*matter come avaunt est dit; et issint prova que le * dit recovery fuit faux ou feint en ley, et issint luy barrera d'aver execution de le judgement †.*

ter as aforesaid; and so prove that the said recovery was false or faint in law, and so shall barre him to have execution of the judgement.

that it was upon former authorities and opinions of judges discovered by him, assented unto by the rest of the judges.

If a recoverie bee had against tenant for life without consent or covine, though it be without title, and execution be had, and tenant for life dieth, the reversion or remainder is discontinued, so as he in the reversion or remainder cannot enter; but if such a recovery be had by agreement and covine betweene the demandant and the tenant for life, then, as hath beene said, it is a forfeiture of the estate for life, and he in the reversion or remainder may enter for the forfeiture. So it is if the tenant for life suffer a common recovery at this day, it is a forfeiture of his estate; for a common recovery is a common conveyance or assurance, whereof the law taketh knowledge. Since *Littleton* wrote, there were two statutes [e] made for preservation of remainders and reversions expectant upon any manner of estate for life; the one in 32. *H.* 8. the other in 14. *Eliz.*: but 32. *H.* 8. extended not to recoveries, when tenant for life came in as vouchee, &c. and therefore that act is repealed by 14. *Eliz.* and full remedie provided for preservation of the entrie of them in reversion or remainder. But the statute of 14. *Eliz.* extendeth not to any recovery, unlesse it be by agreement or covine. Secondly, [f] if there be tenant for life, remainder in taile, the reversion or remainder in fee, if tenant for life be impleaded by agreement, and he vouche tenant in taile, and he vouch over the common vouchee, this shall barre the reversion or remainder in fee, although he in the reversion or remainder did never assent to the recovery; because it was not the intent of the act to extend to such a recovery, in which a tenant in taile was vouched; for he hath power by common recovery, if he were in possession, to cut off all reversions and remainders. And so if tenant for life had surrendred to him in remainder in taile, he might have barred the remainders and reversions expectant upon his estate. Thirdly, where the proviso of that act speaketh of an assent of record by him in reversion or remainder, it is to be understood, that such assent must appeare upon the same record, either upon a voucher, *aid prier*, receit, or the like; for it cannot appeare of record, unlesse it be done in course of law, and not by any extrajudiciall entrie, or by *memorandum*.

5. Ass. 3. 5. E. 3. Entre Cong. 42. Li. 1. fol. 15, 16. Sir William Pelham's case. (6. Rep. 8. b. Ant. 356. a.)

Ant. 356. a. 251. b.

[e] 32. H. 8. cap. 31. 14. Eliz. cap. 8. (Sect. 675. 10. Rep. 49.)

[f] Lib. 3. fol. 60, 61. Lincolne College case.

(2. Roll. Abr. 23. 146.)

Sect. 691.

ITEM, si tenant en taile discontinua le taile, et moruft, et son issue port son briefe de formedon *envers le discontinuee (esteant tenant de franktenement del terre) et le discontinuee pleda que il n'est tenant, mes ousterment disclaima de le tenancy en la terre; en cest cas le judgement serra, que le tenant alast sans jour, et apres tiel*

ALSO, if tenant in taile discontinue the taile, and dieth, and his issue bringeth his writ of *formedon* against the discontinuee (being tenant of the freehold of the land) and the discontinuee plead that he is not tenant, but utterly disclaymeth from the tenancy in the land; in this case the judgement shall be, that the tenant goeth without day, and after such

HERE it appeareth, that upon the plea of nontenure, or of disclaimer of the tenant in a *formedon* in the discender, albeit the expresse judgement be that the tenant shall goe without day, yet in judgement of law the demandant may enter according to the title of his writ, and bee seised in tayle, notwithstanding the discontinuance. And here, *Littleton* saith, the demandant shall be adjudged in his remitter; where hee taketh remitter in a large sense: for in this case the demandant hath not two rights, but hath onely one antient right, and restored to the same by course of law; and so remitter here is taken for a recontinuance of the right.

(Doct. Pla. 133.) 5. E. 4. 1. 36. H. 6. 29. 6. E. 3. 8. 4. E. 4. 38. (3. Rep. 26.)

Non-tenure. Vide Bracton, lib. 5. fol. 431, 432. & 414. Britton, cap. 84.

Ou

* *dit* not in L. and M. nor Roh. † *&c.* added L. and M. and Roh.

judgement l'issue en le taile que est demandant poit entrer en la terre, nyent contristeant le discontinuance, et per tiel entrie il serra adjudge eins en son remitter. Et la cause est, pur ceo que si ascun home suist præcipe quòd reddat *envers ascun tenant de franktenement, en quel action le demandant ne recovera damages, et le tenant pledast nontenure, *ou auterment disclaima en le tenancie, le demandant ne poit averrer son briefe, † et dirra que il est tenant, come le briefe suppose. Et pur cel cause le demandant apres ceo que judgement est done que le tenant alast sans jour, poit entrer en les tenements demands, le quel serra auxy graund advantage a luy en ley, sicome il avoit judgement de recoverer envers le tenant, et per tiel entrie il est en son remitter per force del taile. Mes lou le demandant recovera dammages envers le tenant, la le demandant poit averrer, que il est tenant, come le briefe suppose, et ceo pur l'advantage del*

judgement the issue in the taile that is demandant may enter into the land, notwithstanding the discontinuance, and by such entrie hee shall be adjudged in his remitter. And the reason is, for that if any man sue a *præcipe quòd reddat* against any tenant of the freehold, in which action the demandant shall not recover damages, and the tenant pleads nontenure, or otherwise disclaime in the tenancie, the demandant cannot averre his writ, and say that hee is tenant, as the writ supposeth. And for this cause the demandant after that that judgement is given that the tenant shall goe without day, may enter into the tenements demanded, the which shall bee as great an advantage to him in law, as if he had judgement to recover against the tenant, and by such entry hee is in his remitter by force of the entaile. But where the demandant shall recover damages against the tenant, there the demandant may averre, that he is tenant, as the writ supposeth, and that for the advan-

Ou le demandant ne recovera damages. Here is to bee observed, that in such a *præcipe* where the demandant is to recover dammages, if the tenant pleade non-tenure or disclaime, [*f*] there the demandant may averre him to be tenant of the land, as his writ suppose for the benefit of his damages, which otherwise hee should lose, or pray judgement and enter. [*g*] But where no damages are to bee recovered, as in a *formedon* in the discender, and the like, there hee cannot averre him tenant, but pray his judgement and enter, for thereby hee hath the effect of his suite: *Et frustrà fit per plura, quod fieri potest per pauciora.*

[*f*] 13. H. 7. 28. 36. H. 6. 29. 22. H. 6. 44. 4. E. 4. 38. 5. E. 4. 1. 6. E. 3. 8. (7. Rep. 40.)

[*g*] 8. E. 3. 434. 24. E. 3. 9. 11. H. 4. 16. & 7. H. 6. 17.

5. E. 4. 1. (5. Rep. 68. Doct. Pla. 49.)

Averrer. To averre or avouch, or verifie, *verificare*, whereof commeth *verificatio*, an averment; and is so said as well in English as in French; and is two-fold, viz. generall and particular. A generall averment, which is the conclusion of every plea to the writ, or in barre of replications and other pleadings (for counts or avowries in nature of counts need not bee averred) containing matter affirmative, ought to bee averred, *et hoc paratus est verificare, &c.* Particular averments are, as when the life of tenant for life, or tenant in taile, are averred; and there, tho' this word (*verificare*) be not used, but the matter avouched and affirmed, it is upon the matter an averment. And an averment containeth as well the matter as the forme thereof.

(Ant. 303. a.)

Que le tenant alast sans jour, Quòd tenens eat sine die. This is the entrie of the judgement in that case, that the tenant shall goe without day, that is, to be discharged of further attendance; and this is some-

(9. Rep. 7. Sid. 265. 310.)

* *ou—mes*, L. and M. and Roh. † *et dirra*, not in L. and M. nor Roh.

*del demandant pur recoverer ses damages, ou auterment il ne recoveroit ses damages, queux sont * ou fueront a luy dones per la ley.*

tage of the demandant to recover his dammages, or otherwise hee shall not recover his dammages, which are or were given to him by the law.

time finall for that action, whereof *Littleton* here putteth an example; and sometime temporarie, whereof *Littleton* also hath put an example: as when excommengement is pleaded in disabilitie of the plaintiffe or demandant, there the award is, that the tenant or defendant shall goe without day; and yet when the demandant or plaintiffe have purchased his letters of absolution, upon shewing them to the court, he may have a resommons or reattachment to recontinue the cause againe. But it is to be knowne, that when judgement is given for the tenant or defendant upon a plea in barre, or to the writ, &c. the judgement is all one, viz. *quod tenens*, or *defendens eat inde sine die*, and shall have reference to the nature and matter of the plea, and so be taken either to goe in barre, or to the writ. So when judgement is given against the plaintiffe, either in barre of his action, or in abatement of his writ, &c. the judgement is all one, viz. *nihil capiat per breve*; and it appeareth by the record, whether the plea did goe in barre, or to the writ. And the cause of the judgement is never entred in the record in any case; for that upon consideration had of the record, it appeareth therein.

Vide Sect. 201. (8. Rep. 68.) 3. H. 4. 2. 11. (Ant. 135. b.)

Sect. 692.

ITEM, si home soit disseisie, et le disseisor devy, son heire esteant eins per discent, ore l'entrie de le disseisee est tolle; et si le disseisee porta son briefe d'entrie sur disseisin en le per, envers l'heire, et l'heire disclaime en le tenancy, &c. le demandant poit averer son briefe que il est tenant come le briefe suppose, s'il voit, pur recoverer ses damages: mes uncore s'il voit relinquisher le averment, &c. il poit loyalment entrer en la terre per cause del disclaimer, nient obstant que son entrie adevant fuit tolle. Et ceo fuit adjudge devant mon master sir R. Danby, *jades chiefe justice de la common banke et ses compagnions, &c.*

ALSO, if a man be disseised, and the disseisor die, his heire being in by discent, now the entrie of the disseisee is taken away; and if the disseisee bring his writ of entrie *sur disseisin* in the *per*, against the heire, and the heire disclaime in the tenancie, &c. the demandant may averre his writ that hee is tenant as the writ suppose, if he will, to recover his dammages: but yet if hee will relinquish the averment, &c. he may lawfully enter into the land because of the disclaimer, notwithstanding that his entrie before was taken away. And this was adjudged before my master sir *R. Danby*, late chiefe justice of the common place and his companions, &c.

(F. N. B. 192. b. 1. Roll. Abr. 631. Doct. Pla. 133.) (3. Lev. 330.)

ITEM, si home soit disseisie, &c. Albeit in this case, and in the case before, the entrie of the demandant is his owne act, and the demandant hath no expresse judgement to recover, yet shall he be remitted; because he in judgement of the law shall be in according to the title of his writ, and by his entrie defeat the discontinuance, and consequently is remitted to his antient estate.

36. H. 6. fol. 29

Sir Robert Danby, knight, was a gentleman of an ancient and faire descended family, and chiefe-justice of the court of common-pleas; a grave, reverend, and learned judge, of

5. E. 4. 41. 4. E. 4. 38.

* *ou fueront* not in L. and M. nor Roh.

of whom our author ſpeaketh here with verie great reverence, as you may perceive. And here is to be noted how neceſſatie it is, after the example of our author, to obſerve the judgements and reſolutions of the ſages of the law.

Sect. 693.

*ITEM, lou l'entry d'un home eſt congeable, coment que il prent eſtate a luy quant il eſt de pleine age pur terme de vie, ou en taile, ou en fee, ceo eſt un remitter a luy, ſi tiel priſel de eſtate ne ſoit per fait indent, ou per matter de record, que * concludera ou eſtoppera. Car ſi home ſoit diſſeiſie, et † reprent eſtate de le diſſeiſor ſans fait, ou per fait polle, ceo eſt ‡ un remitter al diſſeiſee, || &c.*

ALSO, where the entrie of a man is congeable, although that he takes an eſtate to him when hee is of full age for terme of life, or in taile, or in fee, this is a remitter to him, if ſuch taking of the eſtate be not by deed indented, or by matter of record, which ſhall conclude or eſtop him. For if a man be diſſeiſed, and takes backe an eſtate from the diſſeiſor without deed, or by deed poll, this is a remitter to the diſſeiſee, &c.

29. Aſſ. p. 26. 43. Aſſ. p. 3. 11. H. 7. 20. 3. H. 6. 19. 40. E. 3. 43. (Sec. 683.)

HERE appeareth a diverſitie betweene a right of entrie and a right of action; for if a man of full age having but a right of action, taketh an eſtate to him, hee is not remitted: but where hee hath a right of entrie, and taketh an eſtate, he by his entrie is remitted, becauſe his entrie is lawfull. And if the diſſeiſor infeoffe the diſſeiſee and others, the diſſeiſee is remitted to the whole, for his entrie is lawfull: otherwiſe it is if his entrie were taken away.

(Hob. 256.)

(Ant. 49. b. 350. a.)

Lou l'entrie eſt congeable. *A.* is diſſeiſed of a mannor, whereunto an advowſon is appendant, an eſtranger uſurpe to the advowſon, if the diſſeiſee enter into the mannor, the advowſon is recontinued againe, which was ſevered by the uſurpation. And ſo it is if tenant in tayle be of a mannor whereunto an advowſon is appendant, the tenant in taile diſcontinueth in fee, the diſcontinuee granteth away the advowſon in fee, and dieth, the iſſue in tayle recontinueth the mannor by recoverie, he is thereby remitted to the advowſon; and in both caſes hee that right hath ſhall preſent when the church becommeth voyd.

8. R. 2. Quar. imp. 199. 19 H. 6. 30. 8 H. 6. 17. 21. H. 6. 2. 3. H. 4. 8. 14. H. 6. 15, 16. 37. H. 6. 18. 26. H. 8. 4. F. N. B. 36. f. & 35. b. (3. Rep. 3. b. Sect. 661.)

The patron of a benefice is outlawed, and the church becommeth voyd, an eſtranger uſurpeth, and ſix moneths paſſe, the king doth recover in a *quare impedit*, and remove the incumbent, &c. the advowſon is recontinued to the rightfull patron. And ſo note a diverſitie betweene a recontinuance and a remitter; for a remitter cannot be properly, unleſſe there be two tities; but a recontinuance may be where there is but one.

22. Aſſ. p. 33. en le caſe de Theobald Granvile. (3 Rep. 3.)

Per fait indent, &c. Here it appeareth, that if the diſſeiſor by deed indented make a leaſe for life, or a gift in taile, or a feoffment in fee, whereunto liverie of ſeiſin is requiſite; yet the deed indented ſhall not ſuffer the liverie made according to the forme and effect of the indenture, to worke any remitter to the diſſeiſee, but ſhall eſtop the diſſeiſee to claime his former eſtate; and if the diſſeiſor upon the feoffment doth reſerve any rent or condition, &c. the rent or condition is good: and the reaſon wherefore a deed indented ſhall conclude the taker more than the deed poll, is, for that the deed poll is only the deed of the feoffor, donor, and leſſor; but the deed indented is the deed of both parties, and therefore aſwell the taker as the giver is concluded.

13. H. 4. 5. 3. H. 4. 17. 8. H. 4. 8. 12. H. 4. 19. 35. Aſſ. 8. 17. Aſſ. 3. 29. Aſſ. 53. 43. E. 3. 17. Parker's caſe 44. E. 3. Eſtop. 10. 21. H. 6. 2. per Paſton. 8. H. 6. 17. per Cottſmore. (1. Roll. Abr. 863. 878. 4. Rep. 52.)

Ou per record. As by fine, deed indented, and inrolled, and the like.

SECT.

* *ny* added L. and M. and Roh.
† *reprent—ent prent*, L. and M. and Roh.
‡ *un—bon*, L. and M. and Roh.
|| *&c.* not in L. and M. nor Roh.

Sect. 694.

ITEM, si home lessa terre pur terme de vie a un auter, le quel aliena a un auter en fee, et l'alienee fait estate a le lessor, ceo est un remitter al lessor, pur ceo que son entrie fuit congeable, * *&c.*

ALSO, if a man let land for terme of life to another, who alieneth to another in fee, and the alienee make an estate to the lessor, this is a remitter to the lessor, because his entrie was congeable, &c.

This is evident enough upon that which hath beene said.

Sect. 695.

ITEM, si home soit disseisie, et le disseisor lessa la terre al disseisee per fait pol, ou sans fait, pur terme des ans, per que le disseisee entra, cest entre est un remitter a le disseisee. Car en tiel case lou l'entre d'un home est congeable, et un lease est fait a luy, coment que il claima per parolx en paiis, que il ad estate per force de tiel lease, ou dit overtment, que il ne claima riens en la terre sinon per force de tiel lease, uncore ceo est un remitter a luy, car tiel † *disclaimer en le paiis n'est riens a purpose. Mes s'il* ‡ *disclaimer en court de record, que il* || *n'ad estate forsque per force de tiel lease, et nemy auterment, donque il est conclude, &c.*

ALSO, if a man bee disseised, and the disseisor let the land to the disseisee by deed pol, or without deed, for terme of yeares, by which the disseisee entreth, this entrie is a remitter to the disseisee. (Hob. 256.) For in such case where the entrie of a man is congeable, and a lease is made to him, albeit that he claimeth by words *in paiis*, that he hath estate by force of such lease, or saith openly, that he claimeth nothing in the land but by force of such lease, yet this is a remitter to him, for that such disclaimer *in paiis* is nothing to the purpose. But if hee disclaime in court of record, that he hath no estate but by force of such lease, and not otherwise, then is he concluded, &c.

HERE appeareth a diversitie betweene a claime *in paiis* of an estate, and a claime of record, for a claime *in paiis* shall not hinder a remitter. Otherwise it is of a claime of record, because that doth worke a conclusion. (3. Rep. 25.)

Sect. 696.

ITEM, si deux joyntenaunts seisie de certaine tenements en fee, l'un

ALSO, if two joyntenants seised of certaine tenements in fee, the one being of

HERE note a diversitie worthy the observation, that where joyntenants or coparceners have one and the same remedie, if the one enter, the other shall enter also: but where (2. Inst. 308.)

* *&c.* not in L. and M. nor Roh. † *disclaimer—clayme,* L. and M. and Roh. ‡ *disclaimer—clayme,* L. and M. and Roh. || *n'ad—ad,* L. and M. and Roh.

10. H. 6. 10. 19. H. 6. 45. 31. H. 6. tit. Ent. Cong. 54.

where remedies bee feverall, there it is otherwife. As if two joyntenants or coparceners joyne in a reall action, where their entrie is not lawfull, and the one is fummoned and fevered, and the other purfueth and recovereth the moitie, the other joyntenant or coparcener fhall enter and take the profits with her, becaufe their remedie was one and the fame. But where two coparceners be, and they are diffeifed, and a difcent is caft, and they have iffue and die, if the iffue of the one recover her moitie, the other fhall not enter with her, becaufe their remedies were feverall; and yet when both have recovered, they are coparceners againe. So here in this cafe that *Littleton* putteth, the two joyntenants have not equall remedie; for the infant hath a right of entry, and the other a right of action; and therefore the infant being remitted to a moitie, the other fhall not enter and take the profits with her.

If *A*. and *B*. joyntenants in fee, be diffeifed by the father of *A*. who dieth feifed, his fonne and heire entreth, he is remitted to the whole, and his companion fhall take advantage thereof. Otherwife here in the cafe of *Littleton*, for that the advantage is given to the infant, more in refpect of his perfon, than of his right; whereof his companion fhall take no advantage. But if the grandfather had diffeifed the joyntenants, and the land had defcended to the father, and from him to *A*. and then *A*. had died, the entrie of the other fhould be taken away by the firft difcent; and therefore he fhould not enter with the heire of *A*.

Vide 35. Aff. pl. ultim.

But here in the cafe of *Littleton*, if after the difcent the other joyntenant had died, and the infant furvived, fome fay that he fhould have entred into the whole, becaufe hee is now, in judgement of law, folely in by the firft feoffment, and he claimeth not under the difcent.

efteant de pleine age, l'auter deins age, font diffeifies, * *&c. et le diffeifor moruft feifie, et fon iffue entra, l'un de les joyntenants efteant adonques deins age, et apres que il vient al pleine age, l'heire le diffeifor leffa les tenements a mefmes les joyntenants pur terme de lour* † *deux vies, ceo eft un remitter (quant al moitie) a celuy que fuit deins age, pur ceo que il eft feifie de ceft moitie que affiert a luy en fee, pur ceo que fon entre fuit congeable. Mes l'auter jointenaunt n'ad en l'auter moitie forfque eftate pur terme de fa vie per force de le leafe, pur ceo que fon entre fuit tolle, &c.*

full age, the other within age, bee diffeifed, &c. and the diffeifor die feifed, and his iffue enter, the one of the joyntenants being then within age, and after that he commeth to full age, the heire of the diffeifor letteth the tenements to the fame joyntenants for terme of their two lives, this is a remitter (as to the moitie) to him that was within age, becaufe hee is feifed of the moitie which belongeth to him in fee, for that his entrie was congeable. But the other joyntenant hath in the other moity but an eftate for terme of his life by force of the leafe, becaufe his entry was taken away, &c.

CHAP. 13. Of Warrantie. Sect. 697.

Vide Sect. 288. 331. (Vaughan 376.)

IL eft communement dit. Here by the opinion of *Littleton, communis opinio* is of authoritie, and ftands with the rule of law, *A communi obfervantia non eft recedendum*

IL eft communement dit, que trois garranties y font, fcilicet, garrantie lineal, garrantie

IT is commonly faid, that there bee three warranties, *fcilicet*, warrantie lineall, warrantie col-*lateral*

* *&c.* not in L. and M. nor Roh.

† *deux* not in L. and M. nor Roh.

rantie collateral, et garrantie que commence per disseisin. Et est ascavoir, que devant l'estatute de Gloucester touts garranties queux discendont a eux queux sont heires a eux queux fesoyent les garranties, fueront barres a mesmes les heires a demander ascuns terres ou tenements encounter les garranties, foreprise les garranties queux commencerent per disseisin; car tiel garrantie ne fuit unque barre al heire, pur ceo que le garrantie commence per tort, scilicet, per disseisin.

laterall, and warrantie that commence by disseisin. And it is to be understood, that before the statute of *Glocester* all warranties which descended to them which are heires to those who made the warranties, were barres to the same heires to demand any lands or tenements against the warranties, except the warranties which commence by disseisin; for such warrantie was no barre to the heire, for that the warrantie commenced by wrong, viz. by disseisin.

dendum: and againe, *Minimè mutanda sunt quæ certam habuerunt interpretationem.* (1. Rep. 1.)

Here our authour beginneth this Chapter with an exact division of warranties. A warrantie is a covenant reall annexed to lands or tenements, whereby a man and his heires are bound to warrant the same; and either upon voucher, or by judgement in a writ of *warrantia cartæ*, to yeeld other lands and tenements (which in old bookes is called *in excambio*) to the value of those that shall bee evicted by a former title, or else may bee used by way of *rebutter*. (1)

Bract. lib. 2. fol. 37. Lib. 5. fol. 380, 381, &c. Glanvill. lib. 3. cap. 1, 2, 3. Lib. 7. cap. 2, 3. Lib. 9. ca. 4. Britton ca. 105. fol. 249, 250, &c. & fol. 88. 106. b. 196, 197. Fleta lib. 5. cap 15. Lib. 6. cap. 23. Mir. cap. 2. §. 17.

33. E. 3. 21. 45. E. 3. 18.

Rebouter is a French word, and is in Latine *repellere*, to repell or barre; that is, in the understanding of the common law, the action of the heire by the warrantie of his ancestor; and this is called to rebut or repell. [c] *Britton* saith, *Garranter en un sence signifie a defender son tenant en sa seisin, et en auter sence signifie que si il ne defende que le garrant luy, soit tenue a eschanges, et de faire son gree a la valiaunce.* [d] *Bracton* saith, *Warrantizare nihil aliud est, quàm defendere et acquietare tenentem qui warrantum vocavit in seisinâ suâ.* [e] *Fleta* saith, *Warrantizare nihil aliud est quàm possidentem vocantem defendere et acquietare in suâ seisinâ vel possessione erga petentem, &c. et tenens de re warranti excambium habebit ad valentiam.*

(Ant. 303. b. 2. Roll. Abr. 775, 776. Cro. Jac. 4.)

[c] Britton fol. 197. b.

[d] Bract. lib. 5. fol. 380.

[e] Fleta lib. 5. cap. 15.

It is to be observed, that there be two kinde of warranties, that is to say, *warrantia expressa et tacita*, vulgarly said warrantie in deed, because they be expressed; and warranties in law, because the law doth tacitely imply them. And this division of warranties that *Littleton* here speaketh of, he intendeth of warranties in deed. And of warranties in law, more shall be said hereafter in this Chapter. As for promises or contracts annexed to chattels reall or personall, they are not intended by our author in his said division, but only warranties concerning freeholds and inheritances.

Lib. 4. fol. 81. Noke's case. (F. N. B. 134. h.)

Vid. Sect. 733. (2. Roll. Abr. 738. Sid. 178. Cro. Ja. 4. Ant. 101. b. Post. 384. a. 1. Roll. Rep. 316. Cro. Jac. 86. 3. Bulst. 95. Poph. 143. Bridg. 128. Owen 60. 3. Mod. 261. S. C. Shower 68.)

Devant le statute de Glocester. This statute was made at a parliament holden at *Glocester* in the sixth yeare of the reigne of king *E.* 1. and therefore it is called the statute of *Glocester*.

Gloc. cap. 3.

Vid. Sect. 724, 725. & 727, &c. (2. Inst. 293.)

Sont barres a mesmes les heires a demander ascuns terres, &c. For the statute, as hath beene said, being made in 6. *E.* 1. (was before the statute of *donis conditionalibus*, which was enacted 13. *Edward* 1.) when all states of inheritance were fee simple. But after the statute of 13. *Edward* 1. the heire in tayle is not barred by the warrantie of his ancestour, unlesse there be assets, as shall be said hereafter more largely in this Chapter.

Bracton lib. 4. fol. 321. b. Fleta lib. 5. cap. 34. 7. E. 3. Gain. 47.

By the statute of *Glocester* foure things are enacted.

First, that if a tenant by the courtesie alien with warrantie and dieth, that this shall bee no barre to the heire in a writ of *mordancester*, without assets in fee simple; and if lands or tenements descend to the heire from the father, he shall be barred, having regard to the value thereof.

(8. Rep. 52, 53)

Secondly,

(1) The doctrine of *warranty* was formerly one of the most interesting and useful articles of legal learning; but the effect and operation of warranties having, by repeated acts of the legislature, been reduced to a very narrow compass, it is become in most respects a matter of speculation rather than of use. In some instances, however, warranties have still a powerful influence on our landed property; and there is no part of our jurisprudence to which the ancient writers have more frequently recourse to explain and illustrate their legal doctrines. Hence abstruse, and in most respects obsolete, as the learning respecting it unquestionably is, it continues to deserve the attention of every person who wishes to obtain accurate notions of those branches of our laws, which are more immediately connected with the doctrines that respect the alienation of landed property. *In the civil law* warranty is defined, the obligation of the seller to put a stop to the eviction and other troubles which the buyer suffers, in the property purchased. Eviction is defined to be the loss which the buyer suffers, either of the whole thing that is sold, or of a part of it, by reason of the right which a third person has to it. The other troubles are those which, without touching the property of the thing sold, diminish the right of the purchaser; as if any one pretends a right to the usufruct of the lands sold, to a rent issuing out of them, to a service, or any other thing of the like nature. The buyer being thus evicted or troubled in his possession, has his recourse to the seller to warrant him. This warranty is either *in law*, being that security which every seller is bound to give for maintaining the buyer in the free possession and enjoyment of the thing sold, although the sale makes no mention of it; or *in deed*, being that kind of particular or conventionary warranty, which the seller and buyer regulate among themselves. See *Domat*, l. 1. tit. 2. § 10. By the practice of *the Roman law*, the buyer might, immediately after the eviction or trouble, give notice of it to the seller, who then, if he thought proper, might make himself a party to the action, and defend it; but till the sentence was pronounced, the buyer could not bring his action of warranty against the seller: and the action was brought before the judge of the place in which the seller was domiciliated. But the practice is different in the courts of law *in France*. There, the buyer, when he gives notice of the action to the seller, may bring his action of warranty against him before the judge, before whom the original action is brought; and if he cannot defend the action, the judge condemns him to indemnify the seller, by the same sentence by which he pronounces in favour of the plaintiff in the original cause. See *Pothier Traité des Contracts de Vente*, partie 2. c. 1. sect. 2. art. 5. § 2. The first warrantor may call upon another to warranty; he in the same manner may call upon a third. But to prevent the delays which must unavoidably ensue from multiplying warranties, a fourth warrantor is not permitted to intervene, except in particular circumstances. The degrees also must be observed. Each person must vouch his own immediate warrantor, as it is not lawful for him to vouch any of the ulterior warrantors. After the warrantor has entered into the warranty, the warrantee may either proceed in his defence jointly with the warrantor, or leave the cause to him solely. The sentence binds them both equally. If the person against whom the action is brought be evicted or troubled in his possession by the sentence of the judge, he has a claim upon the warrantor for a complete indemnification. Sometimes the precise sum to be paid by way of indemnity is fixed and agreed to by the parties upon the making of the contract; but penal obligations of this nature are greatly discountenanced by the laws of France. It is always in the breast of the judge to moderate or encreale them; but they cannot be encreased either by the express contract of the parties, or the equity of the judge, to more than double of the property evicted. See *Traité des Evictions, et de la Garantie Formelle, par Monf. Berthelot*, 2 vol. oct. Paris, 1781.—The warranty treated of by Littleton in this Chapter, is evidently of *feudal extraction*, being derived from the obligation which the lord was

A

under,

Secondly, that if the heire, for want of aſſets at that time deſcended, doth recover the lands of his mother by force of this act, and afterwards aſſets deſcend to the heire from the father, then the tenant ſhall recover againſt the heire the inheritance of the mother by a writ of falſe judgement, which ſhall iſſue out of the record, to reſummon him that ought to warrant, as it hath beene done in other caſes, where the heire being vouched commeth into the court, and pleadeth that he hath nothing by diſcent.

Thirdly, that the iſſue of the ſonne ſhall recover by a writ of *coſinage*, *aiel*, and *beſaiel*.

And laſtly, that the heire of the wife, after the death of the father and mother, ſhall not bee barred of his action to demand the heritage of the mother by writ of entrie, which his father aliened in the time of his mother, whereof no fine was levied in the king's court.

(Ant. 54. b.)

Concerning the firſt, there be two points in law to be obſerved.

[e] 11. E. 2. tit. Garr. 83. 4. E. 3. Garr. 63. 18. E. 3. 51. Pl. Com. 110. 7. E. 3. 53. Temps E. 1. Garr. 87.

Firſt, albeit the ſtatute in this article name a writ of *mordanceſter*, and after writs of *coſinage*, *aiel*, and *beſaiel* [e]; yet a writ of right, a *formedon*, a writ of entry *ad communem legem*, and all other like actions, are within the purview of this ſtatute; for thoſe actions are put but for examples.

27. E. 3. 8, 9. 14. E. 4. Gar. 5. Dier quarto Mar. 148. a.

Secondly, where it is ſaid in the ſaid act (if the tenant by the courteſie alien), yet this releaſe with warrantie to a diſſeiſor, &c. is within the purview of the ſtatute, for that it is in equall miſchiefe; and if that evaſion might take place, the ſtatute ſhould have beene made in vaine.

22. Aſſ. 9. & 37. Temps E. 1. Gar. 86.

[o] 11. H. 7. cap. 20. (Poſt. 380. a. 381. a.)

If tenant by the courteſie be of a ſeigniorie, and the tenancie eſcheate unto him, and after he alieneth with warrantie, this ſhall not binde the iſſue, unleſſe aſſets deſcend; for it is in equall miſchiefe. But notwithſtanding this ſtatute, if feme tenant in dower had aliened in fee with warranty and died, the warranty had bound the heire untill the ſtatute [o] of 11. *H.* 7. ſince our author wrote: by which ſtatute the heire may enter, notwithſtanding ſuch warrantie.

18. E. 3. 9.

(Hob. 31. 8. Rep. 54. a.)

But note, there is a diverſitie betweene a warranty on the part of the mother, and an eſtoppell; for an eſtoppell of the part of the mother ſhall not binde the heire, when hee claimeth from the father: as if lands bee given to the huſband and wife, and to the heires of the huſband, the huſband make a gift in taile, and dieth, the wife recovereth in a *cui in vitâ* againſt the donee, ſuppoſing that ſhe had fee ſimple, and make a feoffement and dyeth, the donee dyeth without iſſue, the iſſue of the huſband and wife bring a *formedon* in the reverter againſt the feoffee; and notwithſtanding that he was heire to the eſtoppell, and the mother was eſtopped, yet for that he claimed the land as heire to his father, hee was not eſtopped. Note, that warranties are favoured in law, being part of a man's aſſurance; but eſtoppels are odious.

21. R. 2. Judgement. 263. (2. Roll. Abr. 776. 8. Rep. 53. b. Ant. 326. a. Doct. & Stud. 44. b. 1. Leo. 261.)

If a feme heire of a diſſeiſor infeoffeth me with warrantie, and marrieth with the diſſeiſee, if after the diſſeiſee bring a *præcipe* againſt me, I ſhall rebut him, in reſpect of the warrantie of his wife, and yet he demandeth the land in another's right. And ſo if the huſband and wife demand the right of the wife, a warrantie of the collaterall anceſtor of the huſband ſhall barre.

11. H. 7. cap. 20. Vid. Sect. 595. See this ſtatute of 11. H. 7. ca. 20. well expounded, Lib. 1. fol. 176. in ſir Anthony Mildmaye's caſe. 3. & 4. Ph. & Mar. Dier 146. Lib. 3. fol. 59, 60, 61, 62. Lincolne Coll. caſe. Pl. Com. fol. 56. 20. Eliz. Dier 362. Doct. & Student 55. 8. Eliz. Dier 248. 19. Eliz. Dier 354. 21. Eliz. ibid. 362. Lib. 3. fol. 50, 51. ſir George Browne's caſe. Lib. 5. fol. 79. Fitzh. caſe. 27. H. 8. 23.

If a woman had beene tenant for life, the remainder or reverſion to her next heire, and the woman had aliened in fee and died, this warrantie had barred her heire in remainder or reverſion; but this is partly holpen by the ſaid act of 11. *H.* 7. viz. where the woman hath any eſtate for life of the inheritance or purchaſe of her huſband, or given to her by any of the anceſtors of the huſband, or by any other perſon ſeiſed to the uſe of her huſband, or of any of his anceſtors, there her alienation, releaſe, or confirmation with warrantie, ſhall not binde the heire.

[f] Mich. 13. Jac. inter Harley & Weſt in ejectione firmæ in Communi Banco. Lincoln.

[g] Paſch. 17. Eliz.

(4. Rep. 10. Ant. 360. a. 115. a. Poſt. 369. a. 381. a. Sid. 24. Plo. 105. a. Dyer 64. b. Jo. 31. Hob. 332. Cro. Eliz. 2. 2. Cro. 475. Ben. 40. 2. Inſt. 681. W. Jones 13. & 254. Palm. 21. 32. 216. Cro. Car. 244. pl. 464.)

To the authorities quoted in the margent, which may ſerve as commentaries upon the ſaid ſtatute, I will only adde two caſes. The one was, [f] A man ſeiſed of lands in fee levied a fine to the uſe of himſelfe for life, and after to the uſe of his wife, and of the heires males of her body by him begotten for her jointure, and had iſſue male, and after he and his wife levied a fine, and ſuffered a common recovery, the huſband and wife died, and the iſſue male entred by force of the ſaid ſtatute of 11. *H.* 7. And it was holden by the juſtices of aſſiſe, (the caſe comming downe to be tried by *niſi prius*), that the entry of the iſſue male was lawfull: and yet this caſe is out of the letter of the ſtatute; for ſhe neither levied the fine, &c. being ſole, or with any other after-taken huſband, but is by herſelfe with her huſband that made the joynture. *Sed qui hæret in literâ hæret in cortice*; and this caſe being in the ſame miſchiefe, is therefore within the remedy of the ſtatute, by the intendment of the makers of the ſame, to avoid the diſheriſon of heires who were provided for by the ſaid joynture, and eſpecially by the huſband himſelfe that made the joynture, which (as it was ſaid) is a ſtronger caſe than the example ſet downe in the ſtatute. The other was, [g] A man is ſeiſed of lands

---

under, by that ſyſtem of polity, to defend his tenant's title to the land againſt all claimants. If the tenant was evicted, the lord was bound to make him a recompence, by giving him lands of equal value to thoſe evicted from him. The doctrine and practice of warranty, in the early ages of the feudal law, is thus ſet forth in the book of the Fiefs, tit. 25. It is there ſtated, that a vaſſal held a fief from the lord, and being diſturbed in his poſſeſſion of it, called upon the lord to defend him. The lord refuſed to appear before the judge, by which the vaſſal loſt his cauſe. The vaſſal thereupon demanded a recompence from the lord. The lord ſaid in anſwer, that the vaſſal never held the fief, nor received the inveſtiture of it from him. The vaſſal replied, that he held the fief from the lord, and had been inveſted with it by him; that he had called upon the lord to defend the poſſeſſion on the trial, and that the lord did not then deny the lands being held of him. All this the vaſſal proved by proper witneſſes. Upon this caſe it was held, that when a vaſſal is diſturbed in the poſſeſſion of his fief, if he calls on the lord to defend him, and it appears on the trial that the lord inveſted him with a fief that did not belong to him, the lord is bound either to give him another fief of equal value, or the price of it in money; and that he is bound to do this as ſoon as it clearly appears that the vaſſal will be evicted of the fief. But that if the lord denies that the fief is held of him, and that the vaſſal, or any of his anceſtors, were inveſted with it by him, and the vaſſal proves thoſe facts, either by an inſtrument, properly authenticated, or by the peers of the court, the lord muſt give him another fief; or may be put to his oath, that neither the vaſſal nor any of his anceſtors held the fief from, or were inveſted with it by him, or any of his anceſtors. If the lord does this, he is to be acquitted.—Sir Martin Wright ſeems to queſtion whether the lord's obligation to protect or defend the feudatory, made him anciently liable upon eviction (without any fraud or defect in him) to compenſate the loſs of the fief. He obſerves, that it can hardly be imagined that while feuds were precarious, and held at the will of the lord, or indeed, that while they were generouſly given, without price or ſtipulated render, the lord ſhould be ſubject to ſuch a loſs; eſpecially ſince it is likely that the lord's obligation upon eviction rather prevailed upon the reaſon of contracted and improper feuds, than from the nature of a pure original feud. He obſerves, that none of the ancient feudiſts make any ſuch diſtinction, but that all of them ſuppoſe the lord's obligation upon eviction to have been general; yet he aſſerts, they muſt be underſtood to ſpeak of the times in which they wrote, when improper feuds chiefly prevailed. See Introduc. to the Law of Tenures, p. 38, 39, 40.—Upon a principle ſimilar to that upon which this diſtinction is grounded, it ſeems to have been formerly made a queſtion by the writers on the feudal laws of the German and Italian ſtates, whether inveſtiture alone, without any expreſs promiſe or undertaking on the part of the lord, entitled the tenant to claim an equivalent from the lord, in caſe of eviction. Rotentall, a German feudiſt of great authority, has ſtated this queſtion, and the authorities upon which the two oppoſite opinions reſpecting it are founded. He mentions it to be his own opinion, that inveſtiture alone, without any promiſe, entitled the tenant to an equivalent; and he ſays, that the greateſt part of thoſe who maintain the oppoſite opinion, admit that the lord, though he has made no promiſe, is bound to give an equivalent, if the fief were originally granted for

lands in the right of his wife, and they two levie a fine, and the conusee grant and rendereth the land to the husband and wife in speciall tayle, the remainder to the right heires of the wife, they have issue, the husband dyeth, the wife taketh another husband, and they two levie a fine in fee, and the issue entereth, this is directly within the letter of the statute, and yet it is out of the meaning; because the state of the land moved from the wife, so as it was the purchase of the husband in letter, and not in meaning. But where the woman is tenant for life, by the gift or conveyance of any other, her alienation with warrantie shall binde the heire at this day. So if a man bee tenant for life (otherwise than as tenant by the courtesie) and alien in fee with warrantie, and dieth, this shall at this day binde the heire, that hath the reversion or remainder by the common law not holpen by any statute. But all this is to be understood, unlesse the heire that hath the reversion or remainder doth avoid the estate so aliened in the life of the ancestour; for then the estate being avoided, the warrantie being annexed unto the estate, is avoided also; whereof more shall be said in this Chapter in his proper place. And therefore it is necessary for the heire in such cases to make an entry as soone as he hath notice or probable suspicion of such an alienation.

Com. Banco. Latton's case, which I myselfe heard and observed. (2. Roll. Abr. 141. Moor. 93.)

Sect. 725. (1. Rep. 66. Post. 367. b. 388. b. 10. Rep. 95.)

As to the second clause of the statute of *Glocester*, there are two points of law to be observed.

First, that by the expresse purview of the statute, if assets doe after discend from the father, then the tenant shall have recovery or restitution of the lands of the mother. But in a *formedon*, if at the time of the warrantie pleaded no assets be discended, whereby the demandant recovereth, if after assets discend, there the tenant shall have a *scire facias* for the assets, and not for the land intailed. And the reason hereof is, that if in this case the tenant should be restored to the land intailed, then if the issue in taile aliened the assets, his issue should recover in a *formedon*; and therefore the sages of the law, to prevent future occasions of suits, resolved the said diversitie in the cases abovesaid, upon consideration and construction of the statute of *Glocester*, and of the statute *de donis conditionalibus*.

Pl. Com. Fulmerstone's case, 110. a. Lib. 8. fol. 53. Sym's case.

Secondly, it is to bee observed, that after assets discended, the recoverie shall bee by writ of judgement, which shall issue out of the rolle of the justices, &c. And here two things are to be declared and explained. First, by what writ, &c. and that is cleere, viz. by *scire facias*. But the second is more difficult; and that is, upon what manner of judgement the *scire facias* is to be grounded: for explanation whereof it is to be understood, that if the tenant will have benefit of the statute, he must plead the warrantie, and acknowledge the title of the demandant, and pray that the advantage of the statute may bee saved unto him, and then if after assets discend, the tenant upon this record shall have a *scire facias*: and if assets discend but for part, he shall have a *scire facias* for so much. But if the tenant plead the warrantie, and plead further that assets discended, &c. and the demandant taketh issue that assets discended not, &c. which issue is found for the demandant, whereupon he recovereth, the tenant, albeit assets doe after discend, shall never have a *scire facias* upon the said judgement; for that by his false plea he hath lost the benefit of the said statute.

Lib. 8. fol. 53, 54. Sym's case. Ibid. 134. Mary Shipley's case. (Doct. Pla. 180. 2. Cro. 15. Ant. 33. a. 326. a.)

Touching the third, sufficient hath beene spoken before For the last, it is to be observed, that if the husband be seised of lands in the right of his wife, and maketh a feoffement in fee with warrantie, the wife dieth, and the husband dieth, this warrantie shall not binde the heire of the wife without assets, albeit the husband be not tenant by the curtesie. But of this you shall reade more hereafter.

8. E. 2. tit. Gar. 81. 18. E. 3. 51.

In the meane time know this, that the learning of warranties is one of the most curious and cunning learnings of the law, and of great use and consequence. (1)

Vide Sect. 725.

A demander ascuns terres ou tenements. A warrantie may not only be annexed to freeholds, or inheritances corporeall, which passe by livery, as houses and lands, but also to freeholds or inheritances incorporeall, which lye in grant, as advowsons; and to rents, commons, estovers, and the like, which issue out of lands or tenements. And not onely to inheritances *in esse*, but also to rents, commons, estovers, &c. newly created. As a man (some say) may grant a rent, &c. out of land for life, in tayle, or in fee with warrantie; for although there can be no title precedent to the rent, yet there may be a title precedent to the land, out of which it issueth before the grant of the rent, which rent may bee avoided by the recovery of the land; in which case the grantee may helpe himselfe by a *warrantia cartae*, upon the especiall matter. And so a warrantie in law may extend to a rent, &c. newly created; and therefore if a rent newly created be granted in exchange for an acre of land, this exchange is good, and every exchange implyeth a warrantie in law. And so a rent newly created may be granted for oweltie of partition.

(2. Roll. Abr. 774. Hob. 14. 28. 2. Saund. 183.)

2. H. 4. 13. 30. H. 8. Dier. 41. Temps E. 1. Admesurement 16. 32. E. 1. Voucher. 294. 30. E. 1. Exchange 16. 9 E. 4. 15. E. 4. 9. 29. Ass. 13. (F. N. B. 134. Ante 50. b. 101. b. 308 nota. Post. 389. a.)

A man

(1) Upon the alterations made by the statute law in the doctrine of warranty, see note 1. 373. b.

services done; or otherwise, in the way of remuneration. See *Rosentall Tractatus et Synopsis totius Juris feudalis*, Coll. Allob. 1610. Vol. 1. 469, 470.—In a more recent publication, expresly on the subject of gratuitous fiefs, it is held, that the lord is bound to defend the fief, and to give the tenant an equivalent, if it is evicted from him. The author states the objection made by sir Martin Wright; and in answer to it observes, that the feudal contract and connection between the lord and tenant is such, as distinguishes it from a voluntary donation, and necessarily includes this obligation upon the lord. See *Petri Schultzii Dissertatio de Feudo Gratiae in Jenichen Thesaurus Juris feudalis*, Francofurti ad Maenum, tom. 2. 556. 567, 568. It should seem that with us anciently, every kind of homage, when received, but not before, bound the lord to acquittal and warranty; that is, to keep the tenant free from distress, entry, or other molestation, for services due to the lords paramount, and to defend his title to the lands against all others; but that in subsequent times, the implied acquittal and warranty were peculiar to that species of homage which is known by the appellation of homage ancestrel. See ant. 67. b. note 1. 105. a. note 1. In another material quality, the warranty annexed to homage ancestrel differed from express warranty. In the case of express warranty, the heir was chargeable only for those lands which he had by descent from the ancestor who created the warranty. But in the case of homage ancestrel, the tenant was not driven to recover in value only those lands which the lord had from that ancestor who created the seignory; that would be impossible, as it was essential to homage ancestrel, that the seignory should have been created before time of memory. It being therefore impossible to ascertain which lands descended from the ancestor who made the grant, the law charged all the lands. See ant. 102. b. But defence and recompence were not the only benefits which the tenant derived from the lord's warranty; it rebutted or repelled the lord from claiming the land itself, or any profit or right from it, but those which under the feudal contract were due to him as lord, according to the fundamental maxim of the doctrine of fiefs, *Homagium repellit perquisitum*. Such appear to be the outlines of the system of warranty in the early ages of the feudal law. The practice of subinfeudation necessarily occasioned a considerable extension of it. That practice arose, in a great measure, from the attempts, which, in every kingdom where the feudal polity has prevailed, the higher tenants or vassals have made to render themselves independent of the crown. In France, towards the end of the Carlovingian race of their monarchs, the dukes or governours of provinces, the counts or governours of towns, and even the subordinate officers of state, taking advantage of the weakness of the royal authority, made hereditary in their families the lands, titles, and offices, which 'till then they had enjoyed for life only. They usurped the sovereign propriety of the land, with civil and military authority over the inhabitants: they granted out the lands to their immediate tenants, and these granted them over to others. By this means, though they always professed to hold their fiefs from the crown, they were in fact absolutely independent of it. They exercised in their territories every royal prerogative; they promulgated laws; they had the power of life and death; they coined money; fixed the standard of weights and measures; granted safeguards; entertained a military force; and imposed taxes, with every

Vide Sect. 741. 45. E. 3. Voucher 72. 9. E. 3. 78. 18. E. 3. 55. 30. E. 3. 30. 21. H. 7. 9. 3. H. 7. 4. 7. H. 4. 17. 10. E. 4. 9. b. 21. E. 4. 26. 14. H. 8 30. H. 8. Dier. 42. (2. Roll. Abr. 744.)

A man seised of a rent secke issuing out of the mannor of *Dale*, taketh a wife, the husband releaseth to the terre-tenant, and warranteth *tenementa prædicta*, and dieth, the wife bringeth a writ of dower of the rent, the terre-tenant shall vouche, for that albeit the release enured by way of extinguishment, yet the warrantie extended to it; and by warranting of the land, all rents, &c. issuing out of the land, that are suspended or discharged at the time of the warrantie created, are warranted also.

Sect. 698.

GARRANTY que commence per disseisin est en tiel forme: sicome lou il est pier et fits, et le fits purchase terre, &c. et lessa mesme la terre a son pier pur terme d'ans, et pier per son fait ent enfeoffa un auter en fee, et oblige luy et ses heires a garranty, et le pier devy, per que le garranty discendist al fits, ceo garranty ne barrera my le fits; car nient obstant cel garrantie le fits poit bien enter en la terre, ou aver un assise envers l'alience s'il voit, pur ceo que le garrantie commence per disseisin; car quant le pier que n'avoit estate forsque pur terme des ans, fist un feoffement en fee, ceo fuit un disseisin al fits del franktenement que adonques fuist en le fits. En mesme le maner est, si le fits lessa a le pier la terre a tener a volunt, et puis le pier fait un feoffment ove garrantie,

WARRANTIE that commences by disseisin is in this manner: as where there is father and son, and the sonne purchaseth land, &c. and letteth the same land to his father for terme of yeares, and the father by his deed thereof infeoffeth another in fee, and bindes him and his heires to warrantie, and the father dies, whereby the warrantie descendeth to the son, this warrantie shall not barre the sonne; for notwithstanding this warrantie the sonne may well enter into the land, or have an assise against the alienee if he will, because the warrantie commenced by disseisin; for when the father which had but an estate for terme of yeares, made a feoffement in fee, this was a disseisin to the sonne of the freehold which then was in the sonne. In the same manner it is, if the sonne letteth to the father

(Doct. & Stud. 155. a. b.)

GARRANTY que commence per disseisin, &c. (1) It is called a warranty that commenceth by disseisin, because regularly the conveyance whereunto the warranty is annexed doth worke a disseisin.

7. E. 3. 41. 43. E. 3. 17. 50. E. 3. 12. Vide Sect. 611.

(2. Inst. 154. 1. Roll. Abr. 663. 3. Rep. 37.)

In this Section *Littleton* putteth five examples of a warrantie commencing by disseisin, viz. of a feoffement made with warranty by tenant for yeares, by tenant at will, by tenant by *elegit*, by tenant by statute merchant, and by tenant by statute staple: all these and the other examples that *Littleton* putteth of this kinde of warranties in the succeeding Sections, have foure qualities.

Lib. 5. fol. 79. b. Fitzherbert's case. (Cro. Car. 483. 2. Roll. Abr. 741.)

First, that the disseisin is done immediatly to the heire that is to be bound; and yet if the father bee tenant for life, the remainder to the sonne in fee, the father by covine and consent maketh a lease for yeares, to the end that the lessee shall make a feoffement in fee, to whom the father shal release with warrantie, and all is executed accordingly, the father dyeth, this warrantie shall not binde, albeit the disseisin was not done immediately to the sonne; for the feoffement of the lessee is a disseisin to the father, who is *particeps criminis*. So it is if one brother make a gift in tayle to another, and the uncle disseise the donee, and infeoffeth another with warrantie, the uncle dieth, and the warrantie descendeth upon the donor, and then the donee dyeth without

31. E. 3. tit. Garrantie. 28.

(5. Rep. 50. a.)

(2. Roll. Abr. 772, 773. Ant. 32. a. 56. a. 171. a. 179 a. F. N. B. 149. c.)

(1) As to *warranties commencing by disseisin*:—Lord-chief baron Gilbert divides warranties into two sorts; first, those commencing by disseisin or wrong; and secondly, binding warranties. The first are where the ancestor that makes the warranty is partner to the wrong; and such warranties are not obliging, because it cannot be presumed that one who is so unjust as to do wrong, will be so just as to leave a recompence to his heir; wherefore such contracts are wholly rejected as collusive, and founded on no consideration. In the *Ancien Coutumier de Normandie*, ch. 96, it is said, that in a writ of *nouvelle dessaisine* there is no vouching to warranty; because it is not to be suffered that any one should retain the possession of another, either by himself, or by the means of another, or that he should disturb it by his foolish hardihood; and whoever does so, ought to restore it.

every other right supposed to be annexed to royalty. It was even admitted, that if the king refused the lord justice, the lord might make war against him. In the ordonnances of St. Lewis, ch. 50, is this remarkable passage: "If the lord says to his liege tenant, "Come with me, I am going to make war against my sovereign, who has refused me the justice of his court: upon this the liege-"man should answer in this manner to the lord: I would willingly go to the king to know the truth of what you say, that he has "denied you his court. And then he shall go to the king, saying to him in this manner: Sir, the lord in whose liegeance and fealty "I am, has told me that you have refused him the justice of your court; and upon this account I am come expresly to your ma-"jesty to know if it is so; for my lord has summoned me to go to war with you. And thereupon, if the king answers that he will "do no judgment in his court, the man shall return immediately to his lord, and his lord must equip him, and fit him out at "his own expence; and if he will not go with him, he shall lose his fief by right. But if the king answers that he will hear him, "and do justice to the lord, the man shall return to him, and shall say: Sir, the king has said to me, that he will willingly do "you justice in his court. Upon which, if the lord says, I never will enter into the king's court, come therefore with me, accord-"ing to the summons I have sent you; then the man should say, I will not go with you; and he shall not lose his fief for his not "going." This shews how powerful and absolute the great vassals were. The same motive which induced the vassals of the crown to attempt to make themselves independent of the crown, induced their tenants to make themselves independent of them. This introduced an ulterior state of vassalage. The king was still called the *sovereign lord*; his immediate vassal was called the lord *suzereign*; and the tenants holding of him were called the *arriere* vassals. Hugh Capet owed the crown of France to the extreme weakness to which this system of subinfeudation had reduced the crown of France; but after he had acquired the throne, he used his utmost efforts to restore it to its antient splendour and strength. His successors pursued the same plan with undeviating attention and consummate policy. It was completed by the union of the provinces of Lorraine and Bar to the crown of France in 1735. See *Abregé Chronologique des Grands Fiefs de la Couronne de France*, Paris 1759. But as to the common incidents of feudality, subinfeudation still prevails in France. In some parts of France, certain portions of the fief descend on the younger children: they are said to hold them of the eldest son by *parage*. The eldest son, however, represents the whole fee, and does homage for it; and is therefore bound to warranty

garrantie, &c. Et si come est dit de pier, issint poit estre dit de chescun auter auncester, &c. En mesme le maner est, si tenaunt per elegit, *tenaunt per statute merchant, ou tenant per statute de le staple, fait feoffment en fee ovesque garrantie,* * *ceo ne barrera my l'heire que doit aver la terre, pur ceo que tiels garranties commencerent per disseisin.*

ther the land to hold at will, and after the father make a feoffment with warrantie, &c. And as it is said of the father, so it may be said of every other ancester, &c. In the same manner is it, if tenant by *elegit*, tenant by statute merchant, or tenant by statute staple, make a feofment in fee with warranty, this shal not bar the heire which ought to have the land, because such warranties commence by disseisin.

issue, albeit the disseisin was done to the donee and not to the donor, yet the warrantie shall not binde him. The father, the sonne, and a third person are joyntenants in fee, the father maketh a feoffment in fee of the whole with warrantie, and dieth, the sonne dieth, the third person shall not only avoyd the feoffment for his owne part, but also for the part of the sonne; and he shall take advantage that the warrantie commenced by disseisin, though the disseisin was done to another.

The second qualitie appearing in *Littleton*'s examples is, that the warrantie and disseisin are *simul et semel*, both at one and the same time. [y] And yet if a man commit a disseisin of intent to make a feoffment in fee with warrantie, albeit he make the feoffment many yeares after the disseisin, notwithstanding because the warrantie was done to that intent and purpose, the law shall adjudge upon the whole matter, and by the intent couple the disseisin and the warrantie together.

(Cro. Car. 483.)

[y] 19. H. 8.12. Lib. 5. fol. 79. b. Fitzh. case.

(Plowd. 51. a. 3. Rep. 78. Post. 369. a. 371. a. 9. Rep. 81. a. Ant. 314. b. 5. Rep. 78.)

The third qualitie is, that the warrantie that commenceth by disseisin by all these examples (if it should binde) should binde as a collaterall warrantie, and therefore commencing by disseisin shall not binde at all.

Ne barrera my le heire, &c. For by the authoritie of our author himselfe, a lessee for yeares may make a feoffment, and by his feoffment a fee simple shall passe; so as albeit as to the lessor it worketh by disseisin, yet betweene the parties the warrantie annexed to such estate standeth good; upon which the feoffee may vouch the feoffor or his heires, as by force of a lineall warrantie. And therefore if a lessee for yeares, or tenant by *elegit, &c.* or a disseisor incontinent make a feoffment in fee with warrantie, if the feoffee be impleaded, hee shall vouch the feoffor, and after him his heire also; because this is a covenant reall, which binde him and his heires to recompence in value, if they have assets by discent to recompence; for there is a feoffment *de facto*, and a feoffment *de jure*: [*] and a feoffment *de facto* made by them that have such interest or possession as is aforesaid, is good betweene the parties, and against all men but only against him that hath right. And therefore if the lord be gardeine of the land, or if the tenant maketh a lease to the lord for yeares, or if the lord be tenant by statute merchant or staple, or by *elegit* of the tenancie, and make a feoffment in fee, hee hereby doth extinguish his seigniorie, although having regard to the lessor it is a disseisin.

(1. Leon. 304. 305. Cro. Car. 388.) Vide Sect. 611. 699. Bract. fol. 216. 223. 224. Fleta lib. 4. cap. 17. 1, 2. Britton, cap. Disseisin. 50. E. 3. 12. b. 8. H. 7. 5. 7 E. 3. 11. 14. E. 3. Feoffments en faits 67. 18. E. 3. Issue 36. 4. E. 2. Briefe 790. 19. E. 2. Ass. 400. 43. E. 3. 7. 17. E. 3. 41. 43. E. 3. Diss. 5. 3. E. 4. 17. 12. E. 4. 12. 10. E. 4. 18. F. N. B. 201. Lib. 3. fol. 78. in Fermor's case.

[*] Temps E. 1. Counterplea de Voucher 126. 50. E. 3 ibidem 124. Vide W. 1. ca. 48. in the second part of the Institutes.

The fourth qualitie is a disseisin; but that is put for an example; and the rather, for that it is most usuall and frequent: but a warrantie that commenceth by abatement or intrusion (that is, when the abatement or intrusion is made of intent to make a feoffment in fee with warrantie), shall not binde the right heire, no more than a warranty that commenceth by disseisin, because all doe commence by wrong. And so it is if the tenant dieth without heire, and an ancestor of the lord enter before the entrie of the lord, and make a feoffment in fee with warrantie, and dieth, this warrantie shall not binde the lord, because it commenceth by wrong, being in nature of an abatement. *Et sic de similibus.* (1)

(10. Rep. 95. 2. Roll. Abr. 740.)

Sect. 699.

ITEM, si gardein en chivalrie, ou gardein en socage, fait

ALSO, if a gardeine in chivalrie, or gardeine in socage, make

† &c. added L. and M. and Roh.

(1) The editor, in note 1. to page 330. a. has (he fears too prolixly) attempted to explain the difference between actual disseisin and disseisin by election, and to prove that the disseisin produced by a feoffment, however slender or tortious the estate of the feoffor may be, is an actual disseisin. It is submitted to the reader, that what he has said on that subject is confirmed by what Littleton says in this Section, and lord Coke's commentary upon it. The discussion, in the note above referred to, of the operation of a feoffment, and the discussion in note 1. p. 271. of the operation of conveyances deriving their effect from the statute of uses, will, perhaps, assist the reader in forming accurate notions of the difference in the operations and effect of feoffments, fines, common recoveries, bargains and sales, releases and wills.

ranty the younger children, from the claims of the lord for his rents and services. Subinfeudation prevails also in Germany. But it must be attended with three circumstances. 1st, It must be a real subinfeudation, and not a sale, or other transaction, under the appearance or colour of a subinfeudation. 2d, The sub-vassal must be, if not of equal, at least of suitable rank and circumstances. 3d, The conditions, so far as the lord is interested in them, must be the same as those upon which the original investiture is granted. See *Dissertatio de Subfeudis Imperii, Mich. Hen. Gribnerii in Jenichen Thes. Feud. t. 1. p. 882. Dissertatio Wenceslai Xaverii Neumann de Puchholtz, quid transeat in vassallum per concessionem feudi, vel subfeudi, ibid. t. 3. 512. Rosentall Tract. & Synopsis totius Juris Feud. tom. 1. 549.*—In England, the practice of subinfeudation was totally inhibited by the statute made in the 18th year of Edward I. commonly called the statute *quia emptoris terrarum*. In the preamble to that statute it is recited, that, by the practice of subinfeudation, the chief lords had lost their escheats, marriages, and wardships: it was therefore enacted, that it might be lawful for every free man to alien all or any part of his lands, to be held not of himself, but of the superior lord by the same services and customs by which the tenant himself held them. This statute, though evidently passed in compliance with the desires of the greater lords, and designed by them to encrease their power and extend their influence, had a very contrary effect; and was probably one of the chief causes

fait un feoffment en fee, ou en fee taile, ou pur terme de vie, ovesque garrantie, &c. tiels garranties ne sont pas barres a les heires as queux les terres serront discendus, pur ceo que ils commence per disseisin.

a feoffment in fee, or in fee taile, or for life, with warrantie, &c. such warranties are not barres to the heyres to whom the lands shall bee discended, because they commence by disseisin.

16. E. 3. Gar. 20. 8. Ass. 2. 43. E. 3. 7. and the books abovesaid. Vide Sect. 698. (3. Rep. 37.)

HERE *Littleton* addeth the case of gardeine in chivalrie, and gardeine in socage, and gardeine because nurture is also in the same case.

Sect. 700.

*ITEM, si le pier et le fits purchase certaine terres ou tenements, a aver et tener a eux joyntment, &c. et puis le pier alien * l'entier a un auter, et oblige luy et ses heires a garrantie, &c. et puis le pier devie, cel garrantie ne barrera my le fits de le moitie que a luy affiert de les dits terres ou tenements, pur ceo que quaunt a cel moitie que affiert a le fits, le garrantie commence per disseisin, &c.*

ALSO, if father and sonne purchase certaine lands or tenements, to have and to hold to them joyntly, &c. and after the father alien the whole to another, and binde him and his heires to warrantie, &c. and after the father dieth, this warrantie shall not barre the sonne of the moitie that belongs to him of the said lands or tenements, because as to that moitie which belongs to the sonne, the warrantie commences by disseisin, &c.

13. Ass. 8. 13. E. 3. Gar. 24, 25. 37. 22. H. 6. 51. 8. H. 7. 6.

(5. Rep. 79.)

(Post. 393. a.)

(1. Rep. 66.)

(F. N. B. 192. a.)

A AVER et tener a eux jointment, &c. This is to bee intended of a joynt purchase in fee; for if the purchase were to the father and the sonne, and the heires of the sonne, and the father maketh a feoffment in fee with warrantie, if the sonne entreth in the life of the father, and the feoffee re-enter, the father dieth, the sonne shall have an assise of the whole: and so is the booke of 22. *H.* 6. to be understood. But if the sonne had not entred in the life of the father, then for the father's moitie it had beene a bar to the sonne, for that therein he had an estate for life; and therefore the warrantie as to that moitie had beene collaterall to the sonne, and by disseisin for the sonne's moitie; and so a warrantie defeated in part, and stand good in part. And this appeareth by the example that *Littleton* hath put. But if the purchase had beene to the father and sonne, and to the heires of the father, then the entrie of the sonne in the life of the father, as to the avoydance of the warrantie, had not availed him, because his father lawfully conveyed away his moitie. (1)

Temps E. 1. Vouch. 207. 39. E. 3. 26. John London's case, 14. H. 6. (8. Rep. 42. Plowd. 66. b. 6. Rep. 119.)

If a man of full age and an infant make a feoffment in fee with warrantie, this warrantie is not void in part, and good in part; but it is good for the whole against the man of full age, and voyd against the infant: for albeit the feoffment of an infant passing by liverie of seisin be voydable, yet his warrantie, which taketh effect only by deed, is meerely voyd.

* *l'entier—l'entierte*, L. and M. and Roh.

(1) It is greatly to be regretted, that sir Edward Coke has not expressed himself more fully on the subject hinted at by him in this note, the defeating of the warranty by the heir's entry or claim in the ancestor's life-time. It is thus mentioned by lord chief-baron Gilbert, Ten. 135. The heir was presumed to receive a recompence, and therefore was barred if he did not claim during the life of his ancestor; and this was the more reasonable, because such recompences were anciently in lands, which did of right descend to the heir; and if the ancestor did alien them, the heir must claim his own during the life of his ancestor, otherwise he could never claim it, inasmuch as this was the whole time of limitation for the heir to challenge his own in this case; and if he slipped that time, he was barred for ever, inasmuch as there might be secret conveyances to alien the recompence for the benefit of the heir, which might turn to the prejudice of the purchaser.

causes which prevented their acquiring that independent and almost sovereign power, which was obtained during the feudal polity by the princes of Italy, Germany, and France. Hence, though the power and influence of the nobles of England were very great, and sometimes such as overshadowed royalty itself, yet they were inferior in every respect to that of the higher nobility of foreign countries. It is evident, that Nevil, the great earl of Warwick, and the nobles of the house of Percy (the greatest subjects ever known in this country) were, neither in strength, dignity, power, or influence, or in any other point of view, equal to the dukes of Brittany or Burgundy, or the counts of Flanders. Besides the general influence of the statute *quia emptores terrarum*, it had a particular influence both on the practice and the doctrine of warranty. The free alienation of property which it authorized, necessarily put an end to the homage ancestrel, and consequently to the implied warranty annexed to it. To remedy this, if the *lord* aliened, the tenants, before they attorned to the new lord, required a new warranty from him; if the *tenant* aliened, it was with an express clause of warranty. This gave the new tenant the benefit of the lord's obligation to warranty the old tenant; as the new tenant might vouch the old tenant, and he in his turn might deraign the lord. This subject will be pursued, and an attempt will be made to investigate and explain the grounds of the distinction between lineal and collateral warranty, in note 1, 373. b.

Sect. 701.

ITEM, ſi A. *de* B. *ſoit ſeiſie d'un meſe, et* F. *de* G. *que nul droit ad d'entrer en meſme le meaſe, claimaunt meſme le meaſe, a tener a luy et a ſes heires, entra en meſme le meaſe, mes le dit* A. *de* B. *adonque eſt continualment demurrant en meſme le meaſe: en ceſt cas le poſſeſſion de franktenement ſerra tout temps adjudge en* A. *de* B. *et nemy en* F. *de* G. *pur ceo que en tiel caſe lou deux ſont en un meaſe, ou auters tenements, et l'un claima per l'un title, et l'auter per l'auter title, la ley adjudgera celuy en poſſeſſion que ad droit d'aver le poſſeſſion de meſmes les tenements. Mes ſi en le caſe avantdit, le dit* F. *de* G. *fait un feoffment a certaine barrettors et extortioners en le pais, pur maintenance de eux aver de meſme le meaſe, per un fait de feoffment ove garrantie, per force de quel le dit* A. *de* B.

ALSO, if *A.* of *B.* bee ſeiſed of a meſe, and *F.* of *G.* that no right hath to enter into the ſame meſe, claiming the ſayd meſe, to hold to him and to his heires, entreth into the ſayd meſe, but the ſame *A.* of *B.* is then continually abiding in the ſame meaſe: in this caſe the poſſeſſion of the freehold ſhall bee alwayes adjudged in *A.* of *B.* and not in *F.* of *G.* becauſe in ſuch caſe where two bee in one houſe, or other tenements, and the one claimeth by one title, and the other by another title, the law ſhal adjudge him in poſſeſſion that hath right to have the poſſeſſion of the ſame tenements. But if in the caſe aforeſayd, the ſayd *F.* of *G.* make a feoffment to certaine barrettors and extortioners in the countrie, to have maintenance from them of the ſayd houſe, by a deed of feoffment with warrantie, by force whereof the ſaid

L'OU deux ſont en un meſe, &c. et l'un claima per l'un title, et l'auter per auter title, &c. For the rule is, *Duo non poſſunt in ſolido unam rem poſſidere.*

(Ant. 194. a. 244. a. 1. Roll. Abr. 661, 662. Plowd. 233. b.)

19. H. 6. fol. 28. b. per Newton. (Siderf. 385. a. Ant. 180. b. 181. a.)

These words of our author be ſignificant and materiall: [h] for if a man hath iſſue two daughters, baſtard eigne and mulier puiſne, and die ſeiſed, and they both enter generally, the ſole poſſeſſion ſhall not bee adjudged only in the mulier, becauſe they both claime by one and the ſame title; and not one by one title, and the other by another title, as our author here ſaith.

[h] 17. E. 3. 59. 11. Aſſ. p. 23. (Perk. 84. 8. Rep. 101. b. Hob. 120. Ant. 189. 244. 10. Rep. Lampet's Caſe.)

[i] If the tenaunt in an aſſiſe of an houſe deſire the plaintiffe to dine with him in the houſe, which the plaintiffe doth accordingly, and ſo they bee both in the houſe; and in truth one pretendeth one title, and the other another title; yet the law in this caſe ſhall not adjudge the poſſeſſion in him that right hath; becauſe our author here ſaith, hee claimed not his right, and it ſhould be to his prejudice if the law ſhould adjudge him poſſeſſion; and a treſpaſſer hee cannot bee, becauſe hee was invited by the tenant in the aſſiſe.

[i] Pl. Com. 91. the Parſon of Honey Lane's caſe. (Ant. 245. b. Plowd. 93. a. b.)

Barrettors. A barrettor is a common moover and exciter, or maintainer of ſuits, quarrels, or parts, either in courts or elſewhere in the countrey. In courts, as in courts of record, or not of record; as in the countie, hundred, or other inferiour courts. In the countrie in three manners: firſt, in diſturbance of the peace: ſecondly, in taking or keeping of poſſeſſions of lands in controverſie, not only by force, but alſo by ſubtiltie

See the Inditement of a common Barretor. W. 1. cap 18 & 32. 40. E. 3 33. Lib. 8. fol. 36. b. Caſe de Barretrie. (3. Inſt. 175. Siderf. 282. 2. Roll. Abr. 355.)

*ne osast pas demurrer en le mease, mes * alast hors de le mease, cest garrantie commence per disseisin, pur ceo que tiel feoffment fuit la cause que le dit A. de B. relinquist le possession de mesme le mease †.*

A. of *B.* dare not abide in the house, but goeth out of the same, this warrantie commenceth by disseisin, because such feoffment was the cause that the sayd *A.* of *B.* relinquished the possession of the same house.

(1. Roll. Abr. 353.)

tiltie and a deceit, and most commonly in suppression of truth and right: thirdly, by false inventions, and sowing of calumniations, rumors, and reports, whereby discord and disquiet may grow betweene neighbours.

33. E. 1. Stat. de Conspiracie. Lib. 8. ubi supra. (3. Rep. 36.)

Barretor is derived of this word (*barret*) which signifieth not only a wrangling suit, but also such brawles and quarrels in the countrey, as are aforesaid.

P. Com. fol. 64. Lib. 10. fol. 101, 102. Beaufage's Case. (3. Inst. 149.)

Extortioners. Extortion, in his proper sense, is a great misprision, by wresting or unlawfully taking by any officer, by colour of his office, any money or valuable thing of or from any man, either that is not due, or more than is due, or before it be due; *quod non est debitum, vel quod est ultra debitum, vel ante tempus quod est debitum:* for this is to be knowne, that it is provided by the [*l*] statute of *W.* 1. that no sheriffe, nor any other minister of the king, shall take any reward for doing of his office, but only that which the king alloweth him, upon paine that hee shall render double to the partie, and be punished at the king's pleasure. And this was the antient common law, and was punishable by fine and imprisonment; but the statute added the aforesaid penaltie. But some latter statutes having permitted them to take in some cases; by colour thereof, the king's officers and ministers, as sheriffes, coroners, escheators, feodaries, gaolers, and the like, doe offend in most cases; and seeing this act yet standeth in force, they cannot take any thing but where and so farre as latter statutes have allowed unto them. But yet such reasonable fees as have beene allowed by the courts of justice of antient time to inferiour ministers and attendants of courts for their labour and attendance, if it be asked and taken of the subject, is no extortion.

[*l*] W. 1. c. 26, &c. W. 1. c. 10. 42. E. 3. 5. 27. Ass. 14. Pl. Com. 68. (2. Roll. Abr. 32.)

(Plowd. 465. Noy. 111. 2. Roll. Abr. 32.) 23. H. 6. c. 10. 33. H. 6. 22. 21. H. 7. 17. Stanf. 49. 3. E. 3. Cor. 372.

And all this was resolved [*n*] by the whole court of king's bench, betweene *Shurley* plaintiffe, and *Packer* deputie of one of the sheriffes of London, in an action upon the case in the king's bench.

[*n*] Hil. 13. Jac. Reg. *S. C. 1. Ro. Rep.*

See the statute of 21. *H.* 8. *cap.* 5. setting downe the fees of ordinaries, registers, and other officers, in certaine cases, and many other statutes; as for example, the statute of 19. *H.* 7. *cap.* 8. against taking of shewage (that is, taking of any thing for shewing of wares and merchandises that be truly customed to the king before) and the like.

Pl. Com. in Dine and Manningham's case. Mir. cap. 5. § 1.

Of this crime it is said, that it is no other than robberie: and another saith, that it is more odious than robberie; for robberie is apparant, and hath the face of a crime; but extortion puts on the visure of vertue, for expedition of justice, and the like; and it is ever accompanied with the grievous sinne of perjurie.

7. E. 4. 21.

But largely extortion is taken for any oppression by extort power, or by colour or pretence of right; and so *Littleton* taketh it in this place. *Extortio* is derived from the verbe *extorqueo*; and it is called *crimen expilationis*, or *concussionis:* and here barretors and extortioners are put but for examples; for if the feoffment be made to any other person or persons, the law is all one.

(3. Inst. 175. 2. Inst. 212. Dyer, 555, 556. Sid. 212, 213. Noy. 52.) see more 2. Inst. 404. & 563.

Pur maintenance de eux aver. Maintenance, *manutenentia*, is derived of the verbe *manutenere*, and signifieth in law, a taking in hand, bearing up or upholding of quarrels and sides, to the disturbance or hindrance of common right; *Culpa est rei se immiscere ad se non pertinenti*; and it is twofold, one in the countrey, and another in the court. For quarrels and sides in the court, [*k*] the statutes have inflicted grievous punishments. But this kinde of maintenance of quarrels and sides in the countrey, is punishable only at the suit of the king, [*r*] as it hath beene resolved. And this maintenance is called *manutenentia*, or *manutentio ruralis*, for example, as to take possessions, or keepe possessions, whereof *Littleton* here speaketh, or the like.

[*k*] 1. E. 3. cap. 14. 20. E. 3. cap. 4, 5.

[*r*] Mich. 7. Ja. in the Starre-Chamber. (Doc. Plac. 240.)

The other is called *curialis*, because it is done *pendente placito*, in the courts of justice; and this was an offence at the common law, and is threefold.

First, to maintaine to have part of the land, or any thing out of the land, or part of the debt, or other thing in plea or suit; and this is called *cambipartia*, champertie.

33. E. 1. Stat. 2. in fine. Regist. 183. 6. E. 3. 33. 22. H. 6. 7. 9. H. 7. 22. (2. Roll. Abr. 114.)

The second is, when one maintaineth the one side, without having any part of the thing in plea

* *se en* added L. and M. and Roh.

† *&c.* added L. and M. and Roh.

(1) Whether an attorney's laying out money for his client be maintenance, see Pierson v. Hughes, Freeman 71. 81.—By the ancient Roman law, there were few cases in which a person was admitted to plead by an attorney, according to the rule, *Nemo alieno nomine lege agere potest.* Recourse was therefore had to a fiction at law, by which it was supposed that the property of the thing in contest was made over to the attorney. The consequence was, that the proceedings were carried on in the name of the attorney, and even the sentence passed upon him. Hence he was called the *dominus litis*. See *Boehmer de dominio litis, l.* 12. *Pothier Pandectæ Justinianeæ*, lib. 3. tit. 3. § 2.

plea, or suit; and this maintenance is two-fold, generall maintenance, and speciall maintenance; whereof you shall reade at large in our bookes, which were too long here to be inserted.

The third is when [u] one laboureth the jury, if it be but to appeare, or if he instruct them, or put them in feare, or the like, he is a maintainer, and he is in law called an embraceor, and an action of maintenance lyeth against him; and if he take money, a *decies tantum* may be brought against him. And whether the jury passe for his side or no, or whether the jurie give any verdict at all, yet shall he be punished as a maintainer or embraceor either at the suit of the king or partie.

30. Ass. 5. 19. E. 4. 3. 20. H. 6. 12. 34. H. 6. 2. 14. H. 6. 11. 8. H. 5. 8. 10. E. 4. 19. W. 1. ca. 25. 28. W. 2. cap. 49. Artic. super Cart. cap. 11. F. N. B. 171, 172. Miror cap. 1. § 5. (Mo. 6. Ant. 157. Hob. 294.) [u] 13. H. 4. 16. b. F. N. B. 171. 11. H. 6. 10. 37. H. 6. 31.

Here in this case that *Littleton* putteth, the feoffement is void by the statute [a] of 1. R. 2.; for thereby it is enacted, that feoffements made for maintenance shall be holden for none, and of no value, so as *Littleton* putteth his case at the common law; for he seemeth to allow the feoffement, where he saith, *tiel feoffment fuit le cause, &c.*; but some have said that the feoffement is not void betweene the feoffor and feoffee, but to him that right hath.

[a] 1. R. 2. cap. 9. Vid. 27. H. 8. fol. 23.

Now, since *Littleton* wrote, there is a notable statute [b] made in suppression of the causes of unlawfull maintenance (which is the most dangerous enemie that justice hath), the effect of which statute is,

[b] 32. H. 8. cap. 9. (Plowd. 79. a.)

First, that no person shall bargaine, buy, or sell, or obtaine any pretenced rights or titles.

(2. Roll. Abr. 113. 114. Hob. 115.)

Secondly, or take, promise, grant, or covenant to have any right or title of any person in or to any lands, tenements, or hereditaments; but if such person which so shall bargaine, &c. their ancestors, or they by whom he or they claime the same, have beene in possession of the same, or of the reversion or remainder thereof, or taken the rents or profits thereof by the space of one whole yeare, &c. upon paine to forfeit the whole value of the lands, &c. and the buyer or taker, &c. knowing the same, to forfeit also the value.

Except in the word ... 32 Hen. 8. ch. 9.

(1. Leon. 167. 208. Plowd. 89. a.)

Thirdly, provided that it shall be lawfull for any person, being in lawfull possession, by taking of the yearely farme, rents or profits, to obtaine and get the pretenced right or title, &c. of any lands whereof he or they shall be in lawfull possession.

For the better understanding of which statute, you must observe, that title or right may be pretenced two manner of wayes:

First, when it is meerely in pretence or supposition, and nothing in verity.

(1. Cro. 232, 233.)

Secondly, when it is a good right or title in verity, and made pretenced by the act of the partie; and both these are within the said statute: for example, If *A.* be lawfull owner of land, and is in possession, *B.* that hath no right thereunto granteth to, or contracteth for the land with another, the grantor and the grantee (albeit the grant be meerely void) are within the danger of the statute; for *B.* hath no right at all, but only in pretence. If *A.* be disseised in this case, *A.* hath a good lawfull right; yet if *A.* being out of possession, granteth to, or contracteth for the land with another, he hath now made his good right of entrie pretenced within the statute, and both the grantor and grantee within the danger thereof. *A fortiori* of a right in action. *Quod nota.*

Pl. Com. fol. 80, &c. Partridge's case.

It is further to be knowne, that a right or title may be considered three manner of wayes.

First, as it is naked and without possession. Secondly, when the absolute right commeth by release or otherwise to a wrongfull possession; and no third person hath either *jus proprietatis*, or *jus possessionis*. The third, when he hath a good right, and a wrongfull possession. As to the first, somewhat hath beene said, and more shall be said hereafter. As to the second, taking the former example, if *A.* be disseised, and the disseisee release unto him, he may presently sell, grant, or contract for the land, and need not tarrie a yeere; for it is a rule upon this statute, that whosoever hath the absolute ownership of any land, tenements, or hereditaments (as in this case the disseisor hath), there such owner may at his pleasure bargaine, grant, or contract for the land, for no person can thereby be prejudiced or grieved. And so if a man mortgage his land, and after redeeme the same; or if a man recover land upon a former title, or be remitted to an ancient right, he may at any time bargaine, grant, or contract for the land, for the reason aforesaid. As to the third, if in the case aforesaid the disseisor dieth seised, and *A.* the disseisee entreth, and disseise the heire of the disseisor, albeit he hath an antient right, yet seeing the possession is unlawfull, if he bargaine or contract for the land before hee hath beene in possession by the space of a yeare, he is within the danger of the statute, because the heire of the disseisor hath right to the possession, and he is thereby grieved, *et sic de similibus*: and albeit he that hath a pretenced right (and none in verity) getteth the possession wrongfully, yet the statute extendeth unto him, aswell as where he is out of possession.

Pl. Com. Partridge's case ubi sup. 6. E. 6. Brooke tit. Maintenance 28.

(Cro. Car. 388. Plowd. 89. a.)

Note, the words of the statute be (any pretenced right), therefore a lease for yeares is within the statute; for the statute saith not (the right), but (any right), and the offendour shall forfeit the whole value of the land. And where the statute speaketh of rights in the plurall number, yet any one right is within the statute. [a] But yet if a man make a lease for yeares to another to the intent to trie the title in an *ejectione firmae*, that is out of the statute, because

23. Eliz. Dier 374. Pl. Com. Partridge's case, f. 87.

[a] Mich 30. & 31. Eliz. inter Finch. & Cuckham in Com. Banc. (Mo. 266.)

(2. Roll. Abr. 114.)

[b] Lib. 4. fol. 26. Copihold cases.

6. E. 6. tit. Maintenance Brooke 38.

(5. Rep. 60.)

[c] 34. H. 8. Dier 52.

because it is in a kinde of course of law; but if it be made to a great man, or any other to sway or countenance the cause, that is within this statute.

Also the statute speakes (of any right or title to any land, &c.) [b] A customary right, or a pretence thereof to lands holden by copie, is within this statute.

The said proviso (which is rather added for explanation, than of any necessitie) extendeth only to a pretenced right or title, and to a good and cleare right; and therefore without question, any that hath a just and lawfull estate may obtaine any pretenced right by release or otherwise; for that cannot be to the prejudice of any: nay, as hath beene said, a disseisor that hath a wrongfull estate may obtaine a release of the disseisee, and that is not within the body of the act, and consequently standeth not in need of any proviso to protect him.

And therefore [c] if there be tenant for life, the remainder in fee by lawfull and just title, he in the remainder may obtaine and get the pretenced right or title of any stranger, not only for that the particular estate and the remainder are all one, but for that it is a meane to extinguish the seeds of troubles and suits, and cannot be to the prejudice of any, as hath beene said. And where the statute saith, (being in lawfull possession by taking the yearely rent, &c.) those words are but explanatory, and put for example; for howsoever he be lawfully seised in possession, reversion, or remainder, it sufficeth though he never tooke profit. But the matter observable upon this proviso, which is worthy of observation, is, that if a disseisor make a lease for life, lives, or yeares, the remainder for life, in tayle, or in fee, he in remainder cannot take a promise or covenant, that when the disseisee hath entred upon the land, or recovered the same, that then he should convey the land to any of them in remainder, thereby to avoid the particular estate, or the interest or estate of any other; for the words of the proviso be (buy, obtaine, get, or have by any reasonable way or meane) and that is not by promise or covenant to convey the land after entry or recovery; for that is neither lawfull, being against the expresse purview of the body of the act, and not reasonable, because it is to the prejudice of a third person. But the reasonable way or meane intended by the statute, is by release or confirmation, or such conveyances as amount to as much: and this agreeth with the letter of the law, viz. the pretenced right or title of any other person; and rights and titles are by release or confirmation, as by reasonable wayes and meanes lawfully transferred and extinct: and the words of promise or covenant, &c. which are prohibited by the body of the act, are omitted in the proviso.

(2. Rep. 31. Ant. 48. b.)

Relinquist le possession, &c. This must be understood, that before livery of seisin upon the feoffement, *A. de B.* departed out of the house; for otherwise the livery and seisin should be void, because *A. de B.* was in possession. And *Littleton* here saith, *per un fait de feoffment*, so as albeit the deed were made before the departure it is not materiall; but the departure must be before the livery of seisin, for that doth worke the disseisin. And yet that which *Littleton* saith is true, that the feoffement was the cause that he relinquished his possession; for otherwise he would not have done it.

But admit that *A. de B.* had departed for any other cause, yet if *F. de G.* enter and enfeoffe certaine barretors or extortioners, or any other with warrantie, this is a warrantie that commenceth by disseisin, for that the feoffement worketh a disseisin.

Sect. 702.

ITEM, si home que nul droit ad d'entrer en auters tenements, entra en mesmes les tenements, et incontinent ent fait un feoffement as auters per son fait ove garrantie, et deliver a eux seisin, cel garrantie commence per dissei-

ALSO, if a man which hath no right to enter into other tenements, enter into the same tenements, and incontinently make a feoffement therof to others by his deed with warranty, and deliver to them seisin, this warranty commence by *sin,*

See before in the Chapter of Releases.
(5. Rep. 79.)

46. E. 3. 6.

THIS doth explaine that which hath beene said before. And albeit *Littleton* useth the words (and incontinently thereof make a feoffement); and that in this case of *Littleton* the disseisin and feoffement were made (*quasi uno tempore*); yet if the disseisin were made to the intent to make a feoffment with warrantie, albeit the feoffement be long after, this (as hath beene said) is a warrantie

sin, pur ceo que le disseisin et le feoffement fueront faits quasi uno tempore. *Et que ceo est ley, poiez veier en un plee** M. 11. Ed. 3. *en un briefe de* formedon *en le reverter.*

by disseisin, because the disseisin and feoffment were made as it were at one time. And that this is law, you may see in a plee *M.* 11. *E.* 3. in a writ of *formedon* in the reverter.

that commenceth by disseisin.

Mich. 11. *E.* 3. This is mistaken, and should be [*d*] 31. *E.* 3. and so is the originall, which case you shall see in Master *Fitzherbert's* Abridgement, for there is no booke at large of that yeare. Hereby you may perceive that learned men looke not only to the cases reported, but unto records, as you may see *Littleton* did; for *Fitzherbert* put this case in print long after, as elsewhere hath beene shewed.

[*d*] 31. E. 3. tit. Garr. 28.

Sect. 703.

GARRANTY lineal est, lou home seisie de terres en fee, † *fait feoffement per son fait a un auter, et oblige luy et ses heires a garranty, et ad issue et morust, et le garrantie discendist a son issue, ceo est lineal garranty. Et la cause pur ceo que* ‡ *est dit lineal garrantie, n'est pur ceo que le garranty discendist de le pier a son heire; mes la cause est, pur ceo que si nul tiel fait ove garranty fuissoit fait per le pier, donque le droit de les tenements discenderoit al heire, et l'heire conveyeroit le discent de* || *son pier, &c.*

WARRANTY lineall is, where a man seised of lands in fee, maketh a feoffement by his deed to another, and bindes himselfe and his heires to warrantie, and hath issue and die, and the warranty descend to his issue, that is a lineal warranty. And the cause why this is called lineall warrantie, is not because the warrantie descendeth from the father to his heire; but the cause is, for that if no such deed with warrantie had beene made by the father, then the right of the tenements should descend to the heire, and the heire should convey the discent from his father, &c.

GARRANTY lineal, &c. A warrantie lineall is a covenant reall annexed to the land by him which either was owner, or might have inherited the land, and from whom his heire lineall or collaterall might by possibilitie have claimed the land as heire from him that made the warranty; whereof *Littleton* himselfe putteth divers cases, which shall be explained in their proper places. And in this case put in this Section, *Littleton* (once for all) sheweth, that the reason of the example here put, is because if no such alienation with warrantie (for so is *Littleton* to be intended) had beene made, the very lands had descended to the heire, so as the case being put of lands in fee simple, the alienation without the warrantie had barred the heire. And note, that it is called a lineall warrantie (1), not because it must descend upon the lineall heire; for be the heire lineall or collaterall, if by possibility he might claime the land from him that made the warrantie, it is lineall; having regard to the warrantie, and title of the land. And also it is called lineall, in respect that the warrantie made by him that had no right or possibility of right to the land, is called collaterall, in regard that it is collaterall to the title of the land. And it is also to be observed, that in all the cases that *Littleton* hath put, or shall put, the lineall or collaterall warranty doth binde the heire; and therefore the successour claiming in another right, shall not be bound by the warrantie of any naturall ancestour. For which cause [*c*] in a *juris utrum* brought by a parson of a church, the collaterall warrantie of his ancestour is no barre, for that he demandeth the land in the right of his church in his politike capacitie, and the warrantie descendeth on him in his naturall capacitie. [*d*] But some have holden, that if a parson bring an assise, that a collaterall warranty of his ancestour shall binde him; and their reason is, for that

(1. Rep. 1.)

(Post. 371. a. 375. a.)

(3. Rep. 59.)
35. E. 3. Garr. 78.

[*c*] 27. H. 6. Garr. 48.

[*d*] 34. E. 3. Garr. 71.

* *M.* 11.—*anno* xxxi. L. and M. and Roh. † *et* added L. and M. and Roh. ‡ *ceo* added L. and M. and Roh. || *son*—*le*, L. and M. and Roh.

(1) As to the distinction between lineal and collateral warranty:—By the definitions given in this place of lineal warranty, it appears to be distinguished from collateral warranty chiefly by this circumstance, that he on whom it descends might possibly have claimed the land as heir to him that made the warranty, and whether he claims as heir lineal or as heir collateral, the warranty is equally lineal. But he must claim as heir; for if an estate is limited to the sons of any person successively in tail, and the eldest son aliens with warranty, and dies without issue, the second son is heir at law to the eldest son: he does not however claim as heir, but as purchasor, and therefore the warranty is collateral to him. So if an estate is limited to the father for life, and after his deceate to his sons successively in tail, and the father aliens with warranty and dies, the warranty descends on his eldest son and heir; but as he claims as purchasor, not as heir, the warranty is collateral to him. But though he must claim as heir, it is not necessary he should make his title *immediately* as heir to him, (see Sect. 706.) neither is it necessary he should derive from him alone. See Sect. 714.—An attempt will be made, note 2, page 372, b. to explain the real distinction between lineal and collateral warranty.

that the assise is brought of his possession and seisin, and he shall recover the meane profits to his owne use: but seeing he is seised of the freehold, whereof the assise is brought *in jure ecclesiæ*, which is in another right than the warrantie, it seemeth that it should not be any barre in the assise. The like law is of a bishop, archdeacon, deane, master of an hospitall, and the like, of their sole possessions, and of the prebend, vicar, and the like.

[*] 45. Ass. 6. 6. E. 3. 56. Pl. Com. 234. & 553. 554. (8. Rep. 1. Ant. 19. b.)

Et oblige luy et ses heires. * King *H.* 3. gave a mannor to *Edmund* earle of Cornwall, and to the heires of his body, saving the possibilitie of reverter, and died: the earle, before the statute of *W.* 2. *cap.* 1. *de donis conditionalibus*, by deed gave the said mannor to another in fee with warrantie in exchange for another mannor, and after the said statute in the 28. yeare of *E.* 1. dieth without issue, leaving assets in fee simple; which warrantie and assets descended upon king *E.* 1. as cosin germaine and heire of the said earle, viz. son and heire of king *Henry* the third, brother of *Richard* earle of Cornwall, father of the said earle *Edmund*. And it was adjudged, that the king, as heire to the said earle *Edmund*, was by the said warrantie and assets barred of the possibilitie of reverter, which he had expectant upon the said gift, albeit the warrantie and assets descended upon the naturall body of king *E.* 1. as heire to a subject; and king *E.* 1. claimed the said mannor, as in his reverter *in jure coronæ* in the capacity of his body politike, in which right he was seised before the gift. In this case, how by the death of the said earle *Edmund* without issue, the king's title by reverter, and the warrantie and assets came together, and that the warrantie was collaterall, yet the king shall not be barred without assets, as a subject shall be; and many other things are to be observed in this case, which the learned reader will observe. (1)

Vide 27. H. 6. Garr. 48. 34. E. 3. Garr. 71.

Vide Sect. 711, 712. (Hob. 339. 9. Rep. 132. b. Vaug. 379.)

Sect. 704, 705.

(8. Rep. 51.)

*CAR si soit pier et fits, et le fits purchase * terres en fee, et le pier de ceo disseisist son fits, et † aliena a un auter en fee per son fait, et per mesme le fait oblige luy et ses heires a garranter mesmes les tenements, &c. et le pier morust; ore est le fits barre d'aver les dits tenements; car il ne poit per ascun suit, ne per auter meane de la ley, aver mesmes les terres per cause del dit garrantie. Et ceo est un collateral garranty; et uncore le garranty discendist lynealment de le pier a le fits.*

FOR if there be father and sonne, and the sonne purchase lands in fee, and the father of this disseiseth his sonne, and alieneth to another in fee by his deed, and by the same deed binde him and his heires to warrant the same tenements, &c. and the father dieth; now is the son barred to have the said tenements; for he cannot by any suit, nor by other meane of law, have the same lands by cause of the said warrantie. And this is a collaterall warrantie; and yet the warrantie descendeth lineally from the father to the sonne.

Sect. 705.

MES pur ceo que si nul tiel fait ove garrantie ust estre fait, le fits en nul maner puissoit conveyer le title que il ad a les tenements de son pier a luy, entant que son pier n'avoit ascun

BUT because if no such deed with warrantie had beene made, the sonne in no manner could convey the title which hee hath to the tenements from his father unto him, inasmuch as his father

estate

* *terres*——*tenements*, L. and M. and Roh. † *ceo* added L. and M. and Roh.

(1) The king was in this case barred of the possibility of reverter descending to him *in jure coronæ*, by warranty and assets from a subject descending on his body natural; for in all likelihood those lands will descend to the same person to whom the crown will descend, and consequently will be a good recompence for the loss of the crown lands; but in the case of the parson, his successor can have no benefit of what the predecessor has in his natural capacity. Hawk. Abr. 474.

estate en droit en les tenements; pur ceo tiel garrantie est appel collateral garrantie, entant que celuy que fist le garrantie est collateral a le title de les tenements: et ceo est a tant a dire, que cestuy a que le garrantie discendist, ne puissoit a luy conveyer le title que il ad de les tenements per my cestuy que fist le garrantie, en cas que nul tiel garrantie fuit fait.

ther had no estate in right in the lands; wherefore such warrantie is called collaterall warrantie, inasmuch as he that maketh the warrantie is collaterall to the title of the tenements: and this is asmuch to say, as hee to whom the warrantie descendeth, could not convey to him the title which hee hath in the tenements by him that made the warrantie, in case that no such warrantie were made.

HERE *Littleton* putteth an example, proving that it is not called lineall, because it descendeth lineally from the father to the son; for in this case the warrantie descendeth lineally, and yet is a collaterall warrantie. In this example you must intend that the disseisin was not of intent to alien with warrantie to barre the sonne; but here the disseisin being done to the sonne, without any such intent, the alienation afterwards with warrantie doth barre the sonne; because that albeit the warrantie doth lineally descend, yet seeing the title is collaterall, that is, that the sonne claimeth not the land as heire to his father, therefore in respect of the title it is a collaterall warrantie. And thus doth *Littleton* agree [e] with the authoritie of our bookes. So as the diversities do stand thus. First, where the disseisin and feoffement are *uno tempore*, and where at severall times. Secondly, where the disseisin is with intent to alien with warrantie, and where the disseisin is made without such intent, and the alienation with warrantie afterwards made.

5. E. 3. 14. 46. E. 3. 6. 19. H. 8. 12. 8. R. 2. Gar. 100. Vid. Sect. 716.

[e] 46. E. 3. 6. 5. E. 3. 14. 19. H. 8. 12.

Sect. 706.

ITEM, si soit aiel, pier, et fits, et le aiel soit disseisie, en que possession le pier releas per son fait ove garrantie, &c. et morust, et puis l'aiel morust; ore le fits est barre d'aver les tenements per le garrantie del pier. Et ceo est appel lineal garrantie, pur ceo que si nul tiel garrantie fuit, le fits ne puissoit conveyer le droit de les tenements a luy, ne monstre coment il est heire al aiel forsque

ALSO, if there bee grandfather, father, and son, and the grandfather is disseised, in whose possession the father releaseth by his deed with warrantie, &c. and dieth, and after the grandfather dieth; now the son is barred to have the tenements by the warranty of the father. And this is called a lineall warrantie, because if no such warrantie were, the son could not convey the right of the tenements to him, nor

HERE *Littleton* putteth an example where the son must claime the land as heire to his grandfather; and yet because hee cannot make himselfe heire to his grandfather but by his father, it is lineall.

And it is to bee observed, that the warrantie in this case descended upon the son, before the discent of the right, which happened by the death of the grandfather, in whom the right was. *Vide Littleton Cap. de Releases*, and after in this Chapter, *Sect.* 707. and 741.

Pier release per son fait ove garrantie. [f] It is to be knowen, that upon everie conveyance of lands, tenements, or hereditaments, as upon fines, feoffments, gifts, &c. releases and confirmations made to the tenant

1. H. 4. 33. 33. E. 3. Gar. 73.

(3. Rep. 59. Ant. 265. a. Post. 386.)

[f] 14. E. 3. Voucher 108. 16. E. 3. ibid. 87. 18. E. 3. ibid. 6. 10. E. 3. 52. 21. E. 3. 27. 11. H. 4. 22. 44. E. 3. Cont. de Vouch. 22. 12. H. 7. 1. Vide Sect. 733. 738. 745.

tenant of the land, a warrantie may bee made, albeit hee that makes the release or confirmation, hath no right to the land, &c.; but some doe hold, that by release or confirmation, where there is no estate created, or transmutation of possession, a warrantie cannot be made to the assignee.

(Post. 385. a.)

que per meane del pier.

shew how hee is heire to the grandfather but by means of the father.

Sect. 707.

*ITEM, si home ad issue deux fits et est disseisie, et l'eigne fits relessa al disseisor per son fait ove garranty, &c. et morust sans issue, et apres ceo le pier morust, ceo est un lineall garrantie al puisne fits, pur ceo que coment que l'eigne fits morust en la vie le pier, uncore pur ceo que per possibilitie il puissoit estre, que il puissoit conveier a luy le title del terre per son eigne frere, si nul tiel garrantie fuissoit. Car il puissoit estre, que apres la mort le pier l'eigne frere entroit en les tenements et morust sans issue, et donque le puisne fits conveyera a luy le title per l'eigne * fits. Mes en tiel cas, si le puisne fits relesse ove garrantie a le disseisor, et morust sans issue, ceo est un collateral garrantie al eigne † fits, pur ceo que de tiel terre que fuit al pier, l'eigne per nul possibilitie poit conveyer a luy le title per meane de le puisne ‡ fits.*

ALSO, if a man hath issue two sonnes and is disseised, and the eldest sonne release to the disseisor by his deed with warrantie, &c. and dies without issue, and afterwards the father dieth, this is a lineall warrantie to the younger sonne, because albeit the eldest sonne died in the life of the father, yet by possibilitie it might have beene, that hee might convey to him the title of the land by his elder brother, if no such warrantie had beene. For it might bee, that after the death of the father the elder brother entred into the tenements and died without issue, and then the yonger sonne shall convey to him the title by the elder son. But in this case, if the younger sonne releaseth with warrantie to the disseisor, and dieth without issue, this is a collaterall warrantie to the elder son, because that of such land as was the father's, the elder by no possibilitie can convey to him the title by meanes of the younger son.

35. E. 3. Gar. 73. 11. H. 4 33. (1. Rep. 66.)

HERE *Littleton* putteth an example, where the heire that is to be barred by the warrantie, is not to make his discent by him that made the warrantie, as in the case before; and yet because by possibilitie he might have claimed by the eldest sonne, if he had survived the father, and died without issue, and so the younger brother might by possibilitie have beene heire to him, the warrantie is lineall.

And here it is to be noted, that the warrantie of the eldest sonne descended before the right descended; whereof more shall be said hereafter, *Sect.* 741.; and the opinion of *Littleton* in this case is holden for law, against the opinions in 35. *E.* 3. *Gar.* 73.

9. E. 3. 16. 38. E. 3. 21. 46. E. 3. 26. 8. R. 2. Gar. 101. (2. Roll. Abr. 773.)

Mes en tiel case le puisne fits release ove garrantie, &c. This warrantie in this case is collaterall to the eldest sonne, and to the issues of his bodie; but if the eldest sonne dieth without issue of his bodie, then the warrantie is lineall to the issues of the bodie of the youngest: and so the warrantie that was collaterall to some person, may become lineall to others.

Sect.

* *fits* not in L. and M. nor Roh. † *fits* not in L. and M. nor Roh. ‡ *fits* not in L. and M. nor Roh.

Sect. 708.

ITEM, si tenant en le taile ad issue trois fits, et discontinue le taile en fee, et le mulnes fits relessa per son fait al discontinuee, et oblige luy et ses heires a garrantie, &c. et puis le tenant en le taile morust, et le mulnes fits morust sans issue, ore l'eigne fits est barre d'aver ascun recoverie per briefe de formedon, *pur ceo que le garrantie del mulnes frere est collateral a luy, entant que il ne poit per nul manner conveyer a luy per force del taile ascun discent per le mulnes, et pur ceo c'est un collateral garrantie. Mes en cest cas si l'eigne fits devie sans issue, ore le puisne frere poit bien aver un briefe de* formdon *en le discender, et recovera mesme le terre, pur ceo que le garrantie del mulnes est lineal al fits puisne, pur ceo que il puissoit estre que per possibilitie le mulnes puissoit estre seisie per force del taile apres la mort son eigne frere, et*

ALSO, if tenaunt in taile hath issue three sonnes, and discontinue the tayle in fee, and the middle son release by his deed to the discontinuee, and binde him and his heires to warrantie, &c. and after the tenant in taile dieth, and the middle son dieth without issue, now the eldest sonne is barred to have any recoverie by writ of *formedon*, because the warrantie of the middle brother is collaterall to him, inasmuch as hee can by no meanes convey to him by force of the tayle any discent by the middle, and therefore this is a collateral warrantie. But in this case if the eldest sonne die without issue, now the youngest brother may well have a writ of *formdon* in the discender, and shall recover the same land, because the warrantie of the middle is lineall to the youngest son, for that it might bee that by possibilitie the middle might bee seised by force of the taile after the death of his eldest

HEREBY it also appeareth, that a warrantie that is collaterall in respect of some persons, may afterwards become lineall in respect of others. Whereupon it followeth, * that a collateral warrantie doth not give a right, but bindeth only a right so long as the same continueth: but if the collaterall warrantie be determined, removed, or defeated, the right is revived. [f] And yet in an assise the plaintiffe hath made his title by a collateral warrantie.

Barre is a word common aswell to the English as to the French, of which commeth the nowne, a bar, *barra*. It signifieth legally a destruction for ever, or taking away for a time of the action of him that right hath. And *barra* is an Italian word, and signifieth barre, as we use it; and it is called a plea in barre, when such a barre is pleaded. Here *Littleton* putteth an example of a barre of an estate taile by a collaterall warranty. It is to be observed, that in some cases an estate taile may be barred by some acts of parliament made since *Littleton* wrote; and in some cases an estate taile cannot be barred, which might when *Littleton* wrote have been barred. For example, if tenant in tayle levie a fine with proclamations according to the statute, this is a barre to the estate taile, but not to him in reversion or remainder, if hee maketh his claime, or pursue his action within five yeares after the state taile spent.

[h] If a gift be made to the eldest sonne, and to the heires of his bodie, the remainder to the father and to the heires of his bodie, the father dieth, the eldest sonne levieth a fine with proclamations, and dieth without issue; this shall barre

(Dr. and Stud. 153. b.)

8. R. 2. Garr. 101.

[*] 43. Ass. 44 24. H. 8. tit. Taile Br. 7. H. 5, 6. tit. Ass. 359. 34. E. 3. Droit. 29. 19. H. 6. 59. 21. H. 7. 40. 5. H. 7. 29. 3. H. 7. 9. b.

[f] 16. Ass. p. 16. 27. Ass. 74. 29. Ass. 50. 43. Ass. 8. 14. H. 4. 13. 19. H. 6. 60.

(Doc. Plac. 54.)

(Dr. and Stud. 56. a.)

4. H. 7. c. 24. & 32. H. 8. c. 36.

(10. Rep. 43.)

[h] Dalison 2. El. & 7. El. Vide lib. 3. fol. 84. le case de Fines.

(3. Leon. 10)

donque le puisne frere puissoit conveyer son title de discent per le mulnes.

brother, and then the youngest brother might convey his title of discent by the middle brother.

the second sonne, for the remainder descended to the eldest.

(Ant. 120. b. 9. Rep. 104. Plowd. 374. a. 375. a. Cro. Eliz. 896. Noy 46. Dyer, 3. b. 133. a.)

If tenant in taile be disseised, or have a right of action, and the tenant of the land levie a fine with proclamations, and five yeares passe, the right of the estate taile is barred.

[b] 26. H. 8. cap. 13. 33 H. 8. cap. 20. 5. E. 6. c. 11. Staunf. Pl. Coron. 18.

[b] If tenant in taile in possession, or that hath a right of entrie, bee attainted of high-treason, the estate taile is barred, and the land is forfeited to the king; and none of these were barred when *Littleton* wrote. A lineall warrantie and assets was a barre to the estate taile when *Littleton* wrote; whereof more shall be said hereafter.

[c] 12. E. 4. 19. Taltarum's case. [d] Vide devant Sect. 610. Vid. Lib. 3. fol. 5. Cuppledick's case, & fol. 94. 97. 106. Lib. 1. fol. 62. Capel's case. Lib. 2. fol. 16. 52. 74. 77. Lib. 6. fol. 41, 42. Lib. 10. fol. 37. Marie Portington's case. (Ante 335. a.) [e] 38. H. 8. taile Br. 41. Pl. Com. fol. 555. 29. H. 8. Dier 52. [f] 34. H. 8. cap 20.

[c] A common recoverie with a voucher over, and a judgement to recover in value, was a barre of the estate taile when *Littleton* wrote. [d] And of common recoveries there bee two sorts, viz. one with a single voucher, and another with a double voucher, and that is more common and more safe: there may be more vouchers over.

[e] If the king had made a gift in taile, and the donee had suffered a common recoverie, this should have barred the estate taile in *Littleton*'s time, but not the reversion or remainder in the king. And so if such a donee had levied a fine with proclamations after the statute of 4. *H.* 7. this had barred the estate taile, although the reversion was in the king. (1) [f] But since *Littleton* wrote, a common recoverie had against tenant in taile of the king's gift, or such a fine levied by him, the reversion continuing in the crowne, is no barre to the estate taile by the statute of 34. *H.* 8. (2) And where the words of the statute be (whereof the reversion or remainder at the time of such recoverie had, shall be in the king) these ten things are to be observed upon the construction of that act. (3)

First, that the estate taile must bee created by a king, and not by any subject, albeit the king be his heire to the reversion; for the preamble speakes of gifts made to subjects, and none can have subjects but the king. And also in the preamble it is said (for service done to the kings of the realme) and the body of the act referreth to the preamble. [g] And therefore if the duke of *Lancaster* had made a gift in taile, and the reversion descended to the king, yet was not that estate taile restrained by that statute; and so of the like.

[g] Trin. 23 Eliz. inter Divcly & Ashton resolved in the Court of Wards.

Lib. 2. fol. 15. & 16. in Wiseman's case.

Secondly, if the king grant over the reversion, then a recoverie suffered will barre the estate taile, because the king had no reversion at the time of the recoverie.

Lib. 8. fol. 77, 78. the Lord Stafford's case. (2. Roll. 394.)

Thirdly, if the king make a gift in taile, the remainder in taile, or grant the reversion in taile, keeping the reversion in the crowne, a recoverie against tenant in taile in possession shall neither barre the estate taile in possession within the expresse purview of the statute, nor by consequence the state in remainder or revesion; for that the reversion or remainder cannot be barred, but where the estate taile in possession is barred.

Lib. 2. fol. 15, 16. Wiseman's case. Lib. 2. fol. 52. Cholmleye's case.

Fourthly, if a subject make a gift in taile, the remainder to the king in fee, albeit the words of the statute be, (whereof the reversion or remainder of the same, &c.) yet seeing the estate in taile was not created by a king, as hath beene said, the estate taile may bee barred by a common recoverie.

(Mo. 115. 195. 2. Rep. 15. b. 1. Cro. 430)

Fifthly, if Prince *Henrie*, sonne of *Henrie* the Seventh, had made a gift in taile, the remainder to *Henrie* the Seventh in fee, which remainder by the death of *Henrie* the Seventh had descended to *Henrie* the Eighth, so as he had the remainder by discent; yet might tenant in taile, for the cause aforesaid, barre the estate taile by a common recoverie.

Lib. 2. fol. 16. Wiseman's case.

Sixthly, the word (remainder) in the statute is no vaine word; for the words of the preamble be, the king hath given or granted, or otherwise provided to his servants and subjects. The word (reversion) in the body of the act hath reference to these words (given or granted); and (remainder) hath reference to these words (otherwise provided.) As if the king in consideration of money, or of assurance of land, or for other consideration by way of provision, procure a subject by deed indented and inrolled, to make a gift in taile to one of his servants and subjects for recompence of service, or other consideration, the remainder to the king in fee, and all this appeare of record; this is a good provision within the statute, and the tenant in taile cannot by a common recoverie barre the estate taile. So it is, if the remainder be limited to the king in taile; but if the remainder bee limited to the king for yeares, or for life, that is no such remainder as it is intended by the statute, because it is of no remainder of continuance, as it ought to be, as it appeareth by the preamble; and it ought to have some affinitie with a reversion, wherewith it is joyned.

see case of Earl of Derby in the Exchq. 6. Ann 11. Mod. 304.

Seventhly, where a common recoverie cannot barre the state taile by force of the said statute, there a fine levied in fee, in taile, for lives, or yeares, with proclamations according to the statutes, shall not barre the state taile, or the issue in taile, where the reversion or remainder

(1) 29. *H.* 8. *Dy.* 32. *accord. tail barred, but not discontinued, because the reversion is in the king: so note the issue is barred by* 4. *H.* 7. *Hob.* 332. *for* 32. *H.* 8. *cap.* 36. *was not then made. Note also, that* 32 *H.* 8. *cap.* 36. *excepts tenant in tail by gift of the king.* Lord Nott. MSS.

(2) Upon this act see Mr. Cruise's Essay on Recoveries, 2d ed. 255.

(3) Nota, 34 *H.* 8. *is not of force in Ireland, therefore the knowledge of the common law in these points is necessary there.— B. being tenant in tail by gift of king H.* 8. *of the manor of* T. *an.* 14 *Eliz. contracted with* A. *to convey it to him and his heirs in consideration of a sum of money, and the manner of assurance was this: queen Eliz. in May,* 14 *Eliz. grants her reversion to* C. *and* D. *and their heirs; June* 14 *Eliz.* B. *suffers a recovery to the use of* C. *and* D. *and their heirs; and in the same term* B. *and* A. *levy a fine of* T. *to* C. *and* D. *which they grant, and render to* A.; *and afterwards, in the same term, reconvey the reversion by fine, &c. to queen Eliz. And now whether this estate to* A. *was a gift in tail* ex provisione *from the queen, within the statute of* 34 *H.* 8. *c.* 20. *was the question between* E. *heir of the body of* A. *and* F. *who claimed by the fine levied by the father of the said* E. *whose daughter he had married; and it was held by Berkeley that it was not,* 1*st, because the grant of the reversion to* C. *expresses no intent of the queen to create an estate tail to* A.: 2*d, when the estate tail of* B. *was docked by the recovery, and upon the fine levied* C. *rendered the tail to* A. *he might have rendered the fee simple if he had willed; and he was the donor of the estate tail, not the queen, except of the reversion afterwards reconveyed:* 3*d, this reversion reconveyed was not in the queen her original reversion, but a new reversion expectant upon the tail of* A. *(for the former tail was docked) wherefore* A. *cannot bar the reversion in the queen, but he may bar his own issue notwithstanding* 34 *H.* 8.: 4*th, because altho' gift in tail by a subject may be a provision of the king within the statute, nevertheless the intent should appear, which is not the case here. Hales made two questions.* I. *What shall be said a provision by the king within this statute, and this is question of law.* II. *Whether this shall be said to be such a provision, which is matter of fact. To the first it seems, that if the queen be merely instrumental in procuring an estate tail to be settled, but that the estate itself does not proceed either from the charge, or from the bounty of the crown as a reward for service, it is no provision within this statute; and therefore it is to be seen, if in this case the entail was upon contract between subject and subject, and if the queen were merely instrumental to perfect the conveyance and save her own reversion, which is the second question, and a question of fact. To the second, that this is not such a provision there are these presumptions.* 1*st, Nothing appears of record that such provision was intended, which by Coke is here held to be necessary (but Hales doubted hereof.)* 2*d, No land, money, or other consideration, moved the queen to procure* B. *to grant this estate tail to* A. 3*d, It does not appear that the queen took notice of any service done by* A. *or of any favour intended by her to him.* 4*th, If the queen had intended a provision within the statute, she might have caused* C. *to convey the fee simple first to herself, and then have granted to* A. *in tail.* 5*th, If it was intended that* A. *should have an entail, which should not be a provision within the statute, no one can contrive any other way than this to effect it.* 6*th, It appears that* A. *was to purchase, and that the queen should not be prejudiced, nor any other person*

which

The case is given with [illegible] names, instead of A. B. &c. as here, & is otherwise written in different words in [illegible]. note the same [illegible] in fol. 372. of the Coke upon Litt. I have in 2 volumes with the notes by Lord Nottingham as I understand them to be & other notes.

Opinion of Berkeley.

mainder is in the king, as is aforesaid, by reason of these words in the said act (the said recovery, or any other thing or things hereafter to be had, done, or suffered by or against any such tenant in taile to the contrary notwithstanding), which words include a fine levied by such a donee, and restraineth the same.

So resolved Pasch. 31. Eliz. Rot. 1645. in Notley's case in Communi Banco.

Eighthly, but where a common recovery shall barre the estate taile, notwithstanding that statute, there a fine with proclamations shall barre the same also. (8. Rep. 77.)

Ninthly, where the said latter words of the statute be (had, done, or suffered by or against any such tenant in taile), the sense and construction is, where tenant in taile is partie or privie to the act, be it by doing or suffering that which should worke the barre, and not by meere permission, he being a stranger to the act. (1)

(3. Cro. 430. Cro. Eliz. 595. Sid. 166. 4. Leon. 40. Moor 467.)

As if tenant in tayle of the gift of the king, the reversion to the king expectant, is disseised, and the disseisor levie a fine, and five yeares passe, this shall barre the estate taile (2): and so if a collaterall ancestour of the donee release with warrantie, and the donee suffer the warrantie to descend without any entry made in the life of the ancestour, this shall binde the tenant in tayle, because he is not party or privie to any act, either done or suffered by or against him.

So holden Trin. 39. Eliz. Rot. 1914. inter Stratford & Dover in Communi Banco.

(Hob. 332. 2. Roll. Abr. 773.)

Tenthly, albeit the preamble of the statute extend onely to gifts in taile made by the kings of England before the act (viz. hath given and granted, &c.), and the body of the act referreth to the preamble (viz. that no such feined recovery hereafter to be had against such tenant in taile), so as this word (such) may seeme to couple the body and the preamble together; yet in this case (such) shall be taken for such in equall mischiefe, or in like case; and by divers parts of the act it appeareth, that the makers of the act intended to extend it to future gifts; and so is the law taken at this day without question.

A recovery in a writ of right against tenant in taile without a voucher, is no barre of any gift in taile.

33. E. 3. Judgement. 252. 3. H. 6. 55. 10. H. 6. 5. 14. E. 4. 5. b. 15. E. 4. 8. F. N. B. 134. b Pl. Com. 237. 28. E. 3. 95. F. N. B. 28. l.

If tenant in taile the remainder over in fee cesse, and the lord recover in a *cessavit*, this shall not barre the estate taile, for the issue shall recover in a *formedon*; neither were either of these barres when *Littleton* wrote. But let us now heare *Littleton*.

Sect. 709.

ITEM, si tenant en taile discontinua le taile, et ad issue et devy, et l'uncle del issue relessa al discontinuee ove garrantie, &c. et morust sans issue, ceo est collateral garranty al issue en taile, pur ceo que le garrantie discendist sur l'issue, le quel ne poit soy conveyer a le taile per meane de son uncle.

ALSO, if tenant in taile discontinue the taile, and hath issue and dieth, and the uncle of the issue release to the discontinuee with warrantie, &c. and dieth without issue, this is a collaterall warranty to the issue in tayle, because the warranty descendeth upon the issue, that cannot convey himselfe to the entayle by meanes of his uncle.

THE reason wherefore the warrantie of the uncle having no right to the land entailed shall barre the issue in tayle is, for that the law presumeth that the uncle would not unnaturally disherit his lawfull heire, being of his owne bloud, of that right which the uncle never had, but came to the heire by another meane, unlesse hee would leave him greater advancement. *Nemo præsumitur alienam posteritatem suæ prætulisse.* And in this case the law will admit no proofe against that which the law presumeth. And so it is of all other collaterall warranties; for no man is presumed to doe any thing against nature.

Pl. Com. fol. 307. a. in Sharington's case.

(2. Roll. Abr. 745.)

(Post. 374. b.)

(3. Rep. 59.)

(Ante 6. b.)

[k] And the like holdeth in some other cases: as if a rent be behinde for twentie yeares, and the lord make an acquittance for the last that is due, all the rest are presumed to be paid; and the law will admit no proofe against this presumption (3). [l] So if a man be within the foure seas, and his wife hath a childe, the law presumeth that it is the childe of the husband; and against this presumption the law will admit no proofe. (4)

[k] 11. H. 4. 55. 10. Eliz. Dier 271.

[l] 7. H. 4. 9.

[m] If a man that is innocent be accused of felony, and for feare flieth for the same, albeit

[m] 3. E. 3. Corone Stanf.

(1) 11. Car. Cro. obiter *in Wyat's case, tenant in tail, reversion in the king, is disseised, entry of the issue is barred; which perhaps is so here, because in both cases the tail is not barred.*—Lord Nott. MSS.

(2) Cro. Car. 430. Jones cited the case according to the report in this place; but it seems he was misled by this book. See the note immediately following.—*It seems to some that the case of Stratford and Dover above quoted is not law; for in 2. Rep.* 11. *Magd. Coll. case, it is adjudged, that the fine does not bar the college, not being parties, because the* 13 *Eliz. makes void all acts which it suffers, and such sufferance extends to the act in which they are not parties, by sir Ol. B.—And sir F. Moore* 467. *reports the same case: and there by Walmsley it is said, that this issue is only bound in the time the fine is levied, but no other issue, and this by* 34 *H.* 8.; *hence it seems, that sir F. Moore or lord Coke have misreported the case, for they are contrary to each other. Note,* Mr. Palmer *told* Hen. Finch, *afterwards lord Nottingham and chancellor, that he attended* Walter *chief-baron upon a reference, and that Walter denied the above case, and said, that the roll was* contra, *and the judgment there* contra *to this report, and that he and* Palmer *went to the house of lord Coke, then living, and shewed him the roll* contra *to his report in this place, and that he acknowledged it, and said, that he trusted to serjeant Bridgman's report: whence it appears, that sir F. Moore's report is the better, and there he reports it to have been,* 39. *Eliz. Ro.* 1914.—Lord Nott. MSS.

(3) This is to be understood of an acquittance under hand and seal, which is an estoppell; for if it be not under seal, the law will admit of proof to the contrary: but an avowry for the last day's rent is no discharge for the former; for by the avowry the avowant says so much is due, but discharges nothing, no other rent being mentioned in the avowry, but that for which he acknowledges the taking the goods. See 1. Sid. 44. 1. Lev. 43. 1. Saund. 285, 286. Lutw. 1173. *Note to the 11th edition.*

(4) But see ant. 244. a. note 2. [handwritten annotation, illegible] 126. a.

which is effected.—Nota, *At the common law, if the king grant lands in fee simple conditional, it was doubted if donee* post prolem suscitatum *might have aliened to bar his issue, Riley* 438. supra 19. *b. but clearly not to bar possibility of reverter in the king; no, not though the alienation were with warranty collateral, unless assets descended to the king. Ante* 19. *b. and* 370. in margine. Sed unde *alienation without warranty or assets bars subject donor,* 4 *H.* 6. *Rot. Parl. n.* 51. *Commons petition that feoffees who buy lands of the king, tenant in tail may enjoy them against the king.* Resp. de roy s'avisera.—*Note also, after Westm.* 2. *and before* 34 *H.* 8. *recovery or fine barred the tail of gift by the king, not the reversion to the king; so that by the wisdom of the common law, where the king raised the family, a kind of perpetuity was intended; for every man was discouraged to purchase from the donee, for no act of his could bar the king's reversion or possibility of reverter, which was a good way to preserve the memory of the king's bounty. When this would not do, upon the dissolution of monasteries, the crown having much land to bestow, began now to provide by* 34 *Hen.* 8. *that no alienation should bar the entail; for there needed no law for the reversion, and no other way could preserve the memory, &c.: and yet this is often eluded by a temporary grant of the reversion by the king, and a reconveyance, &c.*—Lord Nott. MSS.

beit he judicially acquitteth himselfe of the felonie, yet if it be found that he fled for the felonie, he shall, notwithstanding his innocencie, forfeit all his goods and chattels, debts and duties; for as to the forfeiture of them, the law will admit no proofe against the presumption in law grounded upon his flight: and so in many other cases. But yet the generall rule is, *Quod stabitur præsumptioni donec probetur in contrarium*; but, as you see, it hath many exceptions.

Bracton lib. 1. cap. 9.

[n] It hath beene attempted in parliament, that a statute might be made, that no man should be barred by a warrantie collaterall, but where assets descend from the same ancestor (1); but it never tooke effect, for that it should weaken common assurances. (2)

[n] Rot. Parliament 50. E. 3. num. 77.

Sect. 710.

*ITEM, si le tenant en tayle ad issue deux files et morust, et l'eigne entra en le entierty, et ent fait un feoffement en fee ove garrantie, &c. et puis l'eigne file morust sans issue; en cest cas le puisne file est barre quant al un moitie, et quant al auter moitie el n'est pas barre. Car quant a la moitie que affiert a le puisne file, el est barre, pur ceo que quant a cel * part el ne poit conveyer le discent per my le maine de son eigne soer, et pur ceo quant a cel moitie, ceo est un collateral garrantie. Mes quant al auter moity, que affiert a son eigne soer, le garrantie n'est pas barre a le puisne soer, pur ceo que el poit conveyer son discent quant a cel moitie que affiert a son eigne soer per mesme le eigne soer, issint quant a cest moitie que affiert al eigne soer, le garran-*

ALSO, if the tenant in tayle hath issue two daughters and dieth, and the elder entreth into the whole, and thereof maketh a feoffement in fee with warrantie, &c. and after the elder daughter dieth without issue; in this case the younger daughter is barred as to the one moitie, and as to the other moitie shee is not barred. For as to the moity which belongeth to the younger daughter, shee is barred, because as to this part shee cannot convey the discent by meanes of her elder sister, and therefore as to this moitie, this is a collaterall warrantie. But as to the other moitie, which belongeth to her elder sister, the warrantie is no bar to the younger sister, because she may convey her discent as to that moitie which belongeth to her elder sister by the same elder sister, so as to this moitie which be-

Ad issue deux files. If husband and wife, tenants in especiall tayle, have issue a daughter, and the wife die, the husband by a second wife hath issue another daughter, and discontinueth in fee and dieth, a collaterall ancestor of the daughters releaseth to the discontinuee with warranty and dieth, the warrantie descendeth upon both daughters, yet the issue in taile shall bee barred of the whole; for in judgement of law the entire warrantie descendeth upon both of them.

5. E. 2 Garr. 78. Lib. 8. fol. 41. Sym's case.

(10. Rep. 95.)

(Ante 367. b.)
(2. Cro. 217, 218.)

Et l'eigne enter en l'entiertie, et ent fait un feoffement, &c. Here it is to bee understood, that when one coparcener doth generally enter into the whole, this doth not devest the estate which descendeth by the law to the other, unlesse shee that doth enter claimeth the whole, and taketh the profits of the whole; for that shall devest the freehold in law of the other parcener.

(Ant. 189. a. 243. b.)
See before in the Chapter of Discent, Sect. 398.

Otherwise it is after the parceners be actually seised, the taking of the whole profits, or any claime made by the one, cannot put the other out of possession without an

* part—moyte que affiert a luy, L. and M. and Roh.

(1) However, it hath been effected in our days; for by 4 Ann. cap. 16. sect. 21. all warranties since the first day of Trinity Term, anno dom. 1705, by any tenants for life, of any lands, tenements, or hereditaments, coming or descending to any person in reversion or remainder, are void and of no effect; and all collateral warranties made since then of any lands, tenements or hereditaments, by any ancestor who had no estate of inheritance in possession, the same is void against the heir. *Note to the 11th edition.*

(2) The reader will recollect, that, previously to the statute *de donis*, all estates were held either in fee simple, in fee simple conditional, for life, or for years; and that estate-tail, in the light in which we now consider them, had not then an existence. If a person seised in *fee simple* aliened his estate, the alienation was certainly binding both upon his lineal and his collateral heirs; his warranty therefore had effect so far as it entitled the alienee to vouch the heir of the warrantor, and, in case of eviction, to claim a recompence from him, if any real assets descended upon him from the ancestor; but with respect to the repelling or rebutting of the claim of the heir to the estate itself, as the alienations of tenant in fee simple bound the heirs as effectually without the warranty as with it, the warranty, in that respect, could have no operation.—As to the warranties of persons seised of estates held in *fee simple conditional*, it has been observed before, p. 326. b. note 1, that the condition from which that estate took its appellation did not suspend the fee from vesting in the donee immediately by the gift; and therefore if he aliened before he had issue, it not only was no forfeiture, but if afterwards he had issue, it was a bar to them. Hence the warranty of a tenant in fee simple conditional had the same effect with respect to his issue, as the warranty of tenant in tail in fee simple had upon those who claimed from him; that is, with assets, it entitled the warrantee to vouch the issue as heirs at law of the ancestor; but in other respects it had no operation, as the issue was bound by the alienation of the ancestor, as effectually without warranty, as with it. With respect to the donor or reversioner, the alienations of tenant in fee simple conditional could not be binding on him without assets, because he claimed to be in by title paramount.—As to the alienations of tenant *for life or for years*: in most cases they must have been void, as commencing by disseisin. In those cases where they were not void upon that account, it is to be observed, that before the statute of uses an estate of freehold could not be created without livery of seisin; and that as the livery of seisin of tenant for life or for years was a forfeiture of the estate, the reversioner or remainder-man might enter immediately for the forfeiture; but if he did not enter during the life of the person aliening, the warranty estopped him from entering afterwards. The reader will recollect, that if a disseisor, abator, or intrudor, died in the possession of the estate, his heirs so far acquired a presumptive title to the estate, that the disseisee could no longer restore his possession by entry, but was reduced to his action. By analogy to this reasoning, and a rational extention of the principles on which it was founded, the law supposed that the remainder man or reversioner would have entered for the forfeiture of the tenant for life or years, if an equivalent were not given him: it was therefore presumed, that if he did not enter during the life of such particular tenant, he had received from him an equivalent; and this presumption being admitted, he could not afterwards, with any colour of justice, be allowed to claim the estate itself. Such were the effects and operation of warranty at the common law. The first material alteration in it was by the statute of Gloucester, 6. E. 1. ch. 3. by which it was enacted, that the warranty of the father, tenant by the courtesy, either in the life of his wife or afterwards, should not be a bar to the heir without assets. The next statute which made any material alteration upon the

effect

tie est lineal al puisne soer.

longeth to the elder sister, the warrantie is lineall to the younger sister.

Sect. 711.

ET nota, que quant a celuy que demanda fee simple per ascun de ses auncesters, il serra barre per warrantie lineal que discendist sur luy, sinon que soit restraine per ascun estatute.

AND note, that as to him that demandeth fee simple by any of his ancestors, he shall be barred by warrantie lineall which descendeth upon him, unlesse he be restrained by some statute.

Sect. 712.

MES il que demande fee taile per briefe de formedon *en discender, ne serra my barre per lineal garrantie, sinon que il ad assets per discent en fee simple per mesme l'auncester que fist le garranty. Mes collateral garrantie est barre a celuy que demanda fee, et auxy a celuy que demanda fee taile sans ascun auter discent de fee simple, sinon en cases queux sont restraines per les estatutes, et auters cases pur certaine causes, come serra dit en apres.*

BUT hee that demandeth fee tayle by writ of *formedon* in *discender*, shall not bee barred by lineall warrantie, unlesse hee hath assets by discent in fee simple by the same ancestour that made the warrantie. But collaterall warrantie is a barre to him that demandeth fee, and also to him that demandeth fee tayle without any other discent of fee simple, except in cases which are restrained by the statutes, and in other cases for certaine causes, as shall be said hereafter. (1)

actuall putting out or disseisin. And in this case of *Littleton*, when one coparcener entreth into the whole, and maketh a feoffement of the whole, this devesteth the freehold in law out of the other coparcener.

Now seeing the entrie in this case of *Littleton* devested not the estate of the other parcener, if no further proceeding had beene, then it is to be demanded, that seeing the feoffement doth worke the wrong, and bee the wrong either a disseisin, or in nature of an abatement, how can the warrantie annexed to that feoffement that wrought the wrong be collaterall, or binde the youngest sister for her part? To this it is answered, that when the one sister entreth into the whole, the possession being void, and maketh a feoffement in fee, this act subsequent doth so explaine the entry precedent into the whole, that now by construction of law, she was only seised of the whole, and this feoffement can bee no disseisin, because the other sister was never seised; nor any abatement, because they both made but one heire to the anceftour, and one freehold and inheritance descended to them. So as in judgement of law the warrantie doth not commence by disseisin or by abatement, and without question her entrie was no intrusion.

Pl. Com. 543. (5. Rep. 51. Post. 377. a.)

(Sect 398. Post. 393. b.)

Tenant in tayle hath issue two daughters, and discontinueth in fee, the youngest disseiseth the discontinuee to the use of herselfe and her sister, the discontinuee ousteth her, against whom she recovereth in an assise, the eldest agreeth to the disseisin, as she may, against her sister, and become joyntenant with her. And thus is the booke in the 21. Assise [n] to be intended, the case being no other in effect; but *A.* disseiseth one to the use of himselfe and *B*, *B.* agreeth; by this he is joyntenant with *A.*

[n] 21. Ass. p. 19. (Ant. 180.)

Et

(1) The observations of Lord Vaughan on this Section and the comment upon it, deserve attentive perusal. See Vaugh. 375.

effect and operation of warranty, was the statute *de donis*. An attempt has been made in note 1, page 326. b. and notes 1 and 2 to page 327. a. to explain in what manner, and by what construction of law, estates tail derived their origin from that statute. It is obvious, that if the warranty of tenant in tail, without assets, had been permitted to be a bar of the estate tail, it would have been in the power of every tenant in tail to have evaded that statute, and barred his issue. By a kind of analogy, therefore, to what the legislature had done in passing the stat. of Gloucester, the judges, in their construction of the statute *de donis*, held, that the warranty of tenant in tail, without assets, should not bind his issue; but by the same analogy, and to prevent the circuity which would arise if the issue had been permitted to recover the estate from the alienee, and the alienee to recover the assets from the issue, they held, the issue bound by warranty with assets.——With respect to those in remainder or reversion—it is to be observed, that the statute *de donis* extends only to the alienations of tenants in tail; the alienations, therefore, of tenants for life with warranty, remained as they did at the common law, and therefore bound all upon whom the warranty descended, either with or without assets. Neither did the statute *de donis* restrain the alienations of tenant in tail, except so far as they prevented the land descending upon the issue at his death, or reverting to the donor for want of issue in tail. There is nothing in it which, either directly or indirectly, restrains the tenant in tail from barring a remainder-man in tail, by his warranty descending on him. As to a remainder-man in tail, therefore, the operation of warranty in rebutting the heir, remained as it was before the statute: it barred him both with and without assets. This is laid down and explained with great learning and force of argument by lord chief justice Vaughan, in his argument in Bole v. Horton. See his Reports, p. 360. The case there was, that William Vesey devised to John Vesey, his eldest son, and the heirs male of his body; and for want of such issue, to Wm. Vesey, another of his sons, and the heirs male of his body; and for want of such issue, to his own right heirs. John, upon his father's death, entered and died, leaving issue only two daughters: Wm. then entered and aliened with warranty, and died without issue. The question was, whether the warranty rebutted the daughters. Lord chief justice Vaughan was of opinion, that the warranty, not being accompanied with assets, would not have barred his own issues in tail, if there had been any, or the two daughters, who claimed the reversion, both issues in tail and the reversioners being protected by the statute *de donis*: but he admitted, that if there had been any intermediate remainder in tail, the warranty would have rebutted all who claimed under that remainder, a remainder in tail not being under the protection of the statute. The only point before the court in this case was, upon the operation of the warranty to rebut the reversioners. Upon this the court was divided: the chief justice and justice Archer were for the demandant; and justice Wyld and justice Atkins, for the tenant.—The next statute which restrained the operation of warranty, was 11 Henry 7. ch. 20. by which the warranty of the wife of her husband's lands, either with or without her succeeding husband, was held to be void. The last statute which has been enacted for the purpose of restraining the operation of warranty, is the 4 and 5 Ann. ch. 16. by which all warranties of tenant of life are declared void; and all collateral warranties of any ancestor who has not an estate of inheritance in possession, are declared void against the heir. But this statute does not extend to the alienation of tenant in tail in possession. The consequence is, that even at this day, if a tenant in tail in possession discontinues his estate with warranty, it is a bar with assets to his issue, and without assets to those in remainder. Supposing, therefore, the common case of a limitation to the first and other sons successively in tail male; if the

first

3. E. 3. 22. 4. E. 3. 28. 50. 6. E. 3. 56. 7. E. 3. 54. 57. 9. E. 3. 16. 10. E. 3. 14. 15. E. 3. Gar. 27. 20. E. 3. Ibid. 39. 25. E. 3. 50. 27. E. 3. 83. 41. E. 3. Garr. 16. Mich. 38. E. 3. Coram Rege Abbot de Colchester's case. 45. Ass. 6. Pl. Com. 554. 19. E. 4. 10. Vid. Sect. 703. 747.

Et nota, que quant a celuy que demanda fee simple, &c. In these two Sections there are expressed foure legall conclusions:

First, that a lineall warrantie doth binde the right of a fee simple.

Secondly, that a lineall warrantie doth not binde the right of an estate taile, for that it is restrained by the statute of *donis conditionalibus*.

Thirdly, that a lineall warranty and assets is a barre of the right in taile, and is not restrained (as hath beene said) by the said act.

Fourthly, that a collaterall warrantie made by a collaterall ancestor of the donee, doth binde the right of an estate taile, albeit there be no assets; and the reason thereof is upon the statute of *donis conditionalibus*, for that it is not made by the tenant in taile, &c. as the lineall warrantie is.

(Moor. 96. accord. Vaugh. 382. contra. See Vaug. 365.)

To this may be added, that the warranty of the donee in taile, which is collaterall to the donor, or to him in remainder, being heire to him, doth binde them without any assets. For though the alienation of the donee after issue doth not barre the donor, which was the mischiefe provided for by the act, yet the warranty being collaterall doth barre both of them; for the act restraineth not that warranty, but it remaineth at the common law, as *Littleton* after-saith: and in like manner the warranty of the donee doth barre him in the remainder.

Fleta lib. 2. ca. 65. Britton 185. 4. E. 3. Garr. 63. 16. E. 3. Ass. 4. 43. E. 3. 9. 7. H. 6. 3. 11. H. 4. 20. (2. Roll. Abr. 774, 775)

Assets, (id est) quod tantundem valet, sufficient by discent.

Note, assets requisite to make a lineall warranty a barre must have six qualities. First, it must be assets (that is) of equall value or more at the time of the discent. Secondly, it must be of discent, and not by purchase or gift. Thirdly, as *Littleton* here saith, it must be assets in fee simple, and not in taile, or for another man's life. Fourthly, it must descend to him as heire to the same ancestor that made the warranty, as *Littleton* also here saith.

24. E. 3. 47. (6. Rep. 56.) [a] 31. E. 3. Ass. 5. 13. E. 3. Recoverie in value 17. Lib. 3. fol. 31. Butler & Baker's case.

Fifthly, it must be of lands or tenements, or rents, or services valuable, or other profits issuing out of lands or tenements, and not personall inheritances, as annuities, and the like. Sixthly, it must be in state or interest, and not in use or right of actions or rights of entry, for they are no assets until they be brought into possession. [a] But if a rent in fee simple issuing out of the land of the heire descend unto him whereby it is extinct, yet this is assets, and to this purpose hath in judgement of law a continuance.

[b] 14. E. 3. Mesne 7. Registrem 293. [c] Fleta, lib. 2. cap. 65. Britton fol. 185. Extent. manerii. 5. H. 7. 37. 32. H. 6. 21. 33. E. 3. Garr. 102.

[b] A seigniory in fee almoigne is no assets, because it is not valuable; and therefore not to be extended; and so it seemeth of a seigniory of homage and fealty. But an advowson is assets, whereof [c] *Fleta* saith; *Item de ecclesiis quæ ad donationem domini pertinent quot sunt, et quæ, et ubi, et quantum valeat quæ liber ecclesia per annum secundum veram ipsius æstimationem, et pro marcâ solidus extendatur, ut si ecclesia centum marcas valeat per annum, ad centum solidos extendatur advocatio per annum.* (1) And herewith agreeth *Britton*, and others have reckoned a shilling in the pound; and *Britton* addeth further, *mes si la advowson duist estre vendue, adonques serr' le reasonable price solonque le value en un an a cel extent.* Wherein it is to be observed, that antiquitie did ever reckon by markes.

Sect. 713.

ITEM, si terre soit done a un home et a les heires de son corps engendres, le quel prent feme, et ont issue fits enter eux, et le baron discontinua le taile en fee et devy, et puis la feme relessa al discontinuee en fee ove garrantie, &c. et morust, et le garrantie discendist a le fits, ceo est un collateral garrantie.

ALSO, if land be given to a man, and to the heires of his bodie begotten, who taketh wife, and have issue a son betweene them, and the husband discontinues the taile in fee and dieth, and after the wife releaseth to the discontinuee in fee with warrantie, &c. and dieth, and the warranty descends to the son, this is a collaterall warrantie.

THIS case standeth upon the same reason that divers other formerly put by our author doe, viz. that because the heire claimeth only from the father *per formam doni*, and nothing from the wife, that therefore the warrantie of the wife is collaterall, and the warrantie made by any ancestor male or female of the wife bindeth; and here the warrantie descendeth after the discent of the right.

Sect.

(1) Bro. *Assets per Discent* 21. contra.

son, when in possession, levies a fine, that is a discontinuance of the remainders to the other sons; and by reason of the warranty contained in the concord, it is a bar to them, even without assets. It is the same if he executes a feoffment, and accompanies it with a warranty. It remains to observe, that no warranty extends to bar any estate, either in possession, reversion, or remainder, unless before, or, at least, at the time that the warranty is made, it is divested or displaced. See Seymour's case, 10. Rep. 96.— These, it is presumed, are the general outlines of the doctrine of warranty. The reader will observe, by what has been said on that subject, that at common law, the operation of a warranty to rebut the heir could hold in no case where the heir claimed the estate warranted from the ancestor by descent; for, at the common law, wherever the ancestor had the inheritance, he could alien it from the issue; therefore the warranty, as to the purpose of rebutter, was perfectly inoperative. The statutes have made no alteration in these respects. Had it been held that the statute *de donis* did not restrain the effect of the warranty to rebut the issue, this principle would have been broken into, as the heir in that case would have been rebutted by his ancestor's warranty from an estate which he claimed to take from him by descent; but as the contrary construction was received, the principle remains as it did at the common law. The consequence is, that without assets the ancestor's warranty never did, and does not now bind the heir in any case, except where he takes by purchase; and that when he does take by purchase, it binds him, either with or without assets, in every case where the contrary has not been enacted by statute. Upon enquiry it will be found, that the cases where the operation of warranty still prevails are reduced to two; the first, that by the construction of the statute *de donis*, the ancestor's warranty binds the issues in tail with assets; the other, that, at common law, the warranty of the ancestor, tenant in tail in possession, still continues to bar those in remainder without assets. It is observable, that all warranties are collateral, so far as they are extraneous to the estate, and by way of contradistinction to those rights, incidents, or qualities, which by their nature are inherent in, annexed to, or issuing out of the estate which they accompany. In this sense the word collateral frequently occurs in our law books. Thus, 1. Rep. 121. b. an use at common law is said to be a trust or confidence, not issuing out of land, but a thing *collateral*, annexed in privity to the estate. In the same sense it is used in the well-known distinction between those powers which are said to be relating to the land, and *collateral* powers. Thus, whether the warranty descends lineally or collaterally, whether the estate and the warranty descend from the same person or from different persons, and whether the warranty is considered as to its operation of rebutting the heir, or of entitling the alienee to vouch the warrantor, it is, in its nature, collateral to the estate which it accompanies. If in some cases it bars the heir from claiming, and in others it does not, it is only because the statute law has said, that in some cases where by the common law it would have operated as a bar, it shall no longer have that operation; and if, by the statute *de donis*, the warranty of tenant

Sect. 714.

MES si tenements soyent dones a le baron et a sa feme, et a les heires de lour deux corps engendres, queux ont issue fits, et le baron discontinua le taile et morust, et puis la feme relessa ove garrantie et morust, cest garrantie n'est forsque un lineal garrantie a le fits; car le fits ne serra barre en ceo cas de suer son breve de formedon, *sinon que il ad assets per discent en fee simple per sa mere, pur ceo que lour issue en briefe de* formedon *covient conveyer a luy le droit come heire a son pere et a sa mere de lour * deux corps engendres per forme del done; et issint en tiel case, le garrantie de le pere et le garrantie de la mere ne sont forsque lineal garrantie al heire, &c.*

BUT if lands be given to the husband and wife, and to the heires of their two bodies begotten, who have issue a son, and the husband discontinue the taile and dieth, and after the wife release with warrantie and dieth, this warrantie is but a lineall warrantie to the son; for the sonne shall not be barred in this case to sue his writ of *formedon*, unlesse that hee hath assets by discent in fee simple by his mother, because their issue in the writ of *formedon* ought to convey to him the right as heire to his father and mother of their two bodies begotten *per formam doni*; and so in this case the warrantie of the father and the warrantie of the mother are but lineall warrantie to the heire, &c.

(9. Rep. 143. a. Ant. 187. a.)

HERE is a point worthy of observation, that albeit in this case the issue in taile must claime as heire of both their bodies, yet the warrantie of either of them is lineall to the issue; and yet the issue cannot claime as heire to either of them alone, but of both.

35. E. 3. tit. Gar. 73.

If lands be given to a man and to a woman unmarried, and the heires of their two bodies, and they entermarrie, and are disseised, and the husband release with warrantie, the wife dieth, the husband dieth, albeit the donees did take by moities, yet the warrantie is lineall for the whole, because, as our author here saith, the issue must in a *formedon* convey to him the right as heire to his father and his mother of their two bodies engendred; and therefore it is collaterall for no part.

(2. Roll. Abr. 741. Ant. 187. a. Sect. 26.)

Sect. 715.

ET nota, que en chescun cas ou home demanda tenements en fee taile per briefe de formedon, *si ascun del issue en le taile que avoit possession, ou que n'avoit ascun possession, fait un garrantie, &c. si celuy que suist le briefe de* formedon *puissoit per ascun possibilitie, per matter que puissoit estre en fait, conveyer a luy, per my celuy que fist le garrantie*

AND note, that in everie case where a man demandeth lands in fee taile by writ of *formedon*, if any of the issue in taile that hath possession, or that hath not possession, make a warrantie, &c. if hee which sueth the writ of *formedon* might by any possibilitie, by matter which might be *en fait*, convey to him, by him that made the warrantie *per formam doni*, this is a li-

* *deux* not in L. and M. nor Roh.

nant in tail did not bar the issue without assets, but barred it with assets, this is not from any pre-established distinction between lineal and collateral warranty, but because the judges, upon the construction of the statute *de donis*, held the issues in tail and the reversioner should not be deprived of the estate by the indirect and circuitous operation of warranty, when that statute had declared they should not be deprived of it by the direct alienation of common-law conveyances.—The chief part of the observations offered to the reader in this note, are grounded on what was said by lord Vaughan in the argument above referred to: he concludes it by saying, "The "doctrine of the binding of lineal and collateral warranties, or their not binding, is an extraction out of men's brains and "speculations many scores of years after the statute *de donis*.—And if Littleton (whose memory I much honour) had taken "that plain way in resolving his many excellent cases in his Chapter of Warranty, of saying the warranty of the ancestor doth not bind "in this case, because it is restrained by the statute of Gloucester, or the statute *de donis*; and it doth bind in this case, as at the "common law, because not restrained by either statute (for when he wrote there were no other statutes restraining warranties, there "is now a third, 11 H. 7.) his doctrine of warranties had been more clear and satisfactory than now it is, being intricated under "the terms of lineal and collateral; for that in truth is the genuine resolution of most, if not of all his cases; for no man's war-"ranty doth bind, or not, directly, and *a priori*, because it is lineal or collateral; for no statute restrains any warranty under those "terms from binding, nor no law institutes any warranty in those terms; but those are restraints by consequent only from the re-"straints of warranties made by statutes." Vaugh. 375.—Lord Holt is also reported to have said, "The true reason of collateral "warranty was the security of purchasers, and for their encouragement; as also, for the establishing and settling the estates of such "as were in by title, or descent cast; and this was the only security such persons could have at common law. And because the estate "of such persons as are in by title are much favoured in law, these covenants that were for strengthening of them were favoured "likewise. And in those days there was no need of lineal warranty, but, however, the force of that is taken away by the statute of "*donis*, and common recovery is not upon the supposition of recompence in value, and never was within the statute, but always as "much out of it as if it were so mentioned by express words." And this, he said, was my lord Hale's opinion. 12. Mod. 512.

rantie performe del done, * *ceo estun lineal garrantie, et nemy collateral.*

neall warrantie, and not collaterall.

35. E. 3. Gar. 73.

OF this sufficient hath beene said before, *sed nunquàm nimis dicitur quod nunquàm satis dicitur*; for it is a point of great use and consequence.

Sect. 716.

(Vaugh. 377.)

(8. Rep. 51.)

(Vaugh. 367. 377.)

ITEM, si home ad issue trois fits, et il dona terre al eigne fits, a aver et tener a luy et a les heires de son corps engendres, et pur default de tiel issue, le remainder al mulnes fits, a luy et a les heires de son corps engendres, et pur default de tiel issue † *del mulnes, le remainder al puisne fits, et les heires de son corps engendres; en cest cas, si l'eigne* ‡ *discontinua le taile en fee, et oblige luy et ses heyres a garrantie, et morust sans issue, ceo est un collateral garrantie al mulnes fits, et serra barre a demaunder mesme la terre per force del remainder; pur ceo que le remainder est son title, et son eigne frere est collateral a cel title, que commence per force del remainder. En mesme le maner est, si le mulnes fits avoit mesme la terre per force del remainder, pur ceo que son eigne frere ne fist ascun discontinuance, mes morust sans issue de son corps, et puis le mulnes fait un discontinuance ove garrantie, &c. et morust sans issue, ceo est un collateral garrantie a le puisne fits. Et auxy en cest case, si ascun de les dits fits soit disseisie, et le pere que fist le done, &c. relessa a le disseisor tout son droit* § *ove garrantie,* ¶ *ceo est un collateral garrantie a celuy fits sur que le garrantie discendist,* causâ quâ supra.

ALSO, if a man hath issue three sonnes, and giveth land to the eldest sonne, to have and to hold to him and to the heires of his bodie begotten, and for default of such issue, the remainder to the middle sonne, to him and to the heires of his bodie begotten, and for default of such issue of the middle sonne, the remainder to the youngest son, and to the heires of his bodie begotten; in this case, if the eldest discontinue the taile in fee, and binde him and his heires to warrantie, and dieth without issue, this is a collaterall warrantie to the middle son, and shall be a bar to demand the same land by force of the remainder; for that the remainder is his title, and his elder brother is collaterall to this title, which commenceth by force of the remainder. In the same manner it is, if the middle son hath the same land by force of the remainder, because his eldest brother made no discontinuance, but died without issue of his bodie, and after the middle make a discontinuance with warrantie, &c. and dieth without issue, this is a collaterall warrantie to the youngest son. And also in this case, if any of the said sonnes be disseised, and the father that made the gift, &c. releaseth to the disseisor all his right with warrantie, this is a collaterall warrantie to that son upon whom the warrantie descendeth, *causâ quâ supra.*

* *&c.* added L. and M. and Roh. † *del mulnes* not in L. and M. nor Roh. ‡ *fits* added in L. and M. and Roh.
§ *&c.* added L. and M. and Roh. ¶ *&c.* added L. and M. and Roh.

Sect. 717.

ET sic nota, *que lou home que est collateral a le title, * et ceo release ove garrantie, &c. ceo est un collateral garrantie.*

AND so note, that where a man that is collaterall to the title, and releaseth this with warrantie, &c. this is a collaterall warrantie.

HERE it appeareth, that it is not adjudged in law a collaterall warrantie, in respect of the bloud, for the warrantie may be collaterall, albeit the bloud be lineall; and the warrantie may be lineall, albeit the bloud be collaterall, as hath beene said. But it is in law deemed a collaterall warrantie, in respect that he that maketh the warrantie is collaterall to the title of him upon whom the warrantie doth fall; as by the example which *Littleton* here putteth, and by that which hath beene formerly said, is manifest.

8. R. 2. Gar. 101. Vi. Sect. 704.

Sect. 718.

ITEM, si pier dona terre a son eigne fits, a aver et tener a luy et a les heires males de son corps engendres, le remainder a le second fits, &c. si l'eigne fits alienast en fee ovesque garrantie, &c. et ad issue female, et morust sans issue male, ceo n'est pas collaterall garrantie al second fits, † car il ne serra barre de son action de formedon *en le remainder, pur ceo que le garrantie discendist al file del eigne fits, et nemy al second fits: car chescun garrantie que discendist, discendist a celuy que est heire a luy que fist le garrantie, per le common ley.*

ALSO, if a father giveth land to his eldest son, to have and to hold to him and to the heires males of his body begotten, the remainder to the second sonne, &c. if the eldest sonne alieneth in fee with warranty, &c. and hath issue female, and dieth without issue male, this is no collaterall warranty to the second son; for he shall not bee barred of his action of *formedon* in the remainder, because the warranty descended to the daughter of the elder son, and not to the second sonne: for every warrantie which descends, descendeth to him that is heire to him who made the warrantie, by the common law.

HERE is rehearsed a maxime of the common law, that every warrantie doth descend upon him that is heire to him that made the warrantie, by the common law, as by this example it appeareth.

Vid. Sect. 3. 603. 735. 736, 737. (Ant. 329. a. Cro. Eliz. 72.)

A celuy que est heire a luy que fist le garrantie per le common ley, &c. Hereupon many things worthy to be knowne are to be understood.

[a] First, that if a man infeoffeth another of an acre of ground with warrantie, and hath issue two sons, and dieth seised of another acre of land, of the nature of burrough English, the feoffee is impleaded, albeit the warrantie descendeth onely upon the eldest sonne, yet may he vouch them both; the one as heire to the warrantie, and the other as heire to the land: for if he should vouch the eldest son only, then should he not have the fruit of his warranty, viz. a recoverie in value; the youngest son only he cannot vouch, because he is not heire at the common law, upon whom the warrantie descendeth. (1)

[a] 40. E. 3. 14.

(Mod. Rep. 96. 2. Cro. 218.)

[b] So it is of heires in gavelkind, the eldest may bee vouched as heire to the warranty,

[b] 22. E. 4. 10. 4. E. 3. 55. 27. H. 6. 1, 2. 11. E. 3. Dett. 7. (8. Rep. 8. b.)

* &c. added L. and M. and Roh. † *car il ne serra barre—ne luy ledera*, L. and M. and Roh.

(1) 38. E. 3. 22. 43. E. 3. 19. 48. Ass. 41. 4. E. 3. 55. 21. E. 3. 46. 21. E. 3. 36. 11. H. 7. 12. 6. H. 7. 2. Hale's MSS.

[c] 49. Aſſ. 4. 38. E. 3. 22. (Hob. 25.)

[d] 32. E. 3. Vouch. 94. 35. H. 6. 33.

Pl. Com. 515.

(2. Cro. 218.)

[e] 17. E. 2. tit. Recover in value 33. 1. E. 3. 12. 33. E. 3. Judgm. 222. 14. E. 3. ib. 160. 10. E. 3. 52. 18. E. 3. 51. Lib. 1. fol. 96. Shelleye's caſe.

[f] 32. E. 3. Vouch. 94. per Greene. (Plowd. 11. a. Manxel's Caſe.)

[g] Vide Pl. Com. fol. 514. (3. Rep. 5. 10. Rep. 35. Dr. and Stud. 41. b. 8. Rep. 101. b. See Cro. Eliz. 670.)

[h] 17. E. 3. 59. 20. E. 3. Vouch. 129. 32. E. 3. Vouch. 94. 5. H. 7. 2.

[i] 11. H. 7. 12. 11. E. 3. tit. Det. 7. Dy. 5. El. 238. (Moor. 74.)

[k] 11. H. 7. 12. (2. Cro. 25. b. 218. 1. Siderf. 238. 272. 420. Hob. 25.)

ranty, and the other ſonnes in reſpect of the inheritance deſcended unto them. [c] And in like ſort, the heire at the common law, and the heire of the part of the mother, ſhall bee vouched: but the heire at the common law may be vouched alone in both theſe caſes, at the election of the tenant: *et ſic de ſimilibus.* [d] In the ſame manner if a man dieth ſeiſed of certaine lands in fee, having iſſue a ſonne and a daughter by one venter, and a ſonne by another, the eldeſt ſonne entreth and dieth, the land deſcends to the ſiſter; in this caſe the warrantie deſcendeth on the ſonne, and he may be vouched as heire, and the ſiſter, as heire of the land: in which and the other caſe of burrough Engliſh, the ſonne and heire by the common law having nothing by diſcent, the whole loſſe of the recoverie in value lieth upon the heires of the land, albeit they be no heires to the warrantie. Then put the caſe that there is a warrantie paramount, Who ſhall deraigne that warrantie? and to whom ſhall the recompence in value goe? Some have ſaid, that as they are vouched together, ſo ſhall they avouch over, and that the recompence in value ſhall enure according to the loſſe; and that the effect muſt purſue the cauſe, as a recoverie in value by a warrantie of the part of the mother ſhall goe to the heire of the part of the mother, &c.

Some others hold, that it is againſt the maxime of law, that they that are not heires to the warrantie ſhould joyne in voucher, or to take benefit of the warrantie which deſcended not to them; but that the heire at the common law, to whom the warrantie deſcended, ſhall deraigne the warrantie, and recover in value; and that this doth ſtand with the rule of the common law.

Others hold the contrarie, and that this ſhould be both againſt the rule of law, and againſt reaſon alſo; for by the rule of law [e] the vouchee ſhall never ſue to have execution in value, untill execution be ſued againſt him. But in this caſe execution can never be ſued againſt the heire at the common law, therefore he cannot ſue to have execution over in value. Secondly, it ſhould be againſt reaſon, that the heire at the common law ſhould have *totum lucrum*, and the ſpeciall heires *totum damnum*. I finde in our bookes, [f] that this reaſon is yeelded, that the ſpeciall heire ſhould not be vouched only; for (ſay they) if the ſpeciall heires ſhould be vouched only, then could not they deraigne the warrantie over; which ſhould be miſchievous, that they ſhould loſe the benefit of the warrantie, if they ſhould be vouched only. But if the heire at the common law were vouched with them, (as by the law he ought) all might be ſaved; and therefore ſtudie well this point how it may be done.

[g] If tenant in generall taile be, and a common recoverie is had againſt him and his wife, where his wife hath nothing, and they vouch, and have judgement to recover in value, tenant in taile dieth, and the wife ſurviveth; for that the iſſue in taile had the whole loſſe, the recompence ſhall enure wholly to him; and the wife, albeit ſhe was partie to the judgement, ſhall have nothing in the recompence, for that ſhe loſeth nothing.

[h] If the baſtard eigne enter and take the profits, he ſhall be vouched only, and not the baſtard and the mulier; becauſe the baſtard is in appearance heire, and ſhall not diſable himſelfe.

[i] If a man be ſeiſed of lands in gavelkinde, and hath iſſue three ſonnes, and by obligation bindeth himſelfe and his heires and dieth, an action of debt ſhall be maintainable againſt all the three ſonnes, for the heire is not chargeable unleſſe he hath lands by diſcent.

[k] So if a man be ſeiſed of land on the part of his mother, and binde himſelfe and his heires by obligation, and dieth, an action of debt ſhall lie againſt the heire on the part of the mother, without naming of the heire at the common law. And ſo note a diverſitie betweene a perſonall lien of a bond, and a reall lien of a warrantie.

Sect. 719.

[l] 24. E. 3. 36. 27. E. 3. age 108. 38. E. 3. 26. 40. E. 3. 9. 37. H. 8. Br. Noſme. 1. & 40. & tit. Done & Rem. 61.

(Ant. 17. b. 22. b. 1. Roll. Abr. 417. 1. Roll. Abr. 627, 628.)

HERE it appeareth, that [l] whenſoever the anceſtor taketh any eſtate of frehold, a limitation after in the ſame conveyance to any of his heires, are words of limitation, and not of purchaſe, albeit in words it be limited by way of remainder; (1) and therefore here the remainder, to the heires females, veſteth in the tenant in taile himſelfe.

* *NOTA, ſi terre ſoit done a un home, et a les heires males de ſon corps engendres, et pur default de tiel iſſue, le remainder ent a ſes heires females de ſon corps engendres, et puis le*

NOTE, if land bee given to a man, and to the heirs males of his bodie begotten, and for default of ſuch iſſue, the remainder thereof to his heires females of his body begotten, and after the *donee*

* *Nota—Item*, L. and M. and Roh.

(1) In a late very diſtinguiſhed publication it is obſerved, that "where there is a gift to *A.* and his heirs for ever, or to *A.* and "the heirs of his body begotten, the firſt words (*to A.*) create an eſtate for life; the latter (to his heirs, or the heirs of his body) "create a remainder in fee, or in tail, which the law, to prevent an abeyance, refers to and veſts in the anceſtor himſelf, who is "thus tenant for life, with an immediate remainder in fee or in tail; and then by the conjunction of the two eſtates, or the merger "of the leſs in the greater, he becomes tenant in fee, or tenant in tail in poſſeſſion." See *ſir Wm. Blackſtone*'s argument in the caſe of Perrin v. Blake, publiſhed by Mr. Hargrave among his Tracts, fol. 500. This expoſition of the expreſſion in queſtion he afterwards applies, with great ability, in his inveſtigation of the rule in Shelley's caſe. He lays it down as the great fundamental maxim upon which the conſtruction of every deviſe muſt depend, that the intention of the teſtator ſhall be fully and punctually obſerved, ſo far as the ſame is conſiſtent with the eſtabliſhed rules of law, and no farther. He makes a diſtinction between thoſe rules of law which are to be conſidered as the fundamental rules of the property of this kingdom, and are therefore of that eſſential, permanent and ſubſtantial kind, which cannot be exceeded or tranſgreſſed by any intention of a teſtator, however clearly or manifeſtly expreſſed; and thoſe rules of a more arbitrary, technical, and artificial kind, which the intention of a teſtator may controul. He then ſuppoſes that there is a third claſs of rules, of a ſtill more flexible nature. Among the rules of the firſt claſs he reckons theſe: that every tenant in fee ſimple, or fee tail, ſhall have the power of alienating his eſtates, by the ſeveral modes adapted to their reſpective intereſts; that no diſpoſition ſhall be allowed, which in its conſequence tends to a perpetuity; that lands ſhall deſcend to the eldeſt ſon or brother alone, or to all the daughters or ſiſters in partnerſhip. Among the rules of the ſecond claſs he reckons thoſe rules of interpretation by which the courts invariably conſtrue particular modes of expreſſion to denote a particular intention in the teſtator. Thus, ſays he, if a man deviſes his land, being freehold, to another generally, without ſpecifying the duration of his eſtate, the courts conſider it as evidence that he intended the deviſee ſhould be only tenant for life; but if he deviſes, in like manner, a chattel intereſt, the courts conſider it to be evidence of his intention that the deviſee ſhould have the total property. Among the rules of the third claſs he reckons the rule in Shelley's caſe. Having admitted that the ſecond and third claſs of rules allow of exceptions, when it appears to be the teſtator's intention that the operation of his deviſe ſhould be different from that which the legal operation of the words in which it is penned would be, he adds, that this intention ſhall not have this effect, unleſs it is manifeſt and certain; ſo that if his intention that his words ſhould operate contrary to their technical and legal import, does not appear by expreſs words, or by neceſſary implication, the legal operation of the words muſt take effect. He applies this rule to the caſe of Perrin v. Blake. He argues, that it does not appear by any evidence that the teſtator intended his words ſhould not have their legal operation: he

donee en le taile fait feoffment en fee ovesque garrantie accordant, et ad issue fits et file et moruſt, cel garrantie n'eſt forſque lineal garrantie a le fits a demaunder per briefe de formedon en le diſcender; *et auxy il n'eſt forſque lineall a le file, a demaunder meſme la terre per briefe de* formedon en le remainder, *ſi non * frere deviaſt ſans iſſue male, pur ceo que el claime come heire female de la corps ſon pere engendres. Mes en ceſt cas, ſi ſon frere en ſa vie releaſaſt al diſcontinuee, &c. ove garrantie, &c. et puis moruſt ſauns iſſue, ceo eſt un collateral garrantie a le file, pur ceo que el ne poit conveyer a luy le droit que el ad per force de le remaynder per aſcun meane de diſcent per ſon frere, † pur ceo ‡ que le frere eſt collateral a le title ſa ſoer, et pur ceo ſon garrantie eſt collateral, &c.*

donee in tayle maketh a feoffement in fee with warrantie accordingly, and hath iſſue a ſon and a daughter and dieth, this warrantie is but a lineall warrantie to the ſonne to demand by a writ of *formedon* in the diſcender; and alſo it is but lineall to the daughter, to demand the ſame land by writ of *formedon* in the remaynder, *unleſſe the* brother dieth without iſſue male, becauſe ſhee claimeth as heire female of the bodie of her father ingendred. But in this caſe, if her brother in his life releaſe to the diſcontinuee, &c. with warrantie, &c. and after dieth without iſſue, this is a collaterall warranty to the daughter, becauſe ſhee cannot convey to her the right which ſhee hath by force of the remainder by any meanes of diſcent by her brother, for that the brother is collateral to the title of his ſiſter, and therefore his warranty is collaterall, &c.

knowne, that for learning ſake, and to find out the reaſon of the law, theſe limitations to the heires males of the bodie, and after to the heires females of the bodie may be put: but it is dangerous to uſe them in conveyances, for great inconveniencies may ariſe therupon; for if ſuch a tenant in tayle hath iſſue divers ſons, and they have iſſue divers daughters, and likewiſe if tenant in tayle hath iſſue divers daughters, and each of them hath iſſue ſonnes, none of the daughters of the ſons, nor the ſonnes of the daughters, ſhall ever inherite to either of the ſaid eſtates tayle: and ſo it is of the iſſues of the iſſues, for that (as hath beene ſaid) the iſſues inheritable muſt make their claime eyther onely by males, or onely by females, ſo as the females of the males, or males of the females, are wholly excluded to bee inheritable to eyther of the ſaid eſtates tayle: but where the firſt limitation is to the heires males, let the limitation be, for default of ſuch iſſue, to the heires of the bodie of the donee, and then all the iſſues, be they females of males, or males of females, are inheritable.

If a man give lands to a man, to have and to hold to him and the heires males of his bodie, and to him and to the heires females of his bodie, the eſtate to the heires females is in remaynder, and the daughters ſhall not inherite any part, ſo long as there is iſſue male; for the eſtate to the heires males is firſt limited, and ſhall be firſt ſerved; and it is as much to ſay, and after to the heires females, and males in conſtruction of law are to be preferred.

1. H. 6. 4. 11. H. 6. 13, 14. 28. H. 6. Deviſ. 18. Statham. Deviſe. Pl. Com. 414. 20. H. 6. 43. Vid. Litt. ca. Taile, Sect. 24. 37. H. 8. Br. done & rem. 61. & tit. noſme 1. & 40.

(Ant. 25. a. b.)

(Vaugh. 368. g. 376. Ant. 374. a.)

Sect.

* *ſi non—ſi ſon*, L. and M. Roh. Pinſon, Redman, and MSS. This reading, which materially alters the ſenſe of the above paſſage of Littleton, was much relied on by lord Vaughan as above cited, and is alſo accordingly confirmed by edit. 1577, by R. Tottel; 1594, by C. Yetſweirt; and by that of 1639. It is however obſervable, that the text ſtood as above in the firſt edition of Coke upon Littleton 1628, and in all the editions to the 9th incluſive. † *et* added L. and M. and Roh. ‡ *que* not in L. and M. nor Roh.

he ſays, the queſtion is not whether the teſtator intended the anceſtor ſhould or ſhould not have a power of alienating the lands deviſed to him, or ſhould have only an eſtate for his life. He admits it to be clear, that he intended the anceſtor ſhould not have a power of alienating the lands, and that he ſhould take only an eſtate for his life: but the real queſtion, he ſays, is, how the heirs were intended to take, whether as deſcendants or purchaſers. If the teſtator intended they ſhould take as purchaſers, the anceſtor remained tenant for life; if he meant they ſhould take by deſcent, or had formed no intention about the matter, then, ſays he, by operation and conſequence of law the inheritance is veſted in the anceſtor. He ſays, that in the caſe of Perrin and Blake, it is neither clearly expreſſed nor manifeſtly to be implied from any part of the teſtator's will, that he intended the heirs ſhould take as purchaſers: he therefore concludes, that the words in queſtion ſhould be conſtrued according to their legal operation; and conſequently, that in conformity to the rule laid down in Shelley's caſe, they ſhould operate not as words of purchaſe, but as words of deſcent, and the anceſtor therefore take an eſtate in tail.—*Mr. Hargrave*, in his obſervations concerning the rule in Shelley's caſe, remarks, that thoſe who wiſh to avoid the rule avow, that they conſider it as ſubordinate to the intention of the teſtator, as a rule of interpretation, as merely a technical conſtruction of words, which yields to the intention whenever they are oppoſed to each other; that as ſoon as they diſcover that it is not the teſtator's intention that the firſt taker ſhould have a power of barring the entail to his heirs, they think the victory over the rule is complete. On the other hand, thoſe who wiſh to ſupport the rule inſiſt, that it is a rule of interpretation, eſtabliſhed on decrees of the moſt authoritative deciſions, which cannot be departed from without levelling the great land marks, by which the titles to real property are aſcertained, and eſtabliſhing in their room a monſtrous latitude of uncertain and arbitrary conſtruction. He ſays, he finds ſomething to approve, and ſomething to condemn on both ſides of theſe diſcordant comments upon the rule; and that in both there is one common error. To the opponents of the rule he admits, that where the rule would diſappoint a lawful intention ſufficiently expreſſed, it ought not to be effected. But he aſks, whether the intention is lawful. The rule, as he conſiders it, is a concluſion of law upon certain principles—ſo abſolute, as not to have any thing to ſay to the intention, if theſe premiſes really belong to the caſe; and theſe premiſes, he inſiſts, are an intention by heirs of the body, or other words of inheritance, to comprehend the whole line of heirs to the tenant for life, and ſo to build a ſucceſſion upon his preceding eſtate of freehold. This being ſo, if in ſuch caſes the word *heirs* is uſed in that its large and proper ſenſe, it is a contradiction to the rule, to intend that the remainder to the heirs ſhall operate by purchaſe, and ſuch intent is not lawful; ſo that it is incumbent on thoſe who oppoſe this application of the rule, to ſhew, that the word *heirs* is uſed in a qualified ſenſe, and intended merely to deſcribe certain perſons, who, at the death of the tenant for life, may anſwer that deſcription, and to give a ſucceſſion of heirs to them: this being ſhewn, the rule, he ſays, no longer applies. But nothing leſs

than

Sect. 720.

ITEM, jeo ay oye dire, que en temps le roy Richard *le second, il y fuit un justice del common banke, demurrant en* Kent, *appel* Richel, *que avoit issue divers fits, et son entent fuit, que son eigne fits averoit certaine terres et tenements a luy, et a les heires de son corps engendres; et pur default d'issue, le remainder a le second fits, &c. et issint a le tierce fits, &c. et pur ceo que il voile que nul de ses fits alieneroit, ou ferroit garrantie pur barrer ou leder les auters queux serront en le remainder, &c. il fist faire tiel indenture a tiel effect, c'estascavoir, que les terres et tenements fueront dones a son eigne fits sur tiel condition, que si l'eigne fits aliena en fee, ou en fee taile, &c. ou si ascun de ses fits alienast, &c. que adonque lour estate cessera et serroit void; et que adonque mesmes les terres et tenements immediate remaindront a le second fits, et a les heires de son corps engendres,* * et sic ultra, *le remainder as auters de ses fits, et livery de seisin fuit fait accordant.*

ALSO, I have heard say, that in the time of king *Richard* the second, there was a justice of the common place, dwelling in *Kent*, called *Richel*, who had issue divers sonnes; and his intent was, that his eldest sonne should have certaine lands and tenements to him, and to the heires of his bodie begotten; and for default of issue, the remainder to the second sonne, &c. and so to the third sonne, &c. and because he would that none of his sons should alien, or make warrantie to bar or hurt the others that should be in the remainder, &c. he causeth an indenture to be made to this effect, viz. that the lands and tenements were given to his eldest son upon such condition, that if the eldest son alien in fee, or in fee taile, &c. or if any of his sons alien, &c. that then their estate should cease and be void, and that then the same lands and tenements immediately should remain to the second son, and to the heires of his body begotten, *et sic ultra*, the remainder to his other sonnes, and livery of seisin was made accordingly.

(9. Rep. 127.)

(Plowd. 403. a.)

21. H. 6. f. 33. L. 6. f. 42. b. sir Anthony Mildmaye's case.

(1. Rep. 84.)

[m] 2. H. 4. f. 11. in Action sur le case.

JEO ay oye dire, &c. Those things that one hath by credible hearesay, by the example of our author, are worthy of observation. This invention, devised by justice *Richel* in the reigne of king *Richard* the second, who was an Irishman borne, and the like by *Thirning*, chiefe-justice in the reigne of *Henry* the fourth, were both full of imperfections; for *Nihil simul inventum est et perfectum;* and *Sæpe viatorem nova non vetus orbita fallit:* and therefore new inventions in assurances are dangerous. And hereby it may appeare, that it is not safe for any man (be he never so learned) to be of counsell with himselfe in his owne case, but to take advice of other great and learned men.

Non prosunt dominis quæ prosunt omnibus, artes.

And the reason hereof is, *in suo quisque negotio hebetior est, quàm in alieno.*

[m] And the same judge, in his owne name, &c. brought an action upon his case against others, and obtained a verdict, so as the right of the cause was tried on his side; yet for that upon his owne shewing in his count the action did not lye, *ex assensu omnium justiciariorum præter querentem Richel,* judgement was given against him: but let us now leave this judge for example to others, and let us return to our author.

Sect.

* *ceo sur mesme condition, scilicet, que si le second fits alienast, &c. que adonques son estat cessera, et que adonques mesmes les terres et tenements remaindront al tierce fits, et a les heires de son corps engendres,* added L. and M. and Roh.

---

than its appearing, that by the heirs of the body or heirs general, the whole line and succession of heirs to the tenant for life, or, in other words, the whole of his inheritable blood was not meant, can deliver the case from the rule. He says, that the genuine rule in Shelley's case, is part of an ancient policy of the law to guard against the creation of estates of inheritance, with qualities, incidents, or restrictions, foreign to their nature. Thus it is one of the properties of an estate in fee simple, that it may be alienated by the party seised, so that a condition not to alien is void at law. Thus curtesy and dower are incidents to estates of inheritance, and inseparably annexed to them; that these known examples of incidents, inseparable from inheritance, lead to a discovery of a foundation for the rule, which in a moment renders it paramount to, and independent of private intention. It is one branch of a policy of law, adopted to prevent annexing to a real descent the qualities and properties of a purchase, and so is calculated to render impossible the creation of an amphibious species of inheritance; that is, an estate of freehold, with a perpetual succession to heirs, without the other properties of inheritance; in other words, an inheritance in the first ancestor, with the privilege of vesting in the heirs by purchase the succession of one to another, without the legal effects of a descent, a compound of descent, and purchase.—Such a commixture would, he says, have put an end to all those lines of distinction by which we so easily and certainly discriminate inheritances from mere estates of freehold. It would have been a continual source of fraud upon feudal tenure. When the heir came into the tenure by descent, the lord was entitled to those grand fruits of military tenure, wardship and marriage; but if he took by purchase, only the trifling acknowledgment of relief was due to the lord. If the heir were allowed to succeed by purchase, it would defeat the specialty creditors of the ancestor; it would have suspended all actions for the inheritance of land. If private intention had been permitted to annex to real heirship the contradiction of taking by purchase, what principle of our law would have remained to resist stripping the title by succession of all the other effects and consequences legally appropriated to it? Why might it not have given to purchase the qualities of descent? It is a positive rule of our law, that a man cannot raise a fee simple to his own right heirs as purchasers, either by legal conveyance, or by conveyance to uses. By this it is meant, that where the ancestor wills that at his death his heirs shall, by gift from him, come to that very inheritance which the law of descent and succession throws upon them, it is construed as a vain and fruitless attempt to give that to the heirs which the law vests in them. It amounts to a prohibition upon the ancestor against making his heirs purchasers, by giving at his death what the law confers without his aid. But this rule applies only to the acts of the ancestor; it was there-

Sect. 721.

MES il ſemble per reaſon, que touts elx remainders en la forme avantdit ſont voides et de nul value, et ceo pur trois cauſes. Un cauſe eſt, pur ceo que cheſcun remainder que commence per un fait, il covient que le remainder ſoit en luy a que le remainder eſt tayle per force de meſme le fait, avant liverie de ſeiſin eſt fait a luy que avera le franktenement; car en tiel caſe le neſſance et le eſtre de le remainder eſt per le livery de ſeiſin a celuy que avera le franktenement, et tiel remainder ne fuit al ſecond fits al temps de livery de ſeiſin en le cas avantdit, &c.

BUT it ſeemeth by reaſon, that all ſuch remainders in the forme aforeſaid are void and of no value, and that for three cauſes. One cauſe is, for that every remainder which beginneth by a deed, it behooveth that the remainder be in him to whom the remainder is entailed by force of the ſame deed, before the livery of ſeiſin is made to him which ſhal have the freehold; for in ſuch caſe the growing and the being of the remainder is by the livery of ſeiſin to him that ſhall have the freehold, and ſuch remainder was not to the ſecond ſonne at the time of the livery of ſeiſin in the caſe aforeſaid, &c.

HERE our authour is of opinion, that theſe remainders in the forme aforeſaid, are void and of no value for three cauſes.

Un cauſe eſt, &c. Here hee ſetteth downe a rule concerning remainders, viz. every remainder which commenceth by a deed ought to veſt in him to whom it is limitted, when livery of ſeiſin is made to him that hath the particular eſtate. (Plowd. 25. a. 29. a. 2. Cro. 360.)

Firſt, *Littleton* ſaith by deed, [n] becauſe if lands bee granted and rendred by fine for life, the remainder in taile, the remainder in fee, none of theſe remainders are in them in the remainder, untill the particular eſtate be executed.

[n] 7. R. 2. Scire facias. (Ant. 354. b.)

Secondly, that the remainder bee in him, &c. at the time of the livery. This is regularly true, but yet it hath divers exceptions. Firſt, unleſſe the perſon that is to take the remainder be not *in rerum naturâ*; [o] as if a leaſe for life be made, the remainder to the right heires of *I. S.* *I. S.* being then alive, it ſufficeth that the inheritance paſſeth preſently out of the leſſour, but cannot veſt in the heire of *I. S.* for that living his father he is not *in rerum naturâ*, for *non eſt hæres viventis*; ſo as the remainder is good upon this contingent, viz. if *I. S.* die during the life of the leſſee.

(Cro. Eliz. 360.)

(2. Roll. Abr. 419.)

[o] 32. H. 6. tit. Feoffments & Faits, 99. 47. E. 3. 87. 11. R. 2. Detinue, 46. 2. H. 7 13. 12. H. 7. 27. 12. E. 4. 2. 21. H. 7. 11. 7. H 4. 23. 11. H. 4. 74. 18. H. 8. 3. 27. H. 8. 42. 38. E. 3. 26. 30. Aſſ. 47. 6. R. 2. qu. Jur. clam. 20. (1. Rep. 94.)

[p] And ſo it is if a man make a leaſe for life to *A. B.* and *C.* and if *B.* ſurvive *C.* then the remainder to *B.* and his heires. Here is another exception out of the ſaid rule; for albeit the perſon be certaine, yet inaſmuch as it depends upon the dying of *B.* before *C.* the remainder cannot veſt in *C.* preſently. And the reaſon of both theſe caſes in effect is, becauſe the remainder is to commence upon limitation of time, viz. upon the poſſibilitie of the death of one man before another, which is a common poſſibilitie.

[p] Pl. Com. Colthirſt's caſe, fol. 25. 29. (3. Rep. 20. 2. Rep. 57. a. b.)

A man letteth lands for life upon condition to have fee, and warranteth the land *in formâ prædictâ*, afterward the leſſee performeth the condition whereby the leſſee hath fee, the warranty ſhall extend and increaſe according to the ſtate. And ſo it is in that caſe if the leſſor had died before the performance of the condition, the warrantie ſhall riſe and increaſe according to the eſtate, and yet the leſſor himſelfe was never bound to the warrantie, but it hath relation from the firſt livery. And by this it appeareth that a warranty being a covenant reall executory, may extend to an eſtate *in futuro*, having an eſtate, whereupon it may worke in the beginning. But if a man grant a ſeigniorie for yeares upon condition to have fee with

(8. Rep. 73.)

(Hob. 130, 131.)

---

therefore requiſite to have a like barrier as to acts between perſons not ſtanding in that relation towards each other. This is effected by the rule in Shelley's caſe. Thus explained, ſays he, the rule in Shelley's caſe can no longer be treated as a medium for diſcovering the teſtator's intention. The ordinary rules for the interpretation of deeds ſhould be firſt reſorted to. When it is once ſettled that the donor or teſtator has uſed words of inheritance, according to their legal import; has applied them intentionally to comprize the whole line of heirs to the tenant for life; has made him the terminus, by reference to whom the ſucceſſion is to be regulated; then the rule in Shelley's caſe applies, and the heir ſhall not take by purchaſe. But if it ſhall be decided that the teſtator or donor did not mean to involve the whole line of heirs to the tenant for life; did not mean to ingraft a ſucceſſion on his eſtate, and to make him the anceſtor or terminus; but inſtead of this, intended to uſe the word heirs in a limited, reſtrictive, and qualified ſenſe; intended to point at that individual perſon who ſhould be the heir at the moment of the anceſtor's deceaſe; intended to give a diſtinct eſtate of freehold to ſuch ſingle heir, and to make his or her eſtate of freehold the ground-work of a ſucceſſion of heirs; to conſtrue him or her the anceſtor, terminus, or ſtock, for the ſucceſſion to take its courſe from:—in every one of theſe caſes, the premiſes are wanting upon which the rule in Shelley's caſe interpoſes its authority, and the rule therefore becomes extraneous matter.—Previouſly to Mr. Hargrave's publication, the rule in queſtion had been diſcuſſed, with infinite learning and ability, by *Mr. Fearne*, in his Eſſay on Contingent Remainders. In this juſtly celebrated work, Mr. Fearne obſerves, that the rule in Shelley's caſe is ſuppoſed to have been originally introduced to prevent frauds upon the tenure; and that if ſuch a limitation had been conſtrued a contingent remainder, the anceſtor might, in many caſes, have deſtroyed it for his own benefit: if not, he might have let it remain to his heirs in as beneficial manner as if it had deſcended to him, at the ſame time that the lord would have been deprived of thoſe fruits of the tenure, which would have accrued to him upon a deſcent. He then minutely and accurately examines all the caſes upon the ſubject, which had come before the courts of law and equity, and inveſtigates very fully the principles upon which they were determined. He ſays, "that in the caſe of Perrin and Blake, the queſtion is not whether the words, *heirs of the body*, may not, under certain circumſtances, be taken as words of purchaſe; but whether thoſe words, ſtanding perfect, independent, and unexplained, and preceded by a limitation of the legal freehold to the anceſtor in the ſame will, have ever been conſtrued as words of purchaſe." To this he replies, "that not one of the caſes, till that of Perrin and Blake, can fairly be urged in ſupport of an affirmative anſwer to that queſtion." The three very maſterly performances referred to in this note, will make the reader fully acquainted with the general merits of the caſe in queſtion, and of the ſeveral points of legal learning, upon the diſcuſſion of which it either immediately or incidentally depends. But as the ſubject is neceſſarily of a very abſtruſe and intricate nature, and the arguments uſed in ſupport of the different opinions reſpecting it are neceſſarily complicated and interwoven with one another, the following diſcrimination of the leading points upon which the deciſion of the caſe muſt ultimately turn, will, perhaps, be uſeful to thoſe who wiſh to obtain an accurate knowledge of the doctrine in diſpute.—1. Let us firſt ſuppoſe, that after a deviſe to a man for life, and a ſubſequent deviſe to the heirs of his body, the teſtator in

with a warranty *in formâ prædictâ*, and after the condition is performed, this shall not extend to the fee, because the first estate was but for yeares, which was not capable of a warranty. And so it is, if a man make a lease for yeares, the remainder in fee, and warrant the land *in formâ prædictâ*, he in the remainder cannot take benefit of the warranty, because he is not partie to the deed; and immediately he cannot take, if he were partie to the deed, because he is named after the *habendum*, and the estate for yeares is not capable of a warrantie. And so it is if land be given to *A.* and *B.* so long as they joyntly together live, the remainder to the right heires of him that dieth first, and warrant the land *in formâ prædictâ*; *A.* dieth, his heire shall have the warrantie; and yet the remainder vested not during the life of *A.* for the death of *A.* must precede the remainder, and yet shall the heire of *A.* have the land by discent.

1. Rep. 17.)

Sect. 722.

Le second cause est, si le primer fits alienast les tenements en fee, adonques est le franktenement et le fee simple en l'alienee, et en nul auter; et si le donour avoit ascun reversion, per tiel alienation le reversion est discontinue: donques coment per ascun reason poit * *ceo estre que tiel remainder commencera son estre et son nessance immediate apres tiel alienation fait a un estrange, que ad per mesme l'alienation franktenement et fee simple, &c.? Et auxy si tiel remainder serroit bone, adonques purroit il enter sur l'alienee, lou il n'avoit ascun maner de droit avant l'alienation, que serra inconvenient.*

THE second cause is, if the first sonne alien the tenements in fee, then is the freehold and the fee simple in the alienee, and in none other; and if the donor had any reversion, by such alienation the reversion is discontinued: then how by any reason may it be, that such remainder shall commence his being and his growing immediately after such alienation made to a stranger, that hath by the same alienation a freehold and fee simple, &c.? And also if such remainder should bee good, then might hee enter upon the alienee, where he had no manner of right before the alienation, which should bee inconvenient.

Si le primer fits alienast, &c. By the alienation of the donee two things are wrought:

First, the franktenement and fee is in the alienee.

Secondly, the reversion is devested out of the donor. [q] And therefore by the alienation that transferreth the freehold and fee simple to the alienee, there can no remainder be raised and vested in the second sonne. [r] As if a man make a lease for life upon condition that if the lessor grant over the reversion, that then the lessee shall have fee; if the lessor grant the reversion by fine, the lessee shall not have fee; for when the fine transferreth the fee to the conusee, it should bee absurd, and repugnant to reason, that the same fine should worke an estate in the lessee; for one alienation cannot vest an estate of one and the same land to two severall persons at one time.

[q] 21. H. 7. 11. 27. H. 8. 24.

[r] 6. R. 2. quid juris clam. 20. (Perk. Sect. 729. fol. 275, 276. Dyer 209. a. Plowd. 487.)

Argumentum ex absurdo. (5. Rep. 8. a.)

In a man's owne grant, which is ever taken most forcibly against himselfe, the reason of *Littleton* doth hold; for it hath beene resolved by the justices, [s] that if a man seised of an advowson in fee by his deed granteth the next presentation to *A.* and before the church becommeth void, by another deed grant the next presentation of the same church to *B.* the second grant is void, for *A.* had the same granted to him before; and the grantee shall not have the second avoydance by construction, to have the next avoydance, which the grantor might lawfully grant, for the grant of the next avoydance doth not import the second presentation. [t] But if a man seised of an advowson

[s] 20. H. 8. Presentments al Egl. Br. 52. 33. H. 8. ib. 55. 29 H. 8. Dyer 3. 11 Eliz. 282, 283. (5. Rep. 56.)

[t] 15. H. 7. 7. 19. E. 3. quar. imp. 154. (3. Cro. 790, 791.)

* *ceo* not in L. and M. nor Roh.

in express words declares it to be his intention, that by the devises in question he means to give the ancestor the estate for his life only, and to give an estate in fee by purchase to his heirs: Is the rule in question of that very rigid and forcible nature, as to be unaffected and *uncontrouled by these express words?*—II. If the answer to this question is, that the express declaration of the testator will, in this case, controul the legal operation of the words, heirs of the body, the next question is, Can any words short of an express declaration have this effect? or, in other language, Can that rule be *controuled by words of implication?*—III. If the answer is in the affirmative, the next enquiry is, Whether, to form such an implication as will controul the rule, it is sufficient that it appears to be the testator's intention that the *ancestor* should take an *estate for his life only?*—IV. Or, Must it also appear to be his intention that the *heirs* should take, not as descendants, but as *purchasers?*—V. Must it also appear *how* or *what estates* he intends the heirs to take?—VI. And *how* and *what estates* may the heir take by the law of England, his ancestor taking by the same instrument an estate for his life only?—Such, perhaps, will be the process of enquiry, if it is admitted, that there are cases where, in devises of this nature, the heirs will take by purchase: but if that is not admitted; if it is asserted, that where a testator has once devised to a man for life, and afterwards to the heirs of his body, *no* other words, however positive and express, shall controul the legal operation of the words, heirs of his body; it will then remain to inquire into the ground of the supposed inflexibility and rigidity of the rule.—I. Is it that it is *against the law* of the land, that lands should be conveyed to the ancestor for life with such estate or estates in remainder to the heirs of his body, as those heirs must be supposed to take, if they take as purchasers?—To resolve this question with accuracy, it should first be settled what estate or estates the heirs of the body would take under this construction; and then it should be supposed that such estate or estates are devised by the most accurate and scientific legal expressions: if devises so worded would be held contrary to law, the necessary conclusion is, that *the object* intended to be effected by the testator *is against* law.—II. If it appears that such estate or estates are not contrary to the law, but it still is contended that a devise to one for life, and after his decease to the heirs of his body, shall make the heirs take by descent, contrary to the testator's intention, the only remaining ground to support that conclusion is, that to make the heirs take by descent in devises of this nature, is a point of construction so fixedly and unalterably settled by judicial determination, that it is not now in the breast of any court to deviate from it. By investigating the rule in question under the above heads of enquiry, a regular and distinct view may, it is conceived, be obtained of the different points of law which relate to it, and of the different grounds upon which an opinion upon it may be framed.—It is greatly to be lamented that there should be so much uncertainty and difficulty in the application of a rule of law, to which resort must be so often had on the construction of wills. All parties agree that the rule has an existence; but from the liberality which is allowed in the construction of wills, it has been contended that it does not extend to those devises to which it cannot be applied, without

son in fee-take wife; now by act in law is the wife intitled to the third presentation, if the husband die before. The husband grant the third presentation to another, the husband die, the heire shall present twice, the wife shall have the third presentation, and the grantee the fourth; for in this case it shall be taken the third presentation, which he might lawfully grant: and so note a diversitie betweene a title by act in law, and by act of the partie; for the act in law shall worke no prejudice to the grantee.

(2. Cro. 691. contra Winch 94. s. c. Hob. 120. Ant. 189. a.)

Auxi si tiel remainder serroit bone, &c. The force of this argument is, that seeing the estate of the alienee (albeit the words of the condition be, that the state should cease and be void) being an estate of inheritance in lands or tenements, cannot cease or be void before the state be defeated by entrie; then if this remainder should be good, then must it give an entrie upon the alienee to him that had no right before, which should be against the expresse rule of law, viz. that an entrie cannot be given to a stranger to avoid a voydable act, as before hath beene said in the Chapter of Conditions.

(Ant. 214. b. 218. a.)

See 6. Term Rep. B. R. 439. [illegible handwritten note]

Lequel serra enconvenient. Here note three things. First, that whatsoever is against the rule of law is inconvenient. Secondly, that an argument *ab inconvenienti* is strong to prove it is against law, as often hath beene observed. Thirdly, that new inventions (though of a learned judge in his owne profession) are full of inconvenience, *Periculosum est res novas et insuitatas inducere.*

Vide Sect. 87, &c.

Eventus varios res nova semper habet.

Sect. 723.

La tierce cause est, quant la condition est tiel, que si l'eigne fits alienast, &c. que son estate cessera ou serroit void, &c. donques apres tiel alienation, &c. poit le donor enter per force de tiel condition †, coment il semble; et issint le donor ou ses heires en tiel case doient pluis tost aver la terre que le second fits, que n'avoit ascun droit devant tiel alienation; et issint il semble que tielx remainders en le cas avantdit sont voides ‡.

THE third cause is, when the condition is such, that if the elder sonne alien, &c. that his estate shall cease or bee void, &c. then after such alienation, &c. may the donor enter by force of such condition, as it seemeth; and so the donor or his heires in such case ought sooner to have the land than the second sonne, that had not any right before such alienation; and so it seemeth that such remainders in the case aforesayd are void.

HERE it is to bee observed, that part of the condition that prohibiteth the alienation made by tenant in taile is good in law, with such distinction as hath beene before said in the Chapter of Conditions. And the consequent of the condition, viz. that the lands should remaine to another, &c. is void in law, and by the opinion of *Littleton* the donor may re-enter for the condition broken; for *Utile per inutile non vitiatur:* which being in case of a condition for the defeating of an estate, is worthy of observation.

(1. Rep. 48. 62. 120. 10. Rep. 35. 9. Rep. 127. 6. Rep. 40. 2. Rep. 50. Ant. 224. a.)

(1. Roll. Abr. 408.)

And it is to bee noted, that after the death of the donor, the condition descendeth to the eldest sonne; and consequently his alienation doth extinguish the same for ever; wherein the weaknesse of this invention appeareth: and therefore *Littleton* here saith, that it seemeth that the donor may re-enter, and speaketh nothing of his heires. A man hath issue two sonnes, and maketh a gift in taile to the eldest, the remainder in fee to the puisne, upon condition, that the eldest shall not make any discontinuance with warrantie to barre him in the remainder; and if he doth, that then the puisne sonne and his heires shall re-enter, the eldest make a feoffment in fee with warrantie, the father dieth, the eldest sonne dieth without issue, the puisne may enter; but if the discontinuance had beene after the death of the father, the puisne could not have entred. In this case foure points are to be observed. First, as *Littleton* here saith the entrie for the breach of the condition is given to the father, and not to the puisne sonne. Secondly, that

(10. Rep. 40. b.)

(10. Rep. 109.)

† &c. added L. and M. and Roh. ‡ &c. added L. and M. and Roh.

---

without defeating the intention of the testator. It is certain, that no rule of law has a more ancient origin, or is more generally established, than that if a testator expresses his intention defectively, either by not using technical and artificial terms, or by using them improperly, yet if his intention can be collected from his will, the law, however defective his language may be, will construe his words according to his intention; and if the object of it is warranted by the established rules of law and equity, will admit its full operation and effect. It is equally certain, on the other hand, that if the testator's intention appears to be to effect that which the rules of law and equity do not admit, neither the courts of law nor the courts of equity can allow its operation. The first thing, therefore, to be ascertained, is, what the object of the testator is; the next, whether it is such as the rules of law and equity admit. To determine the last point, as soon as it is settled what the testator's intention is, let him be supposed to have expressed it, not in the words actually made use of by him, but in the most accurate and scientific language. If, when so expressed, its operation will be allowed, both at law and in equity, it must be admitted on all hands that it should have its operation and effect, notwithstanding any inaccuracy or impropriety used by the testator in his method of expressing it. But if, when expressed in artificial and scientific language, the law will not give it effect, it must equally be admitted, that it is no longer in the power of the courts to give it an operation; the fault of the testator's will being, not that he has expressed his intention inaccurately, but that the object of his intention is unlawful. To apply this reasoning to the case of Perrin v. Blake, what was the testator's intention? Supposing the heirs in that case to take by purchase, there are, it is conceived, but three constructions to be put upon such a devise. The *first is*, to suppose that the devise to the heirs of the body of the ancestor, to whom the life estate is limited, gives estates to his sons successively in tail, with remainders over in tail to his daughters as tenants in common. Devises of this nature are, unquestionably, conformable to law. They are the modifications of property most frequently introduced in the settlements of real estates. It follows, that if the words of the testator are construed in this sense, they are unobjectionable in point of law. But the courts of law have not thought themselves warranted to construe them in this sense; this construction, therefore, must be laid aside. The *second construction is* to suppose, that the testator's intention is to give the ancestor an estate of freehold, and to vest the inheritance in the person who, at the time of the ancestor's decease, should be the heir of his body, and to make that person the stock of the inheritance. It must be admitted, that this is perfectly lawful; and there is no doubt but a disposition of this nature, if framed in proper language, would be good, not only in a will, but in a deed. The question then will be, Whether that was the intention of the testator? It is obvious, that by the words [illegible] body, the testator means to comprehend *all* the heirs of the body of the devisee; but if the construction

here

41. E. 3. fol.

Vid. Sect. 446.

(10. Rep. 95.)

that by the death of the father the condition descends to the elder sonne, and is but suspended, and is revived by the death of the eldest sonne without issue, and descendeth to the youngest sonne. Thirdly, that the feoffment made in the life of the father cannot give away a condition that is collaterall, as it may doe a right. Fourthly, that a warrantie cannot binde a title of entrie for a condition broken (as hath beene said); but if the discontinuance had beene made after the death of the father, it had extinct the condition: which case is put to open the reason of our author's opinion. (1)

(Plowd. 413. Ant. 282. b)

[*] 31. E. 3. Gager deliverance 5. 22. Ass. 12. 38. E 3. 1. 2. H. 4. 18, &c.

[a] 1. E. 3. cap. 15. stat. 3. 18. E. 3. cap. 1. & 6. 4. H. 4. ca. 2. 11. H. 6. c. 23. 12. E. 4. cap. 8, &c.

In these last three Sections our author hath taught us an excellent point of learning, that when any innovation or new invention starts up, to trie it with the rules of the common law (as our author here hath done); for these be true touchstones to sever the pure gold from the drosse and sophistications of novelties and new inventions. And by this example you may perceive, that the rule of the old common law being soundly (as our author hath done) applyed to such novelties, it doth utterly crush them and bring them to nothing; and commonly a new invention doth offend against many rules and reasons (as here it appeareth) of the common law; and the antient judges and sages of the law have ever (as it appeareth [*] in our bookes) suppressed innovations and novelties in the beginning, as soone as they have offered to creepe up, lest the quiet of the common law might be disturbed: and so have [a] acts of parliament done the like, whereof by the authorities quoted in the margent, you may in stead of many others, upon this occasion take a little taste. But our excellent author, in all his three bookes, hath said nothing but *Ex veterum sapientium ore et more.*

Sect. 724.

(2. Inst. 203. cap. 3)

*ITEM, a le common ley, devant l'estatute de Gloucester, si tenant per le curtesie ust alien en fee ovesque garrantie *, apres son decease ceo fuit un barre al heire †, sicome appiert per les parols de mesme l'estatute: mes il est remedy per mesme l'estatute, que le garrantie de le tenant per le curtesie ne serroit my bar al heire, sinon que il y ad assets per discent per le tenant per le curtesie; car devant le dit estatute, ceo fuit un collateral garrantie al heire, pur ceo que il ne puissoit conveyer ascun title de discent a les tenements per le tenant per le curtesie, mes tantsolement per sa mere, ou auters de ses ancestors ‡; et ceo est le cause pur que il fuit collateral garrantie.*

ALSO, at the common law, before the statute of Gloucester, if tenant by the curtesie had aliened in fee with warrantie, after his decease this was a barre to the heire, as it appeareth by the words of the same statute: but it is remedied by the same statute, that the warrantie of tenant by the curtesie shall bee no barre to the heire, unlesse that hee hath assets by discent by the tenant by the curtesie; for before the sayd statute, this was a collateral warrantie to the heire, for that hee could not convey any title of discent to the tenements by the tenant by the curtesie, but only by his mother, or other of his ancestors; and this is the cause why it was a collateral warrantie.

Sect. 725.

MES si home enheritor prent feme, les queux ont § fits enter eux, et le pier devie, et le fits

BUT if a man inheritor taketh wife, who have issue a sonne betweene them, and the father dies

* *accord* added L. and M. and Roh. † *&c.* added L. and M. and Roh. ‡ *&c.* added L. and M. and Roh.
§ *issue* added L. and M. and Roh.

(1) In some of the former notes, there has been found occasion to anticipate many of the observations which otherwise would have occurred upon this and the three preceding Sections. See ante 203. b. n. 1. 216. a. n. 2. 223. b. n. 1. and particularly 327. a. n. 2.— Some further observations on the subject of these Sections will be found at the foot of page 381. a. ☞

here contended for be admitted, only a particular series or line of such heirs will be admitted. None will be admitted but the person who happens at the time of the ancestor's decease to be the heir of his body, and the heirs of the body of that person; all the other heirs of the body of the ancestor will be utterly excluded. Thus, supposing him to have several sons, the eldest son would, at the time of the testator's decease, answer to the description of heir of his body; he, therefore, would take an estate by purchase, he would be the stock of the inheritance, and from him the lands would descend upon all his issue. But the devise would reach no farther; it would not comprehend the other sons of the ancestor, or their issue. Thus, if this construction should be received, the intention of the testator will be, to a great degree, absolutely defeated. If there are no ulterior limitations or devises after the devise to the heirs of the body of the tenant for life, the reversion in fee will descend on the eldest son; and he may, consequently, dispose of it from his brothers and their issue. If there are any such ulterior limitations or devises, the persons claiming under them would take before, and to the total disinherison of the other brothers and their issue. Of the second construction, therefore, must be repeated what was said of the first, that it is unobjectionable in point of law, but that it is not conformable to the intention of the testator. *The third construction is*, to suppose that the inheritance will first vest in the person answering, at the time of the decease of the ancestor, to the description of heir of his body, and that, on failure of issue of that person, it will vest in him who answers that description at the time of such failure of issue, and so on, while there are any such heirs remaining. This construction is conformable in some respects to the case of John de Mandeville, mentioned by Sir Edward Coke, ante 26. b. and see note in p. 488. of Mr. Douglas's Reports. The question then is, Whether there is any thing unlawful in this intention? To ascertain this, let it be tried by the test above mentioned, that is, let us suppose it expressed in the most accurate and technical language. [illegible] This will give the first son or his issue, at the time of the ancestor's decease, an estate tail; and upon failure of that line of issue, the lands will vest for an estate tail in the person who, at the time of the failure of the issue of the first taking heir, will answer the description of heir of the body

*fits entra en la terre, et endowa ſa mere, et puis le mere alien ceo que el ad en ſa dower, a un auter en fee ove garrantie accordant, et puis moruſt, et le garrantie diſcendiſt a le fits, ore le fits ſerra barre a demaunder meſme la terre per cauſe de la dit garrantie; pur ceo que tiel collateral garrantie de tenaunt en dower n'eſt pas remedie per aſcun eſtatute. Meſme la ley eſt, lou tenaunt a terme de vie fait un alienation oveſque garrantie, &c. et moruſt, et le garrantie diſcendiſt a celuy que avoit le reverſion ou le remainder *, ils ſerront barres per tiel garrantie †.*

eth, and the ſonne entreth into the land, and endow his mother, and after the mother alieneth that which ſhee hath in dower, to another in fee with warrantie accordant, and after dieth, and the warrantie deſcendeth to the ſonne, now the ſon ſhall be barred to demand the ſame land by cauſe of the ſayd warrantie; becauſe that ſuch collaterall warrantie of tenaunt in dower is not remedied by any ſtatute. The ſame law is it, where tenant for life maketh an alienation with warrantie, &c. and dieth, and the warranty deſcendeth to him which hath the reverſion or the remainder, they ſhall be barred by ſuch warrantie.

Of this and the ſubſequent Section ſufficient hath beene ſayd before in this Chapter, *Sect.* 697. (11. H. 7. cap. 20. Ant. 365. b.)

N'eſt pas remedie per aſcun ſtatute. But by a ſtatute made ſince, this caſe is remedied, as you ſee before, *Sect.* 697.

Sect. 726.

ITEM, en le dit caſe, ſi iſſint fuit que quant le tenant en dower alienaſt, ‡ &c. ſon heire fuit deins age, et auxy al temps que le garrantie diſcendiſt ſur luy il fuit deins age; en ceſt cas l'heire poit apres enter ſur l'alienee, nient contriſtant le garrantie diſcendiſt, &c. pur ceo que nul lacheſſe ſerra adjudge en l'heire deins age, que il n'entra pas ſur l'alienee en la vie le tenant en dower. Mes

ALSO, in the caſe aforeſaid, if it were ſo that when the tenant in dower aliened, &c. his heire was within age, and alſo at that time that the warrantie deſcended upon him hee was within age; in this caſe the heire may after enter upon the alienee, notwithſtanding the warrantie deſcended, &c. becauſe no lacheſſe ſhal be adjudged in the heire within age, that hee did not enter upon the alienee in the life

HERE note this diverſitie: if the heire bee within age at the time of the diſcent of the warrantie, he may enter and avoyd the eſtate either within age, or at any time after his full age: and *Littleton* ſaith well, that the infant in this caſe may enter upon the alienee; for if he bring his action againſt him, he ſhal be barred by this warrantie, ſo long as the ſtate whereunto the warrantie is annexed continue, and be not defeated by entrie of the heire: but if hee be within age at the time of the alienation with warrantie, and become of full age before the diſcent of the warranty, the warranty ſhal barre him for ever. Our author putteth his caſes where the entrie of the infant is lawfull; [a] for where the entrie of the infant is not lawfull when the warrantie deſcendeth,

18. E. 4. 13. 35. H. 6. 63. 28. Aſſ. 28. 32. E. 3. Gar. 30. (1. Rep. 120. 140.)

(2. Roll. Abr. 773.) 35. H. 6. 63.

[a] 3. H. 7. 9. 35. H. 6. 63. Br. tit. War. 54. 33. H. 8. tit. War. Br. 84. Lib. 1. fol. 67. a. in Archer's caſe, & 140. Chudley's caſe.

* &c. added L. and M. and Roh. † &c. added L. and M. and Roh. ‡ &c. added L. and M. and Roh.

---

body of the tenant for life, and ſo on till all the heirs of his body, and all their iſſue, are exhauſted.—It is obvious, that a limitation of this nature differs materially from the limitations adopted in the firſt conſtruction, viz. to the ſons ſucceſſively in tail male, with remainder to the daughters; for in that caſe the eſtate veſts immediately in the firſt taker, and the other ſons, and all the daughters, take veſted remainders in tail. But according to the conſtruction we are now ſpeaking of, all after the firſt taker muſt be conſidered as taking *per formam doni*; ſuppoſing even that they take by purchaſe, all the eſtates after that of the firſt taker muſt be contingent. In fact, it is not very eaſy to aſcertain how they would take. But certainly none of the other children, or their heirs, if this conſtruction ſhould be received, would take veſted eſtates during the life of the firſt taker, or the continuance of iſſue of his body: for, till the events in queſtion happened, it muſt be uncertain who, at the particular times in queſtion, would anſwer to the deſcription of heir of the body of the tenant for life; whereas, according to the firſt conſtruction, all the children would anſwer the deſcription under which they are deſigned, immediately upon their reſpective births. Such is the effect of this third conſtruction.—Is there any thing in the deviſe, conſtruing it in this manner, ſuppoſing it to be properly and accurately framed, that combats with any known rule of law? It is certain that ſuch a limitation would be good, if the life eſtate, inſtead of being limited to the anceſtor of the perſons to whom the inheritance is afterwards limited, were limited to a ſtranger; as in the common caſe of a deviſe to *A.* for life, remainder to the right heirs, or the heirs of the body of *I. S.*—Why ſhould its being a deviſe to the anceſtor make a difference? It may even be contended, that a limitation and deviſe of this nature have been allowed in equity. In the caſe of Tipping v. Coſin, Carth. 272, there was a limitation; and in lady Jones v. lady Say and Sele, 8. Vin. 262, there was a deviſe of a truſt eſtate to the anceſtor for life, with a legal remainder after his deceaſe to the heirs of his body. In both caſes it was admitted, that on account of the different qualities of their eſtates, the freehold being equitable, and the inheritance legal, they did not coaleſce ſo as to be within the rule in Shelley's caſe; but it was allowed to be a good remainder in tail, in the heirs of the body of the anceſtor; and in the former of theſe caſes the verdict was for the perſon claiming the remainder. It may be anſwered (and certainly with a great appearance of reaſon) that on account of the different nature and quality of the eſtates, the miſchiefs intended to be obviated by the rule in Shelley's caſe could not follow from admitting the heirs to take in theſe caſes by purchaſe. Conſidering it with reſpect to the feudal principles, which are ſuppoſed to have given occaſion to the rule, the lord would not have loſt the fruits of his tenure, nor would the fee have been put into abeyance. This caſe, therefore, proves nothing in favour of the legality of the eſtates to be raiſed by the conſtruction here contended for. This point is exhauſted by Mr. Hargrave's treatiſe upon it. If the reader is convinced by it that the eſtates to be raiſed by this third conſtruction are not ſuch as the law admits, it follows, that ſuppoſing the deviſe in queſtion

to

si l'heire fuit deins age al temps del alienation, &c. et puis il devient al pleine age en la vie de le tenant en dower, et issint esteant de pleine age il n'entra pas sur l'alienee en la vie de le tenant en dower, et puis le tenaunt en dower morust, &c. la peradventure l'heire serra barre per tiel garrantie; pur ceo que il serra recte sa follie, que il esteant de pleine age ne entra pas en la vie de le tenaunt en dower, &c.

of tenant in dower. But if the heire were within age at the time of the alienation, &c. and after he commeth to full age in the life of tenant in dower, and so being of full age he doth not enter upon the alienee in the life of tenant in dower, and after the tenant in dower dieth, &c. there peradventure the heire shall bee barred by such warrantie; because it shall bee accounted his folly, that he being of full age did not enter in the life of tenant in dower, &c.

scendeth, the warrantie doth binde the infant, as well as a man of full age; and the reason thereof is, because the state whereunto the warrantie was annexed, continueth and cannot be avoided but by action, in which action the warrantie is a barre: and for the same reason likewise it is of a feme covert, if her entrie be not lawful, a warrantie descending on her during the coverture, doth bind her.

(1. Rep. 66.)

[w] And albeit the husband be within age at the discent of the warrantie, yet if the entrie of the wife be taken away, the warrantie shall binde the wife.

[w] 18. E. 3. 3. (F. N. B. 192. g. 2. Inst. 483.)

[q] And herein a diversitie is to bee observed betweene matters of record done or suffered by an infant, and matters *in fait*; for matters *in fait* he shall avoid either within age, or at full age, as hath beene said: but matters of record, as statutes merchants and of the staple, recognizances knowledged by him, or a fine levied by him, recoverie against him by default in a reall action (saving in dower) must be avoyded by him, viz. statutes, &c. by *audita quærela*, and the fine and recoverie (1) by writ of error during his minoritie, and the like. And the reason thereof is, because they are judiciall acts, and taken by a court or a judge, therefore the nonage of the partie, to avoyd the same, shall be tried by inspection of judges, and not by the countrey. And for that his nonage must be tried by inspection, this cannot be done after his full age: and so is the law clerely holden at this day, though there be some difference in our bookes. But if the age be inspected by the judges, and recorded that he is within age, albeit he come of full age before the reversall, yet may it be reversed after his full age. * And so was it resolved by the whole court of king's bench in the case of *Kekewiche*.

[q] 20. E. 3. Audit. quær. 27. F. N. B. 104. k. 6. E. 3. 39. 17. E. 3. 76. 17. Ass. 53. 17. 21. E. 2. 4. 13. E. 3. Aud. quær. 26. 18 E. 3. Infant. 61. 16. H. 7. 5. 15. E. 4. 5. 8. H. 6. 30. 1. H. 7. 15. (10. Rep. 43. Siderf. 321, 322. F. N. B. 104. k. Moor. 76. 460. 9. Rep. 30. b. 12. Rep. 122, 123.) 6. H. 8. Saver de default Br. 50. 3. H. 6. 10. 1. Mar. Dy. 104. (Ant. 131. a. Noy. 16.)

(Cro. Jac. 59. Yelv. 88. contra.)

[*] Pasch. 13. Ja. R. in the king's bench.

If lands had beene given to the husband and wife and their heires, and the husband had made a feoffment to another, to whom a collaterall ancestor of the wife had released and died, and the husband died, (and this had beene before the statute of 32 *H.* 8.) this warrantie had so bound her waiveable right, as she could not waive her estate, and claime dower. Otherwise it is of an estate determined: for if a disseisor make a lease to the husband and wife during the life of the husband, and the husband dieth, she may disagree to this estate determined, to save herselfe from dammages. And so note a diversitie betweene an estate determined, and an estate bound by warrantie.

Nul laches serra adjudge en le heire deins age. *Laches*, or *lasches*, is an old French word for slacknesse, or negligence, or not doing. And the rule (that no negligence shall be adjudged in an infant) is true, where he is thereby to be barred of his entrie in respect of a former right, as by a discent; or of his former right, (as *Littleton* doth here put an example) by a warrantie where his entrie is congeable. But otherwise it is of conditions, charges and penalties going out of or depending upon the originall conveyance, for the laches or negligence shall be adjudged in those cases aswell in the infant as in any other. [y] *Vide Pl. Com. Stowel's case per totum.* And see further there, where an infant being tenant for life or yeares, shall be punished for doing or suffering of waste; and where he claimeth by purchase, a *cessavit* shall lie against him, if he pay not his rent by two yeares. And some have said, if he have the tenancie by discent, and he himselfe cesse, a *cessavit* doth lie, and he shall not have his age because it is of his owne cesser, 31. *E.* 3. *Age* 54. But other bookes (as some conceive them) be against that: *Vid.* 9. *Edw.* 3. 50. 28. *E.* 3. 99. 14. *E.* 3. *Age* 88. 2. *b.*

(Ante 171. b. 246. a. 337. b. 350. b.)

[y] Pl. Com. Stowel's case, 355, &c. (2. Rep. 14. Moor. 92. 4. Rep. 4. b. 9. Rep. 85.)

(1) Since our author wrote, the law seems to be otherwise understood; for 'tis now the common practice for infants, having obtained a privy seal for that purpose, to suffer common recoveries; and the law seems to have been so settled ever since Blunt's case, which is reported in Hobart's Reports, page 196; which recovery was afterwards held good on a writ of error brought, and infancy assigned for error; as may be seen in W. Jones 318. Cro. Car. 557, where the case is reported under the names of the earl of Newport v. sir Henry Mildmay. See Salk. 567. *Note to the 11th edition.*

---

to operate so as to give the heirs an estate by purchase, it must be construed in one of the three modes above mentioned. Now the two first of these modes are not reconcileable with what is acknowledged to be the general scope and object of the testator's intention; and the third is not reconcileable with the laws of the land. The consequence is, that the devise must be left to its legal operation, and the heir must take by descent. But if the reader should be of opinion that the estates which, if the third construction is admitted, will be created by the testator's will, are such as the law allows, still there will remain a formidable objection to the admission of that construction. It will appear, that by a series of adjudications, from the 18 Ed. II. to the case of Coulson v. Coulson, 17 Geo. II. inclusively, devises of the nature in question have been construed to vest the inheritance in the ancestor. Admitting therefore that the reason or foundation of the construction in question is not now discoverable, there still is great reason to contend that it is binding on the courts. This is by no means peculiar to the rule in Shelley's case. There are many other rules of construction received by the courts, which are arbitrary, and some of them not reconcileable to plain reason. Still, being adopted as rules of construction, the courts (sometimes even with an avowed reluctance) consider themselves to be bound to submit to them. It remains to observe, that the observations here offered to the reader, are intended to apply only to the devises of legal estates, and to those devises only in which the argument to except them from the rule in Shelley's case depends at the most on the two following circumstances: 1st, that it evidently appears to be the testator's intention to give the ancestor an estate for his life only; and 2dly, that it also evidently appears to be his intention that the heirs of his body should take by purchase. If the testator's intention appears to be to give the ancestor an estate for life only, and to give an estate by purchase to the heirs of his body; and if, *besides this*, his intention is, that by the devise to the heirs the inheritance should vest in that individual heir who, at the time of the decease of the tenant for life, shall be the heir of his body and the heirs of the body of that person, and that the devise should reach no farther; or his intention is that the inheritance should descend upon the sons of the tenant for life successively in tail, with or without remainders to the daughters; and this ulterior intention appears *from any other part* of the will, either by plain declaration, or clear implication; then, as there is nothing unlawful in this disposition of his property, there is no rule of law or equity stands in the way of such construction.— But this ulterior construction is not to be implied from the mere circumstances of an estate for life only being given to the ancestor, and its appearing either by express words or implication, that it was his intention to give an estate by purchase to the heirs.—It may be said this brings the matter to as much uncertainty as attended it before; but surely that is not the case. Numberless as the cases respecting the point in question are, there are few indeed in which this ulterior explanation of the words, heirs of the body, occurs. See those cited by Mr. Justice Blackstone in Mr. Hargrave's Tracts, 505, 506.

and others, which books doe not prove that the *cessavit* doth not lye in that case, but the contrary, that hee shall have his age to the end, hee may at his full age certainly know what to plead, or what arrerages to tender; for the land was originally charged with the seignorie and services.

* Sect. 727.

MES ore per l'estatute fait 11. H. 7. cap. 10. *il est ordeine, si ascun feme discontinue, alien, release, ou confirme ove garrantie ascun terres ou tenements que el tient en dower pur terme de vie, ou en tayle del done sa primer baron, ou de ses ancesters, ou del done d'ascun auter seisie al use le primer baron, ou de ses ancesters, que touts tiels garranties, &c. serront voides; et que bien lirroit a cesty que avoit ceux terres ou tenements, apres la mort de mesme la feme d'entrer.*

BUT now by the statute made 11. *H.* 7. *cap.* 10. it is ordained, if any woman discontinue, alien, release, or confirme with warrantie any lands or tenements which she holdeth in dower for terme of life, or in taile of the gift of her first husband, or of his ancestors, or of the gift of any other seised to the use of the first husband, or of his ancestours, that all such warranties, &c. shall be void; and that it shall bee lawfull for him which hath these lands or tenements, after the death of the same woman to enter.

(Ant. 52. b. 325.)

THIS is an addition to *Littleton*, and therefore to be passed over. And hereof sufficient hath beene said before, *Sect.* 697.

Sect. 728.

ITEM, il est parle en le fine de le dit estatute de Gloucester, *que parle del alienation ovesque garrantie fait per le tenant per le curtesie en cest forme. Ensement, en mesme le manner, ne soit l'heire le feme apres la mort la pere et le mere barre d'action, s'il demanda l'heritage ou le mariage sa mere per briefe* d'entre, *que son pere aliena en temps sa mere, dont nul fine est levy en la court le*

ALSO, it is spoken in the end of the said statute of *Gloucester*, which speaketh of the alienation with warrantie made by the tenant by the courtesie in this forme. Also, in the same manner, the heire of the woman after the death of the father and mother shall not bee barred of action, if hee demandeth the heritage or the marriage of his mother by writ of entry, that his father aliened in his mother's time,

DONT nul fine est levy en le court le roy, &c. Here are three things worthy of observation concerning the construction of statutes. First, that [a] it is the most naturall and genuine exposition of a statute to construe one part of the statute by another part of the same statute, for that best expresseth the meaning of the makers. As here the question upon the generall words of the statute is, whether a fine levied onely by a husband seised in the right of his wife with warranty shall bar the heire without assets. And it is well expounded by the former part of the act, whereby it is enacted, that alienation made by tenant by the courtesie with warrantie shall not bar the heire, unlesse assets descend,

(Ant. 115. a. 360. a. 365. b. 369. a.)

[a] Pl. Com. f. 75. 7. E. 3. 89.

(3. Rep. 31. 59. 4. Rep. 50. b. 53. 76.)

Vide Bracton lib. 4. f. 321. Fleta lib. 5. cap. 34.

(6. Rep. Gregory's case. 5. Rep. 60. 7. Rep. 37. 8. Rep. 20. 118. 138. Plowd. 204, 205, 206. a. 465. 487. a. 11. Rep. 62. b.)

* This Section not in L. and M. nor Roh.

☞ *Continuation of note to* 379. *b.*

The attempt mentioned in the Sections to which this note refers, is one of the many attempts which have been made at different times to prevent the exercise of that right of alienation which is inseparable from the estate of a tenant in tail. The chief of them are stated in a very pointed manner by Mr. Knowler, 1. Burr. 84. He observes, that the power to suffer a common recovery is a privilege inseparably incident to an estate tail: it is a *potestas alienandi*, which is not restrained by the statute *de donis*, and has been so considered ever since Taltarum's case [12. E. 4. 14. b. p. 16.]. And this power to suffer a common recovery cannot be restrained by condition, limitation, custom, recognizance, statute, or covenant. That it cannot be restrained by condition, appears by Co. Litt. 223. b. 224. a. and Sonday's case, 9. Rep. 128.—That it cannot be restrained by limitation, appears by Cro. Jac. 696. Foy v. Hinde, and by Sonday's case, and other books.—That it cannot be ascertained by custom, appears by the case of Taylor and Shaw, in Carter 6. and 22.—That it cannot be restrained by recognizance, or by statute, appears by Pool's case, cited in Moore 810.—That it cannot be restrained by covenant, appears by the case of Collins v. Plummer, 1. Peere Wms. 104.—That an attempt to suffer a common recovery cannot be restrained, appears by Corbet's case, in the 1. Rep. 83. Mildmay's case, in the 6 Rep. 40. and the case of Pierce v. Wife, in 1. Ventr. 321. And that a conclusion to suffer a recovery cannot be restrained, appears by Mary Portington's case, in the 10. Rep. 55.—One of the last attempts to establish a perpetuity was made in the will of John duke of Marlborough, where a power was given to trustees, on the birth of the sons of the several persons therein mentioned, to revoke the uses limited to those sons in tail male; and in lieu thereof, to limit the estates to the use of such sons for their lives, with immediate remainders to the respective sons of such sons severally and successively in tail male. Lord Northington, in 1759, declared this clause, as it tended to a perpetuity, and was repugnant to the estate limited, was void and of no effect. There was an appeal from this decree to the lords. After hearing counsel upon it, the judges were ordered to attend, and their opinion was asked, "Whether by the rules of law an estate tail limited to the use of persons unborn by "any deed or will, can, by virtue of any power given by such deed or will to trustees, be revoked upon the births of such persons, and "a new estate limited to such persons for their lives respectively, with remainder to their issue successively in tail male." The lord chief-justice of the common pleas delivered the unanimous opinion of the judges in the negative. The utmost stretch towards a perpetuity which the courts have hitherto allowed, is through the medium of an exercise of a power of appointment limited in a deed or will. If the objects of the powers be not restrained to any particular description of persons, but designed generally to be such persons as the party to whom the power is given shall appoint, there is no question but he may appoint life estates, with remainders over, in the

same

*roy: et issint per force de mesme l'estatute, si le baron del feme aliena l'heritage ou mariage sa feme en fee ove garrantie, &c. per son fait en pais, ceo est clere ley, que cest garranty ne barrera my l'heire, sinon que il n'ad assets per discent.**

whereof no fine is levied in the king's court: and so by force of the same statute, if the husband of the wife alien the heritage or mariage of his wife in fee with warrantie, &c. by his deed in the countrey, it is cleere law, that this warranty shall not bar the heire, unlesse hee hath assets by discent.

descend. And therefore it should be inconvenient to intend the statute in such manner, as that he that hath nothing but in the right of his wife should by his fine levied with warrantie barre the heire without assets. And this exposition is *ex visceribus actûs*.

Secondly, the words of an act of parliament must bee taken in a lawfull and rightfull sense; as here the words being (whereof no fine is levied in the king's court) are to be understood, whereof no fine is lawfully or rightfully levied in the king's court. And therefore [b] a fine levied by the husband alone, is not within the meaning of the statute, for that fine should worke a wrong to the wife; but a fine levied by the husband and wife is intended by the statute, for that fine is lawfull and worketh no wrong. [c] So the statute of *W.* 2. *cap.* 5. saith (*Ita quod episcopus ecclesiam conferat*) is construed, *Ita quod episcopus ecclesiam legitimè conferat*; and the like in a number of other cases in our bookes. And generally the rule is, *Quod non præstat impedimentum quod de jure non sortitur effectum.*

(10. Rep. 43.)
[b] Pl. Com. 246. b. Seignior Barkleye's case. Li. 9. fol. 26. in case del Abbot de Strata mercella.
[c] 11. H. 4. 80. 9. E. 4. 12. 21. H. 6. 28. 4. E. 4. 31. 12. H. 4. Formedon 15.

Thirdly, that construction must be made of a statute in suppression of the mischiefe, and in advancement of the remedie, as by this case it appeareth. For a fine levied by the husband only is within the letter of the law; but the mischiefe was, the heire was barred of the inheritance of his mother, by the warrantie of his father without assets: and this act intended to apply a remedy, viz. that it should not barre unlesse there were assets, and therefore the mischiefe is to be suppressed, and the remedie advanced. *Et qui hæret in literâ, hæret in cortice*, as often before hath beene said.

(6. Rep. 20.)

Sect. 729.

MES le doubt est, si le baron alienast l'heritage sa feme per fine levy en la court le roy ovesque garrantie, &c. si ceo barrera l'heire sans ascun discent en value. † Et quant a ceo, jeo voile icy dire certaine reasons, que jeo ay oye dit en cest matter. Jeo ay oye mon master sir Richard Newton, *jades chiefe justice de common banke, dire un foits en mesme le banke, que tiel garrantie que le baron fait per fine levie en le court le roy barrera l'heire, coment que il ‡ ad riens per discent, pur ceo que l'estatute dit (dont nul fine est levy en le court le roy) ||; et issint per son*

(2. Inst. 294.)

BUT the doubt is, if the husband alien the heritage of his wife by fine levied in the king's court with warrantie, &c. if this shall barre the heire without any discent in value. And as to this, I will here tell certaine reasons, which I have heard said in this matter. I have heard my master sir *Richard Newton*, late chiefe-justice of the common pleas, once say in the same court, that such warrantie as the husband maketh by fine levied in the king's court shall barre the heire, albeit hee hath nothing by discent, because the statute saith (whereof no fine is levied in the king's court); and so by his *opinion*

* *&c.* added L. and M. and Roh. † *&c.* added L. and M. and Roh. ‡ *ad* — *n'ad*, L. and M. and Roh. || *&c.* added L. and M. and Roh.

same manner as he might do by a substantive original conveyance, notwithstanding the persons to whom the life estates are appointed were not in existence at the time of the execution of the conveyance in which the power is contained. But it seems to be otherwise, if the objects of the power are restrained to any particular description of persons, as to the children of the appointor. See Alexander v. Alexander, 2. Vez. 640. and Robinson v. Hardcastle, in Mr. Brown's Rep. of Cases determined in Chancery during the 28th Year of his present Majesty's Reign, p. 22.—In note 2, to page 216, it was contended, that the estates created by the exercise of powers of appointment preceded from the time of their coming into existence, all the uses limited to take effect in default of appointment, and all the rights and incidents annexed to them; and consequently, that in the cases where estates are limited to such uses as a person shall appoint, and for want of appointment, to the use of his right heirs, the appointment will be good against the wife's right of dower; but in the same note it is observed, that there are reasons why such appointments should not always be depended upon. The modes generally used to prevent the wife's dower seem open to objection. Sometimes the estate is limited to a purchasor and a trustee and their heirs, but as to the estate of the trustee and his heirs in trust for the purchasor and his heirs. This exposes the purchasor to the chance of the trustee's dying in his life; in which case the right of dower will attach upon the estate. Sometimes the estate is limited to the purchasor and a trustee, and the heirs of the trustee, but in trust for the purchasor. Sometimes it is limited immediately to the trustee and his heirs, in trust for the purchasor and his heirs; but all these modes are objectionable, as they keep the legal fee from the purchasor, and expose him to all the inconvenience of its escheating to the crown for want of heirs of the trustee, or of its becoming vested in infants, married women, or persons residing at a distance, not easily discoverable, or not willing to join in the conveyances required to be made of it. Sometimes even it may be considered to pass in the general devise of the trustee's will, and by that means become settled at law to uses in strict settlement, and therefore not to be regained but by a fine or common recovery, and till the existence of a tenant in tail not to be regained without the aid of parliament. It cannot therefore be desirable that the legal fee should be outstanding in a trustee. To prevent this, the estates may be first limited to such uses as the purchasor shall by deed or will appoint, and for want of appointment, to the use of a trustee, his heirs and assigns, during the life of the purchasor, in trust for him, and subject thereto to the use of the purchasor, his heirs and assigns. If this method be adopted, no doubt will remain of the wife's right of dower being effectually prevented; the purchasor during his life will have the absolute command of the legal fee, and at his death it will descend upon his heir.

*opinion cel garrantie per fine * demurt uncore un collateral garrantie, come il fuit a le common ley, nient remedy per le dit estatute, pur ceo que le dit estatute except alienations per fine ove garrantie.*

opinion this warrantie by fine remaineth yet a collaterall warrantie, as it was at the common law, not remedied by the said statute, because the said statute excepteth alienations by fine with warrantie.

Sect. 730.

ET ascuns auters ont dit, et uncore diont le contrarie, et ceo est lour proofe, que come per mesme le chapiter de dit estatute il est ordeine, que le garrantie le tenant per le curtesie ne serra my barre al heire, sinon que il ad assets per discent, &c. coment que le tenant per le curtesie levie un fine de mesmes les tenements ovesque garrantie, &c. auxy fortment come il poit faire, uncore cel garranty ne barra my l'heire, sinon que il ad assets per discent, &c. Et jeo croy que ceo est ley; et pur ceo ils diont, que serroit inconvenient d'entender l'estatute en tiel forme, que un home que n'ad riens forsque en droit sa feme purroit per fine levie per luy † de mesmes ‡ les tenements queux il ad forsque en droit sa feme ove garranty, &c. barre l'heire de mesmes les tenements sans ascun discent de fee simple, &c. lou le tenant per le curtesie ceo ne puit faire.

AND some others have said, and yet doe say the contrary, and this is their proofe, that as by the same chapter of the said statute it is ordained, that the warrantie of the tenant by the courtesie shall be no barre to the heire, unlesse that he hath assets by discent, &c. although that the tenant by the courtesie levie a fine of the same tenements with warrantie, &c. as strongly as hee can, yet this warrantie shall not barre the heire, unlesse that hee hath assets by discent, &c. And I beleeve that this is law; and therefore they say, that it should be inconvenient to intend the statute in such maner, as a man that hath nothing but in right of his wife might by fine levied by him of the same tenements which he hath but in right of his wife with warrantie, &c. barre the heire of the same tenements without any discent of fee simple, &c. where the tenant by the courtesie cannot doe this.

Sect. 731.

MES ils ont dit, que le statute serra entend solonque cel forme, scilicet, *lou le statute § dit, dont nul fine est levie en court le roy, ceo est a dire, dont nul loial*

BUT they have said, that the statute shall bee intended after this manner, *scilicet*, where the statute saith, whereof no fine is levied in the king s court, that is to say, *fine*

(Plowd. 57. b. Ant. 115. a. 360. a. 369. a. 381. b.)

* &c. added L. and M. and Roh. † *mesme* added L. and M. and Roh. ‡ *mesmes* not in L. and M. nor Roh.
§ *dit—[illegible]*, L. and M. and Roh.

(10. Rep. 43. Ant. 381. b.)

fine est droiturelment levy en la court le roy. Et ceo est, dont nul fine de le baron et sa feme soit levie en le court le roy, car al temps de le fesans del dit estatute, chescun estate de terres ou tenements que ascun home ou feme avoit, que discenderoit a son heire, fuit fee simple sans condition, ou sur certaine conditions en fait ou en ley. Et pur ceo que adonques tiel fine poit droiturelment estre levie per le baron et sa feme, et les heires le baron garronteront, &c. tiel garrantie barrera l'heire, * *et issint ils diont que cest l'entendement de l'estatute, car si le baron et sa feme feront un feoffement en fee per fait en pais, son heire apres le decease le baron et sa feme avera briefe* d'entre sur cui in vitâ, &c. *nient obstant le garrantie de le baron, donque si nul tiel exception fuit fait en l'estatute de le fine levie, &c. donque l'heire averoit le briefe* d'entre, &c. *nient obstant le fine levie per le baron et sa feme, pur ceo que les parolx de l'estatute devant l'exception de fine levie, &c. sont generals, &c. c'estascavoir, que l'heire la feme apres le mort le pere et la mere ne soit barre d'action, s'il demaund l'heritage ou le mariage sa mere per briefe* d'entre, *que son pere aliena en temps sa mere, et issint coment que le baron et la feme alienent per fine, uncore ceo est voier, que le baron aliena en temps la mere, et issint il serroit en case de l'estatute, sinon que tielx parolx fuerent,* scilicet, *dont nul fine est levie en la court le roy; et issint ils diont, que ceo est a entender, dont*

whereof no lawfull fine is rightfully levied in the king's court. And that is, whereof no fine of the husband and his wife is levied in the king's court, for at the time of the making of the said statute, every estate of lands or tenements that any man or woman had, which should descend to his heire, was fee simple without condition, or upon certain conditions in deed or in law. And because that then such fine might rightfully be levied by the husband and his wife, and the heires of the husband should warrant, &c. such warrantie shall barre the heire, and so they say that this is the meaning of the statute, for if the husband and his wife should make a feoffement in fee by deed in the countrie, his heire after the decease of the husband and wife shall have a writ of entrie *sur cui in vitâ, &c.* notwithstanding the warrantie of the husband, then if no such exception were made in the statute of the fine levied, &c. then the heire should have the writ of entrie, &c. notwithstanding the fine levied by the husband and his wife, because the words of the statute before the exception of the fine levied, &c. are generall, viz. that the heire of the wife after the death of the father and mother is not barred of action, if he demand the heritage or the marriage of his mother by writ of entrie, that his father aliened in the time of his mother, and so albeit the husband and wife aliened by fine, yet this is true, that the husband aliened in the time of the mother, and so it should bee in that case of the statute, unlesse that such

nul

* *&c.* added L. and M. and Roh.

nul fine per le baron et sa feme est levie en la court le roy, lequel est loialment levie en tiel case; car si les justices ont conusans, que home que n'ad riens forsque en droit sa feme, voile levier un fine en son nosme solement, ils ne voylont, ne * *unque devoyent prender tiel fine d'estre levie per le baron solement sans* † *sa feme, &c.* Ideo quære *de cest matter, &c.* ‡

words were, viz. whereof no fine is levied in the king's court; and so they say, that this is to be understood, whereof no fine by the husband and his wife is levied in the king's court, the which is lawfully levied in such case; for if the justices have knowledge, that a man that hath nothing but in the right of his wife, will levie a fine in his name onely, they will not, neither ought they to take such fine to be levied by the husband alone without his wife, &c. *Ideo quære* of this matter, &c.

(2. Inst. 391.)

JEO ay oye mon maister sir R. Newton, *&c.* who was a gentleman of an ancient family; in Latine, *de novâ villâ*; in French, *de neufe ville*; and a reverend learned judge, and worthily advanced to be chiefe-justice of the court of common pleas, whom our authour remembers with great reverence, as by his words you may perceive, calling him his master, and citeth his opinion delivered once in the court of common pleas, which our authour heard and observed (whose example therein it is necessary for our student to follow); but the latter opinion (as hath beene before observed) being *Littleton*'s owne, is against the opinion of the lord *Newton* [d], and the law is holden cleerely with our authour at this day; and our authour (as in all other cases) hath good authoritie in law to warrant his opinion: *Nullius hominis authoritas tantum apud nos valere debet, ut meliora non sequeremur si quis attulerit.*

Car si les justices ont conusance, &c. Hereby it appeareth [e] that the judge, if hee knoweth it, ought not to take knowledge of a fine that worketh a wrong to a third person.

Que serroit inconvenient. *Argumentum ab inconvenienti,* is very forcible in law, as often hath beene observed.

[d] Bracton 321. Fleta lib. 5. cap. 34. 8. E. 2. Gar. 81. 18. E. 3. 51. 7. E. 3. 84. Pl. Com. 57. (3. Rep. 77.) Sect. 731.

[e] 33. H. 6. 52: 5. E. 3. 56. 2. Eliz. Dier 178. 1. H. 7. 9. 1. Mar. 89. 4. E. 3. 41. 7. Eliz. Dier 246. Vide Sect. 87, &c.

Of the rest of these three Sections sufficient hath beene said before.

Sect. 732.

ITEM, est ascavoir, que en ceux parolx, ou l'heire demande l'heritage, ou le mariage sa mere, cest parol (ou) est un disjunctive, et est autant a dire, si l'heire demande le heritage sa mere, scilicet, les tenements que sa mere avoit en fee simple per discent ou per purchase, ou si l'heire demaund le mariage sa mere, c'estascavoir, les tenements que

ALSO, it is to be understood, that in these words, where the heire demands the heritage, or the marriage of his mother, this word (or) is a disjunctive, and is asmuch to say, if the heire demand the heritage of his mother, viz. the tenements that his mother had in fee simple by discent or by purchase, or if the heire demaund the marriage of his mother, that is

* *unque* not in L. and M. nor Roh. † *nosme* added L and M. and Roh. ‡ *&c.* not in L. and M. nor Roh.

que fueront dones a sa mere en frankmariage. to say, the tenements that were given to his mother in frankmariage.

(Ant. 16. a.) Vide Sect. 9.

SOME doe expound heritage of the mother to be the lands which the mother hath by discent; and that construction is true, but the statute, by the authoritie of *Littleton*, extendeth also where the mother hath it by purchase in fee simple; for so saith *Littleton* himselfe, that this word (inheritance) is not only intended where a man hath lands by discent, but where a man hath a fee simple by purchase, because his heires may inherit him. And albeit it be true, that the statute extendeth to an estate in frankmariage acquired by purchase, yet doth it extend also to all estates in taile, aswell by discent as by purchase; for that frankmariage is put but for an example.

Sect. 733.

ITEM, come est move ↓ *en divers faits ceux parolx en Latyne,* Ego et hæredes mei * warrantizabimus et imperpetuum defendemus; *il est a veier quel effect ad cel parol,* defendemus, *en tiels faits; et il semble que il n'ad pas l'effect de garrantie, ne emprent en luy* † *la cause de garrantie; car s'il issint serroit, que il prent effect ou cause de garrantie, donques il serroit* ‡ *mitte en ascuns fines levies en la court le roy: et home ne veiet* ‖ *ceo unque que cest parol* defendemus *fuit en ascun fine, mes tantsolement cest parol* warrantizabimus; *per que semble, que cest parol* § *et verbe* warrantizo, ¶ *fait la garrantie, et est la cause de*

ALSO, where it is contained in divers deedes these words in Latine, *Ego et hæredes mei warrantizabimus et imperpetuum defendemus*; it is to bee seene what effect this word (*defendemus*) hath in such deeds; and it seemeth that it hath not the effect of warrantie, nor comprehendeth in it the cause of warranty; for if it should be so, that it tooke the effect or cause of warrantie, then it should bee put into some fines levied in the king's court: and a man never saw that this word (*defendemus*) was in any fine, but only this word (*warrantizabimus*); by which it seemeth, that this word and verbe (*warrantizo*) maketh the warrantie, and is the cause of warrantie, and gar-

EGO et hæredes mei warrantizabimus, et imperpetuum defendemus. Wherein three things are to be observed. First, that *hæredes mei* are words of necessitie, for otherwise the heires are not bound. [a] Secondly, though in the clause of the warrantie it bee not mentioned to whom, &c. yet shall it be intended to the feoffee. [b] Thirdly, that the feoffor may by expresse words warrant the land for the life of the feoffee, or of the feoffor, &c. but the recoverie in value shall bee in fee. [c] Of this *Bracton* writeth in this manner: *Et ego et hæredes mei warrantizabimus tali et hæredibus suis tantùm vel tali et hæredibus et assignatis et hæredibus assignatorum, vel assignatis assignatorum, et eorum hæredibus, et acquietabimus et defendemus eos totam terram illam cum pertinentiis, contra omnes gentes, &c. Per hoc autem quod dicit (ego et hæredes mei) obligat se et hæredes ad warrantiam propinquos, et remotos, præsentes et futuros, et succedentes in infinitum. Per hoc autem quod dicit (warrantizabimus) suscipit in se obligationem ad defendendum suum tenementum in possessione rei datæ et assignatos suos et eorum hæredes et omnes alios, &c. Per hoc autem quod dicit (acquietabimus) obligat se et hæredes suos ad acquietandum si quis*

[a] 6. E. 2. Vouch. 238. [ms.: 12.384] 12. E. 2. ib. 262. 14. H. 4. 15. [ms.: L. Jort. 306. a.]

[b] 38. E. 3. 14.

[c] Bract. fol. 37. 238. & Lib. 5. 380, 381. Brit. fol. 106. b. Flet. lib. 5. cap. 15. & Lib. 6. cap. 23. 35. H. 8. 8. Gar. 90, F. N. B. 134. b.

Brit. ubi sup. Flet. ubi sup. 11. H. 6. 48. 6. E. 2. Gar. 262.

↓ *move—mote,* L. and M. and Roh. * *&c.* added L. and M. and Roh. † *la* not in L. and M. nor Roh. ‡ *mitte—mote,* L. and M. and Roh. ‖ *ceo* not in L. and M. nor Roh. § *et verbe* not in L. and M. nor Roh. ¶ *as, &c.* added L. and M. *&c.* only added in Roh.

The operation of the word Grant is far more extensive than that of the word Release, where the word Grant is in a Deed, the Grantee may use the Deed either in pleading, or in Evidence, as a Release, but he hath an option either in Pleadings or in Evidence to use it as a Grant, a Feoffment, a Release, or Confirmation &c as will be most for his Interest; but the word Release is of a proper, & particular application, and cannot be used as a Grant, Feoffment or Confirmation; Co: Litt. 301. b. therefore tho' I have known a Conveyance objected to for want of the word Release, notwithstanding the word Grant was in it, and the Objection was very mischievous to the party, yet there was no solid foundation for it; the Objection to the Use of the word Grant for the Reason above mentioned, is more common, and there is more colour for it, yet, on examination of the Authorities, it will appear not to be well founded, the mistake arose from the use of the word Grant in the Stat. de Bigamis 4 E. 1. C 6 yet one wo'd think Lord Coke in his Comment on it 2 Inst. 276, had said enough to prevent the mistake, especially as he is confirmed by all the + Auth.s since his Time; by that Stat. (wch is only declaratory) it appears, that where in a Conveyance the Tenendum is of the Chief Lord of the Fee (as it need not then have been but must now always be, where the conveyance is in fee, whether expressed so or not by the Stat. West. 3) his words are "albeit in this act Dedi & Concessi are coupled together, yet these words, Ratione doni proprie ac appropriate the warranty to Dedi only" the same occurs in Co. Litt. 384.a & before Lord Coke's Time in Perk. Sect. 123. and in sev.l other Authorities; but where a Deed only contains a Demise for a Term of Years, there the words Demise, or Grant will amount to a Covenant Cro: Jac: 73. and many more; this may occasion the Mistake, but it is owing to inattention. In the Introduct.

[Margin note, left edge cut off:] …ral since are …ferred to in Vin. …t. covenant to …pl 19 & the …otes

to

to the Law of N: P: there is an implied Caution ag.st the error; for in Page 157 Ed.n 1775 there is this passage viz

"There are some words, which of themselves import no express Covenant; yet in certain Contracts amount to such, & are therefore Covenants in Law; as where a Man Leases Lands for years by the Words Concessi, or Demisi, if the Lessee be evicted, he may have covenant. So if an Assignment be made by the Word Grant." The four words scored under clearly allude to the above Distinction between a Conveyance of the Fee, and a Grant or Demise for a Term of years or the Assignment of such a Term which Distinctions were too well known one would think to have been particularly inserted, as the passage plainly imply, that in general they do not amount to a Covenant.

G Hill

Lincolns Inn 27th July 1789

ex.d

Mr. Serjeant Hill
on the word Grant.

See Co. Litt. 384.

garrantie, et nul auter verbe en nostre ley. | no other word in our law. | *plus petierit servitii vel aliud servitium quam in cartâ donationis continetur. Per hoc autem quod dicit (defendemus) obligat se et hæredes suos ad*

defendendum si quis velit servitutem ponere rei datæ contra formam suæ donationis. [*d*] Hereby it appeareth, that neither *defendere* nor *acquietare* doth create a warrantie, but *warrantizare* only. And as *Ego et hæredes mei warrantizabimus, &c.* in Latine doe create a warrantie; so, I and my heires shall warrant, &c. in English, doth create a warrantie also.

[*d*] 46. E. 3. 28. 11. H. 4. 41. 6. E. 2. Vouch. 262. 2. E. 4. 15. a. (Moor. 175.)

[*e*] If a man be bound to *A.* in an obligation to defend such lands to *A.* whereof the obligor had infeoffed him for twelve yeares, &c. in this case if he be ousted by a stranger without being impleaded, the obligation is forfeit: but if he bee bound to warrant the land, &c. the bond is not forfeited, unlesse the obligee be impleaded, and then the obligor must be readie to warrant, &c.

[*e*] 2. E. 4. 15. tit. Det. 71. (2. Roll. Abr. 396. Cro. Car. 5. Dyer 255. a. Ant. 201. b. 4. Rep. 80. 9. Rep. 61.)

Donques il serra mit en ascuns fines, &c. Here *Littleton* draweth an argument from the forme and words of a fine; and his reason is this: that seeing that a fine is the highest and surest kinde of assurance in law, if *defendemus* had the force of a warrantie, it would have beene contained in fines: and on the other side, seeing this word *warrantizo* is contained in fines to create a warrantie, that therefore that word doth imply a warrantie, and not the other.

Et nul auter verbe en nostre ley. Here it appeareth, that no other verbe in our law doth make a warrantie, but *warrantizo* only, which is only appropriated to create a warrantie.

46. E. 3. 28. Vide Sect. 1.

But, *Qui benè distinguit benè docet*; and here of necessitie you must distinguish, [*] first, betweene a warrantie annexed to a freehold or inheritance, (whereof *Littleton* here speaketh) and a warrantie annexed to a ward, which is a chattell reall; for there, grant, demise, and the like, doe make a warrantie. And of warranties annexed to freeholds and inheritances, some be warranties in deed, and some be warranties in law. A warrantie in deed, or an expresse warrantie, (whereof *Littleton* here speaketh) is created only by this word *warrantizo*; but warranties in law are created by many other words; they be therefore called warranties in law, because in judgement of law they amount to a warrantie without this verbe *warrantizo*. [*f*] As *dedi* is a warrantie in law to the feoffee and his heires during the life of the feoffor, but *concessi* in a feoffment or fine implyeth no warrantie. (1) But before the statute of *quia emptores terrarum*, if a man had given lands by the word *dedi*, to have and to hold to him and to his heires, of the donor and his heires, by certain services, then not only the donor but his heires also had beene bound to warrantie: but if before that statute a man had given lands by this word *dedi*, to a man and to his heires for ever, to hold of the chiefe lord, there the feoffor had not beene bound to warrantie but during his life, as at this day he is.

Sect. 697.
[*] 31. E. 3. Vouch. 24. 12. Rich. 2. tit. Cont. de Vouch. 35. 29. E. 3. 48. 30. E. 3. 6. b. Symken Symons' case. 8. E. 3. 61. 12. E. 3. Vouch. 27. Temps E. 1. Vouch. 302. 3. H. 6. 17.
[*f*] Estat. de Bigamis, c. 6. 2. H. 7. 7. 6. H. 7. 2. 48. E. 3. 2. 31. E. 1. tit. Vouch. 290. Fitz. N. B. 134. b. 6. E. 2. Vouch. 258. (Vaugh. 118.)

And albeit the words of the statute of *bigamis* be, *in cartis autem ubi continentur (dedi et concessi, &c.)* yet if *dedi* be contained alone, it doth import a warrantie; for the statute doth conclude, *ipse tamen feoffator in vitâ suâ ratione proprii doni sui tenetur warrantizare*; so as *dedi* is the word that implyeth warrantie, and not *concessi*. Also where the words of the statute bee further, *sine clausulâ quæ continet warrantiam*, the meaning of the statute is, that *dedi* doth import a warrantie in law, albeit there bee an expresse warrantie in the deed.

(F. N. B. 134. b.)

For if a man make a feoffment by *dedi*, and in the deed doth warrant the land against *I. S.* and his heires, yet *dedi* is a generall warrantie during the life of the feoffor; and so was the statute expounded in both points, [*g*] *Hil.* 14. *El.* in the court of common pleas, which I myselfe heard and observed. [*h*] And if a man make a lease for life reserving a rent, and adde an expresse warrantie, here the expresse warrantie doth not take away the warrantie in law, for he hath election to vouch by force of either of them. And in *Nokes'* case note a diversitie betweene a warrantie that is a covenant reall, and a warrantie concerning a chattell. [*i*] Also this word *excambium* doth imply a warrantie.

[*g*] Hil. 14. El. in Com. Banc.
[*h*] Lib. 4. fol. 80. in Nokes' case. 8. E. 3. 69. 9. E. 3. 15. 10. E. 3. 11. 20. E. 3. Cont. de Gar. 7. 31. E. 3. Vouch. 280. 32. E. 3. ib. 102. 43. E. 3. 3. 2. E. 3. tit. Cui in vita 17.

Also a partition implyeth a warrantie in law, as in the Chapter of Parceners appeareth. And homage auncestrell doth draw to itselfe warrantie, as hath beene said in the Chapter of Homage Auncestrell.

3. E. 3. Formedon 44.
[*i*] 4. E. 2. Vouch. 245. 22. E. 3. 3. 14. H. 6. 2. 20. H. 6. 14. Lib. 4. fol. 121. in Bullard's case. 15. E. 3. Bar. 255. 43. E. 3. 3. Lib. 1. f. 96. Lib. 5. fol. 17. Spencer's case. Lib. 8. fol. 75. St. Stafford's case.

And it is to be observed, that the warrantie wrought by this word *dedi*, is a speciall warrantie, and extendeth to the heires of the feoffee during the life of the donor only. But upon the exchange and homage auncestrell the warrantie extendeth reciprocally to the heires, and against the heires of both parties: and in none of the cases the assignee shall vouch by force

(1) What is said by sir Edward Coke in this place, and the determination of the judges in Nokes' case, 4. Rep. 80, and lord chief justice Vaughan's argument in Hayes v. Bickerstaff, in his Reports, page 126, should remove the scruples too often entertained on the part of trustees, respecting the propriety of their conveying by the word *grant*. From the passages here referred to, it most clearly appears, that the word *grant*, when used in the conveyance of an estate of inheritance, does not imply a warranty; and that if it did, the insertion of any express covenant on the part of the grantor, would qualify and restrain its force and operation within the import and effect of that covenant, as the law, when it appears by express words how far the parties designed the warranty should extend, will not carry it farther by construction. There is therefore no reasonable ground for trustees objecting to convey by the word *grant*; but serious objections may be raised in some cases to purchasers taking a conveyance from them without it. These are stated in the following passage from Bridgman's Complete Conveyancer, vol. 1. 323.—"Sir Jeffrey Palmer's resolution concerning the words "*give* and *grant* in a conveyance. "Sir, I conceive that care ought to be taken in a conveyance, of what nature soever it be, that there "be not therein *give* and *grant*; for they imply a *general warranty*, and shall not be qualified by the *special warranty* following; as "hath of late been thrice adjudged. H. I."—Sir Jeffrey Palmer's answer. "*Give* implies a *personal warranty*, and so is not always "used. The word *grant*, in a lease for years, is a *covenant in law*; or (as you may call it) a *general warranty*, if it be not qua-"lified by a *covenant* or *warranty in fait*: but if there be a *covenant* or *warranty in fait*, then it is restrained to the words of the "*covenant* subsequent. But in an *estate of inheritance* where the *fee* passeth, there the word *grant* is neither a *covenant in law*, nor "*warranty*. For if it should be a *covenant in law*, or *warranty* in itself, it would be there restrained and qualified by the *warranty* "and *covenants in fait*. And a *deed* to pass an *inheritance* where *common* is, cannot be without it; for if it be *common in gross*, it "cannot pass by the *livery*, but must pass by the word *grant*. And I never yet saw a *feoffment* without it. Jeffrey Palmer."—How a *covenant* shall be expounded with regard to the context, or to synonimous or other words, see Com. Dig. Cov. (D.) Vin. Abr. Covenant (L. 4.)

force of any of theſe warranties, but in the caſe of the exchange and *dedi*, the aſſignee ſhall rebutt, but not in the caſe of homage anceſtrell.

[k] 28. Aſſ. 33. 14. H. 4, 5. 18. E. 3. 18. 4. E. 2. Avowr. 201, & 202. 19. E. 3. Avowr. 201, 202. 11. E. 3. Avowr. 100. 30. H. 6. 7. 33. H. 8. Dyer 51. 10. H. 7. 11. b. F. N. B. 163. a.

[*k*] And ſo no man ſhall have a writ of *contra formam collationis*, but only the feoffee and his heires which be privie to the deed; but an aſſignee may rebutt by force of the deed.

[l] 6. E. 2. Cont. de Vouch. 105. 5. E. 3. 67. 4. E. 2. ibid. 102. 6. E. 3. 11. 50. 7. E. 3. 6. 18. E. 3. 8. 22. E. 3. 3. 3. H. 7. 13. 6. H. 7. 2. 14. E. 3. Garr. 32. F. N. B. 134. g.

[*l*] If a man make a gift in taile, or a leaſe for life of land, by deed or without deed, reſerving a rent, or of a rent ſervice by deed, this is a warrantie in law, and the donee or leſſee being impleaded, ſhall vouch and recover in value. And this warrantie in law extendeth not only againſt the donor or leſſor, and his heires, but alſo againſt his aſſignees of the reverſion; and ſo likewiſe the aſſignee of leſſee for life ſhall take benefit of this warrantie in law.

5. E. 3. 87. 20 E. 3. tit. Counterplea de Gar. 7. [m] 4. E. 3. 36. 33. E. 3. tit. Cont. de Vouch. 122. 43. Aſſ. 32. 50. E. 3. 7. F. N. B. 149. m.

[*m*] When dower is aſſigned there is a warrantie in law included, that the tenant in dower being impleaded, ſhall vouch and recover in value a third part of the two parts whereof ſhe is dowable. (1)

And it is to be underſtood, that a warrantie in law and aſſets is in ſome caſes a good bar.

[n] 14. H. 6. 2. 15. E. 3. Bar. 255.

[*n*] In a formedon in the diſcender the tenant may plead, that the anceſtor of the demandant exchanged the land with the tenant for other lands taken in exchange, which deſcended to the demandant, whereunto he hath entred and agreed; or if he hath not entred and agreed unto the lands taken in exchange, then the tenant may plead the warrantie in law, and other aſſets deſcended.

[o] 38. E. 3. 22, 23, 24. 13. E. 3. Gar. 35.

[*o*] If tenant in taile of lands make a gift in taile, or a leaſe for life, rendring a rent, and dieth, and the iſſue bringeth a formedon in the diſcender, the reverſion and rent ſhall not barre the demandant; becauſe by his formedon he is to defeat the reverſion and rent, *Et non poteſt adduci exceptio ejuſdem rei, cujus petitur diſſolutio.*

[p] 16. E. 3. Age 45. 18. E. 3. 8. 31. E. 3. Gar. 29.

[*p*] But if other aſſets in fee ſimple doe deſcend, then this warrantie in law and aſſets is a good barre in the formedon.

Here foure things are to be obſerved: firſt, that no warrantie in law doth barre any collaterall title, but is in nature of a lineall warrantie: wherein the equitie of the law is to be obſerved.

(1. Rep. 10.) Ant. 385. b. Post. 386. a. As to equity, bind heirs though not named, see 2. Vern. 482. 2. Freem. 199.

Secondly, that an expreſſe warrantie ſhall never binde the heires of him that maketh the warrantie, unleſſe (as hath beene ſaid) they be named: as for example, *Littleton* here ſaith (*Ego et hæredes mei*); but in caſe of warranties in law, in many caſes the heires ſhall bee bound to warrantie, albeit they be not named. see acc. Dy. 257. b.

Vide lib. 4. fol. 121. Buſtard's caſe.

Thirdly, that in ſome caſes warranties in law doe extend to execution in value, of ſpeciall lands, and not generally of lands deſcended in fee ſimple, as you may ſee at large in my Reports.

[q] 45. E. 3. 20. b.

[*q*] Fourthly, that warranties in law may be in ſome caſes created without deed, as upon gifts in taile, leaſes for life, eſchanges, and the like

And ſeeing ſomewhat hath beene ſaid out of *Bracton* and other antient authors, concerning aſſignees, it is neceſſarie to ſhew who ſhall take advantage of a warrantie, as aſſignee by way of voucher, to have recompence in value.

[r] 14. E. 3. Gar. 33. 13. E. 1. Gar. 83.

[*r*] If a man infeoffe *A.* and *B.* to have and to hold to them and to their heires, with a clauſe of warrantie, *prædictis* A. *et* B. *et eorum hæredibus et aſſignatis*: in this caſe if *A.* dieth, and *B.* ſurviveth and dieth, and the heire of *B.* infeoffeth *C.* he ſhall vouch as aſſignee, and yet he is but the aſſignee of the heire of one of them; for in judgement of law the aſſignee of the heire is the aſſignee of the anceſtor, and ſo the aſſignee of the aſſignee ſhall vouch *in infinitum*, within theſe words, (his aſſignes.)

Lib. 5. fol. 17. b. in Spenſer's caſe. 38. E. 3. 21.

[ſ] 12. E. 2. Vouch. 263. 19. E. 2. Gar. 85. 13. E. 1. ib. 93. Lib. 5. fol. 17. Spenſer's caſe. 7. E. 3. 34. 10. E. 3. 9. 14. E. 3. Garr. 33. Bract. ubi ſup. 9. E. 2. Garr. de Chart. 30. 36. E. 3. Gar. 1. 4. H. 8. Dy. 1. F. N. B. 135.

[*ſ*] If a man infeoffeth *A.* to have and to hold to him, his heires and aſſignes; *A.* infeoffeth *B.* and his heires, *B.* dieth, the heire of *B.* ſhall vouch as aſſignee to *A.*: ſo as heires of aſſignees, and aſſignees of aſſignes, and aſſignees of heires are within this word (aſſignes); which ſeemed to be a queſtion in *Bracton*'s time. And the aſſignee ſhall not only vouch, but alſo have a *warrantia cartæ*.

[t] 43. E. 3. 23. 26. E. 3. 68. (Ante 174. a. b. Poſt. 390. a.) 40. E. 3. 14. 24. E. 3. 36. 11. H. 4. 94. 30. E. 3. 17. 5. E. 3. Age 19. Pl. Com. 418.

If a man doth warrant land to another without this word (heires), his heires ſhall not vouch: and regularly if he warrant land to a man and his heires, without naming aſſignes, his aſſignee ſhall not vouch. [*t*] But if the father be infeoffed with warrantie to him and his heires, the father infeoffeth his eldeſt ſon with warrantie and dieth, the law giveth to the ſonne advantage of the warrantie made to his father, becauſe by act in law the warrantie betweene the father and the ſonne is extinct.

But note, there is a diverſitie betweene a warrantie that is a covenant reall, which bindeth the partie to yeeld lands or tenements in recompence, and a covenant annexed to the land, which is to yeeld but dammages, for that a covenant is in many caſes extended further than the warrantie. As for example:

[u] 42. E. 3. b. per Finchden.

[*u*] It hath beene adjudged, that where two coparceners made partition of land, and the one made a covenant with the other, to acquite her and her heires of a ſuit that iſſued out

(1) Tenant by the curteſy ſhall not vouch, becauſe he ſhall not recover in value, 10. H. 7. 10. b. but he may pray in aid of him in the reverſion. Hob. Rep. 21.

out of the land the covenantee aliened. In that caſe the aſſignee ſhall have an action of covenant; and yet he was a ſtranger to the covenant, becauſe the acquitall did runne with the land.

(5. Rep. 18. a. in Spencer's caſe.)

[x] *A.* ſeiſed of the mannor of *D.* whereof a chappell was parcell, a prior with the aſſent of his covent covenanteth by deed indented with *A.* and his heires to celebrate divine ſervice in his ſaid chappell weekely, for the lord of the ſaid mannor, and his ſervants, &c. In this caſe the aſſignees ſhall have an action of covenant, albeit they were not named, for that the remedie by covenant doth runne with the land, to give dammages to the partie grieved, and was in a manner appurtenant to the mannor. [y] But if the covenant had beene with a ſtranger to celebrate divine ſervice in the chappell of *A.* and his heires, there the aſſignee ſhall not have an action of covenant; for the covenant cannot be annexed to the mannor, becauſe the covenantee was not ſeiſed of the mannor. See in *Spencer*'s caſe before remembred, divers other diverſities betweene warranties and covenants which yeeld but dammages.

[x] 42. E. 3. 3. a. Laur. Pakenham's caſe. 2. H. 4. 6. 6. H. 4. 1 & 2. Ralfe Brabſon's caſe. Lib 5. fol. 17, 18. Spencer's caſe.

[y] 2. H. 4. 6. Hen. Horne's caſe. 6. H. 4. 1. Lib. 5. fol. 17, 18. Spencer's caſe.

And here it is to be obſerved, that an aſſignee of part of the land ſhall vouche as aſſignee. [*] As if a man make a feoffement in fee of two acres to one, with warrantie to him, his heires and aſſignes, if he make a feoffement of one acre, that feoffee ſhall vouche as aſſignee; for there is a diverſitie betweene the whole eſtate in part, and part of the eſtate in the whole, or of any part. As if a man hath a warrantie to him, his heires, and aſſignes, and he make a leaſe for life, or a gift in taile, the leſſee or donee ſhall not vouch as aſſignee, becauſe he hath not the eſtate in fee ſimple whereunto the warranty was annexed; but the leſſee for life may pray in aide, or the leſſee or donee may vouch the leſſor or donor, and by this meanes hee ſhall take advantage of the warranty. But if a leaſe for life, or a gift in taile be made, the remainder over in fee, ſuch a leſſee or donee ſhall vouch as aſſignee, becauſe the whole eſtate is out of the leſſor, and the particular eſtate and the remainder doe in judgement of law to this purpoſe make but one eſtate.

[*] 18. E. 3. 52. 10. E. 3. 58. 5. E. 3. 40. 12. E. 3. Counterplea de Vouch. 42. 14. E. 3. Voucher 108. 5. E. 3. ibid. 178. 13. E. 3. ibid. 119. 40. E. 3. 22. 41. E. 3. Vouch. 69. & 100. 32. E. 3. ibid. 96. (Hob. 25.)

And this diverſitie was agreed Hill. 14. Eliz. in Communi Banco, which I heard and obſerved.

[a] If a man infeoffe three with warrantie to them and their heires, and one of them releaſe to the other two, they ſhall vouch; but if he had releaſed to one of the other, the warrantie had beene extinct for that part, for he is an aſſignee.

[a] 40. E. 3. 14. 40. Aſſ. 5. 33. H. 6. 4. 37. H. 8. Alienation ſans licence 31. 8. H. 4. 8.

[b] If a man doth warrant land to two men and their heires, and the one make a feoffment in fee, yet the other ſhall vouch for his moitie. If a man at this day be infeoffed with warrantie to him, his heires, and aſſignes, and he make a gift in taile, the remainder in fee, the donee make a feoffment in fee, that feoffee ſhall not vouch as aſſignee, becauſe no man ſhall vouch as aſſignee, but he that commeth in, in privitie of eſtate; but he muſt vouch his feoffor, and he to vouch as aſſignee, but ſuch an aſſignee may rebutte. If the warrantie be made to a man and his heires without this word (aſſignes), yet the aſſignee, or any tenant of the land may rebutte. And albeit no man ſhall vouch or have a *warrantia cartæ*, either as partie, heire, or aſſignee, but in privitie of eſtate, yet any that is in of another eſtate, be it by diſſeiſin, abatement, intruſion, uſurpation, or otherwiſe, ſhall rebutte by force of the warrantie, as a thing annexed to the land, which ſometime was doubted [c] in our bookes. But herein is a diverſitie to be obſerved, when in the caſes aforeſaid he that rebutteth claimeth under the warrantie; and when he that would rebutte claimeth above the warranty, for there he ſhall not rebutte. And therefore if lands be given to two brethren in fee ſimple, with a warranty to the eldeſt and his heires, the eldeſt dieth without iſſue, the ſurvivor albeit he be heire to him, yet ſhall he neither vouch nor rebutte, nor have a *warrantia cartæ*, becauſe his title to the land is by relation above the fall of the warrantie, and he commeth not under the eſtate of him to whom the warrantie is made, as the diſſeiſor, &c. doth.

[b] 11. R. 2. Detin. 46. 7. E. 3. 35. 46. E. 3. 4.

(See Vaugh. 388.)

[c] 38. E. 3. 21. 26. E. 3. 56. Lib. 10. fo. 96. b. Seymour's caſe. 7. E. 3. 34. 35. 8. E. 3. 10. 46. E. 3. 4. 10. E. 3. 42. 45. E. 3. 18. 10. Aſſ. 5. 35. Aſſ. 9. 22. Aſſ. 39. 88. 31. Aſſ. 13.

[d] If a man make a gift in taile at this day, and warrant the land to him, his heires and aſſignes, and after the donee make a feoffement and dieth without iſſue, the warrantie is expired as to any voucher or rebutter, for that the eſtate in taile whereunto it was knit is ſpent: otherwiſe it is, if the gift and feoffement had beene made before the ſtatute of *donis conditionalibus*; for then both the donee and feoffee had a fee ſimple; and ſo are our bookes to be intended in this and the like caſes.

[d] Lib. 3. fol. 62, 63. Lincolne College caſe.

[e] If *A.* be ſeiſed of lands in fee, and *B.* releaſeth unto him or confirmeth his eſtate in fee with warrantie to him, his heires and aſſignes; all men agree this warrantie to be good: but ſome have holden, that no warrantie can be raiſed upon a bare releaſe or confirmation without paſſing ſome eſtate or tranſmutation of poſſeſſion. [f] But the law, as it appeareth by *Littleton* himſelfe, is to the contrary, and that both the party, and (as ſome doe hold) his aſſignee ſhall vouch; but he that is vouched in that caſe muſt be preſent in court, and ready to enter into the warranty and to anſwer, and the tenant muſt ſhew forth the deed of releaſe or confirmation with warrantie, to the intent the demandant may have an anſwer thereunto, and either deny the deed, or avoid it; for that at the time of the confirmation made, he to whom it was made, had nothing in the land, &c. for otherwiſe the demandant may counterplead the voucher by the ſtatute of *W.* 1. viz. that neither vouchee nor any of his anceſtors had any ſeiſin.

[e] 14. E. 3. Garr. 108. 12. H. 7. 1.

[f] 11. H. 4. 22. 10. E. 3. 52. 21. E. 3. 27. Vid. Sect. 706. 738. & 745.

W. 1. cap. 40.