fine, that is a discontinuance of the remainders to the other sons; and by reason of the warranty contained in the concord, it is a bar to them, even without assets. It is the same if he executes a feoffment, and accompanies it with a warranty. It remains to observe, that no warranty extends to bar any estate, either in possession, reversion, or remainder, unless before, or at least at the time that the warranty is made, it is divested or displaced. See Seymour's case, 10. Rep. 96.—These, it is presumed, are the general outlines of the doctrine of warranty. The reader will observe, by what has been said on that subject, that, at common law, the operation of a warranty to rebut the heir could hold in no case where the heir claimed the estate warranted from the ancestor by descent; for, at the common law, wherever the ancestor had the inheritance, he could alien it from the issue; therefore the warranty, as to the purpose of rebutter, was perfectly inoperative. The statutes have made no alteration in these respects. Had it been held that the statute *de donis* did not restrain the effect of the warranty to rebut the issue, this principle would have been broken into, as the heir in that case would have been rebutted by his ancestor's warranty from an estate which he claimed to take from him by descent; but as the contrary construction was received, the principal remains as it did at the common law. The consequence is, that without assets the ancestor's warranty never did, and does not now bind the heir in any case, except where he takes by purchase; and that when he does take by purchase, it binds him, either with or without assets, in every case where the contrary has not been enacted by statute. Upon enquiry it will be found, that the cases where the operation of warranty still prevails are reduced to two; the first, that by the construction of the statute *de donis*, the ancestor's warranty binds the issues in tail with assets; the other, that, at common law, the warranty of the ancestor, tenant in tail in possession, still continues (unless the contrary

[Note 328.] contrary can be supported on the ground before hinted at) to bar those in remainder without assets. It is observable, that [373. b.] all warranties are collateral, so far as they are extraneous to the estate, and by way of contradistinction to those rights, incidents, or qualities, which by their nature are inferent in, annexed to, or issuing out of the estate which they accompany. In this sense the word collateral frequently occurs in our law books. Thus, 1. Rep. 121. b. an use at common law is said to be a trust or confidence, not issuing out of land, but a thing collateral, annexed in privity to the estate. In the same sense it is used in the well-known distinction between those powers which are said to be relating to the land, and collateral powers. Thus, whether the warranty descends lineally or collaterally, whether the estate and the warranty descend from the same person or from different persons, and whether the warranty is considered as to its operation of rebutting the heir, or of entitling the alienee to vouch the warrantor, it is, in its nature, collateral to the estate which it accompanies. If in some cases it bars the heir from claiming, and in others it does not, it is only because the statute-law has said, that in some cases, where by the common law it would have operated as a bar, it shall no longer have that operation; and if, by the statute *de donis*, the warranty of tenant in tail did not bar the issue without assets, but barred it with assets, this is not from any pre-established distinction between lineal and collateral warranty, but because the judges, upon the construction of the statute *de donis*, held the issues in tail and the reversioner should not be deprived of the estate by the indirect and circuitous operation of warranty, when that statute had declared they should not be deprived of it by the direct alienation of common law conveyances.—The chief part of the observations offered to the reader in this note are grounded on what was said by lord Vaughan in the argument above referred to: he concludes it by saying, “The doctrine of the binding of lineal and collateral warranties, or their not binding, is an extraction out of men’s brains and speculations many scores of years after the statute *de donis*.—And if Littleton (whose memory I much honour) had taken that plain way in resolving his many excellent cases in his Chapter of Warranty, of saying the warranty of the ancestor doth not bind in this case, because it is restrained by the statute of Gloucester, or the statute *de donis*; and it doth bind in this case, as at the common law, because not restrained by either statute (for when he wrote there were no other statutes restraining warranties, there is now a third, 11 H. 7.) his doctrine of warranties had been more clear and satisfactory than now it is, being intricated under the terms of lineal and collateral; for that in truth is the genuine resolution of most, if not of all his cases; for no man’s warranty doth bind, or not, directly, and *a priori*, because it is lineal or collateral; for no statute restrains any warranty under those terms from binding, nor no law institutes any warranty in those terms; but those are restraints by consequent only from the restraints of warranties made by statutes.” Vaugh. 375.—Lord Holt is also reported to have said, “The true reason of collateral warranty was the security of purchasers, and for their encouragement; as also, for the establishing and settling the estates of such as were in by title, or descent cast; and this was the only security such persons could have at common law. And because the estate of such persons as are in by title are much favoured in law, these covenants that were for strengthening of them were favoured likewise. And in those days there was no need of lineal warranty; but, however, the force of that is taken away by the statute *de donis*, and common recovery is not upon the supposition
of

“of recompence in value, and never was within the statute, but always
 “as much out of it as if it were so mentioned by express words.”
 And this, he said, was my lord Hale’s opinion. 12. Mod. 512.

[376. b.]

(1) In a late very distinguished publication it is observed, that [Note 329.]
 “where there is a gift to *A.* and his heirs for ever, or to *A.* and the
 “heirs of his body begotten, the first words (to *A.*) create an estate for
 “life; the latter (to his heirs, or the heirs of his body) create a re-
 “mainder in fee, or in tail, which the law, to prevent an abeyance,
 “refers to and vests in the ancestor himself, who is thus tenant for life,
 “with an immediate remainder in fee or in tail; and then by the con-
 “junction of the two estates, or the merger of the less in the greater,
 “he becomes tenant in fee, or tenant in tail in possession.” See *sir*
Wm. Blackstone’s argument in the case of *Perrin v. Blake*, published
 by Mr. Hargrave among his tracts, fol. 500. This exposition of the ex-
 pression in question he afterwards applies, with great ability, in his
 investigation of the rule in *Shelley’s* case. He lays it down as the
 great fundamental maxim, upon which the construction of every devise
 must depend, that the intention of the testator shall be fully and punctu-
 ally observed, so far as the same is consistent with the established rules
 of law, and no farther. He makes a distinction between those rules
 of law which are to be considered as the fundamental rules of the pro-
 perty of this kingdom, and are therefore of that essential, permanent
 and substantial kind, which cannot be exceeded or transgressed by any
 intention of a testator, however clearly or manifestly expressed; and
 those rules of a more arbitrary, technical, and artificial kind, which
 the intention of a testator may control. He then supposes that there
 is a third class of rules, of a still more flexible nature. Among the
 rules of the first class he reckons these; that every tenant in fee sim-
 ple, or fee tail, shall have the power of alienating his estates, by the
 several modes adapted to their respective interests; that no disposition
 shall be allowed, which in its consequence tends to a perpetuity; that
 lands shall descend to the eldest son or brother alone, or to all the
 daughters or sisters in partnership. Among the rules of the second
 class he reckons those rules of interpretation, by which the courts in-
 variably construe particular modes of expression to denote a particular
 intention in the testator. Thus, says he, if a man devises his land, be-
 ing freehold, to another generally, without specifying the duration of
 his estate, the courts consider it as evidence that he intended the devi-
 see should be only tenant for life; but if he devises, in like manner, a
 chattel interest, the courts consider it to be evidence of his intention
 that the devisee should have the total property. Among the rules of
 the third class he reckons the rule in *Shelley’s* case. Having admitted
 that the second and third class of rules allow of exceptions, when it
 appears to be the testator’s intention that the operation of his devise
 should be different from that which the legal operation of the words in
 which it is penned would be, he adds, that this intention shall not
 have this effect, unless it is manifest and certain; so that, if his inten-
 tion that his words should operate contrary to their technical and legal
 import does not appear by express words, or by necessary implica-
 tion, the legal operation of the words must take effect. He applies
 this rule to the case of *Perrin v. Blake*. He argues, that it does not
 appear by any evidence that the testator intended his words should not
 have their legal operation: he says, the question is not whether the
 testator intended the ancestor should or should not have a power of
 alienating the lands devised to him, or should have only an estate for
 his

[Note 329.] his life. He admits it to be clear, that he intended the ancestor should not have a power of alienating the lands, and [376. b.] that he should take only an estate for his life : but the real question, he says, is, how the heirs were intended to take, whether as descendants or purchasers. If the testator intended they should take as purchasers, the ancestor remained tenant for life ; if he meant they should take by descent, or had formed no intention about the matter, then, says he, by operation and consequence of law, the inheritance is vested in the ancestor. He says, that in the case of Perrin and Blake it is neither clearly expressed nor manifestly to be implied, from any part of the testator's will, that he intended the heirs should take as purchasers ; he therefore concludes, that the words in question should be construed according to their legal operation ; and consequently, that in conformity to the rule laid down in Shelley's case they should operate, not as words of purchase, but as words of descent, and the ancestor therefore take an estate in tail.—*Mr. Hargrave*, in his observations concerning the rule in Shelley's case, remarks, that those who wish to avoid the rule avow, that they consider it as subordinate to the intention of the testator, as a rule of interpretation, as merely a technical construction of words, which yields to the intention, whenever they are opposed to each other ; that as soon as they discover that it is not the testator's intention that the first taker should have a power of barring the entail to his heirs, they think the victory over the rule is complete. On the other hand, those who wish to support the rule insist, that it is a rule of interpretation, established on decrees of the most authoritative decisions, which cannot be departed from, without leveling the great land marks by which the titles to real property are ascertained, and establishing in their room a monstrous latitude of uncertain and arbitrary construction. He says, he finds something to approve and something to condemn on both sides of these discordant comments upon the rule ; and that in both there is one common error. To the opponents of the rule he admits, that where the rule would disappoint a lawful intention, sufficiently expressed, it ought not to be effected. But he asks, whether the intention is lawful ? The rule, as he considers it, is a conclusion of law upon certain principles—so absolute, as not to have any thing to say to the intention, if these premises really belong to the case ; and these premises, he insists, are an intention, by heirs of the body, or other words of inheritance, to comprehend the whole line of heirs to the tenant for life, and so to build a succession upon his preceding estate of freehold. This being so, if in such cases the word *heirs* is used in that its large and proper sense, it is a contradiction to the rule, to intend that the remainder to the heirs shall operate by purchase, and such intent is not lawful ; so that it is incumbent on those who oppose this application of the rule to shew, that the word *heirs* is used in a qualified sense, and intended merely to describe certain persons, who, at the death of the tenant for life, may answer that description, and to give a succession of heirs to them : this being shewn, the rule, he says, no longer applies. But nothing less than its appearing, that by the heirs of the body, or heirs general, the whole line and succession of heirs to the tenant for life, or, in other words, the whole of his inheritable blood was not meant, can deliver the case from the rule. He says, that the genuine rule in Shelley's case is part of an ancient policy of the law, to guard against the creation of estates of inheritance, with qualities, incidents, or restrictions, foreign to their nature. Thus it is one of the properties of an estate in fee simple, that it may be alienated by the party seized,

so that a condition not to alien is void at law. Thus courtesy and dower are incidents to estates of inheritance, and inseparably annexed to them ; that these known examples of incidents, inseparable from inheritance, lead to a discovery of a foundation for the rule, which in a moment renders it paramount to and independent of private intention. It is one branch of a policy of law, adopted to prevent annexing to a real descent the qualities and properties of a purchase, and so is calculated to render impossible the creation of an amphibious species of inheritance ; that is, an estate of freehold, with a perpetual succession to heirs, without the other properties of inheritance ; in other words, an inheritance in the first ancestor, with the privilege of vesting in the heirs by purchase the succession of one to another, without the legal effects of a descent, a compound of descent, and purchase.—Such a commixture would, he says, have put an end to all those lines of distinction, by which we so easily and certainly discriminate inheritances from mere estates of freehold. It would have been a continual source of fraud upon feudal tenure. When the heir came into the tenure by descent, the lord was entitled to those grand fruits of military tenure, wardship and marriage ; but if he took by purchase, only the trifling acknowledgment of relief was due to the lord. If the heir were allowed to succeed by purchase, it would defeat the specialty creditors of the ancestor ; it would have suspended all actions for the inheritance of land. If private intention had been permitted to annex to real heirship the contradiction of taking by purchase, what principle of our law would have remained to resist stripping the title by succession of all the other effects and consequences legally appropriated to it ? Why might it not have given to purchase the qualities of descent ? It is a positive rule of our law, that a man cannot raise a fee simple to his own right heirs as purchasers, either by legal conveyance, or by conveyance to uses. By this it is meant, that where the ancestor wills that at his death his heirs shall, by gift from him, come to that very inheritance which the law of descent and succession throws upon them, it is construed as a vain and fruitless attempt to give that to the heirs which the law vests in them. It amounts to a prohibition upon the ancestor against making his heirs purchasers, by giving at his death what the law confers without his aid. But this rule applies only to the acts of the ancestor ; it was therefore requisite to have a like barrier as to acts between persons not standing in that relation towards each other. This is effected by the rule in Shelley's case. Thus explained, says he, the rule in Shelley's case can no longer be treated as a medium for discovering the testator's intention. The ordinary rules for the interpretation of deeds should be first resorted to. When it is once settled that the donor or testator has used words of inheritance, according to their legal import ; has applied them intentionally to comprize the whole line of heirs to the tenant for life ; has made him the terminus, by reference to whom the succession is to be regulated ; then the rule in Shelley's case applies, and the heir shall not take by purchase. But if it shall be decided that the testator or donor did not mean to involve the whole line of heirs to the tenant for life ; did not mean to ingraft a succession on his estate, and to make him the ancestor or terminus ; but, instead of this, intended to use the word heirs in a limited, restrictive, and qualified sense ; intended to point at that individual person who should be the heir at the moment of the ancestor's decease ; intended to give a distinct estate of freehold to such single heir, and to make his or her estate of freehold the ground-work of a succession of heirs ; to construe him or her the ancestor, terminus, or stock, for the succession to take its course from :—in every one of these cases, the pre-

[Note 329.] mises are wanting, upon which the rule in Shelley's case interposes its authority, and the rule therefore becomes extraneous [376. b.] matter—Previously to mr. Hargrave's publication, the rule in question had been discussed, with infinite learning and ability, by *mr. Fearne*, in his Essay on Contingent Remainders. In this justly celebrated work, *mr. Fearne* observes, that the rule in Shelley's case is supposed to have been originally introduced to prevent frauds upon the tenure; and that if such a limitation had been construed a contingent remainder, the ancestor might, in many cases, have destroyed it for his own benefit; if not, he might have let it remain to his heirs in as beneficial a manner as if it had descended to him, at the same time that the lord would have been deprived of those fruits of the tenure, which would have accrued to him upon a descent. He then minutely and accurately examines all the cases upon the subject, which had come before the courts of law and equity, and investigates very fully the principles upon which they were determined. He says, "that in the case of Perrin and Blake, the question is not whether the words, *heirs of the body*, may not, under certain circumstances, be taken as words of purchase; but whether those words, standing perfect, independent, and unexplained, and preceded by a limitation of the legal freehold to the ancestor in the same will, have ever been construed as words of purchase." To this he replies, "that not one of the cases, till that of Perrin and Blake, can fairly be urged in support of an affirmative answer to that question." The three very masterly performances referred to in this note will make the reader fully acquainted with the general merits of the case in question, and of the several points of legal learning, upon the discussion of which it either immediately or incidentally depends. But as the subject is necessarily of a very abstruse and intricate nature, and the arguments used in support of the different opinions respecting it are necessarily complicated and interwoven with one another, the following discrimination of the leading points upon which the decision of the case must ultimately turn will, perhaps, be useful to those who wish to obtain an accurate knowledge of the doctrine in dispute.—I. Let us first suppose, that after a devise to a man for life, and a subsequent devise to the heirs of his body, the testator in express words declares it to be his intention, that by the devises in question he means to give the ancestor an estate for his life only, and to give an estate in fee by purchase to his heirs. Is the rule in question of that very rigid and forcible nature, as to be unaffected and *uncontrolled by these express words*?—II. If the answer to this question is, that the express declaration of the testator will in this case control the legal operation of the words, *heirs of the body*, the next question is, Can any words short of an express declaration have this effect? or, in other language, Can that rule be *controlled by words of implication*?—III. If the answer is in the affirmative, the next enquiry is, Whether, to form such an implication as will control the rule, it is sufficient that it appears to be the testator's intention that the ancestor should *take an estate for his life only*?—IV. Or, Must it also appear to be his intention that the *heirs* should take, not as descendants, but as *purchasers*?—V. Must it also appear *how* or *what estates* he intends the heirs to take?—VI. And *how* and *what estates* may the heir take by the law of England, his ancestor taking by the same instrument an estate for his life only? Such, perhaps, will be the process of enquiry, if it is admitted that there are cases, where, in devises of this nature, the heirs will take by purchase: but if that is not admitted; if it is asserted, that where a testator has once devised to a man for life, and afterwards to the heirs of his body, *no other*

other words, however positive and express, shall control the legal operation of the words, heirs of his body; it will then remain to inquire into the ground of the supposed inflexibility and rigidity of the rule.—I. Is it that it is *against the law* of the land, that lands should be conveyed to the ancestor for life with such estate or estates in remainder to the heirs of his body, as those heirs must be supposed to take, if they take as purchasers?—To resolve this question with accuracy, it should first be settled what estate or estates the heirs of the body would take under this construction; and then it should be supposed that such estate or estates are devised by the most accurate and scientific legal expressions: if devised so worded would be held contrary to law, the necessary conclusion is, that *the object* intended to be effected by the testator is *against law*.—II. If it appears that such estate or estates are not contrary to the law, but it still is contended that a devise to one for life, and after his decease to the heirs of his body, shall make the heirs take by descent, contrary to the testator's intention, the only remaining ground to support that conclusion is, that to make the heirs take by descent, in devises of this nature, is a point of construction so fixedly and unalterably settled by judicial determination, that it is not now in the breast of any court to deviate from it. By investigating the rule in question under the above heads of enquiry, a regular and distinct view may, it is conceived, be obtained of the different points of law which relate to it, and of the different grounds upon which an opinion upon it may be framed.—It is greatly to be lamented, that there should be so much uncertainty and difficulty in the application of a rule of law, to which resort must be so often had on the construction of wills. All parties agree that the rule has an existence; but, from the liberality which is allowed in the construction of wills, it has been contended that it does not extend to those devises, to which it cannot be applied without defeating the intention of the testator. It is certain that no rule of law has a more ancient origin, or is more generally established, than that if a testator expresses his intention defectively, either by not using technical and artificial terms, or by using them improperly, yet, if his intention can be collected from his will, the law, however defective his language may be, will construe his words according to his intention; and, if the object of it is warranted by the established rules of law and equity, will admit its full operation and effect. It is equally certain, on the other hand, that if the testator's intention appears to be to effect that which the rules of law and equity do not admit, neither the courts of law nor the courts of equity can allow its operation. The first thing, therefore, to be ascertained is, what the object of the testator is; the next, whether it is such as the rules of law and equity admit. To determine the last point, as soon as it is settled what the testator's intention is, let him be supposed to have expressed it, not in the words actually made use of by him, but in the most accurate and scientific language. If, when so expressed, its operation will be allowed, both at law and in equity, it must be admitted on all hands that it should have its operation and effect, notwithstanding any inaccuracy or impropriety used by the testator in his method of expressing it. But if, when expressed in artificial and scientific language, the law will not give it effect, it must equally be admitted, that it is no longer in the power of the courts to give it an operation; the fault of the testator's will being, not that he has expressed his intention inaccurately, but that the object of his intention is unlawful. To apply this reasoning to the case of *Perrin v. Blake*, what was the testator's intention? Supposing the heirs in that case to take by purchase, there
are,

[Note³²⁹.] are, it is conceived, but three constructions to be put upon such a devise. The *first is*, to suppose, that the devise to the [376. b.] heirs of the body of the ancestor, to whom the life estate is limited, gives estates to his sons successively in tail, with remainders over in tail to his daughters as tenants in common. Devises of this nature are, unquestionably, conformable to law. They are the modifications of property most frequently introduced in the settlements of real estates. It follows, that if the words of the testator are construed in this sense, they are unobjectionable in point of law. But the courts of law have not thought themselves warranted to construe them in this sense: this construction, therefore, must be laid aside. The *second construction is*, to suppose that the testator's intention is to give the ancestor an estate of freehold, and to vest the inheritance in the person, who, at the time of the ancestor's decease, should be the heir of his body, and to make that person the stock of the inheritance. It must be admitted, that this is perfectly lawful; and there is no doubt but a disposition of this nature, if framed in proper language, would be good, not only in a will, but in a deed. The question then will be, Whether that was the intention of the testator? It is obvious, that by the words, heirs of the body, the testator means to comprehend *all* the heirs of the body of the devisee; but if the construction here contended for be admitted, only a particular series or line of such heirs will be admitted. None will be admitted but the person who happens at the time of the ancestor's decease to be the heir of his body, and the heirs of the body of that person; all the other heirs of the body of the ancestor will be utterly excluded. Thus, supposing him to have several sons, the eldest son would, at the time of the testator's decease, answer to the description of heir of his body; he, therefore, would take an estate by purchase, he would be the stock of the inheritance, and from him the lands would descend upon all his issue. But the devise would reach no farther; it would not comprehend the other sons of the ancestor, or their issue. Thus, if this construction should be received, the intention of the testator will be, to a great degree, absolutely defeated. If there are no ulterior limitations or devises after the devise to the heirs of the body of the tenant for life, the reversion in fee will descend on the eldest son; and he may, consequently, dispose of it from his brothers and their issue. If there are any such ulterior limitations or devises, the persons claiming under them would take before, and to the total disinheritance of the other brothers and their issue. Of the second construction, therefore, must be repeated what was said of the first, that it is unobjectionable in point of law, but that it is not conformable to the intention of the testator. The *third construction is*, to suppose that the inheritance will first vest in the person answering, at the time of the decease of the ancestor, to the description of heir of his body; and that, on failure of issue of that person, it will vest in him who answers that description at the time of such failure of issue, and so on, while there are any such heirs remaining. This construction is conformable in some respects to the case of John de Mandeville, mentioned by sir Edward Coke, ante 26. b. and see note in p. 488. of mr. Douglas's Reports. The question then is, Whether there is any thing unlawful in this intention? To ascertain this, let it be tried by the test above mentioned, that is, let us suppose it expressed in the most accurate and technical language. This will give the first son, or his issue, at the time of the ancestor's decease, an estate tail; and upon failure of that line of issue, the lands will vest for an estate tail in the person, who, at the time of the failure of the issue of the first taking heir, will answer

answer the description of heir of the body of the tenant for life, and so on till all the heirs of his body, and all their issue, are exhausted.—It is obvious, that a limitation of this nature differs materially from the limitations adopted in the first construction, viz. to the sons successively in tail male, with remainder to the daughters; for in that case the estate vests immediately in the first taker, and the other sons, and all the daughters, take vested remainders in tail. But, according to the construction we are now speaking of, all after the first taker must be considered as taking *per formam doni*; supposing even that they take by purchase, all the estates after that of the first taker must be contingent. In fact, it is not very easy to ascertain how they would take. But certainly none of the other children, or their heirs, if this construction should be received, would take vested estates during the life of the first taker, or the continuance of issue of his body: for, till the events in question happened, it must be uncertain who, at the particular times in question, would answer to the description of heir of the body of the tenant for life; whereas, according to the first construction, all the children would answer the description under which they are designed, immediately upon their respective births. Such is the effect of this third construction.—Is there any thing in the devise, construing it in this manner, supposing it to be properly and accurately framed, that combats with any known rule of law? It is certain that such a limitation would be good, if the life estate, instead of being limited to the ancestor of the persons to whom the inheritance is afterwards limited, were limited to a stranger; as in the common case of a devise to *A.* for life, remainder to the right heirs, or the heirs of the body of *J. S.*—Why should its being a devise to the ancestor make a difference? It may even be contended, that a limitation and devise of this nature have been allowed in equity. In the case of *Tipping v. Cosin*, Carth. 272. there was a limitation, and in *lady Jones v. lady Say and Sele*, 8 Vin. 262. there was a devise of a trust estate to the ancestor for life, with a legal remainder after his decease to the heirs of his body. In both cases it was admitted, that on account of the different qualities of their estates, the freehold being equitable, and the inheritance legal, they did not coalesce so as to be within the rule in *Shelley's case*; but it was allowed to be a good remainder in tail, in the heirs of the body of the ancestor; and in the former of these cases the verdict was for the person claiming the remainder. It may be answered (and certainly with a great appearance of reason) that on account of the different nature and quality of the estates, the mischiefs intended to be obviated by the rule in *Shelley's case* could not follow from admitting the heirs to take in these cases by purchase. Considering it with respect to the feudal principles, which are supposed to have given occasion to the rule, the lord would not have lost the fruits of his tenure, nor would the fee have been put into abeyance. This case, therefore, proves nothing in favour of the legality of the estates to be raised by the construction here contended for. This point is exhausted by *mr. Hargrave's treatise* upon it. If the reader is convinced by it that the estates to be raised by this third construction are not such as the law admits, it follows that, supposing the devise in question to operate so as to give the heirs an estate by purchase, it must be construed in one of the three modes above mentioned. Now the two first of these modes are not reconcilable with what is acknowledged to be the general scope and object of the testator's intention; and the third is not reconcilable with the laws of the land. The consequence is, that the devise must be left to its legal operation, and the heir must take by descent. But if the reader should be of opinion that the estates, which, if the third construction is admitted,

will

[Note 329.] will be created by the testator's will, are such as the law allows, still there will remain a formidable objection to the admission of that construction. It will appear, that by a series of adjudications, from the 18 Ed. II. to the case of *Coulson v. Coulson*, 17 Geo. II. inclusively, devises of the nature in question have been construed to vest the inheritance in the ancestor. Admitting therefore that the reason or foundation of the construction in question is not now discoverable, there still is great reason to contend that it is binding on the courts. This is by no means peculiar to the rule in *Shelley's case*. There are many other rules of construction received by the courts, which are arbitrary, and some of them not reconcilable to plain reason. Still, being adopted as rules of construction, the courts (sometimes even with an avowed reluctance) consider themselves to be bound to submit to them. It remains to observe, that the observations here offered to the reader are intended to apply only to the devises of legal estates, and to those devises only in which the argument to except them from the rule in *Shelley's case* depends, at the most, on the two following circumstances: 1st, that it evidently appears to be the testator's intention to give the ancestor an estate for his life only; and 2dly, that it also evidently appears to be his intention that the heirs of his body should take by purchase. If the testator's intention appears to be to give the ancestor an estate for life only, and to give an estate by purchase to the heirs of his body; and if, *besides this*, his intention is, that by the devise to the heirs the inheritance should vest in that individual heir, who, at the time of the decease of the tenant for life, shall be the heir of his body, and the heirs of the body of that person, and that the devise should reach no farther; or his intention is, that the inheritance should descend upon the sons of the tenant for life successively in tail, with or without remainders to the daughters; and this ulterior intention appears *from any other part* of the will, either by plain declaration, or clear implication; then, as there is nothing unlawful in this disposition of his property, there is no rule of law or equity that stands in the way of such construction.—But this ulterior construction is not to be implied from the mere circumstances of an estate for life only being given to the ancestor, and its appearing, either by express words or implication, that it was his intention to give an estate by purchase to the heirs.—It may be said, this brings the matter to as much uncertainty as attended it before: but surely that is not the case. Numberless as the cases respecting the point in question are, there are few indeed in which this ulterior explanation of the words, heirs of the body, occurs. See those cited by Mr. Justice Blackstone in Mr. Hargrave's Tracts, 505, 506.—Since the publication of this note, the rule in *Shelley's case* has again been elaborately discussed by Mr. Fearne in the valuable additions inserted in his fourth edition of his Essay. [The sixth edition of this work, published in London in 1809, has been rendered still more luminous and valuable by the annotations of Mr. Butler.] The learning respecting it, particularly with a view to its application to decided cases, and to those which occur, or are likely to occur on it, in practice, has been ably collected and arranged by Mr. Preston, in his *Succinct View of the Rule in Shelley's Case*. [See also 6 *Cruise's Dig.* 323 to 403, where all the *English* cases decided prior to the publication of that work are abridged and arranged; *Doc d. Strong v. Goff*, 11 *East* 668, decided since; and the following *American* cases.—*Bishop v. Selleck*, 1 *Day* 299; *Brant v. Gelston*, 2 *Johns. ca.* 384; and *Smith & ux. v. Chapman & al.* 1 *Hen. & Mun.* 240.] [See also the 6th vol. of *Cruise's Digest*. In the *United States* the learning on this abstruse part of *English* jurisprudence has been recently explored and applied

plied in the case of *Lesse of Findlay & al. v. Biddle*, 3 Binn. 139. That was the case of a devise to A. during his natural life, and after his decease, if he should die leaving lawful issue, to his heirs as tenants in common, and their respective heirs and assigns forever; but in case he should die without lawful issue, then to B. the brother of A.; the decision of the Court was, that A. took only an estate for life. The Rule in *Shelley's case* has been recognized in its general form, by the *Supreme Court of Connecticut. Bishop v. Selleck*, 1 Day 299.]

[379. b.]

(1) In some of the former notes, there has been found occasion to anticipate many of the observations which otherwise would have occurred upon this and the three preceding Sections. See ante 203. b. n. 1. 216. a. n. 2. 223. b. n. 1. and particularly 327. a. n. 2.—It may however be further observed, that this is one of the many attempts which have been made at different times to prevent the exercise of that right of alienation which is inseparable from the estate of a tenant in tail. The chief of them are stated in a very pointed manner by Mr. Knowler, 1 Burr. 84. He observes, that the power to suffer a common recovery is a privilege inseparably incident to an estate tail: it is a *potestas alienandi*, which is not restrained by the statute *de donis*, and has been so considered ever since Taltarums's case [12 E. 4. 14. b. p. 16.] And this power to suffer a common recovery cannot be restrained by condition, limitation, custom, recognizance, statute, or covenant. That it cannot be restrained by condition, appears by Co. Litt. 223. a. and Sunday's case, 9 Rep. 128.—That it cannot be restrained by limitation, appears by Cro. Jac. 696. Foy, v. Hinde, and by Sunday's case, and other books.—That it cannot be restrained by custom, appears by the case of Taylor and Shaw, in Carter 6. and 22.—That it cannot be restrained by recognizance, or by statute, appears by Pool's case, cited in Moore 810.—That it cannot be restrained by covenant, appears by the case of Collins v. Plummer, 1 Peere Wms. 104.—That an attempt to suffer a common recovery cannot be restrained, appears by Corbet's case, in the 1 Rep. 83. Mildmay's case, in the 6 Rep. 40. and the case of Pierce v. Wise, in 1 Vent. 321. And that a conclusion to suffer a recovery cannot be restrained, appears by Mary Portington's case, in the 10 Rep. 55.—One of the last attempts to establish a perpetuity was made in the will of John duke of Marlborough, where a power was given to trustees, on the birth of the sons of the several persons therein mentioned, to revoke the uses limited to those sons in tail male; and in lieu thereof, to limit the estates to the use of such sons for their lives, with immediate remainders to the respective sons of such sons severally and successively in tail male. Lord Northington, in 1759, declared this clause, as it tended to a perpetuity, and was repugnant to the estate limited, was void and of no effect. There was an appeal from this decree to the lords. And after hearing counsel upon it, the judges were ordered to attend, and their opinion was asked, "Whether by the rules of law an estate tail, limited to the use of persons unborn by any deed or will, can, by virtue of any power given by such deed or will to trustees, be revoked upon the births of such persons, and a new estate limited to such persons for their lives respectively, with remainder to their issue successively in tail male?" The lord chief-justice of the common pleas delivered the unanimous opinion of the judges in the negative. The utmost stretch towards a perpetuity, which the courts have hitherto allowed, is through the medium of an exercise of a power of appointment limited in a deed or will. If the objects of the power be not restrained to any particular description of persons, but designed generally to be such persons as the

[Note 330.]

party to whom the power is given shall appoint, there is no question but he may appoint life estates, with remainders over, in the same manner as he might do by a substantive original conveyance, notwithstanding the persons to whom the life estates are appointed were not in existence at the time of the execution of the conveyance in which the power is contained. But it seems to be otherwise, if the objects of the power are restrained to any particular description of persons, as to the children of the appointor. See *Alexander v. Alexander*, 2 Vez. 640. and *Robinson v. Hardcastle*, in *Mr. Brown's Rep. of Cases determined in Chancery during the 26th year of his present majesty's reign*, p. 22.—In note 2. to page 216, it was contended, that the estates created by the exercise of powers of appointment preceded, from the time of their coming into existence, all the uses limited to take effect in default of appointment, and all the rights and incidents annexed to them; and consequently, that in the cases where estates are limited to such uses as a person shall appoint, and, for want of appointment, to the use of his right heirs, the appointment will be good against the wife's right of dower; but in the same note it is observed, that there are reasons why such appointments should not always be depended upon. The modes generally used to prevent the wife's dower seem open to objection. Sometimes the estate is limited to a purchaser and a trustee and their heirs, but as to the estate of the trustee and his heirs in trust for the purchaser and his heirs. This exposes the purchaser to the chance of the trustee's dying in his life; in which case the right of dower will attach upon the estate. Sometimes the estate is limited to the purchaser and a trustee, and the heirs of the trustee, but in trust for the purchaser. Sometimes it is limited immediately to the trustee and his heirs, in trust for the purchaser and his heirs; but each of these modes is objectionable, as they keep the legal fee from the purchaser, and expose him to all the inconvenience of its escheating to the crown for want of heirs of the trustee, or of its becoming vested in infants, married women, or persons residing at a distance, not easily discoverable, or not willing to join in the conveyances required to be made of it. Sometimes even it may be considered to pass in the general devise of the trustee's will, and by that means become settled at law to uses in strict settlement, and therefore not to be regained but by a fine or common recovery, and till the existence of a tenant in tail not to be regained without the aid of parliament. It cannot therefore be desirable that the legal fee should be outstanding in a trustee. To prevent this, the estates may be first limited to such uses as the purchaser shall by deed or will appoint, and, for want of appointment, to the use of a trustee, his heirs and assigns, during the life of the purchaser, in trust for him, and subject thereto to the use of the purchaser, his heirs and assigns. If this method be adopted, no doubt will remain of the wife's right of dower being effectually prevented; the purchaser during his life will have the absolute command of the legal fee, and at his death it will descend upon his heir.—Another mode is suggested by *Mr. Fearn* in his *Essay on Contingent Remainders*, 4th edition, fol. 509. note. "The lands," says he, "may be limited to the appointees of the purchaser in the fullest manner; and, on default of appointment, to the use of him and his assigns during his life; and from and after the determination of that estate, by any means, in his life-time, to the use of some person and his heirs, during the natural life of the purchaser, in trust for him and his assigns; and from and after the determination of the estate so limited in use to the said trustee and his heirs, to the use of the purchaser, his heirs and assigns for ever."

[380. b.]

(1) Since our author wrote, the law seems to be otherwise understood; for 'tis now the common practice for infants, having obtained a privy seal for that purpose, to suffer common recoveries; and the law seems to have been so settled ever since Blunt's case, which is reported in Hobart's Reports, page 196; which recovery was afterwards held good on a writ of error brought, and infancy assigned for error; as may be seen in W. Jones 318. Cro. Car. 357. where the case is reported under the names of the earl of Newport v. sir Henry Mildmay. See Salk. 567. *Note to the 11th edition.* [Note 331.]

[384. a.]

(1) What is said by sir Edward Coke in this place, and the determination of the judges in Nokes's case, 4 Rep. 80. and lord chief justice Vaughan's argument in Hayes v. Bickerstaff, in his Reports, page 126, should remove the scruples too often entertained on the part of trustees, respecting the propriety of their conveying by the word *grant*. From the passages here referred to, it most clearly appears that the word *grant*, when used in the conveyance of an estate of inheritance, does not imply a warranty; and that if it did, the insertion of any express covenant on the part of the grantor would qualify and restrain its force and operation within the import and effect of that covenant, as the law, when it appears by express words how far the parties designed the warranty should extend, will not carry it farther by construction. There is, therefore, no reasonable ground for trustees objecting to convey by the word *grant*; but serious objections may be raised in some cases to purchasers taking a conveyance from them without it. These are stated in the following passage from Bridgman's Complete Conveyancer, vol. 1. 323.—“Sir Jeffrey Palmer's resolution concerning the words *give* and *grant* in a conveyance. “Sir, I conceive that care ought to be taken in a conveyance, of what nature soever it be, that there be not therein *give* and *grant*; for they imply a *general warranty*, and shall not be qualified by the *special warranty* following; as hath of late been thrice adjudged. H. I.”—Sir Jeffrey Palmer's answer. “*Give* implies a *personal warranty*, and so is not always used. The word *grant*, in a lease for years, is a *covenant in law*; or (as you may call it) a *general warranty*, if it be not qualified by a *covenant or warranty in fact*: but if there be a *covenant or warranty in fact*, then it is restrained to the words of the *covenant* subsequent. But in an *estate of inheritance*, where the *fee* passeth, there the word *grant* is neither a *covenant in law*, nor *warranty*. For if it should be a *covenant in law*, or *warranty* in itself, it would be there restrained and qualified by the *warranty* and *covenants in fact*. And a *deed* to pass an *inheritance* where *common* is cannot be without it; for if it be *common in gross*, it cannot pass by the livery, but must pass by the word *grant*. And I never yet saw a *feoffment* without it. Jeffrey Palmer.” This dictum of sir Jeffrey Palmer has been sometimes cited, to prove that it is not safe for purchasers to take a conveyance by lease and release, or bargain and sale enrolled, if the conveyance be from the trustees, and they do not convey by the word *grant*. It is said that commons, or advowsons, or other things which be in grant, will not, if they are severed from the inheritance, pass without the word *grant*. But this is a mistake, and by no means warranted by sir Jeffrey Palmer's dictum, which evidently applies only to conveyances by feoffment; in which case commons in gross, &c. lying in grant would not pass by the livery, and therefore without the word *grant*, or some other word of a similar

[Note 33.] similar operation, would not pass by the charter of feoffment. But in the case of a lease and release, there is no doubt [384. a.] but any thing which lies in *grant* will vest in the vendee, by the lease for a year, and that a release, without the word *grant*, would operate by way of enlargement to give the releasee the fee. So in the case of a bargain and sale enrolled, any thing which lies in *grant* will vest in the bargainee by the statute of uses without the word *grant*. Upon the whole, therefore, there is no such peculiar operation in this famous monosyllable, as to make it either dangerous for a trustee to convey by it, or essential for a purchaser to require it. How a *covenant* shall be expounded with regard to the context, or to synonymous or other words, see Com. Dig. Cov. (D.) Vin. Abr. Covenant (L. 4.)

To explain more fully what is said above, it may be proper to state, at length, the operation of the word "grant" or "give," in conveyances of estates in fee simple, in gifts in tail, in leases for life, and in leases for years.—1st. *As to the operation of the word "grant" or "give," in conveyances of estates in fee simple*, it is to be observed, that, till the practice of subinfeudation was established by the statute *quia emptores terrarum*, lands might be granted, either to be held of the grantor himself, or to be held of the chief lord of the fee. When they were granted to be held of the grantor himself, at least if the grant were made by the word "*dedi*," there, without any other warranty, the feoffor and his heirs were bound to warranty. This is enacted by the statute *de bigamis*, ch. 6. and we have lord Coke's authority that this statute was only declaratory of the common law in this respect. The reason for implying warranty, in this case, is by his lordship said to be, that, "where *dedi* is accompanied with a "perdurable tenure of the feoffor and his heirs, there *dedi* importeth "a perdurable warranty for the feoffor and his heirs to the feoffee and "his heirs." 2 Inst. 275. The warranty in this instance was therefore a consequence of tenure, (ant. 101. b.) and so necessary a consequence of it, that, where an express and qualified warranty was introduced, it did not restrain or circumscribe the express warranty. Where lands were granted to be held of the chief lord of the fee, then the tenancy was of the chief lord, and no tenure subsisted between the grantor and the grantee. Warranty, therefore, being a consequence of tenure, did not hold in these cases between the grantor and grantee, as there was no tenure between them to raise it. Still, the grantor was supposed to be bound by his own gift. The word "give," therefore, imported, in this case, a warranty to him. But this was personal to the grantor; it did not apply to the heir, and it could not affect him, without working that involuntary alienation, which, in a case of that nature, the jurisprudence of those times did not readily admit. The statute "*quia emptores terrarum*" put an end to the subinfeudation of fee simple estates, and of course put an end to the warranty we have been speaking of, as incident to grants of lands in fee simple, to be held of the grantor and his heirs. The consequence was, that, after the statute *quia emptores terrarum*, there was no case, except that of homage auncestrel, in which warranty, unless it arose from the express contract of the parties, bound more than the donor, or bound him longer than the term of his life. 2dly, *But with respect to estates tail and leases for life*, the judges took this important distinction, that, where a person seised in fee granted for life or in tail, reserving the reversion in himself, the grantees of the particular estates held of the reversioner, and he of the chief lord: where a person granted for life or in tail, with the remainder over in fee simple, both

both the tenants of the particular estates, and the remainder men, held of the chief lord: In the former case, therefore, the tenure between the donor and the donees still subsisting, the law remained as it did before the statute; that is, when those estates were created by the word "*dedi*," both the donor and his heirs were, in consequence of the tenure, obliged to warranty. Thus it stood in respect of grants in fee simple, in tail, or for life; and in all these cases the warranty must be understood in its strict legal import, as implying an obligation in the lord to acquit his tenant against the superior lord, where there was a seignory paramount, and to give the tenant a recompence in case of eviction. 3dly, *But in leases for years*, (to which the subject now leads), the case is very different. A lease for years, (See Bacon's Abr. tit. Leases and Terms for Years,) is a contract between the lessor and the lessee for the possession and profits of land on the one side, and a recompence, rent, or other income, on the other. As the lessor contracts, that the lessee shall hold the land, he cannot claim it in opposition to his covenant.—Thus he parts with the land during the term; but his supposed parting with the land, and the interest of the lessor in it, during the term parted with, was rather a consequence of law accruing from the contract, than the contract for the enjoyment a consequence of law, accruing from the parting with the land. The tenant, therefore, had only the perception of the profits, and was considered to hold the possession for the reversioner. The consequence was, that whoever recovered the freehold reduced the term, whether the recovery were true or feigned. As the possession was not considered to be in the lessee, there was originally no means by which he could recover it. His only remedy was in consequence of the contract which constituted the lease. By virtue of that, the words "yielding and paying," &c. were construed a covenant in favour of the lord, which enabled him to recover his rent by an action of covenant or an action of debt, and the words, "grant, demise, &c." were construed a covenant in favour of the tenant, which enabled him to recover damages as a recompence for the possession lost. In this sense they are said to imply a warranty. From the warranty of freehold estates it differs in its nature, as that arises from tenure, this from contract; and in its operation, as that, being a consequence of tenure, is not modelled by express warranties, this, arising from the contract of the parties, is considered to be modified and regulated by any express covenants inserted in the lease. See Spencer's case, 5 Rep. 17. 1 Lev. 57. 1 Mod. 113. and *Clarke v. Sampson*, 1 Vez. 101. Lord Coke, ant. 101. b. 309. a. expressly says, that warranty cannot be annexed to chattels real or personal; for, says his lordship, if a man warrants them, the party shall have covenant or action upon the case. Thus, therefore, the law stands since the statute *quia emptores*. In all cases of homage auncestrel, if any such now exist, (which is at least doubtful), the doctrine of warranty remains as it did before the statute, that is,—if the grant was made by the word "*dedi*," it imports a warranty. In other cases it may be expressed as the parties think proper: if it be not expressed, then, in conveyances in fee simple, it is not implied by the word "grant," or any other word, except the word "give;" and then it holds only during the life of the grantor: in gifts in tail, and in leases for life, by the word "give," where the reversion is left in the donor, the tenure between him and the donee or lessee still continues. Of that tenure it is a necessary consequence of law, and is not considered to be restrained by any express covenants. In leases for years rendering rent, warranty, considering it to import a covenant for the quiet enjoyment of the term, is of the essence itself of the lease; but the lease being originally founded on contract, any of its terms

terms may be varied by the parties themselves at their pleasure, and is in fact considered as varied *pro tanto* by the insertion of any express covenant. But the effect of an express covenant in restraining the effect of an implied general covenant is not to be confounded with the effect of a particular covenant in restraining the effect of an express general covenant, as the latter is not restrained by a subsequent covenant, unless it can be considered as part of the general covenant. See *Noke's case*, 4 Rep. 80. and 1 Saund. 60.—It may happen, that a person, having a term of years only, conveys the lands as an estate in fee simple to another and his heirs, by the word "grant." But this cannot amount to a warranty of the lands for the term. The operation of the word "grant," in implying a warranty in the creation or assignment of a term, arises from implication only, that is, from the law's presuming, by the party's using the word "grant," that he intended to warrant the lands as a term. But his expressly treating the land in the deed as a fee simple estate, and expressly conveying it as such, necessarily rebuts every implication of its being his intention or undertaking to convey it as a term of years. In what has been said above, the grantor is considered as the real owner of the land, receiving the purchase money, or other consideration of the estate or interest parted with. In this case, independently of all construction of particular words, there is great reason to consider him bound to warranty the property he parts with, as he receives the benefit of it. In the case of a trustee, this ground of raising or implying an obligation of warranty necessarily fails. Upon the whole, to apply what has been said to the point mentioned at the beginning of the note, it appears clear, that whenever there is a deed, on the face of which the trustee is party, and conveys merely as trustee, there is no substantial objection to his conveying by the word "grant." If the lands are freehold, it is clear that no warranty or covenant is imported by it; if it happens that they are held for a term of years only, all implication of an intention or undertaking to convey them for the term is necessarily rebutted by their being treated in the deed, and conveyed by the party, as a fee simple estate; and if any such warranty or covenant would otherwise be implied, it would be restrained by his covenant, that, he himself has done no act to encumber, to a warranty or covenant against his own acts. To obviate, however, every doubt which may be entertained on this ground, it is usual to make the trustee convey "according to his estate, right, or interest, but not further or otherwise,"—or to express that he grants, &c. "not as warranting the title, but in order to pass or convey the lands." Whenever the former words are inserted, care should be taken to make them referrible to the trustee only, and not to the owner of the fee; who, in express contradiction from the guarded mode of conveyance applied to the trustee, should be made to "grant," &c. "fully and absolutely."

It remains to enquire, what remedy a person purchasing under a defective title has, exclusively of the purchaser's warranty or covenants, or where the title is subject to a defect, which the warranty or covenants do not reach. In every case, where the seller conceals from the purchaser the instrument or the fact which occasions the defect, or conceals from him an incumbrance to which the estate is subject, it is a fraud, and the purchaser has the remedy of an action on the case, in the nature of an action of deceit. But a judgment obtained after the death of the seller, in an action of this nature, can only charge his property as a simple contract debt, and will not, therefore, except under very particular circumstances, charge his real assets

assets. A bill in chancery, in most cases, will be found a better remedy. It will lead to a better discovery of the concealment, and the circumstances attending it, and may in some cases enable the court to create a trust in favour of the injured purchaser. But where the instrument or the fact, which occasions the defect of the title, or the instrument creating the incumbrance, is produced, the purchaser has fair notice given him of it, and if the covenants do not extend to it, he appears to be without remedy, unless he can avail himself of the covenants of the earlier vendors, many of which are inherent to the lands, and to some of which, as the covenant for quiet enjoyment, there is no objection on account of their antiquity, where the breach is recent. It sometimes happens, that a purchaser consents to take a defective title, relying for his security on the purchaser's covenants. Where this is the case, this should be particularly mentioned to be the agreement of the parties; as it has been argued, that, as the defect in question was known, it must be understood to have been the agreement of the purchaser to take the title, subject to it, and that the covenants for the title should not extend to warrant it against this particular defect. On the general doctrine respecting the usual covenants for title, see Mr. Sugden's Law of Vendors, Ch. 13.

[384. b.]

(1) Tenant by the curtesy cannot vouch, because he shall not recover in value, 10 H. 7. 10. b. but he may pray in aid of him in the reversion. Hob. Rep. 21. [Note 333.]

[385. b.]

(2) The other may vouch for his moiety, as is observed in the preceding page: but if they make partition, both have lost it. Hob. 25. [Note 334.]

(3) A man enfeoffeth three by deed, and warranteth the land to them, *et cuiuslibet eorum*, this is a joint warranty, because the estate or interest was joint; but if the estates were several, the warranty would be several. 5 Rep. 19. [Note 335.]

(4) Upon a similar principle it was held, that a person could not devise land in frankmarriage, because the donee could not hold of the donor. Ant. 21. b. [Note 336.]

[386. a.]

(1) It is a general rule, that the heir cannot take any thing by descent when the ancestor is secluded from taking. Ant. 99. b.—If a father and his heir apparent join in a warranty, the heir is doubly bound, by his own warranty, and as heir to his father. Moore 20. [Note 337.]

[386. b.]

(1) This seems to be contradicted in Moore 20, where it is said, that if two are vouched, and one of them makes default, the grand *caufe ad valentiam* shall issue against him who made the default; and if one of them dies, the heir and the survivor of them may be vouched, or the survivor of them only, at the election of him who hath the warranty. [Note 338.]

[387. a.]

(1) From this it appears, that the warranty ceases on the expiration of the estate to which it is annexed. In *Smith v. Tyndal*, Salk. 685, 686. it was resolved, that no warranty extinguishes a right, but only binds or bars it so long as the warranty continues in force; for if the warranty be released, the ancient right revives. [Note 339.]

(2) Though the warranty be temporary, yet the thing warranted and [Note 340.]

and to be recovered is perpetual: for it is a warranty of a fee, though not a warranty in fee. Hob. 126.

[388. b.]

[Note 341.] (1) In the former cases put by Littleton, the warranty determined, upon the natural expiration of the estate to which it was annexed: here it determines by the estate being defeated. But if an estate be bound by a warranty, and afterwards the estate to which the warranty is annexed be defeated as to a particular estate only, the warranty shall not be defeated. As if tenant for life, remainder to *A.* be disseised, and an ancestor of *A.* releases to the disseisor with warranty, and dies, and afterwards tenant for life enters or recovers, yet the remainder will be bound by the warranty. See 2 Rol. Abr. 740. l. 40. 741. l. 5. And see Com. Dig. vol. 3. 434, 435.

[389. a.]

[Note 342.] (1) The feoffee with warranty cannot take any advantage of the warranty, unless he be tenant of the land. 26 H. 8. 3. b.

[Note 343.] (2) If a man makes a feoffment with warranty non-feoffment is a good plea; for if the feoffment be avoided, the warranty also is avoided, for that depends upon the feoffment. But if the man makes a lease for years, and covenants that he will warrant and defend the land to the lessee; if the lessee be ousted, whether it be by one that hath or that hath not title, he shall have a writ of covenant. Brownlow Rep. part 2. fol. 165.

[390. b.]

[Note 344.] (1) *But clearly, if the warranty were never executed, as in the case of fine surrender with warranty and assets, there shall be a remitter.* Lord Hale's MSS.

[Note 345.] (2) In Lambard's Justice of Peace, ch. 10. it is said, that if a man be attainted of murder or felony, it is needless to arraign him of new of any other felony, because it is needless to condemn him who already is attainted, except in special cases, either for the advantage of the king, or the commodity of the subject. The author then proceeds to state several examples of both the exceptions. In 4. Rep. fol. 57. sir Edward Coke observes, that though a man be killed in rebellion, he shall not forfeit his lands nor goods; but if the chief-justice (sovereign coroner of England) upon the view of the body, make record thereof, and return it into the king's bench, he shall forfeit lands and goods, as Fineux, chief-justice, did temp. H. 7.

[391. a.]

[Note 346.] The offence of PRÆMUNIRE is called from the words of the writ preparatory to its prosecution. It is described, by Mr. Justice Blackstone, book 4. c. 8. to be, "introducing a foreign power into the land, and creating *imperium in imperio*, by paying that obedience to papal process, which constitutionally belonged to the king alone." To explain fully this offence, and the laws of recusancy mentioned in this place by Lord Coke, it is necessary, I. to state the laws which were past before the Reformation, to restrain what, in the law of England, was termed papal provision, or the pope's presenting to English benefices,—and papal process, or the pope's interfering in the process of the ecclesiastical courts of England. This will lead, II. to a statement of the laws, which, since the division of the churches at the Reformation, have been past against those, who, from their remaining in communion with the see of Rome, have received, in the laws of England, the

the appellation of papists, and persons professing the popish religion. III. After this will be shewn the effect and operation of the laws, which have been past in the present reign, to relieve persons of that description. IV. Some general observations will then be offered, to point out the particular laws, to which his majesty's English subjects in communion with the see of Rome are still exposed, but which do not, in any respect, affect English protestant dissenters; and some remarks on the operation of the toleration act, and the act for quieting corporations, so far as they affect Roman catholics,—on the right or obligation of Roman catholics to serve in the militia, and to serve on juries, and on their right to be admitted to factories, and to hold offices exercisable abroad.

I. WITH RESPECT TO PAPAL PROVISIONS AND PAPAL PROCESS:—The 31 Edw. 1. is said to be the foundation of all the subsequent statutes of *præmunire*. It recites, that the abbots, priors and governors, had, at their own pleasure, set diverse impositions upon the monasteries and houses in their subjection; to remedy which, it was enacted, that, in future, religious persons should send nothing to their superiors beyond the sea; and that no impositions whatsoever should be taxed by priors aliens. By the 25 Edw. 3. stat. 6. 27 Edw. 3. stat. 1. c. 4. and stat. 2. c. 1, 2, 3, 4. it was enacted, that the court of Rome should present or collate to no bishoprick or living in England; and that if any one disturbed any patron, in the presentation to a living, by virtue of papal provision, such provision should pay fine and ransom to the king, at his will, and be imprisoned, till he renounced such provision. The same punishment was inflicted on such, as should cite the king or any of his subjects to answer in the court of Rome. By the 3 Richard 2. ch. 3. and 7 Richard 2. ch. 12. it was enacted, that no alien should be capable of letting his benefice to farm; and that no alien should be capable of being presented to any ecclesiastical preferment, under the penalty of the statute of provisors. By the stat. 12 Richard 2. c. 15. all liegemen of the king, accepting of a living, by any foreign provision, were put out of the king's protection, and the benefice made void. To which, the 13 Richard 2. stat. 2. c. 2. adds banishment and forfeiture of lands and goods; and by c. 3. of the same statute, it was enacted, that any person bringing over any citation or excommunication, from beyond sea, on account of the execution of the foregoing statute of provisors, should be imprisoned, forfeit his goods and lands, and moreover suffer pain of life and member. In the writ for the execution of these statutes, the words *præmunire facias* being used, to command a citation from the party, have denominated, in common speech, not only the writ, but the offence itself of maintaining the papal power, by the name of *præmunire*. The 16 Richard 2. c. 5. which is the statute generally referred to by all subsequent statutes, is usually called the statute of *præmunire*. It enacts, that whoever procures at Rome, or elsewhere, any translations, processes, excommunications, bulls, instruments, or other things, which touch the king, against him, his crown, and realm, and all persons aiding and assisting therein, shall be put out of the king's protection; their lands and goods forfeited to the king's use; and they shall be attached by their bodies, to answer to the king and his council, or process of *præmunire facias* shall be made out against them, as in other cases of provisors. By the 2 Henry 4. c. 3. all persons, who accept any provision from the pope, to be exempt from canonical obedience to their proper ordinary, were also subjected to the penalties of *præmunire*. This is said to be the last ancient statute concerning this offence, till the separation of the church

[Note 346.] of England from the church of Rome, in the reign of Henry 8. The penalties of præmunire have been since applied to [391. a.] other offences, some of which bear more, some less, and some no relation to this original offence. Its punishment is to be gathered from the foregoing statutes, and is thus shortly summed up by sir Edward Coke. "That, from the conviction, the defendant shall be out of the king's protection, and his lands and tenements, goods and chattels, forfeited to the king; and that his body shall remain at the king's pleasure, or, as other authorities have it, during his life." Such is the offence of præmunire, and such its punishment by the law of England. Whenever it is said, that a person, by any act, incurs the penalties of a præmunire, it is meant to express, that he thereby incurs the penalties, which, by the different statutes we have mentioned, are inflicted for the offences therein described. This account of the offence of præmunire, and it's punishment, is taken, or rather copied, from sir William Blackstone's 4th Commentary, chap. 8.

II. WITH RESPECT TO THE LAWS, WHICH, SINCE THE SEPARATION OF THE CHURCH OF ENGLAND FROM THE CHURCH OF ROME, AT THE TIME OF THE REFORMATION, HAVE BEEN PAST, AGAINST THOSE WHO REMAINED IN COMMUNION WITH THE SEE OF ROME, —the laws against them may be reduced under five heads:—II. 1st. The first, are *those which subject them to penalties and punishments for exercising their religious worship*;—under which head, may be ranked, the laws respecting their places of education, and the ministers of their church. By these laws, if any English priest of the church of Rome, born in the dominions of the crown of England, came to England from beyond the seas, or tarried in England three days, without conforming to the church, he was guilty of high treason; and those incurred the guilt of high treason, who were reconciled to the see of Rome, or procured others to be reconciled to it. By these laws also, papists were totally disabled from giving their children any education in their own religion: if they educated their children at home, for maintaining the school-master, if he did not repair to church, or was not allowed by the bishop of the diocese, they were liable to forfeit *L.* 10. a month, and the school-master was liable to forfeit forty shillings a day; if they sent their children for education to any school of their persuasion abroad, they were liable to forfeit *L.* 100. and the children so sent were disabled from inheriting, purchasing or enjoying any lands, profits, goods, debts, duties, legacies, or sums of money.—Saying mass, was punishable by a forfeiture of 200 marks; hearing it, by a forfeiture of 100. See 1 Eliz. ch. 2. 23 Eliz. ch. 1. 27 Eliz. ch. 2. 29 Eliz. ch. 6. 35 Eliz. ch. 2. 2 Jac. 1. ch. 4. 3 Jac. 1. ch. 4, 5. 7 Jac. 1. ch. 6. 3 Car. 1. ch. 2. 25 Car. 2. ch. 2. 7 & 8 W. 3. ch. 27. 1 Geo. 1. ch. 13.—II. 2d. Under the second head were those laws, which punished the English communicants with the church of Rome *for not conforming to the established church*. These are generally called the statutes of recusancy. It should be observed, that absence from church, alone, and unaccompanied by any other act, constitutes recusancy, in the true sense of that word. Till the statute of the 35 Eliz. chap. 2. all non-conformists were considered as recusants, and were all equally subject to the penalties of recusancy: that statute was the first penal statute made against popish recusants, by that name, and as distinguished from other recusants. From that statute arose the distinction between protestant and popish recusants; the former were subject to such statutes of recusancy, as preceded that of the 35th of queen Elizabeth, and to some statutes against recusancy made subsequently to that time; but they

they were relieved from them all, by the act of toleration, in the 1st year of king William's reign. From the 35th Eliz. c. 2. arose also the distinction, between papists and persons professing the popish religion, and popish recusants, and popish recusants convict. Notwithstanding the frequent mention in the statutes, of papists and persons professing the popish religion, neither the statutes themselves, nor the cases adjudged upon them, present a clear notion of the acts or circumstances, that, in the eye of the law, constituted a *papist*, or a *person professing the popish religion*. When a person of that description absented himself from church, he filled the legal description of a *popish recusant*: When he was convicted in a court of law of absenting himself from church, he was termed in the law a *popish recusant convict*: to this must be added the *constructive recusancy*, hereinafter mentioned to be incurred by a refusal to take the oath of supremacy.—With respect to the statutes against recusancy; by these statutes, popish recusants convict were punishable by the censures of the church, and by a fine of *L. 20.* for every month, during which they absented themselves from church; they were disabled from holding offices or employments; from keeping arms in their houses; from maintaining actions or suits at law or in equity; from being executors or guardians; from presenting to advowsons; from practising in the law or physic; and from holding offices, civil or military; they were subject to the penalties attending excommunication, were not permitted to travel five miles from home, unless by licence, upon pain of forfeiting all their goods; and might not come to court under pain of *L. 100.* A married woman, when convicted of recusancy, was liable to forfeit two thirds of her dower or jointure. She could not be executrix or administratrix to her husband, nor have any part of his goods; and, during her marriage, she might be kept in prison, unless her husband redeemed her at the rate of *L. 10.* a month, or the third part of his lands; popish recusants convict were, within three months after conviction, either to submit and renounce their religious opinions, or, if required by four justices, to abjure the realm; and if they did not depart, or if they returned without licence, they were guilty of felony, and were to suffer death as felons.—(See the statutes referred to under the former head.)—II. 3. *As to the penalties or disabilities attending the refusal of Roman catholics to take the oath of supremacy, the declaration against transubstantiation, and the declaration against popery*: It must be premised, that the Roman catholics make no objection to take the *oath of allegiance*, 1 G. 2. c. 13. or the *oath of abjuration*, 6 Geo. 3. c. 53.—*With respect to the oath of supremacy*,—by the 1st Elizabeth, ch. 1. the persons therein mentioned were made compellable to take the oath of supremacy contained in that act: by the 3d of king James the 1st, ch. 4. another oath was prescribed to be taken, commonly called the oath of allegiance and obedience: these oaths were abrogated by the 1st of king William and queen Mary, sess. 1. ch. 8. and a new oath of allegiance and a new oath of supremacy were introduced, and required to be taken in their stead: the statute made in the 2d session of the 1st year of king George the 1st, ch. 13. contains an oath of supremacy, in the same words as the oath of supremacy required to be taken by the 1st of king William and queen Mary. By that oath, persons are made to swear, that “no foreign prince, person, prelate, state or potentate, hath, or ought to have, any jurisdiction, power, supremacy, pre-eminence or authority, ecclesiastical or spiritual, within the realm.” It was required to be taken by the persons therein named; it might be tendered to any person, by any

[Note 346.] two justices of the peace ; and persons refusing the oath so tendered were adjudged to be popish recusants convict, and [391. a.] to forfeit and to be proceeded against as such. This was the constructive recusancy referred to above. It was not the offence itself of recusancy, which, as we have already observed, consisted merely in the party's absenting himself from church : it was the offence of not taking the oaths of supremacy, and the other oaths prescribed by the act of 1 Geo. 1. the refusal of which was, by that statute, placed on the same footing as a legal conviction on the statutes of recusancy, and subjected the party refusing to the penalties of those statutes. This was the most severe of all the laws against papists. The punishment of recusancy was penal in the extreme ; and the persons objecting to the oath in question might be subjected to all the penalties of recusancy, merely by their refusing the oath, when tendered to them. It added to the penal nature of these laws, that the oath in question might be tendered, at the mere will of two justices of peace, without any previous information or complaint before a magistrate, or any other person. Thus, by refusing to take the oath of supremacy, when tendered to them, they became liable to all the penalties of recusancy : and the same refusal, by 7 & 8 Wm. 3. ch. 4. and 1 Geo. 1. st. 2. ch. 13 restrained them from practising the law as advocates, barristers, solicitors, attornies, notaries, or proctors, and from voting at elections.—II. 4. *With respect to receiving the sacrament of our Lord's supper* : By the 13 Charles 2. (commonly called the corporation act,) no person can be legally elected to any office, relating to the government of any city or corporation, unless, within a twelvemonth before, he has received the sacrament of the Lord's supper, according to the rites of the church of England ; and he is also enjoined to take the oaths of allegiance and supremacy, at the same time that he takes the oath of office, or, in default of either of these requisites, such election shall be void.—II. 5. *As to the declaration against transubstantiation* : By the 25th Car. 2. ch. 2. (commonly called the test act,) all officers, civil and military, are directed to take the oath, and make the declaration against transubstantiation, in the court of King's Bench or Chancery, the next term, or at the next quarter sessions, or (by subsequent statutes,) within six months after their admission, and also, within the same time, to receive the sacrament of the Lord's supper, according to the usage of the church of England, in some public church, immediately after divine service and sermon ; and to deliver into court a certificate thereof, signed by the minister and church-warden ; and also to prove the same, by two credible witnesses, upon forfeiture of *L. 500.* and disability to hold the office.—II. 6. *With respect to the declaration against popery* : The act past in the 30th year of Car. 2. st. 2. ch. 1. contains the declaration, and prescribes it to be made by members of either house of parliament, before they take their seats. By it, they declare their disbelief of the doctrine of transubstantiation, and their belief that the invocation of saints, and the sacrifice of the mass, are idolatrous.—II. 7. *With respect to the laws affecting their landed property* :—How this was affected by the law against recusancy, has been already mentioned. By the 11 & 12 W. 3. ch. 4. it was enacted, that a person educated in the popish religion, or professing the same, who did not, in six months after the age of sixteen, take the oaths of allegiance and supremacy, and subscribe the declaration of the 30th Cha. 2. should, in respect of himself only, and of his heirs or posterity, be disabled to inherit or take lands, by descent, devise, or limitation, in possession, reversion, or remainder : and that, during his life, till he took
the

the oaths, and subscribed the declaration against popery, his next of kin, who was a protestant, should enjoy the lands, without accounting for the profits; and should be incapable of purchasing; and that all estates, terms, interests, or profits out of lands, made, done, or suffered to his use, or in trust for him, should be void. By 3 Jac. 1. ch. 5. 1 W. & M. c. 26. 12 Ann. st. 2. c. 14. and 11 Geo. 2. c. 17. papists, or persons professing the popish religion, were disabled from presenting to advowsons, and other ecclesiastical benefices, and to hospitals and other charitable establishments. By annual acts of the legislature, papists, being of the age of 18 years, and not having taken the oaths of allegiance and supremacy, were subjected to the burthen of the double land tax. By a statute made in the second session of the 1st year of Geo. 1st, ch. 55. they were required to register their names and estates in the manner, and under the penalties, therein mentioned; and by the 3d Geo. 1. c. 18. continued by several subsequent statutes, an obligation of enrolling their deeds and wills was imposed on them. Such were the principal penal laws against Roman catholics, *immensus aliarum super alias aceruatarum legum cupulus* (Liv. 3. 34.) at the time of the accession of the house of Brunswick.

III. WITH RESPECT TO THE LAWS WHICH HAVE BEEN PAST IN THE PRESENT REIGN FOR THE RELIEF OF ROMAN CATHOLICS:—
 III. 1. The only act of any importance, which, till the reign of his present majesty, was past for their relief, (and that operated but in an indirect manner for *their* benefit), was *the act of the 3d Geo. 1. c. 18.* On the construction of the 11 & 12 Wm. 3. ch. 4. it had been held, that, as it expressly confined the disability of papists to take by descent to themselves only, and preserved their heirs and posterity from its operation, it was not to be construed as preventing the vesting of the freehold and inheritance in them, in cases of descent, or transmitting them to their posterity: but that the disability respected only the pernancy of the profits, or beneficial property of the lands, of which it deprived them during their non-conformity. Whether that part of the statute, which relates to their taking by purchase, should receive the same construction, was a frequent subject of discussion, the statute being, in that branch of it, without any limitation. To remedy this, the act we are speaking of was past: it enacts, that no sale for a full and valuable consideration, by the owner or reputed owner of any lands, or of any interest therein, theretofore made, or thereafter to be made, to a protestant purchaser, shall be impeached, by reason of any disability of such papist, or of any person under whom he claims, in consequence of the 11 & 12 W. 3. unless the person taking advantage of such disability shall have recovered before the sale, or given notice of his claim to the purchaser, or before the contract for sale shall have entered his claim at the quarter sessions, and *bond fide* pursued his remedy. The act then recites the clauses of the 12 & 13 W. 3. disabling papists from purchasing; and afterwards enacts, that these clauses shall not be thereby altered or repealed, but shall remain in full force. This proviso is couched in such general words, that it created a doubt in some, whether it did not nearly frustrate the whole effect of the act. To this it was answered, that, notwithstanding the proviso, the enacting part of the statute was in full force for the benefit of a protestant purchaser; and that the proviso operated only to declare, that papists themselves should not derive any benefit from the act, in any purchases they should attempt to make under the foregoing clauses. This was considered the better opinion, and on the authority of it, many purchases of considerable consequence

[Note 346.] consequence were made. See also 6 Geo. 2. ch. 5. Thus the laws against the Roman catholics stood at the time of the [391. a.] accession of his present majesty. During his reign two acts, each of great importance. have been past in their favour.—III. 2. *By that of the 18th of his reign*, ch. 60. it was enacted, that so much of the 11 & 12 W. 3. as related to the prosecution of popish priests and jesuits, and imprisoning for life papists who keep schools, or to disable papists from taking by descent or purchase, should be repealed, as to all papists or persons professing the popish religion, claiming under titles not thentofore litigated, who, within six months after the act past, or their coming of age, should take the oath thereby prescribed. Upon this act, a case was decided in chancery, on the 18th of December 1783, under the name of *Bunting v. Williamson*. In that case, a bill had been filed, claiming an estate given to a person professing the popish religion, by will, alledging the incapacity occasioned by the act of the 11th and 12th of king William. The testator died many years before, and after his death a suit had been instituted by another person, who claimed as his heir at law, and that suit was depending at the time when the statute of the 18th Geo. 3. c. 60. was passed; but was afterwards dismissed for want of prosecution. The plaintiff filed his bill, some time after the act, claiming, in right of his wife, as heir at law. The defendants pleaded their title under the testator's will; and that the defendant, who was beneficially interested, having or claiming the estate under that will, had taken the oath prescribed by the act, and concluded with an averment, that the title had not been before litigated by the plaintiff, or any person under whom he claimed. The plaintiffs, on argument of the plea, contended, that the words *not hitherto litigated* extended to the case then before the court, because the title had been litigated, and was in litigation at the time the act passed. But the lords commissioners, Ashurst and Hotham, were clearly of opinion, that the plaintiff not having before litigated the title, nor claiming under any person who had litigated it, the case of the defendants was within the benefit of the act, notwithstanding the prior litigation; and the plea was allowed.—III. 3. *With respect to the act of the 31st of his present majesty, cap. 32.* That statute may be divided into six parts: The 1st, contains the declaration and oath afterwards referred to in the body of the act, and prescribes the method of taking it: The 2d, is a repeal of the statutes of recusancy, in favour of persons taking the oath thereby prescribed: The 3d, is a toleration, under certain regulations, of the religious worship of the Roman catholics, qualifying in like manner, and of their schools for education: The 4th, enacts, that in future no one shall be summoned to take the oath of supremacy prescribed by the 1st W. and Mary, sect. 1. c. 8. and 1st Geo. 1. sect. 2. cap. 13. or the declaration against transubstantiation required by the 25th Ch. 2.;—that the 1st W. and Mary, sect. 1. ch. 9. for removing papists or reputed papists from the cities of London and Westminster, shall not extend to Roman catholics taking the appointed oath;—and that no peer of Great Britain or Ireland, taking that oath, shall be liable to be prosecuted for coming into his majesty's presence, or into the court or house where his majesty resides, under the 30th Car. 2. stat. 2. ch. 1.: The 5th part of the act repeals the laws requiring the deeds and wills of Roman catholics to be registered or inrolled. The 6th dispenses persons acting as a counsellor at law, barrister, attorney, clerk, or notary, from taking the oath of supremacy or the declaration against transubstantiation.—The first part of the act gives rise to two observations: The declaration prescribed by the act is contained in these words; "I, *A. B.* do hereby
"declarr.

“declare, that I do profess the Roman catholic religion.” Till the passing of this act, the persons, who were the subject of it, were known in the English law by the name of papists, reputed papists, or persons professing the popish religion. By requiring this declaration from them, the law has imposed on them, and probably will in future recognize them by, the name of Roman catholics. Still, when the antient penal laws against them are to be mentioned with professional accuracy, it may sometimes be found necessary, (and this necessity has been experienced in the course of this annotation), to mention them under the name applied to them by the abrogated law. The other observation is of more importance. As the bill was originally framed, and as it stood, when, having past the commons, it was brought into the house of lords, the first clause in it directed, that the oath contained in the act of the 18th year of the reign of his present majesty should be taken no longer; but that the oath appointed by the bill should, in future, be administered in its stead, and should give the same benefits and advantages, and should operate to the same effects and purposes, as the oath contained in the 18th of his present majesty. This clause was altered, in the house of lords, to the form in which it now stands. It does not express, that the oath contained in it shall entitle the persons taking it to the benefits of the act of the 18th of his present majesty: it only expresses, that it shall be lawful for catholics to take the oath of the 31st of his present majesty, at the places and times, and in manner therein mentioned. Thus it is very uncertain, whether persons taking only the oath prescribed by the 31st of his present majesty will be entitled to the benefit of the act of the 18th of his present majesty, so as to be relieved from the penalties and disabilities, from which the persons taking the oath prescribed by that act were released by it. The chief of these penalties and disabilities were those inflicted by the 11th and 12th W. 3., which disabled them from taking by descent or purchase. From these penalties and disabilities they are exposed to much real grievance. It seems, therefore, advisable for every Roman catholic, who wishes to be secure in the enjoyment of his landed property, to take both the declaration and oath prescribed by the act of the 31st, and the oath prescribed by the 18th of his present majesty.—III. 4. *As to the double land tax*, that being imposed by the annual land tax act, a repeal of it could not be effected by any prospective act. It is repealed by omitting from the annual land tax act the clause imposing it. The land tax act of the year 1794 contains also a clause, which, after reciting that lands formerly liable to a double assessment were then possessed by protestants, enacted, that where any place, in consequence of that circumstance, should be rated at more than four shillings in the pound, the commissioners might, on complaint, examine into the truth of the complaint, and certify the same to the barons of the exchequer, before the 29th of the following September, who were to discharge the excess by the following November.

IV. WITH RESPECT TO THE COMPARATIVE SITUATION OF THE PROTESTANT DISSENTERS AND THE ROMAN CATHOLICS, AS TO THE PENALTIES AND DISABILITIES TO WHICH THEY ARE SUBJECTED BY LAW, IN CONSEQUENCE OF THEIR RELIGIOUS PRINCIPLES;—it has been already shewn, how the law stands on the corporation and test acts.—IV. 1. The statute of the 1st William and Mary, (commonly called the *toleration act*), exempts all dissenters, except papists and such as deny the Trinity, from all penal laws relating to religion, provided they take the oaths of allegiance and supremacy, and subscribe the declaration against popery, and repair to some congregation
registered

[Note 346.] registered in the bishop's court, or at the sessions. But there is nothing in this act, which dispenses, either with the test act or [391. a.] the corporation act, so far as they impose the obligation of receiving the sacrament of our Lord's supper on persons serving in offices, or elected to serve in corporations; and there is nothing in the act of the 31st of his present majesty, which dispenses catholics from that obligation, in case of their serving in offices, or being admitted into corporations. With respect therefore to the *test act and corporation act*, these are the only acts which subject the protestant dissenters to any penalties or disabilities; to these the Roman catholics are subject equally with the protestant dissenters: there is, therefore, no penalty or disability that affects the protestant dissenters, to which Roman catholics are not subject equally, but there still remain several penalties and disabilities to which Roman catholics are subject, that do not in any respect affect the protestant dissenters. The principal of these are, that by the 30 Car. 2. Roman catholics, in consequence of refusing the oath of supremacy, or the declaration against popery, are disabled from sitting in either house of parliament; by the 7th and 8th of Wm. 3. ch. 27, those who refuse to take the oath of supremacy are disabled from voting at elections; and by several statutes, Roman catholics are disabled from presenting to advowsons. This is peculiar to them, quakers and even jews having the full enjoyment of the right of presentation. It is to be observed, that no person can be presented to a living, who has not been ordained according to the rites of the church of England. Previously to his ordination, he is examined on his faith and morals by his bishop; he takes the oath of allegiance and supremacy, and subscribes the 39 articles; and previously to his admission, he subscribes the three articles respecting the supremacy, the Common Prayer, and the 39 articles; and he makes the declaration of conformity. By the *act of uniformity*, 13 and 14 Car. 2. c. 4. he is bound to use the Common Prayer and other rites and ceremonies of the church of England.—IV. 2. Upon the *corporation act*, it seems to have been the prevailing opinion, that the election of a person, who did not comply with the requisites of that statute, and all the acts done by him, were void. To prevent the consequences of this, the statute of the 5th Geo. 1. was past, intituled, "*An act for quieting and establishing corporations*," by which it was enacted, that no incapacity, disability, forfeiture, or penalty, should be incurred, unless the person were removed, or a prosecution against him commenced, within six months after his election. It was also enacted, that the acts of the person omitting to qualify should not be avoided. Upon this act an important question arose, whether dissenters, being ineligible to public offices, could be obliged to fine for not serving them. This point came to a direct issue, in the case of Allen Evans, esq. It was finally heard, in the house of lords, on the 4th February 1767, when it was determined in favour of the dissenters. For the relief of those, who omit to qualify for serving in offices, or for being elected into corporations, an act of parliament is past annually, by which, after mentioning the corporation and test acts, and some others, which do not relate to the point under consideration, it is enacted, that persons, who, before the passing of the act, have omitted to qualify in the manner prescribed by those acts, and who shall properly qualify before the 25th of the ensuing December, shall be indemnified against all penalties, forfeitures, incapacities, and disabilities, and their elections, and the acts done by them, are declared to be good. There is nothing in this act which excludes catholics from the benefits of it.—IV. 2. By the *militia act*, it is enacted, that no person shall be enrolled in the militia, unless he takes the following "oath: "I, A. B. do sincerely promise and swear, that I will be faithful and

“and bear true allegiance to his majesty King George, his heirs and successors. And I do swear that I am a protestant, and that I will faithfully serve in the militia, within the kingdom of Great Britain, for the defence of the same, during the time for which I am enrolled, unless I shall be sooner discharged.” It seems to deserve consideration, whether, under the existing laws, catholics may not claim to be exempted from serving in the militia, upon the same ground as, in the cited case of Allen Evans, the protestant dissenters claimed, and were allowed, to be exempted from the obligation of serving in offices, viz. That by law they are ineligible, and consequently are not compellable to fine for not serving.—IV. 3. *With respect to the right of Roman catholics to serve on juries*, there does not appear to have ever been any law which subjected them to any such disability, except the statutes, generally called the statutes of recusancy. The statute of the 13. Car. 2. commonly called the corporation act, relates to those offices, only, which concern the government of cities and corporations. The statute of the 25th Car. II. commonly called the test act, (since explained by the 9th of Geo. II.) regards only civil and military offices. Neither of these acts, therefore, abridges catholics of the right in question. With respect to the statutes of recusancy, among other penalties to which these subjected popish recusants convict, one was, that they became liable, upon conviction, to all the consequences of excommunication, and it has been generally understood, that persons excommunicated are disabled from serving on juries. We have more than once observed, that, in the proper sense of the word, not attending the service of the church of England, alone, and unaccompanied by any other circumstance, constitutes recusancy. Of this non-attendance at church, every Roman catholic, necessarily, was guilty, and he might be convicted of it by a very summary process. But till his guilt was established in a judicial manner, the law did not take notice of it; and therefore, unless an actual conviction had taken place, he was not subject to any of the penalties consequent to recusancy. But it has been mentioned, that there was, besides this, a species of constructive recusancy, to which every catholic was liable, by refusing to make the declaration against popery, and to take the oath of supremacy. This had a more direct operation on their ability to serve as jurors. Now as well the declaration against popery, as the oath of supremacy, might be tendered to a catholic in the very court where he presented himself to serve as a jurymen. A refusal amounted to conviction; on conviction he became subject to all the penalties of excommunication, and one of those penalties, (at least by the opinion of the old lawyers) was a disqualification to serve on juries. Thus, it was always in the power of the court, and perhaps of any two magistrates present, to convict, on the spot, a catholic of recusancy, and thereby render problematical, at least, his capacity to serve as juror. Such appears to have been the situation of catholics, in this respect, previously to the act of the 31st of his present majesty. Since the passing of that act, they stand, as to the serving upon juries, in the same predicament as, the rest of his majesty's subjects. By that statute, they are freed from the penalties incident either to positive or to constructive recusancy. It is observable, that the 8th section exempts the ministers of Roman catholic congregations from serving on juries; it seems to follow, that, without this clause, they would have been liable to serve, and, consequently, that all persons out of the reach of this clause are in the eye of the law subject to the duty, and have, of course, the capacity of serving.—IV. 4. *With respect to the right of Roman catholic merchants to be summoned to the meet-*

[Note 346.] *ings of British factories abroad*, it appears that they have, and always had a right to be admitted to them. The meetings of the [391. a.] factory in Portugal were regulated by the 8 Geo. 1. c. 17. but that act contains nothing which discriminates Roman catholic from other merchants. All the foreign factories are, therefore, in this respect, in the same predicament. Now, if Roman catholics are excluded from factories by any act, it must be, either by the corporation act, or by the test act. But with respect to the corporation act, it is to be observed, that a factory is not a corporation, in the legal acceptance of that word; and even if it were, it would not fall within the operation of the corporation act, as that is confined to cities, corporations, &c. within England and Wales, and the town of Berwick upon Tweed. The operation of the test act is more extensive than the operation of the corporation act; it expressly mentions his majesty's navy, the islands of Jersey and Guernsey, and persons who should be admitted into any service or employment in his majesty's or his royal highness's household, within the districts therein mentioned. A factory abroad does not, therefore, fall within the operation of that act. Besides, the privilege of being admitted to the meetings of a foreign factory is not an office, or even a right, of that description which falls within either of those acts. There is reason to suppose that, in point of fact, Roman catholics have not generally been summoned to attend meetings of factories since the year 1720. But no person who is acquainted with the code of penal laws against Roman catholics, particularly the statutes against recusancy, will be surprised at this circumstance, or draw any argument from it against the right contended for, as the operation and tendency of those statutes were such, as induced Roman catholics to forbear asserting some of their most valuable rights, even such as were of the most indisputable nature, rather than obtrude themselves into public notice. If they wish to enforce their right of admission, or their right of voting, they should give notice of their desire to be summoned, and offer to attend at the meetings; then, if admittance should be refused them, or their votes rejected, the proceedings will be illegal: and not only they, but all other persons subject to the proceedings of the factory, will be justified in refusing to pay their contribution-money, or to comply, in any other manner, with the resolutions or orders of the meeting. Besides, a refusal to admit them to the meetings is certainly a personal injury; and wherever a personal injury is done to an English subject abroad, the remedy must be sought in the jurisdiction where the cause of action happens, if it is subject to the king's jurisdiction; if the king has no jurisdiction in that place, this necessarily gives the king's courts a jurisdiction, within which it is brought, by the known fiction of laying the venue in some county of England. This is explained by lord Mansfield, with his usual clearness and ability, in his argument in *Fabrigas v. Mostyn*, Cowp. 170. See also *Phillybrown v. Ryland*, in Stra. 624. Lord Raymond, 1388, and 8 Mod. 354. It is to be observed, that in the great case of *Ashby v. White*, where an action was brought against an officer for refusing a man's vote at an election, the only ground for questioning the action was, that there the house of commons had special jurisdiction. See 6 Mod. 45. 1 Salk. 19. 1 Bro. Parl. Ca. 45. This, it is evident, does not apply to the case now under discussion. What has been said of the right of Roman catholics to insist on being admitted to the meetings of English factories abroad, and of their means of redress, in case of refusal, applies, with proper qualifications, to every other case of a similar description, where their right of admission, acting, or voting, is refused them.—IV. 5. *With respect to the right of Roman catholics to hold offices exercisable abroad:*

abroad :—It has been observed, that the corporation act extends only to cities, &c. within England and Wales, and the town of Berwick upon Tweed ; that the test act mentions only those places, and his majesty's navy, and Jersey and Guernsey ; and that the 31st of his present majesty repeals the statutes of recusancy, and relieves from the penalties imposed on Roman catholics refusing the oath of supremacy, and the declaration against popery : it seems therefore to follow, that there is now in force no law, which disables Roman catholics from holding offices wholly exerciseable abroad, or from serving or holding offices under the East India company, in their foreign possessions. Besides, upon the construction of these laws, and of every other law supposed to affect the Roman catholics, there seems reason to think, that the same spirit, which induced the legislature to repeal so large a proportion of the penal code against them, will influence the judicature in their construction of the unrepealed part of that code, or of any other statute unfavourable to them, in its apparent tendency or operation, so far as it may be open to a doubtful interpretation.



Since the publication of the first Edition of the foregoing Annotation, the Act of the forty-third of His present Majesty, c. 30. has been passed ; which makes the Declaration and Oath contained in the thirty-first of His present Majesty give the benefits of the Oath contained in the eighteenth of His present Majesty, and operate as the oath required to be taken by that Act. This makes taking both Oaths unnecessary, which, till the forty-third of His present Majesty, was, for the reason suggested in the Annotation, a prudent precaution.



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ERRATA.

IN THE ADDITIONS OF THE PRESENT EDITOR.

- Page 6. b. n. 2. for "3 Day"—read 4 *Day* 51.
6. b. n. 6. for "existing in him" read *exciting in him*.
6. b. n. 7. for "q. &" read *q. t.*
36. a. n. 6. for "3 Day" read 4 *Day* 66.
47. b. n. 7. for "Bradley" read *Bradby*.
338. a. n. 1. for "& Johnson" read 8 *Johns*.



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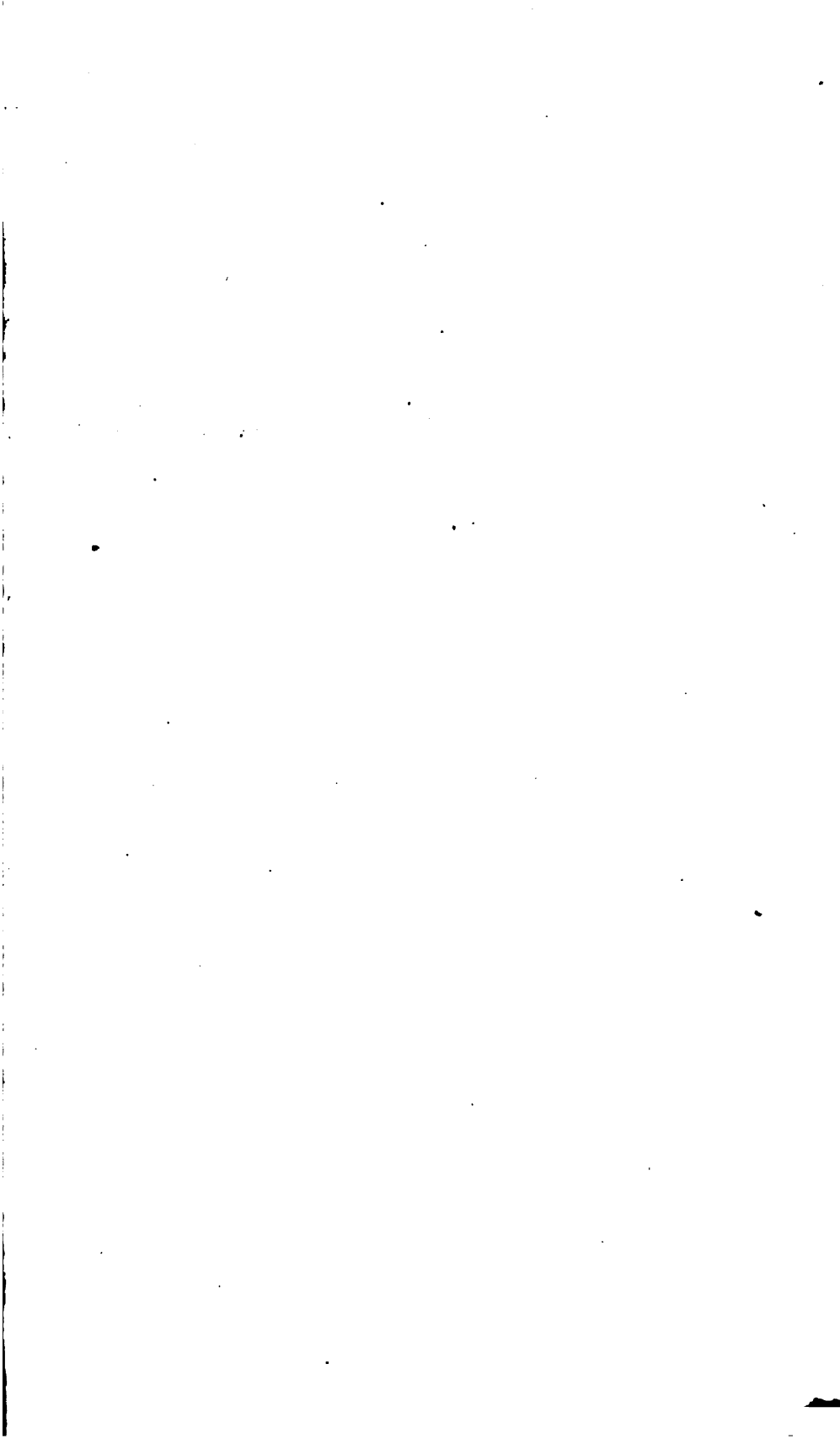
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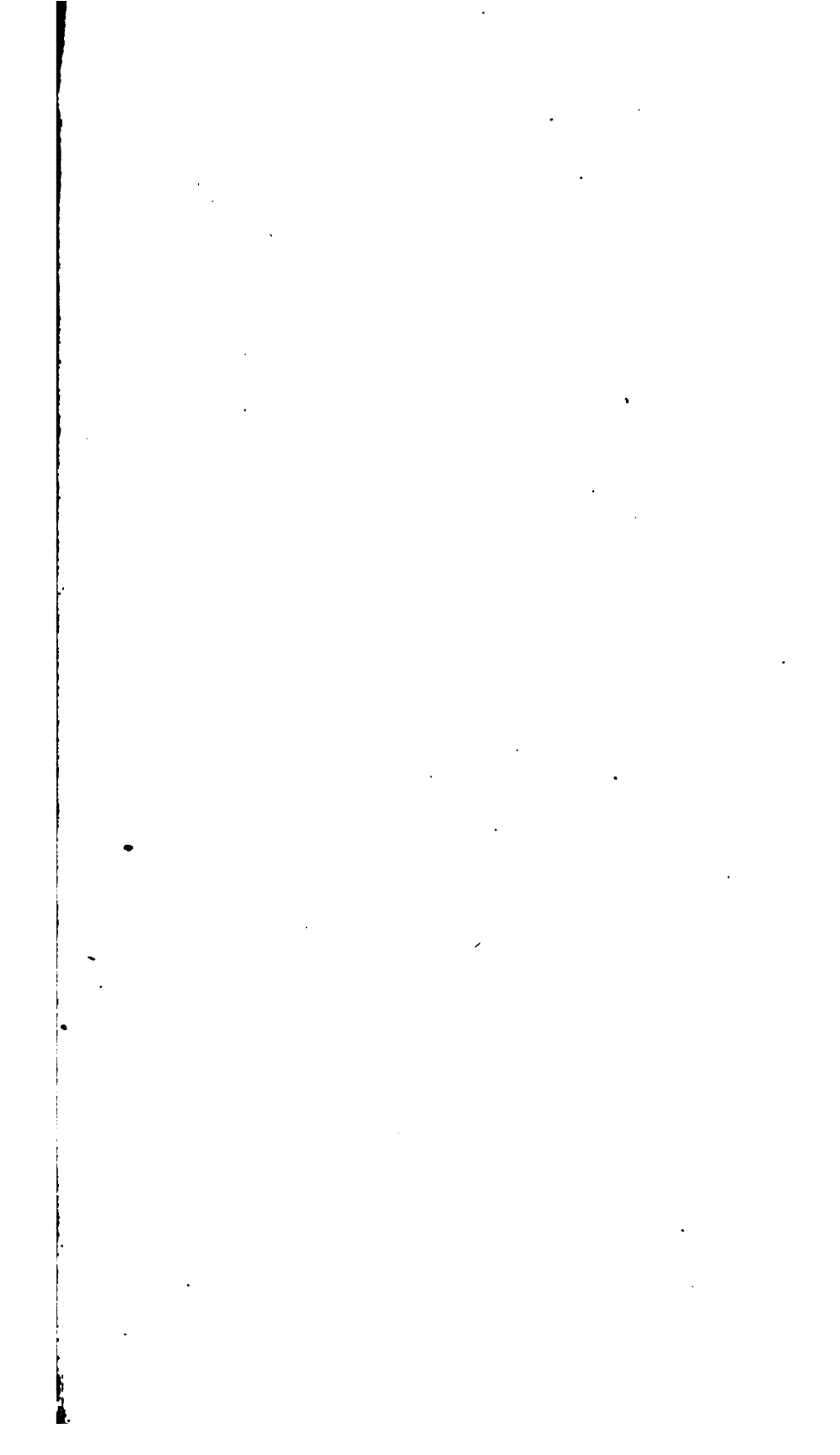
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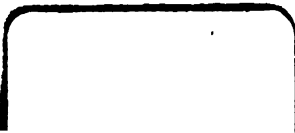




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