BOOK II.

OF DISSEISINS AND THEIR REMEDIES.

CHAPTER I.

Of Suits concerning Land, pleadable by Attachment.

HAVING gone through the form and manner of pleading personal pleas pleadable by attachments of the body or by distresses of movable goods, we must now treat of pleas concerning land, in which the process is by attachment of the very thing demanded. And first, of those pleas which more nearly concern the breach of our peace by fresh force, as when a person is wrongfully ejected or disturbed in the peaceable possession of his freehold, which act of violence is called disseisin, and fresh force. And in favour of complainants it is ordained that disseisins may be pleaded by petty assises in the counties where the lands lie, in the absence as well as in the presence of the offenders.

2. There can be no disseisin except of a freehold.[1] A freehold is a possession of soil or of services is suing out of the soil by a freeman holding in fee to

[1] 'Note that there is a difference between seisin and possession, for one supposes a term of life, and the other a term of years. Note in MS. *N.*

him and his heirs, or at the least for term of life, whether the soil be charged with free or other services. Fee is a right vested in the person of the true heir, or any other who hath acquired it by lawful title, whoever may be seised of the freehold. And this is the property, whereof one may have more and another less, as the heir of the disseisor has one kind of fee and of property, but the disseisee has a greater. But inasmuch as no one can be disseised unless he be first seised, we will therefore, before we proceed to pleas, show in what manner seisin may be acquired.

CHAPTER II.

Of Purchase.

1. Some things are corporeal, as those which one may touch; others incorporeal, as properties, rights, fees, and easements of tenements. Some things are common, as the sea, the air, and the sea shore, and as the right of fishing in tidal waters and in the sea, and in common waters and rivers; and some things are common in a less degree, as being common to certain communities, as the walls and gates of cities and boroughs; other sare common in a more special manner, as lands, rents, and other possessions and rights granted for the common advantage of a community, for which no single plaint can be made by a stranger who is not of the community, *nor can any single person bring such tenements in judgment, in the absence of the

community, or plead or be impleaded by any stranger; for a member cannot answer for the whole body, except as an attorney.

2. There are some things which are no one's property, as things sacred and dedicated to God by prelates of holy church, such as are churchyards, burial-places, churches, chapels, and other consecrated places, whether they are built upon or not. For things divine ought not to be appropriated to human purposes. And if they have been built upon, although the structure fall down, the place still remains sacred. There are also some things which are not the goods of any person, and which are consecrated in the name of God in holy church, such as chalices, censers, crosses, vestments and other like things, which are forbidden to be sold, given away, or alienated, except for ransoming Christian slaves from the hands of pagans.

3. There are also some things which in their natural state are no one's property, and whereof none can make a gift, as birds, stags, does, and other wild beasts, and fishes. So likewise land or other hereditament whereof no person is in seisin. So likewise freemen; and villains deserted and ejected by their lords, who immediately become free; *and all other things abandoned and remaining out of the possession of any one, but in which things a property may be acquired by occupancy.

4. Acquisition or purchase may be in divers ways; for wild creatures taken elsewhere than in a forbidden place or a warren, belong to the taker so long as he

keeps them. But if the creature escapes, and resumes its wildness and its natural state, so that there is no likelihood of its return, it will afterwards belong, not to him who can wound it, but only to him who can take it.[1] One may also acquire a property by inclosing of fish and other wild creatures, as bees. For though bees settle upon a tree, yet the bees do not belong to the owner of the tree, until he has inclosed them in his hive; no more than birds which have built their nest on a tree, for if another takes them, they are his. But if the owner of the tree takes another person's bees in his tree, and knows whose they are, he will be bound to restore them, or to keep them upon terms of divided enjoyment for half the profit which they shall produce. No person can detain from another birds or beasts *ferœ naturæ*, which have been domesticated, without being guilty of robbery or of open trespass against our peace, if due pursuit be made thereof within the year and day, to prevent their being claimed as estrays.

*5. Property may also be acquired by virtue of franchises granted by us concerning things found, which do not belong to anybody, as wreck of sea, beasts estray, rabbits, hares, fish, pheasants, partridges, and other wild creatures; that is to say, by a franchise to

[1] This passage appears obscure. The sense is borrowed from Bracton, who observes that the mere pursuit of a wild animal, even though the pursuer succeeds in so wounding it as to make it possible to take it, will not make it his property, but it will belong to the first person who secures it. Brac. 8 b.

have wreck of sea found on his soil, waifs and estrays found in his fee, and warrens in his demesne lands. Property may likewise be acquired by the increase and produce of beasts and other animals belonging to people; and also by the finding of gems and precious stones on the sea beach or elsewhere in places common to all; so by fishing and by other labour as well at sea as on land. And if any island is found in the sea which is not any one's property, whatever is found therein shall belong to the finder as long as he shall keep it in his hands or in his possession.

6. A purchase or acquisition may also accrue from the fraud and folly of another, as where persons by malice or ignorance build with their own timber on another's soil, or where they plant or engraft trees or sow their grain in another's land, without the leave of the owner of the soil. In such cases what is built, planted, and sown shall belong to the owner of the soil, upon the presumption of a gift; for there is a great presumption that such builders, planters, or sowers intend that *what is so built, planted, or sown should belong to the owners of the soil, especially if such structures are fixed with nails, or the plants or seeds have taken root. But if any one becomes aware of his folly, and speedily removes his timber or his trees, before our prohibition comes against his removing them, and before the timber is fastened with nails, or the trees have taken root, he may lawfully do so.

7. With regard to immovable things of common right, found in the possession of no one, a property

may be purchased in many ways. One way is by a subtraction of water whereby any one's soil is increased by little and little, provided the lands are not bounded between neighbours. But it would be otherwise in case of a sudden increase; for if one neighbour by the violence of a flood is deprived of part of his soil, whereby the soil of his neighbour on the other side of the water is increased, by such a sudden increase nothing shall be lost, unless the river be an arm of the sea; but the soil may be recovered by this assise, if the true possessor be deforced, unless he be barred by negligence. But if the increase has been so gradual, that no one could discover or see it, and has been added by length of time, as in a course of many years, and not in one day or in one year, and the channel and course of the water is itself moving towards the loser, in that case such addition remains the purchase *and the fee and freehold of the purchaser, if certain bounds are not found. And by increase of the demesne the seigniories and fees of the lords increase, and the lords may distrain as well in such additions as elsewhere in their fees without doing a wrong.

8. If a new island is formed in the water, the island shall belong to him whose soil is nearest adjoining to it, in whole or in part according as it rises in the middle or towards one bank of the water. If an island grows up in the sea, it shall belong to the person who shall be found in possession of it. It is otherwise however of an island made by the sea in any one's soil, for the island shall belong to the owner of the fee and

of the soil; and if he be deforced, he shall be aided by this assise.

9. There is also a good title, called succession, as that of the right heir to his inheritance, and of successor to the rights of his church, whereof his predecessor died seised. How an inheritance descends, and to whom, shall be explained in the book concerning Right in the chapter concerning Successions. There is also a kind of title which has some resemblance to succession, namely, title by accruer. This is where by the death of one parcener without heir his share accrues to the other parceners.

10. Things which are not in the seisin of another may be purchased by title of gift, and of feoffment, and also by succession, escheat, reversion, *assignment of dower, hiring, borrowing, and by title of testament. A freehold may also be acquired by being the father of issue born alive, by a special privilege which has the force of law in England and Ireland, and in many other ways. And with regard to the purchase of corporeal things, no gift is sufficient without delivery of seisin.

CHAPTER III.

Of Gifts.

1. A gift is an act whereby anything is voluntarily transferred from the true possessor to another person, with the full intention that the thing shall not return to the donor, and with full intention on the part of the receiver to retain the thing entirely as his own without restoring it to the giver. For a gift cannot be properly made, if the thing given does not so belong to the receiver, that the two rights, of property and of possession, are united in his person, so that the gift cannot be revoked by the donor, or made void by another, in whom the lawful property is vested; as may be done in the case of donations and feoffments by disseisors, and other like gifts in prejudice of the right of another. Gift is a more general term than feoffment; for gift is applicable to all things movable and *immovable, and feoffment is only of soil, whereof a person, being wrongfully ejected, may recover seisin by this assise.

2. It should be known, that some persons have power to give, and others not. For no one can effectually give but he in whose person the possession and the property are vested, and sometimes those who have nothing but the fee and the property, as by assignments

and recognizances in our court; all other manner of gifts are revocable.

3. Kings also may not so alien the rights of their crown or of their royalty as not to be revocable by their successors. It is nevertheless allowable for kings to grant baronies and other demesnes, and franchises, sometimes in alms, at other times to have the prelates and other sage persons of the realm of their council, so as they be summonable by the king and amenable to his justice; and in other cases in fee farm, as cities, boroughs, and other demesnes; and in other cases to retain the love of their people; and in other cases for dispatch of justice, for which several franchises are granted, as that of infangthef, and the power of holding plea in a writ of right, and other franchises.

4. Neither can prelates of holy church so alien the rights of their churches, nor templars, hospitallers, or other persons in religion, as that their gifts shall not be revocable by the donors. *Neither can earls, barons, knights, or serjeants, who hold in chief of us, so dismember our fees without our leave as that we may not lawfully eject the purchasers; nor in such case will it avail to allege length of seisin, inasmuch as no time is limited for the recovery of our rights.

5. Felons cannot after the commission of their felony make any alienation, which may not be revoked by the lords of the fee by our writs of Entry and Escheat. And bastards enfeoffed to themselves and their heirs (where assigns are not specified in the feoffment) cannot alien so as to prevent the lords of the fees from

having the lands aliened as their escheat. Nor may infants within age, nor natural fools, nor madmen, nor deaf persons, nor dumb, nor lepers removed from the society of people, nor villains, make any alienation, nor sokemen of their socage.

6. Neither can married women alien without their husbands; nor can husbands without their wives make such a gift of any part of the inheritance of their wives as shall not be revocable by the wives if they survive their husbands; nor yet wives with their husbands in prejudice of those in whose persons the fee and property are vested by form of the gift, *as in fees tail; nor may husbands give anything to their wives, nor the reverse, after the contract of marriage.

7. Those also cannot effectually give who do so through fear of death, provided they will revoke their deeds as soon as they escape from prison. But unless fear of death can be alleged, any one may give as well in prison as without. Likewise lunatics and frenzied persons may give an alien, but not during their madness. And persons in religion may give before they are professed, and lepers before they are put out of the society of healthy people; fools also, so as they are not fools born.

8. But whether a gift be lawful or wrongful, if the purchaser be challenged in his seisin it becomes the duty of the donor to warrant his gift as long as he lives, although he be not bound thereto by any special clause in a deed, and although the purchaser do homage for the same to another than the donor, as to the

chief lord. And if the donor has bound his heirs to warranty, and the purchaser is impleaded, he shall never be deprived of the gift without the heirs making it up to him in value, supposing they have wherewith to do so, if they cannot defend him in his seisin, and the purchaser proceeds according to law. *But if warranty is excepted. then he must proceed according as it was covenanted between them. Such purchasers may act foolishly, and defeat their own right in this manner, and in like cases. A. ejects B. of his freehold, and gives it to C.; B. proceeds by this assise; A., doubting the result of the assise, ejects C., and restores the land to B., who receives it as his freehold restored, and not by gift. If C. proceeds by this assise, he shall have judgment to eject B., and so B. will lose the possession through his own folly.[1]

9. There are other kinds of gifts, which are not absolute gifts, but are rather leases and demises for a term, or in fee, and whereout a man looks for the reversion or some annual service. Of which gifts some are conditional, and in such the fee is cut down and in suspense until a certain thing happens, as shall be afterwards mentioned; and some are made for a particular purpose, as on occasion of marriage, and for several other causes. Some gifts are absolute and large, others are restrained and in special form, as to some certain heirs named in the gifts, or where certain persons are excepted in the gifts. Some gifts may be ab-

[1] B. will be put to his proprietary action or writ of right, his last possession having been wrongful.

solute at the beginning, and afterwards restrained by this clause, so that the purchaser shall not have power to alien the gift to certain persons, or except to certain persons, or to any one. *Some gifts are complete, where both rights unite in the purchaser; others are begun, but not completed; and such titles are bad, as in case of gifts granted, whereof no livery of seisin follows.

10. Some are weak in their commencement, but are afterwards strengthened by the confirmation of those who have the property, as in the case of gifts made by infants under age, and by those who have no property in the thing, in whatever way they may have come into possession of it. But however such possessions be acquired, where the purchasers have purchased an estate other than their feoffors could legally convey to them, if such purchasers be presently ejected by those in whose persons the property remains or rests, the ejected shall never recover by this assise, on account of the defective entry. And if such purchasers are not presently ejected, they may be afterwards ejected by judgment of our court by virtue of this assise, and of our writs of Entry, and other writs. In some cases, however, the remedy for such disheritable alienations must be delayed until after the decease of the alienors, as in case where the alienors held for the term of their lives. And in case of alienations made by those who had an inferior estate, this assise shall be maintained against the feoffors and feoffees jointly.

*11. There are some also who cannot without our leave purchase anything but movables, as persons in

religion. Neither can a husband purchase more than the movables of his wife, nor the reverse, after marriage celebrated between them; nevertheless whatsoever is the wife's is the husband's, and not the reverse. For the law forbids gifts between husband and wife for two reasons; first, from a presumption of excessive fondness; secondly, lest the donor should through such good-nature remain poor and necessitous. Neither can an infant under age, nor any other person whatsoever, purchase anything where the donor remains in seisin, whether he retain the possession as owner or as guardian. Nor can lepers expelled society, nor madmen, nor idiots, nor such as are incapable of consenting to a purchase, acquire anything without guardians.

12. If any one would make a gift to an infant under age, and yet retain an estate for the term of his life, let him first make a complete gift, and put the infant in seisin, and give him some stranger as his guardian; and when the infant has been in peaceable seisin, let him eject him, and after the donor has been a considerable time in seisin, let him procure himself to be ejected by the infant, so that the donor may recover his seisin by this assise and by conviction, claiming a freehold by title of term of life. But for this proceeding the assent of the infant and guardian will be necessary.

*13. There are some purchases which are invalid, unless induction into seisin follows, as of corporeal things; others which are good without institution of seisin made immediately on the gift, as of things

incorporeal, such as franchises, and easements relating to land, for which this assise lies as well before seisin as after, as to have a way in another's soil, or common for a certain annual rent. For the act of the mind in the union of wills, and the delivery of the writings from one neighbour to another, are sufficient for seisin, as appears by the franchise of infangthef;[1] for it often happens that we grant to persons the franchise of outfangthef, that is to say, to have the punishment of their people and tenants, wheresoever they may be apprehended out of their fee, and adjudged to be hanged, so that after such judgment given, they may take them and bring them back into their franchise, and cause them to be hanged upon their own gallows.[2] In such a franchise, no one to whom we have granted the franchise in that form ought to be disturbed, although he has not hitherto been seised thereof. For it may

[1] The above reading is found in all the MSS. which I have consulted, though the context seems to require 'outfangenthef.'

[2] Bracton defines outfangthef to be the right of trying thieves coming from other parts, and taken within the limits of the lord's jurisdiction; and says expressly that this franchise does not authorise the lord to bring back into his liberty and try one who has left his jurisdiction and been taken elsewhere. (Brac. 154 b.) Fleta follows Bracton, but adds, that though the lord cannot try his own man taken elsewhere, yet when convicted, he has a right to hang him on his own gallows. (Fle. 62.) Later authors, following the 'Termes de la ley,' have explained outfangthef to be the right of the lord to call to judgment in his court one of his own men apprehended for felony out of his fee. See Ducange, Gloss.; Tomline's Law Dict.; Wharton's Law Lexicon.

well happen, that such a chance may not occur within ten years. Whereby it plainly appears that a man may be seised of incorporeal purchases without institution of speedy seisin.

*14. There are some incorporeal things which cannot be well purchased without the aid of our court; as fees and properties;[1] of which by agreement of the purchaser and the donor a fine should be levied in our court, by means whereof this kind of purchase derives effect and stability.[2] Nevertheless there are some fees which are not to be purchased by certain persons without a mesne. For husbands cannot purchase the fees of their wives' dowers,[3] by reason of the service which cannot be attorned from the wife to the husband. Hence the use in such cases of quitclaims from those to whom the reversion belongs.

15. Sometimes it happens that he to whom the reversion legally belongs by the form of the gift, cannot give his right to any person he may choose until he is

[1] The word *fee* is here used for seignory: the word *property* for a proprietary right not accompanied by possession.

[2] 'The right which is severed from the possession is sometimes not vested in the purchaser without recognizance in the King's Court, and then by a judicial writ, called *Quid juris clamat*: sometimes it is vested by quitclaim, and sometimes the two rights must be united, that is, the possession and the property before the right can be alienated.' (Note in MS. *N.*) As to the writ of *Quid juris clamat*, see Reg. Brev. Judic. 36 *b*.

[3] That is, the immediate seignory of the tenements held by the wife by title of dower under a former marriage.

himself seised, as in case of those heirs to whom an inheritance accrues after the decease of the purchasers who were seised for the term of their lives. But the tenants may deliver their seisin to the person to whom the reversion belongs, and he may reenfeoff them or others; and then not only the fee is granted, but the possession at the same time, together with the fee and the freehold.

CHAPTER IV.

Of joint purchases.[1]

1. As one person may make a separate purchase, so may many purchase in common, to them and their heirs and assigns, *or to certain heirs by a limited feoffment, and sometimes to issue born, and sometimes to issue to be born, where one can not be heir to the other. It is thus with the gifts which persons make to their mistresses or concubines,[2]—to have and to hold to the

[1] It should be observed that throughout this chapter, and elsewhere, the word *commun* is used of joint tenancy. No reference is made to tenancy in common, which appears to have been of later growth.

[2] With respect to the supposed gift to a concubine and her children born and to be born, (an example which is borrowed from Bracton,) the annotator in MS. *N.* observes as follows :—'To that it is said that a concubine can purchase to her and her children born and to be born, I do not at all agree, (Je ne m'y acord poynt.) For, suppose the concubine to have two children at the time of the purchase, and the deed to speak thus : Sciant &c.

concubine and her children begotten and to be begotten and their heirs; none of which children can be heir to the others. And if the mother be ejected, although

quod ego dedi Beatriciæ et Clementi et David pueris suis et omnibus aliis pueris de me procreatis ex eadem Beatricia nasciturís, habendum et tenendum prædictis B. C. et D. et eorum hæredibus et assignatis ;—if Beatrice have afterwards children who claim estate by this feoffment, and are kept out by the first purchasers, and bring assise ; being driven to state their title, they must claim either by title of purchase or of succession. And by purchase they can demand nothing, because they are not named by name in the feoffment, and were no parties to the livery of seisin. For in feoffments it behoveth to name certain donor, certain purchaser, and certain tenement : and those who were not *in rerum natura* at the time of the translation cannot claim part in the thing transferred, the nature of the translation being, that when the thing transferred becomes vested in the purchasers, it is extinct in the donors, and the reverse. But in this feoffment everything is extinct in the donor, and is vested in those purchasers who were parties to the induction of seisin, and in none other. Therefore it appears that the word *nascituris* is vain and ineffectual. And if the concubine be pregnant, and the donor say, Dedi Beatriciæ et Clementi filio suo ; and order that the child which shall be born be called Clement; although this happen accordingly, and the child remain ten or twelve years with his mother, as it were continuing his seisin, if he be afterwards ejected by his mother, he shall not recover by the assise, as some say. For the alienation gave forthwith a new tenant to the lord ; and if the mother had committed felony and been attainted, although execution had been delayed until the infant's birth, yet the right of the lord to have the escheat would have accrued immediately ; which right cannot be extinguished by him who could claim no estate at the time of the felony committed, for—jus semper in aliquo sibi vindicat, locum, nec in

the children have not had seisin, yet the mother and children shall recover by this assise, by reason of the seisin which the mother had in their name. And if the mother be dead, again the children shall recover by this assise by virtue of the same seisin, because she took the seisin for herself and her children as their guardian. For that person is seised, for whom and in whose name the seisin is taken; as is the case with the purchases of villains to the use of their lords.

2. Nevertheless if one of them allows himself to die seised of his part before division, it accrues to his parceners, and to their heirs, and so on to all the rest until the last. And if the last die without heirs and without assign, the inheritance shall escheat to the lord. And if any man purchase to himself and his heirs, without assigns being named in the gift, such purchaser, if he has no heirs, cannot alien or make an assign; *but if he has heirs either near or remote, who

loco vacuo requiescere potest.' This latter opinion is upon a point respecting which there is little authority in our common law. By the civil law children in the womb were treated as capable of acquiring property, (see Dig. li. 1. t. 5. l. 26); and this law was followed in our courts having cognizance of wills and administrations. (See Beale *v.* Beale, 1 P. Will. 244. Doe *v.* Lancashire. 5 Term. Rep. 49.) This however was not the case at common law, for it seems to have been the general opinion that if a remainder was limited to a child, who was *in ventre sa mere* at the determination of the particular estate, the remainder failed, the child not being considered to be in *esse*. The contrary rule was finally laid down by Statute 10 and 11 Will. III. c. 16. See Reeve *v.* Long, 1 Salk. 227; Coke Lit. 298 a. (note by Butler); Coke Lit. 390 a.; Blackstone, Comm. vol. i. p. 130.

can warrant the gift, he may in such case give, sell, and make assigns: but if there be no heir, then the tenement will escheat to the lord of the fee.

3. If purchasers holding in common be ejected out of such purchase, they shall all jointly recover their seisin to hold in common, by this assise, whether the disseisor be a stranger or one of the parceners.

4. But if any one die seised of his part in severalty without an heir, and without having created assigns, that part shall not accrue to the parceners after the division, but shall escheat to the lord. And if the lord immediately after the decease of the tenant put himself in seisin by merely setting his foot thereon, it is a sufficient seisin; and if he be ejected or deforced, he shall recover by this assise.

5. There are some purchases which are valid as to some of the purchasers, and not as to others; as, where gifts are made by a husband after marriage to his wife and their common children, or to the wife and the wife's children, such gifts will not avail the wife, but will stand good as to the children.

6. If two brothers purchase jointly to them and their heirs, the elder may be tutor and guardian to the younger, if the younger is under age and the elder of full age; and if both are legitimate, one shall be the other's heir, *if he has no heirs of his own body, and has not made assigns, whether partition was made between them or not. And if one be deforced or ejected after the other's decease, and after having merely set his foot upon the land in the name of seisin of his

inheritance, he shall recover by this assise. And if the assise be brought against the chief lord, and he plead that he claims only wardship in respect of the share of the deceased brother, this defence shall not prevail, although the deceased's brother have left a son or other heir apparent under age, inasmuch as no separate property was ever recognized in the tenement.

CHAPTER V.

Of conditional purchases.

1. Notwithstanding heirs are named in a purchase, yet no purchase thereby accrues to the heirs. And it must be understood that where any one purchases to himself and his heirs, he purchases to himself and his heirs near or remote, and to have and to hold from heir to heir, as well to those begotten as to those which are to be begotten.

2. And as heirs may by the form of the purchase acquire a property in the purchase of their ancestor, so may they by the form of the contract between the donors and the purchasers be excluded from the purchase. For a covenant sometimes bars succession, and effect must be given to the contract and the will of the donors, as in the following and like cases. * If any one purchase to himself and his wife and their issue begotten in lawful matrimony; by such a purchase the

purchasers have only a freehold for their two lives, and the fee accrues their issue if there be any already born; and if not, then the fee remains in the person of the donor until they have issue;[1] and in case the purchasers have no issue, or have issue which fails, the purchase will revert to the donor. And if one of the purchasers die, the other shall retain the purchase for the term of his life. And if they have no issue, and the tenant commits felony, the donor shall have the reversion, and the chief lord shall have no escheat. And if the donor has set his foot on the land in name of

[1] The treatise of Britton appears to have been compiled after the date of the statute *De donis conditionalibus*, 13 Edw. I., and even of the statute *Quia emptores terrarum*, 18 Edw. I., (see the Editor's Introduction); but before the effect of these statutes upon the law had become apparent. The observations of the annotator in MS. *N.* further illustrates this change of law. 'Before the statute [*Quia emptores*] the donor could charge or discharge the tenements at his will, and put one or more conditions in the charter. But since the statute no charter or gift was conditional save gift in fee tail, because every tenant by force of the statute must hold of his chief without mesne. Wherefore some of our companions (les uns de nos compaignons) say that this chapter [of Britton] is vain and antiquated (veyn e antiquité). But let them say what they will (dient lur talent); for it is said 'covenant conquers law,' as, if any one desires that any of these conditions may hold, he may give the tenement in fee simple, and then make indentures containing the conditions at his will; and thus by these collateral covenants (covenans den en costé) one may recover the land either by his own force or by force of law as by writ of covenant. So that, although the charter was not conditional, the conditional writings defeat the charter.' See some further observations on sections 4, 5, and 6.

seisin, and is ejected or deforced, he shall recover by this assise.

3. A condition may be made in many ways; in one way to the advantage of the purchaser, as upon condition that he does not give or alien, and sometimes to his prejudice, as upon condition that he do not hold in fee, but only for a term. There are four principal heads of conditions which are allowable in gifts and other contracts, namely these: I give to thee, so that thou give to me: I do, so that thou do: I do, so that thou give: I give, so that thou do. These conditions so bind the parties by their contracts, *that each is bound to the other in such a manner, that if the one gives or does such a thing, the other is bound and obliged to do the counterpart according to the contract; so, in the negative, that if the one does not do such a thing, the other is not bound to do such a thing. And if the one does the act, and the other will not do the act, it is lawful for the donor to take back his gift; and if he is deforced thereof, he shall be aided by this assise.

4. A purchaser shall also have the like remedy, where certain lands are promised to him, and writings made thereof, on condition that he marry the sister or daughter of the donor, and the purchaser marries her before the donor puts him in seisin of the lands. If the purchaser, seeing that the donor will not keep his covenant with him, puts himself in seisin of the land, in person or by another who takes possession in his name, and he is ejected or deforced, he shall be aided

by this assise.[1] And if the donor performs his contract in part, and in part not, in such case the purchaser shall be aided by our writ of covenant; or of escheat by detainer of the services for two years, as was provided at Gloucester.[2]

5. If the donor says thus: I give thee so much land with the appurtenances, to have and to hold to thee and thy heirs if thou have heirs of thy body begotten: in such gifts the purchaser purchaseth only a freehold, but if he has issue, the fee and the right then first accrue to him, *so that he will be able to give and alien the land, although the issue fail, because the condition is satisfied;[3] and the brothers of the purchasers or their other remote heirs shall inherit such a purchase.

[1] 'That which is said, that the purchaser may thrust himself into seisin upon the marriage, is not well said as to the present law (quant a ore). For, if he can aid himself by writ of covenant, well; if not, let him provide better another time. Note in MS. *N.*

[2] The conclusion of this sentence is obscure; and probably the text is corrupt. The reference appears to be to the fourth chapter of the Statute of Gloucester (6 Ed. I.), by which a remedy was provided to a donor or lessor to recover the land in case of the nonpayment for two years of a fee-farm rent or other service reserved amounting to a fourth part of the value of the land. The writ by which this remedy was enforced was called *Cessavit per biennium.* (Vet. Nat. Brev. 138.) This statute is cited in the corresponding passage of Fleta, as furnishing a remedy for a breach of a condition.

[3] 'This is all void; for the gift is [*qu.* treated in the text as] a conditional gift, and not in fee tail.' Note in MS. *N.*

6. If the donor say, I give thee this land because thou hast served me well: although the cause may be false, it does not follow that the gift is not good. And in the following case also the gift shall be good and firm, whether the cause be true or false: I give thee this land because thou wilt serve me well. But if the donor say, I give thee this land if thou wilt serve me well, the gift here is doubtful and in suspense until the condition is satisfied.[1]

7. Where a gift is made upon condition of something in future, and the condition is possible, there the gift will be deferred until satisfaction of the condition; and if the purchaser brings any plaint, the donor may plead this exception, that no action or plaint can accrue to him until after satisfaction of the condition; as where a gift is made to another on condition that he give 10*l.* But if the condition be impossible, then the gift is of no virtue or force, as if the condition be thus: I give to thee, upon condition thou procure me the moon.

8. Some gifts depend upon the will of another, as in the following case: *I give to thee, if John is willing; here the purchase is of no avail, unless John assents to it. Some purchases are casual, as in this case: I give to thee to hold, if I shall be made a bishop.

[1] What is here said of gifts made for a certain cause, and also of gifts depending upon the will of another or upon chance, is bad law, (rien ne valt.) For it matters not (il ne me chaud) for what cause you give, so you put me in seisin to have and to hold to me and my heirs of the chief lord. Note in MS. *N.*

9. If a gift be made upon more conditions than one, and one of the conditions is satisfied, the gift will be valid, if the conditions are several; but if they are joint, then all must be fulfilled to make the purchase effectual. For it is not the same thing to say, I give to thee, if thou do such a thing or such a thing, and to say, I give if thou do such a thing and such a thing, jointly. For in one case, satisfaction of one of the conditions is sufficient, and in the other it is not sufficient unless all the conditions are satisfied.

10. Another kind of condition which is permissible in gifts is negative, as where a gift is made to the youngest son, or to a stranger, to have and to hold to him and his heirs, if the elder brother shall have no issue of his own, or no issue by such a wife. So, where the gift is made to the purchaser, to have and to hold to him and the heirs of his body begotten, and if he shall have no issue, that then the gift shall revert to the donor, or to certain other persons, to hold jointly, or severally, one after the other.

11. There are other kinds of conditions, which are double; as where the donor says, if thou shalt have no heirs of thy *body begotten, or if thou shalt have heirs and they shall fail, then the gift shall revert to me and my heirs: or thus, if such a thing do not happen, then thou shalt have the land for ever.[1] Gifts may also be made upon several conditions, as in this example: to have and to hold, so thou do, or so thou do not such

[1] This example appears imperfect. Probably some words are lost out of the text.

and such things, and if thou do, the gift shall return to me; or thus, to have and to hold so thou do not do such a thing, or several things, without my leave, and if thou so do, then it shall be lawful for me to put myself in seisin of the gift and retain it for ever.

12. If the purchaser do not in such case according to the covenant, and the donor throw himself into seisin, he shall keep it; and if he be thereof ejected or deforced, he shall recover by this assise. But if he cannot in any way put himself in seisin, then he may avail himself of our writ of covenant, in which the process is by the great and little *Cape*, as in a real action. And if the charters or writings of the original contract are denied in judgment, it will not avail to prove the deeds without making proof withal of the condition being satisfied. For these two things may well stand together, that the deeds may be legal, and that the condition may not have been satisfied.

13. A condition sometimes bars the descent of an inheritance to the right heirs; as in this manner: I give thee such land for a certain term; *and if I die within that time, then the land shall remain to thee and thine heirs, or for term of life, or for other term. Sometimes a condition makes a freehold of a term, and the reverse; as in this case: I give thee, to have and to hold during the life of the purchaser, and for such a time over; and if thou die within that term, then I will that thy heirs or thy executors shall hold the gift for the same term. The chief lords however cannot be deprived of anything; for a term does not take away

wardship, but only delays it until a certain time; unless the heir is an idiot, in which case the lord loses his wardship and the farmer his term, until it be otherwise ordained, at least during the life of the idiot. This rule was laid down by the common assent of the great lords of the realm and by the provision of Robert Walrand, in whose heir and the heir of his heir the statute first took effect.[1]

14. If a gift is made on condition that if the donor shall pay so much at certain days and at a certain place, the gift shall return to the donor, and if not, the land shall remain to the creditor in fee, to him and his heirs; now although it be so expressed in the charter of feoffment, if the creditor dies before the day when the payment should be made, his heirs can demand nothing *before the day; as shall be mentioned among the exceptions in Mortdancester.

15. A fee may be made to arise out of a term; as is the case where one going a pilgrimage leases his land for a term of years with this condition, that if he does not return, the land shall remain in fee to the termor; such a condition shall always be a bar to the action of the heir of the pilgrim. And thus it appears that feoffments and purchases may be conditional as well as simple and without condition.

[1] 'See Coke, Inst. pt. 2. p. 109. Robert Walrand was a Justiciary of the latter part of the reign of Henry III. (Foss, Judges of England, vol. iii. p. 503.)

CHAPTER VI.

Of Reversions and Escheats.

1. A purchase sometimes reverts to the donor; as is the case with a gift made in marriage, for default of heirs. So likewise by form of gift; and sometimes for want of the words "heirs of assigns," and for want of "assigns of assigns." It is therefore necessary in every good purchase that the feoffment be made to have and to hold to the purchaser, his heirs and assigns, and to the heirs and assigns of his heir and to the heirs and assigns of his assigns. For if no mention is made of any of these, and alienation is afterwards made contrary to the form of the gift, the donor may have his action for the reversion. Land also returns to the feoffor or his heirs, or to his assigns by virtue of a fine levied in our court, when it has been leased for term of life or for years, however long the term may be.

*2. Some purchases escheat to the lord of the fee, as where the purchaser is guilty of felony and undergoes judgment. So also, when the purchasers die without heirs. So, when the tenants abandon their tenements. In these cases, if the lords do but set their foot upon the land in name of seisin, they are sufficiently seised in respect of the proprietary right which descended to them, unless they are barred by negligence on account

of too long a delay. But if they put themselves in seisin as soon as the fee is vacant, or within four days after the vacancy, if they are resident near, or within fifteen days if they live at a distance, or within a still longer time as is mentioned below, or any other person does so in their names, and they are afterwards ejected or deforced, they shall have their recovery by this assise. But if they delay too long, it may then be more troublesome to eject the tenants than to proceed by judgment of our court. It is therefore their better course to recover their right by writ of escheat.

3. If a villain or a sokeman make a gift or feoffment of the villenage of their lords, or if the lord's bailiff or farmer, or other in whose person both rights are not united, make a gift of what belongs to another, or if a married woman disposes of her own property without her husband, *the seisin may in the same manner be taken back, whoever be tenant, whether the disseisor or his son, and although the latter may be under age, provided it be done in time; but, if not, it is then better for him to proceed by judgment of our writ of entry than by his own force.

CHAPTER VII.

Of Purchases by Villains.

1. Villains may purchase as well as freemen; but nevertheless whatsoever a villain fairly purchases, he purchases to the use of his lord, unless the purchase be made of the lord, provided that the lord is in seisin of him and of his chattels and of his suit; so that the lord may enter upon the purchase of his villain, later or sooner, as he pleases. For in this case no time runs against him. Villains, therefore, ejected by their lords, in whosesoever fee the purchase may be, shall not recover against their lords by this assise, or have any other remedy. The lord however, after he has been seised of the purchase, and of the charter of his villain, may give to his villain other land to the value, or the same land, *to hold of him in villenage, or may thenceforth hold it in demesne. But in this case the the lord will be bound to perform the services which are due to the chief lord in respect of such purchase.

2. But if the villain purchases any land or other tenement from his lord himself, who enfeoffs him to have and to hold to him and his heirs, whether the purchase is given to be held by free services or by villain customs, and though there is to be merchet or redemption of flesh and blood for the tenement, yet if the lord after-

wards ejects the villain from that or any other purchase, the purchaser shall recover his seisin by this assise. For since the lord intended in his feoffment that the villain should have heirs, he thereby renounced every exception of villenage on account of the villain services issuing therefrom, so that this will avail him nothing. For it is not the same thing to hold freely, and to hold by free services. For whosoever holds to him and his heirs, although he does not hold by free services, yet it follows not that he does not hold freely, that is, as a freeman. And by such feoffment the villain becomes a freeman, whether homage be expressed or not.

3. And if a villain purchase tenements to himself and his heirs of any other than his lord, and some other than his lord eject him, *the villain may recover by this assise against any person except his lord,[s] if the lord be not seised of him, his chattels, and his suit, as in the case of a villain fugitive from his lord, and claiming freedom by any title, as by clergy, or long continuance in a free condition without being claimed by his lord, or by any other title, as has been said in the chapter concerning Naifty. And therefore if such villains die in that condition, and the lords put out their heirs, they shall recover by assise of Mortdancester. For where assise of Novel Disseisin holds in the case of the father, there assise of Mortdancester will lie for his heir.

[1] Some words equivalent to 'and even against his lord' have probably slipped from the text here. See above, l. i. c. 32. s. 7. p. 199; and below, c. 18. s. 2, 3.

4. If one who is villain to more than one lord purchases to himself and his heirs, whichever of his lords shall first oust him may retain the seisin for ever;[1] and if all the lords seize the purchase of the villain at the same time, then let it be theirs to hold in common, until they have divided it.

5. If the villain sells in fee the purchase which he has bought in fee, before the lord shall have taken and seized it, and the lord ejects the free purchaser after he has had peaceable seisin of the gift of the villain, the person ejected shall recover his seisin by this assise; and the lord will be for ever after barred of his action by his negligence.

6. When any villain who is a fugitive from his lord makes a purchase, the lord cannot have any action or set up any *claim against this purchase, until he has recovered and established his right to the villain. And if he has taken anything from him, the villain need never answer his demand, until he has fully restored to him the land and the chattels found out of his fee, which his lord has taken from him. This is by reason of the words in writ, 'with his chattels and all his suit.' For if the villain was not fully reinstated, and put in possession of the same, the words of the writ

[1] 'When several parceners are seised of a villain, if he purchase in the name of one parcener, the property accrues to that parcener; if in the name of all, to all; if in his own name, the one who enters may hold it, and the others are without recovery. For if the purchase of a villain be aliened before the entry of the lord, no advantage can accrue to him.' (Note in MS. *N.*) The several cases are similarly distinguished by Bracton, f. 25 *b.*

would be thrown away, and our precept would be vain, in commanding a man to be put in possession of a thing of which he is himself seised. But when he has proved his title to the person, then he may by judgment and by law seize the lands and chattels and all the purchase of his villain.

CHAPTER VIII.

Of Charters.

1. It has been said above in the chapter concerning Debt that it is necessary for an obligation to be clothed in five different ways. The same clothing is also necessary for gifts and purchases. And as to that clothing by writing, which is called Charter, it must be understood that there are several kinds of charters, as charters of kings and charters of private persons; and of the king's charters some are single, some common, some universal. *Of simple charters, some are of pure feoffment and single, others of conditional feoffment; some are charters of confirmation, and some of quitclaim.[1]

2. Single charters of pure feoffment without condi-

[1] This is from Bracton; but there is some confusion arising from the equivocal use of the word *simple*. The word *privata* is similarly employed in Bracton to denote, on the one hand, a charter made by a private person; and on the other, one granted by the king to an individual, in distinction from one granted to a community or to the entire kingdom.

tion ought to remain with the purchasers and their heirs. Conditional charters ought to be indented in two or three parts, so that one part sealed by the purchaser may remain with the donor, and another part sealed with the seal of the donor may remain with the purchaser and his heirs, and the third part be put into an impartial hand,[1] so that no one may afterwards demand a right in anything by form of gift or by condition, but that our court may be certified of the form by the charter. For no action or exception avails unless it can be proved, and it is useless to pray the court that the adverse party may be compelled to produce a deed, because no one is obliged to arm his adversary.

3. As to royal charters, whether they are allowable, or false or doubtful, can be adjudged by none but ourselves. For it is the office of the author to determine and judge concerning them. Wherefore we will that such doubts and illegalities be referred to none but ourselves, and that all interpretations be made by us.

*4. In single gifts it is sufficient to say thus: 'Know all men present and to come that I, John, have given to Peter so much land with the appurtenances in such a town;' and it is proper to specify between what boundaries. And it is not necessary to say, 'to Peter and his heirs,' where Peter intends to purchase fee and frank tenement, but the heirs will be specified afterwards, thus: 'To have and to hold to the same Peter

[1] Bracton advises, that the deed should be either in two parts, or, if in one, should be deposited *in æqua manu*. Bracton, f. 33 b. So Flete, 196 (§ 2).

and his heirs.' Neither is it necessary to say, 'grants and confirms,' though it is usual to do so; nor is there occasion to say, 'for homage,' nor 'for service,' if it is not intended by the contract; for however homage or service are expressed in the charter, yet the chief lord of the fee shall not lose anything. Some persons however may do so in an exchange of seigniories,[1] as in making a feoffment by custom of knight's service; and in such case it is proper to specify the homage in the feoffment. Appurtenances are named to include both corporeal things, such as hamlets appurtenant to chief manors, and common of pasture, turbary, fishery, or the like; and things incorporeal, as franchises, and servitudes of tenements. Then follows: 'to have and to hold the aforesaid land with the appurtenances, to the same Peter and his heirs, doing therefore to the chief lords of the fee the services thereto belonging.' *And it should be understood, that it is a very necessary clause to specify the service by number, quality, and quantity, and to what persons they are due, so that neither the lords of the fee nor any other may demand more than right, without the feoffors being specially obliged to acquit and defend the purchasers. Then follows: 'for all services, customs, and demands.' And if the gift is made for term of life, or for term of years

[1] There is a difficulty in the interpretation of this passage, which I confess I cannot clear up. The full effect of the statute *Quia emptores terrarum*, recently passed at the time when this book was composed, does not appear to have been understood. See p. 236 note.

over, or in marriage, or in fee tail, or upon condition, the condition shall be specified in the charter indented, as above mentioned.

5. In absolute feoffments it is not proper to say, 'to hold of the donor and of his heirs;' for whatever be said, it will not follow but that the purchaser will become tenant to the lord of the fee, in chief without mesne. And beyond this there is no occasion to say, 'freely, quietly, well, and in peace.' For these words belong rather to the form than to the substance of the business; but if such words are put in, they are harmless. With respect to tenements given in marriage, the form and issue supply the place of a charter; nevertheless a charter does no harm.

6. Sometimes a gift may be enlarged, sometimes restricted. It may be enlarged in this manner: 'to have and to hold to the aforesaid Peter, his heirs, and assigns;' and sometimes further thus: 'and to the heirs and assigns of his assigns.' *It may be restricted as follows: 'to hold until I pay him ten pounds,' or 'until I or my heirs pay him ten pounds,' or 'until I or my heirs or assigns pay Peter or his heirs or assigns.' In another way thus: 'to hold to him and his heirs without making alienation,' or 'without making alienation to such a one,' or 'except to such a one,' or thus, 'to hold during the life of Peter, and after his decease that the gift revert to Thomas and the heirs issuing from him, and if he has no such heirs, then return to Theobald, his heirs and assigns.' And in all these cases we will that the intention of the

donor be observed, so far forth as law and right will allow.

7. It must be understood that no feoffor is bound by the general clause of acquittance to acquit the fee from making contribution for the knighting, of the lord's eldest son, or the marrying of his eldest daughter, nor from sheriff's aid, nor from common amercements or fines of the county or hundred, nor from suits due to the county or hundred court or elsewhere. Any one, however, may by a special clause bind himself to acquit his purchaser from all these services, and such obligations are enforced by writs of mesne.

8. Then there is the clause, 'And I and my heirs will warrant the tenement with the appurtenances, and will acquit and defend the same to the aforesaid Peter, his heirs and assigns for ever.' And this clause of warranty may be more full thus: 'his heirs and assigns and the assigns of his assigns.' And by reason of this clause it is useful in many cases for purchasers to take to themselves the charters of their feoffors, so that if the the feoffors have nothing whereby they can warrant if need be, then the purchasers by virtue of the charters of their feoffors may vouch to warrant the feoffors of their feoffors, to which voucher they shall be admitted wheresoever it is found that the warranty of the first feoffors extends to warranty without mesne. Acquittance and defence are inserted to the intent that the person of whom the purchaser is to hold in chief may be obliged to acquit and defend him,[1] in case any lord paramount or

[1] This sentence appears to imply that the purchaser will hold

other should demand of him other services than the *purchaser shall owe to the lord, of whom the purchaser holds in chief.

9. As to charters of comfirmation and of quitclaim, let every one know that such charters made between persons out of seisin of any right are of no avail, where the parties to them are divested of the right of possession or the right of property.[1] Therefore it is a good precaution for those who are having charters prepared, to take care that the date of the place and of the year be inserted.

10. Afterwards let some of the neighbours who are freemen be called as witnesses, in whose presence the charter should be read and sealed, and the names of the witnesses should be written in the charter. It would also be a good precaution to procure the seals of the witnesses to be affixed, together with the seal of the lord of the fee; or in the presence of the parties to have the charter enrolled in a court of record. And although the witnesses be not called, it is sufficient if the deed be afterwards recorded and acknowledged before them. If the feoffor has no seal of his own, a bor-

of the donor, who promises to acquit and defend him, and therefore to be inapplicable to the law as altered by the statute *Quia emptores terrarum*. (18 Ed. I. c. 1.)

[1] This passage appears to be taken from Fleta, where, however, the text is scarcely less obscure. I understand the meaning to be, that, in order to give validity to a charter of confirmation, the confirmee must be in possession, and the confirmer must have the right of property.

rowed seal will be sufficient. There are many modes of purchase in which no charter is required; as by lawful judgment of our court; by surrender; by release and quitclaim; by default; by assignment of dower; by having issue by the law of England; and by several other ways.

11. But inasmuch as, although a charter is made, witnesses called, and the deed sealed in their presence, yet whatever has been done and said avails nothing unless livery of seisin be made by *the donor to the purchaser, we must therefore say somewhat concerning induction into seisin, how seisin ought to be delivered, and how purchasers ought to receive it, of what things a man may be put into seisin immediately, and of what not until a certain time; and of what things induction into seisin is unnecessary.

CHAPTER IX.

Of Seisins.

1. Forasmuch as the mere grant and authorization of the donor is not in general sufficient for purchasers, unless possession follows, with respect to possessions it must be understood, that possession is properly the seisin and holding of anything in fact and in intention, together with the property. There are some things however of which one cannot commonly retain possession or seisin; for of things incorporeal there can be no

delivery; nor any proper seisin without a corporeal substance. But usage by long prescription supplies in time a legal title.

2. Livery and induction of seisin is a voluntary translation of a corporeal thing belonging to the person transferring it or to another, from the seisin of the true owner to the person of the purchaser, whether the owner transfers it in person, or by another on his behalf attorned and appointed by his letters patent. *Such letters should be in duplicate, one to remain with the attorney, the other with the purchaser.

3. When any livery of seisin is to be made, the donor should first remove all his movable things which he has in the tenement, and his wife and children and all his family, so that there be nothing of his which he has not either removed or sold or let to farm, so that there may be no presumption that the donor intends to retain anything. For as long as he has any intention of retaining, no freehold ever accrues to the purchaser.

4. But if the donor vacates the tenement in fact and in intention, and delivers the seisin thereof to the purchaser, who receives it in fact and in intention, and so keeps it, a freehold, and fee (if the purchase be in fee) immediately accrue to the purchaser, by only setting his foot in the tenement, by virtue of the right, and of the union of wills which are joined, to wit, of the true owner in whose person both the right and the seisin were united, and of the purchaser who receives both the right and the seisin. Therefore, if any one ejected the

purchaser from the land immediately after the gift, he should recover it by this assise as his freehold, although he had not taken any esplees, by virtue of the seisin. For neither user nor esplees are of the substance of the gift, but are equivalent to a declaration and evidence of seisin. And whereas the purchaser will thus have had the seisin in deed and in intention, *so without both act and intention he can never so lose it, as not to be able to recover it.

5. But where any farmer has a term in the land, and is neither ejected nor attorns to the purchaser, if the donor dies during that term, his heir may recover the land by reason of the continuance of the seisin of the termor, who occupied it in the name of the donor. Wherefore no seisin can be legally delivered, except by judgment of our court unless while the seisin be vacant. The heir also shall recover seisin in case the seisin of the farmer has continued with that of the purchaser, inasmuch as the purchaser never had peaceable seisin in the lifetime of the donor. But if the farmer attorns to the purchaser, although he continues to hold his term, provided he has admitted that he holds of the purchaser, the gift is not thereby of less validity; for in such case the feoffment and term may well exist together in different persons.

6. Where there is nothing of the donor's in the tenement, and the tenement is a principal manor or mansion, there it is enough for the donor in the presence of some free neighbours as witnesses, and of some of the tenants, to deliver seisin to the purchaser

by the hasp or ring of the door, or by shutting the gate; and thereby the purchaser becomes seised not only of the mansion, but of whatsoever was named in the charter and was properly the donor's, annexed to the mansion, as demesnes, rents, woods, *meadows, pastures, and other frank tenements. But if a villain of the donor has made a free purchase, of which the donor has never been seised, the purchaser does not immediately become seised of such purchase. If seisin is to be make of a tenement where there is no house, then sufficient livery is made by a rod or by a glove in the presence of good witnesses.

7. It is to be understood, that the freehold never validly attaches to the purchaser until it is extinct in the donor, except by long and peaceable seisin. Nor can anything prevent the freehold from remaining in one of the two persons, and it may happen to remain in the person of the donor, although the donor may intend that the freehold and right should be transferred to the person of the purchaser, and although he may put the purchaser in seisin thereof,—as by his family or chattels remaining in the tenement, which creates a presumption in favour of the heirs of the donor, that the donor retained the fee and freehold in intention, although he made it otherwise appear by colour of deed. And in such case if the purchaser be ejected by the heir of the donor, he shall not recover by this assise, by reason that the donor did not wholly divest himself in his lifetime, but the purchaser found the tenement full, and the donor always in seisin by his chattels and family;

for by the continuance of the seisin it appears that the donor did not intend to part with the freehold. *But if the chattels be stolen or otherwise lost upon the tenement, and the bailiffs and servants of the donor are ordered by him from that day forward not to remain there, unless to wait upon the purchaser as owner of the tenement, in such case there is no presumption that the donor meant to retain anything. So if it was not by the donor's consent or allowance that any of his family or of his chattels remained in the tenement in his name.

8. If a single person or a single beast abides on the part of the donor in the tenement given, the donor thereby retains the seisin as well as by several; as in the case of a feoffor who having given his common of pasture still causes the common to be fed by one beast; for by that one beast the donor retains all the common. So a lord may retain a rent by the hand of one tenant, where several tenants are jointly bound to pay the rent, and the lord has sold it and yet retains the rent, as above said, by means of one of the parceners. And because such presumptions are prejudicial, it is proper that in every regular livery of seisin the possession be absolutely vacant before the freehold can attach to the purchaser by the livery.

*9. When a lawful livery of vacant seisin has been made with the solemnity of witnesses, so that the donor is voluntarily ousted of the seisin and the purchaser put therein, the donor may not afterwards repent thereof. For if he should return immediately after his departure,

and eject the purchaser, the ejected would recover by this assise.

10. If the donor perchance return after such seisin made to the purchaser, and pray to be admitted into the tenement as a stranger, although the donor die in the tenement, yet by such abode and such seisin no right accrues to his heirs, unless they can prove that the donor conducted himself in the tenement as owner in the same way as he had before done, and not as bailiff or servant of the purchaser. But to remove all disputes, it is better for donors to make their abode elsewhere than in tenements of their own gift. And if any donor by the good nature of the purchaser is after the gift admitted into the tenement, and the purchaser perceives that the donor intends to eject or disturb him in his seisin, or to act as if in his own property, let him immediately proceed by this assise, or if he thinks it better eject him without judgment. And if the assise pass in favour of the purchaser his estate is so far confirmed.

11. If the donor or the purchaser dies before livery of seisin, *nothing accrues by the gift to the heirs of the purchaser, nor is anything lost to the heirs of the donor; and if the purchaser thrust himself in after the decease of the donor, the heir of the donor is not to be prevented from putting himself in; and if he be ejected or disturbed, he shall recover by this assise. And if by his own negligence he cannot avail himself of this assise, he shall recover by assise, of Mortdancestor, or by other writ according to the occasion.

12. If any person has made a purchase in another's

name, and by virtue thereof keeps himself in seisin, and he in whose name the purchase is made disavows the deed and the purchase, and some stranger ejects the procurator, the ejected shall not recover by this assise, because he did not hold the seisin in his own name, neither shall he in whose name the purchase was made recover, since he never was in seisin either in deed or in intention. Therefore, as the freehold is not in the heirs of the purchaser, it still remains in the donor, and in such case the donor shall recover by this assise. Children however under age, and such as want discretion, cannot to their own detriment disavow a purchase; for, as a general rule, their estate may be rendered better but not worse.

13. If any donor appoints a servant or friend to put the purchaser in seisin, and livery of seisin is accordingly made to the purchaser in the lifetime of the feoffor, the feofment shall be good. *So likewise, if livery be made soon after the death of the feoffor, before the purchaser knows of his death. But if the heir of the feoffer after his death prohibits the seisin, before livery is made to the purchaser, the gift will be annulled, and the heir shall recover the tenements, because his ancestor died seised.

14. Advowsons of churches cannot be given or purchased simply without some corporeal thing annexed, as soil, rent, or other thing issuing out of the soil. And even if they should be so aliened, yet purchasers cannot be in full seisin of the advowsons until they have presented to the churches, and their presentees have

been admitted and instituted by the bishop. For if the purchaser sell the advowson before he has been so seised by his clerk, and the buyer be impleaded by another, and thereupon vouches his feoffor to warranty, the feoffor may plead that he is not bound to warranty, by reason that he never was seised of the advowson, the church not having been void, but the seisin still remains in the first donor by reason that it never took affect in the person of another. And this reason would be allowable, inasmuch as no one can give that which he hath not,—although the feoffor or the purchaser was fully seised of the manor with all the appurtenances.

15. It is to be understood, that in some cases an advowson may be included in appurtenances, and in some not. For if one give a manor with all the appurtenances without any reservation being specified in the gift, and the advowson of one or more churches is appendant thereto, in such a case the purchaser purchases the advowsons under the word appurtenances. But where the donor gives the manor entirely or by parcels, and in each gift the appurtenances are expressed, yet if the donor reserves to himself any parcel of the whole, entire with the appurtenances, in such case the advowson remains in this parcel, unless the advowson is specified in the alienation. So if the manor be aliened in parcels to divers persons, without anything being reserved to the donor, and each parcel be aliened with the appurtenances without specifying the advowson, the advowson shall belong to the last purchaser.

CHAPTER X.

Of Purchase of Rent.

1. There still remains another kind of purchase, which is made by attornment of rent or other service, with or without the consent of the tenants; as where one attorns his tenant to become subject to a stranger, as concerning his services issuing out of some tenement. *In this manner are purchased seigniories, which sometimes by forfeiture or default of blood fall into demesne. But in order that a tenant may be attorned without his consent, it will be necessary to have the aid of our court by levying a fine.

2. There is likewise another kind of purchase, which is made of an annual fee, in money or other things, in fee or for term of life, given in reward of service or for exchange of land, or other thing, and for which the donor may charge his tenement with distress if any part thereof be in arrear to the purchaser, either by recognizance in our court or by charter. The charter may be in the following form.

3. 'To all who shall see or hear this letter I, J. of B., send greeting. Know that I have given to P. for the service which he has done me (or for some other thing certain) £100 of annual rent in N. and in S., so that out of the manors aforesaid he may take the aforesaid rent from year to year on the day of St. Michael, in whose-

soever hands the manors shall come, during the life of the same P. (or in fee to him his heirs and assigns), and whereof in the name of seisin I have delivered to him 100*s.* beforehand, and to the intent that the aforesaid fee may not be detained from him, and that this grant may be firm, I bind the aforesaid manors to the distress of the same P. (or to P. his heirs and assigns), so that they may *distrain in whosesoever hands they come, so far forth as I myself might do, until they are fully paid the principal fee and their damages. And I and my heirs will warrant the aforesaid fee to the aforesaid P. his heirs and assigns for ever.' As to the date and the witnesses, let that be done which is mentioned in the chapter concerning Charters.

4. Therefore, if there be any arrear of the annuity due to such a purchaser, he may distrain the tenements charged, and if he be disturbed therein, he shall have remedy by this assise, provided the writings are proved to be genuine.

CHAPTER XI.

Of Disseisins.

1. Petty assise is the recognizance of twelve jurors concerning the plaintiff's right upon the possession; and it is called petty to distinguish it from the great assise, after which there is no action or remedy.[1] This is not the case with the petty assise; for though the cause is lost in the petty assise, yet the plaintiff may recover by attaint, or by writ of right, in respect of property.

2. A person may be disseised in many ways. For one is properly said to be disseised who is wrongfully ejected out of any tenement which he peaceably held, and in whose person the right of property in the fee, and the right of possession of the freehold, and the seisin were united.

*3. All seisins do not equally give a freehold title. For the right heir hath sooner a freehold than he who hath no right; for the seisin of every right heir is so tender, that the mere setting of his foot in the capital

[1] 'There is no remedy beyond the great assise, on account of the solemn dignity of the knights, who are as it were the king's companions: for a knight cannot be attainted of falsehood but by battle and by his peers. Therefore it is not to be supposed that so noble persons will perjure themselves for any consideration (a nul foer.)' Note in MS. *N.*

mansion of his inheritance is sufficient for title of freehold, if it is done in the name of seisin, and while the inheritance is vacant, no other person being found in seisin. And the reason is on account of the conjunction of the right of possession with the right of property. So likewise of every seisin taken to his use. Wherefore if such heirs so seised by themselves, or by their procurators or bailiffs or others who may be put in seisin in their name, be ejected by any but ourselves, we will that, of what age soever they be, they shall recover by this assise. Also, if they be under age, and have been in their lords' ward and admitted as heirs, and their lord afterwards refuse to acknowledge them as heirs, such heirs shall be forthwith aided by this assise, whether the lord or any other be found tenant.

4. And if any lord after the death of his tenant finds his fee vacant, and holds possession thereof, claiming a freehold in the fee for default of appearance of the heir, *and is ejected by one who is not heir, he shall be aided to recover the possession by this assise, saving to every one his right.

5. Where any younger brother finding the inheritance of his ancestor vacant, enters and sets himself up for heir, claiming fee and freehold, if he be ejected by the right heir or another out of his peaceable seisin, the disseisee shall recover his estate by this assise. For the right of proximity, or which of them is the nearest heir, cannot be tried but by writ of right only, unless by consent of the tenant. But if the right heir ejects his bastard or younger brother, or other person,

within fifteen days after their entry, the ejected shall never recover by this assise. But if they have had peaceable seisin so long that they might have aliened the inheritance to a stranger, and such purchaser might have enjoyed his seisin so that an action would lie to recover his seisin by this assise if he was ejected,—inasmuch as the same time, and less, suffices to constitute a right in the person of one privy in blood to the right heir, than in a stranger,—it is reasonable that those who might claim by the same descent in an assise of Mortdancester, should, if they are ejected from their seisin, recover by this assise against the right heirs and all others, as well as a stranger enfeoffed in the *meantime by such intruders might do, if he were ejected from his purchase.

6. He, in whose person were united the right of possession of the freehold and the seisin from which he was ejected, is considered as disseised, although the fee be all the while in the person of the desseisor or in another. And not only is he disseised who is ejected from his freehold in his proper person, but he is disseised if his wife, bailiff, attorney, or farmer, be ejected, although he is not himself present. Moreover, not only he who is ejected from his freehold is disseised, but he also who, at what time he returns from market, or pilgrimage, or elsewhere, finds any one else in his freehold who will not suffer him to enter the tenement, or at least keeps himself therein together with the right owner, claiming a freehold in the demesne of the true owner. A person is likewise disseised from the time

that he or his family is disturbed in the enjoyment of his peaceable seisin by another, who by such disturbances claims freehold therein, either as to the whole or part, and either in the principal or in the appurtenances.

7. So likewise is he disseised, who is disturbed in such a manner that he cannot freely enter into his fee and distrain for arrears of services due from the tenement, of which services the lord has been seised. Likewise if the tenant has impeded his distress *by a wall, ditch, or hedge, or by driving his cattle into another's fee; or if no distress is found therein, or any other act has been done, so that the lord cannot go in and out at his pleasure as he was wont to do. Also he is disseised to whom reasonable distress is refused, or rescued by the tenant, where the lord has been seised thereof. Also if the tenant wrongfully replevies the distress made upon him by the lord for arrears of services, whereof the lord has been seised.

8. So likewise is he disseised who is ejected from his freehold by a judgment which is not binding, as by a judgment given without our original writ.

9. Some persons also are disseised who hold for terms of their own life or of the lives of those who had only a freehold. But if he in whom both rights rest leases his land for the term of the lessor's life, no freehold thereby accrues to the purchaser, although the lease of the land be made to the purchaser and his heirs to have and to hold for all the life of the donor; and therefore if the purchaser or his heirs should be

ejected, this assise will not avail them. Those also are disseised who are ejected from tenements which they held by judgment of our court, or without judgment, until such or such a thing be done, or for a qualified term, as in gage or by conditional feoffments.

*10. Disseisin is not only made of lands and tenements, but also of rents, estovers, and all kinds of annual profits due for the term of the life of the disseisee, where view can be given of any certain place from whence these profits are to arise.

11. A person is also disseised at what time another disturbs and deforces him of his freehold, and does not deliver it up after our command to deliver it. One is likewise disseised when the seisin of his inheritance is denied him by the chief lord his guardian, to whom he has done homage, and in whose ward he has been for the same inheritance, so as he can prove the same, although he was in ward but a very short time.

12. Although there be several disseisors, it is sufficient to name two, or one, where the same person is found to be both disseisor and tenant. For one disseisor and one tenant at least must always be named in the plaint. And if several disseisors are named as having done the wrong and force, it does not hurt. But in case of disseisin by a judgment which is not binding, where a person is ejected from seisin of his freehold by judgment in a freeman's court, or in the county or hundred, or in any franchise without our writ, the names of the suitors, together with those of the bailiff and tenant, must be mentioned; but if in our

*court before our Justices, then it will be proper to mention the name of the Justice who pronounced the judgment, and the name of the sheriff, and of the bailiff, and of the tenants.

13. A disseisin is also done by those who convey a freehold to others, where they themselves have none; and in such case the donor as well as the disseisor should be named. But in all disseisins if the writ of novel disseisin falls by the death of the disseisor, or of the tenant, a writ of entry in the second degree takes its place.

14. There are several nusances, which may be prosecuted by this assise, and yet not to recover a freehold, but to remove wrongful nusances, as if a watercourse or way is wrongfully turned or enlarged or straightened, or a ditch, house, wall, hedge, or market wrongfully set up, or a pond wrongfully raised or lowered to the annoyance of his neighbour. Some nusances however are determinable by sheriffs in county courts and not by assises, as in the case of encroachments of curtilage upon common weirs, watering-places for cattle, erection of gates, folds, cowhouses, windmills, ovens, or sheepcotes.

15. There is another kind of disseisin, as of a fishery. For none can have a warren in other's demesnes, except by special deed; but the fishery belongs to him whose land adjoins the river on both sides. And if it adjoins on one side only, then the fishery is his as far as the line of mid-stream, unless it be a common fishery. *Therefore where a stranger disturbs such an

owner for fishing in right of his soil, claiming a freehold in the fishery, he commits manifest disseisin of the owner of the soil, if he has had seisin of the fishery. The like of a woman to whom such a fishery has been assigned in right of dower. Disseisin may also be made of corrodies, and of bailiwicks, and of many other profits, as is said in our statutes.

16. Assise of disseisin will also lie in some cases for a husband against his wife, when after having left her husband for adultery, she attempts without his leave, and without any award of court Christian, to keep herself by force in her husband's freehold or in her own, whereas she has forfeited everything for their two lives by her offence. So in all cases where the wife disseises her husband.

17. This assise lies also for the lord of any fee against all persons wrongfully distraining his tenants, and also against the tenants jointly with the wrongful distrainers, if the tenants subject themselves to any wrongful services, to impose on the fee a greater service than it ought to bear, on account of the disherison and damage which may accrue to the lord, if the fee should by any means fall into his hands by escheat.

18. If any one denies his service and disavows holding of his lord, *in such cases distress does not lie, except where distraining and disavowing are compatible, but this assise takes place, as in the case where the tenant replevies reasonable distress out of the hands of the lord, by which contest he makes himself a peer to his lord, and so far denies the seigniory, although he

does it tacitly; and by reason of this assertion of equality this assise holds in both cases.

19. This assise lies also in the person of a villain and his free wife against the lord of the villain, as in case where a villain, holding nothing in villenage, marries a free woman, having a free tenement where the villain and his wife dwell, if the lord eject them after the year and day, they shall recover by this assise although the lord can prove him his villain by suit of his kindred. The son likewise of a villain ejected from the purchase of his father, who died in a free estate, may recover by this assise as well against his lord as against a stranger.

20. This assise also takes place in favour of those who are ejected by false warranties, as in the following and like cases. John brings an assise of Mortdancester wrongfully against Peter. Peter comes into court and vouches to warrant Theobald. Theobald makes default, whereupon the assise is thus awarded for his default, that although he come another day, yet he shall not be heard to allege any cause wherefore the assise should remain to be taken. *Suppose that for some cause another day is given, as for default of jurors or for any other reason, if Theobald comes at the second day, and says thus, I warrant to Peter, and surrender the tenement to John, if the Justices are so unadvised as to admit such warranty, Peter shall recover by this assise. And the Justices and the sheriff or bailiff, who delivered seisin of the tenement, will be disseisors as well as the tenant; for they had no war-

rant to take cognizance of anything concerning Theobald, inasmuch as he had then no day. And if Theobald has given land in exchange to John, he shall never recover it, because he did it of his own accord without another judgment. For no one vouches another to warrant in order to be disseised by him, but to be defended by him in his possession.

21. If any man takes seisin of a tenement under colour of feoffment, but is not put into seisin by the feoffor, if the feoffee be presently ejected by the feoffor, he shall not recover by this assise. But if two or more thrust themselves into seisin under colour of feoffment, and a contest or dispute arises between them which shall have the seisin in several, he whose seisin is ratified by the donor shall have the best right to recover. And if there is a contest between feoffees who have no right beyond a naked colour of feoffment, this assise shall assist the one who has been ejected from peaceable seisin, against the other who had no right to eject him, by reason of the possessory right which he had, whereas the disseisor had no sort of right to eject him. *And if two or more contend about a tenement to which neither of them has any right, as if both of them are bastards, he who was first in seisin may avail himself of this assise, and shall retain the seisin, until it is recovered by him who has a better right.

22. And as one may be disseised of his own proper tenement which he held in demesne and in severalty, so several persons may be disseised of a tenement

which they hold jointly, as in the case of a husband and his wife, neither of whom shall be aided by this assise or heard without the other, except in the case of adultery, where the wife has eloped from her husband. It is the same with respect to boundaries and landmarks between neighbours whereof both are disseised; for then neither shall be assisted by bringing this assise separately by himself, since such boundaries were never held in severalty; but if such boundaries are ploughed up, moved, or taken away, by any stranger appropriating the soil as his own freehold, the two neighbours or more according as the boundaries were held must be joined in the plaint. For as a river, unless it be a common river dividing counties or hundreds, belongs, as far as the line of mid-water, to him whose soil joins the water, so it is with boundaries of land, except in case of a common way, which none may turn or narrow, and other such like boundaries. *And if a boundary between neighbours be ploughed up by one of the neighbours, then this assise lies to have the boundaries restored to their proper state. Running water however is no longer a boundary than whilst it continues its proper course; but as soon as it changes its channel in its course, it shall no longer be a boundary between neighbours.

23. Parceners and others holding in common, so that none can distinguish his several, may suffer a common disseisin; or, although there has been at one time a severalty, if by the common consent of the parceners the tenement has been afterwards assigned to some

common use, they may avail themselves of this assise if they be afterwards ejected or disturbed. And if one of the parceners be ejected or disturbed of his seisin, by one or more of his co-parceners, the disseisee may have recourse to this assise by a several plaint against his co-parceners, and shall recover; but not to hold in severalty but in common, as he did before. *And if two or more parceners are disseised by the other parceners, each parcener shall have his several assise, and they shall recover to hold in common. And like judgment shall be given in all other possessory writs between parceners before the join-tenancy is severed. But when their tenements have been severed, so that each knows his own part, and one of the parceners is afterward disseised by the other, then this assise lies between them as between strangers holding in severalty; and one or more parceners disseised shall have the like judgment against their co-parceners, disseisors, as against strangers. Where there are several disseisins, several assises shall be instituted, and each disseisor, whether parcener or other, shall answer for his own wrong. What we have said of parceners holding jointly as one heir, by reason of the unity of right of them all, shall be equally understood of neighbours, who though strangers in blood, jointly hold as parceners, by feoffment, and in like cases.

CHAPTER XII.

Where an assise does not lie.

1. All persons have not equally a right of action to recover by this assise. For this remedy shall not be granted to any person ejected from a possession which he held in another's name, as bailiff, guardian, or attorney, or to a farmer holding for term of years, or to those who hold any demesnes by villain customs without title of gift or feoffment,[1] or to persons in religion or others who shall have purchased land of another's fee in mortmain, if they be ejected by the lords of the fee, according to the ordinance of our statute. A villain, of whom his lord has been seised

[1] 'Note, that he who holds ancient demesnes without charter, if he enfeoff a stranger, is as a disseisor. And the proof is this. He who makes a higher estate to another than he himself had, as he who makes frank tenement, where he hath none himself, is a disseisor. And the tenant in ancient demesne hath not frank tenement, for he who hath frank tenement can recover by assise, which the sokeman cannot do. And the lord of the manor hath the freehold, wherefore by such alienation he is disseised. And as soon as the sokeman withholds his services, the lord may take the tenement in his hand, and if he were tenant, then the lord would need to recover by way of distress or by *cessavit*.' (Note in MS. *N*.) See Judge Blackstone's argument as to the status of a tenant in ancient demesne, Considerations on Copyholders, Blackstone's Tracts, p. 199–237. See also Bracton, 165 *b*, 166, 168.

within a year and day as his villain, can never recover against his lord; *nor a freeman who has in our court acknowledged himself to be the villain of the disseisor. Nor can an intruder ever recover if he be presently ejected by the true heir, within the year and day.[1]

2. Nor shall he recover by this assise, from whose soil buildings are removed, which were erected thereon through the ignorance of another and afterwards taken away as soon as the builder perceived his folly. But if the owner of the soil shall carry to the builder our prohibition against his removing them, or if he built them contrary to the forbiddance of the owner of the soil, or in ill faith, and not through ignorance, or where anything is sown or planted in another's soil through ignorance, and that plant remain till it has taken root, if the builder or planter afterwards carry it away without judgment, the owner of the soil shall recover damages as much as if they had been of his own building or planting.

3. Neither shall those persons ever recover against the true heirs by this assise, who shall be ejected from

[1] 'To that he saith, that an intruder shall not recover if he be ejected within the year, I do not agree (*ne m'i acorde je mie*); because it seemeth that he should not be in a worse condition than the disseisor would be.' (Note in MS. *N.*) In Bracton and Fleta the time is not even limited to a year; non competit [assisa] intrusori, nisi tempus habuerit longum et pacificum, quod sufficere possit pro titulo (Brac. 168). A comparison of those statements shows the rapidly growing inclination on the part of the king's court to repress the practice of recovering possession without judgment.

tenements which they claim to hold by the law of England presently after proof made that the children in whose name they must hold were bastards, or such as cannot be heirs, or where they had no issue by *their wives, or were not the first husbands, even if they had issue.[1]

4. Purchasers with whom the donors have all along continued in seisin until their death, shall not recover if such purchasers are presently ejected by the right heirs. Nor can a husband recover his wife's freehold without the wife, nor the wife without the husband; nor the husband alone where the wife is jointly enfeoffed of the freehold with the husband. Nor shall those ever recover by this assise who have been ejected by their own consent, where such consent can be shown and verified by deed covenant or by the country. Nor shall he recover by this assise who is prevented from using his seisin by reason of waste committed by the tenant, until satisfaction be made for the waste and

[1] The opinion, that tenancy by the curtesy is a privilege of a first husband only, is supported by Fleta, but not by Bracton. (See the passages referred to above.) The contrary appears to be implied by the statute *De donis* (13 Ed. I.), which enacted, that for the future the second husband should not have any estate *per legem Angliæ* in a tenement of which his wife had been enfeoffed in frank-marriage with her first husband. And in a case in the Cornish Iter, 30 Edw. I., an estate by the curtesy was allowed to the second husband, of land which had been given in frank-marriage with the first before the statute *De donis*, upon the ground of this implication. (Year-book, 30 Edw. I., p. 126.)

destruction.[1] Nor shall the lord recover by this assise, when he complains that the tenant has disseised him, before he has distrained for his arrears of service, or until he has been in some way prevented from distraining.

5. Nor will this assise assist one who has before withdrawn himself in the same action of assise from his writ against the same person, if it can be proved by record of the rolls of the Justices. Now a wife ejected from her dower, of whom it is proved in court Christian that she was never joined in lawful matrimony to the husband by whose assignment she claims to be endowed, if she be ejected by the right heir. *Nor those who by quitclaim, exchange, or in some other manner, have made accord of the wrong done them. Nor one who by another writ of earlier date has brought his plaint for the same assise, or where an action is pending for the same tenement between the same persons by a writ of higher nature.

6. Nor can he avail himself of this assise, who was enfeoffed upon an express condition specified in writing, or a tacit condition which can be proved by the country, if he be ejected by the feoffor after he has failed to perform the covenant. Thus, if John gave

[1] It appears to follow from this and the parallel passages in Bracton and Fleta, that when waste had been committed by the freeholder, the reversioner might enter without judgment upon the tenement, and hold it until satisfaction had been made for the waste; and further (according to Bracton), until security had been given against further destruction.

land to Peter upon condition that Peter took to wife one of the kindred of John, or some other, or the reverse; if the feoffee changes his mind and takes another wife, and the feoffor afterwards ejects him from the tenement, this assise will not avail the disseisee.

7. Nor will this assise avail him who shall have been ejected pursuant to a judgment of our court, as in the following and similar cases. A younger brother, by default of the next heir, recovers an inheritance by award of our court by judgment in this form, that if the right heir appear, he may presently after his appearance eject whomsoever he may find tenant, whether it be he who so recovers upon the decease of his ancestor or a stranger feoffee; and in that case if the heir is not able to eject the tenant, yet, *where he is known to be the next heir, if he can prove the setting of his foot in the house in the name of seisin, and he is thrust out, he shall be aided by this assise.

8. This assise does not lie for a person ejected by the chief lord, who put himself in seisin of his fee presently after the death of his tenant, where some one who wrongfully pretends to be the next heir ejects the chief lord, and the chief lord again ejects him, once or oftener; and if such pretended heirs bring this assise against the lord, it shall avail them nothing, because they did not find the fee vacant. But if they had found the fee vacant, and had entered as heirs, and had been afterwards ejected by the lord, or any other, from their peaceable seisin, in such case this assise would have availed them.

9. Nor does this assise help him who is disturbed from distraining for a rent not issuing out of land; nor one who is distrained in accordance with his liability.

10. This assise does not take place in respect to churchyards, common ways, walls of boroughs or cities, or of like things common to everybody, because no single person can claim any property or severalty in such common things; and therefore in such cases the remedy is by plaint of trespass.

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*CHAPTER XIII.

Of Remedies in Disseisin.

1. The first remedy in disseisin is for the disseisee to gather friends and force, and without any delay after he may have knowledge of the disseisin to eject the disseisors. And if he can do no more, he should at least keep himself in possession with the disseisors, and make such use of his seisin as he can; in this way the disseisor will never gain a freehold without the consent of the true owner.

2. But if the disseisors have been for a long time in peaceable seisin in the presence of the disseisee, then it is not lawful for the disseisee to eject the disseisors without judgment. In such case inquiry may be made, where the disseisse was at the time of the disseisin;[1] for

[1] The time allowed for re-ejectment is not very clearly stated in the text; and the readings in several of the MSS. vary. The following note is from MS. N. Where the disseisin is done in

if he was present, and knowingly suffered the disseisor to enjoy his peaceable seisin, the disseisee has no such right after a long space of time to eject the disseisor, but that the latter may recover his seisin by this assise, with his damages; for in such case it may reasonably be presumed that the disseisees were willing that the tenements should belong to the disseisors; inasmuch as they suffered their right to lie so long dormant.

3. But if the disseisee was in a distant country at the time when the disseisin was committed, then it is proper to consider and determine within what time his family might have reasonably given him intelligence of the disseisin, and in what time he might have returned to assemble his friends and eject the disseisors. *And that such determinations may not be arbitrary,

presence of the disseisee, the disseisor must be ejected within five days; because the law of ancient time granted that the disseisee should go one day to the east, the second day to the west, the third day to the south, and the fourth day to the north, to seek succour of his friends all the country round. If he be disseised in his absence, then if he was out of his district in any other place within the realm, let him be warned forthwith by his household, and let his reasonable days of journey (ses resnables journees) be allowed, and then four days. If beyond sea in pilgrimage, he shall have forty days, two floods and an ebb, and fifteen days to come from the sea to his house, and then four days. If beyond the sea of Greece in simple pilgrimage, he shall have a year, and two floods and an ebb, and fifteen days, and four days. If beyond the sea of Greece in a general passage, then let three years, two floods, one ebb, fifteen days, and four days be allowed.' This statement of the law agrees with Bracton. As to the time allowed in essoins, see below, book vi. c. 7.

we will that they be adjudged according to the periods allowed in essoins; so that if the disseisee be gone in a general passage to the land of Jerusalem, and after his return he eject the disseisor, or any other who may have been enfeoffed by the disseisor, it is lawful for him so to do, whether it be an infant within age or any other whom he find therein, so as it be done within the fourth day from his return into the country, three days being allowed him to collect arms, friends, and forces; and although the person so ejected brings this assise against the ejector, yet he shall not recover any freehold; for we will not that the absence of such persons be so prejudicial that they be in any way damaged thereby. If the disseisee went on a simple pilgrimage to the holy land, then let there be reckoned a year and a day, and one ebb and flow for delays at sea, and fifteen days for his journey to the land, and four days for assembling his force; and if he has within such time ejected whosoever was found in his tenement, the person ejected shall not recover the land by this assise, even though his ancestor died seised thereof. And if the pilgrimage of the disseisee was on this side of the Grecian sea, the reckoning shall be four months, one ebb and flow, fifteen days, and four days; if in England, fifteen days. And if the disseisee after that time eject the disseisors *without judgment, inasmuch as they have been all that time or longer in peaceable seisin with the knowledge of the disseisees, the disseisors shall have recovery of their estate by this assise; for we will that all persons after the prescribed time

of limitation proceed rather by judgment than force; and the first disseisees shall not be afterwards aided by this assise; for he who acts in opposition to the law has no right to claim aid of the law.

4. And as such disseisors have after a certain time and term a right of action to recover against the disseisees by this assise, so they have also before the time so limited a right of action to recover by this assise against all other disseisors having no right to eject them. For where neither of two persons has any right, the disseisee has a greater right than the disseisor. And although the original disseisor may thus recover by judgment of our court, yet the true owner shall not lose anything of the right when he shall choose to bring his plaint. So also, if during the time limited for ejectment he cannot recover his seisin without our aid, our writ shall be granted to him returnable at the eyre of our Justices, or we will assign him Justices to hear and determine the plaint according to the case.

5. Where a woman is disseised, and afterwards takes a husband, if they will afterwards proceed by this assise, the form of the writ shall be thus: 'John and Peronel his wife have complained to us that Peter has wrongfully disseised the aforesaid Peronel.' *And if the husband desires to purchase a writ against his wife, then thus: 'John and Peronel his wife have complained to us that Peronel of such a town has disseised the aforesaid Peronel': so that the wife is plaintiff although she is disseisor; but the surname is altered before she is named as disseisor.

CHAPTER XIV.

Of Views in Disseisin.

1. If the person ejected cannot or ought not to eject his disseisor, or if the tenant hinders him from using his seisin together with him, he must then complain to us, and we will thereupon grant him our writ to the sheriff of the county in whose bailiwick the tenement is; which writ shall contain the names of the disseisors, of the tenants, and of those who come with force and aid to help the disseisors, and the name of the plaintiff. But let every plaintiff beware of putting in his plaint any who were not wrongdoers, because for every one named in the writ who can acquit himself of the wrong the plaintiff shall be in mercy for his false plaint.

2. When any one has purchased our writs, and also letters from our Justices to the sheriff to inform him of the day and place of their session; the *original writ and the Justices' letter shall be immediately taken to the sheriff; and the plaintiff shall keep our letters patent by him until the day of the plea, and then he shall deliver them up to the Justices to be their warrant; for without either a general or special warrant they cannot determine anything.

3. In the next place it is the sheriff's duty to take pledges, two at least, distrainable to himself, that the

plaintiff will prosecute his plaint, except where on account of his poverty we have permitted him to sue his plaint upon the pledge of his promise only; and then he shall find no other security to the sheriff. And if he goes without our aid, and is unable to recover his seisin, he may then obtain our writ, returnable at our eyre or that of our Justices, or we will grant him Justices to hear and determine the plaint according to the case. When pledges to prosecute are found to the sheriff, or to us in our Chancery, whereof two pledges are sufficient though there are several plaintiffs in one writ, the plaintiffs are not to be required to find any other security, although the return is to be made in a franchise.

4. Security being thus taken if the writ require it, let two freeholders of the neighbourhood be immediately enjoined to summon the neighbours to be at a certain day and place before our Justices to make recognizance upon their oaths, whether the plaintiff has been disseised, as he complains, of his freehold, in such a certain place or not, and that in the meantime they view the tenements in this manner, whether the disseisin be made of land or of rent, of private property or of common; and if of common, whether common to everybody, or only to a certain number of people; also to how much in quantity the thing whereof the *plaint is made amounts, so that they may be prepared with a certain answer when they shall be asked whether the plaintiff hath put too much or too little in his plaint. They ought also to see whether all the

tenement is situate in the county and in the vill named in the writ or not. It is not the sheriff's or bailiff's office to give them the view, but the plaintiff's, who is bound to inform them within what boundaries and divisions the tenements named in the plaint lie.

5. If the plaint be made of corrodies or estovers, or of the delivery of corn yearly, or other provisions or necessaries, or of bailiwicks or wardenships, or of the keepership of a park, or the ward of gates, or other kind of annual office, or of common of pasture, turbary, fishery, or other easements, then the jurors are required to make view of the tenement from whence the easements or estovers arise, or at least of those tenements where the annual necessaries are accustomed to be delivered or are assigned to be received.

6. And if the plaint be made of rent, then the jurors must view the soil from which the rent issues; and not only the soil, but the thing also for which the rent is paid; as in the following and like cases, where rent is granted by one neighbour to another to have a right of driving cattle through any tenement, *or where a rent issuing out of any tenement is partly or wholly released on condition of having an easement in another soil. For although the one party does not require the easement, yet he cannot refuse to pay the rent, or prevent the covenant from being binding in relation to him who is willing to keep it; and the contract shall never be dissolved but by common assent as it was at first made; and therefore, although the person who has granted a rent in fee or for term of life whereof the purchaser

has been seised, does not wish to have the driftway or other easement in the soil of his neighbour, yet if he refuse to pay the rent according as it was covenanted between them, he to whom the rent is due may distrain for the arrears of the rent; and if he cannot find anything to distrain, or if he be hindered from distraining, he shall recover by this assise, if he can show that any soil is charged with the rent; and if not, it is sufficient to view the tenement for which the rent was given.

7. If the plaint is made of a nusance, then let them view the nusance, whether it be a wall, ditch, hedge, or market, or a pond raised or lowered, or otherwise injurious; and in such case it is not sufficient to view the nusance only, but they must also view the tenement to which the annoyance is done. *And in the preceding case also, if the disseisin be by a disturbance of an easement, such as having common in another's soil, or right of drift or way, or water at another's well, or other like easement, it is sufficient to view the tenement subject to the easement, but the tenement to which the pasture belongs must likewise be viewed.

8. The parties, if they please, may be present at the view, and challenge the jurors; and if the parties agree upon jurors, the names of those upon whom they have agreed shall be imbreviated, to be presented to the Justices at the day of plea.

9. Afterwards let the tenant and all the disseisors, or their bailiffs if they cannot themselves be found, be attached, and required to find pledges to be present at

the day of the plea to hear the recognizance of the jurors upon the plaint, so that they may know of what offence they are to be accused.

CHAPTER XV.

Of the Proceedings in Assises.

1. When the Justices are come, they shall forthwith receive the essoins, and afterwards adjourn them. And if the plaintiff in this assise neither appears nor causes himself to be essoined, the writ shall be immediately taken out of the hands of the sheriff, and the names of the jurors presented; and the plaintiff shall be called. *And if he makes default, let him and his pledges to prosecute be in mercy. Then let the tenant or his bailiff and the rest of the disseisors be demanded, and if they make default, or cause themselves to be essoined (since in this assise no essoin avails them,) and it be proved by the sheriff that they were attached by pledges, then their pledges shall be in mercy, because they have not produced them in court according to their engagement. Afterwards let the jurors of the assise, according to the panel, be required to answer to their names; and let such as do not appear according as they have been summoned be in our mercy.

2. If the plaintiff appears, or causes himself to be essoined, and neither the tenant, nor his bailiff, nor his attorney, is present, the pledges as before mentioned shall be immediately amerced, and by way of punish-

ment for the default of the parties it shall be awarded that they be not afterwards allowed to allege any reason for staying the assise, and that the assise be taken by their default.

3. And it should be known that in this and in no other assise every disseisor may answer either in person or by attorney, or by bailiff. Yet they have not all an equal power; for a bailiff cannot do all that his lord can. For a bailiff cannot acknowledge or grant that the disseisin was committed by his lord, so as to prevent the necessity of taking the recognizance, as the disseisor might himself do, if present. *Moreover the bailiff cannot make any accord or partition, nor put the right of his lord into hotchpot, whereby the lord might lose any freehold without the recognizance of the assise. Yet the bailiff may, as well as his master, allege any objection, wherefore the assise ought not to pass, or for the purpose of barring the assise by dilatory or peremptory exceptions, as by an exception, against the judge, or the plaintiff, or the jurors, or against the writ, and by all other exceptions and replications.

4. An attorney may do all that his lord can, except make accord, for as soon as the proceeding in court is ended, the power of the attorney ceases, and in making the accord another proceeding is begun, which was not before in court, when he was appointed attorney only in the proceeding then in court. This however must be understood of special, not of general attorneys. For a general attorney can do as much as his client from the commencement to the end of the suit.

5. When both the plaintiff and the defendants are in court, if the plaintiff declares that he will not further prosecute his writ, in whatever suit this may occur, he shall not afterwards resort to another like writ, *but both he and his pledges to prosecute shall remain in our mercy. And if he withdraws himself from the action, he shall be barred of his action for ever; but if he has leave to seek a better writ, or if the writ be abated for error or for other fault, and likewise if the plea be opened, and in the course of pleading the writ be found defective, although the plaintiff in such case say that he will not further prosecute that writ, yet he shall not thereby be barred from resorting to a better writ of the like kind, because no proceeding is as yet commenced upon the action, but the whole is to the writ, whereby the action remains entire. But if any one withdraw himself from his writ after the action is opened, he shall never resort to the like writ against the same persons for the same tenement, but the writ shall be liable to abate, if the fact be averred by exception. But if upon replication it can be averred that the tenant against whom the first writ was brought was not tenant of the tenement when the writ was abated, and that he obtained it by some means since that time by purchase, succession, or escheat, in such case the plaintiff may resort to another like writ, and the writ shall hold good, in respect of the right of action which commenced after the writ abated.

6. If any person attached declare in court that he has nothing in the tenement nor claims anything, without

*making any reservation, and such confession be recorded, he will be thereby for ever after foreclosed of every right which he may have had until that time in the tenement, if this exception be used against him.[1]

7. If when the parties are come to trial the plaintiff has not our letter patent for trial of his suit, the Justices have no power to hear or determine anything. And if the tenant enter nevertheless into his defence, and lose, he may still recover his former position, and whatsoever the Justices shall do in such case shall be held entirely null and void. But if the plaintiff has the patent, let it be immediately read in audience, and if any doubt arises thereon, the tenant my have on that account a dilatory exception to ward off the assise.[2] Afterwards let oyer be had of the writ close. And let it be immediately demanded of the plaintiff of what freehold he makes his plaint, and let the quality and quantity be imbreviated. Next let our Justices examine how and by what title the plaintiff had a freehold therein; for in every demand it is not sufficient merely to demand, but the plaintiff must show by what right he demands; and this rule applies not only to things movable, but to things immovable, and not only

[1] 'Suppose A to bring a writ of novel disseisin against B, who is tenant. B disclaims. The writ abates. A desires to enter. B will not suffer him. What remedy shall A have? *qu.*' Note in MS. *N*.

[2] 'Note, that if the Justice takes cognizance of any plea without or beyond their warrant or otherwise, recovery may be had upon them by bill to the king's parliament.' Note in MS. *N*.

to claims of possession, but to claims of right. And whoever will not make that appear, is not entitled to be answered.

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*CHAPTER XVI.

Of Title to Freehold.

1. A title of freehold may be acquired several ways,[1] as by succession of inheritance, by feoffment, confirmation, quitclaim, recognizance of gift in court of record, chirograph, judgment of our court, escheat, reversion,

[1] 'Note, that albeit the first part of this chapter saith, that there are sundry titles of frank-tenement, John de Longeville of Northampton tells you shortly (Johan de Longeville de Northampton vus dist curtement) that there are but two, and no more, to wit, inheritance and purchase, which are principals, and all the rest are accessories and comprised in the two. For recognizance and judgment of court are sometimes given by reason of purchase, sometimes of inheritance. But confirmation, quitclaim, action of dower and of curtesy of England, and in all other cases, (except inheritance and its accessories, as reversion and escheat,) are comprised in purchase. Seignory purchased also gives rise to escheat. And if the lordship descend before the escheat happens, this is rather inheritance than purchase; for the purchase is the acquisition (conqueste) of some right to which the purchaser before was entirely a stranger.' (Note in MS. *N.*) I have extracted this note, principally on account of the light which it may throw on the origin of the whole series of notes of which I have made such frequent use. See the Introduction by the Editor.

dower, curtesy of England, fee-tail, in mortgage, or by condition, or until so much money be levied by judgment of our court, or by simple feoffment, or by peaceable seisin after a wrongful entry, or by the other cases aforesaid ; in which it is necessary for the plaintiff, if he expects to be answered, to set forth his title, or at least to say that he was in peaceable seisin so long a time, that he ought not to have been disseised without judgment, so that a freehold had accrued to him by the sufferance and negligence of the true owner, whatever his entry may have been, and that this seisin continued until the tenant and the other disseisors named in the writ wrongfully and without judgment disseised him, and thereof he prays the assise.

2. If the plaintiff states his title by succession of inheritance, then it must be inquired whether he found the fee vacant or not. For if he found no other person in seisin, and he is next heir to the ancestor whose inheritance he claims, the bare setting his foot in the capital messuage of his inheritance is enough to give him a seisin, whoever may be the *deforceor, whether brother or stranger, and that not only of the messuage but of as much of the inheritance whereof his ancestor died seised as belongs to the messuage, by reason of both rights being united in him, that is to say, the possession and the property. In like manner it is with respect to a right by escheat, reversion, or formedon, and in all cases where the possession is actually united with the property.

3. It is otherwise where both rights are not imme-

diately united in one person, as in the case of intruders, bastards, pretended heirs, and others who have no right of property but only the naked possession. The same is true of some purchasers, as those who under colour of feoffment thrust themselves into any tenement, whereof the feoffors never so far put them in seisin but that they themselves died seised thereof. So it is of those who are excepted in feoffments, as Jews, persons in religion, and other excluded or prohibited persons. So of those who enter by disseisin or through disseisors, and of all others who enter to the damage or prejudice of any one. For those who enter into any tenement by such as have no right to give or alienate the same, as by farmers or termors, or by those who hold under condition, or by bailiff, guardian, *villains, or others not being the true owners, can have no freehold unless by peaceable seisin and lapse of time, or where the alienation was conditional, until the condition be satisfied. Neither can such as enter by those who have committed felony of which they are afterwards attainted. Nor those who enter by virtue of feoffments made by bastards, where the bastards were not themselves enfeoffed to them and their assigns; for it was in favour of bastards that the word assigns was first devised to be inserted in feoffments.

4. When the plaintiff shall have set forth his intent and title, it then behoves the tenant to make out his defence, if he can, and to show what right he had to eject or disturb the plaintiff. And if the tenant in support of his title produces a charter of the plaintiff,

that shall not avail him, unless livery of seisin was made to him by the free will of the donor.

5. And if the tenant say that he has no title and claims none, still it does not follow but that inquisition be made by the assise, whether he disseised the plaintiff tortiously or not, and whether with arms or by force, and whether in the night or by day. And concerning the damages and the other circumstances, let judgment be given as shall be hereafter mentioned, according to the verdict.

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*CHAPTER XVII.

Of exceptions to the writ.

1. The immediate taking of this assise is prevented in many ways, as by peremptory exceptions, such as exceptions of naifty or villenage, of condition, covenant, quitclaim, confirmation, release, difficulty of judgment,[1] fine and chirograph, lapse of time and others; and also by dilatory exceptions, as by exceptions to abate the writ, exceptions to the judge, and to the person of the plaintiff, and to the tenant's own person; but excep-

[1] 'Difficulty of judgment is a shameful reason for delay (un delay mult honteus); because the king, who ought to govern the people by the law, ought not to be ignorant of it (la mesconustre); nor his Justices, unless it be in some outrageous and perplexed case (cas horrible e deguisé,) then common counsel is better than private haste.' Note in MS. *N.*

tions to abate the writ must be proposed before the exception to the person of the plaintiff.

2. Supposing the jurisdiction of the Justice to be confirmed, the tenant may then aid himself by exceptions in abatement of the writ, as for a defect found in the writ, as by an erasure in a suspicious place, or if the writ was never sealed with our seal, or if the ordinance or style of our Chancery is not observed. The writ is also abatable and defective for want of date; likewise for a defect in the writing, as being written in two hands, or with different inks; and for damage to the writ, as if it be torn, marred, or cancelled; likewise for defect of the patent, as on account of an erasure, or by reason of the seal being fraudulently attached thereto. And in all cases of falsification of our writs, we will that such suspicions be cleared up, and the like as to illegal distresses;[1] but these cases shall be determined only by Justices thereto authorised. The suspected persons however shall be forthwith attached.

3. The words in the writ, 'has complained to us,' may furnish ground for an exception to abate the writ

[1] The text in this passage seems to be corrupt, and the true reading is not recoverable with certainty. I have ventured to introduce the word *purgez* (perhaps originally written *puriez*), of which there appear to be traces in the various readings. I think the whole may possibly have stood as follows: 'qe les suspeccioun̄s soint puriez et les mauueis brefs detenus et determinez,' &c.; 'that the suspicions be cleared up, and the forged or suspected writs impounded.' The verb *purger* is similarly used in l. i. c. 2. s. 6, ante, p. 11.

*for want of another who has as much or more right to complain than the plaintiff; as where the plaint is of the wife's freehold, and the husband only is named,[1] and in other like cases, where the writ ought to run, 'have complained to us,' &c.

4. The writ is also abatable if purchased before the disseisin, and also if the cause of action has ceased though the disseisin was in fact committed, as if the disseisor has restored the tenement to the disseisee, who has consented to take it back by such surrender. But if he had retaken it by his own force, then it should be worse for the plaintiff. Also if the plaintiff has before withdrawn himself from a like writ, or a like assise, if this be verified. So likewise if the plaintiff has before made his plaint by a writ pending, founded upon the seisin of another, or by a writ of a higher nature, because the order of pleas has not been observed.

5. The writ is also abatable if it is not well framed according to the case. So if the writ be badly pur-

[1] The annotator in MS. *N.* discusses the law here laid down at some length, and distinguishes as follows: 'If the husband has had issue and consequently action to hold by the curtesy, he shall be answered; otherwise not. For the husband detained by his wife out of his wife's right, whereof an estate by the curtesy has accrued to him, shall recover against the wife by the assise, much more against the stranger. So likewise of their common purchase, and of the several right of the husband. But suppose the wife to keep out her husband from the wife's right, *quære* whether he shall recover.' See above, c. 11. s. 16, c. 13. s. 5, and below, c. 18. s.

chased, as if several plaintiffs are named in a writ where there ought to be different assises or the reverse. So where any tenement is acknowledged to two men to hold jointly, if one has seisin thereof, and is afterwards ejected, and he brings plaint alone of being ejected and disseised of the whole, the writ fails, though the other parcener was never in seisin; for the seisin was delivered to him as well in the name of his parcener as in his own proper name; *and he is sufficiently seised in whose name the seisin is taken, if he holds good what was done in his name.

6. The writ may be faulty in several ways, as if it is purchased against him who is tenant in the name of another, as against a bailiff, or farmer, or a guardian, or a canon, or a servant, without naming the principal in the writ. Also by mistake of Christian names in the writ, as Reynard for Reyner, Amice for Avice, or for mistake of surnames; likewise for omission of syllables or of letters in the words or sentences; likewise for want of a surname of dignity, as if John is a secular man, and Master of a Hospital, and complains that he is disseised for a freehold appendant to the same hospital, and is not named Master of the Hospital. The same rule holds in the case of a parson of a church, and all prelates and persons of religion, demanding tenements as appurtenant to their churches or prebends, where they have not named themselves parson of such a church, or archbishop or bishop or canon or prelate. So if a canon secular has a certain dignity in any church whereof he is a canon, to which dignity he

claims the tenant in demand to be appendant, as to a deanery, treasury, or chantry, if he is not named in the writ by the same surname of dignity or office, the writ is abatable. So, in case of the tenant, *if the dignity and office to which he claims the tenant named in the plaint to be annexed are not specified.

7. The writ may also abate for mistake in the town, as if a hamlet is named where the town to which the hamlet belongs ought to have been named. The difference between manors, townships, and hamlets will be noticed in the chapter concerning Recovery of Right. So likewise for want of distinction in the writ between vills of a like name in the same county; as also if the tenant is not situate in the vill named in the writ.

8. If the situation be disputed between the parties, the truth shall be inquired by office, but not so that the gaining or losing of the action shall be at stake, though the parties be willing that it should be so. For the exception is put forward to abate the writ, and not against the assise. And if the jurors say that the tenement is not in the vill named in the writ, the writ abates, but the assise and the wrong nevertheless remain undetermined, and the plaintiff may resort to another like writ, whether he withdrew himself from his writ with or without leave. And if they say that the tenement is in the vill named in the writ, then let the assise be taken. And if the jurors do not know for certain in which of the two vills the tenement lies, then let it be demanded of the plaintiff whether he

claims anything of this tenement in any vill not named in the writ, and afterwards of the tenant, whether he claims anything in the vill named; and if they say no, then *let the jurors of the assise and others of the neighbourhood be ordered to set up proper metes and bounds between the two vills. The like shall be done where a difference arises between parties concerning the boundaries of two manors or two counties, so that the plea and dispute shall be tried and determined by perambulation. And if the plaintiff is under age, the plea must be suspended and respited until he is of age; for no infant can answer to his own prejudice, whether he claims such a thing in such a county, or in such a vill or manor, or not, on account of the perambulation which follows, whereby the right as to the boundaries would be determined for ever. Therefore the plea and perambulation shall stand to be taken at the plaintiff's majority, for before that time he cannot give his assise to the perambulation.

9. If the jurors say, that part of the tenement is in one vill or one county and part in the other, then let the assise be taken for that part of the tenement which is in the vill or in the county named in the writ, and not for the rest. It may thus happen that both the parties remain in our mercy. In the same manner perambulation shall be made in case of a difference between the parties, where the contest is in what fees or in what baronies the tenement lies, where one says in one fee and the other in another, and in particular where the jurors are uncertain; saving that in all these

*cases it shall be demanded of the parties, as before mentioned, whether they claim anything or not.

10. The writ will also abate, if one demands a tenement in privileged soil, where such writs do not run, as in our ancient demesnes, where no writs run except a writ of right close according to the custom of the manor. Exceptions may also be founded upon those words of the writ which say, 'of his freehold,' inasmuch, for example, as the freehold never was the plaintiff's, but his wife's; and if the husband and wife are both plaintiffs and complain that they are disseised, they thereby suppose that they both had a freehold, and that they held in common; and upon this an exception may chance to arise to abate the writ. So also, for not distinguishing between the father and the son, where the son has committed the disseisin and bears the same Christian name and surname as his father. And where any one has two surnames, that surname shall hold by which he is best known. There are several other exceptions to abate the writ which shall be noticed among exceptions in a plea of right.

12. If the writ be lost or maliciously taken off the files, then the authority of the Justice ceases; for without warrant by original writ out of our Chancery no Justice hath record. But if there be any suspicion of malice, let it be forthwith inquired by whose malice the writ was removed; and whosoever shall be convicted thereof shall be taken and punished by imprisonment and heavy ransom.

*CHAPTER XVIII.

Of exceptions to the person of the plaintiff.

1. The writ being established, the tenant may still aid himself by exceptions against the person of the plaintiff, as that he is excommunicated. For a person excommunicate is one that is out of communion on account of a leprosy of the soul, as a leper is for the disease of his body; and so long as a person is excommunicated, he ought not to commune with any one nor any one with him, neither is he entitled to be answered in any action, as shall be noticed in the plea of right.

2. The tenant may also aid himself in a proper case by exception of villenage against the plaintiff in the following form: 'Assise ought not to lie, inasmuch as the plaintiff is my villain.' But then he must also add, that he is seised of his suit and of his chattels, or that he holds of him in villenage;—not however for the purpose of recovering him for his villain, but to bar the assise in the plaintiff's action. But if the plaintiff has by his pleading or by consent put himself upon the jury concerning any circumstance of his estate, and he be thus as it were attainted for the villain of the tenant, the tenant may well take him away and put him in the stocks, or drive him off the land, as he should his

villain, yet not so as to be justified by the judgment of our court without another writ, but at his own peril. *For if the alleged villain can prove himself to be of free condition, as having been enfeoffed to himself and his heirs by his lord, or in any other manner, he shall have an action by writ of trespass or otherwise, against every one who has done him wrong or grievance.

3. So likewise the exception will fail if the plaintiff can prove by the assise or by attaint that he has lived out of the lord's fee and out of his seisin for a year and a day, claiming free estate, without claim by the lord; so that the lord cannot take or recover him as his villain without a writ of naifty. For no one can claim any right to the appurtenances or accessories who has no right in the principal subject of action; and therefore the lord in such cases should first demand the body of his villain by writ of naifty; and after he has recovered the body, he shall have the goods and the land and all that belongs to the body. And if the lord take anything from such fugitive without judgment of our court, he acts against our peace. And therefore we will that such fugitives shall have their action to recover from their lords what their lords shall have taken from them by force after a year and a day from their flight, until the right in the bodies be proved.

4. Therefore in this exception it is proper to examine whether the lords who put forward such exceptions are at that very time seised of those whom they allege to be their villains, and of their suit and chattels, or

whether they were formerly their villains, and have since fled from them; and if so, how long since. For if they have been fugitives above a year, there is no room for the exception, as has been before said; but if the lords can aver their seisin within a year and day, then it holds good; and in like manner, if the lord can aver diligent suit to reclaim and recover him as his fugitive and villain, although he has not been seized of him within the year and day.

5. If the tenant pleads that the plaintiff is the villain of another, he must further say, that he does not hold the tenements which he demands in his own name, but in the name of the lord whose villain he is; in which case the assise shall stand over, unless the plaintiff can show by charter of feoffment that he was enfeoffed to him and his heirs. And even if he proves such a purchase, this proof will not avail unless he further show that his lord was never seised thereof since his purchase; and if it be found that the lord seised the tenement after it had been purchased by his villain, although he afterwards delivered it back to the villain to hold at his will, the assise fails, because the villain was not tenant in his own name, but in the name of his lord. *And if the lord was never seised of the land, then the exception of villenage shall not hold against any stranger.

6. If the plaintiff pleads in replication to the exception of villenage, that he will not nor ought to have his condition, whether he be free or not, tried by the assise, in such case the assise shall be taken upon

the disseisin *ex officio judicis*, unless the tenant will waive the exception; and judgment shall be given according to the verdict; for we will that in favour of liberty no one of free estate be in such case obliged to put himself upon the jurors of the assise to determine his condition without his consent; but it is just that the spoliation, which is founded simply upon possession, be first tried, and afterwards the right concerning the condition, which is of a higher nature.

7. But in writs which concern the property and the right, as in the writs of right of customs and services, where no other customs or services are demanded than those which are due of right, and in other writs of right this exception is of so great force, that if the villain, or he who is alleged to be a villain, refuses to take issue upon it, judgment shall thereupon be given against him; and if the plaintiff puts himself upon the assise, and the assise passes against the lord, then the villain shall for ever after be quit from the claim of his lord; and if against the villain, he shall for ever after remain *his villain as much as if he had recovered him by writ of naifty.

8. But in a possessory writ it has not so much force, for although it pass against his condition, it is not thereby impaired or prejudiced. For the exception serves only to bar the plaintiff of his demand, and does not alter the condition in any point, whether the inquiry of the jury be concerning the plaintiff or concerning his father, whether he died a villain, or in the condition of a freeman although he was a villain. An

inquest upon bastardy is similar in its effect; for if an inquest be taken upon the exception that the father or other ancestor of the plaintiff died a bastard, although it be taken by consent of the parties, and the inquest find that he did die a bastard, yet the status of no person is thereby altered or changed.

9. Other exceptions there are against the person of the plaintiff, as if the writ is purchased in his own name, where the complaint is of a wrong done to another as well as himself; as where the husband alone is named in the writ, and the freehold is the wife's, except in the case of disseisin done by a wife to her husband. And if the writ be purchased in the name of the husband and his wife, jointly enfeoffed of the freehold of the wife, and one of them die pending the writ, the writ is thereby abatable. And the like, where any woman takes a husband pending her writ in which she alone is named.[1] Some plaintiffs also may be debarred from their plaints, inasmuch as they have no several action to demand anything certain in severalty; as parceners and others holding in *common, none of whom could ever tell where his own share was. But if the plaintiff demands to hold in common, he shall be heard.

10. Sometimes an exception arises on behalf of the

[1] 'Ex hoc nota, that none can be party to the purchase, if he be not expressly named, as when the husband marries the disseisee after purchase of her writ. But it is not so of a *feme sole* disseiseress who takes husband after a writ purchased [against her]; because she may do it of malice [to defeat the action].' Note in MS. *N.*

tenant, from his own person, as where he can prove by the assise that he is not disseisor. Also, where the lord of the fee is plaintiff for arrears of his rent, with which the tenement that has been viewed is charged, before he has tried to distrain his fee. For if the tenant demand judgment, whether the assise ought to pass, before the lord has essayed to distrain his fee, or is disavowed as lord, where the tenant acknowledges the services in whole or in part, in such case this assise does not lie, but distress from time to time for the service acknowledged.[1] And if the lord by reason of his poverty is not able to distrain his tenant, then let the sheriff be commanded by precept of the Justices that he aid the plaintiff in distraining his fee.

CHAPTER XIX.

Of Exceptions to the Action.

1. To the words in the writ, 'unjustly and without judgment,' the tenant may plead that it was by judgment; and then it must be examined whether by judgment of our court or of that of another, and whether by our writ or without. *And if it was by judgment of our court or of another without our writ, then the exception shall not avail, but all that was done shall be

[1] There appears to be some corruption in the text, which the MSS. do not enable us to set right. Possibly we ought to read, 'destresce soulement del service conu et otreié.' 'distress only for the service acknowledged and granted.'

annulled. For without an authority given and defined by us no one can be judge over another, especially to take cognizance of or determine concerning the freehold of another. If the plaintiff admits that the judgment was by original writ, but says that it was wrongful, the assise in such case shall fall, and he must be told to seek his remedy by writ of false judgment. But the assise shall not stand over for any judicial writ not issuing out of an original.

2. If any one puts in view a tenement consecrated by the bishop, or any other thing which ought not to be the property of any one, the action and assise thereby fall, and the plaintiff shall be in mercy for his false plaint. And as such tenement ought not to continue in the possession of the tenant, let inquiry be made concerning the tenement; and if it be found that the tenement ought not to remain with the tenant, let the tenant be in mercy for his tortious occupation, and the tenement be restored to its former state. Let like proceedings be taken with regard to a tenement occupied in severalty which ought to be common to any general body, or other community. With respect to the king's highway, or other like thing, an assise shall always fall and be turned into trespass; and inquiry shall be made of the trespass and purpresture, and judgment shall be given according to the verdict.

*3. Sometimes the assise falls for uncertainty, although it is not on that account turned into a jury or perambulation,[1] as happens between a woman and

[1] See c. xvii. s. 8, p. 319. and c. xx. below.

the warrant of her dower before any assignment is made to her of her dower in certain, where if both are ejected, and the woman alone complains and puts in view the third of the whole tenement as her dower, yet she shall not recover any tenement or any seisin by the assise, inasmuch as her portion was never ascertained. But if general seisin has been made to her, then it is sufficient to put her in such seisin as she had before; and if special seisin was given her, but she cannot now tell in what place by reason of the boundaries being removed, or by a like accident, then let land of the like value be assigned to her by the estimation of the jurors of the assise, as much as they can estimate among themselves to have been the amount of the tenement whereof she was disseised.

4. The assise also falls for uncertainty in the person of the plaintiff, as if the jurors have no knowledge of him at all. So, where they do not know for certain whether he held the seisin in his own name or in the name of another. The assise also falls where the jurors do not know who has the better right, the plaintiff or the tenant, as well to the possession as to the property. *Likewise, where the plaintiff claims by title of gift or feoffment, if he was never seised in the lifetime of the feoffor. The assise also falls, when brought by two sisters, who complain in common with their husbands, but the husband of one of them is not named, and this whether he be a felon or not, so long as he is living.[1] So if the principal town is not named; for in

[1] * A freeholder (un prudome) has four daughters, two of whom

one town there may be several parishes, and in one parish several manors, and several hamlets may belong to one manor, as shall be mentioned in the plea of right; but if the principal town is not named, the assise shall stand over.

CHAPTER XX.

Of Assises turned into Juries.

1. Assises are put off several ways, some for a time, some for ever; and some are turned into juries by assent of the parties, where he who refuses his assent after he has pleaded shall be held to fail in his plaint, or be condemned as undefended; others *ex officio judicis*, as where the parties differ in what vill, county, manor, fee, or barony, the tenement is. Assises are put off for a time by pleas in abatement and dilatory exceptions. By peremptory exceptions they are barred for ever.

*2. Some are turned into juries by the exceptions being denied, as in this case, where the plaintiff says that he was seised by title of succession after the death of his ancestor, who died seised, and whose next heir he is, and after whose death he presently entered

take husbands. The husband of one commits felony, for which he is outlawed, and abjures the realm. The father then dies. The inheritance is occupied by a stranger, and the four daughters are to purchase by the assise. *Qu.* Whether it is proper to name the felon, husband of one of the daughters, or not. Note in MS. *N.*

and kept himself in seisin until the disseisor wrongfully and without judgment ejected him,—if the tenant meets this by saying that the ancestor of whom he speaks never died seised in his demesne as of fee, inasmuch as he held only for term of life, and that therefore the plaintiff cannot have a freehold by any title of succession; and if the plaintiff replies that the ancestor died seised as of fee, then the assise shall drop, and by the assent of the parties the jurors become as it were arbitrators; and judgment shall pass according to their verdict;[1] nevertheless upon such verdicts, though passed by common assent of the parties, an attaint may lie.

3. So if it be disputed between the parties whether the ancestor held the tenement in gage or under any other condition or not, and whether the condition was satisfied or not. The like, where the younger brother, or bastard, or other, is ousted by the true heir, if the contest be which is eldest or legitimate, the truth of these questions shall be inquired by a jury by assent of the parties; and the like in other such cases which are numberless, in which the assise is turned into a jury by dilatory exceptions between the parties.

*4. If the plaintiff says that he was seised by title of gift, until he was wrongfully ejected, it may be said in answer, that he by whose gift he claims title was never

[1] 'These things are necessary to succession, true ancestor, true ownership in him, true succession, true heir, and true seisin; of which the four turn the assise, and the fifth makes the assise in its proper nature (en sa grasse nature).' Note in MS. *N.*

in seisin, so as to enable him to make any gift; or if the donor was seised, he never divested himself of the seisin in his lifetime; nor was he who is plaintiff ever seised in the lifetime of the donor, but after the death of the donor he by his own force abated himself into the tenement, out of which the tenant as next heir presently ejected him, so that he was in only by mere abatement; and if the parties by common consent pray averment, the assise shall cease, and it shall be inquired by jury whether the plaintiff was seised by his own abatement or by the livery or induction of seisin by the donor in his lifetime; and judgment shall be given according to the verdict.

5. If the jurors know nothing of the facts, the plaintiff shall take nothing by his plaint, but be in mercy for not proving his contention. And if the jurors are in doubt, the assise shall be stayed, and it shall be adjudged, as before, against the plaintiff.

6. If the plaintiff derive his title under gage or conditional purchase, and the adverse party say that the condition was satisfied, or that satisfaction was ready to made be on the day *named in the deed, by denial of the party the assise shall cease, and shall be turned into a jury, if the parties consent, to inquire whether such satisfaction or tender was made or not. For suppose now that the plaintiff should say that he is disseised of his freehold, and should derive his title under a gift and feoffment, and say that by the gift and feoffment of the disseisor himself he was seised of this tenement, and did homage to him, and took the profits, and enjoyed

his peaceable seisin from Easter until Christmas, when the feoffor himself wrongfully ejected him; if the tenant answer, he may well acknowledge the gift and the feoffment, and the charter and the homage, but if he can prove by writing that all these acts were conditional,[1]—as thus, I enfeoffed you and took your homage upon this condition, that if I find within the year and day that you hold land anywhere of the king in chief, I may put myself in seisin and eject you without wrong, so that when I shall have found for certain that you hold elsewhere of the king in chief, I shall lawfully eject you by virtue of that condition to which you assent,—if such conditions can be shown by writing on one side and on the other, then the plea shall proceed according as the writings are admitted or denied.

*7. And if the conditional writings are falsely denied, although this falsity be afterwards proved, yet as it may happen that the condition has not been satisfied, an inquiry must of necessity be made concerning such

[1] 'Nota, *quod modernis diebus* no charter can be conditional on account of the statute *Quia emptores terrarum*. For the purchaser must hold either of his feoffor or of his chief; and of his feoffor only in fee tail. For when once the purchaser is in rightful seisin of the fee and freehold, he cannot be ousted except by his own consent; neither can the donor, who has once divested himself, have it again except by a new title. But as soon as he gives to hold of the chief lord, he divests himself entirely (se demet tot nettement). Wherefore the charter must be absolute (simple); and if there be any collateral deed of covenant, the donor cannot retain his seisin by his own force, but must use his writ of covenant.' (Note in MS. *N*.) See above, pp. 236, 238, and notes there.

satisfaction, and judgment shall go accordingly, as appears in the chapter concerning Right. For although the charter be proved good, yet it may be void and of no force by reason of its false testimony in saying, I have given, whereas no gift was ever made, although there was some proposal of a gift. Hence it is not sufficient to prove the charter alone, unless the gift is proved; for it may be that the charter is good and genuine, and yet the purchaser did not acquire the tenement by the gift of him who made the charter, but by his own abatement, or by disseisin or intrusion. So on the other hand, although the charter be proved to be false, yet it may be that the gift was good and lawful; wherefore both the gift and the charter must be proved.

8. If such conditions are set up without evidence of any writings, the adverse party may deny by their law, with eleven compurgators, that there ever was such a condition. And if the charter be one of simple feoffment without condition, and the gift be admitted or proved, then no credit need be given to an oral allegation of a condition on account of the presumption arising from the charter which does not mention any condition.

*9. If the donor by virtue of any condition contained in the deed between him and the purchaser cannot put himself in seisin and eject the purchaser according to the condition, he must in that case be aided by writ of covenant, in which the process shall be by the great and little *Cape*, as is in a real action.

10. It often happens that the plaintiffs are prevented from recovering seisin by means of their plaints; as where the jurors of the assise have no kind of knowledge or presumption as to the agreements affecting the plaintiff,[1] or concerning the thing whereof the plaint is made. They may also be impeded by their own will, as in case of conditions; also by release and quitclaim; and by accord, as where the person ejected has agreed to accept the value; also, by charter of confirmation from the person ejected; also by consent, as if the disseisor makes a gift of the tenement, and the person ejected executes a charter of confirmation. They may also be prevented from recovering by their own force and usurpation, as if they take back by their own force what they ought to have repurchased by judgment. Difficulty of judgment is another impediment. So also a legal judgment. And in all these cases upon a difference between the parties the assise shall be turned into a jury, and by way of jury such questions shall be determined.

*11. Where the plaintiff grounds his title on the 'law of England,' and the tenant pleads that he cannot have a freehold by this title because he never had issue by such a wife, or if he ever begat a child the child died in the womb, or if born alive it was not a child but a monster, or supposing it to be a child it was never heard to cry; and if the plaintiff replies to the contrary, the assise

[1] The sense of the original is doubtful. There appears to be some corruption in the text, which I have found it impossible to remove.

shall cease and be turned into a jury. And if the jurors say that they saw the plaintiff in full seisin, and that he was ejected therefrom, but that they know nothing concerning any child by reason that the wife of the plaintiff died in childbed in another part of the country, then the sheriff of that place shall be commanded that he take with him the coroner of the country, and in the presence of the parties, if they choose to be there, inquire where the wife of the plaintiff died, and whether she died in childbed or not, and whether she ever had a child by this plaintiff after he espoused her, and whether it was heard to cry or not, and that he make his return, on such a day and at such a place, of that which he shall find by inquest; and judgment shall be given according to the return.

12. Or the tenant may admit that the woman in whom the fee and freehold were vested had children by the plaintiff, yet that the same ought not to avail him, inasmuch as those children were afterwards proved to be bastards; and if the plaintiff denies this, the assise shall cease and be made a jury by consent of the parties. And if the plaintiff demands how they *were bastards, and the tenant answer, because they were born before the plaintiff married their mother, in such case the truth shall be inquired by means of a jury, and not in the form of an assise. And if he says, by reason that the plantiff never married their mother, and the plaintiff alleges the affirmative, then the assise shall stand over until it be determined in court Christian whether he ever married her or not. The mode

of proceeding in such cases shall be described in treating of exceptions in the Plea of Right.

13. The assises are sometimes also turned into juries on account of trespass, as where any one desires to use the soil of another against the consent of the owner. And if any parcener or other would make severance of what is common against the will of the commoners, or if any commoner commits excess by taking more than his due, the act amounts to a disseisin; and yet it may be a trespass according to the distinction, as where he does not claim any freehold; and then the assise shall cease and be turned into a jury to inquire of the trespass and damages. But because one cannot in such case immediately discover the intention of the trespasser, the plaintiff acts prudently if he proceeds by this assise. And if the act be done a second time, then the assise holds, so that the plaintiff may recover his peaceable seisin. *If it be done a third time, the penalty of redisseisin shall be incurred. If the disseisor claims a freehold, upon this the assise shall take place; and if the assise say that he has a freehold as a commoner and not in severalty, let him be adjudged to have the same seisin as he had before, and be punished as a disseisor for the excess.

14. But in the case of common tenements where disseisins are made secretly and are begun by little and little, it is expedient to take pledges of the trespassers, and to impound the beasts, if any do damage in the commons or surcharge them with cattle, so that upon such seizures satisfaction may be made by the

award of neighbours. And if any one claims a freehold, the owner will act wisely, in the first place, if he keeps him out, so that he may not do any disseisin; and if he cannot be prevented, then this assise takes place.

15. So likewise for trespass by waste and destruction, and also for excessive distress. For excess in distraining sometimes breeds disseisin, and sometimes trespass; disseisin, where any one distrains another, whereby husbandry is disturbed, whereas there is no occasion for the distress; trespass, where one distrains the tenant of the tenant instead of the mesne tenant, the mesne being of sufficient ability. So if the demesnes are distrained when the villenages are sufficient; or the distress is by immovables where there are movables enough to be distrained, *or within the house when enough may be found out of doors, or by beasts of the plough where there are enough of other beasts not used for labour, or by apparel or riding-horse or vessel where the other chattels may be distrained, or if the distress taken be in excess, as twenty pounds for twenty shillings, or if the distress be driven out of the county or out of the fee. And according as it shall be found to be disseisin or trespass, the assise is held as an assise or is turned into a jury to inquire of the trespass. There are more exceptions that cannot all be particularly mentioned here, some of which hold in other pleas, as will further appear in treating of challenges of jurors.

CHAPTER XXI.

Of the challenge of jurors, and of the trial of the assise.

1. When the parties have pleaded to an assise or to a simple jury upon any exception, the day may be delayed many ways, as for default of jurors. Or if a sufficient number of jurors appear, yet some may be removable by the just challenge of the parties.

2. Sometimes the day is delayed on account of the season; for all seasons are not fit. For it is forbidden in the Canon by holy Church upon pain of excommunication, that from Septuagesima until the Octaves of Easter, and from the beginning of Advent until the Octaves of *the Epiphany, and on Ember days, and on the days of the greater litanies, and on Rogation days, and in the week of Pentecost, and in the time of harvest or vintage, which last from St. Margaret's day until fifteen days after Michaelmas, and on solemn festivals of Saints, no one shall be sworn upon the holy Gospels, or hold any secular plea, or make any summons in the times aforesaid, so that all these seasons be set apart for prayer, and for appeasing of quarrels and reconciling those who are at variance, and for gathering the fruits of the earth which are to be the food of man. Nevertheless the bishops and prelates of holy Church do sometimes grant dispensations, that

assises and juries be taken in such seasons for reasonable cause.

3. When the day cannot be put off on account of the season being improper, the jurors may be challenged, and sufficient and reasonable exceptions alleged why they ought not to be sworn or be in verdict against the party. For the same objections lie against jurors taking the oath as against a suspected witness giving his testimony, inasmuch as no one who has been once convicted of perjury ought to be sworn, for such are held to have forfeited their free law, so as not to be credited upon any oath which they take. Nor ought those to be sworn who have suffered judgment of life and limb, or punishment of pillory or tumbrell; nor those who want discretion; *nor excommunicated persons; nor lepers removed from society; nor priests or clerks within holy orders; nor women; nor such as dwell away from the neighbourhood; nor those who are above seventy years of age; nor allies in blood; nor such as can claim any right in the tenement; nor villains; nor persons indicted or appealed of felony; nor those of the household of any of the parties; nor those who are liable to be distrained by either of the parties! nor their lords, or counsellors, or accountants.

4. When the parties have agreed upon the jury, then let the first juror, touching the holy Gospels, swear after this manner. 'Hear this, ye Justices, that I will speak the truth of this assise,' (if the assise is to be taken in manner of an assise and not as a jury,) 'of the tenement of which I have had the view by the

king's precept;' or thus: 'of the tenement whereout such rent is said to arise;' or thus: 'of the pasture and of the tenement,' or 'of the common, whereof I have had the view.' Thus the words of the oath must be varied according to the form of the writ and declaration; and if the plaint be made of nusance, then it shall be said thus: 'of the nusance and of the tenement to which the nusance is said to have been committed;' or thus: 'of the wall, or pond, and of the tenement,' without adding 'whereof I have had the view.' Then it continues thus: 'and I will not fail for anything to speak the truth, so help me God and his Saints.' Then let the rest swear thus: 'The same oath which such a one hath thus sworn, I for my part will keep, so help me God and the Saints.' Then let the Gospels be kissed with all reverence as *our faith and salvation. If several assises are to be taken under one oath, then it shall be said: 'of the assises and of the tenements whereof I have had the view;' or thus: 'of all assises, and of those tenements whereout such rent is supposed to arise;' or thus: 'of those tenements, and of the common of pasture, or turbary, or other, and of the tenements to which it is said they ought to belong, whereof I have had the view;' or thus: 'of this assise, and of the corrody, and of the tenement,' and so of others. And in the other assises of mort-dancester and darrein presentment the oath shall be taken in the same manner.

5. When twelve are sworn, and their names enrolled, then let the writ be read to them by the clerk pro-

thonotary, who shall address them in this manner: 'You shall say by the oath you have taken whether such a one wrongfully and without judgment has disseised the plaintiff of his freehold in such a vill within the term, or not.' The Justice also shall straightway rehearse the substance of the plaint thus: 'John, who is present here, complains of Peter that he has wrongfully and without judgment disseised him of his freehold in such a vill, whereof he puts in his view ten acres of land (or more or less), with the appurtenances;' and then let him mention the declaration of the plaintiff and the allegations of the defendant for the information of the jurors.

*6. The jurors shall immediately withdraw by themselves to confer together; and then let them be so kept, that none of them speak with any other person except the jurors, nor any other person with them. And if any do so maliciously, and be found guilty thereof, let him be punished by imprisonment and fine, and let the jurors be amerced, if they have not themselves accused him. Moreover let the jurors be watched, that they do not give warning to any one, by motion or the eye or by other sign, against which of the parties they intend to pronounce their verdict; and whosoever shall do so, and be found guilty thereof, shall be amerciable or otherwise punishable according to the mischief which may arise.

7. If the jurors cannot agree, let others be added to the majority of the jury, if the parties consent; and if not, let the judgment be against him who refuses to

consent, so that if the plaintiff refuses, the seisin shall remain as before, and he be in mercy; and if the disseisor refuses, he shall be adjudged as undefended. If the jurors cannot pronounce the truth, nor return any verdict as to the fact, let the seisin remain in the tenant, and let the plaintiff be in mercy for not having proved the case made by his plaint. If the jury refuse to pronounce any verdict in the matter through favour to either of the parties, or for any other reason, then let them be shut up without meat or drink until they have given their verdict.

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*CHAPTER XXII.

Of Judgments.

1. When the jurors are all agreed, let them immediately go to the bar before the Justices, and declare their verdict; and according to their verdict let judgment be given for one of the parties, unless any doubt or difficulty arise, which may make it necessary to examine the facts by the jurors or others, or to defer judgment until another day, so that the Justices may in the mean time be advised and consult what is best to do therein. Where the Justices however are doubtful about the verdict, and the jurors have not been sufficiently examined, or have been too hasty in their judgment on account of some word or sentence which might have a double intendment, in such case a certification may be taken by the same or other Justices.

But it is better and safer for the Justices thoroughly to examine the reasons of the jurors so that they may give a good and sound judgment, and that no error may be found either in their office or in the proceedings.

2. When the jurors have declared their verdict upon the substance of the assise, or upon any exception, and such verdict is given against the plaintiff, then let it be awarded that the tenant and the others named in the writ go quit of that assise without day, and that the plaintiff take nothing by his writ, but be in *our mercy for his false plaint. Nevertheless his pledges to prosecute shall not in such case be amerciable, inasmuch as the plaintiff has prosecuted his suit to the end.

3. When the assise is taken after the manner of an assise, regard must be had to the quantity and quality of the plaint, and how much the plaintiff has put in his view and set forth in his plaint; since the oath of the jurors does not extend to that which he has not put in his plaint. And if the Justice awards to the plaintiff more than he has put in his plaint, or if the jurors give him seisin of more than he has put in his view, they commit a manifest disseisin on the tenant:[1] as does the sheriff also, who puts in execution the command of the judge, because in such a case, or in any

[1] '*Ex hoc nota*, that the plaintiff's demand is the Justice's warrant, and the foundation of the judgment. Wherefore if the judgment is given upon a demand other than that which the plaintiff has truly made, whether more or less, the judgment is false.' Note in MS. *N*.

other where the Justice's jurisdiction does not extend, no bailiff ought to obey him in executing his commands. The plaintiff is in a like position who receives such defective seisin. So likewise where the plaintiff encroaches upon the disseisor more than right under colour of judgment. And if the plaintiff puts too much in his view, he is amerciable for his excessive demand.

4. If the verdict be given for the plaintiff, it shall be forthwith inquired who were present at the disseisin, and the manner of the fact, whether the disseisin was committed with banner displayed, or horses harnessed, or by other force of arms, and by what force, and by what arms. And it should be understood that there are divers sorts of arms and divers kinds of force. For all those are said to be armed who carry anything wherewith they may do hurt to people or overpower others, as well as bows, arrows, knives, hatchets, and staves, as hauberks, lances, and swords. So there is armed force, and simple force without arms, as by multitude of people.

*5. And because many a man, having no right, gains seisin by such force, upon which the tenant who has a right to retain and abide in possession leaves the tenement to avoid further mischief, and forasmuch as such ways of obtaining seisin are in part against our peace, we will that the Justices inquire, who came in the force along with the principal disseisor, so that the disseisor and those of the force be punished by imprisonment and fine if they are convicted of a disseisin effected by

force, and if by arms, then ransomed. And if any be convicted of a disseisin done under colour of right, and without breach of the peace, as by a simple disseisin done in the daytime, without force and arms, with a white wand in sign of peace; in such case let the disseisor be amerciable by their peers, and also make satisfaction to the plaintiff in damages. The penalty above mentioned, which is to be imposed upon disseisors who eject people from their freehold, whether by force or arms, or, as it should be done, after a peaceable manner, shall also be imposed upon disseisors who with force or arms, or simply without arms, keep a man out of his freehold when he expects to enter peaceably therein.

6. Sometimes it happens in this assise that the disseisors shelter themselves by us, and say that they neither have or claim anything in the tenement, *but whatsoever they did was done in our name, and that without us the assise cannot pass, nor the fact be brought in judgment without prejudice to us; in which cases we will not that under such pretext the assise shall stand over; but if the disseisin be clear and manifest, let it be adjudged for the plaintiff, and let the common law take its course against the tenant as against any other person; and if any doubt be perceived, let judgment be respited to another day, and let the proceedings in the meantime be laid before us, so that judgment may be ordained by our advice.

7. And because it often happens that the tenant has not committed any disseisin or wrong, but has possibly

purchased the tenement by feoffment of the disseisor; in such case it is reasonable that the tenant should be able to vouch to warranty the disseisor, so that he who has done no wrong may not be punished for the trespass of another, without recovering to the value from his feoffor; and then let the same proceeding be observed as shall be mentioned concerning warranties in the assise of Mortdancester. If two or more assises are prosecuted by several persons against one, the last seisin shall be first tried, and so backwards to the first disseisin.[1]

*8. Afterwards let it be inquired of the jurors what damages the disseisors and the tenants have committed in houses, woods, gardens, warrens, vivaries, parks, rabbit-warrens, and elsewhere; and how much has or might have been by good husbandry received in the

[1] 'A is disseised by B. B continues seised, and is ejected by C. C is ousted by D, who enfeoffs E; A brings assise against B and E; B brings assise against C and E; C against D and E. *Quæstio*, whether E, tenant, ought to answer to all at the same time, or if not to all, to whom first? *Solutio:* The Justices *ex officio* ought to inquire of the last seisin in this manner: 'Good people of the assize, you shall tell us by your oaths which of these three, who bring assise of the same tenement against the same tenant E, was last seised, whether A or B or C.' And if they say C, and before him B, and before him A, then the judgment shall be thus: 'For as much as we find that B hath disseised A, and C hath disseised B, and D hath disseised C; therefore this Court doth award that B and C, being disseisors, do take nothing by their writs, but be amerced, and that A do recover his seisin against E by your views.' (Note in MS. *N.*) Compare Bracton, 177, 178.

meantime of all kinds of issues of the tenement, and what profit in value the plaintiff might have had if he had not been disseised; and it shall be awarded accordingly that the plaintiff recover his full damages. And if the Justices perceive that the jurors are disposed to relieve the disseisor by assessing light damages, because on the other hand they have made him suffer by the loss of the tenement, let the lands be extended by the same jurors at their true value in the presence of the parties, if they will be there; and according to the yearly value let the damages be taxed by the Justices, single or double, according to the ordinance of our statutes, and according as the assise shall have been falsely defended or not.

9. If the disseisors have taken away or detained from the plaintiff any vessel, robe, or chattel, it shall be in the election of the plaintiff either to sue for his chattels by appeal of robbery or trespass, or to have them taxed with the rest of his damages. The damages for wild animals taken in parks or chases, and for fish taken out of ponds, shall be assessed by the jurors; for in such cases the penalty of three years' imprisonment does not lie, *nor in any case except where judgment of felony can be given, if the offender is in peril of life and limb. If houses have been burnt or other damage has happened in the meantime, although it was by an unforeseen accident, without any human malice, yet the disseisor is not thereby discharged from making satisfaction as well for the chattels of the disseisee as for the goods of others wrongfully detained by the disseisor.

CHAPTER XXIII.

Of Appurtenances.

1. HAVING spoken above of disseisins of things corporeal, we must now speak of disseisors of things incorporeal, as of appurtenances. For although a tenement be freehold according to the definition of it, yet in respect of the services wherewith it is charged another tenement may be more free ; and yet both are free tenements. Wherefore if one tenement be charged with any service to another tenement, such service is properly an appurtenance to the tenement to which the service is due, which appurtenances no one ought to disseise another, and if any one does so, the disseisee may be aided by this assise, or by our writ to the sheriff, as shall be hereafter mentioned.

2. It should be known that some appurtenances are free, others servile ; free as in respect of the *persons and tenements to which they are due, servile as regards the tenements from which they issue,[1] and such servitudes are always due from the tenement of another ;

[1] Unless the text is corrupt, the above sentence appears to be a mistaken rendering of the parallel passage in Bracton or Fleta, when the sense is, that the same things which are rights or liberties (jura sive libertates) in relation to the dominant, are servitudes (servitutes) in relation to the servient tenement. This observation is found subsequently in Britton, *post*, s. 8, p. 292.

although no one can subject the soil of any one to servitude but his own. And in this way some tenements are more free than others; for that soil is more free which owes nothing to the soil of its neighbour, than that which is bound to a servitude.

3. A person may subject his tenement to a servitude in several ways, as by granting that another, who has nothing therein, shall have a right of pasturing or mowing, or fishing, or of driving cattle, or of way, or of carrying therein, or by other servitudes which may be infinite and numberless, according as they are simple or compounded of other appurtenances. For there are appurtenances, and also appurtenances of appurtenances. For to a watermill, the course of water is one of the appurtenances, and way is another, to which cleansing and repairing are appurtenant, and are therefore appurtenances to appurtenances; and if any one be disturbed thereof, remedy may be had by this assise.

4. And whether the servitude be due from one soil to that of another or to the person of another by the consent of the true owners, for a certain service or by reason of vicinage, they are not bound to the soil only, or to the person only, but to the certain soil of another, and also to the owner of the soil, whosoever the owner may be. Hence it follows, that whosoever purchases the soil *purchases the appurtenances due to the soil, unless hindered by special exception. Some of which servitudes are ordained and established by those who have power to charge the soil, and others by long

usage on the one side, and by sufferance and negligence on the other. For in such a case it is presumed that sufferance with knowledge amounts by prescription of time to consent. For although a tenement be not burthened with any kind of servitude by appointment or other good title from the owner of the soil, yet if the neighbour has taken by encroachment upon the soil of his neighbour any servitude, as the depasturing of the herbage on his neighbour's soil, and the hindering of the owner from pasturing, and has been seised thereof, claiming freehold, without force and without asking leave of the owner of the soil, and this continually, and not privately by stealth, but boldly and openly, he can never be ejected or disturbed without being disseised. And if he to whom the wrong is done by his own consent, disseise such purchasor by force and not by judgment, that presumption shall be so far prejudicial to him, that if the ejected recover his seisin by judgment of our court, he shall not afterwards eject him but by plea in the right by writ of *Quo Jure*. But by a precarious or secret disseisin, as in the absence of the owner of the soil, *although the bailiffs of such owner be present or consenting, a freehold never accrues to such purchasers.

5. Sometimes the soil is subject to a servitude by law, although not by any man's appointment, or by the establishment of peaceable seisin, as, for example, to the obligation that no one shall do anything in his own soil that may be a grievance or annoyance to his neighbour; of which annoyances there are various

sorts; for some annoyances may be lawful, and in particular such as no neighbour can forbid another to do, as to erect a mill on his own soil; and some may be tortious, as if any one do in his own soil a thing which is a grievance to his neighbour, and which he by law may be prohibited from doing. For the law forbids any one to raise or heighten his pond so as to drown the tenement of his neighbour, or to make a ditch in his own soil whereby the water is diverted from his neighbour, or whereby it is hindered from remaining in its ancient course, or to do any act in his own soil whereby his neighbour may be less able to use his seisin of the servitude wherewith the soil is bound and charged to him, or to use his peaceable seisin where and when he ought, in all such ways as he was wont and ought to use it, in number, kind, quality, and quantity.

6. For there is secret as well as open disseisin; forasmuch as he is equally disseised who is not suffered to have his driftway over *another's soil which is subject thereto, or is not permitted to repair and put in order the way, as if the way was entirely destroyed, or the whole soil turned into a fishpond; and he who is hindered from cleaning out the watercourse of his mill is as much disseised as if the whole watercourse were disturbed or diverted; for to a right of watercourse the right of cleansing is appurtenant, as the right of repairing is appurtenant to a right of way. And he is as much guilty of disseisin who partly hinders another's seisin, as if he disturbed him of the whole.

And if any one has common in another's soil with free ingress and egress by a certain place, if the owner of the soil commits disturbance by making a hedge, wall, or ditch, whereby the ingress and egress is less easy than before, inasmuch as he must drive his cattle a long way round where he could formerly drive them straight, these and like acts may be treated as disseisins, unless the nusances are redressed by presentment in the sheriff's tourn, or in view of frankpledge. So in this case,—where any one has a right of pasture granted to him for his cattle at whatsoever times he pleases, and he is afterwards disturbed so that he can put them in only at a certain time, or when he has a right to pasture throughout the whole and he is hindered from having it except in certain places, or where he ought to have pasture for all manner of beasts and he is allowed to have it only for one kind of beasts, or where he ought to have pasture for a certain number and he is suffered to have it only for a less number; or if it is granted to any one that he may draw away water at his pleasure from another's well and he is disturbed *as above mentioned concerning pasture,—in all these cases this assise is applicable, as much as if complete disturbance had been made of the whole.

7. In all cases where this assise lies for the grantee of such a franchise, it lies also for the owner of the soil if he to whom the franchise is granted uses his seisin in a different or more extensive manner than he ought. Nevertheless it is well to hinder such excesses, so far as possible, at the beginning, so that the dis-

seisors may not avail themselves of peaceable seisin as title of freehold.

8. The servitudes to which a man may subject his land are innumerable; and such rights and franchises are purchased in the same manner and for the like causes as corporeal things. But for the purchase of these franchises the same formality of giving seisin is not requisite, as in purchases of corporeal things. For if the parties are agreed, the delivery of the deeds together with the view of the tenements in the presence of neighbours is sufficient; and if the purchaser be thereafter hindered from enjoying the franchise granted to him by one who had power to grant it, he shall be helped by this assise, although he has not taken any esplees. Thus, where pasture in another's soil is granted in fee or for term *of life, and the writings are delivered, and the soil assigned by view of neighbours, if the purchaser, whether the next day or a long while after, has a mind to feed his cattle on the pasture of that soil according to the tenor of his purchase, and is hindered by the donor or another, he shall be aided by this assise, although he never enjoyed the pasture. For such franchises are so simple that they do not admit of delivery of seisin, as gross, coarse, and material things do. It should be understood that such purchases, in relation to the purchaser and also to the tenement to which they are assigned to belong, are franchises and rights, and with regard to the owner of the soil which is charged, and to the tenement bound thereto, such purchases are servitudes.

9. But although the purchaser is thus in seisin, this does not prove that such seisin is sufficient for ever. For until he has taken other seisin of the pasture, he cannot alien the same; as in the like case of the advowson of a church, which cannot be granted before the donor has been seised of the advowson by presentation. The purchaser may also be barred of his seisin, if the soil be aliened to a stranger before any other seisin was taken thereof beyond the bare delivery of the writings. Therefore it is proper to put in the beasts forthwith. *For the putting in of one beast is a sufficient seisin for all the rest which he might have put in, although the beast be borrowed by the purchaser of some other person, so it be not the donor, unless it be specially excepted in the gift that he shall depasture his own beasts only, and not those of others; and if he omits doing this he may lose his purchase by his negligence, since it is presumed that he did not intend to take any seisin.

10. If the purchaser has neither beast of his own nor can borrow another for the purpose, then it is sufficient to hinder the owner of the soil as much as he can from ploughing and sowing, so that by such molestation he retains a kind of seisin, and may put in his beasts whensoever he chooses to send them, although the land be ploughed and sown, or although the corn be ripe. But if he has been so negligent as to suffer the owner of the soil to plough and sow without any dispute, and then takes seisin for the first time while the corn is growing by feeding his beasts in the

corn, in such case he commits a disseisin against the owner of the soil; and if the owner recovers by this assise, the purchaser shall be barred of his pasture for ever after by his negligence in too long delaying the taking of seisin. But some one may say on the other hand thus, Although you till and sow my land without my leave and I knowingly suffer it, yet no wrong is done me until you carry the produce away; how then is my negligence and the sufferance more dangerous in the one case than in the other? In answer to this, it is to be observed that there is a negligent sufferance and a sufferable caution. *For by suffering lands to be ploughed the lands are improved, and by sowing also; and in such case the sufferance is good and prudent to permit a man to sow another's land; and it is no disseisin to the owner of the soil, since nothing has been done against his consent: but where no profit accrues to him by the sufferance, but on the contrary loss, as in the case in question, then it is negligent sufferance; for in the one case the condition of him who permits the ploughing is made better, and in the other worse.

11. Some enjoy the seisin of common in their own right, and some in the right of others. And as a guardian enjoys the seisin of common in the name of the infant under age whose guardian he is, so likewise the parson of a church enjoys it in the name of his church. For a church is always supposed to be in the same state as an infant under age, by reason of its always being under the guardianship of its parson, by which

guardians churches may purchase and amend their estate, as infants may by their guardians; but they cannot assent to anything to their damage. Wherefore if any church is seised of a common, although the parson dies, yet the church does not in any manner lose its seisin of its common, or any other seisin, any more than an infant under age does by the change of his guardians, by which change his estate is not impaired or altered in any point. *Therefore every parson may use that seisin which his predecessor left to the church; and if he be disturbed therein, he shall recover by this assise. But if the predecessor was beforedisturbed, or if the church was disseised in the time of its avoidance, then another remedy is required, as by our writs of entry, or of *Quod permittat.*

12. Forasmuch as there are several kinds of servitudes, as we have before said, and the most important of these is the right of pasture in another's soil, we shall therefore first treat of common of pasture.

CHAPTER XXIV.

Of Common of Pasture.

1. Common is a general name, and no community can be so restricted but that it be understood that there are at least two or more parceners to whom it is common. And it properly signifies that one person has a right to common with another in another's soil. Pasture likewise is a general name for herbage, acorns, mast, and nuts, and for leaves and flowers, and for all things comprised under the name of pannage.

2. Purchases of common may be large or limited, as at all times, or only at certain hours; and as *per my et per tout*, or only in certain places; or as for all manner of beasts, or only for certain kinds. Reasonable prohibitions are nevertheless excepted in such purchases, sometimes expressly and sometimes tacitly; *for none ought to common in respect of any purchase in seasons of reasonable prohibition, as in hay time or harvest time; so in places particularly reserved for the pasture of lambs or calves, oxen or cows, no more than within the curtilage, or in gardens, orchards, or parks, or in demesnes, which the lord may fence in or enclose at his pleasure.

3. Common is acquired several ways; as by gift, where one gives to another any soil with common ap-

purtenant; and by sale, as if one buy common in another's soil, so that for ever after it be appurtenant to his own soil, although the two soils be in different fees or different baronies or counties, so long as they are adjoining; by vicinage also, as if one neighbour gives common to another, and the reverse; or by long sufferance without other title, with the knowledge and consent of the owners of the soil; for neither the sufferance nor consent of their bailiffs will ever give title of freehold, nor will any arbitrary usurpation, if he who thus acquired it hath not continued and used his seisin with the knowledge of the owners; *yet notwithstanding, if any one having no right but only recent seisin by his own abatement be ejected by another who has less right, he who is thus ejected from his posession shall recover such estate as he had by this assise. For although he has no right to be thus in seisin, yet the disseisors have no right to eject him from his seisin, such as it is. But if he in whose person the property is vested ejects him as soon as he knows of the usurpation, the ejected shall never recover by this assise by title of peaceable continuance in seisin.

4. If any one purchases common of pasture in another's soil, and has no tenement to which the common may belong, this is not properly a purchase of common, but a hiring of the pasture or herbage.

5. As common is acquired by the will and mutual agreement of the donor and purchaser, so is it extinguished and destroyed by the mutual agreement of the parties to the contrary, so that the assent or disassent of

one is of no avail either for purchasing common or for waiving the purchase, unless there be a union of assents or disassents by their common will. And as common is sometimes purchased by long sufferance, so it is lost by long negligence, but only on cases where seisin has been openly enjoyed with the knowledge of the owners.

6. By mutual consent also that may become several which before was held in common. For as land which is common among parceners may by division become several, in the same way any tenement of which the pasture is *common may be divided among the commoners, to be held in severalty. But for this the assent of all the commoners is necessary. And when they have once consented, and the boundaries are fixed, and every one knows his several, no dissent afterwards will avail.

7. Where any soil is charged with a servitude, the servitude may be lessened, restrained, altered, and limited, and in the same manner enlarged and increased, but not against the consent of the donors and purchasers. For if any one should do it against their consent, this assise would lie for him whose soil it was intended to burthen with more than was right; or, on the other hand, the remedy may belong to him to whom the servitude is due, where less is performed than is right.

8. When a gift is to be made of a common, there must be a transfer of it from one person to another, and from one tenement to another, and the persons and tenements should be specified on both parts, as

well the persons of the purchasers and the tenements for which the common is purchased, as the persons of the donors and the tenements which are to be charged with the common; for it is a general rule that there can be no common without soil, that is to say, without soil to which it is servient, nor without soil charged with the service.

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*CHAPTER XXV.

Of the Remedy for Disseisin of Common.

1. Those who are ejected or disturbed of their common may have remedy by our writs, when they shall be unable to retain or peaceably to enjoy their seisin. The forms of remedy however are to be distinguished. For according to the diversities of the cases the writs must be varied; for the same soil may be charged with several servitudes to several soils, as well in the whole as in part: and this may be true in divers ways; one way, on account of the different tenements to which the servitudes belong; another way, by reason of the different persons to whom they are due; and the third way, by reason of a diversity both of the persons and of the tenements. In the first case one writ is sufficient, because of the unity of the person of the plaintiff; but in the second and third cases there are divers rights, and of divers rights there may be divers disseisins, and for divers disseisins there must be divers writs.

2. But if there be a unity in the tenement to which the servitude is due, although there are divers persons, as in case of parceners who hold a tenement in common, in such case, whether there be one plaintiff or more, there need be only one writ, and that by reason of the unity of their right, although they are divers persons, and on account of the unity of the tenement, which is held in common. *But if the tenement be divided between the parceners, and any one of them be afterwards disseised of common belonging to his part, to such case separate plaints and separate writs lie, so that each parcener shall bring a separate assise. If a parcener is disseised of his common by one of his co-parceners, the disseisor and disseisee only are to be named in the writ, without naming the other parceners, whether the parceners be merely neighbours or entitled as one heir.

3. When we have thus granted our writs to the plaintiffs, let them be forthwith attached by pledges;[1] and let jurors be chosen, and let the soil and place of the common be viewed, as well as the tenement to which it is due, so that the jury may be certified of the extent and boundaries of the common, and for what sort of cattle, and how many, and of all the circumstances as to which they will be charged by our Justices.

[1] The French text is somewhat obscure; but it is clear from the parallel place in Bracton that the pledges spoken of are pledges to prosecute. The expression *attachiato brevi* occurs in Fleta, 259.

4. When our Justices are come into the county, and the patent has been read, let the parties be immediately called; and if the plaintiff does not appear, or cause himself to be essoined, whether the disseisor be present or not, in every plea, it shall be adjudged that the plaintiff and his pledges to prosecute be in mercy; whereby the writ is abated, so as never after to be of service to the plaintiff, but he must purchase a new writ. *If the plaintiff be in court, whether the disseisor be there or not, let the original writ be read.

5. Afterwards let the plaintiff be asked of what common he makes his plaint, and of how much, and to what tenement he claims the common to belong. And then let him declare his title, as above is said. For if he has no fee tenement to which the common may belong, he shall fail in his plaint without any other recognisance of the assise. He may then say that the common is appurtenant to his free tenement in such a vill by reason that he was enfeoffed of such a tenement, at which time that common was appurtenant thereto, and by such purchase he was seised thereof, and his seisin peaceably enjoyed, until he was ejected or disturbed. If he says that he is disseised of one hundred acres of common, he may fail in his plaint, inasmuch as he ought to say that he is disseised of the pasture of one hundred acres of common.

CHAPTER XXVI.

Of Exceptions to Common.

1. The plaintiff's contention being thus set forth, if the tenant or his bailiff does not appear, the assise shall proceed by his default; but if the tenant is in court, let him first consider how he may aid himself by exceptions against the judge, or against the plaintiff; against whom he may object, that the action and plaint do not belong to him, inasmuch as he is only a farmer, bailiff, or guardian; *or he may say that he is his villain. Nevertheless, in case where a villain of whom his lord is not seised has married a free woman, who holds of her own inheritance the tenement to which the common is appurtenant, and whereof the lord of the villain has disseised them, the assise shall not be barred by the exception of villenage, but the common shall be united again to the freehold; and the lord may take proceedings to prove his right to the person of the plaintiff if he thinks proper to do so.[1]

2. There are several other exceptions; thus, whereas writ says 'hath unjustly disseised him,' the tenant may traverse this statement, and say that he was

[1] The above case is more fully explained in Bracton, where it appears that even though the villain was in the lord's seisin, yet the common might be recovered by the assise, as accessory to the wife's freehold. (Bracton, 224 *b*, s. 8.)

never seised; and if he can verify this, the writ shall fail. But before proceeding to the assise, the plaintiff should be asked in what manner he was seised; and if he says by title of gift, then a slighter seisin is sufficient on account of the union of the wills of the donor and the purchaser, together with the view and assignment of the tenements in the presence of the neighbours, than where the title is by succession. For in case of a feoffment, if the purchaser be ejected immediately after the assignment of the donor, although such purchaser has not put his beasts in the pasture, yet it does not follow that he shall not recover by this assise. But in case of succession it is otherwise. For it may well be that the predecessor was disseised in his lifetime; or the seisin may have been usurped by intrusion of the tenant during the vacancy *of seisin; in which case this assise will not avail the successor, as above is mentioned.

3. To that which is contained in the writ, 'of his common of pasture appurtenant to his freehold in such a vill,' it may be answered that the soil of the common, and the tenement to which the plaintiff alleges the common to belong, are of diverse baronies or diverse fees, and that the fee in which the common is demanded is so free that it is not charged with any sort of servitude to the other fee, and that the plaintiff never commoned or had any right of common either by title, usage, vicinage, or otherwise; and if, notwithstanding, he ever did common, it was by force, or secretly by stealth, or by leave, or at will; and if he otherwise

commoned, he never did so peaceably, but his beasts were driven away or impounded, and he and his servants released upon security. To which the plaintiff may reply, and allege the contrary, if he thinks fit to do so.

4. Or the tenant may say, that the soil where the plaintiff demands common is his several, which he may plough, sow, and enclose at his pleasure, and at all times keep enclosed. Or he may say that the plaintiff hath no land or tenement to which that common was ever bound or appurtenant; or if he hath land or tenement, yet no common is appurtenant thereto, for the same tenement to which he claims the common to belong used to be forest, or heath, or marsh, or other waste, and *common to all those of the neighbourhood, though the same be now asserted and ploughed up, and that one common cannot be appurtenant to another. Or he may say that the principal disseisor named in the writ is dead. Or he may say that he recovered the common by judgment of our court as appurtenant to such a tenement which he recovered.

5. Or he may say that the plaintiff wrongfully complains, for that at the time of the plaint, and on the day of the date of the writ, the plaintiff himself was seized, and that the present plaint cannot try a fact of more recent time; and therefore at the time of the plaint he had no cause of action, and consequently the plaint is null; or that, if he was disseised at the time he complains, yet he had no cause of action, for that after he was disseised he took back his seisin without

judgment, whereby he is become a disseisor, and that an assise is therefore commenced against him. And according as such exceptions shall be made good, judgment shall be given for one party or the other.

CHAPTER XXVII.

Of Admeasurement of Pasture.

1. Although a person has some right of common, yet he ought not to exceed by putting in more cattle or usurping more common than he is entitled to, or than belongs to his freehold, but only to that to which the common is appurtenant. *For if any person holds an hundred acres of land and common be appurtenant to all the land, and if he aliens this land and purchases other to which common is not appurtenant, in such case he cannot retain any part of the common, except by title of usage beyond the term of limitation running in an assise of Mortdancester. And although he has reserved one acre to which common is appurtenant, yet he ought to have common only in proportion to the quantity of land so reserved.

2. If he will perforce have more, the lord or owner of the soil should apply a remedy by impounding the surcharge or excess of his cattle. And if he cannot do it by himself, he may avail himself of the remedy by this assise for the excess of the cattle, in like manner as this assise would also lie between the owner of

the soil and any one who in spite of the owner insisted upon commoning where he had no manner of right or title to claim common.

3. If the lord will not interpose, a remedy is afforded at the plaint of the commoners by our writ to the sheriff of the county, to remove every outrage, and bring every excess to a certain limit; in which writ our command runs thus:

'John has complained to us that Peter has unjustly surcharged his common of pasture in N., and has put in more beasts than belongs to him to put; therefore we command thee, that without delay thou cause the aforesaid common to be admeasured, so that the same *Peter shall not have more beasts than to him belongs to have according to the free tenement which he holds in the same vill; and that the aforesaid John have as much common as belongs to him, and that we hear no further complaint.'

4. In such case it is the sheriff's duty to take pledges to prosecute, and afterwards to cause the lord of the soil and all the commoners and other neighbours, as well as the person against whom the plaint is brought, to be summoned, to be upon the same common at a certain day, to cause the common to be measured according to our command; and that the parties be then prepared, the one to show his grievances, and the other his right, if he chooses to appear. At the day named, if the plaintiff does not come, he and his pledges shall remain in mercy of the sheriff, and nothing more shall be done upon that writ. If the plaintiff appears at

the day, although his adversary does not appear, yet the admeasurement is not to be put off.

5. If the defendant comes and produces his muniments and explains his title, then let the sheriff cause twelve good men[1] to be chosen, who are to swear that they will lawfully do what the sheriff shall charge them on our behalf. Then let them be charged to declare whether he against whom the plaint is brought has any freehold to which the common is appurtenant, and how many beasts the commoners may common there in respect of every acre, and what sort of beasts; and whether at all times in the year, or only at certain times; and whether all kinds of beasts, or only a certain number; and whether in each part and all parts, or only in a certain part.

6. If the defendant claims common by title of gift, then it shall further be inquired whether he was seised thereof before the *soil was given to become common to the other commoners, or not. And if before, let him remain in his seisin; and if after, then it must be asked whether he enjoyed his seisin under that gift or not, and whether the donor was himself seized of the thing which he is supposed to have given; and judgment shall be given accordingly. And if the gift be prejudicial to the commoners, the gift shall be good only to the extent to which the donor might give without prejudice to any.

[1] The word *prodehomme*, as well as the similar expression *good and lawful man*, implied the possession of a freehold. Compare the note in p. 267.

7. If he claims his seisin and title by usage in the same manner as the other commoners, and can verify this title, then let the pasture fall into hotchpot among the commoners according to every freehold to which the common is appurtenant, so that every acre be put on equal terms with the others.

8. When the jurors have brought in their verdict, let it be immediately put in writing, and sealed under the seals of the jurors, and also entered on the roll, so that if the defendant would again surcharge the pasture, the plaintiff may have his remedy by the penalty provided in our statutes for a second surcharge of pasture.

9. With regard to a tenement held jointly among parceners, and turned into common by their mutual consent, if one of the parceners will surcharge this common with more cattle than he ought, or in any other manner than according to the purport of the first agreement, a remedy lies for the other parceners by our writ of admeasurement, and also by the assise if they please,[1] *as is above explained concerning the owner of the land.

[1] That is, if they decide upon treating the wrong as a disseisin of their freehold, and not merely as a surcharge of common. See Brac. 229*b*; Fle. 263 (§ 4).

CHAPTER XXVIII.

Of Quo jure.

1. Although some acquire common through negligence of the owners of the soil by long usage and peaceable seisin, and by the folly and sufferance of the owners with knowledge of the fact, and although, if any one who has thus enjoyed his seisin be ejected or disturbed, he may recover his seisin by this assise, yet because there would be a great defect in the law if the common thus purchased should remain in that manner with the purchaser, such title arising rather by time than by right, and because the law will not deprive the owners of their remedy in the right of property, therefore a writ upon the right called *Quo jure* has been provided, by which the owner shall recover in the right of property that which he has lost in the right of possession.

2. Not every one however can proceed by this writ. For no one is allowed to have his action by this writ except the chief lord of the manor or vill in which the common lies, or of the principal part thereof. It is moreover necessary, in order that this writ may lie, that the tenement to which the plaintiff alleges the common to belong, and the soil of the common be of different fees or of *different baronies or of different feoffments, so that the plaintiff and the person of whom he complains do not hold their tenements and their

pastures in common but in severalty. For in cases where there are several feoffees of one lord in the same manor or vill, this writ does not take place between the neighbours, because between neighbours resident in one fee such common is more properly called vicinage than common; as where one neighbour allows another to common with him, provided the other allows the same, but not otherwise. When therefore any lord has lost by judgment in the possessory right, and another has gained by assise of Novel Disseisin by reason of his usage and seisin, yet the latter may lose by this writ if he can show no other title, unless he has enjoyed his seisin before the time limited in a writ of right. And one chief lord or more may implead one chief lord or more, as well as one lord another, whether their tenements lie in one or several vills, so long as they are of diverse fees.

3. When this plea comes into court, the person impleaded may be essoined on the first day as well as the plaintiff, and shall by his essoiner have another day; at which day if he makes default an attachment shall be awarded against him, as in personal pleas, because no pasture is here demanded, as is sometimes demanded in a writ of right. But when the person impleaded has appeared in court, and it is specified in our court what common *he claims, then from this point the same process lies as in a writ of right; and therefore if the party impleaded afterwards makes default, the pasture shall be taken into our hand by the little *Cape*.

4. At the day of plea, the parties being present, the

plaintiff shall state his declaration in this form: 'This showeth to you John, who is here, that Peter and the others named in the writ, who are there, (if there are more than one impleaded,) wrongfully demand common in his lands in N., which they ought not to have:' he should also specify the quantity of acres and number of cattle, and in what seasons, according as the person impleaded specifically claimed in our Court:—'and herein wrongfully, in that the same Peter or the others do not pay him any rent, or perform to him any service, nor does he elsewhere common with them, whereby they ought to common in his lands; and if they deny it, then he tenders averment by suit and proof.'

5. Then let it be asked by the Justice what common they claim, and how much, and let their answer be enrolled. And then let it be inquired of them what services they perform for having such common; or, if they were enfeoffed of any tenement to which this common is and then was appurtenant, let it be specified what service and what tenement, and the quantity, and who are tenants thereof. So likewise, where they set up peaceable seisin as a title.

*6. Then let the defendants answer and defend themselves by proper words of defence in this manner: 'Peter (and the others named in the writ) defend the wrong and force, and well show unto you that they rightfully demand to common in the land of the same John in N. by reason that they and their ancestors and their tenants of N. have commoned there by continuance of peaceable seisin before the term limited in

the writ of right, performing to John the following service, to wit, that every astrier in the same vill was used to give to the same John and his ancestors a hen yearly at Christmas, whereof they put themselves on God and the great assise, whether they and their people of N. have better right to common in the lands of the aforesaid John in N. by such service that every commoner who has his hearth in the same vill of N. ought to give to the aforesaid John one hen by the year at Christmas, as is aforesaid, or the same John to hold his land in N. as his several, without the aforesaid Peter and the others having any right to common there.'

7. There are several sorts of services which are performed to the owner of a fee for having common in his fee, as service in money, or by reaping at harvest time so many days or one day; so likewise by mowing or ploughing one day or more, or by some *other compliment of annual courtesy reduced to certainty and of a certain value, so that such rent may be comprised in the extent of the manor.

8. Or the defence may run thus: 'well and truly say that they lawfully demand common by reason that the same John hath commoned throughout all the lands of the same Peter (and the others) until within three years last past, when he of his own accord maliciously withdrew himself therefrom, with the intent thereby to exclude the same Peter (and the others) from commoning in his lands.' And if this be verified by a jury, or acknowledged by both parties, Peter and the others shall retain their common, and John shall remain in

mercy; but he may nevertheless common in their lands as he used to do; and if he be disturbed thereof, he shall recover by assise of novel disseisin, unless he has by his own folly acknowledged in our court that he does not claim any common.

9. If the persons impleaded can neither assign any service or consideration of vicinage, then they must show some other title, as title of purchase or long seisin by prescription of time. Or they may say, that if John does not now common with them, he may impute it to his own negligence, or to the negligence of his ancestors, inasmuch as they used to common in their lands in N. in return for having this common now in dispute; but *that the ancestors of John were ejected, and suffered the soil to be ploughed or built upon, the which common he might still obtain if he had not excluded himself from his action by non-claim. If the parties go to a jury upon this point, the truth thereof shall be inquired by these words, whether John and his men of such a vill, and Peter and the others and their men of the other vill, were ever used to common together in such a place or not; and according to the verdict judgment shall be given. Other exceptions may be used, some of which have been before, and others shall be hereafter mentioned.

10. If the tenements are of one fee, then one neighbour cannot hinder another from reasonable common in respect of vicinage, unless by virtue of some special saving, but that the person disturbed shall recover his seisin by the assise.

11. With regard to seisin of common of pasture recovered by the assise, and afterwards lost by a *Quo jure* in the manner pointed out in this chapter, we will have it understood that seisin may also be recovered, and then got back again by him who has the better right by means of a *Quo jure* in the case of all other commons, such as common rights of digging, of fishing, of watering cattle, or of chase, and others which are innumerable, with their appurtenances, which are free ingress and egress.

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*CHAPTER XXIX.

Of reasonable Estovers.

2. There is another sort of common, as of mowing, lopping, digging, or cutting in another's wood, or in a forest or quarry, marsh, heath, or waste, to the extent of such reasonable estovers as are required for burning, building, or fencing, and doing such other necessary things according as one tenement shall be subject and charged to another, to be enjoyed at least for term of life; and if any one be ejected or disturbed in his seisin thereof, he shall have remedy by this assise, provided that he can aver certain soil to be charged or appointed where he is to receive his estovers, and which he can cause to be viewed by the jurors of the assise. He may be disturbed thereof many ways, as if the owner of the wood cause the whole of the wood to be cut down to the

ground, so that none remains, or at least if as much as is required for common is not planted again; or if he is not permitted to take any, or not sufficient, or only by delivery, or only at certain times.

2. And because great dispute may be set at rest by proper specification in the writings upon the first contract, it is well that all estovers should be plainly expressed in writings, whether they are to be taken in every part, or whether in a certain place, and whether at all times or only at certain times, and of what woods, and in what places, and within what boundaries, and for what tenement; *so that all things be reduced to a certainty and to just measure, and that the one party may not commit waste, nor the other hinder a measurement.

3. But if turbary, heath, herbage, mast, wood, waste, or other thing just above named, be held in common between parceners or neighbours, and any one of them commit excess, waste, or destruction, then let such remedy be applied as is ordained in our statutes.

CHAPTER XXX.

Of Nusances.

1. There still remain other kinds of disseisins, which are to be remedied by this assise, and which arise from tortious nusances done by one neighbour to another; as when a watercourse is wrongfully diverted or stopped, to the annoyance of the neighbour's freehold. For it is a right which may belong to any tenement that the tenant may convey water out of another's soil and through another's soil to his own, at all times or at certain times, and in what quantity he pleases, or only to a certain quantity; and if he is wrongfully disturbed thereof in the whole or in part, then the remedy by this assise is applicable. So in case any one does in his own soil something injurious to the free tenement of his neighbour; as if one raise his pond so high as to damage his neighbour's freehold.

*2. Of nusances, however, some are both tortious and hurtful, others hurtful yet not tortious; therefore it behoves every plaintiff in this case to show what damage is occasioned to him by the nusance. And if the nusance be found to be both hurtful and tortious, then matters are to be entirely restored to their former condition. If not tortious, it must be tolerated, however hurtful it may be. For unto common in another's soil always belong a drove-way and free ingress and

egress, although the drove-way may be hurtful; and if the owner of the soil destroys the ingress, and stops it by a wall, hedge, or ditch, so as to commit an evident nusance to the commoner, this nusance is both tortious and hurtful; and therefore the whole is to be removed and restored to its former condition by this assise, or even without writ, so as it be done immediately upon the fact.

3. The like proceedings must be taken where one has a right to go through another's soil, and the way is stopped or straitened in such a manner that he cannot go, or not so conveniently as he used. The like where the free course of water through another's soil is due by ancient usage or grant, if such course be stopped or diverted in part or entirely. So if a pond be newly made, or heightened, or lowered, whereby the adjoining tenement is drowned or injured; *in such case the nusance is both tortious and hurtful, although this servitude be rather created by law than established by man; and therefore all is to be restored by this assise to the condition it used to be in, at the cost of the offenders. So if he to whom belongs the servitude of having a free chase in another's soil be disturbed entirely or in part, so that he cannot enjoy his chase according as he ought and used to have it.

4. And such nusance may be assigned before the Justices in various manners; as if a man be entirely turned out of his way or disturbed in any manner; or if a way be diverted to the nusance of the commoner, so that he is obliged to go far round, whereas he used

to go and drive straight; or if the way be narrowed, so that he cannot drive a wagon or cart therein as he ought and used to do, although room enough may be left for horses and beasts. So where any one has done an act whereby his neighbour, who has a right to common with him either by watering his cattle at his watering-place, or by drawing water from his well, or otherwise, is hindered from commoning as he ought, either by disturbance of the way leading to or from the water, or by disturbance of the water itself. For as manifest a disseisin is committed by him who does not suffer a watercourse which should move a mill to be repaired where it is stopped, as by him who does not allow the mill to be used.

5. A watercourse is sometimes granted to a person, and sometimes to the tenement of another. A grant made to a person becomes extinct upon the death of the person. *But that which is purchased to my soil remains perpetual; and according to the purchase, and usage, and seisin, the right is to be recovered, if the owner is disseised of it; and in this and the like cases there lies a remedy by this assise, for redressing the nusance at the cost of the disseisors.

6. With regard to the servitude which consists in this, that it is not lawful for any neighbour to erect in his own soil a mill, or weir, or sluice, or other like thing, to the damage of the free tenement of his neighbour, a remedy also lies by this assise to abate the whole, if any nusance be done contrary to this obligation. So likewise, where a nusance is committed by

pulling down or destroying that which at first was lawfully raised, as by pulling down a wall, filling up a ditch, destroying a fishery, pond, bridge, or sluice, or other such thing, the thing shall be restored by this assise to its former condition at the cost of the offenders, and thus the nusance shall be removed.

7. As one may do a wrong and a disseisin by an act, in doing or undoing, so a person may commit a disseisin by negligence without doing anything; as where one is bound to fence or repair or cleanse or the like, and lets the matter be without doing anything, which omission is prejudicial to the free tenement of his neighbour; and this neglect is punishable by the assise. And as one *may commit a tortious nusance by not doing something, so the like may be done by not permitting something; as where a person will not suffer him to fence or to reap who is bound to do so in casement of the complainant's freehold; and this wrong may also be remedied by the assise.

8. There are however some nusances which sheriffs are authorised to redress, as are also our hundreders, and many other freemen, who have view of francpledge for the common benefit;[1] as in the case of a way being stopped, in order that passengers may not be too long deprived of their way, and in the case of several other

[1] 'It should be known that the sheriff ought not to redress any nuisance presented at his tourn, if it be not wrongful and injurious to the community (a commune des gentz). For nuisance done to a single person shall be redressed by a single suit and not otherwise.' Note in MS. *N.*

nusances. But it is not lawful for any one to redress such wrongs without our writ, except those which have been done since the last view, or since the last sheriff's tourn. And although nusances may be redressed by the assise, yet it does not follow that they may not be set right by another remedy, as by removing the nusance immediately upon the fact, or if this be not done, by writ of *Justicies* to the sheriff, whereby he has authority to redress the wrong, being made our Justice to cause the wrong to be remedied; and of matters which concern the writ he is to bear record.

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*CHAPTER XXXI.

Of remedy of nusances.

1. If a *Justicies*, or a Writ of Novel Disseisin is to be obtained for a thing done in one county to the annoyance of a tenement lying in another county, the writ is always to be directed to that sheriff in whose bailiwick the nusance has been committed.

2. Of ponds or of weirs raised, heightened, or demolished, amounting to a tortious nusance, it must be seen whether they are raised in the tenement of the plaintiff where the soil is his own on both sides, as in a river;—for in such case an assise of Novel Disseisin of the freehold of the plaintiff will lie. But if it be in the tenement of him of whom the plaint is made, this assise of nusance is applicable. And if part is in the one soil

and part in the other, as it sometimes happens in rivers where the lands on either side belong to different persons, then properly an assise of freehold lies for the act done in the soil of the plaintiff, and an assise of nusance for the rest of the nusance committed in the other's soil, to remove the nusance; and thus two assises would take place upon a single fact. But to avoid the charge of bringing two assises, the assise of nusance is sufficient to redress the whole wrong.

3. Again, for a single act there may arise several disseisins of freehold, as well as several tortious nusances; as where a person makes a ditch in another's soil against the consent of the owner of the soil, he thereby *disseises him of his freehold, inasmuch as he works his soil against his consent, and the ditch perhaps is made in such a place that the owner is either disturbed of his right of driving cattle, because some way is stopped, or some water is diverted from its right course, or partly hindered from running. And in this and the like cases a remedy lies by this assise of the freehold of the plaintiff, and by this assise the whole matter shall be terminated, as well for the recovery of the freehold as for the removal and redress of the nusances; and since all the torts arise from a single act, they may be remedied by a single judgment.

4. A person may likewise do such an act on his own soil as may injure his neighbour in several ways; as if he stops a way, although the way be his own soil, whereby his neighbour cannot freely drive his cattle and have free ingress and egress for his pasture as he

used; in this case he deprives him of his common, and consequently disseises him of that, and also disseises him of his way by obstructing it; and yet the whole may be redressed by one assise, as by assise of way stopped.

5. There are moreover some cases where a person may by a single act commit several disseisins, and to several people; as if any one cause a common to be enclosed, or a tenement in which one man has a freehold, another (or several others) common of pasture, a third the right of digging or of cutting, a fourth the right of watering his cattle, a fifth a drove-way, *and thus of numberless other services, in such case several disseisins are committed, which may be all restored to their right condition by this assise of freehold, if the owner of the soil will be plaintiff; but if he will not, then every one who would have and recover his estate must bring his plaint each for himself.

6. When the sheriff has received our writ of *Justicies* of Common of pasture, reasonable estovers, common of fishery, marsh, or the like, and the plaintiff has found pledges of suit to the sheriff, it is the sheriff's duty immediately to summon the party against whom the plaint is made, and the neighbours of the hundred, to be at the next county court, or at the place where the nusance or the disseisin is committed, and that the neighbours in the meantime go and view the nusance, and the pasture, and the tenement in which the nusance is done, and the tenement of the plaintiff to which it is supposed to be done.

7. At the day named no essoin shall be allowed to the defendant, any more than to a disseisor, but the inquest shall be taken, whether the defendant come or not; and according to the verdict by view of the jurors the right condition of things shall be restored as it used to be, at the cost of the offender, who shall also repay to the plaintiff his damages, and remain in our mercy.

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*CHAPTER XXXII.

Of Exceptions in the Assise of Nusance.

1. When this assise is brought for any nusance, he against whom the plaint is made may aid himself by several exceptions. Thus, he may say that he did not commit any nusance, or raise a wall, or heighten a pond, or throw down the ditch, but that another person not named in the writ did it; and if this is verified or not denied, the writ falls. Or he may say that the plaintiff had not the tenement to which the nusance was done, at the time when it was first done, but another then held it, and none ought to complain of a wrong done to any except himself.

2. Or he may say that there is no nusance, or if there be any, yet the assise ought not to pass, inasmuch as the nusance is not tortious, because the plaintiff has no right to forbid it; as in the instance of a mill, which one neighbour may erect in his own soil without committing a tort to another neighbour, although the mill

may happen to be an annoyance to that neighbour; and the like of other nusances which are not tortious, and which if any abate or remove by force, he is guilty of a manifest offence against our peace.

3. The parties having pleaded to the assise, let the assise be taken, and if it pass for the plaintiff, then let the sheriff be commanded to cause the nusance to be removed, and the place restored to the condition in which it used to be, *at the cost of the trespassor, whether water is to be brought back into its ancient course, or the course cleansed and turned, or opened, or a ditch filled up or abated, or a pond lowered, or a wall or hedge repaired, or way enlarged, or any other such nusance set right according to its former condition. And in all these cases the thing is to be restored to its ancient condition, in breadth, length, height and depth; and the watercourse is not to be made more or less running, or lower or higher, or in any manner altered, unless for the better, from what it used to be.

4. Every one should always beware of taking by his own force what he ought to recover by judgment; for if he does so, and the other party recover by judgment, the true owner shall hardly after succeed in uniting by judgment the seisin with the property.

5. With regard to the word 'wrongfully' contained in the writ, care must be taken to see whether the nusance be wrongful or not; for if it be not wrongful, an exception thereby accrues to the respondent. But if it be both tortious and hurtful, then it is to be removed and redressed. If it be hurtful, a distinction is

to be made. For if it be hurtful to many others, although it be not hurtful to the plaintiff, yet it ought to be removed by the Justices *ex officio*. For we will always, that the general advantage be regarded and promoted before the advantage of a private person. And if it be not tortious, although it be hurtful, the plaintiff's action ceases so far as respects himself, although it may not as it regards others.

*6. Or he may say, that although at one time it was tortious to the plaintiff, yet he has now lost his action; for he of his own authority and without judgment, a year or more after the nusance was done, abated it, and proceeded by his own force, whereas he ought to have proceeded by judgment —although he might have so abated it immediately after the fact, or at least as soon as he knew of it. And this exception, if verified or not denied, shall be allowed.

7. And whereas the words in the writ are, 'of nusance done in the water, &c.' regard must be had in what county, in what vill, or in what place, the wrong is done; and the like of a pond, weir, or other nusance; and whether the water in which the nusance is done be in all or in part common;[1] and whether the plaintiff, or the other, has the fishery, or only a right of fishing. And with reference to such considerations, exceptions may be allowable. For if the water belongs entirely to him against whom the plaint is made, and

[1] The text is probably corrupt. The sense, following Bracton, would be: whether the water is *appropriated* in the whole or in part, *or* is common.

is in the vill named in the writ, and the tenement to which the nusance is done is in the same vill, or in the same county, the writ is good and well purchased ; but if not, the writ is abatable by reason of these words, 'to the nusance of his freehold in the same vill.' And if the plaintiff has nothing in the water but a common of fishery, and has erected a weir in the same water, and the owner of the water has granted to another a right of fishing in the same water, if the last purchaser erect a weir to the damage of the other weir, the nusance *shall be removed by this assise; as where a market or other franchise is granted, so that it be not a nusance to another adjoining market.[1]

8. In the case last mentioned, a distinction must be made as to the proximity of a market, what may be called adjoining and what not, and within what distance by road a man may complain of a nusance done by one market to another. In order to justify the removal of a market by this assise as a nusance to another adjoining market, the plaintiff must assign the nusance thus: that whereas he hath his market on a certain

[1] 'A fair is a market of all manner of victual, and of all manner of other things, as of horses and other beasts, and birds, and also of *areer de poyz*, as spiceries and other such things; also of gold, silver, tin, and other metals, of precious stones, linen, cloth, furs, arms, and all kinds of merchandise; and this once a year. But markets in country towns may be one day in the week; in boroughs, two days; in cities, three. But in London and in a town having the same liberties as London, (enfranchie come en Lomdres) every day of the week, save Sunday.' Note in MS. *N.*

day of the week in such a town, he against whom the plaint is made has caused another market to be proclaimed and set up on the same day in the same town, or in another town within six miles and a half and the third part of a mile[1] from his market. For if the plaintiff say that he has set up a market on another day, or if he say that the markets do not adjoin by seven miles, he shall take nothing by his plaint. For a common day's journey is at least twenty miles; let therefore the day be divided into three parts, and one part be allowed for going to market, another for marketing, and the third for returning home; so that people may do all in the day, and not be obliged to go *or return in the night for fear of evil doers. If therefore any market be set up adjoining to another market within the third part of twenty miles, and on the same day as the other market, it is a manifest nusance; and such nusance may be redressed or removed by this assise, because it is both hurtful and tortious.

9. If any person feels himself aggrieved by any franchise granted by us on account of a nusance accruing to a franchise belonging to him, and sets himself by force to disturb this franchise, or entirely to de-

[1] It should be by the calculation six miles and a half and the third of a half mile, and is so in the parallel passages of Bracton and Fleta. The following clause is in the charter of Edward III. to the city of London: 'Item Quod nullum mercatum de cætero teneatur infra septem leucas in circuitu civitatis prædictæ.' (Liber Albus. 147.) The Latin word *leuca*, French *lue* appears to have been used in England for the English mile. (See Spellman, Gloss. s. v. *leuca*.)

feat our act, he thereby appears to despise the law, and is therefore liable to be heavily amerced. And, by way of punishment for his force, the other shall retain his franchise, whether it be prejudicial to him or not. For none ought to interpret our grants or our will except ourselves. Therefore we will that in all cases those who think themselves injured by our grants, or otherwise, have a suitable remedy by our orders.

10. It should be known that in all cases of disseisin, where no disseisor is alive at the time when the assise of a freehold, or of a common, or of reasonable estovers, or of a nusance, ought to be taken, the assise shall abate, and the plaintiff shall take nothing by his writ or by his plaint, but be in our mercy, and the tenant go quit without day ; and remedy be given to the plaintiff by writ of entry founded upon disseisin, whereby the tenant will be bound to restitution, although he is not punishable for the first tort, and in which the view shall be made in all points as in the assise of disseisin.

11. Concerning redisseisin, enough is said in our Statutes.

*CHAPTER XXXIII.

Of Farms.

1. There is a kind of action somewhat resembling that of disseisin, for the disturbance or spoliation of a term. For the farmer has as much right to recover his term and his chattel as the freeholder his freehold. Yet he hath not any recovery by his assise, because it never lies for a certain term except where it is awarded to the termor by judgment of our court for a debt or for other cause; for in the case of such terms this assise doth well lie, and the penalty of redisseisin if necessary.

2. But with regard to the first case, where the farmer has nothing of freehold, if he be ejected, the nature of his term is to be regarded, whether the freehold remains in his lessor or in a stranger; for if in the lessor, he may have his remedy by the following writ: 'Command Peter that he render to John so much land with the appurtenances in such a vill, which the same Peter leased to him for a term which is not yet expired.

3. But if the lessor gives away the fee and the freehold, or the freehold alone, to a stranger, and he puts another person in seisin and ousts the farmer without making him any satisfaction for his term, and if it

happen that the lessor retains nothing by which he can be attached to make him keep his *covenant with the termor, or otherwise satisfy him for his damages; in such case there is not yet any certain remedy provided against the lessors; and therefore the best advice in such a case is, that the termors should keep themselves in seisin as much as they can; and if they are ejected, should nevertheless do their utmost to use their seisin, and hinder the purchaser from using it as much as they can, until satisfaction be in some way made to them.

4. There are however some cases in which a person has no right to oppose his being ejected, as where the chief lord ejects the termors on account of the wardship of the lands of an infant who falls in his ward. And this the farmers ought to permit, because they shall have their recovery of the remainder of their term when such wards had attained their full age.

5. There are some cases where the farmers are ejected without the consent of the owners of the tenements, and in such cases a recovery lies by assise of novel disseisin at the suit of the owner of the soil, where the damages however ought to be delivered by the Justices *ex officio* to the termor. And if the owner of the soil when he has thus recovered his tenement will not deliver it again to his termor, he must recover it by writ of covenant: in which writ the process is by summons and attachment. And whereas there are several whose actions are sometimes limited to them and their heirs, sometimes to their assigns, sometimes to the executors, and sometimes against executors and others; therefore

remedies lie by our writs formed according to the particular case.[1]

Here ends the Book of Disseisin ; and begins the Book of Mortdancester.

[1] This passage is somewhat obscure, and it will be seen that in some valuable manuscripts a reading is found which gives a totally different aspect to the whole sentence. The following note from the margin of MS. *N*, appears to explain the expression, 'dount les acciouns sount affermez,' as referring to what in our modern terminology are called the limitations introduced into the lease.

'In this part a recovery is given against the lessor where he is not guilty of the ejectment; with an example of a demise in large terms (ovesques une touche de ferme lessee largement). Wherefore when the deed of lease makes mention thus, habendum et tenendum prædictis B. et C. et eorum hæredibus et assignatis sive legatariis: if one of the termors keep out the other, or if the executors keep out the heirs, or the heirs the executors; or if one die within the term, and his heirs or executors be kept out by the other joint farmer, the recovery appears in the writing which commences thus: 'Every possession' (en la escrowette qe comence issi. Chescune p'on, etc).' Note in MS. *N*. I am unable to explain to what treatise or other writing the last words refer. The same contraction is used for *possession* elsewhere in the same handwriting. See li. iii. c. 15. s. 2. note.