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1830.

READABLE EDITION

OF

COKE UPON LITTLETON.

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BY THOMAS COVENTRY, Esq.

OF LINCOLN'S INN, BARRISTER AT LAW.

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LONDON:

SAUNDERS AND BENNING, LAW BOOKSELLERS,

(SUCCESSORS TO J. BUTTERWORTH AND SON.)

43, FLEET STREET.

1830.



LONDON:  
Printed by Littlewood and Co.,  
Old Bailey.



## P R E F A C E.

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THE text of this work was first published about the year 1481, near 350 years ago, and the Commentary appeared about 150 years afterwards, or 200 years since. It has survived the policy of 16 kings and the attacks of as many generations; and notwithstanding the enactment of some hundreds of statutes, and the adjudication of several thousand critical questions, this admirable production has all along maintained, and still continues to enjoy, a reputation far exceeding that of any other legal publication. Some few, indeed, of its distant members exhibit symptoms of imbecility and decay, but the great body of the work remains sound and vigorous, and bears, even in the present day of reform, every feature of longevity and endurance. It contains, in fact, one main repository of the ancient common law of England, embodied by Littleton, commented on by Coke, and ripened by time into all the authority of an act of parliament,—which indeed it has viewed in the light of a law sanctioned by the common consent of

Prince and People. A code thus matured cannot easily be abolished ; in truth, to abrogate it would be to demolish one main pillar of the state.

These remarks are merely introduced to shew the futility of the supposition, that the sitting commission of inquiry have devoted this venerable pile of learning to destruction. The object of that commission is emendation not subversion ; and when we consider that principle is immutable, and that both the text of Littleton and the commentary of Coke are composed almost entirely of that sterling *matériel*, we may rest assured, from the history of this very work, that however involved the detail of the Law of Real Property may become, its principles will be found stored up in this celebrated compendium, which must remain as it has hitherto done, the foundation of all law on the subjects of real property and conveyancing.

The following pages were composed by two learned and eminent Judges, at the close of long and active lives, occupied almost exclusively in the acquisition of that knowledge which they have thus bequeathed to posterity. The text of Littleton is written without any reference to authorities ; but the Commentary of Coke is supported by a host of quotations from Bracton, Britton, Fleta, Glanville, and the Year-books ; so much so as to render a perusal of those text writers a matter of curiosity rather than of use. Law-books of the present

day are compiled by quite a different class of authors, and assume in consequence an essentially different cast of character. Many of them, it is true, contain excellent collections of the recently adjudged cases and statutes, but in few of them will be found the labour of general deduction or of condensed classification,—qualities in which, as also in ingenious exemplification, the present works abound.

This, then, being the nature of the works now for the hundredth time offered to the Public; the following, it is conceived, is, at the present day, the most convenient shape in which they can appear—that is without note or comment. The text and commentary—unique and intelligible in themselves—have nevertheless been so overloaded with excellent though incongruous notes and references, that the formidable appearance, of the whole and the still more enormous price, have deterred many an aspiring tyro from entering on the perusal of so laboured a performance,—obstacles which it is hoped the present alluring edition will effectually remove,—and in which the student need fear the contraction of no erroneous notion, though his after-reading and experience will shew him many points of qualification.

The object of the present edition of Coke upon Littleton is to give the text of the work complete in its native excellence; omitting only such parts as have become entirely obsolete, and adding a few references to modern

leading decisions and statutes where the text has been altogether altered or very materially modified. The marginal reductions and a new and improved index are also additions.—The pleasing task of rearing upon this solid basis the superstructure of modern law is left to the industry and ingenuity of the student,—an employment which has made many an eminent and successful lawyer, and will doubtless make many more.

*5, Lincoln's Inn,  
29 March, 1830.*

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SOME ACCOUNT

OF

THE LIFE

OF

SIR THOMAS LITTLETON, KNIGHT,

ONE OF THE JUDGES OF THE COURT OF COMMON PLEAS IN THE  
REIGN OF EDWARD IV., A. D. 1467.

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Few particulars have reached us concerning the author of the ensuing Treatise on Estates and Tenures. He lived in times of great civil commotion, but it does not appear that he took any decided part in the violent politics which then agitated the kingdom. This may account for the paucity of facts recorded of his life and character. He was born at the beginning of the 15th century, and died about the year 1481, his exact age not being known. He was buried in the cathedral church at Worcester, where a monument of his own device was erected to his memory. This monument consisted of a fair tomb of marble, which he caused to be finished in his lifetime; displaying a portraiture of himself in a kneeling posture, ejaculating an impressive prayer,—“*O Son of God have mercy upon me.*” As the tomb was completed in his lifetime his age is not added, and

nothing therefore can be said as to the exact period of his birth.

It appears, however, that he was descended from a family of great antiquity in the counties of Salop and Worcester. Thomas Littleton was settled at South Littleton, in the county of Worcester, in the reign of Hen. 3. 1270; his grandson, Thomas Littleton, married the only daughter and heiress at law of Richard Quarterman, with whom he received a considerable landed estate. The issue of this marriage was an only daughter, Elizabeth, the mother of our Author. She married Thomas Westcote Esq., a gentleman of good descent, who held an honourable post in the court of Hen. 6. By settlement on her marriage the estates, both of her father and mother, were entailed on the issue of the marriage, who, it was stipulated, should bear the name and arms of her paternal ancestors, the Littletons. There was issue of this marriage four sons, Thomas, Nicholas, Edmund, and Guy, and four daughters, who, to use the words of Lord Coke, "spread themselves abroad by honourable matches with many ancient families."

The eldest son, Thomas, the subject of this memoir, was designed for the bar, and in due course was entered of the Inner Temple, where he became a reader or lecturer; and by the influence of his father, then in the court of Hen. 6. obtained the stewardship of the king's household; in virtue of which office he sat as Judge in the Palace Court of Westminster,—a court then of much more consequence and resort than at present, and where we may suppose the Judge was usually of the degree of the Coif. That Littleton was at this time a Serjeant may fairly be inferred, from the circumstance of his soon afterwards being made King's Serjeant,



which shows that he had been a Serjeant some time before.

On the 13th of May 1455, he was appointed one of the justices in Eyre, and rode the Northern circuit,— a province entirely devoted to the reigning house of Lancaster, which party Littleton espoused. At this time the military part of feudal tenures was grown into disuse; but in other respects the cumbrous forms of real actions, and all the technical learning of knight's-service, escuage, frankalmoign, villeinage, reliefs, wardships, attainments, warranties, and other feudal incidents, were in full force and vigour. Wills, so fruitful a source of litigation at the present day, were not then allowed of lands, and the present doctrine of uses and trusts had not been introduced, nor had feigned recoveries been fully acknowledged as a common assurance; consequently the present modes of conveyancing were altogether unknown. The only thing in common with that day and this, is the doctrine of Estates, which has continued with little variation from the first introduction of feuds to the present time.

While our Author was on his first circuit the fatal quarrel between the two contending houses of York and Lancaster broke out into open hostilities, which lasted with varying success for a period of near thirty years, until in fact the whole ancient nobility by whom the quarrel had been fomented were nearly annihilated. The Yorkists, for the most part, had the advantage in these fierce encounters; and in 1461 the house of Lancaster was formally deposed. On that occasion a bill of attainder and forfeiture was passed against the weak King Henry 6. and his magnanimous queen, Margaret of Anjou, together with their more conspicuous adherents.

With the declining house of Lancaster, Littleton of course lost his place; and though it does not distinctly appear that he was included in the long list of proscriptions which followed the downfall of his unfortunate prince; yet it is certain that he did not altogether escape disgrace; for we are informed, that in the 2d year of the reign of Edw. 4. he received his pardon, and was continued in his post as justice of assize for the northern circuit. On the King's private espousal with the Lady Elizabeth Grey in 1466, the Earl of Warwick, who had long swayed the counsels of his victorious kinsman, retired in disgust, and a complete change of ministers ensued; Littleton on this occasion was appointed one of the judges of the Court of Common Pleas, and he maintained himself in that situation with great prudence and dignity for fifteen years, when he expired in a ripe old age. He was one of the judges who pronounced sentence in the celebrated Taltarum's case, which gave rise to the use of common recoveries,—the salutary effects of which, in removing the fetters on alienation, have long been felt and acknowledged.

Of the private life and character of Littleton nothing remains at this day. A wretched portrait of him is prefixed to some of the older editions of his Tenures, which was probably taken from the rude effigy on his tomb, or the family escutcheons in the churches of Frankley and Hales Owen. He married Joan, one of the daughters and co-heirs of William Burley, Esq., and widow of Sir Philip Chetwyn, by whom he had three sons, William, Richard, and Thomas. He died the 23d day of August 1481, having made his will only the day before his death, and was buried in the cathedral church of Worcester. William succeeded to the family estates, and his descendants have since been ennobled, first by the style of

Baron Westcote, of Balamore in Ireland, and second, by the title of Lord Littleton, Baron of Frankley in the county of Worcester, the present noble Lord being the second under the latter title. Littleton's arms (argent a chevron between three escalop shells, sable) and motto (*ung Dieu ung Roy*—one God and one King) are scrupulously preserved by the family.

To his second son Richard, who afterwards became a lawyer of great eminence in the reigns of Henry 7. and Henry 8., Littleton left the affectionate bequest of the ensuing *Treatise on Tenures*—a rich inheritance, also, to every Student of the Law. He compiled this book when a judge, after the 14th year of Edw. 4. ; but the exact period cannot be ascertained. It seems, from Sections 291, and 324., that he intended writing on tenancies by elegit and statute-merchant and staple, which not being added, induced Lord Coke to suppose that the work was prepared only a short period before his death and that it was not completely finished at that time. It does not distinctly appear that the work was published in Littleton's lifetime, but it was publicly sold before his death, as is manifest from the following note in the first page of the written copy of his work, now deposited in the public library at Cambridge, Mm. 52 —“ This book was purchased in St. Paul's Church-yard, London, 27th July, 20 Edw. 4. (1480.) for 10*s.* 6*d.*” In the table of contents in this copy no mention is made of the chapters supposed to be omitted, and the situation of the table in the body of the work of the earlier editions, precludes the possibility of its being prepared by any other than the author's hand.

The art of printing was introduced in England about the year 1475, and it is conjectured that the first edition of Littleton made its appearance about 1481, printed by

Lettou and Machlinia ; but, as was common in the infancy of printing, this edition is without date. A more beautiful impression was produced at Rouen or Rohan, in France, by R. Pynson, which also is without date ; but, from its similarity both in type and paper to Statham's Abridgment, printed at the same place for the same person, it is probable that both these editions were published about the same time. They are both written in law French, and run on continuously. West, the author of *Symboliography*, who lived in Lord Coke's time, introduced the sections, without much attention to the sense or grammatical reading ; but these sections have since been retained for convenience of quotation. Lord Coke's edition of Littleton, published with his *Commentary* in 1628, gave the present English translation, which was taken exclusively from the Rohan edition ;—Lord Coke, as it should seem, not being then aware of any other earlier edition. This translation has been very carefully corrected by the edition of Lettou and Machlinia, as also by those of Pynson and Redman, from which corrected editions the present has been prepared.

Of the authority of Littleton—Lord Coke mentions a memorable instance where it was fully acknowledged by the whole Court of Common Pleas. His words are, “ In the reign of our late sovereign lord King James of famous and ever blessed memory, it came in question upon a demurrer in law, whether a release to one trespasser should be available or no to his companion ? Sir Henry Hobart, that honourable judge and great sage of the law, and those reverend and learned judges, Warburton, Winch, and Nichols, his companions, gave judgment according to the opinion of our author, and openly said, that they gave such great reverence to Littleton, that they would not have his case disputed or questioned.” *Co. Pref.*  
—The merit of the work has been uniformly acknow-

ledged and warmly applauded.—Lord Guildford made it a rule never to let a year pass without reading it through—*that*, however, cannot be requisite in the present day.—Lord Coke himself calls it “the ornament of the common law, and the most perfect work that ever was written in any human science,” and Sir William Jones has added his meed of approbation which no one will think partial or exaggerated; he speaks of Littleton as the English lawyers’ great master, and pronounces his work at once luminous in method, apposite in example, and clear and manly in style.

Besides the Treatise on Tenures, “A Reading on the Statute *de Donis*” is attributed to Littleton; but that work was never published, and it is doubtful if it be now in existence.

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\* \* During the progress of this work through the press, a very curious and useful Commentary on the Tenures of Littleton has been presented to the profession, edited by H. Carey, Esq. of Lincoln’s Inn, Barrister at Law. It is supposed to have been written prior to Lord Coke’s Commentary, and Mr. Hargrave considers it a very methodical and instructive work.



# THE LIFE

OF

## SIR EDWARD COKE, KNIGHT,

LORD CHIEF JUSTICE OF THE COURT OF KING'S BENCH IN THE  
REIGN OF JAMES I.

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SIR Edward Coke was born at Mileham in Norfolk, in the year 1549. At the age of ten years he was sent to Norwich free school, and in 1567, at the age of eighteen, he was entered of Trinity College, Cambridge, where he remained four years. At twenty-two he removed to Clifford's Inn, and a year after (1572) he became a member of the Inner Temple, where he soon acquired the reputation of great shrewdness and penetration by the dexterity with which he unravelled a complicated case concerning some peculation of the Cook.

At the age of twenty-eight, after six years' probation in the Temple, he was called to the bar, and in 1578 made his first appearance in the Court of King's Bench in Lord Cromwell's case for libel. He was about this time appointed reader or lecturer of Lyon's Inn, where an excellent portrait of him is preserved. His father, Robert Coke, who was also a lawyer of good repute, and who had been for some time a bencher of Lincoln's Inn, died

in chambers at the early age of forty-seven, while his son Edward was at Norwich school. From his father he could of course derive no "legal lore," but from him he inherited a very ample landed estate, which no doubt contributed to the rapid rise he afterwards experienced. He was successively chosen recorder of Coventry, Norwich, and London, the latter being then a sure stepping-stone to the highest honours in the law.

About six years after his call to the bar, Sir Edward married Miss Bridget Paston, a descendant of Judge Paston, who sat on the Bench of the Common Pleas with the subject of the preceding memoir. With this lady he received a portion of 30,000*l.* and lived with her in great harmony and affection for many years.

The labour and enthusiasm with which he conducted his studies attained for him very early in life the reputation of a sound and trustworthy lawyer, and the talent and research which he brought into court soon placed him among the most eminent practitioners of his day. He was also fortunate enough to enjoy in early life the patronage of several great and influential characters, particularly of Archbishop Whitgift, and Lord Treasurer Burleigh, who threw into his hands most of the crown cases which gave strength and eclat to his well-earned fame.

In June, 1592, Thomas Egerton, Solicitor General (afterwards Lord Ellesmere), was made Attorney General and Coke succeeded him in the office of Solicitor General, as he did a year afterwards in the office of Attorney General when Egerton was made Master of the Rolls. The post of Solicitor General being now vacant, Francis Bacon (afterwards the celebrated Lord Bacon and cor-



rupt Lord Chancellor), then not thirty years of age, made strenuous efforts through his friend the Earl of Essex, to obtain the appointment, but his ambition was blighted, and he attributed his failure chiefly to the interference of his successful rival Coke, who, however, just then promoted, could have had little influence in the nomination of a successor.

At this time Queen Elizabeth was engaged in two expensive military and naval enterprizes on the continent, to support which she was obliged to call a parliament. Coke was returned for Norfolk, and was unanimously elected Speaker of the House of Commons. The Queen's memorable speech on this occasion shews what a despotic prince expects from an obsequious parliament. She granted them "liberty of speech, but they should know what liberty they were entitled to, not a liberty for every one to speak what he pleased or what came uppermost in his brain; that sort of licence she would not allow; their privilege should extend no further than a liberty of saying aye, or no; and she enjoined the speaker, if he perceived any idle heads so negligent of their own safety as to attempt reforming the church or innovating in the commonwealth, that he should refuse the bills exhibited for that purpose, till they were examined by such as were fitter to consider of these things, and could better judge of them:"—language which the Speaker (if we may judge from his conduct in subsequent parliaments) could ill brook, but which from circumstances he then found himself obliged to submit to. His elevated situation, however, was far from enviable. With the indefatigable zeal of the puritans on the one hand, and the reiterated commands of an arbitrary mistress on the other, it required more than ordinary caution and discernment so to manage his conduct as to escape altogether the fury of the raging elements around him. After an angry session of

not quite two months the parliament was hastily dissolved, and the Speaker happily relieved from the critical eminence of his high office.

The death of Sir Edward's first wife took place soon after his appointment to the office of Attorney General, and he was left a widower with ten children to deplore the loss of one who was endeared to him by a long course of conjugal felicity which he was destined never again to enjoy. In 1598 he married Lady Elizabeth Hatton, daughter of the famous Lord Treasurer Burleigh, Earl of Essex, and relict of Sir William Hatton, brother of the chancellor. By this alliance he cemented his connection with the party in power, and acquired for a time a still further addition of influence and splendour. But this marriage proved as unfortunate as the first had been happy. It was celebrated in a private house late in the evening, contrary to the canons of the church, for which the parties were prosecuted in the Ecclesiastical Court. But by a timely submission and supplication for pardon, a dispensation was procured, and they were absolved from the severe penalties which awaited them, on the extraordinary pretence of *ignorance of the law*. Lady Elizabeth Hatton possessed very extensive estates, and a large personal property, which was for the most part settled to her separate use, and she always used the name and title of Lady Elizabeth Hatton, and could never be prevailed on to bear the name of her husband. By this marriage Mr. Coke had two children, but unhappy differences arising between him and his wife, the lady betook herself and children to a separate establishment, and they were never afterwards reconciled.

About the year 1600 the Earl of Essex, the favourite alike of Queen and people, fell into disgrace by his maladministration of affairs in Ireland, and he was tried be-

fore the Privy Council. The Attorney-General Coke opened the case against him with much virulence and cruelty. He displayed, in the strongest colours, all the faults committed by Essex, and exaggerated the indignity of the conditions which Tyrone had been allowed to propose; odious and abominable conditions (said he); a public toleration of an idolatrous religion, pardon for himself and every traitor in Ireland. Essex, however, (such was his popularity) was only deprived of his office and imprisoned during the Queen's pleasure, and if he could have borne his confinement with patience would probably have been restored to favour; but the Queen was cautious and slow in a renewal of her confidence, and although she restored him to liberty, refused to reinstate him in his full credit and authority. She allowed him to retain a wine monopoly which was on the eve of expiring, but when he requested a renewal of the patent, she was advised to refuse, and even added in a contemptuous style that "an ungovernable beast must be stinted in his provender."

This rigour, pushed one step too far, proved the final ruin of this young nobleman, and was the source of infinite sorrow and vexation to the Queen herself. Essex, who had with great difficulty so long subdued his proud spirit, and whose patience was now exhausted, imagining that the Queen was entirely inexorable, burst at once all restraints of submission and prudence, and entered with avidity into every treasonable design which his enemies had prepared to entrap him. He was taken in a wild project to instigate the City to seize the Queen in her palace; and in February 1601 he and the Earl of Southampton were arraigned before their peers on a charge of high treason. The Attorney-General conducted the prosecution, and in a speech abounding in malignant abuse overwhelmed the prisoners with a very aggravated

case of ingratitude and crime. Essex entreated leave to defend himself, declaring that Coke had played the orator, and had abused the ear of the Court with slanders; and Southampton exclaimed—"Mr. Attorney-General, you have urged the matter very far, and you wrong me therein; my blood be upon your head!"

The guilt of the prisoners, however, was too apparent to admit of any doubt, and they were sentenced to bear the heaviest penalty the law can inflict. In signing the death-warrants the Queen felt many compunctions of tenderness towards one whom she had perhaps once sincerely loved. But what chiefly hardened her heart against him, was his supposed obstinacy, in never making, as she hourly expected, any application for mercy. She finally gave her consent to his execution, which was conducted privately in the Tower, agreeably to his own request. Sir Walter Raleigh, who came to the Tower on purpose, it is said, to witness the execution of his rival, increased much, by this unworthy action, the general hatred under which he laboured.

Thus ended the splendid, yet imprudent career of the Earl of Essex, at the very early age of thirty-four. The Queen survived her favourite but a few years: and it seems agreed, that the circumstances attending his death hastened her own. She had in the days of his prosperity presented him with a ring, in token of her affection, assuring him, that into whatever disgrace he should fall, if he sent her that ring, she would immediately afford him a patient hearing, and lend a favourable ear to his apology. Essex reserved this precious gift to the last extremity; and after his condemnation he resolved to try its efficacy. He committed the ring to the Countess of Nottingham, to deliver it to the Queen. The Countess was prevailed on by her husband (the mortal enemy

of Essex) not to execute the commission; and Elizabeth, who still expected that her favourite would make this last appeal to her tenderness, and who ascribed the neglect of it to his invincible obstinacy, was, after much delay, and many internal compunctions, pushed by resentment and policy to sign the warrant for his execution. At a subsequent period the Countess of Nottingham, affected with the near approach of death, revealed the secret to the Queen, who in a furious passion absolutely shook the dying woman in her bed, crying, "*That God might pardon her, but she never could.*" She broke from the room, and thenceforth resigned herself to the deepest and most incurable melancholy, which terminated her existence on the 24th March 1603.\*

On the accession of James I. Coke was retained in his place and knighted. In November following he was called upon to prosecute Sir Walter Raleigh and others for treason. The exact object of this conspiracy is still involved in mystery, and the conspirators themselves had not perhaps formed any fixed design, so early did the discovery take place. It appears however to have been intended to oppose the proclamation of King James, and to place Arabella Stuart (a descendant of Henry 7.) on the throne in his stead. Lords Grey and Cobham, Sir Walter Raleigh and a few others were the principal persons accused. Raleigh was brought to trial at Winchester on the 17th November 1603, the Court then sitting there, on account of a general sickness in London. Cobham was the principal witness against him, but he was not confronted with the prisoner, and his evidence he first retracted, and then retracted his

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\* The celebrated ring is now in the possession of W. Sotheby, Esq., late of Bloomsbury-square.

retractation. Upon the written evidence of this single witness, without any concurring testimony, was this highly gifted individual convicted, contrary to all law, which requires, that in cases of treason the witnesses be examined in the prisoner's presence. Sir Walter knew that if he could once get Cobham face to face, his acquittal was certain; he therefore strenuously pressed the Court for a *viva voce* examination, which Coke as resolutely opposed. At this time all prosecutions for treason were conducted on the statute of Edw. 3., which, according to Lord Chief Justice Anderson, speaks of those who imagine a treason; "and how," says he, "can an imagination be proved by honest men, when it lies only in the secret recesses of a traitor's mind." A prosecution in these days seldom missed its aim from any defect of evidence, or indeed from any other cause. Against the weight and ability of the crown lawyers a prisoner had nothing to oppose: he was allowed no counsel; and if he prayed the Court in their humanity to see that the indictment was sufficient, the answer was, that they sat there not to give counsel, but to judge. Even the innocence of a prisoner could not be made out; for witnesses were not to be heard against the Crown. Juries were no protection to the subject: for though the Court might perhaps allow challenges for cause, they would not allow a prisoner to make one peremptory challenge. No one was, nor does it appear how any body could possibly be acquitted under such a course of proceedings. A trial for high treason was indeed, in those days, a formal, but a certain, method of getting rid of an obnoxious character.

It is scarcely possible to convey an idea of the rancorous abuse which the intemperate Attorney gave way to on this occasion, but by extracts from the trial itself:—

*Attorney-General.*—I shall not need, my lords, to speak any thing concerning the king, nor of the bounty and sweetness of his nature, whose thoughts are innocent, whose words are full of wisdom and learning, and whose works are full of honour; although it be a true saying, *nunquam nimis quod nunquam satis*. But to whom do you bear your malice?—to the children.

*Raleigh.*—To whom speak you this? You tell me news I never heard of.

*Attorney.*—Oh! sir, do I? I will prove you to be the most notorious traitor that ever came to the bar. After you have taken away the king, you would alter the religion. I will charge you with the words.

*Raleigh.*—Your words cannot condemn me; my innocence is my defence.

*Attorney.*—Nay I will prove all; thou art a monster, thou hast an English face, but a Spanish heart. Now you must have money. Aremberg was no sooner in England, but thou incitedst Cobham to go to him, and to deal with him for money to bestow on discontented persons, to raise rebellion in the kingdom.

*Raleigh.*—Let me answer for myself.

*Attorney.*—Thou shalt not.

*Raleigh.*—It concerneth my life.

*Lord Chief-Justice Popham.*—Sir Walter Raleigh, Mr. Attorney is yet but in the general; but, when the king's counsel have given the evidence wholly, you shall answer every particular.

*Raleigh.*—I will wash my hands of the indictment, and die a true man to the king.

*Attorney.*—You are the most absolute traitor that ever was.

*Raleigh.*—Your phrases will not prove it, Mr. Attorney.

*Attorney.*—Cobham writes a letter to my Lord Cecil, and commands Mellis, his man, to lay it in a Spanish bible, and to make as if he found it by chance. This was after he had intelligence with this viper that he was false.

*Lord Cecil.*—You mean a letter intended to me; I never had it.

*Attorney.*—No, my Lord, you had it not. You, my masters of the jury, respect not the wickedness and hatred of the man; respect his cause. If he be guilty, I know you will have care of it, for the preservation of the king, the continuance of the gospel authorized, and the good of us all.

*Raleigh.*—I do not hear yet, that you have spoken one word

against me ; here is no treason of mine done. If my Lord Cobham be a traitor, what is that to me ?

*Attorney.* All that he did was by thy instigation, thou viper ; it was through thee, thou traitor.

*Raleigh.*—It becomes not a man of quality and virtue to call me so ; but I take comfort in it, it is all you can do.

*Attorney.*—Have I angered you ?

*Raleigh.*—I am in no case to be angry.

*Popham, J.*—Sir Walter Raleigh, Mr. Attorney speaks out of the zeal of his duty, for the service of the king, and you for your life ; be valiant on both sides.

*Raleigh.*—I never came to the Lord Cobham's but about matters of his profit ; as the ordering of his house, paying of the servants' board wages &c. I had of his, when I was examined, 4000*l.* worth of jewels for a purchase ; a pearl of 3000*l.*, and a ring worth 500*l.* If he had had a fancy to run away, he would not have left so much to have purchased a lease in fee-farm. I saw him buy 300*l.* worth of books to send to his library at Canterbury, and a cabinet of 30*l.* to give to Mr. Attorney for drawing the conveyances ; and God in Heaven knows, not I, whether he intended to travel or no. But for that practice with Arabella, or letters to Aremberg framed, or any discourse with him, or in what language he spake unto him ; if I knew any of these things, I would absolutely confess the indictment, and acknowledge myself worthy ten thousand deaths.

*Attorney.*—Now let us come to those words of destroying the king and his cubs.

*Raleigh.*—O barbarous ! if they, like unnatural villains, should use these words, shall I be charged with them ? I will not hear it ; I was never any plotter with them against my country ; I was never false to the crown of England. I have spent 4000*l.* of my own against the Spanish faction, for the good of my country. Do you bring the words of these hellish spiders, Clark, Watson, and others against me ?

*Attorney.*—Thou hast a Spanish heart, and thyself art a spider of hell ; for thou confessest the king to be a most sweet and gracious prince, and yet hast conspired against him.

*Raleigh.*—If truth be constant, and constancy be in truth, why has he foresworn what he has said ? You have not proved any one thing against me by direct proofs, but all by circumstances.

*Attorney.*—Have you done ? The king must have the last.



*Raleigh.*—Nay, Mr. Attorney, he which speaks for his life, must speak last. False repetitions and mistakings must not mar my cause. You should speak *secundum allega et probata*, I appeal to God and the king in this point, whether Cobham's accusation be sufficient to condemn me.

*Attorney.*—The king's safety and your clearing cannot agree. I protest before God, I never knew a clearer treason.

*Raleigh.*—I never had intelligence with Cobham since I came to the Tower.

*Attorney.*—Go to, I will lay thee upon thy back, for the most confident traitor that ever came to a bar. Why should you take 8000 crowns for a peace?

*Lord Cecil.*—Be not so impatient, good Mr. Attorney, give him leave to speak.

*Attorney.*—If I may not be patiently heard, you will encourage traitors, and discourage us. I am the king's sworn servant, and must speak: If he be guilty, he is a traitor; if not deliver him.

Here the Attorney sat down in a chafe, and would speak no more, until the commissioners urged and entreated him. After much ado, he went on and made a long repetition of all the evidence for the direction of the jury; and at the repeating of some things, Sir Walter Raleigh interrupted him, and said, he did him wrong.

*Attorney.*—Thou art the most vile and execrable traitor that ever lived.

*Raleigh.*—You speak indiscreetly, barbarously, and uncivilly.

*Attorney.*—I want words sufficient to express thy viperous treasons.

*Raleigh.*—I think you want words indeed, for you have spoken one thing half a dozen times.

*Attorney.*—Thou art an odious fellow, thy name is hateful to all the realm of England for thy pride.

*Raleigh.*—It will go near to prove a measuring cast between you and me, Mr. Attorney.

*Attorney.*—Well, I will now make it appear to the world, that there never lived a viler viper upon the face of the earth than thou.

And therewith the learned attorney drew a letter from his pocket wherein Raleigh purports to council Cobham (after some scripture exhortation) not to associate with preachers as Essex did, and so betray himself; after which the Attorney continued:—

*Attorney.*—Oh! damnable Atheist! he hath learned some text of scripture to serve his own purpose, but falsely alleged. He councils him not to be councilled by preachers, as Essex was: he died the child of God, God honoured him at his death; thou wert by when he died. *Et lupus et turpes instant morientibus ursæ.* He died indeed for his offence. The king himself spake these words; “He that shall say Essex died not for treason is punishable.”

*Raleigh.*—I say that Cobham is a base, dishonourable poor soul.

*Attorney.*—Is he base? I return it into thy throat, on his behalf: but for thee he had been a good subject.

*Lord-Chief-Justice.*—I perceive you are not so clear a man as you have protested all this while; for you should have discovered these matters to the king.

Upon the conclusion of the evidence, the jury retired for about a quarter of an hour and returned a verdict of *Guilty*, upon which,

The *Lord-Chief-Justice* proceeded:—Now it rests with me to pronounce the judgment, which I wish you had not been this day to have received from me: for if the fear of God had been in you answerable to your other great parts, you might have lived to have been a singular good subject. I never saw the like trial, and I hope I shall never see the like again. But since you have been found guilty of these horrible treasons, the judgment of this court is, that you shall be had from hence to the place whence you came, there to remain until the day of execution; and from thence you shall be drawn upon a hurdle through the open streets, to the place of execution, there shall be hanged and cut down alive, and your body shall be opened, your heart and bowels plucked out, and your privy members cut off, and thrown into the fire before your eyes; then your head shall be struck off from your body, and your body shall be divided into four quarters, to be disposed of at the king’s pleasure. And God have mercy upon your soul.

Thus ended this most extraordinary and cruelly conducted trial. But notwithstanding the dreadful sentence recorded, Sir Walter was left to his Majesty’s mercy, who, apparently convinced of the iniquity of the conviction, still thought the prisoner too great a malcontent to have his freedom, and yet too innocent to lose his life. Sir Walter was therefore confined in the Tower,

but permitted to enjoy *libera custodia*; where he beguiled his imprisonment in literary and scientific pursuits. After some time spent in close companionship with musty records, he completed his "History of the World," a book which, "for the exactness of its chronology, singularity of its contexture, and learning of all sorts, should rather seem to be the work of an age, than the production of a single individual in the compass of a few years." The publisher, however, complained that he was a loser by the sale, whereupon Sir Walter threw a second part which he had prepared into the fire.

In this history Sir Walter threw out certain allusions to a gold mine in Guiana, on the southern coasts of America, which, in his travels twenty years before, he alleged to have discovered; and after fourteen years confinement in the Tower, taking advantage of the cupidity of the times, he succeeded in convincing the people, as also the Queen and Prince, and ultimately the wily King James himself, of the truth of his assertions, and obtained a commission for an expedition to Guiana in search of this hidden treasure. The King of Spain, however, had in the mean time taken possession of Guiana, and planted a small colony there called St. Thomas; which Raleigh unadvisedly sacked and plundered, but the Spaniards he alleged commenced hostilities. After a fruitless voyage he returned to an incensed court, and was immediately arrested and brought to London, where he found the Spanish Ambassador crying aloud for vengeance on the destroyer of the rising colony of Guiana. King James was thus involved in an unpleasant situation, he must either sacrifice Raleigh or encounter the charge and toil of a war with Spain. The choice was soon made, and the unfortunate Sir Walter,

at near eighty years of age, was carried to the scaffold — a martyr to his country rather than a traitor to his king. Coke must certainly be acquitted of any share in this execution; but his intemperate zeal had no doubt an intimidating effect on the jury and mainly contributed to the verdict of condemnation which they unhesitatingly returned. It was thought by many that Sir Walter's commission which enabled him to exercise martial law on a considerable body of his majesty's subjects, was in itself so incompatible with the notion of a condemned criminal, that it amounted to a pardon; and certain it is that this act of apparent injustice and cruelty gave general dissatisfaction to the nation.

The next important occasion which called forth a display of the Attorney's sagacity in unravelling the perplexities of a dark and mysterious case, was the Gunpowder Treason, upon which he was engaged three-and-twenty days in arranging and connecting the evidence. At the conclusion of his able speech to the jury, he craved to be reminded of the Lords Commissioners if he had forgot any thing material. Upon which Cecil, then Earl of Salisbury, said, "Mr. Attorney, I do assure you, you have done very well, painfully and learnedly; the evidence you have well opened, and I never heard so much matter better compacted or made more intelligible to a jury."—The principal conspirators pleaded guilty, and Garnet's trial was the only one on which the learned Attorney had an opportunity of displaying his learning and ingenuity; this he did with more temper and suavity than on former occasions, and consequently commanded more general attention and respect. His speech on this occasion, which is given at length in the State Trials, is considered one of the best he ever delivered.

In June, 1606, Gawdy, Chief Justice of the Common Pleas, died, and Sir Edward now mounted the Bench. The day after his appointment, he took his seat as Chief Justice, and was attended by the Society of the Inner Temple, who indulged themselves in the evening, as was usual, with a solemn revel; and this perhaps was one of the last occasions on which a mummery of that kind was performed. The chief seat in the Common Pleas was at this time much more beneficial in point of emolument than that in the King's Bench. It was also less subject to the influence of political intrigues, and was consequently more steady and desirable in the main. In this place Sir Edward conducted himself with much propriety, there being perhaps fewer occasions for the exercise of his forbearance than in the stormy conflicts he was obliged to endure as Attorney-General.

Sir Edward held the Chief-Justiceship of the Common Pleas about seven years, when (August, 1613) Fleming, Chief Justice of the King's Bench, died. By this time Bacon had procured the post of Solicitor-General, and was one of the Privy Council: he was on terms of much intimacy also with Villiers the prime favourite of the King, and through his means this accomplished politician obtained access to the royal ear; and it now appears by the publication of his letters, that to mortify his rival Coke, and at the same time to gratify his own ambition, he advised in a memorial which he drew up, that Coke should be removed to the King's Bench, Hobart, Attorney-General, to the Common Pleas, and that he himself should be made Attorney-General. This advice was adopted, and Sir Edward Coke was, on the 25th of October, 1613, sworn in Chief Justice of the King's Bench. It was one object of Bacon to embroil the Chief Justice with political questions, well knowing his inflexible ad-

herence to the law would render his conduct obnoxious to those whom he opposed.

The Archbishop of Canterbury was at this time at the head of a High Commission Court for the administration of ecclesiastical affairs and the punishment of spiritual delinquents. Besides the power of fine and imprisonment, this Court occasionally indulged in the unconstitutional use of the rack and torture. And its commitment of Sir William Chancey to the Fleet for adultery, now raised a question as to the extent of its jurisdiction. Sir Edward Coke held that the High Commission Court had no power to commit on suspicion, and its power to imprison in any case he also allowed to be impugned without contradiction. (See 12 Co. 19.) This gave great umbrage to the Archbishop, and highly incensed the church party.

With the Lord Chancellor Ellesmere also, Sir Edward found himself entangled in an unpleasant dispute. It had always been, and still is the province of the Chancery to soften the rigour of the common law. It has therefore of necessity, power to modify in some degree the adjudications of courts of law. This the Chief-Justice denied, and hinted, that if after judgment given in the Court of King's Bench, any man should draw that judgment to a new examination in any other court, he the Chief Justice would speedily regard it. The Chancellor, however, was held justified in his claim of jurisdiction in the Star Chamber, and the Chief Justice created many enemies by the dispute.

With the King himself, the Chief Justice had also frequent conflicts on the policy and legality of court measures. On the question of proclamations which King James had been advised were equal to acts of par-

liament, Lord Coke delivered the following unanimous resolution of himself and brethren. "The king by his proclamation cannot create any offence which was not an offence before; for then he may alter the law of the land by his proclamation in a high point. The law of England is divided into three parts; common law, statute law, and custom; but the king's proclamation is none of them. The king has no prerogative but that which the law of the land allows him. But the king, for prevention of offences, may, by proclamation, admonish his subjects that they keep the laws and do not offend them upon punishment to be inflicted by the law &c. Lastly, if the offence be not punishable in the Star Chamber, the prohibition of it by proclamation cannot make it punishable there:" 12 Coke, 76. After this resolution, proclamations were abandoned; but the king still claimed the prerogative in his next speech to parliament.

His majesty was further offended at Sir Edward's obstinate perseverance in doubts concerning the royal prerogative in granting *commendams*. At this time a power was claimed by the crown of granting vacant benefices falling into its hands by lapse or otherwise *in commendam*, as it was called, or in augmentation of poor livings. This prerogative had been generally exercised in favour of poor bishopricks; and now it occurred that a living in Norfolk which had lapsed to the crown, was granted in commendam to the bishop of Lichfield and Coventry. The patron of the advowson sued his writ against the bishop; and, among other important points of law which were involved in the discussion of the case, the right of the sovereign to grant *commendams* was called in question. The king, who perhaps anticipated what would happen, had ordered Secretary Winwood, and the Bishop of Winchester, Dr. Bilson, to attend in court

during the trial, and make a report to him of the proceedings. However the bishop alone was present at the hearing of the cause, and he gave his majesty to understand that Serjeant Chiborne, who argued against the *commendams*, had maintained several positions prejudicial to the royal prerogative; among others, that the king had only power to grant *commendams* in case of necessity, which necessity could never, in fact, exist, since no clerk was bound to keep hospitality above his means. On the receipt of this information, the Attorney-General, Bacon, was directed to acquaint Sir Edward Coke that it was the king's pleasure that all further proceedings in the cause should be stayed till the judges could have an opportunity of conferring with His Majesty on the subject. At Coke's desire a similar intimation was officially sent to all the other judges, and they assembled together for the purpose of consulting as to the course they should pursue. The result of their deliberation was a resolution to act in every respect as though they had received no notice to suspend the proceedings: and a letter was despatched to James, who was then absent from London, containing a firm but respectful remonstrance against the command that had been addressed to them, together with their reasons for not obeying it.

Shortly after this correspondence the king returned to London, and the twelve judges were immediately summoned before the council at Whitehall (June 6th, 1616) to answer for their conduct. His Majesty himself recapitulated the principal circumstances that had occurred, and commented with much asperity on the liberties that had been taken with his prerogative; observing that it was a new thing, and very indecent and unfit for subjects to disobey the king's commandment, but most of all to proceed



in the mean time and to return to him a bare certificate ; whereas they ought to have concluded with the laying down and representing their reasons modestly to His Majesty why they should proceed, and so to have submitted the same to his princely judgment, expecting to hear from him whether they had given him satisfaction." Immediately upon this declaration, the twelve judges fell on their knees and acknowledged their error as to the form of the letter, for which they craved His Majesty's gracious favour and pardon ; but Sir Edward Coke entered into a defence of the matter of it, showing that the delay required would have been a delay of justice ; and therefore contrary to law and the judge's oath. After some little altercation between the Attorney-General and the Lord-Chief-Justice, this point was referred to the decision of Lord Ellesmere, who gave it as his opinion that the stay which had been required by His Majesty was not against the law, nor the judge's oath. The judges were then severally asked, "Whether if, at any time, in a case depending before them, His Majesty conceived it to concern him either in power or profit, and thereupon required to consult with them and that they should stay proceedings in the mean time, they ought not to stay accordingly ?" and they all, with the exception of the Lord-Chief-Justice, declared that they would. But Sir Edward Coke contented himself with answering that "when the case should be he would do that which should be fit for a judge to do." They were then permitted to proceed in the cause, which was finally decided against the Bishop of Litchfield and Coventry.

This firm and resolute conduct of the Lord-Chief-Justice gave great offence to his Majesty, and it is supposed that this weak monarch, in addition to his other reasons for being displeased with Coke, had conceived a mean jealousy of his popularity. It was evident,

indeed, that the fearless integrity which had thwarted the King's views was the principal cause of that popularity; and the circumstance did not escape the attention of James, who afterwards remarked that Sir Edward Coke had obtained it without "having in his nature one particle of those things which are popular in men, being neither civil, nor affable, nor magnificent." He had, however, taken the surest means to acquire the lasting and deserved esteem of his countrymen.

One of the last judicial acts of the Chief Justice was the trial of Mrs. Turner for the murder of Sir Thomas Overbury, and what would be rather a novelty in the present day, the whole conduct of the prosecution was committed to his especial charge by the King—so enormous appeared the crime, and so established was the Judge's fame for tracking the crooked course of villany. The labyrinth of guilt he carefully unravelled, and pursued his scrutiny with great industry and severity; even his great rival Bacon, then Attorney general, paid him many high compliments on the efficacy of his searching examinations. It is, however, lamentable to relate the unbecoming language which the Chief Justice still thought proper to indulge in against the prisoner. He told her that she was guilty of the seven deadly sins, that she was a whore, a bawd, a sorcerer, a witch, a papist, a felon, and a murderer. It is scarcely necessary to add that she was condemned and executed, though the prime movers of the murder, the Earl and Countess of Somerset, escaped with their lives.

The declining health of the venerable Lord Chancellor Ellesmere, now made it apparent that the woolsack would soon be without an occupant. The sharp-sighted Bacon saw in the profound legal attainments of his rival, the only competitors. The credit of the Chief Justice was by this

time completely undermined at court, and his thwarting the favourite Villiers in his endeavours to procure the reversion of a lucrative situation in the Court of King's Bench, may be considered as completing the full measure of his iniquity. It was not therefore, difficult to procure his removal. Some slight pretext was however necessary. He was accused of concealing a statute of 12,000*l.* due to the king from the son of the late Lord Chancellor Hatton, of speaking irreverently of His Majesty in court, of opposing the Attorney-General (Bacon), in the discharge of his duty, of assuming the style of Chief Justicier of England; and of presuming to allow his coachman to drive him bareheaded. Upon these charges, he was in November 1616 displaced, but no impeachment followed. In the ensuing March, Lord Ellesmere died, and Bacon was made Lord Keeper.

At the time of his discharge Sir Edward Coke was 67 years of age, but by great temperance and regularity he preserved his health unimpaired, and lived afterwards to the advanced age of 83. He had been ten years on the bench, and by his opposition to court measures had rendered himself a great favourite with the people; a popularity which his successor Montagu was admonished to forego. The remaining sixteen years of his life were actively spent, and his patriotic exertions in the cause of freedom, still further secured to him the love and esteem of his countrymen.

Sir Edward was anxious for a renewal of the king's favour, and therefore projected a marriage between his youngest daughter by Lady Hatton, and John Villiers, brother of the favourite Duke of Buckingham. At this proposal Lady Hatton was highly offended, and refused her consent altogether until it was wrung from her by an

expression of his majesty's displeasure. The liberal settlements proposed by Sir Edward, and exacted from his lady, hastened on the match, and the parties were married by Michaelmas.

The effect of this union was the restoration of Sir Edward to the council table, and a temporary reconciliation with his wife; but it appears to have been of short continuance, for within a month after, Lady Hatton gave a grand entertainment to the new-married couple at her house in Hatton Garden, at which the King, the Duke of Buckingham, and other great personages were present, but the father of the bride was not only not invited, but expressly excluded.

Sir Edward lived long enough to prepare an impeachment against his formidable rival Bacon, for bribery and corruption, upon which he was convicted, and sentenced to pay a fine of 40,000*l.*, and to be imprisoned in the Tower during his majesty's pleasure. This sentence the disgraced courtier survived five years, but the brilliancy of his literary productions and his unrivalled merits as a philosopher have eclipsed the weaker points of his character.

In the parliament of 1621, Sir Edward was returned for Liskeard in Cornwall, in which to use the words of Camden, he bore himself with the truest patriotism, and taught that no proclamation was of weight against parliament. For these, and other liberal expressions he was committed to the Tower\*, but upon the dissolution of parliament soon after, he was released, and retired

\* The apartment allotted to him was the kitchen, and on the walls it is said were found inscribed, "This place has long wanted a Cook," a curious coincidence if true, as his name had often been pronounced and written *Cook*.

to his country house at Stoke Pogey, to enjoy the residue of his days free from the turmoils of public life.

It was here, in the 75th year of his age, that he employed his leisure in writing the ensuing commentary on the treatise of Littleton, which was first published in 1628, a work replete with sound and useful learning.

In March 1625, King James died, leaving an only son Charles, and one daughter by his queen, Anne of Denmark. Charles, in the 25th year of his age ascended the throne in the midst of a violent struggle then raging between prerogative and liberty. In his third parliament, the venerable subject of this memoir was returned for Buckingham, and his strenuous and generous efforts in forcing a declaration of rights were warmly applauded by the people and never forgotten by the court. This famous ordinance commonly known as *The Petition of Right*, was mainly attained by the animating voice and undaunted resolution of Coke, who in defiance of threats and promises, urged on the measure with such address, that in a few days the Lords were prevailed on to join the lower House, and the petition was passed into a law.

On the dissolution of this parliament, Sir Edward retired from public life, but his unpopularity at court frequently occasioned him great disquiet. A little before his death his house was searched for seditious correspondence, and all his papers and manuscripts seized and deposited in the exchequer. Among the documents carried off was his will, which was never afterwards found.

Sir Edward died on the 3rd September 1633, in the 83rd year of his age, as the following epitaph from his

monument in Titeshall Church, where he was buried, will more fully shew :—

Dedicated to the Memory of  
 Sir Edward Coke, Knight, a late reverend Judge,  
 Born at Mileham in this County of Norff.  
 Excellent in all Learning divine and human, That for his  
 Owne, This for his Countrie's good, especially in the Knowledge  
 And Practice of the Municipal Lawes of this Kingdome,  
 A famous Pleader, a sound Counsellor.  
 In his younger Yeares Recorder of the Cities of Norwiche  
 And London, next Solicitor Generall to Queene  
 Elizabeth, and Speaker of the Parliament in the 35  
 Year of her Reigne. Afterwards Attorney General to  
 The same Queene, as also to her Successor King James.  
 To both a faithfull Servant for their Ma<sup>ties</sup>. for their Safetye.  
 By Kinge James constituted Chief Justice of bothe Benches  
 Successively. In both a Just, in both an Exemplary Judge.  
 One of his Ma<sup>ties</sup>. most honorable Privie Counsell. As also of  
 Counsell to Queene Anne, and Chief Justice in Ire  
 Of all hir Forests Chases and Parkes.  
 Recorder of the Cittye of Coventrye, and High Steward  
 Of the Universitye of Cambridge, whereof he was sometime  
 A member in Trinity Colledge.  
 He had two Wives ; By Bridget his first wife (one of the  
 Daughters and Coheires of John Paston, Esq.) he had Issue Seaven  
 Sonnes and Three Daughters ; And by the Lady Elizabeth his second  
 Wife (One of the Daughters of the Right Honorable Thomas late Earle  
 Of Exeter) he had Issue Two Daughters.  
 A chast Husband, a provident Father.  
 He crowned his pious Life with as pious and  
 Christian Departure at Stoke Poges in the  
 County of Buckingham, on Wednesdaye  
 The Third Daye of September in the Year of  
 Our Lord M.DCXXXIII. And of his age LXXXIII.  
 His last Wordes  
 Thy Kingdom come, Thy Will be done.  
 Learne Reader to live so that thou mayst so die.

Sir Edward Coke was gifted with the advantages of a fine person and commanding appearance. The bust of

him which is preserved in the library at Trinity College, Cambridge, and the portrait which hangs in the hall of Lyon's Inn, represent him as having handsome and regular features, with a gravity of countenance to which the costume of his time, and particularly the long pointed beard, did not a little contribute. He was at all times particularly attentive to his apparel and general personal appearance, holding it for a maxim that the exterior neatness of the body ought to be emblematic of the inward purity of the heart.

The patriotism and independence of Sir Edward Coke, says a contemporary writer, must ever be considered as the brightest feature in his character. It is as a patriot alone that he stands superior to his great contemporary Bacon, with whom throughout the greater part of his professional career he was placed in constant competition. Both had embraced the same profession, both prosecuted it with ardour and success; one attaining the highest, the other the second dignity it can confer; and both lived to experience the instability of the preferment they had struggled so hard to acquire. But the causes which produced the downfall of these illustrious persons were widely different; and he whose integrity was unimpeached rose highest in public estimation after his disgrace at court; while all the brilliant qualities of his rival, when sullied by corruption, failed to procure him the consideration and esteem that to a generous mind form the most gratifying reward of every exertion. As a practical lawyer, Coke was undoubtedly without an equal. All the abstruse learning of the common law, the subtle niceties of pleading, and the voluminous enactments of the statute-book, were treasured in his memory; and from this copious repertory he could always draw wherewithal to supply the emergencies of a particular case.

The regular life which Sir Edward Coke observed, kept him in vigorous health to the last. He seldom slept more than six hours, and usually rose at three in the morning. He was no friend to medicine, and was wont to give God solemn thanks that he never gave his body to physic, his heart to cruelty, nor his hand to corruption. He was very frugal in his expenditure, and as his income was large he left a good inheritance to his family. He was ardently attached to his profession, and one may suppose from the extent, variety, and depth of research displayed in his numerous publications, that he was a slave to his studies; but with method in his labour, and perseverance in his work, he has shewn what temperance and assiduity combined may accomplish. Of the common law he was a great admirer, and when a statesman one day intimated that he meant to consult him on a point of law: "If it be common law," said Coke, "I should be ashamed if I could not give you a ready answer; but if it be statute law, I should be equally ashamed if I answered you immediately." This statesman was Archbishop Abbot, who while hunting in the park, most unhappily killed a man with his cross-bow. Lord Coke was asked on the event being mentioned to him (he was playing at bowls at the time) whether a bishop might hunt in a park by the laws of the realm?—He answered, that it was clear he might, for there was an old law which required of bishops when they died to leave their pack of hounds to the King's free use and disposal.

Bacon's character of Coke is perhaps applicable in some degree to all great lawyers. In a remonstrance addressed to the Chief Justice while under censure, which is undoubtedly Bacon's production, he says, "You cloy your auditory when you would be observed; speech must be either sweet or short. You converse with books, not men, and books especially human; and



have no excellent choice with men, who are the best books; for a man of action and employment you seldom converse with, and then but with your underlings.”— This from an eye witness was perhaps a just though a severe criticism. But in his general character Coke is uniformly spoken of as a man of great prudence and learning, and of a pious and virtuous life. The depth of his knowledge and the wisdom of his judgments have never been disputed, and he must be regarded by all as a sound, constitutional, and upright judge, notwithstanding the obliquity of his manners and the austerity of his deportment.

His works consist of Institutes of the Laws of England in three parts, of which the Commentary on Littleton is the first; and Reports of Cases in the King's Bench, now collected in six volumes, together with some few other smaller productions, but all of equal note. He has found an able biographer in Mr. Woolrych, whose recent “Life of Sir Edward Coke” has set the character of the Chief Justice in a fairer light than it has hitherto been placed in. In Fuller's Worthies also will be found many particulars concerning this great Judge, and his life in the Biographia Britannica, as also that in the biographical department of the Library of Useful Knowledge, are spirited productions.



## LORD COKE'S PREFACE.

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WE have formerly written, that this book is the ornament of the common law, and the most perfect work of its kind, and there never was any learned man in the law, that understood our author, but concurred with me in this commendation. And albeit our author in his *Three Books* cites not many authorities, yet he holds no opinion but what is approved by these two faithful witnesses, authority and reason. We have known many of his cases drawn in question, but never could find any judgment given against them, which we cannot affirm of any other book in our law.

We have in these *Institutes* endeavoured to open the true sense of each particular case, and the extent of the same, either in express words or by implication; and where any position is altered by act of parliament, we have endeavoured to observe the same and wherein the alteration consists. And we have by comparison of the late and modern impressions of the text with the original print, vindicated our author from two injuries: First, from divers corruptions in the late and modern prints, and, Secondly, from all additions and encroachments

upon him, that nothing might appear in this work but his own.

Our hope is, that the young student, who meeting with difficult terms and matter was at first discouraged, may, by reading these Institutes, have the difficulty and darkness both of the matter and terms of art, facilitated and explained, to the end he may proceed in his study cheerfully and with delight; and therefore I have termed them Institutes, because my desire is, they should institute and instruct the studious, and guide him in a ready way to the knowledge of the laws of England.

This Part we have (not without precedent) published in English, to the end that the nobility and gentry of this realm, who may be pleased to read him and these Institutes, may understand the language wherein they are written. And I cannot conjecture that the general communicating of these laws in the English tongue can work any inconvenience, but introduce great profit, seeing that *Ignorantia juris non excusat. Et neminem oportet esse sapientiolem legibus*, No man ought to be wiser than the law. And true it is, that our books of reports and statutes in ancient times were written in such French as in those times was commonly spoken and written by the French themselves. But this kind of French that our author has used, is most commonly written and read, and very rarely spoken, and therefore cannot be either pure, or well pronounced. But it should be remembered that by long custom many ancient terms and words drawn from the French are grown to be terms of art, and are so apt and significant to express the true sense of the laws, and are so woven in the laws themselves, that it is in a manner impossible to change them, neither ought legal terms to be changed. In school divinity you meet with a whole army of words, which can-

not defend themselves *in bello grammaticali*, and yet are more significant, compendious, and effectual to express the true sense of the matter, than if they were expressed in pure Latin.

This work we have called, "The First Part of the Institutes," for two causes: First, because our author is the first book that the student takes in hand. Secondly, because I have other Institutes not yet published, viz. The Second Part, being a Commentary upon the statute of *Magna Charta*, Westm. 1. and other old statutes. The Third Part treats of criminal causes and pleas of the crown: which Three Parts we have by the goodness of Almighty God already finished. The Fourth Part we have purposed to be of the jurisdiction of courts: but hereof we have only collected some materials towards the raising of so great and honourable a building. We have now, by the goodness and assistance of Almighty God, brought this twelfth work to an end: in the Eleven Books of our Reports we have related the opinions and judgments of others; but herein we have set down our own.

Before I entered into any of these Parts of our Institutes, I, acknowledging my own weakness and want of judgment to undertake so great works, directed my humble suit and prayer to the Author of all goodness and wisdom, out of the Book of Wisdom; *Pater et Deus misericordiæ, da mihi sedium tuarum assistricem Sapientiam! Mitte eam de cælis sanctis tuis et à sede magnitudinis tuæ, ut mecum sit et mecum laboret, ut sciam quid acceptum sit apud te!* "O Father and God of mercy, give me wisdom, the assistant of thy seats! O send her out of thy holy heavens, and from the seat of thy greatness, that she may be present with me, and labour with me, that I may know what is pleasing unto thee!" *Amen.*

Our author dealt only with estates and tenures. I have added somewhat concerning estates by force of certain statutes, as of statute-merchant, statute-staple, and *elegit*, (whereof our author intended to have written) and likewise of executors to whom lands are devised for payment of debts, and the like. And once for all I desire the learned reader will not conceive any opinion against this painful and large volume, until he shall have advisedly read over the whole, and diligently searched out, and well considered of the several authorities, proofs and reasons which we have cited and set down for warrant and confirmation of our opinions throughout this whole work.\*

My advice to the student is, that before he read any part of our Commentaries upon any Section, that first he read again and again our author himself in that Section, and do his best endeavours, first of himself, and then by conference with others, (which is the life of study) to understand it, and then to read our Commentary thereupon, and no more at any one time than he is able with a delight to bear away, and after to meditate thereon, which is the life of reading. And albeit the reader shall not in any one day (do what he can) reach to the meaning of our author, or of our Commentaries, yet let him be no way discouraged, but proceed; for on some other day, in some other place, that doubt will be cleared.

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\* The margins of all the editions of Lord Coke's works are crowded with authorities from the Year Books, and the text writers of his day. These have been omitted in the present edition, because of their uselessness in study, and the difficulty of following them, as also from the scarceness of the authorities referred to.

A

READABLE EDITION

OF

COKE UPON LITTLETON.

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BOOK I.

CHAPTER I. SECTION I.

FEE-SIMPLE.

TENANT *in fee-simple* is he who has lands or tenements to hold to him and his heirs for ever. Therefore, if a man purchase lands or tenements *in fee-simple*, it behoves him to have these words in his purchase, *To have and to hold to him and his heirs: for it is these words (his heirs) that make the estate of inheritance.* If a man purchase lands by these words, *To have and to hold to him for ever; or by these words, To have and to hold to him and his assigns for ever: in these cases he hath but an estate for term of life, for that there lack the words (his heirs), which words only make an estate of inheritance in all feoffments and grants.*

Tenant in fee who is.  
[1a]

*Tenant.*] In latin, *tenens* is derived from the verb *teneo*, and has in law several significations. 1. It signifies the estate of the tenant in the land. 2. It signifies the tenure or service whereby the lands or tenements are holden. All lands and tenements in England in the hands of subjects are holden mediately or immediately of the king, and therefore the owner of the land is called a tenant because he holds of some superior lord by some service. But the king in this sense cannot be said to be a tenant, because he has no superior but God Almighty. Of the several

Tenant—mean-  
ing of word.  
[1b]

estates of land our author treats in his first book, and he begins with fee-simple, because all other estates are derived out of the same.

*Fee-simple  
what.*

*Fee-simple.*] Fee legally signifies inheritance, and simple is added for that it is descendible to heirs generally, that is, simply without restraint to heirs of the body or the like. Of fee-simple it is commonly holden that there be three kinds, viz. fee-simple absolute, fee-simple conditional, and fee-simple qualified or base. But the more genuine and apt division were to divide fee, that is, inheritance, into three parts, viz. simple or absolute, conditional, and qualified or base; for this word (simple) properly excludes both conditions and limitations that defeat or abridge the fee. Hereby it appears that fee in legal understanding signifies that the land belongs to us and our heirs, in respect whereof the owner is said to be seised in fee, and in this sense the king even may be said to be seised in fee. Of fee in the first sense our author treats in this first book, and as it is taken in the second sense, in his second book; and of the third you shall read in our author, Sect. 13. 644, 645.

*Lands, tenements,  
and hereditaments.*

[2a]

*Lands or tenements.*] Here it is to be observed, that a man may have a fee-simple in three kinds of hereditaments, viz. real, personal, and mixt. Real, as lands and tenements, whereof our author here speaks. Personal, as if an annuity be granted to a man and "his heirs," it is a fee-simple personal. And lastly, hereditaments may be mixt both of the realty and personalty. As when the king creates an Earl of such a county or other place, to hold that dignity to him and his heirs, this dignity is personal, and also concerns lands and tenements. But of this matter more shall be said in the next chapter. Sect. 14 and 15.

*Fee by right  
and wrong distinguished.*

*A lawful or pure inheritance.*] Here it is well put in the disjunctive lawful or pure, for every fee-simple is not lawful. A disseisor, abator, intruder, usurper, &c. have a fee-simple, but it is not a lawful fee. So that every man who has a fee-simple, has it either by right or by wrong. If by right, then he has it either by purchase or descent. If by wrong, then either by disseisin, intrusion, abatement, usurpation, &c. In this chapter Littleton treats only of a lawful fee-simple, and divides the same as is aforesaid.



*For if a man purchase.]* Persons capable of purchase are of two sorts, natural persons created of God, as I. S. I. N. &c. and persons incorporate or politic created by the policy of man, who are therefore called bodies politic; and these be of two sorts, viz. either sole, or aggregate of many: again, aggregate of many, either of all persons capable, or of one person capable and the rest incapable or dead in law, as in the Chapter of Discontinuance, Sect. 655, shall be shewn. Some men have capacity to purchase, but not ability to hold: some, capacity to purchase and ability to hold or not at the election of themselves or others: some, capacity to take and to hold: some, neither capacity to take nor to hold; and some, are specially disabled to take some particular things.

*Who may purchase.*

If an alien christian or infidel purchase houses, lands, tenements, or hereditaments, to him and his heirs, albeit he can have no heirs, yet he is of capacity to take a fee-simple, but not to hold. For upon an office found, the king shall have it by his prerogative, of whomsoever the land is holden. And so it is if an alien purchases land and dies, the law casts the freehold and inheritance upon the king. If an alien purchase any estate of freehold in houses, lands, tenements, or hereditaments, the king upon office found shall have them. If an alien be made a denizen and purchase land, and die without issue, the lord of the fee shall have the escheat, and not the king. But as to a lease for years, there is a diversity between a lease for years of a house for the habitation of a merchant stranger being an alien, whose king is in league with ours, and a lease for years of lands, meadows, pastures, woods, and the like. For if he take a lease for years of lands, meadows, &c. upon office found, the king shall have it. But of a house for habitation he may take a lease for years as incident to commerce; for without habitation he cannot merchandize or trade. But if he depart or relinquish the realm, the king shall have the lease. So it is, if he die possessed thereof, neither his executors or administrators shall have it, but the king; for he had it only for habitation as necessary to his trade or traffic, and not for the benefit of his executor or administrator. But if the alien be no merchant, then the king shall have the lease for years, albeit it were for his habitation; and so it is if he be an alien enemy. And all this was resolved by the judges assembled for that purpose in the case of Sir James Croft, Pasch. 29. of the reign of Queen Elizabeth.

*Aliens.*

[2b]

*Felon.*

Also if a man commit felony, and after purchase lands, and after is attainted, he had capacity to purchase, but not to hold it; for in that case the lord of the fee shall have the escheat; and if a man be attainted of felony, yet he has capacity to purchase to him and to his heirs, albeit he can have no heir, but he cannot hold it; for in that case the king shall have it by his prerogative, and not the lord a fee; for a man attainted hath no capacity to purchase (being a man *civiliter mortuus*) but only for the benefit of the king, no more than the alien-nee has.

*Corporation.*

If any sole corporation or aggregate of many, either ecclesiastical or temporal (for the words of the statute of mortmain, 7 Edw. 1. c. 2. are *si quis religiosus vel alius*) purchase lands or tenements in fee, they have capacity to take but not to retain unless they have a sufficient license in that behalf; for within the year after the alienation the next lord of the fee may enter; and if he do not, then the next immediate lord to have half a year, and so of all the mesne lords, up to the king who shall have the land so aliened for ever in default of the other lords; but this is to be understood of such inheritances as may be holden. Of inheritances which are not holden of any, as rent charges, commons, and the like, the king shall have them presently by a favourable interpretation of the statute. But an annuity granted to a corporation is not considered as in mortmain, because it charges the person only. And lands granted to a corporation are said to be in mortmain, because the lands are as to the superior lords dead to their services, for by an alienation in mortmain they lose their escheats and the services of their knights, also the feudal incidents of wardship, marriage, reliefs and the like; and therefore such an alienation is said to be in mortmain or dead hand, for that a dead hand yields no service.

*Infants.*

An infant or minor (and all are such who are under the age of twenty-one years) has, without the consent of any other person, capacity to purchase, and the law will assume that such purchase is for his benefit, but at his full age he may either agree thereunto and perfect it, or without cause to be alleged, waive or disagree to the purchase; and so may his heirs after him, if he agreed not thereunto after his full age.

*Lunatic.*

A man of non-sane memory may, without the consent of any other, purchase lands, and he himself cannot waive it, but if he die in his madness, or after his memory recover without agreement

thereunto, his heir may waive and disagree to the estate purchased without any cause shewn ; and so of an idiot. But if the man of non-sane memory recover his memory and agree to the purchase, then is it unavoidable.

And note that an hermaphrodite may purchase land according to that sex which prevails. *Hermaphrodite.*  
[3a]

A fême covert cannot take any thing of the gift of her husband [except by will or through the medium of uses and trusts] but she is of capacity to purchase of others without the consent of her husband. And of this opinion was Littleton in the year-books, and in this book, Sect. 677 ; but her husband may disagree thereunto and devest the whole estate ; but if he neither agree nor disagree, the purchase is good ; but after his death, albeit her husband agreed thereunto, yet she may, without any cause alleged, waive the same, and so may her heirs also, if after the decease of her husband she herself agreed not thereunto. A wife (*uror*) is a good name of purchase, without a Christian name ; and so it is if a Christian name be added and mistaken, as Em for Emelyn, &c. for *utile per inutile non vitiatur*. *Feme covert.*

But the queen consort of the king of England, is a separate person from the king by the common law, and is of ability and hath capacity to purchase and grant without the king. Of which see more at large, Sect. 200. *Queen.*

The parishioners, inhabitants, or churchwardens [of a parish] are not [as such] capable of purchasing lands [except by an act of parliament or grant from the crown] but goods they may purchase. *Churchwardens.*

An ancient grant by a lord to his commoners of a right of way was formerly good ; but otherwise it is of such a grant at this day. And so in ancient time a grant made to a lord *et hominibus suis tam liberis quàm natis*, or the like, was good ; but these persons are not of capacity to purchase land by such a name at this day. *Commoners.*

And regularly it is requisite, that the purchaser be named by the name of baptism and his surname, and that special heed be taken to the name of baptism, for a man cannot have two names of baptism but he may have divers surnames. And yet in *Purchaser's name.*

some cases, though the name of baptism be mistaken (as in the case put before of the wife), the grant is good. So it is if lands be given to Robert Earl of Pembroke, where his name is Henry,—to George bishop of Norwich, where his name is John:—in these and the like cases there can be but one of that dignity or name. And therefore such a grant is good, albeit the name of baptism be mistaken.

*Name of a corporation.*

If by license lands be given to the dean and chapter of the holy and undivided Trinity of Norwich, this is good, although the dean be not named by his proper name, provided there be a dean at the time of the grant, [for the dean is the head, and without a head the corporation is not complete and cannot purchase] but in pleading the dean's proper name must be shewn. And so on the other side, if the dean and chapter make a lease, without naming the dean by his proper name, the lease is good, if there were a dean at the time of the lease; but in pleading, the proper name must be shewn; and so is the year-book 18 E. 4. to be intended; for the same judges in 13 E. 4. held a grant to a mayor aldermen and commonalty to be good although the mayor was not named by his proper name; but in pleading the name must be shewn as it was there also holden.

*Name of baptism and confirmation distinguished.*

If a man be baptised by the name of Thomas, and after, at his confirmation, by the bishop he is named John, he may purchase by the name of his confirmation. And this was the case of Sir Francis Gawdie, late chief justice of the court of Common Pleas, whose name of baptism was Thomas, and his name of confirmation Francis: and the name of Francis he afterwards bore and by the advice of the judges used that name in all his subsequent purchases and grants. And this agrees with our ancient books, where it is holden that a man may have divers names at divers times, but not divers Christian names. And the court said, it may be that a woman is baptised by the name of Anable, and forty years after she is confirmed by the name of Douce, and then her name is changed, and after she is to be called Douce, but all purchases, &c. made by her by her name of baptism before her confirmation remain good; a matter not much in use now, nor requisite to be put in use, yet is it necessary to be known. But purchases are good in many cases by a known name, or by a certain description of the person without either surname or name of baptism, as *uxori* J. S. as hath been said, or *primo genito filio*, or *secundo genito filio*, &c. or *filio natu minimo*, J. S. or *seniori puero*, or *omnibus filiis*, or

*filiabus J. S. or omnibus liberis seu exatibus of J. S. or to the right heirs of J. S.*

A bastard having acquired a name by reputation may purchase by his reputed or known name to him and his heirs, although he can have no heir but of his body. A man makes a lease to B. for life, remainder to the eldest issue male of B. and the heirs males of his body. B. has issue a bastard son, he shall not take the remainder, because in law he is not his son; for *que ex damnato coitu nascuntur inter liberos non computentur*. And, as Littleton says, a bastard is *quasi nullius filius* and cannot have a name of reputation immediately on his birth. So it is if a man make a lease for life to B. the remainder to the eldest issue male of B. to be begotten of the body of Jane S. whether the same issue be legitimate or illegitimate. B. has issue a bastard on the body of Jane S., this son or issue shall not take the remainder; for (as it has been said) by the name of issue, if there had been no other words, he could not take; and (as it has been also said) a bastard cannot take but after he has gained a name by reputation, [as] that he is the son of B. &c. [then if an estate be limited or given to him by that name he may take.] Hence a bastard can take no remainder limited before he be born; but after he is born and has gained by time a reputation to be known by the name of a son, then a remainder limited to him by the name of the son of his reputed father, is good; but if he cannot take the remainder by the name of issue at the time when he is born, he shall never take it at all. And so it seems for the same cause that if, after the birth of issue, B. had married Jane S., whereby the issue might have become bastard *eigne* and have had a possibility to inherit, yet he shall not take the remainder.

Bastard.

[3b]

Persons deformed having human shape, idiots, madmen, lepers, deaf, dumb, and blind, minors, and all other reasonable creatures, have power to purchase and retain lands or tenements.

Who may purchase.

But the common law disables some men to take any estate in some particular things; as if an office either of the grant of the king or subject, which concerns the administration, proceeding, or execution of justice, or the king's revenue, or the common-wealth, or the interest, benefit, or safety of the subject, or the like, if these or any of them be granted to a man that is inexpert, and has

Offices.

Steward.

no skill and science to exercise or execute the same, the grant is merely void, and the party disabled by law and incapable to take the same *pro commodo regis et populi*; for only men of skill, knowledge, and ability to exercise the office are capable of the same, to serve the king and his people. An infant or minor is not capable of an office of stewardship of the court of a manor, either in possession or reversion. No man, though never so skilful and expert, is capable of a judicial office in reversion, but must expect until it fall in possession. And see Sect. 378. where bargaining or giving of money or any manner of reward &c. for offices there mentioned, shall make such a purchaser incapable thereof, which is worthy to be known, but more worthy to be put in due execution.

Monster.

A monster born within lawful matrimony, that hath not human shape, cannot purchase, much less retain any thing.

Professed monks.

The same law is *de professis et mortuis sæculo*, for they are *civiliter mortui*; whereof you shall read at large in its proper place, Sect. 200.

Purchase and descent distinguished.

*Purchase.*] In latin *perquisitum*, of the verb *perquirere*. Littleton describes it in the end of this chapter in this manner: also purchase is called the possession of lands or tenements that a man has by his deed or agreement, unto which possession he comes not by title of descent from any of his ancestors or of his cousins, but by his own deed. So that I take it, a purchase is when one comes to lands by conveyance and [rightful] title, and that decisions, abatements, intrusions, usurpations, and such like estates gained by wrong, are not to be called purchases but oppressions and injuries.

Fraudulent conveyances.

Note, that purchasers of lands, tenements, leases, and hereditaments, for good and valuable consideration, shall avoid all former fraudulent and covinous conveyances, estates, grants, charges, and limitations of use of or out of the same, by a statute made since Littleton wrote, [27 Eliz. c. 4. 13 Eliz. c. 5.] whereof you may plainly and plentifully read in my reports, to which I will add, this case: I. C. had a lease of certain lands for sixty years if he lived so long, and forged a lease for ninety years absolutely, and he by indenture reciting the forged lease, for valuable consideration, bargained and sold the forged lease and all his interest in

the land, to R. G. It seemed to me that R. G. was no purchaser within the statute of 27 Eliz. for he contracted not for the true and lawful interest, for that was not known to him and perhaps if he had known the shortness of the term, he would not have dealt for it, but the visible and known term which he purchased was forged; and *although by general words the true interest did pass*, yet he gave no valuable consideration for it, neither did he contract for it. And of this opinion were all the judges in Serjeant's-Inn, in Fleet-street.

And on the other side, purchases, estates, and contracts may be avoided, since Littleton wrote, by certain acts of parliament against usury; and to those who lend money my caveat is, that neither directly nor indirectly, by art, or cunning invention, they take above ten per cent. interest for their money [the then current interest], for they that seek by sleight to creep out of these statutes, will deceive themselves and repent in the end.

Usury.

[4a]

*Purchase lands.*] Littleton here, and in many places, puts lands but for an example; for his rule extends to seigniories rents, advowsons, commons, estovers, and other hereditaments, of what kind or nature soever.

*Land.*] *Terra*, in the legal signification, comprehends any ground, soil, or earth whatsoever; as meadows, pastures, woods, moors, waters, marshes, furzes, and heath. *Terra est nomen generalissimum et comprehendit omnes species terræ*; but properly, *terra dicitur à terendo, quia vomere teritur*; and anciently it was written with a single *r*; and in that sense it includes whatsoever may be ploughed, and is all one with *arvum ab arando*. It legally includes all castles, houses, and other buildings: for castles, houses, &c. consist upon two things, viz. land or ground, as the foundation or structure thereof, so that in passing the land or ground, the structure or building thereupon passes therewith. Also, the waters that yield fish for the food and sustenance of man are not by that name demandable; but the land whereupon the water flows or stands is demandable, as for example, twenty acres of land covered with water: and besides, the earth does furnish man with many other necessaries for his use, as it is replenished with hidden treasures, namely, with gold, silver, brass, iron, tin, lead, and other metals, and also with a great variety of precious stones, and many other things for profit, ornament, and

Land includes what.

pleasure [all which pass by the general name of land]. And lastly, the earth has, in law, a great extent upwards, not only of water. as hath been said, but of air, and of all other things, even up to heaven; for *cujus est solum ejus est usque ad cælum*.

Moveable fee-simple.

And albeit land, whereof our author here speaks, be the most firm and fixed inheritance, and fee-simple the highest and most absolute estate that a man can have; yet may the same at several times be moveable, sometime in one person and *alternis vicibus* in another; nay, sometime in one place and sometime in another. As for example, if there be eighty acres of meadow, which have been used time out of mind to be divided between certain persons, so that a certain number of acres appertain to each person individually; as for example, to A. thirteen acres to be yearly assigned and lotted out, so as sometime the thirteen acres lie in one place and sometime in another, and so of the rest; A. has a moveable fee-simple in thirteen acres which may be parcel of his manor or lordship, albeit they have no certain place but are yearly set out in several places, so that the number only is certain, and the particular acres or place wherein they lie after the year is uncertain. And so it was adjudged in Bridgwater's case. If a partition be made between two coparceners of one and the same land, viz. that the one shall have the land from Easter until Lammas to her and to her heirs, and the other shall have it from Lammas till Easter to her and her heirs, or that the one shall have it the first year, and the other the second year, *alternis vicibus*, &c. that also is a case wherein two persons have several inheritances in the same land at several times. So it is if two coparceners have two several manors by descent, and they make partition, that the one shall have the one manor for a year, and the other the other manor for the same year, and after that year then that she who had the one manor shall have the other, *et sic alternis vicibus* for ever, this is a good partition, and although the manors be several, yet are they certain, and it is therefore stronger than Bridgwater's case; so that this makes a division of estates into certain or immoveable, whereof Littleton here speaks, and uncertain and moveable, whereof these three cases for examples have been put; and in these cases it is to be noted, that the possession is not only several, but the inheritance is general also.

Herbage.

[4b]

It is also necessary to be seen by what names lands shall pass. If a man has twenty acres of land, and by deed grants to



another and his heirs *vesturam terræ*, and makes livery of seisin *secundam formam chartæ*, the land itself shall not pass, because he has a particular right in the land; for thereby he shall not have the houses, timber-trees, mines, and other real things parcel of the inheritance, but he shall have the vesture of the land, (that is) the corn, grass, underwood, sweepage, and the like, and he shall have an action of trespass *quare clausum fregit*. The same law is if a man grant *herbagium terræ*, he has a like particular right in the land, and shall have an action *quare clausum fregit*; but by grant thereof and livery made the soil shall not pass, as is aforesaid. If a man let to B. the herbage of his woods, and after grants all his lands in the tenure possession or occupation of B., the woods shall pass, for B. hath a particular possession and occupation, which is sufficient in this case; and so it was resolved.

So if a man be seised of a river, and by deed grants *seperalem piscariam* in the same, and makes livery of seisin *secundum formam chartæ*, the soil does not pass nor the water, for the grantor may take water there, and if the river becomes dry, he may take the benefit of the soil; for there passed to the grantee but a particular right, and the livery being made *secundum formam chartæ* cannot enlarge the grant. For the same reason, if a man grant *aquam suam*, the soil shall not pass, but the fishery within the water passes therewith. And land covered with water shall be demanded by the name of so many acres covered with water; whereby it appears that they are distinct things. Fishery.

So if a man grant to another to dig turf in his land and to carry it away at his will and pleasure, the land shall not pass, for part only of the profit is given viz. the turf, and not the trees, mines, &c. Turf.

But if a man seised of lands in fee, by his deed grants to another the profit of those lands, to have and to hold to him and his heirs, and makes livery *secundum formam chartæ*, the whole land itself does pass; for what is the land but the profits thereof, for thereby vesture, herbage, trees, mines, and all whatsoever is parcel of the land passes. Rents and profits include the land itself.

A man seised of divers acres of wood, grants to another *omnes boscos suos*, all his woods, not only the woods growing upon the land pass, but the land itself, and by the name [of land covered with Woods; the same.

wood] shall it be recovered in a *precipe*; for *boscus* does not only include the trees but the land also whereupon they grow.

Pastures.

If a man grants all his pastures, *pasturas*, the land itself employed in the feeding of beasts shall pass, and also such pastures or feedings as he hath in another man's soil. So if a man grant *omnia prata sua*, all his meadows, the land itself of that kind shall pass; *et dicitur pratum quasi paratum*, because it grows spontaneously without manurance. A man grants *omnes brueras suas*, the soil where the heath grows shall pass. And by the grant of *omnes juncarias* or *joncarias*, the soil where rushes grow shall pass; and he that grants *omnes mariscos suos*, does convey all his fens and marshy grounds. By grants of these particular kinds of land, the lands of the description named only do pass; but, as hath been said, by the grant of land in general, all these particular kinds and some others pass.

Meadows.

Heath.

[5a]

Rushes.

Marshes.

Honour.

By the name of an honour, which a subject may have, divers manors and lands may pass. So by the name of an isle, *insula*, many manors lands and tenements may pass. And by the name of a castle, one or more manors may be conveyed; *et è converso*, by the name of a manor &c. a castle may pass. But note by the way, that no subject can build a castle or house of strength embattled &c. or other fortress defensible, without the license of the king, for the danger which might ensue if every man at his pleasure might thus entrench himself. By the name of a town, *villa*, a manor may pass. And by the name of a manor, divers towns may pass.

Isle.

Castle.

Town.

Farm.

By the name of a *ferme* or farm, *firma*, houses, lands, and tenements may pass; and *firma* is derived of the Saxon word *feormian*, to feed or relieve, for in ancient time were reserved upon these leases cattle and other provisions for the lessor's sustenance. Note, a farm in the north part is called a tack, in Lancashire a farm-holt, in Essex a wike; but the word farm is the general word, and anciently *fundus* signified a farm, and sometimes land. Lands making a knight's fee shall pass by the grant of a knight's fee, *de uno feodo militis*. By the name of a grange, *grangia*, a house or edifice, not only where corn is stored up as in barns, but necessary places for husbandry also, as stables for hay and horses, and stables and styes for other cattle, and a curtilage, and the close wherein it stands shall pass. *Stagnum*, in English, a pool, consists of water and land:

Grange.

Pool.

and therefore by the name of *stagnum*, or a pool, the water and land shall pass also. [5b]

So it is of a forest, park, chase, vivary, and warren in a man's own ground, by the grant of any of them, not only the privilege but the land itself passes. Forest.  
Chase.  
Park.

By the grant of a messuage or house, the orchard, garden, and curtilage do pass, and so an acre or more may pass by the name of a house. Messuage and  
curtilage.

By the name of *minera*, or *fodina plumbi*, &c. the land itself shall pass in a grant, if livery be made, and so shall it be recovered in an assize. Mines.  
[6a]

By the grant of a foldcourse, or the like, lands and tenements may pass; [*contra* it is presumed of a sheep-walk.] Fold-course.

*Tenementum*, tenement, is a large word to pass not only lands and other hereditaments and inheritances which are holden, but also offices, rents, commons, profits apprender out of lands, and the like, wherein a man may have a frank-tenement and whereof he can be said to be seised *ut de libero tenemento*. But *hereditamentum*, hereditament, is the largest word of all in that kind; for whatsoever may be inherited is an hereditament, be it corporeal or incorporeal, real, personal, or mixed. Tenements.  
Hereditaments.

A man seised of land in fee having divers charters, deeds, and evidences, makes a feoffment in fee, either without warranty, or with warranty against him and his heirs only [as covenants and warranties are at this day usually made]; the purchaser shall have all the charters, deeds, and evidences, as incident to the lands, *et ratione terre*, to the end he may the better defend the land himself, if he has no warranty to recover in value; for the evidences are, as it were, the sinews of the land, and the feoffor not being bound to warranty, has no use of them. But if the feoffor be bound to warranty [that is, if he warrants the title generally] so that he is bound to render in value [against whoever claims], then is the defence of the title at his own peril; and therefore the feoffee in that case shall have no deeds that comprehend warranty whereof the feoffor may take advantage. Also he [the feoffor] shall [in such case] have such Deeds.

charters as may serve him to deraigne the warranty paramount. Also he shall have all deeds and evidences which are material for the maintenance of the title to the land, but other evidences which concern the possession and not the title of the land [as leases], the feoffee shall have them.

*Habendum.*

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

*Parts of a deed.*

There are eight formal or orderly parts of a deed of feoffment, viz. 1. the premises which are implied by Littleton ; 2. the *habendum*, whereof Littleton speaks ; 3. the *tenendum*, mentioned by Littleton ; 4. the *reddendum* ; 5. the clause of warranty ; 6. the *in cujus rei testimonium*, comprehending the sealing ; 7. the date of the deed, containing the day, the month, the year, and style of the king or of the year of our Lord ; lastly, the clause of *hiiis testibus*. The office of the premises of the deed is twofold : first, rightly to name the feoffor and the feoffee ; and secondly, to comprehend the certainty of the lands or tenements to be conveyed by the feoffment, either by express words or which may by reference be reduced to a certainty, for *certum est quod certum reddi potest*. The *habendum* has also two parts, viz. first, to name again the feoffee ; and secondly, to limit the certainty of the estate. The *tenendum* at this day, where the fee simple passes, must be of the chief lords of the fee. And of the *reddendum*, more shall be said in its proper place in the Chapter of Rents. Of the clause of warranty, more shall be said in the Chapter of Warranties. *In cujus rei testimonium sigillum meum apposui* is added, for the seal is an essential part of the deed. The date of the deed many times antiquity omitted ; and the reason thereof was, for that the limitation of prescription or time of memory, did often in process of time change, and the law was then holden, that a deed bearing date before the limited time of prescription was not pleadable ; and therefore they made their deed without date, to the end they might allege them within the time of prescription. And the date of the deeds was commonly added in the reign of Edw. 2 and Edw. 3, and so ever since. And sometimes antiquity added a place, as *datum apud D.* which was in disadvantage of the feoffee, for if the deed be general, he may allege it to be made where he will. And, lastly, antiquity did add

*hīs testibus* in the contents of the deed after the *in cuius rei testimonium*, written in the same hand that the deed was, which witnesses were called, the deed read, and then their names entered; which clause of *hīs testibus* in subjects' deeds continued until and in the reign of Henry 8, but is now wholly omitted.

If the witness be an infidel, or infamous, or of non-sane memory, or not of discretion, or a party interested, or the like, he can be no good witness. But oftentimes a man may be objected to on a jury who cannot be challenged to be a witness; and therefore, though the witness be of the nearest alliance or kindred, or of counsel, or tenant, or servant to either party, or any other exception that makes him not infamous, or to want understanding or discretion, or a party in interest, though it be proved true, that shall not exclude the witness to be sworn, but he shall be sworn, and his credit upon the exceptions taken against him left to those of the jury who are triers of the fact; insomuch as some books have said, that though the witness named in the deed be named a disseisor in the writ, yet he shall be sworn as a witness to the deed, and though a witness be outlawed in a personal action, that is no exception against him to exclude him to be sworn as a witness to a jury. But note, it is a maxim in law, that witnesses cannot testify a negative, but can only prove an affirmative: but if one of the witnesses named in the deed be one of the panel, he shall be put out of the panel. If all the witnesses be dead (and no man can keep his witnesses alive, for time weareth out all men), then continual and quiet possession is a violent presumption of right, and stands for a proof [i. e. till rebutted.] Note, it hath been resolved, that a wife cannot be produced either for or against her husband, *quia sunt duæ animæ in carne unâ*; and it might be a cause of implacable discord and dissension between them, and a means of great inconvenience.

Witnesses, who  
may be.  
[6 b]

But now let us return to that from which by way of digression (upon this occasion) we are fallen. I have termed the said parts of a deed the formal or orderly parts, but they are not of the essence of a deed of feoffment; for if such a deed be without *premisses*, *habendum*, *tenendum*, *reddendum*, clause of *warranty*, clause of *in cuius rei testimonium*, the *date*, or the clause of *hīs testibus*, yet the deed is good. For if a man by deed gives lands to another and to his heirs without saying more, this is good, if he put his seal to the deed, deliver it, and make livery accordingly. So it is if A.

Formal parts  
not essential.  
[7 a]

give lands to have and to hold to B. and his heirs, this is good, albeit the feoffee is not named in the premises. But no well advised man should trust to such deeds which the law by construction only makes good, *ut res magis valeat*; but when form and substance concur, then is the deed fair and absolutely good.

*Heir, who is.*

[7 b]

To him and to his heirs.] *Hæres*, in the legal understanding of the common law, implieth, that he is *ex justis nuptiis procreatus*; for *hæres legitimus est quem nuptiæ demonstrant*, and is he to whom lands, tenements, or hereditaments, by the act of God and right of blood do descend of some estate of inheritance.

*Monster.*

A monster, which has not the shape of mankind, cannot be heir or inherit any land, albeit it be brought forth within marriage; but although he has deformity in any part of his body, yet if he has human shape he may be heir.

*Bastard.*

[8 a]

Neither can a bastard be heir, as hath been before said.

*Hermaphrodite.*

Every heir is either a male, or female, or an hermaphrodite, that is both male and female. And an hermaphrodite (which is also called *Androgynus*) shall be heir, either male or female, according to that kind of sex which prevails. *Hermaphrodita, tum masculo quam fœminæ comparatur, secundum prævalescentiam sexûs incalescentis*. And accordingly it ought to be baptised. See more of this matter Sect. 35.

*Aliens.*

A man seised of lands in fee hath issue an alien that is born out of the king's allegiance; he cannot be heir, *propter defectum subjectionis*, albeit he be born within lawful marriage. If made denizen by the king's letters patent, yet cannot he inherit to his father or any other. But otherwise it is, if he be naturalized by act of parliament; for then he is not accounted in law an alien but a subject. But after one be made denizen, the issue that he has afterwards shall be heir to him, but no issue that he had before. If an alien comes into England and has issue two sons, these two sons are *indigenæ*, subjects born, because they are born within the realm. And yet if one of them purchase lands in fee, and dies without issue, his brother shall not be his heir; for there was never any inheritable blood between the father and them; and where the sons by no possibility can be heir to the father, the one of them shall not be heir

to the other. See more of this matter Sect. 198. [and 25 Geo. 2. c. 40.]

If a man be attainted of treason or felony, although he be born *Attainder.* within wedlock, he can be heir to no man, nor any man heir to him, *propter delictum*, for that by his attainder his blood is corrupted. And this corruption of blood is so high, that it cannot be absolutely salved and restored but by act of parliament; for albeit the person attainted obtain his charter of pardon, yet that does not make any to be heir whose blood was corrupted at the time of the attainder, either downward or upward. As if a man has issue a son before his attainder, and obtains his pardon, and after the pardon has issue another son, at the time of the attainder the blood of the eldest was corrupted, and therefore he cannot be heir. But if he die, living his father, the younger son shall be heir; for he was not *in esse* at the time of the attainder, and the pardon restored the blood as to all issues begotten afterwards. But in that case if the eldest son had survived the father, the younger son cannot be heir; because he has an elder brother who by possibility might have inherited; but if the elder brother had been an alien, the younger son should be heir, for that the alien never had any inheritable blood in him. See more plentifully of this matter Sect. 746. 747. If a man has issue two sons, and after is attainted of treason or felony, and one of the sons purchase land and dies without issue, the other brother shall be his heir; for the attainder of the father corrupts the lineal blood only, and not the collateral blood between the brethren, which was vested in them before the attainder, and each of them by possibility might have been heir to the father. But otherwise it is in the case of the alienee, as hath been said. But some have holden that if a man after he be attainted of treason or felony have issue two sons, that the one of them cannot be heir to the other, because they could not be heir to the father, for that they had no inheritable blood in them.

One that is born deaf and dumb may be heir to another, albeit it *Incompetent persons.* was otherwise holden in ancient time. And so if born deaf, dumb, and blind, for *in hoc casu vitio parcurit naturali*. But contract they cannot. Idiots, lepers, madmen, outlaws in debt, trespassers, or the like, persons excommunicated, men attainted in a *præmunire* or convicted of heresy, may be heirs.

Posthumous  
child.

If a man has a wife, and dies, and within a very short time after the wife marries again, and within nine months has a child, so as it may be the child of the one or the other, some have said that in this case the child may choose his father, *quia in hoc casu filiatio non potest probari*; for avoiding of which question and other inconveniences, this was the law before the conquest, *Sit omnis vidua sine marito duodecim mensibus, et si maritaverit perdat dotem*.

Heir looms.

A man by the common law cannot be heir to goods or chattels, for *hæres dicitur ab hæreditate*. If a man buy divers fish, as carp, bream, tench, &c. and put them in his pond, and dies, in this case the heir shall have them, and not the executors, but they shall go with the inheritance; because they were at liberty, and could not be gotten without industry as by nets, and other engines. Otherwise it is, if they were in a trunk or the like. Likewise, deer in a park, conies in a warren, and doves in a dovehouse, young and old, shall go to the heir. But of ancient time the heir was permitted to have an action of debt upon a bond made to his ancestor and his heirs; but the law is not so held at this day, vide Sect. 12.

Heir apparent.  
[8 b]

It is to be noted, that one cannot be heir till after the death of his ancestor. Before, he is called *hæres apparens*, heir apparent. When a man having lands in fee-simple dies, and his wife soon marries again, and feigns herself with child by her former husband, in this case though she be married, the writ *de ventre inspiciendo* doth lie for the heir. But if a man seised of lands in fee (for example) has issue a daughter, who is heir apparent, she in the life of her father cannot have this writ for divers causes. 1st. Because she is not heir, but heir apparent; for, as hath been said, *nemo est hæres viventis*; and this writ is given to the heir to whom the land is descended. And both Bracton and Fleta say, that this writ lies *ad querelam veri hæredis*, which cannot be in the life of his ancestor; and herewith agrees Britton and the Register. 2dly. The taking of a husband in the case aforesaid being her own act, cannot bar the heir of his lawful action once vested in him. 3dly. The law does not give the heir apparent any writ, for it is not certain whether he shall be heir, *solus Deus facit hæredis*. 4thly. The inconvenience were too great, if heirs apparent in the life of heir ancestor should have such a writ to examine and try a man's lawful wife in such sort as the writ *de ventre inspiciendo* does appoint; and if she should be found to be with child, or suspected, then she must



be removed to a castle, and there safely kept until her delivery, and so any man's wife might be taken from him against the laws of God and man.

And it is to be observed, that every word of Littleton is worthy of observation. First (*hæres*) in the plural number; for if a man give land to a man and to his heir in the singular number, he has but an estate for life, for his heir cannot take a fee-simple by descent, because he is but one, and therefore in that case his heir shall take nothing. *Heir in singular number.*

Also observable is this conjunctive (*et.*) For if a man give lands to one, to have and to hold to him or his heirs, he has but an estate for life for the uncertainty. *To A. or his heirs.*

*His.*] If a man give land to two, to have and to hold to those two *et hæredibus*, omitting *suis*, they have but an estate for life, for the uncertainty; whereof more hereafter in this section. But it is said, if land be given to one man *et hæredibus*, omitting *suis*, that notwithstanding a fee-simple passes; but it is safe to follow Littleton. *"His" omitted.*

*And his assigns.*] Assignee cometh of the verb *assign*. And note there be assigns in deed, and assigns in law, whereof see more in the chapter of warranty, Sect. 733. *Assigns.*

*These words (his heirs) which words only make an estate of inheritance in all feoffments and grants.*] Here Littleton treats of purchases by natural persons, and not by bodies corporate or politic; for if lands be given to a sole body politic or corporate (as to a bishop, parson, vicar, master of an hospital, &c.) there to give him an estate of inheritance in his politic or corporate capacity, he must have these words: To have and to hold to him and his successors; for without this word *successors*, there passes in those cases no inheritance; for as the heir doth inherit to the ancestor, so the successor doth succeed to the predecessor, and the executor to the testator. *Sole Corporations.*

But it appears here by Littleton, that if a man at this day give lands to J. S. and his successors, this creates no fee-simple in him; for Littleton, speaking of natural persons, saith that these words *Successors.*

[9a] (his heirs) make an estate of inheritance in all feoffments and grants, whereby he excludes these words (his successors.) But if a grant be made to a dean and chapter his heirs and successors; in this case, albeit the word (heirs) applies to them in their natural capacity, yet because the grant is made to them in their politic capacity, it shall enure to them and their successors. And so if the king grants lands to J. S. *habendum sibi et successoribus sive heredibus suis*, this grant shall enure to him and his heirs.

*Children born take jointly with parents when.*

B. having divers sons and daughters, A. gives lands to B. and his children and their heirs; the father and all his children take a fee-simple jointly by force of the words (their heirs); but if he had no child at the time of the feoffment, the children born afterwards shall not take; [but the father shall have an estate tail.]

*Heirs.*

These words (his heirs) do not only extend to his immediate heirs, but to his heirs remote and most remote, born and to be born.

And the reason wherefore the law is so precise to prescribe certain words to create an estate of inheritance, is for avoiding of uncertainty, which is the mother of contention and confusion.

*Estate.*

*Make an estate.] Status dicitur à stando*, because it is fixed and permanent.

*Isle of Man.*

The Isle of Man, which is no part of the kingdom, but a distinct territory of itself, hath been granted by the great seal to divers subjects and their heirs. It was resolved by the Lord Chancellor, the two chief justices and chief baron, that the same is an estate descendible according to the course of the common law; for whatsoever state of inheritance passes under the great seal of England, it shall be descendible according to the rules and course of common law of England.

*Feoffment.*

*In all feoffments and grants.]* Here he gives the feoffment the first place, as the ancient and the most necessary conveyance, both for that it is solemn and public, and therefore best remembered and proved, and also for that it clears all disseisins, abatements, intrusions, and other wrongful or defeasible estates, where the entry of the feoffor is lawful, which neither fine, recovery, nor bargain and sale by deed indented and inrolled doth.

And by “feoffments and grants” is implied a division of fee into *corporeal*, as lands and tenements, which lie in livery and pass by livery either with or without deed [by common law, but now otherwise since the statute of frauds], and *incorporeal*, which lie in grant, and cannot pass by livery, but by deed only, as advowsons, commons, &c. And note, by the delivery of the deed, the freehold and inheritance of such hereditaments as lie in grant, do pass. Hence the deed of incorporeate inheritances equals the livery of corporeate. And therefore Littleton says, in all feoffments and grants, *hereditas, alia corporalis, alia incorporalis: corporalis est, quæ tangi potest et videri; incorporalis, quæ tangi non potest, nec videri.*

*Hereditaments  
corporeal and  
incorporeal.*

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

*Feoffment.*

By a feoffment the corporeate fee is conveyed, and it properly betokens a conveyance in fee, as our author himself hereafter says, in his chapter of tenant for life. And yet sometimes improperly it is called a feoffment when an estate of freehold only doth pass.

*Grant, concessio*, is properly of things incorporeal, which, (as hath been said) cannot pass without deed. And here it is to be observed, (that I may speak once for all) that every period of our author, in all his three books, contains matter of excellent learning, necessarily to be collected by implication, or consequence. For example, he says here, that the words (his heirs) make an estate of inheritance in all feoffments and grants. He expressing feoffments and grants, necessarily implies, that this rule extends not,—

*Grant.*  
[9b]

First, *to last wills and testaments*; for thereby, as he himself after says, an estate of inheritance may pass without these words (his heirs). As if a man devise twenty acres to another, [on condition] that he pay his executors 10*l.* for the same, hereby the devisee bath a fee-simple by the intent of the devisor, albeit the payment be not to the value of the land. So it is if one devise lands to a man

*Will.*

*in perpetuum*, or to give and to sell, or in fee-simple, or to him and his assigns for ever. In these cases a fee-simple will pass by the intent of the devisor, But if the devise be to a man and his assigns, without saying (for ever,) the devisee hath but an estate for life. If one devise land to a man *et sanguine suo*, that is a fee-simple; but if it be *semini suo* it is an estate tail.

*Fine.*

Secondly, that it extendeth not to a *fine sur conusans de droit come ceo que il ad de son done*, by which a fee also may pass without this word (heirs) in respect of the height of that fine, whereby it is implied that there was a precedent gift in fee.

*Release.*

Thirdly, nor to certain releases, and *that* three manner of ways. 1st. When an estate of inheritance passes and continues; as if there be three coparceners or joint tenants, and one of them releases to the other two, or to one of them generally without this word (heirs), by Littleton's opinion they have a fee-simple, as appears hereafter: 2dly. By release, when an estate of inheritance passes and continues not, but is extinguished; as where, the lord releases to the tenant, or grantee of a rent, &c. releases to the tenant of the land generally all his right, &c. hereby the seignior, rent &c. are extinguished for ever, without this word (heirs). 3dly. When a bare right is released, as when disseisee releases to the disseisor all his right, he need not (saith our author in another place) speak of his heirs. But of these and the like cases, more shall be said in its proper place.

*Recovery.*

Fourthly, nor to a *recovery*; for regularly every recoveror recovers a fee-simple.

*Dignity.*

Fifthly, nor to a *creation of nobility by writ*; for when a man is called to the upper house of parliament by writ, he is a baron, and has an inheritance therein without the word (heirs). Yet may the king limit the general estate of inheritance created by the law and custom of the realm to the heirs male or general, of his body by the writ; as he did to *Bromflete*, who in 27 H. 6. was called to parliament by the name of the Lord *Vescy*, &c. with the limitation in the writ to him and the heirs males of his body. But if he be created by patent, he must of necessity have these words (his heirs), or the heirs males of his body, or the heirs of his body, &c. otherwise he has no inheritance. The first creation of a baron by

patent, that I find, was of John Beauchamp of Holt, created baron by patent in 11 R. 2.; for barons, before that time, were called by writ. And it is to be observed, that of ancient times earls, &c. were created by girding them with a sword, and nominating him earl, &c. of such a county or place; and this, with a calling of him to parliament by writ by that name, was a sufficient creation of inheritance.

But out of this rule of our author the law makes divers exceptions (*et exceptio probat regulam*); for sometimes by a feoffment a fee-simple shall pass without these words (his heirs). For example, first, if the father enfeoff the son, to have and to hold to him and to his heirs, and the son enfeoffs the father as fully as the father enfeoffed him, by this the father has a fee-simple. Exceptions.

Secondly, in respect of the consideration, a fee-simple had passed at the common law without this word (heirs), and at this day an estate of inheritance in tail. As if one had given land to a man with his daughter in frank-marriage generally, a fee-simple had passed without this word (heirs); for there is no consideration so much respected in law as the consideration of marriage, in respect of alliance and posterity, [but now an estate tail passes]. Frank marriage.

Thirdly, if a feoffment or grant be made by deed to a mayor and commonalty, or any other corporation aggregate of many persons capable, they have a fee-simple without the word (successors); because in judgment of law they never die. Corporation aggregate.

Fourthly, in case of a sole corporation, a fee-simple shall sometimes pass without this word (successors). As if a feoffment in fee be made of land to a bishop, to have and to hold to him *in liberá elemosiná*, a fee-simple will pass without this word (successors). And so if a man give lands to the king by deed inrolled, a fee-simple will pass without these words (successors, or heirs); because in judgment of law the king never dies. Corporation sole.

Fifthly, in grants sometimes an inheritance shall pass without this word heirs. As if partition be made between coparceners of lands in fee-simple, and for owelty of partition the one grants a rent to the other generally, the grantee shall have a fee-simple without Partition. [10a]

this word (heirs) ; because the grantor hath a fee-simple in consideration whereof he granted the rent.

*Exchange.*

*Confirmation.*

And this rule of our author extends to the passing of estates of inheritance in exchanges, releases, or confirmations that enure by way of enlargement of estate, warranties, bargain and sales by deed indented and inrolled, and the like, in which this word (heirs) is also necessary ; for they amount to a feoffment or grant, and stand upon the same reason that a feoffment and grant does ; for like reason makes like law, *ubi eadem ratio, ibi eudem jus*.

*Like reason.*

And this is to be observed throughout all these three books, that where other cases fall within the same reason, our author puts his case but for an example ; for so our author himself, in another place, explains it, saying, *and memorandum that in all other [such] like cases, although it be not here expressly moved or specified, if they be in like reason, they are in the like law.*

*Purchase.*

*Gavelkind.*

*Right heirs.*

And here our author is understood to speak of heirs when they are inheritable by descent, for they are capable of land also by purchase, and then the course of descent is sometimes altered. As if lands of the nature of gavelkind be given to B. and his heirs, having issue divers sons, all his sons after his decease shall inherit ; but if a lease for life be made of gavelkind lands, the remainder to the right heirs of B. and B. dies, his eldest son only shall inherit ; for he only (to take by purchase) is right heir by the common law. So note a diversity between a purchase and a descent. But where the remainder is limited to the right heirs of B. it need not be said, and to their heirs ; for being plurally limited, it includes a fee-simple, and yet it vests in them only by purchase.

*Conveyances at  
Common Law.*

Out of that which has been said it is to be observed, that a man may purchase lands to him and his heirs by ten manner of conveyances (for I speak not here of estoppels). 1st. By feoffment. 2dly. By grant (of which two our author here speaks). 3dly. By fine, which is a feoffment of record. 4thly. By common recovery, which is a common conveyance, and is in nature of a feoffment of record. 5thly. By exchange, which is in nature of a grant. 6thly. By release to a particular tenant. 7thly. By confirmation to a particular tenant, both which are in nature of grants. 8thly. By grant of a reversion or remainder with attornment of the par-

ticular tenant, of all which our author speaks hereafter. 9thly. By bargain and sale by deed indented and enrolled, ordained by statute since Littleton wrote. 10thly. By devise by custom of some particular place, as he shews hereafter, and since he wrote, by will in writing generally by authority of parliament.

Our author speaks of feoffments and grants, whereby is implied lawful conveyances; and therefore this rule extends not to disseisins, abatements, or intrusions into lands or tenements, or to usurpations to advowsons, &c. in which cases estates in fee-simple are gained by the act and wrong of the disseisors, abators, intruders, and usurpers; and if a disseisin, abatement, or intrusion be made to the use of another, if *cestui que use* agrees thereunto in *pais* [that is, openly in the face of the country, or before witnesses] by this bare agreement he gains a fee-simple, without any livery of seisin, or other ceremony.

*Disseisin and usurpation is always in fee.*

## SECTION 2.

AND if a man purchase land in fee-simple, and die without issue, he who is his next cousin collateral of the whole blood, how far soever he be from him in degree, may inherit and have the land as heir to him.

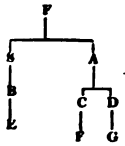
Collateral descent,

Littleton shews here who shall be heirs to lands in fee-simple; for he intends not this case of an estate tail, for he speaks of an heir of the whole blood, which extends not to estates tail, as shall be said hereafter in this Chapter, Sect. 6.

*Next cousin collateral.*] Neither excludes he brothers or sisters, because he hath a special case concerning them in this Chapter, Sect. 5, and in his Chapter of Parceners; but this is intended where a man purchases lands and dies without issue, having neither brother nor sister, then his next cousin collateral shall inherit. So that here is implied a division of heirs, viz. lineal (whoever shall first inherit), and collateral (who are to inherit for default of lineal). For in descents it is a maxim in law, *quòd linea recta semper præfertur transversali*. Lineal descent is conveyed downwards in a right line; as from the grandfather to the father, from the father to

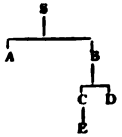
*after brothers and sisters.*

[10b]



the son, &c. Collateral descent is derived from the side of the lineal ; as grandfather's brother, father's brother, &c. " *Next cousin collateral shall inherit*" gives a certain direction to the next cousin to the son, [that is, the cousin to the son shall be preferred to the next cousin of the father,] and, therefore, the father's brother and his posterity shall inherit before the grandfather's brother and his posterity. *Et sic de ceteris ; for propinquior includit propinquum, et propinquus remotum, et remotus, remotiorem.*

" *Next blood.*"



Upon this word (*next*) I put this case. One has issue two sons A. and B. and dies ; B. has two sons, C. and D. and dies. C. the eldest son has issue, and dies. A. purchases lands in fee-simple, and dies without issue. D. is the next cousin, and yet shall not inherit ; but the issue of C. ; for he that is inheritable is accounted in law next of blood. And therefore here is understood a division of *next*, viz. next *jure representationis*, and next *jure propinquitatis* ; that is, by right of representation and by right of propinquity. And Littleton means of the right of representation, for legally in course of descents, he is next of blood inheritable. And the issue of C. represent the person of C. ; and if C. had lived, he had been legally the next of blood. And whensoever the father, if he had lived, should have inherited, his lineal heir by right of representation shall inherit before any other, though another be *jure propinquitatis*, nearer of blood ; and therefore Littleton intends this case of next cousin of blood immediately inheritable. So that this produces another division of next blood, viz. immediately inheritable, as the issue of C., and mediately inheritable as D., if the issue of C. die without issue ; for the issue of C. and all that line, be they never so remote, shall inherit before D. and his line ; and therefore Littleton says well, *how far so ever he be from him in degree.* And here arises a diversity in law between next of blood inheritable by descent, and next of blood capable by purchase ; and therefore, in the case before-mentioned, if a lease for life were made to A., with remainder to his next of blood in fee, in this case, as hath been said, D. shall take the remainder, because he is next of blood and capable by purchase, though he be not legally next to take as heir by descent.

Remainder to next of blood, who takes.



## SECTION 3.

*BUT if there be father and son, and the father hath a brother that is uncle to the son, and the son purchase land in fee-simple, and dies without issue, living his father, the uncle shall have the land as heir to the son, and not the father, yet the father is nearer of blood; because it is a maxim in law, that inheritances may lineally descend, but not ascend. Yet if the son in this case die without issue, and his uncle enters into the land as heir to the son, (as by law he ought), and after the uncle dies without issue, living the father, the father shall have the land as heir to the uncle, and not as heir to his son, for that he cometh to the land by collateral descent and not by lineal ascent.*

Father not heir to son, except through an uncle.

*Yet the father is nearer of blood.]* And therefore some do hold upon these words of Littleton, that if a lease for life were made to the son, the remainder to his next of blood, that the father shall take the remainder by purchase and not the uncle, for that Littleton says the father is next of blood, and yet the uncle is heir. As if a man has issue two sons, and the eldest son has issue a son and dies, then a remainder is limited to his next of blood, the younger son shall take it, yet the other is his heir.

Remainder to "next of blood," if father can take. [5 B. & C. 48.]

*It is a maxim in law, that inheritances may lineally descend, but not ascend.*

*Maxim*, i. e. a sure foundation or ground of art, and a conclusion of reason, so sure and uncontrollable as that they ought not to be questioned. And that which our author here and in other places calls a maxim, hereafter he calls a principle, and it is all one with a rule, a common ground, *postulatum*, or an *axiom*, and it were too much curiosity to make nice distinctions between them.

Maxim, what. [11 a]

*And his uncle enters into the land.]* For if the uncle in this case does not enter into the land, then cannot the father inherit the land; for there is another maxim in law herein implied, that a man that claims as heir in fee-simple to any man by descent, must make himself heir to him that was last seised of the actual freehold and inheritance. And if the uncle in this case does not enter, then

The uncle must be actually seised.

[11 b]

had he but a freehold in law and no actual freehold, but the last that was seised of the actual freehold was the son to whom the father cannot make himself heir; and therefore Littleton says, *and his uncle enters into the land (as by law he ought)*, to make the father inherit as heir to the uncle.

*His title defeated by posthumous heir.*

Note, that true it is that the uncle in this case is heir, but not absolutely heir; for if, after the descent to him, the father has issue a son or daughter, that issue shall enter upon the uncle. And so it is if a man has issue a son and a daughter, the son purchases land in fee and dies without issue, the daughter shall inherit the land; but if the father has afterwards issue a son, this son shall enter into the land as heir to his brother, and if he has issue a daughter and no son, she shall be coparcener with her sister.

*What seisin of incorporeal hereditaments sufficient for a possessio fratris. Advowson.*

*As by law he ought.*] These words as a key do open the secrets of the law; for hereupon is concluded, that where the uncle cannot get an actual possession by entry or otherwise, there the father in this case cannot inherit. And therefore if an advowson be granted to the son and his heirs, and the son dies without issue, and this descends to the uncle, and he dies before he does or can present to the church, the father shall not inherit, because that would make him heir to the son, which he cannot be. And so of a rent and the like. But if the uncle had presented to the church, or had seisin of the rent, there the father should have inherited. For Littleton puts his case of an entry into land but for an example.

*Same of a reversion.*

If the son make a lease for life, and dies without issue, and the reversion descends to the uncle, and he dies, the reversion shall not descend to the father, because in that case he must make himself heir to the son.

*Warranty.*

[12a]

A. infeoffs the son with warranty to him and his heirs, the son dies, the uncle enters into the land and dies, the father if he be impleaded shall not take advantage of this warranty, for then he must vouch A. as heir to his son, which he cannot do; for albeit the warranty descended to the uncle, yet the uncle leaves it as he found it, and then the father by Littleton's (*ought*) cannot take advantage of it. For Littleton, Sect. 603, says that warranties shall descend to him that is heir by the common law; and Sect. 718, he says that every warranty which descends, doth

descend to him who is heir to the person that made the warranty by the common law, which proves that the father shall not be bound by the warranty made by the son, for that the father cannot be heir to the son who made the warranty. And a warranty shall not go with tenements whereunto it is annexed, to any special heir, but only to the heir at the common law. And therefore if the uncle be seised of certain lands, and is disseised, and the son releases to the disseisor with warranty, and dies without issue, this shall bind the uncle ; but if the uncle dies without issue, the father may enter, for the warranty cannot descend upon him.

So if the son concludes himself by pleading concerning the tenure and services of certain lands, this shall bind the uncle ; but if the uncle die without issue, this shall not bind the father, because he cannot be heir to the son, and consequently not to the estoppel in that case ; but if it be such an estoppel as runs with the land, then it is otherwise. Estoppel.

#### SECTION 4.

*AND in case where the son purchases land in fee-simple, and dies without issue, they of his blood on the father's side shall inherit as heirs to him, before any of the blood on the mother's side ; but if he had no heir on the part of his father, then the land shall descend to the heirs on the part of the mother. But if a man marries an inheritrix of lands in fee-simple, who has issue a son, and dies, and the son enters into the tenements, as son and heir to his mother, and after dies without issue, the heirs of the part of the mother ought to inherit, and not the heirs of the part of the father. And if he has no heir on the part of the mother, then the lord of whom the land is held shall have the land by escheat. In the same manner it is, if lands descend to the son of the part of the father, and he enters, and afterwards dies without issue, this land shall descend to the heirs on the part of the father, and not to the heirs on the part of the mother. And if there be no heir on the part of the father, the lord of whom the land is held shall have the land by escheat. And so see the diversity, where the son purchases lands or tenements in fee-simple, and where he comes to*

Descent.  
Paternal line preferred, except it be a maternal estate.  
  
Escheat.

*them by descent on the part of his mother or on the part of his father.*

*Blood of first purchaser.*

By this it appears, that our author, divides heirs into heirs of the part of the father, and into heirs of the part of the mother. And note, it is an old and true maxim in law, that none shall inherit any lands as heir, but only the blood of the first purchaser, for *refert à quo fiat perquisitum*. As for example, *Robert Coke* takes the daughter of *Knightley* to wife, and purchases land to him and to his heirs, and by *Knightley* has issue, *Edward*, none of the blood of the *Knightleys*, though they be of the blood of *Edward*, shall inherit, albeit he had no kindred but them, because they were not of the blood of the first purchaser, viz. of *Robert Coke*.

*Heir on father's side preferred.*

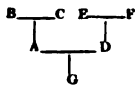
*They of his blood on the father's side.]* Here it is to be understood, that the father has two immediate bloods in him, viz. the blood of his father and the blood of his mother. Both these bloods are of the part of the father. And this made ancient authors say, that if a man be seised of lands in right of his wife, and is attainted of felony, and after has issue, this issue should not inherit his mother, for that he [i. e. the issue born after the attainder] could derive no blood inheritable from the father. And both these bloods of the part of the father must be spent before the heir of the blood on the part of the mother shall inherit, wherein the male line on the part of the father, (that is) the posterity of such male, be they male or female, must fail before the line of the mother shall inherit. And the reason of all this is, for that the blood of the part of the father is more worthy, and more near in judgment of law than the blood of the part of the mother.

*Husband's attainder seised jure uxoris.*

[12b]

*Consanguinity.*

*Before any of the blood on the mother's side.]* And it is to be observed, that the mother has also two immediate bloods in her, (viz.) her father's blood and her mother's blood. Now to illustrate all this by example, *Robert Fairefield*, [A] son of *John Fairefield*, [B] and *Jane Sandie*, [C] takes to wife *Ann Boyes* [D], daughter of *John Boyes* [E] and *Jane Bewpree*, [F] and has issue *William Fairefield* [G], who purchases lands in fee. Here *William Fairefield* [G] has four immediate bloods in him, two of the part of his father, viz. the blood of the *Fairefields*, and the blood of the *Sandies*, and two of the part of his mother, viz. the blood of the



*Boyesses*, and the blood of the *Bewprees*, and so in both cases upward *in infinitum*. Now admit that *William Fairefield* [G] dies without issue, first the blood of the part of his father, viz. of the *Fairefields*, and for want thereof the blood of the *Sundyes*, (for both these are of the part of the father) if both these fail, then the heirs of the part of the mother of *William Fairefield* shall inherit, viz. first the blood of the *Boyesses*, and for default thereof the blood of the *Bewprees*.

It is necessary to be known in what cases the heir of the part of the mother shall inherit, and where not. If a man be seised of lands, as heir of the part of his mother, and makes a feoffment in fee, and takes back an estate to him and his heirs, this is a new purchase; and if he dies without issue, the heirs of the part of the father shall first inherit.\* If a man so seised [i. e. by descent from his mother] makes a feoffment in fee upon condition, and dies, the heir of the part of the father, who is the heir at the common law, shall enter for the condition broken; but the heir of the part of the mother shall enter upon him, and enjoy the land. A man so seised makes a feoffment in fee, reserving a rent to him and to his heirs, this rent shall go to the heirs of the part of the father; but if he had made a gift in tail, or a lease for life, reserving a rent, the heir of the part of the mother shall have the reversion; and the rent also, as incident thereunto, shall pass with it; but the heir of the part of the mother shall not take advantage of a condition annexed to the same, because it is not incident to the reversion, nor can pass therewith.

Maternal  
estate.

Condition.

If a man has a rent-seck of the part of his mother, and the tenant of the land grants a distress to him and to his heirs, and the grantee dies, the distress shall go with the rent to the heir of the part of the mother, as incident or appurtenant to the rent, for now is the rent-seck become a rent charge.

Rent.

Distress.

[13 a]

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\* But here Lord Coke must be understood to speak of two distinct conveyances in fee; the *first* passing the use as well as the possession to the feoffee, and so completely divesting the feoffor of all interest in the land; and the *second* re-granting the estate to him. For if, in the first feoffment, the use had been expressly limited to the feoffor and his heirs, or if there was no declaration of uses, and the feoffment was not on such a consideration as to raise an use in the feoffee, and consequently the use resulted to the feoffor, in either case he is in of his *ancient use*, and not by purchase. 3 Lev. 404., and 2 Salk. 59. Harg. n. (2).

*Maternal descent when broken.*

A man so seised as heir on the part of his mother makes a feoffment in fee to the use of himself and his heirs, the use being a thing in trust and confidence shall ensue the nature of the land, and shall descend to the heir on the part of the mother [that is, the use being the same as it was before the feoffment, it is the old use which continues, and so the estate taken back is not as in the case put before a new purchase.]

*Escheat.*

A man hath a seigniory as heir on the part of his mother, and the tenancy escheats, it shall go to the heir of the part of the mother. If the heir of the part of the mother, of land whereunto a warranty is annexed, be impleaded and vouch, and judgment is given against him, and for him to recover in value, and he dies before execution, the heir of the part of the mother shall sue execution to have in value against the vouchee, for the effect ought to pursue the cause, and the recompense shall ensue the loss.

*Recovery.*

*Limitation to heirs à materna void.*

If a man gives lands to a man, to have and to hold to him and his heirs on the part of his mother, yet the heirs on the part of the father shall inherit; for no man can institute a new kind of inheritance not allowed by the law, and words (on the part of his mother) are void, as in the case that *Littleton* puts in this chapter. If a man gives lands to a man to him and his heirs males, the [common] law rejects this word males, because there is no such kind of inheritance, whereof you shall read more in its proper place.

*Heirs on the part of the wife.*

A man has issue a son, and dies, and the wife dies also, lands are let to one for life with remainder to the heirs of the wife, the son dies without issue, the heirs of the part of the father shall inherit, and not the heirs of the part of the mother; because it [the remainder] vested in the son as a purchaser, [he being born at the time, and on his death it is *his* heir, as the heir of the first purchaser, that is to be sought for, and not the heir of the wife.] And the rule of *Littleton* holds as well in other kind of inheritances, as in lands and tenements.

*Maternal and paternal descent kept distinct.*

*But if a man marries an inheritrix, &c.]* Here there is another maxim, that whensoever lands descend from the part of the mother, the heirs of the part of the father shall never inherit. And likewise when lands descend from the part of the

father, the heirs of the part of the mother shall never inherit; *et sic paterna paternis, et à converso, materna maternis*. For further manifestation whereof. See a Table at the end of this Chapter. [which however is not much to the purpose.]

*Shall have the land by escheat.*] *Escheat* signifies properly when by accident the lands fall to the lord of whom they are held, in which case we say the fee is escheated. And an escheat may happen two ways, *propter defectum sanguinis aut per delictum tenentis*, i. e. for felony, which is perfected by judgment three ways, *aut quia suspensus per collum, aut quia abjuravit regnum, aut quia utlegatus est*. And therefore they who are hanged by martial law, *in furore belli*, forfeit no lands.

*Escheat happens for want of heirs.—Attainders, Abjuration, and Outlawry.*

The father is seised of lands in fee, holden of J. S., the son is attainted of high treason, the father dies, the lands shall escheat to J. S. *propter defectum sanguinis*, for that the father died without heir. And the king cannot have the land, because the son never had any thing to forfeit; but the king shall have the escheat of all the lands whereof the person attainted of high treason was seised, of whomsoever they were holden.

*Attainder of heirs for treason.*

In an appeal of death or other felony, &c. process is awarded against the defendant, and pending the process, the defendant conveys away the land, and afterwards is outlawed, the conveyance is good, and shall defeat the lord of his escheat; but if a man be indicted of felony, and pending the process against him, he conveys away the land, and afterwards is outlawed, the conveyance in that case shall not prevent the lord of his escheat. And the reason of this diversity is manifest; for in the case of the appeal, the writ contains no time when the felony was done, and therefore the escheat can relate but to the outlawry pronounced\*; but the indictment contains the time when the felony was committed, and therefore the escheat upon the outlawry shall relate to that time. Which cases I have added, to the end the student may perceive how much the observation of writs, indictments, process, judgments, and other entries conduces much to the understanding of the right reason of the law.

*Attainder relates to act committed, and intermediate conveyance bad; contra of outlawry.*

[13b]

\* So it is presumed outlawry in a personal action will not invalidate a conveyance before final judgment is pronounced.—Ed.

No escheat on  
dissolution of  
body corporate.  
Land reverts to  
donor.

And it is to be well observed that our author says, *if he has no heir, &c. the land shall escheat.* In which word is implied a diversity (as to the escheat) between fee-simple absolute which a natural body hath, and fee-simple absolute which a body politic or incorporate hath. For if land holden of J. S. be given to an abbot and his successors, in this case, if the abbot and all the convent die, so that the body politic is dissolved, the donor shall have his land again, and not the lord by escheat. And so if land be given in fee-simple to a dean and chapter, or to a mayor and commonalty, and to their successors, and after such body politic or incorporate is dissolved, the donor shall have the land again, and not the lord by escheat. And the reason and cause of this diversity is, for that in the case of a body politic or incorporate, the fee-simple is vested in their politic or incorporate capacity created by the policy of man, and therefore the law doth annex this condition to every such gift and grant, that if such body politic or incorporate be dissolved, the donor or grantor shall re-enter, for that the cause of the gift or grant fails; but no such condition is annexed to an estate in fee-simple vested in any man in his natural capacity, but where the donor or feoffor reserves to him a tenure, and then the law does imply a condition by way of escheat. Also (as hath been said) no writ of escheat lies, but in the three cases aforesaid, and not where a body politic or incorporate is dissolved.

## SECTION 5.

Elder brother. **ALSO if there be three brothers, and the middle brother purchases lands in fee-simple, and dies without issue, the elder brother shall have the land by descent, and not the younger, &c. And also if there be three brothers, and the youngest purchases lands in fee-simple, and dies without issue, the eldest brother shall have the land by descent, and not the middle brother, for the eldest is most worthy of blood.**

Descent and  
purchase dis-  
tinguished.

Now comes our author to the descent between brothers, which he purposely omitted before. *Descent, descensus*, comes of the latin word *descendo*; and, in the legal sense, it signifies when lands by right of blood fall to any person after the death of his ancestors; or a descent is a means whereby one may derive his title to certain



lands as heir to some of his ancestors. And from these observations arises another division of estates in fee-simple, viz. that every man who has a lawful estate in fee-simple has it either by descent or by purchase.

*The eldest is most worthy of blood.*] It is a maxim in law, that the next male of the worthiest blood shall ever inherit (as also and all descendants from him,) before the female, and the female of the part of the father before the male or female of the part of the mother, &c., because the female of the part of the father is of the worthiest blood. And therefore among the males, the eldest brother and his posterity shall inherit lands in fee-simple as heir before any younger brother, or any descending from him, because (as Littleton says) he is *most worthy of blood*. In King Alfred's time, knights' fees descended to the eldest son, for that by division of them between males, the defence of the realm might be weakened; but in those days socage fee was divided between the heirs male, and therewith agrees Glanville. But of this more shall be said hereafter in its proper place.

*Male preferred to female, and paternal female to maternal female.*

[14a]

## SECTION 6.

ALSO it is to be understood, that none shall have land in fee-simple by descent as heir to any man, unless he be his heir of the whole blood. For if a man has issue two sons by divers venters, and the elder purchase lands in fee-simple and dies without issue, the younger brother shall not have the land, but the uncle of the elder brother or other his next cousin shall have the same, because the younger brother is but of half-blood to the elder.

Half blood excluded.

No man can be heir to a fee-simple by the common law but he who has *sanguinem duplicatum*, the whole blood, that is, both of the father and of the mother, so that the half-blood is no blood inheritable by descent; because that he who is but of the half-blood cannot be a complete heir, for that he has not the whole and complete blood, and the law in descents of fee-simple respects that which is complete and perfect.

## SECTION 7.

Possessio  
fratris.

AND if a man has issue a son and a daughter by one venter, and a son by another venter, and the son of the first venter purchases lands in fee and dies without issue, the sister shall have the land by descent as heir to her brother, and not the younger brother, for that the sister is of the whole blood of her elder brother.

## SECTION 8.

Same.

[14 b]

AND also, where a man is seised of lands in fee-simple, and has issue a son and daughter by one venter, and a son by another venter, and dies, and the eldest son enters and dies without issue, the daughter shall have the land and not the younger son; yet the younger son is heir to the father but not to his brother. But if the eldest son does not enter into the land after the death of his father, but dies before any entry made by him, then the younger brother may enter, and shall have the land as heir to his father. But where the elder son in the case aforesaid enters after the death of his father, and has possession, there the sister shall have the land, because *possessio fratris de feodo simplici facit sororem esse hæredem*. But if there be two brothers by divers venters, and the elder be seised of land in fee, and dies without issue, and his uncle enters as next heir to him, and also dies without issue, now the younger brother may have the land as heir to the uncle, for that he is of the whole blood to him, albeit he be but of the half blood to his elder brother.

This rule not  
applicable to  
estates tail and  
reversions. See  
also *infra*, 156.

*Seised of lands in fee-simple.*] These words exclude a seisin in fee-tail, albeit he hath a fee-simple expectant. And therefore, if lands be given to a man and his wife and to the heirs of their two bodies, the remainder to the heirs of the husband, and they have issue a son, and the wife dies, and he takes another wife, and has issue a son, the father dies, the eldest son enters and dies without issue, the second brother of the half blood shall inherit; because the eldest son, by his entry, was not actually seised of the fee-simple, being expectant, but only of the estate tail. And the rule is, that *possessio fratris de feodo simplici facit sororem esse hære-*

*dem*; and here the eldest son is not possessed of the fee-simple, but of the estate tail.

And though Littleton speaks of lands only, yet there may be a *possessio fratris* of a use, of a seignior, a rent, an advowson, and of other hereditaments. *Of what there may be a seisin.*

*And the eldest son enters.]* These words are materially added when the father dies seised of lands in fee-simple, for if the eldest son does not in that case enter, then without question the youngest son shall be heir; because, as hath been said before, he must regularly make himself heir to the person who was last actually seised (or to the purchaser), that is to the father where the eldest son does not enter. And therefore Littleton adds, that the son is heir to the father. But when the eldest son in this case enters, then cannot the youngest son, being of the half blood, be heir to the eldest, but the land shall descend to the sister of the whole blood. Yet in many cases, albeit the son does not enter into lands descended in fee-simple, the sister of the whole blood shall inherit; and in some cases, where the eldest son does enter, yet the younger brother of the half blood shall be heir. *Eldest son must be seised to make possessio fratris.*  
[15a]

If the father makes a lease for years, and the lessee enters, and [the father] dies, then if the eldest son dies during the term before entry or receipt of rent, the younger son of the half blood shall not inherit, but the sister; because the possession of the lease for years is the possession of the eldest son, for he is thereby actually seised of the fee-simple; and consequently the sister of the whole blood shall be heir. *Possession of his yearly tenant, is that seisin.*

The same law is if the lands be holden by knights' service, the eldest son being within age, and the guardian enters into the lands. And so it is if the guardian in socage enter. *Entry by guardian.*

But in the case aforesaid, if the father makes a lease for life, or a gift in fee-tail, and dies, and the eldest son dies in the life of the tenant for life or tenant in tail, the younger brother of the half blood shall inherit; because the tenant for life or tenant in tail is seised of the freehold, and the eldest son hath nothing but a reversion expectant upon that freehold or estate tail; and therefore the youngest son shall inherit the land as heir to the father who was last seised *Lease for life or in tail prevents possessio fratris, unless eldest son receive rent.*

of the actual freehold. And albeit a rent had been reserved upon the lease for life, and the eldest son had received the rent and died, yet it is holden by some that the younger brother shall inherit, because the seisin of the rent is no actual seisin of the freehold of the land. But 35 Ass. pl. 2. seems to the contrary, because the rent issues out of the lands, and is in lieu thereof, wherein the only question is, whether such a seisin of the rent be such an actual seisin of the land in the eldest son as the sister may in a writ of right make herself heir of this land to her brother? But it is clear, that if there be bastard *eigne*, and *mulier puisne*, and the father makes a lease for life or a gift in tail, reserving a rent and dies, and the bastard receives the rent [all his lifetime] and dies [leaving issue] this shall bar the *mulier* [by estoppel], for the reason of that stands upon another maxim, as shall manifestly appear in its apt place, Sect. 399.

Possessio fratris  
how affected by  
dower.

*Seised of lands.*] But in this case, if the eldest son enters, and gets an actual possession of the fee-simple, yet if the wife of the father be endowed of the third part, and the eldest son dies, the younger brother shall have the reversion of the third part, notwithstanding the elder brother's entry; because his actual seisin which he got thereby was by the endowment defeated. But if the eldest son had made a lease for life, and the lessee had endowed the wife of the father, and tenant in dower had died, the daughter should have the reversion, because the reversion was changed and altered by the lease for life, and the reversion is now expectant on a new estate for life.

Entry into part  
sufficient.

[15b]

*Enter.*] Hereupon the question grows, whether if the father be seised of divers parcels of land in one county, and after the death of the father the son enters into one parcel generally, and before any actual entry into the other, dies, whether the general entry into part shall not vest in him an actual seisin in the whole, so that the sister shall inherit the whole? And some take a diversity when an entry shall vest or divest an estate, that there must be several entries into the several parcels, but that where the possession is in no man, but the freehold in law is in the heir that enters, there the general entry into one part reduces all into his actual possession. And therefore if the lord enters into a parcel generally for a mortmain, or the feoffor for a condition broken, [without saying in the name of the whole] or the disseisee into a parcel generally, the

entry shall not vest nor devest in those or the like cases, only for that parcel. But when a man dies seised of divers parcels in possession, and the freehold in law is by the law cast upon the heir, and the possession is in no man, there the entry into parcel generally seems to vest the actual possession in him of the whole. But if his entry in that case be special, viz. that he enter only into that parcel, and no more, then that parcel only is reduced into actual possession.

*A man seised of lands.]* What then is the law of rent, advowson, or such things that lie in grant? If a rent, or an advowson, descend to the eldest son, and he dies before he has seisin of the rent, or present to the church, the rents or advowson shall descend to the youngest son, for that he must make himself heir to his father, as hath been oftentimes said before. The like law is of offices, courts, liberties, franchises, commons of inheritance, and such like. And this case differs from the case of tenant by the curtesy; for there if the wife dies before the rent day, or the church becomes void, the law in respect of the issue begotten by him will give him an estate by the curtesy of England, because there was no laches or default in him, nor could he possibly get seisin. But the case of the descent to the youngest son stands upon another reason, viz. to make himself heir to him that was actually seised, as hath been said.

Possessio fratris  
of advowson,  
rent, &c.

Curtesy.

*In fee-simple.]* For half blood is not respected in estates tail, because the issues claim by descent *per formam doni*, and the issue in tail is ever of the whole blood to the donee.

Half blood ap-  
plies not to  
estates tail.

*Possessio fratris de feodo simplici facit sororem esse hæredem.]* Hereupon four things are to be observed, every word being almost operative and material. First, that the brother must be in actual possession; for *possessio est quasi pedis positio*. 2dly. *de feodo simplici* excludes estates in tail. 3dly. *facit sororem esse hæredem*. So that *soror est hæres facta*, and therefore some act must be done to make her heir, and the younger son is *hæres natus* if no act be done to the contrary. And albeit the words be *facit sororem esse hæredem*, yet this extends to the issue of the sister, &c. who shall inherit before the younger brother. 4thly. Of *dignities*, whereof no other possession can be had but such as descends to a man and his heirs, (as to be a duke, marquis, earl, viscount, or baron) of which there

Four rules to  
possessio fratris.

Sister's issue.

No possessio  
fratris of digni-  
ties.

can be no possession of the brother to make the sister inherit ; but the younger brother, being heir (as *Littleton* says) to the father, shall inherit the dignity inherent to the blood as heir to him who was first created noble.

Neither possessio fratris nor half blood hold as to the crown.

And you shall understand that concerning descents there is a law, parcel of the laws of England, called *jus coronæ*, and differs in many things from the general law concerning the subject. As for example, if the king has issue a son and a daughter by one *venter*, and a son by another *venter*, and purchases lands and dies ; and the eldest son enters and dies without issue, the daughter shall not inherit these lands, nor any other fee-simple lands of the crown, but the younger brother shall have them. Wherein note that neither *possessio fratris* holds of lands of the possessions of the crown, nor is half blood an impediment to the descent of the lands of the crown, as it fell out in experience after the decease of king *Edward* the sixth to queen *Mary*, and from queen *Mary* to queen *Elizabeth*, both of whom were of the half blood, and yet inherited not only the lands which king *Edward* or queen *Mary* purchased, but the ancient lands parcel of the crown also.

Descent of lands belonging to or purchased by the crown.

A man, who is king by descent of the part of his mother, purchases lands to him and his heirs, and dies without issue, this land shall descend to the heir of the part of the mother ; but in the case of a subject, the heir of the part of the father shall have them. So king *Henry* the eighth purchased lands to him and his heirs, and died, having issue two daughters, the lady *Mary* and the lady *Elizabeth* ; after the decease of king *Edward*, the eldest daughter queen *Mary* did alone inherit all his lands in fee-simple. For the eldest daughter or sister of a king shall inherit all his fee-simple lands. So it is if the king purchase lands of the custom of gavelkind, and dies leaving issue divers sons, the eldest son only shall inherit these lands. And the reason is, for that the quality of the person does in these and many other like cases alter the descent, so that all the lands and possessions whereof the king is seised *in jure coronæ*, shall *secundum jus coronæ* attend upon and follow the crown, and therefore to whomsoever the crown descends, these lands and possessions descend also ; for the crown and the lands whereof the king is seised *in jure coronæ*, are *concomitantia*. If the right heir of the crown be attainted of treason, yet shall the crown descend to him, and *eo instante* (without any

[16a]

Descent of crown cures attainted.

other reversal) the attainder is utterly avoided, as it fell out in the case of *Henry the seventh*. And if the king purchase lands to him and his heirs, he is seised thereof *in jure coronæ*; à fortiori, when he purchases land to him, his heirs and successors.

But hereof this little taste shall suffice.

## SECTION 9.

AND it is to wit, that this word (*inheritance*) is not only intended where a man has lands or tenements by descent of inheritance, but also every fee-simple or tail which a man has by his purchase may be called an inheritance, because his heirs may inherit him.

Inheritance  
what.

There be some that have an inheritance, and have it neither by descent, nor properly by purchase, but by creation; as when the king creates any man a duke, a marquis, earl, viscount, or baron to him and his heirs, or to the heirs male of his body, &c. he has an inheritance therein by creation. A man may have an inheritance in title of nobility and dignity three ways; that is to say, by creation, by descent, and by prescription. By creation two manner of ordinary ways (for I will not speak of a creation by parliament), by writ, and by letters patent. Creation by writ is the more ancient way; and here it is to be observed, that a man shall gain an inheritance by writ. King *Richard the second* created *John Beauchampe de Holte* baron of *Kidderminster* by his letters patent, bearing date the 10th *October, anno regni sui 11*, before whom there was never any baron created by letters patent, but only by writ. And it is to be observed, that if he be called generally by writ to parliament, he has a fee-simple in the barony without any words of inheritance; but if he be created by letters patent, the estate of inheritance must be limited by apt words, else the grant will be void. If a man be called by writ to parliament and the writ is delivered to him, and he dies before he comes and sits in parliament, [it becomes a question] whether he was a baron or no? And it is to be answered that he was no baron, for the direction and delivery of the writ to him makes him not noble; for this writ has no operation or effect until he sit in parliament, and thereby his blood is ennobled to him and his heirs lineal, and thereupon a baron is called a peer of parlia-

Necessaries to  
creation of dig-  
nities by writ  
and letters  
patent.

[16 b]

ment. And if issue be joined in any action, whether he be a baron, &c. or no, it shall not be tried by jury, but by the record of parliament, which could not appear unless he were of the parliament. Therefore a duke, earl, &c. of another kingdom, are not to be sued by those names here, for they are not peers of parliament. And albeit the creation by writ is the more ancient; yet the creation by letters patent is the surer, for he may be sufficiently created by letters patent and made noble albeit he never sit in parliament.

*Of nobility by marriage.*

And it is to be observed, that nobility may be granted for term of life by act in law without any actual creation; as if a duke take a wife, by the intermarriage she is a duchess in law; and so of a marquis, an earl, and the rest, and in some other cases. And there is a diversity between a woman that is noble by descent, and a woman that is noble by marriage. For if a woman, that is noble by descent, marry one that is under the degree of nobility, yet she remains noble still; but if she gain her nobility by marriage, she loses it if she marry under the degree of nobility, and so is the rule to be understood, *si mulier nobilis nupserit ignobili desinit esse nobilis*. But if a duchess by marriage marries a baron of the realm, she remains a duchess and loses not her name, because her husband is noble, *et sic de ceteris*.

*Dignity for life.*

And as an estate for life may be gained by marriage, so may the king create either man or woman noble for life, but not for years; because then it might go to executors or administrators. The true division of persons is, that every man is either noble, that is, a lord of parliament of the upper house, or under the degree of nobility, that is, amongst the commons, as knights, esquires, citizens, and burgesses of the lower house of parliament, who are commonly called the House of Commons; and he who is not of the nobility, is by intendment of law among the commons.

[17 a]

## SECTION 10.

*Demesne as of fee.*

AND of such things whereof a man may have a manual occupation, possession or receipt, as of lands, tenements, rents, and such like, there a man shall say in his count and plea, that such a one was seised in his demesne as of fee. But of things which do



not lie in such manual occupation, &c. as of an advowson of a church and such like, then he shall say, that he was seised as of fee, and not in his demesne as of fee.

*Seised.*] *Seisitus*, comes of the French word *seisin*, i. e. *possessio*, saving that in the common law, *seised* or *seisin* is properly applied to the freehold, and *possessed* or *possession* properly to goods and chattels; although sometimes the one is used instead of the other. *Seised and possessed distinguished.*

*In his demesne as of fee.*] *In dominico suo ut in feodo. Dominicum* is not only that inheritance wherein a man has proper dominion or ownership, as it is distinguished from the lands which another holds of him in service, but that which is manually occupied, manured, and possessed, for the necessary sustenance, maintenance, and support, of the lord and his household, and savours *de domo* of the house, either *ad mensam*, for his or their board or sustenance, or is manually received, (as rents) for *bearing and defraying of necessary charges public or private*. And in *Domesday* demesne land is called inland; as for example, *quatuor bovatas terræ de inland, et decem bovatas in servitio*. *Lands in demesne and service distinguished.*

*In such manual occupation, &c.*] There is nothing in our author but is worthy of observation. Here is the first (&c.) and there is no (&c.) in all his three books (there being as you shall perceive very many), but it is for two purposes. 1st. It implies some other necessary matter. 2dly. That the student may, together with that which our author has said, inquire what authorities there be in law that treat of that matter, which will work three notable effects. 1st. It will make him understand our author the better. 2dly. It will exceedingly add to the reader's invention: and lastly, it will fasten the matter more surely in his memory. *Littleton's &c. [17 b]*

*As of an advowson.*] Wherein a man hath as absolute an ownership and property as he hath in land or rents, yet he shall not plead that he is seised *in dominico suo ut de feodo*, because that inheritance, savouring not *de domo*, cannot either serve for the sustenance of him and his household, nor can any thing be received from the same for defraying its charges. And therefore he cannot say that he is seised thereof *in dominico suo ut de feodo*; whereby it appears how the common law detests simony and all corrupt bargains. *Advowson. Law presumes no profit can be derived from it.*

7 B. &amp; C. 150.

presentation to any benefice, and intends that the person presented for discharge of the cure should be presented freely without expectation of any thing; nay, so cautious is the common law in this point, that the plaintiff in a *quare impedit* could recover no damages for the loss of his presentation until the statute of W. 2. c. 5. And that is the reason why a guardian in socage shall not present to an advowson, because he can take nothing for it, and by consequence he cannot account for it, for by law he can meddle with nothing that he cannot account for. And in a writ of right of advowson, the patron shall not allege the esplees or taking of the profits in himself but in his incumbent.

Advowson of a moiety and moiety of advowson distinguished.

[18a]

*Advowson.*] There is this difference between an advowson of the moiety of a benefice [which is an entire thing] and the moiety of an advowson [which is only part]. The advowson of a moiety is, when there are several patrons and two several incumbents in one church, the one of the one moiety thereof, and the other of the other moiety, and one part as well of the church as of the parish allotted to the one, and the other part thereof to the other; and in that case each patron if he be disturbed shall have a *quare impedit, ad medietatem ecclesie*. But if there be two coparceners, and they agree to present by turn, each of them in truth has but a moiety of the advowson, but since there is but one incumbent, if either of them be disturbed, she shall have a *quare impedit, ad ecclesiam*. But in the case of the two coparceners, one of them may have a writ of right of advowson *de medietate advocacionis*; for in truth she has but a right to a moiety; but in the other case, where there are two patrons and two incumbents in one church, each of them may have a writ of right of advowson *de advocacione medietatis*. And as there may be two several parsons in one church, (as hath been said) so there may be two who may make but one parson in a church. And Fitzh. says, that two prebendaries may be one parson of a church, who shall join in a *juris utrum*, so that one rectory may be annexed to two prebends, and then both of them will make but one parson.

## SECTION 11.

AND note, that a man cannot have a more large or greater estate of inheritance than a fee-simple. Fee-simple, the largest estate.

This extends as well to fee-simples conditional and qualified, as to fee-simples pure and absolute. For our author speaks here of the amplexness and greatness of the estate, and not of the perdurableness of the same. And he who has 'a fee-simple conditional or qualified, has as ample and great an estate, as he who has a fee-simple absolute; and hence a diversity appears between the quantity and quality of the estate.

From this estate in fee-simple, estates tail, and all other particular estates are derived; and therefore worthily our author begins his first book with tenant in fee-simple, for *à principalioribus seu dignioribus est inchoandum*.

Cannot have a more large or greater estate &c.] For this cause Hence fee upon a fee, bad. two fee-simples absolute cannot be of one and the self-same land. If the king make a gift in tail, [whereby a reversion is left in himself] and the donee is attainted of treason, in this case the king has not two fee-simples in him, viz. the ancient reversion in fee and a fee-simple determinable upon the dying without issue of tenant in tail, but both of them are consolidated and conjoined together. And so it is if such a tenant in tail conveys the land to the king his heirs and successors, the king has but one estate in fee-simple united in him, and the king's grant of one estate is good, and so was it adjudged in the court of Common Pleas.

And yet by act of law, there may be in several persons a qualified fee-simple in one, and a fee-simple determinable in another by matter *ex post facto*; as if a gift in tail be made to a villein, [who anciently could take nothing except to his lord's use] and the lord enters, the lord has a fee-simple qualified, [that is determinable on the failure of his villein's issue] and the donor has a reversion in fee. But if the lord infeoff the donor, now both fee-simples are united, and he has but one fee-simple in him. But one fee-simple cannot depend upon another by grant of the parties; as if lands Qualified fee and fee-simple incompatible if raised by act of party.

be given to A. [and his heirs] so long as B. has heirs of his body, with remainder over in fee, the remainder is void, [but the grantor has a possibility of reverter which he may grant away.]

## SECTION 12.

Purchase includes every other title but descent.

*ALSO, purchase is called the possession of lands or tenements that a man hath by his deed or agreement, unto which possession he comes not by title of descent from any of his ancestors, or of his cousins, but by his own deed.*

[18b]

A purchase is always intended by title and most properly by some kind of conveyance, either for money or some other consideration, or freely of gift, for that is in law also a purchase. But a descent, because it comes merely by act of law, is not said to be a purchase; and accordingly the makers of the act of parliament in 1 Hen. 5. cap. 5, speak of those who have lands or tenements by purchase or descent of inheritance.

*Tenant by escheat, curtesy or dower, are in by purchase, contra of disseisor.*

And so it is of an escheat or the like, because the inheritance is cast upon, or a title vested in the party by act of law, and not by his own deed or agreement, as our author here says. Like law of the estate of tenant by the curtesy, tenant in dower, or the like. But such as acquire lands by mere injury or wrong, as by disseisin, intrusion, abatement, usurpation, &c. cannot be said to come in by purchase, no more than robbers, burglars, pirates, or the like, can justly be termed purchasers.

*Tomb monument and escutcheon, belong to heir, but executor has also a right of action for defacing them.*

If a nobleman, knight, esquire, &c. be buried in a church, and have his coat-armour and pennons with his arms, and such other ensigns of honour as belong to his degree or order, set up in the church, or if a gravestone or tomb be laid or made, &c. for a monument of him, in this case, albeit the freehold of the church be in the parson and these things be annexed to the freehold, yet cannot the parson [or any other person] take or deface them, without being subject to an action by the heir and his heirs in the honour and memory of whose ancestor they were set up. And some hold that the wife or the executors who first set them up may have an

action in that case also against those that deface them in their time.

And note, that chattels which are constituted heir-looms (such as the best bed, table, pot, pan, cart, or other dead moveable chattel) may go to the heir, and the heir then may have an action for them at the common law, and shall not be obliged to sue in the ecclesiastical court; but heir-looms are made so by custom, not by common law. And the ancient jewels of the crown are heir-looms, and shall descend to the next successor, and are not devisable by testament.

*Heir looms,  
heirs action for.*

## CHAPTER II. SECTION 13.

## FREE-TAIL.

Origin of entails.

TENANT *in fee-tail* is by force of the statute of W.2. cap. 1, for before that statute, all inheritances were *fee-simple*: for all the gifts which are specified in that statute were *fee-simple conditional* at the common law, as appears by the rehearsal of the same statute. And now by this statute, tenant in tail is in two manners, that is to say, tenant in tail general, and tenant in tail special.

[19a]

*The statute of W. 2.]* This statute was made in 13 E. 1. [A.D. 1285], and is called *West. 2.*, because the parliament was holden at Westminster, and to distinguish it from a statute called *Westminster the first*. And albeit many parliaments were afterwards holden at Westminster besides these, yet these two only, *propter excellentiam*, were called the statutes of Westminster. And the cause of making this statute was to preserve the inheritance in the blood of those to whom the gift was made.

Of conditional estates in nature of estates tail at common law.

*Before the said statute all inheritances were fee-simple.]* Here *fee-simple* is taken in its large sense, including as well conditional or qualified, as absolute fees, to distinguish them from estates in tail since the said statute. Before which statute *de donis conditionalibus*, if land had been given to a man, and to the heirs male of his body, the having issue female was no performance of the condition; but if he had issue male and died, the issue male would have inherited, yet he had not a *fee-simple absolute*; for if he had died without issue male, the donor might have entered as in his reverter. By having issue, the condition was performed for three purposes: 1st, to alien; 2d, to forfeit; 3d, to charge with rent, common, or the like. But the course of descent was not altered by having issue, for if the donee had issue and died, and the land had descended to his issue, yet if that issue had died (without any alienation made) without issue, his collateral heir

should not have inherited, because he was not within the form of the gift, viz. heir of the body of the donee. Lands were given before the statute in frank-marriage, and the donees had issue and died, and afterwards the issue died without issue; it was adjudged, that his collateral issue shall not inherit, but the donor shall re-enter. So note, that the heir in tail had no fee-simple absolute at the common law, though there were divers descents. If lands had been given [at the common law] to a man and to his heirs male of his body, and he had issue two sons, and the eldest had issue a daughter, the daughter was not inheritable to the fee-simple, but the younger son *per formam doni*. And so if land had been given at common law to a man and the heirs female of his body, and he had issue a son and daughter, and died, the daughter should have inherited this fee-simple at the common law. If the donee in tail had issue before the statute, and the issue had died without issue, the alienation of the donee at the common law, having no issue at that time, had not barred the donor. If donee in tail at the common law had not aliened before any issue had, and afterwards had issue, this alienation had barred the issue, because he claimed a fee-simple; yet if that issue had died without issue, the donor might re-enter, for that he aliened before any issue, at which time he had no power to alien to bar the possibility of the donor. But if feme tenant in tail had taken husband, and had issue, and the husband and wife had aliened in fee by deed before the statute [without matter of record], the issue might have [recovered the land in a] *formedon in descender*; for the alienation was not lawful: but otherwise it is, if it had been by fine. And these things, though they seem ancient, are necessary notwithstanding to be known, as well for the knowledge of the common law, as for annuities and such like inheritances as cannot be entailed within the said statute, and therefore remain at common law. If the king before the statute *de donis conditionalibus* had made a gift to a man, and to the heirs of his body begotten, the donee after issue born might have aliened as well as in the case of a common person. But if the donee had no issue, and before the statute had aliened with warranty, and died, and the warranty had descended upon the king, this should not have bound the king of his reversion without assets; but otherwise it was in the case of a common person. On the other hand, if lands had been given to the king and to the heirs of his body, he could not before issue have aliened in fee, but only to have barred his issue as a common person might have done, but

*Of the donee's alienation before and after issue had.*

[19 b]

not to have barred the reversion, for that should have been a wrong in the case of a subject, and the king's prerogative cannot alter his case, nor make it greater than the donor gave unto him; and it is a maxim in law, that the king can do no wrong. When all estates were fee-simple, then were purchasers sure of their purchases, farmers of their leases, creditors of their debts, the king and lords had their escheats, forfeitures, wardships, and other profits of their seigniories: and for these and other like cases, by the wisdom of the common law all estates of inheritance were fee-simple; and what contentions and mischiefs have crept into the quiet of the law by these fettered inheritances, daily experience teaches us.

*Statutes. Effect of preamble.*

*As appears by the rehearsal of the same statute.]* Here, by the authority of our author, the rehearsal or preamble of a statute is to be taken for truth; for it cannot be thought, that a statute, which is made by authority of the whole realm, as well of the king, as of the lords spiritual and temporal, and of all the commons, will recite a thing against the truth.

*No use raisable on seisin in tail.*

By this statute the land is as it were appropriated to the tenant in tail and to the heirs of his body, therefore if an estate be made, either before or since the statute of uses, 27 H. 8. c. 10. to a man and the heirs of his body, either to the use of another and his heirs, or to the use of himself and his heirs, this limitation of use is utterly void. For before the said statute of 27 Hen. 8. he could not have executed the estate to the use [and what he could not do before the statute he cannot do since. But this opinion has been controverted, and it seems that a use in fee may be raised on a seisin in tail, subject to determination on failure of the seisin, 1 Sand. Uses.]

## SECTION 14, 15.

*Tail general.*

*TENANT in tail general is, where lands or tenements are given to a man, and to his heirs of his body begotten. In this case it is called general tail, because whatsoever woman such tenant takes to wife (if he has many wives, and by every of them has issue), yet every one of these issues by possibility may inherit the tenements by force of the gift; because every one of such issue is of his body engendered. In the same manner it is, where lands or*



*tenements are given to a woman, and to the heirs of her body; albeit that she has divers husbands, yet the issue which she may have by every husband, may inherit as issue in tail by force of this gift; and therefore such gifts are called general tails.*

*Land.*] In its general and legal signification, (as hath been said before) includes not only all kind of grounds, as meadow, pasture, wood &c. but houses and all edifices whatsoever. In a more restrained sense it is taken for arable ground. *Land includes what.*

*Tenements.*] This is the only word which the said statute of W. 2. that created estates tail, uses; and it includes, not only all corporate inheritances which are or may be holden, but also all inheritances issuing out of any of those [corporeal] inheritances, or concerning, or annexed to, or exercisable within the same, though they lie not in tenure; therefore all these without question may be entailed. As rents, estovers, commons, or other profits whatsoever granted out of land; or uses, offices, dignities which concern lands or certain places, may be entailed within the said statute, because all these savour of the realty. So a right of nomination to a benefice may be entailed for the same reason. But if the grant be of an inheritance merely personal, or to be exercised about chattels, and is not issuing out of land, nor concerning any land, or some certain place, such inheritances cannot be entailed, because they savour nothing of the realty. As if I grant to a man and to the heirs of his body, to be keeper of my hounds, or master of my horse, or to be my falconer, or such like, with a fee therefore, these cannot be entailed within the said estate, for that they be not issuing out of tenements, nor annexed to, or exercisable within, or concerning lands or tenements of freehold or inheritance, but concerning chattels, and savour nothing of the realty. And so it is, if I by my deed for me and my heirs grant an annuity to a man, and the heirs of his body, for that this only charges my person, and concerns not land, nor savours of the realty. In all these cases he has a fee conditional as they were before the statute, and the grantee by his grant or release may bar his heir, as he might have done at the common law, for that in these cases he is not restrained by the said statute. *What may and what may not be entailed.*

[20 a]

*Annuity.*

*And to his heirs of his body begotten.*] In gifts in tail these words (heirs) are as necessary as in feoffments and grants; for seeing *What words essential to create estate tail in deeds.*

Heirs.

[20b]

Seed; issue;  
children.

every estate tail was a fee-simple at the common law, and at the common law no fee-simple could be in feoffments and grants without these words (heirs), and that an estate in fee-tail is but a cut or restrained fee, it follows, that in gifts in a man's life-time no estate can be created without these words (heirs), unless it be in case of frankmarriage, as hereafter shall be shewn. And where *Littleton* says (heirs), yet (héir) in the singular number in a special case may create an estate tail, as appears by 39 Ass. p. 20. hereafter mentioned. And yet if a man give lands to A. and the heirs of his body, the remainder to B. in form aforesaid, this is a good estate tail to B. for that in form aforesaid includes the other. If a man lets lands to A. for life, the remainder to B. in tail, the remainder to C. in form aforesaid, this remainder is void for the uncertainty. But if the remainder had been, the remainder to C. in the same form, this had been a good estate tail; for *idem semper proximo antecedenti refertur*. If a man give lands or tenements to a man and his seed, or the issues or children of his body, he has but an estate for life; for albeit that the statute provides, that the will of the giver according to the form of the deed of gift manifestly expressed shall be observed, yet that will and intent must agree with the rules of law. And of this opinion was our author himself, as it appeared in his learned reading upon this statute, where he holds, if one gives land to a man and the issues of his body lawfully begotten or to his seed, he has but an estate for life, for that there wants words of inheritance.

What words of  
procreation  
necessary.

*Of his body.*] These words are not so strictly required but that they may be expressed by words that amount to as much: for the example that the statute of W. 2. puts hath not these words, "of his body," but the word "heirs," viz. "when any one gives land to a man and his wife and the heirs of this man and woman begotten," &c. If lands be given to B. and his heirs of his first wife lawfully begotten, this is a good estate in special tail (albeit he hath no wife at that time) without these words "of his body." So it is if lands be given to a man and to his heirs which he shall beget of his wife, or to a man and the heirs of his flesh, or to a man and the heirs of him. In all these cases these are good estates tail, and yet these words "of his body" are omitted.

Entail may be  
to other than  
the donee's issue.

It is holden by some opinions, that if there be grandfather, father, and son, and lands are given to the grandfather and to his

heirs begotten by the father, and the father and grandfather die, the son is in as heir to the grandfather begotten upon [or by] the body of his father, and [then] the wife of the grandfather [shall] in that case be endowed. But certain it is, that in some cases one shall have the land *per formam doni* who is not issue of the body of the donee, which see, Section 30.

Dover.  
A  
B  
C

*Begotten.*] “*Procreatis.*” This word may in many cases be omitted or expressed by the like, and yet the estate tail is good : as “heirs of his flesh,” “heirs of him,” “heirs which shall happen” &c. as is aforesaid ; and where the word of Littleton is “engendered,” or “begotten,” *procreatis*, yet if the word be *procreandis*, (being begotten) or *quos procreaverit*, (which shall be begotten) the estate tail is good ; and as *procreatis* extends to the issues begotten afterwards, so *procreandis* extends to the issues begotten before.

*Begotten in past, present, and future tenes.*

## SECTION 16.

**TENANT** *in tail special is, where lands or tenements are given to a man and to his wife, and to the heirs of their two bodies begotten. In this case none shall inherit by force of this gift, but those that be engendered between the two. And it is called special tail, because if the wife dies, and he takes another wife, and have issue, the issue of the second wife shall not inherit by force of this gift, nor the issue of the second husband, if the first husband die.*

Special tail what.

*To a man and his wife.*] Then put the case that lands are given to a man and a woman unmarried and the heirs of their two bodies : for the apparent possibility to marry, they have an estate tail in them presently. So it is where lands are given to the husband of A. and to the wife of B. and the heirs of their bodies, they have presently an estate tail, in respect of the possibility. [*Infra*, sec. 25.]

*To man and woman unmarried.*

But put the case that the premises and the *habendum* are in other manner than Littleton has put, and let us see what the law in such cases is. As if a man in the premises give lands to another and the heirs of his body, *habendum* to him and his heirs for ever ; it has been holden that in this case he hath an estate tail, and a fee-

*What if habendum and premises are repugnant.*

[21 a]

No gift in base  
see direct.

simple expectant. And so (it is said) *vice versá*, if lands be given to a man and to his heirs in the premises, *habendum* to him and the heirs of his body, that he hath an estate tail, and a fee-simple expectant. But it was otherwise resolved in 8 Co. Lit. 150. If lands be given to B. and his heirs, to have and to hold to B. and his heirs, if [i. e. provided] B. have heirs of his body, and if he dies without heirs of his body, that it shall revert to the donor, this is adjudged an estate tail, and the reversion in the donor. For the will of the donor in this deed of gift manifestly expressed shall be observed : and therefore in the case next precedent, if these or the like words be added (and if he dies without heirs of his body that the lands shall revert to the donor), then the *habendum* shall by authority of divers books be construed upon the whole deed, to be a limitation or a declaration what heirs are meant in the premises to inherit, and that in that case the reversion is in the donor.

Two deeds of  
same land, one  
in fee other in  
tail, how con-  
strued.

If a man make a charter of feoffment of an acre of land to A. and his heirs, and another deed of the same acre to A. and the heirs of his body, and deliver seisin according to the form and effect of both deeds, in this case A. cannot take a fee-simple only, as some hold, for that livery was made according to the deed in tail, as well as to the charter in fee, neither can the livery enure only to the deed of estate tail with a fee-simple expectant, for that livery was made as well upon the deed in fee-simple, as the deed in tail. Therefore others hold, that in that case it shall enure by moieties, that is, to have an estate tail in the one moiety, with the fee-simple expectant, and a fee-simple in the other moiety ; and so the livery shall work immediately upon both deeds.

## SECTION 17.

Frank-marriage.  
Ex pro vi.

IN the same manner it is, where tenements are given by one man to another with a wife (who is the daughter or cousin to the giver) in frank-marriage, this gift hath an inheritance by these words (frank-marriage) annexed unto it, although it be not expressly said or rehearsed in the gift that the donees shall have the tenements to them and to their heirs between the two begotten. And this is called special tail, because the issue of the second wife may not inherit.

*To a man with a wife.*] The consideration of marriage is more favoured in law than any other consideration, and here it may be observed once for all, that four things are incident to a frankmarriage. 1st. That it be given for consideration of marriage either to a man with a woman, or, as some have held to a woman with a man. 2dly. That the woman or man who is the cause of the gift be of the blood of the donor; but it may be made as well after marriage as before, and it may be made with a widow, &c. 3dly. If the gift be made of such a thing as lies in tenure, that the donees hold of the donor at the time of the estate in frankmarriage made. A rent service may be given in frankmarriage, because it may be holden. And so may a rent charge or rent seck, as Fitz. N. B. holds, and it appears in our books that a common may be granted in frankmarriage. 4thly. That the donees shall hold freely of the donor till the fourth degree be past. And therefore if land be given to a woman, with the son of a donor in frankmarriage, there passes an inheritance; but if the donee who is the cause of the gift be not of the blood of the donor, then there passes but an estate for life, if livery be made. Also if lands be given to a man with a woman of the blood of the donor *in liberum maritagium*, the remainder in fee either to a stranger or to the donees, they have no estate tail because there is no tenure of the donor; but if in that case, the remainder had been limited to another in tail reserving the reversion in fee to the donor, there the said words (*in liberum maritagium*) create an inheritance, because the donees hold of the donor. And *cestui que use* before the statute of 27 H. 8. could not have made a gift in frankmarriage, because the reversion was in the feoffees. And if the donor gives lands *in liberum maritagium* reserving a rent, this reservation shall take no effect till the fourth degree be past, but the frankmarriage is good; for if the reservation should be good, then could not the donees have an estate tail for want of the words of the heirs of their bodies. And these words (*in liberum maritagium*) are such words of art, and so necessarily required, as they cannot be expressed by words equivalent, or amounting to as much. If the king give land to a man and a woman and the heirs of their two bodies, and the woman die without issue, yet shall the man be tenant in tail after possibility of issue extinct. But if the king give land to a man with a woman of his kindred in frankmarriage, and the woman dies without issue, the man, in the king's case, shall not hold it for his life, because the woman was the cause of the gift; but

Four requintes.  
[21 b]

Free to the 4th  
degree.

Tenant in tail  
apres.

[22a] otherwise it is in case of a common person, if lands be given to a man and a woman in special tail, and they are divorced *causá pracontractús*, both shall hold the lands for their lives; but in case of frankmarriage if they be divorced, the woman shall enjoy the whole land, because she was the cause of the gift.

Guardian.

If lands holden in socage be given in special tail, and the donees die, the issue being within the age of fourteen years, the next of kin of the part of the father, or of the part of the mother who can obtain the custody shall have it, but in case of frankmarriage the heir of the part of the mother shall have it, because as hath been said she was the cause of the gift.

### SECTION 18.

Why called tail.

*AND note, that this word (Talliare) implies that the lands are limited to some certain inheritance. And because it is limited and put in certain what issue shall inherit by force of such gifts and how the inheritance shall endure, it is called in latin, feodum talliatum, i. e. hæreditas in quandam certitudinem limitata. For if tenant in general tail dies without issue, the donor or his heirs may enter as in their reversion.*

Reversion.

To one heir and his heir only.

Of all the estates tail the most coercted or restrained that I find in our books, is the estate tail in 39 Ass. pl. 20, where lands were given to a man and to his wife and to one heir of their bodies lawfully begotten, and to one heir of the body of that heir only; and this case is an exception (some say) out of the general rule put before by Littleton, Sect. 13, that all estates tail were fee-simple at the common law; for (say they) by this limitation (*hæredi*) in the singular number the donees had not had a fee-simple at the common law. [2 Vern. 325.]

### SECTION 19.

Tenure in tail is of donor.

*IN the same manner it is of the tenant in special tail, &c. For in every gift in tail without more saying, the reversion of the fee-simple is in the donor. And the donees and their issue shall do to the donor and to his heirs the like services as the donor does to his*

lord next paramount, except the donees in frankmarriage, who shall hold quietly from all manner of service (unless it be for fealty) until the fourth degree is past, and after the fourth degree is past, the issue in the fifth degree, and so forth the other issues after him, shall hold of the donor or of his heirs as they hold over, as before said.

*The reversion of the fee-simple is in the donor.*] A reversion is where the residue of the estate always does continue in him who made the particular estate, or where the particular estate is derived out of his estate, as here in the case of *Litt.* where tenant in fee-simple makes gift in tail, so it is of a lease for life, or for years. If a man extends lands by force of a statute merchant, staple, recognizance or *elegit*, he leaves a reversion in the conusor.

Reversion what and where.

[22 b]

But since *Littleton* wrote, the description must be more large upon the statute of uses 27 H. 8., for at this day, if a man seised of lands in fee makes a feoffment in fee, (and departs with his whole estate) and limits the use to his daughter for life, and after her decease, to the use of his son in tail, and after to the use of the right heirs of the feoffor: in this case, albeit he departed with the whole fee-simple by the feoffment, and limited no use to himself, yet has he a reversion; for whensoever the ancestor takes an estate for life, and after a limitation is made to his right heirs, the right heirs shall not be purchasers. And here, in this case, when the limitation is to his right heirs, and right heir he cannot have during his life (for *non est hares viventis*) the law creates an use in him during his life, until the future use comes *in esse*, and consequently the right heirs cannot be purchasers; and there is no diversity when the law creates the estate for life, and when the party. And if the limitation had been to the use of himself for life, and after to the use of another in tail, and after to the use of his own right heirs, the reversion in fee would have been in him, because the use of the fee continued over in him; and the statute executes the possession to the use in the same plight, quality, and degree, as the use was limited.

Limitation to donor's right heirs gives him a reversion under rule in *Shelley's case*.

If a man make a gift in tail, or a lease for life, the remainder to his own right heirs, this remainder is void, and he has the reversion in him, for the ancestor during his life bears in his body (in judgment of law) all his heirs, and therefore it is truly said, that

Remainder to donor's right heirs void, when. Ancestor bears all his heirs in him.

*heres est pars antecessoris.* And this appears in a common case, that if land be given to a man and his heirs, all his heirs are so totally in him, as he may give the lands to whom he will. So it is if a man be seised of lands in fee, and by indenture makes a lease for life, the remainder to the heirs male of his own body, this is a void remainder; for the donor cannot make his own right heir a purchaser of an estate tail without departing with the whole fee-simple out of him: as if a man make a feoffment in fee to the use of himself for life, and then to the use of the heirs male of his body, this is a good estate tail executed in himself, and the limitation is good by way of use, because it is raised out of the estate of the feoffees, which the feoffor departed with, and that is apparent, for a limitation of use to himself had without question been good. If a man make a feoffment in fee to the use of himself in tail, and after to the use of the feoffor in fee, the feoffee has no reversion but in nature of a remainder, albeit the feoffee has the estate tail executed in him by the statute, and the feoffee is in by the common law, which is worthy of observation.

Uses—Common  
Law and by  
Statute.

[23 a]

Resulting use.  
Old and new  
seisin.

To conclude this point, whosoever is seised of land, has not only the estate of the land in him, but the right to take the profits, which is in nature of a use, and therefore when he makes a feoffment in fee without valuable consideration to divers particular uses, so much of the use as he disposes not of, is in him as his ancient use in point of reverter. So it is if lands [descended] of the part of the mother [be limited to another to the use of the feoffor and his heirs], the use shall go to the heir of the part of the mother, which could not be, if it were not the old use but a thing newly created. The like law is of lands of the custom of borough-english, gavel-kind, &c.

Tenure of estates  
tail. Subinfeudation.

*The donees and their issue shall do to the donor and to his heirs the like services, as the donor does to his lord next paramount.*] The reason of this is, that when by construction of the said statute there was a reversion settled in the donor, for that the donee had an estate of inheritance, the judges resolved that he should hold of his donor, as his donor held over, except that if the donor by subinfeudation holds of the person of his feoffor, the donee in tail shall hold of his feoffor as of his reversion, provided the donor makes no special reservation, for then the special reservation excludes the tenure which the law would create.



*Except the donees in frankmarriage.]* It is to be understood, that although the land be given in *liberum maritagium*, in free marriage generally, yet first the law makes a limitation of this word (free), viz. till the fourth degree be past, for the reason that our author here yields. And albeit it be free marriage, yet the donees and their issues until the fourth degree be past shall do fealty, for that is incident to every tenure (except frankalmoigne) and cannot be separated from it, and therefore the donees and their issues shall hold it as freely till the fourth degree be past as the donor can make it. See more of this in the chapter of Frankalmoigne.

Frank marriage.

## SECTION 20.

AND *the degrees in frankmarriage shall be counted in this manner, viz. from the donor to the donees in frankmarriage the first degree, because the wife who is one of the donees ought to be daughter, sister, or other cousin of the donor. And from the donees up to their issue shall be accounted the second degree, and from their issue unto their issue the third degree, and so forth. And the reason is because that after every such gift, the issues of the donor, and the issues of the donees after the fourth degree past of both parties in such form to be accounted, may by the law of the holy church intermarry.*

Four degrees in frank marriage how counted.

The learning of degrees set out in the civil and canon law (wherein I find some difference) is worth the knowledge, to the end that Littleton and the law in this case may the better be understood, which I will divide into certain rules; whereof the first is, that a person added to a person in the line of consanguinity makes a degree. And it is to be understood, that a line is threefold, viz.

[23 b]

Mode of reckoning degrees in descent and consanguinity.\*  
Rule. 1.

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\* When a deed cannot operate in the way intended by reason of some technical informality, it remains to be seen whether it may not operate in some other way, and whether there is enough to support it as a covenant to stand seised. Informal deeds are more frequently made among relations than between purchasers, who, in giving valuable considerations, take care to have the instrument formally prepared; but if there is a fourth degree of relationship between the parties, the deed may probably be supported on the doctrine of covenants to stand seised.

Covenant to stand seised.

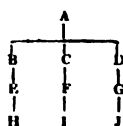
the line ascending, descending, and collateral. And first, for example, of the ascending line, take the son and add the father, and it is one degree ascending; add the grandfather to the father, and it is a second degree ascending.

## Rule 2.

So that how many persons soever there may be, take away one, and you have the number of degrees. If there be four persons it is the third degree, if five the fourth, for one must exceed, and then you have the degree. Likewise by the descending, take the father, and add the son, and it is one degree; then take the son and add the grandchild, and it is the second degree; and so likewise further. Wherein observe that the father, son; and grandchild, albeit there are three persons, yet they make but two degrees, because (as it hath been said) one must exceed for making a degree.

## Rule 3.

It is to be noted, the person must be reckoned from whom the computation is made. And there is no difference between the canon and civil law in the ascending and descending line [but in the collateral line there is] for those whom the civilians reckon in the second degree, the canonists reckon in the first; and those whom they place in the fourth, these place in the second. Therefore if we would know in what degree two of kindred stand according to the civil law, we must begin our reckoning from one, by ascending to the person from whom both are branched, and then, by descending, to the other to whom we count, and it will appear in what degree they are. For example, in brothers' and sisters' sons, take one of them and ascend to his father, there is one degree; from the father to the grandfather, that is the second degree; then descend from the grandfather to his son, that is the third degree; then from his son to his son, that is the fourth. But by the canon law there is another computation, for the canonists always begin from the stock, namely, the person from whom they do descend and of whose distance the question is. For example, if the question be, in what degree the sons of two brothers stand by the canon law? we must begin from the grandfather and descend to one son, that is one degree; then descend to his son, that is another degree; then descend again from the grandfather to his other son, that is one degree; then descend to his son, that is a second degree; so in what degree either of them are distant from the common stock, in the same degree they are distant between



[24 a]

themselves : and if they be not equally distant, then we must observe another rule. In what degree the most remote is distant from the common stock, in the same degree they are distant between themselves, and so the most remote makes the degree.

But it is necessary to be known, concerning marriages between persons of kindred one to another, that it is enacted by the statute of 32 H. 8. that no reservation or prohibition (God's law excepted) shall trouble or impeach any marriage without the Levitical degrees.

*Marriage within Levitical degrees allowed.*

*Equity.*] Is a construction made by the judges, that cases out of the letter of a statute, yet being within the same mischief, or cause of the making of the same, shall be within the same remedy that the statute provides : and the reason thereof is, for that the law-makers could not possibly set down all cases in express terms.

[24b]  
*Stats. Equity of, noticed at Law.*

## SECTIONS 21, 22.

*Also if lands be given to a man and to his heirs male of his body begotten ; his issue male only shall inherit, and not his issue female ; in like manner if the gift be to a man and his issue female of his body begotten, the issue male shall not inherit, but only his issue female. For in such cases the will of the donor shall be observed, who ought to inherit, and who not.*

*Estate tail male or female good.*

These two sections, or any thing therein, need not any explanation, in respect that they shall be explained hereafter in the next section, saving only these words (*who ought to inherit*) are very observable, for they imply a diversity between a descent and a purchase. For when a man gives lands to one and the heirs females of his body, and dies, having issue a son and a daughter, the daughter shall inherit ; for the will of the donor (the statute working with it) shall be observed. But in case of a purchase it is otherwise : for if A. have issue a son and a daughter, and a lease for life be made [to B.] with remainder to the heirs female of the body of A., and A. dies [leaving a son and daughter] the heir female can take nothing, because she is not heir ; for she must be both heir and heir female, which she is not, because the brother is heir, and therefore the will of the giver cannot be observed, because

*Gift to A. and his heirs female good, but gift to the heirs female of A. bad.*

[25a]

here is no gift, and therefore the statute cannot work thereupon. And so it is if a man has a son and a daughter and dies, and lands be given to the daughter and the heirs female of the body of her father, the daughter shall take nothing but an estate for life, because there is no such person, she not being heir. But where a gift is made to a man and to the heirs female of his body, there the donee being the first taker is capable by purchase and the heir female by descent *secundum formam doni*: and therefore Littleton purposely added these words, *who ought to inherit*.\*

## SECTION 23.

Descent of  
estates tail  
male.

AND in case where lands or tenements be given to a man and to the heirs male of his body, and he has issue two sons, and dies, and the eldest son enters as heir male, and has issue a daughter, and dies, his brother shall have the land, and not the daughter, for that the brother is heir male. But otherwise it is in the other entails, which are specified in the statute West. 2.

## SECTION 24.

Same.

ALSO, if lands be given to a man and the heirs male of his body, and he has issue a daughter, who has issue a son, and dies, and after the donee dies: in this case, the son of the daughter shall not inherit by force of the entail; because whosoever shall inherit by force of a gift in tail made to the heirs male, ought to convey his descent wholly by the heirs male. Also in this case the donor may enter, for that the donee is dead without issue male in the law, in-somuch as the issue of the daughter cannot convey to himself the descent by an heir male.

Descent of estate  
tail female.  
[25b]

And so it is *mutatis mutandis*, when a gift in tail is made to a man and to the heirs female of his body, and he has issue a son,

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\* This doctrine of my Lord Coke is not fully acquiesced in. But Mr. Hargrave has attempted to shew, in a voluminous note to this passage, that it will stand the test of the severest criticism where the construction rests singly on the words *heirs female*, and they stand unexplained by any other words or circumstances.

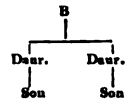
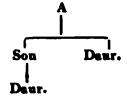
who hath issue a daughter, this daughter shall never inherit, because she must convey by descent through females.

If a man give lands to a man and to the heirs male of his body begotten, remainder to him and to his heirs female of his body begotten, the donee has issue a son, who has issue a daughter, who has issue a son, this son is not inheritable to either or both these estates tail, because, as Littleton saith, the male must make his conveyance only by males, and so must the female by females. But in this case the land shall revert to the donor. And therefore the safest way, when a man will entail his lands to the heirs male and female of his body, is to limit the first estate to him and the heirs male of his body, the remainder to him and to the heirs of his body, and then all his issues whatever are inheritable.

*Descent of tail male, with remainder in tail female.*

But if A. has issue a son and daughter and dies, and the son has issue a daughter and dies, and a lease for life is made, the remainder to the heirs female of the body of A.; in this case the daughter of A. shall not take *causâ quâ suprâ*. But albeit the daughter of the son makes her conveyance by a male, she may take an estate tail by [descent], for she is heir and a female: but if lands be devised to one for life, the remainder to the next heir male of B. in tail, and B. hath issue two daughters, and each of them hath issue a son, and the father and daughters die, some say this remainder is void for the uncertainty; some say that the eldest shall take it, because he is the worthiest; and others say that both of them shall take, for that they both make but one heir.

*Estate tail female.*



If lands be given to a man and to the heirs male or female of his body, he has an estate in tail general in him.

*Heirs male or female.*

## SECTION 25.

*In the same manner it is, where lands are given to a man and his wife, and to the heirs males of their two bodies begotten, &c.*

*Estate tail by entireties.*

*To a man and his wife.] But what if tenements be given to a man and to a woman not being his wife, and to the heirs male of*

*Gifts in tail to man and woman not married how*

construed.  
Ante, sect. 16.

their two bodies? They have also an estate tail, albeit they be not married at that time.\* And so it is, if lands be given to a man who has a wife, and to a woman who has a husband, and the heirs of their two bodies; they have presently an estate tail, for the possibility that they may marry. But if lands be given to two husbands and their wives, and to the heirs of their bodies begotten, they shall take a joint estate for life and several inheritances, viz. the one husband and his wife the one moiety, and the other husband and wife the other moiety, and no cross remainder or other possibility shall be allowed by law, where it is once settled and has taken effect. But if lands be given to a man and two women and the heirs of their bodies begotten, in this case they have a joint estate for life and every of them a several inheritance, because they cannot have one issue of their bodies, neither shall there be by any construction a possibility upon a possibility, viz. that he shall marry the one first and then the other. And the same law is, when land is given to two men and one woman and to the heirs of their bodies begotten.

[26a]

## SECTION 26.

The ancestor  
from whose  
body the issue  
are to proceed  
takes the estate  
tail.

*ALSO, if tenements be given to a man and to his wife, and to the heirs of the body of the man, in this case the husband has an estate in tail general, and the wife but an estate for term of life.*

## SECTION 27.

Same.

*ALSO, if lands be given to the husband and wife, and to the heirs of the husband which he shall beget on the body of his wife, in this case the husband has an estate in special tail, and the wife but an estate for life.*

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\* They have not estates tail each in a moiety, but the whole for life in joint tenancy, with the possibility of having an estate tail in event. They are not tenants in tail *without* possibility, &c. but *with* possibility.

## SECTION 28.

AND *if the gift be made to the husband and to his wife, and to the heirs of the body of the wife by the husband begotten, there the wife hath an estate in special tail, and the husband but for term of life. But if lands be given to the husband and the wife, and to the heirs which the husband shall beget on the body of the wife, in this case both of them have an estate tail, because this word (heirs) is not limited to the one more than to the other.*

If both named they have both an estate tail.

*Heirs.*] This word (*heirs*) is *nomen operativum*. To which of the donees it is limited, it creates an estate tail in him; but if it incline no more to the one than to the other, then both take, as here Littleton puts the case. If lands be given to the husband and the wife and to the heirs of the body of the survivor [which makes a contingent remainder and the heirs take by purchase], the gift is good, and the survivor shall have an estate tail general, but the estate tail vests not till there be a survivor.

"Heirs of survivor." A remainder and neither takes.

And hereby it appears that a gift made to a man and to *the heirs* of his body, is as good as to *his* heirs of his body. [See further *post*, 27 a.]

"The" and "his."

## SECTION 29.

[26b]

ALSO, *if land be given to a man and to his heirs, which he shall beget on the body of his wife, in this case the husband has an estate in special tail, and the wife has nothing* [but her dower.]

The ancestor not named takes nothing.

## SECTION 30.

ALSO, *if a man has issue a son and dies, and land is given to the son and to the heirs of the body of his father begotten, this is a good entail, and yet the father was dead at the time of the gift. And there be many other estates tail by the equity of the said statute of West., which are not here specified.*

To A. and the heirs of the body of his father, an estate tail.

To wife and heirs of her husband, &c. they take by purchase, and she only a life estate.

*If a man has issue a son and dies, &c.*] John de Mandeville by his wife Roberge had issue Robert and Maud. Michael de Morevill gave certain lands to Roberge and to the heirs of John Mandeville her late husband on her body begotten, and it was adjudged that Roberge had an estate but for life, and the fee-tail vested in Robert (heirs of the body of his father being a good name of purchase), and that when he died without issue, Maud the daughter was tenant in tail as heir of the body of her father, *per formam doni*. [But if the gift had been to Roberge and to the heirs of her body by the husband begotten, or to the heirs of her body and of the body of her husband begotten, it would have been an estate tail in the wife; and though the said Maud is called in the writ heir to the said Robert] yet in truth the land did not descend unto her from Robert, and therefore if Maud had been of the half-blood she would have taken. In which case it is to be observed, that albeit Robert being heir took an estate tail by purchase, and the daughter was no heir of his body at the time of the gift, yet she recovered the land *per formam doni*, by the name of heir of the body of her father, which notwithstanding her brother was, and he was capable at the time of the gift; and therefore when the gift was made she took nothing but in expectancy, when she became heir *per formam doni*.

Construction of gift by one coparcener to her sister and the heirs of the body of her father.

If a man has issue two daughters, and dies seised of two acres of land in fee-simple, and the one coparcener gives her part to her sister and to the heirs of the body of her father, in this case the donee has an estate tail in one moiety of the donor's part, for the donee is not the entire heir, but the donor is heir with the donee, [and as to the other moiety the donor by the words should herself take a remainder in tail after her sister's life,] but since she cannot give to the heirs of her own body, the donee has this other moiety of her sister's part for life [with remainder to her sister in fee as of her reversion.]

"Heirs female of the body of the father," a life estate.

[27 a]

If a man has issue a son and a daughter, and dies, and land is given to the daughter and to the heirs female of the body of the father, she takes but an estate for life; because she is not heir female to take by purchase, as before has been said.

"To A. and his heirs on the part of his

*And to the heirs of the body of his father.*] These words (*the heirs*) are observable; for if they were (*his heirs*) it clearly alters the case.



And therefore, if lands be given to the son and to his heirs of the body of his father, the son cannot take as heir of the body of his father, because the grant is to him and to his heirs &c. and consequently he has a fee-simple. But if there be grandfather, father, and son, and the father dies, and lands be given to the son, and to the heirs of the body of the grandfather, this is a good estate tail in the son; so that Littleton put his case of the father but for an example.

*father," a fee.  
"His" and  
"the" distin-  
guished.*

## SECTION 31.

*BUT if a man give lands or tenements to another, to have and to hold to him and to his heirs male, or to his heirs female, he to whom such a gift is made has a fee-simple, because it is not limited by the gift of what body the issue male or female shall be, and so it cannot in any wise be taken by the equity of the said statute, and therefore he has a fee-simple. [So adjudged in Parl. 8 Co. 1.]*

*"Heirs male"  
gives a fee;*

If the king by his letters patent gives lands and tenements to a man and to his heirs male, the grant is void, for that the king is deceived in his grant, inasmuch as there can be no such inheritance of lands or tenements as the king intended to grant. But if the king for reward of service grants armories or arms [i. e. armorial bearings] to a man and to his heirs male without saying (of the body), this is good, and they shall descend accordingly.

*In letters patent  
nothing.*

If a man by his last will devise lands or tenements to a man and to his heirs male, this by construction of law is an estate tail, the law supplying these words (of his body).

*In will "heirs  
male" gives an  
estate tail.*

A man seised of lands in gavelkind gives or devises the same to a man and to his eldest heirs. He cannot hereby alter the customary inheritance, but as in the case of our author, *ut res magis valeat*, the law rejects (males), so in this case the law rejects this adjective (eldest).

*Devise of gavel-  
kind to A. and  
his eldest heirs,  
"eldest" re-  
jected.  
[27 b]*

And so it is if lands be given to a man and to the eldest heirs female of his body, yet all the daughters shall inherit, as it has been resolved.

*So in gift to A.  
and his eldest  
heirs female.*

## CHAPTER III. SECTION 32.

## TENANT IN TAIL AFTER POSSIBILITY OF ISSUE EXTINGT.

This estate occurs only in special tail.

*TENANT in fee-tail after possibility of issue extinct is, where tenements are given to a man and to his wife in special tail; if one of them die without issue, the survivor is tenant in tail after possibility of issue extinct. And if they have issue, and the one dies, albeit that during the life of the issue, the survivor shall not be called tenant in tail after possibility of issue extinct; yet if the issue die without issue, so as there be not any issue alive which may inherit by force of the tail, then the surviving party of the donees is tenant in tail after possibility of issue extinct.*

Privileges and disabilities of tenant in tail apres.

[28 a]

Littleton having spoken of estates of inheritance, viz. fee-simple and fee-tail, now treats of tenants of freehold only, that is, for term of life, and therein first of tenant in tail after possibility of issue extinct; and he gives unto him the first place, because this tenant has several qualities and privileges which tenant in tail himself has and which lessee for life has not. As first, he is punishable for waste. 2dly. He shall not be compelled to attorn. 3dly. He shall not have aid of him in the reversion. And yet he has some other qualities, which are not agreeable to an estate in tail, but to a bare lessee for life. 1st. If he makes a feoffment in fee, this is a forfeiture of his estate [to him in remainder]. 2dly. If an estate in fee, or in fee-tail, in reversion, or remainder, descend or come to this tenant, his estate is drowned, and the fee or fee-tail executed. 3dly. He in the reversion or remainder shall be received upon his default, as well as upon a bare tenant for life. 4thly. An exchange between a bare tenant for life and him is good, for their estates in respect of their quantity are equal; so as the difference stands in the quality, and not in the quantity of the estate. And as an estate tail was originally carved out of a fee-simple, so is the estate of this tenant [carved] out of an estate in special tail. And

these privileges the law allows him to keep in respect of the privity of his estate, and of the inheritance that once was in him. And he is called tenant in tail after possibility of issue extinct, because by no possibility can he have any issue inheritable to the same estate tail. But if one gives land to a man and his wife and to the heirs of their two bodies, and they live till each of them be an hundred years old, and have no issue, yet do they continue tenants in tail, for that the law sees no impossibility of having children.

## SECTION 33.

ALSO, if tenements be given to a man and to his heirs which he Same. shall beget on the body of his wife, in this case the wife has nothing in the tenements, and the husband is seised as donee in special tail. And in this case, if the wife die without issue of her body begotten by her husband, then the husband is tenant in tail after possibility of issue extinct.

*If the wife die without issue.*] So that the estate of this tenancy must be altered by the act of God, and that by dying without issue; for if a feoffment in fee be made to the use of a man and his wife for term of their lives, and after to the use of their next issue male to be begotten in tail [the words issue male being construed words of purchase], and after to the use of the husband and wife and of the heirs of their two bodies begotten, they having no issue male at that time; in this case the husband and wife are tenants in special tail executed [till they have a son], and after they have issue a son, then they become tenants for life, the remainder to the son in tail, the remainder to them in special tail; for albeit their estate tail is turned to an estate for life, yet [are they not tenants in tail apres] but bare tenants for life [for their estate for life comes to them by original limitation]; but if the issue die, and the husband dies leaving no other issue, then the wife shall have the privileges of tenant in tail after possibility of issue extinct, as appears in Lewes Bowles' case, 11 Co. 80. where it is said, that the estate of this tenant must be created by act of God, and not by limitation of the party. If land be given to a man and to his wife and to the heirs of their two bodies; and after they are divorced *causâ præcontractûs*, or *consanguinitatis*, or *affinitatis*, their estate of inheritance is turned to a joint estate for life; and albeit they had

*This estate can arise only by act of God, not by limitation or divorce.*

[28b]

once an inheritance in them, yet for that the estate is altered by their own act, and not by the act of God, viz. by the death of either party without issue, they are not tenants in tail after possibility of issue extinct.

*Special tail after general, bad, [but not è contra.]*

Lands are given to the husband and wife and to the heirs of the body of the husband, the remainder to the husband and wife and to the heirs of their two bodies begotten; the husband dies without issue; the wife shall not be tenant in tail after possibility, for the remainder in special tail was utterly void, and could never take effect; for so long as the husband should have issue, it should inherit by force of the general tail, and if the husband die without issue, then the estate tail special cannot take effect, in as much as the issue which should inherit the special tail, must be begotten by the husband, and so the general, which is larger and greater, has frustrated the special tail which is the lesser. And the wife in that case shall be punished for waste.

## SECTION 34.

*Issue in special tail cannot become tenants in tail, apres.*

*AND note, that none can be tenant in tail after possibility of issue extinct, but one of the donees, or the donee in special tail. For the donee in general tail cannot be said to be tenant in tail after possibility of issue extinct; because always during his life, he may by possibility have issue which may inherit by force of the same entail. And so in the same manner the issue which is heir to the donees in special tail, cannot be tenant in tail after possibility of issue extinct, for the same reason.*

*Frank marriage.*

If lands be given to a man with a woman in frankmarriage, albeit the woman (who was the cause of the gift) dies without issue, yet the husband shall be tenant in tail after possibility of issue extinct, for that he and his wife were donees in special tail, and so are within the words of Littleton. The residue of this section is evident.

## CHAPTER IV. SECTION 35.

[29a]

## CURTESY OF ENGLAND.

TENANT *by the curtesy of England is, where a man takes a wife seised in fee-simple or in fee-tail general, or seised as heir in tail special, and has issue by the same wife male or female born alive, albeit the same after dies or lives, yet if the wife dies, the husband shall hold the land during his life by the law of England. And he is called tenant by the curtesy of England, because this is used in no other realm but England only. And some have said, that he shall not be tenant by the curtesy, unless the child which he has by his wife be heard cry; for by the cry it is proved that the child was born alive.*

Curtesy is husband's estate for life in wife's lands held by her in fee or in tail,

*Takes a wife seised.]* And first of what seisin a man shall be tenant by the curtesy. There is in law a twofold seisin, viz. a seisin in deed, and a seisin in law, whereof more shall be said Sect. 681. And here Littleton intends a seisin in deed, if it may be attained unto. As if a man die seised of lands in fee-simple or in fee-tail general, and these lands descend to his daughter, and she takes a husband and has issue, and dies before any entry, the husband shall not be tenant by the curtesy, and yet in this case she had a seisin in law; but if she or her husband had during her life entered, he should have been tenant by the curtesy [or if the lands had been let to a tenant, the husband would have been entitled to curtesy, although no rent accrued due during the lifetime of the wife, 3 Atk. 469].

and of which she is seised in deed.

A man seised of an advowson or rent in fee has issue a daughter, who is married and has issue, and dies seised, and the wife, before the rent became due or the church became void, dies, she had but a seisin in law, and yet he shall be tenant by the curtesy, because

But of advowson or rent seisin in law enough.

he could by no industry attain to any other seisin. *Et impotentia excusat legem.*

No curtesy of reversion or a bare right.

But a man shall not be tenant by the curtesy of a bare right, title, or use\*, or of a reversion or remainder expectant upon any estate of freehold, unless the particular estate be determined or ended during the coverture.

The issue must be such as can inherit the estate. —Special tail.

*In fee-simple or fee-tail general or special, and hath issue by the same wife, male or female.*] Second, of what estate. If lands be given to a woman and to the heirs male of her body, she takes a husband, and has issue a daughter, and dies, he shall not be tenant by the curtesy; because the daughter by no possibility could inherit the mother's estate in the land; and therefore where Littleton says, issue by his wife male or female, it is to be understood, which by possibility may inherit as heir to her mother of such estate. Littleton himself explains this by express words; cap.v. Dower, fo. 40. sect. 52. And therefore if a woman tenant in tail general makes a feoffment in fee, and takes back an estate in fee, then [having only a base or defeasible fee] takes a husband and has issue, and the wife dies, the issue may in a *formedon* recover the land against the father, by force of the estate tail, and as heir to his mother; [in which case the father cannot have curtesy, for the seisin of his wife is defeated, and the heir inherits, not under that seisin, but under the seisin paramount the feoffment; but if the issue had been content to take the base fee, then would the father have been curtesable.]

Base fee.

Death of issue before wife's seisin immaterial.

*And has issue.*] Third, the time of having issue, and fourth, what kind of issue. If a man seised of lands in fee has issue a daughter, who takes husband and has issue, and the father dies, the husband enters, he shall be tenant by the curtesy, albeit the issue was had before the wife was seised. And so it is albeit the issue had died in the lifetime of the father before any descent of the land, yet shall he be tenant by the curtesy.

Issue born after wife's death, not enough.

If a woman seised of lands in fee takes husband, and by him is pregnant, and in her travail dies, and the child is afterwards de-

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\* That is of a Use before the Statute, or a bare Equity, but of a Trust, the husband is now by a strange anomaly curtesable. 1 Atk. 603.

livered alive, yet the husband shall not be tenant by the curtesy, because the child was not born during the marriage, nor in the lifetime of the wife; but in pleading he may allege that he had issue during the marriage.

If the wife be delivered of a monster, which hath not the shape of mankind, this is no issue in the law; but although the issue has some deformity in any part of his body, yet if he hath human shape this sufficeth. If the issue be born deaf or dumb, or both, or be born an idiot, yet it is lawful issue to make the husband tenant by the curtesy and [itself] to inherit the land.

*Issue, deaf, dumb, or idiot, gives curtesy, contra if a monster.*

*Born alive.*] If it be born alive it is sufficient, though it be not heard cry; for peradventure it may be born dumb. And this was resolved in Paine's case, 8 Co. 30. For the pleading is, that during the marriage the husband had issue by his wife, and upon trial it must be proved that the issue was born alive, for dead issue is a none; and crying is but a proof that the child was born alive, which may be proved by shewing motion, stirring, or the like.

*What signs of life necessary.*

By the custom of gavelkind a man may be tenant by the curtesy without having any issue.

*Gavelkind.*  
[30 a]

*Albeit the issue after dies or lives.*] And therefore if a woman tenant in tail general takes a husband, and has issue, which issue dies, and the wife dies without any other issue, yet the husband shall be tenant by the curtesy, albeit the estate tail be determined, because he was entitled to be tenant by the law of England before the estate tail was spent, and for that the land remaineth.

*Death of issue immaterial.*

But if a woman makes a gift in tail, reserving a rent to her and her heirs, then takes a husband and has issue, the donee dies without issue, and the wife dies, the husband shall not be tenant by the curtesy of the rent, for that the rent newly reserved is by the act of God determined, and no estate thereof remaineth. But if a man be seised in fee of a rent and makes a gift in tail general to a woman, she takes husband and has issue, the issue dies, and the wife dies without issue, he shall be tenant by the curtesy of the rent, because the rent remains.

*Curtesy of rent.*

Four requisites  
to curtesy.

*If the wife dies, the husband shall hold the land, &c.]* Four things do belong to an estate by the curtesy, viz. marriage, seisin of the wife, issue, and death of the wife. But it is not requisite that these should concur together all at one time. And therefore, if a man takes a woman seised of lands in fee, and is disseised, and then they have issue, and the wife dies, he may enter and hold by the curtesy. So if he has issue which dies before disseisin as is aforesaid.

Curtesy begins  
in wife's life  
after issue had.

And albeit the estate [by curtesy] be not consummate until the death of the wife, yet the estate has such a beginning in the life of the wife after issue had, that it is respected in law for divers purposes. First, after issue had, he shall do homage alone, and is become tenant to the lord, and the avowry shall be made only upon the husband in the life of the wife, as shall be said hereafter when we come to the apt place.

Effect of hus-  
band's alien-  
ation.

Secondly, if after issue the husband makes a feoffment in fee, and the wife dies, the feoffee shall hold it during the life of the husband, and the heir of the wife shall not during his life recover it in any real action; for it could not be a forfeiture, because the estate, at the time of the feoffment, was an estate initiate, though not consummate.

Husband can-  
not waive cur-  
tesy and take a  
life estate by  
devise.

And it is adjudged in 29 E. 3. that the tenant by the curtesy cannot claim by a devise, and waive the estate by the curtesy, because, says the book, the freehold commenced in him before the devise for term of his life.

Scotland.  
Ireland.

*In England only.]* It is also used within the realm of Scotland, and there it is called *Curialitas Scotie*. And so it is in the realm of Ireland.

Curtesy allowed  
of joint tenancy  
with several in-  
heritances but  
not dower.

And some have said, that in divers cases a man shall, by having issue, be tenant by the curtesy where a woman shall not be endowed. And therefore they say, if lands be given to two women and to the heirs of their two bodies begotten, and one of them takes husband and has issue and dies, the inheritances being several, the husband shall be tenant by the curtesy, as it is adjudged 7 E. 3, and in other books this judgment is cited and allowed. But certain



it is, that if land be given to two men and to the heirs of their two bodies begotten, and the one takes a wife and dies, she shall not be endowed, for no estate in the land is altered by that marriage. But I leave the reader to his own opinion, or rather to suspend it until he comes to the proper place in the next chapter.

[30b]

A woman takes husband, and has issue, lands descend to the wife, the husband enters, and after the wife is found an idiot by office, the lands shall be seised by the king, for the title of the tenancy by the curtesy and of the king begin at one instant, and the title of the king shall be preferred.

*If wife dies an idiot, curtesy lost.*

A man shall be tenant by the curtesy of a castle which serves for the public defence of the realm, but a woman shall not be endowed thereof, as shall be said more at large hereafter. A man shall be tenant by the curtesy of a common *sans nombre*, but a woman shall not be endowed thereof, because it cannot be divided. A man shall be tenant by the curtesy of a house that is *Caput Baronie* or *Comitatús*: but it appears by 4 H. 3, Dower 180, that a woman shall not be endowed of it, for the law respects honour and order.

*Curtsey of castle or a common.*

A man entitled to be tenant by curtesy makes a feoffment in fee upon condition, and enters for the condition broken, and then his wife dies, he shall not be tenant by the curtesy, because albeit the estate given by the feoffment be conditional, yet [the estate taken back was absolute] and the estate comprised in the feoffment was the entire curtesy which by the feoffment became absolutely extinct [and could not be revested by the condition], for the condition was not annexed to it [the curtesy, but to the estate conveyed]. As if the lord disseise the tenant, then makes a feoffment in fee of the land upon condition, and enters for the condition broken, yet the seigniority is extinct [in that particular land] for that was inclusively extinct by the feoffment [and could not be restored by entry on breach of the condition]. See more of tenant by curtesy, Section 52.

*Husband's feoffment on condition destroys his curtesy.*

## CHAPTER V. SECTION 36.

## OF DOWER.

Dower is the wife's third of her husband's lands for her life.

**TENANT in dower is, where a man is seised of certain lands or tenements in fee-simple, fee-tail general, or as heir in special tail, and takes a wife, and dies, the wife after the decease of her husband shall be endowed of the third part of such lands and tenements as were her husband's at any time during the coverture, to have and to hold to the same wife in severalty by metes and bounds for term of her life, whether she had issue by her husband or no, and of what age soever the wife be; so that she be past the age of nine years at the time of the death of her husband, otherwise she shall not be endowed.**

Three essentials to this estate.

[31 a]

*Tenant in dower.*] Dower by the common law is allowed to the wife for the sustenance of herself and the nurture and education of her children. To the consummation of dower three things are necessary; viz. marriage, seisin, and death of her husband.

It is held free of taxes and crown debts.

*Dos* or dower, as the name imports, is in itself a freedom, and the tenant in dower has many privileges, as to be quit and free of all talliage or tax. And tenant in dower shall not be distrained for the husband's crown debt. And other privileges she has; of all which Ockam yields the reason, *doti ejus parcatur quia præmium pudoris est.*

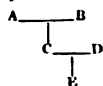
Husband, alien or traitor no dower; contra if an idiot, outlaw, or felon.

*Where a man.*] If the husband be an alien the wife shall not be endowed. But the wife of an idiot, *non compos mentis*, or person outlawed, or attainted of felony or trespass, of heresy, *præmunire*, or the like, shall be endowed. But if the husband be attainted of treason, albeit it be treason done after the title of dower [has attached] she shall not be endowed, as shall be said hereafter.

*Seised.*] Here this word (seised) extends itself as well to a seisin in law, or a civil seisin, as to a seisin in deed, which is a natural seisin: but seised he must be either the one way or the other during the coverture. For note, a woman shall be endowed of a seisin in law. As where lands or tenements descend to the husband, before entry, he has but a seisin in law, and yet the wife shall be endowed, albeit it be not reduced to an actual possession, for it lies not in the power of the wife to bring it to an actual seisin, as the husband may do of his wife's land when he is to be tenant by the curtesy, which is worthy of observation.

And yet of *every* seisin in law, or [indeed of *every*] actual seisin of lands or tenements, a woman shall not be endowed. For example, if there be grandfather, father, and son, and the grandfather is seised of three acres of land in fee, and takes wife, and dies, this land descends to the father, who dies either before or after entry, now is the wife of the father dowable. The father dies, and the wife of the grandfather is endowed of one acre and dies, the wife of the father shall be endowed only of the two acres residue, for the dower of the grandmother is paramount the title of the wife of the father, and the seisin of the father which descended to him (be it in law or actual) is defeated, and now upon the matter the father had but a reversion expectant upon a freehold, and in that case, *dos de dote peti non debet*; although the wife of the grandfather dies living the father's wife. And here note a diversity between a descent and a purchase. For in the case aforesaid, if the grandfather had infeoffed the father, or made a gift in tail unto him, there in the case abovesaid, the wife of the father, after the decease of the grandfather's wife, should have been endowed of that part assigned to the grandmother, and the reason of this diversity is, for that the seisin, that descended after the decease of the grandfather to the father, is avoided by the endowment of the grandmother, whose title was consummate by the death of the grandfather; but in the case of the purchase or gift, that took effect in the life of the grandfather (before the title of dower of the grandmother was consummate), [and] is not [entirely] defeated [by the first dower], but only *quoad* the grandmother, and in that case there shall be *dos de dote*.

No dower of dower on descent, contra on purchase;



[31 b]

And yet there is another diversity where the wife of the father is first endowed, and where the wife of the grandfather; for in that

or if the first dower be not assigned.

case, if after the decease of the grandfather and father the son enters and endows his mother of a third part, against whom the grandmother recovers a third part and dies, the mother shall enter again into the land recovered by the grandmother, because she had in it an estate for term of her life, and the estate for the life of the grandmother is lesser in the eye of the law, as to her, than [an estate for] her own life. [See further, 2 Vern. 403.]

*Of dower on an exchange.*

Also the husband may be seised in his demesne as of fee absolutely, yet the woman shall not be endowed, as she shall not be endowed both of the land given in exchange and of the land taken in exchange, and yet the husband was seised of both, but she may have her election to be endowed of which she will.

*Momentary seisin not enough.*

Also of a seisin for an instant a woman shall not be endowed; as if *cestuique use*, after the statute of 1 R. 3. and before the statute of 27 H. 8, had made a feoffment in fee, his wife should not be endowed. Likewise if two joint-tenants be in fee, and the one makes a feoffment in fee, his wife shall not be endowed. And so if the conusee of a fine grants and renders the land to the conuser, the wife of the conusee shall not be endowed, for it is not possible that the husband could have endowed his wife of such a [temporary and instantaneous] estate.

*Castle, mansion.*

*Lands or tenements.*] Of a castle that is maintained for the necessary defence of the realm a woman shall not be endowed, because it ought not to be divided, and the public shall be preferred before any private right. But of a castle that is only maintained for the private use and habitation of the owner, a woman shall be endowed; and of the principal mansion or capital messuage, the wife shall be endowed, but not if it be *caput baroniae*.

*Estate tail determined.*

And of an estate tail in lands determined, a woman shall be endowed in the like manner and form as a man shall be tenant by the curtesy, *mutatis mutandis*.

*Base fee.*

*In fee-simple, fee-tail general, &c.*] If a man be tenant in fee-tail general and makes a feoffment in fee, and takes back an estate to him and to his wife and to the heirs of their two bodies, and they have issue, and the wife dies, and the husband takes another wife and dies, the [second] wife shall not be endowed, for during the cover-

ture he was seised of an estate tail special, and yet the issue which the second wife had may by possibility have inherited [the estate tail general]. The same law is, if [the husband] in this case had taken back an estate in fee-simple, and afterwards had taken a wife and had issue by her [and died leaving such issue him surviving; the wife in that case] shall not be endowed, for [the base or wrongful fee descending on the issue, he is in by his preferable rightful title under the entail and thereby] the fee-simple becomes vanished by the remitter and the issue has the land by force of the entail, [of which the husband was not seised at any time during the coverture.] But in that case the tenant cannot plead that the husband was never seised of such an estate whereof the demandant might be endowed, but he must plead the special matter.

*And takes a wife.]* If a man so seised as is aforesaid, takes an alien to wife, and dies, she shall not be endowed; but if the king take an alien born [to wife] and dies, she shall be endowed by the law of the crown. *Alien queen.*

If a Jew born in England takes to wife a Jewess born also in England, and the husband is converted to the Christian faith, and then purchases lands, and enfeoffs another, and dies, the wife shall not be endowed unless she also be converted. *Jewess.*

*By metes and bounds.]* Albeit of many inheritances that be entire, whereof no division can be made by metes and bounds, [and where therefore] a woman cannot be endowed of the thing itself, yet she shall be endowed thereof in a special and certain manner. As of a mill, [or rather of the tolls of an ancient mill where by custom all the tenants of a manor are bound to grind their corn, allowing the miller a certain dish full of flour for the use of his mill,—of such a mill] a woman shall not be endowed by metes and bounds, nor in common with the heir, but either she may be endowed of the third toll-dish, or of the whole mill every third month. And a woman shall be endowed of the third part of the profits of a fair, of the third part of the profits of the office of marshalsea, of the third part of the profit of a dove-house, and likewise of the third part of a piscary, viz. every third fish or every third throw of the net. Also of the third presentation to an advowson, and of the third part of profits of courts, fines, heriots, &c. Also a woman *Mill, fair, fishery, advowson, tithes, &c.*  
[32 a]

shall be endowed of tithes : and the surest endowment of tithes is of the third sheaf ; for what land shall be sown is uncertain.

*Husband's lease for life before marriage deprives wife of dower ; contra of lease for years or rent in tail.*

But in some cases of lands and tenements, which are divisible, and which the heir of the husband shall inherit, yet the wife shall not be endowed. As if the husband makes a lease for life of certain lands, reserving a rent to him and his heirs, and then takes wife and dies, the wife shall not be endowed, neither of the reversion (albeit a reversion is within Littleton's definition of a tenement) because there was no seisin in deed or in law of the freehold [during coverture], nor of the rent, because the husband had but a particular estate therein, and no fee-simple. But if the husband makes a lease for years, reserving a rent, and takes a wife and dies, the wife shall be endowed of the third part of the reversion by metes and bounds, together with the third part of the rent, and execution shall not cease during the years. And herewith agrees the common experience at this day. But if the husband makes a gift in tail, reserving a rent to him and to his heirs, and afterwards the donor takes wife and dies, the wife shall be endowed of this rent, because it is a rent in fee, and by possibility may continue for ever.

*Common. Rent. Annuity.*

Of a common certain a woman shall be endowed, but of a common *sans nombre en grosse* she shall not be endowed, as hath been said before. And so of a rent service, rent charge, and rent seck, she shall be endowed : but of an annuity, (which charges only the person and issues not out of any lands or tenements) she shall not be endowed. But if the freehold of the rents, common, &c. were suspended *before* the coverture, and so continue during the coverture, she shall not be endowed of them. [But if the freehold be not suspended before the coverture and] *after the coverture* the husband extinguishes the [rent common &c.] by release or otherwise, yet shall the wife be endowed ; for as to her dower [these things] in the eye of the law have continuance.

*Improved value by building or otherwise.*

If the wife be entitled to have dower of three acres of marsh, each acre being of the value of twelve pence, and the heir by his industry and charge makes it good meadow and improves the value of each acre to ten shillings, the wife shall have her dower according to the improved value, and not according to the value as it was

in her husband's time: for her title is to the quantity of the land, viz. one just third part. And the like law it is if the heir improve the value of the land by building: and on the other side, if the value be impaired in the time of the heir, she shall be endowed according to the value at the time of the assignment, and not according to the value as it was in the time of her husband.

*Any time during the coverture.*] For the better understanding of this it is to be remembered, that to dower three things belong, viz. marriage, seisin, and death of the husband. Concerning the seisin, it is not necessary that the same should continue during the coverture, for albeit the husband aliens the lands or tenements, or extinguishes the rents or commons, &c. yet the woman shall be endowed. But it is necessary that the marriage do continue, for if that be dissolved the dower ceases, *ubi nullum matrimonium, ibi nulla dos*. But this is to be understood when the husband and wife are divorced *à vinculo matrimonii*, as in case of precontract, consanguinity, affinity, &c. and not *à mensâ et thoro* only, as for adultery. And yet it is said, that if the assignment of dower *ad ostium ecclesie* be specified, viz. that notwithstanding any divorce shall happen yet that she shall hold it for life, that this is good.

*Marriage must continue, but seisin need not. Divorce.*

If the wife elope from her husband, that is, if the wife leave her husband, and goes away and carries away with her adulterer, she shall lose her dower until her husband willingly without coercion or ecclesiastical censure be reconciled to her and permit her to cohabit with him. And if she goes willingly with or to the adulterer, this is a departure and a tarrying, albeit she remains not continually with the adulterer, or if she carries with him against her will, or if he turn her away, or if she cohabit with her husband by the censures of the church, in all these cases she loses her dowry.

*Elopement and adultery.*

[32 b]

*In severalty by metes and bounds.*] This means where the husband has a sole possession in severalty, as well as a sole seisin, for if he be seised in common, there the wife cannot be endowed by metes and bounds, as appears in this chapter, Sect. 44.

*Metes and bounds applies not to tenancy in common.*

Note, the endowment by metes and bounds, according to the common right, is more beneficial to the wife, than to be endowed against common right [as *ad ostium ecclesie*] for there she shall hold

*Dowress takes, discharged of what incumbances.*

the land charged with incumbrances made after her title to dower [has occurred, but where she is endowed of common right she takes paramount incumbrances].

*Writ of dower ;  
quarantine, and  
damages.*

*Whether she has issue by her husband or no.]* Herein the tenant in dower, as in many other cases, is preferred before the tenant by curtesy ; but yet this great disadvantage the wife has, that she cannot enter into her dower by common law, but is driven to her writ of dower to recover the same, wherein sometimes great delays are used, and therefore the well-advised friends of the wife will provide for a jointure to be made to her, as shall be said hereafter. By the statute of *Magna Charta*, cap. 7, it is provided that she shall tarry in the chief house of her husband but forty days after his death, within which time dower shall be assigned unto her ; but of little effect was that act, for no penalty is thereby provided if it be not done : which term of forty days is in law called *Quarantine*. But if she marry within the forty days, she loses her quarantine. And by the statute of Merton, 20 H. 3, c. 1, it is provided that the wife shall recover damages in her writ of dower from the time of the death of her husband. But herein divers things are observable. 1st. She shall recover no damages in a writ of right of dower, but only in a writ of dower. 2dly. She shall recover damages only when her husband dies seised of the freehold and inheritance, which a lease for life prevents but not a lease for years. 3dly. If she delay the writ herself, she shall not recover damages, hence, 4thly. It is necessary for the wife to demand her dower as soon as she can before good testimony, for otherwise she may by her own default lose the value and her damages. For if she bring a writ of dower against the heir, and he comes into court and pleads that he has been always ready and yet is to render dower &c. if the wife has not requested her dower, she shall lose the mean values and her damages ; but if she has requested her dower, she may plead it, and issue may be thereupon taken. 6thly. This statute of Merton extends to copyholds, where the custom is that women be dowable. 7thly. If the wife has dower assigned unto her in chancery she shall have no damages.

[33 a]

*Estoppel by ac-  
ceptance either  
in pais or on  
record.*

So it is if the heir or his feoffee assign dower, and the wife accepts it, she loses her damages. A man seised of lands in fee, takes a wife and grants a rent charge, and after makes a feoffment in fee, and takes back an estate tail and dies, the wife recovers



dower against the issue in tail by redition, the wife makes a surmise that her husband died seised, and prays a writ to enquire of the damages, and that is granted to her. In this case she holds the land charged with the rent charge, for by her prayer she accepts herself dowable of the second estate, for of the first estate, whereof she was dowable, her husband died not seised, and so she has concluded herself; wherefore if the rent charge be more to her detriment than the damages are beneficial to her, it is good for her in that case to make no such prayer.

*Of what age soever the wife be, so as she be above the age of nine years at the time of the death of her husband.]* *Of the wife's age.*

Therefore if the wife be past the age of nine years at the time of the death of her husband, she shall be endowed, of what age soever her husband be, although he be but four years old. Wherein it is to be observed, that albeit *Consensus non concubitus facit matrimonium*, and that a woman cannot consent before twelve, nor a man before fourteen, yet this inchoate and imperfect marriage (from the which either of the parties at the age of consent may disagree) shall, after the death of the husband, give dower to the wife, [the possibility of dissent being then taken away] and therefore this, after the death of the husband, is accounted a lawful marriage as to dower, and the bishop upon issue joined in a writ of dower, *Quòd nunquam fuerunt copulati legitimo matrimonio*, ought to certify that they were coupled in lawful marriage, albeit the man were under fourteen, or the wife above nine and under twelve. So it is if a marriage *de facto* be voidable by divorce, in respect of consanguinity, affinity, precontract, or such like, whereby the marriage might have been dissolved, and the parties freed *à vinculo matrimonii* yet if the husband die before any divorce, then, for that it cannot now be avoided, this wife *de facto* shall be endowed; for this is *legitimum matrimonium* (as in the other case when the wife is *infra annos nubile*) *quoad dotem*. And so in a writ of dower the bishop ought to certify, that they were *legitimo matrimonio copulati*, according to the words of the writ.

*Voidable marriage cannot be annulled after death of one party.*

[33b]

But if they were divorced *à vinculo matrimonii* in the life of her husband, she loses her dower: otherwise it is if they were divorced *causâ adulteri*, which is but *à mensâ et thoro*, and not *à vinculo matrimonii*.

*Divorce à mensâ.*

*Wife attainted  
of felony.  
Pardon.*

If the husband alien his land, and the wife is attainted of felony, now is she disabled [to claim dower], but if she be pardoned before the death of the husband, she shall be endowed.

*Wife an alien.  
Effect of deni-  
zation and  
naturalisation.*

But otherwise it is of an original absolute disability; as if a man take an alien to wife, and after the husband aliens the land, and then the wife is made denizen, and the husband dies, she shall not be endowed, because her capacity and possibility to be endowed came [subsequent to the marriage] by the [act of] denization. Otherwise it is if she were naturalized by act of parliament, whereof see more in the Chapter of Villenage.

*Civil death.*

*After the decease of her husband.]* This is intended of a natural, not of a civil death. For if the husband enter in religion, the wife shall not be endowed until he be naturally dead.

*Different sorts  
of dower.*

And in this chapter Littleton divides dower into five parts, viz. dower by the common law. 2d. Dower by the custom. 3d. Dower *ad ostium ecclesie*. 4th. Dower *ex assensu patris*. And 5th. Dower *de la plus beale*. And all these dowers were instituted for the competent livelihood of the wife during her life, and the education of her children by the man she has married.

## SECTION 37.

*Dower by cus-  
tom may be of  
half or the  
whole,*

*AND note, that by the common law the wife shall have for her dower but the third part of the tenements which were her husband's during the espousals; but by the custom of some county, she shall have the half, and by the custom in some towns and boroughs she shall have the whole; and in all these cases she shall be called tenant in dower.*

*or a fourth  
only.*

And as custom may enlarge, so may it abridge dower and restrain it to a fourth part, &c.

*Gavelkind.*

By the custom of gavelkind the wife shall be endowed of a moiety, so long as she keeps herself sole, and without child; which she cannot waive and take her thirds for her life. For in this case, *consuetudo tollit communem legem*.

## SECTION 38.

[34a]

ALSO, there be two other kinds of dower, viz. dower at the church door, and dowers by the father's consent [which dowers are in the nature of jointures at the common law.] Jointures at Common Law.

## SECTION 39.

DOWER at the church door is, where a man of full age seised in fee-simple, has agreed to be married to a woman, and when he comes to the church door to be married, there, after affiance and troth plighted between them, he endows the woman of his whole land, or of the half, or other lesser part thereof, and there openly does declare the quantity and the certainty of the land which she shall have for her dower. In this case the wife, after the death of the husband, may enter into the said quantity of land of which her husband endowed her, without any other assignment. Dower at church door, what.

Where a man of full age.] That is, of one and twenty years. The husband must be 21.  
A man of the age of eighteen years took a wife, and by assent of his guardian endowed her *ad ostium ecclesie*, and it was adjudged a good endowment, albeit the husband died before the age of one and twenty years; but I hold Littleton's opinion to be good law, [and the above endowment by assent of guardian not binding.]

There, after affiance between them.] But this dower is good without deed, because [it does not arise and cannot exist till after the marriage solemnised] and then the husband cannot make a deed to his wife. And no assignment of dower at common law can be made *ad ostium ecclesie* before marriage, for before marriage the woman is not entitled to dower. It may be without deed.

And there openly does declare the quantity and certainty of the land.] Here are two things that the law delights in, viz. 1st. To have this and the like openly and solemnly done. 2dly. To have certainty, which is the mother of quiet and repose. And this word (moiety) abovesaid is to be intended of the half in certainty, Law delights in certainty and publicity. [34b]

and not of a moiety in common, which clearly appears in that here Littleton says, the quantity and certainty of the land.

*Quarantine lost  
by marriage.*

If the wife marry within the forty days she loses her quarantine, for her habitation in the house is personal to her, and only given to her in judgment of law during her widowhood albeit the words of the law are general.

*Dowress cannot  
enter till posses-  
sion delivered  
by sheriff.*

If a woman bring a writ of dower of a six pounds rent charge, and has judgment to recover a third part, albeit it be certain that she shall have forty shillings, yet she cannot distrain for forty shillings, before the sberiff has delivered the same unto her: for wheresoever the writ demands land, rent, or other things in certain, the demandant after judgment may enter or distrain before any seisin delivered to him by the sheriff upon a writ of *habere facias seisinam*. But in dower where the writ demands nothing in certain, there the demandant after the judgment cannot enter or distrain until execution sued, by which execution the sheriff is by the king's writ to deliver the third part in certainty to the demandant. And so it is when the wife of one tenant in common demands a third part of a moiety, yet after judgment she cannot enter until the sheriff deliver to her the third part, albeit the delivery of the sheriff shall reduce it to no more certainty than it was.

*Requisites to  
assignment of  
dower.*

*Without other assignment.*] For as concerning dower at the common law, there must be assignment either by the sheriff (as hath been said), by the king's writ, or else by the heir or other tenant of the land by consent and agreement between them. To a perfect assignment of dower several things are to be observed: 1st. It must be certain. 2dly. It must be either of some part of the land whereof the wife is dowable, or of a rent or some other profit issuing out of it. 3dly. The assignment must be absolute, not conditional, or subject to any limitation. And 4thly. It must be made by him that is tenant, or has the freehold of the land.

*When husband's  
alienees may  
assign dower.  
The one for the  
other of them.*

[35a]

If two or more joint-tenants of lands [that is, if the husband has aliened to two or more in joint-tenancy in fee], one of them may assign dower to his wife of a third part in certainty, and this shall bind his companions, because they were compellable to do the same by law. But if one of them assign a rent out of the land to the wife, this shall not bind his companion, because he was not com-

pellable by the law thereunto. If the husband make several feoffments of several parcels and dies, and the one feoffee assigns dower to the wife in satisfaction of all, the other feoffee shall not take advantage of this assignment, because they are strangers thereunto, and cannot plead the same. But in that case if the husband dies seised of other lands in fee-simple, and the same descend to his heirs, and the heir endows the wife of certain of those lands in full satisfaction of all the dower that she ought to have, as well in the lands of the feoffees as in his own lands, this assignment is good, and the several feoffees may take advantage of it.

## SECTION 40.

*DOWER by assent of the father is, where the father is seised of tenements in fee, and his son and heir apparent, when he is married, endows his wife at the monastery or church door, of parcel of his father's lands or tenements with the assent of his father, and assigns the quantity and parcels. In this case after the death of the son, the wife shall enter into the same parcel without any assignment. But it has been said in this case, it behoves the wife to have a deed from the father to prove his assent and consent to this endowment.*

Dower *ex assensu patris*.

*Where the father is seised of tenements in fee.]* Tenant for life of a parcel of land, the reversion to the father in fee, the son and heir apparent of the father endows his wife of this land by the assent of the father, the tenant for life dies, the husband dies, the reversion was a *tenement* in the father, and yet this is no good endowment *ex assensu patris*, because the father at the time of the assent had but a reversion expectant upon a freehold, whereof he could not have endowed his own wife; and albeit the tenant for life died, living the husband, yet *quod initio non valet, tractu temporis non convalescet*. And for the most part, dower *ad ostium ecclesie* and *ex assensu patris*, ensue the nature of dower at the common law. And for these the wife may have a writ of dower, albeit they be certain, as well as for her third part at common law.

Must be of an estate in possession.

[35b] •

*And his son and heir apparent.]* It must be such a son and heir apparent as must continue heir apparent [that is he must not be heir presumptive], and therefore the youngest son and heir apparent

Heir must be apparent, not presumptive. Gavelkind.

*Boro' English.*  
*Ex assensu fra-*  
*tris.*

cannot endow his wife *ex assensu patris*, of lands whereof the father is seised in fee of the nature of borough English, because the father may have another son, and then the husband is not heir apparent: and it is in respect of the constant and perpetual apparençy, that the son and heir apparent may endow his wife of his father's lands. And so it is of lands in gavelkind; and this is the reason that dower *ex assensu fratris* is not good, for albeit [the brother be] heir apparent at the time, yet by possibility [his brother] may have issue, which would exclude the heir presumptive. But an endowment *ex assensu matris*, is as good as *ex assensu patris*, because in that case there may be an apparençy of a constant and perpetual heir. And some have said, that if the father after his assent be attainted of treason or felony, that the [son's] wife in that case loses her dower, because her husband does not continue heir [to his father, the corruption of blood destroying that continuity.]

*The endowment*  
*is by the son of*  
*his father's*  
*land.*

*When he is married endows his wife.]* In this case, albeit the freehold and inheritance is in the father, yet in respect (as hath been said) of the constant and perpetual apparençy of the heir, the heir apparent does endow, and the father does but assent. And therefore where the father endows his son's wife, there the endowment was held void, because the husband is to endow and the father [only to] assent.

*He need not be*  
*of age;*

And it is holden in 2 H. 3. Dower, 199. That if the heir apparent be within age, yet the endowment *ex assensu patris* is good. Note, Littleton in the case of dower *ad ostium ecclesie*, puts the husband of full age, but here of the dower *ex assensu patris* he speaks generally.

*but the land*  
*must be set out.*

*And assigns the quantity and parcels.]* So as both in dower *ad ostium ecclesie*, et *ex assensu patris*, the certainty must be expressed. And therefore where books speak of a moiety, it is intended (as hath been said) of half in certainty.

*Wife may enter*  
*in father's life-*  
*time.*

*After the death of the son, the wife shall enter.]* In this case after the death of the husband the wife shall enter, or have writ of dower albeit the father be alive.

*Ten essentials*  
*to a deed.*

*It behoveth the wife to have a deed from the father to prove his assent to this endowment.]* This word (deed) in the understanding

of the common law is an instrument written on parchment or paper, whereunto ten things are necessarily incident: viz. First, writing. Second, on parchment or paper. Third, a person able to contract. Fourth, by a sufficient name. Fifth, a person able to be contracted with. Sixth, by a sufficient name. Seventh, a thing to be contracted for. Eighth, apt words required by law. Ninth, sealing. And tenth, delivery.

A deed cannot be written upon wood, leather, cloth, or the like, but only upon parchment or paper, for the writing upon them can be least vitiated, altered, or corrupted; and if the deed be enrolled according to the statute of 27 Hen. 8. cap. 10. it must be enrolled in parchment for the strength and continuance thereof, and not in paper, and so it was resolved in parliament by the judges in anno 23 Eliz.

*On leather, &c.  
bad. Inrolment.*

If a deed be alleged in a *count* or *plea*, regularly it must be shewn to the court, to the end the court may judge whether there be apt words to make it a good contract according to law, whereof more shall be said in the Chapter of Conditions. But if *non est factum* be pleaded, because thereby the sealing, delivery, or other matter of fact is denied, it shall be tried by the country; [i. e. by a jury.]

*Profert re-  
quired of all  
deeds pleaded.*

If a man deliver a writing sealed, to the party to whom it is made, as an escrow to be his deed upon certain conditions, &c. this is an absolute delivery of the deed, being made to the party himself, for the delivery is sufficient without the utterance of any words, otherwise a man that is mute could not deliver a deed: tradition [or delivery] is the only requisite, and then if the words are contrary to the act the words are not of any effect, *non quod dictum est, sed quod factum est inspicitur*. But [a deed] may be delivered to a stranger, as an escrow, &c. because the bare act of delivery to [a person who is no party] without words works nothing. And as a deed may be delivered to the party without words, so may a deed be delivered by words without any [formal] act of delivery, as if the writing sealed lies upon the table, and the feoffor or obligor says to the feoffee or obligee, "Go and take up that writing, it is sufficient for you;" or, "it will serve your turn;" or, "Take it as my deed;" or the like words; either is a sufficient delivery.

*Deed, delivery.  
Escrow.  
[36 a]*

This dower may be of more than a third.

An assignment of dower, either *ad ostium ecclesiæ*, or *ex assensu patris*, may be made of more than a third part. But the ancient law was, that no greater assignment could be made in those cases but of a third part, but less might, as appears in Glanvill.

## SECTION 41.

Widow may reject dower, *ad ostium* and *ex assensu*, and claim dower at Common Law.

AND if after the death of her husband she enters and agrees to such dower at the church door, &c. then she is concluded to claim any other dower by the common law of any [other] lands or tenements which were her husband's. But if she will, she may refuse such dower at the church door &c. and then shall she be endowed after the course of the common law.

Estoppel by acceptance of jointure or dower. [36b]

She is concluded to claim any other dower by the common law.] Wherein a diversity is to be observed between a dower *ad ostium ecclesiæ*, or *ex assensu patris*, and a jointure or estate made to the wife in satisfaction of her dower. [If] dower [*ad ostium* or *ex assensu*] be assented to, [after the husband's death, that] is a bar to dower at the common law, for a woman cannot have double dower, one by the common law and the other *ad ostium*, &c. but a jointure [even if assented to] was no bar of dower at the common law [before the statute of jointures], for a right or title that one has to a freehold cannot be barred by acceptance of a collateral satisfaction.

Six requisites to jointure.

. But since Littleton wrote, by the statute of 27 H. 8, if a jointure be made to the wife [before marriage], according to that statute it is [such] a bar of dower as that the woman shall not have both jointure and dower [and if she accepts the jointure before marriage, then can she not claim dower.] But to the making of a perfect jointure within that statute six things are to be observed. First, Her jointure [must be a primary] limitation [of freehold, *infra*] to take effect in possession or profit for her life at least presently after the decease of her husband. Second, it must be for the term of her own life, or [for some] greater estate. Third, it must be made to herself, and to no other for her. Fourth, it must be made in satisfaction of her whole dower, and not of part of it. Fifth, it must be either expressed or averred to be in satisfaction of her



dower. And sixth, it may be made either before or after marriage.— Concerning the first, if a man make a feoffment in fee of lands or tenements either before or after marriage to the use of the husband for life, and after to the use of A. for life, and then to the use of the wife for life in satisfaction of her dower, this is no jointure within the statute, because by the first limitation it was not to take effect in possession or profit presently after the death of her husband. And albeit in that case A. should die living the husband, and after the death of the husband the wife enters, yet this is no bar of her dower, but she shall have her dower also, because it is not within the said statute, and (as hath been said) by the common law jointure is no bar of dower. 2. It must be either in fee-tail, or for term of her own life; an estate for the life or lives of one or many other persons, or to her for a hundred or a thousand years, &c. if she lives so long, is no good bar of dower, albeit they be expressly made in satisfaction of dower, *causâ quâ supra* [i. e. they are less estates than an estate for her own life]. 3. If an estate be made to others in fee-simple in trust for her for life, so that the estate remains in them, albeit it be for her benefit and by her assent and be expressed to be in full satisfaction of dower, yet is this no bar of dower, [because it is not made to the wife herself]. The 4th is so plain that it needs not any example. 5. A devise by will cannot be averred to be in satisfaction of dower, unless it be so expressed in the will. 6. If the jointure be made before marriage, the wife cannot waive it and claim her dower at the common law; but if it be made after marriage, she may waive the same and claim her dower. I have touched these points the more summarily, because they are resolved at large with the reasons thereof in Vernon's case, 4 Co. 1. So to comprehend all in few words,—A jointure (which in common understanding extends as well to a sole estate as to a joint estate with her husband) is a competent livelihood of *freehold* for the wife of lands or tenements, &c. to take effect presently in possession or profit after the decease of her husband for the life of the wife at least, provided she herself be not the cause of determination or forfeiture of it. If a jointure be made to a wife before coverture, and afterwards the husband and wife alien the lands by fine, she shall not be endowed of any other lands of her husband, [for she accepted the jointure in full satisfaction of all dower]. But if the jointure had been made after marriage, notwithstanding the alienation by the husband and wife thereof by fine, yet seeing her estate was originally waivable, and

*Jointure before  
and after mar-  
riage distin-  
guished.*

the time of her election came not till after the decease of her husband, she may claim her dower in the residue of his lands. But in the other case, the jointure of the wife made before marriage was not waivable at all.

Treason and felony what effect on jointure and dower.

[37 a]

Now, as dower *ad ostium ecclesiæ* and *ex assensu patris* is better for the wife than dower at common law, because in respect of the certainty she may enter and is not driven to her real action, so a jointure is more sure and safe for the wife, for besides an equal certainty, she shall not be barred of her jointure albeit her husband commit treason or felony, as she would be of both her dower *ad ostium ecclesiæ* and *ex assensu patris* by the common law. But now at this day by the statutes of 1 E. 6. cap. 12, and 5 E. 6. cap. 11, a wife shall not lose any title of dower which to her has accrued, by the attainder of her husband by any manner of murder or other felony whatsoever. But if the husband be attainted of high treason or petit treason she shall be barred of her dower at this day, so long as that attainder stands in force.

Etymology of Estoppel.

*Concluded*, comes of the verb *concludo*, which is derived of *con* and *claudo*, to determine, to finish, to shut up, to estop or bar a man to plead or claim any other thing.

#### SECTION 42.

Heir must be heir apparent.

AND note, that no wife shall be endowed *ex assensu patris* in form aforesaid, but where her husband is son and heir apparent to his father.

#### SECTION 43.

Assignment necessary when husband's estate is held in common, or the lands in dower are not set out.

AND note, that in all cases, where the certainty appears what lands or tenements the wife shall have for her dower, there the wife may enter after the death of her husband without any assignment. But where the certainty appears not, as to be endowed of the third part to have in severalty, or the moiety according to the custom to hold in severalty, in such cases it is necessary that her dower be assigned to her after the death of her husband; because it

*does not appear before assignment what part of the lands or tenements she shall have for her dower.*

As if a woman bring a writ of dower of three shillings rent, albeit she ought to be endowed of one shilling, yet cannot she after judgment distrain for twelve pence before assignment, because the demand was uncertain. And so it is if two tenants in common be, and the wife of one of them bring a writ of dower to be endowed of a third part of a moiety, and have judgment to recover, yet cannot she enter without assignment, albeit the assignment cannot give her any certainty, because her husband's estate was uncertain. See more of this before, Section 39.

[37 b]

## SECTION 44.

*BUT if there be two joint tenants of certain lands in fee, and the one aliens that which to him belongs, to another in fee, who takes a wife, and dies; in this case the wife for her dower shall have the third part of the moiety which her husband purchased, to hold in common (as her part amounts) with the heir of her husband, and with the other joint tenant, who did not alien, for that in this case her dower cannot be assigned by metes and bounds.*

Wife of tenant in common cannot have dower set out.

In this case the wife cannot enter without assignment, of which sufficient has been said before.

## SECTION 45.

*AND it is to be understood, that the wife shall not be endowed of lands or tenements which her husband holds jointly with another at the time of his death; but otherwise it is where he holds in common, as in the case next abovesaid.*

No dower of joint tenancy.

The reason of this diversity is, for that the joint tenant who survives, claims the land by the feoffment and by survivorship, which is above the title of dower, and he may plead the feoffment made to himself without naming his companion that died; but tenants in common have several freeholds and inheritances, and

Contra of tenancy in common.

their moieties shall descend to their several heirs, and therefore their wives shall be endowed.

[38a]

## SECTION 46.

Tenant in tail cannot jointure by Common Law or Statute.

*AND it is to be understood, that if tenant in tail endows his wife at the church door, as is aforesaid, this shall avail her little or nothing, for after the husband's decease the issue in tail may enter upon the widow's possession; and so may he in the reversion, if there be no issue in tail then alive.*

The reason of this is, for that the tenant in tail is restrained by the statute of 13 E. 1. *de donis conditionalibus* [from any alienation which shall bind the issue; so that if the tenant in tail makes a jointure it may be defeated by the issue.]

## SECTION 47.

Infant cannot give dower *ad ostium*, but he may *ex assensu patris*.

*ALSO, if a man seised in fee-simple, being within age, endows his wife at the monastery or church door, and dies, and his wife enters, in this case the heir of the husband may oust her. But otherwise it is (as it seems) where the father is seised in fee, and the son within age endows his wife ex assensu patris, the father being then of full age.*

The reason of this diversity is, for that in the first case the husband within age is seised, and therefore he being within age cannot by a voluntary act bind himself; otherwise it is, where he does an act whereunto he is compellable by law: but in the latter case the father who gives the assent [and who is adult] is seised of the freehold and inheritance, and the son therein has nothing, and therefore his heir shall not avoid it in respect of his infancy.

## SECTION 48.

Dower *de la plus beale*.

*ALSO, there is another dower, which is called endowment de la plus beale. [And this is where a man has lands in socage and*

*lands in knight's service, and dies, leaving a son within age and a widow, she shall take her dower wholly out of the lands in socage, in relief of the lord who was entitled to be guardian in chivalry; for knight service, being instituted for the defence of the realm was highly favoured, and should not be dismembered where it could be avoided.]*

## SECTION 52.

[40a]

*AND memorandum, that in every case where a man takes a wife seised of such an estate [in lands or] tenements as the issue which he has by his wife may by possibility inherit, in that case, after the decease of the wife, he shall have the same tenements by the curtesy of England, but otherwise not.*

To curtesy the issue had, must be such as can inherit the wife's estate.

If a man takes a wife seised of lands or tenements in fee, and has issue, and after the wife is attainted of felony so that the issue cannot inherit her estate, yet he shall be tenant by the curtesy in respect of the issue which he had before the felony and which by possibility might then have inherited. But if the wife had been attainted of felony before the issue, albeit he has issue afterward, he shall not be tenant by the curtesy.

Issue before wife's attainder gives curtesy, contra if after.

## SECTION 53.

*ALSO, in every case where a woman takes a husband seised of an estate in [lands or] tenements, and by possibility it may happen that the wife may have issue by her husband, which issue may inherit the same estate as heir to her husband, there the wife shall have dower of such lands or tenements, but otherwise not. For if tenements be given to a man and to the heirs which he shall beget of the body of his wife, in this case the wife has nothing in the tenements, and the husband has an estate as donee in special tail. Yet if the husband die without issue, the same wife shall be endowed of the same tenements; because the issue, which she by possibility might have had by the same husband, might have inherited the same tenements. But if the wife dies, living her husband, and afterwards the husband takes another wife, and dies, his second wife shall not be endowed in this case for the reason aforesaid.*

To dower, the issue, if any, must be such as could inherit the husband's estate.

*The possibility of issue enough, though the wife be a hundred years old or the husband only four.*

Albeit the wife be a hundred years old, or the husband at his death be but four or seven years old, so that there is no common probability of issue between them, yet the law saith, that if the wife be above the age of nine years at the death of her husband, she shall be endowed, and seeing that women in ancient times have had children at an age whereunto no woman doth now attain, the law cannot judge that impossible, which by nature was possible. And in my time, a woman above threescore years old has had a child, and *idedò non definitur in jure*. And for the husband's being of such tender years, he has *habutum*, though he has not *potentiam* at that time; and therefore his wife shall be endowed; [and if he lives long enough there is a possibility of his having issue by his wife, which possibility is all that the law regards.]

[40 b]

*On husband's attainder wife endowable, though issue cannot inherit. E converso on wife's elopement.*

*Which issue may inherit.*] A man seised of land in tail general takes wife, and afterwards is attainted of felony, before the statute of 1 E. 6. the issue should have inherited, and yet the wife should not have been endowed; for the statute of W. 2. cap. 1. relieves the issue in tail, but not the wife. But at this day, if the husband be attainted of felony, the wife shall be endowed, and yet the issue shall not inherit the lands which the father had in fee-simple. If the wife elope from her husband, &c. she shall be barred of her dower, as hath been said, and yet the issue shall inherit.

## SECTION 54.

It is easily perceived that this shaft came not out of Littleton's quiver of choice arrows; and therefore I will leave it [out].

[41 a]

## SECTION 55.

*Effect of husband's attainder.*

AND note, Vavisor says, that if a man be seised of land and commits felony, and after aliens, and then is attainted, his wife shall have a good action of dower against the feoffee: but if the land be escheated to the king, or to the lord, she shall not have a writ of dower. And so see the difference and enquire what the law herein is.

This also is a new addition, and this opinion is exploded: for it is clear, that the wife at the common law should not have been endowed against the feoffee. For to deter and restrain men from committing of treason or felony, the law has inflicted five punishments upon him that is attainted of treason or felony. *The five punishments.* 1. He shall lose his life, and that by the infamous death of hanging between heaven and earth, as unworthy, in respect of his offence, of either. 2. His wife, who is a part of himself (*et erunt animæ duæ in carne unâ*) shall lose her dower. 3. His blood is corrupted, and his children cannot be heirs to him, and if he be noble or gentle before, he and all his posterity are by this attainder made ignoble. 4. He shall forfeit all his lands and tenements; and 5. all his goods and chattels; and all this is included by the law in the judgment, *quòd suspendat ur per collum*. But this is not intended of all felonies, but only of felony by stealing of goods above the value of twelve-pence, and not of *petit larceny* under that value. So that the woman shall lose her dower as well against the feoffee as against the lord by escheat. And the reason of this is yielded by Littleton himself in the Chapter of Warranties, Sect. 746, to the end that men should be afraid to commit felony. But at this day the wife of a man attainted of felony (as often hath been said) shall be endowed by force of the statutes in that case provided.

[41 b]

## CHAPTER VI. SECTION 56.

## TENANT FOR LIFE.

Estate for life  
includes estate  
*pur auter vie*.

**TENANT** for term of life is, where a man lets lands or tenements to another for term of the life of the lessee, or for term of the life of another man. In this case the lessee is tenant for term of life. But by common speech he who holds for term of his own life, is called tenant for life, and he who holds for term of another's life is called tenant *pur auter vie*.

Of occupancy.

*Or for term of another's life.*] Now it is to be understood, that if the lessee in that case dies living *cestuique vie* (that is, he for whose life the lease was made), he that first enters shall hold the land during that other man's life, and he that so enters is within Littleton's words, viz. *tenant pur auter vie*, and shall be punished for waste as tenant *pur auter vie*, and is subject to the payment of the rent reserved, and [this person so entering] is in law called an *occupant*, because his title commences by his first occupation. And so if tenant for his own life grants over his estate to another, if the grantee dies [before the grantor] there the person who first enters shall be [called] an occupant. In like manner it is of an estate created by law; for if tenant by the curtesy or tenant in dower grant over his or her estate, and the grantee dies, there also shall be an occupant. But against the king there shall be no occupant, because *nullum tempus occurrit regi*. And therefore no man shall gain the king's land by priority of entry. There can be no occupant of any thing that lies in grant, which cannot pass without deed, because every occupant must claim by a *que estate* and aver the life of *cestuique vie*. To prevent the estate by occupancy, it is necessary to add these words (to have and to hold to him and his heirs during the life of *cestuique vie*), and this shall prevent [general occupancy, for the heir shall be] the occupant [as specially named], and yet the lessee may assign [the land] to whom he will [notwith-

None of things  
lying in grant.



standing the limitation to heirs]; or if he has already an estate for another man's life without the word *heirs*, he may [to prevent a general occupancy at his death] assign his estate [over] to divers men and their heirs during the life of the *cestuique vie* [in trust for himself, for by probability some one of the assignees thus specially named may outlive the *cestuique vie*].

Note, that to every tenant for life is incident three kinds of estovers, viz. *housbote*, *ploughbote*, and *haybote*. And these the lessee may take upon the land demised without any assignment, unless he be restrained by special covenant, for *modus et conventio vincunt legem*. And the same estovers that tenant for life may have, tenant for years shall have. Estovers.

You have perceived that our author divides tenant for life into two branches, viz. into tenant for term of his own life and into tenant for term of another man's life; to this may be added a third, viz. into an estate both for term of his own life and for term of another man's life. As if a lease be made to A. to hold to him for term of his own life and the lives of B. and C., in this case the lessee has but one freehold during his own life and the lives of two others. And herein is a diversity to be observed between several estates in several degrees, and one estate with several limitations. For in the first, an estate for a man's *own* life is higher than for *another* man's life, but in the second it is not. As if A. be tenant for life, with remainder to B. for life, A. may surrender to B., for the estate of B. for term of his own life is higher than an estate for another man's life: [besides a particular estate is always considered a lesser estate than an estate in remainder:] and therefore if tenant for life enfeoff him in the remainder for life, this is a surrender, and no forfeiture. And albeit an estate for term of a man's own life be but one freehold, yet may several freeholds in certain cases be derived out of the same, whereof our books are very plentiful and therein you may disport yourselves for a time. As if tenant for life makes a lease by deed, or without deed, to him in remainder or reversion in tail or in fee, for the life of him in remainder or reversion [on which grant a reversion necessarily arises to the grantor for the grantee may not outlive him], and afterwards he in the remainder takes wife and dies [whereby the estate for his own life thus granted to him expires], his wife shall not be endowed, for the tenant for life shall enjoy the land again Tenant for life's grant to remainder-man not a forfeiture, nor a surrender if it be for life of grantee.

[42a]

[as in his former estate and condition ; and] forfeiture it cannot be, for he in the remainder was party ; and surrender it cannot be, for the whole estate [of the tenant for life] was not given [i. e. there was an intermediate reversion left in the grantor which prevented a merger]. So it is, if tenant for life take husband and by deed indented they make a lease to him in the reversion for the life of the husband, reserving a rent, this is neither forfeiture nor absolute surrender, for the cause aforesaid, and the reservation is good [for there is a reversion in the tenant for life, to which distress is incident.]

*Estate suspended by dower revives on dower ceasing.*

The heir makes a lease for life, reserving a rent, against whom the wife recovers her dower and dies, the lessee shall have the land again for life, and the rent is revived. B. seised of lands in fee, takes to wife I. S. and infeoffs C. in fee, who takes Alice to wife: C. dies, Alice is endowed ; B. dies, I. S. recovers dower against Alice and dies, Alice shall enjoy the land again during her life.

*Tenant for life's grant for less than his life creates a reversion. Waste.*

If A. and B. are joint-tenants, A. for life and B. in fee, and they join in a lease for life, A. has a reversion, and shall join in an action of waste. So if tenant for life and he in the reversion join in a lease for life, it is said, that they shall join in an action of waste, and that the lessee for life shall recover the place wasted, and he in reversion, damages.

*What uncertain grants give life estates.*

If a man grant an estate to a woman *dum sola fuit*, or *durante viduitate*, or *quamdiu se bene gesserit*, or to a man and a woman during the coverture, or as long as the grantee dwell in such a house, or so long as he pay ten pounds &c. or until the grantee be promoted to a benefice, or for any like uncertain time ; in all these cases, if it be of lands or tenements, the lessee has in judgment of law an estate for life determinable [on the event mentioned] if livery be made ; and if it be of rents, advowsons, or any other thing that lies in grant, he has a like estate for life by the delivery of the deed, and in count or pleading he shall allege the lease, and conclude, that by force thereof he was seised generally for term of his life.

*Lease to A. till he be paid 100l. gives him a life estate, contra on*

If a man make a lease of a manor, which at the time of the lease made is worth twenty pounds *per annum*, to hold until the lessee be paid one hundred pounds out of the rents and profits, in this

case because the annual profits of the manor are uncertain [in themselves, although at the time of the lease they are certain] the lessee has an estate for life, if livery be made, determinable upon the levying of the hundred pounds. But if a man grant a rent of twenty pounds *per annum* until a hundred pounds be paid, there he has an estate for five years, for there it is certain, and depends upon no uncertainty.

*grant of a rent certain.*

And yet in some cases a man shall have an uncertain interest in lands or tenements, and yet [he shall have] neither an estate for life, nor for years, nor at will. As if a man by his will in writing, devise his lands to his executors for payment of his debts, or until his debts be paid; in [either] case the executors have but a chattel interest in the land until the debts are paid; for if they should have it for their lives, then by their deaths their estate would cease and [so by that means] the debts [may remain] unpaid; but being a chattel, it shall go to the executors of executors till the debts are paid, and so note a diversity between a devise and a conveyance at the common law in his lifetime.

*Devise to executors till debts paid gives them but a chattel.*

And tenant by statute merchant, by statute staple, and by *elegit*, have uncertain interests in lands and tenements, and yet they have but chattels, and no freehold.

*Statute and elegit creditors have but chattels.*

A man may have an estate for term of life determinable at will; as if the king grants an office to one at will, with a rent to him for the exercise of his office for term of his life, this rent is determinable upon the determination of the office.

*Office and rent for its performance.*

If one grants lands, tenements, reversions, remainders, rents, advowsons, commons, or the like, and expresses or limits no estate, the lessee or grantee (due ceremonies requisite by law being performed) hath an estate for life. The same law is of a declaration of use. As if A., tenant in fee-simple, makes a lease of lands to B. for term of life, without mentioning for whose life, it shall be deemed for term of the lessee's life, for it shall be taken most strongly against the lessor, and as hath been said an estate for a man's own life is higher than for the life of another.

*A general grant gives an estate for lessee's life,*

But if tenant in tail make such a lease without expressing for whose life, this shall be taken but for the life of the lessor, for two

*except when made by tenant in tail, then it is*

for grantor's  
life.

[42b]

reasons. First, when the construction of any act is left to the law, the law which abhorreth injury and wrong will never so construe it, as it shall work a wrong : and in this case, if by construction it should be for the life of the lessee, then would the estate tail be discontinued and a new reversion gained by wrong : but if it be construed for the life of the tenant in tail, then no wrong is wrought. And it is a general rule, that whensoever the words of a deed, or of the parties without deed, may have a double intendment, and the one stands with law and right, and the other is wrongful and against it, the intendment that stands with law shall be taken. Secondly, the law more respects a lesser estate by right, than a larger estate by wrong ; as if tenant for life in remainder disseise tenant for life [in possession] now he hath a fee-simple [by wrong] ; but if the tenant disseised dies, then is the wrongful estate in fee by law changed to a rightful estate for life. To shut up this point it has been adjudged, that where tenant in tail made a lease to another for term of life generally, and after released to the lessee and his heirs, albeit between the tenant in tail and him, a fee-simple passed [by the release,] yet after the death of the lessee the entry of the issue in tail is lawful, which could not be, if it had been a lease for the life of the lessee, for then by the release it had been a discontinuance executed. But let us now return to Littleton.

### SECTION 57.

Definition of  
terms "donor"  
and "donee,"  
&c.

*AND it is to be understood, that there is feoffor and feoffee, donor and donee, lessor and lessee. Feoffor is properly where a man enfeoffs another in any lands or tenements in fee-simple, he who makes the feoffment is called the feoffor, and he to whom the feoffment is made is called the feoffee. And the donor is properly where a man gives certain lands or tenements to another in tail, he who makes the gift is called the donor, and he to whom the gift is made is called the donee. And the lessor is properly where a man lets to another lands or tenements for term of life or for term of years, or to hold at will, he who makes the lease is called lessor, and he to whom the lease is made is called lessee. And every one who has an estate in any lands or tenements for term of his own or another man's life, is called tenant of the freehold, and no other of a less estate can have a freehold : but those of a greater estate have a freehold ; for he in fee-simple hath a freehold [accompanied*

Freehold and  
less than free-  
hold.

with an inheritance] and tenant in tail hath a freehold [in the same manner.]

In the Comment to Section 2. some mention is made of the persons who may purchase. Now somewhat [remains] to be said of the ability to give, grant, enfeoff, &c. Whosoever is disabled by the common law to take, is disabled to [give, grant, and] enfeoff. But many that have capacity to take, have no ability to enfeoff, as men attainted of treason, felony, or of a *præmunire*, aliens born, traitors, and felons after the offence committed if attainder ensues, idiots, madmen, a man deaf dumb and blind from his nativity, a feme-covert, an infant, a man under duress, [these have no sufficient ability to give or grant,] and their feoffments may be avoided. But bastards, a man deaf, dumb, or blind, with understanding and sound memory, albeit he express his intention by signs only, or the like, may enfeoff, &c. [and their acts solemnly performed cannot afterwards be defeated.]

*Who may grant and who not.*

[43 a]

All feoffments, gifts, grants, and leases by bishops, (albeit they be confirmed by the dean and chapter) or by any of the colleges or halls in either of the Universities or elsewhere, or by deans and chapters, master or guardian of any hospital, parson, vicar, or any other having spiritual or ecclesiastical living, are also liable to be avoided; and all the said bodies politic or corporate, are by the statutes of the realm disabled to make any conveyances to the king, or to any other, as it hath been adjudged: which statutes have been made since Littleton wrote.

*Bishops, parsons, &c.*

[But by the statute of Magna Charta, cap. 32, it seems that the tenant might have made a feoffment of part of his land to hold of himself, but some have doubted this, and the chief lords particularly sought to establish a contrary doctrine, for by this species of subinfeudation they lost a considerable portion of their feudal services; if the tenant could alien to hold of himself, the principle of tenure was preserved and the lord's license and fine were superseded. King Henry the third very strenuously endeavoured to avoid this statute, for that it was made by king John under duress and confirmed by himself when under age.] But in judgment of law the king, as king, cannot be said to be a minor: for when the royal body politic of the king meets with the natural capacity in one person, the whole body shall have the quality of the royal politic,

*Subinfeudation taken away by Statute of quia emptores.*

*Disability of minority affects not the king.*

[43 b]

which is the greater and more worthy, and wherein is no minority. But now this point of subinfeudation is made clear by the statute of 18 E. 1, *de quia emptores terrarum* which has in effect taken away the said statute of Magna Charta, cap. 32, for thereby it is provided, that it shall be lawful for every free man to sell his lands or any part thereof at his will and pleasure, so that the feoffee do hold of the chief lord &c. And herein are divers notable points to be observed. 1st. That these words "it shall be lawful" prove that the tenant could not have safely aliened parcels of his tenancy on the said act of Magna Charta. 2dly. That upon the scoffment of the whole, the tenant shall hold of the chief lord. 3dly. That the tenant might enfeoff one part to hold of the chief lord. But this act (the king being not named) does not take away the king's fine due to him by the statute of Magna Charta.

*Freehold and chattels distinguished.*

*Statute and elegit creditors have a chattel to hold as a freehold.*

*Freehold.*] Here it appears that tenant in fee, tenant in tail, and tenant for life, are said to have a frank-tenement or freehold, to distinguish it from terms for years, or chattels, and customary, or copyhold lands. And note that tenant by statute merchant, statute staple, or *elegit*, are said to hold land *ut liberum tenementum* until their debt be paid; and yet in truth they (as hath been said) have no freehold, but a chattel only, which shall go to their executors; and the executors, if they be ousted, shall have [remedy by real action] as by an assise. But (*ut*) is similitudinary, [and in respect of the remedy by real action these tenants have the similitude of a freehold, but *nullum simile est idem*.

## CHAPTER VII. SECTION 58.

## TENANT FOR TERM OF YEARS.

TENANT *for term of years is where a man lets lands or tenements to another for term of certain years, after the number of years that is accorded between the lessor and lessee. And when the lessee enters by force of the lease, then is he tenant for term of years; and if the lessor in such case reserves to himself a yearly rent upon such lease, he may choose either to distrain for the rent in the tenements let, or else he may have an action of debt for the arrearages against the lessee. But in such case it behoves that the lessor be seised in the same tenements at the time of his lease; for it is a good plea for the lessee to say, that the lessor had nothing in the tenements at the time of the lease, except the lease be made by deed indented, in which case such plea lies not for the lessee to plead.*

Who is.

Remedies for rent.

*Where a man lets lands, &c.]* When Littleton wrote, many persons might make leases for years, or for life or lives, at their will and pleasure, who now cannot make them firm in law. And some persons may now make leases for years, or for life or lives (observing due incidents), firm and good in law, who of themselves could not do so when Littleton wrote, and this by force of divers acts of parliament; as namely, 32 H. 8. 1 Eliz. 13 Eliz. 18 Eliz. and 1 Jac. Regis, of which statutes one is enabling, and the rest are disabling.

Enabling and disabling Statutes.

[44 a]

When Littleton wrote, bishops with the confirmation of the dean and chapter, master and fellows of any college, deans and chapters, master or guardian of any hospital and his brethren, parson or vicar with the consent of the patron and ordinary, archdeacon, prebend, or any other body politic, spiritual and ecclesiastical (*concurrentibus*

Leases by ecclesiastical persons.

*hiis quæ in jure requiruntur*), might have made leases for lives or years, without limitation or stint. And so might they have made gifts in tail or estates in fee at their will and pleasure, whereupon not only great decay of divine service, but dilapidations and other inconveniences ensued, and therefore they were disabled and restrained by the said acts of 1 Eliz. 13 Eliz. and 3 Jac. Regis, to make any estate or conveyance to the king at all, or to the subject; but there is excepted out of the restraint or disability leases for three lives, or one and twenty years, with such reservation of rent, and with such other provisions and limitations as hereafter shall appear.

*Ancient offices.* Also they may make grants of ancient offices of necessity with ancient fees, *concurrentibus hiis quæ in jure requiruntur*, for those grants are not within the statute of 32 H. 8. but by construction they are not restrained by the statutes of 1 Eliz. or 13 Eliz., because these ancient offices be of necessity, and with the ancient fees, and so no diminution of revenue.

*Enabling Statutes.*

There are three kinds of persons who at this day may make leases for three lives &c. in such manner as is hereafter expressed, who could not do so when Littleton wrote, viz. 1st. Any person seised of an estate tail in his own right. 2dly. Any person seised of an estate in fee-simple in the right of his church. 3dly. Any husband and wife seised of any estate of inheritance in fee-simple or fee-tail in right of his wife, or jointly with his wife before the coverture or after, viz. the tenant in tail by deed to bind his issue in tail, but not the reversion or remainder, the bishop &c. by deed without the dean and chapter to bind his successors, the husband and wife by deed to bind the wife and her and their heirs, and these are made good by the statute of 32 H. 8. which enables them thereunto. But to the making of such leases good by the said statute, there are nine things necessary to be observed belonging to them all, and some other to some of them in particular.

*Nine requisites thereto.*

*Indenture.*

First, the lease must be made by deed indented, and not by deed poll or by parol.

*Commencement.*

Secondly, it must be made to begin from the day of the making thereof, or from the making thereof.



Thirdly, if there be an old lease in being, it must be surrendered or expired, or ended within a year of the making of the lease, and the surrender must be absolute and not conditional.

*Not in reversion.*  
[44b]

Fourthly, there must not be a double lease in being at one time; as if a lease for years be made according to the statute, he in the reversion cannot expulse the lessee, and make a lease for life or lives according to the statute, nor *à converso*; for the words of the statute be, to make a lease for three lives, or one and twenty years, so as one or the other may be made and not both.

*Nor concurrent.*

Fifthly, it must not exceed three lives, or one and twenty years, from the making of it, but it may be for a lesser term, or fewer lives.

*Limit of term.*

Sixthly, it must be of lands, tenements, or hereditaments, manurable or corporeal, which are necessary to be let, and whereout a rent by law may be reserved, and not of things that lie in grant, as advowsons, fairs, markets, franchises, and the like, whereout a rent cannot be reserved.

*Corporeal not  
incorporeal  
hereditaments.*

Seventhly, it must be of lands, or tenements, which have most commonly been let to farm, or occupied by the farmers thereof by the space of twenty years next before the lease made, so that if it be let for eleven years at one or several times within those twenty, it is sufficient. A grant by copy of court roll in fee, for life or years is a sufficient letting to farm within the statute, for he is but tenant at will according to the custom, and so it is of a lease at will by common law; but those lettings to farm must be made by some one seised of an estate of inheritance, and not by a guardian in chivalry, tenant by curtesy, tenant in dower, or the like.

*Anciently let.*

*Copyhold.*

Eighthly, that upon every such lease there be reserved yearly during the same lease, due and payable to the lessors their heirs and successors &c. so much yearly farm, or rent, or more as hath been most accustomedly yielded or paid for the lands &c. within twenty years next before such lease made. Hereby, 1st. it appears (as hath been said) that nothing can be demised by authority of this act, but that whereout a rent may be lawfully reserved. 2dly. That where not only a yearly rent was formerly reserved, but things not annual, as heriots, or any fine or other profit at or upon

*Ancient rent.*

the death of the farmer, yet if the yearly rent be reserved upon a lease made by force of this statute, it suffices by the express words of the act. 3dly. If he reserve more than the accustomed rent, it is good also by the express letter of the act; but if twenty acres of land have been accustomedly let, and a lease is made of those twenty, and of one acre which was not accustomedly let, reserving the accustomed yearly rent, and so much more as exceeds the value of the other acre, this lease is not warranted by the act, for that the accustomed rent is not reserved, seeing part was not accustomedly let, and the rent issues out of the whole. 4thly. If tenant in tail let part of the land accustomedly let, and reserve a rent *pro rata*, or more, this is good, for that is in substance the accustomed rent. 5thly. If two coparceners be tenants in tail of twenty acres, every one of equal value and accustomedly let, and they make partition, so that each has ten acres, they may make leases of their several parts each of them, reserving the half of the accustomed rent. 6thly. If the accustomed rent had been payable at four days or feasts of the year, yet if it be reserved yearly payable at one feast, it is sufficient, for the words of the statute are, "reserved yearly."

Addition of acre  
not usually let  
bad.

Coparceners on  
partition may  
reserve half  
rent.

Not *sans waste*.

Ninthly, nor to any lease to be made without impeachment of or for any manner of waste. Therefore if a lease be made for life; the remainder for life &c. that is not warranted by the statute, because it is punishable for waste [inasmuch as the next remainderman not having an estate of inheritance, cannot maintain a writ of waste]. But if a lease be made to one during three lives, this is good, for the occupant, if any happen, shall be punished for waste.

Statutes extend  
to what.

Ecclesiastical  
persons.

Not to a parson  
or vicar.

The words of the statute are (seised in right of the church), yet a bishop that is seised *jure episcopatus*, a dean of his sole possessions in *jure decanatus*, an archdeacon in *jure archidiaconatus*, a prebendary and the like, are within the statute, for every of them generally is seised in *jure ecclesie*. But a parson and vicar are excepted out of the statute of 32 H. 8, and therefore if either of them make a lease for three lives &c. of lands accustomedly let, reserving the accustomed rent, it must be also confirmed by the patron and ordinary, because it is excepted out of 32 H. 8, and not restrained by the statutes of 1 or 13 Eliz. And what has been said concerning a lease for three lives, holds of a lease for twenty-one years.

If a bishop make a lease for twenty-one years, and all these years being spent saving three or more, yet may the bishop make a new lease to another for twenty-one years, to begin from the making, according to the exception of the statute, but not a lease for life or lives, as hath been said; and the concurrent lease has been resolved to be good, as well upon the exception of 1 Eliz. as to bishops as upon 13 Eliz. which extends to spiritual and ecclesiastical corporations, aggregate of many, as deans and chapter &c. which 32 H. 8, did not: but in the case of a concurrent lease by the bishop, it must be confirmed [by the dean and chapter as at common law.]

*Bishop's concurrent lease for years good if confirmed, contra of lease for life.*

[45a]

Also the exception of 1 Eliz. and 13 Eliz. differs from the statute of 32 H. 8, for the lease for years to be made according to the exceptions of the statutes of 1 and 13 Eliz. must begin from the making, and not from the day of the making, but by 32 H. 8, [they must begin] from the day of making. And although the statutes of 1 and 13 Eliz. do not appoint the lease to be made by writing, yet must it therein and in the other eight properties or qualities before mentioned and required by 32 H. 8, follow the pattern thereof (the concurrent lease only except). Although the exception in 1 and 13 Eliz. concerning the accustomed rent is more general than that of 32 H. 8, and there is not any provision for leases made dispensable of waste &c. yet must the pattern of 32 H. 8, be followed: for leases without impeachment of waste made by such spiritual and ecclesiastical persons are unreasonable, and the cause of dilapidations.

*Commencement à datu bad.*

*Rent and waste.*

And albeit it is provided by the said acts of 1 and 13 Eliz. that all grants, &c. leases, &c. made, &c. (other than leases for three lives or one and twenty years, according to these acts) should be utterly void and of no effect, to all intents constructions and purposes, yet grants or leases, &c. not warranted by those acts are not void, but good against the lessor, if it be a sole corporation, or so long as the dean or other head of the corporation remains, if it be a corporation aggregate of many: for the statute was made in benefit of the successor. [Nor, as it seems, is the lease absolutely void, but only voidable, and is affirmed by the successor's acceptance of rent. Hale's MSS.]

*Lease good against party making it.*

*A man lets.*] Here Littleton puts the case where one lets &c. It is therefore necessary to be seen what the law is where divers

*Effect of lease by owner and a stranger.*

join in a lease. If the tenant of the land and a stranger who has nothing in the land, join in a lease for years by deed indented of one and the self-same land, this is the lease of the tenant only, and the confirmation of the stranger, and yet the lease as to the stranger works by conclusion.

*Lease by several owners in one deed.*

If two several tenants of several lands join in a lease for years by deed indented, these are several leases, and several confirmations of each of them from whom no interest passes, and works not by way of conclusion in any sort, because several interests pass from them.

*Lease by particular tenant and remainder man.*

B. tenant for life of C., and he in the remainder or reversion in fee, having several estates in the one and the same land, join in a lease for years by deed indented, this demise shall work in this way: during the life of C. it is the lease of B. and the confirmation of him in the reversion or remainder; and after the decease of C. it is the lease of him in the reversion and remainder, and the confirmation of B.; for seeing the lessors have several estates, the law shall construe the lease to move out of both their estates respectively, and every one to let that which he lawfully may let, and to be the lease only of tenant for life and confirmation of him in the remainder or reversion, neither is there any conclusion in this case, as shall be said hereafter. Tenant for life and he in remainder in fee made a lease for years by deed indented, the lessor was ejected, and brought an *ejectione firmæ*, and declared upon a demise made by tenant for life and him in remainder, and upon not guilty pleaded, this [i. e. the foregoing] special matter was found, and that tenant for life was living, and it was adjudged against the plaintiff; for during the life of the tenant (as hath been said) it is the lease of the tenant for life; and therefore during his life he ought to have declared of a lease made by him, and after his decease he ought to declare of a lease made by him in remainder. And the deed indented could be no estoppel in this case, because there passed an interest from them both. For whenever any interest passes from a party there can be no estoppel against him, and so it was adjudged.

*Estoppel.*

*Rent charge by tenant in tail and him in remainder.*

Hereby you shall understand your books the better which treat of these matters, and accordingly it was adjudged, that where tenant in tail and he and the remainder-man in fee joined in a grant of

a rent-charge by deed in fee, and after the tenant in tail died without issue, the grantee distrained and avowed by force of a grant from him in the remainder; and upon *non concessit*, the jury found the special matter, and it was adjudged for the avowant; for every one granted according to his estate and interest.

Leases for lives or years are of three natures: some are good in law, some are voidable by entry, and some void without entry. Of such as are good in law, some are good at the common law as made by tenant in fee, whereof Littleton here puts his case: some by act of parliament; as tenant in tail, a bishop seised in fee in the right of his church alone without his chapter, a man seised in fee-simple or fee-tail in the right of his wife, together with his wife (as hath been said) may by deed indented make leases for twenty-one years or three lives, in such manner and form as hath been said and by the statute is limited, all which were voidable by the common law when Littleton wrote, and now are made good by parliament. An infant seised of land holden in socage, may by custom make a lease at his age of fifteen years, and shall bind him, which lease was voidable by the common law: some also are voidable by the common law after the death of the lessor, as of tenant in tail, a bishop &c. or after the death of the husband (intended of leases not warranted by the said statute of 32 H. 8.); some are voidable by act of parliament, as by a bishop though it be confirmed by dean and chapter if it be not warranted by the statute of 32 H. 8.; and so of a dean and chapter after the death of the dean; some are voidable at times by the lessor himself or his heirs, as by an infant and the like. Some void *in futuro*, and some are void *in presenti*. *In futuro*, as if a tenant in tail make a lease for years and dies without issue, it is void as to them in reversion or remainder though it be made according to the said statute. If a prebend, parson or vicar make a lease for years, it is void by death if it be not according to the statutes. Otherwise it is of a lease for life, for that is voidable, *et sic de similibus*. Some are void *in presenti*; as if one makes a lease for so many years as he shall live, this is void *in presenti* for the uncertainty.

*Of void and voidable leases.*  
[45 b]

*Lease by infant at 15 good.*

*Leases void against remainder man and reversioner.*

*For term.*] *Terminus*, in the understanding of the law, does not only signify the limits and limitation of time, but also the estate and interest that passes for that time. As if a man makes a lease for twenty-one years, and after makes a lease to begin *from* the end

*Term. Commencement.*  
'from' and  
'after' distinguished.

and expiration of the said term of twenty-one years; and afterwards the first lease is surrendered [or forfeited], yet the second lease shall begin presently; but if it had been to begin *after* the end and expiration of the said term of twenty-one years, in that case, although the first term had been surrendered, yet the second lease should not begin till after the twenty-one years had been ended by effluxion of time, [hence the words, or other sooner determination of the said term, are usually inserted.]

*What words  
make a lease.*

Words to make a lease are, demise, grant, to farm let, betake, and whatsoever word amounts to a grant may serve to make a lease.

*Of the necessary  
certainty to  
commencement  
of term.*

*Of certain years.*] For regularly in every lease for years the term must have a certain beginning and a certain end; and herewith agrees Bracton, *terminus annorum certus debet esse et determinatus*. And Littleton is here to be understood, first, that the years must be certain when the lease is to take effect in interest or possession. For before it takes effect in possession or interest, it may depend upon an uncertainty, viz. upon a possible event before it begin in possession or interest, or upon a limitation or condition subsequent. Secondly, albeit there appear no certainty of years in the lease, yet if by reference to a certainty it may be made certain, it suffices, *quia id certum est quod certum reddi potest*. For example of the first: if A. seised of lands in fee, grant to B. that when B. pays to A. twenty shillings, that from thenceforth he shall have and occupy the land for twenty-one years, and after B. pays the twenty shillings, this is a good lease for twenty-one years from thenceforth. For the second: if A. leases his lands to B. for so many years as B. hath in the manor of Dale, and B. has then a term in the manor of Dale for ten years, this is a good lease by A. to B. of the land of A. for ten years.

*Lease by parson.*

If the parson of D. make a leases of his glebe for so many years as he shall be parson there, this cannot be made certain by any means, for nothing is more uncertain than the time of death, *terminus vitæ est incertus, et licet nihil certius sit morte, nihil tamen incertius est hora mortis*. But if he make a lease for three years, and so from three years to three years, so long as he shall be parson, this is a good lease for six years, if he continue parson so long, 1st, for three years, and after that for three years; and for the residue uncertain [which the law rejects].

If a man makes a lease to J. S. for so many years as J. N. shall name, this at the beginning is uncertain; but when J. N. has named the years, then it is a good lease for so many years.

*For so many years as A. shall name, good.*

A man makes a lease for twenty-one years, if J. S. live so long; this is a good lease for years, and yet is certain in uncertainty, for the life of J. S. is uncertain. By the ancient law of England, for many respects a man could not have made a lease above forty years at the most, for then it was said that by long leases, many were prejudiced and many times men disinherited, but that ancient law is antiquated.

*For 21 years, if A. shall so long live, good.*

[46 a]

In the eye of the law any estate for life, being, as Littleton has said, an estate of freehold, against whom a *præcipe quòd reddat* lies, is a higher and greater estate than a lease for years, though it be for a thousand or more, which never are without suspicion of fraud: and they were the less valuable, for that at the common law, they were subject unto and under the power of the tenant of the freehold, for by suffering a recovery in a real action he could by collusion bar the lessor of his term. But now the statute of 21 H. 8. gives remedy to tenants for term of years to falsify all manner of recoveries had against the tenants of the freehold upon feigned and untrue titles.

*Leasehold a less estate than a freehold.*

*Term not barred by a recovery.*

If two coparceners be, and one of them let her part to another for years, and afterwards upon a writ of partition brought against the lessor, too little is allotted to the lessor, it is holden by some that the lessee cannot avoid it, for that it is made by the oath of men, and judgment is thereupon given that the partition shall remain firm and stable. But if there be two coparceners of three acres of land, every one of equal value, and the one coparcener lets her part, and afterwards makes partition, and one acre only is allotted to the lessor, the lessee is not bound hereby, but he may enter and take the profits of another half acre, for that of right belongs unto him.

*Lease by coparceners how affected by partition.*

And albeit (as hath been said) a lease for years must have a certain beginning and a certain end, yet the continuance thereof may be uncertain, for the same may cease and revive again in divers cases.

*Term must have a certain beginning and certain end.*

*Lease by tenant in tail revives by endowment of his widow.*

As if a tenant in tail make a lease for years reserving twenty shillings, and afterwards takes a wife, and dies without issue, now as to him in the reversion the lease is merely void: but if he endow the wife of tenant in tail of the land (and she may be endowed though the estate tail is determined); now is the lease as to the tenant in dower (who is in of the estate of her husband) revived again as against her, for as to her the estate tail continues, for she shall be attendant for the third part of the rent and services, and yet they were extinguished by act in law. So it is, if tenant in tail make a lease for years *ut supra*, and dies without issue, his wife *enceinte* with a son, he in the reversion enters, against him the lease is void, but after the son is born the lease is good, if it be made according to the statute, otherwise voidable.

*Lease avoided by previous dower revives on its cessation.*

If tenant in fee take wife, and make a lease for years, and dies, the wife is endowed, she shall avoid the lease, but after her decease the lease shall be in force again. [The lease does not in fact determine and revive, as it all along exists, and may be assigned subject only to the preferable right of dower.]

*Dower of appropriate advowson.*  
[46 b]

If a woman be endowed of an advowson which is appropriated [*qu.* without license] and she present, and her incumbent is admitted, instituted, and inducted, albeit the incumbent die, yet is the appropriation wholly dissolved, because the incumbent which came in by presentation, had the whole estate in him; and so it was adjudged, as the case is to be intended.

*Lease by tenant in tail voidable, and confirmable by acceptance of rent.*

Tenant in tail makes a lease for forty years, reserving the rent, to commence ten years after; tenant in tail dies; the issue enter and enfeoff A.; ten years expire, the lessee enters; if A. accept the rent, the lease is good, for he shall have the same election that the issue in tail had, either to make it good, or to avoid it, so that it could not be precisely affirmed whether by the entry of the issue this executory lease was avoided, but it depends uncertainly upon the will of the feoffee.

*Interesse termini. Release.*

*And when the lessee enters by force of the lease, then is he tenant for term of years.]* And true it is, that to many purposes he is not tenant for years until he enter; thus a release made to him is not good to increase his estate before entry; but he may release



the rent reserved before entry, in respect of the privity. Neither can the lessor grant away the reversion by the name of the reversion before the lessee's entry. Sect. 567. But the lessee before entry has an interest, *interesse termini*, grantable to another. *Vide* Sect. 319. And albeit the lessor die before the lessee enters, yet the lessee may enter into the lands, as our author himself holds in this chapter. And so if the lessee die before entry, yet his executors or administrators may enter, because he presently by the lease has an interest in him: and if it be made to two, and one die before entry, his interest shall survive. *Vide* Sect. 281.

*Reversion.*

He who has a lease for years, has it either in his own right, whereof Littleton has here spoken, or in another's right, and that in divers manners; as a man may have a term for years in right of his wife, whereof the husband has power to dispose at any time during his life, and if he survives his wife, the law gives the lease to him. But if he makes no disposition thereof, and his wife survive him, it remains with the wife: but of this in another place more fully. If a man be possessed of a term of forty years in right of his wife, and makes a lease for twenty years, reserving a rent, and dies, the wife shall have the residue of the term, but the executors of the husband shall have the rent, for it was not incident to the reversion, for that the wife was not a party to the lease. So note, that a disposition of part of the term is no disposition of the whole. But if the husband grant the whole term upon condition that the grantee shall pay a sum of money to his executors &c. and the husband dies, then if the condition is broken, and the executors enter, this is a disposition of the term and the wife is barred thereof, for the whole interest was passed away. If a lease be made to baron and feme for term of their lives [whereby they become tenants by entireties] with remainder to the executors of the survivor of them [which remainder being to the survivor is contingent], and the husband grants away this term and dies, this shall not bar the wife, for that the wife had but a possibility, and no interest. If husband and wife be ejected of a term held in right of his wife, and the husband brings an *ejectione firmæ* in his own name, and has judgment to recover, this is an alteration of the term, and vests it in the husband.

*How wife's leasehold estates affected by marriage.*

If a lease for years be made to a bishop and his successors, yet his executors or administrators shall have it *in auter droit*, for regu-

*Corporation cannot hold a term for years,*

since it has no  
executors.

larly no chattel can go in succession to a sole corporation, no more than if a lease be made to a man and his heirs can it go to his heirs. But let us return to Littleton.

Commencement  
of term, à datu.  
Delivery. Im-  
possible or mis-  
recited date.

Touching the time of the beginning of a lease for years, it is to be observed, that if a lease be made by indenture bearing date 26th May &c. to have and to hold for twenty-one years from the date, or from the day of the date, it shall begin on the 27th day of May. If the lease bear date the 26th day of May &c. to have and to hold from the making thereof, or from thenceforth, it shall begin on the day on which it is delivered, for the words of the indenture are not of any effect till the delivery, and thereby from the making or thenceforth, they take their first effect. But if it be *à die confectiois*, then it shall begin on the next day after the delivery. If the *habendum* be for the term of twenty-one years without mentioning when it shall begin, it shall begin from the delivery, for there the words take effect, as is aforesaid. If an indenture of lease bear date which is void or impossible, as the 30th day of February, or the 40th of March, if in this case the term be limited to begin from the date it shall begin from the delivery, as if there had been no date at all. And so it is, if a man by indenture of lease, either recite a lease which is not, or is void, or misrecite a lease in *esse* in a material point, to have and to hold from the ending of the former lease, this lease shall begin in course of time from the delivery thereof.

Rent, of what  
reservable—not  
out of incor-  
poreal heredita-  
ments, for there  
can be no dis-  
tress.

[47 a]

*Reserve to him a yearly rent &c.*] First, it appears here by Littleton, that a rent must be reserved out of the lands or tenements, whereunto the lessor may have recourse to distrain, as Littleton here also says, and therefore a rent cannot be reserved by a common person out of any incorporeal inheritance, as out of advowsons, commons, offices, corrody, mulcture of a mill, tythes, fairs, markets, liberties, privileges, franchises, and the like, but if a lease for years be made of them by deed, it may be good by way of contract to support an action of debt, but distrain the lessor cannot. Neither shall it pass with the grant of the reversion, for it is not a rent incident to the reversion, but if any rent be reserved in such case upon a lease for life, it is utterly void, for in that case no action of debt lies. But if a man demise the vesture or herbage of his land, he may reserve a rent, for the thing is manourable [i. e. capable of perception by the manour or hand], and

the lessor may distrain the cattle upon the land: and so a reversion, or a remainder of lands or tenements may be granted reserving a rent, for the apparent possibility that it may come into possession, and they are tenements within the words of Littleton.

It appears by Littleton, that *reservando* is an apt word of reserving a rent, and so is *reddendo, solvendo, faciendo, inveniundo, dummodo*, and the like. And note a diversity between an exception (which must be part of the thing granted, and must be *in esse*) for which *exceptis, salvo, præter*, and the like, be apt words; and a reservation which is always of a thing not *in esse* but newly created or reserved out of the land or tenement demised. But out of a general a part may be excepted, as out of a manor, an acre, but not a part of a certainty, as out of twenty acres, one.

Reddendum. Reservation, and exception distinguished.

It is to be observed, that the lessor cannot reserve to any other but to himself, for Littleton says, reserve to himself and his heirs, for otherwise the rent shall determine by his death if he die within the term. But if he reserve a rent generally without saying to whom it shall go, it shall go to his heirs. If he reserve a rent to himself and his assigns, yet the rent shall determine by his death; because the reservation is good but during life. So it is if he reserve a rent to himself and his executors it shall end by his death, because the heir has the reversion, and the rent was incident to the reversion. So if a man warrant land to B. and his assigns, the assignee must vouch during the life of B., for the warranty continues only during the life of B. for want of words of inheritance. So if the rent be reserved to the lessor his heirs and assigns, so that it be incident to the inheritance, then shall all the assignees of the reversion enjoy the same.

Reservation must be to lessor or his heirs, not to executors or assigns, if so it ceases on his death.

If two joint tenants be, and they make a lease for years by parol, or by deed poll, reserving a rent to one of them, this shall enure to both, but if it be so reserved by deed indented, it shall enure to him alone [to whom it is reserved] by way of conclusion [that is in exclusion of the survivor, who by joining in the lease is estopped from averring any thing against it, post, 185 a.]

Lease by joint tenants, reserving rent to one.

Rent may be payable every two or three years.

*Yearly rent.*] So it is if the rent be reserved every two, or three, or more years. Of rents Littleton excellently treats hereafter in his chapter of Rents, and therefore in this place thus much shall suffice.

Distress, what may be taken in and what not.

*To distrain for the rent.*] Here it is necessary to be seen what things may be taken for rent, and how the distress ought to be kept. 1st. It must be of a thing whereof a valuable property is in some body, and therefore dogs, bucks, does, conies, and the like that are *feræ naturæ* cannot be distrained. 2d. Although it be of valuable property, as a horse &c. yet when a man or woman is riding on him, or an axe in a man's hand cutting of wood, and the like, they are for that time privileged, and cannot be distrained. 3d. Valuable things shall not be distrained for rent, for the benefit and maintenance of trade and by consequence for the common wealth, and they are there by authority of law; as a horse in a smith's shop shall not be distrained for the rent issuing out of the shop, nor the horse &c. in the hostry, nor the materials in the weaver's shop for the making of cloth; nor cloth or garments in a tailor's shop; nor sacks of corn or meal in a mill or in a market; nor shall any of these things be distrained for damage *feasant*, for they are in custody of the law. 4th. Nothing shall be distrained for rent that cannot be rendered again in as good plight as it was at the time of the distress taken; as sheaves or shocks of corn or the like cannot be distrained for rent, but for damage *feasant* they may be distrained. But chariots or carts of corn may be distrained for rent, for they may be restored. 5th. Beasts belonging to the plough, *averia caruæ*, shall not be distrained, (which is the ancient common law of England, for no man shall be distrained by the utensils or instruments of his trade or profession, as the axe of the carpenter, or the books of a scholar) but goods or other beasts, which Bracton calls *animalia* (or *catella*) *otiosa*, may be distrained. 6th. Furnaces, cauldrons, or the like fixed to the freehold, or the doors or windows of the house, or the like cannot be distrained. Lastly, beasts that escape may be distrained for rent, though they have not been *levant* and *couchant*. [But see as to this last point 2 Lutw. 1573.]

[47 b]

Live cattle. Pounds overt and covert.

Note, that he who distrains any thing that has life, must impound them in a lawful pound within three miles in the same

county, and that is either overt or open, in a pinfold made for such purposes, or in his own close, or in the close of another by his consent. And it is there called open, because the owner may give his cattle meat and drink without trespass to any other, and then the cattle must be sustained at the peril of the owner. Or it is a pound covert, or close, as to impound the cattle in some part of his house, and then the cattle are to be sustained with meat and drink at the peril of him who distrains, and he shall not have any satisfaction therefore. But if the distress be of utensils of household, or such like dead goods which may take harm by wet or weather, or be stolen away, there he must impound them in a house or other pound covert within three miles within the same county, for if he impound them in a pound overt he must answer for them. If the distress be taken of goods without cause, the owner may make rescue; but if they are distrained without cause, and impounded, the owner cannot break the pound and take them out, because they are then in the custody of the law. But if a man distrains cattle for damage *feasant*, and puts them in the pound, and the owner who had common there makes fresh suit, and finds the door unlocked, he may justify the taking away of the cattle in a *parco fracto*. If the owner break the pound and take away his goods, the party distraining may have his action *de parco fracto*, and he may also take his goods that were distrained wheresoever he finds them and impound them again.

But it is to be observed, that for the rent due on the last day of the term, the lessor cannot distrain, because the term is ended [and one cannot distrain the same day the rent becomes due but only the day after;] and therefore some used to reserve the last half year's rent at the feast of the nativity of Saint John Baptist before the end of the term, so that if the rent be not then paid, the lessor may distrain between that and Michaelmas following.

*Rent due on last day of term cannot be distrained for, as term is then ended.\**

*Action of debt.*] Note, upon a lease for years, reserving a yearly rent: the lessor may have several actions of debt for every year's rent.

*Remedy by action of debt.*

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\* But now by statute 8 Ann. c. 14. rent may be distrained for after the determination of the lease in the same manner as before, and for six calendar months afterwards, if the landlord's title and the tenant's possession continue so long. See also 4 Geo. 2. c. 28., 11 Geo. 2. c. 19.

But upon a bond or contract for payment of several sums no action of debt lies till the last day be past.

*Tenant may shew that his landlord hath nothing in the tenements if lease by parol, contra if by deed, which is an estoppel.*

*But in such case it behoves the lessor to be seised in the same tenements at the time of his lease ; for it is a good plea for the lessee to say, that the lessor had nothing in the tenements at the time of the lease.]* And the reason of this is, that in every contract there must be *quid pro quo*, for *contractus est quasi actus contra actum* ; and therefore if the lessor has nothing in the land, the lessee has not *quid pro quo*, nor any thing for which he should pay any rent. And in that case he may also plead, that the lessor *non dimisit*, and give in evidence the other matter, *except the lease be made by deed indented, &c.* If the lease be made by deed indented, then are both parties concluded, but if it be by deed-poll the lessee is not estopped to say, that the lessor had nothing at the time of the lease made. A., lessee for the life of B., makes a lease for years by deed indented, and after purchases the reversion in fee. B. dies [whereby the estate *pour auter vie* out of which the lease was carved ceases, then] A. may avoid his own lease, for he may confess and avoid the lease which took effect in point of interest and determined by the death of B. But if A. had nothing in the land, and made a lease for years by deed indented, and after purchased the land, the lessor is as well concluded as the lessee to say that the lessor had nothing in the land ; and here it works only upon the conclusion, and the lessor cannot confess and avoid as he might in the other case. If a man take a lease of his own land by deed indented reserving a rent, the lessee is concluded. But if a man take a lease of the herbage of his own land by deed indented, this is no conclusion to say, that the lessor had nothing in the land, because it was not made of the land itself : but if a man take a lease for years of his own land by deed indented, the estoppel does not continue after the term ended. For by the making of the lease the estoppel arises, and consequently by the end of the lease, the estoppel determines, and that part of the indenture which belonged to the lessee, after the term ended belongs to the lessor, which could not be if the estoppel continued.

*Doctrine of estoppel fully exemplified.*

[48a]

## SECTION 59.

AND it is to be understood, that in a lease for years, by deed or without deed, there needs no livery of seisin to be made to the lessee, but he may enter when he will by force of the same lease. But of feoffments made in the country [as distinguished from feoffments made in court and enrolled], or gifts in tail, or lease for term of life; in such cases where a freehold shall pass, if it be by deed or without deed, it is necessary to have livery of seisin.

Livery not necessary to term of years.

Livery of seisin is a solemnity that the law requires for the passing of a freehold of lands or tenements by delivery of the seisin thereof. And there are two kinds of livery of seisin, viz. a livery in deed, and a livery in law. A livery in deed is where the feoffor takes the ring of the door, or a turf or a twig of the land, and delivers the same upon the land to the feoffee in name of seisin of the land. And this may be done in two ways. By a solemn act and words; as by delivery of the ring or hasp of the door, or a branch or twig of a tree, or a turf of the land, with these or the like words, (the feoffor and feoffee both holding the deed of feoffment, and the ring of the door, hasp, branch, twig, or turf) and the feoffor saying, "Here I deliver you seisin and possession of this house, in the name of all the lands and tenements contained in this deed, according to the form and effect of this deed;" or by words without any ceremony or act; as, the feoffor being at the door or within the house, may say "Here I deliver you seisin and possession of this house, in the name of seisin and possession of all the lands and tenements contained in this deed:" *et sic de similibus*: or, "Enter you into this house or land, and have and enjoy it according to the deed:" or, "Enter into the house or land, and God give you joy:" or, "I am content you shall enjoy this land according to the deed;" or the like. For if words may amount to a livery within view, much more may they upon the land. But if a man deliver the deed of feoffment upon the land, this amounts to no livery of seisin, for it has another operation to take effect as a deed: but if he deliver the deed upon the land in name of seisin of all the lands contained in the deed, this is a good livery: and so are other books intended that treat hereof, if the deed was delivered in name of seisin of that land. Hereby it appears, that

Livery of seisin how performed.

the delivery of any thing upon the land in name of seisin of that land, though it be nothing concerning the land, as a ring of gold or the like, is a good livery of seisin of the land, and so has it been resolved by all the judges ; and so of the like.

Part in name  
of whole.

If divers parcels of land be contained in a deed, and the feoffor delivers seisin of one parcel according to the deed, all the parcels pass, albeit he says not (in name of all &c.) because the deed contains all. And so if there be divers feoffees, and he makes livery to one according to the deed, the land passes to all the feoffees, and yet the plainer way is to say (in the name of the whole, or of all the feoffees.)

Livery enures  
according to  
deed, ita to te-  
nant for years  
void.

[48 b]

If a man make a charter [of feoffment] in fee, and deliver seisin for life *secundum formam cartæ*, the whole fee-simple shall pass, for it shall be taken most strongly against the feoffor. Note, that these words (*secundum formam cartæ*) are understood according to the quantity and quality of the effectual estate contained in the deed. If a man make a lease for years by deed, and deliver seisin according to the form and effect of the deed ; yet he has but an estate for years, and the livery is void, as Littleton says. So if A. by deed give land to B. to have and to hold (after the death of A.) to B. and his heirs, this is a void deed, because he cannot reserve to himself a particular estate [of freehold nor can he create a freehold *in futuro*], and construction must be made upon the whole deed ; and if livery be made according to the form and effect of the deed, the livery is void also, because the livery refers to a deed that has no effect in law, and cannot therefore work *secundum formam cartæ*.

Livery by at-  
torney good.

And it is to be observed, that neither the feoffor being absent can make livery, nor the feoffee being absent can take livery, but only by warrant of attorney by deed, and not by parol, because it concerns matter of freehold.

Livery of move-  
able freehold.

*Vide* sect. 1, in Bridgewater's case, where a man has a moveable estate of inheritance, for example there put, in thirteen acres : if they be parcel of a manor, they may pass by the name of the manor ; but if they be in gross, then the charter of feoffment must be of thirteen acres lying and being in the meadow of eighty acres, generally, without bounding or describing the same in certainty.



A livery in law is, where the feoffor says to the feoffee, being in the view of the house or land (I give yonder land to you and your heirs, go enter into the same, and take possession thereof accordingly), and the feoffee does accordingly in the life of the feoffor enter, this is a good feoffment. But if either the feoffor or feoffee die before entry the livery is void. And livery within view is good where there is no deed of feoffment. And such a livery is good albeit the land lie in another county. A man makes a charter of feoffment and delivers seisin within view, if the feoffee dare not enter for fear of death, but claims the same, that shall vest the freehold and inheritance in him, albeit by the livery no estate passed to him, neither in deed nor in law, so that such a claim shall serve as well to vest a new estate and right in the feoffee, as in the common case to revest an ancient estate and right in the disseisee &c. as shall be said hereafter more at large in the Chapter of Continual Claim. And so note a livery in law shall be perfected and executed by an entry in law.

Livery in law.

If a man be disseised, and make a deed of feoffment and a letter of attorney to enter and take possession and afterwards to make livery *secundum formam cartæ*, this is a good feoffment albeit he was out of possession at the time of the charter made, for the authority given by the letter of attorney is executory, and nothing passed by the delivery of the deed till livery of seisin was made. And in ancient letters of attorney power is given to others to take possession for the feoffor. But if a man be disseised, and make a writing of lease for years and deliver the deed, and afterwards delivers it upon the ground, the second delivery is void, for the first delivery made it a deed, and because the lease for years must take effect by delivery of the deed, therefore the deed delivered when he was out of possession was void. But so it is not of a charter of feoffment, for that takes effect by the livery and seisin. But if the lessor had delivered it as an escrow, to be delivered as his deed upon the ground, that had been good.

Livery by attorney;—distinctions.

And note, a man may have an inheritance in an upper chamber, though the lower buildings and soil be in another, and seeing it is an inheritance corporeal, it shall pass by livery.

Chambers, inheritance in.

A man makes a lease for years and afterwards makes a deed of feoffment and delivers seisin, the lessee being in possession and not

Tenant in possession must assent to the livery

or quit possession.

assenting to the feoffment, this livery is void; for albeit the feoffor has the freehold and inheritance in him, yet that is not sufficient, for a livery must be given of the possession also; but if the lessee be absent, and has neither wife nor servants (though he has cattle) upon the ground, the livery of seisin shall be good. If a man be seised of a house and several closes in one county in fee, and makes a lease for years, and afterwards makes a feoffment in fee of the same, and makes livery of seisin in the closes (the lessee or his wife or servants then being in the house) the livery is void for the whole: for the lessee cannot be upon every parcel of the land to him demised for the preservation or continuance of his possession therein. And therefore his being in the house, or upon any part of the land to him demised, is sufficient to preserve and continue his possession in the whole from being ousted or dispossessed.

Deed informal in one respect may operate in another.

[49 a]

Note a great diversity; when a man has two ways to pass lands, and both of the ways be by the common law, then if he intends to pass them by one of the ways, [which from some informality he cannot do] yet *ut res magis valeat* it shall pass by the other. But where a man may pass lands either by the common law, or by raising of an use, and settling it by the statute, there in many cases it is otherwise.

Examples.

For example, if a man be seised of two acres in fee, and lets one of them for years, and intending to pass them both by feoffment, makes a charter of feoffment, and makes livery in the acre in possession, in name of both, only the acre in possession passes by the livery; yet if the lessee attorn, the reversion of that acre shall pass by the deed and attornment, for he is in by the common law, and in the *per* in both, and so in the like. But otherwise it is, if the father make a charter of feoffment to his son with a letter of attorney to make livery, and no livery is made, yet no use shall arise to the son, because he should be in by the statute in another degree, viz. in the *post*, and the intention of the parties work much both in the raising and direction of uses. So if *cestuique use* and his feoffees had joined in a feoffment after the statute of 1 R. 3, &c. it had been the feoffment of the feoffees and the confirmation of *cestuique use*, for the estate at the common law shall be preferred.

Livery is to corporeal, same as delivery of deed

So to conclude this point; of freehold and inheritances, some be corporeal, as houses &c. lands &c. these are to pass by livery of

seisin, by deed or without deed; some be incorporeal, as advowsons, rents, commons, estovers &c. these cannot pass without deed, but they may without any livery for the law has provided the deed in this case in place or stead of the livery. And so it is if a man make a lease, and by deed grants the reversion in fee, here the freehold with attornment of the lessee passes by the deed which is in lieu of the livery, [or rather the freehold being in remainder passes by grant].

*is to incorporeal hereditaments.*

This ancient manner of conveyance by feoffment and livery of seisin, does for many respects exceed all other conveyances. For (as hath been said) if the feoffor be out of possession, neither fine, recovery, indenture of bargain and sale enrolled, nor any other conveyance, will avoid an estate by wrong and reduce clearly the estate of the feoffee so as to make a perfect tenant of the freehold; this can be done by livery of seisin only upon the land: and the other conveyances being made off the ground, do sometimes more hurt than good, when the feoffor is out of possession.

*Feoffor out of possession, nothing but livery will avoid estate by wrong.*

And yet in some cases a freehold shall pass by the common law without livery of seisin; as if a house or land belong to an office, by the grant of the office by deed, the house or land passes as belonging thereunto. So if a house or chamber belong to a corody, by the grant of the corody, the house or chamber passes. A freehold may by custom be surrendered without livery, as hereafter shall be said: and so of assignment of dower *ad ostium ecclesie*, or otherwise, and by exchange a freehold may pass without livery, as hereafter shall be said in this Chapter.

*When a freehold may pass without livery.*

### SECTION 60.

*BUT if a man lets lands or tenements by deed or without deed for term of years, the remainder over to another for life, or in tail, or in fee; in this case it is necessary, that the lessor make livery of seisin to the lessee for years, otherwise nothing passes to those in remainder, although the lessee enter into the tenements. And if the termor in this case enters before any livery of seisin be made to him, then is the freehold and also the reversion in the lessor. But if he makes livery of seisin to the lessee, then is the freehold to*

*Livery to term or when there is a remainder of freehold.*

*gether with the fee in those in remainder according to the form of the grant and the will of the lessor.*

*By deed or without deed.]* For seeing that the remainders take effect by livery, there needs no deed [at common law.]

*Remainder what.*

*The remainder.]* Is the residue of an estate in land depending upon a particular estate, and created together with the same, and in law latin it is called *remanere*.

*Text explained.*

*Makes livery of seisin to the lessee.]* Livery is not necessary in this case for the lessee himself, because he has but a term for years, but it is for the benefit of those in the remainder, so that the livery to the lessee shall enure for the benefit of them in the remainder: for delivery of possession could not be made to the next in remainder, because the possession belonged to the lessee for years; and for that the particular term and all the remainders make in law but one estate and take effect at one time, therefore the livery is to be made to the lessee. But if a lease for years without deed be made to A. and B., with remainder to C. in fee, and livery is made to A. in the absence of B. in the name of both; it seems the livery is good to vest the remainder: and there is a diversity where joint attorneyes are appointed to receive livery for another and livery is made to one of them in the name of both, this is clearly void, because they have but a mere and bare authority, and they both make but one attorney in law, unless the warrant be joint and several, but the lessee for years has an interest in the land. Again, if A. is to make a feoffment to B. and C. and their heirs without deed, and A. makes livery to B. in the absence of C. in the name of both and to their heirs; this livery is void to C., because a man being absent can take a freehold by livery [only] by his attorney lawfully authorised to receive the same by deed, unless the feoffment be made by deed, and then the livery to one in the name of both is good.

*Livery by or to one attorney bad, if two jointly appointed.*

*So if to one of two feoffees, when.*

*Delivery of deed and livery of seisin, with and without deed, distinguished.*

Note, there is a diversity between livery of seisin of land and the delivery of a deed; for if a man deliver a deed without saying any thing, it is a good delivery, but to a livery of seisin of land words are necessary; as taking in his hand the deed and the ring of the door (if it be of a house) or a turf or twig (if it be of

land) and the feoffee laying his hand on the deed also, the feoffor must say to the feoffee, "Here I deliver to you seisin of this house," or "of this land, in the name of all the land contained in this deed," according to the form and effect of the deed; or if it be without deed, then the words may be, "Here I deliver you seisin of this house," or "land," &c. "to have and to hold to you for life," or "to you and the heirs of your body," or "to you and your heirs for ever," as the case shall require.

When the kinsman of Elimelech gave unto Boas the parcel of land that was Elimelech's, he took off his shoe, and gave it unto Boas in the name of seisin of the land (after the manner in Israel) in the presence and with the testimony of [ten elders and] many witnesses, [whom he addressed, saying, "Ye are witnesses this day, that I have bought all that was Elimelech's, of the land of Naomi," his kinsman, who alone had the right of redemption: and it does not appear that any writing was then executed.] And when Ephron enfeoffed Abraham of the field of Machpelah, he said to him, "*Agrum trado tibi*," &c. "I deliver this field to thee."

*Antiquity of livery.*

A man makes a lease for years to A., the remainder to B. in fee, and makes livery to A. within view; this livery is void, for no man can take by force of a livery within view, but he who takes the freehold himself.

*Livery in view by attorney bad.*

*And if the termor in this case enters before any livery of seisin made, &c.]* By the entry of the lessee he is in actual possession, and then the livery cannot be made to him who is in possession. But if the lessor and lessee come upon the ground, with purpose the lessor to make and the lessee to take livery, there his entry vests no actual possession in him until livery be made. And therefore if it be agreed between the disseisor and disseisee, that the disseisee shall release all his right to the disseisor upon the land, and accordingly the disseisee enters into the land, and delivers the release to the disseisor upon the land, this is a good release, and the entry of the disseisee, being for this purpose, did not avoid the disseisin, for his intent in this case did guide his entry to a special purpose; [and if it had avoided the disseisin, the disseisor would not have had any estate whereupon the release might have worked.] But if the disseisor enfeoff the disseisee and others, there, albeit

*Lessee's entry prevents livery.*

*No remitter by entry of disseisee to make a release, except when.*

the disseisee came to take livery, yet when livery is made, the disseisee is remitted to the whole in judgment of law, as shall be said more at large in the Chapter of Remitter, in its proper place.

[50a]

## SECTION 61.

Livery of part for all good, except feoffment be by deed, and lands are in different counties.

*AND if a man will make a feoffment, by deed or without deed, of lands or tenements which he has in divers towns in one county, the livery of seisin made in one parcel of the tenements in one town, in the name of all the rest, is sufficient for all other the lands and tenements comprehended within the same feoffment in all other the towns in the same county. But if a man makes a deed of feoffment of lands or tenements in divers counties, there it is necessary in every county to have a livery of seisin.*

*In one county.] And forasmuch as the men of one county do not associate together with men of another county at county courts, turns, leets, and other courts, therefore in judgment of law they shall take no notice of a livery in another county to pass any lands in their own county. But of this more shall be said hereafter.*

## SECTION 62.

Exchange of lands in same county good by parol, [contra now by Statute Frauds.]

*AND in some cases a man shall have by the grant of another a fee-simple, fee-tail, or freehold without livery of seisin. As if there be two men, and each of them is seised of a quantity of land in one county, and the one grants his land to the other in exchange for the land which the other has, and in like manner the other grants his land to the first grantor in exchange for the land which the first grantor has; in this case each may enter into the other's land so put in exchange without any livery of seisin; and such exchange made by parol of tenements within the same county without writing is good enough.*

If in two counties, or of incorporeal hereditaments, a deed requisite.

Here Littleton puts a case where freehold &c. shall pass without livery of seisin, and thereupon puts the case of an exchange of lands in one county which is good by deed or without deed, without any livery, but if it be in several counties there must be a deed.

Also of things that lie in grant, as advowsons, rents, commons &c. an exchange of them, albeit they are in one county, is not good, unless it be by deed; and therefore Littleton puts his case warily of land. And in case of a fine, which is a feoffment of record—of a devise by a last will—of a surrender—of a release or confirmation to a lessee for years, or at will; in all these and some other cases a freehold may pass without livery. But this word (exchange) is so appropriated by law to this case, that it cannot be expressed by any periphrasis or circumlocution.

[50b]

*In this case each may enter &c.]* For by the exchange the parties, albeit the lands are all in one county, have no freehold in deed or in law in them before they execute the same by entry; and therefore if one of them dies before the exchange be executed by entry, the exchange is void; for the heir cannot enter and take it as a purchaser, because he was named only to take by way of limitation of estate in course of descent.

*Entry essential to exchange in parties' life-time.*

## SECTION 63.

AND if the lands exchanged be in divers counties, there it is necessary to have a deed indented made between them of the exchange.

*Deed requisite to exchange of lands in two counties.*

This is evident enough. But of what things an exchange may be made (which was a conveyance frequent in former times) is to be seen: and herein many things are to be observed. 1st. That the things exchanged need not to be *in esse* at the time of the exchange made. As if I grant a rent newly created out of my lands in exchange for the manor of Dale, this is a good exchange. 2dly. There needs no transmutation of possession; and therefore a release of a rent, or estovers, or a right to land, in exchange for land, is good. The things exchanged need not be of one nature, so they concern lands or tenements, whereof Littleton here speaks. As land for rent or common, or any other inheritance which concerns lands or tenements, or spiritual things, as tithes &c. for temporalities, and tenure by divine service for a temporal seigniorship &c. But annuities or such like which charge the person only, and do not

*What may be exchanged. Rent for land, but not an annuity;*

concern lands or tenements, cannot be exchanged for lands or tenements.

## SECTION 64.

nor fee-tail for fee-simple;

*AND note, that in exchanges it is essential that the estates which both parties have in the lands exchanged be equal; for if the one wills and grants that the other shall have his land in fee-tail for the land which he has of the grant of the other in fee-simple, although the other agree to this, yet the exchange is void, because the estates are not equal.*

## SECTION 65.

nor life estate for fee-tail, nor tail general for tail special:

*IN the same manner it is, where it is granted and agreed between them, that the one shall have in the one land fee-tail, and the other in the other land but a term for life; or if the one shall have in the one land fee-tail general, and the other in the other land fee-tail special &c. So in exchanges it is necessary that the estates of both parties be equal, viz. if the one has a fee-simple in the one land, that the other shall have a like estate in the other land; and if the one has fee-tail in the one land, the other ought to have the like estate in the other land &c. and so of other estates. But the [relative] value of the lands is immaterial, for albeit the land of one be of far greater value than the land of the other, that is no detriment to the exchange, provided the estates exchanged be equal. And so in an exchange there are two grants, for each party grants his land to the other in exchange &c. and in each of their grants mention shall be made of the exchange.*

*but joint tenants may exchange with tenants in common or tenants in severalty.*

[51a]

*That the estates be equal.]* Equality in lands is threefold, viz. 1st. Equality in value. 2dly. Equality in quantity of estate given and taken. 3dly. Equality in quality or manner of [holding the] estates given and taken. But, as Littleton says, equality in value is not requisite; neither is equality in the quality or manner of [holding] the estate. And therefore two joint tenants may give lands to two other men [to hold in joint tenancy] in exchange for



lands [received] from them to hold in common; and yet the manner of their estates is not equal, for the estate of one party is joint, and the other is in common. And so it is if two men give lands to A. and his heirs in exchange for lands received from A. to hold to them and their heirs [in joint tenancy or in common]; though here the one party has a joint, and the other a sole estate, yet the exchange is good.

The like law is if the one land be of a defeasible title, and the other of an indefeasible title, yet the exchange is good till it be avoided. So if tenant in tail, or husband seised in right of his wife, exchange lands, and by the exchange they give a fee-simple, this is good until it be avoided by the issue in tail, or by the wife after the death of the husband.

*Defective title makes exchange voidable only, not void. Jure uxoris.*

An exchange with the king is good, and yet the king is seised in his politic capacity, and the subject in his natural capacity.

*Exchange with king good.*

To sum up the whole there are five things necessary to the perfection of an exchange. 1st. That the estates given be equal. 2d. That this word "exchange" be used, which is so individually requisite, that it cannot be supplied by any other word, or described by any circumlocution. 3d. That there be an execution of the exchange by entry or claim in the lifetime of the parties. 4th. That if it be of things that lie in grant, it must be by deed. 5th. If the lands be in several counties, there ought to be a deed indented, or if the things lie in grant [then also a deed indented is requisite] albeit the [things granted] lie in one county.

*Five requisites to an exchange. [51 b]*

If an infant exchange lands, and after his full age occupy the lands taken in exchange, the exchange is become perfect, for the exchange at the first was not void (because it amounted to a livery, and also in respect of the recompence) but voidable only.

*Infant, exchange by, not void but voidable.*

*Although the other agree.]* The agreement of the parties cannot make that good which the law makes void.

*Agreement contrary to law bad.*

## SECTION 66.

*Interesse termini.*

ALSO, if a man lets land to another for a term of years, albeit the lessor dies before the lessee enters into the tenements, yet he may enter into the same tenements after the death of the lessor, because the lessee by force of the lease has right presently to have the tenements according to the form of the lease. But if a man makes a deed of feoffment to another, and a letter of attorney to one to deliver to him seisin by force of the same deed; yet if livery of seisin be not executed in the life of him who made the deed, [that is, the letter of attorney, the feoffment] avails nothing, for [by the death of him who authorised the livery, the power is at an end and cannot be executed afterwards] and then if there be no livery of seisin, he to whom the feoffment was made has nought in the tenements, and the right thereto forthwith descends to the heir of him who made the deed, or some other.

Livery to attorney must be in life time of feoffor.

The reason is, because the interest of the term vests in the lessee before entry, and therefore the death of the lessor cannot divest that which was vested before.

*Power of attorney must be by deed.*

[52a]

*Letter of attorney.*] Here first it appears that the authority to deliver seisin must be by deed: for letter of attorney is equivalent to warrant of attorney [which must be] by deed.

*Disabled persons may be private attorneys.*

Second. Littleton here speaks generally of a letter of attorney to one, and few persons are disabled to be private attorneys to deliver seisin; for monks, infants, fême coverts, persons attainted, outlawed, excommunicated, villeins, aliens &c. may be attorneys. A fême covert may be an attorney to deliver seisin to her husband, and the husband to the wife, and he in remainder to the lessee for life.

*Attorney must pursue his power, and what is a virtual execution of it.*

Third. It appears here that the attorney must pursue his warrant, otherwise he does not deliver seisin by force of the deed. Now his authority is twofold [viz. that which is] expressed in his warrant, and [that which is] implied in law. And first of his express authority. A man seised of Black Acre and White Acre makes a deed of feoffment of both, and a letter of attorney to enter into both Acres, and to deliver seisin of both of them according to the form

and effect of the deed, and he [the attorney] enters into Black Acre and delivers seisin *secundum formam chartæ*, this livery and seisin is good, albeit he did not enter into both, nor into one in the name of both; for when he delivers seisin of one *secundum formam chartæ*, that implies a livery of both. So when the feoffment is made to two or more, and the attorney is to make livery of seisin to both, and the attorney makes livery of seisin to one of the feoffees *secundum formam et effectum chartæ*, this is good to both, but in that case he that is absent may waive the livery.

If lessee for life makes a feoffment [in fee, which is a larger estate than he can warrant] and gives a letter of attorney to [his own] lessor to deliver seisin on the feoffment which the lessor accepts, and makes livery accordingly, notwithstanding this livery the lessor may enter for the forfeiture. But if lessee for years makes a feoffment in fee and gives a letter of attorney to his lessor to make livery, and the lessor makes livery accordingly, this livery shall bind the lessor, and shall not be avoided by him: for the lessor cannot make livery as attorney to the lessee, who had no freehold to deliver; but the freehold which he did deliver was his own [and by his own delivery he shall be bound]. If the lessor make a deed of feoffment and a letter of attorney to the lessee for years to make livery, and he does it accordingly, this shall not drown or extinguish his term, because he did it as a minister to another and in another's right, and this is accounted in judgment of law as the act of the other [and not his own, moreover] the the feoffee claims nothing by the lessee, but only by the lessor who made the feoffment to him. If one as procurator or attorney to another present to his own benefice he puts himself out of possession because he [i. e. his clerk] comes in by the induction and institution of the ordinary. If the tenant devise that his lord shall sell his land, and dies, and the lord sells it, the seignory remains. But if the lord or a grantee of a rent-charge had been also *cestuique use* of the land, and after the statute of R. 3, and before the statute of 27 H. 8, *cestuique use* had made a feoffment in fee of the land, albeit the land passes from the feoffees, and his feoffment is warranted by the power given to him by the statute, yet the seignory or rent-charge is extinct by his feoffment, for he has not a bare authority as the attorney has.

*When the attorney having right is bound by his acceptance of the power.*

If attorney do less than his authority livery void. But custom to grant copyholds in fee authorises a grant for life.

[52b]

If a man be disseised of Black Acre and White Acre, and a warrant of attorney is made to enter into both and to make livery, there, if the attorney enters into Black Acre only and makes livery *secundum formam chartæ*, the livery of seisin is void, because he does less than his warrant; for the estate of the disseissor in White Acre cannot be divested without an entry. But there is a diversity between an authority coupled with an interest, and a bare authority. For example, a custom within a manor time out of mind of man used, was to grant certain lands parcel of the said manor in fee-simple, and never any grant was made to any and the heirs of his body, or for life or years; and the lord of the said manor granted to one by copy for life, with remainder over to another and the heirs of his body; and it was adjudged, that the grant and remainder over was good; for the lord having authority by custom and an interest withal [of the largest dimensions] might grant [thereout] any lesser estate: for in this case, the custom that enables him to grant the greater estate enables him also to grant the lesser, *omne majus in se continet minus*. But he who has but a bare authority, as also he who has a warrant of attorney, must pursue his authority (as hath been said) and if he does less, it is void.

Reversion will pass by livery, though it properly lies in grant.

A man makes a lease for life, then executes a charter of feoffment with a letter of attorney to deliver seisin, the attorney enters upon the lessee [and delivers seisin to the feoffee], this is sufficient to convey away the reversion [although it lies in grant, and the livery and feoffment were not the proper assurances for conveying it]; and the reason is that livery of seisin being requisite to perfect the common assurance of lands [viz. a feoffment], it is [when by accident or design affixed to another instrument] expounded favourably, *ut res magis valeat quam pereat*. And this was adjudged in the court of Common Pleas, and afterwards affirmed in the King's Bench, on a writ of error.

Feoffment by deed-poll good, and attorney may be made by it; contra if by indenture unless he be a party.

And it is to be known, that a deed of feoffment beginning "To all faithful Christians," or "Know all men present and to come," or the like [which are properly commencements of deeds poll, is good, and] a letter of attorney may be contained in such a deed; for one continent [i. e. one instrument] may contain divers deeds to several persons; but if it be by indenture between the feoffor on the one

part, and the feoffee on the other part, there a letter of attorney in such deed is not good unless the attorney be made a party to the deed indented.

Now the authority implied by law, is, that the attorney shall not deliver seisin within view [that is, where, for fear of some bodily injury he dare not enter on the land], for his warrant is intended of an actual and express livery and not of a livery in law, and so it has been resolved.

*Attorney cannot make livery within view.*

*Yet if livery of seisin be not executed in the life of him who made the deed.]* Here albeit the warrant of attorney be indefinite, without limitation of any time, yet the law prescribes a time, as Littleton here says, the life of him that made the deed; but the death not only of the feoffor, of whom Littleton speaks, but of the feoffee also, is a countermand in law of the letter of attorney, and the feoffment itself is thereby rendered of none effect, because nothing can pass before livery of seisin. For if the feoffor dies, the land descends to his heirs; and if the feoffee dies, livery cannot be made to his heir, because then he would take by purchase, whereas "heirs" were named by way of limitation.

*Feoffee's death also vacates power.*

Therefore a letter of attorney to deliver seisin after the decease of the feoffor [in express terms] is void.

*Power to deliver seisin after feoffee's decease void.*

Fourthly, in all cases the attorney must pursue the warrant in substance and effect. 5thly. All this is to be understood of sole persons, or of a corporation or body consisting of one sole person, as a bishop, parson &c. But it holds not of a corporation aggregate of many persons capable. And therefore if a mayor and commonalty make a charter of feoffment with a letter of attorney to deliver seisin, the livery of seisin is good after the decease of the mayor, because the corporation never dies. The like law is of a dean and chapter, *et sic de similibus*.

*Death of aggregate corporation's head vacates not power.*

Lastly, if the lessor by his deed license the lessee for life or years (who is restrained by condition not to alien without license) to alien, and the lessor dies before the lessee does alien, yet his death is no countermand of the license, but the lessee may alien notwithstanding, for the license exempts the lessee out of the penalty of

*Licence to alien not vacated by lessor's death.*

the condition, and the deed was executed on the part of the lessor as much as it could be. So if the king licenses an alienation in mortmain, and dies, the licence may be executed after his death.

## SECTION 67.

Tenant for less than a year said to be tenant for years.

**ALSO, if tenements be let to a man for a term of half a year, or for a quarter of a year &c. in this case, if the lessee commit waste, the lessor shall have a writ of waste against him, and the writ shall say, that he held for a term of years; but he shall have an especial declaration upon the truth of the matter, and the count shall not abate the writ, because he cannot have any other writ upon the matter.**

Waste lies by whom, against whom, and what is waste.

[53a]

Houses.

An action of waste lies against tenant by the curtesy, tenant in dower, tenant for life, for years, or half a year, by him who has the immediate estate of inheritance, for waste or destruction in houses, gardens, woods, trees, or in lands, meadows &c. There are two kinds of waste, viz. voluntary or actual, and permissive. Waste may be done in houses, by pulling or prostrating them down, or by suffering the same to be uncovered, whereby the spars, rafters, or other timber of the house become rotten. But if the house be uncovered when the tenant comes in, it is no waste in the tenant to suffer the same to fall down. But though the house be ruinous at the tenant's coming in, yet if he pull it down, it is waste unless he rebuild it again. Also if glass windows (though glazed by the tenant himself) are broken down, or carried away, it is waste, for the glass is part of the house. And so it is of wainscot, benches, doors, windows, furnaces, and the like, annexed or fixed to the house, either by him in the reversion, or the tenant.

Wainscot, fixtures.

Tenant bound to repair.

Though there be no timber growing upon the ground, yet the tenant at his peril must keep the houses from wasting. If the tenant do or suffer waste to be done in houses, yet if he repair them before any action brought, there lies no action of waste against him, but he cannot plead, *quòd non fecit vastum*, but the special matter. A wall uncovered when the tenant comes in, is no waste if it be suffered to decay.

If the tenant cut down or destroy any fruit-trees growing in the garden or orchard, it is waste; but if such trees grow upon any of the ground which the tenant holds out of the garden or orchard, it is no waste.

*Fruit trees.*

If the tenant build a new house, it is waste, and if he suffer it to be wasted, it is a new waste. If the house falls down by tempest, or be burnt by lightning, or prostrated by enemies, or the like, without a default of the tenant, or was ruinous at his coming in and falls down of itself, the tenant may build the same again with such materials as remain, and with other timber which he may take growing on the ground for his habitation, but he must not make the house larger than it was. If the house be discovered [i. e. unroofed or partially damaged] by tempest, the tenant must in convenient time repair it.

*New erections are waste.*

If the tenant of a dove-house, warren, park, vivary, or the like, take so many that sufficient store be not left [or] as he found when he came in, this is waste; and to suffer the paling to decay, whereby the deer are dispersed, is waste.

*Dovehouse, park, warren.*

And it is to be observed, that there is waste, destruction, and exile. Waste properly is in houses, gardens, and timber-trees, (viz. oak, ash, and elms, and these are timber-trees in all places) either by cutting them down, or topping them, or doing any act whereby the timber may decay. Also in countries where timber is scanty, and beeches or the like are converted to building for the habitation of man, or the like, they are all accounted timber. If the tenant cut down timber-trees, or such as are accounted timber, as is aforesaid, this is waste; and if he suffer the young germins to be destroyed, this is destruction. So it is, if the tenant cut down underwood (as he may by law), yet if he suffer the young germins to be destroyed, or if he stub up the same, this is destruction. Cutting down of willows, beech, birch, asp, maple, or the like, standing in the defence and safeguard of the house, is destruction. If there be a quickset fence of white thorn, if the tenant stub it up, or suffer it to be destroyed, this is destruction; and for all these and the like destructions an action of waste lies. But the cutting out of dead wood is no waste; though converting trees to fuel, when there is sufficient dead wood, is waste. If the tenant suffer the

*Timber trees.*

houses to be wasted, and then fell down timber to repair the same, this is double waste.

*Mines and minerals.*

Digging for gravel, lime, clay, brick, earth, stone, or the like, or for mines of metal, coal, or the like hidden in the earth, where the mines were not open when the tenant came in, is waste: but the tenant may dig for gravel or clay for the reparation of the house, as well as he may take convenient timber-trees.

*Sea and river banks.*

It is waste to suffer a wall of the sea to be in decay, so as by the flowing and reflowing of the sea, the meadow or marsh is surrounded, whereby the same becomes unprofitable; but if it be surrounded suddenly by the rage or violence of the sea, occasioned by wind, tempest, or the like, without any default in the tenant, this is no waste punishable. So it is, if the tenant repair not the banks or walls against rivers, or other waters, whereby the meadows or marshes be surrounded and become rushy and unprofitable.

*Conversion of arable to pasture, &c.*

If the tenant convert arable land into wood, or *à converso*, or meadow into arable, it is waste, for it changes not only the course of husbandry, but the proof and evidence [of his lessor's title to the land, for if the land be described as arable in the deeds and on view the land is found to be pasture, some special evidence is necessary to prove the identity.]

*Fences, ditches, &c.*

The tenant may take sufficient wood to repair the walls, pales, fences, hedges, and ditches, as he found them; but he can make no new fences; and he may take also sufficient ploughbote, firebote, and other housebote.

*Selling reparation timber.*

The tenant cuts down trees for reparations and sells them, and after buys them again, and employs them about necessary reparations, yet is it waste by the vendition: and note that he cannot sell trees, and with the money cover the house.

*Accidental fire.*

Burning of the house by negligence or mischance is waste.

*Estate of inheritance requisite to action of waste.*

No person shall have an action of waste, unless he has the immediate state of inheritance, but sometimes another shall join with him for conformity. As if a reversion be granted to two, and to the



heirs of one ; they two shall join in an action of waste : and in like manner the surviving coparcener and the tenant by the curtesy shall join in an action of waste: and if two joint-tenants be, with remainders to the heirs of one of them, and they make a lease for life, they shall join in an action of waste. If the estate tail determine pending the action of waste, and the plaintiff becomes tenant in tail after possibility of issue extinct, the action of waste is gone. If the tenant doth waste, and he in the reversion dies, the heir shall not have an action of waste for the waste done in the life of the ancestor ; nor shall a bishop, master of an hospital, parson, or the like, for waste in the time of the predecessor. And so if lessee for years commits waste, and dies, an action of waste lies not against the executor or administrator for waste done before their time. But if two coparceners be of a reversion, and waste is committed, and one of them dies, the aunt and the niece shall join in an action of waste. If lands be given to two and to the heirs of one of them, he that has the fee shall not have an action of waste upon the statute of Gloucester, for that they are joint-tenants ; but his heirs shall have an action of waste against [the other becoming sole] tenant for life.

*Coparceners  
joint tenants.*

If a lease be made to A. for life, the remainder to B. for life, the remainder to C. in fee, in this case where it is said in the Register, and in F. N. B. that an action of waste lies, it is to be understood after the death or surrender of B. in the mean remainder, for during his life no action of waste does lie. But if a lease for life be made, the remainder for years, the remainder in fee, an action lies presently during the term in remainder, for the mean term for years is no impediment. But if a man make a lease for life or years, and afterwards grants the reversion for years, the lessor shall have no action of waste during the years, for he himself has granted away the reversion in respect whereof he is to maintain his action. Otherwise it is, if he had made a lease in reversion, which had been but a future interest ; for there an action of waste lies during the term, and so is the book to be understood, and the term shall be saved in that case.

*Mean remain-  
der for life or  
years.*

Note, after waste done there is a special regard to be had to the continuance of the reversion in the same state that it was at the time of the waste done; for if after the waste the reversioner grants over, though he takes back the whole estate again, yet is the waste dis-

*Reversion must  
continue in  
same person.*

punishable. So if he grant the reversion to the use of himself and his wife and his heirs, yet the waste is dispunishable, and so of the like ; because the estate of the reversion continues not, but is altered, and consequently the action of waste for waste done before (which consists in privity) is gone.

*Prohibition lies against whom.*

[54a]

A prohibition of waste lay against tenant by the curtesy and tenant in dower by the common law, but not against tenant for life or years, because they came in by their own act, and he [the lessor] might have provided that no waste should be done.

*Tenant for life's assignee punishable for waste.*

A tenant by the curtesy or in dower can hold of none but of the heir and his heirs by descent, and therefore if they grant over their whole estate, and the grantee commits waste, yet the heir shall have an action of waste against them, and recover the land against the assignee ; but if the heir either before the assignment had granted, or after the assignment doth grant the reversion over, the stranger shall have an action of waste against the assignee, because in both cases the privity is destroyed : in all other cases the action of waste shall be brought against him who did the waste, for it is in nature of a trespass. If tenant for life grants over his estate upon condition, and the grantee commits waste, and the grantor re-enters for the condition broken, the action of waste shall be brought against the grantee, and the place wasted recovered.

*Waste by stranger.*

But tenant by the curtesy, tenant in dower, tenant for life, years, &c. shall answer for the waste done by a stranger, and shall take their remedy over. An infant, as also baron and fême, shall be punished for waste done by a stranger, and so shall the wife that has the estate by survivorship be punished for waste done by her husband in his life-time, if she agree to the estate, though there has been variety of opinions in our books as to this.

*Waste by husband seised jure uxoris.*

But if a fême tenant for life take husband, and the husband commits waste, and the wife dies, no action of waste lies against the husband in the *tenuit*, for he was seised but *in jure uxoris*, and his wife was tenant of the freehold ; but if a fême be possessed of a term for years, and take husband, and the husband commits waste, and the wife dies, the husband shall be charged in an action of waste, for the law gives the term to him.

If tenant for life or years or their assignee make a grant over, and notwithstanding take the profits, an action of waste lies against him by him in the reversion or remainder by the statute.

An occupant shall be punished for waste ; and so if an estate be made to A. and his heirs during the life of B., and A. dies, the heir of A. shall be punished in an action of waste. Occupant.

No action of waste lies against a guardian in socage (but an account or trespass lies), nor against tenant by statute staple, or *elegit*. Guardian.

If waste be done *sparsim* here and there in woods, the whole woods shall be recovered, or so much wherein the waste *sparsim* is done. And so in houses so many rooms shall be recovered wherein there is waste done ; but if waste be done *sparsim* throughout, all shall be recovered. It has been said that if the hall be wasted, the whole house shall be recovered, because the whole house is denominated of the hall ; but later authority is to the contrary. Waste sparsim.

*A writ of waste.*] See in the Register five several writs of waste ; two at the common law for waste done by tenant in dower, or the guardian ; and three by special or statute law, for waste done by tenant for life, for years, and tenant by the curtesy. Five writs of waste.

*The writ shall say that he held for term of years.*] The statute of Gloucester, cap. 5. which gives the action of waste against the lessee for life or years [which lay not against them at the common law] speaks of one that holds for term of years in the plural number ; and yet here it appears, by the authority of Littleton, that although it be a penal law, whereby treble damages and the place wasted shall be recovered, yet a tenant for half a year being within the same mischief, shall be within the same remedy, though it be out of the letter of the law ; for *Qui hæret in literâ hæret in cortice*, which is an excellent example, whereupon in many like cases a man may settle a certain judgment. Tenant for half a year is a tenant for years within Stat. of Gloucester.  
[54 b]

In many cases a tenant for life or years may fell timber to make reparations, albeit he be not compellable thereunto, and shall not be punished for the same in any action of waste. As if a house be ruinous at the time of the lease made, if the lessee suffer the house Lessee may fell timber for repairing dwelling house.

One joint tenant, &c. may compel the other to contribute to repairs.

to fall down he is not punishable, for he is not bound by law to repair the house in that case. And yet if he cut down timber upon the ground so let, and repair it, he may well justify; and the reason is, for that the law favours the supportation and maintenance of houses of habitation for mankind. And therefore if two or more joint-tenants or tenants in common be of a house of habitation, and the one will not repair the house, the other shall have by law a writ of *de reparatione faciendâ*, and the writ says, *ad sustentationem ejusdem domûs teneantur*. So it is if the lessor by his covenant undertakes to repair the house, yet the lessee (if the lessor does it not) may with the timber growing upon the ground repair it, though he be not compellable thereunto. In the same manner, if a man make a lease of a house and land without impeachment of waste for the house, yet may the lessee with the timber upon the ground repair the house, though he may utterly waste it if he will; and so in many other cases.

Lessee may work mines, when.

A man has land in which there is a mine of coals, or of the like, and makes a lease of the land (without mentioning any mines) for life or for years, the lessee for such mines as were open at the time of the lease made, may dig and take the profits thereof. But he cannot dig for any new mine that was not open at the time of the lease made, for that would be adjudged waste. And if there be open mines, and the owner makes a lease of the land with the mines therein, this shall extend to the open mines only, and not to any hidden mine: but if there be no open mine, and the lease is made of the land together with all mines therein, there the lessee may dig for mines, and enjoy the benefit thereof, otherwise those words should be void. I have been the more spacious concerning this learning of waste, for that it is most necessary to be known of all men.

To A. for life, remainder to him for 21 years not merged; contra è converso.

Now has Littleton spoken of an estate for life, and an estate for years in several persons. Now let us see how they stand *simul et semel* in one person. If a man lets lands to another for life, the remainder to him for twenty-one years, he hath both estates in him so distinctly that he may grant away either of them; for a greater estate [cannot merge in a lesser, as a freehold in a chattel, or a remainder in a particular estate, though the greater estate] may uphold a lesser, but not è *converso*; and therefore if a man makes a lease to one for twenty-one years, the remainder to him for term of

his life, the lease for years is merged and drowned in the remainder for life.

If a man make a lease for life to one, the remainder to his executors for twenty-one years, the term for years shall vest in him; for even as ancestor and heir are *correlativa* as to inheritance; (as if an estate for life be made to A., the remainder to B. in tail, the remainder to the right heirs of A. a fee [i. e. a remainder in fee] vests in A. as much as if it had been limited to him and his heirs); even so are testators and executors *correlativa* as to chattels. And therefore if a lease for life be made to the testator, the remainder to his executors for years, the chattel shall vest in the lessee himself, as well as if it had been limited to him and his executors.\*

*Limitation to A's executors vests in him, when.*

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\* And if an estate be limited to A. for life, with remainder to the executors of B. for 21 years, if B. be dead the executors should take a vested interest by way of remainder; but if B. be living they should take a contingent interest by way of remainder, which however does not require any particular estate to support it, because it is not an estate but only an *interesse termini* till entry; but whether "executors" is a good name of purchase, has not, to the recollection of the editor, been distinctly decided. The points for consideration in such a case are, whether a character not fixed by law can be a good description of a person who, perhaps, may never be appointed, and if he be appointed, then another question is, whether he takes beneficially or in trust for the person whose executor he is; the heir, taking by purchase, takes beneficially, indeed he cannot take in trust for his ancestor who is dead.

[55a]

## CHAPTER VIII. SECTION 68.

## TENANT AT WILL.

Tenant at will entitled to emblements, but not tenant for years.

**TENANT at will is, where lands or tenements are let by one man to another, to have and to hold to him at the will of the lessor, by force of which lease the lessee is in possession. In this case the lessee is called tenant at will, because he hath no certain nor sure estate, for the lessor may put him out at what time it pleases him. Yet if the lessee sow the land, and the lessor, after it is sown and before the corn is ripe, puts him out, yet the lessee shall have the corn, and shall have free entry, egress and regress, to cut and carry away the corn, because he knew not at what time the lessor would enter upon him. Otherwise it is if tenant for years, who knows the end of his term, sows the land, and his term ends before the corn is ripe. In this case the lessor, or he in the reversion, shall have the corn, because the lessee knew the certainty of his term and when it would end.**

The will must be at option of both parties.

It is regularly true, that every lease at will must in law be at the will of both parties, and therefore when the lease is made, to have and to hold at the will of the lessor, the law implies it to be at the will of the lessee also; for it cannot be only at the will of the lessor, but it must be at the will of the lessee also. And so it is when the lease is made to have and to hold at the will of the lessee, this must be also at the will of the lessor; and so are all the books that seem *primâ facie* to differ clearly reconciled.

Emblements concern annual profits only.

[55b]

*Yet if the lessee sow the land &c.]* The reason of this is, for that the estate of the lessee is uncertain, and therefore lest the ground should be unmanured, which should be hurtful to the commonwealth, he shall reap the crop which he sowed in peace, albeit the lessor determines his will before it is ripe. And so it is if he set roots or sow hemp or flax, or any other annual profit, if after

the same be planted, the lessor oust the lessee; or if the lessee dies, yet he or his executors shall have that year's crop. But if he plant young fruit trees, or young oaks, ashes, elms &c. or sow the ground with acorns &c. there the lessor may put him out notwithstanding, because they will yield no present annual profit.

And this is not only proper to a lessee at will, that when the lessor determines his will that the lessee shall have the corn sown &c. but to every particular tenant that has an estate uncertain, for that is the reason which Littleton expresses in these words (because he has no certain nor sure estate). And therefore if tenant for life sows the ground, and dies, his executors shall have the corn, for that his estate was uncertain, and determined by the act of God. And the same law is of the lessee for years of tenant for life. So if a man be seised of land in right of his wife, and sows the ground, and dies, his executors shall have the corn, and if his wife die before him he shall have the corn. But if husband and wife be joint tenants of the land, and the husband sows the ground, and the land survives to the wife, it is said, that she shall have the corn. If tenant *pur auter vie* sows the ground, and *cestui que vie* dies, the lessee shall have the corn. If a man seised of lands in fee has issue a daughter and dies, his wife being *enseint* with a son, the daughter sows the ground, and a son is born, yet the daughter shall have the corn, because her estate was lawful, and defeated by the act of God, and it is good for the commonwealth that the ground be sown.

*Who entitled to emblements.*

*Tenant for life.*

*Husband seised jure uxoris.*

*Joint tenants.*

*Tenant pur auter vie.*

*Heir presumptive.*

But if the lessee at will sow the ground with corn &c. and after he himself determine his will and refuses to occupy the ground, in that case the lessor shall have the corn, because he loses his rent. And if a woman who holds land *durante viduitate suâ* sows the ground and takes husband, the lessor shall have the emblements, because the determination of her own estate grew by her own act. But where the estate of the lessee being uncertain is defeasible by a right paramount, or if the lease determine by the act of the lessee, as by forfeiture, condition &c. there he who has the right paramount, or who enters for any forfeiture &c. shall have the corn.

*No emblements if estate determined by party's own act.*

*Derivative estates.*

If a disseisor sow the ground and sever the corn, and the disseissee re-enter, he shall have the corn, because he enters by a

*Disseisor not entitled to em-*

blements though severed.

former title, and severance or removing of the corn alters not the case, for the regress is a recontinuacion of the freehold in him in judgment of law from the beginning.

Tenant by Statute.

If tenant by statute merchant sows the ground, and then a sudden and casual profit falls by which he is satisfied, he shall have the emblements.

What a determination of the will.

*The lessor may put him out.*] There is an express ouster, and an implied ouster: express, as when the lessor [at will] comes upon the land and expressly forewarns the lessee to occupy the ground any longer; implied, as if the lessor without the consent of the lessee enters into the land and cuts down a tree, this is a determination of the will, for that it should otherwise be a wrong in him, unless the trees were excepted, and then it is no determination of the will, for then the act is lawful and the estate continues. If a man leases a manor at will whereunto a common is appendant, if the lessor put in his beasts to use the common, this is a determination of the will. The lessor may by actual entry on the ground determine his will in the absence of the lessee, but by words spoken on the ground the will is not determined until the lessee has notice, no more than the discharge of a factor, attorney, or such like in their absence is sufficient in law until they have notice thereof.

Power not revocable without notice to attorney.

Marriage of lessor or lessee no determination of the will.

If a woman make a lease at will reserving a rent, and she takes husband, this is no countermand of the lease at will, but the husband and wife shall have an action of debt for the rent; and so it is if a lease be made to a woman at will reserving a rent, and the lessee takes husband, this is no countermand of the lease, but the lessor may have an action of debt or distrain them for the rent. So if the husband and wife make a lease at will of the wife's land reserving a rent and the husband dies, yet the lease continues.

Same on death of one lessor or lessee, if there are two.

In like manner if a lease be made by two to two others at will, and one of the lessors or one of the lessees dies, the lease at will is not determined in either of those cases; which are points necessary to be known.

Emblements accrue where

*After it is sown and before the corn is ripe.*] Then put the case that the corn is ripe and ready to cut down, and the lessor, before



the lessee reaps it, enters and puts out the lessee, whether shall the lessee have the corn? And it is without all question that the lessee shall have it, for by the same reason that he shall have it when he is put out before it is ripe, he shall have it when he is put out when it is ripe. *Et ubi eadem est ratio, ibi idem jus.*

*corn is ripe but not cut.*

[56a]

*And shall have free entry, egress and regress.*] For when the law gives any thing to one, it gives impliedly whatsoever is necessary for the taking and enjoying of the same: and the law in this case drives him not to an action for the corn, but gives him a speedy remedy to enter into the land and to take and carry it away, and compels him not to take it at one time, or to carry it before it be ready to be carried; and therefore the law gives all that which is convenient, viz. free entry, egress and regress [way and passage], as much as is necessary. If the lessee be disturbed in this [right of] way which the law gives him, he may have an action upon the case, and recover his damages; and this action the law does give him, for whensoever the law gives any thing, it gives also a remedy for the same.

*Lessees prevented from taking emblements; his remedy; action on the case.*

But here may be observed a diversity between a private way, whereof Littleton here speaks, and a common way. For if the way be a common way, then if any man be disturbed or prevented from going that way, or if a ditch be made across the way so as he cannot go, yet shall he not have an action upon his case; and this the law provided for avoiding of multiplicity of suits, for if any one man might have an action, all men might have the like. But the law for this common nuisance has provided an apt remedy, and that is by presentment in the court-leet, or in the torn [or court of the hundred or county]. But if a man sustain any particular damage by the nuisance, as if he and his horse fall into the ditch, whereby he receive any hurt or loss, there for this special damage which is not common to others, he shall have an action upon his case. And where the inhabitants of Southwark had by custom a watering-place for their cattle which was stopped up by Powel; in that case it was adjudged that any inhabitant of Southwark might have an action; for otherwise they should be without remedy, because such a nuisance is not presentable in the leet or torn. Note the diversity.

*Private and public ways distinguished and remedy for obstruction.*

*Obstruction of watering-place.*

Three kinds of ways.

There are three kinds of ways, whereof you shall read in our ancient books. 1st. A foot way, 2dly. A foot and horse way, vulgarly called pack and prime way, because it is both a footway, which is the *first* or *prime* way, and a pack or drift way also. 3dly. A foot, horse, and cart way, which is twofold, viz. the king's highway for all men, and a common way belonging to a city or town, as between neighbours and neighbours.

Grass not emblements.

If the lessee at will by good husbandry and industry, either by overflowing or trenching, or compassing of the meadows, or digging up of bushes or such like, make the grass to grow in more abundance, yet if the lessor put him out, the lessee shall not have the grass, because the grass is the natural profit of the earth. the same law is if he sows hay-seed, and thereby increases the grass.

## SECTION 69.

Tenants at will and executors allowed reasonable time to remove their goods from the premises.

*ALSO, if a house be let to a man to hold at will, by force whereof the lessee enters into the house, and brings his household stuff into the same, and after the lessor puts him out, yet he shall have free entry egress and regress into the said house for a reasonable time to take away his goods and utensils. As if a man seised of a messuage in fee-simple, fee-tail, or for life, has certain goods within the said house, and makes his executors and dies; whosoever after his decease has the house, his executors shall have free entry egress and regress for a reasonable time to carry out of the same house the goods of their testator.*

House includes curtilage, orchard, and garden.

House, messuage, or mansion, contains the buildings, curtilage, orchard, and garden.

[56 b]  
Cottage, what.

Cottage, *cotagium*, is a little house without land to it.

Neighbour compellable to repair his house.

If a man has a house near to mine, and he suffers his house to be so ruinous that it is like to fall on my house, I may have a writ *de domo reparandâ*, and compel him to repair his house. But a *præcipe* lies not *de domo*, but *de messuagio*.

*Reasonable time.*] What is reasonable time shall be adjudged by the discretion of the justices before whom the cause depends; and so it is of reasonable fines, customs, and services, upon the true state of the case depending before them: for reasonableness in these cases belongs to the knowledge of the law, and is therefore to be decided by the justices. And this being said of time, the like may be said of things uncertain, which ought to be reasonable; for nothing that is contrary to reason, is consonant to law.

*Reasonable time expounded by Judges.*

## SECTION 70.

ALSO, if a man make a deed of feoffment to another of certain lands, and delivers to him the deed, but does not deliver seisin; in this case, he to whom the deed is made, may enter into the land, and hold and occupy it at the will of him who made the deed, because it is proved by the words of the deed that it is his will that the other should have the land [though he has not perfected the feoffment by livery]; but he who made the deed may put out the tenant when he pleases.

To A. generally, an estate for life, if with livery, but if without, an estate at will only.

Here it appears, that if the feoffee enters, he is tenant at will, because he enters by the consent of the feoffor. And albeit the deed be delivered upon the ground [without any livery of seisin of the land], yet that delivery of the deed on the ground does not amount to a livery of seisin of the land; for it has its natural effect, viz. to make the deed. But if the deed be delivered in name of seisin of the land, or if the feoffor says to the feoffee, "Take and enjoy this land according to the deed;" or, "Enter into this land, and God give you joy;" these words do amount to a livery of seisin.

*Delivery of deed on land not in itself a livery of seisin; but what amounts to livery of seisin.*

[57a]

## SECTION 71.

ALSO, if a house be leased to hold at will, the lessee is not bound to sustain or repair the house, as tenant for term of years is. But if tenant at will commits voluntary waste, as by pulling down houses or felling trees, it is said that the lessor may have an action of trespass for this against the lessee. As if I lend one my sheep to

Tenant at will not bound to repair, but liable to trespass for voluntary waste;

*tathe [i. e. to feed, fold, and manure] his land, or my oxen to plough his land, and he kills my cattle, I may well have an action of trespass against him, notwithstanding the lending.*

but not for permissive waste.

The statute of Gloucester extends not to a tenant at will, and therefore for permissive waste the lessor has no remedy at all.

Voluntary waste and assignment a determination of will.

But voluntary waste amounts in law to a determination of the will. So if tenant at will grants over his estate to another, and the grantee enters, he is a disseisor, and the lessor may have an action of trespass against the grantee; for albeit the grant was void, yet it amounts to a determination of the will [on the lessee's part, so as to deprive him of emblements.]

Necessaries in trespass.

[57 b]

Note, in the lowest and the highest offences there are no accessories, but all are principals; as in riots, routs, forcible entries, and other transgressions *vi et armis*, which are the lowest offences; and so in the highest offence, which is *crimen læsæ majestatis*, there be no accessories; but in felonies there be accessories both before and after.

## SECTION 72.

Lessor at will may distrain, but impounding distress on land determines will.

NOTE, *if the lessor upon a lease at will reserve a yearly rent, he may distrain for the rent behind, or have an action of debt for the same at his own election.*

But if he impound the distress upon the ground let at will, the will is determined. Note, he may distrain for the rent, and yet it is no rent-service, for no fealty belongs thereto, but it is a rent distrainable of common right.

Tenant at sufferance who is, as distinguished from tenant at will.

There is a great diversity between a tenant at will and a tenant at sufferance; for tenant at will is in [and continues in] by right, but a tenant at sufferance enters by a lawful title, and holds over by wrong. A tenant at sufferance is he who at the first came in by lawful demise, and after his estate ended continues in possession and wrongfully holds over. As if tenant *pur auter vie* continues in possession after the decease of *cestui que vie*, or tenant for years holds over [after the determination of] his term [the tenant

so holding over is tenant at will by the landlord's laches and sufferance] and hath but a bare possession; but the lessor cannot bring an action of trespass against him before entry. Against the king there can be no tenant at sufferance, but he who holds over in like cases to the above, is an intruder upon the king, because there is no laches imputed to the king for not entering. If tenant in tail of a rent grant the same in fee and dies, yet the issue in tail may bring a *formedon*, and admit himself [that is, elect to be] out of possession, [and proceed accordingly with the *formedon*.] The like law is, if a man makes a lease at will and dies, now is the will determined; and if the lessee continues in possession, he is tenant at sufferance, and yet the heir by admission [or election] may have an assize of Mordancestor against him. But there is a diversity between particular estates made by the *terretenant*, as above said, and particular estates created by act in law: as if a guardian after the full age of the heir continues in possession, he is no tenant at sufferance, but an abator, against whom an assize of Mordancestor lies. *Et sic de similibus.*

*Guardian continuing possession is an abator.*

## CHAPTER IX. SECTION 73.

## TENANT BY COPY OF COURT ROLL.

Copyhold,  
what.

**TENANT** *by copy of court roll is where a man is seised of a manor within which manor there is a custom, which has been used time out of mind of man, that certain tenants within the same manor have been accustomed to have lands and tenements, to hold to them and their heirs in fee-simple, or fee tail, or for term of life. &c. at the will of the lord according to the custom of the same manor.*

Origin.  
[58a]

*Tenant by copy, &c.]* There is no tenant in the law that holds by copy but only this kind of customary tenant, for no man holds by copy of a charter, or copy of a fine, or such like, but this tenant holds by copy of court-roll. Bracton calls copyholders *villanos sockmannos*, not because they were bond, but because they held by base tenure, by doing all kinds of villein services. And Britton says, that some who are free of blood hold land in villenage; and Littleton himself in the next chapter calls them tenants by base tenure; and in the statute of 4 Edw. 1, they are called *custumarii tenantes*, and so Fleta calls them; and before him Ockam (who wrote in the reign of Hen. 2.) spake of them, and how, and upon what occasion they had their beginning.

Of the court  
baron, which  
cannot be held  
out of manor.

*Court.]* The court baron must be holden on some part of the land which is within the manor, for if it be holden out of the manor it is void; unless where a lord being seised of two or three manors has usually time out of mind kept at one of his manors courts for all the said manors, then by custom such courts are sufficient in law, albeit they be not holden within the several manors. And it is to be understood that this court is of two natures. The first is by the common law, and is called a court baron, as some have said, for that it is the freeholders' or freeman's court (for barons in one sense signify freemen), and of that court the freeholders being

suitors\* are the judges, and this may be kept from three weeks to three weeks. The second is a customary court, and that concerns copyholders, and therein the lord or his steward is the judge. Now as there can be no court baron without freeholders, so there cannot be this kind of customary court without copyholders or customary holders. And as there may be a court baron of freeholders only without copyholders, and then is the steward the register, so there may be a customary court of copyholders only without [a court baron for the] freeholders, and then is the lord or his steward the judge. And when the court baron is of this double nature, the court roll contains as well matters appertaining to the customary court as to the court baron. And forasmuch as the title or estate of the copyholder is entered into the roll whereof the steward delivers him a copy, therefore he is called a copyholder. Concerning the institution of the court baron by the laws and ordinances of ancient kings, and especially of king Alfred, it appears that the first kings of this realm had all the lands of England in demesne, and the grand manors and royalties they reserved to themselves, and of the remnant, for defence of the realm, they enfeoffed the barons of the realm with such jurisdiction as the court baron now has, and instituted the freeholders to be judges of the court baron. And herewith agreed the laws of Edward the Confessor. And it is to be observed that in those ancient laws, under the name of barons were comprised all the nobility.

*Of the customary or copyhold court.*

[58b]

There may be a customary manor granted by copy of court roll. So although the word be (*seised*) which properly betokens a freehold, yet tenant for years, tenant by statute merchant, staple, *elegit*, and tenant at will, guardian in chivalry, &c. who are not properly seised but possessed, may be lords of manors *pro tempore*, not only to make admittance, but to grant voluntary copies of ancient copyhold lands which come into their hands [by escheat, forfeiture, or otherwise]. And therefore there is a diversity between disseisors, abators, intruders, and others who have defeasible titles; for their voluntary grants of ancient copyhold lands shall not bind the disseisees or others who have right. And voluntary grants by copy,

*What Lords may admit to and grant copyholds.*

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\* Note, the word "suitors" here does not mean parties to a suit, but the persons who owe suit and service to the court, that is, who *serve* on the homage, and pursue their remedies in that court for injuries done to their lands held of that manor.

made by such particular tenants as aforesaid, shall bind him who has the freehold and inheritance, because all these are lawful lords for the time being; but so is not a tenant at sufferance, because he is in by wrong, as hath been said. But admittances made by disseisors, abators, intruders, tenants at sufferance, or others who have defeasible titles, stand good against those who have right, because it was a lawful act, and they were compellable to make such admittances. And yet in some special cases an estate may be granted by copy by one who is not *dominus pro tempore*, or who has not any thing in the manor. As if the lord of a manor by his will in writing devise, that his executor shall grant the customary tenements of the manor according to the custom of the manor for the payment of his debts, and dies, the executor having nothing in the manor, may make grants according to the custom of the manor.

*Executors.*

*Of the demisable quality of copyholds.*

*Custom.]* To support which three things must concur. The first is time, and that must be out of the memory of man, and therefore a copyhold cannot begin at this day. The second is, that the tenements be parcel of and situate within the manor. The third is, that the copyhold tenements have been demised and are demisable by copy of court roll time out of mind; for it need not have [always] been demised [or let out as copyhold] time out of mind, if they have been always demisable [that is, always capable of being granted as copyholds] that is sufficient. For example: if a copyhold tenement escheat to the lord, and the lord keeps it in his hands for many years, during this time it is not demised, but still the demisable quality is not lost, for the lord has power to demise it again whenever he pleases.

*At the will of the lord according to the custom.]* So that a copyholder is not a bare tenant at will, but a tenant at will according to the custom of the manor.

*What may be granted by copy.*

*Certain tenements.]* What things may be granted by copy, is necessary to be known. 1st. A manor may be granted by copy. 2nd. Underwoods without the soil may be granted by copy to one and his heirs, and so may the herbage or vesture of land. 3rd. And generally all lands and tenements within the manor, and whatsoever concerns lands or tenements, may be granted by copy [provided they have always continued demisable as such]; thus a fair appendant to a manor may be granted by copy &c.



## SECTION 74.

AND *such a tenant may not alien his land by deed, for then the lord may enter as into a thing forfeited unto him. But if he will alien his land to another, it behoves him after the custom to surrender the tenements in court into the hands of the lord, to the use of him whom he wishes to have the estate, in this form, or to this effect.*

Copyholds are conveyed by surrender only.

*A. of B. comes into this court, and surrenders in the same court a messuage &c. into the hands of the lord to the use of C. of D. and his heirs, or the heirs issuing of his body, or for term of life &c. And upon that comes the aforesaid C. of D. and takes of the lord in the same court the aforesaid messuage &c. to have and to hold to him and to his heirs, or to him and to his heirs issuing of his body, or to him for term of life, at the lord's will after the custom of the manor, to do and yield therefore the rents, services, and customs thereof before due and accustomed &c. and gives the lord for a fine &c. and makes unto the lord his fealty &c.*

Form of surrender.

*And such a tenant must surrender.]* This is true in case of alienation, but when a man has but a right to a copyhold, he may release it by deed or by copy to one who is admitted tenant *de facto*.

But a right may be released.  
[59 a]

*Alien by deed.]* Here it appears by Littleton, that there must be an alienation; for the making of the deed alone, unless somewhat pass thereby, is no forfeiture. As if he make a charter of feoffment, or a deed of demise for life, and make no livery, this is no forfeiture, because nothing passes, and therefore no alienation; but otherwise it is of a lease for years. What shall be forfeitures of copyholds you may read at large in my Reports.

What alienation a forfeiture.

*In court.]* This is the general custom of the realm, that every copyholder may surrender in court, and need not to allege any custom therefore. So if out of court he surrender to the lord himself, he need not allege in pleading any custom. But if he surrender out of court into the hands of the lord by the hands of two or three copyholders [tenants of the manor] or by the hands of the

Of surrenders in and out of court.

bailiff or reeve, or out of court by the hands of any other, these customs are particular, and must therefore be pleaded.

Customary freeholds may pass by surrender.  
[59 b]

But although it be incident to the estate of a copyhold to pass, as our author says, by surrender, yet so forcible is custom, that by it a freehold and inheritance may also pass by surrender (without the leave of the lord) in his court, and be delivered over by the bailiff to the feoffee, according to the form of the deed, to be enrolled in the court or the like.

Surrenderer is in by surrenderor, but general surrender gives life estate only.

A. B. comes into this court, and surrenders &c.] Here Littleton puts an example of a surrender in court, and in this example three things are to be observed. 1st. That the surrender to the lord is general without the expression of any estate, for the lord being but an instrument to admit the *cestuique use*, no more passes to him than is sufficient to serve the limitation of the use; and the *cestuique use*, when he is admitted, shall be in by him who made the surrender, and not by the lord. 2dly. If the limitation of the use be general, then the *cestuique use* takes but an estate for life, and therefore here Littleton expresses upon the declaration of the use, the limitation of the estate, viz. in fee-simple, fee-tail &c. 3dly. The lord cannot grant a larger estate than is expressed in the limitation of the use.

Surrender to will severs joint-tenancy.

If two joint tenants be of copyhold lands in fee, and one of them out of court according to the custom surrenders his part into the lord's hands, to the use of his last will, and by his will devises his part to a stranger in fee, and dies, and at the next court the surrender is presented, by the surrender and presentment the jointure is severed, and the devisee ought to be admitted to the moiety of the lands, for now by relation the estate of the land was bound by the surrender.

Lord in remainder bound to admit on surrender to particular tenant.

If the lord of the manor for the time being be lessee for life or for years, guardian, or any who has a particular interest, or who is tenant at will of a manor (all of whom are accounted in law *domini pro tempore*), and takes a surrender into his hands, and before admittance the lessee for life dies, or the years, interest, or custody do end or determine, or the will is determined, though the lord comes in above the lease for life or for years, the custody or other

particular interest or tenancy at will, yet shall he be compelled to make admittance according to the surrender; and so was it holden in 17 Eliz. in the Earl of Arundel's case, which I myself heard.

*And gives the lord for a fine.*] Of fines due to the lord by the copyholder, some are by the change or alteration of the lord, and some by the change or alteration of the tenant. The change of the lord ought to be by the act of God, otherwise no fine can be due; but by the change of the tenant either by the act of God, or by the act of the party, a fine may be due: for if the lord allege a custom within his manor to have a fine of every of his copyholders of the said manor at the alteration or change of the lord of the manor, be it by alienation, demise, death, or otherwise; this is a custom against law as to the alteration or change of the lord by the act of the party, for by that means the copyholders may be oppressed by multitude of fines by the act of the lord. But when the change grows by the act of God, there the custom is good, as by the death of the lord. And this, upon a case in the Chancery referred to Sir John Popham chief justice, and upon conference with Anderson, Periam, Walmesley, and all the judges of Serjeant's Inn in Fleet-street, was so resolved and certified into the Chancery. But upon the change or alteration of the tenant, a fine is due to the lord. Of fines taken of copyholders some are certain by custom, and some are uncertain; but the fine, though it be uncertain, yet must it be reasonable. And that reasonableness shall be discussed by the justices upon the true circumstances of the case appearing unto them; and if the court where the cause depends, adjudges the fine exacted unreasonable, then the copyholder is not compellable to pay it. And so was it adjudged: for all excessiveness is abhorred in law. See more concerning fines of copyholders in my Reports, which are so plainly there set down, that they need not be rehearsed here.

*Fine may become due on lord's death, and on tenant's death or alienation.*

*Fine must be reasonable.*

[60 a]

## SECTION 75.

*AND these tenants are called tenants by copy of court roll; because they have no other evidence concerning their tenements but only the copies of court rolls.*

*Why called copyholders.*

## SECTION 76.

Copyholder's  
remedy is in  
customary  
court.

AND such tenants shall neither implead, nor be impleaded for their tenements by the king's writ. But if they will implead others for their tenements, they shall have a plaint entered in the lord's court in this form, or to this effect: *A. of B. complains against C. of D. of a plea of land, viz. of one messuage, forty acres of land, four acres of meadow &c. with the appurtenances, and makes protestation to follow this complaint in the nature of the king's writ of assize of mordancestor at the common law, or of an assize of novel disseisin, or formedon in the descender at the common law, or in the nature of any other writ &c. Pledges to prosecute F. G. &c.*

Petition of error  
lies to the lord.

Put the case that the demandant in a plaint in nature of a real action recovers the land erroneously, what remedy is there for the party grieved? He cannot have the king's writ of false judgment in respect of the baseness of the estate and tenure, being in the eye of the law but a tenant at will, and the freehold being in another; but he shall have a petition to the lord in the nature of a writ of false judgement, and therein assign errors, and have remedy according to law.

Special custom  
requisite to sup-  
port entails, but  
such entails and  
remainders may  
be barred by  
surrender.

[60b]

*Formedon in the descender at the common law.*] By the opinion of Littleton, as there may be an estate tail by custom with the co-operation of the statute of W.2. cap. 1. so may the tenant in tail have a *formedon in descender*; but as the statute without a custom extends not to copyholds, so a custom without the statute cannot create an estate tail. Now it is not a sufficient proof that lands have been granted in tail, that they have been anciently and usually granted by copy to many men and to the heirs of their bodies, for that may be a fee-simple conditional as it was at common law. But if a remainder has been limited over on such grants and [such remainder has been] enjoyed, or if the issues in tail have avoided the alienation of the ancestor, or if they have recovered the same in writs of *formedon in the descender*, these and such like are proofs of a custom to entail. But if by custom the copyhold may be entailed, the same by like custom may be by surrender alone cut off and destroyed, [and such surrender will by custom bar the remainder

and reversion also, but the natural way of barring a remainder in copyholds is by a customary recovery, though customs to bar by surrender and recovery may be concurrent in the same manor].

## SECTION 77.

AND *although some such tenants have an inheritance according to the custom of the manor, yet they have but an estate at the will of the lord according to the course of the common law. For it is said, that if the lord doth oust them, they have no other remedy but to sue to their lords by petition; for if they should have any other remedy, they would not be tenants at will. But the lord cannot break through the custom, which is reasonable enough. And Brian, chief justice, said, that if such tenant by custom paying his services be ejected by the lord, he shall have an action of trespass against him. H. 21 Ed. 4. And so was the opinion of Danby, chief justice, in 7 Ed. 4. For he saith, that tenant by the custom is as well entitled to have his inheritance according to the custom as he who hath a freehold at the common law.*

Copyholder has now a fixed estate, and cannot be ejected at lord's pleasure.

Here Littleton sets not down his own opinion, which seems rather to the contrary, as appears by the next chapter. [This however does not distinctly appear.] But now, without question, the lord cannot at his pleasure put out the lawful copyholder without some cause of forfeiture, and if he do, the copyholder may have an action of trespass against him; for albeit he is tenant at the will of the lord, yet is it according to the custom of the manor.

[61a]

## CHAPTER X. SECTION 78.

## TENANT BY THE VERGE.

Tenants by  
verge are copy-  
holders.

**TENANTS** *by the verge* are in the same nature as tenants by copy of court roll. But the reason why they are called tenants by the verge, is, for that when they surrender their tenements into the hands of their lord to the use of another, they have a little rod (by the custom) in their hand, the which they deliver to the steward or to the bailiff, according to the custom of the manor, and he who has the land shall take up the same in court, and such taking shall be entered on the roll, and the steward or bailiff, according to the custom, shall deliver to him who takes the land the same rod, or another rod, in the name of seisin; and for this cause they are called tenants by the verge, but they have no other evidence but by copy of court roll.

This tenant *by the verge* is a mere copyholder, and takes his name from the ceremony of the verge [which now is usually adopted in all copyhold manors.]

Steward may be  
retained without  
deed, and dis-  
charged at  
pleasure.

[61b]

*Steward.*] Every steward of courts is either by deed or without deed; for a man may be retained a steward to keep his court baron and also his court leet belonging to the manor without deed, and that retainer shall continue until he be discharged.

Lord may ad-  
mit out of  
manor.

The lord of a manor may make admittances out of court and out of the manor also, as at large appears in my Reports.

## SECTION 79.

AND also in divers lordships and manors there is this custom, viz. if a tenant who holds by custom, will alien his lands or tenements, he may surrender his tenements to the bailiff, or to the reeve, or to two honest men of the same lordship, to the use of him who shall have the land, to have in fee-simple, fee-tail, or for term of life, &c. And they shall present all this at the next court, and then he, who shall have the land by copy of court roll, shall have the same according to the intent of the surrender.

Surrender to bailiff, reeve, and tenants good by custom.

*To the bailiff or to the reeve.]* Littleton intends, 'into the hands of the lord by the hands of the bailiff or the reeve.' The custom guides these surrenders out of court, and the custom must be pursued.

[62a]

*At the next court.]* By the surrender out of court, the copyhold estate passes to the lord under a secret condition, that it be presented at the next court according to the custom of the manor. And therefore if after such a surrender and before the next court, he who made the surrender dies, yet the surrender stands good; and if it be presented at the next court, *cestuique use* shall be admitted thereunto; but if it be not presented at the next court according to the custom, then the surrender becomes void; and so was it clearly holden Pasch. 14 Eliz. in the court of Common Pleas, which I myself heard.

Surrender not presented at next court void.

## SECTION 80.

AND so it is to be understood, that in divers lordships, and in divers manors, there be many and divers [different] customs, as to taking tenements, pleading, and other things to be done; and whatsoever is not against reason may [by these special customs] be well admitted and allowed.

Special customs must be reasonable.

For how long soever it has continued, if it be against reason, it is of no force in law. This however is not to be understood of every

unlearned man's reason, but of artificial and legal reason warranted by authority of law : *Lex est summa ratio*.

## SECTION 81.

Copyholding a  
base tenure.  
[62b]

AND these tenants who hold according to the custom of a lordship or manor, albeit they have an estate of inheritance according to the custom of the lordship or manor, yet because they have no freehold by the course of the common law, they are called tenants by base tenure.

## SECTION 82.

Copyholders  
and tenants at  
will distinguish-  
ed. — "Heirs"  
rejected as to  
the latter.

AND there are divers diversities between tenant at will who is in by lease of his lessor by the course of the common law, and tenant according to the custom of the manor in form aforesaid. For tenant at will according to the custom may have an estate of inheritance at the will of the lord, according to the custom and usage of the manor. But if a man let [freehold] lands or tenements to another, to have and to hold to him and his heirs at the will of the lessor, these words (his heirs) are void. For in this case if the lessee dies, and his heir enters, the lessor shall have a good action of trespass against him ; but not so against the heir of tenant by the custom in any case, &c. for that the custom of the manor in some cases may aid him to bar his lord in an action of trespass, &c.

## SECTION 83.

Copyholder  
must repair.  
[63a]

ALSO, the one tenant by the custom in some places ought to repair and uphold his houses, and the other tenant at will ought not.

Waste a for-  
feiture.

*By the custom.*] For what a copyholder may or ought to do, or not do, the custom of the manor must direct it, for *consuetudo manerii est observanda*. But if there be no custom to the contrary, waste either permissive or voluntary of a copyholder is a forfeiture of his copyhold.



## SECTION 84.

ALSO, *the one, tenant by the custom, shall do fealty, and the other* Fealty.  
*not. And many other diversities there are between them.*

And the doing of fealty by a copyholder proves that a copyholder, so long as he observes the custom of the manor and pays his services, has a fixed estate. For tenant at will, that may be put out at pleasure, shall not do fealty. For to what end should a man swear to be faithful and true to his lord, who may be put out at the pleasure of the lessor, or who may himself determine the tenancy at his pleasure. Of this kind of customary tenants, and of many things concerning them, you may read more in the Fourth Book of my Reports, fol. 21, 22, 23, &c.

## BOOK II.

[64 a]

## CHAPTER I. SECTION 85.

## HOMAGE.

Homage.

*HOMAGE is the most honourable, at the same time the most humble service of reverence that a franktenant may do to his lord. For when the tenant performs homage to his lord, he shall be ungirt, and his head uncovered, and his lord shall sit, and the tenant shall kneel before him on both his knees, and hold his hands jointly together between the hands of his lord, and shall say thus : I become your man from this day forward of life and limb, and of earthly worship, and unto you shall be true and faithful, and bear to you faith for the tenements that I claim to hold of you, saving the faith that I owe unto our sovereign lord the king ; and then the lord so sitting shall kiss him.*

Principle of  
tenure.

[65 a]

*For the tenements that I claim to hold of you.]* For the better understanding of that which shall be said hereafter, it is to be known first, that there is no land in England in the hands of any subject but what is holden of some lord by some kind of service, as partly has been touched before. Secondly, all the lands within this realm were originally derived from the crown, and therefore the king is sovereign lord, or lord paramount, either mediate or immediate of all and every parcel of land within the realm. Thirdly, in ancient time lords upon the creation of their tenures did not only reserve rents, services, and profit, &c. for which they might distrain and have other remedy, but also took an humble submission of their tenants by promise and oath (for to

homage fealty is incident), to be true and faithful to him for the tenements so holden of him, which submission is called homage and fealty, according to the tenure reserved.

One within the age of twenty-one years may do homage; but *Infants.* Bracton says he cannot do fealty, because in doing of fealty he ought to be sworn, which an infant cannot be. But some opinions are in our books to the contrary, viz. that an infant shall do fealty; but I take it to be meant of homage, and herewith agrees Britton.

Glanvill says, women shall not do homage; but Littleton says *Feme covert.* that a woman shall do homage; but she shall not say. "*I become your woman,*" but "*I do to you homage;* and so is Glanvill to be understood, that she shall not do complete homage.

## SECTION 90.

NOTE, *none shall do homage but such as have an estate in fee-simple or fee-tail, in his own right or in right of another. For it is a maxim in law, that he who has an estate but for term of life, shall neither do homage or take homage. For if a woman has lands or tenements in fee-simple, or in fee-tail, which she holds of her lord by homage, and takes husband, and has issue, then [the husband in the life of the wife shall do homage, because he has title to have the tenements by the curtesy of England if he survives his wife, and he also holds in right of his wife. But if the wife dies before homage done by the husband in the life of his wife, and the husband holds himself in as tenant by the curtesy, then he shall not do homage to his lord, because he then hath an estate but for term of life.* *Who may perform homage. [66b]*

*More shall be said of homage in the tenure of homage ancestral.*

*In the right of another.]* As the husband and wife in the right of *Corporation.* his wife, the bishop in right of his bishopric, &c. the abbot or prior in right of his monastery, &c. But no corporation aggregate of many persons capable, be the same ecclesiastical or temporal, can do homage, as a dean and chapter, mayor and commonalty, and

[67 a]

such like, albeit they are seised in fee of lands held by homage, yet shall they not do homage. And the reason is, because that homage must be done in person, and a corporation aggregate of many cannot appear in person; for albeit the bodies natural, whereupon the body politic consists, may be seen, yet the body politic or corporate itself cannot be seen, nor can it do any act but by attorney, and homage must ever be done in person, &c. And albeit an abbot and convent is a corporation aggregate of many, yet because the convent are all dead persons in law, the abbot alone in nature of a sole corporation shall do homage.

## CHAPTER II. SECTION 91.

## FEALTY.

FEALTY is the same that fidelitas is in Latin. And when a freeholder doth fealty to his lord he shall hold his right hand upon a book, and shall say thus: Know ye this, my lord, that I shall be faithful and true unto you, and faith to you shall bear for the lands which I claim to hold of you, and that I shall lawfully do to you the customs and services which I ought to do, at the terms assigned, so help me God and his Saints; and he shall kiss the book. But he shall not kneel when he makes his fealty, nor shall he make such humble reverence as is aforesaid in homage. Fealty.

And when a freeholder.] Every freeholder, except tenant in frankalmoigne shall do fealty. Fealty is a part of homage for all the words of fealty are comprehended within homage, and therefore fealty is incident to homage.

So help me God.] As homage is the more honourable service, so fealty is a service more sacred, because he is sworn thereunto. And the reason wherefore the tenant is not sworn in doing his homage to his lord is, for that no subject is sworn to another subject to become his man of life and member but to the king only, and that is called the oath of allegiance, or *homagium ligeum*.

## SECTION 92.

AND there is great diversity between the doing of fealty and of homage; for homage cannot be done to any but to the lord himself; but the steward of the lord's court, or bailiff, may take fealty for the lord. Who may take.

## SECTION 93.

*Who shall do.* **ALSO, tenant for term of life shall do fealty, and yet he shall not do homage. And divers other diversities there are between homage and fealty.**

The tenant must do fealty in person ; because he must be sworn unto it, and no man can swear by the common law by attorney or proctor.

*Importance of.* Now if lords knew what benefit they may reap by receiving of homage and fealty, they would not neglect them ; for by the receiving of either, it is a sufficient seisin of all manner of services, as by the words of either appears.

## CHAPTER III. SECTION 95.

[68b]

## ESCUAGE.

ESCUAGE is called in latin Scutagium, that is, service of the shield; What it is. and the tenant, who holds his land by escuage, holds by knight's service. And also it is commonly said, that some hold by the service of one knight's fee, and some by the half of a knight's fee. And it is said, that when the king makes a voyage royal into Scotland to subdue the Scots, then he who holds by the service of one knight's fee, ought to be with the king forty days, well and conveniently arrayed for the war. And he who holds his land by a moiety of a knight's fee ought to be with the king twenty days; and he who holds his land by the fourth part of a knight's fee, ought to be with the king ten days; and so he who has more, more, and he who has less, less.

Every tenure by escuage is a tenure by knight's service; but [69a] every tenant that holds by knight's service, holds not by escuage, as shall be said hereafter.

*The service of one knight's fee.*] There is great diversity of opinions concerning the contents of a knight's fee, that is, how much land goes to the livelihood of a knight. For some say that a knight's fee consists of eight hides, and every hide contains an hundred acres, and so a knight's fee should contain eight hundred acres. Others say, that a knight's fee contains six hundred and eighty acres. Others say, that an oxgang of land contains fifteen acres, and eight oxgangs make a ploughland; by which account a ploughland contains a hundred and twenty acres; and that *virgata terræ*, or a yardland contains twenty acres. But I hold, that a knight's fee, an hide or ploughland, a yardland or oxgang of land, do not Knight's fee, ploughland, yardland, &c. a measurement of value, not of content.

Contents of a knight's fee ;

contain any certain number of acres, but that a knight's fee is properly to be esteemed according to the quality, and not according to the quantity of the land, that is to say, *by the value, and not by the content*. Which antiquity I cite, for that it concurs with the act of parliament *anno 1 E. 2, de militibus* ; by which act *census militaris* the estate of a knight is measured by the value of twenty pounds *per annum*, and not by a certain content of acres ; and with this agrees the statute of W. 1. cap. 35, and F. N. B. fol. 82, where twenty pound of land in socage is put as equivalent to a knight's fee ; and this is the most reasonable estimate, for one acre may be better than many others, so that he who has six hundred and eighty or eight hundred acres of barren land, had not according to the ancient account a sufficient revenue to maintain the degree of a knight, and he who had a less number of acres of some land of the value of twenty pound *per annum*, had a sufficient livelihood in those days for the maintenance of a knight. So antiquity thought that four hundred marks of land *per annum* was a competent livelihood for a baron, and four hundred pounds *per annum ad sustinendum nomen et onus* of an earl, and of late time eight hundred marks *per annum* of a marquis, and eight hundred pounds *per annum* of a duke ; so that their yearly revenue was estimated by the value and not by the content. And one ploughland, *carucata terra*, or a hide of land, *hida terra*, which is all one, is not of any certain content, but as much as a plough can by course of husbandry plough in a year. And therewith agrees Lambard *verbo Hide*. And a ploughland may contain a messuage, wood, meadow, and pasture, because by them the ploughmen and the cattle belonging to the plough are maintained. And the venerable Beda calls a ploughland *familiam*, a family ; because it contains necessary things for the maintenance of a family. And Prisot well says in 35 H. 6. fol. 29, that a plough may till more land in a year in one country than in another ; and therefore it stands with reason, that a ploughland should be less in one place than in another. 41 E. 3. tit. Fine 40, and 13 E. 3. Fine 67. A

Of a barony, earldom, &c.

Ploughland, what.

Fine. Parcels.

fine shall not be received *de unâ virgatâ terra* for the uncertainty, *vide 39 H. 6. 8*. But an acre of land is certain by the statute *de terris mensurandis*. Note also, that every ploughland of ancient time was of the yearly value of five nobles *per annum*, and this was the living of a ploughman or yeoman ; and *ex duodecim carucatis constabat unum feodum militis*, which amounts to twenty pounds *per annum*.



And it is to be observed, that the relief of a knight [that is, his payment or rent to his superior lord] and all above him which are noble, is the fourth part of their yearly revenue, as of a knight five pounds, which is the fourth part of twenty pounds. So a barony consists of thirteen knights' fees and one-third of another, which amounts to four hundred marks, and therefore his relief is the fourth part of this, viz. one hundred marks: and an earldom consists of twenty knights' fees, which amount to four hundred pounds (as before it appears by the said ancient record *de modo tenendi parliamentum, &c.*) and therefore his relief is one hundred pounds. And this also appears by the statute of Magna Charta, cap.2. and by the equity of this statute, insomuch that a marquise, which consists of the revenue of two baronies, (which amounts to eight hundred marks,) shall pay according to that just proportion for his relief two hundred marks; and because a dukedom consists of the revenues of two earldoms, viz. eight hundred pounds per annum, a duke shall pay two hundred for a relief, which is also the fourth part of his revenue; and with this agrees the records of the Exchequer.

Relief for knight's fee how much.

[69 b]

Note, at the time of the making the statute of Magna Charta, 9 H. 3. there was not any duke, marquis, or viscount in England, and therefore the statute could not make mention of them, and Edward the eldest son of king Edw. 3, called the Black Prince, was the first duke in England after the Conquest, and Robert earl of Oxford in the reign of Richard 2. was the first marquis. And before the reign of Henry 6. there was not any viscount, a dignity of great antiquity in other realms.

Titles of nobility when introduced.

*A voyage royal.*] A voyage royal is not only when the king himself goes to war, as Littleton here says, but also when his lieutenant or deputy goes. And what shall be termed a voyage royal shall be adjudged in this case by the judges of the common law as an incident to escuage, and not by the constable and marshal, or any other: *et sic de similibus.*

What a voyage royal.

There is also another kind of voyage royal, viz. when one goes with the king's daughter beyond sea to be married, &c. for such a voyage is for the good of the whole realm (for more profit for the realm cannot be than to make alliance with another nation); but of this voyage royal Littleton speaks not here, but only of the voyage royal to war; so that there is a voyage royal of war, and a voyage

royal of peace and amity. And it is to be observed, that he who holds by castle guard or cornage holds by knights' service, and yet he shall pay no escuage, because he holds not to go with the king to war.

*Into Scotland.] In Scotiam.* This is put but for an example, for if the tenure be to go in *Walliam, Hiberniam, Vasconiam, Pictaviam, &c.* it is all one. Sir Richard Rockesley knight held lands at Seaton by serjeanty to be *vantrarius regis*, that is, to be the king's fore-foot man when the king went into Gascony, *donec perusus fuit pari sole-arum pretii 4d.*, that is, until he had worn out a pair of shoes of the price of fourpence. And this service being admitted to be performed when the king went to Gascony to make war, is knight's service.

*Terms of service.* *He who holds by the service of one knight's fee, ought to be with the king forty days.]* But this is to be understood of a tenant who holds of the king immediately; for every man is bound by his tenure to defend his lord, and both he and his lord the king and his country; and therefore if the lord goes not, the tenant is excused. But yet if the tenant prevail goes with the king, it excuses all the mesnes.

And it is to be observed, that for every pound of the ancient value of a knight's fee, accounting twenty pound as land, the tenant must go with the king two days, which comes just to forty days for a whole knight's fee.

[70a]

## SECTION 96.

*Of substitutes.* **BUT** it appears that it is not needful for him who holds by escuage, to go himself with the king, if he will find another able person for him conveniently arrayed for the war to go with the king. And this seems to be good reason. For it may be, that he who holds by such services is languishing, so that he can neither go nor ride. And also an abbot or other man of religion, or a feme sole, who hold by such services, ought not in such case to go in proper person. And Sir William Herle, chief justice of the Common Pleas, has said that escuage shall not be granted but where the king goes himself in his proper person.

*Sir William Herle.*] A famous lawyer, constituted chief justice [71 a] of the Common Pleas by letters patent dated *die Martii anno 5 E. 3.* It appears by Littleton, and by the records, that he was a knight, against the conceit of those who think that the chief justices of the court of Common Pleas were not knighted till long after.

Our student shall observe, that the knowledge of the law is like Law a deep well. a deep well, out of which each man draws according to the strength of his understanding. He that reaches deepest, he sees the amiable and admirable secrets of the law, wherein, I assure you, the sages of the law in former times (whereof Sir William Herle was a principal one) have had the deepest reach. And as the bucket in the depth is easily drawn to the uppermost part of the water, (for *nullum elementum in suo proprio loco est grave*) but take it from the water, it cannot be drawn up but with great difficulty; so albeit beginnings of this study seem difficult, yet when the professor of the law can dive into the depth, it is delightful, easy, and without any heavy burthen, so long as he keeps himself in his own proper element.

## SECTION 97.

[71 b]

AND after such a voyage royal into Scotland, it is commonly said, that by authority of parliament the escuage shall be assessed and put in certain; scil. a certain sum of money how much every one who holds by a whole knight's fee who was neither by himself nor by any other with the king, shall pay to his lord of whom he holds his land by escuage. As put the case, that it was ordained by the authority of parliament, that every one who holds by a whole knight's fee who was not with the king, shall pay to his lord forty shillings; then he who holds by the moiety of a knight's fee, shall pay to his lord but twenty shillings; and he who holds by the fourth part of a knight's fee, shall pay but ten shillings; and he who hath more, more; and who less, less. Escuage how assessed.

[73 a]

## SECTION 99.

Escuage is a  
tenure in  
chivalry.

**AND if one speak generally of escuage, it shall be intended by the common speech of escuage uncertain, which is knight's service. And such escuage draweth to it homage, and homage draweth to it fealty; for fealty is incident to every manner of service, unless it be to the tenure in frankalmoigne, as shall be said afterwards in the tenure of frankalmoigne. And so he who holds by escuage, holds by homage, fealty, and escuage.**

## SECTION 100.

Sub-lords when  
entitled to escu-  
age.

[73 b]

**AND it is to be understood, that when escuage is so assessed by authority of parliament, every lord, of whom the land is held by escuage, shall have the escuage so assessed by parliament; because it is intended by the law, that at the beginning such tenements were given by the lords to the tenant to hold by such services, to defend their lords as well as the king, and to put in quiet their lords and the king from the Scots aforesaid.**

## SECTION 101.

Distress.

**AND because such tenements came first from the lords, it is reason that they should have the escuage of their tenants. And the lords in such case may distress for the escuage so assessed.**

## CHAPTER IV. SECTION 103.

[74b]

## OF KNIGHT'S SERVICE.

**TENURE** *by homage, fealty, and escuage, is to hold by knight's service, and it draweth to it ward, marriage, and relief. For when such tenant dies, and his heir male is within the age of twenty-one years, the lord shall have the land holden of him until the heir be twenty-one years of age; the which is called full age, because such heir, by intendment of law, is not able to do knights service before his age of twenty-one years. Also if such heir be not married at the time of the death of his ancestor, then the lord shall have the wardship and marriage of the heir. But if such tenant dies, his heir female being of the age of fourteen years or more, then the lord shall not have the wardship of the land, nor of the body; because that a woman of such age may have a husband able to do knights service. But if such heir female be within the age of fourteen years, and unmarried at the time of the death of her ancestor, the lord shall have the wardship of the land held of him, until such heir female be of the age of sixteen years; for it is given by the statute of W. 1. c. 22. that by the space of two years next ensuing the said fourteen years, the lord may tender convenable marriage without disparagement to such heir female. And if the lord within the said two years do not tender such marriage, &c. then she at the end of the said two years may enter, and put out her lord. But if such heir female be married within the age of fourteen years in the life of her ancestor, and her ancestor dies, she being within the age of fourteen years, the lord shall have only the wardship of the land until the end of the fourteen years of age of such heir female, and then her husband and she may enter into the land and oust the lord. For this is out of the case of the said statute, because the lord cannot tender marriage*

Of wardship and age of marriage.

*to her who is married, &c. For before the said statute of W. 1. such issue female, who was within the age of fourteen years at the time of the death of her ancestor, and after she had accomplished the age of fourteen years, without any tender of marriage by the lord unto her, such heir female might have entered into the land and ousted the lord, as appears by the rehearsal and words of the said statute ; so that the said statute was made (as it seemeth) in such case altogether for the advantage of lords. But yet this is always intended by the words of the same statute, that the lord shall not have these two years after the fourteen years, as is aforesaid, only where such heir female is within the age of fourteen years and unmarried at the time of the death of her ancestor.*

Origin of  
knight's service.  
[75b]

*Knights service]* was created and provided for the defence of the realm, to perform which service, heirs are not accounted in law able, till the age of one-and-twenty years. Therefore during their minority, the lord shall have the custody of them, not for benefit only, but that the lord might see that they in their young years are taught the deeds of chivalry, and other virtuous and worthy sciences.

Incidents  
thereto.  
[76a]

*And it draws to it ward marriage, and relief.]* So that regularly there are six incidents to knight's service, viz. two of honour and submission, as homage and fealty ; and four of profit, viz. escuage, whereof he has treated before, ward (i. e. wardship of the land), marriage and relief ; of all which our author has spoken. But there are other incidents to knight's service besides these ; as aid for knighting the lord's eldest son, and aid for marriage of his eldest daughter, which at the common law were uncertain, and were called *rationabilia auxilia*, because if they were excessive and unreasonable in the judgment of the court where they were questioned, they ought not to be paid ; but now as well in the king's case, as in the case of the subject, they are by acts of parliament reduced to certainty, which acts are worthy your reading.

Powers of men  
and women at  
different ages.  
[78b]

*But if such tenant dies, his heir female being of the age of fourteen years, &c.]* A woman has seven ages for several purposes appointed to her by law : as, seven years for the lord to have aid *pur file marier* ; nine years to deserve dower ; twelve years to consent to marriage ; until fourteen years to be in ward ; fourteen years to be

out of ward if she attained thereunto in the life of her ancestor ; sixteen years to tender her marriage if she were under the age of fourteen at the death of her ancestor ; and one and twenty years to alienate her lands, goods, and chattels.

A man also by the law for several purposes has divers ages assigned unto him, viz. twelve years to take the oath of allegiance in the torn or leet ; fourteen years to consent to marriage ; fourteen years for the heir in socage to choose his guardian, and fourteen years is also accounted his age of discretion ; fifteen years for the lord to have aid *pur faire fitz chivaler* ; under one and twenty to be in ward to the lord by knight's service ; under fourteen to be in ward to guardian in socage ; fourteen to be out of ward of guardian in socage ; and one and twenty to be out of ward of guardian in chivalry, and to alien his lands, goods, and chattels.

## SECTION 104.

[79 a]

NOTE, that the full age of male and female, according to common speech, is said the age of twenty-one years. And the age of discretion is called the age of fourteen years ; for at this age, the infant who is married within such age to a woman, may agree or disagree to such marriage.

Age of marriage by common law.

Of full age, which is the age of one and twenty, and of the age of discretion, which is the age of fourteen, somewhat has been spoken before. But now to the point of agreement or disagreement in this case. The time of agreement, or disagreement, when they marry *infra annos nobiles*, is for the woman at twelve or after, and for the man at fourteen or after, and there need no new marriage, if they so agree ; but disagree they cannot before the said ages, and then they may disagree, and marry again to others without any divorce ; and if they once after give consent, they can never disagree after. If a man of the age of fourteen marry a woman of the age of ten, at her age of twelve he may disagree as well as she may, though he were of the age of consent ; because in contracts of matrimony, either both must be bound, or equal

[79 b]

election of disagreement given to both ; and so *è converso*, if the woman be of the age of consent, and the man under.

[82b]

## SECTION 111.

The service in chivalry not always by escuage.

*ALSO, divers tenants hold of their lords by knight's service, and yet they hold not by escuage, neither shall they pay escuage ; as they who hold of their lords by castle-ward, that is to say, to ward a tower of the castle of their lord, or a door or some other place of the castle, upon reasonable warning, when their lords hear that the enemies will come, or are come in England. And in many other cases a man may hold by knight's service, and yet he holds not by escuage, nor shall pay escuage, as shall be said in the tenure by grand serjeanty. But in all cases where a man holds by knight's service, this service draws to the lord ward and marriage.*

[83a]

## SECTION 112.

Relief.

*AND if a tenant who holds of his lord by the service of a whole knight's fee dies, his heir being then of full age, i. e. of twenty-one years, then the lord shall have one hundred shillings, for a relief, and of the heir of him who holds by the moiety of a knight's fee fifty shillings, and of him who holds by the fourth part of a knight's fee twenty-five shillings, and so he who holds more, more, and who less, less.*

[83b]

Relief is no service, but an improvement of the service, or an incident to the service, for the which the lord may distrain, but cannot have an action of debt ; but his executors or administrators may have an action of debt, and cannot distrain.

And it is to be understood, that *feodum militis*, a knight's fee, consists of twenty pound land, and he pays for his relief for a whole knight's fee the fourth part of his fee, viz. five pound, and so according to that rate. And so of a barony or earldom, as hath been said.



## SECTION 113.

[84a]

ALSO, a man may hold his land of his lord by the service of two knights' fees; and then the heir, being of full age at the time of the death of his ancestor, shall pay to his lord ten pound for a relief.

Relief.

This is evident, and needs no explanation.

## SECTION 114.

NOTE, if there be grandfather, father, and son, and the mother dies, living the father of the son, and after the grandfather, who holds his land by knight's service, dies seised, and his land descends to the son of the mother as heir to the grandfather, who is within age; in this case the lord shall have the wardship of the land, but not of the body of the heir, because none shall be in ward of his body to any lord living his father, for the father during his life shall have the marriage of his heir apparent, and not the lord. Otherwise it is, if the father dies living the mother, where the land holden in chivalry descends to the son on the part of the father &c.

Wardship.

Son.] Yet the father shall have the marriage of his daughter if she be his heir apparent; and Littleton's reason extends to the daughter, for (says he) the father shall have the wardship of his heir apparent, within which words the daughter is included, so long as she continues heir apparent.

Of his heir apparent.] And therefore if the father be attainted of felony &c. then cannot the son or daughter be an heir apparent, because the blood is corrupted between them, and consequently in the life of the father his son in that case shall be in ward.

Felony.

[84b]

A woman seised of lands in fee holden by knight's service takes husband who is an alien, and has issue, and the wife dies, the issue shall be in ward, and the father shall not have the custody, for

Alien.

in the eye of the law such issue is not his heir apparent, as Littleton here speaks.

[85a]

## SECTION 116.

Guardian in chivalry.

NOTE, *there is guardian in right in chivalry, and guardian in deed in chivalry. Guardian in right in chivalry is, where the lord by reason of his seigniorie is seised of the wardship of the lands and of the heir, ut suprà. Guardian in deed in chivalry is, where in such case the lord after his seisin grants, by deed or without deed, the wardship of the lands, or of the heir, or of both, to another, by force of which grant the grantee is in possession. Then is the grantee called guardian in fait, or guardian in deed.*

Grant de novo, and assignment of thing granted, distinguished. Corporation.

*By deed or without deed.*] Here Littleton affirms, that the wardship of the body may be granted over without deed; and herein note a diversity between a chattel already created and which properly lies in grant, and a chattel derived out of the freehold of a thing that lies in grant. A corporation aggregate of many cannot make a lease for years without deed, in respect of the quality of the incorporation; but their lessee may assign it over without deed.

Advowson. Next presentation.

If an advowson be holden by knight's service, and the tenant dies, leaving an heir within age, the lord cannot grant the wardship of the advowson without deed; because it is derived out of an inheritance that lies in grant, and passes not by livery; for *jus præsentandi est incorporale*, and so (albeit there be no diversity of opinion in our books) is the law taken at this day.

## CHAPTER V. SECTION 117.

[85b]

## OF SOCAGE.

**TENURE** in socage is, where the tenant holds of his lord by certain service [that is, in lieu of] all manner of services, so that the service be not knight's service. As where a man holds his land of his lord by fealty and certain rent for all manner of services; or else where a man holds his land by homage, fealty, and certain rent, for all manner of services; or where a man holds his land by homage and fealty for all manner of services; for homage by itself makes not knight's service.

Socage is a tenure by service certain.

*Tenure in socage.*] Agriculture or tillage is of great account in law, as being very profitable for the common wealth, wherein the goodness of the habit is best known by the privation; for by laying lands used in tilth [as arable] into pasture, six main inconveniences daily increase. 1st. Idleness, which is the ground and beginning of all mischiefs. 2d. Depopulation and decay of towns; for where in some towns two hundred persons were occupied and lived by their lawful labours, by converting of tillage into pasture there have been maintained but two or three herdsmen. 3d. Husbandry, which is one of the greatest commodities of the realm, becomes decayed. 4th. Churches are destroyed, and the service of God neglected by diminution of church livings (as by decay of tithes, &c.) 5th. Injury and wrong is done to patrons and God's ministers. And 6th. The defence of the land against foreign enemies is enfeebled and impaired, the bodies of husbandmen being more strong and able and patient of cold, heat, and hunger, than any other.

Arable takes precedence of pasture.

The two consequences that follow these inconveniences, are, first, the displeasure of Almighty God; and secondly, the subver-

sion of the polity and good government of the realm ; and all this appears in our books. And the common law gives arable land, the pre-eminency and precedency over meadows, pastures, woods, mines, and all other grounds whatsoever ; and *averia caruca*, the beasts of the plough, have in some cases more privilege than other cattle have. And amongst the Romans agriculture or tillage was of high estimation, insomuch as the senators themselves would put their hand to the plough ; and it is said, that tillage never prospered better than when the senators themselves ploughed.

Etymology of  
socage.  
[86a]

*Socagium.*] Littleton in this chapter, Section 119, fetches this word from the original ; *Socagium, a soke, or plough.* And Bracton agrees herewith. *Dicitur socagium (says he) à socco, et inde tenentes dicuntur socmanni, eò quòd deputati sunt tantummodo ad culturam.* And it is to be observed, that in the book of Domesday, land held by knight's service was called Tainland, and land held by socage was called Reveland. And in that book they who held in socage were called by several names, as *Sochemanni*, or *Sokemanni*, which still continues. And note, that the legal termination of (*agium*) in composition signifies service or duty ; as *homagium*, the service of man ; *escuagium*, service by the shield.

Of the service  
in socage.

*So that the service be not knight's service.*] And in the next section he says, that every tenure which is not a tenure in chivalry is a tenure in socage. Here Littleton speaks of tenures of common persons : for grand serjeant is not knight's service, and yet it is not a tenure in socage, as shall be said hereafter. Also here he means temporal services, and not frankalmoigne, as by the examples he puts is manifest, and as in its proper place shall appear more at large. Also here Littleton speaks of socage largely taken, and so called *ab effectu* ; that is, all tenures that have the like effects and incidents belonging to them as socage has, are termed tenures in socage, albeit originally service of the plough was not reserved. As if originally a rose, a pair of gilt spurs, *a rent*, and such like, were reserved ; these are said to be tenures in socage *ab effectu*, for that there shall be like guardian in socage, like relief, and such other effects and incidents as a tenure in socage has, and are so termed to distinguish the same from knight's service. Nay, the worst tenure that I have read of, of this kind, is to hold lands upon the service of performing the office of hangman or executioner. And it seems, in ancient times such officers were not to be hired, unless

they were bound thereunto by tenure. And so note, that some tenures in socage are named *à causá*, and some, and the greater part, *ab effectu*.

*For homage by itself makes not knight's service.]* But it is a presumption, where homage is due, that the land is held by knight's service, as hath been said.

## SECTION 118.

ALSO, *a man may hold of his lord by fealty only, and such tenure is tenure in socage; for every tenure which is not tenure in chivalry is a tenure in socage.* Most tenures now in socage.

## SECTION 119.

AND *it is said, that the reason why such tenure is called and has the name of tenure in socage, is this: because socagium idem est quod servitium socæ, and soca idem est quod caruca, &c. i. e. a soke or a plough. In ancient time, before the limitation of time of memory, a great part of the tenants who held of their lords by socage, ought to come with their ploughs, every of the said tenants for certain days in the year, to plough and sow the demesnes of the lord. And for that such works were done for the livelihood and sustenance of their lord, they were quit against their lord of all manner of services &c. And because that such services were done with their ploughs, this tenure was called tenure in socage. And afterwards these services were changed into money, by the consent of the tenants and by the desire of the lords, viz. into an annual rent, &c. But yet the name of socage remains, and in divers places the tenants yet do such services with their ploughs to their lords; so that all manner of tenures which are not tenures by knight's service, are called tenures in socage.* Etymology of socage.

*Time of memory.]* Time of memory [or rather perhaps time out of memory] is when no man alive has had any proof to the contrary, or has any consuance to the contrary, as shall be hereafter said in its proper place. And of necessity this change hereafter spoken Tenure not changeable within time of memory. [86 b]

of, must be before time of memory; for within time of memory the services of the plough cannot be changed into money by consent of the tenant and the desire of the lords, *scilicet*, into an annual rent, neither by release or confirmation or other conveyance, so long as the seigniori remains, as shall be said in its due place.

*Ploughland, i.e. arable, now includes every other sort.*

*Ought to come with their ploughs.]* The plough is named *propter excellentium*; but the sickle and the scythe, for the reaping in harvest, and such like, are also included. For as *carucata terra*, a ploughland, may contain houses, mills, pasture, meadow, wood, &c. as pertaining to the plough; so under the service of the plough, all services of tillage and husbandry are included.

[87 a]

## SECTION 120.

Socage and escuage distinguished.

*ALSO, if a man holds of his lord by escuage certain, scil. in this manner, when the escuage runs and is assessed by parliament to a greater or lesser sum, that the tenant shall pay to his lord but half a mark for escuage, and no more nor less, to how great a sum, or to how little the escuage runs, &c. such tenure is tenure in socage, and not knight's service. But where the sum which the tenant shall pay for escuage is uncertain, scil. where it may be that the sum that the tenant shall pay for escuage to his lord, may be at one time more and at another time less, according as it is assessed, &c. such tenure is tenure by knight's service.*

## SECTION 121.

Rent certain is socage.

*ALSO, if a man holds his land to pay a certain rent to his lord for castle-guard, this tenure is tenure in socage. But where the tenant ought by himself or by another to do castle-guard, such tenure is tenure by knight's service. [Note, all the holdings here spoken of are in fee.]*

[87 b]

## SECTION 122.

So is all rent-service.

*ALSO, in all cases where the tenant holds of his lord to pay unto him any certain rent, this rent is called rent-service.*

It is called rent service, because it is accompanied with some corporal service, as fealty at the least; in respect whereof the lord may distrain for it of common right. See more of this matter in the Chapter of Rents.

## SECTION 123.

ALSO, in such tenures in socage, if the tenant have issue and die, Guardian in socage. his issue being within the age of fourteen years, then the next friend (le prochein amy) of that heir to whom the inheritance cannot descend, shall have the wardship of the land and of the heir until the age of fourteen years, and such guardian is called guardian in socage. For if the land descend to the heir of the part of the father, then the mother or other next cousin of the part of the mother, shall have the wardship. And if land descend to the heir of the part of the mother, then the father or next friend of the part of the father shall have the wardship of such lands or tenements. And when the heir comes to the age of fourteen years complete, he may enter and oust the guardian in socage, and occupy the land himself, if he will. And such guardian in socage shall not take any issues or profits of such lands or tenements to his own use, but only to the use and profit of the heir; and of this he shall render an account to the heir, when it pleases the heir after he accomplishes the age of fourteen years. But such guardian upon his account shall have allowance for all his reasonable costs and expences in all things, &c. And if such guardian marry the heir within the age of fourteen years, he shall account to the heir, or his executors, for the value of the marriage, although that he took nothing for the value of the marriage; for it shall be accounted his own folly, that he would marry him without taking the value of the marriage, unless he marries the infant to such an inheritance as is equal in value to the marriage of the heir.

In such tenures in socage.] If a man be seised of a rent charge, rent seck, common of pasture, or such like inheritances, which do not lie in tenure, and dies, his heir within age of fourteen years; in this case the heir may choose his guardian: but if he be of such tender years as he can make no choice, then (if the father has made no disposition of the custody of the child) it were most fit, that the

Some incorporeal hereditaments not in tenure, and of these infant may elect his guardian.

[88a] next of kin, to whom the inheritance cannot descend, should have the custody of him. And whosoever takes the rent &c. the heir shall charge him in an account. But if he hold any land in socage, in that case the guardian in socage shall take into his custody as well the rent charges &c. as the land held in socage, because he has the custody of the heir.

*Collateral heir.* *If the tenant have issue and die.]* The same law it is if the tenant has no issue, but a brother or cousin within age of fourteen years at the time of his death. Also this extends as well to issue female, as to issue male.

*Within the age of fourteen years.]* Of this sufficient has been spoken in the next preceding chapter.

*Prochein amy must be of the blood.*

*Then the next friend (le prochein amy) of that heir to whom the inheritance cannot descend.]* The next friend of the heir &c. Here friend (*amy*) is taken for the next of blood. So the effect of it is, that the next of his blood to whom the inheritance cannot descend, whereby affinity without blood is excluded.

*In equal degree who preferred.*

[88b] *The next.]* If there be three brethren, and the youngest holds land in socage, and has issue and dies [leaving] his issue within age of fourteen years, both the uncles are in equal degree, and yet the eldest shall be guardian; because in equal degree the law prefers him. And yet if lands held in socage are given to a man and the heirs of his body, and he dies, his heir within age, the next cousin of the part of the father, albeit he be worthier, shall not be preferred before the next cousin of the part of the mother, but such of them as first seises the heir shall have his custody. But if lands be given in frankmarriage, and the donees have issue and die [leaving] their issue within age of fourteen years, the next of kin on the part of the mother shall have the custody of the body, and not the next of kin on the part of the father, albeit he first seised it, because the mother was the cause of the gift. If a man be seised of lands holden in socage of the part of his father, and of other lands holden in socage of the part of his mother, and dies, his issue being within the age of fourteen years, in this case such of the next of kin of either side as first takes the body of the heir, shall have him; but the next of blood of the part of the father shall enter into the lands of the part of the mother, and the next of



kin of the part of the mother shall enter into the lands of the part of the father.

*To whom the inheritance cannot descend.]* This does not only exclude an immediate descent, but all possibility of descent. As if a man has issue two sons by several *ventres*, and having lands holden in socage of the nature of burgh English dies, leaving his younger brother within the age of fourteen years, the elder brother of the half blood shall not have the custody of the land; because by possibility the elder may inherit the land; for if the youngest die without issue, and the land descend to an uncle, the elder brother of the half blood may be heir to him.

*Elder half brother cannot be guardian to younger brother in boro' English. [Contra Cro. Eliz. 825; but see T. Jo. 17.*

*Then the mother.]* Note, albeit land cannot descend to the mother from her son, (as hath been said) because inheritance cannot ascend, yet here it appears by Littleton, that she is next of blood, for that none (as hath been said) can be guardian in socage but the next of blood; and the like is to be said of the father, as hereafter next appears.

*Mother.*

*Then the father.]* By this it appears, that the father in case of a tenure in socage shall be guardian in socage, and shall not have the custody of his eldest son, in respect of his paternal natural custody (as he shall have in case of a tenure by knight's service, as before appears), but as guardian in socage. And the reason of the diversity is, for that in the case of a tenure in socage, the father must by law be accountable to the son both for his marriage, and also for the profits of his lands, which he should not be if he had the custody of his eldest son in this case as his father in respect of nature, and the act of law never does any man wrong. But no lord or other person, in respect of any tenure by knight's service or otherwise, shall have the custody of any child who is heir apparent to his father, but the father only during his life, as hath been said before.

*Father.*

It is to be observed, that in the laws of England, there are three kinds of guardians, viz. by the common law, by statute law, and by custom. By the common law there are four sorts of guardians, viz. guardian in chivalry (whom Littleton has described before, Sect. 103, &c.) guardian by nature, as the father of the

*Different sorts of guardian.*

eldest son, of whom Littleton has spoken Sect. 114, guardian in socage, treated of by Littleton in this Section, and guardian *per cause de nurture*; all frequent in our books. By statute, viz. the statute in 4 & 5 Ph. and Mary, of women children, which is either of the father or mother without assignation, or of any other to whom the father shall appoint the custody either by his last will or by any act in his life-time, whereof you shall read at large in Ratcliffe's case in my Reports. Lastly, by custom, as of orphans by the custom of the city of London and of other cities and boroughs.

*Guardian (or trustee) forfeits nothing by outlawry or attainder.*

*Only to the use and profit of the heir.]* And therefore guardian in socage shall not forfeit his interest by outlawry or attainder of felony or treason: because he has nothing to his own use, but only to the use of the heir.

*Survives not to husband.*

[89a]

Also if the mother be guardian in socage, and takes husband, and dies, the husband shall not have this custody by survivorship: because the wife had it *en auter droit* in right of the heir.

*Advowson. Guardian cannot present.*

A guardian in socage shall not present to a benefice in right of the heir; because he cannot be accountable therefore, for he can make no benefit thereof,—the law abhorring simony and every corrupt contract for benefices; and therefore in that case the heir shall present himself. And Britton speaking of these guardians said well, that they are rather servants than guardians.

*Account at 14.*

*He shall render an account &c. after the heir accomplishes the age of fourteen years.]* This point has been much controverted in our books; but it was adjudged in the court of common pleas, Pasch. 16 Eliz. Rot. 436, according to the opinion of Littleton, that the heir after the age of fourteen years shall have an action of account against the guardian in socage, when he will at his pleasure; and so is an ancient question well resolved.

*Reasonable expenses and losses allowed.*

*Allowed his reasonable costs and expenses.]* These latter are due to all accountants by the common law. What other allowances shall the guardian have? If the guardian receive the rents and profits of the lands, and be robbed of the same, whether shall he be discharged thereof upon his account? And it seems, that if he be robbed without his default or negligence he shall be discharged thereof.

As if a bailiff of a manor, or a receiver, or a factor of a merchant, or the like accountant, be robbed, he shall be discharged thereof upon his account. And seeing the guardian shall be charged as bailiff after the heir's age of fourteen, and be discharged upon his account if he be robbed, *pari ratione* if he be robbed before the age of fourteen. But otherwise it is of a carrier, for he has his hire, and thereby implicitly undertakes the safe delivery of the goods delivered to him, and therefore he shall answer the value of them if they be taken from him. Note the diversity, and so it was resolved in the King's Bench.

So it is if goods are delivered to a man to be safely kept, and afterwards those goods are stolen from him, this shall not excuse him; because by the acceptance he undertook to keep them safely, and therefore he must keep them at his peril. So it is if goods be delivered to one to be kept, for to be kept and to be safely kept is all one in law, [*contra*, 2 Ld. Ray. 911]. But if the goods are delivered to him to be kept as he would keep his own, there, if they be stolen from him without his default or negligence, he shall be discharged; so if goods are delivered to one as a gage or pledge, and they are stolen, he shall be discharged, because he has a property in them, and therefore he ought to keep them no otherwise than as his own; but if he who gaged them, tendered the money before the stealing and the other refused to deliver them, then for this default in him he shall be charged. If A. leave a chest locked with B. to be kept, and takes away the key with him, and acquaints not B. what is in the chest, and the chest together with the goods of B. are stolen away, B. shall not be charged therewith, because A. did not trust B. with them, as this case is. And that which has been said before of stealing, is to be understood also of other like accidents, as shipwreck by sea, fire by lightning, and other like inevitable accidents. And all these cases were resolved and adjudged in the King's Bench. And by these diversities are all the books concerning this point reconciled. Note, it is necessary for any who receives goods to be kept, to receive them in this special manner, viz. to be kept as his own, or to keep them at the peril of the owner. But now is Littleton to be further heard.

*Common law applicable to custody of deeds or other chattels.*

[89 b]

*He shall account to the heir.*] He shall account for the marriage of the heir, viz. for so much as any man *bonâ fide* had offered for the marriage, or would give in marriage unto him.

*At what age  
infant may  
make will of  
personalty.\**

*Or to his executors.]* Not that an infant of the age of fourteen may make his will (as some hereupon have collected); but the meaning of Littleton is, that if after his marriage he accomplish his age of eighteen years, at what time he may make his testament and constitute executors of his goods and chattels, and the words are so to be understood, as may stand with law and reason.\*

*Executors may  
bring account  
now.*

Note, executors could not have an action of account at the common law, in respect of the privity of the account; but the statute of W. 2. cap. 23. has given the action of account to executors, the statute of 25 E. 3. cap. 5. to executors of executors, and the statute of 31 E. 3. cap. 11. to administrators.

*Guardian ac-  
countable for  
laches.*

*That he would marry him without taking the value.]* So that the guardian shall not account only for that which he shall receive in this case, but for that also which he might receive. And the guardian in socage is bound by law, that the heir be well brought up, and that his evidences [i. e. his vouchers] be safely kept.

## SECTION 124.

*If a stranger  
occupies, he is  
guardian and  
must account.*

*AND if any other man, who is not the next friend, occupies the lands or tenements of the heir as guardian in socage, he shall be compelled to yield an account to the heir, as well as if he had been next friend; for it is no plea for him in the writ of account to say, that he is not the next friend &c. but he shall answer whether he has occupied the lands or tenements as guardian in socage or no.*

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\* Mr. Hargrave has adduced several very strong reasons and authorities for proving that a female may make a will of personalty at twelve, and a male at fourteen; but Lord Coke's opinion has been too long promulgated and acquiesced in to render it prudent to rely on a contrary doctrine where it can be avoided; and there can be no doubt that all Lord Coke's opinions have had a very sensible influence in forming and establishing the practice of conveyancers, for all the old lawyers were educated almost exclusively on his principles and doctrines. When, therefore, from circumstances, it is deemed essential that an infant of the age of twelve or fourteen should make a will, it would be prudent if the case permit, to obtain a confirmation of the will on the testator's attaining the age of eighteen, as also on attaining twenty-one.

*But quære, if after the heir has accomplished the age of fourteen years, and the guardian in socage continually occupies the land until the heir comes to full age, i. e. of twenty-one years, if the heir at his full age shall have an action of account against the guardian, from the time that he occupied after the said fourteen years, as guardian in socage, or as his bailiff.*

*But quære &c.] This quære came not out of Littleton's quiver; for it is evident, that after the age of fourteen years he shall be charged as bailiff, at any time when the heir will, either before his age of twenty-one years, or after.*

[90a]

## SECTION 125.

*ALSO, if guardian in chivalry make his executors and die, the heir being within age &c. the executors shall have the wardship during the nonage &c. But if the guardian in socage make his executors and die, the heirs being within the age of fourteen years, his executors shall not have the wardship; but another next friend, to whom the inheritance cannot descend, shall have the wardship &c. And the reason of this diversity is, because the guardian in chivalry has the wardship to his own use, and the guardian in socage has not the wardship to his own use, but to the use of the heir. And in this case where the guardian in socage dies before any account made by him to the heir, of this the heir is without remedy, for that no writ of account lies against the executors but for the king only.*

Wardship.

*To his own use.] A tenant holds land of a bishop by knight's service, which seigniority the bishop has in right of his bishopric, the tenant dies, his heir within age, the bishop either before or after seisure dies: neither the king, nor the successor of the bishop, shall have the wardship, but his executors. And yet if a bishop have an advowson, and the church becomes void, and the bishop dies, neither the successor nor the executors shall present, but the king: because it is but a chose in action.*

*Advowson next presentation. Bishops, executors. [7 B. & C. 113.]*

[90b]

## SECTION 126.

Relief a year's  
rent on tenant's  
death.

**ALSO, the lord, of whom the land is holden in socage shall, after the decease of his tenant, have of his heir a relief of one year's rent. As if the tenant holds of his lord by fealty, and ten shillings rent payable at certain terms of the year, then the heir shall pay to the lord ten shillings for a relief, beside the ten shillings which he pays for the rent.**

Aid for mar-  
riage.

Also it is to be noted, that beside relief, whereof Littleton here speaks, there belongs to a tenure in socage of common right, aid for making his eldest son a knight at the age of fifteen years, and to marry his daughter at the age of seven years.

## SECTION 127.

Distress lies for  
relief.

**AND in this case, after the death of the tenant, such relief is due to the lord presently, of what age soever the heir be; because such lord cannot have the wardship of the body, nor of the land of the heir. And therefore he may forthwith distrain after the death of his tenant for the relief.**

## SECTIONS 128, 129.

**OF reliefs where a rose, a pound of pepper, a capon, or such like articles are reserved for rent, there the heir must for the first year render double the rent reserved.**

## SECTION 130.

Escheats lost  
by the disuse  
of fealty.

**ALSO, if any will ask, why a man may hold of his lord by fealty only for all manner of services, in so much as when the tenant shall do his fealty, he shall swear to his lord that he will do to his lord all manner of services due, and when he has done fealty, in this**

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

*It is necessary that he should do some service to his lord.]* For there can be no tenure without some service; because the service makes the tenure. Tenure. [92b]

Lands may escheat to the lord two ways; one by attainder, the other without attainder. By attainder in three ways. 1st. *Quia suspensus est per collum.* 2dly. *Quia abjuravit regnum.* 3dly. *Quia utlegatus est.* Without attainder; as if the tenant dies without heir. Causes of escheat,

*Or perchance some other forfeiture.]* As if the land be aliened in mortmain; or when Littleton wrote, if the tenants had erected crosses upon their houses or tenements that they might claim the privilege of the hospitalers to defend themselves against their lords, they had forfeited their tenancies. But since Littleton wrote, the hospitalers are dissolved, and consequently that forfeiture is gone. and other forfeitures.

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\* The want of attention to this advice of Littleton has, in the present day, occasioned great difficulty in proving that any freehold land is held of the manor within which it is situate. The statutes of limitation do not appear to include fealty, and therefore it is presumed lords of manors may even now require fealty to be done—that being an *inseparable* incident of tenure; but as this must be done in a court baron, and as a court baron cannot be holden without two tenants at the least, the king as lord paramount is now the principal person benefited by escheats.

[93a]

## SECTION 131.

Fealty,

*AND for that fealty is incident to all manner of tenures, except the tenure in frankalmoign (as shall be said in the chapter of frankalmoign), and for that the lord could not at the beginning of the tenure have any other service but fealty, it is reason, that a man may hold of his lord by fealty only; and when he has done his fealty, he has done all his services.*

*an inseparable incident of tenure.*

*Fealty is incident.]* Of incidents there are two sorts, viz. separable, and inseparable. Separable, as rents incident to reversions, &c. which may be severed: inseparable, as fealty to a reversion or tenure, which cannot be severed: for as all lands and tenements within England are holden of some lord or other, and either mediately or immediately of the king; so to every tenure at the least fealty is an inseparable incident, so long as the tenure remains; and all other services, except fealty, are severable. But where the tenure is by fealty only, there is no relief due for the cause aforesaid.

## SECTION 132.

*Tenants for life and years hold by fealty, but not tenants at will, except copyholders.*

*ALSO, if a man lets to another lands or tenements for term of life, without naming any rent to be reserved to the lessor, yet he shall do fealty to the lessor, because he holds of him. Also if a lease be made to a man for term of years, it is said, that the lessee shall do fealty to the lessor, because he holds of him. And this is well proved by the words of the writ of waste, when the lessor has cause to bring a writ of waste against him; which writ shall say, that the lessee holds his tenements of the lessor for term of years. So the writ proves a tenure between them. But he, who is tenant at will according to the course of the common law, shall not do fealty; because he has not any sure estate. But otherwise it is of tenant at will according to the custom of the manor; for he is bound to do fealty to his lord for two causes. The one is by reason*



*of the custom; and the other is, for that he takes his estate expressly upon condition to do his lord fealty.*

*And this is well proved by the words of the writ &c.]* Note, the original writs are (as it were) the foundations and grounds of the law, and, as it appears, by Littleton, are of great authority for the proof of the law in particular cases. Original writs one principal evidence of the common law. [93b]

## CHAPTER VI. SECTION 133.

## FRANKALMOIGN.

What it is, [expressly saved by statute 12 Car. 2. c. 24. s. 7.]

TENANT in frankalmoign is, where an abbot, or prior, or other man of religion or holy church holds of his lord in frankalmoign; that is to say in Latin, in liberam eleemosinam, that is, in free alms. And such tenure began first in old time. When a man in old time was seised of certain lands or tenements in his demesne as of fee, and of the same land infeoffed an abbot and his convent, or prior and his convent, to have and to hold to them and their successors in pure and perpetual alms, or in frankalmoign, or by these words to hold of the grantor, or of the lessor, and his heirs in free alms: in such cases the tenements were holden in frankalmoign.

[94 a]

Since Littleton wrote, all abbeys, priories, monasteries, and other religious houses of monks, canons, friars, and nuns &c. have been dissolved, and their possessions given to the crown.

Ecclesiastical division of England.

Westminster was erected a bishopric by H. 8, but by Queen Mary it was restored to an abbey, and by Queen Elisabeth created a deanery collegiate.

The ecclesiastical state of England, as it stands at this day (which is necessary for our student to know), is divided into two provinces, or archbishoprics, viz. of Canterbury and of York. The archbishop of Canterbury is stiled *Metropolitanus et Primas totius Angliæ*, and the archbishop of York *Primas Angliæ*. Each archbishop has within his province, suffragan bishops of several dioceses. The archbishop of Canterbury has under him within his province, of ancient foundations, viz. Rochester his principal chaplain, London his dean, Winchester his chancellor, Norwich, Lincoln, Ely, Chichester, Salisbury, Exeter, Bath and Wells, Worcester, Coventry and Litchfield, Hereford, Landaff, St. David, Bangor, St. Asaph, and four founded by king Henry 8. erected out of the ruins of dissolved monasteries (that is to say) Gloucester, Bristol, Peterborough, and Oxford. The archbishop of

York has under him four, viz. the bishops of the county palatine of Chester, (newly erected by king Henry VIII. and annexed by him to the archbishop of York,) of the county palatine of Durham, Carlisle, and the Isle of Man, annexed to the province of York by Henry VIII., but this archbishop anciently had, a greater number which time has taken from him. The extent of every diocese you may elsewhere read, the which for brevity I here omit. All the said archbishoprics and bishoprics of England were founded by the kings of England, to hold by barony, as hereafter shall be said. And every archbishop and bishop has his dean and chapter, whereof more shall be said hereafter. The archbishop of Canterbury has the precedence, next to him the archbishop of York, next to him the bishop of London [next to him the bishop of Durham, 31 H. 8. c. 10. s. 3.], and next to him the bishop of Winchester, and then all other bishops of both provinces after their antiquity. Every diocese is divided into archdeaconries, whereof there are sixty; and the archdeacon is called *oculus episcopi*; and every archdeaconry is parted into deaneries; and deaneries again into parishes, towns and hamlets. And thus much, for the better understanding of our author, and how the state ecclesiastical stands at this day, shall suffice.

By the ancient common law of England, a man could not alien such lands as he had by descent, without the consent of his heir; yet he might give a part to God in free alms, or with his daughter in free marriage, or to his servant in *remuneratione serviti*.

Frankalmoigne.  
[94b]

*To have and to hold to them and their successors.]* For in case of an abbot or prior and convent, regularly a fee-simple does not pass without this word (successors); for the diversity stands thus between a corporation aggregate of many persons capable, and a sole corporation. As if lands are given to a dean and chapter, they have a fee-simple without this word (successors), for that body never dies; but if lands are given to a bishop, parson, or any other sole corporation, who after their decease have a succession, there without this word (successors) nothing passes unto them but for life. But of corporations aggregate of many, there is a diversity when the head and body both are capable, as in the case of dean and chapter, and when one (as hath been said) is only capable, as in case of an abbot or prior and convent; also lands must be given to a corporation aggregate of many by deed, but to a sole corpor-

Sole and aggregate corporations distinguished as to the word "successors," and capacity of taking by deed or without deed.

ation it may be granted without deed ; but yet out of these general rules, the case of frankalmoign is excepted for by these words, “ *to hold of the grantor or of the lessor and his heirs in free alms,*” a fee-simple passes without this word (successors), albeit it be in case of a sole corporation. For as in case of a gift in frankmarriage, an estate tail passes to the donees without the words (of the heirs of their two bodies) as hath been said in the Chapter of Fee-Tail ; so in case of a gift in frankalmoign (which may be resembled to a divine marriage), a fee-simple passes, though it be in case of a sole corporation, without this word (successors.) And besides, grants in frankalmoign are ancient grants, as hath been said, and therefore shall be allowed as the law was taken when such grants were made.

[95a]

## SECTION 134.

Who may take  
in frankal-  
moign.

*IN the same manner it is, where lands or tenements were granted in ancient time to a dean and chapter and to their successors, or to a parson of a church and his successors, or to any other man of holy church and to his successors, in frankalmoign, if he had capacity to take such grants or feoffments, &c.*

Dean and chap-  
ter, what.

Dean.] *Decanus*, is derived of the Greek word δεκα, that signifies Ten, for that he is an ecclesiastical secular governor, and was anciently over ten prebends or canons at the least in a cathedral church, and is head of his chapter. *Chapter. Capitulum est clericorum congregatio sub uno decano in ecclesiâ cathedrali.* And chapters are twofold, viz. the ancient and the later. And the later are also of two sorts. First, those which were translated or founded by king Henry the eighth, in place of abbots and convents or priors and convents, which were chapters while they stood ; and these are new chapters to old bishoprics. Secondly, where the bishopric was newly founded by Henry the eighth (as Chester, Bristol, &c.) there the chapters also are new. There is a great diversity between the coming in of the ancient deans and of the new. For the ancient come in, in much like sort as bishops do ; for they are chosen by the chapter, by a *conge de eslier*, as bishops are, and the king giving his royal assent they are confirmed by the bishop. But they who are either newly translated or founded, are donative, and by the king's

letters patent are installed, which are matters necessary to be known.

*If he had capacity to take.]* For ecclesiastical persons have not capacity to take in succession, unless they be bodies politic; as bishops, archdeacons, deans, parsons, vicars, &c. or lawfully incorporate by the king's letters patent, or prescription; as deans and chapters, colleges, &c. But a college of religious persons, chantry priests, and such like, who are not lawfully incorporated, but only consist in vulgar reputation, have no capacity to take in succession. Therefore Littleton added materially (*if he had capacity to take.*)

*What ecclesiastical bodies have capacity to take.*

### SECTION 135.

*AND they who hold in frankalmoign, are bound of right before God to make orisons, prayers, masses, and other divine services, for the souls of their grantors or feoffors and the souls of their heirs who are dead, and for the prosperity and good life and good health of their heirs who are alive. And therefore they shall do no fealty to their lord; because this divine service is better for them before God than any doing of fealty; and also because that these words (frankalmoign) exclude the lord to have any earthly or temporal service, but to have only divine and spiritual service to be done for him, &c.*

*Of what the service in frankalmoign consists.*

IN this section there appears a division of tenures, that is to say, some are spiritual and some are temporal. And of spiritual some are uncertain, as tenures in frankalmoign; and some are certain, as tenures by divine service. Again, divine service is two-fold; either spiritual, as prayers to God; or temporal, as distribution of alms to poor people.

*Division of spiritual tenures.*

*To make orisons, prayers, masses, and other divine services.]* Since Littleton wrote, the Liturgy or book of Common Prayer and of celebrating divine service is altered. But notwithstanding this alteration the tenure in frankalmoign remains; and such prayers and divine service shall be said and celebrated, as now is authorized: yea, though the tenure be in particular, as Littleton hereafter says, viz. *to sing a mass &c, or to sing a placebo et dirige*, yet if

*Of the service at this day.*  
[95b]

the tenant says the prayers now authorized, it suffices. And as Littleton has said before in the case of socage, the changing of one kind of temporal services into other temporal services alters neither the name nor the effect of the tenure ; so the changing of spiritual services into other spiritual services alters neither the name nor effect of the tenure. And albeit the tenure in frankalmoign is now reduced to a certainty contained in the book of Common Prayer, yet seeing the original tenure was in frankalmoign, and the change is by general consent by authority of parliament, whereunto every man is party, the tenure remains as it was before.

## SECTION 136.

No distress for  
on-perform-  
ce of service ;

*AND if they who hold their tenements in frankalmoign will not or fail to do such divine service as aforesaid, the lord cannot distrain them for not doing this &c. because it is not put in certainty what services they ought to do. But the lord may complain of this to their ordinary or visitor, praying him that he will lay on them some punishment and correction and also provide that such negligence be no more done &c. And the ordinary or visitor of right ought to do this &c.*

[96b]

## SECTION 137.

except for di-  
vine service in-  
certain.

*BUT if an abbot or prior holds of his lord by a certain divine service, as to sing a mass every Friday this is not frankalmoign, but it is called tenure by divine service in certain. For in tenure in frankalmoign no mention is made of any manner of service ; but for divine service in certain the lord may distrain.*

*Heads of monas-  
teries held by  
barony, as do  
bishops and  
archbishops now.*

[97a]

There were within this realm of England one hundred and eighteen monasteries, founded by the kings of England ; whereof such abbots and priors as were founded to hold of the king *per baronium*, and were called to the parliament by writ, were lords of parliament, and had places and voices there. And of them there were twenty-seven abbots and two priors, as by the rolls of parliament appears. But since our author wrote, all these (as hath

been said) are dissolved. All the archbishops and bishops of England have been founded by the kings of England and hold of the king by barony, and have been all called by writ to the court of parliament and are lords of parliament. And the bishoprics of Wales were founded by the princes of Wales; and the principality of Wales was holden of the king of England, as of his crown. And the bishops of Wales are so called by writ to parliament, and are lords of parliament, as bishops of England are.

## SECTION 138.

[97 b]

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

Frankmarriage and frankalmoign distinguished as to fealty.

## SECTION 139.

[98 a]

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

Alienee of estate in frankalmoign holds by fealty.

Principle of  
tenure still pre-  
served; but  
every new tenure  
is in socage.

It is to be remembered that all lands and tenements in England in the hands of any subject, are holden of some lord or other, and that every tenant must do some kind of service; and that all lands and tenements are holden either mediately or immediately of the king, for originally all lands and tenements were derived from the crown. And it is to be observed, that when the law creates any new tenure, it is the lowest (viz. tenure in socage), and with the least service that can be done, and nearest to the freedom of the former service: as in this case a tenure in socage by fealty only is created by the law, which is the lowest and least service the law can create, because fealty is incident to every tenure except tenure in frankalmoign. It appears by our books, that a seigniorship in frankalmoign may be granted over, and consequently the tenant shall hold of the grantee by fealty only.

[98 b]

## SECTION 140.

Frankalmoign  
cannot be cre-  
ated at this day;

**ALSO, if a man grant at this day to an abbot or to a prior lands or tenements in frankalmoign, these words (frankalmoign) are void, for it is ordained by the statute quia emptores terrarum (which was made anno 18 E. 1.) that none may alien nor grant lands or tenements in fee-simple to hold of himself.**

except by licence  
from the crown.  
[99 a]

But it is to be understood, that a man seised of lands may at this day give the same to a bishop, parson &c. and their successors in frankalmoign, by the consent of the king, and the lords mediate and immediate of whom the land is holden; for the rule is *quilibet potest renunciare juri pro se introducto*.

## SECTIONS 141, 142.

Tenure is of  
donor.

[99 b]

**AND note, that none may hold lands or tenements in frankalmoign, but only of the grantor or of his heirs, who is bound to indemnify the tenant against the distress of any lord paramount.**



## CHAPTER VII. SECTION 143.

[100 b]

## HOMAGE ANCESTRAL.

**TENANT** *by homage ancestral is, where a tenant holds his land of his lord by homage, and the same tenant and his ancestors whose heir he is, have holden the same land of the same lord and of his ancestors whose heir the lord is, time out of memory of man, by homage, and have done to them homage. And this is called homage ancestral, by reason of the continuance which has been, by title of prescription, of the tenancy in the blood of the tenant, and also of the seigniorship in the blood of the lord. And such service of homage ancestral draws to it warranty, that is to say, that the lord who is living and has received the homage of such tenant, ought to warrant his tenant when he is impleaded of the land holden of him by homage ancestral.*

This tenure is where lord and tenant have both immemorially held by descent.

## SECTION 147.

[103 a]

**IF** *a man who holds his land by homage ancestral, alien to another in fee, the alienee shall do homage to his lord: but he holds not of his lord by homage ancestral, because the tenancy was not continued in the blood of the ancestors of the alienee; neither shall the alienee have warranty of the land of his lord, because the continuance of the tenancy in the tenant and to his blood is by the alienation discontinued. And so see, that if the tenant who holds his land of his lord by homage ancestral aliens in fee, though he takes an estate again of the alienee in fee, yet he holds the land by homage, but not by homage ancestral.*

How affected by alienation.

[103 b]

## SECTION 148.

Homage once  
performed en-  
dures for the  
tenant's life.

*ALSO, it is said, that if a man holds his land of his lord by homage and fealty, and he has done homage and fealty to his lord, and the lord has issue a son, and dies, and the seigniorship descends to the son ; in this case the tenant who did homage to the father shall not do homage to the son, because that when a tenant has once done homage to his lord, he is excused for term of his life to do homage to any other heir of the lord. But yet he shall do fealty to the son and heir of the lord, although he did fealty to his father.*

## CHAPTER VIII. SECTION 153.

[105 b]

## GRAND SERJEANTY.

**TENURE** *by grand serjeanty is where a man holds his lands or tenements of our sovereign lord the king by such services as he ought to do in his proper person to the king, as to carry the banner of the king, or his lance, or to lead his army, or to be his marshal, or to carry his sword before him at his coronation, or to be his sewer at his coronation, or his carver, or his butler, or to be one of his chamberlains of the receipt of his exchequer, or to do other like services, &c. And the cause why this service is called grand serjeanty is, for that it is a greater and more worthy service than the service in the tenure of escuage.* What it is.

*Of our lord the king.]* This tenure hath seven special properties. Incidents.  
 1st. To be holden of the king only. 2d. It must be done, when the tenant is able, in proper person. 3d. This service is certain and particular. 4th. The relief due in respect of this tenure differs from knight's service. 5th. It is to be done within the realm. 6th. It is subject to neither *aid pur faire fitz chivaler*, or *file marier*. And 7th. It pays no escuage. But it appears, that tenant by grand serjeanty may in some cases make a deputy; and the diversity seems to be, that where the grand serjeanty is to be done to the royal person of the king, or to execute any high and great office, there his tenant cannot make a deputy without the king's licence. But he who holds to serve him in his war within the realm or by cornage, may make a deputy. [107 a]  
If he may make a deputy.

[107b]

SECTION 158.

Ward; marriage; relief.

*AND note, that all who hold of the king by grand serjeanty, hold of the king by knight's service; and the king for this shall have ward, marriage, and relief; but he shall not have of them escuage, unless they hold of him by escuage.*

## CHAPTER IX. SECTION 159.

[108 a]

## PETIT SERJEANTY.

**TENURE** *by petit serjeanty is where a man holds his land of our sovereign lord the king to yield to him yearly a bow, or a sword, or a dagger, or a knife, or a lance, or a pair of gloves of mail, or a pair of gilt spurs, or an arrow, or divers arrows, or to yield such other small things belonging to war.* What it is.

*Of our lord the king.*] And so Littleton concludes this Chapter, that a man cannot hold by grand serjeanty or petit serjeanty but of the king, and of the king as of his person, and not of any honour or manor. And it is to be observed, that regularly a tenure of the king as of his person is a tenure *in capite*, so called *propter excellentiam*. And this tenure of the king *in capite*, is said to be a tenure of the king as of his crown. And therefore if a seigniorie escheat to the king the tenant holds of the person of the king, and not *in capite*, because the original tenure was not created by the king. And therefore it is directly said that a tenure of the king *in capite* is when the land is not holden of the king as of any honour, castle, or manor &c. but when the land is holden of the king as of his crown. Held only of the king.

## SECTION 160.

[108 b]

**AND** *such service is but socage in effect ; because such tenant by his tenure ought not to go nor to do any thing in his proper person touching the war, but to render and pay yearly certain things to the king, as a man ought to pay a rent.* It is in effect a socage tenure.

That is, the dignity of the person of the king gives it the name of petit serjeanty, but if it were the case of a common person it would be called plain socage, *ab effectu*; for it shall have such effect or incidents as belong to socage, and neither ward nor marriage &c. for they belong to knight's service, and not to socage.

SECTION 161.

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

CHAPTER X. SECTION 162.

TENURE IN BURGAGE.

TENURE *in burgage* is, where in an ancient borough the king is lord, and they who have tenements within the borough hold of the king their tenements at a certain rent by the year. And such tenure is but tenure in socage. What it is.

SECTION 163.

[109 a]

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

SECTION 164.

AND it is to wit, that the ancient towns called boroughs are the most ancient towns in England; and from these towns come the burgesses of parliament, when the king has summoned his parliament.

Every borough incorporate that had a bishop within time of memory, is a city, albeit the bishopric be dissolved; as Westminster had of late a bishop, and therefore it yet remains a city. The burgh of Cambridge, an ancient city, as it appears by a judicial record (which is to be preferred before all others) where *mos civitatis Cantabrigiæ* is found by the oath of twelve men, the recognitors of that assize; which (omitting many others) I thought good to men-

<sup>City, what.</sup>  
[109 b]

tion, in remembrance of my love and duty *almæ matri academiæ Cantabrigiæ*. There are within England two archbishoprics, and twenty-three other bishoprics. Therefore so many cities there are; and Cambridge and Westminster being added, there are in all twenty-seven cities within this realm, and may be more than at this time I can call to memory. It is not necessary that a city be a county of itself; as Cambridge, Ely, Westminster &c. are cities, but are no counties of themselves, but are part of the counties where they are.

*Of the parliament, its antiquity and power.*

[110a]

*Pref. Ruff. Stats.*

*Come the burgesses of parliament.]* Parliament is the highest and most honourable and absolute court of justice in England, consisting of the king, the lords of parliament, and the commons. And again, the lords are here divided into two sorts, viz. spiritual and temporal. And commons are divided into three parts, viz. into knights of shires or counties, citizens out of cities, and burgesses out of boroughs. And as to the antiquity of this high court of parliament, it appears, that divers parliaments have been holden long before and until the time of the conqueror. The conclusion of that great parliament holden by king Ethelstan, at Grately, is very remarkable, which I have seen in these words. "All this was enacted in that great synod or council of Grately, wherent was the archbishop of Wolfhelm, with all the noblemen and wise men, which king Athelstan called together." There have been in the time of, and since the conquest, in the reigns of H. 1. king Stephen, H. 2., R. 1., king John, H. 3. &c. two hundred and eighty sessions of parliament, and at every session divers acts of parliament made, no small number whereof are in print. The jurisdiction of this court is so transcendant, that it makes, enlarges, diminishes, abrogates, repeals, and revives laws, statutes, acts, and ordinances, concerning matters ecclesiastical, capital, criminal, common, civil, martial, maritime, and the rest. None can begin, continue, or dissolve the parliament, but by the king's authority.

[110b]

## SECTION 165.

*Boro English. Youngest son.*

**ALSO,** *for the greater part such boroughs have divers customs and usages, which are not had in other towns. For some boroughs have such a custom, that if a man has issue many sons and dies, the*



*youngest son shall inherit all the tenements which were his father's within the same borough, as heir unto his father by force of the custom ; the which is called borough English.*

*The youngest son shall inherit.]* And by some customs the youngest brother shall inherit ; for *consuetudo loci est observanda.* Youngest brother.

*All the tenements.]* Either in fee-simple, fee-tail, or any other inheritance. If lands of the nature of borough English are let to a man and his heirs during the life of I. S. and the lessee dies, the youngest son shall enjoy it. Estate pur auter vie.

### SECTION 166.

*ALSO, in some boroughs, by custom, the wife shall have for her dower all the tenements which were her husband's.* Dower of Boro' English.

*Which were her husband's &c.]* Here is implied by (&c.) that in some places the wife shall have the moiety of the lands of her husband, so long as she lives unmarried ; as in gavelkind. And of lands in gavelkind a man shall be tenant by the curtesy without having any issue. In some places the widow shall have the whole, or half, *dum sola et casta vixerit*, and the like. [111 a]

### SECTION 167.

*ALSO, in some boroughs, by custom, a man may devise by his testament his lands and tenements which he has in fee-simple within the same borough at the time of his death ; and by force of such devise, he to whom such devise is made, after the death of the devisor, may enter into the tenements so to him devised, to have and to hold to him, after the form and effect of the devise, without any livery of seisin thereof to be made to him &c.* Power of devising allowed by custom in some borough before stat. of Wills.

*Which he has in fee-simple.]* For lands in tail are not devisable by will ; and therefore Littleton in this place adds, (*which he* Estate tail not devisable.

has in fee-simple) which he purposely omitted in the clause concerning borough English ; because there an estate tail is included.

Executors assent necessary to bequest of chattels, contra as to freeholds.

*May enter.*] Note, if a man devise either by special name or generally, goods or chattels real or personal, and dies, the devisee cannot take them without the assent of the executors. But when a man is seised of lands in fee, and devises the same in fee, in tail, for life, or for years, the devisee shall enter ; for in that case the executors have no meddling therewith. And in the case of a devisee by will of lands, whereof the devisor is seised in fee, the freehold or interest in law is in the devisee before he enters, and in that case nothing (having regard to the estate or interest devised) descends to the heir. But if the heir of the devisor enters and holds the devisee out, he may either enter as Littleton here says, or have his writ called *ex gravi quærelâ* ; and this writ (without any particular usage) is incident to the custom to devise ; for otherwise, if a descent were cast before the devisee entered, the devisee would have no remedy. After an actual possession this writ lies not ; for then the devisee may have his ordinary remedy by common law.

Seisin of devisee before entry.

Lands not devisable at common law.

[111 b]

Secus now by stat. of Wills.

And well said Littleton, that lands and tenements were devisable in burghs by custom ; for at common law no lands or tenements were devisable by last will or testament, nor could they be transferred from one to another in any way except by solemn livery of seisin, matter of record, or sufficient writing ; but as Littleton here says, that by certain private customs in some burghs they are devisable. But now since Littleton wrote, by the statutes of 32 and 34 H. 8. lands and tenements are generally devisable by the last will in writing of the tenant in fee-simple, whereby the ancient common law is altered ; whereupon many difficult questions, and most commonly disherison of heirs (when the devisors are pinched by the messengers of death) do arise and happen. But these statutes take not away the custom to devise ; [and the statute of frauds, it should be remembered contains many regulations about the execution of wills, 29 Car. 2. c. 3.].

## SECTION 168.

[112a]

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

Husband may devise to his wife.

The last will preferred.

*A man may not grant, nor give, his tenements to his wife &c.*] This opinion is clear, for by no conveyance at the common law a man could during the coverture, either in possession, reversion, or remainder, limit an estate to his wife. But a man may by his deed covenant with others to stand seised to the use of his wife, or make a feoffment or other conveyance to the use of his wife; and now the estate is executed to such use by the statute of 27 H. 8. for an use is but a trust and confidence, which by such means may be limited by the husband to his wife. But a man cannot covenant with his wife to stand seised to her use; because he cannot covenant with her for the reason that Littleton here yields.

Husband's conveyance to his wife bad, unless it be by uses.

*One person in law.*] If *cestuique use* had devised that his wife should sell his land, and made her executrix and died, and she took another husband, she might sell the land to her husband, for she did it *in auter droit*, and her husband should be in by the devisor.

Wife having power of sale may appoint to her husband.

*By his testament.*] *Testamentum* is (as said before) *testatio mentis*, and is to be favourably expounded according to the meaning of the testator.

Will. Construction.  
[112b]

*To his wife.*] And Littleton himself yields the reason; because the devise does not take effect till after the decease of the devisor. But albeit the last will does not take effect until after his decease, yet if a *fême covert* be seised of lands in fee, she cannot devise the same to her husband, because at the making of her will she had no power to devise the same, being *sub potestate viri*; and the law will intend that it is done by coercion of her husband.

Wife cannot devise to husband.

First grant;  
last will.

*Divers testaments.*] For *voluntas testatoris est ambulatoria usque ad mortem* (as hath been said before) and the latter will countermands the first. And it is truly said, that the first grant and the last will is of the greatest force.

## SECTION 169.

Devise that his executors sell, they may make a feoffment, but heir takes till sale.

*ALSO, by such custom a man may devise by his testament, that his executors may alien and sell the tenements that he has in fee-simple, for a certain sum to distribute for his soul. In this case, though the devisor die seised of the tenements, and the tenements descend to his heir, yet the executors, after the death of the testator, may sell the tenements so devised to them, and put out the heir, and thereof make a feoffment, alienation and estate by deed, or without deed, to those to whom the sale is made. And so may ye here see a case, where a man may make a lawful estate, and yet he has nought in the tenements at the time of the estate made. And the cause is, for that the custom and usage is such. For a custom, used upon a certain reasonable cause, deprives the common law.*

And that, which in Littleton's time a man might do by custom in some particular places, he may now do by the statutes of 32 & 34 H. 8. generally.

Surviving executors may exercise a general power of sale if they are not particularly named, or if they have an estate as well as a power.  
[2 S. & S. 238.]

*The executors, after the death of the testator, may sell.*] Here it appears, that the executors having but a power, as Littleton puts the case, to sell, they must all join in the sale. Then put the case, that one dies, it is regularly true, that being but a bare authority, the survivors cannot sell. But if a man devises his land to A. for term of life, and that after his decease his lands shall be sold by his executors generally (as Littleton here puts his case), and makes three or four executors, and during the life of A. one of the executors dies, and then A. dies, the other two or three executors may sell, because the land could not be sold before, and the plural number of his executors remains. But if they had been named by their names, as I. S., I. N., I. D., and I. G., his executors, then the survivors could not sell the land, because the words of the testator could not be satisfied; and I myself knew this case adjudged. A special verdict was found, that A. was

[113a]

seised of certain lands in fee, and devised the same in tail; and if the donee died without issue, that his said land should be sold by his sons in law, he in truth having five sons in law. One of his sons in law died in the lifetime of the donee, and after the donee died without issue, and then the four sons in law sold the land, and it was adjudged that the sale was good, because they were named generally by his sons in law, and the lands could not be sold by them all; and the words of the will in a benign interpretation are satisfied in the plural number, albeit they had but a bare authority: but if they had been particularly named, it had been otherwise. And if a man devises lands to his executors to be sold, and makes two executors, and the one dies, yet the survivor may sell the land; because as the estate survives, so shall the trust; and so note the diversity between a bare trust, and a trust coupled with an interest. And in both these cases the executors may sell part of the land at one time, and part at another, as they may find purchasers.

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

*Concurrence of renouncing executors not necessary by statute.*

*Executor renouncing cannot purchase.*

*Mesne profits not assets, unless made so.*

*And thereof make a feoffment.]* For albeit the executors in this case have no estate or interest in the land, but only a bare and naked power, yet this feoffment amounts to an alienation, to vest

*Feoffin in by deviser.*

the land in the feoffee, as it appears here, and the feoffee shall be in by the devisor.

*Reversion devised to be sold.*

*By deed or without deed.*] And therefore if by the custom a man devises that a reversion or any other thing which lies in grant shall be sold by his executors, they may sell the same without deed; for the vendee shall be in by the devisor, and not by the executors, as hath been said.

## SECTION 170.

Customs must have been used time out of mind.

AND note, that no custom is to be allowed, but such custom as hath been used by title of prescription, at common law, time out of mind.

Custom what essential to.  
[113b]

[114b]

To customs and prescriptions, these two incidents are inseparable, viz. possession or usage, and time. Possession must have three qualities: it must be long, continual, and peaceable; and note, if a man prescribes to have a rent, and likewise to take a distress for the same, it cannot be avoided by pleading, that the rent has always been paid by coercion, albeit it began by wrong.

What may be claimed by prescription.

*A title of prescription.*] Seeing that prescription makes a title, it may be enquired, first, to what things a man may make a title by prescription without charter; and secondly, how it may be lost by interruption. And first, as to such franchises and liberties as cannot be seised when forfeited before the cause of forfeiture appears of record, no man can make a title by prescription, because prescription being but an usage *in pais*, it cannot extend to such things as cannot be had without matter of record: as for instance the goods and chattels of traitors, felons, felons of themselves, fugitives, outlaws, deodands &c. But to treasure-trove, waifs, estrays, wreck of sea, to hold pleas, courts leet, hundreds &c. to have a park, warren, royal fishes, as whales, sturgeons &c. fairs, markets, frank-foldage, the keeping of a gaol, toll, a corporation by prescription, and the like, a man may make a title by usage and prescription only without any matter of record. *Vide* Sect. 310. where a man shall make a title to lands by prescription. But it is to be observed, that although a man cannot, as is aforesaid, prescribe in the said franchise to have *bona et catalla proditorum*,

*felonum &c.* yet may they and the like be had obliquely, or by a kind of prescription; for a county palatine may be claimed by prescription, and by reason thereof to have *bona et catalla proditorum, felonum &c.*

As to the second, by what means a title by prescription, or custom, may be lost by interruption, it is to be known, that the title, being once gained by prescription or custom, cannot be lost by interruption of the possession for ten or twenty years, but by interruption in the right only; as if a man has a rent or common by prescription, unity of possession of as high and perdurable estate in the land is an interruption in the right. But if a man has a common by prescription, and takes a lease of the land for twenty years, whereby the common is suspended, after the years ended, he may claim the common generally by prescription.

*Custom of prescription not lost by 20 years' disuse, except by merger of rights.*

Time of limitation, as it is taken in law, is a certain time prescribed by statute, within which the demandant in the action must prove himself or some of his ancestors to be seised. Time of limitation is twofold: 1st. In writs; and that is by divers acts of parliament. 2dly. To make a title to any inheritance; and that (as Littleton here says) is by the common law. Limitation of time in writs is provided for by the statutes of Merton, and W. 1. which limited the time from the first year of R. 1. and since Littleton wrote, the former limitation of time in a writ of right is changed and reduced to threescore years next before the *teste* of the writ, by the stat. 32 H. 8.

*Statutes of limitation.*

[115a]

*Time out of mind.*] Is where there is no memory of man to the contrary. But if there be any sufficient proof of record or writing to the contrary, albeit it exceed the memory, or proper knowledge of any man living, yet is it within the memory of man. And this is the reason, that regularly a man cannot prescribe or allege a custom against a statute, because that is matter of record, and is the highest proof and matter of record in law. But yet a man may prescribe against an act of parliament when his prescription or custom is saved or preserved by another act of parliament.

*Memory of man includes written documents.*

There is also a diversity between an act of parliament in the negative and in the affirmative; for an affirmative act does not take away a custom; as the statutes of wills of 32 & 34 H. 8. do not take away a custom to devise lands, as hath often been ad-

*Statutes, construction of negative and affirmative.*

judged. Moreover, there is a diversity between statutes that are in the negative ; for if a statute in the negative be declarative of the ancient law, that is in affirmance of the common law, there as a man may prescribe or allege a custom against the common law, so a man may prescribe against such a statute ; for, as our author says, *consuetudo &c. privat communem legem.*

*Municipal law consists of common law : Statute law and customs.*

[115b]

*Common law.*] The law of England is divided, as hath been said before, into three parts ; 1st. The common law, which is the most general and ancient law of the realm, of part whereof Littleton wrote. 2dly. Statutes or acts of parliament. And 3dly. Particular customs (whereof Littleton also makes some mention). I say particular, for if it be the general custom of the realm, it is part of the common law. The common law has no controller in any part of it, but the high court of parliament ; and if it be not abrogated or altered by parliament, it remains still. The common law appears in the statute of Magna Charta and other ancient statutes (which for the most part are affirmations of the common law) in the original writs, in judicial records, and in our books of terms and years. Acts of parliament appear in the rolls of parliament, and for the most part are in print. Particular customs are to be proved.

## SECTION 171.

*ALSO, every borough is a town, but not è converso. More shall be said of customs in the tenure of villeinage.*



## CHAPTER XI. SECTION 172.

[116 a]

## OF VILLEINAGE.

**TENURE** in villeinage is most properly, when a villein holds of his lord to whom he is a villein, certain lands or tenements according to the custom of the manor, or otherwise, at the will of his lord, and to do to his lord, villein service; as to carry and recarry the dung of his lord out of the city, or out of his lord's manor unto the land of his lord, and to spread the same upon the land, and such like. And some freemen hold their tenements according to the custom of certain manors, by such services. And their tenure also is called tenure in villeinage, and yet they are not villeins; for no land holden in villeinage, or villein land, nor any custom arising out of the land, shall ever make a freeman villein. But a villein may make free land to be villein land to his lord; as where a villein purchases land in fee-simple, or in fee-tail, the lord of the villein may enter into the land, and oust the villein and his heirs for ever; and after, the lord (if he will) may let the same land to the villein, to hold in villeinage.

Tenure in villeinage is where the service is servile.

Villeinage is the service of a bondman. And yet a free man may do the service of him that is bond. And therefore a tenure in villeinage is twofold; one, where the person of the tenant is bond, and the tenure servile; the other, where the person is free, and the tenure servile.

## SECTION 175.

[117 b]

**ALSO**, every villein is either a villein by title of prescription, to wit, that he and his ancestors have been villeins time out of mind of man; or he is a villein by his own confession in a court of record.

Villeins are held by prescription or confession.

Records and  
inrolments prove  
themselves.

*In a court of record.]* A record or enrolment is a memorial or monument of so high a nature, as it imports in itself such an absolute verity, as if it be pleaded that there is no such record, it shall not receive any trial by witness, jury, or otherwise, but only by itself.

Which be courts  
of record.

And every court of record is the king's court, albeit another may have the profit, wherein if the judges do err, a writ of error lies. But the county court, the hundred court, the court baron, and such like, are no courts of record; and therefore the proceedings therein may be denied, and tried by jury, and upon their judgments a writ of error lies not, but a writ of false judgment, for that they are no courts of record, because they cannot hold plea of debt or trespass, if the debt damage amounts to forty shillings, or of any trespass *vi et armis*.

[118 a]

### SECTION 177.

Lord has no  
till till entry.

*ALSO, if a villein purchase land, and alien the land to another before the lord enters, then the lord cannot enter; for it shall be adjudged his folly that he did not enter when the land was in the hands of the villein.*

[119 b]

### SECTION 180.

What if villein  
purchase an  
advowson.

*IN the same manner it is, where a villein purchases an advowson of a church full of an incumbent, the lord of the villein may come to the said church, and claim the said advowson, and by this claim the advowson is in him.*

Simony.

[120 a]

If a villein at this day purchases an advowson in fee, and the church becomes void, and the lord for one hundred pounds given by A. B. clerk presents him to the church, and his clerk is admitted, instituted, and inducted; yet this gains not the advowson to the lord. And so it is in that case, if any on behalf of A. B. had given or contracted with the lord in consideration of any valuable thing to present A. B. to the said church, albeit it had been without the consent or knowledge of A. B. yet it should not

have vested the advowson in the lord. But this was not law when Littleton wrote. But now by the statute of 31 Eliz. the presentation, admission, institution, and induction in both the said cases, and in the like are made void, where before the said statute they were but voidable by deprivation. And if a man present by usurpation to a benefice, by reason of any corrupt contract, agreement, &c., that presentation and the institution and induction thereupon are void; for that act extends to all patrons as well by wrong as by right. But where any presents by usurpation, the rightful patron, and not the king, shall present; for otherwise every rightful patron may lose his presentation. And such an incumbent who comes in by reason of any such corrupt agreement, is so absolutely disabled for ever after to be presented to that church, as the king himself, to whom the law gives the title of presentation in that case, cannot present him again to that church; for the act being made for the suppression of simony and such corrupt agreements, so binds the king in that case, that he cannot present him whom the law has disabled; for the words of the act are, "shall thereupon and from thenceforth be adjudged a disabled person in law to have or enjoy the same benefice." And the party being disabled by the act of parliament (which being an absolute and direct law) cannot be dispensed withall by any grant &c, with a *non obstante*; as it may be, when any thing is prohibited *sub modo*, as upon a penalty given to the king. And the said act does not only extend to benefices with cure, but to dignities, prebends, and all other ecclesiastical livings.

Note, if the church becomes void, albeit the present avoidance be not by law grantable over, yet may the lord of the villein present in his own name, and thereby gain the inheritance of the advowson to him and his heirs; for albeit it be not grantable over, yet it is not merely a chose in action; for if a *fême covert* be seised of an advowson, and the church becomes void, and the wife dies, the husband shall present to the advowson; but otherwise it is of a bond made to the wife; because that is merely in action.

*Present avoidance not grantable over, but it survives to husband if it happen in wife's lifetime.*

## SECTION 181.

[120 b]

ALSO, there is a *villein regardant*, and a *villein in gross*. A *villein regardant* is, as if a man be seised of a manor to which a *villein* is

*Villeins regardant and in gross distinguished.*

*regardant, and he who is seised of the said manor, or they whose estate he has in the same manor, have been seised of the villein and of his ancestors as villeins and neifs regardant to the same manor time out of memory of man. And villein in gross is, where a man is seised of a manor whereunto a villein is regardant, and grants the same villein by his deed to another, then he is villein in gross, and not regardant.*

[121 a]

## SECTION 183.

Prescription in a que estate applies to those things only which will not pass at common law without deed.

*AND here note, that such things, which cannot be granted nor aliened without deed or fine, a man who will have such things by prescription cannot otherwise prescribe but in him and in his ancestors whose heir he is, and not by these words (in him and them whose estate he has), for that he cannot have their estate without deed or other writing, the which ought to be shewn to the court, if he will take any advantage of it.*

*Whose estate (que estate), &c.] quorum statum, as much as to say, whose estate he has. Here Littleton declares an excellent rule, that a man cannot prescribe for any thing by a que estate, which lies in grant and which cannot pass without deed or fine; but in him and his ancestors he may, because he comes in by descent without any conveyance. Neither can a man plead a que estate in himself of any thing that cannot pass without deed; but in another he may, as in bar of an avowry, the plaintiff may plead a que estate in the seigniori in the avowant. But Littleton's words are to be observed, (a man who will have such things by prescription.) Therefore when a thing that lies in grant is but a conveyance to the thing claimed by prescription, there a que estate may be alleged of a thing that lies in grant; as a man may prescribe, that he and his ancestors, and all those whose estate he has in an hundred, have time out of mind, &c. had a leet &c. this is good, &c,*

Profert required of all deeds pleaded.

[121 b]

*The which ought to be shewn to the court.] The reason why every deed that is pleaded ought to be shewn to the court is, because every deed must prove itself to have sufficient words in law, whereof the court only can judge: and also to be proved by others, as by witnesses or other proofs, if the deed be denied, which is matter of fact [to be tried by the jury].*

*By alienation without deed, &c.*] Here by (&c.) is implied, that whatsoever passes by livery of seisin, either in deed or in law, may pass without deed; and not only the rents and services parcel of the manor shall with the demesnes, as the more principal and worthy, pass by livery without deed, but all things regardant, appendant, and appurtenant to the manor, as incidents or adjuncts to the same, shall, together with the manor, pass without deed; all which, as here it appears and elsewhere is said, shall pass without saying *cum pertinentiis*.

*What things pass at common law without deed.*

*Appurtenances.*

## SECTION 184.

AND it is to be understood, that nothing is named regardant to a manor, &c. but a villein. But certain other things, as an advowson and common of pasture, &c. are named appendant to the manor, or to the lands and tenements.

*Appendant and regardant distinguished.*

*Appendant.*] Appendant is any inheritance belonging to another that is superior or more worthy. Appendants are always by prescription; but appurtenants may be created in some cases at this day. As if a man at this day grant to a man and his heirs, common in such a moor for his beasts levant or couchant upon his manor; or if he grant to another common of estovers or turbary in fee-simple to be burnt or spent within his manor; by these grants these commons are appurtenant to the manor, and shall pass by the grant thereof. If A. be seised of a manor, whereunto the franchise of waifs estrays and such like are appendant, and the king purchases the manor with the appurtenances, now are the royal franchises re-united to the crown and not appendant to the manor. But if he grant the manor in as large and ample manner as A. had &c. it is said, that the franchises shall be appendant (or rather appurtenant) to the manor.

*Appendant and appurtenant distinguished and exemplified.*

Concerning things appendant and appurtenant, two things are implied. First, that prescription (which regularly is the mother thereof) does not make any thing appendant or appurtenant, unless the thing appendant or appurtenant agree in quality and nature to the thing whereunto it is appendant or appurtenant: as a thing corporeal cannot properly be appendant to a thing corporeal, nor a

*Same.*

*Corporeal cannot be appendant to corporeal or incorporeal hereditaments.*

thing incorporeal to a thing incorporeal. But things incorporeal which lie in grant, as advowsons, villeins, commons, and the like, may be appendant to things corporeal, as a manor-house or lands; or things corporeal to things incorporeal, as lands to an office.

Common of tur-  
bary appurte-  
nant to house  
only.

Pew appurte-  
nant to house  
only.

[122 a]

But yet (as hath been said) they must agree in nature and quality; for common of turbary or of estovers cannot be appendant or appurtenant to land, but to a house to be spent there. Nor a leet, that is temporal, to a church or chapel, which is ecclesiastical. Neither can a nobleman, esquire, &c. claim a seat in a church by prescription as appendant or belonging to land, but to a house only, for that such a seat belongs to the house in respect of the inhabitaney thereof; and therefore if the house be part of a manor, yet in that case he may claim the seat as appendant to the house for the reason aforesaid.

Advowson may  
be appurtenant  
to manor.

Secondly, that nothing can be properly appendant or appurtenant to any thing, unless the principal or superior thing be of perpetual subsistence and continuance. For example, an advowson that is said to be appendant to a manor, is *in rei veritate* appendant to the demesnes of the manor, which are of perpetual subsistence and continuance, and not to rents or services, which are subject to extinguishment and destruction. An advowson is appendant to the manor of Dale, of which manor the manor of Sale is holden, the manor of Sale is made parcel of the manor of Dale by way of escheat, the advowson is only appendant to the manor of Dale. Note, that an advowson at one turn may be appendant, and at another turn in gross. As if the manor be divided between coparceners, and every one has a part of the manor without saying any thing of the advowson appendant, the advowson remains in coparcenary, and yet, in every of their turns, it is appendant to that part which they have; and so it is, if they make composition to present against common right, yet it remains appendant. But if upon such a partition an express exception be made of the advowson, then the advowson remains in coparcenary and in gross, and so are the books reconciled.

Coparcenary of  
advowson after  
partition.

Common ap-  
pendant.

*Common of pasture.*] There are four kinds of common of pasture, viz. common appendant, which is of common right (and therefore a man need not prescribe for it) [i. e. the prescription is implied] for beasts commonable (that is) for such as serve for the mainte-

nance of the plough, as horses and oxen to plough the land, and for kine and sheep to compester the land, and is appendant to arable land.

The second is common appurtenant, that is, for beasts not commonable; as swine, goats, and the like. If a man purchase part of the land wherein common appendant is to be had, the common shall be apportioned, because it is of common right; but not so of a common appurtenant, or of any other common of what nature soever. But both common appendant and appurtenant shall be apportioned by alienation of part of the land to which common is appendant or appurtenant; and for common appurtenant one must prescribe [not, however, if there be a grant, Cro. Car. 482.]

*Common appurtenant.*

The third is *common per cause de vicinage*, which differs from both the other commons, for that no man can put his beasts therein, but they must escape thither of themselves by reason of vicinity: in which case one may inclose against the other, though it has been so used time out of mind, for that it is but an excuse for trespass.

*Common of vicinage.*

The last is common in gross, which is so called, because it appertains not to land, and it must be by writing or prescription.

*Common in gross.*

Of common appendant, appurtenant, and in gross, some are certain, that is, for a certain number of beasts; some certain by consequence, viz. for such as are levant and couchant upon the land; and some are uncertain, as commons *sauns nombre* in gross, and yet the tenant of the land may pasture or feed there also.

*Common sans nombre.*

There are also divers other commons, as of estovers, of turbary, of piscary, of digging for coals, minerals, and the like.

*Other commons.*

If common appendant be claimed to a manor, yet *in rei veritate* it is appendant to the demesnes, and not to the services; and therefore if a tenancy escheat, the lord shall not increase his common by reason of that.

*Lord's commonage not increased by escheats.*

If a man claim by prescription any manner of common in another man's land, and that the owner of the land shall be excluded to have pasture, estovers, or the like, this is a prescription or custom

*Common which excludes the owner of the soil bad, but he may*

be excluded for  
a time.

against the law, to exclude the owner of the soil; for it is against the nature of this word common, and it was implied in the first grant that the owner of the soil should take his reasonable profit there, as it has been adjudged. But a man may prescribe or allege a custom to have and enjoy *solam vesturam terræ*, from such a day to such a day, and hereby the owner of the soil shall be excluded to pasture or feed there; and so he may prescribe to have *separalem pasturam*, and exclude the owner of the soil from feeding there. So a man may prescribe to have *separalem piscariam* in such a water, and the owner of the soil shall not fish there; but if he claim to have *communiam piscariæ*, or *liberam piscariam*, the owner of the soil shall fish there. And all this has been resolved. And therefore it is necessary for every man by learned advice to plead according to the truth of his case; for *parols font plea*.

[122b]

Disseisee cannot use common, but he may present to an advowson.

A man seised of land whereunto common is appendant is disseised, the disseisee cannot use the common, until he enters into the land whereunto it is appendant. But if a man be disseised of a manor whereunto an advowson is appendant, he may present to the advowson before he enters into the manor; and the reason of this diversity is, because in the case of the common it would be a prejudice to the tenant of the soil: for if the disseisee might do it, the disseisor also might put on his cattle, which would be a double charge to the tenant, but not so of the advowson.

[128b]

## SECTION 198.

Alien, *ALSO, if an alien, who is born out of the allegiance of our sovereign lord the king, will sue an action real or personal, the tenant or defendant may say, that he was born in such a country which is out of the king's allegiance, and ask judgment if he shall be answered.*

Who is, and of denization, naturalization, and descent.

[129a]

Note, here Littleton says not *out of the realm*, but *out of the allegiance*; for he may be born out of the realms of England, yet within the allegiance. And he that is born within the king's allegiance is called sometimes a *denizen*. But many times in acts of parliament, *denizen* is taken for an alien born, that is, enfranchised or denized by letters patent. There is also another kind, and that is an alien naturalized, which must be by act of parliament.



And this alien naturalized is to all intents and purposes the same as a natural born subject, and naturalization differs much from denization; for if the alien had issue in England before his denization, that issue is not inheritable to his father; but if his father be naturalized by parliament, such issue shall inherit. So if the issue of an Englishman born beyond sea be naturalized by act of parliament, he shall inherit his father's lands: but if he be made denizen by letters patent, he shall not; and many other differences there be between them.

*Real or personal.*] In this case the law distinguishes between an alien who is the subject of a prince an enemy to the king, and one who is the subject of a prince in league with the king; and true it is that an alien enemy shall maintain neither real nor personal action, *donec terræ fuerint communes*, that is until both nations are in peace; but an alien who is in league shall maintain personal actions; for an alien may trade and traffic, buy and sell, and therefore of necessity he must be of ability to have personal actions; but he cannot maintain either real or mixt actions. An alien who is condemned in an information, shall have a writ of error to relieve himself. *Et sic de similibus.*

*Alien friend  
and alien  
enemy.*  
[129 b]

*Out of the allegiance of our sovereign lord the king.*] Here Littleton does not say, out of the realm or beyond the sea (as he does Sect. 439, 440, 441. 677.) but out of the allegiance; for (as hath been said before) a man may be born out of the realm, viz. of England, as in Ireland, Jersey, and Guernsey, &c. and yet seeing he is not born out of the allegiance of the king, as Littleton here speaks, he is no alien.

*Out of realm  
and out of lige-  
ance distin-  
guished.*

## SECTION 200.

[132a]

*ALSO, where a man enters into religion, and is professed, he is dead in the law, and his son, or next cousin incontinent shall inherit him, as well as though he were dead indeed. And when he enters into religion he may make his testament and his executors; and they may have an action of debt due to him before his entry into religion, or any other action that executors may have, as if he were dead indeed. And if he make no executors when he*

*A person enter-  
ing into religion  
becomes dead  
in law.*

*enters into religion, then the ordinary may commit the administration of his goods to others, as if he were dead indeed.*

Natural and  
civil death dis-  
tinguished.

*He is dead in the law.] Civiliter mortuus, or mortuus seculo.* There is a death in deed, and there is a civil death or a death in law, *mors civilis* and *mors naturalis*, as here it appears: and therefore to prevent all doubts, leases for life are usually made during natural life.

Effect of civil  
death.

[132b]

*As well as though he were dead indeed.]* But yet to some purposes, profession of religion hath not the effect of a natural death. As if tenant in tail makes a feoffment in fee, and enters into religion, his issue shall have no formedon during his life; because that would be in derogation of his own grant. 2d. His wife shall not be endowed until his natural death. 3d. If the disseisor enters into religion and is professed, so that the land descends to his heir, yet this descent shall not toll the entry of the disseisee. A woman cannot be professed a nun during the life of her husband. But if one joint-tenant be professed in religion, the land shall survive to the other.

Abjuration and  
transportation are  
civil deaths.

[133a]

And here is to be observed, that an abjuration, that is, a deportation for ever into a foreign land, like to profession, (whereof our author here speaks) is a civil death: and that is the reason why the wife may bring an action, or may be impleaded during the natural life of her husband. And so it is, if by act of parliament the husband be attainted of treason or felony, and saving his life, is banished for ever, as Belknap &c. was, this is a civil death, and the wife may sue as a *fême sole*. And hereby you may understand your books which treat of this matter. But if the husband, by act of parliament, have judgment to be exiled but for a time, which some call a relegation, that is no civil death, [but the wife may act as a widow in the mean time; 1 Com. Dig. 10.]

Queen treated  
as a *fême sole*.

But by the common law, the wife of the king of England is an exempt person from the king, and has capacity to take of lands or tenements of the gift of the king which no other feme covert has; and she may sue and be sued without the king, for the wisdom of the common law would not have the king (whose continual care and study is for the public, *et circa ardua regni*) to be troubled and disquieted with

such private and petty matters: so that the wife of the king of England has ability and capacity to grant and to take, and to sue and be sued as a feme-sole by the common law.

Note, there is *annus minor* and *major*. The lesser year consists of three hundred and sixty-five days and six hours, whereby in every fourth year there is *dies excrescens*, which makes that year to have *in rei veritate*, three hundred and sixty-six days, and that is called *annus major*. A quarter of a year contains by legal computation ninety-one days, and half a year contains one hundred and eighty-two days; for the odd hours in legal computation are rejected; and by the statute *de anno bissextili*, it is provided, *quòd computentur dies ille excrescens et dies proximè præcedens pro unico die*, so that in computation that excrescent day is not accounted. A month, *mensis*, is regularly accounted in law twenty-eight days, and not according to the solar month, nor according to the calendar, unless it be for the account of a lapse in a *quare impedit*. There is *mensis solaris*, and *mensis lunaris*. *Solaris est 12 pars anni, viz. spatium 30 dierum horarum 10 et minutorum 30, et lunaris est spatium 28 dierum.*

Computation of  
time.  
[135a b]

Also there was a time, when idiots, madmen, and such as were deaf and dumb naturally, were disabled to sue, because they wanted reason and understanding (*tales enim non multùm distant à brutis.*) But at this day they all may sue; for the suit must be in their name, but it shall be followed by others. And note, that when an idiot does sue or defend, he shall not appear by guardian or prochein ami or attorney, but only in person; yet an infant or minor shall sue by prochein ami, and defend by guardian.

## SECTION 210.

[140a]

*In the county of Kent, where lands and tenements are holden in gavelkind, the custom to fine on the daughter's marriage seems allowable; for every son is as great a gentleman as the eldest, and perchance will grow to greater honour and valour if he has any thing by his ancestors.*

Gavelkind.

*In the county of Kent.]* For that in no county of England lands at this day are of the nature of gavelkind of common right, saving

in Kent only. But yet in divers parts of England, within divers manors and seignories, the like custom is in force. And *gavel-kind*, comes from *gave all kind*: for this custom gives to all the sons alike. But the general custom extends only to sons. Yet by custom, when one brother dies without issue, all the other brethren may inherit.

[140 b] Now by the statute of 31 H. 8. a great part of Kent is made descendable to the eldest son, according to the course of the common law, because by means of that custom, divers ancient and great families after a few descents came to very little or nothing.

## SECTION 211.

Boro English, *ALSO, by the custom of Borough English, where the youngest son inherits all the tenements, this custom stands with some reason; because the younger son (if he lack father and mother) can least of all his brethren help himself, &c.*

extends to daughters.

*By the custom called Borough English.*] Of this custom Littleton has spoken before in the Chapter of Burgage. And in our books there is a special kind of Borough English; as it shall descend to the younger son, if he be not of the half-blood; and if he be, then to the eldest son. Within the manor of B. [Bray, 2 Watk. cap. 410.] in the county of Berks, there is such a custom, that if a man have divers daughters, and no son, and dies, the eldest daughter only shall inherit; and if he have no daughters, but sisters, the eldest sister by the custom shall inherit, and sometimes the youngest. And divers other customs there be in like cases.

[141 a]

## SECTION 212.

No man can be his own judge.

*BUT if a man prescribe, to distrain cattle doing damage on the demesnes of his manor, and the distress to retain till fine were made to him for the damage at his will, this prescription is void; because it is against reason, that if wrong be done any man, that he thereof should be his own judge.*

And therefore a fine levied before the bailiffs of Salop was reversed, because one of the bailiffs was party to the fine, *quia non potest esse iudex et pars.* *Fine taken before a party bad.*

And by this rule cited by our author, at the parliament holden at Kilkenny in Ireland, Lionel duke of Clarence being then lieutenant of that realm, the Irish customs called there the Brehon law (for that the Irish call their judges Brehons) was wholly abolished, for that (as the parliament said) it was no law, but a lewd custom, *et malus usus abolendus est.* But our student must know, that king John in the twelfth year of his reign went into Ireland, and there, by the advice of grave and learned men in the laws whom he carried with him, by parliament *de communi omnium de Hiberniâ consensu*, ordained and established, that Ireland should be governed by the laws of England, which of many of the Irishmen, according to their own desire, was joyfully accepted and obeyed, and of many the same was soon after absolutely refused, preferring their Brehon law before the just and honourable laws of England. [141 b]

And by an act of parliament (called Poyning's law) holden in Ireland in the tenth year of Henry the seventh, it is enacted, that all statutes made in this realm of England before that time, should be of force and be put in use within the realm of Ireland; which (though it be by way of digression) is not unnecessary for our student to know. *What English statutes affect Ireland.*

## CHAPTER XII. SECTION 213.

## OF RENTS.

Rent service,  
distress incident  
to.

**THREE manner of rents there be, that is to say, rent service, rent charge, and rent seck. Rent service is, where the tenant [of the fee or freehold] holds his land of his lord by fealty and certain rent, or by homage fealty and certain rent, or by other services and certain rent. And if rent service at the day it ought to be paid, be behind, the lord may distrain for it of common right.**

Some have divided rents into four kinds, viz. rent service, rent charge, rent distrainable of common right (whereof somewhat shall be said in this chapter,) and rent seck.

Of the service.  
[142 a]

*Rent service.*] It is called a rent service, because it has some corporal service incident to it, which is fealty at least, as here appears.

Out of what it  
must issue.

*His land.*] A rent service cannot be reserved out of any inheritance but such only as is manurable, whereinto the lord may enter and take a distress, as in lands and tenements, reversions, remainders, and, as some have said, out of the herbage of lands, and regularly not out of any inheritances incorporeal, or which lie in grant. But by act of law one rent or service may issue out of another.

Profits cannot  
be reserved as  
rent.

*Certain rent.*] For the rent must be certain, or which may be reduced to a certainty; for *id certum est quod certum reddi potest*. But a man upon his feoffment or conveyance cannot reserve to him parcel of the annual profits themselves, as to reserve the vesture or

herbage of the land or the like, for that would be repugnant to the grant.

*May distrain for it.*] For where there is fealty, there is a distress incident thereunto. But it is to be understood, that for a rent or service, the lord cannot distrain in the night, but in the day-time only; and so it is of a rent charge. But for damage done feasant one may distrain in the night, otherwise it may be the beasts will be gone before he can take them.

*Distress in night allowed for damage feasant, not for rent.*

*Of common right.*] That is, by the common law, without any particular reservation or provision of the party.

## SECTION 214.

[142 b]

**AND if a man give lands or tenements to another in tail, yielding to him certain rent by the year, he of common right may distrain for the rent behind, though such gift be made without deed, because the rent is rent service. In the same manner it is, if a lease be made to a man for life, or the life of another, rendering to the lessor certain rent, or for term of years rendering rent.**

*This rent may issue out of estates tail for life or years,*

*Without deed.*] For it is a rule in law, that a rent service may be reserved without deed.

*and be reserved without deed.*

*In the same manner it is, if a lease be made, &c.*] For these are rent-services, because fealty is incident to them; for (as it hath been said before) a lessee for life or years shall do fealty. And if a man make a lease at will reserving a rent, the lessee shall not do fealty, and yet the lessor may distrain for the rent of common right.

*Distress.*

## SECTION 215.

**BUT in such case, where a man upon a gift or lease reserves to himself a rent service, it is necessary, that the reversion of the lands and tenements be in the donor or lessor. For if a man**

*To a rent service grantor must retain a reversion.*

*makes a feoffment in fee, or gives lands in tail, with remainder over in fee simple, without deed, reserving to himself a certain rent, this reservation is void, because no reversion remains in the donor, and such tenant holds his land immediately of the lord of whom his donor held, &c.*

Of the tenure.

[143a]

The reversion may be granted over, excepting the rent.

*It is necessary that the reversion, &c. be in the donor or lessor.]* This is to be understood only of the ultimate reversion. For if a man makes a gift in tail, with remainder in tail, reserving a rent, and keeps the reversion in himself, this is a rent service. And it is to be understood, that in the case of a gift in tail, lease for life or years, fealty is an incident inseparable to the reversion, so that the donor or lessor cannot grant the reversion over and save to himself the fealty, or such like service. But the rent he may except; because the rent, although it be incident to the reversion, is not inseparably incident. If a man makes a gift in tail without any reservation, the donee shall hold of the donor by the same services that he held over. But otherwise it is of an estate for life or years; for there if he reserves nothing, he shall have fealty only, which is an incident inseparable to the reversion, as hath been said.

Remainder without deed good.

*The remainder over in fee-simple without deed.]* Here it appears, that if a man makes a gift in tail, with remainder in fee, without deed, the remainder is good, and passes out of the donor by the livery of seisin; and so it is of a lease for life or years, with remainder over in fee; for the particular estate and the remainder, to many intents and purposes, make but one estate in judgment of law. Vide Sect. 60.

Remainder must be created at same time as particular estate.

*Remainder*, in legal Latin, is *remanere*, coming of the Latin word *remaneo*; for that it is a remainder or remnant of an estate in lands or tenements expectant upon a particular estate created together with the same at one time, as in the cases here of Littleton appears.

## SECTION 216.

Before stat. Q. E. feoffee held of feoffor.

**AND** *this is by force of the statute of quia emptores terrarum. For before that statute, if a man had made a feoffment in fee*



*simple, by deed or without deed, yielding to him and to his heirs a certain rent, this was a rent service, and for this he might have distrained of common right; and if there were no reservation of rent, nor of any service, yet the feoffee held of the feoffor by the same service as the feoffor held over of his lord next paramount.*

*By deed or without deed, &c.]* For all rent services may be reserved without deed (as hath been said), and as it appears here. And at the common law if a man had made a feoffment in fee by parol, he might upon that feoffment have reserved a rent to him and his heirs; because it was a rent-service, and a tenure was thereby created.

## SECTION 217.

[143 b]

**BUT** *if a man, by deed indented, at this day makes such a gift in fee-tail, the remainder over in fee; or a lease for life, the remainder over in fee; or a feoffment in fee; and by the same indenture he reserves to him and to his heirs a certain rent, and that if the rent be behind it shall be lawful for him and his heirs to distrain, &c. such a rent is a rent charge; because such lands or tenements are charged with such distress by force of the writing only, and not of common right. And if such a man, upon a deed indented, reserve to him and to his heirs a certain rent, without any such clause put in the deed that he may distrain, then such rent is rent seck; because he cannot have the rent, if it be denied, by way of distress; and if in this case he were never seised of the rent, he is without remedy, as shall be said hereafter.*

Rent charge is where distress is expressly reserved. Rent seck, where it is not. Person to whom these rents are reserved need not have a reversion. To neither is distress incident.

*By deed indented.]* It cannot be a deed indented unless it be actually indented; for albeit the words of the deed be *hæc indentura* &c. yet if it be not indented indeed, it is no indenture. But if the deed be indented, albeit the words of the deed be not *hæc indentura*, yet it is an indenture.

Indenture, what.

And it is holden that if a feoffment in fee be made by deed poll reserving a rent, this reservation is good: for when the feoffee accepts the deed and livery of the land, he agrees to the rent, and

Reservation by deed poll good.

the rent is reserved by the words of the feoffor, and not by the grant of the feoffee.

*Reservation must be to grantor.*

*Reserves to him.]* Note, it is a maxim in law, that the rent must be reserved to him from whom the estate of the land moves, and not to a stranger. But some hold, that otherwise it is in the case of the king.

*Fee-farm rent, what ;*

*Such a rent is a rent charge.]* It is called a rent charge because the land for payment thereof is charged with a distress. If it be to the whole value of the land, or to the fourth part of the value, then the rent is called a fee-farm.

*and though distress not incident, feoffor entitled to writ of annuity, if grant be by deed.*

[144 a]

*He is without remedy.]* Note, that upon a reservation of a rent upon a feoffment in fee by deed indented, the feoffor shall not have a writ of annuity, because the words of reservation, as *reddendo, solvendo, faciendo, tenendo, reservando, &c.* are the words of the feoffor, and not of the feoffee, albeit the feoffee by acceptance of the estate is bound thereby.

*Rent may be reserved on a conveyance to uses, or out of reversion.*

And where Littleton puts his case, when a reservation is made upon an estate that passes by livery, the same law it is, if a man at this day bargains and sells his land by deed indented and enrolled according to the statute, a rent may be reserved thereupon ; for albeit an use had only passed by the common law, yet now by the statute of 27 H. 8. cap. 10, the use and possession pass together, and so it was adjudged. And so it is of a grant of a reversion or remainder, and any other conveyance of lands or tenements, whereby any estate passes.

## SECTION 218.

*Same. Rent charge and rent seck.*

*ALSO, if a man seised of certain land grant by a deed poll or by indenture a yearly rent to be issuing out of the same land, to another in fee, or in fee-tail, or for term of life, &c. with a clause of distress, &c. then this is a rent charge ; and if the grant be without clause of distress, then it is a rent seck. And note, that rent seck idem est quod redditus siccus ; for that no distress is incident unto it.*

*Seised of land.*] Note, that a rent cannot be granted out of a piscary, a common, an advowson, or such like incorporeal inheritances, but out of lands or tenements whereunto the grantee may have recourse to distrain, or which may be put in view to the recognitors of an assize, as hath been said before in this chapter. And though it be out of lands or tenements, yet it must be out of an estate that passes by the conveyance (as by all Littleton's examples appears), and not out of a right; as if the disseisee release to the disseisor of the land, reserving a rent, the reservation is void, *et sic de similibus*.

*Rent not grantable out of incorporeal hereditaments, or on the release of a right.*

## SECTION 219.

[144b]

**ALSO, if a man grant by his deed a rent charge to another, and the rent is behind, the grantee may choose whether he will sue a writ of annuity for this against the grantor, or distrain for the rent behind, and the distress detain until he be paid. But he cannot do, or have, both together &c. For if he recovers by a writ of annuity, then the land is discharged of the distress &c. And if he does not sue a writ of annuity but distrains for the arrearages, and the tenant sues his replevin, and then the grantee avows the taking of the distress in the land in a court of record, then is the land charged, and the person of the grantor discharged of the action of annuity.**

*Writ of annuity fixes the person, but suing that discharges the distress.*

*Rent charge.*] And so it is of a rent seck.

*A man grant.*] Put the case, that A. be seised of lands in fee, and he and B. grant a rent charge to one in fee, this *prima facie* is the grant of A. and the confirmation of B. but yet the grantee may have a writ of annuity against both.

*If owner and stranger grant a rent, both suable in writ of annuity.*

Two men grant an annuity of twenty pounds *per annum* to another although the persons be several, yet he shall have but one annuity. But if the grant be, *obligamus nos et utrumque nostrum*, the grantee may have a writ of annuity against either of them; but he shall have but one satisfaction.

*Grant by two passes only one annuity, when.*

*A writ of annuity*, is a writ for the recovery of an annuity. An annuity is a yearly payment of a certain sum of money granted

*annuity charges the person only.*

to another in fee for life or years, charging the person of the grantor only.

*Who entitled to writ of annuity, and against whom.*

But not only the grantee, but his heir and his and their grantee also shall have a writ of annuity. But if a rent charge be granted to a man and his heirs, he shall not have a writ of annuity against the heir of the grantor, albeit he has assets, unless the grant be for him and his heirs.

*Claim of election bars not dower.*

*May choose.]* But if one man grants a rent charge to another and his heirs, and [the grantee of the rent charge] dies, and his wife brings a writ of dower against the heir, the heir cannot in bar of her dower claim the same to be an annuity and no rent charge; but the wife shall recover her dower; for he cannot determine his election by claim, but by suing a writ of annuity.

*Writ of annuity lies not for part nor for owelty rent.*

Neither can the heir have after the endowment an annuity for the two parts: for that would not be according to the deed of grant, for either the whole must be a rent charge or the whole an annuity. But Littleton is to be understood with some limitation: for of a rent granted for owelty of partition, a writ of annuity does not lie, because it is of the nature of the land descended.

[145a b]

*In what other cases a writ of annuity lies not.*

Also of such a rent as may be granted without deed a writ of annuity lies not, thought it be granted by deed.

[146a]

If a rent charge be granted to A. and B. and their heirs; A. distrains the beasts of the grantor, and he sues a replevin; A. avows for himself, and makes conusance for B.; A. dies and B. survives: B. shall not have a writ of annuity; for in that case, the election and avowry for rent of A. bars B. of any election to make it an annuity, albeit he assented not to the avowry. But here is another diversity to be observed between the case aforesaid of the grant of the rent where he (as hath been said) may make it either real or personal, and when a man may have election to have several remedies for a thing that is merely personal or merely real from the beginning. As if a man may have an action of account or an action of debt at his pleasure, and he brings an action of account and appears to it, and after is nonsuited, yet may he have an action of debt afterwards; because both actions charge the person. The like law is of an assize, and of a writ of entry in the nature of an assize, and the like.

## SECTION 220.

ALSO, if a man would that another should have a rent charge issuing out of his land, but would not that his person be charged in any manner by a writ of annuity, then he may have such a clause in the end of his deed as this. " Provided always, that this present writing, nor any thing therein specified, shall not in any way extend to charge my person by a writ or an action of annuity, but only to charge my lands and tenements with the yearly rent aforesaid &c. Then the land is charged, and the person of the grantor discharged.

Proviso discharging person good.

But where the grantee has but one remedy, there that remedy cannot be barred by any proviso ; for such a proviso would be repugnant to the grant. Therefore if a man by his deed grants a rent charge out of the manor of Dale (wherein the grantor has nothing) with such a proviso that it shall not charge his person ; albeit the repugnancy does not appear in the deed, yet the proviso takes away the whole effect of the grant, and therefore is in judgment of law repugnant ; for upon the matter it is but a grant of an annuity, provided that it shall not charge his person [which is bad]. For which cause our author puts his case of a rent charge issuing truly out of land.

If there be only one remedy, such a proviso bad.

But if a man by his deed grant a rent charge out of land, provided that it shall not charge the land, albeit the grantee has a double remedy, as hath been said, yet the proviso is repugnant ; because the land is expressly charged with the rent, but the writ of annuity is but implied in the grant, and therefore that may be restrained without any repugnance, and sufficient remedy left for the grantee ; for which cause our author puts his case of the restraint of bringing a writ of annuity.

Proviso to discharge the land bad ;

And yet in some cases where there is this proviso, that the grantee shall not in any sort charge the person of the grantor generally, still, notwithstanding that proviso, the person of the grantor shall be charged. As if a man grant a rent charge out of certain lands to another for life, with such a proviso ; the rent is

and the person discharged. Executors are not always. [146b]

behind; the grantee dies; the executors of the grantee shall have an action of debt against the grantor, and charge his person for the arrearages in the life of the grantee; because the executors have no other remedy against the grantor for the arrearages; for distrain they cannot, because the estate in the rent is determined, and the proviso cannot leave the executors without remedy, as appears by that which has been said. And therefore our author puts his case of a rent charge continuing.

*Proviso operates how.*

And here it is to be observed, that this word (proviso) has divers operations. Sometimes it works a qualification or limitation, and so it is taken here, and often in our books; sometimes a condition; and sometimes a covenant: whereof you shall read more hereafter, Sect. 320.

*Defeasance.*

*In the end of his deed.*] Here Littleton puts his case of one deed. But though the grant be general and contain no such proviso, yet may the grantee by another deed by way of defeasance grant that he shall not charge the person of the grantor and that if he bring a writ of annuity the rent shall cease.

*Bad grammar vitiates not the deed.*

*Nor any thing &c. shall not.*] Here is to be observed a double negative, *nec* and *non*, which in grammatical construction amounts to an affirmative. Yet the law, that principally respects substance, judges the proviso to be a negative according to the intent of the parties, and not according to grammatical construction, to the end the proviso may take effect; and the like you shall find hereafter in Littleton. *Mala grammatica non vitiat cartam.*

*Effect of this proviso on grant by two.*

Here our author puts his case of one grantor. Put then the case, that A. and B. being joint tenants of lands in fee by their deed grant a rent charge out of those lands, provided that the grantee shall not charge the person of A.; in this case if the grantee brings a writ of annuity, he must charge the person of B. only.

## SECTION 221.

*Power of distress in gross good.*

*ALSO, if one grants by deed to A. that if he be not yearly paid at the feast of Christmas for term of his life twenty shillings of*

*lawful money, that then it shall be lawful for him to distrain for this in the manor of F. &c. this is a good rent charge; because the manor is charged with the rent by way of distress; and yet the person of him who makes the deed is discharged in this case of an action of annuity, because he does not grant by his deed any annuity to the said A. but grants only that he may distrain for such annuity &c.*

But in judgment of law the manor is charged with the rent; though the person of the grantor cannot be charged, because he expressly grants no rent, for that only would charge his person. As if a man by deed, grant a rent of forty shillings to another out of his manor of Dale to have and to perceive to him and his heirs, and grants over by the same deed that if the rent be behind that the grantee shall distrain in the manor of Sale (be the manor of Sale in the same county or in another county, and be this grant by one deed or divers deeds), the rent is only issuing out of the manor of D. and it is but a pain [i. e. a penalty] that he shall distrain in the manor of S.; but both the manors are charged, the one with the rent, and the other with a distress for the rent; the one issuing out of the land, and the other to be taken upon the land. And whereas our author puts his case of a grant for life; so it is if I grant to you, that you and your heirs, or the heirs of your body shall distrain for a rent of forty shillings within my manor of S., this, by construction in law, shall amount to a grant of a rent out of my manor of S. in fee-simple or fee-tail; for if this shall not amount to a grant of a rent, the grant would be of little force or effect if the grantee shall have but a bare distress and no rent in him; for then he shall never have an assize of this &c. And this is the reason why it is so often ruled and resolved, that this amounts to a grant of a rent by construction of law, *ut res magis valeat.*

*Which is a virtual rent charge.*

[147 a]

*Penalty, 7 Co. 23 a.*

If a man seised of lands in fee, and possessed of a term for many years, grant a rent out of both for life in tail or in fee, with clause of distress out of both, this rent being a freehold issues only out of the freehold, and the lands in lease are only charged with a distress. But if he had granted the rent only out of the lands in lease for term of the life of the grantee, this had issued out of the term, and the land had been charged during the term if the grantee lived so long.

*Rent for life charged on freehold and leasehold issues out of freehold only.*

[147 b]

*One rent out of every acre is a rent for each.*

If a man be seised of twenty acres of land, and grant a rent of twenty shillings *percipiend, de quâlibet acrå terræ meæ* (that is), out of every acre of my land, this is a several grant out of every several acre, and the grantee shall have twenty pound in all.

*Grant by B. and S. not vacated by second grant with a surety by deed.*

A. bargains and sells land to B. by indenture, and before enrolment they both grant a rent charge by deed to C. and after the indenture is enrolled: some have said, that this rent charge is avoided; for, say they, it was the grant of A. and by the enrolment it has relation to the delivery, which (say they) shall avoid the grant, notwithstanding the confirmation of the other who had nothing in the land at the time. But the grant is good, and after enrolment it shall by operation of the statute be the grant of B. and the confirmation of A. But if the deed had not been enrolled, it had been the grant of A. and the confirmation of B. and so *quâcunque viâ datâ* the grant is good.

## SECTION 222.

*Merger of rent charge by purchase of part of land, because it cannot be apportioned, contra of rent service,*

*ALSO, if a man has a rent charge to him and to his heirs issuing out of certain land, if he purchase any parcel of this to him and to his heirs, all the rent charge is extinct, and the annuity also; because the rent charge cannot by such manner be apportioned. But if a man, who has a rent service purchase parcel of the land out of which the rent is issuing, this shall not extinguish all, but [only] for the parcel. For a rent service in such case may be apportioned according to the value of the land. But if one holds his land of his lord by the service to render to his lord yearly at such a feast a horse, a golden spear, or a clove, gilliflower, and such like; if in this case the lord purchase parcel of the land, such service is taken away; because such service cannot be severed or apportioned.*

*Rent charge cannot be apportioned, but special reservation may amount to a new grant.*

The reason of this extinguishment is, because the rent is entire, and against common right, and issuing out of every part of the land, and therefore by purchase of part it is extinct in the whole, and cannot be apportioned. But by act in law it may, as hereafter shall be said. If the grantee of a rent charge purchase parcel of the land, and the grantor by his deed reciting the said purchase of

[148 a]



part grants that he may distrain for the same rent in the residue of the land, this amounts to a new grant, and the same rent shall be taken for the like rent or the same in quantity. And so it is if a man by deed grants a rent charge out of his land to a man for life, and grants further by the same deed that he and his heirs may distrain in the land for the same rent, this amounts to a new grant of a rent in fee-simple.

But yet a rent charge by the act of the party may in some cases be apportioned. As if a man has a rent charge of twenty shillings, he may release to the tenant of the land ten shillings, or more or less, and reserve part; for the grantee deals only with that which is his own, viz. the rent, and deals not with the land, as in the case of purchase of part. So, if the grantee of an annuity or rent charge of twenty pounds, grant ten pounds, parcel of the same annuity or rent charge, and the tenant attorn, hereby the annuity or rent charge is divided.

*But owner of rent charge may release part of it.*

And when the rent charge is extinguished by his purchase of part of the land, he shall never have a writ of annuity; because it was by the grant a rent charge, and he has discharged the land of the rent charge by his own act by purchase of part. And therefore he cannot by writ of annuity discharge the land of the distress, as Littleton has before said. But if the rent charge be determined by the act of God or of law, yet the grantee may have a writ of annuity. As if tenant for another man's life by his deed grant a rent-charge to one for twenty-one years, *cestui que vie* dies, the rent charge is determined; and yet the grantee may have during the years a writ of annuity for the arrearages incurred after the death of *cestui que vie*, because the rent charge determined by the act of God and by the course of law. *Actus legis nulli facit injuriam*. The like law is, if the land out of which the rent charge is granted be recovered by an elder title, and thereby the rent charge is avoided, yet the grantee shall have a writ of annuity, for that the rent charge is avoided by the course of law.

*If rent charge be determined by act of law or by eviction on prior title, writ of annuity lies.*

*For a rent service in such case may be apportioned.*] As if a man make a lease for life or years reserving a rent, and the lessee surrenders part to the lessor, the rent shall be apportioned. So if the lessor recovers part of the land in an action of waste, or enters for a forfeiture in part, the rent shall be apportioned.

*Surrender of part, rent apportionable; so on recovery of part for waste.*

So on lease or  
devise of part of  
the reversion.

So likewise if the lessor grants part of the reversion to a stranger, the rent shall be apportioned ; for the rent is incident to the reversion. So it is if tenant by knight's service by his last will and testament in writing devises the reversion of two parts of the lands, the devisee shall have two parts of the rent, [and the same it is premised may be said at this day in the case of a devise of socage lands.]

But if rever-  
sioner accepts  
under-lease or  
grant from his  
tenant, that  
suspends the  
whole rent.

[148 b]

[Contra Poll.  
141. 1 Vent.  
277.]

*Purchase parcel of the land.*] This is intended of a fee-simple, for if there be a lord and tenant [in fee] of forty acres of land by fealty and twenty shillings rent, if the tenant makes a gift in tail, or a lease for life or years of parcel thereof to the lord, in this case the rent shall not be apportioned for any part, but the rent shall be suspended for the whole: for a rent service (says Littleton) may be extinct for part, and apportioned for the rest; but a rent service cannot be suspended in part by the act of the party, and be in *esse* for other part. So it is if the lessor enter upon the lessee for life or years into part, and thereof disseise or put out the lessee, the rent is suspended in the whole, and shall not be apportioned for any part. And where our books speak of an apportionment in the case where the lessor enters upon the lessee in part, they are to be understood where the lessor enters lawfully, as upon a surrender, forfeiture, or such like, where the rent is lawfully extinct in part. And yet by act of law a rent service may be suspended in part, and be in *esse* for part. As when the guardian in chivalry enters into the land of his ward within age, now is the seigniory suspended; but if the wife of the tenant be endowed of a third part of the tenancy, now shall she pay to the lord a third part of the rent. And so it is if the tenant give a part of the tenancy to the father of the lord in tail, and the father dies, whereby the tenancy descends to the lord; in this case by act of law the seigniory is suspended in part and in *esse* for part, and the same law is of a rent charge.

Dowress must  
pay a third part  
of rent.

Seigniory sus-  
pended.

Likewise a seigniory may be suspended in part by the act of a stranger. As if two joint tenants or coparceners be of a seigniory, and one of them disseises the tenant of the land, the other joint tenant or coparcener may distrain for his or her moiety.

Grant and re-  
servation dis-  
tinguished as to

Concerning the apportionment of rents, there is a difference between a grant of a rent, and a reservation of a rent: for if a man

be seised of two acres of land, of one in fee-simple, and of another in tail, and by his deed grants a rent out of both in fee, in tail, for life &c. and dies, the land entailed is discharged, and the land in fee-simple remains charged with the whole rent: for against his own grant he shall not take advantage of the weakness of his estate in part. But if he make a gift in tail, or a lease for life or for years of both acres, reserving a rent, and the donor or lessor dies, and the issue in tail avoid the gift or lease, the rent shall be apportioned; for seeing the rent is reserved out of and for the whole land, it is reason that when part is evicted by an elder title, that the donee or lessee should not be charged with the whole rent, but that it should be apportioned rateably according to the value of the land, as Littleton here says. If a man grant a rent charge out of two acres, and after the grantee recovers one of the acres against the grantor by a title paramount, the whole rent shall issue out of the other acre: but if the recovery be by a faint title by covin, then the rent is extinct for the whole, because he claims under the grantor. If a man infeoffs B. of one acre in fee upon condition, and B. being seised of another acre in fee grants a rent out of both acres to the feoffor, who enters into the one acre for condition broken, the whole rent shall issue out of the other acre; because his title is paramount the grant. But if a man makes a lease of Black Acre and White Acre, reserving two shillings rent, upon condition that if the lessee does such an act &c. that then he shall have the fee in Black Acre, and the lessee performs the condition, albeit now by relation he has the fee-simple *ab initio*, yet shall the rent be apportioned, for that the reversion of one acre whereunto the rent was incident is gone from the lessor; and so note a diversity between a rent in gross and a rent incident to a reversion, concerning the apportionment thereof. And yet in some cases a rent charge shall not be wholly extinct, where the grantee claims from and under the grantor. As if B. makes a lease of one acre for life to A. and A. is seised of another acre in fee, and A. grants a rent charge to B. out of both acres, and commits waste in the acre which he holds for life, and B. recovers in waste; the whole rent is not extinct, but shall be apportioned; and yet B. claims the one acre under A. And so it is if A. had made a feoffment in fee, and B. had entered for the forfeiture, the rent is to be apportioned and is not wholly extinct: and the reason hereof is, for that it is a maxim of law, that no man shall take advantage of his own wrong, and therefore seeing the waste and forfeiture were

*apportionment  
on eviction by  
elder title.*

committed by the act and wrong of the lessee, he shall not take advantage thereof to extinguish the whole rent: and the whole rent cannot issue out of the other acre only, because the lessor has the one acre under the estate of the lessee, and therefore it shall be apportioned.

Common, apportionment of, on descent of part of soil to owner of common.

[149a]

A. has common of pasture *sauns nombre* in twenty acres of land, and ten of those acres descend to A. [in fee-simple]: the common *sauns nombre* is entire and uncertain and cannot be apportioned but shall remain. But if it had been a common certain (as for ten beasts), in that case the common should be apportioned. And so it is of common of estovers, of turbary, of piscary &c. And yet in none of these cases, the descent, which is an act of law, shall work any wrong to the *terre-tenant*; for he shall have that which belongs to him, for the act in law shall work no wrong.

Heriot service indivisible and extinct by lord's purchase of part of land; contra of heriot custom.

[149b]

*Because that such services are not yearly services &c.*] This is *ratio una*, but not *unica*, as it appears by that which has been said. If there be lord and tenant by fealty and heriot service, and the lord purchase part of the land, the heriot service is extinct, (and yet it is not annual, but to be paid at the death of the tenant) because it is entire and valuable. But where our author speaks of services, it is implied that a heriot custom, though it be entire, valuable, and not annual, yet by the purchase of part it shall not be extinguished.

Entire services multiplied by tenant's alienation in parcels.

On the other part, when the tenure is by an entire service, and the tenant aliens part of the tenancy, in what cases the rent shall be multiplied, (that is) where the feoffor and the alienee shall pay the entire rent severally, (for regularly it holds, that *quæ in partes dividi nequeunt solida à singulis præstantur*) and where not, you may read at large in my Reports. [6 Co. 1. 8 Co. 104].

Apportionment is according to value, not quantity.

And by this (&c.) is also implied, that the apportionment shall not be according to the quantity of the land, but according to the quality or value thereof, as by that which has been said appears.

## SECTION 224.

ALSO, if a man has a rent charge, and his father purchases parcel of the tenements charged in fee, and dies, and this parcel descends to his son who has the rent charge, now this charge shall be apportioned according to the value of the land, as is aforesaid of rent service; because such portion of the land purchased by the father comes not to the son by his own act, but by descent and by course of law.

If part descends to owner of rent-charge, no merger of the whole rent, but same may be apportioned.

And so it is if the tenant gives to the father of the grantee part of the land in tail, and this descends to the grantee, the rent shall be apportioned; hence by act of law a rent charge may be suspended for one part, and be in *esse* for another. And so it is, if the father dies, after whose death the rent descends to the son, the rent shall be apportioned; and so it is if the grantee grant the rent to the tenant of the land and to a stranger, the rent is extinct but for a moiety. If a man has issue two daughters, and grants a rent charge out of his land to one of them, and dies, [whereby the land charged with the rent descends to the two daughters in coparcenary], the rent shall be apportioned [as to the daughter to whom the rent is not granted]; and if the grantee [of the rent] enfeoffs another of her part of the land, yet the moiety of the rent remains issuing out of her sister's part, because the part of the grantee in the land by the descent was discharged of the rent.

So if rent descend to owner of part of land.

[150a]

But in all these cases where the rent charge is apportioned by act in law, yet the writ of annuity fails; for if the grantee should bring a writ of annuity, he must ground it upon the grant by deed, and then must he, as it hath been said, bring it for the whole. Also in respect of the realty the rent is apportioned. But the personalty is indivisible, and by act in law shall not be divided.

Writ of annuity lost by apportionment.

If execution be sued of body and lands upon a statute merchant or staple, and after the inheritance of part of those lands descends to the conusee, all the execution is avoided; for the duty is personal, and cannot be divided by act in law.

Statute avoided by descent to conusee.

Recovery on account of infancy or lunacy, the party is in by act of law, not by his own act.

Comes not to the son by his own act, but by descent and by course of law.] If the father within age purchase part of the land charged, and aliens within age and dies, the son recovers in a writ of *dum fuit infra etatem*, or enters; in this case the act of law is mixed with the act of the party, and yet the rent shall be apportioned; for after the recovery or entry the son has the land by descent. So it is in case the son recovers part of the land upon an alienation by his father *dum non fuit compos mentis*, the rent shall be apportioned for the cause aforesaid.

Dowress accepting rent-charge may still claim dower and have an apportionment of the rent.

A man seised of lands in fee takes a wife, and afterwards makes a feoffment in fee, and the feoffee grants a rent charge of ten pound out of the land to the feoffor and his wife and to the heirs of the husband, the husband dies, the wife recovers the moiety of her dower by custom; the rent charge shall be apportioned, and she may distrain for five pounds, which is the moiety of the rent. In which case two notable things are to be observed. 1st. Albeit the dower be by relation or fiction of law above the rent, yet when the wife recovers her dower, she shall not have her entire rent out of the residue; for a relation of fiction of law shall never work wrong or charge to a third person, but *in fitione juris semper est æquitas*. 2d. That albeit her own act concurs with the act in law, yet the rent shall be apportioned.

[151 a b]

## SECTION 228.

Rent on lease for life becomes seck on lessor's granting away reversion reserving rent.

ALSO, if a man let lands to another for term of life, reserving to him certain rent, if he grant the rent to another by his deed, saving to him the reversion of the land so let, &c. such rent is but a rent seck; because the grantee had nothing in the reversion of the land, &c. But if he grant the reversion of the land to another for term of life, and the tenant attorn, &c. then has the grantee the rent as a rent service, for that he has the reversion for term of life.

Rent passes by grant of reversion, but not è converso.

And the reason hereof is, because the rent is incident to the reversion, and passes by a grant of the reversion as with the superior, without saying *cum pertinentiis*. But by the grant of the rent the reversion does not pass.

## SECTION 229.

[152 a]

AND so it is to be intended, that if a man give lands or tenements in tail yielding to him and to his heirs a certain rent, or lets land for term of life rendering a certain rent, if he grant the reversion to another, &c. and the tenant attorn, all the rent and service pass by this word (reversion) because such rent and are service in such case incident to the reversion, and pass by the grant of the reversion. But albeit he grants the rent to another, the reversion does not pass by such grant. Same.

## SECTION 231.

ALSO, if there be lord mesne and tenant, and the tenant holds of the mesne by the service of five shillings, and the mesne holds over by the service of twelvecence, if the lord paramount purchases the tenancy in fee, then the service of the mesnalty is extinct; because when the lord paramount has the tenancy, he holds of his lord next paramount, and if he should hold this of him who was mesne, then he should hold the same tenancy immediately of divers lords by divers services, which would be inconvenient, and the law will sooner suffer a mischief than an inconvenience, and therefore the seigniority of the mesnalty is extinct. Mesnalty extinguished by lord paramount purchasing tenancy.

For one man cannot be both lord and tenant, nor can one and the same land be immediately holden of divers lords. So if the lord release to the tenant, the mesnalty is extinct. For whether the lord purchase the tenancy, or the tenant the seigniority, the same consequence must ensue. Same person cannot be both lord and tenant.  
[152 b]

## SECTION 232.

BUT inasmuch as the tenant holds of the mesne by five shillings, and the mesne holds but by twelvecence, so that he has more in But mesne holds difference of rent as a rent-seck.

*advantage by four shillings than he pays to his lord, he shall have the said four shillings as a rent seck yearly of the lord who purchased the tenancy.*

*Rent-seck taken in execution, distress incident.*

[153 a]

And therefore if a man makes a lease for life reserving a rent, and binds himself in a statute, and [the conusee] has the rent extended and delivered to him, he shall distrain for the rent, because he comes to it by course of law. But if a rent service be made a rent seck by the grant of the lord, the grantee shall not distrain for it, for that the distress remains with the fealty.

### SECTION 233.

*Remedy for rent-seck is by real action, refusal to pay being a disseisin.*

*ALSO, if a man who has a rent seck be once seised of any parcel of the rent, and afterwards the tenant will not pay the rent behind, this is his remedy. He ought to go by himself or by others to the lands or tenements out of which the rent is issuing, and there demand the arrears of the rent; and if the tenant deny [i. e. refuse] to pay it, this denial is a disseisin of the rent. Also, if the tenant be not then ready to pay it, this is a denial, which is a disseisin of the rent. Also, if the tenant, or any other man, be not remaining upon the lands or tenements to pay the rent when he demands the arrears, this is a denial in law and a disseisin in deed, and of such disseisins he may have an assize of novel disseisin against the tenant and shall recover the seisin of the rent, and the arrears with damages, and the costs of his writ and plea. And if after such recovery (and execution had), the rent be again denied unto him, then he shall have a re-disseisin, and shall recover double damages, &c.*

*Demand on land when sufficient.*

*To the lands.]* For a demand of the tenant out of the land is not sufficient; but if there be a house and land, a demand on the land is sufficient; but for a condition broken, it ought to be at the house, as hath been said before.

*Demand of condition and rent distinguished.*

[153 b]

*Arrear.]* This word *arrear* is to be observed, for it is not necessary that the grantee of the rent should demand it at the very time when it becomes due, but at any time after is sufficient. For this is not like a demand of a rent upon a condition; because that



is penal and overthrows the whole estate: and therefore the time of demand must be certain, to the end the lessee, donee, or feoffee may be there to pay the rent. But a demand of a rent seck or rent charge is but a formal means to recover that which is due; and therefore in that case it may be demanded after it is behind at any time, whether the tenant be present or no, for remedies for rights are ever favourably extended.

*This is a denial in law.*] For wheresoever there is a lawful demand of a rent, and the same is not paid, whether the tenant be present or absent, yet this is a denial in law, albeit there be no words of denial. It appears here, that the demand must be made upon the land, and albeit the tenant nor any for him be there, yet must the grantee demand it, because without a demand there can be no denial in deed or in law.

*Demand and non-payment is a denial.*

*Assize of novel disseisin.*] It is called *assiza novæ disseisina*, for that the justices of eyre, before whom these assizes were taken in their proper counties, rode their circuits from seven years to seven years, and no disseisin before the eyre if it were not complained of in the eyre could be questioned after the eyre; and therefore a disseisin committed before the last eyre was called an ancient disseisin, and a disseisin after the last eyre was called a new disseisin, or *nova disseisina*.

*Novel disseisin what.*

*Assizes formerly held once in seven years.*

*And shall recover seisin of the rent.*] But if the land out of which the rent issues be in two counties, albeit it be but one entire rent, yet he must sue two writs of assize. But he shall have these several assizes *in confinio comitatús*, and in either county shall make his plaint of the whole rent by the statute 7 R. 2. cap. 10. But for common of pasture, of turbary, of piscary, of estovers, and the like in one county, appendant or appurtenant to land in another county, an assize *in confinio comitatús* lies at the common law; and so it is of a nuisance done in one county to lands lying in another county, the like assize lies at the common law. And albeit the counties do not adjoin, but there be twenty counties mean between them, yet the assize *in confinio comitatús* lies, and the justices shall sit between the said counties.

*Remedy for rent common, &c. issuing out of land in two counties.*

[154 a]

[154b]

## SECTION 234.

Assize means  
a jury.

AND memorandum, *that this word assize is nomen equivocum ; for sometimes it is taken for a jury. And sometimes for the whole writ of assize. But it seems, that the reason why such writs at the beginning were called assizes was, for that by every such writ it is commanded to the sheriff, quòd summeat twelve, which is as much to say, that he ought to summon a jury.*

[Note, here follows in Coke a long dissertation on the constitution of juries in real actions, which actions being now rarely used, the subject is become one of minor importance.]

Improprate  
tithes are now  
temporal in-  
heritances.

[159a]

As to tithes and other ecclesiastical duties, which came to the crown by the statutes of 27 H. 8., 31 H. 8., 37 H. 8., and 1 E. 6., these are by those statutes and that of 32 H. 8. and 1 & 2 Ph. and Mar. now become temporal inheritances in the hands of laymen, and shall be accounted [real] assets [for payment of their debts], and husbands shall be tenants by the curtesy and wives endowed of them, and shall have other incidents belonging to temporal inheritances.

Remedy for  
subtraction.

Only this ecclesiastical quality they have, that the owner or possessor thereof may sue for the subtraction of the same in the ecclesiastical court. And by another statute [2 Ed. 6. c. 13.] remedy is given as well to the lay person as to the ecclesiastical person for subtraction of all manner of predial tithes ; and he shall recover the treble value if they are not justly divided or set forth ; and albeit the treble value is not expressly given to the proprietor of the tithes, yet forasmuch as he is the party aggrieved, and he has the property and interest in the tithes, the treble value is given to him ; and whensoever a statute gives a forfeiture or penalty against him who wrongfully detains or dispossesses another of his duty or interest, in that case he who sustains the wrong shall have the forfeiture or penalty, and shall have an action therefore upon the statute at the common law, and the king shall not have the forfeiture in that case. But if the proprietor will sue for such subtraction of tithes in the ecclesiastical

court, then he shall recover but the double value by the express words of the act. Hence they have election either to sue for the treble value at the common law, or for the double value in the ecclesiastical court, or for subtraction of tithes there also.

*Assize of mortd'ancestor.*] This writ a man may have after the decease of his immediate ancestor; as where his father, mother, brother, sister, uncle or aunt, dies seised of any lands, and a stranger abates &c.

*Assize mortd'ancestor what.*

## SECTION 235.

[159b]

ALSO, if there be lord and tenant, and the lord grants the rent of his tenant by deed to another, saving to him the other services, and the tenant attorns, that is a rent seck, as is aforesaid. But if the rent be denied him at the next day of payment, he has no remedy; because he had not any possession thereof. But if the tenant when he attorns to the grantee, or afterwards, will give a penny or a halfpenny to the grantee in name of seisin of rent, then if at the next day of payment the rent be denied, he shall have an assize of novel disseisin. And so it is if a man grant by his deed a yearly rent issuing out of his land to another &c., if the grantor then or after pay to the grantee a penny, or a halfpenny, in the name of seisin of the rent, then, if after the next day of payment the rent be denied, the grantee may have an assize, or else not &c.

Rent and service severed it becomes seck. Payment of penny in name of seisin.

Here it is to be observed, that payment of any money in name of seisin of the rent, before any rent becomes due, is a good seisin of the rent to maintain an assize when it is due; and that which is given in the name of seisin of the rent, works this effect to give seisin, and yet is no part of the rent, nor shall be abated out of the rent: but you shall read more hereof hereafter, Sect. 565. The grant and delivery of the deed is no seisin of the rent; but only a seisin in law, which is not sufficient to maintain an assize or any other real action, but there must be an actual seisin.

Payment of penny in name of rent gives actual seisin, on which only real action for rent can be supported.

[160a]

## SECTION 236.

Remedy for  
rent-seck.

ALSO, of rent seck a man may have an assize of mort'dancester, or a writ of ayel or cosinage, and all other manner of actions real as of any other rent.

[160b]

## SECTION 237.

Disseisin of  
rent service.

ALSO, there are three causes of disseisin of rent service, that is to say, rescous, replevin, and enclosure. Rescous is, when the lord distrains in the land holden of him for his rent behind, if the distress be rescued from him, or if the lord comes upon the land to distrain and the tenant or another man will not suffer him &c. Replevin is, when the lord has distrained, and replevin is made of the distress by writ or by plaint. Enclosure is, if the lands and tenements are so enclosed, that the lord may not come within the lands and tenements to distrain. And the cause, why such things are disseisins is that the lord is thereby disturbed of the means by which he may come to his rent, i. e. of his distress.

Arrears and  
current rent  
distinguished.

*For his rent behind.*] Here Littleton decides an ancient question in our books, viz. that the rent must be behind: for if no rent be behind when the distress is taken, how can the rescous amount to a disseisin of the rent when none is due? And that which the tenant may do when there is no rent behind, may a stranger do, if his beasts are distrained. So if the tenant tender the rent to the lord when he is to take the distress, if notwithstanding the lord will distrain, the tenant may make rescous. If the rent of the lord is behind, and the lord distrain the cattle of the tenant in the highway within his fee, the tenant may make rescous, for that it is forbidden by law to distrain in the highway. And by the same reason if the lord will distrain *averia caruca*, where there is a sufficient distress to be taken besides, or if the lord distrain any thing that is not distrainable, either by the common law or by any statute, the tenant may make rescous.

Rescous when  
justified.

[161a]

Note, there is a rescous in deed and a rescous in law. Of a rescous in deed somewhat has already been spoken. A rescous in law is, when a man has taken a distress, and the cattle distrained as he is driving of them to the pound go into the house of the owner, if he that took the distress demand them of the owner, and he deliver them not, this is a rescous in law, and so of the like.

*Rescous in law.*

If the lord comes to distrain cattle which he sees then within his fee, and the tenant or any other, to prevent the lord to distrain, drives the cattle out of the fee of the lord into some place out of his fee; yet may the lord freshly follow, and distrain the cattle, and the tenant cannot make rescous, albeit the place wherein the distress is taken is out of his fee, for now in judgment of law the distress is taken within his fee, and so shall the writ of rescous suppose. But if the lord coming to distrain had no view of the cattle within his fee, though the tenant drive them off purposely, or if the cattle of themselves after the view go out of the fee, or if the tenant after the view remove them for any other cause than to prevent the lord of his distress, then cannot the lord distrain them out of his fee, and if he does the tenant may make rescous.

*If the lord distrain off his own land, tenant may make rescous.*

If a man come to distrain for *damage feasant* sees the beasts in his soil, and the owner chases them out for the purpose of avoiding the distress, the owner of the soil cannot distrain them, and if he does the owner of the cattle may make rescue; for the beasts must be damage feasant at the time of the distress; and so note a diversity.

*Distress for damage feasant how avoidable.*

And so it is of an enclosure, or where the lord cannot come at his distress; for he that disturbs a man of the means [whereby he may obtain his rights] disseises him of the thing itself, as the turning of the stream that runs to a mill is a disseisin of the mill itself. So it is if a man be prevented from manuring his land, this is a disseisin of the land itself.

*Diverting stream a disseisin of the mill.*

## SECTION 238.

[161 b]

AND there are four causes of disseisin of a rent charge: scil. *rescous, replevin, inclosure, and denial*; for *denial is a disseisin of a rent charge, as is said before of a rent seck.*

*Disseisin of rent charge.*

*Detainer when a disseisin.*

To which you may add a fifth, viz. resistance to a distress [which however is a denial.] *Nota*, that when books say that a detainer of a rent charge or seck is a disseisin, it must be intended upon a demand made.

*Rescous by one joint-tenant makes both disseisors.*

If there be two joint-tenants, and the grantee of a rent charge distrains for the rent, and one of them makes rescous, they are both disseisors; for a distress for the rent is a demand in law, and then the non-payment is a denial and a disseisin; but he that made the rescous is the only disseisor with force.

### SECTION 239.

*Disseisin of rent-seck.*

*AND there are two causes of disseisin of a rent seck; that is to say, denial and enclosure.*

The reason wherefore enclosure is a disseisin of a rent seck, is because the grantee cannot come upon the land to demand it.

### SECTION 240.

*Disseisin of rent by forcible prevention of distress.*

*AND it seems, that there is another cause of disseisin of all the three services aforesaid; that is if the lord is going to the land holden of him to distrain for the rent behind, and the tenant hearing this encounters with him, and forestals him in the way by force and arms, or menaces him in such form that he dare not come to the land to distrain for fear of death or bodily hurt, this is a disseisin, for that the lord is disturbed of the means whereby he might come to his rent. And so it is, if by such forestalling or menacing, he who has a rent charge or rent seck is forestalled, or dare not come to the land to ask for the rent behind, &c.*

*Remedy for rents by stat. 32 H. 8. c. 37.*

[162 a]

Now has Littleton spoken of remedies for the recovery of the arrearages of rents. But since Littleton's time a right profitable statute, in the 32d year of H. 8., has been made for the recovery of arrearages of rents in certain cases where there lay no remedy at the common law, and it gives further remedy in some cases where at the common law there was some remedy before, which statute has

been well and beneficially expounded; and hereupon eight things are to be observed.

1st. When Littleton wrote, the heirs, executors, or administrators of a man seised of a rent service, rent charge, rent seck, or fee-farm, in fee-simple or fee-tail, had no remedy for the arrearages incurred in the life of the owner of such rents. But now a double remedy is given to the executors or administrators for payment of debts, &c. viz. either to distrain or to have an action of debt.

Executor's  
remedy for rent.

2d. That the preamble of the statute concerning executors or administrators of tenant for life is to be intended of *tenant pur auter vie*, so long as *cestui que vie* lives, who are also helped by the said double remedy. But after the estate for life determined, his executors or administrators might have had an action of debt by the common law; but they could not have distrained, which now they may do by force of this statute; for in that point it adds another remedy than the common law gave. 3d. If a man make a lease for life or lives, or a gift in tail, reserving a rent, this is a rent service within this statute.

Executors of  
tenant for life.  
[1 Ld. Ray.  
172.]

[162 b]

4th. The distress is the more plain and certain remedy than the action of debt; for the action of debt must be brought against those who took the profits when the rent became behind, or against their executors or administrators; but the distress may be taken upon the land be it either in the tenant's own hands or in the hands of any other who claims *by* or *from* him (i. e. by interpretation *under* him) as by purchase, gift, or descent. And these words, *claiming only by him and from him*, are to be understood claiming only from or under him by purchase, gift, or descent, and not paramount or above him; as the lord by escheat claims not under the tenant by purchase, gift, or descent, but by reason of his seignior, which is a title paramount.

Distress prefer-  
able to action of  
debt, as distress  
may be made by  
"assignis."

Per and Post  
distinguished.

5th. If there be lord and tenant and the rent is behind, and the lord grant away his seignior, and dies, the executors shall have no remedy for these arrearages; because the grantor himself had no remedy for them when he died in respect of his grant, and the statute is (in like manner as the testator might or ought to have done) *et sic de similibus*; for the act gives no remedy when the tes-

Executors.

tator himself has dispensed with the arrearages, or had no remedy when he died.

Executors.

6th. If the tenant makes a lease for life, the remainder for life, the remainder in fee; the tenant for life pays not the rent due to the lord; the lord dies; the tenant for life dies: the executors cannot distrain upon him in remainder, because he claims not by or from the tenant for life. And so it is of a reversion for the cause aforesaid. But if a man grant a rent charge to A. for the life of B. and lets the lands to C. for life, the remainder to D. in fee, the rent is behind by divers years, B. dies, and after C. dies: A. may distrain D. in remainder for all the arrearages, by the latter branch of the statute of 32 H. 8. And this diversity rises upon the several pennings of the former branch and of this latter clause, which gives the lesser estate the greater remedy.

Nomine pœnæ  
descends to heir,  
but arrears be-  
long to execu-  
tors.

7th. For the arrearages of a *nomine pœnæ*, this statute gives no remedy. For such arrearages the grantee himself may have an action of debt, and consequently his executors or administrators may have such an action, and yet the *nomine pœnæ* as an incident to the rent shall descend to the heir.

Of husband's  
remedy for rent  
during cover-  
ture.

8th. A feme sole is seised of a rent in fee, &c. which is behind and unpaid; she takes husband; the rent is behind again; the wife dies: the husband by the common law should not have the arrearages due before the marriage, but for the arrearages become due during the coverture the husband might have an action of debt by the common law. But now this statute by a particular clause gives the husband the arrearages due before marriage, and the said double remedy for the same, that he may distrain for the arrearages accruing during the coverture. So it gives him that which he could not have before, and further remedy for that which the common law gave him. And so it has been adjudged.



## BOOK III.

## CHAPTER I. SECTION 241.

[163a]

## OF PARCENERS.

**PARCENERS** are of two sorts; to wit, *parceners according to the course of the common law, and parceners according to the custom.* **Parceners.** *Parceners after the course of the common law are, where a man or woman, seised of certain lands or tenements in fee-simple or in tail, has no issue but daughters, and dies, and the tenements descend to the daughters, and they enter into the lands or tenements so descended to them, then they are called parceners, and are but one heir to their ancestor. And they are called parceners, because by the writ, which is called breve de partitione faciendâ, the law will constrain them, that partition shall be made among them. And if there be two daughters to whom the land descends, they are called three parceners; and if there be three daughters, they are called three parceners; and four daughters, four parceners; and so forth.*

Our author having treated in his two former books, first of estates and second of tenures, now in his third book teaches us the qualities of these estates, which he divides, 1st into absolute, 2d, conditional. Under absolute estates he classes coparcenery, joint-tenancy, and tenancy in common. Conditions he divides into express or in deed, and conditions at law. Then speaks he of descents, whereby the entry of him that has right may be taken away. And next to that, of the remedy how to preserve the same, viz. by continual claim. Then he teaches how a man, having a

Division.

[163b]

defeasible or an imperfect estate, may perfect and establish the same by three means, viz. by release, by confirmation, and attornment, where that is requisite. Having spoken of a descent, he then speaks of a discontinuance. And next to that, he teaches in what cases the same may be avoided by remitter. And lastly, he sets forth the learning of warranties (a curious and cunning kind of learning I assure you). And thus have you an account of the thirteen several chapters of his third book. And now his method being understood, let us hear what our author will say unto us concerning parceners.

*Parceners are but one heir.*

*Parceners.*] Are altogether but one heir to one person, for albeit they have moieties in the lands, yet are they both but one heir; and one of them is not the moiety of an heir, but both of them are but *unus hæres*.

*Descent and purchase distinguished.*

*Attainder.*

And it is to be observed, that there is a diversity between a descent, which is an act of the law, and a purchase, which is an act of the party. For if a man be seised of lands in fee, and has issue two daughters, and one of the daughters is attainted of felony, and the father dies, both daughters being alive; the one moiety shall descend to the one daughter, and the other moiety shall escheat. But if a man make a lease for life, the remainder to the right heirs of A. being dead, who has issue two daughters, whereof the one is attainted of felony; in this case some have said, that the remainder is not good for a moiety, but void for the whole, for that both the daughters should have been, as Littleton says, but one heir.

*Complete heir.*  
[164a]

And when the right heir claims by purchase, he must be (say they) a complete right heir in judgment of law. And therefore if lands be given to a man and to the heirs female of his body, and he has issue a son and a daughter, and dies, the daughter shall have the land by descent; but if a remainder be limited to the heirs female of the body of I. S. and he has issue a son and a daughter, his daughter shall never take it by purchase, for that she is not heir female of the body of I. S. because he has a son.

*Unity of estate.*

And as they are but one heir, and yet several persons, so have they one entire freehold in the land in respect of strangers, as long as it remains undivided. But between themselves to many pur-

poses they have in judgment of law several freeholds ; for the one of them may enfeoff the other of her part, and make livery.

And this coparcenery is not severed or divided in law by the death of either of them ; for if one die, her part shall descend to her issue. And it is to be observed that herein the descent is sometimes *in stirpes*, viz. to stocks or roots ; and sometimes *in capita*, to heads. As if a man has issue two daughters and dies, this descent is *in capita*, viz. that each shall inherit alike, as Littleton here says. But if a man has issue two daughters, and the eldest daughter has issue three daughters, and the youngest one daughter, all these four shall inherit, but the daughter of the youngest shall have as much as the three daughters of the eldest. Also if a man has issue two daughters, and the eldest has issue divers sons and divers daughters, and the youngest has issue divers daughters, the eldest son of the eldest daughter only shall inherit ; for this descent is not *in capita*, but all the daughters of the youngest shall inherit, and the eldest son is coparcener with the daughters of the youngest, and shall have one moiety, viz. his mother's part ; so that men descending of daughters may be coparceners as well as women, and in this last case the descent is *in stirpes*.

Descent.

[164b]

[Of lands or tenements.] It is to be considered of what inheritances daughters shall be coparceners, and how and in what manner partition shall be made between them. Wherein it is to be observed, that of inheritances some are entire and some are several ; again, of entire, some are divisible, and some are indivisible.

Subdivision.

An advowson is an entire inheritance ; and yet in effect the same may be divided between coparceners, for they may divide it to present by turns.

Advowson.

A rent charge is entire, and against common right ; yet may it be divided between coparceners, and by act in law the tenant of the land is subject to several distresses, and partition may be made before seisin of the rent.

Rent charge.

Entire inheritances not divisible are those which yield an uncertain profit, as estovers, common, corodies, homage, fealty, piscary uncertain, or common *sans nombre*, and if such an uncertain inheritance descends to two coparceners, it cannot be divided between

[165a]  
Partition of  
incorporeal  
inheritances  
which are indi-  
visible.

them ; but then it may be demanded, what shall become of these inheritances ? The answer is, that it appears in our books, that regularly the eldest shall have the reasonable estovers, common, piscary, corody uncertain, &c. and the rest shall have a contribution, that is, an allowance of the value in some other of the inheritances, and so of the like. But what if the common ancestor left no other inheritance to give any thing in allowance, what contribution or recompense shall the younger coparceners have ? It is answered, that if the estovers or piscary or common be uncertain, then shall one coparcener have the estovers, piscary, or common, &c. for a time, and the other for the like time ; as the one for one year, and the other for another, or greater or less time, whereby no prejudice can grow to the owner of the soil. Or in case of the piscary, the one may have one fish and the other the second, &c. or the one may have the first draught, and the other the second draught, &c. And if it be of a park, one may have the first beast, and the second the second, &c. And if of a mill, one may have the mill for a time, and the other for the like time ; or the one one toll-dish, and the other the second.

*Dignities.*

But now let us turn our eye to inheritances of honour and dignity. If there be more daughters than one, the eldest shall not have the dignity ; but the king, who is the sovereign of honour, may for the uncertainty confer the dignity upon which of the daughters he pleases. But if an earl who has this dignity to him and his heirs dies, having issue one daughter, the dignity shall descend to the daughter, for there is no uncertainty, being only one daughter, and the dignity shall descend unto her and her posterity, as well as any other inheritance. But the dignity of the crown of England is without all question descendible to the eldest daughter alone, and to her posterity, and so has it been declared by act of parliament. And if a castle that is used for the necessary defence of the realm descend to two or more coparceners, it shall not be divided, for as one says, *propter jus gladii dividi non potest*. But castles of habitation for private use, that are not for the necessary defence of the realm, ought to be parted between coparceners as well as other houses ; and wives may thereof be endowed, as hath been said in the Chapter of Dower.

## SECTION 242.

[165b]

*ALSO, if a man seised of tenements in fee-simple or in fee-tail dies without issue of his body begotten, and the tenements descend to his sisters, they are parceners, as is aforesaid. And in the same manner, where he has no sisters, but the lands descend to his aunts, they are parceners, &c. But if a man has but one daughter, she shall not be called parcener, but she is called daughter and heir, &c.*

Collaterals.

*Or in fee-tail.] This must be intended of an estate tail made to the father and to the heirs of his body; for otherwise if the estate tail were made to a man and to the heirs of his body, his sisters cannot inherit. And not only daughters shall be coparceners, but sisters, aunts, great-aunts, &c.*

## SECTION 243.

*AND it is to be understood, that partition may be made in divers ways. One is, when they agree to make partition, and do make partition of the tenements; as if there be two parceners to divide between them the tenements in two parts, each part by itself in severalty and of equal value; and if there be three parceners, to divide the tenements in three parts by itself in severalty, &c.*

Partition.

By this section it is to be understood, that there are two kinds of partitions between coparceners; the one in deed or express, and the other in law or implicit [implied]. Of partitions in deed or express, some are voluntary, whereof Littleton enumerates four kinds; and one compulsory, that is, by writ of partition. If coparceners make partition, at full age and unmarried, and of sane memory, of lands in fee-simple, it is good and firm for ever, albeit the values are unequal; but if it be of lands entailed, or if any of the parceners are of non-sane memory, it shall bind the parties themselves, but not their issues unless it be equal; or if any are covert, it shall bind the husband, but not the wife or her heirs; or if any are within age, it shall not bind the infant; as shall be said more fully hereafter.

Equal partition binds who.

[166a]

## SECTION 244.

By friends.

ANOTHER partition there is, viz. to choose, by agreement between themselves, certain of their friends to make partition of the lands or tenements in form aforesaid. And in this case, after such partition, the eldest daughter shall choose first one of the parts so divided, which she will have for her part, and then the second daughter next after her another part, and then the third sister another part &c. unless it is otherwise agreed between them. For it may be agreed between them, that one shall have such tenements, and another such tenements &c. without any primer election.

Agreement  
overrules law.

Here by this (&c.) is implied divers rules of law proving the conclusion of Littleton in this Sect. viz. *modus et conventio vincunt legem. Pacto aliquid licitum est, quod sine pacto non admittitur. Quilibet potest renunciare juri pro se introducto*: but with this limitation, that these rules extend not to any thing which is against the common-wealth or common right. For *conventio privatorum non potest publico juri derogare*.

[166b]

## SECTION 245.

By lot.

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

Advowson.

By Fleta, it appears that *initia pars* is personal to the eldest, and that this prerogative or privilege descends not to her issue, but the next eldest sister shall have it. And here is a diversity to be observed between this case of a partition in deed by the act of the parties, for there the privilege of election of the eldest daughter shall not descend to her issue; but where the law gives the eldest any privilege without her act, there that privilege shall descend. As if there are divers coparceners of an advowson, and they cannot agree to present, the law gives the first presentment to the eldest; and this privilege shall descend to her issue; nay her assignee shall

have it; and so shall her husband who is tenant by the curtesy have it also.

*Then it is said that the eldest sister shall choose last &c.]* By this and the &c. in the end of this section is implied that the rule of law is, *cujus est divisio, alterius est electio*. And the reason of this law is for the avoiding of partiality.

## SECTION 246.

ANOTHER partition or allotment is, as if there are four par- By balls.  
*ceners, and after partition of the lands are made, every part of the land by itself is written in a little scroll and is covered all in wax in manner of a little ball, so that none may see the scroll, and then the four balls of wax are put into a hat to be kept in the hands of an indifferent man, and then the eldest daughter shall first put her hand into the hat, and take a ball of wax with the scroll* [167 a]  
*within the same ball for her part, and then the second sister shall put her hand into the hat and take another, the third sister the third ball, and the fourth sister the fourth ball &c. and in this case every one of them ought to stand to their chance and allotment.*

## SECTION 247.

ALSO, there is another partition. As if there are four par- By writ.  
*ceners, and they will not agree to a partition to be made between them, then the one may have a writ of partitione faciendâ against the other three, or two of them may have a writ of partitione faciendâ against the other two, or three of them may have a writ of partitione faciendâ against the fourth, at their election.*

Here follows the fourth partition in deed. Littleton having spoken of voluntary partitions, or partitions by consent: now he speaks of a partition by the compulsory means of law where no partition can be had by consent. Now the word (*tenet*) in the writ of partition always implies a tenant of a freehold. And therefore if one coparcener makes a lease for years, yet a writ of partition lies. But if one or both make a lease for life, a writ of *Reversion on estate for years distinguished from reversion on estate for life as to writ of partition.*

partition does not lie between them : because they do not hold the freehold together, and the writ of partition must be against the tenant of the freehold. If one coparcener disseise another, during this disseisin a writ of partition does not lie between them; for that *non tenent insimul et pro indiviso*.

Moveable partitions.

But there are other partitions in deed than here have been mentioned. For a partition made between two coparceners, that the one shall have and occupy the land from Easter until the first of August in severalty by himself, and that the other shall have and occupy the land from the first of August until the feast of Easter yearly to himself and their heirs, this is a good partition. [167 b] Also, if two coparceners have two manors by descent, and they make partition, that the one shall have the one manor for one year and the other the other manor for the next year, and so *alternis vicibus* to them and their heirs, this is a good partition. The same law is, if the partition be made in form aforesaid for two or more years, and each coparcener has an estate of inheritance and no chattel, albeit they have the occupation *alternis vicibus* but for a certain term of years.

Severances ;

If one coparcener makes a feoffment in fee of her part, that is a severance of the coparcenary, and several [i. e. not joint] writs of *præcipe* shall lie against the other coparcener and the feoffee.

By curtesy, [sed qu.]

If two coparceners are, and each of them takes husband and has issue, and the wives die, the coparcenary is divided, and here is a partition in law ; [i. e. the husbands are tenants in common.]

## SECTION 248.

Judgment on writ of partition.

*AND when judgment shall be given upon this writ, the judgment shall be thus ; that partition shall be made between the parties, and that the sheriff in his proper person shall go to the lands and tenements &c. and that he by the oath of twelve lawful men of his bailiwick &c. shall make partition between the parties, and that one part of the lands and tenements shall be assigned to the plaintiff, or to one of the plaintiffs, and another part to another*



*parcener &c. not making mention in the judgment of the eldest sister more than of the youngest.*

By Littleton it appears, that the forms of judgments, pleas, and other legal proceedings, do conduce much to the right understanding of the law and of the reason thereof; as here Littleton rightly collects upon the form of the judgment, that the sheriff shall deliver to them such parts as he thinks good, and that the eldest coparcener shall have no election when partition is made by the sheriff. And it is to be observed, that there are two judgements in a writ of partition. Of the former Littleton speaks in this place. And when partition is made by the oath of twelve men, and assignment and allotment thereof, and so returned by the sheriff, then the latter judgment is, *ideo consideratum est, quod partitio prædicta firma et stabilis in perpetuum teneatur*, and this is the principal judgment. And of the other, before this is given, no writ of error lies.

Final and interlocutory.  
[168a]

## SECTION 249.

[168b]

AND of the partition which the sheriff has so made, he shall give notice to the justices under his seal, and the seals of every of the twelve &c. And so in this case you may see, that the eldest sister shall not have the first election, but the sheriff shall assign to her her part which she shall have &c. And it may be that the sheriff will assign first one part to the youngest &c. and last to the eldest &c.

Same.

## SECTION 250.

[169a]

AND note, that partition by agreement between parceners may be made by law between them, as well by parol without deed, as by deed.

Partitions good at common law without deed, [contra now by stat. of Frauds.]

Here it appears, that not only lands and other things which pass by livery without deed, but things also that lie in grant, as rents, commons, advowsons and the like, which cannot pass by grant without deed, whether they are in one county or in several counties, may be parted and divided by parol without deed. But a

partition between joint tenants is not good without deed, albeit it be of lands, for they are compellable to make partition by the statutes of 31 H. 8. c. 10. and 32 H. 8. c. 32. and they must pursue that act by writ *de partitione faciendâ*; and a partition between joint tenants without writ remains as at the common law, which could not be done by parol. And so it is, and for the same reason, of tenants in common. But if there be two tenants in common, and they make partition by parol, and execute the same in severalty by livery, this is good and sufficient in law. And therefore where the books say that joint tenants may make partition without deed, it must be intended of [a partition by] tenants in common executed by livery.

*Of the privity and unity of joint estates.*

Note, between joint tenants there is a twofold privity, viz. in estate and in possession: between tenants in common, there is privity only in possession, and not in estate: but parceners have a threefold privity, viz. in estate, in person, and in possession.

## SECTION 251.

*Owely of partition.*

*ALSO, if two messuages descend to two parceners, and the one messuage is worth twenty shillings per annum, and the other but ten shillings per annum, in this case partition may be made between them in this manner; to wit, the one parcener to have the one messuage, and the other parcener the other messuage; and she who has the messuage worth twenty shillings per annum and her heirs shall pay a yearly rent of five shillings issuing out of the same messuage to the other parcener and to her heirs for ever, because each of them should have equality in value.*

## SECTION 252.

*Of the owelty-rent, and distress.*

*AND such partition made by parol is good enough; and that parcener who shall have the rent and his heirs, may distrain of common right for the rent in the said messuage worth twenty shillings, if the rent of five shillings be behind at any time, in whose hands soever the same messuage shall come, although there never were any writing of this made between them for such a rent.*

*By parol.*] Note, here a rent may be granted for owelty of partition without deed, even as a rent in case of a lease for years, for life, or a gift in tail, may be reserved, without deed; and so may a rent be assigned to a woman out of the land, whereof she is dowable &c. without deed. But albeit an exchange for lands in the same county may be without deed; yet a rent granted for equality of the same exchange cannot be without deed. And the cause of the difference is apparent; for coparceners are in by descent, and compellable to make partition.

*Partition and exchange distinguished as to owelty rent.*

*Issuing out of the same messuage &c.*] For if it be granted out of other lands then descended to the coparceners, there must be a deed. But if the rent be granted generally (out of no land in certain) for owelty of partition, *pro residuo terræ*, it shall be intended out of the property of her who grants it.

[169 b]  
*Owelty rent must be out of same lands.*

If there are three coparceners, and they make partition, and one of them grants twenty shillings per annum out of her part to her two sisters and their heirs for equality of partition, the grantees are not joint tenants of this rent; but the rent is in nature of coparcenary, and after the death of the one grantee the moiety of the rent shall descend to her issue in course of coparcenary, and shall not survive to the other, for that the rent comes in recompence of the land, and therefore shall ensue the nature thereof; and if the grant had been made to the two of a rent of twenty shillings, viz. to the one ten shillings and to the other ten shillings, yet shall they have the rent in course of coparcenary, and join in an action for the same. And if two coparceners by deed indented alien both their parts to another in fee, rendering to them two and their heirs a rent out of the land, they are not joint tenants of this rent, but they shall have the rent in course of coparcenary; because their right in the land, out of which the rent is reserved, was in coparcenary.

*Owelty rent reserved to two is still in coparcenary.*

If one coparcener be married, and for owelty of partition the husband and wife grant a rent to the other two out of the part of the *fême covert*, this partition being equal shall charge the part of the *fême covert* for ever.

*Fême covert.*

*May distrain of common right &c.*] That is, in this case the law gives a distress, lest the grantee should be without remedy for that

*Distress.*

which upon the partition she has given a valuable recompense for in land which descended &c.

## SECTION 253.

Owely-rent is a rent charge.

*IN the same manner it is of all manner of lands and tenements &c. where such rent is reserved to one or to divers parceners upon such partition &c. But such rent is not rent service, but a rent charge of common right had and reserved for equality of partition.*

[170 a]

*Lands and tenements &c.]* Here (&c.) implies a caution, viz. that they are such lands and tenements out of which a rent for equality of partition may be granted, whereof sufficient has been said before.

Reservation is a grant.

*Reserved to one.]* Here reservation is taken for a grant; and if used upon a partition it amounts to a grant, which is worthy the observation.

## SECTION 254.

Parcenary only by descent.

*AND note, that none are called parceners by the common law but females or the heirs of females who come to lands or tenements by descent; for if sisters purchase lands or tenements, of this they are called joint-tenants, and not parceners.*

This needs no explanation.

## SECTION 255.

Unequal partitions bind only unfettered tenants in fee.

*ALSO, if two parceners of land in fee-simple make partition between themselves, and the part of the one values more than the part of the other, if they were at the time of the partition of full age, i. e. of twenty-one years, then the partition shall always remain, and be never defeated. But if the tenements (whereof they make partition) are to them in fee-tail, and the part of the one is better in yearly value than the part of the other, albeit they are concluded during their lives to defeat the partition; yet if the par-*

*cener who has the lesser part in value, has issue and dies, the issue may disagree to the partition, and enter and occupy in common the other part which was allotted to her aunt, and so the other may enter and occupy in common the other part allotted to her sister &c. as if no partition had been made.*

*Then the partition shall always remain &c.]* Hereby it appears, that the inequality of value shall not impeach a partition made of lands in fee-simple between coparceners of full age, no more than it shall do in case of an exchange.

*They are concluded during their lives.]* This unequal partition does so conclude the parceners themselves, as that she who has the unequal part shall not avoid it during her life.

*Concluded.]* This word is derived of *con* and *claudio*, and in this sense signifies to close or shut up her mouth, that she cannot speak to the contrary. *Estoppel well exemplified.*

Husband and wife tenants in special tail of certain lands in fee have issue a daughter; the wife dies; the husband by a second wife has issue another daughter; both the daughters enter (where the eldest is only inheritable) and make partition, the eldest daughter is concluded during her life to impeach the partition, or to say that the youngest is not heir, and yet she is a stranger to the tail, but in respect of privity in their persons the partition shall conclude, for a partition between mere strangers in that case is void, but the issue of the eldest may avoid this partition as issue in tail. [170b]

I. S. seised of lands in fee has issue two daughters, Rose and Anne, bastard eigne and *mulier puisne*, and dies. Rose and Anne enter and make partition. Anne and her heirs are concluded for ever.

### SECTION 256.

*ALSO, if two parceners of lands in fee take husbands, and they and their husbands make partition between them, if the part of the one be less in value than the part of the other, during the lives of their husbands the partition shall stand in its force. But albeit* *Unequal partition binds not feme covert.*

*it shall stand during the lives of their husbands, yet after the death of the husband, the woman who has the lesser part may enter into her sister's part as is aforesaid, and shall defeat the partition.*

*They and their husbands.]* Here it appears, that the wife must be party to the partition, and so are the books to be intended that speak of this matter.

*And shall defeat the partition.]* Note, the partition shall not be defeated for the surplusage only to make the partition equal, but here it appears that it shall be avoided for the whole. But of this more shall be said hereafter in this chapter, Section 264. And though the partition be unequal, yet is not the partition void, but voidable; for if after the decease of the husband, the wife enters into the unequal part and agrees thereunto, this shall bind, and therefore Littleton used the word (defeat), which proves it to be voidable.

Partitions void  
and voidable.

[171a]

### SECTION 257.

But equal parti-  
tion binds  
fême covert.

**BUT** *if the partition made between them were thus, that each part at the time of the allotment made was of equal yearly value, then it cannot afterwards be defeated in such cases.*

*At the time of the allotment.]* Hereby it appears that if the parts at the time of the partition be of equal yearly value, neither the wives nor their heirs shall ever avoid the same; and the reason hereof is, for that the husbands and wives were compellable by law to make partition, and that which they are compellable to do in this case by law, they may do by agreement without process of law. If the annual value of the land be equal at the time of the partition, and after become unequal by any matter subsequent, as by surrounding, ill husbandry, or such like, yet the partition remains good. But if the partition be made by force of the king's writ, and judgment thereof given, it shall bind the fême coverts for ever, albeit the parts be not of equal value; because it is made by the sheriff by the oath of twelve men by authority of law; and the judgment is, that partition shall remain firm and stable for ever, as hath been said.

So does parti-  
tion by writ.

## SECTION 258.

ALSO, if two coparceners be, and the youngest being within the age Infants. of twenty-one years, partition is made between them, so that the part which is allotted to the youngest is of less value than the part of the other, in this case the youngest, during the time of her nonage, and also when she comes to full age, i. e. of twenty-one years, may enter into the part allotted to her sister, and shall defeat the partition. But let such parcener take heed when she comes to her full age, that she takes not to her own use all the profits of the lands and tenements which were allotted unto her; for then she agrees to the partition at such age; in which case the partition shall stand and remain in force. But peradventure she may take the profits of the moiety, leaving the profits of the other moiety to her sister.

As before in the case of fême covert, so it is in the case of the Void and void-able distinguished. infant; for if the partition be equal at the time of allotment, it shall bind him for ever, because he is compellable by law to make partition, and he shall not have his age in a *partitione faciendâ*; [171 b] and though the partition be unequal, and the infant has the lesser part, yet is not the partition void but voidable by his entry; for if he take the whole profits of the unequal part after his full age, the partition is made good for ever. And therefore Littleton here gives him a caveat, that in that case he take not the whole profits of his unequal part. But a partition made by the king's writ *de partitione faciendâ* by the sheriff by the oath of twelve men, and judgment thereupon given, shall bind the infant, though his part be unequal, *causâ quâ suprâ*.

## SECTION 259.

AND it is to be understood, that when it is said, that males or females be of full age, this shall be intended of the age of twenty-one years; for if before such age any deed or feoffment, grant, release, confirmation, obligation, or other writing, be made by any of them Of the disability of infants. &c. or if any within such age be bailiff or receiver to any man &c.

*all serve for nothing, and may be avoided. Also a man before the said age shall not be sworn in an inquest &c.*

The law has so provided for the safety of an infant's estate, that before the age of twenty one years neither a man nor woman can bind themselves by any deed, or alien any land, goods, or chattels.

[172 a] *Age of twenty one years.] Before this age a man or woman is called an infant. An infant may bind himself to pay for his necessary meat, drink, apparel, necessary physic, and such other necessaries, and likewise for his good teaching or instruction whereby he may profit himself afterwards: but if he bind himself in an obligation or other writing with a penalty for the payment of any of these, that obligation shall not bind him. Also other things of necessity shall bind him, as a presentation to a benefice, for otherwise the lapse shall incur against him. Also if an infant be an executor upon payment of the debt due to the testator, he may make an acquittance; but in that case a release without payment is void: and generally whatsoever an infant is bound to do by law, the same shall bind him albeit he does it without suit of law. But one under the age of twenty-one years shall not be charged in an account; because, by intendment of law, before his full age he has not skill or ability [to perform any office or] to raise or make any improvement or profit.*

[172 b]

## SECTION 260.

Partition when lands in fee and in tail descend to two daughters, and one takes the fee and the other the tail.

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



*have her portion of the lands entailed, especially as such partition does not make any discontinuance.*

*The land in fee-simple is allotted to the younger daughter.]* It is first to be observed upon this whole case, that the fee-simple land is allotted to the youngest daughter, and the land entailed to the eldest. This partition *primâ facie* is good; and herein the partition differs from exchange where the estates must be equal.

But yet this partition by matter subsequent may become voidable (as Littleton here puts the case). The eldest coparcener has by the partition and the matter subsequent barred herself of her right in the fee-simple lands, insomuch that when the youngest sister aliens the fee-simple lands and dies, and her issue enters into half the lands entailed, yet shall not the eldest enter into half of the lands in fee-simple upon the alienee; for by the alienation, the privity of estate is destroyed.

*Such partition voidable, not void.*

*The younger daughter aliens her land in fee-simple &c.]* The same law it is, if the youngest daughter had made a gift in tail, for the reversion expectant upon an estate tail is of no account in law, for that it may be cut off by the tenant in tail. Otherwise it is of an estate for life or years. If in this case the youngest daughter alien part of the land in fee-simple, and dies, so as full recompense for the land entailed descends not to her issue, she may waive the taking of any profits thereof and enter into the land entailed; for the issue in tail shall never be barred without a full recompense, though there be a warranty in deed or in law descended. If on the other side the eldest coparcener alien the land entailed and dies, her issue shall have a *formedon* alone for the whole land entailed; for so long as the partition continued in force she is only inheritable to the whole land entailed.

*Reversion on estate tail a cypher.*

[173 a]

*Such partition does not make any discontinuance.]* And the reason thereof is, for that it passes not by livery of seisin, but the partition is in truth less than a grant, for it makes no degree, but each coparcener is in by descent from the common ancestor.

*Partition makes no degree.*

## SECTION 261.

Further reason  
for Sect. 260.

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

Further reason.

*A moiety of lands entailed.] For if a writ of partition had been brought, the eldest should not have been compelled to take the whole estate in tail, for the prejudice that might after ensue, but might have challenged one moiety of the lands in tail, and another moiety of the lands in fee-simple, and this she might do ex provisione legis. But when she will not submit to the policy and provision of the law, but betakes herself to her own policy and provision, there the law will not aid her, as here by Littleton it manifestly appears; and so it is in the other case. As if a man be seised of three manors of equal value in fee, and takes wife, and charges one of the manors with a rent charge, and dies, she may by the provision of the law take a third part of all the manors and hold them discharged; but if she will accept the entire manor charged, it is holden that she shall hold it charged.*

Jointure.  
Election.

Partition of  
estate tail binds  
issue.

[173 b]

A partition of lands entailed between parceners, if it be equal at the time of the partition, shall bind the issue in tail for ever, albeit the one aliens her part. But here it may be demanded, that seeing Littleton says, that it shall be taken to be the folly of the eldest parcener &c. what, if the eldest does not know of the estate tail, either in respect of the antiquity thereof, or for want of having the evidence, or for any other cause, what folly can be imputed to her? The answer is that it is presumed in law, that every one is conusant of her right and title to her own land; and on the other side it should be reckoned great folly in her to be ignorant of her own title. And therefore the reason of Littleton firmly holds.

Every one pre-  
sumed conusant  
of his rights.

## SECTION 262.

ALSO, if a man be seised in fee of an acre of land by just title, and he disseise an infant within age of another acre, and has issue two daughters, and dies seised of both acres, the infant being then within age, and the daughters enter and make partition, so that the one acre is allotted to the part of the one viz. of the youngest in allowance of the other acre which is allotted to the purparty of the other; if afterward the infant enter into the acre whereof he was disseised upon the possession of the parcener who has the same acre, then the same parcener may enter into the other acre which her sister has, and hold in parcenary with her. But if the youngest alien the same acre to another in fee before the entry of the infant, and after the infant enter upon the possession of the alienee, then she cannot enter into the other acre; because, by her alienation, she has altogether prevented herself from having any part of the tenements as parcener. But if the youngest before the entry of the infant make a lease of this for term of years, or for term of life, or in fee-tail saving the reversion to her, and after the infant enters, there peradventure otherwise it is; because she has not disposed of all that was in her, but has reserved the reversion and the fee &c.

Eviction for defective title before sale avoids partition.

Before it appears that when the privity of the estate is destroyed by the feoffment of one coparcener, that upon eviction of a moiety by force of an entail against the other, she shall not enter upon the alienee. But in the case that Littleton puts here, when the privity of estate remains, and the part of the one is evicted, she shall enter and hold in coparcenary with her other coparcener; and so it is in the case of an exchange. By reason of the &c. in the end of this Section there may two questions be justly demanded.

Privity not destroyed by partition.

What if the whole estate in part of the purparty of one parcener be evicted by a title paramount; whether is the whole partition avoided, for Littleton here puts the case that the whole purparty of the one is defeated? The second question is, whether if but part of the estate of one coparcener be evicted, as an estate in tail, or for life, leaving a reversion in the coparcener, whether that shall avoid the partition in the whole? To the first it is answered,

Partition. Effect of eviction from all or part of either purparty.

[174 a]

that if the whole estate in part of the purparty be evicted, that shall avoid the partition in the whole, be it of a manor, that is entire, or of acres of ground, or the like, that are several; for the partition in that case implies for this purpose both a warranty and a condition in law, and either of them is entire, and gives an entry in this case into the whole. And so has it been lately resolved, both in the case of an exchange and a partition. To the second, if any estate of freehold be evicted from the coparcener in all or part of her purparty, it shall be avoided in the whole. As if A. be seised in fee of one acre of land in possession, and of the reversion of another expectant upon an estate for life, and he disseise the lessee for life who makes continual claim; A. dies seised of both acres, and has issue two daughters; partition is made, so that the one acre is allotted to the one, and the other acre to the other; the lessee enters: the partition is avoided for the whole, and so likewise has it been lately resolved.

*Warranty on partition and exchange distinguished.*

Yet there is a diversity between the warranty upon an exchange and upon a partition. For upon the exchange he shall recover a full recompence for all that he loses. But upon the partition she shall recover but the moiety, or half of that which is lost, to the end that the loss may be equal.

*Privity of parceners not destroyed by lease after partition.*

[174 b]

*But if the youngest before the entry of the infant make a lease.]* This (upon that which has been said) needs no explanation. Only this is to be observed, that, albeit it is in the power of tenant in tail to cut off the reversion, yet if the infant enter before it be cut off, the law has such consideration of this reversion, that she who loses it shall enter into her sister's part, and hold with her in co-parcenary, for the privity between them was not wholly destroyed.

## SECTION 263.

*Partition defeated by eviction from either purparty.*

**ALSO, if there be three or four coparceners, &c. who make partition between them, if the part of the one parcener is defeated by such lawful entry, she may enter and occupy the other lands with all the other parceners, and compel them to make new partition between them of the other lands, &c.**

*Between them of the other lands, &c.]* This &c. implies, that so it is between the surviving parceners and the heirs of the other, or between the heirs of parceners, all being dead.

## SECTION 264.

*ALSO, if there be two parceners, and the one takes husband, and the husband and wife have issue between them, and the wife dies, and the husband keeps himself in as tenant by the curtesy, in this case the parcener who survives, and the tenant by the curtesy may well make partition between them, &c. And if the tenant by the curtesy will not agree to make partition, then the parcener who survives may have against the tenant by the curtesy a writ de partitione faciendâ, &c. and compel him to make partition. But if the tenant by the curtesy would have partition to be made between them, and the parcener who survives will not have this, then the tenant by the curtesy cannot have any remedy to have partition, &c. For he cannot have a writ of partitione faciendâ, because he is no parcener. For such a writ lies for parceners only. And so you may see, that a writ of partitione faciendâ lies against tenant by the curtesy, and yet he himself cannot have the like writ.*

Husband of one coparcener compellable to make, but he cannot compel partition.

*The husband keeps himself in as tenant by the curtesy]* This is no severance of the state in coparcenary, for the other coparcener and the tenant by the curtesy shall be jointly impleaded; for he does continue the estate of coparcenary, as the other parcener did.

Husband and the other daughter are parceners.

*Against the tenant by the curtesy a writ de partitione faciendâ, &c.]* Here by the &c. is implied, albeit that the tenant by the curtesy is a stranger in blood, yet the writ *de partitione faciendâ* clearly lies against the tenant by the curtesy, because he continues the estate of coparcenary. If there be two coparceners, and one aliens in fee, they are tenants in common, and several writs of *præcipe* must be brought against them; and yet the parcener shall have a writ of partition against the alienee at the common law, which is a far stronger case than the case put of tenant by the curtesy.

Writ of partition lies against tenant by curtesy, or alienee of one coparcener; [175 a]

but neither of them entitled to such writ at common law.

*Such writ lies for parceners only.*] Hereby it appears, that neither the tenant by the curtesy, nor (much less) the alienee of a coparcener shall have a writ of *partitioe faciendâ* at the common law; for Littleton says here, that such writ lies only for parceners, but it may be brought by a parcener against strangers, as appears before.

Husband in right of his wife entitled to writ of partition.

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

And now by stat. tenant by curtesy and alienee of coparcener, entitled to such writ.

[175 b]

*To have partition, &c.*] Here by this &c. is included all others that are strangers in blood, whether they come to their estates by purchase or by act in law. Since Littleton wrote, by the statutes 31 H. 8. c. 1. and 32 H. 8. c. 32. one joint-tenant or tenant in common may have a writ of partition against the other; and therefore at this day the alienee of one parcener may have a writ of partition against the other parcener, because they are tenants in common: and the like had been attempted in former parliaments, but prevailed not until these latter statutes. The tenant by the curtesy shall have a writ of partition upon the statute of 32 H. 8. c. 32. for albeit he is neither joint-tenant nor tenant in common, for that a *præcipe* lies against the parcener and tenant by the curtesy, as hath been said, yet he is in equal mischief as another tenant for life. If there be three coparceners, and a stranger purchase the part of one of them, he and one other of the coparceners shall not join in a writ of partition, neither by the common law, nor by force of the statute; for the words of the preamble of the statute are (*and none of them by the law does or may know their several parts, &c. and cannot by the laws of this realm make partition thereof, without other of their mutual assents, &c.*) Now in this case one of the plaintiffs, viz. the parcener, may have a writ of partition at the common law, and the other parcener being a purchaser may have it by the statute; and therefore they shall not join in one writ.

## CHAPTER II. SECTION 265.

## PARCENERS BY CUSTOM.

*PARCENERS by the custom are, where a man seised in fee-simple or in fee-tail, of lands or tenements which are of the tenure called gavelkind within the county of Kent, and has issue divers sons and dies, such lands or tenements shall descend to all the sons by the custom, and they shall equally inherit and make partition by the custom, as females shall do, and a writ of partition lies in this case as between females. But it is necessary in the declaration to make mention of the custom. Also such custom is in other places of England, and also such custom is in North Wales, &c.* Gavelkind.

*But it is necessary in the declaration to make mention of the custom.]* That is, the custom of gavelkind as also the custom of Borough English must be alleged generally; for the law, when they are generally alleged, takes knowledge of all their special rules and differences, which is not the case with other customs.

*Parceners by the custom, &c]* It is well said, “by the custom,” [176a] for sons are parceners in respect of the custom of the fee or inheritance, and not in respect of their persons, as daughters and sisters, &c. are.

## SECTION 266.

*ALSO, there is another partition which is of another nature and of another form than any of the partitions aforesaid. As if a man seised of certain lands in fee-simple has issue two* Frankmarriage.

*daughters, and the eldest is married, and the father gives part of his lands to the husband with his daughter in frankmarriage, and dies seised of the remnant, which remnant is of a greater yearly value than the lands given in frankmarriage.*

## SECTION 267.

Hotchpot.

*In this case, neither the husband, nor wife, shall have any thing for their purparty of the said remnant, unless they will put their lands given in frankmarriage in hotchpot with the remnant of the land with her sister. And if they will not do so, then the youngest may hold and occupy the same remnant, and take the profits only to herself. And it seems, that this word (hotchpot) is in English a pudding; for in this pudding is not commonly put one thing alone, but one thing with other things together. And therefore it is necessary in this case to put the lands given in frankmarriage with the other lands in hotchpot, if the husband and wife will have any part in the other lands.*

Advancement.

[176b]

*In this case neither the husband, nor wife, shall have any thing for their purparty, &c.] This gift in frankmarriage shall primâ facie be intended a sufficient advancement; and therefore the remnant shall descend to the other coparcener, only with this provision in law tacitè annexed, that if the donees will put the land into hotchpot, then she shall out of the remnant make up her part equal. But the donees must do the first act, and in the mean time the whole fee-simple land descends to the other. And here are three things (that I may speak once for all) to be observed. First, that in this special case, where there are two daughters, one of them only shall inherit the lands in fee-simple. Secondly, that in this case there lies no writ of partition; because *non tenent insimul et pro indiviso*. Thirdly, if the parcener, to whom the land in fee-simple descends, will not put the lands in hotchpot, then may the donees enter into the fee-simple lands, and hold them in coparcenary with her.*

Custom of London.

Note, the custom of London is, that if the father advance any of his children with any part of his goods, that shall bar them to demand any further part, unless the father under his hand or in his last will do express and declare, that it was but in part of advancement, and then that child so partly advanced shall put his part in



*hotchpot* with the executors and widow, and have a full third part of the whole, accounting that which was formerly given him as part thereof;

## SECTION 268.

[177a]

AND *this term (hotchpot) is but a term similitudinary, and is as much to say, that the lands in frankmarriage and the other lands in fee-simple shall be put together; and this is for this intent, to know the value of all the lands, i. e. of the lands given in frankmarriage, and of the remnant which were not given, and then partition shall be made in form following: As, put the case that a man is seised of thirty acres of land in fee-simple, every acre of the annual value of twelve pence, and that he has issue two daughters, and the one is covert baron, and the father gives ten acres of the thirty acres to the husband with his daughter in frankmarriage, and dies seised of the remnant, then the other sister shall enter into the remnant, viz. into the twenty acres, and shall occupy them to her own use, unless the husband and wife will put the ten acres given in frankmarriage with the twenty acres into hotchpot, that is to say together; and then when the value of every acre is known, to wit, what every acre values by the year, and it is assessed or agreed between them, that every acre is worth by the year twelve pence, then the partition shall be made in this manner, viz. the husband and wife shall have besides the ten acres given to them in frankmarriage five acres in severalty of the twenty acres, and the other sister shall have the remnant, i. e. fifteen acres of the twenty acres for her purparty, so that accounting the ten acres which the baron and feme have by the gift in frankmarriage, and the other five acres of the twenty acres, the husband and wife have as much in yearly value as the other sister.*

Mode of partition on bringing frankmarriage into hotchpot.

[177b]

And herewith in express terms agrees Bracton, Britton, and Fleta, and all the books abovesaid and many others. And it is worthy observation, that after this putting into *hotchpot* and partition made, the lands given in frankmarriage are become as the other lands which descended from the common ancestor, and of these lands if she be impleaded she shall have aid of the other parceners as if the same lands had descended. So the coparcener that

has a rent granted to her for owelty of partition, as is aforesaid, hath the rent as if it had descended to her from the common ancestor.

## SECTION 269.

Frankmarriage is an advancement.

[178a]

AND so always upon such partition the lands given in frankmarriage remain to the donees and to their heirs according to the form of the gift: for if the other parcener should have any of that which is given in frankmarriage, of this would ensue an inconvenience and a thing against reason, which the law will not suffer. And the reason why the lands given in frankmarriage shall be put in hotchpot is this. When a man gives lands or tenements in frankmarriage with his daughter, or with his other cousin, it is intended by the law, that such gift made by this word (frankmarriage) is an advancement, namely that the donor and his heirs shall have no rent nor service of them, but fealty, until the fourth degree be past. And for this cause the law is, that she shall have nothing of the other lands or tenements descended to the other parcener, &c. unless she will put the lands given in frankmarriage into hotchpot. And if she will not put the lands given in frankmarriage into hotchpot, then she shall have nothing of the remnant, because it shall be intended by the law, that she is sufficiently advanced, to which advancement she agrees and holds herself content.

## SECTION 270.

Right of hotchpot descends to issue.

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

By these three &c. in this Section is implied, that if either the donees die before the ancestor, or survive the ancestor and die before such partition, or if the donees and all the parceners die before such partition, upon the putting into hotchpot, their issues

shall have the same benefit to put the lands into *hotchpot*; for that benefit is inheritable and descends to the issues.

## SECTION 271.

AND note, that gifts in frankmarriage were by the common law before the statute of Westminster second, and have been always since used and continued, &c. Frankmarriage disused since stat. West. 2.

*Continued, &c.*] By this &c. is to be understood, that before the statute it was a fee-simple, and since the statute a fee-tail. So that it is true, that the gifts do continue (as our author here says) but not the estates; for the estate is changed, as at large appears in the chapter of Estates Tail. And albeit our author here says, that such gifts have been always since used and continued, yet now they are almost grown out of use, and serve now principally for moot cases and questions in law that thereupon were wont to rise.

[178b]

## SECTION 272.

Also, such putting in hotchpot, &c. is, where the other lands or tenements which were not given in frankmarriage descend from the donors in frankmarriage only; for if the land descend to the daughters by the father of the donor, or by the mother of the donor, or by the brother of the donor or other ancestor, and not by the donor, &c. there it is otherwise; for in such case she, to whom such gift in frankmarriage is made, shall have her part, as if no gift in frankmarriage had been made, because that she was not advanced by them, &c., but by another, &c. Does not apply unless descent be from same ancestor.

## SECTION 273.

ALSO, if a man be seised of thirty acres of land, every acre of equal annual value, and has issue two daughters as aforesaid, and gives fifteen acres hereof to the husband with his daughter in frankmarriage, and dies seised of the other fifteen acres, in this No hotchpot where lands descended are of equal value,

*case the other sister shall have the fifteen acres so descended to her alone, and the husband and wife shall not in this case put the fifteen acres given to them in frankmarriage into hotchpot; because the tenements given in frankmarriage are of as great and good yearly value as the other lands descended &c. For if the lands given in frankmarriage are of equal or of more yearly value than the remnant, in vain and to no purpose shall such tenements given in frankmarriage be put in hotchpot &c., for that she cannot have any of the other lands descended &c., for if she should have any parcel of the lands descended, then she shall have more in yearly value than her sister, which the law will not allow. And as it is spoken in the cases aforesaid of two daughters or of two parceners, in the same manner it is in the like case, where there are more sisters or more parceners, according as the case and matter is &c.*

By this section and the &c. herein some have gathered, that the value of the lands shall be accounted as they were at the time of the gift in frankmarriage. But it is clear, that the value shall be accounted as it was at the time of the partition; for if the donor purchase more land after the gift, or if the land given in frankmarriage be by the act of God decayed in value, or if the remnant of the lands in fee-simple be improved after the gift, or *è converso*, the law shall adjudge of the value as it was at the time of the partition (unless it be by the proper act or default of the parties), as hath been said before in the former Chapter. And some have collected upon this Section, that the reversion in fee of the lands given in frankmarriage shall only descend to the donee; for otherwise the other sister shall have more benefit than the donee, which should be against the reason of our author.

[179a]  
(Value ascertained at time of partition.)

[179b]

## SECTION 274.

or are entailed. *AND it is to be understood, that lands or tenements given in frankmarriage shall not be put in hotchpot but only where lands descend in fee-simple; for of lands descended in fee-tail partition shall be made, as if no such gift in frankmarriage had been made.*

For of lands entailed, the donee in frankmarriage shall have as much part as the other coparcener, because, over and besides the

land given in frankmarriage, the issue in tail claims *per formam doni*, and both of the parceners must equally inherit by force of the gift, *et voluntas donatoris &c. observetur.*

## SECTION 275.

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

Hotchpot applies only to frankmarriage.

## SECTION 276.

ALSO, another partition may be made between parceners, which varies from the partitions aforesaid. As if there are three parceners, and the youngest will have partition, and the other two will not, but will hold in parcenary that which to them belongs, without partition, in this case, if one part be allotted in severalty to the youngest sister according to that which she ought to have, then the others may hold the remnant in parcenary, and occupy in common without partition; if they will, and such partition is good enough. And if afterwards the eldest or middle parcener will make partition between them of that which they hold, they may well do this when they please. But if the partition be made by force of a writ of *partitione faciendâ*, there it is otherwise; for there it is necessary that every parcener have her part in severalty &c.

One of three parceners may separate by consent, but if by writ the whole coparcenary is dissolved.

[180a]

More shall be said of parceners in the Chapter of Joint Tenants, and also in the Chapter of Tenants in Common.

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

## CHAPTER III. SECTION 277.

## OF JOINT-TENANTS.

**Joint-tenants.** **JOINT TENANTS** are, as if a man be seised of certain lands or tenements &c. and infeoffs two, three, four, or more, to have and to hold to them [and their heirs, or leased to them—per Coke] for term of their lives, or for term of another's life, by force of which feoffment or lease they are seised, these are joint-tenants.

**Rent.**  
[180 b] There are also joint-tenants by other conveyances than Littleton here mentions, as by fine, recovery, bargain and sale, release, confirmation, &c. So there are divers other limitations than Littleton here speaks of; as if a rent charge of ten pounds be granted to A. and B. to have and to hold to them two, viz. to A. until he be married, and to B. until he be advanced to a benefice, they are joint-tenants in the mean time, notwithstanding the several limitations; and if A. die before marriage, the rent shall survive, but if A. had married, the rent should have ceased for a moiety, *et sic de converso* on the other side.

**Alien.** Littleton having spoken of one kind of tenants *pro indiviso*, viz. of parceners, comes now to another, viz. joint-tenants: and first, of joint-tenants of freehold. If an alien and a subject purchase lands in fee, they are joint-tenants, and the survivorship shall hold place, *sed nullum tempus occurrit regi*, upon an office found.

*Joint-tenants.*] So called, because the lands or tenement, &c. are conveyed to them jointly, and are distinguished from sole or several tenants, from parceners, and from tenants in common. And these joint-tenants must jointly implead and jointly be impleaded by others, which property is common between them and coparceners; but joint-tenants have a sole quality of survivorship,

**Survivorship.**

which coparceners have not. Littleton, having now spoken of parceners and of joint-tenants of right, next speaks of joint-tenants by wrong.

## SECTION 278.

*ALSO, if two or three &c. disseise another of any lands or tenements to their own use, then the disseisors are joint-tenants. But if they disseise another to the use of one of them, then they are not joint-tenants; but he to whose use the disseisin is made is sole tenant, and the others have nothing in the tenancy, but are called coadjutors to the disseisin &c.* By disseisin.

If A. disseise one to the use of B. who knows not of it, and B. assent to it, in this case till the agreement, A. was tenant of the land, and after agreement B. is tenant of the land, but both of them are disseisors.

A man disseises tenant for life to the use of him in reversion, and afterwards he in the reversion agrees to the disseisin, it is said that he in the reversion is a disseisor in fee, for by the disseisin made by the stranger, the reversion was divested, which (say they) cannot be revested by the agreement of him in the reversion, for that makes him a wrong doer, and therefore no relation of an estate by wrong can help him. *Disseisin by Agreement.* [181 a]

## SECTION 279.

*AND note, that disseisin is properly where a man enters into any lands or tenements where his entry is not congeable, and ousts him who has the freehold &c.* Disseisin, what is.

This description of a disseisin and the &c. in this place is understood only of such lands and tenements whereunto an entry may be made, and not of rents, commons, &c. whereof sufficient has been said before in the Chapter of Rents. And note here, that entry is not a disseisin, unless there be an ouster also of the freehold. And

therefore Littleton does not set down an entry only but an ouster also, as an entry and claim, or taking of profits, &c.

Now as there are joint-tenants by disseisin, so are there joint-tenants by abatement, intrusion, and usurpation, all which are included in the latter &c.

## SECTION 280.

Survivorship.

*AND it is to be understood, that the nature of joint-tenancy is, that he who survives shall have the entire tenancy, according to such estate as he has, if the jointure be continued &c. As if three joint-tenants be in fee-simple, and one has issue and dies, yet they who survive shall have the whole tenements, and the issue shall have nothing. And if the second joint-tenant has issue and dies, yet the third who survives shall have the whole tenements to him and to his heirs for ever. But otherwise it is of parceners; for if three parceners be, and before any partition made the one has issue and dies, that which to him belongs shall descend to his issue. And if such parcener die without issue, that which belongs to her shall descend to her co-heirs, so that they shall have this by descent, and not by survivorship, as joint-tenants shall have &c.*

*If the jointure be continued, &c.]* Here by this &c. many points of learning are to be observed. As that it is proper to joint-tenants only to have lands by survivorship; and this is called in law *jus accrescendi*. But although survivorship be proper to joint-tenants, yet there may be joint-tenants though there be not equal benefit of survivor on both sides. As if a man lets lands to A. and B. during the life of A., if B. dies, A. shall have all by the survivor, but if A. dies, B. shall have nothing.

[181 b]

When trusts and powers survive.

Two or more may have a trust or an authority committed to them jointly, and yet it shall not survive. But herein are divers diversities to be observed. First, there is a diversity between a naked trust or an authority, and a trust or authority joined to an estate or interest. Secondly, there is a diversity between authorities created by the party for private causes, and an authority created by law for execution of justice. As for example, if a man devise that

Power to executors to sell.



his two executors shall sell his land, if one of them die, the survivor shall not sell it; but if he had devised his lands to his executors to be sold, there the survivor shall sell it; which diversity is implied by our author, for he says, that he who survives shall have the entire tenancy.

If a man make a letter of attorney to two to do any act, if one of them die, the survivor shall not do it. If a charter of feoffment be made, and a letter of attorney given to four or three jointly or severally to deliver seisin, two of them cannot make livery; because it is neither by the four or three jointly, nor any of them severally. *Power of attorney.*

*And dies.*] Note, there is a natural death and a civil death, and Littleton's case is to be intended of both; and therefore if two joint-tenants be, and one of them enters into religion, the survivor shall have the whole.

## SECTION 281.

**AND as the survivor holds place between joint-tenants, in the same manner it holds place between those who have a joint estate and possession with another of a chattel, real or personal. As if a lease of lands or tenements be made to many for term of years, he who survives of the lessees shall have the tenements to him alone during the term by force of the same lease. And if a horse or any other chattel personal be given to many, he who survives shall have the horse alone.** *Survivorship extends to chattels real and personal.*

[182 a]

## SECTION 282.

**IN the same manner it is of debts and duties, &c. for if an obligation be made to many for one debt, he who survives shall have the whole debt or duty. And so it is of other covenants and contracts, &c.** *And to bonds and covenants.*

*Debts and duties, &c.*] Here by force of this &c. an exception is to be made of two joint merchants; for the wares, merchandises, debts, or duties that they have as joint merchants or partners, shall *Except as between merchants.*

not survive, but shall go to the executors of him that dies; and this is *per legem mercatoriam*, which (as hath been said) is part of the laws of this realm, for the advancement and continuance of commerce and trade, which is *pro bono publico*; for the rule is, that *jus accrescendi inter mercatores pro beneficio commercii locum non habet*.

## SECTION 283.

Joint-tenants for lives, with several inheritances in tail as tenants in common.

ALSO, there may be some joint-tenants, who may have a joint estate, and be joint-tenants for term of their lives, and yet have several inheritances. As if lands be given to two men and to the heirs of their two bodies begotten, in this case the donees have a joint estate for term of their two lives, and yet they have several inheritances; for if one of the donees has issue and dies, the other who survives shall have the whole by survivorship for term of his life, and if he who survives has also issue and dies, then the issue of the one shall have the one moiety, and the issue of the other shall have the other moiety of the land, and they shall hold the land between them in common; and they are not joint-tenants, but are tenants in common. And the cause why such donees in such case have a joint estate for term of their lives is, for that at the beginning, the lands were given to them two, which words, without more saying, make a joint estate to them for term of their lives. For if a man will let land to another by deed or without deed, not making mention what estate he shall have, and of this makes livery of seisin, in this case the lessee has an estate for term of his life; and so, inasmuch as the lands were given to them, they have a joint estate for term of their lives. And the reason why they shall have several inheritances is this, inasmuch as they cannot by any possibility have an heir between them ingendered, as a man and woman may have, &c. the law wills that their estate and inheritance be such as is reasonable, according to the form and effect of the words of the gift, and this is to the heirs which the one shall beget of his body by any of his wives, and to the heirs which the other shall beget of his body by any of his wives, &c. so that it behoves by necessity of reason that they have several inheritances. And in this case, if the issue of one of the donees after the death of the donee dies, so that he has no issue alive of his body begotten, then the donor or his heir may enter into the moiety as in his reversion &c. although

*the other donee has issue alive &c. And the reason is, forasmuch as the inheritances are several &c. the reversion of them in law is several &c. and the survivor of the issue of the other shall hold no place to have the whole.*

*They have a joint estate for term of their two lives, &c.]* Note, *Shelley's case.* albeit they have several inheritances in tail, and a particular estate for their lives, yet the inheritance does not execute [that is, coalesce] so as to break the joint-tenancy, but they are joint-tenants for life, and tenants in common of the inheritance in tail.

*As a man and woman may have, &c.]* Here a diversity is implied, when the estate of inheritance is limited by one conveyance, as in this case it is, there are no several estates to drown one in another. But when the estates are divided in several conveyances, their particular estates are distinct and divided, and consequently the one drowns the other. As if a lease be made to two men for term of their lives, and afterwards the lessor grants the reversion to these two and to the heirs of their two bodies, the jointure is severed, and they are tenants in common in possession. But it is further implied in the case put by Littleton, that there is no division between the estate for lives and the several inheritances; [i. e. that although there is no consolidation of the two estates to break the joint-tenancy and survivorship, yet the estates are not several and distinct, for the issue must take by descent and not by purchase;] nor can they convey away the inheritances after their decease, [reserving to themselves the estates for life], for the estates are divided only in supposition and consideration of law, and to some purposes the inheritance is said to be executed, as shall be said hereafter. *When applicable.*  
[182 b]

If a man make a lease for life, and afterwards grants the reversion to the tenant for life and a stranger and to their heirs, they are not joint-tenants of the reversion, but the reversion is by act of law executed for the one moiety in the tenant for life [in fee], and for the other moiety he holds it still for life, with reversion of that moiety to the [other] grantee [in fee].

And so it is, if a man makes a lease to two for their lives, and afterwards grants the reversion to one of them in fee, the jointure is severed, and the reversion is executed for the one moiety, and

for the other moiety there is tenant for life with reversion to the grantee.

If lessee for life grants his estate to him in the reversion and to a stranger, the jointure is severed and the reversion executed for one moiety by the act of law.

A. life.  
B. & C. fee.  
B. | B. life of A.  
fee | C. fee.  
[183 a]

If a man makes a lease for life and grants the reversion to two in fee, the lessee grants his estate to one of them, they are not joint-tenants of the reversion; for there is an execution of the estate for the one moiety, and an estate for life with reversion to the other in the other moiety.

To two women  
and the heirs of  
their bodies.  
Curtesy.

Here Littleton has well resolved a doubt; for of ancient time it has been said, that when lands have been given to two women and to the heirs of their two bodies begotten [whereby, as appears by this and the next Section, they are joint-tenants for life with several inheritances], that the husband having issue should be tenant by the curtesy living the other sister; for that as some held the inheritance was executed, and that the sisters were tenants in common in possession, and consequently the husband [was entitled] to be tenant by the curtesy, which he could not be if the women had a joint estate for term of their lives; and likewise it was said, that the issue of the one should recover the moiety in a *formedon* living the other sister. But these are mere words, and Littleton, grounding himself upon good authority in law, has cleared this doubt [and shewn the contrary].

Habendum  
overrules the  
operative part.

*Not making mention what estate he shall have.*] Here Littleton adds materially (not making mention of what estate); for if in the premises lands be let, or a rent granted, the general intendment is that an estate for life passes; but if the *habendum* limit the same for years or at will, the *habendum* qualifies the general intendment of the premises. And the reason of this is, because it is a maxim in law, that every man's grant shall be taken by construction of law most forcibly against himself.

Assignment by  
tenant for life  
or tenant in tail  
passes all his  
interest.

[183 b]

And therefore if tenant for life makes a lease generally, this shall be taken by construction of law an estate for his life who made the lease; for if it should be a lease for the life of the lessee, it would be a wrong to him in the reversion. And so it is if tenant

in tail make a lease generally, the law shall construe this to be such a lease as he may lawfully make, and that is for term of his own life; for if it should be for the life of the lessee, it would be a discontinuance, and consequently the estate which would pass by construction of law would work a wrong.

*And so inasmuch as the lands were given to them, they have a joint estate for term of their lives.]* This is plain, but with this exception, unless the *habendum* otherwise limits the same. And therefore if a lease be made to two, *habendum* to the one for life, the remainder to the other for life, this alters the general intendment of the premises, and so has it been oftentimes resolved. And so it is if a lease be made to two, *habendum* the one moiety to the one and the other moiety to the other, the *habendum* makes them tenants in common; and so one part of the deed explains the other, and no repugnancy between them, *et semper expressum facit cessare tacitum.*

*Habendum explains premises.*

*By any possibility,]* Here it is to be observed, that where the grant is impossible to take effect according to the letter, there the law shall make such a construction as the gift by possibility may take effect, which is worthy of observation. *Ut res magis valeat quàm pereat.*

*Deed if possible to be construed valid.*

*So it behoves by necessity of reason.]* The reason of the law is the life of the law; for though a man can tell the law, yet if he know not the reason thereof, he shall soon forget his superficial knowledge. But when he finds the right reason of the law, and so brings it to his natural reason and thereby comprehends it as his own, this will not only serve him for the understanding of that particular case, but of many others; for *cognitio legis est copulata et complicata*; and this knowledge will long remain with him. All which is plainly implied by the words (and &c.) of our author in this Section.

*Reasons of the law to be sought for.*

*The reversion of them is several, &c.]* The law terms a reversion to be expectant upon the particular estate, because the donor or lessor, or their heirs, after every determination of any particular estate, expects or looks to enjoy the lands or tenements again. Hereby, and by this &c. is implied, that upon one joint or entire gift or lease there is one joint or entire reversion, and upon several gifts or leases there are several reversions. And this is to be understood of the reversion in the donor

*Reversion part of old estate; and how joint-tenancy may be created therein and in ultimate remainder.*

[184a]

or his heirs. But albeit the gifts or leases be several, yet if the donors or lessors grant the reversion to two or more persons and their heirs, they are joint-tenants of the reversion. And so it is of a remainder. And therefore if a gift be made to two men and the heirs of their two bodies begotten, the remainder to them two and their heirs, they are joint-tenants for life, tenants in common of the estate tail, and joint-tenants of the fee-simple in remainder: for they are joint purchasers of the fee-simple, and the remainder in fee is a new-created estate, but the reversion remaining in the donor or his heirs is a part of his ancient fee-simple.

## SECTION 284.

Gift to two women, or to man and woman who are prohibited from marrying, same as gift to two men.

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

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

## SECTION 285.

Gift to two and heirs of one.

**ALSO**, if lands be given to two and to the heirs of one of them, this is a good jointure, and the one has a freehold and the other a fee-simple. And if he who has the fee dies, he who has the freehold shall have the entirety by survivorship for term of his life. In the

*same manner it is, where tenements are given to two and the heirs of the body of one of them engendered, the one has a freehold and the other a fee-tail &c.*

By this Section, and the &c. at the end of it, they are joint-tenants for life, and the fee-simple or estate tail is in one of them ; and because it is by one and the same conveyance, they are joint-tenants, and the fee-simple is not executed to all purposes as hath been said before.

If a fine be levied to two, and to the heirs of one of them, by force whereof he is seised, and he that has the fee dies, and afterwards the joint-tenant for life dies, and a stranger abates, in this case the heir may either suppose the fee-simple executed, and have an assize of Mordancester (the words of which writ are, that the ancestor was at his death seised in his demesne as of fee, which cannot be said of him who has but a remainder expectant upon an estate for life ; but in respect that he is seised of a fee-simple and of a joint estate in possession, the words in the writ are true, that he was seised in his demesne as of fee) or a writ of right, which also in some sort proves the fee-simple executed. Or the heir may have a *scire facias* to execute the fine, by which the heir supposes that the fee was not executed, or he may maintain a writ of intrusion where the heir makes the like supposition, and shall term it a remainder ; [and therefore it appears, that the fee-simple is executed to some purposes and not to others]. And yet when land is given to two and to the heirs of one of them, he in the remainder cannot grant away his fee-simple, as hath been said, [that is, the estates are so far united that he cannot grant away the one estate reserving to himself the other].\*

*Gift to two and heirs of one, how executed.*

[184 b]

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\* Where lands were limited to the use of A. for life, remainder to trustees during the life of A. to preserve contingent remainder ; remainder to his sons successively in tail male, and for default of such issue, to the right heirs of A. ; Mr. Fearné was of opinion that it was doubtful whether A.'s life estate and remainder or reversion in fee were not so consolidated as to render it impossible for A. to convey his remainder or reversion in fee separately and distinctly from his life estate. To obviate this doubt he recommended that the land should be conveyed to the proposed releasee and his heirs, to the use of A. for life ; remainder to the trustees for preserving contingent remainders during his life, remainder to

## SECTION 286.

Of rent charge granted by one of two joint-tenants or parceners in fee.

**ALSO, if two joint-tenants be seised of an estate in fee-simple, and the one grants a rent charge by his deed to another out of that which belongs to him, in this case during the life of the grantor the rent charge is effectual; but after his decease the grant of the rent charge is void so as to charge the land, for he who has the land by survivorship shall hold the whole land discharged. And the cause is for that he who survives claims and has the land by survivorship, and has not nor can claim any thing by descent from his companion &c. But otherwise it is of parceners, for if there be two parceners of tenements in fee-simple, and before any partition made the one charges that which to her belongs by her deed with a rent charge &c. and afterwards dies without issue, by which that which belongs to her descends to the other parcener, in this case the other parcener shall hold the land charged &c. because she came to this moiety by descent as heir &c.**

Judgment binds joint-tenancy, when.

**Claim any thing by descent from his companion &c.]** By which &c. is implied, that so it is if one joint-tenant acknowledge a recognizance or a statute, or suffers a judgment in an action of debt, &c. and dies before execution had, it shall not be executed afterwards. But if execution be sued in the life of the conusor, it shall bind the survivor. And it is further implied, that both in case of the charge and of the recognizance statute and judgment, if he that charges &c. survive, it is good for ever.

Husband's charge binds wife's term, when.

And so it is if a man be possessed of certain lands for term of years in right of his wife, and grants a rent charge, and dies, the wife shall avoid the charge; but if the husband had survived, the charge would have been good during the term.

Joint-tenants of a term, what charge or lease of one binds survivor.

If two joint-tenants be of a term, and the one of them grants to I. S. that if he [I. S.] pay to him [the grantor] ten pounds before

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the sons of A. successively in tail male, by way of confirmation or establishment of those uses under the settlement, with the proposed remainders over. [Note to the 17th edition.]



Michaelmas, that then he [I. S.] shall have his term, and the grantor dies before the day, and I. S. pays the sum to his executors at the day, yet he shall not have the term, but the survivor shall hold place; for it was but in nature of a condition; but if he had made a lease for years, to begin at Michaelmas, it should have bound the survivor. [post Sect. 289 and Noy's Rep. 157]. [185 a]

And where Littleton puts the case of a rent charge, it is so likewise implied, that if one joint-tenant grants a common of pasture, or of turbary, or of estovers, or a corody, or such like, out of his part, or a way over the land, this shall not bind the survivor: for it is a maxim in law, that *jus accrescendi præfertur oneribus*; and there is another maxim, that *alienatio rei præfertur juri accrescendi*. *Charge preferred to survivorship, contra of alienation. Wway.*

If one joint-tenant in fee-simple be indebted to the king, and dies, after his decease no extent shall be made upon the land in the hands of the survivor. *Crown debt.*

If a recovery be had against one joint-tenant, who dies before execution, the survivor shall not avoid this recovery: because the right of the moiety is bound by it. *Recovery.*

If one joint-tenant in fee take a lease for years of a stranger by deed indented and dies, the survivor shall not be bound by the conclusion; because he claims above it, and not under it. *Estoppel.*

*And the cause is, for that he who survives claims and has the land by the survivor, &c.]* Here again Littleton shews the reason: and the cause wherefore the survivor shall not hold the land charged is, for that he claims the land from the first feoffor, and not by his companion, which is Littleton's meaning when he says (that he claims by survivor), for the surviving feoffee may plead a feoffment to himself without any mention of his joint feoffee. *Survivor claims paramount.*

And this is the reason, that if two joint-tenants be in fee, and the one makes a lease for years [by deed Co. Litt. 47a.] reserving a rent and dies, the surviving feoffee shall have the reversion by survivorship, but he shall not have the rent, because he claims in from the first feoffor who is paramount the rent. *Lease by joint-tenants in fee a severance pro tanto.*

Rent charge  
made good by  
release to com-  
panion.

If there be two joint-tenants in fee, and the one joint-tenant grants a rent charge out of his part, and after releases to his joint companion and dies, he shall hold the land charged, for that he is out of the reason and cause set down by Littleton, because he claims not by survivor, inasmuch as the release prevented the same. And of this opinion was Littleton himself before the edition of his book. But all men agree, that if A. B. and C. are joint-tenants in fee, and A. charges his part and then releases to B. and his heirs, and dies, that the charge is good for ever; because in that case B. cannot be in from the first feoffor, because he has a joint companion at the time of the release made, and several writs of *præcipe* must be brought against them. And albeit the release of one joint-tenant to the residue of the joint-tenants makes no degree in supposition of law, neither is there any several estate between them, but the estate of him that releases is as it were extinguished and drowned in their estate and possession, so that one *præcipe* lies against them; yet shall they hold the land charged as is aforesaid. As if tenant for life grant a rent charge, and after surrenders his estate to the lessor, albeit the estate charged be drowned, and the lessor is not in by him, yet he shall hold it charged.

Surrender.

Parceners may  
charge.

*But otherwise it is of parceners, for if there be two parceners &c.] This is to be intended as well of parceners by custom as of parceners by the common law; and here is implied the reason of the diversity, for that the survivor claims above the charge, and the heir by descent under the charge.*

## SECTION 287.

Will of joint-  
tenant void.

*ALSO, if there be two joint-tenants of land in fee-simple within a borough where lands and tenements are devisable by testament, and if the one of the said two joint-tenants devises that which to him belongs by his testament &c. and dies, this devise is void. And the cause is, for that no devise can take effect till after the death of the devisor, and by his death all the land presently comes by the law to his companion, which survives by the survivor; the which he does not claim, nor has any thing in the land by the devisor, but in his own right by the survivor according to the course of law &c. and for this cause such devise is void. But*

otherwise it is of parceners seised of tenements devisable in like case of devise &c. causâ quâ suprâ.

*By his testament &c.*] Either in writing or nuncupative, according to the custom.

*And the cause is, for that no devise can take effect till after the death of the devisor.*] Here both their claims commence at one instant; and although an instant is one indivisible moment, which has not in itself either term or part of time; yet in consideration of law there is a priority of time in an instant, as here the survivor is preferred before the devisee; for Littleton says, that the cause is that no devise can take effect till *after* the death of the devisor, and *by* his death all the land presently comes by law to his companion. Whereby it appears, that Littleton, by these words *post mortem et per mortem*, though they jump at one instant, yet allows priority of time in the instant which he distinguishes by *per* and *post*. And the reason of this priority is, that the survivor claims by the first feoffor (as hath been said) and therefore in judgment of law his title is paramount the title of the devisee, and consequently the devise [is] void, and the rule of law is, that *jus accrescendi præfertur ultimæ voluntati*. [185 b]

Two femes joint-tenants of a lease for years, one of them takes husband and dies, yet the term shall survive; for though all chattels real are given to the husband, if he survive, yet the survivor between the joint-tenants is the elder title, and after the marriage the feme continued solely possessed; for, if the husband dies, the feme shall have it, and not the executors of the husband. But otherwise it is of personal goods. *Two femes joint-tenants of a term, marriage of one no severance; contra of personality.*

If a man be seised of a house, and possessed of divers heir-looms which by custom have gone with the house from heir to heir, and by his will devises away the heir-looms, this devise is void; for as Littleton here says, the will takes effect after his death, and by his death the heir-looms by ancient custom are vested in the heir, and the law prefers the custom before the devise. *Heir-looms, reason why they pass not if expressly devised.*

And so it is if the lord ought to have a heriot when his tenant dies, and the tenant devises away all his goods, yet the lord shall have his heriot for the reason aforesaid. And it has been anciently said, that the heriot shall be paid before the mortuary. *Heriot.*

*But otherwise it is of parceners.]* The reason is evident, for that there is no survivorship between coparceners, but the part of the one is descendible, and consequently may be devised.

[186a]

## SECTION 288.

Seisin per my  
et per tout.

**ALSO, it is commonly said, that every joint-tenant is seised of the land which he holds jointly per my et per tout; and this is as much to say, as he is seised by every parcel and by the whole, &c. and this is true, for in every parcel, and by every parcel and by all the lands and tenements, he is jointly seised with his companion.**

*Also it is commonly said, &c.]* That is, it is the common opinion; and *communis opinio* is of good authority in law.

*Per my et per tout.] Et sic totum tenet et nihil tenet, scil. totum conjunctim, et nihil per se separatim.* And albeit they are so seised (as for example, where there are two joint-tenants in fee) yet to divers purposes each of them has but a right to a moiety; as to enfeoff, give, or demise, or to forfeit or lose by default in a *precipe*.

Alien.

And where all the joint-tenants join in a feoffment, every of them in judgment of law gives but his part. If an alien and a subject purchase lands jointly, the king upon office found shall have but a moiety. And Littleton afterwards in this chapter says, that one joint-tenant has one moiety in law, and the other the other moiety. And therefore if two joint-tenants are, and they both make a feoffment in fee upon condition, and that for breach thereof one of them shall enter into the whole, yet he shall enter but into a moiety, because no more in judgment of law passed from him: and so it is of a gift in tail or a lease for life, &c.

Condition.

Warranty.

Yet every joint-tenant may warrant the whole: because a man may warrant more than passes from him.

If two joint-tenants make a feoffment in fee and one of the feoffors die, the feoffee cannot plead a feoffment from the survivor of the whole, because each of them gave but his part; but otherwise it is on the part of the feoffee, as hath been said before.

And where two joint-tenants are, the one of them may make the other his bailiff of his moiety, and have an action of account against him. *And one joint-tenant may let his part for years or at will to his companion.*

*One joint-tenant may lease to his companion.*

If two joint-tenants be of certain lands, and the one of them by deed indented bargains and sells the lands, and the other joint-tenant dies, and then the deed is enrolled, there passes nothing but the moiety which the bargainor had at the time of the bargain.

*Conveyance by one passes only a moiety, though he survive.*

## SECTION 289.

ALSO, if two joint-tenants be seised of certain lands in fee-simple, and the one lets that which to him belongs to a stranger for term of forty years, and dies before the term begins, or within the term, in this case after his decease the lessee may enter and occupy the moiety let to him during the term &c. although the lessee had never the possession thereof in the life of the lessor by force of the same lease &c. And the diversity between the case of a grant of a rent charge [aforesaid, and this case, is that in the grant of a rent charge by] a joint-tenant, the tenements remain always as they were before, without this, that any has any right to have any parcel of the tenements but they themselves, and the tenements are in the same plight as they were before the charge &c. But where a lease is made by a joint-tenant to another for term of years &c. presently by force of the lease the lessee has right in the same land, (videlicet) of all that which belongs to the lessor, and to have this by force of the same lease during his term. And this is the diversity.

*Lease and rent charge by joint-tenant distinguished.*

*By force of the same lease.]* By this &c. is implied, that where our author speaks of joint-tenants seised in fee, that so it is if two be seised for life, and one makes a lease to begin presently or *in futuro*, and dies, this lease shall bind the survivor, as hath been adjudged. And if one joint-tenant grant *vesturam terræ* or *herbagium terræ*, for years, and dies, this shall bind the survivor; for such a lease has right in the land. So it is if two joint-tenants be of a water, and the one grants the several piscary.

*Lease by one binds survivor, and is a severance pro tanto but no further.*

[186 b]

Advowson.

*The one lets.*] If two joint-tenants be of an advowson, and the one presents to the church, and his clerk is admitted and instituted, this in respect of the privity shall not put the other out of possession; but if that joint-tenant who presents dies, it shall serve for a title in a *quare impedit* brought by the survivor. But yet if one joint-tenant or tenant in common present, or if they present severally, the ordinary may either admit or refuse to admit such a presentee, unless they join in presentation, and after the six months he may in that case present by lapse.

Advowson.  
Parceners.  
Curtesy.

But if there be two or more coparceners, and they cannot agree to present, the eldest shall present; and if her sister disturbs her, she shall have a *quare impedit* against her; and so shall the issue and the assignee of the eldest, and yet he is tenant in common with the youngest. And in the same manner the tenant by the curtesy of the eldest shall present. But if there be four coparceners, and the eldest and the second present [jointly] and the other two present jointly or severally, the ordinary may refuse them all; for the eldest did not present alone, but she and one other of her sisters with her.

[187 a]

## SECTION 290.

Partition.

ALSO, *joint-tenants (if they will) may make partition between them, and the partition is good enough; but they shall not be compelled to do this by law; but if they will make partition of their own will and agreement, the partition shall stand in force.*

Deed.

*May make partition.*] This partition must be by deed, as hath been said before. But joint-tenants for years may make partition without deed.

Compulsory  
partition.

*They shall not be compelled.*] This is true regularly; but, by the custom of some cities and boroughs, one joint-tenant or tenant in common may compel his companion, by writ of partition grounded upon the custom, to make partition. And since Littleton wrote joint-tenants and tenants in common generally are compellable to make partition by writ framed upon the statutes of 31 & 32 H. 8. as before hath been said. And albeit they are now compellable to

make partition, yet seeing they are compellable by writ, they must pursue the statutes, and cannot make partition by *parol*, for that remains at the common law.

If two joint-tenants be of land with warranty, and they make partition by writing [i. e. by consent] the warranty is destroyed ; but if they make partition by writ of partition upon the statute, the warranty remains, because they are compellable thereunto. Warranty.

SECTION 291.

*ALSO, if a joint estate be made of land to a husband and wife and to a third person, in this case the husband and wife have in law in their right but one moiety, [and the third person shall have as much as the husband and wife, viz. the other moiety &c.] And the cause is, for that the husband and wife are but one person in law, and are in like case as if an estate be made to two joint-tenants, where the one has by force of the jointure the one moiety in law, and the other, the other moiety &c. In the same manner it is where an estate is made to the husband and wife and to two other men, in this case the husband and wife have but the third part, and the other two men the other two parts &c. causâ quâ suprâ.* Husband and wife take but one moiety, and companion the other moiety.

*More shall be said of the matter touching joint-tenancy, in the Chapter of tenants in common, and tenant by elegit, and tenant by statute merchant.*

*The husband and wife have in law in their right but one moiety &c.] William Ocle and Joan his wife purchased lands to them and their heirs ; after, William Ocle was attainted of high treason for the murder of the king's father E. 2. and was executed ; Joan his wife survived him ; E. 3. granted the lands to Stephen de Bitterly and his heirs ; John Hawkins the heir of the said Joan in a petition to the king discloses the whole matter, and upon a *scire facias* against the patentee has judgment to recover the lands, for the reason here yielded by our author.* And of what they take they are tenants by entireties. [187 b]

But if an estate be made to a man and a woman and their heirs before marriage, and after they marry, the husband and wife have An estate which does not arise, except they are

man and wife  
at the time.

moieties between them, which is implied in these words of our author, *husband and wife*.

Limitation to  
man and woman  
makes them  
joint-tenants,  
though they  
after inter-  
marry.

*But one person in law.*] Bracton says, *vir et uxor sunt quasi unica persona, quia caro una et sanguis unus*. It has been said, that if a reversion be granted to a man and a woman and their heirs, and before attornment they intermarry, and then attornment is made, that the husband and wife shall have no moieties in this case, no more than if a charter of feoffment be made to a man and a woman, with a letter of attorney to make livery, they intermarry, and then livery is made *secundum formam chartæ*, in which case it is said, that they have no moieties, [but only entireties, that is that they are not joint-tenants, but tenants by entireties]. But certain it is, that if a feoffment were made before the stat. of 27 H. 8. of uses to the use of a man and a woman and their heirs, and they intermarry, and then the statute is made, if the husband alien it is good for a moiety; for the statute executes the possession according to such quality, manner, form, and condition, as they had in the use, [and of the use they were joint-tenants, inasmuch as at the time it was limited they were not *unica persona*, united in marriage] so that though the use vests during the coverture, yet the act of parliament executes several moieties in them, seeing they had several moieties in the use, [i. e. they were joint-tenants or tenants in moieties and not tenants by entireties, as they would have been if the use had been limited during the coverture].

But to tenancy  
by entireties  
estates must be  
of same quality.

A man makes a lease to A. and to a baron and feme, viz. to A. for life, to the husband in tail, and to the feme for years, in this case it is said, that each of them has a third part in respect of the severalty of their estates.

Conveyance by  
man and wife  
joint-tenants,  
estate taken back  
is held by en-  
tireties.

If a feoffment be made to a man and a woman and their heirs with warranty, and they intermarry, and after are impleaded and vouch and recover in value, moieties shall not be between them; for though they were sole when the warranty was made, notwithstanding at the time when they recovered and had execution they were husband and wife, at which time they cannot take by moieties for they are married.

Baron and feme  
cannot in their  
own right con-

Albeit baron and feme (as Littleton here says) be one person in law, so that neither of them can give any estate or interest to the



other, yet if a charter of feoffment be made to the wife, the husband as attorney to the feoffor may make livery to the wife; and so a fême covert who has power to sell land by will, may sell the same to her husband, because they are but instruments for others, and the estate passes from the feoffor or devisor.

*vey to each other.*

If husband and wife and a third person had purchased lands to them and their heirs, and the husband before the statute of 32 H. 8. cap. 1. had aliened the whole land to a stranger in fee, and died, the wife and the other joint-tenant were joint-tenants of the right, and if the wife had died, the other joint-tenant should have had the whole right by survivor, for that they might have joined in a writ of right, and the discontinuance should not have barred the entry of the survivor, for that he claimed not under the discontinuance but by the title paramount above the same by the first feoffment, which is worthy of observation. But if the husband had made a feoffment in fee but of the moiety, and he and his wife had died, their moiety should not have survived to the other.

*Survivorship of right of entry as between baron and feme and a stranger.*

[188a]

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

First, that a right of action and a right of entry may stand in jointure; for at the common law the alienation of the husband was a discontinuance to the wife of the one moiety and a disseisin of the other, so that after the death of the husband the wife has a right of action to the one moiety and the other joint-tenant a right of entry into the other, but they are joint-tenants of the right, because they may join in a writ of right.

*Rights of action and entry may be held in joint-tenancy.*

Secondly, that a right of action or a bare right of entry cannot stand in jointure with a freehold or inheritance in possession, and therefore if the husband make a feoffment of the moiety, this was a discontinuance of that moiety,\* and the other joint-tenant remained in possession of the freehold and inheritance of the other moiety, which for the time was a severance of the jointure; and so are all the books, which seemed to vary amongst themselves, clearly reconciled.

*But not a right and an estate.*

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

*Joint-tenancy must continue to instant of death to give survivorship.*

And this is to be observed, that there shall never be any survivorship unless the thing be in jointure at the instant of the death of him who first dies: for the rule is, *nihil de re accrescit ei, qui nihil in re quando jus accresceret habet.*

*No joint-tenancy of freehold and chattel*

Also if a man demise lands to two, to have and to hold to the one for life and the other for years, they are no joint-tenants; for an estate of freehold cannot stand in jointure with a term for years, and a reversion upon a freehold cannot stand in jointure with a freehold and inheritance in possession; as shall be said in the next Chapter. Neither can a seisin in the right of a politic capacity stand in jointure with seisin in a natural capacity; as shall be said hereafter.

*nor of possession and reversion*

*or politic with natural body.*

*Unity of time.*

If lands be demised for life, with remainder to the right heirs of I. S. and of I. N.; I. S. has issue and dies; and after I. N. has issue and dies, the issues are not joint-tenants because the one moiety vested at one time, and the other moiety vested at another time. And yet in some cases there may be joint-tenants and yet the estate may vest in them at several times, as if a man makes a feoffment in fee to the use of himself and of such wife as he should afterwards marry for term of their lives, and after he takes wife, they are joint-tenants, and yet they come to their estates at several times; and so it is if I disseise one to the use of two, and the one agrees at one time and the other at another, yet they are joint-tenants.

## CHAPTER IV. SECTION 292.

[188b]

## OF TENANTS IN COMMON.

TENANTS *in common* are they who have lands or tenements in fee-simple, fee-tail, or for term of life, &c. and they have such lands or tenements by several titles, and not by a joint title, and none of them knows his own in severalty, but they ought by law to occupy these lands or tenements in common, and pro indiviso to take the profits in common. And because they came to such lands or tenements by several titles, and not by one joint title, and their occupation and possession shall be by law between them in common, they are called tenants in common. As if a man infeoff two joint-tenants in fee, and the one of them aliens that which to him belongs to another in fee, now the alienee and the other joint-tenant are tenants in common; because they are in such tenements by several titles, for the alienee comes to the moiety by the feoffment of one of the joint-tenants, and the other joint-tenant has the other moiety by force of the first feoffment made to him and to his companion, &c. And so they are in by several titles, that is to say, by several feoffments, &c.

Creation and definition.

Littleton, having spoken of parceners, which are only by descent, and of joint-tenants, which are only by purchase and by joint-title, speaks now of tenants in common, which may be by three means, viz. by purchase, by descent, or by prescription, as hereafter in this chapter shall appear.

Or for term of life, &c.] Here &c. implies *pur terme d'auter vie*, or for term of years, or for other fixed estate in the land. [189a]

And here it appears, that the essential difference between joint-tenants and tenants in common is, that joint-tenants have the lands by one joint title and in one right, and tenants in common by several

Tenants in common have several freeholds.

Possession only  
thing in com-  
mon.

titles, or by one title, and by several rights ; which is the reason, that joint-tenants have one joint freehold, and tenants in common have several freeholds. Only this property is common to them both, viz. that their occupation is undivided, and neither of them knows his part in severalty.

SECTION 293.

Fee means fee-  
simple.

AND it is to be understood, that when it is said in any book that a man is seised in fee, without more saying, it shall be intended in fee-simple ; for it shall not be intended by this word (in fee) that a man is seised in fee-tail, unless there be added to it this addition, fee-tail, &c.

SECTION 294.

Alienation by  
one of three  
joint-tenants.

ALSO, if three joint-tenants be, and one of them aliens that which to him belongs to another man in fee, in this case the alienee is tenant in common with the other two joint-tenants : but the other two joint-tenants are seised of the two parts which remain jointly, and of these two parts survivorship between the two holds place, &c.

[189b]

SECTION 295.

Alienation in  
tail.

ALSO, if there be two joint-tenants in fee, and the one gives that [which] to him belongs to another in tail, and the other gives that [which] to him belongs to another in tail, the donees are tenants in common, &c.

SECTION 296.

Issue in tail.

BUT if lands are given to two men and to the heirs of their two bodies begotten, the donees have a joint estate for term of their lives ; and if each of them has issue and dies, their issues shall hold in common, &c. But if lands are given to two abbots, as to the abbot of Westminster and to the abbot of Saint Albans, to have and to

Corporation.

*hold to them and to their successors, in this case they have presently at the beginning an estate in common, and not a joint estate. And the reason is, for that every abbot or other sovereign of a house of religion, before that he was made abbot or sovereign, &c. was but as a dead person in law, and when he is made abbot, he is as a man personable in law only to purchase and have lands or tenements or other things to the use of his house, and to his own proper use, as another secular man may, and therefore at the beginning of their purchase they are tenants in common; and if one of them dies, the abbot who survives shall not have the whole by survivorship, but the successor of the abbot who is dead shall hold the moiety in common with the abbot that survives, &c.*

The &c. in the end of this section implies, that so it is, of any body politic or corporate, be they regular as dead persons in law (whereof our author here speaks) or secular: as if lands are given to two bishops to have and to hold to them and their successors: albeit the bishops were never dead persons in law but had always capacity to take; yet seeing they take this purchase in their politic capacity, as bishops, they are presently tenants in common, because they are seised in several rights, for the one bishop is seised in the right of his bishopric of the one moiety, and the other is seised in the right of his bishopric of the other moiety, and so by several titles and in several capacities, whereas joint-tenants ought to have it in one and the same right and capacity, and by one and the same joint title. The like law is, if lands are given to two parsons and their successors, or to any other such like ecclesiastical bodies politic or incorporate, as hath been said.

Bishops.  
[190a]

Parsons.

#### SECTION 297.

*ALSO, if lands be given to an abbot and a secular man, to have and to hold to them, viz. to the abbot and his successors, and to the secular man and his heirs, they have an estate in common, causâ quâ suprâ.*

Gift to natural and corporate persons jointly.

And so it is, if lands be given to the parson of Dale and to a lay man to have and to hold to them, that is to say, to the parson and his successors, and to the layman and his heirs, they are presently

tenants in common for the causes abovesaid. So of a bishop, &c.  
*Et sic de similibus.*

*King and sub-  
ject.*

If lands are given to the king and to a subject, to have and to hold to them and to their heirs, yet they are tenants in common and not joint-tenants; for the king is not seised in his natural capacity, but in his royal and politic capacity, *in jure coronæ*, which cannot stand in jointure with the seisin of the subject in his natural capacity. So likewise if there be two joint-tenants, and the crown descend to one of them, the jointure is severed, and they are become tenants in common.

*To bishop in  
natural ca-  
pacity.*

But if lands are given to A. de B. bishop of N. and to a secular man, to have and to hold to them and their heirs, in this case they are joint-tenants; for each of them take the lands in their natural capacity.

*One may be  
tenant in com-  
mon with him-  
self.*

If lands are given to John bishop of Norwich and his successors, and to John Overall doctor of divinity and his heirs, being one and the same person, he is tenant in common with himself.

*Chattels cannot  
go to heirs or  
successors.*

But our author's rules do not hold in chattels real or personal; for if a lease for years be made or a ward granted to an abbot and a secular man, or to a bishop and a secular man, or if goods be granted to them, they are joint-tenants, because they take not in their politic capacity, [for no chattel can go in succession to a sole corporation any more than it can to the heirs of a natural person.]

[190 b]

## SECTION 298.

*Habendum in  
moieties.*

**ALSO, if lands are given to two, to have and to hold, i. e. the one moiety to the one and to his heirs, and the other moiety to the other and to his heirs, they are tenants in common.**

And the reason is, because they have several freeholds and an occupation *pro indiviso*.

Here it is to be observed, that the *habendum* severs the premises which *primâ facie* seemed to be joint; for an express estate controls an implied estate as hath been said.

## SECTION 299.

ALSO, if a man seised of certain lands enfeoff another of the moiety of the same land without any speech of assignment or limitation of the same moiety in severalty at the time of the feoffment, then the feoffee and the feoffor shall hold their parts of the land in common.

Grant of a moiety.

And the like law is, if the feoffment be made of a third part or a fourth part, &c. And if there be an advowson appendant, they are also tenants in common of the advowson. And albeit it is said, that such a feoffment of a moiety or a third part, &c. is not good without writing, for that (as they say) a man cannot create an uncertain estate in land by parol; yet is the law clear, that such a feoffment is good by parol without writing, and such an uncertain estate shall pass by livery, and so it appears in our books.

Advowson.

Feoffment by parol.

But if a man be seised of a manor whereunto an advowson is appendant, and makes a feoffment of three acres, parcel of the manor, together with the advowson to two, to have and to hold the one moiety, together with the moiety of the advowson to the one and his heirs, and the other moiety together with the other moiety of the advowson to the other and his heirs, this cannot be good without deed; for the feoffor cannot annex the advowson to these three acres, and disannex it from the rest of the manor, without deed.

Deed necessary to grant of advowson in common, though appendant to land divided.

## SECTION 300.

AND it is to be understood, that in the same manner as is aforesaid of tenants in common of lands or tenements in fee-simple, or in fee-tail, in the same manner may it be of tenants for term of life. As if two joint-tenants be in fee, and the one lets to one man that which belongs to him for term of life, and the other joint-tenant lets that which belongs to him to another for term of life, &c. the said two lessees are tenants in common for their lives, &c.

Assignees of joint-tenants and tenants in common. [191 a]

Vide Sect. 295. where this is sufficiently explained before.

## SECTION 301.

Assignee of one joint-tenant and his companion are tenants in common.

**ALSO if a man let lands to two men for term of their lives, and the one grants all his estate of that which belongs to him to another, then the other tenant for term of life, and he to whom the grant is made, are tenants in common during the time that both the lessees live.**

*And memorandum, that in all other such like cases, although it be not here expressly moved or specified, if they be in like reason, they are in the like law.*

Joint-tenants for lives, disadvantage of severance.

And so it is if lands be let to two for term of their lives and the life of the longer liver of them, and one of them grants his part to a stranger, whereby the jointure is severed, and dies, here shall be no survivor, but the lessor shall enter into the moiety, and the survivor shall have no advantage of these words, (and the life of the longer liver of them,) for two causes. 1st. For that the jointure is severed. 2dly. For that those words are no more than the common law would have implied without them, and *expressio eorum quæ tacitè insunt nihil operatur*. Hereby it appears that in case of leases for life it is more beneficial for the lessor to have the jointure severed than to have it continue [*sed è converso* as to the lessee].

[191 b]

## SECTION 302.

Lease for life by one joint-tenant a severance of the jointure in the reversion. (See Com.)

**ALSO if there be two joint-tenants in fee, and the one lets that which to him belongs to another for term of his life, the tenant for term of life during his life, and the other joint-tenant who did not let, are tenants in common. And upon this case a question may arise; as admit that the lessor has issue and dies, living the other joint-tenant his companion, then living the tenant for life, the question may be this, Whether the reversion of the moiety which the lessor has shall descend to the issue of the lessor, or shall the other joint-tenant have this reversion by survivorship. Some have said in this case, that the other joint-tenant shall have this reversion by the survivor, and their**



*reason is this, scil. That when the joint-tenants were jointly seised in fee-simple, although the one of them make an estate of that belonging to him for term of life, and although he has severed the freehold of this which to him belongs by the lease, yet he has not severed the fee-simple, but the fee-simple remains to them jointly as it was before. And so it seems to them, that the other joint-tenant who survives shall have the reversion by the survivor, &c. And others have said the contrary, and this is their reason, scilicet, That when one of the joint-tenants leases that belonging to him to another for term of his life, by such lease the freehold is severed from the jointure. And by the same reason the reversion which is depending upon the same freehold is severed from the jointure. Also if the lessor has reserved to him an annual rent upon the lease, the lessor only should have had the rent, &c. the which is a proof, that the reversion is only in him, and that the other has nothing in the reversion, &c. Also if the tenant for term of life were impleaded, and makes default, after default the lessor only shall be received to defend his right, and his companion in this case in no manner shall be received, the which proves the reversion of the moiety to be in the lessor only; and so by consequence, if the lessor dies living the lessee for term of life, the reversion shall descend to the heir of the lessor, and shall not come to the other joint-tenant by the survivor, Ideo quære. But in this case if that joint-tenant who has the freehold has issue and dies living the lessor and the lessee, then it seems that the same issue shall have this moiety in demesne and in fee by descent, for that a freehold [or estate in possession] cannot by nature of jointure be annexed to a reversion. And it is certain, that he who leased was seised of the moiety in his demesne as of fee, and none shall have any jointure in his freehold, therefore this shall descend to his issue, &c. Sed quære.*

*And upon this case a question may arise &c.]* Here Littleton makes a question, and shews the reason on both sides, and concludes with a quære. When Littleton makes a question, and shews the reason on both sides, the latter is ever his own and the better. But time has made this question clear; for now all agree, that the jointure is severed for the time, according to the latter opinion here set down in Littleton, whose reasons are unanswerable: for many times the change of the freehold makes

an alteration or change of the reversion. As if tenant in tail, or the husband seised in right of his wife, or tenant for life, make a lease for life of the lessee, in every of these cases the lessor gains a new reversion by wrong, as shall be said more at large in the chapter of Discontinuance ; and if the elder brother grant the reversion (expectant upon a freehold) for life, it shall cause *possessio fratris*, as hath been said.

*Lease for life by both a severance of the reversion, when.*

*By the same reason the reversion which is depending upon the same freehold is severed from the jointure &c.]* If two joint-tenants in fee be, and they both join in a lease to an abbot and a secular man for term of their lives, here the reversion that is dependant upon several freeholds is severed. And so it is if they join in a lease to two secular men, to have and to hold the one moiety to the one for life, and the other moiety to the other for life, for both these cases are warranted by the authority of Littleton.

[192 a]

*Joint-tenants for years, under lease by one, severance of whole jointure.*

If two joint-tenants be of a lease for twenty-one years, and the one of them lets his part for certain years, part of the term, the jointure is severed, and survivor holds not place, for a term for a small number of years is as high an interest as for many more years ; and so was it resolved, Hil. 18 *Eliz. Reginae, in Communi Banco*, which I myself heard.

*Lease for life no severance of coparcenary.*

If two coparceners be in fee, and the one makes a lease for life, this is no severance of the coparcenary, for notwithstanding the lord shall make one avowry upon them both.

*Contra of joint-tenants.*

But if two joint-tenants be, and one makes a lease for life, this is a severance of the jointure, as Littleton here takes it, and several avowries shall be made upon them.

*Lease for life by both no severance of jointure.*

*Also if the lessor had reserved an annual rent, the lessor only should have had the rent &c.]* But if two joint-tenants make a lease for life, reserving a rent to one of them, the rent shall enure to them both, because the reversion remains in jointure, unless the reservation be by deed indented, and then he only to whom it is reserved shall have it. But if they make a lease by deed indented, reserving or saving the reversion to one of them, that is void, because they had the reversion before, but the rent is newly created.

And so it is if such a lessee for life [that is, a lessee of the entirety by both] should surrender to one of them, it shall enure to them both, for that they have a joint reversion. But if the lessee grant his estate to one of them [whereby that one becomes tenant *pur auter vie* of the whole], no part of it [i. e. no part of the grant] shall enure to his companion, because as to the moiety [which in the supposition that any part does] belong to his companion, *that* is [already] in *esse* in him to whom the grant is made [for term of life with] reversion [therein] to the other in fee. [Thus if A. and B. are joint-tenants in fee, and they both join in a lease to C. for his life, with livery, this is no severance of the joint-tenancy in the reversion, and if C. re-grants his life estate to A., then A. becomes tenant *pur auter vie* of the entirety with reversion to himself and B. in joint tenancy.]

Hence surrender to one good.

[192b]

If two joint-tenants make a lease for life with remainder [as to one] to his companion in fee, this is a good remainder of his moiety to his companion.

Remainder.

### SECTION 303.

[193a]

**BUT if it be that the law in this case is such, that if the lessor die living the lessee and living the other joint-tenant who has the freehold of the other moiety, that the reversion shall descend to the issue of the lessor, then is the jointure and title which any of them may have by survivorship and right of the jointure taken away and altogether defeated for ever. In the same manner it is, if that joint-tenant who has the freehold dies living the lessor and the lessee, if the law be so that his freehold and fee which he has in the moiety shall descend to his issue, then the jointure shall be defeated for ever.**

If lease for life by one be in a severance, [as it is] then the survivorship is entirely destroyed.

*Then is the jointure and title &c. and the right of the jointure taken away &c.* And the reason of this is, for if the jointure be severed at the time of the death of him who dies first, the benefit of the survivorship is utterly destroyed for ever, as hath been said before in the Chapter of Joint Tenants. But in the case aforesaid, if the tenant for life dies in the lifetime of both the joint tenants, they are joint tenants again as they were before.

Contra ; for if lessee dies in both their lifetimes joint-tenancy revives.

Effect of one joint-tenant's lease for his own life.

If two joint-tenants be in fee, and the one lets his part to another for the life of the lessor, and the lessor dies, some say that his part shall survive to his companion, for by his death the lease was determined. And others hold the contrary; and their reason is, first, for that at the time of his death the jointure was severed, for so long' as he lived the lease continued. And secondly, that notwithstanding the act of any one of the joint-tenants there must be equal benefit of survivor as to the freehold. But here if the other joint-tenant had died first, there had been no benefit of survivor to the lessor without question.

## SECTION 304.

Three joint-tenants. Effect of release by one to one companion.

**AND, if three joint-tenants be, and the one release by his deed to one of his companions all the right which he has in the land, then hath he to whom the release is made, the third part of the lands by force of the said release, and he and his companion shall hold the other two parts in jointure. And as to the third part, which he has by force of the release, he holds that third part with himself and his companion in common.**

Operation of a release as between joint-tenants and coparceners.

[193 b]

Upon this case these two things are to be observed. 1st. That this release enures by way of *mitter l'estate*, and not by way of extinguishment, for then the release should enure to his companion also, and he is in the *per* by him who makes the release. But if he had released to the other two, then had it wrought no degree, [i. e. a degree in the devolution of the title, as is explained in the Chapter on Descents] but in supposition of law for many purposes they to whom the release is made (as hath been said) shall be supposed *in* from the first feoffor, as they shall deraign the first warranty for the whole. The second thing to be observed is, that he to whom the release is made has a fee-simple without this word (heirs), as hath been touched in the first chapter of the first book, for that he to whom the release is made is seised *per my et per tout* of the fee and inheritance, as hath been said in the Chapter of Joint Tenants. And note, the like law is between coparceners: and further, if there are two coparceners, and the one has issue twenty daughters and dies, the other may release to any one of the daughters, her whole part, albeit she to whom the release is made

hath not an equal part; for by the privity and indivisibility of the estates, the release is good.

But if two joint-tenants be of twenty acres, and the one makes a coffment of his part in eighteen acres, the other cannot release his entire part, but only in two acres, for that the jointure is severed for the residue.

### SECTION 305.

**AND it is to be observed, that sometimes a deed of release shall take effect and enure to pass the estate of him who makes the release to him to whom the release is made, as in the case aforesaid, and also as if a joint estate be made to husband and wife and a third person, and the third person releases all his right in the tenements to the husband, then has the husband the moiety which the stranger had, and the wife has nothing. And if in such case the stranger release to the wife, not naming the husband in the release, then has the wife the moiety which the stranger had, &c. and the husband has nothing but in right of his wife, because the release enures to make [i. e. to pass] an estate to the person to whom it is made, viz. all that which belongs to him who makes the release, &c.**

Husband, wife, and strangers joint-tenants. Effect of stranger's release, 1st to husband, 2nd to wife.

This is evident upon that which has been said before. And it is to be understood, that a release may enure four manner of ways. First, by way of *mitter l'estate*, as here it appears. Secondly, by way of *mitter le droit*. Thirdly, by way of extinguishment. Fourthly, by way of creation or enlargement of an estate, as hereafter in this chapter shall appear. And it is to be observed, that upon a release which creates or enlarges an estate, or enures by way of *mitter l'estate*, a rent may be reserved, but not upon a release that enures by way of *mitter le droit*, or which enures by way of extinguishment.

Fourfold operation of a release.

The (&c.) in the end of this section implies a diversity between a release which enures by way of *mitter l'estate* (whereof Littleton here speaks) and a release that enures by way of extinguishment; for of a release enuring by way of extinguishment made to the husband, the wife shall take benefit, or to the wife, the husband shall take benefit, as hereafter shall more at large appear.

[194a]

## SECTION 306.

Release to one of two disseisors carries the whole.

AND in some cases a release shall enure to pass all the right which he who makes the release has to him to whom the release is made. As if a man seised of certain tenements is disseised by two disseisors [who are joint-tenants], if the disseisee by his deed release all his right, &c. to one of the disseisors, then he to whom the release is made shall have and hold all the tenements to him alone, and shall oust his companion of all occupation in this. And the reason is, for that the two disseisors were in against the law, and when one of them happens to get the release of him who has right of entry, &c. this right in such case shall vest in him to whom the release is made, and he is in like plight as if he who has the right had entered and enfeoffed him. And the reason is, for that he who before had an estate by wrong, i. e. by disseisin, &c. has now by the release a rightful estate.

Here Littleton pursues the second part of his division, viz. where a release shall enure by way of *mitter le droit*.

Usurpation of advowson.

Disseised by two disseisors, &c.] The like law is, where there are two joint abators or intruders, who come in merely by wrong. But if two men usurp [an advowson] by a wrongful presentation to a church, and their clerk is admitted, instituted and inducted, and then the rightful patron releases to one of them, this shall enure to them both, for they come not in merely by wrong, for their clerk is in by admission and institution, which are judicial acts. And therefore an usurpation shall work a *remitter* to one that has a former right.

Reason of the foregoing operation of a release.

Then he to whom the release is made shall have and hold all the tenements, &c.] Here by operation of law presently upon the delivery of the release the whole freehold and inheritance is vested in him to whom the release is made, and all the estate that the other disseisor had is thereby wholly divested: for right and wrong cannot consist together but the wrongful estate gives place to the rightful. And the reason hereof is for that, as hath been said, the disseisor to whom the release was made, was seised *per my et per tout*, where-

[194 b]

unto when the right comes it excludes the wrong; for right which is lawful, and wrong that is contrary to law, cannot stand together.

*In like plight as if he who has the right had entered and enfeoffed him, &c.]* The (&c.) implies that this is true *secundum quid*, but not *simpliciter*: for as to the holding out of the joint disseisor, it amounts to as much as if he had entered and enfeoffed him to whom the release is made, but it does not amount to an entry and feoffment *simpliciter* to all purposes, as shall be said hereafter its proper place in the Chapter of Releases.

## SECTION 307.

*AND in some cases a release shall enure by way of extinguishment ; and in such case the release shall aid the joint-tenant to whom the release was not made as well as him to whom the release was made. As if a man be disseised, and the disseisor makes a feoffment to two men in fee, if the disseisee release by his deed to one of the feoffees, this release shall enure to both the feoffees, for that the feoffees have an estate by law, i. e. by the feoffment, and not by wrong done to any, &c.*

Release to one joint-tenant enures to both.

## SECTION 308.

*IN the same manner it is, if the disseisor makes a lease to a man for term of his life, the remainder over to another in fee, if the disseisee release to the tenant for term of life all his right, &c. this release shall enure as well to him in the remainder as to the tenant for term of life. And the reason is, for that the tenant for life comes to his estate by course of law, and therefore this release shall enure and take effect by way of extinguishment of the right of him who releases, &c. And by this release the tenant for life has no ampler or greater estate than he had before the release made to him, and the right of him who releases is altogether extinct. And inasmuch as this release cannot enlarge the estate of the tenant for life, it is reason that the release should enure to him in remainder, &c.*

Release to particular tenant enures to him in remainder. [195a]

*More shall be said of releases in the Chapter of Releases.*

## SECTION 309.

Alienation by  
parceners  
makes tenant  
in common.

ALSO, if two parceners be, and the one aliens that which belongs to her to another, then the other parcener and the alienee are tenants in common.

[195b]

## SECTION 310.

Prescription.

ALSO note, that tenants in common may be by title of prescription. And in divers other ways may men be tenants in common which are not expressed here, &c.

But joint-tenants cannot be by prescription, because there is survivorship between them, but not between tenants in common.

[196ab]

## SECTIONS 311, 312, 313, 314,

[Treat of the remedies of tenants in common and joint-tenants by real action, in the which tenants in common are for the most part entitled to several actions, but joint-tenants must sue in all their names.]

Grant of rent  
by tenant in  
common is a  
grant of two  
rents; contra  
of reservation to  
them.

[197a]

And it is to be further known, that if there be two tenants in common, and they grant a rent of twenty shillings *per annum* out of their land, the grantee shall have two rents of twenty shillings, for that every man's grant shall be taken most strongly against himself, and therefore they [shall] be [construed as] several grants in law. But if they make a gift in tail, a lease for life, &c. reserving twenty shillings rent to them and their heirs, they shall have but one twenty shillings, for they shall have no more than they themselves reserved: and the donee or lessee shall pay but twenty shillings, according to their own express reservation.

Quare impedit.

[197b]

And tenants in common shall join in a *quare impedit*, because the presentation to the advowson is entire.



## SECTION 315.

ALSO, *tenants in common may have actions personal jointly in all their names, as of trespass, for breaking their closes, fishing in their piscary, and such like. In this case tenants in common shall have one action jointly, and shall recover jointly their damages, because the action is in the personalty, and not in the realty.*

Actions real and personal distinguished.

And it is to be observed, that where damages are to be recovered for a wrong done to tenants in common, or parceners in a personal action, and one of them dies, the survivor shall have the action; for albeit the property or estate be several between them, yet the personal action is joint. And here is implied a diversity between a chattel in possession, and a personal *chuse* in action belonging to them. As if two tenants in common be of land, and one [i. e. a stranger] commits a trespass therein, of this action they are joint-tenants, and the survivor shall hold place. So it is if two tenants in common be of a manor, and they make a bailiff thereof, and one of them dies, the survivor shall have the action of account, for the action given to them for the arrearages upon the account was joint. So it is if two tenants in common sow their land, and one [i. e. a stranger] eats the same off with his cattle, though they have the corn in common, yet the action given to them for trespass in the same is joint, and shall survive. For the trespass and damage done to them was joint, all which is here implied by Littleton, who says, that they shall have an action jointly, and the same law is of coparceners.

Tenants in common and parceners are joint-tenants of personal actions.

[198a]

But if two tenants in common be of goods, as of a horse or of any other goods personal, there if one die, his executors shall be tenant in common with the survivor.

Contra of personal chattels.

*And not in the realty, &c.]* If two tenants in common be of an advowson, and a stranger usurps, so that the right is turned to an action, and they bring a writ of *quare impedit* which concerns the realty, and the six months pass, and one dies, the writ shall not abate, but the survivor shall recover, otherwise there would be no remedy to redress this wrong. And so it is of coparceners, and this is one exception out of our author's rule.

Qua. imp. survives.

So does elegit.

But if three coparceners recover land and damages by force of an *elegit*, and two of them die; the third shall have the whole by survivorship, till the whole damages are paid.

Damages in waste.

If the aunt and niece join in an action of waste for waste done in the life of the other sister, the aunt shall recover the damages only, because the same belongs not by law to the niece. And some hold the damages in that case to be the principal.

## SECTION 316.

Debt for rent not several.  
[198b]

*ALSO, if two tenants in common make a lease of their tenements to another for term of years, rendering to them a certain rent yearly during the term, if the rent be behind, &c. the tenants in common shall have one action of debt against the lessee, and not divers actions, for that the action is in the personalty.*

## SECTION 317.

Avowry.

*BUT in an avowry for the said rent they ought to sever, for this is in the realty, as the assize is above.*

This being an addition to Littleton, albeit it be consonant to law yet I omit [any comment upon] it.

## SECTION 318.

Partition not compulsory.

*ALSO, tenants in common may well make partition between them if they will, but they shall not be compelled to make partition by the law, but if they make partition between themselves by their agreement and consent, such partition is good enough, as is adjudged in the book of assize.*

## SECTION 319.

Chattels real.

*ALSO, as there be tenants in common of lands and tenements &c. as aforesaid, in the same manner there [may] be [tenants in com-*

*mon] of chattels, real and personal. As if a lease be made of certain lands to two men for term of twenty years, and when they are possessed of this, one of the lessees grants that which to him belongs to another during the term, then he to whom the grant is made and the other shall hold and occupy in common.* [199a]

*Grants that which to him belongs.]* The same law is if the one lessee in this case makes a lease for part of the term, the second lessee and the other are tenants in common, as hath been said in the Chapter of Joint-tenants.

### SECTION 320.

[Treats of wardship.]

### SECTION 321.

*In the same manner it is of chattels personal. As if two have jointly by gift or by buying a horse or an ox, &c. and the one grants that which to him belongs of the same horse or ox to another, the grantee and the other who did not grant, shall have and possess such chattels personal in common. And in such cases, where divers persons have chattels real or personal in common, and by divers titles, if one of them dies, the others who survive shall not have this as survivors, but the executors of him who dies shall hold and occupy with them who survive, as their testator did or ought to have done in his lifetime, &c. because their titles and rights in this were several, &c.* Chattels personal. [199b]

### SECTION 322.

*ALSO, in the case aforesaid, if two have an estate in common for term of years, &c. and the one occupies all and puts the other out of possession and occupation, he who is put out of occupation shall have against the other a writ of ejectione firmæ of the moiety, &c.* Ejection for ouster by companion.

### SECTION 323.

[Of wardship.]

Receipt of all  
the rent by one  
tenant in com-  
mon no ouster  
of companion.

*The one occupies all and puts the other out of possession.*] These are words materially added, for albeit one tenant in common take the whole profits, the other has no remedy by law against him, for the taking of the whole profits is no ejectment. But if he drive out of the land any of the cattle of the other tenant in common, or will not suffer him to enter or occupy the land, this is an ejectment or expulsion, whereupon he may have *ejectione firmæ* for the one moiety, and recover damages for the entry, but not for the mesne profits.

Remedy against  
companion as to  
chattels per-  
sonal.

[200 a]

*Ejectione firmæ of the moiety, &c.*] Here by this &c. is to be understood this diversity between chattels real and chattels personal; for if one tenant in common takes all the chattels personal, the other has no remedy by action, but he may take them again.

Waif; Estray.

As if two tenants in common be of a manor to which waif and stray belong, and an estray happens, they are tenants in common of the same, and if the one takes the estray the other has no remedy by action but to take again. But if by prescription the one is to have the first beast happening as an estray, and the other the second, there an action lies if the one takes that which pertains to the other. If two tenants in common be of a dove-house, and the one destroys the old doves, whereby the flight is wholly lost, the other tenant in common shall have an action of trespass, for the whole flight is destroyed, and therefore he cannot in bar plead tenancy in common. And so it is if two tenants in common be of a park, and one destroys all the deer, an action in trespass lies. If two tenants in common be of land and of mete stones, *pro metis et bundis*, and the one takes them up and carries them away, the other shall have an action of trespass *quare vi et armis* against him, in like manner as he shall have for the destruction of doves. If two several owners of houses have a river in common between them, if one of them corrupt the river, the other shall have an action upon his case.

Dove-house;  
trespass.

Deer.  
[200 b]

Mete stones.

River.

Remedy for  
contribution to  
repairs of houses  
and mills.

If two tenants in common, or joint-tenants, be of a house or mill, and it fall in decay, and the one is willing to repair the same, and the other will not, he that is willing shall have a writ *de reparatione faciendâ*; and the writ says, *ad reparationem et sustentationem ejusdem domûs teneantur*; whereby it appears, that owners are in that case bound *pro bono publico* to maintain houses and mills which are for the habitation and use of man.

If one joint-tenant or tenant in common of land makes his companion his bailiff of his part, he shall have an action of account against him, as hath been said. But although one tenant in common or joint-tenant without being made bailiff take the whole profits, no action of account lies against him; for in an action of account he must charge him either as guardian, bailiff, or receiver, as hath been said before, which he cannot do in this case, unless his companion constitute him his bailiff. And therefore all those books which affirm that an action of account lies by one tenant in common, or joint-tenant, against another, must be intended when the one makes the other his bailiff, for otherwise "never his bailiff to render an account" is a good plea.

*Action of account against companion-bailiff.*

If there be two tenants in common of a wood, turbary, piscary, or the like, and one of them commits waste against the will of his companion his companion shall have an action of waste, and he who did the waste before judgment, has election either to take his part in certainty by the sheriff and the oath of men, &c. or grant that from thenceforth he shall not do waste but according to his portion, &c. and if he make choice of a certain place, then the place wasted shall be assigned to him. But this extends not to coparceners, because they were compellable to make partition by the common law: and this, as it is said, extends as well to tenants in common and joint-tenants for life as of inheritance.

*Action of waste by one against the other companion.*

But if one tenant in common, or joint-tenant of a dove-house, destroy the whole flight of doves, no action of waste lies in that case upon the said statute, as some hold.

*Dove-house. Waste.*

If lands are given to two and to the heirs of one of them, and the tenant for life doth waste, he who has the inheritance shall have no action of waste by the statute of Gloucester, but upon the statute of W. 2. he may have an action of waste.

*Life estate. Waste.*

And it is to be known, that one tenant in common may enfeoff his companion, but not release, because the freehold is several. Joint-tenants may release, but not enfeoff, because the freehold is joint; but coparceners may both enfeoff and release, because their seisin to some intents is joint, and to some several.

*Enfeoffment and release distinguished as to tenants in common, joint-tenants, and coparceners.*

## SECTION 324.

Seised and possessed distinguished.

ALSO, when a man pleads a feoffment made to him, or a gift in tail, or a lease for life of any lands or tenements, then he shall say, by force of which feoffment, gift, or lease, he was seised, &c. but when he pleads a lease or grant made to him of a chattel real or personal, then he shall say, by force of which he was possessed, &c.

*More shall be said of tenants in common in the Chapters of Releases and Tenant by Elegit.*

Seisin may be of what.  
[201a]

Seisin is a word of art, and in pleading is only applied to a freehold at least, as *possessed* for distinction sake is to a chattel real or personal. And this holds not only in case of lands or tenements which lie in livery, but also of rents, advowsons, commons, &c. and other things that lie in grant, whereof a man has an estate for life or inheritance, [in all which he is said to be seised though he can have no corporal possession.]

Entry to be pleaded, when.

Also when a man pleads a lease for life, or any higher estate which passes by livery, he is not to plead any entry, for he is in actual seisin by the livery itself. Otherwise it is of a lease for years, because *there* he is not actually possessed until entry.

## CHAPTER V. SECTION 325.

## OF ESTATES UPON CONDITION.

ESTATES which men have in lands or tenements upon condition are of two sorts, viz. either upon condition in deed or upon condition in law. Upon condition in deed is, as if a man by deed indented enfeoffs another in fee-simple, reserving to himself and his heirs yearly a certain rent payable at one feast or divers feasts per annum, on condition that if the rent be behind &c. that it shall be lawful for the feoffor and his heirs into the same lands or tenements to enter &c., or if land be aliened to a man in fee rendering to the feoffor certain rent, and if it happen that the rent be behind by a week, month, or half year, after any day of payment named for it, that then it shall be lawful for the feoffor and his heirs to enter; in these cases, if the rent be not paid at such time, or before such time limited and specified within the condition comprised in the indenture, then may the feoffor or his heirs enter into such lands or tenements, and have and hold the same in his former estate, and the feoffee quite to oust thereof. And this is called an estate upon condition, because the estate of the feoffee is defeasible if the condition be not performed &c.

Condition  
what.

Upon condition.] Littleton having before spoken of estates absolute, now begins to treat of estates upon condition. And a condition annexed to the realty, whereof Littleton here speaks in the legal understanding, *est modus*, a quality annexed by him who has an estate, interest, or right to the same, whereby an estate &c. may either be defeated or enlarged, or created upon an uncertain event.

Upon condition in deed] — *quæ est facti*, that is, upon a condition expressed by the party in legal terms of law.

Different kinds  
of conditions.

[201 b]

*Or upon condition in law &c.] quæ est juris*, that is, *tacitè* created by law without any words used by the party. Again, Littleton subdivides conditions in deed (though not in express words) into conditions precedent and conditions subsequent. Again, of conditions in deed some are affirmative, and some in the negative; and some in the affirmative, which imply a negative: some make the estate whereunto they are annexed voidable by entry or claim, and some make the estate void *ipso facto*, without entry or claim. Also of conditions in deed, some are annexed to the rent reserved out of the land, and some to collateral acts &c.; some are single, some in the conjunctive, some in the disjunctive, as shall evidently appear in this chapter, where the examples of these divisions shall be explained in their proper place.

*Upon condition in deed is, as if a man by deed indented &c.]* Here Littleton puts one example of six several kinds of conditions. That is, 1st. Of a single condition in deed. 2dly. Of a condition subsequent to the estate. 3dly. A condition annexed to the rent &c. 4thly. A condition that defeats the estate. 5thly. A condition that defeats not the estate before an entry. And lastly, a condition in the affirmative, which implies a negative, (as behind or unpaid implies a negative) viz. not paid. All which appears by the express words of Littleton.

Condition of  
re-entry.

*In these cases if the rent be not paid at such time &c. then may the feoffor or his heirs enter &c.]* By this section, and by the (&c.) therein contained, six things are to be understood.

Demand must  
be made,

First, where our author says, *if the rent be behind*, that though the rent is behind and not paid, yet if the feoffor doth not demand the same &c. he shall never re-enter, because the land is the principal debtor.

on the land;

Secondly, the demand must be made upon the land, because the land is the debtor, and that is the place of demand appointed by law.

If the king makes a lease for years, rendering a rent payable at his receipt at Westminster, and after the king grants the reversion to another and his heirs, the grantee shall demand the rent upon the land, and not at the king's receipt at Westminster; for as the



law without express words appoints the lessee in the king's case to pay it at the king's receipt, so in case of a subject, the law appoints the demand to be on the land.

If there be a house upon the land, he must demand the rent at the house. And he cannot demand it at the back door of the house but at the fore door, because the demand must ever be made at the most notorious place. And it is not material whether any person be there or no. Albeit the feoffee be in the hall or other part of the house, yet the feoffor need only come to the fore door, for that is the place appointed by law, albeit the door be open.

*at the house,  
if any at the  
fore door;*

If the feoffment be of a wood only, the demand must be made at the gate of the wood, or at some highway leading through the wood or other the most notorious place. And if one place be as notorious as another, the feoffor has election to demand it at which he will, and albeit the feoffee be in some other part of the wood ready to pay the rent, yet that shall not avail him. *Et sic de similibus.*

*or gate of a  
[field or] wood.  
[202a]*

Thirdly, and if the feoffor demand it on the ground at a place which is not the most notorious, as at the back door of a house &c., and in pleading the feoffor allege a demand of the rent generally at the house, the feoffee may traverse the demand, and upon the evidence it shall be found for him, for that it was a void demand.

*Void demand.*

Fourthly, if the rent be reserved to be paid at any place off the land, yet it is in law a rent, and the feoffor must demand it at the place appointed by the parties, observing that which has been said before concerning the most notorious place.

*Place appointed.*

Fifthly, and all this is to be understood when the feoffee is absent; for if the feoffee comes to the feoffor at any place upon any part of the ground at the day of payment, and offer the rent, albeit they be not at the most notorious place, nor at the last instant, the feoffor is bound to receive it, or else he shall not take advantage of any demand of the rent for that day.

*Tender.*

Sixthly, therefore the place of demand being now known, it is further to be known what time the law has appointed for the same. This partly appears by that which has been last said. For albeit

*Demand and  
tender must be  
made before sun-  
set on last day.*

the last time of demand of the rent is such a convenient time before the sun setting of the last day of payment as the money may be numbered and received, notwithstanding, if the tender be made to him that is to receive it upon any part of the land at any time of the last day of payment, and he refuses, the condition is saved for that time, for by the express reservation the money is to be paid on the day indefinitely, and convenient time before the last instant, is the uttermost time appointed by law, to the intent that then both parties should meet together, the one to demand and receive, and the other to pay it, so that the one should not prevent the other. But if the parties meet upon any part of the land whatsoever on the same day, the tender shall save the condition for ever for that time.

*If a week allowed for payment, demand or tender may be made at any time before last day.*

And if the reservation of the rent be (as here Littleton puts the case) at certain feasts, with condition that if it happen that the rent be behind by the space of a week after any day of payment &c., in this case the feoffor needs not demand it on the feast day, but the uttermost time for the demand is a convenient time (as hath been said) before the last day of the week, unless before that the feoffee meet the feoffor upon the land and tenders the rent as is aforesaid. [See a distinction on this subject, Cro. Eliz. 48. 10 Co. 129 a.]

*Demand at any time sustains distress.*

If a rent be granted payable at a certain day and if it be behind and demanded then that the grantee shall distrain for it, in this case the grantee need not demand it at the day; but if he demand it at any time after he may distrain for it, for the grantee has election in this case to demand it when he will to enable him to distrain.

*Former estate and condition.*

*And the land in his former estate to hold &c.]* Regularly it is true, that he who enters for condition broken shall be seised in his first estate, or of that estate which he had at the time of the estate made upon condition, but yet this fails in many cases.

*Husband's feoffment of wife's estate on condition.*

In respect of impossibility. As if a man seised of lands in right of his wife makes a feoffment in fee by deed indented, upon condition that the feoffee should demise the land to the feoffor for his life &c.; the husband dies; the condition is broken, in this case the heir of the husband shall enter for the condition broken, but it is impossible for him to have the estate that the feoffor had at the time of the condition made: for therein he had but an estate in

right of his wife, which by the [determination of the] coverture was dissolved. And therefore when the heir has entered for the condition broken and defeated the feoffment, his estate vanishes, and presently the estate is vested in the wife.

In respect of necessity. If *cestui que use* after the statute of R. 3., and before the statute of 27 H. 8. [that is, if *cestui que trust* since the statute], had made a feoffment in fee upon condition, and after had entered for condition broken; in this cashee had but an use [trust] when the feoffment was made, but now he shall be seised of the whole estate of the land. So that as in the former case [of husband and wife] the ancestor had somewhat at the making of the condition and the heir shall have nothing when he has entered for the condition broken, so in this case the feoffor had no estate or interest in the land at the time of the condition made but a bare use; yet after his entry for the condition broken he shall be seised of the whole estate in th eland, and *that* of necessity, for by the feoffment in fee of *cestui que use* [or *cestui que trust*] the whole estate and right was divested out of the feoffees. And therefore of necessity the feoffor must gain the whole estate by his entry for the condition broken.

*Feoffment by cestui que trust on condition, and entry for breach, disseises trustees.*

Tenant in special tail has issue, and his wife dies, tenant in tail makes a feoffment in fee upon condition, the issue dies, [whereby the feoffor becomes tenant in tail after possibility of issue], the condition is broken, the feoffor re-enters, he shall have but an estate for life as tenant in tail after possibility of issue extinct by the re-entry, and yet he had an estate tail at the time of the feoffment, and that also of necessity.

*Feoffment on condition by tenant in tail, who after becomes apres. [202b]*

In some cases the feoffor by his re-entry shall be in his former estate, but not in respect of some collateral qualities. As if tenant in tail make a feoffment in fee upon condition [which is a discontinuance and a conversion of the estate tail into a base fee] and dies; the issue in tail within age enters for the condition broken, he shall be first in as tenant in fee-simple [that is of the base fee and] as heir to his father, and [then being in of a wrongful and rightful estate] he shall be instantly remitted to his rightful title. But if the heir be of full age, he shall not be remitted, because he might have had his *formedon* against the feoffee, and the entry for the condition

*Feoffment by tenant in tail on condition.*

*Effect of issue's entry.*

is his own act ; but more shall be said hereof in its proper place in the Chapter of Remitter.

*Entry into part when good.*

If a man make a feoffment in fee of Black Acre and White Acre upon condition &c. and for breach thereof that he shall enter into Black Acre, this is good.

*Feoffment by tenant for life, forfeiture not purged by entry for condition broken.*

If tenant for life make a feoffment in fee upon condition, and enters for the condition broken, he shall be tenant for life again, but subject to a forfeiture, for though the estate is reduced the forfeiture is not purged.

### SECTION 326.

*IN the same manner it is if lands be given in tail, or let for term of life or years, upon condition.*

### SECTION 327.

*Power of distress and entry.*

*BUT where a feoffment is made of certain lands reserving a certain rent &c. upon condition that if the rent be behind that it shall be lawful for the feoffor and his heirs to enter and to hold the land until he be satisfied or paid the rent behind &c., in this case if the rent be behind, and the feoffor or his heirs enter, the feoffee is not altogether excluded from this, but the feoffor shall have and hold the land and thereof take the profits until he be satisfied the rent behind, and when he is satisfied, then may the feoffee re-enter into the same land and hold it as he held it before. For in this case the feoffor shall have the land as for a distress until he be satisfied the rent &c., but he shall take the profits in the mean time to his own use &c.*

*Tender of part good.*

*And to hold the land until he be satisfied or payed the rent behind &c.]* By this it is implied, that if such a feoffment be made, reserving (for example) eight marks rent at the feast of Easter, with such a condition as is aforesaid ; the feoffor at the feast day demands the rent ; the feoffee pays unto him six marks, parcel of the rent ; the feoffor enters into the lands and takes the profits towards satisfaction ; afterwards the feoffee tenders the two marks residue of

the rent to the feoffor upon the land, who refuses it; it has been adjudged that the feoffee upon the refusal may enter into the land; for when the feoffor is satisfied either by perception of the profits or by payment or tender and refusal, or partly by the one and partly by the other, the feoffor may re-enter into the land. And this is within the words of Littleton, viz. (until he be satisfied.) And albeit the feoffor had accepted part of his rent, yet he may enter for the condition broken, and retain the land until he be satisfied the whole. All which is worthy of observation.

[203 a]

*For in this case the feoffor shall have the land as for a distress until he be satisfied.*] By this it appears that the feoffor by his re-entry gains no estate of freehold, but an interest by the agreement of the parties to take the profits in nature of a distress.

*Power of entry gives no estate in land.*

And therefore if a man makes a lease for life with a reservation of rent and a condition [of re-entry on non-payment, then] if he enter [upon] condition broken and takes the profits of the land *quousque &c.* he shall not have an action of debt for the rent in arrears, for the freehold of the lease continues.

*No action of debt after entry.*

But herein also a diversity worthy of observation is implied, viz. if a man makes a lease for years reserving a rent with a condition, that if the rent be behind the lessor shall re-enter and take the profits until thereout he be satisfied, there the profits shall be accounted as parcel of the satisfaction, and during the time that he so takes the profits he shall not have an action of debt for the rent for the satisfaction whereof he takes the profits. But if the condition be, that he shall take the profits until the lessor be satisfied or paid the rent, without saying thereout or to the like effect, there the profits shall be accounted no part of the satisfaction [but the condition shall be considered as a penalty] to hasten the lessee to pay the rent, and as Littleton here says, that until he be satisfied he shall take the profits in the mean time to his own use, [that is without account, although he be afterwards paid the full rent.]

*When this condition a penalty.*

## SECTION 328.

*ALSO, divers words there be, which by virtue of themselves make estates upon condition; one is the word (sub conditione): as if A.*

*Condition, what words make.*

*infeoff B. of certain land, to have and to hold to the said B. and his heirs, upon condition that the said B. and his heirs do pay or cause to be paid to the aforesaid A. and his heirs yearly such a rent &c. In this case without any other words the feoffee has an estate upon condition.*

Rent put only  
for example.  
[203b]

*Such rent &c.]* This (&c.) implies any other rent or sum in gross, or any collateral condition whatsoever, either to be performed by the feoffee (whereof our author here puts his case) or by the feoffor, and extends to all kinds of conditions in deed, before specified.

## SECTION 329.

Provided al-  
ways. So that.

*ALSO, if the words are these, Provided always that the aforesaid B. do pay or cause to be paid to the aforesaid A. such a rent &c. or these, So that the said B. do pay or cause to be paid to the said A. such a rent &c. ; in these cases without more saying, the feoffee has but an estate upon condition, so that if he does not perform the condition, the feoffor and his heirs may enter &c.*

Proviso and  
covenant blend-  
ed.

*Provided always.]* Our author puts his case where a proviso comes alone. And so it is if a man by indenture lets land for years, provided always and it is covenanted and agreed between the said parties, that the lessee shall not alien, this has been adjudged to be a condition by force of the proviso, and a covenant by force of the other words. This word proviso, also, shall be taken as a limitation or qualification, as hereafter in its proper place shall appear. And sometimes it shall amount to a covenant.

Clause of entry  
makes a con-  
dition.

[204a]

*To enter &c.]* Hereby it is evident, that some words of themselves do make conditions, and some other (whereof our author here and in the next Section puts an example) do not of themselves make a condition without a conclusion and clause of re-entry: and many times (*si*) makes a condition, and sometimes a limitation, as hereafter shall be said in this Chapter.

## SECTION 330.

ALSO, there are other words in a deed which cause the tenements to be conditional. As if upon such feoffment a rent be reserved to the feoffor &c. and afterwards these words are put into the deed; that if it happen (*Quod si contingat*) the aforesaid rent be behind in part or in all, that then it shall be lawful for the feoffor and his heirs to enter &c., this is a deed upon condition. " If it happen."

And sometimes in case of lands or tenements (*causa*) shall make a condition. As if a woman give lands to a man and his heirs, *causâ matrimonii prælocuti*, [in consideration of marriage proposed or agreed upon] in this case if she either [refuse to] marry the man, or the man refuse to marry her, she shall have the land again to her and her heirs. But on the other hand, if a man give lands to a woman and her heirs, *causâ matrimonii prælocuti*, though he does not marry her, or the woman refuse, he shall not have the lands again, for it stands not with the modesty of women in this kind to ask advice of learned counsel, as the man may and ought: and the rather, for that in the case of the woman she may aver the cause, (for the reason aforesaid) although it be not contained in the deed, yea though the feoffment be made without deed. [*post 226a*]. *So does feoffment by single woman to a man, causa matrimonii.*

But for the avoiding of a lease for years, such precise words of condition are not so strictly required as in the case of a freehold and inheritance. For if a man by deed make a lease of a manor for years, in which there is this clause (and the said lessee shall continually dwell upon the capital messuage of the said manor upon pain of forfeiture of the said term) these words amount to a condition, *Lease for years, words of condition less strict.*

## SECTION 331.

[204 b]

BUT there is a diversity between this word *si contingat* &c. and the words next aforesaid &c. [*i. e. provided always*]. For these words *si contingat* &c. are nought worth to such a condition, unless they have these words following: That it shall be lawful for the feoffor and his heirs to enter &c. But in the cases aforesaid, the law implies that they contain in themselves a condition that the feoffor *Clause of re-entry when necessary.*

*and his heirs may enter &c.. Yet it is commonly used in all the cases aforesaid to put such a clause in the deed to declare and express to common people, who are not learned in the law, concerning the manner and condition of the feoffment. As if a man seised of land lets the same land to another by deed indented for term of years, rendering to him a certain rent, it is customary to put into the deed [a clause] that if the rent be behind at the day of payment, or by the space of a week or a month &c. that then it shall be lawful for the lessor to distrain &c. yet the lessor may distrain of common right for the rent behind &c. though these words were not inserted in the deed &c.*

*Distress may be made before the time specified.*  
[205a]

*Or a month, &c.]* Here albeit the clause of distress be added that if the rent be behind by the space of a week or a month that the lessor may distrain, yet he may distrain within the week or month, because a distress is incident of common right to every rent service. And the words are in the affirmative, and therefore cannot restrain that which is incident of common right.

## SECTION 332.

*Mortgage what.* ITEM, *if a feoffment be made upon condition, that if the feoffor pay to the feoffee at a certain day &c. forty pounds of money, that then the feoffor may re-enter, &c. in this case the feoffee is called tenant in mortgage, which is in Latin mortuum vadium. And it seems that the cause why it is called mortgage is, for that it is doubtful whether the feoffor will pay at the day limited such sum or not: and if he does not pay, then the land which is put in pledge upon condition for payment of the money, is taken from him for ever, and so dead to him upon condition, &c. And if he pays the money, then the pledge is dead as to the tenant, &c. [that is to the feoffee,]*

*Vivum vadium, or Welsh mortgage.*

*Mortgage]* Is derived of two French words, viz. *mort*, that is *mortuum*, and *gage*, that is *vadium*, or *pignus*. And it is called in Latin *mortuum vadium*, to distinguish it from that which is called *vivum vadium*, which is where a man borrows a sum of money of another, and makes over an estate to him [to hold] until he has received the said sum [out] of the rents and the profits of the land;



in which case neither money nor land dies or is lost, (whereof Littleton has spoken before in this Chapter) and therefore it is called *vivum vadium*. [And this is sometimes called a Welsh mortgage.]

SECTION 333.

[205 b]

ALSO, as a man may make a feoffment in fee in mortgage, so a man may make a gift in tail in mortgage, and a lease for term of life, or for term of years in mortgage. And all such tenants are called tenants in mortgage, according to the estates which they have in the land, &c. Mortgages may be in fee-tail for life or years.

SECTION 334.

ALSO, if a feoffment be made in mortgage upon condition that the feoffor shall pay such a sum at such a day as is between them by their deed indented agreed and limited, although the feoffor dies before the day of payment, &c. yet if the heirs of the feoffor pay the sum of money to the feoffee on the day, or tender to him the money, and the feoffee refuses to receive it, then may the heir enter into the land; and yet the condition is, that if the feoffor shall pay such a sum at such a day, &c. not making mention in the condition of any payment to be made by his heir, but because the heir has interest of right in the condition, &c. and the intent was that the money should be paid at the day assessed, &c. and the feoffee has no more loss if it be paid by the heir than if it were paid by the father, &c. therefore if the heir pay the money, or tender the money at the day limited, &c. and the other refuse it, he may enter, &c. But if a stranger of his own head, who has not any interest, &c. will tender the aforesaid money to the feoffee at the day appointed, the feoffee is not bound to receive it. Mortgagor's heir may redeem, though not named; contra of stranger.

*That the feoffor shall pay at such a day, &c.]* Albeit conditions be not favoured, yet they are not always taken literally. And where it is said, that the heir may tender at the day limited, &c. herein is implied, that the executors or administrators of the mort- So may executor or administrator, or the ordinary. [206 a]

gagor, or in default of them the ordinary [who before the statute of distributions was entitled to the surplus] may also tender, as shall be said hereafter in this Chapter.

*Mortgagor's death without heirs.*

But if the mortgagor die before the day without an heir, so that the condition is become impossible to be performed, here, as the condition is become impossible by the act of God, the estate of the feoffee shall not be avoided, as shall be said hereafter in this Chapter.

*Possible and impossible conditions in bond and feoffment distinguished.*

And as to impossible conditions divers diversities are worthy of observation. First, between a condition annexed to an estate in lands on a feoffment, and a condition of a bond, obligation, recognizance, or such like. For if a condition annexed to lands be possible at the making of the condition, and becomes impossible by the act of God, yet the estate of the feoffee &c. shall not be avoided, [but he shall take the lands absolutely discharged of the condition.] On the other hand, if a man be bound by recognizance or bond, with condition that he shall appear the next term in such a court, and before the day the obligor dies, the recognizance or obligation is saved; and the reason of the diversity is, because the estate of the land is executed and settled in the feoffee, and cannot be redeemed back again but by matter subsequent, viz. the performance of the condition. But the bond or recognizance is a thing in action, and executory, whereof no advantage can be taken until there be a default in the obligor; and therefore in all cases where the condition, of a bond recognizance, &c. is possible at the making of the condition and before the same can be performed the condition becomes impossible by the act of God, by the act of law, or by the act of the obligee &c. there the obligation, &c. is saved. But if the condition of a bond, &c. be impossible at the making of the condition, the obligation, &c. is single, [that is without any condition, and good for the penal sum.] And so it is in case of a feoffment in fee with a condition subsequent which is impossible, the estate of the feoffee is absolute: but if condition precedent be impossible, no estate or interest shall grow thereupon; [i. e. as the feoffee cannot perform the condition he can take no estate or interest in the land.]

[206 b]

*Examples of possible and impossible conditions.*

And to illustrate these by examples you shall understand:—If a man be bound in an obligation &c. with condition that if the

obligor go from the church of St. Peter in Westminster to the church of St. Peter in Rome within three hours, that then the obligation shall be void; the condition is void and impossible, and the obligation stands good. And so it is if a feoffment be made upon condition that the feoffee shall go as aforesaid, the estate of the feoffee is absolute, and the condition impossible and void. If a man make a lease for life upon condition that if the lessee go to Rome as aforesaid, that then he shall have a fee, the condition precedent is impossible and void, and therefore no fee-simple can grow to the lessee. And this is true in all cases that a man shall never take advantage of a condition rendered impossible by his own act.

But it is commonly holden that if the condition of a bond &c. be against law, that the bond itself is void. But herein the law distinguishes between a condition against law for the doing of any act that is *malum in se*, and a condition against law (which concerns not any thing that is *malum in se*) but is against law because it is either repugnant to the estate, or against some maxim or rule in law. And therefore the common opinion is to be understood of conditions against law for the doing of some act that is *malum in se*, and yet therein also the law distinguishes. As if a man be bound upon condition that he shall kill I. S., the bond is void. But if a man make a feoffment upon condition that the feoffee shall kill I. S., the estate is absolute and the condition void.

*Condition against law.*

If a man make a feoffment in fee upon condition that he shall not alien, this condition is repugnant and against law, and the estate of the feoffee is absolute (whereof more shall be said in the proper place.) But if the feoffee be bound in a bond that the feoffee or his heirs shall not alien, this is good, for he may notwithstanding alien if he will forfeit the bond which he himself has made. So it is if a man make a feoffment in fee upon condition that the feoffee shall not take the profits of the land, this condition is repugnant and against law, and the estate is absolute. But a bond with a condition that the feoffee shall not take the profits is good.

*Condition not to alien or take profits, bad in feoffment, good in bond.*

If a man be bound with a condition to enfeoff his wife, the condition is void and against law, because it is against a maxim in law, and yet the bond is good: but if he be bound to pay his wife

*Condition for husband to enfeoff wife bad.*

money, that is good. *Et sic de similibus*, whereof there are plentiful authorities in our books.

*Tender to person good.*

*Tender the money at the day limited, &c.]* Note, hereby is implied that albeit a convenient time before sun-set be the last time given to the feoffor to tender, yet if he tender it to the person of the mortgagee at any time of the day of payment, and he refuses to accept it, the condition is saved for that time.

*Guardian may redeem.*

*But if a stranger of his own head, who has not any interest, &c. will tender.]* Nota, by this is implied that if the mortgagor die leaving his heir within the age of fourteen years (the land being holden in socage), the next of kin to whom the land cannot descend, being his guardian in socage, may tender in the name of the heir, cause he has an interest as guardian in socage.

*And any person for an idiot.*

But if the heir be an idiot of what age soever, any man may make the tender for him in respect of his absolute disability, and the law in this case is grounded on charity, and so in like cases.

*Stranger's tender in mortgagor's name good if accepted.*  
[207a]

*The feoffee is not bound to receive it.]* And note that Littleton says that he is not bound to receive it at a stranger's hand. But if a stranger in the name of the mortgagor or his heir (without his consent or privity) tender the money, and the mortgagee accepts it, this is a good satisfaction, and the mortgagor or his heir agreeing thereunto may re-enter into the land; *omnis ratihabitio retrò trahitur et mandato æquiparatur*. But the mortgagor or his heir may disagree thereunto if he will.

### SECTION 335.

*After tender and refusal mortgages no remedy for money.*

*AND be it remembered that in such case, where a tender of the money is made, &c. and the feoffee refuses to receive it, by the which the feoffor or his heir enters, &c. then the feoffee has no remedy by the common law to recover his money, because it shall be accounted his own folly that he refused the money when a lawful tender of it was made to him.*

*Tender of the money is made &c.]* Here is implied at the due time and place according to the condition.

*Then the feoffee has no remedy by the common law to recover his money &c.]* And the reason is, because the money is collateral to the land, and the feoffee has no remedy thereof.

If a bond in the penal sum of one hundred pounds be made with condition for the payment of fifty pounds at a day; and at the day the obligor tenders the money, and the obligee refuses the same, yet in an action of debt upon the bond [by the obligee], if the defendant [obligor] pleads the tender and refusal, he must also plead that he is yet ready to pay the money and tender the same in court. But if the plaintiff will not then receive it, but takes issue upon the tender, and the same be found against him, he has lost his money for ever. But if a man make a single bond, or acknowledge a statute or recognizance, and afterwards makes a defeasance for the payment of a lesser sum at a day, if the obligor or conuser tenders the lesser sum at the day, and the obligee or conusee refuses it, he shall never have any remedy by law to recover it, because it is no parcel of the sum contained in the obligation, statute, or recognizance, being contained in the defeasance made at the time or after the obligation, statute, or recognizance. And so it is if a man make an obligation of an hundred pound with a condition for the delivery of corn, or timber &c. or for the performance of an arbitrement, or the doing of any act &c. This is collateral to the obligation, that is to say, is not parcel of it, and therefore a tender and refusal is a perpetual bar.

*Tender and refusal on bond.*

But if a man be bound to make a feoffment in fee to the obligee, and he make a lease and release to him and his heirs, albeit this be a collateral condition, yet it is well performed, because this amounts in law to a feoffment.

*Release equivalent to feoffment in performance of condition.*

*Money.]* Lawful money of England, either in gold or silver, is of two sorts, viz. the English money coined by the king's authority, or foreign coin made current by proclamation within the realm.

*Lawful money.*  
[207 b]

### SECTION 336.

*ALSO, if a feoffment be made on this condition, that if the feoffee pay to the feoffor at such a day the sum of twenty pounds, that*

*Feoffee's conveyance before condition brok-*

en good, and  
second feoffee  
may tender.

*then the feoffee shall have the land to him and to his heirs, but if he fail to pay the money at the day appointed, that then it shall be lawful for the feoffor or his heirs to enter &c. and afterwards, before the day appointed the feoffee sells the land to another, and of this makes a feoffment to him; in this case if the second feoffee will tender the sum of money at the day appointed to the feoffor, and the feoffor refuses the same &c. then the second feoffee has an estate in the land clearly without condition. And the reason is, for that the second feoffee has an estate in the condition for the safeguard of his tenancy. And in this case it seems that if the first feoffee after such sale of the land will tender the money at the day appointed &c. to the feoffor, this shall be good enough for the safeguard of the estate of the second feoffee, because the first feoffee was privy to the condition, and so the tender of either of the two is good enough &c.*

Alternative  
when to be ex-  
pressed.

*And if he fail to pay the money &c.]* If a man make a feoffment of lands to have and to hold to the feoffee and his heirs upon condition that if the feoffee pay to the feoffor at such a day twenty pounds that the feoffee shall have the lands to him and his heirs; if the condition had not proceeded further it had been void, for the feoffee had a fee-simple by the first words, and therefore words subsequent are materially added (and if he fail to pay the money &c.)

Privies in estate  
may perform  
condition.

*The second feoffee will tender the sum of money &c.]* Albeit the second feoffee be not named in the condition, yet shall he tender the sum because he is privy in estate, and in judgment of law has an estate and interest in the condition, (as Littleton here says) for the salvation of his tenancy. Vid. Sect. 334. And note, he who has an interest in the condition on the one side, or in the land on the other, may tender.

Tender in bags  
good.  
[208 a]

*Tender the sum.]* The feoffee may tender the money in purses or bags without showing or telling the same, for he does that which he ought, viz. to bring the money in purses or bags, which is the usual way to carry money, and then it behoves the party who is to receive it to put it out and tell it.

First feoffee  
may also tender.

*If the first feoffee.]* Here it appears that the first feoffee may notwithstanding his feoffment pay the money to the feoffor, because

he is party and privy to the condition, and by his tender may save the estate of his feoffee, which in all good dealing he ought to do.

## SECTION 337.

*ALSO, if a feoffment be made upon condition that if the feoffor pay a certain sum of money to the feoffee, then it shall be lawful to the feoffor and his heirs to enter: in this case if the feoffor die before the payment made, and the heir tenders to the feoffee the money, such tender is void, because the time within which this ought to be done is past. For when the condition is, that if the feoffor pay the money to the feoffee &c. this is as much to say, that if the feoffor during his life pay the money to the feoffee &c. and when the feoffor dies, then the time of tender is past. But otherwise it is where a day of payment is limited and the feoffor dies before the day, then may the heir tender the money as is aforesaid, for the time of tender is not past by the death of the feoffor. Also it seems, that in such case where the feoffor dies before the day of payment, if the executors of the feoffor tender the money to the feoffee at the day of payment, this tender is good enough; and if the feoffee refuse it, the heirs of the feoffor may enter. And the reason is because the executors represent the person of their testator &c.*

Heir cannot perform condition unless he is mentioned, or a day be appointed for payment, then he or the executors may tender.

This diversity is plain and evident and agrees with our books, and yet somewhat shall be observed herereupon: for here it appears, that seeing no time is limited the law appoints the time, and that is during the life of the feoffor. Wherein divers diversities are worthy of observation.

Condition on bond and feoffment further distinguished.

First, between this case that Littleton here puts of the condition of a feoffment in fee for the payment of money where no time is limited, and the condition of a bond for the payment of a sum of money where no time is limited: for in such a condition of a bond the money is to be paid presently, that is, in convenient time. And yet in the case of a condition on a bond there is a diversity between a condition of an obligation which concerns the doing of a transitory act without limitation of time, as payment of money, delivery of charters, or the like (for there the condition is to

1st. Where no time of payment is mentioned.

[208b]

be performed presently, that is, in convenient time); and a condition on an obligation where the act to be done is in its nature local, for there the obligor (no time being limited) has time during his life to perform it, as to make a feoffment &c. if the obligee does not hasten the same by request. And in the case where the condition of the obligation is local, there is also a diversity, when the concurrence of the obligor and the obligee is requisite, (as in the said case of a feoffment) and when the obligor may perform it in the absence of the obligee, as to acknowledge satisfaction in the court of King's Bench [on a judgment or recognizance] there, although the acknowledgment is local, yet because he may do it in the absence of the obligee, he must do it in convenient time, and has not time during his life.

2. Where the condition is to re infeoff, and no time limited.

Another diversity is between a condition of an obligation, and a condition of a feoffment, where the act which is local is to be done to a stranger, and where to the obligee or feoffor himself. As if one makes a feoffment in fee upon condition that the feoffee shall infeoff a stranger, and no time is limited, the feoffee shall not have time during his life to make the feoffment, for then he should take the profits in the mean time to his own use, which the stranger ought to have, and therefore he ought to make the feoffment as within convenient time; and so it is of the condition on an obligation. But if the condition be that the feoffee shall re-infeoff the feoffor, there the feoffee has time during his life, on account of the privity between them, unless he be hastened by request, as shall be said hereafter. Another diversity is, when the obligor or feoffee is to infeoff a stranger, as hath been said, and when a stranger is to infeoff the feoffee or obligee: as if A. infeoff B. of Black Acre, upon condition that if C. infeoff B. of White Acre, A. shall re-enter, C. has time during his life, if B. does not hasten it by request, and so of an obligation.

3d. Condition to grant annuity and no time named.

But in some cases albeit the condition be collateral, and is to be performed to the obligee, and no time is limited, yet in respect of the nature of the thing the obligor shall not have time during his life to perform it. As if the condition of an obligation be to grant an annuity or yearly rent to the obligee during his life, payable yearly at the feast of Easter, this annuity or yearly rent must be granted before Easter, or else the obligee shall not have it at that feast during his life, *et sic de similibus*; and so was it resolved by the



judges of the Common Pleas in the argument of Andrews' case, which I myself heard.

Lastly, when the obligor, feoffor, or feoffee is to do a sole act or labour, as to go to Rome, Jerusalem &c. in such and the like cases, the obligor, feoffor, or feoffee, has time during his life, and cannot be hastened by request. And so it is if a stranger to the obligation or feoffment were to do such act, he has time to do it during his life.

4th. To go to Rome, and no time named.

[209a]

*If the executors of the feoffor tender &c.]* So as now it appears that either the heir of the feoffor, or his executors, may (when a day is limited) pay the money; and so also may the administrator of the feoffor, if the feoffor dies intestate; and this may the ordinary do if there be neither executor or administrator as hath been said.

Executor, administrator or ordinary may redeem;

*And if the feoffee refuse it, the heirs of the feoffor may enter &c.]* Nota; a tender by the executors or administrators and a refusal gives the heir of the feoffor a title to entry, for he and the executors are privies in law.

but it will be for the heir's benefit.

*The person of the testator &c.]* This is to be understood concerning goods and chattels either in possession or in action; but the executor represents the person of the testator more than the heir does the person of the ancestor. For if a man binds himself, his executors are bound though they are not named, but it is not so of the heir: furthermore, here the administrators and the ordinary also are implied, as before hath been said.

Executors are bound in a bond, though not named, contra of heirs in a feoffment.

### SECTION 338.

**AND note, that in all cases of condition for payment of a certain sum in gross touching lands or tenements, if lawful tender be once refused, he who ought to tender the money is quit of this and fully discharged for ever afterwards.**

Refusal of tender amounts to a release;

This is to be understood, that he who ought to tender the money is of this discharged for ever to make any other tender; but

except in case of a mortgage, where the debt

remains, though  
land discharged.  
[209 b]

if it were a duty before, though the feoffor enter by force of the condition, yet the debt or duty remains. As if A. borrow a hundred pounds of B. and afterwards mortgages land to B. upon condition for payment thereof; if A. tenders the money to B. and he refuses it, A. may enter into the land, and the land is freed for ever of the condition, but yet the debt remains and may be recovered by action of debt. But if A. without any loan, debt, or duty preceding in feoff B. of land upon condition for the payment of a hundred pounds to B. in nature of a gratuity or gift; in that case if he tender the hundred pound to him according to the condition, and he refuse it, B. has no remedy thereof; and so is our author in this and his other cases of like nature to be understood.

## SECTION 339.

Mortgagee's  
executors en-  
titled to money,  
not his heir.

*ALSO, if the feoffee in mortgage before the day of payment makes his executors and dies, and his heir enters into the land as he ought &c., it seems in this case that the feoffor ought to pay the money at the day appointed to the executors and not to the heir of the feoffee, because the money at the beginning appertained to the feoffee in manner of a duty, and it shall be intended that the estate was made by reason of the lending of the money by the feoffee or for some other duty; and therefore the payment shall not be made to the heir, as it seems; but the words of the condition may be such that the payment shall be made to the heir. As if the condition were, that if the feoffor pay to the feoffee or to his heirs such a sum at such a day &c. there after the death of the feoffee, if he dies before the day limited, the payment ought to be made to the heir at the day appointed.*

Unless heir  
specially named.

[210 a]

By this section also it appears, that the executors do more represent the person of the testator than the heir does the ancestor; for though the executor be not named, yet the law appoints him to receive the money, but so does not the law appoint the heir to receive the money unless he be named. But when he is named and before the day of payment the mortgagee dies, the feoffor cannot pay the money to the executors of the mortgagee, for Littleton here says, that in this case the payment ought to be made to the heir. *Et in hoc casu designatio unius personæ est exclusio alterius, et*

*expressum facit cessare tacitum*; and the law shall never seek out a person when the parties themselves have appointed one.

But if the condition be to pay the money to the feoffee his heirs or executors, then the feoffor has election to pay it either to the heir or executor. *Heirs or executors.*

If a man make a feoffment in fee upon condition that the feoffee shall pay to the feoffor his heirs or assigns twenty pounds at such a day, and before the day the feoffor makes his executors and dies, the feoffee may pay the same either to the heir or to the executors, for they are his assigns in law to this intent. *Heirs or assigns.*

But if a man makes a feoffment in fee upon condition that if the feoffor pay to the feoffee his heirs or assigns twenty pounds before such a feast, and before the feast the feoffee makes his executors and dies, the feoffor ought to pay the money to the heir and not to the executors, for the executors in this case are no assigns in law; and the reason of this diversity is, that in the first case the law must of necessity find out assigns, because there cannot be any assigns in deed, for the feoffor has but a bare condition and no estate in the land which he can assign over. But in the other case the feoffee has an estate in the land which he may assign over; and where there may be assigns in deed, the law shall never seek out or appoint any assigns in law. And albeit the feoffee made no assignment of the estate, yet the executors cannot be assigns, because assigns were only intended by the condition to be assigns of the estate: and so was it resolved, Mich. 23 & 24 Eliz. by the two chief justices in the court of wards between Randall and Brown, which I observed. *Assigns—Executors cannot be of the estate.*

But if the condition be to pay the money to the feoffee his heirs or assigns, and the feoffee makes a feoffment over, it is in the election of the feoffor to pay the money to the first feoffee or to the second feoffee; and if the first feoffee dies, the feoffor may either pay the money to the heir of the first feoffee, or to the second feoffee, for the law will not force the feoffor to take knowledge of the second feoffment, nor of the validity thereof, whether the same be effectual or not, but at his pleasure, and the first feoffee and his heirs are expressly named in the condition. *Mortgagor not bound to take notice of the mortgagee's conveyance before condition broken.*

## SECTION 340.

Place of tender, whether to the person or on the land.

ALSO, upon such case of a feoffment in mortgage, a question has been demanded in what place the feoffor is bound to tender the money to the feoffee at the day appointed &c. And some have said, upon the land so holden in mortgage, because the condition is depending upon the land. And they have said that if the feoffor be upon the land there ready to pay the money to the feoffee at the day set, and the feoffee be not there, then the feoffor is quit and excused of the payment of the money, for it was no default in him. But it seems to some that the law is contrary, and that there was default in him; for that he is bound to seek the feoffee if he be in any other place within the realm of England. As if a man be bound in an obligation of twenty pounds upon condition endorsed upon the same obligation, that if he pay to him to whom the obligation is made at such a day ten pounds, then the obligation of twenty pounds shall lose its force and be holden for nothing; in this case it behoves him who made the obligation to seek him to whom the obligation is made if he be in England, and at the day set to tender to him the said ten pounds, otherwise he shall forfeit the sum of twenty pounds comprised within the obligation &c. And so it seems in the other case &c. And albeit that some have said that the condition is depending upon the land, yet this proves not that the performance of the condition ought to be made upon the land &c., no more than as if the condition were that the feoffor at such a day shall do some special corporeal service to the feoffee, not naming the place where such corporeal service shall be done. In this case the feoffor ought to do such corporeal service at the day limited to the feoffee in what place soever of England the feoffee be, if he will have advantage of the condition &c. So it seems in the other case. And it seems to them that it shall be more properly said, that the estate of the land is depending upon the condition, than to say that the condition is depending upon the land &c. Sed quære &c.

Tender of mortgage money must be to the persons; otherwise of rent.

Also, upon such case of a feoffment in mortgage, a question has been demanded &c.] Here and in other places, that I may say once for all, where Littleton makes a doubt and sets down several opinions

and the reasons, he ever sets down the better opinion and his own last, and so he does here. For at this day this doubt is settled, having been oftentimes resolved, that seeing the money is a sum in gross and collateral to the title of the land, the feoffor must tender the money to the person of the feoffee according to the latter opinion, and it is not sufficient for him to tender it on the land; otherwise it is of a rent that issues out of the land. And if the condition of a bond or feoffment be to make a feoffment, there it is sufficient for him to tender it upon the land, because the estate must pass by livery.

[210b]

*Within the realm of England.*] For if he be out of the realm of England he is not bound to seek him or to go out of the realm unto him. And for that the feoffee is the cause that the feoffor cannot tender the money, the feoffor shall enter into the land as if he had duly tendered it according to the condition.

*Except mortgages be beyond sea.*

If a man be bound to pay twenty pounds at any time during his life at a place certain, the obligor cannot tender the money at the place when he will, for then the obligee would be bound to perpetual attendance, and therefore the obligor in respect of the uncertainty of the time must give the obligee notice that on such a day at the place limited, he will pay the money, and then the obligee must attend there to receive it: for if the obligor then and there tender the money, he shall save the penalty of the bond for ever, and so it is of a feoffment. But if at any time, the obligor or feoffor meet the obligee or feoffee at the place, he may tender the money.

*If time of payment uncertain notice must be given.*

[211a]

## SECTION 341.

[211b]

**BUT if a feoffment in fee be made, reserving to the feoffor a yearly rent, and for default of payment a re-entry &c., in this case the tenant need not tender the rent when it is behind only upon the land, because this is a rent issuing out of the land, which is a rent seck. For if the feoffor be seised once of this rent, and after he comes upon the land &c., and the rent is denied him, he may have an assize of novel disseisin. For albeit he may enter by reason of the condition broken &c., yet he may choose either to relinquish his entry, or to have an assize &c. And so there**

**Tender of rent must be on land.**

**Party having right of entry may either enter or bring action.**

*is a diversity, as to the tender of a rent which is issuing out of the land, and of the tender of a sum in gross, which is not issuing out of any land.*

*Yet he may choose, either to relinquish his entry, or to have an assize.]* Here it appears, that if the condition he broke for non-payment of the rent, yet if the feoffor brings an assize for the rent due at that time, he shall never enter for the condition broken, because he affirms the rent to have a continuance, and thereby waives the condition. And so it is if the rent had had a clause of distress annexed unto it, if the feoffor had distrained for the rent, for non-payment whereof the condition was broken, he should never enter for the condition broken, but he may receive that rent and acquit the same, and yet enter for the condition broken. But if he accept a rent due at a day after, he shall not enter for the condition broken, because he thereby affirms the lease to have continuance.

*Distress precludes entry for condition broken, contra of receipt or release.*

## SECTION 342.

Place should be specially appointed in mortgage condition.  
[212a]  
Condition.

*AND therefore it will be a good and sure thing for him who makes such feoffment in mortgage, to appoint an especial place where the money shall be paid, and the more especial it be put the better it is for the feoffor. As if A. infeoff B. to hold to him and his heirs, upon such condition that if A. pay to B. on the feast of Saint Michael the archangel next coming in the cathedral church of St. Paul's in London within four hours next before the hour of noon of the same feast at the rood loft of the rood of the north door within the same church, or at the tomb of Saint Erkenwald, or at the door of such a chapel, or at such a pillar within the same church, that then it shall be lawful to the aforesaid A. and his heirs to enter &c., in this case he need not seek the feoffee in any other place, or be in any other place, but only in the place mentioned in the indenture, nor be there longer than the time specified in the same indenture, to tender or pay the money to the feoffee &c.*

*Advice of counsel.*

Here is good counsel and advice given, to set down in conveyances every thing in certainty and particularity, for certainty is the mother of quietness and repose, and uncertainty the cause of

variance and contentions ; and for obtaining the one, and avoiding the other, the best mean is, in all assurances, to take counsel of learned and well-experienced men who do not trust to memory only [but have recourse to] precedents.

SECTION. 343.

*ALSO, in such case, where the place of payment is limited, the feoffee is not bound to receive the money in any other place than that so limited. But yet if he do receive the payment in another place, that is good enough and as strong for the feoffor as if the receipt had been in the place named.*

If a mortgagee receive the money at another place, or before the time, it is a good performance of the condition.

Hereby it appears that the place is but a circumstance ; and therefore if the obligee receives it at any other place, it is sufficient, though he be not bound to receive it at any other place. And so it is if the money be to be paid on such a feast, yet if the money be tendered and received at any time before the day, it is sufficient.

[212b]

SECTION 344.

*ALSO, in the case of a feoffment in mortgage, if the feoffor pays to the feoffee a horse, or a cup of silver, or a ring of gold, or any such other thing in full satisfaction of the money, and the other receives it, this is good enough, and as strong as if he had received the sum of money, though the horse or the other thing be not of the twentieth part of the value of the sum of money, because the other has accepted it in full satisfaction.*

So, if he accept another thing for the money.

Hereupon are many diversities worthy of observation. First, there is a diversity, when the condition is for payment of money ; and when for the delivery of a horse, a robe, a ring, or the like : for where it is for payment of money, there if the feoffee or obligee accept a horse &c. in satisfaction, this is good : but if the condition were for the delivery of a horse, or a robe, there, albeit the obligee or feoffee accept money or any other thing for the horse &c., it is no

Condition for money ; acceptance of other thing good, secus if è converso.

performance of the condition. The like law is, if the condition be to acknowledge a recognizance of twenty pounds &c., if the obligee or feoffee accept twenty pounds in satisfaction of the condition, it is not sufficient in law, but notwithstanding such acceptance, the condition is broken. And so it is of all other collateral conditions, though the obligee or feoffee himself accept it.

*Condition to stranger.*

Secondly, if the condition be for payment of money to a stranger, there if the stranger accept a horse or any collateral thing in satisfaction of the money, it is no performance of the condition, because the condition in that case is strictly to be performed.

*Receipt of less sum no performance of condition, (except as to rent); but release under seal cures it.*

Thirdly, where the condition is for payment of twenty pounds, the obligor or feoffor cannot at the time appointed pay a lesser sum in satisfaction of the whole, because it is apparent that a lesser sum of money cannot be a satisfaction of a greater. But if the obligee or feoffee do at the day receive part, and thereof make an acquittance under his seal in full satisfaction of the whole, it is sufficient, for the deed amounts to an acquittance of the whole. If the obligor or lessor pay a lesser sum either before the day, or at another place than that limited by the condition, and the obligee or feoffee receives it, this is a good satisfaction.

*Collateral satisfaction.*

Fourthly, not only things in possession may be given in satisfaction, (whereof Littleton puts his case,) but also if the obligee or feoffee accept a statute or a bond in satisfaction of the money, it is a good satisfaction.

*Balance of account.*  
[213a]

If the obligor or feoffor be bound by condition to pay a hundred marks at a certain day, and at the day the parties account together, and because the feoffee or obligee owes twenty pounds to the obligor or feoffor, that sum is allowed, and the residue of the hundred marks is paid, this is a good satisfaction, and yet the twenty pounds was a chose in action, and no payment was made thereof, but by way of retainer or discharge.



## SECTION 345.

ALSO if a man enfeoff another upon condition that he and his heirs shall render to a stranger and to his heirs a yearly rent of twenty shillings, &c. and if he or his heirs fail in payment thereof, that then it shall be lawful to the feoffor and his heirs to enter, this is a good condition: and yet in this case, albeit such annual payment is in the indenture called a yearly rent, this is not properly a rent. For if it be a rent, it must be either a rent service, a rent charge, or a rent secke, and it is not either of these. For if the stranger were seised of this, and after it were denied him, he shall never have an assise, because it is not issuing out of any tenements [of his,] and so the stranger is without remedy if such yearly rent be behind, but the feoffor or his heirs may enter, &c. And yet if the feoffor or his heirs enter for default of payment, then such rent is taken away for ever. And so such a rent is but a pain [or penalty] set upon the tenant and his heirs, that if they will not pay the rent according to the form of the indenture, they shall lose the land by the entry of the feoffor or his heirs for default of payment. And in this case it seems that the feoffee and his heirs ought to seek the stranger and his heirs if they be within England, because there is no place limited where the payment shall be made and such rent is not issuing out of any land.

Rent of a stranger, — no remedy for.

[Shall render to a stranger a yearly rent, &c.] This reservation is merely void for the reasons hereafter in this section alleged by Littleton, and also because that no estate moves from the stranger and he is not party to the deed. And albeit it be a void reservation and no rent, yet the words of the condition being, that if the feoffee or his heirs fail of payment then, &c., the condition is good, and the words 'annual rent' shall be taken for a sum of money in gross, and not in their proper signification of a rent issuing out of land; and it is to be observed, that words in a condition may be taken out of their proper sense, *ut res magis valeat quàm pereat*, and so in like cases it is holden in our books.

Reservation to a stranger is simply void.

But if A. be seised of certain lands, and A. and B. join in a feoffment in fee, reserving a rent to them both and their heirs, and the

If a party to deed he is no stranger, and

*power of distress is equivalent to a grant of the rent.*

[213b]

feoffee grants that it shall be lawful for them and their heirs to distress for the rent, this is a good grant of a rent to them both, because B. is a party to the deed, and the clause of distress is a grant of the rent to A. and B. as it appears before in the chapter of Rents. But if B. had been a stranger to the deed, then B. would have taken nothing. And upon this diversity are all the books, which *primâ facie* seem to vary, reconciled.

*Demand of sum in gross not necessary.*

*For default of payment.*] Note that seeing it is but a sum in gross, there need no demand of the rent; for Littleton here says, that the feoffee ought to seek the person of the stranger to pay him the sum of money because it is a sum in gross and not issuing out of the land.

## SECTION 346.

*Reservation can only be to grantor and his heirs.*

AND *here note two things: one is, that no rent (properly so called) can be reserved upon any feoffment, gift, or lease, but only to the feoffor, or to the donor, or to the lessor, or to their heirs, and in no manner may it be reserved to any strange person. But if two joint-tenants make a lease by deed indented, reserving to one of them a certain yearly rent, this is a good reservation to him to whom the rent is reserved, for he is privy to the lease and not a stranger thereto, &c.*

*To the feoffor, donor, &c. or to their heirs.*] Hereby it should seem that if a man makes a feoffment, gift, or lease, he may [omitting himself] reserve a rent to his heirs. But Littleton is not so to be understood; his meaning is, that either the feoffor, &c. may reserve the rent to himself only, or to himself and his heirs. And yet it is holden in our books, that a man may make a feoffment in fee, reserving a rent of forty shillings to the feoffor for term of his life, and after his decease, a pound of cumming to his heirs.

[214a]

*To him or his heirs, good only for his life.*

If a man make a feoffment in fee, reserving a rent to him or his heirs, it is good to him for term of his life, and void as to his heir.

*Reservation to one joint-tenant enures to both, when.*

*But if two joint-tenants make a lease by deed indented, &c.*] This case being by deed indented, is evident, and it has been touched

before; but if two joint-tenants without a deed indented make a lease for life, reserving a rent to one of them, it shall enure to both in respect of the joint reversion.

And so it is of a surrender to one of them, it shall enure to them both.

*Surrender to one joint-tenant enures to both.*

If two joint-tenants, the one for life, and the other in fee, join in a lease for life, or a gift in tail, reserving a rent, the rent shall enure to them both; for if the particular estate determine, they shall be joint-tenants again in possession.

*Reservation to joint-tenant generally enures to both.*

But if tenant for life, and he in the reversion join in a lease for life, or a gift in tail by deed, reserving a rent, this shall enure to the tenant for life only, during his life, and after to him in the reversion, for every one grants that which he may lawfully grant: And if at the common law they had made a feoffment in fee generally, the feoffee should have holden of the tenant for life, during his life, and after of him in reversion, and so it was ruled in the King's Bench.

*Lease by tenant for life, and him in remainder.*

### SECTION 347.

*THE second thing is, that no entry or re-entry (which is all one) may be reserved or given, to any person, but only to the feoffor, or to the donor, or to the lessor, and their heirs: and such re-entry cannot be given to any other person. For if a man lets land to another for term of life by indenture, rendering to the lessor and to his heirs a certain rent, and for default of payment a re-entry, &c. if afterward the lessor by a deed grants the reversion of the land to another in fee, and the tenant for term of life attorns, &c. if the rent be afterwards behind, the grantee of the reversion may distrain for the rent, because the rent is incident to the reversion; but he may not enter into the land and oust the tenant as the lessor or his heirs might have done, if the reversion had been continued in them, &c. And in this case the entry is taken away for ever; for the grantee of the reversion cannot enter, causâ quâ suprâ. And neither can the lessor or his heirs enter; for if the lessor might enter, then he ought to be in*

*Re-entry reservable to grantor and his heirs only.*

*It cannot be in gross.*

*Grantee of reversion cannot enter, but may distrain.*

*his former estate, &c., which he cannot be, because he has aliened away the reversion.*

Right of action  
or entry not  
grantable.  
Champerty.

*That no entry, &c.]* Here Littleton recites one of the maxims of the common law; and the reason hereof is, for avoiding of maintenance, suppression of right, and stirring up of suits; and therefore nothing in action, entry, or re-entry can be granted over; for so under colour thereof pretended titles might be granted to great men, whereby right might be trodden down, and the weak oppressed, which the common law forbids; [so that none may] grant before they be in possession.

Condition and  
conditional  
limitation dis-  
tinguished as to  
grantee's right  
of entry.

[214 b]

*For default of payment a re-entry, &c.]* Hereupon is to be collected divers diversities. First, between a condition that requires a re-entry, and a limitation that *ipso facto* determines the estate without any entry. Of this first sort no stranger, as Littleton says, can take advantage. But of limitations it is otherwise. As if a man make a lease *quousque*, that is, until I. S. comes from Rome, and the lessor grants the reversion over to a stranger, then I. S. comes from Rome, the grantee shall take advantage of it and enter, because the estate by the express limitation was determined. So it is if a man make a lease to a woman *quamdiu casta vixerit*, or if a man make a lease for life to a widow *si tamdiu in purâ viduitate viveret*. So it is if a man make a lease for a hundred years if the lessee lives so long, and the lessor grants over the reversion, and the lessee dies, the grantee may enter, *causâ quâ suprâ*.

So between con-  
ditions annexed  
to freehold and  
terms for years.

2. Another diversity is between a condition annexed to a freehold, and a condition annexed to a lease for years. For if a man make a gift in tail or a lease for life upon condition that if the donee or lessee goes not to Rome before such a day the gift or lease shall cease or be void, the grantee of the reversion shall never take advantage of this condition, because the estate cannot cease before an entry; but if the lease had been for years, [i. e. to A. for years upon condition that if he do not go Rome before such a day the lease shall be void, as distinguished from a clause that then the lessor shall re-enter,] there the grantee may take advantage of the condition, because the lease for years is by breach of the condition *ipso facto* void without any entry; for a lease for years may begin without ceremony, and so may it end without

ceremony; but an estate of freehold cannot neither begin nor end without ceremony. And of a void thing a stranger may take benefit, but not of a voidable estate by entry.

*Void and voidable, general rule.*

*To the feoffor, or to the donor, &c. or to their heirs, &c.]* Here is to be observed a diversity between a reservation of a rent and a re-entry: for (as hath been said) a rent cannot be reserved to the heir of the feoffor, but the heir may take advantage of a condition which the feoffor could never do. As if I enfeoff another of an acre of ground upon condition that if my heir pays to the feoffee, &c. twenty shillings, that he and his heir shall re-enter, this condition is good: and if after my decease my heir pays the twenty shillings, he shall re-enter, for he is privy in blood, and enjoys the land as heir to me.

*Reservation to grantor's heir bad; condition to him good.*

*But only to the feoffor, &c. or to their heirs.]* Our author speaks here of natural persons only by way of example, for if a bishop, archdeacon, parson, prebend, or any other body politic or corporate ecclesiastical or temporal, make a lease, &c. upon condition, his successor may enter for the condition broken, for they are privy in right.

*Lease by corporation; successors may enter for condition broken.*

And so if a man have a lease for years and demises or grants the same upon condition, &c. and dies, his executors or administrators may enter for the condition broken, for they are privy in right and represent the person of the dead.

*So may executors or underlessee.*

If *cestuique use* had made a lease for years, &c. upon condition, the feoffees should not enter for the condition broken, for they are privy in estate, but not privy in blood.

*Lease by cestuique trust, trustee cannot enter.*  
[215a]

Another diversity is in case of a lease for years, where the condition is that the lease shall cease and be void, as is aforesaid, and where the condition is, that the lessor shall re-enter, for there the grantee, as Littleton says, shall never take benefit of the condition. [What if it be both, see 6 M. & S. 121. 6 B. & C. 519. 4 B. & A. 401. 2 Russ. 174.]

*Grantee may enter if term to be void, secus if lessor be to re-enter.*

And it is to be observed, that where the estate or lease is *ipso facto* void by the condition or limitation, no acceptance of the rent afterwards can give it continuance, [because the acceptance

*Void lease not confirmable by acceptance of rent, contra of*

*lease voidable  
by entry.*

of rent cannot make a new lease, and the old one is determined]: otherwise it is of an estate or lease voidable by entry.

*Grantee may  
enter for breach  
of condition at  
law in his own  
time, as if a te-  
nant for life  
make a larger  
estate, &c.*

Another diversity is between conditions in deed, whereof sufficient has been said before, and conditions in law. As if a man make a lease for life, there is a condition in law annexed unto it, that if the lessee makes a greater estate, &c. that then the lessor may enter. Of this and the like conditions in law, which give an entry to the lessor, the lessor himself and his heirs shall not only take the benefit of it, but also his assignee and the lord by escheat, every one for the condition in law broken in his own time.

*And now by  
Stat. grantees of  
reversion may  
take advantage  
of re-entries and  
forfeitures.*

Another diversity there is between the judgment of the common law, whereof Littleton wrote, and the law at this day by force of the statute of 32 H. 8. c. 34. For by the common law no grantee or assignee of the reversion could (as hath been said) take advantage of a re-entry by force of any condition. For at the common law, if a man had made a lease for life reserving a rent, &c. and if the rent be behind a re-entry, and the lessor grants the reversion over, the grantee should take no benefit of the condition, for the cause before rehearsed. But now by the said statute of 32 H. 8., the grantee may take advantage thereof, and upon demand of the rent and non-payment, he may re-enter. By this act it is provided, that as well every person who shall have any grant of the king of any reversion, &c. of any lands, &c. which pertained to monasteries, &c. as also all other persons being grantees or assignees, &c. to or by any other person or persons, and their heirs, executors, successors, and assignees shall have like advantage against the lessees, &c. by entry for non-payment of the rent, or for doing of waste or other forfeiture, &c. as the said lessors or grantors themselves ought or might have had. Upon this act divers resolutions and judgments have been given, which are necessary to be known.

*Act extends to  
natural persons,  
not to gifts in  
tail.*

1. That the said statute is general, viz. that the grantee of the reversion of every common person, as well as of the king, may take advantage of conditions. 2. That the statute extends to grants made by the successors of the king, albeit the king be only named in the act. 3. That where the statute speaks of lessees, the same does not extend to gifts in tail.

4. That where the statute speaks of grantees and assignees of the reversion, an assignee of part of the estate of the reversion may take advantage of the condition. As if lessee for life be, &c. and the reversion is granted for life, &c. So if lessee for years, &c. be, and the reversion is granted for years, the grantee for years may take benefit of the condition in respect of this word (*executors*) in the act.

*Also to grantee of part of the estate ;*

5. That a grantee of part of the reversion shall not take advantage of the condition : as if the lease be of three acres, reserving a rent upon condition, and the reversion is granted of two acres, the rent shall be apportioned by the act of the parties, but the condition is destroyed, for that it is entire and against common right.

*not to grantee of part of the land.*

6. That with respect to the king, the condition [in case of an assignment of the reversion in part of the land] is not destroyed, but still remains in the king.

*Except in king's case ;*

7. By act in law a condition may be apportioned in the case of a common person ; as if a lease for years be made of two acres, one of the nature of Borough English, the other at common law, and the lessor having issue two sons, dies, each of them may enter for the condition broken ; and likewise a condition may be apportioned by the act and wrong of the lessee, as hath been said in the chapter of Rents.

*or grantee be in by law.*

8. If a lease for life be made, reserving a rent upon a condition, &c. and the lessor levies a fine of the reversion, he is a grantee or assignee of the reversion ; but without attornment he shall not take advantage of the condition, for the makers of the statute intended to have all necessary incidents observed, otherwise it might be mischievous to the lessee. [*Contra* now attornment taken away.]

*Lessor [in tail] by levying fine has new reversion.*

9. There is a diversity between a condition that is compulsory, and a power of revocation that is voluntary : for a man who has a power of revocation may by his own act extinguish his power of revocation in part, as by levying of a fine of part ; and yet the power shall remain for the residue, because it is in nature of a limitation, and not of a condition ; and so it was resolved in the Earl of

*Power and condition distinguished as to extinguishment in part of land.*

Shrewsbury's case in the Court of Wards. Pasch. 39 Eliz. and Mich. 40 & 41 Eliz.

Statute extends to cestui que use.

[215b]

10. If the lessor bargains and sells the reversion by deed indented and inrolled, the bargainee is not in the *per* by the bargainor,\* and yet he is an assignee within the statute. So if the lessor grant the reversion in fee to the use of A. and his heirs, A. is a sufficient assignee within the statute, because he comes in by the act and limitation of the party, albeit he is in the *post*, and the words of the statute be, *to or by*, and they be assignees to him, although they be not in by him: but such as come in merely by act in law, as the lord by escheat, for forfeiture on mortmain, or the like, they shall not have the benefit of this statute.

Notice of assignment to be given to lessee, when.

11. If the lessor in the case before [mentioned] bargain and sell the reversion by deed indented and inrolled, or if the lessor make a feoffment in fee, and the lessee [commits a breach of the condition] the grantee or feoffee shall not take advantage of the condition without giving notice [of the assignment] to the lessee.

Stat. extends not to conditions not incident to estate, as sums in gross.

12. Albeit the words of the statute be, for non-payment of rent, or for doing of waste or other forfeiture, yet the grantees or assignees shall not take benefit of every forfeiture by force of a condition, but only where the condition is incident to the reversion, as rent, or for the benefit of the estate, as for preventing waste, for keeping houses in repair, for maintaining fences, scouring ditches, preserving woods, or such like, and not [where the condition is] for payment of a sum in gross, delivery of corn, wood, or the like; so that the words "other forfeiture" shall be taken for other forfeitures like to those which are there put, (*videlicet*) payment of rent, not doing of waste, &c. which are for the benefit of the reversion.

#### SECTION 348.

Lord by escheat may distrain for rent, but cannot enter for breach of condition.

ALSO, if lord and tenant be, and the tenant makes a lease for term of life, rendering to the lessor and his heirs such an annual rent,

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\* There is some obscurity in the law concerning the bargainee being in the *post* of the bargainor; see Gilb. Uses, 102, and Cov. Watk. Prin. 301.



*and for default of payment a re-entry, &c. if after the lessor dies without heir during the life of the tenant for life, whereby the reversion comes to the lord by way of escheat, and after the rent of the tenant for life is behind, the lord may distrain the tenant for the rent behind; but he may not enter into the land by force of the condition, &c. because he is not heir to the lessor, &c.*

*To the lord by way of escheat, &c.]* Note, here it appears, that the lord by escheat shall distrain for the rent, and yet the rent was reserved to the lessor and his heirs; but both assignees in deed and assignees in law shall have the rent, because the rent being reserved of inheritance to the lessor and his heirs, is incident to the reversion, and goes with the same. But if the rent were reserved to him and his assigns, and the lessor assigned over the reversion and died, the assignee shall not have the rent after his decease, because the rent determined by his death, for that it was not reserved to him his heirs and assigns.

*Heirs includes assigns in deed and in law.*

*Reservation of rent charge to lessor and his assigns is only for life.*

*But he may not enter into the land by force of the condition, &c.]* Hereby it appears, that at the common law neither assigns in deed nor assigns in law could have taken the benefit of either entry or re-entry by force of a condition.

*Assigns could not enter at common law.*

*Because that he is not heir to the lessor, &c.]* The guardian in chivalry or in socage shall in the right of the heir take benefit of a condition by entry or re-entry, by the common law, and so it is here implied.

*Guardian may enter for condition broken.*

## SECTION 349.

[216a]

*ALSO, if land be granted to a man for term of two years upon condition that if he shall pay to the grantor within the said two years forty marks, then he shall have the land to him and to his heirs &c. in this case if the grantee enter by force of the grant, without any livery of seisin made to him by the grantor and after he pays the grantor the forty marks within the two years, yet he has nothing in the land but for term of two years, because no livery of seisin was made to him at the beginning. For if he should have a freehold and fee in this case, because he has per-*

*Condition precedent. Tenant for years to have fee on payment of a sum good, if with livery.*

*formed the condition, then he would have a freehold by force of the first grant, where no livery of seisin was made to him, which would be inconvenient. But if the grantor had made livery of seisin to the grantee by force of the grant, then should the grantee have the freehold and the fee upon the same condition.*

Here six things are to be observed. First, that Littleton here puts example of a condition precedent. Secondly, that such a condition which creates an estate may be made by parol without deed. Thirdly, that livery of seisin in this case must be made before the lessee enter (as Littleton here says at the beginning), for after entry livery made to tenant in possession is void, as hath been said. Fourthly, that if no livery of seisin be made, no fee-simple passes, although the money be paid. Fifthly, that it is inconvenient that the fee-simple should pass in this case without livery of seisin. Sixthly, that *ab argumentum ab inconvenienti* is forcible in law, as often hath been and shall be observed. See more of this kind of condition in the Section next following.

*Livery to tenant in possession void.*

[216b]

## SECTION 350.

*Tenant to have fee on payment of a sum, if with livery he has the fee, subject to be devested on non-payment.*

*ALSO, if land be granted to a man for term of five years, upon condition, that if he pay to the grantor within the two first years forty marks, that then he shall have the fee, or otherwise but for term of five years, and livery of seisin is made to him by force of the grant, now he has a fee-simple conditional, &c. And if in this case the grantee does not pay to the grantor the forty marks within the first two years, then immediately after the said two years past, the fee and the freehold is and shall be adjudged in the grantor, because the grantor cannot after the said two years presently enter upon the grantee, for that the grantee has yet title by three years to have and occupy the land by force of the same grant. And so because the condition on the part of the grantee is broken, and the grantor cannot enter, the law will put the fee and the freehold in the grantor. For if the grantee in this case makes waste, then, after breach of the condition, &c. and after the two years, the grantor may have his writ of waste. And this is a good proof that the reversion is in him, &c.*

[peculiar reason, as he could not maintain waste if he had not the reversion in fee.]

Now he has a fee-simple conditional, &c.] The like is of an estate in tail, or for life. Many are of opinion against Littleton in this case, and their reason is, because the fee-simple is to commence upon a condition precedent, and therefore cannot pass until the condition be performed; and that here Littleton of a condition precedent doth (before the performance thereof) make it subsequent; and for proof of their opinion they vouch many authorities that that no fee-simple should pass before the condition performed. But notwithstanding this there are those that defend the opinion of Littleton, both by reason and authority. By reason, for that by the rule of law a livery of seisin must pass a present freehold to some person, and cannot give a freehold *in futuro*, as it must do in this case, if after livery of seisin made the freehold and inheritance should not pass presently but expect until the condition be performed; and therefore if a lease for years be made to begin at Michaelmas, the remainder over to another in fee, if the lessor make livery of seisin before Michaelmas, the livery is void, because if it should work at all it must take effect presently, and cannot expect. 2dly. They say that when the lessor makes livery to the lessee, it cannot stand with reason that against his own livery of seisin a freehold should remain in the lessor, seeing there is a person able to take it. But if a man by deed make a lease for years, the remainder to the right heirs of I. S., and the lessor make livery to the lessee *secundum formam chartæ*, this livery is void, because during the life of I. S. his right heir cannot take (for *nemo est hæres viventis*), and in that case the freehold shall not remain in the lessor and expect the death of I. S. during the term; for albeit I. S. die during the term, yet the remainder is void, because a livery of seisin cannot expect. And it is not rare, say they, in our books, that words shall be transposed and marshalled so that the feoffment or grant may take effect. As if a man in the month of February make a lease for years, reserving a yearly rent payable at the feasts of Saint Michael the archangel, and the annunciation of our Lady, during the term, the law (in this case of reservation) will make transposition of the feasts, viz. at the feasts of the annunciation and of Saint Michael the archangel, that the rent may be paid yearly during the term. And further they take a diversity in this case between a lease for life and a lease for years. For in case of

Contingent remainder on term bad.

[217 b]

a lease for life with such a condition to have the fee, they agree that the fee-simple passes not before the performance of the condition, for that the livery may presently work upon the freehold; but otherwise it is [they contend] in the case of a lease for years. Also they take a diversity between inheritances that lie in grant and inheritances that lie in livery. For they agree that if a man grant an advowson for years upon condition, that if the grantee pay twenty shillings &c. within the term, that then he shall have the fee, the grantee shall not have the fee until the condition be performed. *Et sic de similibus.* But otherwise it is [say they] where livery of seisin is requisite, and therefore if the king make such a lease for years upon such a condition, the fee-simple shall not pass presently, because in that case no livery is made.—Learned reader, draw your own conclusion; there is nothing decisive on the point. A condition in benefit of the estate is construed largely, according to the intention of the parties; but a condition which destroys the estate is construed strictly and taken according to the literal meaning of the words.

*Voidable estate not avoided without entry or claim, but avoidance may be waived.*

*Because the grantor cannot enter &c.]* Regularly when any man will take advantage of a condition, if he may enter he must enter [or claim to avoid the estate], and when he cannot enter he must make a claim, and the reason is, for that a freehold and inheritance shall not cease without entry or claim, and also the feoffor or grantor may waive the condition at his pleasure. As if a man grant an advowson to another and his heirs upon condition, that if the grantor &c. pay twenty pounds on such a day &c., the estate of the grantee shall cease or be utterly void, and the grantor pays the money, yet the estate is not re-vested in the grantor before a claim, and that claim must be made at the church. And so it is of a reversion or remainder of a rent, or common, or the like, there must be a claim before the estate be re-vested in the grantor by force of the condition, and that claim must be made upon the land. *A fortiori*, in case of a feoffment where the land passes by livery of seisin there must be a re-entry by force of the condition before the estate be void.

*Though estate void, it does not re-vest till entry or claim.*

If a man bargains and sells land by deed indented and enrolled with a proviso, that if the bargainor pay &c., that then the estate shall cease and be void, and he pays the money, the estate is not re-vested in the bargainor before re-entry; and so it is if a bargain

and sale be made of a reversion, remainder, advowson, rent, common &c. And so it is if lands be devised to a man and his heirs upon condition that if the devisee pay not twenty pounds at such a day, that his estate shall cease and be void, and the money is not paid, the estate shall not be vested in the heir before entry. And so it is of a reversion or remainder, an advowson, rent, common, or the like.

But the said rule hath divers exceptions. First, in this case of Littleton [in the text, where the tenant has the fee subject to be divested on his not performing the condition within half the term, there as the lessor] can make no entry [by reason of the tenant's right to the possession during the residue of the term], he shall not be driven to make any claim to the reversion: for seeing by construction of law the freehold and inheritance passes immediately and together out of the lessor; by like construction the freehold and inheritance by the default of the lessee shall be revested in the lessor without entry or claim. *Exceptions.*

Secondly, if I grant a rent charge in fee out of my land upon condition, there, if the condition be broken, the rent shall be extinct, because I (that am in possession of the land) need not make a claim upon the land, and therefore the law will adjudge the rent void without any claim. *Rent charge.*

Thirdly, if a man make a feoffment to me in fee upon condition that I shall pay unto him twenty pounds at a day &c., and before the day I let to him the land for years, reserving a rent, and after fail in payment, the feoffor shall retain the land to him and to his heirs, and the rent is determined and extinct, for the feoffor could not enter nor need he claim upon the land, for he himself is in possession, and the condition being collateral is not suspended by the lease, otherwise it is of rent reserved. *If land be released to feoffor, he, being in possession, cannot enter.* [218b]

Fourthly, if a man by his deed in consideration of fatherly love &c. covenant to stand seised to the use of himself for life, and after his decease, to the use of his eldest son in tail, the remainder to his second son in tail, the remainder to his third son in fee, with a proviso of revocation &c. and the father makes a revocation according to the proviso, the whole estate is immediately revested in him without entry or claim for the cause aforesaid. *Power of revocation.*

*Suspension.*

*The grantee has yet title by three years.]* By this it appears that albeit the lessee had *pro tempore* a fee-simple, yet after that fee-simple is divested out of him, and vested in the lessor, he shall hold the lands for three years by the express limitation of the parties.

*Merger of one term in another, the term in reversion afterwards defeated by condition, and so both lost;*

If a man make a lease for forty years, and the lessee afterwards takes a lease for twenty years upon condition that if he does such an act, that then the lease for twenty years shall be void, and after the lessee break the condition, by force whereof the second lease is void, notwithstanding this, the lease for forty years is surrendered, for the condition was annexed to the lease for twenty years, but the surrender was absolute. So it is if a man make a lease for forty years, and the lessor grants the reversion to the lessee upon condition, and after the condition broken, the term is absolutely surrendered. And the diversity is when the lessor grants the reversion to the lessee upon condition, and when the lessee grants or surrenders his estate to the lessor; for a condition annexed to a surrender may revest the particular estates, because the surrender is conditional. But when the lessor grants the reversion to the lessee upon condition, there the condition is annexed to the reversion, and the surrender is absolute.

*but surrender may be conditional, so as term may revive on breach.*

*Running lease — Lessee has a term only for those years which he elects to take.*

A man makes a lease for term of life by deed, reserving the first seven years a rose, and if the lessee will hold the land after the seven years, to pay a rent in money; and the lessee will not hold over, but surrenders his term: in this case in judgment of law he had but a term for seven years. And so it is if a man makes a lease for life, and if the lessee within one year pay not twenty shillings, that he shall have but a term for two years, if he pay not the money the estate for life is determined, and he shall have the land but for two years.

*Plaintiff's in waste must have immediate estate of inheritance.*

*This is a good proof then, that the reversion is in him &c.]* Here is implied that no man can have an action of waste, unless the reversion be in him, and by the authority of our author the reason of a case, and well applied, is a good proof in law.

## SECTION 351.

*BUT in such cases of feoffments on condition, where the feoffor may lawfully enter for the condition broken &c., there the feoffor has not the freehold before his entry &c.*

Freehold reverts only on entry.

## SECTION 352.

*ALSO if a feoffment be made upon condition that the feoffee shall give the land to the feoffor and to the wife of the feoffor to have and to hold to them and to the heirs of their two bodies engendered, and for default of such issue, the remainder to the right heirs of the feoffor; in this case if the husband dies, living the wife, before any estate in tail made to them &c. then ought the feoffee by the law to make an estate to the wife as near the condition and also as near to the extent of the condition as he may make it, that is to say, to let the land to the wife for term of life without impeachment of waste with remainder after her decease to the heirs of the body of her husband on her begotten, and for default of such issue, remainder to the right heirs of the husband. And the cause why the lease shall in this case be to the wife alone without impeachment of waste is, for that the condition is that the estate be made to the husband and wife in tail. And if such estate had been made in the lifetime of the husband, then after the death of the husband she would have had an estate tail, which estate is without impeachment of waste. And so it is reason, that as near as a man can make the estate to the intent of the condition it should be made &c. albeit she cannot have an estate tail as she might have had if the gift in tail had been made to her husband and to her in the life of her husband.*

Condition to enfeoff B. and C. in special tail, if B. dies, C. shall have an estate *sans* waste.

*That the feoffee shall give &c.]* Here is no time limited, therefore the feoffee by the law has time during his life, unless he be hastened by the request of the feoffor or the heirs of his body, as Littleton says in the next section. But in this case, if the feoffee dies before any feoffment be made, then is the condition broken, because he made not the estates &c. within the time prescribed by law. But if the feoffment be made upon condition that the feoffee before

*What if no time limited for performance of condition.*

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[219b]

the feast of St. Michael the Archangel next following give the land to the feoffor and to his wife in tail *ut supra*, and before the day the feoffee dies, the estate of the heir of the feoffee shall be absolute, because a certain time is limited by the mutual agreement of the parties, within which time the condition becomes impossible by the act of God, as hath been said before; and therefore it is necessary when a day is limited, to add to the condition, that the feoffee or his heirs do perform the condition; but when no time is limited, then the feoffee at his peril must perform the condition during his life (although there be no request made) or else the feoffor or his heirs may re-enter. But albeit in the case put by Littleton, the fême be a stranger, yet the feoffee is not bound to make the estate within convenient time, because the feoffor who is privy to the condition is to take jointly with her. And so it is if the condition be to enfeoff the feoffor and a stranger, the feoffee has time during his life, unless he be hastened by request. Otherwise it is (as hath been said) where the condition is to enfeoff a stranger or strangers only. If a man make a feoffment in fee, upon condition that the feoffee shall make a gift in tail to the feoffor, the remainder to a stranger in fee, there the feoffee has time during his life, as is aforesaid, because the feoffor who is party and privy to the condition, is to take the first estate. But if the condition were to make a gift in tail to a stranger, with remainder to the feoffor in fee, there the feoffee ought to do it in convenient time, for that the stranger is not privy to the condition, and he ought to have the profits presently, as before hath been said.

*Conditions to create and destroy estate distinguished.*

*To make an estate to the wife as near the condition as he may make it.]* A diversity is to be understood between conditions that are to create an estate, and conditions that are to destroy an estate: for here it appears, that a condition which is to create an estate is to be performed by construction of law as near the condition as may be, and according to the intent and meaning of the condition, albeit the letter and words of the condition cannot be performed: but otherwise it is of a condition that destroys an estate, for that is to be taken strictly, unless it be in certain special cases: and of this somewhat hath been said before in this Chapter.

*Mortgage money to be paid by mortgagor, and a stranger, if*

As if a man mortgage his land to W. upon condition, that if the mortgagor and I. S. pay twenty shillings at such a day to the mortgagee, that then he shall re-enter, and the mortgagor dies before



the day, and I. S. pays the money to the mortgagee, this is a good performance of the condition, and yet the letter of the condition is not performed. But if the mortgagor had been alive at the day, and he would not pay the money but refused to pay the same, and I. S. alone had tendered the money, the mortgagee might have refused it.

*mortgagor, dies, stranger may pay it.*

But if man makes a lease to two for years, with a *proviso*, if the lessees die during the term, the lessor shall re-enter, and one lessee aliens his part and dies, the lessor cannot re-enter, but the assignee shall enjoy the term so long as the survivor lives; and the reason is, because the lease by the *proviso* is not to cease till both are dead. But in the former case, albeit the mortgagor be dead, yet the act of God shall not disable I. S. to pay the money, for thereby the mortgagee receives no prejudice. And so it is in that case, if I. S. had died before the day, the mortgagor might have paid it. And here is to be observed a diversity, when the feoffee dies, for then (as hath been said) the condition is broken, and when the feoffor dies, for then the estate is to be made as near the intent of the condition as may be.

*Lease to cease on death of two lessees, one aliens and dies, lease not forfeited.*

*To the wife for term of life, without impeachment of waste.]* Here it appears, that this estate for life ought to be without impeachment of waste, and yet if the wife accepts of any estate for life without this clause, 'without impeachment of waste,' it is good, because the estate for life is the substance of the grant, and the privilege to be without impeachment of waste is collateral, and only for the benefit of the wife, and the omission of it only for the benefit of the heir. Also if the wife take husband before request made, and then they make request, and the estate is made to the husband and wife, during the life of the wife, this is a good performance of the condition, albeit the estate be made to the husband and wife, where Littleton says it is to be made to the wife, but it is all one in substance, seeing that the limitation is during the life of the wife.

*The clause sans waste may be omitted without breach of condition.*

[220a]

*Without impeachment of waste.]* That is without any challenge or impeachment of waste; and by force hereof the lessee may cut down the trees and convert them to his own use. Otherwise it is if the words were *sans impeachment per ascun action de waste*, for then the discharge extends only to the action, and not to the trees themselves, and in that case the lessor shall have them.

*Sans waste means what.*

## SECTION 353.

No time mentioned for doing a thing, it may be done during life, unless hastened by request.

*ALSO in this case if the husband and wife have issue and die before the gift in tail made to them &c., then the feoffee ought to make an estate to the issue and to the heirs of the body of his father and mother begotten, and for default of such issue, &c. the remainder to the right heirs of the husband, &c. 'And the same law is in other like cases: and if such a feoffee will not make such estate when he is reasonably required by them who ought to have the estate by force of the condition, &c. then may the feoffor or his heirs enter.*

*When he is reasonably required by them who ought to have the estate by force of the condition.]* Note, here it appears that the feoffee has time during his life to make the estate, unless he is otherwise required by them who are to take the estate. This is to be intended of parties or privies, and not of mere strangers, for there (as hath been said) the estate must be made in convenient time. And concerning the request it is to be known, that when the request is made, the party or privy must request the feoffee at a time certain to be upon the land, and to make the estate according to the condition, for seeing no time certain is prescribed for the making of the estate, and it is uncertain when the request will be made, such request and notice must be made as hath been said before in this chapter. And of this section, with the (&c.) there needs not upon that which has been said, any farther explication.

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## SECTION 354.

Condition to re-enseff many men, how to be executed if they die.

*ALSO if a feoffment be made upon condition that the feoffee shall re-enseff many men to have and to hold to them and to their heirs for ever, and all they who ought to have estates die before any estate is made to them, then ought the feoffee to make the estate to the heir of him who survives to have and to hold to him and to the heirs of him who survives.*

Heirs of him who survives.

*To the heir of him who survives.]* Hereupon questions have been made, wherefore the *habendum* is not to the heirs of the heir, and

for what reason it is by Littleton limited to the heirs of the survivor? And the cause is, for that if it were made to the heirs of the heir, then some persons by possibility would be inheritable to the land who would not have inherited if the estate had been made to the survivor and his heirs, and then the condition would not be strictly performed. For example, if the survivor took to wife Alice Fairfield, and the limitation were to his son [i. e. the eldest son and heir of the survivor] and his heirs, then if the son should die without heirs of his father, the blood of the Fairfields (being the blood of his mother) would inherit. But if the limitation be to the right heirs of the father [i. e. of him who survives] then shall not the blood of the Fairfields by any possibility inherit, [for by no possibility could the heirs of the wife become the heirs of the husband as such]; and therefore these words (*and to the heirs of him who survives*), which many have thought superfluous, are very material.

### SECTION 355.

ALSO, if a feoffment be made upon condition to enfeoff another, or to make a gift in tail to another, if the feoffee before the performance of the condition enfeoff a stranger, or make a lease for life, then may the feoffor and his heirs enter, &c. because he has disabled himself to perform the condition, inasmuch as he has made an estate to another, &c.

Feoffee's alienation disables him from performing condition which is a forfeiture.

Littleton having spoken of defaults of performance, or express breaches of conditions, speaks now in what cases the feoffee in judgment of law disables himself to perform the condition; and of disabilities, some are by act of the party, and some by act in law.

*Enfeoff a stranger, or make a lease for life.*] This is a disability by the act of the party, for herein the feoffee has disabled himself to make the feoffment or other estate according to the condition. And to speak once for all, the feoffee is disabled when he cannot convey the land over according to the condition in the same plight, quality, and freedom as the land was conveyed to him; for so the law requires the same, as shall manifestly appear hereafter. And here where our author speaks of a feoffment, he includes an estate tail as well as the fee-simple.

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## SECTION 356.

Even lease for years is such a disability.

IN the same manner it is, if the feoffee before the condition performed, lets the same land to a stranger for term of years; in this case the feoffor and his heirs may enter, &c. because the feoffee has disabled himself to make an estate of the tenements according to that which was in the tenements when the estate thereof was made to him. For if he will make an estate of the tenements according to the condition, &c. then may the lessee for years enter and oust him to whom the estate is made &c. and occupy the same during his term.

If the feoffee, before the condition performed, lets the same land to a stranger for term of years, &c.] Here the &c. implies a lease to take effect in futuro as well as in presenti, also a lease for one year or half a year, &c.

## SECTION 357.

And by feoffee's marriage, his wife becomes dowable, which alters the plight of the tenements.

AND many have said, that if such feoffment be made to a single man upon the same condition, and before he has performed the condition he takes a wife, then the feoffor and his heirs may enter presently, because if he makes an estate according to the condition, and dies, then the wife shall be endowed, and may recover her dower by a writ of dower &c. and so by taking a wife the tenements are put in another plight than they were in at the time of the feoffment made, for then no such wife was dowable, nor should be endowed by the law &c.

Dower of estate on condition. [221 b]

First, here is an example of a disability both by act in law and in futuro, for by marriage the wife is entitled by law to dower after the death of her husband. Secondly, it appears that albeit the wife by the marriage is but entitled to dower, and the estate which she is to have is in futuro, viz. after the decease of her husband, yet it is a present cause of entry. As a lease for years to begin at a day to come is a present disability and cause of re-entry, for that the land is not in that freedom and plight as it was conveyed in to the feoffee, and after the estate made over according to the con-

dition the land would be charged therewith, [which would be against reason and therefore the feoffor in entering shall take discharged of the feoffee's wife's dower, S. 358.]

*In another plight.*] Plight is an old English word, and here signifies not only the estate but the habit and quality of the land, and extends to rent charges, and to a possibility of dower. See Sect. 289, where plight is taken for an estate or interest of and in the land itself, and extends not to a rent charge out of the land.

*Plight, what.*

*Then the feoffor and his heirs may enter presently.*] Here it appears, that seeing for this title or possibility the feoffor may presently enter, that albeit the wife happen to die before the husband, so that the title or possibility takes no effect, yet the feoffor may re-enter, for the feoffee being disabled at any time though the same continue not, yet the feoffor may re-enter, for in that case he that is once disabled is ever disabled. And herein a diversity is to be observed between a disability for a time on the part of the feoffee, and a disability for a time on the part of the feoffor. For if a man makes a feoffment in fee, upon condition that the feoffee before such a day shall re-infeoff the feoffor, and the feoffee takes wife, and the wife dies before the day, yet may the feoffor may re-enter. So it is if the feoffee before the day makes a feoffment in fee, and before the day takes back an estate to him and his heirs, yet the feoffor may re-enter.

*Condition how affected by feoffee's marriage or other possible disability.*

[222 a]

But if a man make a feoffment in fee upon condition, that if the feoffor or his heirs pay a certain sum of money before such a day, and the feoffor commits treason, is attainted and executed, now is there a disability on the part of the feoffor, for he has no heir; but if the heir be restored before the day he may perform the condition. Otherwise it is if such a disability had grown on the part of the feoffee; and the reason of the diversity is, for that, as Littleton says, presently by the disability of the feoffee, the condition is broken, and the feoffor may enter, but so it is not by the disability of the feoffor, or his heirs; for if they perform the condition within the time it is sufficient, for that they may at any time perform the condition before the day.

*If feoffor's disability cease within time, no impediment; contra if feoffee.*

## SECTION 358.

Feoffee's rent-charge or stat. a disability.

IN *the same manner it is, if the feoffee charge the land by his deed with a rent charge before the performance of the condition, or be bound in a statute staple, or statute merchant, in these cases the feoffor and his heirs may enter &c. causâ quâ suprâ. For whosoever comes to the lands by the feoffment of the feoffee, they ought to be liable, and put in execution by force of the statute merchant, or of the statute staple. Quære.*

Entry for condition defeats feoffee's incumbrances.

*But when the feoffor or his heirs, for the causes aforesaid, shall have entered, as it seems they ought &c. then all such things which before such entry might trouble or incumber the land so given upon condition &c. are as to the same land altogether defeated.*

Annuity.

*May enter &c.]* And here it is to be understood, that the grant of the rent charge is a present disability of the feoffee, and therefore albeit the grantee brings a writ of annuity and discharges the land of it *ab initio*, yet the cause of entry being once given by the act of the feoffee the feoffor may re-enter. And so it is if the grant of the rent charge were made for life, and the grantee died before any day of payment, yet the feoffor may re-enter. The like law is of any judgment given against the feoffee wherein debt or damages are recovered.

Judgment a disability.

Stat. confessed after disseisin no disability.

*Or be bound in a statute staple &c.]* If the feoffee be disseised, and after bind himself in a statute staple, or merchant, or in a recognizance, or take wife, this is no disability in him, for that during the disseisin the land is not charged therewith, neither is the land in the hands of the disseisor liable thereunto. And in that case if the wife die, or the conusee release the statute or recognizance, and after the disseisee enters, there is no disability at all, because the land was never charged therewith, and therefore in that case the feoffee may enter and perform the condition in the same plight and freedom as it was conveyed to him in.

Advowson on condition.

If a man grant an advowson upon condition that the grantee shall regrant the same to the grantor in tail; in this case if the church

become void before the regrant, or before any request made by the grantor, he may take advantage of the condition, because the advowson is not in the same plight as it was at the time of the grant upon condition. And therefore the grantee in that case at his peril must regrant it before the church becomes void, or else he is disabled, otherwise he has time during his life, if he be not hastened by request.

If the feoffee suffer a recovery by default upon a feigned title, before execution sued, the feoffor may re-enter for this disability. *Et sic de similibus.* Feoffee's recovery.

## SECTION 359.

*ALSO, if a man makes a deed of feoffment to another, and in the deed there is no condition, but when the feoffor makes livery of seisin he adds a condition; in this case nothing of the tenements passes by the deed, for that the condition is not comprised within the deed, and the feoffment is in like force as if no such deed had been made.* Livery with condition supercedes feoffment without.

And the reason is, for that the estate passes by the livery of seisin. And in this case the feoffor upon the delivery of seisin must express the estate to be taken as to the feoffee and his heirs, or to heirs of his body &c. If an agreement be made between two, that the one shall enfeoff the other upon condition as security for payment of certain money, and after the livery is made to him and his heirs generally, the estate is holden by some to be upon condition, inasmuch as the intent of the parties was not changed at any time, but continued the same at the time of the livery. What if condition omitted in livery.

If a man make a charter of feoffment in fee, and the feoffor delivers seisin for life, the feoffee shall hold it but for life; but if the livery be made expressly for life and according to the deed, the whole fee-simple shall pass, because it has reference to the deed. Feoffment in fee, livery for life.

## SECTION 360.

Condition  
against alien-  
ation void.

ALSO, if a feoffment be made upon this condition, that the feoffee shall not alien the land to any, this condition is void, because when a man is enfeoffed of lands or tenements, he has power to alien them to any person by law. For if such a condition should be good, then the condition would oust him of all the power which the law gives him, which would be against reason, and therefore such a condition is void.

This rule ap-  
plies to every  
species of grant  
and estate.  
[223 a]

Also, if a feoffment be made &c.] And the like law is of a devise in fee upon condition that the devisee shall not alien, the condition is void, and so it is of a grant, release, confirmation, or any other conveyance whereby a fee-simple passes. For it is absurd and repugnant to reason that he who has no possibility of reverter in the land to him, should restrain his feoffee in fee-simple of all power to alien. And so it is if a man be possessed of a lease for years, or of a horse, or of any other chattel real or personal, and give or sell his whole interest or property therein upon condition that the donee or vendee shall not alien the same, this is void, because the whole interest and property is out of him, and he has no possibility of reverter, and it is against trade and traffic between man and man. But these are to be understood of conditions annexed to the grant or sale itself in respect of the repugnancy, and not to any other collateral thing, as hereafter shall appear. Where our author puts his case of a feoffment of land, that is put but for an example: for if a man be seised of a seignior, or a rent, or an advowson, or common, or any other inheritance that lies in grant, and by his deed grants the same to a man and to his heirs upon condition that he shall not alien, this condition is void. But some have said that a man may grant a rent-charge newly created out of lands to a man and to his heirs upon condition that he shall not alien it, and that such a condition is good, because the rent is of his own creation; but this is against the reason and opinion of our author, and against the height and purity of a fee-simple.

Condition not to  
alien without  
licence annexed  
to tenure good.

A man before the statute of *quia emptores terrarum* might have made a feoffment in fee, and added further, that if he or his heirs



alien without license, that he should pay a fine, this had been good. And so it is said, that then the lord might have restrained the alienation of his tenant by condition, because the lord had a possibility of reverter; and so it is in the king's case at this day, because he may reserve a tenure to himself.

*Reverter, possibility of depends on tenure.*

If A. be seised of Black Acre in fee, and B. infeoffs him of White Acre upon condition that A. shall not alien Black Acre, the condition is good, for the condition is annexed to other land, and ousts not the feoffee of his power to alien the land whereof the feoffment is made, and so there is no repugnancy to the estate passed by the feoffment; and so it is of gifts, and the sale of chattels real or personal.

*Condition not to alien land not conveyed good.*

### SECTION 361.

*BUT if the condition be that the feoffee shall not alien to such an one, naming his name, or to any of his heirs, or of the issues of such an one, or the like, which conditions do not take away all power of alienation from the feoffee &c., such condition is good.*

*Condition not to alien to a particular person good.*

If a feoffment in fee be made upon condition that the feoffee shall not infeoff I. S. or any of his heirs or issues &c. this is good, for he does not restrain the feoffee of all his power: the reason here yielded by our author is worthy of observation. And in this case if the feoffee infeoff I. N. of intent and purpose that he shall infeoff I. S. some hold that this is a breach of the condition, for *quando aliquid prohibetur fieri, ex directo prohibetur et per obliquum.*

*What is prohibited directly is so obliquely.*

[223 b]

If a feoffment be made upon condition that the feoffee shall not alien in mortmain, this is good, because such alienation is prohibited by law, and regularly whatsoever is prohibited by the law, may be prohibited by condition, be it *malum prohibitum*, or *malum in se*. In ancient deeds of feoffment in fee there was most commonly a clause, *quòd licitum sit donatori rem datum dare vel vendere cui voluerit, exceptis viris religiosis et Judæis.* Brac. f. 13.

*Condition against mortmain.*

## SECTION 362.

Condition that tenant in tail shall not alien, except for his own life, good.

ALSO, if lands be given in tail upon condition that the tenant in tail and his heirs shall not alien in fee, nor in tail, nor for term of another's life, but only for their own lives, such condition is good. And the reason is, for that when he makes such alienation and discontinuance of the entail, he does contrary to the intent of the donor, for which the statute W. 2. cap. 1. was made, by which statutes estates tail are ordained.

What conditions on estates tail good.

But only for their own lives &c.] And yet if a man make a gift in tail, upon condition that he shall not make a lease for his own life, albeit the estate be lawful, yet the condition is good, because the reversion is in the donor. As if a man make a lease for life or years upon condition, that they shall not grant over their estate or let the land to others, this is good, and yet the grant or lease should be lawful. If a man make a gift in tail upon condition that he shall not make a lease for three lives or twenty-one years, according to the statute of 32 H. 8, the condition is good, for the statute gives him power to make such leases, which may be restrained by condition, and by his own agreement; for this power is not incident to the estate, but given to him collaterally by the act, according to that rule of law, *quilibet potest renunciare juri pro se introducto*.

Condition that tenant in tail shall not suffer recovery bail.

When he makes such alienation and discontinuance of the entail.] And therefore if a gift in tail be made upon condition, that the donee &c. shall not alien, this condition is good to some intents, and void to some; for, as to all those alienations which amount to a discontinuance of the estate tail (as Littleton here speaks), or is against the statute of Westminster 2, the condition is good without question. But as to a common recovery the condition is void, because this is no discontinuance, but a bar, and this common recovery is not restrained by the said statute of W. 2. And therefore such a condition is repugnant to the estate tail; for it is to be observed, that to this estate tail there are divers incidents. First, to be punished of waste. Secondly, that the wife of the donee in tail shall be endowed. Thirdly, that the husband of a *fême* donee after issue shall be tenant by the curtesy. Fourthly, that tenant

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Four incidents to estates tail.

in tail may suffer a common recovery ; and therefore if a man make a gift in tail, upon condition to restrain him of any of these incidents, the condition is repugnant and void in law. And it is to be observed, that a collateral warranty or a lineal with assets in respect of the recompense, is not restrained by the statute *de donis conditionalibus*, neither is a common [recovery in respect of the intended recompense. And Littleton, to the intent to exclude the common recovery, says, *such alienation and discontinuance*, joining them together. If a man before the statute *de donis conditionalibus* had made a gift to a man and to the heirs of his body upon condition that after issue he should not have power to sell, this condition would have been repugnant and void. *Pari ratione*, if after the statute a man makes a gift in tail, the law *tacitè* gives the donee power to suffer a common recovery ; therefore to add a condition that he shall have no power to suffer a common recovery, is repugnant and void.

If a man make a feoffment to a baron and fême in fee, upon condition that they shall not alien, to some intent this is good, and to some intent it is void ; for to restrain an alienation by feoffment or alienation by deed, is good, because such an alienation is tortious and voidable ; but to restrain their alienation by fine is repugnant and void, because it is lawful and unavoidable. It is said, that if a man infeoff an infant in fee upon condition that he shall not alien, this is good to restrain alienations during his minority, but not after his full age.

*Condition in restraint of general alienation bad—of alienation in a particular way or time good.*

### SECTION 363.

FOR it is proved by the words comprised in the same statute, that the will of the donor in such cases shall be observed, and when the tenant in tail makes such discontinuance, he does contrary to that &c. And also in estates tail of any tenements, when the reversion of the fee-simple, or the remainder of the fee-simple is in other persons when such discontinuance is made, then the fee-simple in the remainder is discontinued. And because tenant in tail shall do no such thing against the profit of his issues and good right, such condition is good, as is aforesaid, &c.

*Alienation beyond tenant's life a discontinuance of remainder, and bad ; ita—restrainable by condition.*

Construction of condition not to alien on tenant in tail remainder to himself in fee.

*When the reversion or remainder in fee is in other persons.]* Put the case that a man makes a gift in tail to A., the remainder to him and to his heirs, upon condition that he shall not alien; as to the estate tail the condition is good, for such alienation is prohibited, as hath been said, by the said statute. But as to the fee-simple, some say it is repugnant and void, for the reason that Littleton has yielded; and therefore some are of opinion, that this is a good condition, and shall defeat the alienation for the estate tail only and leave the fee-simple in the alienee, for that the condition in law extended only to the estate tail, and not to the remainder.

Condition enabling alienation for profit of issue good. [224b]

*Against the profit of his issues.]* Hereby it appears, that to restrain tenant in tail from alienation against the profit of his issues is good, for that agrees with the will of the donor and the intent of the statute. But a gift in tail may be made upon condition that tenant in tail &c. may alien for the profit of his issues, and that has been held to be good, and not restrained by the said statute, and seems to agree with the reason of Littleton, because in that case, *voluntas donatoris observetur, &c.* and it must be for the profit of the issues.

### SECTION 364.

Discontinuance how saved by condition.

*ALSO a man may give lands in tail upon condition that if the tenant in tail or his heirs aliens in fee or in tail, or for term of another man's life, &c. and also that if all the issue coming of the tenant in tail be dead without issue, that then it shall be lawful for the donor and for his heirs to enter &c. And by this way the right of the tail may be saved after discontinuance to the issue in tail, if there be any, so as by way of entry of the donor or of his heirs, the tail shall not be defeated by such condition. And yet if the tenant in tail in this case, or his heirs, make any discontinuance, he in the reversion or his heirs, after the entail is determined for default of issue &c. may enter into the land by force of the same condition, and shall not be compelled to sue a writ of formedon in the reverter.*

Condition to take effect on some event

*Alien &c. and also if all the issue be dead, &c.]* Note, Littleton purposely made parcel of the condition in the copulative, that if

the tenant in tail should alien, &c. For if a gift in tail be made to a man and to the heirs of his body, and if he die without heirs of his body, that then the donor and his heirs shall re-enter, this is a void condition; for when the issues fail, the estate determines by the express limitation, and consequently the adding of the condition to defeat that which is determined by the limitation of the estate is void, and in that case the wife of the donee shall be endowed, &c. And therefore Littleton, to make the condition good, added an alienation which amounted to a wrong, and he restrained not the alienation only, (for then presently upon the alienation the donor &c. might re-enter, and defeat the estate tail) but added, 'and die without issue,' to the end that the right of the estate in tail might be preserved and not defeated by the condition, but might be recovered again by the issue in tail in a *formedon*. And Littleton expressly says, that the donor and his heirs after the discontinuance, and after that the estate tail is determined, may re-enter, which is the intention and true meaning of Littleton in this place.

*which determines estate void, and does not barred.*

[225 a]

Note, that in a condition consisting of divers parts in the conjunctive, as here in the case of Littleton, both parts must be performed. But otherwise it is when the condition is in the disjunctive. What then if the condition or limitation is both in the conjunctive and disjunctive: as if a man make a lease to the husband and wife for the term of one and twenty years, if the husband and wife or any child between them shall so long live, and then the wife dies without issue; shall the lease determine or continue during the life of the husband? And the answer is, that it shall continue, for the disjunctive refers to the whole, and disjoins not only the latter part, as to the child, but also as to the baron and fême; so that the sense is, if the baron, fême, or any child shall so long live. And so it is if an use be limited to certain persons until A. shall come from beyond sea, and attain unto his full age, or die, if he comes from beyond sea or attains to his full age, the use ceases.

*Condition in copulative disjunctive and both.*

### SECTION 365.

ALSO a man cannot plead in any action, that an estate was made in fee, or in fee tail, or for term of life, upon condition, if he does not vouch a record thereof, or shew a writing under seal, proving

*Condition to defeat freehold must be in writing, contra as to chattels real.*

*the same condition. For it is a common learning, that a man by plea shall not defeat any estate of freehold by force of any such condition unless he shews the proof of the condition in writing &c. unless it be in some special cases &c. But of chattels real, as of a lease for years, or of grants of wards made by guardians in chivalry, and such like &c. a man may plead that such leases or grants were made upon condition &c. without shewing any writing of the condition. So in the same manner a man may do of gifts and grants of chattels personal, and of contracts personal &c.*

*Requisites to a deed.*

*In any action.*] Be the action real, personal, or mixt, if a condition be pleaded to defeat a freehold, it is regularly true that a deed must be shewn forth in court. And the reason why the deed shall be shewed forth to the court is, for that to every deed there are two things requisite: the one, that it is sufficient in law, and this is called the legal part, and therefore the judgment of that belongs to the judges of the law: the other concerns matter of fact, as sealing and delivery, and this belongs to the jurors. And because every deed ought to prove itself, and be proved by others too; it must prove itself upon the shewing of it forth in court in two ways. First, as to the composition of the words, that it be sufficient in law, and as to that the court shall judge.

*Erasure.  
Interlineation.  
[225 b]*

Secondly, of ancient time if the deed appeared to be erased or interlined in places material, the judges upon view pronounced the deed to be void. But in later times the judges have left it to the jury to try whether the erasure or interlining were before the delivery or after.

*Rent reservable without deed, contra of re-entry.*

And there is a difference between a rent and a re-entry; for upon a gift in tail, or a lease for life, a rent may be reserved without deed, but a condition with a re-entry cannot be reserved in those cases without deed.

*Deed itself must be produced, no copy admissible.*

*Writing under seal.*] Which Littleton intends to be a deed under seal. And well said Littleton, *a deed under seal*. For though the deed be enrolled, yet he cannot plead the enrolment thereof, though it be record. And though it be exemplified under the great seal, yet must he shew forth the deed itself under seal, as Littleton here says, and not the exemplification.

And so when Littleton wrote, no *constat* or *inspeximus* of the king's letters patent were available in court, but only the letters patent themselves under seal. For both the *constat* and *inspeximus* are but exemplifications of the enrolment of the charters or letters patent: and this appears by the resolution of two several parliaments, one holden in the third and fourth years of king Edward the Sixth, and the other in the thirteenth year of queen Elizabeth. But now by those statutes the exemplification or *constat* under the great seal of the enrolment of any letters patent made since the 4th day of February *anno* 27 H. 8., or hereafter to be made, may be pleaded and shewn forth in court, as well against the king as against any other person and *that* by the patentees themselves (whereof there was some doubt conceived upon the said statute of E. 6.) and by all and every other person and persons, claiming by, from, or under them. Which statutes are general and beneficial, and especially the act of 13 Eliz., for that extends not only to lands, tenements, and hereditaments, but to every other thing whatsoever, and ought to be favourably construed for advancement of the remedy and right of the subject. The difference between a *constat inspeximus* and a *vidimus*, you may read at large in Page's case, 8 Co. 8. But none of them by law ought to be had, but only of the enrolment of record, and not of a deed or any other writing that is not of record, and no deed &c. can be enrolled, unless it be duly and lawfully acknowledged.

*Unless it be in some special cases, &c.]* Hereby is implied, that if tenant in dower or by statute or *elegit*, enter for a condition broken, they may plead the estate upon condition without shewing any deed, because their interests are created by the law. And they come not in by him who made the condition, and cannot be supposed to be provided with the deed, but they come to the land by authority of law, and therefore the law will allow them to plead the condition without shewing it. But the lord by escheat, albeit his estate be created by law, shall not plead a condition to defeat a freehold without shewing it, because the deed belongs to him. A tenant by the curtesy shall not plead a condition made by his wife and a re-entry for the condition broken without shewing the deed; for albeit his estate be created by law, yet the law presumes that he had the possession of the deeds and evidences belonging to his wife. But lessees for years, and all others who

Letters patent.

Enrolment.

Condition  
pleadable with-  
out profert of  
deed, when.Deeds belong to  
whom.Escheat.  
[226 a]

Curtesy.

Lessee.

*Lease by mortgagee.*

claim by any conveyance from the party, or justify as servant by commandment &c. must shew the deed. If land be mortgaged upon condition, and the mortgagee let the land for years reserving a rent, [and afterwards] the condition is performed, whereupon the mortgagor re-enters, in an action of debt brought [by the mortgagee] for the rent, the lessee may plead the condition and the re-entry without shewing forth any deed. In an assize the tenant pleads a feoffment of the ancestor of the plaintiff unto him &c., the plaintiff says that the feoffment was upon condition &c., and that the condition was broken, and pleads a re-entry, and that the tenant entered and took away the chest in which the deed was, and yet detains the same, the plaintiff shall not in this case be enforced to shew the deed. If a woman give lands to a man and his heirs by deed or without generally, she may in pleading aver the same to be *causâ matrimonii prælocuti* [for preferment in marriage], albeit she has nothing in writing to prove the same, the reason whereof see Section 330.

*Deed stolen.*

### SECTION 366.

*But condition may be found by a jury.*

*ALSO, albeit a man cannot in any action plead a condition which concerns a freehold without shewing a writing to the jury if they find it as a fact that such condition accompanied the livery as is aforesaid, yet a man may be aided upon such a condition by the verdict.*

*Verdict.*

The jurors are to try the fact, and the judges to adjudge according to the law that arises upon that fact; and therefore if it be found that such a condition was made, and that thereupon the grantor entered, it is left to the judges to say whether such an entry is a disseisin or not: and they may declare that the entry was congeable, and so give judgment for the lessor.

*Estoppels.*  
[227 a]

Estoppels which bind the interest in the land, (as the taking a lease of a man's own land by deed indented, and the like, (being specially found by the jury, the court ought to judge according to the special matter; for albeit, regularly estoppels must be pleaded and relied upon by an apt conclusion, and the jury is sworn *ad veritatem dicendam*, yet when they find *veritatem facti*, they pursue well their oath, and it lies with the court to adjudge according to law.



If a deed be made and dated in a foreign kingdom, of lands within England, yet if livery and seisin be made *secundum formam cartæ*, the land shall pass, for it passes by the livery. *Deed executed abroad good.*  
[228 a]

SECTION 367.

*In the same manner it is of a feoffment in fee or a gift in tail upon condition, although no writing were ever made of it.* Same.

SECTION 368.

*Also in such case the jury may give their verdict at large [i. e. generally upon the whole matter without any special finding] if they will take upon them the knowledge of the law and say, that the lessor did not disseise the lessee &c.* *Jury should find a special verdict when.*

Although the jury, if they will take upon themselves the knowledge of the law, may give a general verdict, yet it is dangerous for them so to do, for if they mistake the law, they run into the danger of an attain; therefore to find the special matter is the safest way where the case is doubtful.

SECTION 369. [228 b]

[Of pleas in bar.]

SECTION 370. [229 a]

*AND seeing that conditions are most commonly contained in deeds indented, somewhat shall be here said (to thee my son) of the difference between an indenture and a deed-poll. And it is to be understood, that if the indenture be bipartite, or tripartite, or quadripartite, all the parts of the indenture are but one deed in law, and every part of the indenture is of as great force and effect as all the parts together are.* *Of deeds poll and indentures.*

*Indenture what.* *In deeds indented.*] An indenture is a writing containing a conveyance, bargain, contract, covenants, or agreements between two or more, and is indented in the top or side answerable to another that likewise comprehends the self same matter, and is called an indenture, for that it is so indented. If a deed begins, *hæc indentura, &c.* and in truth the parchment or paper is not indented, this is no indenture, because words cannot make it indented. But if the deed be actually indented, and there be no words of indenture in the deed, yet it is an indenture in law; for it may be an indenture without words, but not by words without indenting.

*Should be on parchment or paper.*

*In deeds indented.*] And here it is to be understood that it ought to be on parchment or on paper. For if a writing be made upon a piece of a wood, or upon a piece of linen, or on the bark of a tree, or on a stone, or the like, &c. and the same be sealed or delivered, yet it is no deed, for a deed must be written either on parchment or paper, for the writing upon these is least liable to alteration or corruption.

*Tripartite, &c.*

*If the indenture be bipartite, or tripartite, or quadrupartite, &c.*] *Bipartite* is, when there are two parts and two parties to the deed. *Tripartite*, when there are three parts and three parties; and so of *quadrupartite, quinquepartite, &c.*

*Deed poll.*

*And of a deed-poll.*] A deed-poll is that which is plain without any indenting, so called because it is cut even, or polled. Every deed that is pleaded shall be intended to be a deed-poll, unless it be alleged to be indented.

*Property in counterparts.*

*All the parts of the indenture are but one deed in law.*] If a man by deed indented make a gift in tail, and the donee dies without issue, that part of the indenture which belonged to the donee now belongs to the donor, for both parts make but one deed in law.

*Counterpart not sealed immaterial.*

*And every part of the indenture is of as great force &c.*] This is manifest of itself, and is proved by the books aforesaid. It is to be observed, that if the feoffor, donor, or lessor seal the part of the indenture belonging to the feoffee &c. the indenture is good, albeit the feoffee never seals the counterpart belonging to the feoffor &c.

## SECTION 371.

[229 b]

AND *the making of an indenture is in two ways. One is to make them in the third person. Another is to make them in the first person. The making in the third person is in this form:*

Concise form of conveyance.

“ This indenture made between R. of P. of the one part, and V. of D. of the other part, Witnesseth, that the said R. of P. hath granted, and by this present charter indented, confirmed to the aforesaid V. of D. such land, &c, To have and to hold &c. upon condition &c. In witness whereof the parties aforesaid to these presents interchangeably have put their seals. *Or thus:*—In witness whereof to the one part of this indenture remaining with the said V. of D. the said R. of P. hath put his seal, and to the other part of the same indenture remaining with the said R. of P. the said V. of D. hath put his seal. Dated &c.”

*Such an indenture is called an indenture made in the third person, because the verbs &c. are in the third person. And this form of indenture is the most sure making, because it is most commonly used, &c.*

Common forms should always be followed.

*Because it is most commonly used.]* Here it appears that that which is most commonly used in conveyances is the surest way. *A communi observantiâ non est recedendum, et minimè mutanda sunt quæ certam habuerunt interpretationem. Magister rerum usus.*

## SECTION 372.

[230 a]

*The making of an indenture in the first person is in this form:*

“ To all Christian people to whom these presents indented shall come, A. of B. sends greeting in our Lord God everlasting. Know ye me to have given, granted, and by this my present deed indented confirmed to C. of D. such land &c. *Or thus:* Know all men present and to come, that I. A. of B. have given, granted, and by this my present deed indented confirmed to C. of D. such land &c. To have and to hold (*habendum et tenendum*) &c. upon condition

Indenture in first person.

following &c. In witness whereof, as well I the said A. of B. as the aforesaid C. of D. to these indentures have interchangeably put our seals. *Or thus*: In witness whereof I the aforesaid A. to the one part of this indenture have put my seal, and to the other part of the same indenture the said C. of D. hath put his seal &c."

*Precedent books.*

It is requisite for every student to get approved forms and precedents not only of deeds according to the example of Littleton, but of fines and other conveyances and assurances, and especially of good and perfect pleading, and of the right entries and forms of judgments, which will stand him in great stead, both while he studies, and when he gives counsel; and it is a safe thing to follow approved precedents, for *nihil simul inventum est, et perfectum*.

## SECTION 373.

Conveyance by indenture in first person as good as in third. [230 b]

*AND it seems that such indenture which is made in the first person is as good in law, as the indenture made in the third person, when both parties have put to it their seals; for if in the indenture made in the third person or in the first person, it is said that the grantor only has put his seal, and not the grantee, then is the indenture and deed of the grantor only. But where mention is made of the grantee having put his seal to the indenture &c. then is the indenture as well the deed of the grantee as the deed of the grantor. So is it the deed of them both, and also each part of the indenture is the deed of both parties in this case.*

*Grantee by sealing deed makes it his though no party.*

Here is to be observed, that albeit the words in this indenture are only the words of the feoffor, yet if the feoffee put his seal to one part of the indenture, it is the deed of them both. And in this special case to make it the deed of the feoffee, it appears by Littleton, that mention must be made in the deed that he has put to it his seal, for he is no otherwise a party than by putting his seal thereunto. Otherwise it is of a deed indented in the third person, as before appears, for there he is a party to the deed in the beginning. And Littleton's rule is true, that every part of an indenture is the deed of both parties; for, as it hath been said, both parts make but one deed in law in this case.

## SECTION 374.

ALSO if an estate be made by indenture to one for term of his life, the remainder to another in fee upon a certain condition &c., and if the tenant for life puts his seal to one part of the indenture, and afterwards dies, and he in the remainder enters into the land by force of his remainder &c., in this case he is tied to perform all the conditions comprised in the indenture as the tenant for life ought to have done in his life time, and yet he in the remainder never sealed any part of the indenture. But the cause is, for that inasmuch as he entered and agreed to have the lands by force of the indenture, he is bound to perform the conditions within the same indenture; if he will have the land, [he must take it with its burdens.]

Remainder man need not be party to or seal deed.

*Upon a certain condition &c.*] Here by this (&c.) is implied, that the condition in this case extends both to the estate for life, and to the remainder, but by special limitation it may extend to any one of them, and not to the other. And albeit he in the remainder be no party to the indenture (the parties thereunto only being the lessor and the tenant for life), yet when he in the remainder enters and agrees to have the land by force of the indenture, he is bound to perform the conditions contained in the indenture. And here is also a diversity to be understood, that any stranger to the indenture may take by way of remainder, but he cannot in this case take any present estate in possession, because he is a stranger to the deed. If A. by deed indented between him and B. lets lands to B. for life, the remainder to C. in fee reserving a rent, and tenant for life dies, and he in the remainder enters into the lands, he shall be to pay the rent, for the cause and reason before yielded by Littleton.

Contra of person taking in possession.

[231a]

An indenture of lease is engrossed between A. of the one part, and D. and R. of the other part, which purports to be a demise for years by A. to D. and R. A. seals and delivers the indenture to D. and D. seals the counterpart to A. but R. does not seal and deliver it. And by the same indenture it is mentioned, that D. and R. declare themselves bound to the plaintiff in twenty pounds, in case that certain conditions comprised in the indenture are not performed.

Party not signing bound as to rent, but not as to sum in gross.

In a case of this kind A. brought an action against D. only for the twenty pounds, and shewed forth the indenture. The defendant pleaded that it was proved by the indenture that the demise was to D. and R. who was then living, and not named in the writ. The plaintiff replied,; that R. never sealed or delivered the indenture and so his writ was good against D. only. And the counsel of the plaintiff took a diversity between a rent reserved which is parcel of the lease, the land being charged therewith, and a sum in gross, as here the twenty pound is; for as to the rent they agreed that by the agreement of R. to the lease, he was bound to pay it, but for the twenty pound that is a sum in gross and collateral to the lease, and not annexed to the land, and grows due only by the deed, and therefore R. said he was not chargeable therewith, for that he had not sealed and delivered the deed. But inasmuch as he had agreed to the lease which was made by indenture, he was held chargeable by the indenture for the sum in gross; but as he was not named in the writ, it was adjudged that the writ did abate.

Remainder-  
man must take  
cum onere if at  
all.

*To have the lands &c.]* Here is implied an ancient maxim of the law, viz. *Qui sentit commodum sentire debet et onus, et transit terra cum onere.*

## SECTION 375.

Deed poll be-  
longs to feoffee,  
and quære if  
feoffor though  
he has it can  
plead it?

[231 b]

*ALSO, if a feoffment be made by deed poll upon condition, and for that the condition is not performed the feoffor enters and gets the possession of the deed poll, if the feoffee brings an action for this entry against the feoffor, it has been a question if the feoffor may plead the condition by the said deed poll against the feoffee. And some have said he cannot, inasmuch as it seems to them that a deed poll and the property of the same deed belongs to him to whom the deed his made, and not to him who makes the deed. And inasmuch as such a deed does not appertain to the feoffor, it seems to them that he cannot plead it. And others have said the contrary, and have shewed divers reasons. One is, that if in an action between them the feoffee pleads the same deed and shows it to the court, in this case inasmuch as the deed is in court, the feoffor may show to the court how in the deed there are divers*

*conditions to be performed on the part of the feoffee &c., and because they were not performed he entered &c. and to this he shall be received. By the same reason when the feoffor has the deed in hand and shows it to the court, he shall be well received to plead it. [Argument continued in Sects. 376, 377.]*

Here the latter opinion is clear law at this day, and is Littleton's own opinion, as before hath been observed.

*On the part of the feoffee &c.]* Here also is implied if the condition be to be performed on the part of the feoffor or by a stranger; and it is to be understood that when a deed is shewed forth to the court, the deed shall remain in court all that term in the custody of the *custos brevium*, but at the end of the term (if the deed be not denied) then the law adjudges the deed in the custody of the party to whom it belongs, for a man's evidences are as it were the sinews of his land. But if the deed be denied, then the deed in judgment of law remains in court until the plea be determined. The residue of this section needs no explication.

*Deed pleaded must remain in court.*

*Deeds are the sinews of the land.*

## SECTION 376.

[232 a]

*ALSO, if two men do a trespass to another, and he releases to one of them by his deed all actions personal, and notwithstanding sues an action of trespass against the other, the defendant may well shew that the trespass was done by him and by another his fellow, and that the plaintiff by his deed (which he shews forth) released to his fellow all actions personal, and demand judgment &c., and yet such deed belongs to his fellow and not to him. And because he may take advantage by the deed if he can shew it in court he may well plead it. By the same reason may the feoffor in the other case shew the deed poll, for he ought to have advantage of the condition comprised within it.*

*Release of actions to one trespasser enures to the other, who may plead it though no party.*

*If two men do a trespass to another &c.]* Here by this section it is to be understood, that when divers do a trespass the same is joint or several at the will of him to whom the wrong is done, yet if he release to one of them, all are discharged, because his own deed shall be taken most strongly against himself. So if two men

*Release of bond to one obligor enures to others though they are severally bound.*

be jointly and severally bound in an obligation, if the obligee releases to one of them, both are discharged: and seeing the trespassers are parties and privies in wrong, the one shall not plead a release to the other without shewing it forth, albeit the deed appertain to the other.

So heir may  
plead release to  
executors.

If an action of debt upon an obligation be brought against an heir, he may plead in bar a release made by the obligee to the executors. But albeit the deed belongs to another, yet must he shew it forth, for both of them are privy to the testator.

*By the same reason.] Ubi eadem ratio, ibi idem jus.*

### SECTION 377.

Deeds grant-  
able per se.

**ALSO if the feoffee grants the deed to the feoffor, such grant shall be good, and then the deed and the property thereof belongs to the feoffor &c. And when the feoffor has the deed in hand, and pleads it to the court, it shall be rather intended that he comes to the deed by lawful means than by wrongful. And so it seems unto them, that the feoffor may well plead such deed poll which comprises the condition &c., if he has the same in hand. Ideo semper quære de dubiis, quia per rationes pervenitur ad legitimam rationem &c.**

So bond itself  
assignable at  
law.

[232b]

*The property of the deed belongs to the feoffor.]* Hereby it appears that a man may give or grant his deed to another, and such a grant by parol is good. And it is also implied, that if a man has an obligation, though he cannot grant the thing in action, yet he may give or grant the deed, viz. the parchment and wax to another, who may cancel and use [i. e. destroy] the same at his pleasure.

Wrong never  
presumed.

*It shall be rather intended.] Omnia presumuntur legitime facta, donec probetur in contrarium. Injuria non presumitur.*

Reasons of law  
not always  
patent.

*Quia per rationes &c.] For ratio est radius divini luminis.* And by the reasoning and debating of grave and learned men the darkness of ignorance is expelled, and by the light of legal reason the right is discerned, and thereupon judgment given according to law, which is the perfection of reason. This is of Littleton here called *legitima*



*ratio*, whereunto no man can attain but by long study, often conference, long experience, and continual observation. Certain it is, that in matters of difficulty the more seriously they are debated and argued, the more truly they are resolved, and thereby new inventions justly avoided.

## SECTION 378.

ESTATES which men have upon condition in law, are such estates which have a condition by the law to them annexed, albeit that it be not specified in writing. As if a man grant by his deed to another the office of parkership of a park, to have and occupy the same office for term of his life, the estate which he has in the office is upon a condition in law, to wit, that the parker shall well and lawfully keep the park and shall do that which to such office belongs to do, or otherwise it shall be lawful to the grantor and his heirs to oust him and to grant it to another at his will &c. And such a condition so annexed by law to any thing is as strong as if the condition were in writing.

Of condition implied by law.

A forest and chase are not inclosed, but a park must be. The forest and chase differ in offices and laws: every forest is a chase, but every chase is not a forest. A subject may have a forest by especial grant from the king, as the Duke of Lancaster and Abbot of Whitby had.

Forest, park, and chase, what. [233a]

*To oust him if he will &c.*] Littleton here speaks of an ouster by force of a condition in law, therefore it remains to be seen in what other cases the grantor may lawfully oust his officer. There is a diversity between officers who have no other profit but a collateral certain fee, for there the grantor may discharge him of his service, as to be a baily, receiver, surveyor, auditor, or the like, the exercise whereof is but labour and charge to him, but he must have his fee: for the main rule of law is, that no man can frustrate or derogate from his own grant to the prejudice of the grantee. And where albeit the grantee has no other profit but his fee, yet that fee is to be perceived and taken out of the profits appertaining to the lord within his office, for there the grantor cannot discharge him of his service or attendance, for that may turn to the prejudice of

Stewards, receivers, &c. who may be discharged at pleasure.

[233b]

the grantee, if the grantor will not grant the office at all. But in all cases where the officer relinquishes his office, and refuses to attend, he loses his office, fee, profit, and all. There is another diversity where the grantee, besides his certain fee, has profits and vails by reason of his office; there the grantor cannot discharge him of his service or attendance, for that would be to the prejudice of the grantee. As if a man grants to another the office of stewardship of the courts of his manors with a certain fee, the grantor cannot discharge him of his service and attendance, because he has other profits and fees belonging to his office which he should lose if he were discharged of his office.\* And as in the case which Littleton here puts of the office of the keeper of a park, for that he has not only his fee certain, but profits and vails also, in respect of his office, as deer-skins, shoulders &c.

*Conditions in law: different kinds.*

As to conditions in law, you shall understand they are of two kinds, that is to say, by the common law, and by statute. And those by the common law are of two natures, that is to say, the one is founded upon skill and confidence, the other without skill or confidence: upon skill and confidence, as here the office of parkership, and other offices in the next Section mentioned, and the like.

*That tenant for life shall not alien in fee.*

Touching conditions in law without skill, &c. some be by the common law and some by the statute. By the common law as to every estate of tenant by the curtesy, tenant in tail after possibility of issue extinct, tenant in dower, tenant for life, tenant for years, tenant by statute merchant or staple, tenant by *elegit*, guardian &c. there is a condition in law secretly annexed to their estates, that if they alien in fee &c. he in the reversion or remainder may enter, *et sic similibus*, or if they claim a greater estate than they have in a court of record, or the like [the remainder-man may enter].

*Conditions by statute as in mortmain.*

Concerning conditions in law founded upon certain statutes, for some of them an entry is given, and for others a recovery by action: as upon an alienation in mortmain &c. an entry is given, and for waste against tenant for life, or years, or the like, an action is given.

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\* This, it is presumed, must refer to a grant of the stewardship for valuable consideration. See 3 B. & C. 616. ante, 616. post, Sect. 379.

*And such condition is as strong &c.]* Here it is worth while to take a view of the divisions aforesaid in some particular cases. As for example. Admit that an office of parkership is granted or descends to an infant or feme covert, if the conditions in law annexed to this office which requires skill and confidence be not observed and fulfilled, the office is lost for ever, because, as Littleton says it is as strong as an express condition. But if a lease for life be made to a feme covert, or an infant, and they by charter of feoffment alien in fee, the breach of this condition in law, which is without skill &c. is no absolute forfeiture of the estate. So of a condition in law given by statute, which gives an entry only. As if an infant or feme covert with her husband aliens by charter of feoffment in *mortmain*, this is no bar to the infant or feme covert. But if a recovery be had against an infant or feme covert in an action of waste, there they are bound and barred for ever.

*Conditions in law how binding on infants and feme covert.*

And it is to be observed, that a condition in law by force of a statute which gives a recovery, is in some cases more strong than a condition in law without a recovery. For if lessee for life make a lease for years, and afterwards enters into the land and makes waste, and the lessor recovers in an action of waste, he shall avoid the lease made before the waste done. But if the lessee for life makes a lease for years, and afterwards enter upon the lessee and makes a feoffment in fee, this forfeiture shall not avoid the lease for years. Nor in any of the said cases shall a precedent rent granted out of the land be avoided. For if the lessee for life grant a rent charge, and afterwards commits waste and the lessor recovers in an action of waste, he shall hold the land charged during the life of the tenant for life, but if the rent is granted after the waste done, the lessor shall avoid it. And the reason wherefore the lease for years in the case aforesaid shall be avoided, is because of necessity the action of waste must be brought against the lessee for life, which in that case must bind the lessee for years, or else by the act of the lessee for life the lessor would be barred to recover *locum vastatum*, which the statute gives. If a man has an office for life which requires skill and confidence, to which office he has a house belonging, and charges the house with a rent during his life, and after commits a forfeiture of his office, the rent charge shall not be avoided during his life, for regularly a man who takes advantage of a condition in law shall take the land with such charge as he finds it. And there-

*Entry for forfeiture, its effect on derivative estates.*

[234 a]

fore Littleton is here to be understood, that a condition in law is as strong as a condition in deed, to avoid the estate or interest itself, but not to avoid precedent charges, only in some particular cases, as by that which has been said appears.

*What offices not  
saleable,  
3 H. 7. c. 12.*

There are at this day more conditions in law annexed to offices than there were when Littleton wrote: for example, for offices in any wise touching the administration or execution of justice, or clerkship in any court of record, or concerning the king's treasure, revenue, account, customs, alnage, auditorship, king's surveyor, or keeping of any of his majesty's castles, forts, &c. For if any of these officers bargain or sell any of the said offices or any deputation of the same, or take any money or profit, or any promise, covenant, bond, or assurance, to have any money or reward for the same, the person so bargaining or selling, or that shall take any such promise, covenant, bond, or assurance, shall not only forfeit his estate, but also every person so buying, giving or assuring, shall be adjudged a disabled person to have or enjoy the same office or offices, deputation or deputations, &c. and that all such bargains, sales, promises, covenants, and assurances, before specified, shall be void, except as in the said act is excepted. Sir Robert Vernon, knight, being cofferer of the king's house of the king's gift, and having the receipt of a great sum of money yearly of the king's revenue, did for a certain sum of money bargain and sell the same to Sir A. I. and agreed to surrender the said office to the king, to the intent a grant might be made to Sir A. who surrendered it accordingly: and thereupon Sir A. was by the king's appointment admitted and sworn cofferer. And it was resolved by Sir Thomas Egerton, lord chancellor, the chief justice, and others to whom the king referred the same, that the said office was void by the said statute, and that Sir A. was disabled to have or to take the said office, and that no *non obstante* could dispense with this act to enable the said Sir A. for the reason and cause before mentioned, Sect. 180. And hereupon Sir A. was removed, and Sir Marmaduke Darrell sworn (by the king's commandment) in his place. And note, that all promises, bonds and assurances, as well on the part of the bargainer as of the bargaineer, are void by the same act. Therefore by the law of England it is further provided, 12 R. 2. c. 2. that no officer or minister of the king shall be ordained or made for any gift or brocade, favour or affection, and that he who pursues either privily or openly, to obtain a ministerial appointment shall

not be put in the same office or in any other, but that all such officers shall be made of the best and most lawful men and sufficient: a law worthy to be written in letters of gold, but more worthy to be put in due execution. For certainly never shall justice be duly administered but when the officers and ministers of justice be of such quality, and come to their places in such manner as by this law is required.

SECTION 379.

IN *this manner it is of grants of the offices of steward, constable, bedelary, bayliwick, or other offices, &c.* Of deputies. *But if such office be granted to a man, to have and to occupy by himself or his deputy, then if the office be occupied by him or his deputy, as it ought by law to be occupied, this suffices for him, or otherwise the grantor and his heirs may oust the grantee, as is aforesaid.*

SECTION 380.

ALSO, *estates of lands or tenements may be made upon condition in law, albeit upon the estate made there was not any mention or rehearsal of the condition. As put the case that a lease is made to husband and wife to have and to hold to them during the coverture [whereby they become tenants by entireties without survivorship, as the lease is to determine with the coverture] in this case they have an estate for term of their two lives, [i. e. as long as both lives shall jointly continue] upon condition in law, scil. if one of them die, or there be a divorce between them, then it shall be lawful for the lessor and his heirs to enter &c. [a condition however which is the boundary of the estate, and is therefore rather a limitation than a condition.]* Conditions in law. [234 b]

SECTION 381.

[235 a]

AND *that they have an estate for term of their [joint] lives* Same. *is proved thus: Every man who has an estate of freehold in any lands or tenements, has either an estate in fee, or in fee tail, or for term of his own life, or for term of another man's life, now by a*

*lease during coverture, the lessees have a freehold, but they have not a fee, nor fee tail, nor for term of another's life, ergo, they have an estate for term of their own lives, but this is upon condition in law in form aforesaid.*

Words of limitation.  
[235 b]

*During the coverture.] Durante* is properly a word of limitation, as *durante viduitate*. *Dum* also makes a limitation : as if a lease be made, *dum sola fuerit*, or *dum sola et casta vixerit*. *Dummodo* is also a word of limitation; as *dummodo solveret talem redditum*. *Quamdiu* also is a word of limitation, for if a man grants a rent out of the manor of D. *quamdiu* the grantor shall be dwelling upon the manor, this is good, or *quamdiu se bene gesserit*, and so of the following words *donec, quousque, usque ad, tamdiu, ubicunque*.

Different kinds of divorces and their effect.

*Or that there be a divorce between them &c.]* Here is a distinction to be understood : for there are two kinds of divorces, viz. one à *vinculo matrimonii*, and the other à *mensâ et thoro*. Divorces à *vinculo matrimonii* are these: *Causâ præcontractûs, causâ metûs, causâ impotentix seu frigiditatis, causâ affinitatis, causâ consanguinitatis &c.* A *mensâ et thoro*, as *causâ adulterii*, which dissolves not the marriage à *vinculo matrimonii*, for it is subsequent to the marriage. And the divorce that Littleton here speaks of is intended of such divorces as dissolve the marriage à *vinculo matrimonii*, and makes the issue bastard, because they were not *justæ nuptiæ*. And therefore in Littleton's case though the husband and wife be divorced *causâ adulterii*, yet the freehold continues, because the coverture continues. And it is further to be understood, that many divorces that were of force by the canon law when Littleton wrote, are not at this day in force ; for by the statute of 32 H. 8. c. 38., it is declared that all persons may lawfully marry that be not prohibited by God's law to marry, that is to say, that be not prohibited by the Levitical degrees.

Marriage with daughter of wife's sister good. (See Burn, Eccl. Law, 402.)

A man married the daughter of the sister of his first wife, and was drawn in question in the ecclesiastical court for this marriage, alleging the same to be against the canons ; and it was resolved by the Court of Common Pleas, upon consideration had of the said statute, that the marriage could not be impeached, for that the same was declared by the said act of parliament to be good, inasmuch as it was not prohibited by the Levitical degrees, *et sic de similibus*.

## SECTION 382.

IN the same manner it is, if an abbot makes a lease to a man, in this case the lessee has an estate for term of his own life: but this is upon condition in law, scilicet, That if the abbot resign, or be deposed, that then it shall be lawful for his successor to enter &c. [This also is properly a limitation not a condition defeating the estate before its natural determination.]

Lease by one holding an office, gives an estate for life.

If an abbot.] So it is of a bishop, archdeacon, and other ecclesiastical or temporal body politic or corporate, or of any officer or graduate, or the like.—Resign or be deposed.] And so is of a translation and cession.

## SECTION 383.

ALSO, where a man devised his lands to be sold by his executor, and to make distribution of the money for his soul; and it was found, that presently after the death of the testator, one tendered to him a certain sum of money for the lands, but not to the value, and that the executor afterwards held the lands in his own hands two years, to the intent to sell the same deurer to some other; and it was found that he had all the time taken the profits of the lands to his own use, without doing any thing for the soul of the deceased, &c. Moubray, justice, said, the executor in this case is bound by law to make the sale as soon as he [conveniently] can, and it is found that he refused to make sale, and so there was a default in him, and so by force of the devise he was bound to put all the profits coming of the lands to the use of the dead, and it is found that he took them to his own use, and so another default in him. Wherefore it was adjudged, that the heir should recover. And so it appears by the said judgment that by force of the said devise the executor had no estate nor power in the lands but upon condition in law.

Devise of land to be sold by executor, if he does not sell within reasonable time (two years), heir may recover.

Devised his lands to be sold by his executor.] This must be intended of lands devisable by custom, for lands by the common

Devise to executor to sell, and devise that ex-

ecutor shall sell, distinguished.  
 [See 1 Jac. & W. 189. 4 Mad. 44, 142. 2 S. & S. 238.]

[236 a]

law were not devisable. In this section is implied a diversity, viz. when a man devises that his executor shall sell the land, there the lands descend in the mean time to the heir, and until the sale be made the heir may enter and take the profits. But when the land is devised to his executor to be sold, there the devise takes away the descent, and vests the estate of the land in the executor, and he may enter and take the profits and make sale according to the devise. And here it appears, by our author, that when a man devises his tenements to be sold by his executors, it is all one as if he had devised his tenements to his executors to be sold; and the reason is, because he devises the tenements, whereby he breaks the descent.

*The executor in this case is bound by law to make sale as soon as he can.*] And the reason hereof is, for that the mean profits taken before the sale shall not be assets, so that he is not compellable to pay debts with the same, [for they belong to the heir,] and therefore the law will compel the executor to sell the lands as soon as he can, for otherwise he shall take advantage of his own laches: but if a man devise that his executor shall sell his land, there he may sell it at any time, for that he hath but a bare power, and no profit. And by this case it appears what construction the law makes for the speedy payment of debts.

Devise to A., he paying 20l. to B.—a condition, and if he does not pay heir may enter.

[236 b]

So if lands be devised to one to pay twenty pounds to I. S. or paying twenty pounds to I. N. this amounts to a condition. And Crickmer's case was this: a man seised of certain lands holden in socage had issue two daughters, A. and B. and devised all his lands to A. and her heirs, to pay unto B. a certain sum of money at a certain day and place: the money was not paid, and it was adjudged, that these words, "to pay," &c. amounted in a will to a condition; and the reason was, for that the land was devised to A. for that purpose, otherwise B. to whom the money was appointed to be paid, would be remediless, and the lessee of B. [one of the co-heirs] recovered in ejectment one moiety of the land against A.

SECTION 384.

Conclusion.

*AND many other things there are of estates upon condition in law, and in such cases it is not necessary to shew any deed re-*



*hearsing the condition, for the law itself purports the condition, &c.*

Ex paucis dictis intendere plurima possis.

*More shall be said of conditions in the next chapter, in the chapter of Releases, and in the chapter of Discontinuance.*

Hereby it appears, that limitations (which Littleton termeth conditions in law) may be pleaded without deed; and the reason of our author is observable, because the law in itself purports the condition, and withal [observe] that a stranger may take advantage of a limitation, [which he cannot do of a condition.]

*Limitation and condition distinguished.*

Littleton having spoken at large of conditions in deed and in law, somewhat seems necessary to be said of defeasances, whereby the estate or right of freehold and inheritance may be defeated and avoided. There is a diversity between inheritances executed, and inheritances executory; as lands executed by livery, &c. cannot by indenture of defeasance be defeated afterwards. And so if a disseissee release to a disseisor, it cannot be defeated by indentures of defeasance made afterwards; but at the time of the release or feoffment, the same may be defeated by indentures of defeasance, for it is a maxim in law, *quæ incontinenti fiunt in esse videntur*. But rents, annuities, conditions, warranties, and such like, which are inheritances executory, may be defeated by defeasances made either at the time or at any time after: and so is the law of statutes, recognizances, obligations, and other things executory.

*Subsequent defeasances may be annexed to rents, annuities, &c. but not to estates executed.*

[237 a]

Lastly, somewhat is necessary to be spoken concerning clauses of proviso, containing power of revocation, which since Littleton wrote have crept into voluntary conveyances, which pass by raising of uses, being executed by the statute of 27 H. 8., and are become very frequent, and the inheritance of many depend thereupon. As if a man seised of lands in fee, and having issue divers sons, by deed indented, covenants in consideration of fatherly love and for the advancement of the blood, or upon any other good consideration, to stand seised of three acres of land to the use of himself for life, and after to the use of Thomas his eldest son in tail; and for default of such issue, to the use of his second son in tail, with divers like remainders over; with a proviso that it shall be lawful for the covenantor at any time during his

*Powers of revocation in voluntary conveyances under uses and at common law distinguished.*

life to revoke any of the said uses &c. this proviso being coupled with an use, is allowed to be good, and not repugnant to the former estates. But in case of a feoffment, or other conveyance, whereby the feoffee or grantee &c. is in by the common law, such a proviso were merely repugnant and void. And first, in the case aforesaid, if the covenantor, who had an estate for life, revokes the uses according to his power, he is seised again in fee simple without any entry or claim. Secondly, he may revoke part at one time, and part at another. Thirdly, if he makes a feoffment in fee, or levies a fine &c. of any part, this extinguishes his power for that part only; whereas in such case the whole condition would be extinct. But if it be made of the whole, all the power is extinguished; so that to some purposes it is of the nature of a condition, and to other purposes in nature of a limitation. Fourthly, if he who has such power of revocation has no present interest in the land, nor by the cesser of the estate shall have anything, then his feoffment or fine &c. of the land is no extinguishment of his power, because it is merely collateral to the land. Fifthly, by the same conveyance that the old uses are revoked may new uses be created or limited, where the former cease *ipso facto* by the revocation without either entry or claim. Sixthly, That these revocations are favourably interpreted, because many men's inheritances depend on the same.

## CHAPTER VI. SECTION 385.

## OF DESCENTS WHICH TOLL ENTRIES.

DESCENTS *which toll entries are in two ways, to wit, where the descent is in fee, or in fee tail. Descents in fee which toll entries are as if a man seised of certain lands or tenements is by another disseised, and the disseisor has issue, and dies of such estate seised, now the lands descend to the issue of the disseisor by course of law, as heir unto him. And because the law casts the lands or tenements upon the issue by force of the descent, so that the issue comes to the land by course of law and not by his own act, the entry of the disseisee is taken away, and he is put to sue a writ of entry sur disseisin against the heir of the disseisor to recover the land.*—[That is, he is driven to his real action, and cannot bring an ejectment, but now the heir is allowed to lay his demise in ejectment in the lifetime of the ancestor, which the defendant by consent rule is obliged to admit, and by that means this doctrine of descents is at the present day entirely evaded. *Burr. 60. 12 East, 141. Adams, Eject. 41. n.; but this chapter must nevertheless be studied, not only for its own illustrative importance, but for the many collateral points it contains.*]

Where they occur.

*Nota.* In ancient time, if the disseisor had been in long possession, the disseisee could not have entered upon him. Likewise the disseisee could not have entered upon the feoffee of the disseisor, if he had continued a year and a day in quiet possession. But the law is changed in both these cases, only the dying seised, being an act in law, holds at this day, and this seems to be very ancient, for this was the law before the conquest. *Old law.*

And one of the reasons of this ancient law may be, that the heir cannot suddenly by intendment of law know the true state of his

title. And for that many advantages follow the possession and tenant, the law takes away the entry of him who would not enter upon the ancestor, and who is presumed to know his title, and drives him to his action against the heir that may be ignorant thereof.

*Dying seised, necessary to.*

*And dies of such estate seised.]* To a descent that takes away an entry a dying seised is necessary, as here it appears; but a man to other purposes may have lands by descent though his ancestor died not seised, as hath been said before.

*Extends not to incorporeal hereditaments.*

*Of lands or tenements.]* That is, of such tenements as are corporeal, and lie in livery, and not of inheritances which lie in grant, as advowsons, rents, commons in gross, and such like, which are inheritances incorporeal, and yet are included within this word (tenements). For descents of them do not put him who has right to an action; and the reason of this diversity is, for that houses serve for the habitation of men, and lands to be manured for their sustenance, and therefore the heir after a descent shall not be molested or disturbed in them by entry.

*Or where the disseisor dies within five years after the disseisin by stat. which extends to whom.*

*The entry of the disseisee is taken away.]* At the common law, if the disseisor, abator, or intruder had died seised soon after the wrong done, the disseisee and his heirs had been barred of his and their entry without any time limited by law; but now, by the statute 37 H. 6. c. 1. made since Littleton wrote, it is enacted, that except such disseisor has been in the peaceable possession of such manors, lands, &c. whereof he shall die seised by the space of five years next after such disseisin, &c. without entry or continual claim, &c. that *there* such dying seised, &c. shall not take away the entry of such person or persons, &c. But after the five years the disseisee must make such continual claim as our author has taught us, the learning whereof is necessary to be known. And it is said, that abators and intruders are out of this statute, because the statute is penal, and extends only to a disseisor, and that was the most common mischief. The feoffee also of a disseisor is out of the said statute, and remains as at the common law. But if a man makes a lease for life, and the lessee for life is disseised, and the disseisor dies seised within five years, the lessee for life may enter; but if the lessee dies before he doth enter, it is said that the entry of him in the reversion is not lawful, because his entry was not lawful upon the disseisor at the time of the descent, as the

statute speaks. But if lessee for life had died first, and then the disseisor had died seised, he in the reversion had been within the remedy of the statute, because he had title of entry at the time of the descent, as the statute speaks, and so is within the express letter of the statute, albeit the disseisin was not immediate to him, and the like is to be said of a remainder, &c.

SECTION 386.

*DESCENTS in tail which take away entries are as if a man be dis-* Descents in  
tail.  
*seised, and the disseisor gives the same land to another in tail, and the tenant in tail has issue and dies of such estate seised, and the issue enter; in this case the entry of the disseisee is taken away, and he is put to sue against the issue of the tenant in tail a writ of entrie sur disseisin.*

SECTION 387.

[239*a*]

*AND note, that in such descents which take away entries, it is necessary that a man die seised in his demesne as of fee, or in his demesne as of fee tail. For a dying seised for term of life, or for term of another man's life, never takes away an entry.* Dying seised of  
freehold not  
enough.

But if he in the reversion disseise his tenant for life and dies seised, this descent shall take away the entry of the tenant for life. So it is if there be tenant for life, the remainder in tail, the remainder in fee, and tenant in tail disseises the tenant for life and dies seised, this shall take away the entry of the tenant for life.

SECTION 388.

[239*b*]

*ALSO, a descent of a reversion, or of a remainder, does not take away an entry. Hence to those cases which take away entries by force of descents, it is necessary that the party die seised of fee and freehold at the time of his decease, or of fee tail and freehold at the time of his death, or otherwise such descent does not take away an entry.* Dying seised  
of reversion  
not enough.

Reversion on lease for years and life distinguished.

And therefore if a disseisor make a lease for years, and die seised of the reversion, this descent shall take away the entry of the disseisee, because he died seised of the fee and frank-tenement. But if he had made a lease for life, and die seised of the reversion, this descent shall not take away the entry of the disseisee, for though he had the fee, yet he had not the frank-tenement. And if a disseisor make a lease for term of his own life, and dies, this descent shall not take away the entry of the disseisee; for though the fee and frank-tenement descend to the heir of the disseisor, yet the disseisor died not seised of the fee and frank-tenement: and Littleton says, that unless he has the fee and frank-tenement at the time of his decease, such descent shall not take away the entry.

[Cro. Eliz. 315. 3 Lev. 437.]

SECTION 389.

Collateral descent.

ALSO, *descent in the collateral line takes away an entry as well as descent in the lineal or direct line.*

[240a]

SECTION 390.

Lord in by escheat does not take away disseisee's entry.

ALSO, *if the alienee of the disseisor die without issue, and the lord enter as in his escheat: in this case the disseisee may enter upon the lord, because the lord comes not to the land by descent, but by way of escheat.*

But if the lord by escheat die seised, and the land descend to his heir, that descent shall take away the entry of the disseisee. So it is if the disseisor die seised, and the heir of the disseisor dies without heir, the disseisee cannot enter upon the lord by escheat. So that there is a diversity touching the descent, when after a descent cast, the issue in tail dies without issue, and when after a descent cast, the heir in fee-simple dies without heir: for he in the reversion or remainder upon an estate tail comes in above the estate tail, but the lord by escheat comes in under the heir in fee-simple.

SECTION 391.

**ALSO, if a man be seised of certain land in fee, or in fee-tail, upon condition to render certain rent, or upon other condition, albeit such tenant seised in fee or in fee-tail, dies seised, yet if the condition be broken in their lives, or after their decease, this shall not take away the entry of the feoffor or donor, or of their heirs, for that the tenancy is charged with the condition, and the estate of the tenant is conditional in whose hands soever the tenancy comes &c.**

So entry for condition broken is not taken away by tenant's death in possession.

Upon these two sections a diversity is to be observed between a right, for which the law gives a remedy by action, and a title, for which the law gives no remedy by action, but by entry only. For example, the feoffee upon condition in this case has a right to the land, and therefore his entry may be taken away, because he may recover his right by action; but the feoffor or donor who has but a condition, his title of entry cannot be taken away by any descent, because he has no remedy by action to recover the land, and therefore if a descent should take away his entry, it would bar him for ever. And the law is all one whether the descent were before the condition broken, or after.

*Right and title distinguished.*

[240b]

SECTION 392.

**ALSO, if such tenant upon condition be disseised, and the disseisor die thereof seised, and the land descend to the heir of the disseisor, now the entry of the tenant upon condition who was disseised is taken away. Yet if the condition be broken, the feoffor or the donor who made the estate upon condition or their heirs may enter, causâ quâ suprâ.**

Same.

If a man be seised of lands in fee, and by his last will in writing devises the same to another in fee, and dies, after whose decease the freehold in law is cast upon the devisee, and the heir, before any entry made by the devisee, enters, and dies seised, this descent

*Heir's entry upon devisee.*

shall not take away the entry of the devisee; for if the descent, which is an act in law, should take away his entry, the law would bar him of his right, and leave him utterly without remedy.

## SECTION 393.

Disseisee may enter upon disseisor's wife's dower, for the wife is in by her husband, not by his heir or by descent.

**ALSO, if a disseisor dies seised, and his heir enters and endows the wife of the disseisor of the third part of the land &c. in this case as to this part which is assigned to the wife in dower, presently after the wife enters, and has the possession of the same third part, the disseisee may lawfully enter upon the possession of the wife into the same third part. And the reason is, for that when the wife has her dower, she shall be adjudged in immediately by her husband, and not by the heir, and so the descent as to the freehold of the same third part, is defeated. Hence you may see, that before the endowment the disseisee could not enter into any part &c., and after the endowment he may enter upon the wife &c., but yet he cannot enter upon the other two parts which the heir of the disseisor has by the descent.**

[241a]

By this section it appears, that an entry being taken away by the descent, is revived by the endowment, albeit the tenant in dower shall have it but for her life. And the cause is, for that although the heir entered, yet when the wife is endowed she shall not be in by the heir, but immediately by her husband being the disseisor, who is in for her life by a title paramount the dying seised and descent, and therefore in judgment of law, the descent as to the freehold, and the possession which the heir had is taken away by the endowment: for the law adjudges no mean seisin between the husband and the wife.

*Disseisee's entry divests reversion.*

*Nota*, albeit the disseisor conveys away and takes back an estate for life, yet when the disseisee enters upon him, he shall thereby divest the reversion, for the estate of freehold is that whereupon a *præcipe* lies, and therefore the entry of the disseisee is as available in law, as if he had recovered it in a real action.



SECTION 394.

[241 b]

ALSO, if a woman be seised of land in fee, whereof I have right and title to enter, if the woman take husband and they have issue between them, and after the wife dies seised, and after the husband dies, and the issue enters &c., in this case I may enter upon the possession of the issue, for that the issue comes not to the lands immediately by descent after the death of the mother &c.

Curtesy no bar to entry, though given up to issue. [Acc. 1 Salk. 241.]

In this case I may enter upon the possession of the issue &c.] For here was but a descent of a reversion at the time of the dying seised, for the estate of the tenant by the curtesy had commencement by the having of issue, and is consummate by the death of the wife, so that the fee and franktenement did not after the decease of the wife descend to the heir, and albeit the tenant by the curtesy dies afterwards, and the franktenement is cast upon the heir, so as now he has the fee and franktenement by descent, yet because the heir came not to the fee and franktenement at once, immediately after the decease of the wife, such a mediate descent shall not take away the entry of the disseisee. On the other side, an immediate descent may take away an entry for a time, and mediate may be avoided by matter *ex post facto*, as hath been said. But if a dying seised takes not away the entry of him who has right at the time of the descent, it shall not by any matter *ex post facto* take away his entry.

SECTION 395.

ALSO, if a disseisor enfeoffs his father in fee, and the father dies seised of such estate, by which the land descends to the disseisor as son and heir, in this case the disseisee may well enter upon the disseisor, notwithstanding the descent, for as to the disseisin, the disseisor shall be adjudged in but as a disseisor, notwithstanding the descent *quia particeps criminis*.

If disseisor aliens and comes in again by descent or purchase, disseisee may enter. [242a]

And regularly it is true, that albeit a descent is cast and the entry of the disseisee taken away, yet if the disseisor comes to the land again, either by descent or purchase of any estate of free-

hold, which is implied in the (&c.) the disseisee may enter upon him, or have his assise against him, as if no descent or mean conveyance had been, *quia particeps criminis*.

### SECTION 396.

Younger son's abatement on eldest, and death, not a descent, tolling entry of eldest.

*ALSO, if a man seised of certain land in fee hath issue two sons, and dies seised, and the younger son enters by abatement into the land, and has issue, and dies seised thereof, and the land descends to his issue, and the issue enters into the land: in this case the eldest son or his heir may enter by law upon the issue of the younger son, notwithstanding the descent, because when the younger son abated into the land after the death of his father, before any entry made by the eldest son, the law intends that he entered claiming as heir to his father. And for that the eldest son claims by the same title, that is to say, as heir to his father, he and his heirs may enter upon the issue of the younger son notwithstanding the descent &c. because they claim by the same title. And in the same manner it shall be, if there were more descents from one issue to another issue of the younger son.*

Abatement, none between brothers. [Gilb. Tenures, 21.]

### SECTION 397.

Contra if elder brother once seised.

*BUT in this case, if the father be seised of certain lands in fee, and has issue two sons and dies, and the eldest son enters and is seised &c., and after the younger brother disseises him, by which disseisin he is seised in fee, and has issue, and of his estate dies seised, then the elder brother cannot enter, but is put to his writ of entrie sur disseisin &c. to recover the land.*

Abatement, special tail.

[242b]

Borough English.

[243a]

Lands were given to the husband and wife, and to the heirs of their two bodies, they had issue a daughter, the wife died, the husband had issue by another wife four sons and died, the eldest son abated and died seised, this descent took away the entry of the daughters because they claimed not by one title. But if a man be seised of lands of the nature of borough English, and has issue two sons and dies, and the eldest son before any entry made by the youngest, enters into the land by abatement, and dies seised, this shall not take away the entry of the youngest brother. *Et sic de*

*similibus.* And these and the like cases are all within the reason and rule of our author. And where our author speaks only of an abatement, so it is of an intrusion; for if the father makes a lease for life, and has issue two sons and dies, and the tenant for life dies, and the youngest son intrudes and dies seised, this descent shall not take away the entry of the eldest. But if the father had made a lease for years it had been otherwise, for that the possession of the lessee for years makes an actual freehold in the eldest son. And it is to be observed, that the reason of Littleton in this case (*viz.* that both the brethren hold by one title) holds also in many other cases.

*Intrusion.*

*Lessee's possession is freeholder's.*

If two coparceners make partition to present by turns, and one of them usurp the turn of the other, this usurpation shall not put the other out of possession, because they claim by one title.

*Usurpation.*

*And is seised &c.]* That is to say, actually seised, either by entry, as Littleton here puts it, or by possession of the lessee for years, or the like.

*Seisin by tenant for years.*

### SECTION 398.

*IN the same manner it is, if a man seised of certain land in fee, has issue two daughters, and dies, the eldest daughter enters into the land claiming all to herself, and thereof takes the profits, and has issue and dies seised, and then her issue enters, which issue has issue and dies seised, and the second issue enter, et sic ultra, yet the younger daughter and her issue as to the moiety, may enter upon any issue whatsoever of the elder daughter notwithstanding such descent, for that they claim by one and the same title &c. But in such case where both sisters have entered after the death of their father, and were thereof seised, and afterwards the eldest sister had disseised the younger of her part and was thereof seised in fee, and had issue, and of such estate died seised, whereby the lands descend to the issue of the eldest sister, then neither the younger sister nor her heirs can enter &c. causâ quâ suprâ &c.*

One coparcener dying seised of whole, no descent tolling entry of other.

[243 b]

## SECTION 399.

Bastard eigne abating, on mulier puisne, and dying seised, gains a good title.

**ALSO** *if a man be seised of certain lands in fee, and has issue two sons, and the elder is a bastard, and the younger mulier, and the father dies, and the bastard enters claiming as heir to his father, and occupies the land all his life, without any entry made upon him by the mulier, and the bastard has issue and dies seised of such estate in fee, and the land descends to his issue, and his issue enters &c. in this case the mulier is without remedy, for he may not enter nor have any action to recover the land, because there is an ancient law in this case used [to the contrary] &c.*

*What entry of one coparcener an abatement.*

*Claiming all to her.]* Here it appears, that when one coparcener specially enters, claiming the whole land and taking the whole profits, that she gains the moiety of her sister by abatement, and yet her dying seised shall not take away the entry of her sister; whereas when one coparcener enters generally and takes the profits, this shall be accounted in law the entry of them both, and no divesting of the moiety of her sister.

*Feoffment of entirety by one coparcener.*

If one coparcener enters claiming the whole, and makes a feoffment in fee, and takes back an estate to her and her heirs, and has issue and dies seised, this descent shall take away the entry of the other sister, because by the feoffment the privity of the coparcenary was destroyed.

*Bastard, who.*

We term all bastards that are born out of lawful marriage. By the common law if the husband be within the four seas, that is, within the jurisdiction of the king of England, if the wife has issue, no proof is to be admitted to prove the child a bastard, (for in that case *filiatio non potest probari*) unless the husband has an apparent impossibility of procreation; as if the husband be but eight years old, or under the age of procreation, such issue is bastard, albeit he be born within marriage. But if the issue be born within a month or a day after marriage between parties of full lawful age the child is legitimate.

[But see 3 Pr. Wms. 275]

*Descend to his issue.*] For if the bastard dies seised without issue, Escheat. and the lord by escheat enters, this dying seised shall not bar the *mulier*, because there is no descent.

*And his issue enters &c.*] And so it is to be understood, albeit the *mulier*, after the decease of the bastard, enters before the heir of the bastard; for the descent binds, and not the entry of the heir. Abatement on bastard eigne's heir.

*The mulier is without remedy.*] And it is holden that if the *mulier* Infancy. be within age at the time of the dying seised, he shall nevertheless be barred, because the issue of the bastard is in judgment of law become lawful heir, and the law prefers legitimation before the privilege of infancy. So if the bastard dies seised, and his issue endows the wife of the bastard, yet is not the entry of the *mulier* lawful upon the tenant in dower, for his right was barred by the descent. Dower.

*Has issue two sons.*] If a man has issue such a bastard as is aforesaid, and dies, and the bastard enters and dies seised, and the land descends to his issue, the collateral heir of the father is bound, as well as where there are two sons. Collateral heir.

And where our author speaks of sons, so it is if a man has issue two daughters, the eldest being a bastard, and they enter and occupy peaceably as heirs; now the law in favour of legitimation shall not adjudge the whole possession in the *mulier*, (who then had the only right) but in both, so that if the bastard has issue and dies, her issue shall inherit [one moiety.] And in the same case, if both daughters enter and make partition, this partition shall bind the *mulier* for ever. Two coparceners, one a bastard, allowed a share, other estopped. [244 b]

*And the bastard enters as heir to his father.*] If a man has issue bastard *eigne* and *mulier puisne*, and the bastard in the life of the father has issue and dies, and then the father dies seised, and the son of the bastard enters, as heir to the grandfather, and dies seised, this descent shall bind the *mulier*. Entry of bastard eigne's issue good.

SECTION 400.

Bastard eigne  
must be by  
same mother  
as mulier pu-  
isane.

*BUT it has been the opinion of some, that this shall be intended where the father has a son bastard by a woman, and after marries the same woman, and after the espousals he has issue by the same woman a son or a daughter, and after the father dies &c. if such bastard enters &c. and has issue and dies seised &c. then shall the issue of such bastard have the land clearly to him, as it is said before &c. and not any other bastard of the mother who was never married to his father. And this seems to be a good and reasonable opinion: for such a bastard born before marriage celebrated between his father and his mother, by the law of holy church is mulier, albeit by the law of the land he is a bastard, and so he has a colour to enter as heir to his father, for that he is by one law mulier, i. e. by law of holy church. But otherwise it is of a bastard who has no manner of colour to enter as heir, in so much as he can by no law be said to be mulier, for such a bastard is said in the law to be quasi nullius filius &c.*

[245 a]

SECTION 401.

But bastard  
must not be in-  
terrupted by  
mulier.

*BUT in the case aforesaid, where the bastard enters after the death of the father, and the mulier ousts him, and after the bastard disseises the mulier, and has issue and dies seised, and the issue enter, then the mulier may have a writ of entrie sur disseisin against the issue of the bastard, and shall recover the land &c. And so you may see a diversity where such bastard continues the possession all his life without interruption, and where the mulier enters and interrupts the possession of such bastard &c.*

What an entry,  
interruption, or  
claim.

*Interrupts the possession of such bastard &c.] If the bastard invite the mulier to see his house, or to see his pictures &c., or to dine with him, or to hawk, hunt, or sport with him, or such like upon the land descended, and the mulier comes upon the land accordingly, this is no interruption, because he came in by the consent of the bastard, and therefore the coming upon the land can be no trespass; but if the mulier comes upon the ground of his own*

head, and cuts down a tree, or digs the soil, or takes any profit, these shall be interruptions; for rather than the bastard shall punish him in an action of trespass, the act shall amount in law to an entry, because he has a right of entry. So it is if the *mulier* put any of his beasts into the ground, or command a stranger to put on his beasts, these acts amount to an entry; for albeit in these cases the *mulier* does not use any express words of entry, yet these and such like acts, do without any words amount in law to an entry; for acts without words may make an entry, but words without an act (*viz.* entry into the land &c.) cannot make an entry (all which interruptions are implied in the said &c.) More shall be said hereafter of interruptions in the chapter of Continual Claim.

SECTION 402.

ALSO, if an infant within age has cause to enter into any lands or tenements upon another, who is seised in fee or in fee-tail of the same lands or tenements, if the man who is so seised dies of such estate seised, and the lands descend to his issue during the time the infant is within age, such descent shall not take away the entry of the infant, but he may enter upon the issue who is in by descent, for no laches shall be adjudged in an infant within age in such a case.

Descent during infancy no avail;

If an infant within age has cause to enter.] If a man seised of lands in fee dies, his wife *privement enseint* with a son, and a stranger abates and dies seised, and after the son is born, he shall be bound by the descent [i. e. he shall be deprived of his entry, and driven to his action] because he at the time of the descent had no right to enter, and this is to be gathered upon these words of Littleton, *has cause to enter*, which at the time of the descent he has not.

except as to infants in ventre sa mere.

No laches shall be adjudged in an infant within age in such a case.] Littleton well added (*in such a case*) that is, in case of descent, for in some other cases laches shall prejudice an infant. As laches shall be adjudged in an infant if he present not to a church within six months, for the law respects more the privilege of the church (that the cure be served) than the privilege of infancy.

Adyson. Infant must present within six months.

[246a]

## SECTION 403.

No tolling of entry as to wife and her heirs by descent during coverture.

**ALSO, if husband and wife, in right of the wife, have title and right to enter into lands which another has in fee, or in fee-tail, and such tenant dies seised &c. in such case the entry of the husband upon the heir who is in by descent is taken away. But if the husband dies, then the wife may well enter upon the issue who is in by descent, for no laches of the husband shall turn the wife or her heirs to any prejudice or loss in such case, but the wife and her heirs may well enter where such descent is eschewed during the coverture.**

But disseisin must be during the coverture, unless wife marry under age.

**If husband and wife have title and right to enter &c. and such tenant dies seised &c.]** These words are general, but are particularly to be understood, viz. when the wrong was done to the wife during the coverture ; for if a feme sole be seised of lands in fee, and is disseised, and then takes husband ; in this case the husband and wife, as in the right of the wife, have right to enter, and yet the dying seised of the disseisor in that case shall take away the entry of the wife after the death of her husband ; and the reason is as well for that she herself when she was sole might have entered and recontinued the possession, as also it shall be accounted her folly that she would take a husband who would not enter before the descent. But if the woman were within age at the time of her taking husband, then the dying seised shall not after the decease of her husband take away her entry ; because no folly can be accounted in her, for that she was within age when she took husband, and after coverture she cannot enter without her husband ; all which is implied in the said (&c.)

[246b]

Laches no prejudice to feme covert or infant, except as to conditions.

**No laches of the husband shall turn the wife &c. to any prejudice &c.** Here is a diversity to be observed, that albeit regularly no laches shall be accounted in infants, or feme coverts, as is aforesaid, for not entering or claiming to avoid descents, yet laches shall be accounted in them for non-performance of a condition annexed to the estate of the land. For if a feme be enfeoffed either before or after marriage, reserving a rent, and for default of payment a re-entry ; in that case, the laches of the baron shall disinherit the wife for ever.



And so it is of an infant; his laches for not performing a condition annexed to the state, either made to his ancestor or to himself, shall bar him of the right to the land for ever. If a man makes a feoffment in fee to another reserving a rent, and if he pay not the rent within a month, that he shall double the rent, and the feoffee dies, his heir within age, and the infant pays not the rent, he shall not by this laches forfeit any thing. But otherwise it is of a feme covert; and the reason and cause of this diversity is, for that the infant is provided for by the statute of Merton, c. 5.

SECTION 404.

*BUT the court holds, where such title is given to a feme sole, who after takes husband who does not enter but suffers a descent &c. there otherwise it is, for it shall be said to be the folly of the wife o take a husband who entered not in time &c.* Feme sole.

This is added, and therefore, as I have formerly done, I meddle not withal; howbeit the opinion is holden for law, as it appears in the section next precedent.

SECTION 405.

*ALSO, if a man who is of non-sane memory, that is to say in Latin, qui non est compos mentis, has cause to enter into any tenements, if such descent, ut supra, be had in his life during the time that he was not of sound memory, and after he dies, his heir may well enter upon him who is in by descent. And here you may see a case, where the heir may enter and yet his ancestor who had the same title could not enter. For as to him who was out of his memory at the time of such descent, if he enters after such descent, and an action upon this is sued against him, he has nothing to plead for himself, or to help him, but to say, that he was not of sane memory at the time of such descent &c. And he shall not be received to say this, for no man of full age shall be received in any plea by the law to disable his own person, but the heir may well disable the person of his ancestor for his own advantage in such case, for no laches is adjudged by law in him who has no discretion in such case.* Descent cast during idiocy or lunacy no effect against heir of non compos.

Idiotcy. Lunacy. Drunkenness.

[247 a]

*Non compos mentis* is of four sorts; 1. *Ideota*, which from his nativity, by a perpetual infirmity, is *non compos mentis*. 2. He that by sickness, grief, or other accident, wholly loses his memory and understanding. 3. A lunatic that has sometimes his understanding and sometimes not, *aliquando gaudet lucidis intervallis*, and therefore he is called *non compos mentis*, so long as he has not understanding. Lastly, he that by his own vicious act for a time deprives himself of his memory and understanding, as he that is drunken. But that kind of *non compos mentis* shall give no privilege or benefit to him or to his heirs. And a descent shall take away the entry of an idiot, albeit the want of understanding was perpetual; for Littleton speaks generally of a man of non-sane memory. So likewise if a man who becomes *non compos mentis* by accident, as is aforesaid, be disseised and suffers a descent, albeit he recovers his memory and understanding again, yet he shall never avoid the descent; and so it is *à fortiori* of one who hath *lucida intervalla*. As for a drunkard who is *voluntarius dæmon*, he has (as hath been said) no privilege thereby, but what hurt or ill soever he does, his drunkenness aggravates it: *Omne crimen ebrietas et incendit et detegit*.

Idiot's feoffment, fine or recovery, what value.

[247 b]

If an idiot make a feoffment in fee, he shall in pleading never avoid it by saying that he was an idiot at the time of his feoffment and so had been from his nativity. But upon an office found for the king, the king shall avoid the feoffment for the benefit of the idiot, whose custody the law gives to the king. So it is of a *non compos mentis* by accident, and of him *qui gaudet lucidis intervallis* if an estate be made during his lunacy: for albeit the parties themselves cannot be received to disable themselves, yet twelve men upon their oaths may find the truth of the matter. But if any of them alien by fine or recovery, this shall not only bind himself but his heirs also. As amongst other things requisite to be known, these cases you shall find at large in my Commentaries, whereunto, for brevity, I refer the reader: upon all which books there have been four several opinions concerning the alienation or other act of a man that is *non compos mentis* &c. For, first, some are of opinion that he may avoid his own act by entry, or plea. Secondly, others are of opinion that he may avoid it by writ, and not by plea. Thirdly, others, that he may avoid it either by plea, or by writ; and of this opinion is *Fitzherbert* in his *Natura Brevium, ubi supra*. And *Littleton* here is of opinion, that neither by plea nor

by writ nor otherwise, he himself shall avoid it, but his heir (in respect that his ancestor was *non compos mentis*) shall avoid it by entry, plea, or writ. And herewith the greatest authorities of our books agree; and so was it resolved with *Littleton* in *Beverley's* case; where it is said, that it is a maxim of the common law, that the party shall not disable himself. But this holds only in civil causes; for in criminal causes, as felony &c., the act and wrong of a madman shall not be imputed to him. And so it is of an infant, until he is of the age of fourteen, which in law is accounted the age of discretion.

If lands be given to two and to the heirs of one of them, he who has the fee simple shall not have an action of waste upon the statute of Gloucester against the joint-tenant for life, but his heir may maintain an action of waste against him upon the statute of Gloucester; so the heir may maintain that action which the ancestor could not.

*Waste — Joint-tenants for life, Remainder in fee to one of them.*

SECTION 406.

AND if a man of non-sane memory make a feoffment &c. he himself cannot enter, nor have a writ called *Dum non fuit compos mentis*, &c. *causâ quâ suprâ*: but after his death his heir may well enter or have the said writ of *Dum non fuit compos mentis* at his choice. The same law is where an infant within age makes a feoffment, and dies, his heir may enter, or have a writ of *Dum fuit infra ætatem*, &c.

*Feoffment fine or recovery by non compos or infant.*

*Make a feoffment, &c.*] Or any other like conveyance in *pais*; but fines and other assurances of record are not implied in this (&c.)

SECTION 407.

[248 a]

ALSO, if I be disseised by an infant within age, who aliens to another in fee, and the alienee dies seised, and the land descends to his heir, the infant being under age, my entry is taken away.

*Disseisin by infant.*

SECTION 408.

Same.

*BUT if the infant within age enters upon the heir who is in by descent, as he well may, for that the same descent was during his non-age, then I may well enter upon the disseisor, because by his entry he has defeated and taken away the descent.*

Here it appears, that the entry of the infant is lawful, and gives advantage to the disseisee to enter also, because the descent, which was the impediment, is avoided. And it is to be observed, that if the descent be cast, the infant being within age, he may enter at any time, either within age or after his full age.

*Infant's feoffment.*

And so it is if an infant make a feoffment &c. he may enter either within age, or at any time after his full age, and so in both cases may his heir.

SECTION 409.

*What descent cast by death of disseisor's feoffee on condition.*

*IN the same manner it is, where I am disseised, and the disseisor makes a feoffment in fee upon condition, and the feoffee dies of such estate seised, I may not enter upon the heir of the feoffee: but if the condition be broken and the feoffor enters upon the heir, now I may well enter, for when the feoffor or his heir enters for the condition broken, the descent is utterly defeated, &c.*

SECTION 410.

*Descent not cast by entry into religion.*

*ALSO, if I am disseised, and the disseisor has issue and enters into religion, by force whereof the lands descend to his issue, in this case I may well enter upon the issue, and yet there was a descent.*

[249 a]

SECTION 411.

*Though a descent cast the lessee for years*

*ALSO, if I let to a man certain lands for the term of twenty years, and another disseises me and ousts the termor, and dies seised,*

*and the lands descend to his heir, I may not enter; and yet the lessee for years may well enter, because by his entry he does not oust the heir who is in by descent of the freehold which is descended to him, but only claims to have the lands for term of years, which is no expulsion of the heir from the freehold who is in by descent. But otherwise it is where my tenant for life is disseised, causa patet, &c.*

may enter, contra of lessee for life.

*For the term of twenty years.]* It is clear that a descent shall not take away the entry of a lessee for years, as our author here says, nor of a tenant by elegit, or tenant by statute merchant, or such like, who have but a chattel and no freehold; and the reason is, for that by their entry upon the heir by descent, they take no freehold (which, as often hath been observed, is so much respected in law) from him; but otherwise it is of an estate for life or any higher estate. And as a descent of a freehold and inheritance shall take away the entry of him that right has to a freehold or inheritance, so a descent of a freehold and inheritance cannot take away the entry of him that has but a chattel, for that no descent or dying seised can be of the same.

Descent cast no effect on chattels.

A man seised of an advowson in fee grants three avoidances one after another, and after the church becomes void, and the grantor presents, and his clerk is admitted and instituted, and after the church becomes void again, the grantee may present to the second avoidance, for that he was not put out of the possession thereof; for as the lessor having the freehold and inheritance cannot disseise his lessee for years, having but a chattel, so as that any descent may be cast to take away his entry (as Littleton here says); so in the said case the grantor has the franktenement and fee of the advowson rightfully, so as he cannot make any usurpation to gain any estate, or to put the grantee so out of possession as that he should not present, no more than the lessee for years in that case, to enter. Also in respect of the privity that is between them, the usurpation of the grantor shall not put the grantee out of possession for the two latter avoidances. And this was resolved by all the judges of the Court of Common Pleas, which I myself heard and observed.

Advowson, usurpation, grant of three avoidances.

SECTION 412.

Death in time of civil war casts no descent.

ALSO, it is said, that if a man be seised of lands in fee by occupation in time of war, and thereof dies seised in the time of war, and the tenements descend to his heir, such descent shall not oust any man of his entry.

[250 a]

SECTION 413.

Descent cast applies not to corporations.

ALSO, that no dying seised (where the tenements come to another by succession) shall take away the entry of any person &c. As of prelates, abbots, priors, deans, or of the parson of a church, or of other bodies politic &c., albeit there were twenty dyings seised, and twenty successors, this shall not put any man from his entry.

More shall be said of descents in the next chapter.

Successors are in post, heirs in the per.

*By succession.*] This in the common law is applied only to bodies politic, or corporate, which have succession perpetual, and not to natural men: as to a bishop and his successors, or to an abbot, dean, archdeacon, prebend, parson &c. and their successors, and not to I. S. or any other natural body and his successors, but to him and his heirs. And the successor of any of these is in the *post*, and the heir of the natural man is in the *per*; and *succedere* is derived of *sub* and *cedere*.

Different kinds of corporations.

*Bodies politic &c.*] That is a body to take in succession, framed (as to that capacity) by policy, and thereupon it is called here by Littleton a body politic; and it is also called a corporation, or a body incorporate, because the persons are made into a body, and are of capacity to take and grant &c. And this body politic, or incorporate, may commence and be established three manner of ways, viz. by prescription, by letters patents, or by act of parliament. Every body politic, or corporate, is either ecclesiastical or lay: ecclesiastical, either regular, as abbots, priors &c.: or secular, as bishops, deans, archdeacons, parsons, vicars &c.: lay, as mayor

and commonalty, bailiffs and burgesses &c. Also every body politic, or corporate, is either elective, presentative, collative, or donative. And again, it is either sole, or aggregate of many; as you may read in the Third Part of my Commentaries. And this body politic, or corporate, aggregate of many, is by the civilians called *collegium* or *universitas*.

## CHAPTER VII. SECTION 414.

## CONTINUAL CLAIM.

Continual claim preserves right of rent, and defeats effect of descent cast.

*CONTINUAL claim is where a man has right and title to enter into any lands or tenements whereof another is seised in fee, or in fee-tail, if he who has title to enter makes continual claim to the lands or tenements before the dying seised of him who holds the tenements, then albeit such tenant dies thereof seised, and the lands or tenements descend to his heir, yet may he who has made such continual claim, or his heir, enter into the lands or tenements so descended, by reason of the continual claim made, notwithstanding the descent. As if a man be disseised, and the disseisee makes continual claim to the tenements in the life of the disseisor, although the disseisor dies seised in fee, and the land descends to his heir, yet may the disseisee enter upon the possession of the heir notwithstanding the descent.*

Must be made once every year.

Here our author first describes what a continual claim is. It is called *continuum clameum*, because at the common law it must have been made within every year and day, as Littleton here teaches. And yet if he that right hath makes claim, and the ter-tenant dies within the year and the day, this claim though it be but once made (as hath been said) shall preserve the entry of him who makes the claim.

[250 b]

Claim to be made if reversioner cannot enter by reason of term for years.

*Hath right and title to enter.]* And yet in some cases a continual claim may be made by him who has right and cannot enter. If tenant for years, tenant by statute staple, merchant, or *elegit*, be ousted, whereby he in the reversion is disseised, the lessor, or he in reversion, may enter to the intent to make his claim, and yet his entry as to take any profits, is not lawful during the term.

Right of entry how preserved

*Yet may he who has made such continual claim, or his heirs, enter.]* This is to be understood in this manner: that if the father make



claim, and the disseisor dies, and then the father dies, that his heir may enter, because the descent was cast in the father's time, and the right of entry which the father gained by his claim shall descend to his heir. But if the father make continual claim, and dies, and the son makes no continual claim, and within the year and day after the claim made by the father, the disseisor dies, this shall take away the entry of the son, for that the descent was cast in his time, and the claim made by the father shall not avail him who might have claimed himself. And of this opinion was Littleton himself in our books, where he holds that no continual claim can avoid a descent, unless it be made by him who has title to enter, and in whose life the dying seised was. And as here Littleton puts his case of the ancestor and heir, so it holds in all respects of the predecessor and successor.

*to heir by continual claim.*

## SECTION 415.

[251a]

*IN the same manner it is, if tenant for life aliens in fee, he in the reversion or he in the remainder may enter upon the alienee. And if such alienee dies seised of such estate without continual claim made to the tenements, before the dying seised of the alienee, and the lands by reason of the dying seised of the alienee descend to his heir, then cannot he in the reversion nor he in the remainder enter. But if he in the reversion or in the remainder, who has cause to enter upon the alienee, makes continual claim to the land before the dying seised of the alienee, then such a man may enter after the death of the alienee, as well as he might in his life-time.*

Alienation of tenant for life, and death of alienee, puts remainder-man to his action.

## SECTION 416.

*ALSO, if land be let to a man for term of his life, the remainder to another for term of life, the remainder to a third person in fee, if tenant for life aliens to another in fee, and he in the remainder for life makes continual claim to the land before the dying seised of the alienee, and after the alienee dies seised, and after he in the remainder for life dies before any entry made by him, in this case he in the remainder in fee may enter upon the heir of the alienee,*

Continual claim descends from one remainder-man to another.

by reason of the continual claim made by him who had the remainder for life, because that such right of entry as he had shall go and remain to him in the remainder after him, inasmuch as he in the remainder in fee could not enter upon the alienee in fee during the life of him in the remainder for life, and for that he could not then make continual claim, whence it appears that none can make continual claim but when he who has right and title to enter.

Tenant for life  
— Alienation  
when a for-  
feiture.

[251 b]

*Alien to another in fee.*] It is to be observed, that a forfeiture may be made by the alienation of a particular tenant two manner of ways; either *in pais*, or by matter of record. *In pais*, of lands and tenements which lie in livery (whereof Littleton intends this case) where a greater estate passes by livery than the particular tenant may lawfully make, whereby the reversion or remainder is divested, as here in the example that Littleton puts when tenant for life aliens in fee, which must be understood of a feoffment, fine, or recovery by consent. If tenant for life, and he in the remainder for life in Littleton's case, had joined in a feoffment in fee, this had been a forfeiture of both their estates, because he in the remainder is *particeps injuriæ*. And so it is if he in the remainder for life had entered, and disseised tenant for life, and made a feoffment in fee, this had been a forfeiture of the right of his remainder.

None of incor-  
poreal heredita-  
ments.

A particular estate of any thing that lies in grant cannot be forfeited by any grant in fee by deed. As if tenant for life or years of an advowson, rent, common, or of a reversion or remainder of land, by deed grants the same in fee, this is no forfeiture of the estates for nothing passes thereby but that which may lawfully pass; and of that opinion is Littleton in our books.

Contia as to  
tenants for  
years, rem. in  
king.

But if tenant for life or years of land, the reversion or remainder being in the king, make a feoffment in fee, this is a forfeiture, and yet no reversion or remainder is divested out of the king; and the reason is, in respect of the solemnity of the feoffment by livery tending to the king's disherison.

By matter of record, and that by three manner of ways. First by alienation. Secondly, by claiming a greater estate than he ought. Thirdly, by affirming the reversion or remainder to be in a stranger.

First, by alienation; and that of two sorts, viz. by alienation divesting, or not divesting, the reversion or remainder. Divesting, as by levying a fine, or suffering a common recovery of lands, whereby the reversion or remainder is divested: not divesting, as by levying a fine in fee, of an advowson, rent, common, or any other thing that lies in grant: and of this opinion is Littleton in our books. And so note two diversities: first, between a grant by fine (which is of record) and a grant by deed *in pais*; and yet in this they both agree that the reversion or remainder in neither case is divested: secondly, between a matter of record, as a fine &c. and a deed recorded, as a deed enrolled, for that works no forfeiture, because the deed is the original.

*What alienations of tenant for life divest the remainder.*

Secondly, by claim: and that may be in two ways, either express or implied. Express, as if tenant for life in a court of record claims the fee, or if lessee for years be ousted, and then he brings an assise *ut de libero tenemento*. Implied, as if in a writ of right brought against the tenant for life he takes upon himself to join the mise upon the mere right, which none but tenant in fee-simple ought to do. So if lessee for years loses in a *præcipe* and brings a writ of error for error in process, this is a forfeiture.

*Of his claiming the fee in open court.*

Thirdly, by affirming the reversion or remainder to be in a stranger, and that either actively or passively. Actively, in five ways. As first, if tenant for life prays in aid of a stranger, whereby he affirms the reversion to be in him. 2dly. If he attorns to the grant of a stranger; and there note also a diversity between an attornment of record to a stranger, and an attornment *in pais*, for an attornment *in pais* works no forfeiture. 3dly. If a stranger brings a writ of entry *in casu proviso*, and supposes the reversion to be in himself, if the tenant for life confesses the action, this is a forfeiture. 4thly. If tenant for life pleads covinously to the disherison of him in the reversion, this is a forfeiture. 5thly. If a stranger brings an action of waste against lessee for life, and he pleads *nul wast fait*, this is a forfeiture; or the like.

*Disclaiming reversion.*  
[252 a]

Passively, as if tenant for life accepts a fine of a stranger *sur conusans de droit come ceo &c.*; for thereby he affirms of record the reversion to be in a stranger.

*Tenant for life's accepting fine a forfeiture.*

*Remainder-man  
divested by fine  
may still enter  
for the for-  
feiture.*

Littleton here speaks of the forfeiture of an estate; and here it is to be known, that the right of a particular estate may be forfeited also, and that he who has but a right of remainder or reversion may take benefit of the forfeiture. As if tenant for life be disseised, and then levies a fine to the disseisor, he in the reversion or remainder may presently enter upon the disseisor for the forfeiture. And so it is if the lessee after the disseisin had levied a fine to a stranger, though to some respects *partes finis nihil habuerunt*, yet it is a forfeiture of his right.

*Tenant for life's  
lease for life a  
forfeiture.*

Littleton here speaks of an alienation in fee absolutely, but so it is if the lessee for life makes a lease for any other man's life, or a gift in tail. If A. be tenant for life, and makes a lease to B. for his life, and B. dies, and the lessee re-enters, yet the forfeiture remains. If tenant for life makes a lease for life, or a gift in tail, or a feoffment in fee, upon condition, and enters for the condition broken, yet the forfeiture remains. Littleton speaks of an estate for life; so it is of tenant in tail *apres possibilitie*, tenant by the curtesy, tenant in dower, or of him who has an estate during the life of I. S. &c. and so of tenant for years, tenant by statute merchant, statute staple, or *elegit*.

*Surrender and  
forfeiture dis-  
tinguished.*

Littleton says, "where the alienation in fee is made to another," which must be intended a stranger, for if it be made to him in reversion or remainder, it amounts to a surrender of his estate, as at large hath been spoken in the chapter of tenant for life.

*Remainder man  
for life may  
enter for a for-  
feiture, and his  
claim preserves  
the right.*

By Littleton it appears, that tenant for life in remainder may enter for the forfeiture of the first tenant for life, and that if the tenant for life in remainder make continual claim, and the alienee die seised, then may he in the remainder for life enter; and if he die before he enters, then he in the remainder in fee shall enter, because he in the remainder in fee could not make any claim [i. e. during the life of him in remainder for life], and therefore the right of entry, which tenant for life in remainder gained by his claim, shall go to him in remainder in fee in respect of the privity of estate: and so it is of him in the reversion in fee in like case, for he is also privy in estate.

If two joint-tenants be disseised, and one of them makes continual claim, and dies, the survivor shall take benefit of his continual claim in respect of the privity of their estate.

*Claim of one joint-tenant enures to survivor.*

But if tenant for life make continual claim, this shall not give any benefit to him in the remainder, unless the disseisor died in the lifetime of tenant for life, for the cause abovesaid, Section 414.

*Claim of tenant for life in possession enures not to remainder.*

### SECTION 417.

**BUT** *it is to be seen, of thee (my son) how and in what manner such continual claim shall be made; and to learn this well, three things are to be understood. The first thing is, if a man has a right of entry into any lands or tenements in divers towns in one county, if he enter into one parcel of the lands or tenements which are in one town in the name of all the lands or tenements in the same county; by such entry he shall have as good a possession and seisin of all the lands and tenements whereof he has title of entry, as if he had entered in deed into every parcel: and this seems great reason.*

*Entry into part in name of whole, good for lands in that county.*

*If a man has cause to enter into any lands or tenements &c.]* It is not sufficient to tell one generally what he should do, but to direct him how, and in what manner he shall do it, as Littleton does in this place. And here, the general rules of our author are to be understood, that the entry of a man, to recontinue his inheritance or freehold must ensue his action for the recovery of the same.

[252 b]

*A right of entry &c.]* But if three men disseise me severally of three several acres of land, all being in one county, and I enter into one acre in the name of all the three acres, this is good for that acre only which I entered into, because each disseisor is a several tenant of the freehold, and as I must have several actions against them for the recovery of the land, so my entry must be several. And so it is if one man disseise me of three acres of ground and then lets the same severally to three persons for their lives &c., there the entry upon one lessee, in the name of the whole, is good for no more than that acre which he hath in his possession. But if the disseisor had let severally the said three acres to three

*Contra if the disseisin or right of entry be several, or the lands be let to several tenants for years.*

persons for years, there the entry upon one of the lessees, in the name of all the three acres, shall recontinue and revest all the three acres in the disseisee, for that the disseisee might have had one assise against the disseisor, because he remained tenant of the freehold for all the three acres, and therefore one entry shall serve for the whole. If a man disseise me of one acre at one time, and after disseise me of another acre in the same county at another time, in this case my entry into one of the acres in the name of both is good : for that one assise might be brought against him for both disseisins. But if I enfeoff a man of one acre of ground upon condition, and at another time I enfeoff the same man of another acre in the same county upon condition also, and both the conditions are broken, an entry into one acre in the name of both is not sufficient, for I have no right to the land nor action to recover the same but a bare title, and therefore several entries must be made into the same in respect of the several conditions. But an entry in one part of the land, in the name of all the land subject to one condition, is good, although the parcels be several and in several towns. And so note a diversity between several rights of entry, and several titles of entry by force of a condition.

*Separate conditions require separate entries for breach.*

*Different counties.*

*In one county.]* For if the lands lie in several counties there must be several actions, and consequently several entries, as hath been said.

*General entry without saying for what land.*

*In the name of all &c.]* If one disseise me of two several acres in one county, and I enter into one of them generally, without saying, in the name of both ; this shall revest only that acre wherein entry is made, as hath been said : and that is proved by our books, which say, that if I bring an assise of two acres, if I enter into one pending the writ, albeit it shall revest that acre only, yet the writ shall abate.

[253 a]

## SECTION 418.

Same.

*FOR if a man enfeoff another without deed of lands which he has in many towns in one county, and deliver seisin of parcel of the tenements within one town, in the name of all the lands, all the said tenements &c. pass by force of the said livery ; à multò fortiori, it seems good reason, that when a man has title to enter into lands in*

*divers towns in one county, that by the entry made by him into parcel, this shall vest a seisin in him of all, and by such entry he has possession and seisin in deed the same as if he had entered into every parcel.*

## SECTION 419.

[253 b]

*THE second thing to be understood is, that if a man has title to enter into any lands or tenements, but dares not enter into the same lands or tenements nor into any parcel thereof for fear of beating, or for doubt of maiming, or for doubt of death if he approaches as near to the tenements as he dare, then if by word of mouth he claim the lands to be his, presently by such claim he has a possession and seisin in the lands as well as if he had entered in deed, although he never had possession or seisin of the same lands or tenements before the said claim.*

Entry prevented for fear of injury, claim as near as may be, equal thereto.

Here it is to be observed, that every doubt or fear is not sufficient, for it must concern the safety of the person of a man and not his houses or goods; for if he fear the burning of his houses or the taking away or spoiling of his goods, this is not sufficient, because he may recover the same or damages to the value without any corporal hurt. Again, if the fear concerns the person, yet it must not be a vain fear, but such as may befall a constant man; as if the adverse party lie in wait in the way with weapons, or by words menace to beat maim or kill him that would enter; and so in pleading must he show some just cause of fear, for fear of itself is internal and secret. But in a special verdict, if the jurors find that the disseisee did not enter for fear of corporal hurt, this is sufficient, and it shall be intended that they had evidence to prove the same. And it seems that fear of imprisonment is also sufficient, for such a fear suffices to avoid a bond or a deed; for the law has a special regard to the safety and liberty of a man.

Fear of corporal hurt or imprisonment sufficient, but cause must be shewn — Fear of arson not enough.

*By such claim he has a possession and seisin &c.]* Here it is to be observed, that there are two manner of entries, viz. an entry in deed and an entry in law. An entry in deed is sufficiently known. An entry in law is when such a claim is made as is here expressed, which entry in law is as strong and as forcible in law as an entry indeed, and that as well where the lands are in the hands of one by

Entry in law and in deed same in effect.

title as by wrong. And therefore upon such an entry in law an assize lies, as well as upon an entry in deed, and such an entry in law shall avoid a warranty, &c. But here is a diversity to be observed between an entry in law and an entry in deed, for that a continual claim of the disseisee being an entry in law shall vest the possession and seisin in him for his advantage but not for his disadvantage. And therefore if the disseisee bring an assize, and pending the assize he makes continual claim, this shall not abate the assize, but he shall recover damages from the beginning; but otherwise it is of an entry in deed.

[254a]

## SECTION 420.

Same.

*AND that the law is so, is well proved by a plea of assize in the book of assizes anno 38 E. 3. p. 23., the tenor whereof follows in this manner: In the county of Dorset before the justices it was found by verdict of assize, that the plaintiff who had right by descent of inheritance to have the tenements in plaint at the decease of his ancestor, was abiding in the town where the tenements were, and by parol claimed the tenements amongst his neighbours, but for fear of death he durst not approach the tenements, but brought his assize, and upon this matter found, it was awarded that he should recover &c.*

*Reported cases are the strongest authority in law.*

Here it appears that our book-cases are the best proofs what the law is, *argumentum ab autoritate est fortissimum in lege*. And after the example of Littleton, book-cases are principally to be cited for deciding of cases in question, and not any private opinion, *teste meipso*.

## SECTION 421.

Same.

*THE third thing is, that he who has title to enter, when he will make his claim, if he dare approach the land, then he ought to go to the land, or to parcel of it, and make his claim, and if he dare not approach the land for doubt or fear of beating, or maiming, or death, then ought he to go and approach as near as he dare towards the land, or parcel of it, to make his claim.*



*Ought he to go and approach as near &c.*] By this it should seem, that by the authority of our author, if the disseisee comes as near to the land as he dare &c., and makes his claim, this should be sufficient, albeit he be not within the view. But it seems that where a continual claim shall divest any estate in any other person in any lands or tenements, there, as hath been said, he who makes the claim ought to enter into the land or some part thereof, according to the opinion of our author: but where the claim is not to divest any estate, but to bring him who makes it into actual possession, there a claim within view suffices; as upon a descent, the heir having the freehold in law may claim land within view to bring himself into actual possession, and in that sense is the opinion of the court to be intended. But yet the entry into some parcel in the name of the residue is the surest way.

*Claim within view not enough to divest an estate, but it seems sufficient to vest the possession.*

[254b]

## SECTION 422.

*AND if his adversary who occupies the land dies seised in fee or in fee-tail within the year and a day after such claim, whereby the lands descend to his son and heir, yet may he who makes the claim enter upon the possession of the heir.*

Same.

## SECTION 423.

*BUT in this case after the year and day, he who made the claim cannot enter: and therefore if he will be sure that his entry shall not be taken away, it behoves him within the year and day after the first claim to make another claim in form aforesaid, and so over, that is to say, to make a claim within every year and day during the life of his adversary, and then at what time soever his adversary die seised, his entry shall not be taken away by any descent, and this is called continual claim.*

*But a claim within view must be renewed every year and day.*

[255a]

It is to be observed that the day whereon the claim is made shall be accounted one: as for example, if the claim be made on the second day of March, that day shall be accounted as one; for Littleton says in the section next before (after the claim made),

*Day of claim counted as one.*

and then the year must end the 1st day of March, and the day after is the 2d day of March. [But it is to be remembered that a descent during the first five years is not such as will toll an entry, Sect. 385.]

[255b]

## SECTION 424.

Same.

*BUT he may make his claim at what time he will within the year and day.*

## SECTION 425.

Descent cast affects not the claim.

*ALSO, if the adversary be disseised within the year and day, and the disseisor dies seised, such dying seised shall not aggrieve him who made the claim, but he may enter, &c.*

## SECTION 426.

Death of disseisor within year and day after disseisin.  
[256a]

*ALSO, if a man be disseised, and the disseisor dies seised within the year and day next after the disseisin made, whereby the tenements descend to his heirs, in this case the entry of the disseisee is taken away. And for this cause it will be good for the disseisee to make his claim in as short time as he can after the disseisin.*

*Disseisee now allowed five years.*

This in case of a disseisor is now altered by a statute made since Littleton wrote, as hath been said, Sec. 385. for if the disseisor die seised within five years after the disseisin, though there be no continual claim made, it shall not take away the entry of the disseisee, but after the five years there must be such continual claim as was at the common law: but that statute extends not to any feoffee or donee of the disseisor immediate or mediate, who remain still as at the common law, as hath been said.

## SECTION 427.

ALSO, if such disseisôr occupies the lands forty or more years without any claim made by the disseisee &c. and the disseisee a little before the death of the disseisor makes a claim in form aforesaid, if it so happen that within the year and day after such claim the disseisor dies &c. the entry of the disseisee is congeable &c. And therefore it shall be good for such a man who has not made claim and who has good title of entry when he hears that his adversary is languishing, to make his claim &c.

Claim at any time during disseisor's life good.

## SECTION 429.

[256b]

ALSO, of the foregoing, know (my son) two things. One is, where a man has title to enter upon a tenant in tail, if he makes such a claim to the land, then is the estate tail defeated, for this claim is as an entry made by him, and is of the same effect in law as if he had been upon the same tenements and had entered into the same, as before is said. And then when the tenant in tail immediately after such claim continues his occupation in the lands, this is a disseisin made of the same tenements to him who made such claim, and so by consequence the tenant then has a fee simple.

Claim turns estate-tail into fee-simple.

## SECTION 430.

THE second thing is, that as often as he who has right of entry makes such claim, and notwithstanding this his adversary continues his occupation, so often the adversary doth wrong and disseisin to him who made the claim. And for this cause so often may he who makes the same claim for every such wrong and disseisin done unto him, have a writ of trespass Quare clausum fregit &c. and recover damages &c.

Occupation after claim a disseisin for which trespass lies.

[257a]

Have a writ of trespass, quare clausum fregit and recover damages.] The disseisee may have an action of trespass against

Damages, costs, and mesne profits.

the disseisor, and recover damages for the first entry without any regress, but after regress he may have an action of trespass with a *continuando*, and recover as well for all the mean occupation as for the first entry. And here note, that Littleton includes costs within the damages.

## SECTION 431.

Writ of forcible entry also lies with treble damages.

OR *he may have a writ upon the statute, 5 Rich. 2. c. 1. or if his adversary commenced his occupation of the tenements with force and arms, or with a multitude of people at the time of such claim &c. defends it then immediately after the same claim he who makes the same may for every such act have a writ of forcible entry and recover treble damages &c.*

Multitude, how many.

*Multitude.*] One or more may commit a force, three or more may commit an unlawful assembly a riot or a rout. A multitude here spoken of (as some have said) must be ten or more. *Multitudinem decem faciunt.* And so (say they) it is said *de grege hominum.* But I could never read it restrained by the common law to any certain number, but left to the discretion of the judges.

Forcible entry what. [257 b]

*A writ of forcible entry and shall recover treble damages.*] This writ is grounded upon the statute of 8 H. 6., and lies either where one enters with force, or where he enters peaceably and detains it by force, or where he enters by force and detains it by force. And in this action without any regress the plaintiff shall recover treble damages, as well for the mean occupation as for the first entry, by virtue of the statute. And albeit he shall recover treble damages, yet shall he also recover costs which shall be trebled also. One may commit a forcible entry, as hath been said, in respect of the armour or weapons which he hath and which are not usually borne, or in respect of his violence and threats to the terror of another. And if three or four go to make a forcible entry, albeit one alone use the violence, all are guilty of force. If the master comes with a greater number of servants than usually attend on him it is a forcible entry. And it is to be understood, that force is sometimes implied in law, thus every trespass rescous and disseisin implies a force, and is *vi et armis*; there is also an actual force, as with weapons,

number of persons &c., and when an entry is made with such actual force an action lies upon the said statute. See before more of force and arms, Sect. 240.

## SECTION 432.

*ALSO, it is to be seen whether the servant of a man who has title to enter, may by the commandment of his master make continual claim for his master or not.*

Claim by servant, agent, or attorney good.

## SECTION 433.

*AND it seems that in some cases he may do this: for if he by his commandment comes to any parcel of the land, and there makes claim &c. in the name of his master, this claim is good enough for his master, for that he does all which his master should or ought to do in such case &c. Also if the master says to his servant, that he dares not approach the land nor to any parcel thereof to make his claim &c., and that he dare not go nearer than a place called Dale, and commands his servant to go to the same place of Dale, and there make a claim for him &c., if the servant do this &c., that also seems to be a good claim for his master, the same as if his master were there in his proper person, for that the servant did all which his master durst and ought to do by the law in such a case &c.*

Same.

[258 a]

*By commandment.]* If an infant or any man of full age have any right of entry into any lands, any stranger in the name and to the use of the infant or man of full age may enter into the lands, and this regularly shall vest the lands in them without any commandment precedent, or agreement subsequent. But if a disseisor levy a fine with proclamation according to the statute, a stranger without a commandment precedent, or an agreement subsequent within the five years, cannot enter in the name of the disseisee to avoid the fine. And that resolution was grounded upon the construction of the statute of 4 H. 7. c. 24. But an assent subsequent within the five years would be sufficient. *Omnis enim rati-habitio retrotrahitur et mandato æquiparatur*, as hath been said.

Entry to avoid a fine may be made by attorney or agent, on an assent subsequent or precedent.

## SECTION 434.

Same. *ALSO, if a man be languishing or decrepid he may enter or claim by his servant.*

Seisin by attorney.

[258 b]

If a man make a letter of attorney to deliver seisin to I. S. upon condition, and the attorney delivers it absolute, this is void: and some hold that if the warrant be absolute and the seisin upon a condition, the livery is void.

## SECTION 435.

Same. *BUT if the master be in good health, and the servant in going learns that injury is intended, and therefore comes as near the land as he dare and makes claim for his master, it is doubtful whether such claim will avail.*

[259 a]

## SECTION 436.

Entry not tolled by descent during time disseisee is under duress.

*ALSO, some have said, that where a man is in prison and is disseised, and the disseisor dies seised during the time that the disseisor is in prison, whereby the tenements descend to the heir of the disseisor, that this shall not hurt the disseisee who is in prison, but that he may well enter notwithstanding such a descent, because he could not make continual claim when he was in prison.*

## SECTION 437.

If disseisin be during imprisonment.

*BUT the opinion of all the justices, p. 11. H. 7. was, that if the disseisin be before the imprisonment, although the dying seised be during the imprisonment, his entry is taken away.*

## SECTION 438.

[259 b]

**FOR** if a recovery be by default against a person in prison, he may avoid the judgment by a writ of error, à multò fortiori, shall a descent had when he is in prison not hurt him &c., especially seeing he could not go out of prison to make continual claim. Same.

## SECTION 439.

**IN** the same manner, if a man be out of the realm in the king's service, a descent cast shall not hurt him, for he could not make continual claim, and therefore when he comes into England he may enter upon the heir of the disseisor. Ambassadors not hurt by a descent cast.

Out of the realm] (*id est*) *extra regnum*, out of the power of the king of England; for if a man be upon the sea of England, he is within the kingdom or realm of England and within the ligeance of the king of England. And yet *altum mare* is out of the jurisdiction of the common law, and within the jurisdiction of the lord admiral, whose jurisdiction is very ancient, and long before the reign of Edward the Third, as some have supposed, as may appear by the laws of Oleron, (so called, for that they were made by king Richard the First when he was there) that there had been then an admiral time out of mind, and by many other ancient records in the reigns of Henry the Third, Edward the First, and Edward the Second, is most manifest. Out of the realms, what.

[260 b]

## SECTION 440.

**ALSO**, some have said, that if a man be out of the realm, though he be not in the king's service, a descent cast during his absence shall not prejudice his right of entry on his return, provided the disseisin be while he is out of the kingdom, but that otherwise it should be if the disseisin were while he was within the realm either at the time of the disseisin, or at the time of the dying seised of the disseisor. Persons out of the realm not prejudiced by descent cast.

Bond made out  
of England how  
sued for.

[261 b]

*Note*, An obligation made beyond the seas may be sued here in England in what place the plaintiff will. As if it bear date at Bourdeaux in France, it may be alleged to be made in a certain place called Bourdeaux in France, in Islington in the county of Middlesex, and there it shall be tried, for whether there be such a place in Islington or no, is not traversable in that case.

[262 a]

SECTION 441.

Common law  
entry to avoid  
fine must be  
within a year  
and day.

ANOTHER *matter some allege is that before the statute 34 E. 3. c. 15. (by which statute non-claim is ousted) the law was this: that if a fine be levied of certain lands or tenements, and any stranger to the fine who has right to recover the same, makes not his claim thereof within a year and a day next after the fine is levied, he shall be barred for ever. But if he be out of the realm, at the time of the fine levied &c., or in prison, or not of full age, he is not barred, although he make not his claim, &c. And that the law is so is said to be proved by the statute de donis &c. W. 2.*

Now five years  
allowed.

But now, since Littleton wrote, by the statute of 4 H. 7. five years (after proclamation made upon the fine) are given to him who has right to make a claim, or pursue his action, where the common law gave him but a year and a day. But this statute of 4 H. 7. extends only to fines, and not to non-claim upon a judgment in a writ of right, and therefore the said statute of 34 E. 3. here cited by Littleton, which ousts non-claim only to fines levied, extends not to a judgment in a writ of right at this day, and therefore the common law in that case remains to this day, viz. that claim must be made within a year and a day after judgment. Also if a fine be levied without proclamations, or without so many as the law requires, then the statute of non-claim extends to such a fine.

Non-claim at  
common law  
run against  
feme covert  
and reversion,  
contra now.

[262 b]

*Stat. West. 2.]* In this statute is one person omitted who is added in the statute *de modo levandi fines, viz. et sanæ memoriæ*. But a feme-covert had no privilege of non-claim at the common law, as some have said, because she had a husband that might make claim for her. Also they in reversion or remainder expectant upon any estate of freehold were barred by the common law; and yet they could make no claim, because, as hath been said, it belonged



to the particular tenant, and not to them, because their entry was not lawful; which was one of the principal causes of making the said statute of 34 E. 3. which ousted non-claim. But these cases of coverture, and of them in reversion and remainder, are now without question holpen, and just provision made for the saving of their rights and titles by the said statute of 4 H. 7. as by the said act appears.

## SECTION 443.

[263 b]

ALSO, if an abbot of a monastery die, and during the time of vacation a man wrongfully enters in certain parcel of land of the monastery, claiming the land to him and his heirs, and of that estate dies seised, it seems to some, that the abbot may well enter in this case, for that the convent is but a dead body without a head. And in time of vacation a grant made unto them is void.

Entry on corporation during vacancy of its head.

Here, first, it is to be observed, that albeit the freehold and inheritance is in this case in no person, but in abeyance or in consideration of law, yet an entry and claim by one who has no right shall gain the inheritance by wrong. And so it is in case of a bishop, parson, vicar, prebend, or any other sole corporation. And in the statute of Merlebridge it is called an intrusion. Secondly, that seeing by the death of the abbot (which is the act of God) no person is able to make continual claim, therefore a descent during that time shall not prejudice the successor; for, as hath been said, *impotentia excusat legem*. If an usurpation be had to a church in time of vacation, this shall not prejudice the successor to put him out of possession, but at the next avoidance he may present.

Freehold in abeyance during that time.

Advoidson, usurpation during vacancy.

*For the convent is but a dead body &c.]* This is *ratio una*, but not *unica*: for though the rest of the corporation be no mort persons, as the chapter in case of dean and chapter, or the commonalty in case of mayor and commonalty; yet cannot they when there is no dean or mayor make claim, because they have neither ability nor capacity to take or to sue any action, as our author here says.

Chapter without dean, commonalty without mayor can make no claim.

*For in time of vacation a grant made to them is void &c.]* And the reason is, because the body politic which is capable, is not com-

Or take by grant, except in reversion.

[264 a] plete, but wants the head. But this is to be understood of an immediate grant; for if, during the vacation of the abbathy of Dale, lease for life, or a gift in tail be made, the remainder to the abbot of Dale and his successors, this remainder is good, if there be an abbot made during the particular estate. If there be a mayor and commonalty of D. and the mayor dies, a grant made to the mayor and commonalty of D. is void for the cause aforesaid; but in that case if a lease for life be made, the remainder to the mayor and commonalty of D. the remainder is good, if there be a mayor elected during the particular estate.

## CHAPTER VIII. SECTION 444.

## OF RELEASES.

RELEASES are of two kinds, viz. releases of rights which men have in lands or tenements, and releases of actions real or personal. The first sort are commonly in this form or to this effect: —

Releases are of rights or of actions.

## SECTION 445.

[264 b]

“ Know all men by these presents, that I A. of B. have remised, released, and from me and my heirs quitted claim: *or thus*, for me and my heirs quitted claim of D. all the right, title, and claim which I have, or by any means may have, of and in one messuage with the appurtenances in F. &c.” *And it is to be understood, that these words “ remise” and “ quit-claim,” are of the same effect as the word “ release.”*

Form of release of right.

Here Littleton adduces precedents of releases: and precedents both teach and illustrate, and therefore our student will do well to collect a store of precedents of all kinds.

Precedents, their value.

*Remise, release, and quit-claim.*] Here Littleton shews that there are three proper words of release, though they are much of the same effect: there are also the words “ renounce” and “ acquit,” and there are many other means of release; as if the lessor grants to the lessee for life that he shall be discharged of his rent, this is a good release. *Vide Sect. 532.*

What words necessary to release.

And it is to be understood, that there are releases in deed and releases at law; the former being express, must of necessity be by deed. The latter are sometimes by deed, and sometimes without

Releases, express and implied distinguished.

deed. As if the lord disseise the tenant, and makes a feoffment in fee by deed or without deed, this is a release of the seignory. And so it is if the disseisee disseise the heir of the disseisor, and makes a feoffment in fee by deed or without deed, that is a release in law of the right. And the same law is of a right of [or chose in] action, as if the obligor makes the obligee his executor, this is a release in law of the action, but the duty remains, for which the executor may retain goods of the testator to the amount of his debt. So if the feme obligee takes the obligor to husband, this is a release in law. So if there be two feme obligees, and one takes the debtor to husband [this is a release of the whole obligation.] If an infant of the age of seventeen years release a debt, this is void; but if an infant make the debtor his executor, this is a good release in law of [his right of] action [on the bond.] But if a feme executrix takes the debtor to husband, this is no release in law, for that would be a wrong to the dead and work a *devastavit*, which an act in law never shall do.

Obligee made executor, a release.

So if feme obligee marry obligor.

Infant's release.

Feme executrix marrying debtor.

Release in deed must be in fee, it cannot be for life.

But it is to be observed, that there is a diversity between a release in deed and a release in law; for if the heir of the disseisor makes a lease for life, and the disseisee release his right to the lessee for his [own] life [only] the heir's right is gone for ever. But if the disseisee should disseise the heir of the disseisor and then make a lease for life, this is only a release in law, and in that case the right is released during the life of the lessee only, for a release in law shall be expounded more favourably, according to the intent and meaning of the parties, than a release in deed, which being an act of the party shall be taken most strongly against himself; and so it is in the case aforesaid, where the debtor is made executor.

[265 a]

"Right" includes title and claim.

*All the right.*] This word includes not only a right for which a writ of right will lie, but also any title or claim which arises by force of a condition, by a forfeiture in mortmain, or the like, and for which no action is given at law but only an entry.

## SECTION 446.

The words "hereafter have" are useless, as no one

ALSO, these words which are commonly put into releases scilicet "all the right which he shall hereafter have" are simply void in law; for no right passes by the release, but the right only which

*the releasor has at the time of the release made. As if there be father and son, and the father be disseised, and the son (living his father) releases by deed all the right which he has or may have in the same tenements to the disseisor without clause or warranty &c. and after the father dies &c. the son may lawfully enter upon the possession of the disseisor, for that he had no right in the land in his father's life, [and could therefore pass none to the disseisor].*

can release a right which he has not at the time.

Note, a man may have a present right, though it cannot take effect in possession, but *in futuro*, [that is, he may have a present right to a future estate or interest]. As in the case of a reversion or remainder that confers a vested right which the owner may presently release. But in the case put by Littleton where the son releases in the lifetime of his father, the release is void, because he has no right at all at the time when the release is made, [he being then only heir apparent] and all the right being in his father; consequently after the decease of his father, it shall be lawful for the son to enter on the land against his own release. But if a husband seised in fee in his own right makes a lease for life and dies, a release made by his wife of her dower to him in reversion is good, albeit she has no cause of action against him *in presenti*. And in the case put by Littleton of a release by an heir apparent, if a clause of warranty had been annexed to such release, then the son should have been barred. For albeit the release itself cannot bar the right for the cause aforesaid, yet the warranty may rebut, and bar the releasor and his heirs notwithstanding the right released was not in him at the time: and the reason (which in all cases should be sought out) is to prevent a circuitry of action, which is not favoured in law; [for if the releasor should enter upon or recover against the ter-tenant or releasee, *he* could recover again by force of the warranty the same or other lands of equal value from the warrantor]; yet is there a diversity between a warranty and a feoffment; for if there be grandfather, father, and son, and the father disseises the grandfather, and makes a feoffment in fee, and then the grandfather dies, the father against his own feoffment shall not enter; but if he die, his son may enter. And so note a diversity between a release, a feoffment, and a warranty; a release in the above case is void; a feoffment is good against the feoffor, but not against his heir; a warranty is good both against himself and his heirs.

Release by heir apparent, without warranty, bad.

Release of dower to reversioner good.

Release, feoffment, and warranty distinguished. [265 b]

Bare authority  
(as to executors  
to sell) cannot  
be released;

And here are three diversities worthy of observation, viz. 1st. Between a power or an authority, and a right. 2dly. Between powers and authorities themselves. 3dly. Between a right and a possibility. As to the first, if a man by his last will devises that his executors shall sell his land, and dies, if the executors release all their right and title in the land to the heir, this is void, for that they have neither right nor title in the land, but only a bare authority, which is not within Littleton's case of a release of right. And so it is if *cestui que use* had devised that his feoffees should have sold the land. Albeit they had made a feoffment over, yet might they sell the use, for their authority in that case is not given away by the livery.

otherwise of  
power of revoca-  
tion.

As to the second, there is a diversity between such powers or authorities as are only to the use of a stranger and nothing for the benefit of him who makes the release (as in the case before), and a power or authority which respects the benefit of the releasor, such as the usual powers of revocation, in that case when the feoffor has power to alter, change, determine, or revoke the uses (which he may do for his own benefit) then may he release; and if the estates before were defeasible, he may by his release make them absolute and seclude himself from any alteration or revocation, as it hath been resolved; Albain's case, 1 Co. 107.

No release of a  
possibility or  
contingency.

As to the third, before judgment the plaintiff in an action of debt releases to the bail in the king's bench all demands; and after judgment is given, this shall not bar the plaintiff to have execution against the bail, because at the time of the release he has but a mere possibility, and neither *jus in re* nor *jus ad rem*, but the duty is to commence after a contingency and therefore could not be released presently. So if the conusee of a statute &c. release to the conusor all his right in the land, yet may he afterwards sue execution; for he has no right in the land till execution, but only a possibility; and so have I known it adjudged.

## SECTION 447.

Releasee must  
have the free-  
hold;

ALSO, in releases of all right to land, it behoves the releasee to have an estate of freehold in the land, either in deed, or in law, at

*the time of the release made ; if he has such freehold, then the release is good.*

*All right.]* This must be intended of a bare right, and not of a release of right whereby any estate passes, as in the case of a release from the lessor to his lessee for years, as shall be said hereafter. Also it must be intended of a release of a right of freehold at the least, and not to a right for any term of years or chattel real ; as if lessee for years be ousted and he in the reversion [thereby] disseised, and the disseisor makes a lease for years [to a stranger], and the first lessee makes a release [to such stranger, that release is good]. And in some cases it is observable that a release of a right made to one who has neither freehold in deed nor freehold in law, is good and available in law, as where the demandant releases to the vouchee, this is good though the vouchee has nothing in the land : but the reason is, that when the vouchee enters into warranty, he becomes tenant to the demandant, and may render the land to him in respect of the privity ; but a stranger cannot release to the vouchee, because, *in rei veritate*, he is not tenant of the land.

*if the right released be a freehold, otherwise not.*

If a disseisor makes a lease for life, the disseisee may release to the tenant for life ; for to such a release of a bare right there needs no privity, as shall be said hereafter. But if the disseisor makes a lease for years, the disseisee cannot release to the tenant for years, because he has no estate of freehold. And yet in some cases a freehold right may become merged and drowned in a chattel ; as if a fême who has a right to dower releases to the guardian in chivalry, then her right to a freehold shall drown in the chattel, because the writ of dower lies against the guardian and the heir may take advantage of such a release.

*Disseisee may release to tenant for life, but not to tenant for years.*

[266 a]

And it is to be observed, that by an ancient maxim of the common law, a right of entry, or a chose in action, cannot be granted or transferred to a stranger, and thereby is avoided great oppression, injury, and injustice [i. e. in the prevention of maintenance and dealing in rights and titles]. And therefore well says Littleton, that he to whom a release of a right is made must have a freehold.

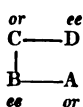
*Right of entry or action cannot be released to a stranger.*

For the better understanding [the mode of conveying or] transferring naked rights to lands or tenements [from one person to another] either by release, feoffment, or otherwise, it is to be

*Rights of property and possession distinguished.*

known, that there is *jus proprietatis*, a right of ownership, *jus possessionis*, a right of seisin or possession, and *jus proprietatis et possessionis*, a right both of property and possession; and this last is anciently called *jus duplicatum*, or *droit droit*. For example, if a man be disseised of an acre of land, the disseisee has *jus proprietatis*, and the disseisor has *jus possessionis* [that is, as against strangers, but not as it should seem against the disseisee, as against him the disseisor cannot well be said to have a right, but only a bare naked possession]; if the disseisee releases to the disseisor, then the disseisor shall have *jus proprietatis et possessionis* [and his title will be complete.]

In what cases disseisee may take advantage of release to his disseisor.



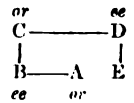
Issue recovering land cannot take advantage of release to discontinuee;

nor can disseisee in certain cases.

And regularly it holds true, that when a naked right to land is released to one who has *jus possessionis*, and another by a mean title recovers the land from him, the right of possession shall draw the naked right with it, and shall not leave a right in him to whom the release is made. For example, if the heir of the disseisor being in by descent, A. disseises him B., and then [the original] disseisee D. releases to A., now if the heir of the disseisor B. enters into the land, and regains the possession, he shall have the benefit of the release of right made by his disseisee to A. But if donee in tail discontinues in fee, whereby the reversion of the donor is turned into a naked right, and the donor afterwards releases to the discontinuee, [and the tenant in tail] dies, and thereupon the issue in tail recover the land against the discontinuee, [this recovery shall nevertheless] leave the reversion in the discontinuee [and shall not carry with it the benefit of the release to the issue]; for the issue in tail can recover [nothing] but the estate tail only, which by consequence must leave the reversion in the discontinuee, for the donor cannot have it [again] against his [own] release. Another diversity is observable when the naked right is obtained before the acquisition of the defeasible estate, for there the recontinuance of the defeasible estate shall not draw with it the preceding right. As if [in the first mentioned case] the disseisee disseise the heir of the disseisor, albeit the heir recover the land against the disseisee, yet shall he leave the preceding right in the disseisee. So if a woman who has a right of dower disseise the heir, and he recovers the land against her, yet shall [that recovery] leave the right of dower in her. Another diversity is to be noted, where the mere right is subsequent, and is transferred by act in law; there, albeit the possession be recontinued, yet that shall not draw with it the naked right,



but shall leave it in him who had it before; as if the heir of the disseisor (B) be disseised [by A.], and the disseisor (A.) infeoffs the heir apparent (E) of the [original] disseisee (D), he being of full age, and afterwards the disseisee (D) dies, whereupon the naked right descends to his heir (E), and the heir of the disseisor (B) recovers the land against him, yet this recovery leaves the naked right in the heir of the disseisee (E). So if the discontinuee of tenant in tail infeoffs the issue in tail of full age, and tenant in tail dies, and then the discontinuee recover the land against him, yet he leaves the naked right in the issue. But if the heir of the disseisor (B) be disseised, and the disseisee (D) releases to the disseisor (A) upon condition, if the condition be broken, it shall revest the naked right [in D].



[266b]

SECTION 448.

**FREEHOLD in law is this:**—*if a man disseises another, and dies seised, whereby the tenements descend to his son, albeit his son does not enter yet he has a freehold in law by force of the descent cast upon him; and therefore a release made to him so being seised of a freehold in law [before entry] is good enough; and if he takes a wife, being so seised in law, although he never enter in deed, and dies, yet shall his wife be endowed.*

Seisin in law what.

Here Littleton describes what a freehold in law is, for he had before spoken in many places of a freehold in deed. And freehold in deed Bracton calls a natural seisin, and freehold in law a civil seisin.

If a man levy a fine to another *sur conusance de droit come ceo que il ad de son done*, or a fine *sur conusance de droit tantum*; these are feoffments of record, and the conusee has a freehold in law in him before he enters.

By fine.

Upon an exchange, the parties have neither freehold in deed nor freehold in law before they enter; so upon a partition the freehold is not removed until an entry.

Exchange or partition.

If tenant for life surrender to him in reversion who accepts the same, then has the reversioner a freehold in law before entry. So upon a livery within view, no freehold is vested before actual entry.

Surrender.

*Bargain and sale. Uses.*

If a man bargain and sell land by deed indented and enrolled, the freehold in law passes presently, [i. e. before enrolment, and now since the Statute of Uses, the freehold in deed also passes immediately on the execution of the deed, provided it be duly enrolled within six months.] And so when uses are raised by a covenant [to stand seised] upon good consideration [a freehold in law passes presently; and now since the Statute of Uses a freehold in deed also passes immediately on the execution of the instrument.]

## SECTION 449.

Releasee must have the freehold; but freehold in reversion or remainder enough.

[267 a]

ALSO, a release of right is good, albeit the releasee has neither the freehold in deed or in law [in possession if he has an estate of freehold or inheritance in reversion.] As if the disseisor lets the land which he has by disseisin to another for term of his life, saving the reversion to him, if the disseisee or his heir release to the disseisor all his right &c. this release is good, because he to whom the release is made had in law a reversion at the time of the release made.

## SECTION 450.

Release to one remainder-man enures to all.

IN the same manner it is, where a lease is made to a man for term of life, with remainder to another for term of another man's life, with remainder to a third person in tail, with remainder to a fourth in fee, if a stranger who has right to the land releases all his right to any of the persons in remainder, such release is good, because each of them has a remainder in deed vested in him.

## SECTION 451.

Release to one having a right only void.

BUT if tenant for life be disseised, [which disseisin being necessarily in fee operates to divest and turn to a right all the remainders] and afterwards he who has any prior right to the lands, (the possession being in the disseisor) releases to one of the remainder men, this release is void, because he to whom it is made has not a remainder in deed at the time of the release made but only a right to a remainder.

## SECTION 452.

[267 b]

AND note, that every release made to the person who has a reversion or remainder in deed, enures to the benefit of the tenant of the freehold, if he has the release in hand to plead.

Release to reversioner enures to particular tenant.

## SECTION 453.

IN the same manner if a release be made to the tenant for life, or to the tenant in tail, this shall enure to the benefit of those in reversion or remainder, as well as to the tenant of the freehold, and they shall have as great advantage of this [as the particular tenant] if they can shew it.

Et è converso.

If two tenants in common of land grant a rent charge of forty shillings out of the same to one in fee, and the grantee releases to one of them [all his right, claim and demand &c.] this shall extinguish but twenty shillings of the rent, for that the grant in judgment of law was originally several. So it is if two men be seised of several acres, and they grant a rent *ut supra*. But there is a diversity between several estates in several lands, and several estates in one land; for if tenant for life and reversioner join in a grant of a rent out of the lands, then if the grantee releases either to him in reversion, or to the tenant for life, the whole rent is extinguished, for it is but one rent, issuing out of both estates, and so note the diversity.

Release of rent to one tenant in common extinguishes only a moiety; same to tenant for life or remainder-man extinguishes the whole.

*If the tenant has the release in hand to plead.*] For albeit he in the reversion or remainder is a stranger to the deed when the release is made to the particular tenant, and the tenant for life or in tail is a stranger to the deed when the release is made to him in reversion or remainder, yet seeing they are privies in estate, none of them in pleading shall take benefit thereof, without shewing the same in court, which is worthy to be observed.

Release must be produced in court.

[268 a]

## SECTION 454.

But release of  
seigniority to one  
having a right  
only good.

ALSO, if there be lord and tenant, and the tenant be disseised, [whereby his estate is turned into a mere right] and then the lord releases to the disseisee [i. e. to the rightful tenant] all the right which he [the lord] has in the seigniority or in the land, this release is good to extinguish the seigniority, by reason of the privity which is between the lord and the disseisee.

Five kinds of  
releases.

From what has been said it appears that a seigniority, a rent, or a right, either *in presenti* or *in futuro*, may be released five different ways, and the first three without any privity. First, to the tenant of the freehold in deed or in law. Second, to him in remainder. Third, to him in the reversion. The other two in respect of privity: as, first, here the lord releases his seigniority to the tenant being disseised, having but a right, and no estate at all: secondly, in respect of the privity, without any estate or right: as by the demandant to the vouchee, or donor to the donee after the donee has discontinued in fee, as appears hereafter in this chapter.

[268 b]

## SECTION 455.

Lease in tail  
rendering rent,  
release to lessee  
disseised, ex-  
tinguishes rent  
but passes no-  
thing in rever-  
sion.

ALSO, if land be given to a man in tail, reserving to the donor and his heirs a certain rent, if the donee be disseised, and after the donor releases to the donee and his heirs all the right which he has in the land, and after the donee enters upon the disseisor; in this case the rent is gone, for the disseisee at the time of the release made, was tenant in right and in law to the donor. But such release shall pass no right to the releasee in the reversion, for the donee to whom the release was made then had nothing in the land but only a right [of entry.]

So of disconti-  
nuance.

[269 a]

And if the donee makes a feoffment in fee, and then the donor releases to him and his heirs all the right in the land, this also shall extinguish the rent, though the tenant in tail after the feoffment has no right in the land.

## SECTION 456.

*IN the same manner it is, if a lease be made to one for life, reserving to the lessor and his heirs a certain rent, if the lessee be dis-  
seised, and after the lessor release to the lessee and his heirs all the  
right which he has in the land, and after the lessee enters, albeit  
in this case the rent is extinct, yet nothing of the right to the re-  
version shall pass causâ quâ suprâ.*

Same of tenant  
for life.

*Nota* here an excellent point of learning, viz. if there be lord and tenant, and the rent is behind for divers years, and the tenant makes a feoffment in fee, if the lord accepts the service or rent of the feoffee due in his [the feoffee's] time, he shall lose the arrearages due in the time of the feoffor; for after such acceptance he shall not avow upon the feoffor, nor upon the feoffee for the arrearages incurred in the time of the feoffor. But in that case if the feoffor dies, albeit the lord accepts the rent or service by the hand of the feoffee due in his time, he shall not lose the arrearages, for now the law compels him to avow upon the feoffee, and that which the law compels him to shall not prejudice him.

Acceptance of  
subsequent rent  
releases arrear-  
ages.

[269 b]

## SECTION 459.

*ALSO, if a man lets to another his land for term of years, if the lessor release to the lessee all his right &c. before the lessee has entered into the land by force of the lease, such release is void, for the lessee had not possession of the land at the time of the release made, but only a right to have and to hold the same by force of the lease. But if the lessee enters into the land, and has possession of it by force of the said lease, then such release made to him by the feoffor, or by his heir, is sufficient to [give] him [the fee] by reason of the privity between them.*

Release to les-  
see for years  
before entry  
bad; contra  
after.

[270 a]

Before entry the lessee has but an *interesse termini*, an interest of a term and no possession: hence a release which enures by way of enlarging an estate cannot work without a possession, for before possession there is no reversion; and yet if a tenant for twenty

Release to re-  
versioner for  
years where the  
first tenant for  
years has enter-  
ed good.

years in possession makes a lease to B. for five years, and B. enters, a release to the first lessee is good, for he had an actual possession, and the possession of his under-lessee is his possession. And so it is if a man makes a lease for years, with remainder for years, and the first lessee enters, a release to him in the remainder for years is good to enlarge his estate. [This shews that the remainderman for years has not merely an *interesse termini*, but an estate which will support a release, and therefore a merger; but this is contradicted, *infra*, fol. 273 b. but it seems to be good law at this day.]

*Release to interesse termini extinguishes the rent, though it enlarges not the estate.*

[270 b]

But if a man makes a lease for years to begin presently, reserving a rent, if before the lessee enters the lessor releases to him all his right in the land, albeit this release cannot enlarge the lessee's estate, yet shall it in respect of the privity extinguish the rent. And so it is if a lease be made to begin at Michaelmas reserving a rent, and before the day the lessor releases all his right in the land, this cannot enure to enlarge the estate, but it may to extinguish the rent in respect of the privity, as was adjudged in the exchequer, which I observed.

*Next presentation cannot be enlarged by release, but one joint-tenant may release to the other.*

A man grants the next avoidance of an advowson to two, one of them may before the church becomes void release to the other; for although the grantor cannot release to them to increase their estate, because their interest is future and not in possession, yet one of them, to extinguish his interest, may release to the other in respect of the privity. But after the church becomes vacant, then such a release is void, because then it is (as it were) but a thing in action. And this was resolved by the whole Court of Common Pleas, which I myself heard and observed.

*One tenant in common of term may release to other before entry.*

And by consequence in the case of Littleton, if a lease for years be made to two, albeit the lessor before they enter cannot release to them to enlarge their estate, yet one of them may before entry release to the other.

*Interesse termini may be granted over.*

“*But only a right &c.*] Which is not to be understood that he has but a naked right, for then he could not grant it over; but seeing he has an *interesse termini* before entry, he may grant it over, albeit for want of an actual possession, he is not capable of a release to enlarge his estate.

*But if the lessee enters into the land.]* This is evident. And herein note a diversity between a lease for life and for years, for before the lessee for years enters, a release cannot be made unto him : but if a man makes a lease for life, with remainder for life, and the first lessee dies, a release to the remainder-man for life and his heirs before his entry is good to enlarge his estate, for he has an estate of freehold in law in him, which may be enlarged by release before entry.

*Release to remainder-man for life before entry good.*

And where our author speaks only of a lessee for years, the same law it is of a tenant by statute merchant or staple, or tenant by *elegit*, or the like.

*Elegit creditor same as lessee for years.*

## SECTION 460.

*AND it seems that when a lease is made to a man to hold at the will of the lessor, and by force of this lease the lessee enters into possession, then if the lessor makes a release to the lessee at will of all his rights &c., this release is good enough on account of the privity between them [by virtue of the lease]; for it would be in vain to make livery of seisin to another who has possession of the same land by lease from the same man before.*

*Release to tenant at will is good.*

By these two Sections a diversity is to be observed between a tenant at will and a tenant at sufferance ; for a release to a tenant at will is good, because between them there is a possession with a privity ; but a release to a tenant at sufferance is void, because he has a possession without privity. As if lessee for years hold over his term &c., a release to him is void, for that there is no privity between them ; and so are the books that speak of this matter to be understood.

*To tenant at sufferance bad.*

## SECTION 461.

[271 a]

*BUT where a man of his own head occupies lands or tenements at the will of him who has the freehold, and such occupier claims nothing but at will &c., if he who has the freehold will release all his right to the occupier &c., this release is void, because there is no privity between them by lease made to the occupier, nor by any other manner &c.*

*Release to a mere occupier bad ;*

*i. e. a tenant at sufferance.*

*Of his own head.]* He does not say, *of his own head enters &c.*, [but of his own head occupies, which imports that the entry was lawful though the occupation be by permission. It should seem therefore that this section] is to be understood of a tenant at sufferance, viz. where a man comes to the possession first lawfully and holds over. For if a man enters into land of his own head, and takes the profits, *his* confession that he holds it at the will of the owner will not qualify that wrongful entry; but he is a disseisor, and then a release to him would be good; or if the owner consent to the occupation, then is he a tenant at will, and in that way also a release to him would be good. [So that this Section must relate to a tenant at sufferance.] But there is a diversity when one comes to a particular estate in land by the act of the party, and when by act in law; for if the guardian holds over after the infancy expired, he is an abator, because his interest came by act in law.

*Guardian holding over an abator.*

*Privies of two kinds—in law and in deed.*

*No privity.]* Privity is a word common as well to the English as to the French law, and in the understanding of the common law is fourfold. 1. As privies in estate, whereof Littleton here speaks: as between the donor and donee, lessor and lessee, which privity is ever immediate. 2. Privies in blood; as the heir to the ancestor, or between coparceners &c., 3. Privities in representation; as, executors &c., to the testator. And 4. Privies in tenure, as the lord and tenant &c., which may be reduced to two general heads, privies in deed, and privies in law.

#### SECTION 462, 463, 464.

*Release by feoffees to will to feoffor good.*

*ALSO, if a man [before the statutes of uses and of wills in the then usual way] enfeoffed another to the use of his will, and the feoffor occupied the same land at the will of his feoffees, who afterwards released all their right to the feoffees, it was a question whether such release were good or no. But it seems it shall be intended by law that the feoffor ought presently to occupy the land at the will of his feoffees; and so there is the like kind of privity between them as between any other tenant at will, and therefore that such their release is good.*

*Resulting use to feoffor.*

Here is to be observed the intendment of law that when a feoffment is made to a future use, as to the performance of his last will, the feoffees shall be seised to the use of the feoffor and of his heirs



in the mean time. Further, the feoffment being made without consideration, it is but reason that the feoffor should have the undisposed of profits in the mean time. And so it is if the use *in presenti* be not entirely disposed of, what remains shall belong to the feoffor and his heirs.

[271 b]

And it is to be observed, that there is a diversity between a feoffment of lands at this day upon confidence, or to the intent to perform a last will, and a feoffment to the use of such person and persons and of such estate and estates as the feoffor shall appoint by his last will: for, in the first case, the lands pass by the will, and not by the feoffment; for after the feoffment the feoffor was seised in fee simple, as he was before; but in the latter case, the will pursuing his power is but a direction of the uses of the feoffment, and the estates pass by execution of the uses, which were raised upon the feoffment; but in both cases the feoffees are seised to the use of the feoffor and his heirs in the mean time: and all this and much more concerning this matter has been adjudged, [which at this day however is rather obscure.]

*Feoffments to will and feoffments to uses appointed by will distinguished.*

Note, uses are raised either by transmutation of the estate, as by fine, feoffment, common recovery &c., or out of the estate of the owner of the land, by bargain and sale by deed indented and inrolled, or by covenant [to stand seised] upon lawful consideration, whereof you may read plentifully in my Reports.

*On what seisin uses may be raised.*

A feoffee to the use of A. and his heirs, before the statute of 27 H. 8. for money bargained and sold the land to C. and his heirs, who had no notice of the former use; yet no use passed by this bargain and sale, for there cannot be two uses *in esse* of one and the same land; and seeing there is no transmutation of possession by the *ter-tenant*, the former use can neither be extinct nor altered. And if there could be two uses of one and the same land, then could not the said statute execute either of them for the uncertainty. But if A. disseise one to the use of B. and A. bargains and sells the land for money to C., C. has an use; and here are two uses of one land, but of several natures; the one, viz. upon the bargain and sale to be executed by the statute, and the other not.

*Bargain and sale of feoffee to uses before statute void.*

[272 a]

But since Littleton wrote, all uses are transferred by act of Parliament into possession, so that the case which Littleton here puts

*Uses now transferred into possession.*

is thereby altogether altered. Yet it is necessary to be known what the common law was before the making of the statute, [otherwise the application of the statute could not be discovered.]

Use before statute in nature of a trust now.  
[272b]

*Nota.* A use is a trust or confidence reposed in some other, which is not issuing out of the land, but as a thing collateral thereto and is annexed in privity to the estate of the land, and to the person touching the land, *scilicet*, that *cestui que use* shall take the profit, and that the *ter-tenant* shall make an estate according to his direction. So that *cestui que use* had neither *jus in re* nor *jus ad rem*, but only a confidence and trust, for which he had no remedy by the common law, but for breach of trust his only remedy was by *subpœna* in chancery.

## SECTION 465.

Release of all right gives only a life-estate.

ALSO, releases [are construed as other conveyances, therefore] if I [being tenant in fee] let land to man for a term of years, by force whereof he is in possession, and afterwards I release to him all my right in the land without more words, and deliver to him the deed, then has he but an estate for life, and no inheritance for want of the word heirs. So if I let land to a man for life, and after release to him all my right without more saying in the release, his estate is not enlarged. But if I release to him and his heirs, then he has a fee simple; and if I release to him and to the heirs of his body begotten, then he has a fee tail &c. And therefore it is necessary to specify in the deed what estate the releasee is to have.

No privity between lessor and under-lessee to sustain a release.

[273a]

It is a certain rule, that when a release enures by way of enlarging an estate, there must be privity of estate [between the releasing parties as there is] between lessor and lessee, donor and donee &c. For if A. makes a lease to B. for life, and the lessee underlets for years, and after A. releases to the under-lessee for years and his heirs, this release is void to enlarge the estate, because there is no privity between A. and the under-lessee for years. So if a man makes a lease for twenty years, and the lessee underlets for ten years, if the first lessor releases to the second lessee, and his heirs, this release is void also for the cause aforesaid. For the same cause, if the donee in tail makes a lease for his own life, and the donor releases to the lessee for life and his heirs, this release is void to enlarge the estate.

But privity only is not enough, as if a tenant by the curtesy grants over his estate, a release to him operates nothing, for he has no estate to enlarge, yet on account of the privity he is liable to an action of waste, attornment &c.

*Release to tenant who has granted away all his estate useless.*

But if a man makes a lease for years, with remainder to another for life, then a release by the lessor to the lessee for years and his heirs, is good, for he hath both a privity and an estate; so a release to him in the remainder for life and his heirs, is good also.

*Release to remainder-man good, for there is privity.*

It is further to be observed, that to a release enuring by way of enlargement of estate, there is not only required privity and an estate, but sufficient words in law to raise or create a new estate. And therefore if a man makes a lease to A. for the life of B., and after releases to A. all his right in the land, by this A. has an estate for term of his own life—a lease for his own life being higher in judgment of law than an estate for term of another man's life.

*Release to tenant pur autre vie gives an estate for his own life.*

[273 b]

If a *fême covert* be tenant for life, a release to the husband and his heirs is good, for there is both privity and an estate in the husband whereupon the release may sufficiently enure by way of enlargement; for by the intermarriage he gains a freehold in his wife's right.

*Release to husband jure uxoris good.*

*For term of years.*] So it is if a release be made to tenant by statute staple or merchant, or tenant by *elegit*, by this a freehold passes for the life of him to whom the release is made, that being the greatest estate that can pass without apt words of inheritance.

*So to elegit creditor good.*

If a man makes a lease for ten years, with the remainder to another for twenty years, and he in remainder releases all his right to the [first] lessee, [that lessee] shall have an estate for thirty years; for one chattel cannot drown in another, and years cannot be consumed in years. [The contrary, however, is now the prevalent opinion. See 6 Madd. 66.]

*No merger of one term in another.*

*But if I release to him and his heirs.*] Here it is to be observed, that an estate of inheritance will not pass by a release by way of enlargement without apt words of inheritance. But there is a diversity between a release that enures by way of enlargement, and a release that enures by way of *mitten l'estate*; for in the latter

*"Heirs" not necessary in release from one joint-tenant or coparcener to companion.*

release there sometimes needs not be any words of inheritance. As if a joint estate be made to husband and wife and a third person and to their heirs, and the third person releases all his right to the husband, this shall enure by way of *mitter l'estate*, and not by way of enlargement, because the husband had a fee-simple already, and heeded not therefore any words of inheritance to give it to him. So it is if the release had been made to the wife. And if there are three joint-tenants, and one of them releases all his right to one of his companions, this enures by way of *mitter l'estate*, and passes the whole fee-simple without the word (heirs). So if there are two joint-tenants, and one of them releases all his right to the other, although the release does not to all purposes enure by way of *mitter l'estate*, for it makes no degree, and he to whom the release is made shall for many purposes be adjudged in from the first feoffor, yet shall it vest all the estate in the other joint-tenant without the word (heirs). But if there be two coparceners, and the one releases all his right to the other, this shall enure by way of *mitter l'estate*, and shall make a degree, and without the word (heirs) shall pass the whole fee-simple. And it is to be observed, that to releases that enure by way of *mitter l'estate*, there must be privity of estate at the time of the release. So if two coparceners be of a rent, and the one of them takes the ter-tenant to husband, the other may release to her, notwithstanding the rent be in suspense, and it shall enure by way of *mitter l'estate*, and she may release also to the ter-tenant, and that shall enure by way of extinguishment: but if she release to her sister and to her husband, it is good to be seen how it shall enure.

Four sorts of releases.

Littleton having now spoken of releases that enure by way of enlargement of estate, and of releases that enure by way of *mitter l'estate*, proceeds to releases that enure by way of *mitter le droit*. Hence it appears that of releases some do enure by way of enlargement of estate, some by way of *mitter l'estate*, some by way of *mitter le droit*, some by way of entry and feoffment, and some by extinguishment.

[274a]

SECTION 466.

Release from disseisee to disseisor enures

ALSO, some releases enure by way of *mitter* [le droit.] As if a man be disseised, and he releases to his disseisor all his right, in

*this case the disseisor has his right, so that where before his estate was wrongful, now by this release it is made lawful and right.*

by mitter le droit.

## SECTION 467.

*BUT here note, that when a man is seised in fee-simple of any lands or tenements, and another releases to him all his right, he need not speak of heirs in this release, for the releasee has already a fee-simple at the time of the release made. And if such a release be made to a man for a day or an hour [or any limited time] it shall be as strong to him in law as if the release had been to him and his heirs [for ever.] For when a right has once departed from the releasor without condition to a person who has the fee-simple, it is gone for ever.*

Release for a moment a release for ever.

But if a man be disseised of two acres, he may release his right in one of them, and yet enter into the other. And albeit the disseisee cannot release part of the estate [as distinguished from part of the land], yet may he release his right upon condition, as here it appears by Littleton.

But release of part good. [274b]

And there is a diversity between a right which is favoured in law, and a condition created by the party which is odious in law, for that it defeats estates. And therefore if a condition be released upon a condition, the release is good and the condition void.

Release of condition on a condition, bad as to the condition, good as to the release.

And note, an express manumission of a villein cannot be upon condition, for once free in that case, is for ever free: so on an attornment to a grantee upon condition, the condition is void because the grant is once settled. But this is to be understood of a condition subsequent, and not of a condition precedent; for in both those cases the condition precedent is good. But letters patent of denization made to an alien, may be either upon condition subsequent or precedent: and so may the king make a charter of pardon to a man for his life upon condition [that he be transported or the like.]

Dispensation on condition bad.

Attornment.

Denization.

Pardon.

## SECTION 468.

Release in enlargement should express the estate.

**BUT** *where a remainder-man or reversioner releases to tenant for years, or for life, or in tail, he ought to determine what estate he means to pass by the release for such release enures by way of enlargement of the estate of him to whom it is made.*

## SECTION 469.

Except where a mere right is released to freeholder.

[275a]

**BUT** *otherwise it is where a man has but a right to the land and nothing in the reversion or remainder in deed. Here if such a man release all his right to one who is tenant of the freehold, all his right is gone, albeit no mention is made of the heirs of the releasee. As if I let lands to one for life, and afterwards release to him to enlarge his estate, the release should be to him and to the heirs of his body, or to him and his heirs, or otherwise he will take no greater estate than he had before.*

Privity, none requisite to release of right.

And here it is observable that to a release of right made to one having an estate of freehold in deed or in law, no privity at all is requisite. As if a disseisor make a lease for life, if the disseisee release to the lessee, this is good, because the lessee has an estate of freehold, albeit there is no privity. And so it is if a disseisor make a lease to A. and his heirs during the life of B. and A. dies, a release by the disseisee to his heirs before he actually enter is good.

## SECTION 470.

Release after discontinuance passes all the right without "heirs."

**BUT** *if my tenant for life lets the land to another for the life of the lessee, with remainder to another person in fee, [which is a discontinuance of my reversion and a conversion of my estate therein to a right] now if I release to the second lessee for life, I shall be barred for ever, albeit no mention is made of the heirs of the releasee, for at the time of the release made I had no re-*

*version, but only a right to have the reversion. For by such a lease to one for life with remainder over which my tenant made in this case, my reversion was discontinued, and the release which I have made shall enure to him in the remainder who may take advantage of it as well as to the tenant for term of life.*

Which is a species of release in extinguishment. But yet the right is not extinct in deed, as shall be said hereafter in this chapter. And here discontinued is taken for divested, though the entry of the lessor be not taken away.

[275b]

## SECTION 471.

*FOR to this purpose the tenant for term of life and he in remainder are but as one tenant in law, and the same as if one tenant had been solely seised in his demesne as of fee at the time of such release made to him &c.*

Particular tenant and remainder man make but one tenant in fee.

*Are as one tenant in law.]* Which is certainly true in this case of a remainder, and so it is in the case of a reversion; as if a disseisor make a lease for life, and the disseisee release all his right to the lessee, this release shall enure to the disseisor in reversion, albeit they have several estates, as hath been said which is implied in this &c. But if a disseisor make a lease for life, with remainder in fee to another, albeit they to some purposes are as one tenant in law, yet if the disseisee release all actions to tenant for life, after the death of the tenant for life, he in remainder shall not take any benefit from this release, for it extended only to the tenant for life, as it is holden in Edward Altham's case. In like manner, if the disseisor make a lease for life, and the disseisee release all actions to the lessee, this enures not to him in reversion, but only to the particular tenant; and so our author is to be understood of a release of rights, and not of a release of actions to the tenant for life, enuring to or for the benefit of him in the remainder or reversion.

*Yet release of actions to one enures not to the other; contra of release of rights.*

## SECTION 472.

Release to one of two disseisors enures to releasee only—  
To one of two feoffees, to both;

**ALSO, if a man be disseised by two, if he release to one of them, the releasee shall hold his companion out of the land, for by such release he has the sole possession and estate in the land. But if a disseisor enfeoffs two persons in fee, and the disseisee release to one of the feoffees, this shall enure to both the feoffees, because they come in by feoffment [or right] and the other [comes in by disseisin or] wrong.**

except releases by tenant for life.

*If a man be disseised &c.]* This must be understood where tenant in fee-simple is disseised and releases; for if tenant for life be disseised by two and releases to one of them, this shall enure to them both; for he to whom the release is made, has a larger estate than he who makes the release, and therefore it cannot enure to him alone to hold out his companion, for then would the release enure by way of entry and grant of an estate, and the disseisor to whom the release is made, would become tenant for life with a reversion vested in the releasor, which strange transmutation and change of estates the law will not suffer.

Release by lessee for years to disseisor extinguishes term.  
[276a]

But if lessee for years be ousted, and he in the reversion disseised, and the lessee releases to the disseisor, the disseisee may enter, for the term of years is extinct and determined. But otherwise it is in the case of a lessee for life, for the disseisor has a freehold whereupon the release of the tenant for life may enure; but in the other case the disseisor has no term for years whereupon the release of the lessee for years may enure, [for the term as before stated is extinct by the release].

In what other cases release to one shall enure to both.

And so it is if donee in tail be disseised by two, and releases to one of them, it shall enure to both. But if the king's tenant for life be disseised by two, and releases to one of them, the releasee shall hold out his companion, for the disseisor gained but the estate for life. So if two joint-tenants make a lease for life, and after disseise the tenant for life, and he releases to one of them, the releasee shall hold out his companion, for the disseisin was but an estate for life. If tenant for life be disseised by two, and he in the reversion and te-



nant for life join in a release to one of the disseisors, the releasee shall hold his companion out, and yet it cannot enure by way of entry and feoffment. But if they severally release their several rights, their several releases shall enure to both the disseisors. But here in Littleton's case, where tenant in fee-simple is disseised by two, and releases to one of them, this for many purposes enures by way of entry and feoffment, and therefore he to whom the release is made shall hold out his companion, and shall thereby become sole tenant of the fee-simple. And this holds not only in case of a disseisin, but also in case of intrusion and abatement: but necessarily he to whom the release is made must be in by wrong, and not by title. If two men gain an advowson by usurpation, and the right patron releases to one of them, the releasee shall not hold out his companion, but it shall enure to them both; for seeing their clerk came in by admission and institution, which are judicial acts, they are merely in by wrong: for an usurpation shall cause a remitter, as appears in F. N. B. 31. m. But if a lease for life be made, the remainder for life, the remainder in fee, and he in the remainder for life disseises the tenant for life, and then tenant for life dies, the disseisin is purged, and he in the remainder for life has but an estate for life. And so note a diversity where the particular estate for life is precedent, and where subsequent. Where our author puts his case of one disseised, put the case that two joint-tenants in fee are disseised by two, and one of the disseisees releases to one of the disseisors all his right, the releasee shall not hold out his companion, because the release is but of the moiety, without any certainty. If a man be disseised by two women, and one of them take husband, and the disseisee releases to the husband, this shall enure to the advantage of both the disseisors, because the husband was no wrong-doer, for he comes *in* by title of some kind. And if two disseisors be, and they make a lease for life, and the disseisee releases to one of them, this shall enure to both, and to the benefit of the lessee for life also; for he cannot by the release have the sole possession and estate, for part of the estate is in another. And so it is (as it seems) if the disseisors make a lease for years, and the disseisee releases to one of them, this shall enure to both, for by the release he cannot have the sole possession: and it appears by Littleton, that he must have the sole possession and hold his companion out [for the release to operate otherwise.]

*Release by entry and feoffment.*

*Advowson.*

*Disseisin by remainder-man for life.*

*Joint-tenants.*

*Disseisors.*

[276b]

## SECTIONS 473 TO 478.

[These sections, and the comment thereupon, relate to releases operating by way of entry and feoffment, and to many obsolete points on disseisins.]

*Disseisin, abatement, intrusion, deforcement, and usurpation distinguished.*

[277 a]

Disseisin is a wrongful putting out of the person who is actually seized of the freehold. Abatement occurs where a man dies seized of an estate of inheritance, and between the death [of the ancestor] and entry of the heir, a stranger interposes himself, then he is said to abate, diminish, or take away the freehold in law descended to the heir.

[277 b]

Intrusion is where the ancestor dies seized of any estate of inheritance expectant upon an estate for life, and then tenant for life dies, and between the death of the tenant for life and the entry of the heir of the reversioner a stranger interposes himself and intrudes upon the freehold. Deforcement comprehends not only the aforementioned, but every other holder of land whereunto another man has right, be it by descent or purchase. Usurpation is where a stranger who has no right presents to a church, and his clerk is admitted and instituted, he is said to be an usurper, and the wrongful act which he has done is called an usurpation.

[278 b]

## SECTIONS 479, 480.

*Release in extinguishment.*

**RELEASES** which enure by way of extinguishment are where the releasee cannot have the thing released, as when the lord releases his seigniority to the tenant of the land, or when the grantee of a rent charge, or the owner of a common, releases to the tenant whose land is charged with the rent or common, these releases are said to extinguish the seigniority rent charge and common.

[280 a]

First, as to the seigniority, this release must of necessity enure by way of extinguishment [not only to the tenant, but] to all men; for the tenant cannot have service to be taken of himself, nor can one man be at the same time both lord and tenant. 2dly. As

to the rent charge; a man cannot have land and rent issuing out of the same land. Nor 3dly. Can a man have land and a common of pasture issuing out of the same land, *et sic de cæteris*. For in all these cases and the like he to whom the release is made cannot have and enjoy the thing that is released, [for these things are peculiarly such as can be enjoyed in the lands of another only, and not out of one's own lands.] But in the case of a right to land, the tenant of the land may take and enjoy that right for the strengthening of his estate therein.

And here note a diversity that the lord may release his seigniority to the tenant of the land for life or in tail, *et sic de cæteris*. But so cannot one release a right or an action; for if it be released but for an hour, it is extinct for ever, as hath been said. And two things are to be observed here. 1st. That by the release of all the right in the land the seigniority is extinct, as well as by the release of all the right in the seigniority, for the seigniority issues out of the land. 2dly. That by a release of all his right in the seigniority or the land, the whole seigniority is extinct without any words of inheritance. If the tenancy be given to a lord and to a stranger and to the heirs of the stranger, and the lord releases to his companion all the right in the land, this release not only passes his estate in the tenancy, but extinguishes also his right in the seigniority, and so one release may enure to extinguish several rights in one and the same land.

*Release of seigniority.*

## SECTIONS 481 TO 491.

[Relate to pleading in real actions, or other abstruse antiquated learning.]

### SECTION 492.

[285 a]

ALSO, as to releases of actions, real and personal, it is thus. Some actions are mixed in the realty and in the personalty: as an action of waste sued against tenant for life; this action is in the realty, because the place wasted shall be recovered; and also in the personalty, because treble damages shall be recovered for the wrongful waste done by the tenant; and therefore in this action

*Release of actions real and personal.*

*a release of actions real is a good plea in bar, and so is a release of actions personal.*

Causes of action.

And by a release of all actions, causes of action are released; but in a submission of actions to arbitrement causes of action are not contained.

Remainder man cannot plead release of actions to ten. for life, though he may a release of right.

[285b]

If a disseisor makes a lease for life, with remainder in fee, and the disseisee releases all actions to the tenant for life, after the death of tenant for life, he in the remainder shall not plead the said release. If the disseisee release all actions to the disseisor, and dies, this bars him but for his life, for after his decease his heir shall have an action, as some have said. And hereby may appear a manifest diversity between a release of rights, and a release of actions.

[286a]

#### SECTION 496.

Release of all actions no release of right of entry.

*ALSO, if a man has remedy by entry or action, and releases to the tenant all actions real, yet this shall not take away his right of entry, for nothing is released but the action.*

Release of one of several remedies no release of other.

[286b]

Here it appears, that where a man may enter, a release of all actions does not bar him of his right, because he has another remedy, viz. to enter. But where his entry is not lawful, there a release of all actions is by consequence a bar of his right, because he has released the only means whereby he might recover his right. And it is to be observed, that when a man has several remedies for one and the self same thing, be it real, personal, or mixed, albeit he releases one of his remedies, he may use the other.

[289a]

#### SECTION 504.

Release of action no release of execution.

*ALSO, if a man recover in debt or damages, and then releases to the defendant all manner of actions, yet may he lawfully sue out execution [on his judgment] by capias ad satisfaciendum, or by elegit, or fieri facias; for execution upon such a writ cannot be said to be an action.*

An action continues until judgment is given, and then process of execution begins; and therefore a release of all actions is regularly no bar of execution, for the execution begins when the action ends.

Action and execution distinguished.

*By capias ad satisfaciendum.*] This is a judicial writ for taking the body in execution until he has made satisfaction: where a *capias ad satisfaciendum* lies at the common law; and where it is given by statute you may read at large in my Reports.

Capias.

*By elegit.*] This is also a judicial writ, and is given by the statute either upon a recovery for debt or damages, or upon a recognizance in any court. And it is called a writ of *elegit*, because the words of the writ are *elegit sibi liberari &c.* By this writ the sheriff shall deliver to the plaintiff all the chattels of the debtor (except his beasts of the plough) and one moiety of his lands. And this must be done by an inquest to be taken by the sheriff, [but no *elegit* can be sued against the heir within age, although the lands be specially bound. Co. Lit. 290. a.]

Elegit attaches goods and half lands.

[289 b]

Since Littleton wrote, a profitable statute has been made concerning executions of lands, 32 H. 8. c. 5. whereby it is provided, that if after lands &c. be delivered in execution the same be recovered [by prior title] before such time as the debt or damages are paid, the creditor shall have a *scire facias* against the debtor his heirs, executors or assigns, to have execution of other lands &c. for the residue of the debt or damages; [but the statute says, whereby the tenant is clearly without remedy, so that if but one acre remain, the creditor cannot have a *scire facias* against his debtor's other lands, because he may hold that acre till he is satisfied.]

Elegit creditor's remedy if evicted by prior title.

[290 a]

*Fieri facias.*] This is a writ mentioned in the said statute, but it is a writ of execution at the common law. And it is called a *feri facias*, because the words of the writ are *quod fieri facias de bonis et catallis &c.*

Fieri facias.

[290 b]

And it is to be observed, that these three writs of execution ought to be sued out within the year and day after judgment; but if the plaintiff sues out any of them within the year, he may continue the same after the year until he has execution.

These writs must be sued within a year and a day.

Subsequent matter may be taken advantage of by audita querela.

And to none of these writs of execution the defendant can plead: but if he has any matter since the judgment to discharge him of execution, he may have an *audita querela*, and relieve himself that way, but plead he cannot. And if the plaintiff after release unto the defendant all executions, yet in none of these three writs he shall plead it, but is driven to his *audita querela*, as hath been said.

Scire facias. Release of actions bars it.

*Scire facias.*] This is a judicial writ, and lies not properly till a year and day after judgment given; and it is so called, because the words of the writ to the sheriff are *quod scire facias præfat' T. &c.* And from the writ it appears, that the defendant is to be warned to plead any matter [if he can] in bar of execution; and therefore albeit it be a judicial writ, yet because the defendant may thereupon plead, this *scire facias* is accounted in law to be in nature of an action; and therefore a release of all actions is a good bar of the same, and likewise a release of executions is a good bar in a *scire facias*. This writ was given by the statute of W. 2., for at common law if the plaintiff had ceased to sue execution by *fieri facias*, or *levari facias* for a year and a day after judgment, he had been driven to his new original.

[291a]

## SECTION 507.

Release of suits includes executions.

**BUT** *where a man recovers debt or damages, and it is agreed between them that the plaintiff shall not sue out execution, then it behoves the plaintiff to release all executions.*

Yet there are other words which will release an execution without express words releasing executions. As if a man release all suits, the execution is gone; for no man can have execution without prayer and suit, but the king only; and therefore if the king releases all suits, it is no bar of his execution, because in the king's case the judges ought to award execution *ex officio* without any suit; but a release of execution bars the king in that case. And so note a diversity between a release of all actions and a release of all suits.

Actions includes not executions, but debt, duty,

If the body of a man be taken in execution, and the plaintiff release all actions, yet shall he remain in execution; but if he re-

lease all debts or duties, he is to be discharged of the execution, because the debt or duty itself is discharged. So it is if judgment be given in an action of debt, and the body of the defendant be taken in execution by a *capias ad satisfaciendum*, and after the plaintiff releases the judgment, by this the body shall be discharged of the execution. So if the plaintiff after judgment release all demands, the execution is discharged. And if A. be accountable so B. and B. releases to him all his duties, this is no bar in an action of account, for "duties" extends to things certain, and what shall fall out upon the account is uncertain: and albeit the Latin word is *debita*, yet duties shall extend to all things due that are certain, and therefore discharges judgments in personal actions, and executions also.

*or demand includes both.*

SECTION 508.

[291 b]

*ALSO, if a man release to another all manner of demands, this is the best release that can be made for the releasee, and shall enure most to his advantage. For by such release of all manner of demands, all manner of actions real and personal, and also all manner of executions are taken away and extinguished.*

Release of all demands the best.

SECTION 509.

*AND if a man has title of entry into any lands or tenements, by such a release his title is taken away. Sed quære de hōc; for Fitz-James, chief justice of England, holds the contrary, because an entry cannot be properly said to be a demand. Year-Book, Pasch. 19 H. 8.*

It includes rights and titles.

Here title is taken in its largest sense, including right also.

[292 a]

SECTION 510.

*AND if a man has a rent-service or rent-charge, or common of pasture &c. by such a release of all manner of demands made to the tenant of the land out of which the service or the rent is*

Also commons, rents, and all services.

issuing, or in which the common is, the service, the rent, or the common, is taken away and extinct &c.

## SECTION 511.

Quarrels, controversies, and debates.

ALSO, if a man releases to another all manner of quarrels, or all controversies and debates between them &c. *quære in what matter and to what effect such words shall extend themselves &c.*

If a man release all *quarrels* (a man's deed being taken most strongly against himself) it is as beneficial as all actions: for by it all actions, real and personal, are released. And by the release of all quarrels, all causes of actions are released thereby, albeit no action be then depending for the same. Controversies and debates are *synonima* and of one signification. If a man release all quarrels it is as large as all actions, which extends as well to actions in courts of record as in base courts. *Omnes exactiones* seem to be large words; for *exactio derivatur ab exigendo*, and *exigere* signifies to inquire or demand.

## SECTION 512.

"All actions" releases the debt, though not then payable.

ALSO, if a man by his deed be bound to another in a certain sum of money to be paid at the feast of Saint Michael next ensuing, if the obligee before the said feast release to the obligor all actions, he shall be barred of the duty for ever, and yet he could not have an action at the time of the release made.

[292 b]

The reason of this case is, for that the debt is a thing consisting merely in action; and therefore albeit no action lies for the debt, because it is *debitum in presenti, quanvis sit solvendum in futuro*; yet because the right of action is in him, the release of all actions is a discharge of the debt itself.

Executor may release before probate.

And so may an executor before probate release an action, (and yet before probate he can have no action,) because the right of the action is in him, and so it was adjudged. And some say, that an ordinary may release an action, and yet he can have none.



But if a man by deed covenants to build a house or make an estate, and before the covenant broken, the covenantee releases to him all actions, suits, and quarrels, this does not discharge the covenant itself, because at the time of the release, *nihil fuit debitum*, there was no debt, or duty, or cause of action in being. But in that case a release of all covenants is a good discharge of the covenant before it be broken.

*Release of covenants discharges it before broken, contra of all actions.*

## SECTION 513.

BUT if a man lets land to another for a year at the rent of forty shillings payable at Michaelmas next, and before Michaelmas releases to the lessee all actions, yet after Michaelmas he may have an action of debt against the lessee for the non-payment of the forty shillings, notwithstanding the said release. *Stude causam diversitatis between these two cases.*

*Release of actions no release of current rent.*

This release shall not bar the lessor of his rent, because it was neither *debitum* nor *solvendum* at the time of the release made; for if the land be evicted from the lessee before the rent becomes due, the rent is avoided; for it is to be paid out of the profits of the land, and it is a thing not merely in action, because it may be granted over. But the lessor before the day may acquit or release the rent [specially.]

But if a man be bound in a bond or by contract to another to pay a hundred pounds at five several days, he shall not have an action of debt before the last day be past: and so note a diversity between duties which touch the realty, and the mere personalty. But if a man be bound in a recognizance to pay a hundred pounds at five several days, presently after the first day of payment he shall have execution upon the recognizance for that sum, and shall not tarry till the last be past, for that it is in the nature of several judgments. And so note a diversity between a debt due by recognizance, and a debt due by bond or contract. And so it is of a covenant or promise, after the first default an action of covenant, or an action upon the case lies, for they are several in their nature.

*Bond or recognizance for instalments when broken.*

*Release of  
actions no re-  
lease of current  
annuity.*

Lastly, note a diversity between debts and covenants, or promises. If a man has an annuity for term of years or for life, or in fee, and he before it is behind releases all actions, this shall not release the annuity, because it is not merely in action, for it may be granted over.

[293 a]

[The residue of this chapter treats of the mode of impannelling the jury of knights in real actions, and of wager of law, &c.]

## CHAPTER IX. SECTION 515.

[295 b]

## OF CONFIRMATION.

A DEED *of confirmation is commonly in this form, or to this effect*: “Know all men &c. that I A. of &c. have ratified approved and confirmed to C. of &c. the estate and possession which I have of and in one messuage &c. with the appurtenances in F.” &c. Form of confirmation.

A confirmation is a conveyance of an estate or right *in esse*, whereby a voidable estate is made sure and unavoidable, or whereby a particular estate is increased. A confirmation does not strengthen a void estate—it may make a voidable or defeasible estate good, but it cannot work upon an estate that is void in law. Void estate not confirmable.

## SECTION 516.

[296 a]

AND *in some cases a deed of confirmation is good and available, where in the same case a deed of release would not be good. As if I let land to a man for life, and he lets the same to another for forty years, and the lessee enters; if I by my deed confirm the estate of the tenant for years, and after the tenant for life dies during the term, I cannot enter into the land during the said term.* Confirmation of tenant for life's lease, good in his lifetime.

But note, where a confirmation shall enlarge an estate, there privity is required, as mentioned in the next section. So where a lessee for life made a lease for thirty years, and after the lessor and lessee for life made a lease for sixty years to another, which lease for sixty years the lessor first confirmed, and after that the lessor confirmed the lease for thirty years, and then the tenant for life died

within the thirty years ; it was adjudged that the lease for thirty years was determined by the death of the lessee for life, and that the lessee for sixty years might enter ; for that albeit the lease for sixty years was the latter in time, yet was it of greater force in law, for that the lessor who had power to confirm which of them he would, did first confirm the second lease.

## SECTION 517.

Release to  
under-tenant  
bad.

*YET if I had released to the tenant for years in the life-time of the tenant for life, such release would have been void, for there was not any privity between me and the tenant for years.*

[296 b]

## SECTION 518.

Same of disseis-  
or's lease for  
years.

*IN the same manner it is if I be disseised, and the disseisor makes a lease to another for term of years, if I release to the termor, this is void : but if I confirm the estate of the termor, this is good and effectual.*

No confirmation  
of interesse  
termini.

But if the disseisor make a lease for years to begin at Michaelmas, and the disseisee confirm his estate, this is void, because he has but an *interessu termini*, and no estate in him, whereupon a confirmation may enure.

## SECTION 519.

Confirmation of  
estates cannot  
be for less than  
the whole.

*ALSO, if I be disseised, and confirm the estate of the disseisor, he has a good and rightful estate in fee-simple, albeit in the deed of confirmation no mention be made of his heirs, because he had a fee-simple at the time of the confirmation. And if the disseisee confirm the estate of the disseisor, to have and to hold to him and the heirs of his body engendered, or to have and to hold to him for term of his life, yet the disseisor has a fee simple and is seised in his demesne as of fee, because when his estate was confirmed, he had then a fee simple, and such deed cannot change his estate without entry made upon him &c.*

In the same manner it is, if the disseisor make a gift in tail, and the disseisee confirms the estate of the donee for the life of the donee, this confirmation enures to the whole estate tail; for a confirmation can make no fraction of an estate so as to extend but to part of the estate only. *Et sic de ceteris.*

## SECTION 520.

[297 a]

*So if the disseisor's estate be confirmed for a day, or an hour, he has a good estate in fee-simple.*

If for a day, good for the whole.

But if a parson make a lease for a hundred years, the patron and the ordinary may confirm fifty of the years, for they have an interest, and may charge in time of vacation. And so if a disseisor make a lease for a hundred years, the disseisee may confirm parcel of those years; but then it must be by apt words, for he must not confirm the lease, or demise, or the estate of the lessee, for if he do the addition as to part of the term will be repugnant and void, as the whole stands confirmed by the first words; but the confirmation in such case should be of the land for part of the term.

But lease for years may be confirmed for part of term,

So may the confirmation be of part of the land; as if it be of forty acres, the disseisor may confirm twenty &c. So if tenant for life make a lease for a hundred years, the lessor may confirm either for part of the term, or for part of the land.

or part of land may be confirmed for whole term.

But an estate of freehold cannot be confirmed for part of the estate, because the estate is entire and not several, as years are.

But freehold cannot be confirmed for part of estate.

## SECTION 521.

*ALSO, if my disseisor make a lease for life, with remainder over in fee, if I release to the tenant for life, this shall enure to him in remainder, because all my right and title is gone by such release. But if I confirm the estate of the tenant for life [that has no effect on the remainder], for after the decease of the tenant for life I may well enter, because nothing is confirmed but the estate of the*

Confirmation to tenant for life, no effect on remainder; otherwise *converso.*

*tenant for life which is now determined ; [on the other hand] if I confirm the estate and title of him in remainder that shall enure for the benefit of the tenant for life, for if his estate should be defeated, the remainder depending upon it should be defeated also, which is against my confirmation &c.*

*Confirmation to one joint-tenant for life confirms fee in his companions.*

[297 b]

And so it is when the several estates are in one person ; as if the disseisor makes a gift in tail, with remainder to the right heirs of tenant in tail, if the disseisee confirms the estate tail, it shall not extend to the fee-simple. But if the disseisor makes a lease for life to A. and B. and the disseisee confirms the estate of A., B. may take advantage thereof ; for the estate of A. so confirmed was a joint estate with B., and in that case the disseisee shall not enter into the land to divest a moiety as to B. But if the disseisor enfeoff A. and B. and the heirs of B., and the disseisee confirms the estate of B: for his life, this shall not only extend to his companion, as hath been said, but to his whole fee-simple, because to many purposes he had the whole fee-simple in him, and the confirmation shall be taken most strongly against the person who made it.

*New fee created by discontinuance.*

If A. makes a lease to B. for life, and B. makes a lease to C. for his life, with remainder to A. in fee, and A. releases to C. all his right, this is good to perfect the estate of C. for his life. But when C. dies, A. shall be in of his old estate, for his release could not enure to himself to perfect his defeasible remainder, but his ancient right remains. And note, that in this case the fee is divested and vested all at one instant ; in the same manner as if tenant in tail makes a lease for life, at the same instant the estate tail is divested out of the donee, and the reversion in fee out of the donor, and a new fee is vested in tenant in tail. And so if the husband makes a lease for life of his wife's land, he divests his own estate which he has in her right and the inheritance of his wife, and at the same instant vests a new reversion in fee in himself.

*Non-claim by remainder man confirms estate for life.*

[298 a]

*For that the remainder is depending &c.]* The reason is, that by the confirmation to him in reversion all the right of the person confirming is gone, and because he cannot by his entry avoid the estate of the lessee for life, without avoiding the estate of the lessor, which is against his own confirmation ; and it has been adjudged, that if a disseisor makes a lease for life, and after levies a fine of the reversion with proclamations, and the five

years pass, so that the disseisee is barred of his right of entry, he shall not enter upon the lessee for life, [for this silent confirmation of the remainder enures equally to confirm the prior estate for life.]

*The remainder should be defeated.*] It is regularly true, that when the particular estate is defeated, the remainder shall be defeated also, but this rule hath divers exceptions. As if the lessor disseise A. lessee for life, and makes a lease to B. for the life of A. with remainder to C. in fee, albeit A. re-enters, and defeats the estate for life, yet the remainder to C. being once vested by good title shall not be avoided; for it is contrary to reason that the lessor should have the remainder again against his own livery. So it is if a lease be made to an infant for life, with remainder over in fee, and the infant at his full age disagrees to the estate for life, yet the remainder is good, for it was once vested by good title [and cannot afterwards be defeated by any accident to the particular estate,—the merger or forfeiture of that estate may accelerate the remainder, but cannot destroy it], and in both these cases it is observable that there was a particular estate at the time of the remainder created. [So that the remainder was good in its inception, and being vested is not liable to destruction by the destruction of the particular estate.] So if a lease be made to A. for the life of B. with remainder to C. in fee, and A. dies before an occupant enters, here also is a remainder without a particular estate, and yet the remainder continues good.\* So where a rent is granted to the tenant of the land for life, with remainder in fee, this is a good remainder, albeit the particular estate continues not [but becomes merged in the land], for *eo instante* that the tenant takes the particular estate, *eo instante* the remainder vests, and the suspension in judgment of law accrues after the taking of the particular estate. As if a man grants a rent to B. for the life of Alice, with remainder to the heirs of the body of Alice, this is a good [contingent] remainder, and yet it must vest upon an instant, [that is it cannot vest during the continuance of the particular estate, but only in the very instant of its determination.]

*Particular estate defeated, remainder defeated also, but vested remainder wants not continuance of particular estate to support it.*

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\* This is not strictly true, for there is a particular estate, though it be for a time without an owner. Now there is a special occupant appointed by law, which reduces the case in the text to a moot point.

## SECTION 522.

Release to one disseisor enures not to the other, *contra* of confirmation.

*ALSO, if there be two disseisors, and the disseisee releases to one of them, the releasee shall hold his companion out of the land. But if the disseisee confirm the estate of one, without saying more in the deed, [that is without adding "and to his heirs"] some say that he shall not hold his companion out, but shall hold jointly with him for that nothing was confirmed but his estate which was joint.*

*Except heirs added.*

But if the confirmation be to one disseisor and his heirs or of all the right of the disseisee in the land, he shall hold out his companion as appears by inference from this section.

[298 b]

## SECTION 523.

Confirmation by one joint-tenant to his companion nugatory without word "heirs."

*AND some have said, that if two joint-tenants be, and one confirms the estate of the other, that the estate remains joint as before. But if the confirmation had been to the other and his heirs, then would the other have a sole estate in the tenements &c. And therefore it is a good and sure thing in every confirmation to have these words; in fee, or in fee tail, or for life, or for years, according to the intention.*

And this confirmation [without heirs] leaves the estate as it was, and amounts not to a severance of the jointure, as some have said.

## SECTION 524.

Confirmation of life estate carries not the fee, though with word "heirs."

*FOR according to some, if a man lets land to another for life, and after confirms his estate to hold to him and his heirs, this confirmation as to heirs is void, for his heirs cannot have an estate which was only for term of his life. But if the confirmation be thus, to have the same land to him and his heirs, [without any recital that the confirmation is intended to be confined to the estate for life] this confirmation passes a fee-simple in the land, for the habendum*



*works on the land, and not on the estate which the tenant already hath.*

Wherein it is to be noted, that the *habendum* and the premises do in substance well agree together, and that the *habendum* may enlarge the premises, but cannot abridge the same.

*Habendum may enlarge but cannot abridge premises.*  
[299 a]

### SECTION 525.

ALSO, if I let land to a *feme sole for life* [as distinguished from the next section where the lease is for years] and she takes husband, and I confirm the estate of the husband and wife, to hold for their lives; in this case [also the *habendum* has no effect on the premises] and the husband still holds jointly with his wife, but in her right for term of her life [as before]. Nevertheless this confirmation shall enure to the husband by way of remainder for term of his life, if he survives his wife.

Confirmation to husband and wife enures how.

Hence it appears that the baron has such an estate in the land in right of his wife as is capable of confirmation to enlarge the estate; and therefore if the confirmation had been made to him alone, to hold to him and his heirs, this would have conveyed the fee-simple to him after the decease of his wife: for if in this case a release had been made to the husband and his heirs, that would have been sufficient to convey the inheritance of the land to the husband. And if in Littleton's case the confirmation had been to the husband and wife, to hold to the two and their heirs, they would have been joint-tenants of the fee-simple, and the husband would have been seised in right of his wife for her life; for the husband and wife cannot take by moieties during the coverture.

*Husband seised jure uxoris capable of release or confirmation in fee.*

[299 b]

If a man lets land to husband and wife, to hold one moiety to the husband for his life, and the other moiety to the wife for her life, and the lessor confirms the estate of, both in the land, to hold to them and their heirs; by this confirmation as to the moiety of the husband, it enures only to the husband and his heirs, for the wife had nothing in that moiety; but as to the moiety of the wife, they are joint-tenants, as hath been said; for the husband has such an estate in his wife's moiety, in her right, as is capable of a confirmation. But if such a lease for life be made to two men by

*Husband and wife seised in moieties, how confirmation to them enures.*

several moieties, and the lessor confirms their estates in the land, to hold to them and their heirs, they are tenants in common of the inheritance; for regularly the confirmation shall enure according to the quality and nature of the estate which it purports to enlarge and increase.

*Confirmation to tenant for life and remainder-man.*

If a lease for life be made to A. with remainder to B. for life, and the lessor confirms their estates in the land, to hold to them and their heirs, A. takes one moiety to him and his heirs, and B. the other moiety to him and his heirs, that is, the limitations will stand thus as to one moiety to A. for life, with remainder to B. for life, with remainder to A. in fee, and as to the other moiety to A. for life, with remainder to B. in fee, for B.'s remainder for life will in his own moiety become merged and extinguished in his remainder in fee, in the same way as if the reversion be granted to tenant for life and a stranger it is executed for one moiety [in the tenant for life, and the other moiety the stranger takes by original limitation;] and therefore they are tenants in common [in fee, and A., who before had all the land for life, has now only half in fee.]

*To tenant for life and stranger.*

*Confirmation to two who are seised in tail makes tenancy in common of reversion.*

If lands be given to two men and the heirs of their bodies be gotten, and the donor confirms their estates in the land, to hold to them and their heirs; in this case some are of opinion, that they shall be joint-tenants of the fee-simple, because the donees were joint-tenants for life, for that the confirmation must enure according to the estate which they have in possession, which is a joint estate for life. But others hold the contrary. For first, say they, that the donees have to some purposes several inheritances executed, though as between the donees a survivorship shall hold for their lives. Secondly, they say, that when the whole estate, which comprehends several inheritances, is confirmed, the confirmation must enure according to the several inheritances, which is the greater and most perdurable estate, and therefore that the donees shall be tenants in common of the inheritance in this case.

*What remainder prevents action of waste.*

And albeit in this case of Littleton, the husband, by the confirmation gains an estate for life in remainder, (as Littleton terms it, which some do object to as not being strictly a remainder,) yet if the husband commits waste, an action of waste shall lie against him and his wife, notwithstanding the mean remainder, because the husband himself commits the waste and does the wrong; and

therefore this remainder shall not excuse him, no more than it would where a man leases to A. during the life of B. with remainder to A. during the life of C., if the lessee commits waste an action of waste will lie against him.

SECTION 526.

*BUT if I let land to a feme sole for a term of years, and she takes husband, and I confirm the estate of husband and wife, to hold for term of their lives: in this case they have a joint estate in the freehold, for the wife had no freehold before &c.*

Confirmation to husband and wife enures how.

And it is to be observed, that chattels real, as leases for years, wardships, and the like, are not by the marriage given to the husband absolutely as all his chattels personal are, but conditionally only, that is if the husband happen to survive her, but he has power to alien them at his pleasure; in the mean time [i. e. till alienation] the husband is possessed of the chattels real in right of his wife, which possession admits of a confirmation or release.

Of husband's interest in his wife's chattels real.

[300 a]

SECTION 527.

*ALSO, if my disseisor grants a rent charge which I confirm and afterwards enters upon the disseisor; quære, in this case, if the land be discharged of the rent or no.*

Confirmation of conditional feoffee's rent-charge not avoided by feoffor's entry for condition broken.

It is a general rule that such a thing as I may defeat by my entry I may make good by my confirmation. Therefore if a feoffee upon condition grant a rent charge in fee, and the feoffor confirms it, and afterwards the condition is broken, and the feoffor enters, he shall not avoid the rent charge. And so it is if the heir of the disseisor grant a rent charge, and the disseisee confirms it, and afterwards recovers the land, he shall not avoid the rent: and yet in neither of these cases was his entry congeable at the time of the confirmation.

## SECTION 528.

Parson's charge confirmed by patron, &c. good, if latter has the fee.

ALSO, if a parson of a church charge his glebe, and the patron and ordinary confirm the same, then shall the same grant stand in force. But in this case it is necessary that the patron have a fee simple in the advowson; for if he have but an estate for life or in tail, the grant shall stand good only during his life and the life of the parson who granted.

Parson is seised of the church and glebe.

[300 b]

Parson] In legal signification is taken for the rector of a parochial church, and he is said to be seised *in jure ecclesie*, and the law had an excellent end therein, viz. that in his person the church might sue for and defend her rights; and also be sued by any who had an elder or better title, and when the church is full, it is said to be full and provided with a parson. Parson imperson-ee, is the rector, who is in possession of the church parochial, be it presentative, or impropriate, and of whom the church is full.

Patron and ordinary's assent before grant enough;

Here are divers things to be noted. First, that the confirmation is but a mere assent by deed to the grant; and therefore it is holden, that if there be parson, patron, and ordinary, and the patron and ordinary give licence by deed to the parson to grant a rent charge out of the glebe, and the parson grants the rent charge accordingly, this is good, and shall bind the successor; and yet here is no confirmation subsequent, but a licence precedent.

except patron be Ordinary, then Dean must assent;

Secondly, The ordinary alone, without the dean and chapter, may agree thereunto, either by licence precedent, or confirmation subsequent; for that the dean and chapter has nothing to do with what the bishop does as ordinary in the life-time of the bishop. But Thirdly, If the bishop be patron, there the bishop cannot confirm alone, but the dean and chapter must confirm also; for the advowson or patronage is parcel of the possession of the bishopric; and therefore the bishop, without the dean and chapter, cannot make the grant good, but only during his own life, [to make it good] after the decease of the incumbent [there must be] either a

licence precedent, or a confirmation subsequent [by the dean and chapter.]

A. parson of D. is patron of the church of S. as belonging to his church of D., and presents B. who by consent of A. and of the ordinary, grants a rent charge out of the glebe; this is not good to make the rent charge perpetual, without the assent of the patron of A. no more than the assent of the bishop is who is patron without the dean and chapter, or no more than the assent of the patron is who is tenant in tail or for life, as in the text. And Littleton here says, that the patron who confirms must have a fee-simple, meaning to make the charge perpetual.

*or patron be parson, then his patron must join.*

Fourthly, he that is patron must be patron in fee-simple; for if he be tenant in tail, or tenant for life, his confirmation or agreement is not good to bind any successor, but such only as come into the church during his life. So if the estate of the patron be conditional, and he confirms, and afterwards the condition is broken, his confirmation is void. But if the patron be tenant in tail, and discontinues the estate in tail, the lease shall stand good during the discontinuance; and if the estate tail be barred, it shall stand good for ever.

*Patron must have indefeasible fee or acquire such during his life.*

But here a diversity is to be observed between a sole corporation, as parson, prebend, vicar, and the like, (who have not the absolute fee in them, for to their grants the patron must give his consent,) and a corporation aggregate of many, as dean and chapter, master fellows and scholars of a college, abbot or prior and convent, and the like, or any sole corporation who has the absolute fee, as a bishop with consent of the dean and chapter; these aggregate corporations may by the common law make any grant of or out of their possessions, without their founder or patron, albeit the abbot or prior &c. were presentable: and the same was at common law of a bishop, because the whole estate and right of the land was in them, and they may respectively maintain a writ of right. [But now they are restrained by divers acts of Parliament presently mentioned.] If a bishop has two chapters, and makes a grant, both chapters must confirm it, or else the successor may avoid the grant. But if one of the chapters be dissolved, then the confirmation of the other is sufficient, and in no case does such grant need the confirmation of the king, though he is founder and patron of all bishop-

*Powers of ecclesiastical corporations at common law.*

[301a]

*Feoffment not confirmable before livery, contra of grant before attornment. Restraining statutes.*

rics. And note the confirmation which Littleton here speaks of must be made in the life-time or during the incumbency of the parson; and so in the case of the bishop or other sole corporation, must it be made in his life-time. But it is to be remembered that grants made by parson, prebends, vicars, bishops, master and fellows of any college, dean and chapter, master or guardian of any hospital, or any other person having a spiritual or ecclesiastical living are restrained by divers acts of parliament to make any grant, rent charge, lease or alienation, other than such as are mentioned in those acts, which you may read at large, and the expositions thereon in my commentaries; [i. e. Readings on the Statutes.]

## SECTION 529.

Tenant for life's rent charge, confirmed by reversioner good, when.

*ALSO, if a man lets land for life, and the tenant for life charges the land with a rent in fee, [which must necessarily determine on the grantor's death,] and he in reversion confirms the same grant, the charge is good enough and effectual, [without words of enlargement or clause of distress.]*

But if the tenant for life had granted a rent to another and his heirs during the life of the grantor by express words, and the lessor had confirmed that grant, the same would nevertheless determine by the death of tenant for life. But if tenant for life upon condition grants a rent in fee, and the lessor confirms this grant, then if after condition broken the lessor re-enters, he shall not avoid the grant.

## SECTION 530.

Chantry.

*AND quære if the patron of a chantry and the chaplain may charge the same with a rent charge in perpetuity.*

[301b]

## SECTION 531.

“Give and grant” good words of confirmation.

*ALSO, in some cases this verb dedi, or this verb concessi, has the same effect in substance, and shall enure to the same intent, as the*

*verb confirmavi. As if I be disseised of an acre of land, and make a deed thus, Sciant præsentis &c., quod dedi to the disseisor &c., or quod concessi to the said disseisor, and deliver the deed only to the disseisor without any livery of seisin of the land, this is a good confirmation, and as strong in law as if there had been in the deed this verb confirmavi &c.*

Here observe, that some words are large and have a general extent, and some have a proper and particular application. The former sort may contain the latter; as *dedi*, or *concessi* may amount to a grant, a feoffment, a gift, a lease, a release, a confirmation, a surrender &c., and it is in the election of the party to use them to which of these purposes he will. But a release, confirmation, or surrender &c., cannot amount to a grant &c., nor can a surrender amount to a confirmation or a release &c., because these are proper and peculiar conveyances destined to a special end. And there are other words besides *dedi* and *concessi*, that will amount to a confirmation, as *dimisi*. In ancient statutes and in original writs this word *dimisi* is applied not only to a lease for life, but to a gift in tail, and to an estate in fee. And he to whom such deed comprehending *dedi* &c., is made, may plead it as a grant, as a release, or as a confirmation, at his election.

*They include all other words, but other words operate only as they import.*

If a parson and ordinary make a lease for years of the glebe to the patron, and the patron by his deed grants it over, or if the disseisor grants a rent to the disseisee, and he by his deed grants it over, and after re-enters; in both these cases one and the same words amount to a grant and a confirmation. And so it is if a disseisor make a lease for life, or a gift in tail, with remainder to the disseisee in fee and the disseisee by his deed grants over the remainder and the particular tenant attorns, the disseisee shall not enter upon the tenant for life, or in tail, for if he should he would avoid his own deed, which amounts to a grant of the estate and a confirmation also.

*Same word may operate both as a grant and confirmation.*  
[302 a]

### SECTS. 532, 533.

[*And note, whensoever a confirmation enlarges or gives an estate there ought to be apt words used for the same, as 'heirs' for a fee, 'heirs of his body,' for an estate tail, and the like.*]

*Words of inheritance necessary to confirmation by enlargement.*

## SECTION 534.

Feoffment by disseisor's heirs and disseisee operates how.

ALSO if a man be disseised, and the disseisor dies seised, and his heir is in by descent, and after the disseisee and the heir of the disseisor make a deed jointly to another in fee with livery of seisin this is the feoffment of the heir and confirmation of the disseisee. But if the disseisee in this case brings a writ of entry in the per and cui against the alienee of the heir of the disseisor, quære, how he shall plead this deed against the demandant by way of confirmation &c. And know, my son, that it is one of the most honorable, laudable, and profitable things in our law, to be acquainted with the science of good pleading in actions real and personal; and therefore I counsel thee especially to employ thy courage and care to learn the same.

Feoffment by feoffees and cestui que use. [302b]

*Feoffment of the heir &c.*] For the land shall ever pass from the person who has the estate in the land. As if *cestui que use* and his feoffees after the statute of 1 R. 3., and before the statute of 27 H. c. 10., had joined in a feoffment, it shall be accounted the feoffment of the feoffees, [and the confirmation of the *cestuis qui use*] because the estate of the land was in them.

Tenant for life and remainder-man's fine or feoffment operates how.

So it is if tenant for life, and he in remainder or reversion in fee, join in a feoffment by deed. The livery of the freehold shall move from the lessee, and the inheritance from the reversioner or remainder-man, according to their respective estates. For it cannot be adjudged by law, that the feoffment of tenant for life draws the reversion or remainder out of the lessor or him in remainder, or that such a feoffment works a wrong because they joined together. If there be tenant for life, with remainder in tail &c. and tenant for life and the remainder-man in tail levy a fine, this is no discontinuance or divesting of any estate in remainder, but each party passes that which he has power and authority to do. And if A. tenant be for life, with remainder to B. for life, with remainder to C. in tail, with remainder to the right heirs of B., and A. and B. join in a feoffment by deed, albeit it may be said that this is the feoffment of A. and the confirmation of B., and consequently that he in remainder in tail cannot enter for the forfeiture during the life of B., yet because B. joined in the feoffment, which was a



tortious act as to the remainder-man in tail, both the tenants for life shall forfeit their estates, and he in the remainder in tail may enter for the forfeiture. But if the reversioner in fee and tenant for life join in a feoffment by parol, this shall be (as some hold) first, a surrender of the estate for life, and then a feoffment of the reversioner; for otherwise, if the whole should pass from the lessee, then he in the reversion might enter for the forfeiture, and every man's act (*ut res magis valeat*) shall be construed most strongly against himself.

And it is to be observed, that if the disseisor and disseisee join in a charter of feoffment, and enter into the land and make livery, it shall be accounted the feoffment of the disseisee, and the confirmation of the disseisor; [but if, as in Littleton's case, the entry of the disseisee be taken away by the descent cast, then is it the feoffment of the heir and the confirmation of the disseisee].

*Operation of feoffment by disseisor and disseisee.*

[303a]

### SECTION 536.

[305a]

*In the same manner it is, if a man has a rent charge out of certain land, and he confirms the estate which the tenant has in the land, yet the rent charge remains to the confirmor.*

*Rent-charge remains to confirmor.*

### SECTION 537.

*In the same manner it is, if a man has common of pasture in another man's land, if he confirms the estate of the tenant of the land, nothing shall pass of his common which notwithstanding his confirmation shall remain to him, as it was before.*

*So does common.*

And note, that a man cannot abridge a rent charge or common of pasture by a confirmation, as he may a rent service in respect of the privity between the lord and tenant; and so it is said a tenure may be abridged by a confirmation, but not a rent charge or common. But a man may release part of his rent charge, or common &c.

[307 a]

SECTION 543.

Release in extinguishment.

AND sometimes the verbs *dedi et concessi* shall enure by way of extinguishment of the thing given or granted; as if a tenant holds of his lord by a certain rent, and the lord by his deed grants the same rent to the tenant and his heirs, this shall enure by way of extinguishment, and thereby the rent is extinct.

The grant enures also by way of release.

[307 b]

SECTION 544.

Release of rent to tenant is.

So if one having a rent charge out of certain land grants to the tenant of the land the rent charge, the rent is extinct, for a man cannot have a rent out of his own land.

But if the grant be to the tenant of the land and a stranger, the rent shall be extinguished but for a moiety: and so it is of a seignior.

SECTION 545.

Confirmation to termor,

ALSO, if I let land to a man for a term of years, and afterwards I confirm his estate without more words in the deed, by this he has no greater estate than for the term of years he had before.

SECTION 546.

carries freehold, when.

BUT if I release to him all my right which I have in the land without more words in the deed, he has an estate of freehold; [to carry it further, words of inheritance must be inserted.]

## SECTION 547.

[308 a]

ALSO, if I being within age let lands to another for term of twenty years, and the lessee grants the land to another for term of ten years: in this case, when I am of full age, if I release to the grantee of my lessee &c. this release is void, because as between him and me there is no privity. But if I confirm his estate, such confirmation is good. But if my lessee grant all his estate to another, then my release made to his grantee is good and effectual.

Release to under-tenant bad, contra of confirmation.

Here it is observable, that the lease of an infant is not void but voidable.

Infant's lease voidable only.

## SECTION 548.

ALSO, if a man grants a rent charge issuing out of his land [that is, a rent charge already created] to another for life, and after confirms his estate in the rent, to hold to him in fee-tail or in fee-simple; this confirmation is void so as to enlarge the estate in the rent, for the confirmor had not any reversion therein.

Confirmation of rent in esse.

Here the diversity is apparent, between a rent newly created and a rent in esse: which needs no explanation. Only this is to be observed, that Littleton intends that the deed of confirmation is not to contain any clause of distress; for otherwise, as to the confirmation the deed is void, but the clause of distress amounts to a new grant, as in the Chapter of Rents has been said.

Clause of distress amounts to new grant.

## SECTION 549.

BUT if a man be seised in fee of a rent service or rent charge, and grants the rent to another for life, and afterwards confirms the estate of the grantee in fee-tail, or in fee-simple, this confirmation is good so as to enlarge his estate according to the words of the confirmation, for the confirmor has a reversion of the rent.

Confirmation of rent carries fee when.

[308 b]

## SECTION 550.

Confirmation of  
rent newly  
created should  
be by fresh  
deed ;

*But in the case aforesaid where a man grants a rent charge to another for life, if he wishes the grantee to have an estate in tail, or in fee, it is necessary that the deed of grant of the rent charge for life be surrendered or cancelled, and then to make a new deed of the like rent charge to have and perceive to the grantee in tail or in fee. Ex paucis plurima concipit ingenium.*

or by a clause  
of distress in  
fee. Cancellation.

*Surrendered or cancelled.] Note by cancellation of the deed the rent which lies only in grant ceases (as here it appears) as well as by the surrender. And the reason wherefore the deed should be surrendered or cancelled, is that the grantor should not be doubly charged, viz. with the old grant for life and with the new grant in fee ; or, as hath been said, the grantor may grant to the grantee for life and his heirs, that he and his heirs shall distrain for the rent &c., and this shall amount to a new grant, and at the same time not create a double charge, whereof you may see more in the Chapter of Rents.*

## CHAPTER X. SECTION 551.

[309 a]

## OF ATTORNMENT.

*ATTORNMENT is necessary where there is lord and tenant, and the lord grants the services of his tenant to another for term of years, or for term of life, or in tail, or in fee, the tenant must attorn to the grantee in the life time of the grantor, otherwise the grant is void. And attornment is in fact nothing more than the tenant's agreement by word to the grant, which is sufficient if he say to the grantee, I agree to the grant made to you &c., or I am well content with the grant made to you &c., but the most common attornment is, to say, Sir, I attorn to you by force of the said grant, or I become your tenant &c., or to deliver to the grantee a penny, or a half-penny, or a farthing, by way of attornment.*

What it is,  
and how per-  
formed.

And the reason hercof is, that every grant must take effect in substance in the lifetime both of the grantor and the grantee. And in this case if the grantor dies before attornment, the seigniory, rent, reversion, or remainder descends to his heir; and therefore after his decease the attornment comes too late: so likewise if the grantee dies before attornment, an attornment to the heir is void, for nothing descended to him: and if he should take, he must take as a purchaser, whereas the word heirs is added only as a word of limitation. But if the grant were by fine, then albeit the conusor or conusee dies, yet the grant is good. For by a fine levied the estate passes to the conusee and his heirs; and attornment to the conusee or his heirs at any time is sufficient to give a privity to maintain a distress. But this doctrine of attornment relates only

All deeds must  
take effect in  
lifetime of  
parties.

[309 b]

to conveyances at common law and to conveyances taking effect under the 27 H. 8. c. 10. made since Littleton wrote.\*

[310b]

## SECTION 553.

Freehold tenants must attorn on lord's alienation.

*IF a man be seised of a manor, consisting part in demesne and part in service, if he alien the manor it is necessary that the freehold tenants who hold of the alienor as of his manor attorn to the alienee, or otherwise the services remain continually in the alienor, but as to the tenants at will [i. e. the copyhold tenants of the demesne] they need not attorn.*

Here it is to be observed, that when a man makes a feoffment of a manor, the services do not pass, but remain in the feoffor until the freeholders attorn; but when they do attorn, the attornment has relation to the feoffment. For albeit the attornment be made many years after the feoffment, yet it shall have relation to make the services pass out of the feoffor *ab initio* even by the livery upon the feoffment, but not to charge the tenants with any mean arrearages, or for waste in the mean time, or the like.

On what alienation attornment necessary.

[312a]

And it is to be observed, that an attornment is only requisite on the alienation of a seignior, a rent, reversion, or remainder, for the tenant never need attorn but where there is tenure, attendance, remainder or payment of a rent out of land. And therefore if an annuity, common of pasture, common of estovers, or the like, be granted for life or years &c. the reversion may be granted without any attornment; and albeit sometimes in some of these cases, or the like, an attornment be pleaded, yet it is surplusage, and more than is needed, because in none of them there is any tenure, attendance, remainder, or payment out of land.

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\* By stat. 4 & 5 Ann. c. 16., attornment is rendered needless, and few statutes have been more complete in their operation than this statute, for except in the few instances noticed in 2 Bing. 59. and 1 Pow. Mortg. 174. n., attornment is now seldom heard of; for which reason it is deemed unnecessary to insert the whole of this chapter, relating as it does to abstruse and antiquated niceties about the effect of attornment on disseisors, abators, &c.

## SECTION 557.

*IF there be lord and tenant, and the tenant lets his tenement to another for life, with remainder to another in fee, and after the lord grants the services to another &c. and the tenant for life attorns, this is good enough, for the tenant for life is tenant in this case to the lord &c. and he in the remainder cannot be said to be tenant to the lord as to this intent, until after the death of the tenant for life: yet in this case if he in the remainder dies without heir, the lord shall have the remainder by way of escheat, because albeit the lord in such case ought to avow upon the tenant for life, yet the whole entire tenement and all estates of freehold fee-simple or otherwise therein are together holden of the lord.*

Tenant for life must attorn. Escheat.

## SECTION 560.

[313a]

*ALSO, if there be lord and tenant, and the tenant grants the tenements to a man for life with remainder to another in fee, if the lord grants the services to the tenant for life in fee, in this case the tenant for life hath a fee in the services; but the services are put in suspense during his life. But the heirs of his tenant for life shall have the services after his decease. And in this case there needs no attornment, for by the acceptance of the deed by him who ought to attorn &c. this is an attornment of itself.*

Grant of services to tenant for life a suspension during his life.

## SECTION 561.

[313b]

*BUT where the tenant hath as great and as high an estate in the tenements as the lord has in the seigniorie; in such case, if the lord grant the service to the tenant in fee, this shall enure by way of extinguishment. Causa patet.*

Merger, the estates must be equally high and perdurable.

Here Littleton intends not only as great and high an estate, but as perdurable also, as hath been said; for a disseisor or tenant in fee upon condition hath as high and great an estate, but not so perdurable an estate as will make an extinguishment.

[315b]

## SECTION 567.

Tenant for years must attorn on grant of reversion, then livery unnecessary.

ALSO, if a man lets tenements for term of years, by force of which lease the lessee is seised, and after the lessor by his deed grants the reversion to another for term of life, or in tail, or in fee; it is necessary in such case that the tenant for years attorn, or otherwise nothing shall pass to the grantee by such deed. And if in this case the tenant for years attorn to the grantee, then the freehold shall presently pass to the grantee by such attornment without any livery of seisin &c. because if any livery of seisin &c. should be or were needful to be made, then the tenant for years should be at the time of the livery of seisin ousted of his possession, which would be against reason.

Elegit creditor and executors must attorn.

And tenant by statute merchant, or tenant by statute staple, or by *elegit*, must also attorn; for the grantee may have a *venire facias ad computandum*, or tender the money &c. and discharge the land; and if the reversion be granted by fine, they shall be compelled to attorn in a *quid juris clamat*. And so executors who have the land till debts are paid must attorn upon the grant of the reversion, although they have not any certain term for years.

## SECTION 568.

Tenant for life must attorn.

ALSO, if tenements be let to a man for term of life, or given in tail, saving the reversion &c. if he in the reversion grant the reversion to another by deed, it is necessary that the tenant of the land attorn to the grantee in the life time of the grantor, otherwise the grant is void.

And his assignee when.

[316a]

If tenant in dower or by the curtesy grant over his or her estate, and the heir grants over the reversion, the tenant in dower or by the curtesy may attorn, [notwithstanding the assignment of his or her estate] because at the time of the grant made they were attendant to the heir in reversion, and the grantee cannot be tenant in dower, or tenant by the curtesy. But if the reversion on a lease for life be granted, and lessee for life assigns over his estate, the lessee cannot attorn; but the attornment of the assignee is good,



because, as Littleton here says, the tenant of the land must attorn, and after the assignment there is no tenure or attendance &c. between the lessee and him in reversion. So if lessee for life assigns over his estate upon condition, he then having nothing in him but a condition shall not attorn; but the assignee may attorn, because he is tenant of the land.

## SECTION 569.

*IN the same manner it is, if land be granted in tail, or let to a man for term of life, the remainder to another in fee, and he in the remainder grants this remainder to another &c. if the tenant of the land attorn in the life of the grantor, then the grant of such a remainder is good, otherwise not, [but see next section.]*

Tenant in tail not bound to attorn.

True it is that tenant in tail may attorn; but where the reversion is granted by fine, he is not compellable to attorn, because he has an estate of inheritance which may continue for ever. And so it is of a tenant in tail after possibility of issue extinct, he shall not be compelled to attorn for the inheritance which was once in him. But if tenant in tail after possibility of issue extinct grant over his estate, his assignee shall be compelled to attorn, because he never had but a bare estate for life.

Tenant in tail apres need not attorn.

## SECTION 570.

[316b]

*YEAR-BOOK, P. 12. Edw. 4. where it was holden that tenant in tail shall not be compelled to attorn, but if he will attorn gratis, it is good enough.*

Tenant in tail.

This is added to Littleton, and therefore though it be good law, and the book truly cited, yet I pass it over.

## SECTION 572.

[317 a]

*AND it is to be understood, that where a lease for years or for life, or a gift in tail, is made to any man reserving to the lessor*

Rent passes by attornment

though not  
named.

*or donor a certain rent &c. if such lessor or donor grant his reversion to another, and the tenant of the land attorns, the rent passes to the grantee, although in the deed of grant of the reversion no mention be made of the rent, for the rent is incident to the reversion in such case, but not è converso &c; for if a man grant the rent in such case to another, reserving to him the reversion of the land, albeit the tenant attorn to the grantee, this shall be but a rent seck &c.*

## SECTION 573.

Tenant for life's acceptance of deed an attornment which vests the remainder.

[317b]

*ALSO, if a man let land to another for his life, and after he confirm by his deed the estate of the tenant for life, the remainder to another in fee, and the tenant for life accepts the deed, then is the remainder in fait in him to whom the remainder is given or limited by the same deed. For the acceptance of the deed, by the tenant for life is an agreement by him, and so an attornment in law. But yet he in the remainder shall not have any action of waste, nor other benefit by such remainder, unless he has the said deed in hand to produce, and therefore it will be a good and sure thing in such case for him in the remainder, that one part of the indenture be delivered to him.*

[319b]

## SECTION 578.

Limitation to tenant for life, with ultimate remainder to his right heirs, gives him remainder in fee.

*ALSO, if a lease be made for life, with remainder to another in tail, with remainder over to the right heirs of the tenant for life; in this case, if the tenant for life grant his remainder in fee to another by his deed, this remainder passes immediately by the deed without any attornment &c. for if any ought to attorn, it should be the tenant for life himself, and it would be vain that he should attorn upon his own grant &c.*

“Right heirs” words of purchase, when.

Here it appears, that where the ancestor takes an estate of freehold, and afterwards a remainder is limited to his right heirs, that the fee simple vests in himself, as well as if it had been limited to him and his heirs; for his right heirs are in this case words of limitation of estate and not of purchase. Otherwise it is where the

ancestor takes but an estate for years: as if a lease for years be made to A. with remainder to B. in tail, with remainder to the right heirs of A., there the remainder vests not in A. but the right heirs shall take by purchase if A. die during the estate tail: for as the ancestor and the heir are *correlativa* as to inheritances, so are the testator and executor, or the intestate and administrator as to chattels. And so it is if A. make a feoffment in fee to the use of B. for life, and after to the use of C. for life or in tail, and after to the use of the right heirs of B., B. hath the fee simple in him as well when it is by way of limitation of use, as when it is by act executed.

## SECTION 586.

[322 a]

*In the same manner is it, where a man lets tenements devisable by custom to another for life, or for years, and devises the reversion by his testament to another in fee, or in fee tail, and dies, and after the tenant commits waste, he to whom the devise was made shall have a writ of waste although the tenant never attorned. And the reason is, for that the will of the devisor made by his testament shall be performed according to the intent of the devisor: and if the effect of this should lie upon the attornment of the tenant, then perchance the tenant would never attorn, and then the will of the devisor would never be performed &c. and for this the devisee shall distrain &c. or he shall have an action of waste &c. without attornment. For if a man devise such tenements to another by his testament, habendum sibi in perpetuum, and dies, and the devisee enters, he hath a fee-simple, causâ quâ suprâ; yet if a deed of feoffment had been made to him by the devisor of the same tenements, habendum sibi in perpetuum, and livery of seisin were made upon this, he would have had but an estate for term of his life.*

Attornment to devisee not essential.

(to hold for ever a fee.)

[322 b]

[325a]

## CHAPTER XI. SECTION 592.

## OF DISCONTINUANCE.

Discontinuance is where right of entry is defeated by alienation.

**DISCONTINUANCE** is an ancient word in the law, and has divers significations &c. One is, where a man aliens to another certain lands or tenements and dies, and another has right to have the same lands or tenements, but he may not enter thereon because of such alienation.

A discontinuance of estates in lands or tenements is properly (in legal understanding) an alienation made or suffered by tenant in tail, or by any person seised in *auter droit*, whereby the issue in tail, or the heir or successor, or those in reversion or remainder, are driven to their action and cannot enter. I have added (properly) by warrant of our author, Sect. 470., where he uses discontinuance for a divesting or displacing of a reversion, though the entry be not taken away. And where our author says, that it has divers significations, he alludes to discontinuance of process which is expounded in my Reports, and need not be inserted here. When Littleton wrote, an estate in lands or tenements might have been discontinued in five ways, viz. by feoffment, fine, release with warranty, confirmation with warranty, and by suffering a recovery in a *præcipe quòd reddat* [i. e. a common recovery], which also was to the prejudice of five kinds of persons, viz. of wives, of heirs, of successors, of those in reversion, and those in remainder. But for wives, and their heirs, and for successors, the law is altered by acts of parliament since Littleton wrote, as in this Chapter in its proper place will appear.

What conveyances create a discontinuance.

[325 b]

## SECTION 593.

*As if an abbot alien lands belonging to the convent in fee, his successor cannot enter into the same lands, but he is put to his action to recover the same.*

Corporation sole could discontinue at common law; *contra* as to corporation aggregate.

And here is to be noted, that the convent, albeit it be composed of dead persons in law, yet is it said to be *capitulum* to the abbot, in the same manner as the dean and chapter is said to be secular to the bishop. As also that a sole body politic who has the absolute right as an abbot, bishop, or the like, may make a discontinuance; but a corporation aggregate of many, as dean and chapter, warden and chaplains, master and fellows, mayor and commonalty &c. cannot make any discontinuance; for if they join, the grant is good; and if the dean, warden, master, or mayor make it alone it is void, and works a disseisin. But now by statutes 27 H. 8. and 31 H. 8., all the abbots, priors, and other religious persons are dissolved, and there are none remaining at this day, and by the statutes 1 Eliz. and 13 Eliz. c. 10., and 1 Jac. c. 3., bishops and all other ecclesiastical persons are disabled to alien or discontinue any of their ecclesiastical livings, as by the same acts doth appear.

*Sole ecclesiastical corporations now disabled.*

## SECTION 594.

*ALSO, if a man be seised of land in right of his wife, and thereof infeoffs another, and dies, the wife may not enter, but she is put to her action, called a cui in vitâ.*

Husband's feoffment a discontinuance.

*In right of his wife.]* That is to say, in fee-simple, fee-tail, or for life. But this discontinuance is altered since our author wrote, by the statute of 32 H. 8., by the purview of which statute, the wife and her heirs after the decease of her husband may enter into the lands or tenements of the wife, notwithstanding the alienation of her husband.

[326a]

*Contra now by stat. 32 H. 8.*

And where our author speaks of a husband seised in right of his wife, so it is where the husband and wife are jointly seised to them

*Construction of that statute.*

and their heirs of an estate made during the coverture [which is commonly called an estate by entreties], and the husband makes a feoffment in fee, and dies, the wife now may enter within the said statute, although it was the inheritance of both. And so it is if the feoffment be made by the husband and wife (albeit the words of the statute be by the husband only), for in substance this is the act of the husband only. So if the husband and wife suffer a recovery this is holpen by the statute: for it is in fact the act of the husband, and the words of the statute are *made, suffered, or done*.

*Divorce.*

If the husband make a feoffment in fee of lands holden in right of his wife, and they are afterwards divorced *causâ præcontractûs*, yet the woman may enter within the purview of the said statute, and is not driven to her writ of *cui ante divortium*, as she was at the common law, albeit the entry be by the statute given to the wife, and now as it proves she was never his lawful wife. But it is enough that she was his wife *de facto* at the time of the alienation, and where her husband dies she cannot be his wife at the time of the entry. If the husband levy a fine with proclamations, and dies, the wife must enter or avoid the estate of the conusee within five years, or else she is barred for ever by the statute of 4 H. 7., for the statute of 32 H. 8. avoids the discontinuance but not the bar; and the statute speaks of a fine, and not of a fine with proclamations. If lands be given to the husband and wife, and to the heirs of their two bodies, and the husband makes a feoffment in fee and dies, the wife is holpen by the said statute, as hath been said, and so is the issue of both their bodies. Feme tenant in tail takes husband, the husband makes a feoffment in fee, the wife before entry dies without issue, he in the reversion or remainder may enter. For, first, the reversion or remainder cannot be discontinued in this case, because the estate tail is not discontinued. 2dly. The words of the statute are: "shall not be prejudicial or hurtful to the wife or her heirs, or such as shall have right title or interest by the death of such wife, but that the same wife and her heirs, and such other to whom such right shall appertain after her decease, shall or lawfully may enter into all such manors, lands &c. according to their rights and titles therein;" by which words the entry of the reversioner or remainder-man is in the above case preserved. If the husband be tenant in tail with remainder to his wife in tail, and the husband makes a feoffment in fee; by this feoffment the husband by the common law not only discontinues his own estate tail, but also his wife's remainder: but at this day after the death

*Husband's fine must be avoided by entry.*

*Remainder-man and reversioner protected by statute.*

of the husband without issue, the wife may enter by the said act of 32 H. 8. If the husband has issue, and makes a feoffment in fee of his wife's land, and the wife dies, the heir of the wife shall not enter during the husband's life, neither by the common law nor by the statute, [for he is entitled to be tenant by the curtesy.]

## SECTION 595.

[326 b]

*ALSO, if tenant in tail of certain land thereof enfeoffs another, and has issue and dies, this issue may not enter into the land, albeit he has right and title by the entail, but he is put to his action, which is called a formedon in le descender.*

Tenant in tail's feoffment divests estate tail.

This extends as well to a woman tenant in tail as a man, and was generally good law when Littleton wrote. But now by stat. 11 H. 7. if a woman has any estate tail jointly with her husband, or only to herself, or to her use in any lands or hereditaments of the inheritance or purchase of her husband, or given to the husband and wife in tail by any of the ancestors of the husband, or by any other person seised to the use of the husband or his ancestors, and shall thereafter being sole, or with any other after-taken husband discontinue &c. the same, every such discontinuance shall be void; and that it shall be lawful for every person to whom the interest, title, or inheritance, after the decease of the said woman should appertain, to enter &c. So that if such a feme tenant in tail make any discontinuance in fee, in tail, or for life, although it be with warranty, yet this does not take away the entry after her death, either of the issue or of him in reversion or remainder. If lands were entailed to a man and his wife, and to the heirs of their two bodies, and the husband had made a feoffment in fee and died, and then the wife had died, this had been a discontinuance at common law: for the title of the issue is as heir of both their bodies, and not as heir to any one of them, and his entry must ensue his title or action, [but now this is otherwise, as is noted in the first-mentioned case of this paragraph].

Now otherwise as to jointures.

*A formedon.] De formâ donationis*, so called because the writ comprehends the form of the gift. And there are three kinds of writs of formedon, viz. the first in the descender to be brought by

Three kinds of formedon.

the issue in tail, who claim by descent *per formam doni*. The second in the reverter, which lies for him in the reversion or his heirs or assigns after the estate tail is spent. And the third in the remainder, which the law gives to him in the remainder, his heirs or assigns, after the determination of the particular estate tail; of all which you may read in the Register and in F. N. B.

[327 a]

## SECTION 596.

Tenant in tail's feoffment, &c. divests reversion;

*ALSO, if there be tenant in tail, the reversion being to the donor and his heirs, if the donor makes a feoffment &c. and dies without issue, he in the reversion cannot enter, but is put to his action of formedon in le reverter.*

## SECTION 597.

and remainder;

*IN the same manner it is, where tenant in tail is seised of certain land whereof the remainder is in another in tail, or in another in fee. If the tenant in tail aliens in fee, or in fee-tail, and afterwards dies without issue, they in remainder may not enter, but are put to their writ of formedon in the remainder &c. and for this cause such feoffments and alienations are called discontinuances.*

which is not altered by any statute.

*Makes a feoffment.*] This implies, either in fee-simple, fee-tail, or for an estate for life; and this remains as when Littleton wrote, not altered by any statute. And the reason hereof is that the remainder-man and reversioner are privy in estate, and it would be highly detrimental to the purchaser, if he were disallowed the benefit of his warranty, the safeguard of which is founded upon reason and equity. But then it may be demanded, seeing that there was no reversion or remainder expectant upon any estate tail at the common law, and that the issue in tail had not any remedy for the tenant in tail's alienation, then by what law is the alienation of tenant in tail a discontinuance at this day to the issue in tail, or to those in reversion or remainder? Whereunto it is thus answered, that it is provided by the statute of W. 2. cap. 1, *De donis conditionalibus, quòd non habeant illi quibus tenementum sic fuerit datum potestatem alienandi, &c.* Upon these words the sages of the law have construed the said act according to the rule and reason of the

Effects of stat. de donis on discontinuance.

[327 b]



common law, and *that* in divers and sundry variable ways. For some alienations of tenant in tail they have adjudged voidable by the issue in tail by action only; some at the election of the issue in tail to avoid it by action, entry, or claim; some are merely void by the death of the tenant in tail: which several constructions were made upon the self-same words aforesaid. As, for example, if tenant in tail makes a feoffment in fee, this drives the issue in tail to his action, which is called in law a discontinuance; and this construction was made, because at common law the feoffment of an abbot or bishop, or of the husband seised in right of his wife worked a discontinuance, and drove the successor and the wife to their action and foreclosed them of their entry; and as the entry of the issue was taken away, so consequently the entry of them in reversion and remainder was likewise defeated.

Also, if an abbot, bishop, or husband in right of his wife were seised of a rent, or of any other inheritance that lay in grant, and they had aliened the rent &c., it was in the election of the successor or wife after the death of her husband to claim the rent &c. or to bring an action, because alienation did not work a discontinuance; and so it is by construction in case of tenant in tail. Lastly, if the abbot, bishop, or husband had granted a rent newly created out of the land to another in fee, this had utterly ceased by their death; and so it is also by construction in case of tenant in tail. So that these words (*non habent potestatem alienandi*) work these effects, viz. as to lands, that a feoffment bars not the issue &c. of his action, but works a discontinuance to bar him of his entry; that as to rents or any thing *in esse* which lies in grant, the said statute takes away the tenant's power to make any discontinuance; and as to rents &c. newly created, the same statute takes away his power to make them continue longer than during his life [and the reason is, because such inheritances lie in grant only and not in livery, and by a grant a man conveys no more than he can lawfully grant, which is not the case with the five species of conveyance before mentioned].

*No discontinuance of rents.*

But there is a diversity between an alienation working a discontinuance of an estate which takes away an entry, and an alienation working, divesting, or displacing an estate which takes away no entry. As if there be tenant for life with remainder to A. in tail, with remainder to B. in fee, if tenant for life aliens in fee [by any

*Effect of tenant for life's alienation by innocent conveyance.*

other than one of the said five tortious conveyances, that is by an innocent conveyance as it is called] this alienation divests and displaces the remainders, but works no discontinuance, for to every discontinuance there must be a divesting or displacing of the estate, and turning the same to a right; (for if it be not turned to a right, they who have the estate cannot be driven to an action) [and here the remainder-man may enter for the forfeiture, either on execution of the conveyance or on the tenant for life's death]. And that is the reason why such inheritances as lie in grant, cannot by grant be discontinued, because such a grant divests no estate, but passes only that which the grantor may lawfully convey, and so the estate itself descends, reverts, or remains, as shall be said hereafter in this Chapter.

*Feoffment of tenant in tail's discontinuance.*

If A. makes a gift in tail to B. who makes a gift in tail to C. and C. makes a feoffment in fee and dies without issue, and B. has issue and dies, the issue of B. may enter; for although the feoffment of C. discontinued the reversion of the fee-simple which B. has gained upon the estate tail made to C., yet could it not discontinue the right of entail which B. had, which was discontinued before; and therefore when C. died without issue, then the discontinuance of the estate tail of B. which passed by his livery, ceased, and consequently the entry of the issue of B. is lawful; which case may open the reason of many other cases.

*Husband, wife, and stranger joint-tenants, effect of husband's feoffment.*

Also note, that a discontinuance made by the husband took away the entry only of the wife and her heirs by the common law, and not of any other who claimed by title paramount above the discontinuance. As if lands had been given to the husband and wife and to a third person, and to their heirs, and the husband had made a feoffment in fee, this had been a discontinuance of one moiety and a disseisin of the other: if the husband had died, and then the wife had died, the survivor should have entered into the whole, for he claimed not under the discontinuance, but by title paramount from the first feoffor; and seeing the right by law survives, the law gives him a remedy to take advantage thereof by entry, for no other remedy for that moiety could he have.

## SECTIONS 598, 599, 600.

ALSO if tenant in tail be disseised, and he releases by deed to the disseisor and his heirs all the right which he [the tenant in tail] has in the same tenements, this is no discontinuance, for nothing passes to the disseisor but the estate for life of the tenant in tail who made the release &c. But by the feoffment of the tenant in tail, a fee-simple passes by force of the livery of seisin &c. [which consequently shall be a discontinuance.] And the reason hereof is, that by the release nothing passes, but what the releasor may lawfully and rightfully release without hurt or damage to other persons who have right therein after his decease &c. So there is great diversity between the feoffment of a tenant in tail and a release by him.

Release of right not a discontinuance; contra of feoffment which passes freehold; [328 a]

It is a rule in law, that the disseisee, or any other who has a right only cannot by his release or confirmation make discontinuance, because nothing can pass thereby but what may be lawfully passed. Otherwise it is of a feoffment in respect of the livery of seisin, for that is the most solemn and common assurance in the country, and to be maintained for the common quiet of the realm; for by the feoffment the freehold (which is so much esteemed in law) passes, whereas by a release only a bare right passes.

## SECTION 601.

BUT if the tenant in tail releases with warranty, and dies, and this warranty descends to his issue in tail, this, it is said, is a discontinuance by reason of the warranty.

or release with warranty;

The reason is, that if the issue in tail should enter, the warranty (which is so much favoured in law) would be destroyed; and therefore to the end that if assets in fee-simple descend [the issue shall be bound], he to whom the release is made may plead the same and bar the demandant; by which means all rights and advantages are saved. And here I may note once for all, that (it is said) with Littleton is as good as a *concessum* in a book-case.

[328 b]

## SECTION 602.

but the warranty must descend on the issue inheritable.

*BUT if a man has issue a son by his wife, and his wife dies, and after he takes another wife, and tenements are given to him and to his second wife, and to the heirs of their bodies engendered, and they have issue another son, and the second wife dies, and after the tenant in tail is disseised, and he releases to the disseisor all his right &c. and binds himself and his heirs to warranty &c. and dies, this is no discontinuance to the issue in tail by the second wife, who may well enter, for the warranty descends to his elder brother whom the father had by his first wife.*

## SECTION 603.

Same. Boro' English.

*IN the same manner it is, where lands are descendible to the youngest son after the custom of Borough-English, and these are entailed &c. and the tenant in tail has two sons, and is disseised, and he releases to his disseisor all his right with warranty &c. and dies, the younger son may enter upon the disseisor, notwithstanding the warranty, because the warranty descends to the elder son; for the warranty shall always descend upon the heir at the common law, [and never on the heir by custom.]*

[329 a]

## SECTION 604.

Release with warranty when no discontinuance.

*ALSO, if an abbot releases to his disseisor with warranty, this is no discontinuance to his successor, for the warranty ceases with his death or privation.*

Effect of bishop's translation.

Note, that privation is here resembled to death, and so is translation also. Wherein this diversity is worthy of observation, that when a bishop &c. makes an estate, lease, grant of a rent-charge, warranty, or any other act which may tend to the diminution of the revenues of the bishopric &c. which should maintain the successor, there the privation or translation of the bishop &c. is all one with his death. But where the bishop is patron and ordinary, and confirms a lease made by the parson without the dean and chapter,

and after the parson dies, and the bishop collates another, and then is translated, yet his confirmation remains good; for the revenues that are to maintain the successor are not thereby diminished. And the like diversity holds in case of resignation, notwithstanding there is some opinion to the contrary.

## SECTION 605.

*ALSO, if a man seised in right of his wife be disseised, and he releases &c. with warranty, this is no discontinuance to the wife, if she survives her husband, for she may enter &c. Causa patet.*

Husband's release with warranty no discontinuance, unless wife his heir.

This is evident, unless the wife be heir to the husband (as by law she may be), and then it is a discontinuance for the cause aforesaid.

## SECTION 606.

[329 b]

*ALSO, if tenant in tail of certain land lets the same to another for term of years, and the lessee enters, and then the tenant in tail by deed releases all his right in the land, to hold to the lessee and his heirs for ever; this is no discontinuance, but after the decease of the tenant in tail, his issue may well enter, because by such release nothing passed but for the life of the tenant in tail.*

Tenant in tail's release no discontinuance.

## SECTION 607.

*IN the same manner it is, if the tenant in tail confirms the estate of the lessee for years, to hold to him and his heirs, this is no discontinuance, for nothing passes by such confirmation but the estate which the tenant in tail has for his life.*

Neither is his confirmation.

## SECTION 611.

[330 b]

*BUT otherwise it is when tenant for life makes a feoffment in fee, for by such a feoffment the fee-simple passes. A tenant for years,*

Feoffment by tenant for life or years a discessin.

*also, may make a feoffment in fee, and by his feoffment the fee-simple shall pass, and yet he has at the time but an estate for a term of years.*

Albeit the feoffment made by lease for years be a feoffment between the feoffor and feoffee, and by this feoffment a fee-simple passes by force of the livery, yet is it a disseisin to the lessor.

[331 a]

## SECTION 613.

Estate *pur auter vie* only passes by tenant in tail's feoffment of all his estates.

ALSO, if tenant in tail by deed grants to another all his estate in the tenements entailed, to hold to the other and his heirs for ever, and delivers seisin accordingly; in this case the grantee has no other estate than for the life of tenant in tail. And so it may be well proved, that tenant in tail cannot grant or alien, or make any rightful estate of freehold to another person but for term of his own life only &c.

The meaning of Littleton is, that having regard to the issue in tail, and to those in reversion or remainder, tenant in tail cannot lawfully make a greater estate than for term of his own life; and therefore this release or grant is no discontinuance. But in regard of himself his release or grant leaves no reversion in him, but puts the same in abeyance, so that after such a release or grant he shall not have any action of waste &c.

[332 a]

## SECTION 617.

So of his grant of advowson or common in gross.

ALSO, if a man be tenant in tail of an advowson in gross, or of a common in gross, and by deed grants the advowson or common to another in fee, this is no discontinuance; for the grantee has no greater estate than for term of the tenant in tail's life.

## SECTION 618.

Fine of things lying in grant no discontinuance.

AND note, that of such things as pass by way of grant without livery, there, albeit such things be granted in fee, by fine, yet this is not a discontinuance.

The reason is because nothing passes but only during the life of tenant in tail, which is lawful, whereas a discontinuance works a wrong. And if tenant in tail of a rent service &c. or of a reversion, or remainder in tail &c. grant the same in fee with warranty, and leaves assets in fee-simple, and dies, this is neither a bar nor a discontinuance to the issue in tail; but he may distrain for the rent or service, or enter into the land after the decease of tenant for life. But if the issue brings a formedon in the descender, and admits himself out of possession, then he shall be barred by the warranty and assets. And where the thing lies in livery, as lands and tenements, yet if to the conveyance of the freehold or inheritance no livery of seisin is requisite, such conveyance works no discontinuance. As if tenant in tail exchange lands &c. or if the king being tenant in tail, grant by his letters patent the lands in fee, there is no discontinuance wrought.

*Grant with warranty a discontinuance, if issue bring formedon.*  
[332b]

*Exchange no discontinuance.*

If tenant in tail make a lease for years of the lands entailed, and afterwards levies a fine of the same, this is a discontinuance; for a fine is a feoffment of record, and the freehold passes. But if tenant in tail makes a lease for his own life, and afterwards levies a fine, this is no discontinuance, because the reversion expectant upon an estate of freehold lies only in grant, and a fine of things lying in grant works no discontinuance as abovesaid.

*Fine of reversion no discontinuance, when.*

## SECTION 620.

[333a]

**BUT** if tenant in tail makes a lease for the life of the lessee, he thereby acquires a new reversion in fee-simple, because when he made the lease for life, he discontinued the estate-tail. And a reversion of the fee-simple must be in some person in such case. It cannot be in the donor, inasmuch as his reversion is discontinued; ergo, the reversion of the fee ought to be in the tenant in tail, who discontinued. And if in this case the tenant in tail grant by his deed this reversion to another, and the tenant for life attorns and dies, living the tenant in tail, whereupon the grantee of the reversion enters, this is a discontinuance in fee, and the issue is put to his formedon, because the reversion was executed, that is, fell in during the lifetime of tenant in tail who made the grant.

*Tenant in tail's lease for life and grant of reversion a discontinuance, if reversion falls in his lifetime;*

*otherwise not.*

For when the reversion is thus executed in the lifetime of the tenant in tail, it is equivalent in judgment of law to a feoffment in fee, for the estate for life passed by livery. But if the lessee for life had not died in the lifetime of the tenant for life, so that the reversion had not fallen in during his life, then would there have been no discontinuance, and the entry of the issue would have been lawful because by the death of the lessee the discontinuance is determined; and consequently the grant made of the reversion gained upon that discontinuance is void also.

*Lease according to statute no discontinuance.*

If tenant in tail makes a lease for three lives, according to the statute 32 H. 8., that is no discontinuance of the estate-tail or of the reversion, because it is authorised by act of parliament, whereunto every man in judgment of law is party.

*Lease by husband and wife a discontinuance for life.*

And yet in some cases the freehold may be discontinued and not the reversion. As if the husband and wife make a lease for life by deed of the wife's land, reserving a rent, and the husband dies; this was a discontinuance at the common law for life; and yet the reversion was not discontinued, but remained in the wife. Otherwise it is if the husband had made the lease alone.

[333 b]

*And the tenant for life dies.]* The like law is if the tenant for life surrenders to the grantee, or if the grantee recovers in an action of waste, or enters for the forfeiture.

*Grant of reversion no discontinuance, but limitation of remainder may be.*

If tenant in tail make a lease for life, with a remainder in fee, this is an absolute discontinuance, although the remainder be not executed [i. e. fall not into possession] in the lifetime of tenant in tail, because it is all one estate, and passes by one livery. And so note a diversity between a grant of a reversion and a limitation of a remainder.

*Reversion must fall in grantor's lifetime to make grant of it a discon.*

B. tenant in tail makes a gift in tail to A. and afterwards B. releases to A. and his heirs, after that A. dies without issue, the issue of the first donee may enter upon the collateral heir, because A. had not seisin and execution of the reversion of the land in his demesne as of fee, as Littleton here speaks. But if tenant in tail makes a lease for the life of the lessee, and afterwards releases to him and his heirs, this is an absolute discontinuance; because the fee-simple is executed in the lifetime of tenant in tail.



If tenant in tail of a manor whereunto an advowson is appendant, makes a feoffment in fee by deed (as it ought to be) of one acre with the advowson, and the church becomes void, and the feoffee presents, and afterwards tenant in tail dies, and the church becomes void, the issue shall not present until he has re-continued the acre. But if the feoffee had not executed the same by presentment, then the issue in tail should have presented. And so was it at the common law of the husband seised in right of his wife, *mutatis mutandis*.

*So incumbent must die as to advowson.*

If a fine be levied by a tenant in tail, and he grants and renders the land to himself and his heirs, and dies before execution, this is no discontinuance. Otherwise it is, if it had been executed in the lifetime of the tenant in tail. If tenant in tail makes a lease for the life of the lessee, and afterwards grants the reversion with warranty, and dies before execution, this is no discontinuance: because the discontinuance was (as hath been said) but for life, and the warranty cannot enlarge the same.

*Executory fine no discontinuance.*

*Nor is grant of reversion with warranty.*

If at this day tenant in tail makes a lease for life, and afterwards by deed indented and enrolled according to the statute bargains and sells the reversion to another in fee, and the lessee dies, so that the reversion is executed [i. e. falls in] in the lifetime of the tenant in tail; although the bargainee is not in the *per* by the tenant in tail, yet inasmuch as he claims the reversion immediately from him, which is executed in his lifetime, this is a discontinuance. And so it is, and for the same cause, if tenant in tail had granted the reversion to the use of another and his heirs. If tenant in tail makes a lease for life, and afterwards disseises the lessee for life, and makes a feoffment in fee, the lessee dies, and then the tenant in tail dies; although the fee is executed, yet because it was not executed by lawful means, (as in all the cases of Littleton it appears it ought to be,) it is no discontinuance.

*Tenant in tail makes a lease for life, then grants away reversion, this a discontinuance, if lessee dies in tenant in tail's lifetime.*

## SECTION 622.

[334a]

**BUT** in this case, if tenant in tail who grants the reversion dies, living the tenant for life, and afterwards the tenant for life dies, and afterwards he to whom the reversion was granted enters &c. then this is no discontinuance, and the issue of the tenant in tail may well enter upon the grantee of the reversion; because the re-

*Tenant in tail's lease for years and life distinguished as to discontinuance.*

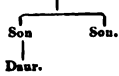
*version which the grantee had was not executed in the lifetime of the tenant in tail &c. And so there is a great diversity when tenant in tail makes a lease for years, and when he makes a lease for life; for in the one case he has a reversion in tail, and in the other case he has a reversion in fee.*

[334 b]

## SECTION 623.

Same exemplified.

Tenant tail male.



*FOR if land be given to a man and to the heirs male of his body engendered, who has issue two sons, and the eldest son has issue a daughter and dies, and the tenant in tail makes a lease for years and dies, now the reversion descends to the younger son, because the reversion was but in the tail, and the youngest son is heir male &c. But if the tenant had made a lease for life &c. and had afterwards died, now the reversion descends to the daughter of the elder brother, for the reversion is in the fee-simple, and the daughter is heir general &c.*

## SECTION 624.

Devise no discontinuance.

*ALSO, if a man be seised in tail of lands devisable by testament &c. and he devises this to another in fee, and dies, and the other enters &c. this is no discontinuance, because no discontinuance was made in the lifetime of the tenant in tail &c.*

## SECTION 625.

Tenant in tail's feoffment to reversioner no discontinuance.

*ALSO, if land be given in tail, saving the reversion to the donor, and the tenant in tail by his deed enfeoffs the donor, to hold to him and his heirs for ever, and delivers to him seisin accordingly &c. this is no discontinuance, because none can discontinue the estate tail unless he discontinues the reversion also. And inasmuch as by such feoffment made to the donor (the reversion then being in him) his reversion was not discontinued or altered &c. this feoffment is no discontinuance &c.*

Contra if there be an intermediate remainder;

This must be understood where the reversion of the donor is immediately expectant upon the estate of the donee; for if a man

makes a gift in tail with remainder in tail, reserving the reversion to himself; in this case if the donee enfeoffs the donor, this is a discontinuance, because there is a mean estate. [335 a]

Also it is to be intended of a feoffment made to the donor solely or only, for if the donee enfeoff the donor and a stranger, this is a discontinuance of the whole land. *or if feoffment be to donor and stranger.*

But if tenant for life makes a lease for his own life to the lessor, the remainder to the lessor and a stranger in fee, in this case, forasmuch as the limitation of the fee would work the wrong, it enures to the lessor as a surrender for the one moiety, and a forfeiture as to the remainder of the stranger; for he cannot give to the lessor that which he had before, as our author here says; and as to the remainder to the stranger, it is a forfeiture of his moiety [for it purports to pass a greater estate than he can warrant], and when the lessor enters, he may take the benefit of such forfeiture. *Tenant for life's feoffment to remainder-man and stranger a surrender and forfeiture.*

But if two joint-tenants be, and one of them enfeoffs his companion and a stranger, and makes livery to the stranger, this shall vest only in the stranger, because the livery cannot enure to his companion. *Feoffment by one joint-tenant to companion and stranger.*

*None can discontinue the estate tail, unless he discontinues the reversion also.*] And therefore if the reversion or remainder be in the king, the tenant in tail cannot discontinue the estate tail. But tenant in tail, with reversion in the king, might have barred the estate tail by a common recovery, until the statute of 34 H. 8. c. 20, which statute now restrains him; such common recovery, however, neither barred nor discontinued the king's reversion. *No discontinuance of remainder in king.*

Note, the reversion may be re-vested, and yet the discontinuance remain. As if a fême covert be tenant for life, and the husband makes a feoffment in fee, and the lessor enters for the forfeiture; here is the reversion re-vested, and yet the discontinuance remained at the common law. *But reversion may be re-vested and discontinuance remain.*

## SECTION 626.

Feoffment to remainder-man no discontinuance.

*IN the same manner it is, where lands are given to a man in tail with remainder to another in fee, and the tenant in tail enfeoffs the remainder-man in fee, this is no discontinuance, causâ quâ suprâ.*

[336a]

## SECTIONS 631.

Tenant in tail's lease with livery always a discontinuance.

*BUT where the tenant in tail makes a lease for years or for life, with remainder to another in fee, and delivers livery of seisin accordingly, this is a discontinuance in fee, for that the fee-simple passes by force of the livery of seisin &c.*

This is evident also, and hereof sufficient hath been spoken before.

## SECTION 632.

Husband's feoffment on condition, if a discontinuance?

*AND it is to be understood, that some discontinuances are made upon condition &c. and if the condition be broken and the estate defeated, then are the discontinuances defeated also. As if the husband seised of land in right of his wife, makes a feoffment in fee upon condition, and dies, if the [husband's] heir afterwards enters upon the feoffee for the condition broken, the entry of the wife is congeable on the heir, for by the entry of the heir the discontinuance is defeated, as is adjudged.*

*Re entry for condition broken avoids feoffment, and by consequence the discontinuance.*

[336b]

Here it appears, that for the condition broken, the heir of the husband may enter; for albeit no right descends from the husband to his heir, yet the title of entry by force of the condition which the husband created, descends to his heir; and if the heir enters, that entry avoids the feoffment, which [being the cause of the discontinuance if the feoffment be defeated the discontinuance is defeated also; the consequence is that] the estate of the heir vanishes away immediately on his entry, and the estate of the fême or her

heirs vests presently without any entry or claim by her or them ; and if the husband himself had re-entered, the estate would have vested in his wife [immediately and he would have become seised *jure uxoris* as before].

## SECTION 633.

ALSO, if a woman inheritrix hath a husband who is within age, and he being within age makes a feoffment of the tenements of his wife in fee, and dies, it has been a question, whether the wife may enter or not &c. And it seems to some, that the entry of the wife after the death of her husband, is congeable in this case. For when her husband made the feoffment [during his minority] &c. he might well enter at any time during the coverture notwithstanding such feoffment, and he could not enter in his own right, but only in right of his wife: ergo, such right of entry in right of his wife remains to the wife after his decease.

Feoffment by minor seised *jure uxoris* no discontinuance.

And the heir of the husband cannot enter, for no right or title descends to him, therefore the wife may take benefit of the nonage of her husband and enter into the land. If husband and wife are both within age, and they by deed indented join in a feoffment reserving a rent, and the husband dies, the wife may enter, or have a *dum fuit infra etatem*. But if she were of full age, she shall not have a *dum fuit infra etatem* for the nonage of her husband, albeit they be but one person in law.

[337 a]

## SECTION 634.

AND it has been said, that if two joint-tenants being within age make a feoffment in fee, and one dies, the survivor may enter into the whole &c.

Effect of feoffment by joint-tenants being infants.

In this case, if one joint-tenant had made a feoffment in fee and died, the right should not have survived, for the jointure was severed for a time. If two joint-tenants be, and the one is of full age and the other within age, and both make a feoffment in fee,

[337 b]

and he of full age dies, the infant may enter or have a *dum fuit infra ætatem* but for a moiety only.

## SECTION 635.

Infant's feoffment never prejudicial to himself or others.

*ALSO, when an infant makes a feoffment it shall neither aggrieve or hurt him but he may well enter &c. So neither therefore shall it aggrieve or hurt another. And for these reasons it seems to some, that after the death of the infant husband so making the feoffment &c. his wife may well enter.*

*But he may well enter &c.]* Here is implied, that he may enter either within age, or at any time after full age, and likewise that after his death his heirs may enter.

*Heirs in Boro' English or special tail may take advantage, of ancestor's infancy.*

*Nota,* a special heir may take advantage of the infancy of the ancestor. As if tenant in tail of an acre of the custom of borough English makes a feoffment in fee within age, and dies, the youngest son may avoid it; for he is privy in blood, and claims by descent from the infant. And so if tenant in tail to him and the heirs female of his body makes a feoffment in fee and dies within age, leaving issue a son and a daughter, the daughter may avoid the feoffment. And so note, that a cause to enter by reason of infancy is not like a right of entry on conditions, warranties, and estoppels, which ever descend to the heir at the common law only.

## SECTION 636.

Discontinuance for life, if it determines on surrender of estate.

*ALSO, if a woman inheritrix takes husband, and they have issue a son, and the husband dies, and she takes another husband, and the second husband lets the land which he has in her right to another for term of his life, and afterwards the wife dies, and then the tenant for life surrenders his estate to the second husband &c. quære, if the son of the wife may enter upon the second husband during the life of the tenant for life &c. But it is clear law, that after the death of the tenant for life, the son of the wife may enter; because the discontinuance, which was only for term of life, is determined &c. by the death of the same tenant for life.*

*Surrender*] Signifies the yeilding up of an estate for life or years to him who has an immediate estate in reversion or remainder, wherein the estate for life or years may drown or merge by mutual agreement between the parties. A surrender properly taken is of two sorts, viz. a surrender in deed, or by express words, and a surrender by operation of law. Littleton here puts his case of a surrender of an estate in possession, for a right cannot be surrendered. And it is to be noted, that a surrender in law is in some cases of greater force than a surrender in deed. As if a man make a lease for years to begin at Michaelmas next, this future interest cannot be surrendered, because there is no reversion wherein it may merge; but by a surrender in law it may be merged. As if the lessee before Michaelmas take a new lease for years either to begin presently, or at Michaelmas, this is a surrender in law of the former lease. *Fortior et æquior est dispositio legis quam hominis.*

*Surrender, what it is, and how many kinds.*

[338 a]

*A right or interest termini cannot be surrendered except by taking fresh lease.*

Also there is a surrender without deed, whereof Littleton gives an example, viz. of an estate for life of lands, which may be surrendered without deed, and without livery of seisin; because it is but a yielding or a restoring of the estate again to him in the immediate reversion or remainder, which is always favoured in law

*Estate for life may be surrendered without deed.*

And there is also a surrender by deed; and that is of things which lie in grant, whereof a particular estate cannot commence without deed, and by consequence the estate cannot be surrendered without deed. But in the example which Littleton here puts, the estate might commence without deed, and therefore might be surrendered without deed. And albeit a particular estate be made of lands by deed, yet may it be surrendered without deed, in respect of the nature and quality of the thing demised, because the particular estate might have been made without deed; and so on the other hand if a man be tenant by the curtesy, or tenant in dower of an advowson, rent, or other thing that lies in grant, albeit there the estate may begin without deed, yet in respect of the nature and quality of the thing, namely that it lies in grant, it cannot be surrendered without deed. And so if a lease for life be made of lands, with remainder for life; albeit the remainder for life began without deed, yet because remainders and reversions, though they be of lands, are things that lie in grant, they cannot be sur-

*Things lying in grant cannot be surrendered without deed.*

rendered without deed. See in my Reports plentiful matter of surrenders.

Surrender of  
life estate no  
effect on deriva-  
tive charges.  
[338 b]

If tenant for life grant a rent-charge, and after surrender, yet the rent remains during his life, for to that purpose he comes in under the charge, [that is, after or subsequent to the charge, and he cannot therefore avoid it;] but if he in the reversion make a lease for years, or grant a rent-charge &c. and then the lessee for life surrenders, the lease or rent shall commence immediately.

Construction of  
surrender as  
between parties  
and strangers.

Here note a diversity, when a surrender is to the prejudice of a stranger, and when it is for his benefit. If a man makes a lease to A. for life, reserving a rent of forty shillings to him and his heirs, with remainder to B. for life, and the lessor grants the reversion in fee to B. and A. attorns—B. shall not have the rent, for although the remainder for life is merged in the fee-simple as between them, yet as to a stranger it is *in esse*; [and as between the grantor and A., B. it seems is to this purpose a stranger], and therefore B. shall not have the rent, but if B. dies his heir coming in of the immediate reversion is no stranger, he therefore shall have the rent.

Of merger by  
union of term  
and reversion in  
different rights.  
Baron and feme.

A master of a hospital being a sole corporation, by the consent of his brethren makes a lease for years of part of the possessions of the hospital; afterwards the lessee for years is made master of the hospital, the term is thereby merged; for a man cannot have a term for years in his own right and a freehold in *auter droit* to consist together; as if a man lessee for years takes a feme lessor to wife, [he will then have at one and the same time a term for years in his own right, and the immediate fee-simple (for his own benefit) in right of his wife, and therefore his term should be drowned; but see 2 Roll. Rep. 472. contra.] Nevertheless a man may have a freehold in his own right and a term for years in *auter droit*: and therefore if a man lessor takes the feme lessee to wife, the term is not merged, but he is possessed of the term in her right during the coverture. So if the lessee makes the lessor his executor, the term is not drowned. *Causá quâ supra*. But if it had been a corporation aggregate of many, the making of the lessee master would not have extinguished the term, no further than it would if the lessee had been made one of the brethren of the hospital.



In this section Littleton makes a quære. Upon which it is observable, that grave and learned men may doubt without any imputation ; for the most learned doubt the most, whereas the more ignorant are for the most part the more bold and confident.

Reflection recommended.

SECTION 637.

If there be grandfather, father, and son, and the grandfather is tenant in tail, and is disseised by the father who makes a feoffment thereof without warranty, and dies, and afterwards the grandfather dies, the son may well enter upon the feoffee, because this was no discontinuance in the father, inasmuch as he was not seised of the estate tail at the time of the feoffment, but only of an estate by disscisin of the grandfather.

No discontinuance of estate tail whereof the party was never seised ;

A  
|  
B  
|  
C

Here it is to be observed, that it is not necessary that the tenant in tail be seised of the estate tail at the time when the discontinuance is effected, if he has been once seised that is sufficient : as if tenant in tail makes a lease for life, whereby he gains a reversion in fee-simple by wrong ; in this case, if he grant the reversion in fee, and the lessee dies, the whole estate is discontinued ; and yet at the time of the grant he was not seised of the estate tail, but because he was once seised by force of the entail a discontinuance ensues. But in many cases a warranty added to a conveyance is said to make a discontinuance *ab effectu*, although he who made the conveyance was never seised by force of the estate tail, because it takes away the entry of him who has the right, in the same manner as a discontinuance does. As if tenant in tail be disseised and dies, and the issue in tail releases to the disseisor with warranty ; in this case, the issue was never seised by force of the entail ; and yet this has the effect of a discontinuance by reason of the warranty, and the reason hereof appears before in this Chapter. And if in the above case the father who made the feoffment had survived the grandfather, he should never have entered against his own feoffment ; but albeit the father had survived, yet after his decease the son should have entered, for the reason here yielded by Littleton. But if the feoffment had been with warranty, then it had wrought the effect of a discontinuance : and therefore Littleton says without warranty.

[339 a]

except by means of warranty.

[340b]

## SECTION 643, 644.

Parson's alienation no discontinuance of successor.

ALSO, if a parson of a church or vicar of a church alien certain lands or tenements parcel of his glebe &c. to another in fee, and dies or resigns &c. his successor may well enter notwithstanding such alienation, for the parson has no right to the fee-simple; that abides in another person [or rather is in perpetual abeyance; the parson cannot consequently maintain a writ of right].

## SECTION 645.

Contra as to bishop, dean, and master of hospital, who may maintain writ of right.

BUT a bishop may have a writ of right of the tenements belonging to his church, for the right is in his chapter, and the fee-simple abides in him and in his chapter. And a dean may have a writ of right, because the right remains in him. And an abbot may have a writ of right, for the right remains in him and in his convent. And a master of a hospital may have a writ of right, because the right remains in him and in his confreres &c. And so of the like cases. But a parson or vicar cannot have a writ of right &c.

Fee-simple of glebe is in abeyance, and why.  
[341a]

Parcel of his glebe &c.] In whom the fee-simple of the glebe is, is a question in our books. Some hold that it is in the patron; but that cannot be for two reasons. First, for that in the beginning the land was given to the parson and his successors, and the patron is no successor. 2dly. The words of the writ of *juris utrùm* are, *si sit libera eleemosina ecclesiæ de D.* and not of the patron. Others hold that the fee-simple is in the patron and ordinary; but this cannot be, for the causes above said: and therefore, of necessity, the fee-simple is in abeyance, as Littleton says, Sect. 646. And this was provided by the providence and wisdom of the law; for that the parson and vicar have *curam animarum*, and were bound to celebrate divine service and administer the sacraments; and therefore no act of the predecessor should make a discontinuance to take away the entry of the successor, and to drive him to a real action, whereby he would be destitute of maintenance in the mean time. Upon consideration of all our books I observe this

diversity: that a parson or vicar, for the benefit of the church and of his successor, is in some cases esteemed in law to have a fee-simple qualified; but to do any thing to the prejudice of his successor in many cases, the law adjudges him to have in effect but an estate for life. As a parson, vicar, archdeacon, prebend, chantry priest, and the like, may have an action of waste, and in the writ it shall be said, *ad exhæredationem ecclesiæ &c. ipsius B. or præbendæ ipsius A.* And the parson &c. who makes a lease for life, shall have a *consimili casu* during the life of the lessee, and a writ of entry *ad communem legem* after his death, or a writ *ad terminum qui præterit*, or a *quòd permittat* in the *debet*, and none can maintain any of these writs, but a tenant in fee-simple or fee-tail. And a parson &c. may receive homage, which tenant for life cannot do. But a parson cannot make a discontinuance, as Littleton here teaches; for that would be to the prejudice of his successor to take away his entry and to drive him to a real action.

[341 b]

Also if a parson &c. make a lease for years, reserving a rent, and dies, the lease is determined by his death, in the same way as a lease by any other tenant for life then determines, and no acceptance of rent by the successor can make it good. Also in a real action a parson, vicar, archdeacon, prebend &c. shall have aid of the patron and ordinary, as tenant for life shall have. So that it is evident, that to many purposes a parson has but in effect an estate for life, and to many a qualified fee-simple, but the entire fee and right is not in him; and that is the reason why he cannot discontinue the fee-simple, because he has it not nor ever had it. And for the same cause he cannot have a writ of right right, nor a writ of right in its nature.

*Parson has only a life estate, and his lease for years determines on his death.*

But here it appears by Littleton, that such bodies politic or corporate as have a sole seisin and may have a writ of right, may discontinue, for the fee and right is in them, albeit they cannot absolutely convey away their lands &c. without assent of others; as a bishop, an abbot, a dean, a master of a hospital, and the like. But this is to be understood where a dean or a master of a hospital &c. are solely seised of distinct possessions: for if the body seised be aggregate of many, as the dean and chapter, master and confreres &c., then the feoffment of the dean or master is not a discontinuance but a disseisin. And having the fee and right in them they shall not have aid in respect of their high and large estate,

*Sole corporations may discontinue at common law.*

albeit any of them be presentable: but a dean that is collative shall have aid of the king. And it is to be observed, that the remedy is ever agreeable to the right: and therefore the bishop, dean, master of a hospital, who have a college or common seal, or the like, shall have a writ of right right, which is the highest remedy, for that they have the highest estate.

*Sole ecclesiastical corporations now disabled by statute.*

[342 a]

But at this day the bishop, dean, master of a hospital, or the like, who have the fee and right in them, cannot discontinue; neither can they or any parson, vicar, archdeacon, prebend, or any other having any ecclesiastical living, with assent of dean and chapter, patron and ordinary, or the consent of any others, make any lease, gift, grant or conveyance, estate, charge or incumbrance to bind his successor other than for term of one and twenty years, or three lives in possession, whereupon the accustomed rent or more shall be reserved. These are excellent laws, and have been well expounded for the maintenance of religion and the good of God's church; for otherwise it is to be feared that holy church would lose more than it would gain in these days.

*Ancient hospitals not dissolved with monasteries; and learning respecting the same.*

Note, of hospitals, some are corporations aggregate of many; as of master or warden &c. and his confreres: some, where the master or warden has only the estate of inheritance in him, and the brethren or sisters power to consent, having college and common seal: some, where the master or warden has the estate in him, but has no college and common seal; and such a master or warden shall have a *juris utrum*: and of these hospitals some are eligible, some donative, and some presentable. But where Littleton, in this and other sections, makes mention of masters of hospitals, the reader must know, that since Littleton wrote, there has been a great alteration made by divers acts of parliament concerning hospitals. These points concerning hospitals were resolved by the justices.

First, that no hospital was given to the crown by the statute of 27 H. 8., nor any hospital is within the statute of 31 H. 8. of monasteries, but only religious and ecclesiastical hospitals, and that no lay hospital was within those statutes. 2dly. If upon the foundation of any lay hospital, or after it was ordained, that one or divers priests should be maintained within the hospital to celebrate divine service to the poor, and to pray for the soul of the founder and all Christian souls, or the like; and that the poor of such hos-

pital should make the like orisons, yet such an hospital is not within the said statutes; for the hospital is lay, and not religious; and all or the most part of ancient lay hospitals were founded or ordained after the like sort; and the makers of those statutes never intended to overthrow works of charity, but to take away the abuse. 3dly. That no hospital was given to the king by the statute of 37 H. 8. but in two cases, where the donors, founders or patrons &c. had entered and expulsed the priests, wardens &c. between the fourth day of February, anno 27 H. 8. and the five and twentieth of December, anno 37 H. 8., or where king Henry the eighth, by commission according to that act, should enter and seise the same; but that determined by the death of that king. 4thly. That the statute of 1 E. 6. extended not to any hospital whatsoever, either lay or religious, as by the same appears. To this I will add, *Panis pauperum vita pauperum; que defraudat eos vir sanguinis est.*

## SECTION 646.

*BUT the highest writ a parson &c. can have is the writ of juris utrum, which is a great proof that the right of fee is not in him, or in any others &c. But the right of the fee-simple is in abeyance, that is, it is only in the remembrance, intendment, and consideration of law, or as some say, in nubibus &c.*

Fee of glebe is  
in abeyance.  
[342 b]

*In abeyance.]* That is, in expectation, of the French word *bayer*, to expect. For when a parson dies we say that the freehold is in abeyance, because a successor is in expectation to take it; and here note the necessity of the true interpretation of words. If tenant *pur auter vie* dies, the freehold is said to be in abeyance until the occupant enters. If a man makes a lease for life, with remainder to the right heirs of I. S., the fee-simple is in abeyance until I. S. dies. And so in the case of the parson, the fee and right is in abeyance, that is, in expectation, in remembrance, intendment, or consideration of law, because it is not in any man then living.

Freehold in occupancy and fee of contingent remainder are in abeyance.

## SECTION 647.

*ALSO, if a parson of a church dies, now the freehold of the glebe of the parsonage is in no one during the time the parsonage is*

Freehold of glebe during vacancy in

abeyance In-  
duction a seisin  
in deed.

*void, but it remains in abeyance viz. in consideration and in the understanding of the law until another be made parson of the same church; and immediately when another is made parson, the freehold in deed is in him as successor.*

*This abeyance  
applies to  
bishoprick,  
deanery, &c.*

So it is of a bishop, abbot, dean, archdeacon, prebend, vicar, and of every other sole corporation or body politic, presentative, elective, or donative, which inheritances put in abeyance are by some called *hæreditates jacentes*: and some say, *que le fee est en balauance*.

[343a]

## SECTION 648.

Reason why  
parson may  
charge his  
glebe in per-  
petuity, with  
assent of patron  
and ordinary.

*ALSO, some peradventure will argue and say, that inasmuch as a parson with the assent of the patron and ordinary, may grant a rent-charge out of the glebe of the parsonage in fee, and so charge the glebe of the parsonage perpetually, ergo they have a fee-simple, or two or one of them have a fee-simple, at the least. To this may be answered, that it is a principle in law, that of every land there is a fee-simple &c. in some body, or otherwise the fee-simple is in abeyance. And there is another principle, that every land of fee-simple may be charged with a rent-charge in fee by one way or another. And when such rent is granted by the deed of the parson and the patron and ordinary &c. in fee, none shall have prejudice or loss by force of such grant, but the grantors in their lives, and the heirs of the patron, and the successors of the ordinary after their decease [who have consented to the charge.] And after such charge, if the parson dies, his successor cannot come to the said church to be parson of the same by the law, but by the presentment of the patron, and admission and institution of the ordinary. And for this cause the successor ought to hold himself content, and agree to that which his patron and the ordinary have lawfully done before him. But this is no proof that the fee-simple is in the patron and ordinary, or in either of them &c. But the reason why such grant of a rent-charge is good, is, because they who have the interest &c. in the said church, viz. the Patron according to the law temporal, and the Ordinary according to the law spiritual, were either assenting to, or were parties to such charge, &c. And this seems to be the true cause why such glebe may be so charged in perpetuity.*

And herein is a diversity worthy observation, that when the right to the fee-simple is by judgment of law perpetually in abeyance, without any expectation of its coming *in esse*, *concurrentibus hiisquæ in jure requiruntur*, there he who has the qualified fee may charge or alien it, as in the case of parson, vicar, prebend, &c. But where the fee-simple is in abeyance and by possibility may every hour come *in esse*, there the fee-simple cannot be charged until it comes *in esse*. As if a lease for life be made, with remainder to the right heirs of I. S., the fee-simple cannot be charged til I. S. is dead. And so is Littleton to be understood, *viz.* that every fee may charged, either in *præsenti* or *in futuro*.

Contingent remainder not alienable during contingency.

[343 b]

*Every land of fee-simple.*] And so it is of lands entailed, for they may be charged in fee also; for the estate tail may be cut off by fine or recovery. Also the estate tail may continue, and yet tenant in tail may lawfully charge the land and bind the issue in tail. As if a disseisor make a gift in tail, and the donee in consideration of a release by the disseisee of all his right to the donee, grants a rent-charge to the disseisee and his heirs, proportionable to the value of his right, this shall bind the issue in tail. And as in the case of a moveable freehold, Sect. 1., if the owner of the thirteen acres, being in a meadow of eighty-five, grant a rent-charge out of the thirteen acres generally, without mentioning where they lie particularly; there, as the estate in the land removes, the charge shall remove also. But since our author wrote, all ecclesiastical persons are disabled from charging any of their ecclesiastical possessions in fee, as before hath been spoken of at large.

Estate tail alienable in fee.

So is a moveable freehold chargeable with a rent.

*By the deed of the parson, and the patron, and the ordinary &c.*] Yet if the parson die, and in time of vacation the patron, by the assent of the ordinary, or the patron and ordinary, grant an annuity or rent-charge out of the glebe, this shall bind the succeeding parsons for ever.

Patron and ordinary in vacation may grant a rent charge.

If there be parson, patron, and ordinary, and the parson, by the ordinance and assent of the ordinary grant an annuity to another, having *quid pro quo* in consideration thereof, this shall bind the successor of the parson, without the consent of the patron.

Parson's exchange with consent of ordinary only, binding.

[344 a]

A church parochial may be donative and exempt from all ordinary jurisdiction, and the incumbent may resign to the patron, and

Donative benefice entirely under patron's

controul and  
visitation; but  
privilege lost by  
presentation.

not to the ordinary; neither can the ordinary visit, but the patron may by commissioners to be appointed by him. And then by Littleton's rule, the patron and incumbent may charge the glebe; and albeit it be donative by a layman, yet a mere layman is not capable of taking the incumbency thereof, but only an able clerk *infra sacros ordines*; for albeit he come in by lay donation, and not by admission or institution, yet his function is spiritual: and if such a clerk donative be disturbed, the patron shall have a *quare impedit* of this church donative, and the writ shall say *quòd permittat ipsum presentare ad ecclesiam &c.* and declare the special matter in the declaration. And so it is of a prebend, chantry, or chapel donative, and the like; and no lapse shall incur to the ordinary, except it be so specially provided in the foundation. But if the patron of such a church, chantry, chapel &c. donative, doth once present to the ordinary, and his clerk is admitted and instituted, the benefice is then become presentable, and never shall be donative after, and lapse shall incur to the ordinary as it does of other benefices presentable. But a presentation to such a donative benefice by a stranger, and admission and institution thereupon is merely void. And all this was resolved by the Court of King's Bench, for the rectory parochial donative of Saint Burian in the county of Cornwall.

Origin of Lay  
or Donative  
benefices.

It appears by our books, and by divers acts of parliament, that at the first all the bishoprics in England were of the king's foundation, and donative *per traditionem baculi*, (*id est*) the crosier, which was the pastoral staff, *et annuli*, the ring whereby he was married to the church. And king Henry the first being requested by the bishop of Rome to make them elective, refused it: but king John by his charter, bearing date *quinto Junii anno decimo septimo*, granted that the bishoprics should be eligible. If the king found a church, hospital, or free chapel donative, he may exempt the same from ordinary jurisdiction, and then his chancellor shall visit the same. Nay, if the king found a church without any special exemption, the ordinary is not, but the king's chancellor is visitor of the same. Now as the king may create donatives exempt from the visitation of the ordinary, so he may by his charter licence any subject to found such a church or chapel, and to ordain that it shall be donative, and not presentable, and to be visited by the founder, and not by the ordinary. And thus began donatives in England, whereof common persons were patrons.

Visitor.



*Ordinary.*] *Ordinarius* is he who has ordinary jurisdiction in causes ecclesiastical, immediate to the king and his courts of common law, for the better execution of justice, as the bishop or any other who has exempt [i. e. substantive] and immediate jurisdiction in causes ecclesiastical.

*Ordinary who and why so called.*

*Law temporal*] Which consists of three parts, viz. First, on the common law, expressed in our books of law and judicial records. Secondly, on statutes contained in acts and records of parliament. And thirdly, on customs grounded upon reason, and used time out of mind; and the construction and determination of these belong to the judges of the realm.

*Law, temporal and spiritual, distinguished.*

*Law spiritual.*] That is the ecclesiastical ordinances allowed by the laws of this realm, viz. those which are not against the common law (whereof the king's prerogative is a principal part) nor against the statutes and customs of the realm; and regularly according to such ecclesiastical laws, the ordinary and other ecclesiastical judges proceed in causes within their cognizance. And this jurisdiction was so bounded by the ancient common laws of the realm, and so declared by act of parliament.

*Admission and institution.*] In propriety of speech, admission is when the bishop upon examination admits the clerk to be able, and says, *Admitto te habilem*. Institution is, when the bishop says, *Instituo te rectorem talis ecclesie cum cura animarum, et accipe curam tuam et meam*. But sometimes in a more enlarged sense, admission included institution also: *cujus presentatus sit admissus* (i. e.) *institutus*. And it is to be observed, that institution is a good plenarty against a common person, but not against the king, [against whom the church is not full till the clerk] is inducted; and that is the reason why plenarty shall be tried by the bishop, because the church is full by institution, which is a spiritual act; but void or not void shall be tried by the common law.

*Institution. Admission. Plenarty, by whom triable.*

At the common law, if a stranger had presented his clerk, and he had been admitted and instituted to a church, whereof any subject had been lawful patron, the patron had no other remedy to recover his advowson, but a writ of right of advowson, wherein the incumbent was not to be removed; and so it was at the common law, if an usurpation had been had upon an infant or fême covert, having an advowson by descent, or upon tenant for life &c. the infant,

*At common law no incumbent whether by usurpation or otherwise could be removed, contra now by stat. West. 2. [344 b]*

fême covert, and he in the reversion were driven to their writ of right of advowson ; for at the common law, if the church were once full, the incumbent could not be removed, and plenarty generally was a good plea in a *quare impedit* or assize of *darrein presentment*: and the reason of this was, to the intent that the incumbent might quietly attend and apply himself to his spiritual charge. And secondly, the law intended that the bishop who had cure of souls within his diocese, would admit and institute an able man for the discharge of his duty and his own ; and that the bishop would do right to every patron within his diocese. But at the common law, if any had usurped upon the king, and his presentee had been admitted, instituted, and inducted (for without induction the church had not been full against the king), the king might have removed him by *quare impedit*, and have been restored to his presentation ; for therein he has a prerogative, *quòd nullum tempus occurrit regi* ; but he could not present, for the plenarty barred him of that ; neither could he remove the incumbent in any way but by action, to the end that the church might be the more quiet in the mean time. Neither did the king recover damages in his *quare impedit* at the common law. But the statute West. 2. has altered the common law in the cases aforesaid, as by the said act appears.

*Usurpation by collation, what and when.*

And if the king present to a church, and his clerk is admitted and instituted, yet before induction the king may repeal and revoke his presentation. But regularly no man can be put out of possession of his advowson but by admission and institution upon an usurpation by a presentation to the church, *cum aliquis jus præsentandi non habens præsentaverit &c.* and not by collation of the bishop ; and therefore if the bishop collate without title, and his clerk is inducted, this shall not put the rightful patron out of possession ; for it shall be taken to be only provisionally made for celebration of divine service until the patron presents ; and therefore he is not driven to his *quare impedit*, or assize of *darrein presentment*, in that case ; but an usurpation by collation shall take away the right of collation which is in another.

*Usurpation during trial of right, how remedied and lapse prevented.*

It is to be observed, that an usurpation upon a presentation shall not only put out of possession the person who has right of presentation, but he who has the right of collation also. Therefore at this day the incumbent shall be removed in a *quare impedit*, or assize of *darrein presentment*, if there be not a plenarty by six months before

the *teste* of the writ ; but then the incumbent must be named in the writ, or else he shall never be removed ; yet at the common law, if the ordinary refused to admit and institute the clerk of the patron, or when any disturbed him to present, so that he could not prefer his clerk, he might have his *quare impedit*, or assize of *darrein presentment* ; and if the church were not full, he may have a writ to the bishop to admit his clerk ; but so odious was simony in the eye of the common law, that before the statute of West. 2, he recovered no damages. At the common law, if pending the *quare impedit* against the ordinary for refusing his clerk, and before the church is full the patron brings a *quare impedit* against the bishop, and pending the suit, the bishop admits and institutes a clerk at the presentation of another, in this case if judgment be given for the patron against the bishop, the patron shall have a writ to the bishop, and remove the incumbent that came in *pendente lite* by usurpation, for *pendente lite nihil innovetur*, and therefore at the common law it was good policy to bring the *quare impedit* against the bishop as speedily as possible. And it is to be observed, that although the clerk who comes in *pendente lite*, by usurpation, shall be removed, yet if the rightful patron, being a stranger to the writ, presents *pendente lite*, and his clerk is admitted and instituted, he shall not be removed ; for else, by the bringing of such *quare impedit* against the ordinary, the rightful patron might be defeated of his presentation ; and therefore since the statute of West. 2., it is among other things inquired *ex officio*, if the church be full, and of whose presentation &c. ; and if the plaintiff should have a writ to the bishop and his clerk admitted (as in most cases he ought), yet may the rightful incumbent have his remedy by law. And as it was good policy to bring a *quare impedit* as speedily as possible against the bishop, so it is good policy at this day to name the bishop in the *quare impedit*, for then he shall not present by lapse. Nor shall the metropolitan either ; for the metropolitan shall never present or collate by lapse after six months, but when the immediate ordinary might have collated by lapse within the six months, and had surceased his time. And so it is if the time has devolved on the king, for the first step or beginning fails ; and in human things, *Quod non habet principium, non habet finem.*

[345a]

## SECTION 549.

Tenant in tail's release to disseisor puts right to the freehold in abeyance during his life;

**ALSO, if tenant in tail has issue and is disseised, and after he releases by his deed all his right to the disseisor: in this case no right to the entail can be in the tenant in tail, because he has released all his right to another, and no right can be in the issue in tail during the life of his father; yet such right to the inheritance in the entail is not altogether extinct by force of such release &c. Ergo, it must needs be that such right remain in abeyance, ut supra, during the life of the tenant in tail who releases &c., but after his decease such right presently revives to his issue in deed, &c.**

## SECTION 650.

also reversion on the grant, so that he has no remedy for waste.

**IN the same manner it is, where tenant in tail grants all his estate to another; in this case the grantee has no estate but for term of life of the tenant in tail, and the reversion of the entail is not in the tenant in tail, because he has granted all his estate and all his right &c. And if the grantee commit waste, the tenant in tail shall not have a writ of waste, for he has no reversion. But the reversion and inheritance of the estate tail during the life of the tenant in tail, is in abeyance, that is to say, only in the remembrance, consideration, and intelligence of the law.**

"Estate" embraces every thing in possession or remainder.

**Grant his estate, concedit statum suum.] State or estate signifies such inheritance, freehold, term for years, tenancy by statute merchant, staple, *elegit*, or the like, as any man has in lands or tenements &c. And by the grant of his estate &c. as much as he can grant shall pass, as here by Littleton's case appears. Tenant for life, with remainder in tail, with remainder to the right heirs of tenant for life, if the tenant for life grant *totum statum suum* to a man and his heirs, both estates shall pass.**

"Right" includes all the estate.

**Right. *Jus, sive rectum*] (Which Littleton often uses) signifies properly, and specially in writs and pleadings, when an estate is turned to a right, as by discontinuance, disseisin &c. where it shall**

be said, *quod jus descendit et non terra*. But (right) does also include the estate *in esse* in conveyances; and therefore if tenant in fee-simple makes a lease for years, and releases all his right in the land to the lessee and his heirs, the whole estate in fee-simple shall pass. And so commonly in fines, the right of the land includes and passes the estate in the land.

[345 b]

*Title*] properly, (as some say) is, when a man hath a lawful cause of entry into lands whereof another is seised, for the which he can have no action, as title of condition, title of mortmain &c. But legally this word (title) includes a right also, as you shall perceive in many places in Littleton: and title is the more general word; for every right is a title, but every title is not such a right for which an action lies: and therefore *Titulus est justa causa possidendi quod nostrum est*, and signifies the means whereby a man comes to land, whether his title be by fine or by feoffment &c. And when the plaintiff in assize makes himself a title, the tenant may say, *Veniat assisa super titulum*; which is as much as to say, he claims the assize upon the title which the plaintiff has made by that particular conveyance. *Et dicitur titulus à tuendo*, because by it he holds and defends his land; and as by a release of a right a title is released, so by release of a title a right is released also. See more hereof in Fitzherbert and Brookes' Abridgments under the head *Title*.

"Title" includes all the right,

*Interest.*] *Interesse* is vulgarly taken for a term or chattel real, and more particularly for a future term; in which case it is said in pleading, that he is possessed *de interesse termini*. But *ex vi termini*, in legal understanding, it extends to estates, rights, and titles that a man has of, in, to, or out of lands; for he is truly said to have an interest in them: and by the grant of *totum interesse suum* in such lands, as well reversions as possessions in fee-simple shall pass. And all these words singularly spoken are *nomina collectiva*; for by the grant of *totum statum suum* in lands, all his estates therein pass. *Et sic de cæteris*.

and interest includes all threes.

*Shall not have a writ of waste &c.*] So it is if tenant for life be, with remainder in tail, and he in the remainder releases to the tenant for life all his right and estate in the land. By this release it is said in our books, that the estate of the lessee is not enlarged, but that the release has this effect, to put the estate tail into abey-

A. for life.  
Remainder to B. in tail. B.'s release to A. no merger, but a release of waste.

ance, so that afterwards the remainder-man cannot have an action of waste; yet in that case (saving reformation) the lessee for life has an estate for the life of tenant in tail expectant upon his own life. But if tenant in fee release to his tenant for life all his right yet he shall have an action of waste. And if tenant in tail makes a lease for his own life he shall have an action of waste.

[346 a]

## SECTION 651.

Bishop's alienation a discontinuance.

*ALSO, if a bishop alien lands which are parcel of his bishopric and dies, this is a discontinuance to his successor, because he cannot enter, but he is put to his writ of de ingressu sine assensu capituli.*

## SECTION 652, 3, 4, 5, 6.

Contra as to dean, unless he be solely seised, and of actions by and against dean and chapter.

*ALSO, if a dean alien lands which he has in right of him and his chapter, and dies, his successor may enter. But if the dean be solely seised as in right of his deanry, then his alienation is a discontinuance to his successor, as is said before. And there is no similarity between a dean and chapter, and an abbot and his convent, for dean and chapter are not dead persons in law &c. for every of them may have an action by himself in divers cases. And of such lands or tenements as the dean and chapter have in common &c. if they be disseised, the dean and chapter shall have an assize, and not the dean alone &c. But if any other person will have an action real for such lands or tenements against the dean &c. he must sue against the dean and chapter, and not against the dean alone &c.*

[346 b]

[347 a]

And the reason of this diversity between the case of the abbot and convent and dean and chapter is, for that the monks are regular, and civilly dead, and the chapter are secular, and persons able and capable in law. But by the policy of law the abbot himself (who is sometimes termed the sovereign) albeit he is a monk and regular, yet has he capacity and ability to sue and be sued, to enfeoff, give, demise, and lease to others, and to purchase and take from others; for otherwise they who have right would not have their lawful

remedy, nor would the house have remedy against any other that did them wrong: neither could the house without such capacity and ability stand. And the convent have no other ability or capacity, but only to assent to estates made to the abbot, and to estates made by him, which for necessity sake, though they be civilly dead, they may do.

## SECTION 657.

*ALSO, if the master of an hospital discontinue certain land of his hospital, his successor cannot enter, but is put to his writ of de ingressu sine assensu confratrum et consorum &c. And all such writs fully appear in the Register &c.*

Master of hospital cannot discontinue.

This must also be understood where the master of the hospital has sole and distinct possessions, and not where he and his brethren are seised as a body politic aggregate of many.

## SECTION 658.

*ALSO, if land be let to a man for term of his life, with remainder to another in tail, saving the reversion to the lessor and after he in the remainder disseises the tenant for term of life, and makes a feoffment to another in fee, and after dies without issue, and the tenant for life dies; it seemeth in this case, that he in the reversion may well enter upon the feoffee, because he in the remainder who made the feoffment, was never seised in tail by force of the same remainder &c.*

Tenant in tail in remainder disseises tenant for life, and enfeoffs stranger, this no discontinuance, for he was never seised of the freehold of the estate tail.

Here it appears, that albeit the feoffor has an estate tail in him expectant upon an estate for life, yet his feoffment works no discontinuance. Wherein Littleton adds a limitation to that which in this chapter he had said generally before, viz. That an estate tail cannot be discontinued but only where he who makes the discontinuance was once seised by force of the entail; which is to be understood, when he is seised of the freehold and inheritance of the estate in tail, and not where he is seised of a remainder or reversion expectant upon a freehold, which freehold (as often hath been said) is ever much respected in law.

[347 b]

## CHAPTER XII. SECTION 659.

## OF REMITTER.

A preference of the better title. **REMITTER** is an ancient term in the law, and occurs where a man has two titles to lands or tenements, viz. one of a more ancient title, and one of a more recent date; then if he comes to the land by the later title, yet the law will adjudge him in by force of the elder title, because that title is the more sure and worthy. As if tenant in tail discontinues, and afterwards disseises his discontinuee and dies in possession, the issue in tail are remitted to their prior better title by force of the entail, and the title and interest of the discontinuee is quite taken away and defeated.

Remitter prevents circuity of action.

A remitter is an operation in law upon the meeting of an ancient right remediable, and a later estate in one person without any folly in him, in this case the ancient right is restored, and the new defeasible estate ceased and vanished. And the reason hereof is, for that the law prefers a sure and constant right, though it be little, before a great estate by wrong which is defeasible: moreover the law (which abhors suits of vexation) ever avoids circuity of action, for the rule is *circuitus est evitandus*, and it is observable that the remitter is of the later title to that which is more ancient, and when two rights descend there can be no remitter if the one cannot be remitted to the other, and regularly to every remitter there are two incidents, viz. an ancient right and a defeasible title united together [in the same person in the same right].

[348 a]

Remitter operates on seisin in law and is pre-

*Is quite taken away and defeated &c.*] Here two things are implied and to be understood: 1st, that this remitter is wrought by



descent of the freehold simply without any entry of the issue, and 2dly, that the law so favours remitter (being a restorer to right), that if the discontinuee be an infant or a fême covert, the issue shall be remitted without respect to the privilege of infancy or coverture; and therefore our author says, *the title and interest of the discontinuee is quite taken away and defeated.*

*ferr'd to infancy and coverture.*

## SECTION 660.

*ALSO, if tenant in tail infeoffs his son or cousin inheritable under the entail, who are then within age in fee, and dies, and then the feoffee (being also heir in tail) is remitted to his estate tail. For albeit during the life of the tenant in tail the feoffee shall be adjudged in by force of the feoffment, yet after the death of tenant in tail, the heir shall be adjudged in by force of the entail and not by force of the feoffment, and although such heir be of full age at the death of the tenant in tail, that is immaterial if the heir were within age at the time of the feoffment made. And if such heir attains his full age in the lifetime of the tenant in tail and charges by his deed the same land with a common of pasture, or with a rent-charge, and then the tenant in tail dies; now it seems that the land is discharged of the common or rent, for the heir is in of another estate, and the estate which he had at the time of the charge made is by the remitter utterly defeated.*

Tenant in tail's feoffment to his son defeated on his death.

The reason is, because no folly can be attributed to the infant in accepting the feoffment at the time it was made. Hence therefore, in this case the law respects the time of the feoffment, and not the time of the death: and albeit the infant might have waived the estate at his full age, yet [seeing that would be to his loss and prejudice, he shall have the benefit of the feoffment till his ancestor's death, when] the right of the estate tail descending on him either within age, or of full age, shall work a remitter [to his estate tail]. But since Littleton wrote, there is great alteration in remitters by the statute of Uses H. 8. c. 10.; for if a tenant in tail now make a feoffment in fee to the use of his son (within age) and his heirs, and dies, and the right of the estate tail descends to the son within age, yet he is not remitted, because the statute executes the possession in such plight, manner, and form, as the use was limited:

*No remitter if one estate be at common law and other under stat. of Uses.*

[348 b]

[whereby the issue is in, not of the estate discontinued, but of a new use under the statute]. But if the issue in tail in this case waive the possession, and bring a formedon in the descender, and recover against the feoffees, he shall thereby be remitted to the estate tail; otherwise the lands may be so incumbered that the issue in tail would be at a great inconvenience; but if no formedon be brought, and that issue dies, his issue shall be remitted; because an estate in fee-simple at the common law descends upon him.

*Grant of rent or common avoided by remitter, contra of lease for years.*

[349 a]

*A common or rent charge.*] That is of things granted out of the land. But if the issue at full age by deed indented or deed poll make a lease for years of the land, albeit by the death of tenant in tail he is remitted and his estate defeated, yet shall he not avoid the lease, for it is made of the land itself, which is become by the lease in other plight than it was by the grant of the rent-charge, which I gather from our author's own words in another place. But if tenant in tail makes a lease for life (whereby he gains a new reversion in fee so long as the tenant for life lives) and grants a rent-charge out of the reversion, and afterwards the tenant for life dies, whereby the grantor becomes tenant in tail again and the reversion [upon which the rent depends] is defeated; yet because the grantor had a right of entail in him, clothed with a fee-simple, the rent charge remains good against him, but not against his issue; which diversity is worthy of observation, for it opens the reason of many cases.

*The land is discharged.*] But the person of the grantor is not discharged, and the grantee may have a writ of annuity against him.

## SECTION 661.

*Remitter an act of necessity.*

*ALSO, a principal cause why such heir shall be remitted, is because there is not any person against whom he may sue his writ of formedon. For against himself he cannot sue, and none other is tenant of the freehold: and for this cause the law adjudges him in his remitter, scilicet, in such plight as if he had lawfully recovered the land against another &c.*

Here it is to be understood, that regularly a man shall not be remitted to a right which is remediless, that is, for which he has no remedy by action; for neither an action without a right, nor a right without an action, can make a remitter. As if tenant in tail suffer a common recovery in which there is error, and afterwards the tenant in tail disseises the recoveror and dies, here the issue in tail has an action, viz. a writ of error; but as long as the recovery remains in force, they have no right, and therefore in that case there is no remitter. If B. purchases an advowson, and suffers an usurpation and six months to pass, and after the usurper grants the advowson to B. and his heirs, and B. dies, his heir is not remitted, because his right to the advowson was remediless, viz. a right without an action.

*None to right remediless.*  
[349b]

*None after erroneous recovery;*

*nor to advowson after lapse.*

Tenant in tail of a manor whereunto an advowson is appendant makes a discontinuance; the discontinuance grants the advowson to tenant in tail and his heirs; tenant in tail dies, the issue is not remitted to the advowson, because the issue had no action to recover the advowson before he recovered the manor whereunto the advowson was appendant. And so it is of all other inheritances regardant, appendant, or appurtenant; a man shall never be remitted to any of these before he recontines the manor &c. whereunto they are regardant, appendant, or belonging. But, on the other hand, if a man be remitted to the principal, he shall also be remitted to the appendant or accessory, albeit it were severed by the discontinuance, or other wrong doer. And therefore if tenant in tail be of a manor whereunto an advowson is appendant, and he infeoffs A. of the manor with its appurtenances, and A. re-infeoffs the tenant in tail, saving to himself the advowson, and tenant in tail dies; his issue being remitted to the manor, are consequently remitted to the advowson, although at that time it was severed from the manor. So it is in the same case if tenant in tail had been disseised, and the disseisor suffer an usurpation, if the disseisee enter into the manor, he is also remitted to the advowson.

*Advowson and thing appendant or appurtenant follows principal.*

### SECTION 662.

ALSO, if land be entailed to a man and his wife, and the heirs of their bodies begotten, who have issue a daughter, and the wife dies, and the husband takes another wife, and has issue another daugh-

*Rmitter on discontinuance of special tail as between two*

daughters of  
different ven-  
ters.

[350 a]

*ter, and afterwards discontinues the estate tail, and disseises the discontinuée and so dies seised, now the land shall descend to the two daughters. And in this case as to the eldest daughter, who is inheritable by force of the entail, this is no remitter but of the moiety. And as to the other moiety she must sue her action of formedon against her sister. For the two sisters are not tenants in coparcenary, but they are tenants in common, for they are in by divers titles—the one by remitter to the entail, and the other by descent from her father of the fee.*

And there can be no remitter but only for so much as comes to the issue by descent, or by any other means without his folly, which in this case is but of a moiety; [for though the whole fee descends on both daughters in coparcenary, yet instantly a remitter takes place as to the one who has an ancient right, and so] the coparcenary is defeated, for the daughters are then in by several titles, viz. the eldest daughter is tenant in tail *per formam doni*, by the remitter of the one moiety; and the youngest is seised in fee-simple by descent of the other moiety, against whom the other sister in tail may have her *formedon*.

### SECTION 663.

Same on discon-  
tinuance to  
heirs in tail and  
stranger.

*IN the same manner it is, if tenant in tail enfeoffs his heir apparent in tail (the heir being within age), and another joint-tenant in fee, and the tenant in tail dies; now the heir in tail is in his remitter as to one moiety, and as to the other moiety he is put to his writ of formedon &c.*

[350 b]

### SECTION 664.

No remitter of  
heir in tail of  
full age, be-  
cause his folly  
to accept feoff-  
ment.

*ALSO, if tenant in tail enfeoffs his heir apparent, the heir being of full age at the time of the feoffment, and after tenant in tail dies; this is no remitter to the heir, because it was his folly (being of full age) to accept such feoffment &c. But such folly cannot be adjudged in the heir being within age at the time of the feoffment &c.*

By this feoffment the heir becomes subject to all charges and incumbrances made or suffered by his ancestor. And therefore our author says well, it was his folly to accept such a feoffment, but folly shall not be adjudged in one within age in respect of his tender years and want of experience, [and though in the above case the heir in tail accepting the feoffment is bound by it, yet his heir in the line of entail is not bound by the feoffment, for no folly can be attributed to him, and therefore he shall be remitted, infra.]

## SECTION 665.

ALSO, if tenant in tail enseoffs a woman in fee, and dies, and his heir in tail within age takes the same woman to wife; this is a remitter, for the husband and wife are one person in law. And the husband cannot sue a writ of formedon, unless he will sue against himself, which would be inconvenient; and no folly can be adjudged in him, he being within age at the time of the espousals. But otherwise it is if such heir were of full age at the time of espousals, for then the heir would take nothing but in right of his wife.

Remitter by infant issue's marriage with discontinuance.

*Takes the same woman to wife.*] Here it may be enquired what things are given to the husband by marriage. First, it appears here by Littleton, that if a man marries a woman seised in fee, he gains by the intermarriage an estate of freehold in her right, which estate is sufficient to work a remitter.

Husband gains freehold by marriage.

[351a]

If the wife be attainted of felony, the lord by escheat shall enter and put out the husband: otherwise it is if the felony be committed after issue had. Also, if the husband be attainted of felony, the king gains no freehold, but a pernaney of the profits during the coverture, and the freehold remains in the wife.

Attainder of husband or wife.

Secondly, if the wife be possessed of a term of years, the husband on marriage becomes entitled to it in her right, and he has power to dispose thereof by grant or demise, and they are so far considered as gifts to him in law that they are forfeited by his attainder or outlawry, and upon an execution against the husband for his debt, the sheriff may sell the term during his life; but the

Husband how interested in his wife's chattels real.

Attainder. Outlawry. Execution.

husband can make no disposition thereof by his last will. Also, if he make no disposition or forfeiture of it during coverture, yet is it a gift in law to him if he survive his wife; but if he dies before his wife, she shall have the term again; and if the husband charge the chattel in his lifetime, it shall not bind the wife surviving. And the same law is of estates by statute merchant, statute staple, *elegit*, wardships, and other chattels real of the wife in possession.

Chattels real in action. Possibility.

But if a feme sole be possessed of a term and is afterwards thereof dispossessed, and then takes husband and dies, the husband surviving shall not be entitled to this right, but the executors or administrators of the wife shall have it; so it is if the wife has but a possibility. In the same manner it is if the wife be possessed of

En auter droit.

chattels real *en auter droit*, as executrix or administratrix, or as guardian in socage &c. and she intermarries, the law makes no gift of these chattels to the husband, although he survive her. In the same manner if a woman before marriage assigns her term to another in trust for herself,\* then takes husband and dies, the

Trust.

husband surviving shall not have this trust, but the executors or administrators of the wife shall have it, for it consists in privity: and so has it been resolved by the justices. Chattels real consisting merely in action the husband shall not have by the intermarriage, unless he recover them in the lifetime of the wife, albeit he survive the wife; as a writ of right of ward, a *valore maritagii*, a forfeiture of marriage and the like, whereunto the wife was entitled before the marriage. But chattels real being of a mixed nature, viz. partly in possession, and partly in action, these which fall to the wife during coverture the husband shall have by the intermarriage, if he survive his wife, albeit he reduce them not into possession in her lifetime; but if the wife survive she shall have

Rent-charge.

them. As if the husband be seised of a rent-service, rent-charge, or rent seck, in right of his wife, and the rent becomes due during the coverture, and the wife dies, the husband shall have the arrearages; but if the wife survive the husband she shall have them, and

Adowson.

not the executors of the husband. So it is of an advowson, if the church become void during the coverture the husband may have a *quare impedit* in his own name, as some hold: but the wife shall

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[\* This, it is apprehended, refers to a trust for her separate use, and a settlement of that nature on the eve of marriage, without her husband's concurrence, is considered fraudulent against him.

have it if she survive him ; and the husband if he survive her : *et sic de similibus*. But if the arrearages had become due, or the church had fallen void before the marriage, then they would be merely in action before the marriage ; and therefore the husband should not have them by the common law, although he survived his wife. But now by the statute of 32 H. 8. c. 37. if the husband survive the wife, he shall have the arrearages incurred as well before as after the marriage. [351 b]

But the marriage is an absolute gift of all chattels personal in the wife's possession in her own right, whether the husband survive the wife or no ; but if they be in action, as debts by obligation, contract, or otherwise, the husband shall not have them unless he and his wife recover them. And of personal goods *en auter droit*, as executrix or administratrix &c., the marriage is no gift of them to the husband, although he survive his wife. If an estray happen within the manor of the wife, if the husband dies before seisure, the wife shall have it, for that the property was not in the wife before seisure. But as to personal goods, there is a diversity worthy of observation between a property in personal goods (as is aforesaid) and a bare possession ; for if personal goods be bailed [i. e. lent] to a feme, or if she find goods, or if goods come to her hands as executrix to a bailiff, and she takes husband, this bare possession is not given to the husband, but the action of detinue must be brought against the husband and wife.

*Husband how interested in his wife's chattels personal.*

### SECTION 666.

ALSO, if the husband seised of land in right of his wife aliens the same to another in fee, and the alienee lets the same land to the husband and wife for their lives, saving to the lessor and his heirs a reversion ; this is a remitter to the wife [of the whole land] for no folly can be adjudged in the wife who is covert in such case. And in this case the lessor has nothing in the reversion, for that the wife is seised [of the whole] in fee.

If husband's alienee re-lets to husband and wife for life, this a remitter, and nothing remains in alienee.

For if the estate gained by marriage be sufficient to work a remitter ; *à fortiori*, an estate made expressly to the husband and wife shall work a remitter in the wife. And so it is if tenant in

*Tenant in tail's feoffment to issue a remitter.*

[352 a] tail enfeoff his issue (being within age) and his wife in fee, and dies; this is a remitter to the issue presently, by the death of the tenant in tail; though some have thought the contrary. And note, in the case of the feme covert, she may be remitted in the life of the discontinuor, because she has a present right: but in the case of tenant in tail, the issue cannot be remitted in the life of the discontinuor, because the issue has no right until his decease.

## SECTION 667.

Though wife remitted, husband bound by lease.

*BUT in this case if the lessor sues an action of waste against the husband and wife, the husband is estopped to say the plaintiff has no reversion, for that is against his own feoffment and lease. And so a man may be estopped by matter in fact, though there be no writing by deed indented, or otherwise.*

Estoppels by record, writing, and in pais defined.

*Estopp.]* Comes of the French word *estoupe*, from whence the English word 'stopped:' and it is called an estoppel or conclusion, because a man's own act or acceptance stops or closes his mouth to allege or plead the contrary. Touching estoppels, which is an excellent and curious learning, it is to be observed, that there are three kinds of estoppels, viz. by matter of record, by matter in writing, and by matter *in pais*. By matter of record, viz. by letters patent, fine, recovery, pleading, taking of continuance, confession, imparlance, warrant of attorney, admittance. By matter in writing, as by deed indented, by making an acquittance by deed indented or by deed poll, by defeasance by deed indented or by deed poll. By matter *in pais*, as by livery of seisin, by entry, by acceptance of rent, by partition, and by acceptance of an estate, as here in the case put by Littleton; whereof he makes this special observation, that a man may be estopped by matter in the country, without any writing.

Nine rules on estoppels, privies in blood, estate, and law, defined.

On the learning of estoppels, these few rules, amongst others, are to be known. First, every estoppel ought to be reciprocal, that is, it should bind both parties; hence a stranger shall neither take advantage of, nor be bound by an estoppel: privies in blood, as the heir; privies in estate, as the feoffee, lessee &c.: privies in law, as the lord by escheat, tenant by the curtesy, tenant in dower, the



incumbent of a benefice, and others who come under by act in law, [352b]  
 or in the *post*, shall be bound and may take advantage of estoppels.  
 Second, every estoppel must be clearly such in itself, and not be  
 proved so by argument or inference. Third, every estoppel ought  
 to be a precise affirmation, and not a rehearsal. Therefore a recital  
 concludes not, because it is not a direct affirmation. Fourth, a  
 matter alleged that is neither traversable nor material [to the mat-  
 ter in hand] shall not estop, [for it would be hard to take away a  
 man's right for want of caution to immaterial expressions.] Fifth,  
 regularly a man shall not be concluded by acceptance [of rent] or  
 the like before his title accrued. Sixth, estoppel against estoppel sets  
 the matter at large. Seventh, matters alleged by way of supposal in  
 counts shall not conclude after non-suit: otherwise it is after judg-  
 ment given; and also pleadings of either party, which are precisely  
 alleged, shall conclude after non-suit. Eighth, where the truth ap-  
 pears on the same record, the adverse party shall not be estopped  
 to allege it. As if a fine be levied without any original, it is void-  
 able, but not void; but if an original be brought, and a *retraxit* en-  
 tered, and after that a concord is made, or a fine levied, this is void,  
 because the truth appears on the record. Ninth, where a record  
 runs to the disability or legitimation of the person, there strangers  
 may take advantage of it, as outlawry, profession, attainder of *præ-*  
*munire*, of felony, bastardy &c. If the bishop certify a bastard  
*eigne* to be a *mulier puisne*, the adverse party may confess and avoid  
 by alleging the special matter. *Recital no estoppel;*  
*pleadings are.*  
*Fine voidable when.*

## SECTION 670.

AND here note, that where any estate shall pass from the wife  
 being covert by fine, she shall be examined before the fine be taken,  
 because such fine concludes the wife for ever. But where nothing  
 moves from the wife, but the husband and wife take an estate by  
 force of a fine, there the wife is not concluded; and she need not  
 be examined &c. *Fine concludes wife as to estates given, but not as to estates taken;*  
 [353b]

The examination of a feme covert ought to be secret; and the  
 object is to examine her, whether she be content to levy a fine of  
 such lands (naming them particularly and distinctly, and the estate  
 intended to be passed by the fine) of her own voluntary free will,  
 and not by threats, menaces, or any other compulsory means. *if separately examined.*

*If husband and wife seised in special tail levy a fine to use of themselves in fee, wife remitted.*

If the husband and wife be tenants in special tail, and they levy a fine at the common law, and after the husband and wife take back an estate to them and their heirs; in this case the estate tail is not barred; and yet against a fine levied by herself she cannot be remitted, because thereupon she was examined: but in that case if the land descend to her issue, he shall be remitted to his estate tail.

## SECTION 671.

*Discontinuee's release to feme covert issue in tail, a remitter.*

*ALSO, if tenant in tail discontinue the estate-tail, and has issue a daughter, and dies, and the daughter being of full age takes husband, and the discontinuee makes a release of this to the husband and wife for term of their lives, this is a remitter to the wife, and the wife is in by force of the tail, causâ quâ suprâ &c.*

It appears that her full age when she took bâron is not material, but her coverture at the time of taking back the estate is. And so note a diversity between a remitter and a descent: for if a woman be disseised, and being of full age takes husband, and then the disseisor dies seised, this descent shall bind the wife, albeit she was covert when the descent was cast, because she was of full age when she took husband. But albeit the wife who has an ancient right, and being of full age, takes husband, and the discontinuee lets the land to the husband and wife for their lives, this is a remitter to the wife, for remitters to ancient rights are favoured in law.

[354a]

## SECTION 672.

*If husband aliens in fee, and takes back an estate to himself and wife for life, this is a remitter.*

*ALSO, if land be given to the husband and wife to hold to them and the heirs of their two bodies begotten, and after the husband aliens the land in fee, and takes back an estate to him and to his wife for their lives: this is a remitter in deed to the husband and wife, mauger [i. e. in despite of] the husband. For it cannot be a remitter to the wife with out being a remitter to the husband also, because the husband and wife are but one person in law, though the husband is estopped to claim it [i. e. the fee-tail against his own alienation of the fee.] And therefore this is a remitter against his own alienation and reprisal, as is said before.*

## SECTION 673.

ALSO, if land be given to a woman in tail, with remainder to another in tail, with remainder to a third in tail, with remainder to a fourth in fee, and the woman takes husband, and the husband discontinues the land in fee; by this discontinuance all the remainders are discontinued. For if the wife dies without issue, they in the remainder shall only have remedy by a writ of formedon in the remainder, when it comes to their turns. But if after such discontinuance, an estate be made to the husband and wife for their lives, or for another man's life, or for any other estate &c. this is a remitter to the wife, and by consequence to those in remainder. For after the wife who is in of her remitter be dead without issue, they in remainder may enter, without any action &c. In the same manner it is of those who have the reversion after such entails.

Discontinuance of particular tenant a discontinuance of all the remainders, but a remitter of the particular tenant is a remitter of the remainders.

[354 b]

Littleton having spoken of remitters to the issue in tail, who is privy in blood, and to the wife, who is privy in person, now speaks of remitters to those in reversion or remainder who are privy in estate.

*Nota*, that if lands are given to husband and wife and their heirs, and the husband makes a feoffment in fee, and the feoffee gives the land to the husband and wife and the heirs of their bodies, and the husband dies; in this case the wife may elect which estate she will have; for both estates are waiveable, and her time of election is not arrived until her husband's decease.

Remitter at wife's election dum sola.

[357 a]

If lands be given to a man and the heirs female of his body, and he makes a feoffment in fee, and takes back an estate to him and his heirs, and dies, leaving issue a daughter and his wife *enseint* with a son, [whereby the fee-simple descends on the presumptive heir, who is also heir in tail; in this case] the daughter is remitted to her prior rightful estate-tail; and albeit a son be afterward born yet shall he not divest the remitter.

Female tail — Remitter of heir presumptive.

[358 b]

## SECTION 682.

Tenant in tail leases for life to his eldest son (of age), remainder to his second son—a remitter to the second, not to the eldest son.

ALSO, if tenant in tail has issue two sons of full age, and he lets the land entailed to the eldest son for his life, with remainder to the younger son for his life, and after the tenant in tail dies; in this case the eldest son is not in his remitter, because he took an estate of his father. But if the eldest die without issue, then this is a remitter to the younger brother, because he is heir in tail, and a freehold in law is cast upon him by force of the remainder; and there is none [but himself] against whom he may sue his action.

[359 a]

## SECTION 684.

Tenant in tail enfeoffs his son and another, who dies, a remitter if son assent not to the deed.

NOTE, if tenant in tail enfeoffs his son and another by deed of the land entailed in fee, and livery of seisin is made to the other according to the deed, but not to the son who knows nothing of the feoffment nor agrees thereto, and afterwards he who took the livery of seisin dies, and the son takes no profit of the land, then the father dies, this is a remitter to the son, because the freehold is cast upon him by survivorship: and there was no default in the son that he agreed not to the feoffment, nor is there any [person but himself] against whom he may sue a writ of formedon.

Livery, a man absent, can neither take nor make.

Here Littleton materially adds by deed; for if a man intends to make a feoffment by *parol* to A. and B. and he and B. come upon the land (A. being absent) and makes livery to B. in the name both of B. and A. and to their heirs, this shall enure only to B.; for neither can a man absent take livery nor make livery without deed. But note, livery being made to one according to the deed, enures to both; because the deed whereunto the livery refers is made to both; for the rule is, that *Verba relata hoc maximè operantur per referentiam ut in eis in esse videntur*.

If he assent it is no remitter.

[359 b]

Here it appears, that if the son be conusant of and agrees to the feoffment &c. it is no remitter to him. And therefore if the feoffment were made by deed indented, and the son with the other seals the counterpart, and then the feoffor made livery to the other ac-

ording to the deed, and the other dies, the son is not remitted, because he was conusaut of the feoffment and agreed to the same; and Littleton says in the case that he puts, that there was no default in the son, because he agreed not to the feoffment in the life of the father: and so it seems, that if A. be seised in tail, and has issue two sons, and by deed indented between him of the one part, and the sons of the other part, makes a lease to the eldest for life, the remainder to the second in fee, and dies, and the eldest son dies without issue, the second son is not remitted, because he agreed to the remainder in the lifetime of the father.

SECTION 685.

*FOR if a man be disseised of certain land, and the disseisor makes a deed of feoffment whereby he infeoffs B. C. and D., and livery of seisin is made to B. and C. but not to D. who was not present at the livery of seisin, nor ever agreed to the feoffment, or took the profits &c. and afterwards B. and C. die and D. survives, and the disseisee brings his writ of disseisin in the per against D. he shall discharge himself of damages, although he be tenant of the freehold of the land.*

Feoffment to three, one waives the estate, he is still in by survivorship.

SECTION 687.

[360 a]

*ALSO, where a bishop or a dean, or other ecclesiastical person, aliens without assent, and the alienee charges the land &c., and afterwards the bishop takes back an estate in the same land by licence, to him and his successors, and the bishop dies, his successor is remitted in right of his church, and shall defeat the charge &c. causâ quâ suprâ.*

Remitter applies to ecclesiastical corporations.

SECTIONS 688, 689, 690.

[361 a]

[Relate to recoveries in feigned actions, and particularly to the case where tenant in tail dies before execution.]

Recovery. [361 b]

If in a common recovery judgment be had against tenant in tail wherein he is vouchee and has judgment to recover over in value,

Tenant in tail's death after judgment immaterial.

Recoveries not  
invented by  
Choke, J.

[362 a]

albeit the tenant in tail dies before execution, yet the recoveror shall execute the judgment against the issue in tail in respect of the intended recompence, because it is the common assurance of the realm, and is well warranted by our books, and was not invented by justice Choke, (who was a grave and learned judge in the time of E. 4.) as some hold by tradition; but it may be that it was founded upon former authorities and opinions of judges discovered by him and assented to by the rest of the judges.

Tenant for life's  
recovery a for-  
feiture and dis-  
continuance,  
when.

If a recovery be had against tenant for life without consent or covin, though it be without title, and execution be had, and tenant for life dies, the reversion or remainder is discontinued, so that he in reversion or remainder cannot enter; but if such a recovery be had by agreement and covin between the demandant and the tenant for life, then, as hath been said, it is a forfeiture of the estate for life, and he in the reversion or remainder may enter for the forfeiture. So it is if the tenant for life suffer a common recovery at this day, it is a forfeiture of his estate; for a common recovery is a common conveyance or assurance, whereof the law takes knowledge. Since Littleton wrote, two statutes have been made for preservation of remainders and reversions expectant upon any manner of estates for life; the one in 32 H. 8. the other in 14 Eliz.: but 32 H. 8. extended not to recoveries when tenant for life came in as vouchee &c. and therefore that act is repealed by 14 Eliz. and full remedy provided for preservation of the entry of those in reversion or remainder. But the statute of 14 Eliz. extends not to any recovery unless it be by agreement or covin. 2dly.

If tenant in  
tail joins it bars  
remainder.

If there be tenant for life, remainder in tail, the reversion or remainder in fee, if tenant for life be impleaded by agreement and then he vouches tenant in tail, who vouches over the common vouchee, this shall bar the reversion or remainder in fee, although he in the reversion or remainder never assented to the recovery; because it was not the intent of the act to extend to a recovery where the tenant in tail was vouched; for he has power by common recovery, if he be in possession, to cut off all reversions and remainders, so that, if tenant for life surrenders to him in remainder in tail, the tenant in tail may bar the remainders and reversions expectant upon his estate. 3dly. Where the proviso of that act speaks of an assent of record by him in reversion or remainder, it is to be understood, that such assent must appear upon the same record, either upon a voucher, *aid prier*, receipt, or the like; for it cannot appear

of record, unless it be done in course of law, and not by any extra-judicial entry or memorandum.

## SECTION 693.

[363 b]

**ALSO, if a man be disseised, and (being of full age) takes back an estate from the disseisor without deed, or by deed poll, this is a remitter to the disseisee.**

Disseisee taking any estate from disseisor by parol or deed poll remitted.

Here note a diversity between a right of entry and a right of action; for if a man of full age having but a right of action takes any estate, he is not remitted: but where he has a right of entry, and takes an estate, he by his entry is remitted, because his entry is lawful. And if the disseisor infeoff the disseisee and others, the disseisee is remitted to the whole, for his entry is lawful: otherwise it is if his entry were taken away [by a descent cast, or otherwise].

A. is disseised of a manor, whereunto an advowson is appendant, and a stranger usurps the advowson, if the disseisee enter into the manor, the advowson is recontinued again, which was severed by the usurpation. And so it is if tenant in tail be of a manor whereupon an advowson is appendant, the tenant in tail discontinues in fee, and the discontinuee grants away the advowson in fee, and dies, if the issue in tail recontinue the manor by recovery, he is thereby remitted to the advowson; and in both cases he who has right shall present when the church becomes void.

Remitter to manor remits to advowson appendant.

If the patron of a benefice is outlawed, and the church becoming void, a stranger usurps, and six months pass, if the king recovers in a *quare impedit* and removes the incumbent, the advowson is recontinued to the rightful patron. And so note a diversity between a recontinuance and a remitter; for a remitter cannot properly be, unless there are two titles; but a recontinuance may be where there is but one.

Re-continuance of advowson.

*Without deed or by deed poll.*] If the disseisor by deed indented makes a lease for life, or gift in tail, or a feoffment in fee, whereunto livery of seisin is requisite; yet the deed indented shall not suffer

Conveyance from disseisor to disseisee by deed an estoppel which

prevents re-  
mitter.

the livery made according to the form and effect of the indenture to work any remitter to the disseisee, but shall estop the disseisee to claim his former estate; and if the disseisor upon the feoffment reserves any rent or condition &c. the rent or condition is good: and the reason wherefore a deed indented shall conclude the taker more than a deed poll, is, for that the deed poll is only the deed of the feoffor, donor, and lessor; but the deed indented is the deed of both parties, and therefore as well the taker as the giver is concluded.

Deed poll no  
estoppel to  
taker.

[364 a]

## SECTION 694.

Alienee of te-  
nant for life  
conveys to lessor  
a remitter.

*ALSO, if a man lets land for life to another, who aliens to another in fee, and the alienee makes an estate to the lessor, this is a remitter to the lessor, because his entry was congeable &c.*

## SECTION 695.

Disseisee's ac-  
ceptance of  
lease for years  
from disseisor  
a remitter and  
no estoppel.

*ALSO, if a man be disseised, and the disseisor lets the land to the disseisee by deed poll, or without deed, for term of years, by which the disseisee enters, this entry is a remitter to the disseisee. For in such case where the entry of a man is congeable, and a lease is made to him, this is no remitter, although he claims by words in pais, or says openly that he claims nothing in the land but by force of such lease, for such disclaimer in pais is nothing to the purpose. But if he disclaim in court of record that he has no estate but by force of such lease, then is he concluded, but not otherwise.*

## SECTION 696.

Remitter as be-  
tween joint-  
tenants.

*ALSO, if two joint-tenants seised of certain tenements in fee, (the one being of full age the other within age,) be disseised &c. and the disseisor dies seised, and his issue enters, one of the joint-tenants being then within age, and after that he comes to full age, and the heir of the disseisor lets the tenements to the same joint-tenants for their lives, this is a remitter (as to the moiety) to him who was*



*within age, because he is seised of the moiety which belongs to him in fee, for his entry was congeable. But the other joint-tenant has in the other moiety but an estate for term of his life by force of the lease, because his entry was taken away &c.*

Here note a diversity worthy the observation, that where joint-tenants or coparceners have one and the same remedy, if the one enter, the other shall enter also; but where their remedies are several, there it is otherwise. As if two joint-tenants or coparceners join in a real action, where their entry is not lawful, and the one is summoned and severed, and the other pursues and recovers the moiety, the other joint-tenant or coparcener shall enter and take the profits with her, because their remedy was one and the same. But where two coparceners be, and they are disseised, and a discent is cast, and they have issue and die, if the issue of the one recovers her moiety, the other shall not enter with her, because their remedies were several: and yet when both have recovered, they are coparceners again. So here in this case, the two joint-tenants have not equal remedy; for the infant has a right of entry, and the other a right of action; and therefore the infant being remitted to a moiety, the other shall not enter and take the profits with her.

*Entry of one  
joint-tenant or  
coparcener  
entry of both.  
[364b]*

## CHAPTER XIII. SECTION 697.

## OF WARRANTY.

Warranty of three kinds—lineal, collateral, and commencing in disseisin.\*

*IT is commonly said, that there are three kinds of warranty, scilicet, warranty lineal, warranty collateral, and warranty that commences by disseisin. And it is to be understood, that before the statute of Gloucester all warranties which descended to the heirs of those who made them barred the same heirs from demanding any lands or tenements so warranted, except warranties commencing by disseisin, which beginning in wrong were no bar to the heir.*

Warranty, what it is.  
[365 a]

A warranty is a covenant real annexed to lands or tenements, whereby a man and his heirs are bound to warrant the same, and either upon voucher, or by judgment in a writ of *warrantia carta*, to yield other lands and tenements in exchange for and to the value of those from which the grantee may be evicted by former title; or else it may be used by way of rebutter, that is, to repel or bar a person. It is also to be observed, that warranties may be expressed or implied; the former being called warranties in deed, because they are expressed; and the latter warranties in law, because the law tacitly implies them. The warranties that Littleton here speaks of, are warranties in deed. And of warranties in law, more shall be said hereafter in this

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\* The student in entering on this truly "curious and cunning learning" should turn to Sections 703, 4, and 707, 8., where the distinction between lineal and collateral warranty is pointedly put by Littleton. He should also bear in mind the stat. 4 & 5 Ann. c. 16., which has very much reduced the application of warranty to transactions of the present day. In Watk. Prin. 112 n. 5th edition, he will also find a succinct synopsis of the modern doctrine of warranty.

Chapter. As for promises or contracts annexed to chattels real or personal, they are not comprehended by our author in this division, which treats exclusively of warranties concerning freeholds and inheritances.

*Before the statute of Gloucester.*] This statute was made at a parliament holden at Gloucester, 6 Edw. 1., (which was before the statute *de donis conditionalibus*, 13 Edw. 1.) when all estates of inheritance were in fee-simple. By that statute it is declared that the heir in tail shall not be barred by the warranty of his ancestor, unless he receive assets by descent from him, as will appear more fully hereafter. By the statute of Gloucester it is enacted, first, that if a tenant by the curtesy aliens with warranty and dies, this warranty shall be no bar to the heir of the wife unless assets in fee-simple descend from the tenant by the curtesy to the wife's heir; but if lands or tenements do descend from the father to the mother's heir, then such heir shall be barred according to the value of the lands so descending.

*Tenant by curtesy's alienation with warranty binds not the wife's heir without assets in fee simple from the alienor. So of like alienation by dowress now.*

Secondly, that if the heir, for want of assets at that time descended, recovers the lands of his mother, and afterwards assets do descend to the heir from the father, then the tenant [i. e. the purchaser] shall recover against the heir the inheritance of the mother. And 3dly. That the heir shall not, after the death of his father and mother, be barred of his action by writ of entry, to demand the inheritance of his mother which his father aliened in her lifetime without fine levied in the king's court. But notwithstanding the statute of Gloucester, if a feme tenant in dower had aliened in fee with warranty and died, the warranty would have bound the heir until the statute 11 H. 7. (enacted ince our author wrote) by which statute the heir may now enter notwithstanding such warranty.

[365 b]

Note, that warranties are favoured in law, being part of a man's assurance; but estoppels are odious.

*Warranties favoured; estoppels odious.*

By the Statute of Jointures, 11 H. 7. c. 20., it is enacted that where the wife has any estate for life of the gift or purchase of her husband, or given to her by any of the ancestors of the husband, or by any other person seised to the use of her husband, or of any of his ancestors, there her alienation, release, or confirmation with

*Stat. jointures protects heir in tail against his mother's alienation and warranty, if lands come from the husband.*

warranty shall not bind her heir [though such heir succeed to the estate by virtue of the settlement].

A man seised of lands in fee levied a fine to the use of himself for life, and after to the use of his wife and the heirs males of her body by him begotten for her jointure, and had issue male : afterwards he and his wife levied a fine, and suffered a common recovery, [the effect of which in the ordinary way would be to bar the issue in tail and those in remainder], and the husband wife and died, and the issue male entered by force of the said statute of 11 H. 7. [on the ground that the alienation of the wife, though she was tenant in special tail, was not lawful, or at least not binding on the issue in special tail], and it was holden, that the entry of the issue male was lawful : and yet this case is out of the letter of the statute ; for the wife neither levied the fine, being sole or with an after-taken husband, but with her husband who made the jointure. [This case, however, has since been overruled by *Kirkman v. Thompson*, Cro. Jac. 474., on the ground that the statute was meant to provide for the disinherison of heirs contrary to the husband's intention, whereas if he joined his intention was manifest.] So a case may be without the meaning of this statute, and yet within the letter. As where a man was seised of lands in right of his wife, and they levied a fine to the use of the husband and wife in special tail, with remainder to the right heirs of the wife, and they had issue, and afterwards the husband died, and the wife married again, and she and her second husband levied a fine of the same lands in fee, this is directly within the letter of the statute, and yet it is out of the meaning ; because the land was originally the wife's [and though the estate tail was of] the purchase of the husband in letter, it was not so in meaning. [and therefore the issue of the first marriage are completely barred by the second fine.]

*If the husband who made the jointure joins, it is not within this statute.*

*So if the land was originally the wife's.*

[366 a]

*Tenant for life aliens with warranty, if his heir be the remainder-man or reverser he is bound.*

But when the woman is tenant for life, by the gift or conveyance of any other person than her husband, her alienation with warranty shall bind her heir at this day. [Therefore if the wife's heir be the remainder-man to succeed to the estate by virtue of the limitations in the settlement, he will be bound if he does not enter for the forfeiture in his mother's lifetime.] So if a man be tenant for life (otherwise than as tenant by the curtesy) and aliens in fee with warranty, and dies, this shall bind his heir [succeeding to] the reversion or remainder. But this is to be understood where the

heir who has the reversion or remainder does not avoid the estate so aliened in the lifetime of his ancestor [by his entry as for the forfeiture; if he does so enter] the estate to which the warranty is annexed being avoided, the warranty is avoided also. And therefore it is necessary for the heir in such case to make an entry as soon as he has notice or probable suspicion of such an alienation. [But now by the stat. 4 & 5 Ann. c. 16. all warranties made by tenant for life descending on the remainder-man or reversioner are void].

Touching the feoffment in fee with warranty by the husband seised in right of his wife, this warranty shall not bind the heirs of the wife without assets [from the husband], although the husband be not tenant by the curtesy. But of this you shall read more hereafter. In the meantime know that the learning of warranties is one of the most cunning and curious learnings in the law, and of great use and consequence.

*Husband's feoffment jure uxoris.*

*To demand any lands or tenements.]* A warranty may not only be annexed to freeholds or inheritances corporeal, which pass by livery, as houses and lands, but also to freeholds or inheritances incorporeal, which lie in grant, as advowsons; and to rents, commons, estovers, and the like, which issue out of lands or tenements. And not only to inheritances *in esse*, but also to rents, commons, estovers &c. newly created. For a man (as some say) may grant a rent &c. out of land for life, in tail, or in fee with warranty; for although there can be no title precedent to the rent, yet there may be a title precedent to the land. And so a warranty in law may extend to a rent &c. newly created; and therefore if a rent newly created be granted in exchange for an acre of land, a warranty is necessarily implied by the exchange. And so a rent newly created may be granted for owelty of partition, [on which also a warranty is necessarily implied.]

*Warranty may be annexed to writs newly created, and is implied on grant of rent for equality of exchange or partition.*

## SECTION 698.

[366 b]

*WARRANTY commencing by disseisin is in this manner: where there is father and son, and the son purchases land &c. and lets the same land to his father for a term of years, and the father afterwards by his deed infeoffs another thereof in fee and binds himself*

*Warranty commencing by disseisin is, where father, tenant for years, makes a feoffment in*

fee with warranty; though the reversioner be his son and heir, he is not bound. So of *elegit* creditors and tenants at will.

*and his heirs to warranty; then when the father dies, the warranty descends to his son, but it shall not bar the son, who, notwithstanding this warranty, may well enter into the land, or have an assize against the alienee if he will, because the warranty commenced by disseisin; for when the father (who had but a term of years) made a feoffment in fee, this was a disseisin to the son of the freehold which was then in him. In the same manner it is, if the son lets to the father the land to hold at will, and afterwards the father makes a feoffment with warranty &c. And as it is said of the father, so it may be said of every other ancestor &c. In the same manner it is, if tenant by *elegit*, tenant by statute merchant or staple, makes a feoffment in fee with warranty, this shall not bar the heir, who is entitled to the land, because such warranty commences by disseisin.*

*Feoffment with warranty by one joint-tenant no bar to the other, though he be feoffor's son and heir.*  
[367 a]

If the father, son, and a third person are joint-tenants in fee, and the father makes a feoffment in fee of the whole with warranty, and dies, [whereby the father's third devolves on the other two and the whole warranty descends on his son and heir, yet the son is not bound because this is a warranty commencing by disseisin], then if the son dies [whereby the whole survives to the third party] he may not only avoid the feoffment for his own part, but also for the part of the son; and he may take advantage that the warranty commenced by disseisin, though the disseisin was done to another.

*Warranties by disseisin are collateral.*

And it is to be observed, that warranties commencing by disseisin are collateral warranties, and shall not by reason of the disseisin bind at all.

*Feoffment by tenant for years passes a fee.*  
[3 B. & C. 388.  
2 S. & S. 206.]

*Shall not bar the heir.*] By the authority of our author himself, a lessee for years may make a feoffment, and by his feoffment a fee-simple shall pass; so that although such a feoffment may work by disseisin as against the lessor, yet as between the parties it is good, and the warranty annexed to such estate, being a covenant real, binds the feoffor and his heirs who are bound to render lands of equal value to the feoffee on eviction if they have assets by descent to recompense him; for there is a feoffment *de facto* and a feoffment *de jure*; and a feoffment *de facto* made by those who have such an interest or possession as is aforesaid, is good between the parties and against all other men except only those who have the legal right and inheritance.

## SECTION 699.

ALSO, if a guardian in chivalry or in socage makes a feoffment in fee, or in fee-tail, or for life, with warranty &c. such warranty is no bar to the heir, because it commences by disseisin.

Feoffment by guardian binds not heir.  
[367 b]

## SECTION 700.

ALSO, if father and son purchase lands to hold to them jointly [in fee], and afterwards the father aliens the whole to another, and binds himself and his heirs to warranty &c., this shall not bind the son as to his moiety, because as to that moiety the warranty commences by disseisin &c.

Father and son joint-tenants in fee; if the father aliens in fee with warranty it is collateral and binds not the son.

But if the purchase was to the father and son and the heirs of the son, then if the father [being tenant for life only] makes a feoffment in fee with warranty, and the son does not enter in his father's lifetime as for the forfeiture, he shall be bound for a moiety by the collateral warranty. But if the purchase had been to the father and son, and to the heirs of the father, then the entry of the son in the lifetime of the father for avoidance of the warranty would not avail him, because his father might have lawfully conveyed away his moiety, [and therefore in such case the warranty on the father's feoffment would have been lineal and binding on his son and heir.]

If a man of full age and an infant make a feoffment in fee with warranty, this warranty is not void in part and good in part; but it is good for the whole against the man of full age and void against the infant; for although the feoffment of an infant passing by livery of seisin is voidable, yet his warranty, which takes effect only by deed, is merely void.

Infant's feoffment voidable, but his warranty void.

## SECTION 701.

[368 a]

ALSO, if A. be seised of a messuage, and F. who has no right to the same enters and dwells therein, in this case the possession of

Two in possession, freehold adjudged in the

one having  
right ;

*the freehold shall be adjudged in A. and not in F., for the law adjudges him to be in possession who has right. But if F. makes a feoffment to certain barretors and extortioners with warranty, by force whereof the said A. dares not abide in the messuage, this warranty commences by disseisin, because such feoffment was the cause of A.'s relinquishing his house.*

except as to  
bastard eigne,  
and mulier  
puisne.

These words of our author are significant and material ; for if a man has issue two daughters, bastard eigne and mulier puisne, and dies seised, and they both enter generally, the sole possession shall not be adjudged in the mulier only [but in the other also], because they both claim by one and the same title, and not the one by one title and the other by another title as [in the case put by] our author.

Statute against  
buying pretend-  
ed titles and  
maintenance.  
[368 b]  
[369 a]

Here barretors and extortioners are put only for examples ; for if the feoffment be made to any other person or persons, the law is all one, for by the stat. 1 R. 2, it is enacted, that feoffments made for maintenance shall be of no value ; so that the case put by Littleton is at the common law, but some have said that the feoffment is not void between the feoffor and the feoffee, but only against him who has right. And since Littleton wrote, there is a notable statute (38 H. 8. c. 9.) made in suppression of unlawful maintenance (which is the most dangerous enemy justice has), the effect of which statute is, first, that no person shall bargain, buy or sell, or obtain any pretended right or title ; or, secondly, take promise, grant, or covenant for any right or title in or to any lands, tenements, or hereditaments, whereof the seller or they for whom he claims have not been in possession a year before, on penalty of forfeiting the whole value of the lands &c. and the buyer or taker &c. knowing the same to forfeit also the value.

Sale of a right  
or title without  
possession incurs  
a forfeiture of  
treble value.

For example, if A. be the lawful owner of land and is also in possession, and B. who has no right thereto grants to, or contracts for the land with another, the grantor and the grantee (albeit the grant be merely void) are within the danger of the statute ; for B. has no right at all, but only in pretence. Further, if A. be disseised, still he has a good lawful right ; but if he, being out of possession, grants to, or contracts for the land with another, he has now made his good right of entry a pretended title within the statute, and both the grantor and grantee are within the danger thereof. *A fortiori* of a right in action. *Quod nota.* So if it be a good right



coupled with a wrongful possession, it is within the statute. As if in the case aforesaid the disseisor dies seised, and A. the disseisee enters and disseises the heirs of the disseisor, albeit he has an ancient right, yet seeing the possession is unlawful, if he bargain or contract for the land before he has been a year in possession, he is within danger of the statute, because the heir of the disseisor has right to the possession, and he is thereby aggrieved, *et sic de similibus*: and albeit he who has a pretended right (and none in verity) gets the possession wrongfully, yet the statute extends to him as well as if he had been out of possession.

Note, the words of the statute are (any pretended right), therefore a lease for years is within the statute. But if a man makes a lease for years to try his title in ejectment, *that* is out of the statute, because it is in course of law: but if it be made to a great man, or any other to sway or countenance the cause, that is within this statute. And a customary right or pretence to a copyhold is within the statute.

*Leasehold and copyhold rights within the statute.*

[369 b]

But if one be remitted to a former title or recover upon an ancient right, or redeem a mortgage, or being a disseisor obtain the release of the disseisee, such person may presently sell, grant, or contract, and need not tarry a year. And without question, any person having a just and lawful estate may obtain any pretended right by release or otherwise; for that cannot be to the prejudice of any: so a disseisor who has a wrongful estate may obtain a release from the disseisee. In like manner a remainder-man [who is necessarily out of possession] having a lawful and just title, may obtain a release of any pretended right or title, not only because the particular estate and remainder are all one; [the possession of the tenants for life being that of the remainder-man]; but because also it is a means of extinguishing the seeds of trouble and suits, and cannot prejudice any. But he in remainder cannot take a promise or covenant, that when the disseisee has entered upon the land, or recovered the same, that then he shall convey the land to the remainder-man, thereby to avoid the particular estate, for that is neither lawful, being against the express purview and body of the act, and not reasonable, because it is to the prejudice of a third person.

*Statute extends not to releases, remainders, and what other things.*

## SECTION 702.

Warranty by disseisin.

*ALSO, if a man who has no right to tenements enters into the same, and incontinently makes a feoffment thereof with warranty and delivers seisin, the warranty commences by disseisin, because the disseisin and feoffment were made at one time.*

[370 a]

## SECTION 703.

Lineal warranty binds the right by descent.

*WARRANTY lineal is, where a man seised of lands in fee makes a feoffment by deed to another, and binds himself and his heirs to warranty, and has issue and dies, and the warranty descends to his issue, that is a lineal warranty. And the reason why this is called lineal warranty, is not because the warranty descends from the father [to the son, but because the heir, if the lands had not been aliened, could not have made any other title thereto but by descent through his father, that is, he could not have claimed right to the lands by purchase; if he could, then, as to that claim, the warranty is collateral.]*

*Warranty lineal.]* A warranty lineal is a covenant real annexed to the land by him who either was owner, or might have inherited the land, and from whom his heir lineal or collateral might by possibility have claimed the land as heir from him who made the warranty. And it is called a lineal warranty, not because it must descend upon the lineal heir; for be the heir lineal or collateral, if by possibility he might claim the land from him who made the warranty, then is it lineal. And it is also called lineal [to distinguish it from collateral warranty, which is, where] the warranty is made by him who has no right or possibility of right to the land, and is therefore collateral to the [real right and] title. And it is to be observed, that warranty, whether lineal or collateral, binds the heir only, and not the successor to a body politic, who claims in another right, and is not bound by the warranty of any natural ancestor.

Warranty binds not a corporation but only the natural heir.

## SECTION 704, 5.

[370b]

FOR *if there be father and son, and the son purchases lands in fee, and the father afterwards disseises his son, and aliens to another in fee with warranty, and dies, now is the son barred by this warranty, which is called collateral, although it descend lineally from the father to the son. It is further called collateral, because he who made the warranty is collateral to the title of the tenements.*

Collateral warranty binds the right by purchase.

[371a]

Because although the warranty lineally descends, yet seeing the title is collateral, that is, that the son claims not the land as heir to his father, therefore in respect of the title it is a collateral warranty.

*The father releases by his deed with warranty &c.]* And it is to be known, that upon every conveyance of lands, tenements, or hereditaments, as upon fines, feoffments, gifts &c. releases and confirmations made to the tenant of the land, a warranty may be made, albeit he who makes the release or confirmation, has no right to the land &c.; but some hold, that by release or confirmation, where there is no estate created, or transmutation of possession, a warranty cannot be made to the assignee.

On what conveyances warranty may be made.

[371b]

## SECTION 707.

ALSO, *if a man has issue two sons and is disseised, and the eldest son releases to the disseissor by deed with warranty &c., and dies without issue, and afterwards the father dies, this is a lineal warranty to the younger son, because albeit the eldest son died in the lifetime of the father, yet by possibility the younger son might have conveyed title to the land by his elder brother, if no such warranty had been made. For after the death of the father the elder brother might have entered the tenements and died without issue, and then title to the land would have been conveyed to the younger son by his elder brother. But if the younger son had released with warranty to the disseissor, and died without issue, this would have been collateral to his elder brother, because of such*

Lineal and collateral warranty distinguished,

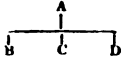
*land as was the father's, the elder could by no possibility convey to himself a title [by descent from his father] through his younger brother.*

And this warranty is collateral to the eldest son and the issue of his body; but if the eldest son dies without issue of his body, then the warranty is lineal to the issue of the body of the youngest: so that the warranty that was collateral to some persons, may become lineal to others.

[372 a]

SECTION 708.

and exemplified.



**ALSO, if tenant in tail has issue three sons, and [by feoffment or otherwise] discontinues the estate tail [and conveys away the land to another] in fee, and then the middle son releases by deed to the discontinuee with warranty, and afterwards the tenant in tail dies, and the middle son dies without issue; now the eldest son is barred of his recovery in a writ of formedon, by the warranty of his middle brother which is collateral to him, inasmuch as he can by no means convey a title to the estate tail by any descent from his middle and younger brother. But if the eldest son dies without issue, now the youngest brother may well have a writ of formedon in the descender, and shall recover the land, because the warranty of the middle brother is lineal to the youngest son, for by possibility the middle brother might have been seised by force of the entail after the death of his eldest brother, and then the youngest brother might have conveyed his title of descent by [or through] his middle brother. [This mode of barring estates tail by collateral warranty is now taken away by the statute 4 & 5 Ann. c. 16.]**

Estate tail how barred by collateral warranty;

which binds the right as long as it continues.

Hereby it appears that collateral warranty does not give a right, but only binds [or bars the exercise of] the right so long as the same [warranty] continues: if the collateral warranty be determined, removed, or defeated, the right revives.

Fine also bars an estate tail but not a remainder.

An estate tail may also be barred by certain acts of parliament made since Littleton wrote; and in some cases an estate tail cannot now be barred which when Littleton wrote might have been. For example, if tenant in tail levy a fine with proclamations according

to the statute, [32 H. 8. c. 36.] this is a bar to the estate tail, [and to all the issue claiming under such estate tail], but it is no bar to him in reversion or remainder if he make his claim or pursue his action within five years after the estate tail is spent. So if a gift be made to the eldest son and the heirs of his body, with remainder to the father and to the heirs of his body, and the father dies, and the eldest son [having thus an estate tail in possession and an estate tail in remainder in the same land] levies a fine with proclamations, and dies without issue: this shall bar the second son, for the remainder descended to the eldest [and could not come to the second son but through him who levied the fine]. In like manner if tenant in tail be disseised, or have a right of action, and the tenant of the land levy a fine with proclamations, and five years pass [without claim, the tenant in tail or his issue being under no disability], the right of the estate tail is barred: and if tenant in tail be attainted of treason, the estate tail is forfeited to the king and bound as to the issues, whether it were in possession or in right only, and none of these were barred when Littleton wrote. [On the other hand] a lineal warranty with assets was a bar to an estate tail when Littleton wrote [which is now taken away], as shall be said hereafter.

[372b]

A common recovery with a voucher over, and a judgment to recover in value, was a bar to an estate tail in Littleton's time. [Littleton himself was in fact a judge of the Common Pleas when the famous case settling this point occurred, and took a conspicuous part in the judgement.] And of common recoveries there are two sorts, viz. one with single voucher, and another with double voucher, which latter is more common and safe: but there may be more [than two] vouchers over [if necessary].

*Common recovery a bar in Littleton's time.*

If the king had made a gift in tail [leaving a reversion in the crown], and the donee had suffered a common recovery, this should have barred the estate tail in Littleton's time, but not the reversion or remainder in the king. And so if such a donee had levied a fine with proclamations after the statute of 4 H. 7., this would have barred the estate tail, although the reversion was in the king. But since Littleton wrote, a common recovery had against tenant in tail of the king's gift, or a fine with proclamations levied by him, the reversion continuing in the crown, is no bar to the estate tail by the statute of 34 H. 8. And these ten things are to be observed upon the construction of that act.

*But estate tail with reversion in crown not now barrable.*

*Exposition of  
stat. 34 H. 8.  
c. 20. The  
estate tail and  
remainder must  
be both created  
by the king.  
[3 Bligh, 62.]*

First, that the estate tail must be created by a king, and not by any subject, albeit the king be his heir [and as such comes in] to the reversion; for the preamble speaks of gifts made to subjects, and none can have subjects but the king. And also in the preamble it is said (for service done to the kings of the realm), and the body of the act refers to the preamble. And therefore if the duke of Lancaster had made a gift in tail, and the reversion had descended to the king, yet [the tenant of] that estate tail was not restrained [from barring it] by this statute; and so of the like. 2dly. If the king grant over the reversion, then a recovery suffered will bar the estate tail, because the king had no reversion at the time the recovery is suffered. 3dly. If the king makes a gift in tail, with remainder in tail to another, or grants the reversion in tail, keeping [an ultimate] reversion in the crown, a recovery suffered by the tenant in tail in possession shall neither bar his own estate tail in possession nor the estate tail in remainder or reversion; for a reversion or remainder cannot be barred, but only where the estate tail in possession is barred.

Fourthly, if a subject makes a gift in tail, with remainder to the king in fee, albeit the words of the statute are (whereof the reversion or remainder of the same, at the time of the recovery had, be in the king), yet seeing the estate in tail was not created by a king, as hath been said, it may be barred by a common recovery. 5thly. If Prince Henry, son of Henry the seventh, had made a gift in tail, with remainder to Henry the seventh in fee, which remainder by the death of Henry the seventh had descended to Henry the eighth, so that he took the remainder by descent; yet might the tenant in tail, for the cause aforesaid, bar the estate tail by a common recovery.

*What is of the  
king's procur-  
ance.*

Sixthly, if the king in consideration of money or land, or for other consideration by way of provision, procure a subject by deed indented and enrolled, to make a gift in tail to one of his servants and subjects for recompense of service, or other consideration, with remainder to the king in fee, and all this appears of record; this is a good provision within the statute, and the tenant in tail cannot by a common recovery bar the estate tail. So it is, if the remainder be limited to the king in tail; but if the remainder be limited to the king for years, or for life, that is no such remainder as is intended by the statute, because it is no remainder of continuance, as

*His remainder  
for years not  
within act.*

it ought to be, as appears by the preamble: and it ought to have some affinity with the reversion wherewith it is joined.

Seventhly, where a common recovery cannot bar the estate tail by force of the statute, there a fine levied with proclamations shall not bar the estate tail, or the issue in tail, [so long as] the reversion or remainder [in fee] is in the king.

*Fine no bar to entail where recovery cannot bar remainder.*

[373 a]

Eighthly, but where a common recovery shall bar the estate tail, notwithstanding that statute, there a fine with proclamations shall bar the same also.

Ninthly, where tenant in tail is no party or not privy to the fine or recovery, there the act does not apply, for the words are, "had done or suffered by or against any such tenant in tail." As if tenant in tail of the gift of the king, with reversion in the crown expectant, is disseised, and the disseissor levies a fine, and five years pass, this shall bar the estate tail; and so if a collateral ancestor of the donee release with warranty, and the donee suffer the warranty to descend without any entry made in the life of the ancestor, this shall bind the tenant in tail, because he is not party or privy to any act either done or suffered by or against him.

*Tenant in tail must be party or privy to the act which excludes collateral warranty and disseisin.*

Tenthly, albeit the preamble of the statute extends only to gifts in tail made by the kings of England before the act, and the body of the act refers to the preamble (viz. that no such feigned recovery &c.) so that this word (such) may seem to couple the body and the preamble together; yet in this case (such) shall be taken for such in equal mischief, or in like case; and by divers parts of the act it appears that the makers intended to extend it to future gifts; and so is the law taken at this day without question.

*Act is prospective as well as retrospective.*

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

*Recovery without voucher no bar.*

And note, the reason of warranty is that the law presumes that no man would unnaturally disinherit his own heir, being of his own blood, without leaving him some greater advancement. So if the lord make an acquittance of the last rent, all the rest is presumed to be paid, and the law will admit no proof against that presump-

*Reason of warranty.*

*Presumptions as to rent and legitimacy.*

tion. So if a man be within the four seas, and his wife have a child, the law presumes it to be his.

[373 b]

## SECTION 710.

One coparcener aliening the whole, warranty lineal and collateral.

*TENANT in tail has issue two daughters, and dies, the eldest enters into the whole, and thereof makes a feoffment with warranty and dies without issue; this is collateral to the youngest as to the one moiety which belonged to her, and lineal as to the moiety belonging to the eldest.*

How one coparcener may disseise another.

[374 a]

Here it is to be understood, that when one coparcener enters generally into the whole, this does not divest the estate which descends by law to the other coparcener; but if the coparcener entering claims the whole and takes [and retains] the profits of the whole, that divests the freehold in law of the other coparcener [and amounts to a disseisin], provided they are not actually seised; but if they are actually seised, nothing done by one coparcener can put the other out of possession but an actual ouster or disseisin. Then it may be asked, how the warranty in Littleton's case could bind, seeing it was annexed to a feoffment, which worked a wrong? The answer is, that when one sister enters into the whole, and makes a feoffment of the whole, the subsequent act so far explains the first entry, that now by construction of law she was at first seised of all, and then making a feoffment of the whole the freehold in law is divested out of the other coparcener.

## SECTION 711, 712.

Lineal warranty bars estate in fee without assets, and estate tail with assets. Collateral warranty bars both estates without assets.

*AND note, that as to the person who demands an estate in fee-simple by any of his ancestors, he shall be barred by lineal warranty descending upon him. But he who demands a fee-tail by writ of formedon in descender, shall not be barred by lineal warranty unless he have assets in fee-simple descended from the ancestor who made the warranty. But collateral warranty is a bar both to estates tail and estates in fee-simple without any assets descending, except in cases restrained by any statute.*



In these two sections there are expressed four legal conclusions: [374 b]  
 —First, that lineal warranty binds the right of a fee-simple. 2dly. That a lineal warranty does not bind the right of an estate tail, for that is restrained by the statute *de donis conditionalibus*. 3dly. That a lineal warranty and assets is a bar to an estate tail and is not restrained by the said act. And 4thly. That a collateral warranty made by a collateral ancestor of the donee, binds an estate tail, albeit [there are no assets; and the reason is, because it is not made by the tenant in tail, as lineal warranty is. To this may be added, that the warranty of the donee in tail, if the person in remainder be heir to the warrantor, such warranty binds both the donor and remainder-man, which is collateral to the donor and to him in remainder, without any assets. For though the alienation of the donee after issue does not bar the donor, which was the mischief provided for by the statute *de donis*, yet the warranty being collateral bars both of them; for the act restrains not that warranty, which therefore remains as at common law, and in like manner the warranty of the donee bars him in remainder. [See further, Gilb. Ten. 141, 142.]

Assets requisite to make a lineal warranty a bar, must be of equal value with the land which it so bars one to demand, it must descend from the same ancestor that made the warranty, and it must be a real inheritance in estate or interest; not a bare [use or right of entry or action, which are not assets till they are reduced into possession. But a rent issuing out of the heir's land descending to him, whereby it becomes extinct, is good assets. An advowson also is assets, and may be extended at the rate of a shilling for every mark of the yearly value of the living. But a seigniority in frankalmoign is not assets, because it is not valuable.

*Assets—Requisites to make.*

## SECTION 714.

[375a]

*LAND is given to husband and wife in special tail, the husband makes a feoffment in fee, and dies, the widow releases to the feoffee with warranty, and dies, this is lineal as to the whole; and the law is the same if the gift had been before marriage, in which case they had taken by moieties, for the heir must claim as heir of both their bodies.*

*Husband's discontinuance  
 wife's release  
 with warranty.*

[375b]

## SECTION 716.

Tenant for life's  
warranty col-  
lateral to re-  
mainder-man  
though his  
heir.

**IF a man has three sons, A. B. and C., and a gift is made to A. for life, remainder to B. in tail, remainder to C. in tail, A. discontinues with warranty: this is collateral to the brothers, because the remainders are their titles, and to those A. is collateral.**

[376a]

## SECTION 717.

Collateral  
warranty enures  
in respect of  
title, not of  
blood.

**AND so note, that where a man is collateral to the title, and he releases his right with warranty &c. this is a collateral warranty.**

Here it appears that it is not adjudged in law a collateral warranty in respect of the blood, for the warranty may be collateral, albeit the blood be lineal; and the warranty may be lineal, albeit the blood be collateral, as hath been said. But it is in law deemed a collateral warranty, in respect that he who makes the warranty is collateral to the title of him upon whom the warranty falls.

Warranty de-  
scends to heir  
at common law  
only.

And note, it is a maxim of law, that warranties descend on the heir at the common law only, *infra*, Sect. 735.

Debt on bond  
lies against  
special or custo-  
mary heir.

[376b]

Observe further, if a man be seised of lands in gavelkind, and has issue three sons, and by obligation binds himself and his heirs and dies, an action of debt shall be maintainable against all the three sons, for the heir is not chargeable unless he has lands by descent. So if a man be seised of land on the part of his mother, and binds himself and his heirs by an obligation, and dies, an action of debt shall lie against the heir on the part of the mother, without naming of the heir at the common law. And so note a diversity between the personal lien of a bond, and the real lien on a warranty.

## SECTION 719.

*If land be given to a man and to the heirs male of his body begotten, and for default of such issue to the heirs female of his body begotten, and afterwards the donee in tail makes a feoffment in fee with warranty, and has issue a son and a daughter and dies, this warranty is lineal both to the son and the daughter.*

To A. in tail male, remainder to his heirs female gives A. a remainder in female tail and not a tail general.

Here it appears, that whensoever the ancestor takes any estate of freehold, and in the same conveyance an estate is limited to any of his heirs, these latter words "his heirs" are words of limitation, and not of purchase, although it be limited by way of remainder; and therefore here the remainder to the heir female vests in the tenant in tail himself: [so only, however, as to give *him* a remainder in tail female, and not by merger to destroy the remainder, and give him an estate tail general.] And it is well to know this learning; nevertheless it is dangerous to use such limitations in conveyances, as great inconveniences may arise thereupon; for if such a tenant in tail has issue divers sons, and they have issue divers daughters, or if tenant in tail has issue divers daughters, and each of them has issue sons, none of the daughters of the sons, nor the sons of the daughters, shall ever inherit to either of the said estates tail; and so it is of the issues of the issues, for (as hath been said) the issues inheritable must make their claim either only by males, or only by females, so that the females of the males, or males of the females, are wholly excluded in the heritage of either of the said estates tail: hence, therefore, it is proper, when the first limitation is to the heirs male, that the remainder should be to the heirs general, as then all the issues, be they females of males, or males of females, are inheritable.

[377 a]

## SECTION 720.

[377 b]

*ALSO, I have heard say, that in the time of king Richard the second, there was a justice of the common pleas, dwelling in Kent, called Richel, who had issue divers sons, and his intent was, that his eldest son should have certain lands and tenements to him and*

Richel's case of perpetuity. Condition against alienation void.

*to the heirs of his body begotten; and for default of issue, the remainder to the second son &c., and so to the third son &c., and because he would that none of his sons should alien, or make warranty to bar or hurt the others that should be in the remainder &c., he caused an indenture to be made, declaring that the lands and tenements were given to his eldest son upon this condition, that if the eldest son aliened in fee, or in fee-tail &c., or if any of his sons aliened &c., that then their estates should cease and be void, and that then the same lands and tenements should immediately remain to the second son and to the heirs of his body begotten, et sic ultra, the remainder to his other sons, and livery of seisin was made accordingly.*

[378 a]

## SECTION 721.

Remainder should vest at same time as particular estate.

**BUT** it seems by reason, that all such remainders are void and of no value, and that for three causes. 1st. Because the remainder did not vest in the second son at the time livery was made of the freehold.

First, Littleton says by deed, because if lands are granted and rendered by fine for life, with remainder in tail, with remainder in fee, none of these remainders are in the remainder-men, until the particular estate is executed.

Except as to contingent remainders.

Secondly, this rule is generally true, but it hath divers exceptions. 1st. If the person who is to take the remainder be not *in rerum naturá*: as if a lease for life be made with remainder to the right heirs of I. S.—I. S. being then alive, now here the inheritance passes presently out of the lessor, but it cannot vest in the heir of I. S., for living the father his heir is not *in rerum naturá*, for *non est heres viventis*; so that the remainder is good upon this contingency, viz. if I. S. die during the life of the lessee. And so it is if a man makes a lease for life to A. B. and C., and if B. survive C., then remainder to B. and his heirs. This is another exception; for albeit the person be certain, yet inasmuch as it depends upon the dying of B. before C. the remainder cannot vest in C. presently. And the reason of both cases in effect is, because the remainder is to commence upon limitation of time, viz. upon the possibility of the death of one man before another, which is a common possibility.

## SECTION 722.

[378b]

*THE second cause is, if the first son alien the tenements in fee, then is the freehold and the fee-simple in the alienee and in none other; and if the donor had any reversion, by such alienation, that reversion is discontinued. Also if such remainder be good, then might the second son enter upon the alienee, when he had no manner of right before the alienation, which would be inconvenient.*

Alienation to one cannot create an estate in another.

Therefore by an alienation which transfers the freehold and fee-simple to the alienee, there can be no remainder raised and vested in another person. As if a man makes a lease for life upon condition that if the lessor grants over the reversion, the lessee shall have the fee; if the lessor grants the reversion by fine, the lessee shall not have the fee; for when the fine transferred the fee to the conusee, it would be absurd and repugnant to reason, that the same fine should work an estate in the lessee; for one alienation cannot vest an estate in two several persons at one time of the same land.

Condition that lessee shall have fee cannot depend on lessor's granting reversion.

In a man's own grant which is ever taken most forcibly against himself, the reason of Littleton holds; for it has been resolved that if a man seised of an advowson in fee by his deed grants the next presentation to A. and before the church becomes void, by another deed he grants the next presentation of the same church to B. the second grant is void, for A. had the same granted to him before; and the grantee shall not have the second avoidance by construction, to have the next avoidance which the grantor might lawfully grant, for the grant of the next avoidance imports not the second presentation. But if a man seised of an advowson in fee take wife; now by act in law is the wife entitled to the third presentation, if the husband die before her. Then if husband grants the third presentation to another and dies, the heir shall present twice, the wife shall have the third presentation, and the grantee the fourth; for in this case it shall be taken the third presentation which he might lawfully grant; and so note a diversity between a title by act in law and by act of the party; for the act in law shall work no prejudice to the grantee.

Next presentation when it means the next a man may grant.

[379a]

## SECTION 723.

Condition cannot create an estate but only determine one, which it may do on alienation.

**THE third cause is, because the donor may enter for breach of the condition in preference to the second son, who having no right before alienation can have no greater right after, and therefore it seems such remainders are void ;— [the meaning is, that a right of entry on breach of a condition cannot be reserved to a stranger but only to the donor and his heirs, i. e. his heirs by descent not by purchase as Richel's case was.]**

Here it is to be observed, that such part of the condition as prohibits the alienation is good, but such part of it as tends to carry the estate over to another, is void, and by the opinion of Littleton the donor may re-enter for the condition broken; for *Utile per inutile non vitiatur*: which being in case of a condition for the defeating of an estate, is worthy of observation. And it is to be noted, that after the death of the donor, the condition descends to the eldest son, and then his alienation would extinguish the same for ever; wherein the weakness of this invention appears: and therefore Littleton here says, that it seems the donor may re-enter without mentioning his heirs.

## SECTIONS 724, 725.

[Treat of the warranty of tenants by the curtesy and tenants in dower, of which enough has been said.]

## SECTION 726.

[Treats of warranty falling on an heir within age, to whom no laches are attributable.]

*Infant's acts of record bind heir if not avoided during minority.*

And herein a diversity is to be observed between matters of record done or suffered by an infant, and matters *in fait*: for matters *in fait* he shall avoid either within age, or at full age, as

hath been said: but matters of record, as statutes merchant or staple, recognizances acknowledged by him, or a fine levied by him, or a recovery suffered against him by default in a real action (saving in dower) must be avoided by him, viz. statutes &c. by *audita querela*, and the fine and recovery by writ of error during his minority and the like. And the reason thereof is, because they are judicial acts and are taken by a court or a judge, therefore the nonage of the party, to avoid the same, shall be tried by inspection of judges, and not by the country. And for that his nonage must be tried by inspection, this cannot be done after his full age: and so is the law clearly holden at this day, though there be some difference in our books. But if the age be inspected by the judges, and it be recorded that he is within age, albeit he come of full age before the reversal, yet may it be reversed after his full age. And so was it resolved by the whole court of king's bench in the case of Kekewich. [380b]

*No laches shall be adjudged in the heir within age.*] Laches, is an old French word for slackness or negligence. And the rule (that no negligence shall be adjudged in an infant) is true, where he is thereby to be barred of his entry in respect of a former right, as by a descent; or of his former right by a warranty where his entry is congeable. But otherwise it is of conditions, charges and penalties, going out of or depending upon the original conveyance, for laches or negligence shall be adjudged in those cases as well in an infant as in any other. Infant not affected by laches or negligence.

## SECTIONS 729, 730, 731, 732.

[382a b]

[Treat of the husband's fine of the wife's land by warranty, which it seems cannot since the statute of Gloucester, bar the wife's heir without assets from the husband.]

## SECTION 733.

[383 b]

*AN express warranty can only be created by the word warrant.*

What words create a warranty.

But warranties in law are created by many other words. Thus *dedi* creates a warranty in law to the feoffee and his heirs during Give, grant, exchange. [384a]

the life of the feoffor, but *concessi* in a feoffment or fine implies no warranty. And this word *dedi* imports a warranty in law, albeit there be an express warranty in the deed. For if a man make a feoffment by *dedi*, and in the deed warrants the land against I. S. and his heirs, yet *dedi* is general warranty during the life of the feoffor. And if a man make a lease for life reserving a rent, and add an express warranty, here the express warranty does not take away the warranty in law, and he may vouch by either of them at his election; and note a diversity between a warranty which is a covenant real annexed to a freehold, and a warranty concerning a chattel, as in Nokes' case, 4 Co. 80. Also this word exchange implies a warranty. Also a partition implies a warranty in law, as in the chapter of parceners appears. And it is to be observed, that the warranty wrought by this word *dedi*, is a special warranty, and extends to the heirs of the feoffee during the life of the donor only. But on an exchange the warranty extends reciprocally to the heirs and against the heirs of both parties.

Lease.

Partition.  
Exchange.

Express warranty can only be created by Deed, ita not by Will, which is no deed; but on a will there may be an implied warranty.

[386 a]

It is further observable, that the heir shall never be bound to any express warranty but where the ancestor was bound by the same; for if the ancestor were not bound, it cannot descend upon the heir.

But a warranty in law may bind the heir, although it never bound the ancestor, and may be created by a last will and testament. As if a man devise lands to a man for life or in tail reserving a rent, the devisee for life or in tail may take advantage of this warranty in law, albeit the ancestor was not bounden, and the warranty shall bind his heirs also, although they are not named. Also an express warranty cannot be created without deed, and a will in writing is no deed, and therefore an express warranty cannot be created by will.

## SECTION 735.

Warranty descends to heirs at common law only; not to heir in Borough English;

ALSO, a warranty cannot go according to the nature of the tenements by the custom &c., but only according to the form of the common law. For if tenant in tail be seised of tenements in borough English, where the custom is, that all the tenements within the same borough ought to descend to the youngest son, and he



*discontinues the entail with warranty &c., and has issue two sons, and dies seised of other lands or tenements in the same borough in fee-simple to the value or more [than the value] of the lands entailed &c., yet the youngest son shall have a formedon of the lands entailed, and shall not be barred by the warranty of his father, albeit assets descended to him in fee-simple from his said father according to the custom &c., because the warranty descends upon his elder brother who is in full life, and not upon the youngest. And in the same manner is it of collateral warranty made of such tenements, where the warranty descends upon the eldest son &c. this shall not bar the youngest son &c.*

[386b]

## SECTION 736.

*IN the same manner is it of lands in the county of Kent, that are called gavelkind, which lands are dividable between the brothers &c. according to the custom; if any such warranty be made by his ancestor, such warranty shall descend only to the heir who is heir at the common law, that is to say, to the elder brother, according to the consance of the common law, and not to all the heirs who are heirs according to the custom.*

or gavelkind;

## SECTION 737.

*ALSO, if tenant in tail has issue two daughters by divers venters and dies, and the daughters enter, and a stranger disseises them of the same tenements, and one of the daughters releases by deed to the disseisor all her right, and binds herself and her heirs to warranty, and dies without issue: in this case the sister who survives may well enter and oust the disseisor, because such warranty is no discontinuance or is collateral to the sister who survives, for the sisters are of the half blood and cannot be heirs the one to the other. But otherwise it is, where there are daughters of a tenant in tail by one venter.*

or heir of the half blood.

[387a]

[387b]

SECTION 738, 739.

But it may be annexed to an estate pur auter vie.

**BUT** warranty may descend to one's heirs for term of another man's life, if it be annexed to such an estate pur auter vie, which estate, though it be no inheritance, is yet a descendable freehold.

[388a]

SECTION 740.

Term of years goes to executors not to heirs, though so limited.

**AND** note, where a lease or grant is made to a man and to his heirs for term of years, in this case the heir of the lessee or the grantee shall not after the death of the lessee or grantee have the lands so granted, because it is a chattel real, and chattels real by the common law shall devolve on the executors of the grantee or lessee, and not on the heir.

And to a term no warranty extends.

[389a]

A warranty extends not to a lease though it be for many thousand years, or to estates of tenant by statute staple, or merchant, or elegit, or any other chattel, but only to estates of freehold or inheritance. And this is the reason why in all actions which a lessee for years may have, a warranty cannot be pleaded in bar, as in an action of trespass, or the like.

SECTION 741, 742, 743.

Destruction of estate defeats warranty.

**IF** the estate to which the warranty is annexed be defeated, the warranty is defeated also.

A man enfeoffs a woman with warranty they intermarry and are impleaded, upon the default of the husband, the wife is received, she shall vouch her husband &c., notwithstanding the warranty was put in suspense. And so on the other side, if a woman enfeoff a man with warranty, and they intermarry and are impleaded, the husband shall vouch himself and his wife by force of the said warranty.

An infant *en ventre sa mere* may be vouched if God give him birth, and if not, such a one heir to the warranty; but he cannot be vouched alone without the heir at the common law, for process shall be presently awarded against him.

*But is put in suspense.*] Tenant in tail makes a feoffment in fee with warranty, and disseises the discontinuee, and dies seised leaving assets to his issue. Some hold that in respect of this suspended warranty and assets, the issue in tail shall not be remitted, but that the discontinuee shall recover against the issue in tail, and he take advantage of his warranty, if any he has, and after in a *formedon* brought by the issue, the discontinuee shall bar him in respect of the warranty and assets; and so every man's right is saved.

[390 b]

## SECTION 745.

*ALSO, if after a feoffment or release with warranty the person whowarranted is attainted of felony, or is outlawed for felony, such warranty shall not bar or aggrieve the issue, for by the attainder of felony the blood is corrupted [and the warranty descends not on them].*

Warranty destroyed by attainder for felony.

*Be attainted of felony, or outlawed &c.*] Note, according to Littleton here, there are two manner of attainders: the one is after appearance, which is in three ways; by confession, by battle, or by verdict: the other upon process of outlawry, which is an attainder in law. But there is a great diversity, as to the forfeiture of land, between an attainder of felony by outlawry upon an appeal, and upon an indictment: for in the case of an appeal the defendant shall forfeit no lands but such as he had at the time of the outlawry pronounced; but in case of an indictment, he shall forfeit such land as he had at the time of the felony committed. And the reason of this diversity is evident; for that in the case of appeal there is no time alleged in the writ when the felony was done, and therefore of necessity it must relate in that case only to the judgment of outlawry: but in the case of an indictment there is a certain time alleged, and therefore in that case it shall relate to that time, viz. to the time when the felony was committed. In the case of the indictment there is this further diversity: that it relates to the time alleged in the indictment for avoiding of estates, charges,

Forfeiture for felony relates to the day of offence committed.

and incumbrances made by the felon after the felony committed ; but as to the mean profits of the land it relates only to the judgment, as well in the case of outlawry as in other cases.

*Conviction and  
attainder dis-  
tinguished.*

Upon attainder for felonies there lie three several writs of escheat, viz. first, when the felon has judgment to be hanged. 2dly. When he is outlawed. 3dly. When he abjures the realm. The defendant in an appeal of death waged battle &c., and was slain in the field, yet judgment was given that he should be hanged ; and the justices said, that it was altogether necessary that such a judgment should be given, for otherwise the lord could not have a writ of escheat. The difference between a man attainted and convicted is, that a man is said to be convicted before judgment of death is passed upon him. But when he has received judgment upon the verdict, confession, outlawry, or abjuration, then is he said to be attainted.

[391 a]

*Goods forfeited  
on conviction ;  
lands on at-  
tainder.*

If a felon be convicted by verdict, confession, or recreancy, he forfeits his goods and chattels &c. presently [that is, on conviction before attainder]. And Stanford (speaking of a felon convict by verdict) says, that he shall forfeit his goods which he had at the time of the verdict given, which is the conviction in that case ; and by the statute of 1 R. 3. c.3. no sheriff, bailiff &c. shall seize the goods of a felon before he be convicted of the felony ; whereby it appears, that the goods may be seized as forfeited after conviction. So that by conviction of felony the goods and chattels of a felon are forfeited ; and by attainder, that is, by judgment given, his lands and tenements are forfeited, and his blood corrupted, but not before. [But though the goods and chattels of a felon are forfeited only from the time of conviction, yet if he dispose of them between his committal to prison and conviction, otherwise than for the necessary sustenance of himself and family, such assignment is open to impeachment as a fraudulent conveyance under the statute 13 Eliz. c. 5. Pauncefoot's case, 3 Co. 82 a. b. Skin. 357. Ch. C. L. 723.]

*Standing mute.*

If the party upon his arraignment refuse to answer according to law, he shall not be adjudged to be hanged, but for his contempt, to *peine fort et dure*, which works no attainder for the felony, or forfeiture of his lands, or corruption of blood. But in case of high treason, if the party refuse to answer according to law, he shall

receive such judgment by attainder, as if he had been convicted by verdict or confession [and a similar judgment is now awarded to persons standing mute, 12 Geo. 3. c. 20.]

*Felony.*] In ancient times this word was of so large an extent that it included high treason; and therefore in our ancient books, by the pardon of all felonies, high treason was included. But afterwards it was resolved, that in the king's pardon or charter, this word (felony) should not only extend to common felonies, and that high treason should not be comprehended under the same but ought to be specially named. Yet it was held that a pardon of all felonies should extend to petit treason: wherefore by the law at this day under the word (felony) in commissions &c. is included petit treason, murder, homicide, burning of houses, burglary, robbery, rape &c., chance-medley *se defendendo*, and petit larceny. And for such of these crimes for which any shall have judgment to be hanged by the neck till he be dead, he shall forfeit all his lands in fee-simple, and his goods and chattels: for felony by chance-medley, or *se defendendo*, or petit larceny, he shall forfeit his goods and chattels, but not his lands of freehold or inheritance. And all felonies punishable according to the course of the common law, are either by the common law or by statute.\*

*What felonies occasion a forfeiture of lands and goods.*

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\* And as to felonies created by statute, the forfeiture ensues the nature of the punishment; if the offender receive sentence of death then is he attainted, and he forfeits all his lands and goods, that is, his *lands* to the king for a year, day, and waste, and after the year and day the king is further entitled to the profits of the land for the residue of the felon's life; on his death the lands now go to the felon's heir (corruption of blood being taken away by the stat. 54 Geo. 3. c. 45. which has consequently deprived the lord and the king of their escheats, but not the king of his year, day, and waste); if the offence be any other than treason or murder the *goods* go to the king absolutely, but if the offence be treason, then the lands and goods go to the king absolutely; if murder, the lands on the tenant's death (subject to the king's year, day, and waste) escheat to the lord of the fee whereof they are holden, for want of an heir, if the lord, by shewing the existence of a court baron and manor, can prove that the lands are holden of his lordship; if not, the lands escheat to the king absolutely, for, in default of any mesne legal tenure, all lands are holden of the king as lord paramount, which is now the case with nineteen-twentieths of the manors in the kingdom; and in that case also the goods are forfeited to the king absolutely. But if the offender receive a lesser punishment than attainder, whether the felony be a grand or petit larceny, then he forfeits all his goods to the king absolutely, and rents in arrear, being part of his goods, are forfeited also, but subsequent rents, it is presumed, belong to the convict.

*Forfeiture, modern doctrine of.*

*Piracy, conviction for works no forfeiture, except when.*

There is also a felony punishable by the civil law, because it is done upon the high sea, as piracy, robbery, or murder, whereof the common law took no notice, because it could not be tried by twelve men. If this piracy be tried before the lord admiral in the court of the admiralty, according to the civil law, and the delinquent be there attainted, yet shall it work no corruption of blood, or forfeiture of his lands; otherwise it is if he be attainted before commissioners by force of the statute of 28 H. 8. By the express purview of that statute, about the end of the reign of queen Elizabeth, certain English pirates who had robbed on the sea certain merchants of Venice in amity with the queen, obtained a coronation pardon [their commission of the piracy not having been then discovered], whereby amongst other things, the king pardoned them all felonies. It was resolved by all the judges of England upon conference and advisement, that this did not pardon the piracy; for seeing it was no felony whereof the common law took consance, and the statute of 28 H. 8. did not alter the offence, but only ordained a trial and inflicted punishment, therefore it ought to be pardoned specially, or by words which were tantamount, and not by the general name of felony; and according to this resolution the delinquents were attainted and executed.

*Corruption of blood includes what.*

[391 b]

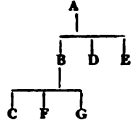
*The blood is corrupted.]* Aptly is a man said to be attainted, *attinctus*, for that by his attainder of treason or felony his blood is so stained and corrupted, as, first, his children cannot be heirs to him, nor to any other ancestor [through him], and therefore the warranty cannot bind; for thereby heirs only are bound. 2dly. If he were noble or gentle before, he and all his children and posterity are by this attainder made base and ignoble, in respect of any nobility or gentry which they had by their birth. 3dly. This corruption of blood is so high, that regularly it cannot be absolutely salved and taken away but by authority of parliament. [It is now taken away, except in cases of treason, petit treason, and murder, by 54 Geo. 3. c. 45.]

*Pardon makes subsequent issue inheritable, if heir.*

[392 a]

And it is a general rule, that having respect to all those whose blood was corrupted at the time of the attainder, the pardon does not remove the corruption of blood neither upward nor downward. As if there be grandfather, father, and son, and the grandfather and father have divers other sons, if the father be attainted of felony and pardoned, yet his blood remains corrupted not only

above him and about him, but also to all his children born at [or before] the time of his attainder. But issue had after the pardon, is inheritable [provided it be the eldest and heir]. But if the issue had after the pardon be the youngest, nothing can descend to him, for that his eldest brother is living and disabled. But if the eldest son dies in the lifetime of the father without issue, then the youngest shall inherit.



It is also to be observed, that judgment against a man for felony that he be hanged by the neck until he be dead, includes five other punishments; 1st. In his wife, who shall lose her dower. 2dly. In his children, who shall become base and ignoble. 3dly. In his posterity, for his blood shall be corrupted, so that they cannot inherit unto him or any other ancestor [through him.] 4thly. He shall forfeit all his lands and tenements which he has in fee, and all his lands which he has in tail for term of his life. And 5thly. All his goods and chattels.

Judgment of death includes what five punishments. [392b]

But some acts of parliament have altered the common law in some of these points: 1st. The statute *de donis conditionalibus*, by which lands entailed are not to be forfeited absolutely, either for felony or treason, but for the life of tenant in tail only. And the cause wherefore this statute was made was to preserve the inheritance in the blood of those to whom the gift was made notwithstanding any attainder for felony or treason. And this act in history is called *gentilitium municipale*; for that thereby the families of many noblemen and gentlemen were continued and preserved to their posterities. And this law continued in force from the thirteenth year of king Edward the first, until the twenty-sixth year of king Henry the eighth, when by act of parliament estates in tail are forfeited absolutely by attainder of high treason. But as to felonies, the statute *de donis conditionalibus* yet remains in force, so that for attainder of felony, lands or tenements entailed are not forfeited but only during the life of tenant in tail, and the inheritance is preserved to the issue.

Tenant in tail forfeits for life only for felony, absolutely for treason.

### SECTIONS 748, 749.

ALSO, a warranty, whether lineal or collateral, may be discharged or defeated by a release of all warranties, or of all covenants real, or of all demands.

How warranties may be discharged.

*Lineal warranty with assets bars issue in tail, but not its issue, unless it receive the assets.*

[393b]

And it is to be known that a lineal warranty with assets [in fee-simple] is a good plea in bar to a *formedon* in the descender; and therefore if tenant in tail aliens with warranty, and leaves assets to descend; if the issue in tail aliens the assets, and dies, the issue of the issue shall recover the land, because the lineal warranty descends to him without assets; for neither the pleading of the warranty without the assets, nor the assets without the warranty, is any bar in a *formedon* in the descender. But if the issue to whom the warranty and assets descended had brought a *formedon*, and by judgment had been barred by reason of the warranty and assets; in that case, albeit he aliens the assets, yet the estate tail is barred for ever; for a bar in a *formedon* in the descender, which is a writ of the highest nature that the issue in tail can have, is a good bar in any other *formedon* in the descender brought afterwards upon the same gift.

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[Here follows in Littleton a Table of Contents, which in this edition has been transferred to the beginning of the book, immediately after the preface.]



## EPILOGUS.

[394b]

AND know, my son, that I would not have thee believe that all I have said in these books is law, for I will not presume to take this much upon me. But of those things that are not law, inquire and learn of my wise masters learned in the law. But notwithstanding certain things which are moved and specified in the said books, are not altogether law, yet such things shall make thee more apt and able to understand and apprehend the arguments and the reasons of the law &c. For by the arguments and reasons in the law a man shall sooner come to the certainty and knowledge of the law itself.

Lex plus laudatur quando ratione probatur.

*I will not presume &c.*] Here observe the great modesty and mildness of our author, which is worthy of imitation; for *Nulla virtus, nulla scientia locum suum et dignitatem conservare potest sine modestiâ.*

*The arguments and reasons in the law.*] For then only can we be said to know the law when we apprehend the reasons of it; that is, when we bring the reason of the law so to our own reason that we perfectly understand it as our own; and then, and never before, have we such an excellent and inseparable property and ownership therein, as we can neither lose it, nor can any man take it from us; and these reasons being fully apprehended in one case will direct us (the learning of the law is so chained together) in many other like cases. But if by your study and industry you make not the reason of the law your own, it is not possible for you long to retain it in your memory.

[395a]

When I had finished this work of the first part of the Institutes, and looked back and considered the multitude of the conclusions in law, the manifold diversities between cases and points of learning; the variety almost infinite of authorities, ancient, constant, and modern, and withall their amiable and admirable consent in so many succeeding ages; the many changes and alterations of the common law, and additions to the same, by many acts of parliament, and that the like work of institutes had not been attempted by any of our profession whom I might imitate, I thought it safe to follow the grave and prudent example of our worthy author, not to take upon me, or to presume that the reader should think that all that I have said herein is law; yet this I may safely affirm, that there is nothing herein but may either open some window of the law to let in more light to the student by diligent search to see the secrets of the law, or to move him to doubt, and withall to enable him to inquire and learn of the sages, what the law, together with the true reason thereof, in these cases is: or lastly, upon consideration had of our old books, laws, and records (which are full of venerable dignity and antiquity) to find out where any alteration has been made, or upon what ground the law has been changed; knowing for certain, that the law is unknown to him who knows not the reason thereof, and that the known certainty of the law is the safety of all. I had once intended for the ease of our student, to have made a table to these Institutes; but when I considered that tables and abridgments are most profitable to those who make them, I have left that work to every studious reader. And in taking farewell, I wish him the gladsome light of jurisprudence, the loveliness of temperance, the stability of fortitude, and the solidity of justice.

THE END.

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*\*\* The following references to Modern Cases will shew the applicability of the foregoing Works to transactions of the present day, as well as assist the Student in his interpretation of the text.*

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