Il covient que il doit faire a ſon ſeignior aſcun ſervice. For there can be no tenure without ſome ſervice; becauſe the ſervice maketh the tenure.

See of this in the chapter of Fee ſimple, ſect. 4 (1. Ro. Abr. 816. F. N. B. 144. Ante 13. a.)

Son eſcheat de la terre. *Eſchaeta* is derived of this word *eſchier*, *quod eſt accidere*; for an eſcheat is a caſuall profit, *quod accidit domino ex eventu et ex inſperato*, which hapneth to the lord by chance and unlooked for. And of this word *eſchaeta* commeth *eſchaetor*, an eſcheator, ſo called, becauſe his office is to inquire of all caſuall profits, and them to ſeiſe into the king's hands, that the ſame may be anſwered to the king (1).

See more of this in the chapter of Warrantie, ſect.

Lands may eſcheat to the lord two manner of wayes; one by attainder, the other without attainder. By attainder in three ſorts. Firſt, *Quia ſuſpenſus eſt per collum.* Secondly, *Quia abjuravit regnum* (2). Thirdly, *Quia utlegatus eſt.* Without attainder, as if the tenant dies without heire.

W. 2. ca. 33. Flet. li. 2. ca. 43. & li. 5. ca. 34. 32. H. 8. ca, 24. (F. N. B. 144.)

Ou per caſe auter forfeiture. As if the land be aliened in mortmaine, or when Littleton wrote, if the tenants had erected croſſes upon their houſes or tenements, in prejudice of the lords, that the tenants might claim the priviledge of the Hoſpitlers to defend themſelves againſt their lords, they had forfeited their tenancies. But ſince Littleton wrote, the Hoſpitlers are diſſolved, and conſequently that forfeiture is gone.

Ou profit. As *reliefe*, *aid pur file marrier*, *aid pur faire fitz chivaler*, and the like.

Il covient que il doit faire a ſon ſeignior aſcun ſervice; a ceo il poyt eſtre dit, que lou un tenant tient ſa terre de ſon ſeignior, il covient, que il doit faire a ſon ſeignior aſcun ſervice; car ſi le tenant ne ſes heires devoyent faire nul manner de ſervice al ſeignior ne a ſes heires, donque per long temps continue il ſerroit hors de memorie et de remembrance, le quel la terre fuit tenus de le ſeignior, ou de ſes heires, ou nemy, et donques pluis toft et pluis rediment voilont homes dire, que la terre neſt pas tenus del ſeignior ou de ſes heires, que auterment; et ſur ceo il ſeignior perdra ſon eſcheat de la terre, ou per caſe auter forfeiture ou profit que il poet aver de le terre. Iſſint il eſt reaſon, que le ſeignior et ſes heires ont aſcun ſervice fayt a eux, pur prover et teſtifier, que la terre eſt tenus de eux.

this caſe no other ſervice is due: to this it may be ſaid, that where a tenant holds his land of his lord, it behooveth that he ought to do ſome ſervice to his lord; for if the tenant nor his heires ought to do no manner of ſervice to his lord nor his heires, then by long continuance of time it would grow out of memorie, whether the land were holden of the lord, or of his heires, or not, and then will men more often and more readily ſay, that the land is not holden of the lord, nor of his heires, than otherwiſe; and hereupon the lord ſhall loſe his eſcheat of the land, or perchance ſome other forfeiture or profit which he might have of the land. So it is reaſon, that the lord and his heires have ſome ſervice done unto them, to proove and teſtifie, that the land is holden of them.

Sect.

(1) See further as to *eſcheat* and *eſcheator* ante 13. and b. 18. b and note 2. there. 4. Inſt. 225. Mad. Excheq. chap. 10. ſ. 2.

(2) Abjuration, according to the *ancient* uſe of the word, had the effect of an attainder; becauſe it was neceſſarily accompanied with the confeſſion of a felony. But this kind of abjuration is not now in force; the privilege of ſanctuary, of which it was conſequential, having been taken away by a ſtatute of James the Firſt. See 21. Jam. c. 28. ſ. 7. 2. Inſt. 629. and 2. Hawk. Pl. C. b. 2. c. 32. However the word *abjuration* is ſtill in uſe in our law for *ſome* purpoſes. For—1. ſome ſtatutes, in order to ſecure the *eſtabliſhed religion*, require perſons convicted of certain kinds of *recuſancy* to abjure the *realm*, on pain of being adjudged guilty of a *capital* felony; and the word in this ſenſe is ſimilar to the ancient abjuration, and is attended with a like effect. 35. Eliz. c. 1. and 2. 13.—2. In order to ſecure the *ſucceſſion of the crown* as ſettled at and ſince the revolution, other ſtatutes make all perſons, who refuſe to take the oath preſcribed for abjuring the *pretender* and his deſcendants, liable to various penalties and forfeitures; but this kind of abjuration differs both in *object* and *effect* from the ancient one. 13. W. 3. c. 6. 1. An. ſt. 1. c. 22. 1. G. 1. ſt. 2. c. 13. 6. G. 3. c. 53.

in the character of guardian by *nature* he is only accountable for the *latter*.—(10) Ante 84. a.—(11) Ante 74. b. Though guardian-

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ET pur ceo que fealtie eſt incident a touts manners de tenures, forſpris le tenure in frankalmoigne, (ſicome ſerra dit en le tenure de frankalmoign) et pur ceo que le Seignior ne voiloit al commencement del tenure aver aſcun auter ſervice, forſque fealtie, il eſt reaſon, que home poet tener de ſon ſeignior per fealtie tantſolement; et quaunt il ad fait ſon fealtie, il ad fait touts ſes ſervices.

AND for that fealtie is incident to all manner of tenures, but to the tenure in frankalmoigne (1), (as ſhall be ſaid in the tenure of frankalmoigne) and for that the lord would not at the beginning of the tenure have any other ſervice but fealty, it is reaſon, that a man may hold of his lord by fealty onely; and when he hath done his fealty, he hath done all his ſervices.

FEaltie eſt incident. (4. Co. 8. Poſt 143. a.)

Of incidents there be two ſorts, *viz.* ſeparable, and inſeparable. *Acc. post 151. b.*

Separable, as rents incident to reverſions, &c. which may be ſevered; inſeparable, as fealty to a reverſion or tenure which cannot be ſevered: for as all lands and tenements within England are holden of ſome lord or other, and either mediately or immediately of the king; ſo to every tenure, at the leaſt fealty is an inſeparable incident, ſo long as the tenure remaines; and all other ſervices, except fealty, are ſeverable. But where the tenure is by fealty only, there is no reliefe due for the cauſe aboveſaid (2).

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ITEM ſi un home leſſe a un auter pur terme de vie certaine terres ou tenements, ſauns parler de aſcun rent render a le leſſor, uncore il ferra fealtie a le leſſor, pur ceo que il tient de luy. Auxy ſi un leaſe ſoit fait a un home pur terme de ans, il eſt dit, que le leſſee ferra fealtie a le leſſor, pur ceo que il tient de luy. Et ceo eſt provebien per les parols del brief de waſt, quaunt le leſſour ad cauſe de porter briefe de waſt envers luy; le quel briefe dira, que le leſſee tient les tenements de le leſſor pur terme de ans.

ALſo if a man letteth to another lands or tenements for terme of life, without naming any rent to be reſerved to the leſſor, yet he ſhall do fealty to the leſſor, becauſe he holdeth of him. Alſo if a leaſe be made to a man for terme of yeares, it is ſaid, that the leſſee ſhall do fealty to the leſſor, becauſe he holdeth of him. And this is well proved by the words of the writ of waſt, when the leſſor hath cauſe to bring a writ of waſt againſt him; which writ ſhall ſay, that the leſſee holds his tenements of the leſſour for terme of yeares. So the

SI un home leſſe pur terme de vie ſauns parler de rent, &c. il ferra fealtie, &c. And the reaſon is; becauſe there is a tenure, and fealtie (as hath beene ſaid) is incident to al manner of tenures; and it is to be noted, that the law, for the ſuretie of

V. Sect. 214. (Ante 67. a. 68. a.)

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

(2) The reaſon is plain. Socage-relief, being a year's rent, cannot be calculated, if an annual rent is not payable. See ante 85. a. note 1. But as by *cuſtom*, or by *expreſs reſervation* on creating the tenure, a payment wholly different from and unconnected with the yearly rent may be due for relief; ſo it may be preſumed, that by the ſame means a relief may be payable, where there is no yearly rent; becauſe the relief is aſcertained, without reference to a yearly rent, in both caſes equally. See Kitch. on Co. ed. 1592. fo. 103. Here it may not be amiſs to advert to ſome other differences between the ſeveral kinds of relief payable by ſocage-tenants. 1. The *proper* ſocage-relief, that is, the relief incident to the tenure by ſocage by the *general* cuſtom of the realm, is a year's rent, and conſequently can never be payable, except where there is an annual rent; but the *improper* ſocage-relief, that is, the relief due either by *ſpecial* cuſtom or by *expreſs* reſervation, may be *more* or *leſs* than the annual rent, or may be payable, where there is no annual rent. 2. The ſocage-relief by *common law* is only payable on a *deſcent* and by a *natural* perſon; but the two other reliefs *may* be due, where the tenant comes in by *purchaſe*, or where he takes as a *ſole corporation* by *ſucceſſion*. Ante 84. a. 2. Ro. Abr. 517. 518. 3. If the relief claimed is one at *common law*, it is preſumed to be due, till the contrary appears; that is, unleſs it can be proved, that the relief hath been releaſed, or that the tenure was reſerved

guardianſhip in *chivalry* is now taken away by act of parliament, it may be uſeful to recollect ſome *general* things concerning it;

of the lord, that his tenant ſhall be faithfull and loyall to him, doth create ſuch a ſervice as the tenant ſhall be bound thereunto by oath.

40. E. 3. 34. 9. H. 6. 41. 10. H. 6. 13. 9. E. 4. 1. 21. E. 4. 29. 5. H. 5. 12. 5. H. 7. 11.

Auxi ſi leaſe ſoit fait pur ans, &c. le leſſee ferra fealty. For there alſo is a tenure between them. And *Littleton*'s opinion in this caſe is holden for good law at this day (1).

Vid. Sect. 84.

Et ceo eſt prove bien per les parols de briefe, &c. *Nota*, the original writs are (as it were) the foundations and grounds of the law, and, as it appeares here by *Littleton*, are of great authority for the proofe of the law in particular caſes (2).

(Ante 63. a. 5. Co. 10.)

Pur ceo que nil nad ſuer eſtate. Therefore tenant at will ſhall not do fealty (as hath been ſaid before); becauſe the matter of an oath muſt be certaine. The reſt of this ſection needs no explication (3).

Iſſint le briefe prova un tenure enter eux. Mes celuy, que eſt tenant a volunt ſolonque le courſe del common ley ne ferra fealtie; pur ceo que il nad aſcun ſure eſtate. Mes auterment eſt de tenant a volunt ſolonque le cuſtome del manor; pur ceo que il eſt obligé pur faire fealtie a ſon ſeignior pur deux cauſes. L'un eſt per cauſe del cuſtome; et lauter eſt, pur ceo que il priſt ſon eſtate en tiel forme pur faire a ſon ſeignior fealty.

Writ proves a tenure betweene them. But he, which is tenant at will according to the courſe of the common law, ſhal not do fealty; becauſe he hath not any ſure eſtate. But otherwiſe it is of tenant at will according to the cuſtom of the mannor; for that he is bound to do fealty to his lord for two cauſes. The one is, by reaſon of the cuſtome, and the other is, for that he taketh his eſtate in ſuch form to do his lord fealty.

CHAP. 6. Sect. 133.

Frankalmoigne.

Like my opinion on the Case from Cambridge de ta. Aug. M

Brict. lib. 2. cap. 5. and lib. 4. ca. 2. Britton fo. 164. 165. Mirror ca. 2. Sect. 18. Glanvil. lib. 7. ca. 1. & lib. 12. ca. 3. & 25 Fleta lib. 3. ca. 5.

UN abbe, prior, auter home de religion, ou de ſaint egliſe. It is to be obſerved, that of eccleſiaſticall perſons ſome be regular, and ſome be ſecular. They be called regular, becauſe they live under certain rules, and have vowed three things; true obedience, perpetuall chaſtity, and wilfull poverty. And when a man is profeſſed in any of the orders of religion, he is ſaid to be *home de religion*, a man of religion, or religious. Of this ſort be all abbots, priors, and others of any of the ſaid orders regular. Secular are perſons eccleſiaſticall; but becauſe they live not under certain rules of ſome of the ſaid orders, nor are votaries

21. H. 7. 39. 29. E. 3. 14.

40. E. 3. 29. 8 H. 6. 23. 7. E. 4. 12. 12. H. 8. 8.

TEnant en frankalmoigne eſt, lou un abbe, ou prior, ou un auter home de religion ou de ſaint egliſe, tient de ſon ſeignior en frankalmoigne; que eſt a dire en Latin en liberam eleæmoſynam. *Et tiel tenure commencoit adeprimes en auncient temps en tiel forme; quant un home en auncient temps fuit ſeiſie de certain terres ou tenements en ſon demeſne come de fee,*

TEnant in frankalmoigne is, where an abbot, or prior, or another man of religion or of holy church, holdeth of his lord in frankealmoigne; that is to ſay in Latine *in liberam eleæmoſinam*, that is, in free almes. And ſuch tenure beganne firſt in old time, when a man in old time was ſeiſed of the lands or tenements in his demeſne as of fee, and of the ſame land infeoffed

et

ſerved with an *expreſs exemption* from relief. 3. Lev. 145. Vin. Abr. *Evidence* A. b. 28. pl. 5. But if the relief be claimed by *ſpecial cuſtom* or *ſpecial reſervation*, the *onus probandi* muſt neceſſarily fall upon the lord. 4. If the relief is by the *common law*, it is merely a fruit *incident to the ſervice*; but if the relief is by *expreſs reſervation*, it is a *part of the ſervice*. This diſtinction, however nice it may appear, may be deemed an *eſſential* one. Relief, when only an *incident to the ſervice*, is not within the limitation of 50 years preſcribed for ſeiſin of it by the 32. H. 8. c. 2. as hath been obſerved in a former note; nor will acceptance of rent eſtop the lord afterwards from claiming ſuch a relief. Ante 83. a. note 2. Cro. Eliz. 885. But the law ſeems to be to the contrary in both theſe particulars, where the relief is *part of the ſervice*. 5. If the relief is by the *common law*, or by *ſpecial reſervation*, the remedy by diſtreſs follows of courſe; but it is ſaid, that for relief by *ſpecial cuſtom*, diſtreſs is not warranted without a preſcription. W. Jo. 133.—Theſe differences between the *three* kinds of ſocage-reliefs lie ſcattered in the books; and thus bringing them into one point of view may be uſeful. The learned reader will judge of their propriety. The diligent ſtudent may add to their number. See further Co. Copyhold. chap. 2. Survey. Dial. 4th edit. 95. and the caſe of Hungerford and Havyland in W. Jo. 132. 2. Bulſtr. 323. Latch 37. 94. 129. 2. Ro. Rep. 370. O. Bendl. 180.

(1) See ante 67. b. note 2.—(2) See ante 73. b.—(3) It may be proper to conclude this chapter of ſocage, by pointing out the

it; and for the uſe of the ſtudent in that reſpect, the following particulars, ſelected principally from the chapter of knights-ſervice,

et de meſmes les terres ou tenements enfeoffa un abbe et ſon covent, ou un pryor, &c. a aver et tener a eux et lour ſucceſſors a touts jours en pure et perpetual almoigne ou en frankalmoigne; [ou per tielx parols, a tener de le grantor, ou de le feoffor, et de ſes heires en frankalmoigne:] (1) en tiels caſes les tenements ſont tenus en frankalmoigne.

an abbot and his covent, or prior and his covent, to have and to hold to them and their ſucceſſours in pure and perpetuall almes, or in frankalmoigne; or by ſuch words, to hold of the grantor or of the leſſor and his heires in free almes: in ſuch caſe the tenements were holden in frankalmoigne.

they are for diſtinction ſake called ſecular, as biſhops, deanes and chapters, archdeacons, prebends, parſons, vicars, and ſuch like. All which *Littleton* here includeth under theſe general words, *de ſaint egliſe*, of holy church; and none of theſe are in law ſaid to be *homes de religion*, or religious. (4. Co. 104.)

Where *Littleton* ſaith (*infeoffa un abbe et ſon covent*) his meaning is, that the abbot only is infeoffed; for he is only a perſon capable, and the covent are dead perſons in law, and have power of aſſent only, and that they thereunto aſſent. But ſince Littleton wrote, all abbeys, priories, monaſteries, and other religious houſes of monkes canons friers and nuns &c. have been diſſolved, and their poſſeſſions given to the crowne (2).

See the ſtatutes of 27. H. 8. not printed, but in the abridgement, 31. H. 8. cap. 13, and 32. H. 8. ca. 24. &c. Vide ſect. 530.

The eccleſiaſticall ſtate of England, as it ſtandeth at this day, (which is neceſſary for our ſtudent to know) is divided into two provinces, or archbiſhopricks, (*viz.*) of Canterbury, and of Yorke. The arbiſhop of Canterbury is ſtyled *Metropolitanus et Primas totius Angliæ*, and the archbiſhop of Yorke *Primas Angliæ*. Each archbiſhop hath within his province ſuffragan biſhops of ſeveral dioceſſes (3). The archbiſhop of Canterbury hath under him within his province, of ancient foundations, *viz.* Rocheſter his principall chaplaine, London his deane, Wincheſter his chancellor, Norwich, Lincolne, Ely, Chicheſter, Saliſbury, Exeter, Bathe and Wells, Worceſter, Coventry and Litchfield, Hereford, Landaffe, St. David, Bangor, and St. Aſſaphe, and four founded by king Henry 8. erected out of the ruins of diſſolved monaſteries (that is to ſay) Glouceſter, Briſtow, Peterborow, and Oxford. The archbiſhop of Yorke hath under him four, (*viz.*) the biſhop of the county palatine of Cheſter newly erected by king H. 8. and annexed by him to the archbiſhopricke of Yorke, the county palatine of Durham, Carlile, and the Iſle of Man annexed to the province of Yorke by H. 8. but a greater number this archbiſhop anciently had, which time hath taken from him. The extent of every dioceſſe you may elſewhere read, the which for brevity I here omit. All the ſaid archbiſhoprickes, and biſhoprickes of England were founded by the kings of England, to hold by barony, as hereafter ſhall be ſaid (4). * And every archbiſhop and biſhop hath his deane and chapter, whereof more ſhall be ſaid hereafter. The archbiſhop of Canterbury hath the precedencie, next to him the archbiſhop of Yorke, next to him the biſhop of London, and next to him the biſhop of Wincheſter (5), and then all other biſhops of both provinces after their ancientneſſe.

(4. Inſt. 321.) Math. Parker de vitis archiepiſcoporum. Linwood. Camden Britannia. Vid. Rot. parliam. anno 36. H. 8. 1. E. 6. 5. E. 6. &c. Weſtminſter alſo was newly erected a biſhopricke by H. 8. but by queene Mary it was reſtored to be an abbey, and by queene Eliz. created a deanry collegiate. Cheſter had been anciently a biſhop's ſee, and long ſince tranſlated to Coventry. 33. H. 8. ca. 31. Camden ubi ſupra. 26. H. 8. firſt fruits and tenths. Vid. Sect. 137.

* 3. Co. 73. deane and chap. of Norwich caſe. Vide Sect. 134. 201. 31. H. 8. cap. 10.

Every dioceſſe is divided into archdeaconries, whereof there be 60; and the archdeacon is called *oculus epiſcopi*; and every archdeaconry is parted into deanries; and deanries again into pariſhes, townes and hamlets. And thus much, for the better underſtanding of our author, and how the ſtate eccleſiaſticall ſtandeth at this day, ſhall ſuffice.

Vide more hereof, ſect. 180. 528. 648. &c.

Frankalmoigne, que eſt a dire en Latine, in liberam eleæmoſinam.

In Engliſh in free almes. There is an officer in the king's houſe called *eleemoſinarius*, vulgarly called the king's almner (whoſe office and duty is excellently deſcribed in ancient authors), *viz. Fragmenta diligenter colligere, et diligenter diſtribuere ſingulis diebus egenis; ægrotos et leproſos, incarceratos, pauperesque viduas, et alios egenos vagoſque in patria commorantes charitative viſitare: item equos relictos, robas, pecuniam, et alia ad eleemoſinam largita recipere, et fideliter diſtribuere. Debet etiam regem ſuper eleemoſinæ largitione crebris ſummonitionibus ſtimulare, præcipue diebus ſanctorum, et rogare ne robas ſuas, quæ magni ſunt pretii, hiſtrionibus, blanditoribus, accuſatoribus, ſeu meniſtrallis, ſed ad eleemoſinæ ſuæ incrementum, jubeat largiri* (6).

Fleta lib. 2. cap. 23.

All eccleſiaſticall perſons may hold in frankalmoign be they ſecular or regular; and no lay perſon can hold in frankalmoign. This adjective (*liber*) doth diſtinguiſh many things in law from others; as here *libera eleemoſina* are words appropriated to this caſe, and doth diſtinguiſh it from a tenure by divine ſervice; *liberum tenementum* from a tenure in villenage or by copyhold or baſe tenure; *liberum feodum* franke fee from a tenure in ancient demeane; *liberum*

Vide Sect 1. Bract. lib. 4. c 37 38. Britton cap. 32.

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

(1) The words between brackets are in L. and M. but not in Rob.—(2) The ſtudent will find a good hiſtory of the diſſolution of monaſteries in England in the excellent preface to that moſt valuable work the *Notitia Monaſtica*, by biſhop Tanner.—(3) Here biſhops are ſtyled ſuffragans in reſpect of their relation to the archbiſhop of their *province*; but formerly each archbiſhop and biſhop had alſo his ſuffragan, to aſſiſt him in conferring orders and in other *ſpiritual* parts of his office within his *dioceſe*. Theſe in our eccleſiaſtical law are called ſuffragan-biſhops, and reſemble the *chorepiſcopi* or *biſhops of the country* in the early times of the chriſtian church. How this *inferior* order of biſhops *may* be elected and conſecrated is regulated by the 26. H. 8. c. 14. but notwithſtanding this ſtatute, it is not uſual to appoint them.—They ſhould not be conſounded with the *co-adjutors* of a biſhop; the *latter* being appointed in caſe of the biſhop's infirmity to ſuperintend his *juriſdiction* and *temporalties*; neither of which was within the interference of the former. See fully on this ſubject in Gibſ. Cod. 1ſt ed. v. 1. p. 155.—(4) See ante 70. b. note 2. poſt 164. a.—(5) This is a miſtake; for the ſtatute, by which precedency is principally regulated, gives the biſhop of Durham place between the biſhop of London and the biſhop of Wincheſter. See 31. H. 8. c. 10. ſ. 3.—(6) The office of king's almoner is uſually given to the archbiſhop of York, with the title of lord high almoner.

ſervice, are brought into one point of view.—Guardianſhip in chivalry could only be where the eſtate veſted in the infant by *deſcent*.

Britton cap. 66. Bract. lib. 4. F. N. B. 150. Bract. lib. 4. fol. 288. 247. 292. Britton fol. 245. Fleta lib. 5. cap. 11. Forteſcue c. 26 24. E. 3. 34. 43. E. 3. Conſpir. 11. 27. Aſſ. 59. Stanf. 175. Vide Sect. 199. Fleta lib. 1. cap. 47.

berum maritagium from other eſtates taile; *libera firma* frank ferme, when an eſtate is changed from knights ſervice to ſocage; *liberum ſocagium* from a tenure by ſervice in chivalrie; *francus bancus* to diſtinguiſh it from other dowers, for that it cometh freely without any act of the huſband's or aſſignement of the heire; *libera lex* to diſtinguiſh men, who enjoy it, and whoſe beſt and freeſt birthright it is, from them, that by their offences have loſt it, as men attainted in an attaint, in a conſpiracie upon an indictment, or in a premunire, &c. And ſo of *libera capella*, *francus plagius* frankpledge, *libera chaſea* free chaſe, *liber burgus*, *liber aper*, *liber taurus*, and the like. But in a matter (ſome will ſay) of curioſity, this ſhall ſuffice; and yet ſeeing it tends to the better underſtanding (others ſay) it is tolerable.

Glanvil. lib. 7. ca. 1. fo. 44. 45. acc.

By the ancient common law of England, a man could not alien ſuch lands as he had by deſcent, without the conſent of his heire; (1) yet he might give a part to God in free almoigne, or with his daughter in free marriage, or to his ſervant *in remuneratione ſervitii*. Our old bookes

Britton ca. 66. fol. 164. Bract. lib. 2. cap. 5. & 10. F. N. B. 211.

deſcribed frankalmoign thus; when lands or tenements were beſtowed upon God, (that is) given to ſuch people as are conſecrated to the ſervice of God. In our ancient bookes theſe gifts of devotion were called churcheſlet, or churchſeed, *quaſi ſemen eccleſiæ*; but in a more particular ſenſe it is deſcribed thus. *Certam menſuram bladi tritici ſignificat, quam quilibet olim ſanctæ eccleſiæ die ſancti Martini, tempore tam Britonum quam Anglorum, contribuerunt. Plures tamen Magnates, poſt Romanorum adventum, illum contributionem ſecundum veterem legem Moiſi nomine primitiarum dabant, prout in brevi regis Knuti ad ſummum pontificem tranſmiſſ' continetur, in quo illam contributionem Churchſed appellant quaſi ſemen eccleſiæ.*

Fleta lib. 1. cap. 42.

Et tiel tenure. For albeit neither fealty, nor any other temporall ſervice, is due, yet it is a tenure.

7. E. 4. 12. 33. H. 6. 6. 7. 39. H. 6. 29.

En ancient temps. [*a*] That is to ſay before the ſtatutes of mortmaine, *viz. magna charta*, cap. 36. and 7. E. 1. *de religioſis*, &c. and before the ſtatute of *quia emptores terrarum*, as ſhall be hereafter in his proper place ſaid in this chapter (2).

[*a*] Mortmaine.

Britton fol. 32. & 90. Bracton lib. 2. cap. 5. Fleta lib. 3. cap. 5. 11. H. 7. 12. (2. Ro. Abr. 61.)

Enfeoffa un abbe et ſon covent, &c. Albeit the covent be dead perſons in law, and the abbot only capable (as before is ſaid) yet if the feoffment be made to an abbot and covent, the ſeoffment is good, and the ſtate veſteth only in the abbot. And note a man may infeoffe an abbot, a biſhop, a parſon, &c. or any other ſole body politique, by deed or without deed, in free almes; and ſo may a gift in frankmariage be made without deed alſo; but if lands be given to a deane and chapter, or any other corporation aggregate of many, there the gift muſt be by deed (3).

39. H. 6. 30. b.

(1. Ro. Abr. 832.)

A aver et tener a eux et a lour ſucceſſors. For in caſe an abbot or prior and covent regularly a fee ſimple doth not paſſe without theſe words (ſucceſſors); (4) for the diverſity ſtandeth thus betweene a corporation aggregate of many capable perſons, and a ſole corporation. As if lands be given to a deane and chapter, they have a fee ſimple without theſe words (ſucceſſors) for that the body never dies; but if lands be given to a biſhop, parſon, or any other ſole corporation, who after their deceaſes have a ſucceſſion, there without theſe words (ſucceſſors) nothing paſſeth unto them but for life (5). But of corporations aggregate of many, there is a diverſity when the head and body both are capable, as in the caſe of deane and chapter, and when one (as hath been ſaid) is onely capable, as in caſe of abbot or prior and covent; but yet out of the generall rules, the caſe of frankalmoign is excepted, as hereafrer ſhall be ſaid. Alſo lands muſt be given to a corporation aggregate of many by deed; but to a ſole corporation it may be granted without deed.

Vid. Litt. in the chapter of Fee ſimple. Sect. 1. 2.

39. H. 6. 30.

Bracton lib. 2. cap. 10. *Poteſt donatio fieri in liberam eleemoſinam eccleſiis cathedralibus, conventualibus, parochialibus, et viris religioſis.*

35. H. 6. 56. 7. E. 4. 11. Vid. Bracton lib. 2. ca. 10.

En pure et perpetuall almoigne. Here it appeareth, that a tenure in frankalmoigne may be created without the word (*libera*) for *pura* implyeth as much.

35. H. 6. 56. 7. E. 4. 11. Bract. ubi. ſupr. 44. E. 3. 24.

Ou en frankalmoigne. But one of theſe words, either *pura* or *libera*, muſt be uſed, or elſe it is no tenure in frankalmoigne.

20. H. 6. fol. 36.

Ou per ceux parolx a tener de le grantor ou feoffor et ſes heires en frankalmoigne. Here it appeareth, that by theſe words a fee ſimple paſſeth without theſe words (ſucceſſors), albeit it be in caſe of a ſole corporation. For as in caſe of a gift in frankmariage, an eſtate taile paſſeth to the donees without words of heires of their two bodies, as hath beene ſaid in the chapter of Fee taile; ſo in caſe of a gift in frankalmoigne (which may be reſembled to a divine mariage), a fee ſimple paſſeth, as hath bin ſaid, though it be in caſe of a ſole corporation, without this word (ſucceſſors). And beſides, grants in frankalmoigne are ancient grants as hath beene ſaid, and therefore ſhall be allowed, as the law was taken, when ſuch grants were made.

38. E. 3. 4. a. 14. H. 6. 12. 10. H. 7. 13. 16. H. 7. 9. 18. E. 3. Conuſans 39. 33. H. 6 22. 17 E. 3. 51. 6. E. 3 54. &c. Tr. 5 H. 3. Rot. 4. in Scaccario. The prior of Dunſtable's caſe.

Sect.

(1) See Wright's Ten. 167.

(2) See poſt ſect. 140.

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

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

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

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deſcent.—All *males* under 21 at the anceſtor's death were liable to it; but not *females*, unleſs they were then under 14.—It extended, not only to the *perſon* of the infant, but alſo to all ſuch of the infant's *lands* or *tenements* as were within the guardian's ſeignory; and if the king was guardian in reſpect of a tenure *in capite*, then to the *whole* of the infant's eſtate, of whomſoever holden, what-

lw 77. a.

Sect. 134.

EN mesme le manner est, lou terres ou tenements fueront grant en ancient temps a un deane et chapter et a lour successors, ou a un parson dun esglis et a ses successors, ou a ascun auter home de saint esglis et a ses successors, en frankalmoigne, si il avoit capacity dapprender tiels grants ou feoffments, &c.

IN the same manner it is, where lands or tenements were granted in ancient time to a deane and chapter and to their successors, or to a parson of a church and his successors, or to any other man of holy church and to his successours, in frankalmoigne, if he had capacitie to take such graunts or feoffments, &c.

EN mesme le manner, &c. Here Littleton, having put an example of bodies incorporate aggregate of many, whereof the head is only capable, now putteth examples both of bodies incorporate, aggregate of many (all being capable) and of sole corporations of secular persons.

Deane. *Decanus* is derived of the Greek word δέκα that signifieth Ten; for that he is an ecclesiasticall secular governour, and was anciently over ten prebends, or canons at the least in a cathedral church, and is head of his chapter (1).

Chapter. *Capitulum est clericorum congregatio sub uno decano in ecclesia cathedrali* (2). And chapters be twofold, *viz.* the ancient, and the later. And the later be also of two sorts. First, those which were translated or founded by king Henry the Eight, in place of abbots and covents, or priors and covents, which were chapters whiles they stood; and these are new chapters to old bishoprickes. Secondly, where the bishopricke was newly founded by Henry the Eight (as Chester, Bristow, &c.) there the chapters are also new(3). There is a great diversitie betweene the commings in of the ancient deane, and of the new. For the ancient come in, in much like sort as bishops doe; for they are chosen by the chapter, by a *conge de eslier*, as bishops be, and the king giving his royall assent they are confirmed by the bishop. But they, which are either newly translated or founded, are donative, and by the king's letters patents are installed, which are matters necessarie to be knowne (4). (3. Co. 73.)

Sil avoit capacitie a prender. For ecclesiasticall persons have not capacitie to take in succession, unless they be bodies politique, as bishops, archdeacons, deanes, parsons, vicars, &c. or lawfully incorporate by the king's letters patents, or prescription, as deanes and chapters, colledges, &c. But a colledge of religious persons, chauntry priests, and such like, that are not lawfully incorporated, but onely consist in vulgar reputation, have no capacity to take in succession. Therefore Littleton added materially *(sil ad capacitie à prender.)*

Sect. 135.

ET tiels, que teignont en frankealmoigne, sont oblige de droit devant Dieu de fair orisons, praiers, mess: et autres divine services, pur les almes de lour grantor ou feoffor et pur les almes de lour heires

AND they, which hold in frankalmoigne, are bound of right before God, to make orisons, prayers, masses, and other divine services, for the soules of their grantor or feoffor, and for the soules of their heires

IN this section there appeareth a division of tenures, that is to say, some be spirituall, and some be temporall. And of spirituall some be incertain, as tenures in frankalmoign; and some be certain, as tenures by divine service. Again, divine service certaine is two fold, either spirituall, as prayers to God, or temporall, as distribution of almes to poore people.

Oblige

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

whatever the tenure, and whether lying in tenure or not.—If the infant heir held lands by knights service of several lords, each

+ Mr Browne Willis in his survey of the Cathedrals [illegible] that the bishop of Durham as [illegible] of York [illegible] of all the bishops of the kingdom except London. See vol. 1. p. [illegible] 2. [illegible]

Oblige de droit. That is they are compellable by the eccleſiaſticall law to doe it; and therefore it is ſaid that they are bound of right, (for want of remedy, and want of right is all one) and the common law (as here it appeareth) taketh knowledge of the eccleſiaſticall law in that behalfe.

De faire oriſons, prayers, meſſes, et auters divine ſervices.

Since Littleton wrote, the lyturgye or booke of Common Praier and of celebrating divine ſervice is altered. This alteration notwithſtanding, yet the tenure in frankalmoigne remaineth; and ſuch prayers and divine ſervice ſhall be ſaid and celebrated, as now is authoriſed; yea, though the tenure be in particular, as Littleton [a] hereafter ſaith, *viz. A chaunter un meſſe, &c. ou a chaunter un placebo et dirige,* yet if the tenant ſaith the praiers now authoriſed, it ſufficeth. And as Littleton [b] hath ſaid before in the caſe of ſocage, the changing of one kinde of temporall ſervices into other temporall ſervices altereth neither the name nor the effect of the tenure; ſo the changing of ſpirituall ſervices into other ſpirituall ſervices altereth neither the name nor effect of the tenure. And albeit the tenure in frankalmoigne is now reduced to a certaintie contained in the booke of Common Prayer, yet ſeeing the originall tenure was in frankalmoigne, and the change is by generall conſent by authority of parliament, [c] whereunto every man is party, the tenure remaines as it was before.

[a] Vide ſect. 137.

[b] Vide ſect. 119.

[c] 2. E. 6. c. 1. 5. & 6. E. 6. cap. 1. 1. Eliz. ca. 2.

Ne ferront aſcun fealtie. Herein tenant in frankalmoigne differeth from a tenant in frankmariage; for tenant in frankmariage ſhall doe fealty, as hath beene ſaid in the chapter of Fee taile, but tenant in frankalmoigne ſhall not doe any, or any other thing, but *devota animarum ſuffragia.*

[d] 33. H. 6. 6. 13. E. 1. tit. Ceunt de Voucher 118.

Tiel divine ſervice eſt melieur pur eux. And it is alſo ſaid in our bookes, [d] *que frankalmoigne eſt le pluis haute ſervice,* and this was confeſſed by the heathen poet.

——fuit hæc ſapientia quondam
Publica privatis ſecernere, ſacra profanis.

And certaine it is, that *nunquam res humanæ proſperè ſuccedunt, ubi negliguntur divinæ.*

Sect. 136.

LE ſeigniour ne poet eux diſtreiner pur ceſt non feaſant, &c.

Diſtreine. The

ET ſi tiels, que teignont lour tenements en frankalmoigne, ne voilont ou failont de faire tiel

AND if they, which hold their tenements in frankalmoign, will not or faile to do ſuch divine ſervice (as

queux ſont mortes, et pur le proſperitie et bon vie et bon ſalute de lour heires que ſont en vie. Et pur ceo ils ne ferront a nul temps aſcun fealtie a lour ſeignior; pur cco que tiel divine ſervice eſt melieur pur eux devant dieu, que aſcun feaſants de fealtie; et auxi pur ceo que ceux parolx (frankemoigne) exclude le ſeignior daver aſcun terrein ou temporall ſervice, mes daver tantſolement divine et ſpirituall ſervice deſtre fait pur luy, &c.

which are dead, and for the proſperity and good life and good health of their heires which are alive. And therefore they ſhall doe no fealty to their lord; becauſe that this divine ſervice is better for them before God, then any doing of fealty; and alſo becauſe that theſe words (frankalmoigne) excludeth the lord to have any earthly or temporal ſervice, but to have onely divine and ſpirituall ſervice to be done for him, &c.

pointment, deans are, 1. *Elective*, as deans of chapters of the *old* foundation; though they are only ſo nominally and in form, the king being the real patron, which will appear from the next note but one. 2. *Donative*, as thoſe deans of chapters of the *new* foundation, who are appointed by the king's letters patent, and are inſtalled under his command to the chapter, without reſorting to the biſhop either for admiſſion or for a mandate of inſtallment; if that mode of promoting *ſtill* prevails in reſpect to any of the new deaneries. See the next note but one. Deans of the royal chapels are alſo *donative*, the king appointing to them in the ſame way. So too may deans of peculiars without cure of ſouls be called, as the dean of the *Arches*, who is appointed by commiſſion from the archbiſhop of Canterbury; but this muſt be underſtood in a large ſenſe of the word *donative*, it being moſt uſually reſtrained to *ſpiritual* promotions. 3. *Preſentative*, as ſome deans of peculiars with cure of ſouls, and the deans of *ſome* chapters of the *new* foundation if not of *all*. Thus the dean of Battel is preſented by the patron to the biſhop of Chicheſter, and from him receives inſtitution. Thus too the dean of Glouceſter is preſented by the king to the biſhop with a mandate to admit him and to give orders for his inſtallment. See the next note but one. 4. *By virtue of another office*, as the biſhop of London is dean of the province of Canterbury, and the biſhop of St. David is dean of his own chapter.—Again in reſpect of the manner of holding, deans are ſo *abſolutely*, or in *commendam*. But this diviſion applies only to *ſpiritual* deaneries.—In thus pointing out the ſeveral denominations of deans, we have attempted a more comprehenſive as well as a nicer *general* diſcrimination and arrangement, than the books uſually reſorted to furniſh; though to them we are indebted for moſt of the materials, and to them we refer the ſtudent for a competent idea of the nature of each kind of deanery. See *Decanus* and *Deanery* in Spelm. Gloſſ. Cow. Dict. Ayl. Parerg. Nelſ. Rights of the Clerg. Burn. Eccleſ. L. and the Index to Gibſ. Cod.—(2) But the name of chapter is not confined to

each lord had the wardſhip of the land within his ſeigniory; and as to the body, the wardſhip of it belonged to that lord, of whom

divine ſervice (come eſt dit) le ſeignior ne poit eux diſtrainer pur cel non feſant, &c. pur ceo que neſt mis en certaine, quelx ſervices ils doient faire. Mes le ſeignior de ceo poit complaine a lour ordinary ou viſitour, luy preyant, que il voiloit mitter puniſhment et correction de ceo, et auxy de provider que tiel negligence ne ſoit pluis avant fait, &c. Et lordinary ou viſitour de droit ceo doit faire, &c.

is ſaid) the lord may not diſtraine them for not doing this, &c. becauſe it is not put in certainty what ſervices they ought to do. But the lord may complaine of this to their ordinary or viſitour, praying him, that he will lay ſome puniſhment and correction for this, and alſo provide that ſuch negligence be no more done, &c. And the ordinarie or viſitor of right ought to doe this, &c.

word diſtreſſe is a French word. In Latine it is called *diſtrictio, ſive angaria*; becauſe the cattell diſtrained are put into a ſtrait, which we call a pownd.

Pur ceo que neſt miſe en certeine queux ſervices ils doient faire. It is a maxim in law, that no diſtreſſe can be taken for any ſervices, that are not put into certainty [e] nor can be reduced to any certainty; for, *id certum eſt, quod certum reddi poteſt*; for [f] *oportet quod certa res deducatur in judicium*: and upon the avowry, damages cannot be recovered for that, which neither hath certainty, nor can be reduced to any certainty. And yet in ſome caſes there may be a certainty in uncertainty; as a man may hold of his lord to theere all the ſheepe depaſturing within the lord's mannor; and this is certaine enough, albeit the lord hath ſometime a greater number, and ſometime a leſſer number there; and yet this incertainty, being referred to the mannor which is certaine, the lord may diſtrain for this uncertainty. *Et ſic de ſimilibus.*

[e] 35. H. 6. 57. Br. tit. Office. 4. 8. E. 3. 3. 66. 20. E. 3. Avowry 131. (Cro. Cha. 583. Cro. Jam. 585. 1. Sid. 263.)
[f] Bra ton fol. 230. & 328. (Poſt 142.)

7. E. 3. 38.

Poet complayner. That is, to complaine in courſe of juſtice, according to the eccleſiaſticall law. (5. Co. 75. a.)

A lour ordinarie. *Ordinarius*, and ſo he is called [g] in the eccleſiaſticall law, *Quia habet ordinariam juriſdictionem in jure proprio, et non per deputationem.* The name we have anciently taken from the canoniſts, and doe apply it onely to a biſhop, or any other that hath ordinary juriſdiction in cauſes eccleſiaſticall. In this caſe of Littleton it is to be obſerved, that the law doth appoint every thing to be done by thoſe, unto whoſe office it properly appertaineth; and foraſmuch as it belongeth to the office of the ordinary in this caſe to ſee divine ſervice ſaid, and to compell them to doe it by eccleſiaſticall cenſures, therefore complaint is to be made unto him. Here and in the next ſection it appeareth, that for deciding of controverſies, and for diſtribution of juſtice within this realm, there be two diſtinct juriſdictions. The one eccleſiaſticall, limited to certaine ſpirituall and particular caſes (of the one whereof our author here ſpeaketh) and the court wherein theſe cauſes are handled, is called *forum eccleſiaſticum*. The other juriſdiction is ſecular and generall; for that it is guided by the common and generall law of the realme. *Quæ pertinet ad coronam et dignitatem regis, et ad regnum in cauſis et placitis rerum temporalium, in foro ſeculari.* So as in this caſe put by our author, the lord hath remedy for his divine ſervice (albeit they iſſue out of temporall lands) in *foro eccleſiaſtico*, by the eccleſiaſticall law; otherwiſe the lord ſhould be without remedy. Yet the common law, to the intent that eccleſiaſticall perſons might the better diſcharge their duty in celebration of divine ſervice, and not to be intangled with temporall buſineſſe, hath provided, that if any of them be choſen to any temporall office, he may have his writ *de clerico infra ſacros ordines conſtituto non eligendo in officium*, &c. and thereof be diſcharged.

[g] Mirror ca. 5. ſect. Bracton lib. 5. fo. 405. &c. Fleta lib. 2. ca. 50. & 55. & lib. 6. ca. 38. Britton fo. 69. 70. W. 2. ca. 19. 17. E. 2. Bre. 822. Regiſt. 141. Lindwood, tit. de Conſtit. cap. exter. Bract. lib. 5. ca. 2. fo. 400. & 401. and the other Authors above aid. (Poſt 344. 9. Co. 39. 2. Inſt. 398.)

Regiſt. Orig. 187.

Ou viſitor. That is, where the king or any of his progenitors is founder of the houſe, there the ordinary regularly ſhall not viſit them, but the chancelour of England is appointed by law to be viſitor of them; or where a ſpeciall viſitor is appointed upon the foundation, the complaint muſt be made to that viſitor.

27. E. 3. 84. 85. Regiſt. 40. F. N. B. 42. 10. Eliz. Dier 273. 16. E. 3. Bre. 660. 21. E. 3. 60. 6. H. 7. 13. 8. Aſſ. 29. Brooke tit. Premunire 21.

De droit doit ceo faire. *De droit*, of right, (that is to ſay) he ought to doe it by the eccleſiaſticall law in the right of his office.

And here is implied a maxime of the common law, that where the right (as our author here ſpeaketh) is ſpirituall, and the remedy therefore onely by the eccleſiaſticall law, the conuſans thereof doth appertaine to the eccleſiaſtical court. (5. Co. 66. b. 2. Co. 43. Plowd. 277.)

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to *cathedrals*, the prebendaries and canons of *collegiate* churches being alſo ſtyled chapters; though rather improperly, as we have before hinted.—(3) The *new* deaneries and chapters to *old* biſhopricks are *eight*; namely, Canterbury, Norwich, Wincheſter, Durham, Ely, Rocheſter, Worceſter, and Carliſle. The new deaneries and chapters to *new* biſhopricks are *five*; namely, Peterborough, Cheſter, Glouceſter, Briſtol, and Oxford. See Will. Cathedr.—(4) In this account of the *old* and *new* deaneries, many particulars, relative to the manner of coming to the poſſeſſion of them, are omitted; and therefore we ſhall add ſome *general* things hiſtorically in reſpect to both.

As to the *old* deaneries, it will be very difficult to trace the ſubject, with any tolerable degree of preciſion, higher than the reign of king John, or to aſcertain what was the *legal* mode of conſtituting deans of chapters before. If our ancient chronicles are to be depended upon, nothing could be more variable than the practice for ſeveral reigns after the Conqueſt. Thus in the church of York, we find ſometimes the archbiſhop collating to the deanery, ſometimes the king conferring, and ſometimes the chapter electing; and it is probable, that a like uncertainty prevailed in other cathedrals. See Drake's Antiq. York 557. to 565. 1 Will. Surv. Cathedr. 64. At length however after many ſtruggles the *elective* mode of conſtituting deans, as well as biſhops, abbots, and priors, was eſtabliſhed throughout the kingdom; for king John by a charter of the 16th of his reign grants, *ut de cætero, in univerſis et ſingulis eccleſiis et monaſteriis cathedralibus et conventualibus totius regni noſtri Angliæ, libera ſint in perpetuum electiones quorumcunque prælatorum majorum et minorum*; and *deans* of chapters clearly fall within the deſcription of *minor prelates*. See king John's charter in 1. Coll. Eccleſ. Hiſt. Append. No. 33. and as to the word *prælatus*, conſult Lyndw. Oxf. Ed. 41. and 217.

whom the tenure was moſt ancient, he being ſtyled the lord by *priority*, and the others lords by *poſteriority*. But this muſt be under-

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2. E. 3. 27. 28.

PER certaine divine ſervice deſtre fait, ſicome a chaunter un meſſe, &c. ou de diſtributer en almoign, &c. Here be the two parts above mentioned, of divine ſervice; and for this divine ſervice certaine, the lord hath his remedy, as here it appeares by our author *in foro ſeculari:* for here it appears, that if the lord diſtreine for not doing of divine ſervice, which is certaine, he ſhall upon his avowry recover dammages at the common law, that is, in the king's temporal court, for the not doing of it. And if iſſue be taken upon the performance of the divine ſervice, it ſhal be tried by a jury of twelve men; becauſe albeit the ſervice be ſpirituall, yet the dammages are temporall, and ſo is the ſeigniory alſo.

(5. Co. 72. b. F. N. B. 209, L.)

38. H. 6. 26. 27.

2. E. 6. ca. 13. verſus finem. 13. E. 3. ca. 5. 11. H. 7. c. 8. 1. El. ca. 2. 13. El. ca. 1. 23. El. ca. 1. 1. Ja. c. 11. & 12.

(4. Co. 20.)

And here is implyed another maxime of the law, that where the common or ſtatute law giveth remedy *in foro ſeculari*, (whether the matter be temporall or ſpiritual) the conuſans of that cauſe belongeth to the king's temporall courts onely; unleſſe the juriſdiction of the eccleſiaſtical court be ſaved or allowed by the ſame ſtatute, to proceed according to the eccleſiaſticall lawes.

Ou de diſtributer en almoigne al cent povres homes. Here note, that the almes and reliefe of poore people, being a worke of charity, is accounted in law divine ſervice; for what herein is done to the poore for God's ſake, is done to God himſelfe.

Poet diſtrein, &c. Here (&c.) includeth many

MES ſi un abbe, ou prior, tient de ſon ſeignior per certaine divine ſervice, en certaine deſtre fait, ſicome a chaunter un meſſe cheſcun vendredie en le ſemaine pur les almes, ut ſupra, *ou cheſcun an a tiel jour a chaunter* placebo *et* dirige, *&c. ou de trover un chapleine de chanter meſſe, &c. ou de diſtributer en almoigne al cent povres homes cent deniers a tiel jour; en tiel caſe, ſi tiel divine ſervice ne ſoit fayt, le ſeignior poet diſtreyner, &c. pur ceo que le divine ſervice eſt miſe en certaine per lour tenure, que le abbee ou prior devoit faire. Et en tiel caſe le ſeignior avera fealtie, &c. come il ſemble. Et tiel tenure neſt paſſe dit tenure en frankalmoigne; eins eſt dit tenure per divine ſervice; car en tenure en frankalmoigne nul mention eſt fait daſcun manner de ſervice; car nul poet tener en frankeal-*

BUT if an abbot, or prior, holds of his lord by a certaine divine ſervice, in certaine to be done, as to ſing a maſſe everie Friday in the weeke, for the ſoules, *ut ſupra*, or every yeare at ſuch a day to ſing a *placebo et dirige*, &c. or to finde a chaplain to ſing a maſſe, &c. or to diſtribute in almes to an hundred poore men an hundred pence, at ſuch a day; in this caſe if ſuch divine ſervice be not done, the lord may diſtreyne, &c. becauſe the divine ſervice is put in certaine by their tenure, which the abbot or prior ought to doe. And in this caſe the lord ſhall have fealtie, &c. as it ſeemeth. And ſuch tenure ſhall not be ſaid to be tenure in frankealmoigne, but is called tenure by divine ſervice; for in tenure in frankealmoigne no mention is made of any manner of ſervice; for none can hold in frankealmoigne, if there be expreſſed any manner

moigne

217. But notwithſtanding the ſtrong terms, in which the freedom of canonical election is provided for by this charter, and the repeated confirmation of it by various ſtatutes, the election of a dean by the chapter is by long practice converted into a mere form, and the king is in reality as much the patron of the *old*, as he is both in name and ſubſtance of the *new* deaneries. For two centuries paſt at leaſt, the king's *congè d'èlire*, which by the charter of John muſt precede every election of a prelate and was in uſe long before, hath been invariably accompanied with the king's *letter miſſive*, as it is ſtyled, recommending a particular perſon, whom the chapter of courſe elect their dean. In the caſe of the *old biſhopricks*, which are filled in the ſame form, the election of the perſon named by the crown is ſecured by a ſtatute of the 25th of Henry the Eighth, which compels the chapter to yield to the recommendation by the pains of a *præmunire*, and if they refuſe authorizes the king to appoint a biſhop by letters patent. See Poſt 134. a. But no ſuch ſtatute hath been yet made in reſpect to the *old* deaneries; and therefore the right of the crown over them reſts wholly on the charter of king John and the ſubſequent practice. Here then it may be aſked, how the crown, without the aid of a ſtatute, can enforce its claim of patronage; and what are the means, by which the nomination would be made effectual if the chapter ſhould diſregard the royal recommendation, and perſevere in a *free* exerciſe of the right of electing? This queſtion may be reſolved, by conſidering, that even the charter of king John requires the king's confirmation of the choice made by the chapter; and therefore by refuſing to confirm he may always prevent the effect of their election. Nay it hath been ſaid, that the election is ſo wholly a ceremony as not even to be eſſential, and that even before any act of parliament to diſpenſe with it the king might nominate to the *old* biſhopricks by letters patent, without reſorting to the chapter for the form of their concurrence; and the *old* deaneries are within the ſame reaſon. See the caſe of Revan O'Brian in Cro. Jam. 552. Palm. 22. and 2. Ro. Rep. 101. 130. and ſ. c. cited in F. N. B. 4to ed. 396. note (a). This doctrine, it muſt be owned, notwithſtanding the poſitive terms in which it was aſſerted, and the reverence due to the judges by whom it was recognized, ſeems as repugnant to the *letter* of king John's charter, as the mode of electing in conformity to the *letter miſſive* certainly

underſtood with an exception of the king; for if any lands of the infant were holden of the king by knights ſervice *in capite*, ho

moigne, ſi ſoit expreſſe aſcun manner de certain ſervice que il doit faire, &c.

of certaine ſervice that he ought to doe, &c.

excellent things, as when, where, and what may be diſtreyned, of all which there is a taſte given in their proper places.

En tiel caſe le ſeignior avera fealtie, &c. come ſemble. For, as it hath beene ſaid, fealty is incident to every tenure, ſaving the tenure in frankalmoigne; and where the lord may diſtreine, there is fealty due. And Britton calleth this tenure (by divine ſervice) *aumone*, and not *libera eleemoſina*. And, ſaith he, *tenure en aumone eſt terre ou tenement que eſt done a aumone, dount aſcun ſervice eſt retenue al feoffor.* Brit. fo. 164.

&c. And here (*&c.*) implyeth diſtreſſe, eſcheat, and the like.

Et tiel tenure neſt paſſe dit tenure en frankalmoigne, eins eſt dit tenure per divine ſervice, &c. And therefore our old bookes divided ſpirituall ſervice into free almes, (which was free from any limitation of certainty) and almes, becauſe the tenants were bound to certaine divine ſervices. 33. H. 6. fol. 6. Brit. ca. 66. (2. Inſt. 460.)

Sil ſoit expreſſe aſcun manner de certaine ſervice. This holdeth where the certainty is reſerved upon the original grant. If lands were given to hold in *libera eleemoſina*, *reddendo* a rent, it ſeemeth the reſervation of the rent to be void; * becauſe it is repugnant and contrary to the former grant *in libera eleemoſina*. 13. E. 1. Count de Vouch. 118. * 13. H. 4. tit. Meſne 74. 30. E. 3. 30. 19. E. 2. Avowrie 224. 32. E. 1. Taile 31. 26. Aſſ. 66. 4 H. 6. 17.

Vide Trin. 4. E. 3. and F. N. B. 231. f. That an abbot or prior that hold in frankalmoigne, ſhall not be charged with a corody. Alſo lands holden in frankalmoigne cannot [*l*] be ancient demeſne, in reſpect of charges incident thereunto. Trin. 4. E. 3. F. N. B. 252. f. 15. E. 3. Corody 4. 11. Aſſ. 22. 50. Aſſ. Pl. 6. [*l*] 32. E. 1. Ant. Dem. 39. 8. E. 3. 5.

Que il doit faire, &c. Here by (*&c.*) is underſtood temporall or ſpirituall ſervice alſo, which he ought to doe corporally, or render, or pay.

There were within this realme of Englande one hundred and eighteene monaſteries, founded by the kings of Englande; whereof ſuch abbots and priors, as were founded to hold of the king *per baroniam*, and were called to the parliament by writ, were lords of parliament, and had places and voices there. * And of them there were twenty-ſeven abbots and two priors, as by the rolles of parliament appeares. But ſince our author wrote, all theſe (as hath beene ſaid) (1) are diſſolved. King Stephen did found the abbey of Feverſham in Kent, *et dedit abbati & monachis, et ſucceſſoribus ſuis, manerium de Feverſham in com. Kanciæ, ſimul cum hundredo, &c. tenendum per baroniam, &c.* who albeit he held by a barony, yet becauſe he was never (that I [*m*] finde) called by writ, he never ſate in parliament. (F. N. B. 232. a. * For example, Rot. Parl. 5. H. 8. & 21. H. 8. &c. [*m*] Canc. Paſ. 30. E. 1.

All the archbiſhops and biſhops of England have beene founded by the kings of England, and doe hold of the king by barony (as before hath beene ſaid) (2) and have beene all called by writ to the court of parliament, and are lords of parliament. As (amongſt many) taking one notable record, [*o*] *mandatum eſt omnibus epiſcopis, qui conventuri ſunt apud Glouceſtriam, die Sabbathi in craſtin. ſanctæ Katherinæ, firmiter inhibendo, quod ſicut baronias ſuas, quas de rege tenent, diligunt, nullo modo præſumant conſilium tenere de aliquibus, quæ ad coronam regis pertinent, vel quæ perſonam regis, vel ſtatum ſuum, vel ſtatum conſilii ſui contingunt, ſcituri pro certo, quòd ſi fecerint, rex inde ſe capiet ad baronias ſuas. Teſte rege apud Hereford, 23 Novemb. &c.* And the biſhoprickes in Wales were founded by the princes of Wales; and the principality of Wales was holden of the king of England, as of his crowne; and when the prince of Wales committed treaſon, rebellion, &c. the principality was forfeited, and the patronages of the biſhops annexed to the crowne of England, ſo as the king is to have penſions for his chaplaines, and corodies for his vadelets, of them, as of biſhops founded by himſelfe (3). And *vide* Mich. 10. H. 4. Rot. 60. *Wallia coram rege*, that the judgment was given accordingly againſt the biſhop of St. David's in Wales, *per juſticiarios de utroque banco & alios de perito concilio domini regis.* And the biſhops of Wales are alſo called by writ to parliament, and are lords of parliament, as biſhops of England be. [*m*] Cant. Paſ. 30. E. 1. cor. rege this foundation is ſo pleaded. (Poſt 134. a. 344. a.) [*o*] Ex rot pat. de anno 18. H. 3. M. 17. 10. H. 4. fo. 6. b.

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ITem ſi ſoit demande, ſi tenant en frankmariage ferra fealtie a le donor ou a

ALSO if it be demanded, if tenant in frankmariage ſhall do fealtie to the do-

LE quel ſerra inconvenient, &c. An argument, drawne from an inconvenience, is forcible in law, as hath beene obſerved V. ſect. 87. 136. 201. 265. 440. 478. 665. 722.

tainly is to the genuine *ſpirit* and intention. But the latter having the ſanction of a practice too ancient to be now drawn into queſtion, it can be of little uſe to deny the former; and accordingly in the reign of Charles the Firſt we find ſome inſtances, in which the king actually appointed to ſome of the old deaneries by letters patent without the leaſt appearance of oppoſition on the part of the chapter. See Rym. Fœd. vol. 8. part 3. page 166. vol. 9. part 1. page 82. To fix the time when the *letter miſſive*, in reſpect either to the old deaneries or the old biſhopricks firſt came into uſe; to explain how from a mere recommendation it grew into a royal mandate; and more particularly to determine, whether it operated as ſuch before the Reformation, or whether *that*, in conſequence of the aſſertion of the king's ſupremacy, was the æra of implicit obedience to it; might be both curious and uſeful. Probably the *letter miſſive* was not *generally* uſed, to controul the freedom of election, till after the time of Edward the Firſt. At leaſt Mr. Prynne, hoſtile as he was to canonical election, he deeming it an uſurpation to the prejudice of the royal prerogative, gives us a *congè d'élire* of Edward the Firſt for the election of a biſhop, which concludes, with a recommendation to the chapter in *general* terms to chuſe a perſon duly qualified; but he takes no notice of its being accompanied with a *letter miſſive*; a circumſtance, which had it occurred, would ſcarce have eſcaped his obſervation. See 3. Pryn. Rec. 1255. The earlieſt precedent of ſuch a letter, we have hitherto met with ſince the charter of king John, is of the year 1347, when Philip de Weſton is ſaid to have been elected to the deanery of York on exhibiting a letter from Edward the Third. Drak. Antiq York, 563. Another inſtance of a *letter miſſive* relative to the ſame deanery occurs in 1544, Henry the Eighth ſignifying it to be his pleaſure that Dr. Wooton ſhould be elected, and the chapter electing him accordingly. Drak. Antiq. York, 565. and Append. 81. Theſe few facts may give *ſome* idea of the gradation, by which the crown hath poſſeſſed itſelf of the complete patronage of the old deaneries. We are not prepared for a more ample diſcuſſion; and if we were, this would not be the proper place for a ſubject ſo extenſive.—☞ *The remainder of this note is neceſſarily poſtponed to* 97. b.

(1) See ante 94. a.—(2) See ante 70. b. and note 2. there.—(3) It ſeems however, that it is not now the practice of the crown

he was intitled to the wardſhip both of the infant's body and all his lands held of the crown *in capite*, or of others by knights-

40. Aſſ. 27.

Littleton ſo. 50. b. 42. E. 3. 5. 28. E. 3. 395. 20. H. 6. 28.

(Ante 23. a.)

ved before, and ſhall be often hereafter. *Nihil, quod eſt inconveniens, eſt licitum.* And the law, that is the perfection of reaſon, cannot ſuffer any thing that is inconvenient.

It is better, ſaith the law, to ſuffer a miſchief that is peculiar to one, then an inconvenience that may prejudice many. See more of this after in this chapter.

Note, the reaſon of this diverſitie, betweene frankalmoigne and frankmariage, ſtandeth upon a maine maxime of law, that there is no land, that is not holden by ſome ſervice ſpirituall or temporall; and therefore the donee in frankmariage ſhall do fealty, for otherwiſe he ſhould doe to his lord no ſervice at all; and yet it is frankmariage, becauſe the law createth the ſervice of fealty for neceſſity of reaſon, and avoiding of an inconvenience. But tenant in frankalmoigne doth ſpirituall and divine ſervice, which is within the ſaid maxime, and therefore the law will not cohort him to do any temporall ſervice. See the next ſection.

Et encounter reaſon. And this is another ſtrong argument in law, *nihil quod eſt contra rationem eſt licitum.* for reaſon is the life of the law, nay the common law itſelfe is nothing elſe but reaſon; which is to be underſtood of an artificiall perfection of reaſon, gotten by long ſtudy, obſervation, and experience, and not of every man's naturall reaſon; for, *nemo naſcitur artifex.* This legall reaſon *eſt ſumma ratio.* And therefore if all the reaſon, that is diſperſed into ſo many ſeverall heads, were united into one, yet could he not make ſuch a law as the law of England is; becauſe by many ſucceſſion of ages it hath beene fined and refined by an infinite number of grave and learned men, and by long experience growne to ſuch a perfection, for the gouvernment of this realme, as the old rule may be juſtly verified of it, *neminem oportet eſſe ſapientiorem legibus:* no man (out of his own private reaſon) ought to be wiſer than the law, which is the perfection of reaſon.

ſes heires devant le quart degree paſſe, &c. il ſemble que cy. Car il neſt pas ſemble quant a cel entent a tenant en frankalmoigne; pur ceo que tenant en frankalmoigne ferra, per cauſe de ſa tenure, divine ſervice pur ſon ſeignior, come devant eſt dit, et ceo il eſt charge a faite per la ley del ſaint eſgliſe, et pur ceo il eſt excuſe et diſcharge de fealtie: mes tenant en frankemariage ne ferra pur ſon tenure tiel ſervice, et ſil ne ferra fealtie, donque il ne ferra a ſon ſeignior aſcun manner de ſervice, ne ſpirituall ne temporal, le quel ſerroit inconvenient et encountre reaſon, que home ſerra tenant deſtate denheritance a un auter, et encore le ſeignior avera nul manner de ſervice de luy. (1) *Et iſſint il ſemble, que il ferra fealtie a ſon ſeignior devant le quart degree paſſe. Et quant il ad fait fealty, il ad fait touts ſes ſervices.*

nor or his heires before the fourth degree be paſt, &c. it ſeemeth that he ſhall. For he is not like as to this purpoſe to tenant in frankalmoign; for tenant in frankalmoign by reaſon of his tenure ſhall do divine ſervice for his lord, as is ſaid before, and this he is charged to do by the law of holy church, and therefore he his excuſed and diſcharged of fealty: but tenant in frankmariage ſhall not do for his tenure ſuch ſervice, and if he doth not fealty, he ſhal not do any manner of ſervice to his lord, neither ſpiritual nor temporall, which would be inconvenient, and againſt reaſon, that a man ſhall be tenant of an eſtate of inheritance to another, and yet the lord ſhall have no manner of ſervice of him. And ſo it ſeemes he ſhall do fealtie to his lord before the fourth degree be paſt. And when he hath done fealtie he hath done all his ſervices.

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

(1) *Come il ſemble.* L and M.

☞ *Continuation of the note left unfiniſhed in* 97. *a.*

As to the deans of the *new* foundation, though the king nominates by letters patent, yet *ſome*, if not *all*, of the *new* deans of *cathedral* churches are *now* deemed *preſentative* and not *donative*, the practice being to preſent the letters patent to the biſhop for inſtitution and a mandate of inſtallment. It hath indeed been a queſtion, whether they are *donative* or *preſentative*; for the underſtanding of which we ſhall ſhortly ſtate the principal facts, on which the caſe, ſo far as relates to the *deanery* of Glouceſter, depends. The new denneries were erected by Henry the Eighth under powers given by act of parliament, which alſo authorized him to make ſtatutes for their regulation by *letters patent or writing under the great ſeal.* In the charter for founding the deanery of Glouceſter, being one of the *new* foundation, the king reſerved the nomination of the deans to himſelf, and directed, that the deans and chapters ſhould be governed according to ſuch rules and ſtatutes as the king ſhould appoint by *indenture.* The king afterwards by commiſſioners named for the purpoſe formed a body of ſtatutes, amongſt which one required, that the king ſhould upon every vacancy nominate a dean by letters patent, and that he ſhould be preſented to the biſhop, and being inſtituted by him ſhould be admitted by the chapter. The commiſſioners ſigned theſe ſtatutes; but they were neither under

knights-ſervice.—It continued over males till *twenty-one*, over females till *ſixteen* or *marriage*.—When it determined, if the tenant

Sect. 139.

ET si un abbe tient de son seignior en frankalmoigne, et labbe et le covent south lour common seale alien mesmes les tenements a un seculer home en fee simple, en ceo cas le seculer home ferra fealtie a le seignior; pour ceo que il ne poit tener de son seignior en frankalmoigne. Car si le seignior ne doit aver de luy fealtie, donque il avera nul manner de service, que serroit inconvenient, ou il est seignior, et le tenement est tenus de luy.

AND if an abbot holdeth of his lord in frankalmoign, and the abbot and covent under their common seale alien the same tenements to a secular man in fee simple, in this case the secular man shall do fealty to the lord; because he cannot hold of his lord in frankalmoigne. For if the lord should not have fealtie of him, he should have no manner of service, which should be inconvenient, where he is lord, and the tenements be holden of him.

THIS case is worthy of great observation; for hereby it appeareth, that albeit the alienors held not by fealty nor any other terrene service, but onely by spirituall services and those incertaine, yet the alienee shall hold by the certaine service of fealty, (and of this opinion is Littleton, agreeable with our bookes in former authorities) for the law createth a new temporall service out of the land to be done by the alienee, wherewith the abbot was not formerly charged, for the avoyding of an inconvenience, *viz.* that the feoffee should doe no manner of service, and consequently that the land should be holden of no man. Wherein it is to be remembred, that (as hath bin said before) all the lands and tenements in England, in the hands of any subject, are holden of some lord or other, and that every tenant must do some kinde of service; and that all lands and tenements are holden either mediately or immediately of the king, for originally all lands and tenements were derived from the crowne. And it is to be observed that when the law createth any new tenure, it is the lowest, (*viz.* tenure in socage) and with the least service that can be done, and neerest to the freedome of the former service; as in this case a tenure in socage by fealty only is created by the law, which is the lowest and least service the law can create, because fealty is incident to every tenure except tenure in frankalmoigne, for if it should create any other service, it must create fealty also. And the law, according to equity and justice, giveth this fealty to the lord, of of whom the land was before holden in frankalmoigne. And lastly, the law so abhorreth an inconvenience, as that it createth out of the land a new service for avoyding thereof. It appeareth by our bookes, that a seigniory in frankalmoigne may be granted over, and consequently the tenant shall hold of the grantee by fealty only; and therefore Britton said well, that no service could be demanded of a tenant in frankalmoigne, *tant come les terres remaine en les maines les feoffees.*

31. E. 3. Cessavit 22. 33. H. 6. 67. 21. E. 4. 11. 9. Co. 123. Anth. Lowe's case. (2. Inst. 502. 3. Co. 3. b.)

(Ante 1. 2. Inst. 501.)

9. Co. 123. in Anth. Lowe's case.

42. Ass. Pl. 6. Britton 164. b.

Sect. 140.

ITEM si home graunta a cel jour a un abbe, ou a un prior, terres ou tenements en frankalmoigne, ceux parolx (frankalmoigne) sont

ALSO if a man grant at this day to an abbot, or to a prior, lands or tenements in frankalmoigne, these words (frankalmoign) are voide; for it is or-

ORdeine per lestatute. Here it appeareth by the authority of Littleton, that this is a statute, and yet the king alone speaketh, *viz. dominus rex in parliamento suo, &c. ad instantiam magnatum regni sui concessit, providit & statuit.* But

see 159. b.

under the *great seal* nor *indented*; and on account of this deviation both from the act of parliament and the commission, they were considered as invalid, and powers were given by other acts to Mary and Elizabeth successively to form other statutes. However nothing final being done under these powers, *some* of the statutes framed by Henry the Eighth's commissioners, for want of others more regularly made, were adopted; but the particular statute, which made the deanery *presentative*, was never practised *after* the Restoration, and only in one instance *before*, the deans being constituted by mere grants from the crown. In this state of things came the 6. Ann. c. 21. which established *such* of the statutes of the cathedral and collegiate churches founded by Henry the Eighth, *as had been usually received and practised in the government of the same respectively since the Restoration*, and were not inconsistent with the constitution of the church of England or the laws of the land. But this act, made to remove doubts, created a very important one; which was, whether the act confirmed the *whole* body of statutes where *any* of them had been practised since the Restoration, or only such statutes or parts of statutes as had been *individually* received. Amongst other cases, which depended on the solution of this doubt, one was the mode of constituting the dean of Gloucester; for if receiving a part of Henry the Eighth's statutes necessarily was followed with a confirmation of the whole, then the cathedral church of Gloucester being under this predicament, it was become essential to conform to the particular statute, which required a presentation of the dean to the bishop, though that form had hitherto been disregarded. It being of importance to have this point settled, the crown in 1720 referred it to Sir Philip Yorke and Sir Robert Raymond the then attorney and solicitor-general, who were of opinion, that it was intended by the act of queen Anne to confirm the whole body of statutes where any part had been received, and therefore that in the case of the particular deanery of Gloucester a presentation was become necessary; though they

Sir Rob. Raymond Sir Phil. York.

tenure was of a *subject*, the heir might enter on the lord *immediately*; but if the king had the wardship, then the heir was not

Vid. 8. Co. the Prince's caſe.

But becauſe it is *dominus rex in parliamento, &c. conceſſit*, it is as much in this caſe (being an ancient ſtatute) as *dominus rex authoritate parliamenti conceſſit.* Secondly, it is (amongſt other acts of parliament) entred into the parliament roll, and therefore ſhall be intended to be ordayned by the king, by the conſent of the lords and commons in that parliament aſſembled. Thirdly, it is a generall law, whereof the judges may take knowledge, and therefore it is to be determined by them, whether it be a ſtatute or no. (1) Now for the divers formes of acts of parliament, you may read them in the Princes caſe, *ubi ſupra.*

(Poſt 143. 2. Inſt. 500.)

Appel quia emptores terrarum. This ſtatute is called ſo; becauſe the ſtatute beginneth with theſe words, *Quia emptores terrarum.*

Nul poet aliener, &c. terres in fee ſimple de tener de luy meſme. This is juſtly inferred upon the ſtatute; but the letter of the ſtatute is, that *feoffatus teneat terram illam de capitali domino, &c.* So as by the authority of Littleton, he, that citeth a ſtatute, is not bound to recite the very words thereof, ſo long as he miſſeth not of the ſubſtance and neceſſary conſequence thereupon; and yet the ſafer way is to vouch the words of a law, as they be.

voides; pur ceo que il eſt ordeine per leſtatute, que eſt appelle quia emptores terrarum (*que leſtatut fuit fait* anno 18 Ed. 1.) *que nul poit aliener ne graunter terres ou tenements en fee ſimple, a tener de luy meſme. Iſſint ſi home ſeiſie de certaine tenements, queux il tient de ſon ſeignior per ſervice de chivaler, et a cel jour il, &c. granta per licence meſmes les tenements a un abbe, &c. en franke-almoigne, labbe tiendra immediatment meſmes les tenements per ſervice de chivaler de meſme le ſeignior, de que ſon grauntor tenoit, et ne tiendra my de ſon grantor en frankalmoigne, per cauſe de meſme leſtatute. Iſſint que nul poit tener en frankalmoigne, ſi non que ſoit per title de preſcription, ou per force de graunt fait a aſcun de ſes predeceſſors devant que meſme le ſtatute fuit fait. Mes le roy poit doner terres ou tenements en fee ſimple, a tener en frankalmoigne, ou per auters ſervices; car il eſt hors de cas del eſtatute.*

dained by the ſtatute which is called *quia emptores terrarum*, (which was made *anno* 18. *E.* 1.) that none may alien nor grant lands or tenements in fee ſimple to hold of himſelfe. So that if a man ſeiſed of certain tenements, which he holdeth of his lord by knights ſervice, and at this day he, &c. granteth by licence the ſame tenements to an abbot, &c. in frankalmoigne, the abbot ſhall hold immediately the tenements by knights ſervice of the ſame lord of whom his grantor held, and ſhall not hold of his grantor in frankalmoigne, by reaſon of the ſame ſtatute. So that none can hold in frankalmoigne, unleſſe it be by title of preſcription, or by force of a grant made to any of his predeceſſours before the ſame ſtatute was made: but the king may give lands or tenements in fee ſimple to hold in fankalmoigne, or by other ſervices; for he is out of the caſe of that ſtatute.

13. E. 3. tit. Releaſe 33. 27. H. 8. F. N. B. 211. I.

Granta per licence meſme les tenements, &c. Here Littleton ſpeaketh of a licence, or a diſpenſation within the ſaid ſtatute of *quia emptores terrarum* (and mentioneth no other ſtatute) which may be done by the king and all the lords immediate and mediate, for it is a rule in law, *alienatio, licet prohibeatur, conſenſu tamen omnium, in quo-*

they allowed the queſtion to be one of *great doubt* and *difficulty*. See Burn. Eccleſ. L. tit. *Deans* and *Chapters*. To this opinion was added the form of a preſentation; and it is preſumed, that the deanery of Glouceſter hath ever ſince been treated by the crown as *preſentative*. Probably too under the ſame ſanction the example may have been followed in reſpect to ſuch other of the *new* deaneries, as at the time of the act of queen Anne were in the ſame circumſtances; that is, had ſtatutes of doubtful authority from Henry the Eighth or any of his ſucceſſors, ſome of which between the Reſtoration and the act of Anne had been uſually practiſed, though not the particular one directing a preſentation of their deans. But whether this conſtruction of the act of Anne hath ever been judicially recognized, we cannot inform the reader. As to thoſe *new* deaneries, which had ſtatutes requiring a preſentation and uſually complied with *after* the Reſtoration, there cannot be the leaſt doubt of their being legally *preſentative*. But if there are any of the *new* deaneries, the rules and ſtatutes of whoſe churches are wholly ſilent as to preſentation, it is moſt likely that they always have been donative, and ſtill continue ſo; and we gueſs, that the church of Weſtminſter may fall under this deſcription, it being *collegiate* and not for any other purpoſe ſubject to the juriſdiction of any biſhop.——From this detail about appointing to deaneries of the new foundations, it ſeems that lord Coke was fully juſtified in ſtyling *all* of them *donative*; for it is ſaid, that none of the charters for founding the *new* deaneries mention preſentation, and that the ſubſequent ſtatutes preſcribing it were equally liable to the objection of *informality* as thoſe of the church of Glouceſter, and there was no act for eſtabliſhing them in lord Coke's time. On the other hand, biſhop Gibſon *might* be equally warranted in calling *all* the *new* deaneries *preſentative*, if we except the colleginte church of Weſtminſter; becauſe in 1713, when the *firſt* edition of his book on Eccleſiaſtical Law was publiſhed, they were become ſo by the operation of the act of queen Anne. This diſtinction of *time* did not ſtrike the biſhop, though a writer in general well informed and much to be relied on, when he animadverted on thoſe, who like lord Coke denominated the *new* deaneries *donative*. 1. Gibſ. Cod. 197.—☞ *The continuation of this note on the old and new deaneries will be found in fol.* 100. b.

(1) This obſervation on *general* or *publick* ſtatutes points at *two* important rules diſtinguiſhing between them and *particular*

or

not intitled to take poſſeſſion of the land without ſuing to the crown for livery, which was a proceſs both nice and expenſive.

See

quorum favorem prohibita eſt, poteſt fieri, and *quilibet poteſt renunciare juri pro ſe introducto:* and the licence of lords immediate and mediate in this caſe ſhall enure to two intents, *viz.* to a diſpenſation both of the ſtatute of *Quia emptore terrarum*, and of the ſtatutes of mortmaine, as Littleton here implyeth; becauſe their deedes ſhall be taken moſt ſtrongly againſt themſelves (1). But it is a ſafe and good policy in the king's licence to have a *non obſtante* alſo of the ſtatutes of mortmaine, and not only a *non obſtante* of the ſtatute of *Quia emptores terrarum.* But it appeareth by Littleton (which is a ſecret of law,) that there needeth not any *non obſtante* by the king of the ſtatutes of mortmaine, for the king ſhall not be intended to be miſconuſant of the law, and when he licenſeth expreſſely to alien an abbot, &c. which is in mortmaine, he needs not make any *non obſtante* of the ſtatutes of mortmaine, for it is apparent to be granted in mortmaine, and the king is the head of the law, and therefore *præſumitur rex habere omnia jura in ſcrinio pectoris ſui,* for the maintenance of his grant to be good according to the law, for which cauſe of purpoſe Littleton maketh no mention of any licence in mortmaine. *Diſpenſatio eſt mali prohibiti provida relaxatio, utilitate ſeu neceſſitate penſata.*

44. Aſſ. Pl. 19. 9. E. 4. b. 11. Pl. Com. 502. 503. Grendon's caſe. Vide 10. Co. 25. 26. 31. & 110. Vide Sect. 686. (5. Co. 56. 7. Co. 14.)

· *Labbe tiendra, &c. per ſervice chivaler.* For although by the death of the abbot there is neither ward, mariage, nor reliefe due, yet he holdeth by knight's ſervice, albeit the lord cannot have the fruit of it; and if the abbot, with the conſent of the covent, alien the land over to a man and his heires, there is the ward, mariage, and reliefe revived. But by preſcription (as it hath been ſaid) the ſucceſſor of an abbot may pay reliefe. An abbot or prior, &c. that holdeth lands by knights ſervice, albeit he ought not in reſpect of his profeſſion to ſerve in warre in proper perſon, yet muſt he find a ſufficient man, conveniently arrayed for the warre, to ſupply his place. And if he can find none, then muſt he pay eſcuage, &c. for his profeſſion doth not priviledge him, but that the king's ſervice in his warre muſt be done, that belongeth to his tenure.

(Ante 70. b.) Lit. fol. 20. a. (2. Ro. Abr. 518.) S. R. 2. relief 14. 3. H. 4. 2. a. (Ante 84. a.) Vide Little. fol. 20.

Nota (reader) ſince Littleton wrote, a man might either in his life time, or by his laſt will in writing [*m*] give lands, tenements, &c. to any ſpirituall body politick, or corporate, to be holden of himſelfe in frankalmoigne, or by divine ſervice, as by the ſtatute of 1 & 2 Phil. & Mariæ (which indured for twenty years) appeareth; which ſtatute, ſince that time, hath beene favourably and benignely expounded.

[*m*] 1. & 2. Ph. & Mar. c. 8. Mich. 8. & 9. Eliz. Dyer, fol. 255.

Iſſint que nul poet tener en frankalmoigne, ſi non que ſoit per title de preſcription, &c. It is to be underſtood, that a man ſeiſed of lands may at this day give the ſame to a biſhop, parſon, &c. and their ſucceſſors in frankalmoigne, by the conſent of the king, and the lords mediate and immediate, of whom the land is holden; for the rule is, *quilibet poteſt renunciare juri pro ſe introducto.*

12. E. 4. 4. 27. H. 8. 2. E. 2. avowrie 185.

So if an eccleſiaſticall perſon hold lands by fealty and certaine rent, the lord at this day may confirme [*n*] his eſtate, to hold to him and his ſucceſſors in frankalmoigne; for the former ſervices be extinct, and nothing is reſerved but that he holds of him, and ſo he did before.

[*n*] 4. E. 3. 21. 22. E. 3. 15. 38. H. 6. 25. Litt. cap. confirmat. 123.

Mes le roy poet, &c. car il eſt hors de caſe del ſtatute.

It is cleere that the king is out of the caſe of the ſtatute; for the ſtatute is *quod feoffatus teneat terram illam, &c. de capitali domino feodi, &c.* and this cannot be intended of the king, who is ſuperior to all, and inferiour to none, but where the king is bound by acts of parliament, and where not, *vide* 11 Co. 66. Magdalen Colledge caſe.

11 Co. 66. Magdalen Colledge caſe.

Sect. 141.

ET nota que nul poit tener terres ou tenements en frankalmoigne, forſprise del grantor, ou de ſes heires. Et pur ceo il eſt dit, que ſi ſoit ſeignior meſne et tenant, et le tenant eſt un abbe, que tient

AND note that none may hold lands or tenements in frankalmoigne, but of the grauntor, or of his heires. And therefore it is ſaid, that if there be lord meſne and tenant, and the tenant is an abbot, which

FOrſprise del grantor, ou de ſes heirs.

The tenure in frankalmoigne is an incident to the inheritable blood of the grantor, and cannot be transferred nor forfeited to any other, no more than a founderſhip of a houſe of religion, (which is intended to be in frankalmoigne, or homage anceſtrel, or the writ of *contra formam feoffamenti*, or the writ of *contra*

14. E. 3. tit. Meſne 7. 14. H. 3. tit. Diſclaim. Br. 33. 15. E. 3. confirm. 8. 27. H. 8. b. Temps E. 1. garr. 90. 45. E. 3. 23. 47. H. 3. garr. 99. 11. H. 4. 52. 14. H. 4. 5. 10. H. 7. 11. 28. Aſſ. 33. 18. E. 3. 18. 22. E. 3. 18. Cerody Broke 5. 22. H. 6. 50. 4 E. 2. avowry 201. 202. 19. E. 3. ibid. 122. 11. E. 3. ibid. 100. 30. H. 6 7. 33. H. 8 Dyer 51. F. N. B. 16. F. N. B. 211. c.

3. Lo. 3. b. [illegible]
7. Co. 13. a.

or *private* ſtatutes.—According to the *firſt*, which relates to their ſeveral *degrees of notoriety*, the judges may and ought to take notice of *public* acts without pleading; but *private* acts *muſt* be pleaded. But there are ſome exceptions to *both* parts of this rule. See Law of *Niſi Prius* ed. of 1775. p. 222. and 1. Sid 209.—The *ſecond* rule imports a difference in the *mode of trial*; for the exiſtence of a *public* act muſt be tried by the judges, who are to inform themſelves in the beſt manner they can; but a *private* act may be put in iſſue and ſhall be tried by the *record.* See Hal. Hiſt. C. L. 15. and Com. Dig. *Parliament* R. 5.—A *third* difference, which hath been taken between a *general* and a *particular* act, is, that the *latter* will not bind *ſtrangers*, though it is without a *ſaving* of their rights. However well founded this laſt difference *may* be, it certainly is uſual in *modern private* acts to inſert a ſpecial ſaving clauſe, explaining how far the rights of ſtrangers are intended to be affected.—A *fourth* difference relates to *offering ſtatutes in evidence to a jury*; for it is ſaid, that a *public* act, printed by the *king's printer or other perſon authorized by the crown*, is good evidence to a jury; but that of a *private* act, there muſt be either an *exemplification under the great ſeal*, or *a copy ſworn to be compared with the parliament roll.* Some authorities however do not correſpond with this laſt difference; and others except out of it *private* acts concerning a whole county. See Vin. Abr. *Evidence* A. b. 1. Law of Niſi Pri. ed. 1775. p. 225. 1. Stra. 446. It ſhould alſo be remarked, that there is a difference between proving private acts *to a jury*, and proving them on the iſſue of *nul tiel record*, which never goes to a jury; nothing leſs than an *exemplification under the great ſeal* being ſufficient in the latter caſe, 2. Salk. 566. For theſe and other differences, between *general* and *particular* ſtatutes, ſee further in Vin. Abr. *Statutes* D. E. 2. 3. and Hatt. Treat. on Stat. cap. 2. p. 11. Though the book laſt cited is publiſhed with the name of Sir Chriſtopher Hatton, lord chancellor to queen Elizabeth, ſome doubt, whether he was really the author. Nicholſ. Engl. Hiſtor. Libr. 2d. ed. 192. However it is at all events a treatiſe well worth conſulting. As to the different forms of ſtatutes, beſides the Prince's caſe in 8. Co. ſee Pryn. on 4. Inſt. 13. Hal. Hiſt. Com. L. 13. Vin. Abr. *Statutes* A. Com. Dig. *Parliament* R. 3. and the Preface to Ruffhead's edit. of Stat.

(1) Here lord Coke explains the king's power of granting licences to alien in Mortmain, notwithſtanding the old ſtatutes againſt

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See ante 77. a.—It had a preference with reſpect to the cuſtody of the infant's body over every other ſpecies of ward ſhip,

15. E. 3. confirm. 8.

contra formam collationis, or any other incident to their inheritable blood. But it is no incident inſeparable; for the lord may releaſe to the tenant in frankalmoigne, and then the tenure is extinct, and he ſhall hold of the lord paramount by fealty, as in the caſe of Littleton, Sect. 139.

Ou de ſes heires. Here (or) hath the ſenſe of (and); for a man cannot at this day grant lands in taile and reſerve a rent to his heires, and exclude the grantor himſelfe; for the heire cannot take any thing in the life of the anceſtor, neither can the heire take any thing by deſcent, when the anceſtor himſelfe is ſecluded. But if a man had granted lands at the common law to hold of his heires, theſe words (to hold of his heires) are void, and he ſhall hold of the grantor as he held over, which he ſhould have done, if he had made no reſervation at all.

de ſon meſne en frankalmoigne, ſi le meſne devy ſans heire, donque le meſnaltie deviendra par eſcheate al dit ſeignior paramount, et labbe adonque tient de luy immediate per fealtie tantum, et ferra a luy fealty; pur ceo que il ne puit tener de luy en frankalmoigne, &c.

holdeth of his meſne in frankalmoigne, if the meſne die without heire, the meſnaltie ſhall come by eſcheate to the ſaid lord paramont, and the abbot ſhall then hold immediately of him by fealty only, and ſhall do to him fealty; becauſe he cannot hold of him in frankalmoign, &c.

Vide 15. E. 4. (2. Ro. Abr. 447. contra.—Hob. 130. Poſt 143. 213. b.)

33. E. 3. tit. Annuity 52. 3. Aſſ. Pl. 8. &c.

And albeit Littleton ſaith, that no man can hold lands in frankalmoign but of the grantor or his heires, yet might an abbot by aſſent of his covent, or a biſhop with aſſent of his chapter, and ſuch like, by licenſe as is aforeſaid, have given lands in frankalmoigne, to hold of them and their ſucceſſors; and as Littleton himſelfe agreeth, the king may give land in frankalmoigne, in which caſe the land ſhall be holden of him, his heires and ſucceſſors.

Et pur ceo eſt dit; ſi ſoit ſeignior meſne et tenant, et le tenant eſt un abbe, &c. By this it appeareth, that if the ſeigniory be transferred by an act in law to a ſtranger, and thereby the purity is altered, that the tenure in frankalmoigne is changed to a tenure in ſocage by fealty, as well as it appeareth before when the ſeigniory or tenancy is granted to another, and the law in this caſe alſo createth a new fealty, wherewith the land was not charged before.

2. E. 4. 46. (2. Ro. Abr. 501. 513.) 7. E. 4. 12. a.

Donques le meſnaltie deviendra per eſcheat al dit ſeignior paramont. This new tenure, created by law, ſhall upon the eſcheate drowne the ſeigniory; for alwaies the ſeignory neerer to the land drownes the ſeigniory that is more remote off: and yet the lord in this caſe, to whom the meſnalty is eſcheated, ſhall hold by the ſame ſervices that he held before the eſcheat.

Sect. 142.

HOME de religion. And yet this caſe extendeth to all eccleſiaſticall perſons, that hold in frankalmoigne, be they ſecular or regular; for the meſne ought to acquite all of them: for they be bound [a] to make praiers for their founder, and his heires; and in conſideration of thoſe prayers, the founder, &c. is bound to pay to the chiefe lord all rents and ſervices iſſuing out of that land, as it appeareth by that which followeth.

[a] Pl. Com. 306. b. in Shorington's caſe. 33. H. 6. 6. 39. H. 6. 29. 14. E. 3. Meſne 7.

De luy acquiter.

ET nota, que lou tiel home de religion tient ſes tenements de ſon ſeignior en frankalmoign, ſon ſeignior eſt tenus per la ley de luy acquitter de cheſcun manner de ſervice, que aſcun ſeignior paramont de luy voet aver ou demander de meſmes les tenements; et ſil ne

AND note, that where ſuch man of religion holds his tenements of his lord in frankalmoigne, his lord is bound by the law to acquite him of every manner of ſervice, which any lord paramont will have or demand of him for the ſame tenements; and if he doth not acquite *luy*

againſt ſuch alienations, on a principle, which makes the licence rather the waiver or remiſſion of a forfeiture, than a diſpenſation. The licence being conſidered in the former way, it is attributing to the king no greater power as lord paramount, than ſubjects, being meſne lords, may exerciſe in reſpect of the forfeitures to which they are intitled on alienations in mortmain. In other words it is conſtruing the ſtatutes, ſo as not to bring the caſe of a licence within them; and conſequently diſpenſation became unneceſſary. It ſhould alſo be remembered, that the king's power of granting ſuch licences ſeems recognized by a ſtatute of Edward the Third. See 18. E. 3. ſt. 3. c. 3. However the pretended power of ſuſpending ſtatutes by regal authority, without conſent of parliament, being declared illegal at the Revolution; and it having been uſual to grant licences to alien in mortmain in a manner, which imported an exerciſe of ſuſpending or diſpenſing power, that is, with a *non obſtante* of the ſtatutes of Mortmain and *quia emptores*; under theſe circumſtances a jealouſy of any thing, in the leaſt connected with an aſſumption of diſpenſing power, might have influenced many to have confounded ſuch licences with diſpenſation; and therefore it was deemed prudent to give them a parliamentary ſanction. See 7. and 8. W. 3. c. 37. It is obſervable, that the ſtatute made for this purpoſe authorizes the king to grant mortmain-licences, without any regard to the perſon of whom the lands were held; and declares,

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ſhip, except only that of the *father* where the infant was his *heir apparent*; even the *mother* being excluded.—It intitled the lord

luy acquita pas, mes ſuffra luy deſtre diſtraine, &c. donque il avera envers ſon ſeignior un briefe de meſne, et recovera envers luy ſes dammages et ſes coſtes de ſon ſuit, &c.

him, but ſuffereth him to be diſtreyned, &c. he ſhall have againſt his lord a writ of meſne, and ſhall recover againſt him his damages and coſts of ſuit, &c.

acquiter is compounded of *ad*, and the old verbe *quietare*, and ſignifieth in law [*b*] to diſcharge, or keepe in quiet, and to ſee that the tenant be ſafely kept from any entries, or other moleſtation for any manner of ſervice, iſſuing out of the land to any lord, that is about the meſne. [*c*] And hereof commeth [*d*] acquitall, and *quietus eſt*, (that is) that he is diſcharged; and he, that is diſcharged of a felony, &c. by judgement, is ſaid to be acquitted of the felony, *acquietatus de felonia*; and if he be drawne in queſtion againe, he may plead [*e*] *auterfoits acquite*. And therefore if ſuch a tenant, as Littleton here ſpeaketh of, be diſtrained by any lord paramount, the meſne (to keep the tenant quiet) may put his beaſts in the pownd, inſtead of the beaſts of the tenant.

[*b*] Fleta lib. 2. ca. 43. Britton fol. 58. 59. Vide hereafter in this Sect. in briefe de Meſne.

[*c*] Vide Sect. 142. 540.

[*d*] 8. E. 2. Corone 424. 20. E. 2. Ibid. 232. Stanf. Pl. Corone 105.

[*e*] 4. E. 3. 35. 17. E. 3. 44. 7. H. 4. 18. 34. H. 6. 47. 13 E. 4. 6. F. N. B. 136. 9. Co. 110. 111. in Treſham's caſe.

There be three kinds of acquitals. 1 An acquitall by Deed 2. An acquitall by preſcription. 3. An acquitall by tenure: and by tenure foure manner of wayes. 1. By owelty of ſervices, for ſervice acquits ſervice. 2. Tenure in frankalmoigne, whereof Littleton here ſpeaketh. 3. Tenure in frankmariage. 4. Tenure by reaſon of dower.

3. E. 3. 14. 77. 5. E. 3. 11. 4. H. 6. 28. 39. E. 3. 19. 11. H. 4. 52. 12. H. 4. 9. 14. H. 4. 17. F. N. B 136. b. h. 39. H. 6. 30. 33. H. 6. 7. F. N. B. 135. m. 4. E. 4. 35. 12. H. 4. 9. 28. E. 3. 95. 17. E. 3. 39

De cheſcun manner de ſervice. [*f*] And yet not of ſervices onely, as homage, fealty, rent workes, and other ſervices, but alſo of improvement of ſervices, as if he be diſtreyned for reliefe, *Aide pur filemarier*, *aide pur faire fitz chivaler*, *&c.* Alſo for ſuite ſervice to a hundred. [*g*] But for ſuit reall in reſpect of reſiance within any hundred, leet, or turne, the meſne ſhall make no acquitall, for that is in reſpect of his perſon and reſiancy.

[*f*] 39. H. 6. 31. a. 9. E. 4. 27. F. N. B. 136 m. 17. E. 2. Meſne. 5. E. 3. 49.

* Bracton lib. 2. fol. 84.

[*g*] 4. E. 3. 42. For this writ ſee the regiſter fol. and F. N. B. fol. 135. Mirror cap. 2. ſect. 13. Bracton lib. 2. fol. 84. Britton fol. 58. Fleta lib. 2. ca. 43. Weſtm. 2. cap. 9.

Brieſe de meſne. *Breve de medio*, a writ of meſne, ſo called by reaſon of the words of the writ of meſne, which are, *Unde idem A. qui medius eſt inter C. et præfatum B. A*, who is meſne between C. that is the lord paramount, and B. that is the tenant paravaile. And note, that there be ſix writs in law, that may be maintained, *quia timet*, before any moleſtation, diſtreſſe, or impleading, as 1. A man may have his writ of *meſne* (whereof Littleton here ſpeakes) before he be diſtreyned. 2. A *warrantia cartæ*, before he be impleaded. 3. A *monſtraverunt*, before any diſtreſſe or vexation. 4. An *audita querela*, before any execution ſued. 5. A *curia claudenda*, before any default of incloſure. 6. A *ne injuſtè vexes*, before any diſtreſſe or moleſtation. And theſe be called *brevia anticipantia*, writs of prevention.

Et recovera vers luy ſes damages. It is to be knowne, that there be two ſeverall judgements in a writ of meſne, one at the common law, another by the ſtatute of W. 2. ca. 9. At the common law he ſhall have judgment to recover his acquitall, and if he be diſtreyned or damnified, his damages and coſts: and the proceſſe at the common law was ſummons, attachment and diſtreſſe infinite, in the ſame county where the writ is brought. * The judgement by the ſaid ſtatute of W. 2. is a forejudger of the meſnalty, and that in two ſeverall caſes. One upon proceſſe given by the ſaid ſtatute, *viz.* Summons, attachment, and grand diſtreſſe, and if he commeth not, and the writ be returned, he ſhall be forjudged. The other caſe is, where the tenant recovereth his acquitall in a writ of meſne, if he be not acquited afterwards, he ſhall have a writ of *diſtringas ad acquietandum* againſt the ſame meſne, and if he commeth not, he ſhall be forejudged by his default of the meſnality; and ſo if he commeth, and it be found againſt him by verdict, he ſhall be forejudged: but forjudger in that caſe is not given againſt his heire, for that the ſtature ſpeaketh onely of the meſne, and not of his heires. And the judgment in caſe of forjudgement is, *quod T. (le meſne) amittat ſervitia de A. (le tenant) de tenementis prædictis, et quod omiſſo prædicto T. præfat' R. (le ſeignior paramount) modo ſit attendens et reſpondens per eadem ſervitia per quæ T. tenuit.* The ſaid ſtatute, in caſe of forjudgement, doth not bind a feme covert; and yet if ſuch a judgement be given againſt a baron and feme, it is not void, but erroneous, and to be reverſed in a writ of error. And ſo a forjudgement againſt a tenant in taile ſhall binde the iſſue in taile in an avowry, untill he reverſeth it by error. If two joyntenants bring a writ of meſne, and the one is ſummoned and ſevered, the other cannot forjudge the meſne; for he ought to be attendant to the lord paramount, as the meſne was, and that cannot he be alone. And ſo it is if there be two joyntenants meſnes, and in a writ of meſne brought againſt them, one maketh default, and the other appeares, there can be no forjudger.

W. 2. ca. 9. Vide 8. Co. 134. Mary Shepley's caſe.

* Bracton lib. 2. fol. 84. Fleta lib. 2. cap. 43.

46. E. 3. 31. 18. E. 2. tit Meſne. F. N. B. 136. 2. H. 4. 7. 17. E. 3. Contra formam Collat. 1. F N. B. 121.

(Poſt 233. b.) 7. E. 3. 41. tit. Meſne 18. 9. E. 2. ibid 67. 14. E 2 ibid. 70 9. Co. 73. b. Doct. Hatley's caſe. (10. Co. 134.)

If

declares, that they ſhall not be ſubject to *any* forfeiture. Before this laſt act the king's licence only prevented the forfeiture to himſelf; and if there was any meſne lord, he might take advantage of the mortmain ſtatutes notwithſtanding the royal licence. See Fitzh. Nat. Br. 221. O. But the act of William ſeems to be expreſſed, ſo as to *extend* the operation of the king's licence, and to render it effectual *univerſally*, by preventing a forfeiture to other lords as well as to the king himſelf. Another thing deſerving of notice is, that the ſtatute is quite ſilent as to the writ of *ad quod damnum*; which anciently was thought an eſſential preliminary to the licence, in order that the king might know what prejudice would ariſe to himſelf or others from granting it. Fitzherbert indeed tells us, that in his time it was become a common practice to purchaſe licences to alien in mortmain without ſuing an *ad quod damnum*, and inſtead of it to add to the patent, granting the licence, ſpecial words to ſignify that it ſhould be good without any writ. But he adds, that it ſeems dubious, whether ſuch patents were good, if they turned out to be prejudicial and diſadvantageous to the king or others. See Fitzh. N. B. 222. D. Whether ſince the ſtatute of William writs of *ad quod damnum* previous to licences from the crown to alienate in mortmain are neceſſary, may deſerve conſideration;

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lord to make a ſale of the marriage of the infant, ſubject only to the reſtriction of not *diſparaging*; and if the infant re-

fuſed

If the tenant be disseised, and the disseisor in a writ of mesne forjudge the meane, this shall not bind the disseisee. And so if the mesne be disseised, and a forjudgement is had against the disseisor, this doth not bind the disseisee; for the words of the said statute are, *Quando tenens sine præjudicio alterius quam medii attornare se potest capitali Domino.*

But if the daughter, the sonne being *in venter sa mere*, be forjudged, it shall bind the son that is borne afterwards; because he had no right at the time of the forjudgment. And so if the tenant enter in religion, and his heire forejudgeth the mesne, and then the ancestor is deraigned, he shall be bound *causa qua supra.* If there be lord, prior mesne, and tenant, the mesne cannot be forjudged; because he alone can doe nothing to the prejudice or the disherison of his church: and the like law is of a bishop, parson, and the like.

16. E. 3. Judgm. 117. (7. Co. 8. a.)

W. 2, ca. 9.

No forjudgement can be, but when there is but one meane betweene the lord distreyning and the tenant; because the tenant, upon the forjudgement, cannot be attendant to the lord distreyning, in respect there is a meane between them, and so the said statute provideth for in expresse termes.

Nota, the plaintife, in a writ of mesne, may chuse either processe at the common law, or upon the said statute of W. 2. Forjudgment is called *forisjudicatio*, and he that is forejudged *foris judicatus.* And Bracton hath this writ, *rex vicecomiti, &c. et non permittas, quod A. capitalis dominus feodi illius habeat custodiam hæredis, quia in curia nostra foris judicatur de custodia, &c.* Fleta calleth it *abjudicationem*, and thereupon commeth *abjudicatus*; for he saith, *Post proclamationem, &c. factam, abjudicetur medius de feodo et servitio suo* (1).

50. E. 3. 23. F. N. B. 137. Bract. l. 4. 256. b. Brit. f. 58. b. Flet. li. 2. ca. 43.

CHAP. 7. Sect. 143.

Homage Auncestrel.

PER title de prescription en le tenancy, en le sanke le tenant, et auxy en le seignior en le sanke le seignior. Here Littleton doth not define what homage auncestrell is, but putteth an example in one case. For in the 146. Section, it appeareth, that blood is not alwayes necessary on the lord's side. In this example here put, there must be a double prescription, both in the blood of the lord, and of the tenant, and therefore I think there is little or no land at all at this day, holden by homage auncestrel.

9. H. 3. Vouch. 277. 47. H. 3. Garr. 99. Temps E. 1. Garr. 90. 4. E. 2. Vouch. 245. 45. E. 3. 43. 11. H. 4. 50. 4. H. 6. 26.

And hereof it is sayd, *Autant est le seignior tenus a son homage, come le homage a son seignior, forsque solement en reverence.* And herewith agreeth Bracton, *Est tanta et talis connexio per homagium inter dominum et tenentem, quod tantum debet dominus tenenti, quantum tenens domino, præter solam reverentiam.*

Brit. fol. 170. a.

Bract. fol. 78. Glanv. li. 9. ca. 4. 5. 6.

Trait a luy garranty

TENURE per homage ancestrel est, lou un tenant tient sa terre de son seignior per homage, et mesme le tenant et ses auncestors, que heire il est, ont tenus mesme le terre del dit seignior et de ses auncestors, que heire le seigniour est, de temps dont memorie ne court, per homage, et ont fait a eux homage. Et ceo est appel homage auncestrel, per cause de continuance, que ad este, per title de prescription, en le tenancie en le sanke le tenaunt, et auxy en le seignio-

TENANT by homage auncestrel is, where a tenant holdeth his land of his lord by homage, and the same tenant and his auncestours, whose heire he is, have holden the same land of the same lord and of his auncestors, whose heire the lord is, time out of memorie of man, by homage, and have done to them homage. And this is called homage auncestrell, by reason of the continuance, which hath beene, by title of prescription, in the tenancie in the bloud of the tenant, and also in the seigniorie in

rie

sideration; for which purpose it may be material to inquire, what the practice hath been —Since writing the former part of this note, we are well informed, that writs of *ad quod damnum* have not been usual on granting mortmain licences since the statute of William. *See.* [illegible]

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

☞ *Continuation of the note concerning the old and new deaneries, which was left unfinished in fol.* 98. b.

What we have hitherto observed, as to the manner of constituting the *old* and *new* deans, must be confined to *England*; those of *Wales* and *Ireland* being under different circumstances, and therefore reserved for a separate consideration.

Of

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fused the marriage tendered by the lord, or married *after* such a tender and against the lord's consent; in the former case, the

rie en le ſanke le ſeignior. Et tiel ſervice de homage anceſtrel traite a luy garrantie, ceſtaſcavoir, que le ſeignior, que eſt en vie et ad receive le homage de tiel tenant, doit garranter ſon tenant, quant il eſt implede de la terre tenus de luy per homage anceſtrel.

the blood of the lord. And ſuch ſervice of homage anceſtrell draweth to it warrantie, that is to ſay, that the lord, which is living and hath received the homage of ſuch tenant, ought to warrant his tenant, when he is impleaded of the land holden of him by homage anceſtrel.

Hereby appeareth, what a reverend reſpect the law hath to ancient inheritances continued in the blood of the lord and of the tenant; for in this example put, if the continuance hath not bin in the blood of both ſides, no warrantie belongeth to homage anceſtrel; but if ancient continuance hath been on both ſides, [*m*] then ſuch homage anceſtrell draweth to it warranty; ſo as ancient continued inheritance on both parties hath more priviledge and account in law, then inheritances lately, or within memory acquired.

Vide Britton ubi ſupra. 14. H. 6. 25. 18. H. 6. 2. b. Glanvil. lib. 9. c. 4. 5. and 6. 9. H. 3. Voucher 277. 47. H. 3. Voucher 270. 271. 43. E. 3. 3. a.

(F. N. B. 134. f.)

[*m*] See the ſecond part of the Inſtitutes upon the 6th chapter of the ſtatute of Bigamis.

(Poſt 384 a.)

If the lord grant the ſervices of his tenant by homage anceſtrel, the tenant ſhall not be compelled in a *per quæ ſervitia* to atturne, unleſſe the conuſee will grant in court to warrant the land unto him. 18. H. 6. 2. b. per Newton.

If the tenant vouch by force of this warrantie in law, it is a good counterplea, that the tenant (or any one of his anceſtors) *receſſit de ſervitio ſuo & fecit ſervitium ſuum A. B. ſine aliqua coactione de ſua propria voluntate.* 9. H. 3. voucher 277.

Et ad receive homage de tiel tenant. [*a*] So as before homage received, the tenant could not abſolutely bind the lord to warranty, and therefore of ancient time there lay [*b*] a writ *de homagio capiendo*, for the tenant againſt the lord, to compell him to receive his homage for the benefit of his warranty. Which writ you ſhall read in Bracton and [*c*] Britton, and the proceſſe, and manner of triall thereupon, and the ſame you ſhall finde in 47. H. 3.

[*a*] 9. H. 3. Voucher 277. Temps E. 1. Gar. 90. 45. E. 3. 23.

[*b*] Glanvil. lib. 9. c. 4. 5. and lib. 1. cap. 3. Bracton lib. 2. fol. 83.

[*c*] Britton fol. 172. 173. 47. H. 3. garrantie 99.

Sect. 144.

ET auxy tiel ſervice per homage auncestrel traite a luy acquital. ſ. que le ſeignior doit acquiter le tenant envers touts auters ſeigniors paramont luy de cheſcun manner de ſervice.

AND alſo ſuch ſervice by homage anceſtrell draweth to it acquittall, ſ. that the lord ought to acquite the tenant againſt all other lords paramont of him of every manner of ſervice.

Trait a luy acquital. Of acquitall ſomewhat hath beene ſaid in the chapter of Frankalmoigne.

Sect. 142. and 540. (Ante 100.)

Sect. 145.

ET il eſt dit, que ſi tiel tenant ſoit emplede per un præcipe quod reddat, &c. *et il vouche a garrantie ſon ſeignior, que vient eins per proces, et demanda del tenant que il ad de luy lier a*

AND it is ſaid, that if ſuch tenant be impleaded by a *præcipe quod reddat, &c.* and vouch to warrantie his lord, who commeth in by proceſs, and demands of the tenant what he hath to binde

UN præcipe quod reddat. This is underſtood of the king's writ directed to the ſherife of the county where the land lyeth, whereby the ſherife is authoriſed to command the tenant of the land to yeeld the ſame to the demandant; and of theſe words of the writ (*præcipe quod reddat*) the writ is ſo called. Writs of

Of the *four* Welſh cathedrals, *two* are without deans; or rather the dignities of biſhop and dean unite in the ſame perſon, the biſhop being deemed *quaſi decanus*, and having, it is ſaid, both an epiſcopal throne and a decanal ſtall allotted to him in the choir. The cathedral churches of St. David's and Landaff are of this kind. St. Aſaph and Bangor, the other two Welſh cathedrals, have the dignity of dean diſtinct from that of biſhop; but the patronage of both deaneries is in the reſpective *biſhops*, they being neither elective by the *chapter*, nor donative by the *crown*. See Ect. Theſaur. ed. of 1742. and Will. Parochial. Anglic.

In reſpect to *Ireland*, as we are informed, before the Reformation the deaneries of the cathedral churches there were elective by the reſpective chapters, under a *congè d'èlire* from the crown, in much the ſame manner as the *old Engliſh* deaneries. But ſince the Iriſh act of the 2d of Elizabeth, which takes away the election of biſhops in Ireland and declares them wholly donative by the king, and hath never been repealed as the Engliſh ſtatute of Edward the Sixth to the ſame effect was, the form of electing to the *old* deaneries hath been alſo diſcontinued, and the king appoints to them by letters patent as to biſhopricks. This change, ſo far as regards the Iriſh old deaneries, not having yet had a parliamentary ſanction, its legality depends on a notion, that the patronage of deaneries as well as of biſhopricks was an ancient right of the crown, that the election by the chapter was a mere ceremony, and that the ſtatute for putting an end to it in the caſe of the biſhopricks was a proviſion of caution and

the infant was liable to the payment of a ſum equal to the value of the marriage, that is, to the profit which the lord

(Post 139. b.) Regist. 159.

of *præcipe* be of foure kindes, *præcipe quod reddat*, *præcipe quod faciat*, *præcipe quod permittat*, et *præcipe quod non permittat*, &c. as appeareth by the regiſter.

Et il vouche a garrantie. *Avoucher*, (in Latin *vocatio*, or *advocatio*) is a word of art, made of the verbe *voco*, and is in [d] the underſtanding of the common law, when the tenant calleth another into the court that is bound to him to warrantie, that is, either to defend the right againſt the demandant, or to yeeld him other land &c. in value, and extendeth to lands or tenements of an eſtate of freehold or inheritance, and not to any chattel real perſonall or mixt, ſaving only in caſe of a wardſhip granted with warranty (as ſhall be ſaid more at large in the chapter of warranties) for in the other caſes concerning chattels, the partie, if he hath a warrantie, ſhall not vouche, but have his action of covenant, if he hath a deed, or if it be by *parol* then an action upon his caſe, or an action of deceipt, as the caſe ſhall require. Now ſeeing that one Latin, French, or Engliſh word, can have this particular ſignification, therefore the common lawyer (that I may ſpeake once for all) is driven, as the profeſſors of other liberall ſciences uſe to doe, to uſe ſignificant words framed by art, which are called *vocabula artis*, though they be not proper to any language. He that voucheth is called the vouchor *vocans*, and he that is vouched is called vouchee *warratus*. [e] The proces, whereby the vouchee is called, is a *ſummoneas ad warrantizandum*, whereupon if the ſherife returneth that the vouchee is ſummoned, and he make default, then a [f] *Magnum cape ad valentiam* is awarded, when if he make default againe, then judgement is given againſt the tenant, and he over to have in value againſt the vouchee. If the vouchee doe appeare, and after make default, then *parvum cape ad valentiam* is awarded, and if he make default againe, then judgement as before. But if the ſherife returne, that the vouchee hath nothing, then after writs of *alias* and *pluries*, a writ of *ſequatur ſub ſuo periculo* ſhall be awarded; and if the like returne be made, then ſhall the demandant have judgement againſt the tenant; but he ſhall not have judgement to recover in value, becauſe the vouchee was never warned, and it appeareth, that he hath nothing. But in the grand *cape ad valentiam*, it appeareth that he hath aſſets, and his making default after ſummons is an implyed confeſſion of the warranty. And it is called a *ſequatur ſub ſuo periculo*; becauſe the tenant ſhall loſe his land

[d] Mir. cap. 5. ſect. 1. and 5. Bract. li. 5. fo. 380. 381. Brit. c. 75. de Gar. Vouch. Fleta l. 6. c. 23, 24, 25, 26. &c. optime. Lamb. Expli. Verb. Advocare.

(Post 365. 389. Hob. 3. 28. Noy 231. 2. Ro. Abr. 738.)

(Cro. Jam. 307.)

[e] V. Reg. Jud. for all theſe judiciall writs.

[f] V. Vet. N. B. 179. 186. 39. E. 3. 28. 14. H. 6. 7. 17. E. 3. 41. 3. H. 4. 4. 11. H. 4. 72. 45. E. 3. 19. F. N. B. 134. 135. (Poſt. 393. a.)

garranty, et il monſtre, comment il et ſes aunceſters, quel heire il eſt, ount tenus ſa terre del vouchee et de ſes aunceſters de temps dont memorie ne curt; et ſi le ſeignior, que eſt vouche, ne avoit reſceive pas homage del tenant, ne daſcun de ſes aunceſters, le ſeignior (ſil voit) poit diſclaimer en le ſeigniorie, et iſſint ouſte le tenant de ſon garrantie. Mes ſi le ſeignior, que eſt vouch, ad receive homage de le tenant, ou de aſcun de ſes aunceſters, donques il ne diſclaimera, mes il eſt oblige per la ley degarranter le tenant; et donque ſi le tenant perd ſa terre en default del vouchee, il recovera en value envers le vouchee de terres et tenements, que le vouchee avoit al temps de le voucher, ou unques puis.

him to warranty, and he ſheweth, how he and his anceſtors, whoſe heire he is, have holden their land of the vouchee and of his anceſtors time out of minde of man; and if the lord, which is vouched, hath not received homage of the tenant, nor of any of his anceſtors, the lord (if he will) may diſclaime in the ſeigniory, and ſo ouſte the tenant of his warranty. But if the lord, who is vouched, hath received homage of the tenant, or of any of his anceſtors, then he ſhall not diſclaime, but he is bound by the law to warrant the tenant; and then if the tenant loſeth his land in default of the vouchee, he ſhall recover in value againſt the vouchee of the lands and tenements, which the vouchee had at the time of the voucher, or any time after.

and not one of neceſſity; and this notion, little conſonant as it may appear to ſome of the facts we have ſtated in our hiſtorical account of the *old* Engliſh deaneries, is not only ſupported by practice ſince the reign of Elizabeth, but ſeems to have been *judicially* recognized and acted upon in the caſe of the Iriſh biſhoprick already cited from Croke James and other books. See ante 96. b. in the notes. Such, we are told, is the ſtate of the patronage of the Iriſh *old* deaneries *in general*; but it muſt be added, that the right of the crown over *one* or *two* of them, which either are or are ſuppoſed to be under peculiar circumſtances, is denied by the chapters. Suits on this ſubject have been depending between the crown and the chapter of *St. Patrick*, one of the two cathedrals of the archbiſhoprick of Dublin; the crown claiming the deanery as a royal *donative*, and the chapter inſiſting that the dean is *elective* by them on a *congè d'elire*, not from the *king*, but from the *archbiſhop of Dublin*, and that it is ſo in the true ſenſe of the word, and not in *name* only like our Engliſh deaneries of the old foundation. See in 17. E. 3. 40. a caſe in which the deanery of York is pleaded to be elective in this form. One amongſt other grounds, on which the chapter are ſaid to defend their title, is, that the deanery was founded by an archbiſhop of Dublin. See War. Irel. by Harr. vol. 1. p. 301. But it ſeems, that both this fact and the inference from it are denied on the part of the crown. We have alſo heard, that the chapter of *Kildare*, which is another of the *Iriſh old* deaneries, claim a right of electing their own dean in the ſame way. As to the *Iriſh new* deaneries, we are told that all of them are unqueſtionably *royal donatives*. The only one, about which there hath

lord might have made by the ſale of it; in the latter caſe, the heir *female* paid the ſame ſum as for a refuſal, but the heir

land without any recompence in value, unlesse he upon that writ can bring in the vouchee to warrant the land unto him : and if, at the *sequatur sub suo periculo*, the tenant and the vouchee make default, and the demandant hath judgment against the tenant, and after brings a *scire facias* to have execution, the tenant may have a *warrantia cartæ*, and if he were impleaded by a stranger, he may vouche againe ; but if he had judgment to recover in value, he shall never have a *warrantia cartæ*, or vouche againe, for by this judgement to recover in value he hath benefit of the warrantie. And you shall finde in bookes a recovery with a single voucher, and that is when there is but one voucher; and with a double voucher, and that is when the vouchee voucheth over, and so a treble voucher, &c. Againe, you shall finde there also a foraine voucher, and that is, when the tenant, being impleaded within a particular jurisdiction, (as in London or the like) voucheth one to warranty, and prayes that he may be summoned in some other county out of the jurisdiction of that court. This is called a foraine voucher, but might more aptly be called a voucher of a forainer *de forinsecis vocatis ad warrantizandum*. Note, that by the civill law every man is bound to warrant the thing that he selleth or conveyeth, albeit there be no expresse warranty; but the common law bindeth him not, unlesse there be a warranty, either in deed or in law for *caveat emptor*, as shall be said more at large in the chapter of warrantie in the third booke.

(Post. 393.) Glouc. ca. 12. F. N. B. 6. c, (Cro. Jam. 4. 1. Ro. Abr. 96. F. N. B. 94.)

Le seignior (sil voet) poet disclaymer en le seigniorie. *Disclaimer, disclamare*, is compounded of *de* and *clamo*, and signifieth utterly to renounce the seignorie.

Brit. 174.

[*a*] Note there be divers kinds of disclaymer, that is to say, a disclaimer in the tenancie; a disclaymer in the bloud; and a disclaymer in the seigniorie; whereof Littleton here putteth his case.

[*a*] 47. H. 3. Disclaim. 35. 16. H. 7. 1. 20. E. 2. tit. Nuper Ob. 14. F. N. B. 197. & 151. b. 45. E. 3. 19. 21. E. 3. 50. E. 3. 23, &c. (Doctr. Plac. 131.)

[*b*] But if the tenant in frankalmoigne bring a writ of mesne against his lord, the lord cannot disclayme in the seignorie ; because he cannot hold of any man in frankalmoigne, but of his donor and his heires. And so note a diversity between a tenure in frankalmoigne, whereby divine service is maintained, and homage ancestrell which respecteth temporall service. But if the lord will not disclayme in the seigniory, in the case of homage ancestrell, then albeit he hath not received homage, he shall warrant the land.

[*b*] 14. H. 3. tit. Disclaim. B. 33.

Si le seignior que est vouche ad receive homage, &c. il ne disclaymera. Therefore it is good for the tenant, to the intent to oust the lord of his disclaymer, in his voucher to allege, that the lord hath taken homage of him ; and if he alledge it not, and the lord offer to disclayme, the tenant may counterplead the same by acceptance of homage. And the reason that the lord cannot disclayme in that case is ; for that he hath accepted his humble and reverent acknowledgement, to become his man of life and member and terrene honour, and to be faithfull and loyall to him, for the tenements which he holds of him, and against the acceptance hereof the lord cannot disclayme.

47. H. 3. Disclaim. 35. Vide Bract. l. 4. 252. b. 16. H. 7. 1. Brit. 173. 174. (Doctr. Plac. 131.)

Que il avoit al temps del voucher. Hereby it appeareth, that the tenant shall not be driven to recover in value only those lands, which the lord had from that ancestor, which created the seigniory ; for that were in manner impossible, for that the seigniory must be created before time of memory, and the first creation of the seigniory did not create the warranty, but the continuance of both sides time out of minde created the warranty. And that is the reason that a writ of annuity shall not [*c*] lye against the heire by prescription ; because it cannot be knowne, whether he hath any land by descent from the said ancestor, that first granted the annuity. And here is a point worthy of observation, that in the case of homage ancestrell, (which is a special warranty in law) by the authority of Littleton, the lands generally, that the lord hath at the time of the voucher, shall be liable to execution in value, whether he hath them by descent or purchase. But in the case of an expresse warrantie the heire shall be charged but only for such lands as he hath by descent from the same ancestor, which created the warranty.

[*c*] 46. E. 3. 5. b. 10. E. 4. 10. b. 19. H. 6. 74. 37. H. 6. 19. 5. H. 7. F. N. B. 152.

Note, what privilege this ancient warranty (created by operation of law) hath more than the expresse warranty. And so you may observe, that in this case *firmior & potentior est operatio legis quam dispositio hominis*.

28. E. 1. Vouch. 291. 9. Ed. 2. War. Car. 20. 19. Fines 127.

Al temps de voucher ou unques puis. This is evident and worthy of diligent observation, *viz.* that the lands of the vouchee shall be liable to the warranty, that the vouchee hath at the time of the voucher ; for that the voucher is in lieu of an action, and in a *warrantia cartæ*, the land, which the defendant hath at the time of the writ brought, shall be lyable to the warranty.

29. E. 3. 3. 18. E. 3. 1. 2. H. 4. 10. 23. E. 3. Recov. in valu. 3. 16. E. 3. Vouch. 85. 19. Ed. 3. Vouch. 24. 22. E. 3. Fitz. Nat. Bre. 134. f.

Upon a judgment in debt, the plantife [*d*] shall not have execution, but only of that land which the defendant had at the time of the judgment; for that the action was brought in respect of the person, and not in respect of the land. But if an action of debt be brought against

[*d*] 2. H. 4. 14. 42. E. 3. 1. 42. Ass. 17. 9. E. 2. tit. Execut. 249. (1. Ro. Abr. 898. 891. 892.)

hath been any contest, is the deanery of *Dromore*, the collation of which was some years ago claimed by the bishop under letters patent from king James the First; but the patent not being warranted by the king's letter, on which it passed, the crown prevailed.

We shall close this note about the *old* and *new* deaneries of cathedral and collegiate churches, with some general observations on the various modes of constituting them. From the inquiries we have made into the subject, it seems to us, that the right to appoint such deans and the mode must generally depend almost wholly upon *charters usage* or *acts of parliament*, and very little on arguments drawn from the *nature of the office* or from *foundership*, however common those topicks may be. The *former* indeed can scarce have influence on any case, which may arise as to the appointment of deaneries. What is there in the nature of the office, which is inconsistent with its being *elective presentative donative* or *collative*, or which renders either of those modes so incongruous as to be contrary to any principle of our law? What is there in the office, which imports, that the patronage should *necessarily* be in the crown, though it usually is? The facts we have stated shew, that in England some deaneries are *nominally elective* under the *royal congè d'elire*, and the rest *really presentative* or *donative* by the crown; and that the only two deaneries of the Welsh cathedrals are *collative* by bishops. Nay, if it can be proved, that election under a congè

heir *male* was charged the *double* value, which was called a forfeiture of marriage. — The gardian in chivalry was no

against the heire, and he alieneth, hanging the writ, yet ſhall the land, which he had at the time of the original purchaſe, be charged; for that the action was brought againſt the heire in reſpect of the land. [e] If a man be nonſuit, the land only, which he had at the time of the amerciament aſſeſſed, ſhall be charged, and not that which he had at the finding of the pledges. For the amerciament is not in reſpect of the land, but of his want of proſecution, which was a default in his perſon. But the iſſues of a juror ſhall be levied upon the feoffee, albeit they were not loſt before the feoffment; becauſe he was returned and ſworne in reſpect of the land. Note the diverſity.

[e] 22. Aſſ. pl. 32. (Finch. L. 353.)

he print. 157 a.

If a man give lands in fee with warranty, and binde certaine lands ſpecially to warranty, the the perſon of the feoffor is hereby bound, and not the land, unleſſe he hath it at the time of the voucher.

32. E. 1. Voucher 292. (2. Ro. Abr. 771.)

Sect. 146.

SON ſeigniorie eſt extinct, et le tenant tiendra de ſeignior prochein paramount, &c. Here two things are to be obſerved: firſt that by this diſclaymer in the ſeigniory, the ſeigniory is [f] extinct in the land.

Vide Britton fol. 58. 110.

(Doctr. Plac. 133)

[f] 45. E. 3. 7. 22. E. 4. 35.

Secondly, that after the diſclaymer the tenant ſhall hold of the next lord paramount, by the ſame ſervices, as the meſne ſo diſclayming held before.

Si un abbe ou prior ſoit vouch, &c. uncore, &c. uncore il ne poet diſclaymer, &c. Here it appeareth of the lords ſide, that continuance of bloud is not neceſſary; but yet there muſt be privity of ſucceſſion time out of minde in one politicke body, for if that body be once diſſolved, though a new be founded of the ſame name, and all the poſſeſſions be granted to them, yet the homage anceſtrell is gone. But if a prior and covent be tranſlated, *concurrentibus hiis quæ in jure requiruntur*, to an abbot and covent, or to deane and chapter, there the homage anceſtrell remaines; for though the name be changed, yet the body was never diſſolved, but in effect it remaineth ſtill. If the body politique were founded within time of memory, there cannot be homage anceſtrell, for that continuance faileth, and though anceſtor is ever properly applyed to a naturall body, yet it is called homage anceſtrell when the tenure is of a body politique, for that it is anceſtrell of the tenants ſide. But on the other ſide, an abbot or prior cannot hold by homage anceſtrell; for as appeareth by Littleton's examples, it muſt ever be anceſtrell of the tenants ſide. And where Littleton putteth his caſe of an abbot or prior, the ſame law is of a biſhop, deane, archdeacon, prebend, parſon, vicar, and the like. Another thing here to be obſerved is, that an abbot or prior cannot diſclaime, &c. for regularly it is true, *quod meliorem conditionem eccleſiæ ſuæ facere poteſt prælatus, deteriorem nequaquam*, and againe, *eccleſiæ ſuæ conditionem meliorem facere poſſunt*

Vide Sect. 143.

14. H. 6. 12. 2. H. 6. 9. 38. Aſſ. p. 22. 37. Aſſ. 6. Co. 3. 73, &c. Deane and Chapter de Norwich caſe.

Et eſt aſcavoir, que en cheſcun cas ou le ſeignior poit diſclaimer en ſon ſeigniorie per la ley, et de ceo voit diſclaimer en court de record, ſon ſeignorie eſt extinct, et le tenant tiendra del ſeignior procheine paramont le ſeignior, que iſſint diſclaime. Mes ſi un abbe ou prior ſoit vouch per force de homage anceſtrel, &c. comment que il ne unque priſt homage, &c. uncore il ne poit diſclaimer en tiel cas, ne en nul auter cas; car ils ne poient anienter ou deveſter choſe de fee, que ad eſte veſtue en lour meaſon.

AND it is to be underſtood, that in every caſe where the lord may diſclaime in his ſeigniorie by the law, and of this he will diſclaime in a court of record, his ſeigniorie is extinct, and the tenant ſhall hold of the lord next paramount to the lord, which ſo diſclaimeth. But if an abbot or prior be vouched by force of homage anceſtrell, &c. albeit that he never tooke homage, &c. yet he cannot diſclaime in this caſe, nor in any other caſe; for they cannot take away or deveſt a thing in fee, which hath beene veſted in their houſe.

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not accountable for the profits made of the infant's land during the wardſhip, but received them for his own private emolument,

possunt sine consensu, deteriorem non possunt sine consensu. And therefore an abbot, prior, bishop, deane, archdeacon, prebend, parson, vicar, or any other sole corporation, that is seised *in auter droit*, cannot disclaime; because, as Littleton saith, they alone cannot devest any fee which is vested in their house or church. For the wisdome of the law would never trust one sole person, with the disposition of the inheritance of his house or church. But an abbot, and prior had their covent, the bishop his chapter, the parson and vicar their patron and ordinarie, and the like of other sole corporations, without whose assent they could passe away no inheritance. 40. E. 3 27. 5. E. 4. 1. 6. E. 3. 51, 52. (7. Co. 10. 11.) 10. E. 4. 2. a. 21. H. 7. 20.

Ils ne poient anienter ou devester chose de fee, &c. These generall words have certaine exceptions; for in a *quo warranto*, at the suit of the king, against a bishop, abbot, or prior, for franchises and liberties, if the bishop, abbot, or prior, disclaime in them, this should binde their successors. If an abbot or prior had acknowledged the action in a writ of annuitie, this should have bound the successour; because he cannot falsifie it in an higher action, and there must be an end of suits. *Expedit reipublicæ, ut sit finis litium.* But if the abbot levie a fine, or acknowledge the action in a *præcipe quod reddat*, the successor shall be bound *pro tempore*, but he may have a writ of right, and recover the land. 6. E. 3. 51, 52. 38. E. 3. 33. 16. E. 3. tit. Abbot 13. 19. E. 3. tit. Abbot. 12. 7. R. 2. Abbot. 7. 12. H. 4. 11. 20 H. 6. fo. ultimo. 4. H. 7. 2. 2. H. 4. 6. 34. Ass. p. 7. 14. E. 4. tit. Abbot. B. 8. E. 3. 28. 12. H. 8. 7.

Per force de homage ancestrell, &c. Here (*&c.*) implyeth or by any other warrantie [*i*], as by the reason, which our authour here yeeldeth, appeareth.

Chose de fee. [*k*] For if in an action of debt upon an obligation against an abbot, the abbot acknowledgeth the action, and dieth, the successour shall not avoid execution, though the obligation was made without the assent of the covent; for he cannot falsifie the recoverie in an higher action, *et res judicata pro veritate accipitur*, and this is but a chattell. And so it is of a statute or recognisance, acknowledged by an abbot or prior.

[*i*] 12. H. 8. 7.

[*k*] 7. R. tit. Abbot. 7. See the bookes next above. (6. Co. 8. a.)

Sect. 147.

ITEM si home, que tient son terre per homage ancestrel, alien a un auter en fee, le alienee ferra homage a son seignior: mes il ne tient de son seigniour per homage auncestrel; pur ceo que le tenancie ne fuit continue en le sanke de les auncesters lalienee; ne lalienee navera jammes garrantie de la terre de son seignior; pur ceo que le continuance del tenancie en le tenant et a son sanke per lalienation est discontinue. Et sic vide, *que si le tenant, que tient la terre per homage ancestrell de son seig-*

ALSO if a man, which holds his land by homage ancestrel, alien to another in fee, the alienee shall doe homage to his lord: but he holdeth not of his lord by homage ancestrell; because the tenancie was not continued in the bloud of the ancestors of the alienee; neither shal the alienee have warrantie of the land of his lord; because the continuance of the tenancie in the tenant and to his bloud by the alienation is discontinued. And so see, that if the tenant, which holdeth his land of his lord

ALIEN a un auter en fee. For hereby the privity of the estate is altered, and the continuance of it in the bloud of the tenant is dissolved. But if the tenant maketh a lease for life, or a gift in taile, this is a continuance of the privitie and estate in the tenant in respect of the reversion, that remaineth in him; for the fee, whereof Littleton heere speaketh, was not out of him. But if the tenant maketh a feoffment in fee upon condition, and dieth, his heire performeth the condition, and reentreth, the homage ancestrell is destroyed in respect of the interruption of the continuance of the privitie and estate; and this case was put and not denied in the argument [*m*] of the case betweene the Lord Cromwell and Andrewes, Mich. 14. & 15. Eliz. which I myselfe heard and observed. As if *cestuy que use* had made a feoffment in fee upon condition, and entred for the condition broken, he should have detained the land against (Post 202. a.) [*m*] 1. Mich. 14. & 15. Eliz. 5. H. 7.

ment, subject only to the *bare* maintenance of the infant. At least it doth not appear in any work we have seen, what means were provided for enforcing the guardian out of the profits of the estate in wardship to support and educate the infant in a style and manner suitable to his rank and fortune.—Lastly, guardianship in chivalry, being deemed more an *interest* for the *profit* of the *guardian* than a *trust* for the *benefit* of the *ward*, was saleable and transferrable, like the ordinary subjects of property, to the best bidder, and if not disposed of was transmissible to the lord's personal representatives. Thus the custody of the infant's person, as well as the care of his estate, might be devolved upon the most perfect *stranger* to the infant, one prompted by every pecuniary motive to abuse the delicate and important trust of education, without any ties of blood or regard to counteract the temptations of interest, or any sufficient authority to restrain him from yielding to their influence. This explication of the nature of wardship in chivalry, general as it is, may well excite a strong idea of the horrid evils necessarily incident to it. On the first reflection it is natural to wonder, how it happened, that a species of guardianship, so constituted on principles repugnant to the voice of nature, so founded in inhumanity, so retarding to the progress of science and literature amongst persons of high birth and with great hereditary estates, and so seemingly replete with mischiefs both public and private, should, in a country distinguished for continual struggles to preserve the valuable and to annihilate the oppressive parts of its constitution, be patiently endured for several centuries after the Conquest, and even remain unreformed by any effectual checks to soften its rigour, till it was wholly taken away at the Restoration. Perhaps however on further consideration of the subject, the wonder may in some measure cease; for the facility of evading guardianship in chivalry, which could only

(F. N. B. 135.)

gainst the feoffees for ever; for that the estate and privitie was for the time taken out of the feoffees, and thereby dissolved for ever. But if the land were recovered against the tenant upon a faint title, and the tenant recover the same againe in an action of higher nature, there the homage auncestrell remaines; for the right was a sufficient meane for the continuance. So it is, if he had reversed it in a writ of error. [n] If the alience be impleaded in Littleton's case, and vouche the alienor that held by homage auncestrell, albeit he commeth in by fiction of law to many purposes in privitie of his former estate, yet to this purpose he cannot come in as tenant by homage auncestrell; because of the discontinuance of the estate and privitie, and, as Littleton saith, the tenancie was not continued in the bloud. [o] And Britton saith, *et come ascun nequedent soit vouche per homage, et le seigniour tende de averrer, que le tenement, dount il vouche, fuit translate hors del sanke del primer purchaser, per feoffment ou per ascun auter translation, en tiel case soit le tenant charger de voucher son feoffor ou ses heires.*

nior, alien en fee, coment que il repriſt estate de lalienee arrere en fee, il tient la terre per homage, mes nemy per homage auncestrell.

by homage auncestrell alieneth in fee, though he taketh an estate againe of the alienee in fee, yet he holds the land by homage, but not by homage auncestrell.

[n] 5. E. 3. per Cantrel.

[o] Britton fol. 170. a.

38. E. 3. 20. 11. H. 4. 22. 17. E. 3. 41. 59. 73. 74. 26. E. 3. 56. 18. E. 3. 56. 16. E. 3. Voucher 87. 18. E. 3. 30. 44. E. 3. Litt. fol. 169.

Coment que il repriſt estate del alienee en fee, &c. For the cause aforesaid, in respect of the interruption of the privitie and continuance of the estate. And herewith agreeth our bookes in cases of warranties in deed, or warranties in law. See more of this in the chapter of warranties.

Sect. 148.

NE ferra homage al fitz. If A. holdeth of B. as of the manor of Dale, whereof B. is seised in taile; B. discontinueth the estate taile, and taketh backe an estate in fee simple; A. doth homage to B. B. dieth seised, the issue in taile entreth; A. shall doe homage againe to the heire in taile of B. because he is remitted to the estate taile, and the state in fee, that his father had, in respect whereof the homage is done, is vanished, and the heire in taile is in of a new estate, in respect whereof he ought to doe a new homage. [p] But regularly it is true, which Littleton saith, that when a tenant hath done once homage to his lord, he is excused for terme of his life to make homage to any other heires of the lord. But he shall doe fealtie to his sonne, albeit he hath done fealtie to the father.

(Post 348. a.)

[p] Britton 175. 176.

ITEM il est dit, que si home tient sa terre de son seignior per homage et fealty, et il ad fait homage et fealty a son seignior, et le seignior ad issue fits, et devy, et le seigniory discendist a le fits, en ceo cas le tenant, que fist homage al pere, ne ferra homage al fits; pur ceo que, quant un tenant ad fait un foits homage a son seignior, il est excuse pur terme de sa vie de faire homage a ascun auter heire del seignior. Mes uncore il ferra fealtie al fits et heire le seignior, coment que il fist fealty a son pere.

ALSO it is said, that if a man holds his land of his lord by homage and fealty, and he hath done homage and fealty to his lord, and the lord hath issue a son and dies, and the seigniorie discendeth to the sonne, in this case the tenant, which did homage to the father, shall not doe homage to the sonne; because that, when a tenant hath once done homage to the lord, he is excused for terme of his life to doe homage to any other heire of the lord. But yet he shall doe fealtie to the sonne and heire of the lord, although he did fealtie to his father.

Sect.

only be on a *descent*, may account both for its being so long submitted to, and for its producing consequences less extensively pernicious than seem almost necessarily incident to it. Various modes of preventing the *descent* were practised. One was enfeoffing the heir in the ancestor's life time; and another was enfeoffing strangers on condition to pay a sum, far exceeding the value of the land, at a time so fixed as to correspond with the heir's coming of age, who might then enter for breach of the condition. See stat. Marlebridge 52. Hen. c. 6. and 2. Inst. 109. When these modes were declared to be fraudulent, and therefore checked by the statute of Marlebridge, a third, still more fit to attain the same end, succeeded; for *uses* and *trusts* being invented, and guardianship in chivalry being only of *legal* estates, it became the fashion to make feoffments to uses, as well for preventing wardship, as for avoiding reliefs and forfeitures, and indirectly exercising the power of devising; and thus the heir taking only the use of the land on a descent instead of becoming *legal tenant*, he of course escaped being in wardship. This evasion continued in practice till 4. Hen. 7. when the legislature thought proper once more to interfere in favour of the lord, and made the heir of *cestuy que use* equally liable to wardship in chivalry with the heir of one dying seised of the *legal* estate. See 4. Hen. 17. c. 17. Ante 84. b. and 2. Inst. 110. Indeed for some time after 4. Hen. 7. there seem to have been no other means of preventing wardship in chivalry, than the ancestor's making a lease for life with remainder to his *heir apparent* in fee. But this protection of wardship in chivalry was soon followed by a great diminution of its profits; for, in the succeeding reign, the statutes of wills gave the power of devising so as to deprive the lord of the wardship in *two thirds* of the land holden by knight's service; in which contracted state this odious species of guardianship was suffered to languish, till it was intirely abolished.

Sect. 149.

ITEM si le seignior, apres le homage a luy fait per son tenant, grant le service de son tenant per le fait a un auter en fee, et le tenant atturna, &c. donque le tenant ne serra my compel de faire homage. Mes il ferra fealty, coment que il fist fealtie devant a le grauntor; car fealtie est incident a chescun atturnement del tenant, quant le seigniorie est graunt. Mes si ascun home soit seisie dun mannor, et un auter home tient de luy la terre come del mannor avantdit per homage, le quel tenant ad fait homage a son seignior que est seisie del mannor, si apres un estrange port Præcipe quod reddat *envers le seignior del mannor, et recovera le mannor envers luy, et suist execution, en ceste case le tenant ferra auterfoits homage a celuy, que recovera le manor, coment que il fist homage devant; pur ceo que lestat celuy, que receivoit le primer homage, est defeate per le recovery, et ne girra en le bouche le tenant a fauxer ou defeater le recoverie, que fuit envers son seignior.* Et sic vide diversitatem *en*

ALSO if the lord, after the homage done unto him by the tenant, grant the service of his tenant by deed to another in fee, and the tenant atturneth, &c. the tenant shall not be compelled to doe homage. But he shall doe fealty, altho' he did fealty before to the grantor; for fealty is incident to every atturnment of the tenant, when the seigniory is granted. But if any man be seised of a mannor, and another holds of him the land, as of the mannor aforesaid by homage, which tenant hath done homage to his lord who is seised of the mannor, if afterwards a stranger bringeth a *Præcipe quod reddat* against the lord of the mannor, and recovereth the mannor against him, and sues execution, in this case the tenant shal againe doe homage to him, which recovered the mannor, although he had done homage before; because the estate of him, which received the first homage, is defeated by the recovery, and it shall not lye in the power of the tenant to falsifie or defeat the recovery, which was against his lord. And so see a

ITEM si le seignior, &c. Britton 176.

grant le service de son tenant per fait, &c.

Note a diversitie, when the lord alieneth the seigniorie, and when the tenant alieneth the tenancy; for when the tenant hath done homage, and the seigniory is transferred to another, either by the act of the party as alienation, or by act in law as descent, yet the tenant shall not iterate homage, as he shall do fealty; but when the tenant doth homage, and alieneth the tenancy, there is a new tenant, which never did homage, and therefore he ought to doe homage to the lord, albeit his alienor had done it before. And it is to be observed, that none shall doe * homage, but the tenant of the land to the lords of whom it is holden; and therefore if homage be due to be done by the tenant, if the tenant alieneth the land to another, the alienor cannot be compelled to doe homage.

13. E. 1. tit. Per quæ servitia, 22. & tit. Gar. 91. (8. Co. 102.)

* 8. E. 4. 27. b.

Attorne, &c. Here by (*&c.*) is to be understood, that albeit he pay his rent, performe his annual services, and doe fealtie, which

abolished by the famous statute of Charles the Second, together with the other oppressive appendages of military tenures. 2. Inst. 110, 111. The curious reader may see further on this subject in Smith's Commonwealth, Engl. ed. b. 3. cap. 5. Staundf. Prærog. 4. Inst. 188. Ley on Wards and Liv. & ante passim in the chapter of Knight's service and the books there cited, the titles *Garde* and *Guardian* in the Abridgments Crompt. Jurisd. of Co. 112. a. to 125. and Mad. Excheq. fol. ed. 221.—(12) Many of our books, especially some of modern date, are very indiscriminate, when they mention guardianship by *nature*. Sometimes the father is styled guardian by nature of his *heir apparent for the time* in general terms, such as at first appear to intimate, that by our law no other ancestor, except the father, not even the mother, is intitled to the guardianship in that right; and accordingly lord chief baron Comyns makes this inference from the language of the books, though as we conceive too hastily. See Com. Dig. *Gardian* C. 3. Co. 38. a. 6. Co. 22. b. there cited. At other times we are told, that, the father being dead, the mother may have a writ of trespass *quare consanguineum et hæredem cepit*; which imports, that she may also be guardian by nature of her heir apparent. But then the silence in one book as to other ancestors, and the express exclusion of the grandfather in another book without the necessary explanation, tend to an opinion, that all ancestors, except the father and mother, are really excluded.

Ante

which is a part of homage, yet homage he shall not doe.

Mes si ascun home soit seisie dun mannor, &c. Here it appeareth, that the case of the recovery of the seigniorie differeth from the alienation of the lord, which is his owne act, or the descent of the seigniory to the heire, which is an act in law. And the reason of this diversitie is, for that by the recovery the state of him, that received the homage, is defeated; for it shall not lie in the mouth of the tenant to falsifie, or to frustrate or defeat the recovery, which was against his lord of the mannor or seigniory, for that the tenant had nothing therein, and every man by law ought to meddle in such cases with that, which belongeth unto him, which is worthy of observation concerning falsifying of recoveries.

Vide Sect. 551. 33. E. 3. Avowrie 255. 37. H. 6. 33. 39. H. 6. 34. 7. H. 7. 11. Doct. & Stud. fol. 45. 28. H. 8. Dyer 41.

Note that to falsifie, in legall understanding, is to prove false, that is, to avoyd, or as Littleton here saith, to defeat, in Latine *falsare, seu falsificare,* [*i*] *falsum facere.*

[*i*] 7. H. 8. cap. 4.

But since Littleton wrote, it is recited by act of parliament, that whereas divers, &c. have suffered recoveries against them of divers mannors, &c. for the performance of their wills, for the suretie of their wives joyntures, &c. and the recoverors had no remedy to compell the freeholders and tenants, &c. to attourne unto them, nor could by order of law attaine to the rents, services, &c. that act doth give the recoverors power to distreyne and avow; whereupon many have thought, that this doth impugne Littleton's case of the recovery. But *distinguendum est.* Littleton intendeth his case, either upon a recovery by title, (for he saith, that the state of the tenant in the recovery is defeated) or without any consent upon pretence of title, which is all one; for the tenant cannot falsifie, and the lord should avow as one that came in of a former title. And Littleton hath good authority in law to warrant [*a*] his opinion, and the statute of 7. H. 8. extendeth to common recoveries had by consent and agreement, as appeareth by the act itselfe, which then was, and yet is a common assurance and conveyance, whereof the law taketh notice, and whereupon (as appeareth by the act) an use might be limited. So as it is apparant, that such recoverors came in meerely under the state of the lord, &c. and had no remedy (as the statute saith) to compell the freeholders and tenants to attourne, and without attournement could neither distreyne nor avow. Wherefore this statute gave recoverors remedy to distreyne, and a forme to avow and justifie, which they had not before, as it appeareth by the Doctor and Student, who lived at that time. The bodie of the act is, *That such recoverors may distreyne and make avowrie, &c. as those persons, against whom the said recovery is, should have done, &c. if the same recovery had not been had, and have like remedie, &c.*

[*a*] 39. H. 6. 22. 37. H. 6. 38. 35. H. 6. 22.

If a man had made a lease for yeares to begin at Michaelmas, reserving a rent; and before Michaelmas he had suffered a common recovery, the recoveror should distreyne for that rent, which the lessor before the recovery could not. But if the recovery had not beene had, then he might have distreyned, and so it is within the statute. But if a fine had beene levied of a mannor, and before attournment the conusee had suffered a common recovery, the recoveror should not distreyne, &c. because the conusee, against whom the recovery was had, could not.

28. H. 8. Dyer 41.

(Post 215. a. 321. a.)

But this act extended onely to distresses and avowries for rents, services, and customes, and gave also a forme of a *quare impedit.* But upon this statute it was holden, that the recoveror could not have an action of debt against the lessee for yeares, nor an action of wast against tenant for life or yeares; and therefore remedy was provided in these cases, by the statute of 21. H. 8.

21. H. S. cap. 15.

Sect. 150.

VIENT a son seigniour. The tenant ought to seeke the lord to doe him homage, if the lord be within England; for this service is personall as well of the lord's side, as of the tenant's side, for law requi-

ITEM si un tenant, que doit per son tenure faire a son seignior homage, vient a son seignior, et dit a ceo case, lou home vient a le seigniorie per recoverie, et lou il vient per discent ou per graunt al seigniorie.

ALSO if a tenant, which ought by his tenure to doe his lord homage, commeth to his lord, and saith unto him, Sir, I

luy

Ante 84. b. 6. Co. 22. b. However in another place we find, that no such opinion was intended to be conveyed; and we are informed, that the grandfather and other ancestors may be guardians by nature of their heirs apparent, as well as the father and mother; tho' being liable to be postponed to others, where the *father* is not, both they and the mother have a title distinguishable from *his* in point of inferiority. 3. Co. 38. a. Further some modern books do not confine guardianship by nature to *heirs apparent*, but denominate the father and mother the natural guardians of *all* their children; and sometimes even the parents of illegitimate issue seem to have been treated as their natural guardians. 1. Ves. 158. 2. Atk. 15. 70. 9. Mod. 117. Sometimes also the guardianship of *female* children under 16, as given to the father and mother by the statute of Philip and Mary, is said to be *jure naturæ*. 4. & 5. Phil. & Mar. c. 8. and 3. Co. 38. b. This various and indefinite manner of expression concerning guardianship by nature must create the most distressing confusion in the minds of students; and for their benefit therefore, we shall attempt to rescue the subject from a part of the obscurity in which it is involved, by offering some few distinctions calculated to reconcile the seeming contrariety of the books, so far as they are capable of being made consistent with each other.

luy, sir, jeo doy a vous faire homage pur les tenements que jeo teigne de vous, et jeo sue icy prist a vous faire homage pur mesmes les tenements; pur que jeo vous pry, que ore ceo voiles receiver de moy.

ought to doe homage unto you for the tenements which I hold of you, and I am here ready to doe homage to you for the same tenements; and therefore I pray you, that you would now receive the same from me.

reth order and decency. And therefore Bracton saith, *et sciendum, quod ille, qui homagium suum facere debet, obtentu reverentiæ quam debet domino suo, adire debet dominum suum ubicunque inventus fuerit in regno, vel alibi si possit commodè adiri, et non tenetur dominus quærere suum tenentem, et sic debet homagium ei facere.* And the same law it is for fealty; and the diversity between these services and the rent is, because that these are personall, and the rent may be payd and received by other, and therefore a tender of the rent upon the land is sufficient.

Bracton fol. 80. a. And Britton fol. 171. agreeth herewith.

Sect. 151.

ET si le seignior adonques refusa de ceo receiver, donque apres tiel refusall le seignior ne poet distreiner le tenant pur le homage aderere, devant que le seignior requiroit le tenant de faire a luy homage, et le tenant a ceo faire refusa.

AND if the lord shall then refuse to receive this, then after such refusall the lord cannot distreine the tenant for the homage behinde, before the lord requireth the tenant to doe homage unto him, and the tenant refuse to doe it.

AND the reason hereof is; for that when the tenant hath done his endeavour and duty to offer his corporall service, and the lord refuseth the same, or doe not accept his service upon his tender thereof, (which is a refusall in law) then the law, in respect of the lord's fault, requireth, that before the lord can distreine for it, that he doth require the tenant to doe that service, and if he either refuse to doe it, or doe it not when he is required, it is a refusall in law.

Vide Bracton fol 83. Britton 171. 172. 21. E. 3 24 21. Ass. p. 73. 20. E. 3. Avowry 223. 45. E. 3. 9. 7. E. 4. 4. 21. E 4. 17. 20. H. 6. 31. (9. Co. 79.)

Sect. 152.

ITEM home poit tener sa terre per homage auncestrel, et per escuage, ou per auter service de chivaler, auxi bien sicome il poyt tener sa terre per homage ancestrel en socage.

ALSO a man may hold his land by homage auncestrell, and by escuage, or by other knights service, as well as he may hold his land by homage auncestrell in socage.

SO as homage auncestrel may belong as wel to a tenure by escuage or knights service, as to a tenure in socage, or to a tenure in nature of socage; whereof there hath somewhat been spoken in the chapter of Socage (1).

CHAP.

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

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other. 1. It seems, that not only the father, but also the mother and every other ancestor, may be guardians by nature, tho'

CHAP. 8. Sect. 153.

Grand Serjeantie. *See also Officers of honour fol. 165. a.*

TENURE per grand ſerjeanty. Serjeanty commeth of the French word *(ſerjeant) i. ſatelles*, and [a] *ſerjeantia idem eſt quod ſervitium.* And it is called *magna ſerjeantia*, or *ſerjanteria*, * or *magnum ſervitium*, great ſervice, as well in reſpect of the excellency and greatneſſe of the perſon to whom it is to be done, (for it is to be done to the king only) as of the honour of the ſervice itſelfe; and ſo Littleton himſelfe in this ſection ſaith, that it is called *magna ſerjeantia*, or *magnum ſervitium*, becauſe it is greater and more worthy than knights ſervice, for this is *revera ſervitium regale*, and not *militare* onely. Fleta ſaith, *magna autem ſerjeantia dici poterit, cum quis ad eundum cum rege in exercitu, cum equo cooperto, vel hujuſmodi, ad patriæ tuitionem fuerit feoffatus.*

[a] Glanvil lib. 9. ca. 4.
[b] Bracton lib. 2. 35. & 84. 85. lib. 1. cap. 10.
* Fleta lib. 1. cap. 10. lib. 2. cap. 9. in fine.
[c] Britton cap. 66. fol. 164. 165. Ockam cap. quod non abſolvitur.

45. E. 3. 25. per Finchden. Fleta, ubi ſupra.

De noſtre ſeignior le roy. This tenure hath ſeven ſpeciall properties. 1. To be holden of the king only. 2. It muſt be done, when the tenant is able, in proper perſon. 3. This ſervice is certaine and particular. 4. The reliefe due in reſpect of this tenure differeth from knights ſervice. 5. It is to be done within the realme (1). 6. It is ſubject to neither *aid pur faire fitz chivaler*, or *file marier*. And 7. it payeth no eſcuage.

Bracton lib. 2. 34. 11. H. 4. 34. 10. H. 4. Avowry 267. F. N. B. 83. 10. H. 6. Anc. Demeſne 11.

Come de porter le banner de noſtre ſeignior le roy ou de ameſner ſon hoſt. This great ſervice to the king may (as it appeareth hereby) concerne the warres and matters mi-

23. H. 3. tit. Gard. Stat. de Ward. & Relev. 28. E. 1.

TEnure per graund ſerjeantie eſt, lou un home tient ſes terres ou tenements de noſtre ſeignior le roy per tiels ſervices, que il doit en ſon proper perſon faire al roy; come de porter le banner de noſtre ſeignior le roy, ou ſa lance, ou de ameſner ſon hoſte, ou deſtre ſon marſhal, ou de porter ſon eſpee devant luy a ſon coronement, ou deſtre ſon ſewer a ſon coronement, ou ſon carver, ou ſon butler, ou deſtre un de ſes chamberlains de le reſceit de ſon eſchequer, ou de faire auters tiels ſervices, &c. Et la cauſe, que tiel ſervice eſt appell grand ſerjeanty eſt, pur ceo que il eſt pluis grand et pluis digne ſervice, que eſt le ſervice en le tenure deſcuage. Car celuy, que tyent per eſcuage neſt pas limite per ſa tenure, de faire aſcun pluis eſpecial ſervice que aſcun auter, que tyent per eſcuage, doit faire. Mes celuy, que

TENURE by grand ſerjeanty is, where a man holds his lands or tenements of our ſoveraign lord the king by ſuch ſervices as he ought to do in his proper perſon to the king, as to carry the banner of the king, or his lance, or to lead his army, or to be his marſhall, or to carry his ſword before him at his coronation, or to be his ſewer at his coronation, or his carver, or his butler, or to be one of his chamberlaines of the receipt of his exchequer, or to do other like ſervices, &c. And the cauſe, why this ſervice is called grand ſerjeanty, is, for that it is a greater and more worthy ſervice, than the ſervice in the tenure of eſcuage. For he, which holdeth by eſcuage, is not limited by his tenure to do any more eſpeciall ſervice, then any other, which holdeth by eſcuage, ought to doe. But he, which holdeth by grand

tyent

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

with conſiderable differences, ſuch as denote the ſuperiority of the father's claim. The father hath the *firſt* title to guardianſhip by nature, the mother the ſecond; and as to other anceſtors, if the ſame infant happens to be heir apparent to two, as to both a paternal and a maternal grandfather, perhaps in this equality of rights priority of poſſeſſion of the infant's perſon may decide the preference, according to the general rule *in æquali jure melior eſt conditio poſſidentis*. But this difference merely reſpects the order of ſucceſſion to guardianſhip by nature. But whilſt the tenure by knight's ſervice continued, there was another difference, which more ſtrongly marked the ſuperiority of this guardianſhip when claimed by the father; for he was intitled to the cuſtody of the infant's perſon, even againſt the lord in chivalry; but the mother and other anceſtors were not allowed to have the ſame preference.

It

tient per grand ſerjeanty, doit faire un eſpecial ſervice al roy, que il, que tient per eſcuage, ne doit faire.

ſerjeanty, ought to doe ſome ſpeciall ſervice to the king, which he, that holds by eſcuage, ought not to doe.

lands to a man, to hold of him to be his marſhall of his hoſt, or to be marſhall of England, or to be conſtable of England, or to be high ſteward of England *, chamberlayne of England, and the like, theſe are grand ſerjanties; and theſe and ſuch like grand ſerjanties are of great and high juriſdiction, and ſome of them concerne matters military in time of war, and ſome ſervices of honour in time of peace. And this is to be obſerved, that though there were divers lords marſhalls of England before the raign of [z] R. 2. yet king R. 2. created Thomas Mowbrey duke of Norfolke, and firſt earle marſhall of England *per nomen comitis mariſchalli Angliæ.*

litary; for ſome grand ſerjeanties are to be done in the time of war for the ſafety of the realme; and ſome in time of peace, for the honour of the realme.

Ou deſtre ſon marſhall. * If the king giveth

(4. Inſt. 123.)
* Fleta lib. 1. cap. 10 11. Eliz. Dier 285. Camd. Brit. 286. 287. * Ockam cap. Officium conſtabulari.

[z] In Rot. Patent. de anno 20. R. 2.

Ou deſtre ſon ſewer a ſon coronement, &c. Theſe and ſuch like grand ſerjanties at the king's coronation are ſervices of honour in time of peace.

Deſtre un de ſes chamberlaines, &c. ou de faire autiels ſervices. It is alſo a tenure by grand ſerjanty to hold [a] by any office to be done in perſon concerning the receipt of the king's treaſure; *Quia theſaurus regis reſpicit regem et regnum*; and *cenſus regius eſt animæ reip.* So it is *firmamentum belli, et ornamentum pacis.*

(4. Inſt. 106.)
[a] Vid. 51. H. 3. ſtatut. 5. 10. E. 3. c. 11. 14. E. 3. c. 14. 26. H. 8. ca. 2. 34. & 35. H. 8. c. 16. 11. E. 4. fo. 1. Pl. Com. 207. 208.

Milites camerarii dicuntur, quia pro camerariis miniſtrant; and concerning their office, this is the effect as Ockam [b] ſaith, *officium camerariorum in recepta conſiſtit in tribus, ſcilicet, claves arcarum, &c. bajulant, pecuniam numeratam ponderant, et per centenas libras in forulas mittunt.* But diſcontinuance in effect hath worne out their office. And yet they continue their name, and keepe the keyes of the treaſurie where the records doe lye.

[b] Ockam cap. Quid ſit Scaccarium. Gervaſius Tilburienſis in Libro Nigro ſub cuſtodia camerariorum.

And another ſaith, *camerarius dicitur à camera, quia camera eſt locus, in quem theſaurus recolligitur, vel conclave in quo pecunia reſervatur.* So as *camerarius* in legall ſignification *eſt cuſtos regii cenſus:* and *Willielmus de Bellocampo comes Warwici* held *officium camerarii in ſcaccario.*

Rot. clauſ. 6. E. 1. memb. 1.

Or by any office concerning the adminiſtration of juſtice, *quia juſticiâ firmatur ſolium.*

Ex lectura Marrowe.

It appeareth by an ancient record, [c] that *Varianus de ſancto Petro tenuit de domino rege in capite medietatem ſerjantiæ pacis per ſervicium inveniendi decem ſervientes pacis ad cuſtodiendam pacem in Ceſtria.*

[c] Ex inquiſitione poſt mortem Variani de ſancto Petro, 4. E. 2. Ceſtr. Vid. 7. Aſſ. 12. 7. E. 3. 57.

See Ockam of the firſt inſtitution and ancient order of the exchequer, Dier 4. Eliz. 213. the uſherie of the exchequer holden by grand ſerjanty.

Tiels ſervices, &c. Here by (*&c.*) is to be underſtood other like ſervices not expreſſed, as partly appeareth by that which hath beene ſaid, *viz.* to be ſteward of England, conſtable of England, chamberlayne of England, and other honourable ſervices, whereof more ſhall be ſaid in this chapter.

Ou un eſpeciall ſervice al roy. That is to ſay, that this great ſervice be ſpecially ſet downe; for it may conſiſt of divers branches, as to goe with the king in his warre in the foreward, and to returne in the reareward; and alſo to pay rent, &c. but yet it muſt be certaine and particular.

23. H. 3. Gard. 148.

Sect. 154.

ITEM ſi tenant, que tient per eſcuage moruſt, ſon heire eſteant de pleine age, ſil tenoit per un fee de chivaler, le heire ne paiera forſque C. *s. pur reliefe, come eſt ordaine per le ſtatute de* Magna Charta, cap. 2. *Mes ſi celuy, que tient de roy per grand*

ALSO if a tenant, which holds by eſcuage, dyeth, his heire being of full age, if he holdeth by one knight's fee, the heire ſhall pay but a C. s. for reliefe, as is ordained by the ſtatute of *Magna Charta, c.* 2. But if he, which holdeth of the king by grand ſerjeanty,

(Ante 83. a.)

ſerjeantie

It is by this laſt diverſity, that lord Coke in another place reconciles the books, which appear to exclude the mother and all other anceſtors except the father from guardianſhip by nature; it being obſerved by him, that they only apply to caſes, in which the right to the infant's perſon was in conteſt with the lord in chivalry. 3. Co. 38. b. Ratcliffe's caſe. 2. According to the *ſtrict* language of our law, only an *heir apparent* can be the ſubject of guardianſhip by nature; which reſtriction is ſo true, that it hath even been doubted, whether ſuch a guardianſhip can be of a daughter, whoſe heirſhip, though denominated *apparent*, yet, being liable to be ſuperſeded by the birth of a ſon, is in *effect* rather of the *preſumptive* kind. 3. Co. 38. b. Ante 84. a. Therefore when *guardianſhip by nature* is extended to children *in general*, or to any beſides ſuch as are *heirs apparent*, it is not conformable to the legal ſenſe of the term amongſt us, but muſt be underſtood to have reference to ſome rule independant of the common law. Thus when in chancery the father and mother are ſtyled the *natural* guardians of *all* their children born in marriage, or of *any* of their illegitimate iſſue, we ſhould ſuppoſe thoſe, who expreſs themſelves ſo generally, to refer to that ſort of guardianſhip, which the order and courſe of nature, as far as we are able to collect it by the light of reaſon, ſeems to point out, and to mean, that it is a good rule to regulate the guardianſhip by, where *poſitive* law is ſilent, and it is in the diſcretion of the lord chancellor to ſettle the guardianſhip. So too when lord Coke ſays, that the cuſtody of a *female* child under *ſixteen*, to which the father, and after his death the mother, is intitled by the proviſions of the ſtatute of the 4 and 5. Philip and Mary, is *jure naturæ*, we ſhould underſtand him to mean, not that ſuch a cuſtody was a *guardianſhip by nature* recognized by our common law, but merely that it was a *ſtatutory* guardianſhip adopted by the legiſlature in conformity to the dictates of

nature,

ſerjeantie moruſt, ſon heire eſteant de plein age, le heire paiera al roy pur reliefe le value de les terres ou tenements per an (ouſter les charges et repriſes) queux il tient del roy per grand ſerjeantie (1). *Et eſt aſcavoir, que* ſerjeantia *en Latin* idem eſt quod ſervitium, et ſic magna ſerjeantia idem eſt quod magnum ſervitium.

dieth, his heire being of full age, the heire ſhall pay to the king for reliefe one yeares value of the lands or tenements which he holdeth of the king by grand ſerjeantie over and beſides all charges and repriſes. And it is to be underſtood, that *ſerjeantia* in Latine is the ſame *quod ſervitium*, and ſo *magna ſerjeantia* is the ſame *quod magnum ſervitium*.

11. H. 4. 72. b.

Paiera al roy pur reliefe le value de ſes terres, &c. And herewith agreeth 11. H. 4. 72. b.

Serjeantia idem eſt quod ſervitium. Hereby it appeareth that the explanation of ancient words and the true ſenſe of them are requiſite, and to be underſtood *per verba notiora*.

Sect. 155.

TENANTS per eſcuage doient faire lour ſervice hors del roialme.

ITEM ceux, que teignont per eſcuage, doient faire lour ſervice hors de roialme; mes ceux, que teignont per graund ſerjeantie, pur le greinder part doient faire lour ſervices deins le roialme.

ALSO they, which hold by eſcuage, ought to doe their ſervice out of the realme; but they, which hold by grand ſerjeantie, for the moſt part ought to do their ſervices within the realme.

F. N. B. 83. E. (4. Co. 88.)

For he, that holdeth by cornage or caſtle-gard, holdeth by knights ſervice, and is to doe his ſervice within the realme; but he holdeth not by eſcuage, and therefore Littleton materially ſaid tenant *per eſcuage*, and not tenant by knights ſervice (2).

Pur le greinder part. For to bear the king's banner, or his lance, or to lead his hoſt, and to be his marſhall, &c. may be as well without the realme; and therefore Littleton ſaid (for the greateſt part.)

Sect. 156.

4. H. 5. cap. 7. 22. E. 4. cap. 8. Camden in Britannia.

EN les marches de Scotland. *Marches* is either a Saxon word, and ſignifieth *limites*, *bourdours*, or an Engliſh word, *viz.* Markes. *Nota*, for that it lyeth neere to Scotland, it is ſayd in the marches of Scotland, and yet the land

ITEM il eſt dit, que en les marches de Scotland aſcuns teignont de roy per cornage, ceſtaſcavoir, pur ventier un cornu, per garner homes de pais, quant ils oyent que le Scottes ou auters enemies veignont ou voilent enter en Engleterre; quel ſervice eſt

ALSO it is ſaid, that in the marches of Scotland ſome hold of the king by cornage, that is to ſay, to winde a horne, to give men of the countrie warning, when they heare that the Scots or other enemies are come or will enter into England; which ſervice is grand ſerjeanty.

graund

(1) See as to reliefs ante 69. b. 76. a. 85. a.

(2) Here lord Coke ſhews, that eſcuage, though uſually an incident to knight's ſervice, is not always ſo; that is, that knight's ſervice *may* be without eſcuage. On the other hand, eſcuage, if *uncertain*, which we muſt underſtand it to be when mentioned *generally*, *cannot* be without knight's ſervice. To expreſs this in fewer words, eſcuage is inſeparable from knight's ſervice, but knight's ſervice is not ſo from eſcuage. This tends to confirm what we obſerved in a former note, that eſcuage ought to be conſidered rather as an incident to the tenure by knight's ſervice, than as a diſtinct tenure. However, it at the ſame time ſeems to point out the reaſon for calling ſome tenures by knight's ſervice tenures by eſcuage; becauſe ſuch a denomination diſtinguiſhed that ſpecies of knight's ſervice, to which eſcuage was incident, from cornage, caſtle-guard, and ſuch other tenures by knight's ſervice as were not liable to eſcuage. We think this a more ſatisfactory way of juſtifying Littleton againſt the cenſure of Mr. Madox for uſing the term of *tenure by eſcuage*, than reſorting to the diſtinction ſuggeſted by Sir Martin Wright; who, as we have formerly hinted, attempts to prove, that though generally eſcuage was an incident to tenure by knight's ſervice, yet ſometimes it was a tenure of itſelf. Ante 73. note 2. But ſtill we muſt confeſs the juſtice of Mr. Madox's animadverſion, ſo far as it applies to the calling *homage* and *fealty* tenures; becauſe the former being incident to every ſpecies of knight's ſervice, except where the tenant was exempt from it by profeſſion, and the latter being an incident to all tenures except tenures at will or at ſufferance, it could anſwer no purpoſe of diſcrimination thus to denominate any tenure.

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nature, and upon principles of general reaſoning. But though what our law calls guardianſhip by nature is thus confined to the

graund ſerjeanty. Mes ſi aſcun tenant tient daſcun auter ſeignior, que de roy, per tiel ſervice de cornage, ceo neſt pas grand ſerjeantie, mes eſt ſervice de chivaler, et trait a luy garde et mariage; car nul poit tener per grand ſerjeanty ſi non de roy tanſolement.

But if any tenant hold of any other, lord then of the king, by ſuch ſervice of cornage, this is not grand ſerjeanty, but it is knights ſervice, and it draweth to it ward and mariage(2); for none may hold by grand ſerjeanty, but of the king only.

knights ſervice, of the king it is grand ſerjeanty; ſo as the royall dignity of the perſon of the lord maketh the difference of the tenure in this caſe (4). And I find that there were *corniculariі* amongſt the Romans, *et dicti fuerunt corniculariі quia cornu faciebant excubias militares*, and *magna ſerjeantia* is appropriated only to this tenure.

whereof Littleton here ſpeaketh, lieth in England (1).

Per cornage. *Cornagium* is derived (as *cornuare* alſo is) *à cornu*, and is as much (as before hath beene noted(3) as the ſervice of the horne. It is alſo called in old bookes *horngeld*.

Note a tenure by cornage of a common perſon is

23. H. tit. Gard. 148. 8. E. 3. 66. in fine. 16. E. 3. Avowrie 90. F. N. B. 83.

Sect. 157.

ITEM home poit veier anno 11. H. 4. *que Cokayne, adonque chiefe baron deſchequer, vient en le common banke, portant oveſques luy la copie dun recorde* in hæc verba. Talis tenet tantam terram de domino rege per ſerjeantiam, ad inveniendum unum hominem ad guerram ubicunque infra quatuor maria, &c. *Et il demaunda, ſil fuit graund ſerjeanty ou petite ſerjeantie. Et Hanke adonques diſoit, que il fuit graunde ſerjeantie; pur ceo que il ad ſervice a faire per corps dun home, et ſil ne purra trover nul home a faire le ſervice pur luy, il meſme doit faire.* Quod alii

ALSO a man may ſee in *anno* 11. H. 4. that Cokayne, then chiefe baron of the exchequer, came into the common place, and brought with him the copy of a record in theſe words. *Talis tenet tantam terram de domino rege per ſerjeantiam ad inveniendum unum hominem ad guerram ubicunque infra quatuor maria, &c.* And he demanded, if this were grand ſerjeanty, or petite ſerjanty. And Hanke then ſaid, that it was grand ſerjanty; becauſe he had a ſervice to do by the bodie of a man, and if he cannot find a man to doe the ſervice for him, he himſelfe ought to doe it(5). *Quod alii juſticiarii conceſſe-*

ET ſil ne purra trover nul home a faire le ſervice pur luy, &c. Hereby it appeares, that tenant by grand ſerjantie may in ſome caſes make a deputy, and therefore the diverſitie is, that, where the grand ſerjanty is to be done to the royall perſon of the king, or to execute one of thoſe high and great offices, there his tenant cannot make a deputie without the king's licence, and therefore Littleton hath ſaid before that ſuch ſervices are to be done in proper perſon. But he, that holdeth to ſerve him in his warre within the realme or by cornage, may make a deputie.

11. H. 4. 72. 24. E. 3. 32. Vd. Hill. 8. E. 1. Middle inter Placita de Banco. Sir John Moyſe's caſe.

11. H. 4. 72.

(*) *Johannes de Archier qui tenet de domino rege in capite per ſerjantiam archerie, &c. in comitatu Glouc. hæres in cuſtodia.*

(*) Clauſ. 18. H. 3. M. 5.

Infra quatuor maria. That is within the kingdome of England, and the dominions of the ſame kingdome (6).

Rot. Eſcheator. 41. H. 3. nu. 23. Stephen Haringdon's caſe.

Now it is good to be ſeene what perſons that hold by grand ſerjantie may doe and performe that honorable ſervice in perſon, and who ought not to be received thereunto

nure. In fact it was not the practice to call any tenure a tenure either by fealty or by homage, except in the caſe of homage auncеſtriel; and though Littleton begins his account of tenures with homage and fealty, yet we may very well ſuppoſe his previous explanation of them and eſcuage, or at leaſt of the former, to have been made merely as an introduction to the deſcription of knight's ſervice. We ſhould not be thus prolix in obſerving on a controverſy, which is more verbal than any thing elſe, if it was not for the ſake of convincing the reader, that however properly Mr. Madox guards againſt confounding the incidents of a tenure with the tenure itſelf, ſtill it would be an injuſtice both to Littleton and Coke to impute any ſuch miſconception to them; and therefore, that ſo far as Mr. Madox's animadverſion hath this tendency, reſpectable as his writings are, it ought to be rejected. Indeed it is highly improbable, that grave and learned authors, like Littleton and Coke, to both of whom, particularly the former, the whole doctrine of tenures was ſo much more familiar than it can poſſibly be in modern times, when the *practice* in reſpect to tenures is confined to a very narrow circle and we are mere *theoriſts* as to the greater part of the ſubject, ſhould adopt an error ſo fundamental.

(1) See further as to the *marches* of Scotland 4. Inſt. 281. and Nicholſ. Leges March.—(2) This paſſage ſeems rather to imply, that wardſhip and marriage were not incident to tenure by *cornage*, when it was of the king and therefore called grand ſerjeanty. But this was not the meaning of Littleton, as appears from a ſubſequent ſection, in which he is more explicit and expreſsly tells us, that *all* tenures by grand ſerjeanty were liable both to ward and marriage. See ſect. 158.—(3) See ante 69. b. —(4) See

the *heir apparent*, yet we muſt not from thence conclude, that parents have not a right to the cuſtody of their *other* children;

[a] 1. R. 2. Rot. Clauſ. m. 45.

unto, but ought to make a ſufficient deputy. At the coronation of [a] king R. 2. John Wilſhire citizen of London exhibited his petition to the high ſteward of England in his court, that where the ſaid John held certain lands in Hayden in the county of Eſſex of the king by grand ſerjantie, *viz.* to hold a towell when the king ſhould waſh his hands before dinner the day of his coronation, &c. and prayed that he might be accepted to doe this office of grand ſerjantie, the judgement followeth. *Et quia apparet per record' de Scaccario domini regis in curia monſtrat' quod prædicta tenementa tenentur de domino rege per ſervitium prædictum, ideo dictus Johannes admittitur ad ſervitium ſuum hujuſmodi faciendum per Edmondum comitem Cantabrigiæ deputatum ſuum, et ſic idem comes in jure ipſius Johannes manutergium tenuit, quando dominus rex lavabat manus ſuas dicto die coronationis ſuæ ante prandium.*

By which record it appeareth, that the ſaid John Wilſhire, being of his quality and having not any dignity, could not doe and performe this high and honorable ſervice to the royall perſon of the king, but did make an honorable deputy, who performed it in his right; which is worthy of obſervation.

Vid. 1. R. 2. Memb. 45.

At the ſame coronation William Furnevall exhibited his petition in the ſame court, that where he held the mannor of Farnham, in the county of Buck, with the hamlet of Cere in the ſame county, by the ſervice to find to the king at his coronation a glove for his right hand, and to ſupport the king's right hand the ſame day, while he held in his hand the verge royall, the judgement followeth. *Qua quidem petitione debite intellecta, et facta publica proclamatione, ſi quis clameo ipſius Willielmi in ea parte contradicere vellet, nemineque ei contrariante, conſideratum fuit, quod idem Willielmus, aſſumpto per eam primitus ordine militari, ad ſervitium prædictum admitteretur faciendum; et poſtmodo (videlicet) die Martis proximo ante coronationem prædictam dominus rex ipſum Willielmum apud Kenington honorifice præfecit in militem, et ſic idem Willielmus ſervitium ſuum prædictum dicto die coronationis juxta, conſiderationem prædictam, perfecit et in omnibus adimplevit.* By which it appeareth, that a knight is of that dignity, that he may performe this high and honourable ſervice in his owne perſon; and although this William Furnevall was deſcended af an honorable family, yet before he was created knight he could not performe it.

And Sir John de Argentine Chivalier performed the ſervice of grand ſerjanty, to be the king's cup-bearer at the ſame coronation.

[m] Vid. 1. R. 2. m. 45.

[m] Anne, which was the the wife of Sir John Haſtings earle of Pembroke, who held the mannor of Aſhley in Norfolke of the king by grand ſerjantie, *viz.* to performe the office of the napery at his coronation, was adjudged to make a deputy; becauſe a woman cannot doe it in perſon, and thereupon ſhe deputeth Sir Thomas Blount knight, who performed the ſame in her right.

Vid. 1. R. 2. m. 45.

John, ſonne and heire of John Haſtings earle of Pembroke, exhibited in the ſame court his petition, ſhewing that by his tenure he was to carrie the great ſpurres of gold before the king at his coronation, &c. The judgement is, *Audita et intellecta billa prædicta, pro eo quod dictus Johannes eſt infra ætatem, et in cuſtodia domini regis, quanquam ſufficienter oſtenditur per recorda, et evidentias, quod ipſe ſervitium prædictum facere deberet, conſideratum extitit, quod eſſet ad voluntatem regis, quis dictum ſervitium iſta vice in jure ipſius Johannis faceret; et ſuper hoc dominus rex aſſignavit Edmundum comitem Marchiæ ad deferendum dicto die coronationis prædicta calcaria in jure præfati hæredis, ſalvo jure alterius cujuſcunque. Et ſic idem comes Marchiæ calcaria illa prædicto die coronationis coram ipſo domino rege deferebat.* By which it appeareth, that the heire, before he hath accompliſhed his age of one and twenty yeares, cannot performe his great and honourable ſervice, but during the minoritie the king ſhall appoint one to performe the ſervice.

Sect. 158.

46. E. 3. 15. a. per Finchden.

HERE Littleton ſaith, that he, that holds by grand ſerjantie, doth hold by knights

ET nota, que touts, que teignont de roy per grand ſerjeantie, doit le tenant en ceo cas paier reliefe al value del terre per an? Ad quod non fuit reſponſum.

AND note, that all, which hold of the king by grand ſerjeantie, ought the tenant to pay reliefe to the value of the land by the yeare? *Ad quod non fuit reſponſum.*

—(4) See poſt 108. b. where for a like reaſon a ſervice, which if it was to be done to a *ſubject*, would be *ſocage*, is diſtinguiſhed by the denomination of *petit ſerjeanty*.—(5) Particular reſpect is due to the opinions of ancient times on the ſubject of tenures; but in the inſtance of the caſe here mentioned to be put to the judges, their reſolution ſeems ſo inconſiſtent with the nature of grand ſerjeanty, as deſcribed both by Littleton and Coke, that it may be allowable to doubt the propriety of the opinion. Littleton ſtates the doing the ſervice to the king in *proper perſon* as a thing eſſential to grand ſerjeanty; and lord Coke enumerates it amongſt the ſpecial properties of this tenure, with the exception only of performing the ſervice by deputy when the tenant himſelf is incapable. Ante 106. b. But if this be ſo, how can a ſervice, expreſsly reſerved to be done by *any* perſon, fall within the deſcription? It is obſervable indeed, that Littleton recites the opinion of the judges without the leaſt approbation; and that even they themſelves, when preſſed to declare, what the relief ought to be, whether 5*l.* as for a tenure by eſcuage, or *a year's value of the lands* as for a grand ſerjeanty, avoided anſwering; from which heſitation it ſeems, as if they were not diſpoſed to adhere to their firſt opinion in all its conſequences. On the other hand, if the tenure in queſtion was not *grand ſerjeanty*, but mere *knight's ſervice*, it tends to prove, that though the perſonal ſervice, in lieu of which eſcuage was payable, was *in general* due only on *foreign expeditions*, yet by *ſpecial* reſervation it might be due *within the realm*. However, reſerving ſervice in war within the realm was a thing ſo unuſual in *practice*, that the ſervice, for which eſcuage was a commutation, was called *ſervitium forinſecum*; a denomination, which according to lord Hale, is founded on the circumſtance of its being due *out of the realm*. See ante 69. b. note 3. In a former note on eſcuage, we adopted lord Hale's opinion as to the reaſon of calling knight's ſervice *ſervitium forinſecum*; becauſe we thought his conjecture a probable one. Ante 74. a. note 1. But

for our law gives the cuſtody of them to their parents till the age of *fourteen* by the guardianſhip of *nurture*, which ſpecies of guardian-

ſerjeanty, teignont de roy per ſervice de chivalrie; et le roy per ceo avera garde, mariage, et reliefe; mes le roy navera de eux eſcuage, ſils ne teignont de luy per eſcuage.

ſerjanty, hold of the king by knights ſervice; and the king for this ſhall have ward, mariage and reliefe; but he ſhall not have of them eſcuage, unleſſe they hold of him by eſcuage.

ſervice, which is ſo ſaid of the effects. And thereforeLittleton doth add, that the king ſhall have ward mariage and reliefe, which are the effects of knights ſervice, &c.

Sometimes in ancient records, *ſervitium militare* is called *ſervitium hauberticum*, or *ſervitium brigandinum*, or *ſervitium loricatum*. And a *haubert* or *brigandine* ſignifieth a coat of male (1). (Ante 75. a.)

CHAP. 9. Sect. 159.

Petit Serjeantie.

TENURE per petit ſerjeanty eſt, lou home tient ſa terre de noſtre ſeignior le Roy de render al Roy annualment un arke, ou un eſpee, ou un dagger, ou un cuttel, ou un launce, ou un paire de gants de ferre, ou un paire de ſpoures d'ore, ou un ſete, ou divers ſetes, ou de render autres tiels petit choſes touchants le guerre.

TENURE by petite ſerjeanty is, where a man holds his land of our ſoveraigne lord the king, to yeeld to him yearly a bow, or a ſword, or a dagger, or a knife, or a lance, or a paire of gloves of maile, or a paire of gilt ſpurs, or an arrow, or divers arrowes, or to yeeld ſuch other ſmall things belonging to warre

DE noſtre ſeignior le roy. And ſo Littleton concludeth this chapter, that a man cannot hold by grand ſerjeanty or petite ſerjeanty, but of the king, and of the king as of his perſon, and not of any honour or manor. (2) And it is to be obſerved, that regularly a tenure of the king as of his perſon is a tenure *in capite*, ſo called κατ' ἐξοχην *propter excellentiam*: becauſe the head is the principall part of the body, and he that holdeth of any common perſon as of his perſon, he in truth holdeth *in capite*; but againe κατ' ἐξοχην it is only in common underſtanding applyed to the king, and that ſeigniory of a common perſon is called a tenure in groſſe, that is, by it ſelfe, and not linked or tied to any mannor, &c.

Britton fol. 164. Bracton lib. 2. fol. 35. Fleta lib. 2. cap. 9. Ockam cap. Quid be avibus oblatis.

(6. Co. 6.)

And this tenure of the king *in capite*, is ſaid [*a*] to be a tenure of the king as of his crowne, that is, as he is king. [*b*] And therefore if one holdeth land of a common perſon in groſſe as of his perſon, and not of any mannor, &c. and this ſeigniory eſcheateth to the king (yea though it be by attainder of treaſon) he holdeth of the perſon of the king, and not *in capite*; becauſe the originall tenure was not created by the king. And therefore it is directly ſaid, that a tenure of the king *in capite*, is when the land is not holden of the king as of any honor, caſtle, or mannor, &c. but when the land is holden of the king as of his crowne (3).

[*a*] Bracton lib. 2. fol. 87. (2. Ro. Abr. 504.)

[*b*] 3. E. 3. Tenures B. 94. 30. H. 8. 43. 28. H. 8. Livery B 57. 29. H. 8. ibid. 58. 6. H. 8. Dier. 58. Vide Leſtatute de 1. E. 6. cap. 4. F. N. B. 5. K. (2. Ro. Abr. 72, 73.)

Note that an honor is the moſt noble ſeigniory of all others, and originally created by the king, but may afterward be granted to others. See for the creation of an honor, 13 H. 8. cap. 5. 33 H. 8. cap. 7. 38. 37 H. 8. cap. 18. (4)

And it is to be obſerved, that a man may hold of the king *in capite*, or of his crowne, as well in ſocage, as by knight's ſervice (5).

De render al roy annualment un arke, ou un eſpee, &c. As grand ſerjeanty muſt be done by the body of a man, ſo petite ſerjeanty hath nothing to do with the body of a man, but to render ſome things touching warre; as a bow, a ſword, a dagger, a knife, a launce, a pair of gantlets of iron, or ſhafts and ſuch like.

Magna Chart. cap. 27.

It is to be obſerved that grand ſerjeanty or knights ſervice is not in law called *liberum ſervitium*, as ſocage is, but *per feodum unius militis*, &c. But to finde the king ſo many ſhips for

Regiſt. fo. 2, F.N.B. fo. 1.

But the reader ſhould recollect, that others explain the denomination in a different way. Ante 74. b.—(6) On many occaſions it may be of importance thoroughly to underſtand the phraſe of *infra*, or as according to claſſical ſtyle it ought to be, *intra quatuor maria*; for there are various ſubjects, as well of the *law of nations*, as of *municipal law*, which are neceſſarily connected with it. Of the former kind are the *ſea dominion* claimed by our king and its incidental rights; eſpecially the right of ſalutation by ſtriking of the flag and lowering the top-ſail to our ſhips of war; a ceremony, which, however it may be conſtrued by foreigners as a mere *compliment*, is conſidered by ourſelves as a *recognition* of ſovereignty. Of the latter ſort are the doctrine concerning eſſoins *de ultra mare*, and all thoſe caſes, which turn upon the *allegation of being beyond ſea*; as queſtions of legitimacy, of outlawry, and on the ſtatutes of limitation particularly may. But notwithſtanding the neceſſity of knowing, for ſuch a variety of purpoſes, what is the ſenſe of the term of being *within the four ſeas*, we do not find the ſubject ſufficiently enlarged upon, either by lord Coke, or indeed ſcarce any other writers deſerving of being called *original*; except Mr. Selden, who is very copious upon it; and Sir Philip Medows, who, though not ſo favourable to our claim of *ſea dominion*, nor ſo generally known as the former, is well intitled to notice. See Seld. Mar. Clauſ. lib. 2. per tot. but more particularly in cap. 1. & 24. and Medows's Obſervat. concerning the Dominion, &c. of the Seas, in a ſmall tract, which was publiſhed in 1689. In this ſcarcity of information on the ſubject, it may be acceptable to the reader to be aſſiſted in his enquiries by a ſhort but pointed view of the ſubject; for which purpoſe we ſhall firſt mention the origin of the phraſe of the *four ſeas*, and explain its moſt general and extended ſenſe.

☞ *The continuation of this note will be found after the note at the end of the notes to* 108. *b.*

(1) The tenure by grand ſerjeanty ſtill continues, though it is ſo regulated by the 12. of Cha. 2. as to be made in effect *free and common ſocage*, except ſo far as regards the merely honorary part of grand ſerjeanty; for the firſt part of the ſtatute, which deſtroys the incidents to tenures by knight's ſervice, of which grand ſerjeanty was the higheſt ſpecies, is expreſſed with a generality ſufficient to reach grand ſerjeanty; but then a proviſo follows, by which the *honorary* ſervices of this tenure are expreſsly ſaved. It is obſervable, that the proviſo for this purpoſe is penned with an inaccuracy, which leads to a very miſtaken idea of the incidents to grand ſerjeanty. The honorary ſervices are preſerved with a cautious exception of ſeveral burthenſome properties, ſuch as *marriage wardſhip* and *voyages royal*; to which are added *eſcuage* and the *aids pur faire fitz chivaler et file marier*, though *theſe latter* were certainly quite foreign to grand ſerjeanty. See ante 105. b. From this undiſtinguiſhing mode of

guardianſhip, though it differs from *that* by *nature* not only in *name* but alſo in *duration* and ſome other particulars, as will appear

for his paſſage is called *liberum ſervitium*; and therefore it is ſaid, *per liberum ſervitium ad inveniendum nobis quinque naves ad tranſitum noſtrum ad mandatum noſtrum.* And therefore cleerly ſuch a tenure is neither grand ſerjeanty, nor knights ſervice; becauſe nothing is to be done by the body of any man, nor in that caſe touching war, but ſhips to be found. And this is the reaſon, that Littleton yeeldeth of the examples he doth here put, becauſe that ſuch a tenant by his tenure ought not to go, nor to doe any thing in his perſon, touching war. And herewith agreeth Bracton, *ex parvis ſerjeantiis, quæ non reſpiciunt regem nec patriæ defenſionem, nullum competere debet maritagium nec cuſtodiam, &c.*

Bract. li. 2. fo. 35.

If a man holdeth land of the king, to finde an horſe of ſuch a price and a ſaddle and a bridle by forty dayes, or any other time, when the king goeth with his army againſt Wales, this is petite ſerjeanty, and no grand ſerjeanty for the cauſe aforeſaid.

9. H. 3. Gard. 145.

Sect. 160.

TIEL ſervice neſt forſque ſocage, &c. But as it hath beene ſaid, the dignity of the perſon of the king giveth the name of petite ſerjeanty, which in caſe of a common perſon ſhould be called plain ſocage *ab effectu:* for it ſhall have ſuch effects or incidents as belong to ſocage, and neither ward nor marriage, &c. for they belong to knights ſervice.

9. H. 3. Gard. 145.

Of this tenure the great charter in the perſon of the king ſaith thus. *Nos non habebimus cuſtodiam hæredis, &c. occaſione alicujus parvæ ſerjeantiæ, quam tenet de nobis per ſervitium reddendo nobis cultellos, ſagittas, &c.*

Mag. Chart. ca. 28. Vide Stat. de Wardis & Relevis 28 E. 1.

ET tiel ſervice ne eſt forſque ſocage en effect; pur ceo que tiel tenant per ſon tenure ne doit aler, ne fayre aſcun choſe, en ſon proper perſon, touchant le guerre, mes de render & payer annualment certaine choſes al roy, ſicome home doyt payer un rent.

AND ſuch ſervice is but ſocage in effect; becauſe that ſuch tenant by his tenure ought not to goe, nor doe any thing, in his proper perſon, touching the warre, but to render and pay yearly certaine things to the king, as a man ought to pay a rent.

Sect. 161.

OF this ſufficient hath beene ſayd before, ſaving that *parva ſerjeantia* is only appropriate to this tenure (1).

Vide Sect. 1.

ET nota, que home ne poyt tener per graund ſerjeantie, ne per petit ſerjeanty, ſinon de roy, &c.

AND note, that a man cannot hold by grand ſerjeanty, nor by petite ſerjeanty, but of the king, &c.

CHAP. 10. Sect. 162.

Tenure en Burgage.

BURGAGE, in Latine *burgagium*, is derived of this word *burgus*, which is *vicus*, *pagus*, or *villa*, a towne (2); and it is called a burgh (3), becauſe it ſendeth burgeſſes to parliament.

Bracton lib. 3. Tract. 2. Britton fol. 164. Mirror cap. 2. ſect. 18. 10. Co. 123, 124. The Mayor of Lynn's Caſe. 40. Aſſ. p. 27. 43. E. 3. 32. 21. E. 4. 53. & 54. 21. H. 7. 15. 2. E. 3. cap. 3.

TENURE en burgage eſt, lou antient burgh eſt, de que le roy eſt ſeignior, &

TENURE in burgage is, where an ancient burrough is, of which the king is lord,

Of burghs ſome be incorporate, and ſome not; and ſome be walled, and ſome not. [*b*] It

[*b*] Bracton lib. 3. fo. 124. Fleta lib. 1. cap. 47.

ceux

of expreſſion, and from the confuſion and redundancy ſo conſpicuous in moſt parts of the ſtatute, we are inclined to infer, that thoſe, who attribute the framing of it to lord chief juſtice Hale, found themſelves on a looſe report, very injurious to the memory of that ſhining ornament of his profeſſion. See Gilb. Eq. Rep. 176.—(2) In a former note we mentioned Mr. Madox's diſapprobation of calling any tenures of the king *by way of diſtinction* tenures *ut de perſona*. We ſhall here explain his reaſons for rejecting the phraſe more fully. The phraſe ſeems *unneceſſary*; for *that* of *ut de corona* fully anſwers the ſame purpoſe of diſtinction. It alſo ſeems *injudicious*, and to tend to an erroneous idea of tenures; becauſe it ſuppoſes, that *ſome* tenures are *not* of the *perſon*, whereas in truth *all are*, and none can hold feudally of an *inanimate* thing, or otherwiſe than of a man's perſon. Mad. Baron. Ang. 167. This is the ſubſtance of Mr. Madox's objections to the phraſe; and we ſtill think, that in ſtrict propriety of ſpeech, his animadverſion on thoſe, who uſe it, is juſtifiable. However in juſtice to lord Coke it ſhould be remembered, that he was not the inventor of the phraſe; Mr. Madox himſelf tracing its origin to the latter end of the reign of Henry the Eighth.—(3) Mr. Madox is not leſs adverſe to thus diſtinguiſhing tenure *in capite* from tenure *ut de honore*, than to the diſtinction of *ut de perſona*; nor are his reaſons leſs convincing. Tenure *in capite*, in its genuine ſenſe, ſignifies a tenure of another *ſine medio*, that is, immediately and without the interpoſition of any meſne or intermediate lord; and therefore when an honor or other ſeigniory came into the hands of the crown by eſcheat or otherwiſe, its tenants were as much tenants *in chief* to the king, as thoſe who were ſo by original grant from the crown. In proof of this Mr. Madox ſelects from ancient records a great variety of inſtances between the 8th of Richard I. and the 20th of Henry VI. in which tenures *ut de honore* are *expreſsly* ſtyled tenures *in capite*; and as Mr. Madox adds no inſtances of a later time than Henry the Eighth and queen Elizabeth, in which the words *in capite* are omitted, it may be conjectured, that the error complained of by Mr. Madox originated ſoon after the time of Henry the Sixth. Mad. Baron. Angl. 181. The deſign of excluding tenures *ut de honore* from the deſcription of *tenures in capite* was to diſtinguiſh thoſe eſtates, which were held of the king by a tenure originally created by the king, from thoſe held of him by a tenure commencing by the ſubinfeudation of a ſubject; between which there were many differences in point of incident very eſſential both to the lord and tenant. Mad. Baron. Angl. 12. But it ſhould have been recollected, that the diſtinction aimed at was already marked, with equal ſufficiency and more correctneſs, by denominating tenures of the firſt ſort tenures *ut de corona*, and thoſe of the ſecond tenures *ut de honore*. The influence of this miſtaken notion of tenancy *in capite* is very evident, as well throughout the ſtatute of Charles the Second for taking away the oppreſſive fruits of knight's ſervice and tenure *in capite*, as in thoſe grants from the crown, which in the *tenendum* are expreſſed to be *ut de honore et non in capite*. See Mad. Excheq. fol. ed. 432. But great as this error about tenure *in capite* may be, lord Coke is excuſeable for conforming in his language to it; becauſe before his time it had been adopted by the legiſlature. See 37. H. 8. c. 20. ſ. 2. 3. 4. 1. E. 6. c. 4. ſ. 1. 2. & 3. and Mad. Baron. Anglic. 233.

☞ *For the remainder of the notes ſee* 108. *a ſee fol* 110. *a.*

(1) The tenure of petit ſerjeanty is not named in the 12. of Cha. 2. but the ſtatute is not without its operations on this tenure.

It

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appear by the next note, is founded on a like conformity to the order of nature. It being thus explained, who are intitled to

the

ceux, que ont tenements deins le burgh, teignont del roy lour tenements, que chescun tenant per son tenement doit payer al roy un certain rent per an, &c. Et tiel tenure nest forsque tenure en socage.

and they, that have tenements within the burrough, hold of the king their tenements; and every tenant for his tenement ought to pay to the king a certaine rent by yeare, &c. And such tenure is but tenure in socage.

was in former times taken for those companies of ten families, which were one anothers pledge; and therefore a pledge in the Saxon tongue a *borhoe*, whereof some take it that a burgh came, whereof also commeth headborough or borowhead, *capitalis plegius*, a chiefe pledge, *viz.* the chiefe man of the borhoe, whom Bracton called *frithburgus*; and hereof also commeth burgbote, which, as Fleta faith, signifieth *quietanciam reparationis murorum civitatis aut burgi.*

Every city is a burgh, but every burgh is not a city; whereof more shall be said hereafter. And the termination of this word *burgagium*, (as before hath beene noted) signifieth the service whereby the burgh is holden. And of this word (burgh) two ancient and noble families take their names, *viz. de Burgo*, and *de Burgo caro, Burchier.*

De que le roy est seignior. But it may be holden of another, as by that, which immediately followeth, appeareth. F. N. B. 64. d.

Sect. 163.

ET mesme le manner est, lou un auter seigniour esperitual ou temporall est seignor de tiel burgh, et les tenants de tenements en tiel burgh teignont de lour seignior a payer, chescun de eux, un annual rent.

AND the same manner is, where another lord spirituall or temporall is lord of such a burrough, and the tenants of the tenements in such a burrough hold of their lord to pay, each of them yearly, an annual rent.

THIS is evident, and needeth no explanation. Only this by the way is to be observed, that bishops, being lords of parliament, have not been called lords spirituall so lately, as some have imagined. 16. R 2. ca. 5. 1. H. 4. ca. 2. &c.

Sect. 164.

ET est appel tenure en burgage; pur ceo que les tenements deins le burgh sont tenus del seignior del burgh per certaine rent, &c. Et est ascavoire, que les antient villes, appel

AND it is called tenure in burgage; for that the tenements within the burrough be holden of the lord of the burrough by certaine rent, &c. And it is to wit, that the ancient townes, called burroughes, be

PER certaine rent, &c. By (&c.) here is implyed fealtie, or other setvice, as to repaire the house of the lord, &c.

Les ancient villes appel burghes.

So as a burgh is an ancient towne, holden of the king or any other lord, which sendeth burgesses to the parliament.

And it is to be observed, that *Burgh* and *Burie* have all one signification; as *Canterburie, Burie Saint Edmond, Sudburie, Salisburie, Banburie, Heytesburie, Malmesburie, Shaftesburie, Teukes-*

It being necessarily a tenure *in capite*, though in effect only so by socage, *livery* and *primer seisin* were of course incident to it on a descent; and these are expresly taken away by the statute from every species of tenure *in capite*, as well *socage in capite* as *knights service in capite*. See ante 77. a. But we apprehend, that in other respects *petit serjeanty* is the same as it was before; that it continues in denomination, and still is a dignified branch of the tenure by socage, from which it only differs in name on account of its reference to *war*.—(2) For the difference between *town* and *borough*, see post 115. b.—(3) For the etymology of *borough*, besides Spelman, Du Fresne, and the other glossarists, see Whitl. on Parliam. 497. Brad. on Bor. 1. and Mad. Firm. Burg. 2.—(4) Mr. Madox cautions his readers against this derivation of *borough*. Mad. Firm. Burg. 2. His reason, we presume, was, that *borough* was a word far more ancient than the practice of sending burgesses to parliament. However it is possible, that some boroughs might be denominated towns, till they were allowed to chuse representatives in parliament; and that they acquired the name of *boroughs* from the circumstance of having that privilege. If any *towns* did become *boroughs* in this way, it in *some degree* accounts for lord Coke's explication of the word, though it will not wholly justify him as an etymologist.

Continuation of the note about the Four seas *from* 108. *a.*

The appellation of the *four seas* takes its rise from the four parts, into which the sea encompassing Great Britain, by reference to the four cardinal points of the globe, is divided. All those parts taken together are sometimes called the *British seas*; but considered separately each varies in its denomination with the coasts of the island. To the *West* our sea is by ancient writers called *Vergivian*, not only including the sea between Great Britain and Ireland, but extending over the Atlantick ocean, which washes the western coast of the latter; and this western part of our sea is subdivided; for so much as runs between England and Ireland is called *St. George's Channel*, or the *Irish sea*, and the sea on the west coast of Scotland is sometimes named

the guardianship by *nature*, and what infants are its objects, we shall conclude with some few other particulars concerning it.—This guardianship continues till the infant attains the age of *twenty-one*.—The books inform us, that it extends no further than the custody of the infant's *person*; a peculiarity, we did not sufficiently advert to, when we were writing a preceding note, which in the last sentence is unguardedly expressed, as if receiving the profits of lands might be part of the office of

guardian

Teukesbury, and others send Burgesses to the parliament. *Vide pro villis, parochiis et hamlettis postea, section* 171.

Cities. *Civitas*, whereof commeth the word city. A city is a borough incorporate (2); which hath, or have had a bishop; and though the bishopricke be dissolved, yet the city remaineth.

Lamb. fol. 125.

In the time of William the conquerour it is declared in these words. *Item nullum mercatum, vel forum sit, nec fieri permittatur, nisi in civitatibus regni nostri, et in burgis clausis et muro vallatis, et castellis, et locis tutissimis, ubi consuetudines regni nostri, et jus nostrum commune, et dignitates coronæ nostræ, quæ constitutæ sunt à bonis prædecessoribus nostris, deperire non possunt, nec defraudari, nec violari, sed omnia rite et per judicium et justitiam fieri debent: et ideo castella et burgi et civitates sunt et fundatæ et ædificatæ; scilicet ad tuitionem gentium, et populorum regni, et ad defensionem regni, et idcirco observari debent cum omni libertate et integritate et ratione.* So as by this it appeareth, that cities were instituted for three purposes. First, *Ad consuetudines regni nostri, et jus nostrum commune, et dignitates coronæ nostræ conservand'.* 2. *Ad tuitionem gentium et populorum regni.* And thirdly, *Ad defensionem regni.* For conservation of laws, whereby every man enjoyeth his owne in peace; for tuition and defence of the king's subjects; and for keeping the king's peace in time of sudden uprores; and lastly for defence of the realme against outward or inward hostility.

burghs, sont les plus ancient vills que sont deins Engleterre; car ceux villes, que ore sont cities ou counties, en ancient temps fueront burghes, et appelles burghes; car de tielx ancient villes, appelles burghes, veignont les burgesses al parliament, quant le roy ad summon son parliament (1).

the most ancient towns, that be within England; for the townes, that now be cities or counties, in old time were boroughes, and called boroughes; for of such old townes, called boroughs, come the burgesses of the parliament to the parliament, when the king hath summoned his parliament.

Mirror cap. 2. sect. 18. Britton fol. 87.

Civitas et urbs in hoc differunt, quod incolæ dicuntur civitas, urbs verò complectitur ædificia; but with us the one is commonly taken for the other. *Villeins sont coultivers de fiefe demurrants in villages upland; car de ville est dit villeine, et de boroughes burgesses, et de cities citizens.*

Mich. 7. R. 1. Rot. 1. (which was in Anno Dom. 1195.) in an Ass. of Darreine Presentment for the Church of St. Peter's in Cambridge.

Every borough incorporate, that had a bishop within time of memory, is a citie, albeit the bishopricke be dissolved; as Westminster had of late a bishop, and therefore it yet remaines a city (3). The burgh of Cambridge, an ancient city, as it appeareth by a judiciall record (which is to be preferred before all others) where *mos civitatis Cantabrigiæ* is found by the oath of twelve men the recognitors of that assise; which (omitting many others) I thought good to mention, in remembrance of my love and duty *almæ matri academiæ Cantabrigiæ.*

There be within England two archbishoprickes, and twenty-three other bishoprickes. Therefore so many cities there be; and Cambridge and Westminster being added, there are in all twenty-seven cities within this realme, and may be more, than at this time I can call to memory.

It is not necessary, that a city be a county of itselfe; as Cambridge, Ely, Westminster, &c. are cities, but are no counties of themselves, but are part of the counties where they be.

(Post. 168. a.)

Counties. Or shires, the one taken from the French, the other from the Saxon; in Latine *comitatus.* Counties are certaine circuits or parts of the kingdome, into the which the whole realme was divided for the better gouvernment thereof, so as there is no land, but it is within some county. And every of them is governed by a yearly officer, which we call a Shireve; which name is compounded of these two Saxon words *Shire* and *reve*, [*i*] *præpositus* or *præfectus comitatus.* But hereof more hereafter in his proper place shall be spoken. There be in England forty-one counties, and in Wales twelve.

10. Co. 123, 124. Vid. Devant sect. 97.

Veignont les burgesses al parliament, &c. Parliament is the highest and most honourable and absolute court of justice in England, consisting of the king the lords of parliament and the commons. And againe, the lords are here divided into two sorts, *viz.* spirituall and temporall. And commons are divided into three parts, *viz.* into knights of shires or counties, citizens out of cities, and burgesses out of burroughes; the words of the writ to the sherife for the election being, *duos milites gladiis cinctos magis idoneos et discretos comitatus tui, et de qualibet civitate comitatus tui duos cives, et de qualibet*

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

(1) See ante 108. b. note 4.—(2) This implies, that unless a borough is *corporate*, it *cannot* be a city. But if this was lord Coke's idea, it is not quite accurate; for though in general the description may be true, yet it is not universally so. Westminster is a *city* and also a *borough*, so far at least as the sending members to parliament can intitle it to that denomination;

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guardian by nature. See ante note 8. of 88. b. Carth. 386, ante 84.—It yields as to the custody of the person to guardianship in socage, where the the title to both guardianships concur in the same individuals as they *necessarily* do in the case of father or mother, if lands held by a socage-tenure descend on the heir apparent being an infant, and *may* in the case of other ancestors; the reason of which is explained elsewhere. See fol. 88. b. note 8. But guardianship in socage ending at *fourteen*, we presume, that after that age the father, or other ancestor having a like title to both guardianships, becomes guardian by nature till the infant's

quolibet burgo duos burgenses de discretioribus, et magis sufficientibus, &c. all which have voyces and suffrages in parliament. You shall reade in the parliament rolls, that (as hath beene said) there is *lex et consuetudo parliamenti, quæ quidem lex quærenda est ab omnibus, ignorata à multis, et cognita à paucis.* Of the members of this court some be by descent, as ancient noblemen; some by creation, as nobles newly created; some by succession, as bishops; some by election, as knights, citizens, and burgesses.

Vide sect. 3.
(4. Inst. 2.)

It is called parliament; because every member of that court should sincerely and discreetly *parler la ment* (1) for the general good of the common wealth; which name it hath also in Scotland (2); and this name before the Conquest was used in [a] the time of Edward the Confessour, William the Conquerour, &c. (3) It was anciently before the Conquest called *michel sinoth, michel gemote, ealla witenage mote*; that is to say, the great court or meeting of the king and of all the wisemen, sometime of the king with the counsell of his bishops nobles and wisest of his people. This court the Frenchman called *les estates,* or *lassemble des estates.* In Germany it is called a *diet.* For those other courts in France that are called parliaments, they are but ordinary courts of justice; and (as *Paulus Jovius* affirmeth) were first established by us.

4 H. 8. cap. 8.
[a] Treatis. de Modo tenend. Parliam. 21. E. 3. fo. 60. a. Johannes de Rupicella tempore regis Johannis. Pol. Virgil. li. 3. tempore H. 1. W. 1. 3 E. 1. in the title.

The king of England is armed with divers councels, one whereof is called *commune concilium,* and that is the court of parliament, and so it is legally called in writs and judicial proceedings *commune concilium regni Angliæ.* And another is called [b] *magnum concilium:* this is sometime applied to the upper house of parliament, and sometime out of parliament time to the peeres of the realme lords of parliament, who are called *magnum concilium regis*; for the proofe whereof take one [c] record for many in the fift yeare of king H. 4. at what time there was an exchange made betweene the king and the earle of Northumberland, whereby the king promiseth to deliver to the earle lands to the value, &c. *per advice et assent des estates de son realme et de son parliament (pareusi que parliament soit devant le feast de St. Lucy) ou auterment per advice de son graund councell, et auters estates de son realme, que le roy ferra assembler devant le dit feast, in case que le parliament ne soit.* And herewith agreeth the act of parliament in 37 E. 3. cap. 18. where it is said, before the chancellour treasurer and great councell. (4) Thirdly (as every man knoweth) the king hath a privy councell for matters of state; (as for example) [d] *Henricus de bello monte baro de magno et de privato concilio regis juratus,* and many others before and after. The fourth councell of the king are his judges of the law for law matters; and this appeareth frequently in our [e] bookes, and must be intended, when it is spoken generally by the councell it is to be understood *secundum subjectam materiam*; for example, if it be legall, then by the king's councell of the law, *viz.* his judges (5).

(Doct. & Stud. 164. 3. Inst. 125, 179. 4. Inst. 53.)
[b] Bracton lib. 1. cap. 2. Regist. 280.
[c] 27. Aug. 5. H. 4.
[d] In Dors. Claus. 16. E. 2. M. 5.
(7. Co. 36.)
[e] 43. Ass. 15. 27. H. 6. 5. 1. R. 3. 11. Regist. 191, 122, 123. 4. E. 3. 2. 39. E. 3. 35. 3. Ass. 15. 19. E. 3. Jugement 174. W. 1. ca. 1. Lastat de Templar. 16. R. 2. Stat de Præmunire.

Now for the antiquity of this high court of parliament, whereof Littleton here speaketh, it appeareth, that divers parliaments have beene holden long before and untill the time of the Conqueror, which be in print, and many more appearing in ancient records and manuscripts (6). [f] *Le roy Alfred assembler' les counties,* &c. *et ordeina pur usage perpetual, que deux foitz per an ou pluis sovent pur mister in temps de peace se assemblerent a Londres, a parlementer sur le guidament del people de Dieu, et coment soy garderent de pecher, viveront en quiet, et receiveront droit per usages et sanits judgements. Per ceste estate se fieront plusors ordinances per plusors roys jesque a temps le roy que ore est, que fuit le roy E.* 1. (7) The conclusion of that great parliament holden by king Ethelstan at Grately is very remarkable, which I have seene in these words. *All this was enacted in that great synod or councell at Grately, whereat was the archbishop Wolfehelme, with all the noblemen and wise men, which king Athelstan called together.*

See the same published by Mr. Lambert.
[f] Mirror ca. 1. sect. 2. Vide Statutes de 4. E. 3. ca. 14. & 36. E. 3. ca. 10.

There have beene in the time of, and since the Conquest, in the reignes of H. 1. king Stephen, H. 2. R. 1. king John, H. 3. &c. 280 sessions of parliament, and at every session divers acts of parliament made, no small number whereof are not in print (8).

Mirr. ca. 2. sect. 4. 7. 10. 14. ca. 4. de Defaults, & cap. de Homicide cap. 1. sect 13. cap. 4. de Poyns. Ockam quid cum Ven. Math. Paris. 212. 213.

The jurisdiction of this court is so transcendent, that it maketh, inlargeth, diminisheth, abrogateth, repealeth and reviveth lawes, statutes, acts and ordinances, concerning matters ecclesiasticall, capitall, criminall, common, civill, martiall, maritime, and the rest. None can begin, continue, or dissolve the parliament, but by the king's authority. Of which court it is said, [a] *Que il est de tresgrand honor et justice, de que nul doit imaginer chose dishonorable.* [b] *Habet rex curiam suam in concilio suo in parliamentis suis, præsentibus prælatis, comitibus, baronibus, proceribus, et aliis viris peritis, ubi terminatæ sunt dubitationes judiciorum, et novis injuriis emersis nova constituuntur remedia, et unicuique justitia prout meruerit retribuetur ibidem.* But this properly doth belong to the jurisdiction of courts, and therefore this little taste hereof shall suffice.

[a] Pl. Com. 398. b. Doctor & Stud. ca. 55. fol. 164.
[b] Fleta lib. 2. ca. 2. Fortescue de Laudibus legum Angliæ, Brac. lib. 1. ca. 2.
(Doctor & Stud. 32.)

Sect.

nation; and yet it certainly is not corporate. Mr. Madox mentions Westminster as a borough *not corporate*; and we ourselves have seen papers in the archives of the dean and chapter of Westminster, which confirm his idea. Mad. Firm. Burg. 49. This fact is material to another purpose. Westminster not being corporate, and yet having, as we apprehend, first sent members to parliament in the reign of Edward the Sixth, is an instance, that the inhabitants of a town may acquire the right of having representatives in parliament *within time of legal memory* without being incorporated, and therefore seems inconsistent with the doctrine of lord chief justice Holt on this subject in Ashby and White. See 3. Pryn. Brev. Parl. sect. 7. p. 188. 1. Will. Notit. Parl. 7. and 21. of the preface. Car. Rights of Elect. part 2. page 233. 1. Stow's Survey Strype's ed. of 1720. p. 8. and 10. of the 2d appendix, and 2. Dougl. Hist. of Cas. of Controv. Elect. 296. 297. 298. It is with great pleasure, that we cite Mr. Douglas's work, as it affords the opportunity of congratulating the student, on the accession of a collection of excellent reports on the law of parliamentary election, accompanied with an instructive historical preface, and very judicious annotations. This is the only work of the kind, except one lately published from Mr. Glanville's manuscript; and they are both particularly valuable, on account of their tendency to *diffuse* the knowledge of a branch of law, which *before* was too much confined to the narrow circle of the few favourites in possession of the *practice.*—(3) This is rather an unapt example of the truth of lord Coke's position; for Westminster, as we have already stated, is *not* a borough *incorporate.* See supra note 2. As to Westminster's being a *city,* it became so by *express creation,* and not *singly* by making it the see of a bishop, however sufficient *that* of itself might have been; the letters patent, which erected the bishoprick, ordaining, *quod tota villa nostra Westmonasterii extunc et deinceps in perpetuum sit civitas, ipsamque civitatem Westmonasterii vocari.* See the letters patent in 1. Burn. Reform. page 246. of the Appendix.

See 3. Term Rep. B. R. 563. 569. 571.

The continuation of the notes to 108. *a. intended to be introduced here, is necessarily postponed to fol.* 111. *a.*

(1) The latter part of this etymology is justly exploded; but it is some excuse for lord Coke, that it did not first come from him, it being to be found in preceding authors of eminence. See Lamb. Archeion in the chapter of *Parliament,* and 1. Whitl. on Parliament 174. A learned writer of the present time suggests, that perhaps *parliament* may be a compound of *parly* and *ment,* two Celtick words, the *former* answering to *parler* in French, and the *latter* signifying *abundance,* and both together importing the same as *great talk* amongst the Indians of North America. Barringt. Obs. on Ant. Stat. 2d ed. 56. But though we do not doubt, that there are two such words in the Celtick language, we are scarce more satisfied with this derivation, than with that expressed by lord Coke. The opinion adopted by Mr. Lambard seems far the most probable; and this is, that *parliament* is not a *compound* word, but *simply* derived from the French verb *parler,* with the addition of *ment* in the termination; which mode of converting *verbs* into *nouns* as well as into *adverbs* is common in the *French* tongue. Lamb. Archeion in the chap. of *Parliament.* A like practice prevailed in the formation of the *Roman* language; and thence

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infant's age of *twenty-one.* See Carth. 384.—Lastly the father may disappoint the mother and other ancestors of the guardianship

Particular customs of Borough English.
The customary descent of the copyholds in the manor of Cheshunt in Hertfordshire was stated to me in a case lately laid before me is thus. "If a father dyes seized, & does not dispose of his copyholds, that part which is above the bank falls to the eldest son, & that which is below the bank to the youngest. Also if a brother dyes seized leaving two brothers, the eldest brother is to have what above the bank, & the youngest brother what is below the bank." F.H. 22. Dec. 1803.

See my opinion on a case relative to this custom 22. Dec. 1803. F.H.

Sect. 165.

ITEM per le greinder part tielx burghes ont divers customes et usages, que nont pas auters villes. Car ascuns burghes ont tiel custome, que si home ad issue plusors fits et morust, le puisne fits enheritera touts les tenements, que fueront a son pere deins meme le burgh come heire a son pere per force de custome; et tiel custome est appel burgh English.

ALSO for the greater part such boroughes have divers customes and usages, which be not had in other towns. For some boroughes have such a custome, that if a man have issue many sonnes and dyeth, the youngest son shall inherit all the tenements, which were his father's within the same borough, as heire unto his father by force of the custome; the which is called borough English (1).

CUSTOMES et usages. *Consuetudo*, is one of the maine triangles of the lawes of England; those lawes being divided into common law, statute law, and custome. Of which it is said, * that *consuetudo quandoque pro lege servatur in partibus, ubi fuerit more utentium approbata, et vicem legis obtinet; longævi enim temporis usus et consuetudinis non est vilis authoritas.* [c] *Longa possessio (sicut jus) parit jus possidendi, et tollit actionem vero domino.*

(Post. 115. b.)
(*) Bract. lib. 1. ca. 3. fol. 2.
[c] Idem lib. 2. fol. 52.
(Dav. 33. a.)

Of every custome there be two essentiall parts, time and usage; time out of minde, (as shall be said hereafter) and continuall and peaceable usage without lawfull interruption (z).

(Doct. Plac. 104. 5. Co. 84. a.)

Que nont pas autres villes. It is necessary to be knowne what customes may be alledged in an upland towne, which is neither city nor borough. * In an upland towne, that is neither in city nor borough, such a custome to devise lands cannot be alledged. Neither in an upland towne can there be a custome of borough English or gavelkinde; but these are customes, which may be in cities or boroughes. [d] Also if lands be within a mannor fee or seigniory, the same by the custome of the mannor fee or seigniory may be devisable, or of the nature of gavelkinde or borough English. * But an upland towne may alledge a custome to have a way to their church, or to make by-lawes for the reparations of the church, the well ordering of the commons, and such like things. And it is to be observed, that in special cases a custome may be [e] alledged within a hamlet, a towne, a burgh, a city, a mannor, an honor, an hundred, and a county: but a custome cannot be alledged generally within the kingdome of England; for that is the common law (3).

(*) 44. E. 3. 33. 40. Ass. 4. 27. 41. 21. E. 4. 54. 43. E. 3. 32.
[d] 21. E. 4. 53. 54.
(6. Co. 59. b.)
(*) 21. E. 4. 54. 15. E. 4. 29. 11. H. 7. 14. 44. E. 3. 18. 21. H. 7. 40.
[e] Bract. lib. 4. 271. 34. E. 1. Detinue 60. 17. E. 2. Detinue 58. 3. E. 3. Dett. 156. 30. E. 3. 25. 39 E. 3. 6. 9. 10. 31. E. 3. Render 6. 17. E. 3. 27. 21. E. 4. 28. 22. E. 4. 8. 7. E. 3. 51. 30. E. 3. 23. 34. H. 8. Dier 54. F. N. B. 122. 5. E. 3. Tresp. 13.

Le puisna fits inheritera. And yet by some customes the youngest *brother* shall inherit; for *consuetudo loci est observanda* (4).

Touts les terres ou tenements: Either in fee simple, fee taille, or any other inheritance. If lands of the nature of borough English be letten to a man and his heires during the life of I. S. and the lessee dyeth, the youngest sonne shall enjoy it (5).

Borough English: So called, because this custome was first (as some hold) in England (6).

Vide Glanvil lib. 7. ca. 3. 9.

Sect. 166.

ITEM en ascun burghes, per le custome, feme avera pur sa dower touts les tenements, que fueront a sa baron, &c.

ALSO in some boroughes, by custome, the wife shall have for her dower all the tenements, which were her husbands.

AND this is called frank banke, *francus bancus. Consuetudo est in partibus illis, quod uxores maritorum defunctorum habeant francum bancum suum de terris sockmannorum tenent' nomine dotis* (7).

Bract. lib. 4. Tract. 6. ca. 13. F. N. B. 150. o. Pl. Com. 413. (Ante 33. b.)

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thence the true source of derivation for *testamentum*, and other similar Latin words; though an injudicious desire to render them more significant and expressive of the qualities of the subjects to which they are applied, than their true deduction would warrant, gave birth to a forced and fanciful kind of etymology, like that now so properly rejected in the instance of the word *parliament*. This false taste in respect to etymology is of a very ancient date; nor were lord Coke and his cotemporaries more chargeable with it, than some of the most admired and pure classical writers of antiquity, not excepting even Cicero. See Menag. Jur. Civil. Amœn. cap. 39. particularly in his observations on the word *testamentum*, and Tayl. Elem. Civ. L. 7.+ It seems to have originated from not attending to the real office of etymology, and confounding it with the definition of the subject to which a word is applied; two things quite distinct in their nature, though it frequently happens, that they reflect light on each other.—(2) For a history of the origin and constitution of the parliament in Scotland before the Union of the two kingdoms in the reign of queen Ann, and of the change made by the establishment of one parliament for Great Britain, see the Treatise on the Laws of Election for Scotland, with which Mr. Wight hath lately obliged the public.—(3) Mr. Lambard guesses, that the word *parliament* was introduced here soon after the Conquest. He cites *Westminster the first*, as the most ancient statute in which he had observed the word to be used; though from a passage in the statute of Edward the Second, mentioning *parliaments* in the times of that king's *progenitors*, he infers, that the word had been adopted several reigns *before*. Lamb. Archeion cap. *Parliament*, and Westm. 1. 3. E. 1. and Articuli Cleri 9. E. 2. One of Mr. Prynne's arguments against the great antiquity of the *modus tenendi parliamentum* is the frequent use of the word *parliament*; he insisting, that it was never applied to denote the *great council of the nation* in any of our ancient records or writings prior to the reign of Hen. 3. See Pryn. on 4. Inst. 2. See further Brad. Introduct. to Engl. Hist. 71.—(4) In the controversy about the origin of the *Commons* in parliament, Mr. Tyrrel contends, that anciently *commune consilium* sometimes denoted an assembly distinct from parliament, and one composed of fewer persons; and particularly, that the *commune consilium*, mentioned in the clause of king John's *Magna Carta* about assessing escuage, which enumerates only archbishops bishops abbots counts and the greater barons, was of this sort. Tyrr. Biblioth. Politic. 311. 314.

also + See Atk. on Power &c. of Parl.! fol. ed. p. 10. & 1. [illegible] Abuse of Parl. 3 & 4.

See Hale on jurisd. of Lords or Parl. chap. 2. & p. 8.

☞ For the remainder of the notes to 110. a. see fol 112. a.

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

ship by nature, by appointing a testamentary guardian under the statutes of Philip and Mary and of Charles the Second, which

Que fueront a ſa baron, &c. Here is implyed by (*&c.*) that in ſome places the wife ſhall have the moity of the lands of her huſband, ſo long as ſhe lives unmarried; as in gavelkinde. And of lands in gavelkinde a man ſhall be tenant by the curteſie without having of any iſſue. (1) In ſome places the widow ſhall have the whole, or halfe, *dum ſola & caſta vixerit*, and the like.

[l] F. N. B. 150. (Ante 33. b.)

10. E. 3. Aide 129.

Sect. 167.

ITEM, en aſcuns burghes, per le cuſtome, home poit deviſer per ſon teſtament ſes terres & tenements, que il ad en fee ſimple deins meſme le burgh al temps de ſon morant; & per force de tiel deviſe, celuy, a que tiel deviſe eſt fait, apres le mort le deviſor, poit entrer en les tenements iſſint a luy deviſes, a aver & tener a luy, ſolonque la forme & effect del deviſe, ſans aſcun liverie de ſeiſin deſtre fait a luy, &c. (4)

ALSO in ſome boroughs, by the cuſtome, a man may deviſe by his teſtament his lands and tenements, which he hath in fee ſimple within the ſame borough at the time of his death; and by force of ſuch deviſe, he, to whome ſuch deviſe is made, after the death of the deviſor, may enter into the tenements ſo to him deviſed, to have and to hold to him, after the forme and effect of the deviſe, without any liverie of ſeiſin thereof to be made to him, &c.

Deviſer. This is a French word, and ſignifieth *ſermocinari* to ſpeake, for *teſtamentum eſt teſtatio mentis, & index animi ſermo* (2). So as *a deviſer per ſon teſtament* is to ſpeake by his teſtament, what his minde is to to have done after his deceaſe.

(5. Co. 73. b.)

Per ſon teſtament. *Teſtamentum eſt* [*m*] *duplex*, 1. *In ſcriptis*. 2. *Nuncupativum, ſeu ſine ſcriptis*. And in ſome cities and boroughes, lands may [*n*] paſſe as chattels by will nuncupative or paroll without writing (3). *Revera* [*o*] *terminatum eſt, quod poteſt legari, ut catallum, tam hæreditas, quam perquiſitum, per barones London' & burgenſes Oxon. Ideo verum eſt, quod in burgis non jacet aſſiſa mortis anteceſſoris.* But in law moſt commonly *ultima voluntas in ſcriptis* is uſed, where lands or tenements are deviſed, and *teſtamentum* when it concerneth chattels.

[*m*] Vide ſect. 58

[*n*] Britton fo. 164. 212. b.

[*o*] Bract. lib. 4. fol. 272. Fleta lib. 5. cap. 5. & lib. 2. cap. 50.

Ses terres ou tenements. And by the ſame cuſtome he may deviſe a rent out of the ſame lands and tenements (5).

4. E. 3. 53. 7. H. 6. 1. 14. H. 8. 5. 22. Aſſ. 78. Abbr. Aſſ. 118. b.

Que il ad en fee ſimple. For lands in taile are not deviſable by will; and therefore he in this place neceſſarily added *(que il ad en fee ſimple)* and purpoſely omitted the ſame in the clauſe concerning borough Engliſh; becauſe there an eſtate taile is included.

4. E. 2. Mortdanc. 39. 49. E. 3. 17. F. N. B. 196. 21. H. 6. 38. a. 7. E. 2. tit. Mortdanc.

Poit entrer. Note, the cuſtome of a city or borough concerning the deviſe of lands is, *quod liceat unicuique civi ſive burgenſi, &c. ejuſdem civitatis ſive burgi tenementa ſua in eadem civitate ſive burgo in teſtamento ſuo in ultima voluntate ſua, tanquam catalla ſua, legare cuicunque voluerit, &c.* [*p*] Now if a man deviſeth, either by ſpeciall name or generally, goods or chattels reall or perſonall, and dyeth, the deviſee cannot take them without the aſſent of the executors (6). But when a man is ſeiſed of lands in fee, and deviſeth the ſame in fee, in taile, for life, or for yeares, the deviſee ſhall enter; for in that caſe the executors have no medling therewith. And in the caſe of a deviſe by will of lands, whereof the deviſor is ſeiſed in fee, the freehold or intereſt in law is in [*q*] the deviſee before he doth enter, and in that caſe nothing [*r*] (having regard to the eſtate or intereſt deviſed) deſcendeth to the heire. But if the heire of the deviſor entreth and holdeth the deviſee out, he may either enter as Littleton here ſaith, or have his writ called *ex gravi querela*; and this writ (without any particular uſage) is incident to the cuſtome to deviſe; for otherwiſe, if a deſcent were caſt before the deviſee did enter, the deviſee ſhould have no remedy. After an actuall poſſeſſion this writ lyeth not; for then the deviſee may have his ordinary remedy by the common law.

F. N. B. 199 Regiſt. in ex gravi Querela. (10. Co. 46.)

[*p*] 2. H. 6 16. 27. H. 6 8. 2. E. 4. 13. 21. E. 4. 21. 4. H. 7. 16.

[*q*] 4. Mar. Br. tit. Deviſe 49.

[*r*] Regiſt. fol. 244. 39. Aſſ. pl. 6. 3. E. 3. Deviſe 12. 29. Aſſ. 31. 34. E. 3. tit. Formedon. Pl. poſtr. 30. H. 8. Deviſe 28. F. N. B. 198. 199. &c. Britton fol. 212. b.

(Poſt 240. b. Cro. Cha. 201. 1. Sid. 191.)

And

31. b —(3) This doctrine, about the reſtriction of cuſtoms to places of a particular denomination, will appear more ſatisfactory, by conſidering the reaſon of having ſome reſtraint, and the nature of that, which lord Coke points out as the eſtabliſhed one. The policy of ſome reſtraint is founded on the uncertainty and confuſion, which would enſue from an infinite diverſity of cuſtoms, if every place, however ſmall and inconſiderable, ſhould be allowed to ſet up ſpecial cuſtoms in direct oppoſition to the general cuſtom of the realm. On this principle the privilege of having *ſpecial* cuſtoms, derogating from the common law, is in general denied to *inferior* places, ſuch as *upland towns*, not being either *cities* or *boroughs*, and *hamlets*; though it is allowed to *larger* or more important diſtricts, ſuch as *counties*, *manors*, *hundreds*, *honors*, *cities*, and *boroughs*. The *ſpecial* caſes, hinted at by lord Coke as an exception to this reſtraint, ſeem to be thoſe, in which the cuſtom tends to advance ſome right recognized by the common law. Thus a town's having a church, being a right at common law, a cuſtom for a way to or repairing the church operates by rendering the exerciſe of that right more effectual. See Robinſ. Gavelk. 32. & 225. However the caſe of dower by cuſtom, mentioned by lord Coke in the chapter on dower, ſeems to be an inſtance within the exception, without being within the reaſon of it. But of this example lord Coke writes doubtfully; for, after inferring from the text of Littleton, that cuſtomary dower may be within a *town*, he obſerves, that it is ſafer to alledge it within a *manor*. See ante 33. b. —(4) But this extenſion of Borough Engliſh to the *collateral* line muſt be ſpecially pleaded. See Robinſ. on Gavelk. 38. 43. 93. and in the Appendix.—(5) See acc. as to eſtates *tail* in Gavelkind land, though expreſsly limited to the heirs male of the body at common law. Dy. 179. b. See alſo ante fol. 10. a. note 3. But as Borough Engliſh may be *extended* by ſpecial cuſtom, ſo may it be *reſtrained*; and therefore the cuſtomary deſcent may be confined to *fee ſimple*. See Appendix to Robinſ. Gavelk. and March 54. there cited.—(6) See as to the denomination of Borough Engliſh and the ſubject in general, Append. to Robinſ. Gavelk.

(1) Accord. ante 30. a. All the differences, between curteſy and dower of Gavelkind land and the ſame eſtates at common law, are minutely explained and commented upon in Mr. Robinſon's book on Gavelkind. See page 155. and 159.—(2) See ante fol. 110. a. note 1.—(3) But now by the 29. Cha. 2. c. 3. a will of *lands* deviſable by *cuſtom* is not good, unleſs it is in writing and ſigned and atteſted in the ſame manner as a will of lands deviſable by *ſtatute*. See poſt. 111. b. *Nuncupative* wills of *perſonalty*, except thoſe of ſoldiers in actual ſervice and mariners at ſea, are alſo newly regulated by the ſame ſtatute.—(4) The *&c.* is not in L. & M.—(5) But it was formerly much controverted, whether a rent-*charge in eſſe*, iſſuing out of ſuch lands and having commenced *within time of memory*, was within the cuſtom of deviſing; and it was not ſettled to be ſo, till the caſe of Randal and Jenkins in the time of lord Hale. See 1 Mod. 212. and Robinſ. on Gavelk. 79. to 84. As to rents-*ſervice*, they of courſe followed the nature of the reverſion or ſeigniory, to which they were incident; nor was there any doubt as to the cuſtom's extending to *other* rents, if they had exiſted *immemorially*.—(6) Acc. Pork. ſect. 488. 570 and 572. to 576. The other authorities relative to this doctrine will be found in Vin. Abr. *Deviſe* A. a. and Com. Dig. *Adminiſtration* C. 5.

Continuation of notes to fol. 108. a. from fol. 108. b.

(4) The firſt book of Mr. Madox's *Baronia Anglica* is principally employed in explaining the nature of an *honor*. He objects to the propriety of the ſtatutes of Hen. 8. referred to by lord Coke; and as they only create *titular* honors and therefore cannot give a juſt idea of the nature of the *genuine* honor, which is a *land barony*, blames lord Coke for his reference. Mad. Bar. Angl. 8, 9, 10, and 236.—(5) See Mad. Baron. Angl. 238, 239. where the learned author obſerves on the inaccuracy of language in the 12 Cha. 2. about tenure *in capite*. The title of the act expreſſes, that it was made for taking away tenure *in capite*; and the firſt enacting clauſe proceeds on the ſame idea. But had the act been accurately penned, it would ſimply have diſcharged ſuch tenure of its oppreſſive fruits and incidents; which would have aſſimilated it to *free and common ſoccage*, without the appearance of attempting to annihilate the *indelible* diſtinction between holding *immediately* of the king and holding of him through the *medium* of other lords. See ante note 3.

which will be the ſubject of a ſubſequent note. See *infra*, note 14.—(13) Here we ſhall bring into one point of view ſome few

[s] 27. H. 8. cap. 10. Britton fol. 212. 78. b. 164. Vide before in this sect. 32. H. 8. cap. 2. 34. H. 8 ca. 5.

[t] Vide 3. Co. 25. &c. in Butler and Baker's case. 6. Co. 16. & 76. 8. Co. 84. 85. 9 Co. 133. 10. Co 82. 83. 84. 11. Co. 24. 1. Co. 25. a

[u] Dier 4. & 5. Phil. & Mar. 155. an. 6. Eliz. Dalison. Pasch. 20 Eliz. betweene Barner and his wife plaintife, and William Long defendant in a writ of partition. Bendloe's adjudged. (9. Co. 133.)

And well said Littleton, that lands and tenements were devisable in burghes by custome; for that [s] at the common law no lands or tenements were devisable by any last will and testament, (1) nor ought to be transferred from one to another, but by solemne livery of seisin, matter of record, or sufficient writing (2); but as Littleton here saith, that by certain private customes in some burghes they are devisable. But now since Littleton wrote, by the statutes of 32. and 34. H. 8. lands and tenements are generally devisable (3) by the last will in writing of the tenant in fee simple, whereby the ancient [t] common law is altered, whereupon many difficult questions, and most commonly disherison of heires (when the devisors are pinched by the messengers of death) doe arise and happen. But [u] these statutes take not away the custome to devise, (4) whereof Littleton speaketh: for though lands devisable by custome be holden by knights service, yet may the owner devise the whole land by force of the custome, and that shall stand good against the heire for the whole. But the devise of lands holden by knights service by force of the statute is utterly void for a third, and the same shall descend to the heire. If he hath any lands holden by knights service *in capite*, and lands in socage, he can devise but two parts of the whole; but if he hold lands by knights service of the king, and not *in capite*, or of a meane lord, and hath also lands in socage, he may devise two parts of his land holden by knights service, and all his socage lands. If he holds any land of the king *in capite*, and by act executed in his life-time he conveyeth any part of his lands to the use of his wife, or of his children, or payment of his debts, though it be with power of revocation, he can devise by his will [x] no more, but to make up the land so conveyed two parts of the whole. And if the lands so conveyed amount to two parts or more, then he can devise nothing by his will. But if he hath land onely that is holden in socage, then he may devise by his will all his socage lands; so as it is apparent, that the benefit of the lords was more carefully provided for, than the good of the heire. But if a man, holding some land of the king by knights service *in capite*, convey two parts of his land to the use of his wife for life, now (as hath beene said) he can devise no part of the residue, but yet he may by his will devise the reversion of the two parts so conveyed to his wife: for the intention of the act is to give power to dispose of two parts intirely.

[x] 6. Co. 17. 18. Sir Edward Clere's case. 3. Co. 34. b. Butler and Baker's case.

10. Co. 80. 81. Leon. Lovey's case.

Leon. Lovey's case, and Butler and Baker's case. Ubi supra.

If the devisor leave a full third part of the land immediately to descend in fee simple or in taile, he may devise the other two parts in fee simple. If a third part be not left, it shall be made up according to the act. But hereditaments, that are not of any yearely value, as *bona & catalla felonum & fugitivorum*, waifes, estrayes, and the like, can neither be left to descend for any part of the third part, or devised as part of the two parts. But yet if such franchises of uncertaine value be holden of the king *in capite*, they shall restraine the devise of all his lands and make it void for a third part. So it is, if a man hath a reversion expectant upon an estate taile dry and fruitlesse holden of the king by knights service *in capite*, yet that shall restraine him to devise but two parts of his lands only. And where the statute speaks of a remainder, it is to be intended only of such a remainder, as may draw ward and mariage by the common law. As if a reversion upon a state for life be granted to one for life, the remainder in fee, during the life of the grantee for life it is not within the statute; but if he dyeth, this is such a remainder, as is within the statute, although it be dry and fruitles. If a gift in taile or a lease for life be made, the remainder in fee, this remainder in fee is not within the statute. But if a man hath lands holden by knights service *in capite* in possession, reversion, or remainder, and also seised of socage land, and devise by his will all his lands, and after he selleth away the *capite* land, or that land is recovered from him, the will is good for the whole socage land. The values both of the third part and the two parts of the lands shall be taken, as they happen to be at the time of the death of the devisor; for then his will takes effect.

(1. Sid. 56.)
Leon. Lovey's case. Ubi supra, fol. 81.

8. Co. 84. 85. Sir Richard Pexhal's case. 3. Co. 33. Butler and Baker's case.

He, that holds by knights service in chiefe, deviseth by his will a rent, common, or other profit as shall amount to the value of two parts out of all his lands: this rent issueth only out of the two parts, and the third part is free of it. And if he hath lands holden by knights service, and not *in capite*, he may charge two parts of the knight service land as is aforesaid, and all his socage land, &c. And if he hath onely socage land, he may by his will charge it at his pleasure, so as the king's and lord's third part is free, and the heire's two parts charged; and this is onely by force of the statute of 34. H. 8.

6. Co. 17. 18. in Sir Edward Clere's case.
(8. Co. 173. Post 271. Cro. Cha. 38.)

If a man make a feoffment in fee of his lands holden by knights service to the use of such person and persons, and of such estate and estates, &c. as he shall appoint by his will, in this case, by operation of law the use and state vests in the feoffor, and he is seised of a qualified fee. In this case, if the feoffor limit estates by his will by force and according to his power, there the uses and estates growing out of the feoffment are good for the whole, and the last will is but directory. (5) But in that case, if the feoffor had devised the land (as owner thereof) without any reference to the feoffment and power thereby given, then taking effect by the will, it is void for a third part. But if he had formerly conveyed two parts to the use of his wife, &c. and after devised the residue by his will without any reference to his power by the feoffe-

See Goodall v. Brigham 1. Bos. & Puller 192. & my note there. 2. Ves. Jun. 594. see 3. Ves. Jun. 301.

(1) The *testamentary* power over *land* was certainly in use among our Anglo Saxon and Danish ancestors; though it seems to have been rather adopted from the remnant of the Roman laws and customs they found here, than brought from their own country: for, as Tacitus, writing of the ancient Germans, says, *successores sui cuique liberi et nullum testamentum*. Spelm. Posthum. 21. 127. After the Norman Conquest, the power of ~~dividing~~ devising lan(d) ceased, except as to *socage* lands in some particular places, such as cities and boroughs, in which it was still preserved; and also except as to *terms for years or chattel interests* in land, which, on account of their original imbecility and insignificance, were deemed personalty, and as such were ever disposeable by will. This limitation of the testamentary power proceeded, partly from the solemn form of transferring land by livery of seisin introduced at the Conquest, which could not be complied with in the case of a last will; partly from a jealousy of death-bed dispositions; but principally from the general restraint of alienation incident to the rigors of the feudal system, as it was *established* or at least *perfected* by the *first William*. See Wright's Ten. 172. In the reign of Edward the first, the statute of *Quia emptores* removed in great measure this latter bar to the exercise of testamentary power; that is, in respect to all *freeholders*, except the king's tenants *in capite*. But the two former obstructions still continued to operate; though indeed this was in *name* and *appearance* only; for soon after the statute of *Quia emptores*, feoffments to *uses* came into fashion, and, last wills were enforced in Chancery as good declarations of the *use*; and thus through the *medium* of *uses* the power of devising was continually exercised in *effect* and *reality*. But at length this practice was checked, not *accidentally*, but *designedly*, by the 27th of Hen. 8. which, by transferring the *possession* or *legal estate* to the use, *necessarily* and *compulsively* consolidated them into one, and so had the effect of wholly destroying all distinction between them, till the means to evade the statute, and, by a very strained construction, to make its operation dependant on the intention of parties, were invented. However the bent of the times was so strong in favour of every kind of alienation, that the legislature, in a few years after having interposed to restrain an *indirect* mode of passing land by last wills, expresly made it devisable. This great change of the common law was effected by the statutes of the 32. and 34. of Henry 8. which taken together gave the power of devising to all having estates in fee simple, except in *join tenancy*, over the *whole* of their *socage* land, and over *two thirds* of their lands holden by *knights service*. The operation of these statutes, was further extended by the conversion of *knights service* into *socage* in the 12. Cha. 2. But still *copyhold* lands, and also, as the best opinion seems to have been, estates *pur autre vie* in *freehold* lands, remained undevisable. On the one hand they were not devisable at *common law*; because they came within the description of *real* estate. On the other hand, they, or at least the former, are not within the *statutes* of Henry 8. these requiring, that the tenure should be *socage*, which a *copyhold* is not, and that the party should have an estate in *fee simple*, which is more than a *tenant pur autre vie* can be said to have. See as to *copyhold* lands 2. Ro. Rep. 383. and as to estates *pur autre vie* in freehold lands Cro. Eliz. 804. Mo. 625. 1. Saund. 261. 1. Salk. 619. This defect of provision in the statutes of wills is now supplied as to estates *pur autre vie* by the 29 Cha. 2. c. 3. which makes them devisable in the same manner as estates in fee simple. But no provision is yet made in respect to *copyhold* estates; and therefore the power of devising is now indirectly exercised over these by an application of the doctrine of uses, similar to that which was antiently resorted to in respect to freehold lands; for the practice is to surrender to the use of the owner's last will; and on this surrender, the will operates as a declaration of the use and not as a devise of the land itself. See 2. Ro. Rep. 383 2. Atk. 37. Gilb. on Uses 36.+ From this deduction it appears, that the *testamentary* power is *now* exercisable, either *directly* or *indirectly*, over land of every tenure now in use, and also over every sort

+ See also 1. Ves. 22 5. & 2. A[tk]. 250 & Mr. Coxe's note in the new ed.?

few *general* things relative both to guardianship by *socage* and *that* by *nurture*.

Guardianship by *socage*, like the one in *chivalry* springs wholly out of *tenure*. Therefore the title to it cannot arise, unless the infant is seized of lands, or other hereditaments *lying in tenure*, holden by socage. Ante fol. 87. b.—Like guardianship in *chivalry*

feoffment, yet this will ſhall enure to declare the uſe upon the feoffement; becauſe he had no power as owner of the land to deviſe any part of it.(1) But if the feoffment had been made to the uſe of his laſt will, although he deviſeth the land with reference to the feoffement, yet it taketh effect only by the will, and not by the feoffement. (2) All which and many other points of intricate and abſtruſe learning you ſhall more largely read in my Reports. (Mo. 280.)

Sauns aſcun liverie de ſeiſin deſtre fait a luy, &c. For in his life time livery of ſeiſin could not be made; becauſe his will is ambulatorie till his death, and no eſtate paſſeth during his life; neither can livery be made after his deceaſe, for then it cometh too late. 40. Aſſ. 38.

Here (*&c.*) (3) implyeth that the deviſe is good without any atturnement of any leſſee or tenant.

Sect. 168.

NOta, coment que home ne poit granter, ne doner, ſes tenements a ſa feme, durant le coverture; pur ceo que ſa feme et luy ne ſont forſque un perſon en ley: uncore per tiel cuſtome il poit deviſer per teſtament ſes tenements a ſa feme, a aver et tener a luy en fee ſimple, ou en fee taile, pur terme de vie ou pur terme des ans; pur ceo que tiel deviſe ne priſt effect forſque apres la mort le deviſor, car touts deviſes ne preignont effect forſque apres la mort le deviſor. Et ſi home fait a divers temps divers teſtaments, et divers deviſes, &c. uncore le darrein deviſe et volunt fait per luy eſtoiera, et lauters ſont voides (4).

ALSO, though a man may not grant, nor give, his tenements to his wife during the coverture; for that his wife and he be but one perſon in the law: yet by ſuch cuſtome he may deviſe by his teſtament his tenements to his wife, to have and to hold to her in fee-ſimple, or in fee taile, or for tearme of life, or yeares; for that ſuch deviſe taketh no effect, but after the death of the deviſor. And if a man at divers times makes divers teſtaments, and divers deviſes, &c. yet the laſt deviſe and will made by him ſhall ſtand, and the others are voyd.

HOME ne poit granter, ne doner, ſes tenements a ſa feme, &c. This opinion is [*a*] cleere, for by no conveyance at the common law a man could during the coverture, either in poſſeſſion reverſion or remainder, limit an eſtate to his wife. But a man may by his deed covenant with others to ſtand ſeiſed to the uſe of his wife, or make a feoffement or other conveyance to the uſe of his wife; and now the ſtate is executed to ſuch uſes by the ſtatute [*b*] of 27. H. 8. for an uſe is but a truſt and confidence, which by ſuch a mean might be limited by the huſband to the wife. But a man cannot covenant with his wife to ſtand ſeiſed to her uſe; becauſe he cannot covenant with her, for the reaſon that Littleton here yeeldeth (5). [*a*] 4. H. 7. [*b*] 27. H. 8. cap. 10. (Plowd. 111. Dy. 106. a. 2. Re. Abr. 788.)

Durant le coverture. That is, during the continuance of the mariage. For to cover in Engliſh is *tegere* in Latine, and is ſo called, for that the wife is *ſub poteſtate viri*, and ſhe is diſabled to contract with any without the conſent of the huſband. [*c*] *Omnia, quæ ſunt uxoris, ſunt ipſius viri. Non habet uxor poteſtatem ſui, ſed vir.* [*c*] Bracton. lib. 2. ca. 15.

Un perſon en ley. *Vir & uxor ſunt quaſi unica perſona, quia caro una, & ſanguis unus. Res licet ſit propria uxoris, vir tamen ejus cuſtos, cum ſit caput mulieris.* Idem lib. 5. Tract. 5. cap. 25. (Hob. 2. Cro. Eliz. 129. Plowd. 414.)

If *Ceſtey que uſe* had deviſed, that his wife ſhould ſell his land, and made her executrix and dyed, and ſhe tooke another huſband, ſhe might ſell the land to her huſband, for ſhe did it *in auter droit*, and her huſband ſhould be in by the deviſor ~~(7)~~ (6). (7). 10. H. 7. 20.

Per teſtament. *Teſtamentum* is (as is ſaid before) *teſtatio mentis*, and is favourably to be expounded according to the meaning of the teſtator. *In contractibus benigna, in*

ſort of intereſt in land, which, not being fettered with intails, can be transferred by alienation taking effect in the owner's lifetime.

☞ *The remainder of the notes to fol* 111. *b. will be found in fol.* 114. *b.*

(1) This was the point adjudged in Sir Edward Clere's caſe; and though, as the *whole* of the land is now deviſable, the doctrine of that caſe is no longer of conſequence in reſpect to the extent and exerciſe of the power of deviſing, yet it may be material for other purpoſes; for it comprehends a *general* rule, ſettling how an act ſhall operate, where it may take effect in two ways, that is, either as the execution of a power derived from *intereſt*, or as the execution of a power not ariſing from *intereſt* but *ſpecially reſerved*. In the great caſe of *Commendams* the doctrine is well explained by lord Hobart, and finely applied. Hob. 160.—(2) The diſtinction here made, between a feoffment *to the uſe of a laſt will*, and one *to ſuch uſes as the feoffor ſhould appoint by laſt will*, ſeems extremely ſubtle. However lord Coke reports it as adopted by the judges in Sir Edward Clere's caſe; and according to Moore the ſame point was adjudged in Battey and Trevilian. Mo. 278. But then as to the former of theſe caſes, the opinion on this point muſt have been extra-judicial, the feoffment having been *to ſuch uſes as ſhould be appointed by will*, and not *to the uſe of the will itſelf*; and as to the latter caſe, it went off finally on another point. The reaſoning in ſupport of the diſtinction will be found poſt 271. b. and more at large in Mo. 516.—(3) See note 4. of fol. 111. a.—(4) The words *& lautres ſont voides* are not in L. and M. Roh. or P.—(5) See further on this ſubject ante note 1. fol. 3. a.—(6) Acc. poſt 187. b. It is agreed in the books, that a wife may, without her huſband, execute a *naked authority*, *whether given before or after coverture*, and though no ſpecial words are uſed to diſpenſe with the diſability of coverture; and in the caſe put by lord Coke the deviſe gives no more. The rule is the ſame, where both an *intereſt* and an authority paſs to the wife, if the authority is *collateral* to and doth not flow from the intereſt; becauſe then the two are as unconnected, as if they were veſted in different perſons. Rep. temp. Finch 346. As too a feme covert may without her huſband convey lands in execution of a mere *power* or *authority*, ſo may ſhe with equal effect in performance of a *condition*, where land is veſted in her on condition to convey to others. W. Jo. 137, 138. The reaſon, why in theſe inſtances the wife may convey without her huſband, ſeems to be, that he can receive no prejudice from her acts, but a great one might ariſe to others, if his concurrence ſhould be eſſential. Yet if the legal eſtate of lands is veſted in a married woman on truſt for another, ſome hold, that ſhe cannot paſs it to *ceſtuique truſt*, unleſs the huſband joins; and therefore that if ſhe makes feoffment or fine without him, the firſt will be void, the latter voidable. This was the opinion of judge Jones in the caſe of Daniel and Upley; but the judges Whitlock and Dodridge diſſented from Jones, and held, that the huſband's joining was not any more requiſite than in the other caſes. W. Jo. 137. Perhaps however Jones's opinion may be moſt conformable to ſtrictly legal doctrine; and his thus diſtinguiſhing a *truſt* from a *power* and a *condition* may be accounted for. Truſts are properly the ſubjects of conſideration for the courts of equity only; and though in them the legal eſtate is made ſubſervient to the truſt, yet the courts of law take notice of truſts for very few purpoſes; nor will it be eaſy to find an authority for departing from any rule about the effect of legal conveyances, merely in reſpect of their being a performance of truſts. See further as to acts by a feme covert without her huſband, under the titles *Baron and Feme Executor* and *Adminiſtration* in the Abridgements.—(7) See the note on this ſort of etymology in fol. 110. a.

Continuation of notes to fol. 110. *a. from fol.* 110. *b.*

(5) Lord Coke in another place repeats the expreſſion, that *for matters of law the judges are the king's chamſel.* Poſt. 304. a. But

chivalry, it is deemed to take place on a *deſcent* only; though ſome have argued to the contrary. Ante note 1. fol. 87. b.—The

in teſtamentis benignior, in reſtitutionibus benigniſſima interpretatio facienda eſt.

[d] 4. E. 2. tit. Deviſe 23.
[e] 44. Aſſ. p. 36. 44. E. 3. 33. 18. E. 3. 8.
[f] Britton 264.

A ſon feme. And Littleton himſelfe yeeldeth the reaſon; [d] becauſe the deviſe doth not take effect till after the deceaſe of the deviſor. And in ſome [e] places the cuſtome is generall, that he may deviſe any lands, &c. in ſome [f] places land onely which the deviſor purchaſed; in ſome place that he may deviſe any eſtate; in ſome places for life onely, &c.

But albeit the laſt will doth not take effect untill after his deceaſe, yet if a feme covert be ſeiſed of lands in fee, ſhe cannot deviſe the ſame to her huſband; becauſe at the making of her will ſhe had no power being *ſub poteſtate viri* to deviſe the ſame, and the law intendeth it ſhould be done by coertion of her huſband.

2. H. 5. 8. 2. R. 3. 22. (Cro. Eliz. 9. Cro. Jam. 49. 290. 649.)

Divers teſtaments. For *voluntas teſtatoris eſt ambulatoria uſque ad mortem* (as hath beene ſaid before) and the later will doth countermand the firſt. And it is truely ſayd that the firſt grant and the laſt will is of greateſt force.

Divers deviſes, &c. Here by (*&c.*) is to be underſtood as well deviſes of chattels reall or perſonall, as of freehold and inheritance: alſo that in one will where there be divers deviſes of one thing the laſt deviſe taketh place. *Cum duo inter ſe pugnantia reperiuntur, in teſtamento ultimum ratum eſt* (1).

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ITEM per tiel cuſtome home poit deviſer per ſon teſtament, que ſes executors poyent aliener et vender ſes tenements, que il ad en fee ſimple, per certaine ſumme de money a diſtributer per ſon alme (2). En ceſt cas, coment que le deviſor devie ſeiſie de les tenements, et les tenements diſcendont a ſon heire; uncore les executors, apres le mort lour teſtator, poyent vender les tenements iſſint a eux deviſes, et ouſter l'heir, et ent faire feoffment alienation et eſtate per fait, ou ſans fait, a eux, a queux le vend eſt fait. Et iſſint pois veier icy un cas, ou home poit faire loial eſtate, et uncor il navoit riens en

ALSO by ſuch cuſtome a man may deviſe by his teſtament, that his executours may alien and ſell the tenements that he hath in fee ſimple, for a certaine ſum, to diſtribute for his ſoule. In this caſe, though the deviſor die ſeiſed of the tenements and the tenements deſcend unto his heire; yet the executors after the death of the teſtator may ſell the tenements ſo deviſed them, and put out the heire, and thereof make a feoffment alienation and eſtate by deed, or without deed, to them to whom the ſale is made. And ſo may ye here ſee a caſe, where a man may make a lawful eſtate, *les*

32. H. 8. cap. 2. 34. H. 8. ca. 5.

QUE ſes executors poient aliener ou vender ſes tenements. And that, which in Littleton's time a man might doe by cuſtome, in ſome particular places, he may now doe by the ſtatutes of 32. & 34. H. 8. generally.

Les executors apres le mort lour teſtator poient vender. Here it appeareth, that the executors having but a power, as Littleton putteth the caſe, to ſell, they muſt all joyn in the ſale. Then put the caſe, that one dies, it is regularly true, that being but a bare authoritie, the ſurvivorr cannot ſel. But if a man deviſeth his land to A. for terme of life, and that after his deceaſe his lands ſhall be ſold by his executors generally, (as Littleton here putteth his caſe) and make three or foure executors, and during the life of A. one of the executors dieth, and then A. dieth, the other two or three executors may ſell; becauſe the land could not be ſold before, and the plurall number of his executors remaine. But if they had beene named by their names, as by I.S I.N. I.D. and I. G. his executors,

49. E. 3. 16. 29. Aſſ. 17. 39. Aſſ. 17. 9. H. 6. 24. 15. H. 7. 12. 21. 14. H. 8. 6. 30. H. 8. tit. Deviſe Br. 31. 2. Eliz. Dyer 177. (6. Co. 16. 1. Ro. Abr. 328. Mo. 61. 62. 147. Cro. Cha. 382.)

But he omits explaining, whether they are ſo called, on account of their *judicial* opinions in the king's courts, of their opinions in parliament when adviſed with by the lords, or any *extra-judicial* opinions the king may be intitled to demand from them. As to the latter, they were not favoured by lord Coke, as appears by his behaviour in the great caſe of Commendams in the reign of James the firſt, when the king ſeverely reprimanded the judges, for diſobeying his mandate to poſtpone proceeding in a cauſe concerning the prerogative till they were conſulted by him. Though lord Coke was deſerted by the other judges, who aſked pardon for having remonſtrated againſt the king's command; and though the privy council decided, that the command was agreeable to law; yet lord Coke bluntly refuſed either to retract or apologize. See lord Coke's life in the Biograph. Britann. One thing much relied on by thoſe, who juſtified the king's order, was the oath of the judges, which is printed in the ſtatute book as a ſtatute of Edward the third, and expreſſly requires them to *counſel the king in his buſineſs*. See 18. E. 3. ſtat. 4. But what is thus called a ſtatute lord Coke denies to be one, and indeed very properly; for it has not the leaſt reſemblance of a ſtatute, being ſimply the form of an oath. 3. Inſt. 146. 224. However, it muſt be admitted, there are various inſtances of the king's conſulting the judges and of their giving their opinions *extra-judicially*. Several of theſe inſtances are referred to in the reports of lord Forteſcue, who endeavours to ſhew, that even in the caſe of ſhip-money the *extra-judicial* opinion firſt given was condemned, not becauſe it was extra-judicial, but becauſe it was groſsly contrary to law. Forteſc. Rep. 386. 389. Ruſhw. vol. 3. Append. 212. Some inſtances of ſuch conſultations have happened ſince the Revolution, particularly ſome few years after in Sir John Fenwick's caſe, and in the reign of George the firſt, when it was made a queſtion whether the education and marriage of the prince of Wales's children belonged to the king or to their father, and ſtill more recently in the caſe of admiral Byng during the laſt reign. See Forteſc. Rep. 385. But however numerous and ſtrong the precedents may be in favour of the king's *extra-judicially* conſulting the judges on queſtions in which the crown is intereſted, it is a right to be underſtood with many exceptions, and ſuch as ought to be exerciſed with great reſerve; leaſt the rigid impartiality, ſo eſſential to their *judicial* capacity ſhould be violated. The anticipation of *judicial* opinions on cauſes *actually depending* ſhould be particularly guarded againſt; and therefore a wiſe and upright judge will ever be cautious, how he *extra-judicially* anſwers queſtions of ſuch a tendency. So far one may venture to qualify the right: becauſe even the houſe of lords have declined taking the opinion of the judges for a reaſon of this ſort, though their attendance on that aſſembly is confeſſedly for aſſiſting the lords in matters of law. See Forteſc. Rep. 384. 385. But it would be a preſumption in us, if we were to be more particular on a ſubject of ſo much delicacy, by attempting to mark the bounds to a right, the extent of which we do not find clearly aſcertained by precedent or authority. See further on this ſubject Foſt. 190. 241.—(7) The ſtatutes of Edward the third cited by lord Coke in the margin require a parliament to be holden once every year; but it ſeems doubtful, whether they were meant to limit the duration of each parliament, or merely the intermiſſion of holding parliaments. The 16. Cha. 2. c. 1. which directs, that the ſitting of parliaments ſhall not be diſcontinued above three years, is certainly for the *latter* purpoſe, and therefore ſtill continues in force, notwithſtanding the modern ſtatutes for making parliaments firſt triennial and afterwards ſeptennial, theſe being for the *former* purpoſe. See 6. W. & M. c. 2. 1. Geo. 1. c. 38.—(8) See Pref. to Ruſſhead's ſtat. 22.

(1) There is a great contrariety in the books, on the effect of two inconſiſtent deviſes in the ſame will. Some hold with lord Coke,

The title to this guardianſhip is in ſuch of the infant's next of blood, as cannot have by deſcent the ſocage eſtate, in reſpect of which

les tenements al temps del estate fait. Et le cause est, pur ceo que la custome et usage ad este tiel (1). Quia consuetudo, ex certa causa rationabili usitata, privat communem legem.

and yet he hath naught in the tenements at the time of the estate made. And the cause is, for that the custome and usage is such. For a custome, used upon a certain resonable cause, depriveth, the common law.

then in that case the survivors could not sell the same, because the words of the testator could not bee satisfied; and I myself knew this case adjudged. * A speciall verdict was found, that A. was seised of certaine lands in fee, and devised the same in taile; and if the donee died without issue, that his said land should be sold by his sons in law; he in truth having five sons in law. One of his sons in law died in the life of the donee, and after the donee dyed without issue, and then the foure of the sonnes in law sold the land, and it was adjudged that the sale was good; because they were named generally by his sonnes in law, and the lands could not be sold by them all, and the words of the will in a benigne interpretation are satisfied in the plurall number, albeit that they had but a bare authority: but if they had bin particularly named, it had beene otherwise. But if a man deviseth lands to his executors to be sold, and maketh two executors, and the one dieth, yet the survivor may sell the land; because as the state, so the trust shall survive, and so note the diversity betweene a bare trust, and a trust coupled with an interest. In both those cases the executors may [a] sell *part of the land at one time*, and part at another, as they may finde purchasers.

(1. Co. 173.)
* Hill. 26. El. inter Vincent & Lee in the King's Bench. (Cro. Eliz. 26. 1. Leon. 285. Mo. 147. 5. Co. 68. Cro. Cha. 382. 1. Rol. Ab. 328.)
39. Ass. p. 17. 4. Eliz. Dier 210. 23. Eliz. Dier 371. Pasch. 32. Eliz. Ro. 1307. in Communi Banco, and so resolved in Vincent's case. (1. Sid. 6. Post 181. b. 236. a. 315. b.)

In Littleton's case admit that one executor had refused to sell, then, as the law stood when Littleton wrote, it was cleare, that the others could not sell. But now by the statute [b] of 21 H. 8. it is provided, that where lands are willed to be sold by executors, that though part of them refuse, yet the residue may sell. And albeit the letter of the law extendeth only where executors have a power to sell, yet being a beneficiall law, it is by construction extended where lands are devised to executors to be sold. Yet in neither of those cases, albeit one refuse, can the other make sale to him that refused; because he is party and privy to the last will, and remains executor still. Mine advice to them that make such devises by wills, to make it as certaine as they can, as that the sale bee made by his executors or the survivors or survivor of them, if his meaning be so, or by such or so many of them, as take upon them the probate of his will, or the like. And it is better to give them an authority then an estate; unlesse his meaning be they should take the profits of the lands in the meane time, and then it is necessary that he deviseth, that the meane profits till the sale shall be assets in their hands, for otherwise they shall not be so. But hereof thus much shall suffice (2).

[a] 1. Co 173. in Digge's case.
[b] 21. H. 8. cap. 4.
(1. Leon. 60)
Tr. 27. H. 8. in the Common Place, Serjeant Bendloe's Report. (1. Rol. Abr. 329. 1 Leon. 87. 225.)

Et ent faire feoffment. For albeit the executors in this case have no estate or interest in the land, but only a bare and naked power, yet this feoffment amounteth to an alienation, to vest the land in the feoffee, as it appeareth here, and the feoffee shall be in by the devisor.

49. E. 3. 16. 38. Ass. 3. 39. Ass. 17. 13 E. 3. Devise 3. 14. H. 8. 10. 15. H. 7. 12. b. (9. Co. 77. a.)

Per fait ou sauns fait. And therefore if by the custome a man deviseth, that a reversion or any other thing that lyeth in grant shall be sold by the executors, they may sell the same without deed (3); for the vendee shall be in by the devisor, and not by executors, as hath beene said.

19. H. 6. (1. Leon. 31.)

Consuetudo ex certa causa rationabili usitata privat communem legem.
Quia consuetudo, contra rationem introducta, potius usurpatio, quam consuetudo, appellari debet. Consuetudo præscripta & legitima vincet legem.

Privat communem legem. For no custome or prescription can take away the force of an act of parliament (4); and therefore Littleton materially speaketh here of the common law.

4. E. 4. 4. 11. H. 4. 7. 39. H. 6. 39. 7. H. 6. 1. 2. 9. H. 6. 56. 8 H. 7. 4. 8 Eliz. Dier 247. (2. Rol. Abr. 266. 4. Inst. 274. 298. 303)

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ET nota, que nul custome est alowable, mesque tiel custome, que ad este use

AND note, that no custome is to bee allowed, but such custome, as hath bin used

PRescription. Prescription is a title taking his substance of use and time allowed by the law. *Præscriptio est titulus ex usu & tempore substantiam capiens*

(4. Co. Luttrel's case. 9 Co. 57. 2. Rol. Abr. 265, 266. 1. Sid. 161. 1. Rol. Abr. 560. 566. Cro. Cha. 175.)

Coke that the second devise revokes the first. Plowd. 541.+ Others think, that both devises are void on account of the repugnancy. Ow. 84. But the opinion, supported by the greatest number of authorities, is, that the two devisees shall take in moieties. The authorities, for and against lord Coke's opinion, are well collected and arranged in a note in the English edition of Plowden. See page 541.—Also amongst those, who think, that both devises shall operate, there is some difference as to the manner, in which the two devisees ought to take. In some of the old books it is said generally, that there shall be a jointenancy. But according to the modern opinion, and, as it seems, the best, there will be a jointenancy or a tenancy in common, according to the words used in limiting the two estates; by which we presume it is meant, that, if the two estates given by the will have the unity or sameness of interest in point of quantity essential to a jointenancy, the devisees shall be join-tenants, but otherwise shall be tenants in common. See 3. Atk. 493.—(2) The distribution here meant probably was giving money to the church to have masses for the testator's soul; a superstition very common in the time of Littleton, and then not inconsistent with any law. Afterwards indeed uses and trusts of land for such purposes were restrained by the 23. of Hen. 8. c. 11. commonly called the statute of *superstitious* uses, though not *wholly*, the statute allowing them if they were not appointed for more than twenty years, and without any limitation of time in the instance of cities and towns corporate having customs to devise in mortmain. But now we apprehend, that, independently of the statute of Henry the eighth, devises of this kind could not have effect; for either they would be void by the mortmain statutes, or, when not within the reach of any of them, would be deemed superstitious by our courts of equity; which would therefore direct the money to be applied to some use really charitable, at the court's discretion, or, should the determined cases not be thought strong enough to warrant the exercise of a discretion so large, would consider the devisee as a trustee for such as would be intitled if there was no devise. See the cases referred to in Vin. Abr. *Charitable Uses* D.

(1) &c. in L. and M.—(2) What my lord Coke advances in this and the preceding folio, about the effect of a will devising that executors shall sell land, is open to a variety of observation.—He first supposes, that such a devise passes no *interest* or estate to the executors, but merely a *power* or *authority*; and thence he infers, that, like common naked authorities, it will not survive. But these positions seem at least controvertible, having been expressly contradicted by decisions since lord Coke's time; and though both should be admitted to be true in point of *law*, they would not avail in a court of *equity*; as this jurisdiction, notwithstanding the extinction of the power at law, would compel it's execution in favour of those, for whose benefit the power was given. As to the power's not surviving for want of an interest, lord Coke himself, both here and in other places, concedes, that if one *devises lands to be sold by his executors*, an *interest* will pass. See post 181. b. 236. a. Now such a devise so resembles *devising that executors shall sell the land*, as to give the distinction made between them the appearance of too curious and overstrained a refinement; such as rather consists in the formal arrangement of words, than of any thing substantial. But the subtlety of the distinction is not the only objection to it; lord Hale, whilst he was chief baron of the exchequer, referring to a case, in which it was adjudged against the distinction. Hardr. 419. However it has been adopted in cases since the first publication of the Coke upon

+ see a decision of Hawkins 2. Atk. 374.

see 1. Bro. Ch. ... 136. ... 303. ...

which the guardianship arises, by descent, without any distinction between the *whole* and *half* blood. If there are two or more in

(4. Co. 36.)

capiens ab authoritate legis. In the common law a preſcription, which is perſonal, is for the moſt part applyed to perſons, being made in the name of a certain perſon and of his anceſtors, or thoſe whoſe eſtate he hath; or in bodies politique or corporate and their predeceſſors, for, as a naturall body is ſaid to have anceſtors, ſo a body politique or corporate is ſaid to have predeceſſors. And a cuſtome, which is locall, is alledged in no perſon, but layd within ſome mannor or other place. As taking one example for many. I. S. ſeiſed of the mannor of D. in fee preſcribeth thus: that I. S. his anceſtors, and all thoſe whoſe eſtate he hath in the ſayd mannor, have time out of minde of man had and uſed to have common of paſture, &c. in ſuch a place, &c. being the land of ſome other, &c. as pertaining to the ſayd mannor. This properly we call a preſcription. A cuſtome is in this manner. A copyholder of the manor of D. doth plead, that within the ſame mannor, there is and hath been ſuch a cuſtome time out of mind of man uſed, that all the copyholders of the ſaid mannor have had and uſed to have common of paſture, &c. in ſuch a waſt of the lord, parcell of the ſayd mannor, &c. where the perſon neither doth or can preſcribe, but alledgeth the cuſtome within the mannor. But both to cuſtomes and preſcriptions, theſe two things are incident inſeparable, *viz.* poſſeſſion or uſage, and time. Poſſeſſion muſt have three qualities, it muſt be long, continual and peaceable, *longa, continua, & pacifica:* for it is ſaid, *transferuntur dominia, ſine titulo & traditione, per uſucaptionem, s. per longam, continuam, & pacificam poſſeſſionem. Longa. i. per ſpatium temporis per legem definitum*, of which hereafter ſhall be ſpoken. *Continuam dico, ita quod non ſit legitime interrupta.*

per title de preſcription s. de temps dont memorie ne curt. Mes divers opinions ont eſte de temps dont memory, &c. & de title per preſcription, que eſt tout un en ley. Car aſcuns ont dit, que temps de memory ſerra dit de temps de limitation en un briefe de droit; ſcilicet de temps le roy R. le i. puis le conqueſt, come eſt done per le ſtatute de Weſtminſter 1. *pur ceo que le briefe de droit eſt le pluis haut briefe en ſa nature, que poit eſtre, et per tiel briefe home poit recover ſon droit de la poſſeſſion ſon aunceſtors de pluis auncient temps, que home purroit per aſcun briefe per le ley, &c. Et entant que il eſt done per le dit eſtatute, que en briefe de droit nul ſoit oye a demander de le ſeiſin ſon aunceſtors de puis longe temps, que de temps le roy R. avantdit, iſſint ceo eſt prove, que continuance de poſſeſſion, ou auters cuſtomes et uſages uſes puis le dit temps, eſt le title de preſcription, &c.* et hoc certum eſt. *Et auters*

by title of preſcription, that is to ſay, from time out of minde. But divers opinions have beene of time out of mind, &c. and of title of preſcription, which is all one in the law. For ſome have ſaid, that time out of mind ſhould bee ſaid from time of limitation in a writ of right; that is to ſay, from the time of king Richard the firſt after the Conqueſt, as is given by the ſtatute of Weſtminſter the firſt, for that a writ of right is the moſt higheſt writ in his nature, that may be. And by ſuch a writ a man may recover his right of the poſſeſſion of his anceſtors, of the moſt ancient time, that any man may by any writ by the law, &c. And in ſo much that it is given by the ſaid eſtatute, that in a writ of right none ſhall be heard to demand of the ſeiſin of his anceſtors of longer time, than of the time of King Richard aforeſaid, therefore this is proved, that continuance of poſſeſſion, or other cuſtoms and uſages uſed after the ſame time is the title

(6. Co. 60. a. 65. b. 66.)
12. E. 4 1. 2. Mariæ, Br. Preſcr. 100. 6 E. 6. Dyer 71. 14. Ed. 3. Bar. 277. 43. E. 3. 32. 7. H. 6. 26. 22 H. 6. 14. 16. E. 2. tit. Preſcript. 53. 45. Aſſ. 8. 40. Aſſ. 27. 41. 21. E. 4. 53, 54.

(9. Co. 57.)

Bract. fo. 52, 52.

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upon Littleton. Thus in the caſe of Hovel and Barnes in the 11th of Charles the firſt, though the judges held that ſuch a power of ſelling given to *two* executors ſurvived, yet they diſavowed founding themſelves on the will's paſſing an intereſt. See W. Jo. 352. and Cro. Cha. 382. Nay, even in a caſe of much later date, lord chancellor King acted, as if he deemed the diſtinction ſettled at law; for he directed the heir to join in a ſale, in which his concurrence would otherwiſe have been unneceſſary. See Yates and Compton 2. P. Wms. 308. In reſpect to the operation of ſuch a deviſe, conſidered as a mere authority, the ſtrict notion about *naked powers* is certainly with lord Coke; and ſome of the old books, beſides thoſe cited by him, very much favour it's application to the caſe of executors. Dy. 119. ed. 1688. the caſe in marg. and Mo. 61. But there are ſome reſpectable authorities the other way: for Perkins is of opinion, that the power of ſelling may be exerciſed by the ſurviving executor; and Brooke infers the ſame doctrine to be the point adjudged in a caſe of Edward the third; and further it was held accordingly, by three judges in the reign of Charles the firſt, on a reference to them out of chancery. Perkins ſect. 550. Bro. Abr. *Deviſe* 50. and the caſe of Hovell and Barnes Cro. Cha. 382. W. Jo. 352. This *latter* opinion ſeems moſt likely to conform to the meaning of a will in caſes of this ſort; for it can ſcarce be imagined, that a teſtator, when he intruſts his executors with a power of ſelling land, ſhould mean to have thoſe, for whoſe benefit he directs the ſale, diſappointed by the death of one of the perſons inveſted with an authority, which the ſurvivor is equally capable of executing. Perhaps too it may be poſſible to juſtify the opinion, by proving a power of ſelling thus given to executors to be ſomething more than the caſe of a naked power. Where a naked power is veſted in two or more *nominatim*, without any reference to an office in it's nature liable to ſurvivorſhip, as an executorſhip is, it without doubt would be a contradiction of the general rule to allow the power to ſurvive. But where a power of ſelling is given to *executors*, or to perſons *nominatim* in *that character*, it is not wholly irreconcileable with the rule to deem a ſurviving executor a perſon within the deſcription; for by the death of one executor the whole character of executors becomes veſted in the ſurvivor, and the power being annexed to the executors *ratione officii*, and the office itſelf ſurviving, why ſhould not the power annexed to it alſo ſurvive, as well as where it ſurvives by reaſon of being coupled with an intereſt? This manner of accounting for the opinion, that a power of ſelling annexed to an executorſhip may ſurvive, is only a conjecture, hazarded for the ſake of reconciling a *particular* caſe with a *general* rule; the reaſons, which influenced thoſe who adopted the opinion, not appearing in any book we have ſeen. However the conjecture is agreeable to the manner, in which lord Hale, in a manuſcript

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in equal degree, he, who firſt gains poſſeſſion of the heir, ſhall have the cuſtody of him; except where they happen to be brothers or ſiſters, or to be the infant's lineal anceſtors, the law preferring the *eldeſt* in the former caſe, and the father or other *male* anceſtor in the latter. But if the infant derives lands by deſcent both *ex parte paternâ* and *ex parte maternâ*, in which caſe it may be poſſible not to find any next of kin incapable of inheriting to the infant, the next of kin on either ſide, firſt ſeiſing the infant, is intitled to the cuſtody of his perſon, and the cuſtody of the lands coming *ex parte paternâ* goes to the paternal heir, and ſo *vice verſâ*, as to the lands coming *ex parte maternâ*. Should however the infant derive lands by deſcent in ſuch a way,

ont dit, que bien et verity eſt, que ſeiſin et continuance puis le dit limitation (1) *eſt un title de preſcription, come eſt avantdit, et per cauſe avandit. Mes ils ont dit, que il y auxy un auter title de preſcription, que fuit a la common ley devant aſcun eſtatute de limitation de briefe, &c. et ceo fuit lou un cuſtome, ou un uſage, ou auter choſe, ad eſte uſe de temps dont memorie des homes ne curt a le contrarie. Et ils ont dit, que il eſt prove per le pleder, lou home voit pleder un title de preſcription de cuſtome* (2). *Il dirra, que tiel cuſtome ad eſte uſe*, de tempore cujus contrarium memoria hominum non exiſtit, *et c'eſt autant a dire quant tiel matter eſt plede, que nul home adonque en vie ad oye aſcun proofe a le contrary, ne avoit aſcun conuſans a le contrary; et entant que tiel title de preſcription fuit a le common ley, et nient ouſte per aſcun eſtatute, ergo il demurt come il fuit a le common ley, et le pluis toſt, entant que la dit limitation de briefe de droit* (3) *eſt de cy long temps paſſe* (4). *Ideo*

of preſcription, and this is certaine. And others have ſaid, that well and truth it is, that ſeiſin and continuance after the limitation &c. is a title of preſcription, as is aforeſaid; and by the cauſe aforeſaid. But they have ſayd, that there is alſo another title of preſcription that was at the common law, before any eſtatute of limitation of writs, &c. and that it was, where a cuſtome or uſage, or other thing, hath beene uſed, for time whereof mind of man runneth not to the contrary. And they have ſaid, that this is proved by the pleading, where a man will plead a title of preſcription of cuſtome. Hee ſhall ſay, that ſuch cuſtome hath beene uſed from time whereof the memory of men runneth not to the contrary, that is as much to ſay, when ſuch a matter is pleaded, that no man then alive hath heard any proofe of the contrary, nor hath no knowledge to the contrary; and inſomuch, that ſuch title of preſcription was at the common law, and not put out by an eſtatute, *ergo*, it abideth as it was at the common law, and the rather, inſomuch that the ſaid limitation of a writ of right, is of ſo long time paſſed, *Ideo quære de hoc*. And

pacificam dico, quia ſi contentioſa fuerit, idem erit quod prius, ſi contentio fuerit juſta. Ut ſi verus dominus ſtatim cum intruſor vel diſſeiſor ingreſſus fuerit ſeiſinam, nitatur tales viribus repellere, et expellere, licet id, quod inceperit, perducere non poſſit ad effectum, dum tamen cum defecerit, diligens ſit ad impetrandum & proſequendum. Longus uſus, nec per vim, nec clam, nec precario, &c. Idem fol. 222. b.

If a man preſcribeth to have a rent, and likewiſe to take a diſtreſſe for the ſame, it cannot bee avoyded by pleading, that the rent hath beene alwayes payd by coherſion, albeit it began by wrong. 13. E. 4. 6.

Un title de preſcription. Seeing that preſcription maketh a title, it is to be ſeene; firſt to what things a man may make a title by preſcription without charter; and ſecondly, how it may be loſt by interruption. (Dr. & Stud. 16. 5. Co. 72.)

For the firſt, as to ſuch franchiſes and liberties as cannot be ſeiſed as forfeited, before the cauſe of forfeiture appeare of record, no man can make a title by preſcription; becauſe, that preſcription being but an uſage *in pais*, it cannot (*) extend to ſuch things as cannot bee ſeiſed, nor had, without matter of record; as to the goods and chatels of traitors, felons, felons of themſelves, fugitives, of thoſe that be put in exigent, deodands, conuſance of pleas, to make a corporation, to have a ſanctuary, to make a coroner 21. H. 6. Preſcrip. 44. 21. E. 4. 6. 1. H. 7. 23. 9. H. 7. 11. 20. 7. H. 6. 45. 6. E. 3. 32. 42. 45. E. 3. 2. 2. E. 4. 26. (9. Co. 59. Doc. Plac. 103. 2. Roll. Abr. 270.)

(*) Fleta lib. 1. cap. 25. Brit. f. 6. & 15. 44. Aſſ. p. 8. 49. E. 3. 3. Stamf. Pl. Cor. 21. 51. 5. Co. 109, 110. 9. Co. 29. (Poſt 195. a. 2 Roll. Abr. 114. 265.)

manuſcript note on a Coke upon Littleton we have been favoured with, is repreſented to have conſidered the power's ſurviving when given to *two* executors, as in the caſe of Lovel and Barnes. The words of the note are theſe. *Hales chief baron ſays, it is ſo, becauſe they were to ſell by reaſon* officii; *yet the law ſtands, that authorities ſhall not ſurvive; and perhaps it had been otherwiſe, if he had ordered his land to be ſold by A. and B. not being named executors, and one of them had died, for that ſeems to be a perſonal truſt.* The conjecture alſo receives great countenance from ſome books, in which it is ſaid, that ſuch a power of ſelling given to *executors* ſhall *paſs* to their executors and adminiſtrators; for if an authority, not being coupled with an intereſt, becomes *tranſmiſſible* in the way of ſucceſſion *in infinitum* till executed, by reaſon of it's being given to executors, much more may it *ſurvive* for a like reaſon. Kelw. 44. 2. Brownl. 194. If indeed the doctrine in the books we refer to is well founded, it will prove a power of ſelling land given to executors capable both of *tranſmiſſion* and *ſurvivorſhip*. But whether lord Coke's notion of the power's not ſurviving, or the oppoſite one, moſt conforms to *ſtrictneſs of law*, is not now of any great importance; as ſuch a power, though extinct at *law*, would certainly be enforced in *equity*. This has long been the practice of our courts of equity; theſe rightly deeming the purpoſe, for which the teſtator directs the money ariſing from the ſale to be applied, to be the ſubſtantial part of the deviſe, and the perſons named to execute the power of ſelling to be mere truſtees; which brings the caſe within the general rule of equity, that a truſt ſhall never fail of execution for want of a truſtee, and that if one is wanting the court ſhall execute the office. The relief is adminiſtered by conſidering the land, in whatever perſon veſted, as bound by the *truſt*, and compelling the heir, or other perſon having the legal eſtate, to perform it. There are many printed precedents of thus executing not only powers actually extinct at law, or ſuppoſed to be ſo, but alſo ſuch as, in point of law, either for want of the will's naming by whom they ſhould be executed, or becauſe thoſe named have died before the teſtator, never could exiſt or take effect. Some of theſe precedents are as early as the reign of Charles the firſt. See Lockon and Lockon 2. Freem. 136. and 1. Cha. Caſ. 179. Garſoot and Garſoot 1. Cha. Caſ. 35. Gwilliam and Rowel Hardr. 204. Pit and Pelham 2. Freem. 134. 1. Cha. Rep. 283. and 1. Cha. Caſ. 176. T. Jo. 85. 1. Lev. 304. See alſo Mar. of Eq. 57. and Vin. Abr. *Deviſe* Q. c. and S. c. Nor do the courts of equity appear ever to have confined this relief, as they certainly do many kinds of aid, to perſons of particular and favoured deſcriptions, ſuch as wife children or creditors; for though in ſome of the old caſes, the perſons relieved were of one or other of theſe deſcriptions, yet in others nearly of the ſame time the parties are

For the notes to this ſide of fol. 114. a. ſee 114. b. and for the remainder of the notes to ~~this page~~.

way, as lets in both the paternal and maternal blood ſucceſſively to the inheritance, but with a preference of the former, as where

ner, &c. to make conſervators of the peace, &c. (1).

(2. Ro. Abr. 270. 9. Co. 29. Poſt 195. a.)

de hoc quære. Et pluſors auters cuſtomes & uſages ont tiels ancient burges.

many other cuſtomes and uſages have ſuch ancient boroughes.

[e] But to treaſure trove, waifes, eſtraies, wrecke of ſea, to hold pleas, courts of leets, hundreds, &c. infange thiefe, outfange thiefe, to have a parke, warren, royall fiſhes, as whales, ſturgions, &c. Fayres, markets, franke foldage, the keeping of a gaole, tolle, a corporation by preſcription, aud the like, a man may make a title by uſage and preſcription onely without any matter of record. (*) *Vide* Sect. 310. where a man ſhall make a title to lands by preſcription.

[e] 22. E. 3. Coron. 241. 9. H. 7. 11. 20. 18. H. 6. Preſcr. 45. 11. H. 4. 10. 21. H. 7. 33. 9. E. 4. 12. 39. E. 3. 35. 46. E. 3. 16. 11. H. 6. 25. F. N. B. 91. 1. H. 7. 24. Stamf. Pl. Cor. 38. 44. E. 3. 4. 22. E. 4. 43, 44. 3. E. 3. Brook Preſc. 57. 44. Aſſ. pl.

(*) 8. H. 6. 16.

But it is to be obſerved, [f] that although a man cannot, as is aforeſaid, preſcribe in the ſaid franchiſe to have *bona & catalla proditorum, felonum, &c.* yet may they and the like bee had obliquely or by a meane by preſcription; for a county palatine may be claimed by preſcription, and by reaſon thereof to have *bona & catalla proditorum, felonum, &c.*

[f] 12. E. 4. 16. 32. H. 6. 25. 12. Eliz. Dier. 288, 289.

As to the ſecond, by what meanes a title by preſcription, or cuſtome, may be loſt by interruption. It is to be knowne, that the title, being once gained by preſcription or cuſtome, cannot be loſt by interruption of the poſſeſſion for ten or twenty yeares, but by interruption in the right, as if a man have had a rent or common by preſcription, unity of poſſeſſion of as high and perdurable eſtate is an interruption in the right.

11. E. 3. tit. Iſſue 40. (2. Ro. Abr. 271. 2. Inſt. 19. Cro. Jam. 155, 156. 454.)

In a writ of meſne the plaintife made his title by preſcription, that the defendant and his anceſtors had acquited the plaintife and his anceſtors, and the terre-tenant time out of minde, &c. the defendant tooke iſſue, that the defendant and his anceſtors had not acquited the plaintife and his anceſtors and the terre-tenant; and the jury gave a ſpecial verdict, that the grandfather of the plaintife was enfeoffed by one Agnes, and that Agnes and her anceſtors were acquitted by the anceſtors of the defendant time out of minde before that time, ſince which time no acquitall had beene; and it was adjudged and affirmed in a writ of error, that the plaintife ſhould recover his acquitall, for that there was once a title by preſcription veſted, which cannot be taken away by a wrongfull ceſſer to acquite of late time, and albeit the verdict had found againſt the letter of the iſſue, yet for that the ſubſtance of the iſſue was found *viz.* a ſufficient title by preſcription, it was adjudged both by the court of Common Pleas, and in the writ of error by the court of King's Bench for the plaintife, which is worthy of obſervation. So a *modus decimandi* was alledged (*) by preſcription time out of minde for tithes of lambes; and thereupon iſſue joyned; and the jury found, that before twenty yeares then laſt paſt there was ſuch a preſcription, and that for theſe twenty yeares he had paid tithe lamb *in ſpecie*, and it was objected, firſt that the iſſue was found againſt the plaintife, for that the preſcription was generall for all the time of preſcription, and twenty years faile thereof. 2. That the party by payment of tithes *in ſpecie* had waived the preſcription or cuſtome. But it was adjudged for the plaintife in the prohibition; for albeit the *modus decimandi* had not bin paid by the ſpace of twenty yeares, yet, the preſcription being found, the ſubſtance of the iſſue is found for the plaintife. And if a man hath a common by preſcription, and taketh a leaſe of the land for twenty yeares, wherby the common is ſuſpended, after the yeares ended he may claime the common generally by preſcription; for that the ſuſpenſion was but to the poſſeſſion, and not to the right, and the inheritance of the common did alwayes remaine, and when a preſcription or cuſtome doth make a title of inheritance (as Littleton ſpeaketh) the partie cannot alter or waive the ſame *in pais* (2).

(*) Mich. 43. & 44. Eliz. in a prohibition betweene Nowell pl. and Hicks vicar of Edmonton defendant in the King's Bench. (2. Co. Biſhop of Winton's caſe. 6. Co. 69. 3. Co. 9. 2. Ro. Abr. 292.)

Temps dont memory, &c. & de title per preſcription, que eſt tout un en ley. So as the time preſcribed or defined by law is, time, whereof there is no memorie of man to the contrary. [e] *Omnis querela, & omnis actio injuriarum, limitata infra certa tempora.*

(Dr. & Stud. 17. a.) [e] Bracton fol. 314.

Temps de limitation. Limitation, as it is taken in law, is a certaine time preſcribed by ſtatute, within the which the demandant in the action muſt prove himſelfe or ſome of his anceſtors to be ſeiſed.

(1. Ro. Abr. 685.)

Enbriefe de droit. In [f] ancient time the limitation in a writ of right was from the time of H. 1. whereof it was ſaid *à tempore regis Henrici ſenioris.* After that by the ſtatute of [g] Merton the limitation was from the time of H. 2. and by the ſtatute [h] of W. 1. the limitation was from the time of R. 1. And this is that limitation, that Littleton here ſpeaketh of. Whereof in the Mirror in reproofe of the law it is thus ſaid, [i] *Abuſion eſt de counter cylonge temps, dount nul ne poet teſtmoigner de vier & de oyer, que ne duré my generalment ouſter 40 ans.*

[f] Regiſt. 158. Bract. fo. 373. 5. Aſſ. p. 2. 34. H. 6. 40.
[g] Stat. de Mert. 20. H. 3. ca. 8.
[h] Weſt. 1. an. 3. E. 1. c. 8. Vide W. 2. 13. E. 1. ca. 46.
[i] Mirror ca. 5. ſect. 1.

Time

Time of limitation is twofold, first, in writs, and that is by divers acts of parliament; secondly to make a title to any inheritance, and that (as Littleton here saith) is by the common law.

Glanvil. li. 13. ca. 3. & 34. Mirror ca. 5. sect. 4. Fleta l. 2. c. 38. & l. 4. c. 5. Britton fol. 79. 82. Bracton lib. 2. fol. 52. & fol. 179. 253. 373.

Limitation of times in writs are provided by the said statute of Merton (1), and after by the said statute of W. 1. which Littleton here citeth, and which was in force when he wrote, but is since altered by a profitable and necessary statute [k] made *anno* 32. H. 8. and by that act, the former limitation of time in a writ of right is changed and reduced to threescore yeares next before the *teste* of the writ, and so of other actions, as by the statute at large appeareth. But it is to be observed, that this act of 32. H. 8. extendeth [l] not to a formedon in the discender (2); nor to the services of escuage homage and fealty (3), for a man may live above the time limited by the act. Neither doth it extend to any other service, which by common possibility may not happen or become due within sixty yeares, as to cover the hall of the lord, or to attend on his lord when he goeth to warre or the like; nor where the seisin is not traversable or issuable (4). Neither doth it extend to a rent created by deed (5), nor to a rent reserved upon any particular estate; for [m] in the one case the deed is the title, and in the other the reservation; nor to any writ of right of advowson, *quare impedit*, or assise of *darreine presentment* (for there was a parson of one of my churches that had been incumbent there above fifty yeares, and dyed but lately) or any writ of right of ward, or ravishment of ward, &c. but they are left as they were before the statute of 32. H. 8 (6). But hereof thus much for the better understanding of Littleton shall suffice (7).

[k] 32. H. 8. cap. 2. See the second part of the Institutes. Merton c. 8.

[l] Mich. 10. & 11. Eliz. Dyer 278. Fitzwilliam's case.

4. Co. 10. & 11. Bevil's case.

[m] 8 Co. 65. Sir Wil. Foster's case.

1. Mar. Parliam. 2. cap. 5. Vide 17. E. 3. 11. Pl. Com. 371. b.

De temps le roy R. 1. And that was intended from the first day of his raigne; for (from the time) being indefinitely, doth include the whole time of his raigne, which is to be observed.

Vide 34. H. 6. 36. *Ju 2 Ves. 500.*

Briefe de droit. *Breve de recto*, a writ of right, so called, for that the words in the writ of right are, *quod sine dilatione plenum rectum teneas.*

Title de prescription al common ley, &c. de temps dont memorie des homes ne curge al contrarie. *Docere oportet longum tempus, & longum usum illum, viz. qui excedit memoriam hominum; tale enim tempus sufficit pro jure.*

Bract. lib. 4. fol. 230. Fleta lib. 4. cap. 24. (5. Co. 72. Dr. & Stud. 16. b.)

Ascun proofe al contraire. For if there be any sufficient proofe of record or writing to the contrary, albeit it exceed the memory, or proper knowledge of any man living, yet is it within the memory of man: for memory or knowledge is twofold. First, by knowledge by prooofe, as by record or sufficient matter of writing. Secondly, by his owne proper knowknowledge. A record or sufficient matter in writing are good memorialls; for *litera scripta manet.* And therefore it is said, when we will by any record or writing commit the memory of any thing to posterity, it is said *tradere memoriæ.* And this is the reason, that regularly a man cannot prescribe or alledge a custome against a statute; because that is matter of record, and is the highest proofe and matter of record in law. But yet a man may prescribe against an act of parliament, when his prescription or custome is saved or preserved by another act of parliament.

(8. Co. 121.) 28. Ass. 25. 38. Ass. 18. 45. E. 3. 26. 5. H. 7. 10. 8. H. 7. 7. 11. H. 7. 21. Dyer 23. Eliz. 273.

There is also a diversity betweene an act of parliament in the negative and in the affirmative; for an affirmative act doth not take away a custome (8); as the statutes of wills of 32. and 34. H. 8. doe not take away a custome to devise lands, as it hath beene often adjudged. Moreover, there is a diversity betweene statutes that be in the negative; for if a statute in the negative be declarative of the ancient law, that is in affirmance of the common law, there aswell as a man may prescribe or alledge a custome against the common law, so a man may doe against such a statute; for as our author saith, *consuetudo, &c. privat communem legem* (9). As the statute of *Magna Charta* provideth, that no leet shall be holden but twice in the yeare (10), yet a man may prescribe to hold it oftener, and at other times (11); for that the statute [n] was but in affirmance of the common law (12).

(2. Ro. Abr. 266. 4. Inst. 274. 298. 303. 2. Inst. 20. 11. Co. 63. 12. Co. 22. Plow. 207. Cro. Jam. 313. 2. Rol. Abr. 266.)

Magna Charta, cap. 35.

(2. Leon. 28.)

[n] 6. H. 7. 2. 8. H. 4. 34. 12. H. 7. 18. 31. H. 6. Leet 11. 18. H. 6. 13.

So the statute [o] of 34. E. 1. (13) provideth, that none shall cut downe any trees of his owne within a forest without the view of the forrester: but inasmuch as this act is in affirmance of the common law (14), a man may prescribe to cut downe his woods within a forest without the view of the forester (15). And so was it adjudged in 16 Eliz. in the exchequer by Sir Edward Sanders chiefe baron, and other the barons of the exchequer, as Sir John Popham chiefe justice of the King's Bench reported to me.

[o] 34. E. 1. tit. Forest. Rast. 1. E. 3. cap. 2. (Doc. Plac. 342. 2. Rol. Abr. 266. Ante 2. Post. 165. b. 233. a. Cro. Jam. 155. Dr. & Stud. 164.)

In the eire of the forest of Pickering, before Willoughby Hungerford and Hanbury justices itinerants there, *anno* 8. E. 3. I reade [p] a claime made by Henry de Percy, lord of the mannor of Semor within the said forest. The forestors, verderours, and regarders found his claime to be true, *viz. Quod prædictus Henricus de Percy, & omnes antecessores sui tenentes manerium*

[p] Itin. Pickering ann. 8. E. 3. Rot. 38.

because the interest, in right of which the testator creates the term, is *real* estate, and creating the term is a *partial* devise of it. Besides appointing new forms of executing wills of real estate, the 29. of Cha. 2. prescribes how devises shall be revoked.—(3) See note 1.—(4) Whilst the power of devising depended wholly on the statutes of Henry the eighth, it was frequently of importance to resort to the custom of devising, as being most beneficial for the devisee. The *power by custom* might be *larger* than the *statutory power*; the former sometimes enabling to devise the *whole*, where the latter could only be exercised over *two parts*. 2. Sid. 153. There was also an essential difference between the two powers in the *mode of execution*; for a will in *writing* was conceived to be necessary to a devise under the *statutes*, but a *nuncupative* will might be sufficient under the *custom*. 2. Sid. 154. But these differences do not now subsist any longer. As on the one hand the 12. of Cha. 2. by communicating to all freehold lands the qualities of the tenure by *common socage*, has rendered the power of devising the *whole* under the statutes of Henry the eighth *universal*: so on the other hand the 29. of Cha. 2. against frauds and perjuries requires the same solemnities of writing, signing, and attestation to a devise by custom, as to one under the statutes. See ante fol. 111. b. note 1. and 111. a. note 3. The two powers of devising being thus assimilated, and made for the most part commensurate, it can *seldom* happen, that it should be necessary to call the power by *custom* in aid; though it is *possible*, as where the custom enables an infant of fourteen or a feme covert, neither of which is capable of devising under the statutes. As to the *infant*, see 37. Hen. 6. 5. Perk. sect. 504. 2. And. 12. 5. Co. 84. and as to the *feme-covert* 5. Com. Dig. 14. where it is said, that by the custom of London she may devise to her husband, but without citing any authority.—(5) Adjudged acc. in Mytton and Lutwich W. Jo. 7.

(1) See cap. 39. and lord Coke's Commentary upon it in 2. Inst. 238.—(2) The statute mentions formedons in *remainder* and *reverter*, and limits them to fifty years; but omits formedon in *descender*. Nor is the latter deemed to be comprehended within the clause of the statute relative to writs of *right*: for a formedon is not in the strict sense a writ of right; though it certainly is in the nature of one, the *mere right* being equally triable in both. Accordingly, in the case cited by lord Coke from Dyer, three judges held, that a formedon *in descender* was not within the statute. The other judge doubted. See also the additional case

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infant, not being inheritable to him. Fitzherbert indeed in his *Natura Brevium* cites two cases of Edward the third; in which guardian in socage granted the wardship to a stranger, and the grant was awarded good. F. N. B. 143. P. The same author too in his abridgment gives another case of the same reign, according to which a lease of guardianship in socage was pleaded. Fitzh. Abr. *Garde* 161. But possibly these cases import, only that a guardian in socage may place the body of the infant under the custody of another, and that such placing will be a good answer to an action for ravishment of the ward; not that the guardianship itself

manerium prædictum, à tempore quo non extat memoria, & sine interruptione aliquali, tenuerunt prædictum manerium cum pertinentiis extra regardum forestæ, & habuerunt woodwardum portantem arcum & sagittas ad præsentandum præsentanda de venatione tantum, &c. & habuerunt in boscis suis de Semere forgeas & mineras, & amputârunt, dederunt, & vendiderunt boscum suum infra manerium prædictum, sine visu forestariorum pro voluntate suâ, & fugarunt & ceperunt vulpes, lepores, capriolos, &c. sicut idem Henricus Percy superius clamat. Which claime by prescription, and found as is aforesaid, the justices doubted onely of two points. The first, forasmuch as the said manor was within the limits of the forest, it should not onely be *contra assisam forestæ*, for his woodward to beare bow and arrowes, where by law he ought to beare but an hatchet, and no bow nor arrowes within the forest, but also *de facili cedere possit in destructionem ferarum, &c.* and therefore doubted whether it might bee claimed by prescription. Their second doubt was concerning *fugationem, & captionem capriolorum in boscis suis prædictis, eo quod est bestia venationis forestæ, & transgressores inde convicti finem facerent ut pro transgressione venationis*: and for that difficulty, the claime was adjourned into the King's Bench. But of the other parts of the prescription no doubt at all was made; and the like had been allowed in the same eire, as in the case of Thomas lord Wake of Lydell, and of Gilbert of Acton, in the same eyre, Rot. 37. and of others. (8. Co. 136. Cro. Jam. 155.)

Il est prove per le pleader. Note one of the best arguments or proofes in law is drawne from the right entries or course of pleading; for the law it selfe speaketh by good pleading, and therefore Littleton here saith, it is proved by the pleading, &c. as if pleading were *ipsius legis viva vox.* (Post 126. a. 283 a. ante 17. a. 10. Co. 88. 1. Sid. 336.)

Entant que tiel title per prescription fuit al common ley, &c. Note all the prescriptions, that were limited from a certaine time, were by act of parliament, as from the time of H. 1. which was the first time of limitation set downe by any act of parliament, and so from the raigne of R. 1. &c. But this prescription of time out of memory of man was (as Littleton here saith) at the common law, and limited to no time. Also here is implyed a maxime of the law, *viz.* that whatsoever was at the common law, and is not ousted or taken away by any statute remaineth still.

Common ley. The law of England is divided, as hath beene said before, into three parts; 1. the common law, which is the most generall and ancient law of the realme; of part whereof Littleton wrote; 2. Statutes or acts of parliament; and 3. Particular customes (whereof Littleton also maketh some mention.) I say particular, for if it be the generall custome of the realme, it is part of the common law. (Ante 110. b. Post 344. a.)

The common law hath no controler in any part of it, but the high court of parliament; and if it be not abrogated or altered by parliament, it remaines still, as Littleton here saith. The common law appeareth in the statute of *Magna Charta* and other ancient statutes (which for the most part are affirmations of the common law) in the originall writs, in judiciall records, and in our bookes of termes and yeares. Acts of parliament appeare in the rolls of parliament, and for the most part are in print. Particular customes are to be proved. (Pref. to 8th. Co.) [manuscript: see Serjeant(?) Wm. Manwaring 22. 23.]

Sect. 171.

ITEM, chescun burgh est un ville, mes nemy è converso. Plus serra dit de custome en le tenure de villenage.

ALSO, every borough is a towne, but not *è converso.* More shall bee sayd of custome in the tenure of villenage.

Ville. Villa quasi vehilla, quod in eam convehantur fructus. And it is called *vicus*, because it is *prope viam. Villa est ex pluribus mansionibus vicinata, & collata ex pluribus vicinis.* If a town be decayed so as no houses remaine, yet it is a towne in law. And so if a borough be decayed, yet shall it send burgesses to the parliament, as old Salisbury and others doe. It cannot be a towne in law, unlesse it hath, or in time past hath had, a church and celebration of divine service, sacraments and burials. What alteration hath beene made in townes, heare what a great lawyer saith. *In Anglia villula tam parva inveniri non poterit, in qua non est miles, armiger, vel paterfamilias, &c. magnis ditatus possessionibus, nec non liberi tenentes alii & valecti plurimis suis patrimoniis sufficientes, &c.* And it appeareth by Littleton, that a towne is the *genus*, and a borough is the *species*; for hee saith that every borough is a towne, but every towne is not a borough. *Et sub appellatione villarum continentur burgi & civitates.* *Bere-*

(2. Inst. 669.) Vid Linwood verbo Vicus. Bract. lib. 5. fol. 434. & lib. 4. fol. 211. Fortescue cap. 29. 7. E. 6. Fines levie de terre. Br. 91. 34. E. 1. Quare imp. 187. Fortescue cap. 29. Fortescue cap. 24.

case in the margin of Dy. ed. 1688. fol. 278. a. But as the 21. Jam. 1. c. 16. requires formedons of every kind to be brought within twenty years after the descent of the title, this defect of the former statute is now of no consequence.—(3) Acc. 3. Lev. 21.—(4) The reason is plainly this. The limitation in the 32d. of Henry the eighth is wholly referable to seisin; the statute requiring a seisin within a certain time according to the nature of the writ; that is, sixty years for writs of *right*, fifty for *possessory* writs founded on an *ancestor's* possession, thirty for *possessory* writs founded on the party's own possession, and so on. Now the limitation being thus dated from a seisin, it would be absurd to extend the statute to actions, in which seisin, not being issuable, can never become the subject of evidence or trial.—(5) This was the point adjudged in Sir William Foster's case cited by lord Coke in the margin; and there is a much earlier adjudication to the same effect in Moore. See Mo. 31. The reason of this exemption of rents created by *deed* out of the statute is of the same kind as is explained in note 4; the statute pointing at rents, to which the title is by *seisin*. But according to Sir William Jones, such exemption should be understood with this qualification; that the *certainty* of the rent should appear in the deed; because otherwise the *quantum* or *quality* of the rent is no more ascertained by the deed, than if there was not one existing. Therefore if the rent is created by reference to something out of the deed, as by reserving such rent as the person reserving pays over without expressing what that is, and the latter rent not having commenced by deed is one, of which seisin is the proper proof; in such a case, seisin, as Sir William Jones thought, is equally requisite to both rents, and consequently both ought equally to be deemed within the limitation of the 32. of Hen. 8. See W. Jo. 238.—(6) It was doubtful whether the several writs, here mentioned in respect to advowsons and wardship, were not within the statute of Henry the eighth; and to remove this doubt a statute of Mary cited by lord Coke was made, declaring, that the former statute should not extend to them. The reasons of that statute are fully explained in Plowden. See fol. 371. But so far as regards *advowsons*, this statute of Mary is no longer of any use; it being enacted by the 7th. of Anne, c. 18. that no usurpation shall displace the estate of the patron, and ~~and~~ that he may present on the next avoidance, as if there had not been any usurpation; which provision in effect takes away all limitation of suits about the right of patronage. See 3. Blackst. Comm. 5th. ed. 250.

For the continuation of the notes to 115. a. see 116. a.

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itself may be transferred by bargain and sale. However should these ancient authorities not bear the former construction, they seem sufficiently answered by the *doctrine* and *practice* of later times; for in them, the acknowledged qualities of guardianship in socage being, that it is a *personal* trust wholly for the infant's benefit, and neither transmissible by succession nor devisable, are not consistent with its being assignable; and we have lord chief justice Vaughan's authority for saying, that even in his time *common experience* proved the contrary. See Plow. 293. Vaug. 181. See too Post 90. b. note 1.—It extends not only to the *person* and *socage* estates of

Berewica, or *berewit*, in Domeſday ſignifieth a towne. *Hæ berewicæ pertinent ad Berchley.* *(Et ſic recitat plus quam viginti villas.)* Domeſday. Glouc.

There be in England and Wales eight thouſand, eight hundred and three townes, or thereabouts.

See more *de villis*, *parochiis*, & *hamlettis*, in the ancient authors of the law, and plentifully in our other bookes. But let us now heare what Littleton ſaith (1). Bract. ubi ſup. Flet. li. 4. c. 15. & lib. 6. ca. 49. Brit. fo. 124. & 274. &c.

CHAP. 11. Villenage. Sect. 172.

TENURE en villenage eſt plus properment, quant un villein tient de ſon ſeignior, a que il eſt villein, certaine terres ou tenements ſolonque le cuſtome del manor au auterment a la volunt ſon ſeignior, & de faire a ſon ſeignior villein ſervice; come de porter & de carier le fime le ſeignior hors del city ou del manor (1) *ſon ſeignior, jeſques a le terre ſon ſeignior, en giſant ceo* (2) *ſur le terre*, & hujuſmodi. *Et aſcuns franke homes teignont lour tenements, ſolonque le cuſtome del certaine manors, per tiels ſervices. Et lour tenure auxy eſt appel tenure en villenage, et uncore ils ne ſont pas villeines; car nul terre tenus en villenage, ou villeine terre, ne aſcun cuſtome ſurdant de la terre, ne unques ſerra*

TENURE in villenage is moſt properly, when a villeine holdeth of his lord, to whom he is a villeine, certaine lands or tenements according to the cuſtome of the manor, or otherwiſe at the will of his lord, and to doe to his lord villeine ſervice; as to carry and recarry the dung of his lord out of the city, or out of his lord's mannor, unto the land of his lord, and to ſpread the ſame upon the land, and ſuch like. And ſome free men hold their tenements, according to the cuſtome of certaine manors, by ſuch ſervices. And their tenure alſo is called tenure in villenage, and yet they are not villeines; for no land holden in villenage or villein land, nor any cuſtome ariſing out of the land, ſhall ever make a free man villeine. But a

TENURE en villenage. Villeine is the French word *villaine*, and that *a villa*, *quia villæ adſcriptus eſt*; for they, which are now called *villani*, of ancient times were called *adſcriptitii*. And in the common law he is called *nativus*; *quia pro majore parte natus eſt ſervus:* and this is hee which the civilians call *ſervus*. [*a*] *Theyn* in the Saxon tongue is *liber*, and *then ſervus*. *Theme* (ſometimes written *theame* corruptly) is an old Saxon word, and ſignifieth *poteſtatem habendi in nativos ſive villanos, cum eorum ſequelis, terris, bonis et catallis.* But *teame* ſometime corruptly written *theam* is of another ſignification; for it is alſo an old Saxon word, [*b*] and ſignifieth, where a man cannot produce his warrant of that which hee bought according to his voucher. Lib. Rub. 76. & 77. Glanv. li. 5. ca. 1. & 2. &c. Vide Bract. li. 1. ca. 6. &c. Brit. fo. 77. & 67. 82. 97. 98. 125, 126. 147. Flet. li. 1. c. 3. Flet. li. 2. cap. 44. Idem li. 4. cap. 11. & 12. Mir. ca. 2. ſect. 18. Ockam.

(F. N. B. 77. a.)

[*a*] Flet. li. 1. ca. 24.

[*b*] Vide Lamb. inter leges Sanct Edw. fo. 132. nu. 25.

Villenage. *Villenagium*, (as in like caſes hath beene ſayd where the termination is in *age*,) is the ſervice of a bondman. And yet a free man may doe the ſervice of him, that is bond. And therefore a tenure in villenage is twofold; one, where the perſon of the tenant is bond, and the tenure ſervile; the other, where the perſon is free, and the tenure ſervile. [*c*] *Serva terra, liberos de ſanguine exiſtentes, villanos facere non poteſt.* And therefore it is ſaid, [*d*] *eſt enim ratio et regula generalis in iſtis duobus caſibus, quod liber homo nihil libertatis propter perſo-*

(F. N. B. 12. 2. Rol. Abr. 73.)

[*c*] Hil. 29. E. 1. Coram rege Ebor. in theſaur.

[*d*] Bract. li. 4. fo. 170.

(1) We do not obſerve, that there is any thing in the ſtatute of Charles the ſecond for taking away military tenures, which in the leaſt varies the tenure by burgage. For further information about *burgage* and *boroughs*, See Brad. on Bor. Mad. Firm. Burg. Squire's Anglo-Sax. Gov. 1ſt. ed. tit. *Boroughs* in the index, and Wright's Ten. 205.—(2) In L. and M. and Roh. the words are *del cite* (which ſeems uſed in the ſame ſenſe as *ſcite*) *del maner.*—(3) Inſtead of *en giſant ceo*, the words in L. and M. and Roh. are *giſaunt warrette & de ſpreder le fyme le ſignour.*

Continuation of notes to 115. *a. from* 115. *b.*

(7) See further as to the ſtatute of 32. Hen. 8. Brooke's reading upon it. Since the 32. of Hen. 8. there have been various ſtatutes for limitation of the time for bringing actions; of which the principal and general one is the 21. of Jam. c. 16. See tit. *Temps* in Com. Dig. and tit. *Limitation* in the other abridgments.—(8) This rule about *affirmative* ſtatutes is very common in the books. See the references in the margin of Plowd. Engl. ed. 112. In another place lord Coke lays down a like rule as to their not taking away the *common law*, but with more particularity; for his words are, that *a ſtatute made in the affirmative without any negative expreſſed or implied, doth not take away the common law.* 2. Inſt. 200. This ſeems to be the juſteſt way of ſtating the rule both as to common law and cuſtoms. See further Plowd. 113. and the references in the margin of Engl. edit. Hatt. on Stat. 83. 4. Com. Dig. 339. 432. Elmes's caſe 1. And. 71, and Dy. 373. pl. 13. and Jones and Smith 2. Bulſt. 36.—(9) This appears to be a good rule; for if a ſtatute is merely declaratory of the common law, the latter ſhould be conſtrued as it was before the recognition by parliament; and conſequently its operation ſhould not be extended to the deſtruction of preſcriptions and cuſtoms, which were before allowable. As to the uſe of *negative* words in ſuch a caſe, they may either ariſe from the ſubject, or be a *mode* of expreſſing what the common law is; in either of which caſes, there cannot be any colour of reaſon for giving more effect to *negative* than belongs to *affirmative* words. In ſhort to ſay, that a ſtatute *merely declaratory* of the common law, being expreſſed in negative words, ſhall operate on ſubjects to which the common law is not applicable, ſeems to be a direct contradiction; for how can a ſtatute be *merely declaratory*, if it is in *any* degree *introductive of a new law?* However there are books, in which lord Coke's diſtinction, in reſpect to negative ſtatutes declaratory of the common law, is denied. See W. Jo. 270, 271, 289. If thoſe, who oppoſe his

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of the infant; but alſo to his hereditaments *not lying in tenure*; and even to his copyhold eſtates unleſs there is a ſpecial cuſtom for the lord's appointing a guardian of them. Ante 87. b. and Egleton's caſe, 1. Ro. Abr. 40. See alſo Hutt. 17. and 2. Lutw. 1181. But whether the guardian in ſocage is intitled to take into his cuſtody the infant's *perſonal* eſtate, we have not yet been able to aſcertain by any expreſs authority. However we are inclined to think, that *perſonalty* is included, except where by the cuſtom of a particular place it happens to be liable to a different cuſtody; our idea being, that the cuſtody of the infant's perſon draws

perſonam ſuam liberam confert villenagio; nec liberum tenementum è contrario mutat ſtatum aut conditionem villani. And againe, [e] *villenagium vel ſervitium nihil detrahit libertati; habita tamen diſtinctione, utrum tales ſint villani, & tenuerunt in villano ſocagio de dominico domini regis.* And againe, [f] *Tenementum non mutat ſtatum liberi non magis quam ſervi; poterit enim liber homo tenere purum villenagium, faciendo quicquid ad villanum pertinebit, & nihilominus liber erit, cum hoc faciat ratione villenagii, & non ratione perſonæ ſuæ: & ideo poterit, quando voluerit, villenagium diſſerere, & liber diſcedere, niſi illaqueatus ſit per uxorem nativam ad hoc faciendum, ad quam ingreſſus fuit in villenagium, & quæ præſtare poterit impedimentum, &c.* And againe, [g] *Purum villenagium eſt, à quo præſtatur ſervitium incertum & indeterminatum, ubi ſcire non poterit veſpere, quale ſervitium fieri debet mane, viz. ubi quis facere tenetur, quicquid ei præceptum fuerit.* And another ſaith to the ſame intent, *Ceux ne ſcavoient le veſpere, de quoy ils ſerverent en la matyn.* [h] *Fuerunt in conqueſtu liberi homines, qui libere tenuerunt tenementa ſua per libera ſervitia, vel per liberas conſuetudines; & cum per potentiores ejecti eſſent, poſtmodum reverſi receperunt eadem tenementa ſua tenenda in villenagio, faciendo inde opera ſervilia, ſed certa et nominata, &c. & nihilominus liberi, quia, licet faciunt opera ſervilia, cum non faciunt ea ratione perſonarum, ſed ratione tenementorum, &c.*

franke home villein. Mes un villein puit faire franke terre deſtre villein terre a ſon ſeignior. Sicome lou un villeine purchaſe terre en fee ſimple, ou en fee taile, le ſeignior del villein poet enter en la terre, & ouſte le villein & ſes heires a touts jours, & puis le ſeignior (ſil voloit) puit leſſer meſme la terre a le villeine, a tener en villenage.

villeine may make free land to bee villeine land to his lord. As where a villeine purchaſeth land in fee ſimple, or in fee taile, the lord of the villeine may enter into the land, and ouſt the villeine and his heires for ever; and after, the lord (if hee will) may let the ſame land to the villein, to hold in villenage.

[e] Idem. lib. 1. ca. 6. Brit. c. 31. & 66. Flet. li. 1. ca. 3.

[f] Bract. fol. 26. 43. E. 3. 5. acc.

[g] Bract. li. 4. fo. 208. Brit. ca. 31.

[h] Bract. li. 1. fo. 7.

How villenage or ſervitude began, and for what cauſe, it is ſaid, [i] *Ab homine & pro vitio introducta eſt ſervitus, ſed libertas à Deo hominis eſt indita naturæ, quare ipſa ab homine ſublatæ ſemper redire gliſcit, ut facit omne, quod libertati naturali privatur.* And another ſaith, [k] that the condition of villeines, from freedome unto bondage, of ancient time grew by conſtitutions of nations. [l] *Fiunt etiam ſervi liberi homines captivitate de jure gentium*; and not by the law of nature, as from the time of Noah's flood forward, in which time all things were common to all, and free to all men alike, and lived under the law naturall, and by multiplication of people, and making proper and private thoſe things that were common, aroſe battels. And then it was ordained by conſtitution of nations, that none ſhould kill another; but that he, that was taken in battell, ſhould remain bond to his taker for ever, and to doe with him, and all that ſhould come of him, his will and pleaſure, as with his beaſt, or any other chattell, to give, or to ſell, or to kill: and after it was ordained for the cruelty of ſome lords, that none ſhould kill them, and that the life and members of them, as well as of free men, were in the hands and protection of kings, and that he that killed his villeine, ſhould have the ſame judgment as if he had killed a freeman. Thereupon they were called *ſervi, quia ſervabantur à dominis & non occidebantur, & non à ſerviendo.* He is called *nativus à naſcendo, quia plerumque natus eſt ſervus*; and he is called *villanus*, for that he doth his villeine ſervice *in villis.*

[i] Forteſc. ca. 42.

[k] Brit. ca. 31.

[l] Bract. li. 1. ca. 6. Flet. li. 1. ca. 3. & ca. 5. Mir. cap. 2. ſect. 18.

(F. N. B. 77. f.) Bract. li. 1. cap. 6. Britton ca. 31. & ubi ſupr. Fleta lib. 1. ca. 2. & 3. [m] Mirror cap. 2. ſect. 18.

Eſt autem libertas naturalis facultas ejus, quod cuique facere libet, niſi quod de jure, aut vi prohibetur. Servitus eſt conſtitutio de jure gentium, qua quis domino alieno contra naturam ſubjicitur. And againe, [m] *Et tout ſoyt que touts creatures duiſſont eſte franks ſolonque le ley de nature, per conſtitution nequidant, & fait de homes ſont asters creatures enſervies, ſicome eſt dit beaſts en parkes, piſſons en ſervors, & oyſeaux en cages.*

[n] Mirror cap. 2. ſect. 18. Geneſis 9. verſ. 10, 11. &c.

Ambroſe.

[n] This is aſſured, that bondage or ſervitude was firſt inflicted for diſhonouring of parents; for Cham the father of Canaan (of whom iſſued the Canaanites) ſeeing the nakednes of his his father Noah, and ſhewing it in deriſion to his brethren, was therefore puniſhed in his ſonne Canaan, with bondage. And herewith agreeth the divine. *Ante vini inventionem inconcuſſa libertas. Non eſſet hodie ſervitus, ſi ebrietas non fuiſſet.*

Hors del citie ou del mannor, &c. This is falſe printed, for the original

his opinion, had meant only to ſay, that in the inſtances, by which he illuſtrates his rule, the negative words of the ſtatutes not only import ſomething more than a declaration of the common law, but were alſo intended to annihilate all particular cuſtoms claſhing with it; or that on other accounts the inſtances were not apt, there might poſſibly be ſome colour for their diſſenting from lord Coke. But what is profeſſed to be controverted is the diſtinction itſelf; which, as we underſtand it, ſeems to be perfectly unexceptionable.—(10) It is obſervable, that *Magna Charta* diſtinguiſhes between *tourns* or the *leets* of *ſheriffs* and the *view* of *frank-pledge*; limiting the *former* to *twice* a year and the *latter* to *once*. In the more ordinary ſenſe *frank-pledge* and *leet* are ſynonymous; as appears from the ſtyle of tourns and other leets, which in court rolls are uſually denominated *curiæ* or *viſus franci plegii*. But when *free-pledge* is uſed, as in *Magna Charta*, it ſhould be underſtood in a *ſtrict* and *particular* ſenſe; according to which it meant only that part of the buſineſs of a court leet, which related to the taking of ſureties or free pledges for every perſon within the juriſdiction; a practice, which had fallen into diſuſe long before lord Coke's time. See 8. H. 7. 4. and 2. Inſt. 72. (11) Adjudged acc. 2. Leon. 28. But it may be doubted, whether the preſcription for holding a leet oftener than twice a year, when examined into, will appear a fit example to prove the rule, that negative ſtatutes in affirmance of the common law may be preſcribed againſt. The only words of *Magna Charta*, which relate to the holding of tourns or leets are theſe, *Nec aliquis vicecomes, vel ballivus, faciat turnum ſuum per hundredum, niſi bis in anno; & nonniſi in loco conſueto, videlicet ſemel poſt Paſcha et iterum poſt feſtum Sancti Michaelis; & viſus de franco plegio tunc fiat ad illum terminum ſancti Michaelis ſine occaſione.* See Blackſt. ed. of Magn. Chart. But this proviſion or declaration ſeems wholly confined to the *tourns* or leets of *ſheriffs*, and not to include the *leets of private perſons*; though it muſt be owned there are ſome authorities to the contrary. *Acc.* Bro. Abr. *Leet* 23. and the opinion of *Periam* in 2. Leon. 74. *Contra* 2. Hal. Hiſt. Pl. C. 71. and the opinion of *Rhodes* 2. Leon. 74. See alſo 2. Hawk. Pl. C. 56. Therefore ſhould this proviſion in *Magna Charta* be only in affirmance of the common law, which as we ſhall mention in the next note is a point controverted, the inſtance would ſtill be liable to exception. See 2. Hawk. Pl. 56. But the

The continuation of the notes to 113. a. intended to be introduced here, is poſtponed to 118. b.

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draws after it the cuſtody of every ſpecies of property, for which the law hath not otherwiſe provided. This idea receives ſome countenance from the inſtances of *copyholds*, and of *hereditaments not lying in tenure*; for including which, it will be difficult to account by any other reaſon, than the one we give for including *perſonalty*. It is alſo ſtrongly confirmed by the manner, in which the 12. of Cha. 2. c. 24. regulates the powers of the guardian, which it enables a father to appoint. After authorizing ſuch guardian to take the cuſtody of the infant's *perſonal eſtate*, as well as of his *lands tenements* and *hereditaments*, it provides, that he may bring *ſuch action or actions in relation thereunto, as by law a guardian in common ſocage might do*: words almoſt neceſſarily importing,

originall is, *hors del scite del mannor*, and so would it be amended at the impressions of the booke hereafter.

Et ascuns frank homes teignont, &c. This is apparent enough, especially upon that which hath beene said. Mirror ca. 2. sect. 18. acc.

Ou un villeine purchase terre en fee simple. Yet the villeine may purchase some kinde of inheritances in fee simple, which the lord of the villeine cannot have. As if a villeine purchase a common *sauns nomber*, the lord shall not have it; for the lord may surcharge the same, which should be a prejudice to the terre-tenant: and the same law of a *corodie incertaine* granted to a villeine, and such like inheritances. And therefore Littleton materially said, *purchase terre*. When the villeine hath an estate of any thing certaine, the lord shall have it; as a rent granted to the villeine, commons certaine, estovers certaine, and such like. [o] But that, which lyeth in action, as a warranty made to the villeine his heires and assignes, the lord shall not take advantage of by voucher; because it is in lieu of an action. Neither shall the lord take advantage of any obligation or covenant, or other thing in action made to the villeine; because they lye in privity, and cannot be transferred to others.

Mirror cap. 2. sect. 18. see 4. Inst. 87.

22. Aff. p. 37. [o] Doct. and Stud. ca. 43. (3. Co. 62, 63. 2. Ro. Abr. 740. Post 120. a.)

[p] If a man be lessee of a villeine for life, for yeares, or at will, and the villeine purchaseth lands in fee; if the lessee entreth into the lands, he shall hold the lands as a perquisite to him and his heirs for ever. But if a bishop hath a villeine in the right of his bishopricke, and he purchaseth lands, and the bishop entreth, the bishop shall have this perquisite to him and his successors, and not to him and his heirs; for the law respecteth the quality, and not the quantity of his estate. So if executors have a villeine for yeares, and the villeine purchase lands in fee, and the executors enter, they shall have a fee simple, but it shall be assets.

[p] L. 5. E. 4. 61. 18. E. 3. 29. 21. H. 6. 37. Broo. tit. Vil. 70. (Plow. 235. a. Ante 90. a.)

Fee taile. By this it is apparant, that if lands bee given to a villeine, and to the heires of his body, the lord may enter and put out the villeine and the heires of his body; for *quicquid acquiritur servo acquiritur domino* (1). And in this case the lord gaines a fee simple determinable upon the dying of the villeine without heire of his body; and the absolute fee simple remaineth still in the donor. And if the lord enter, and after infranchise the donee, and after the donee hath issue, yet that issue shall never have remedy either by *formedon* or entry, to recover this land, by force of the statute of *donis conditionalibus*; for that statute giveth remedy to the issues of the donee, that have capacity and power to take and retaine such a gift; and the title of the lord remaines, as it did at the common law, for the statute restraineth acts done only by the tenant in taile. And so it is, if lands be given to an alien, and to the heires of his body, upon office found, the land is seised for the king, afterwards the king makes the alien a denizen, who hath issue and dyeth, the king shall detaine the land against the issue (3).

15. E. 4. 9. b. Pl. Com. 555. in Walsingham's case.

Note, & see case of denizatn before office, ~~2 Leon. 139.~~ Gouldsb. 29. see also case of villein 2. Leon. 139.

Sect. 173.

ET nota, si feoffment soit fait a certaine person ou persons en fee, al use d'un villeine; ou si un villeine, ove auters persons, soient enfeoffes al use le villeine; quel estate que le villeine ad en le use, en fee taile, pur terme de vie ou d'ans, le seignior del villeine poit entrer en touts ceux terres et tenements, sicome le villein ust este sole seisie del demesne. Et cest per lestatute de anno 19. *H. 7. cap.* 15. (2).

AND note, if a feoffement be made to a certaine person or persons in fee, to the use of a villeine; or if a villeine, with other persons, be infeoffed to the use of the villein; what estate soever that the villein hath in the use, in fee taile, for terme of life or years, the lord of the villein may enter into all those lands and tenements, as if the villein had been sole seised of the demesne. And this is given by the statute of *anno* 19. H. 7. cap. 15.

THIS is an addition to Littleton; and the statute of 19. H. 7. ca. 15. therein mentioned, for the cause that hath beene aforesaid, hath lost his force (3).

Sect.

the strongest objection is, that, in the same chapter of *Magna Charta*, there is a *general* and express reservation of ancient liberties; there being added this qualification, *ita scilicet quod quilibet libertates suas, quas habuit & habere consuevit tempore regis Henrici avi nostri, vel quas postea perquisivit*: which words, even in the opinion of those, who extend *Magna Charta* to *all* leets, suffice to save prescriptions. 2. Leon. 75. What renders lord Coke's thus applying the case of leets the more remarkable is, that he himself in his Second Institute, when commenting on this part of *Magna Charta*, agrees, that *leets* of private persons, so far as regards the *negative* words of *Magna Charta*, are not within it, and takes particular notice of the reservation of ancient liberties. 2. Inst. 72. See further 4. Com. Dig. 122. Perhaps lord Coke might intend to assert, that, notwithstanding *Magna Charta*, it is lawful to prescribe for holding a sheriff's tourn oftener than twice a year; which indeed seems to be admitted by judge Rhodes, who construed *all* leets to be within *Magna Charta*. But we do not observe, that the authorities, lord Coke cites, mention any such prescription —(12) Some think, that *Magna Charta*, so far as regards the time for holding tourns and leets, was introductive of a new law. See 2. Hawk. Pl. C. 56.—(13) The 34. E. 1. is not printed in the modern editions of the statutes. Indeed it seems doubtful, whether it is intitled to the denomination; for lord Coke in another of his works treats it as an *ordinance*, and to prove it such cites Fitzherbert's *Natura Brevium*. 4. Inst. 298. F. N. B. 167. A. See also 12. Co. 23. If it be true, that the 34. E. 1. is only an ordinance, lord Coke's case should be put on the 1. E. 3. st. 1. c. 2. or the *Charta de Foresta* of the 9. H. 3. c. 4. both of which laws provide to the same effect as the 34. E. 1. and are certainly acts of parliament. See also a like negative provision in the *consuetudines et assisa de foresta*, printed as a statute of uncertain time in Russh. ed. Append. 25. and cited by Noy in W. Jo. 270. 291.—(14) Acc. Manw. Forr. L. 1st. ed. 41. a. and Fitzh. Abr. *Trespass* 239. there cited.

see 115. a.

For the remaining note to 115. *a. see* 118. *a.*

(1) This rule about *slaves* holds in *some degree* in respect to *apprentices* and *servants*, particularly the former; though with a great difference in point of extent and application. All acquisitions of property real and personal made by the villein, in whatever way arising, with no other exception than what is allowed of to prevent prejudice to third persons, belonged to his lord; because an incapacity to acquire any thing for his own benefit was one of the harsh characteristics of the villein's condition. But the relation of the apprentice and servant to his master is more mild and limited; for it only imports, that the master shall be intitled to their personal labour during the term stipulated, either in a particular way or generally according to the nature of the service or apprenticeship. Consequently the master cannot claim any other acquisitions, than such as are the result of that labour. What the apprentice or servant earns by his labour, whilst he remains with the master or is actually working for him, falls so clearly within this principle, that there can be no room for doubt. Nor can there be any, where the apprentice or servant is employed by another person with the knowledge and consent of the master, without any circumstances indicating a waiver of their earnings. The books contain several adjudications founded upon this latter idea. Most of them indeed relate to

importing, that the *personal* estate is equally an object of the custody of guardian in socage with the infant's real property. Yet ws

see doctrine as to case between father & child in 1. Wooddes. 451. But quare as to its being supportable by authority or otherwise. See ~~also~~ 1. Blackst. Comment. 452. 453.