BOOK V.

OF PLEAS OF DOWER, AND ENTRY.

*CHAPTER I.

Of the Nature of Dower.

1.

MATRIMONY is no other thing than the union of a woman with a man with the consent of both by junction of Holy Church, to live together as one flesh all their lives without expectation of separation. Therefore it is expedient that married women should be endowed, in order to give women the better disposition to love matrimony, although dower is prejudicial to the lords of fees, that is to say, such dowers as are incident to matrimony. Dower is that which a freeman gives to his wife at the church door in regard of the charge of matrimony, and by way of consideration for the marriage, for support of the wife and nurture of the children to be begotten, if the wife shall survive the husband.

2. Dower is not assigned in all places nor at all times but at certain, to wit, at the commencement of the contract and at the door of the church only, with the solemnity of witnesses and not in private. For as secret marriages, performed in private, are prejudicial to

heirs with reference to the succession, so are they prejudicial to wives with respect to the recovery of their dowers. The nature of dower then is such, that where espousals are solemnized at the church in the presence of the people, in such case and not otherwise dower may be demanded.[1] *And if the marriage be in any

[1] 'Every contract of marriage, at which there is present a parish priest (prestre parochiel) and his clerk, is at the church door, and sufficiently solemn; for it *is in facie ecclesiæ*. And because usage of dower is become law, a wife is sufficiently endowed though her husband say nothing. But suppose that the husband protests distinctly and solemnly at the time of the marriage, that he does not intend that his wife shall be in any way endowed after his decease, and this is a known and notorious fact; *quæstio*, whether she ought to recover dower or not. *Responsio*. It seems not, for if the husband had established her dower in certain, however much less than might have been proper (qe ne affierreit), and she had agreed thereto, she would be barred; so in the other case, when she agreed to the marriage without having dower, she cannot have her action for dower. *Contra*. Dower is accessory to marriage, and, the principal established, the accessories are also established. (*Verum est*, if it had not been contradicted by the husband.) Further, dower was ordained by common constitution of people: and cannot be undone by any single person. For if by one, then by another, and so the constitution would be destroyed; *quod non est permissum, ne pereat lex approbata*.' (Note in MS. *N*.) The reasons here stated against permitting the common rights of the wife to be taken away by private agreement so far prevailed, that before the time of Littleton it became an established rule, that the wife might, if she pleased, after the death of her husband refuse the dower established *ad ostium ecclesiæ*, and fall back upon her common law right. (Vet. Nat. Brev. 6. *b*.; Litt. Ten. s. 41.) The restriction of dower *ad ostium ecclesiæ* to a third, had also

way dissolved by judgment in their lifetime, the wife has no right of action for recovery of dower, unless there was a special clause granted by the husband in the first contract, that if a divorce should happen, she should have a certain provision for the term of her life or otherwise; and such specialty made for dower beyond the general assignment of dower, shall entitle her to an action.

3. Dowers are sometimes given by the father, grandfather, or other kinsman or friend of the wife, of certain land or tenement, or of part of their chattels. And sometimes land, tenement, or chattel is given by the wife or some of her kindred or friends for the marriage. Reasonable dower is sometimes increased by an addition from some kinsman, which may happen as well after the espousals during the marriage, as at the time of the espousals; and this increase, whether the gift be made solely to the wife or to the husband and wife jointly, does not fall into division or partition, provided the gift be simple and absolute, and not in consideration of the marriage.[1]

4. Reasonable dower in knights' fees and grand ser-

at that time been abolished. (Litt. Ten. s. 39; Co. Litt. 34 *b.*; Fitzherbert, Nat. Brev. 150 P.) The Statute 27 Hen. VIII. *c.* 10. by which a jointure might be made in bar of dower, was a restoration of the old law in another form.

[1] This must be understood by reference to book iii. chap. 8. sect. 8, where it is said that a coheiress claiming her part of the inheritance is bound to bring her estate in marriage into hotchpot. Compare Bracton f. 92, 92 *b.*

jeanties is the third part of all the lands, together with the fees and services, which the husband held in his demesne as of fee on the *day of his marriage, and whereof he could afterward endow his wife.[1] In socages, free farms, petty serjeanties, and other fees, let dowers be granted according to custom. Reasonable dower does not extend beyond this, but the wife may be endowed of less, if she is contented to be so. And if there should be any excess, as sometimes happens from too large an assignment by guardians, while the heirs are under age, such excess may be revoked by writ of admeasurement of dower.

5. Wives are not only dowable of the lands and tenements whereof their husbands were seised in their demense as of fee, but they may be endowed also of any lands which are to revert to the heir of the husband upon the death of a tenant holding only for term of life.[2] And in that case the widow shall wait until

[1] The right of the wife to be endowed of land acquired after the marriage is somewhat ambiguously stated. Compare below, chap. 2. s. 4; Hengham Parva, cap. 3. p. 87. This right, which did not exist in the time of Glanvill, and is not admitted by Bracton or Fleta, was held to have been given by Magna Charta, cap. 7. See the Year Book, Mich., 5 Edw. II. p. 133.

[2] This should be understood of an express establishment of dower, not of dower by common right. Compare the parallel passage in Bracton f. 93. '*Case.* A. has four carucates of land, and aliens one carucate to D. for his life. A. afterwards takes wife, and dies. His heir B. enters, and assigns one carucate to the wife in dower. D. the termor dies. *Quæstio.* Shall the wife have the third of this land? She shall not, for the

the death of such tenants, unless it was otherwise agreed in the first contract, that some tenement should be especially assigned to her to hold in tenancy until the land so assigned to her after the other's death should fall in.

6. Although dower may in the first instance be assigned as well of entire manors as of the third part of all the manors, yet that manor which is the head of the barony or county shall remain entire to the heir, if the widow can elsewhere have her dower. *But if there are several capital manors of several baronies or counties, and the widow cannot elsewhere be fully endowed, in such case she must be endowed thereof by necessity, which overcomes law and usage.

CHAPTER II.

Of the Establishment of Dower.

1. Dower, properly speaking, is established by husbands on their wives, and is assigned by the heirs in pursuance of the establishment of the ancestor. And it may be so established from the beginning, that the husband may assign to his wife some certain thing for her dower, if she is satisfied therewith, yet so that if such certain thing be sufficient for her reasonable dower, it shall remain entire; if there be any deficiency, it shall be made up to her; and if there be any

husband had nothing of the demesne the day he married or ever after.' (Note in MS. *N.*)

excess, it shall be restored to the heir. And as wives may be endowed of certain tenements, so they may also be endowed in a certain sum of money or goods, so as they be contented therewith; and if such wives survive their husbands, they cannot demand for their dower more than according to the first appointment. And if the chattels of the deceased are not sufficient, their recovery shall be for the difference.[1]

*2. It may happen that dower is established by a husband not on one wife only, but on several, whether they be all living, or on one after the death of another, or after a divorce pronounced between husband and wife. For it has sometimes been, that a man from wickedness has married several women, all living at the same time; but Holy Church says that of such women none but the first is his lawful wife; wherefore the law regards the others only as false wives or concubines; and therefore they are excluded from any action of dower. Sometimes however she takes the dower who was found last seised of the husband; and sometimes none of them have dower, as will be mentioned

[1] The expression here is obscure. Bracton says in effect, that when a burgess, or other, endows his wife with a sum of money, whether he has lands or not, she can ask no more out of his tenements or chattels, but may insist on having the full amount named, quamdiu ibi fuerit unicus obolus, so far as the chattels of the husband will extend. And Fleta says, more distinctly, that such dowers cannot be demanded except so far as the chattels of the deceased suffice to pay them. See the passages cited in the margin above.

afterwards.[1] So, on the other hand, one woman may be married to several husbands all living at the same time; yet although dower may have been established on her by each husband, she shall not have dower of them all. For she is the wife of one only, and concubine to the others.

3. If dower be deceivably established of all the tenements which the husband shall purchase, yet whereas it may happen that he may never purchase any land, and the widow ought not to be without dower, if the husband had lands in demesne and in fee, such an appointment is treated as an appointment of reasonable dower according to the nature of the fees and the custom of the place. For the law assists the deceived rather than the deceivers.

4. Dower can be established only of such tenements *as the husband held on the day of his marriage, or shall afterwards have held in fee to him and his heirs, whether the heirs be comprehended in the purchase generally or specially, and whether by a tacit condition in fee[2] or by being specially named, as thus: to such a husband and to his heirs which he shall beget, and if

[1] It appears from Bracton that the last possession prevailed where there was no proof of the legality of another marriage. But where no wife was in possession, and no sufficient evidence which claimant was the lawful wife, no dower was assigned. Bracton, f. 94.

[2] These words possibly refer to an estate given in frank-marriage, which was subject to a tacit condition in favour of the donor and his heirs. See Stat. West. 2. (13 Edw. I.) c. 1.

he shall have no issue, or if such issue shall die or fail, that the land thus given shall, after the decease of the purchaser, return to the donor and his heirs. In such a case, if the husband has issue, although such issue die and fail, the wife shall not be thereby barred from having her dower; for, although the gift was in the beginning conditional and the fee in suspense yet by the birth of issue the feoffment becomes simple and absolute,[1] and thus an action of dower accrues to the wife. So is it as to tenements purchased in all other cases where the fee is in suspense, and depends upon an event; for if the event named in the feoffment happens, then a fee thereby accrues to the purchaser, so that the gift which was at first contingent and conditional, becomes simple and absolute; and according to the event an action accrues to the wife to demand her dower or not.

5. Moreover, dower which is established out of lands and tenements which the husband wrongfully holds, as being the right of another, is invalid, if without fraud he loses them by judgment in his lifetime, or his heir after his death. *But as a man may endow his wife out of his own property whether definitely or indefinitely, so he may do it out of lands belonging to others, as where a husband endows his wife with a rea-

[1] The Statute *de donis conditionalibus* (Stat. West. 2. (13 Edw. I.) c. 1.) had recently been made when this was written, and the doctrine here stated appears to be that which prevailed before the judicial exposition of that statute. See Coke, Inst. pt. ii. p. 335.

sonable dower of the inheritance held by his father or mother, with their consent; for such endowment is ineffectual unless the owner of the land is present, and solemnly assents thereto at the church door. And although there be a deed witnessing the act, yet it is invalid unless it be made or at least allowed by the tenant of the land at the church door, and this by reason of the words in the count, which ought to say, 'whereof he endowed her by assent of his ancestor at the church door;' for if she counts that he assented elsewhere, the count is defective, and the writ will be abatable for the variance between it and the count. But reasonable dower may sometimes have been established by a man on his wife; and if the heir in the lifetime of the ancestor and his wife, with the assent of the ancestor, endows his wife of the third part of all the lands of the ancestor, such endowment will be prejudicial to the first wife. He must of necessity therefore endow her only of the third part of two parts, and of the third of the third part when it shall fall in. So in the reverse case,—if the ancestor take a wife whom he has to endow after the heir has endowed his wife of the third part of the whole by the assent of the ancestor.[1]

[1] 'If the father be sole and without a wife at the time when his son endows his wife by the father's assent, and the father take a wife afterwards, he cannot endow her except of the third of two thirds; and on the death of the father and son, the son's wife shall have her action to have dower out of the whole. And where the father and mother are joint purchasers and the son endows his wife by their assent, *constat*, that this is of a third of

*6. When dower has been once legally established, it cannot be increased to the prejudice of the heir by any agreement between the ancestor and his wife after the marriage. And as it cannot be increased to the prejudice of the heir, so neither can it be diminished to the prejudice of the wife.

CHAPTER III.

Of the Assignment of Dower.

1. After the husband's death, the establishment of dower is first confirmed. Wherefore let the dowers of widows be forthwith assigned and delivered to them according as they were established, without asking any fine or using any oppression, and not only their dowers, but also the tenements which were given to them in marriage. And because it is improper that such wives should be thrust out of doors with their husbands' bodies, without having a place to lodge in, it is allowed by law and custom that they may abide in the capital messuages which belonged to their husbands forty days after their husbands' deaths, and that in the meantime

the whole, and if the mother dies, and the father takes another wife, the endowment of this wife takes nothing from the son's wife's dower first established. But suppose the father dies, and the mother takes another husband, who has issue by her, and the mother and son die in one day; *qu.* whether the second husband shall hold the whole by the curtesy, or the son's wife have her dower.' (Note in MS. *N.*)

their dowers be assigned to them, unless the capital messuage be the *head of the county or of a barony, or a castle; in which case some other decent house shall be provided for their dwelling, where they may keep their quarantine; and that wheresoever they abide they shall have suitable maintenance out of the profits of the whole of the lands until their dowers be assigned and delivered to them, according to the appointment made at the church door on the day of marriage, in the same state in all points, with the fruits, rents, and all the appurtenances, as they were on the day of the death of their husbands; and that which has been taken or gathered in the meantime shall be restored to them.

2. But where any husband has aliened his inheritance in his lifetime by feoffment or farms either in part or in the whole, in such case the tenants are not obliged, whether they will or no, immediately to render to the wife her dower, because they have great reason for retaining it, until they are compensated to its value, so far as the law will permit. But if anyone wrongfully delays the rendering of dower, he is obliged to make satisfaction to the wife for her damages, though not in all cases. For if the wife brings her plaint by writ of dower patent demanding the tenements aliened in the lifetime of her husband, by this writ she ought not to recover damages, as will appear in its proper place. But if she complains by the common writ of dower close, and demands her reasonable dower, she shall by this writ recover the third part of all the tenements which her husband held in demesne and in fee as his

own right on the day of his marriage with her, and also of all such tenements as were his after he married her; and if she can prove that she has been wrongfully delayed in obtaining her dower, in such case she shall recover damages, but not where the deforceor has a good reason for keeping back the dower, as before is mentioned. And let him restore the damages who shall be found guilty of the wrong.

3. In some instances the widow shall recover more than the third part, according to the nature of the fee and the custom of the land. For there are many tenements in which reasonable dower extends to a moiety of the land, as is the case in some socage tenements; and in such cases the custom of the country and of the place is to be observed as law.

4. Sometimes also she has a right to recover a certain quantity for her dower pursuant to the establishment of her dower; and in that case let her recover by writ of dower named. And if the dower so specifically named exceed the value of reasonable dower, the heir may recover the excess by writ of admeasurement of dower. But if that specific dower does not amount to the value of the third part, or to the value of reasonable dower, she must be contented with what there is. *For more than the dower named she cannot claim, since at the establishment of it she was contended to take it. But if she was not so contented at the establishment, and can verify her dissent, then she shall recover the difference to the extent of the value of reasonable dower. So likewise if she can aver that in the

establishment a condition was made, that if the dower named did not amount to the value of reasonable dower, the difference should be assigned to her to the extent of the value of reasonable dower. And by means of this writ she shall also recover damages against the wrong doer when she shall have recovered her dower. And in like manner shall widows recover damages for the wrongful detainer of dower established out of the tenements belonging to another.

5. Dower ought to be assigned as a whole, and not by parcels; that is to say, the third of all the lands and tenements which the husbands held in demesne and in fee, as well of villenages, knights' fees, services of freemen, and advowsons of churches, as of demesne land. Unless however in the original establishment of the dower special mention was made of advowsons or third presentations, the widow cannot demand anything for dower in an advowson or presentation, because the advowson of a church is not partible, neither would it admit of division.[1] *But where the dower was established of an entire manor with all the appurtenances, without any reservation, if the advowson of a church be appendant to the manor, the advowson belongs to the dower, and the widow will have a right

[1] Bracton states, that, where there were several advowsons, the widow should have her share of them as entireties; but where there was only one, it should not be divided, but she should have satisfaction for its value. If not so satisfied, he suggests that she ought to have the third presentation. Compare Butler's Coke Litt. 32 a, 32 b, note 197.

to present when the church becomes vacant. For these words 'without any reservation' are equivalent to a special establishment of the advowson on the wife.

6. In the assignment of dower widows cannot claim anything in mansions or castles which are heads of baronies or counties, nor in mansions in other fees where there is but one capital messuage, nor in preserves of deer, vivaries, hays, stanks, parks, or gardens, nor in the fosses of the messuage, nor anything within the close of the capital messuage beyond her quarantine, unless the heir chooses, so long as the value of her dower can be assigned to her in land, rent, or other thing elsewhere. But let one of the houses of the villain tenements be assigned to her to dwell in, and let her be content therewith. And if there be no such, let her be provided with a plot of ground in some convenient place to build and dwell in, and let that be assigned to her in length and breadth in proportion to the third part of the messuage, but not to the value of the third part of the building; and let a sufficient messuage be erected for her out of the issues of the entire inheritance. But if the heir cannot assign her the *value elsewhere, then of necessity he must endow her of the third part of whatever he has, saving the advowson of a church, unless special mention was made thereof in the establishment. But dower shall never be assigned of deer or other game, nor of other beasts in parks or chases, nor of fish in waters, nor of homages. Yet in fisheries where the profits are casual, sometimes the third draught may be assigned,

so that the heir may fish twice and the widow the third time.

7. If a writ of right is to be brought and pleaded, this jurisdiction does not belong to the dower, nor indeed to the court of any one who holds only for term of life; but it must be determined in his court of whom the plaintiff claims to hold the tenements demanded by homage, although he may hold of some other person by fealty. Neither does it belong to dower to have authority to hold view of frank-pledge, or to take cognisance of pleas *de vetito namio* or to have estray or waif, or the correction of assises broken, or the franchise of infangthef, or wreck, or any regal franchise derived from the prerogative of our Crown. For such pleas are pleadable by the heir and his bailiffs, although the widows be endowed of the entire manors to which the franchises belong.

*8. Dower being thus assigned to widows by certain limits and bounds, the wardships, marriages, reliefs, escheats, perquisites of courts, and pleas of their tenants, and all manner of profits issuing out of the dower, shall belong to them, unless they are barred by some special exception. The escheats however shall be theirs only for the term of the dower. And whereas dower ought to be absolutely free, the widow is not bound to discharge the debts of her husband, but that lies upon the heir. And if he is not able to satisfy our debt, or to perform our service, or the service or debt owing to another which the ancestor shall have acknowledged in

our court, then the hand must be extended to reach the dower.[1] If any one refuses to allow dower to the widow of his own accord, she must be aided by plea.

CHAPTER IV.

Of the Remedies for recovery of Dower.

1. Plea of dower is determinable in our court, and that for good reason. For if two or more women should contend together about dower, each alleging herself to have been the espoused wife of the deceased husband, and we or any other person desired to be certified which of them all was his lawful wife, *since one only can be so at one time, as before has been said, this point can be certified only by the court Christian; and therefore if any other than ourselves should direct a mandate to the bishop to be certified upon such a question, and the bishop should refuse, no one except ourselves would have any jurisdiction to compel the bishop to certify against his will. And there are several other reasons.

2. If any widow then would complain of a wrongful

[1] This provision, making the dower to some extent liable for the husband's debts in case of the deficiency of his remaining property, is not derived from Bracton or Fleta. It finds however some support, so far as regards debts due to the Crown, in one of the forms of writs, *quod mulieres non distringantur*, given in the Register. See Regist. Brev. Orig. f. 142 b, 143; Fitzherbert, Nat. Brev. 150 Q; Coke, Litt. 31 a.

detaining of her dower, care must be taken to examine narrowly whether the wrong is done to her by the heir or by any other person, and whether by detainer of all the reasonable dower specially named in the original establishment, and whether of tenements whereof her husband was seised, or of tenements of the ancestor of her husband whereof she was endowed by his assent, and whether she has part or not; and if she has part, whether the deficiency be in the principal subject, or in the appurtenance. On each of these points there lies a different remedy; for if she has never been seised of any part, and the establishment made upon her was of reasonable dower, then the common writ of dower close, 'of reasonable dower whereof she hath nothing,' lies. And if the establishment made was in certain, then there is remedy by another writ. And if of lands of the ancestor by his assent, then she shall have a different remedy. *And if she has part of the tenement and demands the residue, then the writ of right of dower patent pleadable in the court of the heir is in place. And if she has her reasonable dower of the principal, but is deforced of some of the appurtenances, then the writ of dower patent, called writ of dower *de rationabili parte mulieris*, lies.[1]

[1] 'The writ of dower, *unde nihil habet*, and the two possessory writs, *de dote certa* and *de dote de assensu patris*, are pleaded only in the Bench on account of the precept to the bishop. But the writs of right are pleadable in the lord's court, because the cause of dower, that is, the marriage, cannot be denied after the plaintiff has been recognized as lawful wife by the delivery of

3. If several deforceors are in the same county, they may be all comprised in one writ. This plea is real, and pleadable after default by distresses real, as by *Cape's*; and essoins are allowed on the first day, and also after each appearance. And if the deforceor makes default after essoin, and also where the deforceor has vouched to warrant, and not caused his vouchee to be summoned against another day, the petty *Cape* lies. It is intended that this action shall be the most favoured of any of the writs of possession not pleadable by assise, and therefore there ought to be greater dispatch therein.

4. The most common writ of dower is the writ close whereof the widow hath nothing, and therefore we ought to begin with that writ; in which the count is thus: 'This sheweth to you, Peronel, who was the wife of John, that Peter wrongfully deforces her of the third part of so much land with the appurtenances in such a vill to her damage of ten pounds, and herein wrongfully, in that the aforesaid John, formerly her lord, endowed her thereof at the church door on the day when he married her, as he that lawfully so might do, and if he admit this, he does well, *and if he deny it, he denies it wrongfully, for she hath thereof suit good and sufficient.'

5. When the widow has thus declared her case, if the deforceor will not say anything or defend himself,

all or part of her dower, whether this was done by plea or without plea.' (Note in MS. *N*.) For the form of these several writs, see Regist. Brev. Orig. f. 8, 170; Fitzherbert, Nat. Brev. 8 G, 148 A.

he shall remain in mercy as undefended, and she shall recover her demand in the same state as the tenements were on the day that her husband died, and also her damages. And if the deforceor defends the wrong and force and the damages of the plaintiff, and so on, according to the proper words of defence, he may then aid himself several ways, either by general dilatory exceptions or by special peremptory exceptions, as will afterwards appear.

CHAPTER V.

Of vouching to Warranty in Pleas of Dower.

1. If the deforciant vouches to warranty, then the like process shall hold as shall be mentioned of warranties in a plea of right, so far as regards judgments upon defaults.[1] And if the vouchee appears on the day of the summons and enters into warranty, then let the contest be between the plaintiff and the warrant; and in the meantime the tenant may remain at home in his possession until the plea of warranty is determined, for according to the event of that plea the tenant shall hold the land or lose it. And if the demand be of dower which was named in certain to the wife upon the first establishment, and the action goes against the tenant, the widow shall *recover her demand in full, and the tenant to the value from the warrant. But where

[1] The passage referred to is not found in Britton, but the process is stated in Bracton, f. 384, Fleta, p. 411. See Introduction, p. xlii.

reasonable dower is demanded it is not so; for of that dower the widow shall recover to the value of the warrant, and the tenant shall remain in tenancy of the land demanded.

2. Although the warrant be under age, yet, out of favour to widows, it is not the custom or law that the women shall wait until the full age of the warrants, because warranty of dower is not so prejudicial to heirs as to involve disherison. Nevertheless such tenants must show a charter or deed, whereby the court may be certified that the infant is bound to warranty by his ancestor; and whether the demand be of reasonable dower or of dower in certain, the heir shall answer of whatever age he be. And if the widow recovers her demand, and the heir is disposed to dispute it, he may take proceedings when he comes of age. And so he may possibly regain the land which he himself lost, but if he cannot do so, then the first judgment shall stand.

*3. It should be understood that in every judgment awarding seisin to a widow plaintiff of reasonable dower not named, the corn growing and the grass mowed are always to be excepted.

4. Although the infant is in ward, and the wardship aliened from one to another, this does not prejudice the vouchor, because he shall always vouch to warranty the heir, and not his guardian; but the guardian, whoever he be, is bound to produce the infant in court. And what has been said with regard to a sole heir under age, is also to be understood of several heirs under age who are parceners and considered as one heir.

CHAPTER VI.

Of Exceptions respecting the husband's death.

1. Exceptions may arise to the tenant from the articles in the writ. For where as it is said in the writ, 'who was the wife of such an one, formerly her husband,' the tenant may answer, that he was formerly her husband and is so still, and inasmuch as her husband is still alive, he is not bound to answer her in the absence of her husband. And if this be proved, or not denied, the action is at an end; because gifts for marriage, as is the case of lands given in marriage and establishments of dower, are not confirmed until the death of the husband.

2. If the wife says that her husband has taken the habit of profession, and the tenant says that he has not, *this must be certified by the ordinary, and the original plea shall be in the meantime respited. And according to the certificate of the ordinary let judgment be given.[1]

[1] '*Casus.* A man takes a wife, and afterwards goes to a foreign country, and there enters into religion and is professed. The wife brings her writ of dower. The tenant answers, that the husband is alive; and she, that he is dead in law (solum ley de terre), and sets forth how and in what place. *Quæstio, quid*

3. If she says that her husband is dead by natural death, the proof sometimes lies upon the plaintiff, if the tenant puts her upon proving the same; in which case he shall only say that the husband is not dead. For in general it belongs to the plaintiff to prove his case, unless the defendant undertakes to prove the contrary. And if the deforceor says that the husband is alive, and that he is ready to prove the same, and the wife only says that he is dead, without tendering averment, then the proof lies on the tenant, inasmuch as it belongs to the person excepting to prove his exception. And if both undertake the proof, it is for the one to prove the man to be alive and for the other to prove that he is dead, and it may happen that both parties furnish proof of their case; but then credit should be given to the most reasonable proof. And although the widow proves her husband to be dead, yet seisin of dower ought not to be adjudged to her without further answer of the tenant, before she has shown how she is entitled and has right of action in her demand; for it may well be that she has no right to demand dower.

*4. If the proof be found insufficient on both sides, in such case, on account of the favour granted to the widows, judgment ought to be given for the plaintiff; but on this condition nevertheless, that if her husband

juris?' (Note in MS. *N.*) It was subsequently held that if a husband entered into religion although the heir succeeded to the inheritance, the wife should not be endowed until the husband was naturally dead. See Coke, Littleton, f. 33 *b.*; Perkins, Profitable Book, p. 61.

be alive and be produced in court, the wife shall restore the dower with all the profits in the meantime, provided she can find such security to perform this as the court shall award; and if not, the tenant will continue in seisin until the court is better certified of the husband's death. The plea in the meantime shall be suspended, and renewed by resummons when there shall be occasion.

CHAPTER VII.

Of Exceptions founded on the invalidity of the marriage, and on the dower established being different from that claimed.

1. It is also said in the writ, 'such an one who was the wife of such an one.' To this the tenant may answer, that she never was his wife, inasmuch as she was never married to him, but he had her as his concubine; or if she was married to him, yet she never was so by lawful matrimony, because he had before married another who was living at the time he married the plaintiff, so that if she was his wife, she was so in fact only and not in lawful form by reason of the other, who was his wife in law. That he could not have two wives at one time appears by the definition *of matrimony, where it is said, that matrimony is the union of a woman to a man, and not of women to men, but in the singular. And if several women, all living at the same time, are united to one man, yet none of

them but the first is in law his wife; the others being so in fact and wrongfully.

2. Again, although she was his lawful wife, yet the tenant may say that she ought not to have dower by that rule of law which says that the marriage subsisting action of dower remains, but the marriage failing the action is extinct, and a divorce was pronounced between her and her husband, whereby the marriage ceased, and consequently her action to demand dower is extinguished. For a divorce is no other thing but a separation of bed between man and wife. And if this be verified, or not denied, the wife shall not recover any dower. To this the widow may perhaps answer, that although there was once a question in court concerning a separation between her husband and her, yet it never came to judgment in the lifetime of the husband; or, that although the divorce was awarded, yet she appealed against the award; and by that appeal the award was annulled and repealed, and judgment given for the wife; so that the husband was seised of her as his wife the day he died, and she of him as her husband. *To which the tenant may say, that although she appealed from such award, yet still she ought not to have dower, because the husband died before any judgment was given in the plea of appeal.

3. Again, the tenant may say, that although she was his lawful wife, yet she ought not to have dower, because she was never solemnly married at the church door, and consequently dower was never established upon her there. And if this be verified, she shall not

recover any dower on account of the words of the writ, 'at the church door.'

4. If the Justices would be certified concerning any divorce, they must be certified by letters of the ordinary; for the cognizance thereof belongeth not to the lay court,—no more than of matrimony, since the one depends upon the other. Therefore in such case our writ must be directed to the ordinary of the place, that after calling the parties and other necessary persons, he do inquire the truth of the matter, and according as he shall find certify the same to the Justices. In such case the ordinary ought to cause the tenant who propounded the exception, in whatever diocese he resides, to be summoned to be at a certain day and place before him to show whether he can or will say anything against the marriage. And after he has been solemnly summoned, *whether he come at the day or not, let the widow's proof by the witnesses she shall produce be admitted, so as such witnesses be not liable to challenge; and such proof being solemnly admitted upon the oath of the witnesses, let the ordinary forthwith according to the inquest make a return to the Justices of the fact as found; and in such case no appeal lies by any of the parties, that the plea in our court may not in any way be longer delayed.

5. But now it may be asked, whether if a man kept a mistress in concubinage, and begot a child by her, and afterwards secretly married her elsewhere than at the church door, and after such marriage had another child by her, and then publicly married her at the

church door, and there endowed her, and after that had a third child by her, which of these children would be admissible to the succession of the inheritance of the father, and by reason of which of them the mother shall be entitled to dower after the decease of the father. The answer in such case is that the middle son ought to be admitted to the succession of the inheritance of the father, and shall be accounted legitimate in respect of his birth, although the marriage was secret, provided he can aver that he was born within wedlock, whether the espousals were publicly or privately performed. *And yet the mother shall not have dower by reason of that child, but she shall not have it by reason of the third son, and of the solemn espousals wherein she was endowed at the church door. Hence it appears, and true it is, that sometimes the mother shall not have dower, although the son may be admissible to the succession of the inheritance of his father, and that no right ever accrues to any woman to demand dower, unless it was established to her at the church door, and this, whether in a time of interdict or not.[1]

6. When the ordinary has solemnly performed the duty of his office with regard to the making of the inquest upon the points comprised in our mandate, and has thereupon made his return and certified us or our Justices, the tenant at the instance of the plaintiff shall

[1] The meaning seems to be, that though there was an interdict upon the ceremonies of the church, dower could still be 'established' at the church door. Compare Bracton, f. 304.

then be resummoned, that he be before our Justices at a certain day and place. At which day the parties may be essoined. And if the tenant make default, and the resummons be proved, let the land demanded be forthwith taken into our hand by the petty *Cape*, and let him be again summoned to appear at another day to hear his judgment.

7. If the tenant dies before he is resummoned, the widow must revive her action by a fresh writ against the new tenant; and if the aforesaid exception be again alleged, it will not be necessary to send it again *before the court Christian, after judgment has once passed in her favour, but it is sufficient to prove the marriage in court Christian once for all. Therefore that exception will thenceforth be of no avail in the mouth of any one; but some other defence must be made, or the widow shall recover her demand. In like manner if a woman demands a man as her husband, and judgment is pronounced for the woman in court Christian, whether the man has appealed from the judgment or not, yet if he dies before the judgment is reversed, the woman shall recover dower, and that judgment shall for all future time be a sufficient proof of the marriage.

8. If the tenant by way of exception says that she never endowed at the church door in the manner she has declared in her count, and the widow says the contrary, the truth may be inquired by the country. And if she omits the words 'at the church door,' the writ is abatable for the defect in the count. And if the widow

demands more than was at first established upon her at the church door, although her husband from some foolish fondness afterwards increased it, she shall not be entitled to be answered in respect of that increase. *For as dower was appointed her at the church door, whether in specie, or of the third part, and so not in specie, in that form dower shall be assigned to her, and she has an action to demand so much, and no more, if she be deforced thereof.

9. If the widow demands dower named, as being that which was established upon her at the church door in certain, and the tenant says in answer, that she wrongfully demands dower named, inasmuch as at the establishment she was endowed only of reasonable dower, and therefore uncertain, or of the third part of something certain; in such case the proof lies on the widow; and if the tenant expressly tenders averment of the negative, then it shall belong to him to prove his exception, as well as to the widow to prove her case. And if the widow produces witnesses who were present at the establishment, or tenders a writing which was made to her thereof on the day of the establishment, and the tenant offers nothing but averment by the country, in such case, as well as in cases where the death of the husband is to be proved, the widow's proof shall be more admissible and of greater weight than that of the tenant. But if the widow brings her witnesses, and none of them were present at the establishment of the dower, or, in the other case, at the burial of the husband, her proof is in

neither case to be admitted against the suit of the tenant. And if neither of them tenders suit, but simply averment by the country, in such case let the truth be inquired by the country.

*CHAPTER VIII.

Of the pleadings where several women claim dower of one husband.

1. If several women at one time demanded dower by the establishment of a single husband, an exception thereby arises to the deforciant, that he ought not at the same time to answer several women demanding dower by reason of the death of one man.

2. If one woman has recovered dower, and another demands it, a distinction must then be made, whether the plaint is against the tenant alone or against him and the wife endowed, she having vouched the tenant to warrant. For if the tenant has entered into warranty, then the warrant is bound to defend the voucheress against the plaintiff. And if he has not yet entered into warranty, then the dower may answer by herself to the following effect: that the plaintiff ought not to have dower, nor any one except herself, forasmuch as she was the espoused wife of him of whose death she is endowed, and was seised of him as of her husband at the time when he died, and she was therefore endowed, and that rightfully.[1] To which the plaintiff may in

[1] In Bracton this pleading is given as that of the warrant, who is there called tenant. In Fleta, as here, it is the pleading of the woman endowed, and she is called tenant, *mulier tenens*.

answer say, that the tenant saith wrongfully, for she was not his wife, as plainly appears, inasmuch as this same plaintiff heretofore impleaded the same husband in court Christian *and demanded him as her husband in such a place and before such judges, and in the presence of the same tenant deraigned him as her husband, on which occasion she did not make any counterclaim or opposition. And if the tenant does not deny this, the plaintiff shall recover dower of that which she holds. But if she denies it by affirmation or negation, a doubt arises, which must be ascertained by inquiry of the ordinary, and according to his return the parole shall be continued by resummons, and judgment given; and pending the plea in court Christian, the original plea shall be at rest. And if replication be made of an appeal and judgment reversed, the effect shall be as is above mentioned concerning such a replication.

3. Again, if the tenant in dower says only, by way of exception, that the plaintiff cannot be his wife because she held her tongue when she ought to have claimed her husband, as, when the banns of the second marriage were three times solemnly asked in the church where she was present, upon the negation of the tenant both of them shall be sent to court Christian in order that the Justices may be certified upon this question, which of them was the wife of the husband in law, and which only in fact; and according to the certification of the ordinary judgment shall be given.

4. Although one of the women was lawfully his wife, yet her right may be lost by default of evidence, as

where she was married out of our jurisdiction. Also by negligence in her claim. *as where the rightful wife never disputed the second contract in the lifetime of her husband who abandoned her; in which case her right of action is lost, and she ought not to have dower, especially if the second wife remained with the husband until his death. And in like manner her action is lost, even though she disputed the second marriage, if the husband died in the arms of the second wife before judgment of divorce. But in all these cases the first wives shall have dower, if their children are able to recover the succession of their father's inheritance.

CHAPTER IX.

Of Exceptions relating to the Assent of the Father.

1. Sometimes writings are made of the establishment of dower, and that wisely; for if such writings are produced at the trial, the wife's demand can be more clearly made out. And if they should be denied, this doubt may be tried and their legality proved by comparison of seals, by the witnesses named in the writings, by the country, or in several other ways. But of all establishments of dower, there is most need of writing where the assent of a third party has concurred. *The writing may however be so made as to be useless in proving the wife's case; for if it is said, that her husband endowed her, and the assent of the possessor of the land is not mentioned, the writing will not avail in

evidence of her demand. So likewise, if it is stated in the writing, that some other person than the husband endowed her.

2. It is necessary therefore, that in every such writing these points should be specially mentioned, that the husband endowed the wife at the church door of the third part of his father's land, or of that of some other kinsman or friend, and that the same friend or kinsman assented in the same place and at the same time. And although the writing be made elsewhere, yet in order that it may be of effectual value, it should be granted and confirmed by assent at the church door, or the endowment will be worth nothing, if the friend choose to dispute it, on account of the expression in the writ, 'at the church door.' By this reasoning it appears, and it is true, that a woman shall not recover dower against the will of the tenant, unless she make it appear by writing, or by witnesses present at the establishment and at the marriage, or by the country, that these two things concurred at the marriage, namely, an establishment of dower by the husband and an assent of that friend, or his ancestor, of whose land she demands *dower, and that he assented to the endowment, whether there be writing or not, at the church door; for an assent at any other place is useless.

CHAPTER X.

Of common Exceptions in Actions of Dower.

1. To those words in the writ 'whereof she hath nought,' the tenant may answer that she hath part. But then it will be necessary to distinguish, whether the plaintiff has received part of her dower before the purchasing her writ or after. For if after, although from the same deforceor of whom she complains, and in the same vill named in the writ, yet the writ is not thereby abatable; for she may say that satisfaction was made to her for the difference;[1] but if she received part before the writ was purchased,[2] then the writ is abatable; and no writ shall lie but the writ patent upon the right.

2. Again, the deforceor may say that the plaintiff ought not to have dower, for that her husband did not hold the tenement, whereof she claims dower, in demesne either on the day on which he married her or

[1] That is, she may say by way of replication, that at the time of purchasing the writ she had nothing of her dower, but that an assignment has since been made to her in satisfaction of part of her demand. Compare Bracton, f. 311 *b*.

[2] This must be understood, if the part was received from the same deforciant and in the same vill. See Statute of Westminster i. c. 49; Fleta, p. 347 (§ 4).

afterwards, or that if he did hold it in demesne, yet he could not endow her, as he had no fee therein. But if her husband had the fee of any tenement which was to return to him or his heirs on the death of some person *who held it for term of life, in all such kinds of tenements although the freehold was aliened before the husband married her, a wife may demand dower if she was endowed thereof at the church door.

3. Again, he may say that she ought not to have dower by reason that her husband was a felon and suffered judgment of felony, for which he was hanged, or beheaded, or buried in the sands, or dismembered, or drowned, or condemned to some other death,[1] or abjured the realm, or was outlawed; in which case the record must be vouched to warrant. And when the record is produced, the widow may dispute the record unless it is proved by some one authorised by us to bear record. For she may say that some one out of hatred caused her husband to be hanged, when in fact he was never found guilty of any felony, and that this act was done by such an one, and by certain others who coloured his death with a sort of judgment. And if this be verified by the country, the widow ought not by such a wrongful judgment to be barred of her dower, nor the heir of the succession to the inheritance. So neither where the felony did not amount to 12*d*, nor where the outlawry was pronounced before the fourth county

[1] As to the various modes of execution mentioned above, and the places where they were customary, see Hengham Parva, p. 87, and Selden's notes thereupon.

court or pronounced in any other county than in that where the offence was supposed to have been committed. Nor in any case where a lawful defence may be made to the outlawry. Nor in any case of judgment of death, *where the supposed felony is found on examination to be a trespass and not felony, nor in the case of abjurations for trespass, as in parks or fishponds, or other like trespasses.

4. Although the husband suffered judgment of felony and that deservedly, yet she may say that, notwithstanding this, she ought not to be barred of her demand, for at the time he committed his felony she was not united with him nor married to him, neither was assenting or privy thereto. And inasmuch as the wife of a felon ought not to lose her dower, except by reason that she may be fairly supposed to know of the felony of her husband, and even then she is not bound to accuse him, therefore, where the felony was not committed during the time that she was his wife, she ought to have dower of the lands of the heir which are in the custody of his lord.[1]

[1] These last words should apparently be understood of the felon's lands escheated to the lord. 'A man commits a felony which is not discovered; afterwards he purchaseth land, and afterwards taketh a wife, Although he be sentenced for the felony, the wife shall recover dower. Dubium tamen est, quia quicquid acquiritur inter feloniam commissam et ipsius feloniæ convictionem, fit ac si ante feloniam perpetratam propter convictionem ob quam nomen felonis subibit.' (Note in MS. *N.*) I do not find, that in later times an exception was made in favour of the wife of a felon, when the crime was committed before the

5. The widow shall not have her reasonable dower unless she can aver by the country or in some other manner, that she was capable of deserving dower in the lifetime of her husband, whether she be a maid or not, and though she be twenty or a hundred years old; nor where the husbands died so young, or in any other such condition as to be incapable of consenting to matrimony.[1] They are not however barred from re-

marriage. See Perkins, Profitable Book, s. 387; and compare Coke Litt. 31 *a*.

[1] It would appear from the above, that reasonable dower could not be claimed unless the husband was of an age before his death to consent to the marriage. This was not the rule of later times. 'If the wife be past the age of nine yeares at the time of the death of her husband, she shall be endowed, of what age soever her husband be, albeit he were but four yeares *old*.' (Coke Litt. 33 *a*.) And I do not find any authority for the doctrine of the text in Bracton or Fleta. The former says that the minority of the husband or the wife did not impede dower, provided the wife was of ability 'dotem promereri et virum sustinere.' (Bracton f. 92.) And Fleta fixes the required age of the wife at nine years and a half. (Fleta, p. 340. c. 23, § 3, 348, § 9; compare Littleton, Ten. s. 36; Coke Litt. 33 *a*.) But the doctrine of Britton is supported by Hengham (Hengham Parva, p. 88); and by the Register, where it is said, that a woman will lose her dower if her husband die under age. (Regist. Brev. Orig. 170.) And the annotator in MS. *N.* says that in all cases where the husband was incapable of consenting to the marriage, either because he was 'infra annos nubiles, i. e. ad xiiii. annos,' or from any other cause, although there was no default in the wife, she should not have dower. So, it is said to have been held in the 13th Edw. I., that a wife would lose her dower if her husband died under nine years. (Fitzh. Abr. *Dower*, 172, citing

covering other kinds of dower. Neither ought a widow to recover dower in the advowson of any church in whole or in part, unless she can aver that she was endowed thereof; *and still she may be barred by negligence, if she afterwards without question or claim permitted the heir of her husband or some other in his name to present after the death of her husband. And if the writ be obtained against the heir and the guardian jointly, the writ falls if it be challenged, because the guardian must always be summoned to produce the infant whom the plaintiff alleges to be in his ward.

6. Again, the tenant may say that the plaintiff has forfeited and lost dower by adultery, inasmuch as she left her husband after he married her for the bed of another, by which act she forfeited her dower. If to this the wife replies that it ought not to bar or affect her because she was afterwards reconciled to him, so that he received her again, and in her seisin died, the

13 Ed. I. Iter North.; but *qu.* whether it should not be read *ele* for *il*; that is, if *the wife* died under nine years.) In 12 Ric. II. dower was allowed where the husband was ten years of age, and the wife eleven at his death. Fitzh. Abr. *Dower*. 54. The clause which follows in the text refers apparently both to the wives of infants, and to widows of tender age, who, as it seems, might claim dower certain, but not 'reasonable dower.' 'Although the wife be not of ability to deserve dower, yet she shall have it, provided that the assent of the husband was given at their espousals; because establishment of dower is a kind of purchase which is not forbidden by the nonage; and is therefore permissible.' (Note in MS. *N*.) This distinction is also found in Hengham, but does not appear to have been recognized in later times. Compare Coke Litt. 33 *a*.

tenant may say in answer that notwithstanding this she still ought not to have dower, for that he did not receive her of his own accord, but against his will by coercion of Holy Church and by sentence of court Christian. And if this be proved, the plaintiff shall take nothing.

7. If the widow brings her plaint against the heir, he may answer thus, that he is bound to warrant her dower to her in case she was endowed and was impleaded of her dower, provided he has the charters delivered to him, which were his ancestor's, and which she detains from him; for otherwise he may perhaps lose his inheritance; so that he was never against assigning her dower, provided she would have delivered up to him the *charters which belong to him, relating to his inheritance. And if he can verify this, let it be awarded that the widow restore the charters, and that he assign and deliver to her her dower; and the widow shall remain in mercy for her false plaint.

8. Again, the tenant may say that she ought not to be endowed, for that she was once impleaded of part of the dower which she holds, and whereas she ought to have vouched him as the warrant of her dower, she vouched another, such an one by name, in disherison of the right heir. And if the right heir can verify this, she has forfeited all recovery of the residue of her dower for her malice.

9. Or he may say that she wrongfully complains, forasmuch as satisfaction was made to her for her dower by the value in land or money, wherewith she was con-

tented. And if the wife admits the agreement, or does not deny it, but replies that satisfaction was never fully made to her, the demand of dower shall thereby cease, and she may proceed by writ of covenant if she thinks proper. Or he may say that heretofore she recovered dower against him of the same tenements by a like writ, and if this be verified or not denied, the last writ shall fall, and the wife, if she pleases, may sue judgment on the former writ.

10. It may also happen that several wives at one time demand dower of the endowment of one husband, whereas they ought not all to be endowed, *for one only was his lawful wife, and she ought to obtain the dower. But which was his lawful wife and which his coucubine, no secular judge can inquire, for the cognizance of marriage and of testaments belongs to the court Christian; and so long as there is a dispute between two or more wives, dower is not to be allowed, until it be proved in court Christian which of them was the lawful wife of the husband.

11. So where the lawful heir brings an action for his inheritance and the wife for her dower at the same time, dower is not to be granted until the plea relating to the succession is determined, on account of the inconvenience which might ensue. For if two wives who are contending about their dower were to be sent into court Christian, there to determine which of them was the lawful wife of the husband, and which his concubine, it might perhaps fall out that she should prove herself to be the lawful wife, who was not the mother of him who might

prove himself in our court to be the lawful heir, and that the son of her who in the court Christian was found a concubine, might prove himself in our court the lawful heir. Therefore in the above case where several heirs are disputing about their inheritance and several wives about their dower, it is proper that the pleas of dower should be suspended until it be decided in our court to whom the succession is to be adjudged. And accordingly, in the like *case of a dispute between two clerks in court Christian, the prohibition by *Indicavit* was first provided, to cause the plea in court Christian to be suspended, until the question between the patrons be decided in our court, by reason of the risk which might arise to one of the alleged patrons in respect of the advowson, if the plea in court Christian between the clerks was determined before that between the laymen concerning the advowson. And as soon as the heir has recovered his inheritance let dower be assigned to his mother, but without awarding any damages for the delay, inasmuch as the delay was warranted by the court, and did not proceed from the wrongful act of the heir. And when the heir is thus in seisin of the inheritance, whether rightfully, or wrongfully and the wife endowed, and another wife comes and demands dower, and her son demands the inheritance, in such case let the wife be told that she should first cause her son to be proved lawful heir, and that then, and not before, she shall be answered as to her dower.

12. Whether the wife who demands dower has a child or not, that person is always the warrant of her

dower to whom the dower ought to revert after the death of the wife, whether it be the heir or the chief lord, to whom the two other parts are escheated in any way either by failure of blood, or perhaps for felony, or by reversion. There is a case however excepted, where a wife recovers dower of one who was enfeoffed by the husband or his heir, *the heir having nothing left whereout he could warrant the dower or make satisfaction in value; in this case such dower shall revert to him from whom it came, and yet he shall not be warrant of the dower.

13. Or he may say that she ought not to have dower, because her husband had not any right in the land, inasmuch as it was the inheritance or the estate in marriage of his first wife. Or thus: because she of her own accord and by her free will in her absolute widowhood released and quitclaimed all the right which she had or might have in her dower. Or thus: for that she is his nief holding of him in villenage as an astrer,[1] and he seised of her and of her chattels and her suit. Or thus: for that the husband lost the tenement by judgment as the right of another. Or, for that by the custom of the country no widow was ever wont to be endowed unless there were writings. Or, for that the husband never in his lifetime had fee or demesne in the tenement whereof she demands dower. Or, for that the tenant was heretofore acquitted by judgment of the same demand at the suit of the same plaintiff. Or, for that he held nothing in the tenement whereof

[1] See p. 456, note.

she demands dower on the day of the writ purchased, or since. Or, for that he does not claim any freehold therein, but holds it in another's right as guardian or bailiff or termor or villain. *Or, for that he holds the tenement jointly, in common with others, without whom he cannot answer.

14. If any one say that he has only a freehold upon condition until he has levied so much out of the profits, or until such or such an event happens, yet the writ shall not thereby abate but stand, and he may vouch to warranty if he thinks proper. And as to the tenant's exception, that she ought not to have dower because her husband lost the said tenement by judgment, she may answer by way of replication, that it was by fraud and collusion, and by consent of the husband; and if this be proved, the exception will not avail.

15. Again, the tenant may say that her husband aliened the land which she demands in dower before he married her; and if she reply, that such alienation was for term of life or otherwise revertible to the feoffor, and that this land was appointed to her for dower in the original establishment thereof, as soon as it became vacant; and if the tenant denies this, let the truth be inquired by the country.

16. Or he may say that she ought not to have dower, for that the husband of whose death she demands dower had another wife, whom he had married before he married her who now complains, and that he endowed that wife of these same tenements, and that she is yet alive. In such case the tenant shall sue out a

writ to cause the woman, if any such there be, *to come into court to acknowledge whether she makes any claim. But if the plaintiff will aver the negative, to wit, that her husband had not another wife, or that if he had another wife, there is none now living ; in both cases the plea shall be removable into court Christian ; and according to the return of the ordinary judgment shall be given.

17. With respect to dower which a wife recovers from a farmer holding for a term of years, let it be awarded by the Justice *ex officio* that the termor shall retain the other two parts of the land until he has received the value of the third part which he has lost. And thus he will have a kind of freehold where before he had not. But if the wife recovers all the land which the farmer holds, as land whereof she was endowed in certain, in such case the termor ought to recover from his lessor by judgment in the plea of warranty to the value of the land. And if the lessor has no land wherewith he can warrant his term, it shall be awarded *ex officio* by the Justices that he shall recover of his lessor to the value when the land included in the dower shall fall in, or any other out of which he can make satisfaction ; and let this award be enrolled, so that when the time comes he may have remedy by writ of judgment upon such enrolment.

*CHAPTER XI.

Of the Judgment in an Action of Dower.

I. When it cannot be denied that the widow ought to have dower, let it forthwith be awarded that she recover seisin of her dower, and her damages to be assessed by the jury, as before mentioned.

2. But although the widow recover dower, she may lose it in several ways, as where her warrant loses the two other parts by judgment without any collusion, then she will lose her dower. So she may be deprived of it by the custom of the country, as particularly in Kent, and sometime there was such an usage in London and in many other places,[1] that as soon as the widow is married to another husband, or becomes with child by any other than her first husband, she may be immediately ejected from her dower.

3. So if a widow is disseised of her dower, and after a long interval and peaceable seisin of the disseisor she takes the seisin by her own force, refusing to proceed by judgment,—if the disseisor can recover seisin by assise of novel disseisin, the widow shall never re-

[1] The form of expression, which seems to imply that the custom was no longer enforced in London, is not found in the parallel places of Bracton and Fleta.

cover her dower except by the aid of the heir, or by writ of right of dower wherein she shall count of her own seisin.

CHAPTER XII.

Of the Plea of Right of Dower.

1. There are three cases in which a widow has no recovery for her dower, save by writ of right of dower patent pleadable in the court of the warrant. *The first is where the widow has lost her seisin by assise of novel disseisin, as before is mentioned. The second, where the widow demands part of the land or tenement in dower, as of her reasonable share, and is already seised of the rest. The third case is where she is deforced of anything which is appurtenant to her dower.

2. These pleas shall be commenced and tried in the same manner as the great writ of right patent, but not so as to admit of deraignment[1] or of essoin *de malo lecti*, and are removable into the County, and from thence before our Justices, in all the ways that shall be hereafter mentioned in the plea of right by the great writ. Demand of view and voucher of warrant also lie.

3. If the tenant desires to defend himself, or is warranted by another who defends him, the answer may

[1] This word 'deraign' appears to be used here of the mode of trial used in the ordinary or 'great' writ of right, namely, battle or great assise. The proof in writ of right of dower was by 'the country.' See Bracton, f. 313 *b.*; Fleta, p. 359 (§ 1. 2).

be, that the plaintiff wrongfully demands dower, for as much as she of her own free will delivered up or surrendered the tenement to him, and released andq uitclaimed her right; or that she heretofore withdrew herself from a like writ before such a Justice; or that the tenement demanded does not belong to her dower; or that although she was sometime seised thereof, she was not so seised as of her dower; or that she was never endowed thereof, but of other land specially named; or that she was endowed of less than the third part, and was contented therewith; or that she has more than belongs to her to have for her dower; and in the last case if she will not consent to admeasurement, and the tenant is ready to verify this as his *exception, the widow shall take nothing by her writ, but remain in mercy; and let the tenant proceed for admeasurement of the dower whereof she was endowed, whether in certain or of the third part.

CHAPTER XIII.

Of Admeasurement of Dower.

1. Admeasurement is nothing else but the reducing to measure what before was out of measure, and extends as well to a thing which does not belong to dower as to the excess and superfluity of it. But whether the widow holds in dower too much, or a thing which she ought not to hold, yet she is not to be ousted or ejected without judgment. Therefore it is proper to proceed for remedy by writ of admeasurement of dower.

2. When the sheriff has taken pledges for the prosecution of the plaint, it is his duty to summon the widow to appear on a certain day. He ought likewise to summon the coroner and the knights and other freemen of the neighborhood. At which day, if the plea is not removed by *Pone*, it is the duty of the plaintiff to set forth his plaint according to the tenor of the writ, if the widow is present. And if she is not there, or if she is there and cannot say anything whereof the admeasurement ought not to be had, let the admeasurement be straightway made upon the oaths or freeholders then present by good and lawful extent. *Then let it be inquired, in what manner her dower was established on her, whether in certain or of the third part, and according thereto let the admeasurement be finished, yet so that any improvement which has been made by the widow be not included in the extent but fall entirely to her.

3. If the widow chooses, she may say in answer many reasons why the admeasurement ought not to be taken; as, that the heir was of full age when he endowed her; or, that she has held dower before the time named in the assise of novel disseisin; or, although the heir endowed her by his guardian, or, although she was endowed by our escheator or other when the heir was under age, yet that since he has attained his age he has agreed to and confirmed the said assignment; and by several other exceptions she may hinder the admeasurement.

4. If the plea is in our court, and the defendant makes default, distresses and attachments shall run as per-

sonal actions and such further process as is mentioned in our statute.

5. When the widow has by just measurement that which belongs to her for her dower, she has no power to make any sale of the dower or anything that belongs to it beyond her life, or to make exile of villains, or enfranchise them, or commit any waste; and if she does so, the remedy provided by our statutes shall be pursued.[1]

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*CHAPTER XIV.

Of the Actions founded on Writs of Entry.

1. There are some possessory causes which savour much of the right of property, as the action of entry, the right of customs and services, where both the words *solet* and *debet* are contained, of *Quo jure*, of reasonable bounds, of reasonable estovers of each kind, and others like.

2. In the plea of entry there are three degrees. The first is, where one demands land or tenement of his own seisin after a term of lease expired. The second is, where one demands land or tenement after the expiration of a term of lease created by another. The

[1] 'Note, that waste, sale, and exile, are three things that touch disherison; wherefore termor doing them justly loses his tenancy as one who disinherits another: for by his act he proves himself to claim an estate which he ought not to have, and by consequence shall lose all, as it is said in reprobation (en reprover): Often michel yerne bringes littel hom.' (Note in MS. *N.*)

third is, when a tenement is demanded of a tenant who had entry by one to whom some ancestor of the plaintiff leased it for a term which is expired; and according to these degrees the writs of remedy are varied. There is still a fourth form, which is out of the degrees, and is derived from a more remote seisin to which the other three degrees do not extend. The second degree contains the word *per*; the third the words *per* and *cui*; and the form beyond the degrees the word *post*, that is to say, after the lease, or after the disseisin which such an one made to such an one. And if any writ of entry is not framed agreeably to the case, so that one form is obtained instead of another, the writ is defective, and therefore abatable.

3. The form in the first degree is as follows. 'Command W. that he render to P. the manor of C. with the appurtenances, which he demised to him for a term which is past.' The second form is thus. 'Command J. that he render to P. the manor of C. in which he hath not entry save by E. mother (or uncle, cousin, grandfather, or great-grandfather) *of the same P. who leased the aforesaid manor to him for a term which is past.' The third form is as follows. 'Command J. that he render to P. the manor of C. in which he hath not entry save by T. to whom such an one father, (or mother, cousin, grandfather, or great-grandfather, &c.), whose heir the same P. is, leased the said manor for a term which is past.' And the form beyond the degrees is thus:—'in which he hath not entry save after the lease which such an one, father (or mother, &c.) whose

heir he is, made, &c.' And from these four are drawn the forms of all kinds of writs of entry, which are of infinite number.

4. This writ, so long as the degrees and term will permit, lies as well against strangers who have entered by disseisors, whether one or more, as against the heirs of the disseisors and against those who enter by such heirs as far as the person in the third degree, as for example in this form. 'Command P. that he render to J. the manor, &c., in which he hath not entry save by T. son and heir of S. who leased the same manor to him after the same S. had wrongfully disseised the aforesaid J. thereof;' or, if the disseisee is dead, and his heir brings the action against the heir of the disseisor, then thus:—"in which he hath not entry save by T. son and heir of S. who leased the same manor to him after the *same S. had wrongfully disseised E. father (or mother or other ancestor) of the aforesaid J. and whose heir he is.'

5. But if one commits disseisin of a tenement which was the right of his own wife, and the disseisor dies, and the wife abides therein, and continues the like seisin as her husband had in his lifetime, and dies so seised, and her heir after her death enters and continues the same seisin, and the disseisee brings a writ of entry against the same heir, although the heir should make answer that he had not entry by any disseisin which his father or ancestor made thereof, but by descent from his mother, who died seised thereof in her demesne as of fee and of right, yet he is bound to answer to the

entry of the ancestor from whom his mother's seisin was merely derivative. For although the mother die in her demesne as of fee, yet she had a tortious entry by the disseisin of her husband; and because by means of such defective entry, although derivative, the land is come to the heir, the heir is bound in such case to answer to the entry.

6. If the tenement pass the third degree of blood by succession, the remedy by writ of entry will not avail.[1] But in such cases a writ is used to be framed as follows. 'Command P. that he render to J. the manor, whereof T. disseised the same J. or others of his ancestors, whose heir he is,'—without making mention of the entry. Again if any one disseised the disseisor, and afterwards *aliened that tenement, he cannot in such case say, 'which the first disseisor leased to him;' and therefore let it be said thus: 'in which he hath not entry save

[1] 'Nota, that if the tenements be come to several hands, as to five, or ten, or twelve, the writ of entry still lies, because nothing has accrued to the last purchaser more than to the first. But if they be come to four heirs in lineal succession, or to three, *secundum quosdam*, so that each has been seised, and the last is in possession, he is as it were inherited (come enherité) in the right, although the mere right be in another. And also if a grandfather has leased a tenement for a term, and the grandfather, his son, his son's son, and his son's son's son, die before the term be passed, so that the demandant is in the fourth degree, he cannot recover by writ of entry; because it is a writ of possession mixed with the right, and he ought not to be in better condition in this case than if his ancestor, i. e. the great-grandfather, had died seised.' (Note in MS. *N.*)

by such an one, who disseised such an one, after the last named had disseised the plaintiff,' or his heir [1] near or remote; or the entry need not be mentioned.

7. This action lies only against those who hold tenements beyond the term for which they are leased, and against their heirs and assigns, and against those who had entry into any tenement by intrusion or by disseisin, and also against the heirs and assigns of the disseisors and intruders, who had entry therein by them by succession, lease, or feoffment; and against those who had entry by feoffment of bailiffs, guardians, villains, or others who had nothing save for term for life or years, or a simple tenancy, or of infants under age, or by feoffments made by compulsion in prison, or by mad persons, or by the parson of a church, or a monk or canon removable,[2] without the assent of the bishop and the patron; or by felons or bastards, or by others who cannot alien anything of the right. So likewise against those who have deceivably purchased tenements upon a promise to do such or such a thing, and when they are enfeoffed thereof, refuse to perform it.

8. The word 'term,' extends as well to a term of life as to a term of years. But he who leases only for a

[1] This word should apparently be 'ancestor.' The error, if it be so, is probably derived from Fleta, where the word is *hæredem*.

[2] See vol. i. p. 159, and the note there; and compare Year Book, 31 Edw. I. p. 454. The words in Bracton are, 'a canon without the assent of the bishop and chapter, an abbot without the consent of his chapter, or a cellarer clerk or other *procurator* without the consent of his abbot or prior. (Bracton, f. 318.)

*term of years, although he make the lease for a term of a hundred years, leases the profits only, and retains to himself the fee and the right and the freehold, if he had them before the lease; and all that he retains he will leave at his death to his heir; or he may, without doing any wrong to the farmer, give and alien it to a stranger; or he may release and quitclaim every sort of right to the farmer himself, and enfeoff him, without first ousting the farmer of his seisin, such as it is. This he cannot do to a stranger, unless the farmer of his own consent will attorn to the purchaser; for the seisin of the alienor is all along continued by the farmer who enjoys his seisin in the name of his lessor.

CHAPTER XV.

Of the Proceedings in an Action of Entry.

1. The tenant being summoned may cause himself to be essoined *de malo veniendi* and the plaintiff the like. The tenant may also demand view of the thing in demand; and may vouch to warrant, whether mention be made of entry in the writ or not; so nevertheless that if such mention be made, the voucher shall be from person to person, and from warrant to warrant, of the persons named in the writ in order up to the first disseisor, or other entror, or his heir. For other warrants than those named in the writ ought not to be vouched.[1] And if no mention is made of the entry in

[1] That is, if the tenant does not deny the entry to have been

*the writ of degrees, then others who are not named in the writ may be vouched, if the vouchors have sufficient ground for doing so.

2. If the plaintiff founds his case upon the right, counting in the right by descent or by resort, as in the plea of right, and coming down at the end of his count to the entry, in such case the defendant or tenant has two modes of defence. For he may undertake to defend the entry upon the possession, in which case he tenders averment by a jury, or pleads an exception. If, on the other hand, he chooses to defend the descent of the right, he has three ways of defending himself, either by the body of one his freeman, or by putting himself upon the great assise, or by having the plea determined by a jury. If he be defended by battle, or the great assise, where the plaintiff has tendered deraignment, or agreed to the great assise, then the tenant may on the second day of plea have himself essoined *de malo veniendi* as after appearance, and at the next day be essoined *de malo lecti*, and so he may lie for a year *in lanquore*. And in this case the proceedings shall be in all points as will be stated concerning the plea of right; because at the tenant's election and by his defence the right of possession is disregarded, so that the action of entry is entirely changed to the nature of a plea of right. But this never happens upon the election of the plaintiff; therefore in every plea which savours of both rights it is entirely in the defendant's

as stated by the plaintiff. Compare below, c. 16. s. 2; Bracton, f. 321; Year Book, 31 Edw. I. p. 336.

*choice either to defend himself in the right of property by battle or by great assise, or to defend himself in the right of possession. And in some cases also it is in his power to cause the plea of right to be changed into one of possession, as shall afterwards be noticed; for if mention be made of the entry in counting in the plea of right, and the defendant chooses to waive the defence in the right and to defend the entry, and so the possession, the nature of the writ of right is so changed, that neither battle, nor great assise, nor essoin *de malo lecti* will lie, but the plea shall be determined by jury.

3. Nevertheless there are some writs of entry, and of customs and services, which will nowise admit of being changed from a possessory nature to that of a plea of right; as, where a person has leased for a term of years his tenement which he held for term of his life or for a greater term of years, and at the end of the lease demands back again his own seisin; or if he demands by writ of entry a tenement which he demised for a term, and in which he had a fee without ever having taken esplees; so, the writ of customs and services where the *debet* is omitted.

4. It is to be well observed, that in all pleas whatsoever, where the writ makes mention of both rights, and the plaintiff in his declaration counts by means of the right as well as concerning the possession, if the defence proceeds upon the right, however the plea is ended, whether by a jury or in any other manner, there is no resort to the writ of right, because all the right is determined. But if the defence of the right

is waived and the possession only is defended, there will be a further expedient, and a remedy by writ of right, whether the jury find for the plaintiff or for the defendant.

CHAPTER XVI.

Of Exceptions in the Action of Entry.

1. In this plea the tenant may aid himself by general dilatory and peremptory exceptions. Thus he may admit the entry by the term, but say that within the said term the land was released and quitclaimed, or given to him in fee. But in this case, it must be distinguished whether the exception can be proved by charter or writing, or not. For if by writing, which is proved or not denied, the judgment is clear. And if not, and both parties have gone to a jury upon the entry by the count and by defence also through the right, then instead of the great assise let the recognisance of the jury be taken in these words :—to recognise upon their oaths whether the aforesaid P. had other right or other entry in the aforesaid land save *by J., who demised the land to him for a term which is passed, or whether the said P. had entry in that land by the same J. who sold or gave or quitclaimed the same to him in fee, as the said P. says, and whereof he acknowledges that the abovesaid J. the same land first demised to him for a term, but further says that during his term he released the same to him in fee.

2. Again, the tenant may say that he had not entry

by such an one, but by another person named; and in such case the tenant is not obliged to vouch the latter to warranty, but it will be sufficient for him to abate the writ. And if he waive the exception, it may perhaps prejudice him.

Here ends the Law of Possession, and begins the Law of Property.