for the eſtate of B for terme of his own life is higher than an eſtate for another man's life: and therefore if tenant for life infeoffe him in the remainder for life, this is a ſurrender, and no forfeiture. And albeit an eſtate for terme of a man's own life be but one freehold, yet may ſeverall freeholds in certaine caſes be derived out of the ſame, whereof our bookes are very plentiful, and wherewith you may diſport your ſelves for a time. As if tenant for life maketh a leaſe by deed, or without deed, to him in the remainder, or reverſion, in taile or in fee, for the term of the life of him in the rem. or reverſion, and after he in the remainder taketh wife and dieth, his wife ſhall not be endowed, for tenant for life ſhall enjoy the land again; for forfeiture it cannot be, for he in the rem. was party, and ſurrender it cannot be, for that his whole eſtate was not given (1).

(Ante 31. b. poſt 273. b.) 24. E. 3. 32. & 68. 30. Aſſ. p. 47. 19. E. 3. Sur. 8. (1. Co. 76. b.)

13. R. 2. Dow. 95. 7. H. 6. 3. per Cur. 18. E. 3. 48. (2. Ro. Abr. 497. Poſt 335. a)

The heire maketh a leaſe for life, reſerving a rent, againſt whom the wife recovereth her dower and dieth, the leſſee ſhall have the land againe for his life, and the rent is revived.

7. H. 5. 4.

So it is, if tenant for life take huſband and by deed indented they make a leaſe to him in the reverſion for the life of the huſband, reſerving a rent, this is neither forfeiture, nor abſolute ſurrender, for the cauſe aforeſaid; and the reſervation is good.

29. Aſſ. p. 64.

B ſeiſed of lands in fee, taketh to wife Iſ. and infeoffe C in fee, who takes Alice to wife: C dieth, Alice is endowed; B dieth, Iſ. recovereth dower againſt Alice and dieth, Alice ſhall enjoy the land againe during her life (2).

8. E. 2. Aſſ. 393. 45. E. 3. 13.

A and [a] B joyntenants, A for life, and B in fee, joyne in a leaſe for life (3), A hath a reverſion, and ſhall joyne in an action of waſt (4).

[a] 2. H. 5. 7. 13. H. 7. 15. 18. E. 2. Br. 875. F. N. B. 59. f.

Tenant for [b] life, and he in the reverſion joyne in a leaſe for life, it is ſaid, that they ſhall joyne in an action of waſt, and that the leſſee for life ſhall recover the place waſted, and he in reverſion, dammages (5).

[b] 27. H. 8. 13. 13. H. 7. 15. 22. H. 6. 24. 17. E. 3. 9. b.

If a man grant [c] an eſtate to a woman *dum ſola fuit*; or *durante viduitate*, or *quam diu ſe bene geſſerit*, or to a man and a woman during the coverture, or as long as the grantee dwell in ſuch a houſe; or ſo long as he pay x l. &c. or untill the grantee be promoted to a benefice, or for any like incertaine time, which time, as Bracton ſaith, is *tempus indeterminatum*: in all theſe caſes, if it be of lands or tenements, the leſſee hath in judgment of law an eſtate for life determinable, if livery be made; and if it be of rents, advowſons, or any other thing that lie in grant, he hath a like eſtate for life by the delivery of the deed, and in count or pleading he ſhall alledge the leaſe, and conclude, that by force thereof he was ſeiſed generally for terme of his life (6).

[c] 37. H. 6. 27. 26. E. 3. 69. 14. E. 2. Grant. 92. 3. E. 3. 15. 14. H. 8. 13.

Bracton lib. 4. fo. 207. Fleta lib. 3. ca. 12. (1. Ro. Ab. 845.)

If a man make a leaſe of a mannor, that at the time of the leaſe made is worth xx l. *per annum*, to another until c.l. be paid; in this caſe becauſe the annuall profits of the mannor are incertain, he hath an eſtate for life, if livery be made determinable upon the levying of the c.l. (7) But if a man grant a rent of xx l. *per annum* untill c.l. be paid, there he hath an eſtate for five yeares, for there it is certaine, and depends upon no incertainty. And yet in ſome caſes a man ſhall have an incertaine intereſt in lands or tenements, and yet neither an eſtate for life, for yeares, or at will (8). As if a man by his will in writing, deviſe his lands to his executors for payment of debts, and untill his debts be paid; in this caſe the executors have but a chattell, and an incertaine intereſt in the land untill his debts be paid; for if they ſhould have it for their lives, then by their death their eſtate ſhould ceaſe, and the debts unpaid, but being a chattell, it ſhall go to the executors of executors for the payment of his debts: and ſo note a diverſity betweene a deviſe and a conveyance at the common law in his life time. And tenant by ſtatute merchant, by ſtatute ſtaple, and by *Elegit*, have incertaine intereſts in lands or tenements, and yet they have but chattells, and no freehold, whoſe eſtates are created by divers acts of parliament, whereof more ſhall be ſaid hereafter. And ſo have gardians in chivalry which hold over for ſingle or double value incertaine intereſts, and yet but chattells.

(6. Co. 35. b.)

33. Aſſ. p. 2. (Plow. 273.)

8. Co. 94. b. Manning's caſe. 3. H. 7. 13. 27. H. 8. 5. 14. H. 8. 13. 21. Aſſ. p. 8.

If one grant lands or tenements, reverſions, remainder, rents, advowſons, commons, or the like, and expreſſe or limit no eſtate, the leſſee or grantee (due ceremonies requiſite by law being performed) hath an eſtate for life (9). The ſame law is of a declaration of a uſe (10). A man may have an eſtate for terme of life determinable at will; as if the king doth grant an office to one at will, and grant a rent to him for the exerciſe of his office for terme of his life, this is determinable upon the determination of the office.

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

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

A, tenant in fee ſimple makes a leaſe of lands to B, to have and to hold to B for terme of life, without mentioning for whoſe life it ſhall be, it ſhall be deemed for terme of the life of the leſſee, for it ſhall be taken moſt ſtrongly againſt the leſſor, and as hath beene ſaid, an eſtate for a man's owne life is higher than for the life of another (11). But if tenant in taile make ſuch a leaſe without expreſſing for whoſe life, this ſhall be taken but for the life of the leſſor, for two reaſons.

Vide ſect. 381. (1. Ro. Abr. 846.)

Firſt, when the conſtruction of any act is left to the law, the law which abhorreth injury and wrong will never ſo conſtrue it, as it ſhall work a wrong: and in this caſe, if by conſtruction it ſhould be for the life of the leſſee, then ſhould the eſtate taile be diſcontinued, and a new reverſion gained by wrong: but if it be conſtrued for the life of the tenant in taile, then no wrong is wrought. And it is a generall rule, that whenſoever the words of a deed, or of the parties without deed may have a double intendment, and the one ſtandeth with law and right,

(Poſt 183.)

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

(2) Hic *fol.* 21. Hal. MSS.

(3) 13. *E.* 4. 4. *Dy.* 237. *So of a gift in tail.* 38. *E.* 3. 7. Hal. MSS.

(4) *And the writ ought to be* ad exhæredationem *B.* 13. *E.* 2. *Brief* 835. Hal. MSS.

(5) 3. *H.* 7. 9. P. 43. Eliz. C. B. *D. D. n.* 4. *But if the leaſe be without deed it is a ſurrender.* 10. *H.* 7. 3. 1. *Rep.* *Bredon's caſe.* Hal. MSS.

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

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

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

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

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

(11) Vid. 8. *E.* 3. 3. *A leſſee for life makes leaſe to B and C, on condition that if they die leaving A, then the land ſhall revert to A without determining any eſtate certain in the grant. All the eſtate paſſes under the condition, for in* præcipe *A was not received on default of B and C.* Hal. MSS.

4. E. 2. Waſt. 11. 17. E. 3. 7. (Mo. 355. 363. Poſt. 276. a.)

19. H 6. 7. H. 4. 32. 6. E. 3. 17. 7. E. 3. 66. 18. E. 3. 60. 23 E. 3. c. 1. &c. 11. H. 4. 44. 38. E. 3. 23. 24.

right, and the other is wrongfull and againſt law, the intendment that ſtandeth with law ſhall be taken.

Secondly, The law more reſpecteth a leſſer eſtate by right, than a larger eſtate by wrong, as if tenant for life in remainder diſſeiſe tenant for life, now he hath a fee ſimple; but if teſtiant for life die, now is his wrongfull eſtate in fee by judgment in law changed to a rightfull eſtate for life.

If a man retaine a ſervant generally without expreſſing any time, the law ſhall conſtrue it to be for one yeare, for that retainer is according to law. Vide 23. E. 3. cap. 1. &c (1). To ſhut up this point it hath been adjudged, that where tenant in taile made a leaſe to another for terme of life generally, and after releaſed to the leſſee and his heires, albeit betweene the tenant in taile and him a fee ſimple paſſed, yet after the death of the leſſee the entry of the iſſue in taile was lawfull; which could not be, if it had been a leaſe for the life of the leſſee, for then by the releaſe it had beene a diſcontinuance executed (2). But let us now returne to Littleton.

Sect. 57.

THIS and the reſt that follow in this chapter concerning the deſcription of feoffor and feoffee, donor, and donee, and leſſor and leſſee are evident.

Et eſt aſcavoir que il y ad le feoffor, et le feoffee, &c. Vide ſect. 2. Where a light touch is given who may purchaſe. Now ſomewhat is to be ſaid, who have ability to enfeoffe, &c. and may be a feoffor, donor, leſſor, &c. Whoſoever is diſabled by the common law to take, is diſabled to infeoffe, &c. But many that have capacitie to take, have no abilitie to infeoffe, &c. As men attainted of treaſon, felony, or of a *præmunire*, aliens borne, the king's villaines, traitors, felons, &c. he that hath offended againſt the ſtatutes of *præmunire*, after the offences committed (3) if attainders enſue, ideots, madmen, a man deafe, dumbe, and blinde from his nativity, a feme covert, an infant (4), a man by dures: for the feoffments, &c. of theſe may be avoyded. But an hereticke, though he be convicted of hereſie, a leper removed by the king's writ from the ſociety of men, baſtards, a man deafe, dumbe, or blinde, ſo that he hath underſtanding and found memory, albeit he expreſſe his intention by ſignes, villaine of a common

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

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

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

AND it is to be underſtood, that there is feoffor and feoffee, donor and donee, leſſor and leſſee. Feoffor is properly where a man enfeoffes another in any lands or tenements in fee ſimple, he which maketh the feoffment is called the feoffor, and he to whom the feoffment is made, is called the feoffee. And the donor is properly where a man giveth certaine lands or tenements to another in taile, he which maketh the gift is called the donor, and he to whom the gift is made is called the donee. And the leſſor is properly where a man letteth to another lands or tenements for terme of life or for terme of years, or to hold at will, he which maketh the leaſe is called leſſor, *for*

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

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

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

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

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

and hee, to whom the leaſe is made, is called leſſee. And every one, which hath an eſtate in any land or tenements for term of his owne or another man's life, is called tenant of freehold, and none other of a leſſer eſtate can have a freehold: but they of a greater eſtate have a freehold; for he in fee ſimple hath a freehold, and tenant in taile hath a freehold, &c.

perſon before entrie, or the like may infeoffe, &c.

[a] All feoffments, gifts, grants, and leaſes by biſhops, albeit they be confirmed by the deane and chapter, by any of the colledges or halls in either of the Univerſities, or elſewhere, deans and chapters, maſter or gardian of any hoſpital, parſon, vicar, or any other having ſpirituall or eccleſiaſtical living, are alſo to be avoyded, [b] and all the ſaid bodies politique or corporate, are by the ſtatutes of the realm diſabled to make any conveiances to the king, or to any other, as it hath been adjudged: which ſtatutes have bin made ſince Littleton wrote (1).

[a] 32. H. 8 cap. 28. 1. El. not printed. 13. El. ca. 10. 14. El. ca. 11. 18. El. ca. 20. 1. Ja. cap. 3.

[b] 4. Co. 76. 120. 5. Co. 6. 14 6. Co. 37. 11. Co. 67. Magdalen Colledge caſe. Vide Leſt. de W. 2. ca. 41.

It is provided [c] by the ſtatute of *Magna Charta*, *quod nullus liber homo det de cætero amplius alicui de terra ſua, quam ut de reſiduo terræ ſuæ poſſet ſufficient' fieri domino feodi ſervitium ei debitum quod pertinet ad feodum illud.* Upon which act I have heard great queſtion [d] made, whether the feoffment made againſt that ſtatute were voydable or no, and ſome have ſaid that the ſtatute intended not to avoyd the feoffment, but implicite to direct the tenure, *viz.* that the tenant ſhould not infeoffe another of parcell to hold of the chief lord (that is of the next lord) but to hold of himſelfe, and then the lord may diſtreine in everie part for his whole ſervice without any prejudice unto him. But this opinion is againſt [e] the authoritie of our bookes, and againſt the ſaid ſtatute of Magna Charta. For firſt it is agreed in 10. H. 7. that as well before the ſtatute as after, a tenant which held two acres might have aliened one of the acres to hold of him, and notwithſtanding the lord might have diſtrained in which of the acres he would for his whole ſervices: and reaſon teacheth that before that ſtatute a tenant could not have aliened parcell to hold of the chiefe lord; for the ſeignory of the lord was entire, for the which the lord might diſtraine in the whole or in any part, and which the tenant by his owne act cannot divide to the prejudice of the lord to barre him to diſtraine in any part for his ſervices, as he ſhould doe, if he ſhould enfeoffe another of parcell to hold of the chiefe lord. But the tenant might have made a feoffment of the whole to hold of the chiefe lord, for there no prejudice inſued to the lord (2). Others have ſaid, and they ſaid truely, that the intention of the ſtatute was that the tenant could not alien parcell (which might turn to the prejudice of the lord) without his aſſent, and this appeareth cleerly by the mirror. And by this ſtatute the king tooke benefit to have a fine for his licence, before which ſtatute no fine for alienation was due to the king. For it is [f] adjudged that for an alienation in time of Henry the ſecond, no fine was due, and it appeareth in our bookes, that if an alienation had beene made before 20. H. 3. no fine was due to the king for alienation (3). Now it is to be obſerved, that oftentimes for the better underſtanding of our bookes, the adviſed reader muſt take light from hiſtorie and chronicles eſpecially for diſtinction of times. And therefore Matthew Paris (who in his chronicle reciteth Magna Charta) (4) teſtifieth that king Henry the third by evill counſell (and eſpecially, as the truth was, of Hubert de Burgo then chiefe juſtice) ſought to avoyde the great charter firſt granted by his father king John, and afterward granted and confirmed by himſelfe in the ninth of Henry the third, for that as he ſaid king John did grant it by dures, and that he himſelfe was within age when he granted and confirmed it. But foraſmuch as afterwards the ſaid king Henry the third in the twentieth yeare of his raigne, at what time he was nine and twentie yeare old, did grant and confirme the ſaid great charter, for that cauſe to put out all ſcruples is the twentieth yeare of Henry the third named, albeit in law the king's charter granted in the ninth yeare of Henry the third, was of force and validitie notwithſtanding his nonage, for that, in judgement of law the king, as king, cannot be ſaid to be a minor

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

[d] Vide an excellent declaration hereof inter adjudicat' coram Rege. Trin. E. 1. fol. 2. in Theſau. Nott. & Derb.

[e] Bract. lib. 1. 10. H 7 fol. 10. b. 33. E. 3. Avowry 255. Stamf. prer. fo. 29. 8. E. 4. 12.

Mirror cap. 5. Sect. 2. Fleta lib. 3. cap. 3.

[f] 26. Aſſ. p. 37. 20. Aſſ. p. 17. 20 E. 3. Avowry 126. 34 E. 3. c. 15. Vide Stamf. 29. 30. Matt. Paris. Walſingham 37. 39.

Vide 5. H. 3. Mordanc. 53. Magna Charta there vouched, which was the charter of King John, for it was cited before 9. H. 3.

Wright's Ten. 167. note (1)

(1) *And in caſe of corporation aggregate, as dean and chapter, the leaſe is void againſt the dean who makes the leaſe.* M. 13. Car. B. R. *Lloyd and Gregory. But it is otherwiſe in the caſe of a ſole corporation, for there it is void only againſt the ſucceſſor.* M 44. Eliz. C. B. *Saunders's caſe.* Hal. MSS.—See the obſervation on the caſe of Lloyd and Gregory Poſt 45. a. As to conveyances by corporations before the reſtraining ſtatutes, ſee Poſt 44. a. and 103. a.—(2) This aſſertion has been controverted, as repugnant to the feudal notions of alienation, and inconſiſtent with any reaſonable conſtruction of the ſtatute *quia emptores terrarum*. Wright's Ten. 155. Dalrympl. Hiſt. Feud. Prop. 80. and Sulliv. Lect. 418. In fact the hiſtory of our law with reſpect to the powers of alienation before the ſtatute of *quia emptores terrarum* is very much involved in obſcurity. See Bract. *lib.* 2. *cap.* 19. where the author inquires, *ſi ille, cui datum eſt, rem datam ulterius dare poſſet.* See alſo Bract. *lib.* 2. *cap.* 5. and Staundf. Prærog. cap. 7.—(3) Nota, *for ſeiſure of ſerjanties aliened without licence, it ſeems that it was the ancient law.* Vid. Roger Hoveden 783. *It was one of the articles* inter capitula coronæ R. 1. de ſerjantiis alienatis *and ſo it ſtill continues.* Clauſ. 7. Johann. m. 11. *precept to ſeiſe* ſerjantias theinagia et dengagia tent. de honore Lancaſter alienat. poſt primam coronation. H. 2. Vid. T. 7. E. 1. Coram rege Gilbertus de Clare comes Glouceſter *impeached for alienation made to his father.* Vid. 24. E. 3. 71. *ſpecial cuſtom to alienate without licence.* Videtur per Rot. Parl. 29. E. 3. n. 18. quoad *other tenures than ſerjanties the prerogative began in the time of Edward the Firſt.* Nota *it ſeems, that the ſtatute of* quia emptores *takes away licences and pardons of alienations in caſe of tenure of a ſubject. Yet ſee* 14. *H.* 4. 4. recordare longum *for cuſtom of the honor of Glouceſter and* Rot. Parl. 38. H. 6. n. 29. pro ducatu Cornubiæ ubi *ſuch a cuſtom.* Rot. Parl. 8. E. 2. m. 7. in ſcedula pendente dorſo. "Accord eſt et aſſenſu per archeveſques eveſques abbes priores countes "et barons et autres du realme in parlement le roy ſummons a Weſtminſter octab. Hill. 8. E. 2. que eux deſoremes nul fine de-"mandront ne prendront des frankhomes, pur entrer terres et tenements que ſont de leur fee, iſſint totes voyes que per tiel "feoffments ils ne ſoient pas eloignes de leur ſervices ne leur ſervices dedits." Hal. MSS. From lord Hale's obſerving, that the crown's right of ſeiſure for alienation of ſerjanties without licence *ſtill continues*, it ſeems, that his note on the ſubject was written before the 12. Cha. 2. c. 24. which converts tenures by knight ſervice into ſocage and takes away fines of alienation. See Poſt. 43. b. n. 2.—(4) Nota pro carta de libertatibus.—Carta regis Johann. proclamata 19. Junii 17. Johann. apud Runi-

nor, for when the royall bodie politique of the king doth mecte with the naturall capacity in one perſon, the whole bodie ſhall have the qualitie of the royall politique, which is the greater and more worthy, and wherein is no minoritie (1). For, *omne majus trahit ad ſe quod eſt minus.* And it is to be obſerved, that no record can be found, that either a licence of alienation was ſued, or pardon for alienation was obtained for an alienation without licence at any time before the twentieth yeare of Henry the third, and it is holden in the twentieth of Edward the third, that a licence for alienation grew by this ſtatute.

20. Aſſ. Pl. 17. by Skipwith.

Now in the caſe of a common perſon it was the common opinion, that if the tenant had alienated any parcell contrary to the ſaid act, that he himſelfe was bound by his owne act, but that his heire might have avoyded it; and in the king's caſe many held the ſame opinion. For Britton ſaith, *Ne counts, ne barons, ne chivaler, ne ſerjeants, que teignont en chiefe de nous ne purr' my diſmember nous fees ſauns licence: que nous ne puiſſent per droit engettre les purchaſors, &c.* And herewith agreeth Fleta, and our bookes. But now by the ſtatute 1. E. 3. cap. 12. & 34. E. 3. cap. 15. although the king's tenant in chiefe or by grand ſerjantie doe alien all or any part without licence, yet is there not any forfeiture of the ſame, but a reaſonable fine therefore to be paid. And note, it appeareth by the preamble in 1. E. 3. that complaint was made that land holden of the king *in Capite*, being aliened, without licence was ſeiſed as forfeited. And in the caſe of a common perſon, the ſtatute of 18. E. 1. *De quia emptores terrarum* hath made it cleare, for this hath in effect as to the common perſons taken away the ſaid ſtatute of Magna Charta cap. 32. for thereby it is provided, *Quod liceat unicuique libero homini terras ſuas ſeu tenementa ſua, ſeu partem inde ad voluntatem ſuam vendere, ita quod feoffatus teneat, &c. de capitali domino.* And herein are divers notable points to be obſerved. Firſt, that this word *liceat* proveth that the tenant could not, or at leaſt wayes was in danger to alien parcell of his tenancy, &c. upon the ſaid act of Magna Charta. Secondly, that upon the feoffment of the whole, the tenant ſhall hold of the chiefe lord. Thirdly, that the tenant might infeoffe one of part to hold *pro particula* of the chiefe lord. But this act (the king being not named) doth not take away the king's fine due to him by the ſtatute of Magna Charta (2).

Britt. fo. 28. 88. 186. 187. 245. 247. Prer. Regis ca. 7. Fleta lib. 6. cap. 29 acc. 20. E. 3. Aſſ. 122. 29. Aſſ. pl. 19. 14. E. 3. quare imp. 45. 14. H. 4. 2. 3. 9. E. 3. fo. 26. 1. E. 3. c. 12. 34. E. 3. ca. 15. 2. Co. 81. 82. in Seignior Cromwell's caſe.

Regiſt. int. les breves de onerand' pro rata portione.

Franktenement. Here it appeareth that tenant in fee, tenant in taile, and tenant for life are ſaid to have a franktenement, a freehold, ſo called, becauſe it doth diſtinguiſh it from termes of yeares, chattels upon incertaine intereſts, lands in villenage or cuſtomary, or copyhold lands. *Liberum autem tenementum dicitur ad differentiam villenagii, et villanorum qui tenent villenagium quia non habent actionem nec aſſiſam, &c. item quod ſit ſuum et non alienum, hoc eſt ſi teneat nomine alieno ut firmarius et ad terminum vel ſicut creditor ad vadium.* And note that tenant by ſtatute merchant, ſtatute ſtaple, or elegit, are ſaid to hold land *ut liberum tenementum* untill their debt be paid, and yet in troth they (as hath beene ſaid) have no freehold, but a chattle, which ſhall go to the executors, and the executors alſo if they be ouſted ſhall have an aſſiſe. But (*ut*) is ſimilitudinary, becauſe they ſhall by the ſtatutes have an aſſiſe as tenant of the freehold ſhall have, and to that reſpect hath a ſimilitude of a freehold, but *nullum ſimile eſt idem.*

(Plowd. 561. b. 562) Bracton lib 4. fo. 224. Britton cap. 32. & 47. Bracton lib. 4. fo. 22. Regiſt. Judic. 68. 73.

28. Aſſ. p. 7. W. 2. ca. 18. Stat. de mercatoribus an. 13. E. 1. 27. E. 3. ca. 9. 23. H. 8. ca. 6. F. N. B. 178. (Ante 42. a.)

2. Inſt. 390.

^ The words 'their interest' seem wanting. But they are not in the first or second edition. See Brett. ed. Lett. 396. where the want of the seemingly omitted words is not noticed.

CHAP. 7. Sect. 58.

Tenant for terme of yeares.

LOU home leſſa terres, &c. leſſa

[a] Mirror cap. 2. Sect. 17. Bracton lib. 2. cap. 26. & lib. 4. fol. 220. Fleta lib. 3. cap. 12. & lib. 5. cap. 34.
[b] For the word (dimitto) ſee Sect. 531.

and leaſe is [a] derived of the Saxon word *leapum*, or *leaſum*, for that the leſſee commeth in by lawfull meanes; [b] and *dimittere* is in French *layſſer* to depart with or forgoe.

When Littleton wrote, many perſons might make leaſes for yeares, or for life, or

TENANT pur terme dans eſt, lou home leſſa terres ou tenements a un auter pur terme de certaine ans, ſolonque le number des ans que eſt accord perenter le leſ-

TENANT for terme of yeares is, where a man letteth lands or tenements to another for terme of certaine yeares, after the number of yeares that is accorded between the *ſor*

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

(1) See this ſubject conſidered at large in the caſe of the dutchy of Lancaſter Plowd. 214. and in *Willion* and *Berkley*. Plowd. 234.

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

ſor et le leſſee. Et quant le leſſee entrer per force del leas, donque il eſt tenant pur terme des ans; et ſi le leſſor en tiel caſe reſerve a luy un annuall rent ſur tiel leas, il poit eſlier a diſtrainer pur le rent en les tenements leſſes, ou il poit aver un action de debt pur les arrerages enverz le leſſee. Mes in tiel caſe il covient, que le leſſour ſoit ſeiſie de meſmes les tenements al temps del leas, car il eſt bone plee pur le leſſee adire, que le leſſor navoit riens en les tenements al temps de le leas, ſinon que le leas ſoit fait per fait endent, en quel caſe tiel plee donque ne giſt en le bouch le leſſee a pleader.

leſſor and the leſſee, and when the leſſee entreth by force of the leaſe, then is he tenant for tearme of yeares; and if the leſſor in ſuch caſe reſerve to him a yearely rent upon ſuch leaſe, he may chuſe for to diſtraine for the rent in the tenements letten, or elſe he may have an action of debt for the arrerages againſt the leſſee. But in ſuch caſe it behooveth, that the leſſor be ſeiſed in the ſame tenements at the time of his leaſe for it is a good plee for the leſſee to ſay, that the leſſor had nothing in the tenements at the time of the leaſe, except the leaſe be made by deed indented, in which caſe ſuch plee lieth not for the leſſee to plead.

lives at their will and pleaſure, which now cannot make them firme in law. And ſome perſons may now make leaſes for yeares, or for life or lives (obſerving due incidents) firme and good in law, who of themſelves could not ſo doe when Littleton wrote, and this by force of divers acts of parliament [c] as namely 32. H. 8. 1. Eliz. 13. Eliz. 18. Eliz. and 1. Jac. Regis, of which ſtatutes one is enabling, and the reſt are diſabling. When Littleton wrote, biſhoppes with the confirmation of the deane and chapter, maſter and fellowes of any colledge, deanes and chapters, maſter or gardian of any hoſpitall, and his brethren, parſon or vicar with the conſent of the patrone and ordinary, archdeacon, prebend, or any other body politique ſpirituall and eccleſiaſticall (*Concurrentibus hiis quæ in jure requiruntur*) might have made leaſes for lives or yeares without limitation or ſtint. And ſo might they have made gifts in tailes or ſtates in fee at their will and pleaſure, whereupon not onely great decay of divine ſervice, but dilapidations and other inconveniences enſued, and therefore they were diſabled and reſtrained by the ſayd acts of 1. Eliz. 13. Eliz. and 3. Jac. Regis to make any ſtate or conveyance to the king at all, or to the ſubject; but there is excepted out of the reſtraint or diſability, leaſes for three lives, or one and twenty yeares, with ſuch reſervation of rent, and with ſuch other proviſions and limitations as hereafter ſhall appeare. Alſo they may make grants of ancient offices of neceſſity with ancient fees, *Concurrentibus hiis quæ in jure requiruntur*, for thoſe grants are not within the ſtatute of 32. H. 8. but by conſtruction, they are not reſtrained by the ſtatutes of 1. Eliz. or 13. Eliz. becauſe theſe ancient offices be of neceſſity, and with the ancient fees, and ſo no diminution of revenue (1).

There be three kinds of perſons that at this day may make leaſes for three lives, &c. in ſuch ſort as hereafter is expreſſed, which could not ſo doe when Littleton wrote, viz. firſt, any perſon ſeiſed of an eſtate taile in his owne right. Secondly, any perſon ſeiſed of an eſtate in fee ſimple in the right of his church. Thirdly, any huſband and wife ſeiſed of any eſtate of inheritance in fee ſimple or fee taile in the right of his wife, or jointly with his wife before the coverture or after, *viz.* the tenant in taile, by deed to binde his iſſues in taile, but not the reverſion or remainder, the biſhop, &c. by deed without the deane and chapter to bind his ſucceſſors, the huſband and wife by deed to bind the wife and her and their heires (2), and theſe are made good by the ſtatute of 32. H. 8. which inableth them thereunto. But to the making good of ſuch leaſes by the ſaid ſtatute, there are nine things neceſſarily to be obſerved belonging to them all, and ſome other to ſome of them in particular.

Firſt, the leaſe muſt be made by deed indented, and not by deed poll, or by paroll (3).

Secondly, it muſt be made to begin from the day of the making thereof, or from the making thereof (4).

Thirdly,

[c] 32. H. 8 ca. 28. 1. Eliz. not printed but in the abridgement. 13. Eliz. cap. 10. 18. Eliz. cap. 6. 1. Jac. cap. 3.

5. Co. 14. caſe de eccleſiaſtical perſons. 11. Co. 66. Magdalen Colledge caſe. Leveſque de Sarum's caſe. 10. Co. 60. 61. (1. Sid. 162.)

(5. Co. 15.)

(Cro. Char. 16. 47. 50. 10. Co. 58. Pollexf. 134. 4. Mod. 16. Finch 191. 192. 193. Cro. Cha. 48. Cro. Jac. 173.)

5. Co. 6. Sc'g. Mountjoye's caſe. (3. Lev. 438. Cro. Ja. 94. 458.)

(1) Vid. 29. Eliz. *Caſe of the biſhop of Cheſter, who had antiently uſed to have a counſel who had a fee. This grantable by the biſhop with conſent of dean and chapter.* Nota, *though it be not an office of time of which, &c. yet grantable, if of neceſſity, as in the caſe of the biſhop of Glouceſter founded within time of memory.* M. 1. Car. C. B. *Crook n.* 8. *Cook and Young.* Vide *that it is holden, that though it be a new office, yet if neceſſary and the fee is reaſonable, being confirmed it ſhall bind the ſucceſſor;* and vide *the grant of antient office and fee, with the addition of a new fee, which notwithſtanding ſeems good, becauſe the office is antient.* M. 2. Car. C. B. *Crook n.* 7. *Gee's caſe. If it has been uſual to grant an antient office to one only, a grant to two is not good. But if it has been once granted to two or granted in reverſion before the ſtatute* 1. Eliz. *then it ſhall be intended to have been uſually ſo granted, and ſuch grant to two or in reverſion ſhall bind the ſucceſſor.* T. 8. Car. B. R. *Crook n.* 2. *Walker and Lamb.* M. 8. Car. B. R. *Crook n.* 19. *Young and Steele concerning the official and commiſſary of the biſhop of Lincoln and the regiſter of the biſhop of Rocheſter.* Hal. MSS. Ley 75. is contrary to Gee's caſe cited by lord Hale.—See further as to the grant of offices by eccleſiaſtical perſons, New Abr. *Offices* D. See alſo in Burr. part 4. vol. 1. page 219. the caſe of Sir John Trelawney and the biſhop of Wincheſter, in which the court held, that an office and fee which exiſted before the 1ſt. of Eliz. are not within the reſtraint of that ſtatute, but that they may be granted as before the ſtatute, and that the utility or neceſſity of the office is not more material ſince than it was before.

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

(3) See New Abr. *Leaſes* E. 21

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

5. Co. 2. Elmer's caſe.

Thirdly, if there be an old leaſe in being, it muſt be ſurrendred (1) or expired, or ended within a yeare of the making of the leaſe, and the ſurrender muſt be abſolute and not conditionall.

Fourthly, there muſt not be a double leaſe in being at one time, as if a leaſe for yeares be made according to the ſtatute, he in the reverſion cannot expulſe the leſſee, and make a leaſe for life or lives according to the ſtatute, nor *è converſo*; for the words of the ſtatute be, to make a leaſe for three lives, or one and twenty yeares, ſo as one or the other may be made, and not both (2).

(Cro. Cha. 95. Cro. Ja. 112. 273.)

Fiftly, it muſt not exceed three lives, or one and twenty yeares, from the making of it, but it may be for a leſſer terme of fewer lives.

[d] 5. Co. 3. Jewel's caſe. 17. E. 3. 75. 9. Aſſ. 24. 14. E. 3. Scire facias 22. 20. H. 6. 2. 3. H. 6. 21. (1. Sid. 316. 317. 416. Cro. Eliz. 708.)

Sixtly, it muſt be of lands, tenements, or hereditaments, manurable or corporeall, which are neceſſary to be letten, and whereout a rent by law may be reſerved, and not [d] of things that lye in grant, as advowſons, faires, markets, franchiſes, and the like whereout a rent cannot be reſerved (3).

[e] 6. Co. 37. Deane and Chapter of Worceſter's caſe.

Seventhly, it muſt be of lands or tenements which have moſt commonly beene letten to farme, or occupied by the farmers thereof by the ſpace of 20 yeares next before the leaſe made, ſo as if it be letten for 11 yeares at one or ſeverall times within thoſe 20 years it is ſufficient. A grant [e] by copy of court roll in fee for life or yeares is a ſufficient letting to farme within this ſtatute, for he is but tenant at will according to the cuſtome, and ſo it is of a leaſe at will by the common law, but thoſe lettings to farme muſt be made by ſome ſeiſed of an eſtate of inheritance, and not by a gardian in chivalry, tenant by the curteſie, tenant in dower, or the like (4).

5. Co. 6. Seignior Mountjoye's caſe.

Eightly, that upon every ſuch leaſe there be reſerved yearly during the ſame leaſe due and payable to the leſſors, their heires and ſucceſſors, &c. ſo much yearly farme or rent, or more, as hath beene moſt accuſtomably yeilded or paid for the lands, &c. within twenty yeares next before ſuch leaſe made (5). Hereby firſt it appeareth (as hath beene ſaid) that nothing can be demiſed by authority of this act, but that whereout a rent may be lawfully reſerved. Secondly,

(Cro. Jam. 76.)

that where not onely a yearly rent was formerly reſerved, but things not annuall, as heriots, or any fine or other profit at or upon the death of the farmor, yet if the yearely rent be

6. Co. 37. 38. Deane and Chapter of Worceſter's caſe.

reſerved upon a leaſe made by force of this ſtatute, it ſufficeth by the expreſſe words of the act. Thirdly, if he reſerve more then the accuſtomable rent it is good alſo by the expreſſe letter of the act; but if twenty acres of land have beene accuſtomably letten, and a leaſe is made of thoſe twenty, and of one acre which was not accuſtomably letten, reſerving the accuſtomable yearely rent, and ſo much more as exceeds the value of the other acre, this leaſe is not warranted by the act, for that the accuſtomable rent is not reſerved, ſeeing part was not accuſtomably letten, and the rent iſſueth out of the whole. Fourthly, if tenant in taile let part of the land accuſtomably letten, and reſerve a rent *pro rata*, or more, this is good, for that is in ſubſtance the accuſtomable rent. Fiftly, if two coparceners be tenants in taile of twenty acres every one of equall value, and accuſtomably letten, and they make partition, ſo as each have ten acres, they may make leaſes of their ſeverall parts each of them, reſerving the halfe of the accuſtomable rent. Sixtly, if the accuſtomable rent had beene payable at foure daies or feaſts of the yeare, yet if it be reſerved yearely payable at one feaſt, it is ſufficient, for the words of the ſtatute be, reſerved yearely.

5. Co. 5. Seignior Mountjoye's caſe. 6. Co. 37.

Lord Mountjoye's caſe ubi ſupra. (Cro. Cha. 16. 17.)

Deane and Chapter of Worc. caſe ubi ſupra.

Deane and Chapter of Worc. caſe ubi ſupra.

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

Ninthly, nor to any leaſe to be made without impeachment of waſt. Therefore if a leaſe be made for life, the remainder for life, &c. this is not warranted by the ſtatute, becauſe it is diſpuniſhable of waſte. But if a leaſe be made to one during three lives, this is good, for the occupant, if any happen, ſhall be puniſhed for waſte (6). The words of the ſtatute be (ſeiſed in the right of his church) yet a biſhop that is ſeiſed *jure epiſcopatus*, a deane of his ſole poſſeſſions in *jure decanatus*, an archdeacon in *jure archidiaconatus*, a prebendary and the like are within the ſtatute, for every of them generally is ſeiſed in *jure eccleſiæ* (7).

But a parſon and vicar are excepted out of the ſtatute of 32. H. 8. and therefore if either of them make a leaſe for three lives, &c. of lands accuſtomably letten, reſerving the accuſtomed rent, it muſt be alſo confirmed by the patron and ordinary, becauſe it is excepted out of 32. H. 8 (8). and not reſtrained by the ſtatutes of *primo* or 13. Eliz. And what hath beene ſaid concerning a leaſe for three lives, doth hold a leaſe for one and twenty yeares.

Thus much ſhall ſuffice to have ſpoken of the inabling ſtatute of 32. H. 8. the better to inable the reader to underſtand both this and that which followes. Now to ſpeake ſomewhat of the diſabling ſtatutes of 1. Eliz. and 13. Eliz (9). the words of the exception out of the reſtraint and diſability of 1. Eliz. are, *Other than for the terme of twenty one yeares, or three lives, from ſuch time as any ſuch grant or aſſurance ſhall be given, whereupon the old and accuſtomed yearely rent, or more, ſhall be reſerved:* And to that effect is the exception in the ſtatute of 13. Eliz. Firſt, it is to be underſtood that neither of theſe diſabling acts, nor any other, do in any ſort alter or change the inabling ſtatute of 32. H. 8. but leaveth it for a pattern in many things for leaſes to be made by others. Secondly, it is to be knowne, that no leaſe made according to the exception of 1. Eliz. or 13. Eliz. and not warranted by the ſtatute of 32. H. 8. if it be made by

(1) *Feme covert tenant for life; reverſion in tail; huſband ſurrenders; tenant in tail leaſes for three lives; the wife dies. Adjudged, that this is a good leaſe to bind the iſſue. Sydenham and Cops cited by Popham. Mo* 783. Hal. MSS.—(2) M. 29. 30. Eliz. *Clench* 138. *Grindal's caſe.* Hal. MSS.—See S. C. 4. Leon. 78. 1. And. 65. and Mo. 107. and the obſervations upon it in New Abr. *Leaſes* E. rule 3 —(3) *But if tithes have been uſually lett to farm, they cannot be leaſed for life to bind the ſucceſſor; but they may be leaſed for* 21 *years, rendering the antient rent, and it ſhall bind the ſucceſſor. Mo.* 778. T. 2. Jac. B. R. *Adjudged in Denny's caſe, and the rent goes with the reverſion.* Nota, *it was the caſe of the precentor of Paul's.* Hal. MSS.—See New Abr. *Leaſes* E. rule 5 where many authorities are cited to prove this difference between leaſing tithes for life and for years, and that in the latter caſe the leaſe will bind the ſucceſſor becauſe he may have debt for the rent, which will not lie for him on a freehold leaſe. But the diſtinction is no longer of any importance; for the 5. G. 3. c. 17. makes leaſes of tithes and other incorporeal hereditaments by eccleſiaſtical perſons, whether for lives or for years, as good as if the leaſes were of corporeal hereditaments, and gives action of debt to the ſucceſſor for rent reſerved on freehold leaſes.—(4) *Leaſe by the king during vacancy of biſhoprick will not enable.* P. 19. Jac. B.R. *Denny's caſe.* Vid. *Dy.* 271. Hal. MSS.—(5) 6. *Rep.* 37. T. 3. Jac. *Crook n.* 6. Hal. MSS. See Cro Jam. 76.—(6) *Prebend makes leaſe for years, reſerving the running of a colt, rendering rent. A new leaſe, rendering the ſame rent, without reſerving the running of a colt, adjudged good; becauſe* quond *this it is neither reſervatioa nor exception. But if leaſe be of a manor except the woods rendering rent, and after the expiration of it there is a new leaſe rendering the ſame rent without ſuch exception, the ſecond leaſe is bad.* T. 18. Jac. B.R. *caſe of precentor of Paul's.* Hal. MSS.—(7) Vid. *for leaſes by biſhop tenant in tail, &c.—A ſeiſed in tail of a manor, of which three acres parcel of the demeines had been uſually demiſed at* 5 *s. rent, and the reſidue not, demiſes the three acres and alſo the manor* habendum *for* 21 *years, rendering for the three acres and all other the premiſes therewith demiſed* 5 *s. and for the manor* 5 *l. This is good to bind the iſſue for the three acres, but not for the reſidue.* H. 37. Eliz. *Tanfield and Rogers —The biſhop of G. ſeiſed of a manor, of which one tenement was uſually demiſed for life at* 5 *s. rent and the manor uſually at* 10 *s. rent, makes leaſe of the tenement for three lives, rendering* 5 *s. and afterwards leaſes the whole manor for three lives to another rendering rent, and dies. Ruled* 1. *That the reverſion of the tenement paſſes by the leaſe of the manor.* 2. *And therefore that the leaſe of the manor* quoad *the tenement ſhall not bind the ſucceſſor, becauſe then there would be ſix lives in being for the tenement, and the leſſee would be diſpuniſhable of waſte.* 3. *It ſeems, that the leaſe of the manor is alſo voidable, becauſe the rent iſſues alſo out of the tenement.* (Quere *of this, for here the rent as well for the tenement as for the manor is reſerved on the ſecond leaſe, ſo that though the tenement ſhould be evicted the intire rent for the manor would continue.*) 4. *But it was agreed, that the leaſe of a copyhold manor uſually demiſed, or of a manor conſiſting of demeſnes copyholds and ſervices uſually demiſed, is good to bind the ſucceſſor.* 5. *The leaſe is only voidable by the ſucceſſor; and therefore if he accepts the rent, it is good againſt him.* M. 20. Jac. C. B. *Biſhop of Glouceſter againſt Wood,* M. 5. Car. C. B. *Sheir and Penter on leaſe by the biſhop of Exeter.* Hal. MSS.—(8) *Prebend ſimple or prebend with office, as is precentor, is enabled by the ſtatute* 32. H. 8. *Adjudged* Bro. *Leaſes* 62. M. 36. 37. Eliz. *Watſon and Major.* T. 18. Jac. *caſe of precentor of Paul's.* Hal. MSS.—(9) Nota, *theſe diſabling ſtatutes extend*

by a biſhop, or any ſole corporation, but it muſt be confirmed by the deanes and chapters, or others that have intereſt, as hath been ſaid in the caſe of the parſon and vicar, but examples doe illuſtrate. If a biſhop make a leaſe for 21 yeares, and all thoſe yeares being ſpent ſaving three or more; yet may the biſhop make a new leaſe to another for twenty one yeares, to begin from the making, according to the exception of the ſtatute, but not a leaſe for life or lives, as hath beene ſaid, and this concurrent leaſe hath been reſolved to be good(1), as well upon the exception of 1. Eliz. in the caſe of biſhops, as upon 13. Eliz. (2) which extend to ſpirituall and eccleſiaſticall corporations, aggregate of many, as deanes and chapters, &c. which 32. H. 8. did not: but in the caſe of the concurrent leaſe, in the caſe of the biſhop it muſt be confirmed. Alſo the exception of 1. Eliz. and 13. Eliz. doth differ from the ſtatute of 32. H. 8. for the leaſes for yeares to be made according to the exceptions of the ſtatutes of 1. and 13. Eliz. muſt begin from the making, and not from the day of the making, but by force of 32. H. 8. from the day of the making. And although the ſtatutes of the firſt or thirteenth of Eliz. doe not appoint the leaſe to be made by writing, yet muſt it therein and in the other eight properties or qualities before mentioned and required by 32. H. 8. follow the patterne thereof (the concurrent leaſe onely except). (3) Although the exception in 1. and 13. Eliz. concerning the accuſtomed rent is more generall then that of 32. H. 8. and there is not any proviſion for leaſes made diſpuniſhable of waſte, &c. yet muſt the patterne of 32. H. 8. be followed: for leaſes without impeachment of waſte made by ſuch ſpirituall and eccleſiaſticall perſons are unreaſonable and cauſes of dilapidations. Thus much have I thought good to lead the ſtudious reader by the hand, and to conduct him in the right way, and to put all theſe things together upon conſideration had of all the ſtatutes, which otherwiſe might have *prima facie* ſeemed to him a diffuſe and darke laborinth. And albeit it be provided by the ſaid acts of 1. and 13. Eliz. that all grants, &c. leaſes, &c. made, &c. (other then leaſes for three lives, or one and twenty yeares according to thoſe acts) ſhould be utterly voyd and of none effect, to all intents, conſtructions and purpoſes, yet grants, or leaſes, &c. not warranted by thoſe acts are not voyd, but good againſt the leſſor, if it be a ſole corporation: or ſo long as the deane or other head of the corporation remaine, if it be a corporation aggregate of many (4): for the ſtatute was made in benefit of the ſucceſſor (5). But let us now returne to our author.

(Cro. Eliz. 874.) (1. And. 65.) (1. Leon. 59.)

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

Home leſſa. Here Littleton putteth this caſe where one letteth, &c. It is therefore neceſſary to be ſeen what the law is where divers joyne in a leaſe. If the tenant of the land, and a ſtranger which hath nothing in the land joyne in a leaſe for yeares by deed indented of one and the ſelf-ſame land, this is the leaſe of the tenant onely, and the confirmation of the ſtranger, and yet the leaſe as to the ſtranger workes by concluſion (6).

(2. Ro. Ab. 64.) Vide ſect. 346. 11. H. 4. 1. 5. E. 4. 4. 2. 27. H. 8. 16.

If two ſeverall tenants of ſeverall lands, joyne in a leaſe for yeares by deed indented, theſe be ſeverall leaſes and ſeverall confirmations of each of them, from whom no intereſt paſſeth, and worke not by way of concluſion in any ſort, becauſe ſeverall intereſts paſſe from them (7). B tenant for life of C, and he in the remainder or reverſion in fee, having ſeverall eſtates in the one and the ſame land, joyne in a leaſe for yeares by deed indented, this demiſe ſhall worke in this ſort, during the life of C it is the leaſe of B, and confirmation of him in the reverſion or remainder, and after the deceaſe of C it is the leaſe of him in the reverſion or remainder, and the confirmation of B; for ſeeing the leaſors have ſeverall eſtates, the law ſhall conſtrue the leaſe to move out of both their eſtates reſpectively, and every one to let that which he lawfully may let, and not to be the leaſe onely of tenant for life, and the confirmation of him in the remainder or reverſion, neither is there any concluſion in this caſe, as ſhall be ſaid hereafter. Tenant for life and he in the remainder in fee, made a leaſe for yeares by deed indented, the leſſee was ejected, and brought an *ejectione firmæ*, and declared upon a demiſe made by tenant for life and him in remainder, and upon not guilty pleaded, this ſpeciall matter was found, and that tenant for life was living, and it was adjudged [*a*] againſt the pl', for during the life of the tenant (as hath been ſaid) it is the leaſe of the tenant for life, and therefore during his life he ought to have declared of a leaſe made by him, and after his deceaſe he ought to declare of a leaſe made by him in remainder (8). [*b*] And the deed indented could be no eſtoppell in this caſe, becauſe there paſſed an intereſt from them both. And whenſoever any intereſt paſſeth from the party, there can be no eſtoppell againſt him, and [*c*] ſo it was adjudged. Hereby you ſhall underſtand your bookes the better which treat of thoſe matters, and accordingly it was adjudged that where tenant in taile and he in the remainder in fee joyned in a grant of a rent charge by deed in fee, and after tenant in taile died without iſſue, the grantee diſtrained and avowed by force of a graunt from him in the remainder, and upon *non conceſſit*, the jury found the ſpeciall matter, and it was adjudged for the avowant; for every one granted according to his eſtate and intereſt.

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

[*b*] Mich. 36. & 37. Eliz. in the King's Bench. Vide Mich. 6. & 7 Eliz. Dier 234. 235.

[*c*] Hill. 44. Eliz. Rot. 1459 in Communi Banco inter Elliee & Cowne.

Leaſes for lives or yeares are of three natures, ſome be good in law; ſome be voydable by entry,

extend only to their own poſſeſſions. The archdeacon of Ely 12. Eliz. makes leaſe for 50 years, which after the ſtatute 13. Eliz. is confirmed by the biſhop and dean and chapter. Ruled, that this is a good leaſe to bind the ſucceſſor, though after the ſtatute 1. Eliz. and though confirmed after the ſtatute 13. Eliz. H. 37. Eliz. Rot. 882. Sir Edward Dennye's caſe. Hal. MSS.

(1) *Accordingly adjudged, though the concurring leaſe was to commence* a datu indenturæ. T. 21. Eliz. Rot. 124. *Fox and Collier.* M. 22. 23. Eliz. C. B. Rot. 2409. *Scot and Brewſter.* H. 22. Jac. B. R. Rot. 11. *Evans and Aſcu adjudged* T. 3. Car. P. 33. Eliz. W. 14. *Southcot's caſe.* Hal. MSS.—(2) [Nota, *the ſtatute 13. Eliz. chap. 10. quoad tenements in cities is altered by the ſtatute 14. Eliz. chap. 11. which permits leaſes of them for 40 years; and therefore it has been ruled, that covenants for renewing leaſes of meſſuages in cities are not prohibited by the ſtatute 18. Eliz. chap. 11. which only reſtrains leaſes againſt the ſtatute of 13. Eliz. Hob. caſe 352. Crane and Taylor.* Hal. MSS. See Hob. 269.—(3) H. 44. Eliz. C. B. n. 14. D. D. *Biſhop of Hereford againſt Scory. Adjudged accordingly, where the land had not been uſually demiſed.* Hal. MSS.—(4) Nota, *leaſe for three lives by biſhop, not warranted by the ſtatute, is not voidable againſt himſelf, but ſhall bind him.* M. 44. 45. Eliz. C. B. D. D. *n.* 32. *Saunders's caſe. And it is not void, but only voidable againſt the ſucceſſor, for if he accepts the rent the leaſe is good againſt him* M. 8. Car. C. B. *Crook n.* 21. *Owen and App-Rees. But leaſe by A dean of B and his chapter not warranted is void immediately againſt A himſelf. Adjudged ſo, becauſe the corporation is aggregate.* M. 13. Car. B. R. *Lloyd and Gregory.* Hal. MSS.—The caſe of Lloyd and Gregory is reported in Cro. Cha. 502. W. Jo. 405. 1. Ro. Abr. 728. and 2. Ro. Abr. 495. But none of theſe books mention the point to which lord Hale cites the caſe. See New Abr. *Leaſes* H. where ſeveral authorities beſides that of lord Coke are cited to ſhew, that a leaſe by a corporation aggregate, though not warranted by the ſtatutes, is good for the time of the perſon who was head of the corporation when the leaſe was made. See alſo ante 43. a. n. 1.—(5) See further as to leaſes by tenants in tail, huſband and wife, and eccleſiaſtical perſons in Vin. Abr. tit. *Eſtates* and tit. *Confirmation*, and New Abr. tit. *Leaſes*; which title in the latter book is generally attributed to lord chief baron Gilbert, and compriſes a moſt copious and excellent treatiſe on a very difficult and extenſive ſubject.—(6) 2. *H.* 5. 7. *by Aſhf.* Hal. MSS.—(7) *And therefore where the declaration in ejectment was of a joint demiſe of A and B, and on the evidence it appeared, that they were tenants in common, the plaintiff failed.* M. 3. Jac. *Blakaſper's caſe. Noy n.* 43. Hal. MSS. See Noy 13.—(8) Intratur H. 34. Eliz. Rot. 72. *King and Bony.* —Hal. MSS.

entry, and ſome voyd without entry. Of ſuch as be good in law, ſome be good at the common law as made by tenant in fee, whereof Littleton here putteth his caſe, ſome by act of parliament, as tenant in taile, a biſhop ſeiſed in fee in the right of his church alone without his chapter, a man ſeiſed in fee ſimple or fee taile in the right of his wife together with his wife, (as hath beene ſaid) may by deed indented make leaſes for 21 yeares or three lives in ſuch manner and forme as hath beene ſaid and by the ſtatute [*d*] is limited, all which were voydable by the common law when Littleton wrote, and now are made good by parliament.

(3. Co. 64. b.)

[*d*] 32. H. 8. cap. 28.

An infant ſeiſed of land holden in ſocage, may by cuſtome make a leaſe at his age of 15 yeares, and ſhall binde him, which leaſe was voydable by the common law; (1) voydable, ſome by the common law, after the death of the leaſor as of tenant in taile a biſhop, &c. or after the death of the huſband (intended of leaſes not warranted by the ſaid ſtatute of 32. H. 8.) Some voydable by act of parliament, as by a biſhop though it be confirmed by deane and chapter, if it be not warranted by the ſtatute of 32. H. 8. and ſo of a deane and chapter after the death of the deane; ſome voydable at times by the leſſor himſelfe or his heires, as by an infant and the like. Some voyde *in futuro*, and ſome voide *in præſenti*. *In futuro*, as if a tenant in taile make a leaſe for yeares and die without iſſue, it is voide, as to them in reverſion or remainder, though it be made [*e*] according to the ſaid ſtatute. If a prebend, parſon or vicar make a leaſe for yeares, it is voide by death; if it be not according to the ſtatutes. Otherwiſe it is of a leaſe for life, for that is voidable, *et ſic de ſimilibus*.

(Plow. 264. b. Cro. Ja. 173.)

[*e*] 33. H. 8. Dier 3. Co. 59. 60. in Lincolne Co ledge caſe. Hunt's caſe vouched. (1. Ro. Abr. 848.)

Some voide *in præſenti*, as if one make a leaſe for ſo many yeares as he ſhall live, this is voide *in præſenti* for the incertainty. *Et ſic in ſimilibus*, whereof Littleton himſelfe will teach you next and immediately, and I know you would now gladly heare him.

Pur terme. *Pro termino*, *terminus* in the underſtanding of the law doth not onely ſignifie the limits and limitation of time, but alſo the eſtate and intereſt that paſſeth for that time. As if a man make a leaſe for twenty one yeares, and after make a leaſe to begin *a fine et expiratione prædicti termini* 21 *annorum dimiſſ.* and after the firſt leaſe is ſurrendred, the ſecond leaſe ſhall begin preſently, but if it had beene to begin *Poſt finem et expirationem prædict'* 21 *annorum*, in that caſe although the firſt terme had beene ſurrendred, yet the ſecond leaſe ſhould not begin till after the 21 yeares be ended by effluxion of time, and ſo note the diverſitie betweene the terme for 21 yeares, and 21 yeares; and [*f*] herewith agreeth the lord Paget's caſe.

Pl. Com. Wroteſl. 198. 33. H. 8. tit. expoſition des parols 44. 8. Co. 145. in Davenport's caſe (5. Co. 7. 1. Co. 154. 274. 1. Ro. 849.)

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

[*g*] Words to make a leaſe be, demiſe, grant, to fearme let, betake, and whatſoever word amounteth to a grant may ſerve to make a leaſe. In the king's caſe [*b*] this word *Committo* doth amount ſometime to a grant, as when he ſaith *Commiſſimus W. de B. officium ſeneſchalſiæ, &c. quamdiu nobis placuerit*, and by that word alſo he may make a leaſe: and [*i*] therefore *à fortiori* a common perſon by that word may doe the ſame.

[*g*] Vide Sect. 531.

[*b*] Regiſter F. N. B. 270. e.

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

De certaine ans. For regularly in every leaſe for yeares the terme muſt have a certaine beginning, and a certaine end, and herewith [*k*] agreeth Bracton, *terminus annorum certus debet eſſe et determinatus*. And Littleton is here to be underſtood, firſt, that the yeares muſt be certaine when the leaſe is to take effect in intereſt or poſſeſſion. For before it takes effect in poſſeſſion or intereſt, it may depend upon an incertainty, *viz.* upon a poſſible contingent before it begin in poſſeſſion or intereſt, or upon a limitation or condition ſubſequent. Secondly, albeit there appeare no certainty of yeares in the leaſe, yet if by reference to a certainty it may be made certaine it ſufficeth, *Quia id certum eſt quod certum reddi poteſt*. For example of the firſt. If A ſeiſed of lands in fee grant to B, that when B payes to A xx ſhillings, that from thenceforth he ſhall have and occupie the land for 21 yeares, and after B payes the xx ſhillings, this is a good leaſe for 21 yeares from thenceforth. For the ſecond, if A leaſeth his land to B for ſo many yeares as B hath in the mannor of Dale, and B hath then a terme in the mannor of Dale for 10 yeares, this is a good leaſe by A to B of the land of A for 10 yeares. If the parſon of D make a leaſe of his glebe for ſo many yeares as he ſhall be parſon there, this cannot be made certaine by any meanes, for nothing is more uncertaine then the time of death, *Terminus vitæ eſt incertus, et licet nihil certius ſit morte, nihil tamen incertius eſt hora mortis* (2). But if he make a leaſe for three yeares, and ſo from three yeares to three yeares, ſo long as he ſhall be parſon, this is a good leaſe for 6 yeares, if he continue parſon ſo long, firſt for three yeares, and after that for three yeares; and for the reſidue uncertaine (3).

[*k*] 14. H. 8. 14. 3. Mar. leaſes Br. 67. 2. Mar. ibid. 67. Say and Fuller's caſe. Pl. com. 273. and Welden's caſe ibid. 4. H. 6. 12. 21. H. 7. 38. Vid le caſe del eveſque de Bathe. 6. Co. 34. 35. Bract. lib. 2. cap. 9. Vid. 1. Co. 155. 156. Rector de Chedington's caſe. (1. Ro. Ab. 848. 849.)

Bract. lib. 2. cap. 9. So reſolved Hill 26. Eliz. Rot. 935. in com. banco.

If a man maketh a leaſe to I. S. for ſo many yeares as I. N. ſhall name, this at the beginning is incertaine, but when I. N. hath named the yeares, then it is a good leaſe for ſo many yeares.

Pl. com. Say and Fuller's caſe. Mirror ca. 2. ſect. 17. & cap. 5. ſect. 1.

A man maketh a leaſe for 21 yeares if I. S. live ſo long, this is a good leaſe for yeares, and yet is certaine in incertainty, for the life of I. S. is incertaine. See many excellent caſes concerning this matter put in the ſaid caſe of the biſhop of Bath and Wells. By the ancient law of England for many reſpects a man could not have made a leaſe above 40 yeares at the moſt, for then

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

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

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

then was it ſaid that by long leaſes many were prejudiced, and many times men diſherited, but that ancient law is antiquated (1).

In the eye of the law any eſtate for life being, as Littleton hath ſaid, an eſtate of freehold, againſt whom *à præcipe quod reddat* doth lye, is an higher and greater eſtate then a leaſe for yeares, though it be for a thouſand or more, which never are without ſuſpicion of fraud, and they were the leſſe valuable, for that at the common law they were ſubject unto, and under the power of the tenant of the freehold, the learning whereof ſtandeth thus, and is worthy to be knowne. When Littleton wrote, if a man had made a leaſe for yeares by writing, and he that had the freehold had ſuffered himſelfe to be impleaded in a reall action by collufion to bar the leſſee of his terme, and made default, &c. the ſtatute of Glouc' gave the leſſee for yeares ſome remedy by way of receipt, and a triall whether the demandant did move the plea by good right or collufion, and if it were found by collufion, then the termor ſhould enjoy his tearme, and the execution of the judgement ſhould ſtay untill after the tearme ended (2). But this ſtatute extended not to 5 caſes. Firſt, if the leaſe were without writing, for the words of this act are, (ſo that the termor may have recovery by writ of covenant.) 2. It extended not but to a recovery by default (3). 3. The termor could not be relieved by this ſtatute, unleſſe he knew of the recovery, and were received, &c. 4. By the better opinion of bookes, it extended not to tenants by ſtatute merchant, ſtatute ſtaple, or *elegit*. 5. Not to gardian. [*l*] But now the ſtatute of 21. H. 8. doth give remedy in all the ſaid caſes ſaving the caſe of the gardian, and giveth them power to falſifie all manner of recoveries had againſt the tenants of the freehold upon fained and untrue titles, &c. Now the [*m*] ſtatute ſaith, that it was a doubt before that ſtatute whether a termor for yeares might falſifie or no: but yet it ſeemeth by the better opinion of books in ſo great variety, that he having but a chattell, was not able by the common law to falſifie a covenous recovery of the freehold, becauſe he could not have the thing that was recovered (4). [*n*] And Thirning and Hankford doe hold that a gardian is not within the ſtatute of Glouc'.

If two coparceners be, and one of them let her part to another for yeares, and after upon a writ of partition brought againſt the leſſor too little is allotted to the leſſor, it is holden by ſome that the leſſee cannot avoid it, for that it is made by the oath of men, and judgement is thereupon given that the partition ſhall remaine firme and ſtable. But if there be two coperceners of three acres of land, every one of equal value, and the one coparcener letteth her part, and make after partition, and one acre is allotted onely to the leſſor, the leſſee is not bound hereby, but he may enter and take the profits of another halfe acre, for that of right belongs unto him (5). Thus much have I thought good to ſet downe, for it ſufficeth not to know what the law is in theſe caſes, unleſſe he underſtand the reaſon and cauſe thereof.

And albeit (as hath beene ſaid) a leaſe for yeares muſt have a certaine beginning, and a certaine end, yet the continuance thereof may be incertaine, for the ſame may ceaſe and revive againe in divers caſes (6). As if tenant in taile make a leaſe for yeares reſerving xx. ſhillings, and after take a wife and dye without iſſue, now as to him in the reverſion the leaſe is meerly void; but if he indow the wife of tenant in taile of the land, (as ſhe may be though the eſtate taile be determined) now is the leaſe as to the tenant in dower (who is in of the ſtate of her huſband) [*a*] revived againe as againſt her, for as to her the eſtate taile continueth, for ſhe ſhall be attendant for the third part of the rent ſervices, and yet they were extinct by act in law. So it is if tenant in taile make a leaſe for yeares *ut ſupra*, and dyeth without iſſue, his wife enſeint with a ſonne, he in the reverſion enter, againſt him the leaſe is void, but after the ſonne be borne the leaſe is good, if it be made according to the [*b*] ſtatute, and otherwiſe is voydable.

The king made a gift in taile of the mannor of Eaſtfarleigh in Kent, to W to hold by knights ſervice; W made a leaſe to A for thirty ſixe yeares, reſerving thirteene pound rent; W died, his ſon and heire of full age. All this was found by office. As to the king this leaſe is not of force, for he ſhall have his *primer ſeiſin*, as of lands in poſſeſſion, but after livery, the leſſee may enter; and if the iſſue in taile accept the rent, the leaſe ſhall binde him, for the king's *primer ſeiſin* ſhall not take away the election of the iſſue in taile, for it may be that the rent was better then the land: [*c*] and ſo it was adjudged in Awſten's caſe, as I had it of the report of maſter Edmond Plowden, a grave and learned apprentice of law.

If tenant in fee take wife, and make a leaſe for yeares, and dieth, the wife is endowed, ſhe ſhall avoid the leaſe, but after her deceaſe the leaſe ſhall be in force againe. But if the patron grant the next avoydance, and after parſon, patron, and ordinary, before the ſtatute, [*d*] had made a leaſe of the glebe for yeares, and after the parſon dieth, and the grantee of the next avoydance had preſented a clerke to the church, who is admitted, inſtituted, and inducted, and dieth within the terme; the patron preſents a new clarke, and he is admitted, inſtituted, and inducted, albeit he commeth in under the patron that was party to the leaſe, yet becauſe the laſt incumbent, who had the whole ſtate in him, avoyded the leaſe, it ſhall not revive againe, no more than if a feme covert levy a fine alone, if the huſband enter and avoyd the fine, and dye, the whole eſtate is ſo avoyded as it ſhall not binde the wife after his death (7).

11. Co. 35.

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

[*m*] That a termor might falſifie at the Common Law Vid. 10. E. 3. Aſſ. 32. 21. E. 3. 1. 7. H. 7. 11. b. 1. H. 7. 9. b. Pl. Com. 83. 10. E 3 46. 19 E. 3. reſceit 112. That he could not. 30. H. 6 Fauxer recovery 9. 43. Aſſ. 41. 26. H. 8. 2. 9. E 4. 38. F. N. B. 198. E. 14. H. 8. 4. 9. Co. fo. 135 Aſcoughe's caſe.

[*n*] 7. H 4. 12. 33. H. 8. Dier. 52.

(7. Co. 9. a. 1. Ro. Ab. 842.)

[*a*] 10. E. 3. 26. 34. Aſſ. 15. 23. E. 3. Dower 130. (7. Co. 3. b.)

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

(1. Ro. Ab. 842.)

[*c*] Paſch. 2. & 3. Ph. & Mar in an information of Intruſion in the Exchequer againſt Auſten. Vid Dier paſch. 2. & 3. Ph. & Mar. 115. 13. Eliz. ca. 10.

[*d*] 6. E. 6 Dier 72. (Cro. Car. 552.) 17. E. 3 52. 17. Aſſ. p. 17 2. R. 3. 20. 9. H. 6. 33. (Hob. 7.)

(Hob. 225. 10. Co. 43.)

It

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

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

(3) *Or reddition.* 16. *H.* 7. 5. 21. *H.* 7. 25. 5. *H.* 7. 39. 8. *H.* 7. 6. 12. *H.* 8. 7. 27. *H.* 8. 7. 11. *E.* 4. 10. *or on* nihil dicit, *or diſclaimer.* 9. *E.* 4. 37. *by Danby, or on default of the vouchee at the* grand cape *or* ſequatur ſub periculo. 9. E. 4. 38. Hal. MSS.

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

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

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

(7) *Adjudged accordingly* Cro. Cha. *Plowden* v. *Oldford* 582. *But in* Hill. 10. Eliz. C. B. E. 238. *adjudged, that the leaſe revived. Polydore Virgil's caſe.* Hal. MSS.

If a woman be endowed of an advowſon which is appropriated, and ſhe preſent, and her incumbent is admittep, inſtituted, and inducted, albeit the incumbent dye, yet is the appropriation wholly diſſolved, becauſe the incumbent, which came in by preſentation, had the whole ſtate in him, and ſo was it adjudged, as the caſe is to be intended (1).

3. E. 3. 8. per Scroope: (1. Ro. Ab. 240. 241.

Tenant in taile make a leaſe for forty yeares, reſerving a rent, to commence ten yeares after; tenant in taile dye, the iſſue enter and enfeoffe A, ten yeares expire, the leſſee enter, if A accept the rent, the leaſe is good, for he ſhall have the ſame election that the iſſue in taile had, either to make it good, or to avoid it, ſo as it could not be preciſely affirmed, whether by the entry of the iſſue this executory leaſe was avoided, but it dependeth incertainly upon the will of the feoffee](2). But now I know you are deſirous to heare Littleton, who is ſpeaking to you.

Pl. Com. 437. a. (1. Ro. Ab. 831. 842. 843. 1. Sid. 260. 261.)

Et quant le leſſee enter per force del leaſe, donques il eſt tenant pur terme des ans. And true it is, that to many purpoſes he is not tenant for yeares until he enter: as a releaſe made to him is not good to him to increaſe his eſtate, before entry; but he may releaſe the rent reſerved before entry, in reſpect of the privity. Neither can the leſſor grant away the reverſion by the name of the reverſion, before entry, *vide* Sect. 567. But the leſſee before entry hath an intereſt, *intereſſe termini* grantable to another, *vide* Sect. 319. And albeit the leſſor dye before the leſſee enters, yet the leſſee may enter into the lands, as our author himſelfe holdeth in this chapter. And ſo if the leſſee dyeth before he entred, yet his executors or adminiſtrators may enter, becauſe he preſently by the leaſe hath an intereſt in him: and if it be made to two, and one dye before entry, his intereſt ſhall ſurvive. *Vid.* Sect. 281.

(2. Ro. Ab. 403. Cro. Car. 110. 400.)

V. Sect. 454. 455.

(Cro. Ja. 60. 5. Co. 124.)

V. Sect. 665. more fully of this matter. (Hob. 3.)

He that hath a leaſe for yeares, hath it either in his owne right, whereof Littletou hath here ſpoken, or in another's right, and that in divers manners, as a man may have a terme for yeares in the right of his wife, whereof the huſband hath power to diſpoſe at any time during his life, and if he ſurviveth his wife, the law doth give the leaſe to him. But if he make no diſpoſition thereof, and his wife ſurvive him, it remaineth with the wife: but of this in another place more fully.

(1. Ro. Abr. 344. 345. Plow. 191.)

Hil. 17. El. in the king's Bench. (Poſt. 351. 10. Co. 51. Hutt. 17.)

If a man be poſſeſſed of a terme of forty yeares in the right of his wife, and maketh a leaſe for twenty yeares, reſerving a rent, and die, the wife ſhall have the reſidue of the terme, but the executors of the huſband ſhall have the rent, for it was not incident to the reverſion; for that the wife was not party to the leaſe (3). So note, a diſpoſition of part of the terme is no diſpoſition of the whole. But if the huſband grant the whole terme, upon condition that the grantee ſhall pay a ſumme of money to his executors, &c. the huſband die, the condition is broken, the executors enter, this is a diſpoſition of the terme, and the wife is barred thereof, for the whole intereſt was paſſed away (4).

If a leaſe be made to a baron and feme for terme of their lives, the remainder to the executors of the ſurvivor of them, the huſband grant away this terme and dieth, this ſhall not barr the wife, for that the wife had but a poſſibility, and no intereſt.

37. Aſſ. p. 11. Pl. Com. 418. b. (1. Ro. Rep. 359.)

If the huſband and wife be ejected of a terme in the right of his wife, and the huſband bring an *ejectione firmæ* in his owne name (5), and have judgement to recover, this is an alteration of the terme, and veſteth it in the huſband (6).

If a leaſe for yeares be made to a biſhop and his ſucceſſors, yet his executors or adminiſtrators ſhall have it *in auter droit*, for regularly no chattell can goe in ſucceſſion in a caſe of a ſole corporation, no more then if a leaſe be made to a man and his heires it can goe to his heires. But let us returne to Littleton (7).

5. Co. 1. Clayton's caſe. 12. Eliz. Dyer 286. (2. Ro. Ab. 520. Cro. Ja. 135. Poſt. 255. a.) 14. El. Dy. 307. 5. El. Dy. 218. (1. Ro. Ab. 849. 850. Cro. Cha. 78.)

Touching the time of the beginning of a leaſe for yeares, it is to be obſerved, that if a leaſe be made by indenture, bearing date 26 Maii, &c. to have and to hold for twenty one yeares, from the date, or from the day of the date (8), it ſhall begin on the twenty ſeventh day of May (9). If the leaſe beare date the twenty ſixt day of May, &c. to have and to hold from the making hereof, or from henceforth, it ſhall begin on the day in which it is delivered, for the words of the indenture are not of any effect till the delivery, and thereby from the making, or from henceforth take their firſt effect. But if it be *à die confectionis*, then it ſhall begin on the next day after the deliverie. If the *habendum* be for the terme of twenty one yeares, without mentioning when it ſhall begin, it ſhall begin from the deliverie, for there the words take effect, as is aforeſaid. If an indenture of leaſe beare date, whiah is void or impoſſible, as the thirtieth day of Februarie, or the fortieth of March, if in this caſe the terme be limited to begin from the date, it ſhall begin from the delivery, as if there had been no date at all. [a] And ſo it is, if a man by his indenture of leaſe, either recite a leaſe which is not, or is void, or miſrecite a leaſe in point materiall which is in *eſſe*, to have and to hold from the ending of the former leaſe, this leaſe ſhall begin in courſe of time from the delivery thereof (10).

2. Co. 3. Goddard's caſe.

[a] Pl. Com. 148. 3. E. 6. tit. Leaſes Br. 62. 3. El. Dy. 195. 1. Mar. Dyer. 116. (Cro. Car. 460. 2 Ro. Ab. 52. 1. Ro. Ab. 849. 1. Sid. 460.)

Et ſi le leſſor en tiel caſe reſerve a luy un aunual rent ſur tiel leaſe, il poet eſlier a diſtreyner pur le rent, ou il poet aver action de debt pur les arerages.

Reſerve

(1) Vid. 21. E. 3. *Grants* 58. *Appropriation without licence, and* ea de cauſa *it ſeems a diſappropriation.* Hal. MSS.—(2) *But if it was leaſe* in præſenti *by tenant in tail, and the iſſue before entry levies fines, the conuſee ſhall not avoid the leaſe, for the leaſe was only voidable, and the land paſſes in degree of reverſion.* Vid. *Dy.* 51. 7. *Rep.* 9. *Earl of Bedford's caſe.* Hal. MSS.—(3) Vid. tamen *one Evans's caſe, in which it was adjudged that the wife ſhall have the rent. Cited by Houghton.* 16. Jac. Quære and vid. 7. H. 6. 2. T. 16. Jac. *Blaxton and Heath.* 2. *Poph. n.* 38. Hal. MSS. By 2. Poph. lord Hale means the additional caſes at the end of Popham's Reports. See Poph. 125. For Blaxton and Heath, ſee Poph. 145.—(4) *If part of a term be granted by huſband on condition, it ſeems that the condition is gone by his death.* Quære. *A ward changes the property of ſuch a term. Dy.* 183. Hal. MSS. See the caſe in Marg. Dy. 183.—(5) Vide. *Huſband of wife termor may have petition of right alone.* 37. *Aſſ. pl.* 11. *If husband is guardian in right of his wife, dower lies againſt the husband alone; for there can be no voucher there againſt the ward's right.* 2. *E.* 3. 13. 15. 47. *E.* 3. 9. Hal. MSS.—(6) Vid. 50. *E.* 3. *Judgment for husband in* quare impedit *for the wife's advowſon; the husband dies; the wife preſents.* Hal. MSS.—(7) Hic *fol.* 9. *a.* Hal. MSS.—(8) Vid. *for* date *and* day of the date hic *fol.* 6. *a. and the note there.* Hal. MSS. In fol. 6. a. lord Hale gives the following note. Date *and* day of the date *the ſame in point of computation.* 5. *Rep. But in point of intereſt date is taken* inclusive, *day of the date* excluſive *in many caſes.* T. 9. Jac. B. R. *Bulſtr. n.* 177. *A on the ſecond of Auguſt* 1. Jam. *makes an obligation to B, and afterwards on the ſame day B releaſes all actions* uſque datum ſcripti: *the obligation is diſcharged, becauſe* date *is* delivery. *Otherwiſe, if it had been to the* day of the date. T. 9. Car. B. R. *Rooke and Richards. Condition of obligation to ſtand to an award, ſo that it be made within four days after the* date: *a good award may be made the ſame day; and ſo it ſeems, if it be* day of the date. *M.* 1653. *Street's caſe. Stiles* 382. *Obligation dated* 2. *January; releaſe dated* 1. *January of all actions* uſque diem hujus præſentis temporis, *but delivered* 3. *January:* præſens tempus *is the* date, *and ſo the obligation ſtood.* P. 7. Jac. Hal. MSS. See further as to the difference between *date* and *day of the date.* Com. Dig. *Eſtates* G. 8. *Bargain and Sale.* B. 8. *Temps* A. and Vin. Abr. *Eſtate* Z. a. *Time* A. and Wilſ. vol. 1. part 2. page 165. and the next note.—(9) Vid. *for commencement of leaſe,* M. 10. Jac. Rot. 75. *Hob. caſe* 32. *Moor and Muſgrave. A by indenture dated* 4. *May* 10. Jac. *to hold* from the feaſt of the annunciation laſt paſt for the term of 21 years next enſuing the date hereof fully to be complete and ended. *In ejectment plaintiff counts on this leaſe, as a leaſe to hold* from the feaſt for 21 years ex tunc prox. ſequent. *and agreed to be good. But ſee* T. 24. Car. B. R. *Corniſh and Canvſey. Leaſe by indenture of* 25. *of March* 15. Car. *to have and to hold* from and after the day of the date of theſe preſents for the term and time of ſeven years from henceforth next and immediately enſuing, *ſhall commence in computation from the delivery, and in point of intereſt from the date. Stiles* 118. Hal. MSS.—(10) *For miſrecital a leaſe ſhall commence immediately.*

6. Rep.

Reserve a luy un annual rent, &c. First it appeareth [b] here by Littleton that a rent must be reserved out of lands or tenements, whereunto the lessor may have resort or recourse to distreine, as Littleton here also saith, and therefore a rent cannot be reserved by a common person (1) out of any incorporeall inheritance, as advowsons, commons, offices, corodie, mulcture of a mill, tythes, fayres, markets, liberties, priviledges, franchises, and the like. [c] But if the lease be made of them by deed (2) for yeares, it may be good by way of contract to have an action of debt, but distreine the lessor cannot. Neither shall it passe with the grant of the reversion for that it is no rent incident to the reversion (3). But if any rent be reserved in such case upon a lease for life, it is utterly void, for that in that case no action of debt doth lie (4). But if a man demiseth the vesture or herbage of his land, he may reserve a rent, for that the thing is maynorable, and the lessor may distreine the cattell upon the land (5): and so a reversion, or a remainder of lands or tenements may be granted reserving a rent; for the apparent possibility that it may come in possession (6), and they are tenements within the words of Littleton.

[b] 7. Co. 23. But's case. 10. Co. 59. 60. (Cro. Ja. 173. Post 142. a. 144. a. 5. Co. 3. 2. Saund. 303. 2. Ro. Abr. 446. 5. Co. Mountjoy's case. Noy 60)

[c] 30. Ass. p. 5. 12. Ass. 20. 20. H. 4. 10. 1. H. 4. 1. 2. 3. 11. H. 4. 82. 19. E. 2. Fines 126. 44. E. 3. 45. 9. Ass. 24. 26. Ass. 60. 14. E. 3. Scir. fac. 122. 5. E. 3. 68. 17. E. 3. 75. 11. H 4 40. 3. H. 6. 21. 45. 10. H. 6. 12. 21. H. 6. 11. 5. H. 7. 39. 21. H. 7. 19. 17 E. 2. Ex 112. 23. El. Dyer 377.

[a] It appeareth by Littleton, that *reservando* is an apt word of reserving a rent, and so is *reddendo, solvendo, faciendo, inveniendo, dummodo*, and the like (7).

[a] 40. E. 3. 47. 8. E. 3. 67. 21. E. 4. 62. 3. H. 6. 45. 31. Ass. p. 30. 3. Ass. 9. 26 Ass. 66. 32. E. 3. Br. 291. 8. E. 4. 8. 10. El. Dy. 276. Pl. Com. en Browning and Beestone's case fo. 131. 132. &c.

[b] And note a diversity between an exception (which is ever of part of the thing granted and of a thing *in esse*) for which, *exceptis, salvo, præter*, and the like be apt words; and a reservation which is alwaies of a thing not *in esse*, but newly created or reserved out of the land or tenement demised. [c] *Poterit enim quis rem dare et partem rei retinere, vel partem de pertinentiis, et illa pars quam retinet semper cum eo est et semper fuit.* [d] But out of a generall a part may be excepted, as out of a mannor, an acre, *ex verbo generali aliquid excipitur*, and not a part of a certainty, as out of twenty acres one.

[b] 50. E. 3. 12. 13. Ass 9. 38. E. 3. 10. 21. E. 3. 4. 34. Ass. 11. 29. E. 3. 14. 3. H. 6. 45. 10. H. 6. 8. 41. 32. H. 6. 1. 35. H. 6. 34. 17 Ass. 14. H. 8. 1. 44. E. 3. 43. Pl. Com. 361. [c] Bract. li. 2. f. 32. b. & f. 249. [d] 9. El. Dy. 264. 38. H. 6. 38. 14. H. 8. 1. 22. E. 3. 8. 2. E. 3. 56. 5. E. 3 66. 34. Ass. 11.

It is further to be observed that the lessor cannot reserve to any other but to himselfe, for Littleton saith, *reserve a luy*, reserve to himselfe. [e] If two joyntenants be, and they make a lease for yeares by paroll, or deed poll reserving a rent to one of them, this shall enure to them both; but if it be so reserved by deed indented, it shall enure to him alone by way of conclusion.

[e] 5. E. 4. 4. 14 E. 3. bre. 282. 8. Co. 70. 71.

[f] Littleton here is putting of a case, and not making a lease, for then he would not reserve the rent to him, but to him and his heires, for otherwise the rent shall determine by his death, if he die within the terme (8). [g] But if he reserve a rent generally without shewing to whom shall goe, it shall go to his heires. If he reserve a rent to him and his assignes, yet the rent shall determine by his death, because the reservation is good but during his life. So it is if he reserve a rent to him and his executors it shall end by his death, because the heire hath the reversion, and the rent was incident to the reversion (9). So if a man warrant land to B and his assigns, the assignee must vouch during the life of B, for the warrantie continues but only during the life of B, for the warranty is but for life, for want of words of inheritance. But if the warranty be to B, his heires and assignes, so as he hath an inheritance therein, then his assignee shall vouch after his decease. So if the rent be reserved to the lessor, his heires and assignes, so as it be incident to the inheritance, then shall all the assignees of the reversion enjoy the same.

[f] Vid. Sect. 314. 215. 216. &c. 10. E. 4. 18. 11. E. 3. Ass. 86. 27. H. 8. 19. 21. H. 7. 25. 30. H. 8. Dy. 45.

[g] Mich. 5. Ja. in repl. inter Woolton & Edwin Bank le roy. Hil. 33. El Rot. 1431. in bank le roy inter Richmond and Butcher. (Post 215. b. 2. Ro. Ab. 450. 12. Co. 35. 2. Ro. Ab. 743.)

Annual rent. So it is if the rent be reserved every two or three or more yeares (10). Of rents Littleton doth excellently treat hereafter in his chapter of rents, and therefore in this place thus much shall suffice.

A distreyner pur le rent. Here it is necessary to be seene of what things a distresse may be taken for a rent, and how the distresse ought to be demeaned. [b] First it must be of a thing, whereof a valuable propertie is in some body, and therefore dogs, bucks, does (11), conies, and the like that are *feræ naturæ* (12) cannot be distreyned. Secondly, altho' it be of valuable propertie as a horse, &c. yet when a man or woman is riding on him, or an axe in a man's hand cutting of wood and the like, they are for that time priviledged and cannot be distreyned (13). [i] 3. Valuable things shall not be distreined for rent for benefit and maintenance of trades, which by consequent are for the common-wealth, and are there by authority of law, as a horse in a smithe's shop shall not be distreyned for the rent issuing out of the shop, nor the horse, &c. in the hostry, nor the materialls in the weaver's shop for making of cloth, nor cloth or garments in a taylor's shop (14), nor sacks of corne or meale in a mill, nor in a market, nor any thing distrayned for damage fesant, for it is in custody of law, and the like.

Vid. for this word Distreine Sect. 136. [b] 14. H. 8. 25. 2. E. 2. tit. Distreis 6. R. 2. Retours 11. 7. E. 3. Avowr. 199. 15. E. 2. Avowr. 2. (1. Ro. Ab. 666. Cro. El. 552.)

[i] 22. E. 4. 49. b. 7. H. 7. 1 b. 22. E. 4. 36. 4. E. 6. tit. Dist. Br. 74. (Cro. El. 596. Noy 181.)

[k] 4. Nothing shall be distrayned for rent, that cannot be rendered againe in as good plight as it was at the time of the distresse taken (15), as sheaves or shockes of corne or the like cannot be distrayned for rent (16), but for damage fesant they may be distreyned (17). But charretts or carts with corne may be distreyned for rent, for they may be safely restored.

[k] 18. E. 3. 4. a. 11. H. 7. 14. a. 21. H. 7. 39. b. 22. E. 4. 50. b. 2. H. 4. 15. (1. Ro. Abr. 667.)

Rec. post. 161. 2. [l] 5. Beasts belonging to the plow (18), *averia carucæ*, shall not be distreyned (which is the ancient common law of England, for no man shall be distreined by the utensils or instruments of his trade or profession, as the axe of the carpenter, or the bookes of a scholler) while goods or

[l] Okeham 38 39. Bra. lib. 4. f. 217. F. N. B. 90. a. Reg. 97. Flet. lib. 2. ca. 41. Mirr. ca. 2 Sect. 15. 16. 4 E. 3. 1. 29. E. 3. 17.

6. *Rep. bishop of Bath's case.—The earl of Oxford by deed dated* 10. *Feb.* 27. *H.* 8. *demises to A for* 21 *years; and afterwards by indenture, reciting that he by indenture dated* 10. *Feb.* 28. *H.* 8. *had demised to A for* 21 *years, demises the same land to B* habendum *for* 31 *years from and after the expiration surrender or forfeiture of the* said *lease. It was ruled, that B's lease should commence in computation immediately, because A's lease was misrecited.* H. 10. Car. B. R. Crook n. 8. *Miller and Manwaringe. But if in case of such a misrecital, the* habendum *be from and after the demise and indenture made to A, and it is not said the* said *demise then the second lease shall commence after the true lease notwithstanding the misrecital.* M. 1. & 2. P. & M. Rot. 648. *Mount and Hodgken Bendl. n.* 71. Hal. MSS.—See Cro. Cha. 397. and N. Bendl. 38. See further as to the commencement of leases and the effect of misrecitals in that respect, Sheph. Touchst. 272. New Abr. *Leases* L and Vin. Abr. *Estate* Z. a. and *Grant* R. 4.

(1) Lord Coke confines the rule to common persons, because the king may reserve rent out of an incorporeal inheritance; the reason of which is, that he by his prerogative can distrain on all the lands of his lessee. 4. New Abr. 192. & 339.—(2) The case of a lease by *deed* is put, because in general things incorporeal will not pass without deed. Post 48. a. 49. a. 169. a. and ante 9. a.—(3) 12. *H.* 4. 17. Vid. supra *fol.* 44. *b. the case of the precentor of Paul's, according to which rent on lease for years of tithes is incident to the reversion.* Hal. MSS. See ante 44. b. n. 3.—(4) That the common law did not allow debt for rent on freehold leases whilst they continued is certain, though the reason is not quite so clear. See 3. Blackst. 233. It has been accounted for by suggesting, that the remedies by *cessavit* and distress were deemed sufficient securities for the rent and services. See Gilb. on Rents 93. and Gilb. on the Action of Debt in his Cas. in L. and Eq. 370. But it may be proper to observe, that the *cessavit* seems to have been first given by the 6. E. 1. c. 4. though the lord's right of seising the land for subtraction of services, which continued till it was taken away by the 52. H. 3. c. 22. was a remedy in some respects similar, and furnishes occasion for the same observation. See 2. Inst. 295. and Wright's Ten. 197. Note that the 8. Ann c. 14. now gives debt for rent on a lease for life; on which statute Mr. Serjeant Hawkins queries, whether it doth not extend to leases of incorporeal hereditaments. Hawk. Abr. of Co. Litt. 73.—(5) Quære *how assise shall be brought in case of herbage.* 17. *E.* 3. 75. Hal. MSS.—(6) *And after the particular estate determined, distress may be made for all arrears.* 10. *E.* 4. 3. Hal. MSS.—(7) *Lease for years by indenture, and lessee covenants to pay* 5 *l. a year; this is a reservation.* Dy. 276. *H.* 6. Car. B. R. *Crook n.* 1. *Drake and Munday. But if there be* reddendo *rent and the lessee covenants to pay two capons, there it seems to be only covenant.* M. 40. 41. Eliz. *Bruerton's case.* Hal. MSS. See Cro. Cha. 207. and Hardr. 326.—(8) *Rent, reserved to him and his assigns during the term, or to him his executors and assigns during the term, determines by the lessor's death.* T. 2. Car. B. R. *Noy n.* 412. 12. *Co. n.* 20. and Hil. 32. Eliz. *Richmond's case.* Hal. MSS.—See Noy 96. 12. Co. 35. and Cro. Eliz. 217.—But notwithstanding the cases here cited by lord Hale, it was adjudged, whilst he was chief justice of the King's Bench, that the words *during the term* are of themselves sufficient to carry the rent to the heir, if the lessor is seised in fee, and he concurred in the judgment See the case of Sacheverell and Frogatt Entt. 23. Cha. 2. in 2. Saund. 367.—(9) *Rendering rent to him his heirs executors and administrators good, and it shall go to the heir. Drake's case* supra. *Rendering rent to him or his successors good, and the successor shall have it.* 5. *Rep.* Hal. MSS.—(10) See further as to reservation of rent Vin. Abr. title *Reservation*, and Gilb. Treat. on Rents.—(11) But deer kept in a private inclosure may be distrained. See 3. Blackst. Com. 8 where the case of Davis v. Powel C. B. Hil. 11. G. 1. is cited.—(12) Some have thought, that a horse, on which one

[m] 21. H. 7. 26. 3. E. 3. Aſſ. 46. 9.
[n] 7. H. 7. 1. b. 10. H. 7. 21. 11. H. 7. 4. a. 15. H. 7. 17. 18. E. 2. avowrie. 219. 6. E. 4. 22. E. 4. 49. 4. E. 3. diſtreſ. 18. 27. E. 3. 80. 2. H. 4. 16. (2. Leon. 7. Doct. and Stud. lib. 2. c. 27.)
[o] Marlebr. cap. 4. W. 1. cap 16. 2. & 3. Ph. & Mar. cap. 13. Fleta lib. 2. cap. 20. 6. H. 3. axowrie 242. 30. Aſſ. 38. 1. H. 6. 9. 22. E. 4. 11. F. N. B. 89. Doct. and Stud. lib. 2. cap. 27. 5. H. 7. fol. 9.
[p] 33. H. 8. tit. diſtreſ. Br. 65. (1. Ro. Abr. 673.)
[q] 4. E. 6. tit. diſtreſ. 74. F. N. B. 100. E. (Poſt 160. b.)
[r] 3. E. 3. tit. tranſ. 11.
[ſ] 34. H. 6. 18.
[t] Regiſt. F. N. B. 100. 101.
(Doct. and Stud. lib. 2. cap. 9.)
(1. Ro. Ab. 601. Poſt 292. b.)
[u] 7. H. 6. 13. 4. Co. 49. 3. Co. 16. 34. E. 1. tit. Avowrie 233. 32. H. 8. Br. reliefe 11. F. N. B. 82. 83. Glanvil lib. 9. cap. 35. Fleta lib. 2. cap. 40. and lib. 3. cap. 14. Bracton lib. 2. fol. 36. W. 1. cap. 35. 25. E. 3. cap. 11. Britton fol. 57. & 70. (Poſt 3. a. 1. Ro. Abr. 596.)
[x] 45. E. 3 7. 20. E. 4. 10. 34. H. 6. 48. 35. H. 6. 34. 9. H. 6. 35 11. H 4. 22.
[y] 2. E. 2. Eſtop. 253. 39. E. 3. 13. Pl. Com. 434. 18. E. 3. 16. 15. E. 3. Eſtop. 236. 14. H. 4. 32. (Mo. 20.)
[z] 14. H. 6. 23. 8. H. 4. 7.
[a] Reſolve. Paſch. 2. Eliz. in Communi Banco. (Cro. Cha. 110.)
[b] Mich. 31. & 32. Eliz. in Communi Banco adjudge in London's caſe.
[c] 38 H. 6. 24. 30. E. 3. 21.

or other beaſts, which Bracton calls *animalia* (or *catalla*) *otioſa*, may be diſtrained. [m] 6. Furnaces, caudrons or the like fixed to the freehold, or the doores or windowes of a houſe, or the like, cannot be diſtrained(1). [n] Laſtly, beaſts that eſcape (2) may be diſtrained for rent, tho' they have not been levant and couchant(3). [o] Note that he that diſtraines any thing that hath life, muſt impound them in a lawfull pownd within three miles in the ſame county, and that is either overt or open, in a pinfold made for ſuch purpoſes, or in his owne cloſe, or in the cloſe of another by his conſent (4). And it is therefore called open, becauſe the owner may give his cattle meat and drinke without treſpaſſe to any other, and then the cattle muſt be ſuſtained at the perill of the owner. [p] Or it is a pownd covert or cloſe, as to impownd the cattle in ſome part of his houſe, and then the cattle are to be ſuſtained with meat and drink at the perill of him that diſtraineth, and he ſhall not have any ſatisfaction therefore. But if the diſtreſſe be of utenſils of houſhold, or ſuch like dead goods which may take harme by wet or weather, or be ſtolne away, there he muſt impownd them in a houſe or other pownd covert within three miles within the ſame county, for if he impownd them in a pownd overt he muſt anſwer for them.

[q] If the diſtreſſe be taken of goods without cauſe, the owner may make reſcous; but if they be diſtrained without cauſe, and impounded, the owner cannot breake the pownd and take them out, becauſe they are then in the cuſtody of the law.

[r] But if a man diſtraine cattle for damage *feaſant*, and put them in the pownd, and the owner that had common there make freſh ſuite, and find the doore unlocked (5), he may juſtifie the taking away of the cattle in a *parco fracto*. [ſ] If the owner breake the pownd, and take away his goods, the partie diſtraining may have his action *de parco fracto*, and he may alſo take his goods that were diſtrained whereſoever he find them, and impownd them againe.

It is called a writ *de parco fracto* of theſe words in the writ [t] *Parcum illum vi et armis fregit*. And the forme thereof appeares in the Regiſter and F. N. B.

But it is to be obſerved that for the rent due the laſt day of the tearme, the leſſor cannot diſtraine becauſe the terme is ended (6), and therefore ſome uſe to reſerve the laſt halfe yeare's rent, at the feaſt of the nativitie of Saint John Baptiſt before the end of the terme, ſo as if the rent be not then paid, he may diſtraine betweene that and Michaelmaſſe following (7).

Action de debt. Note a diverſitie betweene a rent reſerved upon a leaſe for yeares, reſerving a yearely rent: the leſſor may have ſeverall actions of debt for every yeare's rent. But upon a bond or contract for payment of ſeveral ſummes, no action of debt lieth till the laſt day be paſt (8). But otherwiſe it is of a recognizance, which ſee at large and the reaſon thereof cap. Releaſes Sect. 512. 513. [u] Note that the lord ſhall not have an action of debt for reliefe or for eſcuage due unto him, becauſe he hath other remedie; but his executors or adminiſtrators ſhall have an action therefore, becauſe it is now become as a flower falne from the ſtocke, and they have no other remedy. Neither ſhall the lord have an action of debt for aid, *pur file marier*, or *faire fitz Chivaler*, for the cauſe aforeſaid.

Mes en tiel caſe il covient, que le leſſor ſoit ſeiſie (9) *de meſmes les tenements al temps del leaſe, car eſt bone plea pur le leſſee a dire, que le leſſor navoit riens en les tenements al temps del leaſe.* And the reaſon of this is, for that in every contract there muſt be *quid pro quo*, for *contractus eſt quaſi actus contra actum*, and therefore if the leſſor hath nothing in the land, the leſſee hath not *quid pro quo*, nor any thing for which he ſhould pay any rent. And in that caſe he may alſo plead, that the leſſor *non dimiſit*, and give in evidence the other matter (10).

Si [x] *non que le leaſe ſoit per fait indent, &c.* If the leaſe be made by deed indented, then are both parties concluded, [y] but if it be by deed poll the leſſee is not eſtopped to ſay that the leſſor had nothing at the time of the leaſe made. A, leſſee for the life of B, makes a leaſe for yeares by deed indented, and after purchaſe the reverſion in fee. B dieth, A ſhall avoid his owne leaſe, for he may confeſſe and avoid the leaſe which took effect in point of intereſt, and determined by the death of B. But if A had nothing in the land, and make a leaſe for yeares by deed indented, and after purchaſe the land, the leſſor is as well concluded, as the leſſee to ſay that the leſſor had nothing in the land(11), and here it worketh only upon the concluſion, and the leſſor cannot confeſſe and avoid as he might in the other caſe. [z] If a man take a leaſe of his owne land by deed indented reſerving a rent, the leſſee is concluded. [a] But if a man take a leaſe of the herbage of his owne land by deed indented, this is no concluſion, to ſay that the leſſor had nothing in the land, becauſe it was not made of the land itſelfe: [b] but if a man take a leaſe for yeares of his owne land by deed indented, the eſtoppell doth not continue after the terme ended(12). For by the making of the leaſe, the eſtoppell doth grow, and conſequently by the end of the leaſe, the eſtoppell determines(13), [c] and that part

(1) At common law corn growing could not be diſtrained, becauſe it adheres to the freehold. 1. Ro. Abr. 666. H. pl. 4. But now by the 11. G. 2. c. 19. landlords are empowered to diſtrain all ſorts of corn, graſs, or other product growing on the eſtate demiſed, and to cut and gather them when ripe.—(2) *If they eſcape for want of incloſure by him who ought to repair, they are not diſtrainable. Adj.* 14. Eliz. *Dy.* 317. *The lord cannot diſtrain beaſts which eſcape, when they are gone out of the land, though they are within view.* Vid. 41. *E.* 3. 26. 14. *H.* 7. 8. 20. *H.* 7. 10. 15. *H.* 7. 17. 2. *E.* 4. 6. Hal. MSS. See the next note.—(3) This doctrine has been objected to as too general; and ſeveral diſtinctions are taken, the ſum of which ſeems to be, that if a ſtranger's beaſts eſcape into another's land by default of the owner of the beaſts, as by breaking the fences, they may be diſtrained for rent immediately without being levant or couchant; but that if they eſcape there by default of the tenant of the land, as for want of his keeping a ſufficient fence, then they cannot be diſtrained for rent or ſervice of any kind till they have been levant and couchant, nor afterwards by a landlord for rent on a leaſe, unleſs on notice the owner of the beaſts neglects to remove them, tho' it is ſaid, that ſuch notice is not neceſſary where the diſtreſs is by the lord of the fee for an ancient rent or by the grantee of a rent-charge. See this ſubject argued upon at large in the caſe of Kimp and Cruwes 2. Lutw. 1573.—(4) And now by the 11. G. 2. c. 19. ſ. 10. perſons diſtraining for rent may impound the diſtreſs on any convenient part of the land chargeable with the rent.—(5) Vid. 30. *E.* 26. *where defendant pleads, that he found the cattle* ſans nul manner de fermure ne ferrure n'autre engine. Hal. MSS.—(6) *For one cannot diſtrain the ſame day the rent grows due; but it muſt be the day after.* 21. *H.* 6. 40. Vid. 14. *H.* 4. 31. Hal. MSS. By the 8. An. c. 14. rent may be diſtrained for after determination of the leaſe in the ſame manner as before, if the diſtreſs is made within ſix kalendar months afterwards, and during the continuance of the landlord's title and the poſſeſſion of the tenant from whom the arrears are due.—(7) See further as to diſtreſs 3. Blackſt. Comment. 6 & 145. and in the ſeveral abridgments titles *Diſtreſs* and *Replevin*, and alſo Gilbert's Treatiſe on the Law of Replevins. See alſo 2. W. & M. c. 5. 8. An. c. 14. 4. G. 2. c. 28, & 11. G. 2. c. 19. Theſe ſtatutes have made great alterations in the ancient law of diſtreſs, particularly by empowering perſons, who diſtrain for rent of any kind, to ſell the diſtreſs for payment of the rent in arrear, if the tenant or owner fails to replevy with ſufficient ſecurity within five days after taking of the diſtreſs and giving the tenant notice of the cauſe. This improvement of the remedy by diſtreſs was firſt introduced by the 2. W. & M. c. 5. with reſpect to rents due on demiſe or contract, and afterwards by the 4. G. 2. c. 28. was extended to rents-ſeck, rents of aſſiſe, and chief rents. Before theſe two ſtatutes, the remedy by diſtreſs was very imperfect; for the diſtreſs was merely taken *nomine pœnæ* to compel ſatisfaction, and could not be ſold or uſed for the profit of the perſon diſtraining, except in caſe of the king and in ſome few other inſtances. Moſt of the other changes, made by the ſtatutes ſince lord Coke's time, have been incidentally hinted at in the preceding notes.—(8) See New Abr. *Debt* B. and Vin. Abr. *Debt* O.—(9) Nota *this diverſity. In pleading a leaſe, one ought to ſay, that the leſſor was* ſeiſed *and demiſed; but in count in debt for rent it is good without alledging ſeiſin.* 20. *E.* 3. *Barr.* 132. 21. *H.* 7. 32. Hal. MSS.—(10) 18. *E.* 3. 16. *Brief* 747. *Dy.* 122. *Martyne and Hardye.* Hal. MSS.—(11) Et videtur, *that by the purchaſe of the land, that is turned into a leaſe in intereſt, which before was purely an eſtoppel.* Vid. tamen P. 3. Cur. C. B. *Crook* n. 2. *Iſham and Morris.* Hal. MSS. See Cro. Cha. 109.—(12) Vid. 4. *H.* 6. 7. *If diſſeiſee makes leaſe for years by indenture to diſſeiſor, he ſhall not have aſſiſe during this leaſe.* Hal. MSS.—(13) 30. *E.* 3. 21. Vid. 14. *H.* 6. 22. per curiam. *But if it be eſtoppel by matter of record, as by fine, &c. it continues after.* 2. *E.* 4. Hal. MSS.

one is riding, may be diſtrained for *damage feaſant*. 2. Keb. 596. 1. Sid. 440. But the opinion was extrajudicial, and may be queſtioned;

part of the indenture which belonged to the leſſee, doth after the terme ended belong to the leſſor, which ſhould not be if the eſtoppell continued. (Poſt. 229. a.)

Sect. 59.

ET eſt aſcavoir, que en leaſe pur terme de ans, per fait ou ſans fait il ne beſoygne aſcun liverie de ſeiſin deſtre fait al leſſee, mes il poit entrer quant il voet per force de meſme le leaſe. Mes des feoffments faits en pais, ou dones en le taile, ou leaſe pur term de vie, en tiels caſes ou franktenement paſſera, ſi ceo ſoit per fait ou ſauns fait, il covient aver un livery de ſeiſin.

AND it is to be underſtood, that in a leaſe for yeares by deed or without deed (1), there needs no livery of ſeiſin to be made to the leſſee, but he may enter when he will by force of the ſame leaſe. But of feoffements made in the country, or gifts in taile, or leaſe for terme of life, in ſuch caſes where a freehold ſhall paſſe, if it be by deed, or without deed, it behoveth to have livery of ſeiſin.

LIVERIE de ſeiſin. (2) *Traditio*, or *deliberatio ſeiſinæ* is a ſolemnitie, that the law requireth for the paſſing of a freehold of lands or tenements by delivery of ſeiſin thereof. [*b*] *Intervenire debet ſolennitas in mutatione liberi tenementi, ne contingat donationem deficere pro defectu probationis* (3).

18. E. 3. fo. 16. 41. E. 3. 17. 40. Aſſ. 10. 2. Aſſ. 1. 2. E 3. 4. 43. E 3. Feoff. 51. Pl.Com. 25. a. & 303. b. Vide Sect. 66. (Poſt 216.)

[*b*] Bract. lib. 2. ca. 15.

And there be two kinds of livery of ſeiſin, *viz.* a liverie in [*c*] deed, and a livery in law. A livery in deed is when the feoffor taketh the ring of the doore, or turfe or twigge of the land, and delivereth the ſame upon the land to the feoffee in name of ſeiſin of the land, &c. *per boſtium et per haſpam et annulum vel per fuſtem vel baculum, &c.*

[*c*] Bract. lib. 2. ca. 15. & 18. Brit. ca. 33. in fine fo. 87. Flet. lib. 3. cap. 15.

A ſeiſed of an houſe in fee, and being in the houſe, [*d*] ſaith to B, I demiſe to you this houſe for terme of my life; this is a good beginning to limit the ſtate, but here wanteth livery (4). A livery in deed may be done two manner of wayes, by a ſolemne act and words, as by delivery of the ring or haſpe of the doore, or by a branch or twigge of a tree, or by a turfe of the land, and with [*e*] theſe or the like words, the feoffor and feoffee both holding the deed of feoffment, and the ring of the doore, haſpe, branch, twigge, or turfe: and the feoffor ſaying, here I deliver you ſeiſin and poſſeſſion of this houſe, in the name of all the lands and tenements contained in this deed, according to the forme and effect of this deed. Or by words without any ceremony or act (5), as the feoffor being at the houſe doore, or within the houſe, here I deliver you ſeiſin and poſſeſſion of this houſe, in the name of ſeiſin and poſſeſſion of all the lands and tenements contained in this deed, *et ſic de ſimilibus*, or, enter you into this houſe or land, and have and enjoy it according to the deed; or, enter into the houſe or land, and God give you joy, or, I am content you ſhall enjoy this land according to the deed, or the like. For if words may amount to a liverie within the view, much more it ſhall upon the land (6). But if a man deliver the deed of feoffment upon the land, this amounts to no livery of the land, for it hath another operation to take effect as a deed: but if he deliver the deed upon the land in name of ſeiſin of all the lands contained in the deed, this is a good livery; and ſo are other books intended that treat hereof, that the deed was delivered in name of ſeiſin of that land. Hereby it appeareth, that the delivery of any thing upon the land in name of ſeiſin of that land, though it be nothing concerning the land, as a ring of gold, is good, and ſo hath it beene reſolved by all the judges, and ſo of the like.

[*d*] 6. Co. 26. Sharp's caſe.

[*e*] See of this more Sect. 60. (2. Ro. Ab. 7.)

4. E. 3. 17. b. 41. Aſſ. p. 10. 38. Aſſ. p. 2. 38. E. 3. 11. 39. Aſſ. p. 12. 26. Aſſ. 39. 27. Aſſ. p. 61. 18. E. 3. 16. 6. Co. 26. Sharp's caſe. (Poſt. 37. Cro. Jam. 80.)

43. E. 3. tit. Feoff. 51. 35. H. 8 Feoff. Br (9. Co. 136. b. 1. Leon. 207.)

50. E. 3. Rot. Parlo nu. 30.

If divers parcels of land be conteyned in a deed, and the feoffor delivers ſeiſin of one parcell according to the deed, all the parcels doe paſſe, albeit he ſaith not (in name of all, &c.) becauſe the deeth containeth all. And ſo if there be divers feoffees, and he make livery to one according to the deed, the land paſſeth to all the feoffees (7), and yet the plainer way is to ſay (in the name of the whole, or of all the feoffees (8).)

(Poſt 50. a.) 13. E. 3. Eſſop. 177.

If a man make a charter in fee, and deliver ſeiſin for life *ſecundum formam cartæ*, the whole fee ſimple ſhall paſſe, for it ſhall be taken moſt ſtrongly againſt the feoffor. Note that theſe words *(ſecundam formam cartæ)* are underſtood according to the quantitie and quality of the effectuall eſtate contained in the deed. If a man make a leaſe for yeares by deed, and deliver

Ibidem. (2. Co. 246. Poſt 222.)

7. E. 4. 25. 29. Aſſ. 40. 10. Aſſ. 19. 43. Aſſ. 20.

(1) As to the diſtinction at common law between hereditaments lying in livery, which might be paſſed for any eſtate without deed or even writing, and thoſe lying in grant, which could be transferred by deed only, and the alteration of our ancient law by the 29. Ch. 2. c. 3. which requires a deed or writing in moſt caſes, ſee *infra* n. 3. ante 9. a. and Poſt 49. a 121. b. 169. a.—(2) For the origin and hiſtory of the transfer of lands by livery of ſeiſin, ſee 2. Blackſt. Comment. 311. Mad. Formul. Anglic. Diſſert. 9. and Spelm. Gloſſ. and Du Freſn. Gloſſ. voce *Inveſtitura*.—(3) But ſince the introduction of uſes and truſts and the ſtatute of 27. H. 8. for transferring the poſſeſſion to the uſe, the neceſſity of livery of ſeiſin for paſſing a freehold in corporeal hereditaments has been almoſt wholly ſuperſeded, and in conſequence of it the conveyance by feoffment is now very little in uſe. Before the ſtatute of uſes *equitable* eſtates of freehold might be created through the *medium* of truſts without livery, and by the operation of the ſtatute *legal* eſtates of freehold may now be created in the ſame way. Thoſe who framed the ſtatute of uſes evidently foreſaw, that it would render livery unneceſſary to the paſſing of a freehold, and that a freehold of ſuch things as do not lye in grant would become transferrable by *parol* only without any ſolemnity whatever. To prevent the inconveniences, which might ariſe from a mode of conveyance ſo uncertain in the proof and ſo liable to miſconſtruction and abuſe, it was enacted in the ſame ſeſſion of parliament, that an eſtate of freehold ſhould not paſs by bargain and ſale only, unleſs it was by indenture inrolled. See 27. H. 8. c. 16. The objects of this proviſion evidently were, firſt to force the contracting parties to aſcertain the terms of the conveyance by reducing it into writing; ſecondly, to make the proof of it eaſy by requiring their ſeals to it, and conſequently the preſence of a witneſs; and laſtly, to prevent the frauds of ſecret conveyances by ſubſtituting the more effectual notoriety of inrollment for the more ancient one of livery. But the latter part of this proviſion, which if it had not been evaded would have introduced almoſt an univerſal regiſter of conveyances of the freehold in the caſe of corporeal hereditaments, was ſoon defeated by the invention of the conveyance by leaſe and releaſe, which ſprung from the omiſſion to extend the ſtatute to bargains and ſales for terms of years; and the other parts of the ſtatute were neceſſarily ineffectual in our courts of equity, becauſe theſe were ſtill left at liberty to compel the execution of truſts of the freehold though created without deed or writing. The inconveniences from this inſufficiency of the ſtatute of inrollments are now in ſome meaſure prevented by the 29. Cha. 2. c. 3. which provides againſt conveying any lands or hereditaments for more than three years, or declaring truſts of them, otherwiſe than by writing. See Poſt 121. b.—(4) 9. *Rep.* 13. *Thoroughgood's caſe.* Hal. MSS.—(5) 43. *Aſſ.* 10. 18. *H.* 6. 16. *A makes charter of feoffment to uſes to B, and B being on the land A ſays*, I am content you ſhall have this houſe and land according to the deed made to you; *it is not livery, becauſe it imports only aſſent and is future.* H. 6. Jne. *Maund's caſe. Ley n.* 3. Hal. MSS. See Ley 2.—(6) But Cro. Jam. 80. and Ley 2. ſeem *contra*.—(7) *But if it be without deed nothing paſſes to the others. Dy.* 14. 35. Hal. MSS.—(8) 15. *E.* 4. 18. 18. *E.* 4. 12. 18. *H.* 6. 9. 22. *H.* 6. 1. 40. *E.* 3. 40. Hal. MSS.

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

liver seisin according to the forme and effect of the deed; yet he hath but an estate for yeares, and the liverie is void as Littleton saith. So if A by deed give land to B, to have and to hold after the death of A to B and his heires, this is a void deed, because he cannot reserve to himselfe a particular estate, and construction must be made upon the whole deed, and if livery be made according to the forme and effect of the deed, the livery also is void, because the livery referreth to a deed that hath no effect in law, and therefore it cannot worke *secundum formam et effectum cartæ* (1). And so it was adjudged, *et sic de similibus*. * And it is to be observed that neither the feoffor being absent, can make livery, nor the feoffee being absent can take livery, but by warrant of attorney, by deed, and not by parol, because it concerneth matter of freehold (2).

(Hob. 171. Plow. 155. 197. 1. Sid. 82. 2. Ro. Ab. 7. 1. Co. 127. 129. Cro. Ja. 376.)

Mich. 33. & 34. Eliz. in the King's Bench inter Hogge & Crosse for lands in London. Vid. Pl. Com. 395.

* See more of this Sect. 66. 11. H. 4. 71. 19. Ass. 9 19. H. 8. 9. b. (2. Ro. Ab. 8. Post. 359. 2. Sid. 61.)

Vide Sect. 1. in Bridgewater's case, where a man hath a moveable estate for inheritance, for example there put, in 13 acres: the question is where livery shall be made. First, if they be parcel of a mannor, they may passe by the name of the mannor, but if they be in grosse then the charter of feoffment must be of 13 acres, lying and being in the meadow of 80 acres; generally without bounding or describing of the same in certaintie, and liverie of the seisin of any 13 acres allotted to the feoffee for a yeare *secundum formam cartæ* is a good livery to passe the content of 13 acres wheresoever the same lie in that meadow. In the second case where one entire mannor is separate and divided, as is aforesaid, there is no question but the livery must be made of that mannor, but in the other case where two mannors are separate, and divided *alternis vicibus*, there the charter of feoffment must be made of both, and liverie in that mannor which he is seised of in any one yeare *secundum formam cartæ*, and the next yeare in the other *secundum formam cartæ:* for there are two distinct mannors, and severall estates in them (3).

Bridgewater's case.
(Ante 4. b. Post. 190. b.)

Vid. Sect. 1.

A livery in law is when the feoffor saith to the feoffee being in the view of the house or land, (I give you yonder land to you and your heires, and goe enter into the same, and take possession thereof accordingly,) and the feoffee doth accordingly in the life of the feoffor enter, this is a good feoffment, for *signatio pro traditione habetur* (4). And herewith agreeth Bracton, *item dici poterit et assignari, quando res vendita vel donata sit in conspectu, quam venditor et donator dicit se tradere:* And in another place he saith, *in seisina per affectum et per aspectum.* But if either feoffor or the feoffee die before entry the livery is voyd (5). And livery within the view is good where there is no deed of feoffment. [a] And such a liverie is good albeit the land lie in another county. [b] A man may have an inheritance in an upper chamber, though the lower buildings and soile be in another, and seeing it is an inheritance corporeall it shall passe by livery. [c] A man maketh a charter of feoffment and delivers seisin within the view, the feoffee dares not enter for feare of death, but claimes the same, this shall vest the freehold and inheritance in him, albeit by the livery no estate passed to him, neither in deed, nor in law, so as such a claime shall serve, as well to vest a new estate and right in the feoffee, as in the common case to revest an ancient estate and right in the disseisee, &c. as shall be said hereafter more at large in the chapter of continuall claime. And so note a liverie in law shall be perfected and executed by an entry in law. [d] If a man be disseised, and make a deed of feoffment, and a letter of attorney to enter and take possession, and after to make livery *secundum formam cartæ*, this is a good feoffment albeit he was out of possession at the time of the charter made (6), for the authority given by the letter of attorney is executory, and nothing passed by the delivery of the deed till livery of seisin was made. And in ancient letters of attorney power is given to others to take possession for the feoffor. But if a man be disseised, and make a writing of a lease for yeares and deliver the deed, and after deliver it upon the ground, the second delivery is voyde, for the first delivery made it a deed, and for that the lease for yeares must take effect by the delivery of the deed, therefore the deed delivered when he was out of possession was voyde. But so it is not of a charter of feoffment, for that takes effect by the livery and seisin. But if the lessor had delivered it as an escrowe, to be delivered as his deed upon the ground, this had beene good.

38. E. 3. 11. 38. Ass. p. 2. 43. Ass. p. 20. Temps H. 8. Tit. Feoffments Br. 70. 18. E. 3. 16. b. 28. H. 8. F. 18. 9. E. 4. 39. per Moyle. Bract. lib. 2. cap 18. & lib. 4 fo. 225 a.
(1. Co. 156. Post. 253. a.)

[a] 9. E. 4. 39. 38. E. 3. 11.
[b] 9. E. 4. 38. 40. 5. H. 7. 9. 3. H. 6. tit. Pleint. 1. 11. H. 4. 32. 11. E. 3. Ass. 86.
[c] 38. Ass. p. 23.

[d] Hill. 37. Eliz. Rot. 620. in com. Banco, inter Browne & Terry adjud.
Dyer 16. Eliz. 234.
3. Eliz. Dyer 131.
(6. Co. 26.)

3. Co. 35. inter Jennings & Bragge.
(2. Co. 31. b. 3. Co. 35. b.)

(2. Ro. Ab. 4. Dy. 33. a. Mo. 11.)

2. Co. 31. 32. Bettisworth's case.

A man makes a lease for yeares and after makes a deed of feoffment and delivers seisin, the lessee being in possession and not assenting to the feoffment, this livery is voyd, for albeit the feoffor hath the freehold and inheritance in him, yet that is not sufficient, for a livery must be given of the possession also (7); but if the lessee be absent, and hath neither wife nor servants (though he hath cattell) upon the ground the liverie of seisin shall be good.

If a man be seised of an house, and of divers severall closes in one countie in fee, and makes a lease thereof for yeares, and afterward maketh a feoffment in fee of the same, and makes liverie of seisin in the closes, (the lessee or his wife or servants then being in the house) the livery is voyd for the whole: for the lessee cannot be upon every parcell of the land to him demised, for the preservation or continuance of his possession therein. And therefore his being in the house, or upon any part of the land to him demised, is sufficient to preserve and continue his possession in the whole, from being ousted or dispossessed (8).

Note

(1) *Charter of feoffment* habendum a die datus. *Ruled*, 1. *If livery be made the same day* secundum formam cartæ, *it is void.* 2. *If it was after the day by the feoffor himself, it is good.* 3. *If there be letter of attorney to deliver seisin in the deed, or it was at the same time, and it is delivered after the day, yet it is not good, because the authority was given at a time when it was a void charter But* 4. *if letter of attorney be made after the day, and livery is made according to the deed, it is good. Hob.* 314. *Greenwood and Tiler* T. 3. Car. *Owen and Price.* C. B. H. 3. Jac. Rot. 216. B. R. *Hennings and Paucharden. So there is a diversity between this and a grant of a reversion* habendum *from a day to come, for attornment after the day doth not aid the grant.* 2. *Rep.* 55 *Buckler's case.* Hal. MSS.—See Cro. Jam. 563. and 153.—(2) *Adjudged, that feoffee being absent cannot take livery, nor feoffor being absent make livery, by attorney by* parol. *T* 1659. *Gregory and Badbourne. But a lease for years may be delivered by attorney by* parol, *as has been often adjudged.* Hal. MSS.—(3) Vid. 8. *E.* 2. *Feoffments* 111. *Livery by the lord of any part of the manor without going to it; but* contra *if not parcel.* Hal. MSS.—(4) Nota *the case of* 38. *Ass.* 2. *A makes feoffment to B within the view, and afterwards marries her, and afterwards, claims to the use of the wife; it is a good execution of the livery.* 38. *E.* 3. 11. Vid. 42. *E.* 3. *Feoffments* 54. *Livery good, though the land is not within view.* Hal. MSS.—(5) 1. *Rep. Rector of Cheddington's case.* Hal. MSS.—(6) H. 22. Car. B. R. *Hinde's case,* M. 4. Jac. B. R. *Sparks and Darcy,* 37. Eliz. *Brown's case. Charter of feoffment of lands in the hands of the king with letter of attorney to make livery, and afterwards the feoffor sues* outter maine, *and the attorney makes livery; it is good.* 25. Eliz. *Feoffment on condition which is broken; feoffor makes charter of feoffment and letter of attorney to deliver seisin; the attorney enters and makes livery; it is good. Dick's case.* Hal. MSS.—(7) P. 40. Eliz. B. R. *A tenant for years; the reversion is granted to B for life, remainder to C in tail, remainder to D in fee; D by deed infeoffs A and one E, and makes livery; it was ruled to be void, because there was not any surrender, and A was in possession and could not take by livery. Edes and Knotsford. A tenant for years, remainder to the king for years, remainder to B in fee; B enters and ousts A and makes livery; it is good, notwithstanding the mesne remainder for years to the king; but it would have been otherwise, if the king's remainder had been for life.* Hal. MSS.—(8) *But* nota, *if lessee consents, livery is good, though he be upon the land.* Tr. 40. Eliz. *Shephard and Gray. A makes lease for years, and afterwards makes charter of feoffment with letter of attorney to enter and take possession and seisin for him and such seisin and possession to deliver; the attorney makes livery with the consent of the lessee, he being on the land; and it was ruled good.* P. 1651. *Wegg and Villers.—Lessee for years consents, that feoffor shall make livery, and afterwards goes out of the country, leaving servants on the land; the feoffor enters and makes livery; it was ruled good. But it was ruled, that if lessee be absent, livery by lessor by consent of servants is void, they being upon the land.* T. 7. Jac. C. B. n. 45. *D. D. Blackleach and Small. But if A be lessee of* white acre *by one demise and of* black acre *by another demise of the same lessor; or if there be lessee of* white acre *and* black acre *by one demise, and he makes lease for years of* black acre, *and lessor enters on* black acre *and makes livery, though A be on* white acre *it is good.* 2. *Rep. Bettisworth's case.* Hal. MSS.

being on the cart should not privilege the whole team.—(13) *If ferrets and nets in a warren be taken* damage feasant, *it is good. But if they are in the hands of a man, they cannot be distrained any more than a horse on which a man is; nor can they be distrained, if they are out of the warren.* 2. *E.* 2. *Avowry* 182. 7. *E.* 3. ibid. 199. Hal. MSS. See Vin. Abr *Distress* A.—(14) *If A brings yarn to his neighbour's house to weigh, it cannot be distrained by the lord. Noy* n. 198. *Burley and Read.* Vid. 15. *E. Avowry* 216. Hal. MSS. See Noy 68. and l. c. in Cro. Eliz. 549. and 596. For other cases in which things the property of strangers are privileged from

Note a great diverſity, when a man hath two waies to paſſe lands, and both of the waies be by the common law, and he entendeth to paſſe them by one of the wayes, yet *ut res magis valeat* it ſhall paſſe by the other. But where a man may paſſe lands either by the common law, or by raiſing of an uſe, and ſettling it by the ſtatute, there in many caſes it is otherwiſe (1). For example, if a man be ſeiſed of two acres in fee, and letteth one of them for yeares, and intending to paſſe them both by feoffment, maketh a charter of feoffment, and maketh livery in the acre in poſſeſſion, in name of both, onely the acre in poſſeſſion paſſeth by the livery. Yet if the leſſee attorne, the reverſion of that acre ſhall paſſe by the deed and attornement, for he is in by the common law, and in the *per* in both, and ſo in the like. But otherwiſe it is, if the father make a charter of feoffment to his ſon, and a letter of attorney to make livery, and no livery is made, yet no uſe ſhall riſe to the ſon, becauſe he ſhould be in by the ſtatute in another degree, *viz.* in the *poſt*, and the intention of the parties worke much both in the raiſing and direction of uſes. So if *Ceſty que uſe* and his feoffees had joyned in a feoffment after the ſtatute of 1. R. 3. &c. it had beene the feoffment of the feoffees, and the confirmation of *Ceſty que uſe*, for the ſtate at the common law ſhall be preferred. So to conclude this point, of freehold and inheritances, ſome be corporeall, as houſes, &c. lands, &c. theſe are to paſſe by liverie of ſeiſin, by deed or without deed; ſome be incorporeall, as advowſons, rents, commons, eſtovers, &c. theſe cannot paſſe without deed, but without any liverie (2). And the law hath provided the deed in place or ſtead of a livery. And ſo it is if a man make a leaſe, and by deed grant the reverſion in fee, here the freehold with attornement of the leſſee by the deed doth paſſe, which is in lieu of the livery. See Bract. lib. 2. cap. 18. *Et eſt traditio de re corporali de perſona in perſonam de manu, &c. gratuita tranſlatio, et nihil aliud eſt traditio in uno ſenſu, niſi in poſſeſſionem inductio, de re corporali; et ideo dicitur, quod res incorporales non patiuntur traditionem ſicut ipſum jus quod rei ſive corpori inhæret, et quia non poſſunt res incorporales poſſideri ſed quaſi, ideo traditionem non patiuntur.*

7. E. 4. 20. a. per touts les Juſt. 11. H. 4. 71. Pl. Com. 152. 10. E. 4. 3. (Mo. 99.)

This ancient manner of conveyance by feoffment and livery of ſeiſin, doth for many reſpects exceed all other conveyances. For (as hath beene ſaid) (3) if the feoffor be out of poſſeſſion, neither fine, recovery, indenture of bargaine and ſale inrolled, nor other conveyance, doth avoid an eſtate by wrong, and reduce cleerely the eſtate of the feoffee, and make a perfect tenant of the freehold, but onely livery of the ſeiſin upon the land: the other conveyances being made off from the ground, doe ſometimes more hurt then good, when the feoffor is out of poſſeſſion (4). And yet in ſome caſes a freehold ſhall paſſe by the common law without livery of ſeiſin: as if a houſe or land belong to an office by the grant of the office by deed, the houſe or land paſſeth as belongeth thereunto. So if a houſe or chamber belong to a corodie, by the grant of a corodie, the houſe or chamber paſſeth. A freehold may by cuſtome be ſurrendred without livery, as hereafter ſhall be ſaid (6): and ſo of aſſignement of dower *ad oſtium eccleſiæ*, or otherwiſe, and by exchange a freehold may paſſe without livery, as hereafter ſhall be ſaid in this chapter.

2. Co. 55. Buckler's caſe. 1. H. 7. 28. 8. H. 7. 4. 31. H. 6. 16. 8. H. 7. 4. M. 31. E. 1. coram Rege. Ramulph. Huntingfel's caſe. (5) 3. E. 3. Coron. 310. 11. H. 4. 83. V. Sect. 74.

Sect. 60.

MES ſi home leſſa terres ou tenements, per fait ou ſans fait, a (7) *terme des ans, le remainder ouſter a un auter per terme de vie, ou en taile, ou en fee; donque en tiel caſe il covient, que le leſſor fait un liverie de ſeiſin a le leſſee per terme de ans, ou autrement riens paſſa a eux en le remainder, coment que le leſſee enter en*

BUT if a man letteth lands or tenements by deed or without deed for terme of yeares, the remainder over to another for life, or in taile, or in fee; in this caſe it behooveth, that the leſſor maketh livery of ſeiſin to the leſſee for yeares, otherwiſe nothing paſſeth to them in the remainder, although that the leſſee enter into the

PER fait, ou ſauns fait. For ſeeing that the remainders take effect by livery, there needes no deed (8).

22. H. 6. 1. 10. E. 4. 1. 18. E. 4. 13.

Le remainder is a reſidue of an eſtate in land depending upon a particular eſtate, and created together with the ſame, and in law Latine it is called *remanere* (9).

(Plow. 25. a. Poſt 143. a. Vaugh. 269.)

Fait un livery de ſeiſin al leſſee. This livery is not neceſſary in this caſe for the leſſee himſelfe, becauſe he hath but a terme for yeares, but it is for the benefit of them in the rem', ſo as the livery to the leſſee ſhall enure for the benefit of them in the rem': for the liverie

(1) Where land ſhall paſs by one way or the other at common law.—*Termor for years makes charter of feoffment by the word* dedi, *with letter of attorney in the ſame deed to deliver ſeiſin, and afterwards livery is made, yet it is a forfeiture, and the term ſhall not be ſaid to paſs firſt by the delivery of the deed, as it ſeems. Dy.* 362.—*Grant to a tenant at will ſhall enure as a confirmation. Dy.* 269.—29. Eliz. B. R. *Leonard's caſe. If A makes leaſe for years to B, and afterwards makes charter of feoffment to B being in poſſeſſion with the words* dedi et conceſſi, *with letter of attorney to deliver ſeiſin; before livery, he may uſe the deed as a confirmation in fee, and after livery as a feoffment. And there it was alſo agreed, that if by indenture in conſideration of money A bargains and ſells to B with letter of attorney, and the deed is inrolled, it is a good bargain and ſale.*—17. Eliz. *Leſſee for life and he in remainder in fee make charter of feoffment, and letter of attorney to make livery, which is made accordingly, it is good and the remaindor ſhall not be ſaid to paſs by delivery of the deed.*—Where one ſhall have election to take by ſtatute or common law. Vid. *Dy.* 302. *Grant of reverſion to a brother averred to be* pro fraterno amore.—2. *Rep. Sir R. Heyward's caſe.* Demiſi or conceſſi *taken either as leaſe or bargain and ſale.* 7. *Rep. Bedell's caſe. Grant to a ſon.* T. 15. Car. B. R. *entered* H. 11. Car. Rot. 459. *Father gives and grants to his ſon and his heirs,* habendum *after the death of the father; and no conſideration of blood or marriage is mentioned in the deed; an eſtate ſhall not ariſe by way of uſe.* Nota videtur, *that there was a letter of attorney in the deed.* P. 1657. *Jackſon's caſe. A by indenture for love and affection grants to B a rent in eſſe,* habendum *to B for life, remainder to the uſe of C in tail, remainder to the uſe of A's right heirs, and attornment was made but not till after the death of A; and it being found that B was couſin it was ruled, that an eſtate ſhould ariſe by way of uſe without attornment.*—Where one may elect one way or the other by ſtatute.—Vid. 7. *Rep. Bedell's caſe. If father in conſideration of money bargains and ſells to his ſon, there ought to be an enrollment. But if A for natural love to his ſon and alſo for money grants to the ſon, the land ſhall paſs without inrollment, becauſe the conſideration of love is expreſſed.* M. 1649. *Wats and Dicks* B. R.—Hal. MSS. See further as to electing in what way an eſtate ſhall paſs, Yelv. 124. the caſe of Croſſing and Scudamore. 1. Ventr. 137. and 1. Mod. 175. and Barker and Keat in 2. Mod. 249. See alſo Vin. Abr. *Uſes* B. a. and the obſervation in Hawk. Abr. of Co. Litt. 83.—(2) See ante 9. a. 47. a. 48. a. and Poſt 121. b. and 169. a.—(3) Ante 9. a.—(4) *For this ſee* 2. *Rep.* 56. *Buckler's caſe. Fine by diſſeiſee extinguiſhes his right, and ſhall enure to the diſſeiſor. But ſee this denied* M. 13. Car. B. R. *Crook* n. 7. *Litzherbert's caſe.* Hal. MSS.—See Cro. Cha. 483 and S. C. W. Jo. 397. In this laſt book it is ſaid, that the judges did not deliver any opinion on the point. See further W. Jo. 317. Cro. Cha. 305. and Gouldſb. 162.—(5) Rot. 74. Hal. MSS.—(6) Vid. 5. *Rep. Peryman's caſe.* Hal. MSS.—See 5. Co. 84. In Peryman's caſe the jury found, that in the manor of Porcheſter there was a cuſtom, according to which all alienations of lands within that manor by writing feoffment or laſt will were void, unleſs preſented at the next court of the manor, or at ſome court within a year after, or at the next court after the year; and this was adjudged to be a good cuſtom. In the ſame caſe mention is made, that by the cuſtom of Lidford Caſtle in Devonſhire a freeholder of inheritance cannot paſs his freehold except by ſurrender into the lord's hands. As to this latter kind of cuſtom, in conſequence of which the eſtates ſubject to it have been called *cuſtomary freeholds*, ſee Poſt 59. b. and Blackſt. Law Tracts, 8vo ed. vol. 1. p. 144.—(7) *Un jour.* L. and M.—(8) 12. *H.* 4. 20. Hal. MSS.—(9) *Sed.* 215. Hal. MSS.

verie of the poſſeſſion could not be made to the next in remainder, becauſe the poſſeſſion belonged to the leſſee for yeares, and for that the particular terme, and all the remainders, made in law but one eſtate, and take effect at one time, therefore the livery is to be made to the leſſee. But if a leaſe for yeares without deed be made to A and B, the remainder to C in fee, and livery is made to A in the abſence of B, in the name of both; it ſeemeth the livery is good to veſt the remainder, and there is a diverſity, between two joynt attornies to receive livery for another, and livery and ſeiſin is made to one of them, in the name of both, this is cleerly void, becauſe they had but a meer and bare authority (1), and they both doe in law make but one attorney, unleſſe the warrant be joyntly and ſeverally (2), but the leſſee for yeares hath an intereſt in the land. Againe, if A is to make a feoffment to B and C, and their heires without deed, and A makes livery to B in the abſence of C in the name of both, and to their heires; this livery is void to C, becauſe a man being abſent cannot take a freehold by a livery, but by his attorney being lawfully authoriſed to receive livery by deed, unleſſe the feoffment be made by deed, and then the livery to one in the name of both is good (4).

(Poſt 143 a.)

(5. Co. 94. b.)

10. E. 4. 1. 12. E. 4. 16. 15. E. 4. 18. 22. E. 4. 35. 40. E. 3. 10. 41. (3)
Temps H. 8. Feoffments 72.
6. H. 4. 2. b. Litt. 153.
3. H. 7. 13. (Poſt 359. a.)
(Ante 36. a. 9. Co. 137.)

les tenements. Et ſi le termor en tiel caſe entra devant aſcun liverie de ſeiſin fait a luy, donque eſt le franktenement et auxy le reverſion en le leſſor. Mes ſi il fait liverie de ſeiſin a le leſſee, donque eſt le franktenement ove le fee a eux en le remainder, ſolonque le forme del grant et le volunt del leſſor.

tenements. And if the termour in this caſe entreth before any livery of ſeiſin made to him, then is the freehold and alſo the reverſion in the leſſor. But if he maketh liverie of ſeiſin to the leſſee, then is the freehold together with the fee to them in the remainder, according to the forme of the grant and the will of the leſſor.

Note there is a diverſity between livery of ſeiſin of land, and the delivery of a deed, for if a man deliver a deed without ſaying of any thing, it is a good delivery, but to a livery of ſeiſin of land words are neceſſary; as taking in his hand the deed, and the ring of the doore (if it be an houſe) or a turffe or twigge (if it be of land) and the feoffee laying his hand on it, the feoffor ſay to the feoffee, Here I deliver to you ſeiſin of this houſe, or of this land, in the name of all the land, contained in this deed, according to the forme and effect of the deed, (as hath been ſaid) and if it be without deed, then the words may be, Here I deliver you ſeiſin of this houſe or land, &c. to have and to hold to you for life, or to you and the heires of your body, or to you and your heires for ever as the caſe ſhall require.

Ruth cap. 4. verſe 7. 8. Deut. 25. 9. 10.
Gen. 23. verſe 11.

When the kinſman of Elimelech gave unto Boas the parcell of land that was Elimelech's, he tooke off his ſhoe, and gave it unto Boas in the name of ſeiſin of the land (after the manner in Iſrael) in the preſence, and with the teſtimony of many witneſſes. And when Ephron infeoffed Abraham of the field of Machepela, he ſaid to him, *agrum trado tibi, &c.* I deliver this field to thee.

A man makes a leaſe for yeares to A, the remainder to B in fee, and makes livery to A within the view: this livery is void, for no man can take by force of a livery within the view, but he that taketh the freehold himſelfe.

(Mo. 14)

Et ſi le termor en tiel caſe enter devant aſcun livery fait, &c. By the entry of the leſſee he is in actual poſſeſſion, and then the livery cannot be made to him that is in poſſeſſion, for *quod ſemel meum eſt, amplius meum eſſe non poteſt.* But if the leſſor and leſſee come upon the ground, of purpoſe for the leſſor to make, and the leſſee to take livery, there his entry veſts no actuall poſſeſſion in him untill livery be made; for [a] *affectio tua nomen imponit operi tuo* (5). And therefore if it be agreed betweene the diſſeiſor and diſſeiſee, that the diſſeiſee ſhall releaſe all his right to the diſſeiſor upon the land, and accordingly the diſſeiſee entreth into the land, and delivereth the releaſe to the diſſeiſor upon the land, this is a good releaſe, and the entry of the diſſeiſee, being for this purpoſe, did not avoid the diſſeiſin, for his intent in this caſe did guide his entry to a ſpeciall purpoſe. And ſo was it reſolved [b] by Sir James Dyer, and the whole court of Common Pleas, Paſch. 18. Eliz. upon evidence which I myſelfe heard and obſerved. But if the diſſeiſor enfeoffe the diſſeiſee and others, there albeit the diſſeiſee came to take livery, yet when livery is made, the diſſeiſee is remitted to the whole in judgment of law, as ſhall be ſaid more at large in the chapter of remitter in his proper place.

[a] Bracton lib. 1.

[b] P. 19. Eliz. in Communi Banc. Pl. Com. in Aſſ. de freſh-force. 91. 29. Aſſ. 26. 43. Aſſ p. 3. 3. H. 6. 19. in formdon. (6)

Sect.

(1) See further as to the difference between a naked authority and an authority coupled with an intereſt, Poſt 52. b. 113. a. and 181. b.

(2) See Poſt note 1. in 52. b.

(3) 18. *E.* 4. 12.—Hal. MSS.

(4) *Dy.* 14. 35. 18. *H.* 6. 9. 22. *H.* 6. 1.—Hal. MSS.

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

(6) 9. *H.* 7. 1. 41. *E.* 3. 17. Hal. MSS.

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whether a perſon's chariot, which ſtood at a common livery ſtable, could be diſtrained for rent due from the keeper of the livery ſtable; and the court after two arguments appearing to be ſtrongly inclined in favour of the diſtreſs, the owner of the chariot afterwards declined bringing the queſtion to a third argument, which had been ordered by the court.—(15) 20. *H.* 7 9. 13. 21. *E.* 4. 47. Hal. MSS.—(16) But now by the 2. W. and M. c. 5. ſheaves, or cocks of corn, or corn looſe or in the ſtraw, or hay in any hovel, ſtack or rick, or otherwiſe on the land, may be diſtrained for rent due on demiſe leaſe or contract.—(17) Sheep are equally priviledged with *averia carucæ*, and cannot be taken, if any other diſtreſs can be found. See further 2. Inſt. 133. 134. and the caſe cited in n. 18.—(18) But it has been adjudged, that beaſts of the plow may be taken for the poor's rate under the 43. Eliz. becauſe the remedy given by that and other ſtatutes for compelling the payment of particular rates or ſums of money, though called a diſtreſs, is in *effect* an *execution*. 4. Burr. v. 1. p. 579. See acc. Saund. on 22. Ch. 2. againſt conventicles 59. which is referred to in Com. Dig. *Diſtreſs C.* but not cited in the caſe in 4. Burr.

Sect. 61.

ET ſi home voile faire feoffment, per fait ou ſans fait, de terres ou tenements que il ad en pluſors villes en un countie, le liverie de ſeiſin fait en un parcel de les tenements en un ville, en le noſme de touts, ſuffiſt pur touts les autres terres et tenements comprehendes deins meſme le feoffement, en toutz les autres villes deins meſme le countie. Mes ſi home fait un fait de feoffement des terres ou tenement en divers counties, la il covient en cheſcun countie aver un liverie de ſeiſin.

AND if a man wil make a feoffement, by deed or without deed, of lands or tenements which he hath in divers townes in one countie, the livery of ſeiſin made in one parcell of the tenements in one towne, in the name of all the reſt, is ſufficient for all other the lands and tenements comprehended within the ſame feoffment in al other the townes in the ſame countie (1). But if a man maketh a deed of feoffement of lands or tenements in divers counties, there it behoveth in every county to have a livery of ſeiſin (2).

EN un countie. A countie is fetched from the French, and ſhire from the Saxon. For *Scyran* in the Saxon tongue ſignifieth *partiri*, becauſe everie countie or ſhire is divided and parted by certaine metes and bounds from another, and in Latine is called *Comitatus à comitando*, for accompanying together. And for as much as the men of one county doe not accompany together with men of another county at countie courts, turnes, leets, and other courts, therfore in judgement of law they ſhall take no notice of a liverie in another countie to paſſe any lands in their owne countie. But of this more ſhall be ſaid hereafter. (Poſt 253. a.) (2. Co. 31. b.) (Poſt 168. a.) 45. E. 3. 21.

Sect. 62.

ET en aſcun cas home avera per le grant dun auter fee ſimple, fee taile, ou frankten. ſans livery de ſeiſin. Sicome deux homes ſont, et cheſcun deux eſt ſeiſie dun quantitie de terre deins un countie, et lun granta ſa terre a lauter en eſchange pur la terre que lauter ad, et en meſme le manner lauter granta ſa ter-

AND in ſome caſe a man ſhall have by the grant of another a fee ſimple, fee tail, or freehold without livery of ſeiſin. As if there be two men and each of them is ſeiſed of one quantity of land in one countie, and the one granteth his land to the other in exchange for the land which the other hath, and in like maner the other grant-

HERE Littleton putteth a caſe where freehold, &c. ſhall paſſe without liverie of ſeiſin, and thereupon putteth the caſe of an exchange of lands in one countie that is good by deed or without deed, without any livery, but if it be in ſeverall counties there muſt be a deed. Alſo of things that lye in grant, as advowſons, rents, commons, &c. an exchange of them albeit they be in one counties, is not good, unleſſe it be by deed; and therefore Littleton putteth his caſe warily of land. And in caſe of a fine which is a feoffment of record, of a deviſe by a laſt will, of a ſurrender, of a releaſe or confirmation to a leſſee (4. Co. 121.) 45. E. 3. 21. 3. E. 4. 10. 9 E. 4. 21. 7. H. 4. 1. 8. H. 7. 4. 28. H. 6. 2.

(1) Vid. 11. Eliz. *Dy.* 283. Ceſtui que uſe *of three acres by three ſeveral feoffments in one county makes charter of feoffment of all and livery in one of the acres, it is purſuant to the ſtatute and paſſes all.* Hal. MSS.—The ſtatute meant is the 1. R. 3. c. 1. which empowers *ceſtui que uſe* to make effectual feoffments and conveyances againſt his feoffees in truſt; and the caſe cited was of a feoffment before the 27. H. 8. for transferring uſes into poſſeſſion. It is ſtated, that the livery was made by attorney, and that was the cauſe of the doubt, it being ſaid, by ſome, that the ſtatute of R. 3. ought to be conſtrued ſtrictly and to be confined to conveyances made by the *ceſtui que uſe* in his own perſon. See Bro. *Feoffment to Uſes* 28.

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

Vide Sect. 1.

leſſee for yeares, or at wil. In all theſe and ſome other caſes a freehold, &c. (as hath beene ſaid) may paſſe without liverie. But this word (eſchange) which our author here uſeth, is ſo appropriated by law, to this caſe, as it cannot be expreſſed by any periphraſis or circumlocution (3).

En ceo caſe cheſcun poet enter, &c. For by the exchange the parties, albeit the lands be all in one county, have no freehold in deed or law in them before they execute the ſame by entry; and therefore if one of them dyeth, before the exchange be executed by entrie, the exchange is void; for the heire cannot enter and take it as a purchaſor, becauſe he was named onely to take by way of limitation of eſtate in courſe of diſcent.

9. E. 4. 38. 39. 45. E. 3. 20. 21. 45. E. 3. Exchange 10.

re a le primer grantor en eſchange pur la terre que le primer grantor ad; en ceo caſe cheſcun poit entrer en lauter terre iſſint miſe en eſchange ſans aſcun liverie de ſeiſin, et tiel eſchange fait per parolx de tenements deins meſme le countie ſans eſcript eſt aſſets bone.

eth his land to the firſt grantor in exchange for the land which the firſt grantor hath; in this caſe each may enter into the other's land, ſo put in exchange without any livery of ſeiſin(1). And ſuch exchange made by paroll of tenements within the ſame county without writing is good enough (2).

Sect. 63.

(Hob. 41.)

THIS is evident enough. But of what things an exchange may be made (which was a conveience frequent in former times) is to be ſeene, and herein many things are to be obſerved.

[a] 30. E. 1. Eſch. 15. 3. E. 4. 10. 9. E. 4. 21. 14. H. 8. 20.

(Poſt 366. a.)

First, that the things exchanged [a] need not to be *in eſſe* at the time of the exchange made. As if I grant a rent newly created out of my lands in exchange for the mannor of Dale, this is a good exchange (4).

(1. Ro. Ab. 812.)
[b] 6. E. 56. 30. E. 1. Eſ. 16. 16. E. 3. Eſch. 2. 7. H. 4. 34. 3. E. 4. 11.

[b] Secondly, there needeth no tranſmutation of poſſeſſion, and therefore a releaſe of a rent, or eſtovers, or right to land, in exchange for land, is good (5).

[c] 9. E. 4. 21. 9. E. 3. 56. 21. E. 3. 6.

The things [c] exchanged need not be of one nature, ſo they concerne lands or tenements, whereof Littleton here ſpeaketh. As land for rent or common, or any other inheritance which concerne lands or tenements, or ſpirituall things, as tythes, &c. for temporall, and tenure by a divine ſervice for a temporall ſeigniory, &c. But annuities or ſuch like which charge the perſon onely, and doe not concerne lands or tenements, cannot be exchanged for lands or tenements.

ET ſi les terres ou tenements ſoient en divers counties, ceſt aſcavoire ceo que lun ad eſt un countie et ceo que lauter ad eſt en auter countie, la il covient de aver un fait indent deſtre fait enter eux de tiel eſchange.

AND if the lands or tenements be in divers counties, *viz.* that which the one hath in one county, and that which the other hath in another county, there it behoveth to have a deed indented made betweene them of this exchange.

Sect. 64, 65.

Eſtates. Vide Sect. 650.

EN eſchange, il covient que les eſtates ſoient egales, &c. Equality in lands is threefold, *viz.* Firſt equality in value:

ET nota que en eſchange il covient, que les eſtates ſoint egales, que

AND note that in exchanges it behooveth, that the eſtates, which both par-

am-

(1) It is obſervable, that Littleton expreſſes himſelf concerning an exchange as of a tranſaction between *two*; and in a late caſe the court held, that an exchange in the ſtrict legal ſenſe of the word cannot be between *three*, the principles of it not being applicable to more than two *diſtinct* contracting parties, for want of the mutuality and reciprocity on which its operation ſo entirely depends. For, 1. The conſideration of an exchange and of the implied warranty incident to it is the receiving ſomething with warranty from the *ſame* perſon, to whom ſomething with warranty is given; but if there could be *three* diſtinct parties, each would give to one and receive from another. 2. The implied condition of re-entry is, that re-entry may be made on him whoſe title fails; but if there could be three parties to an exchange, then each perſon would be liable to re-entry for the fault of another's title as well as of his own. See the caſe of Eton College in Wilſon, v. 2. part 3. page 483. and Poſt n. 1. in 51. a. and n. 2. in 52. b.

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

(3) See acc. Poſt 51. b. and Wilſ. vol. 2. part 3. page 491. 496.

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

(5) See as to this Fulb. Paral. 33. a. in the dialogue on exchanges.

ambideux tielx parties averont en les terres iſſint eſchanges, car ſi lun voloit et grant que lauter averoit la terre en fee taile, pur le terre que il averoit del grant de le auter en fee ſimple, coment que lauter ſoit agree a cel, ceſt eſchange eſt voide, pur ceo que les eſtates ne ſont my egales.

ties have in the lands ſo exchanged, be equall, for if the one willeth and grant that the other ſhall have his land in fee taile for the land which he hath of the grant of the other in fee ſimple, although that the other agree to this, yet this exchange is voyde, becauſe the eſtates be not equall.

EN meſme le manner eſt, lou il eſt grant et agree enter eux, que lun avera en lun terre fee taile, et lauter en lauter terre forſque a terme de vie, ou ſi lun avera en lun terre fee taile generall, et lauter en lauter terre fee taile eſpecial, &c. Iſſint touts foits il covient que en eſchange les eſtates dambideux parties ſoient egales, ceſt aſcavoire, ſi lun ad fee ſimple en lun terre, que lauter avera tiel eſtate en lauter terre, et ſi lun ad fee taile en lun terre il covient que lauter avera ſemblable eſtate en lauter terre, &c. et ſic de aliis ſtatibus. *Mes neſt my riens a charger del egal value des terres, car*

IN the ſame manner it is, where it is granted and agreed betweene them, that the one ſhall have in the one land fee taile, and the other in the other land but for terme of life, or if the one ſhall have in the one land fee taile generall, and the other in the other land fee taile eſpecial, &c. So alwaies it behoveth that in exchange the eſtates of both parties be equall, *viz.* if the one hath a fee ſimple in the one land that the other ſhall have like eſtate in the other land, and if the one hath fee taile in the one land the other ought to have the like eſtate in the other land, &c. and ſo of other eſtates. But it is nothing to charge of the equal

Secondly, equality in quantity of eſtate given and taken. Thirdly, equality in quality or manner of the eſtate given and taken. But as Littleton after ſaith, equality in value of lands in an exchange is not requiſite; neither equality in the quality or manner of the eſtate. And therefore if two jointenants give lands jointly to two men and their heires, and the other in exchange of other lands to them and their heires in common, this is a good exchange(1), and yet the manner of their eſtates is not equall, for the eſtate of one party is joynt, and the other in common. And ſo it is if two men give lands in exchange to A and his heires for lands from A to them two and their heires, though the one party have a joynt eſtate, and the other a ſole eſtate, yet the exchange is good. The like is if the one land be of a defeaſible title, and the other of an undefeaſible title, yet the exchange is good till it be avoyded.

[*a*] An exchange with the king is good, and yet the king is ſeiſed in his politike capacity, and the ſubject in his naturall capacity (2). But equality of the quantity of the eſtate is requiſite, as it appeareth clearly in the caſes put by Littleton. [*b*] But therein it is to be obſerved, that it is not neceſſary that the parties to the exchange be ſeiſed of an equall eſtate at the time of the exchange made: for if tenant in taile, or a huſband ſeiſed in the right of his wife, exchange lands, and both by the exchange give a fee ſimple, this is good untill it be avoided by the iſſue in tail, or by the wife after the death of the huſband; [*d*] ſo as Littleton ſaith, that in exchanges it behoveth that the eſtates which both parties have in the land ſo exchanged be equal, is as much as to ſay that the ſtate reciprocally given in exchange ought to be equall. [*e*] But in a partition the eſtates allotted to either party need not to be equall,

[*a*] Bracton lib. 5. fo. 389. 17. E. 3. 12. b. 4. H. 4. 2.

[*b*] 14. H. 6. 6. E. 2. Exch. 12. 8. E. 2. Cui in vita 28. 10. E. 2. Exch. 13. 16. E. 3, Exch. 2. 3. E. 3. 19. 12. H. 4. 12. 21. H. 6. 25. 13. E. 4. 3. (3)

(1. Ro. Ab. 811. 4. Co. 121.)

[*d*] 44. E. 3. 20. 38. E. 3. 15. 39. E. 3. 1. 9. E. 4. 21. 7. H. 4. 17. 30. E. 1. tit. Bre. 834. 30. E. 1. tit. Exchange, 15.

[*e*] F. N. B. 62. m (Poſt. 172. b.)

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

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

(3) 45. *E.* 3. 20. Hal. MSS.

equall, as ſhall be obſerved in his proper place.

To ſhut up this point, there be five things neceſſary to the perfection of an exchange. 1. That the eſtates given be equall (1). 2. That this word (*excambium* exchange) be uſed, [*f*] which is ſo individually requiſite, as it cannot be ſupplied by any other word or deſcribed by any circumlocution(2) : and herewith agreeth Littleton afterwards in this Section. In the booke of Domeſday I finde, *hanc terram cambiavit Hugo Briccuino quod modo tenet comes Meriton, et ipſum ſcambium valet duplum.*

Hugo de Belcamp pro ſcambio de warres.

coment que la terre lun vault mult pluis que la terre de lauter ceo neſt reins a purpoſe, iſſint que les eſtates per leſchange fait ſoient egales. Et iſſint en leſchange ſont deux grants, car cheſcun partie grant ſon terre a lauter en eſchange, &c. et en cheſcun de lour grants mention ſerra fayt de leſchange.

value of the lands, for albeit that the land of the one be of a farre greater value then the land of the other, this is nothing to the purpoſe, ſo as the eſtates made by the exchange be equall. And ſo in an exchange there be two grants, for each party granteth his land to the other in exchange, &c. and in each of their grants mention ſhall be made of the exchange.

[*f*] 9. E. 4. 21. 25. H. 6. 56. 19. H. 6. 27. 44. E. 3. 24. 50. Aſſ. Dorſet. Wadon. Bedf. Sandeia.
9. E. 4. 39. 15. E. 4. 3. 45. E. 3. 30. (4. Co. 121.)

45. E. 3. Eſchange 1.
[*g*] 28 H. 6. 2.
[*b*] 45. E. 3. 20. 7. H. 4. 11.

3. That there be an execution by entry or claime in the life of the parties, as hath bin ſaid. [*g*] 4. That if it be of things that lye in grant, it muſt be by deed. [*b*] 5. If the lands be in ſeverall counties there ought to be a deed indented, or if the thing lye in grant albeit they be in one county.

[*i*] 4. E. 2. tit. Exch. 10. 12. H. 4. 12.

[*i*] If an infant exchange lands, and after his full age occupy the lands taken in exchange, the exchange is become perfect, for the exchange at the firſt was not void (becauſe it amounted to a livery, and alſo in reſpect of the recompence) but voidable (3).

Coment que lauter agree a cel ceſt eſchange eſt voide. The agreement of the parties cannot make that good which the law maketh void.

Sect. 66.

SI home leſſa terre a un auter pur terme dans, coment que le leſſor moruſt devant, &c. The reaſon is becauſe the intereſt of the tearme (as hath beene ſaid) doth paſſe and veſt in the leſſee before entry, and therefore the death of the leſſor cannot deveſt that which was veſted before.

(Poſt 270. a.)

Attorney. Is an ancient Engliſh word, and ſignifieth one that is ſet in the turne, ſtead, or place of another, and of theſe ſome be private (whereof our author here ſpeaketh) and ſome be publike, as attorneys at law, whoſe warrant from his maſter is *ponit loco ſuo talem attornatum ſuum*, which ſetteth in his turne or place ſuch a man to be his attorney.

(9. Co. 75. F. N. B. 156.)

ITEM ſi home leſſa terre a un auter pur term dans, coment que le leſſor moruſt devant que le leſſee enter en les tenements, uncore il poit enter en meſmes les tenements apres le mort le leſſour, pur ceo que le leſſee per force de le leaſe ad droit maintenant daver les tenements ſolonque le forme de le leaſe. Mes ſi home fait un fait de feoffement a un auter, et un letter dattorney a un

ALSO if a man letteth land to another for term of years, albeit the leſſor dieth before the leſſee entreth into the tenements, yet he may enter into the ſame tenements after the death of the leſſor, becauſe the leſſee by force of the leaſe hath right preſently to have the tenements according to the forme of the leaſe. But if a man maketh a deed of feoffment to another, and a letter of attorney to *home*

(1) Vid. 22. *E.* 3. 3. Contra 38. *E.* 3. 15. Hal. MSS..

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

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

home a deliverer a luy ſeiſin per force de meſme le fait, uncore ſi liverie de ſeiſin ne ſoit fait en la vie celuy, que feſoit le fait, ceo ne vault riens, pur ceo que lauter nad pas aſcun droit daver la tenements ſolonque le purport de le dit fait, devant le liverie de ſeiſin; et ſi nul liverie de ſeiſin ſoit fait, donque apres le mort celuy, que fiſt le fait, le droit de tiels tenements eſt maintenant en ſon heire, ou en aſcun auter.

one to deliver to him ſeiſin by force of the ſame deed, yet if livery of ſeiſin be not executed in the life of him which made the deed, this availeth nothing, for that the other had nought to have the tenements according to the purport of the ſaid deed before livery of ſeiſin made; and if there be no livery of ſeiſin, then after the deceaſe of him who made the deed, the right of theſe tenements is forthwith in his heire, or in ſome other.

Et un letter dattorney a un home a deliver a luy ſeiſin per force de meſme le fait. Vid. Sect. 196.

Here firſt it appeareth that the authority to deliver ſeiſin (as hath bin ſaid) muſt be by deed (1): for *letter d'attorney* is as much as a warrant of attorney by deed, for *litteræ* doe ſignifie ſometime a deed, as *litteræ acquietanciæ* doe ſignifie a deed of acquittance, and herewith [a] agreeth Britton.

[a] 24. E. 3. 27. 11. H. 7. 13. Britt. 101. b.

2. Littleton here ſpeakes generally *a un home*, and few perſons are [b] diſabled to be private attorneyes to deliver ſeiſin; for mounks, infants, feme coverts (2), perſons attainted, outlawed, excommunicated, villeins, aliens, &c. may be attorneyes. A feme may be an attorney to deliver ſeiſin to her huſband, and the huſband to the wife, and he in the remainder to the leſſee for life.

[b] 21. E. 4. 18. Br. feoffments. 50. 21. H. 6. 30. 13. E. 3. Attorney 73.

3. It appeareth here that the attorney muſt [c] purſue his warrant, otherwiſe he doth not deliver ſeiſin by force of the deed, as Littleton ſpeaketh. Now his authority is twofold, expreſſed in his warrant, and implyed in law, both which he muſt purſue, and firſt of his expreſſe authority. A man ſeiſed of blacke acre and white acre makes a deed of feoffment of both, and a letter of attorney to enter into both acres, and to deliver ſeiſin of both of them according to the forme and effect of the deed, and he entreth into blacke acre and delivers ſeiſin *ſecundum formam cartæ*, this livery and ſeiſin is good, albeit he did not enter into both, nor into one in the name of both; for when he delivereth ſeiſin of one *ſecundum formam cartæ*, this is *tantamount* and implyeth a livery of both. So when the feoffment is made to two or more, and the attorney is to make livery of ſeiſin to both, and the attorney make livery of ſeiſin to one of the feoffees *ſecundum formam et effectum cartæ*, this is good to both, and yet in that caſe he that is abſent may waive the livery (3). If leſſee for life make a deed of feoffment and a letter of attorney to the leſſor to make livery, and the leſſor maketh livery accordingly, notwithſtanding he ſhall enter for the forfeiture. But if leſſee for yeares make a feoffment in fee and a letter of attorney to the leſſor to make livery, and he make livery accordingly, this livery ſhall binde the leſſor, and ſhall not be avoyded by him: for the leſſor cannot make livery as attorney to the leſſee, becauſe he had no freehold, whereof to make livery, but the freehold was in the leſſor (4). If the leſſor make a deed of feoffment, and a letter of attorney to the leſſee for yeares to make livery, and he doth it accordingly, this ſhall not drowne or extinguiſh his tearme, becauſe he did it as a miniſter to another (6) and in another's right, and is accounted in judgement of law the act of the other and the feoffee claimeth nothing by him (7).

[c] 12. Aſſ. pl. 24. 26. Aſſ. 39. 11. H. 4. 3. 10 H. 7. 11. H. 7. 13. 40. Aſſ. 38. (9. Co. 76. b.)

27. Aſſ. 61. 41. Aſſ. 10. 41. E. 3. 17. (2. Leon. 73.)

(Poſt 310. a. 359. a.)

If one as procurator or attorney to another preſent to his owne benefice, he puts himſelfe out of poſſeſſion, becauſe he commeth in by the induction and inſtitution of the ordinary. If the tenant deviſe that the lord ſhall ſell the land, and dieth, and the lord ſelleth it, the ſeigniory remains. But if the lord or a grantee of a rent charge had been alſo *Ce' que uſe* of the land, and after the ſtatute of R. 3. and before the ſtatute of 27. H. 8. *Ce' que uſe* had made a feoffment in fee of the land, albeit the land paſſeth from the feoffees, and his feoffment is warranted by the power given to him by the ſtatute, yet the ſeignory or rent charge is extinct by his feoffment, for that he hath not a bare authority as the attorney hath (8).

17. E. 3. 61. (F. N. B. 35. O.)

(1. Co. 111. Poſt 265. b.)

If a man be diſſeiſed of blacke acre, and white acre, and a warrant of attorney is made to enter into both and to make livery, there if the atturney enter into blacke acre onely and makes livery *ſecundum formam cartæ*, there the livery of ſeiſin is void, becauſe he doth leſſe then his warrant (9)

(Poſt 252. b.)

(1) Vid. 1. *Aſſ.* 16. 26. *Aſſ.* 29. 35. *Aſſ.* 1. 12. *H.* 7. 27. 13. *H.* 7. 14. 4. *H.* 7. 13. 13. *E.* 4. 8. Hal' MSS.—(2) In another place lord Coke cites a paſſage from the Miroir, which excludes both infants and femes covert from being attornies. Poſt 128. *a.* But that is quite reconcileable with the doctrine here; for there *publick* attornies for proſecuting ſuits at law are meant, whoſe office cannot be properly executed without conſiderable knowledge and diſcretion; but here lord Coke in the firſt part of the ſentence confines himſelf to *private* attornies to deliver ſeiſin, which is an act ſo merely miniſterial that it may be done by the moſt ignorant. See the caſe of Hearle and Greenough in 3. Atk. 695. and 1. Veſ. 298. One queſtion in that caſe was, whether a power of diſpoſing of real eſtate could be well executed by an infant feme-covert of the age of 19; and lord ch. Hardwicke determined againſt the execution of the power, 1 becauſe he thought in general, that *ſuch* a power could not be well given to an infant, the diſability of infancy being ſtronger than that of coverture; 2. becauſe in the particular caſe it did not appear, that the power was intended to be given during infancy, the power being given *notwithſtanding coverture* without the leaſt notice of *infancy*; and 3. becauſe it was a power coupled with an intereſt, the infant having a truſt in equity for life, together with the truſt of the inheritance ſubject to the power.—(2) *Adjudged accordingly of livery to one feoffee.* T. 1651. B. R. *Trotman's caſe.* Vide M. 31. 32. Eliz. C. B. *Trevillian's caſe. A ſeiſed of two acres makes leaſe of one acre to B for years, and afterwards makes charter of feoffment of both acres and letter of attorney to B and C* conjunctim et diviſim *to make livery; B makes livery in one acre and C in another, and adjudged good. Entered* M. 30. 31. Eliz. Rot. 2908. Vide *Bendl. n.* 15. M. 32. 33. Eliz. 1868. Hal. MSS.—(4) *Yet* vide *if leſſee for years makes feoffment and livery, though leſſor be on the land, it ſeems to be a forfeiture. Dy.* 362. 363. 14 *H.* 7. Hal. MSS.—(5) *Smyth's caſe.* Hal. MSS.—(6) *If A brings* præcipe *of C's land againſt B, and recovers, and C is made ſheriff, and* habere facias ſeiſinam *comes to him, he may return the ſpecial matter on account of the miſchief.* 13. *H.* 4. 15. 7. *H* 6. 33. Hal. MSS.—(7) *So it is of livery by the lord.* H 4. *E.* 6. *Mo. n.* 41. *Trevillian's caſe* ſupra. Hal. MSS. See note 13.—By the caſe of livery by the lord, it is meant, that if tenant makes feoffment of his tenancy and the lord as attorney makes livery, it ſhall not extinguiſh his ſeignory. Mo. 11.—(8) See *ſupra* note 7.—(9) Vid. 11. *H.* 4. 3. *If there be feoffment on condition and letter of attorney to make livery accordingly, and livery is made abſolutely, it is void and a diſſeiſin. So e converſo* 12. *Aſſ.* 24. 26. *Aſſ.* 39.—H. 38. Eliz. B. R. *Poph. n.* 2.

warrant for the eſtate of the diſſeiſor in white acre cannot be deveſted without an entry. But there is a diverſity betweene an authority coupled with an intereſt, and a bare authority (1). For example, a cuſtome within a mannor time out of mind of man uſed, was to grant certaine lands parcell of the ſaid mannor in fee ſimple, and never any grant was made to any, and the heires of his body, for life or for yeares; and the lord of the ſaid mannor did grant to one by copie for life, the remainder over to another, and the heires of his body: and it was [k] adjudged, that the grant and remainder over was good; for the lord having authoritie by cuſtome, and an intereſt withall, might grant any leſſer eſtate: for in this caſe, the cuſtome that enableth him to the greater, enableth him to the leſſer, *Omne majus in ſe continet minus.* But he that hath but a bare authority, as he that hath a warrant of atturney, muſt purſue his authority (as hath beene ſaid) and if he doe leſſe, it is voyd (2).

(1. Ro. Ab. 511.)

[k] Hil. 36. El. Rot. 492. Inter Stanton & Barnes, in ejectione firma, in the King's Bench. (Poſt 265. b. 1. Sid. 6.)

A man make a leaſe for life, and after make a charter of feoffment, with a letter of atturney to deliver ſeiſin, the atturney enters upon the leſſee, this is ſufficient to convey away the reverſion, for (3) (that it may be ſaid once for all) livery of ſeiſins being to perfect the common aſſurance of lands, is alwayes expounded favorably, *ut res magis valeat quam pereat.* And all this was adjudged and [l] reſolved by the court of Common Pleas, and after affirmed by all the judges of the King's Bench, in a writ of error.

2. & 3. Ph. & M. Dyer 131. 17. El. Dyer. 40. (Mo. 91. 2. Sid. 65. 2. Leon. 19. Ante 48. b.)

[l] Paſc. 31. El. Rot. 514. in Com. Banc. inter Carter pl. & Claypole & al. def. In ejectione firma, & in brieſe de error. Hil. 32. El. Rot. 791.

And it is to be knowne, that a deed of feoffement beginning *Omnibus Chriſti fidelibus, &c.* or *Sciant præſentes et futuri, &c.* or the like, a letter of atturney may be contained in ſuch a deed; for one continent may containe divers deeds to ſeverall perſons; but if it be by indenture between the feoffor on the one part, and the feoffee on the other part, * there a letter of atturney in ſuch a deed is not good, unleſſe the atturney be made a partie in the deed indented (4).

* Communis error facit jus (ut dicitur) in contrarium. (2. Inſt. 673. 2. Ro. Ab. 8. Cro. Eliz. 905.)

Now the authoritie of an atturney implyed in the law, is, though the warrant be generall, to deliver ſeiſin: yet the atturney cannot deliver ſeiſin within the view, for his warrant is intendable in law of an actuall and expreſſe liverie and not of a liverie in law, and ſo hath it beene reſolved (5). See more hereof here next following.

Paſc. 3. El. in Com. Banc. in Yarham's caſe.

Uncore ſi liverie et ſeiſin ne ſoit fait en la vie celuy que feſoit le fait.

Here albeit the warrant of atturney be indefinite, without limitation of any time, yet the law preſcribeth a time, as Littleton here ſaith, in the life of him that made the deed: but the death not only of the feoffor, of whom Littleton ſpeaketh, but of the feoffee alſo, is a countermand in law of the letter of atturney, and the deed it ſelfe is become of none effect, becauſe in this caſe nothing doth paſſe before livery of ſeiſin. For if the feoffor dieth, the land deſcends to his heire, and if the feoffee dieth, liverie cannot be made to his heire, becauſe then he ſhould take by purchaſe, where heires were named by way of limitation (6). And herewith agreeth Bracton, *Item oportet quod donationem ſequatur rei traditio, etiam in vita donatoris et donatorij.* Therefore a letter of atturney to deliver livery of ſeiſin after the deceaſe of the feoffor is voyd (7).

22. H. 6. 6.

Bracton. li. 2. fo. 16. 40. Aſſ. pl. 38. 29. H. 6. 7. a. 14. E. 4. 2. 18. E. 3. 16. b. 11. H. 7. 13. &c.

Fourthly, in all caſes the atturney muſt purſue the warrant in ſubſtance and effect that he hath to deliver ſeiſin.

Fiftly, all this is to be underſtood of ſole perſons, or of a corporation or body conſiſting of one ſole perſon, or a biſhop perſon, &c. But it holdeth not in a corporation aggregate of many perſons capable (8). And therefore if a maior and commonalty make a charter of feoffement, and a letter of atturney to deliver ſeiſin, the livery of ſeiſin is good after the deceaſe of the maior, becauſe the corporation never dieth (9). The like of a deane and chapter, *Et ſic de ſimilibus.*

18. H. 8. 3. 11. H. 7. 19. (1. Sid. 162.)

Laſtly, if the leſſor by his deed licence the leſſee for life or yeares, (which is reſtrained by condition not to alien without licence) to alien, and the leſſor dyeth before the leſſee doth alien, yet is his death no countermand of the licence, but that he may alien, for the licence exempteth the leſſee out of the penaltie of the condition, and it was executed on the part of the leſſor as much as might be. And ſo was it reſolved, *Michael. 3. Jacob. in communi Banco.* As if the king doth licenſe to alien in mortmaine, and dyeth, the licence may be executed after (10).

(4. Co. 119. b. Cro. Ja. 103. 6. Co. 38)

Mich. 3. Ja. in Com. Banc. F. N. B. 223. 2. E. 3. offi. de Court. 29. Stamf. Prær. 30. (1. Ro. Ab. 331, 332.)

Sect. 67.

(F. N. B. Waſte 55. Poſt 355.)

SI le le leſſee fait waſt. Waſte, *Vaſtum dicitur à vaſtando*, of waſting and depopulating: and for that waſt is often alledg-

ITEM ſi tenements ſoient leſſes a un home per term de demy an, ou pur le

ALSO if tenements be let to a man for terme of halfe a yeare, or for a quarter of a *quarter*

u. 2. Slaning's caſe. A ſeiſed of the manors of B and C, and alſo of a mill in poſſeſſion of I. S. by force of a leaſe for years makes charter of feoffment, with letter of attorney to enter into the ſaid manors and all other the ſaid lands and tenements and ſeiſin thereof to take and after ſuch poſſeſſion and ſeiſin taken ſuch ſeiſin and poſſeſſion to deliver, &c. according to the form and effect of the deed. *The attorney makes livery in the manors of C and B, but not of the mill, nor doth I. S. attorn. Ruled, that the mill doth not paſs, but that the livery of the manors was well executed.* Hal. MSS.

(1) See ante 49. b. and Poſt. 115. a. and 181. b.—(2) Vide *theſe diverſities. A makes letter of attorney to B C and D* conjunctim et diviſim *to make livery. If two make livery, it is void, becauſe it is neither* conjunctim *nor* diviſim. 27. H. 8. 6. *But if one makes livery in one parcel, and another in another parcel, it is good.* M. 31. 32. Eliz. *Trevillian's caſe. But if two make livery in preſence of the third, he not ſaying any thing, it ſeems good.* Dy. 63. *But if authority be to ſix or any two of them to do an act, there if it be done by three it is good.* 5. Rep. 91. *Hoe's caſe. So where one deviſed, that his executors or any one of them might ſell his land, and made three executors, and one died, and the other two ſold, it was ruled good; for it is not ſo ſtrict as* conjunctim et diviſim. M. 37. 38. Eliz. C. B. *the caſe of Townſend and Whales. But if warrant be by ſheriff to three bailiffs* conjunctim et diviſim, *execution by two is good, becauſe it is the execution of juſtice.* M. 44. 45. Eliz. *King and Hobbs.* Hal. MSS. See ante 52. note 3. to which part this note more properly belongs. See alſo *infra* note 6.—(3) *So ſuch attorney may deliver ſeiſin with aſſent of leſſee for years, he being on the land. Adjudged* P. 1651. B. R. *Wegg and Villers.* Hal. MSS.—See *ante* 48. b.—(4) *Adjudged* contra *between Dicker and Noland.* Hal. MSS. See alſo another caſe *contra* in Cro. Eliz. 905. The caſe cited by lord Hale is in 2. Ro. Abr. 8. pl. 12.—(5) *Dy.* 233. *Sir Walter Deny's caſe.* Hal. MSS.—(6) *If A and B joint-tenants in fee make charter of ſeoffment to C and D with letter of attorney to deliver ſeiſin, and B or C dies, it is good as to the ſurvivor.* M. 32. 33. Eliz. W. 68.—(7) Vid. *letter of attorney to deliver ſeiſin after the ſeoffor's death in* 40. *Aſſ.* 38. Nota *by deviſe or by ſpecial cuſtom authority may be created executory after the party's death. Leaſe to A for life, remainder to B for life, A dies,* videtur, *that livery cannot be made to* B. P. 31. Eliz. B. R. W. n. 4. *Peirce and Leverſage.* Hal. MSS. —(8) 11. H. 7. 27. 12. H. 8. 12. 5. H. 7. 25. 21. H. 7. 1. Hal. MSS.—(9) *But it ſeems, that livery cannot be made till the new mayor is made.* Hal. MSS.—(10) Vid. *Plowd. Com.* 457. contra *in licence to the tenant to alien,* ut videtur. Hal. MSS.

quarter de un an, &c. en tiel caſe, ſi le leſſee fait waſt, le leſſor avera envers luy brieſe de waſt, et le brieſe dirra, Quod tenet ad terminum annorum, *mes il avera un ſpeciall declaration ſur le veritie de ſon matter, et le count nabatera le brieſe, pur ceo que il puit aver nul auter brieſe ſur le matter.*

yeares, &c. in this caſe if the leſſee commit waſt, the leſſor ſhall have a writ of waſte againſt him, and the writ ſhall ſay, *Quod tenet ad terminum annorum*, but he ſhall have an eſpeciall declaration upon the truth of his matter, and the count ſhall not abate the writ, becauſe he cannot have any other writ upon the matter.

ged to be in timber, which we call in Latine *maremium*, or *mareſuium*, or *mareſmium*, it is good to fetch both of them from the original. Firſt, *timber* is a Saxon word. Secondly, *maremium* is derived of the French word *marreim*, or *marrein*, which properly ſignifieth timber.

An action of waſt doth lie againſt tenant by the curteſie, tenant in dower, tenant life, foryeares, or halfe a yeare, or gardian in chivalry (1), by him that hath the immediate eſtate of inheritance, for waſt or deſtruction in houſes, gardens, woods, trees, or in lands (2), meadows, &c. or in exile of men to the diſheriſon of him in the reverſion or remainder. There be two kinds of waſts, *viz.* voluntary or actuall, and permiſſive. [*a*] Waſt may be done in houſes, by pulling or proſtrating them down, or by ſuffering the ſame to be uncovered, whereby the ſpars or rafters, plaunchers, or other timber of the houſe are rotten(3). [*b*] But if the houſe be uncovered when the tenant commeth in, it is no waſt in the tenant, to ſuffer the ſame to fall downe. But though the houſe be ruinous at the tenant's coming in, yet if he pull it downe, it is waſt unleſſe he reedifie it againe (4). [*c*] Alſo if glaſſe windowes (tho' glaſed by the tenant himſelfe) be broken downe, or carried away, it is waſt, for the glaſſe is part of his houſe. And ſo it is of wainſcot (5), benches, doores, windowes, furnaces, and the like, annexed or fixed to the houſe, either by him in the reverſion, or the tenant.

[*d*] Though there be no timber growing upon the ground, yet the tenant at his perill muſt keepe the houſes from waſting. If the tenant doe or ſuffer waſte to be done in houſes, yet if he repaire them before any action brought, there lieth no action of waſt againſt him, but he cannot plead, *Quod non fecit vaſtum*, but the ſpeciall matter.

A wall uncovered when the tenant commeth in, is no waſt if it be ſuffered to decay. [*e*] If the tenant cut downe or deſtroy any fruit trees growing in the garden or orchard, it is waſte; but if ſuch trees grow upon any of the ground which the tenant holdeth out of the garden or orchard, it is no waſte (6).

[*f*] If the tenant build a new houſe, it is waſte; and if he ſuffer it to be waſted, it is a new waſte. [*g*] If the houſe fall downe by tempeſt, or be burnt by lightning, or proſtrated by enemies, or the like, without a default of the tenant, or was ruinous at his comming in, and fall downe, the tenant may build the ſame againe with ſuch materialls as remaines, and with other timber which he may take growing on the ground for his habitation, but he muſt not make the houſe larger then it was. If the houſe be diſcovered by tempeſt, the tenant muſt in convenient time repaire it (7).

[*b*] If the tenant of a dove houſe, warren, parke, vivary, eſtangues, or the like, do take ſo many, as ſuch ſufficient ſtore be not left as he found when he came in, this is waſt, and to ſuffer the pale to decay, whereby the deere is diſperſed, is waſte (8).

And it is to be obſerved, that there is waſt, deſtruction, and exile. Waſt properly is in houſes, gardens, (as is aforeſaid) in timber trees, (*viz.* oke, aſh, and elme, and theſe be timber trees in all places) either by cutting of them downe, or topping of them, or doing any act whereby the timber may decay. Alſo in countries where timber is ſcant, and beeches or the like are converted to building for the habitation of man, or the like, they are all accounted timber. [*i*] If the tenant cut down timber trees, or ſuch as are accounted timber (10), as is aforeſaid, this is waſt, and if he ſuffer the young germins to be deſtroyed this is deſtruction [*k*] So it is, if the tenant cut down underwood, (as he may by law) yet if he ſuffer the young germins to be deſtroyed, or if he ſtub up the ſame, this is deſtruction.

[*l*] Cutting downe of willowes, beech, birch, aſpe, maple, or the like, ſtanding in the defence and ſafeguard of the houſe, is deſtruction. [*m*] If there be a quickſet fence of white thorne, if the tenant ſtub it up, or ſuffer it to be deſtroyed, this is deſtruction (11), and for all theſe and the like deſtructions an action of waſt lyeth. [*n*] The cutting of dead wood, that is, *Ubi arbores ſunt aride, mortue, cave, non exiſtentes maremium, nec portantes fructus, nec folia in æſtate*, is no

V. Marlb. ca. 23. 2. part of the Inſtit. (F. N. B. 55.)

[*a*] 34. E. 3. Waſt. 143. (4. Co. 62. Mo. 54. 2. Ro. Ab. 819.)

[*b*] 40. Aſſ. p. 22. 2. Mar. Dyer 117. 23. H. 6. 24. 10. H. 7. 2. 44. E. 3. 44. 29. E. 3. 33. 4. Co. 63. Herlakenden's caſe.

[*c*] 22. H. 6. 18. 12. H. 8. 1. 13. H. 7. 21. 22. E. 4. 18. 21. E. 4. 39. 10. H. 7. 2. Reg. Judic. 26.

[*d*] 44. E. 3. 21. 38. Aſſ. 1. 4. E. 3. Waſt. 22. 10. El. Dyer 276. 5. Co. 119. in Whelpdale's caſe. 19. E. 3. Waſt. 30. 44. E. 3. 44.

[*e*] 7. H. 6. 38. 44. E. 3. 44.

[*f*] 42. E. 3. 21. 49. E. 3. 2. 9. H. 6. 52. 17. E. 2. Waſt. 118. (Hob. 234. 2. Ro. Ab. 814. 815. 820. 1. Ro. Ab. 507. cont. Mo. 7.)

[*g*] 4. Co. 63. Herlakenden's caſe. 43. E. 3. 6. 26. E. 3. 76. 11. H. 4. 32. 12. H. 4. 5. 22. H. 6. 18. 19. E. 3. Waſt. 30.

[*b*] Temps E. 1. waſt. 128. Brit. fo. 34. 5. R. 2. waſt 97. 12 H. 8. 1. Pl. Com. 322. 7. H. 3. Waſt. 141. (2. Ro. Ab. 814.)

[*i*] 22. H. 6. 12. a. 9. H. 6. 1. 66. 11. H. 6. 1. F. N. B. 59. m.

[*k*] 20. E. 3. Waſt. 32. 10. H. 7 2. 42. E. 3. 6. b. 5. E. 4. 100. 41. E. 3. waſt. 82. 20. E. 3. waſt. 32. 12. E. 4. 1. (9)

[*l*] 40. E. 3. 15. b. & 35. 12. E. 4. 1. 12 H. 8. 1. b. 10. H. 7. 2. 8. E. 2. waſt 111. 4. E. 6. waſt. Br. 136. (Cro. Ja. 126. 4. Co. 63. 64. 1 Ro. Ab. 569.)

[*m*] 46. E. 3. 17. 9. H. 6. 10. 12. H. 8. 1.

[*n*] 16. El. Dy. 332. 20. E. 3. Waſt. 32. F. N. B. 59. m.

(1) Some of theſe were not puniſhable at common law. See Poſt 53. b. and 54. a.

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

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

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

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

(6) 14. *H.* 4. 12. Hal. MSS.

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

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

(9) 7. *H.* 6. 38. *Dy.* 35. Hal. MSS.

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

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

no waſt; but turning of trees to coles for fewell, when there is ſufficient dead wood, is waſt.

[o] If the tenant ſuffer the houſes to be wasted, and then fell down timber to repaire the same, this is a double waſt. [p] Digging for gravel, lime, clay, brick, earth, ſtone, or the like, or for mines of mettall, coale, or the like, hidden in the earth, and were not open when the tenant came in, is waſt; but the tenant may dig for gravell or clay for the reparation of the houſe, as well as he may take convenient timber trees (1).

[q] It is waſt to ſuffer a wall of the ſea to be in decay, ſo as by the flowing and reflowing of the ſea, the meadow or marſh is ſurrounded, whereby the ſame becomes unprofitable: but if it be ſurrounded ſuddenly by the rage and violence of the ſea, occaſioned by winde, tempeſt, or the like, without any default in the tenant, [r] this is no waſt puniſhable (2). So it is, if the tenant repaire not the bankes or walls againſt rivers, or other waters, whereby the meadows or marſhes be ſurrounded, and become ruſhy and unprofitable (3).

[s] If the tenant convert arable land into wood, or *è converſo*, or meadow into arable, it is waſte, for it changeth not onely the courſe of his huſbandry, but the proofe of his evidence.

[t] The tenant may take ſufficient wood to repaire the walls, pales, fences, hedges and ditches, as he found them, but he can make no new (4): and he may take alſo ſufficient plowbote, firebote, and other houſbote.

The tenant cutteth downe trees for reparations and ſelleth them, and after buyeth them againe, and imploys them about neceſſary reparations, yet it is waſt by the vendition: he cannot ſell trees, and with the money cover the houſe: burning of the houſe by negligence or miſchance is waſte (5).

[u] If a man make a leaſe for life and by deed grant that if any waſte or deſtruction be done, that it ſhall be redreſſed by neighbours, and not by ſuit or plea, notwithſtanding an action of waſt ſhall lye, for the place wasted cannot be recovered without a plea.

[x] Bracton, Fleta, and Britton doe uſe the ſame diviſion as is aforeſaid, *viz. Vaſtum, deſtructio, et exilium*, in their proper ſignification.

Now ſomewhat is to be ſpoken of exile or deſtruction of men; exile or deſtruction of villaines, or tenants at will, or making them poore, where they were rich when the tenant came in, whereby they depart from their tenures, is waſt. [a] And yet the ſtatute of Glouc' ſpeaketh not of exile, but it is comprehended under the general word of waſt. The ſtatute of W. 1. hath *deſtructionem*, the ſtatute of *Magna Charta* hath *vaſtum et deſtructionem*, the ſtatute of Merlebridge hath *vaſtum, venditionem et exilium in domibus, boſcis, vel hominibus, &c.*

But waſt and deſtruction in their larger ſenſe are words convertible. [b] *Item de hoc quod dicit vaſtum et exilium, ſciendum eſt quod non ſunt referenda ad eundem intellectum, ſed vaſtum et deſtructio fere idem ſunt, vaſtum idem eſt quod deſtructio, et è converſo, et ſe habent ad omnem deſtructionem generaliter.*

[c] *Vaſtum autem et deſtructio fere æquipollent et convertibiliter ſe habent in domibus, boſcis, et gardinis; ſed exilium dici poterit, cum ſervi manumittantur et à tenementis ſuis injurioſè ejiciantur. Fortuna autem et ignis vel hujuſmodi eventus inopinati omnes tenentes excuſant.*

[d] No perſon ſhall have an action of waſt, unleſſe he hath the immediate eſtate of inheritance, but ſometime another ſhall joyne with him for conformity. As if a reverſion be granted to two, and to the heires of one; they two ſhall joyne in an action of waſt: and in like ſort the ſurviving coparcener, and the tenant by the curteſie ſhall joyne in an action of waſte: and if two joyntenants be, and to the heires of one of them, and they make a leaſe for life, they ſhall joyne in an action of waſte (7). [e] If the eſtate tail determine, hanging the action of waſte, and the plt. becomes tenant in taile after poſſibility, the action of waſte is gone. [f] If the tenant doth waſt, and he in the reverſion dyeth, the heyre ſhall not have an action of waſte for the waſte done in the life of the anceſtor; nor a biſhop, maſter of an hoſpitall, parſon, or the like in the time of the predeceſſor. [g] And ſo if leſſee for yeares doth waſte, and dyeth, an action of waſt lyeth not againſt the executor or adminiſtrator, for waſte done before their time. But if two coparceners be of a reverſion, and waſte is committed, and the one of them die, the aunt and the neece ſhall joine in an action of waſte (10).

[h] If lands be given to two and the heires of one of them, he that hath the fee ſhall not have an action of waſte upon the ſtatute of Glouc. for that they are joyntenants, but his heire ſhall have an action of waſte againſt tenant for life.

Note after waſt done there is a ſpeciall regard to be had to the continuance of the reverſion in the ſame ſtate that it was at the time of the waſte done; for if after the waſte he granteth it over, though he taketh backe the whole eſtate again, yet is the waſt diſpuniſhable. So if he grant the reverſion to the uſe of himſelfe and his wife, and of his heires, yet the waſt is diſpuniſhable, and ſo of the like, becauſe the eſtate of the reverſion continueth not, but is altered, and conſequently the action of waſte for waſte done before (which conſiſts in privity) is gone.

[i] A prohibition of waſte did lye againſt tenant by the curteſie (11), tenant in dower, and a gardian in chivalry by the common law, but not againſt tenant for life, or yeares, becauſe they

[o] 44 E. 3. 44. 20. E. 3. Waſt. 32. F. N. B. 59. b. 19. E. 3. Waſt. 30.

[p] 22. H. 6. 18. b 9. E. 4. 35. 41. E. 3. Waſt. 82. 17. E. 3. 7. 9. H. 6. 66. 2. H. 7. 24 F. N. B. 59. n. & 149. c. 20. E. 3. Waſt. 32. (2. Ro. Ab. 815.116.)

[q] Anno 6. El. Of the report of juſtice Daliſon in Griffin's caſe. 17. E. 3. 65. Brit. fol. 168. b. (Mo. 62. 69.)

[r] 20. H. 6 1. F. N. B. 59. n. 6. El. ubi ſupra.

[s] 28. H. 8. Dyer 37. 22. H. 6. 24. 10. H. 7. 5. a. 44. E. 3. 44. (2. Ro. Ab. 814. Cro. Ja. 182.)

[t] 16. El. Dy. 332. 21. H. 6. 4^a. 5. E. 4. 100. 12. E. 3. Waſt. 28. 48. E. 3. 25. Temps. E. 1. 123. 20. E. 3. Waſt. 32. 19. E. 3. Waſt. 30. (Cro. Ja. 292)

[u] 3. E. 3. Waſt. 5. Bracton lib. 4. fol. 315.

[x] Bracton fol. 168. Fleta lib. 1. cap. 11. 16. H. 3. Waſt. 135. 3. E. 2 tit. Waſt. 2. 17. E. 2. Waſt. 118. 10. H. 7. 2. H. 6. 11. 9. H. 6. 52. 11. E. 2. Waſt. 113. F. N. B. 56. H. & 55. c. Regiſt. judic. 25.

[a] Glouc. cap. 5. W. 1. cap. 21. Magna Charta cap. 4. Merleb. cap. 23.

[b] Bract. lib. 4. fol. 316. & 317.

[c] Fleta lib. 1. cap. 11.

[d] 7. E. 3. 54. b. 2. H. 5. 7. 22. H. 6 24. 13. H. 7. 27. H. 8. 13. F. N. B. 59. f. 8. R. 2. Waſt. 147 (6). (5. Co. 11.)

[e] 2. H. 4. 22.

[f] 2. H. 4. 2 (8).

[g] 10. E. 4. 1. 49. E. 3. 25. 23. H. 8. tit. Waſt. Br. 38. E. 3. 17. 44. E. 3. 8. 45. E. 3. 3. 46. E. 3. 31. 11. E. 2. Waſt. 115. 2. Mar. Waſt. 117. 8. E. 2. Waſt. 110 (9). (Ant. 42. a.)

[h] 24. E. 3. 27. 50. E. 3. 3. 8. H. 6. 13. (Poſt. 247. b. 5. Co. 75. 2. Ro. Ab. 834. Poſt. 218. b.)

[i] Bract. lib. 4. f. 315. 316. 317. Fleta lib. 1. cap. 11. Brit. fol. 168. Doct. & Stud. lib. 2. ca. 1. 12. H. 4. 3. 10. H. 3. Waſt. 142. 20. H. 6. 1. 4 H. 3. Waſt. 140. 9. H. 3. ibid. 136. (10. Co. 116. b)

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

(2) See Call. on Sew. 2d. ed. 146.

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

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

(5) But now by the 6. An. c. 31. no action will lie againſt the tenant for ſuch an accident. See the ſtatute more fully ſtated in note 7. ante 53. a. Note alſo the paſſage from *Fleta* cited *infra* by lord Coke.

(6) 17. E. 3. 50. Hal. MSS.

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

(8) 21. H. 6. 46. 39. E. 3. 15. 42. E. 3. 22. Hal. MSS.

(9) 18. E. 4. 16. 10. H. 7. 5. 2. E. 3. 1. Hal. MSS.

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

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

they came in by their own act, and he might have provided that no waſt ſhould be done.

[*i*] A tenant by the curteſie or in dower can hold of none but of the heire, and his heires by deſcent, and therefore if they grant over their whole eſtate, and the grantee doth waſte, yet the heire ſhall have an action of waſte againſt them, and recover the land againſt the aſſignee: but if the heire either before the aſſignement had granted, or after the aſſignement doth grant the reverſion over, the ſtranger ſhall have an action of waſte againſt the aſſignee, becauſe in both caſes the privity is deſtroyed: in all other caſes the action of waſte ſhall be brought againſt him that did the waſte (for it is in nature of a treſpaſſe) unleſſe it be in the caſe of a ward [*k*] for there if the gardian doth waſte and aſſigne over, the action lieth againſt the aſſignee [*l*]. A gardian ſhall not be puniſhed for waſte done by a ſtranger, it is ſo penall unto him, for he ſhall loſe the wardſhip both of the body and of the land(3), though the waſte be but to the value of twenty ſhillings, and if that ſufficeth not to ſatisfie for the waſt, then he ſhall recover damages of the waſte, over and above the loſſe of the ward. But tenant by the curteſie, tenant in dower, tenant for life, yeares, &c. ſhall anſwer for the waſte done by a ſtranger, and ſhall take their remedy over. [*m*] But if there be two joyntenants of a ward, and one of them doe waſt both ſhall anſwer for it.

(2. Inſt. 145 P. 2. 273. 299. b. 5. Co. 77. Stat. Glouc. c. 5.)
[*i*] F. N. B. 56. e. et f. Temps E. 1. Waſt 122. 18. E. 3. 3. 30. E. 3. 16. 38. E. 3. 23. 11. H. 4. 18. 4. E. 3. 25. Regiſt. 72. 3. Co. 23. Walker's caſe. 9. Co 142. Beaumont's caſe (1). (2. Inſt. 303. Dr. & Stud. lib. 2. c. 1.)
[*k*] 27. E. 3. 81. 26. E. 3. Waſt. 10 (2).
[*l*] 12. H. 4. 3. Bract. lib. 4. 316. 317. Fleta lib. 1. c. 11. Brit. 168. 34. E. 3. Waſt. 146. 44. E. 3. 27. F. N. B. 59. a. & 60 g. & T.
[*m*] 33. E. 3. Waſt. 6 (4).

[*n*] If the gardian doth waſte and the heire within age bring an action of waſte, the gardian ſhall loſe the wardſhip as is aforeſaid, but if the heire bring an action of waſte at his full age, then he ſhall recover treble damages, for then he cannot loſe the wardſhip.

[*o*] An infant and baron and fem ſhall be puniſhed for waſte done by a ſtranger, and ſo ſhall the wife that hath the ſtate by ſurvivour for waſt done by the huſband in his life time, if ſhe agree to the eſtate, though there hath beene variety of opinions in our bookes.

[*p*] But if fem tenant for life take huſband, and the huſband doth waſte, and the wife dieth, no action of waſt lieth againſt the huſband in the *tenuit*, for he was ſeiſed but *in jure uxoris*, and his wife was tenant of the freehold; but if a fem be poſſeſſed of a terme for yeares, and take huſband, and the huſband doth waſt, and the wife dieth, the huſband ſhall be charged in an action of waſte, for the law giveth the terme to him.

[*q*] If tenant for life grant over his eſtate upon condition, and the grantee doth waſt, and the grantor re-entreth for the condition broken, the action of waſt ſhall be brought againſt the grantee, and the place waſted recovered.

[*r*] If a leaſe for life be made to a villeine, and waſte is done, the lord entreth, he ſhall not be puniſhed for the waſte done before, but for waſte done after, he ſhall.

[*ſ*] An occupant ſhall be puniſhed for waſte, and ſo if an eſtate be made to A. and his heires during the life of B, A dieth, the heire of A ſhall be puniſhed in an action of waſte.

[*t*] If a leaſe be made to A for life, the remainder to B for life, the remainder to C in fee, in this caſe where it is ſaid in the Regiſter, and in F. N. B. that an action of waſt doth lie, it is to be underſtood after the death or ſurrender of B in the meane remainder, for during his life, no action of waſte doth lie (5).

But if a leaſe for life be made, the remainder for yeares, the remainder in fee, an action doth lie preſently during the terme in remainder, for the meane terme for yeares is no impediment.

But if a man make a leaſe for life or yeares, and after granteth the reverſion for yeares, the leſſor ſhall have no action of waſte during the yeares, for he himſelf hath granted away the reverſion, in reſpect whereof he is to maintaine his action. (*) Otherwiſe it is, if he had made a leaſe in reverſion which had been but a future intereſt, for there an action of waſt lieth during the terme, and ſo is the booke to be underſtood, and the terme ſhall be ſaved in that caſe.

[*u*] No action of waſt lieth againſt a gardian in ſocage, but an account or treſpaſſe, nor againſt tenant by ſtatute ſtaple, &c. or *elegit* (6).

[*w*] If tenant for life or yeares or their aſſignee make a grant over, and notwithſtanding take the profits, an action of waſt lieth againſt him, by him in the reverſion or remainder by the ſtatute, *Nota* (7).

[*x*] If waſt be done *ſparſim* here and there in woods, the whole woods ſhall be recovered, or ſo much wherein the waſt *ſparſim* is done. And ſo in houſes ſo many rooms ſhall be recovered wherein there is waſte done, but if waſt be done *ſparſim* throughout, all ſhall be recovered. It hath beene ſaid that if the hall be waſted, the whole houſe ſhall be recovered, becauſe the whole houſe is denominated of the hall: but later authority is to the contrary.

[*y*] There is waſte of a ſmall value, as Bracton ſaith, *Niſi vaſtum ita modicum ſit propter quod non ſit inquiſitio facienda.* Yet trees to the value of three ſhillings and foure pence hath beene adjudged waſt, and many things together may make waſte to a value (9). But let us now returne to our author (10).

[*n*] 44. E. 3. 27. 48. E. 3. 10. F. N. B. 60 t. 12. H. 4. 3. 19. E. 2. Waſt. 117. 41. E. 3. Waſt. 81. 3. E. 2. Waſt. 3. 7. E. 3. 12.
[*o*] 15. H. 3. Waſt. 16. temps E. 1. Waſt. 128. 2. H. 4. 3. a. 3. E. 3. 13. 76. 11. Aſſ. 11. 21. H. 6. 24. b. 33. H. 6. 31. a. 42. E. 3. 22. 19. E. 3. breve 246. 46. E. 3. 25. 7. H. 6. 2. b. 3. E. 3. 46. 10. E. 3. 17. 18. 9. E. 3. 42. 9. E. 3. Lieve 246. 17. E. 4. 7. 9. H. 6. 52 F. N. B. 36. b. Doct & Stud. lib. 2. c. 1. 23. H. 8. Waſt. 138. 8. Co. 44. Willingham's caſe.
[*p*] 5. Co. 75 Cliſton's caſe. 49. E. 3. 25. 46. E. 3. Waſt. Statham. 10. H. 6. 11. 12. (2. Inſt. 301.)
[*q*] 37. E. 3. 16.
[*r*] 48. E. 3. 19.
[*ſ*] 6. Co. 37. le Deane and Chapt of Worceſter's caſe 10. Co. 9. b. (2 Ro. Ab. 826.)
[*t*] 4. E. 3. 18 Cote's caſe. 3. E. 3. 18. F. N. B. 58. c. & 59. h. 50. E. 3. 3. 33. E. 3. Waſt. 144. 11. E. 3. releeit. 118. 10. E. 4. 9. Regiſt. 74. 2. Co. 92. inter Paget & Carie in Bingham's caſe. 5. Co. 76. Paget's caſe. 10. Co. 44 Jenning's caſe. F. N. B. 59. h. 4 E. 3. 18.
* 4 E. 3. 18. F. tit. Waſt. 18.
[*u*] Merlebridge cap. 17 21. E. 3. 30. 16. E. 3. tit. Waſt. 100. 14. E. 3. Waſt. 107. 2. E. 2. Waſt. 1. 28. H. 6. Waſt. 9. 32. H. 6. 7 F. N. B. 59. E.
[*w*] 11. H. 6. cap. 5. 5. Co. 77. Boothe's caſe.
[*x*] 8. E. 3. Waſt. 112. 4. E. 6. Waſt. 136. 4. E. 3. 32 15. H. 7. 11. 15. E. 3. Waſt. 134. temps E. 1. Waſt. 134. 18. H. 8. 1 (8).
[*y*] Bract. lib 4. fo. 316. 38. E. 3. 7. b. 34. E. 3. Waſt. 136. 14. H. 4. 11. b. F. N. B. 60. c. temps E. 1. Waſt. 124. 19. H. 6. 8 (11).

Briefe de waſte. See in the Regiſter five ſeverall writs of waſt; two at the common law for waſt done by tenant in dower, or the gardian; and three by ſpeciall or ſtatute law, for waſte done by tenant for life, for yeares and tenant by the curteſie.

Briefe

(1) 7. *E.* 3. 34. Hal. MSS.
(2) 26. *E.* 3. *Waſte* 10. *is* contra. Hal. MSS.
(3) *Value of wardſhip not loſt.* Vid. *Dy.* 35. 28. *H.* 8. *Bendl. n.* 33. Hal. MSS.
(4) 3. *E.* 3. 18. Hal. MSS.
(5) But though action of waſte doth not lie in this caſe on account of the intermediate remainder for life, yet a court of equity will interpoſe by injunction to prevent waſte. See 3. Atk. 95. and 210.
(6) Vid. *F. N. B.* 58. *Grantee of reverſion ſhall have waſte.* Hal. MSS.
(7) *F. N. B.* 59. *C.* Hal. MSS.
(8) 3. *E.* 3. 24. Hal. MSS.
(9) Vid. Hil. 40. Eliz. C. B. *n.* 9. *Thorne's caſe.* C. C. *Waſte to the value of* 4 *d* Hal. MSS.
(10) *It ought to be to the value of* 40 *d. at leaſt. Noy n.* 18. *Thore and Thomas.* Hal. MSS.—See Noy 4.—As lord Hale makes ſo frequent a reference to *Noy's Reports*, it may not be amiſs to appriſe the ſtudent, that though the book is known by the name of that very learned lawyer, yet there is not the leaſt reaſon to ſuppoſe, that ſuch a looſe collection of notes was intended by him for the public eye. In an edition of Noy's Reports *penes editorem*, there is the following obſervation upon them in manuſcript. *A ſimple collection of ſcraps of caſes made by Serjeant Sizer from Noy's looſe papers, and impoſed upon the world for the reports of that vile prerogative fellow Noy.* This account of Noy's Reports, which was probably written ſoon after the firſt publication in 1656, though expreſſed in terms inexcuſably groſs, contains an anecdote not altogether uſeleſs.
(11) 9. *H.* 6. 66. Hal. MSS.

[≈] Vid. Bract. lib. 5. f. 413. b. Fleta lib. 2. cap. 12. See the second part of the Institutes. W.2. cap. 24.

Briefe dirra. The writs originall of the regiſter [≈] (as Bracton ſaith) were formed, and of courſe had their firſt authority by act of parliament, and therefore without an act of parliament they cannot be altered, or changed, which is proved by the ſtatute of W. 2. cap. 24. whereby remedy is provided in many caſes. But heare what Bracton ſaith. *Sunt quædam brevia formata in ſuis caſibus, et quædam de curſu, quæ concilio totius regni ſunt approbata, quæ quidem mutari non poſſunt, abſque eorundem contraria voluntate. Magiſtralia autem ſæpe variantur ſecundum varietatem caſuum*, &c. And this is the reaſon that in this caſe of halfe a yeare the words of the writ ſhall be without change, *Quod tenet ad terminum annorum*, and the pl' muſt make a ſpeciall declaration according to his caſe, for otherwiſe he ſhould be without remedy. In this particular caſe the ſtatute of Glouc. cap. 5. which giveth the action of waſte againſt the leſſee for life or yeares (which lay not againſt them at the common law) ſpeaketh of one that holdeth for tearme of yeares in the plurall number, and yet here it appeareth by the authority of Littleton, that although it be a penall law, whereby treble damages and the place waſted ſhall be recovered, yet a tenant for half a yeare being within the ſame miſchiefe, ſhall be within the ſame remedie, though it be out of the letter of the law, for *Qui hæret in littera, hæret in cortice*, which is an excellent example, whereupon in many like caſes a man may ſettle a certaine judgment. You may obſerve in the ſaid ancient authors, what remedie was given for waſt at the common law, and againſt whom, and what was adjudged waſte, deſtruction, and exile.

De vaſto. Bract. li. 4. f. 315. 316. 317. Fleta li. 1. c. 11. & li. 5. c. 33. Britton fol. 162. & 168. 46. E. 3. 31. F. N. B. 60. c. 4. E 4. 13. 37. H. 6. 26. b. 7. H. 7. 2. 14. H. 8. 12. 18. E. 3. 27. (Dr. & Stud. li. 1. ca. 23.)

Vide Marlebridge, ca. 23. 2. part of the Inſtitutes.

In many caſes a tenant for life or yeares may fell down timber to make reparations, albeit he be not compellable thereunto, and ſhall not be puniſhed for the ſame in any action of waſte. As [a] if a houſe be ruinous at the time of the leaſe made, if the leſſee ſuffer the houſe to fall down he is not puniſhable, for he is not bound by law to repaire the houſe in that caſe. And yet if he cut down timber upon the ground ſo letten, and repaire it, he may well juſtifie it, and the reaſon is, for that the law doth favour the ſupportation and maintenance of houſes of habitation for mankind. And therefore if two or more joyntenants or tenants in common be of a houſe of habitation, and the one will not repaire the houſe, the other ſhall have by the law a writ *de reparatione facienda*, and the writ ſaith, *Ad ſuſtentationem ejuſdem domus teneantur*. So it is if the leſſor by his covenant undertaketh to repaire the houſes, yet the leſſee (if the leſſor doth it not) may with the timber growing upon the ground repair it though he be not compellable thereunto (1). In the ſame manner, if a man make a leaſe of a houſe and land without impeachment of waſte for the houſe, yet may the leſſee with the timber upon the ground repaire the houſe, though he may utterly waſte it if he will, and ſo in many other caſes. A man hath land in which there is a mine of coales, or of the like, and maketh [b] a leaſe of the land (without mentioning any mines) for life or for yeares, the leſſee for ſuch mines as were open at the time of the leaſe made, may digge and take the profit thereof. [c] But he cannot digge for any new mine, that was not open at the time of the leaſe made, for that ſhould be adjudged waſte. And if there be open mines, and the owner make a leaſe of the land, with the mines therein, this ſhall extend to the open mines onely, and not to any hidden mine (2), but if there be no open mine, and the leaſe is made of the land together with all mines therein, there the leſſee may digge for mines, and enjoy the benefit thereof, otherwiſe thoſe words ſhould be void. I have been the more ſpacious, concerning this learning of waſte, for that it is moſt neceſſary to be knowne of all men (3).

[a] 12. H. 8. 1. (11. Co. 47. 79. b. Mo. 23)

F. N. B. fo. 127.

(Hob. 234.)

[b] 17. E. 3. 7. 9. H. 6. 66. 12. H. 6. 18. 9. E. 4. 35. 12. E. 4. 8. F. N. B. 149. c. & 59. n.

[c] 5. Co. 12. Sanders' caſe. (1. Co. 46.)

Now hath Littleton ſpoken of an eſtate for life, and an eſtate for yeares in ſeverall perſons. Now let us ſee how they ſtand *ſimul* and *ſemel* in one perſon.

If a man letteth lands to another for life, the remainder to him for 21 yeares, he hath both eſtates in him ſo diſtinctly, as he may grant away either of them; for a greater eſtate may uphold a leſſer, but not *è converſo*, and therefore if a man make a leaſe to one for 21 yeares, the remainder to him for terme of his life, the leaſe for yeares is drowned.

[d] 19. E. 2. Covenant 25. 19. E. 3 Covenant 24. 32. E. 3. Quid juris cl. 5. 17. E. 3. 29. 46. E. 3. 31. 40. E. 3. 5. 11. H. 4. 34. 14 Eliz. Dyer 309. M. 40. & 41. Eliz. in Com. Banc. Rot. 2215. in treſp. inter Sparke & Sparke. Hill. 42. Eliz. Sir John Savage's caſe in Curia Wardorum. (2. Ro. Abr. 47. 418. Mo. 100. 339. 666. 2. Leon. 6. Yelv. 85.)

[a] If a man make a leaſe for life to one, the remainder to his executors for 21 yeares, the terme for yeares ſhall veſt in him (4), for even as anceſtor and heire are *correlativa*, as to inheritance: (as if an eſtate for life be made to A the remainder to B in taile, the remainder to the right heires of A the fee veſted in A as it had been limited to him and his heires) even ſo are the teſtators and the executors *correlativa* as to any chattell. And therefore if a leaſe for life be made to the teſtator, the remainder to his executors for yeares, the chattle ſhall veſt in the leſſee himſelfe, as well as if it had been limited to him and his executors.

CHAP.

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

(2) See *ante* 53. b. and n. 1. there.

(3) See further as to *waſte* in the ſeveral Abridgments, title *Waſte*, and Fulb. 2. part Paral. Dial. 5. fol. 49. b.

(4) 50. *Aſſ.* 1. *And* per curiam *in Sparkes's caſe adjudged, that it ſhall go to the adminiſtrator.* Vide tamen M. 44. 45. Eliz. *Moore's Reports, n.* 911. contra. Vid. 4. & 5. P. & M. *Bendl n.* 115. *Gravenor's caſe.* Hal. MSS.

CHAP. 8. Sect. 68.

Of Tenant at will.

TENANT a volunt eſt, ou terres ou tenements ſont leſſes per un home a un auter, a aver et tener a luy a la volunt le leſſor, per force de quel leaſe le leſſee eſt en poſſeſſion. En tiel cas le leſſee eſt appel tenant a volunt, pur ceo que il nad aſcun certaine ne ſure eſtate, car le leſſor luy poit ouſter a quel temps que il luy plerroit. Uncore ſi le leſſee emblea la terre, et le leſſor, apres lembleer et devant que les blees ſont matures, luy ouſta, uncore le leſſee avera les blees, et avera frank entre egres et regres a ſcier et de carier les blees, pur ceo que il ne ſcavoit a quel temps le leſſor voloit entre ſur luy. Auterment eſt ſi tenant pur terme dans que conuſt le fine de ſon terme emblea ſa terre, et le terme eſt finy devant que les blees ſont matures. En ceo cas le leſſor, ou celuy en la

TENANT at will is, where lands or tenements are let by one man to another, to have and to hold to him at the will of the leſſor, by force of which leaſe, the leſſee is in poſſeſſion. In this caſe the leſſee is called tenant at will, becauſe he hath no certain nor ſure eſtate, for the leſſor may put him out at what time it pleaſeth him. Yet if the leſſee ſoweth the land, and the leſſor, after it is ſowne and before the corne is ripe, put him out, yet the leſſee ſhall have the corne, and ſhall have free entry egreſſe and regreſſe to cut and carie away the corne, becauſe he knew not at what time the leſſor would enter upon him. Otherwiſe it is if tenant for yeares, which knoweth the end of his terme, doth ſow the land, and his terme endeth before the corn is ripe. In this caſe the leſſor, or he in

TENANT a volunt eſt, ou terres ou tenements ſont leſſes per un home a un auter; a aver et tener a luy a la volunt le leſſor, &c. (1) It is regularly true, that every leaſe at will muſt in law be at the will of both parties, and therefore when the leaſe is made, to have and to hold at the will of the leſſor, the law implyeth it to be at the will of the leſſee alſo; for it cannot be onely at the will of the leſſor, but it muſt be at the will of the leſſee alſo. And ſo it is when the leaſe is made to have and to hold at the will of the leſſee, this muſt be alſo at the will of the leſſor; and ſo are all the bookes, that ſeeme *prima facie* to differ, cleerly reconciled (3).

Fleta lib. 3. cap. 15.

(1. Ro. Abr. 858.) 18. H. 6. 1. 38. H. 6. 21. 9. E. 4. 1. b. 10. E. 4. 18. b. 21. H 7. 38. 13. H. 8. 16. 14. H. 8. 11. 14. (2)

Pur ceo que il nad aſcun certaine ou ſure eſtate, &c. *Alia poſſeſſio eſt præcaria, et alia pro prece conceſſa, ut ſi quis ſine ſcripto conceſſerit alicui habitationem vel uſumfructum in re ſua tenenda ad voluntatem ſuam, hæc quidem poſſeſſio præcaria eſt et nuda, eo quod tempeſtive et intempeſtive pro voluntate domini poterit revocari.*

Fleta lib. 3. cap. 15.

Uncore ſi le leſſee emblea la terre, et le leſſor apres le embleer, &c. (4) The reaſon of this is, for that the eſtate of the leſſee is uncertaine, and therefore leaſt the ground (5) ſhould be unmanured, which ſhould be hurtfull to the common-wealth, he ſhall

(5. Co. 85. a. 1. Sid. 339.)

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

(2) 49. *H.* 6. 18. 20. *E.* 4. 9. Hal. MSS.

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

(4) 9. *E.* 3. 24. *is according to Littleton's diverſity, and ſo is the* 11. *H.* 4. 90. *But leſſee at will in ſuch caſe of entry of the leſſor before ſowing ſhall not have the coſts of plowing and manuring.* Hal. MSS.—See ſ. c. acc. in Bro. Abr. *Emblements* pl. 7. and *tenant by copie* pl. 3.

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

ſhall reape the crop which he ſowed in peace, albeit the leſſor doth determine his wil before it be ripe. And ſo it is if he ſet rootes, or ſow hempe or flax, or any other annual profit, if (1) after the ſame be planted, the leſſor ouſt the leſſee, or if the leſſee dieth, yet he or his executors ſhall have that yeare's crop. But if he plant yong fruit trees, or yong okes, aſhes, elmes, &c. or ſow the ground with acornes, &c. there the leſſor may put him out notwithſtanding, becauſe they will yeeld no preſent annuall profit. And this is not only proper to a leſſee at will, that when the leſſor determines his will that the leſſee ſhall have the corne ſowne, &c. but to every particular tenant that hath an eſtate incertaine, for that is the reaſon which Littleton expreſſeth in theſe words *(Pur ceo que il nad aſcun certaine ou ſure eſtate)* (2). And therefore if tenant for life ſoweth the ground, and dieth, his executors ſhall have the corne, for that his eſtate was uncertaine, and determined by the act of God (3). And the ſame law is of the leſſee for yeares of tenant for life (4). So if a man be ſeiſed of land in the right of his wife, and ſoweth the ground, and he dieth, his executors ſhall have the corne, and if his wife die before him he ſhall have the corne (5). But if huſband and wife be jointenants of the land, and the huſband ſoweth the ground and the land ſurviveth to the wife, it is ſaid [*a*] that ſhe ſhall have the corne (7). If tenant *pur terme dauter vie* ſoweth the ground, and *Ceſty que vie* dieth, the leſſee ſhall have the corne. If a man ſeiſed of lands in fee hath iſſue a daughter and dieth, his wife beeing *enſeint* with a ſon, the daughter ſoweth the ground, the ſonne is borne, yet the daughter ſhall [*b*] have the corne, becauſe her eſtate was lawful and defeated by the act of God, and it is good for the common-wealth that the ground be ſowne (8). [*c*] But if the leſſee at will ſow the ground with corne, &c. and after he himſelfe determine his will and refuſeth to occupy the ground, in that caſe the leſſor ſhall have the corne becauſe he loſeth his rent. And if a woman that holdeth land *durante viduitate ſua* ſoweth the ground and taketh huſband [*d*] the leſſor ſhall have the emblements, becauſe that the determination of her owne eſtate grew by her owne act. But where the eſtate of the leſſee being incertaine is defeaſible by a right paramount, or if the leaſe determine by the act of the leſſee as by forfeiture, condition, &c. [*e*] there he that hath the right paramount, or that entreth for any forfeiture, &c. ſhall have the corne (10).

If a diſſeiſor ſow the ground and ſever the corne, and the diſſeiſee re-enter, [*f*] he ſhall have the corne, becauſe he entreth by a former title, and ſeverance or remooving of the corne altereth not the caſe, for the regreſſe is a recontinuation of the freehold in him in judgment of law from the beginning (11).

[*g*] If tenant by ſtatute merchant ſoweth the ground, and then a ſudden and caſuall profit falleth by which he is ſatisfied, he ſhall have the emblements (12).

Le leſſor luy puit ouſter. There is an expreſſe *ouſter*, and implied *ouſter*, an expreſſe, as when the leſſor commeth upon the land, and expreſly forewarneth the leſſee to occupy the ground no longer; an implyed, as if the leſſor without the conſent of the leſſee enter into the land and cut downe a tree, this is a determination of the will, for that it ſhould otherwiſe be a wrong in him, unleſſe the trees were excepted, and then it is no determination of the will, for then the act is lawfull albeit the will doth continue. If a man leaſeth a manor at will whereunto a common is appendant, if the leſſor put in his beaſts to uſe the common, this is a determination of the will (13). The leſſor may by actuall entry into the ground determine his will in the abſence of the leſſee (14), but by words ſpoken from the ground the will is not determined untill the leſſee hath notice (15). No more then the diſcharge of a factor, attorney, or ſuch like in their abſence is ſufficient in law untill they have notice thereof.

[*a*] If a woman make a leaſe at will reſerving a rent and ſhe taketh huſband, this is no countermand of the leaſe at will, but the huſband and wife ſhall have an action of debt for the rent; and ſo it is if a leaſe be made to a woman at will reſerving a rent, and the leſſee taketh huſband, this is no countermand of the leaſe, but the leſſor may have an action of debt or diſtreine them for the rent. So if the huſband and wife make a leaſe at will of the wife's land reſerving a rent and the huſband die, yet the leaſe continueth. In like manner if a leaſe be made by two to two others at will, and the one of the leſſors or of the leſſees die, the leaſe at will is not determined in neither of thoſe caſes; which are neceſſary points to be knowne (16).

Apres lembleer et devant que les blees ſont matures. Then put the caſe that the corne is ripe and ready to cut downe, and the leſſor, before the leſſee reapeth it, enter and put out the leſſee, whether ſhall the leſſee have the corne? and it is without all queſtion that the leſſee ſhall have it, for by the ſame reaſon that he ſhall have it when he is put out before it

18. E. 4. 18. (Cro. Cha. 515.)

Temps E. 1. br. 25. 10 Aſſ. pl. 6. 10. E. 3. 29. 45. E 3. 1. 7. H. 4. 17. 7. Aſſ. 19. 5 Co. 116. Oland's caſe. (2. Inſt. 81. Hob. 132. 5. Co. 85. 1. Ro. Abr. 727)

[*a*] 8. Aſſ. 21. 8. E. 3. 54. Dyer 316. (6) (Cro. Cha. 515.)

[*b*] 16. H. 6. 6.

[*c*] 5. Co. 116. Oland's caſe. (9) (1. Ro. Abr. 726)

[*d*] Oland's caſe ubi ſupra. (Dy. 31. 11. Co. 51. b.)

[*e*] 33. E. 3. treſp. F. 254. 42. E. 3. 25. Oland's caſe ubi ſupra.

[*f*] 27. H. 6. 1. 37. H. 6. 6. 12. E. 4. 45. 14. E. 4. 6. 15. E. 4. 31. 2. H. 7. 1. 5. H. 7. 17. 12. H. 7. 25. 10 H. 4. 1. 28. H. 8. 32. Dyer.

[*g*] 44. E. 3. 15. Fleta lib. 3. cap. 15.

[*b*] 35. H. 6. 24. 21. H. 6. 9. 1. E. 4. 3. 21 E. 4 5. Pl. Com. parſon de Honyland's caſe.

(1. Ro. Abr. 860. Poſt 245. b. 8. Co. 89. 5. Co. 90.) 14. E. 4. 6. 8. E. 4. 11. &c.

[*a*] 5. Co. 10. Henſtead's caſe. 10. Eliz. Dier 269. b.

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

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

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

(4) See Gouldſb. 144.

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

(6) 7. *Aſſ.* 13. 10. *Aſſ* 6. 7. *E.* 3. 57. Hal. MSS.

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

(8) See

it be ripe, he shall have it when he is put out when it is ripe, *Et ubi eadem est ratio, ibi idem jus.*

Et auxi franke entrie, egres et regres. [*b*] For when the law doth give any thing to one, it giveth impliedly whatsoever is necessary, for the taking and enjoying of the same, *quando lex aliquid alicui concedit, concedere videtur et id, sine quo res ipsa esse non potest*(1), and the law in this case driveth him not to an action for the corne, but giveth him a speedy remedy to enter into the land, and to take and carry it away, and compelleth not him to take it at one time, or to cary it before it be ready to be caried; and therefore the law giveth all that which is convenient, *viz.* free entry, egresse and regresse as much as is necessary.

[*b*] Temps E. 1. tit. Grant 4. 9. E. 4. 35. 5. E. 3. tresp. 13. 21. H. 7. 14. b. 8. H. 6. 18. b. 2. R. 2 barre 237. 14. H 8. 2. 27. H. 8. 18. b. (11. Co. 52.)

If the lessee be disturbed of this way which the law doth give unto him, he shall have his action upon his case, and recover his damages, and this action the law doth give unto him, for whensoever the law giveth any thing, it giveth also a remedy for the same. But here is to be observed a diversity betweene a private way, whereof Littleton here speaketh, and a common way. For if the way be a common way, if any man be disturbed to goe that way, or if a ditch be made overthwart the way so as he cannot goe, yet shal he not have an action upon his case; and this the law provided for avoyding of multiplicity of suites, for if any one man might have an action, all men might have the like. But the law for this common nusance hath provided an apt remedy, and that is by presentment in the leete or in the torne, unlesse any man hath a particular damage, as if he and his horse fall into the ditch, whereby he received hurt and losse, there for this special damage, which is not common to others, he shall have an action upon his case (2); and all this [*c*] was resolved by the court in the King's Bench. And in that case it was said, that it had beene adjudged in that court betweene Westbury and Powell, that where the inhabitants of Southwarke had by custome a watering place for their cattell which was stopped up by Powel, that in that case any inhabitant of Southwarke might have an action; for otherwise they should be without remedy because such a nusans is not presentable in the leete or torne. Note the diversity.

(5. Co. 100. 104. b. 1. Ro. Ab. 88. Cro. Jam. 446. 491. F. N. B. 176. b. Cro. Jam. 158.)

[*c*] 27. H. 8. 27. 2. E. 4. 9. 5. E. 4. 2. Tr. 41. Eliz. betweene Finienx and Hovenden. Vid. 5. Co. 72. Williams's case.

There be three kinde of wayes, whereof you shall [*d*] reade in our ancient bookes. First a foot way, which is called *Iter, quod est jus eundi vel ambulandi hominis*, and this was the first way.

[*d*] Fleta lib. 4. cap. 27. Bracton lib. 4. fol. 232. (1. Ro. Ab. 390.)

The second is a foot way and horse way, which is called *actus ab agendo*; and this vulgarly is called *packe* and *prime way*, because it is both a foot way, which was the first or *prime way*, and a *packe* or *drift way* also.

The third is *via* or *aditus*, which containes the other two, and also a cart way, &c. for this is *jus eundi, vehendi, et vehiculum et jumentum ducendi*; and this is twofold; *viz. regia via*, the king's high way for all men, *et communis strata*, belonging to a city or towne, or betweene neighbours and neighbours. This is called in our bookes *chimin*, being a French word for a way, whereof commeth *chiminage chiminagium*, or *chimmagium*, which signifieth a toll due by custome for having a way through a forest; and in ancient records it is sometime also called *pedagium* (3).

32. E. 3. barre 261. 27. E. 3. 78. 6. E. 3. 23.

Carta de foresta cap. 14.

If the lessee at will by good husbandry and industry, either by overflowing or trenching, or compassing of the meadowes, or digging up of bushes or such like, make the grasse to grow in more abundance, yet if the lessor put him out, the lessee shall not have the grasse, because that the grasse is the naturall profit of the earth. And the same law is if he doth sow hayseed, and thereby encreaseth the grasse.

(F. N. B. 149. Ante 32. a. Post 171. a. 179. a.)

Auterment est si tenant pur terme dans que conust le fine de son terme, &c. Well said Littleton (which knoweth the end of his terme) that is, where the end of the terme is certaine; but where the lease for yeares depends upon an incertainty, as upon the death of tenant for life being made by him, or of a husband seised in the right of his wife, or the like, there it is otherwise.

Sect. 69.

ITEM si un mese soit lessé a un home a tener a volunt, per force de quel le lessée enter en le mese, deins quel mese

ALSO if a house be letten to one to hold at will, by force whereof the lessee entreth into the house, and brings his houshold-

SI un mese soit lesse a un home a tener a volunt, &c. The reason of this is evident upon that which hath beene said before.

Mese, or *Maison,* called

(1) See further on this maxim Finch. Disc. on Law 63. and Finch. Descript. of Law 16. b. v. post. 153. a.

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

(3) See further as to *ways*, tit. *Chimin* in Com. Dig. and Vin. Abr. and tit. *Highway* in New Abr. and Burn. Just.

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(8) See ante 11. b. and n. 4. there in respect to intermediate profits, where an estate vested is devested by the birth of a posthumous child. To the observation in that note it may be useful to add, that there is an important distinction as to mesne profits between real estate and personalty. The law will not permit the freehold of land, except in certain special cases, to be in abeyance; and therefore where an estate is to arise on a contingency, the freehold must vest in some person in the *mean time*, either in the heir or some other person who takes subject to the contingency, and that person, whoever he is, has the right to the *mesne* profits for his own benefit, unless they are otherwise disposed of by *express* provision of the parties, as in the case of trustees to preserve contingent remainders who are generally directed how to apply the profits they receive, or by act of parliament, as by the 10. & 11. W. 3. c. 16. which preserves contingent remainders for posthumous children, where there are no trustees for that purpose, and gives such children the estate *in the same manner as if* they were born in the life-time of the father, and is *therefore* construed to carry the profits from the father's death. But the case of personalty is different, for the right to that may be in suspence and contingency, and *generally* during the time it continues so the profits accumulate till the vesting of the capital happens, and then are added to that and belong to the same person. See 3. P. Wms. 305. 2. Atk. 473. and Fearn. on Conting. Rem. 2d. ed. 173 —(10) Vid. 20. *E.* 3. *Trespass* 194. 46. *Ass.* 2. Hal. MSS.—(11) According to *some* of the *antient* authorities, the disseisor shall have the emblements, if the disseisee's entry is *after* severance. See many books cited on this subject in Vin. Abr. *Emblements* 54. The more modern cases are with lord Coke. See Dy. 31. b. Dal. 30. Mo. 24. and 11. Co. 51. b —(12) See further on this subject infra and also Perk. sect. 512. to 524. Vin. Abr. *Emblements* per tot. and *Executor* U. Com. Dig. *Biens* B. C. and G. New Abr. *Executors* and *Administrators* H. 3. and Gilb. Law of Evid. 242. to 252.—(13) Vid. 11. *H.* 6. 28. *by Cottes, lessor's granting a rent-charge doth not determine his will, nor are the lessee's cattle distrainable. Whether the will be determined, if lessor or lessee be outlawed, see* 9. *H.* 6. 10. 5. *Rep.* 116. Hal. MSS.—Rolle makes a *quære* on the case of the rent-charge. The doubt seems reasonable, for the lease at will and the rent-charge clash with each other. If the grantee has the remedy by distress, that makes the tenant's chattels liable to seisure for money not due by his contract. On the other hand,

(2. Co. 32. a.)

called in legall Latine *meſſuagium*, containeth (as hath beene ſaid) the buildings, curtelage, orchard, and garden (1).

[a] 31. El. ca. 1. in Doomſday.

Cottage, *cotagium* is a little houſe without land to it. [a] See 31. Eliz. cap. 1. and cottagers in Domeſday booke are called *cotterelli*: and in ancient records *baga* ſignifieth a houſe. If a man hath a houſe neer to my houſe, and he ſuffereth his houſe to be ſo ruinous as it is like to fall upon my houſe, [b] I may have a writ *de domo reparanda*, and compell him to repair his houſe (2). But a *præcipe* lieth not *de domo*, but *de meſſuagio*.

[b] Reg. 153. F. N. B. 127. 4. E. 2. Vouch. 244. Six acres of land may be parcel of a houſe. (Poſt 200 b.)

Per reaſonable temps. [c] This reaſonable time ſhall be adjudged by the diſcretion of the juſtices, before whom the cauſe dependeth; and ſo it is of reaſonable fines, cuſtomes, and ſervices, upon the true ſtate of the caſe depending before them: for reaſonableneſſe in theſe caſes belongeth to the knowledge of the law, and therefore to be decided by the juſtices. [d] *Quam longum eſſe debet non definitur in jure, ſed pendet ex diſcretione juſticiariorum.* And this being ſaid of time, the like may be ſaid of things incertaine, which ought to be reaſonable; for nothing, that is contrary to reaſon, is conſonant to law.

[c] 22. E. 4. 27. 34. H. 6. 40. (Cro. Jam. 335. 204. Hob. 69. 135. 2. Inſtit. 476. 2. Ro. Rep. 143. 152. 1. Ro. Abr. 523. 2. Ro. Abr. 578. 5. Co. 100. a.)

[d] Bract. li. 2. ca. 52. b. (Poſt. 59. b. 62. a.)

[e] 2. H. 6. 15. 21. H. 6. 30.

[e] *Sicome home ſeiſi dun meſe en fee ſimple, ou fee taile, &c.* This is ſo evident, as it needeth no explanation.

il porta ſes utenſils de meaſon, et puis le leſſor luy ouſta, uncore il avera franke entre egreſſe et regreſſe en meſme le meſe per reaſonable temps; de carrier ſes biens et utenſils. Sicome home ſeiſie dun meſe en fee ſimple, fee taile, ou pur terme de vie, le quel ad certaine biens deins meme le meſe, et fait ſes executors, et devy; quecunque apres ſa mort ad le meſe, uncore les executors averont frank entry egreſſe et regres de carier hors de meſme le meſe les biens lour teſtator per reaſonable temps.

ſtuff into the ſame, and after the leſſor puts him out, yet he ſhall have free entrie, egreſſe and regreſſe into the ſaid houſe, by reaſonable time to take away his goods and utenſils. As if a man ſeiſed of a meſe in fee ſimple, fee taile, or for life, hath certaine goods within the ſayd houſe, and makes his executors, and dieth; whoſoever after his deceaſe hath the houſe, his executors ſhall have free entry egreſſe and regreſſe to carrie out of the ſame houſe the goods of their teſtator by reaſonable time.

Sect. 70.

(1. Ro. Abr. 859. 2. Co. 55. b.)

HERE it appeareth, that if the feoffee doth enter, he is tenant at will, becauſe he entreth by the conſent of the feoffor.

Et deliver a luy le fait. Albeit the deed be delivered upon the ground, yet doth it not amount to a livery of ſeiſin of the land; for it hath its naturall effect to make it a deed. [f] *Donationum alia perfecta, alia incepta et non perfecta: ut*

(6 Co. 26 Ante 48. a.)
[f] Flet. li. 3. ca. 3. & ca. 15. 43. E. 3. tit. Feof. & Faits 51. 35. H. 8. Feof. Br. 27. Aſſ. 61. 38. Aſſ. 2. 39. Aſſ. 12. 41. E. 3. 17. 6. Co. 26. Sharp's caſe.

ITEM ſi un home fait un fait de feoffement a un auter de certaine terre, et deliver a luy le fait, mes nemy liverie de ſeiſin; en ceo caſe celuy, a que le fait eſt fait, poit enter en le terre, et tener et occupier a la volunt celuy, que fiſt

ALSO if a man make a deed of feoffement to another of certaine lands, and delivereth to him the deed, but not liverie of ſeiſin; in this caſe he, to whom the deed is made, may enter into the land, and hold and occupie it at the will of him, which

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(1) See ante 5. b. note 1. where ſome authorities are cited to ſhew, how much will paſs by the word *meſſuage*.

(2) Alſo an action on the caſe will lye for damages ariſing from the neglect to repair. See Fitzh. N. Br. ed. 1730. p. 296. note a.

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hand, if the grantee of the rent-charge cannot diſtrain, he is left without that remedy, which by the grant is expreſsly given to him. See 1. Ro. Abr. 860. As to the caſe of outlawry, ſee Vin. Abr. *Eſtate* Z. b. pl. 1. In 2. Ventr. 248. one of the books cited, lord Hale ſays, that outlawry is not a determination till ſeiſure.—(14) Nota, *if leſſee at will is ouſted by a ſtranger, he may re-enter and continue tenant at will; but if he accepts of a new leaſe from a ſtranger after ſuch ouſter, it has been holden, that his re-entry will not re-veſt the eſtate in the antient leſſor.* Hal. MSS. See Vin. Abr. *Eſtate* A. c.—(15) *So if leſſee ſays, that he will not hold any longer, it is not a determination of the will, unleſs he waives the poſſeſſion.* 20. H. 7. Keilw 65. Hal. MSS.—(16) *If there is tenant at will rendering rent at Michaelmas, and leſſor determines the will before Michaelmas, he ſhall not have any rent. But it has been holden, that if leſſee at any day before the rent-day determines his will, yet leſſor ſhall have the rent incurring the next day after ſuch determination of the will.* Per *Fenner and Williams*; *Yelverton* contra. M. 3. Jac. *Carpenter and Collins. Yelv.* 73. 20. H. 7. *Keilw.* 65. *is accord. if leſſor doth not enter before the rent-day.* Hal. MSS.—See All. 4. in which book there is an opinion by Rolle conformable to that of Fenner and Williams. Alſo in 1. Sid. 339. it is ſaid to have been agreed by the court, that if land be leaſed at will and the rent is reſerved half-yearly or quarterly, the leſſee cannot determine his will two or three days before the rent-day, becauſe that would be a fraudulent determination.

le fait, pur ceo que il eſt prove per les parols del fait, que il eſt la volunt que le auter avera la terre; mes celuy que fiſt le fayt luy poer ouſte quaunt luy pleiſt.

made the deed, becauſe it is proved by the words of the deed, that it is his will that the other ſhould have the land; but he which made the deed may put him out when it pleaſeth him.

ſi donatio lecta fuerit et conceſſa, ac traditio nondum fuerit ſubſecuta. But if the deed be delivered in name of ſeiſin of the land, or if the feoffor ſaith to the feoffee, Take and enjoy this land according to the deed, or Enter into this land and God give you joy: theſe words do amount to a livery of ſeiſin. (Ante 48. a)

Sect. 71.

ITEM ſi un meſe ſoit leſſe a tener a volunt, le leſſee neſt pas tenus a ſuſteiner ou repairer le meaſon, ſicome tenant a terme d'ans eſt tenus. Mes ſi le leſſee a volunt fait voluntarie waſt, ſicome en abatement des meaſons, ou en couper des arbres, il eſt dit que le leſſor avera de ceo envers luy action de treſpaſſe. Sicome jeo bayle a un home mes barbits a compeſter ſa terre, ou mes boefes a arerer la terre, et il occiſt mes avers, jeo puiſſoy bien aver un action de treſpaſs envers luy nient obſtant le bailement.

ALSO if a houſe be leaſed to hold at will, the leſſee is not bound to ſuſtain or repaire the houſe, as tenant for term of years is tyed. But if tenant at will commit voluntary waſt, as in pulling downe of houſes, or in felling of trees, it is ſaid that the leſſor ſhall have an action of treſpaſſe for this, againſt the leſſee. As if I lend to one my ſheepe to tathe his land, or my oxen to plow the land, and he killeth my cattell, I may well have an action of treſpaſs againſt him, notwithſtanding the lending.

SI un meſe ſoit leſſe a tener a volunt le les neſt pas tenus, &c. For the ſtatute of Glouceſter above mentioned extends not to a tenant at will, and therefore for permiſſive waſt, the leſſor hath no remedy at all(1). (5. Co. 13. b.)

Mes ſi leſſee a volunt fait voluntary waſt, &c. [g] And true it is, that if tenant at will cutteth downe timber trees, or voluntarily pull downe and proſtrate houſes, the leſſor ſhall have an action of treſpaſſe againſt him, *quare vi et armis*; for the taking upon him power to cut timber, or proſtrate houſes, concerneth ſo much the freehold and inheritance, as it doth amount in law to a determination of his will; [b] and ſo hath it beene adjudged (2).

[i] If tenant at will granteth over his eſtate to another, and the grantee entreth, he is a diſſeiſor (3), and the leſſor may have an action of treſpaſſe againſt the grantee; for albeit the grant was void, yet it amounteth to a determination of his will.

[g] 21. H. 6. 38. 28. E. 3. 25. 12. H. 4. 3. 22. E. 4. 50.

(1. Ro. Abr. 860. 2. Ro. Abr. 555.)

[b] Mich. 28. & 29. Eliz. Rot. 318. in Com. Banc. inter Walgrave & Somerſet. V. le Counte de Shrewſburie's caſe, 5. Co. 13. b.

[i] 27. H. 6. 3. 22. E. 4. 5. (2. Inſtit. 154. 1. Ro. Abr. 661. 663. 659. Poſt 57. b. Cro. Ch. 303. Cro. Jam. 660. 4. Leon. 35.)

Sicome jeo baile a un home mes barbits a compeſter ſon terre, &c. And the reaſon is, [k] that when the bailee having but a bare uſe of them, taketh upon him as an owner to kill them, he loſeth the benefit of the uſe of them. Or in theſe caſes he may have an action of treſpaſſe *ſur le caſe* for this converſion, at his election (4).

[k] V. 11. H. 4. 24. 1. E. 4. 9. b. 12. E. 4. 8. 21. E. 4. 19. & 76. 22. E. 4. 5. 3. H. 7. 4. 21. H. 7. 14. Flet. li. 2. ca. 1. (2. Ro. Abr. 556. Cro. Ch. 35.) (2. Inſt. 183. 3. Inſt. 20. 21.)

Treſpaſſe. *Tranſgreſſio derivatur à tranſgrediendo*, becauſe it paſſeth that which is right: *Tranſgreſſio autem eſt, cum modus non ſervatur, nec menſura: debet enim quilibet in ſuo facto modum habere, et menſuram: Nota*, in the loweſt and the higheſt offences there are no acceſſaries, but all are principalls; as in ryots, routs, forcible entries, and other tranſgreſſions

(1) *Action on the caſe doth not lie for permiſſive waſte.* 5. *Rep.* 13. *b.* Hal. MSS.—The caſe cited by lord Hale is that of the counteſs of Salop, who brought action on the caſe againſt her tenant at will for ſo negligently keeping his fire, that the houſe was burnt; and the whole court held, that neither action on the caſe nor any other action lay; becauſe at common law and before the ſtatute of *Glouceſter* action did not lie for waſte againſt tenant for life or years, or any other tenant coming in by agreement of parties, and tenant at will is not within the ſtatute. But the doctrine that no action lies ſhould be underſtood with ſome limitation; for if tenant at will ſtipulates with his leſſor to be reſponſible for fire by negligence or for other permiſſive waſte, without doubt an action will lie on ſuch *expreſs* agreement. The ſame obſervation holds with reſpect to tenants for life or years before the ſtatute of *Glouceſter*; for though the *law* did not make them liable to *any* action for waſte, yet it did not reſtrain them from making themſelves liable by *agreement*. It may be of uſe here to add ſomething on the progreſs of the law as to the accidental burning of houſes, ſo far as regards landlord and tenant. At the common law leſſees were not anſwerable to landlords for accidental or negligent burning; for as to fires by accident, it is expreſſed in *Fleta*, that *fortuna ignis vel hujuſmodi eventus inopinati omnes tenentes excuſant*, and lady Shrewſbury's caſe is a direct authority to prove, that tenants are equally excuſable for fires by *negligence*. See *Fleta lib. 1. cap. 12.* Then came the ſtatute of *Glouceſter*, which, by making tenants for life and years liable to waſte without any exception, conſequentially rendered them anſwerable for deſtruction by fire. Thus ſtood the law in lord Coke's time; but now by the 6. An. ch. 31. the ancient law is reſtored, and the diſtinction introduced by the ſtatute of *Glouceſter* between tenants at will and other leſſees is taken away; for the ſtatute of Ann exempts *all perſons* from actions for *accidental* fire in any houſe, except in the caſe of ſpecial agreements between landlord and tenant. See ante 53. a. and note 7. there, and 53. b. and note 5. there. So much relates to tenants coming in *by act or agreement of parties*. As to tenants of *particular eſtates* coming in by *act of law*, as tenant by the curteſy, tenant in dower, and alſo before the ſtatute for taking away military tenures guardian in chivalry, theſe, or at leaſt the two latter, being at common law puniſhable for waſte, were therefore reſponſible for loſſes by fire; unleſs indeed they were anſwerable for waſte *voluntary* only, and not for waſte *permiſſive*, which is a diſtinction I have not yet met with in any book. If then tenant by the curteſy and tenant in dower were by the common law reſponſible for accidental fire, it may ſome time or other become neceſſary to determine, whether they are within the ſtatute of queen Ann. The ſtatute in expreſſion is very *general*, the words being, that no action ſhall be proſecuted againſt *any perſon* in whoſe houſe any fire ſhall *accidentally* begin; and it ſeems calculated to take away all actions in

sions *vi et armis*, which are the lowest offences; and so in the highest offence, which is *crimen læsæ majestatis*, there be no accessaries: but in felonies there be accessaries both before and after.

Sect. 72.

NOTA, si le lessor sur tiel lease a volunt reserve a luy un annuall rent, il poit distrainer pur le rent arere, ou aver de ceo un action de debt a son election.

NOTE, if the lessor upon a lease at will reserve to him a yearly rent, he may distreine for the rent behinde, or have for this an action of debt at his owne election(1).

21. H. 7. 39. b. 2. E. 4. 6. b. 7. E. 4. 27. a. 6. R. 2. Avourie 86.

IL poet distreyner pur le rent arere ou aver de ceo un action de debt, &c. But if he impound the distresse upon the ground letten at will, the will is determined. Note, he may distreine for the rent, and yet it is no rent service, for no fealty belonging thereunto, but a rent distreinable of common right.

There is a great diversity between a tenant at will, and a tenant at sufferance; for tenant at will is alwaies by right, and tenant at sufferance entreth by a lawfull lease, and holdeth over by wrong. A tenant at sufferance is he that at the first came in by lawfull demise, and after his estate ended continueth the possession and wrongfully holdeth over (2). [*l*] As tenant *pur terme dauter vie*, continueth in possession after the decease of *Ce' que vie*, or tenant for yeares holdeth over his terme; the lessor cannot have an action of trespasse before entry. Now that a writ of entry *ad terminum qui præteriit* lyeth against such a tenant, as holdeth over, is rather by admission of the demandant, then for any estate of freehold that is in him, for in judgement of law he hath but a bare possession. But against the king there is no tenant at sufferance, but he that holdeth over in the cases abovesaid is an intruder upon the king, because there is no laches imputed to the king for not entring(4). [*m*] If tenant in taile of a rent grant the same in fee and dieth, yet the issue in taile may bring a *formedon*, and admit himselfe out of possession. The like law is it, if a man maketh a lease at will and dieth, now is the will determined, and if the lessee continueth in possession he is tenant at sufferance, and yet the heyre by admission may have an issue of Mordancestor against him (5). [*n*] But there is a diversity between particular estates made by the *terretenaunt*, as above is said, and particular estates created by act in law: as if a gardian after the full age of the heire continueth in possession, he is no tenant at sufferance, but an abator, against whom an assize of Mordancestor doth lye(6). *Et sic de similibus*(7).

(Post 142. a.)
[*l*] Bracton lib. 4. fol. 318. 4. E. 3. 39. 7. E. 3. 13. 24. E. 3. 24. 38. E. 3. 28. 7. R. 2. Saver de def. 30. 8. E. 4. 25. 4. H. 6. 30. 22. E. 4. 38. 18. E. 4. 25. F. N. B. 201. D. 203. 8. E. 2. entre 87. Temps H. 8. Br. 15 tit. Tenant a volunt. Pl. com. 138. 4. H. 7. 3.
(3)
(Post 270. b. Cro. Cha. 187. Cro. Jam. 169. Ante 57. a.)
[*m*] 13. H. 7. 10. a. 21. H. 6. 54. 5. E. 4. 3. 22. R. 2. tit. Discont. 48. E. 3. 23. Pl. Com. 435. 19. E. 3. bre. 468. 15. E. 4. Discont. 30. 6. E. 3. 56. 57. 21. E. 4. 5. 21. H. 7. 38. 10. E. 4. 18. Per Choke. & Litt.
[*n*] Statute de Merlbridge cap. 26. Abb. Ass. 120. b. F. N. B. 196. 11. E. 4. 10. & 11. Bract. lib. 4. fo. 252. 253.
(Post 271. 1. Ro. Abr. 663.)

CHAP. 9. Sect. 73.

Tenant by Copie.

Note that I have a folio volume of MSS French Reports temp. Eliz. containing a great number of copyhold cases [illegible] particularly fol. 170. a. & b. fol. 181. [illegible] almost wholly copyhold. F. H.

TENANT per copie de court rol' est(8), deins quel manor il y ad un custome que ad est use de temps dont memorie ne court, que certaine tenants deins mesme le manor ont use daver terres et tenements, a tener a

TENANT by copy of court roll is, as if a man be seised of a mannor, within which mannor there is a custome, which hath beene used time out of minde of man, that certaine tenants within the same mannor have used to have lands and te-

(3. Co. 7. Heydon's case. 1. Ro. Abr. 498.)

TENANT per Copie, &c. Tenens per copiam rot. Cur'. *Copie* we call in Latine *copiam*, though *copia* in his proper signification signifieth plenty, but we have made a Latine word of the French word *copie*, and this is ancient, for in the Register fol. 51. there is a writ *de copia libelli deliberanda*, which is grounded upon the statute of 2. H. 4. ca. There is no tenant in the law, that holdeth

eux

(1) *But in his count in debt against lessee at will, he ought to shew that he entred; but otherwise it is as to lessee for years.* 18. *H.* 8. 1. *Dy.* 14.—*Debt lies against copyholder for his rent. Adjudged M.* 10. *Car. B. R. Hitcham's case.* Hal. MSS.—Hitcham's case is in 1. Ro. Abr. 374. P. pl. 1. and 374. Q. pl. 3. But from Rolle's report of the case, and from some subsequent authorities it seems doubtful, whether debt will lie for rent against a copyholder, particularly unless the lord has conveyed away the manor and so lost the remedy by distress. See Carth. 92. and Gilb. Ten. 3d. Lond. ed. 308.—(2) As to holding over, see 4. G. 2. c. 28. by which every tenant for life or years or other person claiming under or by collusion with such tenant, who shall wilfully hold over *after* determination of the term and *demand* made in writing of delivery of the possession by the landlord or him in reversion or remainder, is made liable to the payment of double the yearly value of the lands detained. This statute only took in cases in which the *landlord* gave notice to quit, and therefore the deficiency was supplied by the 11. G. 2. c. 19. which extends the provision for double rent to the holding over after the *tenant's* giving notice to quit. See a case on this latter statute in 4. Burr. v. 3. page 1603. See also 6. An. c. 18. s. 1. against holding over by guardians or trustees of infants and by husbands seised in right of their wives and by all others having particular estates determinable on any life or lives.—(3) Vid. 21. *H.* 6. 38. Hal. MSS.—(4) 4. *H.* 6. 12. Hal. MSS.—(5) *If the heir accepts rents from him, he is tenant at will to the heir.* 10. *E.* 4. 18. *Tenant for years surrenders, and still continues possession, he is tenant at sufferance or disseisor at election. Dy.* 62. Hal. MSS.—(6) *And if guardian in such case dies seised, the entry of the heir tolls.* 7. *H.* 4. 42. per *Cul.* Hal. MSS.—(7) See further as to tenant by sufferance in title *Estate* Vin. Abr. and Com. Dig.—(8 *Si come un home soit seisie d'un maner.* L. and M.—Roh.—P. and Red.

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cases of accidental fire as well from *other* persons as from *landlords*. Note, that it has been doubted on the statute of Ann, whether a covenant to repair *generally* extends to the case of *fire*, and so becomes an agreement within the statute; and therefore where it is intended, that the tenant shall not be liable, it is most usual in the covenant for repairing expresly to *except* accidents by fire.—Note also, that the distinction which is taken as to waste at common law between tenants coming in by *act of law* and tenants whose estates accrue by *act of parties*, will not *universally* hold; for tenants by statute-merchant and statute-staple, though they come in by *process of law*, are not punishable for waste. 6. Co. 37. Perhaps the reason of this may be, that it is in the power of debtors to prevent the commencement of these estates or to determine them by paying the debts, for which creditors have such estates, and also that the tenants of such estates are accountable for all profits they make beyond the amount of the debts due to them.—(2) *Yet if a stranger cuts trees, the tenant at will shall have action, as shall also the lessor, regard being had to their several losses.* 2. *H.* 4. 12. 19. *H.* 6. 45. Hal. MSS.—(3) *Lessee at will makes lease for years, and the lessee enters. Ruled on solemn argument,*

eux et a lour heires en fee ſimple, ou en fee taile, ou a terme de vie, &c. a volunt le ſeignior ſolonque le cuſtome de meſme le manor.

nements to hold to them and their heires in fee ſimple, or fee taile, or for terme of life, &c. at the will of the lord(1) according to the cuſtome of the ſame manor.

And Britton ſaith that ſome that be free of blood doe hold land in villenage, and Littleton himſelfe in the next chapter calleth them tenants by baſe tenure: and in F.N.B. fol. 12. C. *Et ceſt terme, que eſt ore a ceſt jour appel copitenaunts, ou copiholders, ou tenaunts per copie, eſt forſque un novel noſme trove, car daucient temps ils fuer' appelles tenants in villenage, ou de baſe tenure*, &c. [b] And yet in 1. H. 5. 11. they be called copiholders, in 14. H. 4. 34. *tenant per le verge*, in 42. E. 3. 25. *tenant per roll ſolonque le volunt le ſeignior*; and in the ſtatute of 4. E. 1. called *extenta manerii*, they are called *cuſtumarii tenentes*, and ſo doth Fleta call them; and before him Ockam (2) (who wrote in the raigne of H. 2.) ſpake of them, and how, and upon what occaſion they had their beginning.

by copie but onely this kinde of cuſtomary tenant, for no man holdeth by copie of a charter, or by copy of a fine, or ſuch like, but this tenant holdeth by copy of court roll.

[a] Bracton calleth copiholders *villanos ſockmannos*, not beçauſe they were bond, but becauſe they held by baſe tenure by doing of villein ſervices.

[a] Bracton lib. 2. cap. 8. fol. 26. & lib. 4. fo. 209. Britton 165. Fleta lib. 1. ca. 8. & lib. 2. cap. 6. Item de cuſtumariis. Ockam Cap. quid murdrum. F. N. B. f. 12. c.

[b] 1. H. 5. 11. 14. H. 4. 34. 42. E. 3. 25. Vid. 4. Co. 2. Browne's caſe.

[c] *Terra ex ſcripto Saxonice Bockland. Fundum veteres aut ex ſcripto qui Bockland, i. bookland, aut ſine ſcripto qui Folkland dicebatur, poſſidebant. Quæ fuit ex ſcripto poſſeſſio commodior erat conditione, hæreditaria, libera, atque immunis. Fundus ſine ſcripto cenſum penſitabat annuum, atque officiorum ſervitute quadam eſt obligatus. Priorem viri plerunque nobiles atque ingenui, poſteriorem ruſtici fere et pagani poſſidebant* (3).

[c] Lamb. verb. Terra ex ſcripto.

Court. *Curia*, court is a place where juſtice is judicially miniſtred, and is derived *a cura, quia in curiis publicis curas gerebant.* [d] The court baron muſt be holden on ſome part of that which is within the mannor, for if it be holden out of the mannor it is voyd, unleſſe a lord being ſeiſed of two or three mannors hath uſually time out of mind kept at one of his manors courts for all the ſaid manors, then by cuſtome ſuch courts are ſufficient in law, albeit they be not holden within the ſeverall mannors(4). And it is to be underſtood that this court is of two natures, the firſt is by the common law, and is called a court baron, as ſome have ſaid for that it is the freeholders or freemans court, (for barons in one ſenſe ſignifie freemen) and of that court the freeholders being ſuitors be judges, and this may be kept from three weekes to three weekes. The ſecond is a cuſtomary court, and that doth concerne copiholders, and therein the lord or his ſteward is the judge. Now as there can be no court baron without freeholders, ſo there cannot be this kind of cuſtomary court without copiholders or cuſtomary holders. And as there may be a court baron of freeholders only without copiholders, and then is the ſteward the regiſter, ſo there may be a cuſtomary court of copiholders onely without freeholders, and then is the lord or his ſteward the judge (5). And when the court baron is of this double nature, the court roll containeth as well matters appertaining to the cuſtomary court, as to the court baron.

(4. Inſtit. 268.)

[d] Vid. 4. Co. 24. inter Murrell & Smith. Eodem lib. fol. 27. inter Clifton & Molineux. (1. Ro. Abr. 527.)

4. Co. 26. Melwitche's caſe. Britton fol. 274.

(4. Co. 26. b.)

And for as much as the title, or eſtate of the copiholder is entred into the roll whereof the ſteward delivereth him a copie, thereof he is called copiholder. [e] It is called a court baron, becauſe amongſt the lawes of King Edw. the Confeſſor it is ſaid: *Barones vero qui ſuam habent curiam de ſuis hominibus*, &c. taking his name of the baron who was lord of the mannor, or for that properly in the eye of law it hath relation to the freeholders, [f] who are judges of the court. And in ancient charters and records the barons of London, and barons of the cinque ports, do ſignify the freemen of London and of the cinque ports.

[e] Lamb. fol. 128. & 136. Cambden Brit. fo. 121. b. Britton fol. 274.

[f] Mirror cap. 1. ſect. 3.

Seiſie dun mannor. *Manerium dicitur a manendo ſecundum excellentiam ſedes magna fixa et ſtabilis. Lageman, i. habens ſocam et ſacam ſuper homines ſuos*, &c. [g] *Et ſciendum eſt, quod manerium poterit eſſe per ſe ex pluribus edificiis coadjuvatum ſive villis et hamletis adjacentibus. Poterit etiam eſſe manerium et per ſe et cum pluribus villis, et cum pluribus hamlettis adjacentibus, quorum nullum dici poterit manerium per ſe ſed villæ ſuæ hamlettæ. Poterit etiam eſſe per ſe manerium capitale, et plura continere ſub ſe maneria non capitalia, et plures villas et plures hamlettas quaſi ſub uno capite aut domino uno.* And afterwards, *Manerium autem fieri poterit ex pluribus villis vel una, plures enim villæ poterunt eſſe in corpore manerii ſicut et una* (6). And in theſe [h] ancient authors you ſhall ſee the difference, *inter manſionem, villam, et manerium.* Concerning the inſtitution of this court by the lawes and ordinances of ancient kings and eſpecially of King Alfred, it appeareth that

Domeſday.

[g] Bracton lib. 4. fo. 112. Fleta lib. 4. c. 15. & lib. 6. cap. 49. Britton fol. 124.

[h] Bract. lib. 5. fo. 434. Fleta ubi ſupra. Mirror. cap. 1. ſect. 3.

(1) Nota, *theſe words* ad voluntatem domini *are material to expreſs copyhold; for if theſe words be omitted in pleading, it ſhall be intended, that the eſtate is a cuſtomary freehold.* M. 7. Car. B. R. *Crook n. 7. Hughes's caſe.* Hal. MSS. See Cro. Cha. 229. See further as to *cuſtomary freehold* Poſt 59. b. and note 1. there.—(2) This author, whom lord Coke cites on ſeveral occaſions, according to Sir William Dugdale wrote a book on *tenures of the king*, but did not perfect it. Dugd. Orig. Jurid. 1ſt ed. 56. I imagine, that this book is the work referred to by lord Coke; but whether it is in print, or lord Coke cites it from a manuſcript, I have not yet been able to learn.—(3) See ante 5. b. and note 1. there, and 6. a. and note 6. there.—(4) See acc. Cro. Cha. 367. But the lord may take a ſurrender out of the manor, becauſe that may be done out of court; and ſo may the ſteward if there is a ſpecial cuſtom, or according to latter authorities without. See 1. Salk. 184. and Poſt 59. a.—(5) *A ſteward* de facto *is ſufficient.—The king conſtitutes A and B ſtewards of a manor by patent* ſub ſigillo ſcaccarii; *A holds courts; and though the appointment ought to have been* ſub magno ſigillo, *and both ought to have holden the courts, yet it was ruled, that grant by one was good. So it is as to the lord's clerk or an under ſteward.* P. 22. Eliz. Scacc. Hal. MSS.—The doctrine in this caſe ſeems confirmed by the caſes and authorities cited in Vin. Abr. *Steward* F. G. J. K. and Com. Dig. *Copyhold* C. 5. Note alſo particularly what is expreſſed in Co. Copyhold. ſect. 45. in reſpect to the law's not being nice in examining the imperfections of the ſteward's authority, where his acts are *ordinary* and *neceſſary*, and not of a *judicial* kind.—(6) For other explanations of the word *manor*, ſee in Cow. Interp. voc. *Manor*, and the books there cited, particularly Fulb. Paral. part 1. fol. 18. a.

argument, 1. *That it is only a diſſeiſin* at election, *and not* prima facie. 2. *That admitting it to be a diſſeiſin the leſſee at will is the diſſeiſor, and has gained the freehold, and not the leſſee for years.* Paſch. 9. Car. B. R. *Blunden and Baugh.* Hal. MSS.—See S. C. in W. Jo. 315. Cro. Cha. 302. Litt. 297. 372. and 1. Ro. Abr. 661. See alſo Mr. Atkins's caſe in 4. Burr. vol. 1. page 60. in which the curious doctrine of *diſſeiſin by election* is moſt elaborately explained.—(4) *A leſſee for* 20 *years makes leaſe to B for ten; B continues in poſſeſſion after expiration of the leaſe for ten years, and commits waſte. A may have either treſpaſs or action on the caſe, becauſe he is chargeable over in waſte.* P. 6. Car. B. R. *Crook n. 7. Weſt and Treude.* Hal. MSS. See Cro. Cha. 187. and 8. C. W. Jo. 224.

that the firſt kings of this realme had all the lands of England in demeane(1), and *les grand manors et royaltics* they reſerved to themſelves, and of the remnant they, for the defence of the realme, enfeoffed the barons of the realme with ſuch juriſdiction as the court baron now hath, and inſtituted the freeholders to be judges of the court baron. And herewith agreed the aforeſaid law of Saint Edward. And it is to be obſerved, that in thoſe ancient lawes under the name of barons were compriſed all the nobility.

(1. Co. 140. b. Cro. Jam. 260. Mo. 95. 8. Co. 63. b. 1. Ro. Abr. 499. 4. Co. 26. b. 23. b. Cro. Jam. 98.)

There may be a cuſtomary manor granted by copy of court roll(2). So although the word be *(ſeiſie)* which properly betokeneth a freehold, yet tenant for yeares, tenant by ſtatute merchant, ſtaple, elegit, and tenant at will, gardian in chivalry (3), &c. who are not properly ſeiſed but poſſeſſed, are *domini pro tempore*, not only to make admittance, but to grant voluntary copies of ancient copihold lands which come into their hands(4). And therefore there is a diverſity between diſſeiſors, abators, intruders, and others that have defeaſible titles; for their voluntary grants of ancient copihold lands ſhall not bind the diſſeiſees or others that right have (5). And voluntary grants by copie, made by ſuch particular tenants as is aforeſaid, ſhall binde him that hath the freehold and inheritance, becauſe all theſe be lawfull lords for the time being; but ſo is not a tenant at ſufferance, becauſe he is in by wrong as hath been ſaid, and ſo [*i*] was it adjudged P. 29. Eliz. *inter* Rowſe & Artois 4. Co. 24. But admittances made by diſſeiſors, abators, intruders, tenant at ſufferance or others that have defeaſible titles, ſtand good againſt them that right have, becauſe it was a lawfull act, and they were compellable to doe them.

[*i*] 4. Co. 24. p. 29. Eliz. inter Rous & Arteis.

[*k*] And yet in ſome ſpeciall caſe an eſtate may be granted by copie, by one that is not *dominus pro tempore*, nor that hath any thing in the manor. As if the lord of a manor by his will in writing deviſeth, that his executor ſhall grant the cuſtomary tenements of the manor according to the cuſtome of the manor for the paiment of his debts, and dieth, the executor, having nothing in the manor, may make grants according to the cuſtome of the manor (6).

[*k*] Dier. Mich. 7. & 8. Eliz. Manuſcript.

Deins quel mannor il y ad un cuſtome, que ad eſte uſe de temps dont memory ne court, &c. Of this cuſtome here ſpoken of there be three ſupporters. The firſt is time, and that muſt be out of memory of man, which is included within this word (cuſtome) ſo as copihold cannot begin at this day. [*l*] The ſecond ſupporter is that the tenements be parcell of the manor or within the manor, which appeare by theſe words of Littleton, *que certeine tenants deins meſme le mannor, &c.* The third ſupporter is that it hath beene demiſed and demiſible by copie of court roll; for it need not to be demiſed time out of mind by copie of court, but if it be demiſible it is ſufficient. For example: if a copihold tenement eſcheat to the lord, and the lord keepeth it in his hands by many yeares, during this time it is not demiſed but demiſible, for the lord hath power to demiſe it againe (7).

[*l*] Vid. 4. Co. 24. inter Murrel & Smith.

A volunt le ſeignior ſolonque le cuſtome. So as he is not a bare tenant at will, but a tenant at will according to the cuſtome of the mannor, as ſhall be ſpoken more hereafter in this chapter.

Certeine tenements. What things may be granted by copy, is neceſſary to be knowne. Firſt, a manor may be granted by copy (8). Secondly, underwoods without the ſoile may be granted by copy to one and to his heires, and ſo may the herbage or veſture of land. Thirdly, generally all lands and tenements within the manor and whatſoever concerneth lands or tenements may be granted by copie: as a faire appendant to a mannor may be granted by copy, &c (9).

(1. Ro. Abr. 498.) 11. Co. 17. Sir H. Nevil's caſe. 4. Co. 30. 31. inter Hoc & Tayler.

Conſuetudines. This word *conſuetudo* being derived *à conſueto*, properly ſignifieth a cuſtome, as here Littleton taketh it: but in legall underſtanding it ſignifieth alſo tolles, murage, pontage, paviage, and ſuch like newly granted by the king; and therefore when the king grants ſuch things, the words be, *conceſſimus, &c. in auxilium villæ prædict' paviand' &c. conſuetudines ſubſcriptas, viz. de qualibet ſunnagio, &c.*

Regiſt. F. N. B. 270. d. V. mag. Carta in cap. litin. fol. 151. Bract. lib. 3. 117. Fleta lib. 1. cap. 20.

And it was an article of the juſtices in Eire to inquire, *de novis conſuetudinibus levatis in regno, ſive in terra, ſive in aqua, et quis eas levavit et ubi*; where *conſuetudo* is taken for tolles and ſuch like taxes or charges upon the ſubject.

Sect. 74.

(1. Ro. Abr. 509.)

ET tiel tenant ne puit alener ſa terre, &c. And this is

ET tiel tenant ne puit alien ſa terre per fait, car

AND ſuch a tenant may not alien his land by deed, for then *don-*

(1) See as to this ante 1. b. and the authorities in note 1. there.—(2) This is denied in Cro. Jam. 260. and is a point, which has been much controverted. See Vin. Abr. *Copyhold* E. and Com. Dig. *Copyhold* C. 1.—(3) *Guardian in ſocage may grant copies in his own name, nor can the heir hold courts during the intereſt of the guardian.* T. 1. Jac. Rot. 883. C. B. *Shopland and Ridler. Noy n.* 372. *Clare's caſe.* Hal. MSS.—See the former caſe acc. in Cro. Jam. 55. 98. 1. Ro. Abr. 499. pl. 4. Ow. 115. Godb. 143. 4. Leon. n. 23. See alſo acc. 2. P. Wms. 122.—(4) *Cuſtom to grant copies in reverſion after eſtates for life. Ruled, that* dominus pro tempore *may make ſuch grants; and they will bind, though the particular eſtate doth not determine during his intereſt.* P. 41. Eliz. B. R. n. 27. C. C. *Guy and Rey.* Hil. 26. Eliz. *Sir Peter Carew's caſe. More* 147. Vide tamen H. 14. Eliz. ibid. 95. *the caſe of Com. Oxon.* contra. Hal. MSS. Accord. that the lord *pro tempore* may grant in reverſion, where reverſions are grantable by copy; ſee Cro. Eliz. 66. 2. P. Wms. 122. and the caſe of Lade and Barker in 2. New Abr. 684. See alſo the ſubject enlarged upon in Gilb. Ten. 3d. Lond. edit. 204.—(5) *If copyholder ſurrenders to diſſeiſor to the uſe of I. S. diſſeiſor may admit him, if the ſurrenderor be a copyholder in fee; but otherwiſe it is, if he be only copyholder for life, as it ſeems, for it is a new grant.* P. 41. Eliz. B. R. *Martyn and Rew.* Hal. MSS See Gilb. Ten. 3d. Lond. edit. 201.—(6) *If heir before aſſignment of dower grants copies, it will not bind the wife.* P. 28. Eliz. B. R. *Rous and Artois.* Hal. MSS.—See further as to the perſons by whom copyhold eſtates may be granted, in Vin. Abr. *Copyhold* G. and Com. Dig. Copyhold C. 3.—(7) What thing deſtroys the cuſtom of granting a copyhold. *One is leſſee for life or tenant in tail of a manor; a copyhold eſcheats; and leſſee or tenant in tail makes leaſe for years of the copyhold. Though* quoad *himſelf the cuſtom is gone, yet* quoad *the iſſue or reverſioner the cuſtom is not gone. So it is in caſe of a huſband ſeiſed in right of his wife.* P. 38 Eliz. B. R. *Conſtoy and Ruſkey. And accordingly agreed* per curiam P. 1650. *in Cremer and Burnet. But* vid. contra M. 14. Car. B. R. *Crook n.* 22. *in Lee's caſe. Copyholder ſurrenders to the uſe of the lord, who makes leaſe of the manor and of this tenement by name. Ruled, that the tenement is ſtill grantable by copy; for it paſſes with the manor, and ſo continues demiſable.* Tr. 10. Car. *Crook n.* 4. *Lee and Boothby.—The king is ſeiſed of a copyhold manor, the copyhold eſcheats, and the king makes leaſe for years. Ruled, that though the leaſe is good, yet after the term the copyhold is grantable by copy, becauſe the grant doth not inure to a double intent in the caſe*

donques le ſeignior poit entre come en choſe forfeit a luy. Mes ſil voit alien ſa terre a un auter, il covient ſolonque aſcun cuſtome de ſurrender les tenements en aſcun court, &c. en le maine le ſeignior, al uſe celuy que avera le ſtate, en tiel forme, ou a tiel effect.

the lord may enter as into a thing forfeited unto him. But if he will alien his land to another, it behoveth him after the cuſtome to ſurrender the tenements in court, &c. into the hands of the lord to the uſe of him that ſhall have the eſtate, in this forme or to this effect.

Ad hanc curiam venit A de B et ſurſum reddidit in eadem curia, unum meſuagium, &c. in manus domini, ad uſum C de D et hæredum ſuorum, vel hæredum de corpore ſuo exeuntium vel pro termino vitæ ſuæ, &c. Et ſuper hoc venit prædictus C de D et cœpit de domino in eadem curia, meſuagium prædictum, &c. Habendum et tenendum ſibi et hæredibus ſuis, vel ſibi et hæredibus de corpore ſuo exeuntibus, vel ſibi ad terminum vitæ, &c. ad voluntatem domini, ſecundum conſuetudinem manerii, faciendo et reddendo inde redditus, ſervitia, et conſuetudines inde prius debita et conſueta, &c. et dat domino pro fine, &c. et fecit domino fidelitatem, &c.

A of B commeth unto this court, and ſurrendreth in the ſame court a meaſe, &c. in to the hands of the lord, to the uſe of C of D and his heires, or the heires iſſuing of his body, or for terme of life, &c. And upon that commeth the aforeſaid C of D, and taketh of the lord in the ſame court, the foreſaid meaſe, &c. To have and to hold to him and to his heires, or to him and to his heires iſſuing of his body, or to him for terme of life, at the lord's will, after the cuſtome of the manor, to do and yeeld therfore the rents, ſervices, and cuſtomes thereof before due and accuſtomed, &c and giveth the lord for a fine, &c. and maketh unto the lord his fealty, &c.

true in caſe of alienation (1), but when a man hath but a right to a copihold, he may releaſe it by deed or by copie, to one that is admitted tenant *de facto* (2).

Alien per fait. Here it appeareth by Littleton that there muſt be an alienation: for the making of the deed alone, unleſſe ſomewhat paſſe thereby, is no forfeiture. As if he make a charter of feoffment, or a deed of demiſe for life, and make no livery, this is no forfeiture, becauſe nothing paſſeth, and therefore no alienation (3); but otherwiſe it is of a leaſe for yeares (4).

Forfeit a luy. This adjective in Latine is *forisfactus*, the verbe is *forisfacere*, and the nowne *forisfactura*. They are all derived of *foris*, (that is) *extra*, and *facere*, *quaſi diceret, extra legem ſeu conſuetudinem facere*, to do a thing againſt or without law or cuſtome; and that legally is called a forfeiture. Littleton uſeth this word but once in all his booke. What ſhall be ſaid [k] forfeitures of copiholds you may read at large in my Reports (5).

En aſcun court. [l] This is the generall cuſtome of the realme, that every copiholder may ſurrender in court and need not to alleage any cuſtome therefore. So if out of court he ſurrender to the lord himſelfe, he need not alledge in pleading any cuſtome. But if he ſurrender out of court into the hands of the lord by the hands of two or three, &c. copiholders, or by the hands of the bayliffe or reeve, &c. or out of court by the hand of any other, theſe cuſtomes are particular, and therefore he muſt plead them (6).

[m] Bracton lib. 4. fol. 209. ſpeaking of theſe kind of cuſtomary tenants, ſaith, *Dare autem non poſſunt tenementa ſua, nec ex cauſa donationis ad alios transferre non magis quam villani puri; et unde ſi transferre debeant, reſtituant ea*

Lib. intrat. 131. 4. Co. 25. b. inter Kite and Queinton. *Acc. post. 60. a.*

[k] 4. Co. inter les copihold caſes 21. 23. 75 27. 28 8. Co. 92. 99. 100. 9. Co. 75. 107. 10. Co. 131.

[l] Bract. lib. 2. cap. 8. & lib. 4. 49. 15. H. 4. 34. 1. H. 5 11. (1. Ro. Abr. 500. 9. Co. 76.)

[m] Bract. lib. 4 fol. 209. & lib. 2. cap. 8. ac. 14. H. 4. 34.

(1) *Parceners of copyhold cannot make partition without the lord's licence.* P. 41. Eliz. B. R. *Fuller and Terry.* Hal. MSS. The ſame caſe is in 1. Ro. Abr. 509. pl. 1. 2. but the points there are different.—(2) *If copyhold is granted to A and B, who are admitted, A may releaſe to B without fine or ſurrender. Adjudged* P. 19. Jac. *entered* H. 16. Rot. 735. C. B. *Waſe and Pretty. So he may releaſe condition.* T. 2. Jac. *But if he releaſe to diſſeiſor, it is holden void; but he may releaſe all his right to him who is admitted.* M. 5. Car. C. B. per curiam. Hal. MSS.—See acc. Waſe and Pretty in Winch. 3. and ſ. p. acc. by the court in Hetl. 150. See further as to the effect of a releaſe on a copyhold. Vin. Abr. *Copyhold* Z. a. and Com. Dig. *Copyhold* I. i.—(3) But according to Rolle, though livery is not made, the feoffment is a forfeiture, if there be a letter of attorney to deliver ſeiſin, becauſe then the feoffee may at any time perfect the conveyance; and he thinks, that lord Coke ought to be underſtood with this diſtinction. 1. Ro. Abr. 508. pl. 12. 13. However the diſtinction in Rolle may be doubted, for the criterion of forfeiture of a copyhold by alienation ſeems to be the *actual paſſing* of an unlawful eſtate to the lord's prejudice, and in the caſe of the feoffment no intereſt can paſs till livery; nor is it ſtrictly true, that the feoffee may at any time perfect the conveyance, for it is poſſible, that before livery the feoffor may revoke the power of attorney, or the attorney may die or refuſe to execute his authority. See further on this ſubject 3. Leon. 109. and Godb. 269.—(4) The *plural* number is here ſignificant; for a leaſe for *one* year is not a forfeiture, ſuch leaſe by copyholder being, as lord Coke in another place writes, warranted by the *general* cuſtom of the realm. 4. Co. 26. See alſo acc. 9. Co. 75. b. W. Jo. 249 and Litt. Rep. 233. See alſo 1. And. 192. and Mo. 272. and 679. by which it appears that it was once doubted, whether to warrant a leaſe for one year without the lord's licence a *particular* cuſtom was not neceſſary.—The following annotation is by lord Hale. Vid. *as to forfeiture by leaſe or alienation. A is leſſee of a manor for five years; copyholder grants bargains and ſells his copyhold to A and his heirs. Ruled, that this amounts to a ſurrender; and if after the term he who hath the fee of the manor admits A or his heir, it amounts to a new grant.* T. 21. Jac. C. B. *Haſſel and Hamerton.—Copyholder in fee makes leaſe for a year and ſo* de anno in annum *during the life of the copyholder* except one day at the end of every year; *and this was adjudged to be a forfeiture; and ſo if it was by covenant, for it amounts to a leaſe for two years, and the exception*

of the king. P. 1650. *Cremer and Burnet.* Hal. MSS. See Coneſby and Ruſkey in Cro. Eliz. 459. Cremer and Burnet in Sty. 266. and 2. Ro. Abr. 196. pl. 34. and Lee's caſe in Cro. Cha. 521. W. Jo. 449. and 1. Ro. Abr. 498. pl. 1. See alſo the obſervations on the two latter caſes in Vin. Abr. *Prerogative* G. c. pl. 3. 4. See further on the deſtruction of copyhold eſtates in Com. Dig. *Copyhold* B. 3. and L. and Vin. Abr. *Copyhold* R.—(8) See note 2. ſupra.—(9) *Tithes are grantable by copy.* P. 43. Eliz. B. R. *Sands and Drury* per curiam. Hal. MSS. See as to the caſe here cited by lord Hale Vin. Abr. *Copyhold* E. pl. 1. See alſo as to things grantable by copy, Vin. Abr. *ubi ſupra* and Com. Dig. C. 1.

eo domino vel balivo, et ipsi ea tradant aliis in villenagium tenenda. But although it be incident to the estate of a copihold to passe, as our author saith, by surrenders, [b] yet so forcible is custome, that by it a freehold and inheritance may also passe by surrender(1) (without the leave of the lord) in his court, and be delivered over by the baily to the feoffee, according to the forme of the deed, to be inrolled in the court or the like.

[b] Coram rege Mich. 31. E. 3. Ranulph Huntingfield's case. 3. E. 3. Corona 310. 11. H. 4. 83. per Thorning.

Ad hanc curiam venit A de B et sursum reddidit, &c. Here Littleton putteth an example of a surrender in court, and in this example three [c] things are to be observed.

[c] Vide 4. Co. inter les cases de copiholds.

First, that the surrender to the lord be generall without expressing of any estate(2), for that he is but an instrument to admit *Cesty a que use*, for no more passeth to the lord, but to serve the limitation of the use (3); and *Ce' que use*, when he is admitted, shall be in by him that made the surrender, and not by the lord (4).

Secondly, if the limitation of the use be generall, then *Ce' que use* taketh but an estate for life, and therefore here Littleton expresseth upon the declaration of the use, the limitation of the estate, *viz.* in fee simple, fee taile, &c.

Thirdly, the lord cannot grant a larger [d] estate then is expressed in the limitation of the use. Littleton here putteth his case of one. If two joyntenants be of copihold lands in fee, and the one out of court according to the custome surrender his part to the lord's hands, to the use of his last will, and by his will deviseth his part to a stranger in fee, and dyeth, and at the next court the surrender is presented, by the surrender and presentment the joynture was severed, and the devisee ought to be admitted to the moitie of the lands, for now by relation the state of the land was bound by the surrender (5).

[d] Mich. 2. & 3. Ph. & M. in Com. Banco, by the whole court in Constable's case of Pickenham in Norfolke.

In manus domini. *Dominus manerii.* The lord of a mannor is described [e] by Fleta as he ought to be, in these words. *In omnibus autem et supra omnia decet quemlibet dominum verbis esse veracem, et in operibus fidelem, Deum et justitiam amantem, fraudem et peccatum odientem, voluntariosque, malevolos, et injuriosos contemnentem, et apud proximos pietatem vultumque motibilem et plenum, ipsius enim interest potius consilio quam viribus uti, propriove arbitrio. Non cujuslibet voluntarii juvenis menestralli, vel adulatoris, sed jurisperitorum virorum fidelium et honestorum, et in pluribus expertorum, consilio debet favere. Qui bene sibi vult disponere et familiæ suæ, scire veram executionem terrarum suarum necessarium erit, ut perinde sciat quantitatem suarum facultatem et finem annuarum expensarum.* And the residue is fit for every lord of a mannor to know and follow, which were too long here to be recited, only his conclusion having spoken of the lord's revenue and expences I will adde, *Quæ omnia distincte scribantur in membranis, ut perinde sagacius vitam suam disponat et facilius convincat mendacia compotariorum.*

[e] Fleta lib. 2. c. 65. & 71.

[f] If the lord of the manor for the time being be lessee for life or for yeares, gardian, or any that hath any particular interest, or tenant at will of a manor, (all of which are accounted in law *domini pro tempore)* and doe take a surrender into his hands, and before admittance the lessee for life dyeth, or the yeare's interest or custody doe end or determine, or the will is determined, though the lord commeth in above the lease for life or for yeares, the custody or other particular interest or tenancy at will, yet shall he be compelled(6) to make admittance according to the surrender; and so was it holden in 17. Eliz. in the earle of Arundel's case, which I my selfe heard.

[f] See more of this 4. Co. the cases of copiholds. Trin. 1. Ja. Rot. 854. inter Shapland & Ridler in repl. in Com. Banco. the case of the gardian in socage adjudged. (Cro. Jam. 98. 6. Co. 60. b.)

Et dat domino de fine. For the signification of this word *(finis) Vide* Sect. 174. 182. 194. 441.

Of fines due to the lord by the copiholder, some be by the change or alteration of the lord(7), and some by the change or alteration of the tenant. The change of the lord ought to be by act of God, otherwise no fine can be due; but by the change of the tenant either by the act of God, or by the act of the party, a fine may be due: for if the lord doe alledge a custome within his manor to have a fine of every of his copiholders of the said manor at the alteration or change of the lord of the mannor, be it by alienation, demise, death, or otherwise; this is a custome against the law, as to the alteration or change of the lord by the act of the party, for by that meanes the copiholders may be oppressed by multitude of fines, by the act of the lord. But when the change groweth by the act of God, there the custome is good as by the death of the lord. And this, upon a case in the chancery [g] referred to Sir John Popham chiefe justice, and upon conference with Anderson, Periam, Walmesley, and all the judges of Serjants Inn in Fleetstreet, was resolved, and so certified into the chancery. But upon the change or alteration of the tenant (8), a fine is due unto the lord.

[g] T. 39. Eliz. betweene the copiholders of the mannor of Guilsirns, in the county of Northumberland and Armestrong, lord of the manor, in chancerie. (11. Co. 44. a. Cro. Cha. 196. 2. Ro. Abr. 578.)

Of fines taken of copiholders some be certaine by custome, and some be incertaine, but that fine, though it be *incertus*, yet must it be *rationabilis*. And that reasonablenesse shall be discussed by the justices upon the true circumstances of the case appearing unto them; and if the court where the cause dependeth, adjudgeth the fine exacted unreasonable, then is not the copi-

(6) M. 9. Jac. C. B. R. 5. D. D. *Wilde and Francis. Adjudged accordingly, and the admittance is* tenendum *but not* ad voluntatem domini. Hal. MSS.—Vid. acc. ante 49. a. and note 6. there, and also the books cited in Blackst. Law Tr. 8vo. ed. v. 1. p. 144. From these authorities it appears, that estates held *by copy of court-roll*, but not *at the will of the lord*, have been deemed *freehold* estates as well by others, as by lord Coke, and in order to distinguish them from the ordinary kind have been denominated *customary freeholds*. In consequence of the prevalence of this notion, a considerable number of *such* tenants some few years ago claimed a right of voting as *freeholders* at the election of knights of the shire. This gave occasion to a short but most excellent treatise on the subject, in which the learned author traces the origin of lands held in this peculiar way, and proves by the most clear and forcible arguments, that, though these tenures in some respects *resemble* freeholds, they are in *truth* nothing more than a *superior* kind of copyhold. Soon after the publication of this treatise, the doctrine asserted in it received confirmation from an act of parliament, declaring, that no person holding *by copy of court-roll* should be intitled to vote at the election of knights of the shire. See Blackst. Law Tr. 8vo ed. v. 1. page 105. and 31. G. 2. c. 14.—(2) *Copyholder for life surrenders to the use of D, the lord accepts the surrender and admits D for his life who dies. Adjudged, that the surrenderor shall not have the land, but the lord, for he who surrendered had not any reversion. But if copyholder surrenders to the use of B, there on B's death the surrenderor shall have, for he hath the remainder.* M. 6. Car. B. R. Crook n. 10. *King and Lord.* Hal. MSS. See Cro. Cha. 204. and S. C. 1. Ro. Abr. 504. 2. Ro. Abr. 462. See 9. Co. 107. Vin. Abr. *Copyhold* P. 6. Mod. 68. 1. Salk. 188. and Gilb. Ten. 3d Lond. ed. 257.—(3) See Post 62. a. and Jefferies's case cited from Wilf. in note 1.—(4) Acc. by Wilmot justice in 4 Burr. vol. 3. page 1543. and see further as to this Yelv. 223. 4. Co 27. b. Com. Dig. *Copyhold* F. 14. and Gilb. Ten. 3d Lond. ed. 257.—(5) M. 3. Jac. B. R. *Crook n.* 30. *Porter and Porter.* Hal. MSS. See Cro. Jam. 100. by which the case appears to have been adjudged according to lord Coke's doctrine of relation. See further as to the relation of Surrenders in Vin. Abr. *Copyhold* T. b.—(6) Nota *ruled, that action on the case doth not lie against the lord who refuses to admit, but the remedy is to compell him in chancery.* P. 13. Jac. B. R. Crook n. 1. *Ford and Hoskins.* Hal. MSS. See Cro. Jam. 368. and S. C. Mo. 842. 2. Bulstr. 336. But it is said to have been adjudged, that though *surrenderee* cannot have action on the case against the lord for refusing to admit, yet the *surrenderor* may. 3. Bulstr. 217.—(7) Vid. *for tallages in Wales on change of the lord.* 34. H. 8. c. 26. Hal. MSS. See sect. 93.—(8) See Vin. Abr. *Copyhold* W. b. See also much curious learning on this subject in the case of the earl of Bath and Abney in 4. Burr. vol. 1. page 206. In that case the court held, that the executor of a copyholder, for a long term of years, was compellable to be admitted and to pay a fine. The great point of the case was, whether a fine became due on every *change of the tenant*, or on *change of the estate* only.

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exception of a day doth not aid the case. Vid. 10. Jac. B. R. *Bulstr. n.* 201. *Hamlen and Hamlen.* T. 10. Jac. ibid. *n.* 232. *Luttrell and Weston.*—*Copyholder makes lease by indenture for one year, and same day by another makes another lease for one year to commence after the former, and so a third lease by a third indenture for one year after the second, and then surrenders to the steward to the use of the*

copiholder compellable to pay it (1). And so was it adjudged: [b] for all excessivenesse is abhorred in law. See more concerning fines of copiholders in my Reports [i] which are so plainly there set downe, as they need not be rehearsed here.

[b] Pasch. 1. Jac. in com. banco rot. 1845. inter Stallon & Brady.
[i] 4. Co. the cases of copiholds.

Sect. 75.

ET tiels tenants sont appelles tenants per copie de court rolle; pur ceo que ils nont auter evidence concernant lour tenements, forsque les copies des rolles de court.

AND these tenants are called tenants by copie of court rolle; because they have no other evidence concerning their tenements, but onely the copies of court rolles.

ILS nont auter evidence. This is to be understood of evidences of alienation; for a release of a right by deed a copiholder (that commeth in by way of admittance) may have, and that is sufficient to extinguish the right of the copyhold, which he that maketh the release had (2).

(4. Co. 25.)

Sect. 76.

ET tiels tenants ne emplederont, ne serront empledes de lour tenements per briefe le roy. Mes sils voilent empleder auters pur lour tenements, ils averont un plaint fait en le court le seignior en tiel forme, ou a tiel effect: A. de B. queritur versus C. de D. de placito terræ, videlicet, de uno mesuagio, quadraginta acris terr', quatuor acris prati, &c. cum pertin'. & facit protestationem sequi querelam istam in natura brevis dominis regis assisæ mortis antecessoris ad communem legem, vel brevis domini regis assisæ novæ disseisinæ ad communem legem, aut in natura brevis de for-

AND such tenants shall neither implead nor be impleaded for their tenements by the king's writ. But if they will impleade others for their tenements, they shall have a plaint entred in the lords court in this forme, or to this effect: A. of B. complaines against C. of D. of a plea of land, viz. of one mesuage, forty acres of land, four acres of meadow, &c. with the appurtenances, and makes protestation to follow this complaint in the nature of the king's writ of assise of Mordancester at the common law, or of an assise of novel disseisin, or formedon in the discender at the

TIELS tenants ne emplederont, ne serront empledes, &c. This is evident, and needs no explanation.

Mes sils voilent empleder auters, ils averont, &c. Put the case that the demandant in a pleint in nature of a reall action recovereth the land erroniously, what remedy for the party grieved? For he cannot have the king's writ of false judgement in respect of the basenesse of the estate and tenure, being in the eye of the law but a tenant at will. And the freehold being in another, he shall have a petition to the lord in the nature of a writ of false judgement, and therein assigne errors, and have remedy according to law.

De forma donationis in discender ad communem legem. By the opinion of Littleton, as there may be an estate taile by custome with the co-operation of the statute of W. 2. cap. 1. so may he have a *formedon in discender*; but as the statute without a custome extendeth not to copiholds, so a custome

4. H. 4. 34. adjudged in parliament.

14. H. 4. 34. 1. H. 5. 11. Vet. N. B. 18. 13. R. 2. tit. Faux judgment. 7. E. 4. 19. 21. E. 4. 80.
(4. Co. 21. b.)

3. Co. 8. 9. in Heydon's case 4. Co. 22. 23. 15. H. 8. Br. tit. Taile.
(3. Co. 8. b. 1. Ro. Abr. 838.)

(1) 1. *What shall be a reasonable fine. Two years and an half of racked rent adjudged unreasonable; and year and an half is sufficient.* T. 6. Car. B. R. *Crook n.* 8. *Dow and Golding. Two years value of racked rent adjudged unreasonable.* 2. *He, who would take advantage of a forfeiture for non payment of a fine uncertain, ought to assess a reasonable fine and prefix a day and place within the manor for payment of it. Otherwise non-payment is not a forfeiture.* 3. *If it be doubtful, whether the fine be reasonable or not, non-payment is not a forfeiture.* M. 6. Jac. C. B. *n.* 5. *D. D. Willowe's case.* Vide tamen, *for if in truth it be reasonable, non-payment at the day prefixed has been held a forfeiture.* M. 1650. *Parker's case.—Custom, that copyholder shall pay a fine of two years rent or under, held good.* M. 10. Jac. B. R. 2. *Bulstr. n.* 23. *Allen and Abraham. But* M. 36. 37. Eliz. *A B. n.* 148. *In Green and Bury it was ruled void for the uncertainty.* Hal. MSS. See the first case in Cro. Cha. 196. the second in 13. Co. 3. the third in 2. Bulstr. 32. and the fourth in 2. Ro. Abr. 265. pl. 1. Note that in the case, in which two years rack rent was deemed an unreasonable fine, the admittance was on an *alienation* and not on a *descent*, and that on a *descent* two years value is generally understood to be reasonable. See Rep. temp. Finch 464. See further on the *quantum* of fines tit. *Copyhold* in Vin. Abr. X. b. Com. Dig. H. 4. and New Abr. I. 3. and the case of the earl of Bath and Abney in 4. Burr. vol. 1. page 206.—(2) Vid. hic *fol.* 59. *a. A surrenders to the use of B, clearly the land is bound by the surrender, but B hath nothing in the land till admittance.* M. 8. Car. B. R. *Burgoin and Spurling. But if the surrenderee dies, his heir shall be admitted. If the lord accepts rent of B, it is a good admittance.* M. 24. Car. B. R. *Baker and Denham. A surrenders to the use of B, who before admittance surrenders to the use of C and C is admitted. Ruled, that C takes nothing, for B who surrenders hath not any interest to surrender till admittance.* 24. Eliz. *Alderman Dixe's case.* M. 6. Jac. B. R. *m. n* 6. *Wilson and Woodhall. But yet it hath been ruled good, for the admittance of C shall be implied to be an admittance of B first, and so there shall be priority* M. 24. Car. B. R. *Baker and Denham.* P. 41. Eliz. C. B. *Colchin and Colchin.* Vid. T. 15. Jac. B. R. 2. *Poph.* 5. Hal. MSS.—See the first case in Cro. Cha. 273. & 283. and 1. Ro. Abr. 473. & 500. the second in Sty. 145. the fourth case in Yelv. 144. the fifth in Cro. Eliz. 662. and 1. Ro. Abr. 499. pl. 1. See further as to the subject of the cases in this annotation, Com. Dig. *Copyhold* F. 11. and Vin. Abr. *Copyhold* U. W. Y. and Q. b.—(3) *It has been often adjudged accordingly; and in such case surrender is not a discontinuance, but there may be a bar by custom either by surrender or recovery, but not without custom.* M. 2. Car. C. B. *Crook n.* 4. P. 27. Eliz. *Clun and Turner.* P. 1651. B. R. *Franklin and Myn.* Hal. MSS.—See the case of M. 2. Cha. in Cro. Cha. 42. See also Post 60. b. and note 1. & 2. there.

the lord. Ruled, 1. *Though this be by several indentures, and two days interpose between the end of one lease and the beginning of another, it is a forfeiture.* 2. *The covin is apparent, though it was not found.* 3. *Though he surrenders to the lord not having notice, the lord shall be adjudged to be in point of forfeiture, and shall avoid the leases.* M. 7. Car. B. R. n. 15. *Mathew and Whetton.* Hal. MSS.

ſtome without the ſtatute cannot create an eſtate tayle. Now it is not a ſufficient prooſe, that lands have been granted in taile; for albeit lands have anciently and uſually beene granted by copie to many men and to the heires of their bodies, that may be a fee ſimple conditionall as it was at the common law. But if a remainder have been limited over ſuch eſtates and enjoyed, or if the iſſues in taile have avoided the alienation of the anceſtor, or if they have recovered the ſame in writs of *formedon* in the diſcender, theſe and ſuch like be proofes of an eſtate taile. [*y*] But if by cuſtome copihold may be intailed, the ſame by like cuſtome by ſurrender may be cut off (1); and ſo hath it beene adjudged. [*z*] Some have holden that there was a *formedon* in the diſcender at the common law (2).

ma donationis in diſcendere ad communem legem, *ou en nature daſcun auter briefe, &c.* Plegii de proſequendo, F.G.&c.

common law, or in the nature of any other writ, &c. Pledges to proſecute F. G. &c.

(1. Ro. Abr. 506. 1. Sid. 267. 314. Cro. Eliz 717.)

[*y*] P. 29. Eliz. inter Hill and Upcheic. Cuſtome deins le manor de Overhall in Eſſex. 21. El 2. Dier 366. 23. Eliz Dier 373.

[*z*] 10. E. 2. Formdon 55. 21. E. 3. 47. Pl. Com. 240. 4. E. 2. Formdon 50.

Sect. 77.

CAR (il eſt dit) que ſi le Seignior, &c. And here Littleton ſaith truly that it is ſaid ſo, for ſo it is ſaid in 13. E. 3. 13. R. 2. 32. H. 6. & 7. E 4. 19.

But he ſetteth not down his owne opinion, but rather to the contrary, as hereafter in this chapter appeareth. But now *magiſtra rerum experientia* hath made this cleare and without queſtion, that the lord cannot at his pleaſure put out the lawfull coppiholder without ſome cauſe of forfeiture, and if he do the coppiholder, may have an action of treſpaſſe againſt him, for albeit he is *tenens ad voluntatem domini*, yet it is *ſecundum conſuetudinem manerii* (4).

13. E. 3. tit Præſcript. 20. 13. R. 2. faux judgement 7. 32 H. 6. tit. Subpena 2. 7. E. 4. 19.

Vide ſect. 81. 82. 84. 132.

[*b*] And Britton ſpeaking of theſe kinde of tenants ſaith thus, *et ceux ſont priviledges en tiel maner, que nul de les doit ouſter de*

[*b*] Vid. 42. E. 3. 25. Brit. fol. 165.

ET coment que aſcun tiels tenants ont inheritance ſolonque le cuſtome del manor, uncore ils nont eſtate forſque a volunt le ſeignior ſolonque le courſe del common ley. Car il eſt dit, ſi le ſeignior eux ouſta, ſils nont auter remedy forſque de ſuer a lour ſeigniors per petition; car ſils averont auter remedie, ils ne ſerront dits tenants a volunt le ſeignior ſolonque le cuſtome del manor. Mes le ſeignior ne voile enfreinder le cuſtom que eſt reaſonable en tiels caſes. (3)

Mes Brian *chiefe juſtice dit, que ſon opinion ad touts foits eſte, et unquez ſerra, ſi tiel tenant per le cuſtome payant ſes ſervices ſoit eject per le ſeignior, que il avera action de treſpaſs vers luy,* H. 21. Ed. 4. *Et iſſint fuit lopinion de* Danby *chiefe juſtice, M.* 7. Ed. 4.

AND although that ſome ſuch tenants have an inheritance according to the cuſtome of the manor, yet they have but an eſtate but at the will of the lord according to the courſe of the common law. For it is ſaid, that if the lord doe ouſt them, they have no other remedy but to ſue to their lords by petition, for if they ſhould have any other remedy, they ſhould not be ſaid to be tenants at will of the lord according to the cuſtome of the manor. But the lord cannot breake the cuſtome which is reaſonable in theſe caſes.

But *Brian* chiefe juſtice ſaid, that his opinion hath alwaies been and ever ſhall be, that if ſuch tenant by cuſtome paying his ſervices be ejected by the lord, he ſhall have an action of treſpaſs againſt him. *H.* 21. *Ed.* 4. And ſo was the opinion of *Danby* chiefe juſ-

Car

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

(2) See further as to intails of copyholds in Vin. Abr. *Copyhold* F. E. G. c.

(3) What follows in this ſection is neither in L. & M.—Roh.—nor P.—The addition firſt appears in Redm.

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

See the firſt caſe cited by lord Hale in Winch 66. W. Jo. 41. and Hutton 65. though in theſe books the name is different. See the ſecond caſe in 1. Bulſtr. 189. the third in 1. Bulſtr. 215. and the fourth in Cro. Cha. 233. W. Jo. 249. and 1. Ro. Abr. 508. pl. 10.—It is obſervable, that according to the third caſe cited by lord Hale a mere covenant that the leſſee ſhall enjoy for a ſecond year is a forfeiture; but the ſecond caſe and other authorities are to the contrary, becauſe; though *in general* a covenant amounts to a leaſe, yet it ſeems harſh to give ſuch a conſtruction, where a leaſe amounts to a forfeiture, and the intention of the parties may have effect by way of agreement. See Cro. Jam. 311. and 2. Keb. 267. See further as to leaſes by copyholders and forfeiture on that account, New Abr. tit. *Leaſes* I. 6. Vin. Abr. Copyhold G. c. H. C.—(5) See alſo tit. *Copyhold* in Vin. Abr. D. c. to E. d. 2. New Abr. L. and Com. Dig. M.—(6) Nota, *by Rolle ſurrender into the hands of the ſteward, though out of the court is good without cuſtom.* M. 24. Car. B. R. *Baker and Denham.* Hal. MSS. See acc. 1. Ro. Abr. 500. pl. 3. 4. Leon. 211. 1. Salk. 184. Some make a diſtinction between ſtewards by *deed* and ſtewards by *parol*, and think, that only the former can take ſurrenders out of court. Godb. 142. and 1. L. Raym. 159. But this diſtinction has been frequently denied, and indeed ſeems unſupported by any good reaſon. Cro. Jam. 526. Com. Rep. 85.

Car il dit que le tenant per le cuſtome eſt cibien enheritor de aver ſon terre ſolonque le cuſtome, come ceſtuy que ad franktenement al common ley.

tice in 7. Ed. 4. For he ſaith, that tenant by the cuſtome is as well inheritour to have his land according to the cuſtome, as he which hath a freehold at the common law (1).

tiels tenements, tant come ilz font les ſervices que a lour tenements appendent, ne nul ne poet lour ſervices acreſtre ne change a faire autres ſervices ou pluis. And herewith agreeth Sir Robert Danby, chiefe juſtice of the court of Common Pleas, M. 7. E. 4. 19. and Sir Thomas Brian his ſucceſſor, M. 21. E. 4. 80. *viz.* that the copyholder doing his cuſtomes and ſervices, if he be put out by his lord, he ſhall have an action of treſpaſſe againſt him.

CHAP. 10. Sect. 78.

Tenant per le Verge.

TENANTS per le verge ſont en tiel nature come tenants per le copy de court roll. Mes la cauſe, pur que ils ſont appelles tenants per la verge, eſt per ceo que quant ils voilent ſurrender lour tenements en le main lour ſeignior al uſe dun auter, ils averont un petite verge (per le cuſtome) en lour main, le quel ils bailera al ſeneſchall ou al bailife ſolonque le cuſtome et uſe del manor, et celuy, que avera la terre, prendra meſme la terre en le court, et ſon priſel ſerra enter en le roll, et le ſeneſchal ou le bailife ſolonque le cuſtome delivera a ce-

TEnants by the verge are in the ſame nature as tenants by copy of court roll. But the reaſon, why they be called tenants by the verge, is for that when they will ſurrender their tenements into the hands of their lord to the uſe of another, they ſhall have a little rod (by the cuſtome) in their hand, the which they ſhall deliver to the ſteward or to the bailife according to the cuſtome of the manor, and he which ſhall have the land ſhall take up the ſame land in court, and his taking ſhall be entred upon the roll, and the ſteward or bailife according to the cuſtom

TENANTS per le verge. This tenant *per le verge* is a meere copiholder, and taketh his name of the ceremony of the verge (2). Tenure in villenage, or by baſe tenure is thus deſcribed by Britton, [a] *Villenage eſt tenant de demeines de cheſcun ſeigneur baille, a tener a ſon volunt per villeines ſervices de enprover al opes le ſeignior, et livere per verge et nient per title de eſcrit, ne per ſucceſſion de heritage, dont gards de mariages ne auters ſervices reals, come homage et reliefes, ne ponent des amnones de demeines ne de villenage eſts demand.*

14. H. 4. 33. (Cro. Cha. 597.)

[a] Britton fol. 165. a. F. N. B. fol. 12. Liberatio per Virgam.

A le ſeneſchal. (Which we call a ſteward) *seneſchallus* is derived of *ſein* a houſe or place, and *ſchale* an officer or governor. Some ſay that *ſen* is an ancient word for juſtice, ſo as *ſeneſchall* ſhould ſignifie *officiarius juſtitiæ*; and ſome ſay that ſteward is derived of *ſtewe* (that is) a place, and *ward*, that ſignifieth a keeper, warden, or governor; and others, that it is derived of *ſtede*, that ſignifieth a place alſo, and *ward* as it were the keeper or governor of that place. But it is a word of

(1) This muſt be underſtood with exception of ſuch copyholds, as by the cuſtom are grantable for life only.

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

Vide sect. 92. & 379. Fleta lib. 2. cap. 66. Vide statut. de extent. maner. 14. E. 1.

of many significations. In this place it signifieth an officer of justice, *viz.* a keeper of courts, &c. Fleta describeth the office and duty of this officer at large most excellently: *Provideat sibi dominus de seneschallo circumspecto et fideli, viro provido et discreto et gratioso, humili, pudico, pacifico, et modesto, qui in legibus consuetudinibusque provinciæ et officio seneschalciæ se cognoscat, et jura domini sui in omnibus teneri affectet, quique subballivos domini in suis erroribus et ambiguis sciat instruere et docere, quique egenis parcere, et qui nec prece vel pretio velit à tramite justiciæ deviare, et perverse judicare; cujus officium est curias tenere maneriorum; et de subtractionibus consuetudinum, serviciorum, reddituum, sectarum ad cur', mercata, molendina domini et ad visus franciplegii aliarumque libertatum domino pertinentium inquirat, &c.* The residue pertaining to his office is worth your reading at large. Every steward of courts is either by deed or without deed (1); for a man may be retained a steward to keepe his court baron and leet also belonging to the mannor without deed, and that reteyner shall continue untill he be discharged. The lord of a mannor may make admittances out of court and out of the mannor also (2), as at large appeareth in my Reports.

luy que prist la terre meisme le verge, ou un auter verge, en nosme del seisin; et pur cel cause ils sont appelles tenants per le verge, mes ils nont auter evidence, sinon pur copy de court roll.

shall deliver to him that taketh the land the same rod, or another rod, in the name of seisin; and for this cause they are called tenants by the verge, but they have no other evidence but by copy of court roll.

Vide 4. Co Cases de Copiholds. fo. 26, 27, 30.

Sect. 79.

Vide Lamb. exposition of Saxon words.

A Le bailie. This word *bailie* as some say commeth of the French word *baylife*, in Latin *ballivus*; but in truth baily is an old Saxon word, and signifieth a safe keeper or protector, and *baile* or *baillium* is safe keeping or protection: and thereupon we say when a man upon surety is delivered out of prison *traditur in ballium*, he is delivered into bayle, that is, into their safe keeping or protection from prison: and the sherife that hath *custodiam comitatus*, is called *ballivus*, and the county *balliva sua*.

Fleta lib. 2. ca. 67. &69.

Reve, is derived of the Saxon word *gerefa* or *gereve*; and by contraction or rather corruption *greve*, or *reve*, and is in Latine *præfectus* or *præpositus*. It signifies as much as *appruator* a dispoſer or director, as woodreeve, sheepe reve, shire reeve, &c. whereof more shall be said hereafter. Vide Fleta lib. 2. cap. 67. where he treateth of the office of the bailise, and cap. 69. *de officio præpositi*, of

ET auxy en divers seigniories et mannors, il y ad tiel custome, si tiel tenant, que tient per custome, voloit alener ses terres ou tenements, il poit surrender ses tenements a le baily, ou a le reeve, ou a deux probes homes del seigniory, al use cestuy que avera le terre, daver en fee simple, fee taile, ou pur terme de vie, &c. Et tout ceo ils presenteront al procheine court, et donque celuy, que avera la terre per copy de court roll, avera mesme la terre solonque lentent del surrender.

AND also in divers lordshipps and mannors there is this custome, viz. if such a tenant, which holdeth by custome, will alien his lands or tenements, he may surrender his tenements to the bailife or to the reeve, or to two honest men of the same lordship, to the use of him which shall have the land, to have in fee simple, fee taile, or for terme of life, &c. and they shall present all this at the next court, & then he, which shall have the land by copy of court roll, shall have the same according to the intent of the surrender.

the

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

(2) See ante 59. a. and note 6. there.

the office of the reeve, and what belongeth of duty and right to either of them, which words are too long here to be inſerted. Only this I will take out of him. *Baliwus autem cujuſcunque manerii eſſe debet in verbo verax, et in opere diligens et fidelis, ac pro diſcreto appruatore cognitus plegiatus et electus, qui de communioribus legibus pro tanto officio ſufficient' ſe cognoſcat, et quod ſit ita juſtus, quod ob vindictam ſeu cupiditatem non quærat verſus tenentes domini nec alios, &c. Præpoſitus autem tanquam appruator et cultor optimus, &c. domino vel ejus ſeneſchallo palam debet preſentari, cui injungatur officium illud indilate. Non ergo ſit piger aut ſomnolentus, ſed efficaciter et continue commodum domini adipiſci nitatur et exarare, &c.* The reſidue concerning both the offices being worth your reading.

A le bailie ou a le reeve. Littleton intendeth into the hands of the lord by the hands of the baliffe or the reeve.

Ou al deux probes homes del ſeigniorie. The cuſtome doth guide theſe ſurrenders out of court and the cuſtome muſt be purſued.

Vid. 4. Co. 25. Kite and Quaintin's caſe.

Et tout ceo ils preſenteront al procheine court, &c. By the ſurrender out of court, the copihold eſtate paſſeth to the lord under a ſecret condition that it be preſented at the next court according to the cuſtome of the mannor. And therefore if after ſuch a ſurrender, and before the next court, he that made the ſurrender dieth, yet the ſurrender ſtandeth good (1), and if it be preſented at the next court *ce' a que uſe* ſhall be admitted thereunto; but if it be not preſented at the next court according to the cuſtome, then the ſurrender becometh void (2), and ſo was it cleerly holden Paſc. 14. Eliz. in the court of Common Pleas which I my ſelfe heard.

(4. Co 29. b)

Sect. 80.

ET iſſint eſt aſcavoire, que en divers ſeigniories, et divers manors, ſont pluſors et divers cuſtomes en tielx caſes, quant a prender tenements, et quant a pleder, et quant as auters choſes et cuſtomes a faire; et tout ceo, que neſt pas encounter reaſon, poit bien eſtre admitte et allow.

AND ſo it is to be underſtood, that in divers lordſhips, and in divers mannors, there be many and divers cuſtomes in ſuch caſes, as to take tenements, and as to plead, and as to other things and cuſtomes to be done; and whatſoever is not againſt reaſon may well be admitted and allowed.

SONT pluſors et divers cuſtomes. This was cautiouſly ſet downe, for in reſpect of the variety of the cuſtomes in moſt mannors, it is not poſſible to ſet down any certainty, only this incident inſeparable every cuſtome muſt have, *viz.* that it be conſonant to reaſon, for how long ſoever it hath continued, if it be againſt reaſon, it is of no force in law.

Enconter reaſon. This is not to be underſtood of every unlearned man's reaſon, but of artificiall and legal reaſon warranted by authority of law: *Lex eſt ſummæ ratio.*

Sect. 81.

Ils ſont apelles tenants per baſe tenure. Of this ſufficient hath been ſpoken before.

ET tiels tenants que teignont ſolonque le cuſtome dun ſeigniorie ou dun manor, coment que ils ont eſtate denheritance ſolonque le cuſtome del ſeigniory ou manor, uncore pur ceo que ils nont aſcun

AND theſe tenants which hold according to the cuſtome of a lordſhip or mannor, albeit they have an eſtate of inheritance according to the cuſtome of the lordſhip of mannor, yet becauſe *frank-*

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

(2) See further as to the time of preſenting ſurrenders, Vin. Abr. *Copyhold* U. a. Com. Dig. *Copyhold* F. 101

franktenement per le cours del common ley, ils ſont appelles tenants per baſe tenure.

they have no freehold by the courſe of the common law, they are called tenants by baſe tenure.

Sect. 82.

TENANT a volunt ſolonque le cuſtom puit aver eſtate denheritance, etc. Here note that Littleton alloweth, that by the cuſtome of the manor the copiholder hath an inheritance, and conſequently the lord cannot put him out without cauſe.

ET divers diverſities y ſont perenter tenant a volunt, que eſt eins per leaſe ſon leſſor per le courſe del common ley, et tenant ſolonque le cuſtome del manor en le forme avandit. Car tenant a volunt ſolonque cuſtom puit aver eſtate denheritance (come eſt avantdit.) al volunt le ſeignior ſolonque le cuſtome et uſage del manor. Mes ſi home ad terres ou tenements, queux ne ſont deins tiel manor ou ſeigniorie, ou tiel cuſtome ad eſte uſe en le forme avantdit, et voile leſſer tiels terres ou tenements a un auter, a aver et tener a luy et a ſes heires a le volunt le leſſor, ceux parolx (a les heires de le leſſee) ſont voids. Car en ceſt caſe ſi le leſſee devie et ſon heire enter, le leſſor avera bon action de treſpas envers luy; mes nemy iſſint envers lheire le terre per le cuſtome en aſcun cas, &c. pur ceo que le cuſtome de le manor en aſcun cas luy puit aide de barrer ſon ſeignior en action de treſpaſſe, &c.

AND there are divers diverſities between tenant at will, which is in by leaſe of his leſſor by the courſe of the common law, and tenant according to the cuſtome of the manor in forme aforeſaid. For tenant at will according to the cuſtome may have an eſtate of inheritance (as is aforeſaid) at the will of the lord, according to the cuſtome and uſage of the manor. But if a man hath lands or tenements, which be not within ſuch a mannor or lordſhip, where ſuch a cuſtome hath beene uſed in forme aforeſaid, and will let ſuch lands or tenements to another, to have and to hold to him, and to his heires at the will of the leſſor, theſe words (to the heires of the leſſee) are void. For in this caſe if the leſſee dieth, and his heire enter, the leſſor ſhall have a good action of treſpaſſe againſt him; but not ſo againſt the heire of tenant by the cuſtome in any caſe, &c. for that the cuſtome of the mannor in ſome caſe may aide him to barre his lord in an action of treſpaſſe, &c.

10. F. 4. 18. 22. E. 4. 13. 2. R. 2. batte 237. 11. Fl. 7. 22. 21. Fl. 7. 12.

which it is proved, that by the death of the leſſee the leaſe is abſolutely determined, which is proved by this, that if the heire enter the leſſor ſhall have an action of treſpaſſe, *quare vi et armis*, before any entry made by the leſſor.

Pur

Pur ceo que le cuſtome de le manor en aſcun caſe luy puit aider de barrer ſon ſeignior en action de treſpaſſe, &c. Hereby it appeareth, that by the opinion of Littleton the lord againſt the cuſtome of the manor cannot ouſt the copiholder.

Sect. 83.

ITEM lun tenant per le cuſtome en aſcuns lieux doit repairer et ſuſteiner ſes meaſons, et lauter tenant a volunt nemy.

ALSO the one tenant by the cuſtome in ſome places ought to repaire and uphold his houſes, and the other tenant at will ought not.

PER le cuſtome. For what a copiholder may or ought to doe, or not doe, the cuſtome of the manor [*a*] muſt direct it, for *conſuetudo manerii eſt obſervanda.* [*b*] But if there be no cuſtome to the contrary, waſt either permiſſive (1) or voluntary of a copiholder is a forfeiture of his copihold (2).

[*a*] Bracton lib. 2. fol. 76.

[*b*] Vid. 4. Co. 21. 22. &c. in Caſes de Copiholds.

Sect. 84.

ITEM lun tenant per le cuſtome ferra fealtie, et lauter nemy. Et pluſors auters diverſities y ſont perenter eux.

ALSO the one tenant by the cuſtome ſhall do fealty, and the other not. And many other diverſities there be betweene them.

LUN tenant per le cuſtome ferra fealtie, et lauter nemy. And the doing of fealty by a copiholder, proveth that a copiholder, ſo long as he obſerves the cuſtome of the manor and payeth his ſervices, hath a fixed eſtate. For tenant at will, that may be put out at pleaſure, ſhall not doe fealty. For to what end ſhould a man ſweare to be faithfull and true to his lord, and ſhould beare faith to him which he claimeth to hold of him, and that lawfully he ſhall doe his cuſtomes and ſervices, &c. when he hath no certaine eſtate, but may be put out at the pleaſure of of the leſſor, or he himſelfe may determine it at his pleaſure. Of theſe kind of cuſtomary tenants, and of many things concerning them, you may read more in the fourth booke of my Reports, fol. 21, 22, 23, &c. Thus much, as I have here ſet downe, may ſuffice, for the underſtanding of ſuch caſes and opinions as Littleton hath expreſſed (3).

Vide Sect. 132.

(Poſt 93. b.)

4. Co. 21. 22. 23. &c.

Finis Libri primi.

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

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

(3) See further on the ſubject of *copyhold* eſtates Kitchin on Courts, Coke's Copyholder and the Supplement, the book intitled the *Surveior's Dialogue*, Calthrope's Reading on Lord and Copyholder, Hughes on Original Writs 247. to 259. the title *Copyhold* in the Abridgments, the *Lex Cuſtumaria*, and the ſeveral other treatiſes on *copyhold* law, particularly thoſe by Shepherd and Nelſon.

THE

SECOND BOOK

OF THE

FIRST PART

OF THE

INSTITUTES

OF THE

LAWS OF ENGLAND.

Chap. I. Homage. Sect. 85.

HOMAGE eſt le pluis honorable ſervice, et pluis humble ſervice de reverence, que franktenant puit faire a ſon ſeignior. Car quant le tenant ferra homage a ſon ſeignior, il ſerra diſcinct, et ſon teſt diſcover, et ſon ſeignior ſeera, et le tenant genulera devant luy ſur ambideux genues, et tiendra ſes maines extendes, et joyntes enſemble enter les maines le ſeignior, et iſſint dirra: Jeo

HOMAGE is the moſt honorable ſervice, and moſt humble ſervice of reverence, that a franktenant may doe to his lord. For when the tenant ſhall make homage to his lord, he ſhall be ungirt, and his head uncovered, and his lord ſhall ſit, and the tenant ſhal kneele before him on both his knees, and hold his hands joyntly together betweene the hands of his lord, and ſhall ſay thus: I become your man

OUR author having taught us in his former booke the ſeveral diſtinct eſtates of lands and tenements as moſt neceſſary to be knowne, for the underſtanding of theſe two other bookes, doth in this ſecond book treat of the tenures (1) and ſervices, whereby the ſaid lands and tenements be holden; which he divideth into twelve parts, *viz. Homage, Fealty, Eſcuage, Knight ſervice, Socage, Frankalmoigne, Homage Auncеſtrell, Grand Serjeanty, Petit Serjeanty, Tenure in Burgage, in Villenage*, and into *Rents*. Wherein his method is moſt excellent (2), for he beginneth with *Homage*, becauſe it is the moſt humble ſervice of reverence, expreſſing the duty of the tenant to his lord, and the affectionate love and protection of the lord towards his tenant, as hereafter ſhall appeare. Secondly, *Fealty*, a ſacred ſervice, expreſſing by oath (4. Co. 8. a. Bevil's caſe.)

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

As to the firſt inſtitution of feuds, ſome writers deduce them from the earlieſt ages of the world, and ſuppoſe, that the idea of giving land on the terms of doing military ſervice for it, which it muſt be confeſſed was the grand principle of the feudal ſyſtem, muſt have been common to the moſt ancient nations, when they emigrated to form new ſettlements, and was the natural reſult of ſuch a ſituation. See Niell. Diſputat. Feud. cited in Voet. ad Pandect. lib. 38. Digreſſ. de Feud. 1. Gen. 47. But this opinion has been generally diſapproved of as fanciful, and founded on a narrow and incomprehenſive notion of feuds, and depending on reſemblances too faint and remote to warrant a juſt compariſon. Itter. de Feud. Imper. c. 1. ſ. 2. Spelman. Poſthum. 2. Others think, that they diſcover the origin of feuds in the inſtitution of *patron* and *client* by Romulus on the firſt founding of the Roman ſtate. Zaſius Epit. Feud. &c. cited in Itter. de Feud. Imper. c. 1. ſ. 3. But the ſlighteſt examination ſhews this connection to have been widely different from that between *lord* and *vaſſal*; the latter merely ariſing from *land*, and, according to the ſtrict and pure notion of feuds, being ever accompanied with ſervices of a *military* kind and alſo with a *juriſdiction*;

oath his fidelity to his lord.

Thirdly, *Escuage*, which is *servitium scuti*, the service of the shield.

Fourthly, *Knights service*, for the defence of the realme against outward hostility and invasions, which the better might be effected, if such duty fidelity and love were betweene lords and tenants, as ought to be, and as the law expecteth.

Fiftly, *Socage*, the service of the plough, aptly placed next knights service; for that the ploughman maketh the best souldier, as shall appeare in his proper place.

Sixtly, *Frankalmoigne*, service due to Almighty God, placed towards the middest for two causes: first, for that the middest is the most worthy and most honorable place; and secondly, because the first five preceding tenures and services, and the other fixe subsequent, must all become prosperous and usefull, by reason of God's true religion and service; for *nunquam prospere succedunt res humanæ, ubi negliguntur divinæ.* Wherein I would have our student follow the advice given in these ancient verses, for the good spending of the day.

Sex horas somno, totidem des legibus æquis.
Quatuor orabis, des epulisque duas.
Quod supersit ultrix sacris largire camænis.

Seventhly, *homage auncestrell*, ancient families enjoying, with their blood, the ancient inheritance of their forefathers, as a great blessing of the Almighty.

8. &9. *Serjeanty grand et petit*, due to the king only, to whom the highest and most eminent honor, ligeance, and reverence of all kinde is due; which hath two notable effects. First, *imperii majestas est tutelæ salus*, according to the old rule; and secondly, it is an assured means of long continuance of houses and families in prosperous estate, whereof our author speaketh in the chapter before.

10. Then followeth the tenure of Burgage, of ancient burghes and cities, &c. which are to be supported for the honour of the king, and for the maintenance of trade and traffique, the life of all common wealths, especially of ilands.

11. Villenage, for the performance of service, yet necessary service for the clensing of cities, boroughes, mannors, &c. and for the better manuring of arrable grounds, and increase of husbandry.

12. And lastly, tenure by Rents, which are called *vivi redditus*, because the lords and owners thereof do live by them; which they shall enjoy the better, if trade and traffique be maintained, and our native commodities, which are rich and necessary, holden up and saleable at a reasonable value. And now understanding his method, let us peruse our author's words.

And as our author beganne his first booke with fee simple, which is the most principall and worthiest estate, so he beginneth his second booke with homage, which is the most honorable and humble service.

[a] Glanv. li. 9. ca. 1. Bract. fo. 78. 80. Brit. fo. 170. 172. 173. Flet. li. 3. c. 16. Mir. c. 3. de Homage, et l. 5. Sect. 1.

Homage, is derived of [a] *homo*, and it is called *homage*, because when he doth this service, he saith, *Jeo deveigne vostre home.* And in English homage is called manhood, so as the manhood of his tenant, and the homage of his tenant is all one. *Mutua quidem debet esse dominii et homagii fidelitatis connexio, ita quod quantum homo debet domino ex homagio, tantum illi debet dominus ex dominio præter solam reverentiam.*

[b] Lib. Rub. ca. 55.

Foyal et loyal. These words are of great extent, for they extend to the observation of the lord's counsell in whatsoever is honest and profitable. [b] *Omnis homo debet fidem domino suo de vita et membris suis, et terreno honore, et observatione consilii sui per honestum et utile* (comprehended under these words *foyal et loyal*) *salva fide Deo et terræ principi.*

Service.

(1) Nota, *in antient times by* hommes *or men*, homagers, *whom we now call* freeholders, *were intended; as in grants, that he and his men should be free from toll.* 14. *H.* 6. 12. 12. *Ass.* 35. 33. *E.* 3. 88. 31. *E* 3. *Barr* 261. Hal. MSS.—In the famous controversy, which began between Dr. Brady and others some few years before the revolution about the origin of the house of Commons, one point in dispute was the sense of the words *homines* and *liberè tenentes* as used in writs of summons to parliament before the reign of Henry the third and in other ancient records; the doctor endeavouring to confine the word to the king's tenants *in capite*, and his competitors on the other hand being as strenuous to comprehend within the description of *homines* any free subjects of the king, and within that of *liberè tenentes* all freeholders in general, whether they held immediately of the king or not. See voc. *Liberi homines* in the Gloss. at the end of Brad. Introd. to English Hist. Tyrr. Biblioth. Politic. 300. 308. 322. 326. 352. 369. 537. and Lord Lyttelt. Hen. 2. 8vo. ed. vol. 3. p. 337. However Mr. Tyrrel allows the word *homines* to be equivocal, and to vary in the sense according to the occasion on which it is used.

(2) The words *de vie et de membre et de terrene honor* are not in L. and M. but the Roh. and subsequent editions have them.

(3) Vid. *in* Rot. Parl. 18. H. 6. n. 58. *a special act of parliament to excuse the kissing in the case of homage made to the king by reason of pestilence.* Hal. MSS.

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tion; which circumstances are quite foreign to the former, and seem of themselves so essentially to distinguish the two, as to render the labour of seeking for other differences wholly unnecessary. See Bodin. de Repub. lib. 1. c. 7. Crag. Jus Feud. lib. 1. Diegef. 5. et Duck de Us. Jur. Civ. cap. 6. Others again have suggested, that the grants of forfeited lands to the veteran soldiers of Sylla, Julius Cæsar, and the Triumvirs, in the latter times of the Roman republick, gave rise to feuds; but it has been sensibly observed by a very ingenious writer, that such lands were given, not on the condition of *future* but as towards for *past* military

Service. [c] *Servitium in lege Angliæ regulariter accipitur pro servitio, quod per tenentes Dominis suis debetur ratione feodi sui.* But *servitium est duplex, spirituale,* whereof more shall be said in the chapter of frankalmoigne; *et temporale,* whereof our author here treateth. And he beginneth with homage, first, because it is most honourable, for, *honor plus est in honorante, quam in honorato.* 2. It is *pluis humble de reverence,* and both of these for five causes on the part of the tenant. First, the tenant when he doth his homage is *discinctus,* disarmed or unguarded. Secondly, *nudo capite,* bare headed. Thirdly, *ad pedes domini super genua projectus.* Fourthly, *ambas manus junctas inter manus domini porrigit.* Fiftly, *per verba omni supplici veneratione plena,* he saith, *Jeo deveigne vostre home, &c.* And for three causes on the part of the lord: first, the lord doth sit. Secondly, he incloseth his tenant's hands betweene his owne. Thirdly, the lord sitting kisseth the tenant. Prudent antiquity did, for the more solemnity and better memory and observation of that which is to bee done, expresse substances under ceremonies. [c] 2. H. 4. 6. Glanvil et Mir. ubi supra.

Nil sine prudenti fecit ratione vetustas.

Jeo deveigne vostre home de vie et de member. And therefore he is *discinctus,* for that he must never be armed against, or opposite to his lord, but both life and member must be ready for the lawfull defence of his lord.

2. *De terrene honor.* Expressed by kneeling at the feet of his lord. Bract. fol. 80. Britton fol. 173. b. ac. Fleta lib. 3. cap. 16.

3. *Debet quidem tenens manus suas utrasque ponere inter manus utrasque domini sui, per quod significatur ex parte domini protectio defensio et warrantia, et ex parte tenentis reverentia et subjectio.* So as the holding up of the tenant's hands betokeneth reverence and subjection, and the lord's incloshing of his tenant's hands between his own betokeneth protection and defence.

4. *Et a vous serra foyal et loyal, et foy a vous portera, &c.* This faith, *fides,* or *fœdus perpetuum,* this perpetuall league betweene the lord and the tenant is expressed by the lord's kissing of the tenant. And some say, that *fœdus dicitur à fide, quia fides interponitur.* And so firme and strong was this league betweene them, that by the ancient law of England, *nihil facere potest tenens propter obligationem homagii, quod vertatur domino ad exhæredationem, vel alium atrocem injuriam. Nec dominus tenenti è converso. Quod si fecerint, dissolvitur et extinguitur homagium omnino et homagii connexio et obligatio, et erit inde justum judicium cum venerit contra homagium et fidelitatis sacramentum, quod in eo in quo delinquunt puniantur, s. in persona domini, quod amittat dominium, et in persona tenentis, quod amittat tenementum.* Bract. ubi supra. Brit. fol. 174.

Des tenements queux jeo claime a tener de vous. Britton saith, that [a] in doing of homage he must name the lands or tenements for which he doth homage in certaintie, and the reason is, *ne in captione homagii contingat dominum per negligentiam decipi vel per errorem.* [a] Brit. ubi supra. Bract. ubi supra. Glanvil lib. 9. cap. 1. Mir. cap. 3. de Homage.

For the better understanding of that which shall be said hereafter, it is to be knowne, that first, there is no land in England in the hands of any subject, (as it hath been said) but it is holden of some lord by some kind of service, as partly hath been touched before (1).

Secondly, all the lands [b] within this realme were originally derived from the crowne, and therefore the king is soveraigne lord, or lord paramont, either mediate or immediate of all and every parcell of land within the realme (2). [b] 18. E. 3. 35. 44. E. 3. 5. 48. E. 3. 9. 8. H. 7. 12.

Thirdly, that in ancient time lords upon the creation of their tenures did not onely reserve rents, services, and profit, &c. for which they might distreine and have other remedy, but also tooke an humble submission of his tenant by promise and oath, (for to homage fealty is incident) to be true and faithfull to him for the tenements holden of him, which submission is called homage and fealty, according to the tenure reserved.

Salve le foy que jeo doy a nostre seignior le roy. Both because there is *homagium ligeum,* which is due to the king onely, and also because he is soveraigne lord over all (3). Glanvil. lib. 9. c. 1. Mir. c. 3. de Fealty. Bract. ubi supr. Brit. ubi supra. Inter Inquis. apud Lanceston. anno 6. E. 1. Cornub. in Thes.

I have seene an ancient record in *Anno* 6. *Edw.* 1. in these words. *Michael de North, qui sequitur pro Rege, queritur, quod cum Dominus Rex ratione regiæ dignitatis et coronæ suæ tale habeat privilegium quod nullus in regno suo de aliquo qui sit in regno Angliæ alicui homagium facere debeat, vel aliquis hujusmodi homagium ab aliquo recipere debeat, nisi facta mentione de homagio Domino regi debito eidem domino regi fidelitur observand' Walterius Exon' Episcopus, in contemptu domini regis, et ad manifestam quoad privilegium prædictum ipsius domini regis exhæredationem, et ad damnum et dedecus ipsius domini regis ad Valentiam decem Mill' librarum, de Henrico de Pomeray, Thoma de Kanc', Johanne de bello prato, Laurentio filio Ric. Johanne le Soer, Willielmo de Alex', Eudone*

(1) According to this position, of which the truth is undeniable, all the lands in England, except those in the king's hands, are feudal. This universality of tenures, if not quite peculiar to England, certainly doth not prevail in several countries on the continent of Europe, where the feudal system has been established, and it seems, that there are some few portions of allodial land in the northern part of our own island. In France they still have their *franc-aleu,* which is the name by which *allodial* land is distinguished, as well as their *fiefs*: and in some provinces, such as Provence Languedoc and others, which not having any *coutume* or system of customary law adopt the *written* or *Roman* law, the country is so far from being wholly feudal, that all inheritances are presumed to be quite free from feudal dependance till the contrary is proved, and therefore are called *franc-aleu sans titre,* that is, free without the possessor's being obliged to prove them so. Instit. Droit. Franc. par Argou. l. 2. c. 3. Decis. Nouv. par Denisart. tit. *Franc-aleu* and *Droit-ecrit.* Even in Normandy, from which country our ancestors borrowed at least some parts of our law of tenures, and where the feudal policy with its utmost rigors is supposed to have been so early and so completely introduced, a remnant of allodial land is still to be found, and their reformed *coutumier* expressly divides their estates into *franc aleu* and *tenures.* Littelt. par Houard. v. 1. p. 196. and Cout. Reform. Norman. par Berrault. Art. 102. The German and Dutch lawyers make the like distinction with respect to lands in their countries; and they must almost necessarily have a considerable proportion of allodial land, as the rule of their courts of justice is to presume in favour of it, whenever the quality of the land appears doubtful. Heinecc. Elem. Jur. Germ. lib. 2. tit. 1. s. 35. Dar. Inst. Jur. Priv. German. sect. 705. 706. and Voet ad Pandect. lib. 38. Digest. de Feud. sect. 4. As to Scotland, lord Stair expresses himself rather ambiguously on the subject; for he says that there remains *little of allodial land in Scotland,* but in a few lines after observes, that the glebes of the clergy, which seem to come nearest to *allodials,* are more properly *mortified,* or as we should call them, *mortmain* fees. Sta. Inst. b. 4. t. 3. s. 4. However other respectable authors rank the manses and glebes of the Scotch clergy amongst things allodial; and write as if they thought, that the law of fiefs had not yet pervaded the Orkneys. Ersk. Princ. Law Scotl. 126. Ess. Brit. Antiq. 19.—(2) See ante fol. 64. a. note 1. and fol. 1. b. note 1.—(3) Vid. *as to the homage by the king of England to the king of France*

see fol. 1. a. & 2. Hallings. Eccles. Cas. 30.

military services, after the donation of them were of the nature of other Roman estates. Sullivan's Lectures 25. See also Clark. Connect. of Roman Saxon and English Coins 440. Some compare the *coloni et glebæ adscriptii,* of which

Eudone de Tranael, Rogero le gros, Johanne le Lunge, Rado' de Bevill, Guidone Novant, Willielmo de Rouſkerrek, et Hen. Cannel, accepit ſervitia contra privilegium prædict', nulla facta mentione de homagio et fidelitate domino regi debitis. And judgement in the end was given againſt the ſaid biſhop.

Roy. Our anceſtors the Saxons termed him *Coning* or *Cyning*, a name ſignifying power and ſkill, which by way of contraction we now call king. This name the Saxons with a ſmall alteration had from the Brittaines who called him *Koningh* or *Konincke.* In French he is called *Roy*, in Italian *Re*, in Spaniſh *Rey*, all derived from the Latine (*Rex*), of the true ſignification whereof you ſhall read [*d*] plentifull matter in our old bookes.

[*d*] Mirror ca. 1. ſect. 2. and ca. 2. ſect. 1. and 2. Bract. fo. 5. 107. 368. 369. 340 Fleta lib 1. cap. 5. Forteſcue cap. 8. and 37. Staunf. pl. cor. 98 99. and Prær. 65.

So as homage is divided firſt *in homagium ligeum, et non ligeum* (1).

2. *In homagium anteceſſorium, et non anteceſſorium* (2). It is here neceſſary to be knowne, what tenant, that holdeth by homage, ſhall doe homage. [*e*] *Item videndum, quis poteſt homagium facere. Sciendum eſt, quod quilibet liber homo, tam maſculus quam femina, clericus et laicus, major et minor; dum tamen electi in epiſcopos poſt conſecrationem homagium non faciant, quicquid fecerint ante, ſed tantum fidelitatem* (3). *Conventus autem homagium non faciet de jure, ſicut nec Abbas, nec Prior, eo quod tenent nomine alieno, ſcilicet nomine eccleſiarum.*

[*e*] Glanvil lib. 9. ca. 1. Bracton fol. 78. b. Britt. c. 68. fo. 170. 171. Fleta lib. 3. cap. 16.

[*g*] One within the age of 21 yeares may doe homage; but Bracton ſaith he cannot doe fealtie, becauſe in doing fealty he ought to be ſworne, which an infant cannot be (4). But ſome opinions be in our bookes to the contrary, *viz.* that an infant ſhall doe fealtie; but I take it to be meant of homage, and herewith [*h*] agreeth Britton who ſaith, *et tout ſoit que enfant deins age fait homage, pur ceo ne volons nous my que il face ſerement de fealtie, jeſque a taunt que il ſoit de pleine age; et tout ſoit ceo comon dit del people que fait de enfant fait deins age ne ſoit fait my a tener eſtable. Volons neque dent, que cheſcun home et cheſcun feme, de quel age que ils ſoient, facent homage a lour ſeigniour ſolonque leſtatut de la grand charter.*

[*g*] Glanvil lib. 9. cap. 1. Bracton lib. 2. 78 Fleta lib. 3. cap. 16. acc. 21. E. 3. 40. 24. E. 3. 63. 64. 32. E. 3. age 80. & tit. per quæ ſervita. 9. 13. H 4. 5. 33. H. 6. 16. 20. E. 3. per quæ ſervic. 24.
[*h*] Britton. fol. 171.

Glanvill ſaith, [*i*] women ſhall not do homage; but Littleton ſaith that a woman ſhall doe homage, but ſhe ſhall not ſay, *Jeo deveigne voſtre feme*, but *Jeo face a vous homage*; and ſo is Glanvill to be underſtood, that ſhe ſhall not doe compleate homage.

[*i*] Glanvil lib. 9. c. 1. F. N. B. 157. Regiſt. 296. Britton ubi ſupra. Mirror ca. 1. ſect. 3.

See remark in Beames's Glanville 217. n. 1.

Sect. 86.

MES ſi un abbe, ou un pryor, ou auter home de religion, ferra homage a ſon ſeignior, il ne dirra, Jeo deveigne voſtre home, &c. pur ceo que il ad luy profeſſe pur eſtre tant ſolement le home de Dieu. Mes il dirra iſſint, Jeo vous face homage et a vous ſerra foial et loial, et foy a vous portera des tenements que jeo teigne de vous, ſalve la foy que jeo doy a noſtre ſeignior le roy.

BUT if an abbot, or a pryor, or other, man of religion, ſhall doe homage to his lord, he ſhall not ſay, I become your man, &c. for that he hath profeſſed himſelfe to be onely the man of God. But he ſhall ſay thus, I doe homage unto you, and to you I ſhall be true and faithfull, and faith to you beare for the tenements which I hold of you, ſaving the faith which I doe owe unto our lord the king.

NO man of religion, when [*k*] he hath homage ſhall ſay, *Jeo deveigne voſtre home*; becauſe he hath profeſſed himſelfe the man of God, yet ſhall he doe homage, and ſhal ſay, [*l*] *Jeo face a vous homage, et à vous ſerra foyall et loyall, &c.* and note, that here religion is taken largely, for it extends not only to regular perſons as abbots and the like, but alſo to all eccleſiaſticall perſons, as biſhops, deanes, or any other ſole eccleſiaſtical body politike; and ſo it is in uſe at this day, which alſo appeares in our old books.

[*k*] Glanvil lib. 1. cap. 9. in fine. Britton lib. 2. 78. Bracton cap. 68. Fleta lib. 3. ca. 16.

[*l*] Vid. Sect. 96 & 133.

And it is to be obſerved, that in old bookes and records, the homage, which a biſhop, abbot or other man of religion doth, is called fealty, for that it wanteth theſe words, (*Jeo deveigne voſtre home.*) But yet in judgement of law it is homage; becauſe he ſaith, I doe to you homage, &c. and ſo of a woman.

France for the dutchy of Aquitain, &c. It was doubted, whether the homage ought to be liege; *but at length it was reſolved, that it ſhould be* liege; *and for that purpoſe writs patent were made by the king of England, ſettling it in this way*, viz. *that the king of England duke of Guyen ſhould hold his hands between the hands of the king of France, and he who ſhould ſpeak for the king of France ſhould addreſs his words to the king of England duke of Guyen, and ſhould ſay thus,* Do you remain a liege man of the king of France, my lord who is here, as duke of Guyen and peer of France, and promiſe to bear him faith and loyalty? ſay yes; *and that the ſaid king duke and his ſucceſſors dukes of Guyen ſhould ſay* yes; *and that then the king of France ſhould receive the ſaid king of England and duke to the ſaid homage and faith and with a kiſs ſaving his right and the other's.* 1. Pars Pat. 5. E. 3. m. 19.—*For the homage done to the pope by king John, ſee M. Paris* 237. Hal. MSS.—For a full account of the circumſtances, which attended Edward's homage for Guienne, &c. ſee 1. Tind. Rap. fol. ed. 412. See alſo Froiſſ. l. 1. c. 25. and 4. Rym. Fœd. 383. to 390. there cited, and Du Freſn. Gloſſ. voc. Homagium. Mr. Tindal in a note on Rapin obſerves, that liege or full homage is done with head bare and ſword ungirt, as if that was the thing which chiefly diſtinguiſhed homage *ligeum* from homage *non ligeum.* But in truth that *formality* was incident to *both*, and the difference between the two was of a more *eſſential* kind, and Philip de Valois of France and our Edward the Third knew this, or probably there would not have been ſo much difficulty in adjuſting the ceremony between them. Homage *ligeum* was without any ſaving or exception of the faith due to king or other lords; but homage non *ligeum* had ſuch an exception. The former properly came from the *ſubject* to the *ſovereign*; the latter from *one* ſubject to *another.* The former generally and in ſtrictneſs included allegiance as a ſubject, and could not be renounced; though ſometimes, when done by one who was himſelf a ſovereign prince as a mark of feudal dependance in reſpect not of his *whole* dominions but only of a *part* of them, it was not underſtood with ſo much latitude; but the latter never imported any thing more than a connection in the way of tenure, which the *homager* might at any time free himſelf from by renouncing the land he was inveſted with. See Du Freſn. Gloſſ. voc. *Hominum* et *legius*, and Spelman. Gloſſ. voc. *Homagium* et *ligantia.* See also Post. 65. b.

(1) See note 3. in 65. a.—(2) That is, *aunceſtrel* and *not aunceſtrel*, as to which ſee Poſt 100. b.—(3) *Homage done to the king by a biſhop* ſalvo ſuo ordine. *M. Paris* 101. Hal. MSS. See what is ſaid by lord Coke *infra.*—(4) *Infant caſts eſſoin of being in the king's*

which there is ſuch frequent mention both in the Theodoſian code and in that of Juſtinian, with feudatories; but nothing can be more ſtrongly marked than the diſtinction between the two, for the former were adſtricted to the ſoil, were employed in cultivating it, and in performing other *rural* ſervices for the owner, and in ſhort approached nearer

Sect. 87.

Pur ceo que neſt convenient, &c. By this it appeareth, [m] that *argumentum ab inconvenienti plurimum valet in lege*, as often ſhall be obſerved hereafter. *Non ſolum quod licet, ſed quid eſt conveniens eſt conſiderandum. Nihil, quod eſt inconveniens, eſt licitum* (1).

[m] For like reaſons ab inconvenienti, vide Sect. 138. 139. 231. 269. 440. 478. 665. 722. 730. 21. H. 7. 13. F. N. B. 230. d. 16. H. 7. 9.

ITEM ſi feme ſole ferra homage a ſon ſeignior, el ne dirra, Jeo deveigne voſtre feme; pur ceo que neſt convenient, que feme dirra, que il deviendra feme a aſcun home, forſque a ſa baron, quant el eſt eſpouſe. Mes el dirra, jeo face a vous homage, et a vous ſerra foial et loial, et foy a vous portera des tenements que jeo teigne de vous, Salve la foy que jeo doy a noſtre ſeignior le roy.

ALSO if a woman ſole ſhall doe homage, ſhe ſhal not ſay, I become your woman; for it is not fitting, that a woman ſhould ſay that ſhe will become a woman to any man, but to her huſband, when ſhe is married. But ſhe ſhall ſay, I do to you homage, and to you ſhall be faithfull and true, and faith to you ſhall bear for the tenements I hold of you, Saving the faith I owe to our ſoveraigne lord the king.

Sect. 88. (2)

ITEM home puit veier un bone note en M. 15. E. 3. l'ou un home et ſa feme fierent homage et fealty en le common banke, quel eſt eſcrie en tiel forme. Nota, que I. Leukner et Elizabeth ſa feme fierent homage a W. Thorpe en ceſt maner: lun et lautre tiendront jointment lour mains enter les mains W. T. et le baron dit en ceſt forme: Nous vous ferromus homage, et foy a vous porterons, pur les tenements, que nous teignomus de A. votre conuſor, que a vous ad graunt noſtre ſervices en B. et C. et auters villes, &c. encountre touts gents, ſalve la foy que nous devons a noſtre ſeig-

ALSO a man may ſee a good note in M. 15. E. 3. where a man and his wife did homage and fealtie in the common place, which is written in this forme. Note that I. Lewknor and Eliz. his wife did homage to W. Thorpe in this manner: the one and the other held their hands joyntly betweene the hands of W.T. and the huſband ſaith in this forme: We doe to you homage, and faith to you ſhall beare for the tenements which we hold of A. your conuſor, who hath granted to you our ſervices in B. and C. and other townes, &c. againſt all nations(3), ſaving the faith which we owe to our lord the king and to his heires, and to our

IN this [n] record three things are to be obſerved.

[n] Mich. 15. E. 3. tit. Avowrie 109.

1. How neceſſary, and profitable records and obſervations are; albeit they were not publiſhed in print, for at the time when Littleton wrote, this record was not printed.

2. That the huſband and wife doing homage, the huſband ſhall ſpeake the words for them both, *viz.* we doe to you homage, &c.

3. That the homage which the huſband and wife doe, is the very homage which the wife ſhould doe alone. But this joint homage, done by the huſband and wife, is intended to be beforeiſſue had betweene them, whereof more ſhall be ſayd hereafter. And it is to be obſerved, that very few caſes ruled or reſolved in the reigne of Edward the Third, but the ſame or the like had

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

(1) Arguments from inconvenience certainly deſerve the greateſt attention, and where the weight of other reaſoning is nearly on an equipoiſe ought to turn the ſcale. But if the rule of law is clear and explicit, it is in vain to inſiſt upon inconveniencies; nor can it be true that nothing which is inconvenient is lawful, for that ſuppoſes in thoſe, who make laws, a perfection of which the moſt exalted human wiſdom is incapable of attaining, and would be an invincible argument againſt ever changing the law.—(2) In the Rohan edition and in thoſe of Pynſon and Redman, this ſection is tranſpoſed to the chapter of Fealty.—(3) Lord Coke's tranſlation of the word *gents* is erroneous; for as Mr. Madox juſtly remarks, though the *Roman* word *gens*

nearer to *ſlaves* than to *free-men ſoldiers* and *feudal tenants*. See Itter. Feud. Imper. cap. 1. ſect. 3. 5. One civilian of the firſt character ſeems to deduce fiefs from the *procuratores prædiorum*, the *emphyteuticarii*, and others of a ſimilar deſcription, who are well known to the Roman law. Cujac. Obſerv. lib. 8. c. 14. and De feud. lib. 1. princip. But it ſhould be recollected, that the *procuratores prædiorum* were properly only bailiffs and ſervants to the owners of the land, and that the *emphyteuticarii* were merely occupiers of land under contracts of hiring; and therefore one may differ from the great author of this opinion, without forgetting the reſpect juſtly due to ſo high an authority. In truth, the poſſeſſions of the *former* do not appear to have been like *any* fief, and thoſe of the *latter* at the utmoſt only come near to a reſemblance of fiefs of the *prædial* and *improper* kind, ſuch as our *jocage* tenure, and other deviations from the original feudal eſtabliſhments. Conſequently it is not in the leaſt probable, that pure and genuine fiefs, which were the price of *military* ſervice only, and gave riſe to the great ſyſtem of tenures, ſhould be the offspring of ſuch parents. The ſame obſervation may be applied to the *prædia ſtipendiaria*, which ſome writers cite from the books of the Roman law as inſtances of fiefs, but which were, as I apprehend, only a ſpecies of the *emphyteuſis*, or land let to hire. See Itter. de Feud. Imp. cap. 1. ſect. 3. 5. Heinecc. Syntagm. Antiq. Rom. lib. 3. tit. 3. f. 13. and the word

had been ruled or reſolved in the raignes of Edward the ſecond, Edward the firſt, or before, as for example for warrant hereof, *vide* Hill. 17. E. 2. Rot. Parl. &c.

Hill. 17. E. 2. Rot. Parl. &c.

Sect. 89.

Et a mes auters ſeigniours. This ſaving for other lords is good for explanation, albeit the homage is referred onely to the tenements which he holdeth of him to whom he doth the homage.

NOTA ſi un home ad ſeveral tenancies, queux il tient de ſeveral ſeigniors, ſcilicet cheſcun tenancy per homage, donque quant il fait homage a un des ſeigniors, il dirra en le fine de ſon homage fait, Salve la foy que jeo doy noſtre ſeignior le roy, et a mes auters ſeigniors (1).

NOTE if a man hath ſeverall tenancies, which he holdeth of ſeverall lords, that is to ſay, every tenancy by homage, then when he doth homage to one of his lords, he ſhall ſay in the end of his homage done, Saving the faith which I owe to our lord the king, and to my other lords.

Sect. 90.

EN droit dun auter. As the huſband and wife in the right of his wife, the biſhop in right of his biſhopricke, &c. the abbot or prior in right of his monaſtery, &c. But no corporation aggregate of many perſons capable, be the ſame eccleſiaſticall or temporall, can doe homage, as a deane and chapter, maior and commonalty, and ſuch like, albeit they be ſeiſed in fee of lands holden by homage, yet ſhall not they doe homage. And the reaſon is, becauſe that homage muſt be done in perſon, and a corporation aggregate of many cannot appeare in perſon; for albeit the bodies naturall, whereupon the bodie politique conſiſts, may be ſeene, yet the bodie politique or corporate itſelfe cannot be ſeene, nor doe any act but by atturney, and homage muſt ever be done in perſon, &c. (3) And albeit an

[p] 33. H. 8. tit Fealtie. Br. 15. 4. Co. 11. 7. Co. 10. 10. Co. 31.

NOTA que nul ſerra homage, mes tiel que ad eſtate en fee ſimple, ou en fee taile, et ſon droit demeſne, ou en droit dun auter. Car il eſt un maxime en ley, que il, que ad eſtate forſque pur terme de vie, ne ſerra homage, ne prendra homage. Car ſi feme ad terres ou tenements en fee ſimple, ou en fee taile, queux il tient de ſon ſeignior per homage, et prent baron, et ont iſſue, donque le baron en la vie la feme ſerra homage (2),

NOTE, none ſhal do homage but ſuch, as have an eſtate in fee ſimple, or fee taile, in his owne right, or in the right of another. For it is a maxime in law, that he, which hath an eſtate but for terme of life, ſhal neither doe homage or take homage. For if a woman hath lands or tenements in fee ſimple, or in fee taile, which ſhe holdeth of her lord by homage, and taketh huſband, and have iſſue, then the huſband in the life of the wife ſhall doe ho-

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gens ſignifies ſometimes a *nation*, and ſometimes a *family*, and *gents* is *Romanick* or *baſtard Roman*, and derived from *gens*, yet like many other *Romanick* words it acquired a new import, and according to that denotes *men* or *perſons*. See Mad. Bat. Angl. 167. and Hiſt. Exchcq. in Pref. p. 13.

(1) This expreſs ſaving of the faith due to the king was formerly of conſequence, being calculated to prevent that intire dependance of the tenant on his immediate lord, the idea of which in times, when the feudal inſtitutions were in their full vigour, operated very ſtrongly, and tended to depreſs the authority of the ſovereign See a ſenſible note on this ſubject in Litt. par Hovard. v. 1. p. 114. and 121. In another place lord Coke cites an inſtance of an information on the part of the crown againſt a biſhop, for receiving homage from his tennnts without any ſaving of the faith due to the king; but it doth not appear by the extract which lord Coke gives of the record, how this contempt of the royal authority was puniſhed. See ante 65. a.—(2) Vid. F. N. B. 257. *Huſband alone doth fealty before the having of iſſue.* Nota, *before iſſue the avowry for homage ſhall be on the huſband and wife, and not only on the wife.* 29. *E.* 3 15. *But after iſſue the avowry for homage ſhall be on the huſband. But till the lord hath notice of the having iſſue, he may avow upon both.* 7. *E.* 4. 27. *The huſband only ſhall do the homage*, quia ſi dominus adiret prælium, vir conſecuturus eſſet eum, non mulier. 13. *E.* 1. *Avowry.* 234. Hal. MSS.—(3) 2. *E.* 3. 10. *Accord.* Hal. MSS.

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word *ſtipendiaria* in the Lexicons of the Roman law. As to the *ſoldurii*, who were the companions and followers of the princes and chieftains amongſt the *ancient Gauls* and are by ſome writers conſidered as feudal vaſſals, their attachment was independant of land, and this of itſelf is ſufficient to ſhew, that the connection was not the ſame as that which is the reſult of *tenure*. However it may be proper to obſerve, that a like ſort of union between the princes of the *ancient Germans* and their *comites* is agreed

pur ceo que il ad title daver les tenements per le curteſie Dengleterre ſil ſerveſquiſt la feme, et auxy il tient en droit de ſa feme. Mes ſi la feme devy devant· homage fait per le baron en la vie ſa feme, et le baron ſoy tient eins come tenant per le curteſie, donques il ne ſerra homage a ſon ſeignior, pur ceo que el adonque nad eſtate forſque pur terme de vie.

mage, becauſe he hath title to have the tenements by the curteſie of England if he ſurviveth his wife, and alſo he holdeth in right of his wife. But if the wife dies before homage done by the huſband in the life of his wife, and the huſband holdeth himſelfe in as tenant by the curteſie, then he ſhall not doe homage to his lord, becauſe he then hath an eſtate but for terme of life.

Plus ſerra dit de homage en le tenure per homage aunceſtrel.

More ſhall be ſaid of homage in the tenure of homage anceſtrell.

abbot and covent is a corporation aggregate of many, yet becauſe the covent are all dead perſons in law, the abbot alone in nature of a ſole corporation ſhall doe homage,

Un maxime en ley. A maxime is a propoſition, to be of all men confeſſed and granted without proofe, argument, or diſcourſe. *Contrà negantem principia non eſt diſputandum.* But of this ſomewhat hath beene ſaid before. (Ante 10. b. Poſt 343. a.)

Il que ad eſtate forſque pur terme de vie. [q] A parſon or vicar of a church, that hath a qualified fee, [r] and yet to many intents upon the matter but an eſtate for life, can neither receive (1) homage nor doe homage, as a biſhop, an abbot, or any ſuch like, that hath a fee abſolute, may. [ſ] So if a man and his wife be ſeiſed in fee of a ſeigniorie in the right of his wife, the huſband ſhall not receive homage alone, but he and his wife together. [t] But if the huſband in that caſe hath iſſue by his wife, then he ſhall receive homage alone during the life of his wife; and the reaſon is, becauſe he by having of iſſue is intitled to an eſtate for terme of his owne life, in his owne right, and yet is ſeiſed in fee in the right of his wife, ſo as he is not a bare tenant for life. But if his wife dye, then he hath onely but an eſtate for life, and then he cannot receive homage. Yet tenant for life or yeares of a ſeigniory [u] ſhall have ward, mariage, and reliefe, and ſhall ſuppoſe that the tenant died in the fealty of the pl. [x] *Fieri poſſunt homagia libero homini tam maſculo quàm fœminæ, tam majori quàm minori, tam clerico quàm laico.*

[q] Glanvil lib. 9. cap. 2. Britton fol. 170. Temps E. 1. tit. Juris utrum 15. (Poſt 341. b.)
[r] 8. E. 4. 28. 39. E. 3. 15. 3. E. 3. Avowry 175.
[ſ] 2. E. 2. Avowrie 183. F. N. B. 257. 13. E. 3. gard. 39.
[t] 27. Aſſ. p. 51. F. N. B. 257. 13. H. 6. Avowrie 21. 43. E. 3. 13. 44. E. 3. 41 3. E. 3. Avowrie 175. 13. E. 3. 2. gard. 39. 22. E. 3. fol. 19. gard. 44.
[u] 6. E. 2. gard. 122. 13. E. 3. gard. 39. 22. E. 3. gard. 44.
[x] Glanvil lib. 9. cap. 3. 18. E. 3 7. 43. E. 3. 13. 44. E. 3. 41. 13. H. 6. Avowrie 21. 8. H. 6. 13. 7. E. 4. 27. F. N. B. 257.

Et ount iſſue, donque le baron en la vie la feme ferra homage. The reaſon hereof is rendred before, and alſo that after the death of his wife he being but a bare tenant for life ſhall doe no homage; for regularly it is true, that he, that cannot receive homage in reſpect of the weakneſſe of his eſtate in the ſeigniory, ſhall not doe homage, if he hath a like eſtate in the tenancy.

If a man hold of the king, and hath iſſue divers daughters, and dyeth, the king ſhall have homage of every one of theſe daughters. And this [a] appeareth by the ſtatute *de Hibernia anno* 14. *H.* 3. to be the common law, for that act ſaith, *in regno noſtro Angliæ talis eſt lex et conſuetudo, quod ſi quis tenuerit de nobis in capite, et habuerit filias hæredes, ipſo patre defuncto, anteceſſores noſtri habuerunt et ſemper nos habuimus et cepimus homagium de omnibus hujuſmodi filiabus, et ſingulæ earum tenent de nobis in capite in hoc caſu.* And therefore where by the [b] ſtatute *De prærogativa Regis*, it is provided, *Si una hæreditas, &c.* that is but an affirmance of the common law. [c] But this is to be underſtood where the coheirs be of full age; for if they be within age and in ward to the king, *Primogenita tantum facict homagium pro ſe et ſororibus ſuis, et aliæ ſorores, cum ad ætatem pervenerint, facient ſervitia dominis feodorum per manum primogenitæ.* [d] Add therefore if a man holds of a common perſon by the ſervice of homage, and hath iſſue divers daughters and dyeth, the eldeſt daughter onely ſhall doe homage for her and all her ſiſters. And this appeareth alſo by the ſtatute of *Hibernia. Primogenita tantum facict homagium domino pro ſe et omnibus ſororibus ſuis.* And the reaſon is there rendred afterward, *Quia omnes ſorores ſunt quaſi unus hæres de una hæreditate.* [e] But if the copareeners in that caſe make partition, then every one ſhall doe homage, becauſe now it is not *una ſed diverſa hæreditas.* [f] And ſo it is if one make a feoffment in fee

[a] 14. H. 3. tit. Prærog. 5.
[b] Prærog. Regis cap. 5.
[c] Statut. de homagio capiendo Temps E. 1. (2)
[d] Glanvil lib. 7. cap. 3. & lib. 9. cap 2. Bract. lib. 1. de homag. capiend. & lib. 2. fo. 78. 80. Britton fol. 168. b. 171. 172. Fleta lib. 3. cap. 16. & lib. 2. ca. 60. & lib. 5. cap. 9 F. N. B. 161. 150. 259. Stanf. prær. 23. 24. (Poſt 164. b.)
[e] F. N. B. 162. Vide 11. E. 3. Avowrie 101.
[f] 45. E. 3. 23. 24. E. 3. 73. Marlbridge cap. 9. F. N. B. 162.

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

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

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agreed by thoſe who refer the origin of fiefs to a much later period, to have been one of the many cauſes which accelerated the progreſs of fiefs. Itter. de Feud. Imper. cap. 1. ſect. 4. 5. Another opinion as to the beginning of fiefs is, that the uſe of them may be dated from the time of the emperor Alexander Severus, who, about the middle of the third century granted out large diſtricts taken from the enemy on the frontiers of the Roman empire to the *duces limitanei* and others of his officers and ſoldiers, under the conditions of military ſervice, and on thoſe terms declared the land tranſmiſſible to heirs. Seld. Tit. of Hon. 2d ed. c. 1. ſ. 23. p. 332. Duck de Uſ. Jur. Civ. lib. 1. c. 6. Itter. de Feud. Imper. c. 1. ſ. 3. and Clarke's Connect. Rom. Sax. and Engl. Coins 440. Theſe grants, and ſome few others of a like kind, which are attributed to ſucceeding Roman emperors, give the ſemblance of probability to the conjecture of thoſe, who conſider the feudal eſtabliſhments, ſo common in the ſubſequent times, as mere imitations of theſe examples and extenſions of the ſame policy; and it muſt be owned, that they at leaſt ſeem to juſ-