of obſervation. Here is the firſt (&c.) and there is no (&c.) in all his three bookes (there being as you ſhall perceive very many) but it is for two purpoſes. Firſt it doth imply ſome other neceſſary matter. Secondly, that the ſtudent may together with that which our author hath ſaid inquire what authorities there be in law that treat of that matter, which will worke three notable effects: firſt it will make him underſtand our author the better: ſecondly, it will exceedingly adde to the reader's invention. And laſtly, it will faſten the matter more ſurely in his memory, for which purpoſe I have for his eaſe in the beginnning ſet downe in theſe Inſtitutes, the effect of ſome of the principal authorities in law as I conceive them concerning the ſame. In this place the (&c.) implyeth poſſeſſion or receipt, and ſuch other matter as appeareth by my notes in this ſection. As for the authorities of law, you ſhall find the effect of them in this ſection, and the like of the reſt of the (&c.) which you ſhall find in the ſections hereafter mentioned, omitting thoſe (for avoyding of tedioufneſſe) that either are apparent, or which are explaned in ſome other places, *viz.* ſect. 20. 48. 102. 108. 120. 125. 136. 137. 146. 149. 154. 164. 166. 167. 168. 177. 179. 183. 184. 194. 200. 202. 210. 211. 217. 220. 226. 233. 240. 242. 244. 245. 248. 262. 264. 269. 270. 271. 279. 320. 322. 323. 325. 326. 327. 329. 330. 335. 336. 341. 347. 348. 349. 350. 352. 355. 356. 359. 364. 365. 374. 375. 377. 381. 384. 389. 393. 395. 397. 399. 401. 402. 410. 417. 428. 433. 447. 449. 464. 470. 471. 477. 483. 489. 500. 501. 522. 532. 552. 553. 556. 558. 562. 578. 591. 592. 593. 594. 603. 613. 624. 625. 630. 632. 634. 637. 638. 648. 659. 660. 661. 669. 687. 693. 700. 718. 745. 748. 749. All which I have obſerved and quoted here once for all for the eaſe of the ſtudious reader (1).

Britton 205. 206. optime. Fleta lib. 6. cap. 5. Idem lib. 3. cap. 15.

Ut de feodo. Where (*ut*) is not by way of ſimilitude, but to be underſtood poſitively that he is ſeiſed in fee. And ſo it is where one pleads a deſcent to one *ut filio et hæredi*, that is, to Io. S. that is ſonne and heyre, *et ſic de cæteris*, where (*ut*) *denotat ipſam veritatem.*

[*i*] 7. E. 3. 63. 24. E. 3. 74. 34. H. 6. 34. 19. E. 3. quar. imp. 154. Mirror cap. 2. ſect. 17.

(Doctr. Plac. 287. Poſt 89. 388.)

Sicome de advouſon. Of an advowſon [*i*] wherein a man hath as abſolute ownerſhip and propertie as he hath in lands or rents, yet he ſhall not pleade, that he is ſeiſed in *dominico ſuo ut feodo* (2) becauſe that inheritance, ſavouring not *de domo*, cannot either ſerve for the ſuſtentation of him and his houſhold, nor any thing can be received for the ſame for defraying of charges. And therefore he cannot ſay, that he is ſeiſed thereof in *dominico ſuo de feodo*, whereby it appeareth how the common law doth deteſt ſimony and all corrupt bargaines for preſentations to any benefice, but that [*k*] *idonea perſona* for the diſcharge of the cure ſhould be preſented freely without expectation of any thing: nay ſo cautious is the common law in this point, that the pl. in a *quare impedit* ſhould recover no damages for the loſſe of his preſentation untill the ſtatute of W. 2. cap. 5. (3) And that is the reaſon that gardian in ſocage [*l*] ſhall not preſent to an advowſon; becauſe he can take nothing for it, and by conſequent he cannot account for it. And by the law he can meddle with nothing that he cannot account for. [*m*]. And in a writ of right of advowſon, the patron ſhall not alledge the explees or taking of the profits in himſelfe but in his incumbent. And hereby the old bookes ſhall be the better underſtood, *viz.* Bracton, lib 4. tract. 3. cap. nu. 5. *Eſt autem dominicum quod quis habet ad menſam, et proprie, ſicut ſunt* Boordlands *Anglice.* And Fleta lib. 5. ca. 5. *Eſt autem dominicum propria terra ad menſam aſſignata. Dominicum etiam dicitur ad differentiam ejus quod tenetur in ſervitio.* But of an advowſon and ſuch like he ſhall plead, that he is ſeiſed *de advocatione ut de feodo et jure* (4).

[*k*] 6. Co. 51. Boſwel's caſe.

[*l*] 8. E. 2. Preſentment al Egliſe 10. 7. E. 3 39. 27. E. 3. 89. 29. E. 3. 5. 31. E. 3. Eſtopel 240. (Poſt 89. 344. b.)
[*m*] 7. E. 3. 63.
Bracton 263. 372.
Fleta lib. 5. cap. 5

Advowſon. *Advocatio*, ſignifying an advowing or taking into protection, is as much as *jus patronatus.* Sir William Herle in 7. E. 3. fol. 4. ſaith, that it is not long paſt, that a man did know what an advowſon was, but, when a man would grant an advowſon he granted, *eccleſiam* the church, and thereby the advowſon paſſed, vide 45. E. 3. 5. But ſurely the word is of greater antiquity, for in the regiſter there is an originall writ *de recto advocationis*, and in the originall writ of aſſiſe *de darreine preſentment* the patron is called *advocatus.* [*n*] Vide W. 2. ca. 5. And ſo doth [*o*] Bracton call him. *Advocatus autem dici poterit ille, ad quem pertinet jus advocationis alicujus, ut ad eccleſiam præſentet nomine proprio et non aliene.* And [*p*] Fleta lib. 5. cap. 14. agreeth herewith almoſt *totidem verbis: advocatus eſt ad quem pertinet jus advocationis alterius eccleſiæ, ut ad eccleſiam nomine proprio non alieno poſſit præſentare.* And [*q*] Britton cap. 92. The patron is called *avowe*, and the patrons are called *advocati*, for that they be either founders or maintainers or benefactors of the church, either by building dotation or encreaſing of it, in which reſpect they were alſo called *patroni*, and the advowſon *jus patronatus.*

7 E. 3. 4.
45. E. 3. 2.

[*n*] W. 2. ca. 5.
[*o*] Bract. lib. 4. fo. 240.
[*p*] Fleta lib. 5. cap. 14.

And it is to be underſtood that there is a great [*r*] diverſity *inter advocationem medietatis eccleſiæ, &c. et medietatem advocationis eccleſiæ* (5), and of their ſeverall remedies for the ſame. For the advowſon of the moity is, when there be ſeverall patrons and two ſeverall incumbents in one church, the one of the one moity thereof, and the other of the other moity, and one part

[*q*] Britton cap. 92.
[*r*] 33. H. 6. 11. b. per Priſot. 14. H. 6. 15. per Newton. 31. E. 1. droit 68. 69. F. N. B. 31. b. 10. Co. 135. 136 R. Smithe's caſe. 45. E. 3. Fines 41. 45. E. 3. 12. 17. E. 3. 78. 17. E. 2. Dower 163.
(4. Co. 75. 5. Co. 102. 2. Inſt. 375.)

(1) See in fol. 22. a. the note in reſpect to lord Coke's obſervation on Littleton's uſe of *nota, &c.* and like expreſſions. (2) And yet in 34. H. 6. 34. one pleads, that the king was ſeiſed in his demeſne as of fee of an advowſon in groſs.—See alſo 26. E. 3. 64. b. where in a writ of right of advowſon by an abbot againſt the counteſs of Ormond, the plaintiff counts, that one R. was ſeized in his demeſne as of fee and right, and it was held good. If a church be impropriate, the inproptiator may plead ſeiſin in his demeſne as of fee. Plowd. 503.—(3) *Advowſon aſſets. Recovery in value for advowſon ſhall be 12d. for every mark* [the church is worth by the year.] 8. *E.* 2. *Recovery in value.* 11. Hal. MSS. The words between the brackets are added from Fitzh. Abr. As to an advowſon's being aſſets and valuable, ſee Poſt. 374. b. and the note there given on the ſubject.—(4) *Office* de balliva parci vel hundredi *not demeſne, yet the* eſplees *ſhall be laid.* 7. *E.* 3. 63. 8. *E.* 3. 55. *Corody not demeſne.* 17. *E.* 2. *Nuper obiit* 12. *Tithes whether demeſne, Dy.* 85. *One grants a rent-charge, the grantee brings annuity, and declares of a grant* virtute cujus fuit ſeiſitus in dominico ſuo ut de feodo. *By ſome this is electing to have it as a rent-charge,* 3. *E.* 6. *Dy.* 65. *But ruled* contra, *and the pleading good in ſubſtance. M.* 43. 44. *Eliz. B. R. Caſe of Dean of Rocheſter. Noy n.* 162. *M.* 11. *Car. B. R. Cro. n.* 24. *Sprint and Hickes* 2. *Bulſt.* 148. Hal. MSS. The dean of Rocheſter's caſe is in Noy. 37. 2. And. 106. & Ow. 73.—A man intitled to a *road* pleads ſeiſin of it *in dominico ſuo ut de feodo et in jure.* 3. H. 6. 7. In *nativo habendo* eſplees alledged, and yet the count for the villein only *de feodo et jure.* 39 H. 6. 32.—Where a *reverſion* depends on an eſtate for years, there pleading either ſeiſin in demeſne as of fee, or ſeiſin as of fee, will be good; but if the reverſion be on an eſtate of freehold, only ſeiſin in demeſne can be pleaded. Plowd. 191. a. See accord. Dy. 101. in Culpepper's caſe. It is ſaid, that a reverſion or remainder belonging to the king's tenant in capite formerly intitled the king to wardſhip, though the ſtatute 17. E. 2. de prærogativa regis cap. 1. ſpeaks of lands of which the tenant dies ſeiſed *in dominico ſuo ut de feodo.* Stanf. Prærog. 8. a. Plowd. 11. See further as to pleading ſeiſin in demeſne ante 17. a. n. 3. Standf. Prærog. 8. a. 14. a. Doctrin. Plac. 287. & Com. Dig. *Pleader.* C. 35.—(5) But note, that this diverſity doth not hold in the caſe of a rectory; for in Holland's caſe, 4 Co. 75. the pleading was *ad medietatem rectoriæ*, whereas it ſhould have been *ad rectoriam medietatis*, and yet it was taken by the court to be the ſame in effect.

Adgnati quaſi a Patre cognati.

Cognati quaſi ſimul nati ex parte matris.

Gradus Parentelæ & Conſanguinitatis, pro meliori intelligentia Authoris noſtri.

The degrees of Parentage and of Conſanguinitie for the better underſtanding of our Authour.

Approved by
Bracton, lib. 2. cap. 31. fol. 67.
Britton, cap. 89. fol. 220. 221.
Fleta, lib. 5. cap. 7.
Mirror, cap. 1. §. 3. & que heritages.

Adgnati ex Parte Patris.
Couſins on the part of the Father, the more worthy in Diſcents, though farther remote.

Cognati ex parte Matris.
Couſins on the part of the Mother, the leſſe worthy in Diſcents, though nearer of kinne.

Recta Linea.
The right Line.

Linea tranſverſalis ſeu collateralis.
The ſide Line.

Tritavus.
The great Grand-father's great Grand-father.

Tritavia.
The great Grand-father's great Grand-mother.

Linea tranſverſalis ſeu collateralis.
The ſide Line.

Abpatruus magnus.
The great Uncle's Grand-father on the Father's ſide.

Abavunculus magnus.
The great Uncle's Grand-father on the Mother's ſide.

Abamita magna.
The great Uncle's Grand-mother on the Father's ſide.

Abmatertera magna.
The great Uncle's Grand-mother on the Mother's ſide.

5

Attavus.
The great Grand-father's Grand-father.

Attavia.
The great Grand-father's Grand-mother.

Proavunculus magnus.
The great Uncle's Father on the Mother's ſide.

Promatertera magna.
The great Uncle's Mother on the Mother's ſide.

Propatruus magnus.
The great Uncle's Father on the Father's ſide.

Proamita magna.
The great Uncle's Mother on the Father's ſide.

4

Abavus.
The great Grand-father's Father.

Abavia.
The great Grand-father's Mother.

Avunculus magnus.
The great Uncle on the Mother's ſide.

Matertera magna.
The great Aunt on the Mother's ſide.

Patruus magnus.
The great Uncle on the Father's ſide.

Amita magna.
The great Aunt on the Father's ſide.

3

Proavus.
The great Grand-father.

Proavia.
The great Grand-mother.

2

Avus.
The Grand-father.

Avia.
The Grand-mother.

Avunculus.
The Uncle or Mother's Brother.

Matertera.
The Aunt or Mother's Siſter.

Patruus.
The Uncle or Father's Brother.

Amita.
The Aunt or Father's Siſter.

1

Pater.
Father.

Mater.
Mother.

Avunculus, quaſi Avus minor.

Matertera quaſi Mater altera.

Linea recta aſcendens.
The right Line aſcending.

Patrucles à Patruo.
Sonnes or Daughters, Couſin Germans on the Father's ſide.

Amitini ab Amita.
Sonnes or Daughters, Couſin Germans on the Father's ſide.

Linea tranſverſalis, ſeu collateralis.
The ſide Line.

Frater, a Brother.
Semi germanus frater, Brother of one Father and ſeverall Mothers.
Soror, Siſter.

Frater, a Brother,
Uterinus Frater, Brother of one Mother and ſeverall Fathers.
Soror, Siſter.

Linea tranſverſalis, ſeu collateralis.
The ſide Line.

Avunculini ab Avunculo.
Sonnes or Daughters, Couſin Germans on the Mother's ſide.

Materterini à matertera.
Sonnes or Daughters, Couſin Germans on the Mother's ſide.

Uterini quaſi nati ex eodem utero fratres ex ſeperalibus patribus.

Horum. Of theſe. *Filius.* The Sonne.
Filia. The Daughter, right Couſin German.

Propoſitus.

Linea recta The right Line

diſcendens.
diſcending.

Horum. Of theſe. *Filius.* The Sonne.
Filia. The Daughter, right Couſin German.

Filius.
Sonne.

Filia.
Daughter.

1

Eorum. Of theſe. *Nepos collat.* The collaterall Nephew. *Neptis collat.* The collaterall Niece.

Nepos linealis.
The lineall Nephew.

Neptis linealis.
The lineall Niece.

2

Eorum. Of theſe. *Nepos collat.* The collaterall Nephew. *Neptis collat.* The collaterall Niece.

Pronepos linealis.
The lineall Nephewe's or Niece's Son.

Proneptis linealis.
The lineall Nephewe's or Niece's Daughter.

3

Eorundem.
Of theſe.
Pronepos collat.
The collaterall Nephewe's Son
Proneptis collat.
The collaterall Nephewe's Daughter.
Et ſic in infinitum.

Abnepos linealis.
The grand Sonne of the lineall Nephew or Niece.

Abneptis linealis.
The grand Daughter of the lineall Nephew or Niece.

4

Eorundem.
Of theſe.
Pronepos collat.
The collaterall Nephewe's Son
Proneptis collat.
The collaterall Nephewe's Daughter.
Et ſic in infinitum.

Atnepos linealis.
The great grand Sonne of the lineall Nephew or Niece.

Atneptis linealis.
The great grand Daughter of the lineall Nephew or Niece.

5

Trinepos linealis.
The great great grand Sonne of the lineall Nephew or Niece. *Et ſic in infinitum.*

Trineptis linealis.
The great great grand Daughter of the lineall Nephew or Niece. *Et ſic in infinitum.*

6

Place this next before Folio 18. b.

part as well of the church as of the towne allotted to the one, and the other part thereof to the other; and in that caſe each patron if he be diſturbed ſhall have a *quare impedit, quod permittat ipſum præſentare idoneam perſonam ad medietatem eccleſiæ* (1).

But if there be two coparceners, and they do agree to preſent by turne, each of them in truth hath but a moity of the church, but for that there is but one incumbent, if either of them be diſturbed, ſhe ſhall have a *quare impedit, &c. præſentare idoneam perſonam ad eccleſiam*; for that there is but one church and one incumbent, and ſo of the like (2). But in [*f*] the ſaid caſe of two coparceners one of them ſhall have a writ of right ~~of writ~~ of advowſon *de medietate advocationis*; for in truth ſhe hath but a right to a moity; but in the other caſe, where there be two patrons and two incumbents in one church, each of them ſhall have a writ of right of advowſon *de advocatione medietatis.*

(10. Co. 135. F. N. B. 33.)

[*s*] Britton for 235. 31. E. 1. droit 68. 69. F. N. B. 31. b. & 33. a. 5. H. 7 8. 17. E. 3. 38-75. 76. 7. E. 3. 327. 8. E. 3. 425. 22. Aſſ. p 33. 14. H. 4 10. 33. E. 3. quar. imp. 196.

And as there may (as hath beene ſaid) be two ſeverall parſons in one church, ſo there may be two that may make but one parſon in a church. [*t*] Britton ſaith, *ſi aſcun eſgliſe ſoit done a divers perſons per un ſole avowe, nul ne ſe pura pleadre per aſſiſe de juris utrum ne nul eſtre implede ſans lautre, &c.* And therewith agreeth Fleta. [*u*] *Item licet aliqua eccleſia diviſa fuerit inter duos, ſive bona ſua habeant communia ſive ſeparata, dum tamen unicum habeant advocatum nullus eorum ſine alio agere poterit vel implacitari.* And Fitzh. ſaith, that two prebendaries may be one parſon of a church, who ſhall joyne in a *juris utrum*, ſo as one rectory may be annexed to two ſeverall prebends, and both of them make but one parſon. But where one is parſon of the one moity of a church and another of the other moity, as hath been ſaid, there one of them ſhall have a *juris utrum* againſt the other, and in the writ ſhall name him *perſona medietatis eccleſiæ, &c.* But for avoyding of ſuſpicion of curioſitie if we ſhould proceed any further herein, we will attend what Littleton will further teach us.

[*t*] Britton fo. 235.

[*u*] Fleta lib. 5. ca. 19.

F. N. B. 49. o.

F. N. B. 49. p.

Sect. 11.

ET nota, que home ne poit aver pluis ample ou pluis griender eſtate denheritance, (3) *que fee ſimple.*

AND note that a man cannot have a more large or greater eſtate of inheritance than fee ſimple.

THIS doth extend as well to fee ſimples conditional and qualified, as to fee ſimples pure and abſolute. For our author ſpeaketh here of the ampleneſſe and greatneſſe of the eſtate, and not of the perdurableneſſe of the ſame. And he, that hath a fee ſimple conditionall or qualified, hath as ample and great an eſtate, as he that hath a fee ſimple abſolute, ſo as the diverſity appeareth betweene the quantity and quality of the eſtate.

From this ſtate in fee ſimple, eſtates in taile, and all other particular eſtates are derived, and therefore worthily our author beginneth his firſt booke with tenant in fee ſimple, for *à principalioribus ſeu dignioribus eſt inchoandum.*

Ne poit aver pluis ample ou griender eſtate, &c. For this cauſe two [*a*] fee ſimples abſolute cannot be of one, and the ſelfe-ſame land. If the king make a gift in taile, and the donee is attainted of treaſon, in this caſe the king hath not two fee ſimples in him, *viz.* the ancient reverſion in fee, and a fee ſimple determinable upon the dying without iſſue of tenant in taile, but both of them are conſolidated and conjoined together (4). And ſo it is, if ſuch a tenant in taile doth convey the land to the king his heires and ſucceſſors, the king hath but one eſtate in fee ſimple united in him, and the king's grant of one eſtate is good, and ſo was it adjudged in the court of Common Pleas. And yet in ſeveral perſons by act in law, a reverſion may be in fee ſimple in one, and a fee ſimple determinable in another by matter *ex poſt facto*; as if a gift in taile be made to a villeine, and the lord enter, the lord hath a fee ſimple qualified, and the donor a reverſion in fee (5). But if the lord infeoffe the donor, now both fee ſimples are united, and he hath but one fee ſimple in him. But one fee ſimple cannot depend upon another by the grant of the partie, as if lands be given to A (6), ſo long as B hath heires of his body the remainder over in fee, the remainder is voyde (7).

[*a*] Pl. Com. 349. and 248. 19. H. 8. Dier 4. 29. H. 8 Dier. 33. 16. Eliz. Dier 330. 2 Marie Dier 107. Auſten's caſe. Pa. 38. Eliz. rot. 108. in Quir. Imp. betweene the Queene Pl. and the Biſhop of Lincolne, Huſſey and others Deff. 15. E. 4. 6. 8.

(Plowd. 559. Dy. 4. & 12. Cro. Jac. 590. Finch. 8vo. ed. 113. 269. 1. Ro. Abr. 827. Dy. 156. b.)

Sect. 12.

ITEM purchaſe eſt appel la poſſeſſion des terres ou

ALSO purchaſe is called the poſſeſſion of lands or tene-

PUrchaſe in Latin is either *acquiſitum* of the verbe *acquiro*, for ſo I find it in the original regiſter 243. *In terris vel tenementis, quæ viri*

(1) Accordingly in Smith's caſe 10. Co. 135. b. it was agreed, that *quare impedit præſentare ad medietatem eccleſiæ*, ſhall only be when there are two ſeveral patrons and two ſeveral incumbents of diſtinct parts of the ſame church; but in that caſe the court implied as much, becauſe the count alledged a ſeiſin *de advocatione medietatis.* In Windſor's caſe Cro. Eliz. 686. where the count was of the *advowſon of two parts*, the court held the declaration to be bad; but then it was, becauſe by other parts of the declaration it appeared, that the church was entire, and that there was but one incumbent, and conſequently that the plaintiff's title was to *two parts of the advowſon*, and not to *an advowſon of two parts.*—(2) See further on this ſubject Doder Advowſ. 21. 2. Leon. 36. Dy. 78. b. & 299. W. Jo. 446. & Wilſ. vol. 2. page 225. & 231.—(3) *On inheritance*, L and M. Roh. P. and Red. (4) See acc. Cro. Eliz. 519. Hob. 323. & W. Jo. 6.—*The king ſhall be ſaid to be in, in point of reverter, and ſhall avoid leaſes by tenant in tail. Plowd. 552. Tr. 2. Car. Rot. 730. and adjudged H. 3. Car. Hutton. and Crook n. 4. Sir Thomas Holt's caſe. A, tenant for life, remainder to B his ſon and heir apparent in tail, remainder to A's right heirs. A grants rent-charge to C, and his heirs, A and B levy fine to the uſe of A and his heirs, A enfeoffs D and dies, having iſſue B and ruled, that D ſhall hold charged, for by the fine he has a fee conſolidated in him; which quære. For M. 10. Jac. B. R. Buſſtr. n. 35. in Errington's caſe. A and B his wife tenants in tail ſpecial, remainder to the right heirs of A, have iſſue a ſon and a daughter; the ſon by indenture makes leaſe for 40 years to commence after the mother's death, the father being dead; the ſon dies without iſſue; the daughter levies a fine to I. S. the mother dies; and although this leaſe is partly derived out of the fee ſimple, and by the fine I. S. had a conſolidated fee, yet, becauſe the daughter was not liable to the leaſe, conſequently the conuſee ſhall not be liable to the leaſe ſo long as the tail continues. Vid M. 6. Jac. B. R. n. 22. Nedham's caſe. Tenant in tail, remainder to the king, is attainted of treaſon. The king ſhall not be in, in point of remainder, but as long as the tail continues ſhall be in under tenant in tail, and ſubject to his charges, and ſo it differs from Walſingham's caſe, where the king had the reverſion. Paradine's caſe.* Hal. MSS.—See Sir Thomas Holt's caſe in Hutt. 96. and Cro. Cha. 103, and Errington's caſe in 2. Bullſtr. 42. As to Nedham's caſe and Paradine's caſe, I take them to be the ſame, and the reader will find it reported by the name of Poole and Nedham Yelv. 149.—(5) See Acc. Poſt. 117. a.—(6) The words *and his heirs* ſeem wanting here.—(7.) Acc. 10. Co. 97. b. See an obſervation on this doctrine by lord ch. juſtice Vaughan, who ſeems to queſtion it, Vaugh. 269. 270.

viri et mulieres conjunctim acquiſiverunt, &c. Bracton calleth it *perquiſitum*; and by [b] Glanvill it is called *quæſtus* or *perquiſitum*.

Bracton lib. 2. fol. 65.
[b] Glanvill. lib. 7. cap. 1. Britt. c. 33. fo. 84. & 121.
(1. Ro. Abr. 827.)

A purchaſe is alwayes intended by title, and moſt properly by ſome kinde of conveyance either for money or ſome other conſideration, or freely of gift; for that is in law alſo a purchaſe (1). But a deſcent, becauſe it commeth meerely by act of law, is not ſaid to be a purchaſe; and accordingly the makers of the act of parliament in 1. H. 5. ca. 5. ſpeaketh of them that have lands or tenements by purchaſe or deſcent of inheritance. And ſo it is of an eſcheate or the like, becauſe the inheritance is caſt upon, or a title veſted in the lord by act in law, and not by his own deed or agreement, as our author here ſaith (2). Like law of the ſtate of tenant by the courteſie, tenant in dower or the like. But ſuch as attaine to lands by meere injury and wrong, as by diſſeiſin, intruſion, abatement, uſurpation, &c. cannot be ſaid to come in by purchaſe, no more then robbery, burglarie, pyracy or the like can juſtly be termed purchaſe (3).

Pl. Com. Wimbiſſhey's caſe 47. b. 1. H. 5. cap. 5.

tenements que home ad per ſon fait, ou per agreement, a quel poſſeſſion il ne avient per title de diſcent de nul de ſes anceſters, ou de ſes couſins mes per ſon fait demeſne.

ments that a man hath by his deed or agreement, unto which poſſeſſion he commeth not by title of deſcent from any of his anceſtors, or of his couſins but by his owne deed.

(Cro. Jam. 366. Poſt. 27. a. 3. Inſt. 202.)

If a nobleman, knight, eſquire, &c. be buried in a church, and have his coat armor and pennions with his armes, and ſuch other enſignes of honour as belong to his degree or order, ſet up in the church, or if a graveſtone or tombe be laid or made, &c. for a monument of him, [c] in this caſe albeit the freehold of the church be in the parſon, and that theſe be annexed to the freehold, yet cannot the parſon or any take them or deface them, but he is ſubject to an action to the heire, and his heires in the honour and memory of whoſe anceſtors they were ſet up (4). And ſo it was holden, Mich. 10 Ja. and herewith agreeth the lawes [d] in other countries. Note this kind of inheritance. And ſome hold that the wife or executors, that firſt ſet them up, may have an action in that caſe againſt thoſe that deface them in their time (5). And note, that in ſome places chattels as heir-loomes, (as the beſt bed, table, pot, pan, cart, and other dead chattels moveable) may go to the heire (6), and the heire in that caſe may have an action for them at the common law, and ſhall not ſue for them in the eccleſiaſticall court; but the heire-loome is due by cuſtome and not by the common law (7). And the [e] ancient jewels of the crowne are heire-loomes, and ſhall deſcend to the next ſucceſſor, and are not deviſable by teſtament. An heire-loome is called *principalium* or *hæreditarium*. *Conſuetudo hundredi de Stretford in Com' Oxon' eſt, quod hæredes tenentorum infra hundredum prædictum exiſtentium poſt mortem anteceſſorum ſuorum habebunt, &c. principalium, Anglice* an heire-loome, *viz. De quodam genere catallorum, utenſilium, &c. optimum plauſtrum, optimam carucam, optimum ciphum, &c.*

[c] 9. H. 4. 24.

Mich. 10. Ja Obiter in Com. banc. in Pym's caſe. 9. Jac. B. 202.

[d] B. Caſſanæus fol. 13. Conc. 29. 30. E. 3. 2. & 3. 39. E. 3. 6. 9. 10. 1. H. 5. tit. Executors 108. tit. Deſcent Br. 43. 9. E. 4. 15. Madam Wiche's caſe.

[e] Vide 28. H. 8. 24. (12. Co. 104.)

Int. adjudicata coram rege Tr. 41. E. 3. lib. 2. fo. 104. in Theſaur. Sect. 241. 242. &c.

Our author hath not ſpoken of parceners in this chapter, for that he hath particular chapters of the ſame.

Gradus Parentelæ, &c.

Chap. 2. Sect. 13.

(2. Inſt. 331.)
Mirror cap. 2. ſect. 15. & cap. 1. ſect. 5.
(Poſt. 22. a.)

TENANT en fee taile. *Tallium*, or *feodum talliatum*, is derived of the French word *tailler ſcindere*; for ſo Littleton himſelfe in this chapter, ſect. 18. ſaith.

Le Statute de W. 2. This ſtatute was made in 13. E. 1. and is called Weſt. 2. becauſe the parliament was holden at Weſtminſter, and

TENANT in fee taile eſt per force de le ſtatute de Weſt. 2. cap. 1. *car devant le dit ſtatute, touts enheritances fuerent fee ſimple; car touts les dones que ſont ſpecifies deins*

TENANT in fee taile is by force of the ſtatute of *W. 2. cap.* 1. for before the ſaid ſtatute, all inheritances were fee ſimple; for all the gifts which be ſpecified in that ſtatute were fee ſimple *meſne*

(1) In Plowd. 11. Saunders *arguendo* ſays, that one may have land by purchaſe three ways, by bargain or gift for money, by gift without any recompenſe, and by way of remainder.—(2) *The abbot of Fountains of the order of Ciſtercians before the council of Lateran makes a feoffment, and the land eſcheats to him after the council of Lateran. It ſeems, that he ſhall not be charged with tithes, becauſe it is not a purchaſe.* Quære. *M. 7. Jac. B. R. Dickſon and Waller* Hal. MSS. It was decreed by the general council of Lateran in 1215, that the privilege of exemption from tithes, enjoyed by the Ciſtercians and other religious orders, ſhould not extend to lands *purchaſed after* that council. *Ne occaſione privilegiorum ſuorum eccleſiæ ulterius prægraventur, decernimus, ut de alienis terris et* a modo acquirendis, *&c. decimas perſolvant, &c.* Gibl. Cod. 1ſt ed. v. 2. p. 700. 701. This explains the caſe cited by Lord Hale.—An eſcheat in appearance participates of the nature both of a *purchaſe* and a *deſcent*; of the *former*, becauſe ſome act by the lord is requiſite to perfect his title, and the actual poſſeſſion of the land cannot be gained till he enters or brings his writ of eſcheat; of the *latter*, becauſe it follows the nature of the ſeignory, and is inheritable by the ſame perſons; but *ſtrictly* ſpeaking an eſcheat is a title neither by purchaſe nor deſcent It ſhould be conſidered, that though the lord muſt do ſome act to put himſelf into the *actual poſſeſſion*; yet his *title* to take poſſeſſion commences immediately on the want of a tenant, and this title is veſted in him without waiting for his own deed or agreement, and as much by *mere act of law* as the title of an heir is in the caſe of a deſcent; and therefore both titles are equally excluded from being purchaſes. On the other hand, eſcheat is not a title by *deſcent*; for the lord takes in his capacity of *lord* of the ſeignory of which the land eſcheated was holden, and not as *heir* or by right of blood. Nor is it any objection to this way of conſidering the title by eſcheat, that the land eſcheated will be inheritable in the lord as land by purchaſe, where he has the ſeignory by purchaſe, and as land by deſcent where he has the ſeignory by deſcent; for the reaſon of this is, not that the eſcheat is either a purchaſe or deſcent, but becauſe the eſcheat follows the ſeignory, from which the right to it is derived, as an neceſſiry to its principal. According to this view of the ſubject, inſtead of diſtributing all the ſeveral titles to land under *purchaſe* and *deſcent*, it would be more accurate to to ſay, that the title to land is either by *purchaſe*, to which the act or agreement of the party is eſſential, or by *mere act of law*, and under the latter to conſider firſt *deſcent*, and then eſcheat, and ſuch other titles not being by deſcent, as yet like them accrue by mere act of law. See on this ſubject Blackſt. Comment. ed. 5. v. 2. p. 241. and 201.—(3) See Acc. ante 3 b.—(4) See Cro. Jam. 367. 2. Bulſtr. 151. See too the ſeveral books cited in Vin. Abr. *Deſcent* E.—(5) See Acc. 12. Co. 104. where it is ſaid, that afterwards the heir of the perſon, in honour of whom the tomb is erected, ſhall have the action.—(6) Heir-looms by cuſtom cannot be alienated by *deviſe*. See Poſt 185. b. and 1. Vern. 273.—(7) However, perſonal property may be deviſed or limited in ſtrict ſettlement to one for life, with remainder to ſons and

meſme le ſtatute fueront fee ſimple conditional al common ley, come appiert per le reherſal de meſme le ſtatute. Et ore per cel ſtatute tenant en le taile eſt en deux maners, ceſtaſcavoir, tenant en taile generall, et tenant en taile ſpecial.

conditional at the common law, as appeareth by the rehearſall of the ſame ſtatute. And now by this ſtatute, tenant in taile is in two manners, that is to ſay, tenant in taile generall, and tenant in taile ſpeciall.

learnedly read, whoſe reading I have. Of king Ed. 1. and of this ſtatute, Sir William Herle, chiefe juſtice of the court of Common Pleas, in 5. E. 3. 14. ſaith, that king E. 1. was the wiſeſt king that ever was: and the cauſe of the making of this ſtatute was to preſerve the inheritance in the blood of them to whom the gift was made. And in 9. E. 3. 22. he ſaith, that they were ſage men that made this ſtatute (1). See more of this in the chapter of Warranties, ſect. 746.

5. E. 3. 14.

9. E. 3. 22.

Of this eſtate taile it is ſaid, [a] *Modus legem dat donationi, et tenend' eſt etiam conventio, quia modus et conventio vincunt legem: ut ſi alicui cum uxore fiat donatio, habendum et tenendum ſibi et hæredibus quos inter eos legitime procreabunt, ecce quod donator vult tales hæredes in hæreditate paterna et materna ſuccedant, aliis hæredibus eorum remotioribus penitus excluſis: et quod voluntas donatoris obſervari debet, manifeſte apparet per hæc ſtatuta. Quia autem dudum regi durum videbatur, &c.*

[a] Fleta lib. 3. cap. 9 Bract. lib. 2. cap. 5. &c. Brit. ca. 24. & 36.

Devant le dit ſtatute [b] *touts inheritances fueront fee ſimple.* Here fee ſimple is taken in his large ſenſe, including as well conditionall or qualified, as abſolute, to diſtinguiſh them from eſtates in taile ſince the ſaid ſtatute. Before which ſtatute of *donis conditionalibus*, if land had beene given to a man, and to the heires males of his body, the having of an iſſue female had beene no performance of the condition; but if he had iſſue male, and dyed, and the iſſue male had inherited, yet he had not had a fee ſimple abſolute, [c] for if he had died without iſſue male, the donor ſhould have entred as in his reverter. By having of iſſue, the condition was performed for three purpoſes; Firſt, to alien: Secondly, to forfeit: Thirdly, to charge with rent, common, or the like. But the courſe of deſcent was not altered by having iſſue(2): for if the donee had iſſue and died, and the land had deſcended to his iſſue [d] yet if that iſſue had dyed (without any alienation made) without iſſue, his collaterall heire ſhould not have inherited, becauſe he was not within the forme of the gift, *viz.* heire of the body of the donee. [f] Lands were given before the ſtatute in franke-marriage, and the donees had iſſue and died, and after the iſſue died without iſſue; it was adjudged, that his collaterall iſſue ſhall not inherite, but the donor ſhall re-enter. So note, that the heire in taile had no fee ſimple abſolute at the common law, though there were divers deſcents (3).

[b] Vid. ſect. 18. Brit. ca. 36. fol. 93. Pl. Com. 235. 562. Shelley's caſe, 1. Co. 103. (2. Inſt. 333. 7. Co. 38.)

[c] 44. E. 3. 3. 30. E. 1. Formdon 66. 7. E. 3. 6. 7. 7. H. 4. 31. 12. H. 4. 2.

[d] 18. E. 3. 46. 18. Aſſ. p. 5. 12. E. 4. 3.

[f] 4. H. 3. Formdon 34. 18. Aſſ. 5. 12. E. 4. 3. Pl. Com 247. b. 18. E. 2. tit. Formdon 58. 59.

If lands had beene given to a man and to his heires males of his bodie, and he had iſſue two ſonnes, and the eldeſt had iſſue a daughter, the daughter was not inheritable to the fee ſimple, but the younger ſonne *per formam Doni*. And ſo if land had beene given at the common law to a man and the heires females of his body, and he had iſſue a ſonne and a daughter, and died, the daughter ſhould have inherited this fee ſimple at the common law(4); for the ſtatute of *donis conditionalibus* createth no eſtate taile, but of ſuch an eſtate as was fee ſimple at the common law and is deſcendable in ſuch forme as it was at the common law. If the donee in taile had iſſue before the ſtatute, and the iſſue had died without iſſue, the alienation of the donee at the common law, having no iſſue at that time, had not barred the donor.

(1. Ro. Abr. 840.)

[g] If donee in taile at the common law had aliened before any iſſue had, and after had iſſue, this alienation had barred the iſſue, becauſe he claimed a fee ſimple; yet if that iſſue had died without iſſue, the donor might re-enter, for that he aliened before any iſſue, at what time he had no power to alien to barre the poſſibilitie of the donor. [b] But if feme tenant in taile had taken huſband, and had iſſue, and the huſband and wife had aliened in fee by deed before the ſtatute, yet the iſſue might have had a *formdon in deſcender* (5); for the alienation was not lawful: but otherwiſe it is, if it had beene by fine. And theſe things, though they ſeem ancient, are neceſſarie notwithſtanding to be knowne, as well for the knowledge of the common law, as for annuities and ſuch like inheritances, as cannot be intailed within the ſaid ſtatute, and therefore remaine at the common law. [i] If the king before the ſtatute of *Donis con-*

[g] 30. E. 1. Formdon 5. Temps E. 1. ibidem 62. 19. E. 2. Formdon 61. Pl. Com. 246.

[b] 4. E. 2. Formdon 50.

(1. Ro. Abr. 837.)

[i] 6. E. 3. 56. Jo. of Eltham's caſe.

daughters in tail, ſo as to be tranſmiſſible like heir-looms; but the goods will be the abſolute property of the firſt tenant in tail, and be conformable to all the other rules concerning executory deviſes, and cannot render the property unalienable longer than lives in being, and 21 years after. For caſes of heir-looms by deviſe and ſettlement, ſee Gower and Groſvenor, Barnad. Ch. Rep. 54. Wyth and Blackman, 1. Veſ. 196. Duke of Bridgwater and Egerton, 2. Veſ. 121. Boon and Cornforth, 2. Veſ. 277. and Traſford, 3. Atk. 347.—See further on the ſubject of heir-looms, Blackſt. Com. 5th ed. v. 2. p. 427. and Vin. Abr. *Heir-loom*.—(1) However Lord Coke in other places finds great fault with the ſtatute *de donis*. See Poſt. 19. b.—(2) Where the gift was ſpecial to one of the heirs of his or her body by a particular perſon, the courſe of deſcent was in *ſome* degree changed by the having iſſue; for after iſſue had, by conſtruction of law the land became deſcendible to all the heirs of the donee's body, whether they were the donee's iſſue by the perſon named in the gift or by any other perſon, and alſo liable to the curteſy or dower of a *ſecond* huſband or wife. See Acc. Pain's caſe, 8. Co. 35. b. and Berkley's caſe, Plowd. 247. and the next note. Lord Coke infers, that this was the common law from that part of the ſtatute *de donis*, or of Weſtminſter the ſecond, which enacts, that *from thenceforth* neither the *ſecond* huſband nor the iſſue of a ſecond marriage ſhall have any thing in the caſe of ſuch a conditional gift. *Nec habeat de cætero ſecundus vir hujuſmodi mulieris aliquid in tenemento ſic dato per conditionem poſt mortem uxoris ſuæ per legem Angliæ, nec exitus de ſecundo viro et muliere ſucceſſionem hæreditariam.* That at common law the having of iſſue thus enlarged the courſe of deſcent, where the gift was of an *expreſs* conditional fee to a man and woman and the heirs of their two bodies, all the authorities agree; but it is ſaid, that the iſſue of a *ſecond* marriage could not inherit where the gift was in *frank-marriage*, which was an *implied* conditional fee to the donees and the iſſue between them, and yet at the ſame time we are told, that in this latter caſe the *ſecond* huſband might have curteſy. See 2 Inſt. 336. It will be difficult to give a reaſon why a gift to huſband and wife and the iſſue between them ſhould be ſo diſtinguiſhed from a gift in frank-marriage, or why the huſband ſhould have curteſy, where the iſſue by him could not inherit. See the next note, where Lord Hale ſeems to doubt this doctrine.—(3) *If gift be to huſband and wife and the heirs of their bodies, the iſſue by the ſecond marriage inherits.* 8. *Rep. Paine's caſe. It ſeems, that a gift in frank marriage goes to the heirs between the donees only; but a gift to huſband and wife, and to the heirs of their bodies, goes to the heir of the body of the ſurvivor for want of iſſue between them.* Vid. tamen. *Plowd. Comment.* 251.—Hal. MSS.—Lord Hale muſt be here underſtood to ſpeak of gifts at common law.—See the preceding note.—(4) In 1. Ro. Abr. 841. it is ſaid, that if land had been given to one and his heirs *males* of his body, and afterwards he had iſſue a male and a *female*, and afterwards the male died, the *female* ſhould have inherited the land. 18. E. 3. 46. 18. Aſſ. 58. are cited as authorities to prove this to have been the common law in reſpect to fees conditional; but Lord Coke's doctrine here is *contra*, and ſerjeant Rolle refers to it as being ſo; and in reſpect to eſtates in tail male it has been long ſettled, that a female cannot inherit by conveying her deſcent through a male. See Poſt. 25. a. and b.—(5) In another book Lord Coke ſays, that

[k] 45. Ass. p. 6.

[l] Pl. Com. 246. b. (Post. 392. 370. b.)

10. Co. 38. in Port. case.

conditionalibus had made a gift to a man, and to the heires of his bodie begotten, the donee *post prolem suscitatam* might have aliened as well as in the case of a common person. [k] But if the donee had no issue, and before the statute had aliened with warrantie, and died, and the warrantie had descended upon the king, this should not have bound the king of his reversion without assets: but otherwise it was in the case of a common person (1) [l] Of the other side, if lands had beene given to the king and to the heires of his bodie, he could not before issue have aliened in fee, but onely to have barred his issue as a common person might have done, but not to have barred the reversion, for that should have beene a wrong in the case of a subject, and the king's prerogative cannot alter his case, nor make it greater, than the donor gave unto him, and it is a maxime in law, that the king can do no wrong. When all estates were fee simple, then were purchasers sure of their purchases, farmors of their leases, creditors of their debts, the king and lords had their escheats forfeitures wardships and other profits of their seigniories: and for these and other like cases, by the wisedome of the common law all estates of inheritance were fee simple, and what contentions and mischiefs have crept into the quiet of the law by these fettered inheritances, dailie experience teacheth us (2). But see more of this matter in the aforesaid chapter of warrantie, sect. 746.

Common ley. See for explication hereof, sect. 170.

Doct. and Stud. lib. 2. ca. 55.

Come appeirt per le reherfall de mesme le statute. Here, by the authoritie of our author, the rehearsall or preamble of a statute is to be taken for truth; for it cannot be thought, that a statute that is made by authoritie of the whole realme, as well of the king, as of the lords spirituall and temporall, and of all the commons, will recite a thing against the truth.

Et ore per cel statute tenant en taile est en 2. manners, s. tenant en tayle generall, et tenant en tayle especiall.

This division of an estate taile is perfect and sound, for the *membra dividentia, viz.* generall and speciall are converted properly with the thing defined, and they are proved by many authorities of law, and approved of all learned men, and so are all the divisions through all his three bookes, which the studious and diligent reader will observe. And how excellent and difficult a thing it is to divide rightly and properly, especially in the law, the learned do know.

(Plowd. 555. 2. Ro. Abr. 780.)
[r] 24. H. 8. tit. feoffments al uses 4. 27. H. 8. fo.
[s] Pach. 14. Jac. in the King's bench.

By this statute the land is as it were appropriated to the tenant in taile, and to the heires of his body; and therefore [r] if an estate be made, either before or since the statute of 27. H. 8. cap. 10. to a man and the heires of his bodie, either to the use of another and his heires, or to the use of himselfe and his heires, this limitation of use is utterly voyde. For before the said statute of 27. H. 8. he could not have executed the estate to the use, and so was it adjudged [s] in an *ejectione firmae* between John Cowper plaintife, and Thomas Franklin, &c. defendant (3).

Sect. 14, 15.

Vid. sect. 1.

(Ante 6. a.)

TERRES, *Terra*, in his generall and legall signification, (as hath been said before) includeth not onely all kinde of grounds, as medow, pasture, wood, &c. but houses and all edifices whatsoever. In a more restrained sense it is taken for arable ground.

Tenements, tenementa. This is the only word which the said statute of W. 2. that created estates taile, useth; and it includeth, not only all corporate inheritances, which are or may be holden, but also all inheritances issuing out of any of

Tenant en taile generall est, lou terres ou tenements sont dones a un home et a ses heires de son corps engendres. En ceo case est dit generall taile, pur ceo que quelcunque feme, que tiel tenant espousa, (sil avoit plusors femes, et per chescune de eux il ad issue) uncore chescun de les issues

Tenant in taile generall is, where lands or tenements are given to a man, and to his heires of his bodie begotten. In this case it is said generall taile, because whatsoever woman, that such tenant taketh to wife, (if he hath many wives; and by every of them hath issue) yet everie one of these issues by pos-

that a *formedon in descender* lay not at *common law*. See 2 Inst. 33. But this seeming contradiction may perhaps be reconciled, by observing, that in the latter book Lord Coke is commenting on that part of the statute *de donis*, which gives a *formedon in descender*, notwithstanding alienation by the donees, where the gift was to husband and wife, and to the issue between them, or in frank marriage. In such a case the alienation by the donees certainly bound the issue at common law, and consequently before the statute they could not have a formedon in descender. But in the case here put by Lord Coke the wife *only* was the donee, and her alienation was merely by *deed*, which during coverture was insufficient to bind either her or her issue. However, it is proper to mention, that according to some authorities the writ of mortdancestor was the proper remedy for the issue at common law, and that the only case, in which the issue could have a formedon in descender before the statute, was, where by reason of some special circumstances he could not have an assise of *mortdancestor*. To illustrate this the following case has been given. A man hath issue a son by one wife, she dies, and he marries again, and land is given to him and his second wife and the heires of their bodies, and they have a son, and afterwards they both die, and then a stranger abates. Here it is said, that the son by the second wife could not have *mortdancestor*, because one point of that writ is to enquire who is next heir to the father, and the son by the first wife is the heir to the father; and therefore, that *formedon in descender* lay at common law for this special case, because otherwise the son by the second wife would have been without remedy for the freehold. See Plowd. 239.—(1) But Lord Coke in another book says, that though such alienation bound the issue, yet it did not bar the king's possibility of reverter, as it would that of common persons. See the earl of Cornwall's case cited Post 370. b. and in Holt's case 9. Co. 132. b.—(2) Lord Coke in many other places is very strong in his representation of the inconveniencies produced by the statute *de donis*. See Post. 370. b. and Mildmay's case 6. Co. 40. a.—(3) But in Godbolt's report of Franklin and Cooper, it is said to have been resolved, that tenant in tail might stand seized to an use expressed, but that an use could not be averred. Lord Bacon also gives it as his opinion, that an estate tail may be to uses *since* the statute for executing uses, and controverts the reasons for doubting it *before*. Bac. Law Tracts, 8vo ed. 347. See a great number of authorities on this subject in Vin. Abr. *Uses* C.

per possibilitie poit enheriter les tenements per force del done; pur ceo que chescun tiel issue est de sa corps engendre.

possibilitie may inherit the tenements by force of the gift; because that everie such issue is of his bodie ingendred.

EN mesme le maner est, lou terres ou tenements sont dones a un feme, et a ses heires de sa corps issuants. Coment que el avoit divers barons, uncore l'issue, que el poet aver per chescun baron, poit enheriter come issue en le taile per force de tiel done; et pur ceo tielx dones sont appelles generall tailes.

IN the same manner it is, where lands and tenements are given to a woman, and to the heires of her bodie, albeit that she hath divers husbands, yet the issue, which she may have by every husband may inherit as issue in taile by force of this gift; and therefore such gifts are called generall tailes.

those inheritances, or concerning, or annexed to, or exercisible within the same, though they lie not in tenure, therefore all these without question may be intailed. As [t] rents, estovers, commons or other profits whatsoever granted out of land; or uses; offices; dignities which concerne lands or certaine places, may be entailed within the said statute; because all these savour of the realtie. But if the grant be of an inheritance mere personal, or to be exercised about chattels, and is not issuing out of land, nor concerning any land, or some certaine place, such inheritances cannot be intailed, because they savour nothing of the realtie. But examples will illustrate and make this learning cleere.

[t] 7. E. 3. 363. 18. E. 3. 27. 7. H. 6. 8. 32. H.6.28. 5. E. 4. 3. 1. H. 7. 28. 4. H 7. 9. 1. H. 5. 1. H. 8. fol. 3. Nevil's case 7. Co. 33. 34. Pl. Com. in Manxel's case fol. 2. & 3. (7. Co. 33. 11. Co. 1. 1. Ro. Abr. 837-8. 10. Co. 87.)

The writ of assise [u] was *De libero tenemento*, and made his pleint of the office of the fourth part of the serjant of the common place, and the writ adjudged good, and seeing that a man hath a freehold, *liberum tenementum* in it, by consequent it may be intailed.

[u] 7. Ass. p. 12. 7. E. 6. 1. (Fitzh. N. B. 178. f.)

The office of the keeping of the church of our lady of Lincolne was intailed, and a formedon there brought upon that gift of the office by the issue in taile. The [x] office of the marshall of England intailed (1). The [y] office of one of the chamberlains of the exchequer intailed. 1. H. 7. 28. The office of a forrestership intailed. 4. H. 7. 10. 9. E. 4. 56. b. Charters intailed (2). 19. H. 8. 3. Use intailed. Nomination to a benefice intailed.

18 E. 3. 27.
[x] 5. E. 4. 3. 10. E. 4. 14.
[y] 11. E. 4. 1. 1. H. 7. 28. 4. H. 7. 10. 9. E. 4. 526. 19. H. 8. 3. 1. H. 5. 1.

Also a name of dignitie may be intailed within the statute, [a] as dukes, marquesses, earles, viscounts, barons; because they be named of some countie, mannor, towne, or place (3). If the issue in taile [b] in a *formedon* in the *discender* be barred by a false verdict, his release is no barre to his issue, albeit the action is at the common law.

[a] 7. Co. 33 34. Nevil's case. 28. H. 6. Lord Vesey's case. (6. Co. 7. b. Post 392. b. 1. Sid. 261.)
[b] 14. Ass. 2. 3. Eliz. Dyer 188.

The like law is of a writ of errour, 3. Eliz. Dyer 188. If a gift in taile be made with warrantie, the donee releases the warrantie, this shall not bind the issue in taile; for to all these cases and the like the said statute doth extend.

But if I grant to a man, and to the heires of his body, to be keeper of my hounds, or master of my horse, or to be my faulconer, or such like with a fee therefore, yet these cannot be intailed within the said statute, for that they be not issuing out of tenements, nor annexed to, or exercisible within, or concerning lands or tenements of freehold or inheritance, but concerning chattels, and savour nothing of the realtie. And so it is, if I by my deed for me and my heires grant an annuitie to a man, and the heires of his body; for that this only chargeth my person, and concerneth no land, nor savoureth of the realtie (4). In all these cases he hath a fee conditionall, as they were before the statute, and the grantee by his grant or release may barre his heire, as he might have done at the common law, for that in these cases he is not restrained by the said statute (5).

Pl. Com. in Manxel's case. (10. Co. 58. 1. Ro. Abr. 837.)

Et a ses heires de son corps engendres. In gifts in taile these words (*heires*) are as necessary, as in feoffments and grants; for seeing every estate taile was a fee simple at the common law, and at the common law no fee simple could be in feoffements and grants without these words (*heires*), and that an estate in fee taile is but a cut or restrained fee, it followeth, that in gifts in a man's life time no estate can be created without these words (*heires*), unlesse it be in case of frankmarriage, as hereafter shall be shewed. And where Littleton saith (*heires*) yet (*heire*) in the singular number in a speciall case

(1) See in W. Jo. 96 and Collins's Claims of Bar. 183. an account of the original grant and intail of the office of *earl marshal*, by Crew chief justice in his argument of the case about the office of *great chamberlain* of England. In this last case the right, to the great chamberlain's office was contested between an *heir male* claiming under an intail 9. Eliz by one of the *Vere* family, who was then seized of the office in fee, and the *heir general* claiming under the limitations of the original grant from the crown. Crew chief justice spoke in the house of lords for the *heir male*; but a majority of the other judges, amongst whom was Doderidge, gave their opinion for the *heir general*, upon the principle, that this high office, like a title of honour, was inherent in the blood of the first grantee, and incapable of alienation.—(2) *But if the tail be barred by collateral warrantie, detinue will lie for the charters.* Hal. MSS.—See 9. E. 4. 52. b.—(3) *There are many titles of dignity without any place.* Hal. MSS.—In the King and Knollys 1. L. Raym. 13. lord chief justice Holt says, that naming a place is not essential to the creation of a dignity, and mentions the earldom of *Rivers* as an instance. But it has been held, that if the king grants a dignity to one and the heirs male of his body, without naming any place, the grantee shall have a fee conditional, and not an estate tail, as he would have if a place had been mentioned. See 12. Co. 81. where this was adjudged in the case of a baronet. However, though dignities and titles of honour having relation to some place are intailable by the crown as tenements within the statute *de donis*, yet neither the donee nor his issue can bar the intail by fine, recovery, or any other means, as may be done in the case of other intailable things. See Lord Purbeck's case, Show. Parl. Cas. 1. and Collin's Claims of Bar. 293. in which it was adjudged, that the surrender of a dignity to the crown by fine was void.—Note, that in Lord Purbeck's case his counsel distinguished between ancient honours, as being feodary and officiary and having relation to a place, from *modern* dignities as being merely titular and personal, notwithstanding the formality of naming a place in the creation; and from thence infer, that the latter are not within the statute *de donis*.—(4) See the case of the earl of Stafford and Buckley, 2. Ves. 170 in which lord chief justice Hardwicke held, that an annuity in fee, granted by the crown out of the 4½ per cent. duties payable for exports and imports at Barbadoes, was merely a personal inheritance, and not intailable within the statute *de donis*. According to a manuscript note of the same case, lord Hardwicke, in giving his opinion, said, that an annuity out of the revenue of the *post office* or *excise* savours no more of the realty than money.—(5) Two things seem essential to an intail within the statute *de donis*. One requisite is, that the *subject* be land or some other thing of a *real* nature. The other requisite is, that the *estate* in it be an *inheritance*. Therefore neither estates *pur autre vie* in lands, though limited to the grantee and his heirs during the life of *cestui que vie*, nor *terms for years*, are intailable any more than *personal chattels*; because as the latter, not being either interests in things *real* or of *inheritance*, want *both* requisites, so the two former, though interests in things *real*, yet not being also of *inheritance*, are deficient in *one* requisite. However, estates *pur autre vie*, terms for years, and personal chattels, may be so settled, as to answer the purposes of an intail, and be rendered unalienable almost for as long a time, as if they were intailable in the strict sense of the word. Thus estates *pur autre vie* may be devised or limited in strict settlement by way of *remainder* like estates of inheritance; and such as have interests in the nature of estates tail may bar their issue

39. Aſſ. p. 20. 20. H. 6. 35. 5. H. 4 7. b, 14. H. 4. 15. (Poſt. 385. b. 1. Ro. Abr. 829. 8. Co. 57. 1. Co. 103. b. Ante 9. b.)

caſe may create an eſtate taile, as it appeareth by 39. Aſſ. p. 20. hereafter mentioned(1). And yet if a man give lands to A, *et hæredibus de corpore ſuo*, the remainder to B, *in forma prædicta*, this is a good eſtate taile to B, for that *in forma prædicta* do include the other. If a man letteth lands to A for life, the remainder to B in taile, the remainder to C *in forma prædicta*, this remainder is void for the incertantie. But if the remainder had beene, the remainder to C *in eadem forma*, this had beene a good eſtate taile, for *idem ſemper proximo antecedenti refertur*. If a man give lands or tenements to a man *et ſemini ſuo* or *exitibus vel prolibus de corpore ſuo*, to a man and to his ſeed, or to the iſſues or children of his body, he hath but an eſtate for life; for albeit that the ſtatute provideth, that *voluntas donatoris ſecundum formam in charta doni ſui manifeſtè expreſſam de cætero obſervetur*, yet that will and intent muſt agree with the rules of law. And of this opinion was our author himſelfe, as it appeared in his learned reading aforementioned upon this ſtatute, where he holdeth, if a man giveth land to a man *et exitibus de corpore ſuo legitimè procreatis*, or *ſemini ſuo*, he hath but an eſtate for life, for that there wanteth words of inheritance (2).

(Cro. Eliz. 121. Ow. 64. S. C. Mo. 103.)
Vid. Shelley's caſe. 1. Co.

(1. Ro. Abr. 837.)

De ſon corps. Theſe words are not ſo ſtrictly required but that they may be expreſſed by words that amount to as much: for the example that the ſtatute of W. 2. putteth hath not theſe words *(de corpore)*, but theſe words *(hæredibus) viz. Cum aliquis dat terram ſuam alicui viro et ejus uxori et hæredibus de ipſis viro et muliere procreatis.* If lands be given [c] to B, *et hæredibus quos idem B de prima uxore ſua legitimè procrearet*, this is a good eſtate in eſpeciall taile (albeit he hath no wife at that time) without theſe words *(de corpore)*. So it is [d] if lands be given to a man, and to his heires which he ſhall beget of his wife, [e] or to a man *et hæredibus de carne ſuâ*, or to a [f] man *et hæredibus de ſe*. In all theſe caſes theſe be good eſtates in taile, and yet theſe words *de corpore* are omitted.

(7. Co. 41.)
[c] 3. E. 3. tit. Breve. 743. 3. E. 3. tit. Eſtates.
[d] 12. H. 4. 2.
[e] 37. H. 6. 15.
[f] 5. H. 5. 6. (7. Co. 41.)

It is holden [g] by ſome opinion, that if there be grandfather father and ſonne, and lands are given to the grandfather, and to his heires begotten by the father, the father dyeth, the grandfather dyeth, the ſonne is in as heire to the grandfather begotten upon the body of his father, and the wife of the grandfather in that caſe ſhall be endowed. But certaine it is, that in ſome caſes one ſhall have the land *per formam doni* that is not iſſue of the body of the donee, which ſee ſection 30.

[g] 12. H. 4. 2. per Horton.

(Poſt. 27. a. 26. b. 220. a.)

Engendres. This word may in many caſes be omitted or expreſſed by the like, and yet the eſtate in taile is good: as, *hæredibus de carne, hæredibus de ſe, hæred' quos ſibi contigerit, &c.* as is aforeſaid, and where the word of Littleton is, ingendred, or begotten, *procreatis*, yet if the word be *procreandis* or *quos procreaverit*, the eſtate in taile is good; and as *procreatis* ſhall extend to the iſſues begotten afterwards, ſo *procreandis* ſhall extend to the iſſues begotten before (3).

18. E. 2. tit. Bre. 836.
24. E. 3. 28.
(7. Co. 41. Ow. 152.)

Sect. 16.

A Un home & ſa feme. [a] Then put the caſe that lands be given to a man and a woman unmarried, and the heires of their two bodies: for the apparent poſſibilitie to marry, they have an eſtate taile in them preſently. [b] So it is where lands be given to the huſband of A, and to the wife of B, and the heires of their bodies, they have preſently an eſtate in taile, in reſpect of the poſſibilitie. If a feme ſole do enfeoffe a married man *cauſa matrimonii prælocuti*, it is good for the poſſibilitie. But put the caſe that the premiſes and the *habendum* be in other manner than Littleton hath put, and let us ſee

[a] 5. H. 7. 10. 11. E. 3. Formdon 30. Pl. Com. 35.

[b] 10 Co. 120. Chudley's caſe. 49. Aſſ. pl. 13. 34. Aſſ. Pl. 1. Fleta lib. 5. c. 34.

(Plowd. 35. Poſt. 25 b. F. N. B 205. b. Poſt. 204. a. 1. Ro. Abr. 419.)

TEnant en taile ſpecialle eſt, lou terres ou tenements ſont dones a un home et a ſa feme, et a les heires de lour deux corps engendres. En tiel caſe nul poet inheriter per force de le dit done, forſque ceux que ſont ingendres perenter eux deux. Et eſt appelle ſpeciall taile, pur ceo que ſi la feme devy, et il prent auter feme, et ad iſſue, l'iſſue del ſe-

TEnant in taile ſpeciall is, where lands or tenements are given to a man and to his wife, and to the heires of their two bodies begotten. In this caſe none ſhall inherit by force of this gift, but thoſe that be engendred between them two. And it is called eſpeciall taile, becauſe if the wife die, and he taketh another wife, and have iſſue, the iſ-

iſſue and all remainders over by *alienation* of the eſtate *pur autre vie*, as thoſe, who are ſtrictly ſpeaking tenants in tail, may do by *fine* and *recovery*; but then the having of iſſue is not an eſſential preliminary to the power of alienation in the caſe of an eſtate *pur autre vie* limited to one and the heirs of his body, as it is in the caſe of a conditional fee, from which the mode of barring by alienation was evidently borrowed. The manner of ſettling terms for years and perſonal chattels is different, for in them no *remainders* can be limited; but they may be intailed by *executory deviſe* or by deed of *truſt*, as effectually as eſtates of inheritance, if it is not attempted to render them unalienable beyond the duration of lives in being and 21 years after, and perhaps in the caſe of a poſthumous child a few months more; a limitation of time, not *arbitrarily* preſcribed by our courts of juſtice, but wiſely and reaſonably adopted in analogy to the caſe of freeholds of inheritance, which cannot be ſo limited by way of remainder as to poſtpone a complete bar of the intail by fine or recovery for a longer ſpace. It is alſo proper to obſerve, that in the caſe of terms of years and perſonal chattels, the *veſting* of an intereſt, which in realty would be an eſtate tail, bars the iſſue and all the ſubſequent limitations, as effectually as fine and recovery in the caſe of eſtates intailable within the ſtatute *de donis*, or a ſimple alienation in the caſe of conditional fees and eſtates *pur autre vie*; and further, that if the executory limitations of perſonalty are on contingencies too remote, the whole property is in the firſt taker. Upon the whole, by a ſeries of deciſions within the laſt two centuries, and after many ſtruggles in reſpect to perſonalty, it is at length ſettled, that every ſpecies of property is in *ſubſtance* equally capable of being ſettled in the way of intail; and though the modes vary according to the nature of the ſubject, yet they tend to the ſame point, and the duration of the intail is circumſcribed *almoſt* as nearly within the ſame limits, as the difference of property will allow. As to the intail of eſtates *pur autre vie*, ſee 2. Vern. 184. 225. 3. P. Wms. 262. 1. Atk. 524. 2. Atk. 259. 376. 3. Atk. 464. and 2. Veſ. 681. As to the intail of terms for years and perſonal chattels, ſee Manning's caſe, 8. Co. 94. Lampett's caſe, 10. Co. 46. b. Child and Bailey, W. Jo. 15. Duke of Norfolk's caſe, 3. Cha. Caſ. 1. a caſe in Carth. 267. and one in 1. P. Wms. 1. See alſo Fearne's Eſſay on Conting. Rem. and Exec. Dev. 2d ed. p. 122. to the end. Mr. Fearne's work is ſo very inſtructive on the dry and obſcure ſubject of remainders and executory deviſes, that it cannot be too much recommended to the attention of the diligent ſtudent.—Note, it was reſolved in the 40. Eliz. that the ſtatute *de donis* doth not extend to the Iſle of Man, becauſe the ſtatute is *general*, and the Iſle of Man is not *ſpecially* named. See 4. Inſt. 284. 2. And. 115. and 2. Veſ. 350. See alſo ante 9. a. where the following note by lord Hale in reſpect to the caſe of the Iſle of Man, there mentioned by lord Coke to have been adjudged in 40. Eliz. ſhould have been introduced; though as it partly relates to the ſtatute *de donis*, it may come in here without any impropriety. Nota, *William earl of Saliſbury got Man from the Scots, and granted it to William Scroop. Hen. 4. claiming it by conqueſt from him, granted it* comiti Northumbriæ, *and on his attainder granted it to Sir John Stanley and his heirs; and in this caſe ruled, 1. That Man is not parcel of England. 2. That it is bound by ſtatutes of England where ſpecially named, otherwiſe not. Therefore the ſtatutes* de donis, *of uſes, of wills, not in force there; and it deſcends to the coheirs of Ferdinando, and not to his brother William earl of Derby.* Hal. MSS.—As to the intail of copyholds, ſee Poſt 60. a.—(1) See this caſe Poſt. 22. a.—(2) *But deviſe to one et* hæredibus legitimè procreatis *is tail. H. 43. El. C. B. rot. 1408. Moor caſe 711. but contra by act executed 7. Rep. 41. b.—Dormer's caſe. If lands be limited by deed to the uſe of I. S. and* hæredum maſculorum ſuorum legitimè procreatorum, *remainder over, it is a fee ſimple; but if it be* hæredum maſculorum de ſe, *or in Engliſh*, the heirs of him lawfully begotten, *eſpecially where there is a remainder over, it is tail, 7. Rep. 41. Bedell's caſe. Dormer's caſe H. 38. Eliz. B. R. rot 739.* Hal. MSS.—(3) 10. E. 3. 19. *adjudged accordingly.* Hal. MSS. But it is held, that, where the words were *in poſterum procreandis*, ſons born

cond feme ne ſerra jammes inheritable per force de tiel done, ne auxy liſſue del ſecond baron, ſi le prime baron devie.

ſue of the ſecond wife ſhall not inherite by force of this gift, nor alſo the iſſue of the ſecond huſband, if the firſt huſband die.

what the law is in theſe caſes. [c] (1) As if a man in the premiſſes give lands to another and the heires of his bodie, *habendum* to him and his heires for ever; it hath beene holden that in this caſe he hath an eſtate taile, and a fee ſimple expectant. And ſo (it is

[c] 21. H. 6. 7. (Perk. Sect. 18. 170. 2. Sid. 78. 8. Co. 56. b. 8. Co. 154. Plowd. 147. 2. Ro. Abr. 680.)

ſaid) *via verſa*, if lands be given to a man and to his heires in the premiſſes, *habendum* to him and to the heires of his bodie, that he hath an eſtate taile, and a fee ſimple expectant. But vid. lib. 8. fo. 154. b. otherwiſe reſolved, *ut patet ibi* (2). [d] If lands be given to B and his heires, to have and to hold to B and his heires, if B have heires of his bodie, and if he die without heires of his bodie that it ſhall revert to the donor, this is adjudged an eſtate taile, and the reverſion in the donor. [e] For *voluntas donatoris in charta doni ſui manifeſtè expreſſa obſervetur*; and therefore in the caſe next precedent, if theſe or the like words be added (and if he die without heires of his bodie, that the lands ſhall revert to the donor) that then the *habendum* ſhall by authoritie of divers bookes be conſtrued upon the whole deed, to be a limitation or a declaration, what heires are meant in the premiſſes, to inherit, and in that caſe the reverſion is in the donor (3).

[d] 30. Aſſ. p. 47. 35. Aſſ. p. 14. 37. Aſſ. 15. 5. H. 5. 6. (2. Ro. Abr. 68. Cro. Jam. 595. 290. 427. 448.)
[e] W. 2. ca. 22.

[f] If a man make a charter of feoffment of an acre of land to A and his heires, and another deed of the ſame acre to A and the heires of his bodie, and deliver ſeiſin according to the forme and effect of both deeds, in this caſe he cannot take a fee ſimple onely, as ſome hold, for that liverie was made according to the deed in taile, as well as to the charter in fee, neither can the livery enure onely to the deed of eſtate taile with a fee ſimple expectant, for that liverie was made as well upon the deed in fee ſimple, as the deed in taile. Therefore others hold, that in that caſe it ſhall enure by moities, that is, to have an eſtate taile in the one moitie, with the fee ſimple expectant, and a fee ſimple in the other moitie: and ſo the liverie ſhall worke immediately upon both deeds (4).

[f] 2. H 6. 25. 45. E. 3. 20. (Vid. 5. Co. 25. where two fines are levied.)

Sect. 17.

EN meſme le maner eſt, lou tenements ſont dones per un home a un auter ove un feme, que eſt la file ou couſin al donour en frankmariage, le quel done, ad un enheritance per ceux parolx (frankmariage) a ceo annexe, coment que ne ſoit expreſſement dit, ou reherce en le done, ceſtaſcavoir, que les donees averont les tenements a eux et a lour heires perenter eux deux engendres. Et ceo eſt dit eſpecial taile; pur ceo que l'iſſue del ſe-

IN the ſame manner it is, where tenements are given by one man to another, with a wife (which is the daughter or couſin to the giver) in frankmariage (5), the which gift hath an enheritance by theſe words (frankmariage) annexed unto it, although it be not expreſly ſaid or rehearſed in the gift (that is to ſay) that the donees ſhall have the tenements to them and to their heires betweene them two begotten. And this is called eſpeciall taile, becauſe

A Un home ove un feme. Albeit the gift is made of the land to the man with his daughter, &c. yet is the gift good to them both in ſpeciall taile, and therefore that of Stephen de la More in [g] 5. E. 3. is very remarkeable, where the caſe was, that Robert gave the reverſion of lands which Agnes his wife did hold for her life to Stephen de la More, *habendum poſt mortem dictæ Agnetis in liberum maritagium cum Johanna filia ejuſdem Roberti*, and it is adjudged that it is a good eſtate taile. Wherein three things are to be obſerved, firſt that Joane the daughter took with her huſband an eſtate in eſpeciall taile, albeit ſhe were named but under a

Vid. Sect. 19. 20. (2. Ro. Abr. 67.)

5. E. 3. 17.
[g] This caſe is vouched in Pl. Com. 158. to be in 4. E. 3. which being not found (6) in that yeare it is there ſo left without any further reference, but you ſhall find it as above ſaid in 5. E. 3. 17.

cum, viz. cum Johanna, &c (7). 2. That *cum* doth come after the *habendum*, for that it is but all one ſentence. 3. That theſe words, *in liberum maritagium*, doe create an eſtate of inheritance in eſpeciall taile as Littleton

before ſhall be excluded on account of the peculiar force of *in poſterum*.† Adj. M. 26. Eliz. B. R. 3. Leon. 87.—(1) *Where the eſtat. in the* premiſes *ſhall be corrected by the* habendum, *if there happen to be a clauſe of warranty*, 2. E. 2. *Feoffments* 94. Dedi Adamæ de B unam carucat. cum C filia mea in liberum maritagium, habendum Adamæ et hæredibus ſuis faciend. forinſecum ſervitium; *and warranty to Adam* et hæredibus ſuis in perpetuum. *After the death of Adam and his wife, their iſſue bring* mortdanceſtor; *and ruled, that it doth not lie, but* formedon, *becauſe* tail, 10. E. 3. 25. Scintis me dediſſe Edmundo et Aliciæ filiæ meæ et hæredibus ſuis in liberum maritagium, habendum et tenendum dictis E et A et hæredibus ſuis in liberum maritagium. *If the gift be before the ſtatute* de donis, *it is only frank-marriage; if after the ſtatute, it is tail with fee expectant. Vid.* 10. *H.* 6. 16.—19. *H.* 6. 74. *Gift to A, and if he dies without heir of his body reverter to the donor, it is not tail; but if it was by deviſe, it is tail.* Hal. MSS.—(2) The reſolution in 8. Co. 54. b. is, that here the words *heirs of the body* in the *habendum* qualify the word *heirs* in the *premiſes*, and therefore that there ſhall be an eſtate tail without any fee expectant. See acc. Mo. 26. In the caſe in Cro. Jam. 476. and 2. Ro. Rep. 19. 23. ſuch words were held adjudged to paſs tail and fee expectant. But the caſe was attended with circumſtances particularly ſhewing an intention to paſs *both*; for there was a reſervation of tenure to the lord paramount, which could not be if only an eſtate tail paſſed to the donee and the reverſion had remained in the donor, for then the tenure muſt have been of the donor. Alſo there was a warrantie to the grantee and his *heirs*. However, the court intimated, that their opinion would have been the ſame, if theſe ſpecial circumſtances had not occurred. See further as to the operation of the *habendum* in explaining and qualifying the *premiſes* Poſt 183. and the note on lord Coke's doctrine againſt *abridging* the latter by the former, Poſt. 299. a. See alſo Vin. Abr. *Grants* I. K. L. M. and N.—(3) In a note in 1. P. Wms. 57. lord keeper Wright puts the caſe of a gift by deed to one and his *heirs*, and if he die without *iſſue*, remainder over, and holds, that the latter words reſtrain the former, and convert the fee into a tail.—(4) 7. *E.* 3. 64. *Land given to huſband and wife, and the heirs of the body of huſband, and if the huſband and wife die without heirs between them lawfully begotten, remainder over. It is only a tail general in the huſband.* Dy. 171. *Deviſe to A and the* heirs male of his body, *and if he die without* heirs of his body, *remainder over, it is only tail male.*‡—Vid. M. 9. Jac. inter *Walſop and Derby. Deviſe to A in fee, and afterwards by the ſame will deviſe of the ſame land to B in fee, they are joint-tenants.* Vid. 13. *R.* 2. *brief* 645. *Land given to the father and the heirs of his body, remainder to his ſon in tail. It ſeems, the ſon has election to claim by deſcent or purchaſe. (It ſeems the remainder is void, becauſe included in the firſt eſtate.)* Hal. MSS.—(5) *Before or after marriage.* Dy. 147. Hal. MSS.—See acc. Poſt 21. b. and 176. a.—(6) *The caſe is* 4. *E.* 3. 4. Hal. MSS. (7) Dedi et conceſſi Johanni White in liberum maritagium Johannæ filiæ meæ habendum dicto

tleton saith, *le donee ad un inheritance per reason de ceux parolx (frankmariage) a ceo annexe, coment que ne soit expressement dit; &c.* But this had need of some interpretation, for if lands be given by these words (in frankmariage), according to the rules of law, then do these words create an estate of inheritance in speciall taile: for the consideration of marriage is in that case more favoured in law, than any other consideration. But though the gift be in these words, yet if it be not consonant to the rules of law in other things requisite thereunto, there they create but an estate for life. And therefore to speak once for all, four things be incident to a frankmariage. First, that it be given for consideration of mariage either to a man with a woman, or, as some have held, to a woman with a man. For in [*b*] 6. E. 3. 33. in Peirs de Saltmarsh his case, a man gave land to his sonne in frankmariage, and Fitz. N. B. 172. taketh the law so also, and 7. E. 4. 12. *per* Moyle against a new opinion *in temps* H. 8. Br. tit. Frankmariage the former bookes being not remembred. Secondly, that the woman or man, that is the cause of the gift [*i*] be of the blood of the donor; but it may be made as well after marriage as before, and it may be made with a widow, &c. Thirdly, if the gift be made of such a thing as lyeth in tenure, that the donees hold of the donor at the time of the estate in frankmariage made. A rent service [*k*] may be given in frankmariage, because it may be holden. And so may a rent charge or rent secke as Fitz N. B. holdeth, and it appeareth in our bookes that a common was granted in frankmariage. (1) Fourthly, that the donees shall hold freely of the donor till the fourth degree be past. And therefore if land be given to a woman, with a sonne of the donor in frankmariage, there passeth an inheritance; but if the donee that is the cause of the gift be not of the blood of the donor, then there passeth but an estate for life if livery be made. Also if [*l*] lands be given to a man with a woman of the blood of the donor *in liberum maritagium*, the remainder in fee either to a stranger or to the donees, they have no estate taile, because there is no tenure of the donor (2); but if [*m*] in that case, the remainder had beene limited to another in taile reserving the reversion in fee to the donor, there the said words *(in liberum maritagium)* create an inheritance, because the donees hold of the donor. And this is the cause that it is holden, that a man cannot devise land in frankmariage because the donee cannot hold of the donor. And *cesty que use* before the statute of 27. H. 8. could not have made a gift in frankmariage because the reversion was in the feoffees. [*n*] And if the donor doth give lands in *liberum maritagium* reserving a rent, this reservation shall take no effect till the fourth degree be past, but the frankmariage is good, for if the reservation should be good, then could not the donees have an estate taile for want of words of the heires of their bodyes (3).

cond feme ne poit inheriter, &c.

the issue of the second wife may not inherit.

W. 2. ca. 1. 9. E. 3. tit. Taile. 1.

(1. Ro. Abr. 840.)

[*b*] 6. E. 3. 33. Fitz. N. B. 172. 7. E. 4. 12. 15. E. 2. Cui in vita. sect. 24.

[*i*] 4. E. 3. 8. 31. E. 1. taile. 30. Bracton. lib. 2. cap. 7.

[*k*] 22. R. 2. tit. *Discent* 50. Fitz. N. B. 212. 9. H. 6. 35. b. W. 2. ca. 1. acc.

[*l*] Temps H. 8. Br. frankmar. 11. 13. E. 1. formdon 63. Vid. 32. E. 1. tail. 25. 2. E. 2. Feoffment & faitz 9. 17. E. 3. 5 a. 45. E. 3. 20 (1. Ro. Abr. 840.)

[*m*] 20. E 2. aid. 174. 31. E. 3. Gard. 216.

[*n*] Bract. lib. 2. cap. 7. 32. E. 1. taile. 31. 13. H. 4. 74. 4. H. 6. 17. 26. Ass. 66. 31. E. 3. gar. 29.

26. Ass. p. 66. per Wilbye.

En Frankmariage. *Liberum maritagium*, free mariage; *maritagium* is taken for fee taile, and divideth *maritagium* into *liberum et servitio obligatum:* and herewith agreeth Bracton [*o*] lib. 2. cap. 34. and 39. *Maritagium est aut liberum aut servitio obligatum*, and lib. 2. ca. 7. nu. 3. & 4. *liberum maritagium dicitur, ubi donator vult quod terra sic data quieta sit et libera ab omni seculari servitio.* And so, before Bracton, said Glanvill. lib. 7. ca. 18. *Maritagium autem aliud nominatur liberum aliud servitio obnoxium; liberum dicitur maritagium, quando aliquis liber homo aliquam partem terræ suæ dat cum aliqua muliere in maritagium, ita quod ab omni servitio terra illa sit quieta &c.* And after both of them Fleta that followeth them both, lib. 3. cap. 1. saith, *est autem quoddam maritagium liberum ab omni servitio solutum donatori vel ejus hæredi, &c. Et est similiter maritagium servitio obligatum et oneratum, &c.* And these words *(in liberum maritagium)* are such words of art, and so necessarily required, as they cannot be expressed by words equipollent, or amounting to as much. As if a man give lands to a man with his daughter *in connubio soluto ab omni servitio, &c.* Yet there passeth in this case but an estate for life, for seeing that these words *(in liberum maritagium)* create an estate of inheritance against the generall rule of law, the law requireth that they should be legally pursued. But then it may be demanded if a man had given lands at the common law, *in libero maritagio*, whether had the donees a fee simple without these words (heires) for that it appeareth by that which hath beene said before, that all gifts in taile were fee simple at the common law, and that the statute of W. 2. did not create any estate in fee taile, but out of an estate in fee simple. To this it is answered, that these words *(in liberum maritagium)* did create an estate in fee simple at the common law: and it is holden in 31. E. 3. gard. 116. *Per ceux parolx in frankmariage les donees averont les terres a eux et a lour heires parenter eux engendres, et ceo est dit especial taile.* But yet betweene donees in frankmariage and other donees in speciall taile there may be many notable diversities. If the king give land to a man and a woman, and the heires of their two bodies, and the woman die without issue, yet shall the man be tenant in taile *apres possibilitie.* But if the king give land to a man with a woman of his kindred in a frankmariage, and the woman dyeth without issue, the man in the king's case shall not hold it for his life, because the woman was the cause of the gift; but otherwise

[*o*] Bract. lib. 2. ca. 34. & 39. & lib. 2. ca. 7. nu. 3. & 4. Glanvil, lib. 7. ca. 1. & ca. 18.

Fleta lib. 3. ca. 1.

30. E. 1. tit. Formdon. 66. adjudg. acc. (2. Inst. 336.)

31. E. 3. tit. Gard. 126. Mirr. cap. 2. sect. 15. acc.

9. H. 3. Dower, 202.

dicto Johanni cum hæredibus suis in perpetuum de capitali domino feodi; *and warranty to him and his heirs. Ruled, that it is neither tail, nor frank-marriage, but fee simple only in the husband, and nothing in the wife. M. 23. and 24. El. C. B. Webb and Porter.* Vid. contra 32. *E.* 1. *tail* 25. *but* 45. *E.* 3. 20. *agrees.* Hal. MSS.—See acc. the same case in Ow. 26. and Godb. 18. The same case is cited in Mo. 643. pl. 888.

(1) 14. *E.* 2. *Aiel* 1. *Reversion granted by two in frank-marriage.* Vid. 4. *E.* 3. 4. 26. *E.* 3. *tail* 27. Hal. MSS.

(2) *But see the contrary of this* Pasch. 40. Eliz. *C. B. lord Barclaye's case n.* 11. *and all the books here cited prove, that it is at least an estate tail, although no tenure, and it is accordingly adjudged* 17. *E.* 3. 65. Vid. *H.* 43. *El. B. R.* rot. 140. *between lord Barclay and the countess of Warwick.* Hal. MSS.—See S. C. in Mo. 643. Cro. Eliz. 635. and 1. Ro. Abr. 750. but the point of frankmarriage is not reported in the two latter books.

(3) 13. *H.* 4. *Mesne* 74. 30. *E.* 3. 24. *Gift in frankmarriage* salvo forinseco servitio *good, and the donee shall hold in chivalry.*—Hal. MSS.

wiſe it is in the caſe of a common perſon, if lands be given to a man and a woman in eſpeciall taile and they are divorced *cauſa præcontractus*, both ſhall hold the lands for their lives; but in [p] caſe of frankmariage if they be ſo divorced, the woman ſhall enjoy the whole land, becauſe ſhe was the cauſe of the gift (1). If lands holden in ſocage [q] be given in eſpeciall taile and the donees die the iſſue being within the age of 14 yeares, [r] the next of kinne of the part of the father or of the part of the mother which can hap the cuſtody ſhall have it, but in caſe of frankmariage the heire of the part of the mother ſhall have it, becauſe as it hath been ſaid ſhe was the cauſe of the gift.

7. H. 4. 16.

[p] 13. E. 3. tit. Aſſ. 19. E. 3. Aſſ. 83. 12. Aſſ. 22. 19. Aſſ. 2. 8. E. 3. Aſſ. 45. (F. N. B. 204.)
[q] Pl. Com. Carril's caſe.
[r] 17. H. 3. tit. Gard. 146 E. 3. 79.

27.

Sect. 18.

ET nota, quod hoc verbum (Talliare) idem eſt quod ad quandam certidunitem ponere, vel ad quoddam certum hæreditamentum limitare. *Et per ceo que eſt limit et mis en certaine, quel iſſue inheriter a per force de tiels dones, et come longement l' enheritance endurera, il eſt appelle en Latin*, feodum talliatum, i.e. hæreditas in quandam certitudinem limitata. *Car ſi tenant in general taile moruſt ſans iſſue, le donor ou ſes heirs poient entrer come en lour reverſion.*

AND note that this word (*Talliare*) is the ſame as, to ſet to ſome certaintie, or to limit to ſome certaine inheritance. And for that it is limited and put in certaine, what iſſue ſhall inherite by force of ſuch gifts, and how long the inheritance ſhall indure, it is called in Latine, *feodum talliatum. i. e. hæreditas in quandam certitudinem limitata.* For if tenant in generall taile dieth without iſſue, the donor or his heires may enter as in their reverſion (3).

ET nota. This, in our author throughout his three bookes, betokens ſome notable point of inſtruction worthy of more ſpeciall obſervation, which is often [f] uſed by him as you may perceive by the ſections noted in the margent (2).

(Ante 17. b.)

[f] Sect. 18. 37. 42. 43. 49. 50. 64. 72. 89. 90. 104. 108. 114. 116. 147. 158. 161. 168. 170. 183. 254. 279. 346. 387. 452. 467. 618. 619. 637. 642. 670. 682. 684. 711. 717. 719. 738.

Feodum talliatum i. e. *hæreditas in quandam certitudinem limitata.* Here our author doth interpret what *feodum talliatum* is. Of all the eſtates taile moſt coarcted or reſtrained, that I finde in our bookes, is the eſtate taile in 39. Aſſ. Pl. 20. where lands were given to a man and to his wife and to one heire of their bodies lawfully begotten, and to one heire of the body of that heire only, this caſe being adjudged in the point is an exception (ſome ſay) out of the generall rule put before by Littleton. ſect 13. that all eſtates tailes were fee ſimple at the common law; for (ſay they) by this limitation *(hæredi)* in the ſingular number the donees had not had a fee ſimple at the common law. *Vide regiſtrum judiciale*, fo. 6. a gift made to a man *et hæredi maſculo de corpore ſuo* (4).

Weſt. 2. cap. 3. Pl. Com. 251. n.

39. Aſſ. pl. 20. (1. Co. 66. 104. Ante 8. b. 1; Ro. Abr. 838.)

Sect. 13. Vid. Pl. Com. fo. 29. b.

Regiſt. Judic. fo. 6.

Sect 19.

EN meſme le maner eſt del tenant en ſpecial taile, &c. Car en cheſcun done en le taile ſauns pluis ouſter dire, le reverſion del fee ſimple eſt en le donor. Et les donees et

IN the ſame manner it is of the tenant in eſpeciall taile, &c. For in every gift in taile without more ſaying, the reverſion of the fee ſimple is in the donor. And the donees and

EN cheſcun done en taile ſans pluis ouſter dire, le reverſion del fee ſimple eſt en le donor. This is wrought by the conſtruction of the ſtatute of W. 2. cap. 1. which hath turned the fee ſimple of the donee into a particular eſtate of inheritance, and the poſſibility of the donor to a reverſion in him expectant upon the eſtate taile, ſo

(2. Inſt. 331. 333.)

(1) *Kelw.* 104. b. *Accord.* Hal. MSS. See alſo acc. Perk. ſect. 238.

(2) Lord Coke ſeems to lay too much ſtreſs on Littleton's uſe of *nota*, &c. and other words of a like kind. In the edition by Letton and Machlinia &c. is frequently omitted, and *item* is very often put where the other editions have *nota*, and *vice verſa*. This ſhews, how very uncertain it is, whether any peculiar force ought to be attributed to ſuch words. Indeed where they really come from Littleton himſelf, they muſt in general be too ſlight a foundation for any conſiderable inference.

(3) *The iſſue in tail attainted* in vita patris; *after the death of the father the donor cannot enter, but the iſſue, if pardoned may enter, and hold as ſpecial occupant ſubject to the charges of the father*, 29. *Aſſ.* 61.—Hal. MSS.

(4) In the caſe of Richards and lady Bergavenny 2. Vern. 325. the court held a limitation to lady Bergavenny and ſuch heir of her body as ſhould be living at her death, with a remainder over, to be an eſtate tail. But ſee further on this ſubject ante fol. 8. b. n. 4. where ſeveral authorities are referred to in order to enable the ſtudent to find in what caſe *heir* in the ſingular number ought to be conſtrued *nomen collectivum*.

so as there be two inheritances of one land, yet this was doubted in our bookes [f] and there resolved according to Littleton. But I see no cause wherefore that point should be drawne in question, for at the same session of parliament (in which the statute *de donis conditionalibus* was made) *viz.* ca. 3. it is expressely said, *vel per donum in quo reservatur reversio*, so as by the judgement of the same parliament a reversion was setled in the donor.

[f] 12. E. 4. 23. 5. H. 7. 14. West. 2. ca. 13. Pl. Com. 247. 248. 251. 562. 2. E. 2. tit. receit 147. 33. H. 6. 27. 39. E. 3. 18. 45. E. 3. 20.

(Post. 142. b. Plowd. 151. 162. 196. 197. Cro. Cha. 400.)

Le reversion del fee simple est en le donor. A reversion is (2) where the residue of the estate always doth continue in him that made the particular estate, or where the particular estate is derived out of his estate, as here in the case of Litt. Tenant in fee simple, maketh gift in taile, so it is of a lease for life, or for yeares. If a man extend lands by force of a statute merchant, staple, recognizance or elegit, he leaveth a reversion in the conusor. But since Littleton wrote, the description must be more large upon the statute of [a] 27. H. 8. for at this day, if a man seised of lands in fee make a feoffment in fee, (and depart with his whole estate) and limit the use to his daughter for life, and after her decease, to the use of his sonne, in taile, and after to the use of the right heires of the feoffor: in this case, albeit he departed with the whole fee simple by the feoffment, and limited no use to himselfe, yet hath he a reversion (2); [b] for whensoever the ancestor takes an estate for life, and after a limitation is made to his right heires, the right heires shall not be purchasors, and here in this case when the limitation is to his reight heires, and right heire he cannot have during his life (for *non est hæres viventis*) the law doth create an use in him during his life, untill the future use commeth *in esse*, and consequently the right heires cannot be purchasors, and no diversitie when the law creates the estate for life, and when the party. And all this was adjudged betweene [c] Fenwicke and Mitford in the King's Bench, and if the limitation had been to the use of himselfe for life, and after to the use of another in taile, and after to the use of his owne right heires, the reversion of the fee had been in him, because the use of the fee continued ever in him (3); and the statute doth execute the possession to the use in the same plight, qualitie, and degree, as the use was limited.

lour issues ferront al donor et a ses heires autielx services; come le donor fait a son seignior prochein a luy paramount, forsprise les donees in frankmarriage, les queux tiendront quietment de chescun manner de service, sinon que soit per fealtie tanque le quart degree soit passé, et apres ceo que le quart degree soit passe lissue en le cinque degree, et issent ouster lautres des issues apres luy, tiendront del done on ses heires come ils teignont ouster, come il en avant dit.

their issue shall do to the donor, and to his heires the like services, as the donor doth to his lord next paramont, except the donees in frankmarriage who shall hold quietly from all manner of service (unlesse it be for fealtie) untill the fourth degree is past, and after the fourth degree is past the issue in the fift degree, and so forth the other issues after him, shall hold of the donor or of his heires as they hold over, as before is said.

[a] 27. H. 8. ca. 10. (Cro. Cha. 24. 1. Ro. Abr. 625. 1. Co. 104. b. 2. Co. 91. 2. Ro. Abr. 417. 1. Leon. 182.)

[b] 38. E. 3. 26. 27. E. 3. age 118. 24. E. 3. 36. 40. E. 3.

[c] Tr. 31. Eliz inter Fenwicke & Mitford. 32. H. 8. gard. 93. 28. H. 8. Dier. 8. 9. 10. &c. Buckenham's case. 5. Marie. Dier. 163. (1. Ro. Abr. 828. Mo. 284.)

[d] 1. H. 5. 8. 4. H. 6. 20. 9. Eliz. Dier. Bromley's case.

[d] If a man make a gift in taile, or a lease for life, the remainder to his own right heires, this remainder is void, and he hath the reversion in him, for the ancestor during his life beareth in his body (in judgment of law) all his heires, and therefore it is truly said, that *hæres est pars antecessoris*. And this appeareth in a common case, that if land be given to a man and his heires, all his heires are so totally in him, as he may give the lands to whom he will.

[e] Dier. 5. Marie 156. Grosswold's case adjudge. Bendlowes Serjant in his report agreeth. (Hob. 30. 33. 1. Mod. 237. 1. 1. Ro. Rep. 240.)

[e] So it is if a man be seised of lands in fee, and by indenture make a lease for life, the remainder to the heires male of his owne body, this is a void remainder; for the donor cannot make his own right heire a purchasor of an estate taile without departing of the whole fee simple out of him (4): as if a man make a feoffment in fee to the use of himselfe for life, and then to the use of the heires males of his body, this is a good estate taile executed in himselfe, and the limitation is good by way of use, because it is raised out of the state of the feoffees, which the feoffor departed with, and that is apparent, for a limitation of use to himselfe had without question beene good.

[f] 20. Eliz. Dier.

[f] If a man make a feoffment in fee to the use of himselfe in taile, and after to the use of the feoffee in fee, the feoffee hath no reversion, but in nature of a remainder, albeit the feoffor have the estate taile executed in him by the statute, and the feoffee is in by the common law, which is worthy of observation.

To

(1) By what words a reversion will pass, see Vin. Abr. *Reversion*. G. and Com. Dig. *Estates* B. 12.

(2) Vid. 3. & 4. *P. & M. Dy.* 134. contra. Hal. MSS. But see the case cited by lord Hale in the next note, and also ante 12. b. and note 2. there.

(3) Casus Com. Bedford M. 34 35 Eliz. Poph. n. 8. *Feoffment to the use of the feoffor for 40 years, remainder to B in tail, remainder to the right heirs of the feoffor. It is the old reversion, and the feoffor may devise it; for the use returned to the feoffor for want of consideration to retain it in the feoffee till the death of the feoffor.* Hal. MSS.—See the earl of Bedford's case in Poph. 3. Vid. 27. E. 3. 8. 4. *H.* 6. 20. 42. *Ass.* 2. 9. E. 3. 14. 10. E. 3. 48. *Lands granted by A by fine for the life of A, remainder to A's right heirs. It is a reversion in A, and he may grant it.* Hal. MSS. Dy. 237 *Fine to husband, as that which he and his wife have of his gift, with render to the conusor for life, remainder to the right heirs of the husband. It is a void remainder, and the wife survivor shall have it for life.* Hal. MSS.

(4) *Where heir shall be purchasor Vid fol. 9. b. 11. H. 6. 13. Devise to B for life, remainder to C in tail, remainder to the next* heir *of the devisor and the heirs of his body, it is a purchase in the heir.* Quære *there if it had been* heirs.—*Archer's case*, 1. *Rep.* 66. *b. Devise or conveyance to A for life, remainder to his* next heir male, *and to the heirs male of the body of such* heir male, *it is a purchase in the heir, because in the* singular *number, and the limitation is applied to it.*—Vid. 1. *Rep.* 104. *Shellie's case. Use limited for life to A, remainder to the heirs male of the body of A and the heirs male of the body of such heirs male. It is a limitation, and A has a tail executed. But if the ancestor takes estate for years, remainder limited to the heirs male of his body, it doth not vest in the ancestor. Accord.* hic *fol.* 13. *Hodgkinson's case.* Hal. MSS.—See Hodgkinson's case from lord Hale's MSS. at the end of n. 6. ante 14. n.

To conclude this point, [g] whoſoever is ſeiſed of land, hath not only the eſtate of the land in him, but the right to take profits which is in nature of the uſe, and therefore when he makes a feoffment in fee without valuable conſideration to divers particular uſes, ſo much of the uſe, as he diſpoſeth not, is in him as his ancient uſe in point of reverter. As if a man be ſeiſed of two acres, the one holden by knights ſervice by prioritie, and the other by knights ſervice holden by poſterioritie, and maketh a feoffment in fee of both acres to the uſe of himſelfe and his heires, the old uſe continued in him, and the prioritie and poſterioritie remaine. So it is of lands of part of the mother, the uſe ſhall goe to the heire of the part of the mother, which could not be, if it were not the old uſe, but a thing newly created. The like law of lands of the cuſtome of Borough-engliſh, Gavelkind, &c. (1.)

[g] 13. H. 7. 6. 28. H. 8. Dict 12. (3. Co. 81. b. Cro. Jam. 201. Poſt. 271. b.) See 2. Lev. 77. in Ayton v. Mitford & Dy. 146. b. 5. E. 4. 7. 1. Co. 76. 84. 85. 100, &c. Chudley. 2. Co. 56. 57. 58. 77. 78. 4. Co. 22. 6. Co. 34. 43.

Les dones, et lour iſſues ferront al donor et a ſes heires autiels ſervices, come le donor fait a ſon ſeignior procheine a luy paramount. The reaſon of this is, that when by conſtruction of the ſaid ſtatute there was a reverſion ſettled in the donor, for that the donee had an eſtate of inheritance, the judges reſolved that he ſhould hold of his donor, as his donor held over (2): as if the tenant had made a feoffment in fee at the common law, the feoffee ſhould have holden of the feoffor as he held over, and before the ſtatute of W. 2. the donee had holden of the donor as of his perſon, and now of him as of his reverſion: but if a man make a leaſe for life, or years, and reſerve nothing, he ſhall have fealtie only and no rent, though the leſſor hold over by rent, &c. And this, that Littleton ſaith, is regularly true, if the donor maketh no ſpeciall reſervation, for then the ſpeciall reſervation excludes the tenure which the law would create. As if tenant by knights ſervice maketh a gift in taile reſerving fealtie and rent, the donee ſhall hold in ſocage, by fealtie and rent, and not by knights ſervice (3.) But if a man hold land of the king in grand ſerjantie, and maketh a gift in taile generally, in this caſe the donee ſhall not hold of the donor by grand ſerjantie, becauſe no man can hold by grand ſerjantie, but of the king only, as hereafter ſhall be ſaid, and therefore ſeeing grand ſerjantie doth include knights ſervice, he ſhall in that caſe hold of the donor by knights ſervice. If a man ſeiſed of land in the right of his wife holden by knights ſervice giveth the ſame lands in taile generally, the donee ſhall not hold of him by knights ſervice, becauſe his wife held the land, and he had nothing but in her right. And in that caſe the baron hath gained a new reverſion by wrong, and therefore ſuch a donee ſhall doe fealtie only (4).

(Poſt. 143. a.)

(2. Ro. Abr. 501.)

A, ſeiſed of two acres of land, holdeth the one of B by knights ſervice, and twelve pence rent, and the other of C in ſocage and one pennie rent, and makes a gift in taile of both acres without any expreſſe reſervation of any tenure. In this caſe the donor hath but one reverſion. And yet he ſhall make ſeveral avowries, becauſe there be ſeverall tenures created by law in reſpect of the ſeverall tenures over: and the avowrie is made in reſpect of the tenures.

(Doctr. Plac. 53.)

Lord, meſne and tenant, the tenant holdeth by four pence, and the meſne by twelve pence, the tenant makes a gift in taile without reſerving any thing, by reaſon whereof he holdeth by foure pence, in reſpect of the tenure over. Afterwards the reverſion eſcheats, now ſhall the donee hold by twelve pence, for the meſnaltie which was four pence is extinct, and the law reſerved the tenure upon the gift in taile, in reſpect of the meſnaltie, and when the meſnaltie is extinct, the former rent between the donor and donee is extinct alſo, and then by the ſame reaſon that the donee ſhall take advantage, if the donor by releaſe or confirmation had holden by leſſer ſervices, by the ſame reaſon he ſhall be prejudiced, when he holdeth by greater ſervices (5).

(2. Ro. Abr. 501.)

49. E. 310.

Forſprise les donees en Frankmarriage. It is to be underſtood, that although the land be given in *liberum maritagium*, in free marriage generally, yet firſt the law doth make a limitation of this word (free) *viz.* till the fourth degree be paſt, for the reaſon that our author here yeeldeth (6). And 2. albeit it be free marriage, yet the donees and their iſſues untill the fourth degree be paſt ſhall do fealtie, for that is incident to everie tenure (except frankealmoigne) and cannot be ſeparated from it, and therefore the donees and their iſſues ſhall hold it as freely till the fourth degree be paſt as the donor can make it. See more of this in the chapter of Frankalmoigne.

Bracton. lib. 2. fol. 21. Britton cap. 119. Fleta lib. 3. cap. 11. & lib. 6. cap. 2. Vide ſect. 17. 20. (Ante. 21. b. Poſt 178. a.)

Sect. 20.

ET les degrees en frankmarriage, ſerront accompts en tiel maner, ſc. *de*

AND the degrees in frankmariage ſhall be accounted in this manner, *viz.* from

WHERE Littleton ſaith [a] that the donees in frankmariage ſhall hold by fealtie only untill the fourth degree

[a] Vide ſect. 17. 19. 138. 268. 269. 271. 733.

(1) See further on this ſubject the ſeveral books cited ante 12. b. in n. 2. to which add Prec. in Cha. 222. 319. and Plowd. 545. and note f. in the Engliſh tranſlation of Plowden. It may be an uſeful hint to obſerve, that the Engliſh edition of Mr. Plowden's Commentaries, which moſt deſervedly bear as high a character as any book of reports ever publiſhed in our law, has a great number of additional references and ſome notes; and that both of theſe are generally very pertinent, and ſhew great induſtry and judgment in the editor.

(2) *And therefore gift in tail ſaving the reverſion* tenend' de capitalibus dominis feodi per ſervitia debita *is void, and the donee ſhall hold of the donor, as he holds over*, 6. *E.* 3. 28. 45. *E.* 3. 27. 2. *E.* 4. 5. 4. *H* 6. 20. *Champernon's caſe.* Vide 27. *H.* 8. 18.—Hal. MSS.

(3) *But if tenant by chivalry makes gift in tail rendering rent only, the tenure ſhall be chivalry, but the rent* accumulative. *Vid.* hic 52. *Dy* 52. *Keilw.* 125.—Hal. MSS.

(4) Quære *of this caſe for the new reverſion is held in chivalry. Vid.* 4. *Hen.* 6. 21. *by Balth. B holds of A in chivalry, and gives in tail to C, who makes leaſe to R for life and dies. The iſſue of C ſhall be in ward to A, not to B the donor.*—Hal. MSS.

(5) Vid. *Keilw.* 125. 129 —Hal. MSS.

(6) *And therefore after the fourth degree the iſſue ſhall have formedon and count of a gift in frankmarriage; but the warranty and acquittal are gone.* 12, *H.* 4. 9. Vid. 10. *E.* 3. 25. 4. *E* 3 5. *Attornment by donee in frankmarriage.*—Hal. MSS.

degree be paſt, and then the iſſue in the fift degree ſhall hold of the donor as the donor holdeth over, [b] vide Bracton *ubi ſupra, ita quod ille cui terra ſic data fuit, nullum inde faciat ſervitium uſque ad tertium hæredem et uſque quartum gradum, ita quod tertius hæres ſic incluſus.* And herewith alſo agreeth Fleta *ubi ſupra.* And the [c] learning of degrees ſet out in the civil and canon law (wherein I find ſome difference) is worth the knowledge, to the end that Littleton and the law in this caſe may the better be underſtood, which I will divide into certaine rules, whereof the firſt is, that a perſon added to a perſon in the line of conſanguinitie maketh a degree. And it is to be underſtood, that a line is threefold, *viz.* the line aſcending, deſcending, and collaterall. And firſt for example, of the aſcending line, take the ſonne and add the father, and it is one degree aſcending, add the grandfather to the father, and it is a ſecond degree aſcending.

[b] Glanvill. lib. 7. cap. 18. Bract lib. 2. fol. 21. Britton. cap. 119. Fleta lib. 3. cap. 11. & lib. 6. cap. 2.

[c] Vide 10. E. 3. tit. Avowry. 157. 31. E. 3. ceſſavit. 22. 31. E. 3. gard. 116. 21. H. 7. 30.

1. Rule.

2. (Plowd. 444.)

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

3. (Vid. Stat. 32. H. 8. cap. 38. of marriages, 2. Inſt. 683. 25. H. 8. cap. 22.)

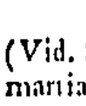
It is to be noted, that in every line the perſon muſt be reckoned from whom the computation is made. And there is no difference between the canon and civill law in the aſcending and deſcending line (2), for thoſe whom the civilians do reckon in the ſecond degree, the canoniſts do reckon in the firſt (3), and thoſe whom they place in the fourth, theſe place in

le donor a les donees en frankmarriage, le primer degree, pur ceo que la feme que eſt une des donees covient eſtre file, ſoer, ou autre couſin a le donor. Et de les donees tanque a lour iſſue il ſerra accompt le ſecond degree, et de lour iſſue tanque a ſon iſſue, le tierce degree, et iſſint ouſter, &c. Et la cauſe eſt, pur ceo que apres cheſcun tiel done les iſſues queux veignont de le donor, et les iſſues queux veignont de les donees apres le quart degree paſſe de ambideux parties en tiel forme deſtre accompt, poyent enter eux per la ley de ſaint eſgliſe entermarie. Et que le donee en frankmarriage ſerra dit le prime degree de les quart degrees, home poit veier en un plee ſur un breve de Droit de Garde P. 31. E. 3. *Lou le Pl. counta, que ſon treſaiel fuit ſeiſie de certe terre, &c. et ceo tenuſt dun autre per ſervice de chivaler, &c. que dona la terre a un* Rafe Holland *oveſque ſa ſoer en frankmarriage, &c.*

the donor to the donees in frankmarriage the firſt degree, becauſe the wife, that is one of the donees, ought to be daughter, ſiſter or other coſen to the donor, and from the donees unto their iſſue ſhall be accounted the ſecond degree, and from their iſſue unto their iſſue the third degeee, and ſo forth. And the reaſon is, becauſe that after every ſuch gift, the iſſues of the donor, and the iſſues of the donees after, the fourth degrees paſt of both parties in ſuch forme to be accounted, may by the law of the holy church entermarie (1). And that the donee in frankmarriage ſhall be ſaid to be the firſt degree of the foure degrees, a man may ſee in a plea upon a writ of right of ward, P. 31. E. 3. where the Pl. pleadeth that his great grandfather was ſeiſed of certaine lands, &c. and held the ſame of another by knight ſervice, &c. who gave the land to one *Raphe Holland* with his ſiſter in frankmarriage, &c.

(1) Nota *by the intent of Littleton in ſome caſes before the fourth degree paſſes from the donor there may be intermarriage, and yet the land ſhall be holden quit till it be paſſed. A gives land in frankmarriage with the daughter of his ſiſter, the iſſue of A and the donee may intermarry after the fourth degree, yet the fourth degree ſhall not be paſſed* quoad *the tenure.* Vid. pag. ſequent. *A gives to the daughter of N in frankmarriage, C and the iſſue of N may intermarry, becauſe they are in* quinto gradu conſanguinitatis, *yet this is only the firſt degree* quoad *the privilege of tenure.* Hal. MSS. There is ſomething apparently wanting in the ſtate of lord Hale's latter caſe; for it is not expreſſed who C is, and how C and the iſſue of N are related in the *fifth* degree. But this accidental omiſſion may be eaſily ſupplied, and the doctrine will be equally intelligible by only ſuppoſing the conſanguinity to be as lord Hale's caſe requires.

(2) The words *but in the collateral line there is* ſeem neceſſary to the ſenſe of this paſſage; and though not to be found in any edition of lord Coke's Commentary, were probably omitted by miſtake.

(3)


G and A are in the fourth degree per utramque legem, *N and K are in the fourth degree by the canon law, but in the eighth degree by the civil law. N and C are in the fourth degree by the canon, in the fifth by the civil law.* Vide pro computatione graduum conſanguinitatis juxta utramque legem cauſ. 35. queſt. 5. pars 2. in Decret. *Juxta jura canonica*—I. Aſcendentium et deſcendentium quot ſunt perſonæ, de quibus quæritur, computatis intermediis, primâ demptâ, tot ſunt gradus inter eas. II. Pro collateralibus. Collateralium in linea æquali quoto gradu quis diſtat à ſtipite communi, toto diſtant inter ſe vel ſibi attinent. Collateralium in linea inæquali quoto gradu remotior diſtat a communi ſtipite, toto inter ſe diſtant.—*Juxta jus civile*—I. In linea rectâ aſcendentium et deſcendentium quot ſunt perſonæ, de quibus quæritur, computatis intermediis, unâ demptâ, tot ſunt gradus inter eas. II. Collateralium. 1. In linea æquali, quoto gradu qui diſtat

in the ſecond. Therefore if we will know in what degree two of kindred do ſtand according to the civill law, we muſt begin our reckoning from one, by aſcending to the perſon from whom both are branched, and then by deſcending to the other to whom we do count, and it will appeare in what degree they are. For example, in brothers and ſiſters ſonnes, take one of them and aſcend to his father, there is one degree from the father to the grandfather, that is the ſecond degree, then deſcend from the grandfather to his ſonne, that is the third degree, then from his ſonne to his ſonne, that is the fourth. But by the cannon law there is another computation, for the canoniſts do ever begin from the ſtocke, namely from the perſon of whom they do deſcend; of whoſe diſtance the queſtion is. For example, if the queſtion be, in what degree the ſonnes of two brothers ſtand by the canon law, we muſt begin from the grandfather and deſcend to one ſonne, that is one degree; then deſcend to his ſonne, that is another degree, then deſcend againe from the grandfather to his other ſonne, that is one degree, then deſcend to his ſonne, that is a ſecond degree, ſo in what degree either of them are diſtant from the common ſtocke, in the ſame degree they are diſtant betweene themſelves: and if they be not equally diſtant, then we muſt obſerve another rule. In what degree the moſt remote is diſtant from the common ſtocke, in the ſame degree they are diſtant betweene themſelves, and ſo the moſt remote maketh the degree. And albeit the donee be a couſin in the third or fourth degree from the donor, yet in this computation it maketh the firſt degree: *gradus dicitur a gradiendo, quia gradiendo aſcenditur et deſcenditur*. And thus much of the civile and cannon law is neceſſarie to the knowledge of the common law in this point (1): and herewith agreeth our author in the words following. (Plowd. 444.)

Les iſſues queux veignont de le donor, et les iſſues queux veignont de les donees apres le 4. *degree paſſe dambideux parties in tiel forme deſte account poient enter eux per le Ley de Saint Eſgliſe entermarrier.* (De Saint Eſgliſe). [*d*] So as hereby it appeareth, that the computation of the degrees in this caſe, muſt be according to the cannon law. But it is neceſſarie to be knowne concerning marriages betweene perſons of kindred one to another, that it is enacted [*e*] by the ſtatute of 32. H. 8. that no reſervation or prohibition (God's law except) ſhall trouble or impeach any marriage without the Leviticall degrees (2).

[*d*] Brit. ca. 119. Accord. Flet. lib. 3. ca. 11. & lib. 6. c. 2.
[*e*] 32. H. 8. ca. 38.

The caſe vouched by Littleton in 31. E. 3. you ſhall finde abridged by Fitz. tit. gard. 116. And albeit this yeare of 31. E. 3. was never in print till Fitzherbert did abridge it and publiſh it in print anno 11. H. 8. and goeth under the name of broken yeares, yet here it appeareth by our author, that the ſame is of authoritie in law, as hereafter alſo in other places ſhall be obſerved.

Sect. 21.

ET touts ceux tailes avantdits, ſont ſpecifies en le dit eſtatute de W. 2. *Auxy ſont divers autres eſtates en le taile, coment que ne ſont ſpecifies per expreſſe parols in le dit eſtatute, mes ils ſont priſes per le equitie de le dit ſtatute. Sicome terres ſont dones a un home et a ſes heires males de ſon corps engendres, en*

AND all theſe entailes aforeſaid be ſpecified in the ſaid ſtatute of *W.* 2. Alſo there be divers other eſtates in taile, though they be not by expreſſe words ſpecified in the ſaid ſtatute, but they are taken by the equitie of the ſame ſtatute. As if lands be given to a man, and to his heires males of his bodie begotten; in this caſe his iſſue male ſhall

ET touts ceux tailes avauntdits ſont ſpecifies en le dit ſtatute de Weſtminſter 2. And ſo it appeareth by the ſaid ſtatute *Auxy ſont divers autres eſtates en le taile, &c.* And herewith agreeth Carbonel's caſe, 33. Edw. 3. *titulo taile* 5.

That the caſes of the ſtatute are ſet down but for examples of eſtates taile, generall and ſpeciall, and not to exclude other eſtates taile. 3. E. 3. 32. 18. Aſſ. p. 5. 18. E. 3. 46. 1. Mar. Dyer 46. Pl. Com. Seignior Barkley's caſe, fo. 251. For, *Exempla illuſtrant non reſtringunt legem.*

3. E. 3. 32. 18. E. 3. 46. 18. Aſſ. p. 5. 1. Mar. Di. 46. Pl. Com. 251.

Equitie

diſtat à communi ſtipite, toto duplicato diſtant inter ſe, vel ſibi attinent; nam quælibet perſona facit gradum. 2. In lineâ inæquali, quot ſunt perſonæ, ſtipite dempto, tot ſunt gradus.—Nota in contractibus matrimonialibus computatio canonica eſt recepta, et hoc per decretalem Innocentis tertii in concilio generali.—Hal. MSS.

(1) See further as to conſanguinity and the manner of computing its degrees by the civil and canon law, Blackſt. Law Tracts 8vo ed. v. 1. p. 14. and 173. and the annotations in the edit. of the *Corp. Jur. Canon.* by the *Pithæi* on that part of Gratian's *Decretum* cited by lord Hale, and Inſt. lib. 3. tit. 6. et Dig. 38. tit. 10. and the commentators on thoſe titles.

(2) *The following paſſages from the canon law are in* Hal. MSS.—Extrav. de conſang. et affin. c. 9. Vir qui à ſtipite quarto gradu mulieri, quæ ex alio latere diſtat quinto, licite copulatur.—Nota antiquitus uſque ad ſeptimam generationem nullus de ſua cognatione ducat uxorem. Decret. 2. Cauſa 52. quæſt. 2. can. 11. Sed in concilio generali ſub Innocentio 3° prohibitio copulæ conjugalis quartum conſanguinitatis et affinitatis non excedat, viz. in collateralibus, ſed in directe aſcendentibus prohibetur contractus matrimonialis in infinitum Extrav. de conſanguinitat. &c. can. 8.—See further as to the prohibition of marriages for affinity or conſanguinity in Tayl. Elem. Civ. L. 314. Inſt. lib. 1. tit. 10 Dig. lib. 23. tit. 2. Cod. lib. 5. tit. 4. Nov. 74. Gibſ. Cod. Jur. Eccleſiaſt. Anglican. 1ſt ed. v. 1. p. 494. Burn. Eccleſ. L. tit. *Marriage*. Vin. Abr. *Marriage* E.

(5. Co. 99. 3. Co. 31.)

Equitie is a conſtruction made by the judges, that caſes out of the letter of a ſtat. yet being within the ſame miſchiefe, or cauſe of the making of the ſame, ſhall be within the ſame remedie that the ſtatute provideth: and the reaſon hereof is, for that the law-maker could not poſſibly ſet downe all caſes in expreſſe terms, *æquitas eſt convenientia rerum quæ cuncta coæquiparat, et quæ in paribus rationibus paria jura et judicia deſiderat.* And againe, *æquitas eſt perfecta quædam ratio quæ jus ſcriptum interpretatur et emendat, nulla ſcriptura comprehenſa, ſed ſolum in vera ratione conſiſtens. Æquitas eſt quaſi æqualitas. Bonus judex ſecundum æquum et bonum judicat, et æquitatem ſtricto juri præfert. Et jus reſpicit æquitatem* (1).

Bract. lib. 4. fol. 186.

[f] 18. Aſſ. p. 5. 18. E. 3. 46. 33. E. 3. tit. Taile 5. 3. E. 3. 32. Pl. Com. Seigniour Barkley's caſe. 2. Mar. Dy. 46. V. ſect. 24.

Sicome terres ſont done a un home et a les [f] *heires males de ſon corps engendres, en tiel caſe ſon iſſue male inheritera liſſue female ne unques inheritera, &c.* This ſhall be explained afterward, ſect. 24 (2).

Tiel caſe ſon iſſue male inheritera, et le iſſue femal ne unque enheritera pas, uncore in l's auters tailes avant dits auterment eſt.

inherit, and the iſſue female ſhall never inherite, and yet in the other entailes aforeſaid, it is otherwiſe.

Sect. 22. & 23.

THESE two ſections, or any thing therein, do need no explanation, in reſpect they ſhall be alſo explaned hereafter in the next ſection, ſaveing onely theſe words *(queux doient inheriter)* are verie obſervable, for they implie a diverſity betweene a. deſcent and a purchaſe. For when a man giveth lands to a man and the heires females of his body, and dyeth having iſſue a ſon and a daughter, the daughter ſhall inherit; for the will of the donor (the ſtatute working with it) ſhall be obſerved. But in caſe [g] of a purchaſe it is otherwiſe: for if A. have iſſue a ſonne and a daughter, and a leaſe for life be made, the remainder to the heires females of the bodie of A. A dieth, the heire female can take nothing, becauſe ſhe is not heire(3); for ſhe muſt be both heire and heire female, which ſhe is not, becauſe the brother is heire, and therefore the will of the giver cannot be obſerved, becauſe here is no gift, and therefore the ſtatute cannot worke thereupon. And ſo it is if a man hath a ſonne and a daughter, and dieth, and lands be given to the daughter, and the heires females of the bodie of her father, the daughter ſhall take

(Poſt. 164. 1. Co. 103. 104.)

(Hob. 31.)

[g] 9. H. 6. 24. 11. H. 6. 13. 14. 37. H. 8. Br. tit. Done 42. tit. noſme 1. & 40. Dyer 23. El. 374 Shelley's caſe 1. Co.

See Barbison & Beaumont in Dom. Proc. in 1714. 1. Pro. Part. Cas. 489. & Wood. Ch. B. Wards Myſt. A. 6.

(Poſt. 26. b.)

IN meſme le manner eſt, ſi terres ou tenements ſoient dones a un home et a ſes heires females de ſon corps engendres, en tiel caſe ſon iſſue female luy inheritera per force et form de le dit done, et nemy iſſue male, pur ceo que en tiels caſes de dones faits en le taile, queux doient enheriter, et queux nemi, la volunt del donor ſerra obſerve.

IN the ſame manner it is, if lands or tenements be given to a man, and to his heires females of his bodie begotten; in this caſe his iſſue female ſhall inherit by force and forme of the ſaid gift, and not his iſſue male. For in ſuch caſes of gifts in taile, the will of the donor ought to be obſerved, who ought to inherit, and who not.

See 1. Kem 407.

ET en le caſe que terres ou tenements ſont dones a un home, et a ſes heires males de ſon corps iſſuants, et il ad iſſue deux fits, et devy, et leign fits entra come heire male, et ad iſſue file et devy ſon frere avera la terre, et nemi la file, pur ceo

AND in caſe where lands or tenements be given to a man, and to the heires males of his bodie, and he hath iſſue two ſonnes, and dieth, and the eldeſt ſon enter as heire male, & hath iſſue a daughter, and dieth, his brother ſhall have the land, &

(1) As to conſtruing ſtatutes by equity, ſee Plowd. 9. 10. 17. 18. 36. 46. 53. 57. 59. 82. 88. 109. 124. 177. 204. 244. 363. 364. 366. 371. 464. 466. See alſo Vin. Abr. *Statutes E.* 6. Hatt. Treat. on Stat Aſh. Expoſit. of Stat. by Eq. and Com. Dig. *Parliament* R. 10.

(2) *And ſee ſuch ſpecial heir is in by deſcent, and ſhall have his age,* 24. E. 3. 60.—Hal. MSS.

(3) *A hath iſſue a ſon and a daughter. The daughter marries B, and has iſſue two daughters. A deviſes to his ſon*; but if he die without iſſue my land ſhall go to my right heirs of my name and poſterity, *and dies. The ſon dies without iſſue. Ruled, that the land ſhall not go to the uncle, for though of his name, he is not heir, for the iſſue of the daughter is heir. H.* 11. *Jac. C. B. Counder and Clerke Mo.* 863. *and Hob.* 29. Hal. MSS.—See the ſame caſe in 1 Brownl. 129.—This caſe of Counder and Clerke is apparently cited by lord Hale in confirmation of lord Coke's poſition as to the neceſſity of being *heir* as well as *female*, in order to take by *purchaſe* under a limitation to the *heir female*; and it is obſervable, that there is not one word in lord Hale's note intimating the leaſt diſapprobation of the doctrine. However, it ſo happens, that in more modern times the propriety of this doctrine has been queſtioned by very reſpectable perſons, who have treated it as equally unſupported by reaſon and authorities of law. But perhaps this cenſure of lord Coke may have been too haſty; and it may be doubted, whether there is a paſſage in all his works, more capable of ſtanding the ſevereſt teſt of modern criticiſm. Therefore the remainder of this note ſhall be employed in the defence of lord Coke's doctrine, and in explaining the qualifications with which it ought to be underſtood; and for this purpoſe it ſhall be formally examined, firſt as a reaſonable rule of conſtruction, and ſecondly by the authorities and determined caſes.

ceo que le frere eſt heire male. Mes autrement ſerra en autres tailes, queux ſont ſpecifies en le dit ſtatute:

not the daughter, for that the brother is heire male. But otherwiſe it is in the other entailes, which are ſpecified in the ſayd ſtatute.

nothing but an eſtate for life; becauſe there is no ſuch perſon, ſhe being not heire. But where a gift is made to a man, and to the heires female of his bodie, there the donee being the firſt taker is capable by purchaſe, and the heire female by deſcent (1), *ſecundum formam doni:* and therefore Littleton purpoſely added theſe words, *queux doient inheriter:*

Sect. 24.

AUxy ſi terres ſoient donees a un home, et a les heires males de ſon corps ingendres, et il ad iſſue file, quel ad iſſue fits et devy, et puis apres le donee devy, en ceſt caſe le fits de la file ne inheritera pas per force de le taile, pur ceo que quecunque, que ſerra inheriter per force dun done en le taile fait as heirs males, covient conveyer ſon diſcent tout per les heires males. Mes en tiel caſe le donor poet entrer, pur ceo que le donee eſt mort ſans iſſue male, en la ley, entaunt que le iſſue del file ne poet conveyer a luy meſme le diſcent per Heyre male.

ALSO if lands be given to a man and to the heires males of his body, and he hath iſſue a daughter, who hath iſſue a ſonne, and dieth, and after the donee die; in this caſe, the ſon of the daughter ſhall not inherit by force of the entaile; becauſe whoſoever ſhall inherit by force of a gift in taile made to the heires males, ought to convey his deſcent wholly by the heires males. Alſo in this caſe the donor may enter, for that the donee is dead without iſſue male in the law, inſomuch as the iſſue of the daughter cannot convey to himſelfe the deſcent by an heire male.

QUECUNQUE ſerra enheriter per force dun done en taile, &c. Vide Tr. [*b*] 28. H. 6. tit. Deviſe 18. (which is not in the booke at large, but written *verbatim* out of Statham): If a man deviſe lands to a man, and to the heires males of his body, and (2) hath iſſue a daughter, which hath iſſue a ſonne, this ſonne ſhall be inheritable, and notwithſtanding in a gift in taile the law is otherwiſe, and that by the opinion of all the judges in the Exchequer Chamber. But I hold this caſe to be ill reported, unleſſe you will referre the opinion of the judges to the gift in taile laſt mentioned. For firſt, albeit a deviſe may create an inheritance by other words than a gift can, yet cannot a deviſe direct an inheritance to deſcend againſt the rule of law. Secondly, there is no intent of the deviſor appearing, that the ſonne of the daughter ſhould, againſt the rule of law, inherit, and the ſtatute provideth, that *voluntas donatoris, &c. obſervetur*. And I have heard this caſe often denied to be law, both in the King's Bench, and in the Common Pleas, vide Pl. Comment 414. b. And ſo it is [*i*] *mutatis mutandis*, when a gift in taile is made to a man, and to his heires females of his body, and he hath iſſue a ſonne, who hath iſſue a daughter, this daughter ſhall never inherit, becauſe ſhe muſt convey by deſcent from females. And for the reaſon hereof ſee a notable caſe in 15. E. 2. tit. Corone 385. where it is adjudged (as before it had beene) that the ſonne of a female ſhould have an appeale of the death of a coſine, and yet the daughter her ſelfe ſhould never have had it. But there it is agreed, that the ſonne of a female [*k*] in a *libertate probanda*, ſhould be no witneſſe or prooſe againſt the iſſue of the male. And the reaſon of this diverſity is very obſervable: for by the common law the female might

Vide ſect. 719.
[*b*] 1. H. 6. 24. 11. H. 6. 13. 14. 28. H. 6. tit. Deviſe 18. Statham tit. Deviſe. Pl. Com. in Scholaſt. caſe 414. b. 20. H. 6. 43. 37. H. 8. Br. tit. Done & Rem. 61. tit. notme 1. & 40. (Hob. 33. Poſt. 377.)

(1. Ro. Abr. 841.)

[*i*] 11. H. 6. 13.

15. E. 2. tit. Cor. 386. (Ante 6. b.)

[*k*] Mirror c. 2. ſect. 7. Vid. Glanvil. lib. 14. cap. 3.

(1) It is very unuſual to create an eſtate in tail *female*, and I have ſeen an argument, in which it has been attempted to prove, that the law of England will not allow of a deſcent through females only, even in the caſe of eſtates tail; but other authors as well as Littleton and Coke mention *ſuch* deſcents, nor did I ever hear any authority cited to ſupport the contrary doctrine. See Plowd. Quær. 87. and 133.—(2) The word *he*, to deſcribe *the deviſee*, is wanting. See acc. Stath. Abr.

When land is given to the *heirs female of the body* of one, either not having *any* preceding eſtate, or not having a preceding eſtate of *freehold*, the words cannot be conſtrued as giving an inheritable quality to an eſtate already veſted and limiting the courſe of deſcent, but neceſſarily muſt operate on the firſt taker as a *deſcriptio perſonæ* and *name of purchaſe*; and lord Coke's doctrine means nothing more, than that thoſe claiming under ſuch a deſcription ſhould *fully* anſwer to it, and conſequently that ſuch as have only *half* of the deſcription ſhould be excluded. Now it is to be conſidered, that the deſcription conſiſts of *two* parts, *one* requiring that the donee ſhould be *heir*, the *other* that the donee ſhould be *female*; and if being *heir* without being *female* will not give a title, why on the other hand ſhould being *female*, without being alſo *heir*, be ſufficient? It is not a ſolid objection to lord Coke to ſay, that his conſtruction is ſtrict, literal, and founded on a rigid adherence to the proper and technical ſenſe of words; becauſe it is reaſonable to preſume in favour of the eſtabliſhed ſenſe of all words, unleſs there are *other* words or ſome ſpecial circumſtances to ſhew a *different* ſenſe in the mind of the perſon uſing them, and lord Coke apparently intends to put a caſe, in which *neither* occur. But it has been obſerved, that where *heirs female of the body* are words of *limitation*, a female may take by *deſcent* as *ſpecial heir*, though not *heir general*; and it is aſked, why ſhould not the ſame perſon be equally capable of taking by *purchaſe*? This objection is plauſible, but not unanſwerable. Where *heirs female of the body* are words of *limitation*, they are neceſſarily uſed to regulate the *ſucceſſion* in a *ſpecial* manner, which object of the donor cannot be attained without a continual excluſion of *heirs general* when they happen to be males; and this eſtabliſhment of a *new* kind of heirſhip is a ground for preſuming that the donor by *heirs* means, not thoſe who are ſo by the *general* law of deſcent, but thoſe who are ſo according to the *ſpecial* courſe of deſcent he profeſſes to introduce. But where *heirs female* are only words of *purchaſe*, they are uſed to deſcribe who ſhall take the eſtate at *one* particular *time* and in *one inſtance*, and eſtabliſhing a *new* courſe of ſucceſſion is not the object in view; and it not being ſo, the ground of preſumption, which governs the former caſe, is wanting. But it may be inſiſted, that, in the caſe put by lord Coke, *heirs female of the body* have a *double* effect, and after operating as words of *purchaſe*, operate a *ſecond* time as words of limitation, and being allowed to point at an *heir ſpecial* in their *latter* application, ought to have the ſame conſtruction in the *former*; for in *ſuch* a caſe it would be ſtrange to ſuppoſe, that *heirs female* were uſed in two different ſenſes. This is reſining on the objection made to lord Coke's doctrine, and placing it in a ſtronger light than it hitherto appears to have been urged. But even in this ſhape the objection would not prove any thing abſurd in lord Coke's *general doctrine*, and would only ſhew that he had choſen an improper example for its illuſtration, and that he ſhould have ſtated a caſe in which *heirs female* can only operate as words of *purchaſe*, as where a gift is made *to the heirs*

female,

(2. Inſt. 68.)
Vid. Seignior de la Ware's caſe, 11. Co. fol. 1.

might have had an appeale as heire to any of her anceſtors, as well as the male. But by the ſtatute of Magna Charta, cap. 34. *Nullus capietur aut impriſonetur propter appellam fœminæ de morte alterius quam viri ſui*, which reſtraineth not the ſonne of the female. And there Scrope ſaith, *per tout le ſerjeant d'Angleterre*, that is, by all the judges of the coife in England, it was awarded, that the iſſue of the female ſhould have an appeale for the death of his couſin. But in a *libertate probanda*, the iſſue of the blood female ſhall not be received to prove villenage in the iſſue of the blood male, for the mother was diſabled by the common law, and the mother might be a neiſe *de en et treue*, that is, of the water and whippe of three cord, (meaning ſuch a bondwoman as is uſed to ſervile workes and correction) and enfranchiſed by her huſband. All which appeareth in the ſaid booke. And it is holden in 17. E. 4. 1. that if a man be ſlaine which hath no heire of the part of his father, that his uncle of the part of his mother ſhall have the appeale, and yet he muſt of neceſſity make his conveyance by a woman, vid. 20. H. 6. fo. 33. the queſtion ſuddenly demanded and debated, and no conſideration or mention had of the ſaid former judgments and authorities; there it is compared to a gift in taile to a man and to his heires males of his body, that the heire male of the daughter ſhall not inherit which hath no affinity to it, and yet the authority of the booke is great, for it is by the aſſent of all the juſtices of the one bench and the other in the Exchequer Chamber, and therefore I leave the learned and judicious reader to his owne judgment. [*l*] Vide Stanford 58. b. 15. E. 2. tit. Coron. 384. If a man give lands to a man and to the heires males of his body begotten, remainder to him and to his heires females on his body begotten, the donee hath iſſue a ſonne who hath iſſue a daughter, who hath iſſue a ſon, this ſonne is not inheritable to either of both theſe eſtates taile, becauſe, as Littleton ſaith, the male muſt make his conveyance only by males, and ſo muſt the females by females. But in this caſe the land ſhall revert to the donor. And therefore the ſafeſt way, when a man will entaile his lands to the heires males and females of his bodie, is to limit the firſt eſtate to him and the heires males of his body, the remainder to him and to the heires of his body, and then all his iſſues whatſoever are inheritable. But if A hath iſſue a ſonne and a daughter and dieth, and the ſonne hath iſſue a daughter and dieth, and a leaſe for life is made, the remainder to the heires females of the body of A; in this caſe the daughter of A ſhall not take *cauſa qua ſupra*. But albeit the daughter of the ſon maketh her conveyance by a male, ſhe ſhall take an eſtate taile by purchaſe, for ſhe is heire and a female; but if the lands be deviſed to one for life, the remainder to the next heire male of B in taile, and B hath iſſue two daughters, and each of them hath iſſue a ſonne, and the father and daughters die, ſome ſay this remainder is void for the uncertainty, ſome ſay that the eldeſt ſhall take it becauſe he is worthieſt, and others ſay that both of them ſhall take for that they both make but one heire (1). If lands be given to a man and to his heires males or females of his body he hath an eſtate in generall taile in him.

(Poſt. 377.)
[*l*] Stanford, 58. b. 15. E. 2. tit. Coron. 384.

17. E. 4. 1.

20. H. 6. 43.

(Hob. 31.)

11. H. 6. 13.
9. H. 6. 25.

Sect. 25.

A Un home, et a ſa feme. But what if tenements be given to a man, and to a woman being not his wife, and to the heires males of their two bodies. They have alſo an eſtate taile, albeit they be not maried at that time (2). And ſo it is, if lands be given to a man which hath a wife, and to a woman which hath a huſband, and the heires of their two bodies: they have preſently an eſtate taile, [*m*] for the poſſibility that they may marry. But if lands be given to two huſbands and their wives, and to the heires of their bodies begotten [*n*] they ſhall take a joint eſtate for life and ſeveral inheritances, *viz.* the one huſband and his wife the one moity, and the other huſband and wife the other moity, and no croſſe remainder or other poſſibility ſhall be allowed by law, where it is once ſettled and takes effect. But if lands be given to a man and two women and the heires of their bodies begotten, [*o*] in this caſe they have a joynt eſtate for life and every of them ſeverall inheritance, becauſe they cannot have one iſſue of their bodies, neither ſhall there be by any conſtruction a poſſibility upon a poſſibility (3), *viz.* that he ſhall mary the one firſt and then the other (4). And the ſame law it is, [*p*] when land is given to two men and one woman, and to the heires of their bodies begotten.

EN meſme le manner eſt, lou tenements ſont done a un home et a ſa feme, et a les heires males de lour deux corps engendres, &c.

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

11. E. 3. Formdon. 20.

(Ante 20. b.)

[*m*] 15. H. 7. 10. 1. Co. Dilon and Frein's caſe 40. Aſſ. p. 13.
[*n*] 24. E. 3. 29. a.
(Dy. 330.)

[*o*] 7. H. 4. 16. 16. E. 3. 78. Littleton fol. 66. 15. Eliz. Dier. 326.
[*p*] 44. E. 3. tit. Taile. 13.

Sect.

(1) Vid. hic fol. 10. b. *Harpur's caſe.* Hal. MSS.—(2) *If huſband and wife are divorced* a vinculo, *they are only tenants for life; for the law doth not preſume, that they will marry again.* 7. *H.* 4. 16. 3. *H.* 6. 43. Hal. MSS.—(3) As to the doctrine of not allowing a poſſibility on a poſſibility, ſee poſt. 184.—(4) *Here it cannot be tail for the uncertainty which of them he will marry firſt. But if a gift was to A and B a feme ſole and to the heirs of their bodies, remainder to A and C a feme ſole and to the heirs of their bodies, it is tail.*—Hal. MSS.

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female of the body of A and their heirs, or *the heirs of their bodies*. So much for the propriety of lord Coke's doctrine independently of authorities; but if it is compared with them, it will appear ſtill more defenſible, and by them it is even applied to the ſame ſort of caſe as is ſtated by him. The neceſſity of being *actually heir* in the ſtrict ſenſe of the word, to take by *purchaſe* under that deſcription, appears by authorities of three kinds.—The firſt order of caſes conſiſts of thoſe, by which it has been ſettled, that if land is given to A for life, with remainder to the *heirs* or *heirs of the body* of B, and A dies before B, or B is attainted of felony and afterwards dies before A, the remainder becomes void. In the former caſe it is ſo, becauſe B being living at the determination of the particular eſtate, no perſon can *then* anſwer to the deſcription of his heir, for *non eſt hæres viventis*. In the latter caſe it is ſo, becauſe B's attainder, by corrupting his blood, prevents his having an heir. Now in *both* theſe caſes there is as much reaſon for departing from the rigid ſenſe of the word *heirs*, and preſuming in favour of an *heir apparent* in the *firſt* caſe, and of ſuch perſon *as would be heir* if there was not an attainder in the *ſecond*, as there is for preſuming in favour of an *heir ſpecial* in the caſe of a gift to the *heirs female*; and yet the doctrine is ſo fixed by authorities, that the judges of modern times have not yet deviated from it even in the caſe of *laſt wills*, except when induced to adopt a leſs ſtrict conſtruction by ſome *additional* words ſtrongly expreſſive of uſing *heirs* in a *ſpecial* ſenſe, as where land is deviſed *to the heir male of A now living*. See Poſt 378. Huſſey's Caſe, Bro. Abr. *Done* 61. the caſe of James and Richardſon Pollexf. 457. that of Burchett and Durdant 2 Ventr. 311. Darbiſon and Beaumond in Vin. Abr. *Deviſe* U. b. pl. 5. but more accurately in 1. P. Wms. 229. and Forteſc. Rep. 18. and that of Frogmorton and Wharrey, Wilſ. vol. 2 part 3. page 125. and 144. See further Vin. Abr. *Remainder* I.—Another ſeries of authorities, conformable to lord Coke's doctrine, conſiſts of caſes, in which it has been agreed, that where *heir* is a word of *purchaſe*, the *heir* at *common law* ſhall take *Gavelkind* or *Borough Engliſh* land, unleſs the *cuſtomary* heir is *expreſsly* mentioned, though if uſed as a word of *limitation*, the *cuſtomary* heir ſhall take without being named. See Bro Abr. *Diſcent* 59. See alſo ante 10. a. and n. 4. there and the caſe of Starkey and Starkey Trin. 19. G. 2. in the Exch. 5. N Abr. 404. This rule in reſpect to *cuſtomary* land is a very cogent argument for lord Coke in point of authority; for the property, which is the *ſubject* of the gift, furniſhes a very colourable pretence for preferring the *cuſtomary* heir, and the peculiar deſcent of the land by force of the *cuſtom* in the perſon who thus takes by purchaſe is preciſely the ſame ſort of argument for the *cuſtomary* heir, as thoſe who differ from lord Coke draw from the ſpecial deſcent by force of the gift where *heirs female of the body* are words of *limitation*. On a nice compariſon it will be found, that the analogy between the gift of the *cuſtomary* land to *heirs*, and the gift of *common law* land to *heirs female of the body*, is almoſt perfect; for in both caſes the words operate firſt as words of *purchaſe* and then

Sect. 26. 27.

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

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

ALSO if tenements be given to a man and to his wife, and to the heires of the bodie of the man, in this caſe the huſband hath an eſtate in generall taile, and the wife but an eſtate for terme of life.

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

ALSO if lands be given to the huſband and wife, and to the heires of the huſband which he ſhall beget on the body of his wife, in this caſe the huſband hath an eſtate in eſpeciall taile, and the wife but an eſtate for life.

Sect. 28.

ET ſi le done ſoit fait al baron & a ſa feme, & a les heires la feme de ſa corps per le baron engendres, donque la feme ad eſtate en eſpecial taile, & le baron forſque pur terme de vie (1). *Mes ſi terres ſont dones a le baron & a la feme, & a les heires que la baron engendra de corps la feme, en ceo caſe ambideux ont eſtate en la taile, pur ceo que ceſt parol* (*heires*) *neſt limit a lun pluis que a lauter* (2).

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

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

19. Hen. 6. 75. a. Regiſt. 239.
17. E. 2. tit. Taile 23.
3. E. 3. 32. 4. E. 3. 43.
5. E. 3. 29. b. & 34. a.
21 E. 3. 43. 12 H. 4. 1.
[q] 3. E. 3. 32. 21. E. 3. 43. 19. H. 6. 75. per Hody.
Regiſt. 239.
(1 Sid. 83.)
[r] 20 E. 3. Briefe 377.

Sect.

(1) In pleading ſeiſin of ſuch an eſtate in huſband and wife, it ſhall be alledged, that they *were ſeized together and to the heirs of the body of the wife in her right*; and not that they were ſeized *of the freehold or fee-tail.* Per Fitzherbert, 27. *H.* 8. 21. *b.*—(2) *Et ils ount en cell caſe tiel eſtate, ſicome terrez furent donez a eux & a lez heires de leur deux corps engendrez.* L. and M.—(3) Vid. *Hob. caſe* 113. *page* 84. *Gift to huſband and wife for their lives, and after their deceaſe to the heirs of the body of the huſband* procreand' ſuper corpus *of the wife, is tail only in the huſband, and the wife hath only for life; and it is the ſame with* hæredibus *of the huſband* de corpore *of the huſband on the wife* procreand'. Skete and Oxenbridge. *So Tr.* 6. *Jac. B R. Repps and Bonham. Land limited to huſband and wife for their lives, and after their deceaſe* hæredibus *of the body of the wife by the huſband to be begotten; it is tail only in the wife. But it was agreed, that, if it had been to the heirs which the huſband ſhould beget on the body of the wife, or to the heirs of the body of the wife and of the body of the huſband to be begotten, it had been tail in both* —8. *R.* 2. tail 32. *Gift to the huſband and wife and to the heirs of their bodies iſſuing, and if the wife* obierit ſine hæredibus, *yet tail in both.* 12. *E.* 3. Variance 77. 9. *E.* 3. 64. ibid. 93. *Land given to huſband and wife and to the heirs of the body of the huſband, and if huſband and wife* obierint ſine hæredibus inter eos procreatis, *remainder over; yet it is tail general in the husband only* —*Land given to the husband and wife and to the heirs of the husband of the body of his wife to be begotten; it is only tail in the husband.* Hic *fect.* 29. *Yet if gift be to the husband and wife and to the heirs of the body of the wife by the husband to be begotten, the tail is only in the wife.* His heirs *appropriate in the firſt caſe,* of the body *in the ſecond caſe.*—Hal. MSS. But where the gift is to the wife *only,* and to the heirs of the body of the huſband, then the tail is not in *either,* of which lord Hale gives the following caſe as an inſtance.—Nota *P.* 1651. *Sir Leventhorpe Franck's caſe. Land given to the wife for life, remainder to the heirs of the body of the husband on the body of the wife to be begotten. Ruled, that it is not tail executed* omnino *in the wife, but a contingent remainder in the heir of the husband's body, it being limited to the heirs of the husband's body; and that as the wife died in the life of her husband, the remainder was void.* Hal. MSS.—The ſame caſe is reported by the name of Goſſage and Tayler in Styl. 315. but there the remainder is differently expreſſed; for it is not to the heirs of the bodies of both in *direct* terms, but it is *to the uſe of the heirs to be begotten upon the body of Suſanna by Leventhorpe her husband*; which moſt probably were the words of the remainder; for Glyn's argument in favour of the wife's having an eſtate tail appears to have been founded on the remainder's not pointing *expreſsly* to the heirs of *either.*—After Sir Leventhorpe Franck's caſe, lord Hale puts a *quære,* and then adds—V. 3. E. 3. Formedon 8. *Land given to I. S.* et uxori ſuæ quam poſtea deſponſaverit et hæredibus de corporibus eorum; *the wife takes nothing becauſe not known at the time; but it is a tail in the husband. Yet* nota, hæredibus de corporibus; *if the wife had taken an eſtate, it had been a tail in both.* Hal. MSS. According to this caſe the tail is in the huſband, though the wife takes no eſtate and the tail is expreſsly to the heirs of the bodies of both. But this is more than was contended for by the counſel for the wife's eſtate tail in *Goſſage* and *Tayler,* who admitted the contrary to have been ſetttled by the caſe in Dy. 99. pl. 64. and by *Lane* and *Pannell,* which is in 1. Ro. Rep. 238. 317. and 438. See alſo contra poſt ſect. 352. and the caſe of Frogmorton on the demiſe of Robinſon againſt Wharrey in Wilſ. vol. 2. page 125. and 144. where on a ſurrender of copyhold lands to A, whom the ſurrenderor intended to marry, and to the heirs of their two bodies, it was adjudged, that the wife took for life with a contingent remainder to the heirs of the bodies of her and her huſband.

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then as words of *limitation*; and as in the latter caſe the heir female by *purchaſe* muſt be the *heir at common law,* and the heir by *deſcent* muſt be a *ſpecial* heir, according to the courſe of deſcent preſcribed by the donor, ſo in the former caſe the heir by *purchaſe* is the heir at *common law,* and the heir by *deſcent* is the heir ſpecial according to the *cuſtom.*—But the authorities of the

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Sect. 29.

20. H. 6. 36.
[1] 1. Co. fol. 140. b. Chudleigh's case adjuge. (7. Co. 41.)

THIS is evident by that which hath been said, and needeth no explanation. But it hath beene said, [1] that if a man give land to another and to his heires of the body of such a woman lawfully begotten, that this is no estate taile for the uncertainty by whom the heires shall be begotten; for that the brother of the donee or other cousin may have issue by the woman, which may be heire to the donee, and estates in taile must be certaine. Therefore our author to make it plaine in all his cases added to these words (his heires) which he shall ingender. But that opinion is, since our author wrote, over-ruled, and that estate adjudged to be an estate taile, and begotten shall be necessarily intended begotten by the donee (1).

ITEM si terre soit done a un home et a ses heires, que il engendra de corps sa feme, en ceo case le baron ad estate en especial taile, et la feme nad riens.

ALSO if land be given to a man and to his heires, which he shall beget on the body of his wife, in this case the husband hath an estate in especiall taile, and the wife hath nothing.

Sect. 30.

(Ante 20. b.)

SI home ad issue fits et devie, &c.

17. E. 2. Taile 23. 2. E. 3. 1. tit. Taile 7. 4. and 5. Ph. and Mar. Dier 156. 12. H. 4. 1. 15. H. 7. 10.
(F. N. B. 213. E. 2. Leon. 25. Co. Entr. 254.)

John de Mandevile by his wife Roberge had issue Robert and Mawde. Michael de Morevill gave certaine lands to Roberge and to the heires of John Mandeville her late husband on her body begotten, and it was adjudged that Roberge had an estate but for life, and the fee taile vested in Robert (heires of the body of his father being a good name of purchase), and that when he dyed without issue, Mawde the daughter was tenant in taile as heire of the body of her father *per formam doni* (2), and the formedon which she brought supposed, *Quod post mortem præfatæ Robergiæ et Roberti filii et hæredis ipsius Johannis Mandeville et hæred' ipsius Johannis de præfata Robergia per præfatum Johannem procreat', præfat' Matildæ filiæ prædict' Johannis de præfatâ Robergia per præfatum Johannem procreatæ sorori et hæredi prædicti Roberti descendere debet per formam donationis prædict'.* And yet in truth the land did not descend unto her from Robert (3), but because she could have no other writ, it was adjudged to be good. In which case it is to be observed, that albeit Robert being heire tooke an estate taile by purchase, and the daughter was no heire of his body at the time of the gift, yet she recovered the land *per formam doni*, by the name of heire of the body of her father, which notwithstanding her brother was and he was capable at the time of the gift; and therefore when the gift was made she tooke nothing, but in expectancy, when she became heire *per formam doni*. But where a man by deede gave lands to Emme late wife of John Master, *habendum et tenendum prædict' Emme et hæredibus Johannis Master de corpore ejusdem Emme procreat'*, in that case the sonne and heire of John Master begotten on the body of Emme took no estate with Emme in the lands; because he was named after the *habendum* (4).

ITEM si home ad issue fits, et devie, et terre est done al fits, et a les heires de corps son pier engendres, cea est bone taile, et uncore le pier fuit mort al temps de la done. Et mults auters estates en taile y sont per le equitie del dit estatute, que icy ne sont specifies.

ALso if a man hath issue a sonne and dyeth, and land is given to the sonne, and to the heires of the body of his father begotten, this is a good entaile, and yet the father was dead at the time of the gift. And there be many other estates in the taile by the equity of the said statute, which be not here specified.

(Post. 220.)

5. H. 4. 3. a.

(2. Ro. Abr. 67. 68.)

If a man hath issue two daughters, and dieth seised of two acres of land in fee simple, and the one coparcener giveth her part to her sister, and to the heires of the body of her father, in this case the donee hath an estate taile in the moity of the donor's part, for the donee is not entire heire but the donor is heire with the donee, and she cannot give to the heires of her owne body, and the donee hath the other moity of her sister's part for life. If a man hath issue a sonne and a daughter, and dieth, and land is given to the daughter and to the heires females of

(Ante 24. b. 25. a.)

(1) *So gift to A and* the *heirs* which her husband shall beget of her body *is tail in the wife; and yet it is not said* her *heirs nor heirs of* her *body.* 41. E. 3. 24. Hal. MSS.—(2) Nota, *in Littleton's case the son takes by purchase, and in Mandevile's case he takes by purchase jointly with the mother. But if the gift had been to Roberge and to the heirs of her body by the husband begotten, or to the heirs of her body and of the body of the husband begotten, it seems tail only in the wife.* Quære *and* vid. 12. H. 4. 102. *by Thirninge, Litt. sect.* 352. *and* 1. *Rep. Shellie's case.* 104. Hal. MSS.—(3) *And therefore though Maud had been of the half blood, he should have taken.* Hic *Hodgkinson's case cited fol.* 14. *sect.* 6. *M.* 30. 31. *Eliz. B. R. Morris and Maule W.* Vid. *H.* 31. *W. n.* 23. Hal. MSS.—See ante fol. 14. a. n. 6.—(4) *Where one named after the* habendum *shall take.—H.* 13. Jac. *Brookes and Brookes. In customary grant by copy, one not named in the premises, being named in the* habendum, *may take a present estate.* Venit I. S. et cepit de domino habendum *to him and his wife is good.—In frank-marriage a wife shall take, though named only in the* habendum. Hic *sect.* 17. 4. *E.* 3. 4. 5. *E.* 3. 17. Brief 703.—*So it seems in render by fine to B* habendum *to B and C his wife.* 8. *E.* 3. 31. 24. *E.* 3. 58.—*So by a deed by way of remainder, a stranger to the deed, though not named in the premises, shall take.* Hic *fol.* 183. *sect* 283. 8. *E* 3. 50. *But otherwise regularly one shall not take a present interest jointly with another, unless he be party to the deed and named in the premises.* 8. *B.* 2. Feoffments hic fol. 378. *sect.* 721. 3. *H.* 6. 18. 27. 16. *E.* 2. Ass. 371. *Trin.* 16. Jac. rot. 1089. *Greenwood and Tyler. Hob.* 314. *But if by deed indented or poll A grants the manor of S* habendum *to B* et hæredibus, *it is good though he was not named in the premises.* Hal. MSS.—See the case of Brookes and Brookes cited by lord Hale in Cro. Jam. 434. and 2. Ro. Abr. 66. 67. and Vin. Abr. *Grant* K. a. in which two last books there are many other cases relative to the same subject. See further ante 7. a. where lord Coke writes, that if A gives land to hold to B and his heirs it is good, though he is not named in the *premises*, to which lord Hale adds—*But gift in the* premises *to A* habendum *to A and B is void as to B. M.* 25. *Eliz. Onv. Vid. ante* 6. *a. Flowd. Comment.* 156 *Throgmorton's case.* Hal. MSS. See also ante where lord Coke describes the office of the *habendum*, on which lord Hale gives the following annotation.—*It is not necessary to repeat the thing granted, it being sufficient that it is named in the* premises. *H.* 44. *Eliz. B. R. Hill and Giles adjudged. One not named in the* premises *shall not take by the* habendum, *unless* First, *in case of frankmarriage, hic sect.* 17. Secondly, *in case of grant by copy. T.* 15. *Jac. B. R. Brooke's case. Cro. Jam.* 434. Thirdly, *in case of a remainder. Lease to husband and wife* habendum *to the husband for* 10 *years; the wife takes nothing. T.* 31. *El. Mo. So lease of the scite of a rectory and all tithes appertaining to it* habendum *the scite* cum pertin' *for* 20 *years the tithes pass only at will. H.* 28. *El. Mo.* 222. *Carye's case. Grant to A and B,* habendum *to A for years, remainder to B for years, is good; but lease of two acres to A and B,* habendum *one acre to A for years, the other to B for years, is bad. T.* 4. *Eliz.* Vid. *Hob.* 172. Hal. MSS.—See *contra* to this last case. Mo. 26. by *Brown arguendo.* For other instances of differences between the *premises* and *habendum*, particularly where the former has been *joint* and the latter *several*, see Mo. 43. 247. 880.

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third kind are those, which occur in respect to gifts to heirs *male* or *female*, and therefore apply more closely. Of these the earliest is John Faringdon's case, 9. H. 6. 23. and 11. H. 6. 12. in which one question was, whether a great grandson could take by pur-

of the body of the father, ſhe taketh but an eſtate for life; becauſe ſhe is not heire female to take by purchaſe as before hath been ſaid.

Et a les heires de corps le pier. Theſe words *(les heires)* are obſervable; for if they were *(ſes heires)* it cleerly altereth the caſe. And therefore, if lands be given to the ſonne and to his heires of the body of his father, the ſonne cannot take as heire of the body of his father, becauſe the grant is to him and to his heires, &c. and conſequently he hath a fee ſimple(1). But if there be grandfather, father and ſonne, and the father dieth, and lands be given to the ſonne, and to the heires of the body of the grandfather, this is a good eſtate taile in the ſonne; ſo as Littleton did put his caſe of the father but for an example (2). (Ante 20. b. Poſt 220. a)

Et mults auters eſtates en le taile y ſont, &c. This needeth no explanation.

Sect 31.

MES ſi home done terres ou tenements a un auter, a aver et tener a luy et a ſes heires males, ou a ſes heires females, il, a que tiel done eſt fait, ad fee-ſimple, pur ceo que n'eſt my limit per le done de quel corps liſſue male ou female iſſera, et iſſint ne poit en aſcun maner eſtre priſe per lequitie del dit eſtatute, et pur ceo il ad fee ſimple.

BUT if a man give lands or tenements to another, to have and to hold to him and to his heires males, or to his heires females, he, to whom ſuch a gift is made, hath a fee-ſimple; becauſe it is not limited by the gift, of what bodie the iſſue male or female ſhall be, and ſo it cannot in any wiſe be taken by the equitie of the ſaid ſtatute, and therefore he hath a fee ſimple.

TERRES ou tenements. This rule extendeth but to lands or tenements, and not to the inheritance that noblemen and gentlemen have in their armories or armes. For where the nobleman or gentleman hath a fee ſimple in his armories or armes, yet is the ſame deſcendible to the heires males lineall or collaterall. For albeit a female be heire at the common law, yet the ſhield, armories and armes deſcend unto them that are able to beare them (farre exceeding the nature of Gavelkind, but with ſeveral differences.) And all the females of that family in reſpect that they be of the ſame blood, may in a loſenge or under a curtaine manifeſt of what family they be by expreſſing the armories and armes belonging to that family, and the huſband of them may impale them or quarter them with their owne as the caſe ſhall require. And for diſtinction and better explanation hereof. If the king by his letters patents giveth lands or tenements to a man, and to his heires males, the grant is void; for that the king is deceived in his grant, in as much as there can be no ſuch inheritance of lands or tenements as the king intended to grant. But if the king for reward of ſervice granteth armories or armes to a man and to his heires males without ſaying (of the body), this is good, and as hath been ſaid, they ſhall deſcend accordingly (3). (Ante 18. b. Poſt 68. b.) 18. H. 8. tit. Patents. Br 104. (1. Co 43. b. 46. b. Mo. 424. Cro. Eliz. 478.)

If a man by his laſt will deviſe lands or tenements to a man and to his heires males, this by conſtruction of law is an eſtate taile, the law ſupplying theſe words (of his brodie) (4). *Vide* the Prince's [*t*] caſe, where it appeareth that an act of parliament may limit an inheritance of lands or tenements, otherwiſe then common law would doe, and create a new eſtate of inheritance, and many authorities in law there cited worthy of note and obſervation. *Rot. Parliam. anno* 1. *E.* 4. *nu.* 26. (5). The [*u*] duchie of Lancaſter is intailed to king Edward the Fourth and his heires kings of England. And king Henry the ſixt did by his letters patents grant, *Johanni filio Johannis Talbot, quod ipſe et hæredes ſui Domini manerij de Kingſton Liſle in comitatu Berk. ex nunc Domini et Barones de Liſle Nobiles et Proceres regni habeantur, teneantur, et reputentur, &c.* By this he had a fee ſimple qualified in the dignity (6). 2. *H.* 5. *fol.* 1. A grant was made to a man, and to his heires tenants of the mannor of Dale (7). A man ſeiſed of lands in Gavelkind, gives or deviſes the ſame to a man and to his eldeſt heires. He cannot hereby alter the cuſtomary inheritance, but as in the caſe of our author, 27. H. 8. 27.

[*t*] 8. Co. 1. The Prince's caſe. 21. E. 3. 4. 22. E. 3. 3. 24. E. 3. 53. 9. H. 6. 25. 9. E. 4. 15. 1. Marie Dier. 94. (7. Co. 41.)

[*u*] Per literas patentes auctoritate parliamenti.

(1) *Yet giſt to A and* his *heirs of the body of B his wife, who is dead, is tail.* 12. *H* 4. 1. Rationem diverſitatis quære, *for the ſecond ſon is his heir of the body of the father.* Hal. MSS.—(2) Vid. *Dy.* 24. 247. 274. 157. 394. *for the form of the writ.* Hal. MSS.—(3) See further as to the deſcent of *Arms* p. 140. b. See alſo on the ſubject of *Arms* in general, Dugd. Ant. Uſage in bearing of Arms and ſeveral pieces in Hearn. Antiq. Diſc. 2d ed. vol. 1.—(4) *Dy* 116. Hal. MSS. See further lord Oſſulſtone's caſe. 3. Salk 336. and 11. Mod. 189. See S. C. cited 2. P. Wms. 2. and in Vin. Abr. *Deviſe* U. b. pl. 2. in Marg.—(5) In the caſe on the title to the earldom of Oxford decided in parliament 1. Cha. 1. the judges held, that a limitation of the earldom to Awbrey de Vere and his heires males, being by act of parliament, was ſufficient to raiſe a fee ſimple deſcendible to males only. See W Jo. 100.—(6) Lord Hale adds the following inſtances of *ſpecial* limitations. *King Henry the Third* dedit manerium de Penreth et Sourby Alexandro regi Scotiæ et hæredibus ſuis regibus Scotiæ; *and Alexander having daughters, of which one was married to the earl of Hunt. died, not having any heir king of Scotland,* et ea de cauſa *king E. 1. recovered ſeiſin, and the coheirs of Alexander were excluded. Lib. parl. E. 1. 134. 308. The hoſpital of Saint Katharine was founded by queen Eleanor, wife of Hen. 3. reſerving the patronage* ſibi et reginis Angliæ pro tempore exiſtentibus et eo titulo regina Philippa uxor E. 3. habet patronatum. *Clauſ. 7. E. 3. parte 2. m. 2.* Hal. MSS.—(7) See further as to a qualified fee ante 1. b. and the books cited in n. 5. there.

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purchaſe under a remainder deviſed to the teſtator's *next heir male and the heirs male of his body*, the great grandſon's mother, who was the teſtator's *heir general*, being alive when the eſtates precedent to the remainder determined. The caſe was argued twice, but there is an *aliternatur* in the Year Book, and what was the opinion of the court is not any where mentioned; but there is reaſon for ſuppoſing, that it was againſt the remainder; for in 20. H. 6. 44. Newton, *then* a judge, though he had before argued as counſel for the remainder in Faringdon's caſe, lays it down as clear law, that if land is given to A for life, remainder to the right heirs *male* of the body of B, to hold to them and their heirs for ever, the ſon of a daughter of B, being his heir, may take notwithſtanding he makes out his deſcription through a *female*; and Forteſcue, chief juſtice, aſſents to the poſition. This conſtruction of *heirs male of the body* as words of purchaſe, being attended to, will be found almoſt neceſſarily to be a clear authority with lord Coke; for it ſhews, that as words of *purchaſe* they deſcribe *males* being alſo *heirs general*, whereas as words of *limitation* it is agreed they have a different import, and ſignify ſuch males as ſhall be *heirs ſpecial* according to the particular courſe of deſcent marked out by the donor, though they do not happen to be *heirs general*; which diſtinction is the whole amount of lord Coke's doctrine. But the next authority, which is in Bro. Abr. *Done.* 61. applies more directly. There lord Brooke, after mentioning the difference taken by Ellerker in Farringdon's caſe between *deſcent* and *purchaſe*, adds in confirmation of it, that *by* Hare, maſter of the Rolls, an antient apprentice, *there is a difference between a giſt in poſſeſſion to a man and his heirs female, &c. and a giſt to a ſtranger the remainder to the heirs females of another, for there heirs* in deed *muſt be when the remainder falls, and otherwiſe the remainder is void for ever.* The ſame doctrine is in Plowd.

Mich. 26. & 27. Eliz. in Com. Banco. Leonard Lovelace's case.

thor, *Ut res magis valeat*, the law rejecteth (Males) so in this case the law rejecteth this adjective (eldest). And so it is if lands be given to a man, and to the eldest heires females of his body, yet all the daughters shall inherit as it hath been resolved.

Et issint ne poet estre prise per lequitie del dit statute, &c. For it is a certaine rule in law, that in every estate in taile within the said statute, it must be limited either by expresse words or by words equipollent of what body the heire inheritable shall issue. And it was [x] adjudged in parliament, that where lands were given to a man, and to his heires males, that this was a fee simple, and that as well the heires females as heires males should inherit, for the grant of a subject shall be taken most strongly against himselfe.

[x] 18. Ass. p. 5. 18. E. 3. 46. 6. (Not so in the king's case.) 9. H. 6. 23. 25. 8 Co. fol. 1. The Prince's case. Ancient tenures. fol. 3.

Et pur ceo il ad fee simple. Littleton's reason being shortly collected is this. Whosoever hath an estate of inheritance, hath either a fee simple or a fee taile; but where lands be given to a man and his heires males, he hath no estate taile, and therefore he hath a fee simple.

What actions tenant in taile may have and cannot have, *vide* Sect. 595. What great alterations have been made since Littleton wrote concerning not only leases to be made by tenant in taile, but barres also of the estate taile itselfe by force of certaine acts of parliament made since Littleton's time, you shall read Sect. 56. and 708. (1).

Chap. 3. Sect. 32.

Tenant in taile apres possibilitie dissue extinct. In Vin. Tail after possibility

(Dr. & Stud. b. 2. c. 1.)

LITTLETON having spoken of estates of inheritance, viz. fee simple and fee taile, now he treateth of tenants of freehold *tantum*, that is, for terme of life, and therein first of tenant in taile after possibility of issue extinct; and he giveth unto him the first place, because this tenant hath eight qualities and priviledges which tenant in taile himselfe hath, and which lessee for life hath not. [a] As first he is dispunishable for waste (2). Secondly, he shall not be compelled to atturne. Thirdly, he shall not have ayde of him in the reversion. Fourthly, upon his alienation, no writ of entrie *in consimili casu*, lyeth. Fifthly, after his death no writ of intrusion doth lie. Sixtly, he may joine the mise in a writ of right, in a speciall manner. Seventhly, in a *Præcipe*, brought by him he shall not name himselfe tenant for life. Eightly, in a *Præcipe* brought against him he shall not be named barely tenant for life. And yet he hath four other qualities, which are not agreeable to an

TENANT en fee taile apres possibilitie dissue extinct est, lou tenements sont dones a un home et a sa feme en especiall taile, si lun de eux devy sans issue, celuy, que survesquist, est tenant en taile apres possibilitie dissue extinct. Et sils avoient issue, et lun devie, coment que durant la vie lissue, celuy que survesquist ne serra dit tenant en taile apres possibilitie dissue extinct; uncore, si lissue devy sans issue, issint que ne soit ascun issue en vie que poit enheriter perforce de le taile, donque celuy, que survesquist,

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

(4. Co. 63. 1. Ro. Abr. 296.)

[a] Temps E. 1. wast. 125. 39. E. 3. 16. 31. E. 3. aid. 35. 42. E. 3. 22. 43. E. 3. 1. 45. E. 3. 22. 28. E. 3. 96. 46. E. 3. 13. 27. 2. H. 4. 17. 7. H. 4. 10. 11. H. 4. 15. 21. H. 6. 56. 10. H. 6. 1. 26. H. 6. aid 77. 3. E. 4. 11. 13. E. 2. Entre Conge. 56. Fitz. N. B. 203. Lewes Bowle's case, 11. Co. fol. 8.

(Cro. Eliz. 671.)

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(1) By what acts tenant in tail may prejudice his issue or those in remainder or reversion without fine or recovery, and where his acts shall not affect them, see Vin. Abr. *Estate* F. a. to I. a. and *Tayle* D. E. F.—(2) See acc. 2. Inst. 302. But yet he cannot have action of waste against another, for he cannot count *ad exhæredationem*; and it is said, that tenant in tail loses his action of waste, if he becomes tenant in tail *after possibility of issue extinct* pending the writ. See Bro. Abr. *Waste* pl. 14. 59, 60. 2. Ro. Abr. 825. pl. 5. Mo. 18. and post 53. b. Note also that it is said, that though such tenant is not punishable for waste, yet if he cuts down trees, they are not his property. 4. Co. 63. As to this difference between being dispunishable for waste in felling trees and having the property in them, see 1. P. Wms. 528. See also 2. P. Wms. 241. where it is said by the court, that if tenant for life cuts down timber, it belongs to those, who at the time of its being severed were seized of the first estate of inheritance.

Quær. 87. and 133. and the very learned author illustrates it by a case, the same as that stated by lord Coke. In *Quære* 87. the words of the book are, *If a remainder is appointed to the right heirs female of the body of I. S. who dies, having a son and daughter, the remainder shall be void; because the daughter cannot have it, in regard that she is not heir though she be female.* The next authority is Shelley's case, which arose between the second son of Edward Shelley and a *posthumous* son of Edward's deceased eldest son. One point was, whether the second son could take by *purchase*, under a remainder *to the heirs male of Edward's body, and the heirs male of the bodies of such heirs male*, in which case his estate would not have been devested by the birth of the posthumous son of his brother, the eldest son having left a daughter, who at Edward's death was his *heir general* Judgment was given against the second son; but from the report of lord Coke and More, it seems not to have been absolutely requisite to have decided whether the second son could take by *purchase*; for the judges held, that on account of the preceding use for life to Edward, the remainder operated as words of *limitation*, though Edward died before the use to him could arise, and that so the second son took in course and nature of a *descent*, till the birth of his brother's posthumous son, who then became intitled. See Mo. 140. and 1. Co. 106. However, lord Dyer in his report of the case places the remainder in *both* points of view, and besides observing that by *descent* the second son could only take the remainder till the birth of his elder brother's posthumous son, also says, that *he could not have it as a purchaser, because he was not heir of the body of his father, for the daughter of the eldest son was heir general, and the second son was not heir male of the body of his father unless he was heir as well as male.* These words from lord Dyer, when it is considered that he was one of the judges on whose opinion Shelley's case was decided, and that they are introduced to explain the reason of the judgment, are very strong evidence, that the judges in Shelley's case gave their sanction to lord Coke's doctrine in the *full* extent of it, that is, in the case of a gift where *heirs male of the body* were both words of purchase and of limitation; and lord Dyer's authority ought to have the greater weight, because he is not contradicted by any other report of the same case; not even by lord Anderson, who was counsel for the second son, for he only takes notice of lord Coke's account

de les donees eſt tenant en le taile apres poſſibilitie diſſue extinct.

nees is tenant in taile, after poſſibilitie of iſſue extinct.

eſtate in taile, but to a bare leſſee for life. [b] (1) Firſt, if he maketh a feoffment in fee, this is a forfeiture of his eſtate (2). Secondly, if an eſtate in fee, or in fee taile, in reverſion, or remainder, deſcend or come to this tenant, his eſtate is drowned, and the fee or fee taile executed. Thirdly, he in the reverſion or remainder ſhall be received upon his default, as well as upon bare tenant for life (3). Fourthly, an exchange between a bare tenant for life and him is good, for their eſtates in reſpect of their quantity are equal; ſo as the difference ſtandeth in the quality, and not in the quantity of the eſtate. And as an eſtate taile was originally carved out of a fee ſimple, ſo is the eſtate of this tenant out of an eſtate in eſpeciall taile. And he is called tenant in taile after poſſibilitie of iſſue extinct; becauſe by no poſſibility he can have any iſſue inheritable to the ſame eſtate taile. But if a man giveth land to a man and his wife, and to the heires of their two bodies, and they live till each of them be C. yeere old, and have no iſſue, yet do they continue tenant in taile; for that the law ſeeth no impoſſibilitie of having children. But when a man and his wife be tenant in eſpeciall taile, and the wife dieth without iſſue, there the law ſeeth an apparent impoſſibility, that any iſſue that the huſband can have by any other wife ſhould inherit this eſtate. And let this tenant keep his eſtate, for he hath theſe priviledges in reſpect of the privity of his eſtate, and of the inheritance that was once in him. [c] For in the caſe of Evens (4), Mich. 28 & 29. Eliz. it was adjudged, that where tenant in taile after poſſibility of iſſue extinct granted over his eſtate to another, that his grantee was compelled to attorne *in a quid juris clamat* (5), as a bare tenant for life, and ſo be named in the writ; for by the aſſignement the privity of the eſtate being altered, the priviledge was gone; and this judgement was affirmed in a writ of error, and herewith agreeth 27. H. 6. tit. aid. Statham 29. E. 3. 1. b(6).

[b] 13. E. Entre Conq. 56. 45. E. 3. 22. 28. E. 3. 96. 27. Aſſ. p. 60. F. N. B. 159. 32. E. 3. tit. ag. 55. 55. E. 3. 4. 9. E. 4. 17. 2. R. 2. reſceit. 147. 41. E. 3. 12. 20. E. 3. reſceit. 38. E. 3. 33. Lewes Bowles' caſe ubi ſupra.

[c] 11. Co. fol. 83. Lewes Bowles' caſe. (Poſt. 316.) 27. H. 6. tit. aid. Statham. 29. E. 3. 1. b.

27. H. 6. tit. aid. 29. E. 3. 1. b.

Sect. 33.

ITEM ſi tenements ſont dones a un home et a ſes heires, que il engendra de corps ſa feme, en ceſt cas la feme nad ryen en les tenements, et le baron eſt ſeiſie come donee en ſpeciall taile. Et en ceo cas, ſi la feme devy ſans iſſue de ſon corps engendres per ſon baron, donques le baron eſt tenant en taile apres poſſibility diſſue extinct.

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

SI la feme devie ſans iſſue. So as the eſtate of this tenancy muſt be altered by the act of God, and that by dying without iſſue; for if a feoffment in fee be made to the uſe of a man and his wife for tearme of their lives, and after to the uſe of their next iſſue male to be begotten in taile, and after to the uſe of the huſband and wife, and of the heires of their two bodies begotten, they having no iſſue male at that time; in this caſe the huſband and wife are tenants in ſpeciall taile executed (7), and after they have iſſue a ſonne, in this caſe they are become tenants for life, the remainder to the ſonne in taile, the remainder to them in ſpeciall taile (8), for albeit their eſtate taile is turned to an eſtate for life, yet they have but a bare eſtate for life; but if the iſſue die, and the huſband die having no other iſſue, and then the ſonne die without iſſue, the wife ſhall have the priviledges belonging to a tenant in taile after poſſibility of iſſue extinct, as it appeareth in Lewes Bowles' caſe *ubi ſupra*, where it is ſaid, that the ſtate of this tenant muſt be created by the act of God, and not by limitation of the party, *ex diſpoſitione Legis*, and not *ex proviſione hominis* [d]. If land be given to a man and to his wife, and to the heires of their two bodies, and after they are divorced *cauſa præcontractus* or *conſanguinitatis*, or *affinitatis*, their eſtate of inheritance is turned to a joint eſtate for life, and albeit they had once an inheritance in them, yet for that the eſtate is altered by their owne act, and not by the act of God, viz. by the

Lewes Bowle's caſe 13. Co. fol. 80. (1. Ro. Rep. 178. 2. Saund. 383. 387. Cro. Eliz. 315. 1. Co. 76. 2. Co. 61.)

[d] 7. H. 4. 16. 8. E. 1. Aſſ. 415. 12. Aſſ. 22. 19. Aſſ. p. 2. 13. E. 3. Aſſ. 91. in fine. (9. Co. 140. 141. 7. Co 42. b. Kenne's caſe. and 4. Co. 29.)

(1) 43. *Aſſ.* 24. Hal. MSS.—(2) *So if he miſpleads*, 39. E. 3. 16. Hal. MSS.—(3) 28. *E.* 3. 96. Contra *as to receipt* Hal. MSS.—(4) *M.* 26. 27. *Eliz. B. R. Leon. T.* 29. *Eliz. Clench* 88. *Evans and Aprichard.* Hal. MSS. See Aprice's caſe, 2. Leon. 40. 3. Leon. 241. which ſeems to be the caſe referred to by lord Coke and lord Hale. The anonymous caſe in 1. Leon. 290. and 3. Leon. 121. ſeems alſo to be the ſame caſe.—(5) 28. *E.* 3. 96. *Grantee has the privilege.* Hal. MSS. But ſee the reaſons for the judgment cited by lord Coke in the books cited in note 4.—(6) Quære *if puniſhable for waſte.* Hal. MSS. See 2. Inſt. 302.—(7) Cordall's caſe Cro. Eliz. 315. is to the contrary; for there land was deviſed to A for life, remainder to his firſt and other ſons in tail male, remainder to the heirs of A's body, and according to Croke, who mentions the caſe as reported to him by lord Coke, it was reſolved, that A's eſtate tail was not executed for the poſſibility of the mean eſtate's interpoſing, but was ſo disjoined during A's life, that his wife could not be endowed. But ſee Caſ. B. R. temp. Hardw. 17. where lord Hardwicke ſays, that Cordall's caſe has been ſeveral times denied to be law.—(8) Sic nota *remainder ſupported, without particular eſtate, by the poſſibilty that iſſue may be born. But if ſuch tenant levies a fine, now this remainder is deſtroyed, becauſe the eſtates are confounded.* Hal. MSS.—Here it is proper to add, that there is a difference between ſubjoining the inheritance to the particular eſtate by the *ſame* conveyance as limits the intermediate contingent remainder, and an acceſſion of one to the other by a *diſtinct* and *ſubſequent* act or conveyance; for in the latter caſe the contingent remainder is deſtroyed, though not in the former. See acc. Purefoy and Rogers 2. Saund. 380. It has even been adjudged, that in the latter caſe the *deſcent* of the inheritance on the perſon having the particular eſtate will deſtroy the contingent remainder, where the deſcent has been *ſubſequent* to the commencement of the particular eſtate. See *Kent*, and *Harpool.* 1. Ventr. 306. T. Jo. 76. *Hooker* and *Hooker* Caſ. in B. R. temp. Hardw. 13. But a deſcent of the fee on tenant for life will not hurt the contingent remainder, where the particular eſtate and the deſcent take place at the *ſame time*, and are derived from the *ſame perſon*; as where land is deviſed to A for life, remainder over on a contingency, and at the deviſor's death the reverſion deſcends upon A as his heir. See acc. Archer's caſe 1. Co. 96. Plunkett and Holmes 1. Lev. 111. and Boothby and Vernon 9. Mod. 147. The caſe of Wood and Ingerſole Cro. Jam. 260. ſeems contra; but ſee the obſervation on the laſt caſe in T. Jo. 79. and Pollexf. 481. It would be a great omiſſion not to apprize the ſtudent, that the ſubject of this note is fully gone into by Mr. Fearne in his Eſſay on Contingent Remainders. See page 111. to 118. of the ſecond edition, where the author moſt learnedly and ingeniouſly ſtates the ſeveral diſtinctions, explains the reaſons on which they depend, and endeavours to reconcile all the caſes on this nice ſubject.

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account of the reaſons of the judgment, by obſerving that they were not mentioned in court. See 1. And. 71. Accordingly Mr. Serjeant Rolle cites Shelley's caſe as having determined the point. See 2. Ro. Abr. 416. F. pl. 5. Aſhenhurſt's caſe. Mich. 7. Jam. is the next authority, and in that land was deviſed to executors till 900*l.* ſhould be raiſed for the preferment of the teſtator's

(1. Ro. Abr. 841.)

the death of either party without iſſue, they are not tenants in taile after poſſibility of iſſue extinct (1). Lands are given to the huſband and wife, and to the heires of the body of the huſband, the remainder to the huſband and wife, and to the heires of their two bodies begotten; the huſband dies without iſſue; the wife ſhall not be tenant in taile after poſſibility, for the remainder in ſpeciall taile was utterly void, for that it could never take effect; for ſo long as the huſband ſhould have iſſue, it ſhould inherit by force of the generall taile, and if the huſband die without iſſue, then the ſpeciall eſtate taile cannot take effect, in as much as the iſſue, which ſhould inherit the eſpeciall, muſt be begotten by the huſband, and ſo the generall, which is larger and greater, hath fruſtrated the eſpeciall which is leſſer. And the wife in that caſe ſhall be puniſhed for waſte.

Sect. 34.

IF lands be given to a man with a woman in frankmarriage, albeit the woman (which was the cauſe of the gift) dieth without iſſue, yet the huſband ſhall be tenant in tayle, *apres poſſibilitie*, &c. for that he and his wife were donees in eſpeciall taile, and ſo within the words of Littleton. The reſidue of this ſection is evident.

ET nota que nul poit eſtre tenant en le taile apres poſſibility diſſue extinct, forſque un des donees, ou le donee en le ſpecial taile. Car le donee en general taile ne poit eſtre unque dit tenant en taile apres poſsibility diſſue extinct; pur ceo que touts temps durant ſa vie, il poit per poſsibility aver iſſue que poit inheriter per force de meſme le taile. Et iſſint en meme le manere liſſue, que eſt heire a les donees en un eſpecial taile, ne poit eſtre dit tenant en taile apres poſsibilitie diſſue extinct, cauſa qua ſupra.

AND note that none can be tenant in taile after poſſibility of iſſue extinct, but one of the donees, or the donee in eſpeciall taile. For the donee in generall taile cannot be ſaid to be tenant in taile after poſſibility of iſſue extinct; becauſe alwaies during his life, he may by poſſibility have iſſue which may inherit by force of the ſame entaile. And ſo in the ſame manner the iſſue, which is heir to the donees in eſpeciall taile, cannot be tenant in taile after poſſibility of iſſue extinct, for the reaſon aboveſaid.

(Dr. and Stud. 61. 11. Co. 80.)

* This, and that which follows, is not in the firſt (2) edition (which I have.) And therefore, (that I may ſpeake it once for all) it was wrong to the authour to adde any thing, (eſpecially in one context) to his worke.

* Et nota *que tenant en taile apres poſſibilitie diſſue extinct ne ſerra unque puny de waſt, pur lenheritance que fuit un foits en luy*, 10. *Hen.* 6. 1.† *Mes ceſtuy en le reverſion poit entrer ſil alien en fee*, 45. *E.* 3. 22.

† ſee contra ant. fol. 27. b. note 1.

And note that tenant in taile after poſſibility of iſſue extinct ſhall not be puniſhed of waſte, for the inheritance that once was in him. 10. H. 6. 1. But he in the reverſion may enter if he alien in fee, 45. E. 3. 22.

CHAP.

(1) *Huſband and wife tenants in ſpecial tail; the huſband was attainted of treaſon, or levies fine with proclamations; the huſband dies having iſſue by the wife: the iſſue cannot inherit, and yet to many purpoſes the wife ſurviving is tenant in tail* after poſſibility, *for if ſhe makes leaſe for 21 years according to the ſtatute, it ſhall bind the conuſee, or if it is for three lives, it ſhall not be a forfeiture. H. 22. Jac. Rot. Crocker and Kelſey. Hob. Rep. Melton's caſe. Vid. 9. Rep. Beaumont's caſe It ſeems, ſhe cannot ſuffer recovery after.* Quære. Vid. *this caſe of Beaumont afterwards debated. H. 13. Cha. B. R. in Baker and Willis Cro. Cha.* 476. The caſe of Crocker and Kelſey is in W. Jo. 60. Hutt. 84. Cro. Jam. 688. Bridgm. 27. 2. Ro. Rep. 490. 498 1. Ro. Abr. 843. pl. 3. and O. Bendl. 139. 143. Beaumont's caſe is in 9. Co. 138. b. and Melton's caſe is in Hob. 254. Note, that in the caſe of Crocker and Kelſey, the queſtion was on the operation of a leaſe for 21 years *not* warranted by the 32. H. 8. the antient rent not having been reſerved; but the iſſue in tail having levied a fine during the wife's life, it was adjudged that the leaſe was good; but it was to have been agreed, that the wife, notwithſtanding the huſband's death, was tenant in tail ſo as to be capable of making leaſes within the ſtature. Indeed this *latter* point had been adjudged in a former caſe, which is in Godb. 102. See too 4. Leon. 57. As to the *former* point, beſides the books already cited, ſee 2. Sid. 62.—(2) By the *firſt* edition, lord Coke means that printed at *Rohan*, as appears by the preface to this his Commentary on Littleton. But the edition by *Letton* and *Machlinia*, which was really the firſt, is alſo without the addition here mentioned. It appears to have been firſt introduced into the edition by *Redman*—See further as to the ſubject of *tenant in tail after poſſibility*. Vin. Abr. *Tayle*, I.

teſtator's three daughters, and afterwards to his right heirs males for ever, and one Beard was found by ſpecial verdict to be the *heir male*; but the court of king's bench held that he could not take the remainder, becauſe the three daughters were the *heirs general*, and in Eaſter 17. James the judgment was affirmed in the exchequer chamber. This caſe is the ſtronger, becauſe it roſe on a will, and the teſtator, in the deviſe to his *heirs male*, mentions his *heirs general*, which no doubt was urged as a circumſtance to ſhew that the teſtator meant a *ſpecial* kind of heir, and might have warranted a departure from the ſtrict ſenſe of *heir* without overturning lord Coke's general rule. See Hob. 34. and Palm. 50. *Counden* and *Clerke* already ſtated from lord Hobart at the beginning of this note, is another caſe where a *deviſe* to *heirs male* could not take effect, becauſe the *heirs general* were *females*; and this judgment appears to have been alſo affirmed on error in B. R. See Jenk. Cent. 294. There are ſeveral modern determinations to the ſame purpoſe. In Southcott and Stowell, which was adjudged about the 29. of Cha. 2. one having two ſons covenanted to ſtand ſeized to the uſe of the eldeſt in ſpecial tail male, remainder to the heirs male of the covenantor, or according to one report of the caſe the heirs male *of his body*, and for want of ſuch iſſue to his own right heirs. The eldeſt ſon dies leaving a ſon and daughter; the covenantor dies, and then the ſon of the covenantor's eldeſt ſon; and the queſtion was whether the ſecond ſon or the daughters of the eldeſt ſon ſhould have the eſtate. The court determined in favour of the ſecond ſon, becauſe the grandſon ſurvived the grandfather, and being *heir general* as well as *male* could take either by *purchaſe* or *deſcent* on his death, and therefore it was immaterial whether an eſtate for life roſe to the covenantor by implication or not; but it was agreed by the whole court, and even by the counſel for the ſecond ſon, that if the grandſon had not ſurvived, the ſecond ſon could not have taken by *purchaſe*, becauſe his nieces would have been *heirs general*, and conſequently he could not have been complete heir. See 1. Freem. 216. 225. 1. Mod. 226. 237. 2. Mod. 207. and 3. Kebl. 704. In 1695 lord keeper Somers, in the caſe of *Starling* and *Elrick*, decreed againſt one, who claimed to take by purchaſe under a deviſe to *heirs male*, becauſe a *female* was the *heir general*. See Prec. in Chanc 54. The caſe of Ford and lord Oſſulſton, which was determined in Mich. 7. Ann, by the king's bench is ſtill ſtronger, for in that

one

CHAP. 4. Sect. 35.

Curteſie Dengleterre.

TENANT per la curteſie Dengleterre eſt, lou, home prent feme ſeiſie en fee ſimple ou en fee taile general, ou ſeiſie come heire de le taile ſpecial, et ad iſſue per meſme la feme male ou female, oyes ou vife (1), *ſoit liſſue apres mort ou en vie, ſi la feme devie, le baron tiendra la terre durant ſa vie, per la ley Dengleterre. Et eſt appel tenant per le Curteſie Dengleterre, pur ceo que ceo eſt uſe en nul auter realme, forſque tantſolement en Engleterre.*

Et aſcuns ont dit, que il ne ſerra tenant per le curteſie, ſi non que lenfant, quil ad per ſa feme, ſoit oye crie, car per le crie eſt prove que le enfant fuit nee vife: Ideo Quære. Quære (2).

TEnant by the curteſie of England is, where a man taketh a wife ſeiſed in fee ſimple or in fee taile generall, or ſeiſed as heir in taile eſpeciall, and hath iſſue by the ſame wife, male or female borne alive, albeit the iſſue after dieth or liveth, yet if the wife dies, the huſband ſhall hold the land during his life by the law of England. And he is called tenant by the curteſie of England, becauſe this is uſed in no other realme but in England onely.

And ſome have ſaid, that he ſhall not be tenant by the curteſie, unleſſe the childe, which he hath by his wife, be heard crie; for by the crie it is proved, that the child was borne alive. Therfore Quære.

PRIST feme ſeiſie. And firſt of what ſeiſin a man ſhall be tenant by the curteſie. [c] There is in law a twofold ſeiſin, viz. a ſeiſin in deed, and a ſeiſin in law, whereof more ſhall be ſaid, Sect. 468, and 681. And here Littleton intendeth a ſeiſin in deed, if it may be attained unto. [f] As if a man dieth ſeiſed of lands in fee ſimple or fee taile generall, and theſe lands deſcend to his daughter, and ſhe taketh a huſband and hath iſſue, and dyeth before any entry, the huſband ſhall not be tenant by the curteſie, and yet in this caſe ſhe had a ſeiſin in law; but if ſhe or her huſband had during her life entred, he ſhould have been tenant by the curteſie (3). [g] A man ſeiſed of an advowſon (4) or rent in fee hath iſſue a daughter, who is married, and hath iſſue, and dyeth ſeiſed, the wife, before the rent became due or the church became voyd, dieth, ſhe had but a ſeiſin in law, and yet he ſhall be tenant by the curteſie, becauſe he could by no induſtry attaine to any other ſeiſin, *Et impotentia excuſat legem* (5) But a man ſhall not be tenant by the curteſie of a bare right, title, uſe (6), or of a reverſion (7) or remainder expectant upon any eſtate of freehold, unleſſe the particular eſtate be determined or ended during the coverture.

[c] F. N. B. 194. (Poſt. 153.)

[f] 1. Mar. Dyer 55.

(Poſt. 40.)

[g] 7. E. 3. 66. 3. H. 7. 5. (6. Co. 68. a. 1. Co. 97. b. 8 Co. 34. Ante 15. b.)

(8. Co. 96.)

At the coronation of king R. 2. ſaith the record, [b] *Johannes rex Caſtiliæ et Legionis Dux Lancaſtriæ, coram dicto domino rege et conſilia ſuo compareus, clamavit ut comes Leiceſtriæ officium Seneſchalciæ Anglicæ, et ut dux Lancaſtriæ ad gerendum principalem gladium domini regis vocat' Curtana die coronationis ejuſdem regis, et ut comes Lincoln' ad ſcindendum et ſecandum coram ipſo domino rege ſedente ad menſam dicto die coronationis; et quia fact' diligenti examinatione coram peritis de conſilio regis de præmiſſis, ſatis conſtabat eidem conſilio, quod ad ipſum ducem tanquam tenentem per legem Angliæ poſt mortem Blanchiæ quondam uxoris ſuæ pertinuit officia prædict' prout ſuperius clamabat exercere, conſideratum fuit per ipſum regem et conſilium ſuum prædictum, quod idem Dux officia prædicta per ſe et ſufficientes deputatos ſuos faceret et exerceret, et feoda debita in hac*

[b] Proceſſ. fact. ad Coronationem R. 2. Anno regni ſui primo Rot. clauſ. m. 45.

(1) Inſtead of *oyes ou vife*, the words are *neez vif* in L. and M. This latter reading is conformable to lord Coke's tranſlation.—(2) This *quære* is in L and M. but not in Roh.—(3) But entry is not always neceſſary to give ſeiſin *in deed*; for if the land is in leaſe for *years*, curteſy may be without entry or even receipt of rent, the poſſeſſion of the leſſee for years being deemed the poſſeſſion of the huſband and wife. See the caſe of De Grey and Richardſon 3. Atk. 469. Lord Coke's doctrine about ſeiſin for a *poſſeſſio fratris* is the ſame. See ante 15. a. In n. 4. there the caſe of Newman and Newman is cited, from Wilſ. vol. 2. p. 516. but no hint being given of the point adjudged, it may be proper to add here, that in that caſe the court conſtrued the poſſeſſion of a mother to be a poſſeſſion for an infant her ſon as his guardian by law, ſhe being next of blood to whom the inheritance could not deſcend, and held it a ſufficient ſeiſin to exclude the daughters by a former *venter*.—(4) *Whether it be an advowſon in groſs or appendant. A ſeiſed of a manor, to which an advowſon is appendant, dies, having iſſue a daughter, who takes huſband and dies before entry into the manor. It ſeems, that the huſband ſhall not be tenant by the curteſy of the advowſon, nor of the rents incident to the manor, becauſe he had not ſeiſin of the principal.* Hal. MSS.—(5) According to Perkins, the huſband ſhall have curteſy in an advowſon, though he ſuffers the ordinary to preſent by lapſe on an avoidance in his wife's life-time. Perk. Sect. 468. But ſuch a caſe is not within lord Coke's reaſon for allowing curteſy of an advowſon without ſeiſin *in deed*; nor do I find any authority to ſupport the doctrine, beſides Mr. Perkins's name. *That* indeed, on account of the learning and ingenuity diſplayed in his *Profitable Book* on the laws of England, ought *in general* to have conſiderable weight; though one, who wrote ſoon after Mr. Perkins, deſcribes him to be *a man that writeth of diverſe titles of our law rather ſubtilly than ſoundly*. Fulb. Paral. 40. a. See alſo a more particular character of Mr. Perkins in Fulb. Prepar. 28. a.—(6) Here an uſe *before* or *not executed* by the 27. H. 8. muſt be meant; for an uſe within that ſtatute is a legal eſtate. See acc. 2. And. 75. 147. and by lord Coke himſelf in Cro. Jam. 201. See alſo 1. New Abridgm. 660. But though in ſtrictneſs of law there cannot be curteſy of *truſts*, yet ſince lord Coke's time our courts of equity have allowed curteſy both of truſts and of other intereſts, which, though in *law* mere rights and *titles*, are deemed *eſtates* in *equity*, and made to conform to many of the rules and conſequences incident to eſtates in *law*. See in 1. Atk. 603 the caſe of Caſhborn and Engliſh, in which lord ch. Hardwicke decreed curteſy of an *equity of redemption*. See S. C. more fully reported in Vin. Abr. *Curteſy* E. pl. 23. However a *wife in point of benefit* may have a truſt of inheritance, which may be ſo declared as to prevent curteſy, as by directing the profits during the wife's life to be paid for her *ſeparate* uſe; for in ſuch a caſe the intention to exclude the huſband from curteſy is manifeſt, and he cannot have an equitable ſeiſin. 3. Atk. 715. It is alſo proper to remark, that though *curteſy* out of a *truſt* is allowed, yet *dower* has been refuſed; a partiality not eaſy to be reconciled with reaſon, however ſettled by the current of authorities. But as to this ſee Poſt 31. b.—(7) Mr. Perkins makes a *quere*, whether, if a woman ſeiſed in fee makes leaſe for *life*, reſerving rent to her and her heirs, the huſband ſhall not have curteſy in the rent during the leaſe; but he ſeems to admit, that the huſband ſhall not have curteſy of the land itſelf, unleſs the leaſe determines before the wife's death. Perk. Sect 467. See Poſt 32 a. where in a like caſe lord Coke ſays, that the wife ſhall not have dower. But if a rent is incident to a reverſion expectant on an eſtate tail, the huſband ſhall have curteſy of the rent till the tail determines. Poſt 30. a.

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one Ford having iſſue three ſons and a daughter, and alſo a brother, deviſed to his three ſons ſucceſſively in tail male, with remainder to his own right heirs male for ever, and the three ſons being dead without iſſue, the whole court held, that the brother

hac parte obtineret. Qui quidem dux officium Seneſchalciæ prædict' perſonaliter adimplevit, &c. And every man, that claimed to hold by grand ſerjanty to do any ſervice to the king at his coronation, exhibited his petition to the ſaid duke as ſteward of England, who upon hearing the proofes either allowed or diſallowed the ſame.

Rot. Patent. Ann. 20. H. 6.

In letters patents made by King H. 6. to Richard earle of Saliſbury you ſhall finde this clauſe, *Quod chariſſimus conſanguineus noſter Richardus, nunc comes Sarum, qui Aliciam filiam et hæredem Thomæ nuper comitis Sarum adhuc ſuperſtitem duxit in uxorem, et cum eadem Alicia prolem tempore mortis prædictæ Thomæ habuit et habet ſuperſtitem de præſenti, eoque pretextu idem Richardus nunc comes Sarum nomen, ſtatum et honorem comitis Sarum, &c. habet, et pro tempore vitæ ſuæ de jure prætextu præmiſſorum habere debet* (1). The name of the iſſue, which the ſaid Richard earle of Saliſbury had by the ſaid Alice was Richard, who married with Anne the ſiſter

Rot. Patent. de anno 27. H. 6. m.

and heire of Henry Beauchamp earle of Warwicke, who was earle of Warwicke to him and to his heires, and duke of Warwicke to him and to the heires males of his body. And Richard the ſonne having then no iſſue by his wife, king H. 6. in 27. yeare of his raigne granted to him that he ſhould be earle of Warwicke, *Licet ipſe et prædicta Anna exitum inter eos ad præſens non habent.* Theſe and many more I have read concerning this matter, and only ſay to the reader, *Utere tuo judicio, nihil enim impedio.*

[i] Vid. 1. E. 3. 6. 5. E. 3. 26. (Poſt. 30.)

[i] If an eſtate of freehold in ſeigniories, rents, commons, or ſuch like be ſuſpended, a man ſhall not be tenant by the curteſie; but if the ſuſpenſion be but for yeares, he ſhall be tenant by the curteſie. As if a tenant make a leaſe for life of the tenancie to the ſeignioreſſe, who taketh a huſband, and hath iſſue, the wife dieth, he ſhall not be tenant by the curteſie(2), but if the leaſe had been made but for yeares he ſhall be tenant by the curteſie.

W. 2 ca. 1. Litt. ca. Dower fol. 40. ſect. 52. Paine's caſe 8. Co. fol. 34.

En fee ſimple on en fee taile generall, ou ſeiſie come heire de la taile ſpeciall, et ad iſſue per la feme male ou female. Secondly, of what eſtate. If lands be given to a woman and to the heires males of her body, ſhe taketh a huſband and hath iſſue a daughter and dieth, he ſhall not be tenant by the curteſie; becauſe the daughter by no poſſibility could inherite the mother's eſtate in the land; and therefore where Littleton ſaith, iſſue by his wife male or female, it is to be underſtood, which by poſſibility may inherit as heir to her mother of ſuch eſtate. Littleton himſelf explaneth this by expreſſe words Cap. Dower fo. 40. Sect. 52. And therefore if a woman tenant in taile generall maketh a feoffment in fee, and taketh back an eſtate in fee; and take a huſband and hath iſſue, and the wife dieth, the iſſue may in a *formedon* recover the land againſt his father; becauſe he is to recover by force of the eſtate taile as heire to his mother, and is not inheritable to his father (3).

Et ad iſſue. 3. The time of having the iſſue. 4. What kinde of iſſue. If a man ſeiſed of lands in fee hath iſſue a daughter, who taketh huſband and hath iſſue, the father dieth, the huſband enter, he [a] ſhall be tenant by the curteſie, albeit the iſſue was had before the wife was ſeiſed. And ſo it is albeit the iſſue had dyed in the life time of her father before any deſcent of the land, yet ſhall he be tenant by the curteſie (4). If a woman [b] ſeiſed of lands in fee taketh huſband, and by him is bigge with childe, and in her travell dieth, and the childe is ripped out her body alive, yet ſhall he not be tenant by the curteſie; becauſe the childe was not borne during the marriage, nor in the life time of the wife, but in the meane time the land deſcended, and in pleading he muſt alledge, that he had iſſue during the marriage.

[a] Old tenures 21. H. 3. tit. dower 198.

[b] Vide Paine's caſe. ubi ſupra.

If the wife be [c] delivered of a monſter, which hath not the ſhape of mankinde, this is no iſſue in the law; but although the iſſue hath ſome deformity in any part of his body, yet if he hath humane ſhape this ſufficeth. *Hii, qui contra formam humani generis converſo more procreantur, (ut ſi mulier monſtruoſum vel prodigioſum fuerit enixa) inter liberos non computentur. Partus tamen cui natura aliquantulum ampliaverit vel diminuerit non tamen ſuperabundanter, ut ſi ſex digitos vel niſi quatuor habuerit, bene debet inter liberos commemorari. Si inutilia natura reddidit membra, ut ſi curvus fuerit aut gibboſus vel membra tortuoſa habuerit, non tamen eſt partus monſtruoſus. Item puerorum alii ſunt maſculi, alii fœminæ, alii hermophraditæ. Hermophradita tam maſculo quam fœminæ comparatur ſecundum prævaleſcentiam ſexus incaleſcentis.*

[c] Bract. lib. 5. 437. 438. Britt. ca. 66. and ca. 83. Fleta lib. 1. c. 5. and lib. 6. cap. 54. (Ante 3. b. 7. b. 8. a.)

If the iſſue be born deaf or dumbe or both, or be born an ideot, yet it is a lawfull iſſue to make the huſband tenant by the curteſie and to inherit the land.

[d] 28. H 8. 25. Dyer. Paine's caſe ubi ſupra.

Oyes ou vive. If it be borne alive [d] it is ſufficient, though it be not heard cry; for peradventure it may be born dumbe. And this is reſolved cleerly in Paine's caſe *ubi ſupra.* For the pleading (as hath beene ſaid) is, that during the mariage he had iſſue by his wife, and upon that point the triall is to be had, and upon the evidence (5) it muſt be proved, that the iſſue was alive, for *mortuus exitus non eſt exitus*, ſo as the crying is but a proofe that the childe was born alive, and ſo is motion, ſtirring, and the like. And it is ſaid by an ancient author [e] that it was ordained in the raigne of king H. 1. *Que touts que ſurvequiſſent*

[e] Mirror cap. 1. ſect. 3.

(1) *So* nota *till iſſue the huſband cannot uſe the title of his wife's dignity; but afterwards he may. So adjudged by Hen. 8. in the caſe of Wimby, who claimed the title of lord Talboys in right of his wife.* Hal. MSS.—This annotation ſhews, that in the opinion of lord Hale a title of honour admits of curteſy. But lord Coke, after ſtating *two* precedents, one of curteſy in a title of honour, and another of curteſy in an office of honour, avoids making the leaſt inference, and profeſſedly leaves the reader to his own judgment; from which reſerve it may be conjectured, that he had his doubts. In fact, the point had been ſeveral times controverted in lord Coke's time. About the year 1580 Richard Bertie claimed the barony of Willoughby in right of his lady Catherine, ducheſs of Suffolk, he having had iſſue by her. The claim was referred by queen Elizabeth, to lord Burghley, and two other commiſſioners, as was alſo a claim of the ſame dignity by Peregrine Bertie, the ſon and heir of the ducheſs of Suffolk by Richard Bertie. At one time the precedents urged for the huſband were thought to make an impreſſion on the commiſſioners; but finally they made a report in favour of the ſon, who was accordingly admitted to the dignity in the life-time of his father. See Coll. Proceed. on Claims of Baron. 1. to 23. But notwithſtanding this caſe, two other claims of a like kind were made within a few years after, the firſt about 1586 by Sir Thomas Fane, in right of his wife Mary, the daughter and heir of Henry lord Bergavenny, and the ſecond about 1604 by Sampſon Lennard, in right of his wife Margaret lady Dacres. Of the event of the *former* claim, I do not find any account; but as to the *latter* it appears, that king James referred it to commiſſioners, and that lady Dacres dying before any deciſion, the affair was compromiſed in 1612 by the king's granting precedency to the huſband as eldeſt ſon of lord Dacres. The letters patent giving this precedency recite, that the commiſſioners *had found baronies on the like right conferred on the huſband in ſeveral families, and in this particular barony of Dacres three ſeveral precedents* There are other expreſſions equally remarkable for a ſtudied ambiguity, ſuch as leaves undecided whether the pretenſion to the wife's title was deemed a claim of *favour* or of *right* from the crown, and appears calculated to *avoid* an adjudication of the point; and in this unſettled ſtate of things, it is not ſurpriſing, that lord Coke ſhould be ſo cautious of advancing any poſitive doctrine on the ſubject. I cannot learn that there have been any claims of dignities by curteſy ſince lord Coke's time, and from the want of modern inſtances of ſuch claims, and from ſome late creations, by which women have been made peereſſes, in order that the families of their huſbands might have titles, and yet the huſbands themſelves continue commoners, it ſeems as if the prevailing notion was againſt curteſy in titles of honour. However I have not yet diſcovered, whether this great queſtion has ever formally received the judgment of the houſe of lords.—For the particulars of Wimby's caſe cited by lord Hale, ſee Coll. Claims of Bar. 11. 44 and 72.—(2) Lord Coke means, that the huſband ſhall not be tenant by the curteſy of the *ſeignory*, it being ſuſpended during the *whole* time of the marriage by the leaſe of the *tenancy* to the wife. See further as to the effect of *ſuſpenſion* on curteſy in Perk. Sect. 459, 460, 461, 462.—(3) The huſband could not have curteſy in reſpect of the *fee*, becauſe that was defeated by the ſon's recovery in the formedon; nor in reſpect of the *tail*, becauſe the wife's feoffment *before* the marriage had diſcontinued the *tail*, and conſequently there could be no ſeiſin of it *during* the marriage. This ſeems to be the *rationale* of the caſe put by lord Coke.—(4) Yet in ſome caſes the time of having iſſue is of conſequence. See Poll 40.—(5) Vid. Paſch. 9. E. 1. tor.

brother could not take as heir male, 1. becauſe a deviſe to heirs male operates as a limitation to *heirs male* of the body, and the

ſent lour dount ils uſſent conceive tenuiſſent les heritages lour fems pur lour vies.

By the cuſtom of Gavelkind [*f*] a man may be tenant by the curteſie without having of any iſſue (1).

[*f*] 9. E. 3. 38. 16. E. 3. aid. 129. Stat. de Conſuetudinibus Kanciæ.

Soit liſſue apres mort ou en vie. And therefore, [*g*] if a woman tenant in taile generall taketh a huſband, and hath iſſue, which iſſue dyeth, and the wife dieth without any other iſſue, yet the huſband ſhall be tenant by the curteſie albeit the eſtate in taile be determined, becauſe he was intitled to be tenant *per legem Angliæ* before the eſtate in taile was ſpent, and for that the land remaineth. But if a woman maketh a gift in taile, and reſerve a rent to her and to her heires, and the donor taketh huſband and hath iſſue, and the donee dieth without iſſue, the wife dieth; the huſband ſhall not be tenant by the curteſie of the rent, for that the rent newly reſerved is by the act of God determined, and no ſtate thereof remaineth. But [*b*] if a man be ſeiſed in fee of a rent and maketh a gift in taile generall to a woman, ſhe taketh huſband and hath iſſue, the iſſue dieth, the wife dieth without iſſue, he ſhall be tenant by the curteſie of the rent, becauſe the rent remaineth (2). The diverſity appeareth.

[*g*] 21. H. 3. tit. Dower 198. Paine's caſe ubi ſupr. (1. Leon. 167.)

[*b*] Brooke tit. per le Curteſie 86. 10. E. 3. 27.

Si la feme devie, le baron tiendra a la terre, &c. Foure things doe belong to an eſtate of tenancy by the curteſie, *viz.* marriage, ſeiſin of the wife, iſſue, and death of the wife. But it is not requiſite, that theſe ſhould concurre all together at one time. And therefore, if a man taketh a woman ſeiſed of lands in fee, and is diſſeiſed, and then have iſſue, and the wife die, he ſhall enter and hold by the curteſie. So if he hath iſſue which dieth before the deſcent, as is aforeſaid.

And albeit the ſtate be not conſummate untill the death of the wife, yet the ſtate hath ſuch a beginning after iſſue had in the life of the wife as is reſpected in law for divers purpoſes.

Firſt, after iſſue had, he ſhall doe homage alone, and is become tenant to the lord, and the avowrie ſhall be made onely upon the huſband in the life of the wife, as ſhall be ſaid hereafter when we come to the apt place (3). Secondly, if after iſſue [*i*] the huſband maketh a feoffment in fee, and the wife dieth, the feoffee ſhall hold it during the life of the huſband, and the heire of the wife ſhall not during his life recover it in *ſur cui in vita*; for it could not be a forfeiture, for that the eſtate, at the time of the feoffment, was an eſtate of tenancy by the curteſie initiate (4) and not conſummate. And it is adjudged in 29. E. 3. that the tenant by the curteſie cannot claime by a deviſe, and waive the ſtate of his tenancy by the curteſie, becauſe ſaith the booke the freehold commenced in him before the deviſe for terme of his life.

(6. Co. 57 b. Poſt. 67. a. 124. b.)

[*i*] 34. E. 2. Cui in vita 13. 2. E. 2. Cui in vita 26. 10. E. 2. Cui in vita 12. Dier 21. Eliz. 363. 29. E. 3. fo. 27.

Et eſt appel tenant per le curteſie Dengleterre, pur ceo que neſt uſe en auter realme forſque tant ſolement en Engleterre.

Per le Curteſie. In Latine *per legem Angliæ.*

Tantſolement en Engleterre. It is alſo uſed within the realme of Scotland, and there it is called *Curialitas Scotiæ.* And ſo it is in the realme of Ireland (5).

Et aſcuns ount dit, que il ne ſerra tenant per le curteſie, ſinon que lenfant que il ad per ſa feme ſoit oye crie, car per le crie eſt prove que le enfant fuit nee vife. Our author having delivered his owne opinion before, *viz. Oyes ou vife*, now he ſheweth the opinions of others: for ſo is ſaid in the [*k*] ſtatute *De tenentibus per legem Angliæ:* and of that opinion is Glanvill [*l*] lib. 7. cap. 8. Bracton lib. 5. tract. 5. cap. 30. Britton cap. 50. fol. 132. Fleta lib. 6. cap. 50. &c. But the reaſon is againſt their opinion; for by the cry it is proved, &c. ſo as it is but an evidence to prove the life of the enfant.

(8. Co. 34)

[*k*] Vet. Mag. Car. part. 2. fol. 70.

[*l*] Glanvill lib. 7. cap. 8. Bract. lib. 5. tract. 5. ca. 30. Britton cap. 50. fo. 132. Fleta lib. 6. cap. 54.

Aſcuns ont dit. By theſe and the like ſpeeches our author intendeth, that the point had been controverted, but thereby, except it be in this ſection where formerly he delivered his opinion as hath been ſaid, he tacitely inſinuateth his owne judgement which in all the reſt holdeth for good law and warranted by good authority throughout his three bookes; which kinde of ſpeech and the like I have collected together, as it appeareth by the ſections in [*m*] the margent.

[*m*] Sect 40. 119. 132. 136. 137. 138. 141. 145. 148. 156. 170. 179. 192. 202. 227. 234. 269. 336. 339. 357. 400. 435. 436. 440. 443. 460. 462. 478. 501. 503. 506. 522. 523. 524. 534. 570. 601. 633. 634. 640. 642. 643. 644. 646. 658. 675. 689. 721. 723. 726. 730. 731. 733. 734.

Ideo quære. This quære is not in the originall edition of Littleton, and therefore to be rejected (6).

And ſome have ſaid, that in divers caſes a man ſhall by having of iſſue be tenant by the curteſie where a woman ſhall not be endowed. And therefore they ſay, if lands be given to two women and to the heires of their two bodies begotten, and one of them take huſband and have iſſue and die, the inheritances being ſeverall the huſband ſhall be tenant by the curteſie, as it is adjudged 7. E. 2. and in other bookes [*n*] this judgment is cited and allowed. But certaine it is, that if land be given to two men and to the heires of their two bodies begotten, and the one taketh wife and dieth, ſhe ſhall not be endowed, for no eſtate in the land is altered by that marriage. But I leave the reader to his owne opinion or rather to ſuſpend it untill he come to

(2. Ro. Abr. 90. & Poſt. 183. contra)

7. E. 3. 6.

[*n*] 17. E. 3. 51.

rot. 4. Si habuit exitum, qui auditus fuit clamare ſeu vocem edere infra quatuor parietes; quia *puer* non fuit *viſus* nec *auditus* clamare ab *hominibus maſculis*, licet per fœminas nominatus fuit Johannes. *Therefore huſband not tenant by the curteſy.* H. 5. E. 1. rot. 1. Wigorn. Hal. MSS.—I cannot gueſs what lord Hale's view could be in citing this record, unleſs it was to ſhew, that anciently in the caſe of curteſy the having *male* iſſue born alive could be proved by *men* only; which muſt be confeſſed to have been a moſt unaccountable peculiarity.

(1) On the other hand, curteſy by the cuſtom of Gavelkind is ſubject to ſeveral diſadvantages; for it is only of a *moiety* of the wife's land, and it *ceaſes* if the huſband *marries again.* See Robinſ. Gavelk. b. 2. c. 1. where the learned author ſuggeſts, that ſome have doubted, whether there is any ſuch variance between the common law and the cuſtom, and therefore undertakes to prove it by authorities on record.—(2) *So if it was a rent* de novo *granted in tail, and the wife dies without iſſue, the huſband ſhall be tenant by the curteſy.* Hal. MSS.—(3) Hic *ſect.* 90. 21. *E.* 3. 35. Hal. MSS.—(4) 4. *E.* 2. Cui in vita 15. 34. *E.* 1. ibid. 30. 10. *E.* 3. 11. 22. *H.* 6. 24. *If huſband intitled to be tenant by the curteſy aliens and retakes eſtate to him and his wife, by which the wife is remitted, he ſhall not be tenant by the curteſy.* Contra *if it was before iſſue had.* 9. *H.* 7. 1. Vid. *T.* 7. Jac. *Ley. n.* 11. *Sparrye's Caſe.* Hal. MSS.—See Ley's Rep. 9.—(5) Pat. 11. H. 3. m. 3. Cum conſuetudo et lex Angliæ ſit, quod ſi aliquis deſponſaverit aliquam hereditatem habentem, et ex ea prolem habuerit, cujus clamor auditus fuerit infra quatuor parietes, et vir ſupervixerit uxorem, habebit tota vita ſua cuſtodiam hereditatis uxoris, licet eu heredem habuerit ex primo viro, qui plenæ ætatis eſt; preceptum eſt, quod eadem lex obſervetur in Hibernia. Hal. MSS.—This ſame extract from the patent roll of 11. H. 3. is given in Hal. Hiſt. C. L. 180.—(6) It appears by the various reading already given, that this *quære*, though not in the *Rohan* edition, which lord Coke thought the oldeſt, is in that by *Letton* and *Machlinia*, which is really the original one.

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the brother could not be heir male of the deviſor's body; 2. becauſe the remainder to the heirs male were words of purchaſe, and by purchaſe the brother could not take as heir male, his niece being the heir at common law; and ſo jealous was lord chief juſtice Holt of departing from the eſtabliſhed doctrine, that notwithſtanding the ſpecial circumſtances in the caſe of Pybus and Mitford, which will preſently be ſtated, he doubted the authority of that caſe. See 3. Salk. 336. 11. Mod. 189 and Vin. Abr. *Deviſe* U. b. pl. 2. in marg. The doctrine was thought to be ſo firmly ſettled by this laſt caſe, that in 1722 lord ch. Macclesfield, in Dawes and Ferrars, which was a caſe ſimilar to that of Ford and Oſſulſton, interrupted the counſel for the perſon claiming as *heir male*, by ſaying that *he would not ſuffer the bar to diſpute what was the land-mark and foundation of the law*; adding, that in the caſe of *Ford* and *lord Oſſulſton* the point had been determined on *trials at bar in every court in Weſtminſter Hall, and appeared to be ſo very plain a caſe, that in the King's Bench the plaintiff's own counſel would not aſk a ſpecial verdict.* See 2. P. Wms. 1. and Prec. in Chanc. 54. However it was not thought proper to acquieſce in this opinion of lord Macclesfield, and a bill of review being brought to reverſe

to the proper place in the next chapter. If lands holden of the king by knights ſervice *in capite* deſcend to a woman, and after office found ſhe intrude and taketh huſband and hath iſſue, in this caſe the huſband ſhall be tenant by the curteſie (1); and yet if the heire male after office in the like caſe intrudeth and taketh wife, this wife ſhall not be endowed, for ſo it is provided by the ſtatute of *Prærogativa regis*, cap. 13. that in that caſe there accrue to the heire no freehold, nor dower to the wife, which by interpretation is as much as to ſay, that the heire ſhall have no freehold as to this reſpect to give any dower to his wife. If a man marry the nieſe of the king by licence and hath iſſue by her, and after lands deſcend to the nieſe and the huſband enter, the nieſe dieth, he ſhall be tenant by the curteſie of this land, and the king upon any office found ſhall not evict it from him, becauſe by the marriage, the nieſe was infranchiſed during the coverture. But if a free woman marry the villaine of the king by licence, and lands deſcend to the villaine, the villaine dieth, the wife ſhall not be endowed, but upon an office found the king ſhall have the land, for the villaine remained ſtill a villaine to the king. A woman [n] taketh huſband, and hath iſſue, lands deſcend to the wife, the huſband enters, and after the wife is found an ideot by office, the lands ſhall be ſeiſed by the king (2), for the title of the tenancy by the curteſie, and of the king begin at one inſtant, and the title of the king ſhall be preferred. A man ſhall be tenant by the curteſie of a caſtle [o] which ſerveth for the publike defence of the realme, but a woman ſhall not be endowed thereof, as ſhall be ſaid more at large hereafter (3).

A man ſhall be tenant by the curteſie of a common *ſauns nomber*, but a woman ſhall not be endowed thereof, becauſe it cannot be divided. A man ſhall be tenant by the curteſie [p] of a houſe that is *Caput Baroniæ*, or *Comitatus:* (4) but it appeareth by 4. H. 3. Dower 180. that a woman ſhall not be endowed of it. For the law reſpecteth honour and order. A man is entitled to be tenant by the curteſie, and maketh a feoffment in fee upon condition, and entreth for the condition broken, and then his wife dieth, he ſhall not be tenant by the curteſie, becauſe albeit the ſtate given by the feoffment, be conditionall, yet his title to be tenant by the curteſie was incluſively abſolutely extinct by the feoffment, for the condition was not annexed to it (5). As if the lord diſſeiſe the tenant, and maketh a feoffment in fee of the land upon condition, and entreth for the condition broken, yet the ſeigniory is extinct, for that was incluſively extinct by the feoffment. See more of tenant by curteſie. Section 52 (6).

Prærog. Regis ca. 13.

33. E. 3. tit. Travers 36. (4. Co. 55. 1. Leon. 47.)

[n] Pl. Com. Dame Hales' caſe 263. (9. Co. 129.)

[o] Magna Carta 30. E. 1. Dower 81. 17. H. 3. Dower. Bract. lib. 2. fol. 46. & 314 (Poſt. 32. a. Cro. Cha. 300. 1. Ro. Abr. 675.)

[p] 4. H. 3. dower 180. Bract. fol. 93. Fleta lib. 5. cap. 23. 2. E. 2. dower 123. 3. E. 3. dower 102. 9. H. 7. 1. 30. E. 3. (Hob. 338. Poſt. 278.)

CHAP. 5. Sect. 36.

Dower.

TEnant en dower (7). *Tenens in dote. Dos*, dower in the common law [q] is taken for that portion of lands or tenements, which the wife hath for terme of her life of the lands or tenements of her huſband after his deceaſe, for the ſuſtenance of herſelfe, and the nurture and education of her children (8). *Propter onus matrimonij, et ad ſuſtentationem uxoris et educationem liberorum cum fuerint procreati ſi vir præmoriatur: et hoc proprie dicitur dos mulieris ſecundum conſuetudinem Anglicanam.* And *dos* is derived *ex donatione, et eſt*

TENANT in dower eſt, lou home eſt ſeiſie de certaine terres ou tenements en fee ſimple, taile generall, ou come heire de le taile ſpeciall, et prent feme, et devie, la feme apres le deceſſe de la baron ſerra endow de la tierce part de tiels terres et tenements, que ſuerront a ſa baron en aſcun temps durant

TENANT in dower is, where a man is ſeiſed of certaine lands or tenements in fee ſimple, fee taile generall, or as heire in ſpeciall taile, and taketh a wife, and dieth, the wife after the deceaſe of her huſband ſhall be endowed of the third part of ſuch lands and tenements as were her huſband's at any time during the coverture,

[q] Lib. Rub. cap. 70. Glanvill lib. 6. cap. 1. Bract. lib. 2. fol. 92. Britt. cap. 101. Fleta lib. 5. cap. 22.

(1) 1. *H.* 7. 17. *Dy.* 95. Hal. MSS.—(2) Mr. Serjeant Hawkins makes a *quære* of this, obſerving that the fee and freehold were in the wife, and that the wife of an ideot ſhall have dower. Hawk. Abr. of Co. Littl. 42. It has been alſo remarked, that there is not any concourſe of titles between the king and the huſband; the huſband's title by curteſy not being *conſummate*, till the death of the wife, when the king's title determines. See Plowd. 264. Engl. ed. in a note by the Editor. However, note the reaſoning in Plowden. See alſo 8. Co. 170. where it is adjudged, that though in the caſe of ideotcy the office for *ſome* purpoſes has relation to the time when the ideot's eſtate commenced, yet the king is only intitled to the profits from the finding of the office; which, as it may have ſome influence on the point of curteſy, is proper to be attended to.—(3) See Poſt 31. b.—(4) *If diſſeiſee enters on diſſeiſor's heir, and makes ſeaſſment on condition, and enters for condition broken, and the heir enters the right is revived.* Vid. 19. *H.* 6. 43. Hal. MSS.—(5) Hic *fol.* 266. Hal. MSS.—(6) See alſo Wright's Ten. 193. and Vin. Abr. *Curteſy*, and the ſame title New Abr.—(7) Nota, *in tenancy in dower the wife ſhall be ſaid to be in by the huſband.* 36. *H.* 6. *Dower* 30. *But tenancy by the curteſy is in the* Poſt. 5. *E.* 2. *Entry* 66. Hal. MSS.—(8) The following note is by the editor of the eleventh edition of lord Coke's Commentary.—(The reaſon why the law gave the wife dower will appear, if we conſider how the law ſtood anciently; for by the old law, if this proviſion had not been made, and the party at the marriage had made no aſſignment of dower, the wife would have been without any proviſion, for the perſonal eſtates even of the richeſt were then very inconſiderable, and before truſts were invented, which is but lately, the huſband could give his wife nothing during his own life, nor could he provide for her by will, becauſe lands could not be deviſed, unleſs it was in ſome particular places by the cuſtom, till the ſtatute of Hen. 8.)

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verſe his decree, lord ch. Hardwicke directed a caſe for the opinion of the King's Bench; but the four judges of that court followed lord Macclesfield, and the perſon under whom the claim was made not being *heir general*, they, in February 1743, certified, that *he could not take by the deſcription of right heir male.* See the certificate in Vin. Abr. *Deviſe* W. b. in a note on pl. 13. Such is the liſt of grave authorities which confirm lord Coke's doctrine as to the neceſſity of being *very heir*, in order to take by *purchaſe* under the deſcription of *heir-male* or *heir female*, whether *of the body* or not; and if they wanted aid from his name, it will ſcarce be denied by the coldeſt of his admirers, that his private opinion on a point of law he had ſo fully conſidered, will even in theſe times, when perhaps we are too apt to decry thoſe ancient authors, whoſe writings are ſtill the grand ſources of information and inſtruction, will be no *mean* addition to their weight. However it muſt be confeſſed, that there are ſome caſes, in which the doctrine has been deviated from; but all of them, except one, are determinations *ſince* his time, and beſides, moſt of them may rather be deemed *exceptions* to lord Coke's *general rule*, than proofs of its *non-exiſtence*. The earlieſt of theſe is a caſe in the time of Elizabeth, and cited by lord Hale in *Pybus* and *Mitford* 1. Ventr. 381. A ſon of the teſtator's brother was admitted to take under a *deviſe* to the teſtator's *heir-male*, though he left three daughters; but the reaſon was, becauſe the teſtator introduced the deviſe with taking notice that his brother had left a ſon, and that he himſelf had three daughters who were his *right heirs*, and he alſo gave the daughters 2000 l. on condition not to trouble the *heir*. In this caſe the *ſpecial* intent of *heir male*, is ſo marked by the *other* words, as clearly to take it out of the general rule; and that lord Hale meant

rant le coverture, d aver et tener a meſme la ſeme en ſeveraltie per metes et bounds pur terme de ſa vie, le quel el avoit iſſue per ſa baron ou nemy et de quel age que la feme ſoit, iſſint que el paſſé lage de neuf ans al temps de le mort ſa baron, [car il covient que el ſoit paſſé lage de neuf ans al temps del mort ſa baron,] (1) ou auterment el ne ſerra my endow.

To have and to hold to the ſame wife in ſeveralty by metes and bounds for terme of her life, whether ſhe hath iſſue by her huſband or no, and of what age ſoever the wife be, ſo as ſhe be paſt the age of nine yeares at the time of the death of her huſband, for ſhe muſt be above nine yeares old, at the time of the deceaſe of her huſband, otherwiſe ſhe ſhall not be endowed.

quaſi donarium, becauſe either the law it ſelfe doth (without any gift) or the huſband himſelf giveth it to her, as ſhall be ſaid hereafter. And at this day *dos* or dower is not taken by the profeſſors of the common law, either for the land which the wife bringeth with her in marriage to her huſband, for then it is either called in frankmarriage or in marriage, as hath beene ſaid, nor for the portion of money or other goods or chattels, which ſhe bringeth with her in marriage, for that is called her marriage portion. And yet of ancient time [r] *Dos mulieris*, the dower or dowrie of the woman was alſo applyed to them. But it is commonly taken for her third part, which ſhe hath of her huſband's lands or tenements.

[r] Britton cap. 101. Bracton lib. 2. fo. 92. Glanvil lib. 6. ca. 1. lib. 7. ca. 1. 2. Co. 93. Bingham's caſe. 4. H. 3. dower 179.

In Domeſday, *Dos* is called *Maritagium*.

To the conſummation of this dower three things are neceſſary; *viz.* marriage, ſeiſin and the death of her huſband.

Dos, [s] the very name doth import a freedome, for the law doth give her therewith many freedomes. *Secundum conſuetudinem regni mulieres viduæ, &c. debent eſſe quictæ de tallagiis, &c.* And tenant in dower ſhall not be diſtreyned for the debt due to the king by the huſband in his life time in the lands which ſhe held in dower. And other priviledges ſhe hath; of all which Ockam yeelds the reaſon, *Doti ejus parcatur quia præmium pudoris eſt* (2).

[s] Clauſ. 11. H. 3. nu. 17. Regiſt. 142. 143. F. N. B. 150. Ockham fol. 40.

Lou home. If the huſband be an alien [t] the wife ſhall not be indowed. So if the huſband be the king's villaine, the wife ſhall not be endowed, (as hath beene ſaid) but if the huſband be a villaine to a common perſon, the wife ſhall be endowed if ſhe be intitled to dower before the entrie of the lord. And ſo if a free man take a niefe to wife and dieth ſhe ſhall be endowed. The wife of an ideot (3), *non compos mentis*, outlawed, or attainted of felony or treſpaſſe, attainted of hereſie, *præmunire*, or the like, ſhall be endowed. But if the huſband be attainted of treaſon, albeit it be treaſon done after the title of dower ſhe ſhall not be endowed, as ſhall be ſaid hereafter.

[t] Bract. fol. 298. 19. E. 2. dower 171. Dame Hale's caſe 13. E. 3. dower Statham. 13. E. 1. tit. Dower. (Poſt. 392. b.)

Seiſie. Here this word (ſeiſed) extendeth it ſelfe as well to a ſeiſin in law, or a civill ſeiſin, as to a ſeiſin in deed, which is a naturall ſeiſin: but ſeiſed he muſt be either the one way or the other during (4) the coverture. For a woman ſhall be endowed of a ſeiſin in law. As where lands or tenements deſcend to the huſband, before entry, he hath but a ſeiſin in law, and yet the wife ſhall be endowed, albeit it be not reduced to an actuall poſſeſſion, for it lieth not in the power of the wife to bring it to an actuall ſeiſin, as the huſband may do of his wives land, when he is to be tenant by curteſie, which is worthy the obſervation. And yet of every ſeiſin in law, or actuall ſeiſin of lands or tenements, a woman ſhall not be endowed. For example, if there be grandfather, father, and ſonne, and the grandfather is ſeiſed of three acres of land in fee, and taketh wife and dieth, this land deſcendeth to the father, who dieth either before or after entry, now is the wife of the father dowable. The father dieth and the wife of the grandfather is endowed of one acre and dieth, the wife of the father ſhall be endowed onely of the two acres reſidue, for the dower of the grandmother is paramount the title of the wife of the father, and the ſeiſin of the father which deſcended to him (be it in law or actuall) is defeated (5), and now upon the matter the father had but a reverſion expectant upon a freehold, and in that caſe, *Dos de dote peti non debet*; although the wife of the grandfather dieth living the father's wife (6). And here note a diverſity [w] betweene a deſcent and a purchaſe. For in the caſe aforeſaid, if the grandfather had infeoffed the father, or made a gift in taile unto him, therein the caſe aboveſaid, the wife of the father, after the deceaſe of the grandfather's wife, ſhould have been endowed of that part aſſigned to the grandmother

[u] 43. E. 3. 32. 45. E. 3. 13. 9. E. 3. 4. F. N. B. 149. 8. E. 3. tit. Aſſ. 393. 19. E. 2. dower 170. 23. E. 3. dower 30. (Perk. ſect. 315 316. 4. Co. 122. Ro. 1. Abr. 677.)

[w] 5. E. 3. tit. Voucher 249. Paris's caſe 9. E. 3 4.

(1) All between the brackets omitted in L. and M. and in Roh.—(2) Clauſ 26. H. 3. m. 15. Mulier ratione tenuræ in dotem non debet venire coram juſticiariis itinerantibus ratione communis ſummonitionis. *But yet ſhe ſhall be attendant to the heir for a third part of the ſervices, for which he is attendant over. Tenant in frank-marriage in the fourth degree dies; his iſſue endows his mother; ſhe ſhall be attendant as the iſſue is and ſhall not hold acquitted. So if A gives to B in tail rendering during his life 5 s. and afterwards 10 s. the wife of B endowed ſhall hold of the heir by a third part of 10 s. But if there be tenant by 5 s. and meſne holds over by 10 s. and tenant dies without heir, his wife ſhall be attendant to the meſne only for the third part of 5 s. Kelw. 124. 129.* Hic *fol. 46. leaſe by tenant in tail, avoided by the iſſue yet revived againſt tenant in dower* —Hal. MSS.—(3) See ante 30. b. n. 3 —(4) *Leſſee for life ſurrenders to him in reverſion on condition, and enters for the condition broken; yet the wife of the reverſioner ſhall be endowed. Noy n. 284. Ormond's caſe.*—Hal. MSS. See Noy 66.—(5) Hic *ſect.* 8. 8. *E.* 3. 13. 8. *Aſſ.* 6. *But by ſome the heir ſhall have mortdanceſter of ſuch ſeiſin.*—Hal. MSS.—(6) 17. *E.* 3. 65. hic *fol.* 42. Vid 6 *E.* 3. 43 contra. Nota *the caſe* 5. *E.* 3. *Vouch.* 249. *A gives in tail to B his eldeſt ſon who dies, the wife of B is endowed of the third part of the whole A dies, his wife brings dower againſt the wife of B, ſhe vouches the heir of her huſband by reaſon of the reverſion, and adjudged that he ſhall warrant.* But quære *if ſhe ſhall recover in value the third part of the whole or only the third part of two parts. It ſeems only the third part of two parts, by reaſon of the eviction. Therefore* quære *if in this caſe the ſeiſin of B be not fully avoided. Suppoſe that the wife of A had firſt recovered, during her life the wife of B cannot demand dower except of the two parts which are in the hands of the heir.*—Hal. MSS.

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meant to cite it as an *exception* appears from his ſaying, that it is not inconſiſtent with *Counden* and *Clerke*. See 1. Ventr. 382. *Bowman* and *Yates* 1. Cha. Caſ. 145. is another caſe which was determined on *ſpecial* circumſtances; for the ſon of a ſecond marriage was allowed to take a rent-charge under a limitation to heirs male by a ſecond wife, though not ſtrictly heir, there being a ſon of the firſt wife, becauſe the ſettlement was apparently made as a proviſion for the iſſue of the ſecond marriage. The caſe of Pybus and Mitford, adjudged 36. Ch. 2. is liable to a ſimilar obſervation. One, who had iſſue two ſons by two different wives, covenanted to ſtand ſeized to the uſe of the heirs male of his body by his ſecond wife. The point determined by three judges againſt one was, that an uſe aroſe to the covenantor's ſon for life, and that ſo the limitation to his heirs male on the body of his ſecond wife being a remainder in tail ſpecial executed in him, his ſon by the ſecond wife took by *deſcent* as *ſpecial* heir; but Hale, chief juſtice, held, that the ſon of the ſecond wife, though not heir general, might have taken by purchaſe, and according to Ventris, Wild, juſtice was of the ſame opinion, though another book mentions, that in this reſpect all the three other judges differed from lord Hale. See 1. Freem. 370, 371. But the reaſoning of lord Hale ſhews, that he did not mean to ſhake Coke's *general* doctrine, and that he founded himſelf on the ſpecial pen-

(4. Co. 122.)

mother, and the reason of this diversitie is, for that the seisin, that descended after the decease of the grandfather to the father, is avoyded by the indowment of the grandmother, whose title was consummate by the death of the grandfather; but in the case of the purchase or gift, that took effect in the life of the grandfather (before the title of dower of the grandmother was consummate) is not defeated, but onely *quoad* the grandmother, and in that case there shall be *Dos de dote*. And yet there is another diversitie [*x*] (1) where the wife of the father is first indowed, and where the wife of the grandfather; for in the same case after the deceale of the grandfather and father the sonne entreth and indoweth his mother of a third part, against whom the grandmother recovereth a third part and dyeth, the mother shall enter againe into the land recovered by the grandmother, because she had in it an estate for terme of her life, and the estate for the life of the grandmother is lesser in the eye of law, as to her then her owne life. Also the husband [*y*] (2) may be seised in his demesne, as of fee absolutely, yet the woman shall not be endowed, as she shall not be indowed both of the land given in exchange, and of the land taken in exchange, and yet the husband was seised of both, but she may have her election to be indowed of which she will.

[*x*] 8. E. 3. tit. Ass. 393. 13. R. 2. Dower 55. 22. E. 3. 5. 8. E. 3. 3. 7. H. 6. 4. (Post. 42. a. 4. Co. 122.)

[*y*] 6. E. 3. 50. F. N. B. 149. (Cro. Cha. 190. 191. 1. Ro. Abr. 676. 474. Cro. Jam. 615. Doctr. Plac. 148. 2. Co. 77.)

[*z*] 27. H. 8. 23. F. N. B. 17. H. 3. Dower 192.

Also of a seisin for an instant a woman shall not be indowed (3), As if *Cestuy que use* [*z*] after the statute of 1. R. 3. and before the statute of 27. H. 8. had made a feoffment in fee, his wife should not be indowed (3 a).

Likewise if two joyntenants be in fee, and the one maketh a feoffment in fee, his wife shall not be indowed (4). And so if the conusee of a fine doth grant and render the land to the conusor, the wife of the conusee shall not be indowed, for it is not possible that the husband could have indowed his wife of such an estate as the usual pleading is, lib. *intrat.* 225. *Quia dicit quod W. quondam vir suus nunquam fuit seisitus de tenementis prædictis de tali statu ita quod eandem A. inde dotasse potuit.*

Vide sect. 242. (Post. 165. a. Ante 30. b)

Des terres ou tenements. Of a castle that is maintained for the necessary defence of the realme a woman shall not be indowed, because it ought not to be divided, and the publique shall be preferred before the private (5). But of a castle that is onely maintained for the private use and habitation of the owner, a woman shall be indowed. And so it was adjudged in the court of [*a*] Common Pleas, where in a writ of dower the demand was, *De tertia parte Castri de Hilderker in Comitatu Northumb.* And the statute of *Magna Charta* cap. 7. whereby it is provided, *nisi domus illa sit Castrum*, is to be understood, a castle maintained for the necessary and publique defence of the realme. And this agreeth with ancient records, [*b*] (albeit in the argument of the said case they were not vouched) the effect whereof be, *Non debent mulieribus assignari in dotem castra quæ fuerunt virorum suorum et quæ de guerra existunt, vel etiam homagia et servitia aliquorum de guerra existent.* Wherein it is to be observed, that the law is not satisfied with the names of things, or nominatives, but with things reall and substantiall. But of the principal mansion, or capitall messuage, the wife shall be indowed, [*c*] *si non sit caput Comitatus, sive Baroniæ* (6), for the honour of the realme, or (as hath beene said) a castle for the publique defence of the realme. And so are the old bookes to be intended, as it was resolved Tr. 17. Eliz. in the court of Common Pleas, which I heard and observed. And of an estate taile in lands determined, a woman shall be indowed in the like manner and forme as a man shall be tenant by the curtesie *mutatis mutandis*.

[*a*] Pasc. 23. Eli. in Com. Banco. Bract. fol 96. Brit. ca. 103. Flet. l. 5. c. 23. 30. E. 1. tit. Dower 81. b. 30. E. 1. Vouch. 298. 17. H. 3. Dower 192. 8. H. 3. Dower 196 8. H. 3. ib. 194.

[*b*] Pat. 1. E. 1. part. 1. m. 17. Esch. 4. E. 1. nu. 88.

[*c*] Bract. l. 2. f. 93. Brit. c. 103. Fleta lib 5. ca. 22. Trin. 17. El. in com. Banco.

En fee simple, fee taile general, &c. If a man be tenant in fee taile generall, [*d*] and make a feoffment in fee, and taketh back an estate to him and to his wife, and to the heires of their two bodies, and they have issue, and the wife dyeth, the husband taketh another wife, and dyeth, the wife shall not be indowed, for during the coverture, he was seised of an estate taile speciall, and yet the issue which the second wife may have, by possibilitie may inherit (7).

[*d*] 41. E. 3. 30. 44. E. 3. 26. 30. H. 8. Dyer 41.

The same law it is, if in this case he had taken backe an estate in fee simple, and after had taken wife and had issue by her; yet she shall not be indowed, for that the fee simple is vanished by the remitter, and her issue hath the land by force of the entaile. But in that case the tenant cannot plead, that the husband was never seised of such an estate whereof the demandant might be indowed, but he must plead the speciall matter (8).

30. H. 8. Dyer. 41.

Et prent feme. If a man so seised as is aforesaid, taketh an alien to wife, and dyeth, she shall not be indowed (9): but if the king take an alien borne, and dyeth, she shall be indowed by the law of the crowne. And Edmond the brother of king Edward the first, married the queen of Navarre, and dyed, and it was resolved [*e*] by all the judges, that she should be indowed of the third part of all the lands whereof her husband was seised in fee (10).

(Doctr. Plac. 148. Post. 33. a) [*e*] Rot. Parl. 26. E. 1. Rot. 1.

If a Jew born in England taketh to wife a Jew borne also in England, the husband is converted to the Christian faith, purchaseth lands, and infeoffeth another, and dyeth, the wife brought

(1) 8. E. 2. *Recovery in value* 10.—Hal. MSS.—(2) Hic *sect.* 56. *fol.* 42.—Hal. MSS.—(3) *If tenant for life makes feoffment in fee and dies, the wife shall not be endowed.* 3. *H.* 4 6. 14. *H.* 4 13. *Yet if tenant at will makes feoffment and dies, his wife shall be endowed. Cited by Jones* 9. *Cha. to have been adjudged* 34. *Eliz. in Mosely and Taylor.*—Hal. MSS—See W. Jo. 317.—(3 a) That there cannot be dower of a *trust*, see Forrest. 138. 2. Atk. 525. See further 2. P. Wms. 700.—(4) S. p. Acc. in *MSS. Common Place-book supposed to be by judge Doderidge*, and 14. H. 4. 13. b. and P. 34. E. 1. Fitzh. Dower 178. cited.—See further Cro. Eliz. 502. Noy 64. Cro. Jam. 615. 1. Atk. 442. and 2. Blackst. Comment. 132.—(5) Pat. 1. E. 1. m. 17. Præsertim cum hujusmodi mulieribus castra, quæ fuerunt virorum suorum, et quæ sunt de guerra, vel etiam homagia et servitia aliquorum, quæ sunt sunt de guerra, in dotem non debuerunt, nec consueverunt assignari, ideo salvis nobis castris et homagiis prædictis, &c.—Hal. MSS.—(6) Vid. *a whole manor reseised, because it was* caput baroniæ, *though assigned by the husband.* Claus. 20. H. 3. m. 20. pro uxore Roberti Fitzwalter.—Hal. MSS.—But this doctrine must be understood to be applicable only to *baronies by tenure*, of which it is said there is not any now remaining except Arundel; and therefore creating a person baron by a title taken from a principal mansion house in his possession will not make the house *caput baroniæ* and so exclude the wife from dower out of it, because such a barony is merely *titular*, and a titular barony cannot have *caput baroniæ*. Adj. in lady Gerrard's case 1. L. Raym. 72. and other books. See Mad. Bar. Angl. 10.—(7) Vid. 24. *E.* 3. 28. 59. *Tenant in tail has issue A and B, and leases to A for years and releases to him and his heirs with warranty, and A takes C to wife and dies having issue D; tenant in tail dies, D dies, and C recovers dower against B. Adjudged.*—Hal. MSS.—(8) 21. *E.* 3. 36. 3. *H.* 6. 55.—Hal. MSS.—(9) Nota *anciently a woman alien was not dowable; but by special act of parliament not printed* rot. parl. 8. H. 5. n. 15. *all women aliens, who from thenceforth* (deslores ou avant) *should be married to Englishmen by licence of the king are enabled to demand their dower after the death of their husbands, to whom they should in time to come be married, in the same manner as English women. But this act did not extend to those married before, and therefore in* Rot. Parl. 9. H. 5. n. 9. *there is a special act of parliament to enable Beatrice countess of Arundel born in Portugal to demand her dower* —Hal. MSS.—See acc. 1. Ro. Abr. 675.—(10) Yet Edmund the queen of Navarre's husband was only a subject, therefore *quære* the reason of the case.

ning of the deed; and he distinguished it, by observing that the limitation was to the heirs by the second wife, and that the covenantor had taken notice in the deed that another was his *heir general*, there being a proviso that if the son by the first wife should, after the death of the son by the second wife, and within five years after attaining 21, pay 1200 l. for the covenantor's younger children, the uses should cease; and for these two reasons he thought the deed sufficient to describe a *special* heir. See Pybus and Mitford 1. Ventr. 372. 1. Freem. 351. 369. Raym. 228. 1. Mod. 121. 159. 3. Keb. 129. 239. 316. 338. and 2. Lev 75. in which last book the case is most fully stated. In Wall and Baker Trim 8. W. 3. the circumstances were still more special; for according to lord Cowper's state of the case the testator expresly directed, *that if his heir should be a female his heir male should pay to his heir female* 12 l *a year out of his lands*; words, manifestly implying, that by *heir-male* was meant a *special* kind

of

brought a writ of dower, and was barred of her dower, and the reason yeelded in the record [*f*] is this, *Quia verò contra justitiam est, quod ipsa dotem petat vel habeat de Tenemento quod fuit viri sui, ex quo in conversione sua noluit cùm eo adhærere et cum eo converti* (1).

[*f*] Dorf. clauf. 18. H. 3. m. 17.

Del tierce part de tiels terres et tenements per severaltie per metes et bonds. Albeit of many inheritances that be entire, whereof no division can be made by metes and bounds; a woman cannot be endowed of the thing itselfe, yet a woman [*g*] shall be endowed thereof in a speciall and certaine manner. As of a mill a woman shall not be endowed by metes and bounds, nor in common with the heire, but either she may be endowed of the third tolle dish, or *de integro molendino per quemlibet* 3. *mensem.* And so of a villeine, [*h*] either the third dayes work; or everie third weeke or month. A woman shall be endowed of the third part of the profit of stallage; of the third part of the profits of a faire, of the third part of the profits of the office of marshalsie, of the [*i*] third part of the profits of the keeping of a parke; of the third part of the profit of a dove-house; and likewise of the third part of a piscary, [*k*] *viz. tertium piscem, vel jactum retis tertium.* Of the third presentation to an advowson (2). A writ of dower lieth de 3. *parte exituum provenientium de custodia gaolæ Abathiæ Westm.* And herewith agreeth reverend antiquitie. *De* [*l*] *nullo, quod est sua natura indivisibile et secationem sive divisionem non patitur; nullam partem habebit, sed satisfaciat ei ad valentiam.* Of the third part of profits of courts, [*m*] fines, heriots, &c. Also a woman shall be endowed of tithes; and the surest indowment of tithes is of the third sheafe, for what land shall be sowne is uncertaine (3).

(1. Ro. Abr. 682.)
[*g*] Bract. lib. 2. fo. 97. b. 23. H. 3. tit. Ass. 435. F. N. B. 149. 45. E. 3. Dower 50.
(Post. 165. a.)
[*h*] 2. H. 6. 11. Bract. lib. 2. fo. 97. Britt. 247. 11. E. 3. tit. Dower 85. 15. E. 3. ibid. 81. 2. E. 3. 57. F. N. B. 8. k.
[*i*] 4. E. 2. Tr. 233. 26. E. 3. 58. 45. E. 3. Dower 50.
(Cro. Jam. 621.)
[*k*] Bract. 98. 208. Brit. 247. Flet. lib. 5. ca. 23. 17. Ed. 2. Dower 104. 163 19. Ed. 3. Quar. Imp. 154. 7. E. 3. 7.
[*l*] Bract. 97. Brit. 146. 147.
[*m*] Lib. Intr. Judgme. 18. fo. 230.

But in some cases of lands and tenements, which are divisible, and which the heire of the husband shall inherit, yet the wife shall not be endowed. As if the husband [*n*] maketh a lease for life of certaine lands, reserving a rent to him and his heires, and he taketh wife and dieth, the wife shall not be endowed, neither of the reversion (albeit it is within these words tenements) because there was no seisin in deed or in law of the freehold nor of the rent, because the husband had but a particular state therein, and no fee simple (4). But if the husband maketh a lease for yeares, reserving a rent, and taketh wife, the husband dieth, the wife shall be endowed of the third part of the reversion by metes and bounds, together with the third part of the rent, and execution shall not cease during the yeares (5). And herewith agreeth the common experience at this day. But if the husband maketh a gift in taile, reserving a rent to him and to his heires, and after the donor taketh wife and dieth, the wife shall be endowed of this rent, because it is a rent in fee, and by possibilitie may continue for ever.

11. Co. 25. 26. Harper's case.
[*n*] 28. Ass. 3. 8. R. 2. Dower 184. 1. E. 6. Dow. 89.
Vid 1. E. 6. Dow. B. 89.
(Ante 30. a.)

Of a common certaine a woman shall be endowed, but of a common *sauns nomber en grosse* she shall not be endowed, as hath beene said before. And so of a rent service, rent charge, and rent secke, she shall be endowed (6): but of an annuitie that chargeth onely the person, and issueth not out of any lands or tenements, she shall not be endowed. But if the freehold of the rents, common, &c. were suspended before the coverture, and so continue during the coverture, she shall not be endowed of them. If after the coverture the husband doth extinguish them by release or otherwise, yet she shall be endowed of them; for as to her dower, they in the eye of the law have continuance.

(Cro. Cha. 300. Ante 30. b. 2. Ro. Abr. 675. Ante 29. b.)
7. Co. 38. Lillingston's case.
6. Co. 78. Seig. Aburganie's case.

If the wife be entitled to have dower of three acres of marsh, every one of the value of twelve pence, the heire by his industry and charge maketh it good meadow, every acre of the value of ten shillings; the wife shall have her dower according to the improved value, and not according to the value as it was in her husband's time: for her title is to the quantitie of the land, *viz.* one just third part (7).

(Post. 56. a. 171. a. 179. a. Perk. sect. 328. Contra)

And the like law it is, if the heire improve the value of the land by building: and on the other side, if the value be impaired in the time of the heire, she shall be endowed according to the value at the time of the assignment, and not according to the value as it was in the time of her husband (8).

(F. N. B. 149. C.)
V. 30. E. 1. Vouch. 298.

Ascuns temps durant le coverture. For the better understanding whereof it is to be knowne, that (as hath beene said) to dower three things doe belong, *viz.* marriage, seisin, and the death of the husband. Concerning the seisin, it is not necessarie that the same should continue during the coverture, for albeit the husband alieneth the lands or tenements, or extinguisheth the rents or commons, &c. yet the woman shall be endowed. But it is necessary that the marriage doe continue, for if that be dissolved the dower ceaseth, *ubi nullum matrimonium, ibi nulla dos.* But this is to be understood when the husband and wife are divorced *à vinculo matrimonii*, as in case of precontract, consanguinity, affinity, &c. and not *à mensa et thoro* only, as for adulterie (9). And yet it is said, that if the assignment of dower *ad ostium ecclesiæ* be specified, *viz.* that notwithstanding any divorce shall happen, yet that she shall hold it for life, that this is good.

Bract. 92. Brit. cap. 101.
Brit. cap. eodem.
(1. Ro. Abr 681. Doctr. Plac. 148. Post. 33. b. 4. Co. 29. 5. Co. 9. b.)

If the wife elope [*o*] from her husband, that is, if the wife leave her husband, and goeth away and tarrieth with her adulterer (10), she shall lose her dower until her husband willingly without

[*o*] W. 2. ca. 34 Lib. Intr. 224. Fleta lib. 5. c. 22. Br. c. 109. Mirror ca. 5. sect 5.
(F. N. B. 150. Perk. sect. 354.
1. Ro. Abr. 680. 1. Sid. 118.)

(1) Nota placitum illud fuit coram justiciariis ad custodiam Judæorum assignatis. Hal. MSS.—See the record at length in Tov. Angl. Judaic. 230. See also Moll. de Jur. Marit. 8th ed. b. 3. c. 6. s. 11.—(2) See post. 32. b. n. 2.—(3) But *the assignment is good, though tithes of the third yard-land be assigned* M. 9. Jac. C. B. *Kettleby's case.*—Hal. MSS.—(4) 25. *E.* 3. 46. *But she shall be endowed of rent reserved in tail so long as the tail continues.* 10. *E.* 3. 27. hic *fol.* 30.—Hal. MSS.—(5) P. 8. Jac C. B n. 23. *Fulgeam's case Noy n.* 280. *Whitley and Best a proviso in the writ of seisin* quod tenens non expellatur. *But see* 27. *H.* 8. 7. *If tenant for years be received and his term is allowed,* cesset executio durante termino. *Yet the law vests the actual possession in him who recovers; and* nota *here she shall recover damages according to the value of the rent.* P. 22. Jac. C. B. *P.* 16. *E.* 3.—Hal. MSS.—(6) *Yet demand of land and common* pro omnibus averiis, *without saying* eidem spectant', *is good after verdict and shall not be intended common without number.* P. 9. Car. B. R. *Prewet and Drake Crook n.* 3.—Hal. MSS. See Cro. Cha. 300. W. Jo. 315 —(7) *But she shall not have emblements.* Dy. 316.—Hal. MSS —(8) Vid. 1. *H.* 5. 11. 17. *E.* 3. *If feoffee improves by buildings, yet dower shall be as it was in the seisin of the husband.* 17. H. 3. Dower 192. 31. E. 1. Vouch. 288. *For the heir is not bound to warrant, except according to the value as it was at the time of the feoffment, and so the wife would recover more against the feoffee than he would recover in value, which is not reasonable.*—Hal. MSS. See further Hugh. Comment. on Orig. Writs 196.—(9) 18. E. 4. 29. Vid. *acc. Noy. n.* 433. *and n.* 467. *Powel and Weekes in case of divorce* causa adulterii. *Yet dower lies.* Vid. *acc.* 10. *E.* 3. 15. *in case of divorce* ex voto castitatis. *Yet this in some cases dissolves the marriage* ex tunc. 45. E. 3. Hal. MSS. See Rowel's case acc. Godb. 145. But according to Rolle's report it was adjudged, that the divorce for adultery was a bar of dower, 1. Ro. Abr. 681 —(10) *Dy* 107. *Where issue is joined on reconciliation after elopement, advantage shall not be had except of one elopement.* Vid. Lib. Parl. 30. *E.* 1. *John Comoy's grant of his wife.* Noveritis me tradidisse et demisisse spontanea mea voluntate domino Willielmo Paynell militi Margaretam uxorem meam; et concedo, quod Margareta cum predicto Willielmo remaneat pro voluntate ipsius Willielmi. *Afterwards William and Mary lived together, and John died. Ruled* 1. *that this was a void grant;* 2. *that it did not amount to a licence, or at least was a void licence;* 3. *that after elopement there shall not be any averment,* quod non fuit adulterium, *though William and Mary after the death of John intermarried. So she was barred of dower.* Nota *they produced a sentence of purgation of adultery in the ecclesiastical court; yet not allowed against such presumption.* Hal. MSS. See Comoy's grant of his wife at length in 2. Inst. 435. and in Marg. of Dy. ed. 1688. fol 106. b. See S. C. cited in 1. Ro. Abr 680. See further Vin. Abr. *Dower* P. and R. Hugh. Comment. Orig. Writs 190.

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of heir in contradistinction to the *heir general.* See 1. Stra. 41. 42. Hitherto lord Coke's general rule as to being both heir and female to take by purchase seems unimpeached. But it must be owned, that there is a case in which the doctrine, after a very solemn discussion, received a most severe attack from a Judge of the highest authority. This happened in the famous case of

(1. Ro. Abr. 680. Perk. ſect. 354.)

out coertion eccleſiaſticall be reconciled unto her, and permit her to cohabit with him, all which is comprehended ſhortly in two hexameters, *Sponte virum mulier fugiens, et adultera facta, Dote ſua careat, niſi ſponſi ſponte retracta.* And [p] if ſhe goeth willingly with or to the avowtrer, this is a departure and a tarrying, albeit ſhe remaineth not continually with the avowtrer, or if ſhe tarryeth with him againſt her will, or if he turne her away, or if ſhe cohabit with her huſband, by the cenſures of the church, in all theſe caſes ſhe loſeth her dowrie. But ſee notable matter hereof in the expoſition upon the ſtatute of W. 2. cap. 34.

[p] 3. E. 3. 2. 6. E. 3. 29. 9. E. 3. 29. 19 E. 3. Dower. 94. 43 E. 3. 19. Vid. Fitz. N. B. 150. h. 8. E. 2. Dower 153.

En ſeveraltie per metes et bonds. And yet in ſome caſes where the huſband was ſole ſeiſed, the wife ſhall not be endowed in ſeveralty by metes and bounds (1). As for example, [q] if a man ſeiſed of lands in fee, took a wife, and infeoffed eight perſons, a writ of dower was brought againſt theſe eight perſons, and two confeſſe the action, and the other ſix pleade in barre, and deſcend to iſſue, the demandant ſhall have judgement to recover the third part of two parts of the land, in eight parts to be divided, and after the iſſue being found for the demandant againſt the ſixe, the demandant ſhall have judgement to recover againſt them the third part of ſixe parts of the ſame lands, in eight parts to be divided, which is worthie the obſervation. But of this more ſhall be afterwards ſaid in this chapter.

[q] M. 2. & 3. Eliz. Dier 187. b. 10. Aſſ. p. 2. 17. E. 3. 4. Tr. 10. H. 5. Rot. 447.

But regularly Littleton's words are to be intended, where the huſband was ſole ſeiſed, for where he was ſeiſed in common, there ſhe cannot be endowed by metes and bounds, as it appeareth in this chapter, Sect. 44. Nota, the endowment by metes and bounds, according to the common right, is more beneficiall to the wife, than to be endowed againſt common right, for there ſhe ſhall hold the land charged, in reſpect of a charge made after the title of dower (2).

26. E. 3. Dower 133. 10. E. 3. 31. 17. E. 2. Dower 164. 19. E. 3. qua. Imp. 154. 12. E. 4. 2. 18. H. 6. 27. per Paſton.

Le quel el avoit iſſue per ſa baron ou nemy. Herein the tenant in dower, as in many other, is preferred before the tenant by the curteſie; but yet this great diſadvantage the wife hath, that ſhe cannot enter into her dower by the common law, but is driven to her writ of dower to recover the ſame, wherein ſometimes great delayes are uſed, and therefore the well adviſed friends of the wife will provide for a joynture to be made to her, as ſhall be ſaid hereafter. For by the ſtatute of [r] *Magna Carta* cap. 7. ſhe ſhall tarrie in the chiefe houſe of her huſband but by the ſpace of fortie dayes after the death of her huſband, within which time dower ſhall be aſſigned unto her, unleſſe it were formerly aſſigned, &c. but of little effect was that act, for that no penaltie was thereby provided if it were not done: which terme of 40 days is in law called *Quarentina.* But if ſhe marry within the 40 dayes ſhe loſeth her quarentine (3). But ſome have ſaid that by the ancient law of England the woman ſhould continue a whole yeare in her huſband's houſe, within which time if dower were not aſſigned, ſhe might recover it: and this certainely was the law of England before the Conqueſt. [s] *Mulieres viduæ bis ſenos menſes viduas exigunto, atque tum demum cui velint nubant, ſin quæ ante annum nupſerit dote mulctata fortunis omnibus à priore marito relictis privatur.* But for the reliefe of the widow it was provided by the ſtatute of Merton made in *Anno* 20. H. 3. cap. 1. (which by [t] Bracton is called *Nova conſtitutio*) that the wife ſhall recover damages in her writ of dower from the time of the death of her huſband (4). But herein divers things are obſervable. Firſt, in what kind of writ of dower ſhe ſhall recover her damages. In a writ for a dower *ad oſtium Eccleſiæ*, or *ex aſſenſu patris*, ſhe ſhall recover no damages, becauſe ſhe may enter, and the words of the ſtatute be *Et dotes ſuas habere non poſſunt ſine placito.* Alſo I have read in an ancient and learned reading upon this ſtatute, that it extendeth only to a writ of dower, *Unde nihil habet*, and not to a writ of right of dower, for in no writ of right damages are to be recovered. 2. She ſhall recover damages only when her huſband die ſeiſed, (that is) ſeiſed of the freehold and inheritance, [u] for albeit the huſband before the title of dower had made a leaſe for yeares reſerving a rent, the wife ſhall recover the third part of the reverſion with a third part of the rent and damages, for the words of the ſtatute be, *De quibus viri ſui obierunt ſeiſiti* (5). 3. Some ſay that the demandant in a writ of dower, that delayeth herſelfe ſhall not recover damages, therefore let the demandant take heed thereof. 4. It is neceſſary for the wife after the deceaſe of her huſband as ſoon as ſhe can to demand her dower before good teſtimony, for otherwiſe ſhe may by her owne default loſe the value after the deceaſe of her huſband and her damages for detaining of her dower. For if ſhe bring a writ of dower againſt the heire, and the heire cometh into the court upon the ſummons the firſt day, and plead that he hath been always ready and yet is to render dower, &c. if the wife have not requeſted her dower, ſhe ſhall loſe the mean values and her damages, but if ſhe hath requeſted her dower ſhe may plead it and iſſue may be thereupon taken.

[r] Magna Carta, cap. 6. Fleta lib. 5. cap. 23. Bracton lib. 2. fol. 96. Britton ca. 103. (Poſt. 34. b.) 19. H. 6. 14. 6. E. 6. Dyer 76. F. N. B. 161. Regiſt. orig. 175. 1. Marie Dower 101. (2. Inſt. 17. F. N. B. 161. A.)

[s] Lamb. Sect 120. 71. & divers ancient manuſcripts. See the 2. part of the Inſtitutes, cap. 7.

[t] Bract. lib. 4 312. & lib. 2. 96 Britton. cap. 103. Fleta. lib. 5. cap. 23.

But it is holden in ſome bookes [w] that a requeſt in *pays* is not ſufficient, and that it is the folly of the wife, that ſhe brought not her writ of dower ſooner. But the law and many [x] bookes be againſt it, and the words of the plea (that he hath beene always ready, &c.) prove the ſame, and the words of the ſtatute alſo prove this, *Et dotes ſuas habere non poſſunt ſine placito.* And

(D. and Stud. Dial. 2. c. 13.) [w] 5. E. 3. 1. 41. E. 3. Dower 46 and not in the booke at large. (Doctr. Plac. 152.) [x] 16. E. 3. Dower 59. 2. H. 4 7. 9. H. 4. 4. tit. iſſue 133. 11. H. 4. 40. 13. E. 4. 7. 14. H. 8. 25. b.

(1) Nota *if the ſheriff doth not return ſeiſin* per metas et bundas, *it is ill, unleſs certain cloſes are aſſigned by name. M.* 44. 45. *El. C. B. Huſband makes leaſe for years and dies, the heir ſays to the wife,* I endow you of the third part of all the lands whereof your huſband was ſeiſed. *Ruled* 1. *This a good endowment, though not by metes and bounds. Otherwiſe where the ſheriff aſſigns dower.* 2. *This aſſignment ſhall bind the leſſee, and they ſhall hold in common. Tr.* 1651. *B. R. Couſh and Lambert.* Hal. MSS. See further as to aſſignment of dower poſt. 34. b.—(2) *Where the wife ſhall hold charged.* Firſt 19. *E.* 3. Quare Impedit 154. *Huſband ſeiſed of the manors of A B and C, to which ſeveral advowſons are appendant, grants the next avoidance of the three advowſons and dies. The heir aſſigns the manor of A to the wife, with the advowſon of A, which becomes void. The grantee ſhall preſent, for aſſignment of common right is of the third part of every manor and the third preſentment of every church. Otherwiſe if the dower had been aſſigned to her* ad oſtium eccleſiæ. Secondly *If the huſband had granted a rent-charge, then in the former caſe the wife ſhall hold it diſcharged, for ſhe may diſtrain in the other two manors, and for the ſame reaſon the wife of the heir ſhall not have* dos de dote. *But* thirdly *if he had granted a rent out of the manor of A, and this manor had been aſſigned, ſhe ſhould hold charged.* 5. *E.* 2. *Avowry* 206. *Huſband's feoffee grants rent charge to the wife, the huſband dies, the third part of the land charged is aſſigned in dower. The rent ſhall be apportioned, and ſhall not iſſue wholly out of the reſidue.* Hal. MSS. See further Vin. Abr. *Dower* D. a.—(3) See further as to *Quarentine* 2. Inſt. 17. Barringt. Ant Stat. 2d. ed. p. 9. 10. Hugh. on Orig. Writs 193. and Vin. Abr. *Dower* I. a.—(4) Vide quoad *damages in dower.* Firſt what ſhall be ſaid to be a dying ſeiſed. *Huſband makes feoffment to the uſe of himſelf for life, remainder to his ſon in tail, and dies ſeiſed; the wife ſhall not have damages, becauſe he doth not die ſeiſed of the inheritance, which deſcends to the ſon. T.* 6. *Car. And therefore finding that the huſband dies ſeiſed without ſaying of what eſtate is ill. M.* 5. Car. *Bromly and Littleton.* Secondly, How the inquiry ſhall be of the the dying ſeiſed and damages. *If judgment be by confeſſion or default, a writ ſhall iſſue to deliver ſeiſin and inquire of damages; but if it be by verdict, the ſame jury ſhall inquire of the dying ſeiſed and damages; but if it be omitted, it may be ſupplied by writ of inquiry.* Thirdly, What the damage ſhall be. Nota *before the ſtatute of Merton no damages in dower, and by that ſtatute the wife ſhall have damages,* viz. *the value of the third part* de tempore mortis uſque judicium, *and by the ſtatute of Glouceſter* 6. *E.* 1. *c.* 1. *coſts as well as damages. Therefore the judgment* quoad *the land may be affirmed in writ of error and the judgement for damages be reverſed, becauſe they are ſeveral in their nature,* 22. *E.* 4. 46. *and error lies after judgment for ſeiſin and before judgment for damages. T.* 24. Car. B. R. *Dudney and Glyde. The damages in dower are* 1. *the value* de tempore mortis; 2. damna occaſione detentionis dotis, *which are uſually aſſeſſed ſeverally. But if they are mixed together by the verdict, yet it is good. T.* 5. Car. C. B. *Hawes caſe Judgment to recover ſeiſin by default, and writ to enquire of the value; the jury aſſeſs the value to the taking of the inquiſition, and judgment given for them, and affirmed good in writ of error; ſo that the judgment intended by the ſtatute of Merton is not the firſt judgment but the ſecond. T.* 1649. *Thynne and Thynne.* Hal. MSS. See in Barn. Not. 2d. ed. p. 234. Penrice's caſe, according to which damages ſhould be computed only to the *awarding* of the writ of inquiſition But Walker and Nevil 1. Leon. 56. and the caſe cited by lord Hale are *contra.*—(5) *Damages in ſuch caſe according to the value, not of the land, but of the rent. P.* 22. Jac. C. B. Hal. MSS.

Brown and Barkham determined by lord chancellor Cowper; who held a younger brother to be capable of taking as heir male

And the reaſon why *tout temps priſt* is a good plea in a writ of dower brought againſt the heire to barre her of the meane values and damages is, becauſe the heire holdeth by title, and doth no wrong till a demand be made(1). But in a writ of aiel, coſinage, &c. where the land and damages are to be recovered, there ſuch a plea is not good; for there the tenant of the land hath no title, but holdeth the land by wrong, and the feoffee of the heire cannot at the firſt day plead *tout temps priſt*, becauſe he had not the land all the time, ſince the death of the anceſtor. 5. It is to be obſerved, that the meane values and damages are to be recovered againſt the tenant in a writ of dower, as it appeareth in a notable record [*y*] between Belfield and Rowſe (2). The tenant as to parcell pleaded non-tenure, and for the reſt due deteynment of charters, upon which pleas they were at iſſue, and both iſſues found by the jury againſt the tenant, and found further that the huſband died ſeiſed ſuch a day and yeare, and had iſſue a ſonne, and that the demandant and the ſonne by 6 yeares after the deceaſe of the huſband together tooke the profits of the land, and after the ſonne ſuch a day and yeare died without iſſue, after whoſe deceaſe the land deſcended to the tenant as uncle and heire to him, by force whereof he entred and tooke the profits untill the purchaſing of the originall writ, and found the value of the land by the yeare, and aſſeſſed damages for the deteyning of the dower, and coſts; and upon this verdict, after often debating, the demandant had judgment to recover her dammages for all the time from the death of her huſband without any defalcation (3). In which caſe many things apparent therein are obſervable. Let the tenant therefore take heed how he plead falſe pleas. 6. That this ſtatute of Merton doth extend to copiholds [*z*] where the cuſtome is, that women be dowable (4). 7. That if the wife hath dower aſſigned to her in chancery ſhe ſhall have no damages, [*a*] for the words of the ſtatute be, *Et viduæ per placitum recuperaverint*, &c. So it is if the heire or his feoffee aſſigne dower, and the wife accepteth it ſhe loſeth her damages.

A man ſeiſed of lands in fee taketh a wife and granteth a rent charge, and after maketh a feoffment in fee, and taketh backe an eſtate taile and dieth, the wife recovereth dower againſt the iſſue in taile by reddition, the wife maketh a ſurmiſe that her huſband died ſeiſed, and prayeth a writ to enquire of the damages, and that is granted to her. In this caſe ſhe holds the land charged with the rent charge, for by her prayer ſhe accepteth herſelfe dowable of the ſecond eſtate (5), for of the firſt eſtate, whereof ſhe was dowable, her huſband died not ſeiſed, and ſo ſhe hath concluded herſelfe, wherefore if the rent charge be more to her detriment then the damages beneficiall to her, it is good for her in that caſe to make no ſuch prayer (6).

De quel age que la feme ſoit, iſſint que el paſſe lage de neufe ans(7) *al temps del mort ſon baron.* *Feme*, wife, here Littleton ſpeaketh of a wife generally, and generally it is to be underſtood as well of a wife *de facto*, as *de jure*. Therefore if the wife be paſt the age of 9 yeares [*b*] at the time of the death of her huſband, ſhe ſhall be endowed, of what age ſoever her huſband be, albeit he were but 4 yeares old. *Quia junior non poteſt dotem promereri, neque virum ſuſtinere; nec obſtabit mulieri petenti minor ætas viri.* Wherein it is to be obſerved, that albeit *Conſenſus non concubitus facit matrimonium*, and that a woman cannot conſent before 12 nor a man before 14, yet this inchoate and imperfect marriage (from the which either of the parties of the age of conſent may diſagree) after the death of the huſband ſhall give dower to the wife, and therefore it is accounted in law after the death of the huſband *legitimum matrimonium*, a lawfull marriage, *quoad dotem*. If a man taketh a wife of the age of 7 yeares, and after alien his land, and after the alienation the wife attaineth to the age of 9 yeares, and after the huſband dieth, the wife ſhall be endowed; for albeit ſhe was not abſolutely dowable at the time of the marriage, yet ſhe was conditionably dowable, *viz.* if ſhe attained to the age of 9 yeares before the death of the huſband, for ſo Littleton here ſaith, ſo that ſhe paſſe the age of 9 yeares at the death of her huſband, for by his death the poſſibility of dower is conſummate.

And ſo it is if the huſband alien his land, and then the wife is attainted of felony, now is ſhe diſabled, but if ſhe be pardoned before the death of the huſband, ſhe ſhall be indowed. If the ſon indow his wife at her age of 7 yeares *ex aſſenſu patris*, if ſhe before the death of her huſband attaine to the age of 9 yeares, the dower is good. But otherwiſe it is of an originall abſolute diſability; as if a man take an alien to wife, and after the huſband alien the land, and after ſhe is made denizen, the huſband dieth, ſhe ſhall not be indowed, (8) becauſe her capacity and poſſibility to be indowed came by the denization. Otherwiſe it is if ſhe were naturalized by act of parliament, whereof ſee more in the chapter of villenage (9).

And the biſhop upon an iſſue joyned in a writ of dower, *Quod nunquam fuerunt copulati legitimo matrimonio*, ought to certifie that they were coupled in lawfull marriage, albeit the man were under fourteene, or the wife above nine, and under twelve (10). So it is if a marriage *de facto*, be voidable by divorce (11), in reſpect of conſanguinity, affinity, precontract, or ſuch like, whereby the marriage might have beene diſſolved, and the parties freed *à vinculo matrimonij*, yet if the huſband die before any divorce, then for that it cannot now be avoyded, this wife *de facto* ſhall be endowed, [*c*] for this is *legitimum matrimonium* (as in the other caſe when

(Doctr. Plac. 152.)

(S. C. Mo. 80. N. Bend. 153. 4. Leon. 198.)

[*y*] Mich. 8. & 9. Eliz. rot. 904. in Comm. banc.

(9. Co. 15. b. Bedingfield's caſe. 1. Ro. Abr. 679.)

[*z*] Tr. 37. Eliz. 4. Co. 30. b. Shawe's caſe

[*a*] 43. Aſſ. Pl. 32. (F. N. B. 263.)

14. H. 8. 28.

(1. Ro. Abr. 675. Doctr. Plac. 148.)

[*b*] 3. E. 1. Dower 172. Itin. North. 8. E. 2. Dower 112. 7. E 2. Dower 147. 12. E. 2. ibid. 159 21. E. 3. 28. 15. E. 3. Dower 67. 12. R. 2. Dower 54. 12. H. 4. 3. 35. H. 6. 40. 7. H. 6. 11. 12. 12. H. 4. Doct. & Stud. Firz. N. B. 149. b. 22. Eliz. Dower 369. Bract. fol. 92. Fleta lib. 5. ca. 21. Lib. Intrat. fo. 123.

(Poſt 37. a. Ante 31. Cro. Jam. 539.)

(See 1. Salk. 120. S. C. 3. Leo. 410.)

(5. Co. 98. b. Berrie's caſe.)

[*c*] 10. E. 3. 35. Fleta lib. 5. cap. 22. Brit. cap. 107.

(7. Co. 41. b.)

(1) *If the tenant comes the firſt day, and acknowledges the action, and avers that he was at all times ready to render dower, the demandant may take judgment immediately, and then there ſhall only be recovery of ſeiſin* et nihil de miſa quia venit primo die. *But if the demandant would have damages, ſhe may aver, that ſhe requeſted her dower and the tenant did not endow her, and then the judgment for damages and value ſhall wait till the iſſue is tried. N. Entries Dower in Judgment* 4. Hal. MSS.—(2) Mich. 8. and 9. Eliz. Belford and Rows, Moor and Bendl. Hal. MSS. See Mo. 80. and N. Bendl. 153.—(3) Ratio iſtius caſus videtur, *becauſe the wife ought to accompt to the heir for the whole. But if the heir be in ward in chivalry and the wardſhip is granted to the wife, or if the wife has eſtate for years, and after the years expired or the full age ſhe brings dower, it ſeems that the heir ſhall not be charged* pro tempore, *becauſe ſhe has a good eſtate to her own uſe. The reaſon is, becauſe the ſtatute of Glouceſter, that every one ſhall render for his time, doth not extend to this caſe.* H. 8. Jac. C. B. Caſus Archiepiſc. Ebor. Hal. MSS.—(4) Vid. Rot. Parl. 3. H. 6. n. 29. *ſpecial act of parliament for giving meſne values to the wife againſt the king*, in caſu comitiſſæ Marche. Hal. MSS.—(5) Sic nota, *the wife has election to be endowed of the laſt ſeiſin; and therefore if huſband and wife levy fine and take back eſtate to the huſband in fee, the wife ſhall dower of the ſecond ſeiſin; but otherwiſe it is in the caſe of a huſband intitled to be tenant by the curteſy*, ut videtur. Hic fol. 30. a. —Hal. MSS.—(6) See further as to damages in dower, Hugh. on Orig. Wr. 180. Treat. on Dow. in Gilb. Law of Uſes 375. 2. L. Raym. 1384. New Abr. *Dower* I. Vin. Abr. *Dower* O. a. P. a. Say. Law of Dam. 16. and 17. Ch. 2. c. 8. ſect. 3. and 4. Caſ. B. R. temp. Hardw. 19. 50. 23.—(7) Vid. *Raſt. Entr.* 228 novem annorum et dimid. *She ought to ſhow how much more ſhe is than 9 years.*—Hal. MSS.—(8) *Philips in his reading holds, that if the wife be attainted, and then the huſband purchaſes lands and aliens it again, and then the wife is pardoned, ſhe ſhall have dower of the land which was purchaſed and aliened during the time ſhe was not dowable. And he cited Maunſfield's caſe adjudged* 28. *Elizabeth. In that caſe a jointure was conveyed to the wife before the coverture, and during the coverture the huſband purchaſed other lands and aliened them again and died, the land which the wife had in jointure was evicted, and the wife had dower of the land which was purchaſed and aliened by her huſband at the time when ſhe was barred of her action of dower. So if wife elopes and huſband purchaſes lands and aliens them, and then the wife is reconciled, ſhe ſhall have dower of thoſe lands.* MS. Comment. on Litt. penes editorem, ſuppoſed to have been written before the publication of lord Coke's Commentary.—See the liſt of readers of the Middle Temple in Dugd. Orig. Jurid. by which it appears that Mr. Philips was autumn reader in 38. Eliz.—See further Plowd. Quær. 281. and 204.—(9) Vide ſupra fol. 31. b.—Hal. MSS.—See note 9. in 31. b.—(10) Vid. M. 9. and 10. E. 1. coram rege Rot. 24. Ebor. *A contracts* per verba de præſenti *with B, and has iſſue by her, and afterwards marries C* in facie eccleſiæ. *B recovers A for her huſband by ſentence of the ordinary, and for not performing the ſentence he is excommunicated, and afterwards enfeoffs D, and then marries B* in facie eccleſiæ, *and dies. She brings dower againſt D, and recovers becauſe the feoffment was* per fraudem *mediate between the ſentence and the ſolemn marriage*, ted reverſatur coram rege et concilio quia predicta A non fuit ſolſitus *during the eſponſals between him and B.* Nota, *neither the contract nor the ſentence was a marriage.* Quoad *marriage* infra annos nubiles, nota infra ſect. 104. *It is only* ſponſalia de futuro quoad *other purpoſes. Dy.* 105. 313. 369. 47. *E.* 3. Action ſur leſtatute 37. *Whether huſband ſhall have treſpaſs de* tali uxore abducta.—Hal. MSS.—(11) Nota obiter. *When A* per judicium eccleſiæ recuperaſſet aliquam in uxorem, vel in divortium celebratum

male under a deviſe to the heirs male of the body of the teſtator's great grandfather, though the daughter of an elder bro- they

when the wife is *infra annos nubiles) quoad dotem.* And ſo in a writ of dower the biſhop ought to certifie, that they were *legitimo matrimonio copulati*, according to the words of the writ. And herewith agreeth 10. E. 3. 35. And [d] Bracton: *quamdiu duravit matrimonium, duravit dotis exactio, eo deficiente deficit dotis petitio, &c. poterit tamen replicare contra exceptionem illam, quod ſi aliquando fuit matrimonium propter conſanguinitatem, &c. inter eos accuſatum, nunquam tamen fuit in vita viri ſui ſolutum nec divortium celebratum.* But if they were divorced *à vinculo matrimonij* in the life of her huſband, ſhe loſeth her dower: otherwiſe it is if they were divorced [e] *Cauſa adulterij* (1), which is but *à menſa et thoro*, and not *à vinculo matrimonij*, as it was adjudged. But ſome doe hold that a wife *de facto* ſhall not have an appeale of the death of her huſband, but onely ſhe that is a wife, *de jure in favorem vitæ* (2). *Vide* 50. E. 3. fol. 15. 28. E. 3. 92. 27. Aſſ. Stamf. Pl. Cor. 59. and that there *nunques accouple in loyall matrimonie* ſhall be taken *de jure* ſtrictly. And ſo in ſome caſe a wife ſhall have dower where ſhe cannot have an appeale, [f] and in other caſes ſhe ſhall have an appeale, where ſhe cannot have a writ of dower, as if ſhe elope (3), &c. ſhe is barred of her dower, but not of her appeale (4): and the reaſon is for that the ſtatute [g] barreth her of her dower, but not of her appeale. So if the huſband be attainted of treaſon, &c. his wife ſhall not be endowed, and yet if any doe kill him, the wife ſhall have an appeale, the reaſon of the diverſity ſhall appeare hereafter in this chapter (5).

Apres le mort le baron. [h] *mortuo viro hinc confirmatur dos.* This is intended of a naturall, not of a civill death. For if the huſband entred in religion, [i] the wife ſhall not be endowed untill he be naturally dead (6).

And in this chapter Littleton divideth dower into five parts, *viz.* dower by the common law. Secondly, dower by the cuſtome. Thirdly, dower *ad oſtium eccleſiæ*. Fourthly, dower *ex aſſenſu patris*. And fifthly, dower *De la pluis beale*. And all theſe dowers were inſtituted for a competent livelihood for the wife during her life. [k] *Propter onus matrimonij, et ad ſuſtentationem uxoris et educationem liberorum, cum fuerint procreati, ſi vir præmoriatur.*

[d] Bracton lib. 4. fol. 304. Britton ibidem. Fleta lib. 5. cap. 23. 32. E. 1. Dier 156. (5. Co. 98. b. Ante 32. a. 1. Ro. Abr. 341. 681. Noy 108.)

[e] Tr. 2. Ja. Rot. 1815. in Communi Banco. Inter Stowell and Wikes in Dower.

[f] 50. E. 3. 15. b.

[g] W. 2. cap. 34. (1. Mod. Rep. 130. 2. Inſt. 68.)

[h] Britton cap. 106. Bracton lib. 4. fol. 301
[i] 31. E. 3. tit. Colluſion 29.

[k] Bract. lib. 2. cap. 39. fol. 92. &c.
Fleta lib. 5. cap. 22.
Britton cap. 101.

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NOTA per le common ley la feme navera pur ſa dower forſque [l] *la tierce part, &c.* This third part is called *rationalis dos*, or *dos legitima*, becauſe it is the dower that the common law giveth, *rationabilis autem dos eſt cujuſlibet mulieris de quocunque tenemento tertia pars omnium terrarum, et tenementorum quæ vir ſuus tenuit in dominico ſuo ut de feodo, &c.*

Mes pur cuſtome daſcun pais (7) *el avera le moitie, et per le cuſtome en aſcun Ville et Burgh el avera lentiertie.* Such

ET nota, que per le common ley la feme navera pur ſa dower forſque la tierce part des tenement que fueront a ſa baron durant le eſpouſels; mes per cuſtome daſcun pais el avera le moitie, et per le cuſtome en aſcun ville et burgh, el avera lentiertie; et en touts tiels caſes, el ſerra dit tenant en dower.

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

[l] Glanvil lib. 6. cap. 1.
Bracton ubi ſupra.
Britton ubi ſupra.
Fleta ubi ſupra.
Mirror cap. 1. ſect. 3.
Magna Carta cap. 7.

Fitz. N. B. 150. O.

[m] 21. E. 4. 53. 54. 7. H. 6. 26. 22. H. 6. 14. 21. H. 7. 17. 40. Aſſ. 27. 41. 16. E. 2. Preſcription 53. 43. E. 3. 32. 45. Aſſ 8. Dier 363. 39. E. 3. 2. 10. 14. E. 3. Barre 277. 13. E. 3. tit. Dower, 65. (1. Ro. Abr. 558. 563.)
[n] Vide le ſtatute de conſuetud. Kanciæ, &c. Trin. 17. E. 3. coram rege Kan. in Theſaur. in which record Senentia ſignifieth Widowhood.

a [m] cuſtome may extend to a county, city, or an ancient burgh without queſtion; and ſo this cuſtome, as here it appeareth by Littleton, may extend to upland towns, which are neither counties, cities, nor boroughs. But the ſurer pleading, in this and the like caſes, is to lay the cuſtome within a mannor or ſeignory, if the truth of the caſe will ſo beare it (8). By the cuſtome of Gavelkind [n] the wife ſhall be indowed of the moity, ſo long as ſhe keepe herſelfe ſole, and without child, which ſhe cannot waive and take her thirds for her life (9). For in that caſe, *Conſuetudo tollit communem legem* (10).

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

Sect.

bratum inter A & B *his wife, and ſhe is married to C*, et poſtea ad proſecutionem A ſententia divortii reverſatur *by appeal, a writ directed to the ſheriff ſhall iſſue out of chancery on the ſentence there certified.* Clauſ. 19. H. 3. m. 1. pro Willelmo de Treyor. Clauſ. 20. H. 3. m. 9. pro Willelmo de Dauntesy. Clauſ. 21. H. 3. m. 17. pro Roberto de Halſted. *And* vid. M. 9. and 10. E. 1. ubi ſupra. Et cum eundem Willelmum, ſi in malitia ſua ulterius perſeveraſſet, ad executionem dictæ ſententiæ regia poteſtas tenebatur compuliſſe, ſi a loci dioceſano fuiſſet ſuper hoc requiſitus. Hal. MSS.

(1) 10. E. 3. 15. Supra 32. Hal. MSS. See n. 9. in 32. a.—(2) Acc. 2. Hawk. Pl. C. b. 2. c. 23. ſ. 36. and the authorities there cited.—(3) To the books cited ante 32. a. n. 10. as to the effect of elopement on dower, add New Abr tit. Marriage E. 1. Treat. on Dower in Gilb. Law of Uſes, 402.—(4) Acc. Bro. *Appeal* 17. Staund. Pl. C. 59. But ſee contra 2. Inſt. 317. and 1. Mod. 130. by judge Hide.—(5) See poſt 37. a.—(6) *The reaſon is, becauſe* poſt carnalem copulam *the huſband cannot be profeſſed without the conſent of the wife.* Extrav. de convertione conjugatorum cap. 2. et per totum. Nec è converſo. Hal. MSS. See New Abr. *Marriage* E. 3. Vin. *Dower* K. and Treat. on Dow. in Gilb. Law of Uſes, 401.—(7) Vid. 15. *H.* 3. *Preſcription* 57. *Cuſtom of the town of Salop, that the wife ſhall have a moiety of ſocage, but if the husband has ſocage and chivalry the wife ſhall have only a third part.* Hal. MSS.—(8) Nota, *the writ ſpecial.* Hal. MSS.—(9) See Acc. Robinſ. Gavelk. 159.—(10) *Accordingly adjudged that ſhe cannot waive. H. 24. Eliz. rot.* 1515. *C. B. P.* 43. *Eliz. Davers and Selby T.* 30. *Eliz. C B. Rot.* 157. *Hunt and Gilbert.* Hal. MSS.—See the former caſe in Cro. Eliz. 825. and the latter in Mo. 260. 1. Leon 133. Gouldſb. 108. Cro. Eliz. 121. and Sav. 91. See further on the ſubject in Robinſ. Gavelk. 179. and Hugh. on Orig. Wr. 160.—(11) By the cuſtom of ſome places the wife ſhall have the *whole of* her huſband's lands in dower. See Fitzh. N. Br. 150. p.

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ther was *heir general*, and inſtead of founding his decree on *ſpecial* circumſtances, which were not wanting in the caſe, moſt expreſsly denied lord Coke's diſtinction between deſcent and purchaſe. See Prec. in Chn. 442. 461. Gilb. Rep. 116, 131. and 1. Strn. 35. But lord Cowper's decree, notwithſtanding his high character, was not acquieſced in; for in November 1641 the ſame caſe was brought, by bill of review, before lord chancellor Hardwicke, who indeed decreed in favour of the ſame perſon, but was far from following lord Cowper in his reaſons. He admitted lord Coke's diſtinction to have been long ago eſtabliſhed, and profeſſed to determine wholly on the ſpecial circumſtances, without the leaſt intention of impeaching the general rule. In giving judgment he divided the caſe into two queſtions, 1ſt. whether it was an eſtabliſhed rule, that he who claims as heir male by purchaſe muſt be general heir as well as neareſt male deſcendant; 2dly, whether the apparent intent of a teſtator to the contrary may not create an exception to the general rule. According to a very good note of the caſe lord Hardwicke's words on the firſt queſtion were theſe: *As to the firſt of theſe queſtions, it cannot be denied, but that the diſtinction between an heir male of the body to take by deſcent, who is the neareſt male deſcendant of the party claiming through males, and to take by purchaſe, who muſt be heir as well as a male deſcendant of the body, has been long ago eſtabliſhed. The ſtatute* de donis *eſtabliſhed the firſt, and the ſecond has been laid down by lord Coke in his Comment upon Littleton, and is taken from his argument in Shelley's caſe and Dyer's report of that caſe, and he has been followed by ſome later authorities. Lord Cowper argued ſtrongly againſt this rule; but as his argument is well known and very common, I ſhall not now take notice of it. If this doctrine had been* res integra *at the time of his decree, or was ſo now, I am ſo fully convinced of the unreaſonableneſs of it that I would never eſtabliſh it. But when a rule of law has long prevailed, it ought to be ſupported, though it be not ſtrictly agreeable to natural reaſon; for in many inſtances it is more material, that the law is ſettled than how it is ſettled. But as I think that this caſe may be determined without determining this queſtion, I ſhall leave the rule*

unim-

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This ſhall be explained by that which ſhall be ſaid in the two Sections next enſuing.

AUXY ſont deux auters manners de dower, ceſtaſcavoir, dower que eſt appelle dowment ad oſtium Eccleſiæ, *et dower appelle dowment* ex aſſenſu patris.

ALSO there be two other kinds of dower, *viz.* dower which is called dowment at the church doore, and dower called dowment by the father's aſſent.

Sect. 39.

DOwment ad oſtium Eccleſiæ *eſt, lou home de plein age ſeiſie en fee ſimple que ſerra eſpouſe a un feme, quant il vient al huis del monaſtery ou deſgliſe deſtre eſpouſe, et la apres affiance enter eux fait, il endowe la feme de ſa entier terre ou de la moity, ou dautre meindre parcel, et la overtment declare le quantitie et la certainty de la terre, que el avera pur ſa dower. In ceo caſe la feme, apres le mort le baron, poit entrer en le dit quantitie de terre dont le baron luy endowa, ſans auter aſſignement de nulluy.*

DOwment at the church doore is, where a man of full age ſeiſed in fee ſimple, who ſhall be married to a woman, and when he commeth to the church doore to be married, there, after affiance and troth plight betweene them, he endoweth the woman of his whole land or of the halfe or other leſſer part thereof, and there openly doth declare the quantity and the certainty of the land which ſhe ſhall have for her dower. In this caſe the wife, after the death of the huſband, may enter into the ſaid quantity of land of which her huſband endowed her, without other aſſignement of any.

IF this dower be made *ad oſtium caſtri ſive meſuagii* it is not good, but ought to be made, *ad oſtium Eccleſiæ ſive monaſterii.* 10. H. 3. Dower 200.

Et ſciendum eſt [o] *quod hæc conſtitutio fieri debet in facie Eccleſiæ, et ad oſtium Eccleſiæ; non enim valet facta in lecto mortali, vel in camera, vel alibi ubi clandeſtina fuêre conjugia.* For the law requires, that this and like matters be done publickly and ſolemnly. [o] Bracton. lib. 2. cap. 18. Mirror. cap. 1. ſect. 2. and cap. 5. 10. H. 3. Dower 201. F.N.B. 150. m. n. Fleta lib. 5. cap. 22. &c. Britton cap. 101. 108. &c. (Perk. ſect. 306.)

Ou home de pleine age. That is of one and twenty yeares. *Anno* 9. H. 3. dower 197. A man of the age of eighteen yeares tooke a wife, and by aſſent of his guardian endowed her *ad oſtium eccleſiæ*, and it was adjudged a good endowment, albeit the huſband dyed before the age of one and twentie yeares; but I hold Littleton's opinion to be good law. 9. H. 3. Dower 197. (Poſt. 38. a. 1. Ro. Abr. 682.)

La apres affiance enter eux. (1) *Affidare eſt fidem dare*, Affiance or ſponſalitie, and is derived of this word *ſpondeo*, becauſe they contract themſelves together, *et ideo ſponſalia dicuntur* [p] *futurarum nuptiarum conventio, et repromiſſio* (2). But this dower is ever after marriage ſolemnized (3), and therefore this dower is good without deed, becauſe he cannot make a deed to his wife. For no aſſignement of dower *ad oſtium eccleſiæ* can be made before marriage, for that before marriage the woman is not intituled to have dower. [p] Glanvil. lib. 6. ca. 1. 40. E. 3. 43. Vide Vernon's caſe, 4. Co. 1. 2.

De ſa entier terre ou de le moitie. (4) In ancient time [q] as it appeareth by Glanvill [q] Glanvill. lib. 6. cap. 1. Bract. lib. 2. cap. 38. 39. and lib. 4. tract. 6. cap. 1. & 6. Britton cap. 101. &c. Fleta lib. 5. cap. 22. &c.

(1) Poſt aſſidationem et carnalem copulam ſunt quaſi *husband and wife, and gift by him to the wife is void.* 16. *H.* 3. *Feoffments* 117. 13. *E.* 1. ibid. 113. Hal. MSS.—(2) This explanation of *affiance* or *ſponſalia* is conformable to the *ſtrict* ſenſe of the word amongſt the civilians and canoniſts; but our law books, as Mr. Swinburne long ago obſerved, uſe *affiance* and *marriage* promiſcuouſly for one and the ſame thing, and lord Coke apparently ſuppoſes Littleton by *affiance* to mean *marriage*; for lord Coke ſays that dower *ad oſtium* ever is *after* marriage, without profeſſing to contradict Littleton. See Swinb. on Spouſals. 2. Perk. ſect. 442.—(3) But though dower *ad oſtium* cannot be till *after* marriage, yet it ſeems that ſuch endowment cannot be made at any time after, but muſt be *immediately after*. See Perk. ſect. 442. where the time of aſſigning dower *ex aſſenſu patris* is ſo explained. But Mr. Perkins adds a caſe, in which, according to ſome ancient books, dower *ex aſſenſu patris* made 8 weeks after the marriage was held good. Perk. Sect. 443. See further Hugh. on Orig. Wr. 167. and note p. in 2. Blackſt. Comment. 5th edit. 134.—(4) Vid. 9. *H.* 3. *Dower* 190. *Dower* ad oſtium eccleſiæ *of a moiety of all lands which he has or may have. He purchaſes lands afterwards, and the dower good for them.* Hal. MSS.

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unimpeached, and found my decree on the ſecond queſtion. He then proceeded to conſider the ſecond queſtion, and after ſtating ſeveral authorities to ſhew there might be exceptions to the general rule, he pointed out the particular circumſtances which he relied upon in the caſe before him, and on account of them only affirmed lord Cowper's decree. Lord Hardwicke's guarded manner of expreſſing himſelf on this laſt caſe amounts to a full acknowledgment of the general rule, and is the ſtrongeſt authority to prove its exiſtence, becauſe he avowed his diſlike of it.—Upon the whole, it is ſubmitted to the learned reader, that the general rule of being *heir general* to as take heir male or female by *purchaſe* may be defended as a reaſonable rule of conſtruction, where the words merely operate as words of purchaſe, and more particularly if the ſuperadded words of limitation are to heirs general, as where land is given to the *heirs female of the body of one and the heirs of their bodies*; that the authorities before and in the time of lord Coke fully warranted him in advancing the rule in its full extent, that is, where the words operate as words both of purchaſe and limitation; that the rule has been confirmed by many caſes ſince lord Coke's time; and laſtly, that as lord Cowper's opinion is the ſingle direct authority in any printed book againſt the rule, and it has been acted upon and acknowledged in ſeveral ſubſequent caſes, it ought ſtill to be obſerved, where the conſtruction reſts ſingly on the words *heirs female*, and they ſtand unexplained by any other words or circumſtances.

(1. Ro. Abr. 682.)
[r] F. N. B. 150.
[ſ] 20. E. 3. Barre 132. 45. E. 3. 6. Fleta lib. 5. 23.

Glanvill lib. 6. cap. 1. It was taken that a man could not have indowed his wife *ad oſtium eccleſiæ* of more then a third part, but of leſſe he might. But at this day [r] the law is taken as Littleton here holdeth. An aſſignement of dower, [ſ] where the huſband was ſole ſeiſed, cannot be made of the third or fourth part in common, but ought to be in ſeveraltie (1).

[t] Britton cap. 101. Bracton lib. 2. cap. 18.

Et la overtment [t] declare le quantitie et certeintie del terre. Here be two things that the law doth delight in, *viz.* firſt, to have this and the like openly and ſolemnly done. Secondly, to have certaintie, which is the mother of quiet and repoſe. And this word (moitie) aboveſaid is to be entended of the halfe in certaintie, and not of the moitie in common, which cleerly [u] appeareth in that here Littleton ſaith, the quantitie and eertaintie of the land.

[u] Vide 14. H. 3. Dower 189. 9. H. 3. Dower 190. 8. H. 3. Dower 195. F. N. B. 150. 40. E. 3. 43.

En ceo caſe la feme poet entrer en le dit quantitie del terre. And afterwards Sectione 43. he ſaith, *Nota, que en touts caſes lou le certaintie appeirt, queux terres ou tenements feme avera pur ſa dower, la feme poet entrer apres la mort ſon baron.* It was inſtituted in favour and reliefe of wives, that a man after marriage might aſſigne to his wife certaintie of dower, to the end that the widow ſhould not be driven to a long and chargeable ſuit, wherein delay might be uſed, and in the meane time her life ſpent, together with her money alſo. For albeit the [w] law hath provided, *Quod vidua poſt mortem mariti ſui non det aliquid pro dote ſua, et maneat in capitali meſuagio mariti ſui per quadraginta dies poſt obitum mariti ſui, infra quos dies aſſignetur ei dos ſua, niſi prius ei aſſignata fuerit, &c. et habeat rationabile eſtoverium ſuum interim in communi*, yet becauſe there was no penaltie or puniſhment inflicted, the tenant of the land may drive her to ſue for her dower. And this continuance of the widow in the capitall meſſuage, is in law called a quarentine, *quarentina*, for that it is by the ſpace of fortie days, as is aforeſaid (2). And if the heire or other tenant of the land put her out, ſhe may have her writ, *De quarentina habenda.* If the wife marry within the fortie dayes ſhe loſeth her quarentine, for her habitation in the houſe is perſonall to her, and only given to her in judgment of law during her widowhood, albeit the words of the law be generall. And therefore to the end that widowes might have certaintie of eſtate, and that they might enter (3) and not be driven to ſuit, the law hath provided dower *ad oſtium eccleſiæ*, and as it ſhall appeare hereafter, dower *ex aſſenſu patris.* And laſtly, by making of a joynture of which (being no dower but made in ſatisfaction of dower either before or after marriage) it is neceſſary that ſomething ſhould be ſaid hereafter in his apt place, for that this now falleth out to be the ſureſt way.

[w] Magna Carta cap. 7. See the ſecond part of the Inſtitutes cap. 7. Fleta lib. 5 cap. 23. Britton cap. 103. Bract. lib. 2. cap. 40. Regiſt. 175. Vide Dyer 6. E. 6. 76. b. and 161. a. F.N.B. 161. 1. Marie. Br. 101. (Ante 32. b.)

Nota. ſureſt way.

(1. Ro. Abr. 681. 2. Inſt 678. 32. H. 8. cap. 5. of execution.)

En touts caſes quant le certeintie appeirt, &c. la feme poet entrer apres le mort del baron. This is to be intended where the certaintie appeareth upon an aſſignement of dower *ad oſtium eccleſiæ*, or *ex aſſenſu patris.* For if a woman bring a writ of dower of ſixe pound rent charge, and ſhe hath judgement to recover the third part, albeit it be certain that ſhe ſhall have fortie ſhillings, yet ſhe cannot [x] diſtreine for 40 ſhillings, before the ſherife doe deliver the ſame unto her: (4) for whereſoever the writ demands land, rent, or other things in certain, the demandant after judgement may enter or diſtrein before any ſeiſin delivered to him by the ſherife upon a writ of *habere facias ſeiſinam.* But in dower where the writ demandeth nothing in certaine, there the demandant after the judgement cannot enter or diſtreine untill execution ſued, by which execution the ſherife is by the king's writ to deliver the third part in certaintie to the demandant. And ſo it is when the wife of one tenant in common demand a third part of a moitie, yet after judgement ſhe cannot enter until the ſherife deliver to her the third part, albeit the deliverie of the ſherife ſhall reduce it to no more certaintie then it was (5).

[x] 45. E. 3. 26. 48. E. 3. 36. 22. Aſſ. 87. 39. E. 3. 12. 37. H. 6. 38. 39. H. 6. 25. 1. H. 5. 8. Brev. 199. 30. E. 3. 30. 21. E. 4. 3. Vide 1. Co. Shelley's caſe. 40. E. 3. 22.

Sauns auter aſſignement (6) *de nulluy.* For as concerning dower at the common law, there muſt be aſſigement either by the ſherife, (as hath been ſaid) by the king's writ, or elſe by the heire or other tenant of the land by conſent and agreement between them. To a perfect aſſignement of dower eight things are to be obſerved: [a] firſt regularly the aſſignement muſt be certaine, as our author here ſaith (7).

[a] 8. E. 2. Ent. 75. 40. E. 3. 22. 45. E. 3. 5. 6.
[b] 1. Mar. Dyer. 91. 1. E. 2. Dower 146. 28. H. 6. 2. Dyer 9. El. 263. 26. Aſſ. 41. 31. E. 3. Scir. fa. 99. 33. H. 6. 2. Vernon's caſe. 4. Co. 1. 5. E. 4. 22. (1. Ro. Abr. 682. 684. Cro. Eliz. 451. Noy 55. Mo. 59. Poſt. 169.)

Secondly, (8) it [b] muſt be either of ſome part of the land whereof ſhe is dowable, or of a rent or ſome other profit iſſuing out of the ſame, either before judgement or after, which rent may be aſſigned to her by parol. But an aſſignement of other land whereof ſhe is not dowable, or of a rent iſſuing out of the ſame, is no barre of her dower (9).

Thirdly, the aſſignement muſt be abſolute, and not conditionall, or ſubject to any limitation (10).

Fourthly, it muſt be made by him that is tenant of the land, but herein certaine diverſities are to be obſerved (11).

[c] 7. H. 6. 34. 10. E. 2. Dower 169. 10. E. 3. 38. (2. Co. 67.)

If two or more be joyntenants of lands, [c] the one of them may aſſigne dower to the wife,

(1) Vide contra *adjudged* ſupra. Hal. MSS. See Lambert's caſe ante 32. b. n. 1. See S. C. in 1. Ro. Abr. 682. X. pl. 3. and Sty. 276. in both of which books the caſe is ſo explained as to make it conſiſtent with lord Coke's *general* doctrine as to the manner of aſſigning; for according to them the court held, that the aſſignment of the third part *in common* would have been bad, if the wife and heir had not by mutual aſſent waived the aſſignment by metes and bounds, and that it would have been error, if the ſheriff had ſo aſſigned. X See further ... X. Y. Z.

X Note also, that in Couch & Lambert the husb. was seized in fee.

(2) See further as to *quarentine* ante 32. a. and n. 3. there, and Treat. on Dow. in Gilb. Law of Uſes 372.

(3) 24. *H.* 3. *Dower* 189. *A man endows his wife of all the lands which his mother then had in dower; the mother and husband dye; the wife brings writ of dower* ad oſtium eccleſiæ *and recovers.* Sic nota, *that the wife may have action orenter.* MSS. Com. on Litt.—See acc. poſt 35. b.

(4) 20. *E.* 4. 14. Hal. MSS.

(5) *If the ſheriff reduces to certainty by metes and bounds, though the demandant refuſes, yet ſhe may afterwards enter.* 10. *Eliz. Dy.* 278. Hal. MSS.

(6) Nota *P.* 38. *Eliz. Wentworth's caſe. It ought to be pleaded by the word* aſſignavt *not* dedit. Hal. MSS.—See Cro. Eliz. 451.

(7) Vid. ante 32. *b. Lambert's caſe.* Hal. MSS.—See n. 1. in 32. b. & *ſupra* n. 1.

(8) 12. *H.* 4. 17. Hal. MSS.

(9) *But ſee* 2. *H.* 5. 12. *The heir aſſigns dower of lands of which the husband was ſeiſed, but the wife not dowable: ſhe is tenant in dower.* 30. *E.* 1. *Briefe* 884. *If wife be endowed, and afterwards exchanges with the heir for other lands which were the inheritance of the husband, ſhe ſhall be ſaid to be tenant in dower of the lands ſo taken in exchange, and her entry ſhall be ſaid to be by the husband.* Per omnes juſticiarios. Hal. MSS.

(10) *P.* 33. *Eliz. Wentworth's caſe. A conditional aſſignment of rent doth not bar dower.* Hal. MSS.

(11) *And this ought to be averred in pleading. Dy.* 361. Hal. MSS.—See S. C. in Cro. Eliz. 451. and Noy 55.

wife of a third part in certainty, and this ſhall binde his companions, becauſe they were compellable to do the ſame by law(1). But if one of them aſſigne a rent out of the land to the wife, this ſhall not binde his companion, becauſe he was not compellable by the law thereunto (2). If the huſband make ſeveral feoffments of ſeverall parcells, and dyeth, and the one feoffee aſſigne dower to the wife of parcell of land in ſatisfaction of all the dower which ſhe ought to have in the land of the other feoffees, the other feoffees ſhall take no benefit of this aſſignement, becauſe they are ſtrangers thereunto, and cannot plead the ſame(3). But in that caſe if the huſband dyeth ſeiſed of other lands in fee ſimple, and the ſame deſcend to his heire, and the heire endoweth the wife of certaine of thoſe lands in full ſatisfaction of all the dower that ſhe ought to have aſwell in the lands of the feoffees, as in his owne lands, this aſſignment is good, and the ſeveral feoffees ſhall take advantage of it (4). And therefore if the wife bring a writ of dower againſt any of them, they may vouch the heire, and he may pleade the aſſignement which he himſelfe hath made in ſafety of himſelfe, leſt they ſhould recover in value againſt him, [d] ſo as there is a privity in this reſpect betweene the heire and the feoffees, and by this meanes the ſame may be pleaded by the heire that made it(5). And ſo it is adjudged in our bookes, which is a notable caſe for many purpoſes.

(9. Co. 18. Mo. 26.)

[d] 33. E. 3. tit. Judgm. 254. 8. E. 3. 69. 17. E. 3. 58. b 3. E. 3. tit. Dower 76. 3. E. 3. Vouch. 196. See the ſecond part of the Inſtitut. W. 1. cap 49.

Fiftly, If aſſignement be made [e] by any diſſeiſor, abator, intruder, or any wrong doer, of lands or tenements, if they came to that eſtate by colluſion and covin betweene the widow and them, albeit the widow hath juſt cauſe of action, and the aſſignment be indifferently made after judgement by the ſheriffe of an equall third part, yet ſhall the diſſeiſee, &c. avoyd it, for covin in this caſe ſhall ſuffocate the right that appertained to her, and ſo the wrongfull manner ſhall avoyd the matter that is lawfull (6).

[e] 25. Aſſ. p. 1. 44. Aſſ. 29. 44. E. 3. 46. 27. Aſſ. 74. 11. H. 4. 60. 15. E. 4. 4. 19. H. 8. 12. Lit. 83. 151. (2. Co. 67. 1. Ro. Ab. 549. 1. Sid. 21. Poſt. 357. 3. Co. 78. 6. Co 58. a 5. Co. 30. b.)

Sixtly, An aſſignment by [f] (7) a diſſeiſor, abator, intruder, &c. if there be no covin, is good, unleſſe it be prejudiciall to the diſſeiſee, &c. As if the huſband [g] infeoffeth the younger ſonne with warranty, the eldeſt ſonne diſſeiſe the yongeſt ſonne, and endow the widow, in this caſe the yonger ſonne ſhall avoyd this aſſignment (8), for otherwiſe he ſhall loſe his warrantie: but a diſſeiſor, abator, intrudor, &c. cannot aſſigne a rent out of the land to her for her dower, to bind the diſſeiſee, &c.

[f] 12. Aſſ. p. 20. 21. E. 3. 12. [g] 3. E. 3. tit. Dower 77. 16. E. 2. tit. dower Statham. (Poſt. 357.)

Seventhly, No aſſignement can be made, but by ſuch as have a freehold (9), (as hath beene ſaid) or againſt whom a writ of dower doth lie, and therefore [h] an aſſignment by a gardian in ſocage is voyd (10), but a gardian in chivalry may aſſigne dower (11), as ſhall be ſaid hereafter, becauſe a writ of dower lieth againſt him, and not againſt a gardian in ſocage.

[h] 31. E. 1. Dower 151. 29. Aſſ. 68. 15. E. 3. Dower 69. (6. Co. 57.)

Eightly, And before the gardian in chivalry enter(12), the heir within age [i] may aſſigne dower, for the gardian may waive the wardſhip. And ſo briefly have you heard, of what, by whom, and to whom the aſſignment muſt be made (13). But there needeth neither livery of ſeiſin, nor writing, to any aſſignement of dower, becauſe it is due of common right.

[i] 7. R. 2. admeſurement. 4. F.N.B 148. f. (Poſt. 38. b.)

Sect. 40.

DOWMENT ex aſſenſu Patris eſt lou le pier eſt ſeiſie de tenements en fee, et ſon fits et heire apparent, quant il eſt eſpouſe, endowe ſa feme al huys del monaſterie ou del Eſgliſe, de parcel de terres ou tenements ſon pier de aſſent ſon pier, et aſſigne la quantitie et les parcels. En ceo caſe apres le mort le fits,

DOwment by aſſent of the father is, where the father is ſeiſed of tenements in fee, and his ſonne and heire apparent, when he is married, endoweth his wife at the monaſtery or church doore, of parcel of his fathers lands or tenements with the aſſent of his father, and aſſignes the quantity and parcels. In this caſe after the death of the

LOU le piere eſt ſeiſie de tenements en fee. Tenant for life of a carve of land, the reverſion to the father in fee, the ſonne and heire apparent of the father endoweth his wife of this carve, by the aſſent of the father, the tenant for life dieth, the huſband dieth, the reverſion was a tenement in the father, and yet this is no good endowment *ex aſſenſu patris*, becauſe the father at the time of the aſſent had but a reverſion expectant upon a freehold, whereof he could not have endowed his owne wife(14); and albeit the tenant for life died, living the huſband, yet, *quod initio non valet, tractu temporis non convaleſcet*

Brit. ca. 109. Fleta lib. 5. ca. 22. 23. Bract. lib. 5. 305 6. E. 3. 54. F.N.B. 150. (1. Ro. Ab. 677.)

(1. Sid. 3. Poſt. 36. b.)

(1) This caſe of aſſignment of dower by one of two or more jointenants muſt be underſtood to be, where the huſband has been ſolely ſeized during the coverture, and afterwards conveys or deviſes the land to two jointly and dies; for the wife of a jointenant is not dowable. See poſt ſect. 45.

(2) 9. E. 3. 38. *Husband and wife are jointenants of land, of which the wife of I. S. is dowable: the husband alone aſſigns: it is good, and ſhall bind the wife.* 7. H. 6. 33. Hal. MSS. See Perk. Sect. 399. and Keilw. 128. b.

(3) Vid. *the ſtatute of Weſtminſter* 1. *cap.* 48. 4. E. 3. 42. M. 8. Jac. C. B. n. 15. D. D. *adjudged accordingly in Throgmorton's caſe.* Hal. MSS —However, Mr. Perkins ſeems to think, that ſuch an aſſignment by one feoffee may be pleaded in bar of dower by the other feoffees. Perk. ſect. 402.

(4) 31. E. 3. *Scire facias* 99. Hal. MSS.

(5) Vid. *if the heir by receit ſhall have the plea. Kelw.* 128. Hal. MSS.

(6) See further on this ſubject Hugh. on Orig. Wr. 199.

(7) 3. E. 3. 1. 50. E. 3. 7. 8. Hal. MSS.

(8) 3. E. 3. 18. *By Herle, the aſſignment ſhall bar in ſuch a caſe.* Hal. MSS.

(9) Acc. Perk. 404.

(10) A quære is made of this in 1. Ro. Abr. 682.

(11) And yet guardian in chivalry had only a chattel Intereſt. See poſt 38. b. where it is explained why a dower might be brought againſt him.

(12) *But not after entry of the guardian.* 9. H. 6. 6. Hal. MSS.

(13) See further as to aſſignment of dower poſt 39. b. Perk. ſect. 393. to 423. Hugh. on Orig. Wr. 194. and 198. New Abr. *Dower* D. and Vin. Abr. *Dower* S. to A. a.

(14) S. p. acc. Perk. 445.

la feme entera en mesme le parcell sauns auter assignement de nulluy. Mes il ad este dit en cest case, que il covient a la feme daver un fait de le pier provant son assent et consent de cel endowment. M. 44. E. 3. fol. 45 (1).

son, the wife shall enter into the same parcell without the assignement of any. But it hath been sayd in this case, that it behooveth the wife to have a deed of the father to proove his assent and consent to this endowment. *M.* 44. *E.* 3. *f.* 45.

valescet. And for the most part, dower *ad ostium ecclesiæ*, and *ex assensu patris*, ensue the nature of a dower at the common law. And for these the wife may have a writ of dower, albeit they be certaine, as for the third part at the common law (2).

Et son fits et heire apparent. It must be such a sonne and heire apparent, as must continue an heire apparent, and therefore the yongest sonne and heire apparent cannot endow his wife *ex assensu patris*, of lands whereof the father is seised in fee of the nature of Borough English, because the father may have another sonne, and then the husband is not heire apparent: and it is in respect of the constant and perpetuall apparance, that the son and heire apparent may endow his wife of his father's lands. And so it is of lands in Gavelkind: [*k*] and this is the reason that dower *ex assensu fratris*, or *consanguinei*, is not good, for that albeit he is heire apparent at that time, yet for the common possibility that he may have issue, and every issue that the brother or cosin should have afterwards, shall exclude him, he is no such heire apparent as the law intendeth. [*l*] But an endowment *ex assensu matris*, is as good as *ex assensu patris*, because there is an apparance of a constant and perpetuall heire. And some have said, that if the father after his assent be attainted of treason or felony, that the wife in that case loseth her dower, because her husband doth not continue heire (3).

[*k*] 8. H. 3. Dower 193. 9. H. 3. Dower 191. 11. H. 3. Dower F.N.B. 150. l. 29. E. 3. Dow. 134.

[*l*] F.N.B. 150. e. Flet. l. 5. cap. 22. Bract. lib. 4. 305. Ambr. Gorge's case. 6. Co. 22.

Quant il est espouse, endow sa feme. [*m*] In this case, albeit the freehold and inheritance is in the father, yet in respect (as hath been said) of the constant and perpetuall apparance of the heire, the heire apparent doth endow, and the father doth but assent. And therefore where the father did endow the wife of his sonne and heire apparent, that endowment was holden void, because the husband in that case must endow, and the father assent.

[*m*] 2. H. 3. Dower 199. (Post. 38. a.) 6. E. 3. 34. 8. E. 2. Dower 154.

And it is holden in 2. H. 3. Dower 199 (4), That if the heire apparent be within age, yet the endowment *ex assensu patris* is good. Note, Littleton in the case of dower *ad ostium ecclesiæ*, doth put the husband of full age, but here of the dower *ex assensu patris*, he speaketh generally.

2. H. 3. Dower 199.

Et assigne le quantitie & les parcels. So as both in dower *ad* [*n*] *ostium ecclesiæ*, & *ex assensu patris*, the certainty must be expressed. And therefore where books speake of a moiety, it is intended (as hath beene said) of an halfe in certaine (5).

[*n*] 9. H. 3. Dower 190. F.N.B. 150. m.

8. E. 2. Dower 154.

Apres la mort le fitz sa feme entera. In this case after the death of the husband the wife shall enter, or have a writ of dower albeit the father be alive.

Que il covient al feme daver un fait provant sont assent a cel endowment.

Un fait. A deed, *factum*, this word (deed) in the understanding of the common law is an instrument written in parchment or paper, [*o*] whereunto ten things are necessarily incident: viz. First, writing. Secondly, in parchment or paper. Thirdly, a person able to contract. Fourthly, by a sufficient name. Fiftly, a person able to be contracted with. Sixtly, by a sufficient name. Seventhly, a thing to be contracted for. Eightly, apt words required by law. Ninthly, sealing. And tenthly, delivery. A deed cannot be written upon wood, leather, cloath, or the like, but onely upon parchment or paper, for the writing upon them can be least vitiated, altered or corrupted.

[*o*] Bract. lib. 2. fo. 33. &c. & l. 5. fo. 396. Brit. fol. 34. 65. 66. 101. Flet. l. 3. ca. 14. & lib. 6. ca. 32. & lib. 3. c. 3, 4, 5, 6. (2. Co. 5. Post 229. a. 2. Ro. Abr. 21.) (5. Co. 74. 76.)

If a deed [*p*] be alledged in *count* or *plea*, regularly it must be shewed to the court (6), to the end the court may judge whether there be apt words to make it a good contract according to the rule of law, whereof more shall be said in the chapter of conditions. But if *non est factum* be pleaded (7), because thereby the sealing, delivery, or other matter of fact is denied, it shall be tried by the country. Of deeds some be indented, and some be deeds poll. Of indented, some be bipartite, some tripartite, some quadripartite, &c. whereof more shall be said in the chapter of conditions. Also of deeds, some be inrolled, and some [*q*] be not inrolled; if it be inrolled according to the statute of 27. Hen. 8. cap. 10. it must be inrolled in parchment for the strength and continuance thereof, and not in paper, and so was it resolved in parliament by

[*p*] 4. E. 2. Fines 116. 14. E. 2. Ley 79. 4. E. 2. Ley 78. 27. H. 6. 10. 27. H. 8. 22. F.N.B. 122. I. (5. Co. 18.)

[*q*] Brit. fol. 101. Bract. l. 2. fol. 33. Fleta lib. 3. ca. 14. (2. Inst. 673.)

(1) No reference to the Year Book, in L. and M. Roh. or P. It was first inserted in Redman's edition. See the observation on this addition to Littleton post 36. a.—(2) See acc. ante 34. b. n. 3.—(3) See Plowd. Quær. 181.—(4) *This book is not to the purpose.* Hal. MSS.—(5) *Dower good of a moiety in common in the said book.* Vid. ante. Hal. MSS. See acc. 9. H. 3. Dower 190. which is the book meant by lord Hale. See also ante 34. b. n. 1.—(6) Where a deed ought to be shewn. *Vid.* 12. *H.* 7. 12. 9. *H.* 7. 15. 9. *E.* 4. 53. 4. *H.* 7. 10. 14. *H.* 8. 18. 18. *H.* 8. 9. *F. N. B.* 210. *E. in formdon. Dr. Leyfield's case* 10. *Rep. Where a thing cannot pass without deed in respect of the nature of the things, as herbage common in gross, &c. one ought to shew deed. So in respect of the quality of the lessor, as count or plea of demise of abbot with consent of convent T.* 36. *Eliz. Goffe and Thurston, mayor and commonalty* P. 5. Jac. B. R. *Garnons and Kenton, master and fellows of a college.* P. 9. Jac. *Lord Norris's case* B. R. *But yet count in ejectment of demise by husband and wife is good without shewing deed, though wife cannot demise without deed, as it seems. Dy.* 91. *when one declares on a deed, where it is not necessary. Count in* ejectione firmæ *on demise* per scriptum indentatum *without shewing, and yet good.* M. 42. 43. El. B. R. *Hall and Mather; and it seems, that defendant shall not have oyer. Count in debt for rent on devise of the reversion* in scriptis hic in curia prolatis, *yet the other shall not have oyer of the testament.* 1651 *Fitton's case. A covenants with B to stand seised to the use of C his son: the son may plead this deed without shewing it, because the estate is executed by the statute.* H. 11. Car. B. R. *Crook n.* 12. *Stockman and Hampson.* M. 5. Jac. C. B. *So it seems, if it was with the party himself.* M. 6. Jac. C. B. *Debt on obligation by commissioners of bankrupt good without shewing deed.* H. 6. Car. B. R. *Crook n.* 5. *Gay and Fielder.* Hal. MSS. See further on *shewing of deeds* and *oyer* in Com. Dig. *Pleader* O. P. Wils. vol. 1. part 1. page 121. vol. 2. page 1. and Sheph. Touchst. 73. but most fully in Vin. Abr. *Faits*, M. a. to M. a. 32.—(7) Where to plead *non est factum. Dy.* 112. *In case of* sigillum avulsum *before issue, one may plead* non est factum. 7. *H.* 6. 18. *If a deed be suspicious by rasure or avulsion of seal, the party on oyer of deed may demur, and put it into the judgment of the court, or plead* non est factum. T. 40. El. B. R. Rot. 202. *Obligation with condition to save harmless against Tracy with a blank: a stranger after delivery fills up the blank with a christian name by consent of the obligor; yet adjudged to avoid the deed, because material. But if the addition is not material, as the addition of a county, and it be by a stranger, it doth not avoid the deed, though if by the party himself it doth avoid it.* Vid. H. 43. Eliz.

by the judges in *anno* 23. Eliz. Now for the reſt of the parts of a deed, you ſhall read thereof plentifully in our bookes, and in my Reports; which by this ſhort inſtruction you ſhall eaſily underſtand (1).

Un fait de feoffement. It is properly called *Charta feoffamenti* (2), and yet if ſuch a deed be denied, the plea is *non eſt factum*. So as of deeds ſome concerne the realtie, as here a deed of feoffement; ſome the perſonaltie, as a deed of gift of goods, obligations, bills, &c. And ſome mixt, whereof more ſhall be ſaid in the chapter of releaſes.

If a man deliver a writing ſealed, to the partie to whom it is made, as an eſcrow to be his deed upon certaine conditions, &c. this is an abſolute deliverie of the deed, being made to the partie himſelf, for the deliverie is ſufficient without ſpeaking of any words (otherwiſe a man that is mute could not deliver a deed), and tradition is onely requiſite, and then when the words are contrarie to the act which is the deliverie, the words are of none effect, *non quod dictum, ſed quod factum eſt inſpicitur*. And hereof though there hath been [*r*] variety of opinions, yet is the law now ſettled agreeable to judgements in former times, and ſo was it reſolved by the whole court of Common Pleas (3). But it may be delivered to a ſtranger, as an eſcrowe, &c. becauſe the bare act of deliverie to him without words worketh nothing (4). And this is the ancient diverſitie [*ſ*] in our bookes, the record whereof I have ſeene agreeable with the reaſon of our old bookes(5). And as a deed may be delivered to the partie without words, ſo may a deed be delivered by words without any act of deliverie 6), as if the writing ſealed lyeth upon the table, and the feoffor or obligor ſaith to the feoffee or obligee, goe and take up the ſaid writing, it is ſufficient for you, or it will ſerve the turne, or take it as my deed, or the like words, it is a ſufficient delivery (7).

(2. Rol. Ab. 26. 9. Co. 137. Noy 50. 11. Cro. Jam. 85.) 35. Aſſ. Pl. 11. Tr. 29. H. 8. Dyer. 95. (1. Cro. El. 835. Hob. 246. Dy. 34. b. N. Ben. 75. 1. And. 4. Cro. El. 884. 1. Raym. 197. Ow. 95. Dy. 192. b. Dal. 104.)

[*r*] Tr. 43. Eliz. inter Haukeſby & Lacher in the King's Bench. Hill. 12. Ja. R. in the Common place. (5. Co. 119. b.)

[*ſ*] 13. H. 8. 19. H. 8. 8. 4. E. 3. 18. 13. H. 4. 8. (3. Co. 26. b. 1. Leon. 140 2. Ro. Abr. 24.)

Of deeds and their diſtinctions you ſhall reade excellent matter in antiquitie. [*t*] *Cartarum, alia regia, alia privatarum; et regiarum, alia privata, alia communis, et alia univerſitatis. Privatarum, alia de puro feoffamento et ſimplici, alia de feoffamento conditionali ſive conventionali, alia de recognitione pura, vel conditionali, alia de quiete clamantia, alia de confirmatione, &c. Verba intentioni non e contra debent inſervire.*

[*t*] Bract. lib. 2. fol. 33. b. Fleta lib. 3. cap. 14.

Carta non eſt [*u*] *niſi veſtimentum donationis. Carta non eſt niſi veſtimentum orationis. Nemo tenetur armare adverſarium ſuum contra ſe. Scriptum eſt inſtrumentum ad inſtruendum quod mens vult. Carta eſt legatus mentis.* [*w*] *Benignæ ſunt faciendæ interpretationes cartarum propter ſimplicitatem laicorum, ut res magis valeat quam pereat. Nihil tam* [*x*] *conveniens eſt naturali æquitati, quam voluntatem domini volentis rem ſuam in alium transferre ratam habere.*

[*u*] Fleta lib. 6. ca. 28. Bracton lib. 2. fo. 34.

[*w*] Bracton lib. 2. f. 94 95.

[*x*] Idem l. 2. fo. 18.

Re, verbis, ſcripto, conſenſu traditione
Junctura veſtes ſumere pacta ſolent.

[*y*] Pl. Com. in Throgmorton's caſe fol. 161. b.

Verba cartarum fortius accipiuntur contra proferentem. Generale dictum generaliter eſt intelligendum. Verba debent intelligi ſecundum ſubjectam materiam. Carta de non ente non valet.

Note, the father may [*a*] make a deed to the wife of his ſonne, and ſo is the law holden, for that the father's land by his aſſent is charged with a future freehold whereunto a deed is requiſite; but to a dower *ad oſtium eccleſiæ* no deed is requiſite. And here it is not well done (of him that made the addition to our author) to vouche 44. E. 3. fo. 45. becauſe the author himſelfe vouched it not, for if he [*b*] meant to have vouched authorities, he would have vouched more than one in this caſe, and thoſe that [*c*] he vouched he would have cited truly, but this caſe is miſtaken both in the yeare and in the leafe, for where it is cited in 44. E. 3. it is in 40. E. 3. and where he ſaith it is fo. 45. it is fo. 43.

[*a*] 3. E. 2. Dower 126. 8. E. 2. Dower 154. 6. E. 3. 34. 40. E. 3. 43.

[*b*] 11 H. 3. Dower 186. 14. H. 3. Dower.

[*c*] 2. E. 2. Dower 125. Vid. Stat. Walliæ anno 12. E. 1. fo. 18. in veteri magna carta. 47. H. 3. Dower 174.

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

[*d*] F.N.B. 150. p. Glanvil. lib. 6. ca. 1. 2. 3.

Sect. 41.

ET ſi apres l'mort le baron el enter, et agree a aſcun tiel dower de les dits dowers ad oſtium eccleſiæ, &c. *donque*

AND if after the death of her huſband ſhe entreth, and agree to any ſuch dower of the ſaid dowers at the church doore, &c. then

EL eſt conclude a claimer aſcun auter dower per la common ley. (8) Wherein a diverſitie is to be obſerved between a dower *ad oſtium eccleſiæ*, or *ex aſſenſu patris*, and a joynture

Eliz. Cam. Scacc. *the caſe of Fox and Markham.* Vid. *Noy ſo.* 112. *n.* 487. *A B and C are bound jointly and ſeverally: the ſeal of A is torn off; in debt againſt B he may plead* non eſt factum. *But if A B and C covenant ſeverally, and the ſeal of A is torn off, it will not avoid againſt the others.* 5. *Rep.* 23. *Vide* where by raſure of the deed the intereſt is loſt. *Where a thing may paſs without deed, as in caſe of feoffment or leaſe, though the deed be raſed, the intereſt continues.* H. 10. Car. B. R. *Crook n.* 8. *Miller and Manwaring. But if leaſe by abbot and convent be interlined by leſſee, the intereſt is deſtroyed.* H. 9. Eliz. rot. 1056. *Bendl. Arden and Michell.* Hal. MSS.—See further as to pleading *non eſt factum* to a deed Sheph. Touchſt. 74. and Vin. Abr. *Faits*, N. a. and as to raſure and alteration of deeds and breaking off ſeals Sheph. Touchſt. 68. 69. Vin. *Faits*, T. to Z. and Com. Dig. *Fait*, F.

(1) See further as to deeds, Perk. c. 2. ante 6. a. and n. 5. there. Sheph. Touchſt. c. 4. Vin. Abr. tit. *Deeds* and alſo tit. *Faits*, Com. Dig. *Fait.*

(2) For the formal parts of a deed of feoffment, ſee ante 6. a.

(3) In Mo. 697. there is an opinion of ſome judges in 39. Eliz. to the contrary; but the authorities ſince are with lord Coke. See acc. Mo. 642. Noy 6. Hob. 246. 9. Co. 137. Sty. 251. 6. Mod. 218.

(4) See Dy. 167. b.

(5) Nota, *if dean and chapter ſeal a deed, it is their deed immediately; but if at the ſame time they make letter of attorney to deliver it, this is not their deed till delivery.* T. 21. Jac. B. R. rot. 662. *Hayward and Fulcher.* Hal. MSS. As to the former point, ſee acc. Dav. 44. 2. Leon. 97. and Cro. Eliz. 167. and as to the latter point the caſe cited by lord Hale in W. Jo. 170. and Palm. 504. according to which the court was divided in opinion.

(6) *The obligor ſeals obligation, and throws it upon the table without other circumſtances; this is not a delivery. But if he throws it towards the obligee, or if the obligee immediately takes it, and the obligor ſays nothing, it is a delivery.* M. 29. and 30. Eliz. Rot. 636. *Staunton and Chambers.* Hal. MSS.—See S. C. in Ow. 95. Cro. Eliz. 122. Dy. Ed. 1688. fo. 192. b. in marg.

(7) Trin. 3. Eliz. *Gibſon* verſ. *Tenant Bendl. n.* 140. Hal. MSS.—See S. C. in N. Bendl. 92. and Dy. 192.—See further as to the delivery of deeds. Sheph. Touchſt. 57. Com. Dig. *Fait* A. 3. Vin. Abr. *Faits* I. and K.

(8) Vid. 32. *E.* 1. *Dower* 126. 177.—Hal. MSS.

(Doc. Pla. 149.) Vernon's case 4. Co. 1. 1. Mariæ. Dyer 91. 31. E. 3. Scire. fac. 99. 20. E. 4. 3.

joynture or estate made to the wife in satisfaction of her dower, for one of those dowers being assented unto is a barre of the dower at the common law, but a joynture was no barre of her dower at the common law. For a right or title that one hath to a freehold cannot be barred by acceptance of collaterall satisfaction (1). But a woman cannot have a double dower, *viz. ad ostium ecclesiæ, &c.* and at the common law, for the wife of one husband can have but one dower. But since Littleton wrote, by the statute of 27. H. 8. if a joynture be made to [a] the wife, according to the purview of that statute, it is a barre of her dower, so as the woman shall not have both joynture and dower, and to the making of a perfect joynture within that statute fixe things are to be observed. First, her joynture by the first limitation is to take effect for her life in possession or profit presently after the decease of her husband. Secondly, that it be for the terme of her owne life, or greater estate. Thirdly, it must be made to herself, and to no other for her. Fourthly, it must be made in satisfaction of her whole dower, and not of part of her dower. Fifthly, it must either be expressed or averred to be in satisfaction of her dower. And sixthly, it may be made either before or after marriage.

el est conclude de claimer ascun auter dower per le common ley dascuns terres ou tenements queux fuerent a sa dit baron. Mes si el voit, el poit refuser tiel dower ad ostium ecclesiæ, &c. *et donque el poet estre endow solonque le cours del common ley.*

she is concluded to claim any other dower by the common law of any the lands or tenements which were her husband's, but if she will, she may refuse such dower at the church dore, &c. and then she may be endowed after the course of the common law.

(Dy. 248. a. 317. a.)

27. H. 8. cap. 10.

[a] 12. E. 2. Dower 158, 27. H. 8. cap. 10. versus finem.

(4. Co. 1. 3, Cro. Jam. 489.)

(1. Sid. 3.)

Leake & Randal's case, 4. Co. 4.

(3. Co. 25. 27.)

Vide Vernon's case ubi supra, fo. 2. b.

Dyer 19. Eliz. 358.

Concerning the first, if a man make a feoffinent in fee of lands or tenements either before or after marriage to the use of the husband for life, and after to the use of A for life, and then to the use of the wife for life in satisfaction of her dower, this is no joynture within the statute, because by the first limitation it was not to take effect in possession or profit presently after the death of her husband. And albeit in that case A should die living the husband, and after the death of the husband the wife entreth, yet this is no barre of her dower, but she shall have her dower also (2), because it is not within the said statute, and (as it hath been said) by the common law it was no barre of her dower (3). 2. It must be either in fee taile, or for terme of her owne life, for an estate for life or lives of one or many other, or to her for a hundred or a thousand yeares, &c. if she live so long, or without such limitation is no barre of her dower, albeit they be expresly made in satisfaction of her dower, *Causa qua supra* (4). 3. If an estate be made to others in fee simple, or for her life upon trust, so as the estate remaine in them, albeit it be for her benefit, and by her assent, and by expresse words to be in full satisfaction of her dower, yet is this no barre of her dower (5). The fourth is so plaine as it needeth not any example. 5. A devise by will cannot be averred to be in satisfaction of her dower, unlesse it be so expressed in the will (6). 6. If the joynture be made before marriage, the wife cannot waive it and claime her dower at the common law, but if it be made after marriage, she may waive the same, and claime her dower (7). I have touched these points the more summarily because they are resolved at large with the reasons thereof in Vernon's case *ubi supra*. So as to comprehend all in few words, a joynture (which in common understanding extendeth as well to a sole estate as to a joynt estate with her husband) is a competent livelihood of freehold for the wife of lands or tenements, &c. to take effect presently in possession or profit after decease of the husband for the life of the wife at the least, if she herselfe be not the cause of determination or forfeiture of it. Which see more at large in Vernon's case *ubi supra*. If a joynture be made to a wife of lands before the coverture, and after the husband and wife alien by fine those lands so conveyed for her joynture, she shall not be endowed of any of the other lands of her husband. But if the joynture had been made after marriage, notwithstanding the alienation by the husband and wife thereof by fine, yet seeing her estate was originally waivable, and the time of her election came not till after the decease of her husband, she may claim her dower in the residue of her lands. But in the other case, the joynture of the wife made before marriage was not waivable at all. Now as the dower *ad ostium ecclesiæ*, and *ex assensu patris*, is better for the wife, because in respect of the certainty she may enter, than the dower at the common law, where she is driven to her reall action, and therefore Britton calleth dower *ad ostium ecclesiæ*, and *ex assensu patris* establishment of dower by the husband and assignment of dower after his decease (for nothing that is uncertaine is established): so a joynture (that hath the force of a barre of dower by the said act of 27. H. 8.) is, as hath been said, more sure and safe for the wife than either dower *ad*

Brit. cap. 102, 103.

(1) *Rent granted by parol out of the same land, of which she is dowable, bars; not if out of other land.* 1. *Mar. Dy.* 91. *Sturge's case.* Hal. MSS.—See Cro. Eliz. 128. But though a collateral satisfaction is not pleadable at law in bar of dower, yet acceptance of a term of years, or of a sum of money, or of any other kind of collateral satisfaction, in lieu of dower, is a good bar in equity. See Lawrence and Lawrence 2. Vern. 365. and note that lord Somers's decree against the wife in that case, which was afterwards reversed by lord keeper Wright, and finally in the house of lords, was objected to, not on account of any doubt of dower's being barrable in equity by a collateral satisfaction, but merely because the devise to the wife was not expressed to be in satisfaction of dower. See further as to bar of dower in equity by collateral satisfaction. 1. Eq. Cas. Abr. *Dower* B. and 9. Mod. 152.

(2) T. 20. Jac. *Sherwell's case. Hutt.* 51. *accord.* Hal. MSS.

(3) But *quære* whether a court of equity will not confine her to one, and compell her to elect which she will have. See the references in note 1. *supra.* and the case of Vollett and Longdon cited in Jordan and Savage New Abr. *Jointure* B. 6.

(4) Vid. M. 29. and 30. Eliz. C. B. Rot. 334. *Devise to the wife for 7 years.* Hal. MSS.

(5) But though this may be true at law, yet it is now settled, that a trust estate, being equally certain and beneficial as what is required at law, or even an agreement to settle lands as a jointure, is a good equitable jointure in bar of dower. See the case of Jordan and Savage reported in New Abr. *Jointure* B. 5.

(6) 10. Eliz. *Dy.* 266. Hal. MSS.—But though a devise cannot at law be averred to be in satisfaction of dower, if the will is silent, yet sometimes our courts of equity have been induced by *special* circumstances to consider such devises as a satisfaction; and it has therefore been decreed, that the wife should make her election to waive her dower and accept under the will, or to waive the will and take her dower. In Lawrence and Lawrence 2. Vern. 365. lord chancellor Somers made such a decree; because he inferred an intention to give in bar of dower, from the testator's having devised the residue of his *whole* estate to another. But this decree was reversed by lord keeper Wright, and the reversal was afterwards affirmed in the house of lords, and this is said to have settled the doctrine. 1. Eq. Cas. Abr. *Dower* B. pl. 2. and see acc. Prec. in Chanc. 133. Vin. Abr. *Devise* T. c. pl. 45. 2. Atk. 427. 3. Atk. 8. 436. See also the case of Broughton and Errington adjudged in Dom. Proc. 8th March 1773. However, notwithstanding the doctrine on which the case of Lawrence and Lawrence was finally decided, and the frequent recognition of that case, devises have been since frequently deemed a satisfaction of dower, on account of very strong and special circumstances; as where allowing the wife to take a double provision would have been quite inconsistent with the dispositions of the will. On this latter principle lord chancellor Northington is said to have decided for a satisfaction of dower in the case of Arnold and Kempstead, which was heard in July 1764, and lord chancellor Camden in the case of Villareal and lord Galway, which was heard soon after the former case.—(7) *Though she be within age* ut videtur *she cannot*

ad oſtium eccleſiæ, or *ex aſſenſu patris*, for beſides it is as certaine as thoſe others, and ſhe may enter into it, after the death of her huſband and not be driven to her action. She ſhall not be barred of her joynture albeit her huſband commit treaſon or felonie, as ſhe ſhall be both of her dower *ad oſtium eccleſiæ* and *ex aſſenſu patris* by the common law. But now at this day by the ſtatutes of 1. E. 6. cap. 2. and 5. E. 6. cap. 11. a wife ſhall not loſe any title of dower which to her was accrued, by the attainder of her huſband by any manner of murder or other felony whatſoever. But [*a*] if the huſband be attainted of high treaſon or petie treaſon ſhe ſhall be [*b*] barred of her dower at this day, ſo long as that attaindrie ſtandeth in force.

Bract. 311. lib. 4. Britton ca. 15.

1. E. 6. ca. 6. 5. E. 6. ca. 11. (Poſt. 40. b.)

[*a*] Stanford 195. b.
[*b*] Vid. in the chapter of Garranty. Sect.

Conclude, commeth of the [*c*] verbe *concludo*, which is derived of *con* and *claudo* to determine, to finiſh, to ſhut up, to eſtoppe or barre a man, to plead or claime any other thing, Vid. Eſtoppell.

[*c*] Pl. Com. 276. b. per Walſh. Vid. Sect. 693. 695. 667. 679.

Sect. 42.

ET nota, que nul feme ſerra endow ex aſſenſu patris *en le forme avantdit, mes lou ſa baron eſt fits et heire apparant a ſon pier.* Quære *de ceux deux caſes de dowment* ad oſtium Eccleſiæ, &c. *ſi la feme al temps del mort ſa baron, ne paſſe lage de ix. ans, ſi el avera dower ou non.*

AND note, that no wife ſhall be endowed *ex aſſenſu patris* in forme aforeſaid, but where her huſband is ſonne and heire apparant to his father. *Quære* of theſe two caſes of dowment *ad oſtium eccleſiæ, &c.* if the wife, at the time of the death of her huſband be not paſt the age of 9. yeares, whether ſhe ſhall have dower or no.

NUL feme ſerra endowed, &c. Of this ſufficient hath beene ſaid before.

Quære de ceux deux caſes de dowment ad oſtium Eccleſiæ, &c. And it ſeemeth, that theſe dowers being made by aſſent, &c. that the ſame are good albeit the wife be within the age of nine yeares, for *Conſenſus tollit errorem.* But without queſtion, a joynture made to her under or above the age of nine yeares, is good.

(Ante 33. a.)

Sect. 43.

ET nota, que en touts caſes lou le certainty appiert, queux terres ou tenements feme avera pur ſa dower, la le feme poit entrer apres la mort ſa la baron ſans aſſignement de nul luy. Mes lou le certaintie ne appiert, ſi come deſtre endow de la tierce part daver en ſeveraltie, ou del moitie ſolonque le cuſtome de tener

AND note, that in all caſes, where the certaintie appeareth what lands or tenements the wife ſhall have for her dower, there the wife may enter after the death of her huſband without aſſignement of any. But where the certainty appeares not, as to be endowed of the 3. part, to have in ſeveralty, or the moity according to the cuſtom

ET nota, que en touts caſes, &c. In all caſes, where the demand of the dower is certaine, as in caſe of dower *ad oſtium Eccleſiæ* or *ex aſſenſu patris*, there the wife after the death of the huſband may enter (1). But where the demand is uncertaine, as in writs of dower at the common law, there albeit the thing it ſelfe be certain, yet ſhall ſhe not take it without aſſignement. As if a woman bring a writ of dower of three ſhillings rent, albeit ſhe ought to be endowed of one ſhilling, yet cannot ſhe after judgment diſtrein for twelve pence before aſſignment (2), becauſe the demand was uncertaine

40. E. 3. 22. 43. 45. E. 3. 4. 20. E. 3. barre. 132. 8. E. 2. Entry 75.

(Ant. 34. b)

not waive. Hal. MSS.—The important queſtion, whether a jointure on an infant before marriage may be waived, was not quite ſettled till the caſe of Drury and Drury, which was heard before lord chancellor Northington in Hillary 1. *Geo.* 3. The points determined by lord Northington in that caſe were, 1. that the ſtatute of 27. H. 8. which introduced jointures, extends to adult women only, infants not being particularly named; and therefore that notwithſtanding a jointure on an infant, ſhe may waive the jointure and elect to take dower: 2. that a covenant by the huſband that his heirs, executors, or adminiſtrators ſhall pay the wife an annuity for her life in full for her *jointure* and in bar of dower, without expreſſing that it ſhall be charged on any *particular* lands or be ſecured out of lands *generally*, is not a good *equitable* jointure within the ſtatute: 3. that a woman being an infant cannot by any contract previous to her marriage bar herſelf of a diſtributive ſhare of her huſband's perſonalty in caſe of his dying inteſtate. From this decree by lord Northington there was an appeal to the houſe of lords, and after hearing the judges *ſeriatim* on the queſtion, whether a jointure on an infant could be waived, on which they were divided in opinion, the decree was *wholly* reverſed. See the printed caſes in the houſe of lords of the year 1762. Before *Drury* and *Drury* the only *judicial* opinions as to the effect of a jointure on an infant were Sir Joſeph Jekyll's in *Cray* and *Willis* againſt its barring, and lord Hardwicke's in *Keys* and *Price* and in *Harvey* and *Aſhley* to the contrary. See Vin. *Dower* Q. 4. pl. 18. Barnad. Ch. Rep. 117. and 3. Atk. 607.

(1) *It ſeems, that though it be aſſigned, the freehold is not in her till entry.* 9. E. 3. 5. Hal. MSS.

(2) *But* videtur, *that after the third part ſet out by the ſheriff ſhe may enter immediately before the writ returned. Yet as to the damages the writ ought to be returned, becauſe another judgment is to be given.* M. 19. Jac B. R. *Howard* verſus *Cavendiſh.* Vid. 10. *Bliz. Dy* 278. Hal. MSS.

taine. And ſo it is if two tenants in common be, and the wife of one of them bring a writ of dower to be endowed of a third part of a moitie, and have judgement to recover, yet cannot ſhe enter without aſſignement, albeit the aſſignement cannot give her any certainty becauſe her huſband's ſtate was incertaine. See more of this before ſection 39.

en ſeveraltie, en tielz caſes ils covient que ſa dower ſoit a luy aſſigne apres le mort del baron; pur ceo que non conſtat devant aſſignement, quel part des terres ou tenements el avera pur ſa dower.

to hold in ſeveraltie, in ſuch caſes it behoveth that her dower be aſſigned unto her after the death of her huſband; becauſe it doth not appeare before aſſignement, what part of the lands or tenements ſhe ſhall have for her dower.

Sect. 44.

Of this ſufficient hath beene ſaid before, and that in this caſe the wife cannot enter without aſſignement.

MES ſi ſoient deux jointenants de certaine terre en fee, et lun alien ceo, que a luy affiert, a un auter en fee, que prent feme et puis devie; en ceo cas la feme pur ſa dower avera le tierce part de la moitie que ſa baron ad purchaſe, a tener en common (come ſa part amountera) oveſque lheire ſa baron, et oveſque lauter jointenant que ne aliena pas; pur ceo que en tiel cas ſa dower ne poit eſtre aſſigne per metes et bounds.

BUT if there be two joyntenants of certaine land in fee, and the one alieneth that which belongeth to him, to another in fee, who taketh a wife, and after dieth; in this caſe the wife for her dower ſhall have the third part of the moitie which her huſband purchaſed, to hold in common (as her part amounteth) with the heire of her huſband, and with the other jointenant, which did not alien; for that in this caſe her dower cannot be aſſigned by metes and bounds.

Sect. 45.

(1. Ro. Ab. 676.)

THE reaſon of this diverſity is for that the jointenant, which ſurviveth, claimeth the land by the feoffment, and by ſurvivorſhippe, which is above the title of dower, and may plead the feoffment, made to himſelfe without naming of his compagnion that died, as ſhall be ſaid hereafter in his proper place; but tenants in common have ſeveral free-holds and inheritances, and their moities ſhall deſcend to their ſeveral heires, and therefore their wives ſhall be indowed.

ET eſt aſcavoir, que la feme ne ſera my endow de terres ou tenements, que ſa baron tient jointment oveſque un auter al temps de ſon morant: mes lou il tient en common, auterment eſt, come en le caſe prochein avantdit.

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

Sect.

Sect. 46.

ET eſt aſcavoir, que ſi tenant en le taile endowa ſa feme ad oſtium Eccleſiæ, *come eſt avantdit, ceo ſervera pur petit ou rien al feme; pur ceo que apres la mort ſa baron, liſſue en le taile puit entrer ſur le poſſeſſion la feme; et iſſint puit celuy en le reverſion ſi ne ſoit iſſue en le taile en vie, &c.*

AND it is be underſtood, that if tenant in taile endoweth his wife at the church doore, as is aforeſaid, this ſhall little or nothing at all availe the wife; for that after the deceaſe of her huſband, the iſſue in taile may enter upon her poſſeſſion; and ſo may he in the reverſion, if there be no iſſue in taile then alive.

THE reaſon of this is, for that tenant in taile is reſtrained by the ſayd ſtatute of 13 E. 1. *de donis conditionalibus.*

And ſo did our author take the law in his learned reading. Here our author's reaſon is *à fine*, and therefore ſuch an endowment is not to be made becauſe it is to no end. Vide Sect. 194.

Sect. 47.

AUXY ſi home ſeiſi enfee ſimple, eſteant deins age, endowa ſa feme al huiz del monaſterie ou degliſe, & devie, & ſa feme enter, en ceo cas lheire la baron luy puit ouſter. Mes auterment eſt (come il ſemble) lou la pier eſt ſeiſie en fee, & le fits deins age endow ſa feme ex aſſenſu patris, *le pier donque eſteant de plein age.*

ALSO if a man ſeiſed in fee ſimple being within age, endoweth his wife at the monaſterie or church doore, and dieth, and his wife enter, in this caſe the heire of the huſband may out her. But otherwiſe it is, (as it ſeemeth) where the father is ſeiſed in fee, and the ſonne within age endoweth his wife *ex aſſenſu patris*, the father being then of full age.

THE reaſon of this diverſitie is for that in the firſt caſe the huſband within age is ſeized, and therefore he being within age cannot by a voluntary act bind himſelf: otherwiſe it is, where he doth an act whereunto he is compellable by law, but in the latter caſe the father which giveth the aſſent, is ſeiſed of the freehold and inheritance, and the ſonne therein hath nothing, and therefore his heire ſhall not avoide it in reſpect of his infancy. Vid. 9. H. 5. tit. dower 197. (Ante 34. a.)

Sect. 48.

AUXY il y ad un auter endowment, que eſt appel dowment de la pluis beale. Et ceo eſt come en tiel caſe, que home ſeiſie de xl. acres de terre, et il tient vint

ALSO there is another dower which is called dowment *de la pluis beale*. And this is in caſe where a man is ſeiſed of forty acres of land, and he holdeth twenty acres of

ET le Seignior de que le terre eſt tenus en chivalrie enter en les vint acres tenus de luy. For he is not poſſeſſed as a gardein againſt whom a writ of dower lieth, untill he doth enter. Of the wardſhip of the body he is poſſeſſed before ſeiſure, becauſe

(Ante 35.)
Vid. le ſtatut, de bigamis cap. 3.

cauſe it is tranſitory, but he is not poſſeſſed of the land untill he enter becauſe it is permanent. And therefore if he doth not enter, the heire within age may aſſigne dower as hath been ſaid, and as it appeareth afterwards.

Si en tiel caſe el port breve de dower envers le gardein en chivalrie. Albeit [a] the gardein in chivalrie or the grantee of the king of a wardſhip hath but a chattle during the minority of the heire, and the woman ſhall recover a freehold in her writ of dower, yet after the gardein as is aforeſaid, hath entered into the land, that writ lieth againſt him, and not againſt the heire who is tenant of the freehold, becauſe the law hath truſted the gardein to plead for the heire within age, and that is in his cuſtody, and alſo for his own particular intereſt, and by this diverſity all the bookes be reconciled (1). So likewiſe if the gardein die, the wife ſhall have a writ of dower againſt his executors, and if there be two executors, and one of them alone take the profits, the writ of dower ſhall be maintained againſt him only. If a man be poſſeſſed of the wardſhip of certaine land, either joyntly with his wife or in the right of his wife, yet the writ of dower lieth againſt the huſband onely. Gardein in ſocage ſhall not endow herſelfe *de la pluis beale* without judgement, as ſhall be ſaid hereafter.

[a] 44. E. 3. 13. 4. H. 6. 11. Stanf. prær. 13. 6. E. 3. 15. 16. E. 3. breve 657. Temps E. 1. breve 863. 11. E. 3. breve 473. 45. E. 3. 5. 17. E. 3. 70. 1. H. 7. 17. 4. H. 7. 1. 4. H. 7. aid le Roy 32. 38. E. 3. 13. 9. H. 6. 6. b. 39. E. 3. 8. 8. E. 2. Dower 169. 8. E. 2. breve 809. 22. E. 4. Dower 16. (9. Co. 17.)

8. E. 3. 52.

8. E. 3. 15. & 31. 38. E. 3. 37. 47. E. 3. 9. b.

Le gardein en chivalrie poit pleader. The authority of Littleton is direct that the gardein may plead this plea. But hereof ariſeth two queſtions. Firſt whether if the heire be vouched by the tenant in the writ of dower in the gard of the gardein (2), whether he coming in as vouchee may plead that plea. The ſecond is, whether if the gardein in

acres de les dits xl. acres de terre dun per ſervice de chivalrie, et les autres vint acres de terre dun auter en ſocage, et prent feme, et ont iſſue fits, et moruſt, ſon fits eſteant deins lage de xiiii. ans, et le ſeigniour, de que la terre eſt tenus en chivalrie, entre en les xx. acres tenus de luy, et eux ad come gardein en chivalrie durant le nonage lenfant, et la mere de lenfant enter en le remnant, et ceo occupie come gardein en ſocage: ſi en tiel caſe le feme port briefe de dower envers le gardein en chivalrie, deſtre endow de les tenements tenus per ſervice de chivaler en le court le roy, ou en auter court, le gardein en chivalrie puit plede en tiel caſe tout ceſt matter et monſtre coment la feme eſt gardein en ſocage, come devant eſt dit, et prie que ſerra adjudge per la court que le feme luy meſme endowera de le pluis beale de les tenements que el ad come gardein en ſocage ſolonque le value de le tierce part

the ſaid forty acres, of one by knight's ſervice, and the other twenty acres of another in ſocage, and taketh wife, and hath iſſue a ſonne, and dyeth, his ſonne being within the age of fourteene yeeres, and the lord of whom the land is holden by knight's ſervice entreth into the twenty acres holden of him, and holdeth them as gardein in chivalrie, during the nonage of the infant, and the mother of the infant, entreth into the reſidue, and occupieth it as gardein in ſocage. If in this caſe the wife bringeth a writ of dower againſt the gardein in chivalry to be endowed of the tenements holden by knight's ſervice, in the king's court, or other court, the gardein in chivalry may pleade in ſuch caſe all this matter, and ſhew how the wife is gardein in ſocage, as aforeſaid, and pray that it may be adjudged by the court, that the wife may endow her ſelfe *de le pluis beale*, i. e. of the moſt faire of the tenements which ſhe hath as gardein in ſo-

que

(1) Nota Paſch. 1651; B. R. *Ruled, 1. Grantee of wardſhip of the body cannot aſſign dower; but grantee or committee of wardſhip of land may, though it be by court of wards. 2. Yet court of wards cannot aſſign dower by commiſſion, but it ought to be by writ* de dote aſſignanda *out of chancery.* Accord. M. 35. 36. Eliz. C. B. *caſe of Viſcounteſs Bouden. 3. But leſſee for years of land by the guardian cannot aſſign dower.—4. But if the king leaſes the land during minority of the heir rendering rent, whether he be a committee to aſſign dower* dubitatur. Videtur quod non, *but there ought to be* dedimus vel committimus cuſtodiam. 2. E. 3 13. *Huſband of ward in right of his wife, and dower againſt the huſband only.* Nota H. 8. Jac. C. B. *Nicholſon and Gower. 1. After full age and before livery, dower lies againſt the heir, and cannot be aſſigned by the king. 2. Judgment in dower againſt the heir in wardſhip ſhall bind the heir, but not the guardian.*—Hal. MSS.

(2) For voucher in wardſhip in dower.—1. *If the heir be in wardſhip of guardian in chivalry, though he be in wardſhip of many, there ought to be voucher of all having the heir in wardſhip, becauſe every one may make defence, and every one ſhall loſe proportionably But ſeveral writs lie againſt ſeveral guardians.* 16. E. 3. Briefe 657.—2. *If the heir be in wardſhip of one or many guardians in ſocage, one may vouch the heir in wardſhip or may vouch at large as it ſeems, and not as in wardſhip, becauſe the guardian has the land only to the uſe of the infant.*—3. *If the heir be in wardſhip of the demandant in chivalry he ought to vouch in wardſhip of the demandant;*

que el claime daver de les tenements tenus en chivalrie per ſa briefe de dower. Et ſi la feme ceo ne puit dedire, donques le judgement ſerra fait, que le gardeine en chivalrie tiendra les terres tenus de luy durant le nonage lenfant quit de la feme, &c (1).

cage, after the value of the third part which ſhe claimes by her writ of dower, to have the tenements holden by knights ſervice. And if the wife cannot gainſay this, then the judgement ſhall be given, that the gardein in chivalry ſhall hold the lands holden of him during the nonage of the infant quit from the woman, &c.

ſocage have not ſufficient, as if the land holden by ſervice of chivalry be thirty acres, and the lands holden in ſocage but five acres; whether ſhe ſhall be endowed by parcels, *viz.* to recover five acres againſt the gardein in chivalry, and to retaine five acres. And as to the firſt the gardein ſhall as well plead it, when he comes in as vouchee, as when he is tenant. And as to the ſecond ſome ſay that the demandant in the writ of dower muſt have aſſets in her hands to the value of her dower, ſo as ſhe ſhall not be partly endowed againſt the gardein, and partly retaine in her owne hands. And they ſay, that the judgement ſhould be in part, that is, as to the land in ſocage in ſeveralty, and as to the land in chivalry to recover the third part, and compare it to the caſe in 8. E. 4. 3. that damages ſhall not be recovered, partly againſt the defendant in an appeale, and partly againſt the abettors, but entirely either againſt the one or the other. And Littleton here putteth his caſe that the gardein in ſocage hath aſſets in value, and ſeeing it is a dower againſt common right, they hold that ſhe muſt be entirely endowed either by herſelfe againſt common right, or againſt the gardein according to common right. But [*a*] yet by the booke in 25. E. 3. 52. b. and others it appeareth, that ſhe may in this very caſe retaine for part, and recover againſt the gardein for part (2).

5. E. 3. 60. 2. E. 3. 31. Lib. intrat. Dower fol. 225. a. 18. E. 3 4. b.

14. H. 7. 26. Keeble. (12. Co. 125, 126.)

[*a*] 25. E. 3. 52. b. 4. E. 2. tit. diſſeiſin. 10. Regiſt. judic. 26. Lib. intrat. 22. 16. E. 3. breve. 657. 20. E. 3. judgement 175.

Gardein in chivalry [*b*] ſhall plead in barre of her dower, detainment, or eloigning of the body of the ward, becauſe his marriage doth appertaine unto him: and if the heire come in [*c*] as vouchee, he ſhall plead the ſame plea. But he ſhall not plead detainment of the charters, [*d*] becauſe the charters concerning the inheritance of the heire belong not to the gardein (3). The gardein in chivalry [*e*] may aſſigne dower of the lands and tenements he hath in ward, or if he aſſigne a rent out of thoſe lands in allowance of her dower, it is good. If the gardein in chivalrie aſſigne too much for her dower, the heire ſhall have a writ of Admeſurement by the common law (4). And ſo [*f*] if the heire within age aſſigne, before the gardein enter, to the wife too much in the dower, the gardein ſhall have a writ of Admeſurement by the ſtatute of Weſt. 2. cap. 7. And if the heire within age, before the gardein enter into the land, aſſigne too much in dower, he himſelfe ſhall have a writ of Admeſurement at full age: and ſome have ſaid, that in that caſe he may have it within age. [*g*] But if the heire (before the gardein enter) endow the wife of more than ſhe ought, and the gardein aſſigne over his eſtate, his aſſignee ſhall have no writ of Admeſurement, becauſe it was a thing in action. Alſo the heire ſhall have an [*h*] Admeſurement for the aſſignment in the life of his anceſtor, by the common law, [*i*] and a writ of Admeſurement lyeth upon an aſſignment in chancery.

[*b*] 7. E. 3. 57. 8. E. 3. 71. (Doc. pla. 149.)
[*c*] 17. E. 3. 58.
[*d*] 10. E. 3. 50. 6. El. Dy. 230.
[*e*] 3. E. 3. Dow. 75. 8. Ed. 2. Dower 155. W. 2. cap. 7. (F.N.B. 148. 149 2. Inſt. 367.)
[*f*] Bract. li. 4 314. Reg. origin. 171. Flet. li. 5 ca. 22. 7. E. 2. tit. Admeſ. 13. F.N.B. 149.
[*g*] 7 R. 2. Admeſ. 4. F.N.B. 148. i.
[*h*] 7. R. 2. ub. ſu. F.N.B. 149. a.
[*i*] 7. R. 2. ub. ſup. 12. H. 6. Admeſ. 9. F. N. B. 149. 25. E. 3. 51.

Donques le judgement ſerra fait que le gardein en chivalrie tiendra les terres tenus de luy durant le nonage lenfant, quit de la feme, &c.

Judgement. *Judicium quaſi juris dictum*, the very voyce of law and right, and therefore, *judicium ſemper pro veritate accipitur.* The ancient words of judgement are very ſignificant, *Conſideratum eſt, &c.* becauſe that judgement is ever given by the court upon due conſideration had of the record before them: and in every judgement there ought to be three perſons, *actor*, *reus*, and *judex*. Of judgements ſome be finall, and ſome not finall, whereof you ſhall read more hereafter. † And now to returne to our author, it is materiall that theſe words *(et cætera)* be explained at large, *viz. Et quod prædicta A* (the demandant) *capiat de terris hæred' prædicti in cuſtodia ſua exiſten' ad valentiam præd' 3. partis cum pertinen' tenend' nomine dotis ſuæ pro præd' 3. parte ſuperius per eam petit* (5). Now ſome are of opinion, that upon this judgement the demandant may not in any ſort endow herſelfe of the land, becauſe ſhe cannot do an act to herſelfe, but ſhe ſhall recoupe the third part of the profits upon her account, and be endowed againſt the heire at his full age (6). But obſerve what Litt. ſaith in the next ſection: but before you come to that, obſerve what priviledge the common law giveth

(1. Ro. Abr. 201. Cro. Cha. 442. poſt 168. a.)

† *See ſection* 192. pp. b

22. E. 4. Dow. 16. 16. E. 3. Wall. 100. 45 E. 3. 6.

mandant; but if he be in wardſhip of the demandant in ſocage, there it is in the election of the feoffee to vouch in wardſhip of the demandant. Regiſtr. Judicial. 54. *But he may plead in bar and pray that ſhe ſhall be endowed* de pluis beale *as well as guardian in chivalry.* 21. E. 3. 28. 25. E. 3. 21.—4. *But if A having* 4 *acres in ſocage and* 2 *acres in chivalry makes feoffment of* 2 *acres of ſocage with warranty and dies, the heir within age, and dower is brought by the wife of A againſt the feoffee,* dubitatur, *if he may vouch the heir in wardſhip of the guardian in chivalry only, or ought to vouch in wardſhip of the demandant and of guardian in chivalry, or if he ſhall only plead in bar that ſhe may endow herſelf* de pluis beale. *But whether the voucher be in wardſhip of guardian in chivalry only, or of guardian in chivalry and demandant guardian in ſocage, the guardian ſhall turn all the loſs on the demandant as it ſeems.* Reg. Judic. 54. 21. E. 3. 28. 25. E. 3. 51.—Hal. MSS. There is an obſcurity in the third part of this annotation by lord Hale, which the editor on tranſlating found himſelf unable to remove. See further on the ſubject in Hugh. on Orig. Wr. 166.

(1) *Et que la feme poet endower lui meme de la pluis beale partie de les terres, qu'ele ad come gardein en ſocage a le value, &c.* L. and M.

(2) Vid. 2. E. 3. *Vouch.* 213. 13. E. 3. *Judgment* 165.—Hal. MSS.

(3) Vid. 9. *Rep.* 15. b. *Ann Bedingfield's caſe.*—Hal. MSS. See further as to pleading detainment of charters. Hugh. Orig. Wr. 183. Vin. Abr. *Dower* L. M. and N.

(4) See further as to Admeſurement of dower. Vin. Abr. *Dower* Q. a. and as to aſſignment in chancery, Hugh. Orig. Wr. 171. New Abr. *Dower* D. 3.

(5) 15. E. 3 *Dower* 69.—Hal. MSS.

(6) Where judgment ſhall be againſt heir and where againſt vouchee.—1. *Where the heir of the huſband is vouched as having aſſets in the ſame county, and the demandant acknowledges it, judgment ſhall be for the demandant againſt the heir, and that the tenant ſhall go in peace*

giveth to the land holden by knights ſervice, *viz.* that it ſhall not be diſmembered, but the whole dower taken of the lands holden in ſocage, and the reaſon is, for that knights ſervice is for the defence of the realm, which is *pro bono publico*, and therefore to be favoured.

Sect. 49.

ET nota, que apres tiel judgement done, la feme puit prender ſes vicines, et en lour preſence endower luy meſme per metes et bonds de la pluis beale part de les tenements que el ad come gardein en ſocage(1), *daver et tener a luy pur terme de ſa vie; et tiel dower eſt appel* dower de la pluis beale.

AND note, that after ſuch a judgement given, the wife may take her neighbours, and in their preſence endow herſelfe by metes and bonds, of the faireſt part of the tenements which ſhe hath as gardein in ſocage, to have and to hold to her for terme of her life; and this dower is called *dower de la pluis beale*.

And the judgement, *viz. Tenend' nomine dotis*, proveth, that ſhe may have it for terme of her life, for every dower is for terme of life.

Sect. 50.

15. E. 3. Dow. 69. 16. E. 3. tit. Waſt. 100.

LOU le judgement eſt fait, &c. For without ſuch a judgement, as appeareth before, gardeine in ſocage cannot endow herſelfe, as likewiſe hath bin ſaid before (3).

Bract. lib. 5. 329. F. N. B. 7 8.

Ou en auter court. That is by writ of right of dower in the court of the heire, if he have any, or of the lord of whom the land is holden.

Et ceo eſt pur ſalvation del eſtate del gardein en chivalrie, durant le nonage de lenfant. For the heire (before the entre of the gardein) cannot plead the ſame plea, that the demandant ſhould endow herſelfe *de la pluis beale*. And the reaſon of this dower *de la pluis beale* to be all of the ſocage land, was for advancement of chivalrie for the defence of the realme (4).

ET nota, que tiel dowment ne puit eſte, mes lou le judgement eſt fait en le court le roy, ou en auter court, &c(2). *et ceo eſt per ſalvation del eſtate del gardeine in chivalri durant le nonage le enfant.*

AND note, that ſuch dowment cannot be, but where a judgement is given in the king's court, or in ſome other court, &c. and this is for the preſervation of the eſtate of the gardein in chivalrie, during the nonage of the infant.

Sect. 51.

This is manifeſt of itſelfe, and therefore needeth no explanation.

ET iſſint poyes veier cinque manners de dower, ſcilicet, dower per le common ley, dower per le cuſtome (5), *dower* ad oſtium eccleſiæ, *dower* ex aſſenſu patris, *et dower* de la pluis beale.

AND ſo you may ſee five kinds of dower, *viz.* dower by the common law, dower by the cuſtome, dower *ad oſtium eccleſiæ*, dower *ex aſſenſu patris*, and dower *de la pluis beale*.

Sect.

if he has aſſets in the ſame county, and if not judgment againſt the tenant and for him over in value. But if it is agreed, that he has not aſſets in the ſame county, but only in a foreign county, then judgment ſhall be againſt the tenant, and for him over in value. 6. E. 3. 11.—2. *If he has aſſets for part in the ſame county,* vide *conditional judgment for that part.* 2. E. 3. *Vouch.* 213. 25. E. 3. 52.—3. *If the tenant vouches the heir of the huſband having aſſets in the ſame county, and the voucher is counterpleaded, or if the demandant* dedit *the aſſets, &c. then it ſeems judgment ſhall be for demandant immediately againſt the tenant and for him over in value. But it ſeems, that the demandant may pray conditional judgment, if the heir counterpleads the aſſets with warranty.* Quære *and* vide 16. E. 3. *Vouch.* 85. 3. E. 3. *Judgment* 165. 18. E. 3. 38. 55.—4. *But if tenant vouch I. S. who vouches the heir of the huſband having aſſets in the ſame county, ſtill no judgment conditional ſhall be given.* 18. E. 3. 36. Contra 2. E. 3. *Vouch.* 213.—Hal. MSS. See further Hugh. Orig. Wr. 163.

(1) *A le valuwe de le tierce partie des tenementez que le gardeyn en chevalerye ad, &c. ad ceo.* L. and M.—Roh.—P. and Red.

(2) *Que la feme ceo puiſt faire.* L. and M.—Roh.

(3) Dower *de la pluis beale*, being merely a conſequence of tenures by knight's ſervice, is virtually aboliſhed by the ſtatute, which converts ſuch tenures into ſocage. See 12. Ch. 2. c. 24.

(4) Vid. 16. E. 3. 88. *She may recoup the third part of the profits on her own account,* ut videtur, *without judgment.* Hal. MSS.

(5) Beſides the books cited ante 33. b. as to dower by cuſtom, ſee Hugh. Orig. Wr. 160. Robinſ. Gavelk. cap. 2. New Abr. *Dower* K. Vin. Abr. *Copyhold* H. 6. Com. Dig. *Copyhold* K. 2.

Sect. 52.

ET memorandum, *que en cheſcun caſe, lou home prent feme ſeiſie de tiel eſtate de tenements, &c. iſſintque liſſue, que il ad per ſon feme, poit per poſſibilitie enheriter meſmes les tenements de tiel eſtate que la feme ad come heire al feme, en tiel caſe apres le mort la feme il avera meſmes les tenements per le curteſie de Angleterre, et auterment nemy.*

AND *memorandum*, that in everie caſe where a man taketh a wife ſeiſed of ſuch an eſtate of tenements, &c. as the iſſue, which he hath by his wife, may by poſſibility inherit the ſame tenements of ſuch an eſtate as the wife hath, as heire to the wife; in this caſe after the deceaſe of the wife, he ſhall have the ſame tenements by the curteſie of England, but otherwiſe not.

MEmorandum. This word doth ever betoken ſome excellent point of learning, which our author hath uſed in other places, as appeareth in the margent. Sect. 234. 301. 335.

The matter hereof hath bin partly explaned in the chapter of Tenant by the curteſie. (Ante 29. b.)

If a man [*a*] taketh a wife ſeiſed of lands or tenements in fee, and hath iſſue, and after the wife is attainted of felony ſo as the iſſue cannot inherit to her, yet he ſhall be tenant by the curteſſe, in reſpect of the iſſue which he had before the felonie, and which by poſſibilitie might then have inherited. But if the wife had been attainted of felonie before the iſſue, albeit he hath iſſue afterward, he ſhall not be tenant by the curteſie (1). [*a*] 21. E. 3. 9. 11. H. 7. 3. H. 7. 17. Stamf. 195. 27. E. 3. 77. 46. E. 3. Petit. 20. 26. Aſſ. p. 2. 13. H. 4. 8. 9. 13.

Come heire al feme.

This doth implie [*b*] a ſecret of law, for except the wife be actually ſeiſed, the heire ſhall not (as hath been ſaid) make himſelfe heire to the wife (2): and this is the reaſon that a man ſhall not be tenant by the curteſie of a ſeiſin in law. [*b*] 8. Co. 34. in Paine's caſe.

Sect. 53.

ET auxy en cheſcun caſe lou le feme prent baron ſeiſie de tiel eſtate des tenements, &c. iſſint que ſi per poſſibilitie il puiſſoit happer, que ſi le feme avoit aſcun iſſue per la baron, et que meſme liſſue puiſſoit per poſſibilitie enheriter meſmes les tenements de tiel eſtate que le baron ad, come heirs a le baron, de tiels tenements el avera ſa dower, et auterment nemy. Car

AND alſo in every caſe where a woman taketh a huſband ſeiſed of ſuch an eſtate in tenements, &c. ſo as by poſſibilitie it may happen that the wife may have iſſue by her huſband, and that the ſame iſſue may by poſſibilitie inherit the ſame tenements of ſuch an eſtate as the huſband hath, as heire to the huſband, of ſuch tenements ſhe ſhall have her dower, and otherwiſe not. For

ISſint que ſi per poſſibilitie il puit happer que le feme avoit aſcun iſſue per ſon baron. 12. H. 4. 2. 7. H. 6. 11. 12. Albeit the wife be a hundred yeares old, or that the huſband at his death was but foure or ſeven yeares old (3), ſo as ſhe had no poſſibilitie to have iſſue by him, yet ſeeing the law ſaith, that if the wife be above the age of nine years at the death of her huſband, ſhe ſhall be endowed, and that women in ancient times have had children at that age, whereunto no woman doth now attaine, the law cannot judge that impoſſible, which by nature was poſſible. And in my time, a woman above threeſcore yeares old hath had a child, and *ideo non definitur in* (1. Ro. Abr. 675)

(1) See ante 29. b. n. 4. and Vin. Abr. *Curteſy*. H.

(2) See 8. Co. 36. a. where 11. H. 4. 11. and 40. E. 3. 9. are cited to prove this doctrine. See alſo ante 11. b. where it is advanced as a general rule, that he, who claims by deſcent, muſt make himſelf heir to the perſon laſt *actually* ſeiſed. See further ante 14. b. 15. b. and n. 3. in 11. b. W. Jo. 361. and Blackſt. Law Tr. 8vo ed. vol. 1. p. 180.

(3) See ante 33. a.

in jure. And for the husband's being of such tender yeares, he hath *habitum*, though he hath not *potentiam* at that time, and therefore his wife shall be endowed.

Et que mesme lissue puissoit per possibilitie inheriter mesmes les tenements, &c. A man seised of land in generall taile, taketh wife, and after is attainted of felony, before the said statute of 1. E. 6. the issue should have inherited, and yet the wife should not have bin endowed: for the statute of W. 2. ca. 1. relieveth the issue in taile, but not the wife in that case(1). But at this day, if the husband be attainted of felony, the wife shall be endowed, and yet the issue shall not inherit the lands which the father had in fee simple. If the wife elope from her husband, &c. she shall be barred of her dower, as hath beene said (2), and yet the issue shall inherit (3).

si tenements sont dones a un home et a les heires que il engendra de corps sa feme, en tiel case la feme nad riens en les tenements, et le baron ad estate forsque come donee en especiall taile. Uncore si le baron devy sans issue, mesme la feme serra endow de mesmes les tenements, pur ceo que lissue, que el per possibilitie puissoit aver per mesme le baron, puissoit enheriter mesmes les tenements. Mes si la feme deviast, vivant sa baron, et puis le baron prist auter feme, et morust, sa second feme serra my endowe en cest case, causa qua[illegible]ra.

if tenements be given to a man, and to the heires which he shall beget of the bodie of his wife, in this case the wife hath nothing in the tenements, and the husband hath an estate but as donee in special taile. Yet if the husband die without issue, the same wife shall be endowed of the same tenements; because the issue, which she by possibilitie might have had by the same husband, might have inherited the same tenements. But if the wife dyeth, living her husband, and after the husband takes another wife and dieth his 2. wife shall not be indowed in this case for the reason aforesaid.

Sect. 54.

5. E. 3. Voucher 249. 8. E. 3. Ass. 393. 4. H 6. 24. F. N. B. 149.

You may easily perceive by the context that this shaft came never out of Littleton's quiver of choice arrowes(4), and therefore I will leave it. Onely for students sake I will refer them to 5. E. 3. Voucher 249. 8. E. 3. Ass. 393. 4. H. 6. 24. F. N. B. 149.

NOTA si un home soit seisie de certaine terres et prist un feme, et puis aliena mesme la terre oue garrantie, et puis le feoffor et le feoffee deviont, et le feme de le feoffor port un action de dower envers le issue le feoffee, et il vouch lheire le feoffor, et pendant le voucher et nient termine, la feme le feoffee port son action de dower envers le heire le feoffee, et demaunda la tierce part de ceo

NOTE if a man be seised of certaine lands, and taketh wife, and after alieneth the same land with warrantie, and after the feoffor and feoffee dye, and the wife of the feoffor bring an action of dower against the issue of the feoffee, and he vouch the heire of the feoffor, and hanging the voucher and undetermined, the wife of the feoffee brings her action of dower against the heire of the feoffee,

(1) 12. *H.* 4. 3. *by Hankford.*—Hal. MSS. See further as to loss of dower by the husband's offences ante 37. a. Post 392. b. Hugh. Orig. Wr. 156. and Vin. Abr. *Dower* Q. 6.

(2) See ante 32. a.

(3) See another instance, where the issue shall inherit and yet the wife shall not be endowed, in Perk. sect. 317.

(4) Section 54. is neither in the edition by L. and M. nor in the Roh. edition. It appears to have been first added in the edition by P.

de que ſa baron fuit ſeiſie, et ne voile demaunder le tierce part del eux deux parts de que ſa baron fuit ſeiſie; fuit adjudge, que el navera judgement tanque lauter plee fuit determine.

feoffee, and demand the third part of that whereof her huſband was ſeiſed, and will not demand the third part of theſe two parts of which her huſband was ſeiſed; it was adjudged, that ſhe ſhould have no judgement untill ſuch time as the other plea were determined.

Sect. 55. (1)

ET nota que Vaviſour dit, que ſi un home ſoit ſeiſie de terre et fait felonie, et puis alien, et puis eſt attaint, la feme avera bone action de dower envers le feoffee: mes ſi ſoit eſchete al roy, ou al ſeignior, el navera breve de dower, et ſic vide diverſitatem, et quære inde legem.

AND note, *Vaviſor* ſaith, that if a man be ſeiſed of land and committeth felony, and after alieneth, and after is attaint, the wife ſhall have a good action of dower againſt the feoffee: but if it be eſcheated to the king, or to the lord, ſhe ſhall not have a writ of dower. And ſo ſee the difference, and inquire what the law is herein.

THIS is alſo of the new addition, *et explosa eſt hæc opinio*; for it is cleare in law, that the wife at the common law ſhould not have been endowed againſt the feoffee. For to deterre and retaine men from committing of treaſon or felony, the law hath inflicted five puniſhments upon him that is attainted of treaſon or felony. 1. He ſhall loſe his life and that by an infamous death of hanging betweene heaven and the earth, as unworthy in reſpect of his offence of either. 2. His wife, that is a part of himſelfe, *(et erunt animæ duæ in carne una)* ſhall loſe her dower. 3. His blood is corrupted, and his children cannot be heires to him, and if he be noble or gentle before, he and all his poſterity are by this attainder made ignoble. 4. He ſhall forfeit all his lands and tenements; And 5. all his goods and chattels, and all this is included by the law in the judgement, *Quod ſuſpendatur per collum.* But this is not intended of all felonies, but of felony by ſtealing of goods above the value of xii. pence, and not of *petit larceny* under the value (2). So as the woman ſhall loſe her dower as well againſt the feoffee as againſt the lord by eſcheat. And ſo it was reſolved in a writ of dower brought by Mary Gates late wife of John Gates, who after the coverture had infeoffed Wiſeman in fee, and after committed high treaſon, and was thereof attainted, that the wife ſhould not be indowed againſt the feoffee, and in that caſe it was reſolved, that ſo it was at the common law in caſe of felony (3). And it is to be underſtood, that the wife ſhall not only loſe her reaſonable dower at the common law for the felony of her huſband, but alſo her dower *ad oſtium eccleſiæ*, and *ex aſſenſu patris* (4), for felony done after the dower aſſigned, and dower by cuſtome alſo (5). And the reaſon of all this is yeelded by Littleton himſelfe in the chapter of Warranties, ſection 746. to the end that men ſhould be afraid to commit felony. But at this day the wife of a man attainted of felony (as often hath been ſaid) ſhall be endowed by force of the ſtatutes in that caſe provided.

Vide Sect. 746. Vide Britton, cap. 109. l. 1. Bracton title Evidens, l. 4. fo. 397. 30. 311. Stanf. pl. cor. 194. 195.

Britton fol. 15. cap. 5.

(Poſt 392. b.)

Vide Sect. 746.

(1. Leon. 3.)

M. 3. & 4. Ph. & Mar. Ro. 760. in com. banco. 8. E. 3. 20. 12. H. 4. 30.

Bracton lib. 4. fol. 311.

Vide Sect. 746. Britton cap. de Homicide, fo. 15. Bracton lib. 4. fol. 308. & Fleta ubi ſupra. & Britton ubi ſupra.

And it appeareth by Britton, *Que fem de homicide ne teigne nul dower de tenants que lour fuit aſſigne per lour barons*, ſo as the wife of a felon attainted by the common law was diſabled to recover dower *ad oſtium eccleſiæ*, and *ex aſſenſu patris*, as well as her reaſonable dower which the common law gave her. See in Bracton many barrès of dower as the law was then held.

CHAP.

(1) Sect. 55. is not in L. and M. nor in Roh. but is in P. and the ſubſequent editions.—(2) *But outlawry in treſpaſs doth not bar.* 3. *E.* 3. 7. 41. Hal. MSS.—(3) S. C. acc. Dy. 140. b. and N. Bendl. 55. But Dyer obſerves, *yet* nota *that the land alienedbefore the treaſon committed was not ſubject to any forfeiture or eſcheat*; and adds, that Brown ſerjeant *fuit valde iratus propter judicium prædictum.* Alſo in Sav. 54. there is a caſe of attainder of the huſband for treaſon, in which two judges for the reaſon mentioned in Dyer were inclined to Vaviſour's opinion; but the caſe of Sir John Gates's wife being cited, the court held that the demandant was not intitled to dower. In this latter caſe the wife afterwards had dower; but then it was allowed to her on account of the reverſal of her huſband's attainder. See 3. Inſt. 315.—(4) Here lord Coke expreſsly makes dower *ex aſſenſu patris*, as well as the dowers at common law and *ad oſtium eccleſiæ* liable to be defeated at common law by the huſband's treaſon or felony. Ante 37. a. But ſome have inclined to think, that the 5. & 6. E. 6. c. 11. which ſo far repeals the 1. E. 6. c. 2. and revives the common law as to take away the wife's dower in caſe of treaſon by the huſband, doth not extend to dower *ex aſſenſu patris.* This will appear from the following extract from a valuable manuſcript, which has been already cited.—*It ſeems that dower* ex aſſenſu patris *ſhall not be loſt by the ſtatute of* 5. *E.* 6. *by attainder of the huſband for treaſon; for the wife is in by the father and not by the huſband, and if action be brought for the land, it ſhall be againſt the huſband and wife.* Contra *of dower* ad oſtium eccleſiæ. Quære tamen *of the former caſe* ex aſſenſu patris. MSS. Comment. on Littl. *pen. Edit.*—In Plowden's Queries 181, a like queſtion is ſtarted as to the effect of the huſband's attainder of felony on dower *ex aſſenſu patris* before the 1 E. 6. c. 2. changed the common law, and ſaved the wife's dower; but Mr. Plowden argues againſt the wife. See further ante 35. b. where lord Coke mentions, that according to ſome opinions the wife loſt dower *ex aſſenſu patris*, if after aſſent the father was attainted of treaſon or felony.—(5) In Winch 27. there is a looſe note of a caſe, in which, notwithſtanding the 1. E. 6. c. 2. for preſerving dower in caſes of treaſon or felony by the huſband, Winch inclined to think, that attainder of the huſband for felony prevented the wife's dower, where the wife of a copyholder for life was dowable by cuſtom. But the reaſons of this opinion, which ſeems ſtrange, do not appear.

Chap. 6. Sect. 56.

Tenant a terme de vie.

TENANT pur terme de vie est, lou home lessa terres ou tenements a un auter pur terme de vie le lessee, ou pur terme de vie dun auter home; en tiel case le lessee en tenant a terme de vie. Mes per common parlance celuy que tient pur terme de sa vie demesne, est appel tenant pur terme de sa vie, et cestuy que tient pur terme dauter vie, est appel tenant pur term dauter vie.

TENANT for term of life is, where a man letteth lands or tenements to another for terme of the life of the lessee, or for terme of the life of another man. In this case the lessee is tenant for terme of life. But by common speech he which holdeth for terme of his owne life, is called tenant for terme of his life, and he which holdeth for terme of another's life, is called tenant for terme of another man's life.

OU pur terme de vie dun auter home. Now it is to be understood, that if the lessee in that case dieth living *Cestyque vie* (that is, he for whose life the lease was made) he that first entreth shall hold the land during that other man's life, and he that so entreth is within Littleton's words, viz. *tenant pur auter vie*, and shall be [a] punished for waste as tenant *pur auter vie*, and subject to the payment of the rent reserved, and is in law called an *occupant*(1) *(occupans)* because his title is by his first occupation. And so if tenant for his owne life grant over his estate to another, if the grantee dyeth there shall be an *occupant*. In like manner it is of an estate created by law [b]; for if tenant by the curtesie or tenant in dower grant over his or her estate, and the grantee dieth, there shall be an *occupans* (2). But against the king there shall be no *occupant*; because *nullum tempus occurrit regi*. And therefore no man shall gain the king's land by priority of entry. There can be no *occupant* of any thing that lyeth in grant(3), and that cannot passe without deed; because every *occupant* must claime by a *que estate* and averre the life of *Ce' que vie*(4). It were [c] good to prevent the incertainty of the estate of the *occupant* to adde these words, (to have and to hold to him and his heires during the life of *Ce' que vie*) and this shall prevent the occupant; and yet the lessee may assigne it to whom he will, or if he hath already an estate for another man's life without these words, then it were good for him to assigne his estate to divers men and their heires during the life of *Ce' que vie* (5).

Note that [d] to every tenant for life, the law as incident to his estate without provision of the party giveth him three kinde of *estovers*, (that is) *housbote* which is twofold, viz. *estoverium ædificandi et ardendi*, *ploughbote* that is *estoverium arandi*, and lastly, *haybote*, and that is *estoverium claudendi*, and these estovers must be reasonable, *estoveria rationabilia*. And these the lessee may take upon the land demised without any assignement, unlesse he be restrayned by speciall covenant(6), for *modus et conventio vincunt legem*. *Bote* in the Saxon tongue, and *estovers* in the French in this case are all of one signification, that is, to have compensation or satisfaction for these purposes. *Estovers* commeth of the French word *estover*. And the same estovers that tenant for life may have, tenant for years shall have.

You have perceived, that our author divides tenant for life into two branches, viz. into tenant for terme of his own life, and into tenant for terme of another man's life: to this may be added a third, viz. into an estate both for terme of his owne life, and for terme of another man's life.

As if a lease be made to A to have to him for terme of his own life, and the lives of B and C, for the lessee in this case hath but one freehold, which hath this limitation; during his owne life, and during the lives of two others. And herein is a diversity to be observed betweene several estates in several degrees, and one estate with several limitations. For in the first, an estate for a man's own life is higher than for another man's life, but in the second it is not. As if A be tenant for life, the remainder or reversion to B for life, A may surrender to B

(Cro Ja. 200. 554.) Bract. lib. 2. ca. 5. & ca. 9. fol. 26. Fleta lib. 3. ca. 12. Britton fol. 83. Bracton lib. 4. fo. 170. Vide Sect. 381.

[a] Vide le Deane de Worcest. case, 6. Co. 37. 27. Ass. 31. 39. E. 3. 1. 27. H. 6. Recognizance. Statham pl. ultimo. 38. H. 6. 27 Bracton lib 2. fo. 9. Britton fo. 84. 85. (Vaugh. 189. 190. Cro. El. 407.)

[b] 27. Ass. p. 31. & Pl. com. fo. 28. b. in Colthorst's case tit. Barre 303. (Cro. Jam. 201. Mo. 394. Cro. Eliz. 57. Mo. 664. Cro. Iam. 282.)

[c] Littleton 167. 11. H. 4. 42. 17. E. 3. 48. 39. E. 3. 25. 7. H. 4. 46. 8. H. 4. 15. Dier 8. Eliz. 253. (2. Ro. Abr. 150. 151. 1. Ro. Abr. 844. 1. Leon. 126. Post 239. a.)

[d] Bract. lib. 4. fo. 222. 231. 232. & vid. fo. 136. 137. Fleta lib. 4. ca. 19. 25. 26. 27. 8. E. 3. 54. 55. 21. E. 3. 41. 48. E. 3. 31. 7. E. 4 28. 21. H. 6. 46. 10. E. 4. 3. F. N. B. 180. 4. Co. 86. 87. in Luttrel's case.

(11. Co. 46.)

Vide Sect. 381.

Rosse's case, 5. Co. 13. (5. Co. 9. b.)

Concerning special occupancy, as it is termed, see Cart. 48. 49. 61. at the bottom. Vaugh. 201. 4 Bridgm. Mod. Rep. 67. 3 Wms 368. & my opinion on a Bristol case 28 Feb. 1803.

(1) Who shall be occupant.—*A makes lease to B for one hundred years, and afterwards ousts him and makes lease to C for the life of D, B re-enters, C dies: B shall not be occupant against his will, for so his term would be drowned.* H. 6. Jac. C. B. *Rawlin's case. L. essee for another's life makes lessee at will, who continues in possession after the death of his lessor: he is an occupant. If A lessee for another's life makes lessee for years, who is possessed, and A dies, it seems that lessee for years shall be occupant against his own will, though he doth not enter; but if the lessee for years makes lease at will, and then A dies, lessee at will shall be occupant, though he claims to the use of the lessee for years, or though lessee for years enters on lessee at will and claims to be occupant. But riding over the ground to hunt or hawk doth not make an occupant.* Vid. *Dy.* 328. H. 15. Jac. B. R. Rot. 356. *Stellicorn and Hayes, and* M. 10. Jac. *Bulstr.* n. 6. *Chamberlain and Ewer. A lessee for life of B makes lessee to C for 20 years, rendering 5 l. C makes lease to D for 10 years, rendering 3 l. A dies: D is occupant, yet he shall pay the rent of 3 l. to C and C shall pay the rent of 5 l. to D, for D's term is prevented from merging by the intervenient reversion in C, but D has the freehold in reversion expectant on C's term and the rent incident to it.* Hal. MSS.—See *Stellicorn and Hayes* in 2. Ro. Rep. 123. and Cro. Jam. 554. and *Chamberlain and Ewer* in 2. Bulstr. 11. 2. Ro. Abr. 151. E. pl. 3. 4. and Palm. 42.—(2) In some books it is asserted, that there cannot be an occupant of estates created by law, without distinguishing between a *general* and a *special* occupant. Cro. Eliz. 58. 1. Bulstr. 135. 2. Ro Rep. 123. Probably the assertion was meant to be confined to the former, for as to the latter the authorities seem decisive in favour of the heir's taking as special occupant if named in granting over curtesy or any other estate created by law. See 27. Ass. pl. 31. Plowd. 28. and 556. and Palm. 32. But even the doctrine against *general* occupancy of estates created by law comes merely from persons arguing as counsel, who neither explain why it should not be, nor cite any authorities except 15. E. 3. Fitzh. Abr. *Scire facias* pl. 17. which appears foreign to the purpose.—(3) Lord Hale adds, *nor of a copyhold.* Hal. MSS.—See acc. 2. L. Raym. 1000. and the reason why in 6. Mod. 66. As to things lying in grant, lord Coke in mentioning them must be understood to mean *general* occupancy only, for he writes in another place, that if *heirs* are named in the grant of a rent *pur autre vie*, they shall take, though formerly this was doubted. See Post 388. Dy. 186. ed. 1689. in marg. 1. Bulst. 155. Mo. 625. 664. and Godb. 172.—(4) Vid. M. 44. 45. Eliz. B. R. *Salter's case. Rent granted to one, his executors and administrators pur autre vie, and the grantee dies; it shall not go to the administrator as special occupant, but determines by the death unless there has been an assignment.* Hal. MSS. See S. C. in Cro. Eliz. 901. Noy 46. Yelv. 9. and Mo. 664. See also S. P. acc. 2. Ro. Abr. 151. G. pl. 3. However some have thought that executors and administrators if named in the grant might take an estate *pur autre vie*, though a *freehold*, even before the 29. Ch. 2. c. 3. and 14. G. 2. c. 20. by which they are now intitled. See 3. Atk. 466. The authority relied on is Dy. 328. b.—(5) The title by *general* occupancy is now universally prevented by the 29. Ch. 2. c. 3. s. 12. and the 14. G. 2. c. 20. s. 9. The first statute enacts, that estates *pur autre vie* shall be deviseable, and if not devised chargeable in the hands of the heir as assets by descent, where the estate falls on him as special occupant; and if he is not intitled as such, shall go to the grantee's executors or administrators and be assets. On this statute a doubt arose, whether it operated further than by making such estates deviseable and assets for debts; and in one case it was adjudged, that the administrator took the surplus of such estates after payment of debts, if not devised, for his own benefit as in the place of a *general* occupant. See 12. Mod. 103. This gave occasion to the second statute, which expresly makes the surplus in case of intestacy distributable as personal estate. See further as to occupancy 2. Blackst. Comment. 258. an elaborate argument by lord chief justice Vaughan Vaugh. 187. Vin. Abr. *Occupance* and *Estates* R. n. 3. Com. Dig. *Estates* F. and New Abr. *Estate for life* B.—(6) *But affirmative covenants do not restrain.* 28. H. 8. Dy. 19.—Hal. MSS.