(Copy).

To Francis Hargrave Esq.re

Dear Sir,

Notwithstanding you expressed your desire to the contrary — I intended mentioning in my preface your name in those — terms which your eminence in the profession and your particular kindness to me so justly require: but from some particular — circumstances ~~with~~ with which you are not unacquainted, I could not do this, without at the same time mentioning others whom for many reasons I could not notice. Permit me to make this private acknowledgement that from my first undertaking this work to its completion, I have received from you the most friendly assistance. Your extensive learning in every branch of the profession and in every branch of literature which has any connection with it are universally known: to add to their celebrity would have been impossible, but it would have given me pleasure to have had it in my power to inform the public how kindly and how liberally you have upon all occasions made them useful to me. I beg you will accept this grateful acknowledgement of my obligations to you as from this account and that you will believe me as incapable of forgetting as I am of repaying them.

I am, Dear Sir, with the greatest respect,

your most obliged humble Servant

(Excuse haste) Lincolns Inn. 19th January 1808. Charles Butler

Examined

Copy of Letter from Charles

Butler Esq.re to Francis Hargrave Esq.r

written in a book upon Littleton next by the

former
~~Letter~~ to the ~~former~~ latter gentleman.

[illegible] concerning
in Lord Coke's Commentary
& his writings,
See Judge Twisden's words 2. Mod. 193. Lord Ch. Justice Eyre in 1. Bosanq. & Pull. 123. Lord Keeper Bridgman's in ead. [illegible] of his Abs. Rep. penes me page

131. For animadversions upon him, see 1. Bosanq. & Pull.

On Saturday, the 29th of October, 1774, will be published,

NUMBER I.

OF

A NEW EDITION, being the THIRTEENTH,

OF

Sir EDWARD COKE's FIRST INSTITUTE,

OR HIS

COMMENTARY UPON LITTLETON;

TOGETHER WITH HIS

LAW-TRACTS, and the TREATISE of the OLD TENURES.

The Whole REVISED and CORRECTED

By FRANCIS HARGRAVE,

OF LINCOLN'S-INN, ESQ.

WITH THE ADDITION OF

VARIOUS READINGS of LITTLETON,

From the MORE EARLY EDITIONS;

A PREFACE, and some NOTES and REFERENCES,

By the EDITOR;

AND ALSO OF

An ANALYSIS of LITTLETON,

Written by an Unknown Hand, in 1658-9, but never before published.

Printed for G. KEARSLY, at No. 46, oppoſite Fetter-Lane, in Fleet-Street; and G. ROBINSON, in Pater-noſter-Row. It may alſo be had of the principal Bookſellers in Great-Britain and Ireland.

CONDITIONS.

I. This Work will be neatly printed, in One Volume Folio, with a new Letter, and on a fine Writing-Paper.

II. The whole Work, it is ſuppoſed, will be compriſed in Forty-Eight Numbers; but if it ſhould exceed Forty-Eight Numbers, the Overplus ſhall be given *gratis*. Each Number will be ſold at the Price of One Shilling.

III. The firſt Number will be publiſhed on Saturday, the 29th of next October; and One Number will be publiſhed every ſucceeding Saturday, till the whole Work ſhall be completed.

IV. In the Courſe of the Publication will be given the Heads of LITTLETON, and COKE, elegantly engraved.

V. No Money will be received previouſly to the Publication of the firſt Number.

*** It is requeſted, that thoſe who intend to be Purchaſers will favour Mr. KEARSLY, or Mr. ROBINSON, with their Names and Addreſs.——The Names of Subſcribers are alſo received by Mr. FLETCHER, of Oxford; Meſſ. FLETCHER and HODGSON, at Cambridge; and Mr. CADELL, in Briſtol.

THE EDITOR'S ADDRESS TO THE PUBLIC.

THE very high and advanced price at which the *twelfth* edition of *Sir Edward Coke's First Inſtitute*, or *Commentary upon Littleton*, has been ſold for a long time paſt, is a proof, that a *new* edition is now wanted in order to ſupply the public demand. This of itſelf may be thought a ſufficient reaſon for offering a *new* edition; but another, and more cogent motive concurs in inducing to ſuch a propoſal; for, notwithſtanding the advantages given to the *tenth*, *eleventh*, and *twelfth* editions, there ſtill remains an ample field for further improvements. It is not intended, by this obſervation, in the leaſt to derogate from the merit of thoſe three editions; of which the *eleventh* is particularly thought by ſome to deſerve commendation, as well on account of the care and induſtry exerted in correcting the errors of former impreſſions, as on account of the knowledge and judgment ſhewn in the additional notes and references. But a work like Sir Edward Coke's Commentary, ſo crouded with references to other books and authorities, will ever leave room for corrections; and being written on a ſubject ſo dependant, as the law neceſſarily is, on the opinions of the time *preſent*, and ſo frequently undergoing changes by acts of the legiſlature, will continually call for additions. Theſe conſiderations may ſuffice to evince the propriety of attempting a *new* edition; but ſomething further is requiſite to recommend *that* now offered to the public; and therefore the editor will explain the plan, on which he propoſes to conduct it.

Littleton's Tenures and *Sir Edward Coke's Commentary* will be printed from the *ſecond* edition, that being generally eſteemed the moſt correct one of the Commentary; but it will be compared with the *eleventh* edition, and occaſionally with the *firſt* and *other* editions, *all* of which have been procured for that purpoſe. Alſo the text of Littleton will be collated with the *Rohan* edition, which was that preferred by Sir Edward Coke, and a ſtill *earlier* one, by *Lettou* and *Machlinia*, which was printed in the life-time of Littleton, or within a year after his death, and has *never yet* been made uſe of in any edition of the Commentary. For the uſe of theſe two moſt curious and ſcarce editions of Littleton, the editor is indebted to the kindneſs of one, whoſe name he ſhould think it an honour to be at liberty to mention. The editor is alſo provided with the curious editions of Littleton by *Pynſon* and *Redman*, which are the next in date to the *Rohan* edition. He is poſſeſſed too of an edition in 1534 by Raſtell, and of *moſt* of the *other* editions of Littleton, which are very numerous; but theſe latter, not being of ſo great authority, will ſeldom be conſulted. It is proper to add, that the editor propoſes to give the various readings of *four* or *five* of the earlieſt editions of Littleton, which has never been attempted before. However, he cannot yet determine, whether it will be poſſible to include ſo much additional matter in the margin, or whether he ſhall not be forced to print the various readings ſeparately at the end of the work.—As to *references*, thoſe in the *firſt*, *ſecond*, and *other* editions of Sir Edward Coke's Commentary before the *tenth*, having been made by Sir Edward Coke himſelf, will be *wholly* retained, with ſuch corrections only of apparent miſtakes as ſhall occur to the editor. Moſt of the additional references in the *tenth*, *eleventh*, and *twelfth* editions will alſo be retained; it being intended only to omit ſuch as the editor ſhall diſcover to be plainly foreign to the purpoſe. The editor is aware, that even ſome of Sir Edward Coke's own references have been complained of as not pertinent; which, when the prodigious number of them, and the great variety of public and private affairs which commanded his attention through life, are conſidered, may be accounted for, without any great reflection on his care and accuracy. But the editor would deem it a preſumption in him to *omit any* part of the *original* work; though, in reſpect to the references, ſuch a liberty is, in ſome inſtances, taken, in the *tenth*, *eleventh*, and *twelfth* editions; and beſides, he would by no means be underſtood to engage for an examination of *every* reference with the book cited, which is a taſk far greater than his other avocations will allow him to engage in. Further, it is propoſed by the editor, to give ſome additional references, particularly to the Reports publiſhed ſince the *twelfth* edition; and ſome few notes; but he avoids promiſing a *great* number of either, leſt he ſhould undertake more than he may hereafter be able to accompliſh. However, in order to make ſome amends for the ſmallneſs of the number of new references, great care ſhall be taken in the choice of them; and they ſhall be ſo given, as clearly to ſhew whether they tend to confirm, to queſtion, to contradict, or to illuſtrate the doctrine advanced in the text; a diſtinction very requiſite for the convenience and information of the reader, though in new edition of law-books too frequently neglected. In the *eleventh* and *twelfth* editions, the *new* refer-

ences are not diſtinguiſhed from Sir Edward Coke's; but in this preſent edition it is thought proper to acquaint the reader, which belong to him, and which to his reſpective editors; and for that purpoſe, the additional references taken from the *tenth*, *eleventh*, and *twelfth* editions will be incloſed between *parentheſes*; and thoſe, with the notes by the editor of this edition, will be printed in *Italics*. Such a diſcrimination is a juſtice due to thoſe from whom the references proceed, particularly to Sir Edward Coke; and, at the ſame time, muſt be a ſatisfaction to the reader.—The *eleventh* and *twelfth* editions contain ſome notes and additions, ſhewing the alterations in the laws ſince the time of Sir Edward Coke, which are printed ſeparately at the end of the work. This has been found inconvenient; and therefore, in the preſent edition, they will be placed in the margin of the book where they reſpectively apply; except ſuch of them as the editor ſhall find improper to be retained, or ſuch as ſhall conſiſt of extracts from acts of parliament, which, being too long for marginal inſertion, will be omitted; and it is hoped, that the omiſſion of thoſe extracts will not be diſapproved of, as a ſhort reference to the ſtatutes themſelves, with an intimation that they have altered the law, will be ſubſtituted, which will equally anſwer the purpoſe of apprizing the reader.—In all the former editions, the French text of Littleton's Tenures, and the whole of Sir Edward Coke's Commentary, were printed in the *black* letter; but in this edition only *Roman* and *Italic* letters will be uſed, which, it is preſumed, will be both an agreeable and uſeful alteration in the printing; the *black* letter being generally deemed leſs pleaſing, and more fatiguing to the ſight, than either of the others.—In reſpect to the *Index* to the Firſt Inſtitute, it will be the ſame as in the *eleventh* and *twelfth* editions.

To the *ninth* and *ſubſequent* editions were added Sir Edward Coke's *Readings* on the *Statute of Fines*, and on *Bail* and *Mainprize*; to the *tenth*, *eleventh*, and *twelfth* was added his *Copyholder*; and to the two latter the *Treatiſe* of the *Old Tenures* was alſo added. All theſe tracts will be given in the preſent edition; but with this difference, that the *Reading* on the *Statute* of *Fines*, will be in *Engliſh*, and the *Treatiſe* of *Old Tenures*, inſtead of being in French only, will be accompanied with the *Old Engliſh* tranſlation, as printed at the end of the *firſt* edition of the *Terms of the Law*. The *original French* of the *Old Tenures* is continued on account of the great antiquity of the book; but in the printing, the *black* letter will not be uſed.

Beſides Sir Edward Coke's *Tracts* and the *Old Tenures*, the preſent edition will have an *Analyſis* of *Littleton*, from a manuſcript, dated 1658-9, which has never yet been printed. This *Analyſis* is a methodical ſummary of Littleton, containing, not only a *general* view of the *whole* work, but alſo a *particular* one of *each* chapter. It accidentally fell into the hands of the editor. He is not informed who was the author; but it appears to him to be judiciouſly and ingeniouſly executed, and worthy of publication; and he hopes that it will not be deemed an improper addition.

To the whole will be prefixed a new Preface, by the editor of the preſent edition. In this Preface, he propoſes, in the *firſt* place, to conſider the merit of *Littleton's Tenures* and *Sir Edward Coke's Commentary*, and to point out the excellencies of each; in the *next* place, to give a *particular* account of the ſeveral editions of both; and *laſtly*, to explain how this will differ from the former editions.

Such is the edition of Sir Edward Coke's Firſt Inſtitute, now ſubmitted as a candidate for the public favour and encouragement; nor ſhall any exertion within the power of the editor be wanting to deſerve them. He foreſees that *great pains* and *labour* will be neceſſary to the effecting a due performance of his engagements, and that *little fame* can be expected from the moſt ſucceſsful execution of an undertaking ſo humble as ſcarce to exceed that of a *mere* editor. But ſtill he looks forward with pleaſure. His veneration for the names of Littleton and Coke; his admiration of their writings; his perſuaſion that an attentive contemplation of them, by the improvement it muſt produce, will be its own reward; and his zeal to be inſtrumental in exhibiting them to the public eye, pure, genuine, and undiſguiſed, and with as many advantages as a faithful and induſtrious editor can beſtow: theſe were the conſiderations which chiefly prompted him to commence the undertaking; and theſe, he truſts, will continue to animate him till it is completed. If by perſeverance and an unremitting ardor, the editor ſhould ſucceed in his endeavours, he will then have the pleaſing ſatisfaction of reflecting, that his labours have been uſeful, inſtructive, and agreeable to himſelf, and, at the ſame time, not wholly unprofitable or unacceptable to the community.

Aug. 20, 1774. FRA. HARGRAVE.

PROPOSALS

FOR

A NEW EDITION

OF

COKE UPON LITTLETON.

Sect. 26. 27.

26. 27. Theſe two Sections need no explanation at all.

ITEM (1) *ſi tenements ſoient dones a un home & a ſa feme, & a les heires del corps del home engendres, en ceo caſe le baron ad eſtate en le taile generall, et la feme forſque eſtate pur terme de vie.*

ALSO if tenements bee giuen to a man and to his wife, and to the heyres of the bodie of the man; In this caſe the huſband hath an eſtate in generall taile, and the wife but an eſtate for terme of life.

ITEM (2) *ſi terres ſoient dones a le baron & ſa feme, & a les heires le baron, queux il engendra de corps ſa feme, en ceo caſe le baron ad eſtate en le taile ſpeciall, & la feme forſque pur terme de vie.*

ALSO if Lands bee giuen to the huſband and wife, and to the heires of the huſband which hee ſhall beget on the body of his wife; In this caſe the huſband hath an eſtate in eſpeciall taile and the wife but an eſtate for life.

Sect. 28.

ET ſi le done ſoit fait al baron & a ſa feme, & a les heires la feme de ſa corps per le baron engendres, donque la feme ad eſtate en eſpecial taile, & le baron forſq. pur terme de vie (3). *Mes ſi terres ſont dones a le baron & a la feme, & a les heires que la baron engendra de corps la feme, en ceo caſe ambideux ont eſtate en la taile* (4), *pur ceo que ceſt parol* (*heires*) *neſt limit a lun pluis que a lauter* (5) (6)(7).

AND if the gift be made to the huſband and to his wife, and to the heires of the body of the wife by the huſband begotten, there the wife hath an eſtate in ſpeciall taile, and the huſband but for terme of life: but if lands bee giuen to the huſband & the wife, & to the heires which the huſband ſhall beget on the body of the wife, in this caſe both of them haue an eſtate taile, becauſe this word (heires) is not limited to the one more than to the other.

HEires. This word (*heires*) is *nomen operatiuum*, to which of the Donees it is limited, it createth the eſtate taile; but if it incline no more to the one than to the other, then both doe take, as here *Littleton* putteth the caſe. And therewith accordeth the caſe of [q] 3 *E.* 3. where it appeareth, *Quod Robertus de S. dedit Iohanni de Riparijs & Matildæ vxori eius, & hæredibus quos idem Iohannes de corpore ipſius Matildæ procrearet, &c.* and this adiudged to bee an eſtate in eſpeciall taile in them both, becauſe the eſtate is equally tailed to the heires of the baron as to the heires of the wife. If lands be giuen to the huſband and the wife, and to the heires of the body of the ſuruiuour, the gift is good, and the ſuruiuour ſhall haue an eſtate in taile generall, but the eſtate taile veſteth not till there be a ſuruiuour. And hereby it appeareth [r] that a gift made to a man and to *the* heires of his body, is as good as to *his* heires of his body.

19 Hen. 6. 75. a. Regiſt. 239; 17 E. 2. tit. Taile 23. 3 E. 3. 32. 4 E. 3. 43. 5 E. 3 29. b. & 34. a. 21 E. 3. 43. 12 H. 4. 1.

[q] 3 E. 3. 32. 21 E. 3. 43; 19 H. 6. 75. per Hody.

Regiſt. 239.

(1 Sid. 83.)

[r] 20 E. 3. Briefe 377.

VARIOUS READINGS of LITTLETON, and NOTES.

(1) *Nota.* P. Red. (2) *Nota.* P. Red.

(3) *In pleading ſeizin of ſuch an eſtate in huſband and wife, it ſhall be alledged, that they* were ſeized together and to the heirs of the body of the wife in her right; *and not that they were ſeized* of the freehold or fee-tail. *Per Fitzherbert*, 27 H. 8 21. b.

(4) *In* 3 *E.* 3. 31. *b. it is argued that the eſtate tail is wholly in the huſband, and that the wife had for life only; but it was adjudged* contra. *However, this may explain why Littleton added what is expreſſed in the next of the various readings, and is one proof of their utility.*

(5) *Et ils ount en cell caſe tiel eſtate, ſicome terres furent dones a eux & a lez heires de leur deux corps engendrez.* L. and M.

(6) *But where the limitation is to the wife only, and to the heirs of the bodies of the huſband and wife, the wife takes for life, and there is a contingent remainder to the heirs of their bodies.* Adjudged in Frogmorton on the demiſe of Robinſon againſt Wharrey, Mich. 11 Geo. 3. C. B. & ſee accord. Dy. 99. 1. Ro. Rep. 238. 317. 438. & Sty. 325.

(7) 12 H. 4. 1. 2. &c. Red. in Marg.

SPECIMEN

OF THE

MANNER OF PRINTING

THE

PROPOSED NEW EDITION

OF

COKE ON LITTLETON.

*** The Various Readings of Littleton taken from *Lettou* and *Machlinea* will be diſtinguiſhed by *L.* and *M.* thoſe from the *Rohan* edition by *Rob.* thoſe from *Pynſon*'s edition by *P.* and thoſe from *R. dman*'s edition by *Red.* and if a Reading ſhould be taken from any *other* edition, it will be particularly mentioned. In Redman's edition there are frequent references to caſes in the Year-Books, which will be given as part of the Various Readings from Redman. — No notice will be taken of any Various Reading, when it is *apparently* quite immaterial. This may ſeem not quite conſiſtent with giving the word *Nota*, in the Specimen, as a various Reading; but the reaſon for it is, that Littleton is thought by Sir Edward Coke to uſe the word *nota* in a ſenſe peculiarly ſignificant. See Co. Litt. 22. a.

The *Notes* and *References* from the *tenth*, *eleventh*, and *twelfth* editions will be incloſed between *parentheſes*; and thoſe by the *editor* of the new edition, with the Various Readings, will be in *Italics*.

The whole of the New Edition will be printed on the ſame kind of paper as this Specimen.

THE

FIRST PART

OF THE

INSTITUTES

OF THE

LAWS of ENGLAND;

OR, A

COMMENTARY upon LITTLETON,

Not the NAME of the AUTHOR only, but of the LAW itſelf.

Quid te vana juvant miſeræ ludibria chartæ?
Hoc lege, quod poſſis dicere jure meum eſt.
Major hæreditas venit unicuique noſtrum à jure et legibus, quàm à parentibus.

Hæc ego grandævus poſui tibi candide lector.

Authore EDWARDO COKE, MILITE.

THE THIRTEENTH EDITION.

ALSO,

Three LEARNED TRACTS of the ſame AUTHOR:

The Firſt, his Reading upon the 27th of EDWARD I. Intitled, DE FINIBUS LEVATIS;
The Second, of BAIL and MAINPRIZE; and the Third, his COMPLETE COPYHOLDER.

TOGETHER WITH THE

TREATISE of the OLD TENURES.

THE WHOLE REVISED AND CORRECTED

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Written by an Unknown Hand in 1658-9, but never before publiſhed.

LONDON,

Printed for G. KEARSLY, near SERJEANT'S-INN, in FLEET-STREET; and
G. ROBINSON, in PATERNOSTER-ROW.

MDCCLXXV.

THE

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THE very high and advanced price, at which the *twelfth* edition of *Sir Edward Coke's First Inſtitute*, or *Commentary upon Littleton*, has been ſold for a long time paſt, is a proof, that a *new* edition is now wanted in order to ſupply the public demand. This of itſelf may be thought a ſufficient reaſon for offering a *new* edition; but another, and more cogent motive concurs in inducing to ſuch a propoſal; for, notwithſtanding the advantages, which may have been given to the *tenth eleventh*, and *twelfth* editions, there ſtill remains an ample field for further improvements. It is not intended, by this obſervation, in the leaſt to derogate from the merit of thoſe three editions; of which the *tenth* and *eleventh* are particularly thought by ſome to deſerve commendation, as well on account of the care and induſtry exerted in correcting the errors of former impreſſions, as on account of the knowledge and judgment ſhewn in the additional notes and references. But a work like Sir Edward Coke's Commentary, ſo crouded with references to other books and authorities, will ever leave room for corrections; and being written on a ſubject ſo dependant, as the law neceſſarily is, on the opinions of the time *preſent*, and ſo frequently undergoing changes by acts of the legiſlature, will continually call for additions. Theſe conſiderations may ſuffice to evince the propriety of attempting a *new* edition; but ſomething further is requiſite to recommend *that* now offered to the public; and therefore the editor will explain the plan, on which he propoſes to conduct it.

Littleton's Tenures and *Sir Edward Coke's Commentary* will be printed from the *ſecond* edition, that being generally eſteemed the moſt correct one of the Commentary; but it will be occaſionally compared with the *firſt* and *other* editions, *all* of which have been procured for that purpoſe. Alſo the text of Littleton will be collated with the *Rohan* edition, which was that preferred by Sir Edward Coke, and a ſtill *earlier* one by *Lettou* and *Machlinia*, which was printed in the life-time of Littleton, or within a year after his death, and has *never yet* been made uſe of in any edition of the Commentary. For the uſe of theſe two moſt curious and ſcarce editions of Littleton, the editor is indebted to the kindneſs of one, whoſe name he ſhould think it an honour to be at liberty to mention. The editor is alſo provided with the curious editions of Littleton by *Pynſon* and *Redman*, which are the next in date to the *Rohan* edition. He is poſſeſſed too of an edition in 1534 by Raſtell, and of *moſt* of the *other* editions of Littleton, which are very numerous; but theſe latter, not being of ſo great authority, will ſeldom be conſulted. It is proper to add, that the editor propoſes to give the various readings of *four* or *five* of the earlieſt editions of Littleton, which has never been attempted before. But no various readings will be given, except where they appear to the editor *ſubſtantially* to affect the ſenſe of the author *; and therefore the reader will not find *any* in the *firſt* ſection; the difference of the ſeveral editions, ſo far as regards that ſection, being apparently quite *immaterial*. As to *references*, thoſe in the *firſt*, *ſecond*, and *other* editions of Sir Edward Coke's Commentary before the *tenth*, having been made by Sir Edward Coke himſelf, will be *wholly* retained, with ſuch corrections only of apparent miſtakes as ſhall occur to the editor. Many of the additional references in the *tenth*, *eleventh*, and *twelfth* editions will alſo be retained; it being intended only to omit ſuch as the editor ſhall diſcover to be plainly foreign to the purpoſe. The editor is aware, that even ſome of Sir Edward Coke's own references have been complained of as not pertinent; which, when the prodigious number of them, and the great variety of public and private affairs which commanded his attention through life, are conſidered, may be accounted for, without any great reflection on his care and accuracy. But the editor would deem it a preſumption in him to *omit any* part of the *original* work; though, in reſpect to the references, ſuch a liberty is in very numerous inſtances taken in the *twelfth* edition †; and beſides, he would by no means be underſtood to engage for an examination of *every* reference with the book cited, which is a taſk far greater than his other avocations will allow him to engage in ‡. Further, it is propoſed by the editor, to give ſome additional references, particularly to the Reports publiſhed ſince the *twelfth* edition; and ſome notes; but he avoids promiſing a *great* number of either, leſt he ſhould undertake more than he may hereafter be able to accompliſh. However, in order to make amends for the ſmallneſs of the number of new notes and references ‖, great care ſhall be taken in the choice of them; and they

* This may ſeem not quite conſiſtent with *ſometimes* giving the word *Nota* as a various reading; but the reaſon of it is, that Littleton is thought by Sir Edward Coke to uſe the word *Nota* in a ſenſe peculiarly ſignificant. See Co. Litt. 22. a.—The various readings of Littleton, taken from the edition by *Lettou* and *Machlinia*, will be diſtinguiſhed by *L*, and *M*. thoſe from the *Rohan* edition by *Roh*. thoſe from *Pynſon*'s edition by *P*. and thoſe from *Redman*'s edition by *Red*. and if a reading ſhould be taken from any *other* edition, it will be particularly mentioned. In *Redman*'s edition there are references to caſes in ſome of the more ancient Year Books, which it was once intended to have given as part of the various readings from Redman; but on re-conſideration, they do not appear of ſufficient conſequence to be taken notice of.

† The editor has not yet found ſuch a liberty taken in any edition, except the *twelfth*; but in *that* the omiſſion of lord Coke's references is very frequent indeed, and he doubts whether many pages can be found without inſtances of it. In ſeveral pages he finds *twenty* or *thirty* references omitted, and in ſome *forty* or *fifty*. The truth of this will appear by examining fol. 4. b. and 5. a. of the *twelfth* edition with the ſame folios in any preceding one. The editor would not be ſo *early* in making this obſervation, if it was not with a view to ſhew, how unaccountable it is, that notwithſtanding this *ſuppreſſion* of a great part of the authorities, on which lord Coke founds his opinions, the *twelfth* edition ſhould ſell for *ſix pounds*, whilſt the price of ſome of the more early editions, though they contain the *whole* of the original work, and therefore are infinitely more valuable, is ſcarce as many *ſhillings*.

‡ It is neceſſary to mention this, leſt the *continuation* of thoſe miſtaken references by lord Coke, which are to be found in all the former editions, ſhould be imputed to the inattention of the editor of the preſent edition, and as a negligence not conſiſtent with his engagements to the public. The editor may add, that many of the miſtakes are of ſuch a kind, that to correct them, and to refer to the books or authorities intended, would exceed his utmoſt diligence and power.

‖ At firſt the editor doubted, whether it would be in his power to give the time neceſſary for writing *many* notes and references; but this firſt number of the work, he hopes, will convince his readers, how anxious he is to furniſh a great number; and he will exert himſelf to the utmoſt in order to continue the work on the ſame enlarged plan. Having engaged in the undertaking, he is reſolved at all events to make great ſacrifices, rather than ſuffer it to languiſh in his hands.

ſhall

ſhall be ſo expreſſed, as clearly to ſhew whether they tend to confirm, to queſtion, to contradict, or to illuſtrate the doctrine advanced in the text; a diſtinction very requiſite for the convenience and information of the reader, though in new editions of law-books too frequently neglected. In the *eleventh* and *twelfth* editions, the *new* references are not diſtinguiſhed from Sir Edward Coke's; but in this preſent edition it is thought proper to acquaint the reader, which belong to him, and which to his reſpective editors; and for that purpoſe, the additional references taken from the *tenth*, *eleventh*, and *twelfth* editions will be incloſed between *parentheſes*; and thoſe, with the notes by the editor of this edition, with the various readings of Littleton, will be referred to by figures, and placed at the bottom of the page. Such a diſcrimination is a juſtice due to thoſe from whom the references proceed, particularly to Sir Edward Coke; and, at the ſame time, muſt be a ſatisfaction to the reader.—The *eleventh* and *twelfth* editions contain ſome notes and additions, ſhewing the alterations in the laws ſince the time of Sir Edward Coke, which were printed ſeparately at the end of the work. This has been found inconvenient; and therefore, in the preſent edition, they will be placed in the margin of the book where they reſpectively apply; except ſuch of them as the editor ſhall find improper to be retained, or ſuch as ſhall conſiſt of extracts from acts of parliament, which, being too long for marginal inſertion, will be omitted; and it is hoped, that the omiſſion of thoſe extracts will not be diſapproved of, as a ſhort reference to the ſtatutes themſelves, with an intimation that they have altered the law, will be ſubſtituted, which will equally anſwer the purpoſe of apprizing the reader *.—In all the former editions, the French text of Littleton's Tenures, and the whole of Sir Edward Coke's Commentary, were printed in the *black* letter; but in this edition only *Roman* and *Italic* letters will be uſed, which, it is preſumed, will be both an agreeable and uſeful alteration in the printing; the *black* letter being generally deemed leſs pleaſing, and more fatiguing to the ſight, than either of the others.—In reſpect to the *Index* to the Firſt Inſtitute, it is at preſent intended, that it ſhall be the ſame as in the *eleventh* and *twelfth* editions; the editor thinking that having already undertaken ſo much, it would be imprudent to pledge himſelf ſtill further, by entering into any engagement for making additions to the Index.

To the *ninth* and *ſubſequent* editions were added Sir Edward Coke's *Readings* on the *Statute of Fines*, and on *Bail* and *Mainprize*; to the *tenth*, *eleventh*, and *twelfth* was added his *Copyholder*; and to the two latter the *Treatiſe* of the *Old Tenures* was alſo added. All theſe tracts will be given in the preſent edition; but with this difference, that the *Reading* on the *Statute* of *Fines*, will be in *Engliſh*, and the *Treatiſe* of *Old Tenures*, inſtead of being in French only, will be accompanied with the *Old Engliſh* tranſlation, as printed at the end of the *firſt* edition of the *Terms of the Law*. The *original French* of the *Old Tenures* is continued on account of the great antiquity of the book; but in the printing, the *black* letter will not be uſed.

Beſides Sir Edward Coke's *Tracts* and the *Old Tenures*, the preſent edition will have an *Analyſis* of *Littleton*, from a manuſcript, dated 1658-9, which has never yet been printed. This *Analyſis* is a methodical ſummary of Littleton, containing, not only a *general* view of the *whole* work, but alſo a *particular* one of *each* chapter. It accidentally fell into the hands of the editor. He is not informed who was the author; but it appears to him to be judiciouſly and ingeniouſly executed, and worthy of publication; and he hopes that it will not be deemed an improper addition, more eſpecially as it will neither occaſion the ſuppreſſion of any other matter, or increaſe the price of the work to the purchaſers.

To the whole will be prefixed a new *Preface*, by the editor of the preſent edition. In this Preface, he propoſes, in the *firſt* place, to conſider the merit of *Littleton's Tenures* and *Sir Edward Coke's Commentary*, and to point out the excellencies of each; in the *next* place, to give a *particular* account of the ſeveral editions of both; and *laſtly*, to explain how this will differ from the former editions.

Such is the edition of Sir Edward Coke's Firſt Inſtitute, now ſubmitted as a candidate for the public favour and encouragement; nor ſhall any exertion within the power of the editor be wanting to deſerve them. He foreſees that *great pains* and *labour* will be neceſſary to the effecting a due performance of his engagements, and that *little fame* can be expected from the moſt ſucceſsful execution of an undertaking ſo humble as ſcarce to exceed that of a *mere* editor. But ſtill he looks forward with pleaſure. His veneration for the names of Littleton and Coke; his admiration of their writings; his perſuaſion that an attentive contemplation of them, by the improvement it muſt produce, will be its own reward; and his zeal to be inſtrumental in exhibiting them to the public eye, pure, genuine, and undiſguiſed, and with as many advantages as a faithful and induſtrious editor can beſtow: theſe were the conſiderations, which *chiefly* prompted him to commence the undertaking; and theſe, he truſts, will continue to animate him till it is completed. If by perſeverance and an unremitting ardor, the editor ſhould ſucceed in his endeavours, he will then have the pleaſing ſatisfaction of reflecting, that his labours have been uſeful, inſtructive, and agreable to himſelf, and, at the ſame time, not wholly unprofitable or unacceptable to the community †.

FRA. HARGRAVE.

* The notes added in the 11th and 12th editions, excluſive of extracts from acts of parliaments, are ſo *few*, that all put together ſcarce amount to ſo much as the additional matter given by the editor of the preſent edition in his firſt number; and he is now doubtful, whether he ſhall retain any of them in their original form. However, if he ſhould, they ſhall be diſtinguiſhed in the manner above mentioned.

† From ſome late circumſtances there is reaſon to apprehend, that the editor's ſituation in reſpect to the work he has undertaken is greatly miſunderſtood. The intire *conduct* of the edition is intruſted to him; but he is not the *proprietor* of it; nor is he perſonally intereſted in the *loſs* or *profits*, which may attend the publication. His engagements to the *proprietors* of the edition are of a very *limited* kind. Thoſe he has entered into with the *public* are very *extenſive*. For the *former* engagements, a benefit, which was offered without any application on his part, is ſecured to him, independently of the event of the publication; but he can truly ſay, that it was the *leaſt* of the conſiderations, which induced him to undertake the work, and that he would ſtill chearfully renounce it, if by ſo doing he could render the work more valuable to the *public*. For his *latter* engagements he deſires no other reward, than the approbation of thoſe, for whoſe benefit his labours are intended.—The editor finds, that ſeveral reſpectable perſons have expreſſed ſurprize at publiſhing the work by *Numbers*. This mode of publication, though in itſelf, not liable to any great exception, has, by the *abuſe* of it, become rather diſreputable in the *appearance*; and therefore when it was firſt propoſed to the *Editor* by the *Proprietors* of the Edition, he objected to it. But on conſidering the great and immediate expences incident to their undertaking, and the other reaſons urged by them, they were found too cogent to be reſiſted; and the editor was the more eaſily induced to acquieſce, becauſe he found the proprietors moſt ready to put themſelves to every expence, which he recommended, for the purpoſe of rendering the work more acceptable to the public.

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

Chap. I. Fee ſimple. Sect. 1.

TEnant en fee ſimple eſt celuy, que ad terres ou tenements à tener à luy et a ſes heires a touts jours. Et eſt appel en Latin, feodum ſimplex, quia feodum idem eſt quod hæreditas (1), et ſimplex idem eſt quod legitimum vel purum, et ſic feodum ſimplex idem eſt quod hæreditas legitima, vel hæreditas pura. *Car ſi home voile purchaſer terres ou tenements en fee ſimple, il covient de aver ceux parolx en ſon purchaſe, A aver et tener a luy et a ſes heires: car ceux parolx (ſes heires) font leſtate denheritance. Car ſi home*

TEnant in fee ſimple is he, which hath lands or tenements to hold to him and his heires for ever. And it is called in Latin, *feodum ſimplex*, for *feodum* is the ſame that inheritance is, and *ſimplex* is as much as to ſay, lawfull or pure. And ſo *feodum ſimplex* ſignifies a lawfull or pure inheritance. For if a man would purchaſe lands or tenements in fee ſimple, it behooveth him to have theſe words in his purchaſe, To have and to hold to him and to his heires; for theſe words (his heires) make the eſtate of inheritance. For if a man pur-

TEnant. In Latin *tenens*, is derived of the verbe *teneo*, and hath in the law five ſignifications. 1. It ſignifies the eſtate of the land, as when the tenant in a *præcipe* of land, pleads, *quod non tenet*, &c. this is as much as to ſay, that he hath not ſeiſin of the freehold of the land in queſtion. And in this ſenſe doth our author take it in this place: and therefore he ſaith tenant in fee ſimple is he which hath lands to hold to him and his heires. 2. It ſignifieth the tenure or the ſervice whereby the lands and tenements be holden, and in this ſenſe it is ſaid in the writ of right, *quæ clamat tenere de te per liberum ſervitium*, &c. And in this ſignification he is called a tenant or holder; becauſe all the lands and tenements in England, in the hands of ſubjects, are holden mediately or immediately of

Vide Sect. 85.

8. H. 7. 12. 18. E. 3. 35.
24. E. 3. 65. 66. 44. E. 3. 5.
48. E. 3. 9.
(2. Inſt. 501.)
(4. Inſt. 192.)

See 2. Stalling ſ. Leches, Car. 30.

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

(12. Co. 9. Case of Stanneries.)

Mir. des Iustic. c. 1. sect. 3. Customs de Normandy, cap. 28.

of the king (1). For in the law of England we have not properly, *allodium*, that is, any subjects land that is not holden; unlesse you will take *allodium* for *ex solido*, as it is often taken in the Booke of *Domesday* (2): and tenants in fee simple are there called *alodarii* or *aloarii*. And he is called a tenant, because he holdeth of some superior lord by some service. And therefore the king in this sense cannot be said to be a (3) tenant, because he hath no superior but God Almighty; *prædium domini regis est directum dominium cujus nullus author est, nisi Deus.* And as Bracton saith, *Omnis quidem sub eo, et ipse sub nullo, nisi tantum sub Deo.* The possessions of the king are called *sacra patrimonia*, and *dominica coronæ regis*. But though a subject hath not properly *directum*, yet hath he *utile dominium*. Of these tenants our author speaketh in his second booke. 3. Also *tenere* signifieth performance, as in the writ of covenant, *quod teneat conventionem*, that is, that he hold or performe his covenant. 4. And likewise it signifieth to be bound, as it is said in every common obligation, *teneri et firmiter obligari*. Lastly, It signifieth to deeme or judge, as in 38. E. 3. c. 4. It shall be holden for none (that is) judged or deemed for none, and so we commonly say, it is holden in our bookes. And these severall significations doe properly belong to our tenant in fee simple. For he hath the estate of the land, he holdeth the land of some superiour lord, and is to performe the services due, and thereunto he is bounden by doome and judgement of law. Of the severall estates of land our author treateth in his first booke, and beginneth with fee simple, because all other estates and interests are derived out of the same.

Lest. de 16. R. 2. cap. 5. 14. El. Dy. 313. a. 1. Co. 47. in Alton Wood's case. (Cro. Cha. 82.)

purchase terres per ceux parolx, A aver et tener a luy a touts jours: ou per tiels parols, A aver et tener a luy et a ses assignes a touts jours: en ceux deux cases il ny ad estate forsque pur terme de vie, pur ceo que il fault ceux parols (ses heires) les queux parolx tant solement font lestate denheritance en touts feoffments et grants.

chase lands by these words, To have and to hold to him for ever; or by these words, To have and to hold to him and his assignes for ever: in these two cases he hath but an estate for term of life, for that there lacke these words (his heires) which words onely make an estate of inheritance in all feoffments and grants.

Bract. lib. 1. cap. 8.

Fee simple. Fee (4) commeth of the French *fief, (i. e.) prædium beneficiarium*, and legally signifieth inheritance, as our author himselfe hereafter expoundeth it. And simple is added, for that it is descendible to his heires generally, that is, simply, without restraint to the heires of his body, or the like. *Feodum est quod quis tenet ex quacunque causa, sive sit tenementum, sive redditus, &c.* In *Domesday* it is called *feudum*. [a] Of fee simple, it is commonly holden, that there be three kinds, *viz.* fee simple absolute, fee simple conditionall, and fee simple qualified, or base fee (5). But the more genuine and apt division were to divide fee, that is, inheritance, into three parts, *viz.* simple or absolute, conditionall, and qualified or base. For this word (simple) properly excludeth both conditions and limitations, that defeat or abridge the fee. * Hereby it appeareth, that fee in our legall understanding signifieth, that the land belongs to us and our heires, in respect whereof the owner is said to be seised in fee, and in this sense the king is said to be seised in fee. [b] It is also taken as it is holden of another by service, and that belongeth onely to the subject; *Item dicitur feodum alio modo ejus qui alium feoffat, et quod quis tenet ab alio, ut si sit qui dicat, talis tenet de me tot feoda per servitium militare.* And Fleta saith, *Poterit unus tenere in feodo quoad servitia, sicut dominus capitalis, et non in dominico; alius in feodo et dominico, et non in servitio, sicut libere tenens alicujus.* [c] And therefore if a stranger claim a seigniory, and distreine and avow for the service, the tenant may plead, that the tenancy is *extra feodum, &c.* of him (that is) out of the seigniory, or not holden of him that claimeth it; but he cannot plead *extra feodum, &c.* unlesse he take the tenancy, that is, the state of the land upon him. Of fee in the first sense our author treateth in this first booke; and as it is taken in the second sense in his second booke: and of the third you shall read in our author, Sect. 13. 643. 644. 645. and plentifully in our books quoted in the margent.

Brit. fo. 83. 207. 208. Fleta lib. 5. cap. 5. & lib. 3. cap. 8. Bract. lib. 4 263. (4. Inst. 202.) Domesday. Mir. des Iust. cap. 2. sect. 15. 17. Bract. lib. 2. cap. 5. 6. 7. Brit. cap. 34. fo. 89. Flet. lib. 3. cap. 2. 8. & 9. & lib. 5. cap. 5.
[a] Bract. fo. 263. & 207. Pl. Com. in Wals. cas. 7. H. 4. 46. 8. H. 4. 15. 18. H. 8. 3. b. 27. Ass. 33. 18. Ass. 5. 18. Ed. 3. 46. 24. E. 3. 28. 9. Ed. 4. 18. 16. H. 7. 4. 10. E. 3. Account 56. 22. R. 2. Disc. 50. 12. Ed. 4. 3. 15. E. 4. 8. Dy. 8. El. 252. 253. 12. H. 8. 8. 4. H. 7. 2. The Case of a person which hath a qualified fee. fee in the title of Desc.
* Vide Sect. 4.
[b] Bract. lib. 4. fo. 263. Flet. lib. 5. cap. 5. Brit. fo. 205. 207.
[c] 2. Ass. p. 4. 12. Ass. 38. 12. E. 3. tit. Hors de son fee. 28. 28. Ass. 41. 7. H. 4. 30. 2. H. 6. 1. (9. Co. 20. & 34. b. 2. Inst. 296. Cro. Jam. 127. Hob. 108. Doctr. Plac. 132. 216.)

Rot. pat. 13. E. 1.

Terres ou tenements. Here it is to be observed, that a man may have a fee simple in three kinds of hereditaments, (6) *viz.* reall, personall, and mixt: Reall, as lands and tenements, whereof our author here speaketh. Personall, as king Edward the first in the thirteenth yeare of his raigne, *concessit Edmundo fratri suo charissimo, quod ipse et hæredes sui habeant, ad requisitionem suam, in Cancellaria nostra et hæredum nostrorum, justiciarios*

(1) Same doctrine, 30 Ass. pl. 1. post 65. Plowd. 498. The origin and principle of this doctrine is well explained in Wright's Ten. 58. and 2 Blackst. Comm. 48. ed. 5. See also Wright's Ten. 137. and Mad. Baron. Anglic. 25.

(2) See Post. 5. a. For particulars concerning *Domesday* Book, see the books cited in Wright's Ten. 56. in note p. and also an Account of Domesday Book, and an Account of Danegeld, both printed by order of the Antiq. Soc. in 1756.

(3) For examples and consequences of this doctrine, see Dy. 134. Plowd. 212. Post. 16. a. 6. Co. 5. b. Finch fol. ed. 7. a. Ro. Abr. 513, 514. Post. 2. b. n. 4.

(4) For the derivation of the word *Fee*, see Wright's Ten. 3. and the books there cited.

(5) See the same division of fee in 10. Co. 97. b. 2. Inst. 96. Vaugh. 273. 2. L. Raym. 1148. and for instances of a qualified fee, see post 27. Plowd. 557. 10. Co. 97. 7. E. 4. 12. a. Cro. Ch. 430. Hardr. 149.

(6) For the extent of the word *hereditament*, and the difference between *that* and *tenement*, see post 6. a.

ciarios ad placita forestarum, quas idem frater noster habet ex dono domini regis Henrici patris nostri, secundum assiss. forestæ tenend', &c. In this case the grantee and his heires had a personall inheritance in making of a request to have letters patents of commission to have justices assigned to him to heare and determine of the pleas of the forrests, and concerneth neither lands or tenements. And so it is if an annuity be granted to a man and his heires, it is a fee simple personall; (1) *et sic de similibus.* And lastly hereditaments mixt both of the realty and personalty. As the abbot of Whitbye in the county of Yorke having a forrest of the gift of William of Percie founder of that abby, and by the charters of king John and of other his progenitors, king Henry the third did grant *abbati et conventui de Whitbye, quod ipsi et eorum successores in perpetuum habeant viridarios suos proprios de libertate sua de Whitbye eligend' de cetero in pleno com. Eborum, prout moris est, ad responsiones et presentationes faciend' de transgressionibus, quas amodo fieri contingет de venatione intra metas forestæ suæ de Whitbye, quam habent ex donatione Willi. de Percey et Alani de Percey filii ejus, et redditione et concessione domini Johannis quondam regis Angliæ patris nostri, et confirmatione nostra, coram justiciariis nostris itinerantibus ad placita forestæ in partibus illis et non alibi, sicut viridarii forestæ nostræ hujusmodi responsiones et presentationes, facere debent, et consueverunt. Et si contingat aliquos forinsecos, qui non sunt de libertate prediorum abbatis et conventus, transgressionem facere de venatione intra metas forestæ predictæ, quos predicti viridarii attachiare non possunt, Volumus et concedimus pro nobis et heredibus nostris, quod hujusmodi transgressores per justiciarios forestæ nostræ ultra Trentam attachientur, ad presentationem viridariorum predict. ad respondendum inde coram justiciariis nostris itinerantibus ad placita forestæ nostræ in partibus illis, cum ibid. ad placitandum venerint prout secundum assisam et consuetudinem forestæ nostræ fuerint faciend'.* Which charter was pleaded upon the claime made by the abbot of Whitbye before Willoughby, Hungerford, and Hanbury, justices in eire in the forrest of Pickering, which eire began *anno* 8 E. 3. And these before them were allowed. And when the king createth an earl of such a county or other place, to hold that dignity to him and his heires, this dignity is personall and also concerneth lands and tenements. (2) But of this matter more shall be said in the next Chapter, Sect. 14. and 15.

(4. Inst. 314. Cro. Ja. 155.)

Ro. Pat. an. 47. H. 3.
Itin. Pickering. 8. E. 3. Ro. 42.

(7. Co. 33.)

Et est appel en Latin feodum simplex, quia feodum idem est, quod hæreditas. Here Littleton himselfe teacheth the signification of *feodum*, according to that which hath been said, which only is to be applied to fee simple pure and absolute. And this and all his other interpretations of words and etimologies throughout all his three bookes (wherein the studious reader will observe many) are perspicuous, and ever *per notiora et nunquam ignotum per ignotius*, and are most necessary, for *ignoratis terminis ignoratur et ars.*

Bract. lib. 4. cap. 9. fo. 263.
Britt. cap. 32. & 79.
For interpretation of words and etymologies. Vid. Sect. 9. 18. 95. 116. 119. 135. 154. 164. 174. 184. 186. 194. 204. 234. 267. 268. 332. 337. 424. 520. 597. 645. 689. 733.

Simplex idem est quod legitimum vel purum, hereof he treateth onely in this place. And Littleton saith well, that *simplex idem est quod purum. Simplex enim dicitur quia sine plicis, et purum dicitur, quod est merum solum sine additione. Simplex donatio et pura est, ubi nulla addita est conditio sive modus; simplex enim datur, quod nullo additamento datur.*

Bract. lib. 2. cap. 39. fo. 92. 62. b. lib. 4. cap. 28.
Fleta. lib. 3. cap. 8.
Bract. lib. 2. cap. 5. &c.
Britt. cap. 34.

Hæreditas legitima vel hereditas pura. And therefore it is well said, *quod donationum alia simplex et pura, quæ nullo jure civili vel naturali cogente, nullo precedente metu vel interveniente, ex mera gratuitaque liberalitate donantis procedit, et ubi nullo casu velit donator ad se reverti quod dedit; alia sub modo conditione vel ob causam, in quibus casibus non proprie fit donatio, cum donator id ad se reverti velit, sed quædam potius feodalis dimissio; alia absoluta et larga; alia stricta et coarctata, sicut certis heredibus, quibusdam a successione exclusis,* &c. And therefore seeing fee simple is *hereditas legitima vel pura*, it plainly confirmeth that the division of fee is by his authority rather to be divided as is aforesaid than fee simple. And he saith well in the disjunctive *legitima vel pura*, for every fee simple is not *legitimum*. For a disseisor, abator, intruder, usurper, &c. have a fee simple, but it is not a lawfull fee. So as every man, that hath a fee simple, hath it either by right or by wrong. If by right, then he hath it either by purchase or discent. If by wrong, then either by disseisin, intrusion, abatement, usurpation, (3) &c. In this Chapter he treateth onely of a lawfull fee simple, and divideth the same as is aforesaid.

Fleta. lib. 3. ca. 3. Plowd. 58. b.

Car si home purchase. Persons capable of purchase are of two sorts, persons naturall created of God, as I. S. I. N. &c. and persons incorporate or politique created by the policy of man; (and therefore they are called bodies politique) and these be of two sorts, *viz.* either sole, or aggregate of many: againe aggregate of many, either of all persons capable, or of one person capable, and the rest incapable or dead in law, as in the Chapter of Discontinuance, Sect. 655. shall be shewed. Some men have capacitie to purchase, but not abilitie to hold. Some capacity to purchase and abilitie to hold or not to hold, at the election of them or others. Some capacitie to take and to hold. Some neither capacitie to take nor to hold. And some specially disabled to take some particular thing.

If an alien Christian or infidel purchase houses, lands, tenements, or hereditaments to him and

Persons capable of purchase.

Who have ability to grant. Vide Sect. 57.

11 Eliz. Dier. 283.
11 H. 4. 20. & 26.
7. E. 4. 29.
(1 Ro. Abr. 194.)

(1) An annuity of inheritance is held to be forfeitable for treason as an *hereditament*, 7. Co. 34. b. yet being only *personal*, it is not an hereditament within the statute of mortmain of the 7. E. 1. st. 2. nor is it intailable within the statute *de donis*. See Post. 2. a. b. & 20. a.

(2) Therefore such dignity has been adjudged to be intailable within the statute *de donis*. See Post. 20. a.

(3) For the difference between such estates by wrong, see Post. 277. a. and that they cannot be said to be by purchase, see Post. 3. b. & 18. b.

and his heires, albeit he can have no heires, yet he is of capacitie to take a fee simple (1) but not to hold (2). For upon an office found, the king shall have it by his prerogative (3), of whom soever the land is holden (4). And so it is if the alien doth purchase land and die, the law doth cast the freehold and inheritance upon the king (5). If an alien purchase any estate of freehold in houses, lands, tenements, or hereditaments, the king upon office found shall have them. If an alien be made denizen and purchase lands, and die without issue, the lord of the fee shall have the escheat, and not the king. But as to a lease for yeares, there is a diversitie betweene a lease for yeares of a house for the habitation of a merchant stranger being an alien, whose king is in league with ours, and a lease for yeares of lands, meadows, pastures, woods, and the like. For if he take a lease for yeares of lands, meadows, &c. upon office found, the king shall have it (6). But of a house for habitation he may take a lease for years as incident to commerce, for without habitation he cannot merchandize or trade (7). But if he depart, or relinquish the realme, the king shall have the lease. So it is if he die possessed thereof, neither his executors or administrators shall have it, but the king: (8) for he had it only for habitation as necessary to his trade or traffique, and not for the benefit of his executor or administrator. But if the alien be no merchant, then the king shall have the lease for yeares, albeit it were for his habitation (9), and so it is if he be an alien enemie. And all this was so resolved by the judges assembled together for that purpose in the case of sir James Croft, Pasch. 29. of the raigne of queene Elizabeth. Also if a man commit felony, and after purchase lands, and after is attainted, he had capacitie to purchase but not to hold it, for in that case the lord of the fee shall have the escheat (10): and if a man be attainted of felony, yet he hath capacity to purchase to him and to his heires, albeit he can have no heire; but he cannot hold it, for in that case the king shall have it by his prerogative, and not the lord of the fee; for a man attainted hath no capacitie to purchase (being a man *civiliter mortuus*) but onely for the benefit of the king, no more than the alien-née hath. If any sole corporation or aggregate of many, either ecclesiastical or temporall (for the words of the statute be *si quis religiosus vel alius*) purchase lands or tenements in fee, they have capacity to take but not to retaine (unlesse they have a sufficient licence in that (11) behalfe) for within the yeare after the alienation, the next lord of the fee may enter, and if he doe not, then the next immediate lord from time to time to have half a yeare, and for default of all the mesne lords, then the king to have the land so aliened for ever, which is to be understood of such inheritance as may be holden. But of such inheritances as are not holden, as villeines, rents-charges, commons, and the like, the king shall have them presently by a favourable interpretation of the statute. An annuity graunted to them is not mortmaine, because it chargeth the person only. Some have said that it is called mortmaine *manus mortua, quia possessio eorum est immortalis, manus pro possessione, et mortua pro immortali*, and the rather for that by the laws and statutes of the realme, all ecclesiastical persons are restrained to alien. * Others say it is called *manus mortua per antiphrasin*, because bodies politique and corporate never die. Others say that it is called mortmaine by resemblance to the holding of a man's hand that is ready to die, for that he then holdeth he letteth not goe till he be dead. These and such others are framed out of wit and invention; but the true cause of the name, and the meaning thereof, was taken from the effects, as it is expressed in the statute itself, *per quod quæ servitia ex hujusmodi feodis debentur, et quæ ad defensionem regni ab initio provisa fuerunt, indebite subtrahuntur, et capitales domini eschaetas suas amittunt*, so as the lands were said to come to dead hands as to the lords, for that by alienation in mortmaine, they lost wholly their escheats, and in effect their knights services for the defence of the realme, wards, marriages, reliefes, and the like, and therefore was called a dead hand, for that a dead hand yeeldeth no service.

I passe over villeins or bondmen, who have power to purchase lands, but not to reteyne them against their lords, because you shall reade at large of them in their proper place in the Chapter of Villenage.

An infant or *minor* (whom we call any that is under the age of 21 yeares) hath, without consent of any other, capacity to purchase, for it is intended for his benefit, and at his full age he may either agree thereunto, and perfect it, or without any cause to be alledged, waive or disagree to the purchase; and so may his heires after him, if he agreed not thereunto after his full age.

A man of non sane memory may without the consent of any other, purchase lands, but he himselfe (12) cannot waive it; but if he die in his madnesse, or after his memory recover, without agreement thereunto, his heire may waive and disagree to the state, without any cause shewed; and so of an ideot. But if the man of non sane memory recover his memory, and agree unto it, it is unavoydable.

43. Ass. p. 23. If an abbot purchase lands to him and his successors without the consent of his convent, he himself cannot waive it; but his successor may upon just cause shewed, as if a greater rent were reserved thereupon than the value of the land, or the like; but he cannot waive it unlesse it be upon just cause, *et sic de similibus, prælatus ecclesiæ suæ conditionem meliorare potest, deteriorare nequit.*

Bract. lib. 2. fo. 12. & 32. And in another place he saith, *Est enim ecclesia ejusdem conditionis, quæ fungitur vice minoris.* But

(1) Therefore on a covenant to stand seized, an use will arise for an alien. Godb. 275. But by *act of law*, as by *descent*, he cannot even *take* for the benefit of the king 7. Co. Calvin's Case, 25. a. Post. 31. b and 1. Ventr. 417. See in Dy. 283. b. the case of a feoffment to an alien and another to uses.—(2) If the purchase is made with the *king's licence*; it seems that he may hold. See 14. H. 4. 20. How the law is, where an alien purchases in the name of a trustee, see King and Holland, Styl. 20. &c. All. 14. and 1. Ro. Abr. 194 See also 13. G. 3. c. 14. which enables aliens to lend money on land, &c. in the West-Indies.—(3) But not *before* office, except in case of the alien's death. Adj. 5. Co. 52. b. Before office, recovery by an alien tenant in tail will bar remainders. Adj. Gouldsb. 102. 4. Leon. 84.—(4) If an alien purchases a copyhold, it is said, that it shall eschent to the lord. Dy. 2. b. in Marg. but see 1. Mod. 17. and All. 14.—(5) See in Plowd. 229. several cases, in which, for a like reason, the king is intitled without office.—(6) Accord. 7. Co. Calvin's Case, Dy. 2. b. in marg.—(7) But 32. H. 8. c. 16. s. 13. makes void all leases of houses or shops to an alien being an *artificer* or *handicraftsman*. This law, however contrary it may seem to good policy and the spirit of commerce, still remains unrepealed; but in favour of aliens, it has been construed very strictly. See 1. Sid. 309. 1. Saund. 7. 2. Show. 135. 3. Mod. 94. 3. Salk. 29. In the latter book a lease to an *alien artificer* is said to be forfeitable to the king at common law; but for this extraordinary doctrine no authority is cited. As to the capacity of aliens to take personal chattels, see 1. Ro. Rep. 93.—(8) Contra 1. And. 25. N. Bendl. 36. See in Cro. Cha. 8. a case where administration to an intestate alien was granted to his nephews and nieces, who were also aliens, and part of the estate consisted of leases for years.—(9) If this be the common law, ought not its severity to be corrected by the legislature? To deny the right of taking a house for habitation to aliens not being *merchants*, is like forbidding all *other* foreigners to come and reside here. See 7. Co. Calvin's case, 17. a. where lord Coke seems to express himself without distinguishing between aliens being merchants and other aliens.—(10) Tenant in tail is guilty of murder, and before conviction levies a fine. It was a question, whether the fine should bar the issue for the lord's benefit; and the court inclined to think that it should; but no judgment was given. 1. Wilf. 2. Part 220.—(11) As to this, see Post. 98. 20.—(12) Fitzherbert argues strongly, that a noncompos may plead his disability to avoid his own acts as well as an infant. Fitz. Nat. Br. 202. See Post. 247. a. & b. much curious learning on the subject, and also 2. Blackst. Com. ed. 5. p. 291. where the progress of the opinions on this subject is critically stated.

But no ſimile holds in every thing, according to the ancient ſaying, *Nullum ſimile quatuor pedibus currit.* [a] An hermaphrodite may purchaſe according to that ſexe which prevaileth. A feme covert cannot take any thing of the gift of her huſband (1), but is of capacity to purchaſe of others without the conſent of her huſband. And of this opinion was Littleton in our books, and in this book, *Sect.* 677. but her huſband may diſagree thereunto, and deveſt the whole eſtate; but if he neither agree nor diſagree, the purchaſe is (2) good; but after his death, albeit her huſband agreed thereunto, yet ſhe may without any cauſe to be alledged waive the ſame, and ſo may her heires alſo, if after the deceaſe of her huſband ſhe herſelfe agreed not thereunto.

[a] 1. H. 7. 16. 7. H. 4. 17. 18. H. 6 8. 39. E. 3. 30. 15. E. 4. fol. 1. b. 27. H. 8. 24. (Hob. 204. 5. Co. 119. b.)

[b] A wife *(uxor)* is a good name of purchaſe, without a Chriſtian name, and ſo it is, if a Chriſtian name be added and miſtaken, as *Em* for *Emelyn*, &c. for *utile per inutile non vitiatur.* But the queene, the conſort of the king of England, is an exempt perſon from the king by the common law, and is of ability and capacity to purchaſe and grant without the king. Of which ſee more at large, *Sect.* 200.

[b] A name of purchaſe. 2. H. 4. 25 1. H. 5. 8. 46. E. 3. 22. 12. Aſſ. 18. 30. E. 3. 18. 1. Aſſ. 11. 11. H. 4. 33. 9. E. 4. 49. 12. E. 3. Eſtoppel. 231. F. N. B. 97. a.

[c] The pariſhioners or inhabitants, or *probi homines* of Dale (3), or the church-wardens are not capable to purchaſe lands, but goods they are, unleſſe it were in ancient time when ſuch grants were allowed (4).

[c] 12. H. 7. 8. 37. H. 6. 30. 10. H. 4 3. b. (4. Inſt. 297.)

[d] An ancient grant by the lord to the commoners in ſuch a waſte, that a way leading to their common ſhould not be ſtreightened, was good; but otherwiſe it is of ſuch a grant at this day. [e] And ſo in ancient time a grant made to a lord, *et hominibus ſuis, tam liberis quam nativis*, or the like, was good; but they are not of capacity to purchaſe by ſuch a name at this day. But yet at this day if the king grant to a man to have the goods and chattels *de hominibus ſuis*, or *de tenentibus ſuis*, or *de reſidentibus infra feodum*, &c. it is good; for there they are not named as purchaſers or takers, but for another man's benefit, who hath capacity to purchaſe or take.

[d] 32. E. 3 barre 261. (Hob. 86. 6. Co. 59.)

[e] 33. E. 3. grant 83. 18. E. 3. 50. 12 Aſſ. 35. 14. H. 6. 12. 34. Aſſ. p. 11. 40. Aſſ. p 21.

[f] And regularly it is requiſite, that the purchaſer be named by the name of baptiſm and his ſurname, and that ſpeciall heed be taken to the name of baptiſm, for that a man cannot have two names of baptiſm as he may have divers ſurnames (5). [g] And it is not ſafe in writs, pleadings, grants, &c. to tranſlate ſurnames into Latin. As if the ſurname of one be Fitzwilliam, or Williamſon, if he tranſlate him to *Filius Willi.* if in truth his father had any other Chriſtian name than William, the writ, &c. ſhall abate; for Fitzwilliam or Williamſon is his ſurname, whatſoever Chriſtian name his father had, therefore the lawyer never tranſlates ſurnames. And yet in ſome caſes, though the name of baptiſme be miſtaken, (as in the caſe before put of the wife) the grant is good.

[f] Bract. lib. 4. tract 1. ca. 20. Britton fol. 121. 122. 3. E. 3. 73. 25. E. 3. 43. 26. Aſſ. 61. 30. Aſſ 16. 46. E. 3. 22. 39. E. 3. 17. 3. H. 6. 25. 19. H. 6. 2. 30. H. 6. 1. 34. H. 6. 19. 11. H. 4. 27. 9. E. 4. 29. 5. E. 4. 46. 65. 14. H. 7. 11. 20. Eliz. Dier. 259. 8. E. 3. 436. 20. E. 3. 25. 1. H. 4. 5. 3. H 6. 26. 19. H. 6. 2. 34. H. 6. 19. 5. E. 4. 55. 27. H. 8. 11. 1. H. 5. 5. 18. E. 3. 32. 27. E. 3. 85. 8. E. 3. 427. 7. H. 6. 29. 9. H. 5. 9.

So it is if lands be given to Robert earl of Pembroke, where his name is Henry, to George biſhop of Norwich, where his name is John, and ſo of an abbot, &c. for in theſe and the like caſes there can be but one of that dignity or name. And therefore ſuch a grant is good, albeit the name of baptiſm be miſtaken. If by licence lands be given to the deane and chapter of the holy and individed Trinity of Norwich, this is good, although the deane be not named by his proper name, if there were a deane at the time of the grant, but in pleading he muſt ſhew his proper name. And ſo on the other ſide, if the deane and chapter make a leaſe without naming the deane by his proper name, the leaſe is good, if there were a deane at the time of the (6) leaſe; but in pleading, the proper name of the deane muſt be ſhewed, and ſo is the booke of the 18. E. 4. to be intended, for the ſame judges in 13. E. 4. held the grant good to a maior, aldermen, and commonalty, albeit the maior was not named by his proper name, but in pleading it muſt be ſhewed, as is there alſo holden (7). If a man be baptized by the name of Thomas, and after at his confirmation by the biſhop he is named John, he may purchaſe by the name of his confirmation. And this was the caſe of ſir Francis Gawdie, late chiefe juſtice of the court of common-pleas, whoſe name of baptiſm was Thomas, and his name of confirmation Francis, and that name of Francis, by the advice of all the judges, in *anno* 36. H. 8. he did beare, and after uſed in all his purchaſes and grants (8). [h] And this doth agree with our ancient books, where it is holden that a man may have divers names at divers times, but not divers Chriſtian names. And the court ſaid, that it may be that a woman was baptized by the name of Anable, and 40 yeares after ſhe was confirmed by the name of Douce, and then her name was changed, and after ſhe was to be named Douce, and that all purchaſes, &c. made by her name of baptiſm before her confirmation remain good, a matter not much in uſe, nor requiſite to be put in ure, but neceſſary to be knowne. [i] But purchaſes are good in many caſes by a knowne name, or by a certaine deſcription of the perſon without either ſurname, or name of baptiſm, as *uxori I. S.* as hath been ſaid, or *primo genito filio*, or *ſecundo genito filio*, &c. or *filio natu minimo I. S.* or *ſeniori puero*, or *omnibus filiis*, or *filiabus I. S.* or *omnibus liberis ſeu exitibus* of I. S. or to the right heires of I. S.

[b] 22. R. 2. brieſe 936. 12. R. 2. feffments, 58. 9. E. 3. 14. 46. E. 3. 21. 3. H. 6. 26. 34. H. 6. 19. 1. H. 7. 29. 5. E. 2. brieſe 741. 14. H. 7. 11.
[i] 17. E. 3. 29. 18. E. 3. 59 30. E. 3. 18. 11. H. 4. 84 Pl. Com. 525. 21. R. 2. deviſe. 41. E. 3. 19. 15. E. 3 Counter-plea de vouch. 43. 35. Aſſ. 13. 37. H. 6. 30. 11. E. 4. 2. 7. H. 4. 5. 40 E. 3. 9. 37. H. 8. Bro. Noſme 40.

[k] But if a man do infranchiſe a villein, *cum tota ſequela ſua*, that is not ſufficient to infranchiſe his children borne before, for the incertainty of the *ſequela.* [l] But regularly in writs, the demandant or tenant is to be named by his Chriſtian name and ſurname, unleſſe it be in caſes of ſome corporations or bodies politique (9).

[k] 15. H. 7. 14.
[l] 8. E. 3 437. 29. E. 2. 44. 19. E. 4. 11. 21. E. 4. 19. 7. H. 6. 29.

A

(1) Adjudged acc. in Chancery. 1. Vern. 385. and 1. Atk. 72. But the doctrine muſt be underſtood with various limitations.—1. Though the huſband cannot convey to the wife *immediately*, yet he may give to a truſtee for her benefit, and the gift will be good. Therefore he may convey land to her by way of uſe, as by enfeoffing or covenanting with another to ſtand ſeized, or ſurrendering a copyhold eſtate, to her uſe. See Poſt. 112. a. 4. Co. 29.—2. According to ſome books, by cuſtom of a particular place, as of York, the wife may take by *immediate* conveyance from the huſband. Fitzh. *Preſcription* 61. Bro. *Cuſtom.* 56.—3. The huſband may give to his wife by *laſt will*; becauſe ſuch gift cannot take effect till his death, when the coverture is determined. Poſt. ſect. 168.—4. It ſeems, that a *donatio mortis cauſâ* by huſband to wife may be good; becauſe *that is* in the nature of a legacy. 1. P. Wms. 441. How the wife may give her ſeparate perſonal property to her huſband, ſee 2. Veſ. 669.

(2) Acc. Poſt. 356. a.

(3) See in Dy. 100. the caſe of a grant by the crown *probis hominibus de Iſlington*, rendering a rent.

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

(5) See Cro. Eliz. 27. 222. 328. Cro. Jam. 558.

(6) But not otherwiſe, Poſt. 264. a. See 21. E. 4. 15. 16.

(7) See 1. Leon. 307. Dy. 86.

(8) Acc. 2. Ro. Abr. 135. A.

(9) As to naming of perſons in writs and pleadings, ſee Thelo. Dig. Br. Orig. lib. 3. and 6. and the title *Abatement* in Com. Dig.

C

[a] 39. E. 3. 11. 24. 17. E. 3. 42. 35. Ass. 13. 41. E. 3. 19.

Vide Sect. 118.
[b] So it was resolved. M. 38. & 39. Eliz. in Bre. de errore. for land in Portington in com. Salop.
(S. C. Cro. Eliz. 509. Noy 35. Mo. 430. 2. Ro. Abr. 43. 44.)
[c] 39. E. 3. 11. 24. 35. Ass. 13. 41. E. 3. 19. 17. E. 3. 42. (6. Co. 66.)

[a] A bastard having gotten a name by reputation may purchase by his reputed or knowne name to him and his heires, although he can have no heir but of his body. A man makes a lease to B. for life, remainder to the eldest issue male of B. and the heires males of his body. B. hath issue a bastard son, he shall not take the remainder, because in law he is not his issue, for *qui ex damnato coitu nascuntur inter liberos non computentur*. And as Littleton saith, a bastard is *quasi nullius filius*, and can have no name of reputation as soone as he is borne. [b] So it is if a man make a lease for life to B. the remainder to the eldest issue male of B. to be begotten of the body of Jane S. whether the same issue be legitimate or illegitimate. B. hath issue a bastard on the body of Jane S. this sonne or issue shall not take the remainder; for (as it hath been said) by the name of issue, if there had beene no other words he could not take, and (as it hath been also said) a bastard cannot take, but after he hath gained a name by reputation, (1) that he is the sonne of B. &c. [c] And therefore he can take no remainder limited before he be born; but after he be borne, and that he hath gained by time a reputation to be knowne by the name of a son, then a remainder to be limited to him by the name of the son of his reputed father is good. But if he cannot take the remainder by the name of issue at the time when he is borne he shall never take it. And so it seemeth, and for the same cause, if after the birth of the issue, B. had married Jane S. so as he became bastard eigne, and had a possibility to inherit yet he shall not take the remainder.

[d] 5. E. 4. tit. office & officer. Bro. 48.
Vinter's case. 5. Mar. Dier. fo. 150. b. & Scrogg's case. (Hob. 148.)
(Cro. Jam. 17.)
[e] M. 40. & 41. Eliz. in the King's Bench between Scamler & Walters.
(Contra March. 43. S. C. W. Jo. 310. Cro. Car. 279 555.)
[f] 11. Co. 2. in Auditor Curle's case.
(5. & 6. E. 6. c. 15 & Post. 234. a.)
Vide Sect. 378.

Persons deformed, ~~not~~ having human shape (2), idcots, mad men, lepers, deafe, dumbe, and blinde, minors, and all other reasonable creatures have power to purchase and retaine lands or tenements. [d] But the common law doth disable some men to take any estate in some particular things: as if an office either of the grant of the king or subject which concernes the administration, proceeding, or execution of justice, or the king's revenue, or the commonwealth, or the interest, benefit, or safetie of the subject, or the like; if these, or any of them be granted to a man that is unexpert, and hath no skill and science to exercise and execute the same, the grant is meerly (3) void, and the partie disabled by law, and incapable to take the same, *pro commodo regis et populi*, for onely men of skill, knowledge, and ability to exercise the same are capable of the same to serve the king and his people. [e] An infant or minor is not capable of an office of stewardship of the court of a manor, either in possession or reversion (4). [f] No man though never so skilful and expert, is capable of a judiciall office in reversion, (5) but must expect untill it fall in possession. And see Sect. 378. where bargaining or giving of money, or any manner of reward, &c. for offices there mentioned, shall make such a purchaser incapable thereof, which is worthy to be knowne, but more worthy to be put in due execution.

1. H. 7. 31.
(Post. 7. b 29 b.)

Some are capable of certain things for some special purpose, but not to use or exercise such things themselves. As the king is capable of an office, not to use but to grant, &c. (6)

[g] Bract. lib. 5. fo. 421. 415. Britt. cap. 22. 39. Fleta lib. 6. cap. 41.

A monster borne within lawfull matrimonie, that hath not human shape cannot purchase, much lesse reteine any thing. [g] The same law is *de professis et mortuis seculo*, for they are *civiliter mortui* (7), whereof you shall read at large in his proper place, *Sect.* 200.

1. E. 3. 9. 44. E. 3. 4.
3. H. 6. 24. 21. R. 2. judgement 263. 7. H. 4. 2.
14. H. 8. 16.
Doct. & Stud. 141.
Pl. Com. fo. 47. Brit. cap. 33.

Purchase. In Latin *perquisitum*, of the verbe *perquirere*, Littleton describeth it in the end of this Chapter in this manner, *Item, purchase est appel le possession de terres ou tenements que home ad per son fait, ou per son agreement, a quel possession il ne avient per title de discent de nul de ses ancesters ou de ses cosens mes per son fait dem.* So as I take it, a purchase is to be taken, when one commeth to lands by conveyance or title, and that disseisins, abatements, intrusions, usurpations, and such like estates gained by wrong, are not said in law purchases (8), but oppressions and injuries.

(Post. 76. a.)
[h] 27. Eliz. cap. 4.
13. Eliz. cap. 5.
3. Co. 80. 82. 83. Twine's case.
5. Co. 60. Gooche's case.
6. Co. 72. Burrel's case.
11 Co. 74. Pasch. 12. Ja. inter Jones pl. and sir Rich. Gronbham def. in ejectione firme in evidence al Jurie.

Note, that purchasers of lands, tenements, leases, and hereditaments for good and valuable consideration, shall avoid all former fraudulent and covinous conveyances, estates, grants, charges and limitations of uses, of or out of the same, [h] by a statute made since Littleton wrote (9), whereof you may plainly and plentifully read in my Reports, to which I will adde this case. I. C. had a lease of certaine lands for 60 yeares, if he lived so long, and forged a lease for 90 years absolutely, and he by indenture reciting the forged lease for valuable consideration bargained and sold the forged lease and all his interest in the land to R. G. It seemed to me that R. G. was no purchaser within the statute of 27. Eliz. for he contracted not for the true and lawfull interest, for that was not knowne to him, for then perhaps he would not have dealt for it, and the visible and knowne tearme was forged, and although by general words the true interest passed, notwithstanding he gave no valuable consideration nor contracted for it. And of this opinion were all the judges in Serjeant's Inne in Fleetstreet.

[i] Hil. 18. E. 3. coram rege in thesaur.
[k] 37. H. 8. cap. 6.
13. Eliz. cap. 8.
5 Co. 69. Burton's case. Eodem lib. 7. Claiton's case.
(Lutw. 271.)

[i] In ancient time when a man made a fraudulent feoffement it was said, *quod posuit terram illam in brigam*, where *brigam* doth signifie wrangle, contention, or intricacy, for fraud is the mother of them all. [k] And on the other side, purchases, estates, and contracts may be avoided since Littleton wrote by certaine acts of parliament against usurie above ten in the hundred, in such manner and forme as by those acts is provided, which statutes are well expounded in my books of Reports, which may be read there. To them that lend money my caveat is, that

neither

(1) The several reports of the case cited by lord Coke in the margin differ very much. According to Noy and Moore, it was held by all but Popham, that the remainder was good, though the bastard was not born till after creating it; and Roll represents the case as if the opinion had been for the remainder. But Croke agrees with lord Coke, and writes that a majority of the judges held the remainder void; though indeed it appears by his report, that the party at length claiming as *lawful issue*, it became unnecessary to decide what would be the effect of a remainder to an unborn bastard. The only modern case I meet with on the subject is one, in which lord chancellor Macclesfield inclined against such a remainder, even though to a child *en ventre sa mere*. 1. P. Wms. 529. However, the doctrine doth not seem fully settled. If the objection against the limitation to a bastard not *in esse* is *uncertainty of description*, it must certainly fail where he is described by the *mother only*; and even where the *father* is named, it may sometimes be possible to ascertain him also sufficiently, as well where the limitation precedes, as where it follows the bastard's birth. See Bro. Grant. 17. 2. Ro. Abr. 43, 44. But if the objection is a *policy of law*, which, for the encouragement of marriage, creates a *disability* of providing for illegitimate children before they are born; then lord Coke's doctrine is true in its full extent. See Cro. Eliz. 510. Which of these is the true principle of objection, is left to the judgment of the learned reader.—(2) Who ought to be deemed such, see Post. 7. b. 25. b.—(3) See acc. Godb. 391. Hard. 130. Scrog's case, cited by lord Coke in the margin, is in Dy. 175.—(4) Acc. Scamler's case ~~and~~ 1. Ro. Abr. 731. J. and Cro. Eliz. 636. But the case in March. 43. is *contra*; and there Mr. justice Jones affirms, that Scamler's case was also *contra*. However, in Cro. Cha. 556. lord Coke's doctrine seems admitted where the office is not granted so as to be exerciseable by a *deputy*.—(5) Acc. 11. Co. 4. a. W. Jo. 264. 2. Lev. 245. and Cas. Temp. Talb. 99. but contra where it has been the usage so to grant. W. Jo. 311. Hardr. 257. 2. Ventr. 188. and it is said that the king may so grant without any usage. March. 42. 4. Mod. 280. Dy. 295.—(6) See as to this Plowd. 381.—(7) But it seems, that this doctrine is now become inapplicable; for there is no longer any legal establishment for *professed* persons in *England*, and our law never took notice of *foreign professions*. See Post. 132. b. 2. Ro. Abr. 43. C. Wright's Ten. 28. 1. Salk. 162.—(8) Accord. Ante. 2. b. and Post. 18. b.—(9) For cases of fraudulent gifts before the 13. Eliz. c. 5. see Dy. 294. b. and 295. a.

neither directly nor indirectly, by art, or cunning invention, they take above ten (1) in the hundred, for they that ſeeke by ſleight to creepe out of theſe ſtatutes, will deceive themſelves, and repent in the end. (5. Co. 69.)

Purchaſe terres. Littleton here and in many other places putteth lands but for an example; for his rule extendeth to ſigniories, rents, advowſons, commons, eſtovers, and other hereditaments of what kind or nature ſoever. Lands and other things to be purchaſed.

Terre. *Terra*, Land in the legall ſignification comprehendeth any ground, ſoile or earth whatſoever, as meadowes, paſtures, woods, moores, waters, mariſhes, furſes and heath. *Terra eſt nomen generaliſſimum, et comprehendit omnes ſpecies terræ*; but properly, *terra dicitur a terendo quia vomere teritur*, and anciently it was written with a ſingle *r*, and in that ſenſe it includeth whatſoever may be plowed, and is all one with *arvum ab arando*. It legally includeth alſo all caſtles, houſes, and other buildings: for caſtles, houſes, &c. conſiſt upon two things, *viz.* land or ground, as the foundation or ſtructure thereupon, ſo as paſſing the land or ground, the ſtructure or building thereupon paſſeth therewith. * Land is anciently called *Fleth*, but land builded is more worthy than other land, becauſe it is for the habitation of man, and in that reſpect hath the precedency to be demanded in the firſt place in a (2) *præcipe*, as hereafter ſhall be ſaid. And therefore this element of the earth is preferred before the other elements, firſt and principally, becauſe it is for the habitation and reſting-place of man; for man cannot reſt in any of the other elements, neither in the water, ayre or fire. For as the heavens are the habitation of Almightie God, ſo the earth hath he appointed as the ſuburbs of heaven to be the habitation of man; *Cœlum cœli domino, terram autem dedit filiis hominum.* All the whole heavens are the Lords, the earth hath he given to the children of men. Beſides, every thing as it ſerveth more immediately or more meerly for the food and uſe of man (as ſhall be ſaid hereafter) hath the precedent dignity before any other. And this doth the earth, for out of the earth commeth man's food, and bread that ſtrengthens man's heart, *confirmat cor hominis*, and wine that gladdeth the heart of man, and oyle that makes him a cheerfull countenance. And therefore *terra olim Ops mater dicta eſt quia omnia hac opus habeant ad vivendum.* And the divine agreeth herewith, for he ſaith, *Patriam tibi et nutricem, et matrem, et menſam, et domum poſuit terram Deus, ſed et ſepulchrum tibi hanc eandem dedit.* Alſo the waters that yeeld fiſh for the food and ſuſtenance of man are not by that name demandable in a *præcipe*, (3) but the land whereupon the water floweth or ſtandeth is demandable (as for example) *viginti acras terræ aquâ coopertas*, and beſides the earth doth furniſh man with many other neceſſaries for his uſe, as it is repleniſhed with hidden treaſures, namely with gold, ſilver, braſſe, iron, tynne, leade, and other metals, and alſo with great varietie of precious ſtones, and many other things for profit, ornament, and pleaſure. And laſtly, the earth hath in law a great extent upwards, not only of water as hath been ſaid, but of ayre and all other things even up to heaven; for *cujus eſt ſolum ejus eſt uſque ad cœlum*, as is holden, 14 *H.* 8. *fo.* 12. 22. *H.* 6. 59. 10. *E.* 4. 14. *Regiſtrum origin.* and in other bookes.

Pl. Com. 168. b. and 170. a. and 151. 4. Co. 87. b. Lutterel's caſe. 4. E. 3. 161. and 6. E. 3. 283. 8. E. 3. 377. Temps E. 1. Briefe 811. 28. H. 8. Dyer 47.

* Tr. 7. E. 3. coram Rege Northampt. in Theſaur.

Pſal. 115. 16.

Pſal. 104. 15.

Chriſoſt. hom. 30.

(Plowd. 313.)

And albeit land, whereof our author here ſpeaketh, be the moſt firme and fixed inheritance, and therefore it is called *ſolum*, *quia eſt ſolidum*, and fee ſimple the moſt higheſt and abſolute eſtate that a man can have; yet may the ſame at ſeverall times be moveable, ſometime in one perſon, and *alternis vicibus* in another, nay ſometime in one place, and ſometime in another. As for example, if there be 80 acres of meadow which have beene uſed time out of mind of man, to be divided betweene certaine perſons, and that a certaine number of acres appertaine to every of theſe perſons, as for example, to A. 13 acres to be yearely aſſigned and lotted out, ſo as ſometime the 13 acres lie in one place, and ſometime in another, and ſo of the reſt. A. hath a moveable fee ſimple in 13 acres, and may be parcell of his mannor, albeit they have no certaine place, but yearely ſet out in ſeverall places, ſo as the number only is certaine, and the particular acres or place wherein they lie after the yeare incertaine. And ſo it was adjudged in the King's Bench upon an eſpeciall verdict (4).

If a partition be made betweene two coparceners of one and the ſelfe-ſame land, that the one ſhall have the land from Eaſter untill Lammas to her and to her heires, and the other ſhall have it from Lammas till Eaſter to her and her heirs, or the one ſhall have it the firſt yeare, and the other the ſecond year *alternis vicibus*, &c. there it is one ſelfe-ſame land wherein two perſons have ſeverall inheritances at ſeverall times. So it is if two coparceners have two ſeverall manors by deſcent, and they make partition, that the one ſhall have the one mannor for a year, and the other the other mannor for the ſame yeare, and after that yeare, then ſhe that had the one mannor ſhall have the other, *et ſic alternis vicibus* for ever, and albeit the mannors be ſeverall, yet are they certaine, and therefore ſtronger than Bridgewater's caſe, ſo as this doth make a diviſion of ſtates of inheritances of lands, *viz.* certaine or unmoveable, whereof Littleton here ſpeaketh, and incertaine and moveable, whereof theſe three caſes for examples have beene put. Wherein it is to be noted, that the poſſeſſion is not onely ſeverall, but the inheritance alſo.

Vid. Sect. 59. where in this caſe livery ſhall be made. (Poſt. 48. b. 7. Co. 5.)

Vide Sect. 648. how theſe 13 acres may be charged. (1. Ro. Abr. 829. Cro. Eliz. 421.)

Hill. 34. Eliz. Rot. 489. in tranſ. inter Weldon & Bridgewater in Banco Regis. Temps E. 1. tit. partition. 21. F. N. B. 62. I.

Vide 1. Co. 87. per Walmſl. F. N. B. 62. K. (Poſt. 167. a. 7. Co. 5.)

Moveable inheritance.

Vide Sect. 114. where advowſont, &c. may be appendant and in gros.

It

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

See 2. Atk. 302. 465. Acc. in chance. 12 P.

(2) Acc. Fitzh. Nat. Br. 2. C. Poſt. 4. b. and 4. Co. 39. a.

(3) Acc. Yelv. 143. See Poſt. 4. b.

(4) S. C. Mo. 302.

By what names, &c. lands, &c. ſhall paſſe.

It is alſo neceſſary to be ſeene by what names lands ſhall paſſe. [a] If a man hath 20 acres of land, and by deed granteth to another and his heires, *veſturam terræ*, and maketh livery of ſeiſin *ſecundum formam cartæ*, the land itſelfe ſhall not paſſe (1), becauſe he hath a particular right in the land, for thereby he ſhall not have the houſes, timber-trees, mines and other reall things parcell of the inheritance, but he ſhall have the veſture of the land, (that is) the corne, graſſe, underwood, ſwepage, and the like, and he ſhall have an action of treſpaſſe, *quare clauſum fregit*. [b] The ſame law, if a man grant, *herbagium terræ*, he hath a like particular right in the land, and ſhall have an action *quare clauſum fregit*, but by grant thereof and liverie made, the ſoile ſhall not paſſe, as is aforeſaid. [c] If a man let to B. the herbage of his woods, and after grant all his lands in the tenure, poſſeſſion, or occupation of B. the woods ſhall paſſe, for B. hath a particular poſſeſſion and occupation, which is ſufficient in this caſe, and ſo it was reſolved. [d] So if a man be ſeiſed of a river, and by deed doe grant *ſeperalem piſcariam* in the ſame, and maketh livery of ſeiſin *ſecundum formam cartæ*, the ſoile doth not paſſe (2) nor the water, for the grantor may take water there, and if the river become drie, he may take the benefit of the ſoile, for there paſſed to the grantee but a particular right, and the livery being made *ſecundum formam cartæ*, cannot enlarge the grant. [e] For the ſame reaſon, if a man grant *aquam ſuam*, the ſoile ſhall not paſſe, but the piſchary (3) within the water paſſeth therewith. And land covered with water ſhall be demanded by the name of ſo many acres *aqua* (4) *coopertas*, whereby it appeareth that they are diſtinct things. [f] So if a man grant to another to dig turves in his land, and to carry them at his will and pleaſure, the land ſhall not paſſe, becauſe but part of the profit is given, for trees, mines, &c. ſhall not paſſe. [g] But if a man ſeiſed of lands in fee by his deed granteth to another the profit of thoſe lands, to have and to hold to him and his heires, and maketh livery *ſecundum formam cartæ*, the whole land itſelfe doth paſſe; for what is the land but the profits thereof, for thereby veſture, herbage, trees, mines, and all whatſoever parcell of that land doth paſſe (5).

[a] Vide Sect. 283. (Poſt. 186. b. Contra 1. Ventr. 393.) 14. H. 8. 6. 4 H. 7. 3. 10. H. 7. 24. 11. H. 7 21. 14. H 7. 4. 6. 21. H. 7. 36. 37. 9. H. 6. 52. 37. H. 6. 35. 22. E 4. barre 116. 11. H. 4. 90. 18. E. 3. Execution 56 4. E. 3. 48. 8. E. 3. 13. 9. Aſſ. p. 12. 38. E. 3. 24.

[b] Bract. fo. 222. 17. E. 3. 75. 39. H. 6. 38. 11. Eliz. Dy. 285. (4. Leon. 43. Poſt. 47. a. Cro. Cha. 362. Noy 54.)

[c] Paſch. 12. Ja. Inter Dockwray & Points in evidence al Jury in Bankle Roy.

[d] Vide Sect. 279. Bract. fo. 208. 40. E. 3. 45. Pl. Com. 154. 10. H. 7. 24 28. 7. H. 7. 13. 18. H. 6. 29. 34. H. 6. 42. 20. H. 6. 4. 18. E. 4. 4. 4. E. 3. 48. 1. E. 3. 4. 32. E. 3. Scir. fac. 100. 22. E. 4. barre 116. 12. H. 3. Aſſ 427. 34. Aſſ. 11. 13. E. 3 tit. entrie. 57. 20. E. 3. Briefe 685. W. 2. c. 24. (2. Ro. Abr. 2.)

[e] Tr. 11. R. 2. in treſp. nient. Imprimee ne abridg 11. H. 7. 4.

[f] 7. E. 3. 342. 5. Aſſ. 9. 10. 7. Aſſ. 9.

[g] 45. E. 3. tit. feoffments et faits. 90. 14. H. 8. 6. Pl Com. 541. b. F. N. B. 8. 12. E. 3. Dower 90.

[b] Aſſ. p. 12. 9. E. 3. 443. 466. Domeſday. 7. R 1. int. fines in Theſaur. (1. Sid. 161.)

[i] Int. Inquiſit. apud Launcaſt. Anno 6. E. 1. in Theſaur Mich. 1. H. 5 coram Rege Rot. 3. in Theſaur.

[k] Tr. 7. Eliz. in banco regis 5. Co 11. Ive's caſe. 14. H. 8. 1. 46. E. 3. 22. 28. H. 8. Dyer 19. 32. H. 8. Bro. reſervat. 39. 7. E. 6. Dyer. 79.

* Glanvil. lib. 8. cap. 3.

[l] Domeſday Regiſtr. F. N. B. 2.

[m] 8. E. 2. Waſt. 111. 7. Aſſ. 18. 11. Aſſ. p. 13. 41. E. 3. Waſt. 82.

† Hill. 14. E. 3. coram Rege Lanc. in Theſaur.

* Inter. Inquiſit. apud Lanc. in com. Cornubie coram Juſtic Aud. anno 6. E. 1. in Theſaur. the B. of Exceſter's caſe.

[n] Domeſday.

[o] Camden 460. 151.

[p] Patch. 44. E. 3. coram Rege in Theſaur.

[q] Hill. 13. E 2. Lanc. coram Rege in Theſaur. Camden. Brit. 247. Rot. Par. 18. E. 1. 8. Eve'que de Carliſle's caſe.

[r] Pl. Com. 169. a. 4. E. 2. Briefe. 792. 793. 3. E. 3. 86. 4. E. 4. 1. 27. H. 8. 12.

[ſ] 20. Aſſ. pl. 9.

[t] Pl. Com. 169. a. 13. E. 3. Briefe 241. 33. E. 3. Entrie 80.

[u] Domeſday. F.N.B. 2. Regiſt.

In our Latin a wood is called *boſcus*. *Grava* ſignifieth a little wood, in old deeds, and *hirſt* or *hurſt* a wood, and ſo doth *holt* and *ſhawe*. *Twaite* ſignifieth a wood grubbed up, and turned to arable. *Stethe* or *ſtede* betokeneth properly a banke of a river, and many times a place, as *ſtowe* doth, and *wic*, a place upon the ſea-ſhore, or upon a river. *Lea* or *ley* ſignifieth paſture.

[b] By the grant of the boillourie of ſalt, it is ſaid that the ſoile ſhall paſſe, for it is the whole profit of the ſoile. And this is called *ſaliva* of the French word *ſalure* for a ſalt pit, and you may read *de ſaliva* in Domeſday, and *ſelda* ſignifieth the ſame thing; [i] and where you ſhall reade in records *de lacerta in profunditate aque ſalſe*, there *lacerta* ſignifieth a fathom. A man ſeiſed of divers acres of wood, grants to another *omnes boſcos ſuos*, all his woods; not onely the woods growing upon the land paſſe, but the land itſelfe, and by the ſame name ſhall be recovered in a *præcipe*; for *boſcus* doth not onely include the trees, but the land alſo whereupon they grow. [k] The ſame law if a man in that caſe grant *omnes boſcos ſuos creſcentes, &c.* yet the land itſelfe ſhall paſſe, as it hath beene (6) adjudged. *Fraſſetum* ſignifieth a wood, or ground that is woodie. [l] If a man hath a wood of elder trees containing 20 acres, and granteth to another 20 *acras alneti* (with an *n* not a *v*) the wood of elders, and the ſoile thereof ſhall paſſe, but no other kinde of woods ſhall paſſe by that name. *Alnetum eſt ubi alni arbores creſcunt* †. And *ſullings* are taken for elders. [m] *Salicetum* doth ſignifie a wood of willowes, *ubi ſalices creſcunt*. Theſe trees in our bookes are called *ſawces*. * *Selda* is a wood of ſallows, willows, or withies. A brackie ground is called *filecetum*, *ubi filices creſcunt*. A wood of aſhes is called *fraxinetum*, *ubi fraxini creſcunt*, and paſſeth by that name, and *lupulicetum*, where hoppes grow, and *arundinetum*, where reeds grow. Some ſay that *dene* or *denne*, whereof *dena* commeth, is properly a valley or dale. *Dena ſilvæ*, and the like, [n] as *droſden*, or *druſden*, or *druden*, ſignifieth a thicket of wood in a valley, for *druſ* or *dru*, ſignifieth a thicket of wood, and is often mentioned in Domeſday. And ſometime *dena* or *denna* ſignifieth, as *villa* and *denne*, a towne.

[o] *Cope* ſignifieth a hill and ſo doth *lawe*, as *ſtanlawe* is *ſaxeus collis*. [p] *Howe* alſo ſignifieth a hill. And *hope combe* and *ſtowe* are valleys, and ſo doth *clough*. And *dunum* or *duna* ſignifieth a hill or higher ground, and therefore commonly the townes that end in *dun*, have hills or higher grounds in them, which we call downs. It commeth of the old French word *dun*.

[q] In our Latin a wood is called *boſcus*. *Grava* ſignifieth a little wood, in old deeds, and *hirſt* or *hurſt* a wood, and ſo doth *holt* and *ſhawe*. *Twaite* ſignifieth a wood grubbed up, and turned to arable. *Stethe* or *ſtede* betokeneth properly a banke of a river, and many times a place, as *ſtowe* doth, and *wic*, a place upon the ſea-ſhore, or upon a river. *Lea* or *ley* ſignifieth paſture.

[r] If a man doth grant all his paſtures, *paſturas*, the land itſelfe imployed to the feeding of beaſts doth paſſe, and alſo ſuch paſtures or feedings, as he hath in another man's ſoile. *Leſwes* or *leſues* is a Saxon word, and ſignifieth paſtures. [ſ] Between *paſtura* and *paſcuum*, the legall difference is that *paſtura* in one ſignification containeth the ground itſelfe called paſture, and by that name is to be demanded. *Paſcuum* feeding, is whereſoever cattell are fed, of what nature ſoever the ground is, and cannot be demanded in a *præcipe* by that name.

[t] If a man grant *omnia prata ſua*, all his meadowes, the land itſelfe of that kinde paſſeth, *et dicitur pratum quaſi paratum*, becauſe it groweth *ſponte* without manurance. [u] A man grants *omnes brueras ſuas*, the ſoile where heath doth grow paſſeth, and may be demanded by that name in

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

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

(3) Acc. Dav. 55. b.

(4) See Acc. Yelv. 143.

(5) Adj. Acc. in the caſe of a deviſe. Cro. Eliz. 190.

(6) To know when *wood* will include the ſoil, and when not, ſee Bro. Grants. 167. Cro. Ja. 487. 524. 2. Ro. Abr. 455. U.Pl.1.3.

Times for
Murray v. Stuart
1805.

LAW REPORT.

COURT OF CHANCERY, Monday, August 5.

CHEVALIER DE GARCEN v. HENRY LORD FAUCONBURG, AND OTHERS.

We noticed this case on Saturday last: it now came before the Court on exceptions to the Master's report. The first was with regard to the evidence; the second, to the construction on that evidence. Nathaniel Piggot, one of the parties, died since the commencement of the suit. It respected the will of Anne Fairfax, dated the 17th of March, 1784. The cause was heard in this Court on the 19th of June, 1801, in consequence of which, the report, on numerous facts, was referred to one of the Masters, and on the 16th of last month, that report was given. The will, after various devises, assigned all the rest and residue of the personal effects of the testatrix to her executors (the Defendants), upon a trust, that they, or the survivor of them, should apply and dispose of the same as she by a codicil should direct. And for want of such appointment, then to pay and apply it to Charles Redden and John De Garcen, who were thus made her residuary legatees. The codicil was subsequently annexed, and contained small legacies to the following persons, or communities:—1. To the Superior of the Benedictine Monks of the North and South Province, 200*l*. 2. To the four Ministers of the Chapels of Gilling, Lopley, and Micklegate, 100*l*. each. 3. To the Superioress of the Benedictine Nuns of Cambray, 200*l*. 4. To the Superioress of the Poor Nuns of St. Claire, 200*l*. 5. To the Superioress of the Black Nuns of Paris, 200*l*. 6. To the Superioress of the Benedictine Nuns of Loraine, ——. 7. To John Boulton, of Gilling-Castle, 2000*l*. for the maintenance of a Catholic Minister in any situation he should select.

The question on the original bill was, whether these legacies were valid; or, whether being nugatory, the sums so intended to be applied, were to devolve to the residuary legatee, the present Plaintiff.

Mr. Romilly, for the Plaintiff, said, that the following questions were referred to the Master, with respect to these ecclesiastical institutions: 1st. If there were any Superiors to these orders? 2dly. If there were Superiors, what was their office; and whether legacies could devolve to them? Further, where they were resident at the time of the death of the testatrix, and when the report was made? The Learned Counsel, after reciting the report of the Master, stated the evidence which had been laid before him, and the codicil of the will. The principal authority on which the report was founded, was the affidavit of Jean Brure, Doctor of the Sorbonne, and of five or six other canonical gentlemen.

The Master found there were establishments of the kind mentioned in the will; that there were Superiors to these institutions; and he not only points out their situation, but their duties. He gives the amount of the whole estate at 15,217*l*. of which 10,478*l*. is in a mortgage, and 1,650*l*. the estimate of a house belonging to the testatrix in Grosvenor-street. He finds that 2000*l*. had been laid out upon securities, and he states the interest accruing upon it.

Mr. Romilly argued, that the Master, instead of stating the existence of these religious societies, ought to have found in his report, that they had been abrogated and destroyed. The Plaintiff was a foreigner it was true, but he was a resident in this country, paying at least a temporary allegiance to the Sovereign, and he was as much entitled to the protection of the laws of this country as any other individual. The Plaintiff was the nearest relation, and the object of the peculiar favour of the testatrix. It was very extraordinary, that the Master, instead of seeking professional assistance for the construction of foreign laws, had taken the opinion of clerical persons, who would be supposed to be wholly unacquainted with juridical subjects unconnected with the Canon Law. The Learned Counsel was fortunately provided with the opinions of François de Turnot, a Counsellor of the Parliament of Paris, born at Rouen, of the age of 42 years. This gentleman deposes to the former existence of the Orders distinguished in the will, but asserts, that, on the 13th of February, 1790, they were suppressed. He [illegible] south province of England. He had heard of the province of York and of Canterbury; but with this ecclesiastical geography he was wholly unacquainted, and it so much resembled the institution of a Catholic hierarchy, that he could not wonder at the indignation against the Papal power among the lower orders, although he disapproved of it. It was not to be supposed, that the Legislature could have lately acted from the sentiment to which he had just adverted; but although the liberal mind would give every possible indulgence to the dictates of conscience, yet it was neither discreet nor decent, that a report recognizing this canonical division of the kingdom should be admitted on the files of the Court. After entering much at length on the principles of foreign law, and on the general adoption of these throughout Catholic Europe, the Learned Counsel directed his attention to the maxims of British jurisprudence, as stated in Littleton, Coke, Brookes, and Lord Redesdale, noticing in his progress the statutes of the 1st of Edward the Sixth, and of the 9th George the Second, as applicable to this subject. He concluded with remarking, that these legacies could not be valid, because the whole of the property which must be appropriated to them, were either in mortgage or in leasehold, and therefore, in the nature of real property, so that they could not be given in mortmain.

Mr. Piggot, on behalf of the Legatees, contended, that these Superiors were not to be considered as representatives of a religious order, but as individuals, and as the private and confidential friends of the testatrix. If the present Plaintiff were the next of kin, and connected with the testatrix in the bonds of affection, it was singular, that of this near and dear friend she had not learnt the name, for John, not Joseph de Garcen, was appointed her residuary legatee.

The Learned Counsel thought, during the speech of his Friend, that he had been transported into some Catholic country, where the papal rights were most zealously supported. He would confidently maintain, that even in the time of Henry VIII. before the reformation, no such doctrines would have been endured as were urged on the present occasion.

Mr. Piggot followed his learned opponent through the several English authorities he had cited, and contended they were all favourable to the legatees.

The Lord Chancellor.—"The first words are, I give to each Superior of the Monks of the North and South province. Can I recognise in any man or woman the character of Superior in the North and South of England?"

Mr. Piggot—"My Lord, this is only the method in which the testatrix has chosen to designate particular persons, *& certum est, quod certum reddi potest.* Here is nothing fiduciary, nothing in trust, as in the case of Smart and Prugen, 6 Vesey, 560. That was a bequest to Sister Winifred Clare, the consideration for which was, that fifty masses, and one annual mass, for the *poor soul* of the testatrix, were to be performed. Some of these Ecclesiastical Societies are now established in Dorsetshire and in Lancashire, and the same names, forms, and distinctions are continued wherever any of these communities reside."—*The Argument deferred.*

[illegible] Superioress of the Poor Nuns of St. Claire, 200*l.* 5. To the Superioress of the Black Nuns of Paris, 200*l.* 6. To the Superioress of the Benedictine Nuns of Loraine, ——. 7. To John Boulton, of Gilling-Castle, 2000*l.* for the maintenance of a Catholic Minister in any situation he should select.

The question on the original bill was, whether these legacies were valid; or, whether being nugatory, the sums so intended to be applied, were to devolve to the residuary legatee, the present Plaintiff.

Mr. ROMILLY, for the Plaintiff, said, that the following questions were referred to the Master, with respect to these ecclesiastical institutions: 1st. If there were any Superiors to these orders? 2dly. If there were Superiors, what was their office; and whether legacies could devolve to them? Further, where they were resident at the time of the death of the testatrix, and when the report was made? The Learned Counsel, after reciting the report of the Master, stated the evidence which had been laid before him, and the codicil of the will. The principal authority on which the report was founded, was the affidavit of Jean Brure, Doctor of the Sorbonne, and of five or six other canonical gentlemen.

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Mr. ROMILLY argued, that the Master, instead of stating the existence of these religious societies, ought to have found in his report, that they had been abrogated and destroyed. The Plaintiff was a foreigner it [illegible] country, paying at least a temporary allegiance to the Sovereign, and he was as much entitled to the protection of the laws of this country as any other individual. The Plaintiff was the nearest relation, and the object of the peculiar favour of the testatrix. It was very extraordinary, that the Master, instead of seeking professional assistance for the construction of foreign laws, had taken the opinion of clerical persons, who would be supposed to be wholly unacquainted with juridical subjects unconnected with the Canon Law. The Learned Counsel was fortunately provided with the opinions of FRANCOIS DE TURNOT, a Counsellor of the Parliament of Paris, born at Rouen, of the age of 42 years. This gentleman deposes to the former existence of the Orders distinguished in the will, but asserts, that, on the 13th of February, 1790, they were suppressed. He does not content himself with giving his opinion, but cites his authorities. He says, that No. 45 of the *Moniteur*, gives the decrees of the National Assembly, which, with respect to these orders, *declarent, sont et demeurent annullés en France.* He says, that before the dissolution of these establishments, a Superior was only a temporary chief; that he was removeable at pleasure; that in law, if a male, he was only a monk; if a female, she was only a nun; and that, male or female, they took only for the benefit of the institution to which they belonged. *Quicquid acquirit monachus, ad monasterium acquiritur.* The arrêt of the Parliament of Dijon declares legacies to be void, the application of which was not specifically stated. Religious persons were considered, with respect to property, as culprits doomed to death; they could receive no legacies. Among the authorities quoted by the Learned Professor were, the Edict of 1749, respecting persons in mortmain; the *Dictionaire du droit Canonique*, 1 vol. 186; 2 vol. 225. A monk, as soon as he has made profession, is dead, *quoad civilia*; he cannot possess property; all he acquires is for the benefit of the convent. The same principle is recognised in *Denizar's Collection de Jurisprudence*, title *Mort Civile*, where the principal questions on civil death are stated. To these he adds, *Loix Ecclesiastiques de la France, par Louis de Heriquois.* The affidavit of Monsieur Samuel Cossart was another respectable source by which the Master had not been assisted in his decision. He deposes, that by the decree of the National Assembly, these religious persons were deprived of their rank as the regular clergy; that they were thrown into the mass of seculars; and that they no longer existed as a canonical institution. The Learned Counsel cited from a MS. in the collection of the British Museum, with which one of the librarians attended, the observance of poverty ordained by St. Benedict. *Ne quis presumit aliquid dare aut accipere;—nec nihil omnino, omnia omnibus sunt communia.* Another dictum of equal importance, was that of the Cardinal De Turre. *Nec quisquam aliquid dicat, nec presumat aliquid unum.* Not even a pen, or a bodkin, *aut graphium aut acus*, could be their own property. To those the Learned Counsel added the decrees of the Council of Trent, and the *Codex Monasticum*, all of which were arranged on the floor of the Court. Mr. ROMILLY was greatly astonished, that such an ecclesiastical establishment was stated as that of the north and

individuals, and as the private and confidential friends of the testatrix. If the present Plaintiff were the next of kin, and connected with the testatrix in the bonds of affection, it was singular, that of this near and dear friend she had not learnt the name, for John, not Joseph de Garcen, was appointed her residuary legatee.

The Learned Counsel thought, during the speech of his Friend, that he had been transported into some Catholic country, where the papal rights were most zealously supported. He would confidently maintain, that even in the time of Henry VIII. before the reformation, no such doctrines would have been endured as were urged on the present occasion.

Mr. PIGGOT followed his learned opponent through the several English authorities he had cited, and contended they were all favourable to the legatees.

The LORD CHANCELLOR.—"The first words are, I give to each Superior of the Monks of the North and South province. Can I recognise in any man or woman the character of Superior in the North and South of England?"

Mr. PIGGOT—"My Lord, this is only the method in which the testatrix has chosen to designate particular persons, *& certum est, quod certum reddi potest.* Here is nothing fiduciary, nothing in trust, as in the case of Smart and Prugen, 6 Vesey, 560. That was a bequest to Sister Winifred Clare, the consideration for which was, that fifty masses, and one annual mass, for the *poor soul* of the testatrix, were to be performed. Some of these Ecclesiastical Societies are now established in Dorsetshire and in Lancashire, and the same names, forms, and distinctions are continued wherever any of these communities reside."—*The Argument deferred.*

Times 7. Aug. 1805.

LAW REPORT.

COURT OF CHANCERY, Tuesday, Aug. 6, 1805.

BLOWER *v.* JAMES.

The Plaintiff enlisted as a soldier in the artillery, and left a copyhold estate, which this bill sought to recover, in the possession of George Williams. In March, 1785, this person wanting money, borrowed upon this estate the sum of 350*l.* as if it were his own property. The Defendant lent the money, took the security, and a redemption bond was executed. In March, 1788, George Williams still occupied the premises, and passing himself off as the proprietor, sold them to the Defendant for 400*l.* When the Plaintiff returned from his military engagement, he was astonished to find this purchaser, Edward James, in the possession of the estate, and filed the present bill to obtain redress.

The Attorney-General, for the Defendant, pleaded the equitable bar of his being the purchaser, without notice of the mortgage. The Defendant had executed a bond, on the advance of the first 350*l.* to surrender the estate on the re-payment of that money. Afterwards, he had paid the consideration, which was the full value of the estate; and he trusted his Lordship would not over-rule the plea.

Mr. Romilly, for the Plaintiff, explained, that the custom of the Manor was to enter as a surrender, and then to give a separate bond of redemption. He said, that in a plea for a valuable consideration, without notice, it was essential that the Defendant should state the particulars of the consideration, and that he should aver he had no such notice. The party must state the consideration, not with uncertainty, but with precision. Lord Redesdale, in his book, observed, (p. 215,) "Such a plea must aver the person who conveyed a mortgage was seised in fee, or pretended to be so seised, and was in possession of the conveyance.—*It must aver the consideration and the actual payment.*" His Lordship refers to the 3d *Atkins*, 814, where the objection taken by Lord Hardwicke was, that the consideration was not distinct and separate; and the plea did not aver the same was really and *bonâ fide* paid. Another objection was, that a part of the consideration was, surrendering back the mortgaged premises, and the Defendant did not say he at that time had not notice.

The Lord Chancellor said—"The defect upon the plea is, that you cannot, upon the matter averred, say, what sum of money was paid for the equity of redemption. It is a rule in pleading, that when you mean to cover a subject, you must say what you paid for that subject. In this case, the first was a mortgage, the second was a purchase, and upon that the arrangement was, that you were to give back part of the premises; and the sum you were to give, was the difference between the principal of 350*l.* and the interest due upon it, and 400*l.* The question is, if the first being a transaction of mortgage, and the second of purchase, whether the sum you so gave for the purchase amounted to sixpence. You aver you paid 400*l.*; and the doubt arising upon the plea is, if you are to state what you gave upon the whole for mortgage and purchase, or whether you are bound to state distinctly what precise sum you gave on the purchase."

The Attorney-General.—"These, I hope, are errors, my Lord, which may be amended."

Mr. Romilly.—"We shall reply to the plea, there is no doubt."

The Lord Chancellor.—"Then let it stand for an answer."

CHEVALIER DE GARCEN *v.* HENRY LORD FAUCONBURG AND OTHERS.

We stated, yesterday, the introductory argument in this cause, on the exceptions to the Master's report. The further hearing occupied nearly five hours of the time of the Court this morning.

Mr. Piggot, Mr. Serjeant Palmer, and Mr. Hall, addressed the Court on behalf of the legatees, the Superiors, and the Superioresses of the several ecclesiastical orders we have noticed. There were only two questions in the cause, 1st, Whether the legatees were sufficiently identified? 2dly, If they could take under the will? The case of the Archconfines of Mount Jusa, when they emigrated to England, and settled in Dorsetshire. A legacy was left to Augustin L'Estrange, the Abbot of that society, which Lord Alvanley was of opinion was capable of taking effect. The orders were established, and they were incapable of being destroyed, but by the authority by which they were founded. That authority was the Pope, and every Court in Europe solicited the dissolution of the Jesuits of the See of Rome. The question was not, if the Abbots and Abbesses could devise property, but whether they could take it for their own personal convenience and benefit. "You have (said Mr. Hall) the Master's report in favour of the legatees; you have living witnesses, acquainted with the customs and regulations of their order, deposing in favour of that report; you have, my Lord, much more, you have Moses and the Prophets; you have Christ and his Apostles; and if you do not believe, 'neither will you, though one should rise from the dead.' The members of these institutions were now thrown on the humanity of all nations; the Learned Counsel on the other side say, that they are in a condition of civil death; natural death must be a consequence as inevitable, if they are deprived of these donations."

Mr. Romilly, in support of the exceptions, said, that it was high time to recal his Lordship's attention to the true question in the cause, which was, if, at the time of the death of the testatrix Anne Fairfax, these were such orders as were distinguished in the will, and whether the individuals of which they consisted could take legacies for their own benefit. The affidavits produced on the other side were from persons wholly incompetent to decide this question, depending on a profound knowledge of the laws of France. These depositions were from clergymen and females, and they were met by the erudition of experienced dignitaries of the law. It was exactly the same as if the affidavits of half a dozen curates and the women of their congregation, on the intricacies of British jurisprudence, were opposed to his lordship and the learned judges of the land. One of the authorities, a judge of the parliament of Paris, Monsieur de Fourneaux, had not been treated with the respect he deserved. Among the members of that body had been found the most enlightened individuals, who were the great ornament of the age and country in which they appeared. They wore the gown of office, not for the petty emoluments which at the English bar were to be acquired, but to confer honour on the institution to which they belonged, and to connect their own reputation with the progress of juridical philosophy, and with the advancement of the glory and happiness of mankind.

The Learned Counsel took a comprehensive view of the various relations of the subject, and of its connexion with our legal and political maxims. He detailed at considerable length the history of the order of Jesuits, which were established in France under Lewis XV. and subsequently exterminated under the mandate of Pope Clement. He insisted that there were no such communities in England as were stated to exist in the report of the Master and if no such societies remained, no Superiors could belong to them, and the property in question must revert to the residuary legatee, for whom he appeared.

The Lord Chancellor.—"The question is, if the decree of the National Assembly applies to women at all. Another is, if, when a nun is destroyed as to her canonical character, whether she be afterwards any thing more than a woman. I have no information before me what is the precise distinction between regulars and seculars, and the decree of the government of France for the time being, with respect to the males, is supposed to operate in producing the conversion from the one to the other. Let it stand over till Thursday morning."

mortgage was seised in fee, or pretended to be so seised, and was in possession of the conveyance,—*It must aver the consideration and the actual payment.*" His Lordship refers to the 3d *Atkins*, 814, where the objection taken by Lord HARDWICKE was, that the consideration was not distinct and separate; and the plea did not aver the same was really and *bonâ fide* paid. Another objection was, that a part of the consideration was, surrendering back the mortgaged premises, and the Defendant did not say he at that time had not notice.

The LORD CHANCELLOR said—"The defect upon the plea is, that you cannot, upon the matter averred, say, what sum of money was paid for the equity of redemption. It is a rule in pleading, that when you mean to cover a subject, you must say what you paid for that subject. In this case, the first was a mortgage, the second was a purchase, and upon that the arrangement was, that you were to give back part of the premises; and the sum you were to give, was the difference between the principal of 350*l.* and the interest due upon it, and 400*l.* The question is, if the first being a transaction of mortgage, and the second of purchase, whether the sum you so gave for the purchase amounted to sixpence. You aver you paid 400*l.*; and the doubt arising upon the plea is, if you are to state what you gave upon the whole for mortgage and purchase, or whether you are bound to state distinctly what precise sum you gave on the purchase."

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CHEVALIER DE GARCEN *v.* HENRY LORD FAUCONBURG AND OTHERS.

We stated, yesterday, the introductory argument in this cause, on the exceptions to the Master's report. The further hearing occupied nearly five hours of the time of the Court this morning.

Mr. PIGGOT, Mr. Serjeant PALMER, and Mr. HALL, addressed the Court on behalf of the legatees, the Superiors, and the Superioresses of the several ecclesiastical orders we have noticed. There were only two questions in the cause, 1st, Whether the legatees were sufficiently identified? 2dly, If they could take under the will? The case of the Archbishop of Canterbury, 2 *Coke*, 48, tended to shew, that Members of Ecclesiastical Corporations, under distinctions peculiar to those corporations, could take under a will. It was absurd to cite as an authority at this day, the vows of poverty of St. Benedict, *anno domini* 480, they could have no reference to the state of society in 1805. In the case of the King v. Lady Partington, 1 *Salk.* 162, Anne Barlow devised, for the good of her soul, the estate which was not her's, but belonged to God and his Saints, and the Court there held, that the Monk might purchase. The case of Sir William Hamilton was argued by Lord Hardwicke, by Sir Philip Yorke, and Sir Robert Raymond. The facts were, that Sir Laurence Hamilton went to Douay, and there became a Monk. Sir William, his son, took possession of the estate, which was forfeited on his becoming a rebel. Sir Laurence afterwards repented of his vows, returned, took the sacrament, and obtained a re-possession of his estates. He was not barred on account of having been a Monk professed. To the same purpose were cited *Swinburne*, 366. *Digest*, book 34, section 20. *Codex* b. 48. 1. The object of our Protestant policy, was to prevent Catholic worship: these fraternities and sisterhoods were not composed of persons who made proselytes by popular harangues, they secluded themselves from society to devote themselves to God. The statute of the 31st & 32d Hen. VIII. stripped all the smaller ecclesiastical establishments of their property, because, in the Royal language, the members were *unthrifty dealers*, but the rights and privileges of the members were not abrogated. They were long subsequently recognized, and protected in the Catholic worship, under statutes passed in the times of the First and Second George. In *Coke's Littleton*, 132, the King made a Monk of his farmer, and it was held that he could have property and the right of recovery. The same doctrine was maintained in the celebrated case of the Monks of La Trappe. The brothers of that institution accommodated themselves to the discipline of St. Barnard. They ate neither meat nor fish; they lived upon vegetables; they abstained from all commerce with the world, and performed all the rites of hospitality, and especially to English travellers. On the 15th of May, 1792, this religious order was suppressed in France, and sought refuge in Switzerland. There they continued until the troops of the Republic invaded the

depositions were from clergymen and females, and they were met by the erudition of experienced dignitaries of the law. It was exactly the same as if the affidavits of half a dozen curates and the women of their congregation, on the intricacies of British jurisprudence, were opposed to his lordship and the learned judges of the land. One of the authorities, a judge of the parliament of Paris, Monsieur de Fourneaux, had not been treated with the respect he deserved. Among the members of that body had been found the most enlightened individuals, who were the great ornament of the age and country in which they appeared. They wore the gown of office, not for the petty emoluments which at the English bar were to be acquired, but to confer honour on the institution to which they belonged, and to connect their own reputation with the progress of juridical philosophy, and with the advancement of the glory and happiness of mankind.

The Learned Counsel took a comprehensive view of the various relations of the subject, and of its connexion with our legal and political maxims. He detailed at considerable length the history of the order of Jesuits, which were established in France under Lewis XV. and subsequently exterminated under the mandate of Pope Clement. He insisted that there were no such communities in England as were stated to exist in the report of the Master and if no such societies remained, no Superiors could belong to them, and the property in question must revert to the residuary legatee, for whom he appeared.

The LORD CHANCELLOR.—"The question is, if the decree of the National Assembly applies to women at all. Another is, if, when a nun is destroyed as to her canonical character, whether she be afterwards any thing more than a woman. I have no information before me what is the precise distinction between regulars and seculars, and the decree of the government of France for the time being with respect to the males, is supposed to operate in producing the conversion from the one to the other. Let it stand over till Thursday morning."

in a *præcipe*, it is derived from *bruyer*, a French word for heath, and it is called *ros* in the Britiſh tongue.

Roncaria or *runcaria* ſignifieth land full of brambles and briers, and is derived of *roucier*, the French word which ſignifieth the ſame, and as much as *ſenticetum*. [a] By the grant of *omnes juncarias* or *joncarias*, the ſoile where ruſhes do grow doth paſſe, for *jonc* in French is a ruſh, whereof *joncaria* commeth. [b] A man grants *omnes ruſcarias ſuas*, the ſoile where *ruſci*, *i. e.* kneholme, or butchers pricks, or broome doe grow, ſhall paſſe, and ſo in the verſe in the Regiſter it is called, but in F. N. B. fol. 2. in the verſe *piſcaria* is put inſtead of *ruſcaria*. And *jampna* commeth of *jonc* and *nower*, a wateriſh place, and is all one in effect with *joncaria*. He that granteth *omnes mariſcos ſuos*, all his fennes or mariſh grounds doe paſſe. *Mariſcus* is derived of the French word *mares* or *marets*; the Latin word for it is *palus* or *locus paludoſus*. *Mora* is derived of the Engliſh word moore, and ſignifieth a more barren and unprofitable ground than marſhes, dangerous for any cattell to goe there, in reſpect of myrie and moriſh ſoyle, neither ſerves it for getting of turves there. [c] You ſhall reade in record, that ſuch a man *perquiſivit treſcent. acr. maretti, &c.* This word *marettum* is derived of *mare* the ſea, and *tego*, and properly ſignifieth a mooriſh and gravelly ground, which the ſea doth cover and overflow at a full ſea, and lyeth betweene the high water marke and low water marke, *infra fluxum et refluxum maris*. By grant of theſe particular kinds, the lands of theſe particular kinds onely doe paſſe; but as hath been ſaid, by the grant of land in generall, all theſe particular kinds, and ſome others doe paſſe. *Non mihi ſi centum linguæ ſint oraque centum, Omnia terrarum percurrere nomina poſſem.* And therefore let us turn our eye to generall words, which doe include lands of ſeveral ſorts and qualities. [d] By the name of an honor, (1) which a ſubject may have, divers mannors and lands may paſſe. So by the name of an iſle, *inſula*, many mannors, lands, and tenements may paſſe.

Holme or *hulmus* ſignifieth an iſle or fenny ground. * A commote is a great ſeigniory, and may include one or divers mannors. [e] By the name of a *caſtle*, one or more mannors may be conveyed, *et è converſo*, by the name of a mannor, &c. a caſtle may paſſe (2). In Domeſday I read, *Comes Alanus habet in ſuo caſtellatu* 200 *maneria, &c. præter caſtellariam habet* 43 *maneria*; and in that booke a caſtle is called *caſtellum*, and *caſtrum*, and *domus defenſibilis*, and *manſus muralis*. [f] But note by the way, that no ſubject can build a caſtle or houſe of ſtrength imbattelled, &c. or other fortreſſe defenſible, called in law by the names aforeſaid, and ſometimes *domus kernellatæ* or *carnellatæ*, *imbattellatæ*, *tenellatæ*, *machecollatæ*, *meſe carnelet*, *&c.* without the licence of the king, for the danger which might enſue, if every man at his pleaſure might do it. And they be called imbattlements, becauſe they are defences againſt battels in aſſaults. *Tenellare* or *tanellare*, is to make holes or loopes in walls, to ſhoote out againſt the aſſailants. *Machecollare* or *machecoulare*, is to make a warlike device over a gate or other paſſage like to a grate, through which ſcalding water, or ponderous, or offenſive things may be caſt upon the aſſaylants (3). But to returne to the matter from whence upon this occaſion we are fallen.

By the name of a towne, *villa*, a mannor may paſſe. In Domeſday, *alodium* (in a large ſenſe) ſignifieth a free mannor (4); and *alodiarii* or *alodarii*, lords of the ſame; and *lannemanni* there ſignifie lords of a mannor, having *ſocam et ſacam de tenentibus et hominibus ſuis*. [g] And by the name of a mannor, divers townes may paſſe. *Quod olim dicebatur fundus nunc manerium dicitur*. By the name of a ferme or fearme (5), *firma*, houſes, lands, and tenements may paſſe; and *firma* is derived of the Saxon word *feormian*, to feed or releeve, for in ancient time, they reſerved upon their leaſes, cattell and other victuall and proviſion for their ſuſtenance. [h] Note a fearme in the north parts is called a tacke, in Lancaſhire a fermeholt, in Eſſex a wike. But the word fearme is the general word, and anciently *fundus* ſignified a fearme, and ſometime land. [i] Lands making a knight's fee (6), ſhall paſſe by the grant of a knight's fee *de uno feodo militis*.

[k] *Unum ſolinum* or *ſolinus terræ* in Domeſday booke containeth two plow lands and ſomewhat leſſe than an halfe; for there it is ſaid, *ſeptem ſolini*, or *ſolina terræ ſunt* 17 *carucat'* (7). *Una hida ſeu carucata terræ*, which is all one as a plow land, *viz.* as much as a plow can (8) till. *Sullerye* alſo ſignifieth a plow-land. *Una virgata terræ*, a yard-land, (the Saxons called it *girdland*, and now the *g* is turned to a *y*) is in ſome countries 10, in ſome 20, in ſome 24, in ſome 30, &c. (9) [l] *Una bovata terræ*, an oxgange, or an oxgate of land, is as much as an ox can till (10). [m] But *carucata terræ* and *bovata terræ* are words compound, and may containe meadow, paſture, and wood neceſſary for ſuch tillage. *Jugum terræ* in Domeſday containeth halfe a plow-land. And by all theſe names, in the raigne of R. 1. lands were uſually demanded, and long after (11).

[n] By the name of a grange, *grangia*, a houſe or edifice, not onely where corne is ſtored up like as in barnes, but neceſſary places for huſbandry alſo, as ſtables for hay and horſes, and ſtables and ſtyes for other cattell, and a *curtilage*, and the cloſe wherein it ſtandeth, ſhall paſſe; and it is a French word, and ſignifieth the ſame as we take it (12).

[o] *Stagnum*, in Engliſh a poole, doth conſiſt of water and land, and therefore by the name of *ſtagnum*

[a] Regiſt. 1. E. 3. 4. F. N. B. 2.

[b] 16. Aſſ. p. 9. Regiſter. Jampna. (Cro. Cha. 179)

[c] Paſch. 41. E. 3. coram rege Lincoln. rot. 28.

[d] Mag. Cart. c. 31. Wallingford Nott. Bolon. Lanc. &c. Trin. 33. E. 1. coram rege in Theſ. honor de Huntingdon. Mich. 9. E. 1. coram rege in Theſ. 18. E. 2. Aſſ. 377. 26. Aſſ. p. 60. 6 E. 3. 56. 47. E. 3. 21. honor de Peverel. 49. E. 3. 324. honor de Egles. 9. H. 6. 27. 36. H. 8. Dyer 58. honor de Glouc. F. N. B. 265. honor Abbath. de Merle. 5. E. 4. 129 7. H. 6. 39. 1. E. 3. 4. &c 13. E. 3. juriſdict. 23. 4. Co. 88. Lutterel's caſe. 5. H. 7. 9. 14. H. 4. in recordo longo. 8. H. 4. Pl. Com. 168. 8. H. 7. 1. 4. E. 4. 16. (4. Inſt. 294.)

* 13. E. 3. juriſdict. 23.

[e] 26. Aſſ. 54. 29. E. 3. 15. 29. H. 6. travers 4. Bract. fo. 434. 1. E. 3. 4 5. H 7. 9. 3. E. 2. Avowry 188. 37. H. 6. 26. 18 H. 6. 11. Lib. rub. ſcac. fo. 18.

[f] In veter. Mag. Cart. cap. Eſcheatriæ. fo. 162. Britton. cap. 20. Rot. Parliam. 45. E. 3. nu. 34. 6. H. 4. nu. 19. 1. E. 4. cap. 1. Rot. Parliam. 1. E. 3. 2. pars Alano Charleton. 22. E. 3. 2. pars Thoma Barkley, &c. (3. Inſt. 201.)

[g] Lamb. expoſit. verb. Ferme. Pl. Com. 195.

[h] Pl. Com. 169. Regiſt. 227. b. eject. firmæ.

[i] 17. E. 3. fo. 8. 5. E. 3. 213. 16. E. 3. bre. 165. 12. E. 2. bre. 814.

[k] 4. E. 3. 161. 6. E. 3. 293. 2. E. 3. 5. 35. H. 6. 20 Pl. Com. 168. 7. Aſſ. 18. 11. Aſſ. 13. Lamb. Expoſ. verb. Hyda et Virgat. terræ. Glanvill. lib. cap. Domeſday. Bract. lib. 2. cap 26. 27. & lib. 5. fo. 434. Regiſt. 72.

[l] 5. E. 3. fine 49. 13 E. 3. fine 67. 39. H. 6 8. 4. E. 3. 159. 8. E. 3. 377. Bracton fo. 180. 269. 431. 5. H. 3. Droit. 66. Pl. Com 168

[m] 13. E. 3. bre. 241. 2. E. 3. 57. Temps E. 1. bre. 811. Pl. Com. 168.

[n] Pl. Com. 169. Linwood 44. E. 3. 21. 4. E. 3 32.

[o] 4. E. 3. tit. Feoffments et faits 79. 14. E. 3. Formedon. 34. 34. Aſſ. pl. 11.

(1) For the nature of a land-honor or barony, ſee Mad. Bar. Angl. 2.
(2) Acc. 2. Inſt. 31.
(3) See further as to caſtles, Mad. Baron. Anglican. 17. to 20. Diſcourſ. by Emin. Antiq. ed. 1773. v. 1. p. 100. 186. and 191.
(4) See ante 1. b.
(5) See 2. Inſt. 145.
(6) As to the contents of a knight's fee, ſee Poſt 69.
(7) Some think, that *ſolinus terræ* was frequently ſynonymous with *carucata terræ*. See Somn. Rom. Ports 81. Cow. Interpr. ed. 1727. voc. *ſolinus terræ*.
(8) See further as to this, Poſt 69. and 86. b.
(9) See Poſt 69.
(10) See Poſt 69.
(11) See further on the dimenſions of land in England, Poſt 200. b. and 69. Crompt. on Courts, 222. and Diſc. by Emin. Antiq. ed. 1773, v. 1. p. 39. to 50. and 107, 195, and 197.—By what names, and in what order, lands, &c. ought to be demanded, ſee Poſt 5. b. Fitzh. N. Br. 2. C. Hugh. Comment. on Orig. Writs. 2. and Theloal's Dig. Br. Orig. l. 8. c. 1. p. 118. and particularly the latter book.
(12) *Grange* ſometimes comprehends a whole *farm*. See 4. Co. 48. b.

[a] 13. E. 3. 4. 4. E. 3. 143. 8. E. 3. 381. 10. E. 3. 482. 13. E. 3. entry 57. F. N. B. 191. h. Domeſday.

ſtagnum or a poole, the water and land ſhall paſſe alſo. [a] In the ſame manner *gurges*, a deepe pit of water, a gors or gulfe conſiſteth of water and land; and therefore by the grant thereof by that name, the ſoile doth paſſe, and a *præcipe* doth lye thereof, and ſhall lay his eſplées in taking of fiſhes as breames and roches. In Domeſday it is called *guort*, *gort*, and *gors* plurally, as for example, *de 3 gorz mille anguillæ*.

[b] Temps E. 1. bre. 861. 4. E. 3. 5. 10. H. 7. 30. 44. E. 3. 12. 43. E. 3. 24. 35. H. 6. 55. 3. H. 6. 2. Domeſday. Bracton. lib. 4. fo. 235. Int. adjudicat. coram rege p 39. E. 3. lib. 3. fo. 95. in Theſaur. (4. Inſt. 289.)

[b] So it is of a forreſt, parke, chaſe, vivarye, and warren in a man's owne ground, by the grant of any of them, not onely the priviledge, but the land itſelfe paſſes, for they are compound. In the booke of Domeſday, that is called *leuuad*, and *leuga*, and *leuued*, and *leuue*, which in Latin is called *leuca*.

[c] 40. Aſſ. 38. 4 H. 6. 14. 35. E. 1. ca. 6. Anno 10. R. 1. inter fines in Theſ. Ferlingus terræ continet 32 acras. Domeſday. Fruſtrum. 16. E. 3. tit. Comon. 9.

[c] *Stadium* or *ferlingus ſive ferlingum*, or *quarentena terræ*, is a furlong of land, and is as much as to ſay, a furrow long, which in ancient time was the eighth part of a mile; and land will paſſe by that name. And ſome hold that by that name land may be demanded. And *de ferlingis et quarentenis*, you ſhall read divers times in the book of Domeſday; and there you ſhall read *in inſula rex habet unum fruſtrum terræ unde exeunt ſex vomeres. Nota*, *fruſtrum* ſignifieth a parcell.

[d] Mich. 8. H. 3. incipien. 9. coram rege. Warr. Ro. 6.

[d] *Warectum* or *warecum*, or *varectum*, doth ſignifie fallow; *terra jacet ad warectum*, the land lyeth fallow: but in truth the word is *vervactum quaſi vere novo victum ſeu ſubactum*, *terra novalis ſeu requieta*, *quia alternis*, *annis requieſcat*,

[e] Virg. Eclog. 1. 2.

[e] *tam culta novalia*.

[f] Bract 211. 233. 22. E. 4. 11ans. 140. Pl. Com. 168. 171. 27. H. 8. Br. Feoffments 53 9. Aſſ. p. 21. 35. H. 6. 44. Pl. Com. 169. (1. Sid. 309.)

[f] By the grant of a meſſuage, or houſe, *meſuagium*, the orchard, garden, and curtilage doe (1) paſſe, and ſo an acre or more may paſſe by the name of a houſe. It is derived of the French word *meſe*.

[g] Domeſday.

[g] In Domeſday, a houſe in a city or burrough is called *haga*; other houſes are called there *manſiones*, *manſuræ*, and *domus*;

[h] Patch. 30. E. 1. coram rege Kanc. in Theſaur. Statut. de extent. manerii. Domeſday.

[h] and in an ancient plea concerning Feverſham in Kent, hawes are interpreted to ſignifie *manſiones*. In Normans French it is called *meſnil* or *meſuil*. *Bye* ſignifieth a dwelling, *bye* an habitation, and *byan* to dwell.

It is to be noted, that in Domeſday there be often named *bordarii ſeu borduanni*, *coſces*, *coſcet*, *cotucami*, *cotarii*, who are all in effect bores or huſbandmen, or cotagers, ſaving that *bordarii*, which commeth of the French word *borde* for a cottage, ſignifieth there bores holding a little houſe, with ſome land of huſbandry bigger than a cottage, and *coterelli* are meere cottagers, *qui cotagia et curtilagia tenent* (2).

Domeſday.

Villani in Domeſday (often named) are not taken there for bondmen, but had their name *de villis*, becauſe they had fermes, and there did worke of huſbandry for the lord, and they were ever named before *bordarii*, &c. and ſuch as are bondmen are called there *ſervi*.

[i] Int. placita coram domino rege Mich. 10. E. 3. Rot 26. Lamb. expoſit. verb. Thanus.

[i] *Coleberti* often alſo named in Domeſday, ſignifieth tenants in free ſocage by free rent, and ſo it is expounded of record. *Radmans* and *radchemiſtres*, (*rad*, or *rede*, ſignifieth firme and ſtable) there alſo often named, theſe are *liberi tenentes qui arabant et herciebant ad curiam domini*, *ſeu falcabant*, *aut metebant*, becauſe their eſtates are firme and ſtable, and they are many times called *ſochemans* and *ſokemanni*, becauſe of their plough ſervice.

[k] Lib. Rub. cap. 15. & cap. 41. & 76. W. 2. c. 46. 7. H. 4. 38. Lib. d'entries Aſſ. corps pol. 2. (4. Inſt. 294.) Domeſday.

Dreuchs ſignifieth free tenants of a mannor, there alſo named. *Taini* or *thaini mediocres* were freeholders, and ſometime called *milites regis*, and their land called *tainland*, and there it is ſaid, *hæc terra T. R. E. fuit tainland, ſed poſtea converſa in reveland.*

[l] 7. H. 4. 28. Fleta lib. 2. cap. 35. Domeſday. 10. R. 1. inter fines.

[k] But *thainus regis* is taken for a baron, for it is ſaid in an ancient author, *thainus regis proximus comiti eſt, et ibidem mediocris thainus, et alibi baro ſive thainus* (3). *Berquarium* or *bercaria* commeth of *berc*, an old Saxon word, uſed at this day for barkes or rindes of trees, and ſignifieth a tanhouſe, or a heath houſe, where barkes or rindes of trees are laid to tan withal, and *berquarii* are mentioned in Domeſday. It ſignifieth alſo, and more legally a ſheep-coat, of the French word *bergerie*.

[l] By *vaccaria* in law is ſignified a dairy houſe, derived of *vacca* the cow. In Latin it is *lactarium* or *lactitium*, and *vaccarius* is mentioned in Domeſday. And Fleta maketh mention of *porcaria*, a ſwineſtye.

The content of an acre is known. The name is common to the Engliſh, German, and French. In legall Latin it is called *acra*, which the Latiniſts call *jugerum*. In Domeſday it is called *arpen prati*, *ſilvæ*, &c. 10. *R.* 1. *inter fines*. *Acra* in Cornwall *continet* 40 *perticatas in longitudine*, *et* 4 *in latitudine*, *et quælibet perticata de* 16 *pedibus in longitudine* (4).

[m] 9. E. 3. 39. Temps E. 1. Br. 866. Mich. 30. E. 1. coram rege Gloc. in Theſaur.

[m] By the grant of a ſelion of land, *ſelio terræ*, a ridge of land, which containeth no certainty, for ſome be greater and ſome be leſſer; and by the grant *de una porca*, a ridge doth paſſe. *Selio* is derived of the French word *ſellon* for a ridge.

[n] Bract. fo. 377. 431. 43. E. 3. 27. Regiſt. fo. 1. 94. 248. 249. F. N. B. fo. 87. F. l.

[n] By the grant *de centum libratis terræ*, or 50 *libratis terre*, or *centum ſolidatis terræ*, &c. land of that value paſſeth, and ſo of more or leſſe, and in ancient time by that name it might have been demanded.

[o] Regula.

[o] And many things may paſſe by a name, that by the ſame name cannot be demanded by a (5) *præcipe*, for that doth require more preſcript forme; but whatſoever may be demanded by a *præcipe* may paſſe by the ſame name by way of grant.

7. R. 1. inter fines Suſſex.

Frythe is a plaine betweene woods, and ſo is lawnd or lound. *Combe*, *hope*, *dene*, *glyn*, *haugh*, *howgh* ſignifieth a vally. *Howe*, *hoo*, *knol*, *law*, *pen*, and *cope* a hill. *Ey*, *ing*, and *worth* ſignifieth a watry place or water. *Faleſia* is a bank or hill by the ſea-ſide; it commeth of *falaize*, which ſignifieth the ſame. Of all theſe you ſhall read in ancient bookes, charters, deeds, and

(1) Contra as to the garden, Keilw. 57. Mo. 24. Dal. in N. Bendl. 29. But ſee acc. Poſt 56. a. and b. Plowd. 171. 2. Co. 32. 2. Saund. 401. S. p. adj. acc. in caſe of a deviſe, 3. Leon. 214. and Cro. Eliz. 89. See acc. 2. Cha. Caſ. 27. See further Litt. Rep. 6. where the court held that the deviſe of a meſſuage was not ſufficient to paſs 2 acres 4 miles diſtant from the meſſuage, though occupied with it. In Keilw. 57. a difference is taken between *meſſuage* and *domus*; and it is there ſaid, that *meſſuage* extends to the *curtilage*, though not to the *garden*, but that *domus* only comprehends buildings. Alſo in ſome of the caſes cited, particularly that from Plowden, the grant was of a *meſſuage* with the *appurtenances*; on which *latter* word ſome ſtreſs ſeems to have been laid.

(2) See as to *cottages*, 2. Inſt. 736.

(3) See further as to *thane* and *thane land*, in Reliq. Spelm. 11, &c. See alſo Poſt 6. a. n. 6.

(4) This differs from the common acre, becauſe each perch uſually contains 16 feet and an half. In ſome places the cuſtom is to meaſure by a perch of 24 feet, and in others by one of 20 feet. See Crompt. on Courts, 222.

(5) See ante 5. a. n. 18.

and records, and to the end that our ſtudent ſhould not be diſcouraged for want of knowledge, when he meeteth with them *(neſcit enim generoſa mens ignorantiam pati)* we have armed him with the ſignification of them, to the end he may proceed in his reading with alacrity, and ſet upon, and know how to worke into with delight theſe rough mines of hidden treaſure.

[m] By the name of *minera* or *fodina plumbi*, &c. the land itſelfe ſhall paſſe in a grant, if livery be made, and alſo be recovered in an aſſiſe, *et ſic de ſimilibus.*

[m] 17. E 3. 7. 43. E. 3. 35. b. Regiſt. 65. 10. H. 7. 21. Pl. Com. 191. 195. Bract. 211. 326.

By the grant of a fouldcourſe or the like, lands and tenements may (1) paſſe [n]. *Tenementum*, tenement, is a large word to paſſe, not onely lands and other inheritances, which are holden; but alſo offices, rents, commons, profits, apprender out of lands and the like, wherein a man hath any frankтenement, and whereof he is ſeiſed, *ut de libero tenemento* (2). But *hæreditamentum*, hereditament, is the largeſt word of all in that kind; for whatſoever may be inherited is an hereditament, be it corporeall or incorporeall, reall, or perſonall, or mixt (3).

[n] 45 E. 3. Vouchee 72. 33. E. 3. grant 102 11. H. 6. 22. 27. 14. E. 4. 4. 20. Aſſ. p. 9. 3. E. 4. 19. 11. H. 7. 25. (Poſt 19 b. 20. and 154)

[o] A man ſeiſed of land in fee has divers charters, deeds, and evidences, and maketh a feoffment in fee, either without warrantie, or with warrantie only againſt him and his heirs, the purchaſer ſhall have all the charters, deeds, and evidences, as incident to the lands, *et ratione terræ*, to the end he may the better defend the land himſelf, having no warrantie to recover in value; for the evidences are as it were the ſinewes of the land, and the feoffor not being bound to warrantie, hath no uſe of them. But if the feoffor be bound to warrantie, *ſo that* he is bound to render in value, then is the defence of the title at his perill; and therefore the feoffee in that caſe ſhall have no deeds that comprehend warrantie, whereof the feoffor may take advantage. Alſo he ſhall have ſuch charters as may ſerve him to deraigne the warrantie paramount. Alſo he ſhall have all deeds and evidences, which are materiall for the maintenance of the title of the land, but other evidences which concerne the poſſeſſion, and not the title of the land, the feoffee ſhall have them (4).

[o] 1. Co. fo. 1. & 2. in Seignior Buckhurſt's caſe. 44. E. 3. 11. b. 39. E. 3 17. a. 19. H. 6. 65. b. 34. H. 6. 1. a. 10. E. 4. 9. b. 18. E. 4. 14. 15. 6. H. 7. 3. b. H. 7. 33. a. (2. Ro. Abr. 31.)

A aver et tener. Theſe two words do in this place prove a double ſignification, *viz. a aver*, to have an eſtate of inheritance of lands deſcendible to his heirs, and *tener* to hold the ſame of ſome ſuperior lord.

There have beene eight formall or orderly parts of a deed of feoffment, (5) *viz.* 1. the *premiſſes* of the deed implyed by Littleton; 2. the *habendum*, whereof Littleton here ſpeaketh; 3. the *tenendum*, mentioned by Littleton; 4. the *reddendum*; 5. the *clauſe of warrantie*; 6. the *in cujus rei teſtimonium*, comprehending the ſealing; 7. the date of the deed, containing the day, the month, the yeare, and ſtile of the king, or of the yeare of our Lord; [p] laſtly, the clauſe of *hiis teſtibus*, and yet all theſe parts were contained in very few and ſignificant words, [q] *hæc fuit candida illius ætatis fides et ſimplicitas, quæ pauculis lineis omnia fidei firmamenta poſuerunt.*

Vid. Sect. 40. & 370. 371. many things de cartis et factis. Fleta, l. b. 3. ca. 14. Britton 100. 101. Bract. lib. 5 fo. 396. a. 399 38. H. 6. 33. 36. Pl. Com. Wrotesleye's caſe, fol. 96.

[p] Vid. Throgmorton's caſe, Pl. Com.

[q] 6. Co. 43. in ſir Anthony Muldmay's caſe. Vid. Sect. 278. (2. Ro. 23.)

The office of the *premiſſes* of the deed is twofold; firſt, rightly to name the feoffor and the feoffee; and ſecondly, to comprehend the certainty of the lands or tenements to be conveied by the feoffment, either by expreſſe words, or which may by reference be reduced to a certaintie; for *certum eſt quod certum reddi poteſt.* The *habendum* hath alſo two parts, *viz.* firſt, to name againe the feoffee; and ſecondly to limit the certaintie of the eſtate. The *tenendum* at this day, where the fee ſimple paſſeth, muſt be of the chiefe lords of the fee. And of the *reddendum* more ſhall be ſaid in his proper place, in the chapter of Rents. Of the *clauſe of warrantie* more ſhall be ſaid in the chapter of Warranties. *In cujus rei teſtimonium ſigillum meum appoſui* was added, for the ſeale is of the eſſentiall part of the deed. The date of the deed many times antiquity omitted, and the reaſon thereof was for that the limitation of preſcription, or time of memory, did often in proceſſe of time change, and the law was then holden, that a deed, bearing date before the limited time of preſcription, was not pleadable; and therefore they made their deedes without date, to the end they might alledge them within the time of preſcription. And the date of the deedes was commonly added in the raigne of E. 2. and E. 3. and ſo ever ſince.

Brit. fo. 101.

And ſometime antiquitie added a place, as *Datum apud D.* which was in diſadvantage of the feoffee; for being in generall he may alleage the deed to be made where he will. And laſtly, antiquitie did add *hiis teſtibus* in the continent of the deed after the *in cujus rei teſtimonium*, written with the ſame hand that the deed was, which witneſſes were called, the deed read, and then their names entered. [r] And this is called charter land, and accordingly the Saxons called it *bockland*, as it were booke land (6): which clauſe of *hiis teſtibus* in ſubjects deeds continued untill and in the raigne of H. 8. but now is wholly omitted. And it appeareth by the ancient authors and authorities of the law, that before the ſtatute of 12. E. 2. ca. 2. proceſſe ſhould be awarded againſt the witneſſes named in the deed, *teſtes in carta nominatos*, [s] and that the ſame ſtatute was but an affirmance of the common law, which not being well underſtood hath cauſed varietie of opinions in our books. But the delay therein was ſo great, and ſometimes (though rarely) by exceptions againſt thoſe witneſſes, which being found true, they were not to be ſworne at all, neither to be joined to the jury, nor as witneſſes; [t] as if the witneſs were infamous, for example, if he be attainted of a falſe verdict, or of a conſpiracie at the ſuite

[r] Lamb. expoſit. verb. terra ex ſcripto. Vid. Forteſcue, cap. 32. See the Second Part of the Inſtit. cap. 38. 12. E. 2. c. 2. See the Second Part of the Inſtitutes. Marlb. cap. 6. and cap. 14.

[s] Brit. fo. 65. 101. 11. E. 3. proceſ. 170. 6. H. 3. proceſ. 209. 8. H. 3. proceſ. 210. 4. E. 2. gard. 119.

[t] Mirror ca. 4. ſect. de infamies et perjurie. Glanv. lib. 2. cap. 15. Bract. lib. 5. fo. 288, 292. Brit. fo. 134. 135. 101. Flet., lib. 5. ca. 21. 8. E. 2. Aſſ. 396. 2. E. 3. 22. 24. E. 3. 34.

(1) Here *fold courſe* ſeems to be underſtood for land uſed as a *ſheep-walk*; but the word has various other ſenſes. Sometimes it ſignifies land to which is appurtenant the ſole right of folding the cattle of others. Sometimes it means merely *ſuch* right of holding. It is alſo uſed to denote the right of folding on another's land, which is called *common* of *faldage*. See in W. Jo. 375. and Cro. Cha. 432. a caſe, in which *common* of *faldage* was claimed, and 2. Ventr. 139. one in which the right of folding the cattle of others is preſcribed for.—(2) See further as to the extent of the word *tenement*, Perk. ſect. 114. & 11. H. 6. 22.—(3) See further as to *hereditament*, Ante 3. Plowd. 58. Mo. 176. 3. Co. 2. Dy. 323. b. pl. 30. With the word *hereditament* lord Coke ends his laborious enquiries about the names, by which things will paſs in grants and other conveyances. His etymologies and explanations of the ſeveral words are certainly open to many obſervations, beſides the few made by the editor of this edition. But the omiſſion on his part proceeds from the nature of his undertaking, which confines him to narrow limits. To ſupply his unavoidable deficiencies in this inſtance, and for the ſake of recommending aſſiſtances which are too much neglected, he refers the ſtudent to the gloſſaries which are ſo peculiarly adapted for the libraries of ſuch as ſtudy Engliſh law, hiſtory, and antiquities. Of theſe a good liſt is given in a tract by Dr. Thomas Barlow, intitled *Directions for the Study of the Engliſh Hiſtory and Antiquities*, and publiſhed in 1742 by Dr. Taylor with his Commentary on the Decemviral Law *De inope Debitore in partes diſſecando*. To this liſt of Gloſſaries ſhould be added Du Freſne's Gloſſary *ad Scriptores Med. et Inſim. Latin. ed. Par.* 1733, the *Gloſſarium Novum* by Charpentier, *ed. Par.* 1766, the Gloſſary by Dr. Kennett, at the end of his Parochial Antiquities, that at the end of Wilkins's Leg. Anglo Saxon. and Lye's Dict. Saxon. & Gothic. Latin. ed. 1772.—(4) See Cro. Eliz. 347. Cro Cha. 442. Noy 145. In all of theſe books it is ſaid, that in the caſe of conveyances to uſes the poſſeſſion of deeds appertains to the *feoffee* or *covenantee*, and not to *ceſtuique uſe*; and the reaſon given is, that it was ſo at common law, and the ſtatute of uſes though it transfers the legal eſtate to *ceſtuique uſe*, doth not transfer the deeds. But this doctrine ſeems queſtionable.—(5) See the obſervations on this part of the Commentary in Mad. Form. Angl. Differt. p. 5. See alſo on the ſubjects of ancient deeds and charters, the whole of the ſame Diſſertation, and Nich. Engl. Hiſt. Libr. 2d ed. 240. Seld. Jan. Angl. b. 2. c. 2. and 3. to which may be added Mabillon de Re Diplomatica.—(6) See further as to *bockland* and *folkland*, Reliq. Spelm. 12. 39. and Dalrymp. Feud.

5. Eliz. c. 9. as to perjury.

(5. Co. 99. Flower's case.) 43. E. 2. conspir. 11. 27. Ass. 59. 33. H. 6. 55. 21. H. 6 36. (4. Inst. 279. 1. Sid. 51. Godb. 288. 2. Bulstr. 154. Raym. 369. 1. Ventr. 349. 1. Kelynge, 38. 18. 4. Inst. 279. T. Jo. 155. 2. Ro. Abr. 686.)
[a] Fortesc. ca. 26. Pat. 55. H. 3. m. 3. Stanf. Pl. Cor. 174. a.
[b] Fortescu. ca. 25.

suite of the king, or convicted of perjury, or of a premunire, or of forgerie upon the statute of 5. Eliz. cap. 14. and not upon the statute of 1. H. 5. cap. 3. or convict of felony, or by judgement lost his eares, or stood upon the pillory or tumbrell, or beene *stigmaticus*, branded, or the like (1), whereby they become infamous for some offences, *quæ sunt minoris culpæ sunt majoris infamiæ*. [a] If a champion in a writ of right become recreant or coward, he thereby loseth *liberam legem*, and thereby becomes infamous, and cannot be a witnesse; for regularly he, that loseth *liberam legem*, becommeth infamous, and can be no witnesse. Or if the witnesse be an infidell (2), or of non sane memory, or not of discretion, or a partie interested, or the like. [b] But oftentimes a man may be challenged to be of a jury, that cannot be challenged to be a witnesse, and therefore though the witnesse be of the neerest alliance, or kindred, or of counsell, or tenant, or servant to either partie, or any other exception that maketh him not infamous, or to want understanding, or discretion, or a partie in interest, though it be proved true, shall not exclude the witnesse to be sworne, [c] but he shall be sworne, and his credit upon the exceptions taken against him left to those of the jury, who are tryers of the fact, insomuch as some bookes have said, that though the witnesse named in the deed be named a disseisor in the writ, yet he shall be sworne as a witnesse to the deed. [d] A witnesse amongst others named in a deed was outlawed, and no proces was awarded against him by the statute, because he was *extra legem*, and an outlawed person cannot be an auditor. And the court in some bookes have said, that they have not seene witnesses challenged, which is regularly to be understood with the limitations abovesaid; but such as are returned to be of a jurie are to be challenged for the causes aforesaid for outlawry, and divers other causes, (for the which a witnesse cannot be challenged) and such proces against witnesses (3) vanished. But seeing the witnesses named in a deed shall be joyned to the inquest, and shall in some sort joyne also in the verdict (in which case if jurie and witnesses finde the deed that is denied to be the deede of the partie, the adverse partie is debarred of his attaint because there is more than 12. that affirme the verdict) (4) it is reason, that in that case of joyning such exception shall be taken against the witnesse as against one of the jury, because he is in the nature of a juror. [e] And therefore to put one example, if he be outlawed in a personall action he cannot be joined to the jury, but yet that is no exception against him to exclude him to be sworne as a witnesse to the jury. And the reason of all this is, for that if he with others should joyne in verdict with the jurie in affirmance of the deed, the partie should be barred of his attaint. But note, there must be more than one witnesse that shall be joyned to the inquest. And albeit they joyne with the jury, and finde it not his deed, notwithstanding this joyning, the partie shall have his attaint, for it is a maxim in law, [f] that witnesses cannot testifie a negative (5), but an affirmative. And if one of the witnesses named in the deed be one of the panell, he shall be put out of the panell; and all these secrets of law do notably appeare in our bookes.

[c] 22. Ass. 12. and 41. 23. Ass. 11. 19. E. 2. tit. Ass. 409.
[d] 34. E. 1. proces. 208.
[e] 34. E. 1. tit. Process. 208. 11. Ass. p. 19. 20. 12. Ass. p. 1. 12. 41. 18. Ass. p. 11. 22. Ass. 15. 23. Ass. 15. 40. Ass. 23. 48. Ass. p. 5. 21. H. 6. 30.
[f] 48. E. 3. 30. 12. H. 6. fo. 6. a. 50. E. 3. 16. 43. E. 3. 32. 12. H. 4. 9. 19. E. 2. Ass. 408. Pasch. 14. E. 3. coram rege Devon. in Thesaur. Fleta, lib. 6. cap. 6. F. N. B. 106. h. and 97. c. (Post 303.)
[g] Mirror ca. 3. Pl. Com. fo. 10. Bract. lib. 5. fo. 400. (Post 373. a.)

To shut up this point, it is to be knowne, [g] that when a triall is by witnesses, regularly the affirmative ought to be proved by two or three witnesses, as to prove a summons of the tenant, or the challenge of a juror, and the like. But when the triall is by verdict of 12 men, there the judgement is not given upon witnesses, or other kinde of evidence, but upon the verdict, and upon such evidence as is given to the jury they give their verdict. And Bracton saith, there is *probatio duplex*, *viz. viva*, as by witnesses *viva voce*, and *mortua*, as by deedes, writings, and instruments. And many times juries, together with other matter, are much induced by presumptions, whereof there be three sorts, *viz.* violent, probable, and light or temerary. *Violenta presumptio* is manie times *plena probatio*, as if one be runne thorow the bodie with a sword in a house, whereof he instantly dieth, and a man is seene to come out of that house with a bloody sword, and no other man was at that time in the house. *Presumptio probabilis* moveth little, but *presumptio levis seu temeraria* moveth not at all. So it is in the case of a charter of feoffment, if all the witnesses to the deed be dead (as no man can keep his witnesses alive, and time weareth out all men) then violent presumption, which stands for a proofe, is continuall and quiet possession; for *ex diuturnitate temporis omnia præsumuntur solenniter esse acta*. Also the deed may receive credit *per collationem sigillorum, scripturæ, &c. et super fidem cartarum mortuis testibus erit ad patriam de necessitate recurrendum*.

Fleta lib. 6. ca. 33. 8. E. 3. 290. 39. E. 3. 21. b.
Glanvil. lib. 10. ca. 12. Fleta, lib. 6 ca. 33.
[h] Pasch. 10. Ja. in Com. Banco upon the stat. of bankrouts. (1. Brownl. 47. 2. Ro. Abr. 585. Hutt. 115. Raym. 1. 1. Ventr. 243. 3. Keb. 193. 1. Sid. 431.)
[i] Fleta, lib. 2. ca. 44. 13. E. 1. tit. Vill. 36. 37. 19. E. 2. ibid. 32. (Post 25.)
[k] Tr. 8. Ja. in Com. Banco. Smithe's case, in evidence upon an information upon the statute of usury. Brit. fo. 134. (Raym. 191. 7. Mod. 118.

Note, it hath beene resolved by the justices, that a wife [h] cannot be produced either against or for her husband (6) *quia sunt duæ animæ in carne una*, and it might be a cause of implacable discord and dissention between the husband and the wife, and a meane of great inconvenience; but [i] in some cases women are by law wholly excluded to beare testimony, as to prove a man to be a villeine, *mulieres ad probationem status hominis admitti non debent*. It was also agreed by the whole court [k] that in an information upon the statute of usury, the partie to the usurious contract shall not be admitted to be a witnesse against the usurer, for in effect he should be *testis in propria causa*, and should avoyd his owne bonds and assurances, and discharge himselfe of the money borrowed; and though he commonly raise up an informer to exhibit the information, yet *in rei veritate* he is the partie (7). And herewith in effect agreeth Brit-

ton

Feud. Prop. 9. In this last book the very spirited writer attempts a new distinction between the two kinds of land, and to shew that *bockland* or *thane land* was *feudal*, and that *folk* or *reveland* was *allodial*. See further post. sect. 86. a. n. (1) there.

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

(2) But now it is settled, that all persons professing to believe in a God, though neither believing in the Old or New Testament, may be witnesses, if sworn according to the ceremonies of their own religion. See in 1. Atk. 19. 2. Eq. Case Abr. 397. and 1. Wils. part 1. p. 84. the great case of Omichund and Barker, in which lord chancellor Hardwicke, assisted by the two chief justices and the chief baron, determined, that the deposition of one who was of the *Gentou* religion should be read in evidence.

(3) See further on this subject of joining with the jury the witnesses named in a deed, and the process for that purpose, 33. H. 6. 19. and in Vin. Abr. *Evidence* H. a. and J. a.

(4) Acc. 1. Ro. Abr. 280. pl. 14. and 2 Inst. 662. See infra n. 5.

(5) Acc. 4. Inst. 279. and the references supra in n. 4. But see 1. Ro. Rep. 83. Comb. 18. 57. Gilb. Law of Evid. 157. Law of Nisi Prius, 1st ed. 422.

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

(7) But this objection fails where the debtor, previously to his examination, has paid the money borrowed, there being, as it is said, no remedy to recover the money back again; and therefore in such a case his testimony hath been received. See the addit. refer. supra in marg. letter [k] and Cas. B. R. temp. Hardw. 266. and Gilb. Law of Evid. 127. See 1. Kenn. Rep. 296. Majanne Kyd...

ton, that he, that challengeth a right in the thing in demand, cannot be a witneſſe, for that he is a party in intereſt (1). But now let us returne to that from the which by way of digreſſion (upon this occaſion) we are fallen. (1. Sid. 51. 2. Ro. Abr. 685.)

And the ancient charters of the king, which paſſed away any franchiſe or revenue of any eſtate of inheritance, had ever this clauſe of *hiis teſtibus*, of the greateſt men of the kingdome, as the charters of creation of nobility yet have at this day. When *hiis teſtibus* was omitted, and when *teſte me ipſo* came into the king's grants, you ſhall reade in the Second Part of the Inſtitutes (2), *Magna Charta*, cap. 38. I have tearmed the ſaid parts of the deed formall or orderly parts, for that they be not of the eſſence of a deed of feoffment, for if ſuch a deed be without *premiſſes*, *habendum*, *tenendum*, *reddendum*, clauſe of *warrantie*, the clauſe of *in cujus rei teſtimonium*, the *date*, and the clauſe of *hiis teſtibus*, yet the deed is good. [*f*] For if a man by deede give lands to another, and to his heires without more ſaying, this is good, if he put his ſeale to the deed, deliver it, and make livery accordingly. [*g*] So it is if A give lands, to have and to hold to B and his heires, this is good, albeit the feoffee is not named in the (3) premiſſes. And yet no well adviſed man will truſt to ſuch deeds, which law by conſtruction maketh good *ut res magis valeat*; but when forme and ſubſtance concurre, then is the deed faire and abſolutely good. The ſealing of charters and deeds is much more ancient than ſome, out of error, have imagined (4); for the charter of the king Edwyn, brother of king Edgar, bearing date *anno Domini* 956. made of the land called *Fecklea* in the iſle of Ely, was not only ſealed with his owne ſeale (which appeareth by theſe words, *ego Edwinus gratia Dei totius Britannicæ telluris rex meum donum proprio ſigillo confirmavi*) but alſo the biſhop of Wincheſter put to his ſeale, *ego Ælfwinus, Winton, eccleſiæ divinus ſpeculator proprium ſigillum impreſſi*. And the charter of king Offa, whereby he gave the Peter-pence, doth yet remaine under ſeale. But no king of England, before or ſince the Conqueſt, ſealed with any ſeale of armes before king R. 1. but the ſeale was the king ſitting in a chaire on the one ſide of the ſeale, and on horſbacke on the other ſide in divers formes. And king R. 1. ſealed with a ſeale of two lyons, for the Conqueror for England bare two lyons, and king John in the right of Aquitaine (the duke whereof bare one lyon) was the firſt that bare three lyons, and made his ſeale accordingly, and all the kings ſince have followed him. And king E. 3. in *anno* 13. of his raigne, did quarter the armes of France with his three lyons, and tooke upon him the title of king of France, and all his ſucceſſors have followed him therein. (2. Inſt. 77.)

In ancient charters of feoffment there was never mention made of the delivery of the deed, or any livery of ſeiſin indorſed; for certainly the witneſſes named in the deed were witneſſes of both: and witneſſes either of delivery of the deed, or of livery of ſeiſin by expreſſe tearmes was but of latter times, and the reaſon was in reſpect of the notoriety of the feoffment. And I have knowne ſome ancient deeds of feoffment having livery of ſeiſin indorſed ſuſpected, and after detected of forgerie. As if a deed in the ſtile of the king name him *defenſor fidei* before 13. H. 8. or *ſupreme head* before 20 H. 8. at what time he was firſt acknowledged ſupreme head by the cleargy; albeit the king uſed not the ſtile of *ſupreme head* in his charters, &c. till 22. H. 8. or *king of Ireland*, before 33. H. 8. at which time he aſſumed the title of *king of Ireland* (5), being before that called lord of Ireland, it is certainly forged, *et ſic de ſimilibus*. 21. H. 8. cap. 16.

And ſome have obſerved that *grace* was attributed to king H. 4. *excellent grace* to king H. 6. *majeſtie* to king H. 8. and before, the king was called *ſoveraigne lord*, *liege lord*, *highneſſe*, and *kingly highneſſe*, which in Latin in legall proceedings is called *regia celſitudo*, as the beginning of the petition of right to the king is *humillime ſupplicavit veſtræ celſitudini regiæ*, &c. and the like. And upon this occaſion it ſhall not be impertinent, ſeeing it is part of the formall deed, to ſet downe the ſeveral ſtiles of the kings of England ſince the Conqueſt. Vid. 2. H. 4. c. 15 where royall majeſty is attributed to the king, and crimen læſæ majeſtatis farr more ancient.

William the Conqueror commonly ſtiled himſelfe *Willielmus rex*, and ſometimes *Willielmus rex Anglorum*. And the like did William Rufus, and ſometimes *Willielmus Dei gratia rex Anglorum*.

Henry the firſt, *Henricus rex Anglorum*, and ſometimes *Henricus Dei gratia rex Anglorum*.

Mawde the ſole daughter and heire of H. 1. wrote *Matildis imperatrix Henrici regis filia et Anglorum domina*. Divers of whoſe creations and grants I have ſeene.

King Stephen uſed the ſtile that king H. 1. did.

Henry the 2. *Fitz-Empreſs* omitted *Dei gratia*, and uſed this ſtile, *Henricus rex Angliæ, dux Normanniæ, et Aquitaniæ, et comes Andegaviæ*, he having the duchy of Aquitaine, and earledome of Poitiers in the right of Elianor his wife heire to both; and the earldome of Anjowe, Tournie and Maine, as ſonne and heire to Jeffery Plantagenet by the ſaid Mawde his wife, daughter and ſole heire of king H. 1. She was firſt maried to Henry the emperor, and after his death to the ſaid Jeffery Plantagenet. Which duchie of Aquitaine doth include Gaſcoigne and Guian.

King R. 1. uſed the ſtile that H. 2. his father did, yet was he king of Cyprus, and after of Jeruſalem, but never uſed either of them.

[*f*] Mirror cap. 1. ſect. 6, and cap. 5. ſect. 1. Glanvil. lib. 10. cap. 12. Bract. lib. 5. fol. 396. Flet. lib 6 ca. 32. Brit. fo. 66.

[*g*] Vid. Tearmes of the Law, verb. Faits. Vid. Glanvil. lib. 10. c. 12. Mir. c. 1. ſect. 3. and c 3. (2. Ro. Abr. 66. pl. 13. Cro. Eliz. 903.)

King

(1) Beſides the books already cited on the ſubject of evidence, ſee *Duncombe's Trials per Pais* in the chapter on evidence, the *Law of Evidence*, and the title *Evidence* in the ſeveral Treatiſes on the Pleas of the Crown, and in the ſeveral Abridgments of Law and Equity. As to the book intitled the *Theory of Evidence*, it is included in the *Law of Niſi Prius*. The writings of the civilians on evidence are very numerous; and the curious reader may ſee an account of them in *Buderus*'s edition of the *Bibliotheca Juris ſelecta* by *Struvius*. Amongſt the moſt admired of their profeſſed writers on the ſubject are *Menochius de Præſumptionibus*, *Maſcardus de Probationibus*, *Everhardus de Teſtibus et Fide Inſtrumentorum*, and *Farinacius de Teſtibus*. Struvius's Bibliotheca Juris will be found very uſeful to the diligent ſtudent, by introducing him to a knowledge of the principal books on the law of nature and nations, the civil and canon law, and the laws of moſt of the countries in Europe, and of the characters of the ſeveral writers. It is to be wiſhed, that we had a *Bibliotheca Juris Anglicani*, written on the ſame critical and enlarged plan. Such a work has been attempted by Mr. *Gatzert*, a German writer, who has lately publiſhed at Gottingen a book entitled *Commentatio Juris Exotici Hiſtorico-Litteraria de Jure Communi Angliæ*. But though Mr. Gatzert, when the diſadvantage of his being a foreigner is conſidered, has really done wonders; yet it is not to be conceived, that ſuch a work can ever be executed with the requiſite judgment, accuracy, and nicety, until the taſk is undertaken by one of our own country, who hath been regularly trained in the ſtudy of the Engliſh law, and is familiarly acquainted with all the writers on our laws, conſtitution, and hiſtory.—(2) In the Second Inſtitute, ſir Edward Coke ſeems to think, that the clauſe of *teſte me ipſo* was firſt introduced into the king's grants in the time of Richard the *ſecond*; but Mr. Madox dates the uſe of it much earlier, and gives an inſtance in the reign of Richard the *firſt*. See 2. Inſt. 77. and Mad. Form. Anglic. Diſſert. p. 32.—(3) The caſes in 3. Leon. 33. and 2. Ro. Abr. 66. pl. 13. are *contra*. That in Cro. Eliz. 902. and 917. alſo ſeems *contra* on the firſt reading; though, on examination, the queſtion appears to have been rather on the manner of pleading the deed, than on the operation of it. But in Car Rep. 123. there is a caſe of the 21. and 22. Eliz. in which the two chief juſtices and the chief baron certified to the chancellor, that a leaſe was good in law, though the leſſee was named in the *habendum* only; and the caſe in Allen 41. is alſo with lord Coke.—(4) See further as to the antiquity of ſealing deeds, in Seld. Jan. Angl. b. 2. c. 2. Mad. Form. Anglic. Diſſert. p. 27. and Nicholſ. Engl. Hiſtor. Libr. ad. ed. 241.—(5) See Poſt. 7. b. n. 1.

King John used that stile, but with this addition, *dominus Hiberniæ*, and yet all that he had in Ireland was conquered by his father king H. 2. which title of *dominus Hiberniæ*, he assumed as annexed to the crowne, albeit his father, in the 23. yeare of his raigne, had created him king of Ireland in his life time (1).

King H. 3. stiled himselfe as his father king John did, untill the 44. yeare of his raigne, and then he left out of his stile *dux Normanniæ, et comes Andegaviæ*, and wrote onely *rex Angliæ, dominus Hiberniæ, et dux Aquitaniæ*.

King E. 1. stiled himselfe in like manner as king H. 3. his father did, *rex Angliæ, dominus Hiberniæ, et dux Aquitaniæ*. And so did king E. 2. during all his raigne. And king E. 3. used the selfe same stile untill the 13. yeare of his raigne, and then he stiled himselfe in this forme *Edwardus Dei gratia rex Angliæ et Franciæ, et dominus Hiberniæ*, leaving out of his stile *dux Aquitaniæ*. He was king of France as sonne and heire of Isabel wife of king E. 2. daughter and heire of Philip le Beau, king of France. He first quartered the French armories with the English in his great seale, *anno Domini* 1338. *et regni sui* 14.

King R. 2. and king H. 4. used the same stile that king E. 3. did. And king H. 5. untill the 8. yeare of his raigne continued the same stile, and then wrote himselfe *rex Angliæ hæres et regens Franciæ, et dominus Hiberniæ*, and so continued during his life.

Vid. Rot. Parliam. anno 1. H. 6. nu. 15. he was stiled rex Franciæ et Angliæ, et dominus Hiberniæ.

King H. 6. wrote, *Henricus Dei gratia rex Angliæ et Franciæ, et dominus Hiberniæ*. This king being crowned in Paris king of France used the said stile 39. yeares, till he was dispossessed of the crowne by king E. 4. who after he had raigned also about ten yeares, king H. 6. was restored to the crowne againe, and then wrote, *Henricus Dei gratia rex Angliæ et Franciæ, et dominus Hiberniæ ab inchoatione regni sui 49. et recaptionis regiæ potestatis primo.*

King E. 4. R. 3. and H. 7. stiled themselves, *rex Angliæ et Franciæ, et dominus Hiberniæ*.

King H. 8. used the same stile till the tenth yeare of his raigne, and then he added this word (*octavus*) as *Henricus octavus Dei gratia, &c.* In the 13. yeare of his raigne he added to his stile *fidei defensor* (2). In the 22. yeare of his raigne, in the end of his stile he added *supremum caput Ecclesiæ Anglicanæ* (3). And in the 23. yeare of his raigne he stiled himselfe thus, *Henricus octavus Dei gratia Angliæ, Franciæ et Hiberniæ rex, fidei defensor, &c. et in terra ecclesiæ Anglicanæ et Hiberniæ supremum caput* (4).

King E. 6. used the same stile, and so did queene Mary in the beginning of her raigne, and by that name summoned her first parliament, but soone after omitted *supremum caput*. And after her marriage with king Philip, the stile notwithstanding that omission was the longest that ever was, *viz. Philip and Mary, by the grace of God, king and queene of England and France, Naples, Jerusalem; and* (5) *Ireland, defenders of the faith, princes of Spaine and Cicilie, archdukes of Austria, dukes of Millaine Burgundy and Brabant, countees of Hasburgh Flanders and Tyroll.* And this stile continued till the fourth and fifth yeare of king Philip and queene Mary, and then Naples was put out, and in place thereof both the Cicilies put in, and so it continued all the life of queene Mary.

I need not mention the stile of queene Elizabeth, king James, nor of our soveraigne lord king Charles, because they are so well knowne, and I feare I have beene too long concerning this point, which certainly is not unnecessary to be knowne for many respects. But to shew the causes and reasons of these alterations would aske a treatise of itselfe (6), and doth not sort to the end that I have aimed at. And now let us returne to the learning of charters and deeds of feoffments and grants.

Livery of seisin incident to a feoffment. Vid. sect. 59.

Very necessary it is that witnesses should be underwritten or indorsed, for the better strengthening of deeds, and their names (if they can write) written with their owne hands. For livery of seisin see hereafter, Sect. 59. and for deeds, Sect. 66. and of conditionall deeds see our author in his chapter of Conditions. And now let us proceed to the other words of our author.

Mirr. cap. 2. sect. 15. Bract. lib. 2. fol. 62. b. Flet. lib. 6. cap. 1. & 54. & lib. 1. cap. 13. Glanvil. lib. 7. ca. 1. & ca. 12. & 13. (Post. 237. b.)

A luy et a ses heires. *Hæres*, in the legall understanding of the common law, implyeth that he is *ex justis nuptiis procreatus*, for *hæres legitimus est quem nuptiæ demonstrant*, and is he to whom lands, tenements, or hereditaments by the act of God, and right of blood do descend of some estate of inheritance, for *solus Deus hæredem facere potest, non homo: dicuntur autem hæreditas et hæres ab hærendo, quod est arcte insidendo, nam qui hæres est, hæret, vel dicitur ab hærendo quia hæreditas sibi hæret, licet nonnulli hæredem dictum velint quod heres fuit, hoc est dominus terrarum, &c. quæ ad eum perveniunt.*

Who may inherit

[a] Bract. lib. 5. fol. 437. 438. Brit. ca. 66. fol. 167. & ca. 83. Fleta lib. 1. ca. 5. (Post. 29. b.)

A monster which hath not the shape of mankind, cannot be heire or inherit any land, albeit it be brought forth within marriage, [a] but although he hath deformity in any part of his body, yet if he hath human shape he may be heire. *Hii qui contra formam humani generis converso more procreantur, ut si mulier monstrosum, vel prodigiosum enixa, inter liberos non computentur, partus tamen cui natura aliquantulum ampliaverit vel diminuerit, non tamen superabundanter (ut si sex digitos vel nisi quatuor habuerit) bene debet inter liberos connumerari.*

Si

(1) See further as to the deduction and change of the king's title in respect to Ireland, in Seld. Tit. Hon. b. 1. c. 4. s. 2.

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

(3) See Burn. Hist. Reform. v. i. p. 136.

(4) See the 35. H. 8. c. 3. which ratifies the king's stile.

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

(6) See further concerning the stiles of the kings of England, and also of Great Britain, since the union of the two kingdoms, in Nicholf. Engl. Histor. Libr. 2d ed. p. 248 and the several Treatises which have been published on the English Coins.

Si inutilia natura reddidit, ut ſi membra tortuoſa habuerit, non tamen is partus monſtroſus. Another ſaith, *ampliatio ſeu diminutio membrorum non nocet.* [b] A baſtard cannot be heire, for (as hath beene ſaid before) *qui ex damnato coitu naſcuntur inter liberos non computentur.* Every heire is either a male, or female, or an hermaphrodite, that is, both male and female. And an hermaphrodite (which is alſo called *Androgynus*) ſhall be heir, either as male or female, according to that kinde of the ſexe which doth prevaile. *Hermaphrodita, tam maſculo, quam fœminæ comparatur, ſecundum prævaleſcentiam ſexus incaleſcentis.* And accordingly it ought to be baptized. See more of this matter, Sect. 35.

[b] Vid. Sect. 188. 399. Bract. lib. 2. fo. 92. Brit. fo. Fleta li. 1. ca. 5. & l. 6. c. 8. Fleta ubi ſupra. 3. R. 2. entr. cong. 38. (1. Ro. Abr. 625.)

[c] A man ſeiſed of lands in fee hath iſſue an alien that is borne out of the king's ligeance; he cannot be heire, *propter defectum ſubjectionis* (1), albeit he be borne within lawfull marriage. If made denizen by the king's letters patent, yet cannot he inherit to his father or any other. But otherwiſe is it, if he be naturalized by act of parliament, for then he is not accounted in law *alienigena*, but *indigena*. But after one be made denizen, the iſſue that he hath afterwards ſhall be heire to him, but no iſſue that he had before. If an alien commeth into England and hath iſſue two ſonnes, theſe two ſonnes are *indigenæ* ſubjects borne, becauſe they are borne within the realme. And yet if one of them purchaſe lands in fee, and dyeth without iſſue, his brother ſhall not be his heire (2); for there was never any inheritable blood betweene the father and them, and where the ſonnes by no poſſibility can be heire to the father, the one of them ſhall not be heire to the other. See more at large of this matter, Sect. 198.

[c] Mirror ca. 1. Ca. 3. Sect. ca. 5. Sect. Bract. lib. 5. fo. 415. 427. Britt. fo. 29. Fleta lib. 6. ca. 47. 13. E. 3. Br. 677. 25. E. 3. de natis ultra mare. 31. E. 3. Couſinage. 5. 42. E. 3. 2. 11. H. 4. 26. 14. H. 4. 19. 20. 3. H 6. 55. 22. H. 6. 38. 9. H. 4. 7. 7. Co. 1. in Calvyn's caſe. (Cro. Jam. 539. Godb. 275. 1. Sid. 195. 201. Noy 158. T. Jo 10. Vaugh. 274. 2. Sid. 23. Hardr. 224. 2. Ventr. 1.)

If a man be attainted of treaſon, or felony, although he be borne within wedlocke, he can be heire to no man, nor any man heire to him *propter delictum*, for that by his attainder his blood is corrupted. And this corruption of blood is ſo high, as it cannot abſolutely be ſalved, and reſtored but by act of parliament; for albeit the perſon attainted obtaine his charter of pardon, yet that doth not make any to be heire whoſe blood was corrupted at the time of the attainder, either downward or upward. [d] As if a man hath iſſue a ſonne before his attainder, and obtaineth his pardon, and after the pardon hath iſſue another ſonne, at the time of the attainder the blood of the eldeſt was corrupted, and therefore he cannot be heire. But if he die living his father, the younger ſonne ſhall be heire, for he was not in *eſſe* at the time of the attainder, and the pardon reſtored the blood as to all iſſues begotten afterwards. But in that caſe if the eldeſt ſonne had ſurvived the father, the younger ſonne cannot be heire, becauſe he hath an elder brother which by poſſibilitie might have inherited; but if the elder brother had been an alien, the younger ſonne ſhould be heire, for that the alien never had any inheritable blood in him (3). See more plentifully of this matter, Sect. 746, 747.

1. Ed. 3. 4. 6. Ed. 3. 55. 27. E. 3. 77. 3. E. 2. diſcent. Br. 64. 31. E. 1. diſcent 17. 46. E. 3. Petition 20. 26. Aſſ. p 2. 49. Aſſ. pl 4. 29. Aſſ. p. 11. 9 H. 5 9.

[d] Stanf. pl. cor. 195. 196. Bract. lib. 3. fo. 132. 133. 276. & lib. 5. fo. 374. Britton fo. 215. b. Fleta lib 1. ca. 28. (Noy 170. Finch 8vo. ed. 207. Ante 2. b. Poſt. 129. Cro. Cha. 543. 1. Sid. 195. 202. 1. Ro. Abr. 625. Cro. Jam. 539.)

Acc. 1. Hen. 417. 426.

If a man hath iſſue two ſonnes, and after is attainted of treaſon, or felony, and one of the ſonnes purchaſe land and dieth without iſſue, the other brother ſhall be his heire; for the attainder of the father corrupteth the lineall blood onely, and not the collaterall blood between the brethren, which was veſted in them before the attainder, and each of them by poſſibility might have been heire to the father, and ſo hath it been adjudged (4), * but otherwiſe in the caſe of the alien-née, as hath been ſaid. [e] But ſome have holden that if a man after he be attainted of treaſon or felony have iſſue two ſonnes, that the one of them cannot be heire to the other; becauſe they could not be heir to the father, for that they never had any inheritable blood in them (5).

* In the Exchequer Mic. 40. & 41. Eliz. in le caſe de Hobby.

[e] Bract. lib. 3. fol. 130. Brit. fol. 15. Fleta lib. 1. cap. 58. (1. Sid. 193. 1. Lev. 60. Vaugh. 274 1. Ventr. 414.)

[f] One that is borne deafe and dumbe may be heire to another, albeit it was otherwiſe holden in ancient time. And ſo if borne deafe, dumbe and blinde, for *in hoc caſu vitio parcitur naturali*, but contract they cannot. Ideots, leapers, madmen, outlawes in debt treſpaſſes or the like, perſons excommunicated, men attainted in a *præmunire*, or convicted of hereſie, may be heires.

[f] Bract. lib. 5. fo 421. 430. 434. lib. 2. fo. 12. Fleta lib. 6. ca. 39. 47. 14. H. 3. Bre. 877. 32. E. 3. Age 8. 10. E. 3. 535. 18. E. 3. 53. 13. E. 3. Ley 49. (1. Ro. Abr. 626)

[g] If a man hath a wife, and dyeth, and within a very ſhort time after the wife marrieth againe, and within 9 months (6) hath a childe, ſo as it may be the childe of the one or the other, ſome have ſaid, that in this caſe the childe may chooſe (7) his father, *quia in hoc caſu filiatio non poteſt probari*, and ſo is the booke to be intended, for avoiding of which queſtion and other inconveniencies, this was the law before the Conqueſt, *Sit omnis vidua ſine marito duodecim menſibus, et ſi maritaverit perdat dotem* (8).

[g] 21. E. 3. 39. Panarollus nova rep. 485. &c. Opus eximium 48. b. Lambard de priſcis Anglorum legibus 120. 72. acc. (1. Ro. Abr. 357. Cro. Jam. 541. 3. S.C. Godb. 281.)

[h] A man by the common law cannot be heire to goods or chattels, for *hæres dicitur ab hæreditate.* [i] If a man buy divers fiſhes, as carps, breames, tenches, &c. and put them in his pond, and dyeth, in this caſe the heire ſhall have them, and not the executors, but they ſhall goe with the (9) inheritance, becauſe they were at libertie and could not be gotten without induſtrie, as by nets, and other engines. Otherwiſe it is, if they were in a trunke or the like. Likewiſe deere in a parke, conies in a warren, and doves in a dove-houſe, young and old, ſhall goe to the (10) heire. [k] But of ancient time the heire was permitted to have an action of debt upon a bond made to his anceſtor and his heires, but the law is not ſo holden at this day. Vid. Sect. 12.

[h] Bract. lib. 4. ca. 9. fo 265. lib. 2. fo. 62. b. Fleta lib. 6. ca. 1. 8. Co. 54. Sym's caſe. [i] Mich. 36. & 37. El. Rot. 25. Inter Gray and Paulet in the king's bench. Stanford 25. b. 18. E. 4. 8. 22. Aſſ. 25. 18. H. 8. 2.

[k] 13. E. 3. det. 135. 139. 140. 47. E. 3. 23 25. E. 3. fo. 48. 26. E. 3. fo. Vid. for an heireloom hæreditarium or principalios, Sect. 12.

[l] It is to be noted that one cannot be heire till after the death of his anceſtor. Before he is called *hæres apparens* heire apparent.

[l] Mirror ca. 1. Sect. 3.

(1) If the *father* in this caſe is to be ſuppoſed a *natural born* ſubject at the birth of the iſſue, the child would now be alſo a *natural born* ſubject, by force of the 7. Ann. c. 5. and 4. Geo. 2. c. 21. But the children of perſons attainted of, or liable to the penalties of treaſon, or in the ſervice of a foreign ſtate in enmity with Great Britain, are excepted from the benefit of this proviſion. See the 25. E 3. ſt. 2. which declares, that at common law, the children of the king, wherever born, may inherit. The ſame ſtatute enables children born abroad to inherit, if at their birth *both* their parents are within the king's allegiance, and their mothers paſs the ſea with the licenſe of their huſbands. Amongſt the MSS. in Lincoln's Inn library, there is a very learned dialogue between two ſerjeants on the 25. E. 3. See lib. no. 80. See alſo Poſt. 128. b. 129 and Cro. Cha. 601.—(2) In the caſe of Collingwood and Pace, the court denied this to be law, and held, that the ſons of aliens were inheritable to each other. See in 1. Sid. 193. and 1. Ventr. 413. the very elaborate ſpeech by lord chief juſtice Hale, on giving the judgment of the court. Alſo now by the 11. and 12. W. 3. c. 6 natural born ſubjects may derive a title by deſcent through their parents, though aliens; but the 25. G. 2. c. 40. confines the benefit of the former ſtatute to ſuch heirs, as ſhall be living and capable of taking at the death of the perſon laſt dying ſeized, unleſs ſuch heirs happen to be daughters, and there is afterwards a ſon or another daughter, for which caſes the ſtatute makes a ſpecial proviſion —(3) Beſides the authorities in the margin, ſee W. Jo. 34 —(4) S. p. acc. Noy. 158 4. Leon. 5.—(5) The principle, on which it has been adjudged that the children of an alien may be heirs as between themſelves, though not to their father, ſeems to reach the caſe of children born after their father's attainder. See the caſes cited in n. 2. ſupra —(6) See Poſt. 123 b. where this is ſaid to be the utmoſt time the law ſuppoſes a woman to go with child, and the authorities which the reader will find there cited on the ſubject.—(7) Brooke queſtions this doctrine; from which it ſeems as if he thought it reaſonable, that the circumſtance of the caſe, inſtead of the choice of the iſſue, ſhould determine who is the father. See Bro. Abr. Baſtardy, pl. 18. and Palm. 10.—(8) See 11, and 12. W. 3. c. 4. which diſables perſons educated in the popiſh religion, or profeſſing it, from inheriting, but in reſpect of themſelves only, if they do not conform within 6 months after the age of 18; and provides, that till they do conform, their proteſtant next of kin ſhall enjoy. By the ſame ſtatute papiſts are diſabled from taking lands by *purchaſe*, which ſhould have been mentioned before. For caſes on the conſtruction of this ſtatute, ſee 1. Stra. 267. 2. P. Wms. 3. 6. and 132. 3. P. Wms. 46. 1. Atk 526. 528. 2. Atk. 210. 3. Atk. 155. 457. 2. Veſ. [illegible]. 1. Wilſ. part. i. p. 176. Rep. Caſ. B. R. temp. Hardw. 149. Caſ. B. R. temp. Hardw. 91. and Vin. Abr. *Deviſe*, I. 7. pl. 4. and 5.—(9) Acc. Cro. Eliz. 372.—(10) It is ſaid, that though the party has only a term of years, ſtill ſuch things will go as acceſſary to the land. See Wentw. Off. Ex. ed. 1676. c. 5 p. 75.

In our old bookes and records there is mention made of another heire, *viz. hæres aſtrarius*, ſo called of Aſtre, that is, an harth of a houſe, becauſe the aunceſtor by conveyance hath ſet his heire apparent, and his family in a houſe and living in his life time, of whom Bracton ſaith thus, [a] *Item eſto quod hæres ſit aſtrarius, vel quod aliquis anteceſſor reſtituat hæredi in vita ſua hæreditatem, et ſe dimiſerit, videtur quod nullo tempore jacebit hæreditas, et ideo quod nec relevari poſſit, nec debeat, nec relevium dari.* [b] For the beneſit and ſafety of right heires *contra partus ſuppoſitos*, the law hath provided remedie by the writ *de ventre inſpiciendo*, whereof the rule in the regiſter is this, *Nota ſi quis habens hæreditatem duxerit aliquam in uxorem, et poſtea moriatur ille ſine hærede de corpore ſuo exeunte, per quod hæreditas illa fratri ipſius defuncti deſcendere debeat, et uxor dicit ſe eſſe prægnantem de ipſo defuncto cum non ſit, habeat frater, et hæres breve de ventre inſpiciendo.* It ſeemeth by Bracton and Fleta which followed him, that this writ doth lie, *Ubi uxor alicujus in vita viri ſui ſe prægnantem fecit cum non ſit, vel poſt mortem viri ſui ſe prægnantem fecit cum non ſit ad exhæredationem veri hæredis, &c. ad querelam veri hæredis per præceptum domini regis, &c.* which is to be underſtood according to the rule of the regiſter. When a man having lands in fee ſimple dieth, and his wife ſoon after marrieth againe, and faines herſelfe with childe by her former huſband, in this caſe though ſhe be married, the writ *de ventre inſpiciendo* doth lie (1) for the heire. But if a man ſeiſed of lands in fee (for example) hath iſſue a daughter, who is heire apparent, ſhe in the life of her father cannot have this writ for divers cauſes; firſt, becauſe ſhe is not heire, but heire apparent; for as hath been ſaid, *nemo eſt hæres viventis*, and this writ is given to the heire to whom the land is deſcended. And both Bracton and Fleta ſay, that this writ lyeth *ad querelam veri hæredis*, which cannot be in the life of his aunceſtor, and herewith agree Britton and the regiſter. Secondly, the taking of a huſband in the caſe aforeſaid being her owne act, cannot barre the heire of his lawfull action once veſted in him (2). Thirdly, the law doth not give the heire apparent any writ, for it is not certaine whether he ſhall be heire, *ſolus Deus facit hæredes*. Fourthly, the inconvenience were too great, if heires apparent in the life of their aunceſtor ſhould have ſuch a writ to examine and trie a man's lawfull wife in ſuch ſort as the writ *de ventre inſpiciendo* doth appoint, and if ſhe ſhould be found to be with childe, or ſuſpect, then ſhe muſt be removed to a caſtle and there ſafely kept untill her delivery, and ſo any man's wife might be taken from him againſt the lawes of God and man.

The words of the writ *de ventre inſpiciendo* make this evident, *Rex vic. ſalutem, monſtravit nobis A. quod cum R.* quæ fuit uxor Clementis *B. prægnans non ſit, ipſa falsò dicit ſe eſſe prægnantem de eodem Clemente*, ad exhæredationem *ipſius A. deſicut terra quæ fuit ejuſdem C.* ad ipſum A. jure hæreditario deſcendere debeat *tanquam* ad fatrem et hæredem *ipſius C. ſi prædict. R. juratem de eo non habuerit, &c.* But this rather belongs to the treatiſe of originall writs, and therefore thus much herein ſhall ſuffice (3).

And it is to be obſerved that every word of Littl. is worthy of obſervation, firſt (Heires) in the plurall number, for if a man give land to a man and to his heire in the ſingular number, he hath but an eſtate for life, for his heire cannot take a fee ſimple by deſcent, becauſe he is but one, and therefore in that caſe his heire ſhall take (4) nothing. Alſo obſervable is this conjunctive *(Et)*. For if a man give lands to one, To have and to hold to him *or* his heires, he hath but an (5) eſtate for life for the uncertaintie. *(Ses, ſuis)*. If a man give land unto two, To have and to hold to them two *et hæredibus* [c] omitting *ſuis* (6), they have but an eſtate for life for the uncertainty, whereof more hereafter in this ſection. But it is ſaid, if land be given to one man, *et hæredibus*, omitting *ſuis*, that notwithſtanding a fee ſimple paſſeth; but it is ſafe to follow Littleton.

[d] *Et de aſſignes.* Aſſignee cometh of the verb *aſſigno*. And note there be aſſignes in deed and aſſignes in law, whereof ſee more in the chapter of warrantie, Sect. 733.

Ceux parolx (ſes heires) tant ſolement ſont leſtate denheritance en touts feoffiments et grants. [e] *Si autem facta eſſet donatio, ut ſi dicam, do tibi talem terram, iſta donatio non extendit ad hæredes ſed ad vitam donatoris, &c.* [f] Here Littleton treateth of purchaſes by naturall perſons, and not of bodies politique or corporate; [g] for if lands be given to a ſole bodie politique or corporate, (as to a biſhop, parſon, vicar, maſter of an hoſpital, &c.) there to give him an eſtate of inheritance in his politique or corporate capacitie, he muſt have theſe words, To have and to hold to him and his ſucceſſors; for without theſe words *ſucceſſors*, in thoſe caſes there paſſeth no inheritance (7), for as the heire doth inherite to the anceſtor, ſo the ſucceſſor doth ſucceed to the predeceſſor, and the executor to the teſtator. [h] But it appeareth here by Littleton that if a man at this day give lands to I. S. and his ſucceſſors, this createth no fee ſimple in him, for Littleton ſpeaking of naturall perſons ſaith that theſe words (his heires) make an eſtate of inheritance in all feoffiments and grants, whereby he excludeth theſe words (his ſucceſſors). [i] And yet if it be an ancient grant it muſt be expounded as the law was taken at the time of the grant. [k] A chantry prieſt incorporate tooke a leaſe to him

[a] Bract. lib. 2. fo. 85. Heref. 8 E. 1 Ro. 80. de Banco. Mirror cap. 2. Sect. 18. Britton 151. b.

[b] Regiſtr. fo. 227. Bracton lib. 2. fo. 69. Britton fo. 165. Fleta lib. 1. ca. 14. (Cro. Eliz. 566. Cro. Jam. 685.)

Britton fo. 165. b. Regiſt. ubi ſupra.

Vid. Bracton, Britton and Fleta ubi ſupra. Regiſtr. ubi ſupra. Bracton and Fleta ubi ſupra have (ad exhæredationem.)

[c] 10. H. 6. 7. 22. H. 6 15. Pl. Com. 28. b. 22. E. 4. 16. 2. H. 4. 13. 20. E. 2. bre. 377.

[d] 5. Co. 96. 97. Brit fo. 28. H. 8. Dyer. Pl. Com. 287. 288. (Poſt. 22. a. 5. Co. 112.)

[e] Bract. lib. 2. cap. 39. fo. 92. b. Br. Ca. 39. fo. 99. b. Fleta lib. 6. ca. 1. 2. & lib. 3. cap. 2. 20. H. 6. 25. 36. 19. H 6. 17. 22. 74. 22. E. 4. 16. b. 4. E. 6. Pl. Com. 26.

[f] Vid. Sect. 413.

[g] 7. E. 3. 25. Vid. Sect. 686. 25. E. 3. 35. Bract. lib. 2. fo. 62. b. Vid. Sect. 413. (5. Co. 112. 1. Leon. 2.)

[h] Pl. Com. 242. Seignior Berkley's caſe.

[i] Vid. Brit. fo. 86. 121. & 170. 17. E. 3. 25. b. 33. H. 6. 22. 10. H. 7. 13. 14. 9. H. 7. 11. 16. H. 7. 9. 15. E. 4 13. 14. H. 6. 12 35. H. 6. 34 24. Aſſ. 14 40. Aſſ. 21. (Poſt 94.) Tr. 5 E. 3. Rot. 4. in Scaccario. 3. E. 3. 32. 7. E. 3. 40. 11 H. 4. 84. 12. H. 4. 12. 18. E. 3. Conuſans 39. b. 5. E. 4. 121. 38. E. 3. 4. Co 9. 28. in Caſe de Abb. de Strata Marcella.

(1) But in ſuch a caſe the manner of proceeding on the writ *de ventre inſpiciendo* is not the ſame, as where the party remains a widow In the caſe in Cro. Jam. 685. the wife was married to a ſecond huſband, when the writ *de ventre inſpiciendo* was ſued. Therefore, inſtead of ordering her into the ſheriff's cuſtody, and to be kept by him till delivered of the child, as the practice is, if the party is a widow, the court permitted the wife to remain with her huſband, on his entering into a recognizance, that ſhe ſhould not remove from the houſe they then inhabited, and that ſome of the women returned by the ſheriff ſhould ſee her every day, and that three or more of them ſhould be preſent at her delivery.—(2) This is a reaſon, why the *actual heir* ſhould *have* his writ notwithſtanding the wife's marrying a ſecond huſband, but is foreign to the *heir apparent's not having* the writ; and therefore I preſume has been placed here by miſtake.—(3) See further on the writ *de ventre inſpiciendo* Ailcough's Caſe Moſ. 391. & 2. P. Wms 591. in which the lord chn. King, on a petition, granted the writ, though the perſons applying were only tenants in tail; and note the ſpecial manner in which he ordered the writ to iſſue, and what he ſaid as to the execution of it. In Moſely's Report, a caſe of *perſonal* eſtate is cited, in which the then maſter of the Rolls, in conformity to the reaſon of the common law, directed that the maſter ſhould appoint two matrons to inſpect a woman. Some perhaps may think this a great ſtretch of power. I cannot conclude this note, without ſuggeſting the neceſſity of an act of parliament to regulate the proceedings on the writ *de ventre inſpiciendo*. If the writ was to be ſtrictly executed, it would be an *intolerable grievance*. On the other hand, if our courts of juſtice ſhould, without authority from the legiſlature, change the eſtabliſhed form for the ſake of ſoftening its rigor, it would be a *dangerous precedent*, and ſomething very like the exerciſe of a diſpenſing power.—(4) According to many authorities, *heir* may be *nomen collectivum*, as well in a deed as a will, and operate in both in the ſame manner as *heirs* in the *plural* number. See 2. Ro. Abr. 253. See alſo 1. Ro. Abr. 832. K. pl. 1. 2. Godb. 155. T. Jo. 111. Cro Eliz. 313. Robinſ. Gavelk. 95 96. Burr. 4. part v. 1. p. 38. & Vin. Abr. *Deviſe* U. a. pl. 13. & *Parols* H.—(5) See 5. Co. 112. Poſt. 214. & Plowd. 286. 289. in which laſt book it is particularly conſidered, where the *diſjunctive* ſhall be conſtrued as the *conjunctive*.—(6) See 2. Ro. Abr. 833. M. & Vin. Abr. *Eſtate* M.—(7) But a fee will paſs to a corporation *aggregate* without the word *ſucceſſors*, and ſometimes to a corporation *ſole*. See Poſt. 94. b. and Vin. Abr. *Eſtate* L.

him and his ſucceſſors for a hundred yeares, and after tooke a releaſe from the leaſor to him and his ſucceſſors, and it was adjudged that by the releaſe he had but an eſtate for life, [k] for he had the leaſe in his naturall capacity, for it could not go in ſucceſſion (1), and (his ſucceſſors) gave him no eſtate of inheritance for want of theſe words (his heires). [l] If the king by his letters patents giveth lands *decano et capitulo, habendum ſibi et hæredibus et ſucceſſoribus ſuis*, in this caſe, albeit they be perſons in their naturall capacity to them and their heires, yet becauſe the grant is made to them in their politique capacity, it ſhall enure to them and their ſucceſſors. And ſo if the king do grant lands to I. S. *habendum ſibi et ſucceſſoribus ſive hæredibus ſuis*, this grant ſhall enure to him and his heires.

[k] Hil. 21. Eliz Dyer's manuſcript, inter Anſley and Johnſon in Com. Banco. (4. Co. 65.)
[l] 18. H. 6. 11. b. &c. adjudge.

[m] B having divers ſonnes and daughters, A giveth lands to B, *et liberis ſuis, et a lour heires*, the father and all his children do take a fee ſimple joyntly by force of theſe words (their heires); (2) but if he had no childe at the time of the feoffement, the childe borne afterward ſhall not take (3).

[m] 15. E. 3. tit. Counterplea de Voucher 43. 37. H. 6. 30. 11. E. 4 2. (Cro. Jam. 374. 6. Co. 16. b. 1. Leon. 287.)

Theſe words (his heires) do not onely extend to his immediate heires, but to his heires remote and moſt remote, borne and to be borne, [n] *ſub quibus vocabulis (hæredibus ſuis) omnes hæredes propinqui comprehenduntur, et remoti, nati, et naſcituri*. And *hæredum appellatione veniunt hæredes hæredum in infinitum*. And the reaſon wherefore the law is ſo preciſe to preſcribe certaine words to create an eſtate of inheritance, is for avoiding of uncertainty, the mother of contention and confuſion.

[n] Fleta lib. 3. cap. 8.
Pl. Com. 163.

There be many words ſo appropriated, as that they cannot be legally expreſſed by any other word, or by any periphraſis or circumlocution: ſome to eſtates of lands, &c. as here and in [a] other places of our author. In this place theſe words *tantſolement*, not *ſolement* alone, but *tantſolement* all onely, i. e. *ſolummodo*, or *duntaxat*, are to be obſerved. [b] Some to tenures; [c] ſome to perſons; [d] ſome to offences; [e] ſome to forms of original writs, either for recovery of right, or removing, or redreſſe of wrong; [f] ſome to warrantie of land. Theſe have I touched for examples. I leave others to the ſtudious reader to obſerve, and add, holding this for an undoubted verity, that there is no knowledge, caſe, or point in law, ſeeme it of never ſo little account, but will ſtand our ſtudent in ſtead at one time or other, and therefore in reading, nothing to be pretermitted.

[a] Sect. 17. 62 133.
[b] Sect. 156. 161.
[c] Sect. 184
[d] Sect. 190. 194. 746.
[e] Sect. 9. 67. 194. 204 234. 236. 241. 405. 485. 478. 651. 655. 646. 620. 014. 637. 674. 692.
[f] Sect. 733.

Font leſtate. *Status dicitur à ſtando*, becauſe it is fixed, and permanent. The Iſle of Man, which is no part of the kingdom, but a diſtinct territory of itſelfe, hath beene granted by the great ſeale to divers ſubjects and their heires. [g] It was reſolved by the lord chancellor, the two chiefe juſtices and chiefe baron, that the ſame is an eſtate deſcendible according to the courſe of the common law; for whatſoever ſtate of inheritance paſſe under the great ſeale of England, it ſhall be deſcendible according to the rules, and courſe of the common law of England (4).

[g] Tr. 40. Eli. in le Count de Derby's caſe, by the Lo. Chancellor, les 2 chiefe Juſtices, & chiefe Baron.

En touts feoffments et grants. Here he giveth the feoffment the firſt place, as the ancient and the moſt neceſſary conveyance, both for that it is ſolemne and publike, and therefore beſt remembred and proved, [g] and alſo for that it cleareth all diſſeiſins, abatements, intruſions, and other wrongfull or defeaſible eſtates, where the entry of the feoffor is lawfull, which neither fine, recovery, nor bargaine and ſale by deede indented and inrolled doth. And here is implyed a diviſion of fee, or inheritance, *viz.* [b] into corporeall, as lands and tenements which lie in livery, comprehended in this word feoffment, and may paſſe by livery by deed, or without deed, which of ſome is called *hæreditas corporata*, and incorporeall, (which lie in grant, and cannot paſſe by livery, but by deede, as advowſons, commons, &c. and of ſome is called *hæreditas incorporata*, and, by the delivery of the deede, the freehold, and inheritance of ſuch inheritance, as doth lie in grant, doth paſſe) comprehended in this word Grant. And the deed of incorporeate inheritances doth equall the livery of corporeate. And therefore Littleton ſaith, in all feoffments and grants, *hæreditas, alia corporalis, alia incorporalis: corporalis eſt, quæ tangi poteſt et videri, incorporalis quæ tangi non poteſt, nec videri*.

[g] Vide Sect. 59. and 66.
[b] Mirror c. 2. ſect. 15. & c. 5. ſect. 1. Bract. lib. 2. fo. 53. 366. 368. Fleta lib. 3 ca. 1. 2. 15. Brit. 84. 87. a. & fol. 63. 101. 102. 141. 142. agreeth herewith. Pl. Com. 171. Hill & Grange.
Mirror ca. 5. ſect. 1. Britton cap. 34.

Feoffment is derived of the word of art *feodum, quia eſt donatio feodi*, for the ancient writers of the law called a feoffment *donatio* of the verb *do* or *dedi*, which is the apteſt word of feoffment (5). And that word Ephron uſed, * when he enfeoffed Abraham, ſaying, I give thee the field of Machpelah over againſt Mamre, and the cave therein I give thee, and all the trees in the field and the borders round about, all which were made ſure unto Abraham for a poſſeſſion, in the preſence of many witneſſes.

For the antiquity of Feoffments ſee the ſecond part of the Inſtitutes, Marlebridge, ca. 9. 8. E. 3. 24. 18. H. 6. 14. 39. H. 6. 39.
* Geneſis 23.

By a feoffment the corporeate fee is conveyed, and it properly betokeneth a conveiance in fee, as our author himſelfe hereafter ſaith, † in his chapter of Tenant for life. And yet ſometime improperly it is called a feoffment when an eſtate of freehold onely doth paſſe, *donc eſt noſme generall plus que neſt feoffment, car donc eſt generall a touts choſes moebles et nient moebles, feoffment eſt riens forſque del ſoyle*. And note there is a difference *inter cartam et factum*, for *carta* is intended

† Vide Sect. 57.
Britton cap. 34. 44. E. 3. 41.
See more of feoffments, Sect. 60.
See of factum, Sect. 259.

(1) The reaſon is, becauſe a chantry prieſt was a corporation *ſole*, which regularly could not take in ſucceſſion chattels *real* or *perſonal*, in *poſſeſſion* or *action*, though a corporation *aggregate* may. Acc. Poſt 46. b. 4. Co. 65. Hob. 64. But by *cuſtom*, ſome chattels will go in ſucceſſion to a *ſole* corporation, as in London, where the chamberlain is a ſpecial corporation for taking bonds, which has been frequently adjudged a good cuſtom. Cro. Eliz. 464. 682. 4. Co. 64. b. Alſo in ſome inſtances, particularly of chattels in *action*, the law is the ſame *without* a cuſtom. See 1. Ro. Abr. 515. pl. 3. 5. and Vin. Abr. *Corporation*, L. As to the king's taking the ancient jewels of the crown, which are a kind of *heir looms*, it is not to be conſidered as an inſtance of a *ſole* corporation's taking *chattels* in ſucceſſion, but rather as one of a perſonal chattel's deſcending like a thing of inheritance. See Poſt 18. b.—(2) But in this caſe, the children muſt be underſtood to be parties to the grant; for it is ſaid, that otherwiſe they can only take, where the limitation is to them by way of remainder. Cro. Eliz. 10.—(3) Acc. Cro. Eliz. 121. 334. Ow. 152. Lord C. J. Hale adds, *that the father takes the whole fee ſimple*. Hal. MSS.—But if the limitation to the children be a remainder, then the children born *after* may take. See Wild's caſe, 6. Co. 18. b. where will be found ſeveral other diſtinctions on this ſubject. See further 1. Ro. Rep. 254. See alſo Vin. Abr. *Deviſe*, Y. a. I am the more frequent in my reference to Mr. Viner's Abridgment, becauſe it tends to facilitate the uſe of that immenſe body of law and equity; which, notwithſtanding all its defects and inaccuracies, muſt be allowed to be a neceſſary part of every lawyer's library. It is indeed a moſt uſeful compilation, and would have been infinitely more ſo, if the author had been leſs ſingular and more nice in his arrangement and method, and more ſtudious in avoiding repetitions. Theſe faults, in great meaſure, proceeded from the author's error of judgment, in attempting to engraft his own very extenſive Abridgment on that of Mr. Serjeant Rolle, whoſe work, though moſt excellent in its kind, and in point of method, ſuccinctneſs, legal preciſion, and many other reſpects, fit to be propoſed as an example for other abridgments of law, was by no means calculated for the exceſſive enlargement from 2 vols. to 23 vols. in folio. It is not to be wondered at, that an incorporation of works, ſo widely different in *proportion* as well as *execution*, ſhould produce much confuſion and diſorder in the *effect*. Mr. Viner's labours would probably have advanced his reputation as a compiler much higher, if he had not attempted an union ſo unnatural.—(4) 8. C. 4. Inſt. 284. and 2 And. 115. See further concerning the Iſle of Man in Pryn. on 4. Inſt. 201. 384. Hale's Hiſt. Com. L. 183. Palm. 344. 1. P. Wms. 329. 1. Veſ. 202. 2. Veſ. 337. 1. Blackſt. Comment. 5th ed. p. 104. and Camp. Polit. Surv. of Brit. v. 1. p. 514.—(5) See more as to the word *feoffment*, in Mad. Formul. Angl. Diſſert. p. 3. 2. Inſt. 110.

intended a charter which doth touch inheritance, and so is not *factum* unless it hath some other addition (1).

Grant, *concessio*, is properly of things incorporeall, which (as hath been said) cannot passe without deed. And here it is to be observed, (that I may speak once for all,) that every period of our author in all his three books containes matter of excellent learning, necessarily to be collected by implication, or consequence. For example he saith here, that these words (*his heires*) make an estate of inheritance in all feoffments and grants. He expressing feoffments and grants, necessarily implyeth, that this rule extendeth not, first, to *last wills* and *testaments*; for thereby, [*i*] as he himselfe after saith, an estate of inheritance may passe without these words (his heires.) [*k*] As if a man devise 20 acres to another, and that he shall pay to his executors for the same ten pound, hereby the devisee hath a fee simple by the intent of the devisor (2), albeit it be not to the value of the land. [*l*] So it is if a man devise lands to a man *in perpetuum*, or to give and to sell, or in *feodo simplici*, or to him and to his assigns for ever. In these cases a fee simple doth passe by the intent of the devisor. But if the devise be to a man and his assignes without saying (for ever), the devisee hath but an estate for life. [*m*] If a man devise land to a man *et sanguini suo*, that is a fee simple; but if it be *semini suo*, it is an estate taile (3).

[*n*] Secondly, that it extendeth not to a *fine sur conusans de droit come ceo que il ad de son done*, by which a fee also may passe without this word (heires) in respect of the height of that fine, and that thereby is implyed that there was a precedent gift in fee.

Thirdly, Nor to *certain releases*, and that three manner of waies, [*o*] first when an estate of inheritance passeth and continueth, as if there be three coparceners or joyntenants, and one of them release to the other two, or to one of them generally without this word (heirs), by Littleton's own opinion they have a fee simple as appeareth hereafter. 2. By release [*p*] when an estate of inheritance passeth and continueth not, but is extinguished, as where the lord releaseth to the tenant, or the grantee of a rent, &c. release to the tenant of the land generally all his right, &c. hereby the seigniory, rent, &c. are extinguished for ever, without these words (heires). [*q*] When a bare right is released, as when the disseisee release to the disseisor all his right, he need not (saith our author in another place) speake of his heires. But of all these, and the like cases, more shall be treated in their proper places. 4. Nor to a *recovery*. A seised of land suffereth B to recover the land against him by a common recovery where the judgment is *quod prædictus B. recuperet versus præd. A. tenementa prædicta cum pertin'*, yet B recovereth a fee simple without these words (heires); for regularly every recoveror recovereth a fee simple. 5. Nor to *a creation of nobilitie by writ*; for when a man is called to the upper house of parliament by writ, he is a baron and hath inheritance therein without the word (heires). (4) Yet may the king limit the generall state of inheritance created by the law and custome of the realme to the heires males, or generall, of his body by the writ, as he did to Bromflete, who in 27. H. 6. was called to Parliament by the name of the lo. Vescye, &c. with the limitation in the writ to him and the heires males of his bodie. But if he be created by patent, he must of necessitie have these words (his heires) or the heires males of his bodie, or the heires of his body, &c. otherwise he hath no inheritance. The first creation of a baron by patent that I finde was of John Beauchampe of Holte, created baron by patent in 11. R. 2. (5). for barons before that time were called by writ. And it is to be observed, that of ancient times earles, &c. were created by girding them with a sword, and nominating him earle, &c. of such a countie or place, and this with a calling of him to parliament by writ, by that name was a sufficient creation of inheritance.

But out of this rule of our author the law doth make divers exceptions (*et exceptio probat regulam*); for sometime by a feoffment a fee simple shall passe without these words (his heires). For example, first, [*r*] if the father infeoffe the sonne, to have and to hold to him and to his heires, and the sonne infeoffeth the father as fully as the father infeoffed him, by this the father hath a fee simple, (6) *quia verba relata hoc maxime operantur per referentiam ut in esse videntur*. [*s*] Secondlie, in respect of the consideration, a fee simple had passed at the common law without this word (heires), and at this day an estate of inheritance tayle. As if a man had given land to a man with his daughter in frankmarriage generally, a fee simple had passed without this word (heires) for there is no consideration so much respected in law, as the consideration of marriage, in respect of alliance and posteritie. [*t*] Thirdly, if a feoffment or grant be made by deed to a mayor and communaltie or any other corporation aggregate of manie persons capable, they have a fee simple without the word (successors); (7) because in judgment of the law they never dye. [*u*] Fourthly, in case of a sole corporation a fee simple shall sometime passe without this word (successors). As if a feoffment in fee be made of land to a bishop, to have and to hold to him in *libera eleemosina*, a fee simple doth passe without this word (successors). [*w*] And so if a man give lands to the king by deede inrolled; a fee simple doth passe without these words (successors or heires); because in judgment of law the king never dieth. Fifthly, in grants sometimes an inheritance shall passe without this word (heires)

3. Co. 63. in Lincolne Colledge case.
(1. Ro. Abr. 833. 6. Co. 16. b.)

[*i*] Litt. lib. 3. c. de Attorn. sect. 5. 8, 6. 4. E. 6. Estates Br. 73. 29. H. 8. Testaments 18. 22. Eliz. Dier 371. Temps H. 8. tit. Conscience Br. 25. (3. Co. 21.)

[*k*] 21. E. 3. 16. 34. H. 6. 7. 19. H. 8. 9. 3. Co. 21. in Boraston's case, 6. Co. 16. 17. 10. Co. 67.

[*l*] Vide sect. 585.

[*m*] Mich. 40. & 41. Eliz. in Error int. Downhall & Catesby adjudge. Brooke tit. Taile 21.

[*n*] 1. Co. 100. Shellye's case. 42. E. 3. 7. 19. H. 6. 17. b. 22. b. Pl. Com. 248.

[*o*] Litt. lib. 2. ca. Tenant in Common, sect. 304. 305. cap. Attorn. sect. 374. Dier 9. Eliz. 263.

[*p*] Litt. lib. 3. c Releases. sect. 479. 480. 20. H. 6. 17. 19. H. 6. 17. 22.

[*q*] Litt. cap. Releases. sect. 467.

27. H. 6. Lo. Vescie's case. (7. Co. 33. b.)

[*r*] 39. Ass. 12. 41. E. 3. tit. Feoffments & faits 254. 14. H. 4. 13. 34. E. 3. Avowry 258.

[*s*] Vide Sect. 17. 12. H. 4. 19. in Formedon.

[*t*] 8. E. 3. 27. 11. H. 7. 12. 22. E. 4. 11. H. 4. 84. 2. H. 4. 13.

[*u*] 19. H. 6. 74. 20. H. 6. 36. (1. Ro. Abr. 43.)

[*w*] Pl. Com. Lo. Berkleye's case.

(1) See further as to the distinction between *charters* and *deeds*, and the various other names of writings before and since the Conquest, in Mad. Form. Angl. Dissert. p. 2. and Mad. Hist. Exch. Pref. Ep. p. 8.

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

(3) As to the passing of an estate of inheritance in *last wills* without the word *heirs*, see the title *Devise*, in the several Abridgments of Law and Equity, and Gilb. Law of Devises.

(4) See as to this, Mr. Serj. Rolle's argument in Coll. Proc. on Claims of Baronies, 209. 221.

(5) Acc. Post 16. b. Seld. Jan. Angl. b. 2. c. 15. and Seld. Tit. Hon. 2d ed. p. 747. which latter book contains the form of the letters patent to lord Beauchamp.

(6) Adj. contra 39. lib. Ass. pl. 12. but Rolle abridges the case with a *quære*. See 1. Ro. Abr. 833. pl. 7.

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

(heires) [x] as if partition be made betweene coparceners of lands in fee ſimple, and for owelty of partition the one grant a rent to the other generally, the grantee ſhall have a fee ſimple without this word (heires) (1); becauſe the grantor hath a fee ſimple in conſideration whereof he granted the rent, *ipſæ etenim leges cupiunt ut jure regantur*. Sixthly, by the forreſt law if an aſſart be granted by the king at a juſtice ſeat (which may be done without charter) to another *habendum et tenendum ſibi inperpetuum*, he hath a fee ſimple without this word (heires) [y] for there is a ſpeciall law of the forreſt, as there is a law marſhall for wars, and a marine law for the ſeas. [z] And this rule of our author extendeth to the paſſing of eſtates of inheritances in exchanges, releaſes, or confirmations that enure by way of enlargement of eſtates, warranties, bargaine and ſales by deed indented and inrolled, and the like in which this word (heires) is alſo neceſſary, for they do tantamount to a feoffment or grant, or ſtand upon the ſame reaſon that a feoffment or grant doth, for like reaſon doth make like law, *ubi eadem ratio, ibi idem jus* (2). And this is to be obſerved throughout all theſe three books, that where other caſes fall within the ſame reaſon, our author doth put his caſe but for example, for ſo our author himſelfe in another place * explaneth it, ſaying, *et memorandum que en touts autres caſes, coment que ne ſont icy expreſſment moves et ſpecifies, ſi ſont en ſemblable reaſon ſont en ſemblable ley*. And here our author is to be underſtood to ſpeak of heires when they are inheritable by deſcent, for they are capable of land alſo by purchaſe, and then the courſe of deſcent is ſometimes altered. As if lands of the nature of gavelkind be given to B, and his heires having iſſue divers ſons, all his ſons after his deceaſe ſhall inherit (3); but if a leaſe for life be made the remainder to the right heires of B and B dieth, his eldeſt ſon only ſhall inherite, for he only to take by purchaſe is right heire by the common law(4). So note a diverſity betweene a purchaſe and a deſcent. But where the remainder is limited to the right heires of B it need not to be ſaid, and to their heires, for being plurally limited it includeth a fee ſimple, and yet it reſteth but in one by purchaſe.

Out of that which hath beene ſaid it is to be obſerved, that a man may purchaſe lands to him and his heires by ten manner of conveyances, (for I ſpeake not here of eſtoppells.) Firſt, by feoffment; ſecondly, by grant (of which two our author here ſpeaketh). Thirdly, by fine, which is a feoffment of record. Fourthly, by common recovery, which is a common conveyance and is in nature of a feoffment of record. Fifthly, by exchange, which is in nature of a grant. Sixthly, by releaſe to a particular tenant. Seventhly, by confirmation to a particular tenant, both which are in nature of grants. Eighthly, by grant of a reverſion or remainder with attornment of the particular tenant, of all which our author ſpeaketh hereafter. Ninthly, by bargaine and ſale by deede indented and inrolled ordained by ſtatute ſince Littleton wrote. Tenthly, by deviſe by cuſtome of ſome particular place, as he ſheweth hereafter, and ſince he wrote, by will in writing, generally by authority of parliament.

What words are apt words for a feoffment or grant, vide ſect. 531. Our author ſpeaketh of feoffments and grants, whereby is implyed lawfull conveyances, and therefore this rule extendeth not to diſſeiſins, abatements or intruſions into lands or tenements or to uſurpations to advowſons, &c. in which caſes eſtates in fee ſimple are gained by the act and wrong of the diſſeiſors, abators, intruders and uſurpers; (5) and if a diſſeiſin, abatement, or intruſion be made to the uſe of another, if *ceſtui que uſe* agreeth thereunto in *pays*, by this bare agreement he gaineth a fee ſimple without any livery of ſeiſin or other ceremony.

[x] 29. Aſſ. 23. 15. H. 7. 14. 2. H. 7. 5. 11. H. 4. 3. 21. E. 3. 1. 21. Aſſ.

[y] 40. H. 7. 7. (4. Inſt. 314.)

[z] 22. E. 3. 3. 45. E. 2. 20. 6. E. 3. 22. 4. Co. 1. Buſtard's caſe. Vide ſect. 465 469. 610. 19. H. 6. 17. 22. 19. E. 2. Garr. 85.

* Sect. 301.

(Poſt 10. b. Dy. 133. b. Hob. 31. 1. Co. 101. 103.)

27. H. 8. ca. 16.
32. H. 8. ca. 2.
34. H. 8. ca. 5.

Sect 531.

37 Aſſ. p. 8. 38. Aſſ. p. 9. 12. E. 4. 9. &c.

Sect. 2.

ET ſi home purchaſe terres en fee ſimple et devy ſans iſſue, cheſcun que eſt ſon prochein coſin collateral del entire ſanke, de quel pluis long degree qu'il ſoit (6), *poet inheriter et aver meme la terre come heire a luy.*

AND if a man purchaſe land in fee ſimple and die without iſſue, he which is his next choſen collaterall of the whole blood, how farre ſo ever he be from him in degree, may inherite and have the land as heire to him.

LITTLETON ſheweth here who ſhall be heire to lands in fee ſimple, for he intendeth not this caſe of an eſtate taile, for that he ſpeaketh of an heire of the whole blood, for that extendeth not to eſtates in taile, as ſhall be ſaid hereafter in this chapter, ſection 6. (Plowd. 444.)

Prochein coſin collaterall. Neither excludeth he brethren or ſiſters, becauſe he hath a ſpeciall caſe concerning them in this chapter, ſect. 5. and in his chapters of Parceners; but this is intended where

(1) Acc. Plowd. 134. b.—(2) For other inſtances in which a fee will paſs by deed or grant without the word *heirs*, ſee Vin. Abr. *Eſtate*, K. 2. and L. To the caſes in Viner, add 8. H. 4. 4. 16. b. 19. H. 6. 17. 20 H. 6. 36. 27. H. 8. 8. b. Dy. 169. which I do not ſee cited by him. See alſo Aſh. Repertor. tit. *Eſtate*.—(3) Here *heirs* being a word of limitation, none can take under it but by *deſcent*; and the land being *gavelkind*, the deſcent is to all the ſons, who are as much heirs to *ſuch* land, as the eldeſt ſon is heir to land deſcending according to the common law. The cuſtom of *gavelkind* extends to eſtates tail, and ſo irreſiſtible is the cuſtomary deſcent both of *gavelkind* and *borough-engliſh* land according to ſome authorities, that, even in the caſe of eſtates tail, it cannot be changed by expreſs words directing a deſcent *ſecundum curſum communis legis* Dy. 128. b. pl. 45. See Robinſ. Gavelk. 94. Mr. Robinſon's book on *Gavelkind* is a very excellent *law-treatiſe*, and *generally* comprehends every thing relative to his ſubject; but in this part of it, he is rather ſhort in his explanation; for though he takes notice of the cuſtom's applying to eſtates tail, yet he neither mentions the caſe from Dyer, nor hints whether *expreſs* words are as inſufficient to exclude the cuſtom from eſtates tail, as they certainly are to controul the deſcent of eſtates in fee. Perhaps the author's ſilence might proceed from his doubts on the ſubject. See further the caſe of *taniſtry*, Dav. 31. a. & 36. b. In that caſe it was reſolved, that the cuſtomary deſcent was interrupted by the grant of an eſtate tail; but then the judges proceeded on a principle quite conſiſtent with the *general* doctrine in Dyer. They held, firſt, that the cuſtom of *taniſtry* only applied to lands going with the *chiefry* or *ſeigniory*, from which the lands in queſtion had been ſevered by the grant of the eſtate tail; and ſecondly, that the cuſtom of *taniſtry* was not *inherent in the land*, like the cuſtoms of *gavelkind* and *borough-engliſh*, but merely *perſonal to the eldeſt and moſt worthy*, and therefore became extinguiſhed for ever, when the land was conveyed to *another* perſon, that is, the heir at common law.—(4) Acc. Rob. Gavelk. 117. 118. and the authorities there cited. The reaſon ſeems to be, that though the *ſubject* of the gift is *cuſtomary* land, the heir at *common law* is preſumed to be meant, unleſs words are added to deſcribe the *cuſtomary* heir. But if *ſuch ſpecial* words are uſed, the preſumption fails; and then it is ſaid, that though the *ſubject* of the gift is *common law-land*, yet the *cuſtomary heir* ſhall be preferred. On this principle, lord ch. Cowper, in a caſe before him, declared, that if one, having *borough engliſh* land and alſo lands at *common law*, deviſes the latter to his heir by the cuſtom of *borough engliſh*, this will be a ſufficient deſcription of the youngeſt ſon, though not heir at common law, and though the deviſe is not of the *cuſtomary*, but of the *common law* land; and that a like deviſe to *gavelkind* heirs would entitle all the ſons. 2. Vern. 732. and Prec. in Cha. 464. But ſee further on this latter ſubject, Poſt 24. b. where lord Coke writes, that to take by *purchaſe* under a limitation to the *heirs female*, the perſon claiming muſt be both *heir* and *female*. See alſo the note, in which it is attempted to juſtify lord Coke for that doctrine, and to explain the qualifications with which it ought to be underſtood.—(5) See Ante 3. b. and Poſt 18. b.—(6) *De lui*. L. and M. Roh. Red.

where a man purchaſeth lands and dieth without iſſue, and having neither brother nor ſiſter, then his next couſin collaterall ſhall inherite(1). So as here is implyed a diviſion of heires, *viz.* lineall (whoever ſhall firſt inherite) and collaterall, (who are to inherite for default of lineall.) For in deſcents it is a *maxime* in law, *quod linea recta ſemper præfertur tranſverſali*. Lineall deſcent is conveyed downward in a right line, as from the grandfather to the father, from the father to the ſonne, &c. Collaterall deſcent is derived from the ſide of the lineall, as grandfather's brother, father's brother, &c. *Prochein couſin collaterall enheritera* doth give a certain direction to the next couſin to the ſonne, and therefore the father's brother and his poſterity ſhall inherite before the grandfather's brother and his poſterity. *Et ſic de cæteris*, for *propinquior excludit propinquum, et propinquus remotum, et remotus remotiorem.*

Glanvill lib. 7. ca. 3. 4. Bract. lib. 2. c. 30. fo. 65. Britton cap. 119. Fleta lib. 6. cap. 1. & 2. (Plowd. 444.)
Bract. lib. 2. cap. 30. fo. 64. Fleta lib. 5. cap. 5. & lib. 6. cap. 1. and 2. Britton cap 119. Mirror 11. cap. 1. ſect. 3. 30. Aſſ. p. 47. (3. Co. 40. 42.)

Upon this word (*prochein*) I put this caſe. One hath iſſue two ſonnes A and B and dieth, B hath two ſonnes C and D and dieth. C the eldeſt ſonne hath iſſue and dieth: A purchaſeth lands in fee ſimple and dieth without iſſue. D is his next couſin, and yet ſhall not inherite, but the iſſue of C, for he that is inheritable is accounted in law next of blood. And therefore here is underſtood a diviſion of *next*, viz. *next jure repræſentationis*, and *next jure propinquitatis*, that is, by right of repreſentation and by right of propinquity. And Littleton meaneth of the right of repreſentation, for legally in courſe of deſcents he is next of blood inheritable. And the iſſue of C doth repreſent the perſon of C, and if C had lived he had been legally next of blood. And whenſoever the father if he had lived, ſhould have inherited, his lineall heire by right of repreſentation ſhall inherite before any other, though another be *jure propinquitatis* neerer of blood. And therefore Littleton intendeth his caſe of next couſin of blood immediately inheritable. So as this produceth another diviſion of next blood, *viz.* immediately inheritable, as the iſſue of C, and mediately inheritable as D, if the iſſue of C die without iſſue; for the iſſue of C and all that line be they never ſo remote ſhall inherit before D or his line, and therefore Littleton ſaith well *de quel pluis long degree que il ſoit*. And here ariſeth a diverſity in law between next of blood inheritable by deſcent, and next of blood capable by purchaſe. And therefore in the caſe before mentioned if a leaſe for life were made to A, the remainder to his next of blood in fee, in this caſe as hath been ſaid D ſhall take the remainder, becauſe he is next of blood and capable by purchaſe, though he be not legally next to take as heire by deſcent (2).

19. R. 2. tit. Gar. 100.

(2 Inſt. 7.)

30. Aſſ. p. 47.

Sect. 3.

UNcore le pier eſt pluis prochein de ſanke. And therefore ſome do hold upon theſe words of Littleton, that if a leaſe for life were made to the ſonne the remainder to his next of blood, that the father ſhould take the remainder by purchaſe, and not the uncle, for that Littleton ſaith the father is next of blood, and yet the uncle is heire. As if a man hath iſſue two ſons, and the eldeſt ſonne hath iſſue a ſonne and die, a remainder is limited to the next of his blood, the younger ſon ſhall take it, yet the other is his heire.

E. 6. tit. Adminiſtr. Br. 47. Ratcliffe's caſe ubi ſup. See after in the chapter of ſocage.

(Hob. 33.)

(3. Co. 40.)

[p] *Eſt un Maxime en le ley, que inheritance poet lineallment diſcender, mes nemy aſcender.*

[p] Pl. Com. 293. b. Oſborne's caſe.

Maxime, i. e. A ſure foundation or ground of art, and a

(Poſt 67.)

MES ſi ſoit pier et fits et le pier ad un frere que eſt uncle a le fits, et le fits purchaſe terre en fee ſimple et mort ſans iſſue vivant ſon pier, luncle avera la terre come heire al fits et nemy le pier, uncore le pier eſt pluis prochein de ſanke; pur ceo que eſt un maxime en le ley, que enheritance poet lineallment diſcender, mes nemy(3) aſcender. Uncore ſi le fits en tiel caſe mort ſans iſſue, et ſon uncle entra en la terre come heire a le

BUT if there be father and ſon, and the father hath a brother that is uncle to the ſon, and the ſon purchaſe land in fee ſimple, and die without iſſue, living his father, the uncle ſhall have the land as heire to the ſon, and not the father, yet the father is neerer of blood; becauſe it is a maxime in law, that inheritance may lineally deſcend, but not aſcend. Yet if the ſon in this caſe die without iſſue, and his uncle enter into the land as heire to the

fits

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

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

(3) *Lineallment.*—P. and Rod.

THE LATE HON. MRS. LEIGH

Was the Sister, and Heiress of the last Lord LEIGH, of Stoneley, which title became extinct at his death. By her demise, one of the finest estates in England comes to her Heir at Law, (to whom is not yet known, but it is believed to Lord CRAVEN), not less, at the present rents, than £17,000 a year, in Warwickshire, Staffordshire, and Cheshire. But, what makes this estate of immense value, is, that the rents have not been raised these sixty years! The good Old Lady, not wishing to raise them, as her Brother had adopted that line of conduct; and at this moment, if re-set, it is supposed the annual revenue would not be less than £50,000.

The late Lord LEIGH died insane; and the Good Lady, whose death we commemorate, was not unmarked in her character by some eccentricity; but it was of the most harmless nature, and always turned on the humane and benevolent part of her disposition! Her munificence was immense, she having been known to give what she called her four years savings (twenty thousand pounds) away at one time to a distant connection. Her charities were very considerable; and, upon the whole, her loss will be long felt in the little circle in which she moved.

See Co. Litt. 10. b.

Lord Leigh devised all his real estates to his wife the Hon^ble Mrs. Leigh for her life, rem^r to her 1^st & o^r sons successively in t. m. rem^r to "the first & nearest "of my kindred being male & of my name & blood that "shall be living at the time of the determination "of the several estates hereinbefore limited & devised & to the "heirs of his body lawfully begotten, & for want of such issue "to my own right heirs for ever."

fits (ſicome il devoit per la ley) et apres l'uncle devia ſans iſſue, vivant le pier, donques le pier avera la terre come heire al uncle, et nemy come heir a ſon fits, pur ceo que il veigne al terre per collateral diſcent et nemy per lineal aſcention.

ſonne (as by law he ought) and after the uncle dieth without iſſue, living the father, the father ſhall have the land as heire to the uncle, and not as heire to his ſonne, for that he commeth to the land by collateral diſcent and not by lineall aſcent.

concluſion of reaſon, ſo called [g] *quia maxima eſt ejus dignitas et certiſſima authoritas, atque quod maximè omnibus probetur*, ſo ſure and uncontrollable as that they ought not to be queſtioned. [r] And that which our author here and in other places calleth a maxime, hereafter he calleth a principle, and it is all one with a *rule*, a *common ground*, *poſtulatum*, or an *axiome*, and it were too much curioſitie to make nice diſtinctions betweene them. And it is well ſaid in our bookes, [ſ] *neſt my a diſputer lancient principles del ley.* I never read any opinion in any booke old or new againſt this maxime, but onely in *lib. rub.* where it is ſaid, [t] *ſi quis ſine liberis diſceſſerit, pater aut mater ejus in hæreditatem ſuccedat, vel frater et ſoror ſi pater et mater deſint, ſi nec hos habeat, ſoror patris vel matris, et deinceps qui propinquiores in parentela fuerint hæreditario ſuccedant, et dum virilis ſexus extiterit, et hæreditas abinde ſit, fœmina non hæreditat.* But all our ancient authors and the conſtant opinion ever ſince do affirme the maxime.

[g] Pl. Com. 27. b. (3. Co. 40.)

[r] Sect. 90. 648.

[ſ] 12. H. 4. Glanvill lib. 7. cap. 1. Bract. lib. 2 cap. 29.

[t] Lib. Rub. cap. 70.

By this maxime in the concluſion of his caſe, onely lineall aſcention in the right line is prohibited, and not in the collaterall, [u] *Quælibet hæreditas naturaliter quidem ad hæredes hæreditabiliter deſcendit, nunquam quidem naturaliter aſcendit. Deſcendit itaque jus quaſi ponderoſum quod cadens deorſum recta linea vel tranſverſali, et nunquam reaſcendit ea via qua deſcendit poſt mortem anteceſſorum, a latere tamen aſcendit alicui propter defectum hæredum inferius provenientium*; ſo as the lineall aſcent is prohibited by law, and not the collaterall (..) And in prohibiting the lineall aſcent, the common law is aſſiſted with the law of the 12 tables (2).

[u] Brit. cap. 119. Fleta lib. 6. ca. 1. Numb. ca. 27. Ratcliff's caſe ubi ſupra. (3. Co. 40.)

Here our author for the confirmation of his opinion draweth a reaſon and a proofe (as you have perceived) from one of the maximes of the common law. Now that I may here obſerve it once for all, his proofes and arguments, in theſe his three books, may be generally divided into two parts, *viz.* from the common law and from ſtatutes, of both which, and of their ſeveral branches I ſhall give the ſtudious reader ſome few examples, and leave the reſt to his diligent obſervation.

For the common law his proofes and argument are drawn from 20 ſeveral fountaines or places.

[a] Firſt, from the maximes, principles, rules, intendment and reaſon of the common law, which indeed is the rule of the law, as here, and in other places our author doth uſe.

[b] Secondly, from the bookes, records, and other authorities of law cited by him *ab authoritate, et pronunciatis.*

[c] Thirdly, from originall writs in the regiſter *à reſcriptis valet argumentum.*

[d] Fourthly, from the forme of good pleading.

[e] Fiftly, from the right entrie of judgements.

[f] Sixtly, *à præcedentibus approbatis et uſu*, from approved precedents and uſe.

[g] Seventhly, *à non uſu*, from not uſe.

[h] Eightly, *ab artificialibus argumentis, conſequentibus et concluſionibus*, artificiall arguments, conſequents and concluſions.

Ninthly, [i] *a communi opinione juriſprudentum*, from the common opinion of the ſages of the law.

Tenthly, [k] *ab inconvenienti*, from that which is inconvenient.

Eleventhly, [l] *a diviſione* from a diviſion, *vel ab enumeratione partium*, from the enumeration of the parts.

Twelfely, [m] *a majore ad minus*, from the greater to the leſſer, or [n] from the leſſer to the greater, [o] *a ſimili*, [p] *a pari.*

13. [q] *Ab impoſſibili*, from that which is impoſſible.

14. [r] *A fine*, from the end.

15. [*] *Ab utili vel inutili*, from that which is profitable or unprofitable.

16. [r] *Ex abſurdo*, for that thereupon ſhall follow an abſurditie, *quaſi a ſurdo prolatum*, becauſe it is repugnant to underſtanding and reaſon.

17. [ſ] *A natura et ordine naturæ*, from the nature or the courſe of nature.

18. [t] *Ab*

[a] Sect. 5. 8. 90. 96. 52 53. 57. 59. 65. 99. 130. 146. 156. 169. 178. 231. 293. 302. 352. 360. 376. 377. 390. 410. 440. 441. 346. 347. 462. 43.

[b] Sect. 20. where a number of others are quoted.

[c] Sect. 67. 132. 170. 234. 241. 263. 613. 614. (Plowd. 228.)

[d] Sect. 58. 170. 183. 369.

[e] Sect 248. 240.

[f] Sect. 88. 74 76. 145. 332. 371. 372. 445.

[g] 108. 733.

[h] Sect. 170 264. 283. 302. 429. 464. 629. 633. 686. 340. 415. 613. 686. 739.

[i] Sect. 697. 59. 104. 288. 332. 478.

[k] Sect. 87. where many others are quoted.

[l] Sect. 13. where many more are quoted, but ſee chiefly ſect. 381.

[m] Sect. 438. 439. 441.

[n] Sect. 18. [o] 301, &c.

[p] 291. 298. 409, &c.

[q] 129 440.

[r] Sect. 146. 194.

[*] Sect. 360.

[r] Sect. 722.

[ſ] Sect. 114. 223. 129. 211. 107. 108.

(1) In Ratcliffe's caſe, 3. Co. 40. the reaſons given for excluding lineal aſcent are, *firſt*, that fathers and mothers are not of the blood of their children; *ſecondly*, that the excluſion is agreeable to the Jewiſh law, as preſcribed to Moſes by God himſelf; and *thirdly*, that it tends to avoid that confuſion and diverſity of opinions in the caſe of deſcents, of which the allowance of lineal aſcenſion by the *civil* law is ſaid to be the occaſion. Lord Coke himſelf controverts the *firſt* of theſe reaſons, by the words of Littleton in the ſection here commented upon, and by the caſe of adminiſtration, in which the father or mother is preferred as *neareſt of blood* to their children, and alſo by the caſe of a remainder to the ſons *neareſt of blood*, under which deſcription the father is entitled to take by purchaſe. But as to the two other reaſons, lord Coke rather appears to adopt them. However, neither of them ſeems ſatisfactory. The inference from God's precept to Moſes is unwarranted, unleſs it can be ſhewn, that it was promulgated as a law for mankind in *general*, inſtead of being, like many other parts of the Moſaical law, a rule for the direction of the Jewiſh nation *only*. Beſides, by the Jewiſh law, the father did ſucceed to the ſon in excluſion of his brothers, unleſs one of them married the widow of the deceaſed, and raiſed up ſeed to him. See Blackſt. Law Tracts, v. 1. p. 181. 8vo ed. and Seld. de Succeſſ. Ebræor. c. 12. there cited. The argument from the ſuppoſed confuſion and uncertainty, which might ariſe, if lineal aſcent ſhould be permitted, is not leſs liable to objection; becauſe lineal *aſcent* might be governed by the ſame rules as lineal *deſcent*; and what is the difference between the two, that ſhould create more confuſion and uncertainty in the one caſe than in the other? Our modern writers account for our law's diſallowance of lineal aſcent in a very different way; and, according to them, it in a great meaſure originated from the nature of ancient feudal grants, which, like eſtates tail, being confined to the firſt feudatory and his deſcendants, neceſſarily excluded his father and mother, and all paramount them and alſo his collateral relations. How this rule in *practice* became extended ſo as to exclude lineal aſcent *univerſally*, without confining it to the caſes to which the feudal reaſon for the rule is applicable, and yet at the ſame time is ſo conſtrued, as to let in all collateral relations, and even the father himſelf collaterally, and by the medium of others, is not now very eaſy to explain, though this has been attempted. See Wright's Ten. 180. and Blackſt. Law Tracts, v. 1. p. 183. 8vo ed. See alſo a learned note on the ſubject in *Littleton avec Obſervat. par M. Houard.* This edition of Littleton is in 2. vol. 4to. and was publiſhed at Rouen in 1766.

(2) See *Tab.* 5 l. *de ſucceſſione ab inteſtato*; but neither in this, nor in any other part of the 12 tables, do I ſee any thing to exclude lineal aſcent; and as I have not met with any book on the Roman law in which ſuch an excluſion is mentioned, I conclud,

18. [t] *Ab ordine religionis*, from the order of religion.
19. [u] *A communi presumptione*, from a common presumption.
20. [w] *A lectionibus jurisprudentium*, from the readings of learned men of law.

From statutes his arguments and proofes are drawne,

1. [x] From the rehearsall or preamble of the statute.
2. By the bodie of the law diversly interpreted.

Sometime by other parts of the same statute, which is *benedicto expositio, et ex visceribus causæ*. [y] Sometime by the reason of the common law. But ever the generall words are to be intended of a lawfull act, [z] and such interpretation must ever be made of all statutes, that the innocent or he in whom there is no default may not be damnified (1).

En la ley. There be divers lawes within the realme of England. As first, [a] *Lex coronæ*, the law of the crowne.

2. [b] *Lex et consuetudo parliamenti. Ista lex est ab omnibus quærenda, à multis ignorata, à paucis cognita.*
3. [c] *Lex naturæ*, the law of nature.
4. [d] *Communis lex Angliæ*, the common law of England, sometime called *lex terræ*, intended by our author in this and the like places.
5. [e] Statute law. Lawes established by authoritie of parliament.
6. [f] *Consuetudines.* Customes reasonable.
7. [g] *Jus belli.* The law of armes, war, and chivalrie, *in republica maximè conservanda sunt jura belli.*
8. [h] Ecclesiastical or canon law in courts in certaine cases.
9. [i] Civil law in certaine cases not onely in courts ecclesiasticall, but in the courts of the constable and marshall, and of the admiraltie, in which court of the admiraltie is observed *la ley Olyron, anno* 5. of Richard the first, so called, because it was published in the isle of Olyron.
10. [k] *Lex forestæ*, forest law.
11. [l] The law of marque or reprisall (2).
12. [m] *Lex mercatoria*, merchant, &c.
13. [n] The lawes and customes of the isles of Jersey, Gernsey and Man.
14. [o] The law and priviledge of the Stannaries.
15. [p] The lawes of the east, west, and middle Marches, which are now abrogated.

But hereof this little taste for our student, that he may be capable of that which he shall reade concerning these and others in records, and in our books, and orderly observe them, shall suffice.

Et son uncle enter en la terre. For if the uncle in this case doth not enter into the land, then cannot the father inherit the land; for there is another maxime in law herein implied, [q] that a man, that claimeth as heire in fee simple to anie man by descent, must make himself heir to him that was last seised of the actuall freehold and inheritance (3). And if the uncle in this case doth not enter, then had he but a freehold in law, and no actuall freehold, but the last that was seised of the actuall freehold was the sonne to whom the father cannot make himself heire; and therefore Littleton saith, *et son uncle enter en la terre (sicome devoit per la ley)* to make the father to inherite, as heire to the uncle. [r] Note, that true it is that the uncle in this case is heire, but not absolutely heire; for if after the descent to him the father hath issue a sonne or daughter, that issue shall enter upon the uncle (4). [s] And so it is if a man hath issue a sonne and a daughter, the sonne purchaseth land in fee and dyeth without issue, the daughter shall inherite the land, but if the father hath afterward issue a sonne, this sonne shall enter into the land as heire to his brother, and if he hath issue a daughter and no sonne, she shall be coparcener with her sister.

Sicome il devoit per la ley. These words as a key doe open the secrets of the law, for hereupon it is concluded, that where the uncle cannot get an actuall possession by entrie or otherwise, there the father in this case cannot inherit. And therefore if an advowson be granted to the sonne and his heires, and the sonne die without issue, and this descend to the uncle, and he die before he doth or can present to the church, the father shall not inherit, because he should make himself heire to the sonne, which he cannot doe. And so of a rent and the like. But if the uncle had presented to the church, or had seisin of the rent, there the father should have inherited. For Littleton putteth his case of an entry into land but for an example. If the sonne make a lease for life, and die without issue, and the reversion descend to the uncle, and he die, the reversion shall not descend to the father, because in that case he must make himselfe heire to the sonne. A infeoffe the son with warrantie to him and his heires, the sonne dies, the uncle enters into the land and dies, the father if he be impleaded shall not take the advantage of this warrantie

[t] Sect. 202.
[u] Sect 440.
[w] Sect. 481.
[x] Sect. 13, &c. Sect. 731. 692. 635. 633 441. 103. 193. 154. 140. 2. (Plowd. 57. b. 49. b.)
[y] Sect. 464. (Cro Ja. 474.)
[z] Sect. 731. 685. (Plowd. 105.)
[a] 17. E. 5. Rot. Parl. nu. 19. 25. E. 3. cap. 1. Regist. inter Jura regia 61. &c. (Post 360.)
[b] Commonly spoken of in Parliament Rolls. (4. Inst. 14.)
[c] 13. E. 4. 9. 7. Co. Calvin's case. Pl. Com. Sharington's case. (Dr. and Stud. Dial. 1. c. 2.)
[d] This law appeareth in our bookes and judiciall records.
[e] There are of record in Rolls of Parliament.
[f] Whereof you shall read in our author, and in our bookes.
[g] Rot. Parl. 2. R. 2. nu. 3. 13. R. 2. ca. 2. (Post 249.)
[h] 7. Co. Caudrie's case articul. super cartas, &c.
[i] 37. H. 6 21. Fortesc. ca. 32. 13. H. 4. 4. 28. H. 8. ca. 15.
[k] Carta de Foresta, &c. the eires of the Forests.
[l] 27. E. 3. ca. 17. Wi. ca. 23. 4. H. 5. ca. 7.
[m] Mirror des Justic. c. 1. Bract. 334. 444. Fleta lib. 2. ca 51. 52. &c. 5. E 3. 11. 38. E. 3. 7. 27. E. 3. cap. 8. Fortesc. 32. F. N. B. 117. 13. E. 4. 9. Rot. Parl. 6. H. 4. nu 43. 10. H. 7. 16. 47. E. 3 22. 30. E. 1. Account 127. Carta mercatoria 31. E. 1. rot. patent. (4. Inst 237.)
[n] Mich. 41. E. 3. coram rege in Thesaur. 12. E. 3. 5. b. 12. H. 8. fol. 5. Rot. Pat. an. 20. E. 1. 7. Co. Calvin's case fol. 21. Regist. fol. 22.
[o] 50. E. 3. Rot. Parl. 50. E. 3. Rot. Patent, &c.
[p] 31. H. 6. ca. 3. 4. Ja. c. 1.
[q] 11. H. 4 11. 10. Ass. 27. 34. Ass. p. 20. 19. E. 2. quar. imped. 177. 45. E. 3. 13. 40. Ass. p. 6.
[r] 11. Ass. p. 6. Doct. and Stud. 12. b. 32. H. 6. 35.
[s] 19. H. 6. 61.

clude, that lord Coke is mistaken in his idea of our law's conforming to the law of the 12 Tables. The mother was indeeed excluded; but it was not because the law of the 12 Tables did not permit lineal *ascent*, but on account of her sex, that law preferring the *agnati* or those related through males, and excluding the *cognati*, or those related through females. See Inst. 3. 3. Princ.

(1) As to the construction of statutes, see lord ch. Hatt. Treat. on Stat.—Ash. Expos Stat. by Eq.—Vin. Ab. *Statutes* E. 6.—Com. Dig. *Parliament* R. 10.

(2) Besides the books more generally known, see Lee's Capt. in War, which is a Treatise on this subject.

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

(4) Here lord Coke is silent as to the right to the intermediate profits from the death of the father. In the case of *Basset* and *Basset*, lord ch. Hardwicke held, that a posthumous son, claiming under a remainder in a settlement, was, by construction of the 10. and 11. W. 3. c. 16. which preserves remainders for posthumous children, where no estate is limited to trustees for that purpose, intitled to the mean profits. See 3. Atk. 203. But in the same case, lord Hardwicke seems to have taken it for granted, that on a *descent* the mean profits belong to the uncle; for he directed, that the profits of the *estate descended* should be accounted for by the uncle, only from the birth of the posthumous son. See Post 55. b. where lord Coke puts the case of a daughter's being intitled against a posthumous brother to corn sowed before his birth; which seems to shew, that lord Coke did not consider the posthumous child as intitled to any mean profits on a descent. See also Wils. Rep. p. 526. where lord ch. J. De Grey, in delivering the opinion of the court of C. P. on a question whether a *posthumous* son was *actually seized*, denies that the posthumous son, in the case of a descent, can be intitled to any profits received before his birth, and cites 9. H. 6. 25. as an authority in point.

rantie, for then he muſt vouch A as heire to his ſonne, which he cannot doe(1), for albeit the warrantie deſcended to the uncle, yet the uncle leaveth it as he found it, and then the father by Littleton's (*devoit*) cannot take advantage of it. For Littleton Sect. 603. ſaith that warranties ſhall deſcend to him that is heire by the common law, and Sect. 718. he ſaith that everie warrantie which deſcends, doth deſcend to him that is heire to him which made the warrantie by the common law, which proveth that the father ſhall not be bound by the warrantie made by the ſonne, for that the father cannot be heire to the ſonne, that made the warrantie. And a warrantie ſhall not goe with the tenements, whereunto it is annexed, to any ſpeciall heire, but alwaies to the heire at the common law (2). And therefore if the uncle be ſeiſed of certaine lands, and is diſſeiſed, the ſonne releaſe to the diſſeiſor, with warrantie, and die without iſſue, this ſhall bind the uncle; but if the uncle die without iſſue, the father may enter, for the warranty cannot deſcend upon him. So if the ſonne concludeth himſelfe by pleading concerning the tenure and ſervices of certaine lands, this ſhall bind the uncle; but if the uncle die without iſſue, this ſhall not bind the father, becauſe he cannot be heire to the ſonne, and conſequently not to the eſtoppell in that caſe; but if it be ſuch an eſtoppell as runneth with the land, then it is otherwiſe (3).

Vid. Sect. 603. 718. (Poſt 329.)

Vid. Sect. 735. 736. 737.

35. H. 6. 33. John Crook's caſe. (5. Co. 79.)

Sect. 4.

ET en tiel caſe, lou le fits purchaſe terre en fee ſimple, et devie ſauns iſſue, ceux de ſon ſanke de part ſon pier enheriteront come heires a luy, devant aſcun de ſanke de part ſa mere: mes ſil nad aſcun heire de part ſon pier, donques la terre diſcendera a les heires de part la mere (4). *Mes ſi home prent* (5) *enheretrix des terres en fee ſimple, queux ont iſſue fits, et deviont, et le fits enter en les tenements, come fits et heire a ſa mere, et puis devie ſans iſſue, les heires de part la mere doyent enheriter, les tenements et jammes les heires de part le pier. Et ſil ny ad aſcun heire de part la mere, donque le ſeignior, de que la terre eſt tenus, avera la*

AND in caſe where the ſonne purchaſeth land in fee ſimple, and dies without iſſue, they of his blood on the father's ſide ſhall inherite as heires to him, before any of the blood on the mother's ſide. But if he hath no heire on the part of his father, then the land ſhall deſcend to the heires on the part of the mother. But if a man marrieth an inheritrix of lands in fee ſimple, who have iſſue a ſonne, and die, and the ſonne enter into the tenements, as ſonne and heire to his mother, and after dies without iſſue, the heires of the part of his mother ought to inherit, and not the heires of the part of the father. And if he hath no heire on the part of the mother, then the lord

BY this it appeareth, that our author divideth heires into heires of the part of the father, and into heires of the part of the mother. [a] And note, it is an old and true maxime in law, that none ſhall inherite any lands as heire, but only the blood of the firſt purchaſer, for * *refert à quo fiat perquiſitum*, As for example, Robert Coke taketh the daughter of Knightley to wife, and purchaſeth lands to him and to his heires, and by Knightley hath iſſue Edward, none of the blood of the Knightleys, though they be of the blood of Edward, ſhall inherite, albeit he had no kindred but them, becauſe they were not of the blood of the firſt purchaſer, viz. Robert Coke (6).

Vide Sect. 354. an excellent point.

[a] Pl Com. Sir Edward Clere's caſe. 447.

[*] Fleta lib. 6 ca. 1. 2. &c. Bracton lib. 2. fo'. 65. 67. 68. 69. &c. Britton ca. 119. 24. E. 3. 50. 39. E. 3. 29. 30. 38. 49. E. 3. 12. 49. Aſſ. p. 4. 12. E. 4. 14. Pl. Com. 445. & 450. 7. E. 6. Dyer 6. 24. E. 3. 24. 37. Aſſ. 4. 40. E. 3. 9. 42. E. 3. 10. 45 E. 3. Releaſes 28. 7. H 5. 3. 4. 8. Aſſ. 6. 35. Aſſ. 2. 5. E. 4. 7. 3. H. 5. 21. H. 7. 33. 40. Aſſ. 6. Ratcliffe's caſe, 5. Co. 42.

Poſt 220. b.

[b] *Ceux del ſank de part ſon pier.* Here it is to be underſtood, that the father hath two immediate bloods in him, viz. the blood of his father, and the blood of his mother (7), both theſe bloods are of the part of the father. [c] And this made ancient authors ſay, that if a man be ſeiſed of lands in the right of his wife, and is attainted of felony, and after hath iſſue, this iſſue ſhould not inherit his mother, for that he could derive no blood inheritable from the father. And both theſe bloods of the part of the father muſt be ſpent before

[b] Bracton ubi ſupra. Fleta ubi ſupra. Britton ca. 118. 119. Pl. Com. 444. Clere's caſe. Tr. 19. E. 1. in Banco Rot. 25. Lincoln. Will. Scer's caſe.

[c] Britton fol. 15. Fleta lib. 1. ca. 18. Pl. Com. 345. 446. &c. Clere's caſe. (1. Sid. 200)

(1) Quære *of this caſe of warranty; for though the lieu of warranty deſcends from him, who makes the warranty, to the heir at common law, and it cannot deſcend to the ſpecial heir, becauſe it is a thing in groſs, yet the benefit of a warranty, being once anexed to land, ſhall go in divers caſes as incident to the land to the ſpecial heir or aſſignee. Thus a gift of* borough engliſh, *with a warranty, ſhall go to the youngeſt ſon with the land.* Hal MSS. See Acc. 2. Ro. Ab. 743. where it is ſaid, that the father may vouch on ſuch a warranty to the uncle. In Gilb. Ten. 18. there is a reference to lord ch. j. Hale's note on this part of lord Coke, from which it appears that lord ch. bar. Gilbert had ſeen lord Hale's MSS. notes.—(2) See Acc. both as eſtoppels and warranties. Hob. 31. 8. Co. 54. but obſerve what is ſaid by lord Hale in the preceding note.—(3) *The ſon makes leaſe for life, and dies; the uncle releaſes to the leſſee for life in tail on condition, and dies.* Quære, *who ſhall enter for the condition broken, as the reverſion in fee doth not deſcend to the father?* Hal. MSS.—(4) *Et ceſt l'oppinion de toutes les juſtices M. 12. E. 4. Mes la fuit tenus ſi terre deſcende a un home de part ſon pere, qui devia ſans iſſue, que ſon prochein heire de part ſon pere enheritera a luy ceſt aſſavoir le procheine que eſt del ſank le pere de part layel. Et pur defaute de tiel heire, ceux que ſont de ſank le pere del part le mere le pere, S. laieleſſe doient enheriter. Et ſil ny ad tiel heire de part le pere donques le ſeignour avera le terre par eſchete.* Red. But this paſſage is not in any edition prior to Redman's, and ſeems an addition to Littleton by another hand, and to be an opinion extracted from 12. E. 4. 14. pl. 12. which is indeed cited in the margin of Redman.—(5) *Feme.* L. and M.—Roh.—P.—Red.—(6) *And therefore if the heir of the part of the father be attainted, the land ſhall eſcheat.* 49. *Aſſ. p.* 4. Hal. MSS.—(7) But ſometimes a man can only have immediate inheritable blood from one parent, as where his father or mother is an alien or perſon attainted; and this it ſeems ſuffices to enable children to inherit from the parent, who confers the inheritable blood, and alſo to inherit to each other. See Acc. ante 8. a. n. 2. and the following note by lord Hale on lord Coke's next paſſage, where he mentions, that according to ancient authors the iſſue of an attainted father cannot inherit to the mother. *This ſeems not to be law. A female heritrix takes an alien to huſband, and they have iſſue; the iſſue ſhall inherit to the mother. Poſt ſect.* 114. *and fol.* 33 *a. for dower of wife being alien or attainted.* Hal. MSS. To the ſame purpoſe is what follows, being a note on fol. 8. a. ante, where lord Coke aſſerts that the children of an alien cannot inherit to each other, though he allows that the children of one attainted, if born before the attainder, may. Quære *of this; for it ſeems the blood of the mother ſuffices to make them inheritable one to the other, and this was the principal reaſon in Hobby's caſe.* Hal. MSS. Alſo lord Hale, in another note on fol. 8. a. ante abridges the caſe of *Bacon* and *Bacon* from Co. Cha and cites *Stephens*'s caſe in the *dutchy* as another caſe of the ſame kind, and then there is the note following.

Yet

(Plowd. 144.)

[a] 19. R. 2. garr. 100.

Britton ca. 118. 119. Fleta lib. 6. ca, 2.

before the heire of the blood of the part of the mother ſhall inherit, wherein ever the line of the male of the part of the father, (that is) the poſteritie of ſuch male, be they male or female, (whoever in deſcents are preferred) muſt faile before the line of the mother ſhall inherit, [a] and the reaſon of all this is for that the blood of the part of the father is more worthie, and more neere in judgment of law, than the blood of the part of the mother.

Devant aſcun del ſanke del part del mere. And it is to be obſerved, that the mother hath alſo two immediate bloods in her, (viz.) her father's blood, and her mother's blood. Now to illuſtrate all this by example. Robert Fairefield, ſonne of John Fairefield and Jane Sandie, takes to wife Anne Boyes, daughter of John Boyes and Jane Bewpree, and hath iſſue William Fairefield who purchaſeth lands in fee. Here William Fairefield hath foure immediate bloods in him, two of the part of his father, viz. the blood of the Fairefields, and the blood of the Sandyes, and two of the part of his mother, viz. the blood of the Boyſes, and the blood of the Bewprees, and ſo in both caſes upward *in infinitum*. Now admit that William Fairefield die without iſſue, firſt the blood of the part of his father, viz. of the Fairefields, and for want thereof the blood of the Sandies (for both theſe are of the part of the father) if both theſe faile, then the heires of the part of the mother of William Fairefield ſhall inherit, viz. firſt the blood of the Boyſes, and for default thereof the blood of the Bewprees.

terre per eſcheat. (1) *En meſme le manner eſt, ſi tenements diſcendont a le fits de part le pier, et il enter et puis moruſt ſans iſſue, cel terre diſcendra as heires de part le pier, et nemy as heires de part la mere. Et ſil ny ad aſcun heire de part le pier, donques le ſeignior, de que la terre eſt tenus, avera la terre per eſcheat.* Et ſic vide diverſitatem, *lou le fits purchaſe terres ou tenements, en fee ſimple, et lou il veient eins a tiels terres ou tenements per diſcent de part ſa mere ou de part ſon pier.*

of whom the land is holden, ſhall have the land by eſcheate. In the ſame manner it is, if lands deſcend to the ſonne, of the part of the father, and he entreth, and afterwards dies without iſſue, this land ſhall deſcend to the heires on the part of the father, and not to the heires on the part of the mother. And if there be no heire of the part of the father, the lord of whom the land is holden ſhall have the land by eſcheate And ſo ſee the diverſity, where the ſonne purchaſeth lands or tenements in fee ſimple, and where he cometh to them by deſcent on the part of his mother, or on the part of his father.

It is neceſſary to be knowne in what caſes the heire of the part of mother ſhall inherite, and where not. If a man be ſeiſed of lands as heire of the part of his mother, and maketh a feoffment in fee, and taketh backe an eſtate to him and to his heires, this is a new purchaſe, and if he dyeth without iſſue, the heires of the part of the father ſhall firſt inherite. (2) If a man ſo ſeiſed maketh a feoffment in fee upon condition, and dye, the heire of the part of the father, which is the heire at the common law, ſhall enter for the condition broken, but the heire of part of the mother ſhall enter upon him, and enjoy the land. [m] A man ſo ſeiſed maketh a feoffment in fee reſerving a rent to him and to his heires, this rent ſhall goe to the heires of the part of the father; but [n] if he had made a gift in taile, or a leaſe for life reſerving a rent, the heire of the part of the mother ſhall have the reverſion, and the rent alſo as incident thereunto ſhall paſſe with it, but the heire of the part of the mother ſhall not take the advantage of a condition annexed to the ſame, becauſe it is not incident to the reverſion, nor can paſſe therewith. [o] If a man had been ſeiſed of a mannor as heire on the part of his mother, and before the ſtatute of *Quia emptores terrarum*, had made a feoffment in fee of parcell to hold of him by rent and ſervice, albeit they be newly created, yet for that they are parcell of the mannor, they ſhall with the reſt of the mannor deſcend to the heire of the part of the mother, *quia multa tranſeunt cum univerſitate quæ per ſe non tranſeunt.* If a man hath a rent ſecke of the part of his mother, and the tenant of the land grant-

9. H. 7. 24. (Plowd. 47. Poſt 202.)

[m] 7. H. 6. 4. 1. Co. 100. Shelleye's caſe.

[n] 5. E. 2. tit. Avowry 207. (Hob. 31.)

[o] 5. E. 3. Avowry 207. (8. Co. 54. 3. Co. 32. b.)

Yet note, that he cannot be heir to his mother, becauſe ſhe is an alien. Huſband denizen takes wife an alien, or wife takes huſband an alien, and they have iſſue. It ſeems the iſſue ſhall inherit to the father in the firſt caſe, to the mother in the ſecond. Ergo videtur, *that if alien has iſſue by denizen two ſons, one ſon ſhall inherit to the other, becauſe the mother is a denizen; and ſo in the caſe of a perſon attainted, having iſſue after attainder; and this was one of the reaſons of Hobby's caſe.* Hal. MSS. This doctrine is agreeable to lord Hale's argument when he gave judgment in *Collingwood* and *Pace*, cited ante ſo. 8. a. n. 2. and alſo confirms the obſervation hazarded in n. 5. fol. 8. a.

(1) All between *En meſme* and *ſic vide* omitted in Red.—(2) But here lord Coke muſt be underſtood to ſpeak of two diſtinct conveyances in fee; the *firſt* paſſing the uſe as well as the poſſeſſion to the feoffee, and ſo completely diveſting the feoffor of all intereſt in the land; and the *ſecond* regranting the eſtate to him. For if in the firſt feoffement, the uſe had been expreſly limited to the feoffor and his heirs, or if there was no declaration of uſes, and the feoffment was not on ſuch a conſideration as to raiſe an uſe in the feoffee, and conſequently the uſe reſulted to the feoffor, in either caſe he is in of his *ancient uſe*, and not by *purchaſe*. Adj. acc. 3, Lev. 406. and 2. Salk. 59. and ſee Acc. Poſt 13. a. and 22. b, What ſhall be a *purchaſe*, and break the *deſcent*, ſo as to entitle the *paternal* heir to a preference over the *maternal* heir, particularly in the caſe of a deviſe to the heir, the ſtudent may inform himſelf by the authorities cited in Vin. Abr. *Heir*. W. 1. 2. to which add Battey and Trevillian. Mo. 278. Hinde and Lyon. 3. Leon. 64. 70. and Dy. 124. Hainſworth and Pretty. Cro. Eliz. 833. 919. Brown and Taylor. Cro Cha. 38. Clark and Smith, 1. Salk. 241. and 1. Lutw. 793. Smith and Trig. 8, Mod. 23. and 1. Stra. 487. Ratcliffe's caſe. 1. Stra. 267. Martin and Strachan. 1. Will. part 1. p. 66. and Hurſt and the earl of Winchelſea Burr. 4. pt. v. 2. p. 879. In this laſt caſe, a feme covert by force of a power appointed by *will* to her heir in fee, but charged the land with debts and legacies; and it was adjudged in B. R. that the heir took by *deſcent*, and that the appointment had no other operation than making the eſtate ſubject to the debts and legacies. One leading principle, which this and the other authorities ſeem clearly to eſtabliſh is, that whenever a *deviſe* gives to the heir the ſame eſtate in *quality* as he would have by *deſcent*, he ſhall take by the *latter*, which is the title moſt favoured by the law; and that merely charging the eſtate with debts or legacies will not break the deſcent. This is onely one of the many uſeful propoſitions, which might be extracted on the ſubject as the reſult of the long liſt of caſes before cited, if this was the proper place for a diſcuſſion ſo nice and difficult.

granteth a diſtreſſe to him and to his heires, and the grantee dieth, the diſtreſſe ſhall go with the rent to the heire of the part of the mother, as incident or appurtenant to the rent, for now is the rent ſecke become a rent charge (1).

[p] A man ſo ſeiſed as heire on the part of his mother maketh a feoffement in fee to the uſe of him and his heires, the uſe being a thing in truſt and confidence ſhall enſue the nature of the land (2), and ſhall deſcend to the heire on the part of the mother. [q] A man hath a ſeigniory as heire of the part of his mother, and the tenancy doth eſcheat, it ſhall go to the heire of the part of the mother. If the heire of the part of the mother of land whereunto a warranty is annexed is impleaded and vouche, and judgment is given againſt him, and for him to recover in value, and he dieth before execution [r] the heire of the part of the mother ſhall ſue execution to have in value againſt the vouchee, for the effect ought to purſue the cauſe, and the recompence ſhall enſue the loſſe.

If a man giveth lands to a man, to have and to hold to him and his heires on the part of his mother, yet the heires of the part of the father ſhall inherit, for no man can inſtitute a new kind of inheritance not allowed by the law, and the words (of the part of his mother) are voide, as in the caſe that Littleton putteth in this chapter. If a man giveth lands to a man to him and his heires males, the law rejecteth this word males, becauſe there is no ſuch kind of inheritance, whereof you ſhall read more in his proper place.

A man hath iſſue a ſonne, and dieth, and the wife dieth alſo, lands are letten for life, the remainder to the heires of the wife, the ſonne dieth without iſſue, the heires of the part of the father ſhall inherite, and not the heires of the part of the mother, becauſe it veſted in the ſonne as a purchaſer. And the rule of Littleton holdeth as well in other kind of inheritances, as in lands and tenements. [s] And therefore if there be lord, *feme meſne*, and tenant, and the meſne bind her ſelfe and her heires by her deed to the acquittall of the tenant, the meſne take huſband, the tenant by his deed granted to the huſband and his heires, that he or his heires ſhall not be bound to acquitall, the huſband and wife have iſſue, and die, this iſſue, being bound as heire to his mother, ſhall not take benefit of the ſaid grant of diſcharge, for that extends to the heires of the part of the father, and not to the heires of the part of the mother, and therefore the heire of the part of the mother was bound to the acquittal (3). And thus much for the better underſtanding of Littleton's caſes concerning the heire of the part of the mother ſhall ſuffice (4).

Mes ſi home priſt feme inheritrix, &c. Here there is another maxime, [t] that whenſoever lands do deſcend from the part of the mother, the heires of the part of the father ſhall never inherit. And likewiſe when lands deſcend from the part of the father, the heires of the part of the mother ſhall never inherit (5). *Et ſic paterna paternis, et è converſo, materna maternis.* For more manifeſtation hereof, and of that which hereafter ſhall be ſaid touching deſcents, ſee a table in the end of this chapter.

Avera la terre per eſcheat. [u] *Eſcheat* (6), *eſchaeta*, is a word of art, and derived from the French word *eſchear (id eſt) cadere, excidere* or *accidere*, and ſignifyeth properly when by accident the lands fall to the lord of whom they are holden, in which caſe we ſay the fee is eſcheated. And therefore, of ſome, *eſcheats* are called *excadentiæ* or *terræ excadentiales* [w]. *Dominus vero capitatis loco hæredis habetur quotiès per defectum vel delictum extinguitur ſanguis ſui tenentis, loco hæredis et haberi poterit niſi per modum donationis fit reverſio cujuſque tenementi.* And Ockam (who wrote in the raigne of Henry the ſecond) treating of tenures of the king, ſaith, *porro eſchaetæ vulgo dicuntur, quæ decedentibus hiis, quæ de rege tenent, &c. cùm non exiſtit ratione ſanguinis hæres, ad fiſcum relabuntur.* [x] So as an eſcheat doth happen two manner of wayes, *aut per defectum ſanguinis*, i. e. for default of heire, *aut per delictum tenentis*, i. e. for felonie, and that is by judgment three manner of waies, *aut quia ſuſpenſus per collum, aut quia abiuravit regnum, aut quia utlegatus eſt.* And therefore, they which are hanged by martiall law *in furore belli*, forfeit no lands: and ſo in like caſes eſcheats by the civilians are called *caduca*.

[y] The father is ſeiſed of lands in fee holden of I. S. the ſon is attainted of high treaſon, the father dieth, the land ſhall eſcheat to I. S. *propter defectum ſanguinis*, for that the father dyeth without heire. And the king cannot have the land, becauſe the ſonne never had any thing to forfeit. But the king ſhall have the eſcheate of all the lands whereof the perſon attainted of high treaſon was ſeiſed, of whomſoever they were holden (7).

[z] In an appeale of death or other felony, &c. proceſſe is awarded againſt the defendant, and hanging the proceſſe the defendant conveyeth away the land, and after is outlawed, the conveyance is good (8) and ſhall defeat the lord of his eſcheat, but if a man be indicted of felony, and hanging the proceſſe againſt him, he conveyeth away the land, and after is outlawed, the conveyance ſhall not in that caſe prevent the lord of his eſcheate. And the reaſon of this diverſity is manifeſt: for in the caſe of the appeale, the writ containeth no time when the

[p] 5. E. 4. 4. 1. Co. 100. Shelley's caſe. 27. H. 8. Dyer Buckenham's caſe. 32. H. 8. (Post. 27. a.) gard Brooke 93. 13. H. 7. 6. (Ro. Abr. 780. Poſt. 23. a. 271. b. 1. Co. 127. Hob. 31 2. Co. 58.)

[q] 16. E. 3. age 46.

[r] Pl. Com. 292. & 515. See more of this in the chapter of Warranties.

[s] 38. E. 3. 12.

[t] 39. E. 3. 29. 49. E. 3. 12.

[u] Vide ſect. 130. Glanvill. lib. 7. cap. 17. Bract. lib. 3. fol. 118. Fleta lib. 5. cap. 5. & lib. 3. cap. 10. Britton ca. 37. & cap. 119. F. N. B. 100. Tr. 19. E. 1. in blanco Rot. 25. (3. Inſt. 21. 4. Inſt. 225. F. N. B. 144. b.)

[w] Fleta lib. 6. cap. 1. Ockam cap. quod non abſolvitur, &c.

[x] Pl. com. Dame Hale's caſe. (Poſt. 92. b.)

[y] Pl. Com. in Nicholl's caſe.

[z] 38. E. 3. f. 37. 30. H. 6. 5. Bract. l. 2. tit. de Forf. Stamf. Pl. cor. 192. and accordcording to this diverſity was it reſolved in 5. E. 6. as it appeareth by my Lord Dier's Manuſcript. (Poſt. 390. b)

(1) Acc. 8. Co. 54. a.—(2) The better reaſon ſeems to be, that the uſe being the ſame as it was before the feoffment, it is the old uſe which continues. As to an uſe's enſuing the nature of the land, ſee 1. Co. 127. 2. Co. 58. and Bac. Read. on Stat. Uſes, 8vo. ed. 308. in which latter book the author controverts the *generality* of the doctrine, which certainly ought to be underſtood with many reſtrictions, and conſiders at large the differences between *uſes* and the *land* itſelf, or rather, as he expreſſes himſelf, between uſes and caſes of poſſeſſion. Lord Bacon's Reading on the Statute of Uſes is a very profound treatiſe on the ſubject ſo far as it goes, and ſhews that he had the cleareſt conception of one of the moſt abſtruſe parts of our law. What might we not have expected from the hands of ſuch a maſter, if his vaſt mind had not ſo embraced within its compaſs the whole field of ſcience, as very much to detach him from profeſſional ſtudies? It may be proper to obſerve, that all the editions of lord Bacon's Reading on Uſes are printed with ſuch extreme incorrectneſs, that many paſſages are rendered almoſt unintelligible, even to the moſt attentive reader. A work ſo excellent deſerves a better edition.—(3) *Note, it was grant and releaſe; but* ratio libri *is, becauſe the huſband was not charged, except during the coverture, and by reaſon of that the diſcharge doth not extend further.* Hal. MSS.—(4) 7. H. 6. 3. *by Cottesmore. If lord takes tenant to wife, and dies having iſſue, which dies without iſſue, the ſeignory is revived, and the tenancy ſhall go to the heir of the part of the mother.* Hal. MSS.—(5) *But if the eldeſt ſon purchaſes land, and it deſcends to the youngeſt ſon, and he dies without heir of the part of the father, it ſhall deſcend to the heir on the part of the mother; becauſe they have one and the ſame mother.* Hal. MSS.—(6) See Wright's Ten. 115. Blackſt. Law Tracts, 8vo. ed. v. 1. p. 236. and 2. Blackſt. Comm. 5th ed. 241.—(7) *A enfeoffs B attainted of treaſon to the uſe of C, the king ſhall have the land diſcharged of the uſe.* Hal. MSS. and Pimb's caſe, M. 27. Eliz. as cited from Moore. See Mo. 196. But note, that according to Moore, B, at the time of the conveyance to him, had only *committed* treaſon, and was not attainted till *after*; and it was by *relation* to the time of committing the offence, that the caſe was conſtrued to be the ſame as if the conveyance had been to a perſon actually attainted. The doctrine in Pym's caſe founds peculiarly harſh; for firſt the legal eſtate in the land was given to the queen by a *conſtructive relation*, and then ſhe was deemed to hold the land diſcharged of the uſe, becauſe the king cannot be a truſtee. However, it is but juſtice to mention, that the caſe being repreſented to queen Elizabeth, ſhe, much to her honour, granted the land to *ceſtuique uſe* by patent. As to the king's holding land diſcharged of all uſes and truſts where the legal eſtate veſts in him, and the ſenſe in which that doctrine is to be underſtood, ſee Vin. Abr. *Uſes* C. where moſt of the authorities on the ſubject are ſtated or referred to.—(8) *But if the party appears on an appeal, and the plaintiff counts, and the defendant is convicted by verdict or confeſſion, it is all one.* Hal MSS.

(W. Jo. 217. Cro. Cha. 172.)

the felony was done, and therefore the eſcheate can relate but to the outlawry pronounced. But the indictment containeth the time when the felony was committed, and therefore the eſcheate upon the outlawry ſhall relate to that time (1). Which caſes I have added, to the end the ſtudent may conceive, that the obſervation of writs, indictments, proceſſe, judgments, and other entries, doth conduce much to the underſtanding of the right reaſon of the law.

[a] Mirror ca. 1. ſect. 5. 51. H. 3. ſtatutum de Scac. Britton fo. 33. 34. Flet. lib. 1. cap. 36. & lib. 2. cap. 34. 35. Regiſt. 301. his Oath 18. E. 1. Ro. Parl. 21. E. 1. Rot. Parl. 1. 29. E. 1. ſtat. de Eſchaetoribus. 14. E. 3. c. 8 28. E. 1. ca. 18. F. N. B. 100. c. Stamf. Prær. 81. 1.H.8. ca 8. 3. H. 8. ca. 2. Capitula Eſchaetriæ in Vet. Magna carta fo. 160. 161, &c.

Of this word (*eſchaeta*) here uſed by our author, commeth [a] *Eſchaetor*, an ancient officer ſo called, becauſe his office is properly to look to eſcheats, wardſhips, and other caſualties belonging to the crowne. In ancient times there were but two eſcheators in England, the one on this ſide of Trent, and the other beyond Trent, at which time they had ſubeſchaetors. But in the raigne of Edward the ſecond, the offices were divided and ſeveral eſcheators made in every county for life, &c. and ſo continued untill the raigne of Edward 3. And afterwards by the ſtatute of 14. E. 3. it is enacted by authority of parliament, that there ſhould be as many eſcheators aſſigned, as when king Edward 3. came to the crown, and that was one in every county, and that no eſcheator ſhould tarry in his office above a yeere, and by another ſtatute to be in office but once in three yeares. The lord treaſurer nameth him.

And hereof alſo cometh *eſchaetria*, which ſignifieth the eſcheaterſhip, or the office of the eſcheater. But now let us heare what our author will further ſay unto us.

Et ſic vide, &c. This kind of ſpeech is often uſed by our author, and doth ever import matter of excellent obſervation, which you may find in the ſections noted in the margin *.

* Sect. 147. 149. 248. 289. 417. 667. &c.

(2. Ro. Abr. 816.)

[b] 7. E. 4. 11 12. Fitz N. B. 33 9. E. 3. 26. 17. E. 2. ſtat. de templariis.

And it is to be well obſerved, that our author ſaith, *ſil nad aſcun heire, &c. la terre eſchaetera.* In which words is implyed a diverſity (as to the eſcheate) betweene fee ſimple abſolute, which a natural body hath, and fee ſimple abſolute, which a body politique or incorporate hath. [b] For if land holden of I. S. be given to an abbot and his ſucceſſors, in this caſe if the abbot and all the covent die ſo that the body politique is diſſolved, the donor ſhall have againe this land, and not the lord by eſcheat (2). And ſo if land be given in fee ſimple to a deane and chapter, or to a maior and commonalty, and to their ſucceſſors, and after ſuch body politique or incorporate is diſſolved, the donor ſhall have again the land, and not the lord by eſcheate. And the reaſon, and the cauſe of this diverſity is, for that in the caſe of a body politique or incorporate the fee ſimple is veſted in their politique or incorporate capacity created by the policy of man, and therefore the law doth annex a condition in law to every ſuch gift and grant, that if ſuch body politique or incorporate be diſſolved, that the donor or grantor ſhall re-enter, for that the cauſe of the gift or grant faileth; but no ſuch condition is annexed to the eſtate in fee ſimple veſted in any man in his naturall capacity, but in caſe where the donor or feoffor reſerveth to him a tenure, and then the law doth imply a condition in law by way of eſcheat. Alſo (as hath beene ſaid) no writ of eſcheat lyeth but in the three caſes aforeſaid, and not where a body politique or incorporate is diſſolved.

Sect. 5.

(Poſt. 237.)

NOW commeth our author to the deſcent betweene brethren, which he purpoſely omitted before. *Diſcent*, *deſcenſus*, commeth of the Latine word *deſcendo*, and, in the legall ſenſe, it ſignifyeth, when lands do by right of blood fall unto any after the death of his anceſtors: or a deſcent is a meanes whereby one doth derive him title to certain lands, as heire to ſome of his anceſtors. And of this, and of that which hath been ſpoken doth ariſe another diviſion of eſtates in fee ſimple, *viz.* every man that hath a lawful eſtate in fee ſimple, hath it either by deſcent, or by purchaſe.

ITEM ſi ſoint trois freres, et le mulnes frere purchaſe terres en fee ſimple, et devie ſauns iſſue, leigne frere avera la terre per diſcent et nemy le puiſne, &c. Et auxi ſi ſoint trois freres, et le puiſne purchaſe terres en fee ſimple, et devie ſans iſſue, leigne frere avera la terre per diſcent et nemy

ALSO if there be three brethren, and the middle brother purchaſeth lands in fee ſimple, and die without iſſue, the elder brother ſhall have the land by deſcent, and not the younger (3), &c. And alſo if there be three brethren, and the youngeſt purchaſe lands in fee ſimple, and die without iſſue, the eldeſt brother ſhall

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

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

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

nemy le mulnes, pur ceo que leigne eſt pluis digne de ſanke.

have the land by deſcent and not the middle, for that the eldeſt is moſt worthy of blood.

Leigne eſt pluis digne de ſanke. It is a maxime in law, that the next of the worthieſt blood ſhall ever inherit, as the male and all deſcendants from him before the female, and the female of the part of the father before the male or female of the part of the mother, &c. becauſe the female of the part of the father is of the worthieſt blood. [c] And therefore among the males the eldeſt brother and his poſterity ſhall inherit lands in fee ſimple as heire before any younger brother, or any deſcending from him, becauſe (as Littleton ſaith) he is *pluis digne de ſanke. Quod prius eſt dignius eſt*, and *qui prior eſt tempore potior eſt jure. Si quis plures filios habuerit, jus proprietatis primo deſcendit ad primogenitum, eo quòd inventus eſt primo in rerum natura.* In king Alfred's time knights fees (1) deſcended to the eldeſt ſonne, for that by diviſion of them between males the defence of the realme might be weakened; but in thoſe dayes ſocage fee was divided between the heires males, and therewith agreeth Glanvill. * *Cum quis hæreditatem habens moriatur, &c. ſi plures reliquerit filios, tunc diſtinguitur utrum ille fuerit miles, ſive per feodum militare tenens, aut liber Sockmannus, quia ſi miles fuerit aut per militiam tenens, tunc ſecundum jus regni Angliæ primogenitus filius patri ſuccedit in toto, &c. ſi verò fuerit liber Sockmannus, tunc quidem dividetur hæreditas inter omnes filios, &c* (2). But hereof more ſhall be ſaid hereafter in his proper place.

[c] Britton cap. 119. Bract. lib. 2. cap. 30. 277. 279. 3. E. 3. 26. 3. Eliz. Dyer 138. Stanford prær. 52. 58. 3. E. 1. tit. avowry. 235. 32. E. 3. diſcent. 80. Bra. lib. 4. 211. Fleta lib. 6. ca. 2. Glanvill lib. 7. ca. 1. Mirror cap. 1. Sect. 3.

* Glanvill lib. 7. cap. 3. & ca. 1. Vid. Pl. Com. 229. b.

Sect. 6.

ITEM eſt aſcavoir, que nul avera terre de fee ſimple per diſcent come heire a aſcun home, ſi non que il ſoit ſon heire dentire ſanke. Car ſi home ad iſſue deux fits per divers venters, et leigne purchaſe terres en fee ſimple et moruſt ſans iſſue, le puiſne frere navera la terre, mes luncle leigne frere ou auter ſon procheine coſin ceo avera, pur ceo que le puiſne frere eſt de demy ſanke al eigne frere.

ALSO it is to be underſtood, that none ſhall have land of fee ſimple by deſcent as heire to any man, unleſſe he be his heire of the whole blood, for if a man hath iſſue two ſonnes by divers venters, and the elder purchaſe lands in fee ſimple, and dye without iſſue, the younger brother ſhall not have the land, but the uncle of the elder brother, or ſome other his next coſin ſhall have the ſame, becauſe the younger brother is but of halfe blood to the elder (5).

NO man can be heire to a fee ſimple by the common law, [d] but he that hath *ſanguinem duplicatum*, the whole blood, that is both of the father and of the mother, ſo as the halfe blood is no blood inheritable by deſcent, (3) becauſe that he that is but of the halfe blood cannot be a compleat heire, for that he hath not the whole and compleate blood (4), and the law in deſcents in fee ſimple doth reſpect that which is compleat and perfect. And this maxime doth not onely hold where lands (whereof Littleton here ſpeaketh) are claymed or demanded as heire, [e] but alſo in caſe of appeale of death: for if one brother be ſlaine, the other brother of the halfe blood ſhall never have an appeale (albeit he ſhall recover nothing therein either in the realtie or perſonaltie) becauſe in the eye of the law he is not heire to him. Alſo this rule extends to a warranty, as our author himſelfe elſewhere holdeth (6).

[d] Bract. lib. 4. idem lib. 2. fo. 65. Britton ca. 119. Fleta lib. 6. ca. 1. 1. E 3 19. John Gifford's caſe. 31. E. 3. Conterpl. de voucher 88. 40. Aſſ. 6. 4. E. 2. Formd. 49. Vid. Ratcliff's caſe, 3. Co. 40 41.

(1. Ro. Abr. 629.)

[e] 7. E. 4. 15.

Sect. 737.

Sect 7.

ET ſi home ad iſſue fits et file

AND if a man hath iſſue a ſonne and a

THIS is put for an example to illuſtrate that which hath been ſaid,

(1) Here lord Coke writes, as taking it for granted, that feudal tenures ſubſiſted in England before the Conqueſt. But this is a controverted point amongſt our beſt writers. See Poſt. 64. a. where a note is given on this ſubject.

(2) See Robinſ. Gavelk. an elaborate diſſertation on the origin, antiquity, and univerſality of partible deſcents. The author purſues his ſubject amongſt the Jews, Greeks, and Romans, and afterwards amongſt moſt of the modern nations in Europe, and then proceeds to inquire into the ſtate of our own law of deſcents before the Conqueſt. See page 20. See alſo lord Hale's learned reſearches into the hiſtory of the law of deſcents in his Hiſt. of the C. L. c. 11. p. 206.

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

(4) See what is obſerved on lord Coke's explanation of the meaning of the term *whole blood*, in 1. Sid. 200. See too 1. Vent. 424. and 2. P. Wms. 667.

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

(6) *So brother of half-blood ſhall not have error on fine levied by the elder brother, though, if there had not been ſuch fine, the land would deſcend to him.* Hal. MSS.—Nota, *if A purchaſes a reverſion expectant on an eſtate for life, and dies without iſſue, regularly his brother*

Britton cap. 119.

ſaid, and needeth no explanation. And heerwith agreeth Britton.

per un venter, et fits per auter venter, et le fits del primer venter purchaſe terres en fee, et moruſt ſans iſſue, la ſoer avera la terre per diſcent, come heire a ſa frere (1) *et nemy le puiſne frere, pur ceo que la ſoer eſt de le entire ſanke a ſon eigne frere.*

daughter by one venter, and a ſon by another venter, and the ſon of the firſt venter purchaſe lands in fee and die without iſſue, the ſiſter ſhall have the land by deſcent as heire to her brother, & not the younger brother, for that the ſiſter is the whole blood of her elder brother.

Sect. 8.

see Watk. on Descent 2. ed. 38. 59. 435.

SEiſie de terres en fee ſimple. Theſe words exclude a ſeiſin in fee taile, albeit he hath a fee ſimple expectant. [*f*] (2) And therefore if lands be given to a man and his wife, and to the heires of their two bodies, the remainder to the heires of the huſband, and they have iſſue a ſonne, and the wife dyeth, and he taketh another wife, and hath iſſue a ſonne, the father dieth, the eldeſt ſon entreth, and dieth without iſſue, the ſecond brother of the halfe blood ſhall inherit, becauſe the eldeſt ſonne by his entry was not actually ſeiſed of the fee ſimple, being expectant but onely of the eſtate taile (3). And the rule is, that *poſſeſſio fratris de feodo ſimplici facit ſororem eſſe hæredem*, and here the eldeſt ſon is not poſſeſſed of the fee ſimple but of the eſtate taile (4.) And where Littleton ſpeaketh onely of lands, [*g*] yet there ſhall be *poſſeſſio fratris* of an uſe (5), of a ſeigniory, a rent, an advowſon, (6) and of other hereditaments.

[*f*] 24. E. 3. 24. 30. 31. E. 3. Count. de Vouch. 88. 32. E. 3. tit. voucher. 37. Aſſ. p 4. 40. E. 3. 9. 42. E. 3. 10. 39. E. 3. fol. 13. 7. H. 5. 3.

(1. Ro. Abr. 627.)

(Cro. Cha. 411. Poſt. 281.)

(3. Co. 40, 41.)

[*g*] 5. E. 4. fo. 7. Pl. Com. fo. 58. in Wimbiſhe's caſe.

Et leigne fits enter. [*h*] Theſe words are materially added when the father dies ſeiſed of lands in fee ſimple, for if the eldeſt ſon doth not in that caſe enter, then without queſtion the youngeſt

[*h*] 10. [illegible] 7. 34. Aſſ. 10. 31. E. 3. Contr. de Vouch. 88. 32. E. 3. tit. Vouch. 94.

ET auxi ou home eſt ſeiſie de terres en fee ſimple, et ad iſſue fits et file per un venter, et fits per auter venter, et moruſt etleigne fits enter, et moruſt ſans iſſue, la file avera les tenements, et nemy le puiſne fits, uncore le puiſne fits eſt heire a le pere, mes nemy a ſon frere. Mes ſi leigne fits ne entra en la terre apres la mort ſonpere, mes moruſt devant aſcun entrie fait per luy, donques le puiſne frere poit entrer, et avera le terre come heire a ſon pere. Mes lou leigne fits en le caſe avant dit entra apres la mort ſon pere, et ad ent' poſſeſſion, donques, lo ſoer avera la terre

AND alſo where a man is ſeiſed of lands in fee ſimple, and hath iſſue a ſonne and daughter by one venter, and a ſon by another venter, and die, and the eldeſt ſon enter, and die without iſſue, the daughter ſhall have the land, and not the younger ſon, yet the younger ſon is heire to the father but not to his brother. But if the elder ſon doth not enter into the land after the death of his father, but die before any entry made by him, then the younger brother may enter and ſhall have the land as heire to his father: but where the elder ſon in the caſe aforeſaid enters after the death of his father, and hath poſ-

Quia

brother of the half blood ſhall not be heir to him; becauſe though when there is a meſne ſeiſin, he ought to make himſelf heir to him who is laſt actually ſeized; yet when there is not ſuch a meſne ſeiſin, he ought to make himſelf heir to him, in whom it firſt veſts by purchaſe. Yet ſee M. 1. Car. C. B. Cro. no. 16. Hodgekinſon and Wood. A having iſſue B a ſon by one venter, and C by another, deviſes to B and the heirs male of his body, remainder to the heirs male of the body of the deviſor and to the heirs male of their bodies, remainder to the deviſor's right heirs, and dies. B dies without iſſue. Ruled, that C ſhall take as heir male of the deviſor, becauſe it is quaſi an entail according to Littleton ſect. 30. But it ſeems, that the fee ſhall deſcend to him, ſince it is a void deviſe of the fee ſimple, and doth not veſt by purchaſe in the eldeſt ſon, but by deſcent. Hal. MSS.

(1) *A ſa frere*, omitted in L. and M.—and Roh.

(2) 7. *H.* 4. 16. *Vid.* 38. *Aſſ.* 8. Hal. MSS.

(3) Acc. Bro. Abr. *Diſcent*, pl. 13. 14. and 30. *Scire Facias*, pl. 126. and Execution 67. 1. Ro. Abr. 628. and ſee 1. Show. 245. and 3. Mod. 257.

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

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

(6) *So of a copyhold before admittance.* 4. *Co.* 22. *b.* Hal. MSS. See Acc. Dy. 291. b. Finch, 8vo. ed. 21.

Quia poſſeſſio fratris de feodo ſimplici facit ſororem eſſe hæredem. *Mes ſi ſont deux freres per divers venters, et leigne eſt ſeiſie de terre en fee et moruſt ſans iſſue, [et ſon uncle entra come prochein heire a luy quel auxy moruſt ſans iſſue,* (1)*] ore le puiſne frere puit aver la terre come heire al uncle, pur ceo que il eſt de lentier ſanke a luy, coment que il ſoit de demy ſanke a ſon eigne frere.*

ſeſſion there the ſiſter ſhall have the land, becauſe *poſſeſſio fratris de feodo ſimplici facit ſororem eſſe hæredem.* But if there be 2 brothers by divers venters, and the elder is ſeiſed of land in fee, and die without iſſue, and his uncle enter as next heire to him, who alſo dies without iſſue, now the yonger brother may have the land as heire to the uncle, for that he is of the whole blood to him, albeit he be but of the halfe blood to his elder brother.

ſonne ſhall be heire, becauſe as it hath beene ſaid before regularly he muſt make himſelfe heire to him that was laſt actually ſeiſed (or to the purchaſor), and that was to the father where the eldeſt ſonne did not enter. And therefore Littleton addeth that the ſonne is heire to the father. [*i*] But when the eldeſt ſonne in this caſe doth enter, then cannot the youngeſt ſonne being of the halfe blood be heire to the eldeſt, but the land ſhall deſcend to the ſiſter of the whole blood. Yet in many caſes albeit the ſonne doth not enter into lands deſcended in fee ſimple, the ſiſter of the whole blood ſhall inherit, and in ſome caſes where the eldeſt ſonne doth enter, yet the younger brother of the half blood ſhall be heire.

[*i*] 11. H. 4. 11. 40. E. 3. 39. 45. E. 3. 13. 40. Aſſ. p. 6. Ratcliffe's caſe 3. Co. 41.

[*k*] If the father maketh a leaſe for years, and the leſſee entreth and dieth, the eldeſt ſonne dieth during the tearme before entry or receipt of rent, the younger ſonne of the halfe blood ſhall not inherite but the ſiſter(2); becauſe the poſſeſſion of the leſſee for yeares is the poſſeſſion of the eldeſt ſonne, ſo as he is actually ſeiſed of the fee ſimple, and conſequently the ſiſter of the whole blood is to be heire(3). The ſame law it is if the lands be holden by knights ſervice, and the eldeſt ſonne is within age, and the gardian entreth into the lands. And ſo it is if the gardian in ſocage enter(4).

[*k*] 5. E. 4. 7. b. 3. H. 7. 5. S. Aſſ P. 6. 45 E. 3. tit. Releaſes 28. (Poſt 243. Mo. 125. 3. Co. 40, 41.)

the father

But in the caſe aforeſaid, if the father make a leaſe for life or a gift in taile, and dyeth, and the eldeſt ſonne dyeth in the life of tenant for life or tenant in taile, the younger brother of the halfe blood ſhall inherit, becauſe the tenant for life or tenant in taile is ſeiſed of the freehold, and the eldeſt ſonne had nothing but reverſion expectant upon that freehold or eſtate taile, and therefore the youngeſt ſonne ſhall inherit the land as heire to his father, who was laſt ſeiſed of the actuall freehold. And albeit a rent had beene reſerved upon the leaſe for life, and the eldeſt ſonne had received the rent and dyed, yet it is holden by ſome * that the younger brother ſhall inherite, becauſe the ſeiſin of the rent is no actuall ſeiſin of the freehold of the land. But 35 *Aſſ. pl.* 2. ſeemeth to the contrary, becauſe the rent iſſueth out of the land and is in lieu thereof(5), wherein the onely queſtion is, whether ſuch a ſeiſin of the rent be ſuch an actual ſeiſin of the land in the eldeſt ſon as the ſiſter may in a writ of right make herſelfe heire of this land to her brother. But it is cleere, that [*l*] if there be baſtard eigne, and *mulier puiſne*, and the father maketh a leaſe for life or a gift in taile reſerving a rent and die, and the baſtard receive the rent and dye, this ſhall barre the mulier, for the reaſon of that ſtandeth upon another maxime as ſhall manifeſtly appeare in his apt place, ſect. 399.

(Poſt. 191..)

* 7. H. 5. 34. per Halls & Logdington.

35. Aſſ. p. 2.

[*l*] 14. E. 2. Baſtard 26. Vid. ſect. 399. (Poſt. 244. a.)

Seiſie des terres. [*m*] (6) But in this caſe, if the eldeſt ſonne doth enter and get an actuall poſſeſſion of the fee ſimple, yet if the wife of the father be indowed of the third part and the eldeſt ſonne dyeth, the younger brother ſhall have the reverſion of this third part notwithſtanding the elder brother's entry; becauſe that his actuall ſeiſin which he got thereby was by the endowment defeated(7). But if the eldeſt ſonne had made a leaſe for life, and the leſſee had endowed the wife of the father, and tenant in dower had died, the daughter ſhould have had the reverſion, becauſe the reverſion was changed and altered by the leaſe for life, and the reverſion is now expectant on a new eſtate for life.

[*m*] 7. H. 5. 2. 3. 4. (8. Co. 35. b. Poſt. 191. b. 4. Co 58. b.)

Enter. Hereupon the queſtion groweth, whether if the father be ſeized of divers ſeverall parcels of lands in one county, and after the death of the father the ſonne entreth into one parcell generally, and before any actuall entry into the other dyeth, this generall entry into part ſhall veſt in him an actual ſeiſin in the whole, ſo as the ſiſter ſhall inherit the whole. And this is a *quære* in 21 H. 7. 33. a (8).

21. H. 7. 33 a.

And

(1) All between the brackets omitted in Roh. edit.

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

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

(4) *See accordingly, though the lord ſeize the land held in ſocage as guardian in chivalry.* 11. *Aſſ.* 6. 34. *Aſſ.* 10. *See* 12. *Eliz. Dy.* 292. *ſo as to copyholder or tenant at will. Quære of tenant by ſufferance.* Hal. MSS.—In Jenk. 242. it is ſaid, that the entry of a deviſee for years will make a *poſſeſſio fratris.* See Vin. Abr. *Deſcent*, K. pl. 34. See further on this ſubject in the caſe of *Newman* and *Newman*, Wilſ. vol. 2. p. 516.

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

(6) See Poſt. 31. a.

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

(8) *Adjudged accordingly in the point P.* 4. *Eliz. B. R.* Hal. MSS.

(Post. 252. b.)

(1. Leon. 265.)

And some doe take a diversitie when an entry shall vest, or devest an estate, that there must be severall entries into the severall parcels, but where the possession is in no man; but the freehold in law is in the heire that entreth, there the generall entry into one part reduceth all into his actuall possession. And therefore if the lord entreth into a parcel generally for a mortmain, or the feoffor for a condition broken, or the disseisee into a parcell generally, the entry shall not vest nor devest in these or like cases, but for that parcell. But when a man dies seised of divers parcels in possession, and the freehold in law is by the law cast upon the heire, and the possession in no man, there the entry into parcel generally seemeth to vest the actuall possession in him in the whole. But if his entry in that case be speciall, *viz.* that he enter only into that parcell and into no more, there it reduceth that parcell only into actuall possession.

[g] 19 E. 2. quare imped. 177. 3. H. 7. 5.

Home seisie des terres. What then is the law of a rent, advowson, or such things that lie in grant? [g] If a rent, or an advowson do descend to the eldest sonne, and he dyeth before he hath seisin of the rent, or presentment to the church, the rent or advowson (1) shall descend to the yongest sonne, for that he must make himselfe heire to his father, as hath beene oftentime said before. The like law is of offices, courts, liberties, franchises, commons of inheritance, and such like. [b] And this case differeth from the case of the tenant by the courtesie, for there if the wife dieth before the rent day, or that the church become voyd, because there was no laches or default in him, nor possibility to get seisin, the law in respect of the issue begotten by him will give him an estate by the courtesie of England. But the case of the descent to the yongest sonne standeth upon another reason, *viz.* to make himselfe heire to him that was last actually seised, as hath beene said.

[b] 7. E. 3. 66. tit. bar. 293. 3. H. 7. 5.
(Post. 29. a.)

[i] 8. E. 3. 11. 49. E. 3. 12. Ratcliffe's case. 3. Co. 41.

En fee simple. [i] For halfe blood is not respected in estates in taile, because that the issues doe claime in descent, *per formam doni*, and the issue in taile is ever of the whole blood to the donee (2).

[k] Bracton lib. 2. fo. 65. & lib. 4. fol. 279. Britton cap. 119. Flet. li. 6. c. 1. 24. E. 3. 30.

[k] *Possessio fratris de feodo simplici facit sororem esse hæredem.* Hereupon foure things are to be observed, every word almost being operative, and materiall. First, that the brother must be in actuall possession; for *possessio est quasi pedis positio*. Secondly, *de feodo simplici* exclude estates in taile. Thirdly, *facit sororem esse hæredem*. So as [l] *soror est hæres facta*, and therefore some act must be done to make her heire, and the yonger sonne is *hæres natus* [m] if no act be done to the contrary. And albeit the words be *facit sororem esse hæredem*, yet this doth extend to the issue of the sister, &c. who shall inherit before the yonger brother. Fourthly, Of *dignities*, whereof no other possession can be had but such as descend (as to be a duke, marquesse, earle, vicount, or baron) to a man and his heires, there can be no possession of the brother to make the sister to inherit (3), but the younger brother, being heire (as Littleton saith) to the father, shall inherit the dignitie inherent to the blood, as heire to him that was first created noble.

[l] Ratcliffe's case 3. Co. 42.
[m] Britton cap. 119.

(Cro. Cha. 601.)

And you shall understand that concerning descents there is a law, parcell of the lawes of England, called *jus coronæ*, and differeth in many things from the generall law concerning the subject. As for example, the king in any suit for any thing that pertaines to the crown shall not shew in certaine his colinage as a subject shall do, or as he himselfe shall do for things touching his dutchie. [n] And in the case of the king, if he hath issue a sonne and a daughter by one venter, and a sonne by another venter, and purchaseth lands and dieth, and the eldest son enter and dieth without issue, the daughter shall not inherit these lands, nor any other fee simple lands of the crowne, but the yonger brother shall have them. Wherein note that neither *possessio fratris* doth hold of lands of the possessions of the crowne, nor halfe blood is no impediment to the descent of the lands of the crowne, as it fell out in experience after the decease of king Edward the sixt to the queene Mary, and from queene Mary, to queene Elizabeth, both which were of the half blood, and yet inherited not onely the lands which king Edward or queen Mary purchased, but the ancient lands parcell of the crowne also.

[n] 34. H. 6. fol 34. Pl. Com. fol. 245. 25. E. 3. ca de natis ultra mare.
(4. Inst. 206.)

Pl. Com. ubi supra.

A man that is king by descent of the part of his mother, purchases lands to him and his heires and dies without issue, this land shall descend to the heire of the part of the mother; but in the case of a subject, the heire of the part of the father shall have them.

(7. Co. 12. b. Calvin's case.)

So king Henry the eight purchased lands to him and his heires, and died having issue two daughters, the lady Mary, and the lady Elizabeth, after the decease of king Edward; the eldest daughter queen Mary did inherit only, all his lands in fee simple. For the eldest daughter, or sister of a king shall inherit all his fee simple lands. So it is if the king purchaseth lands of the custome of gavelkind, and die having issue divers sonnes, the eldest sonne shall only inherit these lands (4). And the reason of all these cases is, for that the qualitie of the person doth in these and many other like cases alters the descent, so as all the lands and possessions whereof the king is seised *in jure coronæ*, shall *secundum jus coronæ* attend upon and follow the crowne, and therefore to whomsoever the crowne descend, those lands and possessions descend also, for the crowne and the lands whereof the king is seised *in jure coronæ*, are con-

Pl. Com. fol. 247.
(1. Sid. 138.)

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

(2) 8. *E.* 3. 11. 12. *E.* 4. 19. 49. *E.* 3. 12. 4. *E.* 2. *Formedon* 49. Hal. MS.

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

(4) Nota, *by the common law, the king is a corporation, and purchases made by him after assumption of the crown vest in a politic capacity. Hence, if an usurper purchases lands, and the right heir resumes the crown, he shall have the purchases,* et e converso, *an usurper shall have the purchases made by a rightful king so long as he has the crown. So it happened in the cases of H.* 4. *H.* 5 *H.* 6. *E.* 4. *R.* 3. *H.* 7. But nota, *purchases made before accession of the crown, or descents from collateral ancestors after accession of the crown,*

concomitantia. If the right heire of the crowne be attainted of treaſon, yet ſhall the crowne deſcend to him, and *eo inſtante* (without any other reverſall) the attainder is utterly avoided, as it fell out in the caſe of Henry the ſeventh(1). [o] And if the king purchaſe lands to him and his heires. he is ſeiſed thereof *in jure coronæ* ; *à fortiori*, when he purchaſes land to him his heires and ſucceſſors (2).

Pl. Com. 238. 1. H. 7. fol. 4. (Plowd. 105. 244. 245.)
[o] 43. E. 3. fol. 20.

But hereof this little taſte ſhall ſuffice.

Sect. 9.

ET eſt aſcavoir que ce parol (enheritance) n'eſt pas tantſolement entendue, lou home ad terres ou tenements per diſcent denheritage, mes auxi cheſcun fee ſimple, ou taile(3)*que home ad per ſon purchaſe puit eſtre dit enheritance, pur ceo que ſes heyres luy purront enheriter. Car en briefe de droit que home portera de terre que fuit de ſon purchaſe demeſne, le briefe dirra:* Quam clamat eſſe jus et hæreditatem ſuam. *Et iſſint ſerra dit en divers auters briefs, queux home ou feme portea de ſon purchaſe demeſne come apiert per le* Regiſt.

AND it is to wit, that this word (*inheritance*) is not onely intended where a man hath lands or tenements by deſcent of inheritage, but alſo every fee ſimple or taile which a man hath by his purchaſe may be ſaid an inheritance, becauſe his heires may inherit him. For in a writ of right which a man bringeth of land that was of his owne purchaſe, the writ ſhall ſay, *Quam clamat eſſe jus et hæreditatem ſuam.* And ſo ſhall it be ſaid in divers other writs which a man or woman bringeth of his owne purchaſe, as appeares by the regiſter.

ET eſt aſcavoir. This kinde of ſpeech is uſed twice in this chapter, and oftentimes by our authour in all his three bookes, and ever teacheth us ſome rule of law, or generall or ſure leading point, as you ſhall perceive by reading, and obſerving of the ſame, which for the eaſe of the ſtudious reader I have obſerved.

Sect. 45. 46. 57. 59. 80. 100. 146. 164. 170. 184. 229. 243. 259. 274. 280. 293. 300. 305. 419. 420. 421. 489. 632. 697. 749.

Quam clamat eſſe jus et hæreditatem ſuam. [a] Here our authour declareth the right ſignification of this word (*inheritance.*) And true it is that in the writ of right patent, &c. *quando dominus remittit curiam ſuam*, the words of the writ be, *Quam clamat eſſe jus et hæreditatem ſuam.* And in the *Præcipe in capite*, in a *cui in vita*, [b] when the defendant claimeth by purchaſe, the writ is *quam clamat eſſe jus et hæreditatem ſuam.* And with Littleton agreeth the Regiſter, fol. 4. & 232. and the booke in 49. E. 3. 22. againſt ſodaine opinions 7. H. 4. 5. 10. H. 6. 9. 39. H. 6. 38. Pl. Com. Wimbeſhe's caſe 47. And yet in 7. H. 4. 5. which is the booke of the greateſt weight, Sir William Thirning chiefe juſtice of the common bench (as it ſeemeth doubting of it) went into the chancery to enquire of the chancery men the forme of the writ in that caſe, and they ſaid that the forme was both the one way and the other, ſo as thereby the opinion of Littleton is confirmed, and the booke in 6. E. 3. fol. 30. is notable, for there in an action of waſte the plaintife ſuppoſed, that the defendant did hold *de hæreditate ſua*, and it is ruled, that albeit the plaintiſe purchaſed the reverſion, yet the writ ſhould ſerve. And there it is ſaid, it hath beene ſeene, that in a *cui in vita*, the writ was, *which the demandant claimed as her right and inheritance*, when it was her purchaſe. And ſo this point wherein there might ſeem ſome contrariety in bookes is manifeſtly cleared. But in the ſtatute of W. 2. cap. 5. *de hæreditate uxorum* by conſtruction of the whole ſtatute is taken onely for the wives inheritance by deſcent, and not by purchaſe as appeareth in 1. E. 2. *tit. Quare imped.* 43. 35. H. 6. 54. F. N. B. 34. b.

[a] Sect. 732. Bract. lib. 2. fo. 62. b Fleta lib. 6. ca. 1. (Poſt. 383. b.)
[b] Regiſt fol. 1. 2. (F. N. Br. 193.)
Regiſt. fol. 4. 232. 49. E. 3. 22. 7. H. 4. 5 10. H. 6. 9. 39. H. 6. 38 6. E. 3. 30. Pl. Com. Wimbeſhe's caſe, 47. & 58. b.
6. E. 3. 30.
W. 2. ca. 5. 1. E. 2. tit. quare imped. 43. 35. H. 6. 54. F. N. B. 34. b.

There be ſome that have an inheritance [c] and have it neither by deſcent nor properly by purchaſe but by creation, as when the king doth create any man a duke, a marqueſſe, earle, viſcount, or baron to him and his heires, or to the heires males of his bodie, &c. he hath an inheritance therein by creation. A man may have an inheritance in title of nobilitie and dignitie three manner of wayes, that is to ſay, by creation, by deſcent, and by pre-

[c] 6. Co. 52. 53. Countes de Rutland's caſe, 8 Co. 16. 17. the Prince's caſe. (4. Inſt. 126.)

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

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

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

(3) *Ou taile* not in L. and M.

(12. Co. 69. ante 9. b.)

prescription (1). By creation two manner of ordinary wayes (for I will not speake of a creation by parliament) by writ, and by letters patent. Creation by writ is the ancienter way, and here it is to be observed, that a man shall gain an inheritance by writ (2). King Richard the Second created John Beauchampe de Holte baron of Kedermister by his letters patents, bearing date the 10th of October, *anno regni sui* 11. before whom there was never any baron created by letters patent, but by writ. And it is to be observed, that if he be generally called by writ to the parliament, he hath a fee simple in the baronie without any words of inheritance. But if he be created by letters patent, the state of inheritance must be limited by apt words, or else the grant is void. If a man be called by writ to the parliament, and the writ is delivered unto him and he dieth before he commeth and sits in parliament, whether he was a baron or no? And it is to be answered that he was no baron, for the direction and deliverie of the writ to him maketh not him noble; for the better understanding whereof it is to be knowne that the words of the writ in that case are, *Rex &c. E. B. de D. Chivalier salutem. Quia de advisamento et assensu concilii nostri, pro quibusdam arduis et urgentibus negotiis statum et defensionem regni nostri Angliæ, &c. concernentibus, quoddam parliamentum nostrum apud civitatem Westm. à 21 Octob. proxim. futuro teneri ordinavimus, et ibid. vobiscum et cum prælatis, magnatibus et proceribus dicti regni nostri colloquium habere et tractatum, vobis in fide et ligeancia quibus nobis tenemini firmiter injungendo mandamus, quod consideratis dictorum negotiorum arduitate, et periculis imminentibus cessante excusatione quacunque, dictis die et loco personaliter interfitis nobiscum et cum prælatis, magnatibus, et proceribus supradictis, super dictis negotiis tractatur' vestramque concilium impensur', &c.* And this writ hath no operation or effect until he sit in parliament, and thereby his blood is ennobled to him and his heires lineall, and thereupon a baron is called a peer of parliament. [d] And if issue be joined in any action, whether he be a baron, &c. or no, it shall not be tryed by jury, but by the record of parliament, which could not appeare unlesse he were of the parliament (3). Therefore a duke, earle, &c. of another kingdome, are not to be sued by those names here, for that they are not peeres of our parliament (4). And albeit the creation by writ is the ancienter, yet the creation by letters patent is the surer, for he may be sufficiently created by letters patents, and made noble, albeit he never sit in parliament.

[e] And it is to be observed, that nobilitie may be granted for term of life, by act in law without any actuall creation; as if a duke take a wife, by the intermarriage she is a duches in law, and so of a marquesse, an earle, and the rest, and in some other cases. And there is a diversitie betweene a woman that is noble by descent, and a woman that is noble by marriage. [f] For if a woman, that is noble by descent, marrie one that is under the degree of nobilitie, yet she remaineth noble still (5); but if she gaine it by marriage, she loseth it, if she marry under the degree of nobilitie, and so is the rule to be understood, *Si mulier nobilis nupserit ignobili desinit esse nobilis.* [g] But if a dutchesse by marriage marrieth a baron of the realme she remaineth a dutchesse and loseth not her name, because her husband is noble (6), *et sic de cæteris.*

And as an estate for life may be gained by marriage, so may the king create either man or woman noble for (7) life [h] but not for yeares, because then it might goe to executors or administrators (8). The true division of persons is, that everie man is either of nobilitie, that is, a lord of parliament of the upper house, or under the degree of nobilitie, amongst the commons as knights, esquires, citizens and burgesses of the lower house of parliament, commonly called the house of commons; and he that is not of the nobilitie is by intendment of law among the commons (9).

Come appiert per le registre. Which booke in the statute of W. 2. ca. 24. is called *Registrum de cancellaria*, because it containeth the formes of writs at the common law that issue out of the chancerie, *tanquam ex officina justiciæ.* There is a register of originall writs, and a register of judiciall writs; but when it is spoken generally of the register it is meant of the register originall. For the antiquitie and excellencie of this booke, see in my preface to the eight part of my Commentaries. This excellent booke our author voucheth divers times in these bookes, and so doth he divers other authorities in law of several kinds, but with this observation, that he citeth no authoritie, but when the case is rare or may seeme doubtfull, which appeareth in this, that he putteth no case in all his three bookes but hath warrant of good authoritie in law. For he knew well the rule, that *perspicua vera non sunt probanda.* And the like observation is made of justice Fitzherbert in his booke of *natura brevium*, that he never citeth authoritie, but when the case is rare or was doubtfull to him. The authorities which our author hath cited in his three bookes I have collected.

Sect.

6. Co. 52. 53. Countesse of Rutland's case. 8. H. 6. 10. 48. E. 3. 30. 35. H. 6. 46. Pl.com. 223.

[d] 35. H. 6. 46. 48. E. 3 30. b. 48. Ass. p 6. 22. Ass. p. 24. Regist. 287. 11. E. 3. breve 472. 20. E. 4. 6.

(6. Co. 52. Countes of Rutland's case.)

[e] 6. Co. 52 53. Countes de Rutland's case. 2. H. 6. 11. 22. Ass. 24. 12. E. 3 breve 254. 8. H. 4. 19. 11. H. 4. 15. Vide Fleta lib. 6. ca. 10.

[f] 4. Co. 118. Acton's case. Tempore Mariæ Reginæ. Brooke nosme de dignity 69. 14. H. 6. 18. 2. H. 6. 11.

[g] 22. H. 6. 52.

[h] 9. Co. 97. 98. Sir George Reynel's case.

Vide Sect. 88. 94. 96. 101. 157. 234. 318. 383. 412. 420. 433. 514. 643. 644. 657. 660. 692. 702. 729.

(1) See 1. Bulstr. 196. where the earldom of Arundel is mentioned as an instance of an earldom by prescription. In this case many curious particulars concerning the *honour of Petworth* are mentioned.

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

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

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

(5) See 14. H. 8. 42. Dy. 79.

(6) But in some books it is said, that if a woman noble by birth marries one of inferior nobility, she shall be styled by the dignity of her second husband. Dutchess of Suffolk's case. Ow. 82. See S. C. O. Bendl. 37.

(7) It has been supposed, that a man may be noble during the life of another. 32. H. 6. 29. by Danby.

(8) *As to the degree of baronet, it is parcel of the name; and therefore capias against I. S. or I. S. knight, where he is baronet, cannot take I. S. baronet. Noy. n. 38. Sir Richard Lucye's case. Tr. 10. Car. B. R. Cro. n. 6. Sir Henry Ferrer's case. The king cannot create a dignity with a mesne between baron and baronets.* 9. Jac. 12. Co. n. 51. Hal. MSS. See Noy. 87. Cro. Cha. 371. and 12. Co. 81.

(9) See 2. Inst. 29. 50.

Sect. 10.

ET de tielx choſes, de queux home poit aver un manuel occupation poſſeſſion ou reſceit, ſicome des terres tenements rents et hujuſmodi, la home dirra en count countant, et en plee pledant, que un tiel fuit ſeiſie en ſon demeſne come de fee. Mes de tiels choſes, que ne giſont en tiel Manuel occupation, &c. ſicome de advowſon deſgliſe et huiuſmodi, la il dirra, que il fuit ſeiſie come de fee, et nemy en ſon demeſne come de fee, et en Latin il eſt en lun cas, quòd talis ſeiſitus fuit, &c. in dominico ſuo ut de feodo, *et en lauter caſe*, quod talis ſeiſitus fuit, &c. ut de feodo.

AND of ſuch things, whereof a man may have a manuell occupation poſſeſſion or receipt, as of lands tenements rents and ſuch like, there a man ſhall ſay in his Count Countant and Plea Pleadant, that ſuch a one was ſeiſed in his demeſne as of fee. But of ſuch things, which do not lie in ſuch Manuall occupation, &c. as of an Advowſon of a Church and ſuch like, there he ſhall ſay, that he was ſeiſed as of fee, and not in his Demeſne as of fee. And in Latine it is in one Caſe, *Quod talis ſeiſitus fuit in dominico ſuo ut de feodo*, and in the other Caſe, *Quod talis ſeiſitus fuit, &c. ut defeodo.*

IN count countant. Count i. e. *narratio* cometh of the French word *conte*, which in Latyne is *narratio*, and is vulgarly called a declaration (1). The original writ is according to its name *breve*, briefe and ſhort; but the count, which the plaintife or demandant makes, is more narrative and ſpacious and certaine both in matter and in circumſtance of time and place, to the end the defendant may be compelled to make a more direct anſwer; ſo as the writ may be compared to *logicke*, and the count to *rhetoricke*; and it is that which the civilians call a *libell.* And in that ancient booke of the Mirror of Juſtices, lib. 2. cap. des loiers, *contors* are *ſerjeants* ſkilfull in law, ſo named of the count as of the principal part, and in W. 2. ca. 29. he is called *ſerjant counter* (2). (Doctr. Pla. 83.) Mirror des Juſtices. W. 2. cap. 29.

En plee pledant. *Placitum.* Here Littleton teacheth good pleading in this point, of which in his third booke and chapter of Confirmation, ſect. 534, he thus ſaith, *et ſaches mon fits, que eſt un des pluis honorables laudables et profitable choſes en noſtre ley, de aver le ſcience du bien pleader en actions reals et perſonels; et pur ceo, ieo toy counſaile eſpecialment de metter ton courage et cure de ceo apprender.* And for this cauſe this word *placitum* is derived *à placendo, quia bene placitare ſuper omnia placet*; and it is not as ſome have ſaid, ſo called *per antiphraſin, quia non placet.* (Poſt. 303.)

Seiſie; *Seiſitus* commeth of the French word *ſeiſin*, i. e. *poſſeſſio*, ſaving that in the common law, *ſeiſed* or *ſeiſin* is properly applyed to freehold, and poſſeſſed or poſſeſſion properly to goods and chattels; although ſometime the one is uſed inſtead of the other. Bract. lib. 4. fol. 263. Idem lib. 5. fol. 372. Britton fol. 205. 206. Fleta lib. 5. cap. 5. Stanf. Prær. 8. Pl. Com. fol. 191. Wroteſley's caſe.

En ſon demeſne come de fee, in Dominico ſuo ut in feodo. *Dominicum* is not onely that inheritance, wherein a man hath proper dominion or owner-ſhip, as it is diſtinguiſhed from the lands which another doth hold of him in ſervice, but that which is manually occupied, manured, and poſſeſſed, for the neceſſary ſuſtentation, maintenance, and ſupportation of the lord and his houſhold, and ſavoureth *de domo*, of the houſe, either *ad menſam*, for his or their bord, and ſuſtentation, or is manually received, (as rents) for bearing and defraying of neceſſary charges publike or private. Of theſe, ſaith our author, he ſhould plead, that he is ſeiſed *in dominico ſuo ut de feodo*, i. e. *de feodo dominicali, ſeu terra dominicali, ſeu reddita dominicali*; which is as much as to ſay demeyne or demaine, of the hand, i.e. manured by the hand, or received by the hand; and therefore he calleth it manuall occupation, poſſeſſion or receipt (3). And in *Domeſday* demeane land is called inland, as for example, 4 *bovatas terræ de inland, et* 10. *bovatas in ſervitio.* Domeſday.

En tiel Manuel occupation, &c. There is nothing in our author but is worthy of

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

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

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