Edw. Anderson

THE

LAW

OF

TENURES;

INCLUDING THE

THEORY AND PRACTICE

OF

COPYHOLDS.

By the late Lord Chief Baron *GILBERT*,

The FOURTH EDITION, Corrected;

WITH

An Historical Introduction on the FEUDAL SYSTEM,
And Copious NOTES and ILLUSTRATIONS,

BY CHARLES WATKINS, ESQ.
Author of an ESSAY on the LAW of DESCENTS, &c.

LONDON:

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1796.

TO

THE HONOURABLE

Sir FRANCIS BULLER, Bart.

ONE OF THE JUSTICES OF

HIS MAJESTY'S COURT OF COMMON PLEAS,

THIS EDITION OF

THE TENURES OF GILBERT

IS

(WITH PERMISSION)

MOST RESPECTFULLY INSCRIBED,

BY

HIS OBLIGED AND

OBEDIENT SERVANT,

CHARLES WATKINS.

LONDON;
EASTER TERM, 1796.

ADVERTISEMENT.

THE former Editions of the TENURES OF GILBERT having become extremely ſcarce, it is conceived that no apology can be requiſite for preſenting a new one to the world. The deſervedly high eſtimation in which the original has been ſo long held, muſt equally render unneceſſary any eulogium which an Advertiſement can beſtow: It remains therefore only to ſay, that the preſent Editor has been anxious to add to the utility of the Work; and, by pointing out more immediately the principles on which the doctrines advanced are eſtabliſhed, and by the addition of references, to enable the Student more eaſily to purſue his reſearches.

The preſent Editor embraces, with much pleaſure, the opportunity thus afforded him, of acknowledging the obligation which he owes to the friendſhip and politeneſs of Mr. HARGRAVE, for his kind

kind communication of the Chief Baron's *Manuſcript* "HISTORY OF THE FEUD," which is in the Poſſeſſion of that Gentleman. From that Manuſcript, the Editor has been enabled to correct many paſſages in the "Treatiſe on Tenures," and to enrich his pages with ſome obſervations of the very learned Author, with which, till now, the Profeſſion has not been preſented.

The Editor is ſorry that he was not enabled to correct the whole of the text:—But he remembered the inviolability which the ſacredneſs of the Author's work muſt ever demand. The inaccuracies which occur muſt be rather lamented than condemned, when it is conſidered that the work was poſthumous; and that the ingenious Author was frequently incapacitated, during many of his latter years, to write himſelf, and, in conſequence, obliged to truſt to his clerks for the faithful communication of what he could only dictate.

Some few Notes were added to the third edition, which have been preſerved; and

and from which thoſe of the preſent Editor are diſtinguiſhed by being inſerted between crotchets. The Side References alſo remain (except in a very few inſtances) as they were given in the laſt edition; and for the accuracy of which the preſent Editor cannot, therefore, be anſwerable.

It has been remarked, that "the ſparks "of all the ſciences in the world are "raked up in the aſhes of the law" (*Finche L.* b. 1. c. 3.): Yet the ſtudy of it has been rendered diſguſting by the confined manner in which it has been treated. When the laws are connected with the hiſtory and manners of the times, they at once intereſt and amuſe; we develope their principles with admiration, and we trace their progreſs with pleaſure. The amplitude and liberality of ſentiment which our Author diſplayed in deducing thoſe principles, and in marking that progreſs, ſhould be equally our imitation, as they have ſo truly been deſerving the celebrity they have received.

INTRO-

INTRODUCTION.

"THE firſt advance," ſays Falconer (*a*), "from a ſavage ſtate towards civilization is when people leave off their mode of gaining ſubſiſtence by hunting or fiſhing, and betake themſelves to paſturage and feeding cattle." We trace back the hiſtory of all civilized nations to this ſtate of manners and mode of life (*b*); and in this ſtate of manners, and in this mode of life, are nations ſtill ſeen to exiſt (*c*). Man, dependent upon his

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(*a*) *On Climate*, b. vi. c. 2. p. 322. 4to.

(*b*) See *Stuart's Diſſ. on Antiq. Engl. Conſt.* p. 1. ſ. 3. *Dalrymple on Feud. Prop.* c. 3. ſ. 1. 2 *Blackſt. Comm.* c. 1. *Ferguſon on Civ. Soc.* p. 2. ſ. 2.

(*c*) As the *Tartars*, *Arabs*, &c.

The author muſt here remark, that he does not refer to the writings of a *Stuart* or a *Sullivan*, &c. merely as authorities in ſupport of what he advances in the courſe of this Introduction, or of the following Notes, but with a view of aſſiſting the reader in his reſearches. In thoſe writings he will find the ſubjects, which can here only be hinted at, purſued with an induſtry, and treated on with an elegance and perſpicuity, that will amply compenſate him for his trouble in conſulting them. They are books, too, which are in moſt perſons poſſeſſion, or which may be eaſily procured; and if he is inclined to purſue his reſearches further, he will in thoſe works be abundantly ſupplied with references to earlier productions.

flocks and his herds for ſubſiſtence, ſeeks the irriguous plain:—he finds it unoccupied; and, conſequently, conceives himſelf entitled to the herbage it yields. While it is not already poſſeſſed by another, another he thinks can have no greater right than himſelf:—the right which he conſiders as belonging to others, he enjoys in common with them; but he perceives that he has a right which excluſively belongs to himſelf, by reaſon of the occupancy he has gained. This right he maintains againſt all his oppoſers while the poſſeſſion is worth its defence. When the produce of the ſpot he ſelected is exhauſted, he quits that poſſeſſion, and leaves it to be occupied by the next who comes.

Still advancing in his progreſs towards refinement, man feels an increaſe of wants, which, by his art and induſtry, he endeavours to ſupply. He finds the ſpontaneous productions of the earth inadequate to this end; and that even thoſe ſpontaneous productions call for the protection of his arm, which can only be rendered them while they continue in his immediate poſſeſſion. He cares not to depend upon the fruit which another may gather before him, or on the grain which even his own herd may deſtroy. Urged by conſiderations like theſe, he ſelects the ſpot which another has not occupied: he furthers its fertility by his cultivation, defends its advancing produce, and at length enjoys the fruits of his labour and care.

care. His attentions confined to the choſen ſpot, he himſelf becomes ſtationary and fixed. He before roved with his herd in ſearch of the diſtant paſture; but he now foregoes his tent or his waggon, and erects a permanent dwelling on the piece he has ſelected to improve. Here he exerts his arm, and here his affections are centered. The grain which ripens in his preſence, by himſelf was nouriſhed and ſown. His habitation had yielded him protection and peace, and was the ſcene of his varied joys. Poſſeſſions thus formed, as it were, by himſelf, he conſiders as peculiarly *his*; and the juſtice of his claim was apparent. To others of equal induſtry an equal ſpot might belong; the world but thinly inhabited, another was not injured by the enjoyment of the portion he choſe. To this ſpot he conceived no other could have claim:—and he enjoyed it as the gift of heaven.

The feelings and the neceſſities of man alike urge him to ſocial intercourſe. The depredations of other individuals render requiſite a mutual defence. Perſons expoſed ſeparately to danger, become leagued for a general ſupport. Families unite in reciprocal aſſiſtance, and a confederacy is eſtabliſhed and a nation formed. The ſociety thus compoſed is ſeparated from others, and the limits of its poſſeſſions preſcribed. The relations of that ſociety are diſtinguiſhed from the relations of individuals, who regard themſelves but as parts of a whole.

Many of theſe ſmall ſocieties, finding the induſtry of the individual inadequate to the cultivation of the ground, as well as the ſtrength of a ſingle arm inſufficient for its defence, aſſemble the people together, and cultivate the earth in common. The whole ſociety unite in the cultivation of the ſoil, and to the whole ſociety does its produce belong. Each of its members contributed to till and to ſow, and each is entitled to his portion of the future harveſt. The property, even of ſuch produce, (and more eſpecially of the ſoil itſelf) was ſuppoſed to be, till actually diſtributed, in the ſtate or ſociety at large:—the individual was only entitled to his ſhare of the fruits when gathered, or of the grain when lodged in their ſtores (*d*).

The

(*d*) "Among ſeveral nations of Indians, each town uſually works together: previous thereto, an old beloved man warns the inhabitants to be ready to plant on a prefixed day. At the dawn of it, one by order goes aloft, and whoops to them with ſhrill calls, 'That the new year is far advanced; that he who expects to eat muſt work; that he who will not work muſt pay the fine according to old cuſtom, or leave the town,' &c. At ſuch times may be ſeen many war-chieftains working in common with the people. About an hour after ſunriſe, they enter the field agreed on by lot, and fall to work with great chearfulneſs. Sometimes one of their orators cheers them with jeſts and humorous old tales, and ſings ſeveral of their moſt agreeable wild tunes, beating alſo with a ſtick in his right hand on the top of an earthen pot covered with a wet and well-ſtretched deerſkin. Thus they

The Gothic nations improved this idea:— with them the property of the ſoil was veſted in the ſociety, the nation, or tribe; but they did not cultivate the earth in common. A portion was ſeparately aſſigned to the individual entitled, who tilled, and enjoyed its produce. When the harveſt was gathered, his title to it ſeems to have ceaſed, and it returned again to the ſtate. In the then ſtate of agriculture, the ſoil required but little preparation; and, previouſly to the following ſeed-time, a new diſtribution was made (*e*); and a ſyſtem very ſimilar to this appears once to have obtained among our Celtic progenitors (*f*). Origin of the feudal ſyſtem.

The Germans had long been in the practice of making incurſions into the neighbouring ſtates under leaders of their own ſelection. They ſometimes returned and divided their ſpoil, and often ſettled in the countries they

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they proceed from field to field till their ſeed is ſown." See *Adair's Amer. Ind.* 406. 430. *Ferguſon on Civil Soc.* pt. 2. ſ. 2. *Linſchot.* b. 2. p. 219—221. *Ariſt. Polit.* c. 3. *Stuart's Diſſ.* pt. 1. ſ. 3. p. 32. n. (9). *View of Soc. in Eur.* b. 1. c. 1. ſ. 1. p. 152.

(*e*) *Tacitus de Morib. Germ.* cap. 26. & *vide Cæſ. de Bello Gall.* lib. iv. c. 2. & lib. vi. c. 20. *Stuart's View*, b. 1. c. 1. ſ. 1. & c. 2. ſ. 1. and notes. *Diſſ.* p. 1. ſ. 3. *Sulliv.* Lect. 4. *Poſt.* 2, (*a*).

(*f*) *Davys's Rep.* 28. b. &c. 49. a. &c. *Camd. Brit.* t. *Cuſt. of the Iriſh*; and ſee 1 *Whit. Manch.* c. 8. ſ. 3. 1 *Warr. Wales*, b. 3. p. 186, &c. b. 4. p. 246. *Tayl. on Gavelk. paſſim.*

had conquered. At length, however, the Gothic tribes, as by concert, forſook their native foreſts, and, over-running the more ſouthern provinces of Europe, eſtabliſhed themſelves on the ruins of the Roman power.

As thoſe barbarous nations were derived from a common ſource, the governments which they founded, and the cuſtoms which regulated their conduct, were as ſimilar to each other as they were different from the forms of polity of other ſtates.

They were originally a free and a brave people, and their conceptions of liberty and glory they religiouſly preſerved. The ultimate property of the ſoil, and the ſource of political authority, were conſidered by them as veſted in the ſociety at large; they were careful of individual freedom, and conſequently jealous of individual power. When they abdicated their native lands and ſought for new habitations, each emigrating body of people was a well regulated army. The freeman, though conſcious of his own importance, and ſenſible of his own claim to a ſhare in the lands which his ſword ſhould contribute to conquer, paid a willing and faithful obedience to his immediate chieftain; and the reſpective chiefs were equally ſubordinate to the heretoch, or general, who conducted them.

When they ſettled in the countries they had ſubdued, ſubordination was ſeen to be as eſſential

tial as when they had marched in purſuit of their ſpoil. The freedom of the individual was alſo ſupported: the authority he acknowledged was not the will of a tyrant, but the voice of the nation of which he himſelf was a part. The ſubordination eſtabliſhed was not for the aggrandizement of a particular perſon, but for the common good and the general defence (*g*).

The

(*g*) "*J'ai toûjours été choqué de ce mécompt de nos hiſtoriens, qui, ſans en excepter aucun, ont manqué à cet égard d'exactitude & de fidélité des le principe; en effet, c'eſt à ce titre le plus abuſif qui puiſſe être imaginé, qu'il faut rapporter l'idée commune, qui fait regarder la Gaule, & à préſent la France, comme le patrimoine de Clovis & de ſes ſucceſſeurs:* OU NE SE SOUVIENT PLUS QUE, DANS L'ORIGINE, CLOVIS N'ETOIT QUE LE GENERAL D'UNE ARMEE LIBRE, QUI L'AVOIT ELU POUR LA CONDUIRE DANS DES ENTREPRISES DONT LA GLOIRE ET LE PROFIT DEVOIENT ETRE COMMUNS." *Boulainvilliers Mem. Hiſtoriques*, 15. Again he ſays, "*Dans le premier état* (upon the conqueſt of Gaul, under the firſt race of their kings) *j'ai fait voir qu'une nation entiere, qui s'eſt déterminée à changer le pais de ſa naiſſance, & à faire une conquête au riſque de ſe perdre elle-même, n'a jamais pû conſider l'établiſſement perſonnel de ſon roi, comme ſon objet principal; il eſt vrai néanmoins, que le ſuccès d'une telle entrepriſe n'a pû lui devenir favourable, ſans que le roi en ait le profit principal, outre la gloire de la conduite; mais que la nation ait renoncé, ou même qu'elle pû renoncer à ſon droit ſur les terres qu'elle s'eſt acquiſe, & qu'elle a partagées, dans la ſeule idée de donner à ce roi, ou à ſes ſucceſſeurs, un pouvoir illimité, dont il ne lui reviendroit d'autre advantage que la gloire d'obeir, c'eſt non ſeulement ce qui n'a pas été fait, mais qu'il étoit impoſſible de faire, ou d'imaginer,*" &c. Ibid. 179. See *Squire, Ang. Sax.*

The nation or tribe in its predatory progreſs was an aſſemblage of ſoldiers whoſe glory was in arms; and an aſſemblage of ſoldiers was it to continue, though it became ſtationed in the country it had gained. "A feudal kingdom," ſays Dr. *Robertſon* (*b*), "was properly an encampment of a great army. Military ideas predominated; military ſubordination was eſtabliſhed; and the poſſeſſion of land was the pay which the ſoldiers received for their perſonal ſervice."

Their heretoch, or general, though elective, became permanent as the danger was permanent againſt which he was elected to contend.

Sax. Gov. f. 66. n. (3); & f. 70. n. (2). See alſo *De St. Remy. Memoires: pref.* "*Ils aimoient la liberté, et ne pouvoient qu'avec peine ſouffrir la domination même des princes de leur nation. Ils éliſoient eux-mêmes leur magiſtrats, & leurs rois, qu'ils changeoient tous les ans, de crainte que quelqu'un n'uſurpât trop d'autorité.*" *De St. Remy. Mem.* tom. 1. *Livre premier*, p. 13. &c. "*Tout ce vaſte pays* (the north of Germany) *étoit deviſé par Canton ſoumis à une infinité de petits princes ou ducs. Pluſieurs ou quelquefois tous ces ſouverains s'uniſſoient pour faire la guerre & des invaſions ſur le terres des peuples voiſins; alors ils éliſoient un général auquel ils donnoient le nom & l'autorité de roi tout le tems qu'ils marchoient ſous ſes ordres.*" *Abrégé Chron. de l'Hiſtoire du Nord. par M. Lacombe*, tom. 1. *Hiſt. de Dannemarc, an.* 772. p. 49.

(*b*) 1 *Hiſt. of Scotl.* 16. c. 1. and ſee 1 *Hiſt. of Cha. V.* f. 1. p. 16, 17. *Weſt on the Creation of Peers*, 1, &c. See the quotation from *Loyſeau* in *Wright on Ten.* 9. n. (t). *Law of Forfeiture for High Treaſon*, 45, &c. *Gilb. MS. Hiſt. of the Feud.*

This

This permanency, and the neceſſity of his continual exertion, increaſed his importance in the view of others: ſtill, however, he was only the repreſentative of the ſtate. The country was portioned out like the military authority; thoſe portions were allotted to certain individuals who acknowledged a ſubordination to others who again held their portion of their ſuperiors, who, in their turns, acknowledged the ſupremacy of the chief.

The property of the ſoil and the ſource of power were veſted in the ſociety; but as the chief repreſented that ſociety, the property of the ſoil, and the ſource of power, became veſted in the chief. Hence every individual who was entitled to a portion of territory was ſaid to hold either mediately or immediately of him (*i*); and hence alſo was he deemed the fountain of juſtice.

Diſtribution of lands.

A tribe, therefore, poſſeſſing a tract of conquered country, reſerved a part of it for the purpoſes of the ſtate, which was denominated the *fiſc* or *demeſnes*. This the king or chief enjoyed, as the repreſentative of the nation, in his political capacity (*k*); the other part was

(*i*) *Poſt.* 2, (*c*).

(*k*) There are ſome obſervations on this capacity of the king, which greatly merit the conſideration of the reader, in the *Law of Forfeiture for High Treaſon*, p. 52, &c.; and ſee alſo *De Lolme on the Conſt. of Engl.* b. 1. c. 1. p. 10, &c.

divided

divided among the great perſonages who attended him in his expedition. Thoſe perſonages conquered for themſelves as well as for their leader, and they conſidered the portions allotted them not ſtrictly as gratuities, but as their due (*l*).

Thoſe

(*l*) When William duke of Normandy expreſſed his intention to invade England, his people told him that though very poſſibly his claim might be juſtly founded, yet they were not obliged to aſſiſt him in gaining its crown:—that they were not bound to ſerve him in foreign wars. He was, therefore, obliged to have recourſe to ſupplication; for he could not command. He promiſed a ſhare of lands as a compenſation for ſervices. The aſſiſtance which he obtained was voluntary, and given him with a view to the poſſeſſions which they afterwards received. The number of ſhips which the nobles ſupplied are mentioned in a manuſcript tranſcribed by *Taylor* at the end of his *Hiſt. of Gavelk.* The rewards too which they actually received were moſt ample:—the earl of Moreton, and afterwards of Cornwall in England, had no leſs than 793 manors given him; but he had contributed to the expedition no leſs than 120 ſhips. Others were rewarded proportionally; their ſhares are enumerated in the hiſtories of *Rapin*, *Hume*, &c., and are mentioned alſo in an *Eſſay on the Polity of Engl.* 476. n. (N N). *Weſt on Peers*, 20. *Sulliv.* L. 17. p. 162, &c.

The earl of Surry did not ſcruple to affirm in the time of Edward the firſt, that his anceſtors had aſſiſted William in gaining England, and were equally entitled to their ſhare of the ſpoil. And, in anſwer to a *quo warranto* iſſued by Edward, he declared that it was by *their* ſwords that his anceſtors had obtained their lands, and that by *his* would he maintain his right. See *Weſt*, 20, 21. *Owen's Britiſh Remains*, 18, 19. *Hiſt. of the Lord Marchers*; and ſee

Thoſe who held their territories immediately from the crown were ſaid to hold *in capite*; but thoſe who held *in capite* had other chiefs, or lords, or barons, ſubordinate to them: they alſo granted to hold of themſelves. Theſe intermediate perſons were denominated the *meſne* lords, of whom ſo much is ſpoken in our laws. Even theſe divided their lands among their followers; and every lordſhip or manor was itſelf the ſimilitude of the kingdom at large. The lord divided his manor, as the ſtate had divided the kingdom, into two parts: the one he retained for his own ſupport, and was partly cultivated by his villeins and copyholders, and was called his demeſnes (*m*); the other part was parcelled out among his dependants, who returned him their ſervices. "A feudal kingdom," ſays *Weſt* (*n*), "is to be conſidered no otherwiſe than as one great ſeigniory or dominion, of which the king is the chief lord."

Camd. Brit. Introd. *Norm.* clvii. 1 *Tyrr.* b. 6. p. 108. *Dr. Squire, Anglo-Sax. Gov.* ſ. 38, 39, &c. 60, 70, &c. 1 *Rob. Scotl.* c. 1. p. 15. *Charles V.* ſ. 1. p. 14. and notes, 256. n. (H). *Stuart's Diſſ.* p. 3. ſ. 2. p. 137. n. (6). *De Lolme*, b. 1. c. 1. p. 10, 11. *De St. Remy. Memoires*, tom. 1. pref. ſ. 14, &c.; and livre ii. p. 86. See, of the Spaniſh invaders of Peru, 1 *Rob. Amer.* b. 6. p. 258. 4to. ed.

(*m*) See 1 *Lord Raym.* 43, 4. 2 *ibid.* 1225. 1 *Salk.* 186.

(*n*) On *Peers*, 2—10.; and ſee 1 *Mad. Excheq.* c. 1. p. 2, 3. *Kaims's Brit. Antiq.* 26. and 1 *Rob. Scotl.* b. 1. p. 77.

We

Juriſdiction of the barons.

We have already obſerved that the king was the origin of judicial power as the repreſentative of the nation. The lord had a juriſdiction alſo commenſurate with his territory. This extended often to life and limb, and by conſequence to the power of pardoning; and the power of pardoning was not even here wholly at an end till the time of Henry the eighth (*o*). The lord was alſo chancellor in his court, and had an equitable as well as a legal authority (*p*). He, too, like his king, had his officers of ſtate, and his hall was attended like the court of his chief (*q*). The impartial adminiſtration of juſtice was carefully provided for; it was not the caprice of their lord, but the ſentence of their peers that they obeyed. Each was the judge of

(*o*) See the *Stat.* 27 *Hen.* 8. c. 24.

(*p*) *Poſt.* 48, (*a*); 209, (*d*); 210, &c. 309, &c. See *Kaims's Eſſ. on Brit. Ant.* Eſſ. 2. *Dalrymple, F. P.* c. 7. ſ. 1. p. 270. *Squire*, ſ. 54, &c. 1 *Rob. Cha. V.* ſ. 1. p. 67, &c. and n. (Z). *Stuart's View*, b. 1. c. 2. ſ. 3. p. 38, and 246, &c.

(*q*) See *Stu. Diſſ.* p. 3. ſ. 3. p. 163. n. (20). *Squire*, ſ. 53. n. (1). 1 *Mad. Excheq.* c. 3. p. 107, &c. *Formul. Angl.* No 2, &c. *Mad. Baron. Anglica*, b. 1. c. 6. p. 133, &c. *St. Palaye*, p. 4, &c.

The houſe of peers was the court-baron of the kingdom: and ſee *Weſt.* 10, &c. *Kaims's Eſſ.* ii. p. 25. 1 *Rob. Cha. V.* ſ. 1. p. 43.; and ſee alſo *Camd. Brit.* t. Cheſhire and Glamorganſhire, of the courts of the earls of thoſe territories.

his

his equals, and each by his equals was judged (*r*). As tenants they were bound to preſerve the rights of their lord, and inform him of their being infringed. They were jealous alſo of his power, and carefully guarded their own. Hence the ſuit of court was inſeparably annexed to the feud (*s*).

Thus we ſee that the kingdom was parcelled out, and each proprietor held of another in a regular ſubordination as he had done with reſpect to his military capacity in the army; for ſtill were his military obligations exiſting. The connections between the ſoldier and his general, the tenant and his lord, were not confined to themſelves; they had a reſpect to the whole ſociety; the public was intereſted, and the whole inſtitution of feudaliſm was national,—was enlarged (*t*).

This connection between the lord and tenant was intimate, and originated in benevolence and gratitude: the conſequent obligations were mu- The obligations of the lord and tenant were reciprocal.

(*r*) *Magna Charta*, c. 14 & 29; and ſee *Stuart's Diſſ.* p. 4. ſ. 4. p. 262. n. (6). *Wright*, 196. n. (*i*); and *Poſt.* 210, (*a*).

The *Count de Boulainvilliers*, (*Mem. Hiſtoriques*, p. 19.) when enumerating the privileges of the freemen, mentions, "*Le droit de juger ſes pareils, et de ne pouvoir être jugé que par eux en matiere criminelle*," &c. See *Squire, Anglo-Sax. Gov.* ſ. 60. n. (2).

(*s*) *Poſt.* 210, (*a*); 324, (*b*).

(*t*) See *Law of Forfeit.* 45. 52, &c. *Co. Litt.* 75. 2 *Inſt.* 597. *Wright on Ten.* 9, 10. 20. 27. 41. 64. n. (*g*); 68. n. (*w*). *Stu. View*, *paſſim.*

tual.

tual. The tenant was dependant upon his lord, but the lord was beholding in his turn to the tenant. Hence the reciprocity of their engagements (*u*). The lord could not alien his seigniory without the consent of his tenant; and hence the ceremony of attornment (*x*). The tenant, on the other hand, could not alien his feud without the concurrence of the lord (*y*). The connection was founded on personal services, and on personal attachments. This connection relaxed, and the lord consented to the transfer; or, by means of a present, his reluctance was done away: and hence came fines on alienation (*z*). It would have been incongruous with the liberty in which this system originated, but which, alas! was forgotten in later days, to introduce a stranger into the tenancy without the consent of the lord, or to subject a freeman to a superior whom he did not choose to obey. Hence also was possession delivered, and the tenant admitted, in the most public manner,

Attornment.

Fines for alienation.

(*u*) *Law of Forfeit.* 46, &c. *Wright*, 12, n. (*a*); 30. 37. 42, &c. 67, and n. (*s*); 145, n. (*a*). *Stu. View*, b. 1. c. 2. s. 1. n. (8), p. 213. b. 2. c. 1. s. 2. and n. (3), p. 317. and *Post.* 50. 81. 133. 151.

"The old way of feoffing for homage and service," says *Madox*, "was an excellent means to unite and consociate men together. Thus a great lord and his frank-tenants by chivalry were in a sort all of one family." *Baronia Anglica*, b. 3. c. 6. p. 280.

(*x*) *Post.* 50 & 81. (*y*) *Post.* 50.

(*z*) *Post.* 50, and n. (*c*); 51, (*a*.)

coram

coram paribus; not only for evidencing the transfer or gift, but for the information of those who were already received into the tenancy (*a*).

By accepting the feud, the tenant was bound to perform the stipulated services and returns (*b*); to accompany his lord to battle or to cultivate his lands, and to attend his courts of justice or state. On such acceptance, he promised to be faithful and true: hence arose fealty and homage. When the lord accepted the homage of his tenant, he also was bound to warranty and defence (*c*). Services. Fealty, &c. Warranty.

In Germany, feuds were annual only; an attention to agriculture would have withdrawn

(*a*) *Post.* 39, (*a*); 250, (*e*).

(*b*) Those services and returns were in after times divided into *feudal* and *extra feudal:* the former were those flowing of necessity from the nature of the tenancy, as fealty, defence, and suit of court; the latter were such as were expressly stipulated in the grant; and the king or lord could impose or require no farther returns. When Edward the first ordered the earls of Hereford and Norfolk to go over with his army into Guienne, they replied that the tenure of their lands did not oblige them do so, unless his majesty went in person. The king insisted on the thing t the earls were firm. "By God, sir earl," said Edward to Hereford, "you shall either go or hang."—"By God, sir king," replied the earl, "I will neither go nor hang." The king submitted, and forgave their warmth. *Stat.* 34 *Ed.* 1. *st.* 4. c. 5. 2 *Inst.* 47, 48, and 536. 3 *Tyrr.* 106. *West.* 7. *Sulliv.* 70. L. 7. *Camd. Brit.* Introd. clvii. *Rapin, Henry,* &c. *sub an.* 1280.

(*c*) *Post.* 133, (*a*).

them

Feuds become for life, &c.

them from warlike enterprizes (*d*). When they became ſettled, the reaſon in ſome meaſure ceaſed, and feuds were conferred for life (*e*); they were then extended to the ſons of the tenant. The diviſion however of them was inimical to the end of the inſtitution, as it

Deſcendible.

divided the ſtrength of the tenancy; the individual therefore was to ſucceed when feuds were permitted to deſcend. The lord then choſe the ſon which he conceived the beſt adapted to the diſcharge of the returns (*f*); the eldeſt generally became the firſt enabled to render them, and the right of primogeniture was at length eſtabliſhed (*g*). Women, being incapable of diſcharging the feudal duties, were of conſequence precluded from the fief (*h*).

Seiſin given to the heir.

Still, however, though the heir ſucceeded, yet he received his feud rather as a gratuity than as a due. He was regularly accepted as a tenant by the lord, and he acknowledged his obligation for the renewal of the grant. On the death of a tenant, as the ſervices ceaſed, the lord took poſſeſſion of the feud. He made proclamation for the heir to claim; and if he did ſo within the time preſcribed, he relin-

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(*d*) *Vide Cæſar de Bello Gall.* lib. vi. c. 20. *Watk. on Deſc.* c. 3. ſ. 1. p. 103.

(*e*) *Poſt.* 2, (*a*).

(*f*) *Poſt.* 11, (*b*).

(*g*) *Poſt.* 11, (*b*).

(*h*) *Poſt.* 11, (*a*).

quiſhed

quiſhed the poſſeſſion to him (*i*). Hence the incidents of heriots, reliefs, primer ſeiſin, &c.

In ſoccage tenures, indeed, the diviſion of the feud was not productive of the miſchiefs which took place with reſpect to military tenancies; hence thoſe in ſoccage deſcended to *all* the ſons till a later period. At length, however, in imitation of the military feuds, they went to the eldeſt alone (*k*).

If the heir was an infant at the death of his anceſtor who held by knight-ſervice, the lord took him under his protection, and educated him in military arts (*l*). If in ſoccage, his relations brought him up, and inſtructed him in ruſtic employs (*m*): hence aroſe the right of ward. The infant was ſooner able to manage rural concerns than to bear arms, and therefore he Wardſhip.

(*i*) *Poſt.* 24, (*o*); 230, (*q*). (*k*) *Poſt.* 2, (*k*).

(*l*) Sir *Edward Coke* ſays (1 *Inſt.* 75, *b.*), that the lord ſhall have the cuſtody of ſuch infants during their minority, not for benefit onely, but that the lord might ſee that they be in their yong yeares taught the deeds of chivalry, and other vertuous and worthy ſciences."

(*m*) "The children [of the tenant in ſoccage] were educated to the labours of the plough, and if the father died, the education devolved on the next relation, on whom the inheritance could not deſcend; for there was no reaſon to caſt the education of the children upon the lord, becauſe the lord had no underſtanding in this ſort of drudgery, but the knowledge of it chiefly lay in the family of the Socmen." *Gilb. Hiſt. of the Feud.* f. 49, MS.

was out of ward in the one caſe at fourteen, in the other at twenty-one (*l*).

Though the greateſt amity ſubſiſted between the lord and his tenants, and though the lords themſelves cordially united in a common cauſe, were peers, and ſubordinate to one head, yet they often bore the moſt implacable enmity to each other (*m*); and that enmity deſcended to their tenants (*n*). Hence was it neceſſary that marriages ſhould not be contracted between the tenants of different clans without the conſent of the ſeveral lords; and from this aroſe the incident of marriage (*o*).

Deadly feuds.

Incident of marriage.

Forfeiture of the feud;

When the tenant did any act which rendered him incapable of diſcharging the duties of the

(*l*) See Note I. at the end of the volume.

Private wars.

(*m*) The barons claimed the right of private war, or of commencing hoſtilities againſt each other at their pleaſure, and even againſt their king in certain caſes. This uſage, however, was not ſo prevalent in this country as in many on the Continent, yet even here it prevailed; that between the earls of Hereford and Gloceſter, (in the time of Edward the Firſt,) particularly, is frequently noticed by our hiſtorians. The truce between thoſe nobles is curious, and is preſerved by *Madox*, (*Form. Anglic* 84, N° 155.) and is given alſo in the Appendix to *Stu. View of Soc. in Eur.* See, of the Right of private War, 1 *Rob. Cha. V.* ſ. 1. p. 51, &c. and note xxi. *De Lolme*, b. 1. c. 1. p. 12, &c. *Stuart's View*, b. 1. c. 2. ſ. 3. p. 38, &c.; 260, &c. 1 *Ward on the Law of Nations*, c. 12. p. 340, &c. See 4 *Bl. Comm.* 82. c. 6. *Stuart's Diſſ.* pt. 3. ſ. 3. p. 159, &c. *Butl. N. to Co. Lit.* 64. *a.* ſ. iv.

(*n*) *Poſt.* 143.

(*o*) *Poſt.* 12, (*a*).

feud,

feud, if he ſhowed himſelf unworthy of its enjoyment, by deſerting his lord in battle, or by the perpetration of certain crimes, it was but juſt that it ſhould return to the lord from whom it was originally derived: hence came the incident of forfeiture (*p*). If, on the other hand, the lord did any thing injurious to the feudal relation, if he was guilty of injuſtice or oppreſſion, he loſt, in his turn, his ſeigniorial rights, and the tenant held immediately of the lord above (*q*). If the heirs of the tenant became extinct, there could be no one to enjoy the gift, or to return the ſervices on which it was granted; then, too, it neceſſarily was reſumed by the lord, and hence aroſe the right of eſcheat and reverter (*r*).

of the ſeigniory.

Right of eſcheat.

Again, as the whole barony was intereſted in the fate of its lord, and, in like manner, the whole nation in that of the king; as the tenants individually were bound by gratitude to him for their gifts, and attached to him from the protection he had afforded, and the ſervices they had been wont to pay; if the lord or the king had unfortunately fallen into the hands of the enemy, they contributed their portion to effectuate his releaſe. In thoſe times the feud and demeſnes were inalienable: beſides, the

Aids.

(*p*) *Poſt.* 38, &c.

(*q*) *Law of Forfeit.* 46. *Wright's Ten.* 44. *Le Grand Couſtumier*, c. 14. *De Feaulte. Mirrour*, c. 1. ſ. 3.

(*r*) *Poſt.* 17.

lord, or king, poſſeſſed his ſeigniory in a political, rather than a perſonal capacity, and therefore it was not chargeable by the individual. Perſonal property was in thoſe days very inconſiderable; and his RANSOM could only be effected by the benevolence of his faithful tenants (*s*). In after-times too, the tenants again teſtified their attachment and gratitude, by making the lord a preſent on occaſion of knighting his eldeſt ſon; a circumſtance attended with much ſplendor, and conſequently with much expence. In this alſo they themſelves were more immediately intereſted; the knight was the defender and ſervant of his country; and they contributed by their preſents to ſupport the magnificence of the ſcene. When his daughter alſo was given in marriage, they a third time evinced that attachment, by augmenting her portion by their voluntary bequeſts. From theſe grew the incidents of *aid*. In after-times too, theſe aids, though originally gratuities flowing ſolely from the munificence of the tenant, were claimed as dues, and perverted to the groſſeſt oppreſſions. Other aids were often demanded, as to pay debts, reliefs, &c. &c. (*t*)

For ranſom.

Knighthood.

Marriage.

(*s*) Of ranſom, ſee *Barrington on the ancient Statutes*, 350. 1 *Hen. VI.* 1 *Ward's Law of Nations*, c. 9. *Wright on Ten.* 112, and n. (*n*); 113, and n. (*o*); and 114, n. (*p*).

(*t*) See further, 1 *Mad. Hiſt. Exchеq.* c. xv. p. 569, &c. *Wright*, 40, &c.; 105, &c.; 111, &c.; 125, and notes, and Append. *Stuart's View*, b. 1. c. 2. ſ. 5. p. 58.; b. 2. c. 1. ſ. 1. p. 78. 332, 333.

A ſyſtem

A ſyſtem thus founded in friendſhip and benevolence, in protection and gratitude, was at length to be the inſtrument of a tyranny the moſt intolerant, rapacious, and inſatiable; its principle indeed was military, and inconſiſtent with the civilization and improvement of the people (*u*). As the intercourſe between nations increaſed, as the good underſtanding which once only ſubſiſted between the individuals of a clan became extended to ſtates and countries, as the arts and civil employs became more diffuſed and embraced, the military ſpirit ſubſided. The knight was allowed his deputy, and at length his ſervice was commuted for money. That military ardour and enthuſiaſm abated, and ſpecie flowing on all ſides into the coffers of the prince, a mercenary rabble ſupplanted the generous and courteous knights with their firm and their faithful tenants. A miſcellaneous crowd of alien hirelings wielded the ſword of power, and at length gave birth to a ſyſtem the moſt hoſtile to the feelings of a brave people that ever endangered freedom, or relaxed the confidence of man in man—that of a ſtanding

Decline of the feudal ſyſtem.

Its principle was military.

Eſcuage.

Mercenaries.

Standing armies.

(*u*) *Voltaire, Spir. Nat.* vol. 2. c. 96. p. 278, 9. 8vo ed. *Dalrymple, F. P.* c. 2. ſ. 1. *Stuart's View*, b. 2. c. 1. ſ. 2. p. 88.; c. 3. ſ. 1. p. 110.; ſ. 2. p. 114. 118, &c. 3 *Eunomus*, ſ. 69. p. 328. *Kaims's Law Tracts*, Tr. v. p. 197. *Brit. Antiq.* eſſ. 1. p. 12.; eſſ. 2. p. 26.; eſſ. 4. p. 156. *Eſſay on the Polity of Engl.* b. 1. c. 4 & 5. 1 *Rob. Scotl.* b. 1. p. 26. 1 *Charles V. paſſim.*

army of mercenary ſoldiers; an army whoſe intereſts were different from thoſe they were ſuppoſed to defend; who were inſulated in forts and barracks.

Depravity of manners.

But this was not the only evil which attended the declenſion of the feudal polity. The heroic valour and magnanimity, the affection and ardour of former ages, ſunk into inſolence and rapacity, into venality and ingratitude; the generoſity, the urbanity, the politeneſs of chivalry, degenerated into licentiouſneſs and intrigue.

But there are limits even to degeneracy; there are bounds which even corruption muſt not paſs; there is a criſis even in depravity, from whence order and ſalubrity are to flow. Though the entire ſyſtem appear vitiated, and though diſſolution itſelf be threatened, yet ſome unſeen hand, which is buſily though ſilently employed, ſhall ſtill over-rule thoſe events, and make them ſubſervient to purpoſes the moſt benign as well as unexpected:—

> "From ſeeming evil ſtill educing good,
> And better thence again, and better ſtill,
> In infinite progreſſion!"

Thoſe principles, eſſential to the welfare and ends of mankind, are not to be eradicated from or extinguiſhed in the human heart; they are implanted by Heaven as inſtruments of its providence, and are ſubſervient to ſchemes and ſyſtems

ſyſtems ample as the univerſe it has formed; they are given to propel man to an advancement in perfection and happineſs, and wiſely adapted to the relations in which he ſtands. Amid all the perturbations and convulſions he is ſubject to, either from exterior or internal evils, there is yet a ſomething which ſhall counteract his errors, and point out the path of rectitude; which ſhall induce, at leaſt poſterity, to explore thoſe paths which others have forſaken, and to adopt thoſe meaſures which are congenial with the feelings of the heart. There is a kind of *vis inertia* in humanity which muſt reſtore it to its deſtined ſtate; and, as man was deſigned and conſtituted for happineſs and the improvement of his nature, he will one day adopt thoſe ſyſtems and rules only which ſhall be evidently conducive to thoſe ends.

The principles of polity become enlarged.

Evils were permitted to be profuſely ſcattered, but antidotes were alſo diſſeminated with as liberal an hand. Remedies grew up with the banes they were to counteract; they were diſcovered even in the principles of that very polity which was attacked, and found to be more ſtrongly implanted in the human breaſt. The benefits which ſprang from the relaxation, and even declenſion, of the feudal ſyſtem, abundantly overbalanced the miſchiefs which its corruptions had introduced. The military ſpirit abating, man no more conſidered man as an enemy, nor himſelf as an animal of prey. The

The military ſpirit ſubſides.

warrior hung up his armour, now uſeleſs, in his hall; he lived among his people, and courted their confidence and eſteem; he encouraged agriculture and induſtry; and literature and the arts were found to be compatible with the cha-

Commerce.

racter of the free and the great. Commerce regained its importance in the eyes of Europe, enriched nations with its bleſſings, and enlightened and enlarged the heart by the intercourſe and reciprocal dependance it introduced. The "hum of men" was not confined to the "tower'd city," to jouſts, or to tournaments, but the din of traffic reſounded in our ports, and the ſong of peace was heard on the plain. The ocean was crowded with the veſſels of trade, and the fields were profuſe in their produce. The commoner by his commerce aroſe to importance in the ſtate (*x*). Men of all orders and ranks aſſimilated by degrees, and diſtinctions and prejudices began to be removed. The heart became expanded by intercourſe and the conviction of the neceſſity of mutual aſſiſtance. To be enlightened, refined, and uſeful, appeared the province allotted to man. Each conſidered another as the child of a common parent with himſelf; of the ſame feelings, and ſubject to the ſame wants. Philanthropy lifted

(*x*) See 1 *Robertſ. Cha. V.* ſ. 1. p. 43, &c. *De Lolme on the Conſt. of Engl. paſſim. Eſſay on the Polity of Engl.* b. 1. c. 6, &c.

her

her head, and each was to partake of her ſmiles. The banners under which his forefathers fought were not now to engage his inquiry. His friendſhip was no more to be influenced by the emblazonry of his ſhield, nor his affections or confidence confined within the bounds of a dukedom or manor; but the narrow conceptions of ariſtocratic pride, of hereditary prejudice, and of contracting and indurating bigotry, were to be diſſipated by the beams of knowledge which on all ſides emaned.

Poſitive and haſty inſtitutions loſt inſenſibly their power over mankind. The wants, the feelings, and the natural relations of humanity were appealed to. The laws adapted themſelves by degrees to the improvements of the times. Forms of government inconſiſtent with thoſe advances, relaxed, or were reprobated; and the intercourſe between man and man, and between nation and nation, began to be founded upon the broad baſis of univerſal benevolence and peace.

But as the improvements of a people are gradual, ſo the alterations in the laws are gradually effected. Proviſions or repeals are introduced as the particular occaſion demands, but the radical principles of the government remain unaltered. The feudal ſyſtem, ſo firmly fixed in this iſland, has never been wholly aboliſhed. From this ſyſtem are derived our laws relative

The principles of our property-laws derived from the feudal ſyſtem.

relative to property (*y*), and to it muſt we have recourſe, in order to account for the origin and utility of many which might otherwiſe appear uſeleſs or unjuſt; and to it muſt we continually recur, to explain and illuſtrate what might otherwiſe ſeem dictated only by caprice; to trace out their principles, their ſpirit, their ends and effects.

By recurring to this ſyſtem did our author explain what, on any other ſyſtem, would have remained for ever inexplicable. He reſcued many of our laws from the imputation of barbarity and arbitrary impoſition; he formed an epocha in their ſtudy, by directing us where to diſcover their origin and principles. But he has not only benefited the ſtudent, he has reflected honour on the nation and its laws. Since his days, many have riſen up in his ſpirit, and, animated by his example, and encouraged by his ſucceſs, purſued thoſe paths which he had ſo arduouſly and ſedulouſly explored. To the ſtudent there cannot be preſented a more ad-

(*y*) "The bulk of our common law," ſays *Weſt*, "is nothing but feudal cuſtoms." *On Peers*, 3. See *Wright on Ten.* 1. 135, &c. *Poſt.* 155. N. LXVI.

"An Engliſh lawyer, (ſays an elegant writer,) if he would attain the true perfection of his art, has, like the painter, his Lombard and Italian ſchools. Our municipal ſyſtem in its progreſs has copied the great draughts in them both." *Eunomus*, vol. 1. ſ. 20. p. 85.

vantageous, or a more pleaſing fund of information, than their labours have produced. This Introduction, therefore, ſhall be concluded with acknowledging the obligations which the writer of it owes to their works, and by referring more particularly to thoſe of their productions which merit ſo peculiarly the attention of him who would wiſh to be acquainted with the rationale of our law (z).

(z) *Stuart's View of Society in Europe*, and his *Hiſtorical Diſſertation on the Antiquity of the Engliſh Conſtitution. Sullivan's Lectures on the Laws of England. Kaims's Hiſtorical Law-Tracts*, and *Eſſays on Britiſh Antiquities. Dalrymple's Eſſay towards an Hiſtory of Feudal Property. Dr. Squire's Hiſtorical Eſſay on the Anglo-Saxon Government. Millar's Hiſtorical View of Engliſh Government. Wright's Introduction to the Law of Tenures. Blackſtone's Commentaries*, vol. 2. *Mr. Butler's Note to Co. Lit.* 64, (*a*). *Monteſquieu's Spirit of Laws. York's Conſiderations on the Law of Forfeiture for High Treaſon. Robertſon's Charles the Fifth*, vol. 1. *Lord Lyttelton's Hiſt. Hen. II.* vol. 3.

THE ORIGIN OF COMMON LAW TENURES.

Of FEUDS (*a*).

A FEUD is a right that a vaſſal has in ſome lands, or ſome immoveable (*b*) thing of his lord's, to take the profits (*c*), paying the feudal duties. Spelm. Rem. fo. 2.

The feudal property was very unſettled in ancient times (*d*). The lords ſucceeded by

(*a*) [See Note II.]

(*b*) [In after-times feuds were permitted of incorporeal things. See *Sulliv.* Lect. vii. p. 74. *Stuart's View*, b. 1. c. 2. ſ. 3. p. 43, 4. *Butler*, n. to *Co. Litt.* 64. *a.* ſ. ii. 1 *Rob. Cha. V.* ſ. 1. N. (H), p. 264. 2 *Roll. Abr. Ten.* (D) & (E), 500, and *Poſt.* 332. N. CLXXVI.]

(*c*) [See N. III.]

(*d*) *Antiquiſſimo tempore ſic erat in dominorum poteſtate conſtitutum, ut quando vellent, poſſent auferre rem in feudum a ſe datum.* Feud. lib. 1. tit. 1. [See *Wright's Ten.* 14. n. (*c*). *Gilb. MS. Hiſt. of the Feud.*]

election

election or ſtrong hand; the tenants temporary, or at the will of their lords.

(*e*) When the barbarous nations had invaded the *Roman* empire the vaſſal's eſtate became certain for life (*f*), then to all his deſcendants. Oppoſite to feudal property is *allodium* (*g*), which ſeems to be the old patrimonial property revived by the chriſtian clergy among the barbarous nations (*h*). This obtained among our *Saxons* (*i*), and gave birth to gavelkind (*k*).

Ld. Raym. 1024. 1292.

Salk. 243.

(*l*) Feuds are hereditary, or for life. In hereditary feuds the word *heirs* is required to diſtinguiſh it from the original feud that was for

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(*e*) *Deinde ſtatutum eſt ut uſque ad vitam fidelis produceretur.* Feud. lib. 1. tit. 1.; [and ſee *Wright's Ten.* 14. n. (*e*).]

(*f*) [See N. IV.] (*g*) [See N. V.]

(*h*) *Somner*'s treatiſe of gavelkind, p. 8, 9. 115. 172. [and ſee *Wright's Ten.* 206. n. (*q*) & (*s*).]

(*i*) [See N. VI.] (*k*) [See N. VII.]

(*l*) There are ſeveral diviſions of feuds, *viz.*

Feudum nobile & ignobile. Crag. de jure feud. 56. Zaſius in uſus feud. fo. 5.

Feudum ligium & non ligium. Seld. tit. of honour, 38. 39.

Francum & non francum. Crag. de jure feud. p. 79.

Reale & perſonale, vel perpetuum & temporale. Zaſius in uſus feud. fo. 5.

Eccleſiaſticum & ſeculare. Zaſius, fo. 6.

Antiquum ſeu paternum & novum. Feud. lib. 3. tit. 50.

Dividuum & individuum. Crag. de jure feud. p. 58.

Maſculinum & fœmineum. Zaſius in uſus feud. fo. 120. [See further of the diviſion of feuds, *Wright's Ten.* 22, &c. and notes. *Sulliv.* Lect. vii.]

life

life only (*m*). In hereditary feuds the deſcent is to be conſidered, where the uſage of other nations is to be compared with the feudal.

The notion of regular property begun among the *Jews* and *Egyptians*. The *Jews* were taught from heaven, and the *Egyptians* by the inundations of *Nile*, to ſettle in regular neighbourhood; and from the *Egyptians* the notions of property came to the *Greeks* and *Romans*.

Among the *Jews*, *Egyptians*, *Greeks*, and *Romans*, the father was the head of the family, and had the inheritance and the power of life and death over his children (ſave that by the *Jewiſh* law it is tempered); for the father might not kill his ſon but in the preſence of the public magiſtrate. Deut. xxi. 18.

Among the *Jews* (*n*) and *Egyptians*, inheritance deſcended by ſettled rules in their tribes and families; and the will could only be made of acquiſitions. Then they could not ſo make a will as to diſinherit the eldeſt ſon of his right of primogeniture, which was that of a double portion. Deut. xxi. 15, 16, 17.

If a man died, the inheritance and acquiſitions undeviſed deſcended to his ſons equally; only the eldeſt had a double portion. This law

(*m*) [See N. VIII.]

(*n*) [See further of theſe ſucceſſions, *Hale's Comm. Law*, 242. c. 11. *Robinſ. Gavelk.* b. 1. c. 2. 2 *Bl. Comm.* c. 14.]

aroſe

The eldeſt ſon was to be ſacrificed, and ſo was to be redeemed from the prieſt.

aroſe becauſe they apprehended ſuch ſon the beginning of the father's ſtrength; therefore he was to be thought ſacred, and to be redeemed from the prieſt, and to bear the honourable charges and offices of the ſtate: but becauſe the words of the law give the reaſon, that the ſon was the beginning of the father's ſtrength; therefore the privilege was perſonal, and went only to the eldeſt. So if a man had iſſue *A.* and *B.*, *A.* had iſſue *C.* and *D.*, and *A.* had died, *C.* and *D.* ſhould have the double portion of their father, but *C.* had no greater ſhare of it than *D.* nor did the double portion ever prevail, where the deſcent was to brothers and other collaterals.

Selden de ſucceſſion. apud Hebræos, c. 23.

(*o*) If a man had no ſons, his daughters inherited, but without double portion to the eldeſt; but they

(*o*) This right of repreſentation is not peculiar to the law of *England*, but is obſerved by the laws of moſt countries; and we read in *Numbers*, ch. xxvi. ver. 33. and ch. xxxvi. that when *Zelophehad* the ſon of *Hepher* died, leaving no ſons, but daughters, they came unto *Moſes*, and claimed the poſſeſſion of their father. This being a new caſe, *Moſes*, it is ſaid, brought that caſe before the Lord, who commanded him to give unto them the poſſeſſion of their father. So that it was here determined that they ſhould take the double portion belonging to their father, as the eldeſt ſon, by right of repreſentation. And this right of repreſentation was practiſed among the *Romans*, and was the law of the twelve tables. *Selden de ſucceſſ. apud Hebræos*, *c.* 23. And this right of repreſentation holds in inheritances deſcendible by

they were obliged to marry among the families of the tribes, that the inheritance might keep among the ſame families.

If a man had no deſcendants, it went to the *agnati* or kindred of the father's ſide; and it never went to the *cognati* or kindred of the mother's ſide, becauſe the father gave the denomination to the families.

If a man died inteſtate, his acquiſitions went firſt to deſcendants, then to his father, as neareſt relation; then to brothers as repreſentatives to his father; only they had a law, that if a brother married the deceaſed's wife, and had iſſue, ſuch iſſue bare the name of the deceaſed, and had the inheritance, excluſive of all others.

If the deceaſed had neither father nor mother, it went to the grandfather, and to the uncles and nephews, as his repreſentatives, and for failure there, to the great grandfather and his repreſentatives *in infinitum* in the ſame order. [6]

As to inheritance, that went to deſcendants, and then to collaterals; for that muſt have paſſed the aſcending line before it could have ſettled in the deſcendants; ſo that *Moſes*, when Numb. xxvii. from 1 to 11. Lev. xxv. ver. 8 to 14. The Agrarian law among the

by cuſtom, as well as by common law, as in the caſe of gavelkind lands, borough *Engliſh*, &c. and there is a remarkable caſe adjudged in the *C. B.* in my Lord *Bridgman's* time, *anno* 1660, 1661. and entered *Hil.* 1655. *rot.* 779. between *Hale* and ——; but it was never printed until my Lord *Raymond's* time. See Lord *Raymond's Rep.* 1025, 1026, *&c.*

Romans was, to divide the lands got by conqueſt among the ſoldiers equally, &c.

he ſpeaks of the laws of inheritance, doth not mention the father, becauſe he muſt have had it before it could come to the ſon.

As a man could not deviſe the inheritance, ſo he could not ſell, but from the time of ſale to the general jubilee, which was once in fifty years; then there was a rotation of all poſſeſſion, and every man was inſtated in his own, which was the *Jewiſh Agrarian* law. See *Hale's Succeſſ.* 5 *to* 11.

The *Roman* law differed from the *Jewiſh* in that the father had the power of life and death over his children without the magiſtrate, ſo that he might deſtroy his ſons, which was frequent in the ancient *Roman* times; for they uſed to expoſe their iſſue, if they had more than they could keep. From hence began the right of
[7] adoption: for to preſerve children from death, they were adopted into other families, and became children of that family to whom adopted. And as a *Roman* had power to deſtroy his children, ſo he might diſinherit them by his will in expreſs words. But if he only pretermitted them, and gave them nothing, then the pretor introduced them to an equal portion with the reſt. So that a *Roman* had an entire power over his children while he lived, and whatever they got was their father's, and at his death, he might diſpoſe of it as he pleaſed among his other children. If he died without ſuch diſpoſition, it firſt went among thoſe of his own

family, whether male or female, by him begotten or adopted. If any of his ſons died, the grandchildren ſucceeded into his portion *in ſtirpes*; but the pretor brought in children emancipated equal with the reſt; for though ſuch were out of their father's family, yet the natural relation continued; but if an adopted ſon was emancipated, he took nothing. The children of daughters did not inherit [to] the father, becauſe they were out of his family.

If a man had no *ſui hæredes*, by the old *Roman* law it went to the *agnati*, as firſt to brothers as repreſentatives of their fathers; to uncles *ex repræſentatione* of their grandfathers, [8] *in capita in infinitum*, after the *Jewiſh* model; but the pretor brought in the *cognati* in equal degrees *in capita in infinitum*, to inherit with the *agnati*. Becauſe, by the indefinite liberty of deviſing, they could not keep eſtates in their tribes; therefore the *cognati* entered in according to their natural relation.

A ſon emancipated, or a ſon that had acquired a *peculium*, after they had allowed that privilege to ſons in the life of their fathers, on failure of iſſue was inherited firſt by the aſcending line, and that failing, by the collateral, only brothers of the whole blood were called in *in capita* equal with parents and their children *in ſtirpes*; for ſuch brothers being of both bloods, they were held equally dear as either parent. On failure of the aſcending line, and brothers

and ſiſters of the whole blood, it went to brothers and ſiſters of the half blood, and their children *in ſtirpes*, by the *Juſtinian* conſtitution. On failure of them it went to thoſe perſons that were next in degree *in capita*; and thoſe that were equally in degree inherited equally, as uncles on the father's and mother's ſide. And the next in degree excluded the more remote, as an uncle living excluded the ſon of an
[9] uncle deceaſed; and the degrees were computed up to the common anceſtor, and then down to the perſon to whom the relation was made: therefore uncles are of the third degree, uncles ſons in the fourth degree. But things deſcended from the father deſcend to the degrees on the father's ſide, according to thoſe rules, that things deſcended from the mother deſcended to the degrees of the mother's ſide, according to the ſame rules.

The 22 & 23 *Car.* 2. *c.* 10. has introduced this law into *England*, in relation to inteſtates eſtates. Only one third is to the wife, two thirds to the children, the heir at law taking equal with the reſt: and the portion of a child preferred to come in average with the reſt. For want of children the wife is to have one moiety, and the next of kin the other. If no wife, the father is to have the whole, as next of kin. But by the ſtat. 1 *Jac.* 2. *c.* 17. the mother is to inherit equally with brothers and ſiſters, and their repreſentatives, according to the

Juſtinian

Juſtinian law: and by the ſtat. of *Car.* 2. the ſucceſſion is carried to brothers and ſiſters children *in ſtirpes* (*p*), according to the civil law, ſave only that no diſtinction is made between brothers and ſiſters of the whole and half blood (*q*); becauſe the law ſpeaks of brothers and ſiſters children indefinitely, without diſtinction of bloods; and the ſpiritual courts had never diſtinguiſhed the bloods, becauſe the canon law, where the degrees of proximity were ſettled in relation to marriages, had made no ſuch diſtinction. For want of brothers and ſiſters, and their children, next of kin ſucceed *in capita*, according to the afore-mentioned rules of civil law, where the next in degree ſucceed both on father's and mother's ſide, and excluded the more remote. But in our law the inteſtate is conſidered as the original proprietor, in whom the eſtate is veſted. So no diſtinction is taken between things coming from the father's or mother's ſide (*r*). [10]

(*p*) [See the caſe of Stanley *v.* Stanley in 1 *Atk.* 457.]

(*q*) [See *Carth.* 51. Brown *v.* Farndell. *Show. P. C.* 108. 110. Watts *v.* Crooke. *Bunbury*, 158. Janſon *v.* Bury, and Wall *v.* Theedham (there cited).]

(*r*) [If there are relations both on the father and mother's ſide in equal degree, they ſhall take together. See 1 *P. Wms.* 53. Moore *v.* Barkham, (cited). *Sir Tho. Raym.* 500.]

The feudal ſucceſſion came in in this manner (*s*): the lords gave lands to ſuch perſons as behaved themſelves well in the war, for their lives only (*t*): ſometimes they alſo married their daughters to them. Then by their feudal donations, they limited the lands to go not only to the feudary himſelf, but alſo to the iſſue of that marriage (*u*); and this brought in the no-
[11] tion of ſucceſſion among the northern nations that invaded the *Roman* empire. The lands therefore in the elder times went to the immediate deſcendants of ſuch marriage, and ori-
Lud. 114, 115, 116, 117. ginally to none elſe: and firſt they went to males, as the moſt worthy of blood, and moſt capable of doing the ſervices annexed to ſuch donations; for want of males it went to females (*w*), as deſcendants of the ſame marriage.

(*x*) The feud was united in the eldeſt male,

(*s*) *Deinde ſtatutum eſt ut uſque ad vitam fidelis produceretur.* Feud. lib. 1. tit. 1.

Poſtea vero eo ventum eſt, ut ad recipientis vitam perdurarēt. Hanneton de jure feud. 139. [See *Wright's Ten.* 14. n. (*e*).]

(*t*) [See *ante.* N. VI. & VIII.] (*u*) [See N. IX.]

(*w*) [See N. X.]

(*x*) *Ordain fuit que fee de chevaler deviendroit al eigne fits per ſucceſſion de heritage, & que ſocage fee fuit partable perenter les males infants.* Horn's Mirror des juſ. lib. 1. c. 1. ſ. 3.

Prol

male (*y*), becauſe he was obliged to do the duty in the wars; and for every knight's fee, was to go out forty days with his lord (*z*); ſo that the feud did not divide among the males, becauſe the duty could not be divided commodiouſly. Becauſe, ſecondly, the males were to keep up the grandeur of the family, therefore the inheritance was not ſhared nor broken. Hence it came to paſs, that among the males the eldeſt was preferred as the moſt worthy, ſince he was [12] ſooneſt able to go to the wars, and do the duties of the tenure.

The eldeſt ſon was anciently married with the conſent and approbation of the lord; for the lord always approved the firſt marriage of his feudary and of his heir apparent (*a*); and if

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Proles fœminei ſexus, vel ex fœmineo ſexu deſcendens, ad ſucceſſionem aſpirare non poteſt, niſi ejus conditionis ſit feudum, vel ex pacto acquiſitum. Feud. lib. 2. tit. 2. ſ. 2. tit. 11, 30, 50, 104. [See *Wright's Ten.* 176. n. (*u*); 178. n. (*d*).]

(*y*) [See N. XI.]

(*z*) [See 2 *Bl. Comm.* c. 4. p. 55. c. 5. p. 62. *Wright's Ten.* 123, 4. and notes, 139—40. *Sulliv.* Lect. xxxi. p. 289. *Stuart's View*, b. 2. c. 3. ſ. 1. p. 109. 112. 367. n. (5). *Gilb. MS. Hiſt. Feud.*

By the laws of *Hoel Dda*, the king of Wales is ſtated to have had the prerogative of leading his army *out* of his kingdom once a year, and that for *ſix weeks* only. Within his territories, it ſeems, he might have conducted his forces to battle as often as he deemed it requiſite. And ſee 1 *Warr. Wales*, 243. 1 *Whit. Manch.* c. 8. ſ. 3.]

(*a*) [See N. XII.]

the feudary died, the heir within age, the lord
Spelm. Rem. 29. had the total marriage of him; and if he was of full age, the lord gave licence to such marriage. Hence the descent always settled in the eldest line, and the daughter of the eldest son was preferred before the second or third brothers (*b*), and their male descendants, in order to encourage the best marriages with such eldest son; and this was the settled course of the (*c*) *feudum nobile*. Whence our law took the pattern for their military tenures, and the socage tenures, divided in *Saxon* times as (*d*) *feudum ignobile*, but afterwards came to imitate the military feud, in order to support their families (*e*).

The feudum ignobile was dividable among the sons.

If there were no sons the feud came to the daughters, who divided it (*f*), because by the donation it was to go to all the descendants; therefore the female descendants could not be excluded, and one of the daughters could not be preferred before the other, because none could do the service of the feud in their own persons, nor did any of them bear the name and dignity of the family. Therefore these were married by the lords among their tenants;

[13]

(*b*) [See N. XIII.]

(*c*) *Zasius in usus feud. fo.* 5. [See *Wright's Ten.* 24. n. (*d*).]

(*d*) *Stry. exam. jur. feud. cap.* 3. *q.* 36, 37. [See *Wright's Ten.* 24. n. (*e*).]

(*e*) [See *ante*, p. 2. N. IV.]

(*f*) [See *ante*, p. 11. N. X. & XI.]

so

ſo they kept the feuds in their ſeveral manors from being broken and divided; as if two daughters divided a knight's fee, the lords, by the marriage of ſuch a daughter with one that had half a knight's fee, re-eſtabliſhed the feuds of their tenants.

If in ſuch feudal donations, the elder line had failed, it went back to the iſſue of the ſecond ſon of the ſame ſtock, to whom the firſt donation was made, and to his deſcendants, becauſe by the feudal donation it went to all the deſcendants of ſuch marriage, and ſo the ſucceſſion was eſtabliſhed to the deſcendants of the ſame ſtock *in infinitum*, but could not go to any other relations but to ſuch as were deſcendants of the ſtock to whom the donation was made (*g*).

In a long courſe of years theſe feudal donations were worn out, when it became impoſſible (*b*) to compute up to the firſt feudal marriage when ſuch donations were originally [14] ſettled; and then they inverted the computation, and computed from the laſt poſſeſſor, provided the heir that claimed was of the blood of the firſt purchaſer; and then the rule was taken *quod ſeizina facit ſtirpem*; for ſince the feudal donation was loſt, they could not regularly

(*g*) [See N. XIV.]

(*b*) [See *Wright's Ten.* 183, &c. *Dalrymple, F. P.* c. 5. ſ. 3. p. 218. 2 *Bl. Comm.* c. 14. p. 228. *Butl.* n. 10 *Co. Litt.* 64. *a.* ſ. v. (4). *Law of Forfeiture*, 28, &c.]

compute

compute the deſcendants from the firſt feudal marriage; therefore they computed from the laſt feudary; and ſince both bloods of the firſt marriage were neceſſary to any perſon that would claim under the firſt donation, they required that a man ſhould be of the whole blood of the laſt feudary that would claim as heir to him; for then of neceſſity he muſt be of both bloods of that remote feudal marriage, where the feud was originally placed. Thus half blood came to be excluded (*i*); becauſe if it were admitted where the feudal donation was loſt, it might have carried it out of the line, where ſuch donations were once ſettled; ſo that in ſuch caſe they put the perſon, claiming as heir, to ſhew that it was an ancient feud, and that the party claiming was of the whole blood of the laſt poſſeſſor, which formed the utmoſt preſumption of the right of ſucceſſion, where the feudal donation was loſt; which half blood did not do; becauſe it was originally ſettled in both
[15] the bloods of the firſt purchaſers. Beſides, lords had the marriage of the feudary; therefore all the iſſue of the ſecond marriage were excluded from the immediate inheritance of the

(*i*) [Of the excluſion of the half-blood, and the reaſons for it, ſee 2 *Bl. Comm.* c. 14. p. 224. *Dalrymple, F. P.* c. 5. ſ. 3. p. 217. *Hale's Com. Law*, c. 11. *Kaims's Brit. Antiq.* eſſ. iv. *Wright*, 182. *Co. Litt.* 14. *a.* n. (3), and 64. *a.* n. (1). ſ. v. (4).]

children

children of the firſt marriage, ſince the lord had not the marriage of the feudary more than once; and therefore they could not come in as iſſue of a ſecond match; but all that claim the inheritance muſt make themſelves heirs under the ſame feudal marriage from whence the laſt feudary deſcended, which half blood could not do. But where they can come in under any marriage preſumed to be made by the feudal lord, they were admitted. Therefore a brother of the half blood was not heir to the brother, but might be heir to the uncle. Hence they formed the rule, *poſſeſſio fratris de feodo ſimplici facit ſororem eſſe hæredem.* For when the old feudal donations came to be loſt, the poſſeſſion was the only *indicium* of who was feudary; therefore any perſon that claimed as his repreſentative, muſt ſhew a deſcent from the ſame ſtock, and therefore the rule was taken as to lands in fee-ſimple, and not as to lands in tail (*k*). For there a man muſt claim as heir *per formam doni*, as they did in the old feudal donations *de feudis novis*; ſo of a remainder after an eſtate for life, that never fell in poſſeſſion, a [16] man muſt claim, by virtue of the contract, as heir to him to whom the remainder was limited; for no man in ſuch caſe can make himſelf heir

(*k*) [There can be no *poſſeſſio fratris* of an eſtate-tail. See *Fitzh. Abr.* t. *Diſcent. pl.* 8. *Ploud.* 57. 3 *Co.* 42. *a. Wats. on Deſc.* c. 1. ſ. 4. p. 86.]

to

to the laſt feudary, ſince the feudal poſſeſſion was in tenant for life (*l*). So of a reverſion on an eſtate for life, upon which no rent was reſerved; for a man muſt make himſelf heir to the laſt feudary before the eſtate for life was created; but if a rent had been reſerved, it had been doubted whether he muſt make himſelf heir to the laſt poſſeſſor of the eſtate, or to him that laſt received the rent; and whether the receipt of rent make ſuch a feudal poſſeſſion as may be laid as eſplees in a writ of right (*m*). Certain it is, that if a reverſion be depending on an eſtate for years, the poſſeſſion of the rent is a poſſeſſion of the land itſelf; and the ſiſter of the whole blood will be heir to the brother; and the brother of the half blood, that is heir to the father that made the leaſe, will have no title (*n*). There is *poſſeſſio fratris* (*o*) of an advowſon or rent, after actual receipt of rent or preſentation of the clerk. So of an uſe, because equity followed the rule of the common law. So of a copyhold, where the eldeſt ſon

Co. Litt. 14, 15. 4 Rep. 21.

(*l*) [See *Watk. on Deſc.* c. 1. ſ. 1. p. 41. ſ. 4. p. 85. c. 3. ſ. 1. p. 108, &c.]

(*m*) [It is now apparently ſettled, that the receipt of rent in theſe caſes will *not* make a *poſſeſſio fratris*. *Co. Litt.* 15. *a*, n. (5), and *vide Poſt.* 18.]

(*n*) [See *Watk. on Deſc.* c. 1. ſ. 2. p. 48.]

(*o*) [Of what hereditaments a *poſſeſſio fratris* may be, ſee *Watk. on Deſc.* c. 1. ſ. 2, and 4.]

receives

receives the profits, and dies, though before admittance.

(*p*) Afterwards where the feud eſcheated (*q*) [17] to the lords for felony or want of heirs, the lords were wont to reſtore the feud to the old family, or grant it out again to another family *ut feudum antiquum* (*r*), and then the deſcents were formed in ſuch new feud, as if it had been *feudum antiquum.* Hence the lineal ſucceſſion, or ſucceſſion of the father (*s*) was totally excluded, becauſe no caſe could happen where the aſcending line could be admitted *in feudis antiquis;* for the father took before the ſon, under the firſt feudary in every ancient feudal donation; and all above ſuch donation were excluded, ſo that in no ſuch donations could any father claim as heir to the ſon.

And this order of deſcent, that excluded the father (*t*), was the rather continued, becauſe the father was guardian to the ſon; and in thoſe

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(*p*) *Revertitur terra ad dominum capitalem, vel ad rectum dominum, ſcil' ad ipſum de cujus feodo eſt.* Bract. lib. 3. fo. 130. lib. 4. fo. 160. b. [See *Wright's Ten.* 115. n. (*q*).]

(*q*) [See *the Introd.* p. xix.] (*r*) [See N. XV.]

(*s*) *Succeſſionis feudi talis eſt natura, quod aſcendentes non ſuccedunt, verbi gratia, pater filio.* Feud. lib. 2. tit. 50, 84. Lit. ſec. 3. [See *Wright's Ten.* 179. n. (*g*).]

(*t*) [Of the excluſion of the aſcending line, ſee *Dalrymple, F. P.* c. 5. § 3. 2 *Bl. Comm.* c. 4. p. 208. *Hale's Com. Law,* c. 11. p. 262, and *Runnington's* n. (D). *Wright's Ten.* 179. *Co. Litt.* 11. *a.* n. (1).]

barbarous

barbarous times they would not truſt the father with any profit from the death of his own iſſue, ſo that the father was totally excluded (*u*). *De feudis*, 153 *to* 261. But a feud purchaſed by the
[18] ſon ſhall deſcend to the uncle, to whom the father may be heir (*w*), if the uncle be in actual poſſeſſion of ſuch feud (*x*); becauſe he claims it then as heir to the laſt feudary, according to the rule before eſtabliſhed, ſince the firſt donation is not to be conſidered, but the laſt poſſeſſor. But if the uncle was not in actual poſſeſſion, as in caſe of a reverſion upon a leaſe for life made of the lands by the ſon, the father cannot be heir, becauſe the ſon was laſt actually ſeiſed. Otherwiſe of a reverſion upon a leaſe for years, for the poſſeſſion of the tenant is the poſſeſſion of the uncle *(ut ante)* (*y*).

Ld. Raym. 35. If a ſon be infeoffed with warranty, and the uncle enters into the land after the death of the ſon, and dies, it is doubted whether the father ſhall take the benefit of ſuch warranty, where the uncle hath not, as it were, actually poſſeſſed it by voucher or *warrantia chartæ*. *Coke* excludes the father, as not repreſenting the ſon,

Co. Litt. and Hale upon it, fo. 11, 12.

(*u*) [See N. XVI.]

(*w*) [*Litt.* ſ. 3 & 8. and *Co.* on thoſe ſections. *Wright*, 182, 3. *Dalrymple*, *F. P.* c. 5. ſ. 3. p. 216.]

(*x*) [See the books referred to in the laſt note, and *Watk. on Deſc.* c. 1. ſ. 1. c. 3. ſ. 2.]

(*y*) [See *ante*, 16, and n. (*s*).]

with

with whom the contract was made. *Hale* admits him (*x*); for ſince the uncle was poſſeſſed of the land, he was in actual poſſeſſion of all its appendices (*a*).

(*b*) If a man purchaſed the *feudum novum ut feudum antiquum* (*c*), and died without iſſue, it went firſt to the father's ſide, becauſe the [19] lords in ſuch feudal donations were preſumed to reſpect the father's ſide, who had been the ancient tenant of the manor. For when it was given *ut feudum antiquum*, it muſt be preſumed to be meant as if it had been an ancient feud of that manor; therefore it went to the father's ſide *in infinitum*, before it could go to any of the female blood. If the father's male line failed, it went to the female blood of the father; for the lords were preſumed rather to reſpect the female blood of their former tenants in (*d*) the blood of the mother, who was newly introduced into the family of ſuch their feudary, becauſe the feud was given as an ancient one, and by conſequence the blood of the precedent tenant was preferred to any other; but the

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(*x*) [See n. (1) to *Co. Litt.* 12. *a.*]

(*a*) [See *Watk. on Deſc.* c. 1. ſ. 2. p. 60, 1.]

(*b*) *Hanneton de jure feud.* 30. [See *Wright's Ten.* 25. n. (*m*) and (*n*).]

(*c*) [See *ante*, p. 17. N. XV. and *Watk. on Deſc.* c. 5. p. 147.]

(*d*) [" *In* the blood of the mother." It ſhould run—" *then* the blood of the mother." *Gilb. MS. Hiſt. Feud.*]

blood

barbarous times they would not truſt the father with any profit from the death of his own iſſue, ſo that the father was totally excluded (*u*). *De feudis*, 153 *to* 261. But a feud purchaſed by the
[18] ſon ſhall deſcend to the uncle, to whom the father may be heir (*w*), if the uncle be in actual poſſeſſion of ſuch feud (*x*); becauſe he claims it then as heir to the laſt feudary, according to the rule before eſtabliſhed, ſince the firſt donation is not to be conſidered, but the laſt poſſeſſor. But if the uncle was not in actual poſſeſſion, as in caſe of a reverſion upon a leaſe for life made of the lands by the ſon, the father cannot be heir, becauſe the ſon was laſt actually ſeiſed. Otherwiſe of a reverſion upon a leaſe for years, for the poſſeſſion of the tenant is the poſſeſſion of the uncle *(ut ante)* (*y*).

Ld. Raym. 35. If a ſon be infeoffed with warranty, and the uncle enters into the land after the death of the ſon, and dies, it is doubted whether the father ſhall take the benefit of ſuch warranty, where the uncle hath not, as it were, actually poſſeſſed it by voucher or *warrantia chartæ*. *Coke* excludes the father, as not repreſenting the ſon,

Co. Litt. and Hale upon it, fo. 11, 12.

(*u*) [See N. XVI.]

(*w*) [*Litt.* ſ. 3 & 8. and *Ck.* on thoſe ſections. *Wright*, 182, 3. *Dalrymple*, *F. P.* c. 5. ſ. 3. p. 216.]

(*x*) [See the books referred to in the laſt note, and *Watk. on Deſc.* c. 1. ſ. 1. c. 3. ſ. 2.]

(*y*) [See *ante*, 16, and n. (*s*).]

with

with whom the contract was made. *Hale* admits him (z); for since the uncle was poſſeſſed of the land, he was in actual poſſeſſion of all its appendices (a).

(b) If a man purchaſed the *feudum novum ut feudum antiquum* (c), and died without iſſue, it went firſt to the father's ſide, becauſe the [19] lords in ſuch feudal donations were preſumed to reſpect the father's ſide, who had been the ancient tenant of the manor. For when it was given *ut feudum antiquum*, it muſt be preſumed to be meant as if it had been an ancient feud of that manor; therefore it went to the father's ſide *in infinitum*, before it could go to any of the female blood. If the father's male line failed, it went to the female blood of the father; for the lords were preſumed rather to reſpect the female blood of their former tenants in (d) the blood of the mother, who was newly introduced into the family of ſuch their feudary, becauſe the feud was given as an ancient one, and by conſequence the blood of the precedent tenant was preferred to any other; but the

(z) [See n. (1) to *Co. Litt.* 12. *a.*]

(a) [See *Watk. on Deſc.* c. 1. ſ. 2. p. 60, 1.]

(b) *Hanneton de jure feud.* 30. [See *Wright's Ten.* 25. n. (*m*) and (*n*).]

(c) [See *ante*, p. 17. N. XV. and *Watk. on Deſc.* c. 5. p. 147.]

(d) ["*In* the blood of the mother." It ſhould run—"*than* the blood of the mother." *Gilb. MS. Hiſt. Feud.*]

blood

blood of the father's mother was preferred to the blood of his grandmother, being both female bloods, and both coming under the consideration of ancient tenants, the nearer tenant's blood was preferred to the more remote (*e*). But if the father's ſide wholly failed, who were preſumed to be the ancient tenants of the manor, then the blood of the mother was admitted, ſince the lord muſt be preſumed to introduce the blood of the mother, when he had given
[20] an indefinite right of repreſentation to his feudary, and there was none of the ancient kindred on the father's ſide remaining; for then it muſt be ſuppoſed his intention, that it ſhould deſcend as if it had been a maternal feud; for otherwiſe he would have limited it to the feudary for his life, or to the feudary and his iſſue, after the manner that was uſed in the limitation of new feuds.

Baſtards (*f*), or children born out of wedlock, were totally excluded from all feudal ſucceſſion, though their parents had afterwards intermarried, becauſe the lords would not be ſerved by any perſons that had that ſtain on their legitimation, nor ſuffer ſuch immoralities in their ſeveral clans; though the civil law admitted them as adopted by the ſubſequent marriage, and ſo the canon law, becauſe the matrimony wiped off the precedent guilt (*g*).

Greg. lib. 4. ſect. 6. 2 Inſt. 97.

(*e*) [See N. XVII.] (*f*) [See N. XVIII.]
(*g*) [See N. XIX.]

Of DESCENTS *which take away* ENTRIES.

WHEN any man is diſſeiſed (*b*), the diſſeiſor has only the naked poſſeſſion, becauſe the diſſeiſee may enter and evict him; but againſt all other perſons the diſſeiſor has a right, and in this reſpect only can be ſaid to have the right of poſſeſſion; for in reſpect to the diſſeiſee he has no right at all. But when a deſcent is caſt, the heir of the diſſeiſor has *jus poſſeſſionis*, becauſe the diſſeiſee cannot enter upon his poſſeſſion and evict him, but is put to his real action, becauſe the freehold is caſt upon the heir (*i*).

The notions of the law do make this title to him (*k*), that there may be a perſon in being to do the feudal duties, to fill the poſſeſſion, and to anſwer the actions of all perſons whatever; and ſince it is the law that gives him this right, and obliges him to theſe duties, antecedent to any act of his own, it muſt defend ſuch poſ-

(*b*) [Diſſeiſin is the wrongful amotion or ouſter of a perſon who was in poſſeſſion of the freehold in deed. Of which ſee *Co. Litt.* 153. *a.* 181. *a.* 277. *a.* 1 *Burr.* 60. Taylor *d.* Atkins *v.* Horde & *al.* *Cowp.* 701. S. C. 3 *Bl. Comm.* c. 10. p. 169. 2 *Ibid.* c. 13. p. 195.]

(*i*) [See N. XX.]

(*k*) ["to him," *i. e.* the heir of the diſſeiſor.]

 ſeſſion.

seſſion from the act of any other perſon whatever, till ſuch poſſeſſion be evicted by judgment, which being alſo the act of law, may deſtroy the heir's title.

[22] In the caſe of fee-tail (*l*), the poſſeſſion is thrown upon the heir in tail, therefore the law conſtitutes the *jus poſſeſſionis* to be in him.

Litt. ſect. 386, 387, 8, 9.

If a diſſeiſor, at the time of his death, has not the freehold in him, it cannot be caſt upon his heir; for then there is no danger that the freehold ſhould want a poſſeſſor; therefore the law creates no title to ſuch poſſeſſion in the heir at law; for it were incongruous that the law ſhould ſuppoſe the right of poſſeſſion in the heir, when the poſſeſſion is in another at the death of the anceſtor. The law will not afterwards create him a new title, in prejudice of the perſon that has the right of propriety.

If the diſſeiſor therefore makes a leaſe for life, he parts with the poſſeſſion, and cannot tranſmit it to the heir, ſince he had parted with it at the time of his death, and the deſcent of a reverſion will not make a right of poſſeſſion (*m*); for nothing deſcends to the heir in reverſion but the right of the reverſion, and that is a right againſt all other perſons but the diſſeiſee. For ſince only the right deſcends, the heir can be in no better caſe than the diſſeiſor was at the

(*l*) [See N. XXI.]

(*m*) [*Watk. on Deſc.* c. 3. ſ. 1. p. 110. n. (*r*).]

time

time of his death; and therefore when tenant for life dies, he has only the naked poſſeſſion, as the diſſeiſor had it. But if the diſſeiſor had [23] died in poſſeſſion, the law, for the reaſon aforeſaid, caſting the poſſeſſion on the heir, makes it a right; for that is properly a right which a man comes to by the act of the law; and ſince the heir in ſuch caſe would come to the poſſeſſion by the act of the law, it muſt be called a right of poſſeſſion; and it could not be a right of poſſeſſion, if he could not defend it againſt all aggreſſors; therefore in ſuch caſe the right of entry is taken away from all others; and hence the diſtinction came to be made between *jus poſſeſſionis* and *jus proprietatis*.

A ſecond reaſon why the deſcent creates a right of poſſeſſion is, becauſe the diſſeiſee has not claimed during the life of the diſſeiſor, and the right of *poſſeſſion* is preſumed to be derelict, if the party ceaſes to claim it, till the law for the neceſſary cauſes before-mentioned is obliged to caſt it upon another; but the right of propriety is not preſumed to be derelict, till the time allowed for the limitation of thoſe actions be expired. So that *Coke* ſays, Anciently a feoffee that came in by title, though by his own act, after a year and a day, had a right of poſſeſſion (*n*).

A third

(*n*) [*Co. on Litt.* 237. *b.* The ſtatute 32 *Hen.* 8. *c.* 33. does not extend to a feoffee of the diſſeiſor; and therefore

Spelm. Feud. 31. A third reaſon why deſcent gives a right of poſſeſſion is, becauſe originally the relief was in nature of a new purchaſe upon every deſcent; for then it did again fall into the lord's hands, till it was relieved out of his hands by ſuch payment (*o*).

Now for ſuch payment they immediately diſtrained upon the poſſeſſion as ſoon as ever the deſcent was caſt (*p*); ſo that the heir was forced upon ſuch payment, in preſervation of his ſtock left on the ground by his anceſtor; and being forced upon this purchaſe, it is fit he ſhould enjoy the right of poſſeſſion. But where a diſſeiſor makes a leaſe for life, and dies, and the reverſion deſcends on the ſon, if he enters after the death of tenant for life, he ſhall pay a relief; and yet ſuch a deſcent ſhall not take away an entry, becauſe it was his own fault that he entered and ſtocked the land himſelf, and made himſelf ſubject to the relief; for then the buyer muſt beware, and take the title in the condition it was in at the death of the anceſtor.

Fourthly, The right of poſſeſſion is gotten by the deſcent, that it may be an encouragement to the tenant to be bold in war; for that none can enter and diſpoſſeſs his children of the eſtate

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the deſcent from ſuch feoffee will toll an entry though he had not been in continual poſſeſſion for five years before. *Co. Litt* 238. *a*. 256. *a*. 1 *Burr*. 108.]

(*o*) [See N. XXII.] (*p*) [See N. XXIII.]

whereof

whereof he dies poſſeſſed; but if another doth the duties of the feud at his death, then it is not reaſon that ſuch a deſcent ſhould give a right of poſſeſſion to his heir.

The eſcheat doth not take away the entry, Litt. ſect. 390.
becauſe, though in reſpect of a ſtranger's *præcipe*, the law doth caſt the freehold upon the lord, antecedent to his own act; yet the lord need not enter to take the profits and to do the duties, as the heir is obliged to do, but the lord may take the diſſeiſee as his lawful tenant (*q*). And it is plain that the law doth not caſt the freehold upon the lord in the ſame manner as it doth upon the heir, becauſe the lord is obliged to anſwer the feudal duties to the lord paramount, in reſpect of his ſeigniory, whether this poſſeſſion was caſt on him or not; ſo that in this caſe there could be no failure of duty, though the lord doth not enter.

In the caſe of a feoffment upon condition, 2 Inſt. 286. Litt. ſect. 391, 2.
there is no diſtinction between the right of poſſeſſion and the right of propriety, but both rights are in the feoffee till the condition broken, and entry for ſuch breach; and afterwards both rights are in the feoffor; therefore the deſcent doth not take away the entry, ſince the poſſeſſion and the propriety deſcends in the ſame manner, *viz.* under the condition that it was at firſt granted; and the poſſeſſion is not [26]

(*q*) [See N. XXIV.]

caſt upon the heir while the propriety is in ſome body elſe, as in the former caſes; and it is the deſcent of a naked poſſeſſion to an heir at law, that forms a *jus poſſeſſionis*, diſtinct and abſtracted from the *jus proprietatis*. But here both rights are united at the time of the deſcent; and if the feoffor in this caſe could not aſſert his claim by an entry, he could have no remedy, either for his *jus poſſeſſionis* or *jus proprietatis*, which are not here ſeparate or diſtinct; for till he enters to take advantage of the breach of the condition, both rights are in the feoffee, becauſe the ſolemnity of the feoffment cannot be determined but by an act of equal notoriety; and becauſe the poſſeſſion and right are not here ſeparate or diſtinct, it is called by a different name, *viz.* not a right, but a title of entry.

Litt. ſect. 393, 4. (*r*) The law doth not caſt dower upon the wife,

(*r*) We find no footſteps of dower in lands, until the time of the *Normans*. *Bacon's Hiſtory of the Eng. Gov.* 104, 146.

But amongſt the laws of the *Saxon* King *Edmund*, *cap.* 51. we find a proviſion made for the ſupport of the wife that ſurvives her huſband out of his goods only.

Nor was there any dower in *Wales*, until it was annexed to the crown of *England*, as appears by *Stat. Walliæ*, viz. *Quia mulieres hactenus non extiterant dotatæ in Wallia, rex concedit quod dotentur.*

[See *Wright's Ten.* 192, and n. (*t*), (*u*), (*x*).

Of the introduction of dower into England, &c. ſee 2 *Bl. Comm.* c. 8. p. 129. *Wright*, 191. See alſo *Stuart's View of Soc. in Eur.* b. 1. c. 2. ſ. 2. and notes (4), &c.

There

wife (*s*), but she takes it by her own act; but when she is endowed, she is in from the death of her husband (*t*); therefore she has only the naked possession her husband had, not any *jus possessionis* at all; since it was not of absolute necessity she should claim her dower; but it is of absolute necessity that the law doth cast the freehold upon the heir. Now by the endowment the possession is avoided that the law cast upon the heir (*u*), because she, as is said, is in from the death of her husband, and by consequence there is no right of possession, as to this third part, acquired to the heir at law; since the law doth not place him in such third, after the death of the father; and though the reversion belongs to him after the death of the mother, yet that is only the reversion of that which the mother possessed, which was a naked possession; and so he has herein no right of possession at all. [27]

Where the disseisor infeoffs the father (*w*), it is presumed to be done in order afterwards to Litt. sect. 395.

There was no dower originally in Wales, *vide Wright ubi sup.* nor in Ireland. See *Davys's Rep.* 49. *b.* 50. *a* & *b.*]

(*s*) [See N. XXV.]

(*t*) [*M.* 24 *Ed.* 3. *pl.* 18. *f.* 32. *b.* 33. *a.* 70. *b.* 71. *a.*; and see *Watk. on Desc.* c. 1. s. 3.]

(*u*) [See *M.* 24 *Ed.* 3. and *Watk. on Desc.* as before, and *Co. Litt.* 241. *a.* n. (1).]

(*w*) [" the father," *i. e. his own* father. See *Litt.* s. 395.]

come in by deſcent, and the act of law ſhall
[28] not give ſanction to the wrong of the party; nor ſhall any man by his own wrong, however cunningly contrived, give to himſelf a right; for when the heir by the deſcent gains a *jus poſſeſſionis*, he is ſuppoſed innocent of the wrong of his anceſtor; but here he is partner of the guilt.

Litt. ſect. 396, 7. When a younger brother enters in this (*x*) caſe, he does not enter to get a poſſeſſion diſtinct from that of the elder brother, but to preſerve the poſſeſſions of the father in the family, that no body elſe abates. For ſince this is the moſt charitable interpretation that can be made of this action, and by ſuch a conſtruction it is juſt and rightful, the law ſhall not intend it to be a wrongful act or diſſeiſin, and by conſequence the poſſeſſion of the younger brother becomes that of the elder brother (*y*): and then if there be not a poſſeſſion diſtinct and ſeparated from the right, the deſcent cannot make a right of poſſeſſion diſtinct from the right of propriety; for it were incongruous that the anceſtor

(*x*) [That is, where a perſon dies ſeized in fee, leaving two ſons, though the eldeſt be heir, yet, if the younger enter, he ſhall be conſidered as holding the poſſeſſion for his elder brother. See *Litt.* ſ. 396, 397.]

(*y*) [And it will ſo fix the poſſeſſion in the eldeſt brother as to cauſe a *poſſeſſio fratris* in him, even to the excluſion of the younger who enters, if he be of the half-blood. See *Co. Litt.* 242. *Bull N. P.* 102. *Watk. on Deſc.* c. 1. ſ. 2. p. 55, 56.]

ſhould

ſhould be conſtrued to poſſeſs in another's right, in order to do no injury, and the heir ſhould be conſtrued to poſſeſs in his own right, in order to do injuſtice to the elder brother. Beſides, no laches can be imputed to the elder brother, ſince the younger entered and poſſeſſed for him. But if the younger brother in this caſe had made a feoffment in fee, and the feoffee had died ſeiſed, this deſcent had taken away the entry, becauſe then the younger brother could not be interpreted to enter to preſerve the eſtate of the elder, but in order to make the advantage of it for himſelf. So in the caſe *Litt.* puts, If the elder brother had entered, then if the younger had entered upon him, this had been in deſtruction of the elder brother's poſſeſſion, and therefore the younger gets a poſſeſſion diſtinct from that of the elder brother, and his heir a diſtinct right of poſſeſſion, and it is the laches of the elder brother, that he did not enter to reſtore his poſſeſſion. [29] Co. Litt. fo. 242.

If one coparcener enters into the whole, it is only in preſervation of the eſtate of the other; but if ſhe diſſeiſeth the other after her entry, there ſhe gets a poſſeſſion diſtinct from that of her ſiſter, and the deſcent will take away the entry, *cauſa qua ſupra* (z). Litt. ſect. 398.

The iſſue of the baſtard eigne not only gains a right of poſſeſſion, but a right of propriety Litt. ſect. 399. 400, 1.

(z) [See *Watk. on Deſc.* c. 1. ſ. 2. p. 52.]

by

by the enjoyment of his anceſtor. Such iſſue are held legitimated (*a*) by the civil law, becauſe they are adopted by the marriage of the mother. So by the canon law, becauſe the *matrimonium ſubſequens tollit reatum precedens*; but by
[30] the feudal law they were excluded, becauſe ſuch a ſtain was thought to continue from the crime of the parents, that they could not do the feudal ſervice with honour to the feudal lords; therefore they were anciently excluded *niſi nominatim ad feuda legitimantur*. But by our law, if they had an uninterrupted enjoyment during life, the iſſue for ever inherited; for ſince there was no objection to their legitimation during their lives, the perſonal defect muſt die with their perſon, in as much as it were inhumanity to throw reproach on them after their deceaſe (*b*); and having done the feudal duties without objection, the objection comes too late when the perſonal diſhonour ceaſes, and to the next perſon in poſſeſſion nó reproach can ariſe.

If baſtards could be any where alledged in the pedigree after the deceaſe of the parties, there would be no end of contention concerning them, and genealogies would be rendered perfectly uncertain; for there being no eſtabliſhed regiſtry of genealogies in the feudal, as

(*a*) [See *ante*, p. 20. N. XIX.]

(*b*) [See 1 *Salk*, 120. Pride *v.* Earls of Bath and Montague.]

was in the *Jewiſh* law, they conceived that the greateſt evidence that could be of the legitimation of the anceſtor, was the uninterrupted enjoyment, and the carrying the ſame by courſe of deſcent to the iſſue. Hence they would not [31] ſuffer this rule by any means to be ſhaken, leſt all deſcents ſhould be rendered precarious; but if any part of the rule fails (*c*), then the right of poſſeſſion is only gotten by ſuch deſcent, and not the right of propriety; as if the poſſeſſion be once interrupted by the mulier, if the baſtard eigne re-enters, this only gets the poſſeſſion, and by ſuch deſcent the iſſue only acquires a *jus poſſeſſionis*.

So if the baſtard eigne leaves a child *in ventre ſa mere*, this ſhall not inherit; for though there the anceſtor had an uninterrupted poſſeſſion, yet there was no deſcent.

But if the mulier abates (*d*), the iſſue of baſtard eigne hath both right of poſſeſſion and right of propriety, becauſe of an uninterrupted poſſeſſion, and deſcent complete, the law caſting the freehold on the iſſue, before his entry, or before the mulier can abate. Nay, this rule is preferred to the privilege of infancy (*e*), ſo that Ld. Raym. 174. if the mulier were an infant, yet the deſcent of

(*c*) [See *Watk. on Deſc.* c. 4. p. 144.]
(*d*) [See *Watk. on Deſc.* c. 1. ſ. 1. p. 34.]
(*e*) [See *Plowd.* 372, and the books cited in the margin of the Engliſh edition.]

the

the iſſue of the baſtard eigne ſhould bar ſuch infant, becauſe it is by the laws of deſcent that the infant himſelf inherits (*f*); and he himſelf could not claim, but by ſuppoſing that uninterrupted poſſeſſion of his anceſtors (*f*), and the conſequent deſcent gives him a right. But if the perſon in the principal caſe were not legitimated, by the eccleſiaſtical law, his entry gives him no title, but as another diſſeiſor; for he is an abſolute ſtranger by all laws, and reputed *nullius filius*.

[32]

Litt. ſect. 402, 3, 4, 5, 6. Ld. Raym. 35.

As to infants, feme coverts, perſons *non compos*, the deſcent to the heir of the diſſeiſor doth not take away their entry, becauſe the infants, *&c.* had a right poſſeſſion, and the act of law cannot take away that right, ſince no laches can be imputed to them; ſince their negligence is not culpable, it were unjuſt to make market of their titles; and therefore the lord, when he takes a relief, is not ſuppoſed to transfer any *jus poſſeſſionis* to the heir of the diſſeiſor, ſince the feud is not ſuppoſed, by negligence and want of a tenant, to fall into his hand, and from thence to be relieved to the heir of the diſſeiſor, who hath title thereunto, ſince if that were doctrine, a negligence were ſuppoſed in theſe uncapable perſons, which the law doth not allow.

(*f*) [See N. XXVI.]

But

But the *non compos* in this caſe cannot alledge the diſability in himſelf (*g*), becauſe he cannot be ſuppoſed conſcious of it; nor is he allowed ever at any time to alledge it: for when he is once *non compos*, there is no certain time when he can be adjudged to recover that diſability, [33] unleſs where he is legally committed, and then the acts during his lunacy will be ſet aſide and diſcharged, and afterwards the commiſſion ſuperſeded; for in no other way can the *non compos* be legally reſtored to his right, and to his capacity of acting.

If an infant diſſeiſes, this only gives him a naked poſſeſſion; for he has no privilege to do wrong; and if he alien in fee, his alienation is voidable. If the alienee dies ſeiſed, he may enter; for though the deſcent gives a right of poſſeſſion againſt the diſſeiſee, yet it gains no right from the infant. If then the infant recovers, he is a diſſeiſor as he was before, and being only in his former eſtate, he has no right of poſſeſſion againſt the diſſeiſee. Litt. ſect. 407, 8. Strange. 939.

If a diſſeiſor, that has only a right of poſſeſſion, makes a feoffment in fee on condition, and the feoffee dies ſeiſed, this gains a right of poſſeſſion to the heir of the feoffee. But if the condition be broken, and the feoffor enters, he deſtroys the eſtate, and the right of poſſeſſion Litt. ſect. 409.

(*g*) [See 2 *Bl. Comm.* c. 19. p. 291. and n. (2) to *Co. Litt.* 247. *a.*]

annexed

annexed to it; and he being only a diſſeiſor, is in his old eſtate, which is a naked poſſeſſion, without any right at all.

[34] A civil death, ſuch as that of entering into
Litt. ſect. 410. religion, doth not take away an entry; for this ſeems to be the voluntary act of the anceſtor, or rather a contrivance between anceſtor and heir, to acquire the right of poſſeſſion; and a man that hath done wrong, ſhall not by his own act acquire to himſelf a right.

Litt. ſect. 411. A leaſe is a covenant real, that binds the poſſeſſion of lands into whoſe hands ſoever afterwards they come (*b*), if the lands be not evicted by a ſuperior title; but the termor has not the freehold in him (*i*), but holds the poſſeſſion, as bailiff of the freeholder, *nomine alieno*, by virtue of the obligation of the covenant. Therefore if ſuch termor be ouſted, and the freeholder diſſeiſed, the diſſeiſor has the naked poſſeſſion bound by the covenant; and if afterwards a deſcent be caſt, the heir of the diſſeiſor has the right of poſſeſſion, bound alſo by the covenant; for the heir of the diſſeiſor has only the right of poſſeſſion which was in the diſſeiſee, and that was bound by that covenant, and therefore it muſt be bound by the ſame covenant in the hands of the heir of the diſſeiſor;

(*b*) [It ſhall bind the lord on eſcheat; ſee 8 *Co.* 45. *a. F. N. B.* 198. *K.* 221. *B.* See *Poſt.* 299. N. CLIII.]

(*i*) [See *Watk. on Deſc.* c. 3. ſ. 1. p. 108.]

and

and were it otherwiſe, the right of the termor would be intirely deſtroyed; for he cannot have a right of poſſeſſion diſtinct from the right of propriety. [35]

Now then, if the termor enters before the deſcent, he reveſts the freehold in the diſſeiſee, who has the right of poſſeſſion; but if he enters after the deſcent, then he can only hold in the name of the freeholder who has the preſent right of poſſeſſion, which is the heir of the diſſeiſor. Ld. Raym. 853.

In the times of domeſtic wars, when the courts of juſtice are not open, the deſcent gives no right of poſſeſſion, though the diſſeiſin was done in time of peace. For it were in vain for a diſſeiſee to exert his right of poſſeſſion, when the courts of juſtice are not open; nor can there be any ſuch thing as the act of law to give a right of poſſeſſion, when the law itſelf is ſilent; but in times of foreign war, when there is juſtice and peace at home, a deſcent will give a right of poſſeſſion; for to encourage enterprizes in ſuch war was ſuch privilege given to the heir of the diſſeiſor (*k*.) Litt. ſect. 412.

A ſucceſſion doth not give a right of poſſeſſion, as a deſcent doth; for a ſucceſſor is in by his own act; for it is by his own concurrent act that he comes to be inſtalled into the rights of his predeceſſor, and therefore he can have no more than he had; [36] Litt. ſect. 413.

(*k*) [See *ante*, p. 24.]

but

but ſince the predeceſſor had a naked poſſeſſion, and not the *jus poſſeſſionis*, the ſucceſſor can have no more. Beſides, the ſucceſſor pays no relief, unleſs by grant or preſcription: for eccleſiaſtical lands were not relieved into the hands of the lord for want of a tenant, being given in free alms, or to do ſervice by proxy; and ſince the lands are not relieved into the hands of the ſucceſſor for a conſideration paid, he doth not acquire a right of poſſeſſion. Beſides, there is no reaſon to encourage the predeceſſor to dare in war, who either went not at all, or elſe by proxy; and therefore no reaſon ſuch ſucceſſion ſhould get a right of poſſeſſion.

Co. Litt. 84. 99. a.

Of CONTINUAL CLAIM.

[37]

Litt. ſect. 414, 415.

IF a man be diſſeiſed, and the diſſeiſor die in peaceable poſſeſſion, immediately after ſuch diſſeiſin (*l*) the heir acquires *jus poſſeſſionis*, if the diſſeiſee ſuffered the anceſtor quietly to enjoy (*m*); for then the preſumptive right is in the heir; but if the diſſeiſee has re-entered within a year and a day before ſuch deſcent,

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(*l*) ["Diſſeiſin"—This ſhould be *deſcent*, and refers to the death of the diſſeiſor in the peaceable poſſeſſion.]

(*m*) [See N. XXVII.]

then

then the heir doth not acquire the *jus poſſeſſionis*. Firſt, becauſe there is no laches in the diſſeiſee, and the act of law would do wrong and injury (which it cannot do) if it ſhould alter the right when the diſſeiſee has done what in him lay to continue the right of poſſeſſion. Secondly, becauſe there is no preſumption that the diſſeiſor had right, if the diſſeiſee continue the claim; for the law cannot preſume the right of poſſeſſion to be derelict, contrary to the manifeſt act of the diſſeiſee. Thirdly, the lord ought not to take the heir for his tenant; and there is ſufficient warning for the anceſtor in his lifetime not to do the voluntary ſervice, nor for the heir after his deceaſe to pay the relief.

(*n*) If the vaſſal renounces the feud, this is a cauſe of forfeiture by the old feudal law, becauſe it was ſaying they would not do the feudal ſervices that were the perpetual conſideration for ſuch poſſeſſion, nor keep within thoſe reſtrictions required by the feudal contract, which were the original deſign of the gift. *Vaſſallus, ſi feudum vel feudi partem aut feudi conditionem ex certa ſcientia inficiatur, & inde convictus fuerit,* [38] Litt. ſect. 416. Digeſt. Feud. lib. 2. tit. 26. fo. 523.

(*n*) *Revertitur terra ad dominum capitalem, vel ad rectum dominum, ſcilicet ad ipſum de cujus feodo eſt.* Glanvil. lib. 7. c. 17. p. 59.

Reaſcendit ad capitales dominos a quibus primo proceſſit. Bracton. lib. 5. c. 6. fo. 375. [See *Wright's Ten.* 115. n. (*q*).]

eo quod abnegavit feudum ejuſq; conditionem, ex-
Ld. Raym. 120. *poliabitur* (*o*). But when diſtreſſes were invented (*p*), then the land itſelf was not ſeiſed for neglect of ſervices, becauſe they had this method of compulſion. But if tenant for life had aliened in fee, there was no redreſs but by a ſeizure of the land itſelf; and therefore this cauſe of forfeiture in our law was reſtrained in [to] the alienation of tenant for life.

If tenant for life makes a feoffment, or levies a fine, it is palpably contrary to his oath of fidelity to the reverſioner, and therefore that is a plain renunciation of the feud. So in the
[39] caſe of the remainder, the eſtate for life is drowned in the fee; therefore the eſtate for life is renounced, and the remainder commences. So if tenant for life of a rent levies a fine, this is a forfeiture; for though the fine being of a rent, paſſes no more than it lawfully may; yet being a public and ſolemn renunciation of the eſtate for life in a court of record, it is within the reaſon of the law, and amounts to a forfeiture, and the remainder man anciently was to claim within the year.

Litt. ſect. 417, 418. The entry is the ſame thing as the *vendicatio* or *calumnia* in the civil or feudal law; and this entry was of equal ſolemnity with the feoff-
Stra 1076. Ld. Raym 779. ment: for as the feoffment was anciently made

(*o*) [See the *Introd.* p. xviii.]
(*p*) [See N. XXVIII.]

on

on the land *coram paribus* (q), who ſubſcribed the feudal inſtrument in the *hiis teſtibus*; ſo it ſeems the entry was made upon the land, and afterwards the claim was recorded in the lord's court, and hence called *clameum*, or *calumniam, apponere vel advocare.* Vid. Digeſt. Feud. lib. 2. tit. 8.

But afterwards they allowed the feoffment to be good, though it was atteſted *per extraneos*, and not *coram paribus*; and the entry was allowed to be good, if made upon the land, though it were not recorded *coram paribus*; but the manner of recording the claims of liberties before the juſtices in eyre remained long after, as appears by the *Regiſter* 19. *b.* which ſeems to be a continuance of the ancient practice. See *Spelm. Gloſſ.* tit. *Calumnia*, fo. 97. But when the feoffments were not atteſted by the *pares*, [*curiæ*,] yet they were atteſted and tried by the *pares comitatus*; and therefore if the land lay in two counties, there muſt be livery in each of them: ſo if the land lies in two counties, the entry muſt be in each, becauſe the atteſtation of both facts, if controverted, muſt be by the *pares comitatus.* [40]

Ld. Raym. 166.

Livery within view, and entry afterwards, is equal to a livery on the land itſelf; and if a man cannot enter for fear of outrage (r), yet it

Litt. ſect. 419, 420.

(q) [See N. XXIX.]

(r) [*i. e.* To his *perſon.* See *Co. Litt.* 253. *b.*]

is good; ſo alſo is a claim within view good, when a man fears to enter; for in both caſes a man ought to take poſſeſſion where he can, becauſe it is the change of poſſeſſion makes the notoriety in both caſes. But if the diſſeiſor menace war to the perſon that hath right, then the law, which doth not compel to impoſſibilities, allows him to make his claim as near the land as he durſt come.

Litt. ſect. 411, 2, 3, 4, 5.

The notion of the laches, in not claiming for a year and a day, is taken out of the feudal law; ſo is the expreſs words of *Frederick*, touching the tenant's claim of his lands from his lord. *Præterea ſiquis infeudatus major quatuordecim annis ſua incuria vel negligentia per annum & diem ſteterit, quod feudi inveſturam a proprio domino non petierit, tranſacto hoc ſpatio feudum amittat.* Digeſt. Feud. lib. 2. tit. 55. fo. 543. Vigelius 241. 255—487. And the reaſon why this time of a year and a day ſeems to be ſet by the feudal law is, becauſe the ſervices appointed ſeem to be annually completed; and therefore that was the time for the vaſſal to claim from his lord; and the ſame time that he had to claim from his lord, he had to claim from any diſſeiſor, for the uniformity of the law; and that the lord might know who was the perſon that he might take for his tenant, and that the lord might receive his feudal fruits from the heir, in caſe the diſſeiſor died. And if the tenant loſt the whole feud, in caſe he did

[41]

not

not claim within a year and a day, it is fit he ſhould loſe the right of poſſeſſion, in caſe he neglects his claim upon the diſſeiſor in the ſame ſpace, that the heir may be in peace, and that the lord may receive him as his tenant. For that was by the ancients thought to be a violent preſumption of dereliction, both in the one caſe and the other. But our law, ſince it gives a diſtreſs for all feudal duties, doth not preſume the feud derelict, in caſe feudal ſervices are not [42] paid, ſince the lord has a power to compel the payment; and therefore the law doth not induce any forfeiture in that caſe. But the law gives the right of poſſeſſion to the heir, in caſe the diſſeiſee doth not claim within the ſpace mentioned, becauſe there the preſumption remains of the dereliction of the diſſeiſee, ſince the entry or action is the only way that he has to obtain poſſeſſion. But if the diſſeiſee enters within a year and a day before the deſcent caſt, though there were twenty mean diſſeiſins, yet the entry is not taken away; for there can be no *jus poſſeſſionis* in the heir, if the diſſeiſee has continued the poſſeſſion by thoſe ſolemn acts that the law requires, and within the time that the law builds a preſumption of a dereliction, if the diſſeiſee neglects his entry. But if the diſſeiſor at common law had kept poſſeſſion forty years, and the diſſeiſee had entered but half a year before his death, yet in that law, as *Litt.* remarks, the heir had not gained the right of poſſeſſion, be-

cauſe no dereliction can be preſumed, if the diſſeiſee claims within the time preſcribed by the law. And if the law cannot preſume that the diſſeiſee has deſerted the right of poſſeſſion, it cannot be transferred to the heir of the diſſeiſor; nor ought the lord, in ſuch caſes, to accept of his ſervices from ſuch heirs. Nay, *Coke* (*s*) ſays that the feoffee of the diſſeiſor that comes in by title after a year and a day was expired, was anciently held to have right of poſſeſſion, and to put the diſſeiſee to his writ of entry, becauſe they came in by title; and for quiet of purchaſers, this non-claim for a year and a day was held a dereliction. Hence writs of entry againſt the feoffee in the *per & cui*. But this was not held ſo in reſpect of diſſeiſors, becauſe they themſelves being the wrong doers, had no law in their favour, leſt it ſhould encourage ſuch injuries. But afterwards, as feoffments became more ſecret, and nothing paid to the lord, then they thought it too hard ſuch feoffments ſhould alter the right of poſſeſſion, and therefore they conſtrued the feoffee that came in by his own act, to be a wrong doer, and not to alter the right of poſſeſſion; but the heir, for the reaſons aforeſaid, was left as before.

[43]

Litt. ſect. 426. If the diſſeiſor dies ſeiſed within a year and a day (*t*) after the diſſeiſin, and before any entry

(*s*) [On *Litt.* 238. *a.* 256. *a.*]

(*t*) [See *ante* 37. N. XXVII.]

by

by the diſſeiſee, this gives a right of poſſeſſion to the heir, becauſe when the diſſeiſee yields up the poſſeſſion peaceably, the preſumptive right is in the diſſeiſor; for it is to be preſumed that the diſſeiſee would return again to his poſſeſſion, [44] if he were not conſcious that his adverſary had the right; wherefore there is no time given after ſuch diſſeiſin, for the diſſeiſee to aſſert his right; for it is to be preſumed he would do it immediately, if he has the right of poſſeſſion in him, and the rather, for that men have the quickeſt ſenſe of injuries immediately after they are committed. So that the giving up the poſſeſſion tamely, and yielding to the diſſeiſin, makes a ſtrong preſumption for the diſſeiſor's right, and, by conſequence, the law muſt take the right of poſſeſſion to be in the heir of the diſſeiſor, and the lord is bound to accept him as tenant, and to relieve the tenements into his hands. But if the diſſeiſee had re-entered, then he had aſſerted his own right of poſſeſſion by ſuch his entry; for *affectio imponit nomen operi*; for the law cannot ſuppoſe the diſſeiſee to have relinquiſhed his right againſt his own expreſs act to the contrary. And if the diſſeiſee has not deſerted his right, the lord ought to attend to the ſolemn claim made by him, and not relieve the tenements into the hands of the heir of the diſſeiſor; and if he doth, it is null and void, and cannot give him any right.

Litt. ſect. 430. Ld. Raym. 62.

If a man be diſſeiſed, he may have an action of treſpaſs againſt ſuch diſſeiſor for the act of entry, becauſe the diſſeiſee being in actual poſſeſſion, and taking the profits, violently to enter and take them away muſt be a tranſgreſſion, and the deſtruction of a man's goods and chattels is puniſhed in this action. But after ſuch diſſeiſin he can have no treſpaſs for the mean profits, for the mean profits follow the poſſeſſion; and the perſon that reſides in the feud is entitled to all the profits of it; becauſe the burthen of the feudal duties is laid on him while in poſſeſſion, in defence of his ſtock on the ground; but when the diſſeiſee enters, the diſſeiſor is a treſpaſſer *ab initio*; for from the time of his entry the diſſeiſee is in of his old title, and ſeated in his rightful feud as he was before; and therefore for all the intermediate time it was a violation done to the profits of his feud, ſince it was originally ſo; and he is in as from the beginning.

11 Co. 51. Co. Litt. 257. 19 H. 6. 27, 8, 9. 2 Rol. Abr. 550. Stra. 596.

Ld. Raym. 229. 476.

If a man has the frank tenement in law in him, yet he ſhall not have an action of treſpaſs before entry (*u*); as the heir ſhall not have an action of treſpaſs againſt the abator before entry; for the poſſeſſion (*w*) of the heir cannot be

(*u*) [*Plowd.* 142. *b.* *Hob.* 224. 2 *Eſpin. N. P.* 91. 3 *Bl. Comm.* 210. c. 12. See further, *Com. Dig.* Treſpaſs (B. 3.), and 20 *Vin.* Treſpaſs (S), and next note.].

(*w*) [See N. XXX.]

abated

abated before he is actually poſſeſſed; for no man can be ſaid actually to enter, till the actual poſſeſſion is in him, and no man can be a treſpaſſer to that poſſeſſion the law caſts upon him, which is only a poſſeſſion *de jure*, and is not capable of an actual violence. Beſides, no chattels by our law can deſcend, and therefore he has a right to the graſs upon the ground only as it is part of the freehold; and ſince he never entered on the ground till the chattels are ſevered, he can have no right to them at all, becauſe he cannot ſhew that the poſſeſſion of them was ever in him, or any perſon from whom he can claim them; and therefore no violation can be done to ſuch poſſeſſion by taking them away. But if a man be diſſeiſed, and his entry be taken away, he can never recover the mean profits; for then the right of poſſeſſion is out of him. The heir of the diſſeiſor is feudary to the lord, and has a lawful poſſeſſion, and the diſſeiſee can never re-enter to make him a diſſeiſor (*x*); and if the diſſeiſee has no right to enter on ſuch poſſeſſion, he can have no right to the profits of ſuch poſſeſſion, but the right is in the heir to undergo the duties of the feud. But if a man were diſſeiſed, and the diſſeiſor made a feoffment in fee, and afterwards the diſſeiſee had entered, he might have had an action of treſpaſs againſt the feoffee, becauſe

[46]

2 Rol. Abr. 552. 19 H. 6. 28.

2 Rol. Abr. 590.

(*x*) [See *ante*, 37. N. XXVII.]

this

this is a continuation of the ſame violence to the iſſues and profits that belong to him, that was firſt begun by the diſſeiſor. *Cro. Eliz.* 540. *Mo.* 461. 2 *Rol. Abr.* 554. *Licet* 10 *Co.* 51. 1 *And.* 352. *Hob.* 98. 1 *Rol. Rep.* 101. *Godb.* 388. are to the contrary. It ſeems not doubted that the old law was otherwiſe, of which I ſhall deduce a brief hiſtory.

In [the] *Saxon* times the right of propriety ſeems to have been only recoverable by a writ of right, as the right of poſſeſſion was recovered by a writ of entry; and Sir *William Herle* himſelf tells us, that the particular writ of entry of *cui in vita* was not anciently known, but they recovered in that caſe in a right of right. 5 *Ed.* 3. 58. 2 *Inſt.* 343. The proceſs in both theſe actions were alike, *viz.* by ſummons, *grand cape* before appearance, and by *petit cape* afterwards. But the battail (*y*) was in the writ of right, where the property was doubtful; but in matters of plain and obvious right, as were thoſe of poſſeſſion, they did not appeal to providence. And it is to be noted, that the proceſs and proceedings in thoſe actions were not then ſo tedious, when the courts were held from three weeks to three weeks, and the proceſs iſſued at every court day. But after the conqueſt, all cauſes were drawn into the king's courts to

(*y*) [See N. XXXI.]

create

create the greater dependance (x); and then the proceſs iſſuing from term to term was found very dilatory. Hence the aſſiſe was invented (a) to do juſtice to the people in their proper counties, by the king's judges, and to determine the matter at once. From thence it is ſaid by *Glanvil*, *Bracton*, and *Fleta*, to be a new-invented remedy. *Glanv. lib.* 2. *c.* 7. *Fleta* 214, 215. And that it was of *Norman* original, appears by the *Cuſtomier* 16. *b.* But the writ of entry retained its old proceſs, and therefore fell into diſuſe, as brought againſt the diſſeiſor himſelf; and when it became thus obſolete, the writ was called a writ of entry, in the nature of an aſſiſe, as though that had been the elder action; or rather becauſe both being of the ſame kind, the aſſiſe was a bar to the writ of entry, & *vice verſa*; for both, as brought againſt the diſſeiſor, ſuppoſed a right of entry in the diſſeiſee, and no action could be brought above once by the law for the ſame thing; wherefore one action was given once only for the right of poſſeſſion, and once for the right of propriety. But a man might bring one action for his own right, and another for his anceſtor's right; for ſuch rights

1 Ld. Raym. 9.

1 Ld. Raym. 273.

(x) [See the *Introd.* p. xii. *Millar's View*, b. 2. c. 3. p. 325. *Dalrymple*, *F. P.* c. 7. ſ. 1. *Kaims's Hiſt. Law-Tracts*, Tr. vi, vii. 1 *Rob. Cha. V.* ſ. 1. p. 71, &c.]

(a) [See 3 *Bl. Comm.* c. 10. p. 184. c. 22. p. 341. c. 23. p. 351. *Stuart's View*, b. 1. c. 2. ſ. 4. n. 5. p. 273, 4. b. 2. c. 1. ſ. 2. p. 338.]

of

of poſſeſſion were diſtinct and different the one
6 Co. 7. b. from the other. When the feud became farther
[49] to be conſidered as a civil right, from henceforth it was not thought neceſſary that the feudary ſhould caſt himſelf on providence, and defend his military poſſeſſion by battail. Then it was thought fit to make a change in the action; and for three deſcents and three alienations a man was allowed his writ of entry (*b*); becauſe the diſſeiſee, being the rightful proprietor, ſhould not be forced to a combate; but after three deſcents it was thought that more than half the right was paid for by fines and reliefs to the feudal lord; and therefore the diſſeiſee was put to his writ of right, to aſſert
2 Inſt. 153. his right of propriety; and every body knows that the writ of entry in the *poſt* came in by the ſtat. *Marlb. c.* 30.

2 Inſt. 248. Whether the other emendations in theſe actions were made by the juſticiar, chancellor, or parliament, is uncertain, but no damages were recovered but againſt the diſſeiſor himſelf (*c*), either by aſſiſe or writ of entry, till the ſtat. *Gloceſt. c.* 1. becauſe the diſſeiſor received the purchaſe money, and ought to anſwer the da-

(*b*) [See 3 *Bl. Comm.* c. 10. p. 181.
Poſſeſſion for one hundred and eighty years, a term rudely ſuppoſed commenſurate with three generations, gave a right among the Britons. *LL. Hoel Dda*; and ſee 1 *Whit. Manch.* c. 8. ſ. 4. p. 277, 8.]
(*c*) [See 2 *Inſt.* 286.]

mages,

mages, and becauſe the feoffee came in as an innocent man, and paid his fine to the lord, and even came in in default of the diſſeiſee himſelf, he not preventing it but by his entry; therefore no damages were allowed till the ſaid ſtatute.

When the fines for alienation were worn out, and they found the prejudices of ſecret feoffments, which were made anciently, as is ſaid, to acquire a right of poſſeſſion, and before that ſtatute to excuſe damages (*d*). 2 *Inſt.* 284. *Hob.* 48. [50]

And here it is to be known that the diſſeiſor hath the naked poſſeſſion (*e*). The feoffee has a colourable poſſeſſion coming by title, and the heir has the right of poſſeſſion. The reaſon why the feoffee's title was formerly allowed, though he came in by wrong, is, becauſe he anciently paid a fine to the lord (*f*); and therefore anciently, if he continued in poſſeſſion a year after ſuch purchaſe, the feoffee of the diſſeiſor gained the right of poſſeſſion: the hiſtory whereof will be proper here.

(*g*) By the ancient feudal law, no man could

(*d*) [This paſſage is not clear; perhaps the word "and" ſhould not have been inſerted in the ſecond line.]

(*e*) [See 2 *Bl. Comm.* c. 13. p. 195, and *ante*, p. 21.]

(*f*) [See N. XXXII.]

(*g*) *Ex jure feudali non minus dominus prohibetur ab alienatione ſui dominii directe ſine conſenſu ſui vaſſalli, quam vaſſallus ab alienatione feudi, & utroque caſu pari pœna & hic & ille punitur, ille amiſſione directe dominii, hic, utilis.* Feud. lib. 1. tit. 22. [See *Wright's Ten.* 30. n. (*c*).]

alien

alien without a licence from the lord of the fee, and this licence was part of the notoriety on ſuch alienations. And if they alienated without ſuch licence, the feud was forfeited. Nor could the lords part with their manors and ſervices without the attornment of their tenants, leſt they ſhould ſubject them to their neighbouring lords, between whom there might be a deadly enmity, which quarrel might be made up between the two lords, but might ſubject the feudary to the mercy of the alienee. That this was the ancient law touching the feud, is plain from all the ancient accounts of this matter. *Vide Vigelius* at large, *lib.* 5. *cau.* 34. *fo.* 288.

[51]

But in *England* (*b*), where the allodial property had very much prevailed in the *Saxon* times, they ſoon revived the free liberty of the alienations without fine, in three caſes. Firſt, *in remunerationem ſervitii*, *viz.* for ſervices done to the feud, as for ſerving in the wars by the feudal tenant, or in plowing the feud at home, both theſe being either for the honour or profit of the feudal lord, they formerly valuing themſelves upon the number and honour of their tenants. Secondly, in free marriage with the daughter of the feudary, or ſome other of his blood; and this was allowed without fine, becauſe the feud was given in fee to provide for

(*b*) [See N. XXXIII.]

relations,

relations, and multiplied tenants to the lord. Thirdly, in free alms, the ſuperſtition of the times allowing it for the good of the ſoul; of which ſee *Glanv. lib.* 7. *c.* 1. *fo.* 44. *Stamf. Prærog. fo.* 27, 28. But in all theſe caſes the alienation was to hold of the feudary, and he was to leave ſufficient to anſwer the feudal ſervices; and this privilege was confirmed by act of parliament, and made more general; ſo that the feudary might alien to whom ever he pleaſed, ſo that ſufficient was left to anſwer the lord's ſervices; and this ſeems to be a privilege mightily contended for; though after it was found inconvenient that the tenure ſhould be of the feudary; and therefore was altered by the ſtatute of *Quia emptores;* but the king not being particularly named, the tenants *in capite* were held to be out of the ſtatute (*i*); and therefore by the ſtatute *Prærog. Regis, c.* 12. it was ſettled that ſuch tenants ſhould not forfeit their lands for ſuch alienations, but ſhould be levied by proceſs out of chancery; ſo that it is plain that formerly ſuch fines were paid in caſe of every private lord; but the attornment conti-

[52] Mag. Char. c. 34.

(*i*) [*Wright's Ten.* 162. *F. N. B.* 211. *I.* 235. *A. Dalrymple, F. P.* c. 2. ſ. 2. p. 57, &c. *Sulliv.* Lect. xii. p. 118. xv. p. 146. 150. xliii. p. 386. 2 *Bl. Comm.* c. 19. p. 289. 2 *Inſt.* 501.

But it was ſaid, that as the ſtatute was made in favour of the lord, he might have diſpenſed with it, if he pleaſed. See the *Stat.* and *Brooke Ten.* 2. *F. N. B.* 211. *I.*]

nued,

nued, of which hereafter; and *vide Stamf.* 27, 28, 29. 9 *Ed.* 3. 29.

Ld. Raym. 862. Where the maxim was delivered by *Wilby*, that the ſervice of one man's body cannot be changed into another man's body without the aſſent of the lord of the fee.

Of RELEASES.

[53]

Litt. ſect. 444, 5.

WHEN a diſſeiſin is committed the poſſeſſion and right are ſeparated; but they may by a lawful conveyance be again united. Now when a man has the right and poſſeſſion in him, he muſt convey by feoffment, which made a notoriety among the tenants, by the feoffment *coram paribus* (*k*). When a man was out of poſſeſſion, he might convey by releaſe only; for the diſſeiſor had the poſſeſſion, which of itſelf made the notoriety, and the releaſe transferred the right; ſo that a releaſe is a conveyance of right to a perſon in poſſeſſion; and this comes inſtead of a feoffment; for a man cannot be put in poſſeſſion, which is the operation of the feoffment, when he is in poſſeſſion before (*l*).

(*k*) [See *ante*, 39. N. XXIX. and *Poſt.* 69. 83.]

(*l*) [See N. XXXIV.]

A releaſe of all a man's right ſuppoſeth that he has right, for he cannot transfer a right which he has not; for if he has nothing, nothing can paſs by the conveyance; and they thought it countenanced maintenance to transfer poſſibilities. But if the heir releaſes with warranty, it bars him when the right deſcends; for the warranty is a covenant for the defence of lands by a man's own act made equal to a feudal contract, and therefore repelled the party himſelf or his heirs from claiming it, ſince he was bound to defend it to another; of which ſee *Hale's Succeſ.* 57. and tit. *Warranty*. But though a man cannot transfer a right that has no being, as he cannot releaſe to the bail before judgment, or to the conuſor of a ſtat. all his right in the land before execution; yet when that which was eſteemed a poſſibility takes the being of a right, as the remainder of a term of five hundred years, it may be releaſed, becauſe the notion of the poſſibility has vaniſhed by the certain eſtabliſhment of the term. 10 *Co. Lambert's* caſe, 47, 48. Litt. ſect. 446. Ld. Raym. 786. Ld. Raym. 1306. [54]

A man cannot releaſe but to the tenant of the freehold (*m*); for the preſumptive right is in the freeholder (though he comes in by diſſeiſin) during his poſſeſſion; and the leſſee for years takes and retains the poſſeſſion but as his bailiff; and ſince the action and entry are only Litt. ſect. 447, 8.

(*m*) [See N. XXXV.]

on the freeholder, he only is capable of a releaſe, and the leſſee for years is a ſtranger. But if a man has a freehold in law I may releaſe; for then the law caſts the poſſeſſion upon him, and he has the preſumptive right. *Vide poſt. ſect.* 510.

[55]
Litt. ſect. 449, 450, 1, 2 3.

Releaſes are fourfold, either enuring by way of *mittre le droit*, extinguiſhment, enlargement of eſtate, and *mittre le eſtate*. Firſt, by way of *mittre le droit*, and this either to the diſſeiſor himſelf, or to the feoffee coming in by title, or to the heir of the diſſeiſor. Where a man releaſes to the diſſeiſor himſelf, it alters the right; but where to the feoffee, it does not alter his title; for the diſſeiſor coming in by wrong, the poſſeſſion is only in him, and there is no notorious title, but only the bare poſſeſſion; and therefore a releaſe makes good that poſſeſſion, by making of it rightful. But the feoffee comes in by title, and therefore the releaſe cannot alter the title; for the feoffment being a notorious act, muſt be defeated by an act of equal notoriety, before any alteration can be made in ſuch title. Therefore if there be two diſſeiſors, and the diſſeiſee releaſe to one of them (*n*), he ſhall hold out his companion, becauſe the diſſeiſor comes in by no lawful or eſtabliſhed act of notoriety, which ought to be defeated before the manner of poſſeſſing can be

(*n*) [See N. XXXVI.]

altered;

altered; and therefore though he poſſeſſed as a joint-tenant before the releaſe, yet after the releaſe he ſhall ouſt his companion, becauſe he was poſſeſſed of the whole before by wrong, and now being poſſeſſed by right, it follows [56] that the poſſeſſion of the other wrong doer is no poſſeſſion at all. But if a diſſeiſor had infeoffed two, the releaſe of the diſſeiſee to one ſhould enure to both, becauſe coming in by the legal notoriety of a feoffment, that muſt be defeated by an act of equal notoriety, before the title can be altered, becauſe the feoffment muſt ſtand good, as an act that gives warning to all perſons in whom the freehold ſubſiſts, till by ſome act of equal ſolemnity it appears that the freehold is in another. Litt. ſect. 472.

Now ſince the freehold is not defeated in this caſe, the feoffment continues, and the releaſe enures to them both. Another reaſon given by the Lord *Coke* is, that they may have opportunity to take advantage of their warranty, which will happen if they be defeated by action or entry; for then if the diſſeiſor refuſes to give a plea *in warrantia chartæ*, they ſhall recover in recompence, which could not be practiſed, if the feoffment were defeated by the ſecret operation of the releaſe. By the ſame rule of reaſon, where a diſſeiſor makes a leaſe for life, the remainder in fee, and the diſſeiſee releaſes to the tenant for life, or to the remainder-man, this enures to them both, be-

cauſe coming in by feudal conveyance, it cannot be altered, unleſs it were defeated by an act of equal notoriety. [57]

If a diſſeiſor makes a leaſe for life, and the diſſeiſee releaſes to tenant for life, this ſhall enure to him in reverſion, becauſe the releaſe cannot alter the eſtate that paſſed by the feudal feoffment, without ſome act of notoriety by which that feoffment is deſtroyed; ſo if there be two diſſeiſors, and they make a leaſe for life, and the diſſeiſee releaſes to tenant for life, this ſhall enure to them all, becauſe the releaſe cannot alter the feudal feoffment.

Co. Litt. 276. If there be tenant for life, the remainder in fee, and tenant for life is diſſeiſed by two, and he releaſes to one of them, he ſhall not hold out his companion; for if he had a rightful eſtate for life by the releaſe, then the remainder would be reveſted: but the remainder cannot reveſt without ſome act of notoriety; for where there is a notorious poſſeſſion by wrong, that may receive a releaſe of the right, without any act of notoriety, becauſe the poſſeſſion is in itſelf a notoriety, but the eſtate cannot alter without ſome act of notoriety, ſo that men may know in whom the fee is lodged; and therefore one of the diſſeiſors doth not take an eſtate for life, and reveſt the remainder; for he to whom the releaſe is made hath a longer eſtate than the releaſor; and ſo, ſhould he be tenant for life, the releaſe would enure by way of grant of his eſtate. [58]

eſtate. So if the remainder-man had releaſed to one of the diſſeiſors, he ſhould not hold out his companion; for if the releaſee might hold out his companion, the eſtate for life gained by wrong would be left in both, during the life of tenant for life, ſince the remainder-man could not by his entry overthrow it during the continuance of the eſtate for life; and whatever right is acquired during the continuance of the unlawful poſſeſſion, is acquired to them both: for if one were to acquire the whole right in remainder, there would be no notoriety of the beginning or determination of the eſtate for life in the other diſſeiſor. But if tenant for life, and he in remainder, join in a releaſe to one diſſeiſor, he ſhall hold out his companion, becauſe when the poſſeſſion is notoriouſly in them both, each of them is capable of a releaſe; and when one has obtained a releaſe, it makes his poſſeſſion rightful; and his holding out his companion makes it immediately notorious, that the eſtate is in him alone. Nay, if the diſſeiſors make a leaſe for years, and the diſſeiſee releaſes to one of them, this ſhall enure to them both, [59] becauſe he cannot make it notorious that the eſtate is in him alone, becauſe he cannot hold out his companion during the continuance of the leaſe for years. So if two joint-tenants are diſſeiſed by two, and one releaſes to one of them, he ſhall not hold out his companion, becauſe he cannot hold him out of the whole,

becauſe he has not the whole right; and ſo there can be no act of notoriety, whereby the eſtate may appear to be in one diſſeiſor.

Co. Litt. 275, 276. If the king's tenant for life be diſſeiſed by two, and releaſes to one of them, this enures to both, becauſe he can only be deſſeiſed of an eſtate for life, ſince the reverſion in the king cannot be deveſted. If there be tenant for life, remainder for life, remainder in fee, and he in remainder for life diſſeiſes the firſt tenant for life, and the firſt tenant for life dies, the diſſeiſin is merged; for ſince it appears by the notoriety of the feudal contract, that he is in his remainder for life, it muſt follow that he cannot be to himſelf a diſſeiſor of ſuch remainder; and if he cannot deveſt the remainder, the diſſeiſin muſt ceaſe with the poſſeſſion of the firſt tenant for life.

[60] Co. Litt. 276. *Littleton* alſo ſays in theſe ſections, that if there be tenant for life, the remainder in fee, and they are diſſeiſed, the tenant for life cannot releaſe to him in remainder, becauſe the naked right cannot be transferred. Having conſidered how this releaſe ſhall operate, as to the diſſeiſor himſelf and his feoffee, the third thing to be conſidered is, how it ſhall operate as to the heir of the diſſeiſor.

The diſſeiſor has the bare poſſeſſion, and the feoffee has the bare poſſeſſion, but he hath it by title, and therefore the releaſe to *them* ſerves inſtead of the delivery of the poſſeſſion by feoffment;

ment; but ſuch releaſe paſſes the right of poſſeſſion as well as the right of propriety; but the heir of the diſſeiſor has the right of poſſeſſion in him; therefore the releaſe of the diſſeiſee only paſſes the right of propriety. If therefore the heir of the diſſeiſor be diſſeiſed, and the diſſeiſee releaſes to ſuch diſſeiſor, and after the heir recovers againſt ſuch diſſeiſor, the right of propriety goes along with it, becauſe when the heir recovers, he defeats the poſſeſſion of the diſſeiſor, as if it had never been, and then can he never recover in any action; for in the writ of right he muſt lay the poſſeſſion in himſelf, or ſome of his anceſtors, and this he cannot do in this caſe; for here never was any [61] poſſeſſion in him, but what was totally defeated and deſtroyed; and he cannot recover by the old poſſeſſion of the diſſeiſee; for that was turned into a naked right, which could not be transferred but to a real and true poſſeſſion; and here being no poſſeſſion but ſuch as ſtands defeated, it is the conveyance of a naked right, which cannot be; and were it allowed, would be a particular cauſe of maintenance in theſe caſes.

But if donee in tail diſcontinue in fee, the reverſion in the donor is turned into a right: now, if the donor releaſes to the diſcontinuee, and the tenant in tail dies, and the iſſue in tail recover againſt the diſcontinuee, yet he leaves the reverſion in the diſcontinuee of neceſſity;

for the iſſue in tail can recover but an eſtate-tail; and as the donor might have granted the reverſion while the tenant in tail was in poſſeſſion, ſo he may releaſe it to the diſcontinuee, who has the right of poſſeſſion. But [if the] diſſeiſee enters upon the heir of [the] diſſeiſor, and infeoffs *A.* and the heir recovers againſt *A.* he hath gained the right of propriety; for *A.* cannot recover back againſt him, *cauſa qua ſupra.* But if the diſſeiſee diſſeiſe the heir of the diſſeiſor, this doth not get the right of poſſeſſion;

[62] but if the heir recovers the right of poſſeſſion, it leaves the right of propriety in him as before; for there is no reaſon, in this caſe, [that] the right of propriety ſhould be carried along with it: for ſince the right remains in him unmoved, and not transferred over to any perſon, he can recover by virtue of the old ſeiſin, that was lawfully in him, though this new wrongful poſſeſſion be defeated and deſtroyed. Therefore alſo if the heir of a diſſeiſor be diſſeiſed, and the ſecond diſſeiſor infeoffs the heir apparent of the diſſeiſee at full age, and the diſſeiſee dies, and then the heir of the diſſeiſor recovers againſt the heir of the diſſeiſee, yet the right of propriety continues, becauſe though the new and wrongful poſſeſſion be defeated, yet he may recover the right of propriety by force of the ancient rightful ſeiſin that was in his anceſtor.

If

If the heir of the diſſeiſor be diſſeiſed, and the diſſeiſee releaſes to the diſſeiſor, upon condition, and the condition be broken, this reveſts the naked right in the diſſeiſee, becauſe when the condition is broken, the releaſe is as if it had never been, and therefore the diſſeiſee may recover by virtue of his ancient ſeiſin.

If diſſeiſee diſſeiſe the heir of the diſſeiſor, [63] and make a feoffment in fee, on condition, if the heir enter before the condition broken, the right of the diſſeiſee is gone for ever; for when the feudal eſtate that paſſed by the feoffment is defeated, the condition thereunto annexed is deſtroyed, and is incapable of being performed or broken, and the right can never reveſt in the diſſeiſee, but upon breach of the condition, which is now become impoſſible; therefore the right can never reveſt in him at all, and therefore he can never recover by virtue of his old ſeiſin, and the feoffee cannot recover, *cauſa qua ſupra*. But if the condition had been broken, and the diſſeiſee had entered, the old right had been reveſted; and if the heir had entered upon him, he might have recovered by virtue of his ancient ſeiſin. Co. Litt. 266.

Secondly, *Of* RELEASES *that enure by way of* EXTINGUISHMENT.

If a man be diſſeiſed, yet he remains tenant in right to the lord; but the diſſeiſor is the apparent Litt. ſect. 454, 5, 6, 7, 8, 9. 460, 1, 2, 3, 4. Ld. Raym. 515. 518. 522. 786.

parent tenant in poſſeſſion; and the lord may, if he pleaſes, ſtill avow upon his rightful tenant; for before the ſtatute of *Quia emptores*, [64] the lord was not obliged to change the body of his tenant. *Stamf. Prærog.* 28. and now he is not obliged to change his tenant, but in caſe of lawful feoffments (*o*), and tender of arreare, and not in the caſe of diſſeiſin. Therefore if a man be diſſeiſed, and the diſſeiſee puts in his beaſts upon the land, and the lord takes them for rent arrear, the diſſeiſee ſhall compel him to avow 9 Co. 21. upon him; and if the lord avows upon the diſſeiſor as his tenant, the diſſeiſee ſhall reply, and ſhew the eſpecial matter, how he was tenant and was diſſeiſed, and ſhall abate the lord's avowry, becauſe the feudal contract has ſtill a continuance between the lord and tenant, and the wrongful act of the diſſeiſor ſhall not deſtroy it; but if the tenant be diſſeiſed, and the lord accept rent from the diſſeiſor, and then the lord diſtrains his beaſts for rent in arrear, he may compel the lord to avow upon him, becauſe he may plead that any ſtranger infeoffed him, and that the lord accepted rent; and the lord cannot, contrary to his own acceptance, traverſe the title that he has admitted by ſuch acceptance. But what if after ſuch acceptance the diſſeiſee ſhould put in his beaſts, and the lord ſhould diſtrain them, can the diſſeiſee com-

(*o*) [See *ante*, p. 52.]

pel

pel him to avow upon him? *Coke* is of opinion that he cannot, becauſe it is the tenant's own [65] laches he let the diſſeiſor continue till rent was thus due and accepted; but the opinion of the 48 *Ed.* 3. 9. ſeems to be contrary, and that he muſt avow upon the diſſeiſee, becauſe when the tenant pleads the deſſeiſin, to compel the lord to avow upon him, it is ſtrange that the lord, by his own act of acceptance, ſhould maintain his avowry, and deſtroy the feudal contract. *Quære*, and ſee the book of *Ed.* 3. For after acceptance, whoſeſoever beaſts he take, by the book he ſeems to be obliged to avow upon them to maintain his diſtreſs. *Co. Litt.* 268. 20 *H.* 6. 41 *Ed.* 3. 2 *a.* 2 *Ed.* 4. 6. but very plain it is, that before acceptance he ſhall be compelled to avow upon the diſſeiſee, if he puts in his beaſts, and the diſſeiſor cannot compel him to avow upon him, though he takes his beaſts on the premiſes. So in the caſe of wardſhip or eſcheat. He may take either heir or either title before acceptance, but after acceptance he cannot enter for the eſcheat of the diſſeiſee's right, becauſe he has taken another tenant. It is alſo plain, that if the diſſeiſor dies ſeiſed, the heir of the diſſeiſor comes in by title, and then the diſſeiſee cannot compel him to avow upon him; for he has loſt the right of poſſeſſion; [66] and the diſſeiſee cannot put his beaſts upon the ground, and therefore cannot compel the lord to avow upon him; and therefore the lord muſt take

take the heir who has ſuch right of poſſeſſion, to be his rightful tenant; but becauſe the diſſeiſee may enter and occupy the land before the deſcent caſt, therefore the lord may releaſe to him, and diſcharge the contract, which is to his benefit, and is ſtill ſo far ſubſiſting, that he may take advantage of it. So where donee in tail releaſes to the diſſeiſor all his right, yet if he in the reverſion releaſes to him afterwards, it ſhall extinguiſh the rent. So where tenant in tail makes a feoffment in fee, though the tail be diſcontinued, becauſe the ſtatute that forbids alienation continues the relation of lord and
Co. Litt. 269. tenant, notwithſtanding the alienation. But if there be lord and very tenant, and the tenant makes a feoffment in fee, and afterwards the lord releaſes, this releaſe extinguiſhes nothing; for the feudal relation is not ſubſiſting after alienation (*p*), and the feoffor only of neceſſity becomes tenant in the avowry till the lord procures his arrears. If there be tenant for life, remainder in fee, and they are diſſeiſed, and the
[67] remainder-man releaſes to tenant for life, this releaſe paſſes no right, as is ſaid, becauſe the remainder-man is out of poſſeſſion, and ſuch a right cannot be transferred, but it ſerves to extinguiſh the right; for he may extinguiſh the benefit that accrues to him by the feudal contract. *Co.* 1 *Rep.* It is here to be noted, that

(*p*) [See N. XXXVII.]

before

before the ſtatute of *Quia emptores*, if a man had alienedd, the feud was forfeited, but afterwards that was compounded for fines; but the lord could then only demand a certain compoſition; and becauſe the tenant had ſworn fealty, he could not withdraw himſelf out of the feudal ſervice during life, but after the death of the feoffor, the lord was enforced to take the feoffee for his tenant; for the lord could not introduce the heir into the feud, contrary to the alienation of the anceſtor. And after the ſtatute of *Quia emptores*, the lord could avow upon the feoffor till the arrears were tendered; but both before and after the ſtatute, by acceptance of the feoffee, he became his tenant; for it is a plain conſent to the alienation. So in Terms; if a termor aſſigns, and the landlord accepts rent from the aſſignee, he can have no action from the termor, becauſe the rent is a ſervice, which being taken from the aſſignee, eſtabliſhes him [68] in the term, and he cannot demand the ſervice but from the tenant of the land; but where there is no ſuch acceptance, if the termor aſſigns in his life-time, or the executor after his deceaſe, yet an action of debt lies for the rent againſt the executor; for a term for years being the ſmalleſt eſtate, is preſumed to continue in perſon, and the contract is ſuppoſed to be performed by that perſon, unleſs he accept another tenant; and that perſon has a continuance to perform all contracts as long as there is an executor

executor that repreſents him, and has aſſets to perform his contracts. 5 *Co.* 24. 1 *Sid.* 266. But a man may have an action of covenant on the covenants in the leaſe, after the acceptance of the aſſignee for his tenant; becauſe though the acceptance diſcharges the tenant from the action of debt, becauſe it diſcharges the ſervice by accepting another, yet without legal words and a ſolemn contract in writing, the covenant cannot be diſcharged; for *Solvetur eo ligamine quo ligatum eſt.* Cro. Jac. 309. 522. Cro. Car. 188. 465, 6, 7, 8, 9, 470.

[69] Thirdly, *Of* RELEASES *that enure by way of* ENLARGEMENT *of the* ESTATE.

And here it is to be known that all feudal eſtates paſſed, as is ſaid, by feoffment, where the contract was ſolemnly made *coram paribus* (*q*) with the utmoſt notoriety, that all perſons that had right might have the utmoſt notice againſt whom to bring their actions: but when the feud came to be inheritable, then it was neceſſary that there ſhould be conveyances to paſs the eſtate, where the feudary had parted with the poſſeſſion for a limited time; as alſo for the lord to paſs the ſervices of his feudal tenants. Now this could not be by feoffment,

(*q*) [See *ante*, 39. N. XXIX.]

becauſe

becauſe ſuch perſons had not the poſſeſſion to transfer (*r*). Conſequently it was neceſſary that they ſhould paſs by grant, where the parties had the utmoſt notoriety that the matter was capable of, which anciently made a notoriety three ways. Firſt, by attornment or conſent of the tenant (*s*), which was required, leſt the lord that had often deadly feuds with his neighbouring clans, ſhould compound the matter by the alienations of ſome of the feudaries, who might be forced into the fealty of another lord, with whom they had anciently contended. Secondly, [70] the notoriety was made by the payment of ſervices, which being anciently corporeal, it was eaſily ſeen who was the feudal lord, becauſe the military tenants attended the lord in perſon in the wars, and the ſocage tenants ploughed and manured the lord's grounds, ſo that when granted it was eaſily ſeen where the ſervice was paid. Thirdly, a notorious poſſeſſion; the eſtate of which may be enlarged. Fourthly, by fines for alienation, which gave notoriety to ſuch contracts (*t*), which grew obſolete by alienations to hold part of the feud; and afterwards by the ſtatute of *quia emptores*, that gave power at all times to alien, holding of the ſuperior lord; but the former cauſes of notoriety

(*r*) [See *ante*, 53. N. XXXIV.]
(*s*) [See *ante*, 50. and *poſt*. 81.]
(*t*) [See *ante*, 50. N. XXXII.]

ſtill continue. Now a releaſe to the particular tenant from the lord from whom he holds, is equal to a grant and attornment, for the ſervices go over to the ſuperior lord, and there needs no attornment; for the tenant's accepting the grant is an attornment, and acceptance and conſent is preſumed to a grant made to himſelf, unleſs the contrary appears.

If *A.* makes a leaſe for life, and leſſee for life makes a leaſe for years, *A.* releaſes to the leſſee for years, and his heirs, this is void, becauſe here is not the conſent of the tenant for
[71] life, who is immediate tenant to the reverſioner, and ought to attorn, and therefore this eſtate ought to paſs by grant and attornment: ſo it is if a man leaſes for twenty years, and the leſſee aſſigns for ten years; but if a man makes a leaſe for years, the remainder for life, and afterwards releaſes to the tenant for years, this is good, becauſe the tenant for years holds of the reverſioner, and pays him the ſervices, and ought to attorn to his grants, and not he in the remainder for life; and therefore where tenant for years accepts a releaſe of the reverſion, it muſt in conſequence be good; but in that caſe a releaſe to him in the remainder for life is good, becauſe the leſſee, in the original infeudation, took the eſtate for years, ſubject to ſuch remainder for life, and therefore there needs no conſent from the leſſee for years, to enlarge the eſtate into a fee. But a man muſt

not

not only have an immediate relation, but he muſt have the notorious poſſeſſion of the eſtate, as tenant for life has by the feudal contract; for if he hath not the poſſeſſion, but has aſſigned it over to another, there can be no ſuch notorious poſſeſſion upon which a releaſe ſhould enure; for it would deſtroy the ſolemnity of contracting, if the releaſe ſhould paſs the eſtate, and charge the tenant, when the party was not really in poſſeſſion. Thus tenant by the curteſy is tenant to the heir* by the law, which he cannot alter by his own act; ſo he remains tenant to the action of waſte, and to attorn to the grants of the reverſioner, notwithſtanding aſſignments; becauſe the eſtate is merely created by the law; yet he is not capable of a releaſe (*u*), becauſe he has no notorious poſſeſſion *in pais*, which may be enlarged into a fee. So if an infant makes a leaſe for life, and the leſſee aſſigns it over to another, with warranty, the infant at full age brings a *dum fuit infra ætatem* againſt the aſſignee, and he vouches the aſſignor, who enters into the warranty; the demandant cannot releaſe in fee ſo as to enlarge the eſtate, becauſe the vouchee has no poſſeſſion. [72]

N. B. As in feoffments there was required the word *heirs* (*w*), to diſtinguiſh the feud from

* ["To the *heir*."—It ought to have been—"To the *lord*." See *Watk. on Deſc.* ch. 1. ſ. 3. p. 83.]

(*u*) [See N. XXXVIII.] (*w*) [See *ante*, 3. N. VIII.]

ſuch as were not hereditary; ſo it muſt be inſerted in releaſes that only come in place of the feoffment, in caſes where the poſſeſſion was transferred before.

Fourthly, *Of* RELEASES *that enure by way of* MITTRE LE ESTATE.

[73] When two ſeveral perſons come in by the ſame feudal contract, one of them may diſcharge to the other the benefit of ſuch feudal contract by a releaſe, becauſe no notoriety is needful, ſince there was a ſufficient notoriety in the prior feudal contract; and ſuch a releaſe is called a releaſe by way of *mittre le eſtate*. Thus two coparceners come in, as it is ſaid, to one entire feud, and deſcending from their father; and therefore they may releaſe privately to each other, without any notoriety by feoffment; becauſe they take by reaſon of the former contract, and deſcent to them, which eſtabliſhes them in the poſſeſſion, without a notoriety. But ſince the coparceners do alſo tranſmit diſtinct eſtates to their children, they may paſs ſuch eſtates by feoffment; for they have, in reſpect of the deſcending line, diſtinct eſtates, which they may paſs by a diſtinct feoffment; but joint-tenants can only paſs the eſtate by releaſe, and not by feoffment, properly ſpeaking; for they are in by the firſt feudal contract; and

therefore a ſecond feoffment cannot give any other farther title or notoriety, becauſe every perſon ſhall be ſuppoſed to be in by the elder and moſt worthy title, which is the prior feoffment; therefore the ſecond feoffment is impertinent (*x*). Nor is this any injury to a ſtranger's *præcipe*, for he may bring it againſt them all, according to the prior feudal contract; and if any [74] of them diſclaim, the reſt muſt defend for the whole, or loſe their intereſt. But if there be two tenants in common, they cannot releaſe to each other, but they muſt paſs their eſtate by feoffment; becauſe this eſtate being eſtabliſhed by different notorieties, each having paſſed by diſtinct liveries, they muſt paſs to each other by a diſtinguiſhing livery, or elſe it cannot be known in whom ſuch parts are, which formerly had paſſed by a diſtinct livery (*y*). Booth. 33.

N. B. That releaſes that enure by way of *mitre le eſtate*, need not have the word *heirs* (*z*), becauſe the parties are not in by ſuch releaſe, but by the former feudal contract, which paſſed an inheritance, and the releaſe only diſcharges the pretenſions of one of them. Co. Litt. 273. b. 200. b. 169.

(*x*) [See *ante*, 53. (*k*).]

(*y*) [And againſt tenants in common there muſt be ſeveral *præcipes*, they having ſeveral freeholds. *Co. Litt.* 195. *b.*]

(*z*) [See *ante*, 3. N. VIII.]

Of CONFIRMATION.

Litt. ſect. 515. Ld. Raym. 300.

CONFIRMATION is the approbation or aſſent to an eſtate already created, which, as far as is in the confirmer's power, makes it good and valid: ſo that the confirmation doth not regularly create an eſtate; but yet ſuch words may be mingled in the confirmation, as may create and enlarge an eſtate; but that is by the force of ſuch words that are foreign to the buſineſs of confirmation, and by their own force and power tend to create the eſtate.

Sec. 516, 517.

A releaſe paſſes away the right from the releaſor, and by that means may conſequentially ſtrengthen the eſtate; but a confirmation primarily ſtrengthens the eſtate, and conſequently ſo far as the eſtate continues, makes it good againſt the confirmer. If my tenant for life makes a leaſe for years, I cannot releaſe to the leſſee for years, becauſe there would want the attornment of tenant for life, and therefore the right muſt paſs, as is ſaid, by grant and attornment, and not by releaſe; but I may confirm the eſtate of tenant for years, for there wants nothing but my aſſent to corroborate the eſtate already in being.

[76]

Sect. 518.

I cannot releaſe to the termor of the diſſeiſor, becauſe he is a perfect ſtranger to the freehold; ſo that the releaſe is to one that has no right or poſſeſſion

poſſeſſion of his own, and therefore it is to him a releaſe of a naked right; but I may confirm that eſtate which is already in being in him.

If a man confirm the diſſeiſor's eſtate for an hour, this paſſes the fee, even without the word *heirs*, becauſe the diſſeiſor has the fee (*a*); and when that eſtate is aſſented to, the diſſeiſee can never afterwards deſtroy it. So if he confirm the *term* (*b*) of the leſſee of the diſſeiſor for ſome part of the years, he cannot defeat it during the whole term, becauſe the *term* is confirmed; and the laſt words being derogatory from his own grant, muſt be rejected; but if he confirms *the land* to the termor, for part of the term and no longer, this is good, becauſe the party that had right, did not totally aſſent by expreſs words, as he did in the two former caſes; for if he did, no derogatory clauſes from ſuch aſſent could be admitted; but his aſſent was originally but partial, and not to the whole eſtate, and therefore it cannot, contrary to the expreſs words, be carried any farther. Sect. 519, 520.

If a man releaſes to tenant for life all his right, this enures to him in the remainder, becauſe he parts with his whole; and he that has but an eſtate for life by the feudal conveyance, cannot have the whole fee, as is ſaid. But if a man confirms the eſtate for life, it is an approbation and aſſent to that eſtate only, and there- Sect. 521. [77]

(*a*) [See *ante*, 22. N. XXI.] (*b*) [See N. XXXIX.]

fore the aſſent being no farther than to the eſtate for life, it cannot be carried to ſtrengthen the remainder; but if he had confirmed the remainder, that had confirmed the eſtate for life by implication; becauſe the remainder cannot be without a particular eſtate to ſupport it, therefore the confirmation of the remainder muſt imply an aſſent to all means neceſſary to ſupport it.

Sect. 522. If a man confirm the eſtate to one of the diſſeiſors, he only has the eſtate as he formerly had it, which was jointly with the other diſſeiſor; but if he confirms the eſtate of one diſſeiſor in the lands, to have and to hold the lands, or his right to him and to his heirs, then ſuch diſſeiſor ſhall hold out his companion; for ſuch *habendum* explains the manner of his confirmation, *viz.* that he ſhould not hold the eſtate merely as it is, but in a manner more beneficial for him, that is, that he ſhould hold the poſſeſſion that he has *per my & per tout* to him only; for the *habendum* explains the aſſent, *viz.* that he ſhould hold the poſſeſſion ſole; ſo
[78] that the poſſeſſion in the whole being confirmed to him only, he has the total right to ſuch poſſeſſion, and therefore may hold out his companion.

Sec. 523. If one joint-tenant confirms the land to the other, this makes no alteration, for he confirms the eſtate in the ſame manner as it is; but if it be to have and to hold ſuch lands to ſuch joint-tenant

tenant only, he has a ſole eſtate; for then he expreſſes a deſign of confirming the poſſeſſion to him alone; ſo that the confirmation goes to the poſſeſſion itſelf, by the explanatory words in the *habendum*, and not to the manner of poſſeſſing; and the words of the *habendum* make the confirmation enure as a new grant of ſuch his moiety (*c*).

Where a man has an eſtate but for life, and he in the reverſion confirms the eſtate to him and his heirs, the confirmation as to the heirs is void, becauſe the eſtate is only confirmed, and nothing new is granted by ſuch confirmation, and the eſtate can continue but for life only; but if it had been to have and to hold the land to him and his heirs, that had amounted to a grant of the fee; for then there appears to be a farther intent than merely to confirm the eſtate, *viz.* to enlarge it to him and his heirs; and taking the grant ſtrongeſt againſt the grantor, it muſt paſs away the fee-ſimple. Sect. 524.

So where I let lands for life or years to a feme ſole, who after marries, and I confirm the term to the huſband and wife, for their lives, this amounts to a new grant of the term for the life of the huſband; for I not only confirm the old term, but erect a new one, ſince the words im- [79] Sect. 525, 6.

(*c*) [This properly operates as a releaſe, and not as a confirmation. See *ante*, 75. *Fitzh. Abr. Confirm.* 15. *Touchſt.* 314.]

port, more than a confirmation of the old term; for in that the husband has nothing in his own right.

Sect. 527, 8, 9, 530. If my disseisor, or my tenant for life, charge the land with a rent-charge in fee, and I confirm it, I shall for ever afterwards hold it charged, because I have assented to the estate, which has a being from such disseisor or tenant for life; and therefore I cannot afterwards destroy it.

Sect. 531, 2, 3. Ld. Raym. 49, 50. If I only use the words *dedi & concessi*, that is as strong as the word *confirmavi* (*d*); for it amounts to a grant of the right to the person in possession; and if he has my right, I can never after impeach his estate.

Sect. 534. Here (*e*) the heir of the disseisor grants the right of possession, and the disseisee the right of propriety; for every one grants what he lawfully may.

Sect. 535, 6, 7. The lord by confirming the estate doth not pass his right to the seigniory, because the confirmation or assent to that estate cannot be interpreted to pass that other distinct right which is [80] in him, since the assent to one estate is no reason to conclude that he has parted with the other; but if he had released all his right, he had extinguished his seigniory, because by such

(*d*) [See *Co. Litt.* 301. *a.* 2 *Anders.* 20. 2 *Sand.* 96. 2 *Brownl.* 292. *Cowp.* 596. *Butl. Addit.* note (1) to *Co. Litt.* 384. *a.* *Post.* 80. (*g*).]

(*e*) [See N. XL.]

remitting

remitting his right, he could not have demanded any thing (*f*).

The lord may abridge the ſervices of his tenant by his confirmation, but he cannot enlarge them or create new ſervices; for when he has confirmed the eſtate by leſſer ſervices, he has granted to the tenant the ſervices that are over and above what was ſpecified in the confirmation; becauſe confirming the eſtate to hold by leſſer ſervices is, by implication, a grant or releaſe of the reſt; for he could not hold by leſſer ſervices, unleſs the reſt were releaſed; but if he confirms to hold by greater or new ſervices, this is void, becauſe this doth not amount to a new grant from the lord. Sect. 538, 540.

If I confirm a villain to another that has him in poſſeſſion, this paſſeth nothing, becauſe this is an incorporeal right, which cannot be deveſted out of me, and the mere confirmation, where a man has no right, is really nothing; for that which is not, cannot be merely confirmed; but if there be the words *dedi* & *conceſſi*, it goes farther than merely to ſtrengthen the eſtate in the lands, for it paſſeth the right to the rent (*g*). Sect. 541, 2, 3.

(*f*) [See N. XLI.] (*g*) [See *ante*, 79. (*d*).]

Of ATTORNMENT.

Lit. ſect. 551. Bracton, l. 2. c. 35. f. 13.

(*b*) ATTORNMENT is the conſent of the tenant to the grant of the ſeigniory, or the reverſion, putting him into the poſſeſſion of the ſervices due from ſuch tenant. The reaſon is threefold. Firſt, From the ancient feudal law (*i*). When the ſeigniories ſubſiſted in their ancient clans, they uſed to be continually contending with each other; and it was frequent in thoſe times to make peace upon amicable conceſſions to each other; but if upon ſuch grants they ſhould have ſubjected any feudaries to the other lord, it might have been to the infinite prejudice of ſuch tenants; for though ſuch contending lords might agree, yet the grudge might continue to the tenants; and therefore the policy of that old law was, that their fealty was not to be carried over to any other, without
[82] their conſent, from whom they might expect oppreſſion rather than protection.

(*b*) The doctrine of attornment was partly avoided by the preſent method of conveying to uſes. *Vide Stat.* 27 *H.* 8. *c.* 10. And it is now, by a late ſtatute for amendment of the law, quite aboliſhed. *Vide Stat.* 4 *Ann.* c. 16. *ſ.* 9. [See *Wright's Ten.* 171. and n. (*f*), (*g*). and *Stat.* 11 *Geo.* 2. c. 19. ſ. 11. *Dougl.* 282, 3. & n. (1) to *Co. Litt.* 309. *a.*]

(*i*) [See *ante*, 39. N. XXIX. 50. 69. and *poſt.* 84. 90, 91.]

Secondly,

Secondly, That the tenant might know to whom the rents and ſervices were due, and to diſtinguiſh the lawful diſtreſs from the tortious taking of his cattle; and this reaſon was ſo prevalent, that when the law gave a free alienation, in reſpect of the ſuperior lord, yet the tenant's right of attornment continued unaltered.

Thirdly, That by the tenant's lawful payment to the grantee of ſuch ſeigniory or reverſion, he might be put into poſſeſſion of ſuch ſeigniory or reverſion; and that by the payment of ſuch rents, and doing of ſuch ſervices, which anciently lay in going to the wars with their lords, and plowing their grounds, all men might know in whom ſuch rights were veſted. And here the moſt general rule is, that the tenant cannot alter the grant, but only attorn to it; and by ſuch his attornment, can make no variation in the grant itſelf: for the tenant has no right to the reverſion, and therefore cannot alter the diſpoſition of it one way or the other; but he has a right to the poſſeſſion, and therefore can put whom he pleaſes into that poſſeſſion which he has in him.

If the lord grants the ſervices to one, and afterwards, by a deed of later date, grants them to another, the tenant may attorn to which he pleaſes; for the ſeigniory or reverſion in ſuch caſes veſts in the lord or reverſioner till attornment; for by the deed nothing paſſes till the grantee is put into poſſeſſion by the attornment,

[83]
Lit. ſec. 552, 3.

Strange 79. Ibid. 106.

ment, no more than a deed of feoffment paſſes the feud before the feoffee be put into poſſeſſion by livery; ſo that if he that has the laſt deed has the firſt poſſeſſion, he is the feudary, becauſe by the notoriety of the livery *coram paribus*, the feud paſſeth. So when it is a reverſion or ſeigniory, which do not lie in livery, it muſt paſs by the notoriety of the tenant's attornment: ſo if a man grants a reverſion in fee, and afterwards grants it to another for life, the tenant attorns to the grantee for life, he ſhall never attorn to the tenant in fee; ſo if a man grants a reverſion in fee upon an eſtate for years, and after confirms the eſtate to the tenant in tail, he ſhall never attorn to the grantee; becauſe, after the acceptance of ſuch confirmation, he cannot put the tenant in poſſeſſion according to the grant, becauſe the reverſion is altered by ſuch his acceptance; and when he cannot put the
[84] grantee in poſſeſſion of the thing, as it was granted, he can make no attornment at all; for his attornment cannot vary or alter the original grant; and if the tenant could alter the grant by his attornment, no body could tell by ſuch grants in whom the ſeigniory or reverſion was lodged; and ſo the notoriety of the attornment, as correſpondent to ſuch grants, would be altogether deſtroyed. And it is highly probable, that as their liveries were anciently very notorious *coram paribus*, ſo were their attornments alſo; and ſuch grants *coram paribus* were read and remembered;

bered; and if the attornments were not to correspond with the grants in all things, it would have caused infinite perplexity and quarrels to have adjusted such differences.

If the reversion be granted to one for life, the remainder to another in fee, if the tenant attorns not to tenant for life, he cannot attorn to the remainder-man; because, if there be no particular estate, there can be no remainder; and there can be no particular estate, unless the tenant gives him possession by his attornment.

The rule that governs these cases is, that he that owes the services must make the attornment; and therefore where the tenant in fee makes an estate for life, yet he remains tenant to the very lord, and must attorn to the grant of the seigniory; but if he makes a lease for life, the remainder in fee, the tenant for life must attorn to such grant; for this is an alienation in fee (*k*); and so by the statute of *Quia emptores* they must hold of the very lord; for since the statute no man can erect a new tenure (*l*); and a new tenure would be created, if the tenant for life were to hold of the remainder-man, and he were to hold over; and the words of the statute carry it for tenant for life to hold of the chief lord. *De cætero liceat cuilibet homini libero ad voluntatem vendere, ita quod feoffatus teneat terram illam de capitali domino feodi illius per eadem*

Co. Lit. 310, Litt. sect. 554, 5, 6, 7.

[85]

(*k*) [See *ante*, 66. N. XXXVII.] (*l*) [See N. XLII.]

ſervitia & conſuetudines per quæ feoffator tenuit. Now the tenant for life is properly the feoffee in this caſe, and therefore is to hold of the lord, and by conſequence muſt attorn to the grant of the ſeigniory; and ſince he holds by the ſervices of the whole fee, he makes an attornment as the very tenant, and there needs no ſubſequent conſent of him in remainder. If the tenant be diſſeiſed, yet ſuch diſſeiſee ſhall attorn to the lord, becauſe the feudal contract continues. But to the grant of a rent-charge, or a rent-ſeck, the tenant to the land muſt attorn, becauſe it is only
[86] the land is liable, and no body elſe, but as tenant of the lands; and therefore the land being to yield the rent, it is the tenant of the land only that is to conſent to ſuch grants, and put the grantee into poſſeſſion; for no man can put him into poſſeſſion of rent iſſuing out of ſuch land, but the tenant of the land itſelf. Therefore if there be very lord, and very tenant be diſſeiſed, and the lord grant the rent off from the other ſervices, the diſſeiſee cannot attorn to this grant, becauſe it becomes a rent-ſeck in the grantee; and then none can attorn but the tenant in poſſeſſion of the land that is to pay it, becauſe he muſt be put into poſſeſſion by the tenant of the land; but if the lord had granted all the ſervices, the diſſeiſee might have put the grantee in poſſeſſion by attornment; becauſe the tenant may be compelled to do the ſervices, being ſtill tenant by the feudal contract, and may compel the lord to

avow

avow upon him; but he is not compellable to pay the rent, which is turned into a rent-ſeck, but as he is tenant of the land, which he is not after the diſſeiſin.

If a diſſeiſſor makes a leaſe for life, the remainder in fee, and the diſſeiſee releaſes to the tenant for life, this ſhall enure to him in the remainder; for the releaſe, as is elſewhere ſhewn (*m*), cannot alter the notoriety of the feudal feoffment; but the releaſe of the feudal lord to the tenant for life ſhall not enure to him in the remainder; for the feudal feoffment is not prejudiced, and ſtands in full force, whether it enure one way or the other, and therefore it ſhall enure to the benefit of him that purchaſed ſuch ſeigniory; and he would not have the benefit of the total purchaſe of the ſeigniory, if the releaſe were to enure to him in the remainder; but if there be tenant for life, the reverſion in fee, if the lord grants the ſervices to the tenant for life, the reverſioner muſt attorn, becauſe he holds of the lord; but ſuch attornment does not alter the tenure of the eſtate for life, for that cannot be altered in ſuch attornment; for it cannot be thought that a bare aſſent to the grant ſhould ever be interpreted to diſcharge the tenant out of his fealty, and to releaſe all manner of ſervices, without any words or deeds whatever. But the tenure, which the

Co. Lit. 311. b. Litt. ſect. 558, 9, 560, 1, 2, 3.

[87]

(*m*) [See the chapter on Releaſes, *ante*, 55, &c.]

tenant

tenant for life purchaſed, is ſuperſeded during the continuance of the eſtate for life, as to all the poſſeſſory fruits of ſuch tenure; for the tenant for life cannot hold of the reverſioner, and yet the reverſioner holds of him; for he cannot exerciſe the prerogatives of a lord over
[88] one to whom he owes fealty (*n*), and therefore he can have no wardſhip, marriage (*o*), or relief of the reverſioner; but if the reverſioner dies without heir, it ſhall eſcheat (*p*), becauſe the tenure of the reverſioner is gone by his dying without heirs, and therefore the cauſe of the ſuſpenſion is taken away; and therefore the tenant for life may have the fee without prejudice to any one; but the tenant for life may not grant the ſeigniory during the ſuſpenſion, becauſe the ſeigniory is drowned in the lands, and he has not an eſtate in the ſeigniory diſtinct from the land; ſo that the grantee can make no title during ſuch ſuſpenſion, becauſe there are no ſervices due from the reverſioner during the continuance of the eſtate for life. But if the very tenant in fee make a leaſe for life or years to the lord, yet the lord may grant the ſeigniory, becauſe the ſervices continue, notwithſtanding the leaſe; for the tenant holds the reverſion of the lord as he did before; for the taking the leaſe

(*n*) *Craig. de jure feud.* 45, 46, 47. [See *poſt.* 152.]
(*o*) *Bracton, lib.* 2. *c.* 36. *Fleta, lib.* 3. *c.* 77. *ſect.* 1.
(*p*) *Feud. lib.* 2. *tit.* 24. *Zaſius in uſus feud.* 83.

ſhall

shall be never interpreted as a destruction of the services that were before due to the lord, while the tenancy of the fee-simple has a continuance; but if the lord disseise the tenant, or the tenant make a feoffment to the lord, then he cannot grant the seigniory; for the lord by the common law, in the first case, and the statute of *Quia emptores* in the second, holds of the next superior lord, and he has no seigniory distinct from the land itself. Co. Lit. 314. 564. Vide post. sect. 582.

If a tenant gives a penny as attornment, this will not found an assise (*q*), because it is no seisin of the rent, unless he gives it *in the name of seisin*; but the grantee may have a writ of recous, because the distress is lawful, being annexed to the services that past by the attornment, and therefore the rescue is tortious. Litt. sect. 565.

The attornment of one joint-tenant is good, for both are tenants of the whole land, and the services are due for the whole land; and since the whole services are due from both, either may consent for the whole, and the distress grows to be notorious on the land for the whole. Sect. 566. Ld. Ram. 312.

The attornment must be during the life of the grantor, because otherwise the reversion descends to the heir of the grantor, who has the right in him, and never granted it out of him. *Vide post.* Sect. 567, 8, 9.

[90]

If either the tenant for years or for life in this case attorn, it is good, because the tenant for Sect. 570. Vide post. f. 582.

(*q*) [See *Litt.* f. 565.]

years holds the eſtate for years of the reverſioner, and pays the ſervices to him, and the tenant for life holds the freehold of the reverſioner; ſo that both in different reſpects hold eſtates of him, and his releaſe to either, as is ſaid, is good enough. But here it may be aſked on *ſect.* 569. If there be tenant for life, remainder in fee, if he in remainder grants the remainder, why tenant for life muſt attorn, when he does not hold of the remainder-man, but of the very lord, as is ſaid before, by force of the ſtatute of *Quia emptores*; and the attornment muſt be made according to the tenure, by the rules aforeſaid laid down. But though there be no tenure of the remainder-man, yet the attornment of the tenant for life is required for two reaſons. Firſt, becauſe the remainder-man came in by the feudal feoffment, and therefore could not paſs without the utmoſt notoriety, and this was by attornment *coram paribus*, and poſſibly ſuch grants and attornments might be anciently made in their courts*; but however ſuch notoriety was
[91] attributed to the attornment, that the feudal feoffment could not be altered without it. Secondly, becauſe the action of waſte, and the forfeiture of tenant for life, was to him in remainder; and ſince he lay liable to ſeveral actions to the remainder-man, it is fit that he ſhould attorn to the grant, being to ſome pur-

[* See *poſt.* N. XXXIII. and *Mad. Form. Angl. paſſim.*]

poſes attendant to him; though by the ſtatute the feudal ſervice was to be paid to the very lord.

But when ſecret feoffments were allowed before two or three perſons, without being *coram paribus*, ſo were alſo ſecret attornments before two or three perſons, without being *coram paribus*; and by the ſame reaſon, if there was tenant for life, and he in reverſion confirmed the eſtate to tenant for life, with the remainder to another in fee, this was good to veſt the remainder; for the accepting of this confirmation implied an aſſent to the remainder that was thereon limited; but then it was neceſſary that it ſhould be by indenture, and the remainder-man ſhould have one part; becauſe otherwiſe the remainder-man would be never able to ſhew this grant, and the aſſent of tenant for life; for the aſſent could not be ſhewn unleſs he had the deed to which he was party, and whereby his acceptance would appear to the court. Sect. 572, 3, 4, 5.

If two joint-tenants make a leaſe for life, they may afterwards releaſe to each other without any attornment of tenant for life; for ſince both of them have the reverſion, the tenant for life is tenant to them both, and conſequently there is no need of any ſubſequent conſent to create a new tenancy; and paying the rent, and doing the ſervices to one only, is a ſufficient notoriety, that the whole fee is in one only. So if there be tenant for life, the remainder for life, he in reverſion may releaſe to him [92]

in the remainder for life; for there needs no notoriety to the firſt tenant for life, becauſe he already aſſented to the limitation of the remainder in the original creation of the feud; and therefore there was no danger that he ſhould be ſubjected to his enemy, and there is ſufficient notoriety to all ſtrangers by his holding of him in the remainder, as there was a ſufficient notoriety in the firſt caſe of the confirmation, by the tenant's holding over of the feudal lord.

Litt. ſect. 576, 7. Theſe ſections (r) ſtand upon the moſt evident property of a feudal feoffment; for ſuch feoffments cannot be defeated but by acts of equal notoriety to the feoffment; ſince the feoffment paſſes the fee by a notorious ceremony, it cannot be deſtroyed but by an act of

[93] equal notoriety, that is, by ſuch an entry as defeats the whole fee; therefore if a man makes a leaſe for life or years, and then enters and ouſts his termor for years, or diſſeiſes his tenant for life, and then makes a feoffment; if the tenant for life or years re-enter, he leaves the fee-ſimple in the feoffee without attornment; for the tenant for life or years by his re-entry cannot defeat the whole feoffment, becauſe he has only a right to an eſtate for life or years; and if his act of entry cannot deſtroy the intire operation of the feoffment, then muſt ſome part of the

(r) ["Theſe ſections."—See *Litt.* ſ. 576, 577. The ſubſtance of them, as alſo of Lord *Coke's* Commentary, is given by our author in the next page.]

eſtate

eſtate that paſſed by the ceremony of this feudal conveyance, be left in the feoffee. So it is if tenant for life or years recovers by ejectment or aſſiſe, yet he leaves the fee in the feoffee; for the entire operation of this feudal conveyance is not deſtroyed by this recovery; and if it be not deſtroyed, the fee muſt reſide in him. But it will be objected, by this method a man may be forced to attorn to his enemy: *Anſwer*, It is better the tenant ſhould receive ſome ſmall prejudice, than the rules of feoffments, upon whoſe notoriety every man's eſtate depended, ſhould be broken. Secondly, It is the tenant's own laches, that he ſuffered himſelf to be ouſted or diſſeiſed; and therefore it is to be preſumed that he was ſatisfied of the feoffee. But then how [94] if they had entered *vi & armis*, and ejected him. *Anſwer*, It ſeems that then ſuch ſubjecting to another, contrary to his will, ſhould be conſidered in an action of treſpaſs, and the tenant ſhould be recompenſed for it in damages.

If a leſſee for twenty years makes a leaſe for ten years, the ſecond leſſee cannot attorn to the grant of him in reverſion, becauſe he holds (*s*) of him; but if the reverſioner enters upon ſuch leſſee, and makes a feoffment in fee, and the leſſee re-enters, this leaves the reverſion in the feoffee without attornment. 6 Rep. 69.

(*s*) ["Becauſe he holds of him:"—Should it not be, "Becauſe he does *not* hold of him?"]

So if a man makes a leaſe for life, and then grants the reverſion for life, in this caſe, if he were to grant the reverſion in fee, the grantee of the reverſion muſt attorn, becauſe he immediately holds of the reverſioner in fee; but if the reverſioner in fee diſſeiſes the tenant for life, and makes a feoffment, and tenant for life re-enters, he re-ſettles himſelf and the grantee for life in their eſtates, and leaves the reverſion in the feoffee; for the leſſee for years, in the firſt caſe, and leſſee for life in the ſecond, by their entry, re-ſettle themſelves and their reverſioners in their eſtates; but they leave the remaining part of the eſtate in the feoffee, becauſe as much
[95] of the feoffee's eſtate as is not defeated by their entry, muſt be left in him.

If two joint-leſſees for years or life be ouſted or diſſeiſed by the leſſor, who makes a feoffment, and one re-enters, he leaves the fee in the feoffee, *cauſa qua ſupra.* If leſſor diſſeiſe his tenant for life or years, and makes a feoffment, and the leſſee re-enters, the rent thereon reſerved is revived, and ought to be paid to the feoffee, becauſe when the leſſee enters, he muſt hold the particular eſtate of ſome body; and if he be in of the ſame eſtate he muſt hold by the ſame ſervices; and ſince the feoffee is in by feoffment, he muſt hold as of his reverſion. But if the grantee of a rent-charge diſſeiſes the tenant of the land, and makes a feoffment in fee, and the tenant re-enters, this can never be revived, becauſe the

the feoffor cannot have it again, contrary to his own feoffment, and the feoffee can never have it, becauſe he was only ſeiſed of the land, and not of the rent, and the rent was never tranſferred to him.

Where a leaſe is made for life, the remainder in tail or for life, the remainder to the right heirs of tenant for life, tenant for life has the remainder in him, and he may grant it (*t*); otherwiſe it is where there is a leaſe for years (*u*), the remainder in tail or for life, the remainder to the right heirs of tenant for years, then the tenant for years cannot grant it; for the remainder is veſted in the right heir as a purchaſer. The reaſon of the difference is, that in the firſt caſe the tenant for life is tenant to the lord, being properly *feoffatus* within the ſtatute of *Quia emptores terrarum*, as is ſaid *ſect.* 554. And therefore when a remainder is afterwards limited to the right heirs of tenant for life, ſuch tenant ſhall be in the homage (*w*) of his lord, becauſe he

Co. Litt. 319. ſect. 578.

[96]

(*t*) [*T.* 11 *Hen.* IV. *f.* 74. *b. pl.* 14. *Bro. Diſc.* 30. *Grauntes*, 49. *Scire Fac.* 126. *Fitzh. Feoffm.* 109. *Co. Litt.* 22. *b.* 319. *b. Jenk. Cent.* 248. *pl.* 38. See 2 *Atk.* 57. 247. *Dougl.* 506. n. 1 *Fearne*, 30. 102. (4th ed.) 1 *Veſ.* 175—7.]

(*u*) [*Co. Litt.* 319. *b.* 1 *Co.* 104. *a.* 1 *Fearne*, 65. 482. (4th ed.)]

(*w*) As to the antiquity of homage, it is very remarkable, that *William* the *Firſt* (commonly called the Conqueror) about the twentieth year of his reign, juſt when the

he has an inheritance for which he ought to vow to venture his life, and the lord ſhall have the fruits of ſuch feudal inheritance; for if the intermediate eſtate be extinct, during the minority of the heir, the lord ſhall have the wardſhip and marriage of him, and ſhall have the heriot of ſuch tenant dying ſeiſed. *Vide Hale ſur*
[97] *Fitzherbert* 143. And by conſequence the inheritance muſt be ſuppoſed to reſide in tenant for life; and were the conſtruction otherwiſe, it would apparently tend to the weakening the tenure and ſtate of the whole kingdom. Therefore ſuch interpretation ought to be made, as beſt ſupports the tenure, when the words will bear both ſenſes. But in the ſecond caſe, the tenant for years is not the *feoffatus*; for the perſon properly that takes by the feoffment is the freeholder, and the tenant for years is but the bailiff to the freeholder; and it is the freeholder that is attendant to the ſuperior lord, may be in his homage, and that holds of him, and

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general ſurvey of *England*, called *Domeſday Book*, is ſuppoſed to have been finiſhed, and not till then, ſummoned all the great men and landholders in the kingdom to *London* and *Saliſbury*, to do their homage to him. *Hale's Hiſt. of the Com. Law*, 109. *Madox's Hiſt. Exchеq. fo.* 6. *in marg.* [At this period, the feudal ſyſtem appears to have been generally and more completely eſtabliſhed in this kingdom. See *Wright's Ten.* 46, &c. 52, &c. 2 *Bl. Comm.* c. 4. p. 48. *Sulliv.* Lect. xxviii. *Butl.* n. to *Co. Litt.* 64. *a.* ſ. v. (1.) and pref. and notes to *the Laws of Will. the Conq.* at the end of *Keham's Norman Dict.* p. 80, &c. *Law of Forf.* 49, &c.]

from

from whom the ſervices are due. Therefore this remainder to the right heirs is not immediately veſted in the tenant for years, becauſe the heir is the firſt that can have the freehold, as feudal tenant to the lord; and therefore, by the words of the grant, he muſt be the firſt purchaſer of ſuch freehold; and becauſe the tenant for years cannot hold of the lord, or the lord avow upon him, no other interpretation can be made. *Co. Litt. ſect.*

Therefore if a leaſe be made to *A.* for years, with livery, the remainder to the right heirs of *A.* this is a void feoffment, not only becauſe the freehold would be in abeyance, and there [98] be no perſon for the ſtranger's *præcipe*; but alſo becauſe there would be no perſon in the mean time for the lord's avowry, and to anſwer his ſervices; and therefore ſuch remainder muſt be void in the very creation of it; becauſe there is no perſon in whom the freehold can veſt; and if the act of notoriety doth not deliver over the poſſeſſion of the freehold, it is a nullity in the very act of delivering poſſeſſion, and altogether impertinent. So it is if ſuch eſtate were limited by way of uſe executed; becauſe if the feoffor does not part with the uſe out of him, the old uſe is executed on the feoffment; for the freehold cannot be in abeyance till tenant for years dies, and it does not execute in the feoffee without conſideration; but it ſeems it were good by way of executory deviſe, if the Ld. Raym. 314. 316. 523.

the contingency avoids a perpetuity, by happening during a life (*x*); becauſe then there is no immediate transferring of the freehold, but it veſts in the heir to anſwer the ſtranger's *præcipe* and the lord's ſervices, until the contingency happens; and it ſeems it ſhould be a good limitation in the caſe of a chancery truſt (*y*), where the legal eſtate is in the feoffee.

Stra. 969. Ib. 996. But if tenant in fee makes a leaſe for years, life, or gift in tail, the remainder to his own

[99] right heirs, or executes ſuch limitation by way of uſe, he is in his old reverſion (*z*), becauſe he never put himſelf out of the homage of his ſuperior lord; for it ſhall not be conſtrued a contingent remainder in the right heirs, becauſe he has not parted with any thing in the reverſion, but to his heirs, to whom a man cannot make a limitation; for he muſt have the fee in him in the mean time, till the contingency happens, and therefore muſt remain tenant to the lord, as he was before; and then it were a very hard conſtruction to make this a contingent remainder only to deſtroy the fruits of the feudal tenure, when the anceſtor held as very tenant to the

(*x*) [See N. XLIII.]

(*y*) [See *Moore*, 720. *pl.* 1006. *Caſes Temp. Talb.* 151. 1 *Atk.* 590, 1. 1 *Fearne*, 427. 449. 18 *Viner*, Remainder, (C. 2.) *pl.* 3. (C. 3.) *pl.* 3. and *poſt.* 263. N. CXXII.]

(*z*) [See *Hob.* 29. 2 *Co.* 91. *b.* 18 *Vin.* Rem. (A). *Watk. on Deſc.* c. 5. p. 168, 9. and *poſt.* 272. N. CXXVII.]

lord

lord during his life. *Co. Litt.* 22. and *Hale* upon it. *Cro. Jac.* 590. 2 *Roll. Rep.* 196. 216. 3 *Leo.* 64. *Dyer* 7. *Popb.* 3. 1 *Co.* 130. *Moor* 118, 119. 284, 5. 720. 2 *Co.* 91. 1 *Co.* 104. *Cro. Car.* 24. *Hob.* 27. 30. 1 *Mod.* 96. 98. 121, 122. 1 *Vent.* 372. 382. 1 *Roll. Abr.* 827. 841. 2 *Roll. Rep.* 196. 216. *Bro. Feoffment to uſes*, 338. *Dyer* 156. 237. 362. 235. 308.

It is here to be noted, that by fine the eſtate paſſes before attornment, and the grantee by fine ſhall have the wardſhip, or enter for an eſcheat or for forfeiture, before the attornment in the *quid juris clamat;* but he cannot diſtrain or have an action of waſte, writ of entry *ad communem legem in conſimili caſu*, or *in caſu proviſo*, or a writ of ward, or of cuſtoms and ſervices, the grantee cannot have before attornment; but what the lord may ſeiſe he is entitled to before attornment, as the heriot, wardſhip, &c. Now to underſtand this, we muſt go into the ancient manner of conveyancing, which was of two ſorts; either by fine or feoffment. The fine was in the lord's court, and by this they paſſed all feudal right which was in poſſeſſion; and there are inſtances as low as the time of *H.* 2. and *Ed.* 2. of fines in the court of the lord, *Madox* 15. (*a*) and they were called fines, Sect. 579, 580, 1, 2, 3, 4. [100]

(*a*) [See *Mddox, Formul. Anglicanum*, 217, &c. *Cruiſe* on *Fines*, c. 1. ſ. 5. *Butl.* n. to *Co. Litt.* 64. *a.* ſ. v. (8).]

becauſe

becauſe a fine was paid to the lord for ſuch agreement (*b*), becauſe it transferred the feudal right held of the lord. Now in ſuch courts they paſſed all the right the tenant had in poſſeſſion; but the right of action could not be transferred (*c*), becauſe that would have encouraged maintenance; therefore whatever ſuch grantee could ſeiſe paſt by this feudal conveyance, but the right of diſtreſs and of action did not paſs without attornment. The feoffment conveyed the feudal poſſeſſion *coram paribus*, out of court; for it was neceſſary to convey
[101] ſometimes before the court was held, and then the poſſeſſion was delivered over *coram paribus*; but as there were two conveyances of copyhold, one in the lord's court, and the other to the cuſtomary tenants; ſo in freehold, where the immediate grant was to the feoffee, and not to the lord, as in the copyhold; yet there were two ſorts of conveyances, one by fine in open court, the other by feoffment *coram paribus*: the right only paſſed by fine, becauſe the poſſeſſion being in the grantee, they might well ſtay till the next court to transfer the right; but where the poſſeſſion was to be parted with, or

(*b*) [The reaſon of their being called *Fines*, is generally ſuppoſed to be from their putting an *end* to the ſuit and claim. See 2 *Bl. Comm.* c. 21. p. 349. and 1 *Cruiſe*, 4. and notes (*b*) & (*c*).]

(*c*) [See 13 *Viner*, Fine, (X). *Touchſt.* 14. 10 *Co.* 50. *a.*]

ſervice

ſervice to be done, or money paid, there the uſual way was *coram paribus*, that the feoffee might not loſe the profits in the mean time, or the poſſeſſion be delivered before the contract could be completed. Thus it ſtood ſome time after the conqueſt; but the after kings endeavouring to retrench the privilege of the great lords (*d*), they firſt in *Magna Charta*, and after by the ſtatute of *Quia emptores terrarum*, began to admit of alienations without fine to the lord; and the acts of the court-baron were only eſteemed [102] to create notoriety among the tenants of the manor. From hence grants in the lords courts were omitted, and the attornments *in pais* were the only notorieties of ſuch grants, no fine being paid to the lord; and the king's courts creating a notoriety all over the land, the uſual way was to make the grant in the king's court in this manner. They uſed to ſuppoſe that the parties had covenanted to alien; and all writs of covenant, as being an action of public concern to the juſtice of the kingdom, were ſueable only in the king's court; and by conſequence this covenant to alien was ſueable there; and that court being poſſeſſed of the matter, as an adverſary cauſe, they were admitted to make all manner of agreement touching ſuch ſuit de-

(*d*) *Stamf. de Prærog. Regis* 28. *a.* [See *Wright's Ten.* 156. n. (*e*).]

pending

pending (*e*); and theſe agreements being amicably made by way of compoſition before the king's court, it became the juſtice of the king's court to ſee them performed; and therefore a *ſcire facias* iſſued to execute the fine, and a *quid*
Ld. Raym. 782. *juris clamat* to the tenant; but by the fine nothing paſſed but what the grantor could ſeiſe, and not the right of action, for the danger of maintenance; but in the *quid juris clamat* the
[103] tenant was compellable to attorn, unleſs he could ſhew that he was ſubmitted to his enemy; ſo that here the proviſion made by the *quid juris clamat* was for the intereſt of the tenant; but the tenant was not compellable to attorn in two caſes. Firſt, if the tenant were tenant in tail; for he claiming ſuch a right, as by poſſibility may continue for ever, is looked upon as maſter of the eſtate, and not bound to transfer the reverſion according to the pleaſure of the grantee. Beſides, the ſtatute law is, that the will of the donor be obſerved, and therefore they cannot compel him to transfer the tenure; but if he attorn *gratis*, it is good, becauſe then it cannot be preſumed to be to the prejudice of his iſſue. Secondly, the tenant ſhall not be compelled to attorn, if the grantee will not allow the privileges belonging to the eſtate; as the tenant ſhall not be compelled to attorn to the meſne, unleſs

(*e*) [See n. (1) to *Co. Litt.* 121. *a.* and n. (1) to 64. *a.* ſ. v. (8). *Cruiſe on Fines*, &c.]

they

they allow his privilege of acquittal againſt the ſuperior lord. Nor the tenant for life, where he is not impeachable for waſte, unleſs they allow that privilege, becauſe this being a final agreement, with the utmoſt notoriety in the king's court, the tenant can have no new privilege, but what appears of record. So if the grantee ſue a *ſcire facias* againſt the tenant, and [104] has judgment to execute the fine for any part of the ſervices, it is an attornment for the whole; for the tenant had opportunity to plead in the *ſcire facias*, why he ſhould not be compelled to attorn.

There needs no attornment to a deviſe, be- Sect. 585, 6.
cauſe theſe are by the cuſtoms of towns and boroughs for the promoting of trade, and do not require the notoriety of a feudal conveyance; and as no livery is required, where it is an eſtate in poſſeſſion, ſo no attornment is re- Stra. 166.
quired, where it is a reverſion.

Of a right a man cannot properly be diſſeiſed, Sect. 587, 8, 9, 590, 1.
though he may of his poſſeſſion; for it is a contradiction in terms, that a man by wrong ſhould have my right (*f*); therefore I cannot be diſſeiſed of a reverſion, while my tenant remains in poſſeſſion; for though my tenant ſhould attorn to ſome body elſe, that would not put me out of poſſeſſion of my reverſion, be-

(*f*) [And it is a contradiction alſo that a man ſhould be diſſeiſed of that of which he had no ſeiſin.]

cauſe

cauſe the right being in me, it could not be transferred to any body elſe, but by ſome act of my own; and the payment of my tenant is but a wrongful payment, and doth not give him my right. So it is if I am ſeiſed of a rent-charge, and the tenant of the land pays it
[105] to another, this does not deveſt me of my right, becauſe the wrongful payment of my tenant cannot alter my right; it is therefore a payment in his own wrong, and it ſtill remains in arrear to me; but if I am diſſeiſed of the demeans of
Ld. Raym. 862. my manor, the ſervices yet remain in me, becauſe the right to the ſervices, by the feudal contract, is not deveſted out of me by the wrongful poſſeſſion of the demeans of my manor; but becauſe all the feudal ſervices are to be done in ſupport of the manor, the knights
Hale's Hiſt. C. Law, p. 107. ſervices being the attendances of ſuch tenants in the general defence of the realm, imbodied under the lord of the demeans, that carried proviſions to ſubſiſt them; and the ſocage ſervices were the actual ploughing in the demeans of the lord; therefore if the tenants attorn to a diſſeiſor, it puts him into the poſſeſſion of ſuch ſervices, as acceſſory and belonging to the demeans of the manor; and if the diſſeiſor die ſeiſed of ſuch demeans as the principal after attornment, then the diſſeiſee, as it ſeems, cannot diſtrain for the acceſſory right of the ſervices; but though the tenant doth attorn to the diſſeiſor, yet he may afterwards refuſe, to avoid the

the double charge, becauſe this does not take away the right of the diſſeiſee, but that he may [106] enter into the demeans, or diſtrain for the ſervices (*g*); for till the right of poſſeſſion is gained by a deſcent, the diſſeiſee may recontinue which part of the manor he pleaſes. If a man let parcel of the demeans for life, he is ſtill lord of the manor, and the reverſion is ſtill parcel of the manor, becauſe held of him as lord of the whole demeans, and therefore ſhall paſs by a grant of the manor; but if a manor be leaſed for life, excepting black-acre, black-acre is not held of the manor; for it does not hold of ſuch tenant for life, but is ſevered from the manor, and therefore will not paſs by a grant of ſuch manor; otherwiſe it is, if ſuch leaſe had been made for years; for then the freehold had been entire, and one and all had therefore paſſed by the grant of ſuch manor.

Of DISCONTINUANCE. [107]

IT is an alienation of the poſſeſſion, where the right of action is left in another; and it began in the caſe of the huſbands alienations of their wives lands. By the civil law, the father Sect. 592, 3, 4, 5, 6, 7.

(*g*) [See *Watk. on Deſc.* c. 1. ſ. 2. p. 61.]

gave the *dos*, which was the eſtate of the wife, given on the marriage; and if it conſiſted of matters moveable, the huſband had the poſſeſſion, but was bound to reſtitution at his death; and even an action was allowed to the wife, in caſe the huſband fell to decay, to recover during his life. If it conſiſted of things immoveable, the huſband could not alien without the conſent of his wife, by the *Julian* law; and by *Juſtinian*'s reformation, he could not alien, though with her conſent. *Conſtante matrimonio rei dotalis dominium civile penes maritum eſt, naturale penes uxorem.* Dig. lib. 23. tit. 2. *De jure dotium.* Ibid. tit. 5. *De fundo dotali.*

Ld. Raym. 72. 1384.

Stra. 625.

When the feudal law allowed the inheritance to deſcend to women (*b*), then began the rights of the huſband to be ſettled. Now, ſince all the feudal eſtates were reckoned civil rights, therefore there was no room for the diſtinction
[108] of the civil law, that placed the civil right in the huſband, as the head and governor of the family, and the natural right in the wife, the legitimate owner. The *German* and *Northern* nations were the ſtricteſt obſervers of the rules of marriage, tying only one man to one woman, and enjoining ſtrict obedience to the huſband, even before their receiving chriſtianity, and much more ſo afterwards. Then when the woman was allowed to ſucceed into the feud,

(*b*) [See *ante*, 11. N. X.]

when

when ſhe took huſband, ſhe had no ſeparate property, but the whole power was lodged in the huſband, and they were reckoned as one in intereſt; therefore the huſband had the right of poſſeſſion, and the wife the right of propriety; or in other words, the huſband was ſeiſed in the right of his wife (*i*); this diſtinction was before known in the feudal law; for every perſon that came in by deſcent, or by lawful alienation in manner before-mentioned, by the ancient feudal law, had the right of poſſeſſion; therefore the huſband being poſſeſſed of the wife's lands by the marriage contract (*k*), was ſuppoſed to have the right of poſſeſſion; and by conſequence the huſband having aliened ſuch right of poſſeſſion, ſhe was anciently driven to her writ of right, by the opinion of Sir *William Herle*, as I think by the better opinion, 5 *Ed.* 3. 58. 2 *Inſt.* 343. for the wife could not complain of diſſeiſin done to the huſband, becauſe they were one in eſtate and intereſt, and the huſband could not do her wrong; and it would be very abſurd for the law to have allowed to complain on the memory of her

Stra. 229.

Ld. Raym. 521.

[109]

(*i*) [The moſt accurate expreſſion is, that the huſband *and* wife are ſeiſed in the right of the wife, the ſeiſin being properly in *both*. See *Dougl.* 329. Polyblank *v.* Hawkins.]

(*k*) [For marriage, being originally with the approbation of the lord of the fee, was a direct acceptance of the huſband as tenant. See *ante*, 12. N. XII. and *poſt.* 224. N. XCVII. 289. N. CXXXVI.]

husband, as though he had been guilty of a violent diſſeiſin; therefore the ancient law gave no poſſeſſory action, which complained of a violation of poſſeſſion, but only allowed her to controvert the right; but when the writs of right grew ſo tedious, and the trial by battail grew out of repute, the law gave her a recovery by the writ of entry of *cui in vita* (*l*); and the huſband was the rather ſuppoſed to have the right of poſſeſſion in him, for that being the ſuperior and governing power, he might defend the poſſeſſion by all actions; and therefore if the huſband loſt by default in a poſſeſſory action, this put the wife to a writ of right, as before, till the ſtatute of *Weſt. c.* 3. but now an actual entry is given to the wife and her heirs by the 32 *H.* 8. *c.* 28. (*m*)

The prelates, abbots, and other eccleſiaſtical perſons that attended the courts of the northern princes, received great favour and donations from them; and to aggrandize the church, and other
[110] political reaſons, the celibacy of the clergy in thoſe things was introduced; ſo that according to the ſuperſtition of that age, ſuch abbots and prelates were ſuppoſed to be married to the church, in as much as the right of propriety was veſted in the church, the eſtate being ap-

(*l*) [See *F. N. B.* 193.]

(*m*) [And, conſequently, the writ of *cui in vita* has ſince become unneceſſary; and ſee *F. N. B.* 193. in margin.]

propriated;

propriated; and the biſhop and abbot, as huſbands and repreſentatives of the church, had the right of poſſeſſion in them; and this the rather, becauſe they might maintain the actions, and recover, and hold courts within their *manors* and *precincts*, as the entire owners; and that crowns and temporal ſtates might have no reverſions of intereſts in their feuds and donations. Therefore, ſince they had the poſſeſſion in fee, they might alien in fee; but they could not alien more than the right of poſſeſſion that was in them; for the right of propriety was in the church; therefore the biſhop could not alien without the conſent of the chapter, who repreſented the clergy of the dioceſe. Nor could the abbot alien without the conſent of his houſe; but the parſon had an eſtate only for life, and the fee was in abeyance; yet anciently he could alien with the conſent of patron and ordinary.

Now to underſtand theſe matters aright, as alſo *ſect.* 643, 4, 5, 6, 7, 8. it will be neceſſary to take a ſhort view of the ancient ſtate of the church. We find by the ſcriptures, that Chriſt inſtituted the apoſtles, and the apoſtles the biſhops, and the biſhops the preſbyters and deacons, (firſt choſen by the church,) the preſbyters to preach in the villages, and the deacons to gather the charities of chriſtians. When a biſhop died, the church choſe out of the preſbyters a fit perſon, who was conſecrated by the neighbouring biſhops. *Burnet's Rights of Princes*, [111]

5, 6, 7, 8, 9, 10, 11. They lived alſo upon the voluntary oblations of chriſtians, which they diſtributed among themſelves and the poor, and being ſuſtained by the people, were therefore elected by them. *Ibid.* 15, 16, 17. But in the time of *Conſtantine*, there was a ſelect community, to make ſuch elections. *Ibid.* 11, 12. And afterwards the people falling out about their elections, and the emperors having ſettled the ſalary of the heathen prieſts, and ſeveral other charities, on the chriſtian prieſts, the elections were made by the emperor, or at leaſt always aſſented to by him. *Ibid.* 46, 47. Afterwards when chriſtianity revived among the northern nations, the chriſtian biſhops being the courtiers of ſeveral princes, and having
[112] begged great feuds for the church, they inveſted them into thoſe great biſhopricks to which thoſe feuds were annexed; and gave them ſuch inveſtiture by the ring, virge, and ſtaff, as a ſymbol of the feudiary dependance upon them (*n*). *Ibid.* 149. So that during the vacancy of a biſhoprick, the king had the guardianſhip of the ſpiritualties, as he had the ward of his temporalties; ſo that if a vacancy happened, the king

(*n*) [See 2 *Spir. Laws*, b. 30. c. 21. b. 31. c. 9. *Sullivan*, Lect. viii. 1 *Bl. Comm.* c. 2. p. 155, 6. c. 11. p. 377, &c. *Weſt on Peers*, 20. 2 *Tyrr.* 25. *Stu. Diſſ.* p. 3. ſ. 6. *Co. Litt.* 344. *a.* *Seld. Tit. Hon.* p. 2. c. 5. ſ. 14, &c. and the title *Lay Inveſt. of Biſhops* in the late editions of *Jacob's Law-Dict.*]

had

had the right of preſentation to ſuch livings, where the patronage was in the biſhop, and preſented to the biſhop ſucceeding. *Godb.* 264. Shortly after, at the council at —— (*o*) they endeavoured to ſet up tithes as a chriſtian demand that had been anciently a tax to the eaſtern princes, and the prieſts and *Levites* in the *Jewiſh* theocracy. And whereas the biſhops uſed to diſtribute their eſtate, upon oblations, by the ancient rules of the church, among their own preſbyters and the poor; now they reſerved the lands to themſelves, and the profits of the lands and the tithes became an ample proviſion for the reſt of the clergy; therefore encouragement was given for building of churches in ſmaller diſtricts; and all ſuch perſons as built and endowed, were to have the right of preſentation, the biſhop condeſcending, upon ſuch conſiderations, to fix the tithe, and the fixed reſidence of the prieſt, to the church, [113] during his life, that was before only itinerary. *Ibid.* 113. But becauſe the care of ſouls was only committed to him during life, he was not capable of the fee, and therefore the fee was in abeyance; ſo that there was this difference between the characters of the prieſts and biſhops, that the biſhops ſucceeded in their own original right, as the ſucceſſors of Chriſt and his apoſtles, the great biſhops of ſouls, and therefore what

(*o*) [The ſecond council of *Maſcon*, *A. D.* 585.]

they took was to themſelves and ſucceſſors; but the prieſts were only the ſubſtitutes of the biſhops, and therefore could not take but during their lives. The parſon therefore being only capable to take for life, for he had no proper ſucceſſor to himſelf, the next parſon coming in from the biſhop, and by his inſtitution; and yet the fee being out of the patron, and not given to the biſhop, but appropriated to the uſe of that particular church, it was ſaid to be in abeyance; but to all beneficial purpoſes, the law allows him to ſuppoſe himſelf to have an inheritance, though he has not properly any ſucceſſor; and therefore the parſon may bring an action of waſte, a writ of entry *ad communem legem*, *in conſimili caſu*, *ad terminum qui præteriit*, a *quod permittat* in the *debet*, a writ of meſne, a *contra formam feoffamenti*, and ſhall receive homage, becauſe theſe are for the benefit of the fee in abeyance; the defence of which the law has committed to him; but the law has provided him a *juris utrum*, and he ſhall not have a writ of right, ſince, for the reaſon above-mentioned, he cannot claim it as his right and inheritance.

Co. Litt. 341.

[114]

But though the biſhop ſent out the preſbyters to fill the cure, yet they reſerved a number of preſbyters; and as formerly all the preſbyters were conſulted touching the affairs of the church and the diſpoſition of the church revenues; ſo now, when the preſbyters were ſettled

ſettled in the parochial church, they conſulted this ſelect number, which anciently were ten; and theſe were allowed a ſtipend out of the church eſtate, called *præbendum*; thence they were called *præbendarii*, and the dean had his name *quia denis præpoſitus*.

When churches were thus regularly ſettled, the biſhop began to aſſume a ſupreme power, and by many acts and new doctrines, ſet himſelf at the head of the church; and then he was willing to ſettle the election of the biſhop in the chapter, and on their differences, to frame an appeal to himſelf. And in the wars, in the time of king *John*, they got this ſucceſſion, that the king firſt gave the chapter leave [115] to chooſe, and then they ſhould proceed to elect a fit perſon; this begot many controverſies between the ſucceeding kings and the popes, but at laſt the kings prevailed, and only gave the chapter leave to chooſe the perſon they appointed.

Donatives are parts of the king's *regale* (*p*); for as he inveſted perſons in their epiſcopal juriſdiction, ſo he could erect churches exempt from their viſitation; for ſince the prince conſtituted the extent of the biſhoprick, and gave the feuds that ſupported it, he could limit the bounds of ſuch juriſdiction. Therefore before the parochial right of tithes were ſettled, he

(*p*) [See 2 *Bl. Comm.* c. 3. p. 23. *Co. Litt.* 344. *a.*]

might

might erect a donative with tithes and cure of ſouls; and at this day he may erect a chapel donative with lands, or impower any man to erect it (*p*), becauſe he takes away none of the ſettled rights of the church. But ſuch church or chapel muſt be conſecrate, and ſuch parſon muſt have orders from the biſhop, otherwiſe he cannot officiate in ſpiritual things; but ſuch church (if preſented to by the lawful patron) becomes preſentative (*p*), becauſe the biſhop thereby takes upon him the cure of ſouls there, by the conſent of the lawful patron; and then
[116] by the rules of the chriſtian religion, he cannot lawfully part with them. But if he take up the preſentation from a diſſeiſor of the manor, this makes no ſuch alteration, for the biſhop has not the lawful cure by ſuch preſentation; but the parſon of ſuch donative churches has the land only for life, after the manner of other preſentative parſonages; for that is the intent of the erection; for the deſign of the prince is not to conſtitute a biſhop to have perpetual ſucceſſors, which power perhaps is not in the prince, but muſt by the rules of the church come from the ſucceſſors of the apoſtles; but it is his deſign to erect a parſonage out of the juriſdiction of the biſhop, which he may do, becauſe he may determine the extent of the dioceſe; and being erected in analogy of a par-

(*p*) [See 2 *Bl. Comm.* c. 3. p. 23. *Co. Litt.* 344. *a.*]

ſonage, the property muſt be ſuppoſed in him as in others. *Co. Litt.* 344. *Digeſt.* 197. *Godb.* 201, 202. 1 *Roll. Rep.* 2, 3. 6 *H.* 7. 13. *Britt.* 100, 103, 4. and from 205 to 250. and eſpecially 238. (*q*)

The third ſort of diſcontinuance is that of tenant in tail, and he is conſidered as the perſon that has the inheritance in him, and therefore has the right of poſſeſſion inheritable. When therefore ſuch tenant in tail makes a feoffment in fee, he aliens the right of poſſeſſion; for though the ſtatute *De donis* preſerves the right [117] of the heir, yet it does not preſerve the poſſeſſion; for it would have been abſurd to ſay, that tenant in tail could have committed a diſſeiſin upon his heir, who is to take by right of repreſentation from him. Hence alſo the ſtatute gives the formedon in deſcender, remainder or reverter, as the remedy to recover the poſſeſſion, together with the right of propriety; and there is no action to recover the one diſtinct from the other; therefore the feoffee of tenant in tail has the right of poſſeſſion, and the iſſue the right of propriety in him.

There is alſo a farther reaſon of convenience why in all theſe three before-mentioned caſes,

(*q*) [By ſtat. 1 *Eliz.* c. 19. 13 *Eliz.* c. 10. and 1 *Jac.* c. 3. eccleſiaſtical perſons are diſabled to alien, (except for a certain period, and in the manner preſcribed in thoſe ſtatutes,) or to diſcontinue their livings, or the property which they poſſeſs in the right of their churches.]

the

the entry is taken away, becauſe the feoffment had anciently a warranty (*r*) annexed unto it, which defended ſuch right of poſſeſſion; and when a man had a warranty to cover his poſſeſſion, it was not fit he ſhould be put out of poſſeſſion by any act *in pais*, without bringing in his warrantor by voucher; and therefore the entry was diſallowed in ſuch caſes, that a man might not be obliged to the expence of getting his judgment in the writs of *warrantia chartæ*.

Sect. 598, 9, 600, 1. [118] If tenant in tail be diſſeiſed, and releaſes to the diſſeiſor all his right, this works no diſcontinuance; for a releaſe being a conveyance in ſecret cannot paſs a poſſeſſion; for a poſſeſſion by the rules of the feudal law cannot paſs without a notorious ceremony *coram paribus*, that the ſtranger may know in whom the fee is lodged, and againſt whom to bring his *præcipe*; as alſo that the lord may know in whom the fee is, that he may avow upon his tenant, ſo that the releaſe can paſs the right only. But the diſſeiſor that has the poſſeſſion, may take a releaſe of the right, becauſe he may make his wrongful poſſeſſion rightful, if the diſſeiſee conveys his right, and the ſtranger has no injury, ſince he muſt bring his *præcipe* againſt the tenant in poſſeſſion, and the lord may avow on either, till notice of the conveyance and tender of arrears, and then muſt avow on the releaſee

(*r*) [See N. XLIV.]

only,

only, ſince the ſtatute of *Quia emptores*. But ſince the right of poſſeſſion is in tenant in tail, why may not he paſs the right of poſſeſſion to the diſſeiſor by ſuch releaſe? The anſwer is plain: A conveyance that cannot paſs the poſſeſſion, cannot paſs the right of poſſeſſion; for no conveyance can paſs the right of poſſeſſion diſtinct from the right of propriety, but ſuch a conveyance that paſſes the very poſſeſſion, which a releaſe, being a conveyance without ſolemnity, [119] will not do. But the harder queſtion is, What eſtate hath ſuch a diſſeiſor, after ſuch a releaſe by tenant in tail? Some have ſaid, that he has an eſtate to him and his heirs during the life of tenant in tail; ſo that then he has only a free- Ld. Raym. 996. 998. 1000. hold, and the heir is a ſpecial occupant, and has no fee in him, becauſe a leſs eſtate by right will drown a greater by wrong; for a man ſhall never be preſumed to do wrong, when he may hold by right. 1 *Saund.* 261. Others have held that the diſſeiſor has, in ſuch caſe, a fee-ſimple, and that his wife is dowable, but that it is determinable by the entry of the iſſue in tail; and the reaſon is, becauſe when a diſſeiſin is committed, the whole fee is notoriouſly in the diſſeiſor by his poſſeſſion, which cannot be abridged and turned into an eſtate for life without an act of notoriety. For if there could be ſuch tranſmutation of eſtates without the ſolemnities of entry, no man would know in whom the fee reſides; ſo the releaſe leaves the diſſeiſin

diſſeiſin *in ſtatu quo*, as to the entry of the heir on him. For this ſee *Co. Litt. p.* 106. and 108. *b.* 10 *Co.* 96. *Seymour*'s caſe, revived by *Holt* in the caſe of ——— (*s*). And the ſame law of a bargain and ſale; for that, when it came over from equity to be a conveyance at
[120] law, paſſed only a right, as a releaſe to diſſeiſor would have done before. But a releaſe with warranty works a diſcontinuance; for at common law, the warranty was a voluntary covenant of the force of a feudal contract, and repelling the warrantor from claiming the land, and obliging him to defend it. And though the ſtatute takes away the force of ſuch covenants, that they ſhall not bar the iſſue, yet the iſſue muſt claim in the method the ſtatute preſcribes, *viz.* by action, and therefore it works a diſcontinuance, ſince the iſſue in ſuch caſe cannot recontinue but by action only.

Sect. 602, 3, 4, 5. Ld. Raym. 435. But the warranty muſt deſcend on the perſon's claiming the land; for if he be not heir, he is not bound to defend the lands, after the manner of a feudal lord; and therefore he is not repelled from claiming them.

Sect. 606, 7, 8, 9, 10, 11, 12. Are all ſeveral inſtances of conveyances, which paſs the right, and work no diſcontinuance (*t*).

(*s*) [Of Machell *v.* Clarke, 1 *Lord Raymond*, 778. and ſee n. (1) to *Co. Litt.* 331. *a.*]

(*t*) [See N. XLV.]

If

If tenant in tail grant "*all his eſtate* (*u*)" in fee, and gives livery thereon, this works no diſcontinuance, becauſe he has an eſtate for the purpoſe of alienation but for term of his life. *Sect.* 614, 15, 16, 17, 18. are farther inſtances of conveyances that paſs a right from tenant in tail, and therefore work no diſcontinuance. Sect. 613. [121]

If tenant in tail makes a leaſe for life (*w*), this works a diſcontinuance during the eſtate for life, becauſe he parts with the freehold out of him, and gains a new reverſion to the tenant in tail. Now if he grants this new reverſion in fee, and tenant for life attorns, and tenant in tail dies during the life of tenant for life, and then tenant for life dies, the iſſue in tail may enter, becauſe this the diſcontinuance is at an end, by the death of tenant for life; and the grant of the reverſion being ſecret, muſt be intended to paſs no more than it lawfully might paſs, unleſs it were executed by entry into the poſſeſſion; for ſince it operates only as a grant, it muſt be only intended to paſs the reverſion during the life of tenant in tail, which he had a lawful power to grant, and not eſtabliſh a right of propriety diſtinct from the right of poſſeſſion. But if a man had thus granted the reverſion, and tenant for life had died, and then the grantee had entered by force of the grant, and the tenant in tail had died, this had worked Sect. 619, 20, 21, 22, 23, 24.

(*u*) [See N. XLVI.] (*w*) [See N. XLVII.]

a diſ-

a diſcontinuance; for the grantee's entry works a ſecond notoriety, which plainly manifeſts a diſcontinuance of the entire fee-ſimple. But it
[122] may be aſked, why ſuch grant operates by the ſubſequent entry, to paſs more than it lawfully may paſs; for if the grant and attornment only operate to paſs a rightful eſtate, why doth the ſubſequent entry, in purſuance of ſuch grant, make it paſs a wrongful one? The anſwer is plain; the grant and attornment of tenant for life paſs the new reverſion depending upon that eſtate for life. But ſince grants in their own nature are ſecret, and therefore paſs no more than they lawfully may paſs, it follows that this grant and attornment alone cannot paſs the reverſion, ſo as to diſinherit the tenant in tail: but if it be executed by entry, then it will; for the entry is a notoriety, that the grantor intended to perpetuate the diſcontinuance, and to continue a right of poſſeſſion diſtinct from the propriety, and muſt be equal to a ſecond feoffment, which he might make when tenant for life dies, during his life; but if he had died before tenant for life, he had not been capable of ſuch feoffment, and conſequently of no diſcontinuance that is tantamount; for the grant and attornment of tenant for life ſhew an endeavour to paſs the new reverſion, and the entry in purſuance thereof muſt be to all manner of purpoſes tantamount to a new feoffment, and therefore continues the right of poſſeſſion diſtinct

diſtinct from the propriety, and is by the law conſtrued not to operate as a grant merely, but taking the acts moſt ſtrongly againſt the parties, it is interpreted to operate as a feoffment.

If tenant in tail infeoffs him in the immediate reverſion or remainder, this operates as a ſurrender, and therefore paſſes no more than it lawfully may paſs, and conſequently works no diſcontinuance; but if the feoffment were to the more remote reverſioner, or to the immediate reverſioner with any other, it is a diſcontinuance, becauſe it cannot be interpreted to operate as a ſurrender (*x*). Sect. 625, 6.

Are all inſtances (*y*) in grants that work no diſcontinuance, *cauſa qua ſupra, ſect.* 633, 4, 5. Sect. 627, 8, 9, 630, 1, 2.

If an infant huſband aliens the wife's lands, this works no diſcontinuance, but the wife after the death of her huſband may enter; for the infant had no diſpoſing power, and therefore could not part with the right of poſſeſſion, but ſo as he might lawfully aſſume it whenever it appeared to be for his benefit; and if the right of poſſeſſion was never parted with, after the death of the huſband it is in the wife, and ſhe may enter

(*x*) [See N. XLVIII.]

(*y*) [Sections 627 and 628, are where an abbot grants a reverſion, or other thing which lies not in livery: ſect. 629, *is* a diſcontinuance: ſections 630 and 631, are *with* livery: and ſect. 632, on condition: and, conſequently, the ſections 629, 630, 631, and 632, ſhould not have been inſerted in the margin.]

and defeat ſuch alienation, ſince it was never abſolutely parted with at the time of ſuch alienation.

[124] Sect. 636. My Lord *Coke* is of opinion in this caſe (*y**) that by ſuch ſurrender to the ſecond huſband the diſcontinuance is taken away; for by the ſurrender the eſtate for life is drowned, and then there is no alienation in being to work a diſcontinuance; for the ſurrender of the eſtate to the ſecond huſband is a giving up the eſtate, and not an aſſignment of it over.

Sect. 637, 8, 9. It is to be known that tenant in tail has the right of poſſeſſion inheritable, and therefore he may diſcontinue the ſame in fee by his feoffment, becauſe ſince he has an inheritable poſſeſſion, it follows of conſequence, that he may alien it without any diſſeiſin to any perſon; but if he only makes a leaſe for life, he executes but part of his power: for ſince he had a poſſeſſion inheritable, he from that poſſeſſion has privilege to alien in fee without diſſeiſin to any one; and therefore after ſuch leaſe for life he grants the reverſion in fee, and tenant for life attorns; and after tenant for life dies, and the grantee of the reverſion enters in the life of tenant in tail, this is a diſcontinuance of the fee; for ſince he had originally an inheritable poſſeſſion, this is an execution of the farther remaining part of his power, and amounts to an alienation of the fee

(*y**) [See N. XLIX.]

by

by a ſecond feoffment; for having originally an inheritable poſſeſſion, he might diſcontinue the ſame in fee; and when he executes but part of his power, the reſt remains in him; and therefore, if he has afterwards opportunity in his life, he may execute it by a ſecond alienation. But if tenant in tail makes a leaſe for life, and dies, and the iſſue grants the reverſion, and the tenant attorns, and then tenant for life dies, and the grantee enters, and the iſſue in tail dies, leaving a ſon; this is no diſcontinuance, but that the ſon may enter; for the iſſue in tail had no inheritable poſſeſſion in him, in as much as the right of the intail only deſcended on him, and not the poſſeſſion; and therefore he could not have any power to alien a right of poſſeſſion that was never in him; and conſequently his grant, when he never had any original right of poſſeſſion, by virtue of ſuch entail, doth not diſcontinue the right of poſſeſſion (z), ſo as to bar the ſon from his entry. So if tenant in tail makes a leaſe for life, and then grants over the reverſion, and the tenant for life attorns, and then the grantee grants over, and the tenant attorns to the ſecond grantee, and dies, and the ſecond grantee enters in the life of tenant in tail, and then the tenant in tail dies, this is no diſcontinuance to bar the iſſue, but that he may enter; [126] becauſe, though the tenant in tail had an origi-

(z) [See N. L.]

nal right to diſcontinue during his life, becauſe he had the right of poſſeſſion in him; yet the firſt grantee had no right of poſſeſſion in him, nor ever was ſeiſed of the land by virtue of the entail, or otherwiſe; and ſince he never had the right of poſſeſſion in him, he cannot alien the right of poſſeſſion, ſo as to work a diſcontinuance.

Alſo 'tis to be noted, that if a man has the right of poſſeſſion, and is not poſſeſſed by virtue of the entail, there he cannot work a diſcontinuance, unleſs by warranty; as if there be grandfather, father, and ſon, and the grandfather is ſeiſed in tail, and the father *diſſeiſes* the grandfather, and makes a feoffment in fee, and dies, this works no diſcontinuance, becauſe the father was not poſſeſſed of the entail, but of a fee-ſimple by diſſeiſin, which was ſubject to the entry of the tenant in tail, and conſequently the alienee is ſubject to the entry of the iſſue in tail, in as much as the father, that made the alienation, had only the naked poſſeſſion by the diſſeiſin, and not the right of poſſeſſion by virtue of the entail; but if the father had *enfeoffed* with *warranty*, this had been a bar, becauſe the heirs in that caſe had been bound by contract to defend
[127] *that poſſeſſion*, and therefore had been ever afterwards repelled from claiming it, if aſſets deſcended. But if tenant in tail makes a leaſe for life, and dies, and the reverſion deſcends to the iſſue, and the iſſue *grants the reverſion* with *warranty*,

ranty, and tenant for life attorns and dies, and the grantee enters, and the iſſue dies leaving a ſon; this is no diſcontinuance, but the ſon may enter; for he is not barred by this warranty; for the iſſue in this caſe *only transfers the reverſion, and not the poſſeſſion, or right of poſſeſſion*; and therefore the iſſue in this caſe is not repelled from claiming the poſſeſſion, which was never transferred to the grantee, and to which the warranty was never annexed; for it were abſurd to conſtrue the warranty to extend to the poſſeſſion of that which never was in poſſeſſion, at the time when the contract was made.

Theſe are ſpoken of in the ſect. next foregoing. *Sect.* 643, 4, 5, 6, 7, 8. *Vide* in the Comment on *Sect.* 595. Sect. 640, 641, 2.

If tenant in tail be diſſeiſed, and he releaſes to the diſſeiſor all his right, this, as is ſaid, puts the eſtate-tail in abeyance (*a*); becauſe having paſt away all his right, he cannot have right contrary to his own releaſe. If there be tenant for life, remainder in tail, and the tenant in tail releaſeth to the tenant for life all his right, this had put the tail in abeyance; ſo that he could not afterwards have maintained an action of waſte; but if the remainder had been in fee, and he in remainder had releaſed all his right, Sect. 649, 650. Ld. Raym. 314. [128] Stra. 969.

(*a*) [But the entail is not diſcontinued; and it only remains in abeyance during the life of the anceſtor. See *ante*, 117. and *Litt.* at the end of ſect. 649.]

the remainder ſtill continues in the tenant in fee, and he may have an action of waſte. And the reaſon of the difference is this, that when the tenant in fee releaſes all his right, he only confirms the eſtate to tenant for life, during his life; and for want of words of inheritance (*b*) it paſſes no farther intereſt; and therefore he has ſtill a remainder depending on an eſtate for life, to which an action of waſte belongs. But tenant in tail cannot, by the releaſe of all his right, paſs an eſtate during the life of the releaſee, but only paſſes an eſtate during his own life; and therefore having put all his right out of him, he cannot bring an action relating to ſuch right.

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[129]

Of REMITTER.

THE notion of remitter ſtands on the principles we have already laid down; for either there is a naked poſſeſſion diſtinct from the right of poſſeſſion and propriety, or elſe there is a right of poſſeſſion diſtinct from the right of propriety. Now where there is a naked poſſeſſion diſtinct from the right of poſſeſſion and propriety, as between diſſeiſor and

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(*b*) [See *ante*, 72. For the releaſe of the remainderman operates by way of enlargement.]

diſſeiſee,

diſſeiſee, where the entry is congeable (*c*); there if the diſſeiſee takes back the poſſeſſion from the diſſeiſor he is remitted. For it cannot be otherwiſe, that when he has taken back the poſſeſſion, he ſhould be ſeated in his old right; for he who has really the title, cannot claim from a diſſeiſor that has no title at all; and it would be very abſurd and unreaſonable, that the diſſeiſee by accepting his own poſſeſſion, ſhould transfer back any right to the diſſeiſor. But where the diſſeiſor transfers it back for life, or years, by deed indented, or by matter of record, there the diſſeiſee is not remitted; for if a man by deed indented takes a leaſe of his own lands, it ſhall bind him to the rent and covenants; becauſe a man can never be allowed to affirm that his own [130] deed is ineffectual, ſince that is the greateſt ſecurity on which men rely in all manner of contracting. The ſame law, if it had been by matter of record; for that is of its own nature uncontrollable evidence, which a man cannot be allowed to controvert. Ld. Raym. 13, 16, 1511.

Where the right of poſſeſſion is diſtinct from the right of propriety (*d*); there, if the proprietary re-obtains the right of poſſeſſion by agreement, he muſt hold it under ſuch agreement; for the other having the right of poſſeſſion, and transferring it to the proprietary, ſuch proprie- Sect. 693, 4, 5.

(*c*) [See N. LI.] (*d*) [See the preceding note, LI.]

tary muſt take the right in the ſame manner as the other has conveyed. For 'tis his own folly and laches, that he would contract about ſuch right of poſſeſſion, and not aſſert his propriety in a proper action; but when he has contracted for ſuch right of poſſeſſion, and ſuch right of poſſeſſion is transferred, he muſt keep to the terms of the bargain, and he leaves all the right in the feoffor he has not contracted for; therefore if tenant in tail enfeoff his heir of full age, and dies, he muſt hold it under the feoffment, becauſe 'tis his own folly that he would take the right of poſſeſſion in this manner, when he was entitled to the right of propriety after the death of his anceſtor.

[131] Sect. 664. But where the proprietary comes to the right of poſſeſſion, without any fault or folly of his own; as where the right of poſſeſſion is caſt upon him by the law, or he or ſhe comes to the right of poſſeſſion by feoffment under age, or during coverture, where no folly can be imputed; there ſuch proprietary is remitted and ſeated in his ancient and former right. For the eldeſt title being the more ancient, is the leaſt ſubject to diſpute; and therefore when the proprietary has in ſuch manner acquired the right of poſſeſſion, 'tis eſteemed, for the repoſe of men's inheritances, to be only a reſtitution of the old title, and not the acquiring a new one; and the rather, becauſe there is none againſt whom

whom the action may be brought to regain the propriety (*e*). And when any perſon has thus acquired the right of poſſeſſion, if any perſon will controvert it in any elder action, 'tis fit he ſhould ſet up an elder title, that the mere right may be decided. Thus if the heir of the diſſeiſor be diſſeiſed by the diſſeiſee, he by ſuch wrong and injuſtice cannot regain the right of poſſeſſion; for an act of wrong can never gain any right; but if ſuch diſſeiſee die ſeiſed (*f*), then the heir has the right of poſſeſſion; and having then both the right of poſſeſſion and of propriety, he is ſeiſed in his ancient right for the [132] reaſons above-mentioned.

If a man enfeoff an infant or feme covert, Sect. 659. that has right of propriety, for life, for years, or on condition, they are remitted to their ancient right, and all ſuch conditions vaniſh. For to a feme covert or infant no folly or laches can be imputed, nor can their acts turn to their prejudice; ſo that when they have acquired the right of poſſeſſion, they are reſtored to their ancient right of propriety; and being not capable of contracting, the terms and conditions of the feoffment do not bind them. But if they were of full age, or diſcovert, then they leave all the right of poſſeſſion in the feoffor, that is not transferred to them by the contract, and muſt hold the right in the manner transferred to them.

(*e*) [See N. LII.] (*f*) [See N. LIII.]

For

For ſince they have no right of poſſeſſion but from their bargain, 'tis fit that they ſhould hold according to ſuch their contract; but in the other caſe, 'twas the folly of ſuch parties to transfer the right of poſſeſſion to ſuch infants as were the proprietors, to hinder them from their actions. And this is the turn of the chapter.

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[133] *Of* WARRANTY.

WARRANTY, according to *Spelman*, is derived from the *Saxon* word *War*, as the *French* word *Guarranty* is derived from the word *Guer*, of the ſame ſignification; which plainly imports an undertaking to defend, and properly by arms, as in a writ of right they anciently defended them. For the warranty was an expreſs undertaking to do the ſame thing, as the feudal lords uſed to do to their tenants, and under the ſame penalties. And ſo this expreſs contract was to be of the ſame import, and to amount to a feudal contract; and for this the parties received a recompence (*g*), and that was generally in other lands by way of exchange, which deſcended to their heirs.

Ld. Raym. 35. ib. 360.

Stra. 414.

Theſe warranties (*b*) were introduced by the liberties of alienations that happened, according

(*g*) [See N. LIV.]

(*b*) ["Theſe warranties:" *i. e.* expreſs warranties.]

to

to *Spelman*, about the time of *Hen.* 3. when the *Saxon* liberty of alienation was revived; for then they uſed to alien to hold of themſelves; and then they annexed a warranty, and thereby were called in to dereign the warranty of ſuch feudal lords, in whoſe homage they were, and did not permit them to alien.

Alſo ſuch expreſs warranties were uſed to be given when the lords aliened their ſeignory (*i*); for where the old lord was bound by his old feudal contract to warrant, this did not extend to an aſſignee, without it had appeared to have run in that manner in the old deed, which was often worn out and loſt, ſo that the feudal tenure did totally ſubſiſt in preſcription; and therefore the tenants would not attorn to deſtroy the warranty on which their homage anceſtrel was founded, without a new expreſs warranty from their new lord. [134]

After the Stat. of *Quia emptores*, they uſed to continue this way of conveyance by warranty, 'till they came up to the old tenants that held by the homage anceſtrel; ſo that warranty became frequent in all conveyancing. And they were contracts that had all the import and effect of a feudal contract, which were anciently made between the lord and tenant for their mutual defence. For, *firſt*, they rebutted ſuch warrantor L. Raym. 360.

(*i*) [See *Sulliv.* lect. xii. p. 120, 1. and *poſt.* 139. 154. (*n*).]

and

and his heirs from claiming any right in the land; and as in the homage anceſtrel the rule was *homagium repellit perquiſitum*, ſo the expreſs warranty repelled the anceſtor from claiming, and not only him, but the heir, though the right
[135] were not in the anceſtor. And as in homage anceſtrel, where the heir received homage, he could never ſet up a title to the land itſelf; ſo here in the expreſs warranty, the heir was preſumed to receive a recompence, and therefore was barred if he did not claim during the life of his anceſtor; and this was the more reaſonable, becauſe ſuch recompences were anciently in lands, which did of right deſcend to the heir; and if the anceſtor did alien them, the heir muſt claim his own during the life of the anceſtor; otherwiſe he could never claim it, in as much as this was the whole time of limitation for the heir to challenge his own in this caſe (*k*). And if he ſlip'd that time, he was barred for ever, in as much as there might be ſecret conveyances to alien the recompence for the benefit of the heir, which might turn to the prejudice of the purchaſer.

But though the warranty barred the right of entry or right of action in the heir, yet it did not bar a title of entry for a condition broken, mortmain, forfeiture, eſcheat, or the like. For the feudal contract only barred all the right to

(*k*) [See N. LV.]

the

the lands themſelves, in the lords themſelves, as is ſaid in the homage anceſtrel; but it did not bar his title of entry for condition broken, forfeitures, eſcheats of ſuch tenants, or the like. [136] And the expreſs warranty could go no farther than the warranty implied in the feudal contract, ſince it came in the place of it. If the warranty attaches in the heir that has right, during the continuance of the eſtate warranted, he is for ever barred to claim it, not only againſt the warrantee himſelf, his heirs and aſſigns, but againſt a diſſeiſor, abator and intrudor, recoveror, *ceſtuy que uſe*, lord of the villain, lord by eſcheat, or any other perſon coming-in in the *Poſt*; becauſe the heir is preſumed to have received a recompence, and therefore cannot have the land itſelf, no more than when he has received homage from an heir that holds by homage anceſtrel, can he claim the land itſelf. But if the warrantee's eſtate be recovered by elder title, then the heir may recover againſt ſuch recoveror, though the warranty were attached in ſuch heir; an example of which ſee *ſect.* 741. becauſe the recompence deſcended to the heir ſtands precarious from the time that the recovery was had; for the warrantee, if he purſued his writ of *warrantia chartæ*, might recover the lands deſcended to the heir, and therefore the heir is at liberty to purſue his action againſt the recoveror. But if the eſtate of the warrantee be defeated by any perſon that comes-in in the [137]

Poſt, before ſuch warranty attaches in the heir, there the heir may enter upon ſuch perſon in the *Poſt*; as if the lord by eſcheat, or the lord of the villain enters before the deſcent of the warranty, there the heir may enter on ſuch lords; for when the eſtate warranted is taken away, before the recompence deſcends on the heir, the heir has title, becauſe when the eſtate warranted is deſtroyed, the anceſtor is not obliged to continue the recompence to deſcend to the heir, but he may alien it; therefore it is not neceſſary to be preſumed, that any recompence deſcends to his heir, or conſequently that the heir ſhould be barred in this caſe, no more than a lord is barred from entering on a diſſeiſor of his tenant before he has accepted the homage from him, which is the recompence for the land itſelf. But if the ſame eſtate continue, to which the warranty was annexed, though in other *lands* [*hands*], yet the heir is barred; as if a man makes a warranty to *A.* and his heirs, and he aliens to *B.* and then the warrantor dies, the heir is barred from entering on *B.* becauſe the ſame eſtate continues, though in other *hands*, to which the warranty was firſt annexed; and therefore it is preſumed in juſtice
[138] that the warrantor left a recompence to deſcend to the heir; for *B.* may have a warranty, and vouch *A.* who may vouch the warrantor and his heirs to recompence. So *ceſtuy que uſe* ſeems to continue the eſtate of the feoffees, and the warranty transferred by the ſtatute, and there-

fore

fore a recompence is presumed to descend to the heir to answer it.

The second operation of the warranty was by way of voucher; for, as in the feudal contract the tenant vouched the feudal lord to defend his possession; so in the express warranty, the purchaser vouched his warrantor, who took the defence of the estate upon him; and as no man could vouch the lord but the tenant, so no man could vouch the warrantor but he that brought himself within the words of the contract, because there was no contract to defend the possession to any body else. But as the lord, by acceptance of homage from the disseisor, was barred from claiming the lands; so the warrantor, having received a recompence, was rebutted from reclaiming the land itself.

The third is by writ *warrantia chartæ*, which also could only be brought by the party to such contract; for the tenant by homage ancestrel might have had his *warrantia chartæ* against his lord, to subject the lands of his lord to answer [139] the feudal contract. And when the assize was invented, in which a man could not vouch; and when also by *West.* 1. *c.* 40. a man could not vouch out of the degrees, unless in both cases the party was present; *vide Booth* 278; then this writ came more into use; and upon such actions, where they could not vouch and have process *ad warrantizandum*, they requested a plea, and the same was done in the case of express

preſs warranty. But it is to be noted, that in caſe the warrantee is impleaded, he muſt requeſt a plea; and when he has ſo done, he may bring his *warrantia chartæ*, and recover at any time till execution actually executed. But if he be turned out of poſſeſſion, then he can have no *warrantia chartæ*; for the warranty in the feudal contract is to the tenant, and in reſemblance thereof, the expreſs warranty is only to the tenant of the land. *Hale's Fitz.* 135. (*l*)

The words that create a warranty were firſt anciently the reſervation of homage (*m*), for the reaſons given in homage anceſtrel, as plainly appears by the ſtatute of *Bigamis* (*n*). *Vide* 275, 276 (*o*). Secondly, the word *Dedi* (*p*), to hold of the donor and his heirs; for when ſuch tenure was erected by the ſaid words, it was ſup-
[140] poſed that the ſervices reſerved were a perpetual recompence for ſuch tenure, and therefore ſuch warranty was perpetual. Thirdly, *Dedi*, to hold of the lord of the fee, was ſettled by the ſtatute of *Bigamis*, *c.* 6. to contain a warranty, during the life of ſuch donor; becauſe the lord might avow upon his old tenant that was already in his homage, during life; and therefore againſt the

(*l*) [*F. N. B.* 135. B. n. (*e*).]

(*m*) [See *ante*, 133. N. LIV.] (*n*) [4 *Ed.* I. *ſt.* 3. c. 6.]

(*o*) [*Booth on Real Actions*, 275, 276.]

(*p*) [Of the operation of the word *dedi*, as to warranty, ſee 4 *Co.* 81. *a. Co. Litt.* 384. *a.* and *Butl.* n. (1). 2 *Bl. Comm. c.* 20. p. 300.]

tortious

tortious entries and diſtreſſes of the lord, it was neceſſary that he ſhould be protected; and it was alſo thought then a point of honour that no man ſhould ſee his own gifts invalidated without entering into the defence of them; and anciently perhaps being taken into the lord's homage created warranty. Fourthly, by the word *warrantizo* (*q*), which contains as expreſs a warranty, as if there had been an homage reſerved to the warrantor, *ſect.* 733. Warranties (*r*) at common law are of two ſorts; firſt, thoſe commencing by diſſeiſin or wrong; and ſecondly, binding warranties. The firſt are where the anceſtor that makes the warranty is partner to the wrong, and ſuch warranties are not obliging; becauſe it cannot be preſumed that one who is ſo unjuſt as to do wrong, will be ſo juſt as to leave a recompence to his heir; wherefore ſuch contracts are wholly rejected as colluſive, and founded on no conſideration. All other warranties were binding at common law; for a recompence was preſumed to be given, which was then either in land, by way of exchange, or in money, which was turned into land, and deſcended to the heir; and therefore the time of limitation for the heir to claim was during the life of the anceſtor (*ſ*); otherwiſe the ſtate of the purchaſer, which ſubſiſted on the warranty

Ld. Raym. 360.

[141]

Sect. 698, 9, 700, 1, 2.

(*q*) [See N. LVI.] (*r*) [This ſhould begin a new line.]
(*ſ*) [See *ante*, 135. N. LV.]

of the anceſtor, ſhould never be defeated by ſuch heir that ought to defend it; and if ſuch warranties were not binding, there might have been many ſecret conveyances for the benefit of the heir, to defraud the purchaſer. And in that age, when the building up of families, and eſtabliſhing them in ſeats and tenures was the whole buſineſs of the times, they preſumed that no man would deſtroy his heir's right for his own preſent advantage (*t*). As to theſe binding warranties, there are ſome altered by the ſtatute: The firſt ſtatute is that of *Gloceſt. c.* 3. which ſays, that tenant by the curteſy ſhall not, by his deed with warranty, bar the heir of the land deſcended to the mother, further than aſſets deſcend from ſuch father; for the eſtate being created by the law only for life, it was fit to
[142] prevent ſuch father from graſping the fee. If aſſets deſcend from the father, by the expreſs meaning of the act, the purchaſer ſhall retain ſo much of the land of the mother. But if lands afterwards deſcend, ſuch purchaſer muſt plead the warranty, and may have a *ſcire facias* for ſo much of the ſame land, as aſſets ſhall afterwards deſcend, in lieu thereof.

The next ſtatute was that of *Weſtm.* 2. *De donis*, which took from tenant in tail the power of alienation. Now this firſt formed the diſtinction between the lineal warranty and collateral;

(*t*) [See N. LVII.]

teral (*u*); for before that ſtatute all warranties were binding to the heirs at law, as well where a man had title to the lands, as where he had not; for after ſuch warranty and acquieſcence, a recompence was preſumed to deſcend, inſtead of the land itſelf.

But the ſtatute *De donis* only barred the alienation of tenant in tail; therefore the lineal warranty was within the ſtatute, but the collateral warranty was left as it was by the common law (*w*); but the difficulty is to obſerve how the diſtinction aroſe between the lineal and collateral warranty; and for this we muſt go back to the conſiderations already mentioned, touching the alienations. Firſt, Originally the perſon aliening conſulted his lord, and a fine for alienation was paid, and the alienee was received into [143] the homage, and conſequently into the warranty of the lord of the fee. Secondly, Towards the latter end of the barons' wars, tenants began to alien to hold of themſelves, to ſave the fine, and then they made expreſs warranties in ſuch conveyances, to bring the feoffor into the defence of the land, who brought in the lord of the fee; and this was confirmed by *Magna Charta*, ſo there was enough to anſwer the lord's diſtreſſes;

(*u*) [See N. LVIII.]

(*w*) [See of the operation of warranty with reſpect to the barring of eſtates-tail, 2 *Bl. Comm. c.* 7. p. 116. *c.* 20. p. 303. *Butl.* n. (2.) to *Co Litt.* 373. *b.*]

but ſometimes they then aliened to hold of the chief lord, and then the lord might have taken the feoffor that was in his homage, for his tenant during life (*x*); but afterwards could not avow upon his heir that never was in his homage at all; and therefore was obliged to take the alienee after the death of the alienor. But, before they were taken into ſuch lord's homage and warranty, they uſed to agree for the fine; and therefore in ſuch caſes the warranty by *Dedi* was during the life of the warrantor. Thirdly, To quiet diſſeiſins, that were uſually very frequent in thoſe unſettled times, between neighbouring feudaries (and from thence (*y*) called deadly feuds) it was uſual for ſuch diſſeiſors to purchaſe warranties (*z*) from ſome anceſtor of the family; [144] and this gave a right to ſuch diſſeiſor; for it might be eaſier to compound with the anceſtor, than with the party to whom the wrong was actually done; and then to quiet men's poſſeſſions ſuch warranty bound, if the owner acquieſced under his expectations from ſuch relations. Fourthly, The next ſtep was on the ſtatute of *Quia emptores*, when they aliened to hold of the chief lord, and the lord being then compellable to receive ſuch perſons into his homage, was not obliged to warranty. Upon the firſt three points the law had ſtood at the making the ſtatute *De donis*, which was only a gene-

(*x*) [See N. LIX.] (*y*) [See N. LX.] (*z*) [See *ante*, 53.]

ral

ral appointment that the will of the donor ſhould be obſerved; ſo that the tenant in tail ſhould not alien to the diſinheritance of the iſſue, and of him in reverſion. But it was left to the king's courts to mould ſuch eſtates, and to make rules and orders to prevent ſuch alienations, and none were more neceſſary than to reſtrain theſe warranties. The firſt order or rule that was taken in this caſe was, that the warranty of tenant in tail, or of any perſon in title under the tail, ſhould be no bar, unleſs aſſets deſcended (*a*). This was made according to the platform of the ſtatute of *Gloceſter*; for they thought it was equal to make the ſame rule as to tenant in tail, as they had made in parliament for tenant by the curteſy, *viz.* That the warranty ſhould be no bar, unleſs the warrantor left an equivalent eſtate to deſcend; but if no aſſets deſcended in the caſe of tenant in tail, they might have a *ſcire facias* for the aſſets, and not for the land intailed. But in the caſe of tenant by the curteſy the *ſcire facias* was for the land, on the part of the mother, which was the very land aliened, and not for the aſſets deſcended; and the reaſon of the difference was, becauſe if the *ſcire facias* had been for the land intailed, then if the aſſets had been aliened, the iſſue in the next deſcent might have come again with his formedon, 1 *Inſt.* 366. and not only tenant in tail himſelf,

[145]

(*a*) [See *ante*, 142. (*w*).]

but all other perſons lineal in that title were debarred from making ſuch warranties; for the eſtate-tail was deſigned by the act to continue to all generations; and if they had permitted the next heir though he was not in poſſeſſion of the tail, to have barred it by his warranty, then might the father and ſon by their warranty have barred the tail, and deſtroyed the perpetuity the ſtatute deſigned. The ſecond order was, that the collateral warranty was not (*b*) within the ſtatute; for the ſtatute only appointed that the will of the donor ſhould be obſerved, that the
[146] tenant in tail ſhould not alien to diſinherit his iſſue, which they extended to all lineals, for the
Ld. Raymond, 360. reaſon aforeſaid; for otherwiſe the will of the donor could not be obſerved. But they could not in any manner of reaſon extend it to collaterals that were not to take by the gift, and therefore could not be forbidden to bar by their warranty. Again, it would be very hard to appeaſe the feuds and diſſeiſins touching eſtates-tail, if the anceſtor could not bar it by collateral warranty, which of old commonly ended ſuch contentions. Nor could there be any exchanges by any anceſtors of the family, in order to better the eſtates of the iſſue, if ſuch collateral warranty were not a bar. And they did not in this caſe oblige the tenant to ſhew aſſets; for

(*b*) [See *ante*, 142. (*w*).]

aſſets

assets were presumed, as it was before, if the whole matter was transacted during the life of tenant in tail; and he did not enter to disannul it; therefore according to the text, *sect.* 708. if the tenant in tail discontinue the tail, and die, leaving three sons, and the middle son releases with warranty (*c*) to the discontinuee, this is a collateral warranty to the eldest son, and lineal to the youngest, *causa qua supra.*

If land be given to a man, and the heirs male of his body, and for default of such issue, to the heirs female, and he hath issue a son and a daughter, the son may bar the daughter by his warranty, *sect.* 719. because the son is not lineal in the tail, *quoad* the females (*d*). And the rule of the court only extends to lineals barring their subsequent heirs; and they made no rule in relation to collaterals, but they were left as they were at common law; for they thought that the alienations were sufficiently prevented, if all persons that came in of the same tail were prohibited from barring their issues, or joining in any warranty to defeat such tail; but as to those that were not seised by force of that intail, there was no reason to nullify their warranties to maintain the will of the donor, since they had no interest in such gifts, and therefore were not obliged by the words thereof to maintain it; and therefore the son, that had no interest [147]

(*c*) [See N. LXI.] (*d*) [See N. LXII.]

in the intails *quoad* the females, might bar it by his warranty.

Now in the homage anceſtrel the lord was obliged to defend his tenant, and find him a champion, if he were impleaded; for if it had not been ſo ordained, all thoſe tenures would
[148] have been precarious, becauſe the tenant having no feudaries, could not himſelf have defended it. So in the expreſs warranty, in reſpect of the recompence given, the warrantor and his heirs are obliged to defend the land, and to find a champion where the trial was by battail.

It is alſo to be noted, that if an infant be diſſeiſed, and the anceſtor of the infant releaſes to ſuch diſſeiſor with warranty, and dies during the nonage of the infant, this is no bar; but if ſuch anceſtor releaſes during the nonage, and after the infant comes of full age, and then ſuch warranty deſcends, then is the infant barred; becauſe where the infant has the right of poſſeſſion, no laches can be imputed to him, nor is he a competent judge of what is a ſufficient recompence; and therefore his acquieſcence cannot be conſtrued to his prejudice; and therefore he ought not to be barred, if he doth not enter during his minority (*e*). But if only a right of action deſcend to the infant, then he is barred by the collateral warranty of his anceſtor, though it deſcends during his infancy, becauſe

(*e*) [See N. LXIII.]

then

then the infant has only a right of propriety; and ſuch rights are recovered in real droitural actions, where battail is joined, and then the [149] parol muſt demur till the infant comes of full age, becauſe the infant cannot fight himſelf, as the method was anciently among thoſe barbarous nations. Nor can he appoint a champion during his nonage; and when he comes of full age, he muſt be barred, becauſe he ought to defend the lands to the tenant, and to procure him a champion; and therefore to ſuch rights of propriety the warranty is a bar, though it deſcend during his infancy. *Sect.* 726. *Co. Litt.* 380. If an anceſtor deviſe lands deviſeable with warranty, as in *ſect.* 734. ſuch warranty doth not bind, becauſe the eſtate begins after the death of the anceſtor, and conſequently there can be no laches in the heir, ſince the warranty did not commence till after the deceaſe of the anceſtor; and therefore there is nothing to be preſumed from ſuch acquieſcence.

Secondly, There can be no recompence given by the anceſtor, ſince the eſtate begins after his deceaſe. Thirdly, There are no parties to ſuch contract; for the anceſtor is not in being at the time when ſuch contract has force, and the heir is not party thereunto (*f*). But if a man warrants the land in fee, and takes back an eſtate for life, as in *ſect.* 744. this doth not deſtroy

(*f*) [See N. LXIV.]

the

and without ſuch acknowledgment to the lord; then it ſeems the lord, if he hath right, may enter, and is not repelled by his own homage from aſſerting ſuch right; but though the lord's accepting homage from the diſſeiſor barred him from any right to the land, yet it did not bar his title of entry for a condition broken or for-
[153] feiture, or on the eſcheat of ſuch diſſeiſor; for he took it under the ſame feudal conditions as the diſſeiſee had it, of which ſee more in title *Warranty* (*i*), and title *Releaſes* (*k*), that enure by way of extinguiſhment. Secondly, As the feudal contract repelled the lord from claiming; ſo in caſe any ſtranger claimed, the lord was vouched; and if he did not defend the tenant, he recovered in recompence againſt him; and this was, that the tenant in the lord's homage might have a quiet poſſeſſion, and the lord might not abet any third perſon to overthrow his title, and therefore the champions of the manor were brought in to defend the title of the tenant in queſtion. Thirdly, By writ of *warrantia chartæ*, and this the tenant by homage anceſtrel had, as well as the perſon that had an expreſs warrantry. *Fitz. Nat. Brev.* 134. for the feudal charter was the foundation of ſuch writ, and therefore the writ runs *unde chartam habet* at this day; and upon ſuch writ he may give the homage anceſtrel in evidence; for the preſcription ſupplies the place of a char-

(*i*) [See *ante*, 135.] (*k*) [See *ante*, 63.]

ter

ter loſt and worn out by age. And *note*, that in theſe actions of *warrantia chartæ*, and by voucher, he ſhall recover in recompence any land that the lord had; but otherwiſe it is [of] an expreſs warranty; for there he ſhall only recover the land deſcended; and the reaſon of the difference is, becauſe when the old feudal contracts grew to be immemorial, they could not diſtinguiſh which lands deſcended from the anceſtor that made the grant; and therefore all lands were liable to ſuch feudal contract, leſt the tenant ſhould be ouſted of his defence. This ſort of tenure has been totally deſtroyed (*l*) by the free liberty of alienation; for before the ſtatute of *Quia emptores*, the lord uſed to licenſe an alienation, and they then ſeemed to ſucceed into the ſame homage, and to have had the ſame defence from the lord; but when the ſtatute of ——— (*m*) came that gave tenants a free power of alienation, the tenant uſed to alien with expreſs warranty, and ſo they uſed to dereign the lord's warranty; and when the lord aliened, they uſed to have an expreſs warranty from their new lord (*n*); otherwiſe they would not attorn; and if they did, it was reputed their own folly. [154]

(*l*) [See *Co. Litt.* 100. *b.* n. (1) to 67. *b.* n. (1) to 105. *a.* 2 *Inſt.* 11. *Sullivan*, Lect. xii. *Cowell's Interp.* tit. *Homage Anceſtrel.*]

(*m*) [Of *Quia Empt. Terr.* 18 *Ed.* I. ſ. 1. c. 1.]

(*n*) [See *ante*, 134. (*i*)]

OF

CUSTOMARY and (*a*) *COPYHOLD*

TENURES.

§ Co. 21. a. 2 Stra. 452.

(*b*) THOUGH a copyholder has but an eſtate at will, yet it is in this different from other eſtates at will; that it doth not determine upon the copyholder's death, but deſcends to his heir,

(*a*) Tenants by the verge, are but copyholders; and have no other evidence but by copy of court roll. But they are ſo called, becauſe when they ſurrender, they deliver a little rod into the ſteward's hand, who ſhall deliver the ſame rod to him that takes the land in the name of ſeiſin. It may be any other thing as well as a rod, according to the cuſtom, as a ſingle penny, a glove, &c.

Copytenants, copyholders, or tenants *per* copy—*d'ancient temps fuer' appelles tenants en villenage—et ceo appiert per les aunciennes tenures*, &c. F. N. B. 12. C. Bro. tit. Villenage 63.

Tenants at will, by copy of court roll, being in truth *bondmen* at the beginning, but having obtained freedom of their perſons, and gained a cuſtom by uſe of occupying their lands, they are now called copyholders, and are ſo privileged that the lord cannot put them out, and all through cuſtom. *Bacon's Uſe of the Law*, 43. [See N. LXVI.]

(*b*) The copyholder may juſtify againſt his lord, but ſo cannot a tenant at will; and he ſhall have the aid of his lord in an action of treſpaſs. 1 *Leo.* 4.

if it be any eſtate of inheritance. The reaſon of this ſeems to be, becauſe upon copyhold eſtates villain tenures were uſually reſerved, and theſe eſtates were given to villains (*c*); therefore no other eſtates could be granted to them but at will; for otherwiſe they had been enfranchiſed, as it ſeems. But to prevent the frequent ending of theſe eſtates, they granted them in fee, but yet at the will of the lord; and according to my lord *Coke*, notwithſtanding ſuch grant, they were entirely at the will of the lord, who ouſted them when he pleaſed, without any reaſon (*d*); which being a very great inconvenience, it ſeems it was altered by ſome poſitive law (*e*) (though that does not appear) which preſerved their eſtates to them, doing their ſervices, but yet left them as it found them, to have eſtates only at (*f*) will (*g*).

Ld. Raymond, 44. F. N. B. 12. C.

A copyholder cannot transfer his eſtate but by ſurrender (*h*); the reaſon is (*i*), becauſe he has only an eſtate at will (*k*), which is deter-

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4 Co. 21. a.

(*c*) [See N. LXVII.] (*d*) [See *Co. Copyh.* ſ. 8, 9.]

(*e*) [See *poſt.* 161. It ſeems rather to have been "by little and little," as Lord *Coke* ſays. *Copyh.* ſ. 32. *Tracts*, 56, 7.]

(*f*) [See N. LXVIII.]

(*g*) Copyhold lands are parcel of the manor itſelf, and not held of the manor. 1 *Ld. Raym.* 44.

(*h*) [See N. LXIX.]

(*i*) And another reaſon of a ſurrender is, that the lord ſhould not be a ſtranger to his tenant.

(*k*) If a ſurrender be defective, a court of equity will relieve. *Mich.* 10 *Geo.* 1725. *Ch. Rep.* 75. *Ch. Caſes* 254. 1 *Vern.* 69. [See N. LXX.]

mined

mined when he takes upon him to grant it over (*l*); for that is a plain declaration of his intent (*m*), that he deſigns to hold the land no
2 Inſt. 57. a. longer; ſo that he muſt ſurrender to the lord, and then he may grant another eſtate at will, which now the lord is compellable to do to him to whoſe uſe the ſurrender is made (*n*). Becauſe the copyholder now has that ſettled intereſt and eſtate in the land, that his heirs ſhall inherit the land, whether the lord be willing or not; and ſo a copyholder hath power over his eſtate, and
2 Inſt. 60. b. not the lord; therefore 21 *Ed.* 4. *Brian* ſaid, that if the lord enter upon his copyholder, he might have treſpaſs (*o*). So far is it now from being a determination of copyholder's eſtate.

[158] A copyholder in fee may ſurrender, reſerving
4 Co. 21. b. rent, with a condition of re-entry for non-payment, and he may re-enter for non-payment; for having a fee-ſimple according to the cuſtom of the manor, he may reſerve what profits he pleaſes out of it, by the ſame reaſon as

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(*l*) The lord is not compellable to make a ſurrender. *Moor* 1088. *Lord Grey's caſe.* [See N. LXXI.]

(*m*) In what caſes copyhold eſtates may be transferred without ſurrender. *Hetley* 150. *Winch.* 3.

Copyhold eſtates are within all the ſtatutes of Bankrupt. *Cro. Car.* 550. 569. 1 *Keb.* 24. [See the preceding Note LXXI.]

(*n*) [See N. LXXII.]

(*o*) [See *Co. Litt.* 60. *b.* *Bro. Ten. p. Copie. pl.* 13. and *vide pl.* 10. *Co. Copyh.* ſ. 9. and ſee *poſt.* 328, 9. where our author ſays that if the lord forceably enter on his copyholder, it ſeems he may be indicted for it.]

he

he may diſpoſe of it as he pleaſes. And ſince by cuſtom an eſtate at will is deſcendable, the deſcent is ordered and governed by the rules of the common law (*p*). For thoſe reaſons that govern the deſcents at common law, are drawn from the nature of deſcent and diſpoſition of eſtates after the owner's death; and are grounded upon thoſe reaſons that ſeem to warrant ſuch a diſpoſition of the eſtate, and are not taken from the nature of the land or thing that is diſpoſed of, and therefore may as well, and with as good reaſon, be applied to the diſpoſition of copyhold as freehold eſtates; ſince it is not the nature of the thing diſpoſed of, that is to rule or govern either in one caſe or in the other. And therefore, where a copyholder by licence (*q*) made a leaſe for years, and the leſſee entered, and the leſſor died, having iſſue a ſon and a daughter by one venter, and a ſon by another, then the eldeſt ſon dies: adjudged, that the daughter of the whole blood ſhall inherit; becauſe the poſſeſſion of the leſſee for years was the poſſeſſion of the elder brother, who may have poſſeſſion

Crook Eliz. 361. Ld. Raymond, 630. Ib. 1345.

4 Co. 23, 3. The like caſe of a guardian. Dier 292. a. Cro. Car. 411.

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4 Rep. 21.

(*p*) [See N. LXXIII.]

(*q*) [It is ſaid in ſome of the books, that the leaſe ſhould be made by *ſurrender*. 3 *Leon.* 69. *Ca.* 106. 4 *Leon.* 38. *Ca.* 103 and 212. *Ca.* 334. *Co. Litt.* 15. *a.* n. (2). But from *Moore*, 125. *Ca.* 272. and *Co. Copyh.* ſ. 41. *Tracts*, 95. it ſhould ſeem that a licence is ſufficient to give this effect to a leaſe.]

before admittance (*r*); for in that caſe he was not admitted; for if it be reaſonable in ſuch caſe at common law to keep the inheritance out of the half blood, ſo it is in copyhold eſtates. But if the brother do not get poſſeſſion, the ſiſter cannot inherit; for then he hath only a right to the lands as repreſentative of his father, which right ſhe is not capable of having, becauſe ſhe is not repreſentative of the father. But when he has gotten poſſeſſion, he hath then an eſtate in the lands deſcendable to him and his heirs, and the ſiſter is his heir; and though he has the lands as repreſentative of his father, yet he hath them to him and his own repreſentatives. But when he never got poſſeſſion, he never executed the power he had of taking the lands to him and his repreſentative; ſo that this power devolves upon the younger ſon as repreſentative of his father; for the law gives the eſtate to him and his repreſentative, who is repreſentative of the dead perſon. Now when he that is repreſentative to the dead perſon, doth not get actual poſſeſſion, and ſo veſt the eſtate in him and his heirs, he hath no power over the lands, and therefore can make
[160] no leaſe or diſpoſition of them by feoffment; becauſe though he hath a right to be abſolute owner of the lands, yet is he not actually ſo till entry, becauſe till then in fact he hath no poſ-

(*r*) [See *Watk. on Deſc.* c. 1. ſ. 2. p. 51, 2.]

ſeſſion;

ſeſſion; and therefore there is no reaſon by a fiction of law to create him a poſſeſſion. And ſo he never having had the lands to him and his repreſentative, he muſt take that is repreſentative to the dead perſon, which is the younger brother; and this alſo may be a reaſon why he that claims by deſcent, muſt make himſelf heir to him that was laſt actually ſeiſed of the freehold. But though copyhold land be governed by the rules of the common law, concerning deſcents, yet it partakes not of the nature of freehold land in other reſpects (*s*). For it is not aſſets in the heirs hands, neither ſhall a woman be endowed, or huſband tenant *per curteſy*, unleſs by ſpecial cuſtom; (*t*) neither ſhall a deſcent toll an entry. The reaſon ſeems to be, becauſe the eſtates of copyholders were at firſt only eſtates at will, and at the abſolute diſpoſition of the lord; and there hath not ſince been any proviſion made for thoſe particular caſes. For my lord *Coke* ſays, that copyholders have only a fee-ſimple *ſecundum quid*; that though they are tenants at will, yet their eſtates ſhall deſcend to their heirs, and not be determined by their death; and not be ſubject to the will of

4 Co. 23. a. 30. b.

[161]

4 Co. 22. a.

(*s*) Nor are they within the ſtatute of *Weſtminſter* the 2. c. 18. which gives *elegits*. *Savil's Rep.* p. . *Heyden's caſe*. [See *poſt*. 185.]

(*t*) Nor are they forfeited by outlawry. *Lit. Rep.* 234. [See *poſt*. 242.]

the lord, as other eſtates at will are (which it ſeems was introduced in favour of them by ſome poſitive law (*u*), though no footſteps of it appear now); but not *ſimpliciter* to have all the collateral qualities of eſtates in fee-ſimple at common law, in which reſpects that poſitive law ſeems to have left them at large as before.

Co. Cop. 114. My lord *Coke* ſays in his Copyholder, that if the leaſe for years determine, and the elder brother die before entry, that the younger brother ſhall inherit; for when he has once got poſſeſſion, which he had by the poſſeſſion of his leſſee for years, then it ſeems he has made the eſtate deſcendable to him and his heirs. But perhaps it will be ſaid, that the poſſeſſion of the leſſee for years is only the poſſeſſion in law of the brother, and not in fact, becauſe he can get no poſſeſſion; and it would be inconvenient to carry the eſtate to another [162] family, if the elder brother die before entry; but when this eſtate for years is ended, then ſince he may get a poſſeſſion by entry, it is acquired by law. But then on the other hand, if by the poſſeſſion of the leſſee for years, he had an eſtate deſcendable to him and his heirs, how comes this eſtate to be deveſted by the expiration of the leaſe for years? It is urged on the other hand, that poſſeſſion was but feigned, and

(*u*) [See *ante*, 156. (*e*)]

is

is now gone (*w*); but yet if the brother were once in poſſeſſion, and then were diſſeiſed, it ſeems the ſiſter ſhould inherit, though the poſſeſſion of the elder brother were gone. But the poſſeſſion of the leſſee was the brother's poſſeſſion only by ſuppoſition of law, to help him out where he could get no poſſeſſion; and therefore when that eſtate for years is gone, the law removes the aſſiſtance it gave before, becauſe now he may get poſſeſſion, and ſo ſets the matter between the brothers as it would if there had been no leaſe for years. *Ideo quære de hoc* (*x*). Dyer 291. Moor 371.

(*y*) The heir before admittance (*z*) may enter and take the profits; for perhaps there may not be a court holden in a great while afterwards. Such heir may ſurrender to the uſe of another before admittance (*a*), but not to prejudice the lord of his fine. *Quære*, Whether the lord in ſuch caſe muſt admit before the heir has paid his fine, and if he do, what remedy there is for the fine (*b*). 4 Co. 22. *b*. 23. [163] 1 Leo. 174.

(*w*) 2 *Levinz* 107. *Blackborn* v. *Greaves*. *Sed quære* 4 *Leo. Caſe* 226. 1 *Ventris* 260. 1 *Mod.* 102. 120.

(*x*) [See N. LXXIV.] (*y*) *Moor* 596. 2 *Cr.* 105.

(*z*) [See *ante*, 159. So he may bring treſpaſs or ejectment, make leaſes, &c. before admiſſion. See *Com. Dig. Copyh.* (D. 2.) *Viner*, *Copyh.* (D. b.) *Watk. on Deſc.* c. 1. ſ. 2. p. 51. and notes. *Co. Copyh.* ſ. 41.]

(*a*) [See N. LXXV.] (*b*) [See N. LXXVI.]

4 Co. 22, 23. Mod. Rep. 120. 3 Co. 7.

The admittance of tenant for life is the admittance of him in remainder (*c*), becauſe they make but one eſtate; but the lord ſhall have a fine for the remainder-man's intereſt, but the remainder-man need not pay it till after the death of tenant for life, for then he becomes tenant to the lord (*d*). *Mich.* 8 *W.* 3. in *B. R. per Holt.* The admittance of tenant for life is the admittance of him in remainder (*c*), ſo as to veſt the eſtate, but not to prejudice the lord of his fine (*d*); for after the death of tenant for life, he in remainder ſhall be admitted again. *Quære.*

1 Leo. 4. Mo. 128.

'Tis enacted by the 31 *H.* 8. *c.* 13. That if any abbot, *&c.* ſhall make any leaſe of lands, *&c.* in the which any eſtate for life then was in being, then every ſuch leaſe to be void. A copyhold was let for life by copy, and then the religious houſe granted a leaſe of it to another for ninety years; and it came to be a queſtion, Whether this was a void leaſe? And the doubt was, Whether a copyhold eſtate for life were within the words of the act, in which (any eſtate or intereſt for life, *&c.*); and it was reſolved, that the leaſe was void, and that the copyholder had an

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(*c*) [See *Watk. on Deſc.* c. 1. ſ. 1. p. 21. n. (*w*); ſ. 2. p. 50. n. and *poſt.* 194.

So the remainder-man or his heir may ſurrender, on the admittance of the particular tenant, though they never were admitted expreſsly themſelves. *Cro. Jac.* 36. *pl.* 10. *Cro. Eliz.* 504, 662. 4 *Leon.* 9. *pl.* 38. *and* 111. *pl.* 126.]

(*d*) [See N. LXXVII.]

eſtate

eſtate or intereſt for life. And in the handling this caſe, ſome general rules were laid down for the expoſition of ſtatutes, where they ſhould extend to copyhold eſtates, and where not (*e*). When a ſtatute alters any intereſt, tenure, cuſtom, ſervice of the manor, or doth any thing in prejudice, either to the lord or tenant, there the general words of an act of parliament will not extend to copyholds; but when an act is generally made for the good of the common weal, and no prejudice accrues to the lord, &c. there copyholders are often bound. And this reaſon, as it ſeems, was the ground the judges went upon in the reſolution before; for there was an act of parliament made for the king's advantage, to prevent the alienation of thoſe lands that were to come into the hands of the king; and it was no prejudice to the lord to hinder granting future eſtates, ſo long as it permitted the granting preſent intereſts (*f*). And in this caſe was ſomething touched concerning the great controverſy of entailing copyhold lands (*g*). And 'twas held *per tot. curiam*, that generally copyhold

1 Ld. Raym. 132.

3 Co. 7. Cro. Car. 42, 3.

Stra. 253, 258.

Stra. 516. Ld. Raym. 1066.

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(*e*) [See N. LXVIII.]

(*f*) About the latter end of the reign of queen *Elizabeth*, the queſtion was debated, Whether copyhold lands could be entailed? *Vide Cr. Eliz.* 308, 907. *Moor* 753. *Godbolt* 358, 367. *Cr. Car.* 131, 411. 2 *Roll. Rep.* 383. *Wm. Jones* 360.

And in *Hill* and *Morſe*'s caſe it was adjudged, that where a copyhold is entailed, it muſt be by a ſpecial cuſtom ſo to do. *Moor* 188. 637. 1 *Lev.* 136. *Raymond* 164. *Sid.* 314.

(*g*) [See N. LXXIX.]

lands could not be entailed; becauſe if the ſta-
3 Co. 8. tute of *Weſtm.* 2. brings in a new eſtate, as an eſtate-tail is, then it muſt introduce a new tenure, *viz.* the donee to hold of the donor, which comes within the rule before of a general act, not binding copyholders in ſuch a caſe. Another reaſon was, becauſe the words of the ſtatute *de donis* are *quod voluntas donatoris*, &c. ſo that what may be entailed within that act of parliament, muſt be given by charter in tail; and copyholds are not given by charter in tail,
Cro. Car. 45. but by ſurrender and admittance. That a ſurrender and admittance is no alienation by deed, ſee *Litt. ſect.* 74. For 'tis there ſaid, an aliena-
Cro. Car. 43. tion by deed is a forfeiture. Again, that copy-
[166] holds cannot be entailed, was alſo reſolved, in the caſe of *Rowden* againſt *Malſter*. In both theſe caſes 'twas objected againſt entailing copyhold lands, that it would introduce a perpetuity, becauſe no fine or recovery could be ſuffered of them; and ſo the owner cannot diſpoſe of them. Thus far then went the reſolution of the courts in both caſes; that copyholds are not
Cro. El. 717, 907. 3 Co. 8. Moor 358. Litt. ſect. 13. generally within the ſtatute *De donis*. But then when 'twas objected by ſome, that where there hath been a cuſtom for entailing copyhold eſtates, there the ſtatute *De donis* co-operating with the cuſtom, ſhould extend to it. But the lord chief baron anſwered that 'twas all one, and that no cuſtom could make the ſtatute extend to copyholds; becauſe all the eſtates at common law were fee-ſimple, as *Litt.* ſays; and

ſo

ſo there could be no cuſtom to entail copyhold lands before the ſtatute; and ſince there could not be; becauſe no eſtate in copyhold is grantable, but what hath been grantable time out of mind; and the ſtatute *De donis* is within the time of man's memory. But this was not the reſolution of the court, but only my lord chief baron's opinion. In the caſe of *Rowden* ver. *Malſter*, a copyhold was ſurrendered to the uſe of the copyholder's will, who deviſed it to *J.* in tail, remainder to *H.* in tail, &c. *J.* hath iſſue, and [167] ſurrenders to the uſe of his wife for life; 'twas adjudged, that ſince the jury found 'twas not the cuſtom of the manor to have an eſtate-tail in a copyhold, that *J.* had a fee-ſimple conditional; and that by his having of iſſue, he had performed the condition, and the ſurrender to the uſe of his wife was good. Cro. Car. 44, 5.

One argument againſt copyholds being entailed was, that no fine could be levied, or recovery ſuffered, becauſe a warranty cannot be annexed to an eſtate at will. There's a caſe cited in *Podger*'s caſe, where 'tis ſaid to be adjudged, that copyholds are not within the ſtatute *De donis*; but it doth not ſay, if they be entailed by cuſtom, they are not within the ſtatute. Cro. El. 391. 9 Co. 105. a.

There is the caſe of *Eriſh* ver. *Rives*, where 'twas adjudged, that without a cuſtom copyholds can't be entailed by the ſtatute *De donis*. Theſe are all the caſes that I can find againſt entailing copyhold lands, none of which go ſo far as to ſay, that if there have been an eſtate-tail by cuſ- Cro. El. 717.

tom,

tom, that 'tis not within the ſtatute *De donis*, but only the opinion of my lord chief baron, which will be but of little weight when we have ſeen the precedents againſt this opinion, which I ſhall now examine. And firſt, There is *Littleton*'s opinion for the entailing of a copyhold; for he ſays, that tenant by copy of court-roll is, as if a man be ſeiſed of a manor, within which manor there is a cuſtom which hath been uſed time out of mind; That certain tenants within the ſame manor have uſed to have lands and tenements, to have and to hold to them and their heirs, in fee-ſimple or fee-tail; ſo that there he ſays expreſsly, that eſtates-tail in copyholds have been time out of mind, and therefore muſt have been before the ſtatute. But my lord *Coke* in his comment on *Littleton*, in another place ſays, that an eſtate-tail may be, by the opinion of *Littleton*, by the cuſtom, the ſtatute co-operating with it; for ſaith he, there can be no eſtate-tail in copyholds by cuſtom only, nor no eſtate-tail by the ſtatute only, but the ſtatute muſt co-operate with the cuſtom. Now the queſtion will be, How this can be reconciled with what *Littleton* ſays? For he ſays, That an eſtate-tail in copyholds was time out of mind of man; and then if eſtates-tail were before the ſtatute, the queſtion is out of doors, whether a copyhold can be entailed by force of the ſtatute; for if they were entailed at the common law, then as to them the ſtatute is but in affirmance of the common law.

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Litt. Sect. 73.

1 Inſt. 60.

It

It ſeems the meaning is this, that eſtates-tail were before the ſtatute, as to the manner of limitation by the cuſtom of ſome manors; as that an eſtate was granted to a man and the heirs of his body begotten, the remainder over to another; but that in other reſpects theſe eſtates were not eſtates-tail before the ſtatute, as that the tenant ſhould no ways alien to debar his iſſue, or them in remainder; or that if he made any diſcontinuance, they ſhould have a formedon in deſcender or remainder; but theſe things were introduced by ſtatute upon the eſtate, which was the ſame in limitation by the common law; and ſo the ſtatute is ſaid to co-operate to make an eſtate-tail; and this obviates the main objection againſt intailing copyholds by the ſtatute, *viz.* That every copyhold eſtate ought to be grantable time out of mind; and if an eſtate-tail were introduced by the ſtatute, then that eſtate was not grantable time out of mind; for if the eſtate-tail were, before the ſtatute, the ſame in point of limitation of the eſtate, as it is now ſince the ſtatute, then an eſtate-tail hath always been grantable time out of mind, though ſome other qualities are now annexed to that eſtate by act of parliament, which were not ſo before, and which may well be ſaid to give the ſtatute ſome ſhare in the making thoſe eſtates, ſince they are ſo very conſiderable. And that the qualities ſhould be annexed to this eſtate by the ſtatute *De donis*, is no ways

Cart. 22.

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ways unreaſonable; for this act was made to redreſs a wrong at common law, and was for the general convenience and profit of the weal publick; and the bringing an eſtate-tail in copyhold lands within the ſtatute *De donis*, is no prejudice to the lord or tenant, alters no tenure, eſtate or cuſtom of the manor, which may any ways prejudice any body.

[Co. Litt. 60. b.] It is no proof of a cuſtom time out of mind to intail a copyhold, that an eſtate hath been granted to a man and the heirs of his body, for that may be a fee-ſimple conditional; but it muſt be ſhewn that a remainder hath been limited over and enjoyed, or that the iſſue have recovered after the alienation of his anceſtor, or the like.

Thoſe that are againſt the intailing copyhold lands, ſay that the eſtate-tail of copyhold land mentioned by *Littleton*, muſt be underſtood a fee-ſimple conditional at common law, or elſe he

3 Co. 8. b. Litt. ſect. 13. contradicts himſelf; for he ſays in another place, that all inheritances at common law were

[171] fee-ſimple; but it ſeems that may be well enough underſtood of freehold eſtates; for one may lay a general rule for all lands, meaning freehold lands, which will not extend to copyhold lands.

Cro. El. 907. Pl. Com Manſel's caſe. 2 Cro. El. 717. Moor 173, 188. Cro. El. 307, 349. 1 Leon. 175. Pop. 128. As that diſtinction about intailing copyhold lands is taken by my Lord *Coke*, and ſo of great authority, yet it is not a ſingle authority, but the ſame diſtinction is taken and allowed in many other caſes. And firſt there is the caſe of *Gurſey*

ver.

ver. *Sanderſon*, where it is doubted whether a copyhold may be intailed, no cuſtom being found one way or the other; by which it ſeems plain, that if there had been a cuſtom found, there had been no queſtion but that it might have been intailed. But then there is the caſe of *Eriſh* ver. *Rives*, that an intail may be of a copyhold by cuſtom, but not without it. There are ſeveral other caſes warrant the ſame diſtinction, as in the margin. Thus you may ſee the reaſons both for and againſt intailing copyhold lands. 1 Sid. 268, 314. Mo. 637.

It is made an objection againſt intailing copyhold lands, that thereby the donee muſt hold of the donor; and the donor being in the reverſion, muſt hold of the lord; and ſo the change of tenants will not be ſo often; and if the donee commit any forfeiture, the donor muſt take advantage of it, which would be to the prejudice of the lord to have the tenure thus altered. To this objection I think it may be very well anſwered, That the truth of the caſe is not ſo; for the donee in tail doth not hold of the donor, but of the lord, as it ſeems every tenant for life doth of a copyhold; and this ſeems to be very reaſonable; for a copyhold in fee-ſimple is not like other eſtates in fee-ſimple at common law, but they are only eſtates at will, and ſo he that is the actual tenant at will is tenant to the lord; for it ſeems to me, that becauſe they are but eſtates at will, there is no diviſion of eſtates, but he Cro Car. 45. [172]

he that is actual tenant at will hath all the eſtate, and there is no part or parcel of the eſtate left in any body elſe; and that a tenant in fee-ſimple of copyhold lands is only he that hath ſuch an eſtate at will in the lands, as, by the cuſtom of the manor, is not to determine by his death; but that after his death his heir ſhall be tenant at will; ſo that when he grants away an eſtate for life, he has no eſtate in the lands left in him, but only a power of being tenant at will, according to the cuſtom of the manor, when his tenant for life's eſtate is ended. And I take it, that in the mean time the tenant for life is tenant at will to the lord, and ſhall do the ſervices; and if he com-
[173] mit a forfeiture, the lord ſhall take advantage of it (*b*). And to this purpoſe there is the caſe of
1 Leo. 1. *Borenford* ver. *Packinton*, where the cuſtom of the manor was, that the widow ſhould have her free bench; and it is there taken for granted that ſhe ſhall hold of the lord (*i*), and be accordingly admitted tenant, and that the heir ſhall not be admitted during her life, which plainly proves that the courſe of tenure of copyhold lands is

(*b*) [9 *Co.* 107. a. *poſt.* 266. N. CXXIII. Unleſs the remainder be expreſsly limited to commence on the forfeiture; in which caſe the lord ſhall not take the advantage of it againſt his own act. 3 *Levintz.* 94. *Com. Dig. Copyh.* (M. 6.) *Viner. Copyh.* (X. c.)]

(*i*) [But note; in the caſe of *Borenford* and *Packington*, the widow had the *whole* of the copyhold as her free-bench: and ſee *ante*, 26. N. XXV.]

not like the tenure of freehold lands at common law; for in that caſe, at common law ſhe ſhould hold of the heir; and though in eſtates at common law the donee holds of the donor by the ſame ſervices the donor holds over; becauſe the ſtatute creating a reverſion in the donor, the judges made expoſition according to the common law, that becauſe a fee-ſimple conditional was held of the feoffor by the ſame ſervices that he held over; therefore the donee ſhould hold of the donor by the ſame ſervices he held over; but at common law the tenant in fee-ſimple conditional of copyhold could hold of no body but of the lord; therefore they cannot hold of the donor that have now an eſtate-tail in copyhold lands, but according to the rule in expounding the ſtatute *De donis*; *viz.* by the common law they muſt hold of the lord, becauſe the tenant in fee-ſimple conditional of copyhold lands at common law held of the lord, and not of the ſurrenderor. In the ſupplement of my Lord *Coke*'s treatiſe of copyholds (*k*) there is a caſe cited between *Lane* and *Hill*, where it is ſaid, That when a copyholder makes a gift in tail, he hath no reverſion but a poſſibility; and the lord ſhall avow upon the donee for the rents and ſervices, and not upon the donor; and therefore it was there ſaid, that he in reverſion could have no formedon in the reverter.

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Cro. Car. 44.

(*k*) [S. 12. *Tracts*. 185.]

A copy-

Hob. 177.
1 Leo. 297.
3 Leo. 197.
1 Brown. 179.

A copyholder, by licence of the lord, makes a leaſe by indenture for twenty years, and then ſurrenders his eſtate by the name of reverſion of one moiety to one, and another moiety to another; and it was adjudged the reverſion paſſed, for the leaſe for years paſſed out of the eſtate of the copyholder, as well as if the leaſe had been made by ſurrender. It ſeems that which occaſioned the doubt in this was, that the leaſe not being made by ſurrender, the leſſor ſtill continued tenant to the lord; and ſo whether he might ſurrender by the name of reverſion was the queſtion. This caſe ſeems very much to ſhake the reaſons I have before given why the particular tenant ſhall hold of the lord, and not of him that created particular eſtates; that is, that there was no reverſion left in him; but yet though ſuch intereſt may paſs by name of reverſion (for any other name to give it will be very hard to find); yet perhaps he hath not in ſtrictneſs ſuch an eſtate in him. However that be, it ſeems the particular tenant holds of the lord; therefore if tenant in fee of a copyhold ſurrenders to one for years, it ſeems to me that the tenant for years ſhall hold of the lord; for by admittance the lord takes him for his tenant; but if the leaſe be made by indenture, there it ſeems he holds of his leſſor; for he is not admitted tenant to the lord. It was held that no attornment was requiſite, becauſe it is the lord that has the power of chuſing and admitting

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tenants,

tenants, and not the leſſee. It was held likewiſe, that the rent was to be divided by the halves according to the reverſion. Having thus examined the reaſons and authorities for intailing a copyhold eſtate, after which there can be no great reaſon to doubt, but that copyholds may be intailed;

It is now requiſite that we ſee the method for the avoiding ſuch intails; and firſt I ſhall ſhew, that a recovery with voucher (*l*) doth not of common right bar the intail of a copyhold; but that as to the intailing them, cuſtom is requiſite; ſo *without cuſtom the intail cannot be cut off. The reaſons are, that becauſe without an intended recompence in value, no recovery ſhall bind, and the ſurrenderee comes-in in the *Poſt*, by the lord, and is not in in the *Per* by the party, and ſo no warranty can be annexed to the copyholder's eſtate. Beſides, they have only an eſtate at will, to which no warranty can be annexed of common right; for no eſtate leſs than a freehold is capable, by common right, of having a warranty annexed to it. And accordingly it was adjudged in *Clun*'s caſe, and all the judges held that the recovery did not bind without a cuſtom. But there is a *quære* whether judgment was given for the plaintiff upon the principal matter, or no; for it ſeems to have been a diſcontinuance (*m*), and then the defend-

Stra. 1197. Recovery ſans cuſtom bar eſtate-t. & ſemble reaſonable, car ſuit nul cuſtome que bar freehold eſtate-t. Mes Quære, car eſtat-t. in cop. eſt create per cuſtom. 1 Rol. Abr. 506. Mo. 358. con. Hob. 177. 4 Co. 27. b. Cro. Car. 45, 205. Mo. 358. con. Cro El. 391.

*[176]

(*l*) [See N. LXXX.] (*m*) [See *poſt*. 189.]

Cro. El. 372, 380. 1 Rol. Abr. 506. Mo. 637.

ant's entry could not be lawful. There are two other cases where this question came in dispute, but was not resolved. It is held, in the case of *Church* ver. *Wiat*, that a recovery by custom may bar, which implies, that without it it cannot bar. But in the case of *Oldcot* ver. *Level*, *Moor* 753. it was agreed that a recovery may be in the court of the lord, that will bar a copyhold; and there it is said generally, and is not put upon any custom.

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Mo. 638. 1 Rol Abr. 506.

It is debated, whether, if there be a custom to bar the issue of a copyhold estate by surrender to one in fee, whether that be good (*n*). *Moor* 188. *Numb.* 336. *Hill* ver. *Morse*.

2 Vernon 585, 705. 1 Sid. 314. Style 450. con. 2 Saund. 422.

Now my lord *Coke* says, by custom, by surrender the intail of a copyhold may be cut off. It is held to be a good bar of a copyhold estate for the tenant in tail to commit a forfeiture (*o*), and the lord to seise and grant to another. Or if the tenant in tail surrenders to the use of the purchaser and his heirs, and the purchaser commits a forfeiture, and the lord seises and regrants; this is held to be a good custom to bar the estate-tail of a copyhold, though the tenant in tail be not privy to it. By this it seems plain, that if tenant in tail commit a forfeiture, his issue is bound by it; but the lord can grant to no body else but to him that is intended to have the estate. Thus it seems plain to me, that as estates by the

(*n*) [See N. LXXXI.] (*o*) [See N. LXXXII.]

custom

cuſtom may be intailed, ſo by the cuſtom alſo thoſe eſtates-tail may be cut off by the ſurrender, recovery, or forfeiture, according to the ſeveral cuſtoms of manors.

Having thus, in ſome meaſure, treated of the rules to know when the general words of an act of parliament extend to copyholds, and when not; and having ſhewed the reaſons both of the [178] one and the other ſide, about intailing copyholds; it will be now neceſſary to deſcend a little farther, and ſhew thoſe particular acts of parliament copyholds are within, and thoſe they are not within. Copyholds are within the ſtatute of limitations (*p*); for that is an act made for the preſervation of the publick quiet, and no ways tending to the prejudice of the lord or tenant. And actions concerning copyholds are as fully and plainly within the words of the act of parliament, as any other actions are, and ſo there is no reaſon to exclude them from the meaning. But debt for the fine of a copyholder is not within the ſtatute of limitation. 2 *Keb.* 536.

1 Ld. Raym. 132. Mobr 410. Ld. Raym. 78. Stra. 253, 258.

The 32 *H.* 8. *c.* 28. of the huſband's diſcontinuing the wife's land, doth not extend to copyhold land, neither in the letter nor equity of it; for the words are, that no fine, feoffment, or any other act or acts, *&c.* of the wife's inheritance or freehold, which words plainly mean nothing Moor 596.

(*p*) [See 3 *Durnf. and Eaſt*, 172, 3.]

but a common law eſtate, and the common law way of conveying; and if the equity of the act ſhould be conſtrued to extend to copyholds, by the entry of the party there would be a tenant without the aſſent or admittance of the lord.

[179] Cro. Car. 44. 1 Inſt. 44. a. 6 Co. 37.

Neither doth the other part of the act concerning leaſes to be made by tenants in tail, or huſbands of lands in right of their wives, extend to copyholds; for it only extends to thoſe lands that are grantable by deed; yet it was adjudged that a grant by deed of copyhold lands by a dean and chapter, ſhould not be avoided by the ſucceſſor, by the 13 *El.* *c.* 10. ſo that the queſtion will be, Why copyholds ſhould not be within the 32 *H.* 8. as well as the 13 *El.* and if the 32 *H.* 8. doth not extend to copyhold land, then a biſhop ſolely cannot make a grant by copy, to bind his ſucceſſor (*q*). My lord *Coke* ſays, that a grant by copy in fee or in tail, for life or years, is a ſufficient demiſing within the act of 32 *H* 8. All thoſe books may be thus reconciled, though in truth they are not contrary to one another. When a man is ſeiſed in fee of lands in right of his church or wife, or is tenant in tail in his own right, and ſome of his lands have been granted by copy for the ſpace, &c. this is a ſufficient demiſing within the act, to warrant his demiſing of them, ſo as to bind the

1 Inſt. 44. b.

(*q*) [See *poſt.* 197.]

heir

heir or ſucceſſor. But where a man is himſelf tenant in tail of copyhold lands, or is ſeiſed in right of his church or wife, there he can make no leaſe to bind by force of the 32 *H.* 8. becauſe [180] they are not to be made by ſurrender by force of that act, but by deed indented; and though by licence of the lord, a leaſe of copyhold may be demiſed by deed indented; yet the eſtate is not originally ſo grantable, to which only the ſtatute extends; and therefore, though copyhold lands have been granted, if they come into the lord's hands, this grant by copy may be a ſufficient demiſing within the act, to warrant his letting them again by deed, according to the act; yet it ſeems he cannot grant them again by copy; for the act requires that leaſes be made by indenture: And it is obſervable in the dean and chapter of *Worceſter*'s caſe, though the lands were copyhold, yet, when they came into their hands, they were demiſed by deed indented, which demiſe was warranted by the act, upon the former grant by copy. Now then if the 32 *H.* 8. doth not enable grants by copy, it is a great queſtion to me, whether the 13 *El.* doth reſtrain 1 Inſt. 45. a. them; for all leaſes, made according to the exception of the reſtraining act, muſt purſue the qualifications of the enabling act, and conſequently muſt be made by deed; and then if grants by copy be left as they were at common law, eccleſiaſtical perſons may grant lands by copy in fee, with the conſent of thoſe perſons

whose consent is required to bind their ſucceſſors; I mean if they have copyhold lands in fee, they may grant them by ſurrender to another: Not that, if they are lords, and they eſcheat, they may grant them in fee; for upon the eſcheat they free themſelves in their hands, and ſo within the act.

Cro. Ja. 305. Hob. 177. Cro. Car. 24, 5, 44. Yel. 222.

Grantees of reverſions of copyholds ſhall not take advantage of a condition broken, by the 32 *H.* 8. (*r*) nor by the common law, (of covenants they may, 1 *Keb.* 350. *Cro. Ca.* 24. 253. *tamen quære* upon *Yel.* 135.) for then by entry they might come in to be tenants to the lord without admittance; and though he in the reverſion may enter by the common law, yet he was tenant before: The act gives remedy to aſſignees, which he is not properly who comes in by ſurrender. When a copyholder enters for a condition broken, he is *in ſtatu quo prius*, and therefore ſhall pay no fine (*ſ*); and if the grantee of the reverſion might enter by force of the ſtatute, he would be in the ſame place as his grantor, and ſo would be in as tenant, and yet pay no fine.

Sid. 42, 73.

Copyholds are not within the 11 *H.* 7. *c.* 20. (*t*), for thereby an entry being given to the next heir, he would come in to be tenant without

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(*r*) [See N. LXXXIII.]

(*ſ*) [*Kitch.* 123. *a. Co. Copyh. ſ.* 56. *Calth.* 60 and 67. *Cro. Eliz.* 239. and *poſt.* 276. (*ſ*) *acc.*]

(*t*) [2 *Cruiſe*, 158, 2 *Veſ.* 358. N. *acc.*]

being

being admitted by the lord. The reaſon they ſeemed to go upon in the reſolution was, that the lands were copyhold, and ſo clearly out of the ſtatute. But another reaſon was mentioned by one judge, which was, that the eſtate being limited to the baron and feme in fee, 'twas out of the ſtatute 11 *H.* 7. which only mentions eſtates-tail, and for lives.

Another reaſon may be, becauſe copyholds are not within the ſtatute 27 *H.* 8. about jointures, and the copyhold lands are within the ſtatutes of bankrupts; for the ſtatute 13 *El.* expreſsly mentions them; and though the other ſtatutes do not, yet they being made for further remedy in the matter aforeſaid, are to be expounded by the former; eſpecially ſince that hath taken care that no prejudice ſhould happen to the lord. The ſtatute 27 *H.* 8. *c.* 10. for executing uſes to the poſſeſſion, extends not to copyholds (*u*), which is plain from common experience; for when a copyholder ſurrenders to the uſe of another, the poſſeſſion is not executed to the uſe; for the ſurrenderee hath nothing till admittance. For 'twas not the intent of the ſtatute to execute the poſſeſſion to the uſe of copyhold lands; for then a tenant would be introduced without the lord's conſent. Neither doth the branch of that act concerning jointures extend to copyholds; ſo that if a jointure be made

Cro. Car. 550, 568.

Cro. Car. 44.

(*u*) [2 *Veſ.* 257. *Sand. on Uſes*, 229. *acc.*]

to a woman in copyhold, that will be no bar to her dower. The reaſon is, becauſe the words of the proviſo being general and introductive of a new law, to bar women of their dower, where they were not barred by the common law, there's no reaſon to extend them, ſince an eſtate in copyhold lands is very diſadvantageous to the woman who muſt pay a fine to be admitted, which ſhe may not be able to do, and thereby will commit a forfeiture; beſides a woman is not dowable of common right of copyhold lands; and ſo it ſeems to have been out of the regard of the ſtatute; and my lord *Coke* defines a jointure to be competent livelihood of freehold; ſo that it muſt be an eſtate of freehold. And in another place he ſays, a tenant by copy hath no freehold; but yet the ſtatute of *Merton* that gives damages in a writ of dower, where the huſband died ſeiſed, extends to copyholds (*w*); and yet ſeiſed is properly applied to freeholds. And my lord *Coke* ſays in his Treatiſe of Copyholds (*x*), that a freehold is twofold in reſpect of the ſtate of the land; and ſo any body that has an eſtate for life, in lands, is a freeholder; and ſo copyholders may be freeholders. And the other ſenſe of the word Freehold, as 'tis oppoſed to copyhold land; but *quære* of this diſtinction, for it ſeems not to be

1 Inſt. 36. b. 2 Inſt. 325. Cro. Car. 43. 4 Co. 30.

1 Inſt. 58. b.

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(*w*) [*Moore*, 410. *Ca.* 559. *Cro. Car.* 43. *acc.*]
(*x*) [S. 15 and 16.]

law.

law. For he ſays generally in another place, that tenant in fee, tail, and for life, are ſaid to have a freehold, becauſe it diſtinguiſhes it from terms for years and copyhold lands; ſo that he there plainly ſaith, that a man cannot have a freehold in copyhold lands (*y*); for if he could, where would be the diſtinction? Therefore I take it, though a feme in a writ of dower of copyhold lands ſhall recover damages by the force of the ſtatute of *Merton* (*z*), yet it is by the equity of the ſtatute, and not by the words. 1 Inſt. 43. b.

The ſtatute of *Weſt.* 2. *c.* 3. in all its branches extends to copyholds; for it is an act made to redreſs wrong, and nò ways prejudicial to the intereſt either of lord or tenant. The 32 *H.* 8. *c.* 9. againſt champerty, extends to copyholds; for the words are *if any bargain, buy, or ſell, any right or title*, ſo that they are within the words; and the act being made to ſuppreſs wrong, is within the equity of it, neither lord nor tenant being prejudiced by it. 3 Co. 9. a. 2 Inſt. 343. Cro. Ca. 43. 1 Inſt. 369. b.

It is ſaid by *Yelverton, arguendo*, that the 32 *H.* 8. *c.* 28. which gives an entry inſtead of the *cui in vita*, extends to copyhold lands; for the act was made to redreſs a wrong, and it is no prejudice to the lord or tenant, that the wife Cro. Car. 43.

[185]

(*y*) [See N. LXXXIV.]

(*z*) [See laſt page. *Copyholders* are not within the ſtatute of *Merton* (*c.* 10.) to make attornies to do ſuit; but freeholders in ancient demeſne are. 2 *Inſt.* 100. and ſee *poſt.* 229. (*o*).]

ſhall

shall enter; and the general words of the act that give a *cui in vita*, have been allowed to extend to copyholds. The words of the statute 32 *H.* 8. are, *being the inheritance or freehold of his wife.* So if this act doth in this branch extend to copyhold lands, as it seems to me it doth, then one and the same act of parliament, in one part of it, will extend by general words
Mo. 596. con. to copyhold, and the other not; for the first part of the act of leases to be made by tenant in tail, extends not to copyhold lands.

Cro. Car. 44. The 31 & 32 *H.* 8. about partitions, extend not to copyhold, because the act provides it shall be done by writ of partition, and copyhold lands are not impleadable at common law.

(*a*) The stat. of *West.* 2. *c.* 18. which gives the *elegit*, extends not to copyhold, for if it did, the lord would have a tenant brought in upon him without his admittance or consent.

[186] By the 2 *Ed.* 6. *c.* 8. it is expressly declared, that a copyholder shall have the like traverses and remedy, where his interest is not found by the office, as freeholders and others have.

By the 1 *Ed.* 6. *c.* 14. it is expressly provided, that no copyholds should come into the king's hands by the dissolution of monasteries,

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(*a*) *Savil's Reports*, *Heydon's* case, pag. 66, pl. 138. A copyhold not forfeitable by outlawry. *Lit. Rep.* 234. 1 *Lev.* 99. *Hetl.* 127. [See *ante*, 160. n. (*s*); and *post.* 242. 328.]

which

which clauſe, it ſeems, was put in, that no prejudice might be to lords of manors.

The forging a court-roll is expreſsly within the 5 *El.* c. 14. A recuſant (*b*) convict that repairs not to his uſual home, or removing from thence above five miles diſtance, forfeits his copyhold to the lord for the offender's life.

The 16 *R.* 2. *c.* 5. which makes it a forfeiture of lands to purchaſe bulls, extends not to copyholds, for the prejudice the lord ſhould ſuſtain if the king ſhould have the lands. The 17 *Ed.* 2. *c.* 10. concerning the wardſhip of ideots' (*c*) lands, doth not extend to copyhold. The ſtat. of fines (*d*), becauſe made to avoid controverſies, and no ways prejudicial to tenant or lord. In the ſupplement to my lord *Coke*'s Treatiſe of Copyholds (*e*), it is ſaid that the 32 *H.* 8. *c.* 8. concerning remedy for arrears of rent extends not to copyholds. To prove which, a caſe is cited in *Leo.* which is this: A lord of a manor, whereof were divers copyholders, granted a rent-charge for life, and afterwards made a feoffment of the manor to *J. S.* in fee, who granted a copyhold for life to *B. J. S.* died, and the grantee of the rent died, and his

4 Co. 126. b. 9 Co. 105. a.

[187]

a Leo. 109.

(*b*) [See *ſtat.* 31 *Geo.* 3. c. 32.]

(*c*) [See *poſt.* 223. (*g*).]

(*d*) [4 *Hen.* 7. c. 24. Here is, ſeemingly, an omiſſion of the words—"*does* extend to them."—See 9 *Co.* 105. *a.* and *poſt.* 207. (*o*).]

(*e*) [S. 21. *Tracts*, 216.]

executors

executors diſtrained for the arrears in *B.*'s copy-hold lands; and it is there ſaid it was held by the court, that the diſtreſs was not well taken; and the reaſon is, becauſe the words of the ſtatute are, *claiming only by and from him;* and the copyholder doth not only claim by his grantor, but by cuſtom. This opinion, as it ſeems, was upon the firſt hearing of the cauſe; for the very caſe is reported quite contrary by the ſame reporter; and it is ſaid to be reſolved by all the judges but *Fenner*, that the copyhold ſhould be charged with the rent-charge; for the cuſtom is no part of his title, but only appoints how he ſhall hold; and ſince it was charged in the lord's hands, it is plainly within the intent and meaning of the act, as well as the words, to be charged in the copyholder's hands; and to this purpoſe there is a caſe in *Dyer* adjudged. But if the caſe were adjudged, that the lands ſhould not be charged in the copyholder's hands, on that reaſon, that he doth not claim only by and from, *&c.* but by cuſtom; yet that would never warrant ſo general a concluſion, that the ſtatute in no other part ſhould extend to copy-holds; and that if a rent were granted out of a copyhold in fee, and the grantee died, that his executors ſhould not have debt or diſtrain. But turn the tables, and if the act of parliament doth in point extend to copyholds, as lands that are claimed by, *&c.* and that which in this caſe only doth make a doubt, is over-ruled, then this

2 Leo. 152.
3 Leo. 59.
Mo. 812. con.

Dyer 270. b.
1 Leo. 4.

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this is a ſtrong argument, that in other caſes, where that is not which occaſioned the doubt, the ſtatute ſhall extend to copyholds, eſpecially ſince the act was made to remedy an apparent wrong, and doth no harm either to lord or tenant.

It came to be a queſtion, whether the 29 *El.* *c.* 5. of recuſants (*f*), extended to copyholds, and two ſeemed of opinion it did, and one took this difference; when a ſtatute is made to tranſfer an eſtate by the name of lands, tenements, and hereditaments, copyhold is not within ſuch ſtatute. 1 Leo. 97, 8. Owen, 37.

Copyholds are not within the 31 *El.* *c.* 7. of cottages (*g*). 1 *Bulſ.* 50. 2 *Inſt.* 737.

If the lord's ſeigniory, cuſtom, or ſervices are impeached (as it ſeems they muſt be, by a ſtatute which transfers an eſtate in copyhold land without the lord's admiſſion), that act extends not to them; but if the cuſtoms, &c. are not altered, then the ſtatute doth, becauſe that act doth not make another tenant to the lord; and it was urged by him (*h*), that by force of that ſtatute the queen was only to have the profits, and no eſtate, and ſo the act did extend [189]

(*f*) [See the *ſtat.* 31 *Geo.* 3. c. 32.]

(*g*) [This ſtatute is repealed by 15 *Geo.* 3. c. 22. See further, *Com. Dig. Copyh.* (N) & (O). *Viner, Copyh.* (O. d.) *Co. Copyh.* f. 52. 56. *Suppl.* f. 21. *Fiſher on Copyh.* c. 14. *Cowp.* 710. *Cro. Car.* 44.]

(*h*) [*Manwoode*, Chief Baron.]

to

to copyholds. The ſtatute ſays, the queen ſhall ſeiſe and take into her hands two parts of the lands, tenements, and hereditaments. *Quære* of this caſe (*i*). It was ſaid *arguendo* of this caſe, that the 13 *El. c.* 4. for making accountants' lands liable to pay debts, extends not to copyholds; which is a reaſonable opinion; for power is given by that act to the queen to make ſale by her letters patent, which would be a very great prejudice to the lord.

4 Co. 23. a. Cro. El. 380. 392. Mo. 358.

I ſhall now ſhew what are diſcontinuances of eſtates in copyhold lands. If there hath been a cuſtom in a manor, that plaints ſhould be proſecuted there in nature of real actions, if a recovery be had upon ſuch plaints againſt tenant in tail, it is a diſcontinuance; for ſince the cuſtom warrants the recovery, it is an incident to ſuch recovery by the common law, that it ſhould be a diſcontinuance, which it ſeems is drawn from the nature of the thing that a judgment given in a court of judicature ought not to be avoided, but by matter of as high a nature, *viz.* by a recovery in a court of juſtice, and not by the entry of the party that hath right.

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4 Co. 23. a.

A man ſeiſed of copyhold land in right of his wife, ſurrenders to the uſe of another in fee; this is no diſcontinuance, but the wife may enter after the death of her huſband; for by the ſurrender he gives up no more than he had,

(*i*) [Caſe of Saliard *v.* Everat, 1 *Leon.* 97.]

had (*k*), and therefore could not give away his wife's right; though before entry ſhe cannot be ſaid to be tenant, becauſe the ſurrenderee is by the lord's admittance made his tenant. And this is not like a feoffment at common law (*l*), which being ſo notorious a way of conveying eſtates, the wife's entry was taken away, the whole eſtate being paſt away to the feoffee for the benefit of ſtrangers, who could never have known whom to have brought their *præcipe* againſt, if the eſtate did not paſs by ſo notorious a conveyance; and then if ſhe ſtill might have entered, they could never know whether ſhe were a treſpaſſer, or in whom the freehold was rightfully veſted. But in caſe of copyhold lands, as there is no ſuch inconveniency, ſo the nature of the conveyance will not admit of ſuch expoſition; for a ſurrender is but a giving or yielding up that eſtate one hath from another; and it is in the nature of the thing impoſſible to ſurrender more than one hath. Therefore if tenant for life ſurrenders to the uſe of another in fee, it is no forfeiture, for it may be ſeen by the court-rolls who is tenant, and ſo the ſtranger is at no loſs to ſue; and eſtates at common law are guided by thoſe rules that do not extend to copyholds, unleſs there be a particular cuſtom for it. It ſeems when a tenant for life

Cro. El. 717. contr.

[191]

Mo. 753.

4 Co. 23.

Ld. Raym. 1145. Ib. 630.

(*k*) [*Ante*, 117, &c. *poſt*. 256. (*g*); 277. (*x*).]
(*l*) [*Ante*, 118, &c.]

makes

makes a ſurrender in fee, though nothing can paſs by the ſurrender but what he hath; yet when the lord admits the ſurrenderee according to this ſurrender, then he hath a fee, for the lord hath an eſtate to paſs a fee-ſimple (*m*).

2 Leo. 95. Another reaſon, beſides that of paſſing the eſtate by feoffment and livery, for the benefit of ſtrangers, why a diſcontinuance ſhould be made by ſuch paſſing of eſtates, is, becauſe a warranty uſually is annexed to ſuch eſtates (*n*); and if the rightful owner might enter, the benefit of the warranty would be loſt; and warranties cannot be annexed to copyhold eſtates (*o*). Notwithſtanding this, there are caſes that a ſurrender is a diſcontinuance of an eſtate-tail in copyhold lands, and my lord *Coke* ſays, that a ſurrender by cuſtom may bar an * eſtate-tail (*p*): but theſe opinions for diſcontinuing by ſurrender do not ſeem to be grounded upon that reaſon or authority, as the contrary opinion is; for there are more caſes againſt it than for it.

Mo. 352. 596. Cro. El. 717. 484. Brownl. 121. 1 Inſt. 60. b. Mo. 358. 753. 2 Leo. 95. 2 Inſt. 248. a. Cro. El. 148. 90. 4 Co. 25.

* [192]

(*m*) [See *poſt.* 255. N. CXIX.—257. N. CXX.]

And note, that though a perſon be wrongfully admitted to a copyhold, yet he who has right may enter and ouſt him. So if he die ſeiſed, the deſcent will not toll an entry (*ante* 160); nor does it in itſelf amount to a diſſeiſin. See *poſt.* 281. N. CXXIX. and *Cro. Jac.* 36. *pl.* 10.]

(*n*) [See *ante*, 117.]

(*o*) [See *Moore*, 358, 9. *Cro. Eliz.* 380. *pl.* 32. and *ante*, 176.]

(*p*) [See *ante*, 177. N. LXXXI.]

An infant ſurrenders, it is no diſcontinuance, but he may enter (*q*). A copyholder in fee ſurrenders to the uſe of another in fee upon condition; at the next court the ſurrender is preſented as an abſolute one (*r*); and the ſurrenderee being dead, his two daughters are admitted; the ſurrenderor releaſes to them, and then ouſts them. In this caſe were two queſtions: firſt, Whether the preſentment was void? and adjudged it was; becauſe the warrant to ground it was not purſued, and ſo as no warrant at all to make ſuch a preſentment; and then without queſtion, the preſentment had been void: but if the ſurrender were conditional, and the preſentment too, but the ſteward had entered it upon the roll abſolutely, the roll being no eſtoppel nor record, the admittance is good; and the party may plead it or give it in evidence, as the truth of the caſe was. The next queſtion of the caſe was, Whether ſurrenders being the only way of conveying copyhold eſtates, the releaſe ſhould transfer a right? and it was adjudged it ſhould (*s*); for the heirs being admitted, the lord had a tenant to anſwer [193] his ſervices; and the releaſe to that tenant operated to extinguiſh a right; but if a diſſeiſin be made of a copyhold, the diſſeiſee's releaſe will

(*q*) [*Moore*, 597. ca. 814. *acc.*]

(*r*) [See *Co. Copyh.* ſ. 40. 4 *Co.* 25. *a.* and *poſt.* 254. 336.]

(*s*) [See *ante*, 157. N. LXIX.]

ſignify nothing (*t*), becauſe the diſſeiſor is no tenant, and the lord hath admitted no body to anſwer him his fines and ſervices.

4 Co. 28, 9. The lord hath only a cuſtomary power to make admittances according to the ſurrender, and ſo far as he executes that power, the admittance is good; but where he goes beyond that power, he acts without a warrant, and it is void (*u*). But if the ſurrender be abſolute, and the admittance conditional, the admittance is good, and the condition void; if the ſurrender be conditional, and the admittance abſolute, that is void. If the ſurrender be to the uſe of *J. S.* and the lord admit *J. N.* this is void, and he may afterwards admit *J. S.* If he admit *J. S.* and a ſtranger, *J. S.* takes all, for the ſtranger's admittance is void. The reaſon of theſe diverſities is, becauſe when the lord acts contrary to his warrant or power, his acts are void; but when he acts according to his power in one thing, but beyond it in another, for what he acts according to his power he hath a warrant, but for what he acts beyond it he hath no warrant, and ſo it is void.

Ld. Raym. 864.

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1 Inſt. 52. b. Cro. El. 373. 4 Co. 23. a. Co. 10. If copyhold lands have been uſually granted in fee, a grant to one in tail (*w*), for life or years, is good.

(*t*) [See *ante*, 157. N. LXIX. and *poſt*. 301.]

(*u*) [See *poſt*. 255.]

(*w*) [See *ante*, 165. N. LXXIX.

And ſee further, *Com. Dig. Copyh.* (C. 8.) to (C. 12.) *Viner, Copyh.* (P).]

The

The admittance of tenant for life is an admittance of him in remainder (*x*), as to veſt the eſtate, but not to prejudice the lord of his fine (*x*), ſaith my lord *Coke;* therefore upon the death of tenant for life, he ſhall be admitted, and pay a fine; for though his eſtate of tenant for life veſts, yet he was never tenant to the lord for the admittance to which he pays his fine. But if a copyholder in fee ſurrenders to the uſe of one for life, and the tenant for life dies, he may enter without any new admittance, or paying any fine; for he had his old eſtate in him, and he was admitted tenant before (*y*); yet it was ſaid by *Popham*, in *Guppin* and *Bunny*'s caſe, that one fine is due in ſuch caſe; but it is but of little authority; for the point of the caſe was, Whether the admittance of tenant for life was the admittance of him in remainder? and becauſe it was made an objection, that if it were, the lord would loſe the fine, which *Popham* anſwers by ſaying, There is none due in ſuch caſe; which objection my lord *Coke* anſwers by ſaying, That though the eſtate be veſted in the remainder-man, yet a fine is due.

Cro. Jac. 21. 4 Co. 22, 3. Mod. 120. 3 Lev. 308. 1 Leo. 174. Cro. El. 148, 149. 504. 1 Roll. Abr. 505. Stra. 1042.

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The caſe of *Dell* and *Higden*, as it is reported by *Moor*, is alſo contrary to the caſes

Moor 357.

(*x*) [See *ante*, 163. N. LXXVII.]

(*y*) [9 *Co.* 107. *a.* *Co. Copyh.* ſ. 56. p. 129. 1 *Leon.* 174. ca. 244. *acc.*]

before; for there it is ſaid but one fine is due; but otherwiſe it is of a reverſion; which diſtinction is laid quite croſs to what it is in the caſes before, and ſeems to have been a miſtake in the reporter; for as it is againſt the caſes before, ſo it is againſt reaſon. The ſame caſe is reported
4 Co. 23. a. by my lord *Coke*, and no ſuch reſolution is mentioned in his report of it; and it is obſervable, that nothing in that caſe, as reported by *Moor*, ſeems to have been either upon reaſon or authority, but one point, which is the ſingle reſolution, as the caſe is reported by lord *Coke*. A copyholder ſurrenders to the uſe of his laſt will, the copyhold eſtate ſtill remains in the ſurrenderor; for all the deſign of the ſurrender was, that he might diſpoſe of it by will, not to veſt any intereſt in any body, or to give away
Cro. El. 441. the power of diſpoſing of it (z); therefore when a copyholder ſurrendered to the uſe of himſelf for life, then to his ſon for life, then to the uſe of his own laſt will, and the ſon died, and the father ſurrendered to the uſe of another in fee; held, that the copyholder might diſpoſe of it in
[196] his lifetime, notwithſtanding the ſurrender to the uſe of his laſt will.

4 Co. 23. b. Every lord of a manor that hath a lawful eſtate in the manor, whatever it be, either fee, tail, life, years, or at will, may make voluntary grants of copyhold lands which come into their

(z) [See N. LXXXV.]

hands;

hands; which grants ſhall bind thoſe that have the inheritance of the manor, whatſoever defects the lord that made the grant may lie under; provided the ancient rent, cuſtom, and ſervices be reſerved; for if the eſtate a copyholder hath in lands, be an eſtate that hath been demiſed and demiſable time out of mind by copy, by the lord, it is ſufficient to ſupport his eſtate by the cuſtom; ſo that no eſtate is required to be in the lord, but only that the copyhold lands ſhould be demiſed and demiſable time out of mind by the lord for the time being; ſo that be he but lord, it is enough; ſo that the cuſtom, which warrants theſe eſtates, only requires that they ſhould have been demiſed and demiſable by the lord for the time being; but it requires no eſtate to be in that lord in particular, ſo that he be but lord; and cuſtom is the life and ſoul of a copyholder's eſtate; for the copyholder doth not derive his eſtate out of the lord's eſtate, (for then it would determine with his eſtate,) but from the cuſtom, [197] which only requires a lawful lord for the time being, and therefore no regard is had to the perſon of the lord; for if a voluntary grant be made by baron and feme, it ſhall bind the feme, notwithſtanding the coverture. So a grant made by an infant, *non compos*, &c. ſhall bind for ever; ſo if the queen be tenant for life of a manor, and a copyhold of inheritance eſcheat, ſhe may grant it by copy, and that grant ſhall

bind the king; for the cuſtom of the manor ſhall bind the king, ſhe being *domina pro tempore*; ſo it ſeems of any body elſe. My lord *Coke* ſays, the ſucceſſors of biſhops, prebends, vicars, &c. are bound by ſuch a grant, by which it is evident, that eccleſiaſtical perſons are not reſtrained from making grants by copy (*a*). The act requires the leaſes made ſhould be by deed indented, which ſhews the intent of the makers was not to reſtrain grants by copy; and a biſhop being lord, the copyholder's eſtate is more derived from cuſtom than from him; for it determines not with his death. So it ſeems, if it be made without conſent of dean and chapter; for he hath a lawful eſtate, and ſo no defect can vitiate the grant; ſo when
4 Co. 22. a. the temporalties come into the king's hands, he
[198] is bound, which ſhews that a grant by him alone is good; for if the conſent of dean and chapter were requiſite, and had, there is no queſtion but that grant ſhould bind, if it were out of the ſtatute, which it muſt be to bind any body.

4 Co. 24. a. 2 Leo. 45. If any perſon that hath a tortious or defeaſible (*b*) eſtate of inheritance, as a diſſeiſor, or feoffee of a diſſeiſor, tenant at ſufferance in a manor, make *voluntary grants upon eſcheats or*

(*a*) [4 *Co.* 21. *b. Co. Copyh.* f. 34. *Tracts*, 75. See *ante*, 179.]

(*b*) [See *poſt.* 201, 2. 285. 313.]

forfeitures,

forfeitures, they ſhall not bind him that hath the right; for he is not *dominus* within the meaning of the cuſtom, but he only that hath a lawful eſtate; but admittances *upon ſurrenders or deſcents* made by ſuch as have defeaſible eſtates, are good, and ſhall bind him that hath right; for that he was compellable ſo to do, and it was no more than the rightful lord muſt have done. In ſuch grants made upon forfeitures, *&c.* the ancient ſervices muſt be reſerved, and the cuſtoms alſo (*c*). The reaſon of this ſeems to be becauſe there is nothing but cuſtom to warrant the grant by copy, which ought to be ſtrictly purſued as to the eſtates, cuſtoms, ſervices, and tenure, or elſe it is not the eſtate that was demiſed before. But yet if there be a copyholder in fee, it ſeems the lord may releaſe part of the ſervices, and not do any prejudice to the copyholder's eſtate; for there is an eſtate there [199] in being that appears to be the old eſtate; but when the lord grants a new eſtate by copy, ſince it is an eſtate againſt common right, and warranted only by cuſtom, that muſt be ſtrictly purſued to bind the heir. My lord *Coke* ſays, If the ancient cuſtoms and ſervices be not reſerved, the grant by copy will not bind the heir or ſucceſſor. This being ſpoken ſo generally, ſeems to intimate plainly, that if the anceſtor

(*c*) [*Co. Copyh.* ſ. 41. 2 *Bl. Comm.* 370. ch. 22, and *poſt.* 821. (*a*).]

hath a fee in the manor, and he grants without obſerving the cuſtom, his heir may avoid it, becauſe it being a grant againſt common right, the cuſtom muſt be purſued. (*Quære*, *Cro. El.* 662. 1 *Rol. Abr.* 499.) Beſides, he puts heir in the ſame equipage with ſucceſſor; and if he means with the conſent of dean and chapter, then a biſhop had as much power as an anceſtor; if he means without the conſent, yet it is not that ſhould avoid the grant, but the non-reſervation of the ancient tenures. And ſo ſtrict is the law in this point, that if the rent be reſerved in ſilver, where it anciently was in gold; or payable at two feaſts, where anciently it was payable at one feaſt; or if two copyholds eſcheat, one uſually demiſed for twenty ſhillings, and the other ten ſhillings, and he demiſes both for
[200] thirty; ſo if three acres eſcheat, held by three ſhillings, and he grants one by copy, reſerving one ſhilling, this is not good; for the cuſtom, which is the only thing that warrants ſuch grants, muſt be purſued.

4 Co. 23. b. If tenant in tail have a copyhold eſcheat to him, *quære*, if he may not grant it by copy again, ſo as to bind the iſſue? He may; and theſe caſes of reſervations are like the reſolutions in my lord *Montjoy*'s caſe, 5 *Co.* where the ſame points were reſolved upon a particular act of parliament, reſtraining the alienation of tenant in tail, other than for three lives or twenty-one years, reſerving the ancient rent; for there it

was

was adjudged the act ought to be ſtrictly purſued; and ſo here the cuſtom, being a particular authority, ought to be ſo too. But yet ſuch grant by copy ſhall bind the lord during his life, and he having admitted the tenant as a copyholder, he ſhall be ſo to him, though his heir may avoid the grant. There are many caſes of grants by the lord for the time being, that are good and binding, and they ſeem to depend upon the ſame reaſon with the caſes before. If a man makes a feoffment in fee of a manor, upon condition, and the feoffee grants eſtates by copy, and then the condition is broken, yet the grants by copy ſhall ſtand good; for he was *legitimus dominus pro tempore*; and yet it is a rule, that when a man enters for a condition broken, he ſhall be in of the ſame eſtate he was in before; and therefore ſhall avoid all mean charges and incumbrances. But the copyholder doth not claim his eſtate out of the lord's grant, but out of the cuſtom; and if the grants were made after the condition broken, yet it is all one; for before entry the feoffee hath a lawful eſtate, and the feoffor may wave the advantage of the condition broken (*d*). But if a leaſe be made of a manor for years (*e*) upon condition to be void upon the breach of a certain condition, and the condition is broken, no voluntary grants made afterwards

[201]

Dyer 344. a. 4 Co. 24. a.

(*d*) [*Co. Litt.* 218. *a.* and ſee *Co. Copyh.* ſ. 34.]
(*e*) [*Touchſt.* 139. and *Co. Copyh.* ſ. 34.]

ſhall

ſhall bind the leſſor, becauſe the eſtate of the leſſee is void; but if it were for life, &c. then the grants were good. If an infant infeoff one of a manor, and the feoffee makes voluntary grants, the entry of the feoffor ſhall not avoid them. In this caſe, and in caſes of grants made after the condition broken, the grantor hath a defeaſible title; and yet the eſtates are good that are granted to the copyholders; yet my lord *Coke* ſays, that if any one has a tortious or defeaſible eſtate, ſubject to the action or entry of another, his voluntary grants ſhall not bind. To reconcile this, it ſeems my lord *Coke* muſt be underſtood, that when any one hath an eſtate, to which another hath right at preſent, that the owner of ſuch a defeaſible eſtate cannot make voluntary grants. But the infant and the feoffor have no ſuch rights; for the feoffees, in both caſes, have lawful and rightful eſtates in the land, till they are defeated; and before they are defeated the feoffors have no right. A man ſeiſed of a manor in fee hath iſſue a daughter, and dies, his wife, *privement enſeint* with a ſon; ſhe makes grants by copy; afterwards the ſon is born: Feoffee of a manor, on condition to infeoff another, the next day, makes voluntary grants by copy: Lord of a manor commits felony, and after exigent granted he paſſeth away copyhold eſtates, and then is attainted; if he were convict by verdict or confeſſion; in all theſe caſes voluntary grants by the lord are good; for he was

[202]

dominus

dominus pro tempore (*f*). My lord *Coke* ſays, that if a lord acknowledge a ſtatute, and then makes a voluntary grant, the lands are not chargeable. But *Moor* is againſt this (*g*), and there are caſes where the grant of a rent-charge, in ſuch caſe, ſhall bind the copyholder (*b*); but there is ſome difference between the two caſes; for in caſe of a rent, the lands were charged with it by the grant, but in caſe of the ſtatute, the lands were only chargeable, and before the actual charge, were granted over; (*vide Moor* 811.) and therefore may be compared to the caſe where a man makes voluntary grants, his wife ſhall not be endowed of thoſe lands, becauſe the copyholder is in by the cuſtom, which was long before the title of *dower* accrued to the woman. It ſeems the reaſon of this caſe is, becauſe the woman had no title of *dower* to thoſe copyhold lands while they were in the hands of copyholders; and the cuſtom warrants the granting them again, ſince they have been always grantable by copy; and the eſtate would be deſtroyed, if ſhe were dowable of them; *Quære* of the caſe of the ſtatute? But if the heir, before aſſignment of dower, grant lands by copy, then it ſeems ſhe may avoid that (*i*); for ſhe had then

Moor 94.

[203]

Brownl. 208.
1 Leo. 16. 100.
4 Co. 24. a.

8 Co. 63. b.
1 Leo. 16.
Dyer 251. a.
Moor 236, 7.

(*f*) [*Co. Copyh.* ſ. 34.]
(*g*) [So, 1 *Leon.* 4. *Ca.* 8. But ſee the next note.]
(*b*) [See N. LXXXVI.]
(*i*) [See n. (6) to *Co. Litt.* 58. *b. acc.*]

a perfect

a perfect title of *dower* to thoſe lands. Thoſe things that take their eſſence by the lord's grant and intereſt, have no longer continuance than his intereſt has; therefore if the lord, tenant for life of a manor, licence the copyholder to alien, and dies, the licence is gone (*k*). Lord of a manor deviſeth by will that his executors ſhall make voluntary grants of copyhold eſtates to pay debts; they have no intereſt, nor are they *domini pro tempore*; yet the grant is good. Tenant by ſufferance can make no voluntary grants to bind the owner. Grants made after alienation in *Mortmain*, and before the entry of the lord, are good. Grants by a parſon before induction, are not good. So, if after inſtitution and induction he reads not the articles, the grant is void to bind the ſucceſſor (*l*); *tamen quære*, Guardian in ſocage may grant copies, but not a bailiff.

2 Inſt. 58. b. Dyer 151. a. 4 Co. 24. a. Owen 115. 119.

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My lord *Coke* ſays, that if there be leſſee for years of a manor, and he grants lands by copy in reverſion, that unleſs the reverſion happen in poſſeſſion before the leaſe for years expire, the grant is void. The reaſon ſeems to be, becauſe now he makes a grant, which is only to take effect after his eſtate ended in point of poſſeſſion, and ſo will bind the future lord's intereſt, but

(*k*) [2 *Brownl.* 40. *Co. Copyh.* ſ. 34. *Tracts.* 72. *Poſt.* 298, 9. *acc.*]

(*l*) [*Co. Copyh.* ſ. 34.]

let

let his own be at large, without any grant by copy, which by conſtruction they will not admit, but take the rule ſtrictly, that he that is *dominus pro tempore* of a particular eſtate, muſt grant in poſſeſſion. And to this purpoſe is my lord of *Oxford*'s caſe; but it is agreed on all hands, that if it come in poſſeſſion during the continuance of the lord's eſtate, that is good. But there is the caſe of *Gay* ver. *Kay*, where it was held good notwithſtanding it did not come in poſſeſſion (*m*); and there it was ſaid that it was cuſtom only warranted the grant, which might as well warrant a grant in reverſion as poſſeſſion; and if the cuſtom will warrant the grant of a fee-ſimple in poſſeſſion by ſuch particular tenant, why not a reverſion in fee? And the like reſolution was made in Sir *Peter Carew*'s caſe. It ſeems the firſt ground of this law, That the lords for the time being might grant copyhold eſtates, was, becauſe copyholders were only tenants at will; and ſo, though the lord *pro tempore* had but a particular eſtate, and yet granted the lands in fee, yet that was no prejudice, but rather an advantage to the lord that was to have the manor, in reſpect of the ſervice he was to

Moor 95. Cro. El. 661. 1 Roll. Abr. 499. Hetley 54. Moor 147.

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(*m*) [See *Com. Dig. Copyh.* (C. 3.) and n. (4) to *Co. Litt.* 58. b. *acc.*

And as the eſtate of the grantee is veſted immediately on the grant made, though the poſſeſſion is to commence at a future time, it ſhould ſeem that ſuch eſtate is not deveſtible on ſuch contingency.]

have

have done him afterwards; and if he had a mind he might put out his tenant at his own pleaſure. But this uncertainty of the copyholder's eſtate being found inconvenient, it was afterwards adjudged, that he ſhould retain his land, and not be ſubject to the pleaſure of the lord; but the other part of the law was left as before; *viz.* that lords for the time being might grant lands in fee, though they themſelves had
[206] but a particular eſtate; and this cuſtom being continued to this day, is what warrants the grants by copy. For it is moſt certain, thoſe eſtates that are granted by lords that have a particular intereſt, cannot be derived from the intereſts of the lords; for if they were, they muſt determine when the lord's eſtate determines; for *nemo plus juris dare*, *&c.* therefore where there hath been a cuſtom that ſuch lands have been granted time out of mind, by copy in fee by the lord, there the cuſtom gives the eſtate, and the lord is but cuſtom's inſtrument to convey even where he hath them in his own hands,
8 Co. 63. and may, if he pleaſes, retain them. And to this purpoſe is the caſe of *Swain*, which ſeems to be a ſtronger caſe than before. Queen *Elizabeth* ſeiſed of a manor in fee, parcel of which manor was a rod and a half copyhold land, and demiſable by copy for one, two, or three lives, and then the queen demiſed the manor to one for twenty-one years, *exceptis omnibus boſcis*, *&c.* who aſſigned his intereſt to one *J. P.* the queen

queen grants the reverſion to *S.* and his heirs, the leſſee attorns, and then holds a court and grants a houſe and the ſaid rod and a half of land by copy for life, upon which ſome trees grew; and within the manor there is a cuſtom that every copyholder, tenant for life, had uſed [207] to take all trees growing upon his copyhold land for fuel in his copyhold houſe, *&c.* and the copyholder cut down the trees in that rod and half for that purpoſe, and he in the reverſion brought treſpaſs; but it was adjudged for the defendant, that notwithſtanding the ſeverance he might take eſtovers; for when he was in by copy, he claimed by cuſtom, which was above the ſeverance. Therefore if copyholders have uſed to have common in the lord's waſte, or eſtovers in his wood, or any other profit apprender in any other part of the manor; and the lord alien the waſte or wood by feoffment or fine, and then grant an eſtate by copy, the copyholder may take the profits in the hands of the alienee; for the cuſtom unites the incident to the principal, as to the copyholder who claims *paramount* the ſeverance. If the alienation be by fine (*o*), and he doth not claim within five years, it ſeems he is barred. This proves that the copyholder claims by cuſtom, not by the lord; for if he did, the feoffment would bar him of his common; the ſame caſe

(*o*) [See *ante*, 186. and *Fiſher on Copyh.* 120. *acc.*]

is

Moor, 811. is reported by *Moor*. Queen *Elizabeth* ſeiſed of a manor in fee, grants copyholds, parcel of the manor, to one in fee by copy, and then grants the inheritance of thoſe copyhold lands
[208] to another in fee; the copyholder makes his will, and deviſes his lands to *Murrel* the plain-
4 Co. 24. b. tiff in fee, and then ſurrenders his copyhold land to the uſe of his laſt will, into the queen's hands; and between the heir of the ſaid copyholder, claiming by deſcent, and the deviſee, it came to be a queſtion, Who ſhould have the land? And it was reſolved, that though the copyhold was ſevered from the manor, yet it ſtill remained copyhold land; for it would be very unreaſonable that it ſhould be in the lord's power to de-
Cro. Jac. 572. 4 Co. 26. b. ſtroy the copyholder's eſtate; and the granting the inheritance over to another, cannot veſt any greater intereſt in the copyholder, ſo as to make his land free, any more than it can deſtroy the grant by copy: And it was further reſolved, that the copyhold deſcended to the heir, notwithſtanding the ſurrender; for that was void, becauſe the lands were not parcel of the manor; and the deviſe only will not paſs copyhold lands; and the copyholder ſhall pay all thoſe ſervices to the feoffee of the inheritance, that he uſed to pay, without keeping a court; for all thoſe ſervices that ariſe by reaſon of a court, he is excuſed from, becauſe the feoffee can keep no court; therefore ſuit of court, and fines for alienation and admittance are gone; for now

the copyhold cannot be ſold, nor the feoffee make admittance or grant by copy; for he is not *dominus pro tempore*, the land being ſevered from the manor; but all thoſe things that were forfeitures before, are ſo ſtill, if the copyholder be obliged to do them, as waſte, making a feoffment. So if the land were of the nature of *Borough Engliſh*, &c. it ſtill remains ſo (*p*). There is no way for ſuch a copyholder to alien, but by decree in Chancery againſt him and his heirs. As this caſe is reported by *Croke*, it is ſaid, the copyholder's heir ſhall pay a fine, as before; but how can that be, when there can be no admittance (*q*)? And *Coke* is againſt this; the caſe is but ſhortly reported by *Croke*.

Cro. El. 499. Moor 393.

Cro. El. 252.

When the lord grants the inheritance of all the copyhold lands, the grantee of all ſuch may hold a court (*r*), take ſurrenders, and make admittances, though the grantee of one copyhold cannot; and this diverſity is taken by my lord *Coke*, in *Neal* and *Jackſon*'s caſe, reported alſo by *Croke*; and the ſame point is alſo reſolved in another caſe of my lord *Coke*'s; for though it be not a manor ſtrictly, becauſe there are no

4 Co. 26. b. Cro. El. 395.

(*p*) [See 2 *Leon.* 208. ca. 257. 4 *Co.* 25. *a. Robinſ. Gavelk.* b. 1. c. 5. and ſee alſo *poſt.* 212. N. XC. 313. (*l*).

But note, that in this caſe the ſeverance of the copyhold from the manor is merely by the act of the lord; and, as the copyholder's concurrence was wanting, his eſtate ſhall not be prejudiced.]

(*q*) [See *poſt.* 218. (*b*).] (*r*) [See *poſt.* 319.]

freeholders (*s*); yet as to the granting copyhold eſtates, it is a manor; for in truth every manor, [210] conſiſting of freeholders and copyholders, hath two courts, one a *Court-Baron*, and the other a 1 Inſt. 58. a. *Court for Copyholders* (*t*), whereof the ſteward is judge; and therefore what reaſon is there, ſince theſe are in effect two ſeveral courts, and there are ſeveral judges of them (*u*), that the want of freeholders ſhould hinder the grantee from keeping a court for granting eſtates by copy, eſpecially, ſince the conſequence is ſo fatal? and therefore if the lord releaſes the ſervice and tenure of his freeholders, yet the lord may keep a court Cro. El. 39. cont. for his cuſtomary tenants: And ſo though the lord cannot make two manors of one, conſiſting of demeans and ſervices, yet by his own act, he may make a manor of copyholders. This ſeems to be but a diviſion of the courts, which before were in one; for a manor ſeems to be ſo to two intents, as to the freeholders, and as to the copyholders; and ſo in effect ſeems to be a double manor; and therefore are there ſeveral courts in effect, and ſeveral judges, according to the matter that is before them; and ſo it is no new making of a manor to grant the inheritance of the copyholds, but only to put that into the hands of two men, which before was in one; and yet was as much two manors then as now.

(*s*) [See N. LXXXVII.]

(*t*) [See N. LXXXVIII.] (*u*) [See N. LXXXIX.]

But

But notwithſtanding all this, there are precedents that ſuch grantee of the inheritance of copyhold lands, cannot keep court, no more than the grantee of the inheritance of one copyhold. And it is ſaid, that a writ of error was brought upon the aforeſaid judgment; and becauſe the opinions of the juſtices and barons were, that the judgment was erroneous, the party compounded, and the plaintiff in error had the land, and the defendant the corn upon the ground. There is the caſe of *Bright* and *Forth*, where a recovery was ſuffered of a manor, excepting the land in *Bradway*, in which were divers copyholders for life; which part in *Bradway* was afterwards conveyed to the counteſs of *Darby*, who granted a copyhold for life. In this caſe it was reſolved, that the grant was void, becauſe there was no manor; and though it was inſiſted on by one of the counſel, that there was a difference betwixt copyholds of inheritance and copyholds for life only; for when they were life, they could not be granted again; yet it was anſwered by *Anderſon*, that it was all one; and indeed what reaſon can there be for a difference why one ſhould not be granted again as well as another; and why a court may be kept in one caſe, and not in the other? This caſe was *Mich.* 37 & 38 *El.* and in *Trin.* 36 *El.* *Anderſon* was of a quite contrary perſuaſion, and held that a leſſee of the freehold of copyhold lands might hold a court and grant copies;

Cro. El. 103.

Cro. El. 442.

Cro. El. 395.

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which shews there is a material difference between the two cases; or else *Anderson* was of a very variable temper. And indeed, this case doth not seem to contradict the cases before; for there the grant was of the inheritance of all
4 Co. 26. b. the copyhold lands; here but of part; and a man cannot, by his own act, create two several courts and manors (*w*); but when the grant is of all the copyhold lands, there is still but one court for copyholders, which there was in effect, when the manor consisted of freeholders. But be it an authority against the granting lands by copy, it seems to be but weak, being both against
Cro. El. 662. reason and several other cases; for after this it was held, that where a woman was endowed of the third part of a manor, and among the rest of a copyhold tenement, that she might grant it by copy; and for what appears, this was the only copyhold tenement that was granted her. But this being done by act in law, no prejudice could accrue to any body.

4 Co. 26. a. Cro. El. 461. The lessee of a copyhold for a year shall maintain an *ejectione firmæ* (*x*); for the common
[213] law warrants his term, and therefore gives him remedy in case he be ousted. So if the lord gives licence to make a lease, the lessee shall have an ejectment.

Cro. El. 483, 224. 1 Leo. 328. There is the case of *Stephens* and *Eliot*, where it was held, the lessee of a copyholder

(*w*) [See N. XC.] (*x*) [See N. XCI.]

could

could not maintain ejectment at common law; and this is generally ſo; but then this muſt be underſtood of a leaſe without licence, and for more than a year; for by the licence, the lord gives up his power of adjudging about the leſſee's eſtate, becauſe when he hath given licence, it ſeems he hath an eſtate at common law, though of copyhold lands. It is held alſo, in ſome caſes, that if a leaſe be made without licence, the leſſee may maintain ejectment at common law (*y*), for the leaſe is a good leaſe againſt any body but the lord. If a copyholder may by cuſtom make a leaſe, ſuch a leſſee may by common law have *ejectione firmæ*, making mention in his count, of the cuſtom, yet this muſt come on the other ſide, by ſome. In this diverſity of opinion, it will be good to ſee what is plain, that ſo we may more eaſily determine and know what is uncertain. And firſt, it ſeems plain that a leſſee for a year of copyhold land, may have an *ejectione firmæ*: And it is very plain alſo, that where a copyholder may make a leaſe by cuſtom, ſuch leſſee may have ejectment. [214] But the queſtion is, Whether ſuch leſſee need mention the cuſtom in his count (*z*)? It ſeems alſo to be plain, that leſſee by licence may maintain the action for the reaſon before. But the main doubt of the caſe is, Whether a leſſee, without licence, may maintain ejectment upon that

Cro. El. 535, 623, 676. Mo. 569, 539, 679, and 271, cont. Cro. El. 469, 717, 728. 1 Leo. 100, 16.

Mo. 272. cont.

(*y*) [See N. XCII.] (*z*) [See the laſt note.]

reaſon that the leaſe is good againſt every body but the lord. And firſt, there is the caſe of *Goodwin* ver. *Longhurſt*, where it was held, by all the judges, that ſuch a leſſee might; but the caſe itſelf was upon a leaſe that was licenſed. And it is ſaid, in the caſe of *Haddon* ver. *Arroſmith*, that ſuch a leſſee may have ejectment. In the caſe of *Collins* ver. *Harding*, it is ſaid, that *ejectione firmæ* lies of copyhold lands; but it is not ſaid upon what leaſe. In the caſe of *Spark*, it is ſaid by *Popham*, that it lies in ſuch caſe: In the caſe of *Stopper* ver. *Gibſon*, it is adjudged, that the leſſee of a copyholder ſhall maintain an *ejectione firmæ*; but it is not ſaid, whether upon a leaſe for a year by cuſtom, or licence; ſo that here is no caſe when this was the point of the caſe, and but one caſe where the judges were of that opinion.

Owen 17. Cro. El. 535.

Cro. El. 461, 623, 676. Mo. 539.

On the other ſide there is the caſe of *Stephens* and *Eliot*, where it was held *per cur.* that a copyholder could not have ejectment; and it is ſaid ſo in *Laughter*'s caſe, and in *Harriſon*'s caſe, that ejectment lies not of it, unleſs the plaintiff declare on the cuſtom; and all thoſe caſes that are for declaring upon the cuſtom are againſt it. And this opinion is ſupported by theſe reaſons, that when a copyholder makes a leaſe, he determines his will, therefore may the lord enter (*a*);

Cro. El. 394, 483, 524.

[215]

Mo. 679. 2 Brownl. 10, 40. 1 Inſt. 57. a.

(*a*) [See *ante*, 213. N. XCII.]

and

and if the leſſee enter, he is a diſſeiſor (*b*). And my lord *Coke*'s ſaying, that a leſſee for a year may have ejectment, excludes others from having it.

A cuſtomary manor may be held by copy of court-roll (*c*), *ad voluntat.* &c. and ſuch a lord may grant copies; but it ſeems it muſt be of ſuch things as have been uſually demiſed by him; for it ſeems he cannot grant all his demeſnes by copy, without they have been uſually demiſed (*d*): For though they have been demiſed time out of mind by the ſuperior lord by copy, that will not warrant his demiſe by copy; becauſe the cuſtom muſt be, that time out of mind they have been granted *per Dominum Manerii*; now they have not been granted by him that is lord of the manor, though they have by the ſuperior lord. This caſe ſeems to prove that a cuſtomary manor to hold courts, &c. may be without any freehold ſervices (*e*); and it may as well be objected againſt ſuch a lord's holding courts, that he hath no manor, becauſe no freehold ſervices; but it ſeems he may have freehold ſervices.

1 Bulſt. 57. 11 Co. 18. Cro. Ja. 260. cont. 327. Yelv. 190. cont. Theſe caſes are thus reconciled, that a cuſtomary court may be held by one that hath ſuch a manor, but not a court-baron.

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A copyholder may ſurrender by attorney in full court (*f*); for of common right a copyholder

(*b*) [See *poſt.* 231, 2. 319. (*y*), *contra.*]

(*c*) [Mr. *Hargrave*, (n. (2) to *Co. Litt.* 58. b.) obſerves That "this is denied in *Cro. Jac.* 268. and is a point which has been much controverted:" and refers to *Vin. Copyh.* (E), and *Com. Dig. Copyh.* (C. 1).]

(*d*) [See *ante*, 212. N. XC.]

(*e*) [See *ante*, 210. N. LXXXVIII.]

(*f*) [See N. XCIII.]

may ſurrender in court, which is common law; as he may make a leaſe for a year without licence; and as an incident to this power, the law allows him to do it by attorney; and a copyholder may be admitted by letter of attorney; but this is not of common right; for every copyholder is to do fealty (*g*), which the attorney cannot do for him; therefore the lord may refuſe to admit by attorney (*g*); but if he do admit him, it is a good admittance. But where there is a cuſtom for a copyholder to ſurrender by the hands of two cuſtomary tenants into the lord's hands, there he cannot ſurrender by attorney into the lord's hands by the hands of two cuſtomary tenants; for ſuch a ſurrender is warranted only by the cuſtom; and therefore unleſs there be a cuſtom alſo to do it by attorney, the common law cannot give that as an incident, for it allows of no ſuch ſurrender.

4 Co. 26, 27.

The lord himſelf may make admittances or grants at any place out of the manor, for he is not confined any more than any other perſon, to grant an eſtate at will where he pleaſes; but there being only cuſtom which enables the ſteward to make ſuch admittances or grants, that which he does he muſt do upon the manor, unleſs there be a cuſtom to keep a court out of

[217]

Ld. Raym. 92. Ib. 76.

(*g*) [See *poſt.* 252, 285. And it is now become uſual to reſpite fealty. And ſee *Harg.* n. (5) to *Co. Litt.* 68. *a.* and n. (5) to 68. *b.*]

the

the manor, which will enable him as well as the cuſtom to do it upon the manor.

It is ſaid, that a ſteward may grant copies as well out of court as in; *ſed quære* (*b*)? Cro. El. 103.

Feme copyholder for life takes huſband who doth waſte, this is a forfeiture of the woman's eſtate; but if a ſtranger do it without the aſſent of the huſband, it is no forfeiture. Ld. Raym. 159. 4 Co. 27. a.

If a copyholder be ſeiſed, by force of ſeveral copies, of ſeveral parcels, by ſeveral tenures, if he commit a forfeiture in one, it is no forfeiture of the reſt: As if he commit waſte in part of black acre, it is a forfeiture of all that acre; and by the ſame reaſon, if waſte be committed in one acre, it is a forfeiture of twenty acres, if held by one tenure; for the condition in law annexed to the whole eſtate is broken; and ſo the lord may enter for the forfeiture: But where there are ſeveral tenures, though they be in the hands of one copyholder, there are ſeveral conditions in law annexed to the ſeveral parcels, and therefore the breach of the one is not ſo of the other. If ſuch a copyholder ſurrenders to the uſe of another, and the lord admits him by one copy, *tenend. per antiqua ſervitia*, the ſeveral tenures remain; but if the admittance were by one tenure, then it ſeems a forfeiture of part would reach the whole, becauſe the condition in law is but one. So if ſeveral copyholds eſcheat 4 Co. 27. a. [218]

(*b*) [See *poſt.* 251.]

to

to the lord, and he grants them again *tenend. per antiqua ſervitia* to A. and he commits a forfeiture in part, this extends not to the whole.

He that comes in by admittance upon another's ſurrender, is in by him that made the ſurrender, and ſhall ſuppoſe himſelf in the *Per* by him (*i*).

4 Co. 27, 28. Where a copyholder hath ſeveral parcels of land by ſeveral tenures, the lord ought to aſſeſs and demand his fines ſeverally (*k*); for the fine for one may be reaſonable, for another unreaſonable: And if ſuch a copyholder ſurrenders to the uſe of another, and he is admitted *tenend. per antiqua ſervitia*, the fines muſt be ſeverally aſſeſſed.

13 Co. 2. No fine is due either upon a deſcent or ſurrender, till admittance, for that is the cauſe of the fine (*l*); and therefore if after that the tenant deny to pay, it is a forfeiture (*m*); but if the fine be uncertain, the tenant is not bound to pay it preſently, becauſe he could not tell what it would be; but he muſt pay it in a convenient time, or elſe the lord may appoint a day for him

Stra. 447.

[219]

(*i*) [See N. XCIV.]

(*k*) [See *Dougl.* 722. Grant *v.* Aſtle; and the caſe of Serle *v.* Marſh, in *Fiſh.* on *Copyh.* Append. 280, 282. *acc.*]

(*l*) [And, conſequently, in thoſe caſes where there is no neceſſity for admiſſion, no fine can be due. See *ante*, 157. N. LXIX. and *poſt.* next page, and 289. 3 *Burr.* 1543. 2 *Durnf.* and *Eaſt*, 485. *Kitch.* 122. *a.*]

(*m*) [*Poſt.* 291, 2.]

to

to pay it on; but a fine certain he must pay presently upon admittance (*n*). *Note*; The lord ought to assess a certain time and place for payment of a fine uncertain; for the tenant cannot carry it always about him, and he ought to demand it. Hob. 135.

When the fine is uncertain, it ought to be reasonable, or else it is no forfeiture if the tenant do not pay it. As this case is reported by *Croke*, it is said, when a fine is certain, the heir ought to tender it upon his prayer to be admitted (*o*). As it is reported by *Coke*, it is said no fine is due until admittance (*o*), and that admittance is the cause; and as *Croke* reports it, so has *Moor*, 623, and if he do not pay it, it is a forfeiture. This seems to contradict what he said before; for if it cannot be a forfeiture until admittance, the demand of the fine must be of the person of the tenant to make a forfeiture. So of rent. Cro. El. 779. Stra. 1042. 13 Co. 3. Two years rent upon a surrender held unreasonable. Hob. 135. 4 Co. 29. b.

When a surrender is made to the use of one, without expressing what estate the *cestuy que use* shall have, he shall only have an estate for life (*p*), except there be a particular custom to the contrary; as if there be a custom that he that hath

(*n*) [See *Moore*, 622. ca. 851. 4 *Co.* 27. *b.* &c. *Cro. Eliz.* 779. and *post.* 227. (*n*).]

(*o*) [The lord cannot refuse admittance till the fine be paid: He must *first* admit, and then demand his fine. See 1 *Roll. Abr.* 506. *Copyh.* (A); and 2 *Durnf.* and *East*, 485. and *ante*, 218. (*l*).]

(*p*) [See *ante*, 3. and N. VIII. *post.* 254. (*b*). 258.]

an

an eſtate *ſibi & ſuis*, he ſhall have fee; this cuſtom is good, and ſo of the like. The limitation of the eſtate is always added to the uſe, not to the ſurrender into the lord's hands; for a ſurrender of the eſtate gives up all the copyholder hath to the lord (*q*). Put the caſe then, that the ſurrender was made to the lord for life, to the uſe of another for life, what eſtate would the lord then have, and what could he make over? Or *quære*, Whether the words *for life* would be of any ſignificancy, though he that is admitted be in by the ſurrenderor? Yet may a man ſurrender to the uſe of his wife, for ſhe takes the eſtate from the lord, as an inſtrument to convey the eſtate to her (*r*); and ſo it comes not within the reaſon of other caſes, that they being but one perſon cannot contract; for he gives the eſtate to the lord, and he admits the feme to it.

Style 145. 4 Co. 29. b.

If one ſurrenders, and dies, if the ſurrender be preſented according to the cuſtom, it is good; otherwiſe void (*s*). So if the cuſtomary tenants, by whoſe hands the ſurrender was, die, yet if the ſurrender be preſented upon good proof, it is ſufficient (*t*).

(*q*) [See *Co. Litt.* 59. *b.* and n. (2), *ante*, 155. N. and 157. N. LXIX.]

(*r*) [See N. XCIV*.] (*s*) [See N. XCV.]

(*t*) [If they remain alive, the ſurrender ſhould, regularly, be preſented by thoſe who took it. See *Co. Copyh.* ſ. 40, and *poſt.* 279, 280.]

If

If he, to whoſe uſe the ſurrender was, die before admittance, yet his heir ſhall be admitted (*u*); for upon admittance the eſtate is in the *ceſtuy que uſe* from the ſurrender by relation (*w*). [221] 2 Sid. 38, 61.

Where grants have been made by copy for life, a grant *durante viduitate* is good, but not *vice verſa*. 4 Co. 25. a. 29. b. Dyer 4. Co. 30.

A ſteward is a good ſteward to all intents and purpoſes, that is retained by parol (*x*) either to take ſurrenders, or make admittances upon voluntary grants: But the lord may diſcharge ſuch ſteward when he will, that is, if he retain him generally; yet a retainer generally by patent ſeems to be for life. The king's auditor or receiver hath no power by parol to retain a ſteward to hold the king's courts; but he ought to have letters patent of the ſtewardſhip of the

(*u*) [See *poſt.* 288. *ante*, 218. N. XCIV. Caſe of Hale *v.* —— Hil. 1655, C. P. cited by *Holt*, C. J. in Clements *v.* Scudamore, 2 *Ld. Raym.* 1025. 1 *P. Wms.* 65. and *Salk.* 243. *Robinſ. Gavelk.* b. 1. c. 6. p. 98. *Com. Dig.* Boro. Engl. 4 *Co.* 29. *b. Viner, Copyh.* (B. e), p. 191. and next note, *acc.*]

(*w*) [See the caſe of Vaughan *d.* Atkins *v.* Atkins, 5 *Burr.* 2764. *Ante*, 218. N. XCIV. *Poſt.* 288, 9. and the books referred to in the preceding note.]

(*x*) [*Co. Copyh.* ſ. 46. *Co. Litt.* 61. *b. Dyer*, 248. *a.* pl. 79. 4 *Co.* 30. *b.*

And ſuch ſteward, retained by parol only, may take a ſurrender as well out of court as in; ſo he may take the examination of a feme covert, &c. without alleging a ſpecial cuſtom; and that though the ſurrender be to his own uſe. See *Cro. Jac.* 526. *Cro. Eliz.* 717. *Harg.* n. (6) to *Co. Litt.* 59. *a.*]

manor

manor to make voluntary grants. The king's ſteward *ex officio* may make voluntary grants (*y*), much more may the ſteward of a common perſon (*z*), if he do not diminiſh the ancient rent (*a*).

Cro. El. 699. 4 Co. 30. Mo. 410. Cro. El. 426. 4 Co. 31.

The caſe of *Shaw* ver. *Thomſon*, as it is reported by lord *Coke*, is an authority that debt lies not in the king's courts for damages (*b*) above 40*s.* but the remedy was in chancery, or in the court of the manor; as it is reported, [by *Moore*] it is adjudged, that debt doth lie in the king's courts, becauſe the court-baron doth not hold plea of things above 40*s.* As it is reported by *Cro.* the queſtion was, Whether the damages were well aſſeſſed to 50*l.* when the court-baron cannot hold plea of above 40*s.*? and it was held they were.

Stra. 786.

[222]

4 Co. 31.

Underwood may be granted by copy or any other thing, parcel of the manor; as a fair appendant to the manor.

(*y*) [See 4 *Co.* 30. Harris and Jay, *acc.*]

(*z*) [See *Moore*, 112. ca. 252. *Cro. Eliz.* 699. Though he be ſteward by parol only. See *Moore*, *ubi ſup.*

So his deputy may grant. *Ibid.*

Or his deputy's ſubſtitute. 1 *Leon.* 288. ca. 394; and ſee 1 *Lord Raym.* 658. *Com. Rep.* 84. But a ſteward cannot grant in oppoſition to the command of his lord. *Cro. Eliz.* 699. and *poſt.* 315. (*p*).]

(*a*) [For if he does, it will be void. *Cro. Eliz.* 699, 700. *ante*, 198.]

(*b*) [—— recovered in the court of the manor.]

Cuſtom

Cuſtom for one copyholder to have common, &c. in his lord's ſoil, is good; for all the other copyholders may have forfeited their eſtates or intereſt therein.

If copyholds come into the lord's hands, if he make a leaſe of them for life or years, by deed or without deed, the copyhold is deſtroyed (*c*), becauſe during thoſe eſtates it was not demiſed or demiſable by copy. So if he make a feoffment in fee upon condition, and enter for the condition broken, yet it is not grantable by copy; but if he keep them in his hands never ſo long, or grant them at will, they may regrant them again by copy; ſo if the interruption be tortious, as if the lord be diſſeiſed, and the diſſeiſor dies ſeiſed, and after the lord's eſtate is recontinued, the lord may grant by copy; ſo it ſeems if the diſſeiſor had made a feoffment in fee. But if they be extended in the lord's hands, or his wife be endowed, though the interruptions be by act in law, yet they ſhall never be granted again.

4 Co 31.

Carthew 428.

3 Leo. 108.

(*c*) [For the lands are immediately enfranchiſed and become of a more honourable nature. See *Carth.* 428. 2 *Co.* 17. *a.*

Copyholds are, in the eye of the law, but eſtates at will; and ſhall, therefore, be merged by the grant of the freehold. See 3 *P. Wms.* 9. Dunn *v.* Green.

See further of the Extinguiſhment of Copyholds, *Com. Dig. Copyh.* (B. 3) and (L); *Viner, Copyh.* (F. b); *Fiſher on Copyh.* c. 13. *Lex Cuſt.* c. 23. *Co. Copyh.* ſ. 62.]

2 Co 17. a. If the copyholder accept a leaſe for years from the lord, the copyhold is for ever gone (*d*); and by the ſame reaſon a releaſe upon that leaſe will paſs the freehold and inheritance to him: But if a leaſe be made of the manor, and of a copyhold tenement by expreſs name, yet this will not exſtinguiſh the copyhold (*e*).

Cro. Car. 521. 1 Keb. 720. 4 Co. 126. b. Hob. 215, 181. Cro. Ja. 573.

If the copyholder takes a leaſe for years of the manor, his copyhold hath no continuance, but he may grant it by copy to another (*f*): If after the copyhold comes to the lord's hands, he aliens the manor by fine, *&c.* the alienee may regrant it (*f*).

The lord ſhall not have the cuſtody of lunatick perſons lands, unleſs there be a cuſtom for it (*g*); neither ſhall the king have it, for the prejudice that would enſue to the lord (*g*).

Ut ſupra.

Hutton 18. 1 Rol. Ab. 502. Noy, 29. In caſe of a widow's eſtate, it is ſaid to be reſolved and agreed in *Lex Cuſt.* 156. that no fine is due. *Quære* of this? for though the eſtate

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(*d*) If copyhold lands be in the hands of a ſubject, who is after preferred to dignity royal, the copyhold is extinct; for it is below the majeſty of a king to perform ſervile ſervices. And yet after his deceaſe, the next who hath right ſhall be admitted, and the tenure ſhall be revived in him. 2 *Siderfin* 82.

(*e*) [See N. XCVI.]

(*f*) [4 *Co.* 31. *b. acc.* And ſee 1 *Roll. Abr.* 498. *Copyh.* (B) and *Com. Dig. Copyh.* (B. 3).]

(*g*) [See *Hob.* 215. *Cro. Jac.* 105. ca. 43. *Dyer* 303. *a.* pl. 46. *Hutt.* 16, 17. 4 *Co.* 126. *b. Ante*, 186. *Poſt.* 307, 8.]

be

be adjudged in the woman, yet that is no argument ſhe ſhall pay no fine, for the eſtate is in the heir by deſcent, and yet he ſhall pay a fine, and both are compellable to be admitted; and then why ſhould they not pay a fine (*b*)? The like of dower and curteſy.

A copyholder had common in his lord's waſte; the lord grants and confirms the copyhold land to him and his heirs, *cum pertinentiis*; adjudged the common was extinct, being annexed to his cuſtomary eſtate, by the cuſtom, which eſtate being determined, the common alſo is, and cannot continue without words to that intent, and *cum pertinent.* will not do; for the common was not appurtenant to the freehold eſtate granted by the lord; therefore care ought to be taken in infranchiſing copyhold eſtates, to add words to continue common and other profits *apprendre* to the copyholder after the infranchiſement (*i*).

Hob. 190. Cro. Ja. 253. Yelv. 189. Noy 136. 2 Rol. Abr. 61. 2 Brownl. 210. Mo. 667. Cro. El. 794. 2 Vernon 250.

Poſt. Carter's Rep. 6, 7, 22. 1 Vernon 393.

In this caſe is cited the caſe of *Ford* ver. *Ward*, where the lord granted to his copyholder the freehold of his copyhold, by the words of (Grant unto him all the lands, tenements and hereditaments thereto appertaining, and thereto uſed and occupied); and it was held he loſt his copyhold (*k*); the reaſon ſeems to be, becauſe

Cro. Ja. 253.

(*b*) [See N. XCVII.] (*i*) [See N. XCVIII.]

(*k*) [" His copyhold :"—Perhaps it ſhould have been " his common :" as in that caſe it was adjudged that, as the copyhold was extinguiſhed on the conveyance of the freehold, the common was, in conſequence, loſt; the eſtate thus ceaſing to which it was annexed. See the caſe of Marſham v. Hunter, *Cro. Jac.* 253.]

the common was nothing appertaining, &c. to the freehold he granted: But as this caſe is re-
Mo. 667. ported by *Moor*, no other words are put in (*l*) all commons, &c. appertaining to the ſaid meſſuage; and there another reaſon is added, *viz.* now he claims by the lord who cannot have common in his own ground. But this is a reaſon only where the common is in the lord's ſoil; but the
1 Brownl. 173. 2 And. 168. other holds where it is in another's ſoil, which is a much ſtronger caſe; for as it ſeems in ſuch caſe there is no way to continue the common: For by the grant of the freehold it is gone, and the lord can make no new grant of it, but in his ſoil he may.

Co. Cop. 16a. not law. My lord *Coke*, in his Treatiſe of Copyholds, ſaith, that if the lord demand his rent of the co-
Stra. 447. pyholder, and he ſaith that he wants money, and intreats the lord to forbear until he be provided; that this is a forfeiture. And that if the lord make a continual demand upon the land, and the copyholder is not there, this is a forfeiture; but if he demand once, and nobody is there, this is no forfeiture. Now as in other reſpects, ſo in this, copyhold cuſtoms are not to be expounded by the ſtrict rules of law, which appears from what *Coke* ſays, who owns that if the copyholder be not there upon the land, it is no forfeiture; yet in caſe of a condition for re-entry,

(*l*) ["In all commons:" It ſhould have been "than all commons. See *Moore*, 667. *pl.* 915.]

that

that had been a forfeiture to entitle the feoffor to an entry. But the condition annexed to copyhold eſtates, is a condition in law; for the eſtates of copyholders are but an eſtate at will, and yet the law makes an inheritance of it, and puts it out of the power of the lord to determine their eſtates, ſo long as they do their ſervices. But when they fail doing this, the law no longer protects their eſtates, but ſuffers the lord to enter; but then this refuſal to do their ſervices muſt be wilful, as it ſeems, which will amount to a determination of the will of the copyholder, and not any other refuſal, if he ſignifies his deſign to pay, and ſo to continue his will; and therefore the caſe above, where the copyholder intreated the lord to forbear, is not law (*m*). To prove which, there is the caſe of *Criſp* and *Fryar*, where that was held no forfeiture; but the caſe itſelf was upon a demand upon the land for three years rent, no body being there, whether it were a forfeiture or no? and as the caſe is reported by *Croke*, one judge was of opinion it was no forfeiture, becauſe it was only a denial in law; and that the condition in law was not annexed to the non-payment, but to the wilful refuſal: But two other judges held it to be a forfeiture, and that a denial in law is a forfeiture, as well as a denial in deed; *ſed adjurnatur*; and no more of it is ſaid in that book. But the caſe is alſo reported in *Moor*; Moor 623. 1 Roll. Abr. 506. Cro. El. 505. [227] Moor 350.

(*m*) [See N. XCIX.]

and there it is said to be held a forfeiture by the same two judges; but the reason given was, because so long a non-payment amounted to a wilful refusal.

My lord *Coke* says, that a demand upon the land is no forfeiture, if the tenant be not there, unless it be a continued demand: And there is the case in *Hobart*, where it was adjudged, that a demand for rent or fine must be of the person of the copyholder (*n*), which proves that a denial in law will not make a forfeiture. The case was, the lord assessed a fine of twenty nobles upon his copyholder, and appointed him to pay it to his bailiff at his house within the manor, three months after; and the fine being not paid at the time appointed, he entered without any demand.

Hob. 135. Moor 623. Cro. Jac. 617. con. 4 Co. 27, 28.

Latch. 122.

The case of *Williams* was this; the lord demanded the rent of the copyholder; he answered, he had it not with him then, but that he would pay it as soon as he could; the lord said, pay it at my house at such a day, which house was within the manor. Adjudged, first, that [228] the copyholder's words (though a denial in law) was no forfeiture, but his non-payment at the day assigned was a forfeiture, because it amounted to a wilful denial, for he promised to pay it, and failed; but had the place assigned been out of the manor, it had been no forfeiture. This case

(*n*) [See *ante*, 219.]

is

is apparently different from that next preceding; for here was a demand of the copyholder, himſelf; there was no demand at all. There is the caſe of *Caſton* and *Utbert*, where a widow had copyhold lands, and divers perſons came for the rent, whom ſhe put off with delays; at laſt comes a young gentleman and demands it; ſhe anſwered that ſhe did not know him, but if he would dance before her, if ſhe liked his dancing, ſhe would pay him; this denial was adjudged no forfeiture, not being wilful. Lit. Rep. 268.

If the eſtate of the lord ceaſe by limitation of uſe, and the uſe and eſtate of the manor are transferred to another, who demands the rent, and the copyholder denies to pay it; no forfeiture, without notice to him of the change of the uſe and eſtate. The like law of a bargain and ſale of a manor inrolled, *&c.* 8 Co. 92.

It ſeems the law is the ſame concerning leaſe and releaſe; but if the manor be in poſſeſſion of the lord himſelf, and not in the hands of any leſſee, and he makes a leaſe, and then releaſes, the leſſee having poſſeſſion; *quære*, if the copyholder denies paying, if this is not a forfeiture, becauſe the entry of the leſſee is notice as much as livery, *&c.*? [229]

Non-appearance at court after ſummons is a forfeiture of the copyhold; but without warning it is no forfeiture, but only negligence; and after ſummons it is a forfeiture, without an expreſs refuſal, as in caſe of rent: For the conſe- Moor 350. 3 Bulſt. 80. 1 Rol. Rep. 256, 429. Noy 5. Cro. El 503.

quence is more fatal in this case, because without the copyholder's attendance there can be no court.

1 Leo. 104. It is held *per tot. cur.* in Sir *J. Braunche*'s case, that a general warning within the parish is sufficient; so that if the copyholder doth not come, let him live where he will, it is a forfeiture, because his tenant may send him word: It was there likewise held, that sickness, or a great office, may excuse the copyholder's attendance, and that services could not be done by attorney (*o*), but an attorney may essoin. But as to the point of general warning, four days notice had been adjudged sufficient time; and how can a copyholder be summoned in that time that lives 200 miles off? therefore it was held in the case of *Taverner* ver. *Cromwel*, that general notice is not sufficient, but a personal summons (*p*): The like in *Crisp* and *Fryar*'s case. This opinion seems most reasonable. If a copyholder be in debt, and is afraid of being arrested, or is a bankrupt, and keeps house, these are good excuses. *Vide* 3 *Leo.* 107.

Cro. El. 353, 505, 506.

[230]

Co. Cop. 159.

The lord comes to the copyholder, and requires him to do his services, and the copyholder answers, if they are due, he will do them, but it shall be tried at law first, whether they are due by law; this is no forfeiture, being no wilful

Latch. 122. Style 141.

(*o*) [*Supplement to Co. Copyh.* f. 18. and *ante*, 184. (z).]
(*p*) [*Fisher on Copyh.* 93. *acc.*]

refusal.

refuſal. If the copyholder ſay, if it be a court, he will appear at it, if not he will not, this is no forfeiture; but if there were no controverſies about the court, but that is only uſed as a ſhift, then it ſeems it is a forfeiture.

If a copyholder refuſe to be admitted, it is a forfeiture. If a copyholder come not to be admitted where the cuſtom of the manor is that every heir ſhall come to court to be admitted; and if he do not, proclamations ſhall be made for him to come in; and ſo in the two next courts, or elſe that the lord ſhall ſeiſe; this is a forfeiture, for the cuſtom is a good cuſtom (*q*), being only to compel the tenant to come in and be admitted. But [otherwiſe] if the heir be beyond ſea at the time of the deſcent, or within age, *non compos*, or in priſon. But it ſeems ſuch cuſtom would bind a feme covert (*r*), being like to the caſe of fines at common law; in which caſe they only were not bound who could not make claim; but a feme covert having a huſband, may claim by him, and therefore ſhe was bound. But if ſuch heir be within *England*, at the time of the firſt proclamation paſſed (*s*), and then go beyond ſea, he ſhall forfeit; for he

Style 387. 8 Co. 100. Cro. Jac. 101. 1 Leo. 100. 4 Leo. 30, 31.

[231]

(*q*) [See N. C.]

(*r*) [The copyhold eſtates of femes covert are preſerved from forfeiture in theſe caſes, and the manner of their admiſſion, and the lord's remedy for his fines, preſcribed and regulated by the *ſtat.* 9 *Geo.* c. 29.]

(*s*) [See 8 *Co.* 100. *b.*]

had warning, and ought to have come in, and not have disabled himself from making claim. But if he had gone beyond sea, after the descent (*t*), and before the first proclamation, this had been no forfeiture; for at the time of the court he is to make claim; *sed quære*. It was said by *Williams*, that because the lord cannot have any services done him in the mean time, that the lord may seise the lands and take the mean profits, and shall not be answerable for them. *Sed quære* (*u*).

Cro. Jac. 101. 226.

If a jury or homage refuse to present the articles, according to their oath, this is a forfeiture of their copyholds, for the prejudice thereby ensuing. If the copyholder make a lease (*w*), it is a forfeiture, yet it is no disseisin to the lord (*x*), which is plain from the cases that say such a lease is good against every body but the lord; for it could not be a lease at all, if it were a disseisin. It is a forfeiture, because the copyholder has broke the custom of the manor, by bringing in a tenant without any admittance; but it is no disseisin in favour of the lord, since the copyholder hath such estate

Dyer 211. 6. Noy 92. Cro. El. 535. 676.

[232]

(*t*) [See N. CI.]

(*u*) [See *Carth.* 41—5. 3 *Durnf.* & *East*, 162. and *post.* 308. N. CLXI.]

(*w*) [*i. e.* A lease not warranted by custom. See *ante* 212, &c.]

(*x*) [See *post.* 309. (*x*).]

as

as may laſt much longer than the leaſe, and not a bare leaſe at will.

A leaſe that will make a copyholder forfeit his eſtate, ought to have a certain beginning and end, or elſe it is a void leaſe, and can convey at moſt but an eſtate at will, which is no forfeiture. A copyholder for life makes a leaſe for a year, and then makes a leaſe to the ſame party for another year, to commence one day after the firſt year, and then ſurrenders his copyhold to the lord; it was adjudged the ſecond leaſe was a forfeiture; for it is not warranted by cuſtom, and ſo being out of the cuſtom, it is, as every other leaſe for years, a forfeiture; for though it be not to commence till after the firſt leaſe ended, yet the land is charged with a double intereſt, one *in præſenti*, the other *in futuro*; which is againſt the cuſtom, and ſo a forfeiture (*y*). Secondly, It was adjudged this leaſe was void againſt the lord, who had the land by the ſurrender, and when the lord enters by force of the ſurrender, he is in by title *paramount* the leaſe. But it ſeems the firſt leſſee ſhall enjoy his leaſe, or elſe it were in the power of the lord to defeat his own grant. There is nothing ſaid of this; but the caſe in *Rolle* is, That the leaſes were executed at one and the ſame time; and then the leſſee, being

1 Bulſt. 189.

Jones 249. 1 Rol. Abr. 510. 1 Bulſt. 215.

1 Rol. Abr. 508. [233]

1 Roll. Abr. 508.

(*y*) [See 1 *Roll. Abr.* 507, 8. *Copyh.* (D), *pl.* 8, &c. and *poſt* 234.]

particeps

particeps criminis, may perhaps forfeit; and as the caſe is reported by the reſt, the leaſe was made to him to commence in reverſion; and ſo he is as much party to the wrong as in the other way; and ſo it ſeems the lord may enter preſently. The ſame point of a leaſe for a year except a day, adjudged a forfeiture.

Cro. Jac. 308.

Cro. Jac. 301.

A. makes a leaſe of his copyhold to one for a year, and then covenants the leſſee ſhall enjoy it *de anno in annum*. No forfeiture, only a covenant and not a leaſe. *Quære*, and ſee the book; for the words *Covenant and Grant* make a leaſe, *&c.* But in another caſe it was held, that theſe words by conſtruction might make a leaſe, where the lands might be let; but otherwiſe where the lands could not be let; which diſtinction ſeems very reaſonable; for the words themſelves do not import a leaſe; and it would be a very injurious conſtruction to make them a leaſe, and ſo a forfeiture, when they only import of themſelves a covenant (z).

Cro. Car. 207.
Cro. Jac. 92.

[234]

2 Keb. 267.

A leaſe for years by parol, to commence *in futuro*, is a forfeiture, becauſe of the unlawful contract made to the lord's diſheriſon.

Cro. El. 499.
351.
1 Roll. Abr. 508.
Moor 392.

The lord gives licence to his copyholder to make a leaſe for twenty-one years, to begin

Moor 184.

(z) [Mr. *Hargrave* remarks that "though in general a "covenant amounts to a leaſe, yet it ſeems harſh to give "ſuch a conſtruction where a leaſe amounts to a forfeiture, "and the intention of the parties may have effect by way "of agreement." N. (4) to *Co. Litt.* 59. *a.*]

next

next *Michaelmas*; the copyholder makes a leaſe accordingly; but before *Michaelmas* makes another leaſe by indenture to another for twenty-one years to begin at *Michaelmas* next; it was held by *Anderſon* that this was a forfeiture; *ſed quære*; for the leaſe was void in point of intereſt, and only worked by way of eſtoppel betwixt the parties; and if no intereſt paſſed, how could it be a forfeiture? yet had the firſt leaſe been ſurrendered, the ſecond leaſe would have taken effect, and then the land had been charged with a leaſe without licence; but till that happened, the land was charged with nothing in point of intereſt. And this is not like the caſe of a future leaſe; for there the land is bound preſently; and though this may happen to be a charge, yet the ſuppoſition is foreign, and ought not to be intended to work a forfeiture. If a man make a deed of feoffment of his copyhold, or a demiſe for life, without livery, no forfeiture, becauſe without livery [235] nothing paſſes (*a*); but by a leaſe for years an intereſt paſſes by the delivery of the deed, and therefore that is a forfeiture (*a*). 1 Inſt. 59. a.

My lord *Coke* ſays, if tenant for life of a copyhold ſuffer a recovery by plaint in the lord's court, as a copyholder of inheritance, this is a forfeiture, but *Lex Cuſt. page* 206. ſays it was Co. Cop. 163. Mod. 199.

(*a*) [See *Co. Copyh.* ſ. 58.; *Com. Dig. Copyh.* (M. 2); *Viner, Copyh.* (G. c) & (I. c); and *poſt.* 255. N. CXVIII. 338. N. CLXXXIX.]

otherwiſe

otherwiſe adjudged in the caſe of *Bird* and *Keck*. *Ideo quære* (*b*). If a copyholder erect a new houſe upon the land without licence, it is no forfeiture (*c*), becauſe it is for the meliora-tion of the ſtate of the land; but then it ſeems this houſe muſt be ſubject to all the cuſtoms of copyhold land; therefore if he pull it down again, it is a forfeiture.

1 Roll. Abr. 507.

1 Bulſt. 50.
1 Inſt. 63. a.
1 Roll. Abr. 508.
Mo. 49. cont.
Co. Cop. 163.

Waſte, either voluntary or permiſſive, is a forfeiture of copyhold lands, unleſs there be a cuſtom to cut trees, &c. It ſeems if a ſtranger doth waſte in the copyhold lands, it is no for-feiture, becauſe not the copyholder's act (*d*). My lord *Coke*, in numbering permiſſive waſte, doth not reckon the waſte done by a ſtranger. And further it is reſolved in *Clifton*'s caſe, that if the

2 Roll's Rep. 372.

(*b*) [See N. CII.]

(*c*) [1 *Roll. Abr.* 507. *Copyh.* (D), *pl.* 6. *acc.*

But ſee *Dyer*, 321. *pl.* 31. in marg. *Hutt.* 103. 4 *Leon.* 241. *Ca.* 383. *contra*.—"As it altereth the nature of the "thing, and putteth the lord to more charge."

See alſo *Co. Litt.* 53. *a.* That if a leſſee for years of freehold lands build a new houſe on the premiſes, it is waſte. Though 1 *Roll. Abr.* 815. *Waſte*, *pl.* 22. is *contra*.]

(*d*) [1 *Roll. Abr.* 508. *Copyh.* (D), *pl.* 17. 4 *Co.* 27. *a.* (See it.) 4 *Leon.* 241. *Ca.* 381. *acc.* and ſee n. (2) to *Co. Litt* 63. *a.*

But *Moore*, 49. *pl.* 149. is *contra*. And Chief Baron *Comyns* ſays that it was reſolved *contra*, and agreed to be ſettled, in *Lutw.* 801. *Dig. Copyh.* (M. 3). And ſee 1 *Veſ.* 462. Rook *v.* Warth, where Lord *Hardwick* ſeemed to conſider the copyholder as anſwerable for waſte in all caſes, except it were occaſioned by the act of GOD.]

husband commit waste in lands of his wife's, it is a forfeiture; but if a stranger commit waste, it is no forfeiture; and it seems every forfeiture ought to be the wilful act of the copyholder, so as it may amount to a determination of his will. Turning plowed land to hop ground or a piscary is a forfeiture. It is said to be resolved in my lord *Montague*'s case, that a copyholder by common law, cannot take house-bote, *&c.* but must have a special custom to warrant it. There is the case of *East* and *Harding*, as reported by *Croke*, that a copyholder cut down timber-trees, and let them lie five years, and after the action brought employed one of them; but the jury found he cut down the trees for the reparation of his house; and even in this case two judges were of opinion that it was no forfeiture, being cut down to repair; and yet in the putting this case, there is no custom said to be found for the cutting down timber for reparation. But *Moor*, in arguing, says, that it was found so. Here the trees were not employed in five years, and then but one employed, and that too after the action brought. *Moor*, in reporting this case in the former part, says, the copyholder cut down two trees, no custom being found one way or other, for the cutting to be a forfeiture or dispunishable. And then a little further he saith, that the jury found the custom for cutting trees for reparation; and then afterwards he says, that it was resolved, Doing of reparations as it is

4 Co. 27. a.

[236]

Lit. Rep. 267, 268.
Cro. El. 5.
13 Co. 68. cont.
Cro. El. 498.
1 Roll. Abr. 508.

Moor 392.

[237]

is found, though it be five years after the cutting, and after entry for the forfeiture, and action brought, is a diſpenſation for the forfeiture. The opinion of *Popham* was, that a copyholder may cut timber for reparation, without cuſtom. It was adjudged between *Dawbridge* and *Cocks*, that a copyholder may lop off the under-boughs without a ſpecial cuſtom, but not the top-boughs, becauſe that would cauſe a putrefaction in the timber. It ſeems reaſonable that a copyholder ſhould have timber to repair, &c. *ſed quære* (*e*). In *Swain's* caſe a cuſtom was found to take houſe-bote, fire-bote, &c. Cuſtom that every copyhold tenant may cut down trees at their will and pleaſure is unreaſonable and void; for then a tenant at will might do it. So it is for a copyholder for life to do it; and one of the reaſons given is, that the ſucceeding copyholder would not have wherewithal to maintain the houſe and the plough, which plainly intimates that a copyholder may cut timber to make reparations; and the rather, becauſe permiſſive waſte is a forfeiture in him. If there is a copyholder for life, who by cuſtom may name his ſucceſſor

Cro. El. 292. 1 Roll. 508. Cro. El. 361.

8 Co. 64. Winch 1. Cro. Ja. 30. Cro. Car. 220. 1 Bulſt. 50. Noy 2. 1 Roll. Abr. 650. 660.

(*e*) [The law ſeems to be that a copyholder may take the neceſſary eſtovers or botes on his copyhold *without* a ſpecial cuſtom. 1 *Lord Raym.* 552. *Poſt.* 239, 40.

But to enable him to take them *on any other lands of his lord*, a ſpecial cuſtom muſt be ſhewn. 4 *Co.* 31. *b.*]

for

for life, and ſo for that copyholder to name his ſucceſſor, ſuch a tenant for life cannot by cuſtom cut timber*. But if he had been a copyholder of inheritance, ſuch cuſtom is good. And my lord *Coke* ſays, that if a copyholder do waſte, it is a forfeiture, unleſs there be a cuſtom to the contrary. If there be a cuſtom for a copyholder to take timber for reparations, fuel, &c. ſuch a cuſtom is good, though the copyholder have but a particular eſtate, though he cannot do what he will with the timber. 8 Co. 64.

If the copyholder take the ſhrouds of trees by cuſtom, if the lord takes the body, an action on the caſe lies againſt him (*f*), which ſeems to prove, that the lord may not cut down the trees upon the copyhold lands, which is very reaſonable; for the copyholder hath a particular intereſt in them; and then if a copyholder of inheritance cannot cut them down by cuſtom, the timber may ſtand and rot, and no body the better for it. Roll. Rep. 196. 26. cont.

Where a copyholder may take trees for reparation, the cops and tops belong to him, and though he cannot repair with them, he may ſell them to help to defray the charges. Copyholder for life cuts down trees, the lord may take them. So it ſeems, if he be a copyholder 3 Bulſt. 281. Style 233.

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* [See 1 *Roll. Abr.* 560. *pl.* 18. and 2 *Durnf.* and *Eaſt*, 746. Mardiner *v.* Elliot, *contra.*]

(*f*) [See *poſt.* 239, 40. *N.* (4) to *Co. Litt.* 60. *b. Ld. Raym.* 551. *acc.*]

of

of inheritance, if there be no cuſtom (*g*). Underleſſee cuts down trees, it is no forfeiture of the copyholder's eſtate (*b*).

Mod. 94.

If the lord grants his trees growing upon the land, or which after will grow, he may cut the trees, now growing, by force of the grant; but as to thoſe that are not grown, the grant is void.

4 Co. 3.

Two years value, for a fine for an admittance upon a ſurrender, was adjudged to be unreaſonable (*i*); but where copyholds are only for life, and fall into the lord's hands, there the intereſt paſſes from the lord, and ſo *arbitrio domini res æſtimari debet* (*k*); but in caſe of ſurrenders, the lord is only an inſtrument.

3 Co. 68. 2 Lea. 272.

The lord of the manor may cut down the timber-trees growing upon the copyhold lands, provided he leave ſufficient for houſe-bote, &c. (*l*) This muſt be underſtood where there is no cuſtom for the copyholder to cut timber-trees. Therefore the caſe before muſt be underſtood, when the lord cuts down the trees, there not being ſufficient left for fuel; for though a cuſtom be alleged for taking ſhrouds for fuel,

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(*g*) [*i. e.* where he is not entitled to them as eſtovers; for the lord is, *prima facie*, entitled to the timber growing on the lands of his copyholders, ſave as to botes. See *Lord Raym.* 551. *Fiſher on Copyh.* 98—100. 2 *Durnf. & Eaſt*, 746.]

(*b*) [See n. (2) to *Co. Litt.* 63. *a.* and *ante*, 235. (*d*).]

(*i*) [See N. CIII.] (*k*) [See N. CIV.]

(*l*) [See above n. (*g*).]

it

it is no more than the common law allows; and therefore if the lord cut down the trees without leaving ſufficient for fuel for the copyholder to take ſhrouds of, an action upon the caſe lies againſt the lord. And my lord *Coke*, preſently after he had laid it down as a reſolution that the lord may take the timber-trees, leaving ſufficient for the copyholder for houſe-bote, *&c.* puts a caſe of an action upon the caſe brought by a copyholder againſt his lord, for cutting down pollingers, where, by the cuſtom of the manor, every copyholder had the loppings of thoſe trees for fuel. And this caſe is cited to prove that an action of treſpaſs lies againſt the lord for cutting trees, not leaving ſufficient, ſo that the caſe muſt be underſtood, where there was not ſufficient beſides; or elſe my lord *Coke* cites a caſe where it is reſolved that the lord can cut down none, to prove that an action of treſpaſs lies for cutting, and not leaving ſufficient; which follows another reſolution in the ſame caſe, that the lord may cut down timber-trees, leaving ſufficient; and the cuſtom to cut makes no alteration; for it is reſolved in the ſame caſe, that every copyholder *de com. jure* may take trees for houſe-bote; ſo that the laying the cuſtom ſeems to be only by way of caution.

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13 Co. 69.

Cro. El. 629. Mod. 546. 355.

(*m*) It ſeems if a copyholder commit fe- Strange 447.

(*m*) *Revertitur terra ad dominum capitalem, vel ad rectum dominum, ſcilicet ad ipſum de cujus feodo eſt.* Bracton, l. 3. fol. 130. [See *Wright*, 115. n. (*q*).]

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lony or treaſon, he forfeits to the lord, without any particular cuſtom; elſe a felon would have no puniſhment in his poſterity, if he had copyholds of never ſo great value. *Coke*, in one place, ſays, if a copyholder commits felony or treaſon, he forfeits his copyhold preſently; in another place he ſays, he forfeits upon preſentment (*n*); and in a third place he ſays, the lands eſcheat to the lord. In none of theſe caſes he mentions any cuſtom, but ſpeaks generally. It is a forfeiture preſently before indictment or attainder, as it ſeems (*o*), becauſe the cuſtom will not, in favour of a felon, ſupport an eſtate at will, but let the lord determine it, as in caſe of any other eſtate at will. The law will not give his eſtate to the king, becauſe then the lord would loſe his ſervices (*p*); yet in *Packinton*'s caſe, a cuſtom is alleged for the lord to have the forfeiture of his tenant's copyhold land for felony; and there the cuſtom was for the wife to have her free bench, and be admitted, during which time he that had the inheritance was attainted and died, and then the

Co. Cop. 150. 264.

13 Co. 3.

1 Leo. 1.

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(*n*) As to forfeitures of copyhold eſtates for treaſon or felony, *Vide T. Jones's Rep.* 189. 2 *Vent.* 38. 3 *Levinz*, 93. 2 *Vent.* 38. 1 *Lev.* 263. 1 *Lev.* 34. 1 *Bulſt.* 13. 2 *Brown.* 217. *Godb.* 287. *Cro. Eliz.* 499.

(*o*) [See N. CV.]

(*p*) In *Packington's* caſe it was adjudged, that the lord might ſeiſe; becauſe the cuſtom was found for him to ſeiſe. 1 *Leo.* 1.

wife

wife died; it was adjudged the inheritance was forfeited to the lord, notwithſtanding he was not tenant (*q*): the cuſtom was if any copyholder be convicted of felony (*q*). However, it ſeems conviction is not neceſſary (*r*); but if the thing will bear it, it is good to lay a cuſtom. Co. Cop. 164.

(*s*) My lord *Coke* ſays (*t*), that if a copyholder be outlawed or excommunicated, upon preſentment the lord ſhall have the profits of the lands. It is ſaid in *Lex Cuſt.* 210. that if a copyholder be outlawed in a perſonal action, it is no forfeiture of his copyhold, but the king ſhall have the profits; *quære* of this; for then how can the lord have his ſervices paid him? *Quære*, If a copyholder forfeits any thing in outlawry, unleſs for a capital crime (*u*). If a man be convict of manſlaughter, and reads, he ſhall not forfeit. Incloſure of copyhold lands is no forfeiture (*w*). If the lord hath uſed to Ut ſupra. Ld. Raym. 154. 306, 307. 1000. 2 Keb. 451, 456.

(*q*) [See N. CVI.]

(*r*) [See the laſt page, N. CV.]

(*s*) If tenant at will be outlawed, his eſtate is determined; but a copyhold is not forfeited or determined by outlawry. *Lit. Rep.* 234.

A copyholder was outlawed, adjudged it is on forfeiture of his eſtate. 1 *Leon.* 99. *Hetl.* 127. [*Poſt.* 328.]

(*t*) [See *Co. Copyh.* ſ. 58.]

(*u*) [See *Vin. Copyh.* (M. c), *pl.* 5. *Ante*, 185, and *poſt.* 328. 4 *Bl. Comm.* 319.]

(*w*) [Of Forfeiture on Enclofure, ſee *Hutt.* 102, 3. *Prec. in Chanc.* 568. Sir H. Peachy *v.* Duke of Somerſet, 1 *Strange*, 447. S. C. *Fiſh. on Copyh.* 101. *Vin. Copyh.* (L. c).]

Hut. 102. Lit. Rep. 246.

have a field-course over the lands of the copyholder, if he incloſe them, and there hath been a cuſtom to fine for ſuch incloſure, it is no forfeiture; but if there hath been no cuſtom to fine, it ſeems it is a forfeiture, becauſe the lord hath no other remedy. Reſcous and replevin are forfeitures of copyhold land, becauſe they amount to wilful refuſals (*x*). Defacing of land-marks is a forfeiture (*y*).

Cro. Car. 7.

Feme copyholder of inheritance takes huſband, who makes a leaſe for years by deed indented, and dies; the feme may enter; or if ſhe be dead, her heir may enter; becauſe the forfeiture for which the lord might enter, continues no longer than the huſband's life, and then ſhe may avoid the leaſe; but if ſhe does any thing that makes the leaſe to have continuance, it ſeems then the forfeiture remains; but if the huſband doth waſte, as in cutting trees, there the lord's inheritance being prejudiced, the forfeiture always remains. So if the huſband denies to pay the rent, or to do ſuit; for the lord muſt have his ſervices, and the feme hath no way to avoid thoſe nonfeaſances. It was ſaid by one judge, that if the lands come to the feme after marriage, it is no forfeiture, becauſe it cannot be ſaid to be her fault to take ſuch a huſband as would not do the ſervices. But it ſeems this diſtinction, for the reaſon

Ld. Raym. 1000. 4 Co 27. a. Cro. El. 149. 2 Rol. Abr. 509.

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(*x*) [*Co. Copyh.* ſ. 57.]
(*y*) [See laſt page, n. (*w*).]

aforeſaid

aforeſaid, is of no uſe, and it is not mentioned in any book. Moſt of the judges of *England* were of opinion, that a leſſee for years (z) might take advantage preſently of a forfeiture though his leaſe were to commence in poſſeſſion at a day to come. It is agreed on all hands, that leſſee for years of a manor may take advantage of the forfeiture. Cro. El. 499. Mo. 393. 1 Rol. Abr. 509.

A copyholder makes a leaſe for years, the lord grants the freehold in fee or for years, no body can take advantage of the forfeiture; for the wrong was to the lord *pro tempore*, and he hath diſpenſed with it by making a grant. Owen, 63.

Copyholder for life, the lord makes a leaſe to commence after the end, forfeiture, or determination of the eſtate for life; the copyholder commits a forfeiture; the lord will not enter; the leſſee may. Copyholder for life, remainder to another in fee, the firſt copyholder commits a forfeit, he in the remainder ſhall not enter, but the lord ſhall hold it during the life of the firſt copyholder; for copyhold eſtates are not like thoſe at common law; for in copyhold caſes the remainder is to commence after the death of tenant for life, and not after his eſtate or intereſt is gone. But in ſuch caſe the forfeiture of tenant for life would not prejudice the eſtate of him in remainder, unleſs there be an expreſs cuſtom for it. So if there be a Roll. Abr. 858. Ld. Raym. 1000. 9 Co. 107. a. 2 Leo. 73. [245]

(z) [See further, *Vin. Copyh.* (T. c).]

Cro. El. 879. cuſtom, that if upon a ſurrender made, the *ceſtuy que uſe* doth not come to be admitted before three proclamations paſs, that he ſhall forfeit his eſtate. If in that manner a ſurrender be made to the uſe of *A.* for life, the remainder to *B.* in fee; and *A.* ſuffers three proclamations to paſs, and *B.* makes no claim; yet ſhall not *B.* forfeit his remainder, for the cuſtom ſhall be taken ſtrictly; but the reaſon of the reſolution of the caſe implies, that had the cuſtom been laid to reach remainders too, it had been good, and the remainder had been forfeited in that caſe.

Cro. El. 598. Then there is the caſe of *Raſtal* and *Turner*, where tenant for life of a copyhold, the reverſion to another in fee, contrives to ſell the copyhold to another in fee, which is to be done in this manner: The tenant for life is to commit a forfeiture, and the lord is to ſeiſe, and

Ld. Raym. 1000. grant it in fee by copy to the vendee; all which is accordingly done; it was adjudged, that the intereſt of the reverſioner was no ways prejudiced by the forfeiture. Theſe authorities are grounded upon the higheſt reaſons; for elſe he that hath but a particular intereſt in copy-

[246] holds, will have as good an intereſt as thoſe that have a fee; for by ſecret covin he may commit a forfeiture, and ſo give away the fee. But notwithſtanding theſe authorities grounded

Mo. 49. upon ſo good reaſons, there is a caſe in *Moor*, where a copyhold to two for lives to have *ſucceſſive*,

ceſſiva, and the firſt committed a forfeiture, and it was adjudged that thereby the remainder was forfeited (*a*).

It is held by my lord *Coke*, that a preſentment is neceſſary to make a forfeiture in thoſe caſes where the lord cannot be preſumed to have notice of himſelf, as if the tenant commit felony. But it is ſaid *per Cur. alibi*, that preſentment is not of neceſſity, but only for the lord's better inſtruction, and he may take notice himſelf if he will. And indeed the reaſon given by *Coke* is of no cogency, that becauſe the lord cannot by intendment have notice of them himſelf, that therefore he ſhall take no advantage of them without preſentment; for if he can take notice of them, why ſhould he not, ſince preſentment is not that which gives title, but only lets him know what he hath a title to? But however, it is ſafe to get ſuch things preſented; and if there be a cuſtom for it, it muſt be purſued. Where the tenure is ſeveral, there the forfeiture of one part is not a forfeiture of all (*b*). It is ſaid by my lord *Coke*, that if the tenure be one, that a feoffment of part is a forfeiture of the whole. But it is ſaid in *Lex Cuſtom.* that only ſo much is forfeited; but if waſte be committed in part, that the whole by the ſame tenure is forfeit; for that goes to the deſtruction of the houſes, and ſo of the whole

Co. Cop. 164. Cro. El. 499. Latch, 227. 3 Keb. 641.

4 Co. 27. Cro. El. 353.

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4 Co. 27. a. 3 Keb. 641.

(*a*) [See N. CVII.] (*b*) [See *ante*, 218. (*k*).]

copyhold eſtates. But if there be no building, *quære*; for it ſeems unreaſonable then, that waſte in part ſhould be a forfeiture of the whole; and ſo it ſeems in caſe of feoffment of part.

2 Roll. Ab. 509. Copyholder by licence lets for years, the leſſee makes a feoffment, he only forfeits his leaſe. It is ſaid to be reſolved in Chancery, that if the father commits a forfeiture, and dies, and the Tothil 107. lord admits his heir (*c*), that this is no diſpenſation with the forfeiture, becauſe the anceſtor died ſeiſed of no eſtate, and ſo none could deſcend to the heir. This caſe ſeems to be unreaſonable, for it ſeems that the anceſtor died ſeiſed of an eſtate; for nothing removes the legal eſtate and intereſt out of him but the lord's ſeiſure (*d*).

3 Keb. 341. There is a diſtinction taken in *Keble*, that where after the death of the tenant, the lord accepts a heriot-ſervice, that is a diſpenſation with [248] the forfeiture, but not where he accepts heriot-cuſtom: This proves, that after the forfeiture the eſtate is in the tenant, elſe the lord could not Vide Cro. Ca. 234. and 1 Keb. 15. have heriot. The reaſon for the difference ſeems to be, becauſe in accepting of heriot-ſervice, he admits the heir tenant; but in accepting heriot-cuſtom, he only admits the tenant died

(*c*) [The lord in all caſes muſt have notice of the forfeiture, otherwiſe it will not be a diſpenſation. See the next page. *Fiſh. on Copyh.* 108. and ſee alſo *Poſt.* 334. N. CLXXVII.]

(*d*) [See *ante*, 213. N. XCII.]

ſeiſed.

seised. *Sed quære*; for it seems to me to be a dispensation; for he admits him to be tenant after the forfeiture committed; and therefore if the lord accept of any services after he knows of the forfeiture, it is a dispensation; for why should not the acceptance and acknowledgment of the tenant to be tenant after a forfeiture, as well dispense with a forfeiture, as acknowledgment of the heir to be a tenant? But it was resolved in that case, that if the lord had once entered for the forfeiture, no acceptance afterward shall conclude him.

If the tenant appear not at court after personal warning, and the lord amerce him, this is a dispensation with the forfeiture. If a copyholder come to his estate tortiously (it seems it must be by admittance, else the release will not operate at all) (*e*) and commits a forfeiture, and then he that hath right releases to him, this shall hinder the lord's entry, because now he hath, as it were, another estate, of which he hath committed no forfeiture. *Sed quære* (*f*). 1 Leo. 104. [249] 1 Brow. 149.

If the tenant repairs before the lord enters for forfeiture, this purges the forfeiture. Cutting trees to repair, and employing them five years after, purged the forfeiture. Moor, 393. Latch, 227.

The succeeding lord shall not take advantage of waste done in the time of the preceding 2 Sid. 8.

(*e*) [See *ante*, 157. N. LXIX.] (*f*) [See N. CVIII.]

Ld. Raymond, 1000.

lord (*g*). But yet it was adjudged, that if there be lord, and two coparceners copyholders, and one makes a feoffment in fee of her part, and then the lord makes a leaſe of the manor, that though the leſſee can take no advantage of the forfeiture, that yet the heir of the leſſor may. The reaſon of the diverſity ſeems to be, becauſe waſte is a prejudice to the lord only, for the time being at leaſt; and is not ſo great a prejudice as feoffments, (and ſo it ſeems of other forfeitures, as denial of rent, ſuit of court, &c. and *a fortiori* for theſe forfeitures, for the denial doth no way prejudice the ſucceeding lord;) but feoffment deveſts the lord of his freehold and inheritance; which being ſtanding prejudices to the lord, he ought to have remedies as laſting as the harm that is done him. *Quære*, If the leſſor outlives the leaſe, whether he may take advantage of the forfeiture?

Pal. 446. Lat. 227.

[250]

5 Co. 116. Moor, 512. 1 Roll's Abr. 727.

Upon entry for the forfeitures the lord ſhall have the emblements (*b*); ſo if it were leaſed (*i*), copyholder (*k*) for life, remainder to another for life, the tenant for life accepts of a bargain and ſale of the freehold and inheritance

(*g*) [*Salk.* 186. *Cro. Jac.* 301. *acc.* Unleſs it be to the diſheriſon of the lord; See below, and 3 *Durnf. and Eaſt*, 173. and *ante*, 247. (c) 334. N. CLXXVII.]

(*b*) [See N. CIX.] (*i*) [See N. CX.]

(*k*) [This ſhould begin a new line.]

of

of his lands, to him and his heirs, and then of a fine: This does not diſplace the remainder, but he has power to take at any time after the death of tenant for life (*l*). If the lord grant a rent-charge out of the inheritance of copyhold land, and then grants the freehold and inheritance to the copyholder for life, he ſhall hold the land diſcharged during his life; ſo if there be a remainder over, it ſhall not commence during the eſtate for life. A lord may make a grant or admittance of a copyhold out of the manor, at what place he pleaſes; but the ſteward cannot, at a court held off the manor, make any grants or admittances (*m*); and in *Coke*'s 1 *Inſt.* 58. *a.* he ſays, that a court-baron cannot be held off the manor, unleſs the lord hath two or three manors, and hath uſually kept court at one for all; which plainly ſhews, that a lord cannot make admittances or grants at a court held off the manor, no more than the ſteward. For *Coke* ſays, that if the court-baron be held off the manor, it is void; and he there ſpeaks of a court-baron as including the copyholder's court, where the ſteward is judge: But as hath been ſaid before, a lord may make admittances or grants out of the manor, at what place he pleaſes, which are *Coke*'s words, and muſt be underſtood not at a court, but at ſome other time, or elſe he contradicts himſelf. It is held, that if the inheritance of copyholds be granted to one,

9 Co. 106.

9 Co. 107. a.

4 Co. 26, 27. 1 Leo. 288. cont.

[251]

1 Inſt. 61. b.

(*l*) [See *ante*, 246. N. CVII.] (*m*) [See N. CXI.]

he

he may hold courts where he will (*n*); for it is no longer a court-baron; and that the lord or his ſteward may grant copies out of court, as well as in court: And as the caſe is reported by *Croke*, the grant was at a court held at another manor. But as *Coke* reports it, though the grant be at another place, yet it is not ſaid to be done at a court (*o*); ſo *quære*, Whether a ſteward may make grants by copy out of court (*p*)? but if a ſteward can, an under ſteward cannot (*q*).

Cro. El. 103.

Co. Cop. 128.

It ſeems a ſteward (if ſpecially empowered) (*r*) may take a ſurrender out of court. A copyholder may ſurrender to the lord by attorney in court, becauſe he may do that *communi jure*, and ſo the common law gives him power to do it by attorney, as an incident to his eſtate (*s*). So a ſurrender to the lord out of court is *de communi jure*, and therefore may be by attorney. But if the ſurrender be by the hands of two cuſtomary tenants, there it cannot be done by attorney without a ſpecial cuſtom. Admittance by the lord in court, and out of court, ſeems to be *de communi jure*, and therefore it ſeems may be done by attorney. It is ſaid to be reſolved, that a copyholder cannot ſurrender by attorney with-

2 Cro. 526. Cro. El. 443. cont. 1 Cro. 273. 1 Leo. 86. Co. Cop. 92. 9 Co. 75. 2 Leo. 36. cont. 1 Inſt. 59. a. Ld. Raym. 76, 656, 658.

[252]

(*n*) [1 *Leon.* 288. *Ca.* 394. *Cro. Eliz.* 103. *acc.* but ſee the laſt page, N. CXI.]

(*o*) [See N. CXI. in laſt page.]

(*p*) [See *Cro. Eliz.* 103, and N. CXI. in laſt page.]

(*q*) [See N. CXI. laſt page.] (*r*) [See N. CXII.]

(*s*) [See *ante*, 216. N. XCIII.]

out

out deed, *Pract. Reg.* 136. but that he may be admitted by attorney without deed. *Quære* of this (*t*).

If the copyholder be in priſon, and that he cannot come, the lord (*u*) may appoint a ſpecial attorney to go to him and take his ſurrender. 1 Leo. 36.

Any words ſpoke by a copyholder in court, ſhewing his intention to ſurrender into the lord's hands, amounts to a good ſurrender (*w*); as if he come in court and ſay, that he is weary of his copyhold, and deſires his lord to take it, this is a ſurrender; but to ſay he renounces his copyholder, this is no ſurrender, becauſe he limits it to no body*. So if he ſay he is content to ſurrender, it is no ſurrender; for that only expreſſes his inclination to do it, not that he actually doth it. *Quære*, Whether words ſpoke out of court will amount to a ſurrender (*x*)? 3 Bulſt. 80. Hutton, 81. 1 Rol. Abr. 504, 3.

Sir *H. P.* lord of a manor, whereof *C.* was a copyholder in fee, and the lord pretended that his copyholder had forfeited, and thereupon entered into communication with him about it; and it was agreed between them, that *C.* ſhould pay 5*l.* to the lord, and ſhould enjoy the ſaid cuſtomary land (except a wood) for his life; and that *C.* ſhould have election, whether he would [253] 1 Leo. 191.

(*t*) [See N. CXIII.] (*u*) [See N. CXIV.]

(*w*) [See *Com. Dig. Copyh.* (F. 6). *Vin. Copyh.* (Z). *Lex Cuſt.* c. 13. p. 102, &c. *Poſt.* 312.]

(*x*) [See N. CXV.]

* [See *poſt.* p. 254. (*a*).]

have

have thoſe lands aſſured to him by copy, or by bill; and he choſe by bill, which was accordingly done; adjudged this was a good ſurrender for life only, and that the lord had the wood diſcharged of the cuſtomary intereſt. Now the communication in this caſe ſeems to have been that which cauſed the ſurrender, for nothing elſe could; and for ought appears, this communication was out of court. The acceptance by bill could not be the ſurrender in this caſe, for the bill was never made of that; ſo that it could only be the communication that amounted to a ſurrender.

3 Bulſt. 80. Copyholder in fee comes into court, and there accepts a copy to himſelf for life, remainder to his wife for life, remainder to his ſon for life; this is tantamount to a ſurrender to the uſe of himſelf, &c. but he hath his old reverſion in him; for there is no ground to make a ſurrender of that by conſtruction, becauſe he has made no diſpoſition of it (*y*). But as this caſe is in *Rolls*, it is ſaid, that it was no ſurrender; for that a copyhold cannot be ſurrendered by a ſurrender in law, but only by actual ſurrender; yet as it is in other places in *Rolls*, it is as in *Bulſtrode*, held to be a ſurrender, but that the reverſion was ſtill in the copyholder.

[254]

1 Roll. Abr. 501.

2 Rol. Rep. 265.

2 Rol. Abr. 171, 172.

A. covenants with *B.* to aſſure him all his copyhold lands, and after he ſurrenders divers par-

(*y*) [See N. CXVI.]

cels

cels by name, and ſome by buttals and boundings; at the next court the ſurrender is preſented and inrolled, but with this addition, by the name of all his copyhold lands; there no more ſhall paſs than what was named in the ſurrender (z). Dyer, 251. b.

If a ſurrender be made to the lord expreſſing no uſe, it ſhall be to the uſe of the lord (a); for it cannot be imagined that the ſurrender was made to no end or purpoſe; and a ſurrender may be made to the lord, and no uſe need be expreſſed. If a ſurrender be made to the uſe of another, without expreſſing what eſtate he ſhall have; a cuſtom that the lord may grant it in fee to him to whoſe uſe the ſurrender is made, is a good cuſtom (b), for he is a chancellor in his own court; and ſo when the thing is left uncertain, it is no way unreaſonable for the lord to determine what ſhall paſs. If a man bargains and ſells copyholds lands, it ſeems nothing paſſes but a uſe; for copyholds are out of the ſtatute of uſes, and therefore ſuch a bargainor may afterwards ſurrender it to the uſe of the bargainee; and no eſtate paſſing, it ſeems to me to be no forfeiture (c). Kitch. 81. b. Co. Cop. 95. Cro. El. 392. [255]

(z) [See *ante*, 192.] (a) [See N. CXVII.]

(b) [But without ſuch cuſtom or future explanation, he ſhall have only an eſtate for life. See *ante*, 3. N. VIII. 219. and *poſt*. 258.]

(c) [See N. CXVIII.]

Copy-

Poph. 125, 126. Cro. Ja. 434. Copyholder in fee ſurrenders to the lord without declaring the uſe; at the next court, it was regranted to him and his wife in tail, remainder to his right heirs. Now this ſubſequent admittance explains to what uſe the ſurrender was made.

4 Co. 29. b. A copyholder in fee ſurrenders to one for life, the lord admits him in fee (*d*), yet the ſurrenderor has a reverſion in him; for the lord is but an inſtrument, and cannot deveſt the eſtate Cro. Car. 205. of him that ſurrenders. But if there be a copyholder for life, and he ſurrenders to the uſe of another for life, who is accordingly admitted, and then dies, yet the ſurrenderor ſhall not be admitted again; for by the ſurrender he paſſed away all his eſtate, and had no intereſt left in him. If the ſurrenderor had died, it ſeems that the eſtate of tenant for life was not ended (*e*), [256] for then the lord would have two deaths to depend upon, either of which would bring him to the eſtate, and yet but one perſon that had an intereſt.

Mo. 8. n. 27. Cuſtom that leſſee for life may let for another's life, is void. It ſeems if there be a viſible inconvenience, that one copyholder for life ſhould change the lives by ſurrendering into the lord's 1 Rol. Abr. 503. hands to the uſe of another for life, that the lord

(*d*) [See *ante*, 193. 4 *Co.* 28. *b.* See alſo 3 *Burr.* 1543. 4 *Ibid.* 1961. 5 *Ibid.* 2776.]

(*e*) [See N. CXIX.]

will

will not be compelled to make admittances thereupon.

Feme tenant for life of a copyhold, took husband, and the reverſion of the ſame was granted to three for lives, and then the baron ſurrendered to the uſe of the firſt reverſioner for term of his life, and ſo he was admitted tenant, and died; and then the ſecond died; and the third prayed to be admitted; and his copy was *cum acciderit poſt mort. ſurſumred. vel forisfac.* of the woman; and it was the opinion of the juſtices, that he ought not to be admitted; but the lord may retain it in his hands as an occupant (*f*). The reaſon is, becauſe the intereſt of the feme was concerned, who had not ſurrendered (*g*). But there was this further in the caſe, that baron and feme would have releaſed their right to the reverſioner, but the lord would not hold a court for it: But it was decreed in chancery that he ſhould either hold a court or quit the poſſeſſion. It is reſolved in my lord *Coke*'s reports, that when a copyholder ſurrenders to the uſe of another, and the lord admits him, that he is in by the *Per* by him that makes the ſurrender (*b*). This being ſpoke ſo generally, cannot by any fair conſtruction but extend to all ſurrenders, Dyer, 264. a.

[257]

4 Co. 27. b. 29. b.

(*f*) [*i. e.* During the life of the huſband; for, on his death, his widow might have entered. See *Dyer*, as cited in the margin.]

(*g*) [See *ante*, 190.] (*b*) [See *ante*, 218. N. XCIV.]

either by tenant for life or in fee. But in the caſe of *King* and *Lord* it is adjudged, that if a copyholder for life ſurrender to the uſe of another for life, who is accordingly admitted, that he is in from the lord, and not from the ſurrenderor. *Popham* 39. *Quære* well of this matter (*i*); for the tenant for life hath not ſuch an eſtate as to be allowed to grant for life to another; but when a copyholder in fee ſurrenders to the uſe of another for life, he is in *quaſi* by the copyholder. This is againſt my lord *Coke*, and as it ſeems againſt reaſon, for the lord is but an inſtrument to convey; therefore he is compellable to grant according to the ſurrender (*k*); and no charge by him, while it is in his hands, ſhall be of any force; and he that ſurrendered ſhall pay the ſervices; and the words of *Coke* are general, that he ſhall be in by the copyholder, in admittances upon ſurrender: Yet *Coke* ſays in another place, that by ſurrender to the lord out of court, the eſtate paſſeth to the lord under a ſecret condition, that it be preſented at next court. But it hath been adjudged ſince, that by ſurrender to the lord by the hands of two tenants, nothing paſſed, but the intereſt remained in him that made the ſurrender (*l*); and there can be no difference where the lord takes himſelf by the hands of two tenants; and if it be

Cro. Car. 204.

Cro. El. 361, 442, 582.

[258]

Co. Cop. 108, 109.

1 Inſt. 62. a. 2 Leo. 101. Cro. Ja. 403. Cro Car. 283. Co. Cop. 103.

(*i*) [See N. CXX.] (*k*) [See *ante*, 193. 255. (*d*).]
(*l*) [See *ante*, 163. N. LXXV. 193. N. LXXXV.]

in

in the lord, how can the copyholder pay the services, or take the profits after surrender, or make another surrender? Ld. Raym. 44.

As well estates as descents of copyholds are to be guided according to the rules of common law, as a necessary consequence upon the customary estates. So that if a surrender be made to the use of one, he has but an estate for life (*m*), unless there be a custom to the contrary; for by custom a use limited to one & *assignatis suis* is good to pass a fee. A surrender to one & *tribus assignatis suis*, adjudged but an estate for life; but in some cases estates in copyhold lands are not guided according to the rules of common law. As where a copyholder in fee surrenders to the lord, who regrants it in this manner; *Memorandum, Quod* J. W. *cepit de domino ceux terres, cui dominus inde concessit seisinam habend. eidem* J. & Eliz. *uxori ejus & hæred. eorum* in tail; adjudged that *Eliz.* took by force of this copy, though she was not named before the *habendum*. But it was said, that there was no more grant to the baron than to the feme; and yet there are the words *cepit de domino cui dominus concessit seisinam*, which seems to amount to a grant. But since the judges thought that the baron did not take before the *habend.* no more than the wife; this case doth not fully prove, that a person may take that is named after the *habend.* when there is

4 Co. 29. b.

Yelv. 16.

[259]

Cro. Ja. 434. One named after the habend. may take copyhold estates. Poph. 125. 2 Rol. Abr. 67.

(*m*) [See *ante*, 219, 220. 254. N. CXVI.]

another only named in the premiſes; for when both are named in the *habend.* only, the admittance would be to no purpoſe, if both could not take; and perhaps at common law, if there be no body named in the premiſes, *habend.* to two, they ſhall both take, elſe the deed could have no effect; but an admittance to one *habend.* to him and another, may be good; *ſed quære* (*n*).

1 Inſt. 7. a.

Co. Cop. 97.

Cro. Car. 366, 7. 1 Brownl. 127. Noy 152. 1 Ld. Raym. 44.

An eſtate-tail in copyholds cannot be created by implication, any more than in freeholds; and if in ſurrenders there be at firſt good limitations of uſes, and then afterwards comes a vitiating clauſe, ſuch clauſe ſhall be rejected.

[260]

Cro. Car. 367. Cro. El. 255.

If a ſurrender be to the uſe of *J. S. habend.* after the death of the ſurrenderor for life, this is a void ſurrender, being but one entire limitation; but if the ſurrender were to him generally, *habend.* after the death of *J. R. quære*, If the *habend.* be void or not? But certain it is, that if the ſurrender be *habend.* after the death of the ſurrenderor, *ad opus & uſum* of his child then in *ventre ſa mere*, ſuch ſurrender is merely void; for a copyholder cannot ſurrender *habend.* after his death, and ſo reſerve to himſelf a particular eſtate, no more than a freeholder can convey ſo. There was a clauſe in a ſurrender: And if it happen that the child die before his full age, or day of marriage, then I do ſurrender the ſaid lands to the uſe of my couſin *J. S.* his heirs and

Cro. Ja. 376. Cro. El. 29. 1 Sand. 151. 1 Roll. Rep. 135. March. 177.

(*n*) [See N. CXXI.]

aſſigns:

assigns: This surrender was held to be void to *J. S.* because the contingency did not happen in the life of the surrenderor; and a man cannot surrender to take effect after his death; it was not resolved absolutely that a fee may be limited upon a fee. *Vide* the book cited in the margin, to explain these matters. This case, as reported by *Rolls* (as it is said in *Lex Cust.* 120.) is an authority that such future use is good. This is the same case as is reported by *Croke*, but directly contrary, and as it seems not grounded upon so good reason as the resolution in *Croke* (*o*); for, as before has been shewn, surrenders are not construed so favourably as wills (though *Coke* says they should be taken according to the intent of the surrenderor); neither is there the same reason; for a man may as well order a surrender in his lifetime, according to the rules of law, as he may any deed to pass away a freehold estate; so that the intention of the party hath not so strong an operation in a surrender, as in a will; and therefore that reason will not support a fee upon a fee in that case, as it doth in a will (*p*). And then it is not at all like a use or trust, in which a fee may be limited upon a fee, because there

1 Rol. Rep. 109, 138, 253.

[261]

Co. Cop. 97.

(*o*) [See 1 *Fearne Conting. Rem.* 416. 418. where that acute writer says that the opinion of our author is, he thinks, excluded by decided cases.]

(*p*) [See 1 *Fearne*, 417. and the cases by him cited, that a fee *may* be limited on a fee of copyholds.]

the legal eſtate was not by any limitation extended further than one entire fee-ſimple, which would be to extend an eſtate further than its original creation warranted. But a uſe, after a uſe in fee, was but only to give an equitable right to ſomebody to have the profits, as long as the eſtate in fee laſted; which is highly reaſonable, that a man that hath a legal eſtate ſhould diſpoſe of the profits of that eſtate as long as it ſhould laſt; for ſo long had he a right to the profits himſelf, which right he may transfer to others, and there is no harm done to any body;
[262] but to extend the legal eſtate, would be to keep the lord of the eſcheat eternally out; and it is only allowed in a will, becauſe of the want of counſel to adviſe with how to do it. But a uſe in a ſurrender is not like this uſe; for he that hath a uſe by a ſurrender is to be admitted to the legal eſtate, and is not ſeiſed to uſe; and therefore if a fee might be limited upon a fee, in ſuch caſes the legal eſtate would be extended further than its original creation warranted, and a great eſtate be made out of a little one; ſo that it ſeems that a fee upon a fee in copyholds, is not good.

Cro. El. 361. A ſurrender was to the uſe of one in fee upon condition that he pay 100*l.* to a ſtranger; and if he failed, it ſhould be to the uſe of the ſtranger in fee; it was moved, whether this were a good limitation, to add fee upon fee. The court directed the matter to be found ſpecially; and it doth not appear what became of it afterwards; but

but *B.* (*q*) conceived the limitation to be good enough, and compared it to a uſe upon a feoffment (*r*); but for the reaſons before, it ſeems it cannot be compared to the caſe of a feoffment to uſes.

A copy was granted to the father and his ſon, he having but one ſon; this is good for the apparent certainty. But if he had many ſons, void. Yet *Coke* ſays, that if a man ſurrenders to the uſe of his ſon *W.* and he has more ſons of that name, this uncertainty may be helped by averment (*s*). But if a man ſurrenders to the uſe of his friend or couſin, this is void, and not to be helped by averment, for the uncertainty. So if the ſurrender be to the uſe of *J. S.* or *J. N.* *Coke* in his copyholder (*t*) ſaith, that a man may ſurrender copyholds immediately to the uſe of an infant *in ventre ſa mere*; for that a ſurrender is a thing executory, and nothing veſts before admittance; and therefore if there be a perſon to take at the time of the admittance, it is ſufficient; which ſeems to be reaſonable, and to carry no inconveniency with it; for it is not like a grant at common law; for there if there be no body to take, the grant is void, becauſe the eſtate muſt be ſomewhere (*u*), and the

Cro. Jac. 374. [263]

Co. Cop. 95.

Mo. 637. cont. 1 Rol. Rep. 109, 138, 203.

(*q*) [*Beaumond*, J.] (*r*) [See the laſt page.]
(*s*) [See 5 *Co.* 68. *b. acc.*] (*t*) [S. 35.]
(*u*) [See N. CXXII.]

grant puts it out of the grantor. But in case of a surrender, there is no inconvenience at all; for the surrenderee hath nothing till admittance, but the estate is in the surrenderor. But then it seems, that if the surrenderee be not *in esse* before the admittance, that the surrender will be void; for this seems to be implied by lord *Coke*; for
[264] he says that if at the time of the admittance the grantee be *in rerum natura*, that will serve; which implies that the admittance is to be made after the usual manner: Not that the admittance-time shall be put off till there be such a person; for then it would have been to no purpose to have said, that if there be such a person to take at the time of the admittance, &c. for there is no question but that it will serve, if the admittance must be staved off till there be such a person; and no question but that the grantee will be *in rerum natura*, if the admittance be to be put off; and so he need not have made a question, If he be, &c. And if he never come *in esse*, then the admittance-time will be eternally put off, the old surrender stand good, and no body be able to dispose of the copyhold estate.

Cro. Jac. 376. 2 Roll. 791. 1 Roll. Rep. 109, 131. 2 Roll. Abr. 415, 416. 2 Bulst. 274, 275.

In the case in *Croke*, no question was made but that the surrender to one *in ventre sa mere*, was good; yet it seems it is not fully settled, whether a devise to an infant *in ventre sa mere*, be good or no. *Ideo quære*. However, in the last case, there is no body to do the services till the

the birth, and in the former the eſtate continues in the ſurrenderor, &c.

A copyholder ſurrenders to the uſe of the right heirs of *J. S.* he being alive, void; for it cannot take effect *in præſenti*, as he would have it. If a man ſurrender to the uſe of his own right heirs, *quære*, Whether the lord ſhall not hold it till his death (*w*)? Co. Cop. 97. 1 Leo. 101. [265]

A copyholder by licence lets for ſixty years, to commence at a time to come; but before that time the leſſee enters, and then the copyholder ſurrenders his reverſion, it ſeems the ſurrender is void, becauſe the entry before the time was a diſſeiſin. Lit. Rep. 17, 18.

Copyholder for life, remainder to another in fee, the remainder-man ſurrenders to the uſe of tenant for life, the remainder to another, though the eſtate limited to tenant for life be void, yet the remainder over is good, and veſts preſently. It is made a doubt whether by the deſtruction of the particular eſtate, the remainder that is in contingency be deſtroyed (*x*). As to this point we ought to diſtinguiſh; for it ſeems ſome are, and ſome are not. As for example: If an eſtate be given to a copyholder for life, the remainder to the right heirs of *J. S.* if the tenant for life die, living *J. S.* there it ſeems clear that the remainder is deſtroyed; for it cannot take effect, 1 Sid. 360. Style 251.

(*w*) [See *poſt.* 272, 3.] (*x*) [See 1 *Fearne*, 469. &c.]

as by the limitation it ought. But then if te-
[266] nant for life in that caſe had committed a forfeiture, or made a ſurrender, and then living tenant for life, *J. S.* had died, it ſeems to be very clear that his right heir might take; for his eſtate in remainder was not to take effect after the determination of the intereſt of tenant for life, but after his death (*y*), and when that happened, he was able to take.

2 Rol. Abr. 794. 9 Co. 107. a.

Lane being married and ſeiſed of a copyhold in fee, ſurrenders it to the uſe of *Dixon* and the wife of *Lane* for their lives, and after to the uſe of the heirs of the body of the huſband and wife; the wife and *D.* are admitted, to them and their heirs; and afterwards *D.* ſurrenders his moiety to the uſe of huſband and wife, and their heirs; and then they ſurrender to the uſe of one *Davis* in fee; then the wife dies, having iſſue, and then the huſband dies, and the heir brings treſpaſs; it was held, that though the huſband and wife were admitted in fee, yet that did not alter the eſtate, but they ſhall be ſeiſed according to the ſurrender; and then when *D.* ſurrendered his moiety, this ſevered the jointure; and then the great queſtion was, What eſtate the woman had, whether for life or tail? for if ſhe had only an eſtate for life, then he that was to take the remainder by force of the limitation, being to be heir of the body of the huſband as well as wife,

1 Roll. Rep. 238, 317, 438. 2 Rol. Abr. 415.

(*y*) [See N. CXXIII.]

could

could not take, becauſe the huſband was alive; and ſo the remainder for a moiety was deſtroyed. But then as the caſe is put in *Lex Cuſt.* 122. though it be ſaid that the huſband was dead alſo; yet nothing was ſaid as to his moiety. *Ideo quære* of this. But then if a moiety were executed in the wife, her heir might take a moiety, as heir by her deſcent. And it was held that there was no execution, but that the remainder was a contingent remainder, and gone for a moiety by the wife's death. This reſolution does not at all thwart the diſtinction before taken, that the remainder ſhould be deſtroyed; for the eſtate, that it was limited after, being gone, and the time being come in which it was to commence; if it could not commence then, it never could. But it is not like the caſe where an eſtate for life is forfeited, and the remainder-man cannot then take, but after the death of tenant for life he may. But let us now examine a little into the reaſon of this reſolution. And firſt, it is very clear that the eſtate could not be ſo far executed in the woman, as to deſtroy the jointure; for that had been apparently to overthrow the deſign of the ſettlement. But this does not ſeem any good ground to conclude that therefore heirs in that caſe ſhould be a name of purchaſe. For if an eſtate be limited to two, and the heirs of one, though the jointure be not ſevered, and to that intent the fee not executed, yet *heirs* are there words of limitation, and not of purchaſe.

Tenant for life, remainder for life, he in remainder enters on tenant for life, and ſurrenders; nothing paſſes; for he is a diſſeiſor. 1 Mod. 199.

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Then

Then let us examine a little farther, and ſee what could be the ground the judges went on to think that the rule, when the anceſtor takes an eſtate for life, &c. can have no operation. Indeed the caſe has this particular in it, that the heir who is to take, is not only to be heir of the anceſtor who hath the tenancy for life, but to another perſon who took no eſtate at all (z); and ſo it ſeemed the deſign of the party to ſettle one entire intereſt in ſuch a one: And there appears no footſteps of his intent, to make him take one moiety by deſcent, and another by purchaſe. But notwithſtanding this, there ſeems to be a manifeſt inconvenience in the reſolution; for if it be conſtrued a contingent remainder, then we ſuppoſe a deed made, and an eſtate given; where, at the very firſt it appeared, that for one moiety, the deed and eſtate could have no manner of effect, unleſs the huſband and wife died both at one nick of time (a); for if the huſband died firſt, then the perſon who was to take, being to be heir of the
[269] wife, and ſhe being alive, &c. and ſo *vice verſâ*. But if we conſtrue it to be executed in the wife, ſo far as to make it an eſtate-tail, though not to deſtroy the jointure, there the deed will have an

(z) [See *Watk. on Deſc.* c. 5. p. 162.]

(a) [See 1 *Fearne*, 459. where that writer conſiders our author as miſtaken on this point. The caſe on which he comments does not, ſays Mr. *Fearne*, involve any ſuch inconſiſtency as he infers; but the inconvenience aroſe from the ſubſequent acts.]

operation; for one moiety it will be executed in the wife, and when ſhe dies, the heir of her body by her huſband begotten will inherit to that moiety, as heir to her; and as for the other moiety, it will be a contingent remainder to veſt in the heir of the huſband, if he die living the particular tenant. And in this caſe the eſtate being made over to him, and by him conveyed to another, nothing but an eſtate for life could paſs by that ſurrender. But then if it were for the life of the ſurrenderee, and then the huſband died, the contingent remainder was gone. By this conſtruction the intent of the parties and the rule of law is ſatisfied. And according to this conſtruction was a caſe adjudged, where a ſurrender was made to the uſe of the wife for life, remainder to the right heirs of huſband and wife. Here the opinion of the court was, That a moiety was executed in the wife (*b*), and that upon her death her heir ſhould have a moiety; and that if the huſband had died firſt, his heir ſhould have had a moiety. This caſe is directly contrary to that next preceding, and ſeems to be grounded upon better reaſon. But *quære* well, whether that caſe be reported as it is ſaid to be? for he ſaith, that *Coke* held the eſtate-tail to be

3 Leo. 4.

[270]

(*b*) [See 1 *Fearne*, 460. where it is obſerved that this deciſion is contradicted by ſeveral adjudications, and conſequently is not law. And ſee *Watk. on Deſc.* c. 5. p. 162. and *poſt.* 272. N. CXXV. and CXXVI.]

executed

executed in that caſe, but that the reporter conceived the contrary; and yet before, in *Lex Cuſt.* 121, 122. he tells us, that *Rolls* conceived that a contingent remainder was not deſtroyed by the deſtruction of the particular eſtate. The caſe before proves that the rule, where the anceſtor takes an eſtate for life (*c*), &c. takes place as well in copyhold (*d*) as freehold eſtates; and indeed what reaſon can there be why it ſhould not; for if it be reaſonable in freehold lands, why not in copyholds; for the rule takes not its riſe from the nature of the land; and it is regularly true, that eſtates and deſcents in copyhold lands are to be guided according to the rules of common law.

Style 249, 271. 2 Roll. Abr. 253. 1 Inſt. 8. b.

A. ſeiſed of a copyhold in fee ſurrenders it to the uſe of his laſt will, by which he deviſes it to *B.* for life, and after his death to the heir of his body begotten, for ever; it is ſaid to be adjudged (*Lex Cuſt.* 124.) that *B.* had a fee executed in him; but it ſeems that muſt be meant of a fee-tail, becauſe the heirs are reſtrained to the body of *B.*(*e*) This caſe does not at all contradict *Coke*, who ſays that if an eſtate be given to a man and

(*c*) [Rule in Shelly's caſe, 1 *Co.* 104.]

(*d*) [See *Watk. on Deſc.* c. 5. p. 167. and *poſt.* 272. N. CXXVII. *acc.*]

(*e*) [The words "for ever," added to a limitation, "to the heirs of the body," will *not*, it ſhould ſeem, turn the eſtate-tail into a fee. See *Dougl.* 324. and ſee alſo 10 *Co.* 44. *a.* and 1 *P. Wms.* 366.]

his heir, he hath but an eſtate for life, for that is meant by feoffment, &c. for he himſelf ſays, in the next folio, that if a man deviſe land to a man *in perpetuum*, it is a fee. And here the deviſe was to a man and one heir *in perpetuum*, which ſure will create a fee, as well as where the word *heir* is left out; but becauſe it is added *heir of his body*, it ſeems the deſign was to give a laſting fee-tail. Neither is it like *Archer*'s caſe, where the deviſe was to one for life, and after to his heir male, and to the heirs male of the body of ſuch heir male; for there there wanted the words *for ever*, to give a fee-tail to the firſt tenant for life; and beſides, there the inheritance is by expreſs words given to the iſſue (*f*). 1 Inſt. 9.

Huſband ſeiſed of lands in fee makes a feoffment to the uſe of his wife for life, and after her deceaſe, to the uſe of the right heirs of the bodies of him and his wife engendered; they have iſſue, and the wife dies; and the *quære* in the book is, Whether the iſſue may enter in the life of his father, or after his deceaſe? And then the book goes farther and ſays, & *come ſemble nemy*, becauſe he cannot be right heir of the body of his father, living his father. This caſe, as far as it is an authority, coming in only by a *come ſemble* of the reporter, is againſt the opinion in the preceding page, and ſeems to be unreaſonable; for unleſs the limitation to the heirs Dyer, 99. [272]

(*f*) [See N. CXXIV.]

be

be executed for a moiety in the feme (*g*), it is impoſſible it ſhould be of any effect; for if the huſband dies firſt, the reverſion will deſcend to the heir, which will be preferred before the contingent remainder (*h*), that is to take effect upon the death both of him and his wife; and if the wife dies firſt, and then the huſband, the contingent remainder is deſtroyed, becauſe it could not take effect upon the death of the tenant for life.

2 Leo. 201. When a copyholder ſurrenders to the uſe of himſelf for life, and then a limitation is made to his right heirs, theſe are words of limitation, and not of purchaſe; but when a ſtranger takes an eſtate for life, and after a limitation is to the right heirs of the ſurrenderor, there, according to *Coke*, heirs are words of purchaſe, and not of limitation; and the reaſon he gives is, becauſe the eſtate is out of the ſurrenderor; which it ſeems from what has been ſaid before, it is not. But yet when the ſurrenderee is admitted, he is in by relation from the ſurrenderor. *Ideo quære* (*i*). According to *Coke*, if a copyholder [273] ſurrender to the uſe of his own right heirs, the lord ſhall hold the land during the life of the ſurrenderor. *Quære* of this (*k*).

(*g*) [See N. CXXV.] (*h*) [See N. CXXVI.]

(*i*) [See N. CXXVII.]

(*k*) [See *ante*, 265. Such a ſurrender is not very likely to occur; as a copyholder would ſcarcely ſurrender *merely* to the uſe of his own right heirs, who would have the eſtate without ſuch ſurrender. But if it were made, the law ſeems to be with lord *Coke*.]

A copy-

A copyhold, demiſable for three lives, was demiſed to one for life, the remainder to another for life, and then to the firſt ſon of the woman he ſhould marry; theſe two remainders not being warranted by the cuſtom, are void; for that warrants only one eſtate with ſeveral limitations, but the firſt eſtate for life being warranted by the cuſtom, is a good eſtate (*l*). Mo. N. 922.

A man ſeiſed of copyhold lands, deviſed a certain parcel of them to his wife for life, the remainder to his brother and his heirs, and afterwards, in preſence of three perſons of the court, ſaid to them, I have made my will as I will have it, and here I ſurrender all my copyhold lands into your hands accordingly; not all his copyhold lands are ſurrendered, but only thoſe mentioned in his will; for he had reſpect to that, in making his ſurrender; and he ſaid he ſurrendered all his copyhold lands *accordingly* (*m*); which ſhewed his intent was only to paſs thoſe lands that were deviſed by his will. Here was no queſtion about the validity of the ſurrender, which was only by parol, and into 3 Leo. 18.

(*l*) [Note, The caſe in *Moore* (677. *Ca.* 922.) was, to one for life, remainder to ſuch woman as he ſhould marry, with remainder to the firſt ſon of his body. And all the juſtices were of opinion, that the two remainders were void; but that the firſt limitation for life was good.

But *quære* of this caſe? and ſee 2 *Lord Raym.* 994. 1 *Salk.* 188. and *poſt.* 323.]

(*m*) [See *ante*, 120. N. XLVI. and *poſt.* 330. (*e*).]

the hands of three tenants of the court; but it is not ſaid in court; and indeed the caſe cannot well be ſuppoſed to be in court; for then the ſurrender had been to the lord or ſteward, and there can be no reaſon why a ſurrender in court by words ſhould be of more validity than a ſurrender by words out of court (*n*).

2 Bulſt. 274.

If a copyholder ſurrenders to the uſe of his laſt will, and therein nominates and appoints that ſuch a one ſhall have the land for life, and after his death gives authority to ſell the lands; in ſuch caſe they may be ſold without any new ſurrender; and the vendee ſhall come in by the will, to which purpoſe the firſt ſurrender is ſufficient (*o*).

Cro. Jac. 199.

Copyholder in fee ſurrenders to the uſe of his laſt will, which he ſaid he would leave with his partner *Moſs*; *Moſs* dies; he recites the ſurrender, and makes his will; it ſeems the deviſee ſhall have the lands; for theſe words, That he would leave in the hands of his partner *Moſs*, are only words of demonſtration, and no way operative or reſtrictive of the operation of the ſurrender or deviſe. And it is a rule in law,

Lit. Rep. 23.

(*n*) [See *ante*, 252. N. CXV.]

(*o*) [2 *Wilſ.* 400. *acc.*; and ſee alſo 1 *Atk.* 96. and *poſt.* next page.

In this caſe an *authority* only is given, and conſequently no admiſſion can be neceſſary; but had any *eſtate*, or *legal intereſt* paſſed, it would have been otherwiſe. See *ante*, 157. N. LXIX.]

when

when an act is to be done, with reference to another thing, which is impoſſible, illegal, or variant, the act ſhall ſtand, and the reference be void.

A copyholder in fee deviſes it to his wife for life, and that ſhe ſhould ſell the reverſion for the payment of his debts; and afterwards he ſurrendered the lands to the uſe of his wife for life, according to the will and deed. Adjudged ſhe might ſell the lands, becauſe in his ſurrender he referred to his will; and afterwards ſhe ſurrendered upon condition to pay 12 *l.*; this was held to be a good ſale, according to the will. [275] Cro. El. 68.

Two jointenants, one ſurrenders his moiety to the uſe of his laſt will, and dies before the ſurrender is preſented, but after he made his will, this is a ſeverance of the jointure; for being preſented, it relates to the time of the firſt ſurrender (*p*). Cro. Jac. 100. 1 Inſt. 59. *b*.

A copyholder ſurrenders to the uſe of another, who, before admittance, ſurrenders to another, who is admitted; no intereſt is hereby veſted in him; for the firſt ſurrenderee had nothing in him to give over (*q*); and the admittance of the ſecond ſurrenderee amounted not to an admittance of the firſt; but an heir Yelv. 144, 145; 1 Roll. Abr. 505. cont.

(*p*) [See *ante*, 218. N. XCIV. and 2 *Veſ.* 639. *acc.*]

(*q*) [See *ante*, 163. N. LXXV. *Fiſher on Copyh.* 131. 148. *Com. Dig. Copyh.* (G. 1); *Co. Litt.* 60. *a.* n. (2); and *poſt.* 283. N. CXXX.]

may ſurrender to the uſe of another, before admittance (*r*); for he has the legal eſtate and intereſt in him. A copyholder may ſurrender to the uſe of another upon condition, that if the ſurrenderor pay ſuch a ſum of money, at ſuch a day, the ſurrender to be void. After the admittance of ſuch ſurrenderee, if the ſurrenderor pay the money, he may re-enter, and ſhall have the land without any new admittance, or any new fine; for he is in of his old eſtate (*s*). So he may ſurrender, reſerving rent; and that if the rent be not paid, he may re-enter; and there no fine or admittance is to be had (*s*). But in caſe where the day of payment of money by the ſurrenderor is paſt; ſo that he hath only an equity of redemption, there it ſeems he muſt pay a fine, and be re-admitted (*t*).

3 Pulſt. 230. cont.

[276]

Cro. Jac. 36. 1 Roll. Abr. 499.

A ſurrender was upon condition to pay 100*l.* to a ſtranger, he tenders the money, and the ſtranger refuſes; the queſtion was, Whether the condition be ſaved? and it was the opinion of one juſtice, that the condition was ſaved; the other juſtices directed it to be found ſpecially. This caſe ſeems now to be beyond all doubt, that the condition is ſaved; for it was the deſign of the parties that the ſurrenderee ſhould retain the land; therefore if a feoffment be

10. El. 361.

1 Inſt. 209. a.

(*r*) [On ſatisfying the lord for his fine. See *ante*, 163. N. LXXV and LXXVI.]

(*s*) [See *ante*, 181. (*s*).] (*t*) [See 2 *Veſ.* 302.]

made

made in fee on condition, that the feoffee ſhall grant a rent-charge to a ſtranger, if the feoffee tender the grant, and he refuſe, the condition is ſaved.

A copyholder ſurrenders to the uſe of *J. S.* [277] paying his executor 100*l.* this is a preſent ſurrender; for otherwiſe it can be of no effect. A 2 Bulſt. 275. copyholder in fee ſurrenders to the uſe of his ſon in fee, upon condition he keep the covenants in ſuch an indenture, and pay 10*l.* The ſon ſurrenders to the uſe of another in fee, but neither keeps the covenants nor pays the 10*l.* the father enters, and dies ſeiſed, the ſon enters as heir to him, and the ſurrenderee of the ſon enters upon him; but his entry was adjudged unlawful; for by the father's entry for the Cro. El. 239. condition broken, the whole eſtates, both of his ſon and his ſurrenderee, were defeated.

An infant ſurrenders copyhold lands, he may at full age diſagree and enter; for in caſe where an infant makes a feoffment in fee, he may enter, much more in caſe of a ſurrender; for a 1 Leo. 95. Poph. 39. feoffment is a conveyance, which will work a Tot. 108. Cro. El. diſcontinuance, but a ſurrender will not (*u*). A feme covert may ſurrender (*w*), being ſolely examined by the ſteward (*x*): and if there be a

(*u*) [See *ante*, 190. (*k*).]

(*w*) [See N. CXXVIII.]

(*x*) [Though ſuch ſteward be retained only by parol, and without alleging a ſpecial cuſtom to do ſo. *Cro. Jac.* 526. *pl.* 2. and *poſt.* 312.]

cuſtom (*y*) for her to be examined before two tenants out of the manor, it is good. A ſurrender to the ſteward to the uſe of the ſteward is good, to give the ſteward an intereſt (*z*), for the ſurrender is in truth to the lord, and not to
[278] the ſteward. A copyholder ſurrenders to the uſe of *A.* in truſt, that he ſhall hold the land until he hath levied certain monies, and that afterwards he ſhall ſurrender to the uſe of *B.*; the monies are levied, *A.* refuſes to ſurrender, *B.* exhibits his bill to the lord of the manor
1 Leo. 2. againſt *A.* who, upon hearing the cauſe, decrees againſt *A.* that he ſhall ſurrender, *A.* refuſes, the lord may ſeiſe and admit *B.* for he is chancellor in his own court.

It ſeems that the preſentment of a ſurrender in court, is only by way of inſtruction, to let the lord know of the ſurrender, and accordingly he may admit; for it is apparent that a preſentment is not of neceſſity (*a*), becauſe the lord may admit out of court; and any act of the lord's conſenting to the ſurrender will amount to an admittance, which plainly ſhews that a preſentment is only to ſhew there was ſuch a ſurrender; for if it were of neceſſity, then there

(*y*) [But two tenants cannot take ſuch examination *without* a ſpecial cuſtom authorizing them ſo to do. *Cro. Eliz.* 717.]

(*z*) [*Cro. Eliz.* 717. and *ante*, 221. (*x*).]

(*a*) [1 *Roll. Abr.* 502. *Copyh.* (M). *pl.* 4. *acc.* and ſee *ante*, 250. N, CXI.]

could

could be no admittance out of court, nor no act implying the lord's conſent would be *tantamount* to an admittance; and then if we go to the reaſon of the thing, ſince the eſtate is only to be ſurrendered to the lord, and by him tranſferred to the ſurrenderee, if he accept the ſurrender, and grant an admittance, which is all that can be done, what need is there of a preſentment, and of what uſe can it be for the homage to preſent a ſurrender, in order for the lord's admittance, when the lord may take notice that there was ſuch a ſurrender, accept it, and admit accordingly? The eſtate, as it was derived from the lord, ſo it muſt be ſurrendered to him, and the preſentment makes no part either of the ſurrender or admittance. In itſelf, it is nothing but a notification that there was ſuch a ſurrender, which if the lord takes notice of, without a preſentment, it fruſtrates the end of a preſentment, and the preſentment is no ways of uſe. Therefore it ſeems, that if a ſurrender be made, and then a wrong preſentment be made of this ſurrender, and then admittance is made according to the ſurrender, that this is good; for only the preſentment can be void, and then there is an admittance upon a ſurrender, without any preſentment, which, for the reaſons before, ſeems to be very good. It is ſaid in *Lex Cuſt.* 137. that a ſurrender muſt be preſented by the ſame perſons that took [279]

Co. Cop. 105. Cro. Jac. 403. 4 Co. 29. b.

it (*b*). So says *Coke*; but that this is not literally true, will appear from what he says in another place, that if he that took the surrender die, yet if presentment be made of it, it is sufficient; and it is said in *Lex Cust.* to have been held by *Wadham Windham*, that if a surrender be made to one tenant, and presented to have been made to another, yet that is nothing to vitiate the surrender; if the surrender be presented by any body, and admittance thereupon made, it seems to be well enough; for it is known that there was a surrender; and if the presentment should be void, yet the admittance is good enough without it.

[280]

Presentment, by the general custom of manors, ought to be made at the next court-day; but by special custom at the second or third court-day; the reason of this seems to be to prevent disputes; for if an old surrender might be trumped up at any time, it would defeat any aftercharges made by him that surrendered; which charges would appear to be good enough, since he is tertenant, and continues possession, and the surrender could not be known. But now let but the purchaser stay a court or two, and then he may be sure to know whether there is any incumbrance; for if the surrender is presented, then it appears, and he need not meddle;

Co. Cop. 105. Style, 257.

(*b*) [See *ante*, 220. (*c*).]

if

If it be not preſented, he knows it is void, and ſo may proceed (*c*).

A ſurrender is made by a copyholder upon condition, for payment of money, and then he makes a ſecond ſurrender, and then a third; but between the ſecond ſurrender and the third, he paid the money; and the queſtion was between the two laſt ſurrenderees, Who ſhould have the land, their two ſurrenders being only preſented, and not the firſt; no court being held till after all the ſurrenders? And it was adjudged for the ſecond ſurrenderee; for till preſentment he had the whole eſtate in him; and it is ſaid in the caſe, that if the ſurrender had firſt been preſented, all mean acts had been void; but becauſe that ſurrender was not preſented, it was void. It ſeems this muſt be underſtood if the money had not been paid, or a court had been held before the money was due, and there the ſurrender had been preſented; for it ſeems the preſentment of the firſt ſurrender, after the payment of the money, had been void, becauſe the ſurrender was void then, and a void ſurrender cannot be preſented; and until a ſurrender be preſented, it cannot bind the intereſt of the land; *ſed quære?* Cro. Car. 273. 283. Burgoin v. Spurling. [281]

If a copyholder die ſeiſed, and the lord admits a ſtranger, this is no diſſeiſin to the copyholder, but he is tenant at will (*d*). 3 Leo. 220.

(*c*) [See *ante*, 220. N. XCV.] (*d*) [See N. CXXIX.]

There

Yelv. 144, 5. There are two caſes which ſeem to be directly againſt admittances by implication; the one is, If a copyholder ſurrenders to the uſe of another, and the *ceſtuy que uſe* before admittance ſurrenders to the uſe of another, and the lord admits him, that this is no admittance of the Cro. Ja. 403. firſt *ceſtuy que uſe* (*e*). The other is, A copyholder ſurrenders to the uſe of another, and he enters and pays rent to the lord, that this is no admittance of *ceſtuy que uſe*; and the reaſon given is, becauſe the cuſtom (of ſurrendering into the hands of two cuſtomary tenants, and preſenting it at next court) is ſtrict and ought to be purſued. But however there are caſes of admittances by conſtruction and implication, without any expreſs admittance; and as the laſt 1 Rol. Abr. 505. 2 Sid. 61. caſe is reported by *Rolls*, it is ſaid that the acceptance of rent out of court from the *ceſtuy que uſe* (the lord knowing of the ſurrender) is an admittance in law (*f*); yet as the caſe is reported by *Croke*, judgment is given for the leſſee of the heir of the ſurrenderor. If we look to the reaſon of the thing, we may con- 3 Bulſt. 230. 215, 216. clude, that any thing that expreſſes the lord's conſent to the ſurrender, ſhould amount to an admittance; for it is his conſent only that is

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(*e*) [See *ante*, 275. (*q*); and next page N. CXXX.]

(*f*) [See *ante*, 278. and *poſt*. next page; and ſee further of Implied Admiſſions. *Fiſher on Copyh.* 154. *Vin. Copyh.* (E. b.) *Calth.* 62, 3.]

requiſite

requiſite after the ſurrender, to make the ſurrenderee a tenant; and what matter is it whether that be done by a *dominus conceſſit & admiſſus eſt*, or by any act that amounts to as much? There is a caſe in *Rolls* too, where the ſurrender of a perſon before admittance, and acceptance of the lord of the ſurrender, was conſtrued to be firſt an admittance, and then a ſurrender; for the lord, by accepting the ſurrender, implies he admits him able to make one (*g*). And by the ſame reaſon, that the acceptance of a ſurrender before admittance amounts to an admittance, the admittance of ſuch a ſurrenderee's ſurrenderee is a good admittance of the firſt ſurrenderee (*g*). If a fine be accepted of one as a copyholder, this amounts to an admittance. Accepting rent from the hands of the two tenants into whoſe hands the ſurrender was made, doth not amount to an admittance of *ceſtuy que uſe*, becauſe the lord may receive it of them without deſigning thereby any thing to a third perſon; but if he takes it from them as from *ceſtuy que uſe*, it is an admittance. This is the ſame caſe as that reported by *Croke;* but *Croke* reports it, that acceptance of rent of *ceſtuy que uſe* is no admittance; *Rolls*, that it is an admittance (the lord knowing of the ſurrender). *Bulſtrode* reports it as paid by the two tenants, into whoſe hands,

1 Rol. Abr. 505.

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3 Bulſt. 237.

3 Bulſt. 215.

(*g*) [See N. CXXX.]

&c.

&c. and then ſays, it is no admittance; but if he had ſhewn that the lord had accepted the rent as of his copyholder, then he ſaith it had been a good admittance.

[284] Leſſee for life, years, or will, of a manor,
1 Inſt. 59. b. Cro. Car. 556. accepts a ſurrender, and then his intereſt determines, the next lord ſhall be compelled to admit. It ſeems if a ſteward have his office
1 Ld. Raym. 658. *exercend. per ſe vel ſufficient. deput.* (*b*) he may exerciſe by deputy, though there be no cuſtom.
1 Leo. 288. *Sed quære?* but if that clauſe be not in, it ſeems he cannot make a deputy, becauſe it is an office of truſt (*i*): But any act of ſervice may be done by one as ſervant to the deputy, *a fortiori* to the ſteward, as to take ſurrenders, make grants by copy, and admittances (*k*).

Poph. 127, 8. The entry of *compertum eſt per homagium* doth not make an admittance, for that only ſhews there was a ſurrender, but implies no aſſent to the ſurrender; but the entry of *dat domino pro fine & fecit domino fidel. & admiſ.* that is the admittance. It is ſaid that in this caſe the ſurrender was preſented, and the ſurrenderee accepted, and a copy granted him,

(*b*) [Of if a grant of ſtewardſhip be to a perſon *and his heirs*, or to him *and his aſſigns*. See 2 *Brownl.* 337. and *poſt.* 314.]

(*i*) [See *Co. Copyh.* f. 46.; and ſee alſo 1 *Hen. Blackſt.* 163. See top *Vin.* Steward (I & K). and *poſt.* 320.]

(*k*) [See *Com. Rep.* 84. 1 *Lord Raym.* 658. 1 *Salk.* 95. *poſt.* 314. *acc.*]

and he ſurrendered again; and this ſurrender was preſented, and a copy granted, and he accepted as a copyhold tenant. In this caſe nothing is ſaid to be reſolved, but the court ſaid that he, to whoſe uſe the ſurrender is made, had not any eſtate before admittance; but they ſaid nothing to the point, whether he were admitted, or not. [285] But it ſeems that in that caſe there is a very good admittance; for he was accepted as tenant; and I ſhould think it was that made him tenant, and not the entry of it in the roll.

If one who hath a *tortious* eſtate takes a ſurrender, and his eſtate end before admittance; *quære*, Whether the right owner ſhall not be compelled to admit, ſince he is compellable to take ſuch ſurrender (*l*)?

A copyholder ſurrenders to the uſe of another and his heirs, the *ceſtuy que uſe* dies before admittance, his heir being beyond ſea; one comes and is admitted in the name of the heir, who conſents; this is a good admittance (*m*). But it ſeems the lord is not compellable to admit by another, becauſe the corporal ſervice of fealty is due to him (*n*). If a ſurrender be to the uſe of *J. S.* and *J. N.* is admitted, and *J. S.* conſents, this is a good admittance; *quære* of it (*o*)? 2 Sid. 37. 61.

(*l*) [See 4 *Co.* 24. *a.* and *ante*, 198; and 257. N. CXX.]
(*m*) [See *ante*, 252. N. CXIII.]
(*n*) [See *ante*, 216. (*g*).] (*o*) [See N. CXXXI.]

A copy-

1 Leo. 100. A copyholder in fee dies, his heir enters and makes a leaſe, the leſſee may maintain *ejection. firmæ*, without the admittance of his leſſor (*p*), or preſentment that he is heir. But it was held in the ſame caſe, that thirty years having incurred between the death of the copyholder and the making the leaſe, that being his own de-
[286] fault, ſhould hinder him of the power of making the leaſe, had he not ſhewn good matter to have excuſed the default. The reaſon of this ſeems to be, becauſe the law caſts the eſtate upon him by deſcent, and ſo enables him to make a leaſe, leſt otherwiſe there being no court held in a great while, he ſhould loſe the profits of the lands; and ſo the law caſts the eſtate upon him, and helps out the defect of an admiſſion; but yet only *pro tempore;* and therefore the heir muſt be admitted; for an eſtate at will is not in itſelf deſcendable; therefore where the heir is guilty of a ſupine negligence, the reaſon for the law's caſting the eſtate upon him ceaſes, and it will reckon no eſtate in him, and conſequently he cannot demiſe (*q*). That which excuſed the admittance for nineteen years, was non-age in the heir; for it was reſolved that the heir during his non-age, was not bound to

(*p*) [See *ante*, 162. (x); and ſee alſo *Bull. Ni. Pri.* 107. where it is ſaid, that he can only make a leaſe to *try his title* before admittance.]

(*q*) [See N. CXXXII.]

pray

pray admittance, or tender his fine (*r*). And if the death of the anceſtor be not preſented, nor proclamation made for the heir to come in, *&c.* he is not prejudiced, though he be of full age (*s*). 4 Leo. 30, 31.

A copyholder of inheritance of a manor of the king's is ouſted; no eſtate is gained hereby to the wrong-doer, but only a bare poſſeſſion. My lord *Coke* ſays, peradventure if a copyholder languiſhing *in extremis*, ſurrenders out of court to the uſe of his couſin, or to any other upon conſideration of affection, blood, or the like, and recovers his health before preſentment, this ſurrender is revocable (*t*); but by his ſaying a ſurrender out of court, it ſeems, if it were made in court, that it were not revocable, for then he ſhewed a more ſettled deſign; and by his ſaying before preſentment, it ſeems that if it were preſented, it were not revocable (*u*); for then the land is bound. By *Wray*, if a copyholder ſurrender *in extremis* to the uſe of himſelf for life, *&c.* this ſurrender ſhall ſtand, becauſe of the eſtate reſerved to himſelf. This ſeems plainly to warrant the aforeſaid opinion of *Coke*. Co. Cop. 104, 5. [287] 1 Leo. 100.

The lord may avow upon the heir for rents and ſervices before admittance (*w*), but he is not Co. Cop. 112. Mo. 272. cont.

(*r*) [See *ante*, 230, 1; and ſee alſo *ſtat.* 9 *Geo.* *c.* 29; and *poſt.* 293. N. CXLIV.]

(*s*) [See *ante*, 230, 1. 1 *Leon.* 100. *Ca.* 128. 3 *Ibid.* 221. *Ca.* 294. *acc.*]

(*t*) [See N. CXXXIII.] (*u*) [See N. CXXXIV.]

(*w*) [See N. CXXXV.]

complete

complete tenant before admittance (*x*), for he cannot maintain a plaint in nature of an aſſiſe before admittance (*y*); but it ſeems he may have aſſiſe of Mortdanceſtor upon his anceſtor's admittance (*z*). *Quære*, Whether a feme be ſo ſeiſed to make her huſband tenant by the curteſy before admittance, where the cuſtom is for tenancy *per* curteſy (*a*)? It ſeems reaſonable it ſhould make the huſband tenant *per* curteſy, as well as the poſſeſſion of the brother before admittance make the ſiſter heir; and by the ſame reaſon the widow ſhall have her widow's eſtate, though her huſband was not admitted (*b*).

Moor, 272. 1 And. 192.

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(*x*) [But he has title againſt every one but the lord, as well before as after admiſſion. See 2 *Durnf. & Eaſt*, 197, 8. and *ante*, 163. N. LXXV.]

(*y*) [*Kitch.* 60. *a.* & *b.* *Co. Copyh.* ſ. 41. *Tr.* 94. and ſee *Moore*, 272. *Ca.* 425.

It is ſaid that he ſhall not be ſworn on the homage before admiſſion (*Kitch.* 87. *b.* and *Co. ubi ſup.*). But ſurely, if an heir were ſworn on the homage, would it not be an admiſſion in effect? What could more ſtrongly confeſs him a tenant?]

(*z*) [See *Co. Copyh.* ſ. 41. *Tr.* 94. *contra.* And *quære*, Whether ſuch plaint in nature of a writ of *Mort d'anceſtor* ever lay of copyholds? See *F. N. B.* 122. (I), & n. (*c*). 3 *Bl. Comm.* 184, 7. c. 10. 1 *Bl. Tracts*, 122; citation from *Bracton*, (*Vide Bract.* lib. 1. c. 11. f. 7. *a.*)]

(*a*) [That the huſband in ſuch caſe ſhall be tenant by the curteſy, See *Moore*, 271, 2. *Ca.* 425—597. *Ca.* 813. and *Watk. on Deſc.* c. 1. ſ. 2. p. 53. n. (8).]

(*b*) [See *Hutt.* 18. *Hob.* 181. 244. *Watk. on Deſc.* c. 1. ſ. 2. p. 53, 4. notes. 1 *Roll. Abr. Copyh.* (M). 502. *pl.* 1. *acc.*]

If

If there be a cuſtom to ſurrender out of court into the hands of two cuſtomary tenants, a ſurrender to the heir of a copyholder before admittance is good. If a copyholder of inheritance ſurrenders this to the uſe of another, and his heirs, and the ſurrenderee die before admittance; *quære*, Whether his heir be in by purchaſe or deſcent? It was the opinion of juſtice *Newdigate*, that he was in by purchaſe; and according to this is *Rolls*. But the opinion of *Glyn* was, he was in in nature of a deſcent; and ſo are ſome other opinions that are more late (*c*). Therefore it was held, if land of the nature of borough *Engliſh* be ſurrendered to one and his heirs, and he die before admittance, that the youngeſt ſon ſhall be admitted; and this opinion ſeems to be very reaſonable, for *heirs* were in the limitation certainly as words of limitation, and not of purchaſe; and certainly there is as much reaſon to adjudge the heir in by deſcent here, as there is to adjudge an heir in by deſcent where a recovery was had againſt the anceſtor, but not executed till after his death; becauſe the uſe might have veſted during the life of the anceſtor; and becauſe the execution hath a retroſpect; and in truth the caſe of a ſurrender is juſt the ſame, for admittance might have been in the life of the [289]

1 Keb. 25. 1 Ld. Raym. 76.

2 Sid. 37. 61. 1 Rol. Abr. 627. 807. 1 Mod. 102. 162.

Quære, & vide 1 Rol. Abr. 502.

2 Ld. Raym. 1026. 28.

1 Co. 106.

(*c*) [See *Watk. on Deſc.* c. 1. ſ. 1. p. 20. and the books there referred to, *acc.*; and ſee alſo *ante*, 220. (*u*).]

anceſtor; and when it was had, it had a retroſpect (*d*).

Winch, 3. 3 Leo. 9. Dyer, 251. a.

One jointenant copyholder releaſes to his companion; this is good, becauſe both were admitted to the whole (*e*). A copyholder in fee ſurrenders into the hands of the lord, to the intent the lord ſhould grant them *de novo* to him for life, and then to *J. S.* his wife, during the nonage of the ſon and heir of *D.* the copyholder, then to the ſon in tail; the copyholder died, and then the lord granted the lands accordingly to the wife, during the nonage of the heir, he being then but five years old; the wife took another huſband and died; the huſband by the opinion of two judges was to have the land during the nonage of the heir, without any new admittance (*f*); if ſo, then it ſeems he ſhall pay no fine, for a fine is due upon the admittance (*g*). By the ſame juſtices, if there be a copyholder for years, and he dies, his executors ſhall have the term without any new admittance. But *Weſton* to the contrary. But however the opinion ſeems reaſonable, for
[290] they continue the poſſeſſion of the teſtator, and have it only to his uſe (*b*).

(*d*) [Of the relation of the admittance to the ſurrender, ſee 5 *Burr.* 2785—7. and *ante*, 163. N. LXXV. 218. N. XCIV.]

(*e*) [See *ante*, 157. N. LXIX.]

(*f*) [See N. CXXXVI.]

(*g*) [See *ante*, 218. (*l*); 219. (*o*).]

(*b*) [See N. CXXXVII.]

Ceſtuy

Ceſtuy que uſe cannot enter or have treſpaſs Cro. El. 349.
againſt any body without admittance, unleſs there be a ſpecial cuſtom for it. There is a caſe in *Yelv.* 16. where it is ſaid upon motion to the court, it was agreed by the four juſtices, that if a copyholder ſurrenders to a ſtranger, and the ſteward will not admit him, and the ſtranger enters and occupies the land, and the lord lets to another to try the title, and he brings ejectment, the occupier may plead Not guilty, and it ſhall be found for him (*i*); and then the report of the caſe goes on, and it is ſaid, *quære rationem?* for if it be in reſpect of the poſſeſſion, it ſeems the title of the lord is elder, by reaſon he has right and title to the freehold, *&c.* and then it is ſaid, *quære*, Whether the reaſon be not becauſe the lord is *particeps criminis?* for it ſhall be intended that he would not let the ſteward admit. Then the report goes on and ſays, *Nota*, the ſurrender was but of a copyhold to him, *& tribus aſſignatis ſuis*, ſo that by his death the eſtate in the copyhold determined, *&c.* This is a very ſtrange report, for the *quæres* and reaſons of the caſe confound it. It ſeems to me, that the reaſon of the caſe [291]
was, becauſe that after the ſurrender, the eſtate continued in the ſurrenderor, and not in the lord; and ſo the poſſeſſion of the ſurrenderee was illegal againſt the ſurrenderor; yet it was

(*i*) [See N. CXXXVIII.]

good againſt every body elſe, and ſo againſt the lord's leſſee; for when the lord refuſes to admit, the way is to compel him in chancery; and no action upon the caſe lies againſt the lord for non-admittance (*k*). It is ſaid in *Lex Cuſt.* 158. that an action lies for the ſurrenderor; *ſed quære* (*l*)? Indeed the reaſon given was, becauſe the ſurrenderee hath no intereſt which the ſurrenderor hath. It ſeems, if a man enter into his wife's lands, and makes a leaſe, and ſhe dies before admittance, yet the leaſe made is good (*m*). The iſſue in the caſe between *Wheeler* and *Honor*, was, Whether the fine to be paid by copyholder was certain or uncertain? and the verdict was, that they were certain. In this caſe it was held by two juſtices, and denied by no body, that debt lay for the lord for his fine (*n*). It ſeems it lies in any caſe; for the verdict finding that copyholders ought to pay a fine certain, did not any more entitle the lord to his action of debt, than he was before: and it ſeems to me, that if upon demand he refuſes to pay the fine, it is a forfeiture (*o*). It is made a *quære* in that caſe, Whether if a copyholder in fee die, and his heir waves the poſſeſſion, and

Tothil, 65. 1 Roll. Rep. 125. 195. 2 Bulſt. 236. Cro. Ja. 368. Mo. 842. 1 And. 192. 1 Sid. 58.

1 Sid. 58.

Stra. 447.

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(*k*) [See *ante*, 157. N. LXXII. 163, N. LXXV.]

(*l*) [See *ante*, 157. N. LXXII. *Lex Cuſt.* c. 17. p. 162. where it is ſaid to be ſo reſolved in Galloway's caſe, 26 *Eliz.*]

(*m*) [See N. CXXXIX.] (*n*) [See N. CXL.]

(*o*) [See *ante*, 218, 219.]

refuſes

refuſes to be admitted, whether the lord ſhall have debt for the fine? and the reporter thinks he cannot wave the poſſeſſion, which to me it ſeems he may do in court of record, or in that caſe of copyhold lands in the lord's court; and if he may do it, then no fine is due (*p*).

Coke ſays, treating of fines, that ſome be by alteration of the lord, and ſome by alteration of the tenant; but that a cuſtom to pay a fine at every alteration of the lord (*q*) is not good; but a cuſtom to pay upon the death (*q*) of every lord is good. *Quære*, Whether a fine be due of common right upon the alteration of the lord by death? it ſeems it is not (*r*), but only where there is a particular cuſtom for it; though my lord *Coke*'s words are general, and may be interpreted either way. 1 Inſt. 59. b.

It is ſaid to be reſolved in *Keble*, that if the lord reſerve rent upon a leaſe for years of the freehold of the copyhold, the reſervation is not good. The meaning of this muſt be, either that the lord reſerves a rent upon a leaſe of the freehold of the copyhold lands, or elſe that he reſerves the copyhold rents to himſelf, ſo that the leſſee ſhall not have them; in both which ſenſes the caſe ſeems unreaſonable; for in the laſt ſenſe I can ſee no reaſon why he ſhould not reſerve the rents as rents-ſeck to himſelf; and 1 Keb. 15. [293]

(*p*) [See N. CXLI.] (*q*) [See N. CXLII.]
(*r*) [See N. CXLIII.]

in the other case surely the reservation must be good, for it seems to be a grant of the reversion for so many years; for by force of such lease the lessee will have all the services of the copyholder, and take advantages of forfeitures, in respect whereof a rent may be reserved. Therefore, where it is adjudged that where a lord made a lease for years, to commence after the determination of a copyhold estate for three lives (where the custom was for a woman to have her widow's estate) that the lease should commence presently in point of computation, though not in point of interest; it seems that must be understood of interest in possession, for surely such a lessee shall have the services, &c.

Cro. El. 499. 2 Leo. cont.

2 Sid. 165.

Infant copyholder makes a lease for years, and at his full age accepts the rent, this makes the lease good (s): such a forfeiture shall not bind an infant, no more than if being tenant for life of freehold lands, he makes a feoffment in fee; but if he accepts the rent after full age, then the forfeiture shall bind him, as it seems. It seems the lord may enter for the forfeiture during the nonage (t), and need not stay to see whether the infant will accept the rent or no, for the particular prejudice done to the lord;

4 Co. 27. Cro. El. 491. Noy, 92. Latch. 199. Rol. Rep. 256. 8 Co. 44.

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(s) [Of making a voidable lease good by acceptance of rent, &c. see *Cowp.* 482. Jenkins *d.* Yate *v.* Church. See also 3 *Durnf.* and *East*, 171. and next note.]

(t) [See N. CXLIV.]

and

and if he ſhould ſtay his acceptance of ſervices from the infant, in the mean time it would be a diſpenſation for the forfeiture. But then the infant at his full age, by diſagreeing to the leaſe, may avoid the forfeiture. Cuſtom that upon payment of ten years rent, the lord ſhall licenſe to let for ninety-nine years; and if he will not licenſe, the tenant may let without: adjudged a good cuſtom; yet the licence ſeems unneceſſary here, ſince it may be done without it (*u*). 2 Keb. 344.

Lord of a manor grants a copyhold, rendering rent *præfat. domino & ſervitia de jure debita & conſueta.* This rent ſhall go to him, his heirs and aſſigns; *ſed quære?* for in caſe of freehold lands it is extinct by the lord's death; otherwiſe if the reſervation were generally made, and not to him. The reaſon of the diverſity may perhaps be, becauſe of the clauſe *& ſervitia prius debita & conſueta*, which ſeems to intend the continuance of the ſervices, during the leaſe; for elſe the grant of the copyhold will not bind the heir; and it ſeems to be the deſign of the grant of the copyhold to be good during the term. And though leſs ſervices are reſerved than uſually were, that thereby the grant may be avoided; yet the intent and purport of that clauſe *per ſervitia prius debita & conſueta*, ſeems to be to continue the rent during the eſtate, becauſe rent was a *ſervitium* 2 Rol. Abr. 450. 2 Inſt. 47. a. [295]

(*u*) [See N. CXLV.]

prius debit. & consuet. though not so little rent; and if more be reserved, then the rent must be paid also, during the whole term, by force of that clause, because rent used to be paid; and though not so much, yet that being the only rent reserved, and the old services being to be continued by force of that clause, the whole must be paid, for that seems the intent of the parties, and there is no ground for an apportionment. But then if no rent have been used to be paid, *quære* of that? But grants of copy and surrenders are not construed as deeds are, but have a more equitable construction (*w*), and therefore it may be good in such case. This distinction is taken in *Popham.*

Poph. 188.

A copyholder made a lease for years by licence, the lessee dies; this shall not be accounted assets in the hands of the executor; otherwise if the lease had been for but a year, because this is an estate at common law (*x*), and the other but a customary estate; *sed quære*, Whether the executor be not compellable to pay
[296] debts with the profits? for though the estate be not extendable, yet it is unreasonable he should take the profits to his own use, while debts go unsatisfied. It seems by this distinction, that a lease for a year of copyhold lands is extendable; and indeed it may as well be in the hands of a

(*w*) [See N. CXLVI.] (*x*) [See N. CXLVII.]

creditor

creditor for a year, without the lord's licence, as in a leſſee's hands (*y*). It is true, copyhold lands are not aſſets in the hands of the heir, for it is nothing but cuſtom that makes an eſtate at will deſcendable; and therefore unleſs there be cuſtom to make them aſſets, they partake only of the qualities of an eſtate at will, which is not to be aſſets; and it is ſufficient for the heir to plead *riens per diſcent*; and therefore the profits of the lands ſhall not be aſſets in his hands, becauſe not deſcendable. But though the term itſelf cannot be aſſets in the hands of the executor, for the reaſon aforeſaid; and alſo becauſe it cannot be extended (*yy*); yet the profits when received may be aſſets, for then they are chattels, and partake no more of the nature of cuſtomary lands; and therefore it ſeems reaſonable they ſhould be aſſets in the hands of the executor; *ſed quære*.

The lord licenſes the copyholder to let for five years, and he lets for three, this is good; ſo if the lord licenſe the copyholder for life, to let for five years, if the copyholder ſo long live, and he lets for five years abſolutely, this is a good purſuance of the licence, for the limitation is implied by law, and ſo need not be expreſſed; but otherwiſe it is, had the limitation been during the life of a ſtranger, had the copyholder had a fee. *A.* hath a licence to

Cro. Ja. 436. Noy, 121. Poph. 105.

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Cro. El. 394. Moor, 50.

(*y*) [See N. CXLVIII.] (*yy*) [See N. CXLIX.]

let

let for twenty-one years from *Michaelmas* laſt, and he makes the leaſe to begin from *Chriſtmas* next; this is not warranted by the licence. It was the opinion of my lord *Dyer*, that if a leaſe be made of freehold and copyhold lands together, rendering rent, that the rent ſhall iſſue only out of the freehold, becauſe the leaſe of the copyhold lands is void, and becauſe they are of no account in law, and ſo may be compared to a leaſe of lands and goods; the rent iſſues out of the lands, and not the goods. But in the caſe of *Collins* and *Harding*, it was held that the rent iſſued out of both, for copyhold lands may be diſtrained upon. This opinion ſeems very reaſonable, for the leaſe is good againſt every body but the lord, and is not a void leaſe; for if the leaſe were only made of the copyhold lands, ſurely the leſſor has remedy for the rent; and then the joining freehold lands with the copyhold can make no alteration.

Mo. 554. Cro. El. 607. 622. 1 Roll. Abr. 426. 1 Roll. Abr. 234.

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1 Leo. 325. A copyholder makes a leaſe by licence for years, rendering rent, and then grants the rent over to another by deed; the leſſee attorns; it was held to be a good grant of a rent-ſeck, but that the grantee could not have debt (x), becauſe he was not privy to the contract, neither hath he the reverſion. Leſſee for years of a manor grants licence to fell timber; it ſeems this is good

1 Keb. 26.

(x) [See N. CL.]

during

during the years; ſo that neither leſſee nor leſſor can take advantage of the forfeiture. Not leſſor, for thereby the leſſee of the manor would loſe the ſervices of his tenant; for he is the lord of whom the copyholder holds, and therefore he muſt take advantages of forfeitures, if any body can, which in this caſe he cannot do becauſe of his licence; but then when his intereſt is determined, ſince there is a prejudice done to the inheritance of the manor, it ſeems the leſſor may take advantage of the forfeiture, for the licence determines by the expiration of the years. When a lord grants a licence to fell timber, and then grants his intereſt over to another, this determines the licence; for the licence is but a diſpenſation with the forfeiture, and gives no property; but the property being transferred to another before the felling, there muſt be a new licence to fell, becauſe he is not party nor privy to it; but if the leſſee fell timber after ſuch an alienation of the manor, it is no forfeiture; *ſed quære* (*a*). [299]

If the copyholder make a leaſe for years by the lord's licence, the leſſee may aſſign over his leaſe, or make an under-leaſe for years, without any new licence; for the lord's intereſt is diſcharged for ſo many years? 1 Roll. Rep. 509.

Lord at will cannot give licence to let for years; for he cannot diſcharge the lord's intereſt any farther than his own intereſt in the manor 1 Roll. Abr. 511.

(*a*) [See N. CLI.]

goes;

goes; and therefore if the lord that gives the licence has but a particular intereſt in the manor, the licence is determined upon the determination of the lord's intereſt. The lord gives licence to leaſe upon condition; the condition is held in *Owen* to be void; *ſed quære* (*b*)? A copyholder makes a leaſe for years with licence, and before the years expire dies without heir; ſome are of opinion the lord may enter, becauſe the eſtate out of which the leaſe was derived is determined; others ſay the licence ſhall be taken as a confirmation (*c*).

2 Brownl. 40.

Owen, 73.

Poph. 188.

Carter, 6, 7. 22.

A copyholder in tail accepts a feoffment; this

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deſtroys not the cuſtom as to his iſſue in tail, for he hath no power to conclude him (*d*); yet if he commit a forfeiture, and the lord ſeiſes, it ſeems his iſſue is bound, it being a common and cuſtomary way to cut off the entail of copyhold lands (*e*). If one ſeiſed of a manor in right of his wife, let lands by indenture for years, this does not deſtroy the cuſtom, as to the wife; for after the death of her huſband ſhe may demiſe it by copy again. And by the ſame reaſon it ſeems her heir may; ſo if tenant for life of a manor lets a copyhold, parcel of the manor for years, and dies, this ſhall not deſtroy the cuſtom, as to him in reverſion. Copyholder accepts to hold his land by bill, under the lord's hand; this

Sira. 1197.

Cro. El. 459. 598.

1 And. 199. Latch, 213.

(*b*) [See N. CLII.] (*c*) [See N. CLIII.]
(*d*) [See N. CLIV.]
(*e*) [See *ante*, 177. N. LXXXI. and LXXXII.]

determines

determines his copyhold. So if he accept an eſtate for life, by parol (*f*), if livery be made; otherwiſe not; for elſe nothing but an eſtate at will paſſes, which cannot merge an eſtate at will.

If a copyholder releaſes to his lord, this extinguiſhes the copyhold (*g*). So if the lord ſell the freehold of the inheritance of the copyhold to another, and then the copyholder releaſes to the purchaſer, this extinguiſhes the copyhold intereſt. But if the copyholder be ouſted, and thereby the lord diſſeiſed, and the copyholder releaſes to the diſſeiſor, this is of no effect. [301] The reaſon of this ſeems to be, that though a releaſe cannot in its own nature paſs away a poſſeſſion, yet it may amount to a ſignification of the tenant's mind to hold the land no longer; for a copyholder is a tenant at will, and therefore, though the poſſeſſion be not granted, any thing amounting to a determination of the copyholder's will, is ſufficient to extinguiſh his copyhold. So if tenant at will, of freehold lands, grants his eſtate over, though nothing paſſes, and the grant is void, yet it amounts to a determination of his will. But then as to the laſt caſe of the diſſeiſor, no right to a copyhold eſtate is extinguiſhed by releaſe, but where the perſon that hath the copy-

Hutton, 81. 1 Keb. 808. 1 Leo. 102.

Cro. El. 21.

1 Inſt. 57. a.

(*f*) [A feoffment muſt now be in writing, by the ſtatute of frauds, 29 *Car.* 2. c. 3.]

(*g*) [See, as to the releaſe of a copyholder, *ante*, 157. N. LXIX.]

hold

hold eſtate comes to it rightfully, becauſe of the prejudice the rightful lord would be at; for in this caſe he would loſe, in his damages againſt the diſſeiſor, the fine due for admittance; and there would be a tenant brought in againſt his will, and an eſtate at will grantable by ſurrender only, paſs by diſſeiſin and releaſe. This caſe is not therefore to be compared to the caſe where tenant for life releaſes to him in the reverſion, this is of no uſe; for it cannot be conſtrued to be a ſurrender (*b*); and as a releaſe it cannot operate, and ſo it is of no effect; but in our caſe, if it be but a declaration of the copyholder's intent to be no longer a copyholder, it is ſufficient. A copyholder bargains and ſells his copyhold lands to the lord of the manor, who is only leſſee for years, the copyhold is not extinguiſhed; for the leſſee is lord of the manor, and ſo the lands are always demiſable by copy (*i*). And there can be no difference between this caſe and where the manor is conveyed away, together with the copyhold at one and the ſame time. Three ſiſters copyholders for life *ſucceſſive*, the eldeſt tenant in poſſeſſion takes huſband, the lord by indenture makes a leaſe to the wife, the remainder to the huſband, remainder to the ſecond ſiſter, who four days after the making the leaſe, agreed *in pais*, and then took huſband, and entered; and the firſt queſtion was, Whether the

4 Co. 25. b. 1 Leo. 102.

Cro. Ja. 169.

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Hut. 81.

2 Leo. 73.

(*b*) [See N. CLV.] (*i*) [See N. CLVI.]

agreement

agreement did extinguiſh her copyhold eſtate? And the opinion of the juſtices ſeemed to be, it did not; but judgment was given againſt the younger ſiſter (*k*); for the eldeſt ſiſter not being dead, ſhe could not enjoy her remainder, that being to commence after the death of her ſiſter. Now this judgment might be given, and the firſt point be left undetermined; for if her copyhold eſtate were extinct by acceptance of the remainder, then to be ſure her entry was not lawful; and if it were not determined, yet it [303] was held the younger ſiſter's remainder could not take place, becauſe, according to *Margaret Podger*'s caſe, the remainder was not to commence till after the eſtate for life ended (*l*); *ſed quære* farther, Whether the younger ſiſter's remainder be not in this caſe deſtroyed? for the eſtate for life of the eldeſt ſiſter is utterly gone; for the lord having made a leaſe, can take no advantage of the forfeiture, and then the remainder not commencing when the particular eſtate ends, it ſeems it can never commence; for there is as much reaſon to deſtroy contingent remainders of copyholds as freehold eſtates (*m*); and this is not like the caſe where the lord ſeiſes the particular eſtate as a forfeiture; for there it

1 Roll. Abr. 505. 2 Brown. 153. 9 Co. 107. Lex Cuſt. 232. Cro. El. 24.

(*k*) [*i. e.* the younger of the *two*; the *ſecond* ſiſter, not the *third*.]

(*l*) [See *ante*, 173. 265.]

(*m*) [See *ante*, 263. N. CXXII. and 1 *Fearne*, 469.]

remains

remains (as it ſeems) to ſupport remainders. Huſband and wife, copyholders in fee, the huſband obtains of the lord, for money paid, an eſtate to them in tail; the huſband dies, the wife enters and ſuffers a recovery, the heir enters upon her by force of the ſtatute 11 *H.* 7. and his entry adjudged lawful; for by her acceptance of the freehold eſtate, the copyhold was extinct. Cuſtom that copyhold tenements ſhould be to the wife after the huſband's death, either for a moiety or intierty; they eſcheat to the lord, and he dies; his wife ſhall not be endowed of a moiety; for they are not copyhold in his hands.

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2 Sid. 19.

2 Sid. 18, 141. March, 206. Style, 266. 2 Roll. Abr. 197. Jones, 449, cont.

The king, lord of a manor, and having copyhold lands in his hands, grants them to one for life, without taking any notice that it is copyhold land; and it was held that this was no deſtruction of the cuſtom; but that after the eſtate for life ended, the lands might be granted by copy again, and that the rule that copyhold lands muſt be always demiſed or demiſable time out, *&c.* extends only to common perſons, and not to the caſe of the king; and the reaſon given was, becauſe the king's grants are not to be taken to a double intent, *viz.* to paſs an eſtate for life, and to infranchiſe the lands too. This caſe came in queſtion afterwards in 1664, and ſo adjudged; for the jury gave no ſpecial verdict, but found the lands to be copyhold, which it ſeems they would never have ventured

to do, had not the court been clearly of opinion that the cuſtom was not deſtroyed. But yet it is ſaid in *Lex Cuſt.* 233. that there is a caſe in *Rolls* againſt this. *Ideo quære*, ſee *Lex Cuſt.* 79, 80. If a copyholder hath had, time out of mind, a way over another copyholder's ground, and he purchaſes the inheritance of his own copyhold, yet the way remains. A copyholder marries the lady of the manor, this is only a ſuſpenſion of the copyhold eſtate; ſo if a copyholder hath the manor in execution: It ſeems to me in this caſe, that the huſband and conuſee being lords for the time, may make voluntary grants of their own copyhold lands, as well as of others that come into their hands; for though they are not copyholders (neither are they ſo when copyholds eſcheat), yet they have copyhold lands that have been demiſable time out of mind, *&c.*

1 Roll. Abr. 498.
1 Roll. Abr. 938. Co. Cop. 172. Heyden's caſe. Savil's Rep.

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Cro. El. 7.

Cro. El. 7.

In that caſe of the huſband he and his wife ſuffered a recovery of the manor to the uſe of themſelves for life, remainder, *&c.* This was adjudged to be a deſtruction of the copyhold eſtate; for then the lands were conveyed by a common law conveyance, and ſo the cuſtom was broken. If there be three copyholders, and one takes an eſtate by livery for life, it ſeems this does not deſtroy the cuſtomary intereſt of thoſe in remainder (*n*).

(*n*) [See N. CLVII.]

J Roll. Abr. 169, 670. 6ones, 243.

One is ſeiſed of a rent-charge by preſcription, yet without preſcription he cannot diſtrain (o) the copyholder's beaſts; for the copyholders are in by as high a title, *viz.* Preſcription. Copyholder for life, the lord lets the manor, with all mines, to *J. S.* who, living the copyholder for life, enters and digs a new pit, and takes coals and converts them; the copyholder brings trover, and it was held it lay; for that the coals, after they were dug, belonged to the copyholder; *ſed quære*, for they are as much parcel of the inheritance as timber trees. If copyholders preſcribe to have common in the lord's waſte, and the lord deſtroys the common by putting conies in it, every copyholder may have an action upon the caſe againſt the lord. If a ſtranger puts in his beaſts, whereby the copyholder loſeth his common, it ſeems he may have an action of the caſe againſt him, as well as diſtrain his beaſts damage-feaſant. But if the damage be ſo little, that, notwithſtanding, the copyholder may take his common, then it ſeems no copyholder can have any action, becauſe the damage is not done to him, but to the owner of the ſoil. The ſame law if a ſtranger dig the turf up; for though he cannot have an action for digging up the turfs, becauſe they do not belong to him, yet if that be the means by which he loſeth his common, the loſs of his

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1 Roll. Abr. 106.

2 Leo. 202, 211.

2 Brown. 146.

1 Roll. Abr. 89.

(o) [See N. CLVIII.]

common

common is a prejudice to him, for which he may have an action. If a copyholder, by licence, makes a leaſe for years, and afterwards enters upon the leſſee, he is a diſſeiſor (*p*) for he can gain no particular eſtate. 1 Rol. Abr. 662.

If a copyholder die ſeiſed, and the lord admits another, who enters, he is not a diſſeiſor, but only a tenant at will, becauſe the lord aſſents to his coming in (*q*). [307] 3 Leo. 210.

How emblements ſhall be diſpoſed of in copyhold caſes, ſee 5 *Co.* 115. 1 *Rol. Abr.* 727. (*r*) Lord of a manor having a copyholder a lunatick in his cuſtody, grants over the cuſtody to another, who brings an action in his own name; it was held not to be well brought; for the committee hath no intereſt, but only a bare cuſtody; and therefore the action ought to be brought in the lunatick's name; and by the ſame reaſon, the lord himſelf could not bring an action in his own name; for if he had intereſt himſelf, he might have aſſigned it over. This being a bare cuſtody, the grant by the lord could be no infranchiſement of the lands. Lex Cuſt. 254. Hob. 215. Noy, 27. Ld. Raymond, 189. Moor, 512.

It was held by *Hobart*, that the lord of a manor *de communi jure* hath not the cuſtody of a lunatick's lands; but there muſt be a cuſtom to warrant it. But it was reſolved in the caſe be- Cro. Jac. 105.

(*p*) [*Per Coke: i. e.* he is a diſſeiſor of the lord in whom the frank tenement was: For of the freehold only can there be a diſſeiſin. See 1 *Roll. Abr.* 662. *Diſſeiſin* (I), *pl.* 7.]

(*q*) [See N. CLIX.] (*r*) [See *ante*, 250.]

tween *Evers* and *Skinner*, that the lord ſhould have the cuſtody of one that was *mutus & furdus*, and no cuſtom was laid; and the queſtion was between the *prochein amy* and the lord; and the reaſon given why the lord ſhould have the cuſtody is, becauſe otherwiſe he would be prejudiced in his rents and ſervices, which reaſon extends as well where there is no cuſtom, as where there is. And if the cuſtody of one that is *mutus & furdus*, of common right belongs to the lord, by the ſame reaſon of one that is lunatick; *Ideo quære*. If there be a cuſtom (*s*) in a manor that the lord ſhall enter and enjoy (*t*) the lands during the nonage of the infant, it is a good cuſtom; for the freehold of the land is in the lord (*u*), and he is tenant to the *præcipe* (*u*). And an eſtate at will may ceaſe for a time, and revive again, as well as it may deſcend by cuſtom.

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1 Leo. 266.
1 Co. 87. a.

Cro. El. 524.

A lord of a manor may avow for the rent or ſervice of his copyholder, in any court at *Weſtminſter*; for he has an eſtate at common law in the rent, and not a cuſtomary eſtate; and it is due to him upon the ſame grounds and reaſons in law as the rent of freehold lands is.

Stra. 786.

1 Roll. Abr. 374.
1 Sid. 58.

Fines for admittances and copyhold rents are arrear, then the lord ſells the manor; he is *ſans*

(*s*) [See N. CLX.] (*t*) [See N. CLXI.]
(*u*) [See *ante*, 156. N. LXVIII. and ſee alſo 2 *Vern.* 243. *Ca.* 228. 3 *Atk.* 12. *acc.*]

remedy,

remedy, both in law and equity; *sed quære* (*w*), for debt lies for a fine, and if it be a duty, surely the paſſing away the manor will not make it ceaſe to be a duty. *Quære*, Why he ſhall not have debt for the rents due by the copyholder, and whether the lord hath not a freehold in them? Carthew, 91, 92. [309]

Copyhold lands are only impleadable in the lord's court; for the common law doth not take notice of ſuch baſe eſtates; therefore if an erroneous judgment be given, no writ of falſe judgment lies, but only a petition to the lord in nature of falſe judgment, or elſe the party grieved may have remedy in chancery (*x*). One recovers in a manor, no precept can be made to take the *poſſe manerii*, and give the party poſſeſſion by force; for the law will not ſuffer any body to take ſuch power into their hands without the king's writ. Cro. Jac. 559. 1 Inſt. 60. a. 1 Roll. Abr. 373. 3 Leo. 99.

Copyholder's leaſe is no diſſeiſin to the lord. 2 *Brown.* 40. *contra.* 1 *Brown.* 133. (*y*) 2 Keb. 598.

If one ſurrenders to the lord, to the intent he ſhould grant it to another, and he admits him,

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(*w*) [See *ante*, 291. N. CXL. and ſee 3 *P. Wms.* 150. 3 *Burr.* 1717. and note (1) to *Co. Litt.* 57. *b.*]

(*x*) [See 1 *P. Wms.* 330. *Show. Parl. Caſ.* 67. 1 *Eq. Abr.* 121.]

(*y*) [1 Brownl. 133. is alſo *contra*, *per Cur.* ſo *ante*, 215. But ſee *ante*, 231. *acc.* and *Vin. Copyh.* (D. e) *pl.* 2. *acc.* cites *Noy*, 92. and *Lat.* 199. *per Cur.* and in 1 *Salk.* 186, 7. it was held by three juſtices to be no diſſeiſin.]

this is good; for the other may plead it as a grant.

Lit. Rep. 175. 1 Roll. Abr. 652.

Copyholder may preſcribe in his lord, being a ſpiritual perſon, to be diſcharged of tithes (z).

Yelv. 2. Cro. El. 784.

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If a cuſtom be altered by conſent of lord and tenants, it ſeems chancery will compel them to ſtand by that alteration. *Quære*, Whether it will reduce a fine incertain into a certainty, at the ſuit of all the copyholders? for though there be an equity in moderating an exceſſive fine, yet it ſeems there is none to reduce an incertain fine to a certain one, at the ſuit of the tenants (a). If a copyholder commit a voluntary forfeiture, there ſeems no equity in relieving (b); copyholders muſt be relieved in chancery for their common (c). Chancery will compel to let a tenant ſue at law, without a forfeiture. So it will compel a licence to let, and alſo to admit a mortgagee to try a cuſtom at common law. After forty-three years poſſeſſion, a defendant was ordered to admit of a ſurrender and admittance. *Lex Cuſt.* 326.

Lex Cuſt. 319, 320.

Toth. 108. 65.

2 Keb. 357.

Lex Cuſt. 323. 327.

Copyholder for three lives covenants, in conſideration of money paid, to ſurrender, and dies before ſurrender, and purchaſer dies; it was agreed the heir of the copyholder ſhould ſur-

(z) [And ſee the caſe of Stephenſon v. Hill, 3 *Burr.* 1270. as to cuſtomary tenants alſo.]

(a) [See N. CLXII.] (b) [See N. CLXIII.]

(c) [See *ante*, 224. N. XCVIII.]

render

render to the purchaſer's heir, and make good the aſſurance (*d*). See other good caſes, where chancery will and will not relieve in copyhold caſes, in *Lex Cuſt.* from *p.* 323 *to* 331. *Moor*, 552. *Toth.* 107.

Copyhold lands cannot be exchanged by deed, [311] but there muſt be a ſurrender and admittance thereupon. A right to a copyhold may be extinguiſhed by a releaſe, but no eſtates can paſs by releaſe (*e*); nor by leaſe and releaſe, though the leaſe be by ſurrender; for a releaſe cannot enlarge a copyhold eſtate (*e*). Co. Cop. 97, 98.

Commiſſioners of bankrupts bargain and ſell copyhold lands (*f*); the eſtate is in the bargainee before admittance, though he may not enter and take the profits before admittance, which the ſtatute ordained as a cautionary remedy for the lord for his fine. Therefore, if there be a cuſtom in a manor that if a copyholder die ſeiſed of a cuſtomary eſtate of inheritance, that the wife ſhould hold the lands for her life; and ſuch a copyholder becomes a bankrupt, and the commiſſioners bargain and ſell the lands by deed indented and inrolled, and then the bankrupt dies; the wife ſhall not have her widow's eſtate; for her huſband did not die ſeiſed (*g*). My Cro. Car. 569.

(*d*) [2 *Veſ.* 631. Hinton *v.* Hinton, *acc.*]
(*e*) [See *ante*, 157. N. LXIX.]
(*f*) [See 1 *Atk.* 95. Drury *v.* Mann.]
(*g*) [See N. CLXIV.]

Co. Cop. 102. Winch, 57, 67. 3 Bulft. 80.

lord *Coke* ſays, that the word *Surrender* is *vocabulum artis*; *ergo*, where a ſurrender is neceſſary, no other word will ſupply the want of it; as the words, *Give*, *Grant*, or the like; *ſed quære* well of this matter; for in *Belfield* and *Adams*'s caſe, it is held that any words

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expreſſing his intention of ſurrendering are good enough (*b*). And this ſaying of a copyholder in court, was held to be a ſufficient ſurrender, *viz.* that he was weary of his copyhold, and requeſted his lord to take it again. See

Hutt. 81. Cro. Jac. 526.

Lex Cuſt. 103, 104. Lands were appertaining to a houſe, and the copyholder ſurrendered the houſe *cum pertinentiis*; adjudged the lands did not paſs (*i*).

Cro. El. 717. Co. Cop. 124. 1 Co. 46. b. Winch. 3. Co. Cop. 12, 68. 2 Roll. Rep. 236.

Examination of a feme covert, by the ſteward out of court, though it did not appear that he was ſteward by patent, or that there was any cuſtom for ſuch an examination, was held to be good (*k*).

If the king grant *omnes terras dominicales manerii de W.* the cuſtomary lands held by copy do not paſs, but in the caſe of a common perſon they do. It is ſaid in *Lex Cuſt.* 92. to be adjudged that if a man grant all his demeſne lands, his copyhold lands will not paſs, if he has other

(*b*) [See *ante*, 252. and 301. N. CLV.]

(*i*) [But ſee *Touchſt.* 94. and the books there cited in n. (*b*); and ſee alſo 2 *J. Blackſt. Rep.* 1148. Doe *dem.* Lempriere *v.* Martin; and 1 *Lev.* 131. Archer *v.* Bennett.]

(*k*) [See *ante*, 277. (*x*).]

lands

lands to satisfy the words of his grant. It seems this must be understood of those lands that he holds by copy, or else it thwarts the case before; and the reason is, because copyhold lands do not pass by such conveyance, but by surrender. If copyhold lands escheat, and are in the king's hands, and he grants *omnes terras suas dominicales*, *quære* if they shall pass. It seems every thing demisable by copy must be parcel of the manor (*l*); for the custom can only extend to the manor, and the pleading is *quod infra manerium, &c.* [313]

Lord of a manor grants the stewardship to *S.* for life, and after becomes lunatick, and the custody is committed to *A. B.* and others; they cannot by their steward grant estates by copy; for they have no estate in the manor, and therefore are not *domini pro tempore*; but the lunatick by his steward may grant copies. Tenant in tail of a manor discontinues and dies, and then the discontinuee makes voluntary grants; these may be avoided by the issue in tail; for the estate of the discontinuee is defeasible and tortious (*m*). Ley's Rep. 47. Hob. 215. Co. Cop. 86.

Guardian in socage may hold courts in his own name, and may grant copies. *Lex Cust.* 88. (*n*) Owen, 1:5.

(*l*) [See 3 *P. Wms.* 10. 4 *Durnf. & East*, 443. *Moor*, 143. *Ca.* 285. and *ante*, 212. N. XC.]

(*m*) [See *ante*, 198.]

(*n*) [1 *Roll. Abr.* 499. *Copyh.* (C) *pl.* 4. 1 *Lord Raym.* 130. *Hargr.* n. (3) to *Co. Lit.* 58. *b. acc.*]

If

Cro. Ja. 55, 98. 1 Inſt. 61. b. Co. Cop. 124. If one be retained ſteward by parol, it is good to make him ſteward at will; and as to all points he is as effectual a ſteward as one retained by patent. There is a difference taken in the caſe between *Blagrave* and *Wood*, between the ſteward of a manor and the ſteward of a court; for that the ſteward of a manor may take ſurrenders out of court, but the ſteward of a court cannot. But this diſtinction is taken no where elſe, and ſeems to have no authority in it, being only affirmed by one counſel, and denied by another. Lord of a manor makes a ſteward *ad exequend. per ſe vel ſufficient. deputat. ſuum*, who makes *A.* his deputy *hac vice* (*o*), to take a ſurrender of baron and feme to the uſe of baron and feme for their lives, the remainder over in fee, & *ulterius ad faciendum quantum in me eſt.* *A.* takes a ſurrender from the baron and feme, upon condition the lord ſhall grant it to them for their lives, the remainder over in fee. In this caſe it was agreed that this deputation *pro hac vice* was good, and that the ſurrender was good enough (though the authority was to take an abſolute ſurrender, and this ſurrender was conditional) by force of the words & *ulterius ad faciend.* The force of theſe words ſeems to me to be, that the deputy ſhall take any thing upon him that the ſteward might, to make good that thing he was to do; and they do not ſeem to give him an

1 Leo. 227.

[314]

Cro. El. 48.

(*o*) [See *ante*, 284.]

authority

authority to take any other ſurrender than to the uſes limited in the deputation. This caſe is ſtrangely reported by *Leonard*; for there the clauſe *& ad ulterius, &c.* is not put in, and the ſurrender was upon condition to pay money, which ſeems clearly out of the authority the deputy had. 1 Leo. 289.

A ſteward *ex officio* may make voluntary grants. *Co. Cop.* 124. Auditor and ſurveyor for the county of *N.* appointed a ſteward for one of the manors *pro illa vice*. Adjudged they had no authority to do it; *ſed quære*, if they may not retain a ſteward by patent. Things of neceſſity done by a ſteward, though he have no authority, are good; as admittances upon deſcents or ſurrenders; but voluntary grants are not good by ſuch a ſteward. If a lord command his ſteward not to grant ſuch lands by copy, and he doth it, it is void (*p*). So if in his grant he diminiſh the ancient rent and ſervices (*p*). It is held by *Coke*, that if an infant is not capable of the office of ſteward of a manor, either in poſſeſſion or reverſion; yet there is a caſe where the grant of a ſtewardſhip to an infant in reverſion *exercend. per ſe vel ſuff. dep. ſuum*, was held good. And it was held there, that if that clauſe were in, *exercend. per ſe vel ſuff. dep. ſuum*, the grant was good, unleſs he were of ſuch tender years as not to be able to

[315]

Cro. El. 699. Co. Cop. 126. 4 Co. 30.

1 Inſt. 3. b. [and N. (4).]

Cro. Car. 556.

(*p*) [See *ante*, 221. (*z*) and (*a*).]

make

Co. Cop. 129. make a deputy. My lord *Coke* allows that an infant, that has the office of ſteward by deſcent, may make a deputy, though the clauſe of *per ſe*, &c. be not in. *Sed quære*, Whether he may do it [316] if he have it by purchaſe? The caſe in *Co. Lit.* and *Cro. Car.* ſeems to be againſt this.

Co. Cop. 125. *Coke* ſays, the law is not very curious in examining the imperfections of the ſteward's perſon, nor the unlawfulneſs of his authority; for be he an infant, *non compos*, lunatick, outlawed, or excommunicate, yet whatſoever things he performs as incident to his place, can never be avoided for any ſuch diſability, becauſe he performs them as a judge; at leaſt, as cuſtom's inſtrument. By this my lord *Coke* ſeems to allow that an infant is capable of the office; for were the grant to him void, then voluntary grants made by him would not be good; which yet my lord *Coke* ſeems to allow, when he ſaith, that whatever things he performs, as incident to his place, can never be avoided; and one incident to a ſteward's place, is to make voluntary grants; and he ſeems indeed to put him in the ſame place with a lunatick perſon; and a grant by him is, without all queſtion, good. It may be meant here, where the infant has the office by deſcent. However it be, it ſeems clear that an infant is capable of the ſtewardſhip *exercend. per ſe*, &c. and where he is of years of diſcretion, perhaps he may exerciſe it himſelf; for it

Cro. Car. 556. was ſaid in the caſe of *Young* ver. *Fowler*, that

the infant in that case, being eleven years old, was able to exercise the office himself, or make a deputy; and something there is darkly expressed, which yet seems to intimate that he may execute it himself. As for the authority of the steward, saith my lord *Coke*, though it prove but counterfeit, if it come to exact trial; yet if in appearance, or outward shew, it seems current, that is sufficient.

If a grant be made to one, and through some defect it is avoidable; yet the courts kept by such a steward, before avoidance, shall stand in force; and whatever he did as steward, is for ever good. This seems very reasonable, and doth not at all thwart the distinction taken before; for there the steward had no authority; and so only necessary acts by him are good. But here he had authority, and was to all intents and purposes steward, till the avoidance; and so all acts, by him done, shall bind. And perhaps this may be the reason why the acts of an infant are unavoidable, that the grant is not actually void, but only voidable; and so before the avoidance of the grant, he is absolute steward. My lord *Coke* is so far from overthrowing the aforesaid distinction, that he takes the same himself; but adds farther, that one that has no manner of pretence nor colour for keeping of courts, if he assumes the steward's place, whatever he does will not be void, especially if a precept be given to the bailiff to give him

Co. Cop. 125. b.

[318]

him warning, which ſeems very reaſonable; for the faint authority of the ſteward is allowed in other caſes, for the ſecurity of purchaſers, who can never know the ſteward's right; and no harm is done to any body, the caſe ſtanding indifferent between vendor and vendee. Therefore where harm would be done (as where the lord's lands and property are diſpoſed of by voluntary grants) there ſuch ſteward can do nothing. But when a ſteward hath no pretence of title, there every body muſt take notice of his wrong; for if they were not obliged, it would be impoſſible for the lord to do any thing according as he thought fit; for any ſtranger might thruſt himſelf into the employment, and introduce whom he pleaſed to be tenants. As the law doth not examine the imperfections of the lord from whom the intereſt paſſes; ſo neither doth it examine the ſteward's, who is reſtrained by law from prejudicing the lord. And as the diſſeiſors, *&c.* may do neceſſary acts, ſo may thoſe ſtewards who have as little title as diſſeiſors.

[319] My lord *Coke* ſays (*q*), that the lord may make admittances and grants by copy at what place he pleaſes; but the ſteward of the manor, at any court held off the manor, (for out of the court, it is ſaid by him in another place, he may make admittances and grants by copy,)

4 Co. 26. b. Co. Cop. 128. and 121. cont.

(*q*) [See *ante*, 250. N. CXI.]

cannot

cannot make any admittances or grants by copy. This ſeems to imply that the lord may make by copy grants and admittances at a court held off the manor; or elſe where is the difference between the caſe of the lord and ſteward? And in the next caſe but one, it is reſolved that if the ſteward at a court held off the manor, make any grants or admittances, they are all void; but he ſays nothing of the lord. In his comment upon *Littleton*, he ſays the court-baron muſt be held upon the manor, elſe it will be void.

As *Melwich*'s caſe is reported by *Croke*, it is there ſaid, that if the lord grant away the freehold of his copyholds, the grantee may hold courts where he will, to make admittances and grants (*r*). If then a grant by copy or admittance ſhould be made at a court held off the manor, though it be a court-baron, why ſhould it be void? Since a court-baron contains in it two courts, one for the freeholders, the other for the copyholders; and ſince that for the copyholders, as to granting copies, *&c.* may be held off the manor, there is no reaſon, that becauſe the court-baron is void, that therefore the admittance ſhould be void; for they are as two diſtinct courts; and the admittance had been good, had the court been only the copyholders court. And if we look back to

Cro. El. 103.

[320]

(*r*) [See *ante*, 209, &c. 250. N. CXI.]

the

the reaſon of the thing, if an admittance may be made at a place off the manor, why not at a court held off the manor? for it is no judicial act; if it were, ſurely it muſt of neceſſity be done in court; and therefore it was held *per tot. cur.* that a court to do theſe things might be held off the manor: It is not diſtinguiſhed in this caſe between the grant of the lord or ſteward: But *Coke* is expreſs that grants by ſtewards at courts held off the manor are void. *Ideo quære de hoc.*

1 Leo. 288.

Co. Cop. 129.

A ſteward cannot *de communi jure* make an under-ſteward (*s*), unleſs he has power by his patent, or be an infant that has the office by deſcent, or be a perſon of that quality that it will be a diſgrace to him to hold the courts himſelf; as if he be an earl, *&c.* Cuſtom that if a copyholder holds lands in fee, and his wife ſurvives him, that ſhe ſhall have it in fee, *& ſic e converſo.* And ſo the cuſtom for an executor to hold for a year after the death of the copyholder, is a good cuſtom, where the wife is to have her *free bench* (*t*). Copyholder (where there is a cuſtom for the feme to have her widow's eſtate) makes a leaſe for years; ſhe ſhall not avoid the leaſe (*u*); for the leaſe being

Noy, 2.

Noy, 29.

[321]

Cro. Ja. 36. Moor, 758.

(*s*) [See *ante*, 284.]

(*t*) [See *Fiſh. on Copyh.* 14. c. 2. *Dougl.* 204. Caſe of Eaſtcourt *v.* Weeks (cited), and *poſt.* 324. (*g*).]

(*u*) [See *Cowp.* 481. *acc.*; and ſee alſo *ante*, 311. N. CLXIV.]

made

made according to the cuſtom, his title is as good as hers; but if the leaſe were made without warrant, then ſhe may. It ſeems to me, that the feme ſhall not in this caſe be endowed of the third part of the rent and reverſion, becauſe cuſtoms ought to be ſtrictly purſued, and that is only to be endowed of land; yet it ſeems after the leaſe ended ſhe ſhall be endowed (*w*), for the huſband did die ſeiſed (the poſſeſſion of his leſſee being his own poſſeſſion). But it was agreed in this caſe, that by ſpecial cuſtom the feme might avoid the leaſe. This among other caſes proves that a copyholder may diſpoſe of his land, and bar his wife of her free bench (*x*), unleſs there be a particular cuſtom that ſhe ſhall avoid any alienation, &c. made by him; for then the particular cuſtom ſhall, as it ſeems, avoid his charge as well in the caſe of copyhold as freehold eſtates, by the common law.

Co. Ent. 123.

1 Cro. 569.

Lord enfeoffs his copyholder in fee where the cuſtom was, that if a copyholder in fee die ſeiſed, his wife ſhall have frank bank; the copyholder died; adjudged the wife was barred; but had the lord enfeoffed a ſtranger, ſhe ſhould have had her free bench, becauſe the land remained copyhold, and the cuſtom not taken away.

Cro. Jac. 126. Carthew, 276.

[322]

(*w*) [See *Bac. Abr. Copyh.* (E). n. (*c*).]

(*x*) [See *Carth.* 276. 2 *Veſ.* 633. 2 *Durnf.* and *Eaſt*, 580. *Cowp.* 481. *acc.*]

3 Leo. 81. Co. Cop. 54. Moor, 123. 4 Co. 61. b.

It came to be a queſtion in *Skipwith*'s caſe, whether the cuſtom for feme coverts to deviſe lands to their huſbands, or any body elſe, were a good cuſtom; but judgment was given upon a defect in the pleadings. It was held by all the juſtices, that copyholds are out of the words of the ſtatute 34 & 35 *H.* 8. of wills (*y*); but *Anderſon* held them to be within the equity of that ſtatute. *Quære* well, whether ſuch cuſtom be good to deviſe (*z*); and ſee the books cited in the margent.

Winch, 27.

If the huſband be attaint of felony, it ſeems the wife ſhall loſe her dower in the copyhold lands, although there be no ſpecial cuſtom (*a*),

March, 8.

for this amounts to an alienation. It is ſaid in *Lex Cuſt.* 46. that the lord of a manor cannot grant a copyhold in reverſion without a ſpecial cuſtom. If this be underſtood where copyholds are only grantable for life, it ſeems reaſonable enough; but where they have been granted in fee, there, if the lord grant to one an eſtate for life, that he may not afterwards grant the reverſion in fee to another, ſeems very unreaſonable (*b*).

[323]

March, 161.

Cuſtom that if a copyholder do not repair, it ſhall be preſented by the homage, the tenant

(*y*) [See N. CLXV.] (*z*) [See N. CLXVI.]

(*a*) [See N. CLXVII.]

(*b*) [See *Cro. Eliz.* 373. *Viner, Copyh.* (P. 3). *Com. Dig. Copyh.* (C. 10—12). 1 *Roll. Abr. Copyh.* (L). *Fiſher on Copyh.* c. 2. p. 14, 15. *ante*, 194. (*w*); 273. (*l*).]

amerced,

amerced, and the lord ſhall diſtrain upon the copyholder or under-tenant; this is a good cuſtom; for the under-tenant is not a meer ſtranger. Cuſtom, that after the death of tenant for life, the lord is compellable to make a grant for life to his ſon, and if no ſon, to his daughter, is a void cuſtom (*c*); becauſe it obliges the lord who hath the intereſt, to grant it to this or that particular perſon, whether he will or no: But a cuſtom for a copyholder for life to nominate his ſucceſſor, is good; for that is a right and intereſt veſted in tenant for life. *Sed quære* (*d*).

Moor, 842. 788. 2 Brown. 85. Noy, 2. Cro. Jac. 368.

Cuſtom for the ſteward to make by-laws for the ordering the common, is a good cuſtom. An order made that a tenant ſhould not put in this or that beaſt is void, becauſe it takes away his inheritance; but if it were that he ſhould not do it before ſuch a day, that is a good by-law, being not reſtrictive of his inheritance, but only directive of it.

March, 28. 1 Leo. 190.

Cuſtom that he that lives about ten miles from the manor, upon paying 8*d.* to the lord, and 1*d.*

Mod. Rep. 77. 1 Sid. 361. 2 Keb. 344. 380. 851.

(*c*) [See *ante*, 157. N. LXXI. 273. (*l*); and the next note.]

(*d*) [See 1 *Roll. Abr.* 560. *Cuſtomes*, (E). *pl.* 18, and 562. (H). *pl.* 1. (Caſe of Rawles *v.* Maſon, *T.* 10. *Jac. per Cur.*) *Cro. Jac.* 368. *Vin. Copyh.* (A. e), *pl.* 7. 2 *Durnf.* and *Eaſt*, 746. 1 *Strange*, 657. *Fiſh. on Copyh.* 18. From which books it appears, that ſuch cuſtom has frequently been recognized as good in law.]

to the ſteward, ſhould be excuſed from attendance upon the court; this is a good cuſtom: if
[324] he avers there are copyholders ſufficient to keep court that live near the manor (*e*); or elſe ſurely the cuſtom will be void; for then no court can be held. As this caſe is reported by *Siderfin*, it is ſaid it was held a good cuſtom, becauſe the court was a court-baron, where the ſuitors are judges; but it ſeems to me to be all one; for that if it were a cuſtomary court, if ſufficient copyholders were near the manor, it is unreaſonable to oblige perſons that live a great way off to attend; and if the court be a court-baron, if there be not a ſufficient number of tenants that live near the manor to do the duty, then copyholders are obliged to do it in that court as well as freeholders (*f*); and therefore it ſeems the cuſtom cannot be good, for no court can be held.

Mo. 8. Noy, 27.

Cuſtom that a copyholder ſhall not alien without licence is good. That a leſſee may hold the lands half a year after the term, is no good cuſtom (*g*). Cuſtom, that if a copyholder make a leaſe for a year, and die, that

Lit. Rep. 233. Hutton, 126, 127. 101.

(*e*) [See N. CLXVIII.] (*f*) [See N. CLXIX.]

(*g*) [" *Per touts les juſtices.*" *Moore*, 8. *pl.* 27. But ſee *Dougl.* 201. Caſe of Wiggleſworth *v.* Dalliſon & *al.* and the caſes there cited; particularly thoſe of Eaſtcourt *v.* Weeks (*Lutw.* 799. 801.), Lewis *v.* Harris, and Beaven *v.* Delahoy (1 *Hen. Bla.* 5 & 7. n. (*a*); from which it ſhould ſeem, that ſuch a cuſtom may be ſupported.]

it

it ſhall be void againſt his heir, is a good cuſtom.

Cuſtom was to demiſe land, the leſſee paying the treble value of the rent; and if he died within the term, that his heir ſhould have it, paying one year's rent; and that if he aſſigned, the aſſignee ſhould have it, paying a year's rent. This was held to be a good cuſtom. Cro. Ja. 671. [325]

Cuſtom that if a copyholder will ſell his land, the next of blood ſhall have the refuſal, or the next neighbour to the eaſt, or the like, is a good cuſtom (*b*). It ſeems the reaſonableneſs of a cuſtom is to be conſidered, not from the rules and maxims of common law, (for there is no cuſtom, but what in ſome point or other overthrows the common law,) but from the conveniency of the thing itſelf. As if there be a cuſtom that a copyholder ſhall not put in his beaſts to take the common before the lord has put in his; this is a void and unreaſonable cuſtom, becauſe it is in the power of the lord by this means to take away the intereſt of his commoners: ſo a cuſtom that the tenant ſhall pay a fine upon the marriage of his daughter is void (*i*), becauſe it is againſt the freedom of the ſubject; but if a man obliges himſelf to ſuch a thing by tenure, it is good, being his own contract (*i*); ſo a cuſtom may be void for the un- 2 Brown 277. Co. Cop. 70, 71. Lex Cuſt. 34. Co. Cop. 73. 2 Roll. Abr. 264, 5.

(*b*) [See N. CLXX.]

(*i*) [See *Co. Litt.* 139, 140. *Calth.* 36. *Sulliv.* Lect. xxiv. p. 227. and *ante*, 108. (*k*); 289. N. CXXXVI.]

certainty; as if a feoffment be made by an infant, it shall be good, if he can tell 12*d.* (*k*), or that tenants ought to pay or ought not to pay
2 Leo. 109, 208. above two years rent for a fine. Custom of a manor was, that if a man took a customary
[326] tenant to wife, and outlived her, he should be tenant *per* curtesy. And a man took a woman to wife who had no copyhold land then, but some descended to her during her coverture; it was adjudged he should not be tenant *per* curtesy, because he is out of the custom (*l*).

1 Roll. Abr. 511. Custom was, that the lord might *solummodo* grant estates in fee. This word *solummodo* was expounded to mean, that he had only used to grant estates in fee; and so it was held he might grant for a less time; but suppose it had been shewn and pleaded that he could not grant any otherwise; *quære* of that (*m*).

Custom was, that when a copyholder sells his land, proclamation shall be made at the next court-day; and if any of the blood of the vendor will give as much money, he shall have

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(*k*) [See *Davys's Rep.* 33. *a.* *Robinf. on Gav.* b. 2. c. 3. p. 223. and the authorities by him cited; and *ante*, *Introd.* xviii. N. I.]

(*l*) [Sir John Savage's case, 2 *Leon.* 109. But this case of Sir John Savage was denied to be law by *Holt*, C. J. and *Powell*, J. in the case of Clements *v.* Scudamore, 1 *Pr. Wms.* 62. 2 *Ld. Raym.* 1028; and in 1 *Salk.* 243. it is said to have been denied by the court.]

(*m*) [See *Cro. Eliz.* 373. See also 1 *Lord Raym.* 999, and *Salk.* 189.]

it.

it (*n*). If the land be sold for money, and any thing else, it seems to be out of the custom. The case was, the land was sold for money, and in consideration of a cure done to the vendor by the vendee, it was held the next of blood could not take advantage of the custom. 1 Roll Abr. 568.

Copyhold is granted to two for the lives of three persons, and tenants *pur auter vie* die, living the *cestuy que vies;* there shall be no occupant, but the lord shall have the estate; for no body can gain a copyhold by occupancy, but by admission of the lord (*o*): But it seems, if the limitation had been to the tenants and their heirs (*p*), during the lives of the *cestuy que vies*, the heir in such case would have the estate (*p*), and not the lord, because he has excluded himself, and expressly granted the copyhold to the grantee and his heirs, during such a time; but then it seems the heir must be admitted and pay his fine. It seems he must only pay a purchase fine, and not such a one as is paid upon a descent; for he doth not take by descent, but by special occupancy (*q*). 1 Roll. Abr. 511. Hales accord. Co. Cop. 132, & 155. cont. [327]

Copyholders may have *solam & separalem pasturam* in the soil of the lord, and exclude the owner. If a copyholder let for years by 2 Sand. 326, 327. Roll. Abr. 888.

(*n*) [See *ante*, 325. N. CLXX.]

(*o*) [2 *Lord Raym.* 1000. *acc.*]

(*p*) [2 *Just. Blackst. Rep.* 1148, Doe *dem.* Lempriere *v.* Martin, *acc.*; and see 2 *Durnf.* and *East*, 746.]

(*q*) [See N. CLXXI.]

licence, this is not extendable in the hands of the leſſee (*r*); for the ſtatute which gives execution of lands, extends not to copyholds.

It ſeems to me that a copyholder of inheritance cannot, without a ſpecial cuſtom, dig for mines (*s*); neither can the lord dig in the copyholder's lands, for the great prejudice he would do to the copyhold eſtate (*t*); and the copyholder himſelf ſeems to have no intereſt in the inheritance of the lands. Copyholder may dig for marl to lay upon the copyhold land: He cannot incloſe where it was never incloſed before. Copyhold not forfeited or determined by outlawry (*u*). Copyholder ſhall have aid of the lord, where the right of the ſeigniory comes in queſtion. If he hath had aid of a biſhop, and then the temporalities come into the king's hands, he ſhall not have aid of the king, becauſe of the delay.

1 Sid. 152. Winch, 8

[328]

Lit. Rep. 234. 2 H. 6. 37. 39.

Style, 311. Cuſtom that a copyholder may give a warrant of attorney to another to ſurrender after his death, is a void cuſtom.

2 Roll. Abr. 157. The king grants a manor in fee-farm, the lands and goods of copyholders are not liable to the rent, becauſe they come in by preſcription, which is before the rent (*w*). Eſtates of

(*r*) [See *ante*, 296. N. CXLVIII and CXLIX.]
(*s*) [See 2 *Atk.* 189. 1 *Pr. Wms.* 407, 8. *acc.*]
(*t*) [See *ante*, 305, 6. 1 *Pr. Wms.* 408. *acc.*]
(*u*) [See *ante*, 242.]
(*w*) [See *ante*, 305. N. CLVIII.]

copy-

copyholders, confirmed by decree in the exchequer or dutchy chamber, ſhall be good, according to the ſaid decrees, by the 7 *Ja.* 1. *c.* 21. But it ſeems from the words of that act, that it only extends to thoſe decrees made after the firſt day of the ſeſſion of that parliament, and two years next enſuing that time.

A biſhop or tenant in tail, *&c.* lets copyhold lands by deed indented; the iſſue or ſucceſſor may grant this by copy again; yet they may make leaſes according to the ſtatute to bind: though no man can have an action of forcible entry, but he that hath a freehold in the tenements; yet if the lord ſhould forcibly enter upon his copyholder, it ſeems he may be indicted for it (*x*); (for if another enters, there is no queſtion but it is a diſſeiſin to the lord;) for it is not requiſite to the maintaining the indictment, that he that diſſeiſes ſhould gain a freehold; *ſed quære*, Whether he that is entered upon muſt not have a freehold? for the 21 *J.* 1. *c.* 15. gives reſtitution of poſſeſſion to a leſſee for years, but no indictment; and had an indictment lain before, that act had been needleſs; for where an indictment lay, there reſtitution was to follow.

2 Roll. Abr. 197.

[329]

F. N. B. 551.

(*x*) [Treſpaſs lies againſt him by the copyholder. See *ante*, 157. (*o*).

See of Indictment, 1 *Hawk. P. C.* 278. c. 64. ſ. 15—17. See alſo 3 *Burr.* 1702 and 1733.]

If

Co. Cop. 24. If a copyholder dies, his heir under the age of fourteen, the next of kin ſhall not have the cuſtody of the copyhold land; for the right of appointing a guardian for them *de jure* belongs to the lord (z), that ſo he may be ſure to have the ſervices done him. This is a particular reaſon why the lord ſhould have the cuſtody of the lands, againſt the common rule for the guardian in ſocage. But the reaſon not extending to the cuſtody of the body, it ſeems the guardian in

Co. Cop. 155. 165. ſocage ſhall have the body. This guardianſhip, ſaith *Coke*, *de communi jure* belonging to the lord, the copyholder cannot by his laſt will and teſtament appoint another guardian: *quære*, Whether at this day by force of the ſtatute 12 *Car.* 2. *c.* 24. the deviſee of a child ſhall

[330] have the guardianſhip of the child's copyhold lands (a)? For the words of the act, ſee the ſtatute at large.

Co. Cop. 38. Copyholders pay no relief, for that is a ſervice only due from freeholders (b). The quality of the lord's eſtate is not regarded in voluntary grants by copy; for if he be but *dominus pro tempore*, it is ſufficient (c); for if baron and feme grant copies, the feme ſhall never avoid this after the death of her huſband;

Co. Cop. 79, 80. but if he alone grant (d), it ſeems ſhe may, for

(z) [See *ante*, 308. N. CLX. *contra.*]
(a) [See N. CLXXII.] (b) [See N. CLXXIII.]
(c) [See *ante*, 196, &c.] (d) [See *Cro. Jac.* 99. *acc.*]

he

he had nothing but *jure uxoris*. Two jointtenants of a manor, a copyhold eſcheats, one may grant the whole, for he is *dominus pro tempore*, and is ſeiſed *per my & per tout*. Lord grants a copyhold for life, where they are grantable in fee, the grantee ſurrenders to the uſe of another in fee, the lord admits *ſecundum officium ſurſumredditionis* (*e*); an eſtate for life only paſſes. If a copyholder ſurrender to the uſe of his laſt will, and by that deviſes it to two, and the lord admits one, this ſhall enure to both (*f*); for when he is admitted, he is in by the ſurrender, which he cannot be unleſs he be a jointenant; for that is his title by the ſurrender.

Co. Cop. 90.

Co. Cop. 97.

A copyholder dies; a ſtranger before the admittance of the heir comes and ſurrenders to the uſe of the heir and his wife; he ſhall ever claim jointly with his wife by force of this eſtoppel. If he had been admitted firſt, and then the ſurrender had been made, *quære*, Whether he had been eſtopped (*g*)?

Co. Cop. 113, 114. f. 41.

[331]

Quære, Whether tithes are grantable by copy? See *Cro. El.* 814. & 1 *Roll. Abr.* 498.

(*e*) [*Co. Copyh.* f. 34. *Tracts*, 77, and *quere*. For lord *Coke* only ſays, "*I think* no fee paſſes;" and ſee *ante*, 255. N. CXIX.; 257. N. CXX. See alſo *ante*, 120. N. XLV. 273. (*m*). Of admiſſions *ſecundum officium ſurſumredditionis*.]

(*f*) [See N. CLXXIV.] (*g*) [See N. CLXXV.]

where

where it is ſaid they may (*b*), as well as a rent-charge (*i*).

Co. Cop. 116. Things that lie not in tenure, are not grantable, unleſs appendant to ſomething that does lie in tenure; for firſt, no rent can be reſerved out of them, becauſe there can be no diſtreſs taken upon them, and then they are not parcel of a manor, which conſiſts only of demeans and ſervices. But then it will be objected, that a rent-ſervice is parcel of a manor, and grantable by copy; for a manor may be granted by copy, but a rent-ſervice may be diſtrained for; and if it be granted by copy, it cannot be granted alone, but lands muſt be granted with it, upon which a diſtreſs may be taken; and as it is part of a manor, it is held of ſome ſuperior lord.

Per ſe it ſeems a rent-ſervice cannot be granted by copy, no more than rent-charges, or commons in groſs, which yet may be granted by copy, as they are appendant to any other
[332] thing. No ſervice can be reſerved or due upon the grant of incorporeal things; ſo that no court can be kept by the grantor, no attendance

(*b*) [*Cro. Eliz.* 413. which cites Sir John Bourn's caſe as ſo adjudged. *Moore*, 355. *Ca.* 480. N. (9) to *Co. Litt.* 58. *b. Supplem.* to *Co. Copyh.* ſ. 17. *Tracts*, 200. *acc.* And note, Tithes are tenements. See 1 *Strange*, 100. and caſes there cited; and alſo *Com. Rep.* 267.]

(*i*) [See below, and *Calth.* 54. *Co. Copyh.* ſ. 42. *Tracts*, 97. *contra*, as to a rent-charge.]

being

being due from the grantees of incorporeal inheritances; ſo as to them there is no lord, and conſequently they cannot paſs by ſurrender and admittance, and ſo are not grantable by copy; and therefore where *Coke* ſays, that any thing parcel of a manor may be granted by copy, or any thing concerning lands and tenements, that muſt be meant parcel of the manor, and no incorporeal things in groſs are parcel of a manor.

Things grantable by copy muſt be things of perpetuity, for otherwiſe it can never be ſhewn that there hath been a cuſtom to demiſe them by copy; yet a man may grant by copy twenty loads of wood to be taken by the grantee (*k*); for it is not requiſite that the grant ſhould have continuance, but that the thing granted by copy, ſhould be a thing of perpetuity, which trees are, for a man may have an inheritance in a tree; yet it ſeems no ſervice is due from the grantee in ſuch a caſe: but then trees while growing, are held; and a tenure may be reſerved upon the grant of them, though no ſervice be due upon the grant of twenty loads; of which *quære* (*l*). Co. Cop. 118.

A ſteward of a manor cannot licenſe perſons to alien by deed *ex officio* (*m*); for that is no cuſtomary thing, but a power derived from the [333] Co. Cop. 122.

(*k*) [*Co. Copyh.* ſ. 42. and *Co. Litt.* 58. *b. acc.*]
(*l*) [See N. CLXXVI.]
(*m*) [See *Co. Copyh.* ſ. 44. *Tracts*, 101, 2.]

lord's

lord's intereſt, and therefore belongs only to the lord, unleſs there be a particular cuſtom for the ſteward to licenſe, or power be given him by the lord in his patent, or otherwiſe. Licence to alien and admittance muſt be in the name of the lord.

Co. Cop. 123. The ſame expoſition that is made of grants of freehold lands, is made of copyhold lands (*n*); therefore a grant to one and his heirs male is a fee, *&c.* See *Co. Cop.* 136, 139.

Co. Cop. 143. Actions merely perſonal a copyholder may ſue at common law. Copyholder makes a leaſe by licence for years, where the cuſtom is for the copyholder to cut down timber-trees; the leſſee for years cuts down the trees; the copyholder ſhall ſue in the lord's court to puniſh this offence.

Co. Cop. 154, &c. A fine is due upon admittance upon a voluntary grant (*o*). Where the cuſtom is for a copyholder's lands to be extended (*p*), the extendor ſhall be admitted and pay a fine.

3 Leo. 9. *A.* intermarries with a feme copyholder for years; he ſhall not be admitted or pay a fine if he ſurvive (*q*). Two jointenants, the one dieth, the other ſhall have all by ſurvivorſhip, without

(*n*) [See *ante*, 295. N. CXLVI.]

(*o*) [See *ante*, 239. N. CIII and CIV.]

(*p*) [See *ante*, 185. 295. N. CXLVII.; 296. N. CXLVIII. and CXLIX.]

(*q*) [See *ante*, 289. N. CXXXVI.]

paying a fine or being admitted (*r*). Tenant for life, and he in remainder join in a grant of [334] their copyhold, but one fine is due (*s*). So if a ſurrender be made, and after a recovery is had by plaint, in the nature of a writ of entry in the *poſt*, for the better aſſurance, but one fine is due (*t*).

Touching waſte voluntary and permiſſive by an infant, a man *non compos*, a feme covert, guardian, *ceſtuy que uſe*, ſee *Co. Cop.* from *p.* 163 *to* 171 (*u*).

Tenant for life of a manor, remainder in fee, a copyholder commits a forfeiture, tenant for life dies; he in remainder may take advantage of his forfeiture, in reſpect of the damage done to his intereſt (*w*). So it ſeems if tenant for life had aliened to another his eſtate, though neither he nor his grantee could take advantage of this forfeiture; yet after his death, it ſeems he in remainder might. If a copyholder does an act which extinguiſhes his copyhold, acceptance of rent will not diſpenſe with it. Otherwiſe, where it is a naked forfeiture (*x*). The lord of a manor demiſes the land by copy

Co. Cop. 170, 171.

Cro. El. 582.

(*r*) [See *ante*, 330. N. CLXXIV.]

(*s*) [See *ante*, 163. (*c*); and N. LXXVII. *Co. Copyh.* f. 56. *Tracts*, 130. *acc.*]

(*t*) [*Co. Copyh.* f. 56. *acc.*]

(*u*) [And further, *Vin. Copyh.* (K. c) & (R. c). *Com. Dig. Copyh.* (M. 3, 4, 5).]

(*w*) [See N. CLXXVII.] (*x*) [See N. CLXXVIII.]

to

to *A.* upon condition he ſhould pay twenty ſhillings yearly to *B.* during his minority, and 100 *l.* when he came at age; *A.* doth not pay the twenty ſhillings yearly, but ſurrenders to the uſe of *P.* and his heirs, whom the lord admits; and afterwards *B.* attains his full age, [335] and the money is not paid him; whereupon the lord enters for the condition broken, and grants it to *B.* and the queſtion was, Whether the lord's admittance of *P.* were not a diſpenſation with the condition? The caſe was not reſolved; but *Fenner* was of opinion it was no diſpenſation; and he argued that becauſe the lord was only an inſtrument to convey, and the *ceſtuy que uſe* is in by him that ſurrendered; and therefore the lord's admittance was no diſpenſation. But ſurely his affirming the power of the copyholder to ſurrender an eſtate after the breach of the condition, for not paying the twenty ſhillings, is a good diſpenſation for that forfeiture, as well as if he had accepted rent after the forfeiture; for the affirming his power to grant over his eſtate, is as much an indication of the lord's mind for the continuance of the eſtate, as the acceptance. But then as for the forfeiture, that accrued after the admittance (*y*),

(*y*) [That is, the forfeiture on nonpayment of the one hundred pounds. The default in not paying the twenty ſhillings was ſuppoſed to have been purged by the ſubſequent ſurrender and admiſſion of P.]

it

It ſeems the admittance could not paſs away that; for the land was charged with the condition, into whoſe hands ſoever it came: And this ſeems to be *Fenner*'s opinion, by the reaſon he gives; for that the *ceſtuy que uſe* coming in by the ſurrenderor, the lord by his admittance did not paſs away his intereſt in the condition; for the queſtion was, Whether the lord had diſpenſed with the condition, not whether he had diſpenſed with the forfeiture of the condition broken? for that was not broken *in part*, till after the admittance: yes (z), *a breach in part was a breach of the whole condition.* [336]

My lord *Coke* ſays, that preſentments of ſurrenders ought, in all material points, to enſue and agree with the ſurrenders themſelves (a), elſe the ſurrender, preſentment, and admittance thereupon, will be void; which ſeems reaſonable; for if the preſentment in matter differs from the ſurrender, the lord hath no ſufficient notice of the ſurrender; and then the admittance upon it muſt in reaſon be bad, and not help out the preſentment; for if the lord knew the true ſurrender, perhaps he would never conſent to ſuch a ſurrender; and the true ſurrender ought to be known, that the lord might know his tenant, and from whom to take his ſervices. The admittance cannot help out, for that was grounded upon the pre- Co. Cop. 105. 4 Co. 25. a.

(z) [Yet.] (a) [See *ante*, 192. (r).]

 ſentment;

ſentment; but if the lord had notice of the true ſurrender, though the preſentment did differ, yet it ſeems reaſonable the admittance ſhould enure according to the ſurrender, becauſe he had notice of the true ſurrender; and when a man is admitted, he is in by the ſurrender. *Sed quære.*—Where it is ſaid, that if the preſentment differ in points material from the ſurrender, that there the admittance, preſentment, and ſurrender, are all void; It ſeems this muſt be underſtood, if the time for preſenting the ſurrender be paſt; for if there ſhould be a preſentment and admittance made contrary to the ſurrender, ſure this will not make the ſurrender void before the utmoſt time allowed by law for the ſurrender's being preſented; for it is no reaſon to ſay that becauſe the preſentment is void, that therefore the ſurrender is void; for the ſurrender depends not on the preſentment, though it may be void becauſe not preſented, but not becauſe ill preſented. So that if after ſuch ill preſentment and admittance, there ſhould be a good preſentment and admittance, it ſeems the ſurrender and all the other acts will ſtand good.

[337]

Cro. El. 442. 4 Co. 23. a.

A. copyholder in fee ſurrenders to the uſe of himſelf for life, then to his ſon for life, then to the uſe of his laſt will; the ſon dies, then the father ſurrenders to the uſe of *J. S.* in fee; adjudged that notwithſtanding the ſurrender to the uſe of one's laſt will, the eſtate remains in the

the copyholder (*b*), and he may ſurrender it in his life-time to whom he pleaſes.

It is ſaid in *Rolls*, that if a copyholder makes a deed of feoffment, with letter of attorney to make a livery, it is a forfeiture, though no livery be made; (*ſecus*, if there had been no letter of attorney to make livery;) for by giving the letter of attorney he hath manifeſted the determination of his will, having put it in the power of another perſon to paſs the eſtate; but when he hath reſerved that power to himſelf, he may chooſe whether he will paſs it or not (*c*). [338] 1 Rol. Abr. 508. Co. Lit. 55.

(*b*) [See *ante*, 195. N. LXXXV.]
(*c*) [See N. CLXXIX.]

NOTES AND ILLUSTRATIONS.

NOTE I. Introd. p. xviii. (*l*).

It ſhould ſeem that in more early times the age of majority was in both caſes the ſame, and fixed at *fifteen*.

In rude ages, man, continually expoſed to danger, found it neceſſary to his protection to be continually armed; and as he was to encounter danger at an early period, he took up his arms as ſoon as he was able to wield them. (See *Adair's Amer. Ind.* 18.) Among a people whoſe glory was in warlike atchievements, the preſenting of arms to youth was made a ceremony ſolemn and important.

In ancient Germany, when a young perſon was deemed capable of bearing arms, he was introduced into public, and they were ſolemnly given him in the preſence of the chiefs of his nation, &c. He from thence became a citizen, a member of the ſtate; and from this cuſtom is derived the ceremony of knighthood. (See *Tacit. de Mor. Germ.* c. 13. and *Cæſ. de Bello Gall.* lib. vi. c. 16. See alſo *St. Palaye, paſſim. Seld. Tit. of Hon.* p. 2. c. 1. ſ. 58. *Works*, n. 3. p. 491. 1003. *Spir. Laws*, b. 18. c. 26.

Stuart's View of Soc. in Eur. b. 1. c. 2. f. 4. p. 47, 8. 269, &c. n. (3). *Lacombe, Abrégé de l'Hiſt. du Nord*, tom. 1. p. 386, 7.

The forms of creation with reſpect to knighthood, and the terms which were uſed to expreſs that ceremony in later days, had alluſion to the cuſtoms of earlier times. "*Willelmus rex fortis anno decimo nono regni ſui, cum de more tenuiſſet curiam,—ad Pentecoſten apud Londoniam, Henricum filium ſuum juniorem* VIRILIBUS INDUIT ARMIS." *Hen. Hunt.* l. 6. p. 370. *Nu.* 20.

"*Rex Wilhelmus in feſto Pentecoſtes apud Weſtmonaſterium—Eodem tempore per prius Henricum filium ſuum juniorem* CINGULO DONAVIT MILITARI." *Rudb. Hiſt. Winton. apud Angl. Sac.* tom. 1. p. 258.

"*Anno gratiæ, M.L.XXXVI. en la ſamiene de Pentecoſte fiſt il ſon Fiz Henri* CHIVALIER *a Weſtmuſter.*" *Chron. MS. in Bibl. Coll. S. Trin. Cantab.* (*Vide* 1 *Mad. Excheq.* 7. n. (*i*).)

To bear arms, "*ad arma ſuſcipienda*," was the uſual phraſe for knighthood. (*Vide Stat. Milit.* 1 *Edw.* II.; ſee alſo 2 *Inſt.* 597, and *poſt.*)

In the more rude ages of ſociety, perſons were from their earlieſt years inured to exerciſe and danger; they were robuſt and vigorous from their mode of life; they ſoon then became capable of bearing arms, eſpecially as the arms of thoſe ages were in general light. A pole pointed with iron, and an ozier ſhield, were the uſual armour of the Germans; many, indeed, fought only with darts or clubs. Pectorals and helmets, and perhaps even complete ſuits of mail (*Loricæ*, ſays *Tacitus*, ſ. 6. and ſee 1 *Nor. Antiq.* c. 9. p. 242.), were known to them, but very ſeldom worn; (and *vide St. Remy, Mem.*

Mem. tom. 1. liv. 2. p. 100, 101.). At an early age therefore might the German, uſed from his infancy to martial amuſements and employs, have been able to become a ſoldier.

Fifteen ſeems the age at which the youth in moſt nations in the northern parts of Europe (and, indeed, in ſtates far removed from the ſuppoſed ſcenes of feudaliſm; ſee the *Code of Gentoo Laws*, c. 2. ſ. 16.; c. 3. ſ. 8.) was conſidered at a ſubſequent period as being capable of bearing arms. (See 1 *Mall. N. A.* c. 9. p. 197. 1 *Monteſq. Spir. Laws*, b. 18. c. 26.; b. 28. c. 25.)

In aftertimes however, when the arms became more ponderous and unwieldy, and when ſuits of "complete ſteel" were generally worn, the age of bearing them, or that of knighthood, was poſtponed, and conſequently the minority protracted till twenty-one. (*Vide Monteſq. ubi ſup. Stuart's View*, b. 1. c. 2. ſ. 5. n. (2), p. 296. *Sulliv.* lect. xii. p. 123.)

"*Ante ætatem verò* VIGINTI UNIUS ANNORUM (ſaid a writer in the time of Edward the Firſt), ROBUSTOS VEL HABILES AD ARMA SUSCIPIENDA PRO PATRIA DEFENSIONE NON REPUTANTUR ——." (*Fleta*, lib. 1. cap. 9. ſ. 4. and *vide Britt.* c. 66. *Bract.* lib. 2. c. 37. f. 86. *b. Year-book, H.* 35 *Hen.* VI. f. 41. *a.*; 42. *a. Litt.* ſ. 103. *Co. Litt.* 78. *b. Stat. de Militibus*, 1 *Ed.* II. ſ. 5. and 2 *Inſt.* 597.)

In ſtill more diſtant days, indeed, the age of majority ſeems to have been *fourteen*, (and ſee here *Lacombe, Abrégé Chron. de l'Hiſt. du Nord*, tom. 1. p. 386, 7.) and, on the heavy armour becoming general, to have been extended to *twenty* years.

The northern nations allowed a certain latitude in calculations like theſe in favour of the perſons af-

fected. When a *year* was required, it added a *day* to that year, that it might be certain that it had actually elapſed; hence our "year and a *day*." In like manner another year was added to the fourteenth, and afterwards to the twentieth, that the heir might have time to ſue out his livery, and to enter upon his lands; to inquire into the ſtate of his property, &c. Hence the year of election ſtill recognized by the Scottiſh law; hence too the *primer ſeiſin*; the annual value of the land, as the relief of the tenant in ſoccage, &c.

"*Præterea ſiquis infeudatus major* QUATUORDECIM ANNIS *ſua incuria vel negligentia* PER ANNUM ET DIEM *ſteterit*," ſays the feudal law, "*quod feudi inveſturam a proprio domino non petierit, tranſactio hoc ſpatio feudum amittat.*" *Dig. Feud.* l. 2. t. 55. f. 543. *cited poſt.* 41. which ſee.

When the age of majority became deferred, we find a ſimilar cuſtom prevailing. According to the *Grand Couſtumier de Normandie*, the heir in chivalry was conſidered as within age till he had accompliſhed his *twentieth* year. "*Et pour ce quilz doibuent eſtres tenues en garde tant que les* VINGT ANS *ſoient acompliz.*" But it immediately adds, "*On leur donne* UNG AN, *pur luſaige de Normendie, en quey ilz peuent faire en court clameur & rappeller les ſaiſines de leurs anceſſeurs par enqueſte. A celuy qui a acompliy* VINGT ET UN AN *neſt pas otroyee l'enqueſte de la ſaiſine a ſon anceſſeur, ſe l'anceſſeur ne mourut dedens* L'AN ET LE JOUR *que la clameur a eſte faicte.*" (*Vide Grand Couſtumier*, c. 33. *De Garde Dorph.* and c. 44. *De Non Aage*, and *St. Palaye, Mem. Chival.* c. 5. *St. Remy, Mem.* tom. 1. liv. 2. p. 82.)

But.

But although the period of twenty-one years became at length the preſumed and general age of majority, yet the lord, if he pleaſed, might have knighted his tenant at an earlier age. If from the ſtrength of his arm, or his advancement in military ſkill, he conceived him worthy of the honours of chivalry, he needed not have waited till he ſhould have completed his twenty-firſt year. But by conferring thoſe honours on his tenant, the lord immediately terminated his minority. He had thus declared him capable of ſuch manly employs, and, of conſequence, could detain him no longer in ward. (See 2 *Inſt.* 11, 12. (*Magna Charta*, c. 3.) and 597. (*Stat. de Militibus.*) *Stuart's View*, b. 1. c. 2. ſ. 5. n. (2). p. 296, 7. *Sulliv.* lect. xii. p. 124. 3 *Lord Lyttlet. Hen.* II. b. 2. p. 173. *Seld. Tit. Hon.* p. 2. c. 3. ſ. 37. *Works*, v. 3. p. 808, 9. 1004. and *vide St. Palaye*, c. 1 and 4.)

In this kingdom too, though the age of knighthood had been for many centuries fixed at twenty-one, the lord might have claimed his aid *pour faire l'aine fitz chevalier* as ſoon as ſuch ſon had attained to *fifteen*. (*Stat. Weſtm.* 1. 3 *Ed.* I. c. 36. and *Co. Litt.* 78. *b.*)

This was a relic of the ancient uſage; and the ancient uſage continued as to thoſe infants who were not concerned in the change of armour, in many reſpects, to later times. It prevails to this day in the county of Kent; for, by the cuſtom of that county, fifteen is ſtill, as to many purpoſes, the age of majority. (See *Robinſ. Gav.* b. 2. c. 3. p. 185—222, &c. and the authorities by him cited. *Litt.* ſ. 104 and 123. See alſo *Monteſq. S. L.* b. 18. c. 26. n. (*); and *poſt.* 293. N. CXLVI.)

We are told expreſsly by *Glanville* that the age of majority of the tenant in ſoccage continued in his days (*temp. Hen.* II.) to be fifteen: "*Si vero hæres & filius ſokemanni fuerit, ætatem habere intelligitur tunc cum* QUINDECIM *compleverit annum.*" (*Lib.* 7. cap. 9.) *Bracton*, who wrote in the time of Henry the Third, adverts to that of fifteen, and of fourteen alſo; he ſeems to recur to the ancient age: (*Vide Bracton, lib.* 2. c. 37. f. 86. *b.* and *lib.* 5. c. 21. *f.* 422. *a.*) And it is obſervable, that the latter author aſſerts that the male heir in ſoccage was to be out of ward as ſoon as he became capable of attending to huſbandry and of conducting his ruſtic employs: "*Item vires requirit ætas ſockagii & diſcretionem & ſenſum, & ſecund. q. hæres ſockmanni, poſſit & ſciat ea exercere, q. pertinent* AD AGRICULTURAM." And that the female became emancipated when able to govern her domeſtic affairs: "*Fœmina verò plenæ eſſe poterit ætatis in ſockagio omni caſu,* CUM POSSIT ET SCIAT DOMUI SUÆ DISPONERE, ET EA FACERE Q. PERTINENT AD DISPOSITIONEM ET ORDINATIONEM DOM. UT SCIAT Q. PERTINEANT AD CONE," (Sir Edward Coke reads *cover*, or *coffer*, 2 *Inſt.* 203.) "ET KEY; *q. quidem eſſe non poterit ante* QUART. DECIM ANN. VEL DECIM. QUINT. *quia hujuſmodi ætas requirit diſcretionem & ſenſum.*" (*Lib.* 2. c. 37. *f.* 86. *b.*) The author of *Fleta*, who compoſed his treatiſe in the reign of Edward the Firſt, mentions no certain number of years for the ſoccage tenant to be out of ward; but contents himſelf with ſaying, that the heir who held by that ſpecies of tenure became of age when marriagable. (*Vide Fleta, lib.* 1. c. 9. ſ. 5.) And the age of marriage he fixes at *fourteen*. (*Lib.* 1. c. 13. and *vide Britt.* c. 67. *Year-book, H.* 35 *Hen.*

Hen. VI. *f.* 40. *b.* &c. *pl.* 2. and *f.* 52. *a.* &c. *pl.* 17. 1 *Roll. Abr.* 342. *tit. Bar. and Feme,* (C.) *pl.* 5. who cites *Skene Regiam Majeſtatem,* 43. *b. Stat. Mert.* c. 6. *an.* 20 *Hen.* III. *Weſtm.* 1. c. 22. *an.* 3 *Ed.* I. and 2 *Inſt.* 203.)

The cauſe of the additional year continuing as to the military tenant was, moſt probably, from the neceſſity of the ſuing of livery by the heir, and the right of the lord to retain the profits of the fief till ſuch livery was regularly ſued; in which caſe it was both for the benefit of the heir, and the intereſt of the lord of the fee. But as to the tenant in ſoccage, the wardſhip appertaining to the relations of the heir who were accountable for the profits of the tenancy, the reaſon for its continuance, in a great meaſure, ceaſed. By the cuſtom of Kent, the heir was obliged to appear in the court of the lord and regularly demand his inheritance, which the lord was accordingly obliged to deliver (ſee *Rob. Gav.* b. 2. c. 3.); and fifteen, therefore, remained in Kent the age of majority. The age of marriage and diſcretion alſo having been fixed at fourteen, both by the common and civil law, prior to the times we are now ſpeaking of, contributed towards the eſtabliſhment of the age of fourteen as that of majority among ſuch tenants who were not intereſted immediately in the change of armour.

As to the tenant in burgage, we find from *Glanville* (*lib.* 7. *cap.* 9. and *Bracton, lib.* 2. *cap.* 37. *f.* 86. *b.*) that he was to be out of ward as ſoon as he became capable of following his father's profeſſion. The latter author ſays expreſsly, that there was, in his time, no certain age required: "*Si autem filius burgenſis, tunc ætatem habere intelligitur, cum denarios diſcretè ſciverit numerare, & pannos ulnare, & alia negotia ſimilia paterna*

terna exercere: SED SIC NON DEFINITUR CERTUM TEMPUS, SED PER SENSUM ET MATURITATEM SUAM." The criterion of ability became at length so vague, nay absurd, that the courts (at least so early as the time of Edward the Second) insisted on the personal presence of the infant, that they might be satisfied that he had discretion to guide him. This, however, was not always practicable; and a certain and definite age was afterwards required as the period of emancipation; though, when *Glanville* wrote, we find that when doubts arose with respect to the majority of the ward, they were to be decided by a jury: "*Per legales homines de visineto & per eorum sacramentum,*" (*l.* 7. *c.* 9.) and *vide Fitzh. Abr. Garde.* 127. *& Dum fuit infra ætatem* 3 *&* 5. See also *Robinf. Gav.* b. 2. c. 3. p. 223, &c. and the authors by him cited, and *post.* 325.)

We shall have occasion, in the course of the following annotations, to apply these remarks in illustration of some of our present usages and laws. (See *post.* 293. N. CXLVI. and 325.) For to the history and manners of the times must we recur to illustrate those laws which were ordained in ages that are past, and those customs to which we have succeeded, as it were, by inheritance; to trace out their origin and mutation, the principles whereon they were founded, and their relation to the general system of our legal polity. From incidents such as these we have noticed, which are too frequently condemned as frivolous and idle by the indolent or captious, how often do discoveries of the first import proceed! But, as it has been well observed (*Eff. on Brit. Antiq.* 160, 1. Eff. iv.) "Lawyers are seldom historians, and historians as seldom lawyers."

NOTE

NOTE II. p. 1. (*a*).

"THE word *feudum* was not known here until about the year 1000. *Somner's Gavelkind*, p. 102." *Note* (*) *to the third edition.* See *Wright's Tenures*, 19.

Somner ſays, "It may very juſtly be doubted whether either the laws, ſtories, or other, either written or printed, monuments of credit of any nation or country can ſhew the word *feodum*, or *feudum*, in uſe among them, until after the beginning of the tenth century," p. 102. *Dr. Robertſon* and *Mr. Butler* ſay not before the eleventh. See 1 *Charles* V. ſ. 1. p. 269, 70. n. (H); and *Mr. Butl. n. to Co. Litt.* 64. *a.* ſ. iii.

Dr. Stuart, indeed, informs us that there is certain evidence of its uſe on the Continent ſo early as the year 884; about which time it was often uſed as ſynonimous with *beneficium.* See his *View of Society in Europe*, b. 2. c. 2. n. 3. p. 352.

It ſhould here be remembered, that, when thoſe grants were at will, they were denominated *munera*; when they became for life, *beneficia*; and when they were permitted to be hereditary, or at leaſt were extended beyond the life of the vaſſal, then, and not till then, they are ſaid to have been properly ſtyled *feuda.* See *Dalrymple on Feudal Prop.* ch. 5. ſ. 1. p. 190. *Sulliv. Lect.* l. iii. p. 23. *Wright's Ten.* 19.

Yet, after all, it ſhould ſeem that the term *feuda* was equally applicable to ſuch giſts when only for life, or even at will: the term importing merely a conditional ſtipend or reward, or, as we ſtill uſe it, a preſent, gratuity, a gift; for feuds, they tell us, were originally voluntary. See 2 *Blackſt. Comm.* ch. 4. p. 45. *Stuart's View*, b. 2. c. 2. p. 94. and 353.

n. 3.

n. 3. 1 *Rob. Cha.* V. ſ. 1. p. 270. n. (H.) *Butl n. to Co. Litt.* 64. *a.* ſ. ii. *Somn. Gavelk.* 108.

The ſenſe was well expreſſed by the terms *munus* and *beneficium*; and Sir *Edward Coke* ſays, that in feoffments, *do* or *dedi* is ſtill the apteſt word. See *Co. Litt.* 9. *a.* 2 *Bl. Comm.* ch. 20. p. 310. *Wright*, 16. and n. (*k*). 150.

From the manner in which many writers have expreſſed themſelves on this ſubject, one would be induced to conclude that they conceived the term *feudum* to have been abſolutely unknown till the grant was protracted beyond the life of the vaſſal; but ſuch conception ſeems fraught with abſurdity, and thoſe expreſſions calculated only to miſlead.

It is obſervable, that the word is acknowledgedly of a German or Gothic origin; whereas the terms *munera* and *beneficia* were as evidently from the Latin language. The former, therefore, muſt neceſſarily ſeem the more ancient, as thus applied, and that by which ſuch gifts were originally ſtyled. What ſeems to have led to the ſuppoſition, that the word was not known till the tenth or eleventh century, was its not being found in any authentic charter written before that period. But the concluſion does not, I think, appear warranted. It might not have been inſerted in charters, &c. till that time; but it does not follow from thence that it was wholly unknown. The charters and laws of thoſe days were chiefly, at leaſt, in the Latin tongue; and this accounts for the uſe of the terms *munus*, *beneficium*, *&c.* in preference to that of *feudum*, which was forged out of the Gothic *feodh*, ſo barbarous in the eſtimation of the Latiniſt. If the apportioning of lands to the individual in conſideration of returns and ſervices, as known, at leaſt in later

later days, by the appellation of *feudal*, owed its birth to the northern nations, is it not reaſonable to expect from the northern nations the term by which it was called? Can it be ſeriouſly ſuppoſed for a moment, that after denominating ſuch portion of land by a term of foreign origin, that of *munus* or *beneficium*, for ſo many centuries, recourſe ſhould *then* be had to their native tongue; to a barbarous dialect, which, in many countries, was almoſt forgotten? Beſides, what name could it have been known by before the Gothic nations became ſo well acquainted with the Latin language? The inheritance of the feud cannot poſſibly, in itſelf, make any alteration in the queſtion: The term *feodh* had no neceſſary relation to ſuch hereditary quality; it was expreſſive only of a *gift*, a *ſtipend*, a *reward*, or, as we yet ſay, a *fee*; even *beneficium* was applied to an *hereditary* grant (ſee *Stuart's View*, b. 2. c. 2. p. 94. and 352. n. 3.), and *feudum*, in after-ages, to a grant for *life*. (See *Somn. Gavelk.* 108. and Sir *Thomas Smith's Commonwealth*, b. 3. c. 10.)

Perhaps the uſe of the word *feudum*, to expreſs an *hereditary* grant, in preference to that of *munus* or *beneficium*, may be thus accounted for; *munus*, *beneficium*, and *feudum* ſeem, I ſay, originally of the ſame import; they were *gifts*. This ſignification of the two Latin terms was remembered, and appeared illy to comport with the idea of an hereditary eſtate. The term *feudum* was not ſo well underſtood; the ſame abſurdity of application did not occur to the Latin ſcribe; he conceived it did not involve it; and he called the eſtate by the name, ſtyle, and title of a *feud*.

As

As we have ſpoken ſo much on this head, it may not be improper to remark that *Whitacre* derives the term from the Celtic tongue, and diſcovers this celebrated ſyſtem among the uſages of our Britiſh progenitors. See 1 *Hiſt. Manch.* ch. 8. ſ. 3. And, indeed, our author himſelf ſeems rather of the ſame way of thinking; as, in his little *Tract on the Conſtitution of England*, he appears to conſider the ancient Iriſh cuſtoms as ſimilar, in a great degree, to thoſe of our Saxon anceſtors, or rather indeed as originally the ſame. See it at the end of his "*Caſes in Law and Equity*," and in his "*Common Pleas*;" and alſo his *Hiſtory of the Feud* (MS.) cap. 1. and ſee *Taylor on Gavelk.* 145. and 153.

NOTE III. p. 1. (*c*).

"By the feudal law, with reſpect to the relation between the ſovereign and the ſubject, the right to the ſoil and the right to the profits of the ſoil were ſeparate; the tenant being inveſted with the latter, the ſovereign continuing to be intitled to the former. This right to the profits was of the moſt extenſive nature; it gave the tenant, except for the purpoſe of alienation, the complete power or dominion over the land, during the term of his tenure." See *Butl. n. Co. Litt.* 64. (*a*). ſ. ii.

Thus the *dominium directum*, or abſolute property, was, under this ſyſtem, placed in the lord; while the *dominium utile*, or the right of poſſeſſion, was in the tenant. See the *Introd.* v. &c. *Dalrymple, F. P.* c. 6. ſ. 1. *Wright's Ten.* 10. 58. 68. 147—9. *Stuart's View.* b. 1. c. 1. ſ. 1. c. 2. ſ. 1 and 2. and notes.

notes, *Stuart's Diſſ. on Antiq. Conſt. of Engl.* part 1. ſ. 3. and part 2. *Sulliv.* lect. iii and iv. *Kaims's Eſſ. on Brit. Antiq.* eſſ. 1. *Kaims's Tracts*, tr. iii. p. 125 and 2 *Bl. Comm.* c. 4 and 7. *Watk. on Deſc.* ch. 3. ſ. 1.

NOTE IV. p. 2. (*f*).

In ancient Germany the lands were divided annually among the individuals entitled, when they returned again to the ſtate. See the *Introduct.* p. v.

And it is obſervable, that a ſimilar diſtribution prevailed in the kingdom of Peru. See *Robertſ. Amer.* b. 7. v. ii. p. 312. 4to. edit.

This annual allotment ſeems to have been dictated by the annual produce of the earth. It was juſt that he who cultivated the land ſhould enjoy the produce of his labours; and theſe it required the greateſt part of the year to return; at leaſt the remaining part of that year was not worth acceptance; and an annual diſtribution anſwered the purpoſes of agriculture in its then ſtate.

It does not ſeem probable that the Germans, who had been uſed to yearly poſſeſſions, would be ſatisfied with eſtates at will. (See *Sulliv.* lect. v. p. 50.) Beſides, when they migrated into the more ſouthern provinces of Europe, thoſe ſoldiers, who were free in their perſons, appear by no means to have been ſo dependent upon their leaders or generals: it was *their* ſword that conquered; and they thought themſelves entitled to their ſhare of the ſpoil. (See the *Introd.* p. vi. &c. *Stuart's Diſſ.* p. 3. ſ. 2. p. 137. n. (6). *Squire on the Anglo Sax. Gov.* ſ. 69, &c. 1 *Rob. Cha.* V. ſ. 1. p. 14. 256. notes. 2 *Rapin's Hiſt. Eng.* 141. n. (*). 8vo. edit. *Diſſ. on the Gov. of the Anglo Sax.*

 However,

However, authors coincide in asserting that *feuds* were anciently at will; and they were, in that stage of their progress, denominated *munera*. (See *ante*, p. 1. n. (*a*). But those gifts at will were, I conceive, only made to those for whom the lord was not obliged to provide, as he was for the soldier who conquered for him. Be this as it may, we find, most clearly, that feuds at a very early period became for life. The faithful follower who had shared the dangers of his lord became, when the conquest was effected, entitled to a provision for his latter days. If we consider the services he had already performed, and was still, by the policy of the times, to render, or the engagements he had entered into to be faithful and true; if we remember that he also had left his native lands in search of a permanent dwelling, we shall not conceive that he could have been requited with a less estate. In this state of the feud they were termed *beneficia*. See note II. and further *Sulliv.* lect. vi. *Wright's Ten.* 14. 151. *Stuart's View.* b. 2. c. 1. s. 2. *Dalrymple, F. P.* ch. 5. s. 1. *Butl.* n. *Co. Litt.* 64. *a.* s. v. 4. 1 *Rob. Cha.* V. s. 1. p. 260, &c. n. (H). *Watk. on Desc.* ch. 3. s. 1.

NOTE V. p. 2. (*g*).

Allodial property was that which a person possessed in his own right, and of which he had the absolute ownership; in which the *dominium directum* was not divided from the *dominium utile*; it was opposed to *feudal*, which was held of a superior. The term is derived from the northern languages; from *Al, totus, integer, et absolutus*; and *Od, status, possessio, vel proprietas*. See *Stuart's View*, b. 1. c. 2. s. 1, 2, 3, and notes. *Diss.* p. 2. s. 3. 2 *Bl. Comm.* ch. 4. p. 45. *Sulliv.*

Sulliv. lect. v. vi. xi. xv. xxvii. *Millar's View of Engl. Gov.* b. 1. c. 5. p. 87. ch. 9. p. 183. *Wright's Ten.* 137. 146, 9. *Kaims's Eſſ. on Brit. Antiq.* eſſ. 1. *Co. Litt.* 1. b. *Harg.* n. (1) to *Co. Litt.* 65. *a. Butler's* continuation of n. (1) to 64. *a. Spirit of Laws*, b. 31. c. 8. *Somn. Gavelk.* 88. 104, &c. 1 *Rob. Cha.* V. ſ. 1. p. 256, &c. 266, &c. n. (H).

NOTE VI. p. 2. (*i*).

It has long been a maxim in our law, that all the lands in England, in the hands of a ſubject, are held, mediately are immediately, of the king. This was a conſequence of the feudal ſcheme. (See the *Introduct.* p. ix.) Yet it is ſaid that *allodial* property continued among us till the time of Henry the Second; and is even yet to be met with in ſome of the iſles of Scotland. See *Mad. Baronia Anglica*, b. 1. c. 2. p. 30. *Stuart's View*, b. 2. c. 2. p. 106. *Diſſ.* p. 3. ſ. 4. p. 178. n. (3). *View*, b. 1. c. 2. ſ. 1. n. (4). p. 208, 9. *Kaims's Eſſ. Brit. Antiq.* eſſ. 1. p. 19. *Harg.* n. (1) to *Co. Litt.* 65. (*a*). And ſee, as to its continuance on the Continent, 1 *Rob. Cha.* V. ſ. 1. p. 267, &c. 271. n. (H).

NOTE VII. p. 2. (*k*).

So in his "*Hiſtory of the Feud*," before cited, our author ſeems to conſider gavelkind lands as originally *allodial*; but whether the obſervation be juſt, that *allodial* land gave birth to gavelkind, appears to admit of much doubt. It ſeems inconſiſtent with the hiſtory of the times. Lands held in ſoccage, though evidently feudal, continued to deſcend to *all*

the ſons ſo lately as the time of Henry the Second. See 2 *Bl. Comm.* ch. 14. p. 215. *Robinſ. Gav.* b. 1. c. 2. *Poſt.* 11. n. (*x*).

They were the military and honorary feuds which firſt became indiviſible, and went to the eldeſt ſon alone (and military feuds, even in Kent, were inheritable by the eldeſt only. 2 *Inſt.* 595. and *Robinſ. Gav.* b. 1. c. 5. p. 46.); and in imitation of theſe it was that the right of primogeniture took place in ſoccage tenures. See *Blackſt. and Robinſ.* as above. *Hale's Hiſt. Com. Law.* c. 11. p. 255. 257. *Wright*, 25, 6. 31, 2. 174. &c. 212. *Sulliv.* lect. xiv. *Butl.* n. to *Co. Litt.* 64. (*a*). ſ. v. (4). and *Poſt.* 12.

The cuſtom of gavelkind, or the diviſion of lands among the ſons, prevailed alſo in Wales. It was the ancient uſage of the country, and continued till the time of *Hen.* 8. It took place even in the caſes of dignities and titles, and was productive of the moſt afflicting miſchiefs among that people. See 1 *Whit. Manch.* c. 8. ſ. 3. 1 *Warr. Wales*, 4. 40. 217. 381. 438. *Hale's Comm. Law*, n. (B). 190. 250. *Robinſ. Gav.* b. 1. c. 2. *Taylor on Gav. paſſim.*

Among the Iriſh the lands were apportioned out among all the males of a clan; and a new diviſion was made on the death of each tenant. See *Davys's Rep.* 28. *b.* Caſe of Taniſtry, and 49. *a.* Caſe of Gavelkind.

NOTE VIII. p. 3. (*m*).

See *Litt.* ſ. 1. "This," as *Blackſtone* remarks, "is plainly a relict of the feodal ſtrictneſs; by which

it was required, that the forms of donation ſhould be punctually purſued; or, that, as *Craig* expreſſes it, in the words of *Baldus*, "*Donationes ſint ſtricti juris, ne quis plus donaſſe præſumatur quam in donatione expreſſerit.*" And therefore (as *Blackſtone* expreſſes it nearly in the words of *Wright*, ſee his *Ten.* 151, 2.) as the perſonal abilities of the donee were originally ſuppoſed to be the only inducements to the gift, the donee's eſtate in the land extended only to his own perſon, and ſubſiſted no longer than his life; unleſs the donor, by an expreſs proviſion in the grant, gave it a longer continuance, and extended it alſo to his heirs. "But this rule," he adds, "is now ſoftened by many exceptions." 2 *Comm.* c. 7. p. 107, 8.

Of thoſe exceptions, ſee *Co. Litt.* 9. *b.* 10. *a.* and Mr. *Harg.* notes. *Viner's Abr.* Eſtates, (K. 2) and (L). *Comyns's Dig.* Eſtates (A. 2). *Touchſt.* 101. *Poſt.* 72. 74, 76.

NOTE IX. p. 10. (*u*).

THIS was what, in after times, was denominated *frank marriage*; and which, though now in a great meaſure obſolete, is ſtill recognized by law. Our author ſays, that on ſuch gifts the eſtate was limited to the iſſue of the marriage by the feudal donation: In later times, however, the very word *frank-marriage* was deemed, by our law, to be ſufficient in itſelf to create an eſtate in ſpecial tail in the donees. See of *frank-marriage*, *Litt.* ſ. 17. and *Co.* on that ſection. 2 *Bl. Comm.* ch. 7. p. 115.

NOTE X. p. 11. (*w*).

IN early times women were not permitted to ſucceed to a proper feud, as they were incapable of performing

forming the ſervices required. Indeed, among rude nations, women were ſeldom ſuffered to partake of the property of the tribe or family, with reſpect, at leaſt, to the uſe or ownerſhip of land; for they did not need it: Before marriage they remained part of their father's family, and, afterwards, the huſband provided for them. The proviſion ſo anxiouſly made for them by the Gentoo laws is pleaſing: "So long as a woman remains unmarried, her father ſhall take care of her; and ſo long as a wife remains young, her huſband ſhall take care of her; and in her old age her ſon ſhall take care of her; and, if before a woman's marriage her father ſhould die, the brother or brother's ſon, or ſuch other near relations of the father, ſhall take care of her; if after marriage her huſband ſhould die, and the wife has not brought forth a ſon, the brothers and brothers' ſons, and ſuch other near relations of her huſband, ſhall take care of her: If there are no brothers, brothers' ſons, or ſuch other near relations of her huſband, the brothers, or ſons of the brothers of her father, ſhall take care of her; if there are none of theſe, the magiſtrate ſhall take care of her. And in every ſtage of life, if the perſons who have been allotted to take care of a woman do not take care of her, each in his reſpective ſtage accordingly, the magiſtrate ſhall fine him." *Code of Gentoo Laws*, c. 20.

In barbarous ages their rights were leſs reſpected; and they required a ſtronger arm for their protection and ſupport. When they were, at length, permitted to ſucceed to an inheritance, they were poſtponed to males; and they ſucceeded firſt to thoſe lands for which no returns were due, or which, when due, were not incompatible with their nature or manners to perform. They inherited allodial property; and then

then thoſe improper feuds for which no ſervices were demanded. They afterwards ſucceeded to ſoccage tenures; and when the military ſervices were admitted to be performed by deputy, or commuted for money, they were permitted alſo to ſucceed to military feuds.

To honorary fiefs they were admitted in early times. Their dignities they were often empowered to communicate to their huſbands; but when they remained unmarried, they performed the functions of their office in perſon; they ſat in courts to debate and to decide; they aſſiſted their ſovereign with their counſel; and they paſſed judgment on their peers.

With us, at this day, women ſucceed to the inheritance in all caſes where not expreſsly precluded by the gift or by the cuſtom of a particular place; but they are poſtponed to males; and the right of primogeniture is not permitted among them. They ſucceed equally, except to dignities and titles of honour; and, in theſe latter caſes, the king ſelects the individual to ſucceed. With reſpect to dignities and titles, however, their rights and privileges are not ſo extenſive as they formerly were; they cannot now communicate them to their huſbands; they cannot now take a ſeat in parliament; nor can they ſit in judgment on a peer,

See *Weſt. on Peers paſſim*; *Collins's Claims to Baronies paſſim*; *Stuart's View*, b. 1 c. 1. ſ. 2. c 2. ſ. 2. and notes, and p. 205, 6. *Wright's Ten.* 26. 28. 31. 33. 177. and notes. *Dalrymple, F. P.* ch 5. ſ. 3. *Kaims's Brit. Antiq.* eſſ. 3 and 4. 2 *Bl. Comm.* ch. 14. *Hale's Comm. Law*, ch. 11. *Butl.* note (1) to *Co. Litt.* 64. *a.* n. (2) to p. 325. (*b*). *Sulliv.* lect. xiv. *Stu. Diſc. prefixed to Sulliv.* 5. n. (7), &c.

3 *Lord Lyttleton's Hen.* II. p. 339. 1 *Tyrr. Hiſt. Engl.* b. 4. p. 210. See alſo *Barrington's Obſ. on the Statutes*, 48. 51 *Hen.* 3. ſ. 6. and *poſt.* next notes (*x*), and XI. and p. 12, 13. 107. 324. and N. CLXVIII.

NOTE XI. p. 11. (*y*).

See, of the right of primogeniture, 2 *Bl. Comm.* ch. 14. p. 214. *Dalrymple, F. P.* ch. 5. ſ. 1. *Robinſ. Gav.* b. 1. c. 2. *Kaims's Brit. Antiq.* eſſ. 4. *Hale's Common Law.* ch. 11. *Wright's Ten.* 25, 6. 31, 2. 174. 177. 212. and notes. *Stuart's View*, b. 1. c. 2. ſ. 3. p. 32. and 220. n. (3). *Sulliv.* lect. xiv. *Butl.* n. *on Co. Litt.* 64. *a.* ſ. v. (4). *ante*, 2. (*d*). and note VII.

It ſhould be here obſerved, that, according to the feudal law at one ſtage of its progreſs, after fiefs became indiviſible, the lord had the power of ſelecting the ſon to ſucceed; and we accordingly find inſtances of the exertion of this privilege even in our own kingdom, and that ſo lately as the time of Henry the Second. "*Galfridus de Mandeville ſenex tenuit Baroniam de Merſewude,—et genuit de prima uxore ſibi deſponſatâ, Robertum de Mandevillâ.—Galfridus autem ſenex de Mandevillâ—aliam uxorem deſponſavit de quâ genuit Raduſphum de Mandevillâ. Qui poſt obitum ipſius Galfridi ſenis tenuit prædictam Baroniam* PER VOLUNTATEM HENRICI REGIS EO QUOD FUIT MELIOR MILES, QUAM ROBERTUS DE MANDEVILLA FRATER EJUS." *Mag. Rot.* 10 *Joan Re. Rot.* 11. b. 1. *Mad. Exchеq.* c. 13. p. 489. n. (*q*). *Weſt. on Peers*, 5. See *Kaims's Eſſ.* eſſ. 4. p. 149. *Dalrymple, F. P.* ch. 5. ſ. 1. p. 193. *Stuart's View.* b. 2.

c. 2.

c. 2. p. 93. and 351. n. (2). *Sulliv.* lect. xiv. p. 136. See alſo 1 *Lamb. Obſ. As. Af. and Am.* c. 11.

" A beautiful inſtance of the remains of this ancient practice," ſays Dalrymple, " is ſtill to be ſeen in the law of England at this day upon the devolution of a peerage to heirs female. Upon that emergency it is the king's privilege to confer the peerage upon any of the daughters he pleaſes." *F. P.* 193. See the laſt note.

At this day, indeed, when dignities are detached from real property, the privilege we are ſpeaking of cannot interfere with, or direct the diſpoſition of the poſſeſſions of the noble perſon ſo dying without iſſue-male. But, while the peerage continued feudal and annexed to territory (and ſuch it was from the Conqueſt till the latter end of the reign of Henry the Third; though the caſtle of Arundel in Suſſex is ſaid to be the only inſtance of the kind now remaining among us, unleſs, indeed, we conſider the baronies of our biſhops in this light; of which ſee 1 *Blackſt. Comm.* c. 2. p. 155, 6. *Warburton's Alliance*, b. 2. c. 3. p. 146, &c.), that territory, and thoſe poſſeſſions to which it was ſo annexed, muſt, of neceſſity, have been enjoyed by the individual ſo ſelected by the king. Indeed the extent of that privilege, during the reigns of the firſt eight monarchs from the conqueſt, is ſtrongly ſhown by the following paſſage: " *Notæ; q. en nuper obiit port par* ii *ſoers vers le tierce ſoer, fuit all. en barr. un cuſtome qu. fuit tyel: Quod ſi aliquis baro. dni. Regis tenens de Rege obiiſſet, en no. haberet hered. niſi filias, et primogenite filie maritate ſunt in vita patris, Dns. Rex daret poſt natam filiam que remaneret in hered. patris alicui milit. ſuorum* CUM TOTA HEREDITATE PATRIS SUI DE

QUA

QUA OBIISSET SEISITUS, *ita quod alie filie nihil recuperent verſus poſt natam filiam in vita ſua:* ET OMNES REGES HABUER. HANC DIGNITATE. A CONQUESTA." 3 *Hen.* III. *Fitzh. Abr. t.* Preſcription, *pl.* 56. See alſo *Kaims's Eſſ. on Brit. Antiq.* eſſ. iii. and *Dalrymple, F. P.* ch. 8. And of Arundel caſtle particularly ſee 1 *Bulſt.* 196. 1 *Lord Raym.* 72. 1 *Salk.* 253. *Heylin's Help to Engl. Hiſt. tit.* Arundel. *Camd. Brit. tit.* Arundel. *Seld. Tit. Hon.* part 2. c. 9. ſ. 5. *Works,* p. 897. 1695. V. 3. *Mad. Baronia Angl.* b. 1. c. 1. p. 23. Notes (1) to *Co. Litt.* 16. *b.* and (6) to 31. *b.*

The ſtat. 12 *Car.* 2. c. 24. ſ. 11. has a ſaving with reſpect to *feodal* titles of honour.

See n. (3) to *Co. Litt.* 15. *b.* where the barony of *Berclay* is conſidered as *feudal.*

So inſeparable was the dignity from the territory in theſe caſes, that whenever there was a transfer of the latter the former alſo was transferred. As thoſe territories, indeed, which were held *per baroniam,* were, of conſequence, held immediately of the king, his conſent was indiſpenſable to the alienation. (See *Madox's Baronia Angl.* b. 1. c. 1. p 23. and *Collins on Baronies* 113. *Sulliv.* lect. xx. p. 188.) An inſtance of ſuch a transfer is given us by Lord *Kaims,* (*Brit. Antiq.* eſſ. iii. p. 79, &c) which occurred in Scotland in the fourteenth century. Thomas Fleming, Earl of Wigtoun, granted that earldom, by his charter, to Archibald of Douglas knight of Gallway:—After the alienation (which was confirmed by king Robert) the grantor was no more conſidered as an earl; nor did he aſſume the title; but the grantor took upon himſelf the ſtile of the earl of Wigtoun. The circumſtance of the honour following the lands, is ludicrouſly

ludicrouſly adverted to in an old ballad given us by *Percy* (*Reliques of Anc. Eng. Poetry*, vol. 2. p. 128.), intitled *The Heir of Linne*. At this day, however, it ſhould ſeem, that a peerage cannot be transferred (unleſs we conſider the ſummoning of the eldeſt ſon of a peer by writ as a transfer of one of his father's baronies. See *Weſt on Peers*, 49, &c.) without the concurrence of parliament; at leaſt in thoſe caſes where the noble perſonage has no other barony to remain in himſelf; as otherwiſe, on the transfer, he would himſelf be deprived of his peerage, and be made ignoble by his own act. The earldom of Arundel is now ſettled by act of parliament in the Norfolk family; and even if it were not, it might be queſtioned whether, under the ſuppoſition of no remaining barony, ſuch an one could now be otherwiſe conveyed; as it has been long ſettled that the whole nation is intereſted in each individual peer; and that a peer cannot be deprived of his peerage but by act of parliament. See *Show. P. C.* 1. &c. *Viſc. Purbec*'s caſe. 12 *Co.* 108. 1 *Bl. Comm.* c. 12. p. 402. *Mad. Baron. Angl.* b. 1. c. 1. p. 25.

NOTE XII. p. 12. (*a*).

By the feudal policy a new tenant could not have been introduced into a fief but by the conſent of the lord. Hence the vaſſal could not alien without his permiſſion; it therefore was reaſonable, in the caſe of females, to ordain that the lord's approbation ſhould be obtained before the tenant ſhould enter into marriage. By marriage the huſband became ſettled in the feud (ſee *poſt.* 108. (*k*). 289. and N. CXXXVI. 224, and N. XCVII.); and, without this precaution, the

the tenancy might have been transferred at the will of the feudatory. Beſides, the marriage might have been contracted with a perſon of another barony or tribe, which perhaps was at enmity with the lord: this was an additional reaſon to make the lord's conſent neceſſary; and this is noticed by *Sir Edw. Coke*, (1 *Inſt.* 78. *b.*) "And the reaſon," ſays that writer, "as I find in antiquity, wherefore the law gave the marriage of the heir female,—and that ſhe ſhould not marry herſelf, was, *pur ceo que les heires females de noſtre terre ne ſe marieront a nous enemies, et dount il nous coviendroit lour homage prendre, ſi eux ſe puiſſent marier a lour voluntés*, *Britton*, c. 67. and *vide Glanv. lib.* 7. *c.* 12. 55. b. *Charter of Henry I. apud Blackſt. Introd. to the Great Charter*, viii. n. (e). *Bract. lib.* 2. *c.* 37. *ſ.* 6. *f.* 88. a. And from the cloſeneſs of the connection and relations of marriage, theſe reaſons held equally as to males.

Theſe reaſons were of continued cogency during the life of the vaſſal; and during the life of the vaſſal was the conſent of the lord once requiſite to his marriage. In after times it was confined to the firſt marriage: in ſome countries, and during ſome periods, to the firſt marriage of females only. It underwent many regulations and reſtrictions, and ended in the moſt diſtreſſing oppreſſions. In this kingdom it was happily aboliſhed, with many other relics of feodal tyranny, by the ſtatute 12 *Car.* 2. *c.* 24.

See the *Introd.* p. xviii. 2 *Bl. Comm.* ch. 5. p. 70. ch. 6. p. 88. *Dalrymple, F. P.* ch. 2. ſ. 2. *Sulliv.* lect. xiii. p. 129. *Wright's Ten.* 82, 86, &c. *Stuart's Diſſ.* p. 2. ſ. 2. p. 101. *Poſt.* 108. (*k*).

NOTE

NOTE XIII. p. 12. (*b*).

THE right of repreſentation was not ſo ſoon eſtabliſhed as that of primogeniture: when it was an acknowledged axiom that the eldeſt ſon ſhould ſucceed, it was ſtrenuouſly diſputed whether the ſecond brother ſhould not take place of his nephew. This was from the manners of the times: the nephew was often an infant; the uncle was already capable of bearing arms; and this circumſtance had its weight in ages of turbulency and ſpoil.

See the authors referred to p. 11. n. (*y*); and 1 *Blackſt. Comm.* 201. ch. 3. and 1 *Rob. Cha. V.* ſ. 1. p. 352. N. (Y); and *poſt.* N. XIV.

NOTE XIV. p. 13. (*g*).

IN the author's manuſcript *Hiſtory of the Feud*, the doctrine of the text, from page 10 to 20 incluſively occurs almoſt in the ſame words. The following paſſage, however, is found in the MS. which is omitted in the text: "By the feudal law they thus carried down the inheritance to all the deſcendants; but they allowed of no adoption according to the inſtitution of the Roman law, becauſe they, in all feudal donations, reſpected the blood of the feudiary; and therefore they had not the liberty to adopt, which might carry the feud out of the blood of the feudiary whom the lord had choſen for his fitneſs in the wars; and, by conſequence, a ſtranger to that blood was not to be admitted: beſides that the law of adoption had been found very prejudicial in the Roman government, where the empire had ſeldom continued for three deſcents in the ſame line; becauſe the reverence

rence to the family decayed by the admiſſion of ſtrangers, not of the blood of the emperor; and therefore they thought, with reaſon, that theſe feudal dominions and eſtates could not be built up, or better ſettled, than by preſerving a conſtant reverence to the blood of the firſt feudal poſſeſſor.

" So that the blood of the poſſeſſor was in the firſt place conſidered, becauſe the gift was for military virtue in the wars, which they apprehended would be derived to the deſcendants: ſo alſo, as it is ſaid, they preferred the eldeſt, becauſe they eſteemed the beſt and moſt worthy blood to be continued in the eldeſt ſon, and that he would be firſt ripe and fit for the feudal ſervices; but the privilege and prerogative of age was poſtponed to the privilege of ſex: for if the daughter was elder than the ſon, yet the ſon was preferred, becauſe the diſability in the male, by reaſon of nonage, was but temporary; but that of ſex was perpetual.

" But yet the daughter of the elder ſon was preferred to a younger brother, becauſe ſhe was the repreſentative of the elder line: but this was to prevent the bloodſhed which would have happened in thoſe barbarous times, if they had not thus conſtituted the line; for they uſually married the eldeſt ſon in the life of the father, by the conſent of the feudal lord, and therefore they ever preferred the iſſue; otherwiſe the ſecond ſon had been next to the feud, in caſe the eldeſt ſon had died leaving iſſue, and there would immediately have ariſen contentions among the ſons; and they would have endeavoured to cut off the eldeſt ſon, in order that they might have ſucceeded in his place: but all hopes of this kind were excluded, by admitting his iſſue, of what ſex ſoever, into

into the inheritance; beſides, they could not have married their eldeſt ſon to the ſame advantage, if their iſſue of what ſex ſoever had not inherited.

" So that to conſtitute the line among equals, the prerogative of age obtained, and obtained ſo far as to carry the ſucceſſion to the repreſentative; and the prerogative of the line was preferred to the privilege of the ſex; the privilege of the ſex was preferred to the prerogative of age; and by theſe means the whole feudal ſucceſſion in the deſcendants of the firſt feudiary got its eſtabliſhment." *Fol.* 35, 36.

NOTE XV. p. 17. (*r*).

A *feudum novum* could devolve only to the *deſcendants* of the feudatory to whom it was granted. It became at length uſual to grant ſuch feud to be held *ut antiquum:* the properties of an ancient feud were conceived then to attach to it; and it became deſcendible to *collaterals*; to any who could derive his blood from the *ſuppoſed* original feudatory. Of this kind are all our grants, in *fee-ſimple*, at this day. See *ante*, 13. (*b*). *Wright's Ten.* 17. 25. 180. and notes. 2 *Bl. Comm.* ch. 14. p. 220. *Kaims's Brit. Antiq.* eſſ. 4.

NOTE XVI. p. 17. (*u*).

The guardian in ſoccage was, (and ſtill is,) by the laws of England, the neareſt of kin *to whom the lands could not poſſibly deſcend.* To place a minor in the care of a perſon who might ſucceed him in the inheritance, is, ſays the law, *quaſi agnum lupo committere ad devorandum.* See *Co. Litt.* 88. b. and *Mr. Harg.* n. (6). 1 *Bl. Comm.* ch. 17. p. 461. *Sulliv.* lect. xiii. p. 127.

But

But this maxim partakes ſtrongly of the barbarity of the times; and, though the barbarity of the times might have warranted its inſtitution, the adherence to it at this day has been warmly reprobated;—with what juſtice or propriety is left to others to decide. See 2 *Pr. Wms.* 264. and *Harg.* n. (6) to *Co. Litt.* 88. b.

NOTE XVII. p. 19. (*e*).

THIS poſition, that "the blood of the father's mother was preferred to the blood of his grandmother," has been the ſubject of much controverſy. It was advanced by Juſtice *Manwoode*, in the caſe of Clere and Brooke (ſee *Plowd.* 450.), and adopted by Lord Bacon and Sir Matthew Hale: it has been ſtrongly and ably oppoſed by Mr. Juſtice Blackſtone (ſee his *Comm.* ch. 14. p. 238. n. 2.), and as warmly defended by Mr. Oſgoode. (See his *Deſc.*)

The writer of this note feels doubly ſenſible of the importance of his undertaking, and doubly diffident of his ability acceptably to accompliſh it, when he is about to enter the liſts with ſuch mighty names: but having thus commenced Annotator, it becomes him not to tremble in the day of doubt; and he will, therefore, firmly acknowledge, that he coincides in ſentiment on the point now under conſideration with the learned commentator on the laws of England;—though oppoſed by a Bacon and a Hale,—and even by our author himſelf.

It is an acknowledged maxim in our laws, that the paternal is always preferred to the maternal line; and that a feud held *ut antiquum* is ſuppoſed to have deſcended paternally. It is alſo eſtabliſhed, that the brother of the grandmother ſhall ſucceed before that of

of the mother (*Plowd.* 444. *Dyer* 314. a. *pl.* 95. Clere *v.* Brooke). And why ſhould we ſtop here? Why ſhould not the blood of the father's grandmother be preferred to that of his mother?—Becauſe, ſay they, the proximity ſhall prevail. But is this aſſertion founded on truth?—Does it not rather, as Mr. Juſtice Blackſtone obſerves, directly contradict many inſtances given both by Plowden and Hale, and moſt, if not all, writers on the laws of deſcent?—Does it not militate againſt axioms which were never denied?

If, when the queſtion is between thoſe of the paternal and thoſe of the maternal line, the law always gives the preference to the former, (See *Dougl.* 778.) Does not the preference, in the caſe now under remark, belong to the father's grandmother?—Are not the heirs of *a mother* preferred to thoſe of *a wife*?—If the hereditaments cannot *be proved* to have deſcended from the mother, are not *they preſumed* to have come from the father? This is the principle of the *feudum novum* held *ut antiquum*. If they cannot be proved to have come from the grandmother, will not the law deem them derived from the grandfather? Now, if this be the preſumption here, that they deſcended from the grandfather,—muſt not the blood of the great grandmother be entitled in preference to that of the grandmother?—for this plain reaſon: becauſe the lands, being ſuppoſed to have come from the grandfather, and his *paternal* line being exhauſted, the law will, on ſuch conſideration, preſume that they came to *him* from his *mother* rather than from his *wife*; otherwiſe where is the obſervance of the rule, that the preference is due to the *paternal* line?—If the queſtion be between a couple of anceſtors, however remote, is not the preſumption in favour of the

male?—If the queſtion be between the heirs of the mother and the heirs of the wife of ſuch male, does it not belong to the former?—If the law then ſuppoſes the hereditaments to have been veſted in the male anceſtor, can the paternal blood be ſaid to be exhauſted, while any deſcendant of *his* mother remains?—And does the law ever call in the blood of a female anceſtor till that of the male be extinct?—If the lands therefore came from the grandfather, are not HIS mother's heirs the firſt entitled, if thoſe of his father be no longer to be found?—If you prefer the blood of the grandmother to that of the great-grandmother, do not you contradict the very axiom you ſet out with? Do you not give the preference to the grandmother rather than to the grandfather?—To the wife than to the huſband?—To the female than to the male? Can you be ſaid to prefer the grandfather when you ſhut out *his* maternal heirs from the ſucceſſion?—If a perſon's blood be compoſed of that of *both* of his anceſtors, can his blood be conſidered as exhauſted when one half of it remains?—Can you deem it wholly extinct when one half is not taken into conſideration?

If, then, we would preſerve a conſiſtency in our deductions, ſhould we not be warranted in affirming the rule which we ought to purſue in theſe caſes to be this: When we trace the *paternal* line, to begin with the father (as a common anceſtor) of the perſon laſt ſeized, or firſt purchaſer, and proceed *upwards*, through the grandfather, great-grandfather, &c. as far as the line can be purſued; and, when the heirs of this part can be no longer diſcovered, to begin *with thoſe of the wife* OF THAT PATERNAL ANCESTOR WITH WHOM OUR DISCOVERIES ENDED; and continue in a

contrary direction, proceeding *downwards*, to the heirs of the mother?

*** The Editor had not ſeen *Mr. Chriſtian*'s edition of the *Commentaries* till after he had written the preceding part of this note. It is with much pleaſure, however, that he is now enabled to refer the reader to what that annotator has advanced in ſupport of this controverted poſition of the very learned judge: and, at the ſame time, he muſt acknowledge that he feels much pleaſure alſo in finding his own obſervations ſo ſtrongly corroborated by thoſe which that annotator has preſented us with. See note (17) to 2 *Comm.* 240.

NOTE XVIII. p. 20. (*f*).

A BASTARD is, by our law, incapable of inheriting, being eſteemed *filius nullius*: neither can he have any heirs except his own deſcendants; for as he has no legal anceſtor, there can be no common ſtock. If he dies without iſſue and inteſtate, his acquired hereditaments will eſcheat to the lord of the fee. See 1 *Bl. Comm.* ch. 16. p. 458.

Among the ancient Welſh and Iriſh, baſtards inherited or were admitted to their portions with legitimate children; till the cuſtom was aboliſhed among the former by *Stat. Walliæ*, 12 *Ed.* I. and among the latter till it was adjudged illegal and void by the juſtices in Hilary, 3 *Jac.* See *Davys's Rep.* 49. a. Caſe of Gavelkind. *Tayl. on Gavelk.* ch. 2 and 15.

NOTE XIX. p. 20. (*g*).

THIS was never adopted by our law. The clergy endeavoured to obtain its adoption in the parliament

of *Merton*, 20 *Hen.* III. (*c.* 9.); but the lay members rejected it with much warmth and firmneſs; declaring with one voice, *that they would not change the laws of England which had hitherto been uſed and approved.* See 2 *Inſt.* 79—96. *Blackſt. Introd. to the Great Charter*, p. lxxxiii, 8vo. edition, *ſub anno* 1253. 1 *Bl. Comm.* Introd. ſ. 1. p. 19. ch. 16. p. 454. See alſo *Barrington on the Stat. of Merton*, *c.* 9.

So that, ſtill, if a child be born before marriage, though its parents marry afterwards, it is nevertheleſs a baſtard by the laws of England.

See further, *poſt.* 29—31.

NOTE XX. p. 21. (*i*).

As the heir has the right to the hereditaments deſcending, the law preſumes that he has the poſſeſſion alſo. This preſumption may indeed, like all other preſumptions, be rebutted: but if the poſſeſſion be not ſhown to be in another, the law concludes it to be in the heir; as the freehold is never conſidered as vacant, or in abeyance: there muſt have been a tenant to diſcharge the feudal duties and returns, and to anſwer to the *præcipe* of a ſtranger. See *Watk. on Deſc.* ch. 1. ſ. 1. p. 25. and ch. 4. p. 131.

NOTE XXI. p. 22. (*l*).

For it is eſſential to a deſcent which takes away an entry, that the anceſtor ſhould die ſeiſed (either in deed or in law, See *Co. Litt.* 239. b,) of an eſtate in *fee-ſimple* or *fee-tail*; the dying ſeiſed of a deſcendible freehold only, will not take away an entry. *Litt.* ſ. 387. and *Co.* upon that ſection.

But

But it ſhould be here obſerved, that a diſſeiſor gains a fee-ſimple by his diſſeiſin, except when a remainder or reverſion be in the King (who cannot be diſſeiſed); as an eſtate gained by wrong is always a *quaſi* fee: ſo that if a tenant for life only be diſſeiſed, the diſſeiſor has a fee-ſimple; and if he die ſeiſed, the deſcent will toll an entry. See *Heb.* 322, 3. *Bro. Eſt.* 17. *Co. Litt.* 42. b. 296. b. and n. (1).

NOTE XXII. p. 24. (*o*).

When feuds were only for life, it was often uſual to grant them again to the ſon of the deceaſed tenant: this, at length, became cuſtomary; and, from a coincidence of events and circumſtances neceſſarily flowing from the then ſtate of manners, ripened ultimately into hereditary ſucceſſion. The ſon, on his acceding to the feud, acknowledged the bounty of his lord; that he received it as a gratuity and not as of right: and this gave birth to the relief. The lord gave him the ſeiſin of the feud in the preſence of his fellow-tenants. The relief continued after the feud was ſtrictly inheritable; and, being originally arbitrary, became the ſource of oppreſſion. The ſeiſin was in England ſoon ſucceeded by the entry of the heir (except as to lands *in capite*): But in ſome countries (and to this day in the kingdom of Scotland) the ſeiſin was regularly delivered to him, and he received it as the renewal of his anceſtor's grant. See 2 *Bl. Comm.* ch. 5. p. 65, 66. ch. 14. p. 209. *Dalrymple, F. P.* ch. 6. ſ. 3. p. 245, 252—3. *Kaims's Law Tracts*, Tr. V. XII. XIII. *Sulliv.* lect. xi. *Wright's Ten.* 97. and *ante Introd.* p. xvi.

And, it is worthy of remark, this uſage of giving the poſſeſſion or ſeiſin to the heir on the death of the

ancestor, is still observed by us in the case of copyholds; with respect to which tenures the feodal customs are more rigidly attended to and enforced. See 2 *Bl. Comm.* ch. 22. p. 367. *Post.* 155. N. LXVI. 230. N. C.

NOTE XXIII. p. 24. (*p*).

If the heir die before entry or actual possession, the relief is equally due: for, immediately on the descent, the lands become vested in the heir, who consequently becomes immediately tenant to the lord. The relief is payable on his accession to the feud; which he is entitled to, by our law, the instant of his ancestor's decease. See *Fitzh. Abr. Relief*, 12. *Brooke, Relief*, 2. *Kitch.* 146. a. *Co. Litt.* 239. b. n. (1).

NOTE XXIV. p. 25. (*q*).

"When the lord comes to the lands by escheat, the law only casts the freehold upon him for want of a tenant. The disseisee, notwithstanding the disseisin, continues the rightful tenant; and, as by his entry he fills the possession, the lord's title, which was only good while a tenant was wanting, must necessarily be at an end." Mr. *Butl.* note (1) to *Co. Litt.* 240. a.

A distinction is noticed in the *Year-book*, 32 *Hen.* VI. by *Littleton* J. as to the entry of the lord, in the case of the *disseisee*'s death without issue, when the entry of the disseisee was tolled at his demise, and when not: in the first case, as the disseisee or his heir could not have entered on the disseisor or his heir, so neither could the lord, who, in such instance, would be obliged to take the disseisor for his tenant, till his title should be legally disproved. In the latter case,

caſe, as the diſſeiſee or his heir might have entered, the lord alſo might enter on the failure of the heirs of the diſſeiſee. See *Hil.* 32 *Hen.* VI. *pl.* 16. *fol.* 27. See alſo *Co. Litt.* 83. b. and 2 *Roll. Abr.* 518. *Ten.* (I). *pl.* 7. *F. N. B.* 144. C.

And note alſo, that if the diſſeiſee die, his heir (the entry not being tolled) ſhall pay a relief. See 2 *Roll. Abr.* 517. *Ten.* (G). *pl.* 2. and p. 518. (I). *pl.* 7.

See *Poſt.* 63 and 66.

NOTE XXV. p. 26. (*s*).

See *Watk. on Deſc.* ch. 1. ſ. 3. p. 81. And note, that it is there ſaid that, "with reſpect to freebench of copyholds, it is otherwiſe;" and ſee 5 *Burr.* 2787. But it was ſo ſaid with reſpect to thoſe caſes only in which the widow takes the *whole* of the eſtate as her freebench: when ſhe takes a *portion* only of the eſtate, it ſhould ſeem that the poſſeſſion is *not* caſt upon her any more than at common law; the heir being then the tenant for the whole eſtate; and the widow ſhould have her portion aſſigned. See *Kitch.* 103. b. 2 *Show.* 184. ca. 186. Chapman *v.* Sharpe. *Poſt.* 173.

NOTE XXVI. p. 31. (*f*).

The infant can, in this caſe, neither make himſelf heir to his father nor yet to his brother the baſtard *eigné*. The baſtard entered, and the law preſumed him, as eldeſt brother, to be the rightful heir of his father; and, as he (the baſtard) was ſuffered to enjoy the poſſeſſion in peace till his death, it will not now permit his legitimacy to be queſtioned. Preſuming, there-

therefore, that he was the rightful heir, the younger brother will not be ſuffered to allege that he was *not* ſuch; and to claim himſelf, as heir to the father; ſince the eldeſt died in poſſeſſion, and has left a ſon on whom the law caſts the deſcent. The younger brother, therefore, cannot now claim by deſcent; as he cannot ſhow himſelf heir to any one.—This ſeems the meaning of our author; and ſee the laſt page.

NOTE XXVII. p. 37. (*m*).

But now by the ſtat. 32 *Hen.* 8. ch. 33. the deſcent to the heir of a diſſeiſor ſhall not toll the entry of him who has right, unleſs ſuch diſſeiſor had the peaceable poſſeſſion for the ſpace of five years next after ſuch diſſeiſor without entry or claim.

Nor can any one enter into lands but within twenty years after his right ſhall accrue, 21 *Jac.* c. 16.; nor ſhall even ſuch entry be effectual, unleſs, upon ſuch entry or claim, an action ſhall be commenced within one year next after ſuch entry or claim, and proſecuted with effect, 4 & 5 *Ann.* c. 16. ſ. 16.

NOTE XXVIII. p. 38. (*p*).

When the tenant omitted to diſcharge ſtrictly the duties of the feud, the lord might have reſumed it immediately. This reſumption was, in many caſes, ſoon conſidered as unneceſſarily ſevere; and *diſtreſſes* were, in conſequence, introduced, after the manner of the civil law, to compel the tenant to perform his ſervices and returns in caſes which did not ſeem to call for a puniſhment ſo heavy as forfeiture. But this privilege of diſtreſs was itſelf ſoon turned to oppreſſion; and we accordingly find it reſtrained and regulated

lated by ſome of our earlieſt laws. See *Gilb. on Rents*, 3, &c. *Gilb. on Diſtreſſes and Replevins*, 1, &c. *Sulliv.* lect. x. p. 97, &c. *Wright*, 198.

NOTE XXIX. p. 39. *(q)*.

See the *Introd.* p. xiv. and further on this ſubject, *Dalrymple, F. P.* 224, &c. ch. 6. ſ. 1. *Kaims's Hiſt. Law Tracts*, Tr. II. and III. 2 *Bl. Comm.* ch. 20. p. 307—317, and *Poſt.* 53. 69. 83. 118. 250. N. CXI.

The reaſon, and indeed neceſſity, for giving the ſeiſin *coram paribus*, is ſo happily pointed out and expreſſed by *Sullivan*, that I truſt the following extract from his *Lectures*, will carry with it an apology for its inſertion:—"The preſence of the *pares curiæ*," ſays he, "was required equally for the advantage of the lord, of the tenants, and of themſelves; of the lord, that, if the tenant was a ſecret enemy, or otherwiſe unqualified, he might be apprized thereof by the peers of his court before he admitted him; and that they might be witneſſes of the obligation the tenant had laid himſelf under of doing ſervice, and of the conditions annexed to the gift, if any there were, which the law did not imply; for the benefit of the tenant, that they might teſtify the grant of the lord, and for what ſervices it was given; and, laſtly, for their own advantage, that they might know what the land was, that it was open for the lord to give, and not the property of any of the vaſſals; and alſo that no improper perſon ſhould be admitted a par, or peer of their court, and conſequently be a witneſs, or judge in their cauſes." *Lect.* vi. p. 58. See *Weſt on Peers*, 63. and *Poſt.* 250. N. CXI.

NOTE

NOTE XXX. p. 45. (w).

THERE ſeem to be a confuſion of expreſſion and want of perſpicuity in this paſſage. It has often, and juſtly been regretted, that the works of this moſt ingenious author ſhould have ſuffered ſo much from the negligence or ignorance of tranſcribers. The paſſage now before us ſeems to preſent itſelf as a glaring proof of that lamented inaccuracy, which the inattention or haſte of a copyiſt has occaſioned.

It is ſaid that "the poſſeſſion of the heir cannot be abated before he is actually poſſeſſed." Now it is certain that it cannot be abated afterwards; for a diſpoſſeſſion afterwards, would be a diſſeiſin and not an abatement. The abatement, therefore, properly is of the legal or ideal poſſeſſion which the law preſumes to be in the heir from the death of the anceſtor *till* his own *actual* poſſeſſion, and which is capable of being diveſted, at leaſt in theory, or rebutted in preſumption; though it, as clearly, will not admit of a treſpaſs or actual violence.

Again it is expreſſed that "no man can be ſaid actually to enter till the actual poſſeſſion is in him." Now the actual poſſeſſion ſeems rather the conſequence of the actual entry, than the entry the conſequence of poſſeſſion.

The doctrine which our author appears to have intended to convey was this:—Though a perſon has a freehold in law, yet he ſhall not have an action of treſpaſs before entry; as the heir ſhall not have ſuch action againſt an abator. For a treſpaſs is an injury done to the actual poſſeſſion of a perſon, and not to the ſuppoſed or ideal poſſeſſion which the law caſts upon

upon the heir; for such a presumed possession cannot possibly be capable of an actual violence. 'Till the heir, therefore, gains the actual possession, by his actual entry, or by what the law deems tantamount to such entry, he cannot have suffered that real and actual injury which is implied in the legal acceptation of a trespass; and, consequently, shall not be permitted to institute an action for the reparation of an injury which he could not in the nature of things sustain.

NOTE XXXI. p. 47. (y).

The trial by battle is generally supposed to have been introduced into this kingdom by the Normans. Yet, though the history and laws of the Saxon times are so remarkably silent on the subject, there does not, I think, appear a sufficient reason to preclude them from the use of it, as it was so common to the Gothic tribes. See 1 *Tyrr. Hist. Introd.* p. cxxv. 2 *Rapin's Hist. Eng.* p. 200. 8vo. edit. *Diss. Gov. Anglo-Sax.* ch. 8. 2 *Henry's Hist. Eng.* b. 2. ch. 3. s. 3. p. 304, and 3 *Ib.* b. 3. ch. 3. s. 1. p. 355. 4to. ed. 2 *Bl. Comm.* ch. 22. p. 337. *Millar's View of Eng. Gov.* b. 1. ch. 4. p. 74. *Falc. Clim.* b. 1. ch. 18. p. 90. *Stuart's View of Soc. in Eur.* b. 1. ch. 2. s. 4. p. 48, and 271. *Diss.* p. 4. s. 4. p. 265. *Montesq. Spir. Laws*, b. 28. ch. 14. *Bacon on Eng. Gov.* p. 1. ch. 37. *Dalrymple, F. P.* ch. 7. s. 2. *Sulliv.* lect. xxvi. p. 250. 1 *Rob. Charles V.* s. 1. p. 52, &c. and n. (Y). *Selden's Duello*, ch. 6. *Works*, vol. 3. p. 68.

NOTE XXXII. p. 50. (f).

The reason why the fine for alienation was paid by the *feoffee*, was because the lands were chargeable in his

his hands for the fine; and, consequently, as, on payment, the charge ceased, it was held at length that he only should pay it. See 2 *Inst.* 67. *F. N. B.* 235. A.

Though, from the nature of the thing, one should conclude that, as a licence was necessary to enable the feoffor to convey, it was but just that he should have satisfied his lord for the fine to impower him to transfer his feud to another. If he took upon himself to alien without a licence, when he must have known that a licence was necessary, it was certainly unreasonable to make the feoffee be answerable for his presumption. However, as in such case the lands were chargeable in the feoffee's hands, the feoffee paid the fine to retain them; and as the lord looked to the lands as his security, so he accepted payment from him in whose possession they were. Thus, as at length the lord could not withhold his consent, or deny his tenant the power to alien, he only regarded the payment of his fine; and, as the lands were chargeable, it signified not to him from whom he received it; since, at the worst, he could have recourse to the tenements chargeable. The tenant, knowing that the lord could not withhold his permission, aliened without asking it: and, as the feoffee found his lands subject to the discharge of the fine, he paid it to exonerate them. Hence, it became usual for him so to do; and, at length, it was expected from no other. When the lord, therefore, accepted the fine from the feoffee, he acknowledged the alienation, and consented to it. Hence, as our author observes, the feoffee had a title, though he originally came in by wrong.

NOTE XXXIII. p. 51. (*b*).

Of the power of the tenant to alien, and of fines for alienation in England, see the *notes* to the thirteenth

teenth and subsequent editions of *Co. Litt.* 43. a. and b. 64. a. s. v. (6, 7, 8). 309. a. 2 *Bl. Comm.* ch. 4. p. 57. ch. 19. p. 287. *Wright*, 29. 43. 165. 169. *Dalrymple, F. P.* ch. 3. *Sulliv.* lect. vi. xii. xv. xvi. xliii. *Stuart's View*, b. 2. ch. 3. s. 2. p. 114. *F. N. B.* 175. A. 224. H. 225, 226. 235. A. 2 *Inst.* 66. 501. *Mill. View Eng. Gov.* b. 2. ch. 6. p. 371. *Post.* 67. 70.

It should seem that among the Saxons, alienation was allowed, unless expressly restrained by the gift. Yet, in some cases, it was necessary to obtain the consent of the lord, as appears from the circumstance of giving him a legacy, or *douceur*, for the purpose of obtaining it; and, indeed, such consent is often expressly stated to have been had. *LL. Alf.* 37. See 1 *Tyrr.* 295. *Somn. Gavelk.* 87, &c. *Sulliv.* lect. xxvii. p. 255. *Dalrymple, F. P.* ch. 3. s. 1. p. 90. *Customal of Kent, in Robinson and Lamb. Append. to Somn.* 198. 201—203. *Lamb. Per Kent*, 491, &c. *Pref. to* 3 *Co.* v. a. *Differt. prefixed to Formul. Angl.* ii. n. (*e*).

From the necessity of this consent of the lord, it is clear that the lands so aliened were not merely *allodial*. They were *held of the lord*; and, consequently, the power of alienation was not, among that people, confined to allodial property. The necessity of this consent continued, even as to the mesne lords, till the time of the statute of *Quia Emptores*. In the will of Edward, the son of Henry III. (afterwards King Edward I.) which was made but a few months before his accession, we find this passage:—" *E pur ceo, primus a nostre seynt pere l'Apostle, ke il voyll ceste tenir, et fere tenir, e confirmer*; E KE IL VOYLE PRIER NOSTRE CHERE PERE, KE IL VOYLE TENIR ESTABLE, E FERE TENIR,

TENIR, PAR TUT SON REAUME, E TUT SON POER, QUEL PART KE IL SEYT, LES CHOSES AVAUNT NOMMES."

This ſtrongly reſembles a clauſe or two in the will of *Ethelſtan*, the ſon of Ethelred, which was made about two hundred and fifty years before; where he prays his father, for God's ſake, and for St. Mary's and St. Peter's, that his will might ſtand. And again:—"Now pray I that all the great perſonages (pyren) who may hear my will read, both clergy and laiety, that they be of aſſiſtance that my will may ſtand, SINCE MY FATHER HAS CONSENTED TO IT." The congruity in the inſtruments of transfer, before and after the Conqueſt, will preſently be noticed. Many inſtances might be ſelected in further proof of it. The anathema, ſo frequent in the Saxon wills, was not forgotten in the Norman. Some of theſe among the former were terrible. "He that bereaves, (impedes, or fruſtrates) my will, (ſays Wolgith,) which by God's permiſſion I have now made, let him be bereaved of theſe earthly joys; and may the Almighty Lord—cut him off from all holy men's communion in Doomſday; and be he delivered to Satan, the Devil, and all his curſed companions to hell's bottom, and there periſh, (or be puniſhed, or tortured,) with thoſe whom God has caſt off or forſaken, without intermiſſion, and never trouble my heirs." (Will of Wolgith, *A. D.* 1046.) See *App. Somn.* 211. "*Et quicunque contra hoc venire preſumpſerit,*" (ſays the will of *Henry* II.) "*Indignationem et iram Omnipotentis Dei, et maledictionem ipſius Dei et meam incurrat.*"

The prayer of Edward to the Pope, ſeems to have been with a view to his perſonals. The church had aſſumed the power of diſpoſing of the property of inteſtates

teſtates in what were called *pious* uſes; but in thoſe caſes the clergy remembered the adage that "Charity began at home." Hence they gained the probate of wills (except in a few particular lordſhips). Could they have ſet a will, therefore, aſide, the diſpoſition would belong to themſelves. It was, conſequently, to ſome purpoſe to obtain the ſupport of his holineſs. Long after the ſtatute of *Quia Emptores*, we find a prayer to the church, in wills, that the teſtament might be affirmed, in caſes where no real property was diſpoſed of. "*Et primus*," (ſays the Earl of Eſſex, *A. D.* 1361.) "*n're tres honourable piere in Dieu, q'totes ceſtes choſes ſoient faites ſolom n're volentie.*" See alſo the will of John of Gaunt. Before the time of Henry VIII. the *uſe* of lands only was deviſable (except by cuſtom); but the lords might have conſented to the *alienation* of lands even before the ſtatute of *Quia Emptores*; and Edward, the ſon of Henry III. deviſed his to truſtees for the benefit of his children; and Edward the Black Prince, about a century afterwards, deviſed the profits of his lands and ſeigniories, for three years, to pay his debts; and a deviſe very ſimilar occurs in the will of his widow, Joan of Kent. Edward, the ſon of Henry, conſidered the conſent of his father as requiſite to give effect to his deviſe; and Edward the Black Prince expreſsly informs us, that the concurrence of his father (Edward III.) was previouſly obtained. "*Enſemble avec touz les iſſuez et profitz q. purront ſoudre & avenir de touz nos terrez & ſeignouris par trois ans apres ce qe dieux aura fait ſa volunte de nous*; LESQUELX PROFITZ N'RE DIT SEIGNOUR ET PERE NOS A OTTRIEZ P' PAIER NOZ DETTEZ." And in the will of his widow, Joan princeſs of Wales, there is the following

following passage:—"*Residuum, &c. ac omnes et singulos fructus, redditus et provent. necnon jura et dominia quecunque* QUOS ET QUE CARISSIMUS FILIUS MEUS RICARDUS REX ANGLIE ET FRANCIE MICHI ET EXECUTORIBUS MEIS CONCESSIT ET DEDIT, POST MORTEM MEAM PER UNUM ANNUM HABENDUM PROUT LITTERIS SUIS INDE CONFECTIS PLENIUS CONTINETUR, *do, lego, et concedo, meis executoribus subscribsit, &c.* These wills are now published. See *A Collection of Royal and other Wills*, printed by Nichols, London, 4to. 1780. And as to that of Henry II. see also *Form. Anglic.* 421, No. 767.

Yet it was asserted by *Fortesque*, in the time of Henry VI. that a king of England could not devise his land any more than a subject could do so. *M.* 35 *Hen.* VI. *pl.* 33. *f.* 29. b. And indeed we find the feoffees expressly mentioned in the wills of Henry V. and VI.—the latter monarch referring also to a special act of parliament, which confirmed such disposition. Yet an act had before passed, *Temp. Ric.* II. enabling the king, his heirs and successors, kings of England, freely to make their *Testaments*, &c. *Rot. Parl.* 16 *Ric.* II. V. 3. N. 10. p. 301. and *Pref. to Coll. Roy. Wills*, iv. n. (*). and 4 *Inst.* 335.

During the Saxon period, the king's demesnes, or those lands which he had in his political capacity, were not alienable without the consent of the nation; and, therefore, they were either said to be granted in council, or witnessed and consented to by the great men. It were needless to cite instances of this; there is scarcely a charter extant, which is not a proof of the assertion. That of the annulling the grant of Baldred, king of Kent, of the manor of Malling in Sussex, to the church of Canterbury, and the subsequent

ſequent gift of it by Egbert and Athelwolf, ſhould not, however, eſcape remembrance, though ſo often the ſubject of remark. Baldred preſumed to make the grant without obtaining the approbation of his people; and his grant was, in conſequence, declared void. Egbert's was *with* their concurrence and aſſent: "*Quod viz. manerium* (ſays the charter of Egbert and Athelwolf,) *prius eidem eccleſiæ dedit Baldredus rex*; SED QUIA NON FUIT DE CONSENSU MAGNATUM REGNI, DONUM ID NON POTUIT VALERE."

The property of the ſubject was ſacred: In the grants of their kings of lands to which they had perſonally acceded in right of eſcheat, &c. they uſually ſtated their title, and right to alien, "that it might be known that they gave what was their own." This was ſtrongly expreſſive of the liberty of the individual, and of the limited power of their kings. Athelſtan, in one of his charters, relates at length how he ſeized the lands as forfeited for treaſon.

Ethelred ſeized thoſe of Ethelſig, as forfeited on outlawry for ſtealing ſwine. The declaration in his grant is curious; and is expreſſive of the manners of the times.

"This was the land forfeited at Dunmalton that Ethelſig forfeited to king Ethelred's hands. It was ſo then that he ſtole the ſwine of Ethelwine, the ſon of Ethelmere the alderman. Then his men did ride to him, and took them out of Ethelſig's houſe; but he fled to the woods, and men outlawed him; and awarded (or adjudged as forfeited, ȝeȝeht,) to king Ethelred his lands and his goods. Then the king gave that land to his ſervant Hawes for a perpetual inheritance. And Wulfric, Wulfrun's ſon, had it

afterwards of him in exchange for other lands that pleased him better, by the king's leave, and the testimony of his wisemen (procenne; his council, his magnates)." See *Pref.* to 3 *Rep.* iv. b. v. a.

There are many things here which merit observation. And in the first place, we see that outlawry for felony was punishable with the forfeiture of lands, among our Saxon ancestors.

The stealing of swine too was, in those days, a crime of great atrocity. It was consequently guarded against by the severest laws, by reason of the then value of that animal, and of the ease with which it might have been stolen.

The flesh of swine formed one of the most important articles of provision among the inhabitants of Europe in those ages. Even the departed heroes in a state of happiness, according to the Icelandic mythology, regaled themselves on boiled pork! See the *Edda*, Fixx.

To pilfer the larder of king Chilperic, was certainly an offence of magnitude. The declaration, that even a courtier had purloined some of his hams of bacon, was enough to blast his reputation in the eyes of the king. (See *Mall. Nor. Antiq.* vol. ii. p. 110. n. A.)

However contemptible the hog and its herdsman may appear in our estimation, they were not so in former ages. The keeper of swine, as Ferguson remarks, was a prime counsellor at the court of Ulysses.

In later days, bacon was the chief viand of Europe. Since the Conquest, we find Philip Fitz-Robert giving, among other things, one hundred bacons to the king, for the wardship of the lands and

heir

heir of Ivo de Munby, 1 *Mad. Excheq.* ch. 10. p. 324. *Mag. Rot.* 1 *Jo. Rot.* 11. a.

The right of pannage, or keeping ſo many hogs in certain woods or wilds, was a privilege of importance. It is repeatedly mentioned in Doomſday Book; and was carefully protected in later days. See *Charta de Foreſtæ*, c. 9. *Barrington on the Anc. Stat.* 33, 4. *Manwoode's For. Laws*, ch. 12. *Fleta, lib.* 2. *cap.* 80. *Somn. Gav.* 23. *Robinſ. Gav.* b. 2. c. 8. p. 264. See alſo *Gibſon's Camd.* t. (Suſſex) *Andred-ſwald:* and note, the Britiſh name of *Andred* ſignifies *waſte, uninhabited*; or, as the Saxons termed it, *weald*, þealð, which is of the ſame import. See *Owen's Welch Dict.* v. *Andred.* In this wood or wild it was that Sigebert, a king of the Weſt-Saxons, was killed by a *ſwine-herd*, after having been depoſed from his throne. See *Camd. ubi ſupra*, and 1 *Tyrr.* 226. *Et vide Matth. Weſtm. ſub. ann.* 756.

In rude ages, when there remained extenſive wilds, in which herds were ſuffered to range for food, the ſtealth of cattle was eaſily effected: hence the ſeverity of the ancient laws for obſtructing them. See *Roll. Anc. Hiſt.* b. 6. c. 1. ſ. 3. *Stuart's View of Soc. in Eur.* b. 1. c. 1. ſ. 1. p. 163. n. (13). *Falc. on Clim.* b. 6. c. 2. p. 343. *Stuart's Diſſ.* p. 1. ſ. 3. p. 27. and n. (4).

Should they even have ſtrayed, the precinct into which they were traced was anſwerable for them, if it could not be ſhewn that they had proceeded further. This was the uſage of Wales from the moſt remote times, and was confirmed by the ſtat. 34 and 35 *Hen.* 8. *c.* 26. *ſ.* 106. Such was the cuſtom among the Iriſh, which received a ſimilar approbation. (See *Camd. Brit. Cuſtoms of the Iriſh*; note

from Sir John Davys, p. 1043.) Such too was the law among the Highlanders in Scotland, ſo lately, at leaſt, as the commencement of the preſent century. (See *Mill. View*, b. 1. c. 6. p. 127, &c.)

But to return: The manner of transferring lands among our Saxon anceſtors is worthy of obſervation, as it tends to illuſtrate our preſent uſages. Many of our rules and cuſtoms are to be traced to that remote period.

The firſt thing which here preſents itſelf to notice is the livery of ſeiſin. This indeed was common to all nations in rude ages. Poſſeſſion was the ſtrongeſt preſumption, if not a proof, of propriety in unlettered times. To transfer that poſſeſſion before witneſſes was the firſt mode of conveyance. (See *ante*, 39. N. XXIX.) The particular uſages of the Saxons, however, were very ſimilar to the preſent. The twig and turf were the ſimpleſt method of livery; and by the twig and turf did they give ſeiſin to the purchaſer. When grants were made to the church, a turf was uſually laid on the altar. This occurred ſo frequently, that it would be needleſs to cite inſtances in its ſupport.

A tree growing on the ſoil was regarded as a part of it; hence, a branch of it ſerved to give ſeiſin. It was eaſier to break off a bough than to dig up a clod, and the former was often adopted. At length poſſeſſion was given by delivering things which had no connection with the land intended to be conveyed: by ſymbols abſolutely arbitrary and indifferent. When Ulphus king of Deira gave lands to the church of York, he "took the horn wherein he was wont to drink, and, filling it with wine, kneeled before the altar," and depoſited it as a ſymbol of poſſeſſion. In

after-

after-days we find an inſtance no leſs extraordinary. In the time of Henry III. William earl of Warrenne and Surry, on a grant made by him to the priory of St. Pancrace, near Lewes in Suſſex, delivered ſeiſin by the hair of his head: "*Per capillos capitis ſui; et fratris ſui Radulfi de Warrenne quos abſcidit de capitibus ſuis cum cotello ante altare.*" *Mag. Rot.* 24 *Hen.* III. *tit. Sudſex. Mad. Formulare Anglicanum, Diſſert.* ſ. xiii. p. x. and *vid. Præf. Epiſt.* 1 *Mad. Excheq.* p. xxix, xxx.

The horn and the locks of hair were choſen as expreſſive of reſpect; and, as they were religiouſly preſerved, they remained monuments of the endowment, and perpetuated the remembrance of the piety of the founder, and of his deference to the church.

The northern nations were always celebrated for carouſals and feaſting; they therefore very naturally employed the art they poſſeſſed in decorating their cups; theſe were often of horn, and generally pretty capacious, even among the gods, as appears from the *Edda* itſelf. (F. xxv.) (and *vide Cæſ. de Bello Gall. lib.* vi. *c.* 26.) In the days of heatheniſm, they were frequently made of the ſculls of their enemies. In Scandinavia and Scotland, they were uſually of ſhells. In each inſtance they were beautified with all the ſkill of the age; and were eſteemed as valuables by a people addicted to drinking and mirth. In Scotland, in the ſecond century, we find "ten ſhells ſtudded with gems," forming part of a preſent to the king of Sora, as an inducement to forego his intentions of hoſtility. (*Oſſian*, vol. i. p. 399. Battle of Lora.) Even in the eleventh century, we find a Saxon prince, Ethelſtan, the ſon of Ethelred, giving to God and St. Peter (or, in other words, to the

church at Canterbury) a drinking-horn, which he had bought of the convent at Ealdminſter. (See *App. to Somn.* 198.)

Ulphus, therefore, conceived that he ſhewed the moſt unequivocal token of reſpect, when he laid upon the altar at York "the horn wherein he was wont to drink;" and, more eſpecially, as he had "filled it with wine." Theſe things are moſt forcibly indicative of the manners of the times, and, like "the day of ſmall things," are not to be "deſpiſed."

When the great earl of Warrenne permitted his hair to be cut off by his brother, and gave it, in the name of ſeiſin, to the prieſts of St. Pancrace, the compliment was felt and acknowledged. The northern nations of Europe were no leſs remarked for annexing the ideas of conſequence, of reſpect, and even of freedom itſelf, to a length of hair, than they were for their love of feſtivity. It was the diadem of the kings of the Francs. *Hottoman* has a whole chapter on this head; ſee his *Franc. Gallia*, c. 9. See alſo *Spir. of Laws*, b. 18. c. 23. To cut off his hair was to depoſe him. To ſuffer a ſlave to let his hair grow, amounted to an emancipation. Even among the Gentoos, the cutting off the hair of a delinquent was to deprive him of his privileges; it implied the loſs of his caſt. (*Code of Gentoo Laws*, ch. 17. ſ. 2.) The clergy of St. Pancrace muſt, as Stuart remarks, have been enchanted with the politeneſs of that nobleman; *View*, 405.

The written inſtruments of transfer among the Saxons are no leſs deſerving of our attention: and here the great ſimilarity between them and the conveyance of the preſent day muſt be apparent to every one. "So unrefining," ſays the before-quoted writer,

writer, "are men of business!" See *Diss. Antiq. Engl. Const.* P. 3. s. 6. p. 200, 1. n. (5); and *Bacon on Engl. Gov.* P. 1. c. 41.

The witnesses to them were numerous; and they were frequently said to be evidenced by the county, hundred, &c. (See *Dissert.* Pref. to *Formul. Angl.* s. xxii. *App. to Somn.* 195, 6. &c. 213. &c. *Lamb. Peramb.* 491. &c. 2 *Tyrr.* Introd. 67. *Somn.* 87. and *vide Bracton, lib.* 2. *c.* 16. f. 38. a. 2 *Bl. Comm.* ch. 20, p. 307.); in which courts they were generally inrolled. See *Somn.* 87. *Squire on the Angl. Sax. Gov.* s. 56, p. 157. and *vide ante,* 39, 40.

They were also, like the indentures of later days, of several parts; "and this writing is tripartite, or three-fold; (⁊ þyſſ a ȝeƿrita ſynd ðreo.) One is at Christ-church; another at St. Augustine's; and the third hath Byrhtric himself." *App. to Somn.* 197. 216. *Formulare Anglic.* 176. No. 284. A power of revocation, or condition, was sometimes inserted. (*Somn.* 215.) In wills the wife often joined with the husband. (*Lamb.* 491. *App. Somn.* 213. *Form. Angl. Dissert.* s. viii. &c.) Many other things ask for notice; such as the limitation; as to one for life with remainder over, &c. (See Pref. to 6 *Co.* iii. &c. App. to *Somn.* 195, 6. 211. &c. *Lamb.* 491. &c.) But this note is already too far extended.

However, before we dismiss the subject, it may be proper to observe, that by the 75th law of Canute, whoever deserted his lord in battle, forfeited his lands, &c.; in which case the lord was to have back the lands he gave, or, if they were *bocland,* they were to go to the king. Hence, it appears, that lands, though not by boc or charter, were nevertheless held of a lord, and, consequently, not allodial. (See *Dalrymp.*

 F. P.

P. P. ch. 1. p. 11. N. (6) to *Co. Litt.* 6. a. and (2) to 86. a.) See alſo the 11th law of the ſame monarch, by which *bocland* is forfeited to the king, *let his lord be whom he will.*

NOTE XXXIV. p. 53. (*l*).

It was the livery of ſeiſin, or tranſmutation of poſſeſſion, which gave effect to a feoffment; and, conſequently, a feoffment could not operate where the poſſeſſion was not changed: and upon this principle it is that one joint-tenant cannot enfeoff his companion. *Noy's Max.* 59. See *poſt.* 73.

A perſon cannot make a feoffment when he has not the poſſeſſion to convey: nor can any one take by feoffment when the poſſeſſion is already in him. See *Noy*, 59. *Perk.* ſ. 203. *Touchſt.* 205. *poſt.* 69.

NOTE XXXV. p. 54. (*m*).

The releaſe here ſpoken of is by way of *mittre le droit*: as a releaſe which operates by way of enlargement may be made to a perſon who has only a chattel intereſt; as a leſſee for years, on his making an actual entry. (See *Litt.* ſ. 459. *Co. Litt.* 270. and notes, and *poſt.* 69).

NOTE XXXVI. p. 55. (*n*).

This is confined to a perſon who was diſſeiſed of an eſtate in fee-ſimple, and does not extend to a tenant in tail or for life: for if the tenant in tail or for life be diſſeiſed by two, and releaſe to one only, it ſhall enure to both. See *Co. Litt.* 275. b. and *poſt.* 57.

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The reason of this difference is that, as the diſſeiſor gains the immediate fee by the diſſeiſin, it muſt be the conveyance of the right to the immediate fee alſo that can change the eſtate. If, therefore, the diſſeiſee in fee, or the tenant for life and remainder-man, releaſe their right to one of the diſſeiſors, it turns his wrongful eſtate in fee into a rightful one: But when the tenant in tail or for life releaſe their right, they would convey a right to a different eſtate than that which was gained by the diſſeiſin; For in order to turn the wrongful eſtate into a rightful one, the *right* which is conveyed muſt be commenſurate with the *wrong*; If they are not equal in quantity, they muſt continue diſtinct, and the firſt eſtate remain unaltered.

NOTE XXXVII. p. 66. (*p*).

When the tenant in tail makes a feoffment, the right of entail remains, and ſhall deſcend to his iſſue; and, conſequently, ſuch iſſue would be the rightful tenant to the donor. (See *poſt.* 116, 117. and *Hob.* 252 and 334; and ſee alſo *ante*, 25.) But when a tenant in fee-ſimple makes a feoffment in fee, no right remains in him; but the whole eſtate (ſince the ſtat. *Quia empt. terr.*) is transferred to the feoffee. See *Co. Litt.* 269. b. *poſt.* 85. (*k*) 133. N. LIV.

NOTE XXXVIII. p. 72. (*u*).

i. e. after aſſignment. See *Co. Litt.* 273.

But before aſſignment he might have taken one. See *Co. Litt.* 273. a. N. (1).

So his grantee may take a releaſe from the reverſioner. 2 *Roll. Abr.* 401. *Releaſe* (B), *pl.* 8.

So, if a feme covert be tenant for life, a releaſe to the

the husband and his heirs will be good; for by marriage he has a freehold in her right. *Co. Litt.* 273.

NOTE XXXIX. p. 76. (*b*).

By confirming the *estate*, *lease*, *demise*, or *term*, the whole interest of the lessee is established; and a clause restricting it in point of time, after confirming it absolutely, would be repugnant. But if the *land* be confirmed for part of the term, the assent is, as our author says, but partial, and does not involve in itself the contradiction before adverted to.

But an estate of freehold cannot be confirmed, though by express words, for part of that estate; for an estate of freehold is intire, is integral, and indivisible. It does not consist, like a term of years, of an aggregate or number of separate portions of time; but is, of itself, a single and individual estate; and see *Co. Litt.* 297. a. and N. (1). and *Touchst.* 317.

NOTE XL. p. 79. (*e*).

This has reference to *Litt.* s. 534. which is to this effect: If a person be disseised, and the disseisor die seised, and his heir be in by descent, and then the disseisee and such heir join in a feoffment; such conveyance shall operate as a feoffment with respect to the heir of the disseisor, and as a confirmation with respect to the disseisee.

NOTE XLI. p. 80. (*f*).

By the *confirmation*, the lord strengthened or established the estate which the tenant already had; but by the *release*, he relinquished his own property, which the tenant had not before. These conveyances are essentially different: The former relates to

the eſtate of the tenant, the latter to the right or title of the lord; and ſee *ante*, 75. and *Finch. L.* p. 107, 8.

NOTE XLII. p. 85. (*e*).

THERE is an exception, however, to this in the caſe of a gift in tail; as a tenure is created between the donor and donee, by virtue of the ſtatute *De donis*: The latter holding of the former, as the former holds over. *Brooke, Garde.* 87. *Eſtates*, 40. *Tenures*, 37. 96. *Kitch.* 146. a. *Litt.* ſ. 19. *Co. Litt.* 23. a. 2 *Co.* 91. b.

And if the donor *grant* his reverſion over to a ſtranger, the donee ſhall hold of ſuch ſtranger. *F. N. B.* 219. E. 2 *Co.* 92. a. and b.

But if lands be given to *A.* in tail, with the remainder over in fee to a ſtranger, the donee ſhall hold of the chief lord; as, in this caſe, the whole eſtate is conveyed, *Bro. Tenures*, 21. *Dyer*, 362. *pl.* 19. 2 *Inſt.* 505. *Co. Litt.* 22. b.

If the tenant in tail has the reverſion in himſelf; there, although the two eſtates continue diſtinct, yet, as he cannot hold of himſelf (ſee *poſt.* 152.), the tenure of the eſtate-tail is ſuſpended; and he is tenant to the lord in fee. See 2 *Co.* 92. b. *Bro. Ten.* 84. 107. *F. N. B.* 143. A. 144. A. *Dyer*, 235. *pl.* 22. 20 *Viner*, Tenure (H, a), *pl.* 12.

NOTE XLIII. p. 98. (*x*).

THE utmoſt length of time that has been hitherto allowed for the contingency of an executory deviſe, is that of a life or lives in being, and one-and-twenty years afterwards. In caſes, indeed, of a poſthumous child,

child, it might perhaps be extended to a few months more. A limitation, says Mr. Hargrave, 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 to an entail, by fine or recovery, for a longer space. *Harg.* n. (5) to *Co. Litt.* 20. a. 2 *Bl. Comm.* ch. 11. p. 174.

NOTE XLIV. p. 117. (r).

But this reason applies only to those who were bound by such warranty; and, consequently, the propriety of urging the circumstance of warranty as an additional cause of such entry ceasing with respect to "all the three cases before mentioned," seems questionable: Since such a consequence of the warranty of the husband, in the first case, was eventual only, and not of necessity, as neither the entry of the wife or her heir was taken away, unless she or her heir was also heir to the husband; as otherwise they were not bound. As to the second case, the warranty of the ecclesiastic did not bind his successor; and, consequently, the reason did not hold as to him. The husband or prelate could not have entered themselves, as they were precluded from so doing by their own acts, and that whether the instrument had a clause of warranty or not: So that this consequence of warranty does not seem to be a reason, in the one case, but eventual or accidental; and, in the other, to be any reason at all. As to the third case, indeed, it is certainly a reason why the issue in tail should not enter, as the warranty descends on him; but it does not hold as a reason why the entry should be tolled of a remainder-man or reversioner, except in instances

ſtances in which they are alſo *the heirs* of the warrantor. It ſhould ſeem, therefore, more accurate to ſay that the warranty in ſuch feoffment is, in ſome caſes, a further reaſon why the entry is taken away; *i. e.* in thoſe caſes where the claimant is *the heir* of the perſon warranting.

NOTE XLV. p. 120. (*t*).

THESE inſtances are—if a tenant in tail make a leaſe for years, and then *releaſes* all his right (606); or *confirm* the eſtate of the leſſee to him and his heirs (607); or, after ſuch leaſe, *grant* his reverſion to another in fee, and the leſſee attorn (608): Again, if my tenant for life leaſe for years, and then *grant* the reverſion to another in fee (609); or if he *confirm* the eſtate of his leſſee to him and his heirs (610); or if a tenant in tail grant for the term of his own life, and *releaſes* to the tenant for life and his heirs all his right (ſ. 612).

Sect. 611. is the caſe of a *feoffment* by the tenant for life.

A *releaſe*, *confirmation*, or *grant*, can, from their very nature, convey only the right which the perſon ſo conveying has in the premiſes. The *feoffment* creates a *new fee*. (See *Watk. on Deſc.* c. 5. p. 186.) In the former caſe, the rights of others are not affected; in the latter, the original eſtates which were portions of the old fee are diveſted, while the new eſtate ſo gained by the feoffment continues.

NOTE XLVI. p. 120. (*u*).

"ALL his eſtate:"—It ſhould here be remembered, that in this caſe the tenant in tail expreſsly confines his intention of aliening to ſuch eſtate which he

he hath in the tenements to him entailed; and, therefore, shall be considered as passing no more than what he lawfully might convey; and the livery, being *secundum formam chartæ*, shall be restrained accordingly. See *Litt.* s. 613., and N. (1) to *Co. Litt.* 331. a. And see *post.* 273. (*m*). 330. (*e*).

NOTE XLVII. p. 121. (*w*).

"A LEASE for life:"—*i. e.* for the life of *another person*. The reason is, when he conveyed "all his estate," as in the last case, he only parted with what he might lawfully have passed; which was an estate *for his own life:* Now, in such case, the title of his issue would not accrue till the estate which he had conveyed by livery would be utterly at an end; and, consequently, it could not interfere with the entry of such issue, as they could not be entitled till his death. But if he had made a lease for the life of another, it might possibly have continued after his own decease: If it had, his issue could not have entered; a discontinuance would have been effected, and they put to their action to recover. Another reason is, that in the former case the reversion was not altered; in the latter it was. See the text of *Litt.* and *Co.* upon it. 333. a.

NOTE XLVIII. p. 123. (*x*).

ANOTHER reason is given by *Littleton*, which is, that no one can discontinue the estate-tail unless he discontinue the reversion or remainder also; s. 625. Now, when the feoffment is made to the reversioner or the remainder-man in fee, in cases where there is no intermediate estate, the reversion or remainder is not altered; as the person to whom it is made was before

before entitled by right. But had there been an intermediate eſtate, or had the feoffment been made to a meſne remainder-man, the intermediate eſtate, or the ultimate limitation, would have been altered; and, conſequently, a diſcontinuance would have taken place.

NOTE XLIX. p. 124. (y*).

THE caſe put by *Littleton* is—A woman inheritrix takes huſband, and has iſſue a ſon; the huſband dies, and ſhe takes a ſecond, who lets the lands to another for life; then the wife dies: the tenant for life afterwards ſurrenders to the ſecond huſband; and the queſtion is, Whether the ſon by the firſt huſband may enter upon the ſecond, during the life of the tenant for life?

The ſecond huſband, by his grant for another's life, diſcontinued the eſtate; and, conſequently, during the exiſtence of ſuch diſcontinuance, the heir of the wife could not have entered before the ſtat. of *Hen.* VIII. But the huſband by ſuch grant gained to himſelf the fee by wrong; and, conſequently, was capable of taking a ſurrender from the tenant for life. The eſtate for life therefore ceaſing, the diſcontinuance alſo ceaſed. If the ſecond huſband had had iſſue alſo, he would have been tenant by the curteſy again: for that being a rightful eſtate, and the fee gained by the grant for life a wrongful one, the law will ſuppoſe him in of the former; as it always prefers a leſs eſtate by right to a larger one by wrong. If he had had no iſſue, he would not, after the death of the wife, have any rightful eſtate at all. In either caſe his alienation was a forfeiture; and now the premiſes being again

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in his poſſeſſion, on the determination of the eſtate for life, the heir of the wife may enter on him; as having, in the latter caſe, no rightful eſtate, and, in the former, by reaſon of ſuch forfeiture. See *Co. Litt.* 42. b. 202. a. and b. 252. a. 338. a. and b.

NOTE L. p. 125. (z).

It has been obſerved before (p. 118), that no conveyance can paſs the right of poſſeſſion diſtinct from the right of propriety, but ſuch as paſſes the very poſſeſſion. Now, the very poſſeſſion was here in the leſſee for life while he lived, and, on his death, in the grantee of the reverſion, on his entry; and, conſequently, it could not be paſſed by the iſſue in tail, as it was never in him. As, therefore, the poſſeſſion ſtill continued wrongful in the grantee, the iſſue, on his title accruing on the death of his father, is not debarred from entering on him: and the grant of the father could not convey more of the right than he had a legal authority to convey, which was only for his own life.

NOTE LI. p. 129. (c).

"Where the entry is congeable." This expreſſion ſhould be attended to; as it is on this point which the doctrine, ſo far as it concerns the acceptance of the eſtate by the perſon out of poſſeſſion, turns. It does not ſeem to have been ſufficiently adverted to by Blackſtone (3 *Comm.* 20); for when the entry *is* taken away, ſo that only a right of action remains, and the perſon out of poſſeſſion takes the franktenement by *his own act*, he ſhall *not* be remitted; as it was his own folly to accept it. But, if his entry be *not* taken away,

away, but be lawful or congeable at the time of acceptance, and the eſtate accepted be not accepted by any mean which may operate as an eſtoppel, he *ſhall* be remitted to his ancient and rightful eſtate. See *Litt.* 693, and *Co. Litt.* 363. a. *Noy's Max.* ch. 18, and next page.

But, if the poſſeſſion come to the proprietary without any fault or folly of his own, it matters not whether he have a right of entry or of action only at the time; for, in either caſe, he ſhall be remitted. But if he have neither the one or the other, he ſhall not be remitted; as if he have a mere right only for which he can have no action. See *Co. Litt.* 349. a. and b. and 3 *Bl. Comm.* 20.

NOTE LII. p. 131. (*e*).

"THE principal reaſon," ſays Mr. Butler, "for his being remitted, is that the perſon ſo remitted cannot ſue or enter upon himſelf; ſo that in thoſe caſes where the poſſeſſion is recoverable by entry, the remitter has the effect of an entry; and in thoſe caſes where it is recoverable by action, it has the effect of a judgment at law." See *note* (1) to *Co. Litt.* 347. b. and ſee alſo 3 *Bl. Comm.* 20.

NOTE LIII. p. 131. (*f*).

THE heir of the diſſeiſor had the right of poſſeſſion by the deſcent from his anceſtor; and the diſſeiſee could not deveſt that right by his own wrong. But when the diſſeiſee himſelf afterwards died ſeiſed, the right of poſſeſſion became fixed in *his* heir; the deſcent from *him* tolling the entry of the heir of the firſt diſſeiſor; in the ſame manner as it became fixed in

the heir of the firſt diſſeiſor by the deſcent from *his* anceſtor. See *ante*, 21, &c.

NOTE LIV. p. 133. (*g*).

It is by reaſon of this ſuppoſed recompence that the heir is bound by the expreſs warranty. He being chargeable only for thoſe lands which deſcend to him from his warranting anceſtor, or, as it is termed, in reſpect of the aſſetts deſcending. The ancient implied, or feudal, warranty bound the heirs of the ſeigniory generally, and not merely with reſpect to the very lands which actually deſcended from the granting anceſtor. The feudal obligations were reciprocal. The tenant and his heirs were bound to homage. The lord and his heirs were bound, as a conſequence, to perpetual warranty. It was in conſideration of the returns of the tenant that the lord was obligated to defend his lands; and, conſequently, as the homage was done by the heirs of the tenant to the heirs of the lord, during the exiſtence of the tenancy, the heirs of the lord were equally bound to warranty as the grantor himſelf, ſince they alſo continued to receive the conſiderations and returns on which the grant was originally made. But ſince the ſtat. of *Quia emptores*, the grantee holds of the ſuperior lord, and no returns are due to the heir of the grantor after alienation; no dependance or connection continues between them: (See *ante*, 66. N. XXXVII.) No benefit accrues to the one, nor can protection be claimed by the other. Hence the heir is not obligated to defend the alienation of his anceſtor, unleſs he be expreſsly bound; and that only in reſpect of the aſſetts deſcending, or preſumed recompence, from the very anceſtor who entered into

the obligation. See further *Poſt.* 134, 5. 139. 142, 3, 4. 151, 2, 3, 4. *Britton, c.* 68. *Wright,* 152. *Notes* (1) ſ. 5. (8) to *Co. Litt.* 64. a. (1) to 67. b. (1) to 105. a. (1) to 365. a. (1) to 384. a. and *Poſt.* 140. N. LVI. *Sulliv.* lect. xii. 2 *Inſt.* 11, &c. 2 *Bl. Comm.* ch. 20. p. 300.

NOTE LV. p. 135. (*k*).

THE reaſon of this is, that the recompence cannot deſcend to the heir during the father's life; and, conſequently, till his deceaſe the ſon cannot be eſtopped. If he does not claim during the life of the father, he is ſuppoſed to have received the recompence; and ſhall therefore be bound; and ſee *Glanv. lib.* 7. *c.* 3. f. 49. b.

NOTE LVI. p. 140. (*q*).

As the ſtat. 4 *Ed.* I. confined the warranty created by the word *dedi* to the life of the feoffor, unleſs the lands were given to be held of him and his heirs; it follows, that, ſince the ſtat. of *Quia emptores* (18 *Ed.* I.) forbids ſuch reſervation of tenure, by ordaining that the feoffee ſhall hold of the lord above, the heirs of the feoffor cannot now, in any caſe where the fee is conveyed, be bound to warranty by force of that word. The obligation on the heirs can now, it is ſaid, be no otherwiſe created than by the word *warrantizo*, or warrant. *Litt.* ſ. 733. *Co. Litt.* 384. a. 2 *Bl. Comm.* ch. 20. p. 300, 1.

In Mr. Butler's note (1) to *Co. Litt.* 384. a. an error has accidentally occurred; and which the writer of the preſent note has been requeſted by Mr. Butler to correct. When the warranty is there ſpoken of

which was anciently implied by the word *dedi*, it is said, "the warranty in this inſtance was therefore a conſequence of tenure; and ſo neceſſary a conſequence of it, that where an expreſs and qualified warranty was introduced, it did not reſtrain or circumſcribe the *expreſs* warranty." From the context it muſt be neceſſarily apparent, that the word *expreſs* was miſprinted for *implied*.

NOTE LVII. p. 141. (*t*).

DESCENT was always favoured in law. The heir was never ſuffered to be diſinherited by preſumption. The feud or tenancy was to be kept entire and unimpaired; as the heir was "to ſit in the ſeat of his anceſtor, and to ſerve the king and the commonwealth in as good eſtate as his anceſtor did." (See 6 *Co.* 17. a.) And hence alſo thoſe charges on the lands which the tenant was enabled to effect, (as a rent-charge for inſtance,) as they impaired the inheritance, and leſſened the emoluments or revenues of the heir, were ſaid to be *againſt common right*;—as inimical to the policy of the times. See *Gilb. on Rents*, 17, 18. 133.

NOTE LVIII. p. 142. (*u*).

THE chief diſtinction between lineal and collateral warranties conſiſts in this: when the perſon on whom the warranty deſcends (who muſt always be the heir at common law) might poſſibly claim the lands *as heir to the warrantor* (whether as heir lineal or collateral), then the warranty *is lineal*. But when the perſon on whom it deſcends, does not claim *the lands* as heir to the perſon warranting, then the warranty *is collateral*.

collateral. See *Mr. Butler's Notes* (1) to *Co. Litt.* 370. a. and (2) to 373. b. and *Poſt.* 144. (*a*). 145, 146.

Lord Chancellor *Cowper* ſaid that "a collateral warranty was certainly one of the harſheſt and moſt cruel points of the common law; becauſe there was not ſo much as an intended recompence; yet he could not find that chancery had ever given relief in it." 10 *Mod.* 3, 4.

NOTE LIX. p. 143. (*x*).

THE tenant having done homage, the obligation continued during his life; and although he had parted with his tenancy, yet his promiſe of amity was not annulled. See *Co. Litt.* 65. a. *Sulliv.* lect. xii. p. 117.

NOTE LX. p. 143. (*y*).

IT is generally conceived that it was from the animoſities ſo uſual in the middle ages between the feudatories, that the term *feud* became expreſſive of the very animoſities themſelves. Hence, ſay they, came the term of *deadly feud*; it was ſignificative of the rancour, the enmity, and avengeful ſpirit which the feudatories ſo frequently bore to each other. But, notwithſtanding the weight of names in favour of this etymology of the word, the derivation given us of it by *Somner* (on *Gav.* 107.) ſeems, I think, much more ſatisfactory. He conſiders the word *feud* (thus applied), the fæhð of our Saxon anceſtors, to be compounded of the Gothic terms *fab*; *i. e. hoſtis, inimicus*, or, as we ſtill ſay, a *foe*; and of *hode, hade*, &c. *i. e. conditio, ſtatus, qualitas*, &c. "toge-

ther importing the condition of enmity in the perſon who bears it;" and ſee *Cowell*, voce *Feed*.

NOTE LXI. p. 146. (*c*).

THE reaſon of this is, that the eldeſt ſon being the heir at law of the middle one, the warranty deſcends on him; he therefore is bound by it, although he have no aſſetts; and this by reaſon of its being *collateral*: and it is collateral to the eldeſt with reſpect to the eſtate-tail, as he does not claim the eſtate-tail as heir to his middle brother, but immediately from his father. But it is ſaid to be *lineal* to the younger, as by poſſibility the middle brother might have been ſeiſed. See *Litt.* ſ. 708, and *F. N. B.* 212. H. I.

NOTE LXII. p. 147. (*d*).

THE daughter cannot poſſibly convey her eſtate through the ſon, but muſt take immediately from the father; the warranty of the ſon, therefore, muſt neceſſarily be *collateral* to her; and, conſequently, ſhe may be bound by it. See *ante*, 142. N. LVIII. and (*w*).

NOTE LXIII. p. 148. (*e*).

SEE *ante*, 135. N. LV. But here the reaſon is the minority of the heir as diſſeiſee, and having in himſelf the *right of poſſeſſion*; and, conſequently, by his entry the eſtate to which the warranty was annexed is defeated and gone, the warranty not interfering with his *right of entry*. But had he had only *a right of action* he would have been bound; as the warranty would have been an utter bar to any action brought, though it would not preclude him from entering.

NOTE

NOTE LXIV. p. 149. (*f*).

ANOTHER reaſon is given by *Sir Edw. Coke*, which is that a warranty cannot be created without deed; and a *will* in writing is not one. *Co. Litt.* 386. a. and ſee the Caſe of the Earl of Darlington, *v.* Pultney, in *Cowp.* 260.

NOTE LXV. p. 152. (*b*).

SEE *ante*, 88. (*n*). and ſee alſo *Dalrymple, F. P.* ch. 5. ſ. 2. p. 208. *Kaims's Brit. Antiq.* eſſ. 4. *Hale's Comm. Law*, ch. 11. p. 258, and 260.

If the ſecond brother had received the feud by grant from his father or elder brother, and died without iſſue, it would have gone to his younger brother; but if he had taken it by the grant of a ſtranger, the eldeſt brother would have ſucceeded. Hence ſprung the diſtinction ſtill recognized in the Scotch law, between the heir of conqueſt, and the heir of line. "The feudal law," ſays *Dalrymple* (*ubi ſup.*), had a peculiar averſion at joining again the property and ſuperiority in one perſon, when they had been once disjoined. The whole ſyſtem was built on the diſtinct rights of ſuperior and vaſſal; and the blending theſe two characters in one perſon, appeared to be the blending of contrary qualities together." In the caſe of the ſtranger there was no danger of this junction. Such was the law of England ſo late as the time of Edward I. and, as Sir Matthew Hale remarks (*Comm. Law*, ch. 11. p. 258, 9.), it has been rather antiquated than altered. But it ſhould ſeem to have been the opinion of the juſtices in the reign of Edward I. that, in caſe the eldeſt brother had had

iſſue at the time when he received homage of the ſecond, ſuch iſſue ſhould not have been precluded from claiming on his death; though it would have been a bar to his iſſue who were born afterwards. See *Fitzh. Abr.* t. *Avowrie, pl.* 235. The reaſon of this opinion does not appear; ſince the iſſue, though born before homage, could not claim but as heir to him *at his death*; and, conſequently, their title was equally ſubſequent to the receipt of homage, as if born afterwards.

Of COPYHOLDS.

NOTE LXVI. p. 155. (*a*).

IF the principles of our laws relative to freehold property are ſo evidently deducible from a feudal origin, as the preceding part of this work has ſo incontrovertibly evinced, to a feudal origin muſt we neceſſarily attribute the principles of our laws relative to copyhold tenure. In this latter ſpecies of property we find the feudal uſages and rules in almoſt a native purity: ſo that we might, indeed, "conclude, that had there been no other evidence of the fact in the reſt of our tenures and eſtates, the very exiſtence of copyholds, and the manner in which they are transferred, would inconteſtibly prove the very univerſal reception which that northern ſyſtem of property for a long time obtained in this iſland; and which communicated itſelf, or at leaſt its ſimilitude, even to our

our very villeins and bondmen." 2 *Bl. Comm.* ch. 22. p. 367.

The barons, poſſeſſed of large tracts of land, divided a portion of them among their followers. A portion alſo they reſerved to themſelves; and this was termed their demeſnes. Parts of this again they granted out in ſmall allotments to the lower orders of their dependants, to be cultivated for the emolument of the lord, or under certain ſervices which were ſuitable to the huſbandman to return. Theſe were held at his will, and reſumable at his pleaſure. While the tenant, however, conducted himſelf faithfully, and fulfilled his conditions and returns, he was ſuffered to continue in the poſſeſſion of the eſtate. If, indeed, he failed in theſe, his intereſt, of conſequence, became forfeited to the lord.

When the tenant died, his children, dependant upon their induſtry in ruſtic employs for ſupport, and bred up under the protection and in the intereſt of their lord, were often permitted to retain the ſpot which their father had cultivated; and ſucceeded on the conditions under which he had held them. This ſeemed reaſonable and juſt. It was conceived hard to deprive the children of a faithful vaſſal of the ſcanty pittance they might reap from ſucceeding him. This became, therefore, frequently practiſed; and, in many manors, this ripened into cuſtom. The common law, always friendly to freedom, countenanced every meaſure which favoured it, and which tended to make the tenant leſs dependant on his lord. The conditions on which the vaſſal held his copyhold, became in time fixed in their nature, though perhaps not always ſo in their duration and extent; and it thence became uſual to grant ſuch an intereſt to the tenant

tenant and his heirs, yet ſubject to the right of reſumption by the lord. The tenant, notwithſtanding ſuch deſcendible eſtate, was ſtill, therefore, ſaid to hold at the lord's will; and his heir was neceſſitated to be regularly admitted to the tenancy. He acknowledged the gift, and was grateful for the renewed munificence of the lord. He accepted the ſeiſin, and paid his fine. (See *ante*, 24. N. XXII). Should the lord, indeed, have required an exorbitant fine, the heir would have been diſinherited; but this the law at length prevented, and confined his demands within the limits of juſtice, and regulated them by the value of the lands to which the heir ought of right to ſucceed. As the tenant held only at will, at leaſt in the conſideration of law, he could not tranſfer his intereſt to another; at the moſt he could only relinquiſh his own right to the premiſes. He therefore returned them to his lord. When a copyholder wiſhed to transfer his eſtate, he communicated thoſe wiſhes to the lord, who often complied with his requeſt, and accepted his reſignation under confidence to regrant the eſtate to the perſon he was deſirous ſhould ſucceed him.—In the reign of King John, we find a freehold ſo transferred through the medium of the king:—Walter Croc releaſed to the king and his heirs the moiety of the barony which was his uncle Walter Britton's; to the end that the king would be pleaſed to enfeoff Richard Briewerre thereof; to hold to Richard and his heirs of the king and his heirs *in capite*: "ITA UT RICARDUS BRIEWERRE ET HÆREDES SUI TENEANT MEDIETATEM PRÆDICTÆ BARONIÆ." *Mag. Rot.* 2 *Jo. Rot.* 7. a. Dorſete and Sumerſete. *Mad. Baronia Angl.* b. 3. c. 4. p. 230. (*l*).—This alſo becoming more frequent, and

and the connection every day relaxing between the lord and his tenant, the returns and duties becoming more fixed and certain, and the advantages of alienation perpetually preſenting themſelves; the law countenanced the uſage, and often enforced its compliance. Still, however, a regular reſignation, or ſurrender, by the old tenant, and a regular acceptance or admiſſion of the new, were requiſite: And this form muſt to this day be adhered to.

The hiſtory and progreſs of theſe tenures, their conſequences and incidents, are already ably and clearly deduced and explained, particularly by Mr. Juſtice Blackſtone (ſee his *Conſiderations on Copyholders*, in his *Tracts*; and his ſecond vol. of *Comment.* ch. 9. and 22.); and will be occaſionally more fully entered into in the courſe of theſe Annotations, under their reſpective heads.

NOTE LXVII. p. 156. (*c*).

COPYHOLDERS are generally ſuppoſed to have been originally villeins; but this opinion has been queſtioned by Lord *Loughborough*. See *Dougl.* 724. n. (2). See *Poſt.* 292. N. CXLI. Mr. Juſt. *Wilmot* conſidered them as forming "a middle eſtate between freeholders and villeins." See 3 *Burr.* 1543.

NOTE LXVIII. p. 156. (*f*).

BUT that not ſimply and dependant upon the caprice of the lord; but they are *tenants at will* "ACCORDING TO THE CUSTOM OF THE MANOR."

They are ſo far tenants at will, however, that the freehold remains in the lord, and their poſſeſſion will cauſe

cauſe a *poſſeſſio fratris* in him. See *Watk. on Deſc.* ch. 1. ſ. 2. p. 51. *Poſt.* 308.

There are other eſtates which are held "*according to the cuſtom of the manor,*" but not "*at the will of the lord.*" Theſe are frequently called cuſtomary freeholds; though perhaps not very properly, as the freehold even of ſuch eſtates remains alſo in the lord of whom they are held. See *Blackſt. Conſid. on Copyh. Tracts*; and 2 *Comm.* ch. 9. p. 149. 3 *Burr.* 1273. 1 *Salk.* 365. 3 *Salk.* 100. *Carth.* 432.

NOTE LXIX. p. 157. (*h*).

See *ante*, 155. N. LXVI.—As the copyholder held only at will, he had nothing to transfer; he could only relinquiſh his title to the premiſes. Beſides, a perſon could not in thoſe times, for the reaſons we have mentioned (*Introd.* xiv. and *ante*, 12. N. XII.), be put into the tenancy but by the approbation of the lord: It followed, therefore, that the old tenant ſhould ſurrender up his intereſt, and the new one be regularly admitted.

But when a perſon had a right to, or an equitable intereſt only (when ſuch equitable intereſts were permitted) in a copyhold eſtate, ſuch perſon was not the tenant of the manor. No ſurrender of ſuch right or intereſt was neceſſary on its conveyance; for none could be made: He therefore might transfer it to another by deed:—Nor would he to whom it was tranſferred require any admiſſion, as he did not become tenant to the lord. The tenant was him in whom the *legal* eſtate was veſted; and by the transfer of the equitable intereſt the tenancy was not altered; hence no fine can be due on ſuch transfer, as there is no change

change of tenant effected, nor, conſequently, any admiſſion required.

Thus, when any one is wrongfully admitted to a copyhold, he becomes tenant to the lord; and he who has the right may releaſe it to him by deed. 4 *Co.* 25. b. *Watk on Deſc.* ch. 1. ſ. 1. p. 31. and *Poſt.* 192, 3. 311.

So one joint-tenant may releaſe to his companion; for each is ſeiſed *per mie et per tout*, and the tenancy is not altered by the ſeceſſion of the individual. *Co. Litt.* 59. a. n. (3). *Poſt.* 289: 330. N. CLXXIV.

And, for the ſame reaſon, a copyholder may releaſe to his lord:—For this is no ſubſtitution of a perſon into the tenancy, but a relinquiſhment of his own intereſt or claim; and the lord is not injured but benefited by ſuch act. 1 *Leon.* 102. *c.* 135. *Hutt.* 65. and *Poſt.* 300.

So if a copyholder ſurrender on condition, he may releaſe ſuch condition by deed; for the tenancy remains as before. *Cro. Jac.* 36. *pl.* 11.

But the releaſe of a copyholder cannot operate in any way but by extinguiſhment, and that when made to a perſon whoſe poſſeſſion was lawful; and therefore it would not be good if made to a diſſeiſor, &c. 1 *Leon.* 102. *c.* 135. and *Poſt.* 193. 300. 311.

So a perſon having only an equitable intereſt may aſſign or deviſe it without a ſurrender. 1 *Atk.* 388, 390. 2 *Atk.* 38. 3 *Atk.* 75. 1 *Veſ.* 121. 489. and ſee 1 *Hen. Blackſt.* 461. and *Poſt.* 177. N. LXXXII.

So of a mere authority or power. *Cro. Jac.* 199. *pl.* 30. 2 *Wilſ.* 400. and *Poſt.* 274. (*o*).

So, by ſtatute, the copyhold eſtate of a bankrupt may be transferred by the commiſſioners, by bargain and ſale inrolled. See 1 *Cooke's Bankr. Laws*, ch. 9.

NOTE

NOTE LXX. p. 157. (*k*).

THE right of alienation being now eſtabliſhed, the ſurrender is conſidered as a form: A court of equity will therefore frequently ſupply its deficiency.

But equity will not interfere in a capricious or arbitrary manner. If the neceſſity or juſtice of the caſe does not demand it, the claimant muſt be left to his fate; and the heir is not to be diſinherited where it would be conſiſtent with juſtice that he ſhould ſucceed.

In caſes of moral obligation, as a proviſion for a wife or children, the court will yield its aſſiſtance and diſpenſe with the form. 1 *Veſ.* 228. 2 *Veſ.* 165. 582. 1 *Atk.* 386, 7. 390. 3 *Atk.* 182. 585, 6.

So in the inſtances of creditors: 1 *Veſ.* 215. 2 *Veſ.* 165. 582. 3 *Atk.* 77. 182. Or of a purchaſer for valuable conſideration: 2 *Vern.* 165. and *Fiſher* v. *Coph.* 138. ch. 16.

But in favour of a perſon for whom the teſtator was not obligated to provide, as in caſe of a deviſe to a ſtranger, a ſurrender will *not* be ſupplied. 2 *Veſ.* 582. 1 *Abr. Eq. Ca.* 122. *Copyh.* (B).

If a deviſe be to a wife for life, with remainder to a ſtranger (as to a nephew or niece), the court will aid the particular deviſe to the wife only, but will not ſupply the ſurrender as to the remainder over. 3 *Bro. Chanc. Caſ.* 170.

See further, as to the caſes in which a ſurrender will be ſupplied or aided in equity, *Com. Dig. Copyh.* (P. 2). *Viner Copyh.* (M. a). 1 *Pr. Williams*, 60. and n. (1) to Mr. Coxe's edition. 1 *Eq. Abr.* 122. *Coph.* (B).

NOTE

NOTE LXXI. p. 157. (*l*).

THIS ſhould have ran—The lord is not compellable to make a *grant*. The caſe in *Moore* was, a cuſtom was ſet up to compel the lord to grant, on the death of a tenant for life, an eſtate for life alſo to the eldeſt ſon; or, if no ſon, to the daughter; and ſo *in perpetuum*: which cuſtom was adjudged ill. (The ixth ſect. of *Mr. Butler's* note (1) to *Co. Litt.* 290. b. on the right of renewal of leaſes for life, may be here conſulted; and ſee *Poſt.* 323.)

NOTE LXXII. p. 157. (*n*).

THE power of compelling the lord to admit the ſurrenderee was firſt aſſumed by the courts of equity. Mr. *Juſt. Blackſtone* conjectures, with much probability, that it was coeval with the introduction of uſes with reſpect to freeholds. See 2 *Comm.* ch. 22. p. 366. Even ſo late as the time of James the Firſt, it was adjudged, that the *ſurrenderee* could not maintain an action againſt the lord for not admitting him. (*Cro. Jac.* 368. *pl.* 1. and *Moore*, 842. *pl.* 1137. and *Poſt.* 291.) Yet it was ſaid that the *ſurrenderor* might have brought it. (See *Lex Cuſt.* ch. 17. p. 160. *Harg.* n. (6) to *Co. Litt.* 59. b. and *poſt.* 291.) A *mandamus* will now, however, lie to compel the admiſſion of a ſurrenderee (2 *Durnf. and Eaſt* 484.); though the court has refuſed it in the caſe of an heir at law, upon the ground that he had as good a title without admiſſion as with it, againſt all but the lord. (See 2 *Durnf. and Eaſt* 197, 8.)

And

And even in the case of copyholders who hold of the king, they may now insist on their admittance: And the order for the stay of admission, which was once made, is now dissolved and abrogated. See 1 *Burt. Exchcq* 19. who cites *Lane's Rep.* 20. (*Case of York and Ailein.*)

NOTE LXXIII. p. 158. (*p*).

When the heirs of the tenant were, through the munificence of the lord, permitted to enjoy the estate, still were they subject to his will, as their ancestor had been before them. It followed, therefore, that as their succession was optional, the pleasure of the lord directed the descent: And thus the custom of the manor was at length to regulate the mode of succession.

The inconveniency of different rules was presently discovered, and the propriety and expediency of reducing the laws of a kingdom to an uniform standard was consequently apparent. The rules of descent as to freeholds became ascertained and acknowledged, and those rules were considered as the common ones of the country, and obligatory in all cases where the claimant could not satisfactorily prove that he had a particular one to guide him. Whenever that proof failed, the common law pointed out the descent; as when he could not evince an exception, he, of consequence, fell within the rule. Thus the customary provisions were taken strictly: If the custom said that the youngest *son* should succeed, it did not follow from thence that the youngest *brother* should do so: There being no custom therefore as to him, the succession of the brothers was regulated by the general law. See the case of Denn *d.* Goodwin *et al. v.* Spray, 1 *Durnf. and East* 466. and the books there referred

referred to, and *Com. Dig.* Boro' Engliſh; and Copyh. (K. 4). See alſo 5 *Durnf. and Eaſt*, 26. Roe *v.* Parker.

NOTE LXXIV. p. 162. (*x*).

THE poſſeſſion of a leſſee for years is always conſidered as that of the freeholder or leſſor, or his heirs: And it ſeems to be the better opinion, that if the eſtate once becomes veſted in the heir ſo as to cauſe a *poſſeſſio fratris*, it ſhall not be conſidered as diveſted again by the termination of the leaſe for years. If, on the death of the anceſtor, it is notorious that the poſſeſſion is in the heir, the end is anſwered, and the law ſatisfied. See *poſt.* 286. N. CXXXII.

NOTE LXXV. p. 163. (*a*).

THE powers of an heir over the eſtate before admiſſion have long been very different from thoſe of a ſurrenderee; though originally, even the heir had no authority over the inheritance till he had obtained a regular ſeiſin from the lord: and this held equally as to freeholds. (See the *Introd.* xvi. *ante*, 24. N. XXII. and *poſt.* 230. N. C.) The heir, before his admiſſion, is now conſidered as tenant as to every one but the lord;—the ſurrenderee was ſaid to have nothing in the premiſes till admittance; neither a *jus in re* nor yet *ad rem.* The heir might have entered and taken the profits (ſee *ante*, p. 162. (*z*);—) but the ſurrenderee could not do ſo. (*Cro. Eliz.* 349. See 2 *Wilſ.* 13. 5 *Burr.* 2770. *Poſt.* 275.) He has now, however, an equitable intereſt which he may deviſe (ſee *Preced. Chanc.* 320. 1 *Durnf. and Eaſt*, 601.) or aſſign. (1 *Durnf. and Eaſt*, 484. *Poſt.* 285. N.

CXXXI.) His ſubſequent admiſſion will have relation alſo to the ſurrender, and give effect to his meſne acts. (See 1 *Durnf. and Eaſt* 600. and ſee alſo *poſt.* 289. (*d*).) But, till actual admittance, he cannot regularly ſurrender to another, as he has no legal eſtate in the premiſes. (See *Cro. Eliz.* 349. and *poſt.* 275. 283. N. CXXX.) The heir, however, having the legal eſtate caſt upon him by the law, may ſurrender on ſatisfying the lord for his fine: His admiſſion, in theſe caſes, is for the benefit of the lord; and therefore the lord may waive it if he pleaſes. So the heir of a remainder-man or reverſioner may ſurrender before admittance, as well as if it had been an eſtate in poſſeſſion. (*Cro. Eliz.* 504. 662. and ſee *Cro. Jac.* 36. *pl.* 10. and *poſt.* 281. N. CXXIX.) And as the heir may ſurrender before admittance, ſo he may take a ſurrender from another tenant out of court. (See *poſt.* 288.)

NOTE LXXVI. p. 163. (*b*).

It does not, I think, appear that the lord is anywiſe obliged to accept the ſurrender of the heir before the payment of his fine. The lord might have compelled him to be admitted, or ſeize his lands. The waiver of that admiſſion is in favour of the heir; and it ought not to be turned to the prejudice of his lord. If the lord accept the ſurrender, and admit the *ceſtuy que uſe*, it ſhould ſeem that he may bring an action of debt or *indebitatus aſſumpſit* for his fine. See *poſt.* 291. N.CXL. 308.

NOTE LXXVII. p. 163. (*d*).

The particular limitation and the remainders over form together but one eſtate in law:—But one admiſ-

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sion therefore can be requisite; and, consequently, but one fine can be due. This fine may be assessed on the admission of the particular tenant, and proportioned to the interests of the several claimants who may pay their shares on coming into possession. If the whole fine, indeed, be paid on the admission of the particular tenant, there can be no portion of it due on the accession of the remainder-man. (See *Watk. on Desc.* ch. 1. s. 1. p. 21. n. (*w*). s. 2. p. 50. n. *Kitch.* 122. 1 *Burr.* 212, &c. and *post.* 194.)

But on the surrender of a remainder to a person to whom it was not originally limited, that person must be admitted and pay a fine. For though the admission of the particular tenant was the admission of the original remainder-man, it was not of the purchaser. (See *Cro. Jac.* 31. *pl.* 1. *Cro. Eliz.* 504. *pl.* 29. and *Fisher on Copb.* 86.)

So it should seem, that on the decease of a remainder-man, during the existence of the particular estate, his heir should be admitted and pay his fine; and see 1 *Burr.* 213.

NOTE LXXVIII. p. 164. (*e*).

The inconveniency of exceptions to the general laws of a state has been in some degree adverted to when speaking of Customary Descents. (*Ante*, 158. and N. LXXIII.) The confusion and uncertainty which necessarily flow from a contradiction, or even variety of local customs, must be deeply felt in the intercourse between members of the same society.—This consequence has been much more generally experienced upon the continent than in this kingdom, as their customs were more variant and extensive.—When the legislature enacts a general law, it expects

a general compliance: The rule is prescribed to the subject; and the subject should regulate his conduct accordingly. The inference, of necessity, must be, that all persons and all kinds of property are comprehended within its injunctions, unless an exception in their favour can be satisfactorily adduced. If no acknowledged right or tolerated usage be infringed; if no injury arise to the privileges or property of an individual with whom it did not intend to interfere; there can be no reason why its rules and obligations should not attach. If, indeed, the consequences of its extension to particular persons or places would be attended with injury to their rights or privileges,—such law cannot then be *presumed* to embrace them: In these cases it would be requisite, that such law should *expressly* include them; as the laws can never be *intended* to do injury to any. If, therefore, the interest of the lord be not prejudiced; if no injury accrues to the copyholder any more than under the like circumstances accrues to the free;—copyhold tenements must be equally within the public acts of the state as freeholds are.

NOTE LXXIX. p. 165. (*g*).

It is very generally asserted in our books, that an estate-tail was not known till the statute *De donis*. (13 *Ed.* 1. *st.* 1. *c.* 1.) All estates of inheritance, we are told, were, prior to that act, either in fee-simple absolute or conditional. Positions and assertions like these must necessarily excite surprise in him who would look only into the principles of feudalism, and the statute we are speaking of, for their elucidation. When he considers that, from the very words of that very statute, the very limitation must have

have exiſted before that act equally as afterwards; that only particular privileges and incidents, of alienating in fee, of charges, or forfeiture, were, under certain circumſtances, before admitted, and that the ſtatute only aboliſhed them: He would be led to aſk with ſome aſtoniſhment, How could the exiſtence of an eſtate-tail (call it what you pleaſe, he would ſay; the *term* indeed might not have been known, but that could make no alteration in the nature of the eſtate: We ſpeak of *things*: We ſtay not to cavil about *words* and *names*); How could the exiſtence of an eſtate-tail before that ſtatute be denied? You admit that the limitation in both caſes was alike; each was to a perſon and the heirs of his body. The difference then was only in the privileges and incidents annexed to the eſtate. But where was the difference before thoſe incidents exiſted? And was it not long after the cuſtom of granting a feud to a perſon and the heirs of his body, that the power of alienation was permitted? Thoſe privileges and incidents were effected by degrees; and, conſequently, the eſtate once exiſted without them. In that caſe, the difference you ſpeak of was not known; and, of conſequence, the eſtates were the ſame: And how then can you affirm that the eſtate-tail was not prior to the ſtatute? That it was unknown at a time when it flouriſhed with its pureſt influence?

The diſſipation or prevention of error is one way of eſtabliſhing truth. Many are the miſconceptions and prejudices which the ſtudent, in all ſciences, has to combat in his progreſs towards knowledge. In that progreſs he will often find that the moſt difficult part of learning is to *unlearn*. He will ſoon perceive that many of the aſſertions of the *wiſe* had their

origin in ignorance. He will ſoon therefore perceive alſo, that aſſertion muſt be attended to with caution. He muſt ſcrutinize and inveſtigate; he muſt not ſubſcribe too implicitly to poſitions which he cannot aſſent to from a conviction of their truth. He muſt heſitate; he muſt reflect. He may not indeed be able to adopt, with *Monteſquieu*, the words of *Correggio*, and to exclaim, "*And I alſo am a Painter:*" But he too ſhould feel that he has powers and rights which Heaven has given him to exert; and that ſo long as infallibility is not the portion of others, ſo long muſt the right of inveſtigation remain in himſelf. He ſhould regard a blind acquieſcence in arbitrary aſſertion; an implicit reliance on the *authority* of great names; as the bane of every thing rational. Shall he behold with jealouſy the ſmalleſt portion of power which his ſtate has delegated; and ſhall he not ſurvey with diſdain; ſhall he not concentrate his energy to oppoſe that tyranny which would ſhackle his intellect; which would enſlave his very ſoul? Yet how often does the ſyſtem ariſe, and, with the Tyrant's frown, demand credence from all, which has only for its baſis the dictum of a pedantic or prejudiced individual? Upon aſſertions and poſitions uttered without proof, and adopted without enquiry, how often has contradiction been piled upon contradiction, and abſurdity upon abſurdity, till truth has been driven out aſhamed, and confuſion and error uſurped the heart of man!

The poſition, however, here ſpoken of, that all eſtates of inheritance were, before the ſtatute *De donis*, either in fee abſolute or conditional, had apparently its origin from a purer and more commendable principle; not from the arbitrary aſſertions of ignorance

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or miſconception, but from the deſire, which even then prevailed, of rendering eſtates alienable for the furtherance of commerce, or for purpoſes equally conducive to the happineſs of mankind.

Let us then look into the Hiſtory of Entails, and endeavour to emancipate the doctrine from its ſeeming inconſiſtences and contradictions.

Feuds were given for life before they were granted to a perſon and the heirs of his body; they were granted to a perſon and the heirs of his body, before they were granted to a perſon and his heirs general or indefinite. The *Deſcendants* of the feudatory were admitted before his *collateral* relations (See *ante*, 11. N. XI. 17. N. XV.): An eſtate tail therefore muſt neceſſarily (in reality, though not in terms) have preceded an eſtate in fee-ſimple: For what was the *feudum novum* but an eſtate tail in effect? (See *ante*, 10. &c. 365. N. XV. *Somner*'s ſays (*Gavelk.* 102.), that *Beneficium* was *Feudum*'s elder brother; and was not the eſtate-tail the elder brother of the fee-ſimple?

We learn from the ſtatute itſelf that the limitation was the ſame before that act, as has been uſed in ſubſequent times: But, prior to that period, the tenant had the power of aliening in fee on iſſue had. This ſeems to have had its origin, in the favour which the common law, even then, ſhowed to alienation, for the purpoſes of commerce, and the proviſion for the younger branches of a family. To enable a man to alien to another and his heirs general (*in perpetuum*), who had himſelf but an eſtate to his own deſcendants, was evidently a moſt flagrant violation of the grant; and ſo the ſtatute *De donis* conſidered it. So bare-faced a fraud on the reverſioner could only be countenanced by the law, from the circumſtance of its

general utility in reſpect to the circulation of property in land; and moſt probably was very gradually effected. But, as commerce, which previouſly to that time began to flouriſh, and the Cruſades, which previouſly alſo had maddened Europe, rendered reſtraints, of all kinds, on alienation, inconvenient, niceties on this head were not attended to; and the lords, abſorbed in the ardour of avenging the cauſe of Heaven, became more regardleſs of their rights of reverter which were attached to ſeigniories they were about to diſpoſe of, or which, being temporal, they affected to deſpiſe.

But when this *furor* ſubſided in Europe; when the barons began to ſee the folly and preſumption of fighting the battles of the Lord, to the deſtruction of mankind; when they diſcovered, from the moſt afflicting experience, the vanity of attempting the regaining of Paleſtine; when they found the inutility even of their partial ſucceſs; when they reflected that to benefit mankind was as acceptable to Heaven as to deſtroy them; that truth was more rapid in her progreſs as the ſword became ſheathed; that their own welfare and happineſs were as juſtifiably regarded, as the enthuſiaſm, the arts, or rapacity of the prieſthood; that a barony in Britain was poſſeſſed of more real advantages than an empty title, a ſhaken fortreſs, or a portion of the ſteril ſands of Judea; when they became ſatisfied with their own country, and attended to their own neceſſities and pleaſures; they then became more regardful of their rights. The frauds which had been committed on them by the alienation of the tenant were noticed and condemned; and the lords, mindful of their own intereſts, and anxious to continue their property unimpaired to

their deſcendants, obtained this celebrated ſtatute* which aboliſhed the power of alienation in the tenant, &c.

This ſtatute, therefore, ſo far from creating a new eſtate, "AUT RE AUT NOMINE," ſays *Sir Martin Wright* (189.)—only reſtored the original one to its wonted vigour.—It only abrogated the privileges and incidents which had been from time to time annexed to it, and which were then deemed merely extrinſic and adſcititious.

The right of primogeniture had been long eſtabliſhed in England (at leaſt as to military tenures). When the limitation was to the heirs general, or to the heirs male of the donee, the eldeſt ſon ſucceeded to the excluſion of the reſt. This was equally the ſame in the caſe of a fee-ſimple as of an eſtate-tail. But as, by this ſtatute, the eſtate could not be aliened from the eldeſt ſon, nor charged in his hands, it was tranſmitted entire and unimpaired. Hence the aggrandizement of the greater families, and the other conſequences ſo favourable to ariſtocratic pride and ambition. Theſe conſequences, with the reſtraints on alienation, and the manifeſt injury to the younger

* 13 *Ed.* I. *A.D.* 1285, which was only about five or ſix years before the expulſion of the Chriſtians from Paleſtine; which happened in 1291. So early as the reign of Henry II. the power of alienation was aſſumed by thoſe who were minded to engage in the *Holy* Wars. The intervening period, a period of upwards of one hundred years, are we doubtleſs to allow for the growth of conditional fees. To the Cruſades are we greatly, if not wholly, to attribute their origin: and it were idle to attempt to reconcile the incongruities of writers on theſe ſubjects, who ſeem to have loſt ſight, not only of hiſtory and the manners of the times, but even of the connection which they bear to the general ſyſtem of feuds.

children,

children, became at length to be loudly reprobated, and were even tolerated with reluctance. The courts of law ſet their faces againſt them: They recurred with triumph to their *fees conditional:* They adverted to the advantages of the one, and to the hardſhips and inconveniences of the other. Hence they ſaid that ſuch limitations continued fees conditional wherever the ſtatute did not attach; and at laſt they declared open war againſt the ſtatute itſelf. They at firſt proceeded with caution and addreſs: They ſapped the citadel they dared not ſtorm. Countenanced, however, by the wants and wiſhes of the times, they afterwards attacked, more openly, this bulwark of feudality and ariſtocratic oppreſſion. The courts from time to time gained a partial conqueſt; and, at length, even the legiſlature itſelf interfered; and "THE STATUTE OF GREAT MEN" has been ſo far fruſtrated or repealed, that the entail may be now, by ſeveral means, deſtroyed.

It has already been noticed that the courts of law deemed ſuch limitations to be ſtill fees conditional in thoſe caſes where the ſtatute did not apply: Hence came the celebrated queſtion—Whether it extended to copyholds? Many were the champions who on this important occaſion entered the liſts and threw down the gauntlet of defiance. Many were the prejudices which they had to contend with; and many were the abſurdities which they permitted to remain. They ſaid that copyholds, deriving their very exiſtence from cuſtom, without a cuſtom could not be entailed; and, of conſequence, they could not be created by a ſtatute which had of courſe a certain beginning which cuſtom had not in its nature. Others affirmed that, as there were no entails before that ſtatute, there could,

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of neceſſity, be none created by a cuſtom which exiſted before it. And here a perſon of common penetration would have been apt to conclude that no entail could be of copyholds at all: Since neither the ſtatute without cuſtom, nor cuſtom without the ſtatute, could create one; as from nothing, nothing could be produced. Others, however, more ſtout, if not more wiſe, than their fellows, aſſerted that, although neither the ſtatute or cuſtom alone could effect an intail, that yet they might, by forming a junction, by mutual co-operation, effectuate ſuch eſtate. But her a more formidable difficulty preſented itſelf; and that was, What is that cuſtomary eſtate on which the ſtatute can attach, and thus be metamorphoſed into an eſtate-tail? An eſtate, by cuſtom, to a perſon and the heirs of his body was ſaid to be a fee-conditional as at common law: It was not on this that the ſtatute could operate; as the tenant, on iſſue had, could ſtill alien in fee. (*Cro. Car.* 42. Rowden and Malſter.) To conſtitute an eſtate-tail of a copyhold it muſt be ſhown that a remainder has been limited over and enjoyed; or that the iſſue has avoided the alienation of his anceſtor, or recovered in a *Formedon in Deſcender*, &c. (*Co. Litt.* 60. b. 2 *Veſ.* 601, &c.)—Now it is laid down as law that, wherever there is a cuſtom to grant a copyhold in fee-ſimple, there you may limit it to one and the heirs of his body with a remainder over to another in fee; and this by the very cuſtom itſelf; as a power to limit the largeſt eſtate which the law acknowledges, neceſſarily includes the power of creating a leſs. (*Cro. Eliz.* 373. Stanton and Barnes. *Poſt.* 194. *Lord Raym.* 999.)

If this then be the caſe, that an eſtate may be limited to a perſon and the heirs of his body with a remainder

remainder over, by force of cuſtom alone, what is become of the co-operation of the ſtatute?—Is it not an eſtate-tail without its help?—And if ſo, might there not have been an eſtate-tail before the ſtatute *De donis?*—It is not a fee-conditional, the darling of the common-law, as it has a remainder expectant upon it: For the ultimate diſpoſition could not be good as a conditional limitation (ſee 1 *Leonard*, 174. *ca.* 244.), as it was too remote.—If it be not a remainder, it cannot be ſupported; but if it be, then the prior eſtate muſt be an eſtate tail.—If it be not ſuch, what is it? What appellation can be aſſigned to it?—It is an abſolute *non-deſcript.* It is an eſtate for which the law has not a name.

Can any grant BY CUSTOM be ſupported at this day, which could not have been made by cuſtom in times anterior to the ſtatute *De donis?*—If a limitation to a perſon and the heirs of his body WITH A REMAINDER OVER, be warranted by a cuſtom to grant in fee, where is the diſtinction between cuſtoms to grant in tail, and not to grant in tail, if a cuſtom to grant in fee will include it?

Inconſiſtency is neceſſarily the conſequence of error; and error here has been the conſequence of a want of diſcrimination and attention to the manners of the times. But it is now, on all hands, agreed that entails may be of copyholds where the uſage to entail has been acknowledged; whether it be effected by cuſtom alone, or by the ſtatute alone, or by the operation of both together. And it ſeems that whether a cuſtom to grant in tail be acknowledged or denied to exiſt in a particular manor, that all copyholds may be entailed in effect:—if not by cuſtom at law, they may be ſo in equity without it: For the cuſtom

cuſtom only binds the tenancy, and has nothing to do with the truſt. (See 2. *Veſ.* 304. 633. 1. *Strange.* 454. 2 *Bl. Comm.* 367. ch. 22.)—If a ſurrender be made to a perſon and his heirs, and a truſt be declared of ſuch eſtate to another and the heirs of his body, a court of equity will ſee it obſerved. The truſtee and his heirs are tenants to the lord; and the lord has nothing further to do with it. The truſt is between the tenant and the *Ceſtuy que uſe*, and ſolely the ſubject of equity.

Upon the whole, therefore, it ſhould ſeem that entails were equally before as ſince the *ſtat. De donis* (whether known by the name or not);—that the common-law, in favour of alienation, annexed privileges and incidents not originally attached to them: that the ſtatute aboliſhed ſuch privileges and incidents, and reſtored them to their priſtine condition:—That copyholds may, by force of a cuſtom to grant in fee-ſimple, be limited to a perſon and the heirs of his body with a remainder over, according to the caſe of Stanton and Barnes (*Cro. Eliz.* 373. and ſee *Litt.* f. 73. 1 *Leon.* 175. *Ca.* 244, *&c.*); and, conſequently, in all manors entails may be allowed where a grant in fee-ſimple is warranted; and even the queſtion may be avoided by creating a truſt. And wherever an entail may be effected, it may be, of conſequence, deſtroyed; as will preſently be ſhown.

NOTE LXXX. p. 175. (*l*).

WHEREVER entails are permitted of copyholds, ſuch entails may be cut off; as otherwiſe it would tend to a perpetuity. A recovery is the ſafer, and Lord Macclesfield ſaid the proper, way of barring ſuch entail (3 *Pr. Wms.* 10.); and ſuch recovery may be ſuffered without

without a particular cuſtom to warrant it, according to the caſe of Dell and Higden, in *Moore*. 358. *pl.* 488: Though a cuſtom to bar the entail by ſurrender may be concurrent with a cuſtom to bar by recovery. 2 *Strange*, 1197. and ſee *poſt*. 177. N. LXXXI.

NOTE LXXXI. p. 177. (*n*).

It is now ſettled that ſuch cuſtom is good; and that it may be concurrent with a cuſtom to bar by recovery: And if no particular mode be preſcribed by the cuſtom of the manor, a ſurrender, though only to the uſe of a will, will be ſufficient for that purpoſe, without a ſpecial cuſtom to warrant it. See 2 *Veſ.* 596. 2 *Strange*, 1197. 2 *Burr.* 979. and Mr. *Coxe*'s note (1) to 3 *Pr. Wms.* 10. and ſee *poſt*. 300.

NOTE LXXXII. p. 177. (*o*).

These are the three modes of barring an eſtate-tail of copyholds: By recovery; by ſurrender; and by forfeiture and re-grant: though the former ſeems the moſt preferable.

And note; as, in the caſe of an equitable eſtate-tail in freeholds, a recovery is eſſential to deſtroy it (though it was once held otherwiſe; *Prec. in Chanc.* 228.) See 1 *Bro. Chanc. Caſ.* 73. and note (2) to *Mr. Coxe's Pr. Wms.* vol. 1. p. 91.; ſo in that of an equity in copyholds, the entail muſt be docked as if it had been a legal entail; and the eſtate will not paſs merely by deviſe. *Per Loughborough J. C.* See 1 *Bl. Term Rep.* 461. Roe *v.* Lowe. Yet chancery will ſometimes relieve though the entail has not been barred, or decree the truſtees to ſurrender. 2 *Vern.* 498. and 585.

NOTE

NOTE LXXXIII. p. 181. (r).

See 3 *Lev.* 326 *contra*; and see alſo *Buller's Niſi Prius*, 161. 1 *Salk.* 185. *Com. Dig.* Copyh. (N). & (R. 12).

And note; that the reaſon aſſigned by our author againſt their taking advantage of the breach of condition does not ſeem ſatisfactory; as the caſe he refers to (ſee *Cro. Jac.* 305. *Cro. Car.* 24, 5.) was on a transfer of the reverſion by ſurrender and admittance, and, conſequently, *with* the conſent of the lord: Nor does it appear that the reverſion of a copyhold can be otherwiſe transferred. And it is now ſettled that a ſurrenderee of a copyhold is an aſſignee within this ſtatute. See *Bull. Ni. Pri.* &c. as above, and 3 *Durnf. & Eaſt*, 398.

NOTE LXXXIV. p. 184. (y).

When Lord Coke applies the term Freehold to an eſtate held by copy, he applies it as contradiſtinguiſhed from a term of years or at will: In every other ſenſe it is inapplicable; and even in this it may not be ſtrictly accurate. When he uſes the term with reſpect "to the ſtate of the law," he oppoſes it to copyhold: And in this latter ſenſe, he tells us that "he takes it throughout his diſcourſe."

The freehold of lands held by copy or cuſtom is properly in the lord. See *ante*, 156. N. LXVIII.

NOTE LXXXV. p. 195. (z).

In the caſe of a ſurrender to will, the eſtate remains in the tenant and not in the lord. 4 *Co.* 23. a. and if he makes no will, or, making a will, deviſes a portion

portion only of his eſtate; the whole in the one caſe, or the undiſpoſed-of part in the other, will deſcend to his cuſtomary heirs. *Cro. Eliz.* 148. 442. 4 *Co.* 29. b. 1 *Leon.* 174. *ca.* 244. 2 *Wilſ.* 15, 16. and ſee *poſt.* 254. N. CXVI. 258.; 337. (*b*).

So if the intended deviſee die in the teſtator's life-time it will be a lapſed deviſe; or, in other words, the appointment will not take place. 2 *Veſ.* 77.

So if a copyholder, ſeiſed in fee, ſurrender to the uſe of his will, and afterwards ſurrender to particular uſes with the ultimate limitation to his own right heirs; he is in of his old uſe; and may deviſe the reverſion without any freſh ſurrender or admiſſion. 2 *J. Blackſt. Rep.* 1046.

And note; if a perſon ſurrender to ſuch uſes as he *ſhall* by will appoint, the lands will paſs by a will made *previouſly* to the ſurrender. 1 *Durnf. & Eaſt*, 438. Note.

But a copyhold purchaſed in the interim between the making of the will and ſurrender, will not paſs. *Ibid.*

And ſo inſeparable is this power of ſurrendering to the uſe of a will from the eſtate of a copyholder, that even a cuſtom againſt it would not be allowed. See 3 *Bro. Chanc. Caſ.* 286.

NOTE LXXXVI. p. 202. (*b*).

1 *Leon.* 16. *ca.* 19. 3 *Leon.* 59. *ca.* 87. *Dyer* 270. b. *ca.* 23. *acc.* But the caſe in 1 *Leon.* 16. was only ſtated by counſel at the bar: That in 3 *Leon.* 59. in C. B. was afterwards adjudged otherwiſe in the King's-Bench, between the ſame parties: See 2 *Leon.* 109. *ca.* 142. That in *Dyer* was denied to be law: See

See 2 *Brownl.* 208. and the caſe in *Moore*, 812. *pl.* 1098. is *contra*.

It is uniformly admitted that if the admiſſion of the copyholder had been on a *ſurrender*, and not merely voluntarily, it would not have been chargeable in either caſe: And it ſhould ſeem that, even in the inſtance of a voluntary grant, the eſtate of the copyholder would be paramount the charge; he being *in* by the cuſtom, and not merely by the act of the lord. See 4 *Co.* 23. b. *Poſt.* 206, 7.

And when we conſider alſo, that the caſes to the contrary have been ſo frequently oppugned, and even denied, we ſhould, perhaps, be warranted in adhering to the opinion of Lord Coke as ſtated in the text; namely, that, even in *voluntary* grants, the copyhold ſhall *not* be charged.

NOTE LXXXVII. p. 209. (*s*).

To conſtitute a legal manor there muſt, of neceſſity, remain *two* free-tenants at leaſt, ſubject to eſcheats:—as a manor cannot exiſt without a court-baron; nor a court-baron without at leaſt two free-ſuitors. See *Co. Litt.* 58.—2 *Roll. Abr.* 121. *Manor.* (——) F. *Kitch.* 4. 3 *Durnf. and Eaſt*, 447. See 2 *Spir. Laws*, b. 28. c. 27. and 42. *Weſt on Peers*, 13. and 1 *Rob. Cha.* V. ſ. 1. p. 368, &c. N. (z).

If there be but *one* free-tenant, yet the ſeigniory, as to him, remains with reſpect to his ſervices, &c. though there can be no court held. 1 *Anderſ.* 257. 2 *Lord Raym.* 864.

And if *all* the tenancies eſcheat, yet it ſhall ſo far continue a manor in contemplation of law as to preſerve the rights of leets, wrecks, &c. *Calth.* 13.

NOTE LXXXVIII. p. 210. (*t*).

These courts are frequently held together and the proceedings entered on one roll. See *Co. Litt.* 58. a. Yet, though ſo generally confounded in practice, they are in themſelves ſeveral and diſtinct. The court-baron is the court of the free-tenants; the cuſtomary, that of the copyholders. The frank-tenants are not the ſuitors of the cuſtomary-court, nor the copyholders of the court-baron. It was the uniform uſage of the northern nations to be tried by their peers:—Shall a copyholder then paſs judgment on a free-tenant? He is not his peer. On the other hand, a frank-tenant has nothing to do with the copyholder: He notices not his acts. The too common practice, therefore, of confounding the free and copyhold tenants on the homage in court, appears open to much objection. They are not the peers of each other:—The copyholder cannot amerce the free-tenant; nor can the free-tenant preſent the acts or death of the copyholder. See *Co. Litt.* 58. 126. b. 4 *Co.* 26. 8 *Co.* 39. b. &c. 3 *Bl. Comm.* 33. ch. 4. *Magna Charta, c.* 14. *F. N. B.* 75. G. 76. D. and note (a). 2 *Wilſ.* 20. 4 *Durnf. and Eaſt*, 446. and 484. *Poſt.* 319, 21. 324.

It is not properly a court-baron where only copyholders are preſent; nor a cuſtomary-court where the ſuitors are only free.—In the court-baron the ſuitors are judges. Shall we call that a court where there is no one to judge? In manors, therefore, where the courts are blended together, the acts of the ſeveral ſuitors ſhould be carefully ſtated and preſerved diſtinct.—In the caſe of Baldwin *v.* Tudge, in 2 *Wilſ.* 20, it was ruled that debt would not lie for an amerciament of a

free-tenant unleſs it appeared ſatisfactorily that the perſons who affeered it were free-tenants alſo; and ſee 4 *Durnf. and Eaſt*, 484.

NOTE LXXXIX. p. 210. (*u*).

In the court-baron the freeholders are judges; and the court ſhould be ſtated to have been held before *them*. *Co. Litt.* 58. 4 *Durnf. and Eaſt*, 446. 484. 2 *Lord Raym.* 862. and ſee 2 *Spir. Laws*, b. 28. c. 27. and 42.

And the ſuitors, before whom it is held, ſhould, regularly, be named.—*Moore*, 75. *pl.* 205. 3 *Leon.* 8.

In the cuſtomary-court the lord, or his ſteward, is judge. *Co. Litt.* 58. a, &c. as before.

The title therefore of the court in the entry on the roll ſhould be carefully attended to:—The court-baron ſhould be ſtated to be held before the ſuitors; and the cuſtomary-court before the lord or his ſteward. When the courts are held together it would be, perhaps, the ſafer way not to mention expreſsly before whom they were held; but to ſtate the perſons preſent generally; and ſo leave it to the law, which will conſider the proper buſineſs of each court to have been tranſacted before the regular judges; (and ſee 1 *Freem.* 525. *ca.* 707.) Thus:

Manor of Fairhurſt. } A Court-Baron and General Cuſtomary-Court of the Right Honourable B. Earl of M. Lord of the Manor of F. aforeſaid, held in and for the ſaid Manor, on Thurſday the —— day of—— in the year of our Lord——

Present:—T. N. Esq. Chief Steward of the said Manor.

A. B.
C. D.
E. F.
&c. } Free-Suitors:—Sworn.

G. H.
I. K.
&c. } Copyhold-Tenants:—Sworn.

O. P. Beadle; &c.

NOTE XC. p. 212. (*w*).

That a manor cannot be created at this day is a position which needs not reference to its support. The creation of manors, in the case of common-persons, seems to have ceased on the passing of the act of *Quia emptores*; and, in the case of tenants *in capite*, by the Stat. 34 *Ed.* III. *c.* 15. See *Wright's Ten.* 158. n. (*p*) and see also *Stu. View of Soc. in Eur.* b. 2. c. 3. s. 2. p. 112.

A person, therefore, cannot increase the number of manors:—but, as the freeholders are independent on the copyholders, and the copyholders on the free, the courts, it is said, may be separated:—The seigniorial rights and privileges are, they say, by this not extended or multiplied; they only exist in the hands of two persons separate and distinct.

But it should seem that, if the lord grant the freehold and inheritance of his copyholds in fee, they must be, in consequence, immediately separated from the manor, (though not indeed to the prejudice of the copyholders who are not parties to the grant, see *ante* 209. (*p*),) as such grantee must hold, by the stat. of *Quia emptores terrarum*, of the lord above:—and, consequently,

conſequently, that the grantor cannot, on ſuch grant, reſerve to himſelf any ſervices or returns. See *Moore*, 143. *pl.* 285. 4 *Durnf. and Eaſt*, 443. See alſo 2 *Ibid.* 705. *Ante*, 209. (*p*). *Poſt.* 224. N. XCVIII. 313. (*l*).

And, as a frank-tenancy in fee cannot now be created to be held of the grantor, ſo neither can a copyhold be granted at this day.—It is eſſential to the very nature of a copyhold that it has been demiſed, or at leaſt demiſable, "from time whereof the memory of man is not to the contrary." So that if it can be ſhown that the premiſes ſo granted were, at any time, not demiſable, ſuch grant cannot be good. See 2 *Durnf. and Eaſt*, 424. Revell *v.* Jodrell; and 705. Townley *v.* Gibſon; and 2 *Wilſ.* 125. Roe *d.* Newman *v.* Newman:—In which latter caſe it was adjudged that a grant of waſte-lands by copy, within time of memory, could not be ſupported;—and ſee *Lord Hale's* note (a) to *F. N. B.* 14. D. 1 *Leon.* 55. *Ca.* 70. *Kitch.* 81. b.

But if lands have been granted by copy for a number of years, as 60 or 80, and it can *not* be ſhown that they were not demiſable before that time, the law will preſume that they were regularly granted; and conſider them as proper copyholds. But in this caſe, as *Calthorpe* ſays, it is not the number of years, but the memory of man, on which their nature as copyhold depends. Such a number of years will create a preſumption: but if it can be ſhown that they were once not demiſable, then ſuch preſumption muſt give place to proof. See *Calth. Readings*, 19. 54, 55.

NOTE XCI. p. 212. (*x*).

See *Bull. N. P.* 107. 1 *Durnf. and Eaſt*, 600. 2 *Eſpin. N. P.* 145—7. 3 *Durnf. and Eaſt*, 169. 1 *Leon.* 100. *ca.* 128. *Com. Dig.* Copyh. (K. 3). *Poſt.* 285. (*p*).

It appears by the laws of *Hoel Dda* that among the Britiſh a proprietor of lands could have let them for a year at his pleaſure, though he could not alien or charge them;—and ſee 1 *Whit. Manch.* c. 8. ſ. 4. p. 377.

NOTE XCII. p. 213. (*y*).

Co. Copyh. ſ. 51. *Cro. Eliz.* 462. 676. 2 *Eſpin. N. P.* 145.

Though a leaſe for ſeveral years without a licence or ſpecial cuſtom is clearly a cauſe of forfeiture, yet the eſtate of the copyholder continues till the lord actually enters, or otherwiſe takes advantage of it as ſuch.—It is not a forfeiture *ipſo facto*;—it is not an abſolute and immediate deſtruction of the tenant's intereſt:—It is only an act for which the lord *may* enter if he pleaſes; but if he does not chooſe to take advantage of it, the tenant's eſtate remains as before. The lord may waive the forfeiture; or if he die without entering, his heir ſhall not enter; nor is the leſſee a diſſeiſor. See 1 *Salk.* 186, 7. *Cro. Jac.* 301. 3 *Durnf. and Eaſt*, 171, 3. *Lex. Cuſt.* 226. ch. 22. *Poſt.* 247. 309. (*x*).

The leaſe therefore may well be conſidered as good as to every one but the lord.

But the great objection to an ejectment being maintainable on ſuch leaſe is, that, as the plaintiff in that action

action must recover by the strength of his own title, and not by the weakness of his adversary's (4 *Burr.* 2487.), he must show a title in himself. Now, should he declare that the premises are copyhold, and that the copyholder made a lease for several years to him, it would be necessary, it is asserted, either to show a licence, or to allege a custom, to warrant such lease; else it would be insupportable from his own statement. (See *Cro. Eliz.* 469. *Moore*, 679. *ca.* 927.) But yet it is elsewhere said (2 *Brownl.* 40.), that the licence need not be mentioned in the declaration; but that the plaintiff ought to give it in evidence on not-guilty pleaded: But if the defendant plead specially, then the plaintiff must plead the licence certainly, in his replication. Again it has been adjudged in other cases (see 1 *Leon.* 100. *ca.* 128.) that the plaintiff need not show that the lease is warranted by the custom; but that that shall come from the other side.

What opinion shall we adopt among such a contrariety of sentiment? What conclusion shall we deduce from *data* so vague? What is to be done when no custom or licence is alleged? Shall the court consider the lease as a common-law lease, and say it is bad upon the plaintiff's own showing? (*Cro. Eliz.* 469.) Or shall it not rather say "We sit not to try the lord's title, but to administer justice between individuals who have not his claim: And, even if execution be had on our decision, there can be no disseisin effected as to any. (See 1 *Burr.* 113.) The lord will not be injured; He is not concluded by a judgment on a suit to which he is not a party: He may yet seize, if he pleases, for a forfeiture." "But to what end," it may be urged, "will you award possession of a term which the lord may defeat the

next hour by his entry?" To this it may be replied: "We know not when the lord may enter, or whether he will enter at all. He may waive the forfeiture, and affirm the leaſe. But, be this as it may, that is his buſineſs; ours is to decide on the caſe now legally before us. He may, it is true, enter and defeat it; and he may alſo make it good, even as to himſelf: in that caſe, our award would not be nugatory. (See *Lex Cuſt.* 212.) We await not his affirmance: The term, as between the parties, has as yet an exiſtence: and it is *their* cauſe, and not *his*, that we are now to decide."—It ſhould ſeem, therefore, that ſuch ejectment *is* maintainable.

NOTE XCIII. p. 216. (*f*).

See 9 *Co.* 75. Combe's caſe. 2 *Veſ.* 679. Mitchell *v.* Neale; and *poſt.* 251, 2.

But a perſon is not compellable to ſurrender by attorney; and therefore, on a covenant to ſurrender on requeſt, the refuſing to execute a letter of attorney to make a ſurrender is no breach. *Cro. Car.* 299.

So a purchaſer is not obliged to accept a ſurrender by attorney where the neceſſity does not appear. See 2 *Veſ.* 679.

And it was ſaid in a note by the reporter of the latter caſe, that, if a perſon be legally conſtituted an attorney, he may act as ſuch notwithſtanding his principal be preſent in court.

NOTE XCIV. p. 218. (*i*).

It is an eſtabliſhed principle that, as to every one but the lord, the admittance ſhall relate to the ſurrender, and operate as from its date. The ſurrender

der is the ſubſtantial part of the conveyance; the admiſſion is now merely a form. The ſurrenderee is *in* by him who made the ſurrender, and not by the lord. *Co. Copyh.* ſ. 41. 3 *Burr.* 1543. 4 *Ibid.* 1961, 2. 5 *Ibid.* 2786. *Poſt.* 218. 257. 288.

Hence, on admiſſion, the meſne acts of the ſurrenderor are defeated.—See *Carth.* 275, 6.

So the meſne acts of the ſurrenderee are effectuated and confirmed. And, therefore, in ejectment he may lay his demiſe between the ſurrender and admittance, (ſee 1 *Durnf. and Eaſt*, 600.); and ſhall, on admiſſion, recover the meſne profits. (See 2 *Wilſ.* 15.)

So the incidents or cuſtomary privileges, or eſtates, derivable out of that of the ſurrenderor are defeated, and attach to that of the ſurrenderee.—If a copyholder therefore ſurrender to the uſe of another and die, and the ſurrenderee be afterwards admitted, the widow of the ſurrenderor ſhall not have her free-bench. See the caſe of Benſon and Scott, *Carthew* 275. 1 *Salk.* 185. 1 *Lev.* 385. and ſee *poſt.* 311. N. CLXIV.

But if the ſurrenderee die before admittance, *his* widow ſhall be endowed, and his heir in by deſcent. See 5 *Burr.* 2764. Vaughan *d.* Atkins *v.* Atkins.

See further, 3 *Burr.* 1543. 4 *Burr.* 1952. *ante* 163. N. LXXV.; and *poſt.* 275. (*p*). 289.

NOTE XCIV.* p. 220. (*r*).

But the lord cannot make a grant of a copyhold to *his own wife*: A man and his wife being but one perſon in law, he cannot convey to her but through the intervention of another. See 2 *Wilſ.* 254.

NOTE

NOTE XCV. p. 220. (*s*).

By the *general cuſtom*, the preſentment ſhould be at the *next* court: To make the preſentment at any other or ſubſequent court, it ſeems that a *ſpecial* cuſtom ſhould be ſhown. See 2 *Veſ.* 302. 602.; and ſee further on this head, *Com. Dig.* Copyh. (F. 11.) *Viner*, Copyh. (U. a) and (X. a); and *poſt.* 278, &c.

But the want of a proper preſentment will, under certain circumſtances, be aided in equity: Of which ſee 2 *Salk.* 449. Taylor *v.* Wheeler. *Viner*, Copyh. (Y. a); and *Com. Dig. ubi ſupra.*

NOTE XCVI. p. 223. (*e*).

The reaſon of this is that the copyhold paſſed as part of the manor: The naming it was merely ſurpluſage. And the granting the inheritance of the copyhold by the lord ſhall not operate to the copyholder's prejudice. See *Cro. Car.* 521. and *ante* 209. (*p*).

But this leaſe is ſuppoſed to be made to a ſtranger; for if the copyholder himſelf take a leaſe of the manor, it would extinguiſh his copyhold. See *Cro. Eliz.* 8. *ca.* 1. 4 *Co.* 31. b. *Moore*, 185. *pl.* 330. and *infra.*

So if the leaſe to the ſtranger be aſſigned to the copyholder. See 2 *Co.* 16. Lane's caſe.

For in theſe caſes the extinguiſhment is the conſequence of his own act.

NOTE XCVII. p. 224. (*b*).

It ſhould ſeem that no admittance is neceſſary in the caſe of a widow on the death of the huſband, and, of conſequence, that no fine can be due; unleſs there be a cuſtom to warrant ſuch admiſſion: and, perhaps, even ſuch a cuſtom would not be allowed; the eſtate of the widow being conſidered as a continuance of that

of

of the husband rather than as a devolution in nature of a descent. In many manors, fines on marriage remained long payable; and, consequently, it was unreasonable to demand another fine on the entry of the widow, as she was by marriage in such cases initiated into the tenancy. See *ante* 12. N. XII. 108. (*i*) and (*k*). *Post.* 289. N. CXXXVI. *Hutton*, 16, 17. *Hob.* 181. 1 *Levintz*, 21. and 172, 3. *Kitch.* 123. a. *Watk. on Desc.* ch. 1. s. 2. p. 53, 4. and notes, 1 *Burr.* 209. 214. *Fisher on Copyh.* ch. 10. p. 87.

NOTE XCVIII. p. 224. (*i*).

See 1 *Salk.* 170. Crowder *v.* Oldfield, and *quære* of that case as there reported; as the copyholder on enfranchisement had ceased to be a customary tenant, for he must afterwards have held of the lord above. (See *ante* 212. N. XC.) and see it differently reported in 2 *Lord Raym.* 1225, and also in *Salk.* 364.

If common, by enfranchisement, be extinct at law, equity will, under certain circumstances, decree its continuance. See the case of Styant *v.* Staker, 2 *Vern.* 250. and further *Com. Dig.* Copyh. (K. 6); *Viner*, Copyh. (K. e); and *post.* 310.

NOTE XCIX. p. 226. (*m*).

The truth is, that all forfeitures are odious in the eye of the law, and therefore it always leans against them. In this case, the copyholder does not deny the right of the lord to the rent; he does not disavow his dependency; he only solicits an indulgence:—If the lord does not choose to accede to it, he may distrain.

This

This therefore cannot amount to a forfeiture. See 1 *Roll. Abr. Copyh.* (C) *pl.* 4. *Moore*, 350. *pl.* 468. and 623. *pl.* 851. *Cro. Eliz.* 505.

NOTE C. p. 230. (*q*).

But without ſuch ſpecial cuſtom the lord can only ſeize *quouſque*. See 1 *Levintz*, 63. 1 *Leon.* 100. *ca.* 128. 3 *Durnf. & Eaſt*, 162. and ſee *Carthew*, 41—5. and *Viner*, Copyh. (N. c); ſee alſo *poſt.* 286 & 287. (*c*).

By the feodal law, when the feud became hereditary, proclamation was made for the heir to make his claim: If he neglected to appear on the third ſummons, the lord was put into poſſeſſion till he did appear: If he appeared within the year, the poſſeſſion was reſtored to him; but if he did not, the feud was abſolutely loſt; and ſee *Wright's Ten.* 196—8. *Dalrymple, F. P.* ch. 3. ſ. 2. p. 47. &c. *Kaims's Traſts*, Tr. V. 2 *Bl. Comm.* ch. 18. p. 278. and *ante* 24. N. XXII.

NOTE CI. p. 231. (*t*).

See 8 *Co.* 101. a. *Cro. Jac.* 101.

Although the heir is not obliged to come in and be admitted till his anceſtor's death has been formally preſented and proclamation regularly made, (of which ſee 3 *Durnf. & Eaſt*, 164. notes,) though he be within the realm, 1 *Leon.* 104. *ca.* 128. 3 *Leon.* 221. *ca.* 294. 4 *Leon.* 31. *ca.* 84. *poſt.* 286. yet it ſhould ſeem that he ſhall be bound, on preſentment and proclamations made, if he leave the kingdom after the deſcent, and before the firſt proclamation; for the point on which theſe caſes turn is, whether, by

by intendment of law, the heir could have had notice of the deſcent and his obligation to be admitted, or not?—And it ſeems that the law will intend that he had knowledge, if he be within the realm at the time of his anceſtor's deceaſe: But if it ſhould be apparent that the heir could not have been informed of ſuch event before his departure, the court would relieve; as in ſuch caſe the preſumption or intendment of law would be rebutted. And it ſhould ſeem that the court would be ſatisfied, even with ſlight grounds, in order to rebut ſuch preſumption; as forfeitures are not to be favoured; and the inclination would be rather for the benefit of the heir at law.

NOTE CII. p. 235. (*b*).

It is clear that the recovery by the tenant for life will not affect the remainders over; but it may be a forfeiture of the life eſtate by ſpecial cuſtom, of which the lord ſhall take advantage and not the remainder-man. (See *ante* 173. (*b*).) But it is ſaid to be no forfeiture even of the life-eſtate, without ſuch ſpecial cuſtom; the lord himſelf being a party to it.

See 1 *Freem.* 192. *pl.* 196. *Viner*, Copyh. (I. c), *pl.* 9. in marg. and *Fiſher on Copyholds*, 96.

NOTE CIII. p. 239. (*i*).

It is now ſettled, that, in caſes where the lord is compellable to admit, and the heirs of the perſon admitted are alſo ſubject to fines on the devolution of the eſtate, a fine muſt not exceed *two* years improved value of the lands, without deducting land-tax, &c. except quit-rents: (See *Dougl.* 724. and notes.)

NOTE

NOTE CIV. p. 239. (*k*).

But where the admiſſion is not compulſory, as in voluntary grants; or in caſes of copyholds for lives, where there is no right of renewal; or where, in caſes of inheritance, the fine is only payable on the admiſſion of the *purchaſer*, whoſe heirs are *not* fineable; an arbitrary fine *will* not be reſtricted, but *may* exceed the two years value. See 1 *Freem.* 496. *pl.* 670. 13 *Co.* 3. 1 *Abr. Caſ. in Eq.* 120. Copyh. (A), *pl.* 15. in marg. (Caſe of Lord Abergavenny *v.* Thomas.)

NOTE CV. p. 241. (*o*).

But not without a ſpecial cuſtom. 1 *Lev.* 263. 2 *Vent.* 38. 2 *Hawk. P. C.* ch. 49. ſ. 7.

If a forfeiture be preſented and the lord ſeize; yet, on the acquittal of the tenant, the forfeiture ſhall be diſcharged, *Godb.* 267. *ca.* 370.; and ſo, if, after conviction, he has his clergy. 1 *Lev.* 263. and next page.

See further of forfeiture for crimes, 2 *Hawk. P. C.* ch. 49. ſ. 7. *Com. Dig.* Copyh. (M. 1.) *Viner*, Copyh. (M. 0.) *Fiſh. on Copyh.* 102.

NOTE CVI. p. 242. (*q*).

A SURRENDEREE, or deviſee (who is properly no other) of a copyhold, who commits a felony and is attainted before admiſſion, ſhall not forfeit his copyhold. 2 *Wilſ.* 13.

But this differs from Packington's caſe: *There* the offender had a legal reverſion, which is a *tenement*, (ſee

(ſee *Dyer*, 137. b. *pl.* 26.); But *here* the perſon attainted had only an equitable intereſt, (ſee *ante* 163. N. LXXV.) on which the cuſtom could not attach.

NOTE CVII. p. 246. (*a*).

See *Co. Copyh.* ſ. 59. *Tratts*, 138. *contra.* See alſo *Lord Raym.* 999.

We may here obſerve that, generally ſpeaking, the acts of one copyholder cannot prejudice the eſtate of another; and therefore the forfeiture of a tenant for life will not deſtroy the remainders over. *Cro. Eliz.* 879. *Poſt.* 250. 305. N. CLVII. See 2 *P. Wms.* 10. note (F).

As to thoſe caſes indeed, where, on grants to ſeveral for lives *ſucceſſivè*, the firſt tenant may diſpoſe of the whole eſtate; it ſeems to hold only where the firſt tenant has the beneficial intereſt in the whole; as it would be manifeſtly unjuſt that one perſon ſhould injure or defeat the property of another; and a cuſtom to enable any one to do ſo would certainly be inſupportable. See 2 *Lord Raym.* 999. *Fiſh. on Copyh.* 15. and *poſt.* 305. N. CLVII.

So the acts of the copyholder alone ſhall not prejudice the lord. See 1 *Salk.* 189.

Nor can thoſe of the lord only prejudice his tenant. 2 *Co.* 17. a. &c.

NOTE CVIII. p. 249. (*f*).

In 1 *Brownl.* 149, 150. the caſe is ſo ſtated by *Yelverton*; but the reporter ſays that *Walter* ſeemed of another opinion, and therefore adds a *quære*, as our author has done.

Indeed

Indeed the doctrine seems justly questionable. The person wrongfully admitted was tenant to the lord; if he then commit a forfeiture, shall the release of the person having right operate to the lord's prejudice? The release is confined to the releasor and releasee; shall the lord then be precluded from exerting his rights by the private agreement of these individuals?

NOTE CIX. p. 250. (*b*).

For the destruction of the estate is thus in consequence of the tenant's own act: And whenever the estate of the tenant is so determined, he is not entitled to his emblements; he can only claim them when his estate is determined by the act of another person, or by the act of God; and this by reason of the uncertainty as to himself: But where the expiration of his estate is certain and known to him, or where he destroys it himself, he shall not have them. In the first case, it was his own folly to sow the lands which he knew he was not to reap; and, in the latter, he must take the consequences of his own conduct.

NOTE CX. p. 250. (*i*).

"So if it were leased." Here seems a dislocation of the text. The passage should, I conceive, have terminated here. The lease alluded to is a lease of the *manor*, and not of the *copyhold*: For the lessee of the copyholder would have been entitled to the emblements. The law, indeed, is otherwise laid down by Lord *Coke* in Oland's case (5 *Co.* 116. a.); but that case is differently given by *Rolle* (1 *Abr.* Emblem. (A), 727. *pl.* 10.), and *Croke* (*Eliz.* 460.); for we are there told, that it was agreed

agreed that the *leſſee* ſhould *have* the emblements, "as the act of the tenant ſhould not prejudice a third perſon:" And ſee 5 *Co.* 85. a. Sir H. Knivett's caſe; and 2 *Bl. Comm.* 123, 4.

If, indeed, the leaſe was itſelf the cauſe of forfeiture, and the lord enter, it might be otherwiſe; as the leſſee himſelf might then be regarded as a *particeps criminis.*

NOTE CXI. p. 250. (*m*).

WHEREVER the lord has power to hold *a court*, the ſteward has power to do ſo likewiſe. It ſhould be held *within* the manor, as it may well be doubted whether the lord can compel the attendance of his tenants out of it. It may in ſome caſes, it is affirmed, be good by cuſtom if held elſewhere; as if a general court be kept for an honour, which includes ſeveral manors. (See *Co. Litt.* 58. a. *Cro. Car.* 367.) And, indeed, it is ſaid that a *cuſtomary court* (for it is acknowledged that it is otherwiſe as to a court-baron, *Co. Litt.* 58. a.) may be held as well without the manor as within, though there be no cuſtom to warrant it. See 1 *Leon.* 288. *ca.* 394. *Cro. Eliz.* 103. *Poſt.* 319. But this muſt be when the tenants voluntarily attend, for it does not appear that they are anywiſe compellable to go out of the manor; as otherwiſe it would be in the power of a lord to make his copyholders travel from Cornwall to Cumberland as often as he ſhould be pleaſed to hold a court.

The lord may admit or grant *out of court* (4 *Co.* 26. b. *Poſt.* 319.); and the ſteward may admit (ſee *Kitch.* 82. b. 1 *Roll. Abr.* 505. Copyh. (V), *pl.* 4. and ſee *poſt.* 251. N. CXII.); and, it ſhould ſeem,

may *grant* (see *Bro. Court-Bar, pl.* 22. and *Ten. p. Copie, pl.* 26. *Cro. Eliz.* 103.) out of court alſo. But it is ſaid that an under ſteward muſt have either a ſpecial authority or cuſtom to enable him even to admit. (See *Bro. ubi ſup.* and *Co. Copyh.* ſ. 46.) *Sed quære*; for may not a deputy-ſteward, properly appointed, do whatever his principal might? (See *Lord Raym.* 659. and 1 *Salk.* 95.)

Now wherever a grant or admittance would be good *out of court*, it ſhould ſeem that it would be good alſo if *out of the manor*; whether made by the lord or his ſteward (ſee 1 *Lord Raym.* 76. *contra*), or a deputy-ſteward (ſee 1 *Salk.* 184.); for, of conſequence, the preſence of the tenants is not neceſſary.

But the preſence of the tenants is abſolutely eſſential to the very exiſtence of A COURT; there cannot be A COURT held without them: But their preſence is not indiſpenſably requiſite to the admiſſion of a new copyholder, as it anciently was to that of a frank-tenant. (See *ante*, 39. N. XXIX.) Each frank-tenant, as *Weſt* (p. 63.) remarks, had originally a negative on every perſon who was propoſed by the lord to be admitted. But this did not hold as to copyhold tenants. The copyholder, if not properly a villein, was removed but little from that order of men, and was, at leaſt, but a tenant ſtrictly at will: He was not to be judged by his fellow-tenants, as the freeholder was; the lord, or his ſteward, was the judge of his court; or if he was ameſnable to a ſuperior one, he was to be tried by freemen, as copyholders could not form a jury at common law. The preſentment of his fellows was not eſſential to give power to the lord to reſume his tenement (ſee *poſt.* 278.); he might

might have ſeized it at his pleaſure whenever he choſe to permit him no longer to hold. From hence then muſt it appear that the ſame reaſons did not apply to the copyhold tenant as did to the free, with reſpect to the admiſſion of a new perſon into the tenancy. Hence the lord, or his ſteward, may admit as well out of court as in; ſince the approbation, or even the teſtimony, of the former tenants is not requiſite. It were, indeed, moſt egregiouſly abſurd to ſuppoſe the concurrence of others to be neceſſary, where the eſtates, equally of themſelves as of the perſon about to be admitted, were abſolutely dependant upon the will of the lord, not only as to their origin, but alſo as to their duration and extent.

The admiſſion, however, of the new tenant out of court ſhould regularly be notified by the lord or his ſteward, at the next court-day, for the information of the tenants. This too was more immediately neceſſary in ancient days; as, in caſe the tenants ſhould have known any objections to the perſon ſo admitted, of which the lord might have been ignorant, they might have informed him of them; from which he might have been induced to reſume the eſtate, as having conferred it on a perſon who was unworthy of the grant. Add to this, that it muſt be regularly inſerted on the court-rolls of the manor; by a copy of which he is to hold.

NOTE CXII. p. 251. (*r*).

A STEWARD may take a ſurrender out of court, and even out of the manor, without a ſpecial cuſtom or authority to do ſo. 1 *Salk.* 184. *Co. Litt.* 59. a. n. (6).

And indeed a cuſtom to the contrary would be void. See 1 *Lord Raym.* 76.

NOTE CXIII. p. 252. (*t*).

When a ſtranger *paſſes* or *conveys* the intereſt of another, it is neceſſary that his power ſo to do ſhould be ſatisfactorily proved; but when he *takes* merely for his benefit, the eſtate will veſt in him, without an *expreſs* conſent. See *poſt.* 285. and *ante,* 216. N. XCIII.

NOTE CXIV. p. 252. (*u*).

So the ſteward or his deputy may take ſuch ſurrender; or either of them may depute or ſubſtitute another to take it. See 1 *Salk.* 95. 1 *Lord Raym.* 658. *Com. Rep.* 84.

NOTE CXV. p. 252. (*x*).

See *poſt.* 273, 4. The ſame words ſpoken out of court will amount to a ſurrender as if ſpoken in court, if ſpoken before a perſon authorized to take a ſurrender out of court (ſee page 253.): But words ſpoken out of court before indifferent perſons, or in common converſation, or in anger, &c. cannot poſſibly amount to a ſurrender of a copyhold.

NOTE CXVI. p. 254. (*y*).

By a ſurrender of a tenant in fee no more of his eſtate paſſes than will ſatisfy the uſes declared: The reſidue will continue in him as of his old eſtate. See 9 *Co.* 107. a. 1 *Brownl.* 181. *Cro. Eliz.* 442. 4 *Co.* 29. b. See alſo *ante,* 195. N. LXXXV.

NOTE

NOTE CXVII. p. 254. (*a*).

BUT *Comyns* concludes from 1 *Roll.* [*Rep.*] 253. that the lord ſhall have it to the uſe of the ſurrenderor See his *Dig.* Copyh. (F.8). *Sed quære:* and ſee 1 *Pr. Wms.* 17. where *Holt*, C. J. ſaid, "If a copyholder ſurrenders to the lord without declaring an uſe, the copyhold extinguiſhes, as on a ſurrender by tenant for life to him in reverſion."

NOTE CXVIII. p. 255. (*e*).

Godb. 269. *ca.* 374. *Supplem. to Co. Copyh. ſ.* 10. *Tratts*, 175. *acc.* though there are caſes to the contrary: yet doubtleſs the legal eſtate did not paſs from the copyholder; and, therefore, it may well be queſtioned whether the law is not as conceived by our Author in his text; and more eſpecially as forfeitures are by no means to be favoured; and ſee *ante*, 235. (*a*); and *poſt.* 338. N. CLXXIX.

NOTE CXIX. p. 255. (*e*).

FOR he was admitted as tenant for *his own life*; and was IN BY THE LORD, and not by *the ſurrenderor*. See the caſe cited, *Cro. Car.* 205.

The admiſſion of the new tenant for *his* life, on the ſurrender of the old one, was the lord's own act. He could not have been compelled to admit him on ſuch terms. The old tenant had an eſtate for *his own* life, and not for the life of another: He could have transferred *that* intereſt, but he could not oblige the lord to grant an intereſt, which might have been of longer continuance. If a tenant for life, of freehold lands,

conveys to another for the life of the grantee, it is a forfeiture of his eſtate. The ſurrender, indeed, is not, in this caſe, a forfeiture, as it only paſſed the intereſt of the ſurrenderee; but he could only nominate a tenant as to that intereſt. Could a copyholder for life ſurrender to another for his life, and the lord be compellable to admit, ſuch eſtate might be protracted for ever: as the tenant, who was withering with age or conſuming with ſickneſs, might ſo introduce into the tenancy a perſon who might poſſibly continue in it for a century to come. See *poſt.* 256, 7. 261, 2. *Co. Litt.* 58. b. n. (5); and 59. b. n. (2).

And, accordingly, we find it declared that a cuſtom for a tenant for life to ſurrender to another for the life of that other, would not be good. *Moore*, 8. *ca.* 27. and next page.

NOTE CXX. p. 257. (*i*).

See *ante*, 255. N. CXIX. When a copyholder ſurrenders his intereſt, or a portion of his intereſt, to the uſe of another, whom he nominates to ſucceed him in the tenancy, the perſon ſo nominated ſhall, when admitted, be *in* by the ſurrenderee. (See *ante*, 218. N. XCIV.) This is merely a transfer of the exiſting intereſt by one individual to another, and the lord is only an inſtrument of conveyance. But on voluntary grants the new tenant muſt be *in* by the lord. He derives no intereſt from his predeceſſor. He cannot therefore be in by him. In the caſe ſtated, where a copyholder for life ſurrenders to another for *his* life, and the lord admits, the new tenant muſt be *in* by the lord. He does not ſucceed to the intereſt of the former tenant; for that was only to continue during ſuch tenant's life; The eſtate to which he is admitted

is

is for his own life; which eſtate was never in the old tenant, but is a new grant from the lord. The old tenant could not transfer what he had not himſelf. The new one, therefore, being in of a different eſtate, cannot be in by him, but by the lord who granted it.

If a tenant for life or in tail ſurrender to a diſſeiſor of a manor to the uſe of another for life or in tail, and the diſſeiſor admit the ſurrenderee, it ſhall not bind the diſſeiſee: But if *A.*, a tenant for life, ſurrender to ſuch diſſeiſor to the uſe of another during the life of *A.*, and the diſſeiſor admit him accordingly, it ſhall bind the diſſeiſee for ever. See 1 *Roll. Abr.* 503. Copyh. (P), *pl.* 4. and 5 *Co. Litt.* 58. b. n. (5).

The reaſon of this is, that, in the firſt inſtances, the admittance would have operated as a new grant; for the perſon admitted would have had an eſtate which was not in the ſurrenderee, and conſequently could have been derived only from the lord. In the latter, it was merely a transfer of the old tenant's intereſt; where the diſſeiſor was no more than an inſtrument: And where the diſſeiſor is only an inſtrument of conveyance, his acts will bind the diſſeiſee: But in the caſe of voluntary grants they will not do ſo. See *ante*, 198.

NOTE CXXI. p. 259. (*n*).

It was obſerved by *Holt*, C. J. (1 *Pr. Wms.* 17.) that "the reſolution in 2 *Roll. Abr.* 67. (Grants, *pl.* 18.) *was founded upon the cuſtom of the manor*, which was that a perſon named after the *Habendum* ſhould take the eſtate limited to him." And in *Cro. Jac.* 434. we find it alleged, as one ground of the judg-

ment, that "in many manors there were no other forms of grant or limitation."

In *Rolle* too, a diſtinction is taken between ſuch a limitation on an admiſſion in conſequence of a ſurrender, and on a voluntary grant:—In the one inſtance it is ſaid to enure by way of explanation of the ſurrender; and in ſuch caſe the form of the grant is not material: But that in the other the eſtate paſſes ſolely by the grant, and there is no ſurrender to direct it, or to guide the conſtruction. See *pl.* 18, 19. and 23.

NOTE CXXII. p. 263. (*u*).

THE freehold of lands held by copy is in the lord, and therefore *quære* whether the rule, that a contingent remainder muſt veſt during the continuance of the particular eſtate, or *eo inſtanti* that it determines, extends to copyholds. See 3 *Atk.* 13. and ſee alſo 1 *Atk.* 590. *Caſes Temp. Talb.* 151. 1 *Fearne*, 427—449. and *ante*, 98. (*y*); and *poſt.* 303. (*m*).

NOTE CXXIII. p. 266. (*y*).

SEE *ante*, 173. (*b*). And note the difference between a *Civil* and a *Natural* death. See 2 *Co.* 48. b. *Co. Litt.* 132. a. 2 *Bl. Comm.* 121. and 4 *Ibid.* 380, 1. and 3 *Lev.* 94.

As, for inſtance, if a copyhold be granted to *A.* for life, with remainder to *B.* in fee, and *A.* commit waſte; the lord may enter, and retain the lands till *A.*'s natural death. But if *A.*, inſtead of committing waſte, be ſuppoſed to be outlawed for a capital crime, he would be dead in law; and, conſequently, *B.*'s eſtate would, it ſhould ſeem, come into poſſeſſion, in caſe *A.*'s eſtate was not expreſsly limited to him for his natural life. See the books as cited above.

NOTE

NOTE CXXIV. p. 271. (*f*).

THE caſe alluded to (Pawſey *v.* Lowdell) differs from Archer's caſe in this:—In the caſe of Archer, the limitation was "to the heirs male of the body of ſuch heir male;" ſo that the inheritance was by expreſs words, as our Author ſays, given *to the iſſue*; and ſuch iſſue was made the root of a new inheritance; the ſtock of a new deſcent. See *Harg. Law Tracts*, 506. &c. 1 *Fearne*, 229. *Watk. on Deſ.* ch. 5. p. 170.

In that of Pawſey *v.* Lowdell, it was to *B.* for life, and, after his death, to the heir of his body begotten, for ever; where the word "heir" was deemed *nomen collectivum*; and, conſequently, according to the rule in Shelly's caſe, the limitation veſted in the anceſtor, and the heir was in by deſcent. The heirs were confined, by the firſt part of the limitation, to thoſe of the body; but then the words "for ever" were added: But thoſe words do not ſeem (as noticed above, 270. (*e*),) to have the conſequence our Author ſo repeatedly inſiſts on.

NOTE CXXV. p. 272. (*g*).

THE particular eſtate being confined to the wife, and the limitation over being to the heirs of the bodies of both huſband *and* wife, the eſtate-tail was not executed; but the heirs of the bodies of huſband and wife took by purchaſe. See *ante*, 269. (*b*); and ſee the caſe of Frogmorton *d.* Robinſon *v.* Wharrey, 2 *Bl. Rep.* 728. and 3 *Wilſ.* 125. and 144. 1 *Fearne*, 43, &c. and *Co. Litt.* 26. a. n. (3); and 219. a. n. (3).

NOTE

NOTE CXXVI. p. 272. (*b*).

If the husband dies first, the fee will undoubtedly descend to his eldest son;—But then, on the death of the wife, such son would be the heir of *both* their bodies; and would, consequently, take the remainder in tail:—and such estate-tail would not be merged in the fee. (*Plowd.* 296. b.) If the wife, indeed, dies first, the remainder would be destroyed; as there could be no heir of *both* their bodies till the death of both; and, consequently, no one to take the remainder when it ought to vest.

NOTE CXXVII. p. 272. (*i*).

The distinction taken by Coke was when the surrenderee took a particular estate himself, and when not (and see *Kitch.* 86. a. 88. a. and b.): And such distinction has been recognized in the case of Roe *v.* Quartley (1 *Durnf. and East*, 634.): Yet it is questioned by our Author; and also by Mr. *Fearne* (*Conting. Rem.* 86. 4th *ed.*).

Indeed a similar distinction was once, it seems, held as to freeholds (see *Dyer*, 134. a. *pl.* 7. &c. and *Hob.* 31.); but has been now long exploded (see 3 *Lev.* 406. *Salk.* 591. 2 *Pr. Wms.* 138.—in which latter book, the case in *Hobart* was denied to be law): And, as it is now settled that the surrenderor of a copyhold taking the ultimate limitation is in of his *old* estate (see 4 *Burr.* 1952. 1 *Str.* 487. 2 *Bl. Rep.* 1046. 1 *Fearne*, 86. &c.); it should seem also that the case of Allen and Palmer, which our Author cites, is (notwithstanding its recognition in that of Roe and Quartley) not now law.

NOTE

NOTE CXXVIII. p. 277. (*w*).

With the conſent of her huſband; but not without. 2 *Wilſ.* 1. See *poſt*, 322. N. CLXVI.

For as the huſband becomes, on marriage, ſeiſed in her right, it ſhould ſeem therefore unreaſonable to ſuffer the wife to deprive him of his intereſt without his conſent; and ſee *ante*, 256.

But if ſhe ſurrender, in his preſence, it ſeems to be ſufficient, though he does not join; his conſent being, in ſuch caſe, apparent. See 1 *Veſ.* 229.

So it ſhould ſeem that where a wife has a copyhold to her ſeparate uſe, ſhe may ſurrender it without the concurrence of her huſband: For here the reaſon fails. *Sed quære*; and ſee 2 *Brow. Chanc. Caſ.* 377; and ſee alſo 3 *Ibid.* 8. and 1 *Veſ.* 303. 518.

NOTE CXXIX. p. 281. (*d*).

So if the lord wrongfully ſeize the copyhold of his tenant, and grant it to a ſtranger in fee, and the grantee die ſeiſed; yet the firſt copyholder, or his heir, may enter upon the heir of the wrongful tenant, and ſurrender to the uſe of a ſtranger. See *Cro. Jac.* 36. *pl.* 10.

So if an infant ſurrender, and the ſurrenderee be admitted, yet the infant, when of full age, may enter upon him. *Moore*, 597. *pl.* 814; and ſee 1 *Leon.* 95. *ca.* 124.

NOTE CXXX. p. 283. (*g*).

See *ante*, 163. N. LXXV. 275. 281, 2. *Co. Litt.* 60. a. n. (2). *Co. Copyh.* ſ. 39. 1 *Brownl.* 143.

and

and *quære* as to this; for the books are contradictory. But it ſhould ſeem from the principle of the thing, that the admiſſion of the firſt ſurrenderee *would* be implied. The firſt ſurrenderee, indeed, having no legal intereſt in the premiſes, could not compel the lord to accept a ſurrender from him, without a previous admiſſion: Yet if he choſe to accept it, why may he not do ſo? Neither party is injured: The forms are ſatisfied, or waived by him who only is intereſted. And on the ſecond ſurrenderee being admitted, the law, it ſhould ſeem, would not ſuffer the right of the firſt ſurrenderee to be queſtioned, and the whole title unravelled.

NOTE CXXXI. p. 285. (o).

The intereſt of I. S. was aſſignable. See *ante*, 163. N. LXXV. and 2 *Durnf. and Eaſt*, 484.

So, I. S. might have *releaſed* to I. N. on his admittance. See *ante*, 157. N. LXIX. 192, 3.

Yet *quære*, as our Author ſays, whether ſuch aſſignment or releaſe would be good by *parol*. For though the ſtat. 29 *Car.* 2. c. 3. does not extend, by expreſs exception, to copyhold or cuſtomary intereſts, yet would a *right*, or intereſt of this kind, paſs at common-law without *deed*?

NOTE CXXXII. p. 286. (q).

See *ante* 162. N. LXXIV. And *quære*, as the heir was not neceſſitated to claim admittance till proclamation made (*infra*). If he does not come in on the cuſtomary proclamations, the lord may ſeize:—If the lord does not ſeize, it is his own fault; and the eſtate of the heir cannot, I think, be conſidered as deveſted by reaſon of circumſtances like theſe.

NOTE CXXXIII. p. 287. (*t*).

But if a perſon ſurrender out of court for a *valuable* conſideration, he cannot revoke it, though before preſentment. See *Co. Copyh.* ſ. 39. *Tracts*, 88. *Kitch.* 82.

NOTE CXXXIV. p. 287. (*u*).

Kitchin ſays that it may be revoked at any time before *admiſſion*; and adds, "*Et c. pluis toſt eſt usè, et eſtoit ove reaſon: Et iſſint eſt le ley come ſemble a moy.*"—82. a.

NOTE CXXXV. p. 287. (*w*).

This can only be where the delay of admiſſion is occaſioned by the heir; as if the lord make proclamation for him to come in and be admitted, and the heir does not do ſo before the third proclamation be made: Here the law perhaps would permit the lord to avow on him by reaſon of the length of time now uſual between the death of the anceſtor and the third proclamation, as courts at this day are ſo ſeldom held; and the lord manifeſts his intention to admit him when he ſhall come and requeſt it. But if the delay be occaſioned by the lord himſelf, the avowing on the heir for rents or ſervices would, I conceive, be tantamount to an admiſſion in itſelf; as it would certainly be acknowledging him as tenant. In the former caſe, the law would not perhaps ſuffer the heir to avail himſelf of the avowal as an admittance; when it was the effect of his own neglect or refuſal: Yet, even in that caſe, there would be field for doubt, as the lord might have held his court oftener if he pleaſed. See *Co. Copyh.* ſ. 31. *Tracts*, 50; and *ante*, 282. (*f*).

NOTE

NOTE CXXXVI. p. 289. (*f*).

See *poſt.* 291. N. CXXXIX. and 333. *Dyer*, 251. *pl.* 90. *Co. Copyh.* ſ. 56. *Tratts*, 129. *acc.*

The approbation of the lord was originally neceſſary to enable the feme to marry; whence a fine was generally paid on that event. (See *Co. Litt.* 117. b. 139. b. 140. a. *Sulliv.* lect. xxiv. p. 227.) Such approbation was equivalent to an admiſſion of the huſband into the tenancy. See *ante*, 12. N. XII. 108. (*i* and *k*); 224. N. XCVII. The huſband from thence became ſeiſed or poſſeſſed in right of marriage, and was to do the ſervices to the lord. (See *Calth.* 52. *Cro. Eliz.* 149. *pl.* 18.) From theſe principles it ſhould ſeem to follow that when once a perſon became fixed in the tenancy by marriage, no admiſſion could be afterwards neceſſary. See *ante*, 224. N. XCVII.

NOTE CXXXVII. p. 290. (*b*).

It is now ſettled that executors muſt be admitted and pay their fine. See 1 *Burr.* 206. Earl of Bath *v.* Abney.

NOTE CXXXVIII. p. 290. (*i*).

See *Com. Rep.* 245. and 2 *Wilſ.* 14. And *quære* of the aſſertion there noticed, as the lord might have been compelled to admit by *mandamus*. See *ante*, 157. N. LXXII.

But it is ſaid that if the lord accept a ſurrender, and the ſurrenderee enter in conſequence, and afterwards the lord ouſt him before admittance, an action would lie againſt the lord; becauſe he ſhall not take advantage

advantage of his own wrong. 2 *Wilſ.* 15. There does not, as this caſe is put, appear any title in the lord to enter; his tenancy is full; the ſurrenderor continues tenant to him. The ſurrenderee entered with the conſent of the ſurrenderor, he is not therefore a treſpaſſer as to him; he muſt be conſidered at leaſt as his tenant at will, and therefore no diſſeiſor of the lord. The lord is not injured by his occupancy; he is compellable to admit him; and in the mean time the ſurrenderor is anſwerable for the fruits of the tenancy. The lord can have no more right to enter and ouſt the tenant at will of his copyholder, than to expulſe the copyholder himſelf: If he does ſo, he would, I conceive, in either caſe, be ſubject to an action as here ſtated. See *ante*, 157. (*o*).

NOTE CXXXIX. p. 291. (*m*).

THE heir may enter and leaſe before admiſſion (ſee *ante*, 162. (*z*); 285. (*p*); and it ſhould ſeem that of conſequence the huſband of the heireſs might do ſo. (See *ante*, 289. N. CXXXVI.) But it muſt be here underſtood of a leaſe which is warranted by the cuſtom *without* licence; for if the lord grant the huſband ſuch licence, it might amount to an admittance, and ſo be without the intent of the caſe.

NOTE CXL. p. 291. (*n*).

DEBT or *indebitatus aſſumpſit* will lie for a fine. See *Dougl.* 727. and notes. 3 *Burr.* 1717. and *poſt.* 308. (*w*).

And ſuch action is not within the ſtatute of limitations. See *ante*, 178.

NOTE

NOTE CXLI. p. 292. (p).

The lord cannot compel the heir to accept the copyhold; he can only make proclamation for him to come in and be admitted; and if he do not claim within the time prescribed by the law or custom, he may seize the lands: And see the case of Clayton v. Cookes, 2 *Atk.* 449. and also 3 *Pr. Wms.* 151.

In some manors, where the custom is for lands to descend after the manner of gavelkind, it often occurs in practice that the heir will not accept his portion, as not being worth the fines and fees: The estate becomes at length so divided and subdivided as to be frequently frittered into trifles, and the share of the individual unworthy of acceptance under the accustomed dues.

If the heir declines admission, there can of necessity be no fine payable to the lord; since admission is the cause of the fine. See *ante*, 218.

Without entering into the controversy whether copyholders were, or were not, originally *villeins* (see *ante*, 156. N. LXVII.); yet we may here observe, that persons of that order of men were once in so abject a slavery, even in this island, and that long after the Norman æra, as to hold lands absolutely at the will of their lord, without the power of quitting them but by his permission. See 1 *Bl. Law Tracts*, 119. &c. 2 *Bl. Comm.* 93. ch. 6. and see also *Sir Tho. Smith's Commonwealth*, b. 3. c. 10.

There were others who were not quite so dependent upon the will of their masters, but, though they held at their will, could relinquish their lands if they chose to do so. *Ibid.* and see *Stuart's Diss.* p. 5. s. 2. p. 283.

There

There was yet a third claſs who enjoyed greater privileges, and who could not have been amoved from their tenancies while they performed their ſervices and returns. 1 *Bl. Tracts*, 122, &c.

NOTE CXLII. p. 292. (*q*).

For otherwiſe the lords might alien as often as they pleaſed, and ſo oppreſs the tenants by the multitude of fines. See *Co. Litt.* 59. b. and the caſe of the Duke of Somerſet *v.* France *& al.* 1 *Strange*, 654.

The cuſtom can therefore be only ſupported when the change of the lord is by the act of God.

NOTE CXLIII. p. 292. (*r*).

It ſhould ſeem that no fine whatever can be due from the copyholder of common right. It appears, even on admiſſion, to be dependant upon cuſtom. In many manors there is no fine due on the admiſſion of an heir-at-law. See 3 *Durnf. and Eaſt*, 162. *Kitch.* 103. b. *Dougl.* 725, &c. 1 *Freem.* 496. *pl.* 670.

NOTE CXLIV. p. 293. (*t*).

It ſhould ſeem from the reaſon of the thing, that an infant became capable of forfeiting when he was out of ward. At that time he was neceſſarily ſuppoſed able to govern for himſelf, and therefore amenable for his acts. *Sir Edw. Coke* ſays (*Copyh.* f. 59.), "An infant, that is under the age of fourteen, is unable to forfeit his copyhold, becauſe he wanteth diſcretion (ſee *Litt.* f. 59.); and, till then, he is to be in ward to the next of his kindred," &c. Till the age of fourteen, therefore, the management of his

lands was in others, whose acts could not prejudice him, nor be presumed to do injury to the lord. At fourteen he took upon himself the government of the tenements; and, of consequence, one would presume, became responsible for his acts.

But though the infant copyholder, or tenant in soccage, was out of ward at fourteen; the person who held in chivalry continued under his guardian till twenty-one. (See the *Introd.* xvii. and p. 439, &c.) Responsibility, therefore, did not attach on the military tenant till one-and-twenty. The law at length extended the age of responsibility to twenty-one, in the case of all infants. Hence there came a chasm or vacuum in the instances of tenants in soccage, and of copyholders: At fourteen they had the direction of their lands, and yet were not amesnable for their acts till seven years afterwards! From causes how remote do circumstances of the first importance arise! Who could have conceived that such would have been the effect of a change of armour!

The tenant of lands held by copy, after attaining fourteen, makes a lease not warranted by the custom: What is the lord to do?—Shall he enter as for a forfeiture?—The law says, an infant under twenty-one is not bound by such lease: He may, at least, avoid it when of age. But it would be replied, Is it not a lease till he does avoid it?—Our author therefore says, That it seems the lord may enter, as for a forfeiture, during the nonage, and hold till the infant disaffirm the lease. But it should seem, from the observation of *Lord Mansfield*, in the case of Zouch *d.* Abbot *v.* Parsons (3 *Burr.* 1807, 8.), that as, in case the lease here made by the infant should be deemed good till avoidance, the estate would be subject to forfeiture; such

ſuch leaſe ſhould be conſidered, not as *voidable* only, but as abſolutely void *ab initio*. And it ſhould therefore ſeem, that the lord cannot be juſtified in entering at all.

As the privilege of the infant of avoiding or affirming his acts when of age, is given him by the law for *his benefit*, it muſt be evident that the reaſoning of *Lord Manſfield* was juſt. There could be no advantage to the infant in conſidering this leaſe as voidable only, and ſo preſerving an option when of age. Should he affirm the leaſe, it would immediately be a forfeiture of his copyhold; and the lord would have nothing to do but to retain the lands. If, therefore, there could be no benefit from affirming the leaſe, where is the utility of his option? If his only advantage would be in its avoidance, why ſhould the law not conſider it as *void?* Its only reaſon for deeming a leaſe voidable is for the benefit it may yield to the infant, but here no benefit can ariſe.

NOTE CXLV. p. 294. (*u*).

It can only be done without eventually; *i. e.* in caſe the lord refuſe the condition ſtipulated. An option is given him; he may accept the ten years rent, and ſo grant his licence.

NOTE CXLVI. p. 295. (*w*).

But the poſition, that a ſurrender is to be conſtrued liberally; and not as a deed; was denied by *Holt*, C. J. who ſaid that the opinion in *Popham* was of no authority; for it is among the additional caſes, and not reported by *Popham* himſelf; and there is no mention made of it in the report of the ſame caſe, in

Cro. Jac. 434. See 1 *P. Wms.* 16. Fiſher and Wigg.

It was held, in the caſe of Fiſher and Wigg (1 *P. Wms.* 14. 1 *Lord Raym.* 622. 2 *Veſ.* 257.), by two juſtices (Turton and Gould) againſt *Holt*, C. J. that a ſurrender ſhould be conſtrued favourably, and not ſtrictly as a deed at common law. And *Lord Hardwicke*, in the caſe of Rigden and Vallier, expreſſed a greater ſatisfaction with the arguments of the two juſtices, than with thoſe of *Lord Holt* (ſee 3 *Atk.* 734. 2 *Veſ.* 256, 7. See alſo 1 *Wilſ.* 341. and *Cowp.* 660.): Though he ſeemed, in that of Lovell *v.* Lovell (3 *Atk.* 11.), to be of *Lord Holt*'s opinion, that a ſurrender ſhould be conſtrued as a deed: But, in the caſe of Rigden *v.* Vallier, he made a diſtinction between words of *limitation*, and words of *regulation* or *modification* of the eſtate. See 2 *Veſ.* 257. 3 *Atk.* 734.

The principle of Fiſher and Wigg has been recognized in later caſes (ſee *Cowp.* 660. and 1 *Wilſ.* 341.); though that in Idle *v.* Cooke, is directly oppoſite: Which was, that a ſurrender ſhould be taken as a deed. (1 *Pr. Wms.* 70. 1 *Salk.* 620. 2 *Lord Raym.* 1144; and ſee 2 *Atk.* 101. where it was adopted by *Wright*, J.)

In the caſe of Wright *d.* Burrell *v.* Kemp (3 *Durnf.* and *Eaſt*, 470.), *Lord Kenyon* ſaid, "There is no doubt but that a ſurrender is conſidered as a common law conveyance, and is not entitled to the ſame favourable conſtruction as a will: And, therefore, unleſs the ſurrenderor has uſed the language which will confer a legal eſtate, it cannot be conferred. In deeds, certain legal phraſes muſt be uſed in order to create certain eſtates,—as the word "heirs"

to

to create a fee,—and "heirs of the body" to create an eſtate tail: But, beyond that, I would ſay, with *Lord Hardwicke*, that there is no magic in particular words, further than as they ſhew the intention of the parties." And *Aſhburſt*, J. ſaid, "The intention of the ſurrenderor muſt prevail, unleſs it is contrary to any rule of law: We muſt collect the intention of the parties in deeds as well as in wills; to give effect to which, the word *or* may, in both caſes, be equally conſtrued into *and*." And, accordingly, in the principal caſe, the court conſtrued the word *or* into *and*, in order to effectuate the intention of the ſurrenderor.

And thus the law appears to be ſettled upon very rational grounds; and the queſtion, on which there ſeems to have been ſuch a contrariety of opinion, to be now at reſt.

NOTE CXLVII. p. 295. (*x*).

Quære, Is not a leaſe made *with* licence for ſeveral years, as much an eſtate at common-law as a leaſe for one year without licence? See 3 *Leon.* 69. *pl.* 106. *Bull. N. P.* 107.

NOTE CXLVIII. p. 296. (*y*).

And if a leaſe be *with* licence, it may be as well in the hands of creditors as in the leſſee's hands; as ſuch leaſe may be legally aſſigned *ad infinitum*, without any new licence. See *poſt.* 299.

NOTE CXLIX. p. 296. (*y**).

Quære, Whether a leaſe with licence may not be extended, for the reaſons given in the preceding

notes? Copyhold lands in general are not extendible, as otherwiſe a new tenant would be introduced without the conſent of the lord: But, in this caſe, where the leaſe may be aſſigned without licence, and where the leſſor continues tenant to the lord in whoſe hands ſoever the term may chance to be, does not the reaſon againſt extending them fail? But ſee *poſt.* 327. *contra*, where *Rolle* is cited. (See 1 *Roll. Abr.* 888. Execution (M), *pl.* 3.)

NOTE CL. p. 298. (z).

See the ſtatute 4 *Geo.* 2. c. 28. ſ. 5. which gives to "all and every perſon and perſons, bodies politic and corporate, the like remedy by diſtreſs and ſale in caſes of rent-ſeck, rents of aſſize, and chief-rents, payable within the time therein ſpecified or thereafter to be created, as in rent reſerved on leaſe." As this ſtatute enacts ſo generally, that ALL perſons ſhall have the power to diſtrain in caſe of rents-ſeck, without any qualification whatever, without alluding to any particular kind of property out of which ſuch rents-ſeck were to iſſue, without referring to the queſtionable words, "lands, tenements, and hereditaments;" and, more eſpecially as it is a remedial law, it ſhould ſeem that copyholds are equally within its influence as freeholds are.

But note, copyholds were not within the ſtatute 32 *Hen.* 8. c. 37. empowering executors to diſtrain. See *Bull. N. P.* 55—7. 2 *Eſpin. N. P.* 19—23.

NOTE CLI. p. 299. (a).

The reaſon is that the licence is abſolutely at an end on the alienation of the manor; for it was only a

perſonal

perſonal diſpenſation (*ante*, 203.): But the *leaſe* is not affected by ſuch alienation, ſince it is equally binding in whoſe hands ſoever the manor may be. If the leſſee's felling of timber, or licenſing his tenant ſo to do, was no forfeiture *before* ſuch alienation, it could not poſſibly be ſo *after* it, as his intereſt and powers continued exactly the ſame.

NOTE CLII. p. 299. (*b*).

SEE *Cro. Eliz.* 462. *pl.* 8. *acc.* But it is ſaid that ſuch licence may be on a condition *precedent*; becauſe, in that caſe, it does not properly operate as a licence till the condition be performed. See 6 *Viner*, Copyh. (N. e), *pl.* 1. in margin, cites *Popham*, 105, 6.

NOTE CLIII. p. 299. (*c*).

THAT ſuch licence would be good againſt the lord, ſee *Hutt.* 101, 2; and ſee *Viner*, Copyh. (N. e), *pl.* 5. and margin.

So, in caſe the copyholder had forfeited or ſurrendered, the leaſe would have bound the lord. See *Hutt.* and *Viner*, as above.

And theſe caſes are with reaſon: For if the leaſe be made *with* licence, which is the act of the lord, why ſhould he not be bound? And would it not, in the other caſes, be unjuſt that the copyholder ſhould, by his own act, deſtroy the eſtate he had granted? Hence it is ſaid in *Hutton*, that a cuſtom to defeat the term by the copyholder's ſurrendering up his eſtate, would not be good.

If a freeholder makes a leaſe for years, and dies without heir, the leaſe ſhall bind the lord who takes

by eſcheat. *F. N. B.* 198. F. 221. B. 8 *Co.* 45. a. and *ante*, 34. (*b*).

NOTE CLIV. p. 300. (*d*).

But it has been ſince determined, that, by a grant of the freehold, the copyhold, though entailed, would be extinguiſhed. 3 *Pr. Wms.* 9. Dunn *v.* Green.

NOTE CLV. p. 301. (*b*).

But *quære* of this? as ſuch deed of releaſe would, it ſhould ſeem, be conſidered as a ſurrender, and operate as ſuch. See *Touchſt.* 82. 306. *Bull. N. P.* 111. *Cro. Jac.* 696. *pl.* 9. 2 *Roll. Abr.* 494. Surrender (C), *pl.* 1. (G) and (H); and caſe of Goodtitle *d.* Edwards *v.* Bailey, *Cowp.* 597; and *poſt.* 311, 12.

NOTE CLVI. p. 302. (*i*).

The caſe in *Hutton* is that of Blemmerhaſſet *v.* Humberſtone (p. 65.); and there is a confuſion in that report: In the firſt part of the caſe it is ſaid to have been reſolved, that the copyhold *was* extinguiſhed; and at the end, that it was agreed that the copyhold was *not* extinct, but that the lord might grant it again *de novo*. See *Sir Will. Jones*, 41. *pl.* 2.

The truth ſeems to be, that by the bargain and ſale the copyholder's eſtate was determined, was relinquiſhed or returned to the lord; but that the nature of the copyhold was not changed by ſuch bargain and ſale, ſo that it might again be granted by copy, as its demiſable properties were not deſtroyed. See 4 *Co.* 31. a. Frenche's caſe. 1 *Roll. Abr.* 498.

Copyh.

Copyh. (B), *pl.* 2. *Cro. Car.* 521; and ſee alſo *Dougl.* 710, 720.

NOTE CLVII. p. 305. (*n*).

See *ante*, 246. N. CVII. 265. (*x*).

In ſome manors there is a cuſtom for the perſon firſt named in grants for lives to defeat the eſtate of thoſe in remainder. See *Lord Raym.* 999.

Quære, Whether the acceptance of an eſtate by livery, by the firſt taker, would not defeat them in ſuch caſe. *Sed vide Raym. ubi ſupra*, and *ante*, 246. N. CVII.

NOTE CLVIII. p. 305. (*o*).

Rolle ſpeaks of this more dubiouſly: He introduces it with an "*uncore ſemble.*" (*Diſtreſs* (I), *pl.* 32.) Yet he ſays (*pl.* 33.), it is *clear* that he could not diſtrain the beaſts of the copyholder had the rent been by grant, or anywiſe except by preſcription; and ſee *poſt.* 328.

NOTE CLIX. p. 307. (*q*).

In *Leonard* it is ſaid, *per curiam*, that he was tenant at will, and not a diſſeiſor of the copyholder who had the land by deſcent; becauſe he came in with the approbation of the lord. (3 *Leon.* 210. *ca.* 274.) He could not have been a diſſeiſor of the lord for the reaſon alleged: And a copyholder, not having the freehold in him, cannot properly be ſaid to be diſſeiſed.

And it ſhould ſeem that the heir of the copyholder who died ſeiſed might have juſtified entering on him who was wrongfully admitted, or even on his heir; for the

the dying ſeiſed of a copyhold will not toll an entry. See *Cro. Jac.* 36. *pl.* 10. and *ante*, 281. N. CXXIX.

NOTE CLX. p. 308. (*s*).

If there be *no* cuſtom, it is ſaid that the guardian in ſoccage ſhall have the copyhold lands of the infant. See *ante*, 293. N. CXLIV. 2 *Roll Abr.* 40. *Gardien* (P), *pl.* 1. *Harg.* n. (13) to *Co. Litt.* 89. a. *Poſt.* 329; and ſee alſo 2 *Veſ.* 303.

See now too the ſtat. 9 *Geo.* c. 29, of infant copyholders; and 3 *Burr.* 1717.

NOTE CLXI. p. 308. (*t*).

I. e. To his own uſe without account. See the caſes cited in the margin. This is upon the principle, that, as the infant is incapable of doing the ſervices, the lord ſhould take the profits in order to find others to do them. See the *Introd.* xvii. *Watkins on the King's title as guardian of the Duchy of Cornwall. Carthew.* 45. and *ante*, 230, 1. 442, 3. N. C. CI.

So, the guardian in Chivalry took the profits to his own uſe, ſubject to the bare maintenance of the ward: See *Sulliv.* lect. XII. p. 123. *Harg.* n. (11) to *Co. Litt.* 88. a. It was otherwiſe as to a guardian in ſoccage; for he was accountable to the infant when of age. See *Litt.* ſ. 123; and *Co. Litt.* 89. a. And it ſhould be remembered, that, as the lord has the cuſtody of the infant only *by cuſtom*, that cuſtom muſt be ſtrictly purſued.

NOTE CLXII. p. 310. (*a*).

See *Lex Cuſt.* ch. 35. p. 323, &c. which cites Dyer *v.* Dyer, 44 *Eliz.*

A bill

A bill will not lie in equity for an individual copyholder to be relieved againſt an exceſſive fine; it being the province of a jury at common-law to determine as to the reaſonableneſs of it. But, in order to avoid a multiplicity of ſuits, a bill may be brought to ſettle a *general* fine, payable by all the copyholders of a manor. See *3 Pr. Wms.* 155. Cowper *v.* Clerk.

NOTE CLXIII. p. 310. (*b*).

EQUITY will not relieve againſt a voluntary forfeiture, nor unleſs a compenſation can be made to the lord: See the caſe of Sir H. Peachy *v.* Duke of Somerſet. *Preced. in Chanc.* 566. 1 *Stra.* 447. S. C. 6 *Viner*, Copyh. (D.e), *pl.* 9. S.C. and *Ibid.* (E.d).

Or in caſes where the act of the tenant is in itſelf indifferent, though amounting to a forfeiture at law; as in the caſe of a quaker refuſing to take the *oath* of fealty, &c. See *Preced. in Chanc.* 574. and *Viner*, Copyh. (E. d), *pl.* 8.

NOTE CLXIV. p. 311. (*g*).

DOWER at common law is of thoſe lands of which the huſband was ſolely ſeiſed of an eſtate of freehold and inheritance *at any time during the coverture*: (*Litt.* ſ. 36.) So of dower in gavelkind-lands by the cuſtom of Kent. (See *Robinſ. Gavelk.* b. 2. c. 2. p. 172.) But a widow can only claim her free-bench of copyhold-lands when her huſband *dies ſeiſed.* See *Carth.* 275. 2. *Veſ.* 633. and 638. 2 *Atk.* 526. *Cowp.* 481. *Poſt.* 321, &c.

NOTE

NOTE CLXV. p. 322. (*y*).

COPYHOLDS are neither within the ſtat. of *Hen.* 8. or *Car.* 2. as to *Wills*. They paſs by the ſurrender; and the will is no more than a teſtamentary declaration of the uſes on ſuch ſurrender; and it will operate as ſuch though not atteſted by any witneſſes. See *Harg.* n. (1) and (3) to *Co. Litt.* 111. b. and 2 *Atk.* 37. Tuffnell *v.* Page, and 1 *Veſ.* 225. *acc.*

NOTE CLXVI. p. 322. (*z*).

THAT ſuch a cuſtom is good, ſee 2 *Brownl.* 218. *Godbolt. ca.* 22. *Moore*, 123. *ca.* 268. and ſee alſo 3 *Leon.* 81. *ca.* 122. and *Brooke, Deviſe*, 34. See 4 *Co.* 61. a. and b. *contra*; and *Co. Copyh.* ſ. 35. *Traſts*, 79. *dub.* And ſee the caſe of Taylor *v.* Philips, 1 *Veſ.* 229. in which *Lord Hardwicke* ſeemed inclined to think that ſuch a cuſtom might be ſupported.

In the caſe of Taylor *v.* Philips the huſband was preſent when the wife ſurrendered, and conſequently, his conſent was implied: But it has been determined that a cuſtom for a feme covert to ſurrender *without* ſuch conſent is abſolutely inſupportable. 2 *Wilſ.* 1. Stevens *d.* Wiſe *v.* Tyrrell; and ſee *ante*, 277. N. CXXVIII.

NOTE CLXVII. p. 322. (*a*).

AND ſee *Lex Man.* 144, 5. caſe of Allen *v.* Booth, *acc.* Yet ſee the ſtat. 1 *Ed.* 6. c. 12. ſ. 17. which enacts that the wife ſhall not loſe her dower though the huſband be attainted, convicted, or outlawed (except for treaſon; ſee 5 and 6 *Ed.* 6. c. 11. ſ. 13.); any ſtatute, law, *uſage, or cuſtom to the contrary* notwithſtanding.

And

And therefore *quære* as to the caſe cited by our Author from *Winch*, which does not ſeem entitled to any credit. See *Harg.* n. (5) to *Co. Litt.* 41. a. See alſo *Hard.* 434. *contra.*

And note, that, in ſome manors, copyholds were not forfeited for felony, even before that ſtatute; and where the heir did not loſe the inheritance, the widow did not loſe her dower. See *Tayl. on Gavelk.* ch. 8. *Robinſ. on Gavelk.* b. 2. c. 4. p. 230.

NOTE CLXVIII. p. 324. (*e*).

A WOMAN may be of the homage in a cuſtomary court; and even in a court-baron to preſent, &c. But ſhe ſhall not ſit as a judge to try iſſues, &c. See 2 *Inſt.* 119. and *ante*, 11. N. X.

NOTE CLXIX. p. 324. (*f*).

COPYHOLDERS owe no ſuit to the court-baron as contra-diſtinguiſhed from the cuſtomary-court, nor can they act there in the capacity of ſuitors. The ſuitors to the court-baron muſt be *frank-tenants*. If the lord has two or more frank-tenants holding of his manor, he may oblige them to attend:—If he has not, he cannot hold ſuch court. See *ante*, 210.

NOTE CLXX. p. 325. (*b*).

WHO can read of ſuch a cuſtom without being immediately reminded of the *Retrait Feodal* and the *Retrait Lignager* on the alienation of the fief, which took place in ſo many countries; and indeed of the *jus retractus* which was known to ſo many more?

"In many countries (ſays Mr. *Butler*) where the tenant ſells his fief, the lord has a *jus retractus*, or *retrait*

retrait feodal, by which he has a right to become himſelf the purchaſer of the fief on reimburſing the ſtranger the price paid by him for the purchaſe of it, and the coſts attending the purchaſe. In many countries alſo, the right of the heir is conſulted by giving him the *retrait lignager*, by which, when a fief is ſold, a relation of the vendor, within a certain degree of parentage, may entitle himſelf to repurchaſe the fief by an offer of the purchaſe-money, intereſt, coſts, and expences, or, as it is termed in the writ, *Offre de bourſe, deniers, loyaux coûts a parfaire.*" N. (1) to *Co. Litt.* 64. a. ſ. v. (6). See alſo *Dalrymp. Feodal Property*, ch. 3. ſ. 1. p. 88. and *poſt.* 326. *Kaims's Hiſt. Law Tracts*, tr. III. p. 112. and 443.

NOTE CLXXI. p. 327. (*q*).

THE fine ſhould certainly be proportioned to the probable duration of the lives of the *ceſtui que vies*. The lord would, in this caſe, be compellable to admit the heir of the deceaſed tenant, according to the deſignation of his own grant. And though the court would not, on the application for a *mandamus* to admit, give any opinion reſpecting the reaſonableneſs of the fine (ſee 2 *Durnf. and Eaſt*, 485.); yet, if it ſhould be conſidered as unreaſonable on aſſeſſment, the tenant might juſtify a refuſal to pay it; and the court would equally interpoſe and aid him, as on a common admiſſion on a ſtrict deſcent.

NOTE CLXXII. p. 330. (*a*).

IT has been adjudged, that the ſtatute of *Car.* 2. does not extend to copyholds. 3 *Levintz*, 395. 1 *Lord Raym.* 132. And ſee *Harg.* n. (16) to *Co. Litt.* 89. a.

The

The ground of the deciſion in *Levintz* is ſtated to be the prejudice to the lord which would otherwiſe be occaſioned, as it would infringe his privilege of appointing a guardian; or, at leaſt, would take away the cuſtom to appoint; with which the ſtatute did not ſeem to intend to interfere. And ſee *Lord Raym. ubi ſupra.*

If there be *no* cuſtom in a manor to appoint a guardian, we have ſeen that the cuſtody of the infant's copyholds belongs to the guardian in ſoccage (*ante*, 308. N. CLX.); and, therefore, though the appointment by the father, under the ſtatute of Charles the Second, ſhould not be good againſt *the cuſtom*, yet might it not be ſupported againſt the guardian in ſoccage, where there is no cuſtom to interfere? (And ſee 2 *Wilſ.* 129. Roe *d.* Parry *v.* Hodgſon.) And, as copyholds are equally within acts of parliament as freeholds are, where no prejudice accrues either to the lord or tenant (ſee *ante*, 164. N. LXXVIII.), might not this ſtat. be conſidered as embracing copyholds, where the cuſtom is not concerned? The rights of the lord, or of the perſon entitled by cuſtom to the wardſhip, ſhould be protected; but the reaſon fails as to the guardian in ſoccage. However, as the guardian in ſoccage ſeems entitled to the cuſtody of the *body*, notwithſtanding the cuſtom (ſee page 329.), it ſhould ſeem alſo that the father may, by that ſtatute, appoint a guardian to the *perſon* of his child, if he cannot affect his copyhold property. See the *Statute* 12 *Car.* 2. c. 24. ſ. 8. (2), and ſ. 9.

NOTE CLXXIII. p. 330. (*b*).

Co. Copyh. ſ. 25. Yet it is ſaid that, by cuſtom, a copyholder may pay a relief. *Com. Dig.* Copyh. (K. 11),

(K. 11), cites *Jones (Sir Will.)*, 133. And see 2 *Bl. Comm.* 97. ch. 6.

Perhaps these positions may be thus reconciled: If a copyholder pay a fine on his admission as heir, it would be absurd to suppose him obliged to pay his relief also: For wherein does the relief differ from the fine?—(See the *Introd.* xvi., and *ante*, 24. N. XXII. 155. N. LXVI. 163. N. LXXV.) But if he pay *no* fine on such admission *as heir*, (which is the case in many manors,) a custom for him to pay a relief may not be unreasonable.

NOTE CLXXIV. p. 330. (*f*).

Kitch. 122. *a.* 2 *Wilf.* 162. *acc.*

Aliter of tenants-in-common; as they have several estates. See 1 *Lord Raym.* 631. 1 *Pr. Wms.* 21.

And it should seem that, in case of coparceners, the admission of one would be the admission of all; they all being but *one* tenant, and having but one freehold at common-law. See 3 *Leon.* 13. *ca.* 30. *Cro. Car.* 521. *Stat. Hibern.* 14 *Hen.* 3. *Bro.-Coparcen.* 3. *Litt.* f. 241. *Co. Litt.* 163. b. &c.

But when one coparcener dies, the others (or the heirs of the deceased) must be admitted and pay their fines: For although coparceners *take* but one estate, they *transmit* several to their heirs. See *Cuith.* 64. *Co. Copyh.* f. 56. *Tracts*, 130; and *ante*, 73.

So of tenants-in-common. *Co. Copyh.* f. 56. *Tracts*, 130.

But otherwise of joint-tenants: for when one joint-tenant dies, the others take his share, and continue in on the original admission. See *Co. Copyh. ubi sup. Kitch.* 122. *a.* *Fisher on Copyh.* 87, 88.

NOTE CLXXV. p. 331. (g).

See *Co. Copyh.* f. 41. The ſtranger having nothing, could, of conſequence, ſurrender nothing to the lord. But if the heir *accept* an admittance, knowingly, according to ſuch ſurrender, he ſhall be concluded; as it was his own act. This admiſſion would be conſidered as a new grant, and, conſequently, a relinquiſhment of his old eſtate. And, I ſhould conceive, that if the heir *had* been admitted before the ſurrender by the ſtranger, it would have made no difference in this reſpect, the ſtranger having no more in the premiſes before the admiſſion of the heir than he could have had afterwards; and the preſumption againſt the heir would have been the ſame; *i. e.* that he had relinquiſhed his old eſtate, and had accepted a new one.

NOTE CLXXVI. p. 332. (*l*).

The grant of twenty loads of wood to be taken by the grantee out of the manor of Dale, &c. ſeems more nearly to reſemble the fiefs *de cavena* and *de camera* than any thing elſe: Thoſe were permitted at a very early period; and perhaps theſe grants of wood, &c. are to be ſupported upon the ſame grounds.

The fiefs *de cavena* and *de camera* were grants in the nature of penſions or corrodies, of a certain ſum of money, or quantity of corn, &c. to be paid or delivered, out of the treaſury or granary of the lord, to the grantees, at certain times mentioned in the grant. See *Fleta*, lib. 2. cap. 7. *F. N. B.* 230. &c. *Sulliv.* lect. vii. *Butl.* n. (1) to *Co. Litt.* 64. a. ſ. 11. And ſee alſo *Stuart's View of Soc. in Eur.* b. 1. c. 2. ſ. 3. p. 42, 3.

NOTE CLXXVII. p. 334. (*w*).

" In reſpect of the damage done to his intereſt:" For if the forfeiture be by reaſon of any act of the copyholder, which is injurious only to the tenant for life, and works no diſheriſon of the eſtate, the lord in remainder can *not* take advantage of it. See *ante*, 249. (*g*).

NOTE CLXXVIII. p. 334. (*x*).

The courts always lean againſt forfeitures. But the forfeiture muſt, in all caſes, be known to the lord, before there can be a diſpenſation. See *ante*, 247. (*c*).

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NOTE CLXXIX. p. 338. (*c*).

Mr. Hargrave very juſtly remarks, that this " Diſtinction in *Rolle* may be doubted, for the criterion of forfeiture of a copyhold by alienation ſeems to be the *actual paſſing* of an unlawful eſtate, to the lord's prejudice; And, in the caſe of the feoffment, no intereſt can paſs till livery; nor is it ſtrictly true that the feoffee may at any time perfect the conveyance, for it is poſſible that, before livery, the feoffor may revoke the power of attorney, or the attorney may die, or refuſe to execute his authority:" And he directs us further to 3 *Leon.* 109. and *Godb.* 269. See n. (3) to *Co. Litt.* 59. a.

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THE END.

ERRATA & ADDENDA.

Page x. Introd. N. (*l.*)—*after* "Hiſt. of Gavelk." *add* "and ſee alſo Lord Lyttl. Hiſt. Hen. II. vol. i. Append. No. 1."
97. N. laſt line—*for* "Keham" *read* "Kelham."
340. l. 19.—*add* "& vide Matth. Weſtm. lib. ii. f. 6. ſub ann. 1084; & f. 68. f. a. 1212. Matth. Paris, f. 9. l. 48. f. a. 1084; f. 640. l. 64. f. a. 1247. &c. 3 Lyttl. Hen. II. 337. N. to p. 114. oct. ed."
346. l. 28.—*for* "theſe" *read* "thoſe."
353. N. VI. *l.* 3.—*read* "mediately *or* immediately."
360. l. 32.—*for* "grantor" *read* "grantee."
425. l. 11.—*for* "her" *read* "here."
431. N. LXXXVII. *l.* 5. *after* "manor" *dele* (——).

N. B. It was originally intended to have given the larger Notes at the bottom of the page, but it was found impracticable by reaſon of the great length of many of them. The deſign, however, was not abandoned till the firſt ſheet of the Introduction was through the preſs; and, therefore, when a note is referred to from that ſheet by the *letter*, the letter of reference is not correct: Yet, as thoſe references are ſo few, and the number of the *page* referred to is accurate, it is hoped that the reader will not experience much inconvenience from the circumſtance.

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