VOLUME II.

BOOK III.

OF INTRUSIONS AND THEIR REMEDIES.

CHAPTER I.

Of Intrusions.

1.

HAVING concluded the process whereby a plaintiff may recover his seisin of freehold, in redress of a wrong done to his own person, we shall now speak of the method of recovering by plea the seisin of his ancestor. For when any one dies, his heir ought to succeed to whatsoever he died seised of in his demesne as of fee, although another may have had more right of property therein, unless he died as a felon convict. And if he died without any heir, the chief lord shall stand in the place of heir.

2. But because a person that has no right may immediately after the death of any one abate himself into the inheritance of the right heir, and keep out the heir and the chief lord of the fee, and no law would permit the seisin to remain in that fashion, the law allows such intruders to be ejected while the intrusion

is fresh by the right heirs or the chief lord of the fee without any wrong being done; and the word 'fresh' shall be so understood, according as the right heir has means of knowing the fact, and according as he was near or far, as has been said in the Book of Disseisins. *If they cannot so eject, or if the abators have had so long and so peaceable a seisin, that they ought not to be ejected without judgment, then they must be aided by remedy of our court. But because there are several kinds of intrusions, the form of the writ must be varied according to the different cases.

3. Intrusion is a wrongful abatement during the vacancy of the soil, when no one is in seisin either by corporeal presence or by continuance of will; as after the death of a person who died seised of the fee and freehold, before the heir of the deceased has taken any sort of seisin; or after the decease of one who in like manner died seised of the fee and freehold without heir or as a felon, before the lord to whom the escheat belongs has attained to seisin thereof; or after the death of any one who died seised only of the freehold by fine levied and chirograph, or by form of gift, or by other kind of tenure for term of life, before he to whom the land ought to revert has attained to seisin.

4. As all these cases are intrusions, the forms of the writs must be varied according to the diversity of the cases. Sometimes the action and the plaint belong to the right heirs, and sometimes to the chief lords by reason of escheat, and sometimes by reason of wardship. And because pleas ought rather to be hastened

than delayed, it is proper that such writs be provided as drive the intruders to answer by the *great and little *Cape*, rather than other kind of writs pleadable by personal distresses. In this writ neither view nor voucher lies, because the plea savours in part of the nature of novel disseisin and of trespass by reason of the abatement.

5. If the heir be of full age at the time of the death of his ancestor, and holds himself in seisin of his inheritance with the deceased, and after the decease is found in seisin, or if after the death of his ancestor he finds the inheritance vacant, and enters before the chief lord has seised it, it is lawful for such heir being of full age to keep out the chief lord if he can, unless he ought to hold the inheritance of us in chief, so as he be always ready to perform to the lord homage or relief or other service according as law and right require.

6. But because all heirs are not bound to perform homage to their lords, we must first understand the nature of tenements,—which are subject in relation to the lords of the fees, to homage, and which not; and what tenements and what heirs ought to be in ward of the lords, and what not; and in respect of what kind of tenements lords ought to have wardship, marriage, homage, and relief, and of what not.

*CHAPTER II.

Of Wardship; of the various tenures of land; and of the remedy against suppositititious children.

1. There are several kinds of fees and tenures, the chief whereof are those of knight service and grand serjeanty,[1] which fees were provided for the defence

[1] 'Note, that knight's fee is dependent on the shield (del escu): and signifieth that one ought to do knight's duty (fere chivalerie) for such tenements, i. e. exercise arms (hantier les armes) in time of war. So Grand Serjeanty is a diminutive of the shield (un deminutif del escu); and signifieth that one should do esquire's duties (esquierie) for such tenure, i. e. be armed, as belongeth to an esquire, to combat in time of war, or otherwise serve, as the king or his lord hath need. And he shall do homage, for he will do honourable service (honesté fra) in battle, and fight armed with his target hanging from his neck, which is to him in stead of shield. And this you may understand by the name, for *esquier* is, as it were, *escuer*. But there is a difference between the arms (armures) of knights and esquires. So Petty Serjeanty is a diminutive of Grand Serjeanty. For knights and serjeants cannot endure in war without being served with provisions (vitaille) and other things. Wherefore for footmen (home a pié) were such tenures provided, to do such various duties as belong to their service; because a footman (poun) cannot do noble acts (honesté fere); and gentlemen (gentiz gentz) hold no feat honourable except prowess of arms. All the other tenures, save ancient demesnes, are dependent upon the fees aforesaid.

of our realm, and of which the heirs are not capable of defence or of bearing arms until they have accomplished the age of twenty-one years; and it is therefore ordained that the lords of the fees shall have for all the intermediate time the wardship of their fees, and all the profits of the issues, and the advowsons of churches, and the wardship of wards, without making waste of woods, destruction of tenements, exile of villains, or sale of lands.

2. The same tenant may be heir to several fees, of which one is of more ancient feoffment than another. And whereas the first feoffor or the lord of the most ancient fee has a better right to the wardship of the body, and consequently to the marriage, by reason of the allegiance, than another later feoffor, it sometimes happens, where the last feoffor thinks that he is the first and has a greater right, that he who has no right deforces the wardship from him who has a better right. For which wrong a remedy is provided by our writ of right of ward, which is intended to be determined by a simple jury upon the priority of feoffment

For frank farms, fee farms, and frank almoigne, were changed (translateez) from knights' fees into socages discharged of such foreign service for a certain sum by the year. Ancient demeynes were and are the king's villenages; whereof burgages and sokemanries are changed for such villenages into free tenure (franchise) at a certain service done to their lord. And as ancient demesnes are the king's villenages, to be cultivated and dealt with as may please him (pur gayner e pur fere quantque lui plest), so are other kinds of villenages the demesnes of other lordships.' Note in MS. *N.*

without battle or great assise. *So writs of right of marriage are not frank tenement, but movable chattels devisable by testament; the manner of proceeding in which writ, after the great distress awarded, is contained in our Statutes of Westminster.

3. Nevertheless if there be any such heirs whose ancestors died seised of any land held of us in chief of the ancient fees of our Crown,[1] we will that we have the wardship of all the lands which ought to descend to those heirs as their inheritance, with all the corn found on such lands, to whose fee soever the lands belong. And if the ancestors of such heirs held any land of us in chief as of our escheats, or of our purchases, or of our petty serjeanties, or of our socages, or of our fee farms, in that case the custody of the bodies of such heirs during their tender age shall remain with us, and their marriages shall be ours;[2] but each lord shall have the wardship of his own fee and of the land held of him, until such heirs have proved their age in our court, and have recovered their inheritance out of our hand.

[1] The annotator in MS. *N.* applies the term 'homage ancestrel' to the case here supposed, and says that it was then to be presumed (dunc deyt hom entendre) that the tenant or his ancestors were enfeoffed by the king before any of his other feoffors.

[2] There is some confusion in this statement; the rule that the custody of the body and the marriage belonged to the king applied only where the land was held of the king, though not *de corona*, by military service, and not to the other cases mentioned in the text of tenants in socage or by petty serjeanty. Compare Magna Carta, c. 27; and the parallel passage in Bracton.

4. As long as the lands of such heirs remain in our hand, we will that they be quit as against all people of suits of courts and of all other services which may be demanded of them by reason of their tenements, and be quit also so long as they are in our wardship, of all *manner of obligations and demands which may be made upon them on account of their ancestors. And if any lands have been let to farm for term of years, or otherwise for a less term than term of life or in fee, such lands being part of the inheritance of the infants, we will that the farmers be ejected from the lands, saving to them their chattels found thereon, so that each lord may have the wardship of his fee. And when the heirs shall have accomplished their age, then the farmers shall have their action by our writ of covenant to recover the remainder of their terms, if they cannot recover it without writ.

5. There are other kind of tenures, as petty serjeanties, sokemanries, free farms, fee farms, burgages, ancient demesnes, free alms, free marriages, and villenages; to which fees no wardship appertains, but only nurture by him who shall be nearest of kin to the heir on the mother's side when the inheritance descends on the part of the father, or by the nearest of blood on the father's side when the inheritance descends from the mother. Such guardians are rather bailiffs than guardians; for if they do not render a lawful account of the issues of such inheritances, at such time as the heirs choose to require the same, such guardians may be imprisoned and punished like other bailiffs, accord-

ing to the penalty provided in our statute. *And in the case of such heirs no certain time is limited for their full age; but as soon as they have discretion to till land, measure cloth, count money, and to manage their trade, they shall be deemed of age; and the females as soon as they have attained discretion and have learned the management of household affairs.[1]

[1] The older authorities fix fifteen years as the age of majority for socage tenants, and apply the shifting test of 'discretion' only to the children of burgesses or tenants in burgage. The following note may serve in some measure to show how the old rule in this respect was gradually set aside, and the age of twenty-one established as the period of majority for all classes. 'Of heirs in socage, the common age for males is sixteen years, and for females fourteen. This is so (Oyl), for having and administering their inheritance; but not for aliening it conclusively (finalment) *secundam quosdam*: for they say that the writ of entry *dum fuit infra ætatem* supposes the age of twenty-one years. Others say that this age is given for knights' fees only, and that they are so long in ward in regard to the administration for fear of the aliening and dismemberment of their inheritance. Whence it follows, he who by law can and ought to administer, can by law alien; but in socage the tenant at sixteen years of age can and ought to administer,—*eadem ratione*, to alien.' Note in MS. *N*.

Shortly after the time of this note, the question as to the power of alienation by socage tenants under twenty-one appears to have been settled in the negative; and in the following case, decided 13 Edw. III., the power of aliening a burgage tenement before that age is treated as resting upon special custom. 'In *dum fuit infra ætatem* in Gloucester, the tenant pleaded that the usage of the town is such, that when a man knows how to count 12*d*. and to measure an ell of cloth, he is of age to alien his land,

6. Grand serjeanty is a service due from a tenement, which service concerns the defence of the country; as to be Marshal or to set our host in battle, or to find a man mounted and armed for the field;[1] so, to be the keeper of our goshawks,[2] or other like great services. Petty serjeanty is a service issuing from a tenement by performing to us[3] some little service, when we are

and of such age was the demandant when he leased. And because the tenant did not state the age in certain, so that the demandant might answer it, it was awarded that the demandant should recover.' T. 13 Ed. III. cited Vet. Nat. Br. 128; Bro. Abr. *Dum fuit*. 3; Fitzh. Nat. Brev. 192 H. (note by Hale).

[1] As to the question whether this is great or little serjeanty, see Lit. Ten. s. 157; Co. Lit. 107 a.; and Butler's Note, ib.

[2] This example does not agree with the description of grand serjeanty, as connected with the defence of the country. Some of the manuscripts remedy this inconsistency by reading *estours*, or *estovers*, so as to make the service that of guarding the king's stores or provisions. Abundant examples of tenure by the service of keeping hawks and falcons may be found in Blount's Tenures by Beckwith, pp. 263–280. In one case at least (p. 275) the service was connected with homage, which affords some presumption that it was considered a grand serjeanty. (See Bracton 79 (§ 6); Fleta 204 (c. 16. § 2); 207 (§ 19); Co. Lit. 86 a). And the estates held by such services were frequently of importance. The lords Grey of Wilton are stated by Camden to have held their manor of Acton by the service of keeping a gerfalcon for the king. Camden's Britannia by Gough vol. i. p. 315. In later times such tenures were classed as petty serjeanties.

[3] This passage of Britton appears to be the first authority for confining the term Serjeanty to tenures *in capite*. (See Lit. Ten. s. 161.) In Bracton, serjeanty is a tenure by a special or ex-

about to take the field, amounting to half a mark or less, as are the services of bringing to us in field a bag, or a brooch,[1] or an arrow, or a bow without a string, or a pair of spurs or gloves, or some like service.

traordinary service either to the king or any other lord. And Britton in a subsequent chapter speaks of a grand serjeanty not held of the king in chief. (Post, c. iv. s. 31.) The words of Britton may also have given occasion to the distinction afterwards adopted, by which the term 'petty serjeanty' was confined to 'small things *belonging to war*.' (Lit. Ten. s. 159.) The principal examples of minor serjeanties in Bracton are connected with the occupations of peace, as the serjeanty of riding with the lord from one manor to another, of holding the lord's court, or of carrying his precepts (portandi brevia). We may also see in Britton's examples the germ of Littleton's distinction of great and little serjeanty, that the one ought to be done in the tenant's proper person, while the other obliges him to nothing but a mere rendering or payment, as of a rent, (Lit. Ten. 153, 160.) In Bracton, serjeanties are called great and little, either with reference to their value (Brac. 87 *b*), or to the nature of the duty, as concerning the king's army or the defence of the realm on the one hand, and peaceable services or duties to inferior lords on the other. (Brac. 35 *b*.) And it would seem to have been Bracton's opinion, that all serjeanties *in capite*, whether great or small, brought to the king the right of wardship. (Brac. 87 *b*; 35 *b*, 36.) The account given of great and little serjeanty and their incidents in the fragment of law, printed under the title of *Statutum de Wardis et Releviis* (Stat. temp. incer.), is similar to that of Britton.

[1] Thomas Carnifex tenet de domino Rege in capite manerium de R. in com. Ebor. per serjantiam inveniendi domino Regi in exercitu in Wallia unum equum, unum falcem, unam brochiam, et unum saccum, &c.; et prædictus Thomas in misericordia pro injusta detentione.' Plac. Cor. 7 Ed. I. Ebor. cited in Blount's

7. Sokemanries are lands and tenements which are not held by knight service or by grand or petty serjeanties, but by simple services, as lands enfranchised by us or our predecessors of our ancient demesnes.

8. Free farms are lands and tenements, whereof the nature of the fee is changed by feoffment out of chivalry, to be held by fixed yearly services, and in respect whereof neither homage, wardship, marriage, *nor relief can be demanded, nor any other service not specified in the feoffment. Fee farms are lands held in fee by rendering for them yearly the true value, or more or less; which rent if the feoffees cease to pay for two years together, an action thereby accrues to the feoffors, or their heirs, to demand the tenements in demesne; for which tenements neither homage, wardship, marriage, nor relief can be demanded without specialty in writing.

9. Free alms is where land is given to God, and to some persons serving God, in pure and perpetual alms, for which the feoffors can demand no kind of earthly service, so long as the lands remain in the hands of the feoffees; the constitution of which alms is to be duly observed. Land held in alms is when land or tenement is given in alms, some service being reserved thereout

Tenures, p. 49; Blount's Tenures by Beckwith, p. 137. See also Bracton, f. 36. The word *brochia*, which in several services reserved in tenures is connected with *saccus*, is conjectured to mean the instrument, either a pin, or a brooch or buckle, with which the bag of leather or canvas was fastened. See Blount's Tenures by Beckwith, p. 110, 133; Ducange Gloss. s. v. *broca*, *brochia*.

to the feoffor. And as it is of free alms and of land given in alms so it is of land given in free marriage.

10. Burgage is a tenement in a city or borough or other place privileged by us or our predecessors; and such tenements are devisable according as they are derived by purchase or inheritance, agreeably to the custom of the place.

11. Ancient demesnes are lands which were part of the ancient manors *annexed to our Crown, in which demesnes dwell some who have been freely enfeoffed by charter,—and these are our free tenants,—and others who are free of blood and hold land of us in villenage,—and these are properly our sokemen, and are privileged in this manner, that they are not to be ousted from such tenements so long as they perform the services which appertain to their tenements, nor can their service be increased or altered, so that they shall do any other or greater services, or in any other way than as they have been used to do. And because such sokemen are the tillers of our lands, we will that they be not summoned anywhere to toil in juries or inquests, except in the manors to which they belong. And because we will that they enjoy such immunity, the writ of right close is provided, which is pleadable before the bailiff of the manor for a wrong done by one sokeman to another, that bailiff may do the plaintiff right according to the custom of the manor by means of simple inquests. Nevertheless we will that in pleas of trespass and other personal actions, sokemen be summonable and answerable as well as others.

12. Villenage is a tenement of the demesne of any lord, delivered to be held at his will by villain services, to be cultivated for the use of the lord, and whereof livery is given by the rod and not by title of deed or by succession of inheritance. Neither wardship nor marriage nor other real services, as homage and relief, can be demanded from ancient demesne or villenages. *In the same manors of our ancient demesnes there are also pure villains both by blood and by tenure, who may be ousted from their tenements and deprived of their chattels at the will of their lords.

13. It sometimes happens that women at the time of the death of their husbands feign themselves with child by their husbands when in fact they are not, to the great damage of the heirs; in which case we will that the following remedy be ordained. When any one complains of such discreet, he shall have our writ to the sheriff of the district, commanding him without delay to cause to come before him and before the coroners in full county court the woman against whom the complaint is made; and it shall be inquired of her, whether she be with child, and by whom; and if she says, by her husband who is dead, the sheriff shall forthwith cause to come discreet and lawful women to the number of six at least, who are to be sworn upon the holy Evangelists, that they will lawfully act and true presentment make of the articles wherewith they shall be charged on our behalf. Then let them be charged that they upon their oath search the woman who pretends to be with child by handling her belly

and her breasts, and using all other means whereby they may be certified whether she is with child or not. Then they shall take her privately into a house, and inquire into the truth.

*14. If the women declare that she is with child, or they are in doubt whether she be or not, then the sheriff shall cause the woman to be placed in our castle or elsewhere in safe custody, so that no woman or other person who may be suspected of any fraud have access to her; and there she shall remain at her own charge till the time when she should be delivered, and no woman in the meantime shall go near her, unless she be of the lineage of the plaintiff. And if she have not a child within forty weeks after the death of her husband, or if she is not found to be with child, let her be punished by imprisonment and fine; and the chief lords of the fees shall forthwith take the homage of the heir without further delay.

15. If she is delivered of a child within the forty weeks, the child shall be admitted to the inheritance, unless the next heir can prove that such child was begotten by another man than her husband, as if he show that the husband was impotent, or that he was in prison or in another kingdom for two or three years before the child was born, and remained so until after the birth, without coming near his wife, or aver some other apparent presumption notorious to everybody. For in such cases we will not that the right heirs shall be disinherited by the wife's adultery.

*16. If two brothers, or other persons, offer themselves to do homage to their lord for the same inheritance, and one of them was born in marriage and the other before marriage, we will that in such case the lord shall admit to the inheritance him who was born within marriage, although he be younger than the other. And if any heir offer himself to do homage to his lord for the inheritance of his ancestor, whose father and mother were divorced by holy church by reason of the marriage between them being found unlawful, the lord shall not upon that account fail to take the homage of such children begotten in marriage, whether the marriage was lawful or unlawful.

17. If any heir is begotten by another than the husband of his mother, that is to say, at a time when it may be presumed that the husband might have begotten the child in matrimony, we will not that the adultery of the mother be a bar to the inheritance of the child. So, where a child begotten by another and imposed upon the husband as his issue, is brought up by the husband and owned by him as his heir, we will that such children be admissible to the inheritance, if it may be presumed that the husband of the mother may have begotten them. But if the husbands of such wives, who bring up as their lawful heirs children that were begotten by others than the husbands, were hindered by manifest infirmity or distance of place and time, so that evident presumption and common fame, as before mentioned, operates against the husbands having been capable of begetting those children,

*although they choose to bring them up in their houses and to acknowledge them as their own, yet such children shall not be admissible to the inheritances. Neither shall those whom husbands shall find in their houses begotten by others, and whom they shall straightway remove out of their houses and disown as their issue. Therefore we will that every one in such case do openly disown and straightway cause to be removed such supposititious issue, as soon as he shall know of it. For after he has once owned the child to be his, and this fact is testified by the neighbourhood, he may never after disown it.

18. And if a complaint come before us from any right heir concerning a supposititious child so brought up and acknowledged as heir by any husband and his wife to the disherison of the right heir, we will straightway command the sheriff of the county, at the suit of the plaintiff, that he have the bodies of such husband, and of such a one his wife, and of such child whom they are bringing up, before our Justices at a certain day and place to answer to such plaintiff, who alleges himself to be heir to the same husband, why they do in disherison of the plaintiff bring up the aforesaid child and own him for their issue, which he is not. At which day it will be necessary for the plaintiff to show some presumptions in his favour to make good his charge; which if he cannot do, it shall be adjudged against him. And if by the proceedings in the plea between the parties judgment be given against the infant and for the plaintiff, the

malice of the husband and of his wife shall be punished by imprisonment and fine.

*19. And if any child which is born a monster,—as one that has more than the proper number of members,[1] as three hands or three feet, or a deficiency in the same, as no hands or no feet,—demands the inheritance of his ancestor, such children shall not be admissible to any inheritance, or accounted as children, but as beasts and monsters. Wherefore no one who has begotten them can by such issue claim title of freehold in the inheritance of his wife by virtue of the law of England.

20. And whereas it sometimes happens that the heir is an idiot from his birth whereby he is incapable of taking care of his inheritance, we will that such heirs, of whomsoever they hold, and whether they be male or female, remain in our custody, with all their inheritances, saving to every lord all other services belonging to him for lands held of him, and that they so remain in our wardship as long as they continue in their idiocy. But this rule shall not hold with regard to those who become insane by any sickness.

21. When any one who has been in ward, and who ought to hold of us in chief, has reached the age of twenty-one years, if he demand the inheritance out of

[1] Bracton repeats in all the passages above cited, that an increase or decrease in the number of members not affecting the human form of the offspring, as where a child is born with six fingers on one hand, or only four, does not affect its rights. See Digest, li. i. tit. 6. l. 14.

our hands, or if any other heir of whatever age he be do the like, such persons must first, by solemn inquests taken by virtue of our writs, prove their age by their kindred *and by other lawful people of the neighbourhood where they were born,—to wit, whether they are of the full age of twenty-one years or not, and whether they are next heirs.

22. And if any one proves his age by good inquest sealed under the seals of the jurors and returned into our Chancery to be safely kept, then we will that he perform homage and swear fealty to us, and obtain our writ to our escheator or to our sheriff, that he cause him to have seisin of the lands which were in our hand, by the death of the ancestor of such heir, in his bailiwick. But if our escheator or sheriff perceives that fraud has been practised upon us in the aforesaid proof, he shall defer the delivery of seisin until we have taken an attaint against the twelve first jurors. And if they are attainted of a false oath, let them be punished as shall be mentioned in the chapter concerning attaints. And if they have been falsely accused, let the accuser be punished by imprisonment and fine, which may be great or small in proportion to the malice of the offender.

23. When the heir has obtained the seisin of the lands held of us, let him straightway have seisin of his lands held of the fees of others, without making fine to the lords, and without giving anything of his goods except his reliefs. And when he shall recover the seisin of his inheritance out of the hands of others, we

will that his lands shall be delivered up to him stocked with ploughs and other stock at least as well as the lords found them. *And if the lords make waste, sale, destruction, or exile in such inheritances, before the heirs have proved their age, then the heirs may be aided either by our writs of trespass or of waste, or by assise of novel disseisin, to be brought by themselves or their friends according as is contained in our statutes, in which the penalties are ordained. All guardians shall however be excused from liability in respect of accident by fire or water, or other like waste, where they shall not be guilty of any malice.

CHAPTER III.

Of Marriage.

1. When any one holding of us in chief shall die, leaving a male heir of full age, we will that such heir may marry where he pleases without paying a fine to us or to any other. But if such heir be under age, then the marriage of him shall belong to us, and he may not marry without our leave under pain of heavy forfeiture.

2. With respect to female heirs, where an inheritance wholly or partly held of us in chief descends to several daughters or their issue, as one heir, the eldest shall do homage to us for all her parceners, and the others shall do homage to the eldest. We will never-

theless have the marriages of them all of whatever age they may be, as often as they are to be married, so that they cannot be married without our leave. This prohibition was first made, lest the female heirs of our land *should marry with our enemies, whose homage we should then be obliged to take, if the heirs might marry at their will.

3. With respect to marriages belonging to others than us, we will that the lords give or offer marriages to the heirs male before they have completed their age. And if they have not tendered them marriage while under age, then the lords shall be barred of any action to demand anything for their marriage. But if the lords have tendered them marriage without disparagement, and the heirs will not consent thereto, the penalty provided in our statute shall take effect. Marriages shall be tendered to female heirs before they be fourteen years old, otherwise the lords shall be debarred of their right.[1]

4. If any female heir of tender years be married where she is disparaged, then we will that, if she was

[1] Our author omits to state the modification of the law introduced by the Statute of Westminster I (3 Ed. I. c. 22), by which the right was granted, or confirmed, to lords to retain the wardship of female heirs for two years after they had reached the age of fourteen years, and to offer them a suitable marriage within that time. If the heiress refused the marriage, the lord might hold the lands till she attained twenty-one, and for a further time until he had received the value of the marriage. Cf. Littleton, Tenures, s. 103; Coke Lit. 79 a; 2 Inst. 202; Lord Darcie's Case, 6 Co. Rep. 71.

of fourteen years or upwards, so that she was able to consent to marriage, no penalty shall be incurred; but if she was under that age, the penalty shall be this, that the lord shall lose the wardship for that time, and make satisfaction to the friends of the person so married, and that all the profit received for the marriage shall be restored to the friends and kindred of the woman, to be improved for her use. *And if she be married to any of his villains, the lord who gave her away shall be punished by imprisonment, until due amends be made by appointment of the kindred of the wife; and such persons shall afterwards be put to ransom for the malice.

5. We forbid any lord to force an infant in his ward, male or female, to take wife or husband. And when any heirs, male or female, have once been married by their lords in whose wardship they were, or have once made satisfaction for their marriage, if they be to marry again, they shall for ever after be at their own disposal, provided they hold nothing of us. So also, where they have been married in the lifetime of their fathers.[1]

[1] 'An infant under age, married in the life of his ancestor, comes into ward of his lord. His wife dies. His lord tenders him another wife, whom he refuses. *Qu.* Whether forfeiture of marriage lies or not. Surely not; for no force of law can compel the heir to be bigamous.' (Note in MS. *N.*) This question is resolved in the same way by Babington, the king's attorney, in the seventh year of Henry VI, the same reason being given.—'Par le prise del seconde feme *efficitur bigamus*, a qe la Ley ne luy coherte.' So Vet. Nat. Brev. 93. b. But if the heir

6. When two or more lords claim the marriage of one infant, it is impossible for all of them to have it, although the ancestors of such infant may have held of all by knight service; in which case let it be adjudged according to the priority of the feoffments, so that the marriage shall be awarded to that lord by whose ancestor the earliest feoffment shall be found to have been made; and let the deforceor be punished according to the tenor of our statutes. If no priority of feoffment is found by the inquest, as where the ancestor of the infant purchased of all the lords at once at the time of the Conquest, or in like cases, the judgment shall be in favour of him who shall be in seisin of the infant.

*7. Where any one who has no right has seised the body of the heir within age, and sold the marriage of such infant to another, and he is impleaded, in such case the person impleaded may vouch to warrant, so that each offender may bear the penalty of his own trespass.

was married by his ancestor, *infra annos nubiles*, and the wife died before the age of consent, the lord, it is said, should have the marriage. (Y. B. 7 Hen. VI. f. 11 b.) This latter statement is adopted by Fitzherbert (Nat. Brev. 143 M.), and Coke (Co. Lit. 79. b.) It will be remembered that bigamy (in the ancient and proper sense of the word) involved the loss of the benefit of clergy. (See Ante, l. 1. c. 5. s. 5, p. 28.) On this account it was, according to Lord Coke, a disparagement for a lord to marry an heir to a widow, 'whereby he should by reason of the bigamie have lost the benefit of his cleargie, whereby he might save his life.' (Co. Lit. 80. b.)

CHAPTER IV.

Of Homage.

1. Homage is a legal bond, whereby a person is bound and obliged to warrant, acquit, and defend his tenant in his seisin against all persons for the services due from the tenements which he holds of him, and whereby, on the other hand, the tenant is obliged and bound to return to perform to his lord the services due from the tenement, which he holds of him, in service or in demesne, and to keep his faith towards him inviolate. And the lord is thereby as much bound to his man as the man is to his lord, reverence only excepted.

2. Nevertheless if any one be vouched by reason of homage, and the lord offers to prove that the tenement for which he is vouched was transferred from the blood of the first purchaser by feoffment or some other conveyance, in such case the tenement shall be charged to vouch his feoffor or the feoffor of his ancestors.[1]

[1] Note, that homage ancestral, and homage purchased by attornment made in the king's court, give warranty and none other, without an especial clause of warranty, or what is equivalent thereto, as the word *dedi*; as, where B held of A by homage before the statute [Stat. Quia Emptores, 18 Ed. I.], and afterwards has given the land to another, doing the services to the

3. Homage binds two persons by their mutual consent; and by their mutual consent it may be released and undone, but not by the assent of one of them only.

*4. When any heir is desirous of being admitted to the inheritance of his ancestor, and there is no doubt of his being the nearest heir, we will that he in the first place do homage to his lord, or offer to do it,—in respect that is to say, of his lands held by knight's service,—and that the lord receive his homage, unless there is a reasonable impediment. This may arise in the case of homage tendered for a fee not held by knight's service or grand serjeanty, except where the custom of the place is contrary; and sometimes on account of the condition of the tenants, as where the hold is villenage.

5. On the part of the tenant again, homage is some-

chief lord. For all purchases are now made by *dedi*, and with an especial clause of warranty; and the purchaser may thus vouch the feoffor or his heirs, who are bound to warranty by deed. Therefore he who holds by specialty ought to vouch by specialty, and he who holds by homage ancestral, ought to vouch by the same. And note, that homage is ancestral from the time of the Conquest, or before the limitation of the writ of right, or from the great grandfather of the lord, of whom the great grandfather of the tenant held, and so from heir to heir on each side. When there are fewer degrees, the tenant cannot vouch by homage without specialty.' (Note in MS. *N.*) Cf. ante, liv. ii. cap. 3. s. 8. See the later doctrine as to homage ancestral in Littleton, Ten. Sect. 143–152, with Coke's Commentary, Co. Lit. 100. b. See also 2 Inst. 275.

times refused, and that rightly, as where the lands are given in free alms, or are held by petty serjeanties or by free socage; and sometimes on account of the persons of the lords, as where they have married female heirs, and demand the homage in their own names, whereas their wives ought to demand it; so likewise where the lords demands homage before their tenants are in seisin, or before they are themselves seised of their inheritance; and when it is demanded by those who have no right to demand homage, as termors and others.

6. When an inheritance descends to any heir who holds of us and of several others, in such case the allegiance of the seigniory shall belong to us, and we shall not be barred by reason of the priority of any other feoffor. But if such heir does not hold of us, the allegiance of the seigniory shall belong to that lord who has the best right to his marriage.

*7. Whereas damage might accrue to us and other lords of fees in course of time, if several persons, to whom an inheritance descends as to one heir, should perform their services to the lords according to their portions, we will that every lord, if he pleases, may take the homage of all the parceners, male and female, as of one heir, such homage being considered as only one homage by reason of the unity of right, so that no lord may lose the wardship or marriage of any tenants in chivalry of his fee; but that one of the parceners may, if the lord choose, swear the fealty to perform to him the services of the whole inheritance, so that

neither we nor any other may receive the services of our fees by parcels nor by different hands;[1] and in such case the other parceners shall do fealty and the services of their portions to their chief parceners.

8. Although an infant under age do homage, yet we will not have him take the oath of fealty until he be of full age. And although it is commonly said, that the act of an infant, done under age, ought not to be held binding, yet we will that every man and woman admissible to an inheritance, of what age soever they be, do homage to their lords according to the statute of the Great Charter; *so that the lords shall not have the profits of wardships or marriages on the one hand without being bound to the risk of warranties on the other.

9. All those who hold by knight's service in their own names may do homage; but persons in religion, and clerks, and others holding in others' names, ought not to do homage for the tenements so held, as in the case of tenements which they hold in the names of their churches, where the persons are named last in the feoffments, as appears by the charters, which begin thus: I give to God and the church of such a place, and to the persons therein serving God. In these gifts

[1] It appears from a subsequent section, that it was not considered altogether safe for a lord to avail himself of the right of taking the entire service by the hands of the eldest parcener, inasmuch as his title to the wardship of the descendants of the junior parcener might be thereby endangered. See below, s. 23.

therefore the feoffment is made first to God and his Church and afterwards to the persons therein serving God. Which persons cannot do any homage, but only take the oath of fealty. And such persons do sometimes make a payment to their lords of double the yearly value of their services at the end of every thirty years, in remembrance of relief, as is the common custom in Normandy.

10. He who is to do homage ought to seek out his lord from reverence to him; and when he has found him let him tender his homage, with his hands clasped, before good people, who, if there be occasion, may bear witness thereof. If the lord refuses to take his homage, let him seek him again fifteen days after, and tender it to him as before, and so for three times. *And if he wrongfully refuse it three times by the testimony of good people, then we will that the lords be foreclosed of such homage, and that the tenants may perform their homage to the superior lords of the fees. And when another lord has thus received his homage, we will that the services be performed to him; and yet, if the tenant be impleaded concerning his tenement, the first lord shall be bound to warranty. And if the next superior lord refuse his homage, let it be tendered from lord to lord until it comes to us; which homage we may safely take.

11. If any lord fraudulently refuses or delays to take the homage of his tenant, in order, perchance, that he may not be held to warranty, the tenant in such case may keep back relief and all kinds of services due from

him to the lord until he has taken his homage, so that the lord shall have no seigniory over him until he has received him as his tenant; and no tenant in such case shall be obliged to make satisfaction for arrears of services before the homage has been received.

12. And if such tenants are not willing to transfer their homage to another lord, let them be aided by our writ to the sheriff of the county, *to command the lord that he justly and without delay take the homage of such a one who holds or claims to hold of him by knight's service; and that, if he omits doing it, he be at a certain day and place before our Justices to show cause why he has not done it. At which day both may be essoined; and if the lord make default, the process against him shall be by great distresses, as in personal pleas, until he shall appear.

13. When the lord appears and has to answer to the action of the plaintiff, he may say that he refused to take his homage, because he is not next heir to the ancestor whose heir he claims to be, inasmuch as he has an elder brother alive beyond sea or elsewhere, who is nearer heir to the same ancestor; or because he is a bastard; or because he is the feoffee of one who has committed felony, or who is appealed of a felony from which judgment of death, outlawry, or abjuration may ensue, and which feoffor is still living; or by reason that he or some of his ancestors entered into the tenements which he claims to hold of him by a defective entry, as by intrusion, disseisin, or by default after default made in our court, or by means of one who

held the tenements for term of life, or in villenage, or at will, or for term of years, or in mortgage, or in fee tail, or in ward, or by means of a bailiff, or in like cases; or because the tenement for which he tendered homage, was given in marriage, and therefore he expects the reversion until the appearance of heirs; or because the tenant has no heir of his body, *wherefore the defendant contends that the tenant's portion ought still to accrue to him if the tenant should die without any heir of his own;[1] or because this same tenant has done some act by which the lord is discharged from receiving his homage; and such exceptions, if true, shall be allowed.

14. Therefore it behoves every lord, before he takes the homage of his tenant, to examine whether he is the right heir, and concerning all the circumstances named in the above exceptions, and that he know for what tenement and for how much he ought to take homage, and of how much the tenant is seised in de-

[1] These two justifications of refusal of homage refer to the two cases of tenants in frank-marriage, and co-parceners; the feoffor in the one case and the elder parcener in the other being justified in refusing the homage until the third generation. See Glan. li. 7. c. 3; *li.* 9. c. 2; Brac. 21, 21 *b*; Fle. 190, 191. The reason of this was, that the acceptance of homage might prejudice his right of succession to the inheritance, upon the principle laid down in Glanville: 'Nemo potest simul esse hæres et dominus.' See Glan. li. 7. c. 1. Compare Littleton's Tenures, s. 19, 20, where it appears that in later times the tenant in frank-marriage was quit of all service, except fealty, until the succession of the issue in the fifth degree.

mesne, and of how much in service, so that no one may be deceived as to the risk which he runs in respect of warranty.

15. Again, the lord, when he comes into court, in answer to the allegation of the plaintiff, that his father held of him and did homage to him, or to his father or other ancestor, by such certain services, may say that he held nothing of him, nor did any homage to him, nor ought to hold anything of him. And if he offers to make this good by his champion, he shall be admitted thereto if the tenant chooses to accept it; but if he chooses to put himself upon the great assise, it shall be charged to say, whether the lord, of whom the tenant complains, has the better right to hold the tenement in demesne, or the tenant to hold it of him. For it may well be, that the plaintiff or his ancestor did homage to the ancestors of the same person of whom he complains, and yet never had seisin of the tenement or of the fee for which they performed the homage; *or if they had seisin, yet they had it by their own intrusion, and not by induction of any feoffor at a time when the tenement was vacant; in which case homage may lawfully be refused, on account of the right of action which the lord has to demand the tenement in demesne by reason of the defective entry of the tenant or his ancestors.

16. When any tenant resists doing homage to his lord, the lord should distrain for the arrears of the services if any are due. And if the tenant causes the distress to be replevied, the lord, where he cannot count of his

own seisin, shall have his remedy by writ of customs and services.[1] And if the tenant has sworn fealty to his lord, although he has done no other service to him, he cannot disclaim holding of his lord in any court of record, without an action immediately accruing to the lord to demand his fee in demesne. And if the lord

[1] 'If the tenant refuses homage, the lord may distrain his fee for the services which are in arrear. But he should make avowry in the first place for custom, as well as for service; as for homage and fealty, which are not properly services, but customs depending upon service. For homage is appurtenant to escuage, and is a security for whatever belongs to knight's service; and fealty is appurtenant to rent, and is a security for what belongs to socage. Wherefore the security should first be demanded between lord and tenant, as between others who make contracts. And the lord may make avowry of his own seisin, or that of his father or grandfather, against the tenant by whose hand, or that of his father or grandfather, he was seised; so, in more distant degrees, provided he can assign seisin of his ancestors within the time limited in writs of novel disseisin. But where he can only say that his ancestors, or himself, were seised of the homage or fealty, without seisin of escuage or rent, he cannot say that he is disseised; for rent gives seisin, and not fealty, nor homage. But the lord ought not to distrain but for arrears of rent or service, of which he can allege seisin as aforesaid; which seisin of rent gives him continuance of possession, and authority to distrain for the arrears, and for the fealty by reason of the service which is in arrear. And if he cannot allege seisin as aforesaid, he cannot make avowry for homage or fealty, although he have received them within the time limited, nor consequently recover by assise of novel disseisin for the replevin of him who should be his tenant, but shall be driven to his writ of customs and services.' (Note in MS. *N.*) Compare Brac. 83 *b*, 84; Fle. 211.

has been seised of any service of that fee by the hand of any actual tenant, although he was not seised by means of him who replevied the cattle, the lord shall nevertheless recover by assise of novel disseisin.

17. When homage is to be done, it should be done in this manner. The tenant should tender his homage to his lord with his hands joined in token of subjection and reverence; and the lord, in token of warranty acquittance and defence, ought to hold the tenant's hands between his own. And where homage is to be done to us, it ought to be done with these *words: 'I become your man for the fees and tenements which I hold and ought to hold of you, and will bear you faith of life and limb of body and chattels and of every earthly honour against all who can live or die.' Then the lord, whosoever he may be, whether ourself or another, and whether male or female, clerk or lay, old or young, ought to kiss his tenant, whether he be poor or rich, ugly or handsome, in token of perpetual affiance, and obligation of strict friendship. And when any one has done homage to us, every other lord shall be foreclosed of the allegiance of seigniory.

18. Where homage is to be done to any other liege lord than us, let it be done in these words: 'I become your man for the fees and tenements which I hold and ought to hold of you, and particularly for such a tenement named by certain quantity and certain bounds, and for such fees, and will bear you faith of life and

limb above[1] all people, saving the faith which I owe to the king and his heirs.' The lord may thus know for how much he will be bound to warrant his tenant.

19. If homage is to be performed to any other than to a liege lord, the tenant shall say thus: 'I become your man for the fees and tenements which I hold and ought to hold of you, *and in particular for certain land or a certain tenement in such a vill,' as is above-said, 'and I will bear you faith above all people, saving the faith which I owe to the king and to my other lords.'

20. When any one is to do homage for a pension *ex camera*,[2] as a servant may do to his lord, as his servant and not as his man, the words shall be simply these: 'I become your man, and will bear you faith above all

[1] In Bracton and Fleta the word is *contra*, and a misreading may be suspected. Compare the form in s. 17. But *outre* is found in all the MSS. which have been consulted, both here and in the corresponding places of ss. 19, 20.

[2] Compare Bracton, 79 *b* (§ 6); Fle. 20 (§ 18. 19); and see post, s. 31. Bracton says, that no homage was done for a rent *ex camerâ*, where no land was bound: Fleta, that it ought not to be done, and if it be done, no right of wardship or marriage arises. The general rule is laid down by Glanville, and repeated by Bracton: 'Pro solo dominio fieri non debent homagia alicui excepto Principe.' (Glan. li. 9. c. 2; Brac. 79 *b*, § 6). But it is mentioned by Bracton and Fleta, that it was the common practice for champions to do homage to their principals, which could only be *ratione dominii*: and see post, s. 31. This probably arose from the form in which the wager of battle was tendered: 'et hoc promptus sum probare per hunc liberum meum hominem.' (Glanc. li. 2. c. 3.)

people as long as the homage shall endure, saving the faith which I owe to the king and to all my other lords.' And such homages may be released by waiver of the pensions and by release of the obligations. And a recent change in the law has had this effect, that homages taken by feoffors to the prejudice of the chief lord are not binding or of any force.[1]

21. As soon as homage is performed, those who are bound to do any services to the lords for the tenements shall straightway take the oath of fealty,—if to us, in the following form, laying their hands upon the Holy Gospels: 'Hear this, ye good people, that I, such a one by name, faith will bear to our lord king Edward from this day forward, of life and limb, of body and chattels, and of earthly honour, and the services which belong to him for the fees and tenements which I hold of him, will lawfully perform to him as they become due to the best of my power, so help me God and the Saints.'

22. If fealty is to be done to any other liege lord than to us, then let it be done in these words: 'Hear you this, my lord John, that I, Peter, from this day, from this day forward, will bear you faith of life and limb, saving my faith to the king and his heirs, and the services, which belong to you for the fees and

[1] This passage is important, as shewing the age of Britton. The statute referred to as a 'new constitution' can be no other than the statute of Westminster the third, *Quia emptores terrarum*, passed in the 18th year of Edward I, A. D. 1290. See Introduction by the Editor.

tenements which I hold of you, lawfully will perform to you as they become due to the best of my power, so help me God and the Saints.'

*23. If any one refuses to do fealty to his lord, the lord may distrain his tenant until he does it. But no parcener or his issue shall swear fealty except to the eldest parcener, nor to him, unless the lord consents; but it shall be in the election of the lord to take his services by the hands of one or of all the parceners. For otherwise he might lose the wardships and marriages of the other parceners, by reason of the words in the writ of ward, where the plaintiff says that the ancestor of the infant, in respect of whom he demands wardship, was his tenant, and performed to him knight's service; which would be false, if the service was done to any other than to him.

24. From parcener to parcener fealty is sworn thus: 'Hear you this, John, that I, Peter, will bear you faith from this day forward, and the services due for my portion of the inheritance which was Theobald's, our common ancestor's, lawfully will perform to you as they become due to the best of my power: so help me God and the Saints.' And to the other lords thus: 'Hear you this, my lord John, that I, Peter, will bear you faith from this day forward, and the services which belong to you for the fees and tenements,'—and so on, as before, fealty of life and limb being never sworn except to us and to liege lords.

25. For allegiance is of so high a nature, that if two lords are at difference, the tenant must perform his

service to his liege lord against his other lord in his own person, and must perform his service to his other lord by attorney. And homage is so strong a bond between lord and tenant, that none may without judgment *or the mutual consent of the parties recede from the homage, so long as the tenant shall keep in his hands the tenements or fees, for which he is bound to perform such service; neither may the lord do anything which touches the disherison of the tenant or other great wrong to his damage in life or limb, nor the tenant to the lord after performance of homage, without by the very act breaking the league between them and extinguishing the homage.

26. If the lord be convicted by judgment of this great wrong, it shall be awarded that he be forejudged of his seigniory for ever, and be otherwise punished according to the offence, and that the tenant perform his homage to his superior lord. And if the wrong be convicted in the person of the tenant, let it be awarded that he lose the tenement or fee for which he did homage.

27. And we will that if any tenants disavow their lord, or disclaim holding of him in a court bearing record, the lord, on account of the homage and the oath of fealty which the tenant has broken, shall have an action to recover the tenement of such tenant of his fee in demesne, by the following writ: 'Command such an one that justly and without delay he surrender to such an one so much land, or so many fees, with the appurtenances in such a place, which the aforesaid

*such an one detains from him, and for which he did homage and service to him, and which ought to be his escheat, inasmuch as the aforesaid such an one, contrary to his homage and the oath of fealty which he had taken to him for the same, maliciously to his disherison disclaimed him for his lord and the holding of anything of him, and that, if he omits doing it, he be at a certain day and place before our Justices to show why he has not done it.'

28. This writ need not be pleaded by descent, but may be determined by a jury and inquest as to the fee and the quantity thereof. For the lord cannot properly count by descent by reason of the ancestors of the tenant, who have been always in possession. And whether he plead by descent or not, we will not have the action determined by battle or great assise; but we allow, if there be occasion, that the tenant may put himself on a jury after the manner of a great assise by these words, to wit, whether he has most right to hold this fee, or the tenement demanded, in demesne, or he who demands it, and to whom this same tenant, or some of his ancestors whose heir he is, did homage and service for the same, and afterwards, contrary to his homage and fealty, maliciously disclaimed him. And let judgment be given according to the verdict.

*29. The lord has likewise the same action against his tenant, where the tenant has performed to another that homage which he ought to have done to him, if it be found that there was fraud or malice in the act; or if he has done homage wrongfully to another after he

had rightfully performed homage to him. But if the tenant has done it by the distress of another, or by folly and not by malice, in such case we will that the lords and the tenant be made to appear in our court, and it shall be there discussed which has the better right to the homage. And he who is in the right shall recover, and he who is in the wrong shall be punished.

30. Whereas battle may not be joined between lord and tenant during the homage, we will that if any tenant would appeal his lord of felony or otherwise fight with him, that he surrender to the lord the fee or tenement which he holds of him, so that the homage may thus be released. For homage cannot in any other way be released.

31. If homage be done without the possession of any fee or tenement, that homage shall be of no force. Neither let homage be done for those fees or tenements from which no wardship or marriage arises.[1] Neither let homage for grand serjeanty, although it

[1] This rule was not of universal application, since homage was sometimes due from socage tenements, where neither wardship nor marriage could be claimed. Brac. 77 *b*; Fle. 207 (§ 17, 18). The rights of wardship and marriage were inseparably connected, as appears in the argument used in the following note: 'An infant under age marries a wife, to whom after marriage a knight's fee descends. *Qu.* Shall the lord have relief, or wardship until the husband's age? Some say wardship, because he must take his homage, and he ought to have the wardship of his tenant holding of him by homage. But wardship belongs where marriage belongs; and the marriage of the infant, even if he were unmarried, could not belong to the lord. Therefore the wardship does not belong to him.' (Note in MS. *N.*)

be performed, be of any force, unless the serjeanty be held of us in chief,—no more than homage done for a rent *ex camerâ*, or by a champion of other servant.

*32. For homage once properly performed between tenant and lord endures as long as they both live. And although homage fail by the death of the lord, yet it remains entire in the person of the tenant. For although the tenant does homage to the heir of his lord, and so from heir to heir, yet he does not thereby perform several homages, but renews several times the same homage. Therefore it is sufficient for a tenant to take up his land by relief once, although he does homage several times. But if several homages become due on the part of the tenant, as from heir to heir, we will that wardship or relief follow every homage. One tenant nevertheless may perform several homages for different tenements at one time, or at several times, to the same lord; but when homage has been once performed between lord and tenant, it ought not to be done again between the same persons for the same tenement.

33. Neither will we that the lord attorn the homage and service of his tenant against the will of the tenant to whomsoever he pleases, and particularly to the mortal enemy of the tenant, or to one who has nothing whereby he can warrant him if need be. But in other cases we are willing it should be so far permitted, that if a tenant will not of his own consent attorn to hold of another lord according to the wish of the lord, the feoffment shall be made

*by fine levied in our court between the lord and his feoffee, of the service of the tenant. By virtue of which fine, we will command the sheriff of the county by our writ of judgment to cause the tenant to come into our court to shew what tenements and what fees he holds of the lord and by what services. When he appears, if he says that he holds nothing, and does not claim to hold anything of him, it shall be awarded that he go quit, and that the lord be in mercy; and the lord may then obtain his remedy as above mentioned. If the tenant say that he holds of the lord certain tenements or fees, and by certain services, let it be awarded that he be released from the first lord and his homage transferred to the third party, to whom his lord has attorned him.

34. If the tenant say that he has done homage for the tenement, which homage is not yet extinct, and demand judgment whether he ought to perform two homages to two persons for one tenement in the lifetime of his first lord, from whom he does not wish to separate; in such case we will not have it awarded that any do homage against his will to another than him to whom he first did it in the lifetime of his first lord. But if he can give no reason why he ought not to do fealty to him to whom he is attorned, let it be awarded that he take the oath of fealty to him; and if he will not do it of his own accord, let it be awarded that the purchaser distrain the tenements or the fees whereout the services should issue, until he shall do fealty to him. For whosoever grants service, grants

*a right to distrain. And when the feoffor dies, we will that the homage be immediately extinct in the persons of the heirs of the feoffor, and take place anew in that of the purchaser according to the force of the fine levied in our court.

35. And if such purchaser distrain the tenant for homage or for other service, and the tenant cause his distress to be replevied, and in his pleading says that he wrongfully took his cattle, inasmuch he does not claim to hold anything of him, yet notwithstanding such replication, we will not that he cease to distrain; for in this case distress and disclaimer may well stand together.

36. Nevertheless there are cases, in which such tenants may avail themselves of the exception, that they ought not to be attorned against their consent, as where a lord, for the purpose of burdening his tenant and discharging himself, wishes to attorn his tenant to one who has nothing whereby he can warrant him, or satisfy him for the value, if need be. In this case the exception shall be allowable to every tenant, so that it shall not be in the power of any lord, on account of the smallness of the service, to waive his fee, in order to be discharged from the risk of warranty.

*CHAPTER V.

Of Reliefs.

1. If any tenant is of full age at the time of the death of his ancestor whose heir he is, let him immediasely go and find his lord, and do him homage and relieve his inheritance which lies dormant and unsupported upon the death of his ancestor. Which relief is reduced to a certainty among the articles of the Great Charter.

2. But if anyone has been so long in ward of his lord after the death of his ancestor, that the lord has taken any sort of profits of his inheritance in however small a quantity on account of wardship, the heir shall be quit of relief. And although homage be often renewed on the death of several lords, yet no tenant shall be obliged to relieve his land more than once in his lifetime, and his heir another time, and so from heir to heir, as above is mentioned in treating of homage.

3. And although any one alien his tenements, yet the lord of the fee may not demand of the feoffee any relief. For we will that all purchasers shall be quit of relief for their lives in respect of the tenements purchased. So likewise, all those whose lords are changed. And those who hold for term of life only.

And those, who marry women, who were some time in ward of their lords, that is to say, for the inheritances of their wives. And as we will not that any under the age of twenty-one years shall give relief, so *neither will we that relief be paid to any under that age, nor before the lord is seised of his inheritance, nor before the lord has restored to the tenant the charters of his inheritances, if in his hands.

4. Although the law does not require relief in the case of any tenement other than a fee of chivalry or grand serjeanty, yet for tenements which are not of such fees, where the service is fixed, we will that every tenant give to his lord in acknowledgment of his seigniory the amount of one year's rent, so that the lord in that year shall have as much as double his tenant's rent. And in such acknowledgments the same rule shall be observed as has been mentioned concerning reliefs, that none make the acknowledgment before he is of age to take the oath of fealty,—nor more than once,—nor until his lord be of full age and in seisin of his inheritance. And for tenements held in fee-farm or in free alms, let nothing be given, except what is specially expressed in the deed.

5. With respect to heriots, we will that no tenement, nor any heir, be bound. For the gift of an heriot is a payment made, on account of the death of the tenant of some lord, of the best beast found in the possession of the deceased, or of one not the best, according to the appointment of the dying person, to the use of the lord; which payment does not at all concern the heir or his

inheritance. Neither is it to be compared with relief; for it arises more out of favour than of right, and is more paid by villains than by freemen.

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*CHAPTER VI.

Of Mortdancester.

1. It is always the duty of heirs, when they come to their inheritances by succession, to permit their lords to make a simple seisin,[1] without doing any sort of damage, whereby they may be recognised as lords. And if such heirs are under age, and ought to hold by knights' service, let the lords first take their homages, and afterwards have the wardship of their fees. If the lords find their fees vacant, they may seize them simply in right of seigniory, and fully in right of the lawful heir, whosoever he may be. And this last clause shall be a justification for all such lords delaying

[1] This is the rule laid down by Bracton (f. 252 *b*), and confirmed by the Statute of Marlborough, c. 16. Lord Coke, in commenting upon this statute, interprets 'simple seisin' to mean relief. But although in all probability it soon became the practice to be contented with this recognition of seigniory, the words of the statute, as well as those of Bracton, appear rather to contemplate a formal possession of the tenement, it being expressly provided that the lord was not to take or remove anything from the land, or to eject the heir. It will be seen that in the next sentence of the text, the simple, or formal, seisin of the lord, is contrasted with the full, or beneficial, possession of the heir.

to take the homage or to yield up the inheritance to any other than the lawful heir.

2. If any lord through malice or negligence shall take the homage of one who is not the right heir, where the lord well knows that there is a nearer heir, or has reason to suspect it by another offering himself as right heir, or by common report of the neighbourhood, and after receiving such homage, shall deliver to him seisin of the inheritance in demand, and the right heir shall then bring an assise of Mortdancester against the tenant, *and the tenant shall vouch the lord to warranty by reason of the homage which the lord received of him; we will that in such case the lord shall be bound to warranty and to exchange, although he alleges by exception that he took his homage saving every person's right, since he took the first step to disinherit the right heir. But if no other had claimed the inheritance, and the lord had had no suspicion that another was heir, it would have been reasonable that such a condition in the taking of homage should have been allowable; and in such a case we will that such conditional receptions of homages shall be allowed, but in no other cases.

3. If any lord be in seisin of his fee, and be doubtful of several persons who demand the inheritance and offer themselves as heirs, whose homage he ought to take, such lord may keep himself in the inheritance, without claiming anything but the seigniory, until he be certainly informed which is the nearest heir to the deceased ancestor.

4. If it happens that the elder brother and right heir is out of the country at the time of the death of his ancestor, and the younger brother finds the inheritance vacant, and thrusts himself in, claiming the inheritance as right heir; in such case the lord may take the homage of the younger brother, under condition that seisin of the inheritance be delivered to the elder brother or his *issue whenever he shall appear to demand his inheritance, whoever be then tenant. For if the lord eject the younger brother after he has been seised, he shall recover by assise of Novel Disseisin, to hold nevertheless according to the condition aforesaid. And if the lord is in seisin, and keeps out the younger brother, who proceeds against the lord by assise of Mortdancester, and it is found by the assise that he has an elder brother, seisin shall be awarded to him under the before-mentioned condition. But if a bastard keeps himself in seisin, where no heir offers himself for the inheritance, in such case it is lawful for the lord to eject such bastard, except where his long possession through the negligence or weakness of the lord constitutes a valid title to the freehold.

5. Therefore it behoves every lord to seize his fee without delay upon the death of his tenant, if he finds it vacant. And if the heir is of full age, and in seisin, and will not suffer the lord to have seisin nor acknowledge him as lord; in such case the lord may lawfully keep himself in seisin, together with the heir or the person who pretends to be heir, but he must not eject him; and if he can do nothing more, he may disturb

such heir in the enjoyment of his seisin until *he acknowledges him as his lord. When he shall acknowledge him, let the lord forthwith take his homage and security for his relief, and his oath of fealty, and that he will lawfully perform to him the services which belong to his inheritance; and let his inheritance and the free management thereof be then restored to him without delay.

6. If the lord obtains the first seisin, the heir being of full age, and the lord will not acknowledge him as heir, his first remedy is by assise of Mortdancester. And when any person wishes to proceed before our Justices for an inheritance thus detained from him, let him first find security by known pledges to prosecute his plaint, if he has such pledges ready; and if he has not, we will command the sheriff of the county to take security; and if the plaintiff be so poor that he cannot find security, the pledging of his own faith shall be sufficient; and such writs as his suit requires shall be forthwith granted to him. And if the plaintiff is under age, he need not find security to prosecute his plaint, nor need any term be mentioned in his writ.[1]

7. As this assise is limited between certain persons, so likewise it is confined within certain degrees; for assise is to be granted *of the death of the father, mother, uncle, aunt, brother, and sister, and not ascend-

[1] That is, no term of limitation need be named, since, if his immediate ancestor died seised, the minority of the heir is itself a proof of the recent accruer of his title. See Bracton, f. 254.

ing higher, as to the grandfather, nor descending lower, as to the nephew; so that neither of the death of the grandfather nor of the death of the nephew alone,[1] nor in any higher or lower degree is this assise ever allowed. And the more clearly to see of what ancestors this assise lies, let four degrees be set down, of which father and mother make one degree, uncle and aunt on the father's side the second degree collateral, uncle and aunt on the mother's side the third degree collateral, and the child of the father or of the mother, the son's own brother or sister, make the fourth degree in the right line descending from the father and the mother. And this fourth degree is divisible into three, as appears by the above figure.

8. And if the son is to institute this assise against any stranger in blood, being tenant, then this assise may well be had of the death of his father, or of the death of his mother, and not in the reverse case.[2] For this assise always supposes priority in the ancestor, or at least equality; and requires to be brought by the lower of the higher, ascending and not descending, and also from equal to equal, as of the death of the brother by the brother or by the sister, and of the death of the sister on behalf the brother or sister. And if any one in a more remote degree is

[1] This word 'alone' appears to have reference to the exception afterwards stated concerning the case of a joint assise. See s. 10.

[2] This appears to imply the possibility of a father claiming as heir to his son, though not by this assise. See post, l. vi. c. 4, s. 4, and note there.

aided by this assise, it will be rather in consequence of some other person who makes the assise, than for himself, as shall be afterwards mentioned. Therefore we will that if any separate assise be brought to trial concerning the death of any person not within these two degrees, the assise shall fall, unless some person is joined who may make good the assise.

9. Neither by this assise nor by any other possessory writ shall any proximity of blood be tried; that is to say, between demandant and tenant claiming by the same descent; but between all strangers in blood the assise shall lie so far as it may extend. And such kindred as cannot be aided by this assise shall have their remedy by our writs of Cosinage, of Ael, Aele, Besael, and Besaele; which writs do not determine anything of the mere right, but spring out of this assise, and determine by means of juries the right of possession. The assise however takes place among privies of blood claiming by different descents, as between two brothers by different fathers or by different mothers. *For the brother begotten by any other father is an entire stranger, so far as concerns the demanding of anything upon the death of the father or ancestor of the other brother, and so of two brothers born of different mothers. But this assise does not lie between a legitimate brother and a bastard seised of the other's inheritance, because the proof of the proximity of blood cannot be tried by any possessory plea.

10. Sometimes two or three persons in different

degrees are joined together, and obtain their remedy by assise of Mortdancester, where the plea partakes of the nature of an assise of Mortdancester and of Cosinage; as in the case of an inheritance which descended from one stock to two persons, constituting a single heir, by different lines, as to a daughter on the one side, in whose person the assise of Mortdancester takes place, and to a grandson by another daughter on the other side, in whose person the writ of Ael lies, being in a degree to which assise of Mortdancester does not extend. In the which case we will that the recognitors of the assise come and make recognisance upon their oath, whether the father (or mother) of the daughter, and the grandfather (or grandmother) of the grandson was seized in his demesne, &c. And what is said of the seisin of the grandfather or grandmother as regards the grandson may also be said and reputed for law concerning their brothers and sisters, uncles and aunts of the daughter, and cousins[1] to the grandson, since they are in the same degree with the grandfather and grandmother; but higher the assise of Mortdancester does not ascend.

*11. And because there is more speedy remedy in the assise of Mortdancester than in the plea of Cosinage de Ael, we will that such plaintiffs have relief by assise of Mortdancester, whether the parties wish to join in one plaint or not, so that the daughter shall not be able to proceed by an assise without naming in the writ the grandson or his issue in what-

[1] That is, as I understand, great-uncles and great-aunts.

soever degree found; nor can the grandson or his issue proceed by writ of Cosinage in the lifetime of the daughter who is his co-parcener and nearer by one degree or more. For the nearest person makes the assise, and draws to itself the person in the more remote degree.

12. There are other writs somewhat resembling this last double action, as of the death of the uncle or aunt in a partible inheritance[1]; where in every case the nephew ought to be joined in the same action with the uncle and the aunt in an assise of Mortdancester, and this action is not mixed with Cosinage; and the recognitors of the assise ought to come and make recognisance upon their oath whether the uncle or the aunt on the father's or mother's side of the nephew demandant on the one part, and the brother or the sister of the uncle or the aunt on the side of the other demandant, whose heirs these two demandants are, was seized in his or her demesne.

13. Where the inheritance is not partible, and the uncle brings an assise of Mortdancester of the death of his father or mother, uncle or aunt, *and the nephew by the brother brings a writ of Cosinage for the same tenement against the same strangers, or if both have instituted an assise of Mortdancester against the same stranger, that is to say, the nephew,

[1] It will be remembered that in early times, by common custom, tenements in socage were partible or divisible among the sons. See Glan. l. 7, c. 3; l. 13, s. 11; Brac. 76; Fle. 309 (§ 2).

upon the death of his uncle or aunt, and the uncle of the same nephew, upon the death of his brother or sister; in both these cases the nephew is to be received to the inheritance before the uncle. And if one of them either by assise or by Cosinage demands against the other an inheritance descending from the same stock; in such case it shall be adjudged in favour of whichever party is in possession, if the tenant claims by the same descent as the demandant does, although the demandant may have a better right; and let him afterwards proceed by writ of right, by which writ alone the proximity of blood and the right can be tried.

14. If any stranger, as, for example, the chief lord or other, deforce parceners of their inheritance, and some of them are diligent in demanding their inheritances and others negligent, it behoves the diligent, whether one or more, to make his plaint and purchase his writ in the names of all the parceners who have not their portions, by reason of the unity of the right which remains united until division; after which any party who will may sue; and those who choose to sue shall have remedy by this assise of the death of their common ancestor.

*15. Whereas this assise does not lie between privies of blood, and in particular between parceners who take as one heir, we propose, before more is said of the assise, in part to explain by what actions, and by what writs, and how one parcener may compel his other parceners to make severance of their inheritance which

they hold in common, so that each may know his several, and that each may have his reasonable portion according to his due; and if any one be deforced of the whole by his parceners, how and by what writ he may have redress, and by what writ he may recover part if he be disseised of part.

CHAPTER VII.

Of a Mixed Action.

1. There is a kind of action which may be tried in our court, called a mixed action, inasmuch it concerns the person against whom the demand is made as well as the thing demanded; and therefore is pleadable by personal distresses and by real also, as by the great and little *Cape*. Of such kind is an action to sever a thing held in common, wherein each party is plaintiff and defendant, as where strangers without affinity or kindred have something to be divided between them which they hold in *common, as in the case of neighbors who proceed by action to divide some tenement between them, so that each may have severalty. Another kind of mixed action is that called in the Imperial law *actio familiæ herciscundæ*,[1] which takes place

[1] 'Nota hic de actione que dicitur Familia Herciscunde.' (Note in MS. *N*.) The word *herciscundæ*, (from *herciscere*, 'to divide.') which is scarcely found except in this connection, ap-

between those who have a common inheritance to divide.

2. Nevertheless two actions[1] do not arise as soon as the inheritance or other thing is held between such parceners in common, but from the time that any of them begins to compel the others to a division. And this action obtains among several parceners and co-heirs, as where several brothers[2] or sisters or their issue hold an inheritance in common as one heir, and wish to proceed for a division, so that every one may have his portion in severalty. It also lies between parceners who are as one heir in respect of a common tenement which they are desirous of having divided, and which is divisible by reason of the tenement. These actions are called mixed, because either party is plaintiff and either defendant, that party being plaintiff who first complains.

pears to have been taken for a proper name by our author or his transcribers.

[1] The word *cestes*, 'these,' appears to be wanting at the beginning of this sentence. In Bracton it is, 'Sed hæ duæ actiones;' but in Fleta we find, 'Sed duæ actiones.' Accepting the omission, we should perhaps translate the words, 'double or mixed action.' As to the relation of this work to Fleta, see the Introduction by the Editor.

[2] The words 'brothers or' seem to have crept into the text by mistake. The two cases intended in this and the following clause are, first, where a tenement is divisible by the common law among sisters; secondly, where a tenement is divisible by custom (par la resoun del tenement) among brothers. See the corresponding passage in Bracton and Fleta.

3. In these two cases, if any parcener demand against another his reasonable share, and the tenant or tenants make default, there shall be taken into our hand, out of the entire common inheritance, the portion which belongs to the plaintiff; *and thus the distress will be real and not personal. And such shall be the proceeding in a plea *de rationabili parte*, which takes place where one is denied to be a parcener and is deforced of his share. But where all are acknowledged to be heirs and parceners, there should be no plea *de rationabili parte*, although an action may arise on account of one of them having less for his share than he ought to have.

4. It is proper therefore in such case, as soon as the parceners have performed their homage to their chief lords and are desirous to have their inheritance divided between them, so that each may know his several portion, that an extent should first be taken, and that according to the extent partition should be made between them. And if such parceners would have our aid in making the division, whereby an oath is taken to do it lawfully, then at the request of any plaintiff parcener we will command the sheriff that he do by knights and other good men of the county, in the presence of the parceners, if they will be there, cause an extent to be made of all the lands and tenements which were of such an one (the common ancestor of the parceners), in such a county; and according to this extent livery shall be made of his share to every parcener.

5. The extent shall be made in this manner.[1] First let an inquest be taken upon the oath of the jurors, how much the buildings in the capital manor, and the moats, vivaries, hays, pools and other *fisheries are worth by the year, clear of outgoings. Then let the true value be inquired of the gardens, curtilages, dovecots, and the other issues within the court; then how many fields and closes of arable land there are in the demesne, and how many acres each close contains, and how much every acre is worth by the year; and how many acres of meadow there are in demesne, and how much every acre is worth by the year; and how many acres there are of every kind of pasture, and sufficient for how many beasts, and what kind of beasts, and how much the pasturage of one beast is worth by the year according to the kind of beast. Under this article is comprised as well common of pasture for sheep, hogs, and goats, as pasture several for oxen, cows, and heifers, and for studs of mares and colts in woods or parks, or in enclosures or elsewhere in their severals. Afterwards let inquiry be made concerning the said woods, how much each acre is worth by the year, to keep as wood, or to assart and improve; and how many acres the parks and the other demesne woods contain; then, of the value of the reasonable estovers from land belonging to others, how much they are worth by the

[1] This section much resembles the ancient summary, called *Extenta manerii*, printed among the *Statuta temporis incerti*, in the Statutes at large.

year, as wood for building, fencing, and burning, and rights of fishing in another's river, and of digging turfs in another's soil or in some common soil and other necessaries. Afterwards let inquiry be made of *honey, and of pannage, and of mast of acorns, nuts, and other kinds of fruits, and of all manner of profits arising from forests, woods, moors, heaths, turbaries, wastes, and every other kind of commodity issuing from commons, how much they are worth by the year. Then, of rents issuing out of the fees belonging to the manor, and of rents due to the manor for common granted in the fees of the manor, and of all other sorts of rents. Next, of mills, vivaries out of the manor, and several fisheries, how much they are worth by the year. Then, of pleas and perquisites of courts and of franchises, markets, warrens, rabbit-warrens, traverses, tolls, customs, and views of frank pledge, and of the yearly issues of every kind of franchise: and then, of the advowsons of churches, how much each church is worth by the year; and of suits of freeholders, how much each suit is worth upon every default. It should also be inquired concerning aids, presents, heriots, and every kind of annual compliment. And afterwards, of villains, and of the villenages let every house be separately extended, and then their closes, meadows, and pastures; also their rents, services, talliages, and customs.

6. The whole amount of the extent shall be entered on a roll, together with a verdict. And for every marc in the value of a church, one shilling shall be put

in the extent; *so that if the church be worth one hundred marcs a year, the yearly value shall be extended at a hundred shillings; and according to this valuation those who do not keep the advowson of the church shall be compensated in land. For an advowson is not divisible; but if it were to be sold, the reasonable price would be according to the annual value of the church. This extent being so made, shall be enrolled and sealed under the seals of the sworn extendors.

7. If the parceners are present, they shall be asked whether any of them can show cause why any person who calls himself a parcener ought not to have his share of the inheritance. And when it is declared how many are to divide the inheritance, or where no cause can be shown why all should not share, or if none of the parceners appear, and the summons is proved, let the inheritance be forthwith divided into so many parts as there are parceners, according to the extent, so that each portion may be severed from the other by divisions and bounds.

8. Afterwards let the parcels be entered and specified in several scrolls, and let those scrolls be delivered to some layman who knows nothing of letters or of the contents, and let him deliver one scroll to each parcener; and according to the lot of those scrolls let each parcener take to his share. *And if any of the parceners has improved or damaged the land while it was in his hands, either in part or in the whole, let such damage be taken into account in the extent against the person who did it, and likewise let his por-

tion be increased according to the improvement he may have made.

9. If the sheriff be negligent in this matter, we will send our precept to the coroners of the district, or we will assign by our letters patent some Justice to execute it. For such delivery of shares touches very nearly upon the right of property by reason of the assignment of boundaries; and it is therefore necessary that such partitions be discreetly, properly, and lawfully made.

10. And whether such deliveries are made by lot, or by election, the eldest parcener choosing first, and so one after the other according to their ages, let the parcels be presently imbreviated on a roll, that is to say, what each parcel is, and how much, and between what bounds the parcel is assigned, and to what parcener by name, so that all the parcels of each share be enrolled,[1] as well demesnes as fees and services and dowers or other lands held in any manner for term of life, which are to revert after the death of the tenants, and to whom these lands are to revert, and to which of the parceners the services of such tenants are assigned. And he to whom any service is assigned towards his share shall forthwith take the homage of the tenant;

[1] 'Upon a division being made, each parcener has a like title to his several. This title, when the division is made by the king's mandate, is a title of law, and requires to be vouched by record. But division made by assent of parties requires to be averred by specialty of writing, upon which issue shall be joined (le averrement se joyndra).' Note in MS. *N.*

and he who has to await the *reversion shall have assigned to him in the meantime a portion of some other tenement according to the value of the land which is to revert to him, to be held until that land falls in.

11. If any one of the parceners die after the partition, not having any heir of his body begotten, then his share shall accrue to the other parceners or their issue, to be divided between them by equal portions, yet not by succession of inheritance, for none of them is heir to the other, but by right of accruer.[1]

12. And if any one of the parceners is not contented with the partition, we will cause the proceedings and the record to come before our Justices of the Bench; and the plaintiff shall there state what errors have been made, and the errors shall there be redressed by a new extent if need be. And after assignment of the shares, either by lot or election, let seisin be executed by judgment of our court.

[1] 'Whereas it is said that the parceners shall have the proportion of the one who dies by right of accruer, our companions say (si dient nos compaygnons) that this is not so. For after division, each parcener is inherited of his portion (est enhite de sa purpartie), as if he had purchased of a stranger; and if he had purchased of a stranger, and died without issue, his brothers or sisters would be his heirs.' (Note in MS. *N*.) The statement in the text, that the portion is taken *per jus accrescendi*, is derived from Bracton, who however does not say that the parceners are not heirs to each other.

CHAPTER VIII.

Of the Division of Inheritances.

1. All inheritances do not fall into partition or hotch-pot, to be divided among parceners; as the capital manors or capital castles of counties or baronies, and as parks, vivaries, and advowsons of churches. *But where the inheritance is divisible, the eldest brother or the eldest sister by right of seniority shall have the capital mansion for his share, unless this mansion be the head of an earldom or of a barony, as is said above, by reason of the right of the sword, which does not bear division, and of the risk that the strength of the realm may be diminished thereby, which strength was originally constituted and divided by counties and baronies.

2. But if there are several capital houses or castles of earldoms or baronies, then partition may be made of such castles or houses, yet so as to leave them in their entirety, saving to the eldest the prerogative of choosing first. For in such cases the rights of the sword are preserved uninjured and undismembered, which would not be if one capital mansion of an earldom or barony was divided among several persons. For if there be but one castle or one house as head of the earldom or barony, that shall remain entire

to the eldest, so that a proportionate allowance be made to the others according to its value, out of the remainder of the inheritance.

3. If there are several capital mansions, then let the eldest have the first choice after the inheritance is divided into parcels, and the second next, and so of the other degrees, descending from degree to degree. And if there are more parceners than there are capital mansions, then let that parcener who has no house fallen into his share have the value of a house delivered to him out of the entire inheritance. *And if there are more capital houses than parceners, let the houses in excess be divided among them in equal portions, unless the parceners agree that some or all of them shall remain entirely with one or more of the parceners, and that an allowance in proportion to the value be made to the others. And if there is but one capital mansion, let not that be subject to partition, provided that there is some other part of the inheritance out of which satisfaction can be made to the parceners of the value of their proportions, supposing that the inheritance is partible by custom. If otherwise, it will remain entirely to the eldest.

4. With regard to lands in ancient demesne, the ancient custom of the place shall be observed; for in some places it is held as a custom that the inheritance is divisible among all the children, both brothers and sisters; in some places, that the eldest son shall take all and in others, that the whole shall go to the youngest brother.

5. Sometimes the hall of a house is divided into two halves, or into several parts; and sometimes it is separated from the chambers, and so of other buildings, as shall be mentioned in treating of pleas of dower. But advowsons of churches, servitudes of soil, and such kinds of incorporeal things, are from their nature incapable of partition. Nevertheless several advowsons and several rights may admit of a partition among parceners, where each right remains entire. *But the advowson of a single church ought not to be divided, although sometimes the body of the church may have become partible or divisible in ancient times by reason of different baronies. For if a church is void by the death of the parson, and several parceners are patrons as one heir and one body, by reason of the unity of their right, no one has a right to present to such church without the others, until the advowson be wholly assigned to one of the parceners as part of his share, or so limited by agreement between them, that one shall present one turn, the second the next turn, and so on in succession. And if any one before such agreement offers to present by reason of seniority, the clerk shall not be admissible to institution, so long as any of the parceners oppose the presentation.

6. The like of servitudes; for if a tenement to which a servitude is due falls in partition and division among parceners, the servitude is neither diminished nor altered, but remains in its unity so far as regards the land charged. And although a servitude is divided into several parts, as regards the land to which it is due

by reason of the plurality of parceners, and although there may be several entire rights thereto, yet the land shall not be more burdened than it was before the partition, and thus the servitude shall remain in its unity.

7. There are some parts of an inheritance which will not admit of a division, *and therefore ought to be wholly assigned to one of the parceners, satisfaction being made to the others according to the value out of the remainder of the inheritance. Such are vivaries, fisheries, hays, and parks, provided there are other hereditaments whereout satisfaction may be made in proportion to the other parceners. Nevertheless the parties may come to terms, and it is allowable, if they so agree, that one of them shall have one draught or one fish, or one beast in the park, and the second another, and a third the third and so on.

8. With respect to land or other hereditament before given with any of the parceners in frank marriage, the usage shall be this; that if she to whom the land was given in marriage chooses to share in the inheritance whereof their common ancestor died seised in demesne as of fee, she shall yield up and relinquish that which was before given her in marriage, and it shall fall into hotchpot with the remainder of the inheritance, and then she shall take her share according to the chance of the allotment with her other parceners. And if she keeps to her estate in marriage for her share, still it must be seen whether this is worth more than belongs to her proportion or not. For if

more, a measurement shall be made,—and this whether the land came by descent from the part of the father *or of the mother or by purchase,—and the excess shall be divided by equal portions between all the parceners. The same usage shall hold where a mother in her widowhood gives to any of her daughters all her estate held in marriage. But where the feoffment is absolute, partition never takes place. For we will that such gifts by pure feoffment without mention of marriage shall be held as valid in the case of privies of blood as they would be in that of a stranger. And if either father or mother or both give to one of the parceners in marriage all their inheritance, in such case the inheritance shall not fall into partition, because nothing remains to be divided between the other parceners.

9. If the eldest die in the lifetime of her father or mother from whom the inheritance is to descend, the second daughter shall have her prerogative of election, although the deceased have left behind her a son or a daughter lawfully begotten, because the eldest did not survive her ancestor, whose heir she would have been. We have next to deal with the action *de rationabili parte.*

CHAPTER IX.

Of the Plea de Rationabili Parte.[1]

1. When any of the parceners is deforced by his coparceners of all his reasonable share of the inheritance of their common ancestor, the proper proceeding is by the writ close *de rationabili parte*, and not by assise of Mortdancester. *For this writ, and no other, tries and determines the right of possession between parceners and coheirs, because at the instant of the ancestor's death every parcener has the same undivided right, and the mere right descended to each equally,—the youngest as well as the eldest,—which is not the case between brothers or other kindred, not being parceners, where the mere right descends sooner to one than to the other.

2. There are other kind of writs *de rationabili parte*, for there is one concerning the possession, and three concerning right. The possessory writ does not lie between strangers, but between parceners only, and it is a close writ. Its effect is to require an answer as well from several to one as from one to several, wherefore he deforces them of the reasonable share

[1] The greater part of the materials of this chapter appears to be in Fleta, though not always in the same order, and not in Bracton.

belonging to them of the inheritance which was of such an one their father, mother, brother, sister, uncle, aunt, grandfather, grandmother, or cousin, who lately died, as it is said. Or if any parcener be in a more remote degree than another, then thus: of the inheritance which belonged to such an one, father of the aforesaid Helice, and grandfather of the aforesaid Peronel, and so on according to the degrees.

3. This writ lies only between parcener plaintiff and parcener tenant, and extends as far as the time limited in an assise of Novel Disseisin, and not further, by reason of the word 'lately,'[1] which does not suppose a longer time. And this writ extends to every ancestor in the ascending *line as far as the great-great-grandfather, and in the descending to the nephew in the lowest degree, so far as the time aforesaid will permit. If the plaintiff in this writ count in the right, the writ is abatable for the reason which shall be given in the Chapter of Cosinage.

4. There are three writs of right, and these ought to be open writs, and are pleadable in the court of the chief lord. Two of them lie at any time either within or after the term aforesaid; whereof one serves to recover a part of the inheritance, where a parcener is seised of part, and lacks the residue of his reasonable share; and the other serves to recover the appurtenances, in all or in part, where he is deprived of them by his coparceners. The third writ of right takes place after the time aforesaid, to recover the whole

[1] The Latin word in the writ is *nuper*. Fle. 315 (§ 40).

of the reasonable share ; as, where one parcener is deforceor, and the coparceners negligently omit to demand their portions beyond the time limited in an assise of Novel Disseisin; for thenceforth such sleepers shall be foreclosed of their recovery by the close writ *de rationabili parte*, so that they shall never recover against the parcener deforceor but by writ of right patent *de rationabili parte;* in which writ exceptions lie as in the great writ of right, but not battle, nor great assise, by reason of the nearness of blood.

5. When the close writ is obtained, and surety found to prosecute, and the summons made and proved, in case the tenant parcener *or parceners make default, although the action seems to be personal, because no certain thing is demanded, yet no attachment shall be made except by the great *Cape*, of the bulk of the inheritance to the value of the share of the plaintiff.

6. If several parceners are tenants in common or in proportions, and the writ does not comprise them all, the writ is thereby defective and abatable. For their right is so far one, that one ought not to answer without the rest on account of contribution. And if any one of them do so, it shall not prejudice the other parceners tenants. And where several parceners are plaintiffs, unless each makes his plaint separately, the writ shall be abatable, because such a writ obtained on a joint plaint cannot lead to a judgment that every one shall have his reasonable share. In this plea there lies

neither view, nor voucher to warranty, nor abatement of writ for non-tenure.

7. When the parties are come into court, the deforceor may plead that the land is not partible; or that the plaintiff hath no right in his demand because he is not of the blood; or, although he be of the blood, yet he ought not to have any share, or to be a parcener with the tenant for a certain reason; or although he should have been a parcener, yet he was excluded from the succession by the form of gift of his ancestor.

*8. If any one who was enfeoffed of all or a part of the inheritance by the common ancestor of the parceners is impleaded thereof, he shall vouch to warranty, not one only, but all the parceners; and if he do not, and the voucher be challenged, the tenant may lose by his foolish voucher. For since there is only one right, it would be unjust to make one of the parceners answerable for the entire right, and to oblige him to make warranty or exchange without the rest of the parceners making contribution according as belongs to each of them; for else he would not retain his reasonable share. Nevertheless where one alone is vouched, and he enters into warranty without demanding aid of his parceners, the other parceners, if he miscarry, shall not be bound to contribute to make up his share.

9. Although the issue of one of the sisters be begotten in matrimony by a villain, yet such issue shall not thereby be barred from recovering his reasonable

share from his aunt. But felony, bastardy, and the like general exceptions, may bar such plaintiffs from recovering their proportions.

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*CHAPTER X.

Of Summons, and other proceedings in the Assise of Mortdancester.

1. The writ of Mortdancester being obtained according to the nature of the plaint, and the patent produced to our Justices, we will that, inasmuch as assises of Mortdancester and Novel Disseisin are pleadable only in the counties where the tenements lie, our Justices, upon sight of our letters patent, shall set a day to the plaintiff, and afterwards give notice by their letter to the sheriff of the county on what day and at what place in the county they will come to hear the plea. Then let the plaintiff take that letter and our writ close and carry them to the sheriff, and keep the patent by him until the day of plea.

2. The sheriff having received our writ, and taken pledges to prosecute, if required by our writ, shall forthwith cause jurors to be chosen of the neighbourhood by the assent of the parties, if they agree. And when they are chosen, let two freemen, terre-tenants, be enjoined to summon these jurors in their proper persons, as shall be mentioned in the chapter concerning summons in the writ of right. And the sheriff shall command them to summon the jurors to be at a

certain day and place before our Justices, to make recognisance, whether such an one is dead, and whether he died since the time named in our writ seised of the tenement in such a vill in his demesne as of fee, and whether such plaintiff is his next heir; and that in the meantime they view the tenement, as before has been mentioned among the proceedings in novel disseisin, so that every juror *in all particulars be distinctly warned, fifteen days at least before his coming into our court, upon what point he ought to inform himself. And let the summoners be charged to be there on the same day to prove their summons; as is the rule with all summoners upon every summons.

3. Upon the day named the parties may be essoined *de malo veniendi;* and if the plaintiff is essoined on the first day, and the tenant offers himself, then another day shall be given to the tenant and to the plaintiff's essoiner; at which day if the plaintiff does not appear to warrant his essoiner, the writ shall abate, and it shall be awarded that the tenant go quit without day, and that the plaintiff and his pledges to prosecute be in mercy. And if the plaintiff appears, and the tenant causes himself to be essoined *de malo veniendi*, it shall be allowed, if he is of full age, and another day shall be given to the plaintiff and to the tenant's essoiner; so that in this assise one essoin *de malo veniendi* lies for each party, and no more essoins are allowed, although there be several demandants or several tenants where they demand or hold in common. But let no essoin be allowed to any person under age for

the reason which shall be given in the plea of right. Neither let any essoin be allowed to the tenant though of full age, as against an infant under age demandant, but let the assise be presently taken by default of the tenant, and no resummons take place.

4. If the tenant is under age, regard must be had how and by what title he is in seisin; for if he is in any manner seized by title of purchase, the assise immediately lies; but in such case he may avail himself of an essoin as well as one of full age. If by title of succession, another inquiry is necessary; for if his ancestor died seised in his demesne as of fee, he shall not answer, but the assise shall stand over till he is of age, however he may perchance answer to the writ of entry of the disseisin of his ancestor. But if he did not die seised in his demesne as of fee, inasmuch as he held only for term of life, the assise shall not stand over. And if he died seised for a certain term under a condition, or by judgment of our court, in such cases it will be necessary to know whether the condition is satisfied, or the judgment executed, or not; and the assise shall pass or stand over accordingly.

5. If there are several plaintiffs who demand by this assise, or if it is brought against several tenants, then it must be observed whether they are parceners entitled as one heir, or strangers to each other, and whether one or more are under age, or all of full age, and whether they hold in *severalty or in common. And although one or all or some of the plaintiffs are under age, yet the assise shall not stand over respecting

the tenements held in severalty, on account of their nonage, except only as against the chief lord. But if one or more or all of the tenants are under age, and their tenements are not severed, but are held in common, in such case the assise shall be stayed until the youngest has attained his age and they are all of full age; and this by reason of the unity of their right, which has not yet been divided, and concerning which one cannot answer without the other as long as the tenement is held in common. But if each knew his several, then the assise should pass so far as regards those that are of age.

6. Where several daughters and coheirs have brought this assise against the chief lord, the assise shall pass for those that are of full age, provided there is no dispute respecting their marriages;[1] but with regard to the others who are under age, the assise shall stand over till they are of age; and when they have attained their age, they shall recover their reasonable shares either by this assise against the chief lord, or by writ close *de rationabili parte* against the other sisters, if they are deforceors.

7. Where a common inheritance is divided between parceners, the assise need only be brought against him or them who hold the tenement demanded. *But if any parcener be summoned and appear in court, and say that he cannot answer without his parceners by

[1] That is, provided the lord has no claim against the land for the value of the marriages of the several demandants. See before, l. iii. c. 3. s. 3, note.

reason of the unity of right which is between them, the writ shall not thereby abate, but the other parceners shall be summoned to come and answer, so that if he against whom the plaint is made shall lose, he shall not do so without all the other parceners being bound to contribute. But where they hold in common, the writ abates if all are not named.

8. If the tenant makes default, and the plaintiff presents himself, command shall be given to the sheriff that the tenant be resummoned to be before the Justices another day to hear the recognisance of the assise, and to answer why he was not before them on such a day according as he was summoned; after which resummons he shall not be essoined. But whether the tenant cause himself to be essoined or otherwise make default, the recognisance of the assise shall be taken by default. Neither does a resummons ever lie after an essoin, for by the essoin cast for the tenant he admits the summons.

9. When the tenant comes into court by resummons, first let him answer for his contumacy, as to which he may say that he was not summoned. And thereupon let the summoners be examined, and if upon examination they are found to disagree *in the circumstances of the summoning, let the tenant be adjudged quit as to the default, and the summoners in mercy. And if they are found to agree, then he may defend the summons by his law; and for the more speedy dispatch of justice, let him forthwith make his law by himself alone, that he did not know of any summons before

the day of the former session, and be quit of the default; and let him straightway answer to the assise. But if he has been essoined, he cannot afterwards deny the summons.

10. Where the tenant appears on the first day, he may still put off the day of assise by excepting that he had not a reasonable summons; as where it was made the day before the session of the Justices, or two or three days, or less than fifteen days before. This objection shall be tried by examination of the summoners as above mentioned; and if it be found that he had not a reasonable summons, let the parties and the assise be adjourned to another day; at which day he may be essoined. And if at that day he make default, he shall not be resummoned; for he may not deny the adjournment of the Justices; but the assise, if ready, shall be taken by his default. And if it is not then ready the plaintiff shall be adjourned to another day, and the sheriff shall be commanded that he then have the bodies of those of the assise. At which day let such of the assise as were not present on the former day pursuant to their summons be amerced, if they cannot excuse themselves respecting the summons.

*11. Although the tenant come into court on the adjourned day, and is ready to answer, yet he shall not be admitted thereto, for the contempt done to us and our court by his neglect, except in some special cases, as to produce some charter whereby the jurors may be better informed, or at the least whereby he

may vouch some person to warrant; in which case we allow him to be admitted thereto, but not to allege any reason to stay the assise, nor to plead any dilatory exceptions. Neither shall he be admitted to plead peremptory exceptions, wherein perhaps he might say that the ancestor of whose death the assise is brought held the lands only for term of his life by a fine levied in our court,[1] or the exception of felony, or other peremptory exceptions; but the recognisance of the assise shall be taken, and it shall be awarded that he be in our mercy for his default.

12. When the parties come in court without making default, let the plaintiff straightway deliver his patent to the Justices; and if it is found to be sufficient warrant for them, then let them cause such writ, together with the original writ close which was sent to the sheriff, to be read in audience. And then let the plaintiff state his contention according to the articles of the original writ, and say how he is next heir to such ancestor.

13. And if the tenant has nothing to object, or if he denies the demand of the plaintiff and contradicts the substance of his contention *wholly or in part, let the truth be inquired by twelve jurors, and not less, summoned for that purpose, whereof seven at least shall have been present at the view, and none of whom

[1] In this point our author differs from Bracton (f. 255), who states the exceptions here mentioned as those which might be pleaded by the tenant in default. Fleta appears to agree with Britton.

are removable by just challenge of the parties. They shall take the oath, as hath been said before in the assise of novel disseisin; and judgment shall be given according to their verdict either for the plaintiff or for the tenant.

14. If the assise has been taken upon the substance, and upon the points mentioned in the writ, and either party feels himself aggrieved by the verdict, whether the assise was taken by the tenant's default or not, and whether the tenant put himself as to the point in question upon the verdict of the assise or not, the party aggrieved shall have his remedy by attaint. The like upon a false oath by the assise touching any exception, as an exception of villenage and naifty, or of fine levied in our court, or of any covenant, or of a judgment before given in our court concerning the same tenement, or upon other like manifest exception. But in exceptions upon which verdicts are pronounced by way of jury and not of assise, and upon which the parties have put themselves by consent, and against which verdicts there is no evident presumption of perjury, attaints shall not be allowed, inasmuch as the jurors are by the assent of both parties made as it were judicial arbitrators.

*15. If the parties agree before taking the recognisance of the assise, let the accord be received and enrolled, and according to the enrolment let the sheriff be commanded to deliver seisin. And we will that parties pleading, if they pray leave to accord in our court, shall have leave for that purpose, except in felonies in

which a man's life is in peril, saving to us the amercements to us belonging.

16. If any one by assise of Mortdancester recovers seisin of his inheritance out of the hands of the lord of the fee claiming wardship, where the fee is neither held in chivalry nor in grand serjeanty, or if the kindred of any infant in ward recover seisin of the inheritance of the heir in ward on account of waste and destruction committed by the lord in the wardship, the proceedings in the plea shall be enrolled, and according to the enrolment the sheriff shall be commanded to deliver seisin as aforesaid.

CHAPTER XI.

Of Warranties in Assise of Mortdancester.

1. When the parties are at trial and the jurors ready, if the tenant has any warrant who is bound to warrant and defend him in his seisin, it is more for his advantage to vouch him than at his own peril to take upon himself to defend the tenement against the plaintiff. And if he vouches, then it is material whether the warrant vouched be under age or of full age. If under age, the tenant must produce a charter to the guardian, or show that *homage was done to the infant's ancestor whose heir he is, or some other clear reason why he is bound to warranty; otherwise the vouchee under age shall not answer.

2. If the warrant be of full age, then there is no need to show a charter or other presumption; but

he may be vouched by aid of the court, or without aid, as shall be said *in treating of warranties in a writ of right.*"[1] If it be done by aid of the court, and the warrant resides in the county, let the sheriff be commanded to summon him to appear before the same Justices on another day, to warrant according as he shall be vouched, or to refuse. And if the warrant has land elsewhere, and none in that county, let him be summoned by our writ of judgment.[1]

3. If the tenant vouches to warrant separately, where he ought to vouch more than one together, or many where he ought to vouch only one, and the warrants demand judgment of the bad voucher, in such case the tenant shall fail in his voucher, as he would have done in case of a writ ill purchased.

4. When the tenant has vouched to warrant any one who comes into court and warrants him, or several tenants in common as one heir, who warrant him, and these vouch some other, and so on from warrant to warrant, if any one of the whole number makes

[1] The chapter here referred to is wanting in all the copies. See before, vol. i. p. 107, note; and see the last chapter of Britton, s. 5, where reference is made to the same chapter alluded to above. As to the incompleteness of the work, see the Introduction by the Editor.

[2] If the vouchee had land in the county, he was summoned without writ by precept of the Justices to the sheriff; if his land was in another county, it was necessary to obtain a writ out of the Chancery. See the parallel passages of Bracton and Fleta. The expression 'writ of judgment' is in Fleta, not in Bracton. The form of the judicial writ is in Reg. Brev. Judic. 46 *b*.

default, the assise shall be taken by his default, as if all had made default, whether they be any of them under age or not. *And what is said concerning one tenant, shall be observed where there are several.

5. If the warrant appears at the day for which he is summoned, and the plaintiff also, but not the tenant, let the assise be forthwith taken by the default of the tenant, if the jurors are present; and if not, let another day be given to the parties. And if the warrant has waited until the fourth day, let it be awarded that he go quit of his warranty without day, and that the assise be taken by the default of the tenant, as above said. The reason why the plaintiff shall not straightway recover his demand without recognisance of the assise, is because all the points of his writ or some of them may be false; for although the tenement demanded ceases presumptively to be the tenant's by reason of his default, yet still it is necessary that our court be informed of the right of the plaintiff; for if the assise say that the plaintiff hath no right in his demand, there is no reason that he should recover, inasmuch as he cannot prove the points of his case.

6. If the tenant appears and the warrants also, and the plaintiff makes default on the fourth day, let it be awarded that the tenant go quit of that writ without day, and the warrants of their warranty, and that the plaintiff and his pledges of suit remain in mercy in our court.

7. If the tenant and the plaintiff appear in court,

and *the warrant makes default, let the assise be taken by the default of the warrant, but let no caption of land be awarded against the warrant until it be known by the assise whether the tenant ought to retain the land or to lose it. For if he ought to retain it, then there will be no need of proceeding to the plea of warranty.

8. And if the taking of the assise is delayed by any chance to another day, and the warrant comes on that day and is ready to warrant, yet he shall not be admitted thereto, except with a view to making the exchanges,[1] before the assise is taken in form of assise; and this for three reasons; first, because he had no day given him to warrant: secondly, because he lost the benefit of his exceptions and all his defences by the default which he made on the former day; and thirdly, because there is no need of his being admitted thereto before the necessity of it is known, as hath been said above. Hence it is apparent that there is no need of his presence until he is caused to appear by distress, after the assise has passed against the tenant. For if he were allowed to come into court after his default, and to warrant and say, 'I warrant, and I restore the tenement demanded to the plaintiff,' the warrant would be guilty of a manifest disseisin against the tenant, if it were done against his consent, and particularly as the warrant had then no day in court. For although the warrant is obliged to defend his tenant in his possession, he ought not upon that pre

[1] See below, s. 16.

tence *to disseise him by surrendering to the plaintiff his demand, inasmuch as surrendering and defending are contraries.

9. When the taking of the assise is awarded by default of the warrant, and the assise passes against the tenant, then for the first time seisin shall be awarded to the plaintiff,[1] and the warrant shall be distrained to appear on another day in the following manner. The sheriff shall take into our hand of the lands of the warrant as much as the value of the land demanded, and he shall be summoned, as will be mentioned in the plea of right.[2] For warranty in one sense signifies the defending of the tenant in his seisin, and in another sense it signifies that if he does not defend him after being properly summoned, the warrant is bound to exchange, and to make him satisfaction to the value. And in this manner let him be distrained, if he has land in the same county.

10. If the land lost and the land whereout exchange is to be made are in diverse counties, first let the tenant's land be extended; and when our Justices shall be certified of the value, let the sheriff in whose bailiwick the warrant has land be commanded by writ of judgment to take into our hand to the value according

[1] This statement about seisin being awarded at this stage of the proceedings is not found in the corresponding place of Bracton or Fleta, and appears inconsistent with s. 11. See also s. 23, 24. Perhaps we should read, gardé la seisine al tenaunt, the tenant's possession being undisturbed.

[2] See note above, s. 2.

to the extent, and let the warrant be summoned to be before them on another day. *And if several warrants are to be thus distrained, having their lands in diverse counties, the sheriffs shall be commanded that each of them take into our hand proportionally much as each ought to warrant according to the valuation of the land of the tenant.

11. The reason why the plaintiff shall not recover his demand immediately after the default of the warrant, and after the assise passed in his favour, is this, because the warrant may perhaps excuse himself for the default by alleging some hindrance; by which excuse the proceedings may be annulled as far back as the summons, as in a plea of right; for it cannot be properly adjudged a default so long as it may be defended by law; and it would be ill, if the warrant should lose his answer to the demandant, and give the tenant his exchange when he had a good defence. But if the warrant does not come into court, or if he comes and cannot excuse himself for the default, then and not before let the assise be taken by the default of the warrant; and if it be found that the plaintiff has right in his demand, let it be awarded that the plaintiff recover

[1] This statement is difficult to reconcile with what is said before in s. 7, where the assise is directed to be taken immediately upon the first default of the vouchee. (See also s. 8, 12.) The same apparent inconsistency is found in the parallel passages of Bracton and Fleta. Perhaps we should understand here, that the assise taken in the absence of the warrant should not be treated as taken by his default, so as to be binding upon him, until he had had an opportunity of clearing his default.

his demand against the tenant, and that the tenant recover to the value of the land of the warrant, and the warrant remain in our mercy. And if the plaintiff has no right, let it be adjudged against him, as before is said.

12. And because it would be wrong for the tenant to recover against the warrant by his default to the value of the *land demanded, and at the same time to hold his own land in peace, supposing the assise to declare against the plaintiff, therefore we will that the assise be taken before any plea is commenced against the warrant. And if the warrant, whose land is taken into our hand, does not appear on the day for which he is a second time summoned, and the assise, being sworn and lawfully charged, has passed for the plaintiff, let judgment then be given against the warrant, as is before more fully set forth.

13. If the warrant comes into court, and says by way of counter-plea to the warranty, that he ought not, neither is able to warrant, by reason that is the defending of the tenant in his seisin, nevertheless, as warranty in another sense signifies the giving to the tenant an equivalent exchange, if he has lost his land by default of the warrant, we will that the plaintiff recover his exchanges. And yet if he can defend himself from the liability to make satisfaction to the value, it shall be awarded by our Justices that he go quit without day.

14. If he enter into warranty and vouch another to warrant, let the second warrant be summoned against

another day; at which if he makes default, let there be taken into our hands of his land to the value of the land demanded, and let him be summoned against another day; at which day if he does not appear, or if he appears and cannot clear his default, the judgment shall be by process of the lesser *Cape*, as shall be more fully and plainly said in treating of the plea of right.[1]

*15. If the second vouchee comes into court and counterpleads the warranty, and says that he is not bound to warrant because the other holds nothing of him, nor does any service to him, nor ever did homage to him, or if he says that he is not now bound to warranty, because, although he were bound thereto, yet the vouchor has made default to him, and has lost his aid by such default, which was prejudicial to him, inasmuch as where he might have answered to the assise if he had appeared at the day, he by his default lost all his defences and exceptions, which loss he may impute to his own negligence, and if he thereof demands judgment, we will that judgment be given against the vouchor. So likewise, if a third vouchee gives the same answer.

16. Hence it plainly appears, that when the warrant makes default the first day, whereupon the assise is adjudged to be taken, but through some accident the recognisance of the assise is delayed until another day, and the warrant comes at that day, and before the assise is taken, is ready to warrant, he may be ad-

[1] See note ante, s. 2. The practice referred to is described in Bracton 384; Fleta 411, c. 25.

mitted thereto, yet not so as to allege any reason for staying the assise, or to defend the tenant in his seisin, but in order to make the exchanges if the tenant should lose by the assise,—and much more after the recognisance of the assise,—and that a vouchee in that position will not be assisted by vouching another warrant.

*17. If any warrant, after he has vouched another, makes default in court, and the plaintiff and tenant are in court, let the recognisance of the assise be immediately taken, whether the second warrant appears or not; and let the same course be taken, where the tenant makes default, although the warrant is present. For although the tenant or warrant might have some reason to allege for hindering the assise, yet the warrant shall not be therefore quit of the warranty[1]. For the assise shall not be stayed for anything the tenant can say, forasmuch as he has put his whole defence in the mouth of the warrant, and cannot resume it at his

[1] I think there is some confusion here, arising from the compiler having followed Fleta's abridgment of Bracton, in which the sense of the latter is not truly represented. The reason given by Bracton for excluding the warrant from taking exceptions to the assise in the absence of his vouchor is that by the default of the latter he is quit of the warranty. Bracton afterwards supposes another case, in which the vouchee has appeared and denied his liability to warranty; then, he says, neither the tenant nor the vouchee are in a position to raise any objection to the taking of the assise, for the same reasons as are stated by Britton in the next sentence. Brac. 260; Fle. 284 (§ 9). As to the relation between Fleta and Britton, see the Editor's Introduction.

pleasure; and the warrant has nothing to do but to defend himself as to the warranty.

18. If the warrant makes no default and enters into warranty, then he is allowed to answer and allege against the assise any reason why it ought not to pass, since all the exceptions and defences are allowed him which would have been allowable to the tenant, inasmuch as by his warranty he is put in the place of tenant. Or the first warrant may vouch a second, and he another, and so of several.

19. When several are thus vouched, and the last cannot defend the tenant, or if the assise is taken by default of any warrant, and the last warrant cannot defend himself from liability to exchange, let it be awarded that the vouchor have of the land of his *warrant to the value, and so from vouchor to vouchor until the plaintiff recover his demand against the tenant, and he in value against his warrant, and the last warrant shall remain in our mercy.

20. If one or more of the warrants are under age, the plea shall stand over without day until their age. Where of several demandants in common one dies before the assise is taken, the writ does not thereby abate. Neither shall it abate if one die out of several tenants in common. But if the inheritance has been divided between parceners who before held in common' and one of the parceners die, the assise shall abate on account of the writ being bad. And if husband and wife are impleaded of the right of the wife, and the husband dies before the assise is taken, neither the

assise nor the writ shall abate; but otherwise in the reverse case.

21. If the plaintiff or the tenant or both die before the assise, the assise shall fail for want of a foundation. And if any warrant dies after he is vouched, but before he has warranted, neither the assise nor the writ thereby abates, but the tenant must begin again to vouch his heir. But if he dies after he has warranted, the writ shall abate for want of a foundation, as the vouchee by his warranty has made himself, as it were, principal tenant, and taken upon himself the conduct of the principal plea.

*22. If any tenant or warrant shall say by way of answer, that he cannot answer without us, and thereupon puts forward a charter of us or some of our predecessors, the assise nevertheless shall not be stayed. But if it passes for the plaintiff, let judgment be deferred until the next session, in case by the charter we may be bound to warranty by virtue of some special words, although the clause of warranty may not be therein expressed, and in the meantime let our Justices be consulted by us upon the judgment. But if it be a charter of confirmation of king Canute, or of any other who was not our ancestor, or if the charter express that we have granted as much as was in us saving the rights of all other parties, in that and the like cases we will not have judgment delayed.

23. If it shall happen that some great[1] dispute or

[1] It would seem from this, that when the warrant appeared.

difficult question arises in a plea of warranty, by the discussion of which the assise is like to be delayed for a day or more, in such case there will be no harm in taking the assise, by the recognisance whereof it may be ascertained, whether there be any need of continuing the plea of warranty or not; for if the assise passes against the plaintiff, there will be no need of determining the plea of warranty.

24. If the younger brother has entered into the inheritance of his father, and during the time of his seisin has enfeoffed a stranger, against whom the elder *brother brings an assise of mortdancester, and the tenant vouches to warrant the younger brother his feoffor, and the latter appears to warrant, and says, that assise ought not to be between him and his elder brother, inasmuch as he claims to hold the tenement by the same descent, the assise shall not be thereby stayed; for, although the younger brother is bound to defend the tenant by his warranty, yet he is not very tenant, for the tenant shall never part with his seisin pending the plea of warranty; but when the warrant can no longer defend him in his seisin, and judgment is given against the warrant, then and not before he shall be ousted by judgment. For if the assise between these brothers were to fail by reason of the exception of the same descent, then a right of action ought to arise in favour of the elder to demand the same tenements by writ of right, which could not be unless the

the Justices were accustomed, in a simple case, to go into the question of warranty before deciding the original plea.

younger brother was actual tenant; and if he be required to bring the writ of right against tenant, then it will be lawful for the tenant to defend the right of the elder brother either by battle or by great assise. Therefore to avoid this great inconvenience, we will not that this exception be allowed in any possessory writ unless between the demandant and the actual tenant.

*25. If one enfeoff another of any tenement, and the feoffee makes an intrusion or other encroachment upon a third person, who brings an assise of mort-dancester against the feoffee,—as suppose John enfeoffs Peter, and Peter effeoffs Robert of the same tenement, after whose death Peter enters into the tenement as chief lord, and the heir of Robert brings an assise against Peter; if Peter thereupon wishes to vouch John to warrant, and John can aver that Peter did not enter into the tenement by the act of John, but by his own intrusion, in such case John, or any one in like position, shall not be bound to warrant; but in such circumstances every one shall answer for his personal act.

26. If an assise of Mortdancester is to be brought for a tenement held for a term of years, and the farmer only is named tenant in the writ, the term being for ten or twelve years, or more or less, the farmer may say upon the trial, that he claims nothing in the tenement but a term of years under the lease of such an one; and if it be so, the writ shall fail. And if the lessor alone is named as tenant, the writ shall

likewise fail, so that the assise may not pass to the prejudice of the farmer, who has as much right to his term as the lessor to the freehold. But if both are named in the writ, the writ shall stand; and the farmer shall be present at the day, and vouch his lessor to warrant his term, if he thinks fit to do so.

*27. Nevertheless, in some cases the farmer only needs to be named in the writ as where a lord has sold the wardship of any lands for a certain term of years, before which term the heir attains his full age and brings an assise against the farmer, if the tenant vouches the lord to warrant by virtue of some deed of covenant, which witnesses that the lord is bound to warranty until a certain term extending beyond the majority of the right heir, we will that such cases be favorably viewed in relation to the heirs plaintiffs, so that they may not be delayed of their right of inheritance by such vouchers; and the farmers shall have their recovery against their warrants by writ of covenant.

28. If the parties present themselves in court, but it is necessary to delay the day by the default of the jurors, let the parties be adjourned to their said day without further essoin, as is ordained in our statutes. At which day if the assise passes, whether as an assise or as a jury, for the plaintiff in the absence of the tenant, let the judgment be delayed until another day, and the tenant be summoned to come upon such day to hear his judgment; at which day, whether he come or not, judgment shall be given for the plaintiff, for

the default of the tenant after appearance. *But if it has been agreed between the parties that the assise be taken and judgment given the first day, then, whether the tenant come or not, the agreement between the parties shall take effect.

CHAPTER XII.

Exception of 'same Descent.'

1. To the points of the writ the tenant may answer several ways; for as to that which is first contained in the writ, namely, whether such ancestor was seised, he may plead, that as this ancestor was the plaintiff's father or other ancestor by whose seisin he claims the inheritance, so was he likewise ancestor to the tenant, and by reason of the death of such ancestor he holds himself in the inheritance as next heir; and if he demands judgment whether the assise ought to take place between such privies in blood claiming by the same descent, in such case we will that the tenant go without day, and the plaintiff take nothing by his writ for the reasons after mentioned, but remain in our mercy for his false plaint. And if he thinks proper, he may proceed by writ of right to try the proximity of blood.

2. Nevertheless in some cases the plaintiff may have a valid replication, as where a plaintiff claims the tenement by the feoffment of a common ancestor of himself and the tenant, and thereof produces charters

*or tenders averment, and says that he claims nothing by descent. But the tenant may answer by way of triplication, that the same feoffment ought not to prejudice him, because the donor never altered his estate, and the plaintiff was never in seisin, but the donor *all* along continued in seisin and died seised; and according as he can verify this, so let judgment be given.

3. Nevertheless between two privies in blood, brothers or cousins or other privies, this assise may lie, as also the writ of Cosinage and of Ael, if it has been customarily used,[1] where the right heir is plaintiff immediately after the death of their common ancestor, before the tenants can claim title of freehold by long and peaceable seisin. The time allowed must be determined by considering whether the right heir demanded his inheritance immediately after he knew of it, or could know of it, according as he was far off or near, on this side or beyond the seas, in prison or out, or according as he shall have been negligent in suffering the tenant to sleep in his seisin.

4. If one parcener demand against another by this assise, as where a sister demands her share against her sister, the writ and assise shall fail; and the writ *de rationabili parte* lies. Where the tenant says that the plaintiff had a sister who had issue children, who are alive, and who would have as much right to demand the inheritance as she, if this be verified, the writ shall fail, and the assise be stayed, whether those children

[1] The statement here made is not confirmed by anything in Bracton or Fleta.

were begotten in matrimony or not. And as this assise does not lie between parceners and coheirs, so neither does it take place between parceners who hold in common or in severalty by reason of the land which is in itself partible; but only the writ *de rationabili parte.* And as it lies not between privies of blood being legitimate, so does it not lie between a bastard brother, tenant, and a legitimate brother, plaintiff,—nor any writ except the writ of right, whereby the proximity and right of blood is tried and determined.

CHAPTER XIII.

Exception upon the word 'seised.'

1. With respect to the clause expressed in the writ, 'died seised,' many exceptions may arise. For one may die seised in several ways, as by bodily presence, and also by intention, although not present in person. And in like manner may seisin be acquired. A person may also retain seisin by bodily presence, *although he has no intention to retain it, as happens with those who make a gift and then die seised, before the purchasers have had complete seisin. And a man may die seised by intention, as is the case with those who go on a pilgrimage leaving no one in their tenements, and die on their way.

2. A person may die seised by bailiff, attorney, or guardian, as well as if he died seised in his own person. Thus, where a guardian in the name of an infant under

age, or any other procurator or attorney in the name of another receives seisin of any tenement, if he in whose name the seisin is taken die so seised, we are content that such persons be deemed to have died seised, although they do not come to be seised in their own persons, and that their heirs may demand such seisin by this assise on their fathers' deaths.

3. Again, several persons may die seised of the same tenement, which they have held as of fee by divers feoffments. And when several assises have been brought by them,[1] for it the assise brought for the death of the person last seised must be first determined, and so backwards from seisin to seisin, until the right of possession is united by judgment with the right of property.

4. Where any one is enfeoffed to him and his heirs by him begotten, and if he have no issue or if his issue die, then over to others, if the purchaser dies having issue, his child may proceed by this assise. *But if he has no issue, or if the issue is dead, then the right descends to the others named in the feoffment; in whose persons however no recovery lies by this assise, but by writ of formedon.

[1] That is, apparently by the heirs of the persons so dying seised (cf. Brac. 262 *b*). The case supposed is somewhat obscure, but appears to be that of several successive abatements. Upon the death of A seised in the fee, B a stranger enters, and enfeoffs C in fee. C dies seised, and D a stranger enters and enfeoffs E, who dies seised. F a stranger enters. The respective heirs of E, C, and A bring several assises of the deaths of their respective ancestors. The assise of the death of E is taken first.

5. A man also may make such a feoffment that his heirs cannot be aided by this assise. Thus, where one has enfeoffed another for the life of the feoffor, if the purchaser survive the feoffor and retain the seisin, the heirs of the feoffor shall not avail themselves of this assise, but of a writ of entry *ad terminum qui præteriit.* And if any one make purchase of a tenement for his life only, the feoffor shall have his recovery after the purchaser's decease, if he be deforced, by the same writ of entry. If any one be enfeoffed to him and his heirs so long as the feoffor shall live, in such case this assise will lie in favour of the heirs of the purchaser after their father's death during the life of the feoffor;[1] and the heirs of the feoffor after their father's death shall have their recovery by writ of entry, as aforesaid.

6. The tenant may traverse, and tender averment by the assise, that the ancestor did not ever die seised, or that if he died seised, he was seised not in his own right but in the name of another, or for a term without having fee or freehold. And if the plaintiff say that he was seised by virtue of some feoffment, to this it may be answered by triplication, as hath been said above.

[1] Compare below, c. 15, s. 2, and note there.

*CHAPTER XIV.

Exception upon the words 'last seised.'

1. The tenant may urge as another exception, that the plaintiff wrongfully demands by this assise as upon the death of his ancestor; inasmuch as the plaintiff himself, or another, was in seisin since the death of the same ancestor by whose seisin he demands. For where after the heir is of full age and has had his seisin upon the death of his ancestor, he aliens his inheritance and sells it in fee, if he could recover it from the purchaser by demanding it in respect of the seisin of his ancestor, the feoffment would be invalidated and ineffectual, and this would be greatly inconvenient.

2. It is necessary therefore to observe what seisin thus had after the death of an ancestor excludes the assise, and what does not. For the seisin of the right heir at a time when the inheritance was vacant after his ancestor's death, of whatever age the heir may be, shall always bar him from recovering by this assise, because then the assise of Novel Disseisin lies. But if he is not in a position to aver seisin in that assise, then the assise of Mortdancester is in place. But if an heir has had a wrongful seisin from which he has been presently ejected, such seisin bars not this assise, so that this exception is not allowable, unless the tenant

say that another died more lately seised as right heir of the ancestor whose seisin is demanded, and whose heir the plaintiff is.[1] And where two parceners, coheirs, bring this assise against a stranger *upon the death of their ancestor, if the tenant say that one of the parceners was since seised, the assise shall not be stayed if this seisin took none effect.

[1] The latter part of the above sentence is not easily intelligible; and the text appears doubtful. I do not find in Bracton or Fleta anything which throws light upon it. According to these authors, the objection, founded upon a former possession of the demandant, was held only where, being of age, he had been in lawful seisin for so long a time that he might have conveyed away the property. (Brac. 273, 273 *b*; Fle. 297.) Seisin by an infant was immaterial, since the objection was founded only upon the danger of one, who had aliened the land, recovering it by the assise against his own donee. (Brac. 273 *b*.) Where the demandant had had a tortious seisin from which he had been ejected, the seisin did not furnish in itself a valid exception to the assise; but another objection might be taken, namely, that the demandant had forfeited his right to the assise by usurping the possession without judgment. (Brac. 273.)

CHAPTER XV.

Exception upon the words 'in his demesne.'

1. Whereas it is said in the writ, 'in his demesne,' the tenant may aid himself by exceptions. For in demesne may be held lands and rents, in fee and for term of life. But demesne is properly a tenement which is held severally in fee. Those tenements also which are held in villenage and farmed at will from day to day, and commonly for terms of years, and are in the care or custody of others, are the demesne of him of whom they are so holden. The word demesne is also used in distinction from that which is holden in seignory or service, or in common with others. For then my demesnes are the same as your demesnes; so that this assise shall fail if it be brought upon the death of several persons tenants in demesne, inasmuch as its nature requires that it should be always brought in respect of the death of the person last seised, as hereafter shall be said.

2. But this assise does not hold concerning any manner of demesne, save that whereof the ancestor died seised *as of fee, whether it be land or service. For it lieth not concerning the seisin of any farmer for term of years, or of him who hath held in villenage,

or in ward, or in gage, or for term of life,[1] or by condition in fee, where the heirs are excluded by the form of the feoffment either for a time or for ever.

3. But if the heirs of a creditor proceed by this assise, and the deforciant pleads against them that their ancestor held the tenements demanded only in gage, and the heirs of the creditor reply that the land was engaged to their ancestor, whose heirs they are, until a certain day upon this condition, that, if the debtor did not pay to their ancestor a sum of money at a certain day since passed, the land should remain to the creditor and his heirs in fee, and if the demandants can aver this by writing or in any other manner, then this assise shall take place concerning the seisin of the creditor, unless the deforciant can aver payment, or at least that the making of such payment was offered at the day, and openly tendered at a certain place in the

[1] 'A termor holding to him and his heirs and assigns for the life of the lessor shall recover by Disseisin; and his heir if ejected by the lessor or a stranger by Mortdancestor. Which implies as it were the possession of a fee (qe sone tot en la p'on come de fee), which fee becomes extinct in the purchaser by virtue of the covenant, upon the death of the lessor, and not before. And it is to be understood, that he who hath only a term of years hath barely (escharcement) a chattel; and shall therefore recover nothing but damages by the *Justicies* (le Iustice), or by the *Quare ejecit*. But he who can in any way claim more than a term of years shall recover by assise of Novel Disseisin. For term of years and no more is chattel; and more than a chattel he cannot have without having a freehold.' (Note in MS. *N*.)

presence of lawful people, in full view and to the full amount without any default. For if a part is paid or tendered, but the whole is neither paid nor tendered, the debtor shall gain nothing by his exception. *And the same reason shall hold, if a breach has been made of one day out of several, where the payment was to have been made by parcels at several times.

4. If the assise is brought by the heirs of the debtor against the creditor or his heirs, when this condition comes in question, and it is found that the money was not paid or tendered according to the condition, let the assise abate and let the intention of the feoffer be observed. And if the assise be brought before the day for fulfilment of the condition, let it be awarded that the tenant go without day and the plaintiff be in mercy for his false plaint, because the time for complaining is not yet come, and the creditor or his heir shall not be obliged to receive his money or part with his security before the day, unless he is willing so to do.

5. And if the condition of payment does not extend to the heirs of the debtor, and the debtor dies before the day, the lands shall remain with the creditor according to the covenant, although the heir of the debtor be ready to pay the money borrowed, inasmuch as heirs are not named in the covenant.[1] And so on

[1] In the time of Littleton, a more liberal construction was put upon a conditional clause of this kind, the heirs, though not named, being allowed to perform the condition. Lit. Ten, s. 334; Co. Lit. 205 b.

the other hand we will that the covenants shall be observed, where no mention is made of the heirs of the creditor; so that if the heirs of the debtor bring an assise against the creditor or his heirs,[1] and the heirs of the creditor plead to the assise and say that their ancestor died seised in fee, and the heirs of the debtor reply that he was seised not purely in fee but in gage for a sum of money, which they are ready to pay, and the deforceors say, that they cannot be admitted thereto, *because the day of payment is passed, and the payment does not extend to their persons, and the plaintiffs say, that neither does the gage extend to the deforceors—if it be found by the writings of covenant, which cannot be contradicted, that the land was engaged in the following form, that if the debtor did not pay the money at the day passed the land should remain to the creditor in fee, in such case the plaintiffs shall take nothing, although it is not specified in the writings that the land shall remain to the heirs of the creditor, by reason of the word fee, which is equivalent thereto.

6. And if the plaintiffs say that equity ought to assist them, by reason of the smallness of the debt, that shall not avail them, since every freeman may dispose of his property at his will without doing any wrong to his heirs, except in particular cases, as in *formedon* or in marriage, or when the gift is to persons in religion or other prohibited persons.

7. We will also that the covenant be performed

[1] It should be, 'against the heirs of the creditors.'

between the debtor and creditor concerning land let to farm to the creditor, where the condition is, that if the debtor happen to die within the term, the land shall remain to the creditor in fee, or for his whole life; or if it be covenanted, that if the creditor die within a certain term, then the tenement so engaged shall remain to some third person, such covenant shall stand good. And although the heirs of the debtor have some colour for bringing this assise of the death of their ancestor, inasmuch as he died in a manner seised in fee, yet their right must stand or fall by the covenant. And whereas a simple covenant bars the assise for a time or for ever, there is much greater reason for its being stayed in pursuance of a judgment of our court.

CHAPTER XVI.

Exception founded on the words 'as of fee.'

1. As to the words contained in the writ, 'as of fee,' one person may hold in fee in respect of the service and not in demesne, as the lord of the fee; and another may hold in fee and in demesne and not in service, as any free tenant. Fee is also whatsoever any person holds to himself and his heirs, whether it be land or rent issuing out of land. And there is a third kind of fee, which is a general name for all fees, as well for a knight's fee as all others.

2. But the fee specified in this assise always signifies land or rent which the ancestor held to himself and his

heirs, and which he might in his lifetime have sold in fee *without doing a prejudice or wrong to any one. And if the assise be brought of any other manner of seisin, as of land held for term of life or for term of years, the assise shall fall. The words in the writ, 'as of fee,' may be understood in two ways, according as the word 'as' imports an apparent truth, as in the case of disseisors intruders and others, who withhold another's right and die seised as of fee, or signifies the mere truth, when persons who hold by a good title, and than whom none has a better right, die seised in fee. In both these cases we will that this assise take place.

3. Again, the tenant may say, that although the ancestor died seised as of fee, yet no part thereof could descend to his heirs because he was a bastard. And, although no one can be attained as a bastard except in his lifetime and in court Christian, yet if the parties consent that it shall be inquired by the assise, by way of jury, whether the ancestor was a bastard or not, let the recognisance be taken, and judgment be given according to the verdict. And if any one will not put himself on the averment, then let judgment be given against him whether he be tenant or plaintiff. And let the like be done, in cases where it is put forward as an exception, that the ancestor died a bastard without any heir to the tenement, whereof he was enfeoffed only to himself and to his heirs.[1]

[1] It is not easy to see how the case added in this clause differs from the one first mentioned. The whole passage is paraphrased from Bracton or Fleta, where the expressions are somewhat dif-

4. Or the tenant may say that he holds the tenements demanded only as bailiff, or at will, or by wardship of *some third person, without whom he cannot answer; and if this be proved, the assise shall fall. So, if he says that the ancestor did not die seised of the land in demesne, but only of the fee.

5. Again, the tenant may grant that the ancestor of the plaintiff died seised as of fee, but say that nevertheless he cannot take anything by this assise, for that the same ancestor let the tenement to the tenant for a term on condition that, if the lessor died before the end of the term, the termor should have a freehold for term of life, or a fee and freehold, wherefore that which he held before as at farm, he holds now as his freehold; and if such a covenant be verified, the assise is at an end. In like manner it shall be stayed, where the land has been put in gage, if the debtor has not discharged it or at least offered to discharge it at the day, according as we have said before; or if he holds the land as a security by judgment of our court.

6. Again, the tenant may say that he has nothing and claims nothing at this time except in seigniory, or by title of wardship, or to hold in another's name by the lease of such an one, as a farmer, at the will of his

ferent. The latter case may possibly be that, where a bastard enfeoffed to himself and his heirs (without 'assigns') gives to another in fee, and dies leaving no heir, upon which the lord enters. The question however in this case would not arise upon an assise of Mortdancester of the death of the bastard, as seems to be implied in the text. See vol. i. p. 312.

lessor, who is not named in the writ, and if this be proved or not denied, and the jury testify that he has not claimed anything in his own name, the writ is thereby abatable. *So, if the tenant acknowledges himself to be the villain of another, and thus to hold in another's name.

7. If any one demands by this assise that which a widow holds in excess of her right dower, the assise shall fail, inasmuch as she claims nothing but her dower; and remedy shall be had by writ of admeasurement of dower.

CHAPTER XVII.

Exception founded on the words 'the day whereon he died.'

1. With regard to the words in the writ, 'the day whereon he died,' or 'the day whereon he assumed the religious habit,' or 'the day whereon he departed from his house on pilgrimage and undertook the journey in which he died,'—it is necessary to attend to the following points. For there is a solar day and a lunar day, according as God divided the light from the darkness, and these two days make one artificial day, which is made up of the day and of the night following, and contains twenty-four hours, and is divisible into four parts. The first may begin at nightfall and end at midnight, the second may begin at midnight and end at daybreak, the third may begin at daybreak and end

at noon, the fourth may begin at noon and continue till nightfall. Therefore whether any one dies in the night *or in the day, he dies in the artificial day, and for this reason it is said in our writ, 'the day whereon he died,' and not 'the night whereon he died.'

2. It behoves him therefore who would recover his inheritance by this assise not only to aver that his ancestor, of whose death he has brought this assise, was seised some time of the day on which he died, but he must also shew that he died seised. For these two propositions may stand together, that the ancestor was seised on the day on which he died, and that he did not die seised; since one may be seised of a tenement in his demesne as of fee at daybreak, and yet before noon in the same quarter of a day he may give it away, and put another in seisin thereof with a full intention of divesting himself, and the purchaser may take seisin thereof with full intention to retain it, by the union of which assent there accrues to the purchaser a freehold and fee and demesne by the will of the feoffor, who put himself out of the seisin of the whole, and has no intention of retaining any part of it. And if the feoffor dies immediately in the second quarter, and his heir demands by this assise the land aliened, and the tenant says that the ancestor did not die seised as in the case aforesaid, and thereof produces a charter of feoffment which witnesseth the same, although the plaintiff say that the grant of his ancestor ought not at all to avail the purchaser, inasmuch as he never took esplees in full seisin before the death of the grantor,

*yet the plaintiff shall not succeed by this assise, unless it be found by the assise that the intention of the donor was contrary to his gift, or the plaintiff can prove that the ancestor was not in good memory and right mind at the time of the feoffment.

3. For where the ancestor, if he had lived and had repented of his gift, could not have had his recovery by assise of Novel Disseisin at the time that this assise is brought, it would be unjust if this assise should lie in the person of his heir. But the ancestor could never have recovered by assise of Novel Disseisin, so long as it could have been proved by recognisance of the assise that of his own accord he made the gift, and of his own accord went out and dispossessed himself, and of his own accord put the tenant in seisin. And according to this reasoning it would appear, and it is true, that, if the donor had remained alive and repented of his gift, and the next day or the third day or soon after the gift had ejected the purchaser, the purchaser might have recovered by assise of Novel Disseisin by reason of the conjunction of their two wills, which took place at the transferring of the seisin.

4. Hence it appears, and so it is, that two or more persons may on the same day be severally seised of the same tenement in their demesne as of fee, provided perhaps, by reason of the words of the count in the plea of right, that each can take seisin of the homages and rents and lands to the value of half a mark or more. Whereof if the donor dies on the day of his gift, and the purchaser also,—or the purchasers, supposing sev-

eral *successive feoffments to have been made the same day from one to the other,—and diverse assises are brought of the same tenement by the heirs of the donor and by the heirs of the several purchasers, for every such plaintiff the assise will lie, but the heir of him who died last seised on the same day shall retain the tenement by judgment.

5. The same rule appears from the case of him who undertakes a pilgrimage, for he may divest himself of his seisin and enfeoff some stranger, and straightway on the same day begin his journey, and die the same day or the next; in which case, although his heir can aver by the assise that his ancestor was seised on the day that he set out on his journey towards his pilgrimage, yet he doth not thereby prove that his ancestor left him any seisin or any right, since he neither died seised corporeally nor by intention. And the same reason may be assigned where a person makes a gift to another and puts him in seisin, and the same day assumes the religious habit. From all which considerations it appears that this assise lies only for those whose ancestors died or are treated as having died seised, for the reasons aforesaid.

6. Again, the tenant may say that the ancestor is not yet dead, and if this is verified, the assise shall fall.

*CHAPTER XVIII.

Exception founded on the words 'of so much land with the appurtenances.'

1. The writ also contains these words, 'of so much land with the appurtenances in such a vill;' from which words exceptions may arise in favour of the tenant; as, for an error in the demand, if 'tenement' is named instead of 'rent,' or the reverse, or 'rent' instead of 'customs and services,' or two carucates of land for one, or if any one demands service, when he ought to demand annual rent. Wherefore if a tenement be demanded of him, who claims nothing therein,[1] or nothing but in the name of another, as guardian, farmer, villain, or bailiff, or in the name of his wife, where such others are not named in the writ, or nothing but the seigniory and services, or if service is demanded where tenement should be demanded in demesne in all or in part, or if the plaintiff says that he demands that as in demesne which the

[1] 'Note, that when one demands by Mortdancester otherwise than as the defendant holds, the assise shall fall; thus, if the demandant supposes in the tenant other estate than he hath, as where he is not "tenant in his demesne as of fee." For one ought to demand of him that hath the thing demanded; for of him that hath nothing, nothing can be demanded.' (Note in MS. *N.*)

tenant holds in demesne, and that in service which the tenant holds in service, the writ thereby falls. For in this assise every one ought to make his demand agreeably to the tenour of the writ, and according as his ancestor died seised.

2. And if the plaintiff cannot shew the jurors the tenement which he demands, nor where he ought to recover, the assise thereby falls. *So, if the tenant says that he does not hold all that is demanded, and the jurors of the assise say that they do not know whether he holds the whole or not.

CHAPTER XIX.

Exception founded on the words 'after the term.'

It is also contained in the writ, 'whether the ancestor died after' a certain term named in the same writ, from which an exception may arise in favour of the tenant. For if he can prove that the ancestor did not die seised after such term in his demesne as of fee, the assise shall fall.

CHAPTER XX.

Exception founded on the words 'next heir.'

1. The next article in the writ is, 'whether the plaintiff is next heir.' Who is nearer heir than another has been in part mentioned above, and shall be more fully set forth in treating of the writ of right. And as to the proximity, the tenant may answer that another is nearer heir than the plaintiff, or he may absolutely traverse his being the next heir, and thereupon descend to averment by the assise.

2. Or he may say, supposing the land to be partible, that the plaintiff is not the nearest heir, there being another as near not named in the writ; and if this exception is proved or not denied, the assise shall fail.[1] So if an assise is brought against one parcener, where several parceners hold in common, *the writ is thereby abatable. And when this assise is brought against several parceners, or others holding in common, and one of the tenants dies, the writ falls.

3. Again, the tenant may say that the plaintiff cannot be next heir, for that the ancestor of whose death

[1] See the entry of an assise 16 Edw. I, cited in Cowel's Interpreter, *s. v.* Partitione facienda.

he brings the assise did not hold the tenements in his own name, but in the name of such an one, and was his villain, which case being proved or not denied, the assise shall fall.

4. As to an assise brought by one sister against another of a tenement descending from their common ancestor, we will that such an assise shall not lie, by reason of the parity of the possessory right among them, but the remedy shall be by writ of partition. And where two sisters, one of whom is legitimate and the other is a bastard, have brought this assise against a tenant, although the assise say that one was born in matrimony and the other before, yet it does not therefore follow that the seisin shall not be adjudged to both, saving to the legitimate her action to recover the bastard's share by writ of right when she is of age to do so; and let the objection of bastardy be then determined upon replication. The same rule also holds among parceners, some of whom are villains and others free.[1]

*5. Again, the tenant may admit that the plaintiff is next heir, but still may say that he ought not as yet to have the seisin, for that the tenant holds it by feoffment of the ancestor for term of life, or in gage, or upon condition, or for a certain time by judgment of our court, or by the law of England for term of life.

[1] The case in which this point would arise is explained by Bracton, by reference to a custom of Cornwall: according to which, if a freeman married a neif, half the children were free, and half were villains.

But for this he must prove that he had issue, which was heard to cry, and which had human form, and not that of a monster and was never attainted as bastard.

6. Again, he may say that there is a nearer heir, as where the youngest of three brothers bring this assise of the death of his second brother, if the tenant produces in court any issue of the eldest brother, the assise shall fall.

7. Or he may say, that although the plaintiff is the next heir to his ancestor, yet his ancestor excluded him by a disposition made in his last will by testament; and if this be verified, and the tenement be devisable by usage and custom of the place, as is the case with burgage tenements, the assise shall fall.

8. Or the tenant may say, that although the plaintiff be right heir, yet he cannot have remedy by this writ by reason of an usage to the contrary, to wit, that no writ shall run, except the writ of right close according to the custom of the manor. And if the tenement is parcel of the ancient demesnes of our Crown, and both the plaintiff and tenant are sokemen, or if the plaintiff being a sokeman has brought this assise against the *lord of the manor, the writ shall thereby abate, unless the plaintiff can shew how by feoffment the tenement has been changed from socage.

9. Or he may say, that although the plaintiff is next heir, yet his ancestor did not so die seised, but

that the donor always continued in seisin together with him, and still is seised; and if this be verified, the assise shall be stayed.

CHAPTER XXI.

Exceptions founded on the words 'who holds the land.'

1. As to the words in the writ, 'summon such an one who holds the aforesaid land,' or 'holds the rent deforced,'—inquiry should be made whether the tenant holds all according as the ancestor held it, or only part of it. For the whole may be of various kinds. Thus, where the plaintiff demands a manor with the appurtenances, or one carucate of land with the appurtenances, or twenty librates of land with the appurtenances, the jurors according to the demand must particularly view what tenement and how much the plaintiff demands, and whether the whole according as the ancestor held it or part only; and if the whole be demanded, and a part of that whole not excepted in the writ be alienated, the assise shall fall.

2. And if the plaintiff makes his demand by parcels, then every parcel is a separate whole, and therefore if the tenant does not hold the whole of any parcel the writ shall fall as to the whole of that parcel, and shall hold good as to the other *entire parcels. For though there is but one plaintiff against several tenants, yet several (although similar) actions shall accrue, by reason of the plurality of parcels and of tenants. And

where one parcel is demanded against one tenant by several particulars, as one caracute of land by several virgates, or one virgate by several acres, if the tenant does not hold the whole according to the demand, the writ shall fall, either because the tenant never held any part of it, or because he aliened part before the writ was obtained, of which alienation no notice is taken.

3. If any alienation be made after the obtaining of the writ, the assise shall not be thereby stayed, by reason of the presumption of fraud in the alienor, as in such cases there is a great presumption that such alienations are made to delay the plaintiffs of their right, and to evade the judgments of our court. But if any such alienation be made, and the feoffor die before the day of plea, the writ shall not abate; but the tenant must come and answer to the assise, or vouch to warrant the heir of the feoffor. And if the heir is under age, yet the assise shall not stand over to be taken; *for in such cases we will that the heir shall answer of what age soever he be, as it is ordained in our statutes that he shall answer to the writ of entry founded on disseisin. And if the heir recover, let the tenant's right be saved to recover his warranty, when the heir shall be of age, by resummons out of the rolls of our Justices, wherein we will that special mention be made thereof.

4. If the tenant says that he does not hold the whole, then he ought to declare who holds the residue. For we will that before writs be abated for a fault or

error, the tenants inform the plaintiffs how they shall purchase good writs. And if the tenant sets forth the name of him who holds the residue, the plaintiff may perhaps answer thereto, that the writ ought not thereby to abate, for the tenant himself held the whole the day that the writ was purchased.

5. Or the plaintiff may say that the person who holds such residue holds it for a term of years, or at will, or in villenage, and is the villain of him who is named tenant in the writ; and in such case the writ shall stand. And if the tenant says that the person who holds the residue is his freeman, and holds such residue of him freely, and the plaintiff is not prepared with suit of the blood of the villain to prove that he is a villain, the writ shall fall; and let the plaintiff obtain a good writ against both the tenants. If the tenants allege non-tenure, and cannot say who holds the residue, let them answer for what they hold.

*6. This exception of non-tenure lies properly in this assise, together with the other exceptions concerning the words in the writ. For in other writs, if it be put forward with effect, it is of such force, that there is no room for other exceptions, but judgment must be given according as proof is made of this exception. And that in different ways; for in writs of escheat, entry, formedon, cosinage, and others, in which battle and the great assise do not lie, if the verdict upon this exception be given for the tenant, the writ abates, and so the exception is dilatory,—if against the tenant, the plaintiff shall recover, saving to the tenant his action

in the right; but if it be put forward sucessfully in a plea of right, it will be peremptory against whomsoever it passes.

7. If the plaintiff makes his plaint and demands a tenement in demesne, and the writ says, 'whereof the tenant deforceth him,' the writ is thereby abatable for fault in such writ, for it ought to have said, 'which the tenant holds.' And if he does not demand land or tenement in demesne, but rent and service, and the writ says, 'which the tenant holds,' the writ, if it be challenged, is in that respect defective and abatable, for it ought to have been, 'who deforceth the aforesaid rent.' *And if there is error in the writ as to the name of the vill, as to where a hamlet is named, where it should have been a vill, or any other kind of error, the writ is thereby abatable.

CHAPTER XXII.

Exceptions of felony and bastardy, and other exceptions to the assise.

1. Again, the tenant may say that assise ought not to be, for that the ancestor whose seisin he demands was a felon, so that no right or seisin could descend through him to any other, but to the chief lord[1] as an escheat. But this is not sufficient, unless it be said

[1] The expression 'chief lord' denotes not the superior or sovereign, but the immediate lord; as the tenant in chief is the immediate tenant. See before, book ii. c. 8. ss. 5, 8.

how he was a felon, as in an exception of bastardy, it must be set forth how a bastard. And when he has explained how he was a felon, then he must aver it by record, on account of the danger there might be of an attaint, if the jurors of the assise should make a false verdict. For if he says that he was adjudged felon at such or such a place, yet this is not sufficient, unless the judgment was fully executed, and for this some record should be vouched as a warrant. And for this reason it plainly appears that no judgment of felony ought to be given except in presence of some one to bear record thereof. If the tenant says that he was outlawed, to this it may be answered that such outlawry was afterwards legally reversed, as is above mentioned.

2. If the tenant says that the plaintiff had an elder brother who committed felony for which he suffered judgment, *so that no right could descend from the ancestor except through him, by reason of whose felony he, as chief lord, entered into the tenements as his escheat,—whereas there are diverse opinions upon this point, we will that it be understood that the law in such case as to all writs is this: that if the eldest brother survived the ancestor of whose seisin this assise is brought, or if he died before the ancestor and left any issue still living, this assise shall fall, and otherwise it shall not, but the assise shall be taken by virtue of the right which descended from the ancestor to the younger son, since the right never found any elder brother, or issue of him, to whom it might

descend; and such case shall be treated as if he had never been born, and no mention shall be ever made of him in counting of any descent. And if such a count be challenged for the omission, it shall be answered that he did not live until any right could descend to him; and that if any did descend to him, it nevertheless resulted to the ancestor from whom it came, so that the right descended from the father or other ancestor to the younger brother without any intermediate, as if no elder had ever existed.

3. Exception of bastardy being objected against any plaintiff or tenant in this assise stays the assise in all cases; and sometimes it turns it into a jury, and sometimes the cognisance thereof is transferred to be decided in Court Christian. *Nevertheless against one who is under age and tenant, no averment shall pass upon an exception of bastardy before he is of full age, because that exception determines the right. But if the exception be pleaded against the plaintiff, although he be under age, yet it does not follow that a jury shall not be had to ascertain the truth concerning such exception. And if the tenant say that the plaintiff's father was never married to his mother, this fact must be certified by the bishop and ordinaries. And if the same exception is put forward against both, the legitimacy of the plaintiff must first be ascertained; for if he cannot prove his legitimacy, the possession will remain with the tenant, whether he is a bastard or not.

4. Again, the tenant may say that if the plaintiff

ever had any right, or if his ancestor had it, that right has he released and quitclaimed. In this case however it is not enough to plead this in words, although he may have sufficient suit, but he must make it appear by record of our court, or by writing, or charter of the plaintiff. And even this quitclaim will not avail if the plaintiff can prove that no fee or freehold or right had descended to him at the time of making it, or that he was under age, or not in his right mind, or that the person to whom the quitclaim was made was not at the time in seisin of the tenement, but afterwards thrust himself into seisin by intrusion or by force.

*5. Again, the tenant may say that the plaintiff wrongfully impleads him, for that the ancestor of the plaintiff enfeoffed him, and bound the plaintiff to warranty, and therefore if he were impleaded by another, he should vouch him to warranty;—and if this be proved or not denied the action shall fall;[1]—wherefore the purchaser entered therein when the seisin was vacant by the assent and induction of the feoffor, or by judgment of our court, and not by his own intrusion or force; or, although the entry was wrongful and defective, yet the plaintiff, or another who had as great a right, afterwards ratified it by confirmation; and if this be true, the assise shall fall.

6. Again, the tenant may claim title by reversion, or through a fine in our court, which supposes a

[1] There appears to be an error or omission in the text at this point, which I have been unable to correct.

reversion in default of issue,[1] although it be prejudicial to the plaintiff; and if the plaintiff does not avoid the fine, the action shall fail, unless the plaintiff has a fee-tail by form of gift. The fine may be avoided several ways; for it is sufficient if he to whom it is prejudicial was detained in prison or out of the realm of England, or under age, or out of his right mind, or deaf or dumb, whereby he could not reclaim the fine within the year and day.

7. Where the tenant says that he cannot answer without us, if he produces a charter, whereby we are bound to warranty and exchange, the assise shall stand over, but not otherwise.

*8. Again, he may claim title by judgment of our court, either by surrender or by default made by the

[1] There is a confusion here, which I am unable satisfactorily to clear up. The words *par reversioun ou* appear to have been slipped into the text by mistake. The words *fin qe suppose reversioun* are from Fleta, where the word *supponit* is perhaps used in the sense of 'suppresses' or 'destroys.' After the statute *De donis conditionalibus*, which is alluded to above, but is not noticed in Fleta, a reversion for default of issue could not be barred by fine, as had previously been the usage. But at the time when Britton and Fleta were written, such a plea might still be common with reference to a fine levied before the passing of the statute, it being expressly provided that this enactment should not be retrospective. The later operation of a fine to bar the issue in tail was a consequence of the construction put upon the Stat. 4 Hen. VII. c. 24; see Coke, Inst. ii. 517, 518; Brooke, Abr. ti. Fine pl. 1; Blackstone, Comm. vol. ii. pp. 118, 354; Reeves, Hist. Eng. Law, vol. iv. pp. 135, 138; Hallam, Const. Hist. vol. i. p. 14.

plaintiff or his ancester, or in some other manner. Or he may say, that although he had once a right to bring this assise, nevertheless he has defeated that right, inasmuch as he has not observed the proper order of pleading; for he formerly brought his plaint against the same tenant for the same tenements in the property by writ of right, wherefore he cannot come back afterwards to plead upon the possession. Or thus: that assise ought not to be, because an assise formerly passed between the same persons of the same tenements, and in favour of the tenant; and if this be verified, the second action in all kinds of assises shall abate. So, if there is another assise concerning the same tenement between the same persons still pending, as by reason of a plea of bastardy pending in Court Christian, or for other reason. The like if the tenant can aver that the plaintiff holds to an equal value by exchange.

9. Again, the tenant may say that the tenement is the right of another, which the plaintiff cannot bring in judgment without the tenant's wife, in whom the freehold rests, and that he holds nothing therein save jointly with his wife. *And this he may verify three ways, either because they were enfeoffed to hold in common, in which case he must either shew a charter or vouch some record; or because he found his wife seised thereof before he married her; or because the tenement descended to his wife as her inheritance after his marriage with her.

10. Or he may say that the plaintiff is his villain

and his astrer, and abiding in his villenage;[1] and if this be verified, the action shall fall.

11. If the tenant is deaf and dumb naturally, and the same is not lately come upon him through sickness, or if he is a mere madman or an idiot from his birth, so as to be incapable of discretion, the assise shall stand over until he is in a better state.[2] In the same manner also where the tenant is under age, the assise shall stand over until his age, if his ancestor died seised of the tenement as of fee, of whatever kind of fee it be, whether knights' fee, free farm, burgage or other. And if the plaintiff who brings a plaint against his chief lord is under age, in such case the assise shall stand over until his age, if the lord claims nothing but the seigniory; but if he or another claims a freehold therein, the assise shall go.

[1] That is, as I understand it, in *the lord's* villenage, or upon his demesne. An astrer (Lat. *astrarius*) was a peasant householder, residing at the hearth or home (astre) where he was bred, 'villanus in veteri astro suo commorans.' (Fle. 217 (§ 8); Hengham Mag. c. viii. p. 103.) The word *astre*, in this sense, has been supposed to be connected with the English *hearth*, Anglo-Saxon *heorð*, but seems to be common to many of the medieval Roman dialects. See Spelman, Gloss. *s. v.* astre; Ducange, Gloss. *s. vv.* astre, stare.

[2] This appears to be one of those instances in which Bracton or Fleta has been carelessly paraphrased. The direction to put off the assise refers to the case where the incapacity arises from sickness. Compare Brac. 274; Fle. 298 (§ 29). In the other case, according to Bracton, *cadit assisa*.

*CHAPTER XXIII.

Of Assises of Mortdancester turned into Juries.

1. Sometimes this assise descends from its comprehensive nature, and is turned into a jury; and this for many causes in the same way as the assise of Novel Disseisin.[1] Thus, it sometimes happens by reason of form of gift, where the heir female is to be admitted to the inheritance before the heir male.

2. So, where any one has brought this assise against his lord, and the lord answers that he claims nothing but wardship, and to this it is replied that he cannot claim wardship, because the fee is neither chivalry nor serjeanty, and the lord says that he and his ancestors have had the wardship thereof from the time whereof memory runneth not,—if the party traverses and denies this, in such case the truth shall be inquired by the jurors in form of jury.

[1] 'The first point in the writ is whether the ancestor died seised; the second, whether he died within the term; the third, whether the demandant is next heir. If the assise passes upon the substance (sus le gros) of these three points, it passes in its general nature (grosse nature). But if the tenant put forward an exception against the demandant, to which he answers, and says that it ought not to affect him, and for such a reason, and tenders averment by the assise, if then it passes, it is as a jury.' (Note in MS. *N.*)

3. So, upon the exception of sale, as where the plaintiff is answered, that he had an elder brother acknowledged as heir and seised of the inheritance, who sold the land to the tenant, if the plaintiff says that this brother was never seised, so as to be able to make alienation, or that although he was himself seised, yet he never put the tenant in seisin during his lifetime, the truth shall be inquired by jury. The same, where the tenant puts forward a release from the plaintiff's ancestor, and he denies that it was ever the deed of his ancestor.

4. Likewise, if the tenant says that he claims nothing save by the law of England for term of life, *and the plaintiff says that he never had issue by his wife; in such and in many other cases the assise shall be turned into a jury if the parties consent, and if not, it shall be adjudged against him that will not consent.

5. So, on account of a supposititious child, as where any one, pretending to be heir, demands by this assise against the true heir, if such right heir says that the plaintiff was not begotten by him whose seisin he demands, for that at the time of his birth the person whom he alleges to be his father was in parts beyond sea, and had been so for two years and upwards before, or impotent, or labouring under such an infirmity that he could not be presumed capable of begetting children, but that as soon as he returned he removed him from his house as the offspring of another, or that although he acknowledged him for his own, it was well known and notorious that he was not begotten by such ancestor;

if this point be contested between the parties, the assise is at an end, and the truth shall be inquired by jury; and so in numberless other cases.

CHAPTER XXIV.

Of the Judgment in an assise of Mortdancester.

1. When the parties have pleaded to the assise, let the jurors be called, and let those who are absent be *amerced, and the rest go and lay their hands on the book. Then let it be asked of the parties, whether they have anything to say wherefore the jurors should not be sworn one after another; and after their challenges are allowed, as we have said before in treating of the assise of Novel Disseisin, if there do not remain as many as twelve unchallenged, let that day be respited and let the sheriff be commanded to cause a sufficient number to come on another day.

2. When there are jurors enough, let them go and be sworn in the manner described in assise of Novel Disseisin. Afterwards let them be charged, and safely kept so that no one come near them until they have given in their answer. And according to their verdict let judgment be given for the one party or the other. And afterwards let the damages be taxed by the jurors, as before is said.

3. If several persons bring this assise of the death of their common ancestor, and the jurors cannot say which of them all is nearest heir, in such case the

seisin shall remain with the tenant, unless the plaintiffs for the manifestation of their right cause the jurors to be charged upon some point, or they themselves declare it, whereby the Justices may be informed which of them has the best right of action. If several assises are brought against one tenant for one and the same tenement demanded by divers descents, in such case the *recognisance must first be taken of that assise which is brought upon the last seisin. If a perambulation is necessary, let it be made as hath been said above. The party which is in the wrong shall be moderately or heavily amerced, according as his claim was malicious or founded on a colour of right.

CHAPTER XXV.

Of the writ called Quod permittat.

1. Sometimes it happens that although the right heir has obtained the seisin of his inheritance, nevertheless he is hindered from having the seisen of some common or other appurtenance annexed to his inheritance, in another's soil, and whereof his ancestor died seised; in which case no remedy lies for the heir by this assise, but by a simple jury proceeding by virtue of a writ provided in this case, called *Quod permittat*. The same remedy is provided for successors against the deforceors of such appurtenances whereof their predecessors died seised as in right of their

churches. And if there are several deforceors who hold in common, then all must be named in the writ, or the writ, if it be challenged, will be abatable.

2. This writ tries only the right of possession,[1] and is therefore limited within the same term, and to the same persons, as the assise of Mortdancester; *and beyond this term no writ lies in this case except a writ of right patent pleadable in the court of the lord of the fee.

3. In this writ of possession an essoin lies the first day as well for the tenant as for the plaintiff. And

[1] 'Sometimes the *Quod permittat* may be altogether in the Right, when it contains the words *habere debet*; sometimes altogether in the Possession, by reason of the word *solet*, and this when the demandant demands of his own seisin. But when one demands the seisin of his ancestor, this savours of the nature of Mortdancester, because the writ shall make mention that the ancestor was seised of the thing as of fee as appurtenant to his freehold in such a town the day whereon he died.' (Note in MS. N.) A writ of *Quod permittat* containing the words *habere debet* was treated as a writ of right, triable by battle or great assise; and accordingly it was decided in 32 Edw. I. that a parson could not prosecute such an action without aid of the patron and the bishop. Year Book, 32 Edw. I. pp. 117, 510. Compare Vetus Natura Brevium, 68 *b*. In the examples given by Bracton of this writ, which he, as well as our author, describes as affecting the possession and not the property, the action is founded upon the seisin of the ancestor of the plaintiff, or of the predecessor of a parson claiming in right of his church. For the forms of writ in which the demandant founded his claim upon his own seisin, and of those in which the words *debet* and *solet* were contained, see Regist. Brev. Orig. 155, 156; Fitzherbert, Nat. Brev. 123; and compare below, l. v. c. 14. s. 1.

if the tenant makes default, let the distress run according to the process before-mentioned in the chapter of *Quo jure*. Demand of view and voucher of warranty both lie in this writ.

CHAPTER XXVI.

Of the writs of Cosinage, Ael, and Besael.

1. As the assise of Mortdancester is limited within certain degrees, and holds only of the death of certain persons and against certain persons and extends no further, certain writs in degrees adjoining, to which that assise does not extend except by reason of another person joined with the plaintiff, have been provided in aid of that assise, whereby in all cases of so recent a seisin a plaintiff will not be compelled to have recourse to a writ of right, wherein there are many delays and risks. These writs are those of Cosinage, Ael, and Besael, by which, if the time allows, the right of possession may be tried.

2. As these writs are provided in aid of that assise, it is reasonable that they should in a great measure follow the nature of it, as in respect of the term, and therefore the same limitation of term *is fixed for one and the other; so likewise they hold between the same persons out of the degrees, for these writs take effect between the same persons beyond the limits of the assise, between whom the assise lies within the limits, (and not between other persons, as privies of blood

claiming by the same descent), ascending to the grandfather's grandfather, if the time admits of it, and descending to the remotest blood.

3. It should be understood, that all those who issue from uncles and aunts, as well on the part of the father as on the part of the mother, and all those who issue from brothers and sisters, and those also who issue from their issue, in the degrees to which the assise of Mortdancester does not extend, are properly cousins to each other. And in the right line descending they are cousins, as well as in the collateral lines. For ascending they are ancestors, or grandfathers or great-grandfathers, and descending they are cousins, because the great-grandfather or the grandfather's grandfather may by writ of Cosinage demand the seisin of the lowest found in the right line, and the grandfather or father or mother by the same writ may demand the seisin of the son or daughter;[1] where in the other

[1] Our author appears to stand alone in asserting a right of inheritance in the ascending line. (See post, l. vi. c. 3. s. 4.) A has a son B, and no other of his blood; B purchases, and dies without issue. *Quæstio.* Whether his father can or ought to have the purchase. *Solutio.* The chief lord and not the father, because the son is of the blood of the father, but the father is not of the blood of the son. But the purchase shall ascend collaterally, as to uncle or aunt, and this is the first resort, for in every Cosinage the count must be by resort. The second resort is to the grandfather's or grandmother's brother or sister; the third to the brother or sister of the great-grandfather or great-grandmother. But the seisin of the grandfather's grandfather cannot be counted of, save in the writ of right; so that by the

direction assise of Mortdancester, writs of Ael and Besael, and writ of right would lie.

4. In order to see plainly in what degrees they are cousins in relation to the father or others found in the direct line, let a line be drawn straight down, and let there be placed therein four degrees, one above the other, in the first of which let great-grandfather and great-grandmother be placed, in the second grandfather and grandmother, in the third *father and mother and in the fourth son and daughter. From the three upper degrees let three cross lines be drawn on each side, and for every male child let a degree be made by itself on the one side, and likewise for every female child on the other side, and for every child of these children let a degree be made further down, and so on for the issue of that issue from degree to degree, the eldest always filling the degree adjoining the father or mother in the right line descending. The degree found under the great-grandfather signifies his eldest son, and in the degrees at the side of the son, who is called grandfather, are the younger brothers and sisters of the grandfather, who are uncles and aunts to the father or mother, and so by like reason it is to be understood of all the other degrees below.

5. All those, of whose death neither assise of Mort-

fourth resort demand can only be made in a writ of right.' (Note in MS. *N.*) For the purpose of limitation the degrees appear to have been counted back from the person whose seisin was demanded, not from the claimant. See Year Book, 32 Edw. I. p. 145.

dancester nor writ of Ael or Besael lies, are cousins, and where no remedy lies by these writs, it lies by writ of Cosinage, as long as the time allows, beyond which no kind of remedy lies but by writ of right, which is the *last remedy of all. The nature of the plea of Cosinage serves to explain the descents and the resorts as well of the right line as of the collateral, and the descent and the resort of the kindred out of the right line to the collateral.

6. In counting upon this writ no mention should be made of the right, nor in any writ of possession, where no mention is made thereof in the writ; for by variance between the writ and the declaration the writ would be abatable; but in this writ and in those of Ael and Besael it is sufficient to count of the sesin of the cousin or grandfather or great-grandfather, who died seised in his demesne as of fee, without speaking of the right. For these two words, 'in his demesne as of fee,' bring in judgment all the possessory right; and when the word 'right' is expressed in the count, it imports that the plaintiff intends to bring in question the property, whereof if the writ makes no mention, and the error is challenged, the writ thereby abates.

7. Moreover it is not essential to count in any possessory writ of any taking of profits, and this is no more necessary in pleas of Cosinage or Ael or other writs of possession, than in assise of Novel Disseisin or Mortdancester. For one may be seised without taking profits, as the right heir becomes seised after the

death of his *ancestor, the inheritance being vacant, by setting his foot thereon, and others in whose persons the property rests by a single conjunction of the right with the possession, the tenement being first vacant; in which cases although such heir should die before taking any of the profits, yet he would nevertheless die seised in his demesne as of fee. If however the taking of esplees is mentioned and can be verified, these words are rather of service than otherwise, since they tend strongly to declare the seisin.

8. In this writ lie essoins, process by *Cape* upon default, demand of view, voucher of warrant, exceptions of the same descent, of seisin, of last seised, of his demesne as of fee, of so much land, of term of proximity, of non-tenure, of felony, of errors, of bastardy, and the others mentioned above in assise of Mortdancester.