Vide sect. 214. 216, 226. 252. 331.

being largely taken, as well the statutes and customes of the realme, as that which is properly the common law, is included within *common droit*. Littleton in this his treatise nameth *common droit* fixe times.

Sect. 214.

35. H. 6 34 (Cro. Eliz. 33. Post. 225. b.)

SAUNS fait. For it is a rule in law, that a rent service may be reserved without deed.

Vide sect. 131. 132.

En mesme le manner, si lease soit fait, &c. For these be rents services, because fealty is incident to these rents; for (as it hath bin said before) a lessee for life or years shall doe fealty. And if a man make a lease at will, reserving a rent, the lessee shall not doe fealty, and yet the lessor shall distreine for the rent of common right.

ET si home voyloit doner terres ou tenements a un auter en taile, rendant a luy certain rent per an (1), *il de common droit poit distreiner pur le rent aderere, coment que tiel done fuit fait sans fait; pur ceo que tiel rent est rent service. En mesme le maner est, si leas soit fait a un home pur terme de vie, ou d'auter vie* (2), *rendant al lessor certaine rent, ou pur terme de ans rendant certaine rent.*

AND if a man will give lands or tenements to another in the taile, yeelding to him certaine rent by the yeare, hee of common right may distraine for the rent behind, though that such gift was made without deed; because that such 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, rendring to the lessor certaine rent, or for tearme of yeares rendring rent.

Rendant commeth of the word *reddo, i. rem pro re dare*, and signifieth yeelding or repaying; but of this I have spoken before in this chapter. Sect. 213.

Sect. 215.

(Ante 22. b. Plowd. 151. a. 162. a. Cro. Cha. 400. 548. 2. Ro. Abr. 60.)

REversion. *Reversio* commeth of the Latine word *revertor*, and signifieth a returning againe; and therefore *reversio terræ est tanquam terra revertens in possessione donatori, sive hæredibus suis, post dictum finitum, &c.* as in the cases that Littleton here hath put.

(Ante 47. a.)

Il covient, que le reversion &c. soit en le donor ou lessor &c. This is not to be understood only of a reversion immediately expectant upon the gift or lease. For if a man maketh a gift in tayle, the remainder in tayle reserving a rent, and keepe the reversion in himselfe, this is a rent service.

MES en tiel cas, ou home sur tiel done ou lease voile reserver a luy rent service, il covient, que le reversion de les terres & tenements soit en le donor ou lessor. Car si home voile faire feoffement en fee, ou voile doner terres en taile, le remainder oustre en fee simple sans fait, reservant a luy certaine rent, tiel reservation est void; pur ceo que nul reversion remaine en le donor, & tiel tenant

BUT in such case, where a man upon such a gift or lease will reserve to him a rent service, it behoveth, that the reversion of the lands and tenements be in the donor or lessor. For if a man will make a feoffment in fee, or will give lands in taile, the remainder over in fee simple without deed, reserving to him a certaine rent, this reservation is void; for that no reversion remaines in the donor, and such

Reservant. *Reserver* commeth of the Latine

tient

(1) *Per an* not in L. & M. or Roh. but in P. & Red.
(2) *Ou d'auter vie* not in L. & M. or Roh. but in P. & Red.

in the reign of king John. 2. Inst. 295. Yet this seems strange, because, in the reign of this prince, the lord of the fee had a much more easy way of recovering his tenant's land for default of service, than by a *cessavit* in the court of the king; namely, a distress of the land by a process of seisure in his own court. The latter mode continued till the 52. of Hen. 3. took it away, by prohibiting distress of the freehold except by the king's writ, and so leaving the tenant's chattels as the only subject for the lord's distress. It was this alteration of the old law, which, as we apprehend, gave occasion to introducing the *cessavit* by the statutes of Gloucester and Westminster; nor at the utmost can we account for an earlier use of the *cessavit* than the 52. of Hen. 3. Perhaps, therefore, lord Coke's case of king John was nothing more than a process of *cesser* in the lord's court, and he might only call it a *cessavit* by reason of the resemblance, between the proceedings on the writ of *cessavit* in the king's court and those on the process of *cessavit* in the court of the lord.—These remedies of *gavelet* and *cessavit* are now fallen wholly into disuse, Mr. Lambard not remembering an instance of resorting to the customary *gavelet* of Kent in his time, and the cases in our books on both the *gavelets* and the *cessavit* being all of antient date; from which it may be presumed, that distress of the tenant's goods is now usually a very sufficient, or at least a preferable remedy. Lamb. Perambulat. ed. 1596. p. 554. Nor whilst the others continued in use, were they applicable, except when the tenure was in fee. Booth on Real Act. 133. But in imitation of them, it hath long been the practice to reserve a power of re-entry for nonpayment of rent on granting leases for lives or years; and the legislature have also interposed against lessees, as well to obviate the difficulty from the niceties of an entry for forfeiture at common law, by enabling landlords to recover possession by ejectment in a special manner, as to qualify and prevent an abuse of the tenant's remedy of injunction in equity. 4. Geo. 2. c. 28. Further, on a like principle of convenience, a summary jurisdiction is given to justices of the peace, enabling them to restore the possession to the landlord, where the tenant deserts the premises in lease, without leaving a sufficient distress. 11. G. 2. c. 19. See further as to the *cessavit* and other remedies for subtraction of services, 3. Blackst. Comm. 8. ed. 230.

(3) See Bro. Abr. *Reservation* 46. Dr. & Stud. Dial. 2. c. 22.

To be placed before fol. 143.

ADVERTISEMENT

TO THE

PURCHASERS

OF THE

NEW EDITION

OF

COKE UPON LITTLETON.

MR. HARGRAVE takes this opportunity of informing the purchasers of the new edition of Coke upon Littleton, that he has determined to allot a principal part of the enſuing long vacation to the further proſecution of that undertaking; and therefore flatters himſelf, that he ſhall be able to be prepared with ſuch additional numbers before next Michaelmas term, as to be then able to ſupport a monthly publication with tolerable regularity till the edition ſhall be completed. It grieves him, when he reflects on the paſt delays; and if the numbers already given had not been publiſhed, not only without payment of any ſubſcription-money, but at a vaſt expence of time and books without any return of profit to himſelf hitherto, and he did not place great reliance on the expectation of a generous indulgence to an editor publiſhing under ſuch circumſtances, he ſhould ſink under the idea of having offended ſo many reſpectable perſons as have given encouragement to that work. The truth is, that various cauſes have hitherto united to impede the editor's progreſs. At one time the intenſe application, into which a zeal to execute the undertaking on an enlarged plan gradually carried the editor, ſo ſhook his conſtitution and injured his health, that, on that ſingle account and without reference to any other cauſe, it became abſolutely neceſſary to ſuſpend the proſecution of the work. This was ſucceeded by obſtructions of another nature; namely, profeſſional avocations, and an indiſpenſable attention to the private concerns of himſelf and family. But at no time hath the editor yet loſt ſight of the undertaking; and now he enjoys the pleaſure of being ſo ſituate, as not to ſee a proſpect of much future interruption. Lately too, he has given an unambiguous proof of his intention

intention to complete the edition, by agreeing with the original proprietors to purchaſe the whole intereſt in it at a conſiderable price. The conſequence is, that he is now become the full and ſole proprietor; and unleſs the work ſhall be continued, he will loſe both all beneficial return for his paſt labors and expences in the edition, and the purchaſe-money he has agreed to pay to the late proprietors. From this time, therefore, the great intereſt he has at ſtake will be an additional ſecurity to the purchaſers for completion of the undertaking; though he can with great truth declare, that none ſuch was wanting; becauſe he truſts, that an anxiety to perform his engagements, in the beſt manner his ſituation ſhall allow, will ever operate more ſtrongly on his mind, than any view to his own perſonal intereſt or convenience.

LONDON, June 15, 1782.

tient la terre immediatment de le ſeignior, de que ſon donor tenoit, &c.

tenant holds his land immediately of the lord, of whom his donor held, &c.

hath the force of *ſaving* or *excepting*. So as (*k*) ſometime it ſerveth to reſerve a new thing, *viz.* a rent, and (*l*) ſometime to except part of the thing in *eſſe* that is granted. (1)

(*k*) 8. E. 4. 4b. 26. Aſſ. Pl. 66. (Ant. 47. a.)
(*l*) 35. H. 6. 34.

And it is to be underſtood, that in the caſe of the gift in taile, leaſe for life or years, the fealtie is an incident inſeparable to the reverſion, ſo as the donor or leſſor cannot grant the reverſion over, and ſave to himſelfe the fealty or ſuch like ſervice. But the rent he may except; becauſe the rent, although it be incident to the reverſion, yet it is not inſeparably incident. If a man maketh a gift in taile without any reſervation, the donee ſhall hold of the donor by the ſame ſervices that he held over. (*m*) But otherwiſe it is of an eſtate for life or years; for there if he reſerveth nothing, he ſhall have fealty onely, which is an incident inſeparable to the reverſion, as hath been ſaid.

(Poſt. 317. a.)
(Ant. 23. a.)
(*m*) Litt. fo. 4. Old tenures 5. 38. E. 3. 7. 33. H. 6. 7.

Le remaindre ouſtre en fee ſimple ſans fait. Here it appeareth, that if a man maketh a gift in taile, the remainder in fee, without deed, (*n*) the remainder is good, and paſſeth out of the donor by the livery of ſeiſin: and ſo it is of a leaſe for life or yeares, the remainder over in fee; for the particular eſtate and the remainder, to many intents and purpoſes, make but one eſtate in judgement of law. *Vide ſect.* 60.

(*n*) 40. E. 3. 10. 10. E. 4. 1. 12. E. 4. 16. 15. E. 4. 18. 18. E. 4. 12. 18. H. 8. 4. 3. H. 7. 13. F. N. B. 219. 11. H. 4. 39. 38. E. 3. 36. 44. E. 3. 8. (Ant. 49. b.)

Remainder, in legall latine, is *remanere*, comming of the latine word *remaneo*; for that (*o*) 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* appeareth. (2)

(*o*) 2. Co. 51. Cholmelies caſe. (Ant. 49. a. Plowd. 25. a. 35. a.)

Sect. 216.

ET ceo eſt per force de le ſtatute de quia emptores terrarum. *Car devaunt le dit eſtatute ſi home feſoit un feoffement en fee ſimple, per fait ou ſans fait, rendant a luy & a ſes heires certaine rent, ceo fuit rent ſervice, & pur ceo il puiſſoit diſtreine de common droit; & s'il fuit nul reſervation d'aſcun rent ne d'aſcun ſervice, uncore le feoffee tenuſt del feoffor per autiel ſervice, que le feoffor tenuſt ouſter de ſon ſeignior procheine paramont.*

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, yeelding to him and to his heires a certaine rent, this was a rent ſervice, and for this hee might have diſtrained of common right; and if there were no reſervation of any rent, nor of any ſervice, yet the feoffee held of the feoffor by the ſame ſervice, as the feoffor did hold over his lord next paramont.

(2. Inſt. 500. Ant. 98. b.)

QUia emptores terrarum. Hereof is ſpoken before in the chapter of *Frankalmoigne, ſectione* 140.

Per fait ou ſans fait, &c. For all rent ſervices may be reſerved without deed (as hath been ſaid) and as it appeareth here. (Ant. 142. b.)

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 heires; becauſe it was a rent ſervice, and a tenure thereby created.

Et s'il fuit nul reſervation, &c. le feoffee tenuſt del feoffor per autiels ſervices, &c. This is evident, and agreeth with our bookes (*) that in this caſe the law created the tenure; wherein it is to bee obſerved, how the law regardeth equity and equalitie without any proviſion or reſervation of the party. (Dy. 146. b. Ant. 23. a.)

(*) Britton fol. 100. 2. E. 3. 33 25. E. 3. gard. 21. 49. E. 3. 10. 22. Aſſ. pl. 53. 7. H. 4. 14. 23. E. 3. avowrie 255. 4. H. 6. Litt. cap. taile Sect.

Ipſæ etenim leges cupiunt, ut jure regantur.

Sect.

(1) In a preceding note lord Coke aſſerts, that reſervation is *always* of a thing newly created out of the land demiſed. Ant. 47. a. But here he is more qualified in expreſſion, and allows the word to be *ſometimes* uſed to *except* part of the thing granted. However, the former is the more technical uſe of the word; *exception* being a more proper term than *reſervation* for the latter purpoſe. The learning on this ſubject will be found under the title *reſervation* in Viner's Abridgment.

(2) See Fearne's Eſſ. on Conting. Rem. 3d. ed. p. 5. to 11.

Continuation of notes to 141. *b.*

(2) From citing this paſſage of the year-book of Richard the Third, according to which Engliſh ſtatutes do not bind Ireland, and from this manner of mentioning the ſame paſſage in his 12th report, one might infer, that lord Coke was of that opinion. 12. Co. 111, 12. But in Calvin's caſe referring to the ſame year-book, he explains it to mean, where Ireland is not *ſpecially named*; and ſo he ſtates the rule to be in the 4th Inſtitute. 7. Co. Calvin's caſe 22. b. 4. Inſt. 350. 351. Here alſo he cites the year book of 1. Hen. 7. which controuls the year-book of R. 3. Lord Coke's explanation in Calvin's caſe evinces his ſentiments more ſtrongly; becauſe Ireland, if conſidered as quite diſtinct in government from England, would have been a more apt inſtance to ſupport his doctrine in favor of the poſt-nati of Scotland. We do not, however, mean by this to offer any opinion on the controverſy about the political connection between England and Ireland. It is a ſubject of too much importance and delicacy, as well as of too much extent, to be diſcourſed of in a note. See 6. Geo. 1. c. 5. 22. G. 3. c. 53. and 23. G. 3. c. 28. The firſt of theſe ſtatutes aſſerts the legiſlative power of Great-Britain over Ireland, and alſo the appellant juriſdiction. By the two latter both are annihilated.

(3) Irish ſtat. 10. H. 7. c. 22.

(4) The ſtatute for taking away military tenures leaves the tenure by villenage, as it was before; one of the proviſoes declaring, that the act ſhall not be conſtrued *to alter or change any tenure by copy of court-roll, or any ſervices incident thereunto.* 12. Cha. 2. chap. 24. ſ. 7.

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Britton fol. 100. Fleta lib. 3. ca. 14. Vide Sect. 370. Poſt. 229. a. (5. Co. 20. b. 2. Ro. Abr. 22. 3. Leon. 16. 2. Inſt. 672.)

PER fait endent. It cannot be a deed indented unleſſe it bee 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. (3)

(p) 8. E. 4. 8. 11. H. 7. 22. 35. H. 6. 34. 20. E. 4. 13. 17. E. 3. 12. H. 4. 17. (2. Ro. Abr. 449.)

And it is holden that (p) 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 agreeth to the rent, and the rent is reſerved by the words of the feoffor, and not by the grant of the feoffee. But of this more hereafter. In the mean time it is to be noted, that of ancient time a deed indented was called *charta cyrographata*; (4) or *charta communis*, becauſe each party had a part. And a deed poll was called *charta de unâ parte*. (q) *Chartæ autem de purâ donatione et ſimplici penès donatorium & ejus hæredes debent remanere. Communes vero duplicari debent, ita quòd quilibet habet partem ſuam; vel ſi una ſit tantùm, tunc in æquâ manu communis amici utriuſque ponatur, ſalvo cuſtodienda, dum cuilibet partium neceſſe fuerit exhibendum.*

(q) Fleta lib. 3. ca. 14. Britton fol. 100.

Reſervant a luy. (r) Note, it is a maxime in law, that the rent muſt be reſerved to him from whom the ſtate of the land moveth, and not to a ſtranger. (ſ) But ſome doe hold, that otherwiſe it is in the caſe of the king.

(r) 12. E. 2. feoffments 8. 18. E. 2. Aſſ. 381. (Ant. 47. a. 2. Ro. Abr. 447. Cro. Cha. 289.)

(ſ) 35. H. 6. 36. (2. Ro Abr. 447. 425. Mo. 93. 168.)

Old tenures. Britton cap. 66. 164. F. N. B. 210. Bract. 86.

Et tiel rent eſt rent charge. It is called a rent charge, becauſe the land for payment thereof is charged with a diſtreſſe. 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 farme. (5) Here *Littleton* putteth his caſe, and ſo did he

MES ſi home, per fait endent, a cel jour fait tiel done en fee taile, (1) *le remainder ouſter en fee, ou leaſe a terme de vie, le remainder ouſter en fee; ou un feoffment en fee; & per meme l'endenture il reſerve a luy & a ſes heires un certaine rent, & que ſi le rent ſoit aderere, que bien lirroit a luy & a ſes heires a diſtreiner &c. tiel rent eſt rent charge; pur ceo que tielx terres ou tenements ſont charges ove tiel diſtreſſe per force de le ſcripture tantſolement, & nemy de common droit. Et ſi tiel home, ſur fait endent, reſerva a luy & a ſes heires certain rent, ſans aſcun tiel clauſe miſe en le fait, que il poit diſtreiner, donque tiel rent eſt rent ſecke; pur ceo que il ne poit vener de aver le rent, ſi ceo ſoit deny, per meane de diſtreſſe; & s'il ne fuit unques en ceſt cas ſeiſie de le rent, il eſt ſans remedie, come ſerra dit apres.*

BUT if a man, by deed indented, at this day maketh ſuch a gift in fee taile, the remainder over in fee; or a leaſe for life, the remainder over in fee; or a feoffement in fee; and by the ſame indenture hee reſerveth to him and to his heires a certaine rent, and that if the rent be behind, it ſhall be lawfull for him and his heires to diſtreine, &c. ſuch a rent is a rent charge; becauſe ſuch lands or tenements are charged with ſuch diſtreſſe 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 heires a certaine rent, without any ſuch clauſe put in the deed, that he may diſtreine, then ſuch rent is rent ſecke; for that hee cannot come to have the rent, if it be denied, by way of diſtres; and if in this caſe hee were never ſeiſed of the rent, he is without remedie, as ſhall be ſaid hereafter. (2)

(1) *Fee* not in L. and M. Roh. and Redm.

(2) See poſt. ſect. 341.

(3) The *indenting* or cutting *in modum dentium*, which is uſually at the top, ever ſuppoſes two parts, being made in order that the parts when joined may be authenticated by the ſameneſs of the cutting. See as to the uſe and origin of indenting charters in England, Mad. Formular. Anglican. p. 28, 29. of the diſſertation prefixed.

(4) Mr. Madox objects to lord Coke's treating the *chirographum* as altogether the ſame thing with the *indenture*; becauſe anciently many *chirographa* were not *indented*, but cut in the rectilinear form. Mad. Formul. Anglic. Diſſert. p. 29. In fact, the name of *chirograph* properly belonged to thoſe deeds, which were at firſt of two parts written on the ſame paper or parchment, with the word *chirographum* in capital letters between the two parts, and were afterwards divided by a cut through the middle of thoſe letters; and thus whether the cutting was *indented* or in a ſtrait line, ſuch deeds were equally *chirographa*. Ibid. p. 29. Cangii Gloſs. voce *chirographa*. Spelm. Gloſs. voce *indentura*. Mabill. de Re Diplomat. lib. 1. c. 2. Some indeed apply this explanation to the *ſyngrapha*, and only deſcribe the *chirographa* as deeds of one part, and ſo called from being written with the party's own hand. Lyndw. tit. de offic. Archidiac. c. 1. in not. But the ſame perſons allow, that *ſometimes ſyngrapha* and *chirographa* are uſed promiſcuouſly; and in the opinion of others, they are more commonly ſo applied. Ibid. & Mad. ubi ſupra. Both the *chirograph* and the *indenture*, then, uſually importing to be a deed of two parts, they are ſo far the ſame; and we do not apprehend, that lord Coke meant to carry the reſemblance further. Conſequently he is not affected by Mr. Madox's obſervation, which ſeems to ſuppoſe, though too haſtily, that lord Coke had conſidered the *chirograph* and the *indenture* as wholly the ſame.

(5) The

he in the next section before, of a clause of distresse generally granted: (t) A man granted a rent out of certaine land, *pro consilio impenso & impendendo*, to have and to hold to him and to his assignees for terme of his life, payable at four feasts in the yeare, and for default of payment upon demand it should be lawfull for him to distrayne; the grantee granted the rent over; the assignee after one of the dayes demanded the rent, and distreyned, and the distresse adjudged lawfull; for he needs not make a demand at any of the dayes, as in the case of re-entry, but he may demand it when he will, for it is only to entitle him to his remedy for his meere duty (1).

(t) 7. Co. 28. b Maund's case H. 43. El. in Com. Banco. Rot. 1108. inter Maund & Gregory.
M. 40. & 41. El. in Com. Banco inter Stanly & Read.
18. El. Dyer 348.
(Hut. 23. 42. Post. 153. b. 2. Ro. Abr. 426. Dy. 2. Post. 202. a. 204. a. Dy. 51. Plowd. 7. Perk. f. 101. Mo. 5. March 149.)

Distreyner, &c. Hereby (&c.) is implyed what things are destreynable, which elsewhere is expressed at large. Also where the distresse is to be taken in the same land, and in some other, which with many differences is set downe in his proper place. (Vide sect. 221. Ant. 47. a.)

Il serra sans remedie. Note, that upon a reservation of a rent upon a feoffement in fee by deed indented, (w) 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 state is bound thereby.

(w) 33. E. 3. Annuity 52. 1. H. 4. 5. 26. Ass. Pl. 66. 21. E. 4. (1. Ro. Abr. 226.)

And where *Littleton* putteth his case, when a reservation is made upon an estate that passeth by livery, the same law it is, if a man at this day doe bargaine and sell his land by deed indented and inrolled according to the statute, a rent may be reserved thereupon; for albeit an use had onely passed by the common law, yet now by the statute of 27. H. 8. cap. 10. the use and possession passe 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 doth passe.

* Mich. 39. & 40. El. in Com. Banco inter Wicks & Tillard.

Sect. 218.

AUxy, si home seisie de certain terre graunt, per un fait polle, ou per indenture, un annual rent issuant hors de mesme la terre, a un auter en fee, ou en fee taile, ou pur terme de vie, &c. ovesque clause de distresse, &c. donques ceo est rent charge; & si le grant soit sans clause de distresse, donques il est rent seck. Et nota, *que rent secke* idem est quod redditus siccus; *pur ceo que nul distresse est incident a ceo.*

ALSO if a man seised of certaine land grant, by a deed poll, or by indenture, a yearely rent to be issuing out of the same land, to another in fee, or in fee taile, or for terme of life, &c. with a clause of distresse, &c. then this is a rent charge; and if the grant be without clause of distress, then it is a rent secke. And note, that rent secke *idem est quod redditus siccus*; for that no distresse is incident unto it.

This needs no explanation, for *Littleton* expounds it himselfe.

SEisie de terre. Note, that a rent cannot be granted out of a pischary, a common, an advowson, or such like incorporeal inheritances, but out of lands or tenements whereunto the grantee may have recourse to distreyne, or which may be put in view to the recognitors of an assise, as hath beene said before in this chapter. And though it be out of lands or tenements, (x) yet it must be out of an estate that passeth by the conveyance, (as by all *Littleton*'s examples appeareth) and not out of a right: as if the disseisee release to the disseisor of land, reserving a rent, the reservation is void, *Et sic de similibus.*

(x) 32. E. 3. tit. scir. fac. 100. 40. E. 3. Pl. Com. 139. (Ant. 47. a. 142. a. Vaugh. 202. 204.)
Vide sect. 213.
(z) 10. E. 4. 3. b. 33. H. 6. 5. 50. E. 3. 9. 8. E. 4. 8. 5. E. 3. Fines 1. 9. E. 3. 7. 46. E. 3. 27. 21. H. 6. 8. Temp. E. 1. Ass. 42.

Grant per fait. *Also a man may have a rent by prescription.

* 19 E. 3. Title 34. (Ant. 114. a. 6. Co. 58.)

Rent secke *idem est quod redditus siccus.*

Sect.

(1) See further as to this difference between a re-entry to avoid an estate and an entry to distrain, the second point in Maund's case above cited, and Gilb. on rents 73.

(s) The true meaning of *fee-farm* is a perpetual farm or rent; the name being founded on the *perpetuity* of the rent or service, not on the *quantum*. See Mad. Finan. Burg. 3. Here indeed lord Coke seems to intimate the contrary, by confining the denomination of *fee-farm* to rents at least equal to the fourth part of the value of the land; and the word is explained in a like manner by Sir Henry Spelman and the author of the book of *Old Tenures*, with this difference only, that the latter restricts the value to a *third*. See Spelm. Glos. voce *feodi-firma*, and Old Ten. tit. *fee-firme*. But it would be wrong to understand any of these writers, as intending *absolutely* and *universally* to exclude all rents of *less* value; for the word *fee-farm* most certainly imports every rent or service, whatever the *quantum* may be, which is reserved on a grant in fee; and so lord Coke himself agrees in another work, citing Britton and other books for authorities. 2 Inst. 44. Britt. 164. b. The sometimes confining the term of *fee-farm* to rents of a certain value probably arose, partly from the statute of Gloucester, which gives the *cessavit* only where the rent amounts to one fourth of the value of the land; and partly from its being most usual on grants in *fee-farm* not to reserve less than a third or fourth of such value. See 6. E. 1. c. 4. F. N. B. 210. C. Ant. 142. a. note 2.—After the statute of *quia emptores* granting in fee-farm, except by the king, became impracticable; because the grantor parting with the fee is by operation of that statute without any reversion, and without a reversion there cannot be a rent-service, as Littleton himself writes in section 216. Yet I have seen a modern grant in fee of a large estate in Ireland, reserving a perpetual rent of great value. But such rent, considered as a fee-farm rent, I thought clearly void. However, as in the case I allude to, the conveyance contained a power for the grantor and his heirs and assigns to distrain for the rent when in arrear, and also a power to enter and receive the profits till all arrears should be paid, the rent might be good as a rent-charge: and so on being consulted I held it to be.—Since writing the preceding part of this note, a most valuable collection of new Reports has been published; and in one of the cases, the learned reporter has given a note relative to fee farm rents, which well deserves attention. See the case of Bradbury *v.* Wright, in Mr. Douglas's Rep. of Ca. in B. R. 602. However, I so far differ from the last mentioned note, as to continue of opinion, that the term of *fee-farm* is not properly applicable to any rents except *rents-service*.

Sect. 219.

(7. Co. 24. 1. Ro. Abr. 887.)

RENT charge. Here it appeareth by *Littleton*, that this *primâ facie* is a rent charge, whereof in this chapter ſhall be ſpoken more at large.

And ſo it is of a rent ſecke.

Home grant. Put caſe, that *A.* be ſeiſed of lands in fee, and he and *B.* grant a rent charge to one in fee, this *primâ facie* is the grant of *A.* and the confirmation of *B.* but yet the grantee may have a writ of annuity againſt both.

(a) 16. 2. E. tit. Annuity 47. Vide ſect. 314.

(*a*) Two men grant an annuity of twenty pounds *per annum* to another, although the perſons be ſeverall, yet he ſhall have but one annuity. But if the grant be, *obligamus nos, & utrumque noſtrum*, the grantee may have a writ of annuity againſt either of them; but he ſhall have but one ſatisfaction.

(5. Co. 86. 1. Ro. Abr. 895. Hob. 59. Plowd. 439.)

Briefe de annuitie is a writ for the recovery of an annuity. (*b*) An annuity is a yearly payment of a certaine ſumme of money, granted to another in fee for life or yeares, charging the perſon of the grantor onely. (*c*) But not only the grantee, but his heire and his and their grantee (1) alſo ſhall have a writ of annuity. (*d*) But if a rent charge be granted to a man and his heires, he ſhall not have a writ of annuity againſt the heire of the grantor, albeit he hath aſſets, unleſs the grant be for him and his heires. (2)

(b) Doct. & Stud. ca. 3. 17. El. Dyer. 344. b. 45. E. 3. Executor 72. See ant. 2. a. (Finch's Law 301. F.N.B. 152. a.)

(c) 3. E. 6. Dyer 65. And Sergeante Bendloes reporteth, that ſo was the opinion of the Court.

(*d*) 2. H. 4. 13. Dyer 17. Eliz. 344. b. (10. Co. 128. Hob. 58. Plowd. 457. a. 1. Ro. Abr. 826.)

ITEM ſi home grant a per ſon fait un rent charge a un auter, et le rent eſt arrere, le grantee poet eſlier, s'il voet ſuer un briefe de annuitie de ceo envers le grantor, ou diſtreyner pur le rent arrere, & le diſtreſſe retainer tanque il ſoit de ceo pay. Mes il ne poit faire, ne aver, ambideux enſemble, &c. Car s'il recover per briefe d'annuity, donques la terre eſt diſcharge de le diſtreſſe, &c. Et s'il ne ſuiſt briefe de annuitie, mes diſtreine pur les arrerages, & le tenant ſuiſt ſon replegiare, & donques le grantee avowa le priſel de le diſtreſſe en le terre en court de record, donques eſt la terre charge, & la perſon del grantor diſcharge d' action d' annuity.

ALſo if a man grant by his deed a rent charge to another, and the rent is behind, the grantee may chuſe, whether he will ſue a writ of annuity for this againſt the grantor, or diſtreine for the rent behinde, and the diſtreſſe detaine until he be payd. But he cannot doe, 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 doth not ſue a writ of annuity, but diſtreine for the arrerages, and the tenant ſueth his replevin, and then the grantee avow the taking of the diſtreſſe 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.

Poet eſlier. The grantee hath election to bring a writ of annuity, and charging the perſon onely to make it perſonall; or to diſtraine upon the land, and to make it reall.

(a. Co. 36. and Mo. 83.)

It should be, a writ lies not, against the grantor dieth.

But if a man grant a rent charge to a man and his heires, and dieth, and his wife bring a writ of dower againſt the heire, the heire in barre of her dower claimes the ſame to be an annuity, and no rent charge; yet the wife ſhall recover her dower; for he cannot determine his election by claime, but by ſuing of a writ of annuity (as *Littleton* ſaith) neither can the heire have after the endowment an annuity for the two parts; for that ſhould 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: (*e*) for of a rent granted for owelty of partition, a writ of annuity doth not lie, becauſe it is of the nature of the land deſcended

(e) 29. Aſſ. p. 23.

(1) Formerly it was doubted, whether an annuity was aſſignable, though *aſſigns* were mentioned in the grant; the argument being, that it was a mere perſonal contract, and therefore a *choſe in action*. See the caſes in 2. Vin. Abr. 515. and 3. Vin. Abr. 151. But in a caſe in C. B. 3. Cha. 1. this objection, which in ſtrictneſs of law carried force with it, was over-ruled Gerrard v. Boden Hetl. 80. It ſeems too, that naming *aſſigns* is not eſſential to the making an annuity aſſignable, the principle of the objection to its being ſo being the ſame, whether *aſſigns* are mentioned or omitted. However, Perkins in the ſpecial caſe of an annuity *pro conſilio impendendo* requires naming of *aſſigns*. Perk. ſ. 101. Even then too he queſtions the annuity's being aſſignable. But this was ſettled in Maund's caſe 7. Co. 28. b. one point reſolved being, that expreſs words would make ſuch an annuity aſſignable.

(2) The reaſon is; becauſe our law preſumes, that it is not intended to include the heir in the obligation, where he is not named; and conſequently, in the caſe ſuppoſed by lord Coke, it is too late to elect to make the rent-charge an annuity after the death of the grantor. See poſt. 383. b. 384. b. 386. a 10. Co. 128. a. Vin. Abr. *Annuity* B. But this reaſoning fails in application, if the grantor of the annuity is a body politic, and as ſuch hath perpetual continuance. Therefore an annuity granted by the king will bind his heirs and ſucceſſors, though not named, his political capacity never dying, but having continuance in his ſucceſſor; and ſo it was adjudged the 15th of Elizabeth in Sir Thomas Wroth's caſe. Plowd. 455.

ſcended. Alſo of ſuch a rent as may be granted without deed a writ of annuitie doth not lie, though it be granted by deed.

[f] And here is to be noted, that here is no election given of two ſeverall things, as if the grant were of an annuitie or a robe yearely, &c. for there the grantor had election at the day to deliver which he would. But here is two remedies given for one yearely ſumme, and conſequently the grantee ſhall at any time have election to take which of the remedies hee will; for in all caſes where ſeverall remedies be given, the party to whom the law giveth the remedies, it giveth him withall election to take which of the remedies he will.

[f] Sir Rowland Heyward's caſe, 2. Co. 36. 28. E. 3. 98. 41. E. 3. 10. a. 2. H. 4. 12. 6. H. 4. 10. 36. H. 6. 10. 9. E. 4. 46. 21. E 4. 55. b. 1. E. 5. 1. F. N. B. 121. (Plowd. 439. Poſt. 310. b. 1. Ro. Abr. 446. 447. 725. Hob. 58.)

Mes il ne poet faire ou aver ambideux enſemble. For then he ſhould recover one thing twice, which ſhould be a double charge to the grantor.

Note, as to elections, theſe diverſities following: (1)

2. Co. 36. 37. in Sir Rowland Heyward's caſe.

Firſt, when nothing paſſeth to the feoffee or grantee before election to have the one thing or the other, there the election ought to be made in the life of the parties, and the heir or executor cannot make election. But when an eſtate or intereſt paſſes immediatly to the feoffee, donee, or grantee, there election may be made by them, or by their heires or executors.

Secondly, when one and the ſame thing paſſeth to the donee or grantee, and the donee or grantee hath election in what manner or degree he will take this, there the intereſt paſſeth immediately, and the partie, his heires, or executors, may make election when they will.

Thirdly, when election is given to ſeverall perſons, there the firſt election made by any of the perſons ſhall ſtand.

Fourthly, in caſe an election be given of two ſeverall things, alwaies he, which is the firſt agent, and which ought to doe the firſt act, ſhall have the election. As if a man granteth a rent of twentie ſhillings or a robe to one and to his heires, the grantor ſhall have the election; for he is the firſt agent, by payment of the one, or deliverie of the other. So if a man maketh a leaſe, tendring a rent or a robe, the leſſee ſhall have the election *cauſâ quâ ſupra*. And with this agree the bookes in the * margent. [g] But if I give unto you one of my horſes in my ſtable, there you ſhall have the election; for you ſhall be the firſt agent by taking or ſeiſure of one of them. And if one grant to another twentie loads of hazill or twentie loads of maple to be taken in his wood of D. there the grantee ſhall have election; for he ought to doe the firſt act, *s.* to fell and take the ſame.

(1. Ro. Abr. 725. Ant. 46. b. Plowd. 6. Poſt. 146. a. Hob. 174.)

* 9. E. 4. 36. b. 13. E. 4. 4. b. l. 5. E. 4. 6. b. 11. E. 3. annu. 27. 11. Aſſ. p. 8. 29. Aſſ. 55. 3. E. 3. tit. Aſſ. 175. 43. E. 3. tit. Barre 194. (5. Co. 25. 41.)

[g] 2. H. 7. 23. a.

Fiftly, when the thing granted is of things annuall, and are to have continuance, there the election remaineth to the grantor, (in caſe where the law giveth to him election) as well after the day, as before. Otherwiſe it is when the things are to be performed *unicâ vice*. And therefore if I grant to another for life an annuitie or a robe at the feaſt of Eaſter, and both are behind, the grantee ought to bring his writ of annuitie in the disjunctive; for if he bring his writ of annuitie for the one onely, and recover, this judgement ſhall determine his election for ever; for he ſhall never have a writ of annuitie afterwards, but a *ſcire facias* upon the ſaid judgement. Which reaſon, *Fitzherbert*, in his *Natura Brevium*, (2) not obſerving, held an opinion to the contrarie. But if I contract with you to pay unto you twentie ſhillings or a robe at the feaſt of Eaſter, after the feaſt you may bring an action of debt for the one or for the other.

(Ant. 90. b. 6. Co. 45.)

9. E. 4. 36. 13. E. 4. 4. and the other above ſaid bookes. (Plowd. 6. 1. Ro. Abr. 726.)

Sixtly, the feoffee by his act and wrong may loſe his election, and give the ſame to the feoffor. As if one infeoffe another of two acres, to have and to hold the one for life, and the other in taile, and he before election maketh a feoffment of both; in this caſe, the feoffor ſhall enter into which of them he will, for the act and wrong of the feoffee. (3)

Sil recover en brieſe de annuitie donques eſt la terre diſcharge de diſtreſſe. Here is to be obſerved, that this determination of the election of the grantee muſt be by action or ſuit in court of record; [h] for albeit the grantee diſtreine for the rent, yet hee may bring a writ of annuitie and diſcharge the land. And *Littleton* putteth his caſe here ſurely upon a recoverie in a writ of annuitie. [i] But if the grantee doth bring a writ of annuitie, and at the returne thereof appeare and count, this is a determination of his election in court of record, albeit he never proceedeth any further. [k] As if a wife be endowed *ex aſſenſu patris*, and the huſband dieth, the wife hath election either to have her dower at the common law or *ex aſſenſu patris* (4); if ſhe bring a writ of dower at the common law, and count, albeit ſhe recover not, yet ſhall ſhe never after claime her dower *ex aſſenſu patris*.

[h] 17. El. Dyer. 344. b.

[i] F. N. B. 152. a. 5. H. 7. 33. b.

[k] 12. E. 2. Dower 158.

[l] So if the grantee bring an aſſiſe for the rent, and make his plaint, he ſhall never after bring a writ of annuitie. But the purchaſing of a writ of annuitie, and entrie of it in court of record, or of an aſſiſe, is no determination of the election; becauſe an eſtranger may purchaſe a writ in the name of the grantee, and enter it of record: but if the grantee appeare thereunto, &c. then this doth amount to a determination of his election, as hath been ſaid.

[l] 10. E. 4. 17.

Son

(1) Lord Coke extracts the ſix following rules concerning election *verbatim* from his own Reports. See 2. Co. 36. b.

(2) See F. N. B. 152. G.

(3) But if the grant be to hold one acre for life and the other in fee, and donee makes ſeoffment of *one* acre only, it is an election to have the fee of that; and this being lawful nothing is forfeited. Perk. ſ. 78. Plowd. 6. b.

(4) See acc. before ſect. 41.

(2. Inſt. 139.)
Glanvill. lib. 12. ca. 12.
Marlbr. ca. 21.
W. 1. ca. 16. 17. W. 2. ca. 39.
Fleta, lib. 2. ca. 40.

Son replegiare. *Littleton* ſpake immediately before of *un breife d'annuity*, but here he ſaith *ſon replegiare*; becauſe goods may be replevied two manner of wayes, *viz.* by writ, and that is by the common law, or by pleint, and that is by the ſtatutes for the more ſpeedy having againe of their cattell and goods. A *replegiare* lyeth, as *Littleton* here teacheth us, where goods are diſtreined and impounded, the owner of the goods may have a writ *de replegiari facias*, whereby the ſherife is commanded, taking ſureties in that behalfe, to redeliver the goods diſtreined to the owner, or upon complaint made to the ſherife he ought to make a replevy in the countrey. *Replegiare* is compounded of *re*, and *plegiare*, as much as to ſay, as to redeliver upon pledges or ſurreties; and in the ſtatute of *Marlebridge*, *deliberare* is uſed for *replegiare*. [*m*] And the ſherife ought to take two kinde of pledges, one by the common law, and they be *plegii de proſequendo*, and another by the ſtatute, *viz. plegii de retorno habendo. Vide ſect.* 58. what things may lawfully be diſtreyned, whereupon a *replegiare* may be ſued. The formes of the writ you ſhall reade in the Regiſter and F. N. B.*

Marlbr. ca. 21.
(Doctr. Plac. 314.)
21. H. 6. Returne de Vic. 17.
(Poſt 161. a.)
[*m*] W. 2. ca. 2. Fleta, lib. 4. ca. 5. 4. H. 6. 15.

* Regiſtr. F. N. B. 68.

[*n*] It is a generall rule, that the plaintife muſt have the property of the goods in him at the time of the taking. [*o*] But yet if the goods of a villeine be diſtrayned, the Lord of the villeine ſhall have a replevy; becauſe the bringing of the replevy amounts to a clayme in law, and veſts the property in the plaintife. But in that caſe if the goods of the villeine be taken by a treſpaſſer, the lord ſhall have no replevy; becauſe the villeine had but a right.

[*n*] 3. E. 3. 74. 6. H. 4. 2. & 39. 9. H. 6. 39. 20. H. 6. 19.
[*o*] 33. E. 3. Replev. 43. 42. E. 3 18. 9. H. 6. 25. F. N. B. 69. F. 6. H. 7. 9. 19. E. 3. Repl. 32.

[*p*] But there is two kinde of properties; a generall propertie, which every abſolute ownor hath; and a ſpeciall propertie, as goods pledged or taken to manure his lands or the like; and of both theſe a *replegiare* doth lye.

[*p*] 42. E. 3. 18. 11. H. 4. 17. 23. 47. E. 3. 12. 48. E. 3. 20. 7. H. 4. 17.
(2. Ro. Abr. 430. Plowd. 524.)
Marlbr. ca. 21.

And albeit it be provided by the ſtatute of *Marlebridge*, *cap.* 21. *quòd vicecomes poſt querimoniam inde ſibi factam ea, ſine impedimento vel contradictione ejus qui dicta averia ceperit, deliberare poſſit*, &c. [*q*] yet where the defendant claimes property, the ſherife cannot proceed; for it is a rule in law, that property ought to be tryed by writ. And therefore in that caſe where the tryall is by pleint, the plaintife may have a writ *de proprietate probandâ* directed to the ſherife to trie the propertie; and if thereupon it be found for the plaintife, then the ſherife to make deliverance, (for ſo be the words of the writ) and if for the defendant, he can no further proceed. But that is but an enqueſt of office; and therefore if thereby it bee found againſt the plaintife, yet he may have a writ of replevy to the ſherife; and if he returne the claime of propertie, &c. yet ſhall it proceed in the court of common pleas, where the propertie ſhall be put in iſſue and finally tried. And the ſherife may take a pleint upon the ſaid act out of the county, and make replevyn preſently; for it ſhould be inconvenient for the owner to forbeare his cattell till the county day.

[*q*] 30. E. 3. 22. 31. E. 3. Repl. v. 35. & 4. 7. H. 4. 26. 28. 31. H. 6. Prop. Prob. 5. 1. E. 4. 9. 21. E. 4. 64. 2. Eliz. Dyer 173. 21. E. 4. 66.
(2. Ro. Abr. 431.)

[*r*] It is to be noted, that a man cannot claime propertie by his bailife or ſervant; and the reaſon is, for that if the clayme fall out to be falſe he ſhall be fined for his contempt, which the lord cannot be unleſſe he maketh clayme himſelfe; for *nemo punitur pro alieno delicto* (1).

[*r*] 5. E. 3. 38. 11. H. 4. 4. 17. E. 2. Propr. Prob. 6.

In a ſpeciall caſe a man may have a replevyn of goods not diſtreyned. As if the meſne put in his cattell in lieu of the cattell of the tenant paravaile, that he is bound to acquite, he ſhall have a replevyn of thoſe cattell that never were diſtreyned.

34. H. 6. 47.

If a man by his deed grant a rent with clauſe of diſtreſſe, and grant further, that hee ſhall keep the goods diſtreyned againſt gages and pledges, untill the rent be payd, yet ſhall the ſherife replevy the goods diſtreyned; for it is againſt the nature of ſuch a diſtreſſe to be irrepleviſable, and by ſuch an intention the currant of replevyns ſhould be overthrown to the hindrance of the common wealth; and therefore it was diſallowed by the whole court, and awarded that the defendant ſhould gage deliverance, or elſe goe to priſon. And *Bracton* is of the ſame opinion; for he ſaith, *Eodem modo de viâ obſtructâ, per breve quòd juſticiet propter communem utilitatem, ne tranſeuntes ire diù impediantur, quia hoc eſſet commune damnum; & in hoc vicecomes & juſticiarii faciant ſicut ſuper detentionem averiorum contra vadium plegii, propter communem utilitatem, ne animalia diu incluſa pereant*; which in mine opinion is an excellent point of learning.

31. E. 3. Gage deliver. 5.

(Poſt. 282. b. Doct. & Stud. 129. b.)

Bracton, lib. 4. fo. 233. a. & b.

If the beaſts of divers ſeverall men be taken, they cannot joyne in a *repleg.* but every one muſt have a ſeverall replevyn (2). And ſo in a replevyn it is a good plea to ſay, that the property is to the plaintife and to a ſtranger; and where there be two plaintifes, that the property is to one of them.

28. E. 3. 92. 3. H. 4. 12. 34. H. 6. 37. 2. E. 4. 23. (5. Co. 19. a.)

There is alſo a writ *de homine replegiando*. But Littleton is ready to give you further inſtruction: therefore heare him.

Regiſt. fol. 133. Bract. fo. 121. & 154. W. 1. ca. 11. Fleta, lib. 2. ca. 2. F. N. B. 66. b.

Et avowa le priſe, &c. en court de record. Here it appeareth, that an avowry in court of record, which is in nature of an action, is a determination of his election before any judgement given (3). And this is a good proofe of that, which hath beene formerly ſaid of the writs of annuity and aſſiſe (4).

Electio

(1) This is explained to be intended only in reſpect to the county court; for in the king's bench the bailiff is not liable to a fine; and therefore it has been held, that there one may make conuſance and claim property by a bailiff. Adj. in Hamſtead *v.* Oldham, 1. Lev. 90. and 2. Keb. 441.
(2) But in favor of liberty, the law permits two to join in ſuing the writ *de homine replegiando*. F. N. B. 66. F.
(3) Acc. poſt. 268. a. F. N. B. 152. A.
(4) See ante 145. a.

Electio semel facta & placitum testatum non patitur regressum. 21. H. 6. 24. per Newton.
Quod semel placuit in electionibus amplius displicere non potest. 27. H. 6. 4.

If a rent charge be granted to *A.* and *B.* and their heires; *A.* distreyneth the beasts of the grantor, and he sueth a replevin; *A.* avoweth for himselfe, and maketh conusance for *B*; *A.* dyeth and *B.* surviveth: *B.* shall not have a writ of annuity; for in that case, the election and avowry for the rent of *A.* barreth *B.* of any election to make it an annuity, albeit he assented not to the avowry.

But here is another diversity to be observed betweene the case aforesaid of the grant of the rent where he (as hath beene said) may make it either reall or personall, and when a man may have election to have severall remedies for a thing that is meerly personall or meerly reall from the beginning. As if a man may have an action of account or an action of debt at his pleasure, and he bringeth an action of account and appeare to it, and after is nonsuite, yet may he have an action of debt afterwards; because both actions charge the person. The like law is of an assise and of a writ of entry in the nature of an assise, and the like. (2. Co. 36. b.) 28. E. 3. 98. b. 27. E. 3. 89. b. (6. Co. 7. a. Ant. 139. a.)

Sect. 220.

ITEM, si home voile qu'un auter averoit un rent charge issuant hors de sa terre, mes il ne voile que sa person soit charge en ascun maner per briefe d'annuitie, donques il poit aver tiel clause en la fine de son fait: Proviso semper, quòd præsens scriptum, nec aliquid in eo specificatum, non aliqualiter se extendat ad onerandam personam meam, per breve vel actionem de annuitate, sed tantummodo ad onerandum terras & tenementa mea de annuali redditu predict', &c. (1) *Donques la terre est charge, & le person del grantor discharge.*

ALSO if a man would that another should have a rent charge issuing out of his land, but would not that his person bee charged in any manner by a writ of annuity, then hee may have such a clause in the end of his deed: *Provided alwaies, that this present writing, nor any thing therein specified, shall 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 yearely rent aforesaid, &c.* Then the land is charged, and the person of the grantor discharged.

BY this section it appeareth, that when in a generall grant the law doth give two remedies, that the grantor may provide that the grantee shall not use one of them and leave the party to the other (2). But where the grantee hath but one remedy, there that remedy cannot be barred by any proviso; for such a proviso should be repugnant to the grant. 28. H. 8. Dier 9. b. (Hob. 72.)

De annuali reddi-tu, &c. Here by (&c.) and the consequent of this section bee implyed divers excellent points of learning, *viz.* If a man by his deede granteth a rent charge out of the mannour of Dale (wherein the grantor hath nothing) with such a proviso that it shall not charge his person; albeit the repugnancie doth not appeare in the deed, yet the proviso taketh away the whole effect of the grant, and therefore is in judgement of law repugnant; for upon the matter it is but a grant of an annuity, provided that it shall not charge his person (3). For which cause our author putteth his case of a rent charge issuing truly out of land. 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 hath a double remedy, as hath beene said, yet the proviso is repugnant; because the land is expressly charged with the rent, but the writ of annuity is but implyed in the grant, and therefore that may bee restrained without any repugnancie, and sufficient remedy left for the grantee; for which cause our author putteth his case of the restraint of bringing a writ of annuity. And yet in some case where there is a proviso in (1. Ro. Abr. 227. Hutt. 33.)

So it was resolved by the justices in 11. H. 8. as justice Spilman reporteth. 9. H. 6. 53.

(1) For the operation of this sort of *proviso*, see Dy. 222. a. and 2. Co. 72. a.
(2) See post. 266. a. & b. 393. a.
(3) Acc. in Brediman's case, 6. Co. 58. b.

6. Eliz. Dier 227. (4. Co. 49. a. 7. Co. 39. b. 6. Co. 41. b. Poſt. 162. a.)

in the deed that the grantee ſhall not in any ſort charge the perſon of the grantor generally, notwithſtanding the perſon of the grantor ſhall be charged. As if a man grant a rent charge out of certaine lands to another for life, with ſuch a *proviſo*; the rent is behinde; the grantee dyeth; the executors of the grantee ſhall have an action of debt againſt the grantor, and charge his perſon for the arrerages in the life of the grantee; becauſe the executors have no other remedy againſt the grantor for the arrerages; for diſtreine they cannot, becauſe the eſtate in the rent is determined, and the proviſo cannot leave the executors without remedy, as appeareth by that which hath beene ſaid. (1) And therefore our author putteth his caſe of a rent charge continuing. And here is to be obſerved, that this word *(proviſo)* hath diſ-

(Poſt. 203. b. 2. Co. 72. a.)

vers operations. Sometime it worketh a qualification or limitation, and ſo it is taken here, and often in our bookes; ſometime a condition; and ſometime a covenant: whereof you ſhall reade more hereafter, *ſect.* 320.

32. Aſſ. p. 1. Vide ſect. 384. (Cro. Eliz. 837. 1. Ro. Abr. 590. Mo. 811.)

En le fine de ſon fait. Here *Littleton* putteth his caſe of one deed. But though the grant be generall, and want ſuch a 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 hee bring a writ of annuity that the rent ſhall ceaſe.

* Lib. 3. cap. de condic. ſect. 362. (10. Co. 139. a. Hob. 191. Cro. Cha. 555.)

Nec aliquid in eo ſpecificatum non aliqualiter ſe extendat, &c. Here is to be obſerved a double negative, *nec*, and *non*, which in grammaticall conſtruction amounteth to an affirmative; for *Negatio deſtruit negationem, & ambo faciunt affirmativum.* Yet the law, that principally reſpecteth ſubſtance, doth judge the proviſo to be a negative according to the intent of the parties, and not according to grammaticall conſtruction, to the end the proviſo may take effect; and the like you ſhall finde hereafter in *Littleton.* * *Mala grammatica non vitiat cartam.* Here our author putteth his caſe of one grantor. Put then the caſe, that *A.* and *B.* being joyntenants 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 bringeth a writ of annuity, he muſt charge the perſon of *B.* only.

Sect. 221.

(2. Rb. Abr. 424.)

QUE *ſi* A. *de* B. Here wanteth words to precede theſe, viz. *que il grant al* A. *de* B. *&c. que ſi* A. *de* B. *&c.* as it appeareth in the originall, (2) and ſo it appeareth in the cloſe of this ſection, viz. *Mes granta tantſolement que il poet diſtreyner.* And without ſuch a grant the clauſe ſhould be imperfect.

(Plowd. 139.)

Pur ceo que le manor eſt charge ove le rent per voy de diſtreſſe. And yet no rent is expreſly granted out of the mannor. But, by the grant that he ſhall diſtreine for ſuch a yearely ſumme of money, in judgement of law the mannor is charged with the rent; but the perſon of the grantor cannot be charged, becauſe he expreſly granteth no rent, for that would charge his perſon, but that the grantee ſhould diſtreine, &c. which only chargeth the land.

ITEM, ſi home fait tiel fait en tiel maner, que ſi A. *de* B. *ne ſoit annuelment pay al feaſt de Noel pur terme de ſa vie xx.s. de loyal mony, que adonques bien lirroit a meme ceſtuy* A. *de* B. *a diſtreiner pur ceo en le manor de* F. *&c. ceo eſt bone rent charge; pur ceo que le manor eſt charge ove le rent per voy de diſtres* (3); *& uncore la perſon de celuy, que fait tiel fait, eſt diſcharge en tiel caſe de action d'annuitie, pur ceo que il ne granta per ſon fait aſcun*

ALSO, if one make a deed in this manner, that if *A.* of *B.* be not yearely payed at the feaſt of Chriſtmaſſe for terme of his life xx.s. of lawfull money, that then it ſhall be lawfull for the ſaid *A.* of *B.* to diſtreyne for this in the mannor of *F.* &c. this is a good rent charge; becauſe the mannor is charged with the rent by way of diſtreſſe; and yet the perſon of him, which makes ſuch deed, is diſcharged in this caſe of an action of annuitie, becauſe he doth

annuitie

(1) At firſt this may ſeem contradicted by the ſtatute of 32. H. 8. c. 37. according to the recital of which the executors of tenant for life of a rent charge had no remedy at common law for arrears due to their teſtator. But Lord Coke in another place obſerves, that the preamble of 32. H. 8. ſhould be underſtood to apply not to tenant for his life only, but to tenant *pur autre vie*, ſo long as *ceſtuique vie* lives. Poſt. 162. a.

(2) The words, here ſtated by Lord Coke to be in the original, are not in L. & M. or Roh.

(3) In L. & M. and in Roh. *&c.* is added.

annuitie a le dit A. *de* B. *mes granta tantſolement, q'il poit diſtreiner pur tiel annuitie, &c.*

not grant by his deed any annuitie to the ſaid *A.* of *B* but granteth only that he may diſtreine for ſuch annuitie, &c.

Que il poet diſtreiner pur tiel annuity, &c.

Here by (*&c.*) many points worthy of obſervation are implyed, *viz.* if a man ſeiſed of lands in fee bindeth his goods and lands to the payment of a yearly rent to *A. de B.* this is a good rent charge with power to diſtreine, albeit there be no expreſſe words of charge, nor to diſtreine. Or in thete words, *Obligo manerium meum de* C. *& omnia bona in dicto manerio exiſtent'* A. *de* B. *in annuo redditu de xx.s. ad diſtringend' per balivum domini regis pro redditu prædicto.* By this grant a rent charge iſſueth out of the mannor; and where the words be, *ad diſtringendum per balivum domini regis*, this is for the advantage of the grantee. And therefore the king's baily ſhould be but his miniſter to diſtreine for his rent; and that which he may doe by his ſervant, he may doe by himſelfe, or by any other of his ſervants (2).

18. Aſſ. p. 1. 18. E. 3. 32. 3. Aſſ. 7. 3. E. 3. 12. 10. Aſſ. 24. 31. Aſſ. p. 17. 33. Aſſ. (1) Annuity 52. 16. E. 3. grant 64.

If a man by deed grant a rent of forty ſhillings to another out of his mannor of *Dale*, to have and to perceive to him and his heirs, and grant over by the ſame deed, that if the rent be behind, that the grantee ſhall diſtreine in the mannor of *Sale* (be the mannor of *Sale* in the ſame county or in another county, and bee this grant by one deed or divers deeds) the rent is onely iſſuing out of the mannor of *D.* and it is but a paine that he ſhall diſtreine in the mannor of *S.*; but both the mannors are charged, the one with the rent, and the other with a diſtreſſe 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 heires, or the heires of your body, ſhall diſtreine for a rent of forty ſhillings within my mannor of *S.* this by conſtruction in law ſhall amount to a grant of a rent out of my mannor of *S.* in fee ſimple or fee taile; for if this ſhall not amount to a grant of a rent, the grant ſhall be of little force or effect, if the grantee ſhall have but a bare diſtreſſe and no rent in him; for then he ſhall never have an aſſiſe of this, &c. And this is the reaſon, that it is ſo often ruled and reſolved *, that this amounts to a grant of a rent *per* conſtruction of law, *ut res magis valeat.* And all this is neceſſarily implyed in the *(&c.)* and in this caſe the grantee ſhall not have a writ of annuity, as our author ſaith. And whereas our author putteth his caſe where the diſtreſſe is to be taken in the ſame land out of which the rent by conſtruction of law is iſſuing, hereby is implyed, that if a rent be granted out of the mannor of *D.* and the grantor grant over, that if the rent be behinde, the grantee ſhall diſtreine for the ſame rent in the mannor of *S.* this is but a penalty in the mannor of *S.* for three cauſes.

7. Co. 23. 24. in Buts his caſe.

* 3. E. 3. 12. 3. Aſſ. p. 7. 14. Aſſ. p. 14. 16. E. 3. tit. grants 64. 18. E. 3. 32. 26. Aſſ. 38. 30. Aſſ. 12. 46. E. 3. 18. 32. 8. H. 4. 19. 9. H. 6. 9. 22. H. 6. 11. (5. Co. 55. Poſt. 213.)

Firſt, the law needs not to make conſtruction that this ſhall amount to a grant of a rent, for here a rent is expreſly granted to be iſſuing out of the mannor of *D.* and the parties have expreſly limited out of what land the rent ſhall iſſue, and upon what land the diſtreſſe ſhall be taken, and the law will not make an expoſition againſt the expreſſe words and intention of the parties when this way ſtands with the rule of the law. *Quoties in verbis nulla eſt ambiguitas, ibi nulla expoſitio contra verba expreſſa fienda eſt.*

Secondly, if in this caſe this ſhall amount to a grant of a rent out of the mannor of *S.* then the grantor ſhall be twice charged. For if the grantee bringeth a writ of annuity, this ſhall extend onely to the mannor of *D.*; for upon the grant of a diſtreſſe in the mannor of *S.* no writ of annuity lyeth, becauſe the mannor of *S.* is only charged, and not the perſon of the grantor as to this (3); and for this cauſe the bringing of the writ of annuity cannot diſcharge the mannor of *S.* of any rent: and ſo the law by conſtruction againſt the words and the intention of the parties ſhall doe injury to the grantor to charge him twice.

Thirdly, if in ſuch caſe the mannor of *S.* in which the diſtreſſe is only limited, ſhall be in another county, then it hath beene often adjudged, that the rent ſhall not iſſue out of the ſame, but the diſtreſſe ſhall be as a meane and remedy to compell the tenant of the land to pay the rent. And it was ſaid, that there was no diverſity in reaſon, that the law in conſtruction ſhall make the rent to be iſſuing out of this, when it lyeth in the ſame county, and not when it lyeth in ſeverall counties; for the words in both caſes are all one, and there is no reaſon to ſay that he ſhall faile of a recovery by aſſiſe (4). And the bookes in 1. *Aſſ. p.* 10. and 1. *E.* 3. 21. and other bookes doe not ſay that the rent iſſueth in this caſe out of both, but that the land in which the diſtreſſe ſhall be taken is charged; and this is true, for it is charged with the diſtreſſe. And inaſmuch as it was charged with the diſtreſſe, their opinion was, that the tenants of both of them ſhall be named in the aſſiſe. And the opinion of *Finchden*, in 41. *E.* 3. 13. was affirmed to be good law, that if the mannor of *D.* out of which the rent is granted, be recovered by an elder title, that all the rent is extinct (5); but if the mannor of *S.* in which the diſtreſſe is limited, be evicted, yet all the rent remaines *. So if the grantee purchaſe parcell of the mannor of *S.* the rent is not extinct; for that the rent iſſueth onely out of the mannor

Vide Bulwar's caſe. 7. Co. 3. 1. Aſſ. p. 10. 1. E. 3. 21. Vide 9. E. 3. 13. 31. Aſſ. 27. 17. E. 4. 6. 10. Aſſ. 4. 10. E. 3. 18. 2. E. 2. Aſſ. 360. 1. Aſſ. 10. 3. Aſſ. 7. 32. H. 6. 27. 22. Aſſ. 66. 31. Aſſ. 27. 29. E. 3. Aſſiſe 366. 41. E. 3. 13. per Finchden.

* Vide 17. E. 4. 6. ſemblable caſe. Vide Sect. prox. ſequen.

(1) Inſtead of *Aſſ.* it ſhould be *E.* 3.
(2) What follows on this ſide of the folio is taken almoſt verbatim from Butts' caſe, in 7. Co. 23. a.
(3) Acc. ant. 146. b.
(4) How the remedy by aſſiſe is affected where the rent iſſues out of land in ſeveral counties, is explained by lord Coke poſt. fol. 153. b. 154. a.
(5) See poſt. 148. a. and 349. a. where the ſame doctrine is expreſſed; but it is added, that the grantee ſhall have a writ of annuity.

nor of *D* (1). And it is said, that if a man grant a rent out of three acres, and grant over, that if the rent be behind, that he shall distreine for the rent in one of the acres, this rent is entire, and cannot be a rent secke out of two acres, and a rent charge out of the third acre, and therefore it is a rent secke for the whole; and yet hee shall distreine for this in the third acre. So if a rent be granted to two and to their heires out of an acre of land, and that it shall be lawfull for one of them and his heires to distreine for this in the same acre, this is a rent secke; for insomuch as they stand joyntly seised of one intire rent, it cannot be as to the one a rent secke, and as to the other a rent charge, and this distresse is as an appurtenant to the rent: and therefore if he which hath the rent dieth, the survivor shall distreine; and if both grant over the rent to another, he shall distreine for this. But if a man grant a rent out of blacke acre to one and to his heires, and grant to him that he may distreine for this in the same acre for terme of his life, this is a rent charge for his life, and a rent secke after, *diversis temporibus*. Otherwise it is if the distresse be limited for certaine yeares in the same land, there this remaines a rent secke intirely, for that the fee and the freehold is seck in such case.

(7. Co. 23.) If a man seised of lands in fee (2), and possessed of a terme for many yeares, grant a rent out of both for life in taile or in fee, with clause of distresse out of both, this rent being a freehold doth issue onely out of the freehold, and the lands in lease are onely charged with a distresse (3). But if he had granted the rent only out of the lands in lease for terme of the life of the grantee, this had issued out of the terme, and the land had beene charged during the terme, if the grantee lived so long. (Plowd. 524. b. 525. a.)

22. H. 6. 10. b. If a man be seised of twenty acres of land, and grant a rent of twenty shillings *percipiend' de quâlibet acrâ terræ meæ* (that is) out of every one acre of my land, this is a severall grant out of every severall acre, and the grantee shall have twenty pounds in all.

A. doth bargaine and sell land to *B.* by indenture, and before inrolment they both grant a rent charge by deed to *C.* and after the indenture is inrolled: some have said, that this rent charge is avoided; for say they, it was the grant of *A.* and by the inrolment it hath relation to the delivery, which (say they) shall avoid the grant, notwithstanding the confirmation of the other which had nothing in the land at that time. But the grant is good, and after the inrolment by the operation of the statute (4), it shall be the grant of *B.* and the confirmation of *A.* But if the deed had not beene inrolled, it had beene the grant of *A.* and the confirmation of *B.* and so *quâcunque viâ datâ* the grant is good (5). (Cro. Cha. 110. 217. Cro. Jam. 52. 53.)

Sect. 222.

ALso if a man hath a rent charge to him and to his heires issuing out of certaine land, if hee purchase any parcell of this to him and to his heires, all the rent charge is extinct, and the annuitie also; because the rent charge cannot by such manner bee apportioned. But if a man, which hath a rent service, purchase parcel of the land out of which the rent is issuing, this shal not extinguish all, but for the parcel. For

ITem, si home ad un rent charge a luy & a ses heires issuant hors de certein terre, s'il purchase ascun parcel de cel a luy & a ses heires, tout le rent charge est extinct & lannuitie auxy (6); pur ceo que rent charge ne poit per tiel maner estre apportion. Mes si home, que ad rent service, purchase parcel de la terre dont le rent est issuant, ceo n'extiendra tout, mes pur le parcel; car rent service en tiel cas poit

EXtinct commeth of the verbe *extinguere*, to destroy or put out; and a rent is said to be extinguished, when it is destroied and put out.

Apportion. This commeth of the word *portio*, *quasi partio*, which signifieth a part of the whole; and apportion signifieth a division or partition of a rent, common, &c. or a making of it into parts. (2. Inst. 503. 504.)

[a] The reason of this extinguishment is; because the rent is intire, 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, X and cannot bee [b] apportioned (7). But by act in law it may, as hereafter (8) shall be said. [c] If the grantee of a rent charge purchase parcell of the land, and the grantor by his deed

[a] Doct. & Stud. lib. 2. cap. 16. 21. H. 7. 2. 21. E. 3. 58.
See case of Butler v. Mornings Noy's Rep. 5.
(1. Ro. Abr. 234.)

[b] 30. Ass. 12. 9. Ass. 22.

[c] 46. E. 3. 32. 14. Ass. p. 14. 26. Ass. 38.

(1) See further as to extinguishment of rent, infra.
(2) The case here stated in Butts' case, 5. Co. 23.
(3) See post. 196. b. & 197. a.
(4) 27. H. 8. c. 16.
(5) See 1. Com. Dig. 544. where most of the authorities on the relation of the inrollment of a bargain and sale to its execution are referred to. See also post. 186. a. and Hynde's case, 4. Co. 71. a.
(6) In L. & M. and also in Roh. it is *anyenty* instead of *annuitie aussi*; and so the sense requires.
(7) Acc. Sav. 69. Noy. 5. the same doctrine prevails as to conditions and common appurtenant, and for a like reason. Post. 215. a. Ante. 122. a.
(8) See post. sect. 224. and fol. 164. a.

X This doctrine causes a difficulty, where one hath a rentcharge, & it is wished to discharge part of the land from the payment in order to enable a sale or mortgage of such part. One mode [practised] of avoiding preserving the rentcharge in the other parts of the land is agreeing, that the rentcharge shall not be prejudiced as to the other parts, but shall be wholly payable thereout. But this seems to be rather a new grant of the rent[charge] by implication, than a preservation of the old rentcharge. Another mode sometimes adopted is drawing a [illegible] from the owner of the rentcharge not to claim the rentcharge out of the land intended to be exonerated. But even this mode is not quite free from exception; for according to some books, it seems that a covenant not to sue amounts to a release. See Noy's Rep. [illegible] & Abridgm. tit. Release K. 2.

poit eſtre apportion ſolonque le value de la terre. Mes ſi un tient ſa terre de ſon ſeignior per le ſervice de render a ſon ſeignior annuelment a tiel feaſt un chival, ou un eſperon d'or, ou un clove, gylofer, & hujuſmodi; ſi en tiel cas le ſeignior purchaſe parcel de la terre, tiel ſervice eſt ale; pur ceo que tiel ſervice ne poit eſtre ſever, ne apportion.

a rent ſervice in ſuch caſe may be apportioned according to the value of the land. But if one holdeth his land of his lord by the ſervice to render to his lord yearely at ſuch a feaſt a horſe, a golden ſpeare, or a clove, gilliflower, and ſuch like; if in this caſe the lord purchaſe parcell of the land, ſuch ſervice is taken away; becauſe ſuch ſervice cannot be ſevered nor apportioned.

reciting the ſaid purchaſe of part granteth that hee may diſtreyne for the ſame rent in the reſidue of the land, this amounteth to a new grant, and the ſame rent ſhall be taken for the like rent or the ſame in quantity. And ſo it is [d] if a man by deed granteth a rent charge out of his land to a man for life, and granteth further by the ſame deed that hee and his heires may diſtreyne in the land for the ſame rent, this amounteth to a new grant of a rent in fee ſimple. (1) (Ant. 146. b.) [d] 8. H. 4. 19. (Poſt. 308. b.)

But yet a rent charge by the act of the partie may in ſome caſe be apportioned. As if a man hath a rent charge of 20 ſhillings, he may releaſe to the tenant of the land 10 ſhillings or more or leſſe, and reſerve part; (2) for the grantee dealeth onely with (1. Ro. Abr. 235.)

that which is his owne, *viz.* the rent, and dealeth not with the land as in caſe of purchaſe of part. And ſo was it holden in the common place, *Hill.* 14. *Eliz.* which I myſelfe heard and obſerved. So [e] if the grantee of an annuity or rent charge of 20 pound grant 10 pound parcell of the ſame annuity or rent charge, and the tenant attorne, hereby the annuity or rent charge is divided. (3) *See post.* Hil. 14. Eliz. [e] 9. H. 6. 12. 53. F. N. B. 152. D. E.

And [f] when the rent charge is extinguiſhed by his purchaſe of part of the land, he ſhall never have a writ of annuitie; becauſe it was by the grant a rent charge, and he hath diſcharged the land of the rent charge by his owne act by purchaſe of part. And therefore he cannot by writ of annuity diſcharge the land of the diſtreſſe, as *Littleton* hath before (4) ſaid. But if the rent charge be determined by the act of God or of the 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 21 yeares, *ceſty que vie* dieth, the rent charge is determined; and yet the grantee may have during the yeares a writ of annuity for the arrerages incurred after the death of *ceſty que vie*, becauſe the rent charge did determine 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 voyded, yet the grantee ſhall have a writ of annuity; for that the rent charge is avoyded by the courſe of law; and ſo it was holden in *Ward's* caſe above remembred againſt an opinion *obiter in* 9. *II.* 6. 42. a. [f] 14. E. 4. 4. 22. E. 4. le darrein caſe 51. 7. H. 6., 9. H. 6. 1. 5. H. 7. 33. Ward's caſe cited in 2. Co. in Heyward's caſe fo. 36. 9. II. 6 42.

Car rent ſervice in tiel caſe poet eſtre apportion. Whether this apportionment was at the common law, or by the force of the ſtatute of *quia emptores terrarum*, hath beene a queſtion in our bookes. * And it appeareth by *Littleton*, that it was ſo at the common law; for when he citeth any thing provided by any ſtatute, he citeth the ſtatute, as he hath done this very act before. *Littleton* ſpeaketh here indefinitely of rent ſervice, and there be divers kindes of rent ſervices which are not within that ſtatute; and yet ſuch rent ſervices are apportionable by the common law. As if a man maketh a leaſe for life or yeares reſerving a rent, and the leſſee ſurrender part to the leſſor, the rent ſhall be apportioned. So if the leſſor recovereth part of the land in an action of waſte, or entereth for a forfeiture in part, the rent ſhall be apportioned. * Brookes tit. apportionment 28. 18. E. 3. 49. 22. Aſſ. 52. 3. Aſſ. 18. 18. E. 2 Avowrie 218. Vid. 6. Co. 1. 2. in Bruerton's caſe. Vid. 8. Co. 105. 106. in Talbot's caſe. (1. Ro. Abr. 234. Poſt. 215.)

[g] So likewiſe if the leſſor granteth part of the reverſion to a ſtranger, the rent ſhall be apportioned; for the rent is incident to the reverſion. [h] So it is if tenant by knights ſervice by his laſt will and teſtament in writing deviſeth the reverſion of two parts of the lands, the deviſee ſhall have two parts of the rent. [g] 14. H. 8. 12. Vid. 8. Co. 79. in Wilde's caſe. Paſch. 30. Eliz. Rot. 233. So it was adjudged inter Collins and Harding. (13. Co. 57.)

And theſe caſes are in mine opinion rightly adjudged againſt a ſudden opinion in *Hil.* 6. and 7. *E.* 6. reported by ſerjeant *Bendloe* to the contrary. Note, what inconvenience ſhould follow, if by the ſeverance of the reverſion the rent ſhould be extinct. [h] Trin. 43. Eliz. Rot. 948. inter Well & Laſſels. & Hill. 42. Eliz. Rot. 108. in communi banco inter Ewer & Moyle.

Purchaſe parcell de la terre. This is intended of a fee ſimple, for

(1) Acc. Dy. 253. a. for there is a caſe, in which it was held, that a rent charge ſhould go to the heir, though heirs were not mentioned, except in the clauſe of diſtreſs.
(2) See acc. in the comment on ſect. 537. poſt. fol. 305. a.
(3) But Hobart, who *arguendo* puts the like caſe, obſerves, that the tenant is not compellable to attorn. Hob. 25.
(4) This ſeems a miſtake; at leaſt I cannot find any paſſage of the kind in Littleton. In one copy which I have of the Coke upon Littleton, the whole of this paſſage is ſtruck through with a pen; and in another it is ſcored under as doubtful.
(5) Ant. ſect. 216.

for if there be a lord and tenant of 40 acres of land by fealty and 20 ſhillings rent [i], if the tenant maketh a gift in taile, or a leaſe for life or yeares, of parcell 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 (ſaith *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 partie, and in *eſſe* for other (1) part. So it is if the leſſor enter upon the leſſee for life or yeares 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 bookes * ſpeake of an apportionment in 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 in law a rent ſervice may be ſuſpended in part, and in *eſſe* for part. * As when the gardian in chivalrie entreth into the land of his ward within age, now is the ſeigniorie ſuſpended: but if the wife of the tenant be endowed of a third part of the tenancie, now ſhall ſhe pay to the lord the third part of the rent. * And ſo it is if the tenant give a part of the tenancie to the father of the lord in taile, the father dieth, and this deſcends to the lord; in this caſe by act in law the ſeigniorie is ſuſpended in part and in *eſſe* for part, and the ſame law is of a rent charge.

Likewiſe a ſeigniorie may be ſuſpended in part by the act of a ſtranger. * As if two joyntenants or coparceners be of a ſeigniorie, and one of them diſſeiſe the tenant of the land, the other joyntenant or coparcener ſhall diſtreine for his or her moitie.

Concerning the apportionment of rents, there is a difference betweene a grant of a rent, and a reſervation of a rent: for [k] if a man be ſeiſed of two acres of land, of one in fee ſimple, and of another in taile, and by his deed grant a rent out of both in fee, in taile, for life, &c. and dieth, the land intailed is diſcharged, and the land in fee ſimple remaines charged with the whole rent; for againſt his owne grant he ſhall not take advantage of the weakeneſſe of his owne eſtate in part. [l] But if he make a gift in taile, a leaſe for life or for yeares of both acres, reſerving a rent, the donor or leſſor dieth, the iſſue in taile avoydeth 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 ratably according to the value of the land, as *Littleton* here ſaith.

[m] If a man grant a rent charge out of two acres, and after the grantee recovereth one of the acres againſt the grantor by a title paramount, the whole rent ſhall iſſue out of the other acre: but if the recoverie be by a faint title by covine, then the rent is extinct for the whole, becauſe he claimeth under the grantor.

If a man infeoffeth *B.* of one acre in fee upon condition, and *B.* being ſeiſed of another acre in fee granteth a rent out of both acres to the feoffor, who entreth into the one acre for the condition broken, the whole rent ſhall iſſue out of the other acre; becauſe his title is paramount the (3) grant. But if a man maketh a leaſe for life of blacke acre and white acre, reſerving two ſhillings rent, upon condition that if the leſſee doth ſuch an act, &c. that then he ſhall have fee in blacke acre, the leſſee performes the condition, albeit now by relation he hath 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 diverſitie betweene a rent in groſſe 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 claimeth from and under the grantor. As if *B.* maketh a leaſe of one acre for life to *A.* and *A.* is ſeiſed of another acre in fee, *A* granteth a rent charge to *B.* out of both acres, and doth waſt in the acre which he holdeth for life, *B.* recovereth in waſt; the whole rent is not extinct, but ſhall be apportioned; and yet *B.* claimeth the one acre under *A.* And ſo it is if *A.* had made a feoffment in fee, and *B.* had entred for the forfeiture, the rent is to be apportioned, and is not wholly extinct: and the reaſon hereof is, for that it is a maxime of law, that no man ſhall take advantage of his owne wrong, *nullus commodum capere poteſt de injuriâ ſuâ propriâ*; (4) and therefore ſeeing the waſt and forfeiture were 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 onely out of the other acre, becauſe the leſſor hath the one acre under the eſtate of the leſſee, and therefore it ſhall be apportioned. * If the king give two acres of land of equall value to another in fee, fee taile, for life or yeares, reſerving a rent of two ſhillings, and the one acre is evicted by a title paramount, the rent ſhall be apportioned.

Mes ſi un home tient ſa terre, &c. per ſervice de render annuelment, &c. un chival ou un eſperon d'or, &c. ſi en tiel caſe le ſeignior purchaſe parcel de la terre, tiel ſervice eſt ale. (5)

Chival.

[i] 32. H. 8. tit. Extinguiſhment. Br. 48. 11. Ed. 3. Ceſſavit 21. 17. E. 3. 57. a. (Goldſb. 44. 1. Ro. Abr. 938. 9. Co. 135. 1. Ro. Abr. 235.)

* 21. E. 4. 29. 9. E. 4. 1. 7. H. 6. 26. 4. H. 7. 6. b. 11. E. 3. Ceſſavit 21. (1. Ro. Abr. 235.)

* 33. E. 3. Dower 138.

* 30. Aſſ. p. 12.

* 27. E. 3. 88.

[k] 12. H. 4. 17. 17. Ed. 2. Dower 164. 30. Aſſ. p. 12.

[l] 20. H. 6. 3. 9. E. 4. 1. 2. 35. H. 8. Dyer 56. 7. E. 6. Dyer 82. 9. E. 3. 6. H. 4. 17. (1. Ro. Abr. 235.)

[m] Doct. & Stud. li. 2. c. 17.

* Dyer Mich. 7. & 8. Eliz. Manuſcript. The earle of Huntingdon's caſe. Vid. F. N. B. 234. b. Briefe de deonerando pro rata port.

(1) This poſition is denied by lord Hale and the court of king's-bench in the caſe of Hodgkins v. Robſon and Thornborow, Mich. 27. Cha. 2. See the report of that caſe in 1. Vent. 277. 2. Lev. 143. and Pollexf. 141.

(2) Acc. in Aſcough's caſe, 9. Co. 135. b. and there the reaſon is expreſſed, namely, that one coparcener ſhall not be prejudiced by the tortious act of the other. See alſo acc. poſt. 188. a.

(3) See the caſe of dower, poſt. 150. a.

(4) So alſo by the tortious act of the leſſee a condition may be apportioned; though in general it is not diviſible by act of the parties. Poſt. 275. a. & 4 Co. 120. a. 8. Co. 79. b.

(5) What ſervices ſhall be extinguiſhed by the lord's purchaſe of part of the land, and what ſhall be apportioned or remain, is explained much at large in Talbot's caſe, 8. Co. 105. and in Bruerton's caſe, 6. Co. 1.

Chival. *Nota*, in Latine *deſtrarius* is a great horſe or horſe of ſervice, of the French word *deſtrier*; *palfridus* a horſe to travell on (1), of the French word *palfray*; and *runcinus* a nagge (you ſhall often read of them in record) it commeth of the Italian word *roncino*. But admit that parcell of the land holden by ſuch entire ſervice come to the lord by deſcent, whether ſhall the entire ſervice wholly remaine, or be extinct? And it is holden, that in ſome caſe it ſhall be extinct for the whole, as ſuit ſervice, and ſuch other entire annuall ſuit ſervices. But if the ſervice be to render yearly at ſuch a feaſt a horſe, or the like, and the tenant infeoffe the father of the lord of part, which deſcends, yet the feoffor ſhall hold by a horſe, becauſe the ſervice was multiplied, and each of them, *viz.* the feoffor and the feoffee, held by a horſe.

Anno 6. R. i. Rot. 5. War. Bruerton's caſe. 6. Co. 2. 34. Aſſ. 15. 35. H. 6. Exec. 21. Pl. Com. 72. 40. E. 3. 40. 5. E. 2. tit. Avowrie 206. (2. Inſt. 503. 8. Co. 105.)

A. hath common of paſture *ſauns nombre*, in twenty acres of land, and tenne of thoſe acres deſcend to *A.*: the common *ſauns nombre* is entire and incertaine, and cannot be apportioned, but ſhall remaine. But if it had beene a common certaine (as for ten beaſts), in that caſe the common ſhould be apportioned. And ſo it is of common of eſtovers, of turbarie, of piſcharie, &c. And yet in none of theſe caſes, the deſcent, which is an act in law, ſhall worke any wrong to the *terre-tenant*; for he ſhall have that which belongeth to him, for the act in law ſhall worke no wrong (2).

If three joyntenants hold by an entire yearly rent, as a horſe, or of a graine of wheat, and the tenants ceſſe by two yeares, and the lord recover two parts of the land againſt two of them, and the third ſaves his part by tendring of the rent, &c. and finding ſuretie; albeit the lord come to the two parts by lawfull recovery, grounded upon the default and wrong of the two joyntenants, yet ſhall the entire annuall rent be extinct (3).

F. N. B. 209. 40. E. 3. 40.

If the tenant holdeth by fealty and a buſhell of wheat, or a pound of comyn, or of pepper, or ſuch like, and the lord purchaſeth part of the land, there ſhall be an apportionment, as well as if the rent were in money: and yet if the rent were by one graine of wheat, or one ſeed of comyn, or one pepper corne, by the purchaſe of part, the whole ſhould be extinct. But if an entire ſervice be *pro bono publico*, as knights ſervice, caſtle gard, cornage, &c. for the defence of the realme, or to repaire a bridge or a way, to keepe a beacon, or to keepe the king's records, or for advancement of juſtice and peace, as to ayd the ſherife, or to be conſtable of *England* (4), though the lord purchaſe part, the ſervice (5) remaines. So it is if the tenure be *pro opere devotionis ſive pietatis*, as to find a preacher, or to provide the ornaments of ſuch a church; or *pro opere charitatis*, as to marry a poore virgin, or to bind a poore boy apprentice, or to feed a poore man. And ſo note a diverſity betweene theſe caſes, and entire ſervices for the private benefit of the lord.

Vid. Litt. cap. tenant in common 71. b. 6. Co. 1. 2. in Bruerton's caſe. Lit. f. 49. 11. H. 7. 12. b. 24. H. 8. Tenures 53. Brooks. 35. H. 6. 6. 11. El. Dy. 285. 16. E. 3. Avowrie 93.

Sect. 223.

MES ſi un home tient ſa terre dun auter, per homage ſealtie & eſcuage, & per certaine rent, ſi le ſeignior purchaſe parcel de la terre, &c. en tiel caſe le rent ſera apportion, come eſt avant dit: mes uncore en ceſt caſe l'homage & fealty demurront entier a le ſeignior; car le ſeignior avera le homage & fealtie de ſon tenant pur le remnant de les

BUT if a man hold his land of another, by homage fealty and eſcuage, and certaine rent, if the lord purchaſe part of the land, &c. in this caſe the rent ſhall be apportioned, as is aforeſaid: but yet in this caſe the homage and fealty abide entire to the lord; for the lord ſhall have the homage and fealty of his tenant for the reſt of the lands and tenements

PUrchaſe parcel de la terre, &c. Here, by this *&c.* is implyed, that the reaſons, wherefore homage and fealty remaine and are not extinct in this caſe, are: Firſt, becauſe it can be no loſſe to the tenant, as it might in the caſe of an horſe or other entire ſervice; for there it may bee the remnant is not ſufficient in value to pay it. Secondly, there is no land, but it muſt be holden by ſome ſervice or other; and homage and fealty are the freeſt and leaſt chargeable ſervices to the tenant.

Bruerton's caſe ubi ſupra. (6. Co. 10.)

5. E. 2. Avowrie. 206.

Pur ceo que tiel ſervices ne ſont paſſe annual ſervices, &c. This is *ratio una*, but not *unica*, as it appeareth by that which hath

(1) It is uſed in this ſenſe in a writ in F. N. B. 93. I.
(2) This ſame maxim is cited and applied ant. fol. 148. a.
(3) A learned obſerver on the Coke upon Littleton, whoſe MSS. notes I have, objects to it as againſt reaſon, that the lord ſhould loſe his ſervice from the third jointenant. However, the year-book of E. 4. cited by lord Coke, is an authority for the poſition; and further it ſhould be conſidered, that the caſe ſuppoſed is of an *intire* rent, that is, of one incapable of diviſion.
(4) See poſt. 165. a.
(5) Acc. poſt. 149. b.

(Plowd. 96. a.) Bruerton's caſe 6. Co. Talbot's caſe 8. Co. 104. 8. H. 7. 11. (Poſt. 176. b. 185. b.)

hath beene ſaid. If there be lord and tenant by fealtie and herriot ſervice, and the lord purchaſe part of the land, the herriot ſervice is extinct, (and yet it is not annuall, but to bee paid at the death of the tenant) becauſe it is entire and valuable.

terres et tenements tenus de luy, come il avoit adevant (1), *pur ceo que tiels ſervices ne ſont pas annuals ſervices, et ne poyent eſtre apportion, mes l'eſcuage poit, & ſerra apportion ſolonque l'afferance et rate de la terre, &c.*

holden of him, as hee had before, becauſe that ſuch ſervices are no yearely ſervices, and cannot be apportioned, but the eſcuage may and ſhall bee apportioned according to the quantitie and rate of the land, &c.

Solonque l'afferance & rate de la terre, &c. Here is by this (&c.) implyed, that in ſome caſe where it is entire and valuable, and not annuall, it ſhall not (as hath beene ſayd) be extinguiſhed by purchaſe of parts : * as knights ſervice which is to be performed by the body of a man, if the lord purchaſe part, yet the tenure by knights ſervice remaines for the reſidue, *quia pro bono publico & pro defenſione regni* ; (2) but the eſcuage ſhall be apportioned, as here *Littleton* ſaith, becauſe that is for the benefit of the lord, and yet it is caſuall, and not annuall And where our author ſpeaketh of ſervices, it is implied, that a herriot cuſtome, though it be entire, valuable, and not annuall, by the purchaſe of part ſhall not be extinct. On the other part, when the tenure is by an entire ſervice, and the tenant alien part of the tenancie, in what caſes the rent ſhall be multiplyed (that is) where the feoffor and the alienee ſhall pay the entire rent ſeverally, (3) (for regularly it holdeth, that *quæ in partes dividi nequeunt ſolida à ſingulis præſtantur)* and where not, you may read at large in my * *Reports*.

* 7. E. 3. 29. Talbot's caſe 8. Co. 104.

* Bruerton's caſe 6. Co. 1. 2. Talbot's caſe 8. Co. 104.

And by this (&c.) is alſo implyed, that the apportionment ſhall not be according to the quantity of the land, but according to the quantity or value thereof, (4) as by that which hath beene ſaid appeareth.

Sect. 224.

5. E. 2. Avowrie 200. 21. E. 3. 58. b. 34. Aſſ. 15. tit. apportionment. b. 28. 9. Aſſ. 22.

NOte here a diverſity, when the grantee of a rent charge commeth to a part of the land charged by his owne act, and when by the courſe of law. (6)

ITem, ſi home ad un rent charge, & ſon pier purchaſe parcel de les tenements charges en fee, & moruſt, & cel parcel deſcend a ſon fits, que ad le rent charge, ore cel (5) *charge ſerra apportion ſolonque le value de la terre come eſt avantdit de rent ſervice ; pur ceo que tiel portion de la terre purchaſe per la piere ne vient al fits per ſon fait demeſne, mes per diſcent & per courſe del ley.*

ALſo, if a man hath a rent charge, and his father purchaſe parcell of the tenements charged in fee, and dieth, & this parcell deſcends to his ſonne, who hath 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 commeth not to the ſonne by his owne fact, but by deſcent and by courſe of law.

30. Aſſ. Pl. 12.

Purchaſe parcel de les tenements charges en fee. And ſo it is if the tenant giveth to the father of the grantee part of the land in taile, and this deſcend to the grantee, the rent ſhall be apportioned ; and ſo by act in law a rent charge may bee ſuſpended for one part, and in *eſſe* for another.

(Ant. 148. b.)

34. H. 6. 41. b.

And ſo it is, if the father be grantee of a rent, and the ſon purchaſe part of the land charged, and the father dieth 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 moitie.

If

(1) In L. & M. *&c.* is here added.
(2) Acc. ant. 149. a.
(3) Ant. 67. b.
(4) Acc. infra, ſect. 224.
(5) The word *rent* is here inſerted in L. & M.
(6) Acc. ant. 147. b.

If a man hath iſſue two daughters, and grant a rent charge out of his land to one of them and dieth, the rent ſhall be apportioned; and if the grantee in this caſe enfeoffeth another of her part of the land, yet the moity of the rent remaineth iſſuing out of her ſiſter's part, becauſe the part of the grantee in the land by the deſcent was diſcharged of the rent. But in all theſe caſes where the rent charge is apportioned by act in law, yet the writ of annuity faileth; 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 beene ſaid, (1) bring it for the whole. 9. Aſſ. 22.

Annua nec debitum judex non ſeparat ipſum. 5. R. 2. Annuity 21.

Alſo in reſpect of the realty the rent is apportioned. But the perſonalty is indiviſible, and by act in law ſhall not be divided. If execution be ſued of body and lands upon a ſtatute merchant or ſtaple, and after the inheritance of part of thoſe lands deſcend to the conuſee, all the execution is avoided; for the duty is perſonall, and cannot be divided by act in law (2). Pl. Com. 72. 35. H. 6. tit. Execut. 21. 15. E. 4. 5.

Ne vient al ſitz per ſon fait demeſne, mes per diſcent & per courſe del ley.

If the father within age purchaſe part of the land charged, and alieneth within age and dyeth, the ſonne recovereth in a writ of *dum fuit infra ætatem*, or entereth: in this caſe the act of law is mixt with the act of the party, and yet the rent ſhall be apportioned; for after the recovery or entry the ſonne hath the land by deſcent.

So it is in caſe the ſonne recovereth part of the land upon an alienation by his father, *dum non fuit compos mentis*, the rent ſhall be apportioned for the cauſe aforeſaid.

A man ſeiſed of lands in a fee taketh wife, and maketh a feoffment in fee, the feoffee grants a rent charge of x. pound out of the land to the feoffor and his wife and to the heires of the huſband, the huſband dyeth, the wife recovereth the moity for her dower by the cuſtome; the rent charge ſhall be apportioned, and ſhe may diſtreine for five pound, which is the moity of the rent (3). In which caſe two notable things are to be obſerved. Firſt, albeit the dower be by relation or fiction of law above the rent (4), yet when the wife recovereth her dower, ſhe ſhall not have her entire rent out of the reſidue; for a relation or fiction of law ſhall never worke a wrong or charge to a third perſon, but *in fictione juris ſemper eſt æquitas*. Secondly, that albeit her owne act doe concurre with the act in law, yet the rent ſhall be apportioned. 5. E. 2. Avowry 206. 3. Co. 29. in Butler & Baker's caſe.

Sect. 225.

ITem, ſi ſoit ſeignior & tenant, & le tenant tient de ſon ſeignior per fealty & certaine rent, & le ſeignior granta le rent per ſon fait a un auter, &c. reſervant a luy le fealty, & le tenant atturna al grantee de le rent, ore tiel rent eſt rent ſeck a le grantee; pur ceo que les tenements ne ſont tenus del grantor (5) de le rent, mes ſont tenus del ſeignior que reſerve a luy fealtie.

ALſo if there bee lord and tenant, and the tenant holds of his lord by fealtie and certaine rent, and the lord grants the rent by his deed to another, reſerving the fealty to himſelfe, and the tenant atturnes to the grantee of the rent, now this rent is rent ſeck to the grantee; becauſe the tenements are not holden of the grantor of the rent, but are holden of the lord who reſerved to him the fealtie.

ET le ſeignior granta le rent, &c.

So it is if the lord releaſe the rent to the tenant ſaving the fealty, the rent is extinct. But if there be lord and tenant by fealty and rent, and the lord by his deed reciting the tenure releaſe all his right in the land ſaving his ſaid rent, the ſeigniory remaines, and he ſhall have the rent as a rent ſervice, and the fealty incident to it; for the ſaid rent is as much to ſay as the rent ſervice whereunto fealty is incident. 12. E. 4. 11. 9. E. 3. 1. 40. E. 3. 22. b. 13. E. 3. tit. Releaſes 36. (Poſt. 151. a.)

And if the lord hath iſſue two daughters and dieth, and upon partition the fealtie is allotted to the one and the rent to the other, ſhe ſhall have the rent as a rent ſeeke. 17. E. 3. 72. b.

If there be lord of a manor and tenant by fealty, 17. E. 3. 72. b.

ſuit of court and rent, the lord grant the fealty ſaving to him the ſuit of court and rent, the ſaving is good for the rent, but not for the ſuit to court; becauſe the grantee

(1) Ant. 144. b. near the end.

(2) Acc. 2. Ventr. 327. For other inſtances of the indiviſibility of debts and perſonal duties, ſee F. N. B. 46. a. Keilw. 106. a. Bro. Nov. Caſ. pl. 52. 135. Hetl. 53. March. 56. 61.

(3) This Time caſe is cited and approved of in Aſcough's caſe, 8. Co. 135. b.

(4) See the caſe of condition ant. 148. b.

(5) *Grantee* inſtead of *grantor* in L. & M. & Roh. which is agreeable to the ſenſe of the paſſage.

tee can keepe no court, and there is no tenure of the grantor, and therefore the ſuit of court is loſt and periſhed in that caſe.

If the donee hold of the donor by fealty and certaine rent, and the donor grant the ſervices to another, and the tenant atturne, ſome have ſaid the rent ſhall not paſſe, becauſe the rent cannot paſſe but as a rent ſervice being granted by the name of ſervices; and the fealty cannot paſſe, becauſe as hath beene ſaide (1) the fealty is incident inſeparable to the reverſion. But it ſeemeth, that the rent ſhall paſſe as a rent ſecke; (2) becauſe at the time of the grant it was a rent ſervice in the grantor, and therefore there be words ſufficient to paſſe it to the grantee, and it is not of neceſſity that it ſhall be a rent ſervice in the hands of the grantee.

. E. 3. b. Fitz Warren's caſe.

If there be lord and tenant by fealty and certaine rent, and the lord by deed grant the rent in fee ſaving the fealty, and grant further by the ſame deed that the grantee may diſtreine for the ſame rent in the tenancy, albeit a diſtreſſe were incident to the rent in the hands of the grantor, and although a tenant attorne to the grant, yet cannot the grantee diſtraine; for the diſtreſſe remaines as an incident inſeparable to the ſeigniory, for then the tenant ſhould be ſubject to two ſeverall diſtreſſes of two ſeverall men. (3) *And ſo it is if* the lord in that caſe grant the rent in tayle or for life, ſaving the fealty, and further grant that the grantee may diſtreine for it, albeit the reverſion of the rent be a rent ſervice, yet the donee or grantee ſhall have it but as a rent ſecke, and ſhall not diſtreine for it.

7. E. 3. 2. 3. Adjudged.

31. Aſſ. 31. 17. Aſſ. 10. 32. Aſſ. pl. 10. F. N. B. 178. D. 22. H. 6. 3. b. 4. E. 2. Aſſ. 449. 28. H. 8. Dier 31.

It is to bee obſerved, that where a rent ſervice is become a rent ſecke by ſeverance of the ſame from the ſeigniory, that now the nature of the rent is changed; for if the grantee purchaſe part of the land, the whole rent ſhall be extinct. And whereas in an aſſiſe for a rent ſervice, all the tenants of the land need not to be named, but ſuch as did the diſſeiſin; yet in aſſiſe for the rent ſeck, which ſometimes was a rent ſervice, all the tenants muſt be named, as in caſe of a rent charge, albeit he were diſſeiſed but by one ſole tenant. * But if the lord of a mannor releaſe the fealty to his tenant ſaving the rent, or that a meſnalty become a rent by ſurpluſage, (4) thoſe that are now ſecke (and ſometimes were ſervice) are part of the mannor; but a rent charge cannot be part of a mannor.

* 31. Aſſ. 23. 22. Aſſ. 53.

(Mo. 190. 1. Leon. 14.)

Attorne, &c. Of attornement ſhall bee hereafter ſaid in his proper chapter and place.

Sect. 226.

SI le ſeignior voet granter per ſon fait le homage, &c. It is to be obſerved, that where the ſeigniory is by homage fealty and rent, [a] if the lord grant away the homage, the fealty ſhall paſſe; for fealty is an incident inſeparable to homage [b], and cannot by any ſaving in any grant be ſeparated from it, for homage cannot be ſole or alone. But the rent (though it be not ſaved) ſhall not paſſe in that caſe; becauſe the rent is not incident to homage: and ſo it is if there be lord and tenant by fealty and rent, and the lord grant over the fealty without any ſavings, the rent paſſeth not. But fealty hath an incident inſeparable belonging to it, which by no ſaving can bee ſeparated, and that is a diſtreſſe; for, as *Littleton* ſaith here, a ſervice cannot be ſeck (that is) without ſome

[a] 40. E. 3. 22. per Curiam.

[b] 44. E. 3. 19. 20. 39. H. 6. 25. 29. Aſſ. pl. 30. 26. Aſſ. p. 38.

EN meſme le manner eſt, l'ou home tient ſa terre per homage fealtie et certaine rent, ſi le ſeignior grant la rent, ſavant a luy le homage, tiel rent apres tiel grant eſt rent ſecke. Mes la ou terres ſont tenus per homage fealty et certeine rent, ſi le ſeignior voet granter per ſon fait le homage de ſon tenant a un auter, ſavant a luy le remnant de les ſervices, et le tenant atturna a luy ſolonque le forme del graunt; en ceſt caſe le tenant

IN the ſame manner, where a man holds his land by homage fealty and certaine rent, if the lord grant the rent, ſaving to him the homage, ſuch rent after ſuch grant is rent ſeck. But there where lands are holden by homage fealty and certaine rent, if the lord will grant by his deed the homage of his tenant to another, ſaving to him the remnant of his ſervices, and the tenant atturne to him according to the forme of the grant; in this caſe *tiendra*

(1) Ant. 147. a.

(2) See poſt. 152. a. the comment on ſect. 230. and note 6. there.

(3) This only ſhews, that the tenant cannot be made liable to two ſeveral diſtreſſes by *act of his lord*. But on *act of law* it is otherwiſe, of which lord Coke gives an inſtance poſt. 164. b.

(4) This paſſage being ſhortly expreſſed may to ſome be obſcure. The caſe intended is that of lord meſne and tenant, where the rent from the tenant to the meſne is greater than the latter pays to the lord, and the lord purchaſes of the tenant; the conſequence of which is, that the meſne becomes intitled to the ſurpluſage rent from the lord, namely, to ſo much as the rent from the tenant to the meſne exceeds the rent to the lord from the meſne. See W. Jo. 234. and poſt. ſect. 214. and fol. 154. b. and 309. b.

tiendra ſa terre del grantee, & le ſeignior que grantaſt le homage n'avera forſque le rent come rent ſecke, & ne unques diſtreynera pur le rent (1), *pur ceo que homage ne fealtie ne eſcuage ne poit eſtre dit ſeck, car nul tiel ſervice poit eſtre dit ſeck. Car celuy, que ad ou doit aver homage ou fealtie ou eſcuage de ſa terre, poit per common droit diſtreyner pur ceo s'il ſoit adererre; car homage fealtie & eſcuage ſont ſervices, per queux terres ou tenements ſont tenus, &c. & ſont tiels, que en nul maner poient eſtre priſes forſque come ſervices, &c.*

the tenant ſhall hold his land of the grantee, and the lord who granted the homage ſhall have but the rent as a rent ſeck, and ſhall never diſtrain for the rent, becauſe that homage nor fealty nor eſcuage cannot bee ſaid ſecke, for no ſuch ſervice may be ſaid ſecke. For he, which hath or ought to have homage fealty or eſcuage of his land, may by common right diſtreine for it, if it bee behind; for homage fealtie and eſcuage are ſervices, by which lands or tenements are holden, &c. and are ſuch ſervices as in no manner can bee taken but as ſervices, &c.

diſtreſſe belonging to it, for then it were not a ſervice, and ſo of homage and eſcuage.

Terres ou tenements ſont tenus, &c. By this *(&c.)* and out of this ſection it may be collected, that if [c] there bee lord and tenant by fealty and rent, the annuall rent, which is a profitable ſervice, is of higher and more reſpect in law then the fealty; and therefore by the grant of the rent the fealty ſhall paſſe as an incident thereunto; but it is an incident ſeparable, and therefore may be by a ſaving, as *Littleton* hath (2) ſaid, ſeparated from it. And ſo when the tenure is by fealty and rent, and the rent be recovered, the fealty ſhall includedly bee recovered. [d] And where the tenure is by homage fealty and rent, by the recovery of the rent with the appurtenances upon a former right, the homage and fealty alſo ſhall bee reſtored by neceſſity and indulgence of the law; for ſeeing the law giveth no *præcipe* for the homage and fealty, but for the rent only, reaſon would, that by the recovery of the rent the whole entire ſeigniory ſhall bc incluſively reſtored (3) in that caſe. But if the recovery be without title (4), there the rent is recovered as a rent ſeck, for that worketh no more then a grant *; but by the recovery of a mannor, whether it be by title or without title, homage fealty and all other ſervices parcell of the mannor are recovered. And albeit fealty cannot bee divided from homage by grant (as hath beene ſaid) yet by extinguiſhment it may [e]. As if there be lord and tenant by homage fealty and rent, and the lord releaſe the ſeigniory and ſervices, or all his right in the land ſaving the fealty and rent, or ſaving the ſaid rent, or if he by expreſſe words releaſe the homage ſaving the fealty and rent, there the fealty and rent remain, for the homage is extinct. And ſo note a diverſity betweene a grant and a releaſe in that caſe. But ſo long as homage continues, the fealty cannot be divided from it.

[c] 44. E. 3. 19. 26. Aſſ. 38. 29. Aſſ. p. 20. 9. E. 3. 2. 39. H. 6. 24. 25. 27. H. 8. 20. 8. E. 4. 28.

[d] Temps H. 8. Br. tit. incidents 24. 44. E. 3. 19. 29. Aſſ. 20. 39. H. 6. 24. 25.

(Ant. 148. b)
* Vide ſect. 149.

[e] 9. E. 3. 1. (Ant. 150. a.)

Forſque come ſervices, &c. Here is implyed a diverſity betweene theſe corporall ſervices of homage fealty and eſcuage, which cannot become ſecke or dry, but make tenure whereunto diſtreſſes eſcheats and other profits bee incident, and other corporall ſervices, as to plough, repaire, attend, and the like, and all rents whatſoever, for they may become ſecke or dry and make no tenure.

Sect. 227.

MES autermentt eſt de rent, que fuit un foits rent ſervice; pur ceo que quant

BUT otherwiſe it is of a rent, which was once rent ſervice; becauſe when it is ſevered

ET le ſeignior ne poet grant tiel rent oue diſtres, come eſt dit.

[f] For the

[f] 7. E. 3. 2. 3.

(1) In L. and M. here follow theſe words, viz. *Pur ceo que fealte ne poet eſtre ſevere de homage et.* But they are not in the Roh. edition.

(2) Sect. 225. fo. 150. a.

(3) So if land, to which common is appendant or appurtenant, be recovered in aſſiſe of novel diſſeiſin, it is a tacit recovery of the common alſo. Poſt. 154. b. It is the ſame on recovery of a manor, to which a villein is regardant. Poſt. 306. b. So remitter to the principal is remitter to the acceſſary. Poſt. 349. b. All this is agreeable to the rule, that *acceſſorium ſequitur ſuum principale*, which is cited in the next folio. See 152. a. and the caſe of trees in 11. Co. 49. b.

(4) Of recovery *without title*, where uſed to mean a *common* recovery, ſee ant. 104. a. Of recovery *without title*, as diſtinguiſhed from a *common* recovery, read poſt. 362. a.

the diſtreſſe is an incident inſeparable to the fealty, as hath been ſaid [g], and therefore a releaſe of diſtreſſe is void.

[g] 7. E. 4. 11. 3. H. 7. 4. 5.

Incident, *Incidens*, a thing appertaining to or following another as a more worthy or principall; whereof you ſee here, and in divers other places of *Littleton* examples. And of incidents ſome be ſeparable, and ſome inſeparable (2), as hath beene ſaid.

il eſt ſever per le grant le ſeignior de les auters ſervices, il ne poet eſtre dit rent ſervice, pur ceo que il ne ad a ceo fealty, que eſt incident a cheſcun manner de rent ſervice; & pur ceo eſt dit rent ſecke(1). *Et le ſeignior ne poet grant tiel rent ove diſtreſſe, come eſt dit.*

by the grant of the lord from the other ſervices, it cannot bee ſaid rent ſervice, for that it hath not fealty unto it, which is incident to every manner of rent ſervice; and therefore it is called rent ſeck. And the lord cannot grant ſuch a rent with a diſtreſſe, as it is ſaid.

Sect. 228.

SAvant a luy le reverſion, &c. By this word *(&c)*. is to be obſerved [h], that this rent reſerved is a rent ſervice, and hath fealty incident to it; and both rent and fealty are incident to the reverſion, *viz.* [i] the rent incident to the reverſion ſeparably, but the fealty incident to the reverſion inſeparably; but by the grant of the rent, the fealty in this caſe ſhall not paſſe becauſe the fealty is inſeparably incident to the reverſion, but the grantee ſhall have the rent as a rent ſecke. Alſo by this *(&c.)* is implyed an attornement of the tenant; for without that, although by the grant the rent is turned to a rent ſecke, ſo as the tenant cannot be charged with any diſtreſſe, yet to the paſſing thereof there muſt be an attornment.

[h] 41. E. 3. 16.

[i] 12. E. 4. 3. 32. H. 8. tit. Patents. Br. 26. Aſſ. 66. 48. E. 3. 9. b. Doct. & Stud. li. 2. ca. 9.

Attorne, &c. Here is implyed by this *(&c.)* an attornment in the life of the grantee, and other incidents to an attornment, whereof you ſhall reade at large in the chapter of attornment (3).

ITem ſi home leſſa a un auter terres pur terme de vie, reſervant a luy certain rent, s'il grant le rent a un auter perſon fait, ſavant a luy le reverſion de la terre iſſint leſſe, &c. tiel rent neſt forſque rent ſeck; pur ceo que le grantee nad riens en le reverſion del terre, &c. Mes s'il grant le reverſion del terre a un auter pur terme de vie, & le tenant atturne, &c. donques ad le grantee le rent come rent ſervice; pur ceo que il ad le reverſion pur terme de vie.

ALſo if a man lett to another lands for tearme of life, reſerving to him certaine rent, if hee grant the rent to another by his deed, ſaving to him the reverſion of the land ſo letten &c. ſuch rent is but a rent ſeck; becauſe that the grantee had nothing in the reverſion of the land &c. But if he grant the reverſion of the land to another for tearme of life, and the tenant attorne, &c. then hath the grantee the rent as a rent ſervice; for that he hath the reverſion for tearme of life.

Donques ad le grantee le rent come rent ſervice; pur ceo que il ad le reverſion pur terme de vie. And the reaſon hereof is, becauſe the rent is incident to the reverſion, as hath beene ſaid, and (as *Littleton* ſaith here) paſſeth away by the grant of the reverſion as with the ſuperior, without ſaying *cum pertinentiis*, (4) *&c.* for the reverſion cannot be ſeck (5). But by the grant of the rent the reverſion doth not paſſe (6).

(1) The words which follow in this ſection are not in L. and M. or in the Rob. edition; nor in the two MSS.

(2) This diſtinction of incidents is made before fol. 93. a. For examples of incidents inſeparable, ſee infra, and alſo ant. 99. a. b. 113. b. 150. b. 151. a. Bro. Nouv. Caſ. pl. 7.

(3) Poſt. 309. a.

(4) Acc. ant. 121. b. poſt. 307. a.

(5) Lord Coke only means, that a reverſion cannot be without fealty, and its inſeparable concomitant the remedy of diſtreſs. In reſpect to preſent profit, a reverſion may be dry and fruitleſs during the particular eſtates, and until it comes into poſſeſſion. To a reverſion of this latter kind, lord Coke himſelf gives the deſcription of dry and fruitleſs, ant. 111. b. Hence it appears, that the word *ſeck* is uſed by our lawyers in two ſenſes. According to one, it ſignifies *want of remedy by diſtreſs*, as Littleton expounds the word in ſection 218. In another, it imports *want of preſent fruit and profit*, as in the caſe of the reverſion without rent or other ſervice except fealty.

(6) See acc. from Littleton himſelf at the end of ſection 229.

Sect. 229.

ET iſſint eſt a entendue, que ſi home dona terrez ou tenements en le taile rendant a luy & a ſes heires certaine rent, ou leſſa terre pur terme de vie rendant certaine rent, s'il granta le reverſion a un auter &c. & le tenant atturna, tout le rent & ſervice paſſe per ceſt parol (reverſion) pur ceo que tiel rent & ſervice en tiel cas ſont incidents a le reverſion, & paſſont per le grant de le reverſion. Mes coment que il granta le rent a un auter, le reverſion ne paſſa my per tiel grant, &c. (1)

AND ſo it is to be intended, that if a man give lands or tenements in taile yeilding to him and to his heires a certaine rent, or letteth land for tearme of life rendring a certaine rent, if hee grant the reverſion to another &c. and the tenant atturne, all the rent and ſervice paſſe by this word (reverſion) (2) becauſe that ſuch rent and ſervice in ſuch caſe are incident to the reverſion, and paſſe by the grant of the reverſion. But albeit that hee granteth the rent to another, the reverſion doth not paſſe by ſuch grant, &c. (3) (Poſt. 324. a. b.)

THIS needs no explication, but is evident by that which hath formerly beene ſaid, ſaving by this (*&c.*) in the end is implied the old rule, That the incident ſhall paſſe by the grant of the principall, but not the principall by the grant of the incident. *Acceſſorium non ducit, ſed ſequitur ſuum principale.* (4)

Sect. 230. (5)

ISSINT nota le diverſitie. Et iſſint eſt tenus P. 21. E. 4. *Mes il eſt adjudge,* an. 26. lib. aſſiſarum, *ou les ſervices del tenant en taile fueront grants, que ceo fuit bone grant, nient obſtant que le reverſion demurt.*

SO note the diverſity. And ſo it is holden *P.21.E.4.* But it is adjudged 26. of the book of aſſiſes, where the ſervices of tenant in taile were granted, that this was a good grant, notwithſtanding that the reverſion remaine.

THIS is added to *Littleton.* And therefore as I have done heretofore, and ſhall doe hereafter in like caſes, I paſſe it over. And the caſe here cited in 26. *Aſſ. p.* 66. was *contra opinionem multorum*; and afterwards that judgement was reverſed by writ of error, for that the ſervices remained with the reverſion as incidents (6) inſeparable.

Sect. 231.

ITEM ſi ſoit ſeignior meſne & tenant, & le tenant tient del meſne per ſervice de v. s. & le meſne tient ouſter per ſervice

ALSO if there bee lord meſne and tenant, and the tenant holdeth of the meſne by the ſervice of five ſhillings, & the meſne

SI ſoit ſeignior meſne & tenant &c. ſi le ſeignior paramont purchaſe le tenancie en fee, &c.

[k] Some have ſaid, that in [k] 20. E. 3. avowrie, 126.

(1) The ſame diſtinction between granting the *reverſion* and granting the rent is taken poſt. ſect. 572.
(2) According to Bro. Nouv. Caſ. pl. 192. this holds in the caſe of the king as well as in the caſe of a common perſon.
(3) See ant. 150. b. 2. Ro. Abr. 59. & infra note b.
(4) See ant. 151. a. note 3. and poſt. 349. b.
(5) No part of this ſection is in L. & M. Roh. or P.
(6) This reaſon is unexceptionable in reſpect to ſervices, which in their nature are inſeparable from the reverſion, ſuch as fealty. But it fails in reſpect to the rent, which Lord Coke has before repreſented to be a ſeparable incident, ant. 151. b. The true conſtruction of the grant ſuppoſed ſeems to be, that it is ſufficient to paſs the rent as a rent ſeck, but that for the other ſervices it is void. It ſhould be recollected too, that this conſtruction is conformable to one by lord Coke on a ſimilar caſe, which he ſtates and explains in fol. 150. b. See the top of the page there.

2. E. 2. tit. Exting. 6. 26. H. 6. ibid. 7.

in this caſe it were reaſon, that by the purchaſe of the lord paramount his ſeigniory ſhould be onely extinct, and that he ſhould become tenant to the meſne, and the meſne to hold over as the lord paramount held. But that cannot bee; for that one man cannot be both lord and tenant, nor one land immediatly holden of divers lords.

[l] 7. Aſſ. 2 7. E. 3. 20.

[l] If the tenant infeoffe the lord paramount and his wife and their heires, in this caſe the meſnalty is but ſuſpended; for if the wife ſurvive, both meſnalty and ſeigniory are revived.

It is ſaid, that if there be lord meſne and tenant, each of them by fealty and five pence, the lord confirme the ſtate of the tenant, to hold of him by fealty and three pence, that the meſnalty is extinct. (1) [m] And ſo in the ſame caſe, if the tenant bee an abbot, and the lord confirme his eſtate to hold of him in frankalmoigne, the meſnalty is (2) extinct. [n] So it is if the lord releaſe to the tenant (3.) For whether the lord purchaſe the tenancie, or the tenant the ſeigniory, the meſnalty is extinct. And albeit the meſne grant the meſnalty for life, and then the lord releaſe to the tenant, both the reverſion and the eſtate for life are drowned. [o] So if there bee lord and tenant, and the tenant make a gift in taile, the remainder to the king, the ſeigniory is extinct. (4)

[m] 4. E. 3. 19. See for this hereafter in the chapter of Confirmation, ſect. (538.)

[n] 8. H. 6. 24.

(Poſt. 280. a.) [o] 4. & 5. P. & M. Dy. 154. (2. Co. 92. b.)

de xii. d. ſi le ſeignior paramont purchaſe le tenancie en fee, donques le ſervice de le meſnaltie eſt extinct; pur ceo que quant le ſeignior paramont ad le tenancie, il tient de ſon ſeignior procheine paramont a luy, & s'il doit tener ceo de luy que fuit meſne, donques il tiendra un meſme tenancie immediate de divers ſeigniors per divers ſervices, que ſerroit inconvenient, et la ley voit plus toſt ſuffer un miſchiefe que un inconvenience, et pur ceo le ſeigniory del meſnaltie eſt extinct.

holdeth over by the ſervice of 12 pence, if the lord paramont purchaſe the tenancie in fee, then the ſervice of the meſnalty is extinct; becauſe that when the lord paramont hath the tenancie, he holdeth of his lord next paramont to him, & if he ſhould hold this of him which was meſne, then he ſhould hold the ſame tenancie immediately of divers lords by divers ſervices, which ſhould be inconvenient, and the law will ſooner ſuffer a miſchiefe then an inconvenience, and therefore the ſeigniorie of the meſnalty is extinct.

Vid. ſect. 138. 139.

Que ſerra inconvenient. Here it appeareth, that *argumentum ab inconvenienti* is forcible in law, as hath been ſaid before, (5) and ſhall be often obſerved hereafter.

[p] 13. H. 4. 3. 40. Aſſ. p. 27. 12. R. 2. Vouch. 81.

[p] *Le ley voet pluis toſt ſuffer miſchiefe que inconvenience.* (6) *Lex citius tolerare vult privatum damnum, quam publicum malum.* Here be two maximes of the common law.

Firſt, that no man can hold one and the ſame land immediately of two ſeverall lords.

Secondly, that one man cannot of the ſame land be both lord and tenant. And it is to be obſerved, that it is holden for an inconvenience, that any of the maximes of the law ſhould be broken, though a private man ſuffer loſſe: for that by infringing of a maxime, not onely a generall prejudice to many, but in the end a publike incertainty and confuſion to all would follow. And the rule of law is regularly true, *res inter alios acta alteri nocere non (7) debet, et factum unius alteri nocere non debet*; which are true with this exception, unleſſe an inconvenience ſhould follow, as our author here teacheth us.

Sect. 232.

IL avera le iiij. s. come rent ſecke. *MES entant que le tenant te-*

BUT in as much as the tenant holds *nus*

(1) In the preceding caſe lord Coke ſtates the doctrine upon it as a mere *dictum*; and by his marginal reference to the chapter of Confirmation, he apparently reſerves his own opinion for a future occaſion. Afterwards when he reſumes the ſubject, he holds, that, on account of *want of privity* between the lord paramount and the tenant paravail, *confirmation* from the former to the latter cannot abridge the ſervices due to the meſne, and ſo alter the tenure between the meſne and the tenant paravail. Poſt. 305. b.

(2) Lord Coke in a ſubſequent part of his Commentary gives a different deciſion of this caſe; for there he holds, that the lord cannot extinguiſh the meſnalty by *confirmation* to the tenant paravail, there being *no privity* between them. Poſt. 305. b. But this is no any contradiction of himſelf; becauſe here he is apparently giving the *dictum* of others.

(3) It deſerves conſideration, whether the *releaſe* of lord paramount is not as inſufficient to paſs the ſeigniory to the tenant paravail, as a *confirmation*, both being conveyances in which *privity* is required. See poſt. ſect. 461.

(4) The reaſon of this is elſewhere explained to be, that the ſeigniory being extinct for the fee ſimple, it cannot remain for the particular eſtate either for life or in tail. See poſt. 312. b. Quick's caſe 9. Co. 129. b. a caſe in Gouldſb. 149. and Bingham's caſe 2. Co. 92.

(5) Ant. 97. b.

(6) It ſounds harſhly to prefer a miſchief to an inconvenience, the greater evil to the leſſer. But the true conſtruction of the rule obviates this objection; for it certainly means, as lord Coke's addition explains, that the law prefers a *private* miſchief to a *public* inconvenience.

(7) The ſame maxim is cited poſt. 319. a. In Wingate's Maxims 327. there is a great variety of caſes for illuſtration of the rule.

nuſt del meſne per v. s. & le meſne tenuſt forſque per xii. d. iſſint que il avoit pluis en advantage per iiii. s. que il payaſt a ſon ſeignior, il avera les ditz iiii. s. come rent ſeck annuelment de le ſeignior que purchaſe le tenancie.

of the meſne by five ſhillings, and the meſne hold but by twelve pence, ſo as he hath more in advantage by foure ſhillings, than he paies to his lord, he ſhall have the ſaid foure ſhillings as a rent ſecke yearely of the lord which purchaſed the tenancie.

And yet hee ſhall diſtreyne for it (1); for, ſeeing the fealtie is extinct, the law reſerves the diſtreſſe to the rent; for, as it hath been ſaid in the like caſe, ſeeing the fealtie is extinct, the diſtreſſe by act in law may be preſerved, *Quia quando lex aliquid alicui concedit, concedere videtur & id ſine quo res ipſa eſſe non poteſt* (2). [r] And therefore if a man maketh a leaſe for life, reſerving a rent, and bind himſelfe in a ſtatute, and [the conuſee] (3) hath the rent extended and delivered to him, he ſhall diſtreyne for the rent (4), becauſe he commeth to it by courſe of law.

[r] 13. H. 4. Avowrie 237. (Poſt. 225. b. Mo. 36.)

[s] But if a rent ſervice be made a rent ſecke by the grant of the lord, the grantee ſhall not diſtreyne for it; for that the diſtreſſe remaines with the fealtie. [t] If there be lord meſne and tenant, and the meſnaltie is a mannor having divers freeholders, and the lord purchaſe one of the tenancies, and there is a rent by ſurpluſage, this rent albeit it be changed into another nature (as hath beene ſaid) is parcell of the mannor. But yet by purchaſe of part of the land, the whole rent is extinct, albeit the law did preſerve it.

[s] 28. E. 3. 93. (Ant. 150. b. 151. b. 309. b.)
[t] 31. Aſſ. 23. 22. Aſſ. 53. 2. H. 6. 14.

Sect. 233.

ITem ſi home, que ad rent ſeck, eſt un foits ſeiſi d'aſcun parcel de le rent & apres le tenant ne voit payer le rent aderere, ceo eſt ſon remedie. Il covient de aler per luy ou per autres a les terres ou tenements dont le rent eſt iſſuant, & là demander les arerages del rent; & ſi le tenant denia ceo de payer, ceſt denier eſt un diſſeiſin de le rent. Auxy ſi le tenant ne ſoit adonques priſt a payer, ceo eſt un denier, que eſt un diſſeiſin de rent. (5) *Auxy ſi le tenant, ne nul auter home, ſoit demurrant ſur les terres*

ALſo if a man, which hath a rent ſecke, be once ſeiſed of any parcell of the rent, and after the tenant will not pay the rent behind, this is his remedie. Hee ought to goe by himſelfe or by others to the lands or tenements out of which the rent is iſſuing, and there demand the arrerages of the rent; and if the tenant denie to pay it, this deniall is a diſſeiſin of the rent. Alſo if the tenant be not then readie to pay it, this is a denial, which is a diſſeiſin of the rent. Alſo if the tenant, nor any other man, be remaining

SEiſin, or *ſeiſon*, is common aſwel to the Engliſh, as to the French, and ſignifies in the common law poſſeſſion, whereof *ſeiſina* a Latin word is made, and *ſeiſire* a verbe. (Ant. 29. a.)

D'aſcun parcel. [u] A ſeiſin of parcel is a ſufficient ſeiſin in law, to have an aſſiſe of the whole rent.

[u] 5. E. 4. 2. (Poſt. 315. a. Cro. Cha. 507.)

Concerning the generall learning of ſeiſins, you may reade *lib.* 4. *Bevil's caſe, fol.* 8. *lib.* 5. *fol.* 98. *lib.* 6. *fol.* 57. *lib.* 7. *fol.* 24. 29. *lib.* 9. *fol.* 33. And many authorities of law there cited, but ſufficient is ſaid here to explane *Littleton*. (9. Co. 23.) T. 18. E. 1. coram rege Nott. in Theſaur.

A les Terres, &c. [w] 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 (6), as hath beene ſaid before (7).

[w] 49. E. 3. 14. b. 14. E. 4. 4. Pl. Com. 71.

Arere. This word *arere* is to bee obſerved, for it is not neceſſary, that the

(1) If the rent may be diſtrained for, can it be properly called ſeck? Littleton in ſect. 218. deſcribes a rent to be ſeck, becauſe diſtreſs is not incident to it. But if lord Coke is right here, a rent may be ſeck, and yet be diſtrained for. According to the reſolution of the king's bench in W. Jo. 234. the rent, in a caſe ſuch as is ſuppoſed by Littleton, is *quaſi* a rent-ſervice diſtreinable of common right. In other words, the diſtreſs is given, or rather ſaved, by the law, to prevent the meſne from being prejudiced by acts between lord and tenant to which the meſne is no party. This brings the caſe to a reſemblance of a rent reſerved for equality on a partition between coparceners; which by the implication of law is a rent charge without aid of any clauſe of diſtreſs, and therefore called by Littleton a rent-charge diſtrainable of common right. See poſt. ſect. 253.

(2) See ſame maxim ant. fol. 56. a. See alſo 11. Co. 52. a. Cro. Jam. 170. 189. and Oldfield's caſe, Noy 123.

(3) The words [the conuſee] are not in the original, but are added by the editor as eſſential to the ſenſe of the paſſage.

(4) Acc. Bro. Abr. *Executions* 143. Yet it has been ſaid, that the reverſion itſelf is not extendable. Bro. Nouv. Caſ. pl. 227. See as to this 1. Ro. Abr. 888, pl. 6. and 7. Mod. 40. and Carth. 126.

(5) The words *de rent* not in L. and M. or Roh.

(6) Acc. F. N. B. 179. A.

(7) Acc. poſt. 201. b.

(Ant. 144. a.)

the grantee of the rent ſhould demand it at the very time when it becommeth due, but at any time after it is ſufficient. For this is not like a demand of a rent upon a condition; becauſe that is penall and overthroweth the whole ſtate, and [x] therefore the time of demand muſt be certaine, to the end the leſſee, donee, or feoffee may be there to pay the rent (2). But a demand of a rent ſecke or rent charge is but onely a formal meane to recover that which is due; [y] and therefore in that caſe it may be demanded after it is behinde at any time whether the tenant be preſent or no, for remedies for rights are ever favourably extended.

[x] 29. Aſſ. 51. 8. H. 6. 11. Lib. de Entries 79. b. (5. Co. 56. 7. Co. 28 1. Leon. 305. Cro. Jam. 9. 10. 145.)

[y] Mich. 41. E. 3. coram Rege adjudge accordingly.

Ceo eſt un denier en ley. For whereſoever there is a lawfull demand of a rent, and the ſame is not paid, whether the tenant be preſent or abſent, yet this is a deniall in law, (3) albeit there be no words of denyall. It appeareth 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 denier in deed, or in law.

ou les tenements pur payer le rent quaunt il demaund les arrerages, ceo eſt un denier en ley & un diſſeiſin en fait, & de tiels diſſeiſins il poit aver aſſiſe de novel diſſeiſin *envers le tenant, & recovera le ſeiſin del rent, & ſes arrerages & ſes dammages, & les coſtages de ſon breve & de ſon plee, &c. Et ſi apres tiel recovery* [*& execution ewe*] (1) *le rent ſoyt auter foits a luy denie, donque il avera un rediſſeiſin, & recovera ſes double dammages, &c.*

ning upon the lands or tenements to pay the rent when he demandeth the arrearages, this is a deniall in law, and a diſſeiſin in deed, and of ſuch diſeiſins he may have an aſſiſe of *novel diſſeiſin* againſt the tenant, & ſhal recover the ſeiſin of the rent, & his arrerages, & his dammages, & the coſts of his writ & of his plea, &c. And if after ſuch recovery & execution had, the rent be againe denied unto him, then he ſhall have a rediſſeiſin, and ſhall recover his double dammages, &c.

(Poſt. 201. b.)

Diſſeiſin. (4) [z] *Diſſeiſina* is a putting out of a man out of ſeiſin, and ever implyeth a wrong. (5) But diſpoſſeſſing or ejectment is a putting out of poſſeſſion, and may bee by right or by wrong. * *Omnis diſſeiſina eſt tranſgreſſio, ſed non omnis tranſgreſſio eſt diſſeiſina. Si eo animo fortè ingrediatur fundum alienum, non quòd ſibi uſurpet tenementum vel jura, non facit diſſeiſinam, ſed tranſgreſſionem, &c. Quærendum eſt à judice quo animo hoc fecerit, &c.* (6) And of ancient time a diſſeiſin was defined thus: *Diſſeiſin eſt un perſonel treſpaſſe de tortious ouſter del ſeiſin* (7).

[z] Vid. Bract. lib. 4 fol. 161. 262. 204. Brit. ca. 42. 43. &c. f. 83. 106. 114. 115. 118. Mir. ca. 2. Sect. 1.
* Flet. lib. 4. ca. 1. Bra. ubi ſupra. (4. Leon. 48. a. Cro. Cha. 303.)

Mirr. ca. 2. ſect. 25. Bracton lib. 4. ca. 4. Britton ca. 44. 45. &c. Fleta, lib. 4. ca. 5. & 2. & 3.

Aſſiſe de novel diſſeiſin. *Aſſiſa novæ diſſeiſinæ. Aſſiſa* properly commeth of the Latin word *aſſideo*, which is to aſſociate or ſet together; ſo as properly aſſiſe is an aſſociation or ſitting together. And the writ, whereby certaine perſons are authoriſed and called together, is called *aſſiſa novæ diſſeiſinæ*; ſo as *aſſiſa* is but *ceſſio* (8). But becauſe *ceſſio* is but a generall word, therefore in this ſenſe *aſſiſa* is uſed in law for a particular ceſſion by force of the writ *de aſſiſa novæ diſſeiſinæ*; and accordingly it was anciently ſaid *aſſiſe in un caſe n'eſt auter choſe que ceſſion des juſtices.* And it is called *aſſiſa novæ diſſeiſinæ*; for that the juſtices of eire, before whom theſe aſſiſes were taken in their proper counties, did ride their circuits from 7 years to 7 years, and no diſſeiſin before the eire if it were not complained of in the eire could be queſtioned after the eire; and therefore a diſſeiſin committed before the laſt eire was called an ancient diſſeiſin, and a diſſeiſin after the laſt eire was called a new diſſeiſin or *nova diſſeiſina. Aſſiſa* alſo ſignifieth a jury, of their ſitting together, and alſo a ceſſion of parliament, as *Littleton* hereafter in this chapter ſheweth.

Mirror ca. 2. ſect. 25.

(7. Co. 3. b.)

Et recovera le ſeiſin del rent. Here, and by the (*&c.*) in the end of this ſection is implyed, that our author intendeth his caſe where the rent iſſueth out of lands in one county. For if a man be ſeiſed of two acres of land in two ſeverall counties, and maketh a leaſe of both of them reſerving two ſhillings rent, in this caſe, albeit ſeverall liveries (9) be made at ſeverall times, yet is it but one entire rent in reſpect of the neceſſitie of the caſe, and he ſhall diſtreyne in one county for the whole, and make one avowrie for the whole. But he ſhall have ſeverall aſſiſes *in conſinio comitatus*, and in either countie ſhall make

(1) The words between brackets not in L. & M. Roh. or P.
(2) Acc. as to condition of re-entry, poſt. 301. a. Acc. whether the condition be for re-entry or a ſum *nomine pœnæ*, 7. Co. 28. b. Hob. 82. 207. But the caſe of Thyn v. Cholmley Mo. 347. is *contra* as to a ſum *nomine pœnæ*.
(3) For diſſeiſin of rent by denial, ſee poſt. ſect. 238.
(4) See Littleton's deſcription of diſſeiſin, poſt. ſect. 279.
(5) It alſo implieth force. Poſt. 257. b.
(6) The preceding paſſages in Latin are not from Bracton or Fleta in the places cited by lord Coke, but from Bract. 216. b.
(7) For other deſcriptions of diſſeiſin beſides thoſe given or referred to by lord Coke, ſee poſt. 377. a. 6. Co. 58. The ancient authors cited by lord Coke, particularly Bracton and Fleta, are very full in explaining the various modes of diſſeiſin. The additional marginal references to 4. Leon. and Cro. Cha. are to caſes about diſſeiſin by *election*, as to which ſee poſt. 306. b. and 323. a. See alſo the caſe of Taylor on demiſe of Atkyns v. Horde, 1. Burr. 60. In this laſt caſe it was attempted to ſupport a common recovery by ſuppoſing the tenant to the præcipe to have gained a freehold by diſſeiſin. The nature of a diſſeiſin was therefore elaborately inveſtigated by the counſel. Lord Mansfield, alſo, who had been recently made chief juſtice of the king's bench, and delivered the court's opinion in a very diſtinguiſhed argument, expatiated on the ſame ſubject, in order to repel the arguments for a freehold by diſſeiſin in the caſe before the court, by ſhewing, that the doctrine in our books about diſſeiſins chiefly applies to diſſeiſin by a perſon electing for the ſake of certain remedies to ſuppoſe himſelf diſſeiſed. There will probably be occaſion to refer to ſome points of the learning diſplayed in the courſe of this famous caſe in a ſubſequent part of the preſent work; eſpecially where Littleton writes concerning diſſeiſins by *election*. See poſt. ſect. 568.
(8) It ſhould be *aſſiſio*, the word as Coke ſpells it tending to a wrong derivation.
(9) As to livery of lands ſituate in ſeveral counties, ſee ant. ſect. 61. 62.

make his plaint of the whole rent; but there ſhall be but one patent to the juſtices. [a] And this aſſiſe *in confinio comitatus* is given by the ſtatute of 7. *R.* 2. *cap.* 10. for no aſſiſe lay in that caſe at the common law, but the party might diſtreine. [b] But for a common of paſture, of turbary, of piſchary, of eſtovers, and the like, in one county, appendant or appurtenant to land in another county, an aſſiſe *in confinio comitatus* did lye at the common law; [c] and ſo it is of a nuſans done in one county to lands lying in another county, the like aſſiſe did lye at the common law.

[a] 10. Aſſ. pl. 4. 18. Aſſ. p. 1. & 18. E. 3. 32. 22. H. 6. 9. 10.
[b] F. N. B. 180. a. (7. Co. 2. 3. 4.)
[c] F. N. B. 183. k.

[d] And albeit the counties doe not adjoyne, but there be 20 counties meane betweene them, yet the aſſiſe *in confinio comitatus* doth lye (1), and the juſtices ſhall ſit betweene the ſaid counties. [e] And where it is ſaid before of two counties, the like law it is if the ſame extend into more counties. (2)

[d] 5. E. 4. 2.
[e] F. N. B. 180. a.

[f] If a man hold divers mannors or lands in divers ſeverall counties by one tenure, and the lord is deforced of his ſervices, he ſhall have ſeverall writs of cuſtomes and ſervices; for every county one writ returnable at one day in the court of common pleas, and thereupon count according to his caſe by the common law.

[f] 30. E. 1. tit. Droit. F. N. B. 151. m.

[g] But if the tenant in that caſe doe ceaſe, the lord ſhall not have ſeverall writs of *ceſſavit ut ſupra*; for the writ of *ceſſavit* is given by ſtatute * and the forme and manner of the writ therein preſcribed, and thereupon it is holden in our bookes that in that caſe a *ceſſavit* doth not lye. (3)

[g] 18. Aſſ. pl. 1.
* W. 2. cap. 21.

[h] *Il avera un redifſeiſin & recovera ſes double damages &c.* Here by this (*&c.*) is alſo to be underſtood, that a writ of redifſeiſin is given by the ſtatute of *Merton* * (ſo called becauſe the parliament was holden at *Merton in Anno* 20. *H.* 3.) the letter whereof is, *Item ſi quis fuerit diſſeiſitus de libero tenemento & coram juſticiariis itinerantibus ſeiſinam ſuam recuperaverit, per aſſiſam novæ diſſeiſinæ, vel per recognitionem eorum qui fecerint diſſeiſinam, & ipſe diſſeiſitus per vicecomitem ſeiſinam ſuam habuerit, ſi iidem diſſeiſitores, poſtea poſt iter juſticiariorum, vel infra, de eodem tenemento iterum eundem conquerentem diſſeiſiverint, & inde convicti fuerint, ſtatim capiantur, &c.* (4) But the double damages are given by the ſtatute of *W.* 2. *cap.* 26. (5)

[h] Bracton fol. 236. Britton 133. 246. Fleta lib. 4. cap. 29. Merton cap. 3. Regiſt. 206 207.
* Mirror ca. 3. W. 2. c. 46. Vid. ſect. 234.
Vide Regiſt. 206. b. (1. Ro. Abr. 571.)

And *Littleton* in few words hath made a good expoſition of this ſtatute; for where the ſtatute ſaith, *diſſeiſitus de libero tenemento*, *Littleton* expounds it [i] to extend to a rent ſecke or rent charge. (6) Albeit, as hath beene ſaid, they be againſt common right, yet a man hath a freehold in them, [k] and he that granteth *omnia tenementa ſua*, a rent charge or a rent ſecke doth paſſe. (7)

[i] 40. Aſſ. 23. ac.
[k] 14. E. 4. 4. 11. H. 6. 22. (Ant. 6. a. 19. b.)

Coram juſticiariis itinerantibus, &c. ſaith the ſtatute. But *Littleton* ſpeaketh generally and ſo is the ſtatute to be intended before any other juſtices that have authority to take aſſiſes, and juſtices itinerant are ſet downe but for an example, which is worthy of the obſervation, [l] being a penall law.

[l] Fitz. N. B. 180. h.

Recuperaverit per aſſiſam, &c. ſaith the ſtatute, here *aſſiſa* is taken for the verdict of the aſſiſe, as *Littleton* hereafter in this chapter expoundeth the ſame. *Vel per recognitionem, &c.* or by confeſſion. Then the queſtion is, what if the recovery were upon a demurrer or by pleading of a record and failer of it, or by any other manner. And ſeeing *Littleton* ſpeaketh generally, it muſt be underſtood of all manner of recoveries in an aſſiſe of *novel diſſeiſin*; and ſo it is confirmed by the ſtatute of *W.* 2. *cap.* 26. (8)

Recoverie. *Recuperatio* commeth of the verbe *recuperare*, *i. ad rem per injuriam extortam ſive detentam per ſententiam judicis reſtitui.* And *recuperatio* in the common law is all one with *evictio* in the civill law, which is *alicujus rei in cauſam alterius abductæ per judicem acquiſitio.*

Et execution eſt. *Per vicecomitem ſeiſinam habuerit*, ſaith the ſtatute; but *Littleton* ſpeaketh generally, *(et execution eſt)* and execution had; ſo as whether it bee by the ſherife or by the party, ſo as execution or poſſeſſion be had, it ſufficeth. (9)

Execution, *Executio*, and ſignifieth in law the obtaining of actuall poſſeſſion of any thing acquired by judgement of law or by a fine executory levied, whether it be by the ſherife, or by the entry of the party, whereof you ſhall reade more hereafter. (10)

Vide ſect. 504.

Note, it appeareth here by *Littleton*, that [m] the recovery in a former writ muſt be in aſſiſe of *novel diſſeiſin*, wherein theſe words *(tiel recoverie)* are to be obſerved. And therefore if in a writ of right cloſe in ancient demeſne, the demandant maketh his proteſtation to ſue in the nature of aſſiſe of *novel diſſeiſin*, and after is redifſeiſed, hee ſhall not have a writ of redifſeiſin; becauſe the firſt recovery was not by writ of aſſiſe of *novel diſſeiſin*. [n] And ſo it is, if the recovery were in aſſiſe of freſh force by bill according to the cuſtome of ſome city or borrough. Alſo in ancient demeſne there be no coroners. (11)

[m] 14. E. 2. tit. Rediſſ. 9. F. N. B. 189. g.
[n] 14. E. 3. tit. Redif. 8. Vide the 2. part of the Inſtitutes. Stat. de Merton, cap. 3.

Si iidem diſſeiſitores, ſaith the ſtatute. [o] So as it muſt be the ſame diſſeiſors: but here *iidem*

[o] 9. H. 4. 5. F. N. B. 189. c. 23. Aſ. pl. 7. (Cro. Jam. 334.)

(1) Acc. Fine. Deſcript. del Com. L. 59. a. & 49. Aſſ. pl. 1. & 21. Hen. 6. 3. there cited.
(2) Fitzherbert in the place cited in the margin is a direct authority for this. But according to Finch, more than two counties cannot join. Fine. Deſcript. del Com. L. 59. a. See further on trial by two or more counties, 21. Vin. Abr. 103.
(3) Acc. F. N. B. 209. K.
(4) Acc. 2. Inſt. 82. 115.
(5) See 2. Inſt. 416.
(6) Acc. F. N. B. 178. D.
(7) So where lands and *tenements* are deviſable by cuſtom of a borough, both rent-charge and rent-ſervice are within the cuſtom. Poſt. ſect. 585. But ſometimes the word *tenement* is uſed in a more limited ſenſe, and to exclude rents and other incorporeal hereditaments, as by Littleton in writing of deſcents to toll entries. See poſt. ſect. 385.
(8) See further as to *redifſeiſin* Fitzherbert's comment on the writ of that name. F. N. B. 188. B.
(9) Acc. ant. 34. b. See alſo Dy. 278. b. March 95.
(10) Poſt. 289. a.
(11) This is an additional reaſon againſt a writ of redifſeiſin; becauſe that writ requires that the coroners be taken to ſee it executed, and they are not officers of the court of ancient demeſne. The ſame reaſon applies more ſtrongly in reſpect of the ſheriff, for the writ is directable to him, and he is judge as well as officer in it. See Kitch. 96. a. & Fulwood's caſe, 4. Co. 65. a. See alſo Dalt. Sher. 33. b. where the ſheriff's duty in executing the writ of diſſeiſin is explained.

(F. N. B. 188. c.)

iidem is taken for *non alii*. And therefore if the recovery in the aſſiſe were againſt two diſſeiſors, and one of them rediſſeiſe him againe, he ſhall have a rediſſeiſin againſt him, for he is not *alius*. But if the recovery had been againſt one, and he and another rediſſeiſe the plaintife, he ſhall not have a rediſſeiſin; for here is *alius*; and he cannot have a rediſſeiſin againſt the former diſſeiſor alone, becauſe he is jointenant with another; [*p*] for joyntenancy in a writ of rediſſeiſin is a good plea, and a ſtranger ſhall not be ſubject to double impriſonment and double dammages.

[*p*] 33. E. 3. rediſſeiſin 7. (3. Co. 13. b. Poſt. 198. a.)

[*q*] 9. H. 4. 5. F. N. B. 188. E.

[*q*] If a recovery be had againſt a woman in an aſſiſe of *novel diſſeiſin*, and the plaintiſe recovereth and hath execution, the woman taketh huſband, and both of them rediſſeiſe the plaintife, he ſhall not have a rediſſeiſin, becauſe the huſband is *alius*. [*r*] And yet if a feme recover in an aſſiſe, and after take baron, and they are rediſſeiſed, the huſband and wife ſhall have a rediſſeiſin; becauſe the huſband joyneth for conformity, and it is in the right of his wife who was diſſeiſed before, ſo in effect it is *idem diſſeiſitus & idem conquerens*. (1)

[*r*] F. N. B. 188. E. Regiſtr. 9. H. 4. 5.

(Hob. 96.)

If two coparceners be diſſeiſed and recover in an aſſiſe, if after they make partition, and after they be ſeverally diſſeiſed, they ſhall have ſeverall rediſſeiſins; and ſo it is of joyntenants; for they be *iidem conquerentes, & non alii*. Alſo a rediſſeiſin doth lye againſt the diſſeiſor which doth rediſſeiſe, and againſt another to whom he made feoffment after the ſecond diſſeiſin; for otherwiſe the rediſſeiſor might prevent the plaintife of his rediſſeiſin. But in an aſſiſe againſt *A* and *B*, *A* is found diſſeiſor, and *B* tenant, and the plaintife doth recover, and after he which was found tenant diſſeiſes the plaintife, he ſhall not have a rediſſeiſin; becauſe he did diſſeiſe him but once. (2)

F. N. B. 188. G.

De eodem tenemento, ſaith the ſtatute. If the plaintife be rediſſeiſed of parcell of the tenement formerly recovered, he ſhall have a rediſſeiſin.

(Ant. 153. a.)

If the meſne recovereth (3) a rent when it is a rent ſervice, and after the rent becommeth a rent ſeck by ſurpluſage, and doth rediſſeiſe him of the rent, he ſhall have a rediſſeiſin; for the ſubſtance of the rent remaines, though the quality be altered. (4)

[*ſ*] 26. H. 6. tit. Aid 77.

[*ſ*] If tenant in ſpeciall taile recovereth in aſſiſe, and after becommeth tenant in taile after poſſibility of iſſue extinct, and then is rediſſeiſed, he ſhall have a rediſſeiſin; for albeit the ſtate of inheritance be altered, yet the ſame freehold remaineth. (5)

8. E. 3. tit. Rediſſeiſin 6. F. N. B. 189. p.

If a man recover land in an aſſiſe of *novel diſſeiſin*, whereunto there is a common appendant or appurtenant, and after is rediſſeiſed of the common, hee ſhall have a rediſſeiſin of the common, for it was tacitely recovered in the aſſiſe. (6)

Sect. 234.

Æquivocum. (7) For the better underſtanding hereof, of theſe there bee two kinds, *viz. æquivocum æquivocans*; and *æquivocum æquivocatum*.

Æquivocum æquivocans eſt plurivocum, polyſemus, a word of divers ſeverall ſignifications.

Æquivocum æquivocatum eſt univocum, that is to ſay, reduced to a certaine ſignification. As here in *Littleton*'s example, *aſſiſa eſt nomen æquivocum æquivocans*; for ſometime it ſignifieth a jury, ſometime the writ of aſſiſe, and ſometime an ordinance or ſtatute. Now aſſiſe, *jurata*, (8) is *æquivocum æquivocatum*; and ſo is *breve de aſſiſa novæ diſſeiſinæ*, and *aſſiſa panis*, &c. Even as *canis eſt nomen æ-*

ET memorandum, que ceſt noſme aſſiſe eſt nomen æquivocum; *car aſcun foits eſt priſe pur un jurie*; *car le commencement de le record de aſſiſe de novel diſſeiſin iſſint commencera:* aſſiſa venit recognitura &c. quod idem eſt quòd jurata venit recognitura &c. *Et la cauſe eſt, pur ceo que per le briefe de aſſiſe il eſt command a la vicont*, quòd faceret

AND *memorandum*, that this name aſſiſe is *nomen equivocum*; for ſometimes it is taken for a jurie; for the beginning of the record of an aſſiſe of *novel diſſeiſin* beginneth thus: *aſſiſa venit recognitura &c.* which is the ſame, as *jurata venit recognitura*. And the reaſon is, for that by the writ of aſſiſe it is commanded to the ſherife, *quòd faceret duodecim liberos & legales homi-*

duodecim

(1) So if a feme commits a rediſſeiſin, and *afterwards* is married, the writ lies againſt both; becauſe in that caſe the huſband is named, not as the actor, but only in conformity to the law which will not ſuffer the wife to be ſued alone, and to ſatisfie the damages. Hob. 96.

(2) See poſt. ſect. 278.

(3) Recovery in *aſſiſe* muſt be underſtood.

(4) The reaſon is, becauſe the alteration is made by the act of others, namely of the lord paramount and tenant paravaile. Acc. 4. Co. 9. a. and b. in Bevil's caſe. See ant. ſect. 232. poſt. 309. b. ant. 152. b.

(5) Acc. 11. Co. 81. a. in Lewis Bowles's caſe.

(6) Other inſtances of tacit recovery are mentioned ant. fol. 151. a.

(7) See Hob. 303.

(8) Lord Coke means "taken for *jurata*."

duodecim liberos & legales homines de vicineto &c. videre tenementum illud, & nomina illorum imbreviare, & quòd ſummoneat eos per bonos ſummonitores, quòd ſint coram juſticiariis, &c. parati inde facere recognitionem &c. *Et pur ceo que, per tiel original, un panel per force de meſme le brieſe devoit eſtre returne &c. il eſt dit en le commencement del record en le aſſiſe*, aſſiſa venit recognitura &c. *Auxy en brieſe de droit il eſt communement dit, que le tenant luy poit mitter en Dieu & grand aſſiſe &c. Auxy il y ad un brieſe en le* regiſter, *que eſt appel brieſe* de magnâ aſſiſâ eligendâ. *Iſſint eſt ceo bien prove, que ceſt noſme aſſiſe* aliquando ponitur pro jurat'. *Et aſcun foits il eſt priſe pur tout le brieſe d'aſſiſe; & ſolonque cel entent il eſt pluis properment & pluis communement priſe, ſicome* aſſiſe de novel diſſeiſin *eſt priſe pur tout le breve de* aſſiſe de novel diſſeiſin. *Et en meſme le maner aſſiſe de nes de vicineto, &c. videre tenementum illud, & nomina illorum imbreviare, & quòd ſummoneat eos per bonos ſummonitores, quòd ſint coram juſticiariis &c. parati inde facere recognitionem &c.* And becauſe that, by ſuch an originall, a pannell by force of the ſame writ ought to be returned &c. it is ſaid in the beginning of the record in the aſſize, *aſſiſa venit recognitura &c.* Alſo in a writ of right it is commonly ſaid that the tenant may put himſelfe on God and the great aſſiſe. Alſo there is a writ in the regiſter which is called a writ, *de magnâ aſſiſâ eligendâ.* So as this is well proved, that this name aſſiſe ſomtimes is taken for a jury. And ſomtimes it is taken for the whole writ of aſſiſe; and according to this purpoſe it is moſt properly & moſt commonly taken, as an aſſiſe of *novel diſſeiſin* is taken for the whole writ of aſſiſe of *novel diſſeiſin.* And in the ſame manner an aſſiſe of common of paſture is taken for the whole writ of aſſiſe *quivocum; canis latrabilis, canis marinus, canis cæleſtis, ſunt æquivoca æquivocata.*

Aſſiſe de novel diſſeiſin. Note [a] there be foure aſſiſes, *viz.* this writ, an aſſiſe of *mortdanceſter*, of *darreine preſentment*, and of *utrum.* (1) (2. Co. 70.)

[a] Bracton lib. 4. fo. 160. Britton ca. 42. fo. 105. 134. F. N. B. Fleta lib. 4. ca. 5. &c. Mirror ca. 2. ſect. 13.

Vicount. Vide ſect. 248. verbo (*Shireve.*) (Ant. 109. b; Poſt. 168. a.)

Quòd faciat 12 *liberos & legales homines de vicineto, &c.* [b] Albeit the words of the writ be *duodecim*, yet by ancient courſe the ſherife muſt return (2) 24: and this is for expedition of juſtice; for if 12 ſhould onely be returned, no man ſhould have a full jury appear, or be ſworn in reſpect of challenges, without a *tales*, which ſhould be a great delay of tryals. So as in this caſe uſage & ancient courſe maketh law. And it ſeemeth to me, that the law in this caſe delighteth her ſelfe in the number of 12; for there muſt not onely be 12 *jurors* (3) for the tryall of matters of fact, [c] but 12 judges of ancient time for tryall of matters in law *in the Exchequer Chamber.* Alſo for matters of ſtate there were in ancient time twelve *Counſellors of State.* He that wageth his law muſt have *eleven others with him*, which thinke hee ſayes true. And that *number of twelve* is much reſpected *in holy writ*, as 12 *apoſtles*, 12 *ſtones*, 12 *tribes*, &c. [b] 1. H. 7. 2.

[c] Vid. Pl. Com. in proœmio.

Joſhua 4. Geneſ. 49.

[d] He that is of a jury, muſt be *liber homo*, that is not only a freeman and not bond, but alſo one that hath ſuch freedome of mind as he ſtands indifferent as hee ſtands unſworne. Secondly, he muſt bee *legalis.* And by the law every juror, that is returned for the tryall of any iſſue or cauſe, ought to have three properties. [d] 9. E. 4. 16.

(*) Firſt,

(1) *Juris utrum.*

(2) See 3. G. 2. c. 25. ſ. 8.

(3) In a Coke upon Littleton in my poſſeſſion, there is the following marginal note on the neceſſity of having 12 jurors.—"In the manor of Penryn Farrein in Cornwall, there was a cuſtome to try an iſſue with *ſix* jurors; and this cuſtome was "adjudged no good cuſtome, as Rolle cheiſe juſtice affirmed in Mich. terme 1652."—The printed books alſo furniſh two caſes againſt ſuch a cuſtom; in the firſt of which caſes Rolle appears to have argued for it, and to have noticed that there was a multitude of records in twenty ſeveral courts in Cornwall proving it's prevalency. See Fredymock v. Perryman, Cro. Cha. 259. 1. Ro. Abr. 564. and Aike et Aimon v. Hunkin, 1. Sid. 233. However in ſome ſpecial caſes the jury may be leſs than twelve; and in ſome muſt or may be more.—1. They may be leſs. Thus it may be in Wales under the proviſion of the ſtatute of 34. & 35. H. 8. concerning Wales, which allows of ſix. See 34. & 35. H. 8. c. 26. ſ. 74. Cro. Cha. 259. 1. Sid. 233. and 3. G. 2. c. 25. ſ. 9. So alſo it is in ſome ſpecial caſes in England, as 6 or 8 in inquiry of damages on default, and in inquiry of waſte, though this latter has been queſtioned and even denied. Spelm. Gloſſ. voce *jurata*, Fitzh. N. B. 107. C. Dune. Trials per Pais, cap. 6. 1. Ventr. 113. Finch. Law 400. Further there is in Glanvil a writ for a jury of 8 to inquire into the age where infancy is alledged. Glanv. lib. 13. c. 14. 15. 16.—2. Inſtances, in which the law allows or requires more than twelve, are, attaint in which there muſt be 24, the great aſſize in which there muſt be 16, the grand jury for indictments which uſually conſiſt of ſome number between 12 and 23, and writ of inquiry of waſte in which 13 have been allowed. Finch. Law 484. Spelm. Gloſſ. voce *jurata.* 2. Hal. Hiſt. Pl. C. 161. and Cro. Cha. 414.

(*) Artic. ſuper Cart. ca. 9. Regiſt. 178. 8. E. 3. 30.

(*) Firſt, hee ought to bee dwelling moſt neere to the place where the queſtion is moved. (2)

Secondly, he ought to bee moſt ſufficient both for underſtanding, and competencie of eſtate. (3)

Thirdly, he ought to bee leaſt ſuſpitious, that is, to be indifferent as he ſtands unſworne: and then hee is accounted in law *liber & legalis homo*; otherwiſe he may be challenged & not ſuffered to be ſworne. (4)

Vid. ſect. 102. 193.

9. H. 6. 37.

The moſt uſual triall of matters of fact is by 12 ſuch men; for *ad quæſtionem facti non reſpondent judices:* and matters in law the judges ought to decide and diſcuſſe; for *ad quæſtionem juris non reſpondent juratores.* (5)

[e] Vid. Artic. ſuper Cart. ca. 9. Forteſc. ca. 25. &c. 29.

[e] For the inſtitution and right uſe of this triall by 12 men, and wherefore other countries have them not, and how this triall excells others, ſee *Forteſcue* at large, *cap.* 25. *&c.* 29.

[f] Glanvil. lib. ca. 14. 15. Bracton lib. 3. fol. 110. a.

[f] And in ancient time they were 12 knights. This trial of the fact *per duodecim liberos & legales homines* is very ancient; for heare what the law was before the conqueſt.

[g] Lamb. verb. Centuria.

[g] *In ſingulis centuriis comitia ſunto, atque liberæ conditionis viri duodeni ætate ſuperiores unà cum præpoſito ſacra tenentes juranto, &c.* Nay the tryall in ſome caſes, *per medietatem linguæ*, (as we ſpeake) was as ancient.

[h] Lamb. fol. 91. 3.

[h] *Viri duodeni jure conſulti, Angliæ ſex, Walliæ totidem, Anglis & Wallis jus dicunto*; and of ancient time it was callled *duodecim virale judicium.* (6)

Now ſeeing we are juſtly occaſioned, and the rather for the (*&c.*) herein, to ſpeak of a challenge to jurors, to make the ſtudious reader capable of the underſtanding of the bookes of law concerning this matter, it ſhall be neceſſary to ſay ſomewhat of challenges; and firſt what a challenge is.

Challenge is a word common as well to the Engliſh as to the French, and ſometime ſignifieth to claime, and the Latine word is *vendicare*; ſometime in reſpect of revenge to challenge into the field, and then it is called in Latine *vindicare* or *provocare*; ſometime in reſpect of partiality or inſufficiency, to challenge in court perſons returned on a jury. And ſeeing there is no proper Latin word to ſignifie this particular kind of challenge, they have framed a word anciently written [a] *chalumniare*, and *calumpniare*, and *calumpniare*, and now written *calumniare:* and hath no affinity with the verbe *calumnior*, or *calumnia*, which is derived of that, for that is of a quite other ſenſe, ſignifying a falſe accuſer, and in that ſenſe [b] *Bracton* uſeth *calumniator* to be a falſe accuſer: but it is derived of the old word *caloir* or *chaloir*, which in one ſignification is to care for or foreſee. And for that to challenge jurors is the meane to care for or foreſee, that an indifferent triall be had, it is called *calumniare*, to challenge, that is to except againſt them that are returned to be jurors, & this is his proper ſignification. [c] But ſometimes a ſommons, *ſommonitio*, is ſaid to bee *calumniata*, and a count to be challenged,

[a] W. 2. ca. 31. Vid. Stat. de 12. E. 2. de eſſon. calumniandis. Fleta lib. 1. cap. 32. Britton fol. 6. a. 12. a. 118. & 134. 12. Aſſ. 10.
[b] Bract. lib. 3. fol. 137.
[c] Bract. lib. 4. fol. 257. Vet. N. B. fol. 76.

common de paſture eſt priſe pur tout le briefe d'aſſiſe de common de paſture, & aſſiſe de mortdanceſter eſt priſe pur tout le briefe d'aſſiſe de mortdanceſter, & aſſiſe de darraine preſentment eſt priſe pur tout le breve d'aſſiſe de darraine preſentment. Mes il ſemble, que le cauſe pur que tiels briefes al commencement fueront appels aſſiſes fuit, pur ceo que per cheſcun tiel briefe il eſt commande al viſcount, quòd ſummoneat xii, *le quel eſt a tant adire, que doit ſummoner un jurie. Et aſcun foits aſſiſe eſt priſe pur un ordinance, s. pur mitter certaine choſes en certaine rule & diſpoſition, ſicome ordinance que eſt appel* (1) aſſiſa panis & cerviſiæ.

of common of paſture, and aſſiſe of *mortdanceſter* is taken for the whole writ of aſſiſe of *mortdanceſter*, and aſſiſe of *darreine preſentment* is taken for the whole writ of *darreine preſentment*. But it ſeemes, that the reaſon why ſuch writs at the beginning were called aſſiſes was, for that by every ſuch writ it is commanded to the ſherife, *quòd ſummoneat* 12, which is as much to ſay, that hee ought to ſommon a jury. And ſometime aſſiſe is taken for an ordinance, to wit, to put certaine things into a certaine rule and diſpoſition, as an ordinance which is called *aſſiſa panis & cerviſiæ.*

(1) The words *entre les auncions eſtatutes* are here added in L. & M. Roh. and P.

(2) See poſt. 157. a. ant. 125. a. n. 2. This qualification is now becomne unneceſſary in civil caſes, the 4. An. c. 16. ſ. 6. & 7. directing that in them the jury ſhall be taken from the body of the county. See ant. 125. a. n. 2. and a learned tract by the late mr. ſerjeant Wynne, intitled a Diſſertation on the writ *de non ponendis in aſſiſis & juratis.* See alſo 2. Inſt. 447. & 561.

(3) See poſt. 156. a.

(4) Of other modes of trying facts beſides that by jury, ſee ant. 74. a.

(5) This *decantatum*, as lord chief juſtice Vaughan calls it on account of its frequency in the books, about the reſpective provinces of judge and jury, hath, ſince lord Coke's time, become the ſubject of very heated controverſy, eſpecially on proſecutions for ſtate-libels; ſome aiming to render juries wholly dependent on the judge for matters of law, and others contending for nearly a compleat and unqualified independence. On the trial of John Lilburne for treaſon in 1649 high words paſſed between the court and him, in conſequence of his ſtating to the jury that they were judges both of law and fact, and citing paſſages in the Coke upon Littleton to prove it. 2. State Tr. 4th ed. 69. and poſt. 228 a. In the caſe of Penn and Meade, who in 1670 were indicted for unlawfully aſſembling the people and preaching to them, the jury gave a verdict againſt the directions of the court in point of law, and for this were committed to priſon. But the commitment was queſtioned; and, on a habeas corpus brought in the court of common pleas, it was declared illegal; lord chief juſtice Vaughan diſtinguiſhing himſelf on the occaſion by a moſt profound argument in favour of the rights of a jury. Buſhell's caſe 1. Freem. 1. and Vaugh. 135. However the conteſt did not ceaſe, as appears by ſir John Hawles's famous dialogue between a barriſter and a juryman, which was publiſhed in 1680 to aſſert the claims of the latter againſt the then current doctrine decrying their authority. Since the revolution alſo many caſes have occurred, in which there has been much debate on the like topic. See King v. Poole in Caſ. B. R. temp Hardwicke 23. Franklin's caſe 9. State Tri. 275. Peter Zenger's ibid. Owen's caſe 10. State Tr. p. 196. of Append. and Woodfall's caſe 5. Burr. 261. By attending to the caſes before referred to, it will be eaſy to trace the progreſs of this controverſy on the limits of the jury's province.

In reſpect to my own ideas on this ſubject, they are at preſent to this effect:

On the one hand, as the jury may, as often as they think fit, find a general verdict, I therefore think it unqueſtionable, that they ſo far may decide upon the law as well as fact, ſuch a verdict neceſſarily involving both. In this I have the authority of Littleton himſelf, who hereafter writes, that *if the inqueſt will take upon them the knowledge of the law upon the matter, they may give their verdict generally.* Poſt. ſect. 368. and fol. 228.

But on the other hand I think it ſeems clear, that queſtions of law generally and more properly belong to the judges; and that, excluſively of the fitneſs of having the law expounded by thoſe who are trained to the knowledge of it by long ſtudy and practice, this appears from various conſiderations.—I. If the parties litigating agree in their facts, the cauſe can never go to a jury, but is tried on a demurrer; it being a rule, and I believe without exception, that iſſues in law are ever determined by the judges, and only iſſues of fact are tried by a jury. Ant. 71. b.—II. Even when an iſſue in fact is joined, and comes before a jury

lenged, but this is improperly. And forasmuch as mens lives, fames, lands, and goods, are to be tryed by jurors, it is moſt neceſſary, that they be *omni exceptione majores*; and therefore I will handle this matter the more largely.

A challenge to jurors is twofold, either to the array, or to the polls: to the array of the principall pannell, and to the array of the *tales*. And herein you ſhall underſtand, that the jurors names are ranked in the pannel one under another; which order or ranking the jurie is called the array, and the verbe, to array the jurie; and ſo we ſay in common ſpeech, *battaile array*, for the order of the battaile. And this array we call *arraiamentum*, and to make the array *arraiare* derived of the French word *arroier*; ſo as to challenge the array of the pannell is at once to challenge or except againſt all the perſons ſo arrayed or impannelled, in reſpect of the partialitie or default of the ſherife, coroner, or other officer that made the returne.

And it is to be knowne, that there is a principall cauſe of challenge to the array, and a challenge to the favour.

Principall, in reſpect of partialitie. As firſt, if the ſherife, or other officers be of [*a*] kindred, or affinitie (1), to the plaintife or defendant, if her affinitie (2) continue [*b*]. Secondly, if any one or more of the jurie bee returned at the denomination of the partie, plaintife or defendant, the whole array ſhall be quaſhed. So it is if the ſherife returne any one, that he be more favourable to the one than to the other, all the array ſhall be quaſhed. [*c*] Thirdly, if the plaintife or defendant have an action of batterie againſt the ſherife, or the ſherife againſt either partie, this is a good cauſe of challenge. So if the plaintife or defendant have an action of debt againſt the ſherife; (but otherwiſe it is if the ſherife have an action of debt againſt either partie) or if the ſherife have parcell of the land depending upon the ſame title [*d*]; or if the ſherife, or his bailife which returned the jurie, be under the diſtreſſe of either party; or if the ſherife or his bailife be either of counſell, atturney, officer in fee or of robes, or ſervant of either partie, goſſip, or arbitrator in the ſame matter, and treated thereof. [*e*] And where a ſubject may challenge the array for unindifferencie, there the king being a partie may alſo challenge for the ſame cauſe, as for kindred, or that he hath part of the land, or the like: and where the array ſhall be challenged againſt the king, you ſhall reade in our bookes.

[*f*] By default of the ſherife, as when the array of a pannell is returned by a bailife of a franchiſe, and the ſherife returne it as of himſelfe, this ſhall be quaſhed, becauſe the partie ſhould loſe his challenges. But if a ſherife returne a jurie within a libertie, this is good, and the lord of the franchiſe is driven to his remedie againſt him.

If a peere of the realme or lord of parliament be demandant or plaintife, tenant or defendant, there muſt a knight be returned of his jurie, be he lord ſpirituall or temporall, or elſe the array may be quaſhed [*g*]: but if he be returned, although he appeare not, yet the jurie may be taken of the reſidue. And if others be joyned with the lord of parliament, yet if there be no knight returned, the array ſhall be quaſhed againſt all. [*h*] So in an attaint there ought to be a knight returned of the jurie (3).

[*i*] And when the king is partie, as in travers of an office, he that traverſeth may challenge the array, as hereafter in this *ſection* ſhall appeare; and ſo it is in caſe of life; and likewiſe the king may challenge the array: and this ſhall be tried by triors according to the uſuall courſe. [*k*] The array challenged on both ſides ſhall be quaſhed.

[*l*] And if two eſtrangers make a pannell and not in favourable manner for the one partie or the other, and the ſherife returnes the ſame, the array was challenged for this cauſe, and adjudged good.

[*m*] If the bailife of a libertie returne any out of his franchiſe, the array ſhall be quaſhed, as an array returned by one that hath no franchiſe ſhall be quaſhed.

Challenge to the array for favour. [*n*] He, that taketh this, muſt ſhew in certaine the name of him that made it, and in whoſe time, and all in certainety. This kinde of challenge, being no principall challenge, muſt be left to the diſcretion and conſcience of the triors. As if the plaintife or defendant be tenant to the ſherife, this is no principall challenge; for the lord is in no danger of his tenant; but *è converſo* it is a principall challenge; but in the other hee may challenge for favour, and leave it to triall. So affinitie betweene the ſonne of the ſherife and the daughter of the partie, or *è converſo*, or the like, is no principall challenge, but to the favour: but if the ſherife marrie the daughter of either partie, or *è converſo*, this (as hath beene ſaid) is a principall challenge, or the like. [*o*] But where the king is partie, one ſhall not challenge the array for favour, &c. becauſe in reſpect of his allegeance he ought to favour the king more (4). But if the ſherife be a vadelect of the crowne, or other meniall ſervant of the king, there the challenge is good (5). And likewiſe the king may challenge the array for favour.

Note, upon that which hath been ſaid it appeareth, that the challenge to the array is in reſpect of the cauſe of unindifferencie or default in the ſherife or other officer that made the returne,

[*a*] 12. Aſſ. 36. 26. Aſſ. 31. 3 E. 4. 12. 31. Aſſ. 7. 29. Aſſ. 2. 22. E. 4. 2. 12. E. 3. Chall. 114. 21. E. 3. 5. b. 3. H. 7. 5. Pl. Com. 73. 15. H. 7. 9. 7. E. 6. Dier 78. 12. H. 6. Chall. 159. (Plowd. 425. 2. Ro. Abr. 638.)

[*b*] 21. E. 4. 74. 49. E. 3. 1. 15. E. 3. 43. 22. E. 3. 12. 9. E. 4. 46. 8. H. 5. 5. 28. Aſſ. 22. 41. E. 3. Chall. 99. (2. Ro. Abr. 640. Dy. 319.)

[*c*] 11. H. 4. 26. 22. E. 4. 1. 38. E. 3. 25. 38. H. 6. 6. (Mo. 3.)

[*d*] 14. E. 3. 5. & 38. 44. Aſſ. 23. 22. E. 4. 1. 3. H. 6. 39. 15. H. 7. 9. b. 27. Aſſ. 28. 7. H. 7. 10. 26. Aſſ. 56. 22. 20. H. 6. 34. 23. Aſſ. 12. 45. Aſſ. 1. 9. Aſſ. 8. 8. Aſſ. 23. 7. E. 3. 56. 21. H. 7. 38. 2. H. 4. 13. 44. E. 3. 43. 20. H. 6. 39. 44. Aſſ. 18. 3. H. 6. 24. 17. E. 2. Chall. 168. 4. E. 4. 11.

[*e*] 4. H. 7. 44. E. 3. 38. 38. Aſſ. 19. 22. E. 4. Chall. 63. Staml. 162. c.

[*f*] 39. Aſſ. 2. 17. E. 3. 50. 17. Aſſ. 11. 30. Aſſ. 5. 8. Aſſ. 3.

[*g*] 13. E. 3. Chall. 115. *Bi.* Enqueſt. 100. 6. Co. 54. Counteſs de Rutland's caſe *Plo.* Com. 117. 27. H. 8. 22. 4 El. Dier. 208. 8. Eliz. Di. 246. 14. Eliz. Dier 318. 10. Eliz. Dier 265. b. (1. Leon. 5. 2. Ro. Abr. 636.)

[*h*] 17. E. 2. Attaint 69.

[*i*] 32. E. 4. tit. Chall. 63. Staml. Pl. Cor. 19. Aſſ. 6. b. 4. H. 7. 8. 44. E. 3. 38. (2. Ro. Abr. 645.)

[*k*] 8. H. 4. 22. (Mo. 895.)

[*l*] 6. R. 2. Chall. 102. 13. E. 3. Ibid. 108.

[*m*] 32. E. 3. Chall. 110. 111. 32. Aſſ. 6. 38. Aſſ. 13.

[*n*] 34. H. 6. Chall. 69. 8. H. 4. 22. 27. Aſſ. 20. 22. E. 3. 12. Vid. 26. Aſſ. 21. 38. H. 6. 9. 7. H. 6. 25. 19. H. 6. 48. 20. H. 6. 38. 20. E. 4. 2. 22. E. 4. Chall. 62.

[*o*] 22. E. 4. Chall. 63. 4. H. 7. 8.

(1) In the caſe of Mounſon and Weſt 1 Leon. 88. it was argued, that affinity was a challenge to the *favor* only; and to this two judges inclined at firſt; but after time taken to conſider the point, it was adjudged to be a *principal* challenge by three judges, the 4th heſitating.

(2) Having iſſue living by the wife, though ſhe is dead, is ſufficient to continue the huſband's affinity. Nor is it neceſſary, that the iſſue ſhould be inheritable to the land, where land is the ſubject of the action. Both of theſe poſitions I infer from the caſe of Mounſon and Weſt before cited from 1. Leon. 88.

(3) By a ſtatute of the late king no challenge can now be taken to any pannel for want of a knight in it. See 18. G. 2. c. 18. ſ. 4. This proviſion is made in *general* terms; but the recital, which precedes it, is confined to the inconveniences of ſuch challenges where *peers* are parties.

(4) Acc. Keilw. 101. a. But lord Hale is of a different opinion; for he expreſsly allows challenges for *favor* to priſoners in treaſon and felony, and conſequently ſo far againſt the king. 2. Hal. Hiſt. Pl. C. 271. Though, too, lord Coke's doctrine ſhould be admitted, the reaſon he gives for it, which is almoſt in the words of the caſe of 22. E. 4. cited in the margin from Fitzherbert's Abridgement, ſeems rather unſatisfactory. But a better principle to found the rule upon was not unobvious; namely, that from the extenſive variety of the king's connections with his ſubjects through tenures and offices, if *favor* to him was to prevail as an exception to a juror, it might lead to an infinitude of objections, and ſo operate as a ſerious obſtruction to juſtice in ſuits in which he is a party.

For the remainder of the notes of this page, ſee fol. 158. a.

jury for trial, either party, by demurring to evidence, which includes an admiſſion of the fact to which the evidence applies, may ſo far draw the cauſe from the cognizance of the jury; for in that caſe the law is reſerved for the deciſion of the court from which the iſſue of fact comes, and the jury is either diſcharged, or at the utmoſt only aſcertains the damages. Ant. 72. a. Dougl. Rep. 127. 213. Buller's Niſi Pri. 2d edition 313.—III. The jury is ſuppoſed to be ſo inadequate to finding out the law, that it is incumbent upon the judge, who preſides at the trial, to inform them what the law is; and, as a check to the judge in the diſcharge of this duty, either party may under the ſtatute of Weſtminſter the 2d. c. 31. make his exception in writing to the judge's direction, and inforce its being made a part of the record, ſo as afterwards to found error upon it. See poſt, 2. Inſt. 426. Trials per Pais, 8th ed. 222. 466. Caſe of Fabrigas and Moſtyn in xi. State Trials. Caſe of Money and others v. Leach 3. Burr. 1742. Buller's Law of Niſ. Pri. 2d ed. 315.—IV. The jury is ever at liberty to give a ſpecial verdict, the nature of which is to find the facts at large and leave the concluſion of law to the judges of the court from which the iſſue comes. Formerly indeed it was doubted, whether in certain caſes, in which the iſſue was of a very limited and reſtrained kind, the jury was not bound to find a general verdict. But the contrary was ſettled in

returne, and not in reſpect of the perſons returned, where there is no unindifferencie or default in the ſherife, &c. for if the challenge to the array be found againſt the partie that takes it, yet he ſhall have his particular challenge to the polls (1).

In ſome caſes a challenge may be had to the polls, and in ſome caſes not at all. Challenge to the polls is a challenge to the particular perſons; and theſe be of foure kinds, that is to ſay, peremptorie, principall, which induce favour, and for default of hundredors.

[p] Peremptorie, this is ſo called; becauſe he may challenge peremptorily upon his owne diſlike, without ſhewing of any cauſe; and this onely is in caſe of treaſon or felonie, in *favorem vitæ*. And by the common law the priſoner, upon an endictment or appeale, might challenge thirtie five, which was under the number of three juries. But now by the ſtatute of 22. H. 8. the number is reduced to twentie in petite treaſon, murder and felonie; and in caſe of high treaſon, and miſpriſion of high treaſon, it was taken away by the ſtatute of 33. H. 8. but now by the ſtatute of 1. & 2. *Phil. & Mariæ*, the common law is revived. For any treaſon, the priſoner ſhall have his challenge to the number of thirtie (2) five; and ſo it hath beene reſolved * by the juſtices upon conference betweene them in the caſe of ſir Walter Raleigh and George Brookes. But all this is to be underſtood when any ſubject that is not a peere of the realme is arraigned for treaſon or felonie. But if hee be a lord of parliament and a peere of the realme, and is to be tryed by his peeres, he ſhall not challenge any of his peeres at all; for they are not ſworne as other jurors be, but finde the party guiltie or not guiltie upon their faith or allegiance to the king, and they are judges of the fact, and every of them doth ſeparately give his judgement, beginning at the loweſt. But a ſubject under the degree of nobilitie may in caſe of treaſon or felonie challenge for juſt cauſe as many as he can, as ſhall be ſaid hereafter. In an appeale of death againſt divers they pleade not guiltie, and one joynt *venire facias* is awarded, if one challenge peremptorily, he ſhall be drawne againſt all. (3) Otherwiſe it is of ſeverall *venire fac.*

Note that at the common law before the ſtatute of 33. E. 1. the king might have challenged peremptorily without ſhewing cauſe, but only that they were not good for the king, and without being limited to any number. But this was miſchievous to the ſubject, tending to infinite delayes and danger. And therefore it is enacted, [q] *quòd de cætero licèt pro domino rege dicatur, quòd juratores, &c. non ſunt boni pro rege; non propter hoc remaneant inquiſitiones, &c. ſed aſſignent certam cauſam calumniæ ſuæ, &c.* whereby the king is now reſtrained. (4)

Principall, ſo called, becauſe if it be found true, it ſtandeth ſufficient of it ſelfe without leaving any thing to the conſcience or diſcretion of the triors. Of a principall cauſe of challenge to the array, we have ſaid ſomewhat already. Now it followeth with like brevitie to ſpeake of principall challenges to the polles, (that is) ſeverally to the perſons returned.

Principall challenges to the poll may be reduced to foure heads: firſt, *propter honoris reſpectum*, for reſpect of honour: ſecondly, *propter defectum*, for want or default: thirdly, *propter affectum*, for affection or partialitie: fourthly, *propter delictum*, for crime or delict.

I. *Propter honoris reſpectum*, as any peere of the realme, or lord of parliament, as a baron, viſcount, earle, marqueſſe, and duke; for theſe in reſpect of honour and nobilitie, are not to be ſworne on juries; and if neither partie will challenge him, he may challenge himſelfe, for by *Magna Charta* it is provided, *quòd nec ſuper eum ibimus, nec ſuper eum mittemus, niſi per legale judicium parium ſuorum, aut per legem terræ.* Now the common law hath divided all the ſubjects into lords of parliament, and into the commons of the realme. The peers of the realme are divided into barons, viſcounts, earles, marqueſſes and dukes. The commons are divided into knights, eſquires, gentlemen, citizens, yeomen, and burgeſſes. And in judgement of law any of the ſaid degrees of nobilitie are peers to another. As if an earle, marqueſſe, or duke, be to be tried for treaſon or felonie, a baron or any other degree of nobilitie is his peere. In like manner, a knight, eſquire, &c. ſhall be tried *per pares*; and that is by any of the commons, as gentlemen, citizens, yeomen, or burgeſſes; ſo as when any of the commons is to have a tryall either at the king's ſuit, or betweene partie and partie, a peere of the realme ſhall not be impanelled in any caſe.

II. *Propter defectum*,

1. *Patriæ*, [a] as aliens borne.

2. *Libertatis*, [b] as villeins or bondmen, and ſo a champion muſt be a freeman.

3. *Annui cenſus, i. liberi tenementi.* [c] Firſt, what yearely freehold a juror ought to have that paſſeth upon triall of the life of a man, or in a plea reall, or in a plea perſonall, where the debt or dammage in the declaration amounteth to fortie markes, *vide ſect.* 464. (5) *Secondly, this freehold muſt be in his owne right, in fee ſimple, fee taile, for terme of his owne life, or for another man's life, although it be upon condition, or in the right of his wife, out of antient demeſne, for freehold within antient demeſne will not ſerve. But if the debt or dammage amounteth

[p] 1. H. 5. Chal. 162. 9. H. 5. 7. 15. E. 4. 32. 14. H. 7. 7. 19. Doct. & Stud. lib. 2. Forteſcue cap. 27. 3. H 7. 2. 2. R. 3. 13. 32. H. 6. 26. 17. Aſſ. 6. 37. H. 6. 8. 22. H. 8. ca. 14. 33. H. 8. tit. Chal. Br. 217. 33. H. 8. ca. 23. 1. & 2. P. & M. ca. 10. 23. H. 6. 26. 14. H. 7. 14. Stanf. Pl. Cor. 137. 138. (2. Inſt. 227.)

* Hil. 1. Ja. R.

See Fost. 247.

9. E. 4. 27.

(1. Ventr. 309.)

[q] 33. E. 1. ordinatio de inquiſitionibus. Stanf. Pl. Cor. 162.

6. Co. 52. 53. Counteſſe de Rutland's caſe. 48. E. 3. 30. 48. Aſſ. 6. 35. H. 6. 46. 22. Aſſ. 24. F. N. B. 165. D. E. & 166. Regiſt. 179. (1. Sid. 277.)

[a] 7. Co. 18. Calvin's caſe. 10. Co. 104. 14. H. 4. 19. b.

[b] Bract. fo. 185. Brit. fo. 135. Flet. li. 4. ca. 8. 26. Aſſ. 28. 3. H. 6. 39. 9. E. 4. 16. b. 21. H. 6. 20. 10. H. 7. 20.

[c] Vid. ſect. 464. 38. Aſſ. 19. 17. Aſſ. 15. 4. H. 6. 28. 9. H. 5. 5. 10. H. 6. 7. 8. 18. 2. H. 7. 1. 10. H. 7. 14. 19. H. 6. 9. 7. H. 6. 25. 40. 44. 12. E. 4. 13. 3. H. 4. 4.
(See the ſtatutes of 23. H. 8. 13. and 4. & 5. W. & M. 24.)

* 9. H. 6. Chal. 27. 9. H. 7. 1. (2. Ro. Abr. 647. Poſt. 272. Forteſc. 56, 62. a.)

(1) Nota, *on writ of right the pannel returned by the four knights ſhall not be challenged, but challenge ought to be taken before the four knights before the pannel made.* H. 30. El. B. R. Pigott and Clarke. Hal. MSS.—See acc. poſt. 158. a. 294. a. Mo. 67. and Gouldſb. 23.

(2) Agreed acc. in petty treaſon in Swan's caſe, Foſt. 107.

(3) Adj. acc. Plowd. 100.

(4) But according to the conſtruction made of this ſtatute or ordinance the king is not bound to ſhew cauſe of challenge till all the pannel is called over, and not then unleſs from challenges or otherwiſe the jury is incompleat. See State Tri. 4th ed. v. 3. p. 468. v. 4. p. 423. v. 5. p. 195. See further on this point ſir John Hawles's Remarks on Trials in State Tri. 4th ed. v. 3. p. 169.

(5) See alſo a learned diſſertation on the writ *de non ponendis in aſſiſis et juratis* in the Miſcellany of Law-Tracts by the late Mr. Serjeant Wynne, p. 62 to 74. See too 1. Ventr. 366. and ſir John Hawles's Remarks on Trials, in State Trials 4th ed. v. 3. p. 169. 187.

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in Dowman's caſe 9. Co. 11. b. and the rule now holds both in criminal and civil caſes without exception. See poſt. 227. b. Staundf. Pl. C. 165 a. Major Oneby's caſe 2. L. Raym. 1494.—V. Whilſt attaints, which ſtill ſubſiſt in law, were in uſe, it was hazardous in a jury to find a general verdict, where the caſe was doubtful, and they were apprized of it by the judges; becauſe if they miſtook the law, they were in danger of an attaint. Poſt 228. a Hob. 227. Vaugh. 144. 2. Hal. Hiſt. Pl. C. 310. Gilb. Com. Pl. 2d. edition 128.—VI. If the jury find the facts ſpecially, and add their concluſion as to the law, it is not binding on the judges; but they have a right to controul the verdict and declare the law as they conceive it to be. At leaſt this is the language of ſome moſt reſpectable authorities. Staundf. Pl. C. 165. a. Plowd. 114. a. b. 4. Co. 42. b. Hal. Hiſt. Pl. C. v. 1. p. 471. 476. 477. and v. 2. p. 301.—VII. The courts have long exerciſed the power of granting new trials in civil caſes, where the jury find againſt that which the judge trying the cauſe or the court at large holds to be law, or where the jury find a general verdict and the court conceives that on account of difficulty of law there ought to have been a ſpecial one. King v. Poole Caſ. B. R. temp. Hardwicke 26. Though too in criminal and penal caſes the judges do not claim ſuch a diſcretion againſt perſons acquitted, the reaſon I preſume is in reſpect of the rule that *nemo bis punitur aut vexatur pro eadem delicto*, or the hardſhip which would ariſe from allowing a perſon to be twice put in jeopardy for one offence; and if this be ſo, it only ſhews, that on that account an exception is made to a general rule. 4. Blackſt. 8th ed. 361. 2. L. Raym. 1585. 2. Stra. 899. 4. Co. 40. a. and Wingate's Maxims, 695.

Upon the whole, as my mind is affected with this intereſting ſubject, the reſult is, that the *immediate* and *direct* right of deciding upon queſtions of law is entruſted to the judges; that in a jury it is only *incidental*; that in the exerciſe of this incidental right the latter are not only placed under the ſuperintendance of the former, but are in ſome degree controulable by them;

mounteth not to fortie marks, any freehold ſufficeth. [d] Thirdly, he muſt have freehold in that countie where the cauſe of the action ariſeth; and though he hath in another, it ſufficeth not (1). [e] Fourthly, if after his returne he ſelleth away his land, or if *ceſty que vie* or his wife dieth, or an entry be made for the condition broken, ſo as his freehold be determined, he may be challenged for inſufficiencie of freehold (2).

[d] 19. H. 6. 9. 17. Aſſ. 15.
[e] 12. H. 7. 4. 21. H. 6. 38. 7. H. 4. 1. (Poſt. 272. b.)

4. *Hundredorum.* Firſt, by the common law, in a plea reall mixt and perſonal, there ought to be foure of the hundred (where the cauſe of action ariſeth) returned for their better notice of the cauſe; for *vicini vicinorum facta præſumuntur ſcire* (3). And now ſince *Littleton* wrote [f] in a plea perſonall, if two hundredors appeare, it ſufficeth (4); and in an attaint, [g] although the jury is double, yet the hundredors are not double. Secondly, [h] if he hath either freehold in the hundred, though it be to the value but of halfe an acre, or if he dwell there, though hee hath no freehold in it, it ſufficeth. [i] Thirdly, if the cauſe of the action riſeth in divers hundreds, yet the number ſhal ſuffice, as if it had come out of one, and not ſeverall hundredors out of each hundred. [k] Fourthly, if there be divers hundreds within one leet or rape, if he hath any freehold, or dwell in any of thoſe hundreds, though not in the proper hundred, it ſufficeth. [l] Fiftly, if the jury come *de corpore comitatûs*, or *de proximo hundredo*, where the one partie is lord of the hundred, or the like, there need no hundredors be returned at all. [m] Sixtly, if a hundredor after he be returned ſell away his land within that hundred, yet ſhall he not be challenged for the hundred, for that this notice remaines. Otherwiſe as hath bin ſaid for his inſufficiencie of freehold; for his feare to offend, and to have lands waſted, &c. which is one of the reaſons of law, is taken away. [n] Seventhly, he that challengeth for the hundred muſt ſhew in what hundred it is, and not drive the other partie to ſhew it. Eightly, his challenge for the hundred is not *ſimpliciter* but *ſecundùm quid*; for, though it bee found that he hath nothing in the hundred, yet ſhall not he be drawne, but remaine *præter H.* that is, beſides for the hundred; and albeit he dwelleth or have land in the hundred, yet muſt he have ſufficient freehold.

(2. Ro. Abr. 636. Forteſc. 56. b. Poſt. 158. a.)
[f] 27. Eliz. ca. 6.
[g] 7. H. 4. 47.
[h] 16. E. 4. 7. 4. Mar. Br. Chal. 216. 21. E. 4. 74. 75. 9. H. 6. 66.
[i] 20. H. 6. 23. 4. Mar. Br. Chal. 216.
[k] 10. H. 6. 5. 12. H. 4. 14. 19. E. 4. 5.
[l] 37. H. 6. 11. 25. E. 3. 43 (Cro. Jam. 550.)
[m] 21. H. 6. 38. 12. H. 7. 4.
[n] 7. Eliz. Dyer 231.

III. *Propter affectum:* And this is of two ſorts, either working a principall challenge, or to the favour. And againe a principall challenge is of two ſorts, either by judgement of law without any act of his, or by judgement of law upon his owne act.

Bract. fo. 185. Brit. fo. 134. 135. Fleta lib. 4. ca. 8. 21. E. 4. 11. 12.

And it is ſaid that a principall challenge is, when there is expreſſe favor or expreſſe malice.

1. Without any act of his, as if the juror bee [a] of blood or kindred to either partie, *conſanguineus*, which is compounded *ex con & ſanguine, quaſi eodem ſanguine natus*, as it were iſſued from the ſame blood; and this is a principall challenge, for that the law preſumeth that one kinſman doth favour another before a ſtranger; [b] and how farre remote ſo ever he is of kindred, yet the challenge is good. And if the plaintife chalenge a juror for kindred to the defendant, it is no counter plea to ſay that he is of kindred alſo to the plaintife, though hee bee in a neerer degree; for the words of the *venire facias* forbiddeth the juror to be of kindred to either partie.

[a] Britton fol. 135.
[b] Mirror ca. 3. de ordinance d'attaint.
Bracton, Britton, Fleta } ubi ſupra.

[c] If a body politick or incorporate, ſole or aggregate of many, bring any action that concernes their body politick or incorporate, if the juror be of kindred to any that is of that body (although the body politick or incorporate can have no kindred) yet for that thoſe bodies conſiſt of naturall perſons, it is a principall challenge. [d] A baſtard cannot be of kindred to any, (5) and therefore it can be no principall challenge. And here it is to be knowne, that *affinitas*, affinity, hath in law two ſenſes. In his proper ſenſe it is taken for that neerneſſe that is gotten by marriage. *Cùm duæ cognationes inter ſe diviſæ per nuptias copulantur, & altera ad alterius fines accedit, & inde dicitur affinis.* In a larger ſenſe *affinitas* is taken alſo for conſanguinitie and kindred, as in the writ of *venire facias*, and otherwhere. [e] Affinity or alliance by marriage is a principall challenge, and equivalent to conſanguinity when it is betweene either of the parties, as if the plaintife or defendant marry the daughter or couſin of the juror, or the juror marry the daughter or couſin of the plaintife or defendant, and the ſame continues, or iſſue be (6) had. But if the ſon of the juror hath maried the daughter of the plaintife, this is no principall challenge, but to the favour; becauſe it is not betweene the parties. Much more may be ſaid hereof; *ſed ſumma ſequor faſtigia rerum.*

[c] 7. E. 4. 4. 17. E. 4. 7. 21. E. 4. 20. 28. H. 6. 10. 28. Aſſ. 18. 34. Aſſ. 6. Hob. 87. 1. Saund. 344.
[d] 41. E. 3. Chal. 99. 41. E. 3. 9. 26. H. 6. Chal. 163.
[e] Mirror, Bracton, Britton, Fleta } ubi ſupra.
3. E. 4. 14. 21. E. 3. 5. 41. 43. E. 3. Chal. 93. 43. Aſſ. 25. 26. 22. E. 4. 2. 14. H. 7. 2. 15. H. 7. 9.
[f] 19. H. 8. 7. 28. H. 8. Dier 37. 1. Mariæ Dyer 91. 2. Eliz. ibid. 177.

[f] If there be a challenge for coſinage, he that taketh the challenge muſt ſhew how the juror is couſin. But yet if the coſinage, that is the effect and ſubſtance, be found, it ſufficeth; for the law preferreth that which is materiall before that which is formall.

[g] If the juror have part of the land that dependeth upon the ſame title. (7)

[g] Bracton, Britton, Fleta } ubi ſupra.

[h] If a juror be within the hundred, (8) leet, or any way within the ſeigniory immediately or mediately, or any other diſtreſſe of either party, this is a principall challenge. But if either party be within the diſtreſſe of the juror, this is no principall challenge, but to the favour.

Mirror ubi ſupra.
[h] 9. H. 6. tit. Chal. 27. 38. E. 3. 25. 22. E. 4. Chal. 61. 4. H. 6. 25. 3. H. 6. 39. 36. H. 6. Chal. 46. 22. E. 4. 1. 27. Aſſ. 28. 22. E. 3. 12.

[i] If a witneſſe named in the deed (9) be returned of the jury, it is a good cauſe of challenge of him. [k] So it is if one within age of one and twenty bee returned, it is a good cauſe of challenge.

[i] 23. Aſſ. 11.
[k] Mirror ubi ſupra.

2. Upon

(1) Vid. acc. per omnes juſticiarios M. 29. 30. Eliz. Clench 139.—Hal. MSS.
(2) See ant. 102. b.
(3) See Brownl. Rep. b. 194.
(4) And now by the 4. An. c. 16. & 24. G. 2. c. 18. the jury muſt be taken from the *body of the county* in actions or ſuits in the king's courts of record at *Weſtminſter*, and in actions or informations on penal ſtatutes. But appeals of felony or murder, and indictments or preſentments of treaſon felony murder or other matter, are excepted from this proviſion; and therefore in them hundredors are ſtill in ſtrictneſs neceſſary.—It is obſervable, that the 24. G. 2. by which this alteration was made as to actions on penal ſtatutes, names the counties palatine of *Lancaſter Cheſter* and *Durham*, and *Wales*, as well as *Weſtminſter*. But in the 4. of An. only the latter place is mentioned.—See further on the ſubject of hundredors ant. 125. a. note 2. to which add 1. P. Wms. 207. and a cate on the 4. Ann. in Mr. Serj. Wynne's Miſcell. Law Tracts 60.
(5) See ant. 123. a.
(6) But the iſſue muſt be *living*. See ant. 156. a. n.
(7) Here the ſenſe is incompleat; but I apprehend, that lord Coke means to give the exception as a principal challenge.
(8) Acc. Dy. 176. a.
(9) See ant. 6 *a*.

them; and therefore that in all points of law ariſing on a trial, juries ought to ſhew the moſt reſpectful deference to the advice and recommendation of judges. In favour of this concluſion the conduct of juries bears ample teſtimony; for to their honour it ſhould be remembered, that the examples of their reſiſting the advice of a judge in points of law are rare, except where they have been provoked into ſuch an oppoſition by the groſſneſs of his own miſconduct, or betrayed into an unjuſt ſuſpicion of his integrity by the miſrepreſentation and ill practice of others. In civil caſes, particularly where the title to *real* property is in queſtion, juries almoſt univerſally find a ſpecial verdict as often as the judge recommends their ſo doing; and though in criminal caſes ſpecial verdicts are not frequent, it is not from any averſeneſs to them in juries, but from the nature of criminal cauſes, which generally depend more upon the evidence of facts than any difficulty of law. Nor is it any ſmall merit in this arrangement, that in conſequence of it every perſon accuſed of a capital crime is enabled by the general plea of *not guilty* to have the benefit of a trial, in which the judge and jury are a check upon each other; and that this *benefit* may be always enjoyed, except in ſuch

2. [l] Upon his own act, as if the juror hath given a verdict before for the same cause, albeit it be reversed by writ of error, or if after verdict, judgement were arrested. So if hee hath given a former verdict upon the same title or matter though betweene other persons. [m] But it is to be observed, that I may speake once for all, that in this or other like cases, hee that taketh the challenge must shew the record if he will have it take place as a principall challenge: otherwise he must conclude to the favour (1), unlesse it be a record of the same court, and then he must shew the day and terme.

[n] So likewise one may be challenged, that he was inditor of the plaintife or defendant, either of treason, felony, misprision, trespasse, or the like in the same cause.

[o] If the juror be godfather to the child of the plaintife or defendant, or *è converso*, this is allowed to be a good challenge in our bookes (2).

[p] If a juror hath beene an arbitrator chosen by the plaintife or defendant in the same cause, and have beene informed of, or treated of the matter, this is a principall challenge. Otherwise if he were never informed, nor treated thereof; and otherwise if hee were indifferently chosen by either of the parties, though he treated thereof. But a [q] commissioner chosen by one of the parties for examination of witnesses in the same cause, is no principall cause of challenge; for he is made by the king under the great seale, (3) and not by the partie, as the arbitrator is; but he may upon cause be challenged for favour.

[r] If hee be of counsell, servant, or of robes, or fee of either partie, it is a principall challenge. (4)

[s] If any after he be returned do eate and drinke at the charge of either partie, it is a principall cause of challenge (5). Otherwise it is of a trior after he be sworne.

[t] Actions brought, either by the juror against either of the parties, or by either of the parties against him, which imply malice or displeasure, are causes of principall challenge; unlesse they be brought by covyn either before or after the returne; for if covin be found, then it is no cause of challenge. Other actions, which doe not imply malice or displeasure, are but to the favour.

[u] In a cause, where the parson of a parish is partie, and the right of the church commeth in debate, a parishioner is a principall challenge. Otherwise it is in debt, or any other action where the right of the church commeth not in question.

[w] If either partie labour the juror, and give him any thing to give his verdict, this is a principall challenge. But if either partie labour the juror to appeare and to doe his conscience, this is no challenge at all, but lawfull for him to do it. (6)

[x] That the juror is a fellow servant with either partie is no principall challenge, but to the favour.

[y] Neither of the parties can take that challenge to the polls, which he might have had to the array.

[a] Note, if the defendant may have a principall cause of challenge to the array, if the sherife returne the jury, the plaintife in that case may for his owne expedition alledge the same, and pray proceese to the coroners; which he cannot have, unlesse the defendant will confesse it; but if the defendant will not confesse it, then the plaintife shall have a *venire facias* to the sherife, and the defendant shall never take any challenge for that cause (7), and so in like cases. But on the part of the defendant any such matter shall not bee alledged, and proceese prayed to the coroners; becaus he may challenge the jury for that cause, and can be at no prejudice.

[b] Challenge concluding to the favour, when either partie cannot take any principall challenge, but sheweth causes of favour, which must be left to the conscience and discretion of the triors upon hearing their evidence to finde him favourable or not favourable. But yet some of them come neerer to a principall challenge then other. [c] As if the juror be of kindred, or under the distresse of him in the reversion or remainder, or in whose right the avowrie or justification is made, or the like, these be no principall challenges; because he in reversion, remainder, or in whose right the avowrie or justification is, is not partie to the recorde; otherwise it is if they were made parties by aide, receipt, or voucher: and yet the cause of favour is apparent, so it is of all principall causes, if they were partie to the record. Now the causes of favour are infinite; and thereof somewhat may be gathered of that which hath been said, and the rest I purposely leave the reader to the reading of our bookes concerning that matter. For all which the rule of law is, that he must stand indifferent as hee stands unsworne.

[d] The subject may challenge the polles, where the king is partie. And if a man bee outlawed of treason or felony, at the suit of the king, and the partie for avoyding thereof alledgeth imprisonment, or the like, at the time of the outlawry; though the issue bee joyned upon a collaterall point, yet shall the partie have such challenges as if he had been arraigned upon the crime it self, for this by a meane concerneth his life also (8).

IV. *Propter*

[1] 8. H. 5. 10. 33. H. 6. 1. 10. H. 6. 24. 7. H. 4. 11. 18. E. 4. 12. 21. E. 4. 74. 11. R. 2. tit. Challenge 106. 27. Ass. 13.
[m] 43. E. 3. Chal. 93. 8. H. 5. 10.

[n] Mirror ubi supra. Brit. fo. 12. 11. Ass. 36. 8. H. 4. 2. 7. E. 4. 4. 12. Ass. 26. 19. Ass. 6. 40. Ass. 10. 25. E. 3. c. 3.
[o] 40. Ass. 20. 2. H. 4. 15. 10. H. 6. Chal. 40. 7. H. 6. 40. 19. H. 6. 66. 4. E. 4. 11. 7. E. 4. 4.
[p] 20. H. 6. 39. 9. E. 4. 46. 35. H. 6. 19. H. 6. 3. H. 6. 24. 7. H. 7. 10. (2. Ro. Abr. 665.)
[q] 9. Co. 71. Peacock's case

[r] Mirror, Bracton, Britton } ubi supra. 12. Ass. 36. 26. Ass. 56. 28. Ass. 19. 31. Ass. 7. 44. Ass. 18.
[s] 13. H. 4. 13. 11. R. 2. Chal. 164.
[t] Bracton, Fleta } ubi supra. 44. E. 3. 5. 38. 44. Ass. 23. 8. E. 3. 25. 43. E. 3. 31. 22. E. 4. 1. 38. H. 6. 6. 43. E. 3. Chal. 93. 11. H. 4. 26. 11. H. 6. 15. 32. E. 3. Chal. 189. 24. E. 3. 37. 39. Ass. 2. 20. Ass. 11. 43. Ass. 46.
[u] 17. Ass. 15.
[w] 8. E. 3. 39. 20. H. 6. 39. 33. H. 8. Dyer 48. (Post. 379. a. Hob. 294.)
[x] 22. Eliz. Dyer 367.
Bracton, Britton, Fleta } ubi supra.
[y] 49. E. 3. 1.
[a] 9. E. 4. 6. 21. E. 4. 31. 22. E. 4. 3. 14. H. 6. 2. 20. E. 4. 2. 3. H. 7. 5. 22. Eliz. Dyer 367. (2. Ro. Abr. 644. 668. 669. Cro. Jam. 547. Post. 320. b. Plowd. 74. a. Hob. 64.)

[b] Mirror ca. 3. d'ordinance d'attaint. Bract. lib. 4. fol. 185. Britt. fol. 134. 135. Fleta lib. 4. c. 8. 7. H. 6. 25.
[c] 9. H. 7. 3. 10. H. 7. 20. 3. H. 7. 2. 10. E. 4. 12. 15. E. 4. 18. 12. Ass. 23. (1. Ro. Rep. 328. Cro. Jam. 547.)

[d] 6. R. 2. Chal. 141. 19. Ass. 6. 38. Ass. 22. 11. R. 2. Chal. 165. 4. H. 5. ibid. 153. (1. Sid. 244.)

(1) Acc. 2. Brownl. 268.
(2) See Mo. 3.
(3) See an instance of such a commission in Cro. Jam. 65.
(4) See ant. 156. a. n. 4.
(5) The same thing avoids a verdict. Post. 227. b.
(6) Yet *labouring* a jury, *though it be but to appear*, is afterwards stated to amount to the crime of *maintenance* in a third person. Post. 369. a. Here indeed the author qualifies the *labouring* to appear by supposing it to be to *do his conscience*. But this addition of words seems a slight ground for a difference of construction.
(7) Held accordingly Hutt. 22.
(8) Staundford is of the same opinion, citing for authorities from Fitzherbert's Abridgement the cases of 11. R. 2. & 4. H. 5. here referred to by lord Coke. Staundf. Pl. C. 163. a. However the benefit of peremptory challenges on *collateral* issues in capital cases has been denied by the practice of latter times. Case of Okey and others East. 14. Ch. 2. 1. Lev. 61. Johnson's case Mich. 2. G. 2. Post. 46. Mr. Ratcliffe's case Mich. 20. G. 2. Post. 40.—In the report of the case last cited, lord Hale is referred to as an authority for disallowing such challenges. But lord Hale is not absolute in his opinion; and Staundford, whom lord Hale cites, not only writes with a *quære* in the part so cited, but in a subsequent passage gives an opinion in favour of the challenge. Staundf. Pl. C. 158. a. 163. a.

small offences as are left to the summary jurisdiction of a justice of the peace; which exception from the necessity of the times is continually increasing, but which however cannot be too cautiously extended to new objects.—Thus considered, the distinction between the office of judge and jury seems to claim our utmost respect. May this wise distribution of power between the two long continue to flourish, unspoiled, either by the proud incroachment of ill-designing judges, or the wild presumption of licentious juries!

It would be wrong to conclude this note, without referring the reader to the very forcible reasoning on the same subject, in a modern work, which contains much general legal instruction elegantly conveyed. See "EUNOMUS, or Dialogues "concerning the Law and Constitution of England," vol. 3. p. 196.

(6) See further on the origin of English juries, Spelm. Gloss. voc. *jurata*, Dissertat. Epistolar. in Ling. Septentrion. Thesaur. Hickes. Stiernh. de jure Sueon. et Goth. vetust. lib. 1. c. 3. and Dr. Pettingal's Enquiry into the Use and Practice of Juries amongst the Greeks and Romans.

IV. *Propter delictum.* [e] As if the juror be attainted or convicted of treaſon, or felony, or for any offence to life or member, or in attaint for a falſe verdict, or for perjury as a witneſſe, or in a conſpiracie at the ſuite of the king, or in any ſuite (either for the king, or for any ſubject) be adjudged to the pillory, tumbrell, or the like, or to be branded, or to be ſtigmatique, or to have any other corporall puniſhment whereby he becommeth infamous, (for it is a maxime in law *repellitur à ſacramento infamis*) theſe and the like are principall cauſes of challenge. So it is if a man be outlawed in treſpaſſe, debt, or any other action, (1) for he is *exlex*, and therefore is not *legalis homo*. And old bookes have ſaid, that, if he be excommunicated, he could not be of a jury.

[e] Mirror, Bracton, Britton, Fleta } ubi ſupra. 11. H. 4. 41. 12. H. 4. 10. 33. H. 6. 21. (2. Ro. Abr. 650.)

[f] See the ſtatutes of *W.* 2. and *artic. ſupra cartas*, what perſons the ſherife ought to returne on juryes. And ſee *F. N. B. breve de non ponendis in aſſiſis & juratis*, (2) and the regiſter in the ſame writ. And ſee there what remedy the party hath that is returned againſt law.

[f] W. 2. ca. 38. Artic. ſuper cart. ca. 9. F. N. B. 165. & 166. Regiſtr.

It is neceſſarie to be knowne the time when the challenge is to be taken. [g] Firſt, hee that hath divers challenges muſt take them all at once, and the law ſo requireth indifferent trialls, as divers challenges are not accounted double. [h] Secondly, if one be challenged by one party, if after he be tried indifferent, it is time enough for the other party to challenge him. [i] Thirdly, after challenge to the array, and triall duely returned, if the ſame party take a challenge to the polls, hee muſt ſhew cauſe preſently. [k] Fourthly, ſo if a juror be formerly ſworn, if he be challenged, he muſt ſhew cauſe preſently, and that cauſe muſt riſe ſince he was ſworne. [l] Fiftly, when the king is party or in an appeale of felony, the defendant, that challengeth for cauſe, muſt ſhew his cauſe preſently. Sixtly, if a man in caſe of treaſon or felony challenge for cauſe, and he be tried indifferent, yet he may challenge him peremptorily. Seventhly, a challenge for the hundred muſt bee taken before ſo many bee ſworne, as will ſerve for hundredors, or elſe hee loſeth the advantage thereof. Eighthly, [m] in a writ of right, the graund jury muſt bee challenged before the foure knights before they be returned in court; (3) for after they be returned in court, there cannot any challenge be taken unto them. Ninthly, *nota* [n] The array of the *tales* ſhall not bee challenged by any one party, untill the array of the principall be tried; but if the plaintife challenge the array of the principall, the defendant may challenge the array of the *tales*. After one hath taken a challenge to the polle, he cannot challenge the array.

[g] 9. E. 4. 16. 10. H. 5. 9. 37. H. 6. 8. 3. H. 6. 38. Brooke tit. Chal. 8. 7. H. 6. 40. 14. H. 7. 5. 6.
[h] 9. E. 4. 16. 27. H. 8. 2.
[i] 43. E. 3. Chal. 93. 20. E. 3. ibid. 116. 22. E. 4. ibid. 61. 7. H. 4. 41. 3. El. Dower 201.
[k] 22. E. 4. 1. 9. H. 5. 6.
[l] 1. H. 5. 10. 38. Aſſ. 22. (Ant. 157. a.)
[m] 7. H. 4. 20. 15. E. 4. 1.
[n] 9. E. 4. 27. 9. H. 5. 11. 34. Aſſ. 6. 13. E. 3. Chal. 108.

Now it is to be ſeene, how challenges to the array of the principall pannell, or of the *tales*, or of the polles ſhall be tried, and who ſhall bee triors of the ſame, and to whom proceſſe ſhall be awarded.

1. [o] If the plaintife alledge a cauſe of challenge againſt the ſherife, the proceſſe ſhall be directed to the coroners; if any cauſe againſt any of the coroners, proceſſe ſhall be awarded to the reſt; if againſt all of them, then the court ſhall appoint certaine eliſors or eſſiors (ſo named *ab eligendo*) becauſe they are named by the court, againſt whoſe returne no challenge ſhall be taken to the array, becauſe they were appointed by the court; but hee may have his challenge to the (4) polles. [p] Note, if proceſſe be once awarded for the partiality of the ſherife, though there be a new ſherife, yet proceſſe ſhall never bee awarded to him; for the entrie is, *Ita quòd vicecomes ſe non intromittat.* But otherwiſe it is, for that he was tenant to either partie, or the like.

[o] 18. E. 4. 8. (Forteſc. 55.)
[p] 15. H. 7. 9. 14. H. 7. 31. 18. E. 4. 3.

2. [q] If the array be challenged in court, it ſhall be tryed by two of them that be impannelled to be appointed by the court; for the triors in that caſe ſhall not exceed the number of two, unleſſe it be by conſent. But when the court names two for ſome ſpeciall cauſe alledged by either partie, the court may name others. If the array be quaſhed, then proceſſe ſhall be awarded, *ut ſupra.*

[q] 29. Aſſ. 3. 19. H. 6. 48. 21. H. 6. Chal. 38. 33. H. 6. 21. 4. E. 4. 17. 43. E. 3. Chal. 95. 2. R. 2. ibid. 101. 34. Aſſ. 6. 27. Aſſ. 28. 43. Aſſ. 26.

[r] If a pannell upon a *venire facias* be returned, and a *tales*, and the array of the principall is challenged, the triors, which try and quaſh the array, ſhall not try the array of the *tales*; for now it is as if there had beene no appearance of the principall pannell: but if the triors affirme the array of the principall, then they ſhall try the array of the *tales*. If the plaintife challenge the array of the principall, and the defendant the array of the *tales*, there the one of the principall, and the other of the *tales*, ſhall try both arrayes. For other matter concerning the *tales*, ſee [s] in my Reports matters worthy of obſervation (5). [t] When any challenge is made to the polls, two triors ſhall bee appointed by the court; and if they trie one indifferent, and he be ſworne, then he and the two triors ſhall try another; and if another be tried indifferent, and he be ſworne, then the two triors ceaſe, and the two that be ſworne on the jury ſhall try the reſt. [u] If the plaintife challenge ten, and the defendant one, and the twelfth is ſworne, becauſe one cannot try alone, there ſhall be added to him one challenged by the plaintife, and the other by the defendant. When the triall is to be had by two counties, the manner of the triall is worthy of obſervation, and apparant in our [av] books. [x] If the foure knights in the writ of right be challenged they ſhall try themſelves (6), and they ſhall chooſe the

[r] 9. E. 4. 46. 19. H. 6. 48. 34. Aſſ. 6. 7. E 6. Dier 78. 9. H. 5. 11.
[s] 10. Co. 104. 105. Denbawd's caſe.
[t] 19. H. 6. 9. 22. E. 4. Chal. 61. 62.
[u] 7. H. 4. 41.
[w] 11. H. 4. 61. 48. E. 3. 30. 11. H. 4. 63.
[x] 22. E. 3. 18. 39. E. 3. 2.

(1) It has been queſtioned, whether outlawry in a *perſonal* action is ſufficient to diſqualify from being a juror; and in Sir William Withepole's caſe, Mich. 3. Cha. 1. the court of king's bench was divided on this point. Cro. Cha. 135. W. Jo. 198. and Ley's Rep. 81.

(2) See the late Mr. Serj. Wynne's Diſſertation upon this writ in his Miſcellany of Law Tracts, p. 56.

(3) Acc. ant. 156. b. & poſt. 294. a.

(4) See further on awarding *venires* to coroners and on appointing *eliſors*, Umfrev. Lex Coronator. 235. to 242.

(5) See alſo Trials per Pais, chap. 5.

(6) Acc. poſt. 294. a.

Continuation of the notes of fol. 156. a.

(5) Lord Coke having immediately before expreſſed, that the array ſhall not be challenged for *favor* againſt the king, he muſt be here underſtood to conſider *being a vadelet or other menial ſervant of the crown*, as a *principal* challenge to the array; for otherwiſe he would be inconſiſtent; unleſs, indeed, he is ſuppoſed in the firſt inſtance to ſtate a general rule and in the ſecond an exception to it, which, as his words are, would be a ſtrained conſtruction. It is alſo ſtrong evidence of lord Coke's intending to give this challenge to the *array* as a principal one, that he elſewhere repreſents *being a ſervant of either party* where the ſuit is between ſubjects as a principal challenge both to the array and to the polls. See ſupra and alſo poſt. 157. b. However, lord Hale will not allow this ſort of exception to a juror to be more than a challenge to the *favor* in trials for treaſon or felony; citing for authority from Fitzherbert's Abridgement a caſe in 3. H. 6. which is a deciſion in point by the whole court; to which may be added the *dictum* in the Year-Book of 4. Hen. 7. 3. Alſo the practice ſince lord Hale's time ſeems to have accorded with his doctrine, there being ſubſequent inſtances in print in which ſuch an exception when taken to the polls has been diſallowed, but not one I believe of its being received. The inſtances of diſallowing the exception as a principal challenge, to which I ſhall refer, are Mr. Hampden's trial in the king's-bench, Hill. 36. Cha. 2. for a miſdemeanor, and ſir William Parkyns's at the Old Bailey in 1695 for high treaſon. See State Tri. 4th ed. v. 3. p. 825. and v. 4. p. 633. In the former the point was ſharply argued on challenges by Mr. Hampden of two jurors for having offices in the king's foreſt; and as the counſel for Mr. Hampden relied on lord Coke and on Rolle's Abridgement of the Caſe of 22. E. 4. here cited by lord Coke in the margin as the ground of his doctrine, ſo the court adjudged againſt the exception as a principal challenge on the authority of the caſe of 3. H. 6. cited by lord Hale. In the latter ſir William Parkyns challenged two for being

the graund assise, and try the challenges of the parties. [y] If the cause of challenge touch the dishonor or discredit of the juror, he shall not be examined upon his oath, (1) but in other cases he shall be examined upon his oath, to informe the triors. (2) [z] If an inquest bee awarded by default, the defendant hath lost his challenge; but the plaintife may challenge for just cause, and that shall be examined and tried.

Wheresoever the plaintife is to recover *per visum juratorum*, there ought to be sixe of the jury that have had the view or knowne the land in question, so as he be able to put the plaintife in possession if he recover.

In a *proprietate probandâ*, and a writ to inquire for waste, the parties have beene received to take their challenges. (3) [a] But passing over many things touching this matter, I will conclude with the saying of *Bracton. *Plures autem aliæ sunt causæ recusandi juratores, de quibus ad præsens non recolo, sed quæ jam enumeratæ sunt sufficiant exempli causâ.* (4) And so let us return to *Littl.*

De visneto, &c. It should be *vicineto*. *Vicinetum* is derived of this word *vicinus*, and signifieth neighbourhood, or a place neere at hand, or a neighbour place. And the reason wherefore the jury must be of the neighbourhood, is, for that *vicinus facta vicini præsumitur scire*; all which is implied in this word (*&c.*)

Quòd summoneat eos, &c. *Summoneo* is compounded of *sub & moneo, & euphoniæ gratiâ* it is said *summoneo*, to warne or summon, as in this case the sherife must warne or summon the recognitors of the assise to appeare before the justices of assise, &c. And it is truly said [b], that in this case *legitimam summonitionem recipere in propriâ personâ ubicunque inventus fuerit in comitatu in quo fuerit res petita; qui quidem si non inveniatur, sufficit, si ad domicilium fiat, dum tamen alicui de familiâ suâ manifestè fuerit relata, &c.*

Per bonos summonitores. Here two things are to bee observed. 1. that the summoners must be *boni (id est) fide digni, ut valeant legitimum testimonium perhibere, cùm inde per justiciarios fuerint requisiti.* [c] And another saith, *sems, ne serfs, ne enfans, ne nul enfamys, ne nul que nest fife tenant, ne poet este bone summoner.* 2. It is spoken in the plurall number, *per bonos summonitores*, and therefore there must be two at the least. *Nec sufficit quòd summonitio fiat per unum tantùm, &c. necesse est igitur quòd per duos ad minus fiat, &c.* There is also a summons of a tenant in a reall action; whereof, and of pernors and veiors you shall reade [d] plentifully and plainely in our bookes, whereunto being matter of course I referre you.

Item summonitionum alia est generalis, alia specialis. Whereof you shall finde excellent matter in our [e] old bookes, where you shall also reade at large *de summonitione, præsummonitione, & resummonitione.*

Facere recognitionem. *Cognitio* is knowledge, or knowledgement, or opinion, and recognition is a serious acknowledgement or opinion upon such matters of fact as they shall have in charge, and thereupon the jurors are called *recognitores assisæ*. *Vide Sect.* 233. *recognitio* taken for the confession of the tenant.

Pannell is an English word, and signifieth a little part; for a pane is a part, and a pannell is a little part; as a pannell of wainscot, a pannell of a saddle, and a pannell of parchment wherein the jurors names be written and annexed to the writ. And a jury is said to be impannelled, when the sherife hath entred their names into the pannell, or little peece of parchment, *in pannello assisæ*.

Briefe de droit, *Breve de recto.* Writs of right bee of two natures: 1. A writ of right, whereof *Littleton* here speaketh, which is the highest writ of all other reall writs whatsoever, and hath the greatest respect, &c. and the most assured and finall judgement; and therefore this writ is called a writ of right; and this in [f] old books is called *dreit dreit*; and this writ *est darrein remedie de touts recoveries enter touts ordres des pleas*; and the jury in this writ is called *magna assisa*, or *magna jurata*, as *Littleton* here saith. 2. Writs of right in their nature, as the *rationabili parte*, and *ne injuste vexes.*

De Recto. *Rectum* is a proper and significant word for the right that any hath; and wrong or injury is in French aptly called *tort*; because injury and wrong is wrested or crooked, being contrary to that which is right and straight. Now the law that is *linea recta est index sui & obliqui.* And *Britton** saith, that *tort a la ley est contrarye*, and as aptly for the cause aforesaid is injury in English called wrong. And *injuria* is derived of *in* and *jus*, because it is contrary to right; so as *a faire tort* is *facere tortum.* And *Fleta* saith [g] *est autem jus publicum & privatum, quod ex naturalibus præceptis, aut gentium, aut civilibus est collectum; & quod in jure scripto jus appellatur, id in lege Angliæ rectum esse dicitur.* And in the [h] Mirror, and other places of the law, it is called *droit*; as *droit defend*, the law defendeth.

En le Register. *Register* is a most ancient booke of the common law; and it is two-

[y] 49. E. 3. 1. 2. (Hob. 84. 1. Sid. 374. 232. Cro. Jam. 388. 1. Ro. Rep. 110.)

[z] 2. H. 4. 14. 4. E. 4. 3. 10. E. 3. 32. 22. Ass. 28. 31. 21. H. 6. 56. 16. Ass. 1. 5. E. 5. 35. 36.

[a] 8. H. 5. tit. Chal. 167. 2. H. 4. 3. 34. E. 3. Chal. 175. 21. H. 6. 56. 8. E. 4. 3. 16. E. 4. 1.
* Bracton lib. 4. fo. 185.
(7. Co. 1. Bulwer's case.)

[b] Bracton lib. 5. fo. 333. 334. Mirr. cap. 2. sect. 19. Fleta lib. 6. cap. 6. Brit. cap. 121.

[c] Bracton, Britton, Fleta } ubi supra
Bracton, Britton, Fleta, Mirror } ubi supra.

[d] Regist. judicial. 1. 2. 107. 43. E. 3. 32. 24. E. 3. 35. 3. E. 3. 48. 50. E. 3. 16. 8. H. 6. 1. b. F. N. B. 97.

[e] Mirror, Bracton, Britton, Fleta } ubi supra.

Register 223.

[f] Bracton lib. 5. fo. 372. Britton fo. 117. Fleta l. 6. ca. 1. Glanvil lib. 1. c. 4. 5. &c. lib. 2. ca. 7. lib. 12. ca. 1.
(1. Ro. Abr. 686.)

(Post. 265. a. 345. a.)

* Britton fo. 116. Fleta lib. 2. ca. 1.

[g] Fleta lib. 6. ca. 1.

[h] Mirror ca. 2. sect. 16. & cap. 5. sect. 2.

(1) Held accordingly by the court in Cook's case Salk. 153.

(2) This is one instance of the examination called a *voir dire*; for as a witness is on a *voir dire* to try an objection to his competency to give evidence, so a juror may be sworn in like manner to try the cause of challenge to him. It is thought fit to take notice of this; because in some of our books, the *voir dire* is described, as if confined to the challenge of a witness, and only used to distinguish such a partial swearing of a witness from swearing of him *in chief*. For instances of examining jurors on a *voir dire*, see Francia's case, State Tri. 4th ed. v. 1. p. 59. and Mr. Townley's in Post. 7. But in both of these the challenge not being *to the favour* was examined into by the court without triors.

(3) Some seem to understand it as a general rule, that challenges of jurors are excluded, where the inquest is for information merely, or not being so is without an issue joined between the parties; as in inquests of office before sheriffs coroners and escheators, and in writs of inquiry for damages. Office of executor, ed. 1676. p. 240. 1. Ro. Abr. 660. Umfrev. Lex Coronator. 174. 183. and in the Introduct. 51. Probably lord Coke here means to advert to this doctrine, and to give the *proprietate probandâ* and the writ to inquire of waste, both of which are inquests without any issue joined, as instances of exception to it. Broke adds another exception; for in abridging the case of waste from the year book of 2. H. 4. 3. he observes, that the law is the same on a writ of redisseisin. Bro. Error 31.—As to the rule itself for thus excluding challenges, be it well or ill founded, the sheriff, or other officer taking the inquest, certainly ought not to accept any jurors but such as are legally qualified; and if such are received, it seems a just ground for quashing the proceeding or for error according to the nature of the case. See Sir William Withepole's case reported in W. Jo. 198. Cro. Cha. 134. and Ley 81. and noticed in 2. Hal. H. P. C. 60.

(4) See further on challenges of Jurors Kitch. French ed. 91. a. Lamb. Just. ed. of 1602. p. 379. Dalt. Sher. 1st ed. 120. Trials per Pa. chap. 9. and title *Trial* in Viner.

being servants of the king; but was informed by lord Holt, that it was no cause of challenge. The first of these instances was a direct adjudication; but, however, it lost part of its weight, in consequence of having occurred in an ill time whilst lord Jefferies presided in the king's-bench, and of being accompanied with ungracious and unbecoming language from him in respect to both Coke and Rolle. The second was rather an extrajudicial opinion; because the counsel for the crown consented to put by the jurors objected to on the ground of being king's servants, unless there should be a defect of other jurors, which did not happen. But lord Holt declared against the challenge in the most absolute and unreserved terms, as if it would not bear arguing.

twofold, *viz. regiſtrum brevium originalium*, and *regiſtrum brevium judicialium*: It is a French word and ſignifieth a memoriall of writs. Sometimes the regiſter of originall writs is called *regiſtrum cancellariæ*; becauſe all originall writs doe iſſue out of the chauncery; as *extrà officinam juſticiæ*, for the antiquity and eſtimation of which booke I referre the reader to the epiſtle before the tenth part of my commentaries. (1)

13. E. 1. ca. 24. Pl. Com. 228. b.

Magna aſſiſa eligenda is a judiciall writ of the ſherife to returne foure lawfull knights before the juſtices there upon their oathes to returne twelve (2) knights of the vicinage to try the miſe in a writ of right.

(Cro. Cha. 511.)

Aſſiſe de common de paſture, &c. Of what things an *aſſiſe of novel diſſeiſin* lay at the common law, and of what by the ſtatute, you may reade at large in my [*k*] Reports in *John Webbe*'s caſe, where the authorities of law are plentifully cited, and they and the ſtatute well explained. But ſince *Littleton* wrote, a man may have [*l*] an aſſiſe of *novel diſſeiſin*, *aſſiſe* of *mord'anc'*, or any *præcipe quòd reddat*, *quòd ei deforceat*, writs of dower, or other writs originall, as the caſe ſhall require, of tythes, penſions, or other eccleſiaſticall or ſpirituall profit, if he be diſſeiſed, deforced, wronged, or otherwiſe kept or put from the ſame, which by the lawes and ſtatutes of the realme are made temporall or admitted to be or abide in temporall hands; ſo as by the ſaid act a lay man, having tythes or offerings, may either ſue for the ſubtraction or with-holding of the ſame in the eccleſiaſticall court, or at the common law at his election. And ſeeing no ſpeciall writ is given * by the ſtatute, the party muſt have a generall writ of *aſſiſe de libero tenemento*, and make a ſpeciall pleint. But his *præcipe* muſt be, *quòd reddat omnes & omnimodas decimas majores, mixtas, & minutas, infra Dale quoquo modo creſcen' contingen' ac annuatim renovan'*, or the like, according to his caſe. [*m*] But neither aſſiſe nor any *præcipe* did lye of them as of tythes or any other eccleſiaſticall duty at the common law; for the aſſiſe brought of the tenth part of all manner of corne growing in an hundred acres of land, after the tythes of the parſon taken, was a lay profit *apprender*, and no eccleſiaſticall duty.

[*k*] 8. Co. 45.

[*l*] 32. H. 8. ca. 7.

* 7. E. 6. Dier 83. &c.

[*m*] 44. E. 3. 5. Vid. Regiſt. 165. Vid. le briefe de indicavit. W. 2. ca. 5. Conjunctim feoffatis ca. ultimo. Bracton lib. 5. fo. 402. Britton fo. 200. Regiſt. fo. 35. 4. E. 3. 27. 29. 16. E. 3. quare imp. 147. Vid. 2. H. 3. tit. Grant 89. (Cro. Cha. 301.)

But tythes or other eccleſiaſticall duties, that came to the crowne by the ſtatutes [*n*] of 27. *H.* 8. 31. *H.* 8. 37. *H.* 8. and 1. *E.* 6. are by thoſe ſtatutes and this of 32. *H.* 8. and of 1. and 2. *Ph. & Mariæ*, in the hands of laymen temporall inheritances, and ſhall be accounted aſſets; and huſbands ſhall be tenants by the curteſie, and wives endowed of them, and ſhall have other incidents belonging to temporall inheritances. Onely this eccleſiaſticall quality they have, that the owner or poſſeſſor thereof may ſue for the ſubtraction of the ſame in the eccleſiaſticall court.

[*n*] 27. H. 8. of Monaſteries not printed. 31. H. 8. ca. 13. 37. H. 8. ca. 4. 1. E. 6. ca. 14. 1. & 2. Ph. & Mar. ca. 8. 2. E. 3. ca. 13.

But by another [*o*] ſtatute, remedy is given aſwell to the lay perſon as to the eccleſiaſticall perſon, for ſubtraction of all manner of prediall tythes; and he ſhall recover the treble value if they be not juſtly divided or ſet forth; and albeit the treble value be not expreſly given to the proprietary of the tythes, yet foraſmuch as he is the party grieved, and he hath the propertie and intereſt in the tythes, the treble value is given to him; and whenſoever a ſtatute giveth a forfeiture or penalty againſt him which wrongfully detaineth or diſpoſſeſſeth another of his duty or intereſt, in that caſe he that hath 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. And ſo it was [*p*] adjudged in the exchequer upon conference with other judges in an information for the treble value for not ſetting out of tythes in *Iſlington* in the county of *Cambridge*. (3) And if the proprietary will ſue for ſuch ſubtraction of tythes in the eccleſiaſticall court, then he ſhall recover but the double value by the expreſſe words of the act. Wherein it is to be obſerved, that the act of parliament doth give a temporall remedy at the common law to parſons and vicars and other eccleſiaſticall perſons for an eccleſiaſticall duty, and to laymen proprietaries of tythes the like remedy; but, as it hath beene ſaid, they have election either to ſue for the treble value at the common law, or for the double value in the eccleſiaſticall court, or for ſubtraction of tythes there alſo. (4)

[*o*] 2. E. 6. ca. 13.

[*p*] Paſch. 29. Eliz. between the queene and Wood in the exchequer, and ſo it was reſolved by all the judges upon conference, Mich. 4. Ja. regis.

Aſſiſe de mord'anceſter. *Aſſiſa mortis anteceſſoris.* [*q*] This writ a man may have after the deceaſe of his immediate anceſtor; as where his father, mother, brother, ſiſter, uncle or aunt, dye ſeiſed of any lands, and an eſtranger abate, &c.

[*q*] Britton fo. 178. 179. &c. Bracton lib. 4. tractat. 3. per totum, fo. 252. &c. Mirror ca. 2. ſect. 15. F. N. B. 114. &c.

Aſſiſe de darreine preſentment. *Aſſiſa ultimæ præſentationis*, whereof you ſhall reade [*r*] plentifully in our bookes.

[*r*] Britton ca. 90. fo. 222. Bract. lib. 4. fo. 238. Mirror ubi ſupra. F. N. B. 195. Regiſt. orig. 30.

To theſe may be added *aſſiſa utrum*, or *juris utrum* [*s*] which is the higheſt writ a parſon, vicar, &c. can have for the recovering of the gleebe land, &c. in right of his church. But it may be demanded, wherefore theſe originall writs are called by the ſpeciall name of aſſiſes more than other originall writs; and here *Littleton* yeeldeth the reaſon, becauſe that by theſe writs it is commanded to the ſherife *quòd ſummoneat* 12, which is as much to ſay, as to ſummon a jury. So as in theſe caſes, there is a jury returned the firſt day, and they are to appeare

[*s*] Bracton fo. 285. 286. Britton ca. 95. fo. 234. Mirror ubi ſupra. F. N. B. 48. 49.

(1) See alſo ant. 16. b. and 73. b.

(2) This is the number mentioned in the writ to the ſheriff and alſo in the oath of the four knights. Booth on Real Act. 96, 97. But in Mo. 67. it is ſaid, that ſometimes *fourteen* have been returned. In *King v. Dryden*, being the caſe cited above in the margin from Cro. Cha. 511. *twenty* were returned by the four knights; on which it became a queſtion, whether *twelve only* ſhould have been returned, and whether the ſurpluſage did not vitiate the whole return. But no adjudication appears in Croke's report. However in 2. Ro. Abr. 674. where the ſame caſe is ſhortly reported, it is mentioned, that the court held the return good, it being obſerved, that ſeveral precedents were cited in favour of ſuch a return; and that it reſembled the caſe of a common *venire*, on which it was uſual to return *twenty-four*, though the writ is reſtrained to *twelve*.

(3) The ſame caſe is more fully ſtated by lord Coke in 2. Inſt. 650. being part of his comment on the ſtatute of 2. Ed. 6.

(4) Since lord Coke's time a *third* remedy for tithes, where they are of ſmall value, has been given; for by the 7. & 8. W. 3. c. 6. tithes under 40s. may be recovered in a ſummary way before two juſtices of the peace; and by the 7. & 8. W. 3. c. 34. which was at firſt temporary, but is now made perpetual, tithes under ten pounds are made recoverable from *Quakers* in the ſame way. In London tithes by the 37. H. 8. c. 12. are recoverable before the lord mayor with an appeal to the lord chancellor. To theſe various modes of proceeding for tithes ſhould be added the equitable remedy by bill either in chancery or the exchequer; both of which courts have long entertained ſuits for tithes. Formerly, however, the juriſdiction of chancery in this reſpect was queſtioned, it being ſo far from ſettled in lord Coke's time, that there are inſtances of controverting it even ſince the Reſtoration. 1. Freem. 303. 2. Cha. Caſ 237. But as to the exchequer, tithes are ſaid to have been anciently cognizable there; though this is contradicted by lord chancellor Nottingham, who dates the origin of the proceeding by Engliſh bill, and conſequently that court's equitable juriſdiction over tithes, from the ſtatute of Hen. 8. erecting the court of augmentation. Hardr. 116. 1. Freem. 303. and 33. H. 8. c. 39. This equitable interference of chancery and the exchequer with tithes is generally conſidered as merely *incidental* and *collateral*; namely, as a conſequence of their juriſdiction in account and in enforcing diſcovery. 3. Blackſt. Com. 9th ed. 437. and the reaſons of the appellant in Whitehead and others v. Travis and others, Dom. Proc. January 1779. But ſome give a broader foundation to this branch of exchequer juriſdiction; and in reſpect of extraparochial tithes, which are part of the ancient inheritance of the crown, they inſiſt, that ſuits for tithes muſt ever have fallen within the compaſs of the exchequer's *direct* and *ſubſtantive* juriſdiction as a court of revenue. See the caſe of reſpondent in the appeal before cited, and Hardr. 117. Perhaps it is upon this idea as well as on account of the greater frequency of ſuits for tithes in the exchequer, that lord Hardwicke calls that court the proper juriſdiction for them. 3. Atk. 247. Yet I confeſs, it ſeems to me, that the antiquity of the exchequer juriſdiction in the *particular* caſe of *extraparochial* tithes is no proof of a juriſdiction as to tithes in *general*. See further, as to the juriſdiction of chancery and exchequer over tithes, Rayner's Caſes at large, Introduct. xiv. and Vin. Abr. tit. *diſmes*.

appeare as soone as the defendant. And because by these writs a jury is to be returned, the law calleth them assises, *ab effectu*; because an assise (which in this sense signifieth a jury) is to be returned. But beside the signification of the writ * of assise, whereof *Littleton* here speaketh, it signifieth the whole proceeding upon the writ.

* Mag. Chart. ca. 12. And W. 2. ca. 25.

In other originall writs regularly no jury is to be returned before the appearance of the parties and an issue joyned between them; and therefore these other originalls are not called assises.

Pur un ordinance. Here *assisa* signifieth an ordinance, &c. Ordinance, *ordinatio*, is derived of the verbe *ordinare*, to ordaine or set in order. And note, an act [r] of parliament (as *Littleton* here proveth) is an ordinance; for it sets downe orders, which are to bee kept as lawes: and so is *ordinatio forestæ*, *ordinatio de inquisitionibus*, and *ordinatio contra servientes*, and other statutes many times called ordinances; and it is said almost in every act of parliament, 'Be it therefore ordained, &c. by authority of this parliament, or the like.' But *è converso*, every ordinance is not a statute, as that of 8. *H.* 6. *cap.* 29. (1) for every statute must be made by the king, with the assents of the lords and commons; and if it appeare by the act, that it was made by two of them onely, it is no statute. (2)

[r] 19. H. 3. Juris utrum 16. 39. E. 3. 1. 7. 42. E. 3. 38. 29. E. 3. 7. Regist. orig. 189. 33. E. 1. 5. R. 2. ca. 2. Vid. 8. Co. le Princes case.

See 9 Co. a. 96.

The example put by *Littleton* is *assisa panis & cervisiæ.* [s] This ordinance was made at a parliament holden *anno* 51. *H.* 3. and the like ordinance was made, entituled *assisa cervisiæ*, which you may see in old *Magna Charta*, *fol.* 57. *b.* [t] And so *assisa de Clarendon*, which was in 10 *H.* 2. and *assisa forestæ* ordained in *anno* 34. *E.* 1. and such like. And aptly an ordinance of parliament antiquity hath called an assise, for that an act of parliament doth ordaine such a certaine order, as nothing can be done more or lesse by right. [u] And *Fleta* saith, *et habet rex in potestate suâ ut leges & consuetudines & assisas in regno suo provisas & approbatas & juratas, &c.* where assises are taken for statutes, which are the effects of the sessions of parliament.

[s] Mir. ca. 1. sect. 13. & ca. 4. de Articles de Eire. Bract. li. 3. fo. 136.
[t] Stanf. fo. 118. Mir. ca. 2. sect. 15. Hoveden 313. Regist. orig. 279.
[u] Flet. li. 1. ca. 17.

De ponderibus & mensuris, of weights and measures, is a most necessary learning to bee knowne, and daily in use, but it belongeth not to this treatise. In some other (if God so please) somewhat shall be said of them. (3)

Sect. 235.

ET le tenant attorna. Here it appeareth, that an attornament (that is, an agreement to the grant) is no seisin of the rent.

Il ne ad ascun remedie, &c. which is as much to say, as he hath not any remedy either at the common law, or in any court of equity, which is worthy of observation.

See more of this in the chapter of attornement sect. 565. (4. Co. 10. Poll. 314. b. 315. a.)

Voile doner al grantee un denier, ou un maile, &c. en nosme de seisin de rent, &c. Here it is to be observed, that payment of any money in name of seisin of the rent, before any rent become due, is a good seisin of the rent to have an assise when it is due; and that, which is given in the name of seisin of the rent, worketh his

ITEM si soit seignior & tenant, & le seignior granta le rent de son tenant per son fait a un auter, savant a luy les services, & le tenant atturna, ceo est un rent secke, come est dit adevant. Mes si le rent a luy soit denie al prochein jour de payment, il ny ad ascun remedie; pur ceo qu'il n'avoit de ceo ascun possession. Mes si le tenant, quaunt il atturna al grantee, ou apres, voile doner al grantee un denier, ou un maile, &c. en

ALSO if there bee lord and tenant and the lord granteth the rent of his tenant by deed to another, saving to him the other services, and the tenant atturneth, that is a rent secke, as it is aforesaid. But if the rent be denied him at the next day of payment, hee hath no remedie; because that he had not thereof any possession. But if the tenant when he atturneth to the grauntee, or afterwards, will give a penie or a halfe-penie to the grantee in *nosme*

(1) In Dy. 144. b. the reporter questions this same statute or ordinance, and on the same ground as is expressed in the prince's case cited by lord Coke; namely, that the king and the lords are named without the commons. But the editor of the last edition of Dyer gives a note tending to obviate the objection thus taken. The 8. H. 6. c. 29. is also supported as a statute by mr. serjeant Hawkins and mr. Ruffhead in the prefaces to their respective editions of the statutes at large. The latter of these urges two strong arguments in favour of the 8. H. 6. c. 29. exclusive of the general argument for *presuming* the assent of the commons, of which in the next note. According to the first the roll containing the 8. H. 6. has a general preface, which mentions the assent of the commons in terms referable to all the chapters of that year. The second is, that the 22. H. 8. c. 10. expressly refers to the 8. H. 6. c. 29. as a statute, and therefore that the latter has been legislatively recognized.

(2) Acc. 4. H. 7. 18. Mo. 824. and the prince's case 8. Co. 20. a. In 4. Inst. 25. lord Coke also describes a statute as having the consent of king lords and commons, and an ordinance as made by only one or two of them.—But Mr. Prynne is very angry with lord Coke for thus distinguishing between an ordinance and a statute. He first attacked the difference in his *Irenarches Redivivus*; and there he is very copious in his arguments and instances against it. But Mr. Prynne did not rest here; for he continued the subject in various subsequent publications; namely, in his preface and index to what is called Cotton's Abridgment of the Records, and in his Animadversions on the 4th Institute. See the latter book p. 13. But in all these works, particularly his *Irenarches Redivivus*, he appears to me to labour the point in a manner, which indicates a very considerable misapprehension of lord Coke. It is manifest from his lordship's words here, that he did not mean to deny, that the term of *ordinance* might not be or was not frequently applied to statutes; for he here adduces instances of such an application. His chief intent was to guard against universally and indiscriminately so considering all ordinances in parliament. But Mr. Prynne not connecting what is here said by lord Coke with his words in the 4th Institute, but looking to the latter only, tediously and provokingly argues, as if lord Coke had denied, that an ordinance could be or was in any case a statute. Not content with fighting this imaginary proposition, Mr. Prynne runs into the contrary extreme of asserting, that acts of parliament and ordinances are universally and invariably the same. Thus the true questions arising on the subject were in great measure lost sight of, or at least were so obscured by being complicated with foreign, and needless discussion, as not easily to strike the reader. The real topicks for debate with lord Coke, and those which should have been pointedly attended to, were, first, whether the term of ordinance was ever in fact applied to a provision made during the time of parliament by only one or two of the three branches of the legislature; and secondly, and principally, whether naming only one or two parts of the legislature doth exclude

the

noſme de ſeiſin de le rent, donques ſi apres a le procheine jour de payment le rent a luy ſoit denie, il avera aſſiſe de novel diſſeiſin. Et iſſint eſt lou home granta per ſon fait un annual rent iſſuant hors de ſa terre a un auter, &c. ſi le grantor adonques ou apres paya al grantee un denier, ou un maile, en noſme de ſeiſin de le rent, donques, ſi apres al procheine jour de payment le rent ſoit denie, le grantee poet aver aſſiſe, ou auterment nemy, &c.

name of ſeiſin of rent, then if after at the next day of payment the rent bee denied him, hee ſhall have an aſſiſe of *novel diſſeiſin*. And ſo it is if a man grant by his deed a yearely rent iſſuing out of his land, to another, &c. if the grauntor then after pay to the grauntee a penie, or an halfe-pennie, in name of ſeiſin of the rent, then, if after the next day of payment the rent be denyed, the grauntee may have an aſſiſe, or elſe not, &c.

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.

Un denier, ou un maile, &c. Here by this (&c.) is implyed, that ſo it is of the gift of a ſheepe, or an oxe, or a ring, or a paire of gloves, or a pound of pepper, or of any valuable thing.

Iſſint ſi home grant per ſon fait un annual rent iſſuant hors de ſon terre a un auter, &c. By this (&c.) is implyed, that the grant and deliverie of the deed is no ſeiſin of the rent; and that a ſeiſin in law, which the grantee hath by the grant, is not ſufficient to maintaine an aſſiſe or any other reall action, but there muſt be an actuall ſeiſin. (6. Co. 56. b. 4. Co. 9.)

Sect. 236.

ITEM de rent ſecke home poet aver aſſiſe de mort d'anceſter, ou briefe de ayel ou de coſinage, & touts auters manners d'actions reals, come la caſe giſt, ſicome il poet aver d'aſcun autre rent.

ALSO of rent ſecke a man may have an aſſiſe of *mort-d'aunceſtor*, or a writ of *ayel* or coſinage, and all other manner of actions realls, as the caſe lyeth, as hee may have of any other rent.

BRIEFE de ayel. *Breve de avo.* This writ lieth, where the grandfather or grandmother was ſeiſed of any land in fee the day that he died, and an eſtranger abate, the heire ſhall have this writ. [w] And if the great grandfather, *beſaiel, proavus*, or great grandmother, *beſaicles, proavia*, be ſeiſed, as is aforeſaid, and die, &c. the heire ſhall have a writ *de beſaiel, proavo*, or *beſaicles, proaviâ, &c.*

Bract. li. 2. fo. 67. Brit. c. 89. & c. 76. Flet. li. 5. c. 7. 8. &c. F. N. B. 221.

[w] 6. E. 3. 34. 7. E. 3. 46. Regiſt. 226. F. N. B. 221. a. b. Britton. ca. 76.

Briefe de coſinage. *Breve de conſanguinitate.* [x] This writ lieth, where the great grandfather's father, *tritavus (id eſt) tertius avus*, or *abavus, (id eſt) avus avi* was ſeiſed as is aforeſaid, or where grandfather's or grandmother's mother, &c. *ut ſupr.* And ſo it is of the ſeiſin of the brother of the grandfather's grandfather, &c. (1)

[x] Bract. lib. 2. fo. 67. Brit. c. 89. & c. 76. Flet. l. 5. ca. 7. 8. F. N. B. 221.

Rent ſecke. And ſo it is of a rent charge to all reſpects.

Et touts auters manners d'actions reals. Hereupon ſome have gathered, that a man ſhall have a writ of right of a rent ſecke, or of a rent charge, albeit they be againſt common right. But that, which hath beene ſaid by *Littleton* of an aſſiſe of *mortdaunceſter*, a writ of *ayel, coſinage*, and other actions realls, is to be underſtood after ſeiſin had by ſome of the anceſtors of the demandant; for without an actuall ſeiſin, or ſeiſin in deed, none of theſe are maintainable.

15. E. 2. Hors de ſon fee 27. 3. E. 3. 35. 4. E. 3. droit 31. F. N. B. 6. 14. E. 4. 5. Diverſity des Courts 117. 33. E. 3. Judgm. 252.

Sect.

(1) See the table for the degrees of conſanguinity placed before fol. 18.

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the preſumption of the third's having aſſented. As to the former of theſe queſtions, it is rather verbal; and therefore I will here only obſerve upon it, that uſing the word *ordinance* in the manner ſtated by lord Coke ſeems well enough to anſwer the purpoſe of diſcrimination; that the word may have been frequently ſo applied in antient times notwithſtanding the numerous examples of a contrary application ſo induſtriouſly collected by mr. Prynne; that lord chief juſtice Crew partly adopts lord Coke's idea; that mr. Prynne himſelf in his later writings, though he ſtill denies lord Coke's diſtinction, brings forward and acknowledges precedents, which tend in ſome degree to affirm it; and that calling the acts of the parliament in the reign of Charles I. without the royal aſſent to them *ordinances* ſeems to have originated from lord Coke's difference between an ordinance and a compleat ſtatute. See W. Jo. 103. Prynne's Index to Cott. Abridgm. of Rec. title *ordinances*, and his Animadv. on 4. Inſt. 13. As to the ſecond queſtion, beſides what may be found in mr. Prynne's pieces, it has been diſtinctly conſidered by mr. ſerjeant Hawkins and mr. Ruſſhead, both of whom, in the prefaces to their ſeveral editions of the ſtatutes, anxiouſly oppoſe lord Coke's idea of not preſuming the aſſent of lords or commons, where the record names one but omits the other. The general purport of the reaſons urged by the former is, the various irregular and ſometimes inexplicit penning of the more ancient ſtatutes, the allowed force of ſeveral ſtatutes in which only the king is named, and the long reception of others which do mention the king and lords without the commons. The latter editor purſues the like topics more at large, but, as it ſeems to me, in terms leſs guarded; ſome paſſages of his preface being ſuch, as may encourage a haſty and unlearned reader to fall into the unwarrantable ſuppoſition, that the right of aſſent in the commons is diſputable even as late as the reign of Richard the ſecond, rather than induce him to *preſume* the fact of their aſſent's having been given. See further on this ſubject, and for the various ſenſe of the word *ordinance*, 2. Whitelocke on the Writ of Parliament, Elſynge on Parl. laſt ed. 26. and Barringt. on Ant. Stat. 4th ed. 46.

(3) Accordingly lord Coke diſcourſes a little on theſe ſubjects in two other works. See 2. Inſt. 41. and 4. Inſt. 273.

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(Cro. Jam. 485. 2. Ro. Abr. 277. 456. 457. Hob. 180. Dy. 241. Cro. Cha. 109. F. N. B. 101. c.)

18. E. 3. 3. 44. E. 3. 20. b. 20. H. 7. 1. a. 21. H. 7. 40. a. F. N. B. 102. b. 6. H. 6. Diſſeiſin 9. 4. E. 2. Aſſ. 43. 8. E. 2. ibid. 416. W. 2. ca. 6. 12. H. 7. Kelway 20. (Poſt. 323. a.)

[p] 6. R. 2. Reſcous 10. 40. E. 3. 33. 31. E. 3. Reſcous 17. 22. H. 6. 2. b. 6. E. 4. 11. b. 7. E. 4. 20. 5. E. 4. 8. 34. H. 6. 47. F. N. B. 102. E. 2. H. 4. 21. 16. 4. E. 6. Diſtreſſe Br. 24. 39. E. 3. 35. 39. H. 6. 7. 4. Co. 11. Bevill's caſe. 8. H. 4. 1. (Ant. 47. b. 9. Co. 23.)

7. E. 4. 24. (5. Co. 76.)

17. E. 3. 43. Vid. tit. Reſcous 24.

REſcous. *Reſcuſſus* is here deſcribed by *Littleton.* It is an ancient French word comming from *reſcourrer, (id eſt) recuperare,* that is, to take from, to reſcue or recover. *Reſcous* is a taking away and ſetting at liberty againſt law a diſtreſſe taken, or a perſon arreſted by the proces or courſe of law. And all is one, as to the point of the diſſeiſin, to reſcue the diſtreſſe after it is taken, and before hand to reſiſt and withſtand the taking of it; but yet it is no reſcous, untill it be diſtreyned. And therefore you may make ſixe diſſeiſins of a rent ſervice; *reſcous* of a diſtreſſe, reſiſtance to diſtreyne, replevin,(3) incloſure, counterpleading of the title, and vouching of a record and failing. If the tenant reſcue the diſtreſſe, and after is diſſeiſed of the tenancie, yet the aſſiſe lieth againſt him for the diſſeiſin done of the rent by the reſcous.

Pur ſon rent arere. Here *Littleton* decideth an antient queſtion in our bookes, [p] *viz.* that the rent muſt be behind, or elſe the tenant may make reſcous: for if no rent be behind when the diſtreſſe is taken, how can the reſcous amount to a diſſeiſin of the rent when none is due? And ſo it is, if the tenant reſiſt the lord to diſtreine, when there is no rent behind, this can be no diſſeiſin of the rent for the cauſe above ſayd, and this (as it appeareth by *Littleton*) holdeth as well in caſe of a rent ſervice between lord and tenant, as in caſe of a rent charge, &c. And ſo I heard ſir *Chriſtopher Wray* chief juſtice ſay, that he had adjudged it. And that which the tenant may do when there is no rent behind, may a ſtranger doe, if his beaſts be diſtrained. If the tenant tender the rent to the lord when he is to take the diſtreſſe, if notwithſtanding the lord will diſtreyne, the tenant may make reſcous. (4) If the rent of the lord be behind, and the lord diſtreine the cattell of the tenant in the high way within his fee, the tenant may make reſcous.

ITEM ſont trois cauſes de diſſeiſin de rent ſervice, ſcil. reſcous, replevin, & encloſure. Reſcous eſt, quaunt le ſeignior en la terre tenus de luy diſtreine pour ſon rent arere, ſi le diſtres de luy ſoit reſcous, ou ſi le ſeignior vient ſur la terre, & voile diſtreyner, & le tenant ou auter home ne luy voile ſuffer, &c. Replevin eſt, quant le ſeignior ad diſtreine, et replevin ſoit fait de le diſtreſſe per briefe ou per plaint. Encloſure eſt, ſi les terres ou les tenements ſont iſſint encloſes, (1), *que le ſeignior ne poyt vener deins les terres ou tenements pur diſtreyner. Et la cauſe, pur que tiels choſes iſſint faits ſont diſſeiſins al ſeignior, eſt, pur ceo que per tiels choſes le ſeignior eſt diſturbe de le mean per que il doit avoire & vener a ſon rent, ſcil. de le diſtreſſe.* (2)

ALSO there be three cauſes of diſſeiſin of rent ſervice, that is to ſay, reſcous, replevin, and encloſure. Reſcous is, when the lord diſtraineth in the land holden of him for his rent behind, if the diſtreſſe be reſcued from him, or the lord come upon the land, and will diſtreine, and the tenant or another man will not ſuffer him, &c. Replevin is, when the lord hath diſtrained, and replevin is made of the diſtreſs by writ or by plaint. Encloſure is, if the lands and tenements bee ſo encloſed, that the lord may not come within the lands and tenements for to diſtrein. And the cauſe, why ſuch things ſo done be diſſeiſins made to the lord, is for this, that by ſuch things the lord is diſturbed of the meane by which hee ought to have come to his rent, *ſcil.* of the diſtreſſe.

(1) *Encloſes* not in L. & M. but in Roh. P. & Red.

(2) *De le diſtreſſe* not in L. & M. Roh. or P.

(3) In a Coke upon Littleton I have with MSS. notes, it is objected to conſidering replevin here as a diſſeiſin, that bringing a replevin is a courſe of law, and that neither an expreſs denial of a rent-ſervice, nor keeping the land without any thing diſtrainable by law upon it, amounts to a diſſeiſin. Yet, the annotator allows, that there is an ancient pleading in aſſiſe to warrant the doctrine, the material words of which he gives at length.

(4) See ſeveral authorities accordingly cited in the caſe of the ſix carpenters 8. Co. 146. b. & 147. a. There too lord Coke ſtates the diverſities in point of effect, between tender on the land before diſtreſs, tender after diſtreſs and before incloſure, and tender after incloſure. See alſo Hob. 207.

ſcous, for that it is defended by law to diſtreine in the (1) high way. And by the ſame reaſon if the lord will diſtreyne *averia carucæ*, where there is a ſufficient diſtreſſe to be taken (2) beſides, or if the lord diſtrayne any thing that is not diſtreynable, either by the common law, or by any ſtatute, the tenant may make reſcous.

Note, there is a reſcous in deed and a reſcous in law. Of a reſcous in deed ſomewhat hath already been ſpoken. A reſcous in law is, when a man hath taken a diſtreſſe, and the cattle diſtreyned as he is driving of them to the pownd goe into the houſe of the owner, if he that tooke the diſtreſſe demand them of the owner, and he deliver them not, this is a reſcous in law, and ſo of the like. (Ant. 47. b. F. N. B. 102. C.) 3. E. 3. Reſcous 12.

And every word of *Littleton* is materiall, for he ſaith;

En la terre tenus de luy. And therefore if the lord diſtreyne out of his fee in lands not holden of him, the tenant may make reſcous, unleſſe it bee in ſome ſpeciall caſes.

As if the lord come to diſtreyne cattle which he ſeeth then within his fee, and the tenant or any other to prevent the lord to diſtreyne, drive the cattle out of the fee of the lord into ſome place out of his fee; yet may the lord freſhly follow, and diſtreyne the cattle, and the tenant cannot make reſcous, albeit the place wherein the diſtreſſe is taken is out of his fee, for now in judgement of law the diſtreſſe is taken within his fee, and ſo ſhall the writ of reſcous ſuppoſe. 44. E. 3. 20. 6. R. 2. Reſcous 11. 11. H. 7. 4. 21. H. 7. 40. 34. H. 6. 18. 16. E. 4. 10. lib. 9. fol. 22. in caſe de avowrie. (9. Co. 22. Plowd. 37. b. 38. a. 2. Inſt. 131. Poſt. 268. b. 1. Ro. Abr. 671.)

But if the lord comming to diſtreyne 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 goe out of the fee, or if the tenant after the view remove them for any other cauſe than to prevent the lord of his diſtreſſe, then cannot the lord diſtreyne them out of his fee, and if he doth the tenant may make reſcous.

If a man come to diſtreyne for *damage feaſant*, and ſee the beaſts in his ſoyle, and the owner chaſe them out of purpoſe before the diſtreſſe taken, the owner of the ſoyle cannot diſtreyne them, and if he doth, the owner of the cattle may reſcue them; for the beaſts muſt be damage feaſant at the time of the diſtreſſe; and ſo note a diverſitie. 16. E. 4. 10. 2. E. 2. avowrie 182. lib. 9. ubi ſupra.

There is a diverſity [*a*] betweene a warrant of record and a warrant or an authoritie in law; for if a *capias* be awarded to the ſheriſe to arreſt a man for felony, albeit the party be innocent, yet cannot he make reſcous. But if a ſherife will, by authoritie which the law giveth him, arreſt any man for felony which is not guiltie, he may reſcue himſelfe. (3) [*a*] 14. H. 7. 20. tit. Juſtice de peace 9. (6. Co. 54. a. 3. Inſt. 221.)

Replevin [*b*] Is derived of *replegiare* to redeliver to the owner upon pledges or furetie. [*b*] Brit. fol. 108. Fleta lib. 4. cap. 1. Mirror cap. 2. ſect. 15. (Ant. 145. b.)

[*c*] Alſo to counterplead the plaintife in an aſſiſe, by which he is delayed, maketh him that pleadeth it a diſſeiſor. Otherwiſe it is, if he had pleaded *nul tort*, &c. [*c*] 24. Aſſ. 3. 29. Aſſ. 52. Fleta lib. 4. cap. 1. Britton fol. 108.

Encloſer is here alſo deſcribed, and need no other explication; for the lord cannot [*d*] breake open the gates, or breake down the incloſures to take a diſtreſſe, and therefore the law accounts it a diſſeiſin. But all theſe are intended by *Littleton* to be diſſeiſins after an actuall ſeiſin had, and when the rent is behind: otherwiſe none of theſe are diſſeiſins at all. [*d*] 10. E. 3. 9. 49. E. 3. 14. 7. E. 3. 3. 11. H. 7. 28. 8. Aſſ. 18. 10. E. 4. 2.

But wherefore ſhould a reſcous of the diſtreſſe by the party himſelfe, or a replevin which is a redelivery of the diſtreſſe by the ſherife by the courſe of law to the partie, be any diſſeiſin of the rent ſervice? *Littleton* doth here yeeld the true reaſon; becauſe that by the reſcue, and by the ſuing of the replevyn, the lord is diſturbed of the meane by the which he ought to have and come to his rent, *viz.* of the diſtreſſe. Bract. lib. 4. fol. 161. 204. Britton fol. 108. Fleta lib. 4. cap. 1.

And ſo it is of an incloſer; for he that diſturbes a man of the meane diſſeiſeth him of the thing it ſelfe, [*e*] as the turning of the whole ſtreame that runnes to a mill is a diſſeiſin of the mill it ſelfe. [*e*] 9. Aſſ. 19. Mirror ca. 2. ſect. 15. Brit. fol. 108. 114. 118. 141.

So it is if a man be diſturbed to enter and manure his land, [*f*] this is a diſſeiſin of the land it ſelfe; for *qui adimit medium dirimit finem*, and *qui obſtruit aditum deſtruit commodum*. [*g*] And therefore where it is ſaid, that a man ſhall not be puniſhed for ſuing of writs in the king's court, be it of right or wrong, it is regularly (4) true, but it fayleth in this ſpeciall caſe of the writ of replevyn for the cauſe aforeſaid. [*b*] But *denier* is no diſſeiſin of a rent ſervice without reſcous or reſiſtance. [*f*] 26. Aſſ. 17. 3. E. 4. 2. per Littl. 49. E. 3. 14. b. [*g*] F. N. B. 42. g. 22. E. 3. 15. 43. Aſſ. 40. 43. E. 3. 20. faux judg. 10. 8. E. 4. 15. per Moyle. 2. R. 3. 19. (Hob. 205. 266. 1. Mod. 4. Cro. Eliz. 836. 1. Sid. 463.) [*h*] 3. E. 3. 75. 8. H. 6. 11.

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(1) It is ſo provided by the ſtatute of Marlebridge chap. 15. But the king is excepted. See the commentary on that ſtatute in 2. Inſt. 131. Some diſtreſſes alſo by the ſubject are not within this proviſion, of which there are inſtances given with the reaſons in 2. Inſt. 133. and lord Hales' notes on F. N. B. 90. A.

(2) Acc. ant. 47. a. and more at large in 2. Inſt. 133.

(3) But, ſuch arreſt *virtute officii* being made on a juſt ground of ſuſpicion of felony, the party reſcues himſelf at his peril; for, according to lord Hale, if in the attempt to make the reſcue he is upon neceſſity ſlain, it is no felony in the officer; and on the ſame principle if the officer is killed it will be murder. 2. Hal. H. P. C. 85. 86. 87. 92. 93. The obvious reaſon is, that the law makes it a duty in the ſheriff and certain other officers to arreſt for felony on juſt ſuſpicion; and therefore reſcue from ſuch arreſt is reſiſtance of a lawful authority. If this be ſo, lord Coke is here too unqualified in expreſſion. See further on this point Foſt. 270. 1. Burn's Juſtice tit. *Arreſt*, and Dougl. Rep. 345.

(4) Acc. Dy. 285. a. 4. Co. 146. b. 1. Bulſtr. 141. But on this rule it may be aſked, whether the law of England is ſo defective as to furniſh no remedy for the injury of being harraſſed by vexatious and groundleſs ſuits, or, to uſe the language of the Roman law, no penalty to reſtrain the *temerè litigantes?* It may be anſwered, that the rule is not to be underſtood ſo largely; for certainly there are various proviſions, the object of which is to diſcourage the commencement of ſuits from an unjuſt or improper ſpirit of litigation. I. By the antient law no perſon could proſecute a civil action without having in the firſt ſtage of it two or more perſons as pledges of proſecution; and if judgment was given againſt the plaintiff or he deſerted his ſuit, both he and they were liable to amercement to the king either for not proſecuting or *pro falſo clamore;* and hence the clauſe of *ſi fecerit te ſecurum* in writs ſummoning the defendant to anſwer. Mirr. c. 1. ſ. 3. c. 2. ſ. 24. Ant. 126. b. 127. a. Originally theſe pledges were or ought to have been real and reſponſible perſons; and the amercement of them and their principal was an actual branch of royal revenue; the aſcertainment of the ſum to be paid as an amercement being ſometimes by the jury impannelled to try the iſſue, and ſometimes by a jury ſummoned for that ſpecial purpoſe by the coroner on receiving an eſtreat of the amercement. F. N. B. on the writ of *miſerata miſericordia* 75. K. Griefley's caſe 8. Co. 39. a. Beecher's caſe 8. Co. 61. a. But this guard at length loſt all its vigor, and even ſo early as in the reign of Edward the Fourth appears to have evaporated into mere form. 18. Ed. 4. 9. b. pl. 19. However as a form it ſtill continues; and if omitted was a ground either for a demurrer or for a writ of error, till the legiſlature interpoſed by two different ſtatutes, the laſt of which has been ſo liberally conſtrued as ſcarce to make it poſſible to take advantage of the non-return or non-entry of pledges in any ſtage of a *civil* ſuit. See 3. Bulſt. 61. and the caſe of Huſſey v. Moore on a *penal* ſtatute ibid. 175. where the ſubject of pledges is moſt learnedly inveſtigated. See alſo Forteſc. Rep. 330. 1. Wilſ. 226. 2. Wilſ. 142. II. As the amercement leviable on a plaintiff and his pledges belonged wholly to the king in reſpect of and by way of penalty for troubling his courts improperly, it became neceſſary to have a diſtinct proviſion in favor of defendants who were unjuſtly ſued; and for this purpoſe the legiſlature introduced coſts in their favor. The firſt law giving coſts to a defendant is ſaid to be the ſtatute of Marlebridge c. 6. which gave an action to the lord where he was defrauded of wardſhip by his tenant's colluſively enfeoffing his heir within age, but at the ſame time directed, that the feoffee ſhould have his damages and coſts where he was maliciouſly impleaded. 52. Hen. 3. c. 8. and 2. Inſt. 112. This proviſion for one particular caſe was, but not till after a long interval, followed by various ſtatutes of a *general* kind, under which at this day a defendant is almoſt univerſally intitled to coſts where the ſuit terminates againſt the plaintiff. See 22. H. 8. c. 15. 4. Jam. 1. c. 3. 8. Eliz. c. 2. 13. Cha. 2. ſt. 2. c. 2. 8. & 9. W. & M. c. 11. 4. & 5. An. c. 16. to which add Law of Niſi Pri. ed. of 1775. chap. 8. p. 328. Mr. Serjeant Sayer's Law of Coſts c. 8. 9. & 10. and Mr. Crompton's Pract. of K. B. & C. P. common placed, 2. ed. v. 2 p. 461. But the ſtatutory proviſions are confined to ſuits in the king's courts of common law. X However our courts of equity ſupply this ſeeming defect by the exerciſe of a diſcretion in awarding coſts to a defendant, which is conſtantly done as

X [illegible]

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Britton ubi ſupra. Fleta lib. 4. cap. 1.

SONT 4 cauſes de diſſeiſin de rent charge. And you may adde a fifth, *viz.* reſiſtance to diſtreine, counterpleading and vouching a record and fayler thereof, as hath beene ſaid before. (1)

ET ſont 4 cauſes de diſſeiſin de rent charge; ſcilicet, reſcous, replevin, enclo-ſure, & denier, car denier eſt un diſſeiſin de rent charge, come eſt avantdit de rent ſeck.

AND there bee foure cauſes of diſſeiſin of a rent charge; *ſcz.* reſcous, replevin, incloſure, & deniall, for denyall is a diſſeiſin of a rent charge, as is ſaid before of a rent ſecke.

14. E. 4. 4. 35. H. 6. 7. 3. Aſſ. 8. 10. E. 3. 9. 40. E. 3. 24. 3. H. 6. 35. 3. E. 3. 75. 29. Aſſ. 51. 39. Aſſ. 4. 40. Aſſ. 3. 13. E. 1. Aſſ. 40. 3. Aſſ. 8. 8. H. 6. 11. 18. E. 3. Aſſ. 78. (Cro. Cha. 507.)

Denier. Deniall is a diſſeiſin of a rent charge, aſwell as of a rent ſecke; albeit he may diſtreine for the rent charge, aſwell as for a rent ſervice. *Nota*, that when bookes ſay that a detainer of a rent charge or ſecke is a diſſeiſin, it muſt be intended upon a demand made. (2)

If there be two joyntenants, and the grantee of a rent charge diſtreine for the rent, and one of them make reſcous, they are both diſſeiſors; (3) for a diſtreſſe for the rent is a demand in law, and then the non-payment is a deniall and a diſſeiſin; but he that made the reſcous is onely the diſſeiſor with force.

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49. E. 3. 15. 29. Aſſ. 5. 36. Aſſ. 7. 10. E. 3. 19. 33. H. 6. 35. 35. H. 6. 7. b.

THE reaſon, wherefore incloſure is a diſſeiſin of a rent ſecke, is, becauſe the grantee cannot come upon the land to demand it.

ET deux ſont cauſes de diſſeiſin de rent ſeck; ceſtaſcavoir denier & encloſure.

AND there be two cauſes of diſſeiſin of a rent ſecke, that is to ſay, deniall and incloſure.

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[*] Fleta lib. 1. cap. 42. 49. E. 3. 14. 49. Aſſ. 5. 29. Aſſ. 49. (3. Inſt. 195.)

FORSTALLA, [*] foreſtellamentum, ſignifieth *obtruſionem viæ vel impedimentum tranſitûs &c.*

Ove force & armes. *Vi & armis.*

[i] Vid. ſect. 431. (Poſt. 257. b.)

Force, *vis*, in [i] the common law is moſt commonly taken in ill part, and taken for unlawfull violence, for *maximè paci ſunt contraria vis et injuria.* And therefore *Britton* ſaid well, ſpeaking in the perſon of the king, *nous volons, que touts gents plais uſent judgement que force.* (4) *Arma.* Armes in the common law ſignifieth any thing, that a man ſtriketh or hurteth

ET il ſemble, que il y ad un auter cauſe de diſſeiſin de touts les trois ſervices avantdits, ceſtaſcavoir, ſi le ſeignior ſoit en alant a la terre tenus de luy pur diſtreyner pur le rent arere, & le tenant ceo oyant luy encounter, & luy forſtala la voy oveſque force & armes, ou luy menace en tiel forme que il ne oſaſt

AND it ſeemeth, 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 for to diſtreine for the rent behind, and the tenant hearing this encountreth with him, foreſtalleth him the way with force and armes, or menaceth him in ſuch forme, that *vener*

(1) Ant. 160. b.
(2) This is agreeable to Littleton's deſcription of ſuch a diſſeiſin in ſect. 233. See W. Jo. 414.
(3) See acc. as to attornment by one of two jointenants, ſect. 566.
(4) Britt. 116. a.

ſee 2. Blk. 553 as often as they think, that, from the want of equity in the plaintiff or on any other account, he ought to have coſts. III. Where two or more conſpire to harraſs any perſon by a falſe and malicious ſuit whether *criminally* or *civilly*, it is a crime puniſhable by indictment, or the parties injured may ſue for damages by writ of conſpiracy; and both of theſe remedies lie at common law, that part of the ſtatute or ordinance of *articuli ſuper chartas*, which gives remedy againſt conſpirators by writ out of chancery, being according to both Staundford and lord Coke only an affirmance of the common law. Staundf. P. C. 172. 2. Inſt. 561. 562. IV. There is alſo a remedy for a *falſe* and *malicious* proſecution, though the aggravation of a conſpiracy or confederacy is wanting and the injury comes from one only; for in ſuch a caſe the party proſecuted may have an action upon the caſe for damages. I apprehend too that ſuch action lies, as well where the vexation is practiſed by a *civil* ſuit, as where it is carried on through the medium of a criminal proceſs. F. N. B. 114. D. Indeed the numerous caſes to be met with in the books are chiefly for criminal proſecutions. See 1. Vin. Abr. 17. to 35. and the caſe of Farmer v. Dalling 4. Burr. 1971. But there ſeems to be no reaſon for diſtinguiſhing between the writ of conſpiracy and an action upon the caſe in this reſpect; and excluſively of other authorities which may probably be found upon a ſearch, lord Hobart, mr. ſerjeant Rolle, and lord Holt, all concur in the idea, that where a *civil* ſuit is commenced falſely and maliciouſly and for the mere purpoſe of vexation it is actionable. See Hobart's argument in Waterer v. Freeman Hob. 205. 266. Rolle's words in Sty. 379. and Holt's argument in giving judgment in Savill v. Roberts reported in 12. Mod. 208. 1. L. Raym. and other books, and the caſe of an action for falſely and maliciouſly ſuing out a commiſſion of bankruptcy in 1. Blackſt. Rep. 427. However from the language of a caſe in Dyer and of another in lord Coke's Reports, I doubt, whether actions on the caſe for falſe and malicious proſecutions were in general allowed in the reign of Elizabeth. Dy. 285. a. 4. Co. 14. b. V. In ſome ſpecial caſes, a plaintiff failing in his action is expoſed to the *direct* and *immediate* puniſhment of fine and impriſonment by the court in which he ſues, without the benefit of a jury to aſſeſs the fine, or the circuity of a ſeparate proſecution to try the malice. This is the law in certain actions which are of a high nature, where the injury of which the defendant is accuſed concerns life or limb, or is otherwiſe of an atrocious kind, as in appeals of felony or mayhem, and in attaint; for in all theſe the plaintiff may be fined and impriſoned by the court, if he be barred or nonſuited, or if the writ abates by his own default. Beecher's caſe 8. Co. 60. a. It is the ſame, where the action, though not of ſo high an order, is *apparently* vexatious; for on this principle a plaintiff, who ſues the

ſame

vener a ſa terre pur diſtreiner pur ſon rent arere pur doubt de mort ou mutilation de ſes members, ceo eſt un diſſeiſin, pur ceo que le ſeignior eſt diſturbe de le meane, per que il doit vener a ſon rent. Et iſſint eſt, ſi, per tiel forſtalment ou menace, celuy que ad un rent charge ou rent ſecke eſt forſtalle, ou ne oſaſt vener a la terre a demaunder le rent arere, &c.

hee dare not come to the land to diſtreine for his rent behinde for doubt of death, or bodily hurt, this is a diſſeiſin, for that that the lord is diſturbed of the meane whereby hee ought to come to his rent. And ſo it is, if, by ſuch foreſtalling or menacing, hee that hath rent charge or rent ſecke is foreſtalled, or dare not come to the land to aſke the rent behinde, &c.

withall. [k] *Omnes illos dicimus armatos, qui habent cum quo nocere poſſunt. Telorum autem appellatione omnia, in quibus ſinguli homines nocere poſſunt, accipiuntur. Sed ſi quis venerit ſine armis, & in ipſâ concertatione ligna ſumpſerit, fuſtes & lapides, talis dicetur vis armata: ſed ſi quis venerit cum armis, armis tamen ad dejiciendum non uſus fuerit, & dejecerit, vis armata dicitur eſſe facta, ſufficit enim terror armorum ut videatur armis dejeciſſe.* And, *Armorum quædam ſunt tuitionis (& quod quis ob tutelam corporis ſui vel ſui juris fecerit, juſtè feciſſe videtur) quædam pacis & juſtitiæ, quædam perturbationis pacis, & injuriæ; quædam uſurpationis rei alienæ.*

[k] Bracton lib. 4. fo. 162. & lib. 3. fol. 144. Fleta lib. 4. cap. 4.

Againe, *Armorum quædam ſunt moluta, et quædam quæ faciunt bruſuram, etc. Arma moluta plagam faciunt; ſicut gladius, biſacuta, et hujuſmodi, ligna verò et lapides bruſuras, orbes, et ictus, etc.* To conclude this, it is truly ſaid, that *armorum appellatione non ſolùm ſcuta et gladii et galeæ continentur, ſed et fuſtes et lapides.* As the poet ſaith: (3 Inſt. 161. 162.)

Jamque faces et ſaxa volant; furor arma miniſtrat. Virgil 1. Æneid.

Sed vim vi repellere licet, modò fiat moderamine inculpatæ tutelæ, non ad ſumendam vindictam, ſed ad propulſandam injuriam.

Pur doubt de mort & mutilation de ſes members. For it muſt not be *vagus & vanus timor, ſed talis, qui cadere poſſit in virum conſtantem, & non in hominem vanum & meticuloſum; talis enim debet eſſe metus, qui in ſe continet mortis periculum & corporis cruciatum.* *Littleton* here ſaith, it muſt be for feare of death * or mutilation of members. *Et nemo tenetur exponere ſe infortuniis & periculis.* (1) And therefore a foreſtalment with ſuch a menace is a diſſeiſin; not onely (ſaith *Littleton*) of a rent ſervice, but alſo of a rent charge and rent ſeck. Theſe be all the diſſeiſins of a rent that our author ſpeakes of. See hereafter [l] where a diſſeiſin ſhall be by way of admittance of the owner of the rent. And *Littleton* doth adde the binding reaſon in caſe of foreſtalment, becauſe the lord is diſturbed of the meane by which he ought to come to his rent, whereof there hath beene ſpoken ſufficient before, (2) as well in caſe of the rent charge and rent ſecke, as of the rent ſervice.

Bracton lib. 2. 16. Britton fol. 19. & 88. Fleta lib. 3. ca. 7. (Poſt. 253. b.)

* See of this in the Chapter of Deſcents. 49. E. 3. 14. 49. Aſſ. 5. 29. Aſſ. 49. &c.

[l] Vid. ſect. 589.

&c. Of the (*&c.*) in the end of this ſection, and what is implyed therein, ſufficient hath beene ſpoken before.

Now hath *Littleton* ſpoken of remedies for the recovery of the arrerages of rents. But ſince *Littleton*'s time a right profitable ſtatute * in the 32. yeare of *H.* 8. hath beene made for the recovery of arrerages of rents in certaine caſes where there lay no remedy at the common law, and giveth further remedy in ſome caſes where at the common law there was ſome (3) remedy; which ſtatute hath beene well and beneficially expounded; and hereupon eight things are to be obſerved.

* 32. H. 8. cap. 37. (5. Co. 118. Dy. 375. b. 7. Co. 39. b. Ant. 148. a.)

1. When *Littleton* wrote, the heires, executors, or adminiſtrators, of a man ſeiſed of a rent ſervice, rent charge, rent ſecke, or fee farme, in fee ſimple or fee taile, had no remedy for the arrerages 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 diſtreine or to have an action of debt.

4. Co. 49. 50. a. Ognell's caſe. 40. E. 3. Execution 98. 45 E. 3. hb. 71. 9. H. 6. 43. 14. H. 8. 20. 19. H. 6. 43. 34. H. 6. 20. 32. E. 3. Det. 9. 9. H. 7. 17. 19. E. 3. juriſdiction 22. (Cro. Cha. 471. 472.)

2. 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 *ceſtuy que vie* liveth, (4) who are alſo holpen 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 diſtreyned

(1) See more fully on this ſubject poſt. 253. b.

(2) Ant. 161. a.

(3) See as to this point infra note 4. and 162. b. note 1.

(4) This paſſage of lord Coke has been cited to prove, that he was of opinion againſt extending the *remedy* of the ſtatute to the executors of a tenant for his own life, who before the ſtatute were intitled to action of debt, but could not diſtrain. See Hool v. Bell in 1. L. Raym. 172. But I think, that lord Coke was miſunderſtood. He appears to me to have merely intended to guard againſt an error of law, into which the generality of the *preamble* of the ſtatute might lead uninformed perſons; the preamble reciting that the executors of *tenants for life* had no remedy, without diſtinguiſhing what kind of tenants for life, whereas in truth the executors of tenant for *his own life*, and alſo the executors of tenant *pur autre vie* after death *of ceſtui que vie*, had remedy by action of debt before the ſtatute. That it was not the meaning of lord Coke to reſtrict the benefit of the ſtatute to caſes in which there was no remedy before, and on that account to exclude the executors of tenants for their own lives from the remedy of diſtreſs given by the ſtatute, is to me clear; becauſe he himſelf ſtates both in a preceding and in a ſubſequent paragraph, that the ſtatute ſometimes operates by adding a remedy to that before exiſting at common law. See further as to this point, poſt. note 1. in 162. b.

ſame perſon in two different courts for the ſame cauſe, may be fined. Ibid. and 14. H. 7. 7.—The reſult, as to the law at preſent and ſince pledges of proſecution have become a mere formality, ſeems to be this. No man is actionable for *merely ſuing* whether in a criminal or civil form, however falſe the ſuit may be in foundation; nor is otherwiſe puniſhable, except in the caſe of a civil ſuit, by the payment of coſts. But if the ſuit be *malicious* as well as *falſe*, it is on that account puniſhable; ſometimes by indictment or information, as in the caſe of a conſpiracy; ſometimes by immediate fine and impriſonment in the court in which the malicious ſuit is carried on, as in appeals of felony or mayhem or in attaint; and ſometimes by action of the party fined, as where a damage can be proved, or where from the groſſneſs or criminality of the charge or imputation the law ſuppoſes a damage to be inevitable.—Such are the various proviſions of our law to deter men from becoming *plaintiffs* or complainants without juſtifiable cauſe. As to the proviſions againſt obſtinate or vexatious *defendants*, theſe being rather beyond the principle for explanation of which this note was begun, and the note itſelf being already ſo extended, I ſhall be content with obſerving, that, excluſively of the finding of damages and award of coſts againſt ſuch defendants, there is in ſome few caſes of a very ſpecial nature a power in the court to puniſh their miſbehaviour by fine and impriſonment. See Dy. 67. a. & b. Beecher's caſe 8. Co. 59. & 60.—See further on the general ſubject of this note, Cow. Inſt. Jur. Anglic. lib. 4. tit. 16.

distreyned, which now they may doe by force of this statute; for in that point it addeth [m] another remedy, than the common law gave. (1)

[m] 23. Eliz. Dier 375. (Ant. 146. b.)

3. If a man make a lease for life or lives, or a gift in taile, reserving a rent, this is a rent service within this statute.

26. E. 3. 64. 11. H. 4. fol. ult. Ognel's case ubi supra. & 7. Co. 39. b. Lillington's case.

4. The distresse is the more plaine and certain remedy than the action of debt; for the action of debt must be brought against them that tooke the profits when the rent became behinde, or against their executors or administrators; but the distresse may be taken upon the land, be it either in the tenants owne hands or in the hands of any other that claimes by or from him, (that is by interpretation under him) by purchase, gift or descent. And these words, *claiming onely by and from him*, are to be understood claiming onely from or under him by purchase, gift, or descent, and not paramount or above him; as the lord by escheate claimeth not under the tenant by purchase, gift, or descent, but by reason of his seigniory which is a title paramount. (2)

(2. Sid. 29.)

5. If there be lord and tenant, and the rent is behinde, and the lord grant away his seigniory, and dyeth, the executors shall have no remedy for these arrerages; because the grantor himself had no remedy for them when he dyed 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 giveth no remedy; when the testator himselfe hath dispenced with the arrerages or had no remedy when he dyed. (3)

(4. Co. 51.)

6. If the tenant make a lease for life the remainder for life, the remainder in fee, the tenant for life payes not the rent due to the lord, the lord dyeth, the tenant for life dyeth: the executors cannot distreine upon him in remainder, because he claimes 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 letteth the lands to *C.* for life, the remainder to *D.* in fee, the rent is behinde by divers yeares, *B.* dyeth, and after *C.* dyeth: *A.* may distrein *D.* in remainder for all the arrerages, by the latter branch of the statute of 32. *H.* 8. And this diversity riseth upon the severall pennings of the former branch and of this later, which you may reade in the statute it selfe, and so expounded and adjudged [o] in *Edridge*'s case, and the latter clause giveth the lesser estate the greater remedy.

[o] 5. Co. 118. Edridge's case.

7. For the arrerages of a *nomine pœnæ*, and for reliefe, or for aid *pur faire fits chivaler* or *pur file marier*, this statute * giveth no remedy. For, for the arrerages of the *nomine pœnæ*, the grantee himselfe may have an action of debt, and consequently his executors or administrators; and yet the *nomine pœnæ* as an incident to the rent shall descend to the heire. For reliefe the lord cannot have an action of debt but distreine; but his executors by [p] the common law shall have an action of debt (4), for it is no rent but a casuall improvement of services. For the said aides, if the lord doth levy them, the sonne and the daughter respectively shall have an action of debt against the executors or administrators of the lord, and if they have nothing, then against the heire; but this is by the statute [q] of *W.* 1. *Note*, that all manner of arrerages of rents issuing out of a freehold or inheritance, whether they be in money or corne, cattell, fowle, pepper, comine, victuall, spurres, gloves, or any other profit to be delivered or yeelded, and whether they be annuall or every three or four yeares, &c. or the like, are within this statute; but work dayes, or any corporall service, or the like, are not within this statute.

* 40. E. 3. 3. b. 11. H. 4. 85. 14. E. 4. 4. 20. H. 7. 1. a. 28. H. 8. Dier 24.

[p] 34. E. 1. Avowry 233. F. N. B. 122. 10. H. 6. 11. 11. H. 6. 8. Mich. 32. H. 8. Rot. 429. Leake's case. Ognel's case ubi supra. 3. E. 3. Debt 157. (3. Co. 66. Cro. Eliz. 893.)

[q] W. 1. ca. 36. F. N. B. 82. 122.

8. A feme sole is seised of a rent in fee, &c. which is behinde and unpaid; she taketh husband; the rent is behinde again; the wife dyeth: the husband by the common law should not have the arrerages growne due before the mariage, but for the arrerages become due during the coverture the husband might [r] have an action of debt by the common law. But now this statute * by a particular clause giveth the husband the arrerages due before mariage, and the said double remedy for the same, and that he may distreyne for the arrerages growne due during the coverture. So it giveth him that which he could not have before, and further remedy for that which the common law gave him. And so it hath beene [s] adjudged.

[r] 26. E. 3. 64. 10. H. 6. 11. (Cro. Jam. 28.)
* 22. H. 6. 25. F. N. B. 121. (Post. 351. b.)

The bishop of [t] *Norwich* had the first-fruits of all the clergy within the dioceese at every avoydance; the church became void, and another parson became incumbent, who paid the bishop parcell of his first-fruits according to the taxation of the church, and for the rest he had a day given unto him to pay it; the bishop dyed; the residue was not payd, whereupon his executors brought an action of debt: and it is adjudged that no action doth lie, because it is a meere spirituall thing and no lay contract, and therefore the court had no jurisdiction to hold plea of it.

[s] Hill. 17. Eliz. Rot. 457. inter Sharpe & Pole. Vide Ognel's case ubi supra.
[t] 19 E. 3. Jurisdict. 22.

I have beene the longer in the exposition of the said statute, (5) for that it is a generall case, and doth concerne most part of the subjects of England. (6)

Finis Libri Secundi.

THE

(1) This doctrine is impugned by the court's resolution in *Turner* v. *Lee* Cro. Cha. 471. for according to that case the statute of II. 8. only applies, where the common law gives no remedy. To this construction also the preamble of the statute affords countenance. However in a case in Cro. Eliz. 332. it seems to have been taken for granted, that the statute did not operate thus restrictively; and in *Hoole* v. *Bell* 1. L. Raym. 172. it was adjudged, that the statute being remedial extends to the executors of *all* tenants for life, as well to those executors who previously to the statute were intitled to action of debt, as to those executors who had no remedy whatever. Ever since too this last case, I apprehend the law to have been taken accordingly. See further as to this construction, ant. 162. a. note 4.

(2) For other cases not within the statute on a like ground, see Cro. Eliz. 332. 1. Leon. 302. 2. Vern. 612. See also on the extent of this branch of the statute Edridge's case, 5. Co. 118.

(3) Acc. by Vaughan chief justice, in his Reports 40.

(4) Adjudged accordingly in a case in Noy 43. and Cro. Eliz. 883. See also acc. ant. 83. a. & b.

(5) In 18. Vin. Abr. 542. most of the cases on this statute since lord Coke's time will be found distributed according to the several clauses. See also Gilbert on Action of Debt, b. 1. chap. 2. & 3.

(6) The only clause in the statute of Cha. 2. for converting military into common socage tenures, which seems to affect rents, is a proviso to preserve rents certain, and to make the reliefs on them universally the same as on the death of tenant in common socage. See 12. Cha. 2. c. 24. s. 5. and as to the difference between relief for knight's service and relief for common socage, ant. sect. 112. and 126. with the commentary thereon. But various other statutory provisions relative to rents have been made since lord Coke's time; and as these are very material to the recovery of rents, it may not be amiss here to take a general review of the chief of them, though some have been incidentally noticed before in the chapters on *tenants for years* and *tenants at will*. I. There are several statutes, which extend the remedy for arrears of rent by action of debt. By the 8. Ann. c. 14. debt is given for rents on leases for a life or lives *during their continuance*, which the common law denied. Ant. 47. a. note 4. The 11. G. 2. c. 19. gives action on the case to executors of a lessor or landlord, being only tenant for his own life, where he dies before or on a rent-day, and by his death the lease determines, in which case the lessee or under tenant by the common law might have avoided paying any rent. And by the 5. G. 3. c. 17. which enables ecclesiastical persons to lease tithes and other incorporeal inheritances, debt is given for recovery of rent on such leases. Ant. 47. a. note 4. II. Other statutory provisions extend the remedy for rents by distress to cases to which it was before inapplicable, particularly to *rents seck*. Thus the 4. G. 2. c. 28. on account of the tediousness and difficulty of the remedy for rent seck and also rents of assize and chief rents, (though why these two latter were added I do not understand) enables distraining for such rents, where they have been duly answered for three years within twenty years before the first day of the then session of parliament, *or where created afterwards*, as in case of rent on a lease. So too the 4. Ann. c. 14. gives distress for arrears of rent *after determination* of any lease, whether for life or lives, for years or at will, but with a proviso, that the distress be within six kalendar months after such

THE

THIRD BOOK

OF THE

FIRST PART

OF THE

INSTITUTES

OF THE

LAWS OF ENGLAND. (1)

Chap. I. Of Parceners. Sect. 241.

PArceners ſont en deux maners, ceſt-aſcavoir ; parceners ſolonque le courſe del common ley, & parceners ſolonque cuſtome. Parceners ſolonque le courſe del common ley ſont, l'ou home, ou feme, ſeiſie de certaines terres ou tenements en fee ſimple ou en taile, n'ad iſſue forſque files, et devie, et les tenements diſcendont a les iſſues (2), et les files entront en les terres ou tenements iſſint

PArceners are of two ſorts, to wit; parceners according to the courſe of the common law, and parceners according to the cuſtome. Parceners after the courſe of the common law are, where a man, or woman, ſeiſed of certaine lands or tenements in fee ſimple or in taile, hath no iſſue but daughters, & dieth, & the tenements deſcend to the iſſues, and the daughters enter into the lands or tenements

OUR author having treated in his two former bookes, firſt of eſtates of lands and tenements, and in his ſecond booke of tenures whereby the ſame have beene holden, now in his third booke doth teach us divers things concerning both of them, as, 1. The qualities of their eſtates. 2. In what caſes the entry of him that right hath may bee takenaway. 3. The remedies, and in what caſes the ſame may be prevented, or avoyded. 4. How a man may bee barred of his right for ever, and in what caſes the ſame may be prevented or avoyded.

For the firſt, he, having ſpoken of ſole eſtates, divideth the quality of eſtates into individed and conditionall. Individed, into coparcenary, joyntenancy, and tenancy in common. Coparcenary, into parceners by the common

(1) In the vellum MSS. of Littleton belonging to the public library at Cambridge, there is the following argument or introduction to this third book.

" En ceſt tierce liver aſcun choſe ſera dit a toy, mon fitz, de parceners, de jointenantez, de tenantez in comen, de eſtatez " de terrez et tenementez ſur condition, de diſcentez que tollount entrez, de continuell clayme, de releiſſez et confirmationz, " de garrantiez liniall et collaterall et de garrantiez que comenſont per diſſeiſin, de attornament, de *ſurrenderons*, de diſcontinuance, de remitterez, de *tenant per elegit*, de *tenant per eſtatut merchant*, de *tenant per eſtatut de le ſtaple &c.*"

On this addition to the printed copies of Littleton, ſir William Jones, who kindly favoured me with the readings from the two Cambridge manuſcripts, writes this obſervation.—" It is very remarkable, that in this argument a chapter is promiſed concerning *ſurrenders*, of which Littleton has not expreſsly and ſeparately treated. The word *ſurrenderons*, which is abbreviated by the tranſcriber, ſeems completely to have puzled a former owner of the manuſcript. He ſays in the margin, *ceſte parole eſt en autre fragment que jeo ay : quære ce que il ſignifie.* Since then *ſurrenders* are mentioned in two manuſcripts as one of the heads of the third book, it is not improbable, that the author intended to have written a diſtinct chapter concerning them, as he did write concerning *tenants by* ELEGIT and by STATUTE MERCHANT and STAPLE."—See ſect. 324. where Littleton refers to a chapter on *elegits*.

(2) In L. & M. and in Roh. it is *filles* inſtead of *iſſues*.

ſuch determination and during continuance of the landlord's title and poſſeſſion of the tenant indebted; whereas by the common law the power of diſtreſs ceaſed with the tenure. III. Other ſtatutory proviſions have variouſly improved the remedy of diſtreſs for rents, where it is applicable; namely, by enabling the ſale of the property diſtrained and ſo giving to it the effect of an execution, by making new ſubjects of property diſtrainable, by newly regulating the mode of impounding diſtreſſes, by authorizing to diſtrain in *any place* things fraudulently carried off the premiſes to evade diſtreſs, and by preventing the avoidance of the *whole* diſtreſs for a mere informality or irregularity in *part* of the proceſs. See 2. W. & M. c. 5. 8. Ann. c. 14. 4. G. 2. c. 28. and 11. G. 2. c. 19. to which add 3. Blackſt. Com. 9th ed. 6. to 15. where the effect of theſe ſtatutes is admirably incorporated into his view of the law of diſtreſſes with his uſual excellence of order. IV. The 8. An. c. 14. ſ. 1. ſecures to landlords to the amount of a year's rent where ſo much or more is in arrear, in preference to perſons ſeizing goods on the land in leaſe under an execution; but this favour is granted with a proviſo to prevent prejudice to the crown in recovering and ſeizing debts fines and forfeitures.

Vide sect. 385.

common law, and parceners by the custome; and he beginneth his third book with parceners claiming by descent, which, comming by the act of law and right of bloud, is the noblest & worthiest meanes whereby lands doe fall from one to another. Conditional, into conditions expresse or in deed, and conditions in law. Conditions in deed, into gages which he divideth into *vadia mortua*, and *vadia viva*. *Vadia mortua*, so called because either money or land may be lost: and *viva*, because neither money nor land can be lost, but both preserved. Then speaketh he of descents, wherby the entry of him that right hath may be taken away. And next to that of the remedy how to prevent the same, *viz.* by continuall claim. Then he teacheth, how a man, having a defeasible or an imperfect estate, may perfect and establish the same by three meanes, *viz.* by releasse, by confirmation, and attournment, where that is requisite.

discendus a eux, donques els sont appels parceners, & quaunt a files els sont (1) *forsque un heire a lour ancestor. Et els sont appel parceners; pur ceo que per le briefe, que est appel briefe de* participatione faciendâ, *la ley eux voet cohercer, que partition serra fait enter eux. Et si sont deux files al queux les terres discendont, donque els sont appels deux parceners; et si sont trois files, donque els sont appels trois parceners; et si quater files, quater parceners; & issint ouster.* (2)

so descended to them, then they are called parceners, and be but one heire to their ancestour. And they are called parceners; because by the writ, which is called *breve de participatione faciendâ*, the law will constraine them, that partition shall be made among them. And if there be two daughters to whom the land descendeth, then they bee called two parceners; & if there bee three daughters, they bee called three parceners; and foure daughters, four parceners; and so forth.

Having spoken of a descent, being an act in law which taketh away an entry, he doth then speake of a discontinuance, the act of the party, whereby the entry of them that right have shall be taken away. And next unto that he teacheth in what case the same may be avoided by remitter. After he had treated of descents and discontinuances, which take away entries, but barre not actions, lastly, he setteth forth the learning of warranties, (a curious and cunning kind of learning I assure you) whereby both entry, action, and right may be barred, and the remedies how they may be prevented before they fall, and in what cases they may be avoyded after they be fallen. And thus have you an account of the thirteene severall chapters of his third booke. And now his method being understood, let us heare what our author will say unto us concerning parceners.

[a] Bract. lib. 2. fo. 66. 71. &c. & 76. &c. & lib. 5. fo. 443. Brit. fo. 58. 112. 128. 183. 184. 185. 189. 193. Flet. lib. 5. ca. 9. li. 6. ca. 47. Glan. li. 7. ca. 3. & li. 13. c. 11.

[b] Bract. li. 2. fo. 66. 76. Flet. ubi supr. Brit. ubi sup. & Statut de Hibern.

[c] Vide sect. 8. vers. fin.

Et quant a files els sont forsque un heire a lour [a] *ancester.* This is false printed; for the originall is, *et quanque files els sont, els sont parceners, et sont forsque un heire a lour aunceſtor.* (3)

Parceners. [b] *Jus descendit quasi uni hæredi propter juris unitatem, sicut sunt plures filiæ, &c. Et ubi omnes simul & in solidum hæredes sunt, plures cohæredes sunt quasi unum corpus, propter unitatem juris quod habent.* Whereupon it followeth, that albeit where there bee two parceners [c] they have moities in the lands descended to them, yet are they both but one heyre; and one of them is not the moity of an heire, but both of them are but *unus hæres.*

[d] Fleta lib. 5. ca. 9. Fleta lib. 6. ca. 47.

And it is to be observed, that there is a diversity betweene a descent, which is an act of the law, and a purchase, which is an act of the party. [d] For if a man be seised of lands in fee, and hath issue two daughters, and one of the daughters is attainted of felony, the father dieth both daughters being alive; the one moitie shall descend to the one daughter, and the other moitie shall escheat. But if a man make a lease for life, the remainder to the right heires of *A.* being dead, who hath issue two daughters, whereof the one is attainted of felony, in this case some have said, that the remainder is not good for a moitie, but voyd for the whole; for that both the daughters should have beene (as *Littleton* saith) but one heire. (4)

(1) See below note 3.

(2) In L. & M. and in Roh. an &c. comes in here.

(3) The words are as here corrected by lord Coke both in L. and M. and in Roh.

(4) See ant. 25. b. 26. b. and post. 196. b. 374. b. Here lord Hale introduces the following note.—*Donee in tail on condition not to discontinue. Donee has issue two daughters. One discontinues. The donor may enter. R. 26. Eliz. C. B. sir W. Moore's case.* Hal. MSS.

A man makes a gift in taile, reſerving two ſhillings rent to himſelfe during his life, and if he die his heire within age then reſerving a rent of twentie ſhillings to his heires for ever; he dieth having iſſue two daughters, the one of full age, the other within age: in this caſe the donee ſhall hold by fealtie onely, inſomuch as the one daughter as well as the other is his heire, and both of them (as *Littleton* ſaith) make but one heire, *ergo* his heire is not within age, neither is his heire in that caſe of full age. But if the reſervation had been, "and if he die, "his heire neither being within age, nor of full age, &c." in this caſe the reſervation had beene good. And if it doth not begin in his next heire, it ſhall never begin as this caſe is; for that the precedencie is not performed. [e] But yet if one of them be of age, and the other within age, ſhe ſhall have her age and other priviledges and advantages that an heire within age ſhall have; and when they are demandants, for the nonage of the one the paroll ſhal demurre againſt them both (1). [f] *Sunt autem plures participes quaſi unum corpus, in eo quòd unum jus habent; & oportet quòd corpus ſit integrum, & quòd in nullâ parte ſit defectus.* And when the right heire doth claime by purchaſe, he muſt be (ſay they) a compleat right heire in judgement of law. (2) And therefore if lands be given to a man and to the heires females of his bodie, and he hath iſſue a ſon and a daughter, and dieth, the daughter ſhall have the land by deſcent; but if a remainder be limited to the heires females of the bodie of *I. S.* and he hath iſſue a ſonne and a daughter, his daughter ſhall never take it by purchaſe, for that ſhe is not heire female of the body of *I. S.* becauſe he hath a ſonne.

(Poſt. 196. b.)

[e] Temps E. 1. Age 128. 8. E. 2. Judgement 240. 30. E. 3. 7. 44. E. 3. Age 47. 26. Aſſ. 65. 13. E. 3. Age 51. 28. Aſſ. 22. 29. Aſſ. 25. 57. 34. H. 6. 4. Aſſ. 17.

[f] Fleta lib. 5. ca. 9. et lib. 6. cap. 47. (1. Co. 103. 2. Ro. Abr. 416.)

If a man give lands to another, and to the heires males of his body, upon condition, that if he die without heire female of his bodie, that then the donor ſhall re-enter, this condition is utterly voyd, (3) for he cannot have an heire female, ſo long as he hath an heire male.

And as they be but one heire, and yet ſeverall perſons; ſo have they one entire freehold in the land, as long as it remaines undivided, in reſpect of any ſtranger's *præcipe*. [g] But betweene themſelves to many purpoſes they have in judgement of law ſeverall freeholds; for the one of them may infeoffe another of them of her part, and make liverie. [h] And this coparcenarie is not ſevered or divided by law by the death of any of them; for if one die, her part ſhall deſcend to her iſſue, and one *præcipe* ſhall lie againſt them, for they ſhall never joyne as heires to ſeverall auncеſtors in any action auncеſtrell, but when one right deſcends from one auncеſtour: and then *propter unitatem juris*, though they be in ſeverall degrees from the common auncеſtor, yet ſhall they joyne. But the iſſues of ſeverall coparceners, becauſe ſeverall rights deſcend, ſhall never joyne as heires to their mothers; and yet when they have recovered, a writ of partition lieth betweene them.

[g] 10. E. 4. 17. E. 3. 46. (Mo. 60.)

[h] 37. H. 6. 8. 19. H. 6. 45. (Poſt. 196. a.)

Vid. ſect. 313.

For example, [i] If a man hath iſſue two daughters, and is diſſeiſed, and the daughters have iſſue and die, the iſſues ſhall joyne in a *præcipe*; becauſe one right deſcends from the auncеſtor; and it maketh no difference, whether the common auncеſtor, being out of poſſeſſion, died before the daughters or after, for that in both caſes they muſt make themſelves heires to the grandfather which was laſt ſeiſed, and when the iſſues [k] have recovered they are coparceners, and one *præcipe* ſhall lie againſt them. And likewiſe if the iſſues of two coparceners, which are in by ſeverall deſcents, be diſſeiſed, they ſhall joyne in aſſiſe. But in the ſame caſe if the two daughters had been actually ſeiſed, and had beene diſſeiſed, after their deceaſes the iſſues ſhall not joyne; becauſe ſeverall rights deſcended to them from ſeverall auncеſtors: and yet when they have ſeverally recovered, they are coparceners, (4) and one *præcipe* lieth againſt them, and a releaſe made by one of them to the other is good. And ſo note a diverſitie *inter deſcenſum in capita, & in ſtirpes.*

[i] 7. E. 3. 30. 34. 48. E. 3. 14. 24. E. 3. 13. F. N. B. 221. 35. H. 6. 23. 27. E. 3. 89. 31. H. 6. 14. b.

[k] 37. H. 6 8. 9. E. 4. 13. b. 42. E. 3. 16. 17. (8 Co. 86. Poſt. 196. a. 364. b.)

And the ſtatute of *Glouceſter cap.* 6. made *anno* 6 *Edw.* 1. ſpeaketh, *ſi home murge, &c.* if a man dieth: ſo as that ſtatute extendeth not, but where one dieth, and hath divers heires, whereof one is ſonne or daughter, brother or ſiſter, nephew or neece, and the others be in a further degree, all their heires from henceforth ſhall have their recoverie by writ of mort-dauncеſtor. And this ſeemeth to me to be the common law; for *Bracton*, who writ before this ſtatute, ſaith, [l] *in caſu cùm ſit aſſiſa mortis anteceſſoris conjungenda cum conſanguinitate, non erit poſtea recurrendum ad præcipe de conſanguinitate, ſed ad aſſiſam mortis; quia perſona, quæ propinquior eſt, & facit aſſiſam, & trahit ad ſe perſonam & gradum remotiorem ut ubi potius procedat aſſiſa quàm præcipe, quia id, quod eſt magis remotum, non trahit ad ſe quod eſt magis junctum, ſed è contrario in omni caſu.* And herewith agreeth the moſt of our [m] bookes: and two coparceners ſhall have a writ of *ayel*, and by their count ſuppoſe the common auncеſtor to be grandfather to the one, and great grandfather to the other. (5)

(F. N. B. 195. H.)

[l] Bracton lib. 4. 254. b. Britton fol. 181. 182. & 178. 204. Fleta lib. 5. cap. 1. et 2. & 9. in fine.

[m] 19 E. 3. tit. Joyndre in Action 31. 7. E. 3. 30. et 34. 27. E. 3. 89. 48. E. 3. 14. 24. E. 3. 13. F. N. B. 221. Regiſter. Vide 32. E. 1. Joindre in Action 34. 13. E. 3. ibid 29. Temps E. 2. ib. 35. 30. E. 1. ibid. 36. 25. H. 6. 23.

I have beene the longer herein; for that this inheritance of coparceners is the rareſt kind of inheritance that is in the law.

Furthermore it is to be obſerved, that herein alſo in caſe of coparceners, [n] ſometimes the deſcent is *in ſtirpes*, (*viz.*) to ſtockes or roots; and ſometime *in capita*, to heads. As if a man hath iſſue two daughters and dyeth, this deſcent is *in capita*, *viz.* that every one ſhall inherit alike, as *Littleton* here ſaith. But if a man hath iſſue two daughters, and the

[n] Bracton lib. 2. 66. Britton cap. 71. Fleta lib. 5. cap. 9. et 6. cap. 47.

(1) But in the writ *de partitione faciendâ* the younger ſiſter ſhall not have her age againſt the elder. Poſt. 171. a.

(2) In a former note I have much at length, and as I fear tediouſly, endeavoured to ſupport lord Coke in this doctrine. Ant. 24. b. note 3. But ſince the writing of that note a caſe has been publiſhed, in which the court of king's bench after three arguments decided againſt applying the rule to a *will*. See Willes and others v. Palmer and others 5. Burr. 2615. In another caſe alſo, which was three times argued, the court of exchequer, as I underſtand, refuſed to apply the rule to a *marriage-ſettlement*. Evans on demiſe of Burtenſhaw *v.* Weſton determined in a ſpecial verdict in Scaccar. Mich. 1774. or Hill. 1775. This latter caſe had been previouſly determined in B. R. in a caſe reſerved in an ejectment in which mr. Burtenſhaw was defendant, and there too the caſe was argued three times. In both courts the judgment was againſt mr. Burtenſhaw. But the queſtion on the conſtruction of *heirs female of the body* conſidered as words of *purchaſe* was only a *ſecondary* point; and whether it was debated in B. R. or not, I am not at preſent informed. After ſuch authorities, it can be ſcarce neceſſary to guard the reader againſt incautiouſly adopting my private ideas.

(3) As to effect from a condition's being void, ſee poſt. 206. a. & b.

(4) See the like as to jointenants, poſt. 188. a.

(5) See F. N. B. 197. B.

the eldeſt daughter hath iſſue three daughters, and the youngeſt one daughter, all theſe foure ſhall inherit; but the daughter of the youngeſt ſhall have as much as the three daughters of the eldeſt, *ratione ſtirpium*, and not *ratione capitum*, for in judgement of law every daughter hath a ſeveral ſtocke or root.

Alſo if a man hath iſſue two daughters, and the eldeſt hath iſſue divers ſonnes and divers daughters, and the youngeſt hath iſſue divers daughters, the eldeſt ſon of the eldeſt daughter ſhall onely inherit; for this deſcent is not in *capita*, but all the daughters of the yongeſt ſhall inherit, and the eldeſt ſon is coparcener with the daughters of the yongeſt, and ſhall have one moitie, (*viz.*) his mother's part; ſo that men deſcending of daughters may be coparceners, as well as women, and ſhall joyntly implead and be impleaded, as is aforeſaid.

[o] 20. E. 2. Nupei ob. 14. F. N. B. 197. 7. E. 3. 13.

[o] If there be two coparceners, and the one bring a *rationabili parte* or a *nuper obiit* againſt the other, the defendant claime by purchaſe, and diſclaime in the blood, the plaintife ſhall have a *mortdaunceſter* againſt her as a ſtranger for the whole. (1)

Bract. lib. 2. fo. 66. 71. &c. Brit. ca. 71. Fleta l. 5. ca. 9.

Parceners ſont en deux manners. Here *Littleton* doth divide parceners; and herewith doe agree the ancient bookes of law.

Et ils ſont appels parceners, &c. Parceners, *participes, et dicuntur participes, quaſi partis capaces, ſive partem capientes; quia res inter eas eſt communis ratione plurium perſonarum.* This tenancie in the ancient books of law is called *adæquatio*, and ſometime *familia hirſciſcunda*, (2) an inheritance to be divided; and many times parceners are called coparceners.

[p] Regiſt. Orig. 76. 316. Regiſt. Jud. 80. Brit. ubi ſup. Flet. ubi ſup. Bract. ubi ſupra, & 5. Co. 413. b.

Breve de participatione faciendâ. This is falſe printed, (3) and ſhould be *De partitione faciendâ*, (4) a writ whereby the coparceners are compelled to make partition. [p] *Item eſt alia actio mixta, quæ dicitur actio familiæ hirciſcundæ; & locum habet inter eos qui communem habent hæreditatem, &c. Et locum habet, ut videtur, inter cohæredes, ubi agitur de proparte ſororum; vel inter alios, ubi res inter partes et cohæredes dividi debeat, ſicut ſunt plures ſorores, quæ ſunt quaſi unus hæres, vel inter plures fratres, qui ſunt quaſi unus hæres ratione rei quæ diviſibilis eſt inter plures maſculos, &c.*

(Ant. 32. a. 150. 151.)

Des terres & tenements. It is to be conſidered of what inheritances daughters ſhall be coparceners, and how and in what manner partition ſhall be made betweene them. Wherein it is to be obſerved, that of inheritances ſome be entire, and ſome be ſeverall: againe, of entire, ſome be diviſible, and ſome be indiviſible. And here it appeareth by *Littleton*, that parceners take their appellation, becauſe they are compelled to make partition by writ of *partitione faciendâ*; where note, that *Littleton* alloweth well to finde out the true derivation of words, as often hath beene and ſhall be obſerved.

If a villeine deſcend to two coparceners, this is an entire inheritance; and albeit the villeine himſelf cannot be divided, yet the profit of him may be divided; one coparcener may have the ſervice one day, one weeke, &c. and the other another day or weeke, &c. And for the ſame reaſon a woman ſhall be endowed of a villeine, as before it appeareth in the chapter of dower. (5) Likewiſe an advowſon is an entire inheritance; [q] and yet in effect the ſame may be divided betweene coparceners, for they may divide it to preſent by turnes. (6)

[q] 13. E. 2. tit. Quar. Imp. 170. 17. E. 3. 38. Flet. li. 5. c. 9. Mir. ca. 2. ſect. 17.

A rent charge is entire, and againſt common right; [r] yet may it be divided betweene coparceners, and by act in law the tenant of the land is ſubject to ſeverall diſtreſſes, and partition may be made before ſeiſin of the rent.

[r] 44. E. 3. tit. Partic. 6. & tit. Avowrie 75. 2. H. 6. fol. 11. (Ant. 148. a.)

Entire inheritances not diviſible, we finde divers in our bookes; and ſome inheritances that are diviſible, and yet ſhall not be parted or divided betweene copareeners, as hereafter ſhall appeare.

[s] 2. E. 2. tit. Dower 123.
[t] 17. E. 2. nuper obiit 12. 16. E. 2. ibid. 11. 5. Mariæ Dier 153.

[s] If a man have reaſonable eſtovers, as houſebote, heybote, &c. appendant to his freehold, they are ſo entire as they ſhall not be divided betweene coparceners. [t] So if a corody incertaine be granted to a man and his heires, and he hath iſſue divers daughters, this corodie ſhall not be divided betweene them; but of a corodie certaine, partition may be made.

[u] 17. E. 3. 72.
[w] 13. E. 2. Quare Imped. 170. Fleta lib. 5. ca. 9.
[x] Mich. 24. et 25. Eliz. inter Comitem de Huntingdon et Seignior Mountjoy. (Mo. 174.)

[u] Homage and fealtie cannot be divided betweene copareeners (7). [w] So a piſcharie incertaine, or a common *ſans nombre*, (8) cannot be divided betweene coparceners; for that would be a charge to the tenant of the ſoile.—[x] The lord *Mountjoy*, ſeiſed of the mannor of Canford in fee, did by deed indented and inrolled bargaine and ſell the ſame to *Browne* in fee, in which indenture this clauſe was contained. *Provided alwayes, and the ſaid Browne did covenant and grant to and with the ſaid lord Mountjoye, his heires, and aſſignes, that the lord Mountjoy, his heires and aſſignes, might dig for ore in the lands (which were greate waſte) parcell of the ſaid mannor, and to dig turfe alſo for the making of allome.* And in this caſe three poynts were reſolved by all the judges. Firſt, that this did amount to a grant of an intereſt and inheritance to the lord *Mountjoy*, to digge, &c. Secondly, that notwithſtanding

(1) See poſt. 175. 242. a.
(2) See the verb *herciſco* or *erciſco* uſed ant. 86. a.
(3) But in L. & M. and in Roh. it is the ſame.
(4) *Monſieur Houard* derives this writ from the capitulars of the firſt French kings. 1. Hou. Littl. 318.
(5) Ant. 32. a.
(6) See an inſtance of a partition of an advowſon between jointenants in Carth. 505.
(7) See ant. 67. b. and Dav. Rep. 61. b.
(8) Acc. as to common *ſans nombre*, ant. 149. a. See the note on this ſort of common, ant. 122. a.

ding this grant *Browne* his heires and aſſignes might dig alſo, and like to the caſe of common *ſauns nomber*. Thirdly, that the lord *Mountjoy* might aſſigne his whole intereſt to one, two, or more; but then, if there be two or more, they could make no diviſion of it, but work together with one ſtocke; neither could the lord *Mountjoy*, *&c.* aſſigne his intereſt in any part of the waſt to one or more, for that might worke a prejudice and a ſurcharge to the tenant of the land; and therefore if ſuch an incertaine inheritance deſcendeth to two coparceners, it cannot be divided betweene them (1).

(Ant. 122. a. 1. Saund. 351.) Vide 5. Mariæ Dier 153. (Noy 145. Cro. Jam. 256. 257. 1. Mod. 74.)

But then it may be demanded, what ſhall become of theſe inheritances? The anſwer is, that it appeareth in our bookes, that regularly [*y*] the eldeſt ſhall have the reaſonable eſtovers, common, piſchary, corody incertaine, &c. and the reſt ſhall have a contribution, that is, an allowance of the value in ſome other of the inheritance, and ſo of the like. But what if the common anceſtor left no other inheritance to give any thing in allowance, what contribution or recompence ſhall the younger coparceners have? It is anſwered, that if the eſtovers or piſchary or common be incertaine, then ſhall one coparcener have the eſtovers, piſchary, or common, &c. for a time, and the other for the like time; as the one for one yeare, and the other for another, or more, or leſſer time, whereby no prejudice can grow to the owner of the ſoile. Or in caſe of the piſchary, the one may have one fiſh, and the other the ſecond, &c. or one may have the firſt draught, and the ſecond 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 to have the mill for a time, and the other the like time; or the one one toll diſh, and the other the ſecond, (2) &c. And this appeareth to be the ancient law; for it is ſaid, [*z*] *Sunt aliæ res hereditariæ, quæ veniunt in partitionem, quæ, cùm dividi non poſſunt, conceduntur uni; ita quòd aliæ eoh eredes alibi de communi hereditate habeant ad valorem, ſicut ſunt vivaria, piſcariæ, parci; vel ſaltem quòd partem habeant pro defectu, ſicut ſecundum piſcem, tertium vel quartum, vel ſecundum tractum, tertium vel quartum. Item in parcis ſecundam, tertiam aut quartam beſtiam.*

(6. Co. 1.) [*y*] 2. E. 2. dower 123. 13. E. 2. quar. imp. 170. Fleta ubi ſupra. Vide Mirror ca. 2. ſect. 17.

[*z*] Bracton lib. 2. 76. Britton cap. 71. 72. Fleta lib. 5. cap. 9.

But now let us turne our eye to inheritances of honor and dignity. And of this there is an ancient booke caſe, [*] in 23. *H.* 3. *tit. partition* 18. in theſe words: Note, if the earldome of *Cheſter* deſcend to coparceners, it ſhall be divided betweene them as well as other lands, and the eldeſt ſhall not have this ſeigniory and earledome entire to herſelfe, *quod nota*, adjudged *per totam curiam*. (3) By this it appeareth, that the earledome (that is, the poſſeſſions (4) of the earledome) ſhall bee divided; and that where there bee more daughters than one, the eldeſt ſhall not have the dignity and power of the earle, that is, to bee a counteſſe. What then ſhall become of that dignity? The anſwer is [*a*] that in that caſe the king, who is the ſoveraigne of honour and dignity, may for the incertainty conferre the dignity upon which of the daughters he pleaſe. And this hath beene the uſage ſince the conqueſt, as it is ſaid. (6) *But quere, & ſee caſe of Scotland before Edw. 1.*

(Ant. 18. b. 27. a.) [*] 23. H. 3. tit. partition 18.

[*a*] 3. H. 3. tit. preſcription (5).

But if an earle that hath his dignity to him and his heires dieth, having iſſue one daughter, the dignity ſhall deſcend to the daughter; for there is no incertainty, but onely one daughter, and the dignity ſhall deſcend unto her and her poſterity, as well as any other inheritance. And this appeareth by many precedents, and by a late judgement given in *Sampſon Leonard's* caſe, who maried with *Margaret* the only ſiſter and heire of *Gregory Fines lord Dacre* of the South, and in the caſe of *William lord Ros*. (7)

But there is a difference betweene a dignity or name of nobility, and an office of honor. For if a man hold a mannor of the king to be high conſtable of *England*, and dye having iſſue two daughters, the eldeſt daughter taketh huſband, he ſhall execute the office (8) ſolely, and before mariage it ſhall be exerciſed by ſome ſufficient deputy: and all this was reſolved by all the judges of *England*, in the caſe of [*b*] the duke of *Buckingham*. But the dignity of the crowne of *England* is without all queſtion deſcendible to the eldeſt daughter alone, and to her poſterity, (10) and ſo hath it beene declared by act of parliament. [*] For, *regnum non eſt diviſibile*. And ſo was the deſcent of *Troy*.

[*b*] 11. Eliz. Dier 285. the duke of Buckingham's caſe. (9)

[*] 25. H. 8. cap. 22.

Præterea ſceptrum, Ilione quod geſſerat olim
Maxima natarum Priami.——

Virgil 1. Æneid.

[*b*] If a caſtle, that is uſed for the neceſſary defence of the realme, deſcend to two or more coparceners, this caſtle might be divided by chambers and roomes as other houſes bee. But yet, for that it is *pro bono publico & pro defenſione regni*, it ſhall not be divided; for as one ſaith, *propter jus gladii dividi non poteſt*; and another ſaith, [*] *pur le droit del eſpée que ne ſoeffre diviſion en aventure que le force del realme ne defaille pax taunt*. But caſtles of habitation for private uſe, that are not for the neceſſary defence of the realme, ought to bee parted betweene coparceners as well as other houſes; and wives may thereof be endowed, as hath beene ſaid in the chapter of dower. (11)

[*b*] Bracton lib. 2. fol. 76. Fleta lib. 5. cap. 9.

[*] Britton 186. 187.

Vide ſect. 36.

If there be two coparceners of certaine lands with warranty, and they make partition of

(1) This fame caſe of the earl of Huntingdon and lord Mountjoy is reported in Godb. 17. 1. And. 307. and Mo. 174. Lord Anderſon gives the opinion of the judges as it was certified in writing to the privy council; but this certificate takes no notice of the point of *indiviſibility*; nor is it one of the queſtions ſtated by lord Anderſon to have been referred to the judges.—In Mo. 307. the ſame caſe is cited *arguendo*; and there four judges are repreſented to have been equally divided in opinion as to the firſt point mentioned by lord Coke. But according to Anderſon the difference of opinion was only, whether any remedy was furniſhed by law for the intereſt reſerved to lord Mountjoy by the proviſo. As to this latter point, ſee 8. Co. 46. Noy 145.

(2) How dower is to be aſſigned out of indiviſible inheritances, ſee ant. 32. a.

(3) See Dav. Rep. 61. b.

(4) In 2. Ro. Abr. 254. the caſe of 23. H. 3. relative to the earldom of Cheſter is mentioned as if the daughters might have been coparceners of the *dignity* itſelf, and not merely of the *poſſeſſions of the earldom*. How the earldom of Cheſter became annexed to the crown in the reign of Hen. 3. on the death of John Scot the laſt earl leaving three ſiſters his coheirs, is explained in 1. Dugd. Bar. 45. See further on this point of indiviſibility Bract. 76. b. Brit. 187. Flet. 313. and Dav. Rep. 61. b.

(5) Fitz. Abr. *partition* 56.

(6) This doctrine about the abeyance of titles of honor and their being revived by the royal nomination, though our books furniſh little matter on the ſubject, is undoubtedly law; and there are many inſtances of an exertion of this prerogative. One of the moſt remarkable took place during the preſent reign in the perſon of the late mr. Norborn Berkley, who in 1764 was called to the houſe of peers in right of the old barony of Botetourt after an abeyance of ſeveral centuries, and was allowed to ſit according to the antiquity of that barony. See Caſ. in Dom. Proc. for 1764. Another inſtance in the preſent reign is the caſe of ſir Francis Daſhwood late lord Delpencer; for in 1763 he was called to the antient barony of that name in right of his deceaſed mother, who was eldeſt ſiſter and one of the coheirs of an earl of Weſtmorland, on whoſe death that barony had become in abeyance; and being ſo ſummoned he took his ſeat as premier baron in place of lord Abergavenny, who before poſſeſſed that diſtinction.

(7) The firſt of theſe caſes was in 1596. and the ſecond in 1616. Both are now in print, having been publiſhed from manuſcripts of the time by mr. Collins in his claims concerning baronies, &c. See p. 24. & 162. It muſt not be inferred from the purpoſe for which lord Coke cites them, that the deſcent of a barony to a female, where in the creation it was not confined to heirs *male*, was controvertible. The points debated in thoſe caſes were of another kind. In Sampſon Leonard's the queſtion was, whether the huſband can be tenant by the curteſy of a title of honour. See my obſervation as to that point ant. 29. b. note 1. That of lord Ros depended on the effect of ſuperadding an earldom in tail *male* to one having a barony before deſcendible to heirs *general*, it being contended, that the former ſhould attract the latter in point of deſcent ſo as to be inſeparable whilſt the earldom continues.

(8) In

of the land, the warranty ſhall remayne; becauſe they are compellable to make partition. [c] But otherwiſe it was of joyntenants at the common law, as ſhall be ſaid hereafter in his proper place.—[d] *Thomas de Eberſton*, ſeiſed of the mannor of *Eberſton* within the forreſt of *Pickering*, had kept time out of mind a woodward for keeping of the woods parcell of that mannor, and had the barke of all the trees felled in the ſaid woods by any of the forreſters of that forreſt as belonging to his mannor (which he could not have without a preſcription). (1) *Thomas* of *Eberſton* infeoffed two of the ſaid mannor; betweene whom partition was made, ſo as one of them had the one halfe in ſeveralty, and the other the other halfe. (2) *Robert Wyerne* afterwards had the one halfe, and *Thomas Thurniſe* the other; and they in the eyre of *Pickering* claimed to keepe a woodward within the ſaid woods, and the barke aforeſaid; and the truth hereof and the uſage being ſpecially found by the forreſtors verderors and regardors, *Willoughby Hungerford* and *Hanburie* juſtices itinerants within that forreſt gave judgment as followeth. *Ideo conſideratum eſt, quòd prædict' Robertus & Thomas habeant woodwardum & corticem in boſco prædicto de quercubus prædictis ſibi & hæredibus ſuis imperpetuum. Salvo ſemper jure, &c.*

[c] 29. E. 3. garrantie 70. (6. Co. 12. b.)
[d] Itin. Pickering. 8. E. 3. Rot. 34. (Ant. 115. a.)

Sect. 242.

AUXY ſi home ſeiſie de tenements en fee ſimple ou en fee taile devy ſauns iſſue de ſon corps engender, & les tenements diſcendont a ſes ſoers, els ſont parceners, come eſt avantdit. Et en meſme le maner, lou il n'ad pas ſoers, mes les tenements diſcendont a ſes aunts, els ſont parceners, (3) &c. Mes ſi home n'ad forſque une file, el ne poit eſtre dit parcener, mes el eſt appelle file & heire, &c.

ALSO if a man ſeiſed of tenements in fee ſimple or in fee-tayle dieth without iſſue of his bodie begotten, and the tenements deſcend to his ſiſters, they are parceners as is aforeſaid. And in the ſame manner, where he hath no ſiſters, but the lands deſcend to his aunts, they are parceners, &c. But if a man hath but one daughter, ſhe ſhal not be called parcener, but ſhee is called daughter and heire, &c.

OU en fee taile. This muſt be intended of an eſtate taile made to the father and to the heires of his body; for otherwiſe if the ſtate tayle were made to a man and to the heires of his body, his ſiſters cannot inherit. And not only daughters ſhall be coparceners, but ſiſters, aunts, great aunts, &c.

File & heire, &c. Here by *(&c.)* is implyed ſiſter and heire, aunt and heire, great aunt and heire, and ſo upward.

Sect. 243.

(Ant. 46. a.)

BY this *ſection*, and the *(&c.)* in the end of it, it is to be underſtood, that there are two kind of partitions betweene copareeners; the one in deed or expreſſe, and the other in law or implicite. Of partitions in deed or expreſſe, ſome bee voluntary whereof *Littleton* enumerates foure manners; and one compulſary, that is, by writ of partition. (4)

ET eſt aſcavoir, que partition enter parceners poit eſtre fait en divers manners. Un eſt, quant els agreeont de faire partition, & font partition de les tenements; ſicome ſi ſoyent deux parceners,

AND it is to bee underſtood, that partition may be made in divers maners. One is, when they agree to make partition, & do make partition of the tenements; as if there bee two parceners to divide between them

a

(1) The claim of a like privilege as appurtenant to a manor is mentioned in Compt. Juriſd. Co. 192. b. See further concerning the office of *woodward* in Manwood's For. Laws by Nelſon, 389.

(2) It is obſervable in this partition, that no proviſion is made in reſpect to the office of woodward and privilege of having the bark of felled trees, which were appurtenant to the manor. In a former place lord Coke ſtates the partition of a manor to which an advowſon was appendant, and explains what the effect is on the advowſon, where from want of any particular agreement between the parties it is left to the law to regulate how the advowſon ſhall be diſpoſed of. Ant. 122. a.

(3) *Els ſont parceners* not in L. & M. or Roh.

(4) The reference in the margin to fol. 46. a. is to an inſtance of the difference in point of effect on the leſſee for years of a coparcener, between partition by writ and partition without.

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(8) In a late conteſt about the office of *great chamberlain*, which aroſe in conſequence of the late duke of Ancaſter's leaving two ſiſters his co-heireſſes, one of whom was married to mr. Burrell, the then attorney general made a report in conformity to the doctrine here ſtated by lord Coke as to the office of high conſtable; and this report, of which I have a copy, contains a very learned inveſtigation of the ſubject. But afterwards when the caſe came before the lords, the judges gave it as their opinion, *that the office belongs to both ſiſters; that the huſband of the eldeſt is not of right intitled to execute it; and that both ſiſters may execute it by deputy to be appointed by them, ſuch deputy not being of a degree inferior to a knight, and to be approved of by the king.* See Journ. Dom. Proc. 25. May 1781. the printed caſes of the ſeveral claimants, and the Parl. Reg. for 1780-1, v. 4. 258 to 297.

(9) S. C. Keilw. 170. b. 4. Inſt. 127.

(10) See ant. 15. b.

(11) Ant. 31. b.

a devider enter eux les tenements en deux parts, cheſcun part per ſoy en ſeveraltie & d'egal value; et ſi ſont 3 parceners, a devider les tenements en trois parts per ſoy en ſeveraltie, &c.

the tenements in two parts, each part by it ſelfe in ſeveralty and of equall value; and if there bee three parceners, to divide the tenements in three parts by it ſelfe in ſeveralty, &c.

The firſt partition in deed betweene coparceners, is that which *Littleton* here ſpeaketh of, *viz. Quant els agreont & font partition de les tenements, &c. cheſcun part per ſoy en ſeveralty & de egall value, &c.* If coparceners make partitions, at full age and unmarried & of *ſane memorie*, of lands in fee ſimple, it is good & firme for ever, albeit the values be unequall; but if it be of lands entailed, or if any of the parceners be of *non ſane memorie*, it ſhall bind the parties themſelves, but not their iſſues unleſſe it be equall; or if any be *covert*, it ſhall bind the huſband, but not the wife or her heires; or if any be within age, it ſhall not bind the infant; as ſhall be ſaid more fully hereafter (1). The ſecond partition followeth in the next ſection. And here the (*&c.*) implyeth further, that if there be foure parceners, then foure parts, if five, five parts and ſo forth. It further implyeth, that all this muſt be in ſeveralty; whereof, and with what limitations this is to bee underſtood, it hath beene declared before. (F. N. B. 167.) Vide ſect. 241.

Sect. 244.

UN auter partition eſt, a eſtier per agreement enter eux, certaine de lour amies, de faire partition des terres ou tenements en le forme avantdit. Et en tiels caſes, apres tiel partition, le eigne file prymerment eſleira un des partes iſſint divides, que el voit aver pur ſa part, & donques la ſecond file procheine apres luy auter part, & donques la tierce ſoer auter part, donques le quarte auter part, &c. ſi iſſint ſoit que ſoient pluſors ſoers, &c. ſi ne ſoit auterment agree enter eux. Car il poit eſtre agree enter eux, que un avera tiels tenements, & un autre tiels tenements, & un autre tiels tenements, &c. ſans aſcun tiel primer election, &c.

ANother partition there is, *viz.* to chooſe, by agreement betweene themſelves, certaine of their friends, to make partition of the lands or tenements in forme aforeſaid. And in theſe caſes, 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, then the fourth another part, &c. if ſo bee that there bee more ſiſters, &c. unleſſe it bee otherwiſe agreed betweene them. For it may be agreed betweene them, that one ſhall have ſuch tenements, and another ſuch tenements, &c. without any primer election.

DOnques le quarte auter part, &c. Here the (*&c.*) implyeth the 5 ſiſter, and after her the 6 and ſo forth. 31. Aſſ. 26.

Car il poet eſtre agree enter eux, que un avera tiels tenements & un auter tiels tenements, &c. Here by this (*&c.*) is implyed divers rules of law proving the concluſion of *Littleton* in this ſect. *viz. Modus & 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, that is againſt the common-wealth or common right. For *conventio privatorum non poteſt publico juri derogare.* (1. Sid. 193. 269. Cro. Eliz. 664.) (1. Sid. 339.)

(1) See poſt. ſect. 255. to 258. incluſive. See alſo 173. b.

Sect.