

585

A
TREATISE
OF
TENURES,
In two parts:

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George White

A

TREATISE
OF
TENURES,
In Two Parts;

Containing

I. The Original, Nature, Use and Effect of FEUDAL OR COMMON LAW TENURES.

II. Of CUSTOMARY and COPYHOLD TENURES, explaining the Nature and Use of COPYHOLDS, and their particular Customs, with Respect to the Duties of the Lords, Stewards, Tenants and Suitors: With the Nature of Fines, Forfeitures, Hariots, Escheats, Descents, &c.

By a late Learned JUDGE.

The Second Edition.

In the SAVOY:

Printed by E. and R. NUTT, and R. GOSLING, (Assigns of E. Sayer, Esq;) for Robert Gosling, at the Crown and Mitre, opposite Fetter-Lane, in Fleet-Street, and Daniel Browne, at the Black Swan, without Temple-Bar. M.DCC.XXXVIII.

THE
PREFACE.

THE general Scope and Design of the present Discourse is to give the Reader some clearer Ideas of our Tenures, both at Common Law and by Custom, than have hitherto appeared in Print; to which End our Learned Author has more especially commented and remarked on those two Treatises of my Lord Coke, that are most remarkable for either of these Subjects, viz. his Commentary on Littleton, and his Compleat Copyholder: And accordingly this Tract is divided into two Parts or Divisions.

In

In the former Part our Author, after he has laid down the principal Rules that conduce to a right Understanding of Feudal Tenures, proceeds to shew how easily the Grounds and Reasons of our Common Law Tenures may be apprehended and practised, by applying the Rules of the Feudal Law to the Cases that arise touching those Tenures, or the Incidents thereof.

And this he illustrates by Instances taken from the various Kinds of Estates, Seisins, Disseisins, Rights, Entries, Possessions, Liveries, Attornments, Warranties, &c. and more especially explains that true and just Distinction of Right, Jus in Re, & ad Rem, viz. a Right of Possession, and a Right of Property; and in what Cases a Claim, or Entry, or Action is given thereby, (as also how far a naked Possession differs

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from

from a Right of Possession, and the Consequences of either.)

He has also clearly explained the Reason of those publick Ceremonies and Acts of Notoriety, required by the Feudal Law, for the acquiring, possessing and transferring of Feuds, and which formerly were equally requisite in our Common Law Tenures, viz. Liveries, Attornments, &c. the Disuse whereof has not only occasioned an Uncertainty in many Titles and Estates; but also introduced that mischievous Practice of private and secret Feoffments, by Lease and Release, Covenants to Uses, &c. and which in Consequence has introduced a Deluge of Perjuries, Forgeries, and other Corruptions over the Common Law, and which can never be rectified, or the Mischief redressed, till the Common Law be in that Particular restored to the antient Method of passing Estates

in Pais, or by some publick Act of Notoriety.

The other Part of this Discourse, being properly a Commentary on my Lord Coke's Compleat Copyholder, has so well explain'd the doubtful Parts of that Discourse, and so fully evidenced, not only the Nature and Use of Copyholds, and their particular Customs, but also the Modus Acquirendi, Possidendi & Transferendi of these Estates, and therein of Surrenders, Presentments, Admissions, &c. the Duties of Lords, Stewards, Tenants and Suitors, with the Nature of Fines, Forfeitures, Hariots, Escheats, Descents, &c. that I apprehend little more can materially be added to what our Author has himself observed touching these Particulars.

T H E

Original, Nature,
Use, and Effect of
Feudal or Common Law
T E N U R E S.

Of Feuds.

A **F**EUD is a Right, that a Vassal has in Lands or some immoveable Thing of his Lord's, to take the Profits, paying the Feudal Duties. Spelm. Rem. fo. 2.

The Feudal Property was very unsettled in ancient Times. The Lords succeeded by Election or strong Hand; the Tenants Temporary, or at the Will of their Lords.

When the Barbarous Nations had invaded the *Roman* Empire, the Vassal's Estate became certain for Life, then to all his Descendants. Opposite to Feudal Property is *Allodium*, which seems to be

Of Feudal or

the old Patrimonial Property revived by the Christian Clergy among the Barbarous Nations. This obtained among our *Saxons*, and gave Birth to Gavelkind.

Feuds are Hereditary, or for Life. In Hereditary Feuds the Word *Heirs* is required, to distinguish it from the original Feud that was for Life only. 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 publick Magistrate.

Deut. xxi.
18.

Among *Jews* 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,

Deut. xxi.
15, 16, 17.

niture, which was that of a double Portion.

If a Man died, the Inheritance and Acquisitions undevifed defcended to his Sons equally ; only the Eldeft had a double Portion. This Law arofe becaufe they apprehended fuch 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 becaufe 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 Eldeft. So if a Man had Ifsue *A.* and *B.* *A.* had Ifsue *C.* and *D.* and *A.* had died, *C.* and *D.* fhould 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 Defcent was to Brothers and other Collaterals.

The eldeft Son was to be facrificed, and fo was to be redeemed from the Priest.

If a Man had no Sons, his Daughters inherited, but without double Portion to the Eldeft ; but they were obliged to marry among the Families of the Tribes, that the Inheritance might keep among the fame Families.

If a Man had no Defcendants, 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.

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 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

Numb.
xxvii.
from 1 to
11.

Lev. xxv.
v. 8 to 14.
The Agrarian Law,
among the
Romans,
was to divide the
Lands got
by Conquest
among the
Soldiers e-
qually, &c.

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 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

Of Feudal or

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 the Father, because they were out of his Family.

If a Man had no *sui Heredes*, by the old *Roman* Law it went to the *Agnati*, as first to Brothers as Representatives of their Fathers ; to Uncles *ex Representatione* of their Grandfathers, *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* enter'd 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

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 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 Moie-ty, 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 *Fac. 2. c. 17.* the Mother is to inherit equally

with Brothers and Sisters, and their Representatives, according to *Justinian Law*: And by the Stat. of *Car. 2.* the Succession is carried to Brothers and Sisters Children *in Stirpes*, according to Civil Law, save only that no Distinction is made between Brothers and Sisters of the whole and half Blood; 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 aforementioned 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 or Mother's Side.

The Feudal Succession came in in this Manner: The Lords gave Lands to such Persons as behaved themselves well in the War, for their Lives only: Sometimes they also married their Daughters to them. Then by their Feudal Donations, they limited the Lands to go not only to the Feudary

dary himself, but also to the Issue of that Marriage; and this brought in the Notion 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 originally 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, as Descendants of the same Marriage.

Lud. 114,
115, 116,
117.

The Feud was united in the eldest Male, 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; 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 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; and if the Feudary died, the Heir within Age, the Lord had the
total

Spel.
Rem. 29.

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, and their Male Descendants, in order to encourage the best Marriages with such eldest Son ; and this was the settled Course of the *Feudum nobile*. Whence our Law took the Pattern for their Military Tenures and the Socage Tenures, divided in *Saxon* Times as *Feudum ignobile*, but afterwards came to imitate the Military Feud, in order to support their Families.

The *Feudum ignobile* was dividable among the Sons.

If there were no Sons the Feud came to the Daughters, who divided it, 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 ; 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

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.

In a long Course of Years these Feudal Donations were worn out, when it became impossible to compute up to the first Feudal Marriage when such Donations were originally 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 seizi-na facit stirpem*; for since the Feudal Donation was lost, they could not regularly 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
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of both Bloods of that remote feudal Marriage, where the Feud was originally placed. Thus half Blood came to be excluded; because if it were admitted where 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 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 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
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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. 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 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 to the last Feudary, since the Feudal Possession was in Tenant for Life. 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 reserv'd, 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. Certain

tain 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. There is *possessio fratris* 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 receives the Profits, and dies, tho' before Admittance.

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

Afterwards where the Feud escheated 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*, 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 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

And this Order of Descent, that excluded the Father, was the rather continued, because the Father was Guardian to the Son ; and in those 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. *De Feudis* 153 to 261. But a Feud purchased by the Son, shall descend to the Uncle, to whom the Father may be Heir, if the Uncle be in actual Possession of such Feud ; 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*).

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 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 re-
 present-
 Co. Lit. and Hale upon it, fo. 11, 12.

presenting the Son, with whom the Contract was made. *Hale* admits him; for, since the Uncle was possessed of the Land, he was in actual Possession of all its Appendices.

If a Man purchased the *Feudum novum* or *Feudum antiquum*, and died without Issue, it went first to the Father's Side, because the 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 fail'd, 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 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 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 Tenants Blood was preferred

preferred to the more remote. 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 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, 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; tho' the Civil Law admitted them as Adopted by the subsequent Marriage, and so the Canon Law, because the Matrimony wiped off the precedent Guilt. Greg. li.
4. sect. 6.
2 Inst. 97.

Of Descents Which take away Entries.

WHEN any Man is disseised, the Disseisor has only the naked Possession, because the Disseisee may enter and evict him; but against all other Persons the Disseisor has 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 *ius 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.

The Notions of the Law do make this Title to him, 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 Possession 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.

In the Case of Fee-tail, the Possession is thrown upon the Heir in Tail, therefore the Law construes the *jus possessionis* to be in him. Lit. Sect.
§ 86, § 87,
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; 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 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 Dis-

Of Descents Which

feisor had 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 allow'd 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.

A third Reason why Descent gives a Right of Possession is, because originally
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Spelm. 7
Feud. 31.

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.

Now for such Payment they immediately distrained upon the Possession as soon as ever the Descent was cast; 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 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 whereof he dies possessed; but if another doth the Duties of the Feud at his Death, then it

Of Descents Which

is not Reason that such a Descent should give a Right of Possession to his Heir.

Lit. Sect.
390.

The Escheat doth not take away the Entry, 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. 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 Seignior, 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.

2 Inst.
286.
Lit. Sect.
391. 2.

In the Case of a Feoffment upon Condition, 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 cast upon the Heir while the Propriety is in some Body else, as in
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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.

The Law doth not cast Dower upon Lit. Sect. the Wife, but she takes it by her own 393. 4. Act ; but when she is endowed, she is in from the Death of her Husband ; 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, because she, as is said, is in from

Of Descents Which

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,

Lit. Sect.
395.

Where the Disseisor infeoffs the Father, it is presumed to be done in order afterwards to come in by Descent, and the Act of Law shall 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.

Lit. Sect.
396. 7.

When a younger Brother enters in this 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,

fin, and by Consequence the Possession of the younger Brother becomes that of the elder Brother : 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 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.

Co. Lit.
fo. 242.

If

Lit. Sect.
398.

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*.

Lit. Sect.
399. 400.
1.

The Issue of the Bastard Eigne not only gains a Right of Possession, but a Right of Propriety by the Enjoyment of his Ancestor. Such Issue are held Legitimated 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 prece-*
dens ; but by 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 ; and having done the Feudal Duties without Objection, the Objection comes too late when the personal
Disho-

Dishonour ceases, and to the next Person in Possession no 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 was in the *Ferwish* 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 suffer this Rule by any Means to be shaken, least all Descents should be rendered precarious; but if any Part of the Rule fails, 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, the Issue of Bastard Eigne hath both Right of Possession

sion and Right of Propriety, because of an uninterrupted Possession, and Descent compleat, 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, so that if the Mulier were an Infant, yet the Descent of the Issue of the Bastard Eigne should bar such Infant, because it is by the Laws of Descents that the Infant himself inherits; and he himself could not claim, but by supposing that uninterrupted Possession of his Ancestors, 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*.

Lit. Sect.
402. 3. 4.
405. 6.

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 of 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

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.

But the *non Compos* in this Case cannot alledge the Disability in himself, 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, 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 Lit. Sect. 407. 8. 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 tho' 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 Disfeisee.

Lit. Sect.
409.

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 annexed to it; and he being only a Disseisor, is in his old Estate, which is a naked Possession, without any Right at all.

Lit. Sect.
410.

A Civil Death, such as that of entering into 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.

Lit. Sect.
411.

A Lease is a Covenant real, that binds the Possession of Lands into whose Hands soever afterwards they come, if the Lands be not evicted by a superiour Title; but the Termor has not the Freehold in him, 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; and were it otherwise, the Right of the Termor would be entirely destroyed; for he cannot have a Right of Possession distinct from the Right of Propriety.

Now then if Termor enters before the Descent, he reverts 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.

In the Times of domestick Wars, when the Courts of Justice are not open, the Descent gives no Right of Possession, tho' 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

Lit. Sect.

412.

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.

Lit. Sect.
413.

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 enstalled into the Rights of his Predecessor, and therefore he can have no more than he had ; 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. Lit.
84.

Of continual Claim.

IF a Man be disseised, and the Disseisor Lit. Sect. 414, 415, die in peaceable Possession, immediately after such Disseisin the Heir acquires *jus possessionis*, if the Disseisee suffered the Ancestor quietly to enjoy; 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, 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 Life-time not to do the Voluntary Service, nor for the Heir after his Decease to pay the Relief.

If the Vassal renounces the Feud, this Lit. Sect. 416, is a Cause of Forfeiture by the old Feudal Law, because it was saying they would not do the Feudal Services that were the

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Digest.
Feud. li.
2. tit. 26.
fo. 523.

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 eo quod abnegavit Feudum ejusq; conditionem, expoliabitur.* But when Distresses were invented, then the Land itself was not seized 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 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 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 publick and solemn Renunciation of the Estate for Life in a Court of Record, it is within the Reason of the Law, and amounts

mounts to a Forfeiture, and the Remainder Man anciently was to claim within the Year.

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 Feoffment: For as the Feoffment was anciently made on the Land *coram paribus*, 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. Lit. Sect. 417, 418.

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*, 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*.

Lit. Sect. 419, 420. 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, yet it 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.

Lit. Sect. 421. 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 si quis infeudatus major quatuordecim annis sua in Curia vel negligentia per annum & diem steterit, quod feudi investuram a proprio domino non petierit, transactō hoc spatium Feudum amittat.* Digest. Feud. li. 2. tit. 55. fo. 543. Vigilius 241. 255. — 478. 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

ally compleated ; 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 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 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.

session. But if the Disseisee enters within a Year and 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, because 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* 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 come 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
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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 Favours, least 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.

If the Disseisor dies seised within a Year and Day after the Disseisin, and before any Entry 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, 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 yield-

Lit. Sect.
426.

ing 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.

Lit. Sect.
430.

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 intitled to all the Profits of it; because the Burthen of the Feudal Duties

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. it.
257. 19 H.
6. 27. 8.
9. 2 Rol.
Abr. 550.

If a Man has the Frank-Tenement in Law in him, yet he shall not have an Action of Trespass before Entry; as the Heir shall not have an Action of Trespass against the Abator before Entry; for the Possession of the Heir cannot be 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

2 Roll.
Abr. 553.
19 H. 6.
28.

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 ; 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

2 Roll.
Abr. 550.

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 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 *Roll. Abr.* 554. *Licet.* 10 *Co.* 51. 1 *And.* 352. *Hob.* 98. 1 *Roll. 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 *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 Writ 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 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, where 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 create the greater Dependance; and then the Proceſs iſſuing from Term to Term was found very dilatory. Hence the Aſſiſe was invented 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.* li. 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

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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 of Possession were distinct and different the one from the other. When the Feud became farther 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; 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 his

his Right of Propriety; and every Body ^{2 Inst.} knows that the Writ of Entry in the *Post* ^{153.} came in by the Stat. *Marlb. c. 30.*

Whether the other Emendations in these ^{2 Inst.} Actions were made by the *Justiciar*, *Chan-* ^{248.} *cancellor* or *Parliament*, is uncertain, but no Damages were recovered but against the Disseisor himself, 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 Damages, 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 wore 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. *2 Inst. 284. Hob. 48.*

And here it is to be known that the Disseisor hath the naked Possession. 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; and therefore anciently, if he continued in Possession a
Year

Year after such Purchase, the Feoffee of the Disseisor gained the Right of Possession: The History whereof will be proper here.

By the ancient Feudal Law, no Man could 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, least they should subject them to their neighbouring Lords, between whom their 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, *li. 5. cau. 34. fo. 288.*

But in *England*, 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

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 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. li. 7. c. 1. fo. 44. Stamford. 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; 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

Mag.
Char. c.
34.

the Attornment continued, of which hereafter, and *Vide Stamford. 27, 28, 29. 9 Ed. 3. 29.*

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.

Lit. Sect.
444. 5.

WHEN a Disseisin is committed, the Possession and Right is 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*. 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.

Lit. Sect.
446.

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 Success.* 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 500 Years, it may be released, because the Notion of the Possibility has vanished by the certain Establishment of the Term. 10 *Co. Lampert's Case*, 47, 48.

A Man cannot release but to the Tenant of the Freehold; 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 is only 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

Lit. Sect.
447. 8.

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in Law I may release, for then the Law casts the Possession upon him, and he has the presumptive Right. *Vide post. Sect. 510.*

Releases are four-fold, either enuring by
 Lit. Sect. 449, 450. 1, 2, 3. Way of *Mitter 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, 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 alter'd; and therefore tho' he possessed as a Joint-tenant before the Release, yet after the Release, he shall oust his Companion, because he was possessed
 of

of the whole before by Wrong, and now being possessed by Right, it follows that the Possession of the other wrong Doer is no Possession at all. But if a Disseisor had enfeoffed 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.

Lit. 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 Charta*, 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, because coming in by Feudal Conveyance,

it cannot be altered, unless it were defeated by an Act of equal Notoriety.

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. Lit.
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

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. 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 are 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, 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. Lit.
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 disseised of an Estate for Life, since the Reversion in the King cannot be divested. 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 divest the Remainder, the Disseisin must cease with the Possession of the first Tenant for Life.

Co. Lit.
276.

Littleton also says in these Sections, that if there be Tenant for Life, the Remainder in Fee, and they are disseised,
Tenant

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 consider'd 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; 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 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 Disseisee enters upon the Heir of Disseisor, and enfeoffs *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; 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, the Right of Propriety should be carried along with it: For since the Right remains in him unmoved, and not transferred over
to

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 enfeoffs 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 the Heir of the Disseisor be disseised, and the Disseisee releases to the Disseisor, upon Condition, and the Condition be broken, this reverts 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, 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 annex'd is destroyed, and is incapable of being performed or broken, and the Right can never

ver revert in the Disseisee, but upon Breach of the Condition, which is now become impossible; therefore the Right can never revert 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 entred, the old Right had been reverted; and if the Heir had entred upon him, he might have recovered by Virtue of his ancient Seisin.

Co. Lit.
266.

Secondly, Of Releases that enure by Way of Extinguishment.

Lit. Sect. If a Man be disseised, yet he remains
454. 5. Tenant in Right to the Lord; but the
6. 7. 8. Disseisor is the apparent Tenant in Posses-
9. 460. sion; and the Lord may, if he pleases, still
1. 2. 3. 4. avow upon his rightful Tenant; for before
the Statute of *Quia Emptores*, 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, and Ten-
der of Arrears, and not in the Case of a
Disseisin. Therefore if a Man be disseised,
and the Disseisee puts on his Beasts upon
the Land, and the Lord takes them for
Rent arrear, the Disseisee shall compel
him to avow upon him; and if the Lord
avows

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 enfeoffed 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 compel him to avow upon him ? *Coke* is of Opinion that he cannot, because it is the Tenant's own 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 Disseisin, 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

dal Contract. *Quær.* and see the Book of *Ed.* 3. For after Acceptance, whosoever Beasts he take, by the Book he seems to be obliged to avow upon them to maintain his Distress. *Co. Lit.* 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, tho' 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, 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 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

tage 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 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, 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 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 before the Statute of *Quia Emptores*, if a Man had aliened, the Feud was forfeited, but afterwards that was compounded for Fines; but the Lord could then only demand a certain Composition; and because

Co. Lit.
269.

cause 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 tendred, but both before and after the Statute, by Acceptance of the Feoffee, he become 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 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 that represents

sents 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.

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* 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

could not be by Feoffment, because such Persons had not the Possession to transfer. 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, 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*, 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 Soccage Tenants plowed 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, 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 superiour Lord; but the former Causes of Notoriety still

continue.

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 superiour 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 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

F such

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 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 meerly created by the Law; yet he is not capable of a Release, 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 etatem* against the Assignee, and he vouches the Assignor, who enters into the Warranty; the Demandant cannot release in Fee so as to enlarge

enlarge the Estate, because the Vouchee has no Possession.

N. B. As in Feoffments there was required the Word *Heirs*, to distinguish the Feud from 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*.

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. 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 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.

Co. Lit.

273. b.

200. b. 169.

N. B. That Releases that enure by Way of *Mittre le Estate*, need not have the Word *Heirs*, because the Parties are not in by such Release; but by the former Feudal

Feudal Contract, which passed an Inheritance, and the Release only discharges the Pretensions of one of them.

Of Confirmation.

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. Lit. Sect. 515.

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.

Sec. 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 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.

Sec. 519,
520. 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 ; and when that Estate is assented to, the Disseisee can never afterwards destroy it. So if he confirm the Term 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 there-

therefore it cannot contrary to the exprefs Words be carried any farther.

If a Man releases to Tenant for Life Sect. 521. 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 therefore 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.

If a Man confirm the Estate to one of Sect. 522. 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 meerly 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 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.

Se&t. 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 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.

Se&t. 524. 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
meerly

meerly 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.

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 import more than a Confirmation of the old Term; for in that the Husband has nothing in his own Right. Sect. 525.
6.

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. 527.
S. 9. 530.

If I only use the Words *Dedi & Concessi*, that is as strong as the Word *Confirmavi*; 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. 531.
2. 3.

Here 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. 534.

The

Se&t. 535.
6. 7.

The Lord by confirming the Estate, doth not pass his Right to the Seigniorie, because the Confirmation or Assent to that Estate cannot be interpreted to pass that other distinct Right, which is 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 Seigniorie, because by such remitting his Right, he could not have demanded any thing.

Se&t. 538.
9. 540.

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.

Se&t. 541.
2. 3.

If I confirm a Villain to another that has him in Possession, this passeth nothing, because this is an incorporeal Right, which cannot be divested out of me, and the meer Confirmation, where a Man has no Right, is really nothing; for
that

that which is not cannot be meerly confirmed; but if there be the Words *Dedi & Concessi*, it goes farther than meerly to strengthen the Estate in the Lands, for it passeth the Right to the Rent.

Of Attornment.

Attornment is the Consent of the Tenant to the Grant of the Seigniority, or the Reversion, putting him into the Possession of the Services due from such Tenant. The Reason is three-fold. *First*, From the ancient Feudal Law. 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 their Consent, from whom they might expect Oppression rather than Protection.

Lit. Sect.
551.

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 superiour Lord, yet the Tenant's Right of Attornment continued unaltered.

Thirdly, That by the Tenant's lawful Payment to the Grantee of such Seigniorship or Reversion, he might be put into Possession of such Seigniorship 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.

Lit. Sect.
552. 3.

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 Seig-

niory 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, 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 Seignior, 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 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

tell by such Grants in whom the Seigniorie 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 ; 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.

Co. Lit.
310.
Lit. Sect.
554. 5. 6.
7.

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 Seigniorie ; 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 ; and so by the Statute

tute of *Quia Emptores*, they must hold of the very Lord; for since the Statute, no Man can erect a new Tenure; 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 cetero liceat cuilibet homini libero ad voluntatem vendere, ita quod Feoffatus teneat terram illam de capitali Domino feodi illius per eadem 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 Seignior; 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 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 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 Disseisor 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, 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

Seigni-

Co. Lit.

311. b.

Lit. Sect.

558. 9.

560. 1. 2.

3.

Seigniorie; and he would not have the Benefit of the total Purchase of the Seigniorie, 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 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 one to whom he owes Fealty, and therefore he can have no Wardship, Marriage, or Relief of the Reversioner; but if the Reversioner dies without Heir, it shall escheat, 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 Seigniorie during the Suspension, because the Seigniorie is drowned in the Lands, and he has not an Estate in the Seigniorie 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 Seigniorie, 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 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 Seigniorie; 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 Seigniorie distinct from the Land itself.

Co. Lit.
314. 564.
Vid. post.
Sect. 582.
Lit. Sect.
565.

If a Tenant gives a Penny as Attornment, this will not found an Assise, 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 Rescous, because the Distress is lawful, being annexed to the Services

Services that pass by the Attornment, and therefore the Rescue is tortious.

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.

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.

If either the Tenant for Years or for Life in this Case attorn, it is good, because the Tenant for 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, 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. Sect. 570.
Vid. post.
582.

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 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 Purposes attendant to him; though by the Statute, the Feudal Service was to be paid to the very Lord.

Stat. 572.
3. 4. 5.

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

mainder 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.

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 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 Tenants holding over of the Feudal Lord.

Lit. Sect.
576. 7.

These Sections 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 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 entire Operation of the Feoffment, then must some Part of the 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.

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 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 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.

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, resettle themselves and their Reversioners in their Estates; but they leave the remaining Part of the Estate in the Feoffee, because as much 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 of 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 Feoffor cannot have it again, contrary to his own Feoffment, and the Feoffee can
never

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; otherwise it is where there is a Lease for Years, 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 of his Lord, because 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 Harriot of such Tenant dying seised. *Vide Hale sur Fitzherbert* 143. And by Consequence the Inheritance must be supposed to reside
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Co. Lit.
319. Sect.
578.

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 *Feof-fatus* ; 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 superiour Lord, may be in his Homage, and that holds of him, and 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. Lit. 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 be no Person for the Stranger's *Præcipe* ; but also because there would be no Person in the mean
Time

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 Contingency avoids a Perpetuity, by happening during a Life; 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, where the legal Estate is in the Feoffee. But if Tenant in Fee makes a Lease for Years, Life, or Gift in Tail, the Remainder to his own right Heirs, or executes such Limitation by Way of Use, he is in his old Reversion, because he never put himself out of the Homage of his superiour Lord; for it shall

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 Lord, during his Life. *Co. Lit.* 22. and *Hale* upon it. *Cro. Jac.* 590. 2 *Roll. Rep.* 196. 216. 3 *Leo.* 64. *Dyer.* 7. *Poph.* 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.

Sec. 579.
580. 1. 2.
3. 4.

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 & Services*, the Grantee cannot have
before

before Attornment; but what the Lord may seise he is entitled to before Attornment, as the Hariot, 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. and they were called Fines, because a Fine was paid to the Lord for such Agreement, 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, 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 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 im-

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mediate 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 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 compleated. Thus it stood some Time after the Conquest; but the after Kings endeavouring to retrench the Privilege of the great Lords, 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 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

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ties had covenanted to alien; and all Writs of Covenant, as being an Action of publick 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 depending; 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 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 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

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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 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 Grantee sue a *Scire facias* against the Tenant, and 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.

Se&t. 585.
6.

There needs no Attornment to a Devise, because 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 required where it is a Reversion. Of

Of a Right a Man cannot properly be disseised, though he may of his Possession; for it is a Contradiction in Terms, that a Man by Wrong should have my Right; 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, because 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 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 Demesns of 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 Demesns of my Manor; but because all the Feudal Services are to be done in Support of the Manor, the Knights Services being the Attendances of such Tenants in the general Defence of the Realm, imbodyed under the Lord of the Demesnes, that carried

Provisions to subsist them; and the Socage Services were the actual Plowing 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 seized 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 double Charge, because this does not take away the Right of the Disseisee, but that he may enter into the Demeans, or distrain for the Services; 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 Blackacre, Blackacre 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

for then the Freehold had been entire, and one and all had therefore passed by the Grant of such Manor.

Of Discontinuance.

IT is an Alienation of the Possession, See. 592.
 where the Right of Action is left in 3. 4. 5. 6.
 another; and it began in the Case of the 7.
 Husbands Alienations of their Wives Lands.
 By the Civil Law, the Father gave the
Dos, which was the Estate of the Wife,
 given on the Marriage; and if it consist-
 ed of Matters moveable, the Husband had
 the Possession, but was bound to Restitu-
 tion 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 im-
 moveable, the Husband could not alien
 without the Consent of his Wife, by the
Julian Law. And by *Justinian's* Refor-
 mation, he could not alien, though with
 her Consent. *Constante matrimonio rei do-*
talis dominium civile penes maritum est,
naturale penes uxorem. Dig. li. 23. tit.
 2. *De jure dotium.* Ibid. tit. 5. *De*
fundo dotali.

When the Feudal Law allowed the Inheritance to descend to Women, 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 of the Civil Law, that placed the Civil Right in the Husband, as the Head and Governour of the Family, and the natural Right in the Wife, as 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, when she took Husband, she had no separate Property, but the whole Power was lodg'd 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 ; 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

riage Contract, 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 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*; and the Husband was the rather supposed to have the Right of Possession in him, for that being the superiour 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.*

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 political Reasons, the Celebacy 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 appropriated ; and the Bishop and Abbot, as Husbānds 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 ;

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 *Seēt. 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, 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

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by him. *Ibid.* 46, 47. Afterwards when Christianity revived among the Northern Nations, the Christian Bishops being the Courtiers of several Princes, and having 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, Virg, and Staff, as a Symbol of the Feudary Dependance upon them. *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 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——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;

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 fix'd Residence of the Priest, to the Church, 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 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,

Waste, a Writ of Entry *ad Communiem legem, in consimili casu, ad terminum qui præterit, 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 *Furis 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. Lit.
341.

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 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,

ter, 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 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*; 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 might erect a Donative with Tithes and Cure of Souls; and at this Day he may erect a Chapel Donative with Lands, or empower any Man to erect it, 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, because the Bishop thereby

thereby takes upon him the Cure of Souls there, by the Consent of the lawful Patron ; and then 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 Parsonage, the Property must be supposed in him as in others. *Co. Lit.* 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.

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
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such Tenant in Tail makes a Feoffment in Fee, he aliens the Right of Possession; for though the Statute *De donis* preserves the Right 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, the Entry is taken away, because the Feoffment had anciently a Warranty 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*.

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Stat. 598.
9. 600. 1.

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 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
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the very Possession, which a Release, being a Conveyance without Solemnity, 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 Freehold, 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 *in statu quo*, as to the Entry of the Heir on him. For this see *Co. Lit.* p. 106. and 108. b. 10 *Co.* 96. *Seymor's Case* revived by *Holt* in the Case of ———. And the same Law of a Bargain and Sale; for that, when it came

over from Equity to be a Conveyance at 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.

Se&t. 602.
3. 4. 5. 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.

Se&t. 606.
7. 8. 9.
10. 11.
12. Are all several Instances of Conveyances, which pass the Right, and work no Discontinuance.

Se&t. 613. If Tenant in Tail grant all his Estate 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. *Se&t.* 614. 15. 16. 17. 18. are farther Instances of Conveyances, that pass a Right from Tenant

in Tail, and therefore work no Discontinuance.

If Tenant in Tail makes a Lease for Life, 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 a Discontinuance; for the Grantee's Entry works a second Notoriety, which plainly manifests a Discontinuance of the entire Fee-Simple. But it may be asked why such Grant operates

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Sect. 619.
20. 21. 22.
623. 4.

by the subsequent Entry, to pass more than it lawfully may pass; for if the Grant and Attornment only operates 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 passes 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 can't 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 dyed 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 shews 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 from the Propriety, and is by the Law construed not to operate as a Grant meerly,

ly, but taking the Acts most strongly against the Parties, it is interpreted to operate as a Feoffment.

If Tenant in Tail enfeoffs 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. Sect. 625, 6.

Are all Instances in Grants that work no Discontinuance, *causa qua supra*, Sect. 633. 4. 5. 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 and defeat such Alienation, since it was never absolutely parted with at the Time of such Alienation. Sect. 627. 8. 9. 630. 1, 2.

My Lord *Coke* is of Opinion in this Case, 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.

Se&t. 637.
8, 9.

'Tis 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 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, 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; because, tho' the Tenant in Tail had an original 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 seized 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 entailed with Warranty, this had been a Bar, because the Heirs in that Case had been bound by Contract to defend 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, and Tenant for Life attorns and dies, and the Grantee enters, and the Issue dies leaving a Son; this
is

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; 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, 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, 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.

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 Disseisee, where the Entry is congeable; there if the Disseisee takes back the Possession from the Disseisor, he is remitted. For it cannot be otherwise, that
when

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 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.

Where the Right of Possession is distinct Sect. 693.
 from the Right of Propriety; there, if the 4 5
 Proprietary reobtains 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 Proprietary 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

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.

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 Mens 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 the Action may be brought
to

to regain the Propriety. 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 meer 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, 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 Reasons abovementioned.

If a Man enfeoff an Infant or Feme Covert, 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 discover, 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

Sect. 659.

ferred to them. 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 the Turn of the Chapter.

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, and that was generally in other Lands by Way of Exchange, which descended to their Heirs.

These

These Warranties were introduced by the Liberties of Alienations that happened, according 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 Seignior; 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.

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

made between the Lord and Tenant for their mutual Defence. For, *First*, they rebutted such Warrantor and his Heirs from claiming any Right in the Land; and as in the Homage Ancestrel the Rule was *Homagium repellit perquisitum*, so the exprefs Warranty repelled the Ancestor from claiming, and not only him, but the Heir, tho' the Right 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 exprefs 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. 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 tho' the Warranty barred the Right of Entry or Right of Action in the Heir,
yet

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 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. 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 Intruder, Recoveror, *Cesty 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 it self, no more than, when he has received Homage from an Heir that holds by Homage Ancestrel, can he claim the Land it self. But if the Warrantee's Estate be recovered by elder Title, then the Heir may recover against such Recoveror, tho' the Warranty were attached in such Heir; an Example of which see *Seçt.* 741. because the Recompence descended to the Heir stands precarious,

rious 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 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 it self. But if the same Estate continue, to which the Warranty was annexed, tho' in other *Lands*, yet the Heir is barred ; as if a Man makes a Warranty to *A.* and his

Heirs,

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 annex'd; and therefore it is presumed in Justice 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 therefore 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,

pence, was rebutted from claiming the Land itself.

The Third is by Writ of *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 the Feudal Contract. And when the Assise was invented, in which a Man could not vouch; and when also by *Westm. 1. c. 40.* a Man could not vouch out of the Degrees, unless in both Cases the Party was present; *vid. 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 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.*

The

The Words that create a Warranty were first anciently the Reservation of Homage, for the Reasons given in Homage Ancestrel, as plainly appears by the Statute of *Bigamis*. *Vid.* 275. 276. Secondly the Word *Dedi*, to hold of the Donor and his Heirs; for when such Tenure was erected by the said Words, it was supposed 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 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*, which contains as express a Warranty as if there had been an Homage reserved to the Warrantor, *Señt.* 733. Warranties at Common Law are of two Sorts; first, those commencing by Disseisin or Wrong; and secondly, binding

Stat. 698.
9. 700.
1. 2.

ing 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; otherwise the Estate of the Purchaser, which subsisted on the Warranty 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. As to these binding Warranties, there are some altered by the Statute: The first Statute is that of

Glocest.

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 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; 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; 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 Alinee was received into 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 exprefs 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 ; 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 ; 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 un-

settled

settled Times, between neighbouring Feudaries (and from thence called Deadly Feuds), it was usual for such Disseisors to purchase Warranties from some Ancestor of the Family; 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 Mens 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 general 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. This was made according to the Platform of the Statute of *Gloucester*; 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, 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

cond Order was, that the Collateral Warranty was not within the Statute ; for the Statute only appointed that the Will of the Donor should be observed, that the Tenant in Tail should not alien to disinherit his Issue, which they extended to all Lineals, for the 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 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 to the Discontinuee, this is a Collateral War-

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 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. 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 Entail, 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 in the Entails *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 have been
preca-

precarious, because the Tenant having no Feudaries, could not himself have defended it. So in the exprefs 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. 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 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 Parol must demur till the Infant comes of full Age, because the Infant cannot fight himself,

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. *Seēt. 726. Co. Lit. 380.* If an Ancestor devise Lands deviseable with Warranty, as in *Seēt. 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. But if a Man warrants the Land in Fee, and takes back an Estate for Life, as in *Seēt. 744.* this doth not destroy the Warranty, because here a Recompence is presumed to be given for the whole Fee; and there was Laches in the Heir for not claiming it during the Life
of

of the Ancestor, and there was a Party to such Warranty, at the Time the Contract had its Being. The Warranty, like all other Contracts, may be released and discharged; and if the Warrantor be attainted, so that he can have no Heirs, no Man can be barred by Force of such Warranty; because in these Cases there can be no Recompence presumed to descend to the Heir. *Vide Sect. 785. 6. 7. 8.*

Of Homage Ancestrel.

THE old Authors, that have best explained our *English* Law, tell us that there is a mutual Bond between Lord and Tenant. *Tanta and talis connexio inter Dominum & tenentem quod tantum debet Dominus tenenti, quantum tenens Domino, præter solam reverentiam.* So that as the Tenant was bound to defend the Lord, so also the Lord in his Turn was bound to defend his Tenant. And anciently, when their Way of Trial was by Battail, such a Connexion was absolutely necessary; because if the Lord was impleaded, it was necessary he should have Champions in the Trial by Battail, to make out his Right; and therefore the Tenants were the Lord's Champions, who were obliged to be Freemen; for the ancient

Form

Form was, that they should defend *per Corpus liberi hominis*. Now when the Tenant was impleaded, who did not thus retain Champions, he used to vouch his Lord to defend him by his other Freemen. Now this Warranty, in the ancient Tenures, had three Effects. *First*, To rebut the Lord and his Heirs from claiming any Right to the Land; for the Homage in those Times was thought an Equivalent to the Land itself; because the Lord had such an Addition of Strength and Honour from the Service of his Tenant, that it was more to their Reputation and Defence, than the having the Possession itself; and therefore the ancient Maxim was *Quod Homagium repellit perquisitum*. So that if the elder Brother had enfeoffed the second, reserving Homage, and had received Homage, and then the second Brother had died without Issue, it should have descended to the youngest; for *Nemo potest esse tenens & Dominus, & Homagium repellit perquisitum*. And the Law seemed to incline that the Lords, upon no Pretence of Right, might enter upon their Tenants, and use the great Power they then had to their Oppression. So that if the Lord had accepted Rent from the Disseisor, he could not afterwards enter for an Escheat, though the Disseisee died without Heirs. But if a Disseisor comes in above such Tenancy, and without such

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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 Forfeiture, 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 *Tit. Warranty* and *Tit. Releases* 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 Warranty. *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 Charter 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 an expresse 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 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 Stat. of———came that gave Tenants a free Power of Alienation, the Tenants used to alien with expresse Warranty, and so they used to dereign the Lord's Warranty; and when the Lord aliened, they used to have an expresse Warranty from their new Lord; otherwise they would not attorn; and if they did, it was reputed their own Folly.

PART II.

OF

CUSTOMARY

AND

Copyhold Tenures.

THO' a Copyholder has but an E-^{4 Co. 21.}
 state at Will, yet 'tis in this diffe-^{a.}
 rent from other Estates at Will;
 that it doth not determine upon the Copy-
 holder's Death, but descends to his Heir, if
 it be any Estate of Inheritance. The Rea-
 son of this seems to be, because upon Co-
 pyhold Estates Villain Tenures were usual-
 ly reserved, and these Estates were given
 to Villains; therefore no other Estates
 could be granted to them but at Will; for
 otherwise they had been enfranchized, as it
 seems. But to prevent the frequent End-
 ing of these Estates, they granted them in
 Fee, but yet at the Will of the Lord; and
 according to my Lord *Coke*, notwithstand-
 ing such Grant, they were entirely at the
 Will of the Lord, who ousted them when
 L he

he pleased, without any Reason ; which being a very great Inconvenience, it seems it was altered by some positive Law (tho' that docs not appear) which preserved their Estates to them, doing their Services, but yet left them as it found them, to have Estates only at Will.

4 Co. 21.
a.

A Copyholder cannot transfer his Estate but by Surrender ; the Reason is, because he has only an Estate at Will, which is determined when he takes upon him to grant it over ; for that is a plain Declaration of his Intent, that he designs to hold the Land no 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. 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 not the Lord ; therefore 21

1 Inst. 60.
b.

Ed. 4. Brian said, that if the Lord enter upon his Copyholder, he might have Trespass. So far is it now from being a Determination of the Copyholder's Estate.

4 Co. 21.
b.

A Copyholder in Fee, may surrender, reserving Rent, with a Condition of Re-entry for Nonpayment, and he may re-enter for Nonpayment ; for having a Fee-simple according to the Custom of the Manor,

nor,

nor, he may reserve what Profits he pleases out of it, by the same Reason as 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. 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 'tis 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 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 should inherit, because the Possession of the Lessee for Years was the Possession of the elder Brother, who may have Possession before Admittance; 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,

4Co.23.3.
The like
Case of a
Guardi-
an. Dier
292. a.
Cro. Car.
411.

so 'tis 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 descendible to him and his Heirs, and the Sister is his Heir; and tho' 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 no Lease or Disposition of them by Feoffment; because tho' 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 Possession; and therefore there is no Reason by a Fiction of Law to create him a Possession. And so he never having had
the

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 seized of the Freehold. But tho' 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. For 'tis not Affests in the Heirs Hands, neither shall a Woman be endowed, Husband Tenant *per Curtesie*, unless by special Custom; 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 tho' 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 the Lord, as other Estates at Will are (which it seems was introduced in Favour of them by some positive Law, tho' 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 dye 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 descendible 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 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, 'tis required by Law. But then on the other Hand, if by the Possession of the Lessee for Years, he had an Estate descendible to him and his Heirs, how comes this Estate to be divested by the Expiration of the Lease for Years? 'Tis urged on the other Hand, that Possession was but feigned, and is now gone; but yet if the Brother were once in Possession, and then were disseised, it seems the Sister should inherit, tho' 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

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.*

The Heir before Admittance 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, 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. 4 Co. 22.
b. 23.

1 Leo.
174.

The Admittance of Tenant for Life is the Admittance of him in Remainder, 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. *Mich. 8. W. 3. in B. R. Per Holt.* The Admittance of Tenant for Life is the Admittance of him in Remainder, so as to vest the Estate, but not to prejudice the Lord of his Fine; for after the Death of Tenant for Life, he in Remainder shall be admitted again. *Quære.* 4 Co. 22.
23.
Mod.
Rep. 120.
3 Co. 7.

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 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. 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

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

tion 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. And in this Case was something touched concerning the great Controversy of entailing Copyhold Lands. And 'twas held *per tot. Curiam*, that generally Copyhold Lands could not be entailed; because if the Stat. *West. 2.* brings 3 Co. 8. 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 Stat. *De Donis* are *quod voluntas donatoris, &c.* so that what may be intailed within that Act of Parliament, must be given by Charter in Tail; and Copyholds are not given by Charter in Tail, but by Surrender and Admittance. That a Surrender and Admittance is no Alienation by Cro. Car. 45. Deed, see *Litt. Sect. 74.* For 'tis there said an Alienation by Deed is a Forfeiture. Again, that Copyholds cannot be entailed, Cro. Car. 43. 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

Cro. El.
717, 907.
3 Co. 8.
Moor.
358.
Lit. Sec.
13.

pose of them. Thus far then went the Resolution of the Courts in both Cases; that Copyholds are not generally within the Stat. *De Donis*. But then when 'twas objected by some, that where there hath been a Custom for entailing Copyhold Estates, there the Stat. *De Donis* cooperating 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 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 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

Cro. Car.
44. 5.

formed the Condition, and the Surrender to the Use of his Wife was good.

One Argument against Copyholds being intailed was, that no ~~Tax~~^{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 Stat. *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 Stat. *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 Custom, that 'tis not within the Stat. *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

Cro. El.
717.

Litt. Sect.
73.

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
 1 Inst. 60. 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 Stat. 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 intailed 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.

Cart. 22. 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

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 cooperate to make an Estate-Tail; and this obviates the main Objection against entailing 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 'tis now since the Statute, then an Estate-Tail hath always been grantable Time out of Mind, tho' 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 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.

'Tis no Proof of a Custom Time out of Mind, to entail 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 entailing 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 contradicts himself; for he says in another Place, that all Inheritances at Common Law were 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.

3 Co. 8.
b. Lit.
Sect. 13.

Cro. El.
907. Pl.
Com.
Manfel's
Case.
2 Cro. El.
717.
Moor.
173. 188.

As that Distinction about entailing 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. *Sanderfon*,

Sanderson, where it is doubted whether a Copyhold may be entailed, 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 entailed. But then there is the Case of *Erish* ver. *Rives*, that an Entail 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 entailing Copyhold Lands.

Cro. El.
307. 149.
1 Leon.
175. Pop.
128. 1 Sid.
268. 314.
Mo. 637.

It is made an Objection against entailing 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 Advange 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

Cro. Car.
45.

al 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 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 commit a Forfeiture, the Lord shall take Advantage of it. And to this Purpose there is the Case

¶ Leo. 1. of *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, 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 not like the Tenure of Freehold

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 to my Lord *Coke's* Treatise of Copyholds, 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.

Cro. Car. 44.

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

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 Tenants, and not the Lessee. It was held likewise that the Rent was to be divided by the Halfs, according to the Reversion. Having thus examined the Reasons and Authorities for entailing a Copyhold Estate, after which there can be no great Reason to doubt but that Copyholds may be entailed ;

It is now requisite that we see the Method for the avoiding such Entails ; and first I shall shew that a Recovery with Voucher doth not of Common Right bar the Entail of a Copyhold ; but that as to the entailing them, Custom is requisite ; so without Custom the Entail 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

Recovery sans Custom bar Estate t. & semble Reasonable Custom bar Freehold Estate t. Mes Quare Car Estate t. in Cop. est create per Custom 1 Rol. Abr. 506. Mo. 358. cont. Hob. 177. 4 Co. 27. b. Cro. Car. 45. 205. Mo. 358. cont. held

Cro. El.
391.

held that the Recovery did not bind without a Custom. But there is a *Quere* whether Judgment was given for the Plaintiff upon the principal Matter, or no; for it seems to have been a Discontinuance, and then the Defendant's Entry could not be

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

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.

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. *Moor 188. Numb. 336. Hill ver. Morse.*

1 Sid, 314.
Style
450. Con.
2 Saund.
422.

Now my Lord *Coke* says, by Custom, by Surrender the Entail 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, 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

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 cannot grant to any Body else but to him that is intended to have the Estate. Thus it seems plain to me, that as Estates by the Custom may be entailed, so by the Custom also those Estates-Tail may be cut off by 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 one and the other Side, about entailing 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; 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.

Morr.
595.

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 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.

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. My Lord *Coke* says that a Grant by Copy in Fee or in Tail,

1 *Inst.* 44.
b.

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 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.

1 Inst. 45.
a.
Cro. Ja.
305. Hob.
177. Cro.
Ca. 24. 5.
44.
Yel. 222.

Grantees of Reversions of Copyholds shall not take Advantage of a Condition broken, by the 32 *H. 8.* nor by the Common Law, (of Covenants they may, 1 *Kebl.* 350. *Cro. Ca. 24. 253. tamen Quere* upon *Yel. 135.*) For then by Entry he might come in to be Tenant to the Lord without Admittance; and tho' he in the Reversion may

pac. 267. Vol. 1. p. 11.
460. contra.

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; 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.

Copyholds are not within the 11 *H. 7.* 2 Sid. 41.
ca. 20. for thereby an Entry being given 73.
 to the next Heir, he would come in to be Tenant without 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 Stat. 11 *H. 7.* which only mentions Estates-Tail, and for Lives.

Another Reason may be, because Copyholds are not within the Stat. 27 *H. 8.* Cro. Car. 550. 568.
 about Jointures, and the Copyhold Lands are within the Statutes of Bankrupts; for the Stat. 13 *Eliz.* expressly mentions them; and tho' the other Statutes do not, yet they being made for further Remedy in the Matter aforesaid, are ~~not~~ to be expounded by
 the

the former ; especially since that hath taken Care that no Prejudice should happen to the Lord. The Stat. 27 *H. 8. ca. 10.* for executing Uses to the Possession, extends not to Copyholds, 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 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 Livelyhood of

Cro. Car. 44.

1 Inst. 36.
h.
2 Inst. 325.

Freehold

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 Stat. of *Merton* that gives Damages in a Writ of Dower, where the Husband died seised, extends to Copyholds; and yet seised is properly applied to Freeholds. And my Lord *Coke* says in his Treatise of Copyholds, 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 *Quere* of this Distinction, for it seems not to be 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; for if he could, where would be the Distinction. Therefore I take it, tho' a Feme in a Writ of Dower of Copyhold Lands shall recover Damages by the Force of the Stat. of *Merton*, yet 'tis by the Equity of the Statute, and not by the Words.

The Stat. of *West. 2. ca. 3.* in all its Branches extends to Copyholds; for 'tis an Act made to redress Wrong, and no ways preju-

Cro. Car.
43.
4 Co. 30.

1 Inst. 58.
b.

1 Inst. 43.
b.

3 Co. 9. a.
2 Inst. 345.
Cro. Car.
43.
1 Inst.
369. b.

prejudicial to the Interest either of Lord or Tenant. The 32 *H. 8. ca. 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.

Cro. Car.
43.

'Tis said by *Telverton arguendo*, that the 32 *H. 8. ca. 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 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 Stat. 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 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.

Mo. 596.
cont.

Cro. Car.
44

The 31 and 32 *H. 8.* about Partitions, extend not to Copyhold, because the Act provides it shall be done by Writ of Partition,

tion, and Copyhold Lands are not impleadable at Common Law.

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.

By the *2 Ed. 6. c. 8.* 'tis expressly, that Copyholders 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.* 'tis expressly provided, that no Copyholds should come into the Kings Hands, by the Dissolution of Monasteries; 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 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 Lands, doth not extend to Copyhold. The Stat. of Fines, ^{because made to avoid Controversies,} ^{4 Co. 126. b. 9 Co. 105. a.}

2 Leo.
109.

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

verfies, and no ways prejudicial to Tenant or Lord. In the Supplement to my Lord *Coke's* Treatise of Copyholds, 'tis faid that the 32 *H. 8. c. 38.* concerning Remedy for Arrears of Rent, extends not to Copyholds. To prove which a Cafe 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 Executors distrained for the Arrears in *B.'s* Copyhold Lands; and 'tis there faid 'twas held by the Court, that the Distrefs was not well taken; and the Reason is, becaufe 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 feems, was upon the firft hearing of the Cafe; for the very Cafe is reported quite contrary by the fame Reporter; and 'tis faid to be refolved by all the Judges but *Fenner*, that the Copyhold fhould be charged with the Rent-charge; for the Custom is no Part of his Title, but only appoints how he fhall hold; and fince it was charged in the Lord's Hands, 'tis 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

Purpose there is a Case in *Dyer* adjudged. *Dyer* 270.
 But if the Case were adjudged, that the ^{b.}
 Lands should not be charged in the Copy-
 holder'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 ex-
 tend 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 is a strong Argument, that
 in other Cases where that is not, which oc-
 casioned the Doubt, the Statute shall ex-
 tend 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 *1 Leo. 97.*
29 El. c. 5. of Recufants, extended to Co- ^{8.}
 pyholds, and two seemed of Opinion it *Owen 37.*
 did, and one took this Difference; when
 a Statute is made to transfer an Estate by
 the Name of Lands, Tenements, and He-
 reditaments, Copyhold is not within such
 Statute.

Copyholds are not within the 31 *El. c.* 7. of Cottages. 1 *Bull.* 50. 2 *Inst.* 737.

If the Lord's Seignior, 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 'twas urged by him, that by Force of that Statute, the Queen was only to have the Profits, and no Estate, and so the Act did extend 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. 'Twas 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, 'tis a Discontinuance; for since the Custom

warrants

warrants the Recovery, 'tis an Incident to such a 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.

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, and therefore could not give away his Wife's Right; tho' 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, 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,

4 Co. 23.

a.

Cro. El.

717.

contr.

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 'tis 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, 'tis 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 makes a Surrender in Fee, tho' 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. 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 ; and if the rightful owner might enter, the Benefit of the Warranty would be lost ; and Warranties cannot be annexed to Copyhold Estates. Notwithstanding this there are Cases that a Surrender is a Discontinuance of an Estate-Tail in Copyhold Lands, and my Lord

Mo. 753.

4 Co. 23.

1 Leo. 95.

Mo. 596.

352.

Cro. El.

717. 484.

Brownl.

221.

Lord *Coke* says, that a Surrender by Custom may bar an Estate-Tail: 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.

1 Inst. 60.
b.
Mo. 358.
753.
1 Leo. 95.
1 Inst.
248. a.
Cro. El.
148. 90.
4 Co. 25.

An Infant surrenders, 'tis no Discontinuance, but he may enter. 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; 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 trans-

fer a Right; and it was adjudged it should;
for the Heirs being admitted, the Lord had
a Tenant to answer his Services; and the
Release to that Tenant operated to extin-
guish a Right; but if a Disseisin be made
of a Copyhold, the Disseisee's Release will
signify nothing, 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. 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 ~~and~~ Stranger's Admittance is void. The Reason of these Diversities are 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

what he acts beyond it he hath no Warrant, and so it is void.

If Copyhold Lands have been usually granted in Fee, Grant to one in Tail, for Life or Years, is good.

The Admittance of Tenant for Life is an Admittance of him in Remainder, as to vest the Estate, but not to prejudice the Lord of his Fine, 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; 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 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

1 Inst.
52. b.
Cro. El.
373.
4 Co.
23. a.
Co. 10.
Cro. Jac.
21.
4 Co. 22.
23.
Mod. 120. 102.
3 Lev. v. ante 151.
308.
1 Leo.
174.
Cro. El.
148. 149.
504.
1 Roll.
Abr. 505.

though the Estate be vested in the Remainder-Man, yet a Fine is due.

Moor
357.

4 Co. 23. a.

Cro. El.
441.

The Case of *Dell* and *Higden*, as it is reported by *Moor*, is also contrary to the Cases 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 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 my 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 the Power of disposing of it; 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 his

his Life-time, notwithstanding the Surrender to the Use of his Last Will.

Every Lord of a Manor that hath a lawful Estate in the Manor, what ever it be, either Fee, Tail, Life, Years, or at Will, may make voluntary Grants of Copyhold Lands which come into their 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, 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. 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 the

4 Co. 22. a. Temporalties come into the King's Hands, he is bound, which shews that a Grant by him alone is good; for if the Consent
of

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.

If any Person that hath a Tortious or Defeasible Estate of Inheritance, as Disseisor, or Feoffee of a Disseisor, Tenant at Sufferance in a Manor, make voluntary Grants upon Escheats or 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. 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 in Being that appears to be the old Estate; but when the

Lord

4Co.24.a.
2Leo.45.

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 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 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

the Custom, which is the only thing that warrants such Grants, must be pursued.

If Tenant in Tail have a Copyhold Estate cheat to him, *Quere*, 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 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, 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

4 Co.23.b.

Dyer. avoid all mean Charges and Incumbrances.
 344. a.
 4 Co. 24. a. 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 Foffee hath a lawful Estate, and the Feoffor may wave the Advantage of the Condition broken. But if a Lease be made of a Manor for Years upon Condition to be void upon the Breach of a certain Condition, and the Condition is broken, no voluntary Grants made afterwards 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 enfeoff one of a Manor, and the Foffee 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

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 fei- sed of a Manor in Fee hath Issue a Daugh- ter, 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 enfeoff another the next Day, makes voluntary Grants by Copy. Lord of a Manor commits Felony, and after Exigent granted he passeth a- way Copyhold Estates, and then is attaint- ed ; if he were convict by Verdict or Con- fession ; in all these Cases voluntary Grants by the Lord are good ; for he was *Domi- nus pro tempore*. 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, and there are Cases where the Grant of a Rent-charge, in such Case, shall bind the Copyholder ; but there is some Diffe- rence between the two Cases ; for in Case of a Rent, the Lands were charged with it by the Grant, but in Case of the Sta- tute, the Lands were only chargeable, and before the actual Charge, were granted over ; (*vid. Moor 811.*) and therefore may be compared to the Case where a Man makes voluntary Grants, his Wife shall not

word, i. e. the custom

*These grants are
not void, but by
the Statute in the Major
and minor cases from
the Statute. The
Exigent awarded
in a grant by Copy
after the felony com-
mitted shall bind
good notwithstanding
the Statute. Copy-
hold. p. 23.*

Brown.
208.
1 Leo. 16.
100.
4 Co. 24. a.

1854-55-56-57-58-59-60-61-62-63-64-65-66-67-68-69-70-71-72-73-74-75-76-77-78-79-80-81-82-83-84-85-86-87-88-89-90-91-92-93-94-95-96-97-98-99-100

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: *Quere* 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; for she had then 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, license the Copyholder to alien, and dies, the License is gone. 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 *Dominii 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

8 Co. 63. b.

1 Leo. 16.

Dyer 251.

a. Moor

236. 7.

1 Inst.

58. b.

Dyer

151. a.

4 Co. 24. a.

Owen.

115. 119.

not good. So if after Institution and Induction, he reads not the Articles, the Grant is void to bind the Successor; *tamen Quære.* Guardian in Socage may grant Copies, but not a Bailiff.

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 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 that is good. But there is the Case of *Gay* ver. *Kay*, where it was held good notwithstanding it did not come in Possession; 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,

Moor 95.
Cro. El.
661.
1 Roll.
Abr. 499.
Hetly 54.
Moor
147.

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 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 Copyholders 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 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, 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 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 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

O claimed

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, 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 is reported by *Moor*. Queen *Elizabeth* seized 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 to another in Fee; the Copyholder makes his Will, and devises his Lands to *Murrel*, the Plaintiff 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 tho' the Copyhold was severed from the Manor,

Moor
811.

4 Co. 24. b.

nor,

nor, yet it still remained Copyold Land ; for it would be very unreasonable that it should be in the Lord's Power to destroy 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 cannot 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. There is no Way for such a Copyholder

Cro. Jac.
572.
4 Co. 26. b.

4 Co. 25. a.

Cro. El.
499.
Moor
393.

x vide 3. Kingd. p. 109.

Cro. El.
252.

to alien, but by Decree in Chancery against him and his Heirs.^x 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: And *Coke* is against this; the Case is but shortly reported by *Croke*.

4 Co. 26. b.
Cro. El.
395.

1 Inst. 58.
a.

When the Lord grants the Inheritance of all the Copyhold Lands, the Grantee of all such may hold a Court, 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 Freeholders; yet as to the Granting Copyhold Estates, it is a Manor; for in Truth every Manor, consisting of Freeholders and Copyholders, hath two Courts, one a *Court-Baron*, and the other a *Court for Copyholders*, 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, 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,

holders, yet the Lord may keep a Court for his Customary Tenants: And so tho' 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. 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

Cro. El.
39. cont.

Cro. El.
103.

Cro. El.

442.

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 for 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 Perswasion, and held that a Lessee of the Freehold of Copyhold Lands might hold a Court and grant Copies; 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 the Copyhold Lands; here but of Part; and a Man cannot, by his own Act, create two severall Courts and Manors; but when the Grant is of all the Copyhold Lands, there

Cro. El.
325.

4 Co. 26. b.

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 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 was granted her. But this being done by Act in Law, no Prejudice could accrue to any Body.

Cro. El.
662.

The Lessee of a Copyhold for a Year shall maintain an *Ejectione firme*; for the Common 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.

4 Co. 26. *no*
Cro. El.
461.

There is the Case of *Stephens and Eliot*, where it was held the Lessee of a Copyholder 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

Cro. El.
483. 224.
1 Leo.
328.
Cro. El.
535. 623.
676.
Mo. 569.
539. 679.
and 271.
cont.
Cro. El.
469. 717.
728.
1 Leo.
100. 16.

Lands. It is held also, in some Cases, that if a Lease be made without Licence, the Lessee may maintain Ejectment at Common Law; 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 firmae*, 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 firmae*: And it is very plain also that where a Copyholder may make a Lease by Custom, such Lessee may have Ejectment. But the Question is, Whether such Lessee need mention the Custom in his Count. 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 Reason that the Lease is good against every Body but the Lord. And first, there is the Case of *Goodwin ver. Loughurst*, 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*,

Mo. 272.
cont.

Owin 17.
Cro. El.
535.

Haddon ver. Arrosmith, that such a Lessee may have Ejectment. In the Case of *Collins ver. Harding*, 'tis said, that *Eject. firme* lies of Copyhold Lands; but 'tis not said upon what Lease. In the Case of *Spark*, 'tis said by *Popham* that it lies in such Case; in the Case of *Stopper ver. Gibson*, 'tis adjudged that the Lessee of a Copyholder shall maintain an *Eject. firme*, but 'tis 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.

Cro. El.
461. 623.
676.
Mo. 539.

On the other Side there's the Case of *Stephen and Eliot*, where 'twas held *per Cur.* that a Copyholder could not have Ejectment; and 'tis 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; and if the Lessee enter, he is a Disseisor. And my Lord *Coke's* saying, that a Lessee for a Year may have Ejectment, excludes others from having it.

Cro. El.
394. 483.
524.

Mo. 679.
2 Brownl.
10. 40.
1 Inst. 57.
4.

A Customary Manor may be held by Copy of Court-Roll, *ad voluntat. &c.* and such

1 Bull.
57.
11 Co. 18.

Cro. Ja. 260. such a Lord may grant Copies; but it
 cont. 327. seems it must be of such Things as have
 Yelv. 190. been usually demised by him; for it seems
 con. he cannot grant all his Demesns by Copy,
 These without they have been usually demised:
 Cases are For tho' they have been demised Time out
 thus re- of Mind by the superior Lord by Copy,
 conciled, that will not warrant his Demise by Copy;
 that a because the Custom must be, that Time
 customa- out of Mind they have been granted *per*
 ry Court *Dominum Manerii*; now they have not been
 may be granted by him that is Lord of the Ma-
 held by nor, tho' they have by the superior Lord.
 one that This Case seems to prove that a customary
 hath such Manor to hold Courts, &c. may be with-
 a Manor, out any Freehold Services; and it may as
 but not a well be objected against such a Lord's
 Court- holding Courts, that he hath no Manor,
 Baron. because no Freehold Services; but it seems
 he may have Freehold Services.

A Copyholder may surrender by Attor-
 ney in full Court; for of common Right a
 Copyholder may surrender in Court, which
 is Common Law; as he may make a Lease
 for a Year without Licence; and as an In-
 cident 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, which the At-
 torney cannot do for him; therefore the
 Lord may refuse to admit by Attorney;
 but

but if he do admit him, 'tis 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 Lords 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.

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 the Manor, which will enable him as well as the Custom to do it upon the Manor. 4 Co. 26.
27.

'Tis said that a Steward may grant Copies as well out of Court as in; *sed Quære.* 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, 'tis no Forfeiture. 4 Co. 27.

If

If a Copyholder be seised by Force of several Copies, of several Parcels, by several Tenures, if he commit a Forfeiture in one, 'tis no Forfeiture of the rest: As if he commit Waste in Part of Black Acre, 'tis a Forfeiture of all that Acre; and by the same Reason if Waste be committed in one Acre, 'tis a Forfeiture of twenty Acres, if held by one Tenure; for the Condition in Law annexed to the whole Estate is broke; and so the Lord may enter for the Forfeiture: But where there are several Tenures, tho' 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 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.

Where

Where a Copyholder hath several Parcels of Land by several Tenures, the Lord ought to assess and demand his Fines severally; 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. 4 Co. 27.
28.

No Fine is due either upon a Descent or Surrender, till Admittance, for that is the Cause of the Fine; and therefore if after that the Tenant deny to pay, 'tis a Forfeiture; 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 to pay it on; but a Fine certain he must pay presently upon Admittance. *Note*; the Lord ought to assess a certain Time and Place for Payment of a Fine uncertain; for the Tenant can't carry it always about him, and he ought to demand it. 13 Co. 2.
Hob. 135.

When the Fine is uncertain, it ought to be reasonable, or else 'tis no Forfeiture if the Tenant do not pay it. As this Case is reported by *Croke*, 'tis said, when a Fine is certain, the Heir ought to tender it upon his Prayer to be admitted. As 'tis reported by *Cook*, 'tis said no Fine is due 'till Admittance, and that Admittance is the Cause; Cro. El.
779.
13 Co. 3.
Two
Years
Rent up-
on a Sur-
render
held un-
reasona-
ble.
and

Hob. 135.
4 Co. 29.
b.

and as *Croke* reports it, so has *Moor*, 623. and if he do not pay it, 'tis a Forfeiture. This seems to contradict what he said before; for if it cannot be a Forfeiture 'til Admittance, the Demand of the Fine must be of the Person of the Tenant to make a Forfeiture. So of Rent.

When a Surrender is made to the Use of one, without expressing what Estate the *Cesty que use* shall have, he shall only have an Estate for Life, except there be a particular Custom to the contrary; as if there be a Custom that he that hath 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. 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, tho' 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; and so it comes not within the Reason of other Cases, that they being but one Person cannot contract; for he

gives

Stile 145.
4 Co. 29.
b.

gives the Estate to the Lord, and he admits the Feme to it.

If one surrenders, and dies, if the Surrender be presented according to the Custom, 'tis good; otherwise void. So if the customary Tenants, by whose Hands the Surrender was, die, yet if the Surrender be presented upon good Proof, 'tis sufficient.

If he, to whose Use the Surrender was, die before Admittance, yet his Heir shall be admitted; for upon Admittance the Estate is in the *Cesty que use* from the Surrender by Relation. 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 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 Manor, to make voluntary Grants. The King's Steward *ex Officio* may make voluntary Grants, much more may the Steward of a common

mon Person, if he do not diminish the ancient Rent.

The Case of *Shaw ver. Thomson*, as 'tis reported by Lord *Coke*, is an Authority that Debt lies not in the King's Courts for Damages above 40 s. but the Remedy was in Chancery, or in the Court of the Manor; as 'tis reported; 'tis adjudged that Debt doth lie in the King's Courts, because the Court-Baron doth not hold Plea of Things above 40 s. as 'tis 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 'twas held they were.

4 Co. 31. Under-wood may be granted by Copy, or any other thing, Parcel of the Manor, as a Fair appendant to the Manor.

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.

4 Co. 31. 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; because during those Estates 'twas not demised or demisable by Copy. So if he make a Feoffment in Fee upon Condition, and enter for the Condition broken, yet 'tis not grantable by Copy; but if he keep them in his Hands never so long, or grant them at Will, they may

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, tho' the Interruptions be by Act in Law, yet they shall never be granted again.

If the Copyholder accept a Lease for ^{2 Co. 17.} Years from the Lord, the Copyhold is for ^{a.} ever gone ; 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 ^{Cro. Car.} Copyhold Tenement by express Name, yet ^{521.} this will not extinguish the Copyhold. ^{1 Keb. 720.}

If the Copyholder takes a Lease for Years ^{4 Co. 126.} of the Manner, his Copyhold hath no Con- ^{b.} tinuance, but he may grant it by Copy to ^{Hob. 215.} another : If after the Copyhold comes to ^{181.} the Lord's Hands, he aliens the Manor by ^{Cro. Jac. 573.} Fine, &c. the Alienee may regrant it.

The Lord shall not have the Custody of Lunatick Persons Lands, unless there be a Custom for it ; neither shall the King have it, for the Prejudice that would ensue to ^{Ut supra.} the Lord.

In Case of a Widow's Estate, 'tis said ^{Hutton.} to be resolved and agreed in *Lex Cust.* ^{18.} 156. ^{1 Rol. Ab.} that no Fine is due. *Quere* of this ; for ^{592.} tho' ^{Noy. 29.}

tho' the Estate 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. The like of Dower and Curtesy.

Hob. 190. A Copyholder had Common in his
 Cro. Ja. Lord's Waste; the Lord grants and con-
 253. firms the Copyhold Land to him and his
 Yelv. 189. Heirs, *cum pertinentiis*; adjudged the
 Noy. 136. Common was extinct, being annexed to his
 2 R. Ab. customary Estate, by the Custom, which
 61. Estate being determined, the Common also
 2 Brownl. is, and can't continue without Words to that
 210. Intent, and *cum pertinent'* will not do; for
 Mo. 667. the Common was not appurtenant to the
 Cro. El. Freehold Estate granted by the Lord; there-
 794. fore Care ought to be taken in infranchising
 Copyhold Estates, to add Words to conti-
 nue Common and other Profits *aprendre*
 to the Copyholder after the Infranchise-
 ment.

Cro. Ja. In this Case is cited the Case of *Ford*
 253. 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 there-
 to appertaining, and thereto used and occu-
 pied); and 'twas held he lost his Copyhold;
 the Reason seems to be, because the Com-
 mon was nothing appertaining, &c. to the
 Free-

Freehold he granted: But as this Case is reported by *Moor*, no other Words are put in 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 other holds where 'tis in another's Soil, which is a much stronger Case; for as it seems in such Case there's no way to continue the Common: For by the Grant of the Freehold 'tis gone, and the Lord can make no new Grant of it, but in his Soil he may.

Mo. 667.

1 Brownl.
173.
2 And.
168.

My Lord *Coke*, in his Treatise of Copyholds, saith, that if the Lord demand his Rent of the Copyholder, and he saith that he wants Money, and intreats the Lord to forbear 'till 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 no body is there, this is no Forfeiture. Now as in other Respects, so in this, *viz.* Copyhold Customs are not to be expounded by the strict Rules in Law, which appears from what *Coke* says, who owns that if the Copyholder be not there upon the Land, 'tis no Forfeiture; yet in Case of a Condition for Re-entry, that had been a

Co. Cop.
162.
not Law.

Forfeiture to entitle the Feoffor to an Entry. But the Condition annexed to Copyhold Estates; is a Condition in Law; for as 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. To prove which there's the Case of *Crisp and Fryar*, where that was held no Forfeiture; but the Case it self 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 *Crook*, one Judge was of Opinion 'twas no Forfeiture, because 'twas 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;

Mo. 623.
1 Rol.
Ab. 506.

Cro. El.
505.

Deed ; *sed adjurnatur* ; and no more of it is said in that Book. But the Case is also reported in *Moor* ; and there 'tis said Mo. 350. 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's the Case in *Hobart*, Hob. 135. Mo. 623. Cro. Ja. 617. cont. 4 Co. 27. 28. where 'twas adjudged that a Demand for Rent or Fine must be of the Person of the Copyholder, 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.

The Case of *Williams* was this; the Latch. 122. 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 the Copyholder's Words (tho' 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 is apparently different from that next preceding; for here was a Demand of the Copyholder himself; there was no Demand at all. There's the Case of *Caston* and *Ubert*, 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.

8 Co. 92.

If the Estate of the Lord cease, by Limitation of Use, and the Use and Estate of the Manor is 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.

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

Co. Cop. 159. House, these are good Excuses. *Vide* 3 *Leo.* 107.

Latch. 122. *Style* 141.

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 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.

Style 387.
8 Co. 100.
Cro. Jac. 101.
1 *Leo.* 100.
4 *Leo.* 30.
319

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, being only to compel the Tenant to come in and be admitted. But 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, 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 ha-

ving 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, and then go beyond Sea, he shall forfeit; for he 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, 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*.

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, it is a Forfeiture, yet it is no Disseisin to the Lord, 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 as may last much longer

Dyer
211. 6.
Noy 92.
Cro. El.
535. 676.

longer than the Lease, and not a bare Lease at Will.

1 Bulst.
189.

Jones
249.
1 Roll.
Abr. 510.
1 Bulst.
215.

1 Roll.
Abr. 510.

1 Roll.
Abr. 508.

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 presenti*, the other *in futuro*; which is against the Custom, and so a Forfeiture. *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 *Rolls* is, That the Leases were executed at one and the same Time; and then the Lessee, being *particeps*

ceps 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 Day, adjudged a Forfeiture.

Cro. Jac.
308.

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. *Quær.* 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.

Cro. Jac.
301.

Cro. Car
207.

Cro. Jac.
92.

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

The Lord gives Licence to his Copyholder to make a Lease for twenty-one Years, to begin next *Michaelmas* ; the Copyholder makes a Lease accordingly ;
but

392.

Moor
184.

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 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 nothing passes; but by a Lease for Years an Interest passes by the Delivery of the Deed, and therefore that is a Forfeiture.

1 Inst. 59.
a.
Co. Cop.
163.
Mod. 199.

My Lord *Coke* says, if Tenant for Life of a Copyhold suffer a Recovery by Plaintiff in the Lord's Court, as a Copyholder of Inheritance, this is a Forfeiture, but *Lex Cust. pag. 206.* says it was otherwise adjudged in the Case of *Bird and Keck. Ideo Quære.*

Quere. If a Copyholder erect a new House upon the Land without Licence, it is no Forfeiture, because it is for the Melioration 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.

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 Forfeiture, because not the Copyholder's act. My Lord *Coke*, in numbring permissive Waste, doth not reckon the Waste done by a Stranger.

1 Bulst.
50.
8 Inst. 63.
".
1 Roll.
Abr. 508.
Mo. 49.
cont.
Co. Cop.
163.

And further it is resolved in *Clifton's Case*, that if the 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

4 Co. 27.
a.

Lit. Rep.
267. 268.

after

Cro. El. 5.
13 Co. 68.
cont.
Cro. El.
498.
1 Roll.
Abr. 508.

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

Mo. 392. 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 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 *Darwinbridge* 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

Cro. El. 292.
1 Roll. 508.
Cro. El. 361.

the

the Timber. It seems reasonable that a Copyholder should have Timber to repair, &c. *sed Quære.* 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 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.
Winch. 1.
Cro. Jac.
30.
Cro. Car.
220.
1 Bull.
50.
Noy 2.
1 Roll.
Abr. 650.
660.

8 Co. 64.

If

Roll.
Rep. 196.
26. cont.

If the Copyholder take the Shrouds of Trees by Custom, if the Lord takes the Body, an Action of the Case lies against him, 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.

3 Bull.
281.
Style 233.

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 of Inheritance, if there be no Custom. Under-Lessee cuts down Trees, it is no Forfeiture of the Copyholder's Estate.

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.

13 Co. 3.

Two Years Value, for a Fine for an Admittance upon a Surrender, was adjudged to be unreasonable; but where Copyholds are only for Life, and fall into the Lord's Hands, there the Interest passes from the Lord,

Lord, and so *Arbitrio Domini res aestimari debet*; but in Case of Surrenders, the Lord is only an Instrument.

The Lord of the Manor may cut down the Timber-Trees growing upon the Copyhold Lands, provided he leave sufficient for House-bote, &c. 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 tho' a Custom be alledged for taking Shrouds for Fuel, 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 Trespas lies against the Lord for cutting Trees, not leaving sufficient, so that the Case must be understood, where there

13 Co. 68.
1 Leo.
272.

13 Co. 69.

Cro. El.
629.
Mod. 546.
355.

Q. was

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.

It seems if a Copyholder commit Felony 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 ; 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, 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

Co. Cop.
150. 164.
13 Co. 3.

cause then the Lord would lose his Services ; yet in *Packinton's Case*, a Custom is alledged 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 Wife died ; it was adjudged the Inheritance was forfeited to the Lord, notwithstanding he was not Tenant : The Custom was if any Copyholder be convicted of Felony. However, it seems Conviction is not necessary ; but if the Thing will bear it, it is good to lay a Custom. 1 Leo. 1.

My Lord *Coke* says, 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 Utlawry, unless for a capital Crime. If a Man be convicted of Manslaughter, and reads, he shall not forfeit. Inclosure of Copyhold Lands is no Forfeiture. If the Lord hath used to have a Field-Course over the Lands of the Copyholder, if he inclose them, and there Co. Cop. 164.

hath Ut supra.

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. Defacing of Land-marks is a Forfeiture.

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 Non-feasances. 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 aforesaid, is of no Use, and it is not mentioned

4 Co. 27.
a.
Cro. El.
149.
1 Roll.
Abr. 509.

tioned in any Book. Most of the Judges of *England* were of Opinion, that a Lessee for Years 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 Roll.
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

Roll.
Abr. 858.

9 Co. 107.
a.
2 Leo. 73.

Cro. El.
879.

Custom for it. So if there be a 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's 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 seize, and grant it in Fee by Copy to the Vendee; all which is accordingly done; 'twas 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 Copyholds, will have as good an Interest as those that have a Fee; for by secret Covin he may commit a Forfeiture,

feiture, and so give away the Fee. But notwithstanding these Authorities grounded upon so good Reasons, there's a Case in *Moor*, where a Copyhold to Two for Lives to have *successive*, and the first committed a Forfeiture, and 'twas adjudged that thereby the Remainder was forfeited. Mo. 49.

'Tis 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 'tis 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 'tis 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. 'Tis said by my Lord *Coke*, that if the Tenure be one, that a Feoffment of Part is a Forfeiture of the whole: But 'tis said in *Lex Custom.* that Co. Cop. 164.
Cro. El. 499.
Latch. 227.
3 Keb. 641.
4 Co. 27.
Cro. El. 353.
4 Co. 27.
3 Keb. 641.

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 Copyhold Estates. But if there be no Building, *Quere* ; 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.

1 Rol. Ab.
509.

Tothil.
107.

Copyholder by Licence lets for Years, the Lessee makes a Feoffment, he only forfeits his Lease. 'Tis said to be resolved in Chancery, that if the Father commits a Forfeiture, and dies, and the Lord admits his Heir, that this is no Dispensation with the Forfeiture, because the Ancestor died seized of no Estate, and so none could descend to the Heir. This Case seems to be unreasonable, for it seems that the Ancestor died seized of an Estate ; for nothing removes the legal Estate and Interest out of him but the Lord's Seifure.

3 Keb.
341.

There's a Distinction taken in *Keble*, that where after the Death of the Tenant, the Lord accepts a Heriot-Service, that is a Dispensation with 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 have Heriot. The Reason for the Difference seems to be, because in accepting of Heriot-Service, he admits the Heir Tenant ;

Vid. Cro.
Ca. 234.
and 1 Keb.
15.

nant; but in accepting Heriot-Custom, he only admits the Tenant died seised. *Sed quere*; 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, 'tis 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 'twas resolved in that Case, that if the Lord hath 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) 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.

1 Leo.
104.

1 Brow.
149.

Sed quere.

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.

Mo. 393.
Latch.
227.

2 Sid. 8.

Pal. 446.

Lat. 227.

The succeeding Lord shall not take Advantage of Waste done in the Time of the preceding Lord: But yet 'twas 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 tho' 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.

5 Co. 116.

Upon Entry for the Forfeitures the Lord shall have the Emblements; so if it were leased, Copyholder for Life, Remainder to another for Life, the Tenant for Life accepts of a Bargain and Sale of the Freehold and Inheritance of his Lands, to him and his Heirs, and then of a Fine: This does not displace the Remainder, but he has

9 Co.
106.

has Power to take at any Time after the Death of Tenant for Life. 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; and in *Coke's 1st. 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, 'tis 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. 'Tis held, that if the Inheritance of Copyholds be granted

9 Co. 107.
a.

4 Co. 26.
27.
1 Leo.
288. cont.

1 Inst. 61.
b.

granted to one, he may hold Courts where he will; for 'tis 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, tho' the Grant be at another Place, yet 'tis not said to be done at a Court; so *Quere* whether a Steward may make Grants by Copy out of Court; but if a Steward can, an Under-Steward cannot.

Cro. El.
103.

Co. Cop.
128.

2 Cro.
526.

Cro. El.
443. cont.

1 Cro. 273.
1 Leo. 86.

Co. Cop.
92.

9 Co. 75.
1 Leo.

36. cont.
1 Inst. 59.
a.

It seems a Steward (if specially impow-er'd) 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: 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. 'Tis said to be resolved, that a Copyholder cannot surrender by Attorney without Deed, *Pract. Reg.* 136. but that he may be admitted by Attorney without Deed. *Quere* of this.

If

If the Copyholder be in Prison, and that he cannot come, the Lord 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; 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 Copyhold, this is no Surrender, because he limits it to no body. So if he say he is content to surrender, 'tis no Surrender; for that only expresses his Inclination to do it, not that he actually doth it. *Quere*, Whether Words spoke out of Court will amount to a Surrender. 3 Bulst. 80.
Hut. 81.
1 Rol. Ab.
502, 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 'twas 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 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 dis-

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 Bullt.
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. But as this Case is in *Rolls*, 'tis said that 'twas no Surrender; for that a Copyhold cannot be surrendered by a Surrender in Law, but only by actual Surrender; yet as 'tis in other Places in *Rolls*, 'tis as in *Bulstrode*, held to be a Surrender, but that the Reversion was still in the Copyholder.

1 Rol. Ab.
501.

1 Rol.
Rep. 265.
1 Rol. Ab.
171. 172.

A. covenants with *B.* to assure him all his Copyhold Lands, and after he surrenders divers Parcels 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 Copy-

Copyhold Lands; there no more shall pass than what was named in the Surrender. Dyer
251. b.

If a Surrender be made to the Lord expressing no Use, it shall be to the Use of the Lord; 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. Kitch.
81. b.
Co. Cop.
95.

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, for he is a Chancellor in his own Court; and so when the Thing is left uncertain, 'tis no way unreasonable for the Lord to determine what shall pass. Cro. El.
392.

If a Man bargains and sells Copyhold 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.

Copyholder in Fee surrenders to the Lord without declaring the Use; at the next Court, 'twas re-granted to him and his Wife in Tail, Remainder to his right Heirs. Now this subsequent Admittance explains to what Use the Surrender was made. Poph.
125. 126.
Cro. Ja.
434.

A Copyholder in Fee surrenders to one for Life, the Lord admits him Fee, yet the 4 Co. 29. b.

Cro. Car.
205.

the Surrenderor has a Reversion in him; for the Lord is but an Instrument, and cannot develt the Estate 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, 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. S. n. 7.

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 surrendring into the Lord's Hands to the Use of another for Life, that the Lord will not be compelled to make Admittances thereupon.

1 Rol. Ab.
503.

Dyer
264. a.

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. surrendered. vel forisfac. of the Woman; and 'twas the Opinion of the Justices, that he ought not to be admitted; but the Lord may retain it in his Hands as an Occupant. The Reason is, because the Interest of the Feme was concerned, who had not surrendered: 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. 'Tis 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. This being spoke so generally, cannot by any fair Construction but extend to all Surrenders, either by Tenant for Life or in Fee. But in the Case of *King and Lord*'tis 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. *Quere* well of this Matter; 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

4 Co. 27.
b. 29. b.

Cro. Car.
204.

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; and no Charge by him while 'tis 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; and there can be no Difference where the Lord takes himself by the Hands of two Tenants; and if it be in the Lord, how can the Copyholder pay the Services, or take the Profits after Surrender, or make another Surrender.

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, unless there be a Custom to the contrary; for by Custom a Use limited to one & assignatis

Cro. El.
361. 442.
582.

Co. Cop.
108. 9.

1 Inst. 62.

4.
1 Leo.
101.

Cro. Jac.

403.
Cro. Car.
283.

Co. Cop.
103.

4 Co. 29.
b.

Copyhold Tenures.

signatis 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, tho' she was not named before the *Habendum*. But 'twas 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's another only named in the Premisses; 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 Premisses, *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.*

Ye

Cro. Jac.
434.
One named after the *Habend.* may take Copyhold Estates.
Poph.
125.
2 Roll.
Ab. 67.

1 Inst. 7. a.

Co. Cop.
97.