Sect. 245.

ET la part, que l'eigne soer ad, est appelle en Latin enitia pars. *Mes si les parceners agreeont, que l'eigne soer ferra partition de les tenements en le forme avantdit, & si ceo el fait, donque il est dit, que l'eigne soer esliera pluis darreine pur sa part, & apres chescun de ses soers, &c.* (1)

AND the part, which the eldest sister hath, is called in Latine *enitia pars.* But if the parceners agree, that the eldest sister shall make partition of the tenements in manner aforesaid, and if she doe this, then it is said, that the eldest sister shall choose last for her part, and after every one of her sisters, &c.

ENitia pars. It is called in old bookes * *æisnetia*, which is derived of the French word *eisne* for eldest, as much to say as the part of the eldest; for *Bracton* saith, *quòd eisnetia semper est præferenda propter privilegium ætatis; sed esto, quòd filia primogenita relicto nepote vel nepte in vitâ patris vel matris, decesserit, præferenda erit soror antenata tali nepoti vel nèpti quantum ad eisnetiam, quia mortem parentum expectant.* And herewith agreeth *Fleta* also, *quod nota:* whereby it appeareth that *enitia pars* is personall to the eldest, and that this prerogative or priviledge descendeth not to her issue, but the next eldest sister shall have it. [*f*] And here is a diversity to be observed betweene this case of a partition in deed by the act of the parties, for there the priviledge of election of the eldest daughter shall not descend to her issue; and where the law doth give the eldest any priviledge without her act, there that priviledge shall descend. As if there be divers coparceners of an advowson *, and they cannot agree to present, the law doth give the first presentment to the eldest; and this priviledge shall descend to her issue; nay her assignee shall have it, (2) and so shall her husband, that is tenant by the curtesie, have it also (3).

* Bract. li. 2. 77. Fleta lib. 5. ca. 9. Britton ca. 72.

[*f*] 45. E. 3. fines 41. 19. E. 3. quar. imp. 59. 18. E. 2. ibid. 176. 5. H. 5. 10. 38. H. 6. 9. Doct. & Stud. 116. 117. Vid. Bract. 238. 249.
* 5. H. 7. 8. 34. H. 6. 40. 11. H. 4. 54. 20. E. 3. quar. imp. 63. 34. E. 3. Ibid. 198. 15. E. 3. Dar. Presentment 11.
17. E. 3. 20. 21. 21. E. 3. 21. F. N. B. 32. (Post. 18. b.)

Donques il est dit l'eigne soer eslier pluis darreine, &c. By this and the *&c.* in the end of this Section is implyed, the rule of law is, *cujus est divisio, alterius est electio.* And the reason of the law is for avoyding of partiality,

(*Ipsæ etenim leges cupiunt ut jure regantur*)

which might apparently follow if the eldest might both divide and choose (4). Now followeth the third partition in deed.

Sect. 246.

UN auter partition ou allotment est, sicome soient quater parceners, & apres le partition de les terres fait, chescun part del terre soit per soy solement escript en un petit escrovet, & soit covert tout en cere en le maner d'un petit pile, issint que nul poit veier l'escrovet, & donque soient les 4 piles de cere mis en un bonnet a garder en les maines d'un indifferent home, & donques

ANOTHER partition or allotment is, as if there be foure parceners, and after partition of the lands be made, every part of the land by itselfe is written in a little scrowle, and is covered all in waxe in manner of a little ball, so as none may see the scrowle, and then the 4 balls of waxe are put in a hat to bee kept in the hands of an indifferent man, and then the eldest daughter shall first

(1) The &c. not in L. & M. or Roh.

(2) Acc. P. 18. E. *Quare Impedit* 176. Post. 186. b. 3. Co. 22. b. 2. Inst. 365. 2. Ro. Abr. 346. Mallory's Quare Impedit 145. Three judges also held accordingly East. 23. Eliz. in Harris & Haies v. Nichols Cro. Eliz. 18. But Anderson chief justice doubted, whether a grantee should have the privilege. In Keilwey there is a case of 18 Hen. 7. in which Frowike chief justice is made to give it to the grantee of the eldest sister, only where it has been once exercised by herself. But he afterwards doubted his own distinction, and seemed to incline to the grantee's right generally; in consequence of which the report concludes thus: *Stude bene et quære.* Keilw. 49. Upon the whole therefore it seems, that the point is not quite settled; and to determine it properly would require a very careful examination of the numerous cases cited by lord Coke here and in the second Institute. See 7. Ann. c. 18.——I was led into this note by a reference to the case from Cro. Eliz. in a Coke upon Littleton of the late mr. Beversham Filmer, and by an opinion of the same very learned gentleman, in which he represents the point to be doubtful, and therefore dissuaded accepting the title to the next presentation of an advowson belonging to three sons as heirs in gavel-kind, unless they would all join in the grant. The eminence of mr. Filmer as a barrister, more especially in the conveyancing line, will, I presume, fully justify me for thus introducing his name. The doubts of a lawyer so profound and correct, as he was universally allowed to be, will ever claim high respect; and it is with peculiar pleasure, that I take this opportunity of expressing the veneration with which I hold him in my remembrance.

(3) Agreed by lord Anderson in the case from Cro. Eliz. cited in the preceding note.

(4) See Hob. 107. where the doctrine is cited with approbation.

donques leigne file primerment mettra sa maine en le bonnet, quel prendra un pile de cere ovesque le scrovet deins mesme le pile pur sa part, & donques le second soer mettra sa maine en le bonnet & prendra un auter, le tierce soer le 3 pile, & le 4 soer le 4 pile, &c. & en ceo cas covient chescun de eux luy tener a sa chance & allotment.

put her hand into the hat, and take a ball of waxe with the scrowle within the same ball for her part, and then the second sister shall put her hand into the hat and take another, the 3 sister the 3 ball, & the 4 sister the 4 ball, &c. and in this case every one of them ought to stand to their chance and allotment.

Allotment. Of this partition by lots ancient authors * write, that in that case coparceners *fortunam faciunt judicem.* And Littleton here tearmeth it chance; for in the end of this section he saith, that in this case every of them ought to hold her selfe to her chance; and of this kinde of division you shall read in holy scripture, where it is sayd, *dedi vobis possessionem quam dividetis sorte.*

The *&c.* in the end of this section implyeth, that if there be more coparceners there must be more balls according to the number of the parceners.

* Fleta lib. 5. ca. 9. Bracton lib. 2. 75. Britton cap. 72.

Vide Numbers ca. 26. verse 54. 55. & ca. 33. ver. 54. of division by lots.

Sect. 247.

ITEM un auter partition il y ad. Sicome sont quater parceners, & ils ne voilent agreer a partition d'estre fait enter eux, donque l'un poit aver brief de partitione faciendâ *envers les auters trois; ou deux d'eux poient aver brief* de partitione faciendâ *envers les auters deux, ou trois de eux poyent aver brief* de partitione faciendâ *envers le quart, à lour election.*

ALSO there is another partition. As if there bee foure parceners, and they will not agree to a partition to bee made betweene them, then the one may have a writ of *partitione faciendâ* against the other three, or two of them may have a writ of *partitione faciendâ* against the other two, or three of them may have a writ of *partitione faciendâ* against the fourth, at their election.

HERE followeth the fourth partition in deed. *Littleton* having spoken of voluntary partitions, or partitions by consent; now he speakes of a partition by the compulsary means of law where no partition can be had by consent. Now of what inheritance partition may be made by the writ of *partitione faciendâ* may partly appeare by that which hath beene sayd. Moreover it is to bee observed, that the words of the writ *de partitione faciendâ* be, * *quòd cùm eædem A & B insimul & pro indiviso teneant tres acras terræ cum pertinen', &c.* And note that this word *(tenet)* (1) in a writ doth alwayes imply a tenant of a freehold. And therefore [g] if one coparcener maketh a lease for yeares, yet a writ of partition doth lie (2). But if one or both make a lease for life, a writ of partition doth not lye betweene them; because *non insimul & pro indiviso tenent,* they doe not hold the freehold together, and the writ of partition must be against the tenant of the freehold. [h] If one coparcener disseise another, during this disseisin a writ of partition doth not lie betweene them; for that *non tenent insimul & pro indiviso.*

But there be other partitions in deed then here have beene mentioned. [i] For a partition made between two coparceners, that the one shall have and occupy the land from *Easter* untill the first of August only in severalty by himselfe, and that the other shall have and occupie the land from the first of August untill the feast of *Easter* yearely to them and their heires, this is a good partition (3). Also if two coparceners have two mannors by descent, and

* 3 E. 3. 47. 48.

[g] 21. E. 3. 57. F. N. B. 62. g. 28. H. 6. 2. 11. H. 4. 3. 4. H. 7. 10. b. (Post. 176. b.)

[h] 4. H. 7. 9. 11. Ass. 23 (Post. 167. b. 187. a.)

[i] Temps E. 1. partition 21. F. N. B. 62. I. (7. Co. 5.)

(1) See the various applications of the verb *tenet* explained ant. fol. 1. a. & b.

(2) So too execution of dower is not prevented by a lease for years subsisting at the husband's death. Ant. 32. a. How lessee for years is affected by such a partition, is before explained by lord Coke in fol. 46. a.

(3) See the case of a *movable* fee simple, stated ant. fol. 4. a.

and they make partition, that the one shall have the one manor for one yeare, and the other the other manor for this yeare, and so *alternis vicibus* to them and their heires, this is a good partition. The same law is, if the partition be made in forme aforesaid, for two or more yeares, and each coparcener have an estate of inheritance, and no chattell, albeit either of them *alternis vicibus* have the occupation but for a certaine terme of yeares.

Of partitions in law, some be by act in law without judgement, and some be by judgement, and not in a writ *de partitione faciendâ*. And of these in order.

[*k*] 36. H. 6. 7. (Post. 192. a.)

[*k*] If there be lord, three coparceners mesnes, and tenant, and one coparcener purchase the tenancy, this is not onely a partition of the mesnalty, being extinct for a third part, but a division of the seigniory paramount, for now he must make severall avowries (1).

[*l*] 37. H. 6. 8. 43. E. 3. 1.

[*l*] If one coparcener make a feoffement in fee of her part, this is a severance of the coparcenarie, and severall writs of *præcipe* shall lie against the other coparcener and the feoffee (2).

[*m*] 17. E. 3. 14. 15.

[*m*] If two coparceners be, and each of them taketh husband and have issue, the wives die, the coparcenary is divided, and here is a partition in law.

[*n*] 12. E. 3. Judgm. 162. 7. Ass. 10. 7. E. 3. 49. 10. Ass. 17. 12. Ass. 5. 17. 10. E. 3. 40. 43. 28. Ass. 35. 23. Ass. 18. 20. E. 3. Ass. 62. 3. E. 3. 48. b. 19. H. 6. 45. 7. H. 6. 4. 3. E. 4. 10.
* Bract. lib. 4. fo. 216. b.
[*o*] 3. E. 3. 48. 21. R. 2. tit. Nuper ob. 22. 4. H. 7. 10. 30. E. 1. Nup. ob. 18. F. N. B. 9. b.
* Britton fol. 112. a.
[*p*] 6. Co. 12. & 13. Morrice's case accorde. (Post. 187. a.)

[*n*] If two coparceners be, and one disseise the other, and the disseisee bringeth an assise, and recover, it hath beene said, that she shall have judgement to hold her moity in severalty. And this seemeth (say they) verie ancient, and thereupon vouch *Bracton*, * *si res fuerit communis locum habere poterit communi dividendo judicium.* And [*o*] so (say they) if the one coparcener recover against another in a *nuper obiit*, or a *rationabili parte*, the judgement shall be, that the demandant shall recover and hold in severalty. But *Britton* is to the contrary; for he saith, * *et si ascun des parceners soit enget ou disturbe de la seisin per ses auters parceners, un, ou plusors, al disseisee viendra assise per severall pleint sur les parceners & recovera, mes nemy a tener en severaltie, mes en common solonque ceo que avant le fist, &c.* [*p*] And this seemeth reasonable; for he must have his judgement according to his plaint, and that was of a moitie, and not of any thing in severaltie, and the sherife cannot have any warrant to make any partition in severalty or by metes and bounds.

Sect. 248.

ET quant judgement sera done sur tiel brief, le judgment serra tiel; que partition serra fait enter les parties, & que le vicount en son proper person alera a les terres & tenements, &c. & que il per le serement de xii loyalx homes de son bayliwicke&c. serra partition enter les parties, & que l'un part de mesmes les terres & tenements soyent assignes al plaintif ou a l'un des plaintifs, et un auter part a un auter parcener, &c. nient feasant

AND when judgement shall be given upon this writ, the judgment shall be thus; that partition shall be made betweene the parties, and that the sherife in his proper person shall go to the lands and tenements, &c. & that he by the oath of 12 lawful men of his bailiwicke, &c. shall make partition between the parties, & that one part of the lands & tenements shall be assigned to the plaintif or to one of the plaintifs, & another part to another parcener, &c. not making mention in

Bract. fo. 66. &c. Brit. 71. &c. Brit. ca. 72. Fleta lib. 5. ca. 9.

NOTE the first judgement in a writ of partition, whereof *Littleton* here speaketh, is, *quòd partitio fiat inter partes prædictas de tenementis prædictis, cum pertinentiis,* after which judgement. By this &c. *viz. tenements,* &c. is implyed, that a writ shall be awarded to the sherife, *quòd assumptis tecum 12 liberis & legalibus hominibus de vicencto tuo, per quos rei veritas meliùs sciri poterit, in propriâ personâ tuâ accedas ad tenementa prædicta cum pertinentibus, & ibidem per eorum sacramentum, in præsentiâ partium (3) prædictarum per te præmuniendarum si interesse voluerint, prædicta tenementa cum pertinentibus per sacramentum bonorum & legalium hominum prædictorum, habito respectu ad verum valorem earundem, in duas partes æquales partiri & dividi, & unam partem partium illarum, &c.*

This last &c. in this *section* is evident.

Ockam ca. quid sit liber judiciarius. (4) 40. E. 3. 45. 9. Ass. 2. 8. Ass. 35. 49. E. 3. 2. Regist. F. N. B. 16.

Judgement. Judi-

(1) But according to Bro. Nouv. Cas. 108. the lord should have notice of the partition.

(2) Acc. ant. 67. b. post. 175. a. 195. a. But this sort of partition is not a partition in the sense in which Littleton writes of partitions, nor in the common sense of the word. He means a division of the land itself; whereas what lord Coke here calls a partition is a mere severance of the unity of title, which operates, as Littleton afterwards states, by making a tenancy in common. See sect. 309.

(3) These words enjoining the partition to be made *in the presence of the parties* shew, that the proceeding before the sheriff is quite *open*. So too as it seems should be the execution of a *commission* of partition issued by chancery as a court of equity, such commission being in nature of a writ at common law for the like purpose. But I understand, that there have been instances of treating the commission of partition as a *close* proceeding, and that on that idea it has been sometimes the practice to annex an oath of secrecy to the commission. This practice, I presume, has grown from not attending to the difference between commissions to divide lands and commissions to examine witnesses merely. In the latter sort of commission an oath to keep the depositions secret is expresly required by an order of chancery of the 9th of February 1721; and exclusively of the order the proceeding implies secrecy, the depositions being ever kept close under seal, till leave is obtained to divulge them by the passing of publication. But neither the language nor spirit of this order is applicable to commissions of partition, which like the writ of partition ought to be *openly* executed.

(4) See Dialog. de Scaccar. lib. 1. cap. 16. which has the same title.

sant mention en le judgement de l'eigne soer pluis que de puisne.

the judgement of the eldest sister more than of the youngest.

cium est quasi juris dictum, so called, because so long as it stands in force *pro veritate accipitur* (1) and cannot be contradicted. And thereupon antiquitie called that excellent booke in the exchequer, *Domesday, Dies judicii. Sicut enim districti & terribilis examinis illa novissima sententia nullâ tergiversationis arte valet eludi, &c. sic sententia ejusdem libri inficiari non potest, vel impunè declinari; ob hoc nos eundem librum judiciarium nominamus, &c. quòd ab eo sicut a prædicto judicio non licet ullâ ratione discedere.* By *Littleton* it appeareth, that the formes of judgements, pleas, and other legall proceedings, doe conduce much to the right understanding of the law and of the reason thereof; as here *Littleton* rightly collecteth upon the forme of the judgement, that the sherife shall deliver to them such parts as he thinkes good, and that the eldest coparcener shall have no election when partition is made by the sherife. And it is to bee observed, that there bee two judgements in a writ of partition. Of the former *Littleton* speaketh in this place. And when partition is made by the oath of twelve men, and assignement and allotment thereof, and so returned by the sherife, then the latter judgment is, *ideo consideratum est, quòd partitio prædicta firma & stabilis imperpetuum teneatur*, and this is the principall judgement. [q] And of the other, before this be given, no writ of error doth lie. (2)

[q] 11. Co. 40. Hill. 39. Eliz. Rot. 327. in Banke le Roy inter An. Countes de War & le Seignior Berkley. (Fortesc. 52. Ant. 50. a. 109. b.)

Shireve is a word compounded of two Saxon words, *viz. shire*, and *reve*. *Shire, satrapia*, or *comitatus*, commeth of the Saxon verbe *shiram, i. partiri*, for that the whole realme is parted and divided into shires; and *reve* is *præfectus*, or *præpositus*; so as *shireve* is the *reve* of the shire, *præfectus satrapiæ, provinciæ*, or *comitatus*. And he is called *præfectus*, because he is the chiefe officer to the king within the shire; for the words of his patent be, *commisimus vobis custodiam comitatûs nostri de &c.* And he hath a threefold custodie, *triplicem custodiam, viz.* First, *vitæ justitiæ*; for no suit begins, and no processe is served but by the sherife. Also he is to returne indifferent juries for the triall of mens lives, liberties, lands, goods, &c. Secondly, *vitæ legis*; hee is, after long suits and chargeable, to make execution, which is the life and fruit of the law. Thirdly, *vitæ reipublicæ*; he is *principalis conservator pacis* within the countie, (3) which is the life of the common wealth, *vita reipublicæ pax*.

He is called before *sect.* 234. *viscount*, in Latyne, *vicecomes, i. vice comitis*, that is, in stead of the earle of that countie, who in antient time had the regiment of the countie under the king. For it is said in the *Mirror*, * that it appeareth by the ordinance of antient kings before the conquest, that the earles of the counties had the custodie or gard of the counties, and when the earles left their custodies or gards, then was the custodie of counties committed to viscounts, who therefore (as it hath beene sayd) are called *vicecomites*. And *Ockam cap. quid centuria, &c. porro vicecomes dicitur, quòd vicem comitis suppleat.*

Vide the second part of the Institutes. W. 1 c. 10.

* Mirror cap. 1. sect. 3.

Ockam cap. Quid Centur. &c.

Marculphus saith, this office is *judiciaria dignitas*; *Lampridius*, that it is *officium dignitatis*. *Fortescue* saith, *quòd vicecomes est nobilis officiarius*. And see there, and observe well his honourable and solemne election and creation at this day. But to confirme all that hath beene said touching this point, and to conclude the same, among the lawes of *Edward* the confessor (4) I finde it thus recorded. *Verùm quod modò vocatur comitatus olim apud Britones temporibus Romanorum in regno isto Britanniæ vocabatur consulatus, & qui modò vocantur vicecomites tunc temporis vice-consules vocabantur; ille verò dicebatur viceconsul, qui consule absente ipsius vices supplebat in jure & in foro.* (5) Herein many things are worthy of observation. First, for the antiquity of counties. Secondly, that which wee called *comitatum*, the Romanes more latinely called *consulatum*. Thirdly, whom the Saxons afterwards called (as hath beene said) *shireve* or *earle*, the Romanes called *consul*. Fourthly, that the sherife was deputy of the consull or earle; and therefore the Romanes called him *viceconsul*, as we at this day call him *vicecomes*. Fiftly, that the sherife in the Romanes time, and before, was a minister to the king's courts of law & justice, and had then a court of his owne, which was the county court, then called *curia consulatus*, as appeareth by these words, *ipsius vices supplebat in jure et in foro*. Sixtly, that this realme was divided into shires and counties, and those shires into cities, burroughes, and townes, by the Brittaines: so that king *Ælfred's* division of shires and counties was but a renovation or more exact description of the same. (6) Lastly, the consequence that will follow upon these things being so ancient, (as in the time of, and before the Romanes) the studious reader will easily collect. And afterwards, *fol.* 135. amongst the lawes of the same king it appeareth, that those whom the Saxons sometimes called (and now we call) *aldermen*, or *eorles*, the Romanes called *senatores, et similiter olim apud Britones temporibus Romanorum in regno isto Britanniæ vocabantur senatores, qui postea temporibus Saxonum vocabantur aldermani, non propter ætatem, sed propter sapientiam & dignitatem, cùm quidam adolescentes essent, jurisperiti tamen & super hoc experti.* (7)

Fortescue cap. 24. 12. R. 2. cap.

Lambert fol. 129. 12.

Cæsar. Polichro. Huntingdon. Polidor inter leges Malmuen. Hooker lib. 2.

De

(1) See same explanation of *judicium*, ant. 39. a.

(2) The difference between an *interlocutory* judgment or award and a *final principal* or *plenary* judgment is here pointed at; as to which see Metcalfe's case 11. Co. 38. both questions in it depending on the distinction. See also Office of Exec. ed. 1676. chap. 17. p. 279. How the *civil* and *canon* laws distinguished between *interlocutory* and *definitive* sentences, especially in point of appeal, and between sentences *merely interlocutory* and *interlocutory* sentences *having the effect of definitive*, may be collected in some degree by consulting Voet. ad Dig. lib. 42. tit. 1. s. 4. Perez. in Cod. lib. 7. tit. 62. Wood's Civ. L. 8vo ed. 379. and Gilb. Chanc. c. 10. As to the difference between interlocutory and final decrees or orders in our courts of equity, see Pract. Reg. in Chanc. 122. and 153. and Nosle v. Foot in Dom. Proc. 12. March 1739. On the same subject in our ecclesiastical courts, see 1. Ought. Ord. and Consett's Pract. of Spirit. Co. 3d edit. 229. to 250. These references may assist inquiry; but a far more extended information will be necessary, before the distinctions can be well ascertained, and the use of them in point of *appeal conclusion* or otherwise be fully understood.

(3) See Lamb. Just. ed. of 1602, p. 12. 13. and 2. Inst. 174. in both of which books the coroner is so stiled.

(4) Concerning the dispute about the authenticity of these laws, see notes 3. & 4. ant. 68. b. to which add Preface to 8. Co. Rep. 1. Tyrr. Hist. b. 6. p. 103. Ibid. v. 2. p. 62. Brad. Introd. to Eng. Hist. 260. and a note by the late bishop of St. David, dr. Squire, in his book on the Anglo Saxon Gov. in Engl. ed. of 1753, p. 219. Mr. Selden's opinion of these laws was, that "as the ordinary copies are, and as they speak in the published volume of Saxon laws, they are not without many mixtures "of somewhat later transcribers." Seld. on Tithes, ed. 1618. p. 225. A like temperate caution concerning these laws is interposed by sir Henry Spelman and mr. Somner. Spelm. Gloss. 3d ed. 67. Reliq. Spelm. 61. Somn. on Gavelk. 101. But dr. Brady is not content with this; for, moved by that excess of party-spirit, which is so destructive of truth and so much tarnishes his learned writings on the English history, he indiscriminately and passionately rejects the whole body of these laws. His words in one place are as follow. "The factious bishops and churchmen and the seditious and dissolute barons made a noise for king Edward's "laws. But what they were it is now a hard matter to know. Those, put forth under his name with mr. Lambard's Saxon "laws, were none of his. They are incoherent farce and mixture, and a heap of nonsense, put together by some unskilful "bishop

De son Bayliwicke. It appeareth before; that the enquest must be *de vicineto* of the place where the lands doe lie, and not generally *de balivâ suâ.* By this it appeareth, that the sherife is *balivus,* and his county called *baliva;* and therefore it is good to be seene what *balivus* originally signified, and whereof it is derived.

Flet. lib. 2. cap. 67. (Cro. Jam. 178. Plowd. 28. b. 1. Ro. Abr. 339.)
Bract. lib. 3. tract. 2. cap. 33. nu. 3. Idem lib. 3. fo. 121. b.

Baylife (1) is a French word and signifies an officer concerning the administration of justice of a certaine province; and because a sherife hath an office concerning the administration of justice within his county or bailiwicke, therefore he calleth his county *baliva sua.* For example, when he cannot find the defendant, &c. he returneth, *non est inventus in balivâ meâ.*

Bract. li. 3. 156. b. Brit. fo. 56. Flet. li. 2. ca. 63. (10. Co. 103. Post. 295. a.)

I have heard great question made, what the true exposition of this word *balivus* is. In the statute of *Magna Charta cap.* 28. the letter of that statute is, *nullus balivus de cætero ponat aliquem ad legem manifestam nec ad juramentum simplici loquelâ suâ sine testibus fidelibus ad hoc inductis.* And some have said, that *balivus* in this statute signifieth any judge; for the law must be waged and made before the judge. And this statute (say they) extends to the courts of common pleas, king's bench, &c. for they must bring with them *fideles testes, &c.* and so hath beene the usage to this day.

Glanv. li. 1. ca. 9.

But I have perused a very ancient and learned reading upon this statute; and the reader taketh it, that, at the common law before this statute, he, that would make his law in any court of record, must bring with him *fideles testes.* And this opinion herein is warranted by *Glanvil,* who wrote in the reigne of *Henry* the second. But the reader holdeth, that in the courts which were not of record, (2) as the county court, the hundred court, the court baron, &c. there the defendant without any faithfull witnesses might before this stat. have made his law, for remedy whereof this act was made; and therefore (saith he) the statute extendeth to the judges of such courts as are not of record. In 10. *H.* 4. it is holden, that if a lord, that hath a franchise in a leet, doth not enquire of things enquirable, and punish them, the sherife shall enquire in his turne, *et si le vicount ne faire en son torne, le baylie le roy enquirer' quant il vient, ou auterment serra inquise per justice en eire,* where *baylie le roy* is understood *justice le roy.* And in the *Mirror* * it is holden, that the statute doth extend to everie justice, minister of the king, steward, &c. and all comprehended under this word *baylife.*

10. H. 4. 4. (Cro. Jam. 551. 584.)

* Mir. ca. 5. sect. 2. Vi. Bract. fo. 409. Flet. li. 2. ca. 63. 56.

The chiefe magistrates in divers antient corporations are called baylifs, as in Ipswich, Yarmouth, Colchester, &c. And *baylife* in French is *diaetes, nomarcha,* in English, a bailife or governor. But of this thus much shall suffice.

Sect. 249.

Brit. fo. 185. b. acc. Bract. l. 2. fo. 71. &c. Flet. l. 5. ca. 9.

ET de la partition que le vicount ad issint fait il serra notice as justices (3) *south son seale & les seales de chescun de les* 12, *&c. Et issint en ceo case poies veier, que l'eigne soer n'avera my la primer election,* (4) *mes le vicount luy assignera sa part que el avera, &c. Et poit estre que le vicount doit assigner primerment un part a le plus puisne, &c. & darreinement a l'eigne, &c.*

AND of the partition which the sherife hath so made, he shall give notice to the justices under his seale, and the seales of everie of the 12, &c. And so in this case you may see, that the eldest sister shal not have the first election, but the sherife shall assigne to her her part which shee shal have, &c. And it may be that the sherife will assigne first one part to the youngest, &c. and last to the eldest, &c.

SOUTH son seale, &c. Note, the partition, made and delivered by the sherife and jurors, ought to bee returned into the court under the seale of the sherife, and the seales of the twelve jurors; for the words of the judiciall writ of partition, which doth command the sherife to make partition, are, *assumptis tecum* 12, *&c.* (so as there must be twelve) *& partitionem inde, &c. scir' facias justiciariis, &c. sub sigillo tuo, & sigillis eorum per quorum sacramentum partitionem illam fecei is, &c.* And this is the reason, wherefore in this case the partition, which they make upon oath, ought to be returned under their seales: & the reason of that is for the more strengthning of the partition

(1) See ant. 61. b. at the bottom. The additional references in the margin on the side of the word *bailiff* relate to *bailiffs of manors.*
(2) Concerning the distinction of courts of record, see ant. 117. b.
(3) In L. & M. and in Roh. there is an *&c.* here.
(4) An *&c.* here in L. & M. and in Roh.

" bishop monk or clerk many years after his death to serve the ends and designs of the present times." General Pref. to Brad. Eng. Hist. xxx. See further Wright. Ten. 65. note (i).

(5) The passage here cited from the laws of Edward the Confessor seems rather a remark by the copier or translator of the law, than a part of the law itself; and perhaps it is on this account, that Lambard distinguishes this passage in the printing by an *Italick* letter. But whether the passage is to be deemed part of the law or not, the comparison it draws, of the Roman denominations of their territorial government and officers in Britain with those of the Saxons, seems to me quite imaginary. At least I am not able to find any trace of authority to prove such an use or application of the words "*consulatus consul* and *vice-consul*" amongst the Romans whilst Britain was a part of their empire, as this extract supposes.

(6) This agrees with the idea of sir John Spelman in his life of Alfred, and of mr. St. Amand in his Essay on the Legislative Power of England. Dr. Stuart in his Historical Dissertation on the English Constitution makes some additional remarks in support of the same opinion. See 2d ed. of this latter book, 250.

(7) The remark above in note 5. on the former extract from Lambard's Anglo-Saxon Laws equally applies to this second one. As to the origin and office of sheriffs, see further Preface to 3. Co. Rep. Dav. Rep. 60. Dalt. on Sher. Spelm. Gloss. vocibus *comites comitatus & vicecomes,* Seld. tit. Hon. ed. 1681. p. 627. 2. Henry's Hist. Gr. Brit. 242. a note by lord Fortescue in his ancestor's book on absolute and limited monarchy, 112. and Stuart's Hist. Differt. on Engl. Const. 2d ed. 241.

tition by the 12, and that the sherife should not returne what partition he would. Now after all this, this (*&c.*) *viz.* 12, *&c.* doth imply, that the principall judgement upon the partition so returned is, *ideo consideratum est per curiam quod partitio firma & stabilis imperpetuum teneatur.* (1) The latter two (*&c.*) are evident. (2)

Lib. 11. fol. 40. in Metcalfe's case.

Sect. 250.

ET nota, que partition per agreement perenter parceners poit estre fait per la ley enter eux, auxibien per parol sans fait, come per fait.

AND note, that partition by agreement betweene parceners may bee made by law betweene them, as well by paroll without deed, as by deed. (3)

HERE it appeareth, that [r] not onely lands and other things that may passe by livery without deed, but things also that do lie in grant, as rents commons advowsons and the like that cannot passe by grant without deed, whether they bee in one county or in severall counties, may be parted and divided by paroll without deed. [s] But a partition betweene joyntenants is not good without deed, albeit it be of lands, and that they be compellable to make partition by the statutes of 31. *H.* 8. *cap.* 1. and 32. *H.* 8. *cap.* 32. because they must pursue that act by writ *de partitione faciendâ*; and a partition betweene joyntenants without writ remaines at the common law which could not bee done by paroll. And so it is and for the same reason of tenants in common. But if two tenants in common be, and they make partition by paroll, and execute the same in severalty by livery, this is good, and sufficient in law. And therefore where bookes say, that joyntenants made partition without deed, it must be intended of tenants in common and executed by liverie.

Nota, betweene joyntenants there is a twofold privity, *viz.* in estate and in possession: betweene tenants in common, there is privity onely in possession, and not in estate: but parceners have a threefold privity, *viz.* in estate, in person, and in possession.

[r] 3. E. 4. 9. 10. 9. E. 4. 38. 11. H. 4. 3. 9. H. 4. partition 13. 21. E. 3. 38.

(Dy. 350. b. Post 187. a. 198. b.)

[s] Vide sect. 290. 3. H. 4. 1. 19. H. 6. 25. 28. H. 6. 2. 3. E. 4. 9. 10. 47. E. 3. 22. 47. Ass. 8. 19. H. 6. 1. 17. E. 3. 46. 30. Ass. 8. lib. 4. fo. 73. li. 6. fo. 12. 13. 2. H. 7. 5. Dier 18. Eliz. 358. 31. H. 8. Dier 46. 2. Eliz. Dier 179. 28. H. 8. Dier 29. 1. Mar. Dier 98. (1. Leon. 103. 6. Co. 12. 8. Co. 42. Post. 186. a. 193. b. 200. b. 335. a. 2. Inst. 403.)

Sect. 251, & 252.

ITEM si deux meases discendont a deux parceners, & l'un mease vault per an 20 s. l'auter forsque 10 s. per an, en cest cas partition poit estre fait enter eux en tiel forme; cestascavoir, que un parcener avera l'un mease, & que l'auter parcener avera l'auter mease; & celuy que avera le mease que est de value de 20 s. & ses heires payeront un annual rent

ALSO if two meses descend to two parceners, and the one mease is worth twenty shillings *per annum*, and the other but ten shillings *per annum*, in this case partition may bee made betweene them in this manner; to wit, the one parcener to have the one mease, and the other parcener the other mease; and shee which hath the mease worth 20 shillings *per annum* and her heires shal pay

PER *parol.* *Nota*, Here [t] a rent may be granted for owelty of partition without (4) deed, even as a rent in case of a lease for yeares, for life, or a gift in taile, may bee reserved, without deed; and so may a rent be assigned to a woman out of the land, whereof shee is dowable, &c. without deed. But albeit an exchange for lands in the same county may be without deed; yet a rent granted for egality (5) of the same exchange cannot be without deed. And the cause of the difference is apparent; for coparceners are in by descent, and compellable to make partition.

Le rent, &c. The same law is of common of estovers, or a corodie, or a common of

[t] 8. E. 3. 16. 21. Ass. p. 1. 21. E. 3. 38. 11. H. 4. 61. 45. E. 3. 21. 2. H. 6. 14. 21. H. 6. 11. 1. Mar. Dier 91.

(Ant. 34. b.)

(Mo. 29.)

(1) See acc. ant. 168. a.

(2) Here I shall subjoin to Littleton's explanation of the different modes of *express* partition the following notices for the aid of students. I. Since Littleton's time a statute has been made for newly regulating the proceedings on a writ of partition, with a view to render them less dilatory and more effectual; and this statute equally extends to parceners join-tenants and tenants in common. See 8. & 9. W. & M. c. 31. What the form of proceeding under the writ of partition was before, is explained in Flet. lib. 5. c. 9. Bract. lib. 2. c. 33. Brit. c. 71. 72. 73. and Booth on Real Actions 244. II. Partition by *release* between co-parceners, which I do not observe to be noticed by Littleton or Coke, is mentioned in 2. Fulbeck's Paral. fol. 57. b. III. There is a partition by *judgment* exclusive of that on the *partitione faciendâ*. An instance of it is stated in 6. Co. 12. b. IV. Littleton hereafter adds to the forms of partition explained by him in this chapter, one other form; namely, partition by throwing into hotchpot, which is the subject of sect. 266. V. Besides the writ of partition mentioned by Littleton there was another also issuing out of chancery, which was called a writ of livery and partition. It applied, where land holden of the king *in capite* descended to two or more as co-parceners, in which case they could not have livery of their land from the crown without a partition, the reason of which is explained in Staundf. Prerog. 24. b. 81. b. The various forms of this writ of partition may be seen by consulting F. N. B. 256. F. 259. C. 261. B. C. and Reg. Orig. 316. 317. It differed from the common writ *de partitione faciendâ* in almost every respect. *That* was directed to the sheriff, *this* to the escheator: *that* was returnable in the common pleas, *this* in chancery: *that* was executed with a jury, *this* without: *that* was given for the benefit of the party suing it, *this* grew out of a policy to increase the number of the king's tenants *in capite* for his advantage: the partition in *that* was confirmed by a judgment of the court on return of the writ, the partition in *this* had no such solemnity added to it: and lastly the partition on *that* was conclusive on the parties though infants and all claiming under them, but the partition on *this* was open to subsequent inquiry and if unequal avoidable by *scire facias* in chancery or a *partitione faciendâ* at common law. See Staundf. Prerog. and Fitzh. N. B. in the places before cited and post. 171. a. & b. See further on the force of such partition in chancery 29. Ass. pl. 3. Bro. Abr. jurisdiction 114. partition pl. 10. But this species of partition under the writ of livery is no longer in force: for it was a mere incident to livery; and livery being taken away by the 12. Cha. 2. c. 24. as one of the great grievances from tenure *in capite*, all writs of livery of course are, as a very learned writer has forcibly expressed it, *uno flatu* dispersed. See mr. serjeant Wynne's Observat. on F. N. B. in his Miscellany of Law Tracts p. 51. VI. Another kind of partition in chancery unnoticed by Littleton was, where two persons succeeded as co-parcenary heirs to land holden of the king *in capite* and one of them being within age was in ward to the crown; for then the king's committee of the infant heir might

de v. s. issuant hors de mesme le mease a l'auter parcener & a ses heires a touts jours, pur ceo que chescun de eux auroit owelty en value.

a yeerely rent of five shillings issuing out of the same mease to the other parcener and to her heires for ever, because each of them should have equality in value.

of pasture, &c. or a way granted upon the partition by the one coparcener to the other. All which and the like, albeit they lie in grant, yet upon the partition may they be granted without deed.

Issuant hors de mesme le mease, &c. [x] For if it be granted out of other lands then descended to the coparceners, then there must be a deed. [z] But if the rent be granted generally (out of no land in certaine) for owelty of partition, *pro residuo terræ*, it shall bee intended out of the purpartie of her that granteth it.

[x] 1. Mariæ Dyer 91.

[z] 29. Ass. 23. 29. E. 3. 9. b. Pl. Com. 34.

Post. 252. b.)

Sect. 252.

ET tiel partition fait per parol est assets bone; & mesme le parcener, que avera le rent, & ses heires, purront distreiner de commen droit pur le rent en le dit mease de le value de 20 s. si le rent de 5 s. soit aderere en ascun temps, en quecunque mains que mesme le mease deviendra, coment que ne fuit unques ascun escripture de ceo fait enter eux de tiel rent.

AND such partition made by paroll is good enough; and that parcener, who shall have the rent, & hisheires, maydistrein of common right for the rent in the sayd mease worth twenty shillings, if the rent of 5 shillings be behinde at any time, in whose hands soever the same mease shall come, although there never were any writing of this made betweene them for such a rent.

[a] If there be three coparceners, and they make partition, and one of them grant twenty shillings *per annum* out of her part to her two sisters and their heires for equality of partition, the grantees are not joyntenants of this rent; but the rent is in nature of coparcenary, and after the death of the one grantee the moity of the rent shall descend to her issue in course of coparcenary, and not survive to the other, for that the rent doth come in recompence of the land, and therefore shall ensue the nature thereof; and if the grant had beene made to them two of a rent of twenty shillings, *viz.* to the one ten shillings, and to the other ten shillings, yet shall they have the rent in course of coparcenary, and joyne in action for the same.

[a] 15. H. 7. 14. 29. Ass. 23. 29. E. 3. 9. b. (5. Co. 8. a. Wyndham's case. 3. Co. 22. b. Hob. 172. Post. 177. b.)

[b] If one coparcener be maried, and for owelty of partition the husband and wife grant a rent to the other two out of the part of the fem covert, this partition being equall shall charge the part of the fem covert for ever.

[b] 29. Ass. 23. 29. E. 3. 9. 17. E. 3. 10.

[c] If two coparceners by deed indented alien both their parts to another in fee, rendring to them two and their heires a rent out of the land, they are not joyntenants of this rent, but they shall have the rent in course of coparcenary; because their right in the land, out of which the rent is reserved, was in coparcenary.

[c] 38. E. 3. 26. b.

Purront distreiner de common droit, &c. That is, [d] in this case the law doth give a distresse, lest the grantee should bee without remedy, for the which upon the partition she hath given a valuable recompence in land, which descended, &c. And so in the case of dower abovementioned. (1)

[d] 1. Mariæ Dyer 91. 8. E. 3. 16. and other the bookes abovesaid.

Sect. 253.

EN mesme le maner est de touts maners de terres & tene-

IN the same manner it is of all manner of lands and tene-ments

TERRES & tenements, &c. Here (&c.) implyeth a caution, *viz.* that they be such lands

(1) See ant. 34. b. 153. a. and Sheph. Comm. Assur. 425.

might assent to make partition with the other co-parcener, in which case the writ for livery to the co-parcener of full age recited that with such assent the king had assigned certain estates for the purparty of such co-parcener, and directed the escheator to give livery accordingly. F. N. B. 260. B. This mode of partition in chancery is also at an end from the same cause as the writ of partition and livery. VII. A new compulsory mode of partition has sprung up, and is now fully established; namely by decree of chancery exercising its *equitable* jurisdiction on a bill filed praying for a partition: in which case 'tis usual for the court to issue a commission for the purpose to various persons, who proceed without a jury. How far this branch of equitable jurisdiction, so trenching upon the writ of partition and wresting from a court of common law its antient exclusive jurisdiction over this subject, might be traced by examining the records of chancery, I know not. But the earliest instance of a bill for partition I observe to be noticed in the printed books is a case of the 40. Eliz. in Tothill's Transact. of Chanc. title *partition*. According to the short report of this case the court interposed from necessity in respect of the minority of one of the parties, the book expressing that on that account he could not be made party to a writ of partition; which reason seems very inaccurate, for, if lord Coke is right, that writ doth lye against an infant, and he shall not have his age in it, and after judgment he is bound by the partition. See post. 171. b. But probably in lord Coke's time this was a rare and rather unsettled mode of compelling partition; for I observe in a case in chancery of the 6. Cha. 1. which was referred to the judges on a point of law between two co-parceners, that the judges certified for issuing a *writ of partition* between them, and that the court ordered one accordingly; which, I presume, would scarce have been done, if the decree for partition and a commission to make it had then been a current and familiar proceeding with chancery. 1. Cha. Rep. 49. However it appears by the language of the court in a very important cause, in which the grand question was whether the lord chancellor here could hold plea of a trust of lands in Ireland, that in the reign of James the Second bills of partition were become common. 1. Vern. 421. 2. Cha. Cas. 189. For other reported cases on bills of partition, see Toth. Transact. tit. *partition*, 1. Cha. Rep. 235. 3. Cha. Rep. 29. 2. Cha. Cas. 214. 237. 2. Vern. 232. 1. P. Wms. 446. 2. P. Wms. 518. As to the forms of a commission of partition, see 1. Prax. Alm. Cur. 3d ed. 93. 94. Clerk's Tutor in Chanc. 3d ed. 360. and 2. Harrison's Chanc. last ed. 306. For cases in which chancery interposes by awarding commissions to ascertain boundaries, which subject in some degree connects with commissions of partition, see Tothill 84. 126. 130. Nels. Ch. Rep. 14. 121. 1. Cha. Rep. 41. 63. 259. Rep. temp. Finch. [illegible] Cas. Rep. 107. 17. 96. 239. 462. 1. Cha. Cas. 145. 1. Vern. 359. 456. 2. Vern. 38. and 1. Ves. 453. To these add Fitzh. N. B. 133. on the writ *de perambulatione faciendi*, which being considered may perhaps throw some light on the origin of this branch of equitable

ments, &c. lou tiel rent est réserve a un ou a divers parceners sur tiel partition &c. Mes tiel rent n'est pas rent service, mes est rent charge de common droit (1) *ewe & reserve pur egaltie de partition* (2).

ments, &c. where such rent is reserved to one or to divers parceners upon such partition, &c. But such rent is not rent service, but a rentcharge of common right had and reserved for equality of partition.

and tenements out of which a rent for egaltie of partition may be granted, whereof sufficient hath beene said before.

Réserve al un. Here reservation is taken for a grant; and if it be used upon the partition, doth amount in this case to a grant, which is worthy the observation.

Sect. 254.

ET nota, que nulles sont appelles parceners per le common ley, mes females ou les heires de females, que veignont a terres & tenements per discent: car si soers purchase terres ou tenements, de ceo ils sont appelles joyntenants, & nemy parceners.

AND note, that none are called parceners by the common-law, but females or the heires of females, which come to lands or tenements by discent: for if sisters purchase lands or tenements, of this they are called joyntenants, and not parceners.

This needs no explanation.

Sect. 255.

ITEM si deux parceners de terres en fee simple font particion enter eux, & la part de un vault pluis que le part de l'auter, si els fueront al temps de la particion de pleine age, s. de 21 ans, donques la particion touts dits demurrera, & ne serra unques defeat. Mes si les tenements (dont els font particion) soyent a eux en fee taile, & le part que l'un ad est

ALSO if two parceners of land in fee simple make partition between themselves, and the part of the one valueth more then the part of the other, if they were at the time of the partition of full age, s. of 21 yeares, then the partition shall alway remaine and be never defeated. But if the tenements (whereof they make partition) be to them in fee taile, and the part of the one

DONQUES le partition touts dits demurrera, &c. Hereby it appeareth, that the inequality of the value shall not impeach a partition made of lands in fee simple betweene coparceners of full age, (3) no more then it shall doe in case of an exchange. (4)

9. H. 6. 5. and other the bookes abovesaid.

Ils sont concludes durant lour vies. This inequall partition doth so conclude the parceners themselves, as shee that hath the unequall part shall not avoid it during her life.

Concludes. This word is derived of *con* and *claudo*, (5) and in this sense signifieth to close or shut up her mouth that she cannot speake to the contrary.

(Post. 352. a.)

Hus-

(1) See ant. 153. a. note 1.
(2) In L. and M. &c. here.
(3) Ant. acc. 166. a.
(4) Ant. 51. a.
(5) Acc. ant. 37. a.

equitable jurisdiction; and concerning the modes of *partition* by our law see the cases under that title in Fitzh. Abr. Bro. Abr. and Viner.—Concerning partition by the Roman law, see Fulbeck in his parallel of the civil canon and English Laws b. 2. p. 57. This neglected but ingenious writer extracts from the Roman law three actions having the like object with our writ of partition. These are the action *de familiâ hercifcundâ*, the action *pro socio*, and the action *de communi dividundo*. He applies the first to partition amongst co-heirs, the second to that amongst join-tenants, and the third to that amongst tenants in common; an assimilation, in which he is partly followed by lord Stair in respect to the law of Scotland. Stair's Instit. 48. The second and third of these Roman actions are treated of in lib. 10. tit. 2. & 3. of the Digest, tit. 1. of the same book being upon the action *finium regundorum*, which partly answers to our bill in equity for ascertaining boundaries. It is remarkable also, that Fleta represents the three Roman actions last mentioned as a part of our law. Flet. lib. 5. c. 9. p. 309. See further as to the Roman law about *partition* 1. Dom. Civ. L. by Strah. 326. For partition according to the French law, see tit. *partage* in their books; and for the like subject in the Scotch law, see concerning the *obligation of division, heirs portioners, commonties*, and *writs of division*, in Stair's Instit. 48. 477. 169. 576. and in Erskine's Instit. 468.

(3) In 1. Atk. 542. there is a case in equity, in which lord Hardwicke allows of a *parol* agreement for a partition. See infra note 4. and 1. Vern. 472.

(4) Here the eleventh edition of this book has a note questioning whether such *parol* grant would be good now in respect of the 29. Cha. 2. c. 3. and mr serjeant Hawkins in his Abridgment makes a like question. See supra note 3.

(5) Of *equality* in exchanges, see ant. 50. b. 51. a. & b.

11. Aſſ. p. 23.

See after the chapter of Garr. (2) (Doctor & Stud. 65.)

[g] 21. E. 3. 34. 35. 2. E. 2. Baſtardy 19. 11. Aſſ. 23. 30. Aſſ. 7. 17. E. 3. 59. (8. Co. 101. b. Poſt. 244. b.)

Huſband and wife tenants in ſpeciall taile of certaine lands in fee have iſſue a daughter, the wife dyeth, the huſband by a ſecond wife hath iſſue another daughter, both the daughters enter (where the eldeſt is only inheritable) and make partition: the eldeſt daughter is concluded during her life to impeach the partition, or to ſay that the youngeſt is not heire, and yet ſhe is a ſtranger to the taile, but in reſpect of privity in their perſons the partition ſhall conclude, for a partition between meere ſtrangers in that caſe is voyd, but the iſſue of the eldeſt ſhall avoid this partition as iſſue in taile.

[g] *I. S.* ſeiſed of lands in fee hath iſſue two daughters, *Roſe* and *Anne*, baſtards eigne and *mulier puiſne*, and dieth. *Roſe* and *Anne* doe enter and make partition. (3) *Anne* and her heires are concluded for ever. (4)

melieux en annuall value que eſt la part le l'auter, coment que els ſont concludes durant lour vies a defeater la particion; uncore ſi le parcener, que ad le meinder part en value, ad iſſue & devy, l'iſſue poit diſagreer a la partition, & enter & occupier en common l'auter part que fuit allotte a ſa aunt, & iſſint l'auter poit enter & occupier en common l'auter part allotte a ſa ſoer, &c. ſi come nul partition uſt eſte fait. (1)

is better in yearly value then the part of the other, albeit they be concluded during their lives to defeat the partition; yet if the parcener, which hath the leſſer part in value, hath iſſue and dye, the iſſue may diſagree to the partition, and enter and occupy in common the other part which was allotted to her aunt, and ſo the other may enter and occupy in common the other part allotted to her ſiſter, &c. as if no partition had beene made.

Sect. 256.

* 42. Aſſ 22. 8. E. 4. 4. 9. E. 3. 38. 15. E. 4. 20. F. N. B. 62. 29. Aſſ. 23. 9. H. 6. 5. 43. Aſſ. 14.

[h] Vid. 2. E. 2. Cui in vita 17.

Els & lour barons. Here it appeareth, that the wife muſt be party to the partition, and ſo are the bookes * to bee intended that ſpeake of this matter.

Et defeatera le particion. Note, the partition ſhall not bee defeated for the ſurpluſage onely to make the partition equall, but here it appeareth that it ſhall bee avoyded for the whole. But of this more ſhall be ſaid hereafter in this chapter, *ſectione* 264. [h] And though the partition be unequall, yet is not the partition voyd, but voydable; for if after the deceaſe of the huſband, the wife entereth into the unequall part, and agreeth thereunto, this ſhall binde, and therefore *Littleton*

ITEM ſi deux parceners de tenements en fee preignent barons, & els & lour barons font partition enter eux, ſi la part l'un eſt meinder en anual value que la part l'auter, durant les vies lour barons la particion eſtoyera en ſa force. Mes coment que il eſtoyera durant les vies les barons, uncore apres la mort le baron, celuy feme, que ad le meinder part, poit enter en la part ſa ſoer

ALSO if two parceners of lands in fee take huſbands, and they and their huſbands make partition betweene them, if the part of the one bee leſſe in value then the part of the other, during the lives of their huſbands the partition ſhall ſtand in its force. But albeit it ſhal ſtand during the lives of their huſbands, yet after the death of the huſband, that woman which hath the leſſer part may enter into

(1) This caſe of Littleton turns upon the *inequality* of the partition; for if the parts are equal, it binds notwithſtanding infancy. Ant. 166. a. Poſt. 173. b.

(2) See the caſe of diſcontinuance ſtated by lord Coke poſt. 373. b.

(3) In a Coke upon Littleton I have with MSS. notes and references, the annotator is for excluding from ſuch an eſtoppel as is here ſtated a partition in *pais*. His note is thus expreſſed: "If two make partition in *court of record*, when one of them "had no right, he thereby ſhall gain a moiety by eſtoppel or concluſion. Bro. Nouv. Caſ. pl. 306. But otherwiſe I conceive of "a partition in *pais*; though the book ſpeaketh generally; and upon this difference you ſhall read a like caſe in this booke "fol. 46. a."

(4) Acc. Dr. & Stud. dial. 1. c. 19. where *mulier puiſne* ſues livery with *baſtard eigne*. See Bro. A[illegible] 31. and *diſcent* 9. But it is ſaid, that this ſort of eſtoppel will not bind in chancery. Cary's Rep. 26. See further 2. Co. 4. b. Cro. Cha. 110. Pollexf. 67. and 3. Com. Dig. 278.

soer come est avantdit, & defeatera la particion.

her sisters part as is aforesaid, and shall defeat the partition.

useth the word (*defeatera*,) which proveth it to bee voydable.

Sect. 257.

MES si le partition fait perenter les barons (1) fuit tiel, que chescun part al temps d'allotment fait fuit de egall annuall value, donque il ne poit apres estre defeat en tielx cases.

BUT if the partition made betweene the husbands were thus, that each part at the time of the allotment made was of equall yearely value, then it cannot afterwards be defeated in such cases.

PErenter les barons. This is mistaken, for the originall is *parenter eux*, that is, betweene the barons and fems, and not as it is here betweene the barons, therefore this error would be hereafter reformed.

Al temps del allotment. Hereby it appeareth, that if the parts at the time of the partition bee of equall yearly value, neither the wives nor their heyres shall ever avoyd the same; and the reason hereof is, for that the husbands and wives were compellable by law to make partition, and that which they are compellable to doe in this case by law, they may doe by agreement without processe of (2) law. If the annuall value of the land be equall at the time of the partition, and after become unequall by any matter subsequent, as by surrounding, ill husbandry, or such like, yet the partition remaines good.

9. H. 6. 5. And other the bookes abovesaid. (Post. 179.)

Judicis officium est, ut res ita tempora rerum
Quærere; quæsito tempore tutus eris.

But if the partition be made by force of the king's writ, and judgement thereof given, it shall binde the fem-coverts for ever, albeit the parts be not of equall annuall value; because it is made by the sherife by the oath of twelve men by authority of law; and the judgement is, that partition shall remaine firme and stable for ever, as hath beene said. [a] But a partition in the chancery where one coparcener is of full age and sueth livery, and one other is within age and hath an unequall part allotted to her, this shall not binde her at full age; for in a writ directed to the escheator to make partition, there is a *salvo jure*, and there is no judgement upon such a partition. But if such a partition be equall, it shall binde, so that a part of the land holden *in capite* bee allotted to every of the coparceners, for to that end there is an expresse *proviso* in the writ. [b] And this partition may be avoyded either by *scire fac'* in the chancery, or by a writ *de partitione faciendâ* at the common law at her full age (3).

[a] F. N. B. 256. 259. 260. 261. 262. 263. 9. H. 6. 6. 21. E. 3. 31.

[b] Vide 21. E. 3. 31.

Sect. 258.

ITEM si deux parceners sont, et le puisne esteant deins l'age de 21 ans, & particion est fait enter eux, issint que la purpartie que est allot al puisne est de meindre value que la purpartie l'auter, en cest case le

ALSO if two coparceners be, and the yongest being within the age of twenty-one years, partition is made betweene them, so as the part which is allotted to the youngest is of lesse value than the part of the

AS before in the case of the fem-covert, [c] so it is in the case of the enfant; for if the partition be equall at the time of the allotment, it shall binde him for ever; because he is compellable by law to make partition, and he shall not have his age in a *partitione faciendâ*;

[c] 43. Ass. 14. 9. H. 6. 5. 6. 7. E. 3. 13. 8. E. 3. 24. 10. H. 4. 5. 31. Ass. 16. 21. H. 6. 25.

(1. Ro. Abr. 138. Hob. 179.)

(1) Instead of *les barons* it is *eux* in L. & M. & Roh.

(2) In 1. Atk. 541. there is a case, in which lord chancellor Hardwicke is represented to say, that a partition by agreement between two husbands will not bind the inheritance of their wives. But, notwithstanding this high authority, I take the doctrine of Littleton and Coke, that such a partition will bind the wives *unless it be unequal*, to be clear law, and for the cogent reason here given by the latter. See acc. F. N. B. 62. F.

(3) Acc. F. N. B. 62. H.

dâ; (2) and though the partition be unequal, and the infant hath the lesser part, yet is not the partition void but voidable by his entry, for if he take the whole profits of the unequall part, after his full age, the partition is made good for ever. And therefore *Littleton* here giveth him a caveat, that in that case he take not the whole profits of his unequal part, neither shall an unequall partition in the chancery binde an infant as appeareth before. (3) But a partition, made by the king's writ *de partitione faciendâ* by the sherife by the oath of twelve men, and judgement thereupon given, shall binde the infant, though his part be unequall, *causâ quâ suprà*.

le puisne, durant le temps de son nonage, & auxy quaunt el vient a pleine age, s. de 21 ans, poit enter en la purpartie a sa soer allot & defeatera la partition. Mes bien soy gard tiel parcener quant el vient a sa plein age, que el ne preigne a son use demesne touts les profits des terres ou tenements que a luy furent allots. Car donques el soy agreea a le partition a tiel age, en quel case la partition estoyera & demurra en sa force. Mes peraventure les profits de la moitie el poit prender, relinquisant les profits de l'auter moitie a sa soer. (1)

other, in this case the youngest, during the time of her nonage, and also when shee commeth to full age, s. of 21 yeares, may enter into the part allotted to her sister, and shall defeat the partition. But let such parcener take heed when she comes to her full age, that shee taketh not to her owne use all the profits of the lands or tenements which were allotted unto her; for then shee agrees to the partition at such age, in which case the partition shall stand and remaine in its force. But peradventure she may take the profits of the moitie, leaving the profits of the other moitie to her sister.

Sect. 259.

THE law hath provided for the safety of a man's or woman's estate, that * before their age of twentie one yeares they cannot binde themselves by any deed, (4) or alien any land (5), goods, or chattels (6).

* Vid. sect. 402. 403. (2. Inst. 673. F. N. B. 192. g. Post. 246. a. 337. b. 350. a. & b. 380. a. Ant. 171. a. 8. Co. 44. b.)

Age de 21 ans. Before this age a man or woman is called an enfant.

Fait. *Factum, Anglicè*, a deed, and signifieth in the common law, an instrument consisting of three things, *viz.* writing, sealing, and delivery, comprehending a bargaine or contract betweene party and party, man or woman. It is called of the civilians *literarum obligatio*.

Brit. fo. 65. 66. & 101. Flet. li. 3. ca. 14.

(Perk. sect. 135.)

Feoffment. Of this word sufficient hath bin

ET est ascavoir, que quant il est dit, que males ou females sont de pleine age, ceo serra entendue d'age de 21 ans; car si devant tiel age, ascun fait ou feoffement, grant, release, confirmation, obligation, ou auter scripture, soit fait per ascun de eux, &c. ou si ascun deins tiel age soit baylife ou receiver a ascun home, &c. tout serve pur nient, & poit estre avoyde. Auxy

AND it is to be understood, that when it is said, that males or females bee of full age, this shall be intended of the age of 21 yeares; for if before such age any deed or feoffement, grant, release, confirmation, obligation, or other writing, bee made by any of them, &c. or if any within such age bee baylife or receiver to any man, &c. all serve for nothing, and may be avoided. Al-

(1) In L. & M. & Roh. an &c. here.

(2) Acc. 6. Co. 4. b. But there the reason given for an infant's not having his age in partition is different, namely that both coparceners *are in possession*. In the year book of 9. H. 6. 6. b. the reason is expressed to be the *prejudice which otherwise there might be to the infant*.

(3) See the case of partition of an advowson between coparceners, where one is within age, in F. N. B. 36. D.

(4) See ant. 51. b. note 2. and 52. a. note 2. To the references there add 3. P. Wms. 208.

(5) Not even though a special power is given to him, though it is otherwise with a feme covert. So held by lord chancellor Hardwicke in a case in 1. Ves. 298. and 3. Atk. 695. See Mo. 512. But by the 7. An. c. 17. an infant having a real estate only as a trustee or under a mortgage is enabled to convey under the direction of the court of chancery or the court of exchequer. However this act is deemed not to extend to trusts merely constructive. 2. P. Wms. 549. 3. P. Wms. 387. Another exception to an infant's not being able to alien land arises from the custom of particular places, as the custom of Kent in respect to gavelkind lands, which may be aliened by an infant on attaining 15. See the late mr. Robinson's excellent Treatise on Gavelk. 193. and Mo. 512.

(6) But an infant may before 21 dispose of personal estate by last will, though it is controverted at what age this testamentary power begins to attach in infants. On this point I have heretofore expressed my notions at length. See note 6. of fo. 89. b.

Auxy home devant le dit age ne serra my jure en un enquest, &c. (1)

So a man before the sayd age shall not be sworne in an enquest, &c.

sayd before in the first chapter of the first booke.

Grant. *Concessio* is in the common law a conveyance of a thing that lies in grant and not in livery, which cannot passe without deed; as advowsons, services, rents, commons, reversions, and such like. Of this also sufficient likewise hath beene said in the first chapter of the first booke.

Lib. 3. fol. 63. in Lincolne Colledge case.

Release, confirmation, &c. Of these shall bee spoken hereafter in their proper places and chapters.

Obligation is a word of his owne nature of a large extent; but it is commonly taken in the common law, for a bond containing a penalty, with condition for payment of money or to do or suffer some act or thing, &c. and a bill is most commonly taken for a single bond without condition.

Ou auter scripture soit fait per ascun de eux, &c. Here by this (*&c.*) is implied some exceptions out of this generality, [d] as an infant may bind himselfe to pay for his necessary meat, drinke, apparell, necessary physicke, and such other necessaries, and likewise for his good teaching or instruction, whereby he may profit himselfe afterwards: but if he bind himselfe in an obligation or other writing with a penalty (2) for the payment of any of these, that obligation shall not bind him. [e] Also other things of necessity shall bind them, as a presentation to a benefice, (3) for otherwise the laps shall incurre against him. Also if an infant be an executor upon payment of any debt due to the testator, hee may make an acquittance; but in that case a release without payment is voyd (4): and generally whatsoever an infant is bound to do by law, the same shall bind him, albeit he doth it without suit of law. (5) But of this common learning this little tast shall suffice.

[d] 18. E. 4. 2. 21. H. 6. 3. lib. 9. fol. 87. Pinchons case. (2. Ro. Abr. 146. Cro. Eliz. 920. 2. Inst. 483. Cro. Cha. 179. Cro. Jam. 494. 560. 1. Ro. Abr. 729. Plowd. 364.)

[e] 8. E. 4. 4. 9. H. 6. 5. 17. E. 3. 9. 29. Ass. 25. 2. Mariæ Dyer 104. 105. (5 Co. 29. b. 27. a. 6. Co. 3. Cro. Cha. 324. 590. 502. Mo. 105. Cro. Jam. 320. 1. Sid. 41. 259. 446.)

Baylife ou receiver al ascun home, &c. By this *&c.* many things are implied, as that by baylife is understood a servant that hath administration and charge of lands goods and chattels to make the best benefit for the owner, against whom an action of account doth lie for the profits which he hath raised or made or might by his industry or care have reasonably raised or made, his reasonable charges and expences deducted. [f] But one under the age of twenty one yeares shall not be charged in any such account; (6) because, by intendment of law, before his full age hee hath not skill and ability to raise or make any such improvement and profit.

Fleta li. 2. ca. 64. & c. 67. Britton fol. 62. 70. Fleta lib. 2. cap. 64. 41. E. 3. 39. 46. E. 3. account 40. 2. R. 2. ibid. 45. 6. R. 2. ibid. 3. E. 3. 10. (Cro. Jam. 177. 1. Leon. 219.)

[f] 13. E. 3. infant 9. 17. E. 2. account 121. 21. E. 3. 8. 10 H. 4. 14. 2. H. 4. 13. regist. 135. (Finch L. 302. 303. Noy 12.)

An account against a receiver is, when one receiveth money to the use of another to render an account; but upon his account he shall not be allowed his expences and charges. [g] And therefore a man cannot charge a baylife as a receiver; because then the baylife should lose his expences and charges.

[g] 43. E. 3. 31. 46. E. 3. 3. b. 4. H. 6. 27. (1. Ro. Abr. 119. 2. Inst. 379. 4. Leon. 39. 1. Ro. Rep. 87.)

In an account against a receiver, the plaintife must declare by whose hands the defendant received the money, which he shall not doe in the case of a baylife. [h] But in some case in an action of account against one as *receptor denariorum*, he shall have allowance of his expences and charges, and also shall account for the profit he received (7) or might reasonably receive; and this was provided by law in favour of merchants, and for advancement of trade and trafficke.

[h] 30. E. 3. 1. account 127. 47. E. 3. 22. 10. H. 7. 16. Bract. li. 5. f. 334. Brit. f. 62. Fleta l. 2. c. 64. & 51. 5. E. 3. 1. lib. intrat. 17. 18. 19. (F. N. B. 117. d. Post. 182. a. Cro. Jam. 410.)

As if two joynt merchants occupy their stocke goods and merchandizes in common to their common profit, one of them naming himselfe a merchant shall have an account against the other naming him a merchant, and shall charge him as *receptor denariorum ipsius B. ex quacunque causa & contractu ad communem utilitatem ipsorum A. & B. provenien' sicut per legem mercatoriam rationabiliter monstrare poterit.*

[i] If there be two joyntenants or tenants in common of lands, and the one make the other his baylife of his moity, he shall have an action of account against him as bailife: and so are the bookes to be intended, that speake of an action of account in that case. (8)

[i] 45. E. 3. 10. 3. E. 3. 27. 39. E. 3. 27. 47. E. 3. 22. F. N. B. 118. (Post. 186. 200. b.)

So as there be but three kinds of writs of account, *viz.* against one as gardian, whereof *Littleton* hath spoken before in the chapter of socage; the second against one as baylife; and the third as receiver; as here it appeareth. [k] For a man shall not bee charged in an account as surveyor, controller, apprentice, reve, or heyward. And to maintaine an action of account, there must be, either a privity (9) in deed by the consent of the partie, for [l] against a disseisor or other wrongdoer no account doth lie; or a privity in law *ex provisione legis* made by the law, as against a gardian, &c. whereof sufficient hath been spoken in the chapter of socage. (10)

[k] 13. E. 3. account 76. 41. E. 3. ibidem 34. 8. E. 3. 46. 8. E. 4. 6. b. F. N. B. 119. d. (2. Inst. 379. F. N. B. 119. c. 1. Ro. Abr. 119.)

[l] 2. Mar. B. account 89. F. N. B. 117. Pl. Com. 542. 2. H. 4. 12. 33. H. 6. 2. 4. H. 7. 6. &c. (F. N. B. 119. c.)

Ne

(1) No *&c.* in L. & M. or Roh.

(2) Acc. 1. Ro. Abr. 729. pl. 8. Mo. 679. Cro. Eliz. 920. Godb. 219. But lord Coke's words imply, that a single bond, that is, one *without a penalty*, being given for necessaries, may be good against an infant; and so it hath been frequently adjudged. See March 145. 1. Ro. Abr. 729. pl. 8. and 1. Lev. 86.

(3) See acc. ant. 89. a. and note 1 there.

(4) Acc. post. 264. b.

(5) See F. N. B. 168. d. and the notes b. &c. in the 4to edition as to infant's binding himself to serve.

(6) See acc. ant. 88. b.

(7) See Dy. 21. b.

(8) But now one jointenant or tenant in common may have account against the other as bailiff for receiving more than his share of profits, though there is no appointment of him as bailiff. See 4. An. c. 16. f. 27. See too 1. Leon. 219.

(9) See as to this and the king's prerogative in charging persons as accountants the earl of Devonshire's case 11. Co. 89. a.

(10) Ant. 90. b.

Ne serra jure en un enquest, &c. By this *&c.* is implied a maxime in law, [m] *quòd minor jurare non potest.* For example, [n] an infant cannot make his law of *non summons*; [o] and therefore the default shall not grieve him; for seeing the meane to excuse the default is taken away by law, the default it selfe shall not prejudice him. But yet this rule hath an exception, that [p] an infant, when he is of the age of 12 yeares, shall take the oath of allegeance to the king (1): and this was, as *Bracton* saith, *secundùm leges sancti Edwardi*; but indeed such was the law in the time of king *Arthur*. (2) [q] An infant cannot upon his oath make his law in an action of debt. [r] And the husband and wife of full age, for the debt of the wife before the coverture, shall make their law.

[m] Bract. lib. 5. fo. 340. b.
[n] 13. E. 3. Ley 50.
[o] 26. E. 3. 63. 2. Mariæ Dyer 104. 105.
[p] Vid. devant cap. de Homage et cap. de Fealty sect. 85. 91. Bract. li. 2. fo. 124. Britton fo. 73. 74. et fol. 19. Fleta lib. 1. cap. 27.
[q] 11. H. 6. 40. 1. H. 7. 25. 15. E. 4. 24. (Post. 295.)
[r] 46. E. 3. 10. 9. E. 4. 24. 15. E. 4. 2. 21. H. 3. 23. (Post. 295. a. Cro. Eliz. 161.)

Sect. 260.

ITEM si terres ou tenements soyent dones a un home en le taile, quel ad tant des terres en fee simple, et ad issue deux files, et devie, & ses deux files font partition enter eux, issint que la terre en fee simple est allot a la file puisne en allowance des terres & (3) tenements tailes allottes a la file eigne, si, apres tiel partition fait, la puisne file alienast sa terre en fee simple a un auter en fee, & ad issue fits ou file & devie, l'issue poit bien entrer en les tenements tailes & eux tener & occupier en purpartie ovesque son aunt. Et ceo est pur deux causes. Un est, pur ceo que l'issue ne poit aver ascun remedie de la terre alien per sa mere, pur ceo que la terre fuit a luy en fee simple; & pur tant que il est un de les heires en taile, & n'ad my ascun recompence de ceo que a luy affiert de les tenements tailes, il est

ALSO if lands or tenements be given to a man in taile, who hath as much land in fee simple, and hath issue two daughters and die, and his two daughters make partition betweene them, so as the land in fee-simple is allotted to the younger daughter in allowance for the lands and tenements in taile allotted to the elder daughter, if, after such partition made, the yonger daughter alieneth her land in fee simple to another in fee, & hath issue a son or daughter & dies, the issue may enter into the lands in taile and hold and occupy them in purparty with her aunt. And this is for two causes. One is, for that the issue can have no remedie for the land sold by the mother; because the land was to her in fee simple; and in as much as she is one of the heires in taile, & hath no recompence of that which belongeth to her of the lands in taile, it is reason

La terre en fee simple est allot a la file puisne. It is first to be observed upon this whole case, that the fee simple land is allotted to the yongest daughter, and the land entailed to the eldest. This partition *primâ facie* is good; (4) and herein the partition differeth from the exchange, where in the exchange the estates must be equal.

(4. Co. 121. b.)

(Ant. 51. a.)

But yet this partition by matter subsequent may become voidable (as *Littleton* here puts the case). The eldest coparcener hath by the partition and the matter subsequent barred herself of her right in the fee simple lands, insomuch as when the yongest sister alieneth the fee simple lands and dieth, and her issue entreth into halfe the lands entailed, yet shall not the eldest enter into halfe of the lands in fee simple upon the alienee; for by the alienation, the privitie of the state is destroyed.

Le puisne file alien la terre en fee simple, &c. The same law it is, if the youngest daugh-

reason

(1) Acc. ant. 68. b. & 78. b. See also 128. a.—Another exception is, that he may be sworn as a witness at 14, and *before* if he appears to understand an oath or rather as it is expressed by lord Hale hath competent discretion. 11. Mod. 228. 2. Hal. H. P. C. 278.—Also according to lord Hale in some cases of exigence, as in rape, an infant of tender years may be examined without oath.—In 1. Stra. 700. there is a case in which an infant of 7 years was refused. There too the point about examining infants as witnesses is ably argued. The same point was touched upon incidentally in the great case of Omychund and Barker before lord chancellor Hardwicke about receiving a Gentoo's evidence; which I more particularly refer to here; because in it lord Hale's doctrine of admitting infants to give evidence in criminal cases *without oath* is said to have been over-ruled at the Old Bailey after mature deliberation and also by lord Raymond. 1. Atk. 29. See 1. Hal. Hist. P. C. 302. 634. and 2. Hal. H. P. C. 279. and Lamb. Just. 24. 1602. p. 85.

(2) See notes 3. and 4. of fol. 68. b.

(3) In L. & M. instead of *terres &* it is *autres*.

(4) Acc. F. N. B. 62. M.—Here lord Hale's MS. makes a question, *whether such partition be void or voidable, being made by husband,* and cites M. 30. 31. Eliz. B. R. Morris and Maule.

reaſon, que el eit ſa purparty de les tenements tailes, & noſmement quant tiel partition ne fait aſcun diſcontinuance (1).

Mes le contrary eſt tenus M. 10. H. 6. *s. que le heire ne poit enter ſur le parcener que ad la terre taile, mes eſt mis a* formedon.

that ſhe hath her portion of the lands tailed, and namely when ſuch partition doth not make any diſcontinuance.

But the contrary is holden M. 10. H. 6. s. that the heire may not enter upon the parcener who hath the intailed land, but is put to a *formedon*.

ter had made a gift in tayle, for the reverſion expectant upon an eſtate tayle is of no account in law (2), for that it may bee cut off by the tenant in tayle. Otherwiſe it is of an eſtate for life or yeares. If in this caſe the youngeſt daughter alien part of the land in fee ſimple, and dieth, ſo as a full recompence for the land entailed deſcends not to her iſſue, ſhe may waive the taking of any profits thereof and enter into the land entailed; for the iſſue in taile ſhall never be barred without a full recompence, though there be a warranty (3) in deed or in law deſcended. If on the other ſide the eldeſt coparcener alien the land entayled and dyeth, her iſſue ſhall have a *formedon* alone (4) for the whole land entailed; for ſo long as the partition continueth in force (5), ſhe is only enheritable to the whole land entailed.

(Poſt. 174. b.)

Et n'ad my aſcun recompence. This is intended, as it appeareth, of a full recompence.

Tiel partition ne fait aſcun diſcontinuance. And the reaſon thereof is, for that it paſſeth not by livery of ſeiſin, but the partition is in truth leſſe then a grant, for that it maketh no degree, but each coparcener is in by deſcent from the common anceſtor.

See more of this in the chapter of diſcontinuance. Sectione

Mes le contrary eſt tenus, &c. This is no part of *Littleton*, and is contrary to law as appeareth by *Littleton* himſelfe; and beſides, the caſe intended is not truly vouched, for it is not in 10. H. 6. but in 20. H. 6. and yet there it is but the opinion of *Newton obiter* by the way. *Vide F. tit. part.* 1.

20. H. 6. 14.

Sect. 261.

UN auter cauſe eſt, pur ceo que il ſerra rette la folly del eigne ſoer, que el voit ſuffer ou agree a tiel partition, ou el puiſſoit aver ſi el voile la moitie de la terre en fee ſimple & ſon moitie des tenements en le taile pur ſay purparty, & iſſint eſtre ſure ſans dammage.

ANother reaſon is, for that it ſhall be accounted the folly of the eldeſt ſiſter, that ſhe would ſuffer or agree to ſuch a partition, where ſhe might if ſhee would have had the moity of the land in fee ſimple and a moity of lands entailed for her part, and ſo to be ſure without loſſe.

UN auter cauſe, &c. This is another reaſon to prove, that by the partition the eldeſt daughter hath concluded her ſelfe, as is aforeſaid.

Son moitie des terres en le taile. For if a writ of partition had beene brought, the eldeſt ſhould not have beene compelled to take the whole eſtate in tayle, for the prejudice that might after enſue, but might have challenged the one moity of the lands in taile, and another moity of the lands in fee ſimple, and this ſhe might doe *ex proviſione legis*. But when ſhe will not ſubmit her to the policie and proviſion of the law, but betake herſelfe to her owne policy and proviſion, there the law will not ayde her, as here by *Littleton* it manifeſtly appeareth. And ſo it is in the other caſe. (*) As if a man be ſeiſed of three mannors of equal value in fee, and taketh wiſe, and chargeth one of the mannors with a rent charge, and dyeth, ſhe may by the proviſion of the law take a third part of all the mannors and hold them diſcharged; but if ſhe will accept the entire mannor charged, it is holden that ſhe ſhall hold it charged.

(*) 26. E. 3. dower 133. 17. E. 2. tit. dower 164. 18. H. 6. 27. (Ant. 32. b. 33. a.)

A

(1) In L. & M. Roh. and the two Cambridge MSS. theſe words are added, *de le taille, ſi come ſera dit en apres en le chapitre de diſcontinuance.* What follows in this ſection is not in L. & M. Roh. or the MSS.

(2) For the effect of this doctrine about reverſions on eſtates tail, and with what qualification it ſhould be underſtood, ſee the authorities collected in 1. Vin. Abr. 141. pl. 2. to which add 2. Atk. 406. and poſt. 174. b.

(3) Lord Coke may be here preſumed to mean a *lineal* warranty; becauſe hereafter he allows and in his time it was the common learning, that *collateral* warranty would bar the iſſue in tail without recompence. Poſt. 374. b.

(4) In a Coke upon Littleton I have with MS. notes there is the following remark.—" *Quære* of this; for I think the formedon muſt be brought in the name of the iſſue and the ſurviving parcener, and then the parcener to be ſummoned and ſevered, and then the iſſue to make a ſpecial count and ſhew the partition."

(5) See poſt. 176. b. and ſect. 274.

Dyer 1. Mar. 98.

A partition of lands intailed betweene parceners, if it be equall at the time of the partition, shall bind the issues in taile for ever (1), albeit the one doe alien her part.

But here it may be demanded, that seeing *Littleton* saith, that it shall be taken to be the folly of the eldest parcener, &c. what if so be the eldest did not know of the estate tayle either in respect of the antiquity thereof, or for want of having of the evidence, or for any other cause, what folly can be imputed to her?

The answer is, that it is presumed in law, that every one is conusant of her right and title to her owne land; and on the other side it should be arrected (2) great folly in her to bee ignorant of her owne title. And therefore the reason of *Littleton* doth firmly hold.

Sect. 262.

AUXY si home soit seisie en fee d'un carve de terre per just title, & disseisist un enfant deins age d'un auter carve, & ad issue deux files, & morust seisi d'ambideux carves, l'enfant adonque esteant deins age, & les files entront & font partition, issint que l'un carve est allotte al purparty l'un, come per case al puisne en allowance d'auter carve que est allotte a le purparty de l'auter, si puis l'enfant enter en le carve dont il fuit disseisist sur la possession le parcener que ad mesme le carve, donques mesme le parcener poit entrer en l'auter carve que sa soer ad, & tener en parcenary ovesque luy. Mes si le puisne aliena mesme la carve a un auter en fee simple devant l'entrie l'enfant, & puis l'enfant enter sur le possession l'alienee, donque

ALSO if a man bee seised in fee of a carve of land by just title, and hee disseise an infant within age of another carve, and hath issue two daughters, and dyeth seised of both carves, the infant being then within age, and the daughters enter and make partition, so as the one carve is allotted for the part of the one, as per case to the youngest in allowance of the other carve which is allotted to the purpartie of the other, if afterward the infant enter into the carve whereof hee was disseised upon the possession of the parcener which hath the same carve, then the same parcener may enter into the other carve which her sister hath, and hold in parcenary with her. But if the yongest alien the same carve to another in fee before the entry of

BEfore (3) it appeareth, that when the privity of the estate is destroyed by the feoffment of one coparcener, that upon eviction of a moity by force of an entayle against the other she shall not enter upon the alienee. But in this case that *Littleton* here putteth, when the privity of the state remaineth, and the part of the one is evicted, (*) she shall enter and hold in coparcenary with her other coparcener; and so it is in the case of an exchange. By reason of the *&c.* in the end of this section there may two questions be justly demanded.

(*) 15. E. 4. 3. a. per Littleton. lib. 4. fo. 121. 122. Bastard's case.

What if the whole estate in part of the purparty of one parcener be evicted by a title paramont; whether is the whole partition avoyded, for that *Littleton* here putteth the case that the whole purpartie of the one is defeated?

The second question is, whether if but part of the state of one coparcener be evicted, as an estate in taile, or for life, leaving a reversion in the coparcener, whether that shall avoid the partition in the whole?

To the first it is answered, that if the whole estate in part of the purparty bee evicted, that shall avoyd the partition in the whole, bee it of a mannor, that is entire, or of acres of ground, or the like that bee severall; [n] for the partition in that case implyeth for this purpose both a warrantie and a condition in law (4), and either of them is entire, and giveth an entry in this case into the whole. And so hath

[n] 13. E. 4. 3. 42. Ass. 22.

(1) Acc. ant. 166. a. 2. Vern. 233.
(2) This word, which is so uncommon that I cannot find it noticed in any dictionary I have seen, is apparently used for *reckoned*. Lord Coke seems to borrow it from Littleton's use of the word *rette* at the beginning of the section here commented upon.
(3) Ant. 172. b.
(4) That is a condition to give re-entry and a warranty to vouch and have recompence. See post. 384. a.

que el ne poit enter en l'auter carve; pur ceo que per son alienation el ad luy tout oustement dismisse d'aver ascun part de les tenements come parcener. Mes si le puisne devant l'entrie l'enfant fait de ceo un lease pur terme d'ans, ou pur terme de vie, ou en fee tayle savant la reversion a luy, & puis l'enfant enter, là paraventure auterment est; pur ceo que el ne soy dismisse de tout ceo que fuit en luy, mes ad reserve a luy le reversion & le fee, &c.

the infant, and after the infant enter upon the possession of the alienee, then she cannot enter into the other carve; because by her alienation shee hath altogether dismissed her self to have any parte of the tenements as parcener. But if the youngest before the entry of the infant make a lease of this for terme of yeares, or for terme of life, or in fee tayle saving the reversion to her, and after the infant enter, there peradventure otherwise it is; because she hath not dismissed her selfe of all which was in her, but hath reserved to her the reversion, & the fee, &c.

it beene lately resolved [o] both in the case of exchange and of the partition.

[o] Bostard's case lib. 4. fol. 121.

To the second, if any estate of freehold be evicted from the coparcener in all or part of her purparty, it shall be avoyded in the whole. (1) As if *A.* bee seised in fee of one acre of land in possession, and of the reversion of another expectant upon an estate for life, and hee disseise the lessee for life who makes continuall clayme; *A.* dyeth seised of both acres, and hath issue two daughters; partition is made, so as the one acre is allotted to the one, and the other acre to the other; the lessees enter: the partition is avoided for the whole, and so likewise hath [p] it beene lately resolved.

[p] Bostard's case, ubi supra.

[q] Yet there is a diversity betweene the warranty, and the condition which the law createth upon the partition. Where one coparcener taketh benefit of the condition in law (2) she defeateth the partition in the whole. But when shee voucheth by force of the warranty in law for part, the partition shall not bee defeated in the whole, but shee shall recover recompence for that part. And therein also there is another diversity betweene a recovery in value by force of the warranty upon the exchange and upon the partition. For upon the exchange he shall recover a full recompence for all that he loseth. But upon the partition she shall recover but the moity, or halfe of that which is lost, to the end that the losse may be equall. (3).

[q] Vide 5. E. 3. tit. voucher 249.

(6. Co. 12. b. 1. Ro. Abr. 815. 4. Co. 122.)

Many other diversities there be between exchanges and partitions; for there are more and greater privities in case of partition in persons bloud and estates, than there is in exchanges; all which were too tedious to rehearse in this place, seeing so much as hath beene said herein is sufficient for the explanation of the cases of partition which *Littleton* hath put.

18. E. 2. tit aid 171. 19. H. 6. 26. (Ant. 50. b.)

Donques el ne poet enter en l'auter carve, &c. By this is also approved that which hath beene often said before, that when the whole privity betweene coparceners is destroyed, there ceaseth any recompence to be expected either upon the condition in law or warranty in law by force of the partition.

Per son alienation il ad luy tout oustement dismisse d'aver ascun part de les tenements come parcener. Hereupon it followeth, that if one parcener maketh a feoffement in fee, and after her feoffee is impleaded and voucheth the feoffor, [r] she may have aid of her coparcener to deraigne a warranty paramount, (4) but never to recover *pro ratâ* against her by force of the warranty in law upon the partition; for *Littleton* here saith, that by her alienation she hath dismissed her selfe to have any part of the land as parcener, and without question as parcener she must recover *pro ratâ*, upon the warranty in law against the other parcener.

(Post. 243. b.)

[r] 41 E. 3. 24. 11. H. 4. 22. 23. 14. E. 3. aid 24. (Hob. 21. 26.)

And yet in some case the feoffee of one coparcener shall have aid of the other parceners to deraigne the warranty paramount. And therefore [a] if there be two coparceners and they make partition, and the one of them enfeoffes her sonne and heire apparent and dieth, the sonne is impleaded, albeit he be in by the feoffement of his mother, yet shall he pray in ayd of the

[a] 43 E. 3. 23. Pl. Com. 4. E. 3. 15. 5. E. 3. 7. 38. E. 3. 17. &c.

(1) So it is of an exchange. Hob. 152. Calthrope's reading on lord and copyholder 92. 1. Ro. Abr. 815.
(2) That is, *by entry*.
(3) See acc. the case of dower post. 384. b. See also the provision in favour of the lord for the third part not devisable by the statute of wills 34. & 35. H. 8. c. 5. s. 11.
(4) See 31. H. 8. c. 1. s. 3. 4 H. 7. 3. a. & Plowd. Mansel's case 7. a. & b.

[b] 32. E. 1. tit. a'd 178. 3. E. 2. ibid. 163. (Post. 384. b.)

the other coparcener to have the warranty paramount; and the reason [b] of the granting of this aid is, for that the warranty betweene the mother and the sonne is by law adnulled, (1) and therefore the law giveth the sonne albeit he be in by feoffment, to pray in ayd of the other parcener, to deraigne the warranty paramount; wherein is to bee observed the great equity of the common law in this case;

Ipsæ etenim leges cupiunt ut jure regantur.

[*] 2. H. 6. 16. (Plowd. 9. b. Mansel's case.)

[*] But if a man be seised of lands in fee, and hath issue two daughters, and make a gift in taile to one of them, and dye seised of the reversion in fee which descends to both sisters, and the donee or her issue is impleaded, she shall not pray in ayd of the other coparcener, either to recover *pro ratâ*, or to deraigne the warranty paramount; for that the other sister is a stranger to the state taile, whereof the eldest was sole tenant, and never particion was or could be thereof made. (2)

(Ant. 173. a.)

Mes si le puisne devant l'entrie l'enfant fait de ceo un lease, &c. ou en fee taile savant le reversion a luy, &c. This (upon that which hath beene said) (3) needeth no explanation. Only this is to be observed, that, albeit it is in the power of tenant in taile to cut off the reversion, yet if the infant enter before it be cut off, the law hath such consideration of this reversion, that she that loseth it shall enter into her sisters part, and hold with her in coparcenary, for that the privity betweene them was not wholly destroyed. (4)

Sect. 263.

(F. N. B. 162. c.)

ITEM si soient trois ou quater parceners, &c. que font partition enter eux, si le part d'un parcener soit defeat per tiel loyal entrie, el poit enter & occupier les auters terres ovesque touts les auters parceners, & eux compeller de faire novel partition de les auters terres enter eux, &c.

ALSO if there be three or foure coparceners, &c. which make partition betweene them, if the part of the one parcener be defeated by such lawfull entrie, she may enter and occupie the other lands with all the other parceners, and compell them to make new partition betweene them of the other lands, &c.

INTER eux, &c. This *&c.* implieth, that so it is betweene the surviving parceners and the heires of the other, or betweene the heires of parceners, all being dead.

Sect. 264.

LE baron soy tient eins come tenant per le curtesie. This is no severance of the state in coparcenary, [b] for the other coparcener and the tenant by the curtesie shall be joyntly impleaded; for he doth continue the state of coparcenary, as the other parcener did. (5)

[b] 24. E. 3. 29. 31. E. 3. Briefe 339. 9. E. 4. 13. 19. H. 6. 26. 3. H. 6. 26. 3. H. 6. Ass. 1. 37. H. 6. 8. 21. E. 3. 14. (Ant. 167. b.)

Vers le tenant

ITEM si sont deux parceners, & l'un prent baron, & le baron & sa feme ont issue enter eux, & la feme devy, & le baron soy tient eyns en le moity come tenant per le curtesie, en ceo cas le parcener que survesquist & le tenant per le curtesie bien poient faire partition

ALSO if there bee two parceners, and the one taketh husband, and the husband and wife have issue betweene them, and his wife dieth, and the husband keepes himselfe in as tenant by the curtesie, in this case the parcener which survi-

(1) Acc. post. 390. a.
(2) See post. 177. b. contra as to land given in frankmarriage. See also 2. H. 6. 16.
(3) Ant. 173. a. and note 2. there.
(4) See ant. 103. a. & b.
(5) Acc. post. 175. b. See also fo. 192. a. and Bro. joinder in action 40.

tition enter eux, &c. Et si le tenant per le curtesie ne voit agreer al partition d'estre fait, donques le parcener que survesquist poit aver envers le tenant per le curtesie, briefe de partitione faciendâ, &c. *& luy compeller de faire partition. Mes si le tenant per le curtesie voile aver partition enter eux d'estre fait, & le parcener que survesquist ne voit ceo aver, donque le tenant per le curtesie n'avera ascun remedy pur aver partition, &c. Car il ne poit aver briefe de* partitione faciendâ, *pur ceo que il n'est parcener, car tiel briefe gist pur parceners tantsolement. Et issint poyes veyer, que briefe de* partitione faciendâ *gist envers tenant per le curtesie, & uncore il mesme ne poit aver tiel briefe.*

veth, and the tenant by the curtesie may well make partition between them, &c. And if the tenant by the curtesie will not agree to make partition, then the parcener which surviveth may have against the tenant by the curtesie a writ *de partitione faciendâ, &c.* & compel him to make partition. But if the tenant by the curtesie would have partition to be made between them, and the parcener which surviveth will not have this, then the tenant by the curtesie cannot have any remedy to have partition, &c. For hee cannot have a writ of *partitione faciendâ*, because he is no parcener. For such a writ lyeth for parceners only. And so you may see, that a writ of *partitione faciendâ* lyeth against tenant by the curtesie, and yet he himselfe cannot have the like writ.

Per le curtesie brief de partitione faciendâ, &c. Here by the *&c.* is implyed, that albeit that the tenant by the curtesie be an estranger in blood, yet the [c] writ *de partitione faciendâ* clearly lies against the tenant by the curtesie, because he continueth the estate of coparcenary.

[c] 3. E. 3. 47. 9. E. 5. 13. 16. E. 3. Aid 129. 19. E. 3. ibid. 144.

If two coparceners be, and one doth alien in fee, they are tenants in common, and severall writs of *præcipe* must be brought against them; (1) and yet the parcener shal have a writ of partition against the alienee at the common law, which is a far stronger case then the case put of tenant by the curtesie.

28. E. 3. 51.

Tiel briefe gist pur parceners tantsolement. Hereby it appeareth, that neither the tenant by the curtesie, nor (much lesse) the alienee of a coparcener shall have a writ of *partitione faciendâ* at the common law; (2) for *Littleton* saith here, that such a writ lyeth onely for parceners, [*] but it may be brought by a parcener against strangers, as it appeareth before. But a *nuper obiit* and a *rationabili parte* (3) doe lye onely betweene two coparceners on both sides.

[*] 3. E. 3. 47. 48. (F. N. B. 197. Plowd. 306. b.)

If three coparceners be, and the eldest doth purchase the part of the youngest, the eldest, having one part by descent and the other by purchase, shall have a writ of partition at the common law against the other middle sister, *et sic de similibus*. And so it is in a far stronger case, if there be three coparceners, and the eldest taketh husband, and the husband purchase the part of the youngest, the husband for his part is a stranger and no parcener, and yet he and his wife shall have a writ of partition against the middle sister at the common law, because he is seised of one part in the right of his wife who is a parcener. (4)

Dier 1. Mariæ 98.

F. N. B. 52. Registr.

Pur aver partition, &c. Here by this *&c.* is included all others that be strangers in blood, whether they come to their estates by purchase or by act in law. Since *Littleton* wrote, by the statutes [d] one joyntenant or tenant in common may have a writ of partition against the other; and therefore at this day the alienee of one parcener may have a writ of partition against the other parcener, because they are tenants in common: and the like had beene attempted in former parliaments [*] but prevailed not untill these latter statutes.

[d] 31. H. 8. cap. 1. 32. H. 8. cap. 32. Vid. sect. 290.

[*] Rot. Parl. 1. R. 2. nu. 82.

[e] The tenant by the curtesie shall have a writ of partition upon the statute of 32.

[e] Brooke tit. partition 41.

(1) Acc. ant. 167. b. But it is no severance, if the alienation be only for life. Post. 192. a.
(2) See acc. Dy. 98. b.
(3) See ant. 164. b.
(4) See in F. N. B. 62. S. the form of the writ in such a case.

32. *H.* 8. *ca.* 32. for albeit he is neither jointenant nor tenant in common, for that a *præcipe* lyeth against the parcener and tenant by the curtesie, as hath been said, yet he is in equall mischiefe as another tenant for life.

[*f*] Mich. 7. & 8. Eliz. Bendloes inter Wotton & Cooke. (1) Dier 3. Mariæ 128. A. & 7. Eliz. 243.

[*f*] If there be three coparceners and a stranger purchase the part of one of them, he and one other of the coparceners shall not joyne in a writ of partition, neither by the common law, nor by force of the statute; for the words of the preamble of the statute be *(and none of them by the law doth or may know their severall parts, &c. and cannot by the lawes of this realme make partition thereof, without other of their mutuall assents, &c.)* Now in this case the one of the plaintifes, *viz.* the parcener, may have a writ of partition at the common law, and the other parcener being a purchaser may have it by the statute; and therefore they shall not joyne in one writ.

Cap. 2. Parceners by Custome. Sect. 265.

PARCENERS per le custome sont lou home seisie en fee simple, ou en fee taile, de terres ou tenements que sont de tenure appel gavelkind deins le county de Kent, & ad issue divers fits & devie, tielx terres ou tenements discenderont a touts les fits per le custome, & ovelment enheriteront & ferront partition enter eux per le custome, sicome females ferront, et briefe de partitione faciendâ *gist en ceo cas, sicome enter females. Mes il covient en la declaration de faire mention de le custome. Auxy tiel custome est en auters lieux d'Engleterre. Et auxi tiel custome est en North Gales, &c.* (2)

PARCENERS by the custome are, where a man seised in fee simple, or in fee tayle, of lands or tenements which are of the tenure called gavelkind within the countie of Kent, and hath issue divers sonnes and die, such lands or tenements shall descend to all the sons by the custome, and they shall equally inherit and make partition by the custom, as females shall do, and a writ of partition lieth in this case as between females. But it behooveth in the declaration to make mention of the custome. Also such custome is in other places of England, and also such custome is in North-Wales, (3) &c.

(1. Sid. 136. Ant. 140. a.) See before all the ancient authors of the law concerning gavelkind ubi supra. Lambert verbo terra exscript.

Mes il covient en le declaration de faire mention de le custome. Well said *Littleton*, [*g*] that he in his declaration must make mention of the custome, as to say, that the land is of the custome of *gavelkinde*; but hee shall not prescribe in it. And so is it of *Burgh English*. And these two vary in that point from other customes; for the law, when they are generally alledged, taketh knowledge of these two. (4)

[*g*] 5. E. 4. 8. b. 21. E. 4. 56. b. Plo. Com. 129. b. in Buckleis case. Vide sect. 8. versus finem. (1. Sid. 138. Doctr. Plac. 105.)

In [*h*] *Domesday* it is thus said, *duo fratres tenuerunt in paragio* (5) *quisque habuit aulam suam, & potuerint ire quò voluerint.*

[*h*] Berochescire. Hereford.

Auxy tiel custome est en auters lieux Angleterre. Of this sufficient hath beene said before. (6)

North Gales. Wales, *Wallia.* It commeth [*i*] of the Saxon word *wealh*, which signifieth *peregrinus*, or *exterus*; for the *Saxons* so called them, because in troth they were strangers to them being the remaine of the old and ancient Britons, a wise and warlike nation inhabiting in the west part of England. These men have kept their proper language for above these thousand yeares past; and they to this day call us Englishmen *Saisons*, (that is) Saxons. And the like custome, as our author here saith was in North Wales, was also in Ireland; for there the lands also (which is one marke of the ancient Brittons) were of the nature of *gavelkinde*: but where by their *Brehon* law the bastards

[*i*] Lamb. verb. Welshmen. Silvester Giraldus.

(1) S. C. is also in Dy. 260. b.

(2) In L. & M. and the two MSS. it is *en Northumberland et North Walez, &c.*

(3) But by the 34. & 35. H. 8. gavelkind descent of lands in Wales is expresly taken away, and all lands there are made descendible to the eldest son according to the common law of England. See that statute c. 26. s. 91. and 128. Also in Kent various estates have been made descendible according to the common law by special statutes for this purpose. See Robins. on Gavelk. 75.

(4) But according to a very accurate writer on *gavelkind* this doctrine must be restrained to the special descent of *gavelkind* and *Borough English* lands, which is considered as the essence of both; and therefore the other customs incident to *gavelkind* and *Borough English* land must be *specially* pleaded. See Robins. on Gavelk. 41. For this difference several authorities are cited; namely, as to *gavelkind* a case in Cro. Cha. 562. another in 1. Lev. 79. 1. Sid. 137. and Raym. 76. and a third in 2. Sid. 153. and as to *Borough English* a case in 1. Salk. 243. I the rather introduce these references because mr. Robinson's treatise is become very scarce.

(5) This word means *equality*, being derived from the adjective *par*, and made a substantive by the addition of *agium*. Read more concerning the termination of *agium* ant. 86. a. See also as to *disparagatio* ant. 80. a.

(6) Ant. 14. a. and 140. a. See also book 1. chap. 7. of Robinson on Gavelkind, where the reader will see a most learned dissertation on the origin antiquity and universality of partible descents.

ſtards inherited with their legitimate ſons, as to the baſtards that cuſtome was aboliſhed. (1) And agreeing with *Littleton* in this point, ſee an old ſtatute. * *Aliter uſitatum eſt in Walliâ, quàm in Angliâ, quoad ſucceſſionem hæreditatis, eò quòd hæreditas partibilis eſt inter hæredes maſculos, et à tempore cujus non extitit memoria partibilis extitit, dominus rex non vult, quòd conſuetudo illa abrogetur, ſed quòd hæreditates remaneant partibiles inter conſimiles hæredes ſicut fieri conſuevit, & fiat partitio illius ſicut fieri conſuevit.* (2)

Vide ſect. 212.

* Stat. Walliæ, an. 12. E. 1.

Parceners per le cuſtome, &c. Well ſayd *Littleton*, "by the cuſtome," for ſons are parceners in reſpect of the cuſtome of the fee or inheritance, and not in reſpect of their perſons, as daughters and ſiſters, &c. be. [h] *Et ſunt participes quaſi partem capientes, &c. ratione ipſius rei quæ partibilis eſt, et non ratione perſonarum, quæ non ſunt quaſi unus hæres &, unum corpus, ſed diverſi hæredes, ubi tenementum partibile eſt inter plures cohæredes petentes, qui deſcendunt de eodem ſtipite & ſemper ſolent dividi ab antiquo.*

[h] Bract. li. 5. fo. 428. Brit. cap. 71. Flet. lib. 5. cap. 9.

Sect. 266.

ITEM il y ad autre particion quel eſt d'auter nature et d'auter forme que aſcuns des partitions avauntdits ſont. Sicome home ſeiſie de certain terres en fee ſimple ad iſſue deux files, et l'eigne eſt mary, et le piere dona parcel de ſes terres a le baron ove ſa file en frankmariage, et moruſt ſeiſie de le remnant, le quel remnant eſt de pluis greinder value per an que ſont les terres dones en frankmariage.

ALſo there is another partition which is of another nature and of another forme then any of the partitions aforeſaid be. As if a man ſeiſed of certaine lands in fee ſimple hath iſſue two daughters; and the eldeſt is maried, and the father giveth part of his lands to the huſband with his daughter in frankemariage, and dyeth ſeiſed of the remnant, the which remnant is of a greater yearly value then the lands given in frankmariage.

DONA parcel de ſes terres a le baron ove ſa file en frankmariage. Here it appeareth, that a gift in frankemarriage may be made after mariage, as hath beene ſayd in the chapter of fee tayle. (3)

Le quel remnant eſt de pluis greinder value per an, &c. Admit, that the lands given in frankmariage are of greater value than the lands deſcended in fee ſimple, ſhall the other ſiſter have any remedy againſt the donees? It is plaine ſhe ſhall not; becauſe it is lawfull for a man to diſpoſe of his own lands at his will and pleaſure.

Sect. 267.

EN cel caſe, le baron, ne le feme, avera riens pur lour purpartie de le dit remnant, ſinon que ils voilent mitter lour terres dones en frankmariage en hotchpot *oveſque le rem-*

IN this caſe, neither the huſband, nor wife, ſhall have any thing for their purpartie of the ſaid remnant, unleſs they will put their lands given in frankmariage in *hotchpot*, with the remnant of the

EN cel caſe, le baron, ne le feme, avera riens pur lour purpartie, &c. [i] This gift in frankmariage ſhall *primâ facie* be intended a ſufficient advancement; and therefore the remnant ſhall deſcend to the other coparcener, onely with this proviſion in law *tacitè* annexed, that if the donees

[i] 8. H. 3. breve 880. 34. E. 1. nuper obiit 15. adjudge 4. E. 3. 49. 10. Aſſ. p. 14. Vi. 10. E. 3. 38. & 30. Aſſ. 7. Bracton lib. 2. fol. 77. lib. 5. fo. 428. Brit. ca. 72. Fleta lib. 6. cap. 47.

(1) The gavelkind deſcent of lands in Ireland was an incident to the cuſtom of *taniſtry*, and as ſuch fell to the ground with its principal in conſequence of a ſolemn judgment againſt the latter in a caſe of the fifth of James the firſt. For this caſe, which is excellently reported by ſir John Davis, who was attorney-general in Ireland at the time, ſee Dav. Rep. 28. But in the reign of queen Anne, the policy of weakening the Roman Catholic intereſt in Ireland was the cauſe of an Iriſh ſtatute to make the lands of papiſts deſcendible according to the gavelkind cuſtom unleſs the heir conformed within a limited time. See Robinſ. on Gavelk. 17. However now by an Iriſh ſtatute of the preſent reign the deſcent of the lands of papiſts is again reduced to the courſe of the common law. Iriſh Stat. of 17. & 18. G. 3. c. 49. ſ. 1.—Lord Coke, from his ſuppoſing that the Brehon law of partibility except as to baſtards remained in Ireland, ſeems not to have been aware of the caſe of taniſtry. Indeed what he writes in this reſpect was before that caſe more applicable to Wales than Ireland; for the ſtatute of Wales cited in the next paſſage confirms the partible deſcent of lands there amongſt males with an exception excluding baſtards, whereas I doubt whether there is any evidence of confirmation of the Brehon law with ſuch an exception. See ant. 141. a. where lord Coke himſelf takes notice of a total abolition of the Brehon law.

(2) See ant. 175. b. note 4.

(3) See ant. 21. b. See alſo acc as to dower *ex aſſenſu patris* after marriage F. N. B. 151. L.

nant de la terre oveſque ſa ſoer. Et ſi iſſint ils ne voilent fayre, donques le puiſne poet tener & occupier meme le remnande, & prendra a luy les profits tantſolement. Et il ſemble, que ceſt parol (hotchpot) *eſt en Engliſh* a pudding, *car en tiel* pudding *n'eſt communement miſe un choſe tantſolement, mes un choſe oveſque autres choſes enſemble. Et pur ceo il covient en tiel caſe de mitter les terres dones en frankmariage oveſque les auters terres en* hotchpot, *ſi le baron & ſa feme voilent aver aſcun part en les auters terres.*

land with her ſiſter. And if they will not doe ſo, then the youngeſt may hold and occupie the ſame remnant, and take the profits onely to her ſelfe. And it ſeemeth, that this word *(hotchpot)* is in Engliſh a pudding; for in this pudding is not commonly put one thing alone, but one thing with other things together. And therefore it behooveth in this caſe to put the lands given in frankemariage with the other lands in *hotchpot*, if the huſband and wife will have any part in the other lands.

nees will put the land into *hotchpot*, then ſhe ſhall out of the remnant make up her part equall. But the donees muſt doe the firſt act, and in the meane time the whole fee ſimple land deſcends to the other. And this is warranted here by *Littleton, viz.* that the donees ſhall have nothing for the purpartie of the remnant, unleſſe they will put their lands given in frankemariage in *hotchpot* ſo as the donees muſt doe the firſt act; and more expreſly after in this chapter, (1) where he directly ſaith, that the other ſiſter ſhall enter into the remnant, and them to occupy to her owne uſe, unleſſe the huſband and wife will put the lands given in frankmariage into *hotchpot*. And herewith agreeth *Fleta*, (2) who ſaith, *cùm dicat tenens excipiendo, quòd non tenetur petenti reſpondere, quia A. participem habet, &c. replicari poterit à petente quòd prædict' A. tenet quandam partem in maritagium de communi hæreditate, nec vult illud in partem ponere.* And here are three things (that I may ſpeake once for all) to be obſerved. Firſt, that in this ſpeciall caſe where there be two daughters, one of them onely ſhall inherit the lands in fee ſimple. Secondly, that in this caſe there lieth no writ of partition; becauſe *non tenent inſimul & pro indiviſo.* Thirdly, if the parcener, to whom the land in fee ſimple deſcended, will not put the lands in *hotchpot*, then may the donees enter into the fee ſimple lands, and hold them in coparcenarie with her.

[k] Glanvil. lib. 7. cap. 5. Bracton lib. 2. fol. 60. Fleta lib. 2. cap. 5. (4) Magna Carta cap. 18. 3. F. N. B. 222. 30. E. 3. 25. 31. E. 3. Reſp. 60. 31. Aſſ. 14. 17. E. 2. Detinew 17. E. 3. 17. 1. E. 2. Detinew 56. 31. H. 8. tit. rationab. parte bonorum 6.

* Lamb. f. 119. 68. (Poſt. 185. b. An. 149. b.)

And it ſeemeth by our old bookes, [k] that by the ancient law there was a kind of reſemblance hereof concerning goods. *Si autem poſt debita deducta, & poſt deductionem expenſarum quæ neceſſariæ erunt, id totum, quod tunc ſuperfuerit, dividatur in tres partes; quarum una pars relinquatur pueris* (3) *ſi pueros habuerit defunctus, ſecunda uxori ſi ſuperſtes fuerit, & de tertiâ parte habeat teſtator liberam diſponendi facultatem. Si autem liberos non habeat, tunc medietas defuncto, & alia medietas uxori: ſi autem ſine uxore deceſſerit liberis exiſtentibus, tunc medietas defuncto, & alia medietas liberis tribuatur: ſi autem ſine uxore & liberis, tunc id totum defuncto remanebit.* And by the law before the conqueſt it * was thus provided, *ſive quis incuriâ ſive morte repentinâ fuerit inteſtatus mortuus, dominus tamen nullam rerum ſuarum partem (præter eam quæ jure debetur herioti nomine) ſibi aſſumito, verùm eas judicio ſuo uxori, liberis & cognatione proximis juſtè pro ſuo cuique jure diſtribuito.*

[l] Regiſt. 142. 34. E. 1. Detinew 60. 1. E. 4. 6. 7. E. 4. 21. 43. E. 3. 38. (F. N. B. 122. L.)
[m] 3. E. 3. dette 156. 40. E. 3. 18.

But it appeareth by the *Regiſter*, [l] and many of our bookes, that there muſt be a cuſtome alleged in ſome county, &c. (5) to inable the wife or children to the writ *de rationabili parte bonorum*; (6) and ſo hath it beene reſolved in parliament. [m] But ſuch children, as be reaſonably advanced by the father in his life time with any part of his goods, ſhall have no further part of his goods; for the words of the writ be, *nec in vitâ patris promoti fuerunt.* (7)

Note, the cuſtome of *London* is, that if the father advance any of his children with any part of his goods, that ſhall bar them to demand any further part, unleſſe the father under his hand or in his laſt will do expreſſe and declare, that it was but in part of advancement, (8) and then that child ſo partly advanced ſhall put his part in *hotchpot* with the executors and widow, (9) and have a full third part of the whole, accounting that which was formerly given unto him as part thereof. And this is that in effect, which the civilians call *collatio bonorum.* (10)

Et

(1) See ſect. 268.

(2) See alſo acc. F. N. B. 197. O.

(3) Though *pueri* more commonly means *boys*, yet it is plain, that here it comprehends children of both ſexes; becauſe afterwards *liberi* is uſed for the ſame purpoſe. The word is uſed in the ſame large ſenſe in the writ *de rationabili parte bonorum*; and therefore Fitzherbert obſerves, that the ſon and daughter may join in that writ. F. N. B. 122. C. Alſo this large ſenſe of *pueri* is warranted both by the application of the word in the Roman law, and by its derivation from the Greek word παῖς, which is maſculine or feminine according to the article before it. To this effect Juſtinian's Digeſt in the title *de verborum ſignificatione* gives the following extract from the commentary of the Roman lawyer Julius Paulus on his famous predeceſſor Sabinus. *Pueri appellatione etiam puella ſignificatur: nam et fœminas puerperas appellant recentes ex partu; et Græci παιδίον communiter appellatur.* See Dig. lib. 50. tit. 16. leg. 163. and Menag. Jur. Civil. Amœnitates cap. 39. voce *puerpera*, where that learned French writer expatiates on the etymology of *puer*. I have been induced to give this explanation of the word *puer* by a caſe in our own lawbooks, which actually turned upon the queſtion, whether a *daughter* could take lands under that deſcription. The caſe aroſe on a remainder in a ſettlement made by a man on his firſt marriage *ſeniori puero* of the huſband and the heirs of his body; and this was decided by two judges againſt one to intitle a daughter and only child of the firſt marriage in preference to the ſon of a ſecond. Dy. 337. b. However there is a much earlier caſe on the conſtruction of *pueri*, in which it was interpreted to exclude *females*: Hob. 33. and the caſe there cited from 30. Aſſ. 47. & 30. E. 3. 27. But now indeed, when legal inſtruments are ſo univerſally expreſſed in the Engliſh tongue, it is not probable, that any diſpute ſhould ariſe in our courts of juſtice about the interpretation of this Latin word.

(4) The chapter of Fleta is here referred to erroneouſly. It ſhould be cap. 57.

(5) The places, uſually named, as thoſe in which the cuſtomary diviſion of perſonalty on a death prevailed and ſo in favor of wife and children reſtrained the teſtamentary power to a third or a moiety, are theſe: the province of York, the city of London, and various diſtricts of Wales. But ſince lord Coke's time ſeveral ſtatutes have been made to remove this reſtraint in each of theſe different places; and under thoſe ſtatutes the *whole* of the perſonal eſtate is now diſpoſeable by laſt will in them through England and Wales, with this exception however, that there is ſtill no ſtatute affecting either the city of Cheſter which is part of the province of York, or ſuch other places not within that province or London or Wales as may have ſuch a cuſtom; though whether there be any ſuch places, I am uncertain. See for the province of York 4. W. & M. c. 2. & 2. & 3. An. c. 5. for London 11. G. 1. c. 18. and for Wales 7. & 8. W. 3. c. 38. Indeed ſir William Blackſtone treats the teſtamentary power over perſonal eſtate as now prevailing through *all* England. 2. Blackſt. Comm. 9th ed. 493. But if there be no other ſtatutes than thoſe he cites, being the ſame as are before mentioned, I take this to be a miſtake ſo far at leaſt as regards the city of Cheſter. The fact is, that both the cities of York and Cheſter were excepted in the 4. of W. & M. and that the 2. & 3. An. take away the exception as to the city of York only. As too the ſtatutes, which ſubject the cuſtom of dividing the perſonal eſtate of deceaſed perſons to the teſtamentary power, do not name any place in England except London and the province of York, it follows, that the

local

Et il semble que cest parol (hotchpot) est en English a pudding, &c.
Littleton both here and in other places searcheth for the signification of words, in all arts a thing most necessary; for *ignoratis terminis ignoratur & ars.* *Vide* for *Etymologies, sect.* 95. 119. 135. 154. 164. 204. 234. *&c.*

Hutspot or *hotspot* is an old Saxon word, and signifieth so much as *Littleton* here speaks. And the French use *hotchpot* for a commixion of divers things together. It signifieth here metaphorically *in partem positio.* In English we use to say *hodgepodge*, in Latine *farrago* or *miscellaneum.*

Vide Brit. cap. 72. 4. E. 3. 49. 6. E. 3. 30. 10. E. 3. 38. 24. E. 3. 27. F. N. B. 262. Regist. 320. Fleta lib. 6. ca. 47. (1) Mich. 10. E. 1. coram rege Hereford in thesaur.

The residue of this section needeth no explication.

Sect. 268.

Et cest terme (hotchpot) n'est forsque un terme similitudinarie, & est a tant adire, cestascavoir, de mitter les terres en frankmarriage & les auters terres en fee simple ensemble; & ceo est a tiel entent de conuster le value de touts les terres, s. de les terres dones en frankmarriage, & de le remnant que ne fueront dones, & donques partition serra fait en le forme que ensuist. Sicome, mittomus que home soit seisie de 30 acres de terre en fee simple, chescun acre de value de 12 d. per an. & que il ad issue deux files, & l'une est covert de baron, & le pier dona 10 acres de les 30 acres a le baron ove sa file en frankmarriage, & morust seisie de le remnant, donques l'auter soer entra en le remnant, s. en les 20 acres, & eux occupiera a son use demesne, si non que le baron et sa feme voile mitter les 10 acres dones en frankemarriage, ove les 20 acres en hotchpot, cestascavoir, ensemble; & donque quant le value de chescun acre est conus, cestascavoir que chescun acre vault per an, & est assesse ou enter eux agree, que chescun acre vault per an 12 d. donques le partition serra

AND this tearme (*hotchpot*) is but a tearme similitudinary, & is as much to say, as to put the lands in frankmariage and the other lands in fee simple together; and this is for this intent, to know the value of all the lands *scz.* of the lands given in frankmarriage, and of the remnant which were not given, and then partition shall be made in form following. As, put the case that a man be seised of 30 acres of land in fee simple, every acre of the value of 12 pence by the yeare, and that he hath issue two daughters, and the one is covert baron, and the father gives ten acres of the 30 acres to the husband with the daughter in frankmarriage, and dyeth seised of the remnant, then the other sister shall enter into the remnant, *viz.* into the 20 acres, and shall occupie them to her owne use, unlesse the husband and his wife will put the 10 acres given in frankmariage, with the 20 acres in hotchpot, that is to say, together; and then when the value of everie acre is knowne, to wit, what every acre valueth by the year, and is assessed or agreed between them, that every acre is worth by the yeare 12 pence, then the partition shall be

(1) This reference to Fleta is wrong. It should be lib. 5. cap. 9. p. 314.

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local custom of any other part of England on this subject is not disturbed by any statutory provision. It now only remains to add here, that though the testamentary power is thus extended over the whole personalty notwithstanding the customs within London or the province of York or within any part of Wales, yet in the case of an intestacy the customs of those places still operate, there being a special provision to save them and all other peculiar customs in the statute of Cha. 2. for distributing the personal estates of intestates. See 22. & 23. Cha. 2. c. 10. See further as to the statutes about these customs in the latter part of note 9. infra.

(5) In Swinburne on testaments there is a curious dissertation explaining the custom of the province of York in respect to filial portions; and in the course of it, the question, what sort of advancement shall exclude a child, is considered at large. This valuable part of Swinburne is not in the first edition; but was afterwards added by him. It is otherwise as to many additions in the latter editions of his book; these being full of enlargements coming from others, but printed without discriminating them from Swinburne's own work. This manner of treating authors in new editions is ever dissatisfactory and unjustifiable; but in respect to law-books, it is peculiarly inconvenient, the weight and authority of these so much depending on the character of the author. To Swinburne on this subject add the title *wills* in dr. Burn's Eccles. Law, in the course of which it is learnedly attempted to give the result of every thing to be met with on the subject in Swinburne's book or elsewhere.

(6) Acc. 2. Inst. 33. But in this point some of great respect differ from lord Coke. Fitzherbert in his commentary on the writ *de rationabili parte bonorum* contends, that the distribution, which excludes the testamentary power from one third or one moiety of the personal estate, was in his time the *general* law of the land, and therefore needed not a special custom to support it. He is followed by Swinburne in the same idea, and even by our great modern commentator on the law of England, who cites Finch's law to prove, that the general law was taken to be as represented by Fitzherbert as late as the reign of Charles the first. However mr. justice Blackstone states, that about this period the general law insensibly changed; which amounts

ſerra fait en tiel forme, ceſtaſcavoir le baron & ſa feme averont ouſtre les 10 acres dones a eux en frankmarriage 5 acres en ſeveraltie de les 20 acres, & l'auter ſoer avera le remnant, s. 15 acres de les 20 acres pur ſa purpartie, iſſint que accomptant les 10 acres que le baron & ſa feme ount per le done en frankmarriage, et les auters 5 acres de les 20 acres, le baron et ſa feme ont autant en annual value que l'auter ſoer ad.

made in this manner, *viz.* the huſband and wife ſhall have beſides the 10 acres given to them in frankmariage 5 acres in ſeveraltie of the 20 acres, and the other ſiſter ſhall have the remnant, *ſz.* 15 acres of the 20 acres for her purpartie, ſo as accounting the 10 acres which the baron and fem have by the gift in frankmariage, and the other 5 acres of the 20 acres, the huſband and wife have as much in yearly value as the other ſiſter.

Bract. lib. 2. fol. 77. lib. 5. fol. 428. Brit. cap. 72. and Fleta lib. 6. ca. 47. 4. E. 3. 49. 10. E. 3. 37. [n] 10. E. 3. 37. 10. Aſſ. 14. 4. E. 3. 49. [o] 29. Aſſ. 23. (Ant. 169. b.)

AND herewith in expreſſe tearmes agreeth *Bracton*, *Britton*, and *Fleta*, and all the bookes abovesaid and many others. And it is worthy the obſervation [n] that after this putting into hotchpot, and partition made, the lands given in frankmariage are become as the other lands which deſcended from the common anceſtor, and of theſe lands if ſhe be impleaded [o] ſhe ſhall have aide of the other parcener as if the ſame lands had deſcended. (1) So the coparcener that hath a rent granted to her for owelty of partition, as is aforeſaid, hath the rent, as if it had deſcended to her from the common anceſtor.

Sect. 269.

ET iſſint touts foits ſur tiel partition les terres dones en frankmarriage demurgent a les donees & a lour heires ſolonque le forme de le done: car ſi l'auter parcener averoit riens de ceo que eſt done en frankmarriage, de ceo enſueroit enconvenience & choſe encounter reaſon, que la ley ne voit ſuffer. Et la cauſe, pur que les terres dones en frankmarriage ſerront mis en hotchpot, eſt ceo. Quant home done terres ou tenements en frankmarriage ove ſa file ou ove auter coſin, il eſt entendus per la ley, que tiel done fait per tiel parol (frankmarriage) eſt un avancement, & pur avancement de ſa file ou de ſon auter coſin, & noſmement

(Hob. 10.)

AND ſo alwaies upon ſuch partition the lands given in frankmarriage remaine to the donees and to their heires according to the forme of the gift: for if the other parcener ſhould have any of that which is given in frankmarriage, of this would enſue an inconvenience and a thing againſt reaſon, which the law will not ſuffer. And the reaſon, why the lands given in frankmariage ſhal bee put in hotchpot, is this. When a man giveth lands or tenements in frankmariage with his daughter, or with his other couſin, it is intended by the law, that ſuch gift made by this word (frankmariage) is an advancement, and for advancement of his daughter, or of his couſin, and namely when

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(1) See ant. 174. b. *contra* as to gift in tail to a daughter not being in frankmarriage.

amounts to an admiſſion that lord Coke's doctrine of the neceſſity of a ſpecial cuſtom for the *rationabili parte bonorum* became perfectly eſtabliſhed within a few years after his advancing it, and that this was ſo without the aid of any ſtatute. It is obſervable alſo, that mr. juſtice Blackſtone conſiders Bracton and Fleta as clear authorities againſt lord Coke. But mr. Somner, whoſe very learned and extended diſcuſſion of this ſubject ſeems to have eſcaped the author of the Commentaries, though not inclined to an intire agreement with lord Coke, cites various paſſages of the ſame ancient authors, from which it appears, that their writings in this reſpect are contradictory. See in Somn. Gavelk. 91. a diſſertation on the queſtion, *whether the writ* DE RATIONABILI PARTE BONORUM *was by the common law or by cuſtom.* Nor is it a ſlight teſtimony of its being ſettled law in lord Coke's time not to allow of the writ *de rationabili parte bonorum* without a ſpecial cuſtom, that mr. Somner, whoſe book before cited was finiſhed as early as 1647 though not publiſhed till the reſtoration, obſerves on the order of partition under this writ, that it was then, and *that not lately*, antiquated and vaniſhed out of uſe in Kent and other counties, ſurviving only in the province of York and ſome few cities.

(7) What under the cuſtom of the province of York ought to be deemed a reaſonable advancement ſufficient to bar the right to a filial portion, is largely diſcourſed upon in Swinburne on Teſtaments part 3. ſect. 18. For the caſes ſince Swinburne's time, ſee Eq. Caſ. Abr. 160. 161. 11. Vin. Abr. 198. Burn's Eccleſ. L. tit. *wills*.

(8) Mr. Somner writes doubtfully on the preceding doctrine, and makes it queſtionable, whether the child advanced may not waive his former portion and elect to take benefit of the cuſtomary partition in the way of hotchpot. Somn. Gavelk. 91. By others the doctrine is abſolutely denied in another form, by inſiſting, that the advancement muſt be equal to the cuſtomary ſhare; and that, if the child advanced can prove the advancement to be leſs, then ſuch child on the terms of throwing the advancement into hotchpot is intitled to the benefit of the cuſtomary partition, notwithſtanding any declaration of the father to the contrary. Green's Priv. Lond. 52. 53. But in a caſe before lord chancellor Somers, the mayor and aldermen of London certified the cuſtom in terms not wholly agreeing either with lord Coke or with the differences from him before ſtated. According to this certificate, though the advancement ſhall not be equal to the cuſtomary ſhare at the father's deceaſe, yet the child ſo advanced

vanced

quant le donor et ses heyres n'averont ascun rent ne service de eux, sinon que soit fealty, tanque le quart degree soit passe, &c. Et pur tiel cause la ley est, que el avera riens de les auters terres ou tenements discendus a l'auter parcener, &c. sinon que el voile mitter les terres dones en frankmariage en hotchpot, come est dit. Et si el ne voille mitter les terres dones en frankmariage en hotchpot, donque el n'avera riens del remnant, pur ceo que serra entendu per la ley, que el est sufficientment avance, a que avancement el soy agree & luy tient content.

the donor and his heires shall have no rent nor service of them but fealtie untill the fourth degree be past (1). And for this cause the law is, that shee shall have nothing of the other lands or tenements descended to the other parcener, &c. unlesse shee will put the lands given in frankmariage in hotchpot, as is said. And if she will not put the lands given in frankmariage in hotchpot, then she shall have nothing of the remnant, because it shall be intended by the law, that shee is sufficiently advanced, to which advancement shee agreeth and holds her selfe content.

(Ant. 23. a.)

DE ceo ensueroit enconvenience & chose encounter reason que la ley ne voet suffer.

Quod est inconveniens aut contra rationem non permissum est in lege. Hereby it appeareth, as it hath beene often noted, [o] that an argument *ab inconvenienti aut ab eo quod est contra rationem* is forcible in law. [p] *Nihil enim, quod est inconveniens, est licitum.*

Regula.
[o] Vid. sect. 138. 139. 231. 440. 478. 488. 722.
[p] 40. Ass. 27.

Tanque le quart degree soit passe, &c. Here by *&c.* is implyed how the degrees shall be accounted, whereof sufficient hath beene said before.

(Ant. 23. b.)
Sect 20.

Sect. 270.

MESME la ley est perenter les heires de les donees en frankmariage, et les auters parceners, &c. si les donees en frankmariage deviont devant lour auncester, ou devant tiel partition, &c. quant a mitter en hotchpot, &c.

THE same law is between the heirs of the donees in frankmariage, & the other parceners, &c. if the donees in frankmariage die before their ancestor, or before such partition, &c. as to put in hotchpot, &c.

BY these three *&c.* in this section is implied, that if either the donees dye before the ancestor, or survive the ancestor and die before such a partition, or if the donees and all the parceners die before such partition upon the putting into hotchpot, their issues shall have the same benefit to put the lands into hotchpot; for that benefit is heritable, and descendible to the issues.

Sect. 271.

ET nota, que dones en frankmariage fueront per

AND note, that gifts in frankmarriage were by the common

COntinue, &c. By this *&c.* is to be understood, that before the statute it was a fee simple, and since

(1) See ant. 21. b.

vanced shall be excluded from any further part of the customary estate, unless the father shall by his last will or some other writing signed with his name or mark declare the value of such advancement, in which case the child advanced, bringing the advancement into hotchpot, shall, notwithstanding the father's declaration of having fully advanced the child, have as much more as will make the advancement a full customary share. This certificate was considered by lord Somers as conclusive of the question; and has been since referred to by lord chancellor Hardwicke, as settling the point. See the case of Chase *v.* Box in 1. L. Raym. 484. & 1. Eq. Cas. Abr. 154. in which latter book the certificate from the city is given at length. See also lord Hardwicke's words in 1. Ves. 16. and those of Fortescue master of the rolls in 3. Atk. 45. Being therefore taken as the rule of future decision, the certificate demands particular attention. The result with respect to its operation upon the several ideas, which, as is before stated, have prevailed concerning this point of the custom, may be thus stated.—Mr. Somner's notion, of a *general* right of election in the child advanced to waive his advancement and claim the customary share, seems to fall to the ground; there being no election, except where the father under his hand ascertains the advancement by confessing what its value was, and being so ascertained it can be proved to be less than what the custom gives.—The opinion, that the advanced child is universally at liberty to prove his customary share greater than the advancement and so intitle himself to the benefit of the customary partition, seems to fail; because the terms of the certificate appear to admit no other evidence to ascertain what the value of the advancement was, than the father's hand-writing, though it must be confessed, that excluding other evidence is scarce to be satisfactorily accounted for, unless the common reason of the difficulty of taking an account of such advancements shall be deemed a sufficient one.—As to lord Coke's representation of the custom, this also receives some qualification from the beforementioned certificate: for, though it leaves him perfectly right, where the father is silent about the advancement; yet it crosses lord Coke's opinion of the effect of the father's declaring the advancement to be in full, and makes such declaration inoperative where the advancement admitted by the father's hand-writing is not *actually* full and adequate.

(9) Here

[q] 12. H. 4. 11. 31. E. 3. Gard. 116.

(Ant. 21. a.)

since the statute a fee taile. So as it is true, that [q] the gifts doe continue (as our author here saith) but not the estates; for the estate is changed, as at large appeareth in the chapter of estates in taile. And albeit our author here saith, that such gifts have beene alwaies since used and continued, yet now they be almost growne out of use, and serve now principally for moote cases and questions in law that thereupon were wont to rise.

la common ley devant le statute de Westminster second, et tout temps puis ad esle use et continue, &c.

law before the statute of Westm. second, and have beene alwaies since used and continued, &c.

Sect. 272.

THE lands given in frankmariage and the lands in fee simple must move from one and the same ancestor, for the lands given in frankmariage are in respect of the advancement accounted in law, as hath beene said (1), as if the same had descended from the same ancestor who died seised of the fee simple lands, and there is no reason to barre the donee of her full part of the fee simple lands that descended from another ancestor from whom shee had no such advancement.

Nemy per le donor, &c. Here *&c.* implieth no more but that donor that made the gift of frankmariage. The other two *&c.* in this section need no explanation.

ITEM, tiel mitter en hotchpot, &c. est lou les auters terres ou tenements que ne fueront dones en frankmariage descendont de les donors en frankmariage tantsolement; car si les terres descenderont a les files per le pier le donor, ou per le mere le donor, ou per le frere le donor ou auter ancestor, et nemy per le donor, &c. la auterment est, car en tiel cas el, a quel tiel done en frankmariage est fait, avera sa part, sicome nul tiel done en frankmarriage ust este fait, pur ceo que el ne fuit avance per eux, &c. eins per un auter, &c.

ALSO, such putting in hotchpot, &c. is, where the other lands or tenements which were not given in frankmariage descend from the donors in frankmariage only; for if the lands shall descend to the daughters by the father of the donor, or by the mother of the donor, or by the brother of the donor or other ancester, & not by the donor, &c. there it is otherwise; for in such case, shee, to whom such gift in frankmariage is made, shal have her part, as if no gift in frankmariage had beene made, because that she was not advanced by them, &c. but by another, &c.

Sect. 273.

BY this *section* and the *&c.* herein some have gathered, that the value of the lands shall be accounted as they were at the time of the gift in

ITEM, si home seisie de 30 acres de terre chescun acre de ovel annual value, eiant issue deux files come est avantdit, et dona 15 acres de ceo

ALSO if a man be seised of 30 acres of land everie acre of equall annuall value, and have issue two daughters as aforesaid, and giveth 15 acres

(1) Ant. 177. b.

(9) Here lord Coke extends the putting into hotchpot so as to make it for the benefit both of the executors in respect of the testamentary third and of the wife for her third part. But Salkeld reports it as the opinion of sir Edward Northey, that the custom requires the advanced share to be brought into hotchpot for the benefit of other children only; and therefore that in case of there being no other child besides the advanced one, such child shall have his full orphan's part without any regard to what has been already received. Salk. 426. See further concerning this custom of London a discourse in justification of it in 2. Stow's Surv. of Lond. Strype's ed. of 1720. first Append. 61. and the statute of 11. G. 1. c. 18. For the cases on the custom and the statute of 11. G. 1. concerning it, see Eq. Cas. Abr. 150. to 160. the title *custom of London* in New Abr. Viner's Abr. and 2. Eq. Cas. Abr. Com. Dig. tit. *guardian* G. 2. and the contin. in same part, and Burn's Eccl. L. tit. *wills*. Add to these March. 107. Forrest. 130. Barnard. Ch. Rep. 430. 2. Atk. 43. 523. 644. and 3. Atk. 213. 616. See also Flet. l. 2. p. 125.—Note, that though the 11. G. 1. c. 18. enables making a will of the whole personalty notwithstanding the custom, yet this is with the exception of freemen agreeing by writing upon or in consideration of marriage or otherwise to be subject to the custom. In this respect therefore there is a difference in the form of the statute alteration of the custom as to London and the alteration as to Wales and the province of York, the statutes as to these two latter not providing for an agreement to abide by the custom. Perhaps however it may be doubted, whether an *express* provision was necessary to create such an exception; but on this point I do not mean to offer any opinion.

(10) See on the *collation of goods* Dig. lib. 37. tit. 6. 1. Dom. Civ. L. by Strah. 687.—The Roman law in respect to the collation of goods deserves the particular attention of the English lawyer; as our statute for distribution of the personal estate of intestates contains a like provision to prevent children advanced in the life-time of the intestate from having double portions, which was apparently borrowed in some degree from the *collatio bonorum*, and may therefore be considerably influenced in the construction by the rules of the Roman law and the doctrine of the civilians on that title. See 22. & 23. Ch. 2. c. 10. f. 5. Forrest. 276. See also for the cases in general on this part of the statute of distribution, 11. Vin. Abr. 159. 2. Com. Dig. 145. Continuation of same book 176. and Eq. Cas. Abr. 248.

ceo a le baron ove sa file en frankmarriage, & morust seisie de les auters 15 acres, en cest case l'auter soer avera les 15 acres issint discendus a luy sole, et le baron et sa feme ne mitteront en tiel cas les 15 acres a eux dones en frankmarriage en hotchpot; pur ceo que les tenements dones en frankmarriage sont de auxy grand et de bone annual value come les auters terres discendus, &c. Car si les terres dones en frankmarriage sont de tant egal annual value, que le remnant sont, ou de pluis value, en vaine et a nul entent tielx tenements dones en frankmarriage serra mis en hotchpot, &c. pur ceo que el ne poit riens aver de les auters terres discendus, &c. car si el averoit ascun parcel de les tenements discendus, donques el avera pluis de annual value que sa soer &c. que la ley ne voit, &c. Et sicome est parle en les cases avantdits de deux files ou de deux parceners; en mesme le maner est en semblable cas, l'ou sont plusors soers ou plusors parceners, solonque ceo que le case & le matter est &c.

hereof to the husband with his daughter in frankmariage, and dies seised of the other 15 acres, in this case the other sister shall have the 15 acres so descended to her alone, and the husband and wife shall not in this case put the 15 acres given to them in frankmariage into hotchpot, because the tenements given in frankmariage are of as great and good yearly value as the other lands descended, &c. For if the lands given in frankmariage bee of equall or of more yearely value then the remnant, in vaine and to no purpose shall such tenements given in frankmariage bee put in hotchpot, &c. for that she cannot have any of the other lands descended, &c. for if shee should have any parcell of the lands descended, then she shall have more in yearly value then her sister, &c. which the law will not, &c. And as it is spoken in the cases aforesaid of two daughters or of two parceners; in the same manner it is in the like case, where there are more sisters or more parceners, according as the case and matter is, &c.

frankmariage. But it is clear, that the value shall bee accounted as it was at the time of the partition; for if the donor purchase more land after the gift, or if the land given in frankmariage be by the act of God decayed in value, or if the remnant of the lands in fee simple be improved after the gift, or *è converso*, the law shall adjudge of the value as it was at the time of the partition, (unlesse it bee by the proper act or default of the parties) as hath beene said before in the former chapter. And some have collected upon this section, that the reversion in fee of the lands given in frankmariage shall only descend to the donee; for otherwise the other sister shal have more benefit then the donee, which should bee against the reason of our author.

(Ant. 32. a. 171. 3.)

In vaine & a nul entent, &c. For it is a maxime in law, *lex non præcipit inutilia, quia inutilis labor stultus.*

Regula. Vid. sect. 194. 578. lib. 5. fo. 89.

Sect. 274.

ET est ascavoir, que terres ou tenements dones en frank-mariage ne serra mise en hotchpot, *forsque ou terres discende en fee simple; car de terre discendus en fee taile partition serra fait, sicome nul tiel done en frankmariage ust este fait.*

AND it is to be understood, that lands or tenements given in frankmariage shall not bee put in *hotchpot*, but where lands descend in fee simple; for of lands descended in fee taile partition shall be made, as if no such gift in frankemariage had beene made.

(Ant. 172 b.)

31. Ass. pl. 14.

FOR of lands intailed the donee in frankmarriage shall have as much part as the other coparcener, because, over and besides the land given in frankmariage, the issue in taile claimeth *per formam doni*, and both of the parceners must equally inherit by force of the gift, *& voluntas donatoris &c. observetur.*

Sect. 275.

ITEM nuls terres serra mise en hotchpot *ove auters, sinon terres que fueront done en frank-mariage tant solement: car si ascun feme ad ascuns auters terres ou tenements per ascun auter done en le tayle, el ne unques mittera tiel terre issint done en* hotchpot, *mes el avera sa purpartie de le remnant discendus, &c. scilicet a tant que l'auter parcener avera de le mesme remnant.*

ALSO no lands shall bee put in *hotchpot* with other lands, but lands given in frankmariage only: for if a woman have any other lands or tenements by any other gift in taile, she shal never put such lands so given in *hotchpot*, but she shal have her purparty of the remnant descended, &c. (*videlicet*) as much as the other parcener shall have of the same remnant.

13. E. 2. tit. taile 26. 6. E. 3. 30. b. 4. E. 3. 49. 50.

Bract. li. 2. fo. 77.

FOR if the ancestor infeoffeth one of his daughters of part of his land, or purchase lands to him and her, and their heires, or giveth to her part of his lands in taile speciall or generall, she notwithstanding this shall have a full part in the remnant of the lands in fee simple; for the benefit of putting &c. into *hotchpot* is onely appropriated to a gift in frankmariage, *(quia maritagium cadit in partem)* which shall be (as is aforesaid) accounted as parcell of her advancement.

Sect. 276.

ITEM un auter partition poet estre fait enter parceners, que variast de les partitions avantdits. Sicome y sont trois parceners, & le puisne voet aver partition, & les auters deux ne voillont, mes voilent tener en parcenarie ceo que a eux affi-

ALSO another partition may be made betweene parceners, which varieth from the partitions aforesaid. As if there bee three parceners, and the youngest will have partition, and the other two will not, but will hold in parcenarie that which to them belon-

ert

ert ſans particion, en ceſte caſe, ſi un part ſoit alot en ſeveralty al puiſne ſoer ſolonque ceo que el doit aver, donques les auters poient tener le remnant en parcenarie, & occupier en common ſans partition ſi els voilent, & tiel partition eſt aſſets bone. Et ſi apres l'eigne ou le mulnes parcener voile fayre partition inter eux de ceo que ils teignont, ils poient ceo bien faire quant a eux pleiſt. Mes l'ou partition ſerra fait per force de briefe de partitione facienda, *la auterment eſt; car la covient, que cheſcun parcener avera ſa part en ſeveraltie, &c.*

geth, without partition, in this caſe if one part be allotted in ſeveralty to the youngeſt ſiſter, according to that which ſhee ought to have, then the others may hold the remnant in parcenarie, and occupy in common without partition, if they will, and ſuch partition is good enough. And if afterwards the eldeſt or middle parcener will make partition betweene them of that which they hold, they may well do this when they pleaſe. But where partition ſhall be made by force of a writ of *partitione facienda*, there it is otherwiſe; for there it behoveth, that every parcener have her part in ſeveraltie, &c.

Pluis ſerra dit des parceners en le chapter de Joyntenants, & auxy en le chapter de Tenants in Common.

More ſhall be ſaid of parceners in the chapter of Joyntenants, and alſo in the chapter of Tenants in Common.

HERE it is to be obſerved, that this partition is good by conſent, for *conſenſus tollit errorem*; but if it be by the king's writ, then everie parcener muſt have his part. And here you may ſee that *modus & conventio vincunt legem*.

24. H. 3. tit. Partic. 19.

Regula.

En ſeveraltie, &c. Here by this *&c.* is implied another kind of ſeveraltie than our author hath mentioned; and that is, that the one parcener ſhall have the land in ſeveraltie from the feaſt of Eaſter until the gule of Auguſt, (that is, the firſt of Auguſt) and the other in ſeveraltie from thence untill the feaſt of Eaſter, or the like, & *ſic alternis vicibus* to them and their heires *in perpetuum*, whereof ſufficient hath beene ſpoken before. (1)

Cap. 3. Of Joyntenants. Sect. 277.

JOyntenants ſont, ſicome home ſeiſie de certaines terres ou tenements, &c. & enfeoffe deux, trois, quater, ou pluſors, a aver & tener a eux pur term de lour vies, ou pur terme d'auter vie, per force de quel feoffment ou leaſe ils ſont ſei-

JOyntenants are, as if a man bee ſeiſed of certaine lands or tenements, &c. and infeoffeth two, three, foure, or more, to have and to hold to them for term of their lives, or for terme of another's life, by force of which feoffement or

THIS agreeth not with the original, (2) for it ſhould bee, *joyntenants ſont, ſicome home ſeiſie de certaine terres ou tenements, &c.* & ent *enfeoffe deux, ou trois, ou quater, ou pluſors, a aver & tener a eux* & a lour heires, ou leſſa a eux *pur terme de lour vies ou pur terme dauter vie, per force de quel feoffement ou leaſe, &c.* The error may eaſily bee perceived by that which is in print, *viz.* "by force of which feoffment "or leaſe," &c. *ergo* there muſt be

Bract. li. 4. fo. 262. (3) Brit ca. 35. & fo. 112. Flet. lib. 3 ca 4. 10. & li. 6. ca. 47 (4) (2. Ro Abr. 86.)

(1) Ant. 4. a. and 167. a.

(2) Notwithſtanding lord Coke's cenſure of the text here, it agrees with the print of the two earlieſt editions, neither the edition by L. & M. nor the Rohan one having any of the words added by lord Coke, except *ent* before *enfeoffe*. But I think that his addition ſeems requiſite to the ſenſe intended to be conveyed by Littleton, as well for the reaſon aſſigned by lord Coke, as becauſe otherwiſe Littleton's deſcription of jointenancy might be conſtrued to exclude an eſtate in *fee*, which certainly could not be his intention. Probably therefore the omiſſion of an eſtate in fee was an error in the manuſcript from which Littleton was firſt printed. The addition of an eſtate in fee to Littleton's deſcription of jointenancy was firſt introduced by Raſtell in his edition of 1534. which I was firſt led to obſerve by a note I was favoured with from mr. juſtice Blackſtone.

(3) I take this reference to Bracton to be erroneous. But in fol. 28. a. of Bracton there is a chapter, which connects with Littleton's on jointenancy; the firſt branch of it being *de donationibus factis pluribus ſimul ſive ſucceſſive*. See alſo Bract. fo. 12. b. & 13. a.

(4) It ſhould be cap. 48. to which as a correſponding part of an almoſt co-temporary writer add Bract. fol. 428. a.

be feoffment and leafe spoken of before.

fies, tiels font joyn- tenants.

leafe they are feifed, these are joyntenants.

There be alfo joyntenants by other conveyances than *Littleton* here mentioneth, as by fine, recoverie, bargaine and fale, releafe, confirmation, &c. So there be divers other limitations than *Littleton* here fpeaketh of: as if a rent charge of ten pounds be granted to *A.* and *B.* to have and to hold to them two, *viz.* to *A.* untill he be married, and to *B.* untill he be advanced to a benefice, they be joyntenants in the meane time, notwithftanding the feverall limitations, (1) and if *A.* die before marriage, the rent fhall furvive; but if *A.* had married, the rent fhould have ceafed for a moitie, *& fic è converfo* on the other fide.

7. E. 4. 29. 11. H. 4. 26. (5. Co. 52.)

Littleton having fpoken of one kinde of tenants *pro indivifo, viz.* of parceners, commeth now to another, *viz.* joyntenants, and firft of joyntenants of freehold. If an alien and a fubject purchafe lands in fee, they are joyntenants, and the furvivorfhip fhall hold place, (2) *et nullum tempus occurrit regi,* upon an office found.

Flet. lib. 6. ca. 47. Bract. lib. 5. fol. 435. a. (Noy 13. Ant. 164. Cro. Jam. 83. 166. Poft. fect. 311.)

Joyntenants. So called, becaufe the lands or tenements &c. are conveyed to them joyntly, *conjunctim feoffati, &c.* or *qui conjunctim tenent,* and are diftinguifhed from fole or feverall tenants, from parceners, and from tenants in common, &c. and anciently they were called *participes, & non hæredes.* And thefe joyntenants muft joyntly implead and joyntly be impleaded by others, (3) which propertie is common betweene them and coparceners; but joyntenants have a fole qualitie of furvivorfhip, which coparceners have not. *Littleton,* having now fpoken of parceners and of joyntenants of right, doth next fpeake of joyntenants by wrong.

Sect. 278.

ITEM *fi deux ou trois, &c. diffeifont un auter d'afcun terres ou tenements a lour ufe demefne, donques les diffeifours font joyntenants. Mes fils diffeifont un auter al ufe d'un de eux, donques ils ne font joyntenants; mes celuy a que ufe le diffeifin eft fait eft fole tenant, & les auters n'ont riens en le tenancie, mes font appels coadjutors a le diffeifin, &c.*

ALfo if two or three, &c. diffeife another of any lands or tenements to their own ufe, then the diffeifors are joyntenants. But if they diffeife another to the ufe of one of them, then they are not joyntenants; but hee to whofe ufe the diffeifin is made is fole tenant, and the others have nothing in the tenancy, but are called coadjutors to the diffeifin, &c.

50. E. 3. 2. 17. Aff. 14. 14. Aff. 12. 8. Aff. p. 30. 10. E. 3. 47. 10. Aff. 22. 23. H. 8. tit. diffeif. p. 77. 28. Aff. 21. 27. Aff. 30. 12. E. 4. 9. 7. E. 4. 7. b. 38. Aff. 7. 21. H. 7. 35. 29. Aff. 50. 21. H. 8. 25. 35. H. 6. 61. 21. E. 4. 46. 15. E. 4. 15. F. N. B. 179. g. (Mo. 53. Poft. 374. a. Ant. 10. a. 1. Ro. Abr. 660. Poft. 188. a.)

IT is to bee obferved, that fome diffeifors be tenants of the land, and fome be no tenants of the lands; & of both thefe kinds *Littleton* here fpeaketh.

&c. In the firft *&c.* nothing is implied but foure or five, or more. But in the latter *&c.* many things be to bee underftood. As of diffeifors that be no tenants, fome are coadjutors whereof *Littleton* here fpeaketh, fome counfellors, commanders, &c. when the diffeifin is not to bee done to any of their ufes. Alfo if *A.* diffeife one to the ufe of *B.* who knoweth not of it, & *B.* affent to it, in this cafe til the agreement, *A.* was tenant of the land, & after agreement *B.* is tenant of the land, but both of them be diffeifors: for *omnis ratihabitio retrotrahitur & mandato equiparatur.* (4) And it is worthie of the obfervation, and implied alfo in the latter *&c.* that feeing coadjutors, counfellors, commanders, &c. are all diffeifors, that albeit the diffeifor which is tenant dieth, yet the affife lieth againft the coadjutor, counfellor, commander, &c. and tenant of the land, (5) though he be no diffeifor. (6)

Poft. 245. a. 258. a.)

(1. Ro. Abr. 663.)

[a] 50. E. 3. 2. (Cro. Cha. 303. 1. Ro. Abr. 661. 662. Poft. 323. a.)

[a] The demandant and others in a *præcipe* did diffeife the tenant to the ufe of the others, and the writ did not abate; for the demandant was a diffeifor, but gained no tenancy in the land, for that he was but a coadjutor.

A man diffeifeth tenant for life to the ufe of him in the reverfion, and after he in the reverfion agreeth to the diffeifin, it is faid, that he in the reverfion is a diffeifor in fee, for by the diffeifin made by the ftranger, the reverfion was divefted, (7) which (fay they) cannot bee revefted

(1) See ant. 169. b. poft. 183. b. Hob. 171. and Shephard's Common Affurances 389. In the two latter books, efpecially in Hobart, there is a variety of curious matter expounding the nature and ufe of a *fcilicet* and how far it may qualify the *premifes* or *habendum* in a conveyance. See alfo 1. P. Wms. 18. and the cafe of a bond to two with a *fcilicet* fevering the money between them in Dy. 350. Lord Hobart feems to confider the *fcilicet* as a fort of *ancillary* claufe, which may explain, but cannot operate in abfolute contradiction of the *premifes* or *habendum.* In a Coke upon Littleton I have the learned annotator confiders the *fcilicet* as lefs potent than the *habendum,* obferving upon the cafe here ftated by lord Coke, that though the *fcilicet* cannot fever the joint eftate given in the *premifes* and the *habendum,* yet that the *habendum* might fo controul the *premifes.* He therefore holds, that if the grant of ten pounds had been to *A.* and *B. habendum* to *A.* till he be married, and to *B.* till he be advanced to a benefice, there they would be tenants in common. This nice diftinction between the *habendum* and the *fcilicet* in point of effect I leave to the confideration of the learned reader.

(2) See poft. 186. a.—Lord Coke in his reports qualifies this by adding *till office found under the great feal.* 5. Co. 52. b. But if the natural-born fubject furvives the alien, and then the king's title is found by office, fhall it by relation to the creation of the jointenancy defeat the fubject's title by furvivorfhip? The words of lord Coke both here and in the 5th report are ambiguous. His firft words here favour the furviving jointenant. But his fubfequent introduction of the rule of *nullum tempus occurrit regi,* with the qualification in the 5th report, tends to a different conclufion. Though too lord Coke takes notice of a joint purchafe by an alien and a fubject, yet there is not enough to folve the difficulty. See poft. 288. a. See as to this point of relation in offices finding the king's title W. Jo. 78. and Nichols's cafe Plowd. 481.

(3) See the ftatute *de conjunctim feoffatis* 34. E. 1. lord Coke's notice of it in 2. Inft. 527. and Theloall's Dig. Orig. Br. in the chapter on *Jointenants* in b. 2. fol. 456.

(4) But infants and femes covert are exceptions to this rule; for commandment before or agreement after is not fufficient to make them diffeifors, but it muft be by their actual entry or their own proper act. Poft. 357. b. F. N. B. 179. C. 3. H. 4. 17. a. Alfo in the cafe of perfons of full age, if a diffeifin to the ufe of another be accompanied with a forcible entry, his *fubfequent* agreement, though it makes him a diffeifor, fhall not charge him with the force on the ftatute of 8. Hen. 4. actual entry being neceffary for that purpofe. Ant. 16. a. & b.

(5) That is, he that is feifed of the freehold by title from the diffeifor, as by feoffment leafe or defcent from him.

(6) See ant. 154. b.

(7) Why diffeifin of tenant for life makes a fee in the diffeifor is thus accounted for by lord Hobart with his ufual peculiarity and energy of phrafe. "A grant to *J. S.* and his heirs during the life of *J. D.* is no fee, but a fpecial occupancy, as is refolved "in Chudleigh's cafe. But a diffeifin of an eftate for life by neceffity in law makes a *quafi* fee; becaufe wrong is unlimited, "and ravens all that can be gotten, and is not governed by terms of the eftates, becaufe it is not contained within rules." Hob. 323.

revested by the agreement of him in the reversion, for that it maketh him a wrong doer, and therefore no relation of an estate by wrong can helpe him. (1)

Coadjutor. *Coadjutor est qui auxiliatur alteri*; and is derived *à coadjuvando, Anglicè* a fellow helper.

Sect. 279.

ET nota que disseisin est proprement, l'ou un home entra en ascun terres ou tenements l'ou son entre n'est pas congeable, & oustа celuy que ad franktenement, &c.

AND note that disseisin is properly, where a man entreth into any lands or tenements where his entry is not congeable, & ousteth him which hath the freehold, &c.

THIS description of a disseisin and the *&c.* in this place is understood onely of such lands and tenements whereunto an entry may bee made, and not of rents, commons, &c. (2) whereof sufficient hath been said before (3) in the chapter of rents; and so in effect *Littleton* described it before the edition of his book. And note here, that every entry is no disseisin, unlesse there be an ouster also of the freehold. And therefore *Littleton* doth not set downe an entrie onely but an ouster alsо, as an entry and a claimer, or taking of profits &c.

3. E. 4. 2. 34. Ass. 11. 12. 26. Ass. 17. 41. Ass. 10. 24. E. 3. 31. Pl. Com. 89. Parson de Hony Lane 7. Ass. 10. 11. Ass. 25. 12. E. 3. tit. Ass. 88. 45. Ass. 7. 9. Ass. 19. 39. Ass. 1. 18. E. 2. Ass. 374.

Now as there be joyntenants by disseisin, so are there joyntenants by abatement, intrusion, and usurpation, all which are included in the latter *&c.*

Sect. 280.

ET est ascavoir, que la nature de joyntenancie est, que celuy que survesquist avera solement l'entier tenancie solonques tiel estate que il ad, si le joynture soit continue, &c. Sicome si trois joyntenants sont en fee simple, & l'un ad issue & devie, uncore ceux que survesquont averont les tenements entier, & l'issue n'avera riens. Et si le second joyntenant ad issue & devie, uncore le tierce que survesquist avera les tenements entier, & eux avera a luy & a ses

AND it is to be understood, that the nature of joyntenancy is, that he which surviveth shall have only the entire tenancie according to such estate as he hath, if the joynture be continued, &c. As if three joyntenants bee in fee simple, and the one hath issue and dieth, yet they which survive shall have the whole tenements, and the issue shall have nothing. And if the second joyntenant hath issue and dye, yet the third which surviveth shall have the whole tene-

SI le joynture soit continue, &c.

Here by this *&c.* many points of learning are to bee observed. As that it is proper to joyntenants onely to have lands by survivor; for no survivor of other tenants *pro indiviso* shall have the whole by survivor, but onely joyntenants: and this is called in law *jus accrescendi. Omnes feoffati sunt simul habendi & tenendi, nec totum nec partem separatam nec per se, sed ut quilibet eorum totum habeat cum aliis in communi; & cùm unus moriatur, non descendit aliqua pars hæredi morientis, nec separata nec in communi ante mortem omnium, sed pars illa communis per jus accrescendi accrescit superstitibus de personâ ad personam usque ad ultimum superstitem.* But although survivorship bee proper to joyntenants, yet it is not proper *quarto modo* (that is) *omni, soli & semper*; for there may bee joyn-

Bracton lib. 4. fol. 262. b. Britton cap. 35. Fleta lib. 3. ca. 4. & ca. 10. 49. E. 3. fol. 5. 6.

(1) Acc. 277. b. To what lord Coke has written on *disseisin by procurement*, a learned annotator in a Coke upon Littleton I have adds the following references relative to *procurers of trespass*, namely 11. H. 7. 6. a. 12. H. 7. 14. a. 21. H. 7. 21. a. 13. H. 7. 13. a.

(2) In respect to disseisin of rents, read post. 306. b. 323. a. & b.

(3) Ant. sect. 233. and the comment thereon.

jointenants, though there be not equall benefit of survivor on both sides. As if a man letteth lands to *A.* and *B.* during the life of *A.* if *B.* dyeth, *A.* shall have all by the survivor, but if *A.* dyeth *B.* shall have nothing. (1)

Two or more may have a trust or an authoritie committed to them joyntly, and yet it shall not survive. But herein are divers diversities to be observed. First, there is a diversitie betweene a naked trust or an authoritie, and a trust or authoritie joyned to an estate or interest. (2) Secondly, there is a diversitie between authorities created by the partie for private causes, and authoritie created by law for execution of justice. As for example, [b] if a man devise that his two executors shall sel his land, if one of them dye, the survivor shal not sell it; (3) but if he had devised his lands to his executors to be sold, there the survivor shall sell it; which diversitie is implyed by our author, for hee saith, that he that surviveth shall have the entire tenancie.

(9. Co. 75. b.)

(1. Sid. 6.)

[b] 39. Ass. p. 17. 30. H. 8. tit. devise B. Dyer 3. Eliz. 190. 49. E. 3. 16. 2. Eliz. Dyer 177. 23. Eliz. Dyer 371. 4. Eliz. Dyer 210. (Mo. 61. 341.)

heires a touts jours. Mes auterment est de parceners; car si trois parceners sont, & devant ascun partition fait l'un ad issue & devie, ceo que a luy affiert discendra a son issu. Et si tiel parcener morust sans issue, donques ceo que a lui affiert discendra a ses coheires, issint que ils averont ceo per discent, & nemy per survivor, come joyntenants averont, &c.

ments to him and to his heires for ever. But otherwise it is of parceners; for if three parceners be, and before any partition made the one hath issue and dyeth, that which to him belongeth shall descend to his issue, & if such parcener die without issue, that which belongs to her shal descend to her coheires, so as they shal have this by descent and not by survivor, as joyntenants shall have, &c.

If a man make a letter of atturney to two, to do any act, if one of them dye, the survivor shall not do it: but if a *venire facias* be awarded to foure coroners to impannell, and returne a jury, and one of them dye, yet the other shall execute and returne the same.

10. H. 4. 2. & 3. 14. H. 4. 34. 39. H. 6. 42. 31. Ass. 20. 33. H. 8. joynt. Br. 62. 30. H. 8. condition Br. 190.

If a charter of feoffment [c] be made, and a letter of atturney to foure or three joyntly and severally to deliver seisin, two of them cannot make liverie; because it is neither by them foure or three joyntly, nor any of them severally: but if the sherife upon a *capias* directed to him make a warrant to foure or three joyntly or severally to arrest the defendant, two of them may arrest him, because it is for the execution of justice [d] which is *pro bono publico*, and therefore shall be more favourably expounded, then when it is onely for private; and so hath it beene adjudged. (4) *Jura publica ex privato promiscuè decidi non debent.*

[c] 38. H. 8. Dyer 62. 27. H. 8. fol. 6. (5. Co. 91. Yelv. 25. 26. Cro. Eliz. 913. 914.)

[d] Pasch. 45. Eliz. in the king's bench betweene King and Hobbes. (Hutt. 127.)

Et devie. Note there is a naturall death and a civill death, and *Littleton's* case is to be intended of both; and therefore [e] if two joyntenants be, and one of them entreth into religion, the survivor shall have the whole. (5)

[e] 21. R. 2. judgment 263. (Ant. 132. b.)

Sect. 281.

ET come le survivor tient lieu enter joyntenants, (6) en mesme le maner il tient lieu enter eux queux ont joynt estate ou possession ove auter de chattel real ou personal. Sicome si leas de terres ou tenements soit fait a plusors pur terme des ans, celuy, que survesquist de les lessees, avera les tenements a luy entier durant le terme per force de mesme le leas. Et si un chival ou un auter

AND as the survivour holds place betweene joyntenants, in the same manner it holdeth place betweene them which have joynt estate or possession with another of a chattell, reall or personall. As if a lease of lands or tenements bee made to many for terme of yeares, hee, which survives of the lessees, shall have the tenements to him only during the terme by force of

(1) See further as to benefit of survivorship on one side only, post. 193. a. 239. b. & Dy. 10. b.

(2) See ant. 112. b. 113. a. post. 297. a.

(3) In a former part I have ventured to make a doubt of this, and to contend that the power to sell being given to the executors *by reason of an office and interest*, which do go to the survivor, may well survive with them. See ant. note 2. to 113. a.

(4) See acc. as to warrant of the peace to two, Lambard's Justice ed. 1602 p. 84.

(5) See ant. note 7. of fol. 3. b. and note 1. of fol. 132. b. Add Rey's case 2. Ro. Abr. 43.

(6) *&c.* in L. & M. and Roh.

Cases of joint mortgagees

Petty v. Styward rep. in Chan. 7. Char. 1. agt. the survivorship.

Case of farm jointly occupied & stocked at joint expence, or only taken jointly.

Hayes v. Kingdome before L^d Nott. in 1. Vern. 33. is for the survivorship, where no agreem^t to the contrary. But in the actual case there was a survivorship expressly stipulated for; & according to Lord N's own report he said, that if survivorship had not been expressly agreed for, it would have been hindered in equity.

Jefferys v. Small before Lord Keeper North 1. Vern. 217. strong authority agt. the survivorship, where the farm occupied jointly & stocked at joint expence, & also in every case of a joint undertaking in the way of trade. But the survivorship only then admitted, where farm merely taken jointly, or where they became joint tenants by gift or conveyance independently of any [illegible] [illegible].

~~Chancery~~

Buildg. leases taken ~~under~~ jointly & built upon at joint expense.

Wilkes & Prince v. Aylsworth & others ~~for~~ 1. Vern. 360. The decree in that case was against the survivorship. but it [illegible] for a particular reason: & because the executor of the deceased jointenant had expressly informed the purchaser ~~by~~ of her having no claim & after the purchase had lain by 2 years.

Joint purchase.

Lake v. Cradock by ~~Trevor~~ Master of Rolls & afterwds. by Lord Ch. King ~~[illegible]~~ against the survivorship, though the 2 purchasors contributed equally; because it was a purchase in venture to drain a level, & with hazard in the nature of merchandize.

Rigden v. Vallier 3. Atk. 731. & 2. Ves. 258. Lord Hardwicke incidentally observes on the leaning of equity against survivorship; & ~~[illegible]~~ his words imports his being clear, that if purchase money pd. in unequal proportions, ~~[illegible]~~ equity will decree agt. surviving purchaser's having the whole; but he seems rather to admit contrary where the purchase money is pay'd in equal proportions, & there is nothing special to go upon.

Rolleridge v. Partlet. Gen'y in commerce put out money as joint cr's; it shall not survive. Lord Hardwicke.

ter chattel personal sont done a plusors, celuy que survesquist avera le chival solement.

the same lease. (1) And if a horse, or any other chattell personall be given to many, hee which surviveth shall have the horse onely.

HEREBY it is manifest, that survivor holdeth place regularly as well betweene joyntenants of goods and chattels in possession or in right, as joyntenants of inheritance or freehold.

(Cro. Eliz. 33. 2. Ro. Abr. 86. 87.)

Chattell, Or *Catell,* whereof commeth the word used in law [*f*] *Catalla,* and is as *Littleton* here teacheth, twofold, *viz.* reall and personall, and putteth examples of both.

[*f*] Regist. origin. 139. 244. Bract. lib. 2. 39. H. 6. 35. Standford Pr. 45.

Sect. 282.

EN mesme le maner est de dets & duties, &c. car si un obligation soit fait a plusors pur un debt, celuy que survesquist avera tout le det ou dutie. Et issint est d'auters covenants & contracts, &c. (3)

IN the same manner it is of debts and duties, &c. for if an obligation be made to many for one debt, hee which surviveth shall have the whole debt or dutie. And so is it of other covenants and contracts, &c.

NOW he speaketh of debts, duties, covenants, contracts, &c. (2)

Dets & dutyes, &c. Here by force of this *&c.* an exception is to bee made of two joynt merchants; for the wares, merchandizes, debts, or duties, that they have as joynt-merchants or parteners, shall not survive, but shall goe to the executors of him that deceaseth; and this is *per legem mercatoriam,* which (as hath beene said) is part of the lawes of this realm, for the advancement and continuance of commerce and trade, which is *pro bono publico,* for the rule is, that *jus accrescendi inter mercatores pro beneficio commercii locum non habet.* (4)

And to the latter *&c.* in this section the like exception must be made.

(1. Ro. Abr. 6.)

F. N. B. 117. E. 38. E. 3. 7.

(Ant. 172. a. Cro. Jam. 306. 1. Ro. Abr. 6. Cro. Cha. 301. 1. Sid. 236. 179.) (5)

Sect. 283.

ITEM ascuns jointenants poient estre, que poient aver joint estate, et estre jointenants pur terme de lour vies, et uncore ils ont severall enheritances. Si come terres soient dones a deux homes et a les heires de lour deux corps engendres, en cest case les donees ont joint estates pur terme de lour deux vies, et uncore ils ont

ALSO there may be some joyntenants, which may have a joint estate, & be jointtenants for terme of their lives, & yet have severall inheritances. As if lands be given to two men and to the heires of their two bodies begotten, in this case the donees have a joint estate for term of their two lives, and yet they have severall inheritances; for if one of

ILS ont joynt estate pur terme de lour deux vies, &c. Note, albeit they have severall inheritances in taile, and a particular estate for their lives, yet the inheritance doth not execute and so breake the joyntenancy, but they are joyntenants for life, and tenants in common of the inheritance in tayle.

Si come home & fem poient aver, &c. Here a diversity is implyed, when the estate of inheritance is limited by one conveyance, as

Vide sect. 296. (Post. 189. b.

Vide Westcote's case 2. Co. 60. 61. (1. Sid. 83.)

(1) And this benefit of survivorship takes place on a lease for years to two, though one of the lessees dies before entry. Ant. 46. b.

(2) See further, as to things of which there shall be a survivorship, and where express words are necessary to give that benefit, 11. Co. 3. b. 2. Ro. Abr. 86. B. 2. 2. P. Wms. 672. and tit. *survivor* in Vin. Abr. and tit. *jointenants* B. 1. & D. ibid.

(3) No *&c.* in L. & M. or Roh.

(4) See more fully as to this 2. Brownl. 99. See also acc. Noy 55.

(5) These additional references are retained, though they scarce deserve it; for they only relate to different instances of the *lex mercatoria,* and do not touch the particular rule against the *jus accrescendi.*

Vid. 12. E. 4. 2. b.

(Sect. 285.)

[f] 39. H. 6. 2. b.
(4. Leon. 37. Post. 299. b. Cro. Jam. 260. 261.)

[g] Wescots case, ubi supra.

Ibidem 7. H. 6.

as in this case it is, there are no severall estates to drowne one in another. But when the states are divided in severall conveiances, their particular estates are distinct and divided, and consequently the one drownes the other. As if a lease bee made to two men for terme of their lives, and after the lessor granteth the reversion to them two, and to the heires of their two bodies, the joynture is severed, and they are tenants in common in possession. And it is further implied, that in this case of *Littleton* there is no division betweene the estate for lives, and the severall inheritances; for in this case they cannot convey away the inheritances after their decease, (1) for it is divided only in supposition and consideration of law, and to some purposes the inheritance is said to be executed, as shall bee said hereafter.

If a man make a lease for [f] life, and after granteth the reversion to the tenant for life and to a stranger and to their heires, they are not joyntenants of the reversion, but the reversion is by act of law executed for the one moitie in the tenant for life, and for the other moity he holdeth it still for life the reversion of that moity to the grantee. And so it is, if a man maketh a lease [g] to two for their lives, and after granteth the reversion to one of them in fee, the joynture is severed, and the reversion is executed for the one moitie, and for the other moitie there is tenant for life the reversion to the grantee (2).

If lessee for life granteth his estate to him in the reversion, and to a stranger, the joynture is severed, and the reversion executed for the one moitie by the act of law. (3)

severall inheritances; car si l'un des donees ad issue et devy, l'auter que survesquist avera tout per le survivor pur terme de sa vie, et si celuy que survesquist auxy ad issue et devy, donques l'issue del un avera l'un moitie, et l'issue del auter avera l'auter moitie de la terre, et ils tiendront la terre enter eux en common, et ne sont pas joyntenants, mes sont tenants en common. Et la cause, pur que tielx donees en tiel cas ont joynt estate pur terme de lour vies, est, pur ceo que al commencement les terres fueront dones a eux deux, les queux parols sans pluis dire font joint estate a eux pur terme de lour vies. Car si home voit lesser terre a un auter per fait ou sans fait, nient feasant mention quel estate il averoit, et de ceo fait liverie de seisin, en ceo case le lessee ad estate pur terme de sa vie; et issint entant que les terres fueront dones a eux, ils ont joint estate pur terme de lour vies. Et la cause, pur que ils averont several enheritances est ceo, entant que ils ne poient aver per nul possibility

the donees hath issue and dye, the other which surviveth shall have the whole by the survivor for terme of his life, and if he which surviveth hath also issue and die, then the issue of the one shall have the one moitie, & the issue of the other shall have the other moity of the land, and they shal hold the land betweene them in common, and they are not joyntenants, but are tenants in common. And the cause, why such donees in such case have a joynt estate for terme of their lives, is, for that at the beginning the lands were given to them two, which words without more saying make a joynt estate to them for terme of their lives. For if a man will let land to another by deed or without deed, not making mention what estate he shall have, and of this make liverie of seisin, in this case the lessee hath an estate for terme of his life; and so in as much as the lands were given to them, they have a joint estate for term of their lives. And the reason why they shall have several inhe-

(1) See post. 184. b.

(2) *Vid. Hil.* 35. *Eliz. B. R. rot. No.* 96. *Perkins & Pecke Dy.* 12. 41. E. 3. 21. 21. H. 6. 40. 40. *Ass.* 45. E. 3. 2.—*Hil.* 37. *Eliz. Dickson v. Marsh B. R. rot. No.* 103. *Devise to eldest son and another for life. Held, that they are jointenants though the fee descends; but mal?.* Hal. MSS. See as to the latter case Cro. Jam. 260.

(3) See post. 192. 200. b. 335. a.

lity un heire enter eux engender, ſicome home et feme poient aver, &c. donque la ley voet que lour eſtate et lour enheritance ſoit tiel come reaſon voet, ſolonque la forme et effect des parols del done, & ceo eſt a les heires que l'un engendra de ſon corps per aſcun de ſes femes (1) *[& a les heires que l'auter engendra de ſon corps per aſcun de ſes femes] &c. iſſint il covient per neceſſitie de reaſon, que ils averont ſeveralx inheritances. Et en tiel cas ſi l'iſſue d'un des donees apres la mort des donees devie, iſſint que il n'ad aſcun iſſue en vie de ſon corps engendre, donque le donor ou ſon heire poit enter en la moity come en ſon reverſion, &c. coment que l'autre des donees ad iſſue en vie &c. Et la cauſe eſt, que entant que les enheritances ſont ſeveral &c. le reverſion de eux en ley eſt ſeveral, &c. et le ſurvivor del iſſue del auter ne tiendra pas lieu d'aver l'entierte.*

ritances is this, inaſmuch as they cannot by any poſſibility have an heir between them ingendred, as a man and woman may have, &c. the law will that their eſtate & inheritance be ſuch as is reaſonable, according to the forme & effect of the words of the gift, & this is to the heires which the one ſhall beget of his body by any of his wives, and to the heirs which the other ſhall beget of his body by any of his wives, &c. ſo as it behoveth by neceſſitie of reaſon, that they have ſeveral inheritances. And in this caſe if the iſſue of one of the donees after the death of the donees dye, ſo that he hath no iſſue alive of his body begotten, then the donor or his heire may enter into the moity as in his reverſion, &c. although the other donee hath iſſue alive, &c. And the reaſon is, foraſmuch as the inheritances be ſeveral &c. the reverſion of them in law is ſeverall &c. and the ſurvivor of the iſſue of the other ſhall hold no place to have the whole.

If a man maketh a leaſe for life and granteth the reverſion to two in fee, the leſſee granteth his eſtate to one of them, they are not joyntenants of the reverſion; for there is an execution of the eſtate for the one moitie, and an eſtate for life, the reverſion to the other of the other moity. (2)

Here *Littleton* hath well reſolved a doubt, for of ancient time it hath beene ſaid, [*h*] that when lands have beene given to two women and to the heires of their two bodies begotten (which caſe our author putteth in the next ſection) that the huſband having iſſue ſhould bee tenant by the courteſie living the other ſiſter; for that as ſome held the inheritance was executed, and that the ſiſters were tenants in common in poſſeſſion, and conſequently the huſband to be tenant by the curteſie, which hee could not bee if the women had a joynt eſtate for terme of their lives; and likewiſe it was ſaid [*i*] that the iſſue of the one ſhould recover the moytie in a *formedon* living the other ſiſter. But, *verba ſunt hæc*, and *Littleton*, grounding himſelfe upon good authority in law, hath cleered this doubt.

Nient feaſant mention quel eſtate il averoit. Here *Littleton* addeth materially (not making mention of what eſtate) for [*k*] if in the premiſſes lands bee letten, or a rent granted, the general intendment is, that an eſtate for life paſſeth; but if the *habendum* limit the ſame for yeares or at will, the *habendum* doth qualifie the generall intendment of the premiſſes. And the reaſon of this is, for that it is a maxime in law, that every man's grant ſhall bee taken by conſtruction of law moſt forcible againſt himſelfe. *Qualibet conceſſio fortiſſime contra donatorem interpretanda eſt*; which is ſo to be underſtood, that no wrong be thereby done, for it is another maxime in law, *quod legis conſtructio non facit injuriam.* And therefore if tenant for life maketh a leaſe generally, this ſhall bee taken by conſtruction

[*h*] 17. E. 3. 51. 78. 18. E. 3. 39. 50. E. 3. Statham tit. done. 50. E. 3. feoffements & faitz 97.

(Ant. 13. a)

[*i*] 44. E. 3. taile 13. 8. Aſſ. 33. 24. E. 3. 29. 7. H. 4. 16. Corbet's caſe 1. Co. 81. b. 4. Mariæ Dier 145. See before in the chapter of ten by the curteſie ſectione . (Ant. 30. a. 2. Ro. Abr. 90.)

[*k*] Pl. Com. in Throgmorton's caſe. (2. Co. 23. 55. 5. Co. 111. 2. Ro. Abr. 66.)

Regula. (5. Co. 8. a. Plowd. 161. a. Ant. 42. a.)

(1) In L. & M. & Roh. the following words here placed between brackets are omitted.
(2) But it is otherwiſe on a ſurrender; for that enures to both jointenants of the reverſion. Poſt. 192. a. See further Perk. ſect. [illegible]

construction of law an estate for his owne life that made the lease, for if it should be a lease for the life of the lessee it should be a wrong to him in the reversion. And so it is if tenant in taile make a lease generally, the law shall contrive this to be such a lease as hee may lawfully make, and that is for terme of his owne life, for if it should be for the life of the lessee, it should be a discontinuance, and consequently the state which should passe by construction of law should worke a wrong. (1)

Et issint entant que les terres fueront dones a eux ils ount joynt estate pur lour vies. This is plaine, but with this exception, unlesse the *habendum* doth otherwise limit the same. And therefore if a lease be made [l] to two, *habendum* to the one for life, the remainder to the other for life, this doth alter the generall intendment of the premisses, (2) and so hath it beene oftentimes resolved. And so it is if a lease bee made to two, *habendum* the one moity to the one, and the other moitie to the other, the *habendum* doth make them tenants in common; and so one part of the deed doth explaine the other; and no repugnancy betweene them, *et semper expressum facit cessare tacitum.* (3)

[l] 8. E. 3. 427. tit. feoffem. & faits 73. 30. H. 8. tit. joynt. Br. 53. Dyer fo. 361. Pl. Com. 160. (Hob. 171. Post. 190. b. 2. Ro. Abr. 65. 68. 1. Leon. 10. 11.)

Per nul possibilitie. Here it is to be observed, that where the grant is impossible to take effect according to the letter, there the law shall make such a construction as the gift by possibilitie may take effect, which is worthy of observation. *Benignæ faciendæ sunt interpretationes cartarum propter simplicitatem laicorum, ut res magis valeat quàm pereat.*

Bracton. (2. Ro. Abr. 66. 5. Co. 19. a. Hob. 313.)

Issint il covient per necessitie de reason. The reason of the law is the life of the law; for though a man can tell the law, yet if he know not the reason thereof, he shall soone forget his superficiall knowledge. But when hee findeth the right reason of the law, and so bringeth it to his natural reason, that he comprehendeth it as his own, this will not onely serve him for the understanding of that particular case, but of many other; for *cognitio legis est copulata & complicata*; and this knowledge will long remaine with him. All which is plainly implyed by the words and &c. of our author in this section.

Et en tiel case si l'issue d'un des donees apres la mort des donees devie issint que il n'ad ascun issue en vie de son corps engendres, donques le donor ou son heire poet enter en le moitie. This is mistaken in the imprinting, and varieth from the originall, (4) which is, *si l'un donee ou l'issue d'un des donees apres la mort des donees devie, issint que il n'ad ascun issue, &c.* For it is evident, that if the one donee himselfe dieth without issue, the inheritance doth revert for a moitie, and after the decease of the other donee, the donor may enter into that moitie; and whether the issue of the one donee dieth without issue at any time, either in the life of the other donee, or after his decease, it is not materiall, for whensoever no issue is remaining of the one donee, so as the state taile is spent, the donor may after the decease of the surviving donee enter into that moity. (5)

Et la cause est, que entant que les inheritances, &c. *Littleton* in this chapter hath often said, *et la cause est*, which is worthie of observation, for then wee are truely said to know any thing when we know the true cause thereof. *Tunc unumquodque scire dicimur, cùm primam causam scire putamus. Scire autem propriè est rem ratione & per causam cognoscere.*

Arist. 1. Metaphys.

Fœlix qui potuit rerum cognoscere causas.

Virg. 1. Georg.

And therefore all students of law are to apply their principall indeavour to attaine thereunto, all which is implyed by the words and several &c. in this section.

Here the cause of the entrie of the donor into a moitie in this case is, that in as much as the inheritance is severall, the reversion is severall. Therefore upon the severall determination of the estate in taile, the donor may enter. And the law termeth a reversion to bee expectant upon the particular estate; because the donor or lessor, or their heirs, after every determination of any particular estate, doth expect or looke for to enjoy the lands or tenements againe.

(Post. 191. b. Hob. 33.)

Le reversion de eux en ley est severall, &c. Hereby, and by this &c. is implyed, that upon one joynt or entire gift or lease there is one joynt or entire reversion, and upon severall gifts or leases there bee severall reversions. And this is to be understood of the reversion in the donor or his heires. But albeit the gifts or leases be severall, yet if the donors or lessors grant the reversion to two or more persons and their heires, they are joyntenants of the reversion. And so it is of a remainder. And therefore if a gift be made to two men and the heires of their two bodies begotten, the remainder to them two and their heirs, they are joyntenants for life, tenants in common of the state taile, and joyntenants of the fee

Dyer 14. El. 300.

(1) Acc. ant. 42. a. and there the reason is more fully expressed.
(2) Acc. Perk. sect. 174.
(3) Acc. sect. 298. See also 2. Co. 55. a. & b. ant. 180. b. post. 189. a. 299. b.
(4) But lord Coke's correction is not conformable either to L. & M. or the Roh. edition.
(5) See Hob. 33.

fee simple in remainder; for they are joynt purchasers of the fee simple, and the remainder in fee is a new created estate, but the reversion remaining in the donor or his heires is a part of his ancient fee simple.

(2. Co. 60. b. post. 299. b.)

Sect. 284.

ET sicome est dit de males, en mesme le manner est l'ou terre est done a deux females, & a les heires de lour deux corps engendres.

AND as it is said of males, in the same manner it is where land is given to two females, and to the heires of their two bodies engendred.

IF a man giveth lands to two men and one woman, and the heires of their three bodies begotten, in this case they have severall inheritances; for albeit it may be said, that the woman may by possibility marry both the men one after another: yet first she cannot marrie them both *in praesenti*, and the law will never intend a possibilitie upon a possibility, as first to marry the one, and then to marry the other (1); secondly, the form of the gift is, to the heires of their three bodies, which is not possible, and therefore they shall have several inheritances. And so it is, if a gift be made to one man and to two women, *mutatis mutandis*. In the same manner, if a gift in taile be made to a man and his mother, [m] or to a man and his sister (2), or to him and his aunt, &c. in this and like cases, albeit the gift is made to a man and a woman, yet they have severall inheritances; because they cannot marry together, and are within the rule and reason of our author.

44. E. 3. tit. Taile 13. (Ant. 25. b.)

(2. Ro. Abr. 48. 1. Co. 120. 156. b. Ant. 46. b. 10. Co. 50. b.)

Ju 25. b.

[m] 18. E. 3. 39. 7. H. 4. 16.

Sect. 285.

ITEM si terres soyent dones a deux & a les heires de l'un de eux, ceo est bone jointure, et l'un ad franktenement, et l'auter ad fee simple. Et si celuy que ad le fee devie, celuy que ad le franktenement avera l'entiertie per le survivor pur terme de sa vie. En mesme le manner est, l'ou tenements sont dones a deux & les heires del corps d'un de eux engendres, l'un ad franktenement, & l'auter ad fee taile, &c.

ALSO if lands be given to two and to the heires of one of them, this is a good joynture, and the one hath a freehold, and the other a fee simple. And if he which hath the fee dieth, he which hath the freehold shall have the entiertie by survivor for terme of his life. In the same manner it is, where tenements bee given to two & the heirs of the body of one of them engendred, the one hath a freehold, & the other a fee taile, &c.

BY this section, and the &c. in the end of it, they are joyntenants for life, and the fee-simple or estate taile is in one of them; and because it is by one and the same conveyance, they are joyntenants, and the fee-simple is not executed to all purposes, as hath beene said before (3).

If a fine bee levied to two, [n] and to the heires of one of them, by force whereof hee is seised, he that hath fee dieth, and after the joyntenant for life dieth, and an estranger abates, in this case the heire may either suppose the fee simple executed, and have an assise of *Mortdauncester*, the words of which writ be, *Si R. pater fuit seisitus die quo obiit in dominico suo ut de feodo*; which cannot bee said of him that hath but a remainder expectant upon an estate for life; but in respect that he is seised of a fee simple, and of a joynt estate in possession, the words in the writ be true, that he was seised *in dominico suo ut de feodo* (4). Likewise the heir may have a writ of right, which also in some sort proves the fee simple executed; or the heir may have a *scire facias* to execute the fine, by which the heir supposeth that

(2. Co. 60. b.)

(Sect. 283.)

[n] 42. E. 3. 9. 10. 11. H. 4. 55. 31. E. 3. scire facias 19. 29. H. 8. Mortd. B. 59. 4. E. 3. 37. F. N. B. 196. & 219. 4. E. 3. Itinere Derby. 24. E. 3. 70.

(2. Co. 61.)

(1. Ro. Abr. 686.)

(1) Yet in fol. 20. b. lord Coke allows a present estate tail in a case of *double* possibility equal to that here supposed; namely the case of a gift to the husband of *A.* and the wife of *B.* and the heirs of their bodies. See further on this head Vin. Abr. tit. *possibility*, and Fearne on Conting. Rem. 3d ed. 176.

(2) See Dy. 326. a.

(3) Ant. 182. b. See also post. 297. b. Fearne on Conting. Rem. 23. 24. 26. 28. 29. Bro. Nouv. Cas. pl. 260. 303. 387. These references will introduce the reader to most of the learning on this curious point.

(4) See however Bro. Nouv. Cas. pl. 115. which is *contra*.

(Post, 281.)

that the fee was not executed, or he may maintaine a writ of intrusion where the heire maketh the like supposition, and shall terme it a remainder. (1) And yet when land is given to two and to the heires of one of them, he in the remainder cannot grant away his fee simple, as hath beene said. (2)

Sect. 286.

ITEM si deux joyntenaunts sont seisies d'estate en fee simple, & l'un graunt un rent charge per son fait a un auter hors de ceo, que a luy affiert (3) en cest case durant la vie le grantor le rent charge est effectuall; mes apres son decesse le grant de le rent charge est void, quant a charger la terre, car celuy que ad la terre per le survivor tiendra tout la terre discharge. Et la cause est, pur ceo que celuy que survesquist clayma & ad la terre per le survivor, (4) & nemy ad, ne poet de ceo claymer rien per discent de son compaignion, &c. Mes auterment est de parceners, car si soient deux parceners des tenements en fee simple, et devant ascun partition fait l'un charge ceo que a luy affiert per son fait d'un rent charge, &c. et puis morust sans issue, per que ceo, que a luy affiert, discend a l'auter parcener, en cest case l'auter parcener tiendra la terre charge, &c. pur ceo que il vient a cel moitie per discent, come heire, &c.

ALSO if two joyntenants be seised of an estate in fee simple, and the one grants a rent-charge by his deed to another out of that which belongeth to him, in this case during the life of the grantor the rent charge is effectuall; but after his decease the grant of the rent charge is void, as to charge the land, for he which hath the land by survivor shal hold the whole land discharged. And the cause is, for that he which surviveth claimeth & hath the land by the survivor, and hath not, nor can claime any thing by descent from his companion, &c. But otherwise it is of parceners, for if there be two parceners of tenements in fee simple, & before any partition made the one chargeth that which to her belongeth by her deed with a rent charge, &c. & after dieth without issue, by which that which belongeth to her descends to the other parcener, in this case the other parcener shall hold the land charged, &c. because shee came to this moity by descent, as heir, &c.

F. N. B. 204. E. 207. 7. H. 6. 2. 13. H. 7. 22. 10. E. 3. 34. 17. R. 2. tit. charge 15. 5. H. 5. 8. Vide sect. 289. (6. Co. 79. a.)

Claimer riens per discent de son compagnion, &c. By which &c. is implyed, that so it is if one joyntenant acknowledge a recognisance or a statute, or suffreth a judgment in an action of debt, &c. and dieth before execution had, it shall not bee executed afterwards. (5) But if execution be sued in the life of the conusor, it shall bind the survivor. And it is further implyed, that both in the case of the charge and of the recognisance statute and judgement, if he that chargeth, &c. survive, it is good for ever.

[o] 9. H. 6. 32. (Hob. 3. Plowd. 418. b.)

And so it is [o] if a man bee possessed of certaine lands for term of yeares in the right of his wife, and granteth a rent charge, and dyeth, the wife shall avoyd the charge; (6) but if the husband had survived, the charge is good during the terme.

[p] 8. E. 3. tit. execution Statham.

If a villeine purchase lands, and binde himselfe in a recognisance, if the lord enter before [p] execution, the lord shall avoyde the same, as it hath beene said. But otherwise it is if he had made a lease for yeares, for the reason that *Littleton* here yeeldeth in this *section*. (7)

[q] 14 H. 8. 22. Pl. Com. 263. b. in dame Hales case.

If two joyntenants bee of a terme, [q] and the one of them grant to *I. S.* that

if

(1) Acc. F. N. B. 204. E. So also such heir shall have a writ of entry *in consimili casu*, where the surviving tenant for life aliens in fee. F. N. B. 207. B.

(2) See ant. 182. b.—There is a seeming difficulty in this passage. But I conceive lord Coke's meaning to be, that, though for some purposes the estate for life of the jointenant having the fee is distinct from and unmerged in his greater estate, yet for granting it is not so, but both estates are in that respect consolidated notwithstanding the estate of the other jointenant; and therefore that the fee cannot in strictness of law be granted as a remainder *co nomine*, and as an interest distinct from the estate for life. This explanation is confirmed by a note in a Coke upon Littleton I have, in which it is strongly observed, that "the two "estates, viz. for life and in fee, or rather one limited estate, are so confounded together in one person, that he cannot sever them "and make them distinct estates, for he cannot grant the estate for life reserving to himself the fee simple, nor can he grant the "fee simple and reserve the estate for life, but he may pass away all his interest by feoffment or he may forfeit all." See Bro. Nouv. Cas. pl. 115. It also much agrees with the language of lord Coke's report of Wiscot's case, especially where he observes, that when an estate is made to three and the heirs of one, *he, who hath the fee, cannot grant over the remainder, and continue in himself an estate for life*, for which lord Coke cites 12. E. 4. 2. b. See 2. Co. 61. a. Besides if the passage here should be understood to signify, that the jointenant having the fee could not in *any* form pass away the fee subject to the estate of the other jointenant, it would not only be contrary to the power of alienation necessarily incident to a fee simple, but would be inconsistent with lord Coke's own doctrine in a subsequent part of his commentary. See the case of an estate to the father and son and the heirs of the father, post. 367. b. See also post. sect. 578. Indeed lord Coke's position thus qualified appears to have a [illegible]ness in it, which with some may perhaps render it questionable. However he seems justified by the words of the year-book, which he cites as his authority; for they are, that, *if two have land to them and the heirs of one, he who hath fee cannot grant the reversion of his companion to another; but if both [illegible] all pass [illegible].* See further as to grant of a remainder or reversion by one having a present and previous estate, Sheph. Touchstone 237. and Sheph. Common Assur. 12. 13.

(3) *Cy.* in L. and M. & Roh.

(4) *&c.* in L. and M. & Roh.

(5) See acc. 7 H. [illegible] 2. Ro. Abr. 83.

(6) Yet the husband's [illegible] of termination of any part of it binds the wife surviving. Post. 351. a. The reason of this difference is explained post. 185. a. It is also well explained in Finch's L. 8. and in the New Abridgement [illegible]. See further 1. Vern. 396.

(7) See also the reason given in sect. 289.

if he pay to him ten pound before *Michaelmasse*, that then he shall have his terme, the grantor dyeth before the day, *I. S.* payes the summe to his executors at the day, yet hee shall not have the tearme, but the survivor shall hold place; for it was but in nature of a communication: (1) but if he had made a lease for yeares, to begin at *Michaelmasse*, it should have bound the survivor. (2)

(Finch's L. 97. 6. Co. 35. a. Ro. Abr. 88. 89. Cro. Jam. 91. 92.)

And where *Littleton* putteth the case of a rent charge, it is so likewise implyed, that if one joyntenant granteth a common of pasture, or of turbary, or of estovers, or a corody, or such like, out of his part, or a way over the land, this shall not bind the survivor: for it is a maxime in law, that *jus accrescendi praefertur oneribus*; and there is another maxime, that *alienatio rei praefertur juri accrescendi*.

45. E. 3. 13. Vide sect. 289.

If one joyntenant in fee simple be indebted to the king, and dyeth, [r] after his decease no extent shall be made upon the land in the hands of the survivor.

If a recovery be had against one joyntenant, who dyeth before execution, the survivour shall not avoid this recovery; because that the right of the moitie is bound by it.

[r] 40. Ass. 36. 50. Ass. 5. F. N. B. 149. q. Pl. Com. 321. (1. Co. 86. Post. 352. a.)

If one joyntenant in fee take a lease for yeares of an estranger by deed indented and dyeth, the survivour shall not be bound by the conclusion; because he claymes above it, and not under it.

Et la cause est, pur ceo que celuy que survesquist claime & ad la terre per survivor, &c. Here againe *Littleton* sheweth the reason: and the cause, wherefore the survivour shall not hold the land charged, is, for that he claymeth the land from the first feoffor, (3) and not by his companion, which is *Littleton*'s meaning when he saith, (that he claimeth by survivor) for [s] the surviving feoffee may plead a feoffment to himselfe without any mention of his joynt feoffee. (4) And this is the reason, that if two joyntenants bee in fee, and the one maketh a lease for yeares, reserving a rent and dyeth, the surviving feoffee [t] shall have the reversion by survivor, but he shall not have the rent, because he claimeth in from the first feoffor, which is paramount the rent. If there be two joyntenants in fee, and the one joyntenant granteth a rent charge out of his part, and after releaseth to his joynt companion and dyeth, he shall hold the land charged; for that he is out of the reason and cause set downe by *Littleton*, because he claimeth not by survivor, in as much as the release prevented the same. And of this opinion was *Littleton* himselfe [u] before the edition of his booke. But all men agree, that if *A. B.* and *C.* be joyntenants in fee, and *A.* chargeth his part, and then releaseth to *B.* and his heirs, and dyeth, that the [w] charge is good for ever; because in that case *B.* cannot be in from the first feoffor, because he hath a joynt companion at the time of the release made, and severall writs of *praecipe* must be brought against them. (5) And albeit the release of one joyntenant to the residue of the joyntenants makes no degree in supposition of law, neither is there any severall estate between them, but the estate of him that releaseth is as it were extinguished and drowned in their estate and possession, so as one *praecipe* lyeth against them, (7) yet shall they hold the land charged as is aforesaid. As if tenant for life grant a rent charge, and after surrendreth his estate to the lessor, albeit the estate charged be drowned, and the lessor is not in by him, yet hee shall hold it charged. (8)

[s] 14. E. 4. 1. b. 18. E. 2. brief 830. 8. E. 2. entry 77. 18. E. 3. 28. 38. E. 3. 26. 8. H. 6. 25. Vide 46. E. 3. 77. 35. H. 6. 39.

[t] Dict. Mich. 2. & 3. Eliz. 187. lib. 1. fol. 96. Vide lib. 6. fol. 78. 79 (Post. 318. a.)

[u] 33. H. 6. 5. a. 9. Eliz. Dyer 263.

[w] 37. H. 8. tit. alienation Br. 31. 10. E. 4. 3. b. 40. E. 3. 41. b. 33. H. 6. 5. 22. H. 6. 42. b. per Pole. 35. E. 3. release 43. 33. E. 3. avowry 195. 14. H. 8. 2. (6) (Cro. Jam. 696. Plowd. 198. 6. Co. 79. a. 8. Co. 145. 9. Co. 107. b. Post. 233. b.)

Mes autrement est de parceners, car si sont deux parceners, &c. This is to be intended as well of parceners by custome as of parceners by the common law; and here is implyed the reason of the diversitie, for that the survivor doth claime above the charge, and the heire by descent under the charge. (9)

Sect. 287.

ITEM si sont deux joyntenants des terres en fee simple deins un burgh, l'ou les terres & tenements sont devisables per testament, & si l'un de les dits deux joyntenants devise ceo que a luy affiert per son

ALSO if there bee two joyntenants of land in fee simple within a borough, where lands and tenements are devisable by testament, & if the one of the said two joyntenants deviseth that which to him be-

PER son testament, &c. Either in writing, or nuncupative, according to the custome.

Et la cause est, pur ceo que nul devise poet prender effect mes apres le mort le devisor (10) & per sa mort tout la terre maintenant devient per la ley a son compagnion, &c.

(1) See Dy. 337. a.
(2) See post. sect. 289.
(3) For this same reason a wife shall not have dower out of lands of which her husband was jointenant. Ant. 37. b. See post. 355. a. a case of warranty depending on the same principle.
(4) Acc. F. N. B. [illegible]. B.
(5) As to the partial effect of such a release on the jointenancy, see post. sect. 304.
(6) It should be 12. a.
(7) See the case of waste in Brownl. Rep. 238.
(8) Acc. 33[illegible]. b. 233. b.
(9) In Calthrope's reading on Copyholds 64. the doctrine of admission on the death of copyholders being jointenants or parceners is stated according to this diversity.
(10) Acc. ant. 112. a. b. as a reason for the goodness of a devise by husband to wife.

&c. Here doth their claimes commence at one instant: and although an instant *est unum indivisibile tempore quod non est tempus nec pars temporis, ad quod tamen partes temporis connectuntur*, and that *instans est finis unius temporis & principium alterius*; (1) yet in consideration of law there is a prioritie of time in an instant, as here the survivor is preferred before the devise, for *Littleton* saith, that the cause is that no devise can take effect till after the death of the devisor, and by his death all the land presently commeth by the law to his companion. Whereby it appeareth, that *Littleton* by these words *post mortem & per mortem*, though they jump at one instant, yet alloweth priority of time in the instant which he distinguisheth by *per* & *post*. And the reason of this prioritie is, that the survivour clayrneth by the first feoffor (as hath bin said) and therefore in judgment of law his title is paramount the title of the devisee, and consequently the devise void, and the rule of law is that *jus accrescendi præfertur ultimæ voluntati*. (2)

Pl. Com. in Fulmerston's case.

(Plowd. 258. b. Ant. 30. a.)

testament, &c. & morust, ceo devise est voide. Et la cause est, pur ceo que nul devise poit prender effect mes apres la mort le devisor, et per sa mort tout la terre maintenant devient per la ley a son companion, que survesquist, per le survivor; le quel il ne claime, ne ad reins en la terre per my le devisor, mes en son droit demesne per le survivor solonque le course de ley, &c. & pur cel cause tiel devise est voide. Mes auterment est de parceners seisies des tenements devisables en tiel case de devise, &c. causâ quâ suprà.

longeth by his testament, &c. and dieth, this devise is voide. And the cause is, for that no devise can take effect till after the death of the devisor: and by his death all the land presently commeth by the law to his companion, which surviveth, by the survivor; the which hee doth not claime, nor hath any thing in the land by the devisor, but in his owne right by the survivor according to the course of law, &c. and for this cause such devise is void. But otherwise it is of parceners seised of tenements devisable in like case of devise, &c. *causâ quâ suprà*.

(Plowd. 418. Hob. 3. Cro. Eliz. 33.)

Two fems joyntenants of a lease for yeares, one of them taketh husband and dieth, yet the terme shall survive; for though all chattels reals are given to the husband, if he survive, yet the survivor between the joyntenants is the elder title, and after the marriage the feme continued sole possessed; for, if the husband dyeth, the feme shall have it, and not the executors of the husband. (3) But otherwise it is of personall goods.

1. H. 5. executors 108.

If a man be seised of a house, and possessed of divers heirlomes, that by custome have gone with the house from heire to heire, and by his will deviseth away the heirelomes, this devise is void; for as *Littleton* here saith, the will taketh effect after his death, and by his death the heirlomes by ancient custome are vested in the heire (4), and the law preferreth the custome before the devise. And so it is if the lord ought to have a herriot when his tenant dieth, and the tenant deviseth away all his goods, yet the lord shall have his herriot for the reason aforesaid. And it hath beene anciently said, that the herriot shall bee paid before the mortuary. [x] *Imprimis autem debet quilibet, qui testaverit, dominum suum de meliore re quam habuerit recognoscere, & postea ecclesiam de aliâ meliore, &c.* wherein the lord is preferred, for that the tenure is of him. This dutie to the lord is very antient; for in the lawes before the conquest it is said, *sive quis incuriâ, sive morte repentinâ, fuerit intestat' mortuus, dominus tamen nullam rerum suarum partem (præter eam quæ jure debetur herioti nomine) sibi assumito* (6). In the Saxon tongue it is called *heregeat*, as much to say (as I take it) as the lords best; for *here* is lord, and *geat* is best. But let us returne to *Littleton*.

[x] Fleta lib. 2. cap. 50. (5) Bracton lib. 2. fol. 60. Britton fol. 178.

Lamb. fol. 119. 58.

Mes auterment est de parceners seisies des tenements devisable en tiel case del devise, &c. causâ quâ suprà.

The reason is evident, for that there is no survivour between coparceners, but the part of the one is descendible, and consequently may be devised.

Sect.

(1) Therefore in Fitzwilliam's case 6. Co. 32. it was argued, that the indulgence of the law in connecting two times to make one instant time cannot be extended to *three* times. See post. 298. a. a case in which priority of time in an instant is allowed, for sake of saving the remainder in fee of a rent from the effect of a suspension of the particular estate.
(2) Acc. as to *goods*, Office of Exec. ed. 1676. p. 26. Perk. sect. 526. Swinb. on Testam. part 3. sect. 6.
(3) See ant. 46. b. post. 351. a. and the case of a purchase by husband and wife jointly, the former being a villein, in 2. Ro. Abr. 733. D. pl. 2.
(4) Acc. ant. 18. b.
(5) It should be cap. 57.
(6) See this same passage cited ant. 176. b.

Sect. 288.

ITEM il est comunement dit, que chescun joyntenant est seisie de la terre qu'il tient joyntment (1) per my et per tout; et ceo est autant adire qu'il est seisie per chescun parcel et per tout, &c. et ceo est voier, car en chescun parcel, et per chescun parcel, et per touts les terres et tenements, il est joyntment seisie ovesque son companion. (2)

ALSO it is commonly said, that every jointenant is seised of the land which hee holdeth joyntly *per my & per tout*; and this is as much to say, as he is seised by every parcell & by the whole, &c: and this is true, for in every parcell, and by every parcell, and by al the lands and tenements, he is joyntly seised with his compagnion.

ITEM est communement dit &c. That is, it is the common opinion, and *communis opinio* is of good authoritie in law. *A communi observantiâ non est recedendum,* (3) which appeareth here by *Littleton.*

Vide sect. 697.

Per my & per tout. Et sic totum tenet & nihil tenet, s. totum conjunctim, & nihil per se separatim. And albeit they are so seised (as for example where there bee two joyntenants in fee) yet to divers purposes each of them hath but a right to a moitie; as to enfeoffe give or demise, or to forfeit. (4) or lose by default in a *præcipe.* (5) If my villein [y] and another purchase lands to them two and their heires, I may enter into a moity.

(Post. 350. a. 2. Co. 66. b. 2. Ro. Abr. 86.) Vide Bracton lib. 5. fo. 430. Britton cap. 35. Fleta lib. 3. cap. 4. 40. E. 3. 40. 18. E. 2. bre. 831. 35. H. 6. 39. Vide the second part of the Institutes upon the 6. chapter of the statute de bigamis. Fleta lib. 1. cap. 28. 40. Ass. 79. 48. E. 3. 16.

[y] Vid. 6. E. 3. 4. 7. E. 4. 29. 11. El. Dyer 183. (2. Co. 58. a. Cro. Jam. 91. 1. Leon. 47.)

And where all the joyntenants joyne in a feoffment, every of them in judgment of law do give but his part. (6) If an alien and a subject purchase lands joyntly, the king upon office found shall have but a moity. (7) And *Littleton* afterwards in this chapter (8) saith, that one joyntenant hath one moity in law, and the other the other moity. And therefore if two joyntenants be [z] and both they make a feoffment in fee upon condition, and that for breach thereof one of them shall enter into the whole, yet he shall enter but into a moitie, because no more in judgment of law passed from him: (9) and so it is of a gift in taile or a lease for life, &c.

[z] Pl. Com. in Browning's case, fol. (133. a.) (Post. 192. a.)

Yet every joyntenant may warrant the whole; [a] because a man may warrant more then passeth from him. (10)

[a] Vide the second part of the Institutes upon the 6. chapter of the statute of bigamis.

If two joyntenants make a feoffment in fee [b] and one of the feoffors dye, the feoffee cannot plead a feoffment from the survivor of the whole, because each of them gave but his part; but otherwise it is on the part of the feoffees, as hath beene said before.

[b] 14. E. 4. 5. and the other bookes abovesaid.

And where two joyntenants be, the one of them [c] may make the other his baylife of his moity, and have an action of account (11) against him. And one joyntenant [d] may let his part for yeares or at will to his companion.

[c] 21. E. 3. 60. (Post. 200. b.)
[d] 11. H. 3. 60. 33. (Post. 193. b. 335. a.)

If two joyntenants be of certaine lands, and the one of them by deed indented [e] bargaineth and selleth the lands, and the other joyntenant dyeth, and then the deed is inrolled, there shall passe nothing but the moity which the bargainer had at the time of the bargain. (12)

[e] 6. E. 6. tit. Faits inroll. 9. Br. (Cro. Cha. 217. 569. 1. Co. 173.)

Sect. 289.

ITEM si deux joyntenants sont seisies de certain terres en fee simple, & l'un lessa ceo que a luy affiert a un estranger pur terme de 40 ans, & devie devant le term com-

ALSO if two joyntenants bee seised of certain lands in fee simple, and the one letteth that to him belongeth to a stranger for terme of forty yeares, and dyeth before the

PER force de mesme le dit lease, &c.

By this *&c.* is implyed, [f] that where our author speaketh of joyntenants seised in fee, that so it is if two be seised for life, and one make a lease to begin presently or in

[f] Vid. sect. 286. & 660. & sect. 2.

(1) *&c.* in L & M. & Roh.
(2) *&c.* in L. & M. & Roh.
(3) This same maxim is cited post. 229. b. and 364. b. In Wingate's Maxims 752. there is a variety of cases collected to illustrate the application of this rule. Other rules immediately connected with this are, that *communis error facit jus* and *res judicata pro veritate habetur,* and also that *minimè mutanda sunt quæ certam interpretationem habuerunt,* as to which see post. 365. a. Hob. 147. Wing. Max. 758. and ant. 52. b. in the margin.—In a late ecclesiastical case of great importance, in which bonds of resignation were condemned by the supreme court of appellant jurisdiction, these four maxims appear to me to have included the chief topic of argument in favour of such bonds.
(4) Acc. as to copyholders being jointenants Calthrope's Reading 97. Kitch. French ed. 82. a.
(5) See ant. 125. b.
(6) Acc. 11. H. 7. a. pl. 5.
(7) See ant. 180. and note 2. there.
(8) Post. sect. 291.
(9) See ant. 47. a. & post. 214. a. the case of a lease by two jointenants with reservation of rent to one, and the difference there taken between such a lease by *parol* and one by *deed indented.* See also Dy. 263. a.
(10) See post. sect. 700.
(11) See ant. 172. a.
(12) See ant. 147. b.

mence, ou deins le terme, en cest case apres son decease le lessee poet enter et occupier la moitie a luy lesse durant le terme, &c. coment que le lessee n'avoit unques possession de ceo en la vie le lessor, per force de mesme le lease, &c. Et le diversitie perenter le case de grant de rent-charge (1) [*avantdit, et cest case est ceo. Car en grant de rent charge per*] *joyntenaunt, &c. les tenements demurgent touts foits come ils fueront adevant, sans ceo que ascun ad ascun droit d'aver ascun parcell de les tenements forsque eux mesmes, et les tenements sont en tiel plyte, come ils fueront devant le charge, &c. Mes ou lease est fait per un joyntenant a un auter pur terme des ans, &c. maintenaunt per force de le lease le lessee ad droit en mesme la terre, cestascavoir, de tout ceo que a son lessour affiert, et d'aver ceo per force de mesme le lease durant son terme.* (2) *Et ceo est la diversitie.* (3)

term beginneth, or within the terme, in this case after his decease the lessee may enter and occupie the moitie let unto him during the terme, &c. although the lessee had never the possession thereof in the life of the lessor, by force of the same lease, &c. And the diversitie betweene the case of a grant of a rent charge aforesaid, and this case, is this. For in the grant of a rent charge by a joyntenant, &c. the tenements remaine alwayes as they were before, without this that any hath any right to have any parcell of the tenements but they themselves, and the tenements are in the same plight as they were before the charge, &c. But where a lease is made by a joyntenant to another for terme of yeares, &c. presently by force of the lease the lessee hath right in the same land, (*videlicet*) of all that which to the lessor belongeth, and to have this by force of the same lease during his terme. And this is the diversitie.

(Dy. 187. a. 2. Ro. Abr. 89.)

in futuro, and dieth, this lease shall binde the survivor, as it hath been adjudged. (4)

[g] 11. H. 4. 90. 14. H. 8. 6. 17. E. 4. 6. a. 9. H. 6. 52. 21. H. 7. 29. 14. H. 7. 4. 18. E. 3. execution 56. 11. El. Dy. 285. Plow. Com. 160. a. Temps E. 1. Ass. 422. 20. H. 6. 4. 7. H. 7. 13. 10. H. 7. 24. (Ant. 4. b.)

[g] And if one joyntenant grant *vesturam terræ*, or *herbagium terræ*; for yeares, and dieth, this shall binde the survivor; for such a lessee hath right in the land. So it is if two joyntenants be of a water, and the one granteth the severall pischary.

L'un lessa. The one letteth. If two joyntenants bee of an advowson, and [h] the one presenteth to the church, and his clerke is admitted and instituted, this in respect of the privity shall not put the other out of possession; (5) but if that joyntenant that presenteth dieth, it shal serve for a title in a *quare impedit* brought by the survivor. (6) But yet if one joyntenant or tenant in common present, or if they present severally, the ordinary may either admit or refuse to admit such a presentee, unlesse they joyn in presentation, and after the sixe moneths he may in that case present by lapse (7).

[h] 6. E. 3. 38. 39. 52. 7. E. 3. 20. 21. 17. E. 3. 37. b. 22. E. 3. 9. 30. E. 3. 16. 11. H. 4. 54. 15. E. 3. Dar. presentment 11. 10. E. 4. 94. 1. H. 7. 1. b. 2. R. 3. Quar. Imp. 102. 9. El. Dy. 259. 36. H. 8. Br. present. 27. H. 8. fo. 11. 5. H. 7. 8. 6. E. 4. 10. b. Doct. & Stud. 116. 34. H. 6. 40. 20. E. 3. Quar. Imp. 63. F. N. B. 34. V. (2. Ro. Abr. 355.)

But if two or more coparceners bee, [i] and they cannot agree to present, the eldest shall present; and if her sister doth disturbe her, she shall have a *quare impedit* against her; and so shall the issue and the assignee of the eldest, and yet he is tenant in common with the youngest. (8) And in the same manner the tenant by the curtesie of the eldest shall present. But if there bee foure coparceners and the eldest and the second present, and the other two present joyntly or severally, the ordinary may refuse them all; for the eldest did not present alone, but she and one other of her sisters. But now let us returne to *Littleton*. (9)

[i] Bract. li. 4. fo. 338. 245. 247. Brit. fo. 223. 45. Ed. 3. Fines 41. 18. E. 2. Quar. Imp. 176. 38. H. 6. 9. 19. E. 3. ib. 50. 5. H. 5. 10. F. N. B. 34. V. (Plowd. 332. b. 333. a. 10. Co. 135. b. 2. Ro. Abr. 346. F. N. B. 33. E. Ant. 166. b. Post. 243. a. & sect. 299.)

(1) The following words between brackets not in L. & M. or Roh.
(2) *Vie* instead of *terme* in L. & M. & Roh.
(3) *&c.* in L. & M. & Roh.
(4) See acc. Cro. Jam. 91. & 2. Brownl. 175.
(5) See post. 243. a. 249. a.
(6) Acc. more fully 2. Inst. 365. According to F. N. B. 34. the law is the same between coparceners, which agrees with lord Coke's doctrine about them in 2. Inst. 365. & post. 243. a. See further the case of usurpation of a right of presenting ant. 149. a. See also the case of attornment to one of two joyntenants, post. sect. 566. Add 5. Co. 97. b.
(7) See 5. H. 7. 8. a. Burn. Ecc. L. tit. *advowson*, Wats. Compl. Incumb. c. 8.
(8) See my note on this subject ant. 166. b. Hob. 119. Dy. 55. a.
(9) See further on presentation where more than one have an interest in an advowson, 2. Gibs. Cod. 1st ed. 804. ant. 17. b, 18. a. 17. Vin. Abr. 325. Mallory's *Quare Impedit* 71. to 75.

Sect. 290.

ITEM joyntenants (s'ils voilent) poient faire partition enter eux, et la partition est assets bon; mes de ceo faire ils ne serront compels per la ley; mes s'ils voylent faire partition de lour proper volunt & agreement, le partition estoiera en sa force.

ALSO joyntenants (if they will) may make partition betweene them, and the partition is good enough; but they shall not bee compelled to doe this by the law; but if they will make partition of their own will and agreement, the partition shall stand in force.

POyent faire partition. But this partition must bee [k] by deed as hath beene said before. But joyntenants for yeares may [l] make partition without deed.

Ils ne serra compell. This is true regularly; but, by the custome of some cities and boroughs, one joyntenant or tenant in common may compell his companion, by writ of partition grounded upon the custome, to make partition. (1) But since *Littleton* wrote jointenants and tenants in common generally are compellable to make partition by writ framed upon the statutes [m] of 31. & 32. *H.* 8. as before hath been said. (2) And albeit they be now compellable to make partition, yet, seeing they are compellable by writ, they must pursue the statutes, and cannot make partition by *parol*, for that remaines at the common law. And by *Littleton*'s authoritie herein it seemeth to me, that if one joyntenant or tenant in common disseise another, and the disseisee bring his assise for the moytie, that in this case, though the plaintife prayeth it, yet no judgement shall bee given to hold in severaltie, for then at the common law there might have beene by compulsion of law a partition between joyntenants and tenants in common, and by rule of law the plaintife must have judgement according to his pleint or demand.

If two joyntenants be [n] of land with warranty, and they make partition by writing, the warrantie is destroyed; but if they make partition by writ of partition upon the statute, the warrantie remaines, because they are compellable thereunto. (3)

(Post. 198. b.)

[k] Vid. sect. 259. 318. (Ant. 169. a. F. N. B. 62. f.)

[l] 18. El. Dyer 350.

F. N. B. 62. b.

[m] 31. H. 8. ca. 1. 32. H. 8. ca. 32. Vid. sect. 264. 247. 259 Mich. 16. & 17. El. 1. 340. Inter Harris & Eden adjudge. acc. 18. El. Dyer 350. b. Vide before in the chapter of partition, many bookes cited concerning this matter. (Ant. 175. a. sect. 250. Mo. 29. Dy. 350. Ant. 167. b.) 3 E. 3. 48. F. N. B. 9. b. 7. Ass. 10. 7. E. 3. 29. 10. Ass. 17. 10. E. 3. 40. 43. 12. Ass. 15. 17. 12. E. 3. judgement 102. 20. E. 3. Ass. 62. 28. Ass. 35. 23. Ass. 10. 7. H. 6. 4. 19. H. 6. 45. 3. E. 4. 10. Vid. sect. 247. Brit. fo. 112. lib. 6. fo. 12. & 13. Mories case.

[n] 29. E. 3. tit. Garr.

Sect. 291.

ITEM si un joynt estate soit fait de terre a le baron & a sa feme & a un tierce person, en ceo cas le baron et sa feme n'ont en ley en lour droit forsque le moitie, &c. (4) [et le tierce person avera tant come le baron et sa feme ont, s. l'auter moitie, &c.] Et la cause est, pur ceo que le baron et sa feme ne sont forsque un person en

ALSO if a joynt estate be made of land to husband and wife and to a third person, in this case the husband & wife have in law in their right but the moity, and the third person shall have as much as the husband & wife, *viz.* the other moity, &c. And the cause is, for that the husband and wife are but one person in

LE baron & sa feme n'ont en ley en lour droit forsque le moitie, &c. *William Ocle* and *Joane* his wife [o] purchased lands to them two and their heires; after *William Ocle* was attainted of high treason for the murther of the king's father *E.* 2. and was executed; *Joan* his wife survived him; *E.* 3. granted the lands to *Stephen de Bitterly* and his heires: *John Hawkins* the heire of the said *Joan* in a petition to the king discloseth this whole matter, and upon a *scir. facias* against the patentee hath judgement to recover the lands,

(Post. 299. b. 351. a. 2. Co. 68.)

[o] Mich. 33. E. 3. coram rege Salop. in Thesaur. (Post. 326. a. 1. Ro. Abr. 389. 388. 9. Co. 140.)

(1) For instances of such custom, see for London F. N. B. 62. b. and for gavelkind land ant. sect. 265. and Robins. on Gavelk. 1[illegible].

(2) Ant. 169. a.—In a Coke upon Littleton I have, there is the following note on the extent of the statutes of 31. and 32. H. 8. "Adjudged by St. John cheife justice and Windham and Archer justices, Hillary 1659 in the common bench, in the cause "between Major and the lord Coventry, that a tenant by elegit may have a writ of partition by the statute of 32 H. 8. and it is "within the meaning thereof." This is followed with a reference to Cro. Cha. 44. where it is said, that the statute doth not extend to copyholds.

(3) Acc. ant. 165. a. and b. as to parceners, because they are compellable to make partition at common law. See the case of and between parceners after partition ant. 174. a. and b.

(4) The words following between brackets not in L. and M. or Roh

ley, et sont en semblable case, sicome estate soit fait a deux joyntenants, ou l'un ad per force de joynture l'un moitie en ley, & l'auter l'auter moitie, &c. (1) *En mesme le maner est l'ou estate est fait a le baron et a sa feme et as auters deux homes, en tiel cas le baron et sa feme n'ont forsque la tierce part, et les auters deux homes les auters deux parts, &c.* Causâ quâ suprà.

law, and are in like case as if an estate be made to two joyntenants, where the one hath by force of the joynture the one moity in law, and the other the other moity, &c. In the same manner it is where an estate is made to the husband and wife and to two other men, in this case the husband and wife have but the third part and the other two men the other two parts, &c. *causâ quâ suprà.*

PLUIS serra dit del matter touchant joyntenancie, en le chapter de tenants en common, et tenant per elegit, et tenant per statute merchant.

MORE shall be said of the matter touching joyntenancy in the chapter of tenants in common, & tenant by elegit, and tenant by statute merchant.

lands, for the reason here yeelded by our author.

Vide sect. 665.

But if an estate be made to a man and a woman and their heires before marriage, and after they marry, the husband and wife have moities betweene them, which is implyed in these words of our author, *baron & sa feme.* (2)

Forsque un person en Ley. Bract. saith [p] *vir & uxor sunt quasi unica persona, quia caro una & sanguis unus.* (3) It hath bin said, that if a reversion bee granted to a man and a woman and their heires, and before attornment they entermarrie, and then attornment is made, that the husband and wife shall have no moities in this case, (4) no more than if a charter of feoffment be made to a man and a woman, with a letter of atturnie to make livery, they entermarry, and then liverie is made *secundum formam chartæ*, in which case it is said that they have no moities. But certain it is, that if a feoffment were made before the stat. of 27. H. 8. of uses to the use of a man [q] and a woman, and their heirs, and they entermarry, and then the statute is made, if the husband alien it is good for a moity; for the statute executes the possession according to such qualitie, manner, forme, and condition, as they had in the use, so as though it vest during the coverture, yet the act of parliament executes severall moities in them, seeing they had several moities in the use. (5)

[p] Bract. li. 5. fo. 416 20. H. 3. Discent 52. lib. 4. fo. 68. Tokers case. Pl. Com. 483. Nichols case.

[q] 4. Mar. Dyer 149. 3. Mar. Dyer 122. 29. H. 8. Dyer 32.

If an estate be made to a villeine and his wife [r] being free, and to their heires, albeit they have severall capacities, *viz.* the villeine to purchase for the benefit of the lord, and the wife for her owne, yet if the lord of the villeine enter, and the wife surviveth her husband, she shall injoy the whole land, because there be no moities betweene them.

[r] 40. Ass. p. 7.

A man makes a lease to *A.* and to a baron and feme, *viz.* to *A.* for life, to the husband in taile, and to the feme for yeares, in this case it is said, that each of them hath a third part in respect of the severaltie of their estates.

If a feoffment be made to a man and a woman and their heires with warrantie, [s] and they entermarrie, and after are impleaded and vouch and recover in value, moities shall not be betweene them; for though they were sole when the warrantie was made, notwithstanding at the time when they recovered and had execution they were husband and wife, in which time they cannot take by moities.

[s] Pl. Com. 483. Nichols case.

Albeit baron and feme (as *Littleton* here saith) be one person in law, so as neither of them can give any estate or interest to the other, (6) yet if a charter of feoffment bee made to the wife, the husband as atturney to the feoffor may make liverie to the wife; (7) and so a feme covert, that hath power to sell land by will, may sell the same to her husband, because they are but instruments for others, and the state passeth from the feoffor or devisor.

10. H. 7. 20.

If a husband, wife, and a third person purchase lands to them and their heires [t] and the husband before the statute of 32. *H.* 8. *cap.* 1. had aliened the whole land to a stranger in fee, and died, the wife and the other joyntenant were joyntenants of the right, and if the wife had

[t] 11. E. 3. cui in vita 9. 16. E. 3. ibid. 36. E. 3. ib. 20. 35. Ass. pl. 15. 31. H. 6. tit. Ent. congeable 54. 19. H. 6. 45. F. N. B. 193. k.

(1) No &c. in L. & M. or Roh.

(2) See acc. as to this difference between a joint estate to husband and wife *before* marriage and one *after*, Calthrope's Read. on Copyh. 92. F. N. B. 194. B. See further case of Butler and Baker 3. Co. 25. the case of Margery Mose ant. 133. a. the case of 4. Ass. 4. cited in 1. Ro. Abr. 271. and the case of Ward and Walthew Yelv. 101.

(3) See ant. 112. a. where the same passage from Bracton is cited.

(4) See acc. post. 310. a. and there the doctrine is more positively expressed. See further the case of a lease for life to baron and feme and afterwards confirmation, post. 299. b.

(5) See Dy. 200. a.

(6) Acc. ant. 112. a. and observe note 6. there.

(7) Acc. ant. 52. a.

had died, the other joyntenant should have had the whole right by survivor (1); for that they might have joyned in a writ of right (2), and the discontinuance should not have barred the entrie of the survivor, for that he claymed not under the discontinuance, but by title paramount above the same by the first feoffement (3), which is worthie of observation. But if the husband had made a feoffment in fee but of the moity, and he and his wife had dyed, their moity should not have survived to the other.

And for the better understanding of this diversity divers things are worthy of observation.

First, that a right of action and a right of entrie may stand in joynture; for at the common law the alienation of the husband was a discontinuance to the wife of the one moity, and a disseisin of the other, so as after the death of the husband, the wife hath a right of action to the one moity, and the other joyntenant a right of entrie into the other, but they are jointenants of the right, because they may joyne in a writ of right.

Vide sect. 302. (Post. 327. b.)

Secondly, that a right of action or a bare right of entrie cannot stand in joynture with a freehold or inheritance in possession, and therefore if the husband make a feoffment of the moitie, this was a discontinuance of that moity, * and the other jointenant remained in possession of the freehold and inheritance of the other moity, which for the time was a severance of the jointure (4); and so are all the bookes, which seemed to varie amongst themselves, cleerely reconciled.

* Vide the statute of 32. H. 8. 2. it is no discontinuance at this day.

If two joyntenants be of a rent, and the one of them disseise the tenant of the land, [u] this is a severance of the joynture for a time; for the moitie of the rent is suspended by unitie of possession (5), and therefore cannot stand in joynture with the other moitie in possession. And this is to be observed, that there shall never bee any survivor, unlesse the thing be in joynture at the instant of the death of him that first dyeth: (6) for the rule is, *nihil de re accrescit ei, qui nihil in re quando jus accresceret habet.*

[u] Pl. Com. 419. Biatchbridges case.

Also if a man demiseth lands to two, to have and to hold to the one for life, and the other for yeares, they are no joyntenants; for a state of freehold cannot stand in joynture with a terme for yeares: and a reversion upon a freehold cannot stand in joynture with a freehold and inheritance in possession, as shall be said in the next chapter (7). Neither can a seisin in the right of a politique capacity stand in joynture with seisin in a natural capacity, as shall be said hereafter (8).

46. E. 3. 21. 19. H. 6. 45. 37. H. 8. 8. 3. E. 4. 10.

If two femes be joyntly seised, and they take barons, and the barons joyne in an alienation and dye, the wives are joyntenants of the right, and may joyne in a writ of right; and yet they may have severall writs of *cui in vitâ* at their election; but when they have recovered in those severall writs, they shall be joyntenants againe. But if the barons had aliened severally, this had bin a severance of the joynture for a time, for the reason abovesaid.

If two joyntenants, the one for life, and the other in fee, lose by default, the one shall have a writ of right, and the other a *quòd ei deforceat*; and yet when they have severally recovered, they shall be joyntenants againe (9). So it is if two joyntenants bee disseised, and an assise is brought, and the one is summoned and severed, and the other recover the moitie, and after another assise is brought, and he that recovereth is summoned and severed, and the other recover, albeit they severally recover, yet they are joyntenants againe (10).

And in all cases where the joyntenants pursue one joynt remedy, and the one is summoned and severed and the other recover, he that is summoned and severed shall enter with him; but where their remedies be severall, there the one shall not enter with the other, till both have recovered: and the same law is of coparceners. If lands [w] be demised for life, the remainder to the right heires of *I. S.* and of *I. N. I. S.* hath issue and dieth, and after *I. N.* hath issue and dieth, the issues are not joyntenants, because the one moity vested at one time, and the other moity vested at another time (11). And yet in some cases there may be joyntenants, and yet the estate may vest in them at severall times.

Vid. Lit. cap. Remitter, the last case. (Post. 364. b.)
10. H. 6. 10. 31. H. 6. tit. Entre congeable. 46. E. 3. 21. b. 3. E. 4. 10. 37. H. 6. 8.
[w] 24. E. 3. 29. 18. E. 3. 28. 38. E. 3. (Cro Jam. 259.)

If a man [x] make a feoffement in fee to the use of himselfe and of such wife as he should afterwards marrie, for terme of their lives, and after he taketh wife, they are joyntenants, and yet they come to their estates at severall times (13).

[x] 17. El. Dyer Brent's case(12)

And so it is if I disseise one to the use of two, and the one agrees at one time, and the other at another, yet they are joyntenants.

In this section are three &c. the first and second are at large explained before, the last is intended where more parties take then three.

Cap.

(1) Acc. 2. Ro. Abr. 88. D. pl. 3.
(2) See post. 337. a.
(3) See post. 364. b. and ant. 185. a.
(4) Acc. post. 337. b.
(5) See ant. 148. b.
(6) Acc. post. 193. a.
(7) Post. sect. 302. near the end.
(8) Post. sect. 297.
(9) See post. 214. a. and Bro. Abr. *jointenants* 6.
(10) A like case of parceners is stated before, and resolved in the same way. Ant. 164. a. See further 19. H. 6. 45. b.
(11) For other cases, where *joint* words are construed to operate *severally* for the like reason, see the arguments in mr. justice Windham's case, 5. Co. 7. a.
(12) It is in Dy. 339. b. pl. 48. but without any name. It is also much at large in 2. Leon. 14.
(13) See *contra* as to an estate at *common law*, the case of a gift to one and his children ant. 9. a. The reason of the difference is, that in the case of the *use* the estate is vested and settled in the feoffees till the future use comes in to *esse*. See further as to this difference and the reason of it, 1. Co. 100. b. 101. a. and Dy. 274. b.

Cap. 4. Of Tenants in Common. Sect. 292.

TENANTS en common sont ceux, que ont terres ou tenements en fee simple, fee taile, ou pur terme de vie, &c. les queux ont tielx terres ou tenements per severall titles, & nemy per joint title, et nul de eux scavoit de ceo son severall, mes ils doient per la ley occupier tiels terres ou tenements en common, & pro indiviso *a prender les profits en common. Et pur ceo que ils aviendront a tielx terres ou tenements per severall titles, et nemy per un joynt title, et lour occupation et possession serra per la ley perenter eux en common, ils sont appels tenaunts en common. Sicome un home enfeoffa deux joyntenants en fee, et l'un de eux alien ceo que a luy affiert a un auter en fee, ore le alienee et l'auter joyntenant sont tenants en common; pur ceo que ils sont eins en tiels tenements per severall titles, car l'alienee vient eins en la moitie per la feoffement d'un des joyntenants, et l'auter joyntenant ad l'auter moitie per force de le primer feoffment fait a luy et a son compaignion, &c.* (1). *Et issint ils sont eins per severall titles, cestascavoir, per severall feoffements, &c.* (2)

(Noy 13.)

TEnants in Common are they, which have lands or tenements in fee simple, fee taile, or for terme of life, &c. and they have such lands or tenements by severall titles, and not by a joynt title, and none of them know of this his severall, but they ought by the law to occupie these lands or tenements in common, and *pro indiviso* to take the profits in common. And because they come to such lands or tenements by severall titles, and not by one joynt title, and their occupation and possession shall be by law betweene them in common, they are called tenants in common. As if a man infeoffe two joyntenants in fee, and the one of them alien that which to him belongeth to another in fee, now the alienee and the other jointenant are tenants in common; because they are in such tenements by severall titles, for the alienee commeth to the moytie by the feoffement of one of the joyntenants, and the other joyntenant hath the other moitie by force of the first feoffement made to him and to his companion, &c. And so they are in by severall titles, that is to say, by severall feoffements, &c.

Flet. li. 3. ca. 4.

LIttleton having spoken of parceners, which are onely by descent, and of joyntenants which are onely by purchase and by joint title, speaketh now of tenants in common, which may be by three meanes, *viz.* by purchase, by descent, or by prescription, as hereafter in this chapter shall appeare (3).

Ou

(1) No *&c.* in L. & M. or Roh.
(2) No *&c.* in L. & M. or Roh.
(3) See sect. 310. which gives an instance of tenancy in common by prescription.

Ou pur terme de vie, &c. Here *&c.* implyeth *pur terme d'auter vie*, or for tearm of yeares, or for any other fixed estate in the land.

And here it appeareth, that the essentiall difference betweene joyntenants and tenants in common is, that joyntenants have the lands by one joint title and in one right, (1) and tenants in common by severall titles or by one title and by severall rights; which is the reason, that joyntenants have one joint freehold, and tenants in common have severall freeholds. Onely this propertie is common to them both, *viz.* that their occupation is individed, and neither of them knoweth his part in severall.

Vide sect 296.

The example that *Littleton* putteth in this section is perspicuous, and needeth no explication.

Sect. 293.

ET est ascavoir, que quant il est dit en ascun livre que home est seisie en fee sauns pluis dire, il serra entendue en fee simple; car il ne serra entendue per tiel paroll (en fee) que home est seisie en fee taile, sinon que soit mis a ceo tiel addition, fee tayle, &c.

AND it is to bee understood, that when it is said in any booke that a man is seised in fee, without more saying, it shall bee intended in fee simple, for it shall not bee intended by this word (in fee) that a man is seised in fee tayle, unlesse there bee added to it this addition, fee tayle, &c.

(Ant. 1. b. 11. Co. 38.)

THIS is evident, and *secundum excellentiam* it shall be taken for the highest and best fee, and that is fee simple.

Vide devant sect. 99 (Ant. 73. a.)

Addition in fee tayle, &c. Here is implyed a maxime in law, *viz.* that *additio probat minoritatem*; as it is vulgarly said, the younger sonne giveth the difference (2).

Sect. 294.

ITEM si trois joyntenants sont, & un de eux alien ceo que a luy affiert a un auter home en fee, en cest cas l'alienee est tenant en common ovesque les auters deux joyntenants; mes uncore les auters deux joyntenants sont seisies des deux parts joyntment que remayne (3), & de ceux deux parts le survivor enter eux deux tient lieu, &c. (4)

ALSO if three joyntenants bee, and one of them alien that which to him belongeth to another man in fee, in this case the alienee is tenant in common with the other two joyntenants; but yet the other two joyntenants are seised of the two parts which remain joyntly (5), and of these two parts the survivor between them two holdeth place, &c.

THIS needeth no explication, onely the *&c.* in the end of this section implyeth, that the same law is where there be more joyntenants than three.

Sect.

(1) See post. 299. b. the first line.
(2) The difference of arms is meant. See more particularly as to this ant. 140. b.
(3) *Que remayne* not in L. & M. or Roh.
(4) No *&c.* in L. and M. or Roh.
(5) See sect. 304. & 312.

5 E

Sect. 295.

ITEM si soient deux joyntenants en fee, & l'un dona ceo que a luy affiert a un auter en le tayle(1) *[& l'auter done ceo que a luy affiert a un auter en le taile] les donees sont tenants en common, &c.*

ALSO if there bee two joyntenants in fee, and the one giveth that to him belongeth to another in tayle, and the other giveth that to him belongs to another in taile, the donees are tenants in common, &c.

Vide sect. 300.

THE *&c.* in the end of this section implyeth, that so it is when a lease for life or *pur auter vie* is made, for in that case also the lessees are tenants in common.

Sect. 296.

MES si terres sont dones a deux homes, & a les heires de lour deux corps engendres, les donees ount joint estate pur terme de lour vies; & si chescun de eux ad issue & devy, lour issues tiendront en common, &c. Mes si terres sont dones a deux abbes, sicome al abbe de Westminster & al abbe de S. Albon, a aver & tener a eux & a lour successors, en cest cas ils ont maintenant al commencement estate en common, & nemy joynt estate. Et le cause est, pur ceo que chescun abbe, ou auter soveraigne, de meason de religion, devant que il fuit fait abbe, ou soveraigne, &c. il fuit forsque come mort person en ley, et quant il est fait abbe(2)*, il est come un home person able en ley tantsolement a purchaser et aver terres ou tenements ou*

BUT if lands be given to two men, and to the heires of their two bodies begotten, the donees have a joynt estate for tearme of their lives; and if each of them hath issue and dye, their issues shall hold in common, &c. But if lands be given to two abbots, as to the abbot of Westminster and to the abbot of Saint Albons, to have and to hold to them and to their successors, in this case they have presently at the beginning an estate in common, & not a joynt estate. And the reason is, for that every abbot or other soveraigne of a house of religion, before that hee was made abbot or soveraign, &c. was but as a dead person in law, and when he is made abbot, he is as a man person able in law onely to purchase and have lands or tenements or other things to the use of his house, and

SI terres sont dones a deux homes, &c. Of this sufficient hath been spoken in the chapter [a] of joyntenants.

[a] Sect. 283. (Ant. 182. a.)

Mes si terres sont dones a deux abbes, &c. In this case of the two abbots in respect of their several capacities, albeit the words bee joynt, yet the law [b] doth adjudge them to be severally seised (3).

(2. Saund. 319.)
[b] 7. H. 7. 9. b. 16. H. 7. 15. b. 3. H. 7. 11. 10. E. 4. 16. b. 5. H. 7. 25. 18. E. 3. 27. 49. E. 3. 25. b. (2. Ro. Abr. 91. 2. Saund. 319.)

The *&c.* in the end of this section implyeth, that so it is, if any [c] body politique or corporate, be they regular, as dead persons in law (whereof our author here speaketh) or seculer: as if

Vide sect. 200.

[c] 4. H. 7. 45. 18. E. 3. 27. b.

auters

(1) The words between brackets not in L. & M. or Roh.
(2) *&c.* in L. & M. and Roh.
(3) Here joint words are construed to make several estates in respect of the *several capacities of the donees.* In a former part *vesting at several times* makes joint words to operate severally. Ant. 88. a. and mr. justice Wyndham's case 5. Co. 7. a. there cited in a note. A few passages further, lord Coke gives an instance of joint words passing two entire things to two grantees in consequence of the *several quality of the things granted.* Post. 190. the case of a corrody. See further as to the effect from several capacities in the grantees, post. 191. b. and ant. 183. b. near the end.

auters choses al use de sa meason, et nemy a son proper use, come auter secular home poit, & pur ceo al commencement de lour purchase ils sont tenants en common, et si l'un de eux devie, l'abbe que survesquist n'avera my tout per le survivour, mes le successor de l'abbe que morust tiendra le moitie en common ove l'abbe que survesquist, &c.

not to his own proper use, as another secular man may, and therefore at the beginning of their purchase they are tenants in common, and if one of them die, the abbot which surviveth shall not have the whole by survivor, but the successor of the abbot which is dead shall hold the moity in common with the abbot that surviveth, &c.

lands be given to two bishops, to have and to hold to them two and their successours: albeit the bishops were never any dead persons in law, but alwayes of capacitie to take, yet seeing they take this purchase in their politique capacitie, as bishops, they are presently tenants in common, because they are seised in severall rights, for the one bishop is seised in the right of his bishoprick of the one moitie, and the other is seised in the right of his bishoprick of the other moitie, and so by severall titles and in severall capacities, whereas joyntenants ought to have it in one and the same right and capacitie, and by one and the same joynt title. The like law is, if lands be given to two parsons and their successors or to any other such like ecclesiasticall bodies politique or incorporate, as hath bin said.

(5. Co. 8. a. justice Wyndham's case.)

If a corodie be granted to two men and their heires, in this case, because the corodie is incerthine and cannot be severed, it shall amount to a severall grant to each of them one corodie; for the persons be severall, and the corodie is personall. (1)

Sect. 297.

ITEM si terres soient dones a un abbe & a un secular home, a aver & tener a eux, s. al abbe & a ses successors, & al secular home a luy & a ses heires, donques ils ount estate en common, causâ quâ suprà.

ALSO if lands bee given to an abbot & a secular man, to have and to hold to them, *viz.* to the abbot and his successors, and to the secular man to him and to his heires, they have an estate in common, *causâ quâ suprà.*

AND so it is, if lands be given to the parson of *Dale* and to a lay man, to have and to hold to them, that is to say, to the parson and his successors, and to the lay man and his heires, they are presently tenants in common for the causes abovesaid. So of a bishop, &c. *Et sic de similibus.*

F. N. B. 49. I. 16. E. 3. joindre en action 27. 16. Ass. pl. 1. 2. R. 3. 16. 7. H. 7. 9. 13. H. 8. 14. (5. Co. 8.)

If lands bee given to the king and to a subject, to have and to hold to them & to their heires, yet they are tenants in common, and not joyntenants; for the king is not seised in his naturall capacitie, but in his royall and politique capacitie, *in jure coronæ*, which cannot stand in joynture with the seisin of the subject in his natural capacitie. So likewise if there be two joyntenants, and the crowne descend to one of them, the joynture is severed, and they are become tenants in common. But if lands be given to *A. de B.* bishop of *N.* and to a secular man, to have and to hold to them two and to their heires, in this case they are joyntenants; for each of them take the lands in their naturall capacitie.

Pl. Com. in seig. Barkley's case.

(Ant. 16. a.)

If lands be given to *John* bishop of *Norwich* and his successors and to *John Overall* doctor of divinity and his heires, being one and the same person, he is tenant in common [d] with himselfe. But our author's rules doe not hold in chattels reals or personals; for if a lease for yeares be made or a ward granted to an abbot and a secular man, or to a bishop and secular man, or if goods be granted to them, they are joyntenants, because they take not in their politique capacity. (2)

(Post. 310. b. a. Ro. Abr. 91.)

[d] 13. H. 8. 14. 16. H. 7. 15. 9. H. 6. 25. 45. E. 3. 25.

Sect.

(1) Lord Coke cites no authority for this. But in 8. E. 4. 17. there is a case, which tends to confirm and explain his doctrine as to a corrody's not being grantable to more than one. The case arose on grant of a corrody by Hen. 6. to two and the longer liver, where one was dead, the question being, whether during the life of the survivor this was sufficient to justify the prior of Friswith, on whom the corody was chargeable, in refusing a new grantee sent by Edward the fourth. Upon this case NELE serjeant argued for the king, that a *corrody which is for one man cannot be given to two, for two men cannot have the maintenance of one man*; and thence he inferred, that the grant to the two was void. But the judges distinguished; for they all said, *that if the corrody be to have certain bread and certain service, this may be granted to twenty men, &c. as to have 20 breads or 6 gallons of ale, &c. but that a corrody to sit every day in the hall of the prior and to be served as the men of the prior are, this cannot be granted to many, for every one of them would have as much as one had heretofore, which would not be reason, &c.*—I was carried to this case in the year book of E. 4. by a reference in Fitzherbert's *Natura Brevium*, which in the commentary on the writs *de corrodio habendo & de annuâ pensione* contains a great variety of learning on this antiquated subject. See F. N. B. 230. F.

(2) In a former part lord Coke explains the reason of this to be, that no chattel can go in succession in the case of a sole corporation, no more than a lease for years to one and his heirs can go to heirs. Ant. 46. b. But there are exceptions to this rule. The king is mentioned as one by lord Coke ant. 90. a. Another is, where there is a special custom, as the care of the chamberlain of London, for orphanage monies. Fulwood's case 4. Co. 65. a. to which add Arundel's case Hob. 64. and ant. fo. 9. a. note 1. there. 90. a. and the case of a bond to a lay person and an abbot in F. N. B. 120. B.