# BOOK VI.

## OF PROPRIETARY ACTIONS.

### INTRODUCTION.

### *Of the Plea of Right.*

HAVING finished the form and manner of pleading the possessory right, we must now treat of the manner of pleading upon the right of property, which in the order of pleas is the last of all remedies; so that none can descend from a writ of right to a writ of a lower nature, although the reverse may be done.

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### *CHAPTER I.

### *Of Proximity of Heirs.*

1. This action alone by the manner of counting tries the proximity of heirs with respect to the succession to the inheritance. For inheritance is the succession of the heir to every right of which the ancestor died seised. And from inheritance is derived heir, who is the successor to every right which the ancestor had at the time of his death. And this right sometimes descends like a weighty body, and sometimes ascends. And although the possession does not always follow the mere right, yet in the end it will return to it, if the

right heir proceeds in a proper manner. For to the right heir descends the mere right which his ancestor had when he died, whether the heir at the time of his ancestor's death be in the country or beyond sea, and whether he is in his mother's womb or already born.

2. All children however are not admissible to the inheritance, for some are natural and legitimate ;[1] and of those who are both legitimate and natural, some are sons and heirs, others sons and not heirs ; and some are heirs of their fathers, some of their mothers, and some on both sides, and others are not heirs to either, although they are both legitimate and natural ; and some begin by being heirs and afterwards perhaps cease to be so, and others not. And of natural and legitimate heirs, some are near and some again nearer, *and some remote and others more remote. For all brothers on the father's side are near heirs of their father by reason of the share they have in the possession. This is undeniable, because if the younger brother keeps his elder brother out of his inheritance, and has taken the profits and peaceable seisin thereof, the eldest shall

[1] A clause appears to have been left out by the copyist here, owing to the repetition of the same word. The text should probably stand thus : Car acuns sount naturels et mulerez, et acuns sount naturels et nient mulerez, et acuns ne sount ne naturels ne mulerez. See the parallel places in Bracton and Fleta, referred to above. According to Bracton, a natural child is one born of parents between whom at the time of intercourse a legal marriage is possible, as between a bachelor and a maid not of kin to each other. And children born *ex prohibito coitu* are neither legitimate nor natural. (Bracton, f. 64.)

have no recovery in the right of possession, as before is mentioned, but he is driven to demand his inheritance by means of the writ of right, which writ alone tries who is nearest heir in blood. And according as it shall be found by counting of the proximity among brothers judgment shall be given. But in all cases that person is next heir at law to whom the mere right soonest descends.

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## CHAPTER II.

### *Of Succession, and the Law of Inheritance.*

1. All those who first descend from the common stock from degree to degree in the direct line for ever are lawful and true heirs; and when default is found in the direct line, then those who are found to be the nearest in the collateral degrees for ever are the right heirs; and lastly, when default is found in the transverse line descending, those who appear to be nearest in any *transverse line ascending shall be admissible. But although the heirs so ascending for ever are lawful and right heirs, yet they are not all admissible at the same time to the succession, because the eldest, being nearest, excludes the youngest who is near, and he who is near excludes the remote, and the remote one more remote. And when all these fail, either by their blood becoming extinct, or by their right being forfeited by judgment of felony, the tenement must of necessity return to the lord of the fee, as to the source from

which it first issued, for want of any other direction in which it can go: and in such case the homage received for the tenement is extinguished.[1]

2. There are many things which constitute proximity, and confer an inheritance and right of succession, to wit, sex, age, line, a partible inheritance, plurality of female heirs, form of gift, and blood. Sex, because the male is to be received and the female rejected, so long as there is a male heir apparent of the father by the same mother; but the daughter begotten on the first wife is to be preferred in the succession to the marriage granted with her mother to the male begotten by the same father on the second wife.

3. Age is material; because he who is the first born is admissible before the younger son of the same father and mother, and the younger brother will remain nearest heir to the elder, or at least a near heir, *according as the elder shall have issue or not. And if the elder brother dies without heir of his own in the lifetime of his father, the younger brother will take his place, and begin to be next heir to their common father, and the other younger ones will be near; and so of those more remote, without end.

4. If the elder brother dies in his father's lifetime, having begotten an heir, this issue remains under the authority of the grandfather, and shall be next heir to the grandfather by reason of the mere right which descended to him by the death of his father, the grand-

[1] See above, pp. 360 and 361, and the note there.

father's son, although the son did not live to attain any estate: and the uncle or aunt shall be only near heir, although he is one degree nearer than the grandson, who is next heir. Therefore if the uncle, or aunt, being out of seisin, demand the seisin of his father by assise of Mortdancester, or by writ of right against the grandson the exception of proximity shall bar him; and in like manner if he demand against a stranger. And if the uncle or aunt is in seisin, and keeps out the grandson, the grandson, being next heir, shall recover by means of the writ of right by pleading his descent. And what is here said of the younger brother, uncle to the near heir, may be taken as an example of the position of near heirs in all like cases.

5. Line is material; because the daughter found in the direct line descending is to be preferred before the male found in the transverse line.

6. Of a partible inheritance, the younger son, as before has been mentioned, shall have as great a share as the elder; and in this case the custom of the place shall be observed.

*7. Plurality of female heirs affects the succession, as in case of sisters parceners, who, whether they are begotten of one or of several mothers, all present themselves in the place of one heir, and no one of them is to be preferred before another, neither can one be heir to the others; for that would imply a nearer proximity in one than in another, which there is not, since they are all equally nearest. And if one of them dies, the shares of the rest shall be thereby increased, but not

by succession, but by a kind of right called that of accruer.[1]

8. The form of gift is also material, as appears in the case of feoffments, whereby strangers are admissible to the succession in preference to the next heirs, who are excluded by the feoffors. For the wills of donors are to be observed as far as the law can permit; and although such strangers are not right heirs, yet they shall be in the place of heirs. And so shall all those stand in the place of heirs to whom lands or tenements fall by any manner of reversion or of escheat, whether it be by default of blood or by forfeiture.

9. Right of blood sometimes causes the female to exclude the male. For if A. begets by one wife a son and a daughter, and by another wife a son, the eldest son is next heir to the father and *the mother, and if he dies without issue of his own, the sister is nearer heir to the deceased brother than the younger brother by the second or third wife. And so likewise the issue of the sister. But the first issue shall never demand any part of the inheritance of their step-mother until

[1] It appears to follow from the doctrine of the text, that if an inheritance descended to several daughters by two wives, the share of one coparcener dying without issue would go by survivorship or accruer to all the others, and not by descent to her sisters of the whole blood. A similar doctrine is to be found obscurely expressed in Bracton, f. 66 *b*. (Compare Bracton, f. 77 *b*; and see above, p. 73, and note there; Blackstone, Commentaries, vol. ii. p. 231, note.) In modern times no *jus accrescendi* has been admitted between parceners. (Blackstone, Commentaries, vol. ii. p. 188.)

after the decease of her issue, and if she has no issue by their father, they can never demand any part of the inheritance of their step-mother; nor, although she has issue by their father, if her inheritance did not descend to their brothers or sisters, the children of their common father by their step-mother. But if the inheritance falls to their brothers or sister, the children of the same father by a different mother, and the issue of their step-mother fails, an action immediately accrues to the first children, or to their issue, to demand the seisin of the last children, or of their issue.[1]

10. Of issue begotten upon the same mother by different fathers, the son by the first father and his issue are nearer, and are sooner to be admitted to every inheritance on the part of their mother, as well as on the part of their father, than the younger sons; and if they die seised and without issue, the sisters by the same father and mother are to be preferred to the brothers by the same mother and different fathers. *But if no male child of the first husband, or his issue, survive to attain the inheritance of his mother, then the males by the second husband are admissible to the

[1] I do not find any authority in Bracton for the succession of the half-brother to an inheritance descended from his step-mother, a stranger in blood. But see the Year Book, 33 Edw. I. p. 444. Bracton allows a man to be heir to his half-brother in respect of land purchased by him, in default of brothers or sisters of the whole blood. And in respect of land descended from their common father, he appears to doubt whether the half-brother would not be preferred to the sister of the whole blood. (Bracton, f. 65, 65 *b*. 66 *b*.)

inheritance of the mother before the females by the first husband; but if any male of the first husband has issue, male or female, this issue is to be admitted to the inheritance of the mother before the males by the second husband.

11. Sometimes also the younger sister excludes the elder brother, as where John begets by his first wife a son, and by his second wife a son and a daughter, and the younger son purchases lands or tenements, and dies without heir of his own body, the sister of the purchaser shall carry off the inheritance and exclude the elder brother, although the brother would be sooner admitted to the inheritance descending from the person of John the common father. And if John has issue two sons and two daughters by diverse mothers, the elder brother is nearest heir to John, and after him the younger, if the father survive the eldest son; but if one of these brothers makes a purchase, and dies without heirs of his own body, the sister of the same venter as the purchasor shall be the nearest heir, and shall exclude the brother and sister of the other venter, if not barred by homage.[1]

[1] It is probably meant that an elder brother of the half blood will be excluded in favour of a sister of the whole blood, even where the relation of homage between the two half-brothers does not present an obstacle to the descent to the brother, as would be the case where the tenement of the deceased was derived by gift from the common father. Compare Glanvill, li. vii. c. 1; Bracton, f. 65 *b*; Fleta, p. 371 (§ 15, 16); and see above, p. 34, note.

12. If there are three or more brothers by the same father and mother, and the youngest of them all makes a purchase and dies without heir of his own body, the eldest brother shall be his next heir, and shall exclude the father and mother, although they are nearer in blood, because the brother is found to be the nearest in the same degree, which the father and the mother are not; and he shall also exclude the other brothers and sisters, although they are found in the same degree. And even if the intermediate or other brother be in seisin, yet the eldest shall obtain it by a writ of right. And if the eldest brother dies without heir of his own body, then it shall go to the next eldest brother, and so from brother to brother, until it comes to the sisters. And if neither brother nor sister nor any issue of them appear, then it shall go to the common father;[1] or if the father be dead, and no other be found in any degree nearer on his side, to the common mother; and so of all the other degrees ascending. In what manner the degrees branch out will appear by the following degrees of kindred.

[1] See note, p. 325.

## CHAPTER III.

### *Of Degrees of Kindred.*

1. There are various degrees of kindred, as will appear in the following figure. It must be observed, no one, whether male or female, found in any degree in the collateral line, either ascending or descending, is admissible to succeed, so long as any person is found alive in the direct line descending; but when no one is found there, then we are driven of necessity to seek the degrees in the collateral lines.

2. It is always proper to begin to count from the common stock last seised of both rights, and so descending in *the direct line from degree to degree, without stepping over any, to the plaintiff, and not only through all the occupied degrees in the direct line, but sometimes through the vacant degrees; as in case where the eldest son, having issue, dies before his ancestor. Sometimes in counting by descent the vacant degrees are passed over, as, where the eldest sons die without heirs of their bodies in the lifetime of their ancestors; for if an eldest son dies without issue in the lifetime of his ancestor, it is never necessary to count through him, because he did not survive until any estate descended to him, but such degree is quite vacant; so also if he had

an heir who died without issue; and in such case the next brother occupies his place by reason of the mere right, which attaches to him as the next of blood. And if there is not any brother, then the right of succession will attach to the sister or sisters; and if there is no sister, then it will resort to the next occupied degree on the side of that ancestor from whom the inheritance moves in some collateral line. And as soon as he becomes seised of both rights, he begins to make a direct line as to issue begotten by him, and to be a common stock with regard to the heirs derived from him. *Yet if any one chooses to count through a person, or his children, who did not live until any estate descended to them by the death of the common ancestor, it does no harm; but in such case he ought not to say that the right of succession descended, but that from John ought the right to have descended to Peter, and from Peter to Thomas as his grandson and heir; but inasmuch as such son or grandson did not live until such right descended to him, because he died in the lifetime of the common ancestor, the right descended to the second brother or to the other next heir. And sometimes the count is divided into branches by reason of plurality of heirs, as in case of sisters parceners, where it is proper first to count through all the degrees of the issue of the first, and then of the second, and so of the rest.

3. For the assistance of learners, a figure may be made to show more plainly the degrees and the lines direct and collateral, whereby a person may be better acquainted with the law of successions. Let therefore

a perpendicular line be drawn, and in the middle of it let a void space be left for the supposed plaintiff, and let his father or mother be placed above him as the first ancestor, and that will make the first degree. Above the father or mother let the grandfather or grandmother of the plaintiff be put as in the second degree, and above the grandfather the great-grandfather or the great-grandmother, *as in the third degree; and above the great-grandfather the great-great-grandfather and so higher and higher by different degrees as far as the time limited in a writ of right will allow. And directly under the plaintiff let son or daughter be placed, which will make the first degree descending; and under him grandson or granddaughter, to make the second degree; and lower again the son or daughter of the grandson or granddaughter to make the third degree, and so descending from degree to degree *ad infinitum*.

4. If there be found no plaintiff in the direct line to whom the right of succession can descend, then of necessity it must descend to the collateral degrees, that is, to the nearest to the father or the mother, as, to the uncle or aunt, and so on, descending in that line from degree to degree so far as they continue, and then for default of degrees found in the first collateral line, it must resort to the grandfather in the direct line, and afterwards for default there, resort to the brother or sister of the grandfather in the collateral line, and so from degree to degree so far as they shall be found full; and so of all the other higher degrees, so that the right of succession shall fall to those who shall be found

in the direct line, if none can be found anywhere below him to whom the right may descend.[1] *And for default of him who would have made a degree in the direct line the right shall descend to one who shall be found in the collateral line, and for default of a degree in the collateral line the right shall resort again to the direct line at a higher degree, and if it find that degree full, it shall attach there; if not, it shall go on descending in the collateral line, and so of all the other degrees.

5. And if no degree be found where the right may rest,—or even if any be found,—the lord of the fee may seize his fee until he in whose person the mere right of succession rests shall come and demand it, and in the meantime the lord shall stand in the place of the heir.

6. How the degrees are placed in consanguinity, appears by the above figure, whereof the half might

[1] It will be observed, that the writer admits succession by lineal ascendants, contrary to the generally received opinion, and without authority from the writers whom he generally follows. See before, p. 164, note, pp. 319, 320; and compare p. 312; Glanvill, l. vii. c. 1; Bracton, f. 626. Coke, who frequently in his margin cites Britton upon this very subject, does not appear to have understood him as contradicting the received doctrine; 'I never read,' he says, 'any opinion in any booke, old or new, against this maxime,' (that an inheritance lineally descends, but does not ascend,) 'but only in *Lib. Rub.*, where it is said, Si quis sine liberis decesseret, pater aut mater ejus in hæreditatem succedat, vel pater et soror, si pater et mater desint' (Coke Litt. 11 a.) The authority cited by Coke as *Liber Ruber* is the Collection of Anglo-Saxon Laws known as *Leges Henrici I.* c. lxx. § 20.

suffice, and then it would resemble a banner; but it is displayed on the one side to show the issue of male ancestors, and on the other to show the issue of female ancestors.

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## CHAPTER IV.

*Of the proceedings in a Plea of Right before the Court Baron and County Court, and of its removal into the Royal Court.*

1. Writs of right patent ought to be brought in the courts of the lords of whom the plaintiffs claim to hold; and therefore if they are brought or purchased in any other courts than those of the chief lords the fees, such chief lords shall have their courts out of our court, as soon as they make demand thereof, and can prove the fees to be theirs; *and the writs and proceedings shall fall to the ground, and the plaintiffs shall remain in our mercy.

2. The plaintiff, having purchased his writ, ought to carry, and show it to him to whom the mandate is directed; and he forthwith, without demanding pledges to prosecute, is bound to appoint him a day at his first court, which ought to be within three weeks, upon the same fee; and the writ should be produced and read in full court, and entered on the roll, and the tenant summoned by award of the court.

3. If the plaintiff be longer delayed, and can prove the same, as hereafter mentioned, by plaint and proof, he may by reason of such wrong, and because his lord

has failed to do him right, waive the court of his lord, and plead in the county court, whether the lord has the franchise of return of writs or not. And thus in some cases the plaint may be removed out of a court, and afterwards brought back into it again. And before proof made of default the plaint shall not be considered as in the county, but after that, and not before, a *Pone* will lie to remove it before our Justices.

4. There are many ways besides in which a cause is *removable into the county court*, as, where the lord refuses to intermeddle therein, or because he has no court, or because he has released his court by his letters patent; also for want of authority in the lord and his court, as where the tenant vouches a warrant out of his jurisdiction, *and whom he cannot compel to appear, or if the tenant cause himself to be essoined *de malo lecti* elsewhere than in the jurisdiction of his lord, or because he has not authority to send the four knights to judge of the sickness for which he is essoined, or if the tenant put himself upon the great assise, and for many other reasons. Sometimes also the plea is removable by the tenant, as where he does not hold anything of him to whom the writ is directed.

5. As to summonses and defaults and essoins in the courts of freemen, the practice ought to be according to the custom of the country; but in the demanding of view, vouching to warranty, counting by descents and resorts, defending, excepting, and joining in battle, let the same order of pleading be observed in the court of a freeman as is awarded in our court.

6. The manner of proving the lord's court false, where the lord himself or the bailiff to whom the mandate was directed, has failed to do justice, is as follows. In the first place, the plaintiff should complain to the sheriff, and produce the writ in full county court, and then, by award of the suitors, and without any security to prosecute being found, the bailiff of the hundred or some other shall be commanded that in the presence of the neighbours he go and take the oath of the plaintiff and two others, in the court of the lord, if he has a court, or at his mansion, *or if he has neither court nor mansion, then upon the land itself, that the lord has failed to do him right; for it is not sufficient to prove that the court has failed to do right, but it must be proved that he to whom the mandate is directed failed to do right, the words in the writ being, 'And if thou do it not, the sheriff shall do it.'

7. Therefore every plaintiff, before the plaint is removable into the county, ought to complain of the court to him to whom the writ is directed. And then the lord, having heard the plaint, ought straightway to see and examine the proceedings, and to hear the plaintiff in the presence of the suitors, in what point the suitors have done him wrong; and if he finds an error, he has authority to amend it, and to amerce the suitors. And if he neglects to do so, then the complaint shall be made to the sheriff.

8. When the bailiff has taken the oath of the plaintiff and his cojurors, he is straightway to cause the tenant to be summoned by two freemen terre-tenants

to appear at the next county court to answer to such a plaintiff upon a demand made against him of so much land with the appurtenances in such a vill, according to the purport of the writ; and he ought to enjoin the summoners to be at such county court to prove the summons, and also to appoint the plaintiff the same day to prosecute his plaint. When the sheriff, or any deputy of the sheriff in a county or franchise, fails to do right to the plaintiff, if he farms his office, he is punishable *by imprisonment and fine as a despiser of our mandate; and if he be sheriff in fee, he hath deserved, if convicted, to lose the franchise, and to make satisfaction to the plaintiff for his damages.

9. When the plaint is thus adjourned into the county, if the lord of the fee comes into court and complains of plaintiff, and offers to show and instruct the court that the plaintiff has misinformed the sheriff and the county, and that he himself never failed in doing right, whatever his court may have done, he shall be heard, provided he comes before any essoin is adjourned in the county either for the plaintiff or for the tenant. But if he waits till an essoin is entered, allowed, and adjourned, and the plea has been so long in the county, that upon the arrival of the *Pone* the least spark of a proceeding in the county court can be discerned, the lord of the fee cannot afterwards insist upon his jurisdiction.[1] If the sheriff maliciously return that there

[1] It may be seen from the above, that although the jurisdiction of the lord was in theory maintained, the utmost facility was afforded for evading it. And it was found that in practice most

is no plaint in the county court according to the tenor of the *Pone*, yet the *Pone* shall not be lost, if by the dates of the writ patent and of the *Pone* it may be presumed in favour of the plaintiff that the plaint may have been in the county; and afterwards the plea shall take its course according to its nature.

10. At the day of the summons at the county court the parties may be essoined, and to him who shall be essoined another day shall be given by his essoiner at the next county court. At which day the person who before appeared may cause himself to be essoined, and so after each appearance, though it happen a thousand times, *except in special cases, as will appear in the chapter of essoins *de malo veniendi*. If the plaintiff makes default, and the tenant appears, let it be awarded that the tenant go without day, and that the plaintiff take nothing by his writ, but remain in our mercy, that is, if the default before view; but if default be made after view, let it be awarded that the tenant remain in his seisin quit of the plaintiff and his heirs for ever after, and the plaintiff be in mercy. And if both make default, then one default may be set against the other, the tenant not having had judgment to depart without day.

11. If the tenant makes default, and the summons is

lords were contented to waive their jurisdiction respecting the title to land, for an important reason, which we learn from Hengham, namely, that little or no profit accrued to the lord from holding such pleas in his court. Hengham Magna, c. 3. p. 11.

witnessed by the summoners, it shall be awarded, when the default is before appearance, that the land demanded be taken into our hand according to the terms of the great *Cape*, or otherwise according to the usage of the place. So likewise, where the tenant makes default at the first county court, if the bailiff with the summoners attest the summons; and this summons the tenant cannot defend by his law; and thus the bailiff, with the testimony of summoners, bears record of summonses. And if the tenant makes default after default, judgment shall be immediately given for the plaintiff, saving to the tenant his right to recover when he thinks good. *In like manner it shall be, if the tenant does not within fifteen days replevy the land taken into our hands, unless the case is affected by deceit. What is here wanting upon the subject of defaults in general shall be more particularly supplied hereafter.[1]

12. When the parties have appeared in court, and the plaintiff has counted his count against the tenant, and the tenant has defended the wrong by proper words of defence, then he may vouch to warranty, if he has any one to vouch, and if the warrant does not live within the distress of the sheriff of that county, then the voucher must be aided by the following writ directed

[1] The further explanation of the law of defaults here promised is not found in the treatise as it now exists. The same observation applies to the description of trial by battle referred to in s. 14. See the Editor's Introduction, p. xlv. The subject of defaults is more fully treated in Bracton, f. 364 *b*–380; Fleta, p. 395–400.

to the sheriff of that county where the warrant has his land. 'Command such an one that he warrant to such an one so much land with the appurtenances in such a vill; and that, if he does not do it, he be at the first assises when the Justices make their eyre in those parts to show why he has not warranted.'

13. If the vouchee will thereupon enter into warranty in the county, it is well; if not, let the plaint stand over to the eyre, if it be not first removed before our Justices. For in such case the county court will have no authority to proceed further in the action. And when the plea of warranty is tried before our Justices in eyre, then they may either determine the principal plea themselves, or send it to be determined in the county. *But if the plea be in the meantime removed before our Justices, then the adjournment in eyre is annulled, and the tenant shall vouch to warranty again in the plea of *Pone*. Where the warrant is under the age of twenty-one years, and comes into court to prove his age, the principal plea and the plea of warranty also before the Justices in eyre, are suspended until the warrant is of age.

14. If the tenant defends himself by battle, the proceedings shall be as hereafter mentioned. If by the great assise, then let a day be given at the next county court, and let the tenant in the meantime obtain a letter from the Chancery; and by his own mouth he is required to say that he is tenant, and by what words he has put himself on the great assise;[1] he shall then have a writ

[1] The text of this sentence, either from corruption or other-

to the sheriff to cause the plea to cease until the eyre, which writ shall be enrolled by way of precaution, on account of the attachment which follows, if the sheriff refuses to cease thereupon. And when the tenant has purchased this writ, then let the plaintiff sue out another writ to the sheriff to cause the great assise to be summoned against the coming of the Justices for the hearing of all pleas. If the tenant has omitted to obtain the prohibition aforesaid, then at the next county court, or at the day given to the essoiner of the tenant, the plaintiff shall recover seisin of his demand by the default of the tenant.

15. Actions are removed out of the county court in several ways; sometimes at the instance of the plaintiff, and this may be without assigning any cause; *and sometimes at the request of the tenant; but this ought not to be done without affirmation of the cause in the body of the writ of *Pone*, which cause ought not to be allowed before it has been tried in full county by the oath of the tenant with two cojurors.[1]

wise, is somewhat dislocated. I have restored it in the translation to what appears to have been the proper order. See Bracton, f. 331; Fleta, p. 377.

[1] The reason for making this difference between the plaintiff and the tenant seems to have been, that while the latter might desire to remove the cause for the purpose of delay, the former could have no interest in so doing. (Hengham Magna, c. iv. p. 14.) The cause assigned by the tenant might be a connexion between the sheriff and the plaintiff, or the predominating influence of the latter in the county, or that the tenant was abroad, or too infirm to attend the county court. (Bracton, f. 332 *b*; Hengham Magna, c. iv. p. 14.)

16. If the cause be removed before our Justices at the request of the tenant, and he makes default upon the first day, and the plaintiff proffers himself and demands judgment of the default, the plaintiff shall recover seisin of his demand, and the tenant remain in mercy. And if the cause is removed out of the county at the instance of the plaintiff, and he makes default on the first day, and the tenant is essoined, and his essoiner leaves the court, having judgment to go without day, although the plaintiff keeps by him the writ patent, if he brings a fresh *Pone* to remove the plaint out of the county, this new writ will be of no avail, but must be returned in this manner, that no plaint is depending in the county court according to the tenor of the writ, inasmuch as by another like writ it was removed out of the county before the Justices. And thus all the plea will have to be begun afresh, but not by the same writ.

17. Sometimes the action is by necessity moved out of the county court at the instance of the plaintiff, as, where the tenant is privileged, as the Templars, Hospitallers, and others are, *who have this franchise by royal charters, that they need not to answer any plea elsewhere than before our Justices. If nevertheless they have anywhere entered upon their answer, they cannot afterwards change their minds or withdraw. Sometimes also of necessity, when the county court has no authority to proceed further in the plea, as where bastardy is alleged, or marriage is denied, or in other cases to the cognizance of which the jurisdiction of the county does not extend. Sometimes also the plea is

removed on account of the folly of the suitors of the county, as where battle is awarded and joined contrary to the common law and the common usages of this realm. Sometimes also by reason of the difficulty of judgment, and for many other causes. The petty writ of right, which contains the clause, 'according to the custom of the manor,' and which was provided in favour of sokemen, is never removable before the Justices.

## CHAPTER V.

### *Of Summons in a Plea of Right.*

1. The plaint being thus removed into the great court at the instance of the plaintiff, the tenant must be summoned to be there at a certain day to answer the plaintiff according to the form of the plaint. There is summons, after-summons, and resummons. And there is also a precept which is not properly a *summons, as where we should command any one to come, or command the sheriff to cause him to come, or that he have or attach such an one, or cause him to know that he be on such a day in such a place. But of proper summonses, some are general and some special. A general summons is one which concerns an entire community, as the common summons in eyre, which is solemnly proclaimed throughout cities, boroughs, and markets, and in other like cases. Such summonses no single person can deny or defend by his law. Special

summons is, for example, where summons is made upon a certain plea to certain persons. And so possibly one essoin might lie for both summonses; as if any one who is impleaded has his day of plea on the first day of the eyre, and he causes himself to be essoined, the essoin will excuse his absence as well for the general as the special summons.

2. All persons ought not to be summoned. For an infant under age is not capable of receiving any summons except through his guardian; nor a person detained in prison, although he may cause a summons to be made without guardian; nor a madman, nor one otherwise deprived of sense, as an idiot; nor deaf and dumb persons; nor married women without their husbands; nor a canon removable without the dean *and chapter, nor other persons in religion removable without the abbot or their prior.[1]

3. When any one then is to be lawfully summoned, wherever he be found in the county where the demand is made, he may be reasonably summoned in his proper person by two freemen terre-tenants of the county. For no one is obliged to receive a summons out of the

[1] The word 'removable' appears to be applied to the officers of a religious house holding office during the pleasure of their superior. See l. i. c. 29. s. 6, and note there, vol. i. p. 159. The parallel passage in Bracton points to the existence in some cases of an irremovable officer charged with the duty of representing the religious foundation in court. 'Item viri religiosi' [summoneri debent] 'per procuratores sindicos et actores perpetuos et non amotibiles, et qui tales sint, quod possint lucrari et perdere et rem in judicium deducere.' Bracton, f. 336 b.

precinct of the county, unless from the mouth of a Justice himself. And if he is not found, then it is sufficient to make the summons at his house, so that he may be informed thereof when he returns. And if the tenant has several houses, let it be made at that which is upon the land demanded, if he be resident there, or has any family there who can inform him of the summons. And if no land is demanded, let it be made at that house where he chiefly resides; and if he has no house in the county, then it is sufficient to make the summons in the fee where he is distrainable, with a great number of neighbours for witnesses.

4. When any person is to be reasonably summoned, he ought to have fifteen days at least to prepare his defence. If less time is given, and the person summoned chooses to challenge the summons, it is of no force; but the summoners ought to be in mercy, if they are convicted of their unreasonable summons. Yet there are some causes which are so favoured, that reasonable summons is not required in them, as in causes touching ourselves or our kindred, ambassadors from foreign countries, merchants, and crusaders. So likewise in our eyres, or in the eyre of *our Justices, and in disseisins, intrusions, abatements, and fresh force. Nevertheless if any one after such unreasonable summons causes himself to be essoined, or appears without challenging the summons, or if he accepts a day of grace, he cannot afterwards challenge the summons as unreasonable. When the tenant has thus been reasonably summoned, he may not from that time absent

himself out of the realm or elsewhere, though he afterwards procure our letters of protection; but the plaintiff shall recover his demand, unless the plea be defended by the tenant or his attorney.

5. In every summons it is proper to have the warrant or transcript sealed with his known seal,[1] so that the tenant may know before what judge he is summoned, and may be able to arm himself with exceptions against the action of the plaintiff; otherwise such summons shall be unreasonable and of no effect, and the tenant, upon challenging the summons, must be summoned again either by the Justice in court or else by summoners. It is said, before what judge, because one is not obliged to appear before every one who pretends to be a judge; for no one can have authority to cause any to be summoned except from us; and though he should have authority from some Justice, that is of no value, because a Justice, cannot make another *Justice, nor authorize any person to bear record or pass judgment without warrant from us. And it is a general rule of law that no one shall be affected by a judgment pronounced by one who is not truly his judge. When any one therefore has had a reasonable summons to appear before a person who has power

[1] The written warrant for summons is not mentioned in Bracton; and in Fleta, although the warrant is mentioned, there is no notice of its bearing any seal. The seal required would appear to be the seal of the sheriff of the county where the appearance was to be, whether in the county court or before the Justices Itinerant.

and authority of judging from us, it is his duty to appear accordingly.

6. And because it may happen that the blame ought to fall upon the sheriff, it is proper to know who is in fault, whether the sheriff or the summoners; and if it be found that the sheriff did not direct any one to make the summons, let him be punished for his neglect, unless he has a reasonable excuse, as that the plaintiff did not find any security to prosecute his plaint, or that the writ came so late that he could not execute it, or that he received the writ out of his county, and before it came to him he was obliged by such a precept to go elsewhere into some distant place; and by many other reasons the sheriff may reasonably excuse himself. And if the day contained in the writ is passed, then the plaintiff must purchase a new writ. So likewise where the summoners did not execute the summons, although they were enjoined to do so. This fact the summoners may defend by their law, although the sheriff brings suit to prove it.[1]

[1] This is probably not to be understood of the case where the summons was publicly ordered in the county court; in which case, according to Glanvill, Bracton, and Fleta, the suitors bore record, which could not be contradicted by the summoners. Possibly the practice of ordering summons in the county court, which in the time of Glanvill was the regular course, had now become unusual. See Glanvill, li. 1. c. 30; Bracton, f. 336; Fleta, p. 380.

## *CHAPTER V

### *Of Essoins.*

1. No person ought to depart unpunished after he has been reasonably summoned, and does not think fit to appear in court, unless upon some reasonable excuse, whence essoins arise, as the service of God, or of ourselves, accusation of crime, sickness, force. Service of God, such as pilgrimage, which ought to be an important excuse, and favoured according to the nature of it, provided that no summons arrived before the journey. Our service, as where a man is in our forces for the defence of us, our people, or our realm. Accousation of crime, for if any person be indicted or appealed of life and limb, he is never obliged to answer in a matter involving loss of land or of chattels, until he has defended himself in the more weighty matter. Sickness, as in the case of those who put themselves in motion towards the court, and are seized with sickness by the way. Force, as in the case of those who are hindered by imprisonment, or by robbers or other enemies on the road, or the breaking of bridges or other passages, storms, or want of boats or ships.

2. If any one therefore desires to excuse his absence, let him presently send some excuser, who may relate in court the impediment as it has occurred. And if

the latter does not cause the *excuse to be entered on the same day as is specified in the writ, or as was before given to the party in court, the excuse will not afterwards be allowed. Such excuses are called essoins, and the excusers essoiners.

3. However the essoin is enrolled, the purport ought to be as follows: 'John, the essoiner of Peter, came the first day, and showed, that whereas Peter his master was summoned to be in this court on this day to answer to Robert of a plea of land, the same Peter, before any summons was made to him, had set out from his house on a pilgrimage in the service of the Heavenly King towards parts beyond sea to that holy sepulchre at Jerusalem, in a general passage with other crusaders,' if there was a general passage at that time, or else, 'on an ordinary passage;' or, 'before any summons was made upon him, he went upon the king's service, in pursuance of a precept in that behalf as upon a service due for his land.' In the above form he may cause himself to be essoined of the service of the Heavenly or Earthly King. Or thus: 'such a sickness overtook him in journeying towards this court, that he could not come forward to gain or lose, but had himself carried back to his own home or elsewhere.' Or, 'such other hindrance came upon him by the way, that he could not proceed to gain or lose;' and thus he excuses himself by way of essoin *de malo veniendi;* and therefore the essoiner ought to tender averment.

*4. But because the proof of the essoin is the business of his master and not of the essoiner, and because it is

not yet ascertained whether he is a true or a false messenger, or whether his master will acknowledge him or not, it is customary for the essoiners of rich and powerful persons, as earls, barons, and all others holding by barony, to find pledges to produce their lords at the day appointed, so that such essoiners may not escape unpunished, if they are not warranted in their message. But inasmuch as this would be oppressive if it were done with the essoiners of poor people, it is permitted, out of favour to such persons, that the essoiners of all other sorts of people do promise only, without more, to produce their warrants at the day appointed.

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## CHAPTER VII.

### *Of the Essoin* de ultra mare.

1. Essoins are briefly divided into essoins *de malo veniendi* and essoins *de malo lecti*. But the first division is again divided into those *de ultra mare* and those *de citra mare*. And of those *de ultra mare*, some are beyond the Grecian sea, and some simply beyond sea, as at Rome or at Saint James. *And of those beyond the Grecian sea, some are in a simple pilgrimage to the sepulchre of Jerusalem, others to the same place in a general pilgrimage.

2. In essoins *de citra mare* the impediment sometimes arises from sickness, and sometimes from other hindrances. And of those from sickness, some arise from sickness overtaking the party on the road, and some from disease, which is called *malum lecti*, and

some from an illness coming on in the town where the court is held. Of other impediments, some arise from the senses, as in cases of idiots, persons deaf and dumb, and others who are not of sufficient capacity to receive a summons ; some arise from hindrances of imprisonment, or of roads ; some from the service of the earthly king ; and from accusation of felony.

3. In the essoin beyond the Grecian sea in a general pilgrimage, it must be observed whether there has been within the year a general passage of any Christian king, or other person sent by the Pope with a great host of Christians ; for then this essoin is allowable, and the plea will stand over without day, out of favour for the pilgrims of God, on account of the privilege of those who have taken the cross, until the return or death of the pilgrim. There are some however who obtain our letters patent of protection to be in force for one, two, or three years, and who nevertheless by virtue of our letters patent do also make general attorneys ; and such persons do well and wisely. *For no great lord or knight of our realm ought to travel forth of it without our licence, since by that means the kingdom might be left destitute of able persons ; and such letters ought to be presently shown in full county or hundred court, or at public places. And if there has not been any general passage to the Holy Land within the year, then let this essoin be turned into the essoin beyond the Grecian sea to the Holy Land in simple pilgrimage. This essoin is the first of all the essoins ; for if it be cast after any

of the others, it will, from its nature, never be allowed.

4. In the essoin beyond the Grecian sea in simple pilgrimage the term of a year and a day is to be granted. And if the essoiner sees that he cannot be warranted at the end of the year, then again the essoin *de ultra mare* simply shall take place, which signifies a common pilgrimage to Rome or Saint James ; and such essoin shall be allowed, and the adjournment shall be for the period of forty days, and one flood, and one ebb of the sea. And if the essoiner perceives that his master does not come to warrant him, then again the essoin *de malo veniendi* shall lie, in which a term of fifteen days at least ought to be given. *And if he is still prevented from appearing by sickness, then a distinction must be made, whether he lies sick on his road, or in the town where the court is held, for if on the road,[1] this gives rise to an essoin *de malo lecti ;* and this essoin must be made by two messengers or friends, and not by essoiners, as shall be hereafter mentioned. If he lies in the town where the Court is, then the essoin *de malo villæ* takes place, as shall be noticed in its turn. And if the essoinee does not then appear to warrant the essoiner, then and not before the land is to be taken into our hand by way of distress, unless we have received his possessions under our protection by our letters patent, which suspend all pleas but four.[1]

I should prefer to read *a sa masoun*, ' at home,' here and in the line above ; but I find no authority for it.

[2] Five kinds of actions are mentioned in Fleta as not being

5. The manner of entering essoins is as follows: 'John, who is gone over in a general passage of pilgrims to the Holy Land, against Peter, of a plea of land, by such an one.' And if in a simple pilgrimage, then thus: 'John, who is gone in a pilgrimage to the Holy Land, against Peter, of a plea of land, by such an one.' And if in a more ordinary pilgrimage, then thus: 'John, who is gone across the sea in a pilgrimage, against Peter, of a plea of land, by such an one,' whether it be the sea of France, Ireland, or Scotland, which he has crossed. If it be an essoin *de malo veniendi*, whatever the hindrance be, whether *sickness, imprisonment, hindrance of passage, or other, then thus: 'John against Peter, of a plea of land, by such an one.'

6. If several holding in common by one title are essoined, then let the essoin be entered according as they please, either thus, 'John against Peter and' the others named in the writ, or against each person severally. Nevertheless they may be all essoined by one essoiner. And if part cause themselves to be essoined and part not, then it will be necessary to mention the names of those who are essoined, and take no notice of the others who are not essoined, as thus: 'John and the

stayed by letters of protection, namely, the assises of novel disseisin, mortdancester, and last presentation, and the actions of *quare impedit* and dower *unde nihil habet*. (Fleta, p. 383. § 2). A note in MS. *Z* mentions the same actions, omitting the assise of mortdancester, and adding plaints commenced before Justices in eyre.

others named in the writ against Peter, or against P. M. and R.' But it is otherwise with the essoins of several persons holding by different rights although they hold or demand in common. For in such cases the entry must be thus: 'John against Peter, Thomas, and Simon, of such a plea, by such an one;' or thus: 'Peter against John, Thomas against John,' and so severally of all the rest; and in that case every tenant who causes himself to be essoined must have a separate essoiner.

## CHAPTER VIII.

### *Of the Essoin founded on the King's Service.*

The essoin *de servitio regis* may be received at any period in those cases where it is allowable; for it is in some cases allowable, and in some not. It is never to be allowed in any of the four petty assises, nor in a plea of dower where a widow complains that she has nothing of her dower, nor in attaints, *nor in certifications, nor in any plea where the plaintiff is under age. Neither does it lie for any person who does not serve us in chief, although he performs his service to some one belonging to us; nor is it to be allowed to those who do service to us, unless they are with us by our command in order to perform the service to which they are bound by reason of some tenement. To such persons our Chancellor ought to grant a writ to warrant their essoiners, and excuse their absence, so long as they

continue with us in such services; and if any writ be otherwise granted, we will that such writs be impeached and held bad.

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## CHAPTER IX.

### *Of the Essoin* de Malo veniendi.

Neither the essoin *de malo veniendi* nor any other essoin lies for any person under age, because an infant cannot warrant any essoiner. For warranty of essoin is nothing else but swearing upon the evangelists that the cause of his absence was true, according as he was essoined at the former day. Neither does it lie in an accusation of felony; nor in the person of disseisors or redisseisors; nor for those impleaded of hamsoken, or of fresh force, or of abatement; nor in pleas *de vetito namio* in the person of the defendants; *nor for such as are let by bail to be answered for by others, body for body; nor in the persons of those whom the sheriff is commanded to cause to come, or to cause to know that they be there if they will; nor of those who have made attorneys in court, unless the attorneys be also essoined; nor for one attorney, where two have been made in one plea with several powers, unless both be essoined; neither does the essoin lie where the adverse parties are dead, or have not pursued their writs or plaints, or where the writ does not agree with the essoin;[1] nor

[1] This appears to be mistaken rendering of the words of Bracton, ubi breve non convenit petitioni. The meaning in Bracton

in those cases where the sheriff is commanded to distrain by land and chattels; nor where the parties are adjourned from one day to the next; nor where they have agreed to come without essoin; nor after day of grace given by consent; nor where the plea is suspended for default of jurors, except for the defendant, and that only once; nor where the party essoined, or his attorney, hath been seen in court in the meantime before the adjournment of the essoin, and the Justices have taken notice thereof; neither does an essoin ever lie immediately after default, unless by consent.

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## *CHAPTER X.

### *Of Attorneys.*

1. Attorneys cannot be made by every one; for an infant under age, a deaf and dumb person, an idiot, a man simply mad or otherwise without discretion, a person accused of felony, or any one who is forbidden by us to do so, or a leper expelled from society, cannot make an attorney.

2. Of attorneys, some are general and some special. General attorneys are made in two ways, that is to say, either by our letters patent, or by appointment of parties before Justices in eyre. Those attorneys who are made by our letters patent have sometimes more

seems to be, that when the whole proceeding is void, as where the plaintiff has not obtained a writ suitable to his plaint, the essoin is null. See Bracton, f. 341; Fleta, p. 384 (§ 4), 385 (§ 6).

authority than other general attorneys, because they have sometimes the power granted them to attorn others in their place. All general attorneys may levy fines and make chirographs, and final accords in all pleas as fully as those whose attorneys they are. This cannot be done by special attorneys; for as soon as parties are at accord in any sort of plea, that proceeding is at an end; and if any question is to be made upon the accord, thereupon begins another sort of plea, and of another nature. And though one be made attorney in the existing proceeding, he is not thereby made attorney in the future proceeding, unless he be made general attorney in all pleas commenced and to be commenced.

*3. No one can admit persons as attorneys by our letters patent, except us and our Chancellor. Neither ought other general attorneys to be admitted save before our Justices in eyres and in full court. Special attorneys cannot be admitted except by us or our Chancellor, or other person whom we may especially assign by our writ in that behalf, or the Judges in full court, whoever they be, sheriffs, or freemen, before whom the party is bound to plead by our writ. Where the proceeding is commenced without our writ, a court of suitors cannot bear record of attorney; and therefore no attorney can be admitted in such a court without our writ, except where the proceeding is commenced by writ. The four knights, who are sent to the sick persons in essoins *de malo lecti* and *de malo villæ*, can also admit attorneys. If any person offers himself as attorney for us, or for any other, in any of the

aforesaid cases, and being challenged by the adverse party, is not admitted as attorney, such person may be committed to prison. And when any one has been thus made attorney, he cannot retire pending the proceeding without the consent of his client.

4. When two or more are made attorneys disjunctively, whether they be made general or special attorneys, *although each has the power of his master, yet the essoin of one attorney will be invalid, unless all the attorneys be essoined, on account of the fraud which might be practised by the attorney who is not essoined, after the adverse party has had a day given him as against the essoiner of the other attorney, and has thereupon left the court. So, when any one has made an attorney, and has then appeared in court and pleaded, and had another day given him in his own person, it is not sufficient at the next day that he alone should be essoined, because there is an attorney; nor that the attorney alone should be essoined, because it was not the attorney that had day given him. It is therefore safer for both to be essoined.

5. When any has made a special attorney against a certain person tenant, and the tenant vouches to warranty, the attorney does not keep his place as against the warrant, but the plaintiff should make a new attorney in the plea of warranty, or else he will lose his writ, if the warrant take the objection, as will be said of husband and wife plaintiffs, in the chapter upon warranties,[1]

[1] This is another reference to a future chapter either never supplied or lost. The same chapter is referred to before, li. iii.

and the attorney would in such a case be liable to be committed to prison. So likewise in all cases where any one offers himself for attorney, who was so made before any proceeding existed for which he was made attorney, as where the attorney was appointed before the *writ was delivered to the sheriff, or before any summons was made. For before summons, or something equivalent to it, the proceeding is not begun. So, where the sheriff merely informs a person that he is to appear in court on such a day, if he think proper to do so, if any one offers himself as the attorney of such person before he has appeared in court, the attorney is liable to challenge. So also is he who offers himself as attorney of one not named in the writ or the principal plaint, before the party whose attorney he represents himself to be has appeared in court; as where people have purchased tenements after the writs have been sued out against their feoffors, and have friends in court, who put themselves forward as attorneys of the tenants, to make a defence against the right of plaintiffs,—in such case the attorneys are liable to challenge, whether they have warrant or no; for before such tenants have appeared in court in their own persons, they will not be allowed an attorney. And in our court, however the practice may be in the law Christian, such attorneys are challengeable as offer themselves to make their law for their masters, or to swear upon their souls. So also in all cases where any

c. 11. s. 2. The point intended to be mentioned may be found in Bracton, f. 381; Fleta, p. 408 (§ 9).

one offers himself as attorney in the plea of *Pone*, having been appointed before the *Pone* was sued out.

6. If any attorney dies pending the plea, a distinction is to be made, whether he whose attorney he was is gone across the sea or not. For if he be not in England, —or not in Ireland, supposing the plea to be there,— the action may be suspended without day until his return.[1]

[1] It is plain from the above abrupt conclusion, as well as from the references, occurring in several parts of the work, to future passages and chapters which are not found in the existing treatise, that Britton in its present form is incomplete. See before, vol. i. p. 108; vol. ii. pp. 411, 414, 612. The few additional lines, which are found in two manuscripts of no great authority, do not appear to me to be a part of the original work, which, if continued, would probably have consisted of several more chapters following the arrangement of the latter part of Bracton and Fleta. See the Editor's Introduction, p. xlv.