fee (which is a partition in law for that part) the feoffee ſhall doe homage, for every tenant in common ſhall doe ſeverall ſervices. And it hath been adjudged [g] in our bookes, that if the eldeſt coparcener doe homage to the lord, and afterward the younger ſiſter maketh a feoffment in fee of her part, the lord ſhall have homage for the part of the younger ſiſter, for that which was *una hæreditas*, one inheritance by law, by the alienation, which is her act, is (as hath beene ſaid) divided and become in groſſe, and the coparcenary defeated.

[g] 2. E. 2. Avowrie 179. (2. Ro. Abr. 514. F. N. B. 135.)

But if tenant infeoffe divers men in fee joyntly, [b] all theſe jointenants ſhall joyntly doe their homage, and their fealty alſo. [i] If homage be due by the tenant, and he maketh a feoffement in fee, the feoffor ſhall not doe homage; becauſe albeit he is ſuppoſed to be tenant in ſome caſes, *quant al avowrie*, yet the feoffee is very tenant, and homage ſhall ever be done by the very tenant, but that very tenant needeth not to be very tenant of the land, and therefore the meſne becauſe he is very tenant to the lord paramount (though he be not tenant of the land) ſhall doe homage. And ſo it is of the diſſeiſee, and of tenant in taile, after a feoffment in fee, for in that caſe the donee is very tenant to the donor.

[b] 7. E. 4. 27. 28. 14. H. 4. 38. 1. H. 5. grant 43. 31. E. 3. gard. 116.
[i] 48. E. 3. 8. 15. E. 4. 13. 5. E. 4. 3.

If a tenant that holdeth by homage maketh a feoffment in fee of part, [k] that feoffee ſhall doe homage, and ſo ſhall every feoffee of what part ſoever.

[k] 22. E. 4. 22.

If there be two coparceners or jointenants of a ſeigniory, if the tenant doth homage and fealty to one of them, [l] he ſhall be excuſed againſt the other.

[l] 3. E. 2. Avowrie 187. 13. H. 4. 5. 13. R. 2. tit. Avowrie 89. 8. H. 3. tit. Preſcription 38. Hill. 22. E. 1. coram Rege Rot. 43. (Poſt 73. a.)

If homage be parcell of a tenure, it is a preſumption that the tenure is by knights ſervice, unleſſe the contrary be proved, but of itſelfe it maketh not knights ſervice. And yet by cuſtome the heire of him that holds by homage onely may be in ward.

More ſhall be ſaid of homage in the title of Homage Anceſtrell (1).

CHAP. 2. Sect. 91.

Fealty.

FEALTY in French is *feaulty*, and is [a] derived of the Latin word *fides*, or *fidelitas*.

[a] Bract. lib. 2. fol. 80. Britton Regiſt. origin. 302. Mirror cap. 3. de ſerement. & de fealt. Statut. de 17. E. 2. tit. Homage.

Et quant franktenant. Every freeholder, except tenant in frankalmoigne ſhall doe fealty. [b] And yet ſome that are not tenants of any freehold ſhall doe fealty, as a tenant for years ſhall do fealtie (2). Bracton ſaith, *De nullo tenemento, quod tenetur ad terminum, fit homagium, fit tamen inde fidelitatis ſacramentum.*

[b] Bracton lib. 2. fol. 80. a. Brit. fo. 173. Fleta lib. 3. ca. 16. Littleton fo. 29. nu. 132. 40. E. 3. 34. 9. H. 6. 43. 10. H. 6. 13. 5. H. 5 12. 9. E. 4. 1. 21. E. 4. 29. 5. H. 7. 11.

Que a vous ſerra foial et loial, &c. et foy a vous portera des tenements que jeo claime a tener de vous, et que loialment a vous ferra les cuſtomes et ſervices, &c.

FEALTY, idem eſt quod fidelitas *en Latin. Et quant franktenant ferra fealtie a ſon ſeignior, il tiendra ſa maine dexter ſur un lievre et dirra iſſint; Ceo oyes vous mon ſeignior, que jeo a vous ſerra foyal et loyal, et foy a vous portera des tenements que jeo claime a tener de vous, et que loialment a vous ferra les cuſtomes et ſervices, queux faire a vous doy, as termes aſſignes, ſicome moy aide Dieu et ſes Saints; et baſera le lievre. Mes il ne genulera quant il fait fealty, ne ferra tiel humble reverence, come avant eſt dit en homage.*

FEALTY is the ſame that *fidelitas* is in Latine. And when a freeholder doth fealty to his lord, he ſhal hold his right hand upon a booke, and ſhall ſay thus, Know ye this my lord, that I ſhall be faithfull and true unto you, and faith to you ſhall beare for the lands which I claime to hold of you, and that I ſhall lawfully doe to you the cuſtomes and ſervices, which I ought to do, at the termes aſſigned, ſo help me God and his Saints; and he ſhall kiſſe the book. But he ſhall not kneele when he maketh his fealty, nor ſhall make ſuch humble reverence as is aforeſaid in homage.

[c] Fealtie

(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 ſeignory for life or years only, in which caſe he could not take homage and therefore was allowed wardſhip without. *Dominus* (as Magna Charta expreſſes it) *non habeat cuſtodiam ejus, nec terræ ſuæ, antequam homagium ceperit*; which words it is ſaid import, not that the lord could not have the wardſhip of the heir unleſs he had actually received homage from the anceſtor, but only that he could not have it till it was received from the heir. See 9. H. 3. cap. 3. and 2. Inſt. 10. To the tenant the homage was ſcarce of leſs importance; for antiently *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 *auncеſtrel*. See Poſt fol. 100. a. 101. a. 2. Inſt. 11. Such being the effect of homage, it was neceſſary to provide the means of compelling the tenant to *do* and the lord to *receive* it; and accordingly our law gave the remedy by *diſtreſs* for the *former* purpoſe, and the writ *de capiendo homagio* for the *latter*. Poſt 105. a. 2. Inſt. 11. However when it was ſettled, that *implied* acquittal and warranty were only incident to homage *auncеſtrel*, 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 intitle himſelf to acquittal and warranty, having ceaſed with reſpect to *that*, and homage *auncеſtrel* 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. Alſo according to 3. 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. fo. 132. a.

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tify Mr. Selden in obſerving, that *ſome* uſe of fiefs may very properly be referred to the time of Alexander Severus. But that opinion,

[c] Fealtie is a part of homage (1), for all the words of fealtie are comprehended within homage (2), and therefore fealtie is incident to homage.

[c] Mirror cap. 3. de ſer. & de fealtie. (4. Co. 8. b.)

Sicome moy aide dieu. As homage is the more honourable ſervice, ſo fealty is a ſervice more ſacred, becauſe he is ſworne thereunto. And the reaſon wherefore the tenant is not ſworne in doing his homage to his lord is, for that no ſubject is ſworne to another ſubject to become his man of life and member but to the king onely, and that is called the oath of allegeance or *homagium ligeum* (3). And thoſe words for that purpoſe are omitted out of fealtie, which is to be done upon oath. And Littleton ſaid wel (when a freeholder doth fealtie); [d] for the fealtie of him, that holdeth in villenage, differeth from the fealtie of the freeholder. For the villeine holding his right hand upon the booke ſhall ſay thus to his lord, Hear you my lord A. that I A. B. from this day forward ſhall be to you true and faithful, and ſhall owe you fealtie for the land that I hold of you in villenage, and ſhall be juſtified by you in bodie and goods, ſo help me God, &c. as by the act (4) appeareth.

(7. Co. Calvin's caſe.)

[d] Stat. de 17. E. 2. tit. Homage in le Abridgment.

Sect. 92.

ET graund diverſitie y ad per enter feaſans de fealtie et de homage; car homage ne poit eſtre fait forſque al ſeignior meme; mes le ſeneſchal de court le ſeignior, ou bailife, puit prender ſealtie pur le ſeignior.

AND there is great diverſitie betweene the doing of fealty, and of homage; for homage cannot be done to any but to the lord himſelfe; but the ſteward of the lord's court, or bailife, may take fealty for the lord.

BRACTON lib. 2. fo. 80. ſaith thus: *Sciendum eſt, quod non per procuratores nec per literas fieri poterit homagium; ſed in propria perſona, tam domini quam tenentis, capi debet et fieri.*

Bracton lib. 2. fo. 8. 21. E. 4. 17. acc. 2. E. 3. 10. 32. H. 6. 23. 9. Co. 76.

Mes le ſeneſchal, &c. ou bailiſe poet prender fealtie. This is ſo evident, as it needeth no explanation.

[e] Vid. For the ſignification of Seneſchal and Bailiſe Sect. 78. 79. 248. & 379.

Sect. 93.

ITEM tenant a terme de vie ferra fealtie, et uncore il ne ferra homage. Et divers autres diverſities y ſont perenter homage et fealtie.

ALSO tenant for terme of life ſhall doe fealtie, and yet he ſhall not doe homage. And divers other diverſities there be betweene homage and fealty.

THE tenant muſt doe fealtie in perſon; becauſe he muſt be ſworne unto it, and no man can ſweare by the common law by attorney or proctor. (5)

9. Co. 76.

Sect. 94.

ITEM home poit veir 15. E. 3. coment home et ſa feme fieront homage et fealtie en common banke, que leſt eſcript devant en tenure de homage.

ALSO a man may ſee in 15. E. 3. how a man and his wife ſhall doe homage and fealty in the common place, which is written before in the tenure of homage.

THIS is evident and appeareth before; and if lords knew what benefit they may reape by receiving of homage and fealty, they would not neglect them; [e] for by the receiving of either of them, it is a ſufficient ſeiſin of all manner of ſervices, as by the words [f] of either of them appeareth (6). Now if it be demanded,

[e] 4. Co. 8. & 9. Co. Bevil's caſe. 13. E. 4. 5.

[f] Vid. Sect. 118. 130. 138.

(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*.—(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.—(3) See ante 65. a. and note 1. in 66. b. and Poſt n. 1. in 68. b.—In note 1. of 66. b. it is obſerved, that it doth not appear by the extract from the record of the biſhop of Exeter's caſe, what puniſhment was inflicted on the biſhop for receiving homage without the exception of faith to the king. But this was a miſtake, for the extract mentions the ſuit to have been for 10,000l. and ſo Dr. Sullivan ſtates it to have been; though in his book no authority is vouched. See Sulliv. Lect. 129. It is obſervable, that there is a want of reference to authorities through the whole of the ſame ingenious book; a deficiency very much to be lamented, as it renders that work, which is particularly valuable for the copiouſneſs of the author's hiſtorical deductions in reſpect to fiefs, much leſs uſeful than it would otherwiſe be.—(4) See the note on this ſuppoſed ſtatute in 67. b. ante.—(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 Doniſ. Nouvel. Deciſ.—(6) Vid. *that ſeiſin of fealty doth not eſtop the tenant from traverſing the ſeiſin of other ſervices.* 41. E. 3. 25. 50. *John Lillburne's caſe*. Hal. MSS. See further as to the advantages accruing from the receiving of homage and fealty, ante 67. b. and Poſt 92. a. and b. and note 5. in 68. b.

opinion, which ſeems to have the moſt probability and is adopted by the generality of the beſt writers, particularly thoſe of the

what difference is betweene the oath of fealtie, when it is done to the king in reſpect of a tenure, and the oath which everie ſubject ought to take in reſpect of his allegeance, Littleton here ſetteth downe the oath of fealtie. Now the [g] oath of allegeance is thus, you ſhall ſweare, &c. (1) Then it may be demanded, where and when is this oath to be taken, and it is anſwered, that whoſoever is above the age of twelve yeares, is to be ſworne in the tourne, unleſſe he be within ſome leet, and then in the leet (2) : and I reade amongſt the lawes of Saint Edward (3), *Quod hanc legem invenit Arthurus, qui quondam fuit inclitiſſimus rex Britannorum, et ita conſolidavit et confœderavit regnum Britanniæ univerſum ſemper in unum. Hujus legis authoritate expulit Arthurus prædictus Saracenos et inimicos à regno. Lex enim iſta diu ſopita fuit et ſepulta, donec Eadgarus rex Anglorum excitavit, et erexit in lucem, et illam per totum regnum obſerri precipit.* Which law in ſome manner is obſerved at this day (4). But to returne to Littleton (5).

[g] Brit. ca. 29. Calvin's caſe 7. Co. 6. b. 12. H. 7. 18.

Lambert 135.

Plus ſerra dit de fealtie en le tenure en ſocage, et en le tenure en frankalmoigne, et en le tenure per homage auncеſtrel.

More ſhall be ſaid of fealtie in the tenure in ſocage, and in frankealmoigne, and in the tenure by homage auncеſtrell.

CHAP. 3. Sect. 95. (6)

Eſcuage.

[a] Mir. ca. 1. ſect. 3. Brit. fo. 162. &c. Ockam cap. Quid ſit ſcutagium. (F. N. B. 83. C. 2. Ro. Abr. 507. 4. Inſt. 192 Poſt 87. a. 106. b.)

Eſcuage. [a] In Latine *Scutagium (id eſt) Servitium ſcuti*, ſervice of the ſhield. Hereby it appeareth that right interpretations and etymologies are neceſſary: for, *ad recte docendum oportet primum inquirere nomina, quia rerum cognitio a nominibus rerum dependet.*

(Poſt 86. b. 177. a.)

Nomina ſi neſcis, perit cognitio rerum.

And herewith agreeth that which is ſaid, *Primo excutienda eſt verbi vis, ne ſermonis vitio obſtructur oratio, ſive lex ſine argumentis.*

[b] Bract. li. 2. fo. 36. a. Flet. li. 3. ca. 14. Ockam ubi ſupra. 27. Aſſ. 52. 31. Aſſ. 38.

Scutum in French is *Eſcue*, and thereof commeth the *Eſcuer*, (*i.*) *Scutifer*, which we uſually call *Armiger*. [b] Of this Bracton ſaith, *Item ſcutagium dicitur, quòd talis præſtatio pertinet ad ſcutum, quod aſſumitur ad ſervitium militare.* And Fleta ſaith, *Sunt quædam ſervitia forinſeca, et dici poſſunt regalia, quæ ad ſcutum præſtantur, et inde habemus ſcutagium, et ratione ſcuti pro feodo militari reputatur :* and Ockam ſaith, *Hæc itaque ſumma, quia nomine ſcutorum ſolvitur, ſcutagium nuncupatur* (7).

(Poſt 74. b.)

Eſcuage eſt appell en Latine Scutagium, *ceſtaſcavoir*, Servitium ſcuti. *Et tiel tenant, qui tient ſa terre per eſcuage, tient per ſervice de chivaler. Et auxy il eſt communement dit, que aſcun tient per un fee de ſervice de chivaler, et aſcun per le moity dun fee de ſervice de chivaler, &c. Et il eſt dit, que quant le roy face voyage royal en Eſcoce pur ſubduer les Scotes, donques il, que tient per un fee de ſervice de chivaler, covient eſtre ove le roy per* 40 *jours, bien et covenablement array pur le guerre. Et celuy, que tient ſa terre per le moity*

ESCUAGE is called in Latine *Scutagium*, that is, ſervice of the ſhield; and that tenant, which holdeth his land by eſcuage, holdeth by knights ſervice. And alſo it is commonly ſaid, That ſome hold by the ſervice of one knight's fee, and ſome by the halfe of a knight's fee. And it is ſayd, That when the king makes a voyage royall into Scotland to ſubdue the Scots, then he, which holdeth by the ſervice of one knight's fee, ought to be with the king fortie dayes, well and convenientlie arrayed for the war. And he, which holdeth his land by the moitie of a knight's

moity

(1) The form of the *old* oath of allegiance may be ſeen in the books cited in the margin ; but it has been changed by ſeveral ſtatutes made ſince the revolution, and theſe indulge quakers with ſigning a declaration of fidelity inſtead of taking the oath. See Burn's Juſtice tit. *Oaths* and Com. Dig. tit. *Allegiance*. In lord Hale's Hiſtory of the Pleas of the Crown, there is a very learned diſſertation on the old oath of allegiance, in which his lordſhip explains how it differs from the oath of fealty to the king by reaſon of tenure. He alſo diſcourſes largely on the ſubject of homage, and points out the ſeveral diſtinctions between *homagium ſimplex*, *homagium ligeum*, and *homagium mixtum*. See 1. Hal. Hiſt. P. C. 61. to 75. This curious part of lord Hale's works did not occur, till it was too late to give the benefit of it to the notes in the chapter of Homage.—(2) How the taking of the oaths of allegiance is regulated by modern ſtatutes, ſee Com. Dig. tit. *Allegiance* and Burn's Juſt. tit. *Oaths*.—(3) As to the laws of Edward the Confeſſor, the authenticity of thoſe in print is controverted by the famous Dr. Hickes. See Hick. Theſaur. Ling. Septentrion. Diſſert. Epiſt. 95.—(4) Mr. Lambard, who publiſhed the firſt edition of the Anglo-Saxon Laws, informs his reader, that thoſe called Edward the Confeſſor's were printed from two manuſcripts, and that one of them was very ancient, but the other not ſo old ; and it appears, that this ſtrange tale, about king Arthur's conſolidating the whole iſland of Britain into one kingdom, was not in the more ancient manuſcript. See Lamb. Archaionom. 124. a. A learned writer on Britiſh antiquities, who appears to have taken great pains to point out the real tranſactions of Arthur, though a warm advocate for great part of his hiſtory, doth not profeſs to vouch for this tradition concerning him. See Whitak. Manchеſt. 4to ed. v. 1. p. 31.—(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. 2. c. 24. or any other ſtatute made ſince his time. But it is no longer the practice to exact the performance of fealty. In the caſe of copyholders, it is become a thing of courſe on admitting them to enter a reſpite of fealty ; but with reſpect to ſuch as hold by other tenures, it is never thought of. However it may not be amiſs to remember, that the title to fealty ſtill remains ; that it is due from all tenants except tenants by frankalmoigne and ſuch as hold at will or by ſufferance, and if required muſt be *iterated* on *every* change of the lord, it differing in this reſpect from homage, which except in ſpecial caſes is only due *once* ; that the receiving of it is at leaſt attended with the advantage of preſerving the memory of tenures, which though perhaps ſufficiently done in the caſe of *copyholds* by the admittances and by the payment of fines and quit-rents and continual render of other ſervices, may be very neceſſary in caſes, where fealty is the only ſervice due ; and laſtly, that the law for compelling the performance of fealty has provided the remedy by diſtreſs, which is an inſeparable incident to all ſervices due by *tenure*, and in the caſe of fealty cannot, as it is ſaid, be *exceſſive*. See ante 68. a. and Poſt 103. b. 104. a. b. 152. b. and Kitch. ed. 1592. fo. 70. b. and 131. b. 2. Inſt. 107. and 4. Co. 8. b. See further as to fealty, Sulliv. Lect. 68. where the oath of fealty is learnedly commented upon, and the words *fidelitas* et *ſacramentum* in the Gloſſ. by Spelman and Du Freſne.—(6) Mr. Madox in his Baron. Angl. 227. animadverts upon this ſection of Littleton ; as to which ſee note n. 2. of 64. a. alſo and the note at the end of this chapter of eſcuage Poſt 74. b.—(7) In a former place, a doubt is expreſſed as to the book by Ockam

ſee cont. fol. 65. a. & b.

ſee cont. fol. 71. a.

the preſent times, attributes the origin of the feudal eſtabliſhments principally to the northern nations, which in the fourth and

fifth

moitie dun fee de chivaler, covient eſte oue le roy per 20 *jours; et il, que tient ſon terre per le quart part dun fee de chivaler, covient eſte oue le roy per* 10 *jours; et iſſint que pluis, pluis, et que meins, meins.*

fee, ought to be with the king twentie dayes; and he which holdeth his land by the fourth part of a knight's fee, ought to be with the king ten dayes; and ſo he that hath more, more, and he that hath leſſe, leſſe.

[c] *Et tiel tenant que tient ſon terre per eſcuage tient per ſervice de chivaler.* [d] For as fealty is incident to homage, ſo homage and knights ſervice be incident to eſcuage, and by the grant of ſervices eſcuage paſſeth with the reſt. Every tenure by eſcuage is a tenure by knights ſervice; but every tenant, that holdeth by knights ſervice, holdeth not by eſcuage, as ſhall be ſaid hereafter(1). But note here the wiſedome of antiquity, [e] *Mavult enim princeps, domeſticos quam ſtipendiarios bellicis apponere caſibus*, that is, to be ſerved in his warres by his owne ſubjects, rather then by ſtipendary forainers.

[c] Mirr. cap. 1. ſect. 3.

[d] 2. E. 3. 8. b. 19. E. 3. Avowry 294. 26. H. 8. 1. a. 2. E. 3. Per quæ ſervic. 11. 43. E. 3. 22. F. N. B. 83. 84. (4. Inſt. 192.)

(Poſt. 82. b.)

[e] Lib. rub.

Un fee de ſervice de chivaler. [f] There is great diverſity of opinions concerning the contents of a knight's fee, that is, how much land goeth to the livelyhood of a knight. For ſome ſay that a knight's fee conſiſteth of eight hides, and every hide containeth an hundred acres, and ſo a knight's fee ſhould containe 800 acres. Others ſay, that a knight's fee containeth 680 acres. Others ſay, that an oxgange of land containeth 15 acres, and eight oxgangs make a plowland; by which account a plowland containes 120 acres; and that *virgata terræ*, or a yard land, containeth 20 acres. But I hold, that a knight's fee, an hide or plowland, a yardland or oxgange of land, doe not containe any certaine number of acres (2); but a knight's fee is properly to be eſteemed according to the qualitie, and not according to the quantity of the land, that is to ſay, by the value, and not by the content (3). And therefore it is very true, which Maſter Camden in his Britannia page 136. ſaith, *viz Subſequenti ætate ex cenſu ut colligitur facti fuerunt equites, &c.* And antiquity thought, that twenty pound land was ſufficient to maintaine the degree of a knight, as appeareth in the ancient treatiſe *De modo tenendi Parliamentum*(4) *tempore regis Edw. filii regis Etheldredi*, where it appeareth that *comitatus* (to wit) an earledome, *conſtat ex viginti feodis unius militis, quolibet feodo computato ad viginti libratas; baronia conſtat ex* 13 *feodis, et* 3 *parte unius feodi militis* (5) *ſecundum computationem prædictam; unum feodum militis conſtat ex terris ad valentiam* 20*l.* Which antiquity I cite, for that it concurreth with the act of parliament, *anno* 1. *E.* 2. *de militibus* (6); by which act *Cenſus militaris* the ſtate of a knight is meaſured by the value of xx pound *per annum*, and not by any certaine content of acres; and with this agreeth the ſtatute of W. 1. cap. 35. and F. N. B. fol. 82. where twenty pound of land in ſocage is put in equipage of a knight's fee; and this is the moſt reaſonable eſtimate, for one acre may be better than many others, ſo as he, which hath 680 or 800 acres of ſome barren land, had not according to the ancient account a ſufficient revenue to maintaine the degree of a knight, and he, which had a leſſe number of acres of ſome land of the value of xx pound *per annum*, had a ſufficient livelihood in thoſe daies for the maintenance of a knight (7). So antiquity thought that 400 markes of land *per annum* was a competent livelihood for a baron, and 400 pound *per annum*, *ad ſuſtinendum nomen et onus* of an earle, and of late time 800 markes *per annum* of a marqueſſe, and 800 pound *per annum* of a duke; ſo that their yearly revenue was eſtimated by the value and not by the content. And one plow land, *carucata terræ*, or a hide of land, *hida terræ*, (which is all one) is not of any certain content, but as much as a plough can by courſe of huſbandry plow in a yeare. And therewith agreeth Lambert *verbo Hide*. And a plowland may containe a meſſuage, wood, meadow, and paſture, becauſe that by them the plowmen and the cattell belonging to the plow are maintained. *Vide Temps* E. 1. tit. Briefe 860. 4. E. 3. 47. Pl. Com. in Hill and Grange's caſe, fol. 168. *Vide* 6. E. 3. fol. 42. and 39. H. 6. 8. a. And venerable Beda calleth a plowland *familiam* a family; becauſe it containeth neceſſary things for the maintenance of a family. And Priſot well ſaith in 35. H. 6. fol. 29. that a plow may till more land in a yeare in one country than in another; and therefore it ſtands with reaſon, that a plowland ſhould be leſſe in one place than in another. 41. E. 3 tit. Fine 40. and 13 E. 3. Fine 67. A fine ſhall not be received *de una virgata terræ* for the uncertainty, *vide* 39. H. 6. 8. But an acre of land is certaine by the ſtatute *de terris menſurandis*. Note alſo (reader) that every plowland of ancient time was of the yearely value of five nobles *per annum*, and this was the living of a plowman or yeoman; and *ex duodecim carucatis conſtabat unum feodum militis*, which amount to 20 pound *per annum*. And this you may ſee *Termino paſch. anno* 3. *E.* 1. *Coram Rogero de Seyton et ſociis ſuis juſticiariis apud Weſtm.*

[f] 9. Co. 123. in Lowe's caſe.

Vide 7. Co. 33. 34. Nevil's caſe. (Sid. 128.)

(2. Ro. Abr. 515. 516. F. N. B. 82. c)

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

(1) See as to this Poſt 82. b.—(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 plough 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 una bovata maritci *is ill.* 13. *E.* 3. *Briefe* 241. Hal. MSS. See *infra* a like caſe as to the uncertainty of *virgata*.—(3) Mr. Selden inſiſts, that a knight's fee was eſtimable, neither by the value nor the quantity of the land, but by the ſervices or number of knights reſerved. Seld. Tit. Hon. 2d ed. part 2. c. 5. ſ. 26.—(4) See a note on this treatiſe Poſt 69. b.—(5) This notion of there being a certain number of knights fees in an earldom and barony is controverted by Mr. Selden; and he cites inſtances of earldoms and baronies with a leſs as well as with a greater number than lord Coke mentions. Seld. Tit. Hon. 2d ed. part 2. c. 5. ſ. 26.—(6) Lord Coke in another place obſerves, that the 1. E. 2. *de militibus*, though called a ſtatute, was only a writ granted by the king in the time of parliament and therefore entred of record. 2. Inſt. 593.—(7) Notâ quoad preceptum de militibus faciendis variatim ſe habet cenſus communis militaris. Omnes laici qui tenent integrum feodum militis fiant milites

and fifth centuries over-run the weſtern part of the Roman empire, and at length out of its ruins formed the principal of the various

West. Ebor. Ro. 10. *Radulphus de Normanville petens in brevi de medio quæritur contra Luciam de Kyme, quod cum ipsa teneat de ipso duas carectatas terræ in Coningston per homagium et servitium militare, unde duodecim carucatæ terræ faciunt unum feodum militis pro omni servitio, ipsa distrinxit ipsum ad faciendam sectam ad curiam suam de Thorneton in Craven, &c* (1).

(Post. 76. a. 83. b.)

And it is to be observed, that the relief of a knight and all above him which be noble, is the fourth part of their yearly revenue, as of a knight five pound, which is the fourth part of 20 pound. So *una baronia constat ex* 13 *feodis militum et de* 3 *parte unius feodi militis*, which amount to 400 markes, and therefore his relief is the fourth part of this, *viz.* 100 markes: and an earledome consists of twenty knights fees, which amount to 400 pound (as before it appeareth by the said ancient record *de modo tenendi parliamentum, &c* (2).) and therefore his relief is 100 pound. And this also appeareth by the statute of Magna Charta, cap. 2. and by the equity of this statute, insomuch as a marquisdome, which consists of the revenue of two baronies which amount to 800 markes, shall pay according to that just proportion for his relief 200 markes; and because a dukedome consists of the revenues of two earledomes, *viz.* 800 pound *per annum*, a duke shall pay 200 for a relief, which is also the fourth part of his revenue; and with this agree the records of the Exchequer.

Note (reader) at the time of the making of the statute of Magna Charta 9. H. 3. there was not any duke, marquesse, or vicount in England, and therefore the statute could not make mention of them, and Edward the eldest sonne of king E. 3. called the Black Prince was the first duke in England after the Conquest, and Robert earle of Oxford in the reigne of R. 2. was the first marquesse, *Sic enim inter ordines Angliæ in sua Britannia testatur Camden ubi supra. Et titulus Marchionis serius ad nos devenit, nec ante R.* 2. *tempora cuiquam delatus; ille enim Robertum Vere Oxoniæ comitem delicias suas primum Marchionem Dubliniæ designavit, meritumque erat honoris nomen. Hæc ille.* And before the reigne of H. 6. there was not any viscount. *Sic enim idem author ubi supra asserit. Post comites vicecomites ordine sequuntur. Viscounts nos vocamus. Hæc vetus officii sed nova dignitatis appellatio, et H.* 6. *tempore ad nos primum audita. Hæc ille. Et dominus de Bello monte* was the first viscount created by king H. 6. *Vide Cassianeum in gloria mundi parte* 4. *consid.* 55. that this dignity of a viscount is of great antiquity in other realmes.

7. H. 4. 9. 31. Ass. 30. 26. Ass. 66. 27. Ass. 52. 8. E. 3. 154.

Bracton lib. 2. 36. *Item sunt quædam servitia, quæ dicuntur forinseca, gravensis sunt in carta de feoffamentis expressa et nominata, et quæ ideo dici possunt forinseca, quia pertinent ad dominum regem, et non ad dominum capitalem, nisi cum in propria persona projectus fuerit in servitio, vel nisi cum pro servitio suo satisfecerit domino regi, &c.*

7. E. 3. 29. 11. H. 4. 7. F. N. B. 28. b. & 83. g. 3. H. 4. 16. 28. H. 6. 1. b. 39. H. 6. 38. 6. R. 2. Protection 46. 19. R. 2. Gard. 165. 17. H. 6. Protect. 56. 7. E. 4. 27. 11. H. 4. 7. 3. H. 4. 16. (F. N. B. 84. f. 2. Ro. Abr. 508.)

Voyage Royal. A voyage royall is not onely, when the king himselfe goeth to warre, as Littleton here saith, but also when his lieutenant or deputy of his lieutenant goeth. And what shall be said a voyage royall shall be adjudged in this case by the judges of the common law as an incident to escuage, and not by the constable and marshall, or any other: *et sic de similibus.*

There is also another kind of voyage royall, *viz.* when one goeth with the king's daughter beyond sea to be maried, &c. for such a voyage is for the good of the whole realme, (for more profit for the realme cannot be then to make alliance with another nation); but of this voyage royall Littleton speaketh not here, but onely of the voyage royall to warre: so as there is a voyage royall of warre, and a voyage royall of peace and amity. And it is to be observed, that he that holdeth by castle gard or cornage holdeth by knights service, and yet he shall pay no escuage, because he holdeth not to goe with the king to warre (3).

Lib. Rub. in Scacc. 47. 48. 19. R. 2. Gard. 95. 6. R. 2. Protection 46. 6. H. 3. Avowry 242. Vide Rot. Claus. 8. H. 3. & Fin. 8. H. 3. & Patent. 9. H. 3. multi solverunt scutagium pro exercit. in Walliam. memb. 30. & ante Claus. 6. H. 3. memb. 3.

En Escoce. *In Scotiam*, this is put but for an example, for if the tenure be to goe *in Walliam, Hiberniam, Vasconiam, Pictaviam, &c.* it is all one. See an ancient record, *Rot. de finibus Termino Mich.* 11. *E.* 2. Sir Rich. Rockesley knight did hold lands at Seaton by serjeanty to be *Vantrarius Regis*, that is to be the king's fore-foot-man when the king went into Gascoigne, *donec perusus fuit pari solutarum precii* 4 *d.* that is, untill he had worne out a paire of shooes of the price of foure pence. And this service, being admitted to be performed when the king went to Gascoigne to make warre, is knights service.

Il que tient per un fee de service de chivalier covient este ove le roy per 40 *jours.* But this is to be understood of a tenant that holdeth of the king immediately; for every man is bound by his tenure to defend his lord, and both he and his lord the king and his country; and therefore if the lord goeth not, his tenant is excused. But yet if the tenant peravaile goeth with the king, it excuseth all the meines.

And it is to be observed, that for every pound of the ancient value of a knight's fee accounting twenty pound land, the tenant must goe with the king two dayes, which commeth just to 40 dayes for a whole knight's fee. By the stature of Magna Charta it is provided, that *scutagium de cæter' capiatur sicut capi consuevit tempore Hen. regis avi nostri.*

Magna Charta cap. 37. Fleta lib. cap. 60.

Sect.

lites. 1. pars Claus. 9. H. 3. m. 24. dors. Claus. 16. H. 3. m. 4 dorso. Postea fiant milites, qui habent 15 *l.* per annum vel feodum militis. Rotulo respect. militiæ 40. H. 3. tempore E. 1. Qui habent viginti librant, fiant milites Rot. hundredi 3. E. 1. Et sic continuavit usque 2. E. 2. et postea. Sed demum qui habent 40. librat. terræ fiant milites. Claus. 6. E. 2. m. 27. Et sic continuavit usque 17. regis Caroli. Vid. Rot. Parl. 18. H. 6. n. 43. 28. H. 6. n. 12. and vid. Claus. 6. E. 2. m. 27. 19 E. 2. m. 9. E. 3. m. 17.—Hal. MSS.—Before and in the time of Charles the first it was apprehended, that the king might lawfully compel all men, who were of full age and seised of lands to the value of 40 l. 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.

(1) 4. E. 2. Avowry 200. Viginti virgatæ terræ faciunt unum feodum militis. M. 13. & 14. E. 1. Rot. 17 Glouc. Quadraginta carucat. terræ faciunt unum feodum militis. 8. E. 3. 49. Duodecim carucatæ et duæ bovatæ terræ faciunt unum feodum militis. Vid. apud Math. Paris in Vitis 23 abbatum fol. 131. Abbas Sancti Albani debet regi sex milites. Et ibi recensentur numeri hidarum ad quodlibet feodum militis. Alibi quinque, alibi sex, alibi septem hidæ faciunt feodum militis. Hal. MSS.—See further as to the contents of a knight's fee, Post 76. a. and 83. b. and 2. Inst. 596.—(2) Vide Seld. Tit. Hon. parte 2. c. 5. f. 26. ubi authoritas authoris libri modi tenendi parl. et ista opinio de certa propertione annui valoris feodi militaris, baroniæ, et comitatus, optime 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 Hen. 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. Pryn, of whom the former supposes it to have been an imposture of the time of Edward the Third, and the latter makes it an invention as late as the 31. H. 6. seem to furnish unsurmountable objections against the authority of the *English modus*; and so convinced of their force was an able advocate for the existence of the commons as a constituent part of parliament before the 49. Hen. 3. that he candidly gives up its antiquity, though if it could have been defended, it would have decided the controversy in his favour, for it expressly mentions citizens and burgesses as well as knights of the shire. See 4. Inst. 12. Seld. Tit. Hon. 2d ed. part 2. c. 5. f. 26. Pryn on 4. Inst. 1. and Tyrr. Biblioth. Polit. 270. 406. However Dr. Dopping bishop of Meath, who in 1692 first published the *Irish modus*, feebly endeavours to defend the antiquity of the supposed transcript in the time of Hen. 2. and two other writers deservedly of great credit seem inclined the same way. See Molyn. Case of Ireland and Harr. Edit of Ware's Hist. and Antiq. of 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. Sæpissime temporibus H. 2. R. 1. Johann. H. 3. 1. E. 2. Scutagium pro exercitu regis

in

various states and governments, into which we now see Europe divided. Many reasons might be adduced in favour of this opinion,

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MES il appiert per les plees et arguments faits en un bon plee ſur briefe de detinue de un eſcript obligatorie port per un H. Gray, T. 7. E. 3. que ne beſoigne a celuy, que tient per eſcuage, de aler oue le roy luy meſme, ſil voile trover un auter perſon able pur luy convenablement array per le guerre, de aler ove le roy. Et ceo ſemble eſtre bon reaſon. Car poit eſtre, que celuy que tient per tiels ſervices eſt languiſhant, iſſint que il ne poit aler ne chivaucher. Et auxy un abbe, ou auter home de religion, ou feme ſole, que tient per tiels ſervices, ne doit en tiel cas aler en proper perſon. Et Sir W. Herle, adonque chiefe juſtice de cómmon bank, diſoit en tiel plee, que eſcuage ne ſerra graunt mes lou le roy alaſt luy meſme en ſon proper perſon. Et fuiſt demurre en judgement en meſme le plee, le quel les xl. jours ſerront accompts de le primer jour del mu-

BUT it appeareth by the pleas and arguments made in a plea upon a writ of detinue of a writing obligatorie brought by one H. Gray, T. 7. E. 3. that it is not needfull for him, which holdeth by eſcuage, to goe himſelfe with the king, if he will finde another able perſon for him conveniently arrayed for the warre to goe with the king. And this ſeemeth to be good reaſon. For it may be, that he which holdeth by ſuch ſervices is languiſhing, ſo as he can neither go nor ride. And alſo an abbot or other man of religion, or a feme ſole, which hold by ſuch ſervices, ought not in ſuch caſe to goe in proper perſon. And Sir William Herle then chiefe juſtice of the common place ſaid in this plea, that eſcuage ſhall not be granted but where the king goes himſelfe in his proper perſon. And it was demurred in judgment in the ſame plea, whither the 40 dayes ſhould be accounted from the firſt day of

TR. 7. E. 3. &c. This is the firſt booke at large that our author hath cited. And it is to be obſerved, that this point is not debated in the ſaid booke, but onely it is there admitted, and yet is good authority in law; for our author ſaith, that it appeareth by this booke. Now both by Littleton himſelfe, and by the booke of 7. E. 3. it is apparant, that albeit the tenure is, that he which holdeth by a whole knight's fee ought to be with the king, &c. to do a corporall ſervice, yet he may finde another able man to do it for him. T. 7. E. 3. fol. 29. (9. Co. 130. 2. Ro. Alr. 509.)

By the ſtatute of Magna Charta, cap. 20. it is provided, that no knight, that holdeth by caſtle-gard, ſhall be diſtreyned to give money for the keeping of the caſtle, *Si ipſe eam facere voluerit in propria perſona ſua, vel per alium probum hominem faciet, ſi ipſe eam facere non poſſit proper rationabilem cauſam.* (4. Co. 88.)

Some have thought, that he that holds by eſcuage is taken by the equity of this ſtatute that ſpeaketh onely of caſtle-gard. But it is holden, that this ſtatute is but an affirmance of the common law. For where that act ſaith, (*propter rationabilem cauſam*) that reaſonable cauſe is referred to the tenant's own diſcretion and choyce, and the cauſe is not materiall or iſſuable no more then in the caſe that Littleton here putteth, as hereafter appeareth. And I would adviſe our ſtudent, that when he ſhall be enabled and armed to ſet upon the yeare bookes, or reports of law, that he be furniſhed with all the whole courſe of the law, that when he heareth a caſe vouched and applyed either in Weſtminſter hall, (where it is neceſſary for him to be a diligent hearer, and obſerver of caſes of law) or at readings or other exerciſes of learning, he may finde out and read the caſe ſo vouched; (6. Co. 20.)

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 rendeſvous of the army, and commanded the lords, &c.* nominatim *and others by proclamation* quod 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 ſæpiſſime alibi. Vide pro ſcutagiis captis occaſione diverſarum expeditionum. Tempore H. 2. ſcutagium bis aſſeſſum ante annum quintum, tertium ſcutagium 7. H. 2. pro exercitu Tholoſæ duas marcas, quartum pro eodem exercitu unam marcam, quintum 18. H. 2. pro exercitu Hiberniæ 20 s. ſextum pro exercitu Galloway 20 s. Tempore Richardi primi, primum ſcutagium pro exercitu Walliæ anno ſecundo ad 10 s. ſecundum anno ſexto ad 20 s. pro quolibet feodo pro redemptione regis, tertium 8. R. 1. pro exercitu Normanniæ ad 20 s. 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 Hibernia duas marcas, nonum anno decimo tertio pro exercitu Walliæ ad duas marcas, decimum pro exercitu Scotiæ, undecimum anno decimo ſexto Johannis pro

opinion, and to evince that purſuing the hiſtory of theſe nations from their firſt ſucceſsful irruptions into the Roman empire is

ed; for that will both faſten it in his memory, and be to him as good as an expoſition of that caſe. But that muſt not hinder his timely and orderly reading, which (all excuſes ſet apart) he muſt bind himſelfe unto; for there be two things to be avoyded by him, as enemies to learning, *præpoſtera lectio*, and *præpropera praxis*. But let us now heare what our author will ſay.

Et ceo ſemble bone reaſon, &c. Here Littleton ſheweth three reaſons wherefore the tenant ſhould not be conſtrained to doe his ſervice in perſon.

Firſt, it may be the tenant is ſicke, ſo as he is neither able to goe nor ride. And ever ſuch conſtruction muſt be made in matters concerning the defence of the realme or common good, as the ſame may be effected and performed. To the former diſability may be added where a corporation aggregate of many, as deane and chapter, maior and commonalty, &c. or an infant being a purchaſer, for theſe alſo muſt finde an able man. But it may be objected, that in theſe particular caſes the tenant might finde a man, but not when he himſelfe is able without all excuſe or impediment. To this it is anſwered, that *Sapiens incipit à fine*. And the end of this ſervice is for defence of the realme, and ſo it be done by an able and ſufficient man, the end is effected.

Secondly, ſeeing there are ſo many juſt excuſes of the tenant, it were dangerous, and tending to the hindrance of the ſervice, if theſe excuſes ſhould be iſſuable, *Multa in jure communi contra rationem diſputandi pro communi utilitate introducta ſunt.*

Laſtly, both Littleton, and the booke in the ſeventh of Edward the Third, giveth the tenant power, without any cauſe to be ſhewed, to finde an able and ſufficient man, and oftentimes *jura publica ex privato promiſcue decidi non debent.*

Un abbe ou auter home de religion. Note, that if the king had given lands to an abbot and his ſucceſſors to hold by knights ſervice, this had beene good, and the abbot ſhould doe homage and find a man, &c. or pay eſcuage, but there was no wardſhip or relieſe or other incident belonging thereunto. And though the law ſaith, that this was a mortmaine, that is, that they held faſt their inheritances, yet if the abbot, with the aſſent of his covent, had conveyed the land to a naturall man and his heires, now wardſhip and relieſe and other incidents belonged of common right to the tenure. And ſo it is, if the king give lands to a maior and communalty and their ſucceſſors, to be holden by knights ſervice, in this caſe the patentees (as hath beene ſaid) ſhall doe no homage, neither ſhall there be any wardſhip or relieſe, onely they alſo ſhall find a man, &c. or pay eſcuage. But if they convey over the lands to any naturall man and his heires, now homage, ward, marriage, and relieſe, and other incidents belong hereunto. And yet this poſſibility was *remota potentia*; but the reaſon hereof is, *Ceſſante ratione legis ceſſat ipſa lex*, the reaſon of the immunity was in reſpect of the body politique, which by the conveyance over ceaſeth, which is worthy of the obſervation.

(Poſt. 99. a.)

And it is to be obſerved, that every biſhop in England hath a baronie (2), and that barony is holden of the king *in capite*, and yet the king can neither have wardſhip or relief.

If two joyntenants be of land holden by knights ſervice, if one goeth with the king, it ſufficeth for both, and both of them cannot be compelled to goe, for by their tenure one man is onely to goe.

6 H. 3. Avowry 242. F. N. B. 83. S4.

If the tenant peravaile goeth, it diſchargeth the meſne; for one tenancy ſhall pay but one eſcuage.

Ou auter home de religion. Here this word (religion) is taken largely, *viz.* not onely for regular, or dead perſons, as abbots, monkes, or the like, but for ſecular perſons alſo, as biſhops, parſons, vicars, and the like; for neither of them are bound to goe in proper perſon. For *nemo militans Deo implicetur ſecularibus negotiis.*

Languiſhant. So it may be ſaid of an ideot, a mad man, a leper, a man maymed, blind, deafe, of decrepit age, or the like.

Ou fem ſole. Seeing that a fem ſole, that cannot performe knights ſervice, may ſerve by deputy, it may be demanded wherefore an heire male being within the age of 21 yeares

pro exercitu Bretaniæ ad tres marcas ſed non ſolutum. Nota temporibus Henrici tertii ſcutagium Ludowici duas marcas anno ſecundo, Byham 10 s. anno quinto, Montegomery duas marcas anno octavo, Bedford duas marcas anno octavo, Kerry duas marcas anno decimo tertio, Bretanny 40 s. anno decimo quarto, Pictaviæ 40 s. anno decimo quinto, Elam 20 s. anno decimo ſexto, Gaſcoigny 40 s. anno viceſſimo ſecundo, Guyen 40 s. anno viceſſimo nono, Walliæ 40 s. 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. Exchеq. chap. 16. where the whole ſubject of eſcuage is fully explained from the records. See alſo Poſt 72. a. and b.

(1) Mr. Madox obſerves, that Sir William Herle's poſition, that eſcuage ſhould not be granted but where the king goes to the war in perſon, is fallacious. Mad. Baron. Angl. 226.

(2) Lord chief juſtice Hale, in a manuſcript treatiſe on the *Jura Coronæ*, gives it as his opinion, that the biſhops do not hold their poſſeſſions *per baroniam*, and that they ſit in the houſe of peers by *cuſtom* and uſage, and not as barons by *tenure*. But the propriety of this doctrine has been ably controverted by a writer of very great eminence now living. See Warburt. *Alliance* between *Church* and *State*, 4th edit. 149.

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

yeares may not ſerve alſo by deputie, being not able to ſerve himſelfe.

To this it is anſwered, that in caſes of minoritie, all is one to both ſexes, *viz.* if the heire male be at the death of the anceſtor under the age of one and twenty, or the heire female under the age of 14 they can make no deputy, but the lord ſhall have wardſhip as an incident to the tenure: therefore Littleton is here to be underſtood of a feme ſole of full age, and ſeiſed of land holden by knights ſervice either by purchaſe or deſcent.

Covenablement arraie pur le guerre. So as here are foure things to be obſerved.

Firſt (as hath been ſaid) that he may find another.

Secondly, that he that is found muſt be an able perſon.

Thirdly, he muſt be armed at the coſts and charge of the tenant, and herein is to be noted, *Quod non definitur in jure*, with what manner of armor the ſouldier ſhall be arrayed with, for time place and occaſion doe alter the manner and kind of the armour (1).

Fourthly, he muſt have ſuch armor, as ſhall be neceſſary, and ſo appointed in readineſſe.

Ferdwit is a Saxon word *et ſignificat quictanciam murdri in exercitu. Worſcott* is an old Engliſh word and ſignifieth *liberum eſſe de oneribus armorum.* Fleta lib. 1. cap. 42.

It is truly ſaid, *quod miles hæc tria curare debet, corpus ut validiſſimum et perniciſſimum habeat, arma apta ad ſubita imperia, cætera Deo et imperatori curæ eſſe.* Livius.

Sapiens non ſemper it uno gradu, ſed una via, non ſe mutat ſed aptat. Qui ſecundos optat eventus, dimicet arte non caſu. In omni conflictu non tam prodeſt multitudo, quam virtus. Vegetius.

Eſt optimi ducis ſcire et vincere, et cedere prudenter tempori. Multum poteſt in rebus humanis occaſio, plurimum in bellicis. Polibius.

Quid tam neceſſarium eſt, quam tenere ſemper arma, quibus tectus eſſe poſſis. But I will take my leave of theſe excellent authors of art military, and referre them to thoſe that profeſſe the ſame, and will returne to Littleton. Vegetius.

Muſter. I finde this word in the ſtatute of 18. H. 6. cap. 19. and the ancient military order is worthy of obſervation; for before and long after that ſtatute, when the king was to be ſerved with ſouldiers for his warre, a knight or eſquire of the country, that had revenues farmors and tenants, would covenant with the king, by indenture inrolled in the exchequer, to ſerve the king for ſuch a terme with ſo many men (ſpecially named in a liſt) in his warre, &c. an excellent inſtitution that they ſhould ſerve under him, whom they knew and honoured, and with whom they muſt live at their returne. Theſe men being muſtered before the king's commiſſioners, and receiving any part of their wages, and their names ſo recorded, if they after departed from their captaine within the terme contrary to the forme of that ſtatute, it was felony. But now that ſtatute is of no force; becauſe that ancient and excellent forme of military courſe is altogether antiquated: but later ſtatutes have provided for that miſchiefe. (3. Inſt. 86. Cro. Cha. 71.) 6. Co. 27. the ſouldiers caſe.

To muſter is to make a ſhew of ſouldiers well armed and trained before the king's commiſſioners in ſome open field. *Ubi ſe oſtendentes præludunt prælio.* In Latine it is *cenſere, ſeu luſtrare exercitum.*

By the law before the conqueſt muſters and ſhewing of armour ſhould be *uno eodem die per univerſum regnum, ne aliqui poſſint arma familiaribus et notis accommodare, nec ipſi illa mutuo accipere, ac juſtitiam domini regis defraudare, et dominum regem et regnum offendere.* Lamb. fo. 135. b.

Concerning the point in law, demurred in judgement, in the ſeventh of Edward the third, here mentioned by our author, the law accounteth the beginning of the fortie dayes after the king entreth into the foreine nation; for then the war beginneth, and till he come there, he and his hoſt are ſaid to goe towards the warre, and no militarie ſervice is to be done till the king and his hoſt come thither.

Sir William Herle. A famous lawyer conſtituted cheife juſtice of the Common Pleas by letters patent dated, 2 *die Martii anno* 5. *E.* 3. It appeareth by Littleton, and by the record, that he was a knight, againſt the conceit of thoſe, that thinke, that the chiefe juſtices of the court of Common Pleas were not knighted till long after.

Our ſtudent ſhall obſerve, that the knowledge of the law is like a deepe well, out of which each man draweth according to the ſtrength of his underſtanding. He that reacheth deepeſt, he ſeeth the amiable, and admirable ſecrets of the law, wherein, I aſſure you, the ſages of the law in former times, (whereof Sir William Herle was a principall one) have had the deepeſt reach. And as the bucket in the depth is eaſily drawne to the uppermoſt part of the water, (for *nullum elementum in ſuo proprio loco eſt grave*) but take it from the water, it cannot be drawne up but with great difficultie; ſo albeit beginnings of this ſtudy ſeem difficult, yet when the profeſſor of the law can dive into the depth, it is delightfull, eaſie, and without any heavy burthen, ſo long as he keepe himſelfe in his owne proper element.

Juſtice.

(1) Vide pro aſſiſa armorum.—27. H. 2. Quicunque habet feodum unius militis, habeat loricam caſſidem clipeum et lanceam. Quicunque liber laicus habuerit in catallo vel reditu ad valentiam ſexdecim marcarum, habeat loricam lanceam clipeum et caſſidem. Quicunque liber laicus habuerit in catallo ad valentiam decem marcarum, habeat halbergellum 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 illa arma habenda et ad ea tenenda in ſervitio regis. Hoveden 614. *This aſſiſe continued till the time of king John, and then was a little altered. And this aſſiſe made in the time of king John was repeated and again commanded, and men were compelled to be ſworn to it.* Clauſ. 14. H 3. m. 5. dorſo. *Commiſſioners were aſſigned to cauſe men to be ſworn and aſſiſed to arms, as they were ſworn in the time of king John, in this form.* Quiſquis habet feodum militis integrum, habeat loricam; qui habet dimidium feodi militis, habeat haubergellum; qui habet catalla ad valentiam quindecim marcarum, habeat loricam; qui habet catalla ad valentiam decem marcarum, habeat haubergellum; qui habet catalla ad valentiam decem librarum, habeat capellum ferreum perpunctum et lanceam; qui habet ad valentiam viginti ſolidorum, habeat arcum et ſigittas. In qualibet villa ſit *unus* conſtabularius, in quolibet burgo *plures*, ad quorum ſummonitionem omnes ad arma jurati in warda ſua conveniant ad imbreviandum diſtincte 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 and then another aſſiſe was ordained. In* Clauſ. 26. Hen. 3. pars 2. m. 10. *many articles are ordained, which differ little from the ſtatute of Winton. Amongſt others there is this article.* Singuli vicecomites, cum duobus militibus ad hoc aſſignatis, faciant cives, burgenſes, liberos homines, villanos, et alios à quindecem ad

for extentive and difficult.—2. It is neceſſary to poſtpone the concluſion of this note, as alſo note 2. of 64. a. to another place, on account of the length of the note from lord Hale's MSS. concerning the *aſſiſe of arms.* They ſhall be given at the end of the chapter of *knights ſervice.*

Glanvile lib. 2. cap. 6. &c.

Justice. In Glanvil he is called *justitia in ipso abstracto*, as it were justice itselfe; which appellation remaines still in English and French, to put them in mind of their dutie and functions. But now in legall Latin they are called *justiciarii tanquam justi in concreto*, and they are called *justiciarii de banco*, &c. and never *judices de banco*, &c.

Comon banke. *Banke* is a Saxon word, and signifieth a bench or high seat, or a tribunall, and is properly applyed to the justices of the court of Common Pleas, because the justices of that court set there as in a certaine place: for all writs returnable into that court are *coram justiciariis nostris apud Westmon.* or any other certaine place where the court set; and legall records tearme them *justiciarii de banco*. But writs returnable into the court called the King's Bench are *coram nobis (i. rege) ubicunque fuerimus in Anglia*; and all judiciall records there are stiled *coram rege*. But for distinction sake it is called the King's Bench; both because the records of that court are stiled (as hath beene sayd) *coram rege*, and because kings in former times have often personally set there (1). For the antiquity of the court of Common Pleas they erre, that hold that before the statute of Magna Charta there was no court of Common Pleas, but had his creation by or after that charter; for the learned know, that in the sixe and twentieth yeare of Edward the Third, the abbot of B, in a writ of affize brought before the justices in Eire claimed conusance and to have writs of assize, and other originall writs out of the king's court by prescription, time out of mind of man, in the raignes of Saint Edmond, and Saint Edward the Confessor before the conquest. And on the behalfe of the abbot were shewed divers allowances thereof in former times in the kings courts, and that King Henry the first confirmed their usages, and that they should have conusance of pleas, so that the justices of the one bench or the other should not intermeddle. And the statute of Magna Charta erecteth no court, but giveth direction for the proper jurisdiction thereof in these words. *Communia placita non sequantur curiam nostram, sed teneantur in aliquo certo loco.* And properly the statute saith, *non sequantur*, for that the king's bench did in those dayes follow the king *ubicunque fuerit in Anglia*, and therefore enacteth that Common Pleas should be holden in a court resident in a certaine place. In the next chapter of Magna Charta (made at one and the same time) it is provided; *Et ea, quæ per eosdem (s. justiciarios et itinerantes) propter difficultatem aliquorum articulorum terminari non possunt, referantur ad justiciarios nostro de banco, et ibi terminentur.* And in the next to that, *assisæ de ultima præsentatione semper capiantur coram justiciariis de banco, et ibi terminentur.* Therefore it manifestly appeareth, that at the making of the statute of Magna Charta there were *justiciarii de banco*, which all men confesse to be the court of Common Pleas. And therefore that court was not erected by or after that statute (2). For the authority of this court, it is evident by that which hath beene said, that it hath jurisdiction of all Common Pleas. But let us returne to Littleton.

26. Ass. p. 24. 4. E. 3. fo. 19. Bracton lib. 3. fol. 105. b. Britton fol. 1. & 2. Fleta lib. 2 cap. 2. Mirror cap. 5. sect. 1. Fortescue cap. 51. See in the Preface to the third part of my Reports.

Mirror cap. 5. sect. 2. Fleta lib. 2. cap. 54.

(Doc. Pla. 115. 5. Co. 104.)

Demurre en judgement. A demurrer commeth of the Latine word *demorari* to abide; and therefore he, which demurreth in law, is said, he that abideth in law. *Moratur* or *demoratur in lege*. Whensoever the councill learned of the party is of opinion, that the count or plea of the adverse party is insufficient in law, then he demurreth or abideth in law, and referreth the same to the judgement of the court, and therefore well saith Littleton here, *demurre en judgement*, the words of a demurrer being *quia narratio, &c. materiaque in eadem contenta minus sufficiens in lege existit, &c.* and so of a plea, *quia placitum, &c. materiaque in eodem contenta minus sufficiens in lege existit, &c. unde pro defectu sufficientis narrationis sive placiti, &c. petit judicium, &c.* But if the plea be sufficient in law, and the matter of fact be false, then the adverse partie taketh issue thereupon, and that is tryed by a jury; for matters in law are decided by the judges, and matters in fact by juries, as elsewhere is said more at large.

(5. Co. 69. Hob. 164.)

Now as there is no issue upon the fact, but when it is joyned betweene the parties, so there is no demurrer in law, but when it is joyned; and therefore when a demurrer is offered by the one party as is aforesaid, the adverse party joyneth with him, (for example) saith, *quod placitum prædictum, &c. materiaque in eadem contenta bonum et sufficiens in lege existunt, &c. et petit judicium*, and thereupon the demurrer is said to be joyned, and then the case is argued by councell learned of both sides; and if the poynts be difficult, then it is argued openly by the judges of that court, and if they or the greater part concurre in opinion, accordingly judgement is given; and if the court be equally divided, or conceive great doubt of the case, then may they adjourne it into the exchequer chamber, where the case shall be argued by all the judges of England, where if the judges shall be equally divided, then (if none of them change their opinion) it shall be decided at the next parliament by a prelate, two earles, and two barons, which shall have power and commission of the king in that behalfe, and by advice of themselves, the chancellor, treasurer, the justices of the

Vid. Bract. lib. 5. fo. 352. b.

14. E. 3. cap. 5. Statut. 1.

(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. Black. Comm. 5th ed. 41. and Mad. Hist. Excheq. fol. ed. 58. 64. 68. and 553.

(2) From the whole of lord Coke's observations here and in the 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

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ad sexaginta annos, affideri et jurari ad arma secundum quantitatem terrarum et catallorum, scilicet, ad quindecem librata terræ, unam loricam unum capellum ferreum gladium cutellum 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 quam quadraginta solidos, falcum giformas et cultellos et alia minuta arma; ad catalla sexaginta marcarum, unam loricam capellum gladium et equum; ad catalla quadraginta marcarum, unum capellum haubergellum gladium et cultellum; ad catalla decem marcarum, gladium cultellum arcum et sagittas; ad catalla quadraginta solidorum et infra decem marcas, falcos gisarmas et alia minuta arma. Omnes item alii, qui possunt habere, arcus et sagittas habeant. In singulis civitatibus et burgis jurati ad arma sint intendentes majori, vel ballivis ubi non sunt majores. In singulis villis aliis constituantur unus

the one bench and the other, and other of the king's councell, as many and such as shall seeme convenient, shall make a good judgement, &c. And if the difficulty be so great as they cannot determine it, then it shal be determined by the lords in the upper house of parliament(1). See the statute, for it extends not onely to the case abovesaid, but also where judgements are delayed in the Chancery, King's Bench, Common Bench, and the Exchequer, the justices assigned, and other justices of Oyer and Terminer, sometime by difficulty, sometime by divers opinions of justices, and sometime for other causes. [a] Before which statute, if judgements were not given by reason of difficulty, the doubt was decided at the next parliament, (which then was to be holden once every yeare at the least(2). [b] *Si autem talia nunquam prius evenerint, et obscurum et difficile fit eorum judicium, tunc ponatur judicium in respectum usque ad magnam curiam, ut ibi per concilium curiæ terminentur.* But hereof thus much shall suffice. [c] He that demurreth in law confesseth all such matters of fact, as are well and sufficiently pleaded. If there be a demurrer for part and an issue for part, the more orderly course is to give judgement upon the demurrer first; but yet it is in the discretion of the court to try the issue first, if they will. After demurrer joyned in any court of record, the judges shall give judgment according as the very right of the cause and matter in law shall appeare, without regarding any want of forme in any writ, returne, plaint, declaration, or other pleading, proces, or course of proceeding, except those onely which the party demurring shall specially and particularly set downe and expresse in his demurrer (3). [a] Now what is substance and what is forme you shall read in my Reports.

And in some cases a man shall alledge speciall matter, and conclude with a demurrer; [b] as in an action of trespasse brought by I. S. for the taking of his horse, the defendant pleads that he himselfe was possessed of the horse untill he was by one I. S. dispossessed, who gave him to the plaintife, &c. the plaintife saith that I. S. named in the barre and I. S. the plaintife were all one person, and not divers; and to the plea pleaded by the defendant in the manner, he demurred in law, and the court did hold the plea and demurrer good, for without the matter alledged he could not demurre. Now as there may be a demurrer upon counts and pleas, so there may be of aid prier, voucher, receit, waging of law, and the like. [c] By that which hath been said it appeareth, that there is a generall demurrer, that is, shewing no cause, and a speciall demurrer which sheweth the cause of his demurrer. Also by that which hath beene said, there is a demurrer upon pleading, &c. and there is also a demurrer upon evidence. [d] As if the plaintife in evidence shew any matter of record, or deeds or writings, or any sentence in the ecclesiasticall court, or other matter of evidence by testimony of witnesses, or otherwise, whereupon doubt in law ariseth, and the defendant offer to demurre in law thereupon, the plaintife cannot refuse to joine in demurrer, no more then in a demurrer upon a count, replication, &c. and so *e converso* may the plaintife demurre in law upon the evidence of the defendant.

But if evidence for the king in an information or any other suite be given, and the defendant offer to demurre in law upon the evidence, the king's counsell shall not be inforced to joyne in demurrer: but in that case, the court may direct the jury to finde the speciall matter.

En judgement. For the signification of this word, *Vide* Sect. 366.

Rot. Parlia. 14. E. 3. nu. 31. a proceeding in Sir John Stanton's case upon difficulty in the court of Common Pleas. Vide Britton fol. 41. 21. E. 3. 37. 38. 39. E. 3. fo. 1. 21. 35. 40. E. 3. 34. 13. H. 4. 3. 4.

[a] 4. E. 3. ca. 14.

[b] Bracton lib. 1. cap. 2. nu. 7. Brit. fol. 41. 1. E. 3. 7. 8. 2. E. 3. 6. 7.

[c] 17. E. 3. 50. b. 47. E. 3. 13. 14. 5. H. 7. 1. 13. E. 4. 7. b Pl. Com. 85. 411. 172. (5. Co. 69. b. 1. Sid. 10 Post 125. Hob. 232. 233. Doc. Pla. 115. 116.)

48. E. 3. 15 2. R. 2. inquest. 2. 38. E. 3. 25. 11. H. 4. 5. 75. 3. E. 4. 2.

[a] 3. Co. 57. Linc. Coll. case. 5. Co. 74. Wymek's case. 10. Co 88. usque 98. Doctor Leyfield's case. (1. Leon. 178. Doc Pla. 116. 117.)

[b] 13 E. 4. 7. 31. E. 3. Estoppel. 244. 33. H 6. 9. 10. 22. E. 4. 50. 1. H. 7. 21.

[c] 14. H. 4. 31. 37. H. 6. 6.

[d] 5. Co. 104. a. Baker's case.

[e] 38. H. 8. Dyer 53. (Cro. Eliz. 752.)

Sect. 97.

ET apres tiel voyage royal en Escoce, il est communement dit, que per authoritie de parliament lescuage serra assesse et mis en certaine; scil. certeine summe dargent, quant chescun, que tient per entier fee de service de chivaler, quel ne fuit

AND after such a voyage royall into Scotland, it is commonly said, that by authority of parliament the escuage shal be assessed and put in certeine; scil. a certaine summe of money, how much every one, which holdeth by a whole knight's fee,

APRES voiage royall, &c. il est communement dit, que per authority de parliament escuage serra assesse. *Nota*, here is a secret of law included, that albeit escuage incertaine be due by tenure, yet because the assessement thereof concerned so many and so great a number of the subjects of the realme, it could not be assessed by the king or any other but by parliament: [a] and

Coke, as to admit, that the *Magna Carta* 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 Carta* 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. Exchcq. fol. ed. 63. and the chapter on the division of the king's courts 539. See further 3. Blackst. 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.

(1) See further, as to the adjourning of causes into the exchequer chamber in order to have the opinion of all the judges, 4. Inst. 110. 118. and *Warraine* and *Smith* 2. Bulstr. 146. in which case the court refused to grant a motion for such an adjournment.

(2) See 4. Inst. 9. and Com. Dig. *Parliament* C.

(3) See 27. Eliz. c. 5. and 4. An. c. 16.

unus vel duo constabularii secundum numerum inhabitantium. In singulis vero hundredis unus capitalis constabularius, ad cujus mandatum omnes jurati ad arma de hundredo conveniant, et ei sint intendentes ad faciendum ea quæ spectant ad conservationem pacis. Omnes vero constabularii capitanei intendentes sint vicecomiti et duobus militibus prædictis, ad veniendum ad mandatum eorum, et faciendum per præcepta eorum ea quæ spectant ad conservationem pacis nostræ, &c. *And so two knights were assigned in every county to perform the premises. The next assise of arms was in the* 13. *of Edw.* 1. *by the statute of* Winton,

[a] 13. H. 4. 5.

[b] 8. H. 3. Rot. Clauſ. & Rot. finium. memb. 30. & ante.

Staff. P. 14. E. 1. de banco.

F. N. B. 84.

Bract. lib. 2. 36. a.

F. N. B. 84.

Rot. Parl. 9. R. 2. nu. 40.

[a] and this was by the common law (1).

[b] No eſcuage was aſſeſſed by parliament ſince the reigne of Edward the ſecond, and in the eight yeare of his reigne eſcuage was aſſeſſed (2).

If the tenant goeth with the king, and dyeth *in exercitu*, in the hoſt or armie, he is excuſed by law, and no eſcuage ſhall be demanded.

And it is to be obſerved, that if he, that holds of the king by eſcuage, goeth, or findeth another to goe for him with the king, &c. then he ſhall have eſcuage of his tenants that hold of him by ſuch ſervice (3), which muſt be aſſeſſed by parliament.

But if the king's tenant goeth not with the king, then he ſhall pay for his default eſcuage, and ſhall have no eſcuage of his tenants (4). Richard the Second making a voyage royall into Scotland, at the petition of his commons pardoned the payment of eſcuage.

per luy meſme, ne per un auter pur luy oue le roy, paiera a ſon ſeignior, de que il tient la terre, per eſcuage. Sicome mittomus, que il fuit ordaine per authoritie de la parliament, que cheſcun, que tient per entire fee de ſervice de chivaler, que ne fuit oue le roy, payera a ſon ſeignior 40 *s. donque celuy, que tient per moitie dun fee de chivaler, ne payera a ſon ſeignior forſque xx. s. et celuy, que tient per la quart part de fee de chivaler, ne payera forſque x. s. et ſic que pluis, pluis, et que meins, meins.*

who was neither by himſelfe, nor by any other, with the king, ſhall pay to his lord of whom he holds his land by eſcuage. As put the caſe, that it was ordained by the authoritie of the parliament, that every one, which holdeth by a whole knight's fee, who was not with the king, ſhall pay to his lord fortie ſhillings; then he, which holdeth by the moitie of a knight's fee, ſhall pay to his lord but twentie ſhillings, and he, which holdeth by the fourth part of a knight's fee, ſhall pay but x. s. and he, which hath more, more, and which leſſe, leſſe (5).

Sect. 98.

Vid. Sect. 120.

15. E. 2. tit. Avow. 215. 26. Aſſ. 65. 30. E. 3. 23. b. 4. Co. 88. in Luttrel's caſe.

ASCUNS teignont per cuſtome, &c. *Nota*, that eſcuage is directed by cuſtome.

Mes auterment eſt de eſcuage certaine. Here it appeareth, that eſcuage is twofold, *viz.* eſcuage incertaine, whereof Littl. here ſpeaks; and eſcuage certain. *Quemadmodum incertitudo ſcutagii facit ſervitium militare, ita certitudo ſcu-*

ET aſcuns teignont per la cuſtome (6), *que ſi leſcuage courge per authoritie de parliament a aſcun ſumme de money, que ils ne pairont forſque la moitie de ceo, et aſcuns teignont que ils ne payeront forſque le quart part de ceo. Mes pur ceo que leſcuage, que ils paieront, eſt non certain, pur ceo que neſt certaine coment le parliament*

AND ſome hold by the cuſtome, that if eſcuage be aſſeſſed by authoritie of parliament at any ſumme of mony, that they ſhal pay but the moitie of that ſumme, and ſome but the fourth part of that ſumme. But becauſe the eſcuage that they ſhould pay is uncertaine, for that it is not certaine how the parliament will aſſeſſe the eſcuage, they hold by knights ſer-

aſſeſſera

(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.

(2) See ante 69. b. note 3.

(3) Vid. clauſ. 26. H. 3. part 2. m. 10. dorſ. Rex vicecomiti. Precipimus, quod de omnibus feodis militum, quæ tenentur de tenentibus de nobis in capite, qui brevia noſtra non tulerint de habendo ſcutagio ſuo, et ſimiliter defeodis militum quæ tenenter de wardis in manu noſtra, ſcutagium noſtrum colligi facias, ita quod habeas ad ſatisfaciendum, &c. Hal. MSS.

(4) According to Mr. Madox's account it ſeems, that the lord, though he did not go in perſon, or ſend a deputy, was intitled 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 4. *infra.*

(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 diverſe meſnalties and reſerved 20 knights fees, and A had done the king's ſervice, he ſhould have had the eſcuage of 20 fees. But if A did not do the king's ſervice, the king ſhould have had the eſcuage of 4 fees and alſo of 20 fees or at leaſt of* 16. Vid. Rot. Parl 8. m. 4. dorſo. et lib. Parl. 14. E. 2. petitiones magnatum inde. Clauſ. 16. H. 3. m. 17. Rex vicecomiti Cornubiæ precepit, quod nullum diſtringat niſi pro tot feodis, quod regi tenetur reddere. Hal. MSS.

(6) The words in L. and M. and Roh. are *aſcun tenantes teignont*, and the words *per la cuſtome* are omitted.

Winton, *which commands, that every one ſhall be ſworn to armor according to the value of their lands and goods, viz. from lands of* 15 *pounds and chattels of* 40 *marks,* ad haubergellum capellum ferreum gladium cultellum et equum; *from land of* 10 *l. and goods of* 20 *marks,* ad haubergellum capellum ferreum gladium et cultellum, *from land of* 5 *l.* ad gladium cultellum et capellum ferreum; *from*

aſſeſſera leſcuage, eux teignont per ſervice de chivaler. Mes autrement eſt de leſcuage certaine, de que ſerra parle en le tenure de ſocage.

vice. But otherwiſe it is of eſcuage certain, of which ſhall be ſpoken in the tenure of ſocage.

tagii facit ſocagium. But more of this in the chapter of Socage, Sect. 120.

Per parliament. Of the antiquitie and authoritie of this court, ſee Sect. 164.

Sect. 99.

ET ſi home parle generalment deſcuage, il ſerra entendue per le common parlance deſcuage noncertaine, que eſt ſervice de chivaler. Et tiel eſcuage trait a luy homage, et homage trait a luy fealtie; car fealtie eſt incident a cheſcun manner de ſervice forſque a le tenure en frankalmoigne, come ſerra dit apres en le tenure de frankalmoigne. Et iſſint il, que tient per eſcuage, tient per homage fealtie et eſcuage.

AND if one ſpeake generally of eſcuage, it ſhal be intended by the common ſpeech of eſcuage incertaine, which is knights ſervice. And ſuch eſcuage draweth to it homage, and homage draweth to it fealtie; for fealtie is incident to every manner of ſervice, unleſſe it be to the tenure in frankalmoigne, as ſhal be ſaid afterward in the tenure of frankalmoigne (1). And ſo he, which holdeth by eſcuage, holds by homage, fealty and eſcuage (2).

ET ſi home parle generalment deſcuage, il ſerra intend per le common parlance deſcuage non certain.

Verba æquivoca et in dubio poſita intelliguntur in digniori et potentiori ſenſu. Tenure *in capite ex vi termini* is a tenure in groſſe, and it may be holden of a ſubject; but being ſpoken generally, it is *ſecundum excellentiam* intended of the king, for he is *caput reipublicæ.*

Et tiel eſcuage trait a luy homage, et homage trait a luy fealtie; car fealtie eſt incident a cheſcun manner de ſervice forſque a tenure en frankealmoigne.

(2. Inſt. 485. 6. Co. 20. Poſt 78. b. 189. a. 381. b. 1. Sid. 265. 11. Co. 39. a.)
Entendments en Ley Sect. 100. 110. 367. 377. 393. 406. 462. 463. 5. E. 2. Reſceit 165 20. H. 6. 23. 21. H. 6. 8. 3. H 6. 29. 13. H. 4. 4. 6. El. Dyer 230. 10. E. 4. 11. 32. E. 3. Gaid. 31.

Brit. fo. 163.

40. E. 3. 21. 8. H. 7. 4.

Sect. 100.

This is gathered by the effects of their tenure, for eſſences are found out by properties, fountains by rivers, and cauſes by effects: for amongſt others, the lords ſhall have eſcuage of their tenants, &c. as it followeth.

ET eſt aſcavoire, que quant eſcuage eſt tielment aſſeſſe per authoritie de parliament cheſcun ſeignior, de que le terre eſt tenus per eſcuage, avera leſcuage iſſint aſſeſſe per parliament; pur ceo que il eſt in-

AND it is to be underſtood, that when eſcuage is ſo aſſeſſed by authoritie of parliament, everie lord, of whom the land is holden by eſcuage, ſhal have the eſcuage ſo aſſeſſed by parliament; becauſe it is intended by the law, that at *tendus*

(1) See acc. Mad. Baron. Angl. 166.

(2) From this and the next preceding ſection it ſeems, that, notwithſtanding Littleton's expreſſing himſelf in other places as if *eſcuage* was a diſtinct tenure or ſervice, he did not conſider it as ſuch. Eſcuage muſt be either *certain* or *uncertain*, and Littleton expreſsly writes, that being the *former* it is *ſocage*, and being the *latter* it is *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

from 40 *s. to land of* 5 *l.* ad gladium cultellum arcum et ſagittas; et qui minus, juratur ad giſarmas cultellos et alia minuta arma; et qui minus habuerit quam 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 pœna foriſfacturæ omnium bonorum et catallorum pro prima vice, et ſecunda vice ſub pœna captionis terrarum in manus regis et impriſonamento corporum, *and it was alſo commanded,* quod citra feſtum, &c. in forma prædicta armati parati ſint ad proficiſcendum cum rege verſus Scotos cum victualibus neceſſariis pro quadraginta diebus, ſuorum et aliorum de partibus ſuis ſumptibus providendis. Vid. Clauſ. 9. E. 2. m. 25. dorſo. *This aſſiſe received ſome change about the* 8. *of E.* 3. *and in* Clauſ. 8. E. 3. m. 3. dorſo *there is the following precept.* Proclamationem facias, quod omnes de balliva tua, qui habent quadraginta librata terræ vel redditus, licet milites non ſunt, equitatura et armis competentibus juſta ſtatum ſuum, viz. unuſquiſque eorum pro ſe et altero ad minus; et omnes, qui habent viginti librata terræ, cum equitatura et armis pro ſeipſis ad minus, faciant ſibi provideri: et illi, qui minus habent, aſſideantur juxta ſtatutum Wintoniæ. *But in progreſs of time the ſtatute of Winton fell into diſuſe, and commiſſions iſſued to array men*

tendus per la ley, que al commencement tiels tenements fuerent dones per les ſeigniors a les tenants, de tener per tielx ſervices a defender lour ſeigniors, auxy bien come le roy, et mitter en quiet lour ſeigniors et le roy de les Scotes avandits.

the beginning ſuch tenements were given by the lords to the tenants to hold by ſuch ſervices, to defend their lords aſwell as the king, and to put in quiet their lords and the king from the Scots aforeſaid.

Sect. 101.

F. N. B. 84. Regiſter. 88. de Scutagio habendo.

LES ſeigniours averont leſcuage, &c. This is evident.

Briefe le roy. This commeth of the Latine word *Breve*.

Fitzh. in his preface to his N. B. ſaith of them, that they be thoſe foundations, whereupon the whole law doth depend.

[a] Bracton deſcribeth a writ thus. *Breve quidem, cum ſit formatum ad ſimilitudinem regulæ juris; quia breviter et paucis verbis intentionem proferentis exponit, et explanat, ſicut regula juris rem, quæ eſt, breviter enarrat. Non tamen ita breve eſſe debeat, quin rationem et vim intentionis contineat.*

[a] Bracton lib. 5. fol 413. Fleta lib. 2. cap. 12. Britton fol. 122. 227. (1. Sid. 187.)

Of writs ſome be original, *brevia originalia*, and ſome be judiciall, *brevia judicialia*.

(7. Co. 4. a. 4. Inſt. 10.)

Alſo of originals, *quædam ſunt formata ſub ſuis caſibus et de curſu, et de communi conſilio totius regni conceſſa et approbata, quæ quidem nullatenus mutari poterint abſque conſenſu et voluntate eorum; et quædam ſunt magiſtralia, et ſæpe variantur ſecundum varietatem caſuum, factorum et querelarum*, as for example actions upon the caſe, which varie according to the varietie of everie man's caſe, and the like; and theſe being not of courſe, the maſters being learned men did make. *Item brevium originalium alia ſunt realia, alia perſonalia, alia mixta. Item brevium originalium, alia ſunt patentia ſive aperta, et alia clauſa.* Certaine it is, that the originall writs are ſo artificially and briefely compiled, as there is nothing redundant or wanting in them, of which an honourable ſecretary of ſtate once ſaid, that it was not poſſible to comprehend ſo much matter ſo perſpicuouſly in fewer words. Of all theſe kinds of writs you ſhal read plentifully in the Regiſter, whereof Littleton maketh mention in this place, and alſo in Fitz. N. B.

(Plowd. 228. a. 4 Inſt 71.) Bracton ubi ſupra Britton ubi ſupra. Regiſt. 88. F. N. B. 84.

Sicome appiert per le regiſter. Regiſter, is the name of a moſt antient booke and of great authoritie in law, containing all the originall writs of the common law; of which booke ſee more in the preface to the ninth part of my Reports, and contayneth alſo *brevia judicialia, quæ ſæpius variantur ſecundum varietatem placitorum proponentis et reſpondentis* (1).

Alſo it appeareth by the Regiſter, that the king ſhal have eſcuage of his tenants, which hold of him as of a mannor which he hath in ward (2), or by reaſon of a vacation of a biſhopricke.

F. N. B 84.

And ſo ſhall a common perſon, if he hath an eſtate for life or for yeares of a feigniory.

ET pur ceo que tiels tenements devi-endront primes des ſeigniors, il eſt reaſon que ils averont leſcuage de lour tenants. Et les ſeigniors en tiel caſe purront diſtreiner pur leſcuage iſſint aſſeſſe, ou ils en aſcuns caſes purront aver briefe le roy direct as viconts de meme les counties, &c. de levier tiel eſcuage pur eux, ſicome appiert per le Regiſter. Mes de tiels tenants, queux teignont per eſcuage de roy, queux ne ſueront oue le roy en Eſcoce, le roy meſme avera leſcuage.

AND becauſe ſuch tenements came firſt from the lords, it is reaſon that they ſhould have the eſcuage of their tenants. And the lords in ſuch caſe may diſtreine for the eſcuage ſo aſſeſſed, or they in ſome caſes may have the king's writs directed to the ſheriffs of the ſame counties, &c. to levie ſuch eſcuage for them, as it appeareth by the Regiſter. But of ſuch tenants, as hold of the king by eſcuage, which were not with the king in Scotland, the king himſelfe ſhal have the eſcuage.

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tain was a fine or ſum of money payable as a commutation for perſonal ſervice, yet antiently a payment in money, bearing a certain proportion to the eſcuage aſſeſſed from time to time on tenants by knights ſervice, and on that account called eſcuage, was ſometimes a ſervice originally reſerved, and then eſcuage was itſelf the tenure and ſo denominated to diſtinguiſh it from the genuine and proper tenure by knights ſervice. See Wright's Ten. 121. to 127. But this diſtinction, it is allowed, is not hinted at by Littleton, and it is even conjectured, that in his time it might be loſt in the *general* notion of eſcuage, to which only Mr. Madox meant to apply his animadverſion on Littleton and Coke for conſidering it as a tenure. See further 2. Blackſt. Comm. 5th ed. 75.

(1) See further as to the Regiſter of Writs, Nicholſ. Engl. Hiſtor. Libr. ad ed. 205.

(2) See ante 72. b. note 3.

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juxta ſtatus ſui exigentiam et faculteates. Vid. Clauſ. 43. E. 3 m. 24. et ſæpiſſime. *This commiſſion was afterwards regulated and confirmed in parliament.* Rot. Parl. 5. H. 4 n. 24. *And now the ſtatute of Winton is repealed by the* 21. *Jam. chap.* 28. *But this doth not relate to military ſervice, and is only a certain military proviſion for the peace of the kingdom, and concerned burgeſſes and ſockman as well as tenants by knight's ſervice. And according to this difference, the commiſſion of array extended both to tenants by knight's ſervice and others; but the writ, which is called* ſummonitio ſervitii, *reſpected tenants by knight's ſervice only. And as to this latter,* 1. *It is to be obſerved, that the ſervice was eſtimated by the number of fees; and ſo he, who held* per baroniam vel comitatum, *was attendant only according to the number of knight's fees, by which the barony or earldom was held, as clearly appears in Selden's Titles of Honor,*

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ITEM en tiel caſe avandit, lou le roy face un voyage royall en Eſcoce(1), *et leſcuage eſt aſſeſſe per parliament, ſi le ſeignior diſtreine ſon tenant, que tient de luy per ſervice dentier fee de chivaler, pur leſcuage iſſint aſſeſſe, &c. et le tenant plede, et voit averrer, que il fuit oue le roy en Eſcoce, &c. per xl. jours, et le ſeignior voit averrer le contrarie, il eſt dit, que il ſerra trie per le certificat del marſhall del hoſt le roy* (2) *en eſcript ſouth ſon ſeale que, ſerra mis a les juſtices.*

ITEM, in ſuch caſe aforeſaid, where the king maketh a voyage royall into Scotland, and the eſcuage is aſſeſſed by parliament, if the lord diſtraine his tenant, that holdeth of him by ſervice of a whole knight's fee, for the eſcuage ſo aſſeſſed, &c. and the tenant pleadeth, and will aver, that he was with the king in Scotland, &c. by 40 dayes, and the lord will averre the contrary, it is ſayd, that it ſhall be tryed by the certificat of the marſhall of the king's hoſt in writing under his ſeale, which ſhall be ſent to the juſtices.

ET voit averrer, que il fuit ove le roy en Eſcoce per 40 *jours, &c.* [a] *il eſt dit, que il ſerra trie per le certificat del marſhall.* This is a tryall appointed by the law, *ne curia regis deficeret in juſticia exhibenda.* [b] Herewith agreeth the Regiſter, where the marſhall is called *conſtabularius exercitus noſtri.*

(6. Co. 21.)

[a] 2. E. 4. 11. 4. E. 4. 10. 21. E. 4. 10. F. N. B. 85. 11. H. 7. 5. 9. Co. 32. Caſe de Strat. Marc.

[b] Regiſt. 88. F. N. B. 84. 2. E. 4. 1 4. E. 4. 10. 9. H. 4. 3. 11. H. 7. 5. 21. H. 6. 50. 33. H. 6. 1. 45.

Marſhall de hoſte le roy. *Mareſchallus exercitus, in Saxon Mariſchalk. .i. equitum magiſter.* This word *Marſhall* is either derived of *Mars*, or of *Marc* an horſe, and *ſchalc*, which ſignifieth in the Saxon tongue, a maſter or governor. [c] In the lawes before the conqueſt it is ſaid, *Mareſchalli exercitus ſeu ductores exercitus Heretoches per Anglos vocabantur. Illi ordinabant acies denſiſſimas in præliis et alas conſtituebant, prout decuit, et prout ei melius viſum fuerit ad honorem coronæ et ad utilitatem regni.* [d] And here it is to be obſerved, that his certificate in this caſe is a triall in law. I read of fixe kinds of certificates allowed for trials by the common law; the firſt whereof Littleton here ſpeaketh of, in time of warre out of the realme. 2. In time of peace out of the realme. [e] As if it be alledged in avoydance of an outlawrie, that the defendant was in priſon at Burdeaux in the ſervice of the maior of Burdeaux, it ſhall be tryed by the certificate of the maior of Burdeaux. 3. For matters within the realme, [f] the cuſtome of London ſhall be certified by the maior and aldermen by the mouth of the recorder. 4. By certificate of the ſherife upon a writ to him directed [g] in caſe of priviledge, if one be a citizen or a forreiner. 5. Tryall of records by certificate of the judges in whoſe cuſtody they are by law. All theſe be in temporall cauſes. 6. In cauſes eccleſiaſticall, as loyalty of marriage, generall baſtardie, excommengement, profeſſion. Theſe and the like are regularly to be tryed by the certificate of the ordinarie.

[c] Lamb. fo. 136.

[d] 2. E. 4. 1. b. 4. E. 4. 10. 23. E. 4. 47. F. N. B. 85. (2. Inſt. 428. Poſt 261. a.)

[e] 4. E. 4. 10.

[f] 5. E. 4. 3a. 21. E. 4. 16. (2. Ro. Ab. 579.)

[g] 10. H. 6. 10. (Forteſc. cap. 32.)

(12. Co. 67.)

And there be divers other trialls allowed by the common law, then by a jury of 12 men, which you may reade at large in the ninth booke of my Reports, fol. 30, 31, &c. in the caſe of the abbot of Strata Marcella, which are as plainly ſet downe there, as they can be here. And in this caſe, if the triall ſhould not be by certificate, it ſhould want triall, which ſhould be inconvenient. Onely in this place I will adde ſomething of a forreine triall which I finde not in any of the treatiſes lately publiſhed againſt ſingle combats; becauſe it may deterre men from that ungodly and unlawfull kinde of revenge, whereupon many murders have enſued, and prevent all hope of impunity for default of triall in that caſe.

(4. Inſt. 124.)

If a ſubject of the king be killed by another of his ſubjects out of England in any forreine country, the wife or he that is heire of the dead may have an appeale for this murder or homicide before the conſtable and the marſhall, whoſe ſentence is upon teſtimony of witneſſes or combate. And accordingly, where a ſubject of the king was ſlaine in Scotland

Stat. de 1. H. 4. cap. 14. 13. H. 4. fol. 5. Vid Rot. Parliam. 8. H. 6. nu. 38. Staſf. pl. Cor. fo. 65.

(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 law was, when knights 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 Thouloufe, 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.

(2) In L. and M. the words are *conſtable de la hoſte le roy.*

(3) In L. and M. there is an *&c.* after *ſeal* and the words *que ſera mis a les juſtices* are omitted.

(4) See further as to trial by certificate Com. Dig. tit. *Certificate* and title *Trial* in Viner and the other Abridgments.

Honor, part 2. chap. 5. ſect. 26. where it is mentioned, that the barony de veteri ponte *was holden by 5 knights fees, and that Clifford, who had married one of the coheirs, acknowledged the ſervice of two knights and an half. 2. On ſummons of the army on ſervice at a place and day certain, every knight by himſelf or his deputy came before the conſtable and marſhall, 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*

land by others of the king's ſubjects, the wife of the dead had her appeale therefore before the conſtable and the marſhall. And ſo it was [*] reſolved in the raigne of queen Elizabeth in the caſe of Sir Francis Drake, who ſtrook off the head of *Doutie in partibus tranſmarinis*, that his brother and heire might have an appeale. *Sed regina noluit conſtituere conſtabularium Angliæ, &c. et ideo dormivit appellum.*

[*] Anno 25. Eliz. (Poſt 261. Hutt. 3.)

If a man be mortally wounded in France, and dyeth thereof in England, it is ſaid that an appeale doth lie upon the ſaid ſtatute; for it is not puniſhable by the common law, and the proceeding there (as hath beene ſaid) is upon witneſſes or combate, and not by jurie, and the mortal wound was given out of the realme (1).

CHAP. 4. Sect. 103.

Knights ſervice.

SERVICE de chivaler: *Nota*, it appeareth by [a] the Regiſter, that it is [b] ſaid *unum feodum militis*, and not *feodum unius militis*, as it was ſaid, [c] by ſome of old, and ſo *duo feoda militis*, &c. and ſometime theſe fees are called *feoda militaria* [d]. Our author, having before treated of homage fealty and eſcuage, now commeth to knight ſervice itſelfe. In Domeſday it is thus recorded, *epiſcopus Baiecenſis, ille qui tenet de Modardo, reddit ei* 50*s. et ſervitium unius militis.*

(6 Co. 73. b.)
[a] Glanvil. lib. 7. cap. 10.
[b] Regiſt. 2. 30. E. 3. 24.
[c] Glanvil. lib. 7. cap. 14.

[d] Glanvil. lib. 7. c. 9. &c. Fleta lib. 1. cap. 8. Bracton lib. 2. fol. 85. Britton fol. 162. & fol 28. & 95. Ockam in diverſis locis. Mirror cap. 1. ſect. 3. Sud. Diton.

Chivaler, *i. eques*, knight is a Saxon word, and by them written *cnite*. *Chivaler* taketh his name from the horſe; becauſe they alwayes ſerved in warres on horſeback. The Latines called them *equites*, the Spaniards *cavalleroes*, the Frenchmen *chivaliers*, the Italians *cavallieri*, and the Germanes *reiters*, all from the horſe. It is neceſſary to be ſeene by what names this ſervice of a knight is called. It is called [e] *Servitium forinſecum, quia pertinet ad dominum regem et non ad capitalem dominum, niſi cum in propria perſona profectus fuerit in ſervitio, et niſi cum pro ſervitio ſuo ſatisfecerit domino regi, &c. Ideo forinſecum dici poteſt, quia fit et capitur foris, ſive extra ſervitium quod ſit*

[e] Brict. lib. 2. fo. 36. 37. Britton fol. 164. 165. Fleta lib. 3. cap. 14. 19. E 2. Avowry 224. 26. Aſſ. 65. 31. Aſſ. 30. 30. E 3. 23. 8. E. 3. 67. 7. H. 4 19.

(Ante 68. b.)

TENURE per homage fealty et eſcuage eſt a tener per ſervice de chivaler, et trait a luy gard mariage et relief. Car quant tiel tenant moruſt, et ſon heire male eſt deins lage de 21 *ans, le ſeignior avera la terre tenus de luy tanque al age del heire de* 21 *ans; le quel eſt appel pleine age, pur ceo que tiel home, per entendement del ley, neſt pas able de faire tiel ſervice de chivaler devant lage de* 21 *ans. Et auxy ſi tiel heire ne ſoit marie al temps de mort de tiel auncеſter, donque le ſeignior avera le garde et le mariage de luy. Mes ſi tiel tenant devie, ſon heire female eſteant dage de* 14 *ans ou de plus, donque le ſeignior*

TENURE by homage fealty and eſcuage is to hold by knights ſervice, and it draweth to it ward, mariage and reliefe. For when ſuch tenant dyeth, and his heire male be within the age of 21 yeares, the lord ſhall have the land holden of him untill the age of the heire of 21 yeares; the which is called full age, becauſe ſuch heire by intendment of the law is not able to doe ſuch knight's ſervice before his age of 21 yeares. And alſo if ſuch heire be not maried at the time of the death of his anceſtor, then the lord ſhall have the wardſhip and mariage of him. But if ſuch tenant dieth, his heire female being of the age of 14 yeares or more, then the lord

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(1) The office of high conſtable became extinct in the reign of Henry the eighth by the attainder of Stafford duke of Buckingham, in whom it was hereditary; and ſince his death there hath not been any permanent high conſtable, the practice having uniformly been to keep the office vacant except on particular occaſions. In conſequence of this it hath frequently been a ſubject of great controverſy, whether during the vacancy of the office of high conſtable the juriſdiction incident to the court of chivalry can be exerciſed by the earl marſhal only. Lord Coke's manner of ſtating Sir Francis Drake's caſe imports, that an appeal could not be proſecuted againſt him for want of a high conſtable, and Dr. Duck, in his excellent treatiſe on the uſe and authority of the civil law ſays, that the judges being conſulted by Elizabeth were of that opinion. Duck lib. 2. cap. 8. pars 3. f. 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 Lyndſey 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. page 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 *honor* 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

knight's fee ought to perform his ſervice by one knight, or by himſelf in perſon, or per duos ſervientes five armigeros, *who in value are equal to a knight.* Seld. ubi ſupra. *So he, who held by the moiety of a knights fee, might perform all the ſervice either* 40 *days* per ſervientem

navera my le garde del terre, ne de corps; pur ceo que feme de tiel age poit aver baron able de faire service de chivaler. Mes si tiel heire female soit deins lage de 14 *ans, et nient marie al temps de la mort son aunceſter, donque le ſeignior avera le garde de la terre tenus de luy, tanque al age de tiel heire female de* 16 *ans, pur ceo que il eſt done per le ſtatute de Weſtm.* 1. *cap.* 22. *que per* 2 *ans procheine enſuant les dits* 14 *ans, le ſeignior poit tender convenable mariage ſans diſparagement a tiel heire female. Et ſi le ſeignior deins les dits* 2 *ans ne luy tender tiel mariage, &c. donque el al fine des dits* 2 *ans poit enter et ouſte ſon ſeignior. Mes ſi tiel heire female ſoy marie deins lage de* 14 *ans en la vie ſon anceſter, et ſon aunceſter devy, el eſteant deins lage de* 14 *ans, le ſeignior navera forſque la garde de la terre jeſques a fine de* 14 *ans dage de tiel heire female, et donque*

ſhall not have the wardſhip of the land, nor of the bodie; becauſe that a woman of ſuch age may have a huſband able to doe knights ſervice. But if ſuch heire female be within the age of 14 yeares, and unmaried at the time of the death of her anceſtors, the lord ſhal have the wardſhip of the land holden of him until the age of ſuch heire female of 16 yeares. For it is given by the ſtatute of W. 1. cap. 22. that by the ſpace of two yeares next enſuing the ſayd 14 yeares, the lord may tender convenable mariage without diſparagement to ſuch heir female. And if the lord within the ſaid two years do not tender ſuch mariage, &c. then ſhe at the end of the ſaid 2 yeeres may enter, and put out her lord. But if ſuch heire female be married within the age of 14 yeres in the life of her anceſter, and her anceſter dieth, ſhe being within the age of 14 yeares, the lord ſhall have only the wardſhip of the land untill the end of the 14 yeares of age of ſuch

domino capitali. And it is called *ſcutagium*, as it appeareth [*f*] by Littleton and many authorities before recited; ſometime *droit de eſpec.* Alſo it is called [*g*] *regale ſervitium, quia ſpecialiter pertinet ad dominum regem. Ut ſi dicatur in carta, faciendo inde forinſecum ſervitium, vel regale ſervitium, vel ſervitium domini regis, quod idem eſt, &c.* And another ſaith: *Et ſunt quædam ſervitia forinſeca, quæ dici poterunt regalia, quæ ad ſcutum præſtantur: et inde habemus ſcutagium, et ratione ſcuti pro feodo militari reputatur, &c.* So as in reſpect of him that doth it, it is called *ſervitium militis*; but in reſpect of him for and to whom it is done, *viz.* to the king, and for the realme, it is called *ſervitium regale*, or *ſervitium domini regis, &c.* [*b*] In ancient time they which held by knights ſervice were called *milites, qui per loricas, &c. defendunt et deſerviunt, &c.* and ſometime this ſervice is called *ſervitium hauberticum.* And in ancient time, ſuch as held by knights ſervice for the defence of the realme had many priviledges granted to them by law: as for example they might have a writ *de eſſend' quiet' de tallagio*, the effect whereof was [*i*] *Si Tho. filius Ranulphi terram ſuam tenet per ſervitium militare, ſicut domino regi monſtravit, tunc nullum ab eodem Tho. capiant tallagium, nec pro eo dando ipſum diſtringant, vel homines ſuos qui per conſimile ſervitium teneant.* And this agreeth with the ancient charter of king Henry the 1. before mentioned, which he made on the day of his coronation for the reſtitution of the ancient lawes. [*k*] *Militibus, qui per loricas terras ſuas defendunt et deſerviunt, terras dominicarum carucat' ſuarum quietas ab omnibus gildis, et omni opere, &c. concedo:* and the reaſon thereof is there yeelded, *Sient tam magno gravamine allevati ſint*

[*f*] Bracton ubi ſupra. Fleta lib. 3. cap. 14.

[*g*] Britton fol. 187. Bracton ubi ſupra.

[*b*] Carta Hen. prim. Mat. Paris. Mirror. cap. 2. ſect. 17.

[*i*] Rot. Clauſ. 19. H. 3. m. 22.

[*k*] Carta H. 1. in libro rub. fol. 41. in ſcaccario.

ſel 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. ad. ed. vol. 2. p. 250. One authority much relied on by Dr. Plott is an opinion of the lord keeper the maſter of the rolls and a great number of the privy council in the 20th of James the firſt, who after a ſolemn hearing declared, that the earl marſhal had all the powers of judicature without the high conſtable during the vacancy of that office. Upon report of this to the king, he iſſued his commiſſion under the great ſeal to Thomas earl of Arundel the then earl marſhal, which, after reciting that the earl marſhal had delayed to proceed in ſome cauſes before him on account of doubts of his authority, contains the following ſtrong declaration of his judicial power. *We held it fit*, ſays the king, *in a caſe of ſo great weight to proceed with extraordinary deliberation, and having now both by ourſelf and the whole body of our council received ample ſatisfaction by many and clear proofs; that the conſtable and marſhal were joint judges together, and ſeveral in the vacancy of either, we do hereby authoriſe will and command you our earl marſhal, that from henceforth you proceed in all cauſes whatſoever, whereof the court of conſtable ought properly to take cogniſance, as judicially and definitively as any conſtable or marſhal of this realm, either joyntly or ſeverally, heretofore have done.* A more explicit recognition of the earl marſhal's juriſdiction could not be penned, nor one more full and unreſerved; for it declares his judicial power to extend to *all cauſes whatſoever of which the court of the conſtable and marſhal ought properly to take cogniſance*, without one exception. How it happened, that ſo ſoon after this ſolemn hearing and declaration concerning the earl marſhal, the lord keeper and judges of the King's Bench ſhould adviſe the king that lord Rea's appeal could not be taken without a high conſtable, ſeems very extraordinary and unaccountable. To attribute their advice to that jealouſy of juriſdictions conforming ſo much to the civil law, which our judges of the courts of common law ſometimes may have indulged to an illiberal exceſs, would be unjuſt; becauſe we are not now poſſeſſed of the reaſons aſſigned for the opinion thus given to the crown; and on the other hand, the ſame want of information greatly leſſens its weight and authority. Having thus exhibited a view of the controverſy about the earl marſhal's judicial powers, it may be proper to appriſe the reader, that there is not the leaſt intention of advancing any opinion in reſpect to it, further than by obſerving upon the diſtinction between the caſes of *honor* and *arms* and thoſe of *life* and *limb*, ſo far as it is founded on the 1. H. 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*

vientem *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 per-*

sint, ita equis et armis se bene instruant, ut apti et parati sint ad servitium meum, et defensionem regni mei. But these priviledges and quittances are discontinued, and the charge remaineth.

[l] Glanvil lib. 7. ca. 9. 10. Fleta lib. 1. ca. 8. & 9. & lib. 3. cap. 16. 17. &c. Bracton lib. 2. cap. 16. Mirror cap. 5. sect. 2. Britton 162. (4. Inst. 192.)

It is called commonly in [l] our bookes *servitium militare*, &c. or *servitium militis*. And this service was created and provided for the defence of the realme, to performe which service the heires are not accounted in law able till the age of one and twenty yeares. Therefore during their minority, the lord shal have the custody of them, not for benefit onely, but that the lord might see, that they be in their yong yeares taught the deeds of chivalry, and other vertuous and worthy sciences.

[m] Fortescue cap 44.

[m] *Si hæreditas teneatur per servitium militare, tunc per leges iufans ipse, et hæreditas ejus, &c. per dominum feodi illius custodientur, &c. Quis putas, infantem talem in artibus bellicis, quos facere ratione tenuræ suæ ipse astringitur domino feodi sui, melius instruere poterit, aut velit, quam dominus ille, cui ab eo servitium tale debetur, et qui majoris potentiæ et honoris æstimatur, quam sunt alii amici propinqui tenentis sui? Ipse namque, ut sibi ab eodem tenente melius serviatur, diligentem curam adhibebit, et melius in hiis eum erudire expertus esse censetur quam reliqui amici juvenis, &c. et revera non minimum erit regno accommodum, ut incolæ ejus in armis sint experti, nam audacter quilibet facit, quod se scire ipse non diffidit.*

[n] Lamb. fol. 135. a.

[n] Amongst the lawes of Saint Edward the Confessor, it is thus provided, *Debent enim universi liberi homines, &c. secundum feodum suum, et secundum tenementa sua arma habere, et illa semper prompta conservare ad tuitionem regni, et servitium dominorum suorum juxta preceptum domini regis explendum et peragendum.* And William the Conqueror confirmed that law in these words: *Statuimus et firmiter præcipimus, ut omnes comites, et barones, et milites, et servientes, et universi liberi homines totius regni*

son baron et luy poient enter en la terre et ouste le seignior. Car ceo est hors de cas de le dit estatute, entant que le seignior ne poit tender mariage a luy que est marie, &c. Car devant le dit estatute Westm. 1. tiel issue female, que fuit deins age de 14 ans, al temps de mort son auncester, et puis que el avoit accomplish lage de 14 ans, sans ascun tender de mariage per le seignior a luy, tiel heire female donque puissoit enter en le terre et ouste le seignior, sicome appiert per le reherfall et parolx de le dit statute; issint que le dit statute fuit fait en tiel cas tout pur ladvantage de seigniors, come il semble. Mes uncore ceo touts foits est entendue per les parolx de meme le statute, que le seignior navera les deux ans apres les 14 ans, come est avantdit, mes lou tiel heire female soit deins lage de 14 ans nient marie al temps de mort son ancester.

heire female, and then her husband and she may enter into the land, and oust the lord. For this is out of the case of the said statute, insomuch as the lord cannot tender mariage to her which is maried, &c. For before the said statute of W. 1. such issue female, which was within the age of 14 yeares at the time of the death of her ancestor, and after she had accomplished the age of 14 yeares, without any tender of mariage by the lord unto her, such heire female might have entred into the land and ousted the lord, as appeareth by the rehearsall and words of the said statute; so as the said statute was made (as it seemeth) in such case altogether for the advantage of lords. But yet this is alwayes intended by the words of the same statute, that the lord shal not have these two years after the 14 yeares as is aforesaid, but where such heire female is within the age of 14 yeares, and unmaried at the time of the death of her ancestor (1).

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 priviledged 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 laid to be in the discretion of the court to grant or refuse the duel. See Rushw. v. 3. 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. 3. p. 127.—Before we leave this subject, it may not be amiss to hint the necessity of having the *criminal* jurisdiction of the court of chivalry, which is really of importance, duly regulated and reformed. From the preceding account it appears to be doubtful who can lawfully act as the judges, and besides the want of a trial by jury may be deemed a reasonable objection to the form of proceeding; and in consequence of these two circumstances the *criminal* jurisdiction of the court of chivalry hath long been in a dormant state, and is likely to continue in it, unless the legislature applies a remedy. This it would be easy to effect; for nothing more would be necessary, than to ascertain who should constitute the court in cases of appeals, to abolish the present mode of trial, and to substitute in its room the trial by jury on a plan like that, which has already been adopted by statute in respect to the *criminal* jurisdiction of the admiralty court. However it must not be taken for granted, that this court is the *only* jurisdiction for the trial of crimes committed in *foreign* countries; or that without resorting to it, there would be an absolute defect of justice in the case of *all* such crimes. For 1. the 33. of Hen. 8. c. 23. provides, that treason misprision of treason and murder, in whatever place committed, whether *within the king's dominions or without*, shall be triable before commissioners of *oyer and terminer* to be appointed for that purpose; and this statute, we are told, stands unrepealed as to murder, and hath accordingly been sometimes put into use. 2. As to treasons and misprisions of treason committed out of the realm, they by the 35. H. 8 c. 2 are triable either before the king's bench or commissioners. See 1. Hal. Hist. Pl C. 283. It is also provided by the 26. of H. 8. c. 13. that the crimes made treason under that statute or being so before, if committed *out of the realm*, shall be indictable before commissioners and tried in the king's bench; but it is doubtful whether this statute is now in force. See farther as to the high constable and earl marshal Post 106. a. and 391. b.—Note as to *escuage*, it is *expressly* taken away by the 12. Cha. 2. c. 24. and had fallen into dituse long before; for there is no instance of parliament's assessing it since the reign of Edw. 2. See ante 72. b.

(1) In L. and M. and the Pap. MS. there is the following. *Item si un home tient un maner de un auter per servyce de chivaler, et*

performed the service per duos milites galeatos et lege militari decenter armatos et octo armigeros, *four of whom were* equites cum

regni nostri prædicti habeant et teneant se semper in armis et in equis ut decet, et oportet, et quod sint semper prompti et parati ad servitium suum integrum nobis explendum et peragendum, cum semper opus adfuerit, secundum quod nobis debent de feodis et tenementis suis de jure facere, &c. Out of these two lawes the studious and learned reader will gather divers notable things. And therefore if after the lord hath the wardship of the body and the land, the lord doth release to the infant his right in the seigniorie, or the seigniorie descendeth to the infant, he shall be out of ward both for the body and the land; for he was in ward in respect he was not able to doe those services which he ought to doe to his lord, which now are extinct, and *cessante causa cessat causatum.* And our author saith, that the tenure by knights service draweth unto it ward, marriage, &c. so as there must be a tenure continuing. As if the conusor in a statute merchant be in execution, and his land also, and the conusee release to him all debts, this shall discharge the execution; for the debt was the cause of the execution, and of the continuance of it till the debt be satisfied, therefore the discharge of the debt which is the cause, dischargeth the execution which is the effect.

See W. 1. cap. 48. The second part of the Institutes. (6. Co. 22. Post 248.)

20. Ass. p. 7. (2. Ro. Ab. 404. Doc. Pla. 106.)

Et trait a luy gard, mariage, et reliefe. So as regularly there be sixe incidents to knights service, (*viz.*) two of honour and submission, as Homage and Fealtie. And foure of profit, *viz.* Escuage, whereof he hath treated before, Ward (*.i.* wardship of the land) Mariage and Reliefe; of all which our author hath spoken. But there be other incidents to knights service besides these; [a] as *Aide pur faire fits chivalier, et aide pur file marier, &c.* which at the common law were uncertaine, and were called *rationabilia auxilia*, because if they were excessive and unreasonable in the judgement of the court where they were questioned, they ought not to be paide: but now as well in the king's case, as in the case of the subject, they are by acts of parliament reduced to certaintie, which are worthy your reading (1).

Gard, or *Ward*, in Latine *custodia*, and hereof the lord is called *gardian*, *custos*, and the *minor* is called a ward or one in ward. [b] And albeit (as our author saith) knight service draweth with it ward, &c. yet by custome the heire of him, that holdeth in socage, may be in ward.

[a] Grand. Cust. de Norm. cap. 35. Regist. orig. fo. 87. Glanvil lib. 9. ca. 8. 35. Fleta lib. 2. cap. 40. & lib. 3. ca. 14. Mirror ca. 1 sect. 3. Britton fo. 55. & 70. F. N. B. 82. b. W. 1. ca. 35. 25. E. 3. ca. 11. 11. H. 4. 34. 5 E 3. 11. Vide sect. 110.

[b] 8. H. 3. Prescript. 38. Pasch. 21. E. 1. Coram rege Rot. 43. Nota pro Hibernia Prior del St. Trinitie de Dublin's case.

Marriage. *Maritagium* betokeneth, not onely the copulation of man and wife in mariage, but also (as in this place here) the interest of the gardian in bestowing of a ward in marriage, which the law gave to the lord, not for his benefit onely, but that he should match him vertuously and in a good family without disparagement, as shall be said hereafter, which is the principall foundation of his estate.

[c] *Reliefe.* *Relevium* is derived from the Latine word *relevare*; for so [d] ancient authors say, and give this reason, *Quia hæreditas, quæ jacens fuit per antecessoris decessum, relevatur in manus hæredum, et propter factam relevationem facienda erit ab hærede quædam præstatio, quæ dicitur relevium.* And in Domesday it is called *relevamentum* and *relevatio.*

The reliefe of a whole knight's fee is five pound, and so according to that rate. And this reliefe was as some hold certaine by the common law; * but the reliefe of earles and barons were incertaine, and therefore were called *relevia rationabilia*; but the statute of Magna Charta, cap. 2. limits them in certaine, and mentioneth also a knight's fee. But I reade in the book of Domesday, *Quod Tainus vel miles regis dominicus moriens pro relevamento dimittebat regi omnia arma sua, et equum unum cum sella et alium sine sella; quod si essent ei canes vel accipitres, præstabantur regi, ut si vellet acciperet.*

[c] Vid. Sect. 112. Post 83. a. & ant. 69. a. & Wright's Ten. 97.

[d] Bracton lib. 2. ca. 36. fol. 84. Fleta lib. 1. ca. 10. & lib. 3. ca. 16. 17. Britt. ca. 69 70. Glanvil lib. 9. ca. 4. & lib. 7. ca. 9. Ockam de differentiis releviorum. (Ante 69. b. Post 83. a.)

[*] Ockam ubi supra. Bracton lib. 2. fo. 85.

Since Littleton wrote [e] there is a good law made against fraudulent feoffements, gifts, grants, &c. contrived of fraud to hinder or defraud lords, &c. of their reliefes and heriots amongst other things, for the exposition of which statute reade the authorities quoted in the margent. And it is to be observed, that the words of the said act of 13. Eliz. are, (*be it therefore declared, ordained, and enacted*) and therefore like cases, and insemblable mischief shall be taken within the remedie of this act by reason of this word (*declared*), whereby it appeareth what the law was before the making of this statute (2).

[e] 13. Eliz. ca. 5. 17. E. 3. Reliefe 3. 7. E. 3. ib. 11. 3. Co. 80. &c. Twine's case. 5. Co. 60. Gooche's case. 6. Co. 18. Pakeman's case. 10. Co. 56. b. See also the statutes of 3. H. 7. c. 4. & 50. E. 3. ca. 6. Vide Mich. 12. & 13. Eliz. Dier 295.

Son heire male. [f] For regularly by the common law the heire shall not be in ward, unlesse he claime as heire by descent. The statute of Merton, *de hiis qui primogenitos feoffare solent*, [g] did helpe feoffments by collusion in certaine cases. And Britton saith, that Robert de Walrand a sage of the law did advise the great lords of the realme to make the said statute, which when it was past, the same act tooke his first effect in the heire of Walrand's owne heire, whereof Britton maketh a speciall remembrance. But now [h] by the statutes of 32, and 34. H. 8. of wills, he which holdeth lands by knights service may by act executed in his life time, or by his last will in writing, dispose two parts as by the said acts appeareth. If he dispose all by act executed, then it shall stand good against the heire,

so

[f] Britton 168. Fleta lib. 1. ca. 9.

[g] Merton ca. 6. (11. Rep. 23.) Bract. fo. 85. Brit. fo. 65. 9. H. 4. 6. 4. H. 7. ca. 17. 27. H. 8. 7. 89. Partridge's case. Pl. Com. 82.

[h] 32. H. 8. ca. 1. 34. H. 8. ca. 5.

et il tient un auter maner de un auter home per un tiel servyce, mez il tient lun maner per priorite, &c. et l'auter maner per posteriorite, et ady issue file, et devie, et les maners descendont al file adonques esteant deinz lage de 14 auns, et le seignour de que un dez maners est tenu per priorite seisit le garde del corps del heire et de le maner tenuz de luy, et lauter seignour seisit le garde del auter maner tenuz de luy, en cest case quant la file vient al age de 14 auns, ele entrera en le maner tenuz per posteriorite coment que ele soit adonques desmarie. Qar les parols de meme lestatute de Westminster premier *sont en tiel forme que ensuyst. Les heires femels, puis que eles avyront complie age de 14 aunz, et le seignour, a qui le mariage appent, celes ne voudra marier, mez per coveitise de la terre celes voudra tener dismariez, purveu est que le seignour ne puise aver ne tener per encheson de le mariage les terrez de celes heirez femels outre deux auns aprez le terme dez avauntdiz 14 auns, &c. per queux parols, il poet estre prove, que apres les 14 aunz null doit aver les terrez en tiel case, &c. forsque celui, a qui le maraige appent, &c. et pur ceo que tiell maraige nappent a celuy, de qui la terre est tenus per posteriorite, &c. tiell heir femel, quant ele vient al age de 14 auns, poet bien entre en tiel terre, que issint est tenus per posteriorite, &c* —See 35. H. 6. 52.

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

(2) See a note on the subject of *relief*, Post 83. a.

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,*

(10. Co. 80.)
[i] 3. Co. 25. 26. in Butler's case. 6. Co 75. in Sir George Curson's case. 8 Co. 163. Might's case. Eod. lib. fo. 171. in Vigil Parker's case.
[k] Mir. ca. 1. Sect. 3.

so as nothing shall descend unto the heire. But in case of a devise by his last will, a third part shall descend to the heire, though all be devised away: and if the tenant leave a third part to descend, then the devise is good for the residue. [i] But these things require so many diversities grounded upon evident reasons, and are so plainely expressed in my Commentaries, as they (being very long) shall not need to be repeated here. [k] And that the tenure by knights service draweth to it ward mariage and reliefe, is of great antiquity, for so it was in the time of king Alfred (1).

Quant tiel tenant mort. Here Littleton speaketh not of a dying seised by the tenant, for in many cases the heire shall be in ward, albeit the tenant died not seised, &c. nor in the homage of the lord. As if the tenant maketh a feoffement in fee upon condition, and the feoffor dieth, after his death the condition is broken, the heire within age entreth for the condition broken, he shall be in ward, and yet the feoffor had no estate or right in the land at the time of his death, but onely a condition, and which was broken after his decease.

(1. Co. 99.)
[*] 39. E. 3. 36. tit. Gard 92. 33. E. 3. Gard. 162. 11. H. 7. 12. 19. E 3. Gard. 114. 18. Ass. 18. 40. Ass. 36. 20. El. 362. 4. H. 6. 16. b. F. N. B. 143. 6. H 4. 4. a.
[l] 7. H. 4. 12. 1. H. 7. 12. 22. E. 4. 7. 6. 40. E. 3. 43. 4. M. 136. 15. E. 4. 10. 11.

[*] But because the condition restoreth the tenant to the land in nature of a descent, (for he shall be in by descent) by the same reason shall it restore the lord to the wardship, seeing now (as Littleton saith) the heire of his tenant is within age, and not able to doe him service, and no default in the lord to barre him of his wardship.

[l] And so I doe take it, that if the heire within age recover in a *dum non fuit compos mentis*, or *formedon en discender*, or remainder as heire, or such like, the heire shall be in ward; for these be stronger cases then the former, for here a right doth descend to the demandant, which right being by course of law restored to the possession of the heire within age, by consequence the lord is to have the wardship of him, but in the case of the condition, no right at all descended to the heire, as hath beene said.

33. E. 3. Gard. 162.
(2. Ro. Ab. 38.)

And so if tenant in tayle, the remainder in fee, maketh a feoffement in fee, and dyeth leaving the issue in taile within age, if the feoffee infeoffe the issue in taile, whereby he is remitted, the shall be in ward to the lord; for as he is restored to the title of the land as heire, so is the lord restored to his title of wardship as lord of the fee. And as to this purpose herein I take no difference betweene a right of action and a right of entry descending, when by action the right of the land is lawfully recovered by the heire within age, to his tenant; and albeit he dyed not in his homage, yet there was a right of homage, and no default or laches was in the lord, or act done by him to prejudice himselfe thereof.

11. H. 7. 12.

But if one levie a fine executorie (as *fur grant et render*) to a man and his heires, and he to whom the land is granted and rendred, before execution dieth, his heire being within age entreth, he shall not be in ward, for his ancestor was never tenant to the lord, and so there is a manifest diversitie betweene this and the other cases. *Et sic de cæteris.*

13. El. Dyer 298.

But if the tenant maketh a feoffement in fee of lands holden by knights service to the use of the feoffee and his heires, untill the time that the feoffor pay to the feoffee or his heires a hundred pounds, for the which a time and place is limited; the feoffee dyeth, his heire within age; the lord shall have the wardship of the bodie of the heire, and of the lands of the feoffee, conditionally, for he cannot have a more absolute interest in the wardship, than the heire hath in the tenancie: therefore if the feoffor pay the mony at the day and place, and entreth into the land, in this case both the wardship of the bodie and lands is devested, because the lord had no absolute interest in neither of them, but doth depend upon the performance or not performance of the condition.

(Post 248. a)

[*] 12. H. 4. 16. per Thirning.

[*] So if the conusor of a fine executorie of lands holden by knights service dyeth his heire within age, the lord shall have the wardship of the bodie and land: but if the conusee entreth, the heire is disherited, and the lord hath lost the whole benefit of his wardship.

[m] 41. E. 3. 225.
[n] 15. E. 4. 11.

If the disseisee dyeth his heire being within age, [m] the lord shall have the wardship of the heire of the bodie of the disseisee. [n] But put the case, that in that case the disseisor dieth seised, and his heire within age, the lord may seise the wardship of his heire also, and of the land also: but the doubt is, whether the heire of the disseisee shall, after the descent to the heire of the disseisor, continue in ward, for that after the descent the heire of the disseisor is become his lawful tenant, and the heir of the disseisee is not tenant unto him untill he hath recovered the land.

[o] 14. H. 8. 5. 4. H. 7. cap. 17.

If *cesti que use* before the statute of 27. H. 8. had dyed, his heire within age, the lord [o] should have the wardship of his heire; and if the feoffee had dyed, his heire within age, the lord should have had the wardship of his heire also, and so a double wardship for one and same land, the one by the statute of 4. H. 7. the other by the common law.

[p] 41. E. 3. 26. tit. Avowrie 264. 20. H. 6. 9. 48. E. 3. 8 b. 10. F. 1. 26. 31. E. 3. tit. Gard. 116. 18. E. 3. 7. 14. H. 4. 38. 1. H. 5 Grant 43. 5. E. 4. 3. 7. E. 4. 27. 15. E. 4. 13. 2. E. 2. Avow. 181.

[p] Tenant by knights service maketh a gift in taile, the remainder in fee, tenant in taile maketh a feoffement in fee, and dyeth, his heire within age, the lord shall have the wardship of him; and if the feoffee dieth, his heire within age, the lord shall have the wardship also of his heire, and of the land.

If

(1) This shews, that in lord Coke's opinion the feudal tenures were settled here before the conquest. But as to this controverted point, see note 1. of 64. a.

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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 Saint 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,*

If tenant by knights ſervice maketh a gift in taile, and the donee maketh a feoffment in fee, and the donee dieth his heire within age, the donor ſhall have the wardſhip of him; becauſe he is his tenant in right. [q] But if the feoffee dieth, his heire within age, the donor ſhall not have the wardſhip of his heire, but the lord paramount; becauſe he is tenant *in fait* to him, neither ſhall the donor avow upon the feoffee or his heire for the ſervices due unto him, becauſe he muſt in his avowry ſhew the reverſion in fee to be out of him by the feoffment, and conſequently the ſervices incident to the reverſion are alſo out of him, but he ſhall avow upon the donee and his iſſues: [r] and thus are all the bookes that ſeeme to be at variance, either anſwered or reconciled.

(2. Ro. Ab. 38.)

[q] So was it holden Tr. 18. El. in Com. Banco per Cur. which myſelfe heard and noted, in Sir Thomas Wyat's caſe.

[r] So was it reſolved in Sir Tho. Wyat's caſe ubi ſupra.

[a] *La terre tenus de luy, &c.* Littleton here ſpeaketh of lands holden of a ſubject: for if a man hold land of the king by knights ſervice *in capite*, and other lands of other lords, and dieth his heire within age, the king ſhall have the wardſhip of all the lands by his prerogative: and this was due to the king by the common law, the fees of certaine excepted, as in the ſtatute of *prærogativa regis cap.* 1. appeareth.

[a] Glanv. lib. 7. cap 10. Bract. lib. 2 fo. 85. 86. 87. Brit. l. 3. c. 2. Fleta l. 1. c. 10. 9. H. 3. Prerog. 25. 21. H. 3. ib 26. Rot. Finium. 6. Johan. Stat. Prerog. Reg. c. 1.

But if a man holdeth lands of the king by knights ſervice, as of an honor or mannor, &c. [b] in that caſe the king ſhall onely have the lands holden of him, and not of any other. Yet by reaſon of tenures of the king by knights ſervice of certaine honours, (while they were in the king's hands) the king (as ſome have ſaid) had (as it were by preſcription) his prerogative, *viz. Raleigh age net bonony* and *Peverel*, and ſo of lands holden by knights ſervice of the duchy of Lancaſter in the county palatine (1).

[b] Bract. ubi ſupra. Mag. carta c. 31. 1. E. 6. ca. 4. 5. E. 3. 5. 47. E 3. 21. 29. H 8 B. tit. Livery 58. 28. H. 8. ibid 55. (2. Ro. Ab. 503)

[c] When an heire hath bin in ward to the king by reaſon of a tenure *in capite*, after his full age he muſt ſue livery, which is halfe a yeare's profit of his lands holden. But if he be of full age at the time of the death of his anceſtor, then he ſhall pay for lands in poſſeſſion a whole yeare's profit for *primer ſeiſin:* but if it be of a reverſion expectant upon an eſtate for life, as tenant in dower, tenant by the curteſie, or tenant for life, then he ſhall pay but the moity of one yeare's profit.

[c] 8. Co. 172. Hale's caſe. 38. H. 8 Br. tit. Livery 60. Vid. ſect. 154. (F. N. B. 255. E.)

[d] If the heire be in ward by reaſon of a tenure of an honour or mannor, (except as before) he ſhall not ſue liverie, but an *ouſter le maine cum exitibus*, albeit he never made tender. [e] And if he be of full age, the king ſhall have no *primer ſeiſin*, but relieſe. But where the tenure is *in capite*, there the king ſhall have the meane profits untill the tender be made; and if the tender be made, and not duely purſued, the king ſhall alſo have all the meane profits.

[d] 1. El. Dier 168.

[e] 22 H. 8. tit. Liv. Br. 62.

[f] He that holdeth of the king by ſocage in chiefe, and dieth, his heire of full age, the king ſhall have livery and *primer ſeiſin* onely of the lands ſo holden, and not of the lands holden of others. [g] But if the heire of ſuch a tenant in ſocage in chiefe be within the age of fourteene at the death of his anceſtor, he ſhall neither ſue livery, nor pay *primer ſeiſin*, either then or any time after: and the reaſon thereof is, for that the cuſtodie of his body and lands in that caſe belong to the *prochein amy*, as gardian in ſocage. [h] Neither ſhall the king have *primer ſeiſin* of lands holden in Burgage, (as ſome have ſaid) for that it is no tenure in *capite*. [See Mad. Remark on this in Burma Burgage 23.]

[f] 38. H 8. Liver. Br. 60. 45. E. 3. 11. 35. H. 6. 52. Stanf. 13 b.

[g] 20. El. Dy. 362. F. N. B. 259. b.

[h] F. N. B. 263. 7. E. 4. 17. Stanf. Prær. 13. Br. tit. Liv. 64.

Note, there is a generall livery, and a ſpeciall livery: a generall livery hath two properties:

Firſt, it is full of charge to the heire, for he muſt finde an office in every county where he hath land, or elſe he cannot ſue a generall livery, and he muſt ſue out his writ of *ætate probanda, &c.*

[i] The ſecond property is, that it is full of danger: firſt, it concludeth the heire for ever after to denie any tenure found in the office. Secondly, if livery be not ſued of all and of every parcell which the king ought to have, whether it be found in the office or not found (for a generall livery could not be ſued by parcels) the liverie is void, and the king may reſciſe the lands, and be anſwered of the meane profits. So it is if the office be inſufficient, or the proceſſe whereof the livery was made be inſufficient, or the like, the king ſhall reſeiſe, as is aforeſaid. [a] Therefore for the eaſe of the heire, and for avoyding of ſuch danger, the heire for the moſt part ſueth out a ſpeciall livery, which containeth a beneficiall pardon, and ſaveth the ſaid charges, and preventeth the ſaid concluſion, and the other dangers, which being of grace, and not of right, as the generall livery is, the king may well and juſtly take more for a ſpeciall livery, than for a generall, for the cauſes aforeſaid, but ever with ſuch moderation as the heire may cheerfully goe through therewith.

[i] 46. E. 3. 33. 47. E. 3. 21. 21. H. 6. 28. b. 33. H. 6. 50. 29. Aſſ. 8. Pl. Com. Countee of Leic. caſe 44. E. 2. 1. & 25. 12. R. 2. Liv. 28. 2. H. 7. fol. 12.

[a] 1. H. 4. 6. b. 37. H. 8. Eſtop. Br. 1. 218. 7. E. 6. ib. 222. Scurfield's caſe. Tr. 8. Ja. in our Ward. 23. El Dier 377. 28. H. 8. Br. tit. Liv. 56.

Note that livery is in nature of a reſtitution, which is to be taken favourably: for if livery be made of a mannor *cum pertinentiis*, the heire ſhall thereby have the advowſon appendant. Otherwiſe it is in grants by letters patents.

41. E. 3. 5. 5. E. 6. 6. 27. Aſſ. 48. Pl. Com. 252. 20. El. Dyer 360. (10. Co. 64. a.)

Since the time that Littleton wrote [c] there is a court of wards and liveries erected by authority of parliament concerning the order of the king's wards, &c. to be holden before the maſter of the wards and the councell of that court appointed by thoſe acts. This hath made

[c] 32. H. 8. 46. 33. H. 8. cap. 22. (4. Inſt 188.)

(1) Rot. Parl. 11. H. 6. n. 57. Simile pro ducatu Cornub. Rot. Parl. 18. H. 6. n. 42. *Ryley's eſcheat* m. 4. and 5. E 1. Rot. 20. Nota, *as to the ancient honor of Peverel, the tenure of that is* in capite, *but ſome new additions to the honor are not ſo.* P. 7. Jac. *Ley 7. Clarke's caſe.* Vid. tamen P. 17. Jac. Churche's caſe, Ley 52. *for there it was found, that tenure of the honor of Peverel is tenure* in capite *as to the manor of Woodham Mortimer.* Hal. MSS. By a tenure *in capite* in this note, lord Hale means a tenure of the king *ut de corona* 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 perſona regis*; and as to the *latter*, it was not allowed to be a tenure *in capite*

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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* th.

made ſuch a manifold alteration, as were too long here to be inſerted, and doth belong to another treatiſe mentioned in the epiſtle of the juriſdiction of courts, where it were neceſſary, that the true juriſdiction of that court ſhould be ſet downe, a matter of no great difficulty, ſeeing it began ſo late by authority of parliament. And ſince Littleton's time, [d] there is a right of profitable ſtatute made concerning the finding of offices and other things, not onely concerning the king's wards, or their rights and poſſeſſions, but ſome other proviſions very beneficiall for the ſubject, in all to the number of 12. [e] Firſt, that ſuch perſons as hold for tearme of yeares, or by copy of court roll, or have any rent common or profit apprender out of any lands found in any office, wherby the king is intituled to the wardſhip of the lands or tenements, or to the forfeiture of the lands or tenements upon attainder of treaſon, felony, *præmunire*, or any other offence, yet may they have, hold, enjoy, and perceive their ſeveral eſtates, intereſts, and profits, although they be not found in the office. And this being a beneficiall law the eſtates of tenant by ſtatute ſtaple merchant and *elegit*, and executors, that hold lands for payment of debts, are taken to be within the benefit of the clauſe: [f] and ſo is a doubt in 14. El. Dier cleered.

[d] 2. E. 6. ca. 8.

(9. Co. 16.)

[e] 4. E. 4. 23. 33. H. 8. tit. enter congeabl. Br. 125.

[f] 14. Eliz. Dier. fo. 319.

2. Where it is found, that the heire is of fewer yeares than in truth he is, he ſhall not be concluded hereby, [g] but every ſuch heire at his very full age may proſecute a writ of *ætate probanda*, and ſue his livery or *ouſter le maine:* in which caſe he had no remedy by the common law.

[g] 5. Mar. Dier 156.

[a] 24. E. 3. 31. 38. 9. H. 6. 18. 12. E. 4. 16. 30. Aſſ. 28. 4. Co. 56. & 60. Sadler's caſe. Stanf. prerog. 58. b. 52. 5. E. 4. 4. 16. E 4. 4. 1. H. 7. 14. 2. H. 7. 12. 4. H. 7. 15. 8. H. 7. 11. F. N. B. 262. 12. R. 2. Livery 28. F. N. B. 233. 7. Co. 44. 45. Ken's caſe.

[a] 3. Where one perſon or more be found heire, where another perſon is heire, the partie grieved had no remedy.

4. Or where one perſon or more be found heire in one county, and another perſon or perſons found heire in another county, there could have beene no interpleading.

5. Or if any perſon be untruly found by office lunaticke, or ideot, or dead, the party grieved may traverſe the ſaid offices; and you may reade in Ken's caſe how the office ſhall be traverſed upon this act.

[b] 4. E. 4. 23. 10. H. 6. 19. 4. Co. 56. &c. Sadler's caſe. 32. H. 8. entre Cong. Br. 125. 14. E. 3. cap. 14.

[b] 6. Where it is untruly found by office, that any perſon attainted of treaſon, felony, or *præmunire*, is ſeiſed of any lands, &c. the party grieved, having juſt title of freehold, ſhall have his travers or *monſtrans de droit* (without being driven by this double matter of record to his petition of right as he was before this ſtatute) which is much more ſpeedy then the petition, for upon the petition there be foure writs of ſearch, and every one muſt have 40 dayes before the ſerving, and now but two writs of ſearch.

[c] Vide 6. Co. 6. Wheeler's caſe.

7. Where an office is found by theſe words or the like *quod de quo vel de quibus tenementa prædicta tenentur, juratores præd' ignorant*, or holden of the king *per quæ ſervitia juratores ignorant*, it ſhall not be taken for any immediate tenure of the king in chiefe, but in ſuch caſes a *melius inquirendum* to be awarded as hath beene accuſtomed of old time. This branch hath beene well [d] expounded; for if the firſt office finde a tenure of the king *per quæ ſervitia, &c.* yet if upon the *melius inquirendum* the tenure be found of a ſubject, the firſt office hath loſt his force *per ſenſum hujus ſtatuti*, and need not be traverſed, and the *melius, &c.* is in nature of the *diem clauſit extremum* or *mandamus, &c.* and this was but a declaration of the ancient common law, as by the words of the ſtatute *(as hath beene accuſtomed of old)* it appeareth; but if upon the *melius* it be found againe as uncertainely as before is ſaid, then it is in judgement of law a tenure in *capite*, and ſo it was before the making of this act, and ſo are the bookes that ſpeake hereof to be intended; but if upon the *melius* a tenure be found of the king *ut de manerio per quæ ſervitia, &c.* it ſhall be taken for knights ſervice.

[d] 12. Eliz. Dier f. 292. a. 8. Co. 168. Paris Stoughter's caſe.

13. Eliz. Dier 306. 4. H. 6. 13. 10. H. 4. 2. b.

8. Where it is found that lands, &c. are holden of the king immediately, where in truth they are holden of a common perſon and not of the king immediately, and that the heire is within age, ſuch heire within age ſhall have his traverſe, &c. which he could not have had by the common law.

9. The meane lords of whom the lands are holden. which the king hath by his prerogative during the minority of the heire, ſhall receive and take ſuch rents as are due unto them by the hands of ſuch of the king's officers as receive the profits of the ſame lands, where before that act, the lords uſed to ſpare the rents due, &c. during the king's poſſeſſion, and after livery ſued charged the heire with all the arrerages.

10. There is a proviſion for offices found before the ſtatute or before the 20 day of March next after the act.

11. A ſpeciall clauſe is, that a *ſcire fac'* ſhall be awarded upon every travers by force of this act, and where the party was put to his petition, there upon the travers there ſhall be two writs of ſearch granted.

12. And laſtly, if judgement ſhall be given againſt the king upon a traverſe by vertue of this act, all former rights appearing of record are ſaved to the king. But albeit theſe points are moſt neceſſary to be knowne, yet let us now returne to Littleton.

15. E. 4. 12. 46. E. 3. 12, 21. H. 6. 11. 3. H. 7. 5.

Littleton warily and materially (treating of a common perſon) ſaith, *tenus de luy* holden of him, for he ſhall have nothing in ward but that which is holden of him. But the king by his prerogative

pite. 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 perſona* 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 eſchеat of an honor or barony, we ſhould call the tenure of thoſe of the *firſt* deſcription a tenure *ut de corona*, 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 corona*, though in other reſpects there certainly are very important differences between the two, ſuch as render it highly neceſſary to preſerve a diſtinction. See Mad. Baron. Angl. 163.

the king's ſubjects are liable to for the internal defence of the realm. The *remainder* relates to the performance of that *particular* military ſervice, which was due by reaſon of tenure, and might be required on *foreign* expeditions. With reſpect to the *latter* it may be ſufficient to add, that military ſervice by tenure was wholly aboliſhed by the 12. Cha. 2. c. 24. which in *expreſs* terms diſcharges all eſtates from ſervices on *voyages royall*, and that long before this ſtatute it had fallen into diſuſe, as appears from there not being any inſtance of aſſeſſing eſcuage ſince the reign of Edward the ſecond. As to the *former*, lord Hale ends his hiſtorical deduction

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prerogative ſhall not onely have ſuch lands and tenements, which (as hath been ſaid) the heire of his tenant by knights ſervice *in capite* holdeth of others, but ſuch inheritances alſo as are not holden at all of any, as rent charges, rent ſecke, fayres, markets, warrens, annuities, and the like; and ſo is the law cleerely holden at this day, as it hath beene reſolved; and ſo experience teacheth, that the king by his prerogative given to him by the ancient common law ſhall have thoſe inheritances not holden, and ſo the *quære* made by [o] Stanford is cleered and made without queſtion.

[o] Stanf. Prær. fo. 8.

The law is changed ſince Littleton wrote in many caſes both for the mariage of the body, and for the wardſhip of the lands, and a farre greater benefit given to the lords then the common law gave them, and ſome advantage given to the heires, which before they had not, which ſhall be touched briefly.

If the father had made an eſtate for life or a gift in taile of lands holden by knights ſervice to his eldeſt ſonne, or other heire apparent within age, the remainder in fee to any other, and dyed, the heire ſhould not have beene in ward; for this was out of the ſtatute of Merlebridge. But at this day the heire ſhall be in that caſe in ward for his body, and a third part of his land.

Merlebridge, ca. 1. pl. com. 82. 27. H. 8. 10. 33. H. 6. 14.

[a] So if the father had infeoffed his eldeſt ſonne within age and a ſtranger and the heires of the ſonne, and died, the ſonne ſhould have beene out of ward; but at this day he ſhall be in ward for his body, and for a third part of his moity. [b] So if the father had infeoffed any of his younger ſonnes or others for the making of his wife a joynture, or for the advancement of his daughters, or for the payment of his debts, and after infeoffe and convey the land to his heire and dyed, his heire within age, his heire ſhould not have beene in ward; becauſe he was bound by the law of nature and nations to provide for them; but now in all theſe caſes the heire ſhall be in ward for his body, and a third part of the land, and all this groweth by conſtruction upon the ſtatutes of 32. and 34. H. 8. [c] But if either the eldeſt ſonne, or any of the younger ſonnes purchaſe lands of his father, which are holden by knights ſervice, *bona fide* for the reaſonable value, this is out of thoſe ſtatutes, and the heire ſhall neither be in ward, nor pay *primer ſeiſon*.

[a] 31. E. 3. Colluſion 29. 33. H. 6. 14.
[b] 33. H. 6 14. 27. H. 8. 7. 6. Co 76. 77. Sir George Curion's caſe. 10. Eliz. 260. 3. Eliz. 193. 20. Eliz. 361. 19. Eliz. 276. 5. Mariæ 158.
[c] 10. Co. 83. Leonard Lovey's caſe.

And in all the caſes aboveſaid, (for example) if a feoffement be made to the uſe of his wife for life, or to the uſe of any of his younger ſonnes for life, or to the uſe of ſome perſons for life for payment of debts, and upon all theſe eſtates a remainder is limited over, if the wife or tenant for life dye in the life of the father, [d] or if it be conveyed to the uſe of the wife or yonger children in fee, or fee taile, or in fee for payment of debts, and theſe lands are conveyed away in the life time of the father, after the deceaſe of the father no wardſhip, &c. accrueth by force of any of the ſaid ſtatutes, for ſuch eſtates muſt continue till the title of wardſhip doe grow. (1)

[d] 2. Co. 91. Bingham's caſe. 6. Co. ubi ſupra 84. 8. Co. 165. Digbye's caſe.

[e] If the father convey his lands holden by knights ſervice either of the king or of any meane lord to his middle ſonne in taile, the remainder to the youngeſt ſonne in fee, and dyeth, the eldeſt being within age, and the king or lord ſeize the body and two parts of the land, if the middle brother dye without iſſue, the king or the lord ſhall not have any benefit of the ſtatute againſt him in remainder; for the ſtatute was once ſatisfied, and the ſtatute extendeth not to him in remainder.

[e] 14. Eliz. Dier 308. 3. Mariæ. Dier 130. 2. Co. 93. 94. Bingham's caſe, & Northcot's caſe. 10. Co. 80. Leonard Lovey's caſe.

[f] If there be a grandfather, father, and divers ſonnes, and the grandfather in the life of the father convey his lands holden by knights ſervice to any of the ſonnes, this is out of the ſtatute of 32. H. 8. and if the grandfather die, there is neither wardſhip nor primer ſeiſon due (2) for the father hath the immediate care of his ſons. But if the father be dead, then the care of them belongs to the grandfather, and then if the grandfather convey any of the lands to any of the ſonnes, it is within the ſaid ſtatute: [g] and a conveyance to the uſe of any of his collaterall blood, which is not his heire apparant is out of the ſaid ſtatute. And ſo are conveyances either by father or mother to or to the uſe of baſtard children out of the ſtatute; for *qui ex damnato coitu naſcuntur, inter liberos non computentur*. And the preamble ſpeaketh of lawfull generations. If a man ſeiſed of lands holden in ſocage convey them to the uſe of his wife, or of his children, or payment of his debts, and after purchaſe lands holden by knights ſervice *in capite*, and dieth his heire within age, the king ſhall have no part of the ſocage land. [h] But if in that caſe he had by his will in writing deviſed his ſocage lands in fee, and after purchaſed lands holden *in capite*, and dieth, the king ſhall have ſo much of the ſocage lands as will make a full third part of all. The benefits, that grew to the ſubject by thoſe acts of parliament, were, that tenants in fee ſimple might deviſe their lands by their laſt wills in writing in ſuch manner and forme, as by the ſaid acts appeareth; alſo that the father might infeoffe his eldeſt ſonne or other heire lineall or collaterall of his lands holden by knights ſervice, and two parts of the lands ſhall be out of ward. And in * Might's caſe you ſhall reade excellent matter of eſtates made upon colluſion. (3)

[f] 6 Co. 77. Sir George Curſon's caſe. 2. Eliz. Dier. 181. 8. Eliz. Dier. 252.

[g] 10. Co. 83. Leon. Lovey's caſe. 18. Eliz. Dier. 385.

[h] Leon. Lovey's caſe ubi ſupra. Butler & Baker's caſe. 3. Co. 25, &c.

* 8. Co. 163. Might's caſe.

And both the ſtatutes of 32. and 34. H. 8. concerning wills and wardſhips are many wayes prejudiciall to the heires, as taking one example for many. If tenant by knights ſervice

(1) Vid. Trin. 8. Jac. Ley 21. *Allicock's caſe.* Hal. MSS.

(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.

(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*

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

service make a feoffement in fee to the uſe of his wife and her heires, or to the uſe of a younger ſonne and his heires, or wholly for the payment of his debts; in theſe caſes, although nothing at all of the lands ſo holden deſcend to the heire, but he is diſherited of the ſame, yet his body ſhall be in ward. But this for a little taſte may ſuffice. More hereof you may reade in my Reports in the ſeverall caſes noted in the margent.

Leon. Lovey's caſe ubi ſupra, 22. Eliz. Dier. 367.

Pleine age. Full age regularly is one and twenty yeares.

32. E. 3. gard. 61.

Entendement del ley. *Entendement .i. intellectus*, the underſtanding or intelligence of the law. Regularly judges ought to adjudge according to the common intendment of law.

2. H. 5. 4. (6. Co. 20. Ante 73. a. Poſt. 314. b.)

By intendment of law every parſon or rector of a church is ſuppoſed to be reſident on his benefice, unleſſe the contrary be proved.

10. H. 6. S. 21. E. 3. 33. a. 27. H. S. fo. 10.

Of common intendment one part of a mannor ſhall not be of another nature then the reſt.

Sic Robins. in Gawdy. 49.

Of common intendment a will ſhall not be ſuppoſed to be made by colluſion. *In facto quod ſe habet ad bonum et malum, magis de bono, quam de malo lex intendit. Lex intendit vicinum vicini facta ſcire. Nulla impoſſibilia aut inhoneſta ſunt præſumenda, vera autem et honeſta, et poſſibilia. Lex ſemper intendit, quod convenit rationi.* As in this caſe, the gardian ſhall have the cuſtody of the land untill the heire come to his full age of one and twenty yeares; becauſe by intendment of law the heire is not able to doe knights ſervice before that age, which is grounded upon apparant reaſon. There note that the full age of a man or woman to alien, demiſe, let, contract, &c. is one and twenty yeares, the civill law five and twenty yeares, for then the Romanes accounted men to have *plenam maturitatem*, and the Lombards at eighteene yeares.

Vide Britton, fol. 169.

Si le heire ne ſoit marie al temps del mort de tiel aunceſter, &c. *Aunceſter* is derived of the Latine word *anteceſſor*, and in law there is a difference between *anteceſſor* and *prædeceſſor*. For *anteceſſor* is applyed to a naturall perſon, as I. S. *et anteceſſores ſui*; but *prædeceſſor* is applied to a body politique or corporate, as *epiſcopus London. et predeceſſores ſui, rector de D. et prædeceſſores ſui, &c.*

Glanvil. lib. 7. cap. 1. Mirror, cap. 5. Sect 2. Britton. fol. 168. b. 39. H. 6. cap. 2.

Mes ſi tiel tenant devie ſon heire female eſteant del age de 14 ans, &c. And the reaſon as I finde in antiquity, wherefore the law gave the mariage of the heire female if ſhe were within the age of fourteene, and that ſhe ſhould not marry herſelfe, was, *pur ceo que les heires females de noſtre terre ne ſe marieront a nous enemies, et dount il nous coviendroit lour homage prendre, ſi eux ſe puiſſent marier a lour volent.* This is a ſpeciall age for an heire female to be out of ward, if ſhe attaine unto it in the life time of her anceſtor; for at that age ſhe may have a huſband able to doe knights ſervice. A woman hath ſeven ages for ſeverall purpoſes appointed to her by law: as, ſeven yeares for the lord to have aid *pur file marier*; nine yeares to deſerve dower, twelve yeares to conſent to mariage, untill fourteene yeares to be in ward, fourteene yeares to be out ward if ſhe attained thereunto in the life of her anceſtor, ſixteene yeares for to tender her mariage if ſhe were under the age of fourteene at the death of her anceſtor, and one and twenty yeares to alienate her lands goods and chattells.

35. H. 6. 40. Bracton lib. 2. cap. 37. (1. Ro. Ab. 342. 6. Co. 73. b.)

34. E. 1 Stat. 3. Glanvil. lib. 7. cap. 9. Dier 5 Marie 162. Bracton. lib. 2. cap. 37. F. N. B. 202. (1. Ro. Ab. 137. 138.)

A man alſo by the law for ſeverall purpoſes hath divers ages aſſigned unto him, *viz.* twelve yeares to take the oath of allegeance in the torne or leet, fourteene yeares to conſent to mariage, fourteene yeares for the heire in ſocage to chooſe his gardian, and fourteene yeares is alſo accounted his age of diſcretion, fifteene yeares for the lord to have aid *pur faire fitz chivaler*, under one and twenty to be in ward to the lord by knights ſervice, under fourteene to be in ward to gardian in ſocage, fourteene to be out of ward of gardian in ſocage, and one and twenty to be out of ward of gardian in chivalrie and to alien his lands goods and chattels.

35. H. 6. 52. tit. Gard. 71. Stanford. 3. b. F. N. B. 256. 253. 35. H. 6. 40.

Mes ſi tiel heire female ſoit deins lage de 14 ans et nient marie, &c. Le ſeignior avera la gard del terre. But put caſe that the lord cannot have the wardſhip of the land, as if the lord before the age of fourteene granteth over the wardſhip of the body, in this caſe the grantee of the body cannot enjoy the benefit of the two yeares, becauſe he cannot hold over the land, and the lord which hath the wardſhip of the land only ſhould loſe the benefit of the two yeares, becauſe he hath the lands onely and cannot tender any mariage. Therefore in this caſe the heire female ſhall enter into her land at her age of 14 yeares. So if a tenant holdeth of one lord by priority, and of another by poſteriority and dieth, his heire female within the age of 14 yeares, the lord by poſteriority ſhall have the lands but untill her age of 14 yeares, becauſe the mariage belongeth not to him. Alſo if the lord marieth the heire female within the two yeares, her huſband and ſhe ſhall preſently enter into the lands: for, *ceſſante cauſa, ceſſat effectus; et ceſſante ratione legis, ceſſat beneficium legis.*

Britton. fol. 169. 35. H. 6. 52.

If *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.

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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. *Hist. 516. to 565. See also* 2. *Rym. Rep. of Parl. 1. to 40. 2. Inst.* 528.

If the lord tender a convenable mariage to the heire within the two yeares, and ſhe mary elſewhere within thoſe two yeares, the lord ſhall not have the forfeiture of the mariage; for the ſtatute giveth the two yeares onely to make a tender. 35. H. 6. 52. 35. H. 6. tit. Gard. 71. 6. Co. 71. the lord Darcie's caſe.

Et ſi le ſeignior deins les dits 2 ans ne luy tender tiel mariage, &c. donque el al fine del dits 2 ans poet entrer, et ouſte le ſeignior. This is ſo evident, as it needeth no explication.

Mes ſi tiel heire female ſoit marie deins lage de 14 ans en la vie ſon anceſter, et ſon anceſter devie el eſteant deins age de 14 ans, le ſeignior navera la gard forſque de la terre jeſque al age de 14 ans, &c. Note, albeit the heire female be maried at the age of twelve yeares in the life of her anceſtor, (at which age ſhe may conſent to matrimony) to a man of full age, that is able to doe knights ſervice, yet if the anceſtor die before her age of fourteene, the gardian ſhall have the land untill her age of fourteene, becauſe (as hath beene ſaid) that is the time appointed by the common law. And ſo if the heire male be maried in the life of the anceſtor at his age of fourteene yeares, and the anceſtor dieth, the lord ſhall have the land until the ward commeth to the age of one and twenty. F. N. B. 143.

Car ceo eſt hors del caſe del dit ſtatute, intant que le ſeignior ne poet tender mariage a luy que eſt marie.

Natura non facit vacuum, nec lex ſupervacuum. The law doth never enforce a man to doe a vaine thing.

And where the ſaid ſtatute of W. 1. giveth unto the lord the ſaid two yeares, thereby is implyed, that if he dyeth within the two yeares, his executors or adminiſtrators ſhall have the ſame. For when the ſtatute veſteth an intereſt in the lord, the law giveth the ſame to his executors or adminiſtrators. Then put caſe, that a lord hath the wardſhip of the bodie and land of an heire female, and maketh his executor, and dyeth before her age of foureteene yeares, whether the executor ſhall have the two yeares, becauſe the executor is not lord. But I take it, the executor having the wardſhip of the body and land, ſhall in that caſe have the two yeares, for that they were veſted in the lord (1). 27. H. 8. 3. 11. E. 3. Exec. 77. 4. E. 3. 55. 28. Aſſ. p. 7.

It is further provided by the ſaid ſtatute, that if the lord tender a convenable mariage to the heire female within the ſaid two yeares, and the heire female refuſeth, then the lord ſhall hold the land untill her age of one and twenty yeares, and further untill he hath levied the value of her mariage. But if the lord doth not tender a mariage within the two yeares, he ſhall loſe the value of the mariage, and content himſelfe with the two yeares value. 31. Aſſ. p. 26. (Cro. Jam. 151.) 6. Co. 71. L. Darcie's caſe.

Car devant le dit ſtatute, &c. ſicome appiert per le rehearſall et parols de le dit ſtatute. *Nota*, the rehearſall or preamble of the ſtatute is a good meane to finde out the meaning of the ſtatute, and as it were a key to open the underſtanding thereof (2). The tender of a mariage to an heire female before the age of fourteene is void, which muſt be underſtood where the lord may hold the land for the ſaid two yeares, for then the ſtatute appointeth the time of the tender; but where the lord cannot have the two yeares, he may tender a mariage to the heire female at any time after the age of twelve and before fourteene, for ſo he might have done at the common law. 35. H. 6. 52. Gard. 71. 35 H. 6. 52. Gard. 71. 6. Co. 71. lord Darcie's caſe. Britton 169.

Sect. 104.

NOTA, que le pleine age de male et female, ſolonque le common parlance, eſt dit lage de 21 ans. Et lage de diſcretion eſt dit lage de 14 ans; car a tiel age le enfant que eſt marie deins tiel age a un feme, puit agreer

NOTE that the full age of male and female, according to common ſpeech, is ſaid the age of 21 yeares. And the age of diſcretion is called the age of 14 yeares; for at this age, the infant, which is maried within ſuch age to a wo-

OF full age, which is the age of one and twenty, and of the age of diſcretion, which is the age of fourteene (3), ſomewhat hath beene ſpoken before (4). But now to the point of agreement or diſagreement in this caſe. The time of agreement, or diſagreement, when they marrie *infra annos nubiles*, is for the woman at 12 or after, and for the man at fourteene or after, and there need no new mariage, if they ſo agree; but diſagree they can not (Ante 78. b.) 5. Mar. Gard. Br. pl. ultimo. 39. E. 3. 32. 33. Prær. Reg. cap. 6. Tr. 24. Eliz. Rot. 842. in bank le roy Baniſter's caſe.

(1) See 6. Co. 74. a.

(2) Lord Coke's manner of expreſſing himſelf on the operation of the *preamble* in the conſtruction of ſtatutes is very obſervable Inſtead of ſaying *generally*, that the preamble ſhall 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.

(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.

(4) To lord Coke's account of the ſeveral ages of a man and woman, which is given in fol. 78. b. add 1. Hal. Hiſt. Pl. C. 17.

not before the ſaid ages, and then they may diſagree and marie againe to others without any divorce: and if they once after give conſent, they can never diſagree after (1). If a man of the age of fourteen marry a woman of the age of ten, at her age of twelve he may aſwell diſagree, as ſhe may, though he were of the age of conſent; becauſe in contracts of matrimony, either both muſt be bound, or equal election of diſagreement given to both, and ſo *è converſo*, if the woman be of the age of conſent, and the man under (2).

a tiel mariage ou diſagreer.

man, may agree or diſgree to ſuch mariage.

(1. Ro. Abr. 341. 3. Inſt. 89.)

Sect. 105.

13. E. 1. gard. 137. Britton fol. 169. acc.

Glanvil lib. 7. cap. 12.

27. H. 6. gard. 118.

27. H. 6. gard. 118.

27. H. 6. gard. 118.

F. N. B. 243.

7. H. 6. 11.

IT is a maxime in law, *Quod dominus non maritabit minorem in cuſtodia ſua niſi ſemel.* And another ſaith, *Si ſemel legitimè nupt' fuer', &c. poſtmodum non tenebuntur ſub cuſtodia dominorum eſſe.* Albeit this mariage is *de facto*, and not *de jure*, and though the diſagreement diſſolveth it *ab initio*, yet the lord ſhall never have the mariage of him.

And ſo if the gardian marieth his ward to a woman, and after the mariage is diſſolved by reaſon of a precontract (4), yet the gardian ſhall never have the mariage of the ward againe.

But if one raviſheth a ward from the lord and marieth him within the age of conſent, in that caſe if the lord taketh again his ward, and he at the age of conſent diſagreeth to the mariage, the lord ſhall have the mariage of him, for he never had it before.

So likewiſe, if the anceſtor marieth his heire apparant *infra annos nubiles*, and dieth his heire within age, the ward diſagreeth, the gardian ſhall have the wardſhip of him. The ſame law it is in the ſame caſe, if the wife dyeth before the age of conſent, the lord ſhall have the mariage of the heire.

ET ſi la gardien en chivalrie marie un foits le garde deins lage de 14 ans a un feme, et puis ſil al age de 14 ans diſagree a le mariage, il eſt dit per aſcuns, que lenfant neſt pas tenuz per le ley deſtre auterfoits marie per ſon gardeine, pur ceo que le gardeine avoit un foits le mariage de luy, et pur ceo il fuit hors de ſon garde quant al garde de ſon corps. Et quant il avoit un foits le mariage de luy et un foits fuit hors de ſon garde, il navera plus avant le mariage de luy (3).

AND if the gardian in chivalrie doth once marie the ward within his age of 14 yeares to a woman, and if afterward at his age of 14 yeares he diſagree to the mariage, it is ſaid by ſome, that the infant is not tied by the law to be againe maried by his gardian, for that the gardian had once the mariage of him, and becauſe he was once out of his ward as to the ward of his bodie. And when he had once the mariage of him, and he was once out of his wardſhip, he ſhall no more have the mariage of him.

[a] 30. E. 1. gard. 156. 12. E. 1. gard. 138. 21. E 3. 19. 20. E. 3. gard. 41. Temps E. 1. ibidem 128. 35. H. 6. 45. 7. H. 6. 11. Vide Prær. Reg. cap. 6. 13. H. 3. gard. 147. Stanf. prær. 26. 27.
[b] 27. H. 6. gard. 118. F. N. B. 143. m. 19. E. 3. judgement 123. 45. E. 3. 16.
[c] 47. E. 3. tit. Action ſur le ſtatute 38, and the bookes aboveſaid.

And ſo note a diverſity when the ward is maried by the anceſtor or by a raviſher, and when by the gardian himſelfe. [a] For if the anceſtor marie his heire apparent *infra annos nubiles* and dyeth, in this caſe, if the mariage be diſſolved by diſagreement either of the ward or of his wife, the gardian ſhall have the mariage of him. [b] And ſo it is if a raviſhor marrie a ward *infra annos nubiles*, and the mariage is diſſolved, *ut ſupra*, the gardian ſhall have the mariage. If the heire male in ward of the age of tenne yeares be maried without the conſent of the lord, he may tender unto the heire *infra annos nubiles* a mariage, albeit he be ſo maried, and if he refuſe, and agree to the former mariage, the lord ſhall have the forfeiture of his mariage, as it hath beene holden. But otherwiſe it is [c] (ſaith Littleton) where the gardian himſelfe marrieth the ward, *ut ſupra*. And the reaſon of the diverſitie is, becauſe in this caſe the gardian had once the mariage of him, but ſo had not he in either of the other caſes, and it is a maxime in law, *Quod dominus non maritabit pupillum niſi ſemel.*

It

(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. G. 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

It appeareth upon conſideration of all the bookes aforeſaid, that where the anceſtor marrieth his heire apparent within the age of conſent, and dyeth, the infant ſtill being within the age of conſent, the lord may take the infant (if he will) into his poſſeſſion, in reſpect the infant may diſagree to the marriage; and if the infant be deteyned from him, he ſhall recover him in a writ of raviſhment of ward, and thereupon have the infant delivered to him. [d] But if the anceſtor marrieth his heire apparant *infra annos nubiles*, and dieth his heire being *infra annos nubiles*, and after age of conſent the heire agreeth to the marriage, neither the king nor the lord ſhall have the marriage, for now it is a marriage *ab initio*, and there neede no other marriage.

[d] 7. H. 6. 11. adjudged in the booke at large.

Sect. 106.

EN meſme le manner eſt, ſi le gardein luy marie, et la feme devie, eſteant lenfant deins lage de xiiii ans ou xxi.

IN the ſame manner it is, if the gardian marry him, and the wife die, the infant being within the age of 14 yeares or 21.

THIS Littleton addeth, becauſe he ſpake in the caſe next before of a diſagreement by the infant. Here he ſaith, that if the wife dye, the infant being within the age of conſent.

Sect. 107.

ET que tiel enfant poit diſagreer a tiel marriage, quant il vient al age de xiiii ans, il eſt prouve per les parolx del ſtatute de Merton cap. 6. que iſſint dit.

AND that ſuch infant may diſagree to ſuch marriage, when he comes to the age of 14 yeares, it is proved by the words of the ſtatute of Merton cap. 6. which ſaith thus.

De dominis, qui maritaverint illos, quos habent in cuſtodia ſua, villanis, vel aliis, ſicut burgenſibus ubi diſparagentur, ſi talis hæres fuerit infra 14 annos, et talis ætatis quod matrimonio conſentire non poſſit, tunc ſi parentes illi conquerantur, dominus amittat cuſtodiam illam uſque ad ætatem hæredis, et omne commodum, quod inde receptum fuerit, convertatur ad commodum hæredis infra ætatem exiſtentis; ſecundum diſpoſitionem parentum, propter dedecus ei impoſitum. Si autem fuerit *14 ans et ultra*, quod conſentire poſſit et tali matrimonio conſenſerit, nulla ſequantur pœna.

Et iſſint eſt prove per meſme le eſtatute, que nul diſparagement eſt, mes lou celuy, que eſt en garde, eſt marie deins lage de xiiii ans.

And ſo it is proved by the ſame ſtatute, that there is no diſparagement, but where he, which is in ward, is maried within the age of 14 yeares.

LE Eſtatute de Merton. So called becauſe the parliament was holden at Merton.

Et que tiel enfant poit diſagreer, &c. il eſt prove, &c. Note the time of diſagreement is ſet downe by act of parliament, and ſo obſerved by Littleton, who ſeekes no other prooſe therein then by the law of England. Merton ca. 6.

Ubi diſparagentur. Diſparagement, *diſparagatio*, commeth of the verbe *diſparago*, and that of *diſpar*, and *ago*.

Now it is neceſſarie to be underſtood, what diſparagements there be for the which the heire may refuſe.

And of ſuch diſparagements there be foure kindes.

The firſt *propter vitium animi*, as an ideot, *non compos mentis*, a lunatique, &c. (1).

The ſecond *propter vitium ſanguinis*, as firſt a villein. 2. Burgenſis. 3. The ſonne or daughter of a perſon attainted of treaſon or felony, albeit pardoned, for the blood is corrupted. 4. A baſtard. 5. An alien or the childe of an alien. *Burgenſis* is a man of trade, as an haberdaſher, a draper

Bracton lib. 2. fol. 91. Britton fo. 169. Fleta lib. 1. cap. 12. Mirror ca. 2. Sect. 17. Rot Parl. 18. E. 1. fo. 9. The daughter of Nevil married to the ſonne of Tho. of Weyland after his attainder.

(1) The 15. G. 2. c. 30. annuls the marriages of all perſons, who after being found lunaticks on inquiſition by commiſſion under the great ſeal, or after being committed to the care of truſtees by act of parliament, ſhall marry without the chancellor's declaring them of ſane mind. Before this act there could be no doubt as to the validity of the marriages of lunaticks, where it could be clearly proved, that they were married in their lucid intervals. One ſhould think, that there could be as little room to doubt their incapacity of contracting marriage whilſt in an actual ſtate of inſanity, if our books were not remarkably ſilent on the ſubject, and it was not alſo ſaid, that by our law an ideot *a nativitate*, in whom the general incapacity of making contracts appears to form as ſtrong an objection as occurs in the caſe of a madman, may conſent to marriage. This doctrine, as to ideots, however ſtrange it may appear, is mentioned as a point adjudged in one caſe, and ſeems confirmed by allowing dower to the wife of an ideot, and by queſtioning the right of an ideot's huſband to curteſy merely, whereon account of an office finding the wife's ideotcy and the deſcent of land to her after the marriage it is apprehended, that there is a concourſe of titles between the king and the huſband. See 1. Ro. Abr. 357. and ante fol. 30. b and note 2. there. By the Roman law, perſons continually mad, lunaticks except during the intervals of ſanity, and ideots were all equally incapable of marriage. See Brouwer. de jur. connubior. lib. 2. cap. 4.

going into Scotland to be married there and returning into England immediately afterwards. Indeed the validity of ſuch mar-

draper or the like, (and this agreeth with the civill law, *Patricii cum plebeiis matrimonia ne contrahant,*) whereof Glanvill ſpeaketh thus, *Si vero fuerit filius burgenſis, ætatem habere tunc intelligitur, quando diſcrete ſciverit denarios numerare, et pannos ulnare et alia paterna negotia ſimiliter exercere.*

The third, *Propter vitium corporis*, as firſt *de membris*, having but one hand, one foot; one eye, &c. Secondly, deformitie, as to looke a ſquint, a creeple, halt, lame, decrepit, crooked, &c. Thirdly, privation, as blind, deafe, dumbe, &c. Fourthly, diſeaſe horrible, as leproſie, palſie, dropſie, or ſuch like diſeaſes. Fiftly, great and continuall infirmitie, as a conſumption and ſuch like. Sixtly, impotency to have children in reſpect either of age paſt childreñ, or ſo tender yeares as there is too great diſparitie, or for naturall diſabilitie or impediment or ſuch like. Seventhly, defloured of her virginity.

The fourth kinde of diſparagement was *propter jacturam privilegii, &c.* as to marry the heire to a widow, whereby he ſhould by reaſon of the bigamie have loſt the benefit of his cleargie, whereby he might ſave his life; but now the exception of bigamie in that caſe is ouſted by the ſtatute (1). And Littleton ſaith, [*d*] that there be many other diſparagements which are not ſpecified in the ſaid ſtatute, for thoſe two mentioned are put but for examples. In a word, it muſt be *competens maritagium abſque diſparagatione.*

1. E. 6. cap. 12.
[*d*] Vide Sect. 109. F. N. B. 149.

Si talis heres fuerit infra 14 annos, et talis ætatis quod matrimonio conſentire non poſſit, &c. Note albeit the ward, where he is diſparaged, may diſagree at his age of fourteene yeares, yet the law doth ſo abhorre the odious dealing of the gardian, to whom the cuſtody of the heire is committed, and his horrible profanation of honourable marriage, the only ligament of mens inheritances, as it inflicteth a great puniſhment upon the lord in this caſe, albeit the marriage be not perfect, but avoydable by diſagreement.

Tunc ſi parentes illi conquerantur. Littleton in the next ſection expoundeth theſe words in this manner, *viz. Si parentes conquerantur, i. e. Si parentes inter eos lamententur, quæ eſt tant a dire, que ſi les coſens de tiel infant ont cauſe de faire lamentation ou complaint pur le hont fait lour coſent iſſint diſparage, quel eſt in manner un hont a eux. Parens eſt nomen generale ad omne genus cognationis.* See more of this in the next ſection.

Dominus amittat cuſtodiam illam uſque ad ætatem hæredis et omne commodum quod inde receptum fuerit convertatur ad commodum hæredis, &c. Here followeth the penaltie.

Firſt, *amittat cuſtodiam*, that is, the whole benefit of the wardſhip. But in this caſe if the gardian hath granted the wardſhip of the land to another *bona fide*, and after, the heire is diſparaged, the grantee ſhall not forfeit his intereſt, for the ſtatute is *(dominus amittat cuſtodiam.)*

Secondly, *Et omne commodum, quod inde receptum fuerit, convertatur ad commodum hæredis ſecundum diſpoſitionem parentum.* Theſe words are expounded by Littleton which needeth no further explanation. Now where readers upon this ſtatute have put a caſe, that if the tenant hath iſſue a daughter, his wife *enſeint* with a ſonne and dieth, the lord doth diſparage the daughter before the age of twelve yeares, the ſonne is borne, the daughter diſagrees, the ſonne dieth, the daughter within the age of fourteene, ſhe ſhall be in ward againe. This caſe is not warranted by this ſtatute, for this ſtatute extends not to the heires female.

Vide the ſecond part of the Inſtitutes. Merton cap. 5. 6. 35. H. 6. 53. (9. Co. 127.)

If the tenant make a leaſe to A. for life, the remainder to B. in fee, the tenant for life ſurrenders upon condition, B. dieth his heire within age, the lord diſparages the heire, tenant for life entreth for the condition broken and dieth, the heire ſhall be out of ward, for that he claimeth as heire to one man. But if after the diſparagement lands deſcend from another anceſtor to the ward ſo diſparaged, he ſhall be in ward for thoſe lands.

If two joyntenants be of a ward, and the one diſparageth the heire, both ſhall loſe the wardſhip, for the words be *et omne commodum, &c.*

Si autem fuerit 14 annorum et ultra, &c. nulla ſequatur pœna. By which it appeareth (as Littleton obſerveth) that there is no diſparagement, but where the ward is married within the age of fourteene.

Britton. fol. 169. acc.

Sect. 108.

9. H. 3. (2. Inſt. 1.)

LEſtatute de magna charta. Though it be in forme of a

NOTA que il ſoloit eſtre queſtion, coment ceux

NOTE, it hath beene a queſtion, how theſe words ſhall be

pa-

(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

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 marriages of minors without the conſent of guardians was evaded by running away into another province having a different law, *hanc rem manifeſto pertinere ad everſionem Juris noſtri, ac ideo non magiſtratus hæc obligatos è jure gentium ejuſmodi nuptias agnoſcere et ratas habere. Multoque magis ſtatuendum*

parolx ſerront entendes, Si parentes conquerantur,&c. *Et il ſemble a aſcuns, que conſiderant leſtatute de* Magna Charta, *que voit*, quod hæredes maritentur abſque diſparagatione, &c. *ſur quel cel ſtatute de Merton ſur tiel point eſt foundue* (1), *que nul action poit eſtre pris ſur cel ſtatute* (2), *entant que il ne fuit unques view ne oye, que aſcun action fuit port ſur cel ſtatute de Merton pur cel diſparagement envers le gardeine pur ceſt matter avandit*, (3) *&c. et ſi aſcun action puiſſoit eſtre priſe ſur tiel matter, il ſerra entendue aſcun foits* (4) *eſtre miſe en ure.* Et nota (5) *que ceux parolx ſerront entendes* (6), Si parentes conquerantur, id eſt, ſi parentes inter eos lamententur, *que* (7) *eſt taunt adire, que ſi les couſins de tiel enfant ont cauſe de faire lamentation ou complaint enter eux, pur le hont fait a lour couſin iſſint diſparage, quel eſt en maner un hont a eux, donques puit le prochein couſine, a que* underſtood, (*Si parentes conquerantur.*) And it ſeemeth to ſome, who conſidering the ſtatute of *Magna Charta*, which willeth, *quod hæredes maritentur abſque diſparagatione, &c.* upon which this ſtatute of Merton upon this point is founded, that no action can be brought upon this ſtatute, inſomuch as it was never ſeene or heard, that any action was brought upon the ſtatute of Merton for this diſparagement againſt the gardian for the matter aforeſaid, &c. and if any action might have beene brought for this matter, it ſhall be intended that at ſome time it would have beene put in ure. And note that theſe words ſhall be underſtood thus, *Si parentes conquerantur, id eſt, ſi parentes inter eos lamententur*, which is as much as to ſay, as if the couſins of ſuch infant have cauſe to make lamentation or complaint amongſt themſelves, for the ſhame done to their couſin ſo diſparaged, which in manner is a ſhame to them, then may the next couſin to whom the

charter, yet being granted by aſſent and authoritie of parliament Littleton here ſaith it is a ſtatute. Vide 8. Co. the Prince's caſe.

This parliamentarie charter hath divers appellations in law. Here it is called *Magna Charta*, not for the length or largeneſſe of it, (for it is but ſhort in reſpect of the charters granted of private things to private perſons now adayes being *elephantinæ chartæ*,) but it is called the great charter in reſpect of the great weightineſſe and weightie greatneſſe of the matter contained in it in few words, being the fountaine of all the fundamentall lawes of the realme; and therefore it may truly be ſaid of it, that it is *magnum in parvo*. It is in our bookes called *Charta libertatum*, & *communis libertas Angliæ*, or *Libertates Angliæ*, *Charta de libertatibus*, *Magna Charta*, &c. And well may the lawes of England be called *libertates*, *quia liberos faciunt*. *Magna fuit quondam magnæ reverentia chartæ.* Bracton, 414. & 291. Fleta, lib. 2. cap. 45. & lib. 3. cap. 3. Mirror, cap. 2. § 18. Britton, fol. 177. b.

This ſtatute of *Magna Charta* is but a confirmation or reſtitution of the common law, as in the ſtatute called *confirmatio chartarum anno* 25. *E.* 1. it appeareth by the opinion of all the juſtices; and in 5. H. 3. tit. Mord. 53. *Magna Charta* is there vouched; for there it appeareth, that King John had granted the like charter of renovation of the ancient lawes. 25. E. 1. 5. H. 3. Mord. 53. Matth. Pa. 2, 5, 276, 248.

This ſtatute of *Magna Charta* hath beene confirmed above 30 times, and commanded to be put in execution. By the ſtatute of 25. E. 1. cap. 2. judgements given againſt any points of the charters of *Magna Charta*, or *Charta de Foreſta*, are adjudged void. And by the ſtatute of 42. E. 3. c. 1. if any ſtatute be made againſt either of theſe charters it ſhall be void. 25. E. 1. ca. 2. 42. E. 3. ca. 1.

Sur leſtatute de Magna Charta leſtatute de Merton eſt foundue ſur tiel

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. Bingh. Antiq. Chriſt. Ch. b. 4. c. 5. Tayl. Elem. Civ. L. 295. and the word *Bigamus* in the index to the Corp. Jur. Canon. ed. Pithœor. However the excluſion of bigamiſts from the benefit of clergy was not entirely accompliſhed till the council of Lyons ended the doubts, which before prevailed, by poſitively declaring bigamiſts *omni privilegio clericali 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. *See also 1. Hawk. Pleas of the Crown 464. Why my note there.*

(1) *Que nul action poit eſtre pris ſur cel ſtatute*, not in L. & M.—(2) *Come ſemble et.* L. and M.—(3) *Pur ceſt matter avant dit* not in L. & M.—(4) *Per comen preſumption devaunt ceux heures* inſtead of *entendue aſcun foits* in L. & M.—(5) *Et nota* not in L. & M.—(6) *En tiel maner* in L. & M.—(7) *Ou* inſtead of *que* in L. & M.

eſt, eos contra jus gentium facere videri, qui civibus alieni imperii ſua facilitate, jus patrium legibus contrarium, ſcientes volentes impertiuntur. See the digreſſion *de conflictu legum diverſarum in diverſis imperiis* in Huber. Prælect. Jur. Rom. page 538. In this digreſ-

lenheritage ne puit discender, enter et ouster le gardeine en chivalrie. Et sil ne voile, un auter cousin del enfant poit ceo faire, et les issues et profits prender al use del enfant, et de ceo render accompt al enfant, quant il vient a son plein age. Ou auterment lenfant deins age poit enter luy mesme, et ouster le gardein,&c. Sed quære de hoc.

inheritance cannot descend, enter and ouste the gardein in chivalrie. And if he will not, another cousin of the infant may doe this, and take the issues and profits to the use of the infant, and of this to render an account to the infant when he comes to his full age. Or otherwise the infant within age may enter himselfe and ouste the gardein, &c. *Sed quære de hoc.*

tiel point, viz. Quod hæredes maritentur absque disparagatione (1).

Foundue. So as *Magna Charta* is the foundation of other acts of parliament. This act extendeth as well to females as to males.

Nul action poet estre prise sur cel statute, intant que il ne unques fuit view ou oye,&c. Et si ascun action puissoit estre prise sur cest matter, il serra intend a ascun foits estre mise in ure.

Vide Petitiones coram domino rege in Parliamento, fol. 3. 18. E. 1.

39. H. 6. 39. per Ashton. 6. Eliz. Dier, 229. (Ante 11. a.)

23. Eliz. Dier. Nullum breve de errore de judicio in 5. port. quia nullum breve repetitur. 3. E. 3. 50. 11. H. 4. 7. and 38.

Hereby it appeareth how safe it is to be guided by judicial presidents, the rule being good, *Periculosum existimo, quod bonorum virorum non comprobatur exemplo.* And as usage is a good interpreter of lawes, so non usage where there is no example is a great intendment, that the law will not beare it; for saith Littleton, if any action might have beene grounded upon such matter, it shall be intended, that sometime it should have beene put in ure (2). Not that an act of parliament by non user can be antiquated or lose his force, but that it may be expounded or declared how the act is to be understood.

Vide Lestatute de Marlebridge, cap. 17. In custodia parentum.

Si parentes conquerantur. Of this sufficient hath beene said before.

Si les cousins. Here Littleton expoundeth parents to be his cousins, under which name of cousins Littleton includeth uncles and other cousins, who when the father is dead are *in loco parentum.*

Ont cause a faire lamentation, &c. Note if they have cause to make lamentation, it sufficeth though they never complaine.

Pur le hont fait a lour cousin. For when their cousin is disparaged in his mariage, it is not only a shame and infamie to the heire, but in him to all his bloud and kindred.

Donques poit le procheine cousin, a que le enheritance ne poit discender, enter et ouster le gardein in chivalrie.

This is worthy the observation, for the words of the statute are generall, *Secundum dispositionem parentum,* and the construction thereof shall be according to the reason of the common law, for the next cousin, to whom the inheritance cannot descend, shall enter and ouste the gardian, and shall be in place of a gardian, as it is in case of a gardian in socage.

Et sil ne voile, un auter cousin del enfant poet ceo faire. Still pursuing the reason of the common law in case of gardian in socage.

Et les issues et profits prender al use del enfant, &c. This is so evident as it needeth no explication.

Ou auterment lenfant deins age poit enter luy mesme et ouste le gardein. If none of the cousins aforesaid will enter, then the heire himself may enter. In all which the reason of the common law is pursued. But what if the heire be disparaged, and the next of kin doth enter, and when the heire commeth to 14 he agreeth to the marriage. Yet shall not this give any advantage to the lord, for that he had lost the wardship before.

Sect.

(1) See 9. Hen. 3. c. 6.

(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 an 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. & 957. It might also have been observed, that Littleton is only stating the opinion of others, and that he concludes with a *quære*; and further, that in the case put by him the question was merely, whether the proper remedy was by *action* or by *entry*. However it must be confessed, that the novelty of an action may frequently be fairly urged as a strong *presumptive* argument against its lying; more particularly, where the *right*, which is the foundation of the action, is admitted, and the *mode of relief* is the only thing controverted, as was the case in Ashby and White.

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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. G. 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.—(2) See acc. Swinb. on Spousals 34. But though the rule, which where one of the parties

See further as to the lex loci, the case of [illegible] v. Kinloch in Dom. Proc. from Scotland in [illegible] 204. [illegible] in Chanc. 287. 577. 1. P. Wms 431. Select Cas. in Chanc. 69. Vin. Abr. tit. Contract [illegible] 8. 22. 2. Ves. 301. ~~[illegible]~~ 556. Mos. 2. [illegible] 131. & the case of Sir [illegible] in Dom. Proc. March 1771. Hamilton & East Ind. Comp. of Holland Dom. Proc. 1732. Fitzgibb. 203. Dial. on Laws & Constit. of Engl. v. 3. p. 317. v. 4. p. 199. 260. 4. Term Rep. [illegible] Martin Dom. Proc. 17 June 1795. Bruce v. Bruce Dom. Proc. April 1790. Somerville v. Lord Somerville 5. Ves. jun. 750. Sheddon v. Patrick &c from Ct. of Sessn. in Scotl. Dom. Proc. Feb. 1808.

Sect. 109.

Of this ſufficient hath been ſaid before.

ITEM mults auters divers diſparagements y ſont, que ne ſont ſpecifies en meſme leſtatute. Come ſi le heire, que eſt en gard, eſt mary a un, que nad forſque un pee, ou forſque un maine, ou que eſt deforme, decrepite, ou ayant horrible diſeaſe, ou graund et continual infirmitie; et (ſi ſoit heire male), ſi ſoit marry a feme, que eſt paſſe l'age denfanter. Et mults auters cauſes de diſparagements ſont; ſed de illis quære, *car il eſt bon matter dapprender.*

ALſo there be many and divers other diſparagements, which are not ſpecified in the ſame ſtatute. As if the heire which is in ward be married to one which hath but one foot, or but one hand, or which is deformed, decrepit, or having ſome horrible diſeaſe, or great and continuall infirmitie. And (if he be an heire male) if he be married to a woman paſt the age of childe-bearing. And there be other cauſes of diſparagement; but inquire of them, for it is a good matter to underſtand. (Ante 80. a.)

Sect. 110.

ET des heires males, que ſont deins lage de 21 ans apres le mort lour anceſter nient marries, en tiel cas le ſeignior avera le mariage de tiel heire, et avera temps et ſpace de tender a luy convenable mariage ſans diſparagement deins meme le temps de 21 ans. Et eſt aſcavoir, que lheire en tiel caſe poit eſlier ſil voit eſtre marry ou non; mes ſi le ſeignior, que eſt appel gardein en chivalry a tiel heire, tender convenable mariage deins lage de 21 ans ſans diſparagement, et lheire ceo refuſe, et ne ſoy marie deyns le dit age,

AND of heires males, which be within the age of 21 yeares after the deceaſe of their anceſtor and not married, in this caſe the lord ſhall have the mariage of ſuch heire, and he ſhall have time and ſpace to tender to him covenable mariage without diſparagement within the ſaid time of 21 yeares. And it is to be underſtood, that the heire in this caſe may chuſe whether he will be married or no; but if the lord which is called guardian in chivalry tenders to ſuch heire covenable mariage within the age of 21 yeares without diſpa-

DE tender a luy convenable marriage, &c. But it is in the election of the lord, whether for the ſingle value the lord will tender a mariage or no, for he ſhall have the ſingle value without any tender (1). 6. Co. 70. Lo. Darcie's caſe Vid. Britton, fol. 169. (5. Co. 127.)

And of this there needeth no other explication. The value of the mariage of ſuch an heire is according to the valuation by lawfull triall, or as much as another had before offered to give for the ſame without fraud and covyn. Merton, cap. 6. 18. E. 3. 18.

Le heire en tiel caſe poit eſlier ſil voit eſtre marrie, ou non, &c. And ſo on the other ſide, though there be a tender made of a covenable mariage without diſparagement, yet the heire may refuſe, for in everie mariage there

(1) This point, which before lord Coke's time appears to have been doubtful, was adjudged in the caſe of Palmer and Wilder, and again in lord Darcie's caſe. See the former caſe in 5. Co. 126. b. and the latter in 6. Co. 70. b.

parties is under the age of diſcretion makes the contract of marriage equally voidable by *both*, is admitted with reſpect to *actual* marriages, yet the civilians and canoniſts are not agreed, that it holds as to contracts of marriage *per verba de præſenti* without ſolemnization. Some think, that ſuch contracts have the full effect of a contract *per verba de præſenti* on the perſon who is of the age of diſcretion, and that it is only in the power of the *younger* party to aſſent or diſſent on attaining the age of diſcretion. But according to others, *both* parties are in the ſame ſituation, and as it can only have the force of a contract *per verba de futuro* as to the younger party unleſs it is ratified at the age of diſcretion, ſo in the mean time it ſhall not have a greater effect on the *elder*, and conſequently unleſs the contract is ratified by *both* when the *younger* party attains the age of diſcretion, it will not avoid the ſubſequent marriage of *either*. Swinburne adopts this laſt opinion. See Swinb. on Spouſ. 36. But this doctrine

there muſt be a free conſent.

Si tiel heire. That is, if ſuch an heire to whom a tender hath been made by the lord, and by whom a refuſall hath beene made. If ſuch an heire afterwards marieth another within age, he ſhall forfeit double the value; but if he before any tender marieth himſelfe within age, he ſhall pay but the ſingle value of the mariage.

Neither the ſingle value, nor the double value ſhall be recovered againſt the heire, but after his full age; but for both theſe the lord hath a double remedie, viz. an action as is aforeſaid, or the lord may retaine the land after full age for his ſatisfaction of both, with this difference, that in the caſe of the ſingle value the taking of the profits ſhall not be accounted parcell of the value, but as a gage or pledge till the heire do ſatisfie him of the ſingle value; but in caſe of the double value, the perception of the profits ſhall be taken in ſatisfaction of the double value, for the ſtatute of Merton, which giveth the forfeiture, ſaith, *Dominus teneat terram, &c. per tantum tempus qod inde percipere poſſit duplicem valorem maritagii:* which words (*quod inde, &c.*) proveth that the taking of the profits ſhall go in ſatisfaction: but in caſe of the ſingle value, until the heire doth ſatisfie the lord of the ſame.

donques le gardeine avera le value del mariage del tiel heire male. Mes ſi tiel heire luy meme marie dems lage de 21 ans encounter la volunt le gardeine en chivalrie, donquez le gardein avera le double value del mariage per force de leſtatute de Merton avantdit, come en meme leſtatute eſt compriſe pluis a pleine.

ragement, and the heire refuſeth this, and doth not marrie himſelfe within the ſaid age, then the gardein ſhall have the value of the mariage of ſuch heire male. But if ſuch heire marieth himſelf within the age of 21 yeares againſt the will of the gardein in chivalrie, then the gardein ſhall have the double value of the marriage by force of the ſtatute of Merton aforeſaid, as in the ſame ſtatute is more fully at large compriſed.

Stat. de Merton. cap. 6. 2. E. 2. acc. ſur leſtat. 43. 3. E. 2. ibid. 27. 16. E. 3. ibid. 14. 18. E. 3. 18. Temps E. 1. acc. ſur. leſtat. 43. E. 3. 21. 27. H 8. 4. Statut. de Merton, cap. 7. 35. H. 6. tit. gard. 71. 6. Co. 71. Lord Darcie's caſe.

No forfeiture of marriage is given, by the ſaid ſtatute of Merton, of an heire female, as appeareth by the ſaid act; neither at the common law could the lord have holden the land of the heire female after fourteene yeares for the value.

Sect. 111.

4. Co. 88. in Lutterel's caſe. 6. Co. 20. a. Gregorie's caſe. 19. R. 2. Gard. 195.

PER caſtle gard. wardum caſtri, ſeu caſtle-gardum, ſeu caſtri-gardum. He that holdeth by caſtle-gard, holdeth by knights ſervice, but not by eſcuage, for eſcuage is due when the king maketh a voyage royall out of this realme (as hath beene ſaid) and the tenant maketh default, but caſtle-gard is to be done within the realme, and without any voyage royall.

Alſo a certaine tearme is appointed for the ſervice of the tenant that holdeth by eſcuage, but no certaine tearme by law for him that holdeth by caſtle-gard. Vide in the title of Grand Serjeantie. Sect. Hereof come

ITEM divers tenants teignont de lour ſeigniors per ſervice de chivaler, et uncore ils ne teignont per eſcuage, ne pateront eſcuage; come ceux, que teignont de lour ſeigniors per caſtle garde, ceſtaſcavoir, a garder un tower del caſtle lour ſeignior, ou un huis ou un auter lieu del caſtle, per reaſonable garniſhment, quant lour ſeigni-

ALSO divers tenants hold of their lords by knights ſervice, and yet they hold not by eſcuage, neither ſhall they pay eſcuage; as they which hold of their lords by caſtle-ward, that is to ſay, to ward a tower of the caſtle of their lord, or a doore or ſome other place of the caſtle, upon reaſonable warning, when their lords heare that the enemics will come,

ors

doctrine of reciprocity where one of the parties is an infant or under the age of diſcretion, however true it may be in its application to actual marriages or to contracts of marriage *per verba de præſenti*, muſt not be conſidered as extending to other contracts with an infant, not even contracts of marriage *per verba de futuro*; for in them the perſon of full age may, it is ſaid, be bound at *all* events by our law, and yet as to the infant the contract may be *voidable*. Accordingly in the caſe of *Holt* and *Ward* the court held, that if a man of full age enters into a contract of marriage with a woman of 15 *per verba de futuro*, and afterwards marries another woman, an action on the caſe lies againſt him for breach of his promiſe. See 2. Stra. 850. & 937. & S. C. in Fitz-Gibb. 175. 275. 1. Barnad. 208. 247. 333. 2. Barnad. 12. 173. 176. As to the effect of the 26. of G. 2. c. 33. on *precontracts* of marriage, ſee note 4.—(3) In L. and M. the words *quære de hoc* are added.—(4) It ſeems, that *precontract* is now no longer a cauſe for diſſolving a marriage in England; for it appears *impliedly* taken away by 26. G. 2. c. 33. which enacts, that there ſhall be no ſuit in the eccleſiaſtical court for compelling the celebration of marriage by reaſon of any contract, whether *per verba de præſenti* or *per verba de futuro*, entered into after the 25th of March 1754. It is obſervable, that the ſtatute mentions contracts of marriage by *future* as well as thoſe by *preſent* words; but notwithſtanding this, it is far from being clear, that matrimony could ever be compelled in the eccleſiaſtical court on a contract of the former kind otherwiſe than by *admonition*, and probably it was included in the ſtatute merely from caution. See 2. Stra. 938.

ors oyont, qüe enemies voylent vener, ou ſont venus en Engleterre. Et en pluſors auters caſes home poit tener per ſervice de chevaler, et uncore il ne tient per eſcuage, ne payera eſcuage, ſicome ſèrra dit en le tenure per graund ſerjeantie. Mes en touts caſes ou home tient per ſervice de chivaler, tiel ſervice trait all ſeignior gard et mariage.

or are come in England. And in many other caſes a man may hold by knights ſervice, and yet he holdeth not by eſcuage, nor ſhall pay eſcuage, as ſhall be ſaid in the tenure by grand ſerjeantie. But in all caſes where a man holds by knights ſervice, this ſervice draweth to the lord ward and mariage.

caſtellani, or *conſtabularii caſtri*, for keepers or conſtables of a caſtle.

A garder un tower del caſtle, &c. A tower, or a doore, or a bridge, or a ſconce, or ſome other certaine part of the caſtle; for the tenure muſt be certaine. And this may be done by the tenant himſelfe or his deputie.

Vide Mag. Chart. cap. 19. 20. W. 1. cap. 7. Bract. lib. 5. fol. 363. Fleta lib. 2. cap. 43.

Magna Chart. cap. 20.

Del ſeignior. For it cannot be of a caſtle of another.

Lord and tenant by caſtle-gard, the lord granteth over his ſeigniorie to another, [a] the caſtle-gard is gone becauſe the grantee hath not the caſtle. [b] For the ſame reaſon it is, that if one holdeth of me, as of my manor of D. by fealtie and ſuit of court, if I grant over the ſervices of this tenant, the ſuit is gone, becauſe the grantee hath not the manor. [c] But if the caſtle be wholly ruinated, *Si caſtrum ſit penitus dirutum*, yet the tenure remaineth by knights ſervice, and it goeth in benefit of the tenant, as to the garding of the caſtle, untill it be reedified. But ward and mariage belongeth to the lord in the meane time. For Littleton in the end of this ſection putteth it for a generall rule in all caſes where a man holdeth by knights ſervice, it draweth ward and mariage.

(2. Ro. Ab. 513.)
[a] Temps E. 2. tit. Aſſ. 399. 31. E. 1. tit. Aſſ. 441.
[b] 17. E. 3. 65. 72. 4. E. 3. 42.
[c] 4. Co. 88. Luttrel's caſe. 3. H. 8. Bendloes Capel's caſe. 4. E. 3. 55.

If the tenant make default in garding of the caſtle, the lord may diſtreine for it, and recover ſatisfaction in dammages.

Per reaſonable garniſhment. This warning muſt be given by the lord or ſome other for him, and the tenant need not to ſtirre untill he have ſuch warning.

Enemies. Which is to be underſtood of any manner of enemies whatſoever. And though Littleton ſpeakes of enemies, yet it ſeemeth that to keep a caſtle in time of inſurrection and rebellion (albeit in proprietie of ſpeech rebels are no enemies) is a tenure by knights ſervice. Vide Hill. 8. E. 1. Midd. Rott. 86.

Voylent vener. For preparation is to be made upon warning before the enemie be come indeed into England. This appeareth to be in time of hoſtilitie and warre, or for preparation therefore. But a tenure to keepe a caſtle in time of peace only is no knights ſervice.

If the tenant by caſtle-gard doe ſerve the king in his warre, he ſhall be diſcharged againſt the lord, according to the quantitie of the time that he was in the king's hoſt.

(2. Ro. Ab. 505.)

Fleta ſpeaketh of an old word called *wardwite*, and (ſaith he) *Significat quietanciam miſericordiæ, in caſu quo non invenerit quis hominem ad wardam faciendam in caſtro.*

Fleta lib. 1. cap. 42.

Sect. 112.

ET ſi un tenant, que tient de ſon ſeignior per ſervice de entier fee de chivaler, moruſt, ſon heire donquez eſteant deplein age ſ. de 21 ans,

AND if a tenant, which holdeth of his lord by the ſervice of a whole knight's fee, dieth, his heire then being of full age ſ. of 21 yeares, then

Relieſe, relevium. This word is derived from the originall before (1).

Nota, Relieſe [a] is no ſervice, but an improvement of the ſervice, or an incident to the ſervice (2), for the which the lord may diſtreine (3), but cannot have an action of debt (4), but

Vide Sect. 103. Knight's Fee. 97. 76. a. & 69. a.

[a] Temps E. 1. Relieſe. 13. 41. E. 3. 22. 4. E. 2. Avowrie. 210. 7. H. 6. 13. 22. H. 8. Rot. 528. 34. E. 1. Avowrie 233. (3. Co. 66. Ante 47. b.)

(1) See ante 76. a. Lord Coke there cites a paſſage from Domeſday book, in which reliefs are mentioned; and from this early uſe of the word, and from the terms of a law of Edward the Confeſſor and of two laws of Canute, ſome have inferred, that reliefs were known to the Saxons. This circumſtance is much relied on by thoſe, who inſiſt, that feudal tenures were eſtabliſhed in England before the Conqueſt; and therefore Sir Henry Spelman, who ſupports the contrary opinion, is very full in his obſervation on this part of the ſubject. The ſum of what he advances is, that Domeſday book at the utmoſt only proves the uſe of reliefs after the Conqueſt, which is not denied; that the ſuppoſed law of Edward the Confeſſor is either not genuine or belongs to William Rufus; that *heriot*, which is the word uſed in the original language of the laws of Canute, is improperly tranſlated *relief*; and laſtly, that however it might ſuit with the policy of the Normans to aſſimilate *reliefs* to *heriots*, there were the moſt eſſential differences between the two. According to Sir Henry Spelman, the heriot was paid out of the *goods* of the *deceaſed* poſſeſſor of the land, the relief by the *heir*, out of *his own purſe*; the heriots at *all* events, the relief *only* in caſe of taking up the lands in ſucceſſion. Theſe two of the differences taken by Spelman are particularly ſtated here; becauſe they ap-

but his executors or adminiſtrators may have an action of debt, and cannot diſtraine (1).

[b] Stat. de 1. E. 2 de militibus. Vide 9. Co. 124. Anth. Lowe's caſe. (2. Inſt. 596. Ante 69. b.)

And it [b] is to be underſtood, that *feodum militis*, a knight's fee, conſiſteth of twentie pound land (2), and he payeth for his reliefe for a whole knight's fee the fourth part of his fee, viz. five pound, and ſo according to the rate.

Baronia, a baronie, or a baron's fee, conſiſteth of thirteene knights fees and the third part of a knights fee (3), which amounteth to foure hundred markes *per annum*; and the baron for an entire baronie payeth for his reliefe an hundred markes, which is the fourth part of the value of his baronie.

Comitatus, an earledome, or an earle's fee conſiſteth of a baronie, and the third part of a baronie, which includeth twenty knights fees amounting to foure hundred pound land *per annum*, and he payeth for his reliefe for an entire earledome the fourth part of his revenue, and that is an hundred pound. All which appeareth by the ſtatute of Magna Charta cap. 2. made in the ninth yeare of Henrie the third, at which time there was neither duke, marqueſſe nor viſcount in England, as before is ſaid. But there be preſidents in the exchequer, that a dukedome conſiſting of two earledomes, viz. eight hundred pound land by the yeare, payeth two hundred pound, and a marqueſſe conſiſting of two baronies, viz. eight hundred markes land *per annum*, and of an earledome and a halfe, payeth two hundred markes for his reliefe. What the viſcount ſhould pay in certaine I have not heard. Before the making of the ſtatute of Magna Charta the king had *rationabile relevium* of noblemen, and it was not reduced to any certaintie (4), yet ought it to have been reaſonable and not exceſſive.

(2. Ro. Ab. 516.)

Glanvil, lib. 9. cap. 4. 6. Bracton, lib. 2. fol. 83. Britton, fol. 178. Ockam 42. F. N. B. 83. 256. Fleta lib. 3. cap. 17. Magna Charta, cap. 2.

I have ſeene the record of a charter made in 20. H. 6. to Henrie Beauchampe earle of Warwicke, whereby he was created king of the Ile of Wight, to him and the heires males of his bodie. His reliefe was incertaine, and not limited by the ſtatute of Magna Charta.

Vide Bracton, fol. 84. 14. H. 4. in recordo longo. 10. H. 7. 19. 20. E. 3 Aſſ. 122. tit. Avowrie. 126. 18. Aſſ. pl. ultimo. 22. E. 3. 8.

It is to be obſerved, that the words of the ſtatute of Magna Charta be *Hæres comitis de comitatu integro et hæres baronis de baronia integra, &c.* Now what an entire earledome and an entire baronie is, hath beene declared before.

It is alſo to be obſerved, that at and before the ſtatute of Magna Charta all earledomes and baronies were derived from the crowne, and were holden of the king *in capite*, and the king would not ſuffer them to be divided, or ſevered. And ſuch entire earledomes, and entire baronies are within the ſtatute, but at this day earles and barons are without ſuch earldomes and baronies of the kings gift in chiefe. For at the creation of an earle, he hath ſometimes an annuitie granted unto him (5), and ſometimes nothing; ſo as ſuch earles and barons ſo created are cleerely out of the ſtatute of Magna Charta, and are to pay ſuch reliefes as other men that hold of the king *in capite*. For as the heire of a knight ſhall not pay reliefe, unleſſe he hath a knight's fee, &c. ſo neither the earle nor baron ſhall pay any reliefe by this ſtatute, unleſſe he hath an earledome, &c. or baronie, &c.

16. E. 3. Eſchange 2. 46. E. 3. Forfeiture 18.

Son heire de pleine age ſ. de 21 ans. And yet in ſome caſe the heire ſhall pay reliefe when he was within age at the time of the death of his anceſtor. As if a man holdeth lands of the king by knights ſervice *in capite*, and of a common perſon other lands by knights ſervice, and dieth, his heire being within age, the king hath all in ward by his prerogative untill the full age of the heire. In this caſe the heire ſhall pay reliefe to the other lord, for that the king had the wardſhip of bodie and lands. And the lord upon everie deſcent ought to have either wardſhip or reliefe.

24. E. 3. 24. 26. H. 8. 32. H. 8. ca. 2. in fine.

But if there be lord and tenant by knights ſervice, and the tenant dieth, his heire being within age, the lord wayveth his wardſhip as he may, and taketh himſelfe to his ſeigniorie, in this caſe the lord ſhall not have reliefe at his full age, becauſe he might have had the wardſhip of the bodie and land. Lord and tenant of two manors by divers tenures by knights ſervice, the tenant is diſſeiſed of the one, and the diſſeiſor dieth ſeiſed, and the tenant dieth ſeiſed of the other, his heire within age, the lord ſeiſed the bodie and lands of that manor, and after the heire at his full age recovereth the other manor againſt the heire of the diſſeiſor, he ſhall pay reliefe for that manor, and ſo one lord of the heire of one tenant ſhall have both wardſhip during his minoritie and reliefe at his full age.

1. E. 3. 6. Pl. Com. 229. 33. E. 3. tit. Gard. Stathom.

Son

(1) S. p. acc. ante 47. b. poſt 162. b. and 1. Show. 36.
(2) See ante 69. a. and note 3. there.
(3) As to this notion of there being a certain number of knights fees in a barony and earldom, ſee ante 69. a. note 5.
(4) See 2. Inſt. 7. 8. and Wright's Ten 99.
(5) This annuity is therefore called *creation-money*, and the grant of it uſually expreſſed, that it was aſſigned in order to enable the grantee the better to ſuſtain his newly-acquired dignity. Mr. Madox gives us various inſtances of ſuch annuities; and it appears, that they were not confined to earls; for one of the letters patent in his book is a grant of 10l. a year by Hen. 6. out of the crown-revenues in Cumberland to Sir Thomas Percy on creating him baron of Egremont. See Mad. Baron. Anglic. 142. In Dyer 2. a. notice is taken of an annuity of this kind, and it is there ſaid to be ſo annexed to the dignity as not to be alienable. See further as to creation-money, Camd. Britann. ed. 1772. p. 125.

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ply to heriots and reliefs as they are now diſtinguiſhable. See the Treat. on Feuds in Spelm. Poſthum. 31. It is obſervable, that Bracton marks the diſtinction between reliefs and heriots very ſtrongly, and in terms partly correſponding with the idea of Spelman; for after treating at large on reliefs Bracton adds, *eſt quidem alia præſtatio, quæ nominatur herietum, et quæ nullam comparationem habeat ad relevium; ſcilicet ubi tenens, liber vel ſervus, in morte ſua dominum ſuum, de quo tenuerit, reſpicit de meliori averio*

Son heire. [k] And yet the ſucceſſor of a biſhop or abbot may pay reliefe by preſcription or grant.

[k] 3. E. 3. 13. 76. 8 R 2. Reliefe 14. 3. H. 4. 2. 2. H 3. Avowrie 124.

If the tenant infeoffeth his heire apparent by colluſion, and dieth, [l] his heire of full age, it is a queſtion in our bookes, whether he ſhall have reliefe either by the common law, or by the ſtatute of Marlebridge ca. 6. But now the ſtatute [m] of 13. Eliz. ca. 5. hath cleered that queſtion, and that the lord ſhall have reliefe where the conveyance is made to any perſon by colluſion, &c.

[l] 39. E. 3. tit. Reliefe 24. E. 3. Renere 11. Bracton lib. 2. 85.

[m] 13. Eliz. cap. 5.

Sect. 113.

This is evident, and needeth no explanation.

ITEM home poit tener ſon terre de ſon ſeignior per le ſervice de deux fees de chivaler; et donque lheire, eſteant de pleine age al temps de mort ſon aunceſtre, paiera a ſon ſeignior x. l. pur reliefe.

ALSO a man may hold his land of his lord by the ſervice of two knights fees, and then the heire, being of full age at the time of the death of his anceſtor, ſhall pay to his lord x. pound for reliefe (1).

Sect. 114.

NOTA ſi ſoit aiel pier et fits, et la mere moruſt vivant le pier de le fits, et puis laiel, que tient la terre per ſervice de chivaler, moruſt ſeiſie, et ſa terre diſcendiſt al fits la mere come heire al aiel, que eſt deins age, en ceſt cas le ſeignor avera le garde de la terre, mes nemy le garde del corps del heire, pur ceo que nul ſerra en garde de ſon corps a aſcun ſeignior vivant ſon pier, pur ceo que le pier durant ſon vie avera le mariage de ſon heire apparant, et nemy le ſeignior. Auterment eſt, ou le pier eſt mort vivant la mere, lou le terre tenus en chi-

NOTE, if there be grandfather father and ſonne, and the mother dieth living the father of the ſonne, and after the grandfather, which holds his land by knights ſervice, dieth ſeiſed, and his land deſcend to the ſonne of the mother as heire to the grandfather, who is within age, in this caſe the lord ſhall have the wardſhip of the land, but not of the bodie of the heire, becauſe none ſhall be in ward of his bodie to any lord, living his father, for the father during his life ſhall have the marriage of his heire apparent, and not the lord (2). Otherwiſe it is, where the father dieth living the mother,

FITZ. Yet the father ſhall have the marriage of his daughter if ſhe be his heire apparent, and Littleton's reaſon extendeth to the daughter, for that (ſaith he) the father ſhall have the wardſhip of his heire apparent, within which words the daughter is included, ſo long as the continueth heire apparent.

Fleta, lib. 1. cap 5. 16. E. 3. Diſſeiſin, 6. 31. E. 1 Gard. 154. 8. E 2. Treſp. 237. F. N B. 243. Ambroſia Gorge's caſe. 6. Co. 22.

Le ſeignior avera le gard del terre. Note that albeit in this caſe the law doth give the cuſtodie of the body to the father, and barreth the lord thereof, yet the lord ſhall have the wardſhip of the land by force of the tenure at the firſt creation thereof. And ſo it is if the father marieth his heire within age and dieth, yet the lord ſhall have the wardſhip of the land.

Vivant ſon pier. This doth not extend to any collaterall heire, but only to the ſonne or daughter being heire apparent; for albeit a man ſhall have an action of treſpaſſe *Quare conſanguineum et hæredum cæpit*, and albeit the words be *Cujus maritagium ad ipſum pertinet*, becauſe the well beſtowing of his

9. E. 2. 18. E. 3. 25. 29. Aſſ 35. 29. E. 3. 37. 31. E. 3. Bar. 237.

(1) See further as to reliefs, Poſt 85. a. at the end of the note there, 90. b. 91. a. and b. 92. a. 93. a. 106. a. Wright's Ten. 97. and Vin. Abr. *Tenures* E. a. to O. a.

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

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averio ſuo, vel de ſecundo meliori, ſecundum diverſam locorum conſuetudinem; quæ quidem præſtatio magis ſit de gratia quam de jure, et quæ hæreditatem non contingit. See Bract. lib. 2. cap. 36. fo. 86. a. See further as to heriots, poſt 185. b.—(2) See acc. Ley on Wards and Liv. fol. ed 17. W. Jo. 133. The diſtinction is not merely *nominal*; for lord Coke in another place aſſigns it as a reaſon, why a relief is not within the limitation of 50 years preſcribed by the 32. H. 8. c. 2. in the caſe of avowry or conuſance for *ſuit* or *ſervice*. 2. Inſt. 95. Note that in the book laſt cited *forty* years are mentioned as the limitation in the 32. H. 8. but Mr. Ruſſhead in his edition of the Statutes ſays, that in the *record* the time is *fifty* years.—(3) But it is ſaid, that if the relief is claimed,

Not

32. E. 3. Gard. 32. 30. E. 3. 17. 31. H. 6. 55. 12. H. 4. 16. F. N. B. 143. 31. E. 3. Br. 357. 9. E. 4. 53.

~~was~~ heire apparent in mariage is a great eſtabliſhment of his houſe, yet that is to be underſtood as againſt a wrongdoer, but not againſt a gardian in chivalrie, and the mother ſhall have the like writ for taking away of her ſonne and heire apparent. And yet the mother ſhall not barre the lord by knights ſervice of his wardſhip of the bodie, as Littleton here ſaith, *Qui tamen ex filia tua naſcitur in poteſtate tua non eſt, ſed patris ejus.*

valrie diſcendiſt al fits de part ſon pier, &c.

where the land holden in chivalrie deſcends to the ſon on the part of the father, &c.

Vide Flet. lib. 1. cap. 6. See W. 2. c. 35. (2. Ro. Ab. 39.)

A aſcun ſeignior. Put the caſe there is lord, & *feme* tenant by knights ſervice of a carve of land, the *feme* maketh a feoffment in fee upon condition, and taketh the lord to huſband, and have iſſue a ſonne, the wife dieth, the iſſue entreth for the condition broken, the lord entreth into the land as gardeine by knights ſervice, and maketh his executors, and dieth, in this caſe, the executors ſhall have the wardſhip of the land during the minority of the heire, but not the wardſhip of the body; for albeit the lord ſeemeth to have a double intereſt in the wardſhip of the bodie, one as lord, and another as father, yet as father, and not as lord in judgement of law, he ſhall have the wardſhip of the bodie of his ſon and heire apparent, in reſpect of nature, which was before any wardſhip of reſpect of ſeigniories by knights ſervice began, and that wardſhip by reaſon of nature cannot be waived, and claime made in reſpect of the ſeigniorie. And the executors of the father ſhall not have ſuch a wardſhip, which the teſtator had as father, neither can ſuch a wardſhip be forfeited by outlawrie, becauſe it is due to the father in reſpect of privitie of nature.

(3. Co. 39. a. poſt 88. b.) 33. H. 6. 55. 7. Co. 13. in Calvin's caſe. Vide Flet. lib. 1. c. 12. § cum Patr. de feodo, &c. (Ante 8. a. 2. Ro. Ab. 39.)

De ſon heire apparent. And therefore if the father be attainted of felonie, &c. then cannot the ſonne or daughter be an heire apparent, becauſe the bloud is corrupted betweene them, and conſequently in the life of the father his ſonne in that caſe ſhall be in ward.

A woman ſeiſed of lands in fee holden by knights ſervice taketh huſband an alien, and hath iſſue, and the wife dieth, the iſſue ſhall be in ward, and the father ſhall not have the cuſtodie of him, for that in the eye of the law he is not his heire apparent, as Littleton here ſpeaketh.

Sect. 115.

This ſection is an addition to Littleton (1), and therefore I paſſe it over; and the rather, for that the ſaid ſtatute of 4. H. 7. is become of no force, for that by the ſtatute of 27. H. 8. cap. 10. all uſes are transferred into poſſeſſion.

NOTA, ſi home ſoit ſeiſie de terre, que eſt tenus per ſervice de chivaler, et fait feoffment en fee a ſon uſe, et moruſt ſeiſie del uſe, ſon heire deins age, et nul volunt per luy declare, le ſeignior avera briefe de droit de gard de corps et del terre, ſicome tenant uſt devie ſeiſie del demeſne. Et ſi le heire ſoit de pleine age al temps del morant ſon anceſtor, en tiel caſe il payera reliefe, ſicome il fuiſſoit ſeiſie del demeſne. Et ceſt per leſtatute de anno 4. H. cap. 17.

NOTE, if a man be ſeiſed of land which is holden by knight's ſervice, and maketh a feoffment in fee to his own uſe, and dieth ſeiſed of the uſe, his heire within age, and no will declared by him, the Lord ſhall have a writ of right of the wardſhip of the bodie and land, as if the tenant had died ſeiſed of the demeſne. And if the heire bee of full age at the time of the deceaſe of his anceſtor, in this caſe he ſhall pay reliefe, as if he had been ſeiſed of the demeſne. And this is by the ſtatute of 4 H. 7. cap. 17.

Sect.

(1) It was firſt introduced in Red.

not by reaſon of tenure, but by *cuſtom*, there muſt be a preſcription for the diſtreſs to warrant it. See W. Jo. 133.—(4) Acc. ante 47. b. But there are ſome opinions to the contrary. See 2. Leon. 179. 2. Ro. Rep. 371.

Sect. 116.

NOTA, il y ad gardein en droit en chivalrie, et gardein en fayt en chivalrie. Gardein en droit en chivalrie eſt, lou le ſeigniour per cauſe de ſon ſeigniorie eſt ſeiſie de gard de terres et del heyre, ut ſupra. *Gardein en fayt en chivalrie eſt, lou en tiel caſe le ſeigniour apres ſon ſeiſin graunt, per fayt ou ſauns fayt, le gard des terres, ou del heire, ou dambideux a un auter, per force de quel grant le grauntee eſt en poſſeſſion. Donque eſt le grauntee appel gardeine en fait.*

NOTE, there is gardian in right in chivalrie, and gardian in deede. in chivalrie. Gardian in right in chivalrie is, where the lord by reaſon of his ſeigniory is ſeiſed of the wardſhippe of the lands, and of the heyre, *ut ſupra*. Gardian in deede in chivalrie is, where in ſuch caſe the lord after his ſeiſin grants, by deed or without deede, the wardſhip of the lands, or of the heire, or of both, to another, by force of which grant the grauntee is in poſſeſſion. Then is the grauntee called gardian in fait, or gardian in deed.

HERE Littleton divideth gardian in Chivalrie, into gardian in right, a gardian in fait. And this is evident, and needeth no explanation.

Per fait ou ſans fait. Here Littleton affirmeth, that the wardſhip of the body may be granted over without deed; and herein note a diverſity betweene an originall chattell of a thing that properly lyeth in grant, and a chattell derived out of a freehold of any thing that lyeth in grant. As for example, if a man make a leaſe for years of a villeine, this cannot be done without deed, neither can the leſſee aſſigno it over without deed, becauſe it is derived out of a freehold that lyeth in Grant. But the wardſhip of the body is an original chattel during the minority derived out of no freehold; and therefore as the law createth it without deed, ſo it may be aſſigned over without deed. (2. Ro. Ab. 62.)

A corporation aggregate of many, cannot make a leaſe for yeares without deed, in reſpect of the quality of the incorporation; but their leſſee may aſſigne it over without deed. 12. E. 3. tit. Grant. 59. 7. E. 3. 63. 26. E. 3. 65. 28. E. 3. 96. 14. E. 3. Act. ſur Leſt. 17. 25. E. 3. 40. 31. E. 3. Vouch. 5. 46. E. 3. 25. 20. E. 4. 16. 12. H. 4. 19. 5. H. 7. 17. 36. 22. El. Dyer 371. 35. H. 8. Br. tit Grant. 85.

36. H. 8. tit Grant. B. 125. 22. H. 6. 34. 19. H. 6. 33. (Poſt. 325. b.)

If an advowſon be holden by knight's ſervice, and the tenant dieth, his heire being within age, the Lord cannot grant the wardſhip of the advowſon without deed; becauſe it is derived out of an inheritance that lyeth in grant, and paſſeth not by livery; for *jus præſentandi eſt incorporale*, and ſo (albeit there be diverſity of opinion in our bookes) is the law taken at this day. (1) 24. E. 3. 69. 70. 5. E. 3. 58. 43. E. 3. 15. 5. H. 7. 36. 14. H. 7. 16. 15. H. 8. 8. Bract. 366. 368. 246. 43. E. 3. 1. 6. 5. H. 7. 37. 11. H. 6. 4. 6. H. 7. 3. 18. H. 8. 16. Eli. Dyer 323.

CHAP.

(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* abolithing tenure by knight's ſervice, and the conſequences peculiar to that tenure and *ſocage in capite*, it deſcends into *particulars* with a redundancy of words, which can only be accounted for by the extreme anxiety to extirpate completely the evils the legiſlature had under contemplation, for which purpoſe it might be deemed moſt ſafe to attack them in every ſhape. We have already obſerved in ſome former notes, that homage eſcuage and the aids *pur file marier* and *pur faire fitz chivalier* are expreſsly mentioned. It remains to add, that the ſtatute, after taking away the court of wards and liveries, enumerates wardſhips, liveries, primer ſeiſins or ouſterlemains, values and forfeitures of marriages, and fines ſeiſures and pardons for alienation, and ſweeps away the whole. But the act preſerves rents certain, heriots, ſuits of court, and other ſervices incident to common ſocage, and fealty; and alſo fines for alienation due by the cuſtoms of particular manors, unleſs ſuch fines are for lands *in capite*. Reliefs for lands, of which the tenure is converted into common ſocage, are alſo ſaved in ſome inſtances; for the clauſe, which preſerves *rents certain*, provides that ſuch relief ſhall be paid *in reſpect of ſuch rents*, as is paid on the death of a tenant in common ſocage. From this clauſe it ſeems, that there can be no relief out of lands which the ſtatute changed into *ſocage*, unleſs where a quit-rent is alſo payable; and the reaſon of thus expreſſing the act will appear by conſidering, that a year's rent is the relief for lands holden by common ſocage, and conſequently is never due out of lands, which are not ſubject to a rent. See poſt ſect. 126.

☞ It was intended to have continued the notes of fol. 64. a. in this place; but the annotator finds it convenient to poſtpone them to the end of the chapter of Villenage.

CHAP. 5. Sect. 117.

Socage.

Mirror ca. 1. sect. 3.

4. H. 7. ca. 19. 4. Co. Tirringham's case fo. 39. and 4. H. 7. ca. 12.

TEnure in Socage.(1) Agriculture or Tillage is of great account in law, as being very profitable for the common wealth, wherein the goodneſſe of the habit is beſt knowne by the privation: for by laying of lands uſed in tilth to paſture, ſix maine inconveniences do daily encreaſe. Firſt idleneſſe, which is the ground and beginning of all miſchiefs. 2. Depopulation, and decay of townes; for where in ſome townes 200 perſons were occupied, and lived by their lawful labors, by converting of tillage into paſture, there have beene maintained but two or three heardmen; and where men have beene accounted ſheepe of God's paſture, now become ſheep men of theſe paſtures. 3. Huſbandry, which is one of the greateſt commodities of the realme, is decayed. 4. Churches are deſtroyed, and the ſervice of God neglected by diminution of church livings, (as by decay of tythes, &c.) 5. Injury and wrong is done to patrons and God's miniſters. And 6. The defence of the land againſt forraine enemies is enfeebled and impaired, the bodies of huſbandmen being more ſtrong and able, and patient of cold, heat, and hunger, than of any other.

TENURE en ſocage eſt, lou le tenant tient de ſon ſeignior ſon tenement per certeine ſervice pur touts maners de ſervices, iſſint que les ſervices ne ſont pas ſervices de chyvaler. Sicome lou home tient ſon terre de ſon ſeignior per fealtie et per certeine rent, pur touts maners de ſervices; ou lou home tient per homage et fealtie et certeine rent pur touts maners de ſervices; ou lou il tient per homage et fealty pur touts maners de ſervices, car homage per ſoy ne fait pas ſervice de chivaler.

TENURE in Socage is, where the tenant holdeth of his lord the tenancie by certaine ſervice for all manner of ſervices, ſo that the ſervice be not knights ſervice. As where a man holdeth his land of his lord by fealty and certaine rent, for all manner of ſervices; or elſe where a man holdeth his land by homage, fealty, and certaine rent, for all manner of ſervices, for homage by itſelfe maketh not knights ſervice.

(a) 20. E. 3. Admeaſurement 8. 14. Aſſ. 21. 24. E. 3. 25. * Mirrer. Bracton fo. 217. Fleta. lib. 2. ca. 41. Regiſt. orig. 97. O. kam. 38. 39. 4. E. 3. 1. a. 18. E. 2. tit. action ſur leſtat. 45. Temps E. 1. Avoury 230. 29. E. 3. 16. 17.

The two conſequents that follow of theſe inconveniences, are firſt the diſpleaſure of Almighty God, and ſecondly the ſubverſion of the policy and good government of the realm; and all this appeareth in our bookes. And the common law [a] giveth errable land (which anciently is called *hyde and gaine*) the preheminency and precedency before meadowes, paſtures, woods, mynes, and all other grounds whatſoever: and * *averia carucæ* the beaſts of the plough have in ſome caſes more priviledge than other cattell have. And amongſt the Romans agriculture or tillage was of high eſtimation, inſomuch as the ſenators themſelves would put their hand to the plough, and it is ſaid, that never proſpered tillage better, than when the ſenators themſelves plowed (ſuch force hath the example of ſuperiors) whereof three famous Romanes in their ſeveral kinds ſpake.

Cic. lib. 1. Offic. *Omnium rerum, ex quibus aliquid exquiritur, nihil agricultura melius, nihil uberius, nihil dulcius, nihil libero homine dignius.*

Virgil. lib. 1. Georg.
O fortunatos nimium, ſua ſi bona norunt
Agricolas, quibus ipſa procul diſcordibus armis
Fundit humo facilem victum juſtiſſima tellus.

Seneca in Epiſt. *Nullum laborem recuſant manus, quæ ab aratro ad arma transferuntur, &c. fortior autem miles ex confragoſo venit; ſed ille unctus et nitidus in primo pulvere deficit.* But now let us peruſe our author's words.

Socag'um

(1) See Wright's Ten. 142. and 2. Blackſt. Comment. 5th ed. 79.

Socagium. Littleton in this chapter ſection 119. fetcheth this word from the originall. *Socagium idem eſt quod ſervitium ſocæ, et ſoca idem eſt quod caruca. s. un ſoke ou un carue.*(1)

And Bracton agreeth herewith. *Dicitur ſocagium* (ſaith he) *à ſocco, et inde tenentes dicuntur ſocmanni,* [b] *eo quod deputati ſunt tantummodo ad culturam.* And Benerth ſignifieth the ſervice of plough and cart. It is to be obſerved, that in the booke of [c] Domeſday land holden by knight's ſervice was called Tainland, and land holden by Socage was called Reveland; which appeareth in that it is ſaid there, *hæc terra fuit terra regis Edwardi Taineland, ſed poſtea converſa eſt in Reveland.* (2) And in that booke they that held in Socage were called by ſeverall names, as Sochemanni or Sokemanni, which ſtill continueth; ſometime * *Coleberti. i. qui tenent in liberum ſocagium per redditum*; and ſometime they are called Radcheneſtres. *i. liberi homines, qui tamen arabant, herciabant, falcabant, metebant, &c.* And here it appeareth how neceſſary it is, that words be fetched from their originals, and our author *eſt verus etimologus* both in this and in many other places in his [d] three bookes. And it is to be obſerved once for all, that the legall termination of (*agium*) in compoſition ſignifieth ſervice or duty, as *homagium* the ſervice of the man, *eſcuagium ſervitium ſcuti,* [e] *ſocagium ſervitium ſocæ, hidagium* the duty to be paid for the hide or plough-land; and ſo of *cornagium, coragium, carnagium, cariagium, burgagium, villenagium,* and *guidagium,* (which one deſcribeth thus) *quod datur alicui, ut tuto conducatur per loca alterius,* and the like.

Bracton lib. 2. fol. 77.

[b] Glanvil. lib. 7. cap. 9. & 11. & lib. 9. ca. 4. Fleta lib. 1. ca. 8. & lib. 3. ca. 14. & 16. Britton fol. 164.

[c] Domeſday, Herefordſc. Vid. devant ſect 1. Sudru. Wendeford. Weſceſterſc.

* Mich. 10. E. 3. Coram rege Witts in Theſaur.

[d] For etimologies vid. ſect 95. 154. 164. 204. 234. 267 268. &c.

[e] Fleta lib. 3. ca. 14. Bracton lib. 2. cap. 16. Britton. fol. 164

Iſſint que les ſervices [f] *ne ſont pas ſervices de chivaler.* And in the next ſection he ſaith, and every tenure, that is not a tenant in chivalry, is a tenure in Socage. *Ex donationibus autem, feoda militaria, vel magnam ſerjantiam non continentibus, oritur nobis quoddam nomen generale, quod eſt ſocagium.* Here Littleton ſpeaketh of tenures of common perſons; for grand ſerjantie is not knight's ſervice, and yet it is not a tenure in Socage, as ſhall be ſaid hereafter. Alſo here he meaneth temporall ſervices, and not frankalmoigne, as by the examples he put is manifeſt, and as in his proper place ſhall appeare more at large, Alſo here Littleton ſpeaketh of ſocage largely taken, and ſo called *ab effectu*; that is, all tenures, that have the like effects and incidents belonging to them as ſocage hath, are termed tenures in ſocage, albeit originally ſervice of the plough was not reſerved. As if originally a roſe, a paire of gilt ſpurs, a rent, and ſuch like were reſerved, or that the tenants in *condemnatos ultrices manus mittant, ut alios ſuſpendio, alios membrorum detruncatione, &c. puniant*, theſe are ſaid to be tenures in ſocage *ab effectu*; for that there ſhall be like gardein in ſocage, like reliefe, and ſuch other effects and incidents as a tenure in ſocage hath, and are ſo termed to diſtinguiſh the ſame from knights ſervice. Nay, the worſt tenure that I have read of, of this kind, is to hold lands to be *ultor ſceleratorum condemnatorum, ut alios ſuſpendio, alios membrorum detruncatione vel aliis modis juxta quantitatem perpetrati ſceleris puniat*, (that is) to be a hangman or executioner. It ſeemeth in ancient times ſuch officers were not voluntaries, nor for lucre to be hired, unleſſe they were bound thereunto by tenure. And ſo note that ſome tenures in ſocage are named *à cauſa*, and ſome and the greater part *ab effectu.*

[f] Mirror, ca. 2. ſect. 18.

Fleta ubi ſupra.

Ockam, cap. quæ per ſolam conſuetudinem, &c.

Ockam, fo. 31. a & b.

Car homage de ſoy ne fait ſervice de chivaler. But it is a preſumption where homage is due, that the land is holden by knights ſervice, as hath beene ſaid.

Sect. 118.

ITem home poit tener de ſon ſeignior per ſealty tantum, et tiel tenure eſt tenure en ſocage; car cheſcun tenure, que neſt pas tenure in chivalry, eſt tenure en ſocage.

ALSO a man may hold of his lord by fealty only, and ſuch tenure is tenure in ſocage: for every tenure, which is not tenure in chivalrie, is a tenure in ſocage.

(4. Co. 8.)

Of this ſufficiently hath beene ſaid before.

Sect. 119.

ET il eſt dit, que la cauſe, pur que tiel tenure eſt dit et ad le noſme de tenure en ſocage,

AND it is ſaid, that the reaſon, why ſuch tenure is called and hath the name of tenure in ſocage,

TEMPS de memory. Time of memory is when no man alive hath had any proofe

(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 explanation of *Thane land* and *Reve-land*

(6. Co. 59.)

Cap. Burgage. sect. 170.

proofe to the contrary, nor hath any conusance to the contrarie, as shall be hereafter said in his proper place. And of necessity this change, hereafter spoken of, must be before time of memorie; for within time of memory, the services of the plough cannot be changed into money by consent of the tenant and the desire of the lords, .s. into an annuall rent, neither by release or confirmation or other conveyance, so long as the seigniory remaineth, as shall be said in his due place.

Mirror. cap. 2. sect. 18. Vid. 19. E. 2. Avowrie. 224. 3. E. 2. action. sur lest. 24. 10. E. 3. 24. 20. E. 3. Avowrie. 124. 39. E. 3. 17. 39 Ass. p. 3. 20. Ass. 1.

Cap. Confirmation. sect. 539.

Devoient vener oue lour sokes. The plough is named *propter excellentiam*; but the sicle, and the syth, for the reaping in harvest and such like, are also included. For as *carucata terræ*, a plough land, may contain houses, milles, pastures, medow, wood, &c. as pertaining to the plough; so under the service of the plough, all services of tillage or husbandry are included.

lee sont. 5. a. 6 g. a.

4. E. 3. 161. 6. E. 3. 283.

Uncore le nosme de socage demurt. Altho' the cause whereupon the name of socage first grew be taken away, yet the name remaines the same it hath beene, and is used to distinguish this tenure from a tenure by knights service. *Nomina si nesciis, perit cognitio*

eſt ceo; quia ſocagium idem eſt quod ſervitium ſocæ, et ſoca idem eſt quod caruca, .s. *un ſoke ou un carue. Et en ancient temps, devant le limitation de temps de memorie, grand part de les tenants, que tyendront de lour ſeigniors per ſocage, devoient vener ove lour ſokes, chieſcun de les dits tenant pur certein jours per an pur arer et ſemer les demeſnes le ſeignior. Et pur ceo que tielx overages fueront fait pur le viver et ſuſtenance de lour ſeigniors, ils fueront quits envers lour ſeigniors de touts maners de ſervices, &c. Et pur ceo que tielx ſervices fueront faits ove lour ſokes, tiel tenure fuit appel tenure en ſocage. Et puis apres tiels ſervices fueront changes en denyers, per conſent des tenants et per deſire des ſeigniors, s. en un annuall rent, &c. Mes uncore le noſme de ſocage demurt, et en divers lyeux les tenants uncore font tiels ſervices ove lour ſokes a lour ſeigniors; iſſint que touts maners de tenures, que ne ſont pàs tenures per ſervice de chivaler, ſont appels tenures en ſocage.*

is this; becauſe *ſocagium idem eſt quod ſervitium ſocæ*, and *ſoca idem eſt quod caruca, &c.* a ſoke or a plough. In ancient time, before the limitation of time of memory, a great part of the tenants, which held of their lords by ſocage, ought to come with their ploughes, every of the ſaid tenants for certaine daies in the yeare to plow and ſow the demeſne of the lord. And for that ſuch workes were done for the livelihood and ſuſtenance of their lord, they were quit againſt their lord of all manner of ſervices, &c. And becauſe that ſuch ſervices were done with their ploughs, this tenure was called tenure in ſocage. And afterward theſe ſervices were changed into money by the conſent of the tenants and by the deſire of the lords, *viz.* into an annual rent, &c. But yet the name of ſocage remaineth, and in divers places the tenants yet doe ſuch ſervices with their ploughes to their lords; ſo that all manner of tenures, which are not tenures by knights ſervice, are called tenures in ſocage.

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

nitio rerum. Et nominâ ſi perdas, certè diſtinctio rerum perditur. Therefore the names of things (as Littleton here teacheth) are for avoyding of confuſion diligently to be obſerved.

Sect. 120.

ITEM ſi home tient de ſon ſeignior per eſcuage certaine, ſ. en tiel forme quant leſcuage curge et eſt aſſeſſe per parliament a griender ſumme ou meinder ſumme, que le tenant paiera a ſon ſeignior ſoſque demy marke pur eſcuage, et nient pluis ne meins, a quel graund ſumme ou a quel petite ſumme que leſcuage curge, &c. tiel tenure eſt tenure en ſocage, et nemy ſervice de chivalrie. Mes lou le ſumme, que le tenant paiera pur leſcuage eſt non certain, ſ. lou il poit eſtre que le ſumme, que le tenant paiera pur leſcuage a ſon ſeignior, poit eſtre a un foits le greinder et a auter foits le meinder, ſolonque ceo que eſt aſſeſſe, &c. donques tiel tenure eſt tenure per ſervice de chivaler.

ALSO if a man holdeth of his lord by eſcuage certaine, ſ. in this manner, when the eſcuage runneth and is aſſeſſed by parliament to a greater or leſſer ſum, that the tenant ſhall pay to his lord but halfe a marke for eſcuage, and no more nor leſſe, to how great a ſum, or to how little the eſcuage runneth, &c. ſuch tenure is tenure in ſocage, and not knights ſervice. But where the ſumme, which the tenant ſhall pay for eſcuage is uncertaine, ſ. where it may be that the ſumme, that the tenant ſhall pay for eſcuage to his lord, may be at one time more and at another time leſſe, according as it is aſſeſſed, &c. ſuch tenure is tenure by knights ſervice.

ESCUAGE certain (6. Co. 6. b.) is not *in rei veritate ſervitium ſcuti*, which is to be done by the body of a man, but it is *ſervitium crumenæ* of money, which is to be drawne out of the purſe, and that is in effect a tenure in ſocage; wherein it is to be obſerved, that the ſervice of payment of money is the more baſe, and leſſe profitable for the commonwealth in this caſe, and hereof ſomewhat hath been ſaid before in the chapter of Eſcuage, Sect. 98, 99.

If a man hold by homage, fealty and eſcuage, ſ. by an halfe penny, when eſcuage runs at fortie ſhillings, this is a tenure in ſocage, and no knights ſervice, for two cauſes. 15. E. 2. tit. Avowrie 215. 31. E. 1. Aſſ. 441. 26. Aſſ. 66. 5. E. 3. 6.

Firſt, it is ſocage tenure, becauſe of the certainty, for to the tenure in ſocage 5. E. 4. 128. Vid. Rot. Parl. 4. E. 3. nu. 19. Clavering's caſe excellently reſolved in parliament. Hill. 3. E. 2. coram Rege Rot. 34. Agnes Frowick's caſe.

certa ſervitia doe ever belong, ſo as the huſbandman may the rather live in quiet.

Secondly, Eſcuage is to be paid at every time when it is aſſeſſed, and here it is not to be paid, but when it amounteth to forty ſhillings.

Sect. 121.

ITEM ſi home tient ſa terre pur paier certaine rent a ſon ſeignior pur caſtle-garde, tiel tenure eſt tenure en ſocage.

ALSO if a man holdeth his land to pay a certaine rent to his lord for caſtle-gard, this tenure is tenure in ſocage (1). But HEREin the difference ſtandeth thus. If a rent be paid for caſtle-garde, it is cleere a ſocage tenure, as it is agreed Vide ſect. 98. 99.

(1) According to Fitzherbert ſuch a tenure was *knights ſervice*. This he infers from the form of a writ of livery ſued out by an heir on attaining his full age, where he held of the king *as of an honor* in the king's hands by the ſervice of rendering the rent of ten ſhillings a year towards guarding the caſtle of Dover; and Fitzherbert endeavours to account for the tenure's 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 *quære*; and indeed it ſeems very liable to exception. For—1. The form of the writ relied upon appears quite conſiſtent with *ſocage in capite*; ſuing of livery by the heir at full age having been incident to that tenure as well as to *knights 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

Vide 4. Co. 88. in Lutterel's caſe.
19. R. 2. Gard. 195. 26. Aſſ. 66. F. N. B. 83. 256. 6. Co. 20. Gregorie's caſe.

ed in Lutterel's caſe according to Littleton's opinion. But if a ſumme in groſſe, or other thing, be voluntarily paid or given by the tenant, and voluntarily received by the lord in lieu of caſtle-gard, yet the tenure by knights ſervice remaineth. Vide Sect. 98. & 99.

Mes lou le tenant doit per luy meme ou per un auter faire caſtle-garde, tiel tenure eſt tenure per ſervice de chivaler.

where the tenant ought by himſelfe or by another to doe caſtle-gard, ſuch tenure is tenure by knights ſervice.

Sect. 122.

IT is called rent ſervice, becauſe it is accompanied with ſome corporal ſervice, as fealty at the leaſt; in reſpect whereof the lord may diſtraine for it of common right. See more of this matter in the chapter of Rents.

ITEM en touts caſes lou le tenant tient del ſeignior a paier a luy aſcun certeine rent, cel rent eſt appelle rent ſervice.

ALSO in all caſes where the tenant holdeth of his lord to pay unto him any certaine rent, this rent is called rent ſervice.

Sect. 123.

(2. Rc. Abr. 40.)

EN tiels tenures en ſocage. If a man be ſeiſed of a rent charge, rent ſecke, common of paſture, and ſuch like inheritances, which doe not lie in tenure, and dyeth, his heire within age of 14 yeares; in this caſe, the heire may choſe his gardein: but if he be of ſuch tender yeares as he can make no choice, then (if the father hath made no diſpoſition of the cuſtody of the childe) it were moſt fit, that the next of kin, to whom the inheritance cannot deſcend, ſhould have the cuſtody of him (2). And whoſoever taketh the rent, &c. the heire ſhall charge him in an account. But if he hold any land in ſocage, in that caſe the

Vide le ſtatute de 4. & 5. Ph. & Marie. cap. 8.

ITEM en tielx tenures en ſocage, ſi le tenant ad iſſue et devie, ſon iſſue eſteant deins lage de 14 ans, donques le prochine amy del heire(1), *a que lheritage ne poit diſcendre, avera la garde de la terre et del heir jeſque al age del heir de 14 ans, et tiel gardein eſt appelle gardein en ſocage. Car ſi la terre deſcendiſt al heire de part le pier, donques la mere, ou auter procheine coſen de part le mere, avera la garde. Et ſi le terre diſcendiſt al heire de part la mere, donques le pier ou le prochein amy de part del pier avera le garde de tielx terres ou tenements. Et quant lheire vient al age de 14 ans compleat, il poit enter et ouſter le gardein en ſocage, et*

ALSO in ſuch tenures in ſocage, if the tenant have iſſue and die, his iſſue being within the age of 14 yeares, then the next friend of that heire, to whom the inheritance cannot deſcend, ſhall have the wardſhip of the land and of the heire untill the age of 14 yeares, and ſuch gardeine is called gardeine in ſocage. For if the land diſcend to the heire of the part of the father, then the mother, or other next couſin of the part of the mother, ſhall have the wardſhip. And if land diſcend to the heir of the part of the mother, then the father or next friend of the part of the father ſhall have the wardſhip of ſuch lands or tenements.

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(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.

(2) See poſt 88. b.

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by Mr. Madox *ut de corona*, 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 knights-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

occupier la terre luy meſme, ſil voit. Et tiel gardeine en ſocage ne prendra aſcuns iſſues ou profits de tielx terres ou tenements a ſon uſe demeſne, mes tantſolement al uſe et profit del heire; et del ceo il rendra accompt al heire, quant pleaſt al heire apres ceo que lheire accompliſh lage de xiiii ans. Mes tiel gardein ſur ſon accompt avera allowance de touts ſes reaſonable coſts et expences en touts choſes, &c. Et ſi tiel gardein maria lheire deins xiiii ans, il accomptera al heire, ou a ſes executors, de value del mariage, coment que il ne priſt riens pur le value del mariage; pur ceo que il ſerra rette ſa folly demeſne, que il luy voiloit marier ſans prender la value del mariage, ſinon que il luy maria a tiel mariage, que eſt tant en value come le mariage del heire, &c.

And when the heyre cometh to the age of 14 years complete, he may enter and ouſt the gardian in ſocage, and occupy the land himſelfe, if he will. And ſuch gardian in ſocage ſhal not take any iſſues or profits of ſuch lands or tenements to his own uſe, but only to the uſe and profit of the heire; and of this he ſhal render an account to the heire, when it pleaſeth the heire after he accompliſheth the age of 14 yeares. But ſuch gardian upon his account ſhall have allowance of all his reaſonable coſts and expences in all things, &c. And if ſuch gardian marry the heire within age of 14 yeares, he ſhall account to the heire, or his executors, of the value of the mariage, although that he tooke nothing for the value of the mariage; for it ſhall be accounted his own folly, that he would marry him without taking the value of the mariage, unles that he marrieth him to ſuch a marriage, that is as much worth in value as the mariage of the heire.

gardian in ſocage ſhall take into his cuſtody as well the rent charges, &c. as the land holden in ſocage, becauſe he hath the cuſtody of the heire.

Si le tenant ad iſſue et devie. The ſame law it is if the tenant hath no iſſue, but a brother or coſin within age of 14 yeares at the time of his death. [a] Alſo this doth extend as well to iſſue female, as to iſſue male.

[a] 10. R. 2. Account 132.

Deins lage de 14 ans. Of this ſufficient hath been ſpoken in the next preceding chapter.

Donques le procheine amy del heire, a que le enheritance ne poit diſcender. The next friend of the heire, &c. Here *amy* or friend is taken for the next of blood. So the effect of it is, that the next of his blood to whom the inheritance cannot diſcend, wherby affinity without blood is excluded.

Glanvil lib. 7. cap. 11. Britton 163. Fleta lib. 1. cap. 9. Stat. de Hibernia, tit. Partition. (Plowd. 446.)

Le prochein. The next.

[b] If there be three brethren, and the youngeſt holdeth land in ſocage, and hath iſſue and dyeth his iſſue within age of 14 yeares, both the uncles are in equall degree, and yet the eldeſt ſhall be gardian; becauſe in equall degree the law preferreth him. [c] And yet if lands holden in ſocage be given to a man and to the heirs of his body, and he dyeth his heire within age, the next coſin of the part of the father, albeit he be worthier, ſhall not be preferred before the next coſin of the part of the mother, but ſuch of them as firſt ſeaſeth the heire ſhall have his cuſtody (1). But if lands be given in frankmariage, and the donees have iſſue and dye their iſſue within age of 14 yeares, the next of kin of the part of the mother ſhall have the cuſtody of the body, and not the next of kin of the part of the father albeit he firſt ſeaſed it, becauſe the mother was the cauſe of the gift. If a man be ſeiſed of lands holden in ſocage of the part of his father, and of other lands holden in ſocage of the part of his mother, and dyeth, his iſſue being within the age of 14 yeares, in this caſe ſuch of the next of

[b] Vid. 30. Aſſ. 47.

[c] Pl. Com. Carrel's caſe.

47. H. 3. Gard. 146. (2. Ro. Abr. 40. Ante 22. a.)

(1) This is according to the rule *in æquali jure melior eſt conditio poſſidentis*. Plowd. 296. in Carrel's caſe. See too Hawk. Abr of Co. Litt.

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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 Lutterel'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.

of kinne of either ſide, as firſt happeth the body of the heire, ſhall have him (1), but the next of blood of the part of the father ſhall enter into the lands of the part of the mother, and the next of kinne of the part of the mother, ſhall enter into the lands of the part of the father (2).

[d] F. N. B. 139. b. Regiſt.
[e] 7. E. 3. 46. 16. E. 3. ac. 52. 21. E. 3. 8. 31. E. 3. Enfant 9. 17. E. 2. Account 121. 26. E. 3. 63. 10. H. 6. 14. F. N. B. 118.
[f] Bract. li. 2. fo. 88.
[b] Flet. l. 1. ca. 10.

[d] If A be gardian in ſocage, of the body and lands of B within the age of fourteene yeares, A ſhall be gardian in ſocage *per cauſe de Gard* (3). But an infant within age, that [e] is not in the cuſtody of another, cannot be gardian in ſocage; becauſe no writ of account lyeth againſt an infant. And herewith agreeth Bract. [f] and yeeldeth this reaſon, *alium regere non poteſt, qui ſeipſum regere non novit.* And Fleta ſaith, [b] that *minor minorem cuſtodire non debet; alios enim præſumitur male regere, qui ſeipſum regere neſcit.* And by like reaſon an ideot, a man *non compos mentis*, a lunaticke, a man *cæcus & mutus*, or *ſurdus & mutus*, or a leper removed by a writ *de leproſo amovendo*, cannot be gardian in ſocage. But in the caſe of gard *per cauſe de Gard*, there lyeth an action of account againſt A in the caſe aboveſaid.

[i] Lib. Rub. cap. 70.
[k] Glanv. lib. 7. ca. 11.
[l] Pl. Com. Carrel's caſe. (2. Ro. Abr. 40. Cro. Eliz. 825. Mo. 635.)
[m] Lit. lib. 1. fo. 2, 3.

A que le heritage ne poet deſcender. [i] *Nullus hæredipetæ ſuo propinquo vel extraneo periculoſa ſane* (4) *cuſtodia committatur.* Note [k] this word *(poet)* may or can. [l] And therefore this doth not onely exclude an immediate diſcent, but all poſſibility of diſcent. As if a man hath iſſue two ſons by ſeveral venters, and having lands holden in ſocage of the nature of burgh Engliſh dyeth, the yonger brother within age of 14 yeares, [m] the elder brother of the halfe blood ſhall not have the cuſtody of the land (5); becauſe by poſſibility the elder may inherit the land, for if the yongeſt dye without iſſue, and the land diſcend to an uncle, the elder brother of the halfe blood may be heire unto him: and herewith doth agree our ancient authors. [n] *Hæres ſokmanni ſub cuſtodia capitalium dominorum non erit, ſed ſub cuſtodia conſanguineorum ſuorum propinquiorum, hoc eſt, eorum qui conjuncti ſunt jure ſanguinis, & non jure ſucceſſionis, ex parte quorum non deſcendit hæreditas; & regulariter verum eſt, quod nunquam remanebit aliquis in cuſtodia alicujus, de quo haberi poſſit ſuſpitio, quod velit jus clamare in ipſa hæreditate, & unde ſi plures ſint filiæ & hæredes & tenere debeant in ſocagio, nulla debet eſſe in cuſtodio alterius.* [o] And this is contrary to the civil law; for *leges civiles impuberum tutelas proximis de eorum ſanguine committunt, ſive agnati fuerint, cognati, unicuique, videlicet, ſecundum gradum & ordinem, qui in hæreditate pupilli ſucceſſurus eſt.* But this the law of England ſaith, *eſt quaſi agnum lupo committere ad devorandum* (6).

[n] Bract. lib. 2. fol. 87. Brit. fol. 163. b. Flet. li. 1. c. 9. 28. E. 1. Stat. 1. Forteſc. c. 40.

[o] Forteſc. ubi ſupra. Statut. de Homagio capiendo, temps E. 1.

Donques la mere. Note, albeit land cannot diſcend to the mother from her ſonne, (as hath beene ſaid) becauſe inheritance cannot aſcend, yet here it appeareth by Littleton, that ſhe is next of blood (7), for none (as hath beene ſaid) can be gardian in ſocage, but the next of blood; and the like is to be ſaid of the father, as hereafter next appeareth.

Donques le pier. By this it appeareth, that the father in caſe of a tenure in ſocage ſhall be gardian in ſocage, and ſhall not have the cuſtody of his eldeſt ſonne, in reſpect of his paternall naturall cuſtody, (as he ſhall have in caſe of a tenure by knights ſervice, as before appeareth) (8) but as gardian in ſocage. And the reaſon of the diverſity is, for that in the caſe of a tenure in ſocage, the father muſt by law be accountable to the ſonne both for his mariage, and alſo for the profits of his lands, which he ſhould not be if he had the cuſtody of his eldeſt ſonne in this caſe as his father in reſpect of nature (9, and the act of law never doth any man wrong.

But no lord or other perſon, in reſpect of any tenure by knights ſervice or otherwiſe, ſhall have the cuſtody of any childe that is heire apparant to his father, but the father only during his life, as hath beene ſaid before (10).

It is to be obſerved, that in the lawes of England, there are three manner of gardianſhips, *viz.* by the common law, by ſtatute law, and by cuſtome. By the common law there are foure manner of gardians, *viz.* gardian in chivalry (whom Littleton hath deſcribed before Sect. 103, &c.) (11) gardian by nature, as the father of the eldeſt ſon, of whom Littleton hath ſpoken Sect. 114, (12) gardian in ſocage treated of by Littleton in this Section, and gardian *per cauſe de nurture*; (13) all frequent in [a] our books. By ſtatute, *viz.* the ſtatute in 4 & 5 *Ph. & Mar.* of women children, and that is in two manners, either of the father or mother (14) without aſſignation, or of any other to whom the father ſhall appoint the cuſtody, either by his laſt will, or by any act in his life-time, whereof you ſhall reade at large [b] in Ratcliffe's caſe in my Reports (15. [c] Laſtly, by cuſtome, as of orphans by the cuſtome of the city of London, and of other cities and boroughes (16).

[a] 8 E. 3. 43. 8. E. 4. 5. (5. Co. 37.)

[b] 3. Co. 57. Ratcliffe's caſe.
[c] 32. E. 3. Gard. 31. 8. R. 2. Gard. 166. (Cro. Jam. 99.)

Tantſolement al uſe et profit del heire. And therefore gardian in ſocage ſhall not forfeit his intereſt by outlawrie or attainder of felony or treaſon; becauſe he hath nothing to his owne uſe, but to the uſe of the heire.

Alſo

(1) See ante 88. a. note 1.—(2) Mr. Serjeant Hawkins ſuppoſes an elder brother to purchaſe land and the land to deſcend to his younger brother being under 14; in which caſe the infant's paternal and maternal relations are equally of the blood of the firſt purchaſer, and therefore equally capable of inheriting to them; and then Mr. Serjeant aſks, who ſhall be guardian in ſocage. Hawk. Abr. of Co. Litt. Perhaps there may be ſome difficulty in ſolving this queſtion. If Littleton's rule be underſtood *ſtrictly*, there cannot be any guardian in ſocage in ſuch a caſe unleſs the next friend is a father or mother or other lineal anceſtor, or of the half blood; for all of the other relations may by poſſibility ſucceed as immediate heirs to the ſon. But if the next of blood on either ſide may be guardian, the mother's blood muſt be preferred, becauſe they are the *moſt remote* from the ſucceſſion.—(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.—(4) *Sine* inſtead of *ſane* ſeems neceſſary to the ſenſe of this paſſage.—(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.—(6) Lord Chancellor Macclesfield very much diſapproved of the rule of our law, which gives the guardianſhip in ſocage to the next of kin to whom the land *cannot* deſcend. He would not allow the excluſion of the heir to the land to be founded on reaſon, but deemed it the offspring of barbarous times and the effect of a cruel preſumption. Therefore, when he was applied to on a like principle, for an order to remove a lunatick from the cuſtody of Mr. Juſtice Dormer, who was the lunatick's uncle and next in remainder to him, but had with the conſent of the *nominal* committee of the lunatick's perſon taken care of him for many years and treated him with the greateſt tenderneſs, under theſe circumſtances his lordſhip refuſed

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Also if the mother be gardian in socage, and taketh husband, and dyeth, the husband shall not have this custody by survivour; because the wife had it *en auter droit*, in the right of the heire.

Pl. Com. 294. (3. Co. 39.)

A guardian in socage shall not [*d*] present to a benefice in the right of the heire; because he cannot be accomptable therefore, for that he can make no benefit thereof, for the law doth abhorre simony or any corrupt contract for benefices; and therefore in that case the heire shall present himselfe (1). And Britton speaking of these gardians said well, *Les queux gardeins sont pluis serjants que gardeins*, (that is) which gardians are rather servants then gardians.

[*d*] 8. E. 2. Præsentment 10. 7. H. 27. 39. E. 3. 89. 29. E. 3. 5. F. N. B. 33. 31. E. 3. Estoppel, 340. Britton 163. 164. Fleta lib. 1. cap. 10. (2. Ro. Abr. 41. Cro. Jam. 99. 3. Inst. 156. Post 120. a.)

Il rendra account, &c. apres que lheire ad accomplishe lage de 14 ans. This point hath beene much controverted in our bookes, and the causes of the doubts have beene, first upon the words of the statute of [*e*] Merlebridge ca. 17. 2. Upon the originall writ of account against the gardian in socage. The words of the statute be *cum ad legitimam ætatem pervenerit sibi respondeat, &c.* and *legitima ætas*, [*f*] lawfull age is xxi yeares. Also the writ of accompt reciteth the said statute, *quare cum de communi consilio regni nostri provisum sit, quod custodes terrarum & tenementorum, quæ tenentur in socagio, hæredibus terrarum & tenementorum illorum, cum ad plenam ætatem pervenerint, reddant rationabilem compotum.* [*g*] Whereupon it is gathered that no action of account did lye against the gardian in socage at the common law, untill the heire be of his lawfull age of 21 yeares. But as to the first (*legitima ætas*) as the statute [*h*] speaketh, or *plena ætas* (as the writ doth render it) are to be understood *secundum subjectam materiam*, that is of the heire of socage land, whose lawfull and full age as to the custody or guardianship is 14. And as to the recitall of the statute, [*i*] it is evident that an action of account did lye against gardian in socage at the common law. And that the statute was made in affirmance or declaration of the common law; for the statute speaketh onely *de custodia parentum*, that is of a gardian in right, but yet an action of account lyeth against him that occupieth the land as gardian, albeit he be not of the blood (as hereafter shall be said). And upon consideration had of the said statute and of all the bookes, it was adjudged in the court of Common Pleas, Pasch. 16. Eliz. Rot. 436. according to the opinion of Littleton, that the heire after the age of 14 yeares shall have an action of account against the gardian in socage, when he will at his pleasure; and so is an ancient question well resolved (2).

3. Inst. 156. Post 120. a.)

[*e*] It is called the statute of Merlebridge, because the parliament in 52. H. 3. was holden there.

[*f*] 16. E. 3. Wast. 100. 18. E. 3. 55. 77. 29. E. 3. 5. Vide 32. E. 3. Gard 31. F. N. B. 118. 6. E. 3. 38.

[*g*] 16. E. 2. Account 120. 17. E. 2. ibid. 121.

[*h*] 2. E. 2. Account. 14. E. 3. ib. 3. Mar. Dy. 137. Keylwey 131.

[*i*] 18. E. 2. Avowry 220. (2. Inst. 380. Cro. Cha. 229.)

Pasch. 16. Eliz. Rot. 436. in communi banco.

Britton was of opinion, that the statute of Merlebridge, which gave the *capias* in account, extended to gardian in socage, for he wrote before the statute of W. 2. c. 11. But later bookes have over-ruled this point, that no *capias* lyeth against gardian in socage, for the statute extendeth to bailifes only. Neither doth the statute of W. 2. extend to gardian in socage, for that speaketh onely *de servientibus, balivis, camerariis, & receptoribus.*

Mirror ca. 2. Sect. 17. Britton fol. 163. b. Fleta lib. 2. cap. 64. 18. E. 2. Avowry 220. 17. E. 3. 59. Merlbr. ca. 29. W. 2. ca. 11.

Mes tiel gardien sur son account avera allowance de touts ses reasonable costs et expences en touts choses. (3) And this is due to all accountants by the common law (4); and so it is declared by the said statute of Merlebridge, *salvis ipsis custodibus rationabilibus misis suis.*

The statute of Merlbr. intended by Litt. is ca. 17.

Allowance. What other allowances shall the gardian have? If the gardian receive the rents and profits of the lands, and be robbed of the same, whether shall he be discharged thereof upon his account? And it seemeth, that if he be robbed without his default or negligence he shall be discharged thereof (5). As if a bailife of a manor, or a receiver, or a factor of a merchant, or the like accountant, be robbed, he shall be discharged thereof upon his account. And seeing the gardian shall be charged as bailife after the heires age of 14 and be discharged upon his account, if he be robbed, *pari ratione* if he be robbed before the age of 14. But otherwise it is of a carier, for he hath his hire (6), and thereby implicitely undertaketh the safe delivery of the goods delivered to him, and therefore he shall answer the value of them if he be robbed of them (7). Note the diversity, and so it was resolved * in the King's Bench.

41. E. 3. 3. 22. Ass. 41. 22. E. 3. Account 111. 29. Ass. 28. 3. H. 7. 4. b. 6. H. 7. 12. 10. H. 7. 25. 10. H. 6. 21. 2. E. 4. 15. Doct. & Stud. c. 38. fo. 130. (Cro. Eliz. 219. 1. Ro. Ab. 2. 3. 124.)

* Hil. 38. Eliz. inter Woodliefe and Curties. (8)

So it is if goods be delivered to a man to be safely kept, and after those goods are stollen from him, this shall not excuse him; because by the acceptance he undertooke to keepe them safely, and therefore he must keepe them at his perill.

(4. Co. 83. b. Cro. Eliz. 815. Cro. Jam. 188. Noy 126.)

So it is if goods be delivered to one to be kept, for to be kept and to be safely kept is all one in law (9). But if the goods be delivered to be kept as he would keepe his owne, there if they be stollen from him without his default or negligence, he shall be discharged. So if goods be delivered to one as a gage or pledge, and they be stollen, he shall be discharged; because he hath a property in them (10), and therefore he ought to keepe them no otherwise then his owne; but if he that gaged them, tendred the money before the stealing, and the other refused to deliver them, then for this default in him he shall be charged.

29. Ass. p. 28. (Cro. Jam. 188. 189.)

If A leave a chest locked with B to be kept, and taketh away the key with him, and acquainteth

8. E. 2. tit. Detinue 59. (8. Co. 32. 5. Co. 13. b.)

(1) S. p. acc. ante 17. b. post 120. a. S. p. acc. as to guardian by nurture. Cro. Jam. 99. In another work lord Coke extends the doctrine so far, as to say that the infant shall present *whatsoever his age* may be. 3. Inst. 156. But some suppose the guardian to have the right of presenting in the name of the infant. Others again admit the right of the infant *in general*, but add, that if the infant be of such tender years as not to have any discretion, then the guardian should present for him. See Vin. Abr. *Guardian* Q. pl. 2. But the law seems now settled in the full extent of lord Coke's opinion by a determination of lord chancellor King. In a cause before him an advowson had been conveyed to trustees on trust to present such person as the grantor his heirs or assigns should by deed appoint; and on the principle that an infant of *any* age may present, his lordship confirmed an appointment by an infant-heir, though it appeared, that the child was not a year old, and that the guardian guided the child's pen in making his mark and putting his seal. 2. Eq. Cas. Abr. *Infant* B. pl. 3. Vin. Abr. *Collation* A. pl. 10 Wats. Clergym. L. ed. 1740. p. 140. See also 3. Atk. 710 — However, though this decision may remove all doubts about the *legal* right of an infant of the most tender age to present, still it remains to be seen, whether the want of discretion would induce a court of equity to controul the exercise, where a presentation is obtained from an infant without the concurrence of the guardian.—(2) But against a testamentary or other guardian, whose authority doth not determine till the infant is twenty-one, or *being a female* attains that age or *marries*, the infant cannot have action of account before; for the rule of the *common law* is, that account shall not lie whilst the guardianship continues. However in *equity* the infant may by *prochein amy* sue his guardian for an account during the minority. 2. Vern. 342. 2. P. Wms. 119. 1. Ves. 91. 3. Atk. 625.—(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.—(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.—(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.—(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 law's charging the carrier is the *public employment* he exercises. 1. Ld. Raym. 917. 1. Salk. 143. 12. Mod. 487.—(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. Hardr. 485. 3. Mod. 227. Wils. v. 1. part 1. page 281.—(8) S. C. Mo. 462. Ow. 57. 1. Ro. Abr. 2.—(9) This doctrine was denied by the court in the great case of Coggs and Barnard; and it is now understood, that acceptance of goods to be kept *generally* is merely an undertaking to keep them as the party receiving 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*.—(10) Lord ch. j. Holt thought this reason insufficient,

+ See also 2. Ves. 484. Wilf. Head in Chanc. 2. ed. 26. 26.

to make such an order, 1. P. Wms. 260. See also 9. Mod. 142. and Cary's Rep. 137. 138. But notwithstanding this censure by one most

(Doct. & Stud. 129. b.)

quainteth not B what is in the cheſt, and the cheſt together with the goods of B are ſtolen away, B ſhall not be charged therewith, becauſe A did not truſt B with them as this caſe is (1). And that, which hath beene ſaid before of ſtealing, is to be underſtood alſo of other like accidents, as ſhipwracke by ſea, fire by lightning, and other like inevitable accidents (2). And all theſe caſes were reſolved, and adjudged in the King's Bench. * And by theſe diverſities are all the bookes concerning this point reconciled (3).

* Paſch. 43. Eliz. inter Southcote & Benne in Detinue. (4. Co. 83. b.)

Note, reader it is neceſſary for any, that receiveth goods to be kept, to receive them in this ſpeciall manner, *viz.* to be kept as his owne, or to keepe them at the perill of the owner (4). But now is Littleton to be further heard.

Et ſi tiel gardein maria le heire deins 14 *ans, &c.* For if he marry the heire after 14, he is out of his cuſtody, and no account ſhall be made therefore.

Il accountera a luy. He ſhall account for the mariage of the heire, *viz.* for ſo much as any man *bona fide* had offered for the mariage, or would give in mariage unto him.

(1. Ro. Abr. 908. 910. Cro. Car. 79.)

Ou a ſes executors. Not (5) that an infant of the age of 14 may make his will (as ſome hereupon have collected); but the meaning of Littleton is, that if after his mariage he accompliſh his age of 18 yeares, at what time he may make his teſtament (6), and conſtitute executors for his goods and chattells, and the words are ſo to be underſtood, as may ſtand with law and reaſon. Note, executors could not have an action of account at the common law, in reſpect of the privity of the account; but the ſtatute of W. 2. ca. 23. hath given the action of account to executors, the ſtatute of 25. E. 3. ca. 5. to executors of executors, and the ſtatute of 31. E. 3. c. 11. to adminiſtrators.

7. E. 3. 62. 19. E. 3. Account 56. 38. E. 3. 7. 31. E. 3. tit. Account 57.

Que il voile luy marier ſans prender le value. So as the gardian ſhall not account only for that which he ſhall receive in this caſe, but for that alſo which he might receive.

3. E. 3. 10. 46. E. 3. Account 40. 2. R. 2. ibid. 45. 6. R. 2. Account 47.

Si non que il luy marier a tiel mariage que eſt tant en value, &c. This needeth no explanation.

If the heire in ſocage be raviſhed out of the cuſtody of the gardian, and the raviſher marieth the heire, the gardian ſhall have a writ of raviſhment of ward, and recover the value of the mariage, &c. and ſhall account to the heire for the ſame.

Hill. 3. E. 2. Coram Rege, Rot. 34. Agnes Frowicke's caſe. F. N. B. 139. I. & 140. 26. E. 3. 65. 1. E. 3. 19. 20.

And the gardian in ſocage is bounden by law, that the heire be well brought up, and that his evidences be ſafely kept.

Trin. 1. H. 5. Coram Rege, Rot. 1. Midd.

The grandmother of the ſonne and heire of John Bernevill, who held the manor of Totington in the county of Midd. in ſocage, recovered the heire in a raviſhment of ward againſt Simon Chevin, which had maried the ſtepmother of the heire; and by the rule of the court, the plaintife *pro nutritura hæredis et pro cuſtodia evidentiarum invenit plegios.*

Sect. 124.

79. E. 2. Avowry 221. 39. E. 3. 16. 41. E. 3. Account 35. 49 E. 3. 19. 18. E. 3. 77. 28. Aſſ. p. 11. Pl. Com. 542. 6. E. 3. 38. F. N. B. 118.

ET ſi aſcun auter home, que neſt pas procheine amy, &c. If a ſtranger entreth into the lands of the infant within age of 14, and taketh the profits of the ſame, the infant may charge him as gardian in ſocage. And this doth well agree with the writ of account againſt a gardian in ſocage, for the words be, *Idem B præfato A rationabilem compotum ſuum de exitibus*

ET ſi aſcun auter home, que neſt procheine amy, occupie les terres ou tenements del heire come gardeine en ſocage, il ſerra compell' de render accompt al heire, auxi bien ſicomie il fuiſſoyt prochein amy; car il neſt pas plee pur luy en briefe daccompt adire, que il neſt procheine amie, &c. mes il reſpondra le quel

AND if any other man, who is not the next friend, occupies the lands or tenements of the heire as gardian in ſocage, he ſhall be compelled to yeeld an account to the heire, as wel as if he had beene next friend; for it is no plea for him in the writ of account to ſay, that he is not the next friend, &c. but he ſhall anſwer

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ficient, 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.

(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. 165. Law of Niſi Prius ed. 1775. p. 71.—(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. Bulſtr. 280. 2. L. Raym. 918. Vin. Abr. tit. *Maſter of a Ship* B. pl. 12.—(3) The *old* doctrine about bailment will be found at large in Southcote's caſe, which is cited by lord Coke in the margin. For the *modern* doctrine, the ſtudent ſhould conſult the famous caſe of Coggs and Barnard already cited. Lord chief juſtice Holt's argument in that caſe, as reported by Lord Raymond, particularly merits attention; it being a moſt maſterly view of the whole ſubject of bailment. Another important caſe connected with the ſame ſubject is that of Lane and Cotton, in which three judges againſt Holt held, that action on the caſe will not lie againſt the Maſter of the General Poſt Office for the loſs of a letter with Exchequer bills in it. 12. Mod. 472. See further the following books, which are citations from a note by the editor of the 11th edition.—21. E. 4. 55. 4. E. 3. 6. 2. H. 7. 11. Palm. 548. W. Jo. 179. Grot. de jur. bell. l. 2. c. 12. ſ. 13. Puffend. de jur. nat. l. 5. c. 4. ſ. 6. 7. and Dom. Loix Civ. l. 1. t. 5. ſ. 2. t. 6. ſ. 3. t. 7. ſ. 3.—(4) We have already obſerved, that *in general* this diſtinction is now exploded. Ante 89. a. note 9. See further tit. *Bailment* and *Carrier* in New Abr. tit. *Bailment* and *Action for Negligence* in Vin. tit. *Action on the caſe for miſfeaſance* in Com. Dig. Law of Niſi Prius ed. 1775. p. 69.—(5) It is *note* in *all* the former editions, but *not* is apparently *the true* reading.—(6) There is a great abundance of irreconcileable opinions in our books about the earlieſt age, at which a will

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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

il ad occupie les terres ou tenements come gardeine en ſocage ou nemy. Sed quære, *ſi apres ceo que le heire ad accompliſh lage de* 14 *ans, et gardeine en ſocage continualment occupia la terre tanque lheire vient a plein age, ſ.* 21 *ans, ſi le heire a ſon plein age avera action daccompt envers le gardein de temps que il occupia apres les dits* 14 *ans, come envers gardeine en ſocage, ou envers luy come ſon baylife.*

whether he hath occupied the lands or tenements as gardian in ſocage or no. But *quære*, if after the heire hath accompliſhed the age of 14 yeares, and the gardian in ſocage continually occupieth the land until the heire comes to full age, ſ. of 21 yeares, if the heire at his full age ſhall have an action of account againſt the gardian, from the time that he occupied after the ſaid 14 yeares, as gardian in ſocage, or againſt him as his bailife.

provenientibus de terris et tenementis ſuis in N. quæ tenentur in ſocagio, et quorum cuſtodiam idem B habuit dum præd. A infra ætatem fuit, ut dicitur. And true it is, that in judgement of law he had the cuſtody of the lands: and he is called *tutor alienus*, and the right gardian in ſocage *tutor proprius*, and it is no plea for him to denie that he is *procheine amy*, but he muſt anſwer to the taking of the profits (1), as Littleton here ſaith.

13. E. 3. Account 77. 22. E. 3. 11. 41. E. 3. Account 35. 10. H. 7. 7. 4. H. 7. 6. b. 7. H. 7. 9. a.

Sed quære, &c. This *quære* came not out of Littleton's quiver; for it is evident, that after the age of 14 yeares he ſhall be charged as bailife at any time when the heire will, either before his age of 21 yeares, or after (2).

6. E. 3. 38. 32. E. 3. Account 60. 7. E. 4. F. N. B. 118.

Sect. 125.

ITEM ſi gardein en chivalry face ſes executors et devy, le heire eſteant deins age, &c. les executors averont le garde durant le nonage, &c. Mes ſi gardein en ſocage face ſes executors et devy, le heire eſteant deins lage de 14 *ans, ſes executors naveront pas le garde; mes un auter procheine amy, a que le heritage ne poyt my diſcend, avera la garde &c. Et la cauſe de diverſity eſt, pur ceo que gardein en*

ALSO if gardian in chivalrie makes his executors and die, the heire being within age, &c. the executours ſhall have the wardſhip during the nonage, &c. But if the gardian in ſocage make his executours and die, the heire being within the age of 14 yeares, his executours ſhall not have the wardſhip; but another next friend, to whom the inheritance cannot deſcend, ſhall have the wardſhip, &c. And the reaſon of this diverſitie is be-

A Son proper uſe. A tenant holdeth land of a biſhop by knights ſervice, which ſeigniorie the biſhop hath in the right of his biſhoprick, the tenant dieth his heire within age, the biſhop either before or after ſeiſure dyeth; neither the King, nor the ſucceſſor of the biſhop ſhall have the wardſhip, but his executors. For albeit the biſhop hath the ſeigniorie, *in auter droit*, yet the wardſhip being but a chattell he hath in his owne right, and a chattell cannot goe in the ſucceſſion of a ſole corporation, unleſs it be in the caſe of the king (3).

7. R. 2. Bic. 634. 40. E. 3. 14. 2. H. 4. 19. 10. Eliz. Dier 277. (Poſt 117. 4. Co. 64. b.)

7. H. 4. 41. 44. E. 3. 42.

And yet if a biſhop have an advowſon, and the church become void, and the biſhop die, neither the ſucceſſor nor the executors ſhall preſent, but the king; becauſe it is but a choſe in action (4). And ſo it is in caſe where the king hath wardſhip, but that

24. E. 3. 26. 44. E. 3. F. N. B. 33. See more of this in the chapter of Warranty, ſect. 740. (Cro. Jam. 248.)

a will may be made of *perſonal* eſtate. Here lord Coke ſtates 18 to be the age; though the reaſons and authorities in favour of that time do not appear.—Others mention 17, that being the age at which an adminiſtration during the minority of an executor determines. 1. Vern. 255. 2. Vern. 558. But this opinion was probably founded on an idea, that our ſpiritual courts make no difference between the time for acting as an executor and the time for making a will, which is clearly a miſtaken notion. However it receives ſome countenance from the deciſive manner in which a late chancellor of the firſt authority mentions 17, and the ambiguous terms in which he ſpeaks of an earlier age. 1. Veſ. 303. 3. Atk. 709.—According to others 15 is the age for *males*, if the party can be proved of ſufficient diſcretion; but we are not informed why, and therefore little reſpect is due to this opinion, if *that* can be deemed one, which in fact was nothing more than a looſe *dictum*. 2. Vern. 469.—Others doubt, whether any time before 21 is not too early; becauſe none can be adminiſtrators till they have attained that age. 1. Vern. 326. The reaſons uſually aſſigned for not granting adminiſtration to any perſon under 21 are, that an adminiſtrator being created by ſtatute his age ſhould be according to the common law, and that the ſtatute of diſtribution requires the ſecurity of a bond from an adminiſtrator, which an infant cannot give. See the books cited in Vin. Abr. *Executors* L. 3. pl. 6. This latter reaſon againſt an infant's being adminiſtrator is the moſt forcible; but both ſeem equally inapplicable to the other point; the power of making a will of perſonal eſtate not being derived from or regulated by any ſtatute, and the giving of a bond being foreign to the caſe of a teſtator.—In Perkins *four* is ſaid to be the age for making a will of perſonalty; but though this is the time mentioned in the old as well as the new editions of 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 xiiii was the age intended. Perk. ſect. 503. Swinb. Teſtam. part 2. ſect. 2. Off. of Ex. cap. 18.—The laſt opinion on the ſubject, and that moſt to be relied upon, diſtinguiſhes between *males* and *females*, making the *teſtamentary* power to commence in the former at 14, and in the latter at 12. At theſe ages the Roman law allowed of teſtaments, and the civilians agree that our eccleſiaſtical courts follow the ſame rule: and to them we ought principally to reſort for information on teſtamentary ſubjects; becauſe theſe being ſo peculiarly of ſpiritual conuſance, they ſpeak more *ex tripode juridico*, to uſe the phraſe of a great author, than our common lawyers. Swinb. on Teſtam. part 2. ſect. 2. Godolph. Orph. Leg. 276. 2. Strah. Dom. 11. Harr. Juſtin. Inſtit. l. 2. t. 12. § 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 *doli capaces* in reſpect to crimes. 1. Hal. H. P. C. 22.

(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*.—(2) Notwithſtanding lord Coke's obſervation on the *quære*, it is in L. and M. Roh. P. and both of the MSS.—(3) Acc. ante 9. a. 46. b. poſt 388. a.—(4) This reaſon requires ſome explanation. It

equal pretenſions to the truſt, without the ſame temptation in point of *intereſt* to abuſe it. However in juſtification of the Roman

that is a prerogative that belongeth to the king to provide for the church being void; for where the tenure by knights service is of a common person, the executors of the tenant shall present where the avoidance fell in the life of the tenant.

chivalrie ad le garde a son proper use, et gardein en socage nad le garde a son use, mes al use del heire(1). *Et en cas lou le gardein en socage devy devant ascun accompt fait per luy al heire, de ceo le heire est sans remedie; pur ceo que nul briefe daccompt gist envers les executors, si non pur le roy solement.*

cause the guardian in chivalrie hath the wardship to his owne use, and the gardian in socage hath not the wardship to his owne use, but to the use of the heire. And in this case where the gardian in socage dyeth before any account made by him to the heire, of this the heire is without remedy, for that no writ of account lieth against the executors (2), but for the king onely.

31. E. 3. Account 57. 19. E. 3. ibid. 156. 48. E. 3. 2. 2. H. 4. 13. F. N. B. 117. 19. H. 6. 5. 4. E. 4. 25. 43. E. 3. 21. 11. Co. 89. (2. Inst. 404.)

Le heire est sauns remedie, &c. For albeit in an action of account against a gardian in socage, &c. the defendant cannot wage his law, yet in respect of the privity of the matters of account, and the discharge resting in the knowledge of the parties thereunto, an action of account neither lyeth against the executors of the accountant, nor at the common law for the executors of him to whom the account is to be made as is aforesaid (3); but that is holpen by statute (4). (*) It hath beene attempted in parliament to give an action of account against the executors of a gardian in socage, but never could be effected (5).

* Rot. Parl. 50. E. 3. nu. 123.

[a] Pl. Com. 321. Keyleway 131. 11. Co. 89.

Si non pur le roy solement. [a] The reason of this is because the king's treasure is the sinewes of warre, and the honour and safety of the king in time of peace, *firmamentum belli, et ornamentum pacis*; and therefore the death of the party shall not barre the king of his treasure due unto him upon the account, because it is intended, that the king was busied about the publike for the good of the common-wealth, and had not leisure to call his accountant to make his account, and *nullum tempus occurrit regi* (6). Littleton speaketh of the king's prerogative but twice in all his bookes, *viz.* here, and Sect. 178. and in both places, as part of the lawes of England. *Prærogativa* is [b] derived of *præ .i. ante*, and *rogare*, that is, to aske or demand before-hand, whereof commeth *prærogativa*, and is denominated of the most excellent part, because though an act hath passed both the houses of the lords and commons in parliament, yet, before it be a law, the royall assent must be asked or demanded and obtained, and this is the proper sense of the word. But legally (*) it extends to all powers, preheminences, and priviledges, which the law giveth to the crowne, whereof Littleton here speaketh of one. Bract. lib. 1. in one place calleth it *libertatem*, in another *privilegium regis*; [c] Britton [d] (following W. 1.) *droit le roy*; [e] *registr. jus regium*, and *jus regium coronæ*, &c.

Vid. Sect. 178. Stanf. Prær. 32.

[b] Fortescue fo. 45. Rot. Parl. 1. H. 4. nu. 188. Pl. Com. 236. Stanf. Pl. Cor. 162. b. Stanf. Prær. 1. a. & 10. b.
[*] Stanf. Prær. 5. 10.

[c] Westm. 1. cap. 50.
[d] Britton fol. 27.
[e] Regist. fol. 61. &c.

Sect. 126.

43. E. 3. Barre 294. 9. E. 4. 36. Bract. lib. 2. fol. 35. Glanvil lib. 9. cap. 4. (2. Ro. Abr. 519. Post 145. a.)

CERTEINE *rent.* A tenant holdeth of his lord certaine lands in socage, to pay yearely a paire of gilt spurs or five shillings in money at the feast of Easter. In this case the rent is uncertaine, and the tenant may pay which of them he will at the said feast, and likewise the tenant may pay which of them he will for reliefe; but if he pay it not when he ought, then may the

ITEM le seignior, de que la terre est tenus en socage, apres le mort son tenant avera reliefe en tiel forme. Si le tenant, tient per fealtie et certein rent a paier annualment, &c. si les termes de paiment son

ALSO the lord, of whom the land is holden in socage, after the decease of his tenant shall have reliefe in this manner. If the tenant holdeth by fealty and certaine rent to pay yeerely, &c. if the tearmes of

It is not, that *choses in action* are in their nature incapable of transmission to executors; for the contrary is known to be law, and some instances of it are here given: but it is, because in the case of a *chose in action*, so peculiar as a right of presentation, the law favours the king more than the bishop's executors, and therefore gives the king, as having in his custody the temporalties of the vacant bishoprick, that presentation, which executors in general are entitled to when they are opposed to an heir. See post 388. Bro. Abr. *Presentation* 34. Wats. Clergym. L. ed. 1747. p. 72. But then it may be asked, why the king should not have a like preference, in the case of the bishop's being intitled to a wardship by knight's service in right of his see and dying *before* reducing it into possession by seisure. The answer may be, that the law distinguishes between an *interest both of profit and trust*, as wardship by knight's service is, and one *merely of trust*, such as a presentation. The law gives the former to the bishop's executors, for the benefit of his personal estate. It gives the latter to the king; because the presentation to a vacant church cannot lawfully be sold; and as the bishop's personal estate cannot derive any *profit* from the presentation, the law deems it more proper to follow the temporalties of the see to which the advowson belongs. In a subsequent part of the commentary, where it is said, that the bishop's executors shall not present, because nothing can be taken for a presentation, lord Coke seems to hint at something of this kind. Post 388. a. However as a like reason might be urged against executors in favour of an heir, it is most safe to rely on the right of the king as settled by *authorities* and *long practice*.—This preference of the king's title by prerogative is carried so far, that even *presentation* and *institution* in the 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.

(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.—(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.—(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 ballance. F. N. B. page 267. of 4to ed. in lord Hale's notes.—(4) The 13. E. 1. c 23. gave 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.—(5) Acc. Cott. Abr. Rec. 131. But now by 4. An. c. 16. s. 27. actions of account lie against the executors and administrators of every *guardian* bailiff and receiver.+—(6) See post 119. a. and the note there.

+ Accordingly the Lord Nottingham's Mss. Prolegom. ch. 7. s. 6. bills in equity did lye agt. ex[ecut]ors in such cases.

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

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ſont a payer per deux termes del an, ou per quater termes del an, le ſeignior avera del heire ſon tenant tant, come le rent amount, que il paya per an. Sicome le tenant tient de ſon ſeignior per fealtie, et x. s. de rent payable a certaine termes del an, donques lheire paiera al ſeignior x. s. pur reliefe, ouſter les x. s. que il paiera pur le rent.

payment be to pay at two termes of the yeare, or at 4 termes in the yeare, the lord ſhal have of the heire of his tenant as much, as the rent amounts unto, which he payeth yearly. As if the tenant holds of his lord by fealty, and tenne ſhillings rent payable at certaine termes of the yeare, then the heire ſhall pay to the lord ten ſhillings for relief, beſide the tenne ſhillings which he payeth for the rent.

lord diſtraine for which of them he will. But if the tenure be to attend on his lord at the feaſt of Chriſtmaſſe, or to pay ten ſhillings, there the reliefe muſt be ten ſhillings, becauſe the other cannot be doubled; *et ſic de ſimilibus.* (2. Co. 37. 2. Ro. Abr. 519.)

A paier annuelment. If the tenant holdeth of his lord by fealty, and to pay every two or three year ten ſhillings, albeit this be no annuall rent, yet ſhall he pay ten ſhillings for reliefe; *et ſic de ſimilibus.*

But it is to be noted, that beſide reliefe, whereof Littleton here ſpeaketh, there belongeth to a tenure in ſocage of common right aid for the making of his eldeſt ſon a knight at the age of fifteene years, and to marry his daughter at the age of 7 yeares (1). Vid. Sect. 103. F. N. B. 82. Weſt. 1. cap. 35. 25. E. 3. ſtat. 5. cap. 11.

En meſme le manner eſt, ſi home ſoit ſeiſie de certeine terre que eſt tenus en ſocage, et fait feoffement en fee a ſon uſe, et moruſt ſeiſie del uſe, (ſon heire del age de 14 ans, ou pluis, et nul volunt per luy declare) le ſeignior avera reliefe del heire, ſicome avant eſt dit. Et ceſt per le ſtatute de Ann. 19. *Hen.* 7. *cap.* 15. (2)

In the ſame manner it is, if a man be ſeiſed of certaine land, which is holden in ſocage, and maketh a feoffement in fee to his owne uſe, and dieth ſeiſed of the uſe, (his heire of the age of 14 yeares or more, and no will by him declared) the lord ſhall have reliefe of the heire, as afore is ſaid. And this by the ſtatute of 19. H. 7. cap. 15.

This is an addition to Littleton, whereof I omit it the rather for that the ſtatute of 19. H. 7. is for the cauſe above mentioned become of none effect.

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ET en tiel cas apres la mort le tenant, tiel reliefe eſt due al ſeignior maintenant, de quel age que le heire ſoit; pur ceo que tiel ſeignior ne poit aver le garde de corps ne de terre

AND in this caſe, after the death of the tenant, ſuch reliefe is due to the lord preſently, of what age ſoever the heire be; becauſe ſuch lord cannot have the wardſhip of the body, nor of the land of the heire.

MAintenant, and as Littleton ſaith, he ought not to attend the payment of his reliefe according to the daies of paiment of his rent; but he ought to have his reliefe preſently, and for the ſame he may incontinently diſtraine after the death of the tenant. 16. H. 7. 4. 18. E. 3. 26. p. 18. Bracton lib. 2. fol. 85. dabit hæres una vice redditum ſuum unius anni duplicatum. Britton fo. 178. acc. Fleta lib. 1. cap. 8. (2. Ro. Abr. 519.)

And therefore in the caſe aforeſaid, where the tenant holdeth by the rent of five ſhillings, or a paire of gilt ſpurres,

(1) We have already had occaſion to obſerve, that theſe aids are taken away by the 12. Cha. 2. c. 24. Ante 76. a. note 1.—(2) This part about relief from the heir of *ceſtuique uſe,* as lord Coke truly obſerves, is an addition to Littleton; and it firſt appears in *Redman.* See poſt 117. a.

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 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 guar-

(Ante 47. b. 2. Ro. Abr. 519.)

ſpurres, if the heire be not preſently (that is, as preſently and as conveniently as he may, all due circumſtances conſidered) after the death of his anceſtor ready upon the land to pay reliefe, the lord may diſtrain for which of them he will; and if the tenant tendred either of them according to the law, and none for the lord was ready there to receive it, yet the lord may diſtraine for that, which was tendred, at his pleaſure (2).

le heire. Et le ſeignior en tiel caſe ne doit attendre a le payment de ſon reliefe, ſolonques les termes et jours de payment de rent; mes il doit aver ſon reliefe maintenant, et pur ceo il poit incontinent (1) *diſtraine apres le mort ſon tenant pur reliefe.*

And the lord in ſuch caſe ought not to attend for the payment of his reliefe, according to the terms and dayes of payment of the rent; but he is to have his reliefe preſently, and therefore he may forthwith diſtreine after the death of his tenant for reliefe.

45. E. 3. 19. 35. H. 6. 52. 20. Eliz. Dier 361 Stanf. Prær. 13. b. F. N. B. 256. 259.

De quel age que le heire ſoit. And yet it appeareth in our bookes, that in this caſe the king in caſe of a tenure in ſocage in chiefe ſhall not have primer ſeiſin unleſſe the heire be of the age of 14 yeares at the death of his anceſtor; for if he be under that age, he is in the gard and cuſtody of his *prochein amy*.

But otherwiſe it is in caſe of a common perſon, as here it appeareth. And where in ſome impreſſions theſe words be added (*iſſint que il paſſa lage de* 14 *ans*), thoſe words ſo added are againſt the law, and no part of Littleton's worke (3).

Sect. 128.

(Poſt 142. a.)

UN lib. de pepper ou cumyn. Here it is to be obſerved, that the lord may reſerve pepper, or any other things that be *exotica*, foreign of the growth of outlandiſh countreyes or beyond ſea, as well as of the growth of England, whereby navigation (the life of every iland) is employed. And where Littleton here putteth his caſe in the disjunctive, if the tenant doth hold by fealty and one pound of pepper or a pound of cummun, he ſhall pay for reliefe a pound of pepper or a pound of cummin, over and beſides the rent. But if the tenant holdeth of his lord by doing of certaine worke dayes in harveſt, or to attend at Chriſtmaſſe, or ſuch like, he ſhall not double the ſame; for of corporall ſervice or labour or worke of the tenant,

EN meſme le maner eſt, lou le tenant tient de ſon ſeignior per fealtie et un li. de peper ou cummin, et le tenant moruſt, le ſeignior avera pur relief un lib. de cummin, ou un lib. de peper, ouſter le common rent. En meſme le maner eſt, lou tenant tient a payer per an certaine number de capons, ou de gallines, ou un paire de gaunts, ou certaine buſhels de frument, et hujuſmodi.

IN the ſame manner it is, where the tenant holdeth of his lord by fealtie and a pound of pepper or cummin, and the tenant dyeth, the lord ſhall have for reliefe a pound of cummin, or a pound of pepper, beſides the common rent. In the ſame manner it is, where the tenant holdeth to pay yearely a number of capons or hennes, or a paire of gloves, or certaine buſhels of corne, or ſuch like.

(2. Ro. Abr. 515.)

no reliefe is due, but where the tenant holdeth by ſuch yearly rents or profits, which may be paid or delivered, whereof Littleton hath put his examples; and by them is manifeſtly proved, that corporall ſervice, worke, or labour, ſhall not be doubled in this caſe (4).

Ou certaine buſhels de frument. Here it appeareth, that the reliefe of buſhels of corne is to be paid preſently, though the tenant die in winter before corne be ripe.

Note

(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* on *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.

(2) See ante 83. b. note 4.

(3) Accordingly the words objected to by lord Coke are neither in L. and M. or Roh.—They were firſt inſerted in P.

(4) But Rolle tells us, that Maſter Herbert of the Inner Temple in his autumn reading 11 Cha. 1. held the contrary. 2. Ro. Abr. 515.

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dians 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 Coment. ad Indect. l. 26. 1. 2. 3. 1. Strah. Dom. 264. Stair's Inſt. of Law of Scotl. 3. 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.—(7) As to the conſtruction of the words *next of blood* in other caſes, ſee ante 10. b. and note 2. there.—(8) Ante 84. b.—(9) Lord Coke ſhould

Note, here are examples put of five natures. 1. *Aromatorum exoticum*, of ſpices or drugs of outlandiſh growth. 2. *Granorum*, of corne of Engliſh growth. 3. *Avium villaticarum*, of powltry, as capons, hens, &c. 4. *Artificiorum*, of handicrafts, as a paire of gloves generally either of outlandiſh or Engliſh. 5. *Aut ſimilium*, or ſuch like, (that is) of like outlandiſh growth or of Engliſh growth, or of powltry, or of artifices outlandiſh or Engliſh, and like herein alſo, that they may be paid or delivered to the lord every year, or every ſecond or third year, &c.

Sect. 129.

MES en aſcun caſe le ſeignior doit demurrer a diſtreiner pur ſon reliefe jeſque a certaine temps. Sicome le tenant tient de ſon ſeignior per un roſe, ou per un buſhel de roſes, a paier al feaſt de Nativitie de Saint John Baptiſt, ſi tiel tenant devie en yuer, donque le ſeigniour ne poit diſtreiner pur ſon reliefe, tanque al temps que roſes per le courſe del an poient aver lour creſſer, &c. et ſic de ſimilibus.

BUT in ſome caſe the lord ought to ſtay to diſtreine for his reliefe untill a certaine time. As if the tenant holds of his lord by a roſe, or by a buſhell of roſes, to pay at the feaſt of St. John the Baptiſt, if ſuch tenant dieth in winter, then the lord cannot diſtreine for his reliefe, untill the time that roſes by the courſe of the yeare may have their growth, &c. and ſo of the like.

PER le courſe del an. (Poſt 197. b.)

Lex ſpectat naturæ ordinem, the law reſpecteth the order and courſe of nature. *Lex non cogit ad impoſſibilia*, the law compells no man to impoſſible things. The argument *ab impoſſibili* is forcible in law. *Impoſſibile eſt, quod naturæ rei repugnat.* And here it is to be obſerved, that Littleton puts a diverſity betweene corne and roſes; for corne will laſt. And therefore the tenant muſt deliver the corne preſently before the time of growth, (as before is ſaid), and ſo of ſaffron, and the like. But roſes, or other flowers, that are *fructus fugaces*, cannot be kept, and therefore are not to be delivered till the time of growing. Neither is the tenant driven by law artificially to preſerve roſes; for the law in theſe caſes reſpecteth nature, and the courſe of the yeare, as Littleton here ſaith, *et ars naturam imitatur, et ſic de ſimilibus.*

Sect. 130.

ITEM ſi aſcun voile demand, pur que home poit tener de ſon ſeignior per fealty tantſolement pur touts maners des ſervices, entant que quant le tenant ferra fealtie, il jurera a ſon ſeignior que il ferra a ſon ſeigniour touts maners des ſervices dues, et quant il ad

ALSO if any will aſke, why a man may hold of his lord by fealty only for all manner of ſervices, inſomuch as when the tenant ſhall doe his fealty, he ſhal ſweare to his lord that he will doe to his lord all manner of ſervices due, and when he hath done fealty in

QUANT le tenant ferra fealty, il jurera a ſon ſeignior, &c. Here it appeareth, that the doing of the fealty is both a performance of his ſervice, and of his oath alſo when it is done, for that no other ſervice is due; and that one oath of fealty is taken of all that hold, and is not to be changed for any noveltie or nicety of invention; for judges anciently and continually have ſuppreſſed innovations, and would in no caſe change the ancient common law.

31. E. 3. tit. Gager deliverance 5.
38. E. 3. 1. 42. Aſſ. p. 12. 4. E. 3. ca. 5. 18. E. 3. ca. 4. & 6.
4. H. 4. ca. 2. 2. H. 4. fo. 18.

Il

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