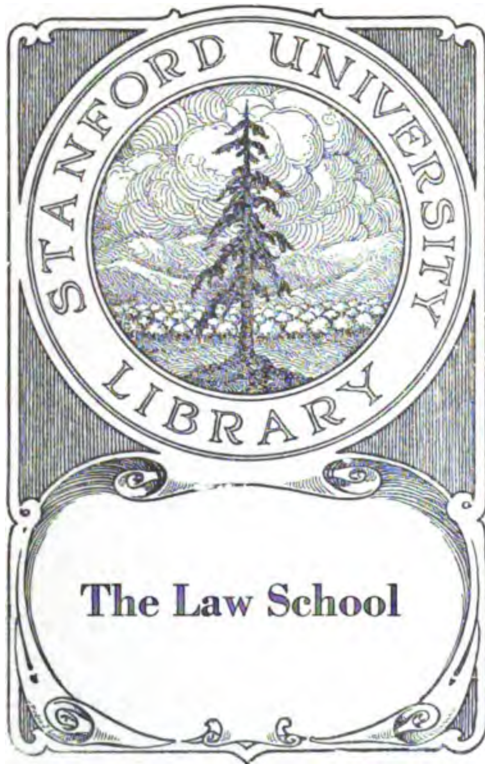
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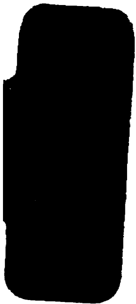

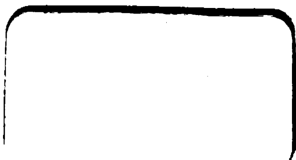

THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND.

IN THREE VOLUMES.

VOL. II.

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THE FIRST PART OF THE Institutes of the Laws of England;

OR, A COMMENTARY upon LITTLETON:

Not the NAME of the AUTHOR only, but of the LAW itself.

Quid te vana juvant miseræ ludibria chartæ?
Hoc lege, quod possis dicere jure meum est. MART.

Major hæreditas venit unicuique nostrum à jure et legibus, quàm à parentibus. CICERO.

Hæc ego grandævus posui tibi, candide lector,

Authore EDWARDO COKE, MILITE.

The FIFTEENTH EDITION;

Revised and Corrected, with further Additions of NOTES, REFERENCES, and PROPER TABLES.

BY FRANCIS HARGRAVE AND CHARLES BUTLER,

ESQUIRES, OF LINCOLN'S-INN.

Including also the NOTES of Lord Chief Justice HALE and Lord Chancellor NOTTINGHAM:

AND

An ANALYSIS of LITTLETON, written by an Unknown Hand in 1658-9.

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THE

FIRST PART

OF THE

INSTITUTES

OF THE

LAWS OF ENGLAND.

LIB. III. CHAP. 5. Of Estates upon Condition. Sect. (1) 325.

*ESTATES que homes ount en terres ou tenements * sur condition † sont de deux maners*, scilicet, *‡ ou ils ont estate sur condition en fait, ou sur condition en ley, ‖ &c. Sur condition en fait est, sicome un home per fait endent enfeoffa un auter en fee § simple, reservant a luy et a ses heires annualment certaine rent payable a un feast ou a divers feasts per an, sur condition que si le rent soit aderere, &c. que bien list al feoffor et a ces heires en mesmes les terres ou tenements de entrer, &c. Ou si terre soit alien a un home en fee rendant a luy certaine rent, &c. et s'il happa que le rent soit aderere per un semaigne apres ascun jour de payment de ceo, ou per un mois apres ascun jour de payment de ceo, ou per ** un demy, &c. que adonques bien lirroit a le feoffor et a les heires d'entrer, &c. ‡‡ En*

ESTATES which men have in lands or tenements upon condition are of two sorts, viz. either they have estate upon condition in deed, or upon condition in law, &c. Upon condition in deed is, as if a man by deed indented enfeoffes another in fee simple, reserving to him and his heires yearely a certaine rent payable at one feast or divers feasts *per annum*, on condition that if the rent be behind, &c. that it shall bee lawfull for the feoffor and his heires into the same lands or tenements to enter, &c. And if it happen the rent to be behind by a week after any day of payment of it, or by a moneth after any day of payment of it, or by halfe a yeare, &c. that then it shall be lawfull to the feoffor and his heires to enter, &c. In these cases if the rent be not paid at such

(1) [See Note 84.]
* *sur condition* not in L. and M. nor Roh.
† *de—en* in L. and M. and Roh.
‡ *ou* not in L. and M. nor Roh.
‖ *&c.* not in L. and M. nor Roh.
§ *simple* not in L. and M. nor Roh.
** *un—demy* not in L. and M. nor Roh.
‡‡ *Et* added in L. and M. and Roh.

En ceux cases si le rent ne soit paie a tiel temps ou devant tiel temps limit et specifie deins le condition comprises en l'endenture, donques poit le feoffor ou ses heires entrer en tielx terres ou tenements, et eux en son primer estate aver et tener, et de ceo ouste le feoffee tout net. Et est appelle estate sur condition, pur ceo que le state le feoffee est defeasible, si le condition ne soit performe, &c.

such time or before such time limited and specified within the condition comprised in the indenture, then may the feoffor or his heires enter into such lands or tenements, and them in his former estate to have and hold, and the feoffee quite to ouste thereof. And it is called an estate upon condition, because that the state of the feoffee is defeasible, if the condition bee not performed, &c.

Glanvil. lib 10. cap. 8. Bracton lib. 2. cap. 5, 6, 7, &c. lib. 4. fol. 213. Brit. cap. 36. & fol. 89. 99. 114. 130. 205, 206, 207. 249. Fleta lib. 3. cap. 9. & lib. 5. ca. 5. Mirr. cap. 2. sect. 15. & 17.

"SUR condition." *Littleton* having before spoken of estates absolute, now beginneth to intreate of estates upon condition. And a condition annexed to the realtie, whereof *Littleton* here speaketh in the legall understanding, *est modus*, a qualitie annexed by him that hath estate, interest, or right, to the same, whereby an estate, &c. may either be defeated, or enlarged, or created upon an incertaine event. *Conditio dicitur cùm quid in casum incertum qui potest tendere ad esse aut non esse confertur.*

"*Sur condition en fait,*" *quae est facti*, that is, upon a condition expressed by the partie in legall termes of law.

(Plow. 23. a. 1. Roll. Abr. 420. 2. Rep. 79.)

"*Ou sur condition en ley, &c.*" *quae est juris*, that is, *tacitè* created by law without any words used by the partie. Againe, *Littleton* subdivideth conditions in deed (though not in expresse words) into conditions precedent (of which it is said, *Conditio adimpleri debet priusquam sequatur effectus*) and conditions subsequent. Againe, of conditions in deed some be affirmative, and some in the negative; and some in the affirmative, which imply a negative: some make the estate, whereunto they are annexed, voydable by entrie or clayme, and some make the estate void *ipso facto*, without entrie or claime.

[201. b.]

Also of conditions in deed, some bee annexed to the rent reserved out of the land, and some to collaterall acts, &c. some be single, some in the conjunctive, some in the disjunctive, as shall evidently appeare in this Chapter, where the examples of these divisions shall be explained in their proper place.

Mir. cap. 2. sect. 15. & 17.

"*En ley, &c.*" Of conditions in law more shall be said hereafter in this Chapter.

"*Sur condition en fait est, sicome un home per fait indent, &c.*" Here *Littleton* putteth one example of sixe severall kinds of conditions. That is, first, of a single condition in deed. Secondly, of a condition subsequent to the estate. Thirdly, a condition annexed to the rent, &c. Fourthly, a condition that defeateth the estate. Fifthly, A condition that defeateth not the estate before an entrie. And lastly, a condition in the affirmative, which implieth a negative, (as behind or unpaid implieth a negative) viz. not paid. All which doe appeare by the expresse words of *Littleton*.

"*Rend' a luy certaine rent, &c.*" Here by this (&c.) is implyed for life, in taile, or in fee.

"*Et*

"*Et en cest case si le rent ne soit pay a tiel temps, &c. donques poet le feoffor ou ses heires entrer, &c.*" By this Section, and by the (&c.) therein contained, sixe things are to be understood.

First, Where our author saith, *si le rent soit arere*, that though the rent be behind and not paid [b], yet if the feoffor doth not demand the same, &c. he shall never re-enter (1), because the land is the principall debtor; for the rent issueth out of the land, and in an assise for the rent the land shall be put in view; and if the land be evicted by a title paramount, the rent is avoyded, and after such eviction the person of the feoffee shall not be charged therewith, for the person of the feoffee was only charged with the rent in respect of the grant out of the land.

[b] 40. Ass. 11. 20. H. 6. 30, 31. 6. H. 7. 7. 19. H. 6. 76. 20. H. 6. 32. 22. H. 6. 46. Pl Com. Kidwely's case fo. 70. & Hill and Grange's case fol. 73.

Secondly, The demand must be made upon the land, because the land is the debtor, and that is the place of demand appointed by law (2).

(Noy 23. 1. Roll. Abr. 459, 460. Perk. sect. 827. Noy 23.)

If the king maketh a lease for yeares, rendring a rent payable at his receipt at *Westminster*, and after the king granteth the reversion to another and his heires, the grantee shall demand the rent upon the land, and not at the king's receipt at *Westminster*; for as the law without expresse words doth appoint the lessee in the king's case to pay it at the king's receipt, so in case of a subject, the law appoints the demand to be on the land (3).

Lib. 4. fol. 72, 73. Boroughe's case.

If there be a house upon the same, he must demand the rent at the house. And he cannot demand it at the backe doore of the house but at the fore doore, because the demand must ever be made at the most notorious place. And it is not material whether any person be ther or no.

49. Ass. 5. 15. Eliz. Di. 329.

Albeit the feoffee be in the hall or other part of the house, yet the feoffor neede not [c] but come to the fore doore; for that is the place appointed by law, albeit the doore be open.

[c] Bendloes en Tresp. 4. & 5. Ph. & Mar.

[202. a.] [d] If the feoffment were made of a wood only, the demand must be made at the gate of the wood, or at some high way leading through the wood or other most notorious place. And if one place be as notorious as another, the feoffor hath election to demand it at which hee will, and albeit the feoffee be in some other part of the wood redie to pay the rent, yet that shall not availe him. *Et sic de similibus.*

[d] 15. Eliz. Dyer 329.

(Ante 145. a.)

Thirdly, And if the feoffor demand it on the ground at a place which is not most notorious, as at the backe doore of a house, &c. and in pleading the feoffor alleadge a demand of the rent generally at the house, the feoffee may traverse the demand, and upon the evidence it shall bee found for him, for that it was a void demand.

Fourthly, If the rent be reserved to be paid at any place from the land, yet it is in law a rent, and the feoffor must demand it at the place appointed by the parties, observing that which hath beene said before concerning the most notorious place.

Lib. 4. Boroughe's case fol. 73. Pl. Com. 70.

Fifthly, And all this is to be understood when the feoffee is absent; for if the feoffee commeth to the feoffor at any place upon any part of the ground at the day of payment, and offer his rent, albeit they be not at the most notorious place, nor at the last instant, the

(1) [See Note 85.]

(2) For the place of performing the condition, see Litt. Sect. 340. and the Commentary on that Section.

(3) [See Note 86.]

(Post. 211. a.)
(7. Rep. 28.)

the feoffor is bound to receive it, or else he shall not take any advantage of any demand of the rent for that day (1).

Sixtly, Therefore the place of demand being now known, it is further to be known what time the law hath appointed for the same. This partly appeareth by that which hath beene last said. For albeit the last time of demand of the rent is such a convenient time before the sunne setting of the last day of payment as the money may be numbred and received, notwithstanding, if the tender be made to him that is to receive it upon any part of the land at any time of the last day of payment, and he refuseth, the condition is saved for that time, for by the expresse reservation the money is to be paid on the day indefinitely, and convenient time before the last instant, is the uttermost time appointed by law, to the intent (2) that then both parties should meet together, the one to demand and receive, and the other to pay it, so as the one should not prevent the other. But if the parties meet upon any part of the land whatsoever on the same day, the tender shall save the condition for ever for that time.

(5. Rep. 114. b.)
(2. Cro. 423. 500.)

Lib. 5. fol. 114. Wade's case. Pl. Com. Hill. et Grange's case 167. 172. 20. H. 6. 30, 31. 6. H. 7. 3.

And if the reservation of the rent be (as here *Littleton* putteth the case) at certaine feasts, with condition that if it happen the rent to be behind by the space of a weeke after any day of payment, &c. in this case the feoffor needeth not demand it on the feast day, but the uttermost time for the demand is a convenient time (as hath beene said) before the last day of the weeke, unlesse before that the feoffee meet the feoffor upon the land and tender the rent as is aforesaid. (3)

Mich. 40. & 41. Eliz. inter Stanly & Read. Lib. 7. fo. 28. Maundes case.

If a rent be granted payable at a certaine day, and if it be behinde and demanded that the grantee shall distreine for it, in this case the grantee need not demand it at the day; but if he demand it at any time after he shall distreyne for it, for the grantee hath election in this case to demand it when he will to inable him to distreine.

8. H. 7. 7. b.

" *Et eux en son primer estate aver, &c.*" Regularly it is true that he that entreth for a condition broken shall be seised in his first estate, or of that estate which hee had at the time of the estate made upon condition, but yet this fayleth in many cases.

4. H. 6. 2. lib. 8. fo. 43, 44. Whittingham's case. 5. H. 7. 6. a. (Post. 297. b.)

1. In respect of impossibility. As if a man seised of lands in the right of his wife, maketh a feoffment in fee by deed indented, upon condition that the feoffee should demise the land to the feoffor for his life, &c. the husband dieth, the condition is broken, in this case the heire of the husband shall enter for the condition broken, but it is impossible for him to have the estate that the feoffor had at the time of the condition made: for therein he had but an estate in the right of his wife, which by the coverture was dissolved. And therefore when the heire hath entred for the condition broken, and defeated the feoffment, his estate doth vanish, and presently the state is vested in the Wife.

2. In respect of necessity. If *Cesty que use* after the statute of *R.* 3. and before the statute of 27. *H.* 8. had made a feoffment in fee upon condition, and after had entred for the condition broken; in

(1) For the difference of the demand to be made in case of a re-entry to avoid an estate, or the forfeiture of a sum *nomine pœnæ*; and of the demand to be made in case of an entry to distrain; see before 144. a.

(2) [See Note 87.]

(3) [See Note 88.]

in this case he had but an use when the feoffment was made, but now he shall be seised of the whole state of the land. So that as in the former case, the ancestor had somewhat at the making of the condition, and the heire shall have nothing when he hath entred for the condition broken, so in this case the feoffor had no estate or interest in the land at the time of the condition made, but a bare use; yet after his entrie for the condition broken he shall be seised of the whole state in the land, and that also for necessitie, for by the feoffment in fee of *Cesty que use*, the whole estate and right was devested out of the feoffees. And therfore of necessitie the feoffor must gaine the whole estate by his entrie for the condition broken.

Tenant in speciall taile hath issue, and his wife dieth, tenant in taile maketh a feoffment in fee upon condition, the issue dieth, the condition is broken, the feoffor re-enters, he shall have but an estate for life, as tenant in taile *apres possibility* of issue extinct by the re-entry, and yet he had an estate taile at the time of the feoffement, and that also for necessity. (8. Rep. 43, 44.)

3. In some cases the feoffor by his re-entry shall be in his former estate, but not in respect of some collaterall qualities. As if tenant by homage ancestrell maketh a feoffement in fee upon condition, and entreth upon the condition broken, it shall never be holden by homage ancestrell againe. And so it is if a copihold escheate and the lord make a feoffement in fee upon condition, and entreth for the condition broken. And the reason in both these cases is, for that the custome or prescription for the time is interrupted. (Ante 103. a.) [202. b.]

(1) Lord and tenant by fealty and rent, the lord is in seisin of his rent, the lord granteth his seignory to another and to his heires upon condition, the tenant attorneth and payeth his rent to the grantee, the condition is broken, the lord distreineth for his rent, and rescous is made, he shall be in his former estate, and yet the former seisin shall not enable him to have an assise without a new seisin. 15. Ass. 12. (4. Rep. 9. a.)

If tenant in taile make a feoffment in fee upon condition, and dieth, the issue in taile within age doth enter for the condition broken, he shall be first in as tenant in fee simple as heire to his father, and consequently and instantly he shall be remitted. But if the heire be of full age, he shal not be remitted, because he might have had his *formedon* against the feoffee, and the entrie for the condition is his owne act; but more shall be said hereof in his proper place in the Chapter of *Remitter*. 8. H. 7. 7. (Post. 350. b.)

If a man make a feoffment in fee of *Blacke Acre* and *White Acre* upon condition, &c. and for breach thereof that he shall enter into *Blacke Acre*, this is good. 2. H. 6. 4. (1. Roll. Abr. 412.)

If tenant for life make a feoffment in fee upon condition, and entreth for the condition broken, he shall be tenant for life againe, but subject to a forfeiture, for the state is reduced, but the forfeiture is not purged. (2) 43. Ass. 47. 13. E. 4. 4. 2. H. 5. 7. b. 39. Ass. 15. 11 H. 5. 25. 16. Ass. 47. (1. Roll. Abr. 856. Post. 252. a.)

(1) [See Note 89.] (2) [See Note 90.]

Sect. 326.

*EN mesme le manner est si terres sont dones en le taile, ou lesses a terme de vie ou * des ans, sur † condition, &c.*

IN the same manner it is if lands be given in taile, or let for terme of life or of yeares, upon condition, &c.

"*Sur condition, &c.*" This implyeth the severall kindes of conditions in deed before specified.

Sect. 327.

*MES lou feoffment est fait de certaine terres reservant certain rent, ‡ &c. sur tiel condition, que si le rent soit aderere, § que bien lirroit al feoffor et ‖ ses heires d'entrer, ** et la terre tener tanque ils soient satisfies ou payes de le rent aderere, &c. en cest case si le rent soit aderere, et le feoffor ou ses heires enter, le feoffee n'est pas exclude de ceo tout ⸸ net, mes le feoffor avera et tiendra la terre, et prendra ent les profits, tanque ⸸⸸ il soit satisfie de le rent aderere; et quant il est satisfie, donque poit le feoffee ‡† re-entrer en mesme la terre, et ceo tener ‖‖ come il tenoit adevant. Car en tiel cas le feoffor avera §§ la terre forsque en maner come pur un distres, tanque ** il soit satisfie de le rent, &c. coment †† que il prendre les profits en le meane temps ‡‡ a son use demesne, &c.*

BUT where a feoffment is made of certaine lands reserving a certaine rent, &c. upon such condition, that if the rent be behind, that it shall be lawfull for the feoffor and his heires to enter, and to hold the land untill he be satisfied or payed the rent behinde, &c. in this case if the rent be behind, and the feoffor or his heires enter, the feoffee is not altogether excluded from this, but the feoffor shall have and hold the land, and thereof take the profits, until he be satisfied of the rent behinde; and when he is satisfied, then may the feoffee re-enter into the same land, and hold it as he held it before. For in this case the feoffor shal have the land but in maner as for a distresse, until he be satisfied of the rent, &c. though he take the profits in the meane time to his owne use, &c.

Vide Sect. 332. 19 E. tit. barre 280. 19. R. 2. done rent 10. P. Com. 524. [b] 20. E. 3. tit. covenant. 3.

"*ET la terre tener tanque ils soyent satisfies ou paies de le rent aderere, &c.*" By this it is implyed, that if such a feoffment be made, reserving (*b*) (for example) 8 markes rent at the feast

* *a terme* added in L. and M. and Roh.
† *tiel* added in L. and M. and Roh.
‡ *&c.* not in L. and M.
§ *il* added in L. and M.
‖ *a* added in L. and M.
** *en la terre tenus de eux* in L. and M.
⸸ *de* added in L. and M. and Roh.
⸸⸸ *que* added in L. and M. and Roh.
‡† *re entrer—entre* in L. and M. and Roh.
‖‖ *come—coment* in L. and M. and Roh.
§§ *avera la terre—ceo aver* in L. and M. and Roh.
** *que* added in L. and M. and Roh.
†† *que* not in L. and M. nor Roh.
‡‡ *a son use demesne* not in L. and M. nor Roh.

feast of *Easter*, with such a condition as is afore said, the feoffor at the feast day demands the rent, the feoffee paieth unto him 6 markes parcell of the rent, the feoffor entreth into the lands and taketh the profits towards satisfaction. Afterwards the feoffee doth tender the two markes residue of the rent to the feoffor upon the [203. a.] land, who refuseth it. It hath beene adjudged that the feoffee upon the refusal may enter into the land; (1) for when the feoffor is satisfied either by perception of the profits or by payment or tender and refusall, or partly by the one and partly by the other, the feoffee may re-enter into the land. And this is within the words of *Littleton*, viz. (*untill he be satisfied.*) And albeit the feoffor had accepted part of his rent, yet he may enter for the condition broken, and retaine the land untill he be satisfied of the whole. All which is worthy of observation.

(Autrement in case de obligation ou debt sur contract. Doc. Pla. 109.)

" *Et en tiel case le feoffor avera la terre forsque en manner come un distresse, tanque il soit satisfie de la rent, &c.*" By this it appeareth that the feoffor by his re-entry gaineth no estate of freehold (2), but an interest by the agreement of the parties to take the profits in nature of a distresse. And therefore if a man maketh a lease for life with a reservation of a rent and such a condition, if he enter [upon] the condition broken and take the profits of the land *quousque, &c.* he shall not have an action of debt for the rent *arere*, for that the freehold of the lessee doth continue, and therefore the booke [c] that seemeth to the contrary is false printed, and the true case was of a lease for yeares, as it appeareth afterwards in the same page of the leafe.

(Sid. 223. 262. 344. Plow. 524. b.)

[c] 2. E. 3. fo. 7.

But herein also a diversity worthy the observation is implyed, viz. If a man make a lease for yeares reserving a rent with a condition that if the rent be behind, that the lessor shall re-enter and take the profits untill thereof he be satisfied, there the profits shall be accounted as parcell of the satisfaction, and during the time that he so taketh the profits he shall not have an action of debt for the rent for the satisfaction whereof he taketh the profits. But if the condition be that he shall take the profits untill the feoffor be satisfied or paid of the rent, without saying (thereof) or to the like effect, there the profits shall be accounted no part of the satisfaction but to hasten the [lessor] to pay it, and as *Littleton* here saith, that untill he be satisfied he shall take the profits in the meane time to his owne use (3).

30. E. 3. 7. Vid. semblable. 27. H. 8. 4. 43. E. 3 21. 31. Ass. Pl. 26. Vid. le statute de Merton ca. 6. and observe these words, quod inde percipere possint duplicem valorem, &c. Et c. 7. without this word (inde) (See ant. 82. b.)

(1) [See Note 91.]
(2) [See Note 92.]
(3) [See Note 93.]

Sect. 328.

ITEM, divers parolx (enter ‖ *auters) y sont, queux per vertue de eux mesmes font estates sur condition; un est le parol* §§ sub conditione: *sicome* A. *enfeoffa* B. *de certaine terre*, habendum et tenendum eidem *B.* et hæredibus suis, sub * conditione, quòd idem *B.* et hæredes sui solvant seu solvi faciant præfat' *A.* et hæredibus suis annuatim talem redditum, &c. *En cest case sans ascun pluis dire le feoffee ad estate sur condition*,

ALSO, divers words (amongst others) there be, which by vertue of themselves make estates upon condition; one is the word (*sub condic.*) as if *A.* infeoffe *B.* of certaine land, to have and to hold to the said *B.* and his heires, upon condition, that the said *B.* and his heires do pay or cause to be paid to the aforesaid *A.* and his heires yearely such a rent, &c. In this case without any more saying the feoffee hath an estate upon condition.

Sub Conditione. Marie Dyer 138. 27. H. 8. 15. 13. H. 4. Enter Cong 57. 29. Ass. 7. 33. Ass. 11. 40. Ass. 13. Bracton ubi supra. Fleta lib. 4. ca. 9. Brit. cap. 36. & ubi supra.

HERE in this and the next two Sections *Littleton* doth put four examples of words that make conditions in deed: and first *sub conditione*. This is the most expresse and proper condition in deed, and therefore our author beginneth with it.

Vid. Sect. 325.

"*Talem redditum, &c.*" This (*&c.*) implieth any other rent [203. b.] or sum in grosse, or any collaterall condition whatsoever, either to be performed by the feoffee (whereof our author here putteth his case) or by the feoffor, and extendeth to all kinds of conditions in deed, before specified.

Sect. 329.

AUXY, si les † *parols fueront tielx*, Proviso semper, quòd prædict' *B.* solvat seu solvi faciat præfato *A.* talem redditum, &c. *ou fueront tielx*, Ita quòd prædict' *B.* solvat seu solvi faciat præfato *A.* talem redditum, &c. *en ceux cases sauns pluis dire, le feoffee* ‖ *n'ad estate forsque sur condition; issint que s'il ne performast le condition, le feoffor et ses heires poyent entrer, &c.*

ALSO, if the words were such, Provided alwaies, that the aforesaid *B.* do pay or cause to be paid to the aforesaid *A.* such a rent, &c. or these, So that the said *B.* do pay or cause to be paid to the said *A.* such a rent, &c. in these cases without more saying, the feoffee hath but an estate upon condition; so as if he doth not performe the condition, the feoffor and his heires may enter, &c.

"PROVISO

‖ *les* added in L. and M. and Roh.

§§ *sub conditione—de condicion* in L. and M. and Roh.

* *istâ* added in L. and M. and Roh.

† *parols—condicions* in L. and M. and Roh.

‖ *n'ad—ad* in L. and M.

" *PROVISO semper, quòd B. solvat, &c.*"

Our author putteth his case where a *proviso* commeth alone. And so it is if a man by indenture letteth lands for yeares, provided alwaies, and it is covenanted and agreed between the said parties, that the lessee should not alien, and it was adjudged that this was a condition by force of the *proviso*, and a covenant by force of the other words (1).

Proviso. Vid. Sect. 220. Dier 28. H. 8. fol. 13. 27. H. 8. fol. 14, 15. 13. H. 4. Entre Cong. 57. Seignior Cromwell's case, lib. 2. fo. 71, 72, at large. 35. H. 8. tit. condition. Br. lib. 8. 89. Frances case. (2. Rep. 70. b.)

This word *proviso* shall be also taken as a limitation or qualification, as hereafter in his proper place shall be said. And sometime it shal amount to a covenant. All which do appeare by the authorities in the margent *.

[*] 27. H. 8. 15. &c.

For the (*&c.*) in this Section explanation is made in the Section next before.

Ita quod. Fleta lib. 4. ca. 9. Bracton ubi supra. Britton ubi supra.

" *Ou fueront tiels*, Ita quòd." This is the third condition in deed, whereof our author maketh mention.

(Dyer 13. b)

Sect. 330.

*ITEM, auters parols sont en un fait queux causont les tenements estre conditionals. Sicome sur tiel feoffment un rent est reserve al feoffor, &c. et puis soit mitte en le fait * cest parol,* Quòd si contingat redditum prædictum a retrò fore in parte vel in toto †, quòd tunc benè licebit *a le feoffor et a ses heires d'entrer, &c. ceo est un fait sur condition.*

ALSO, there bee other words in a deede which cause the tenements to be conditionall. As if upon such feoffment a rent be reserved to the feoffor, &c. and afterward this word is put into the deed, That if it happen the aforesaid rent to be behind in part or in all, that then it shall be lawful for the feoffor and his heires to enter, &c. this is a deed upon condition.

" *QUOD si contingat, &c.*"

This is the fourth condition in deed set downe by our author.

(Ant. 146 b) 6. E. 2. Entrie Cong. 65. 8. E. 2. Ass. 320. adjudged. Quod si contingat. Pasch. 37. Eliz. Rot. 254. inter Sayer et Hares in Com. Banco.

" *D'entrer, &c.*" Hereby it is evident, that some words of themselves do make a condition, and some other (whereof our authour here and in the next Section * putteth an example) do not of themselves make a condition without a conclusion and clause of reentrie: and manie times (*si*) makes a condition, and sometimes a limitation, as hereafter shall be said in this Chapter.

[204. a.]

* Vid. Sect. 331.

3. H. 6. 7. Si Flet. li. 4. ca. 9. Bract. li. 4. fo. 213. b. (5. Rep. 9.)

*Inesse potest donationi modus, conditio, sive causa. * Scito quòd (ut) modus est (si) conditio (quia) causa.*

* 4. Mar. Dyer 138. b.

Conditio is explained before. *Modus* is at this day properly taken for a modification, limitation, or qualification, for the which also the law hath appointed apt words; and because *Littleton* speaketh of

Bract. ubi supra.

(1) [See Note 94.]

* *cest parol* not in L. and M. nor in Roh.
† *&c.* added in L. and M. and in Roh.

of this also in the end of this Chapter, I will reserve this matter to his proper place, where the reader shall perceive excellent matter of learning touching this point.

Causa, the cause or consideration of the grant. And herein there is a diversitie betweene a gift of lands, and a gift of an annuitie or such like. For example, if a man grant an annuitie *pro unâ acrâ terræ*, in this case this word *pro* sheweth the cause of the grant, and therefore amounteth to a condition; for if the acre of land be evicted by an elder title, the annuitie shall cease, for *cessante causâ cessat effectus*.

Pro. 14. E. 3. 34. (Hob. 41, 42. 10. Rep. 42. Plo. 141. a. 7 Rep. 9. b. 10. 28. b. Ant. 144. a. 9. Rep. 50. a. Post. 237. a.) 9. E. 4. 20. 32 E. 3. Annu. 30. 14. E. 4. 4. 15. E. 4. 2. b. 8. H. 6. 23. 5. E. 2. tit. An. 44. 41. E. 3. 19. 32. E. 1. Avowrie 242.

And so if an annuitie be granted *pro decimis, &c.* if the grantee be unjustly disturbed of the tithes the annuitie ceaseth. And so it is if an annuitie be granted *pro consilio*, and the grantee refuse to give counsell, the annuitie ceaseth. So if an annuitie be granted *quod præstaret consilium*, this makes the grant conditionall.

But if *A. pro consilio impenso, &c.* make a feoffement, or a lease for life, of an acre, or *pro unâ acrâ terræ, &c.* albeit he denieth counsell, or that the acre be evicted, yet *A.* shall not re-enter, for in this case there ought to be legall words of condition or qualification, for the cause or consideration shall not avoyd the state of the feoffee; and the reason of this diversitie is, for that the state of the land is executed, and the annuitie executorie.

21. E. 4. 49. 22. E. 4. 28. 35. H. 6. 2. 10. E. 3. 44. 5. E. 2. 9. E. 4. 20. 15. E. 4. 3.

Flet. li. 5. ca. 34. 34. Ass. 1. 40. Ass. 13.

And yet sometime in case of lands or tenements (*causa*) shall make a condition. As if a woman give lands to a man and his heires, *causâ matrimonii prælocuti*, in this case if shee either marrie the man, or the man refuse to marrie her, she shall have the land againe to her and to her heires. [e] But of the other side, if a man give land to a woman and to her heires, *causâ matrimonii prælocuti*, though he marrie her, or the woman refuse, he shall not have the lands againe, for it stands not with the modestie of women in this kind, to aske advice of learned counsell, as the man may and ought: * and the rather, for that in the case of the woman shee may averre the cause, (for the reason aforesaid) although it be not contained in the deed, yea though the feoffement be made without deed.

[e] 5. E. 2. cui in vita 34. tit. Condition Br. 5. H. 4. 1.

* 12. E. 1. 1. feoffements & faits 114. F. N. B. 205 L. Vid. Sect. 365.

Ad faciend' ea intentione, &c. Dyer 138. 7. H. 4. 22. 31. H. 8. tit. Condition 19. Br. Pl. Com. 142. 38. H. 6. 33. 36, 37. Doct. & Stud. li. 2. ca. 34.

If a man maketh a feoffement in fee, *ad faciendum*, or *faciendo*, or *eâ intentione*, or *ad effectum*, or *ad propositum*, that the feoffee shall doe or not do such an act, none of these words make the state in the land conditionall, for in judgement of law they are no words of condition; and so it was resolved, *Hil.* 18. *Eliz. in Com. Banco*, in the case of a common person; but in the case of the king the said or the like words doe create a condition, and so it is in the case of a will of a common person, which case I myselfe heard and observed.

27. H. 8. 18. a. 32. E. 3. Brev. 291. (1. Roll. Abr. 407, 408, 409, 410. Moore 57. 2. Leo. 33. 3. Rep. 64. a. 10. Rep. 42. a.)

But for the avoyding of a lease for yeares, such precise words of condition are not so strictly required as in case of freehold and inheritance. [f] For if a man by deed make a lease of a manor for yeares, in which there is a clause (and the said lessee shall continually dwell upon the capitall messuage of the said manor, upon paine of forfeiture of the said terme) these words amount to a condition.

[f] 7. E. 6. Dier 79. 28. H. 8. Dier 27. a. sub pœna forisfacturæ.

And

And so it is if such a clause be in such a lease, *Quod non licebit*, to the lessee, *dare, vendere, vel concedere statum, et sub pœnâ feris-facturæ*, this amounts to make the lease for yeares defeasible, and so was it adjudged in the court of common pleas [g] in queene *Elizabeth's* time; and the reason of the court was, that a lease for yeares was but a contract, which may begin by word, and by word may be dissolved.

Quod non licebit. 3. E. 6. Dy. 65, 66. 4. Mar. 138. [g] Hill. 40. Eliz. Rot. 16.. inter Browne and Ayer. Vid. Pl. Com. 142. Br. and Bestone's case.

[204. b.]

Sect. 331.

MES il est diversity perenter cest parol (si contingat, &c.) *et les parols procheine avantdits. Car ceux parolx* (si contingat, &c.) *ne valent riens a tiel condition, sinon que il ad ceux parolx subsequents, Que bien list al feoffor et a ses heires d'entrer, &c. Mes en les cases avantdits, il ne besoigne per la ley de mitter tiel clause,* (scilicet) *que le feoffor et ses heyres poyent entrer, &c. pur ceo que ils poyent faire ceo per force des parols avantdits, pur ceo que ils impreignont* * *a eux mesmes en ley un condition*, scilicet, *que le feoffor et ses heires poyent entrer, &c. Uncore il est communement use en touts tiels cases avantdits de mitter* † *les clauses en les faits*, scilicet, *si le rent soit aderere, &c. que bien lirroit a le feoffor et a ses heires d'entrer, &c. Et ceo est bien fait, a cel intent, pur declarer et expresser a les lays gents, que ne sont apprises* ‡ *en la ley*, ‖ *de le manner et le condition de le feoffement, &c. Sicome home seisie de terre* § *lessa mesme la terre a un auter per fait indent pur terme des ans, rendant a luy certain rent, il est use de mitter en le fait, que si le rent soit arere al jour de payment, ou per un semaigne ou per un mois, &c. que adonque bien lirroit al lessor a distreyner, &c.* ** *uncore le lessor poit distreiner de common droit pur le rent arere,*

BUT there is a diversitie between this word *si contingat, &c.* and the words next aforesaid, &c. For these words, *si contingat, &c.* are nought worth to such a condition, unlesse it hath these words following, That it shall be lawfull for the feoffor and his heires to enter, &c. But in the cases aforesaid, it is not necessarie by the law to put such clause, *scilicet*, that the feoffor and his heires may enter, &c. because they may doe this by force of the words aforesaid, for that they containe in themselves a condition, *scilicet*, that the feoffor and his heires may enter, &c. Yet it is commonly used in all such cases aforesaid to put the clauses in the deeds, *scilicet*, if the rent be behind, &c. that it shall be lawfull to the feoffor and his heires to enter, &c. And this is well done, for this intent, to declare and expresse to the common people, who are not learned in the law, of the manner and condition of the feoffement, &c. As if a man seised of land letteth the same land to another by deede indented for terme of yeares, rendering to him a certaine rent, it is used to be put into the deed, that if the rent be behind at the day of payment, or by the space of a weeke or a moneth, &c. that then it shall be lawfull to the lessor to distreine,

* *a—en* in L. and M. and Roh.
† *les tiels* in L. and M. and Roh.
‡ *en la—de* in L. and M. *de la* in Roh.
‖ *de la manner—le matere* in L. and M. and Roh.
§ *come de franktenement* added in L. and M. and Roh.
** *Et* added in L. and M. and Roh.

arere, &c. coment que tiels parols ne unque fueront mises en le fait, &c.

treine, &c. yet the lessor may distreyne of common right for the rent behind, &c. though such words were not put into the deed, &c.

" *Ilz ne besoigne per la ley de mitter tiel clause, &c.*" *Quæ dubitationis causâ tollendæ inseruntur, communem legem non lædunt. Et expressio eorum quæ tacitè insunt, nihil operatur.* [205. a.]

" *Per un moys, &c.*" Here albeit the clause of distresse bee added, that if the rent be behind by the space of a weeke or a moneth, that the lessor may distraine, yet he may distraine within the weeke or moneth, because a distresse is incident of common right to every rent service. And the words be in the affirmative, and therefore cannot restraine that which is incident of common right.

The other (*&c.*) in this Section upon that which hath beene said are evident.

Sect. 332.

*ITEM, si * feoffment soit fait † sur tiel condition, que si le feoffor paya al feoffee a certaine jour, &c.* 40 *li. d'argent, que adonque le feoffor poit re-entrer, &c. en ceo cas le feoffee est appell tenant en morgage, que est autant a dire en Francois come mortgage, et en Latin* mortuum vadium. *Et il semble que le cause pur que il est appelle mortgage, est, pur ceo que il estoyt en awerouft si le feoffor ‡ voyt payer al jour limitte tiel summe ou non: et s'il ne paya pas, donque le terre que il mitter en gage sur condition de payment de le money, est ale de luy a touts jours, et issint mort ‖ a luy sur condition, &c. Et s'il paya le money, donques est le gage mort quant a le tenant, &c.*

ITEM, if a feoffment be made upon such condition, that if the feoffor pay to the feoffee at a certain day, &c. 40 pounds of money, that then the feoffor may re-enter, &c. in this case the feoffee is called tenant in morgage, which is as much to say in French as mortgage, and in Latine *mortuum vadium* (1). And it seemeth that the cause why it is called mortgage is, for that it is doubtful whether the feoffor will pay at the day limited such summe or not: and if he doth not pay, then the land which is put in pledge upon condition for the payment of the money, is taken from him for ever, and so dead to him upon condition, &c. And if he doth pay the money, then the pledge is dead as to the tenant, &c.

[*c*] Glanvil. lib. 10. cap. 68. & lib. 13. cap. 26, 27.

" *Mortgage*" is derived [*c*] of two French words, viz. *mort.* that is *mortuum*, and *gage*, that is *vadium*, or *pignus*. And it is called in Latine *mortuum vadium*, or *morgagium*. Now it is called here *mortgage* or *mortuum vadium*, both for the reason here expressed by *Littleton*, as also to distinguish it from that which is called *vivum vadium*. *Vivum autem dicitur vadium, quia nunquam moritur ex aliquâ parte quod ex suis proventubus acquiratur.* As if a man borrow a hundred

* *ascun* added in Roh. but not in L. and M.

† *a ascun home* added in Roh. but not in L. and M.

‡ *voyt—poet*, in L. and M. and Roh.

‖ *a luy sur condition, &c. Et s'il paya le money dont est le gage mort*, not in L. and M. nor Roh.

(1) [See Note 96.]

a hundred pounds of another, and maketh an estate of lands unto him, untill he hath received the said summe of the issues and the profits of the land, so as in this case neither money nor land dieth, or is lost, (whereof *Littleton* hath spoken [d] before in this Chapter) and therefore it is called *vivum vadium*.

[d] Vid. Sect. 327.

[205. b.]

Sect. 333.

*ITEM, sicome home poit faire feoffment en fee en mortgage, * issint home poit faire done en taile en mortgage, et un leas pur terme de vie, ou pur terme des ans en mortgage. † Et touts tiels tenants sont appels tenants en mortgage, solonque les estates que ils ont en la terre, &c.*

ALSO, as a man may make a feoffment in fee in morgage, so a man may make a gift in tayle in morgage, and a lease for terme of life, or for terme of yeares in morgage. And all such tenants are called tenants in morgage, according to the estates which they have in the land, &c.

This Section upon that which hath beene said needeth no further explication.

Sect. 334.

ITEM, si feoffment soit fait en mortgage sur condition, que le feoffor payera tiel summe a tiel jour, &c. come est ‡ enter eux per lour fait endent accorde et limit, coment que le feoffor morust devant le jour de payment, &c. uncore si le heire ‖ le feoffor paya mesme le summe § de money a mesme le jour a le feoffee, ou tender a luy les deniers, et le feoffee ceo refusa de receiver, donque poit l'heire entrer en le terre; et uncore le condition est, que si le feoffour payera tiel summe a tiel jour, &c. nient feasant mention en le condition d'ascun payment d'estre fait per son heire, mes pur ceo que le heire ad interesse de droit en le condition, &c. et l'entent fuit forsque que les deniers serront paies al jour assesse, &c. et le feoffee n'ad pluis dammage, si il soit pay per l'heire, que s'il fuit pay per le pier, &c. et pur cest cause, si le heire paya les deniers, ou tendera

ALSO, if a feoffment be made in morgage upon condition, that the feoffor shall pay such a summe at such a day, &c. as is betweene them by their deed indented agreed and limited, although the feoffor dyeth before the day of payment, &c. yet if the heire of the feoffor pay the same summe of money at the same day to the feoffee, or tender to him the money, and the feoffee refuse to receive it, then may the heire enter into the land; and yet the condition is, that if the feoffor shall pay such a summe at such a day, &c. not making mention in the condition of any payment to bee made by his heire, but for that the heire hath interest of right in the condition, &c. and the intent was but that the mony should bee payed at the day assessed, &c. and the feoffee hath no more losse, if it be paid by

* *issint home poit faire done en taile en mortgage*, not in L. and M. nor Roh.
† *Et* not in L. and M. nor Roh.
‡ *enter—perenter*, L. and M. and Roh.
‖ *de* added in L. and M. and Roh.
§ *de money* not in L. and M. nor Roh.

*dera les deniers a le jour assesse, &c. et l'auter ceo refusa, il poet entrer, &c. Mes si un estranger de sa teste demesne, que n'ad ascun interesse, &c. voile tender les * avantdits deniers al feoffee a le jour assesse, le feoffee n'est † pas tenus de ceo receiver.*

by the heir, then if it were paid by the father, &c. therefore if the heire pay the money, or tender the money at the day limited, &c. and the other refuse it, he may enter, &c. But if a stranger of his own head, who hath not any interest, &c. will tender the aforesaid money to the feoffee at the day appointed, the feoffee is not bound to receive it.

27. H. 8. 19. b. Lib. 8. fol. 91. Frances' case. (1. Roll. 426.)

"*QUE le feoffor paiera a tiel jour, &c.*" Albeit conditions bee not favoured, yet they are not alwayes taken literally, but in this case the law enableth the heire that was not named to performe the condition for foure causes. (1)

(Post. 219. b.)

First, Because there is a day limited, so as the heire commeth within the time limited by the condition, for otherwise he could not doe it, as shall be said hereafter in this Chapter.

Secondly, For that the condition descends unto the heire, and therefore the law that giveth him an interest in the condition, giveth him an abilitie to performe it.

Thirdly, For that the feoffee doth receive no dammage or prejudice therby (all these reasons are expresly to be collected out of the words of *Littleton*). And these things being observed,

Fourthly, The intent and true meaning of the condition shall be performed. And where it is here said, that the heire may tender *al jour assesse, &c.* herein is implyed, that the executors or administrators of the morgageor, or in default of them the ordinary may also tender, as shall be said [*f*] hereafter in this Chapter. But what if the condition had beene, if the morgageor or his heires did pay, &c. and hee dyed before the day without heire, so as the condition became impossible, here it is to be observed, that where the condition becommeth impossible to be performed by the act of God, as by death, &c. the state of the feoffee shall not be avoyded, as shall bee said hereafter in this Chapter. And therefore the law here inableth the heire (of whom no mention was made in the condition) to performe the condition, lest the inheritance should be lost, wherein divers diversities are worthy of observation. (1)

[206. a.]

[*f*] Vid. Sect. 337.

First, betweene a condition annexed to a state in lands or tenements upon a feoffment, gift in taile, &c. and a condition of an obligation, recognizance, or such like. [*g*] For if a condition annexed to lands bee possible at the making of the condition, and become impossible by the act of God, yet the state of the feoffee, &c. shall not bee avoyded. As if a man maketh a feoffment in fee upon condition, that the feoffor shall within one yeare goe to the citie of *Paris* about the affaires of the feoffee, and presently after the feoffor dyeth, so as it is impossible by the act of God that the condition should be performed, yet the estate of the feoffee is become absolute; for though the condition be subsequent to the state, yet there is a precedency before the re-entry, viz. the performance of the condition. And if the land should by construction of law be taken from the feoffee, this should work a dammage to the feoffee, for that the condition is not performed which was made for his benefit.

[*g*] Pl. Com. 456. Wrothe's case. 14. H. 7. 3. 15. H. 7. 1. 14. E. 4. 3. 38. H. 6. 2, 3.

* *avantdits* not in L. and M. but in Roh.
† *pas* not in L. and M. but in Roh.

(1) [See Note 97.]
{206. a.]
(1) [See Note 98.]

nefit. And it appeareth by *Littleton*, that it must not be to the dammage of the feoffee; and so it is if the feoffor shall appeare in such a court the next tearme, and before the day the feoffor dyeth, the estate of the feoffee is absolute. [*b*] But if a man be bound by recognizance or bond with condition that he shall appeare the next tearme in such a court, and before the day the conusee or obligor dyeth, the recognizance or obligation is saved; and the reason of the diversitie is, because the state of the land is executed and settled in the feoffee, and cannot be redeemed back againe but by matter subsequent, viz. the performance of the condition. But the bond or recognizance is a thing in action, and executory, whereof no advantage can be taken untill there be a default in the obligor; and therefore in all cases where a condition of a bond, recognizance, &c. is possible at the time of the making of the condition, and before the same can be performed, the condition becomes impossible by the act of God, or of the law, or of the obligee, &c. there the obligation, &c. is saved. But if the condition of a bond, &c. be impossible at the time of the making of the condition, the obligation, &c, is single. And so it is in case of a feoffment in fee with a condition subsequent that is impossible, the state of the feoffee is absolute; but [206. b.] if the condition precedent be impossible, no state or interest shall grow thereupon. And to illustrate these by examples you shall understand. If a man be bound in an obligation, &c. with condition that if the obligor doe goe from the church of St. *Peter* in *Westminster* to the church of St. *Peter* in *Rome* within three hours, that then the obligation shall be voyd. The condition is voyde and impossible, and the obligation standeth good.

[*b*] 15. H. 7. 18. 31. H. 6. barre 60. 18. E. 4. 17. 9. Eliz. 262. Dyer lib. 5. 22. Laughter's case. 38. H. 6. 2.

Fleta lib. 4. cap. 9. & Bracton & Britton ubi supra.

(1. Leo 229. 1. Roll. Abr. 420. Cro. El. 291. 864.) 14. H. 8. 28. 10 H. 7. 22. 4. H. 7. 4. 8. E. 4. 1.

28. H 8. 25. lib. 5. fo. 22. Laughter's case. & 75. 39 H. 3. 5. 17. H. 6. Obligat. 18. 5. El. Dier 222.

And so it is if a feoffment be made upon condition that the feoffee shall goe as is aforesaid, the state of the feoffee is absolute, and the condition impossible and voyde.

* If a man make a lease for life upon condition that if the lessee goe to *Rome*, as is aforesaid, that then he shall have a fee, the condition precedent is impossible and voyde, and therefore no fee simple can grow to the lessee,

* Pl. Com. Fuller's case, 272. (1. Roll. Abr. 418. Post. 217. b. 218)

If a man make a feoffment in fee upon condition that the feoffee shall re-enfeoffe him before such a day, and before the day the feoffor disseise the feoffee and hold him out by force untill the day be past, the state of the feoffee is absolute, for " the feoffor is the cause wherefore the condition cannot be performed, and therefore shall never take advantage for non-performance thereof. [*i*]" And so it is if *A.* be bound to *B.* that *I. S.* shall marry *Jane G.* before such a day, and before the day *B.* marry with *Jane*, he shall never take advantage of the bond, for that he himselfe is the meane that the condition could not be performed. And this is regularly true in all cases.

35. H. 6. tit. barre 262. 37. H. 6 barre 60. 2. E. 3. 9. 9. Eliz. Dyer 262. 28. H. 8. 30. (8th Rep. 83. a. 92. a. Hob. 24.) [*i*] 4. H. 7. 4. 30. H. 8. Dyer 42. 11. H. 4. 57. in protection. 10. H. 7. 18. (Doc. Pla. 23)

But it is commonly holden [*k*] that if the condition of a bond, &c. be against law, that the bond itselfe is voyd.

[*k*] Vid. Bract. Britton, Fleta ubi supra. Bracton lib. 3. fol. 100.

But herein the law distinguisheth between a condition against law for the doing of any act that is *malum in se*, and a condition against law (that concerneth not any thing that is *malum in se*) but therefore is against law, because it is either repugnant to the state, or against some maxime or rule in law. And therefore the common opinion is to bee understood of conditions against law for the doing of some act that is *malum in se*, and yet therein also the law distinguisheth.

2. H. 4. 9. 8. E. 4. 12. b. 2. E. 4. 2. & 3. 4. H. 7. 4. b. 10. H. 7. 22. 14. H. 8. 25.

42. E. 3. 6. 23. (1. Roll. Abr. 418. Plo. 64. b.) 2. H. 4. 9.

tinguisheth. As if a man be bound upon condition that he shall kill *I. S.* the bond is voyde.

(2. Ven. 109.)

(Pl. Com. Browning's case 133.)

But if a man make a feoffment upon condition that the feoffee shall kill *I. S.* the estate is absolute, and the condition voyd.

(Post. Sect. 360. 10. Rep. 38. Hob. 170. 1. Roll. Abr. 419.)

If a man make a feoffment in fee upon condition that he shall not alien, this condition is repugnant and against law, and the state of the feoffee is absolute (whereof more shall bee said in his proper place). But if the feoffee be bound in a bond, that the feoffee or his heires shall not alien, this is good, for he may notwithstanding alien if he will forfeit his bond that he himselfe hath made.

7. H. 6. 43. b. 21. H. 6. 33. 21. H. 7. 11. 21. H. 7. 30. 20. E. 4. 8. (Moore 810. Post. 225.) Pl. Com. in Browning's case 133. a. 27. H. 8.

So it is if a man make a feoffment in fee upon condition that the feoffee shall not take the profits of the land, this condition is repugnant and against law, and the state is absolute.

But a bond with a condition that the feoffee shall not take the profits is good. If a man be bound with a condition to enfeoffe his wife, the condition is voide and against law, because it is against the maxime in law, and yet the bond is good; but if he be bound to pay his wife money, that is good. *Et sic de similibus,* whereof there bee plentifull authorities in our bookes (1).

Vide Sect. 325. (5. Rep. 114.)

" *Tender les deniers al jour assesse, &c.*" Note, hereby is implyed, that albeit a convenient time before sun set be the last time given to the feoffor to tender, yet if he tender it to the person of the morgagee at any time of the day of payment, and hee refuseth it, the condition is saved for that time.

" *Il poet enter, &c.*" And so may his heire after his death.

Vide Sect. 401. Hill. 28. Eliz. in Banco Regis inter Watkins & Astwick pro terris in Com. Devon. 45. E. 3. tit. Release 28. 32. E. 1. tit. Annuity 51. 33. H. 6. 13. (1. Leo. 34. Moore 222. Post. 225. b. 225. a.)

" *Mes si estranger de sa teste demesne, que n'ad ascun interesse, &c. voile tender les avantdits deniers al feoffee al jour assesse, le feoffee n'est pas tenus de ceo receiver.*" *Nota,* by this period and the (*&c.*) it is implyed, that if the morgager dye, his heire within age of 14 yeares (the land being holden in socage), the next of kinne to whom the land cannot descend being his gardian in socage may tender in the name of the heir, because he hath an interest as gardian in socage. Also if the heire be within age of 21 yeares, and the land is holden by knights service, the lord of whom the land is holden may make the tender of his interest which hee shall have when the condition is performed, for these in respect of their interest are not accounted estrangers.

But if the heire be an ideot, of what age soever, any man may make the tender for him in respect of his absolute disability, and the law in this case is grounded upon charity, and so in like cases.

36. H. 6. tit. barre 166. 33. E. 1. tit. Annuitie 51. 33. E. 3. judgement 254. (Ant. 180. b. Post. 245. a. 258. a.)

" *Le feoffee n'est pas tenus de ceo receiver.*" And note that *Littleton* saith, that hee is not bound to receive it at a stranger's hand. But if any stranger in the name of the morgageor or his heire (without his consent or privity) tender the money, and the morgagee accepteth it, this is a good satisfaction, and the morgageor or his heire agreeing thereunto may re-enter into the land, *omnis ratihabitio retro trahitur et mandato æquiparatur.* But the morgageor or his heire may disagree thereunto if he will.

[207. a.]

(1) [See Note 99.]

Sect.

Sect. 335.

ET memorandum que en tiel cas, lou tiel tender de le money est fait, &c. et le feoffee de receiver ceo refusa, per que le feoffor ou ses heires entront, &c. donque le feoffee n'ad ascun remedy d'aver le money per le common ley, pur ceo que il serra rette sa follie que il refusa le money, quant un loyal tendre de ceo fuit fait a luy.

AND be it remembred that in such case, where such tender of the money is made, &c. and the feoffee refuse to receive it, by which the feoffor or his heires enter, &c. then the feoffee hath no remedy by the common law to have this money, because it shall be accounted his own folly that he refused the money, when a lawful tender of it was made unto him. (1)

"*TENDER de le money est fait, &c.*" Here is implyed at the due time and place according to the condition.

"*Entront, &c.*" viz. into the lands or tenements.

"*Donque le feoffee n'ad ascun remedie d'aver le money per le common ley, &c.*" And the reason is, because the money is collaterall to the land, and the feoffee hath no remedy therfore.

8. E. 2. tit. Ass. 389. 31. Ass. 32.

If an obligation of an hundred pound be made with condition for the payment of fifty pound at a day, and at the day the obligor tender the money, and the obligee refuseth the same, yet in action of debt upon the obligation if the defendant plead the tender and refusall, he must also plead that he is yet ready to pay the money, and tender the same in court. But if the plaintife will not then receive it, but take issue upon the tender, and the same be found against him, he hath lost the money for ever.

(2. Roll. Abr. 523, 524. Sid. 13. 364, 365.) 22. H. 6. 39. 21. E. 4. 25. 22. E. 3. 5. Lib. 9. fo. 79. H. Peytoe's case. (2. Roll. Abr. 523. Dyer 24. b. 25. a. cont.)

If a man be bound in 200 quarters of wheat for deliverie of a 100 quarters, if the obligor tender at the day a 100 quarters, &c. he [illegible]ll not plead *uncore prist*, because albeit it be parcell of the cond[illegible]n, yet they be *bona peritura*, and it is a charge for the obligor [illegible]eep them. And the reason wherefore in the case of the obligation the summe mentioned in the condition is not lost by the tender and refusall, is not only for that it is a duty and parcel of the obligation, and therefore is not lost by the tender and refusall, but also for that the obligee hath remedy by law for the same. And in this case, *liberata pecunia non liberat offerentem*.

8. E. 2. tit. Ass. 389.

But if a man make a single bond, or knowledge a statute or recognizance, and afterwards made a defeasance for the payment of a lesser sum at a day, if the obligor or conusor tender the lesser summe at the day, and the obligee or conusee refuseth it, he shall never have any remedy by law to recover it, because it is no parcell of the sum contained in the obligation, statute or recognizance, being contained in the defeasance made at the time or after the obligation, statute, or recognizance. And in this case in pleading of the tender and refusall the partie shall not be driven to plead, that he is yet ready to pay the same or to tender it in court: neither hath the obligee or conusee any remedy by law to recover the

(2. Saund. 48) 7. H. 4. 18. 5. Mar. Dier 190. 21. E. 4. 25. 22. E. 3. 5. 33. H. 6. 2. b. 17. Ass. pl. 2. 20. E. 4. 1. b. 9. H. 6. 16. 36. H. 6. 26. 15 E. 4. 1. 16. H. 7. 13. 18. E. 3. 53. 7. E. 4. [illegible]

(1) [See Note 100.]

19. H. 8. 12.
27. H. 8. 1. a.
22. H. 6. 39. tit. Abatement 11.
49. E. 3. 3.
19. H. 6. 12.
[o] Henry Peytoe's case, ubi supra. 31. Ass. 25.
11. H. 4. 33.
2. H. 6. 8.
1. H. 4.
17. E. 4. 3. Pl. Com. Fogasse's case, fo. 6. (Moore 36, 37. Post. 236. b.)

the summe contained in the defeasance. [o] And so it is if a man make an obligation of 100 pound with condition for the deliverie of corne, or timber, &c. or for the performance of an arbitrement, or the doing of any act, &c. This is collaterall to the obligation, that is to say, is not parcell of it, and therefore a tender and refusall is a perpetuall barre (2).

But if a man be bound to make a feoffement in fee to the obligee, and he make a lease and a release to him and his heires, albeit this be a collaterall condition, yet is it well performed, because this amounts in law to a feoffment (3).

Lib. 5. fo. 114, 115 Wade's case, lib. 9. fo. 78. (5. Rep. 114. Wade's case 2. Inst. 579. 742. 3. Inst. 93.)

"*Money, moneta, legalis moneta Angliæ,*" lawfull money of *England*, either in gold or silver, is of two sorts, viz. the *English* money coyned by the king's authoritie, or forraine coyne by proclamation made currant within the realme. *Coyne, cuna dicitur à cudendo*, of coyning of money. In French *coine* signifieth a corner, because in ancient time money was square with corners, as it is in some countries at this day. Some say that *coine dicitur à* κοινος, *id est communis, quòd sit omnibus rebus communis. Moneta dicitur à monendo*, not only because he that hath it, is to be warned providently to use it, but also because *nota illa de authore et valore admonet. Pecunia dicitur à pecu*, beasts, *omnes enim veterum divitiæ in animalibus consistebant*; and it appeareth that in *Homer*'s time, there was no money but exchange of cattel, &c. (1)

Aristotle, lib. 5. cap. 8. (Cro. Car. 89. Trover and Conversion lies for money out of a bag.)

[207. b.]

Nummus, απο τȣ νομȣ, *quia lege sit non natura. Vide* (*) the statute of 9. *H.* 5. of the noble, halfe noble, and farthing of gold, which is the fourth part of a noble, and that is twenty pence.

(*) 2. H. 5. stat. 2. cap. 7. (Cro. El. 841.)

Sect. 336.

ITEM, si feoffment soit fait sur tiel condition, que si le feoffee paya al feoffor a tiel jour inter eux limit xx l. * *adonque sle feoffee avera la terre a luy et a ses heires; et s'il faile de payer les deniers a le jour* † *assesse,* ‡ *que adonque bien list a le feoffor ou a ses heires d'entrer, &c. et puis devant le jour assesse, le feoffee venda la terre a un auter, et de ceo fait feoffment a luy, en cest case si le second feoffee voile tender le summe de les deniers a le jour assesse a le feoffor, et le feoffor ceo refusa, &c. donque le second feoffee ad estate en la*

ALSO, if a feoffment be made on this condition, that if the feoffee pay to the feoffor at such a day between them limited twenty pounds, then the feoffee shal have the land to him and to his heires; and if he faile to pay the money at the day appointed, that then it shall be lawfull for the feoffor or his heires to enter, &c. and afterwards before the day appointed, the feoffee sel the land to another, and of this maketh a feoffment to him, in this case if the second feoffee wil tender the sum of money at the day appointed

(2) [See Note 101.]
(3) [See Note 102.]

[207. b.]
(1) [See Note 103.]
* *que* added in L. and M. and Roh.
† *assesse*—&c. L. and M.
‡ *que* added in Roh. but not in L. and M.

la terre clerement sans condition. Et la cause est, pur ceo que le second feoffee avoit interest en le condition pur salvation de ‖ son tenancie. Et en cest case il semble que si le primer feoffee apres tiel vender de la terre, voile tender le money a le jour assesse, &c. a le feoffor, ceo sera assets bone pur salvation d'estate de le second feoffee, pur ceo que le primer feoffee fuit privie a le condition, et issint le tender de ascun de eux deux est assets bone, &c.

pointed to the feoffor, and the feoffor refuseth the same, &c. then the second feoffee hath an estate in the land cleerely without condition. And the reason is, for that the second feoffee hath an interest in the condition for the safegard of his tenancy. And in this case it seemes that if the first feoffee after such sale of the land, will tender the money at the day appointed, &c. to the feoffor, this shall be good enough for the safegard of the estate of the second feoffee, because the first feoffee was privie to the condition, and so the tender of either of them two is good enough, &c.

" *ET s'il faile de paier les deniers, &c.*"
If a man make a feoffment of lands, to have and to hold to him and his heires, upon condition, that if the feoffee pay to the feoffor at such a day twenty pounds, that then the feoffee shall have the lands to him and his heires, if the condition had not proceeded further, it had been void, for that the feoffee had a fee simple by the first words, and therefore the words subsequent (2) are materially added, (and if he faile to pay the money, &c.)

12. E. 3. Condic. 8.
13. E. 3. ibid. 10.
12. Ass. 5.
Plo. 481.
(5. Rep. 117.)
Li. 5. fo. 96, 97. Goodale's case.

" *Le second feoffee voile tender le summe des deniers, &c.*"
Albeit the second feoffee bee not named in the condition, yet shall hee tender the summe because he is privie in estate, and in judgment of law hath an estate and interest in the condition, (as *Littleton* here saith) for the salvation of his tenancy. *Vid.* Sect. 334. And note, he that hath interest in the condition on the one side, or in the land on the other, may tender.

And it is to bee observed also, that the feoffee may tender any money that is currant within the realme, albeit it be forreine coine, so as it be currant by act of parliament, or by the king's proclamation, (3) as hath beene said.

(8. Rep. 42. b)
(2 Cro. 9. 245.)
Li. 5. fo. 114, 115 Wade's case.

[208. a.] " *Tender le summe.*" The feoffee may tender the money in purses or bagges, without shewing or telling the same, for he doth that which he ought, viz. to bring the money in purses or bagges, which is the usuall manner to carry money in, and then it is the part of the party that is to receive it to put it out and tell it.

" *A primer feoffee.*" Here it appeareth, that the first feoffee may, notwithstanding his feoffment, pay the money to the feoffor, because he is partie and privie to the condition, and by his tender may save the estate of his feoffee, which in all good dealing he ought to doe. (1)

‖ *son—le* L. and M. and Roh.
(2) See note 1. fol. 216.
(3) [See Note 104.]

[208. a.]
(1) [See Note 105.]

Sect. 337.

*ITEM, si feoffement soit fait sur condition, que si le feoffor paya certaine summe d'argent al feoffee, adonques bien lirroit a feoffor et a ses heires d'entrer *: en cest case si le feoffor devie devant le payment fait, et l'heire voile tender al feoffee les deniers, tiel tender est voyd, pur ceo que le temps deins quel ceo doit estre fait est passe. Car quaunt le condition est, que si le feoffor paya les deniers al feoffee, &c. ceo est tant a dire, que si le feoffor durant sa vie paya les deniers al feoffee, &c. et quant le feoffor morust, donques le temps de le tender est passe. Mes auterment est lou un jour de payment est limit, et le feoffor devie devaunt le jour, donque poet le heire tender les deniers come est avantdit, pur ceo que le temps de le tender ne fuyt passe per le mort del feoffor. Auxy il semble, ‡ que en tiel case lou le feoffor devy devant le jour de payment, si les executors de le feoffor tendront les deniers al feoffee al jour de payment, cel tender est assets bone; et si le feoffee ceo refuse, † les heires de feoffor poient entrer, &c. Et le cause est, pur ceo que les executors representont le person lour testator, &c.*

ALSO, if a feoffment bee made upon condition, that if the feoffor pay a certaine summe of money to the feoffee, then it shal be lawfull to the feoffor and his heires to enter: in this case if the feoffor die before the payment made, and the heire wil tender to the feoffee the money, such tender is void, because the time within which this ought to be done is past. For when the condition is, that if the feoffor pay the money to the feoffee, &c. this is as much to say, as if the feoffor during his life pay the money to the feoffee, &c. and when the feoffor dyeth, then the time of the tender is past. But otherwise it is where a day of payment is limited, and the feoffor die before the day, then may the heire tender the money as is aforesaid, for that the time of the tender was not past by the death of the feoffor. Also it seemeth, that in such case where the feoffor dieth before the day of payment, if the executors of the feoffor tender the money to the feoffee at the day of payment, this tender is good enough; and if the feoffee refuse it, the heires of the feoffor may enter, &c. And the reason is, for that the executors represent the person of their testator, &c. (1)

[208. b.]

[a] 14. H. 7. 31. 15. H. 7. 1. (Ant. 47. Post. 219. a. 2. Cro. 244.) (2. Co. 70.)

THIS diversitie is plaine and evident, and agreeth with [a] our books, and yet somewhat shal be observed hereupon: for here it appeareth, that seeing no time is limited, the law doth appoint the time, and that is during the life of the feoffor. Wherein divers diversities are worthy the observation:

44. E. 3. 9. 33. H. 6. 45. & 48. b. 4. E. 4. 29. 9. E. 4. 22.

First, Betweene this case that *Littleton* here putteth of the condition of a feoffment in fee, for the payment of money where no time is limited, and the condition of a bond for the payment of a summe of money where no time is limited: for in such a condition of a bond the money is to be payd presently, that is, in convenient time. [b] And yet in case of a condition of a bond there is a

1. E. 4. 30. 21. E. 4. 38. b. 9. H. 7. 17. b. 10. H. 7. 15. 14. H. 8. 21. a. & 29. b.
[b] Lib. 6. fol. 30, 31. Boothie's case. 33. H. 6. 47, 48.

diversitie

* *&c.* added in L. and M. and Roh.
[208. b.]
‡ *que* not in L. and M. nor Roh.

† *donques* added in L. and M. and Roh.
(1) [See Note 106.]

2 diversitie betweene a condition of an obligation, which concernes the doing of a transitorie act without limitation of any time, as payment of money, delivery of charters, or the like, for there the condition is to bee performed presently, that is, in convenient time; and when by the condition of the obligation the act that is to bee done to the obligee is of his owne nature locall, for there the obligor (no time being limited) hath time during his life to performe it, as to make a feoffment, &c. if the obligee doth not 3 hasten the same by request. In case where the condition of the obligation is locall, there is also a diversitie, when the concurrence of the obligor and the obligee is requisite, (as in the said case of the feoffment) and when the obligor may performe it in the absence of the obligee, as to knowledge satisfaction in the court of king's bench, [*] although the knowledge of satisfaction is locall, yet because he may doe it in the absence of the obligee, he must doe it in convenient time, and hath not time during his life.

(1. Roll. Abr. 436.)

(6. Rep. 31. Boothie's case. Post. 210. b.)

(2. Roll. Abr. 436, 437.)

[*] Boothie's case, ubi supra. (Doc. Pla. 263. 457.)

4 Another diversity is, where the condition concerneth a transitory or locall act, and is to be performed to the feoffee or obligee, and where it is to be performed to a stranger: as if *A.* be bound to *B.* to pay ten pounds to *C.* *A.* tenders to *C.* and he refuseth, the bond is forfeited, as in this Section shall be said more at large.

5 Another diversitie is betweene a condition of an obligation, and a condition upon a feoffment, where the act that is locall is to be done to a stranger, and where to the obligee or feoffor himselfe. As if one make a feoffment in fee, upon condition that the feoffee shall infeoffe a stranger, and no time limited, the feoffee shall not have time during his life to make the feoffment, for then he should take the profits in the meane time to his owne use, which the estranger ought to have, and therefore hee ought to make the feoffment as soone as conveniently he may; and so it is of the condition of an obligation. But if the condition be, that the feoffee shall re-infeoffe the feoffor, there the feoffee hath time during his life, for the privitie of the condition between them, unlesse he be hastened by request, as shall bee said hereafter.

(Vide ant. Sect. 324.) Boothie's case, li. 6. fo. 31. li. 2. fo. 79. b. Seignior Cromwell's case. 44. E. 3. 9. 21. E. 4. 41. 2. E. 4. 3, 4. 19. H. 6 67. 73. 76. 4 E. 4. 4. b. 26. H. 8. 9. b. (2. Rep. 59. 219. b.)

6 Another diversitie is, when the obligor or feoffor is to enfeoffe a stranger, as hath been said, and when a stranger is to infeoffe the feoffee or obligee: as if *A.* infeoffe *B.* of *Black Acre*, upon condition that if *C.* infeoffe *B.* of *White Acre*, *A.* shall re-enter, *C.* hath time during his life, if *B.* doth not hasten it by request, and so of an obligation.

(Vide post. Sect. 352, 353, 354.)

7 But in some cases albeit the condition be collaterall, and is to be performed to the obligee, and no time limited, yet in respect of the nature of the thing the obligor shall not have time during his life to performe it. As if the condition of an obligation bee, to grant an annuitie or yeerely rent to the obligee during his life, payable yearely at the feast of *Easter*, this annuity or yeerely rent must be granted before *Easter*, or else the obligee shall not have it at that feast during his life, *et sic de similibus*; and so was it resolved by the judges [*] of the common pleas in the argument of *Andrews*'s case, which I my selfe heard.

14. E. 3. Det. 138. li. 2. fo. 80. Seignior Cromwell's case.

[*] Vid. Dyer. 14. El. 311. (6. Rep. Boothie's case.)

8 Lastly, When the obligor, feoffor, or feoffee is to doe a sole act [209. a.] or labour, as to goe to *Rome*, *Jerusalem*, &c. in such and the like cases, the obligor, feoffor, or feoffee, hath time during his life, and cannot be hastened by request. And so it is if a stranger to the obligation or feoffment were to doe such an act, he hath time to doe it at any time during his life.

(Ant. 206. a.) Lib. 5. fol. 96, 97 Goodale's case. [f] Vid. Sect. 334. (See Hensloe's case 9. Rep. 36. b.)

" *Si les executors del feoffor tendront, &c.*" So as now it appeareth that either the heire of the feoffor, or his executors, may (when a day is limited) pay the money; and so also may the administrator of the feoffor doe, if the feoffor dye intestate [f]; and this may the ordinarie doe if there be neither executor nor administrator as hath beene said.

" *Et le feoffee refuse, les heires del feoffor poient entrer, &c.*" *Nota*, a tender by the executors or administrators, and a refusall, doth give the heire of the feoffor a title of entrie. And here by this (*&c.*) is a diversitie implyed, when a tender and refusall shall give a third person title of entrie.

33. H. 6. 16, 17. 36. H. 6. 8. 2. E. 4. 2, 3. 15. E. 4. 5, 6. 22. E. 4. 13. 32. E. 3. barre 264. 7. E. 3. 29. 9. H. 7. 17. 10. H. 7. 14 b. 35. H. 8. Dier 56. lib. 5. fol. 23. Lambe's case. (5. Rep. 23. 1 Roll. Abr. 452. Post. 211. a. Ant 206. a.) [b] 8. E. 4. 14. 2. E. 4. ubi supra.

If a man be bound to *A.* in an obligation with condition to enfeoffe *B.* (who is a meere stranger) before a day, the obligor doth offer to enfeoffe *B.* and he refuseth, the obligation is forfeit, for the obligor hath taken upon him to infeoff him, and his refusall cannot satisfie the condition, because no feoffment is made; but if the feoffment had beene by the condition to be made to the obligee, or to any other for his benefit or behoofe, a tender and refusall shall save the bond, because he himselfe upon the matter is the cause wherefore the condition could not be performed, and therefore shall not give himselfe cause of action. But if *A.* be bound to *B.* with condition that *C.* shall enfeoffe *D.* in this case if *C.* tender, and *D.* refuse, the obligation is saved, for the obligor himselfe undertaketh to doe no act, but that a stranger shall infeoffe a stranger. And it is holden in bookes [b] that in this case it shall be intended, that the feoffment should be made for the benefit of the obligee. Some to reconcile the bookes seeme to make a difference between an expresse refusall of the stranger, and a readinesse of the obligor at the day and place to make performance, and the absence of the stranger: but that can make no difference. I take it rather to be the error of the reporter, and the records themselves are necessary to be seene; for the law herein is, as it hath beene before declared.

19. H. 6. 34. (2. Rep. 59. 1. Roll. Abr 452. 1. Rep. 133. b.)

If *I.* enfeoffe one in fee upon condition to enfeoffe *I. S.* and his heires, the feoffee tenders the feoffment to *I. S.* and he refuseth it, the feoffor may re-enter, for by the expresse intent of the condition, the feoffee should not have and retaine any benefit or estate in the land, but is as it were an instrument to convey over the land.

2. E. 4. Entrie conge 25.

But in that case if the condition were to make a gift in tayle to *I. S.* and he refuseth it, and a tender and refusall is made, there the feoffor shall not re-enter, for that it was intended that the feoffee should have an estate in the land. And so it is if a feoffment bee made upon condition that the feoffee shall grant a rent charge to a stranger, if the feoffee tender the grant and he refuseth, the feoffor shall not re-enter, because the feoffee was to retaine the land; which points are worthy of due observation.

Here in the case of *Littleton*, when the executors make the tender, and the feoffee refuseth, albeit the heire be a third person, yet is he no stranger, but he and the executors also are privies in law.

(Post. 209. b.)

" *Le person del testator, &c.*" This is to bee understood concerning goods and chattels either in possession or in action, and the executor doth more actually represent the person of the testator, than the heire doth the person of the ancestor. For if a man bind-

eth

eth himselfe, his executors are bound though they bee not named, but so it is not of the heire: furthermore, here the administrators and the ordinary also are implyed, as before hath beene said (1).

(2. Saun. 136.)

Sect. 338.

ET nota, que en touts cases de condition de payment de certaine summe en grosse touchant terres ou tenements, si loyall tender soit un foits refuse, celuy que duissoit tender le money est de ceo assouth, et pleinment discharge pur touts temps aprés.

AND note, that in all cases of condition for payment of a certaine summe in grosse touching lands or tenements, if lawfull tender be once refused, he which ought to tender the money is of this quit, and fully discharged for ever afterwards.

THIS is to be understood, that he that ought to tender the money is of this discharged for ever to make any other tender; but if it were a dutie before, though the feoffor enter by force of the condition, yet the debt or dutie remayneth. As if *A.* borroweth a hundred pound of *B.* and after mortgageth land to *B.* upon condition for payment thereof; if *A.* tender the money to *B.* and he refuseth it, *A.* may enter into the land, and the land is freed for ever of the condition, but yet the debt remaineth, and may be recovered by action of debt. But if *A.* without any loane, debt, or dutie preceding infeoffe *B.* of land upon condition for the payment of a hundred pounds to *B.* in nature of a gratuitie or gift; in that case if he tender the hundred pound to him according to the condition and he refuseth it, *B.* hath no remedie therefore; and so is our author in this and his other cases of like nature to be understood.

[209. b.]

Vide Sect. sequent.

(9. Rep. 79. a.)

Sect. 339.

*ITEM, si le feoffee en mortgage devant le jour de payment que serroit fait a luy, face ses executors et devie, et son heire enter en le terre come il devoit, &c. il semble en cest cas que le feoffor doit payer le money al jour assesse al executors, et nemy al heire le feoffee, pur ceo que le money al commencement trenchoit al feoffee en maner come un dutie, et serra entendue que l'estate fuit fait pur cause de le prompter de le money per le feoffee, ou pur cause d'auter dutie; et pur ceo le payment ne serra fait al heire, * come il semble, mes les parols del condition poyent estre tiels, que le payment serra fait al heire. Come si le con-*

ALSO, if the feoffee in morgage before the day of payment which should be made to him, makes his executors and die, and his heire entreth into the land as he ought, &c. it seemeth in this case that the feoffour ought to pay the money at the day appointed to the executors, and not to the heire of the feoffee, because the money at the beginning trenched to the feoffee in manner as a dutie, and shall be intended that the estate was made by reason of the lending of the money by the feoffee, or for some other dutie; and therefore the payment shall not be made to the heire, as

(1) [See Note 107.]

* *come il semble, mes les parols del condition poyent etre tiels, que le payment serra fait al heire,* not in L. and M. nor Roh.

condition fuit, que si le feoffor paya al feoffee, ou a ses heires, tiel summe a tiell jour, &c. la apres la mort le feoffee s'il moruſt devant le jour limit, * *le payment doit eſtre fait al heir al jour aſſeſſe, &c.*

as it ſeemeth, but the words of the condition may be ſuch, as the payment ſhall be made to the heire. As if the condition were, that if the feoffor pay to the feoffee or to his heires ſuch a ſumme at ſuch a day, &c. there after the death of the feoffee, if he dieth before the day limited, the payment ought to be made to the heire at the day appointed, &c.

18. E. 4. fol. 18. lib. 5. fol. 98. Goodale's caſe. 19. H. 6. 54. 20. E. 3. Account Pl. 70. (5 Rep. 117.)

"*PAIERA tiel ſumme a tiel jour, &c.*" Here is implyed, that this payment ought to bee reall, and not in ſhew or appearance. For if it be agreed betweene the feoffor and the executors of the feoffee that the feoffor ſhall pay to the executors but part of the money, and that yet in appearance the whole ſumme ſhall be paid, and that the reſidue ſhall bee repaid, and accordingly at the day and place the whole ſumme is paid, and after the reſidue is repaid, this is no performance of the condition, for the ſtate ſhall not be deveſted out of the heire, which is a third perſon, without a true and effectuall payment, and not by a ſhadow or colour of payment, and the agreement precedent doth guide the payment ſubſequent.

(5. Rep. 96.)

(Ant. 209. a. 9. Rep. 39.)

And by this Section alſo it appeareth, that the executors do more repreſent the perſon of the teſtator, then the heire doth to the aunceſtor; for though the executor be not named, yet the law appoints him to receive the money, but ſo doth not the law appoint the heire to receive the money unleſſe he be named.

[210. a.]

"*Doit eſtre fait al heire al jour aſſeſſe, &c.*" And here it alſo appeareth, that if the condition upon the morgage be to pay to the morgagee or his heires the money, &c. and before the day of payment the morgagee dieth, the feoffor cannot pay the money to the executors of the morgagee: for *Littleton* ſaith that in this caſe the payment ought to be made to the heire. *Et in hoc caſu deſignatio unius perſonæ eſt excluſio alterius, et expreſſum facit ceſſare tacitum*; and the law ſhall never ſeeke out a perſon, when the parties themſelves have appointed one. But if the condition be to pay the money to the feoffee his heires or executors, then the feoffor hath election to pay it either [m] to the heire or executors.

Vid. lib. 5. fo. 96. Goodale's caſe. Dier 2. Eliz. 181. 44. E. 3. 1. b. (Ant. 47. a.)

[m] 12. E. 3. Condition 8. & 10.

(8. Rep. 73.)

If a man make a feoffment in fee upon condition that the feoffee ſhall pay to the feoffor his heires or aſſignes 20 pound at ſuch a day, and before the day the feoffor make his executors and dieth, the feoffee may pay the ſame either to the heire or to the executors, for they are his aſſignes in law to this intent. But if a man make a feoffment in fee upon condition that if the feoffor pay to the feoffee his heires or aſſignes 20 pound before ſuch a feaſt, and before the feaſt the feoffee maketh his executors and dyeth, the feoffor ought to pay the money to the heire, and not to the executors, for the executors in this caſe are no aſſignees in law; and the reaſon of this diverſitie is this, for that in the firſt caſe the law muſt of neceſſitie finde out aſſignes, becauſe there cannot be any aſſignes in deed, for the feoffor hath but a bare condition and no eſtate in the land which he can aſſigne over. But in the other caſe the feoffee hath an eſtate in the land which he may aſſigne over; and where there may bee aſ-

(1. Roll. Abr. 421.)

(Hob. 9.)

ſignee

* *donques* added in L. and M. and Roh.

signees in deed, the law shall never seeke out or appoint any assignes in law. And albeit the feoffee made no assignment of the estate, yet the executors cannot be assignees, because assignes were onely intended by the condition to be assignees of the estate; and so was it resolved (*) *Mich.* 23. & 24. *Eliz.* by the two chiefe justices in the court of wards betweene *Randall* and *Browne*, which I observed.

But if the condition be to pay the money to the feoffee his heires or assignes, and the feoffee make a feoffment over, it is in the election of the feoffor to pay the money to the first feoffee or to the second feoffee; and so if the first feoffee dyeth, the feoffor may either pay the money to the heire of the first feoffee or to the second feoffee, for the law will not enforce the feoffor to take knowledge of the second feoffment, nor of the validity thereof, whether the same be effectuall or not, but at his pleasure, and the first feoffee and his heires are expresly named in the condition (1).

27. H. 8. 2. 3. & 4. Ph. & Mar 140. a.

(*) Mic. 23. & 24. Eliz. in curia Wardorum inter Randal & Browne. Vid. 2. Eliz. Dier 181. Pl. Com. Chapman's case 186. 288. Vid. Goodale's case lib. 5. fo. 96, 97. 17. Ass. pl. 2. Goodale's case ubi supra.

(Mo. 243. Ant. 208. a.)

Sect. 340.

ITEM, † *sur tiel case de feoffment en mortgage, question ad este demaunde en quel lieu le feoffour est tenus* ‡ *de tender les deniers a le feoffee al jour assesse, &c. Et ascuns ont dit, que sur la terre issint* § *tenus en morgage, pur ceo que le condition est dependant sur le terre. Et ont dit* ‖ *que si le feoffor soit* ¶ *sur le terre la prest a paier le money al feoffee a le jour assesse, et le feoffee adonque ne soit pas la,* ⸸ *adonque le feoffor est assouth et excuse de payment de le mony, pur ceo que nul default est en luy. Mes il semble a ascuns que la ley est contrary, et que default est en luy; car il est tenus de querer le feoffee s'il soit adonque en* ** *ascun auter lieu deins le roialme de Engleterre. Come si home soit oblige en un obligation de* 20 *li. sur condition endorce sur mesme l'obligation, que s'il paya a celuy a que l'obligation est fait a tiel jour* 10 *li.* †† *adonque l'obligation de* 20 *li. perdra sa force, et serra tenus per nul; en cest cas il covient a celuy que fist obligation*

ALSO, upon such case of feoffment in morgage, a question hath been demanded in what place the feoffor is bound to tender the money to the feoffee at the day appointed, &c. And some have said, upon the land so holden in morgage, because the condition is depending upon the land. And they have said that if the feoffor be upon the land there ready to pay the money to the feoffee at the day set, and the feoffee bee not then there, then the feoffor is quit and excused of the payment of the money, for that no default is in him. But it seemeth to some that the law is contrary, and that default is in him; for he is bound to seeke the feoffee if hee bee then in any other place within the realm of England. As if a man be bound in an obligation of 20 pound upon condition endorsed upon the same obligation, that if he pay to him to whom the obligation is made at such a day 10 pound, then the obligation of 20

(1) [See Note 108.]
† *sur—en*, L. and M. and Roh.
‡ *de—a*, L. and M. and Roh.
§ *tenus* not in L. and M.
‖ *que* not in L. and M. but in Roh.
¶ *sur le terre la*, not in L. and M. nor Roh.
⸸ *que* added in L. and M. and Roh.
** *ascun—un*, L. and M. and Roh.
†† *que* added in L. and M. and Roh.

tion de querer celuy a que l'obligation est fait, s'il soit deins Engleterre, et al jour assesse de tendre a luy les dits 10 li. auterment il forfeitera la summe de 20 li. comprise deins l'obligation, || *&c. Et issint il semble en l'auter cas, &c. Et coment que ascuns ont dit, que le condition est dependant sur la terre, uncore ceo ne prove que le seasans de le condition d'estre performe, covient estre fait sur la terre, &c. nient plus que si le condition fuit que le feoffor ferra a tiel jour, &c. un especial corporall service al feoffee, nient nosmant le lieu ou tiel corporal service serra fait. En tiel cas le feoffor doit faire tiel corporal service al jour limitte al feoffee, en quecunque lieu d'Engleterre que le feoffee est, s'il voile aver advantage de le condition, &c. Issint il semble en l'auter cas. Et il semble a eux que il serroit pluis properment dit, que l'estate de la terre est dependant sur la condition,* * *que* † *a dire que le condition est dependant sur la terre, &c.* Sed quære, &c.

20 pound shall lose his force, and bee holden for nothing; in this case it behooveth him that made the obligation to seek him to whom the obligation is made if he be in England, and at the day set to tender unto him the said 10 pound, otherwise he shall forfeit the summe of 20 pound comprised within the obligation, &c. And so it seemeth in the other case, &c. And albeit that some have said that the condition is depending upon the land, yet this proves not that the making of the condition to bee performed, ought to be made upon the land, &c. no more then if the condition were that the feoffor at such a day shall do some speciall corporall service to the feoffee, not naming the place where such corporall service shall be done. In this case the feoffor ought to do such corporall service at the day limited to the feoffee, in what place soever of England that the feoffee bee, if he will have advantage of the condition, &c. So it seemeth in the other case. And it seemes to them that it shall bee more properly said, that the estate of the land is depending upon the condition, then to say that the condition is depending upon the land, &c. *Sed quære, &c.*

" *ITEM, sur tiel case de feoffment en morgage, question ad este demande, &c.*" Here and in other places, that I may say once for all, where *Littleton* maketh a doubt, and setteth down severall opinions and the reasons, he ever setteth downe (*) the better opinion and his owne last, and so he doth here. [n] For at this day this doubt is settled, having beene oftentimes resolved, that seeing the money is a summe in grosse and collaterall to the title of the land, that the feoffor must tender the money to the person of the feoffee according to the later opinion, and it is not sufficient for him to tender it upon the land; otherwise it is of a rent that issueth out of the land. But if the condition of a bond or feoffment be to deliver twenty quarters of wheat or twenty load of timber or such like, the obligor or feoffor is not bound to carry the same about and seeke the feoffee, but the obligor or feoffor before the day must goe to the feoffee, and know where he will appoint to receive it, and there it must bee delivered. And so note a diversitie betweene money and things ponderous, or of great waight. If the condition of a bond or feoffment be to make a feoffment, there it is sufficient [b] for him to tender it upon the land, because the state must passe by liverie.

(*) Vid. Sect. 170. 302. 375.
[n] 8. E. 4. 4. & 14. 11. H. 4. 62. 17. Ass. p. 2. 17. E. 3. 2. 21. H. 7. Keylway 74. 16. Eliz. Dier 327. lib. 4. fo. 73. in Borough's case. 41. E. 4. 6. (5. Rep. 95. 2. Cro. 423. 3. Cro. 688.) 18 E. 4. 2. 19. R. 2. Det. 178. (Ant. 206. b. 207. a.) (1. Roll. 453.) (Ant. 208.)
[b] 2. E. 4. 3.

[210. b.]

" *Deins*

|| *&c.* not in L. and M. but in Roh.

* *&c.* added L. and M. and Roh.
† *est a tant,* added L. and M. and Roh.

" *Deins le roialm d'Engleterre* (1)." For if he be out of the realme of *England*, hee is not bound to seeke him, or to goe out of the realme unto him. And for that the feoffee is the cause that the feoffor cannot tender the money, the feoffor shall enter into the land, as if he had duly tendered it according to the condition.

[211. a.]

" *Un especiall corporall service al feoffee.*" This is a diversity betweene a rent issuing out of land, and a corporall service issuing out of land, for it sufficeth (as hath beene said) that the rent bee tendered upon the land, (1) out of which it issueth. But homage or any other special corporal service must be done to the person of the lord, and the tenant ought by the law of conveniency to seeke him to whom the service is to bee done in any place within *England*.

21. E. 3. 10. 20. H. 6. 31. 27. E. 3. 34. 21. Ass. 13. 7. E. 4. 4. 21. E. 4. 17. 20. E. Avowrie 113. 45. E. 3. 9. 46. E. 3. Barre 216. Mich. 22. & 23. Eliz. in Banke le Roy, which I myselfe heard and observed. 19. Eliz. Dier 354. Lib. 8. fol. 92. in France's case. (Cro. Jac. 9.)

If a man be bound to pay twenty pound at any time during his life at a place certaine, the obligor cannot tender the money at the place when he will, for then the obligee should bee bound to perpetuall attendance, and therefore the obligor in respect of the incertainty of the time must give the obligee notice that on such a day at the place limited, he wil pay the money, and then the obligee must attend there to receive it: for if the obligor then and there tender the money, he shall save the penaltie of the bond for ever.

(1. Roll. Abr. 453. Ant. 206. 210.)

The same law it is if a man make a feoffment in fee upon condition, if the feoffor at any time during his life pay to the feoffee twenty pound at such a place certaine, that then, &c. In this case the feoffor must give notice to the feoffee when he will pay it, for without such notice as is aforesaid, the tender will not be sufficient. But in both these cases if at any time the obligor or feoffor meete the obligee or feoffee at the place, he may tender the money.

18. Eliz. Dyer 354. (2. Rep. 59. 3. Rep. 64.) (8. Rep. 92. Post. Sect. 353. 2. Cro. 9. 10.)

If *A.* be bound to *B.* with condition that *C.* shall enfeoffe *D.* on such a day, *C.* must give notice to *D.* thereof, and request him to be on the land at the day to receive the feoffment, and in that case he is bound to seeke *D.* and to give him notice.

(Hob. 51. 1. Roll. Abr. 463. 2. Cro. 9.)

" *De tender,*" or *tendre*, is a word common both to the *English* and *French*, in *Latine offerre*; and in that sense, and with that *Latyn* word it is alwayes used in the common law. *Vide* Sect. 514. the tender of the halfe marke. And before, Sect. 333, 334. 337.

(2. E. 4. 3. & 4.)

[211. b.]

Sect. 341.

*MES si feoffment en fee soit fait, reservant al feoffor un annual rent, et pur default de payment un re-entrie, &c. en cest case il ne besoigne * le tenant a tender le rent, quaunt il est arere, forsque sur le terre, pur ceo que ceo est rent issuant hors de la terre, que † est rent*

BUT if a feoffment in fee bee made, reserving to the feoffor a yerely rent, and for default of payment a re-entrie, &c. in this case the tenant needeth not to tender the rent, when it is behind, but upon the land, because this is a rent issuing out of the land,

* *a* added L. and M. and Roh.
† *ceo* added L. and M. and Roh.

(1) [See Note 109.]

[211. a.]
(1) [See Note 110.]

rent secke. Car si le feoffor soit seisie un foits de cest rent, et puis il vient sur la terre, &c. et le rent luy soit denie, il poet aver assise de Novel Disseisin. *Car coment que il poet entrer per cause de le condition enfreint, &c. uncore il poet eslier*, scilicet, *de relinquisher son entrie, ou d'aver un assise, &c. Et issint est diversitie, quant al tender de le rent que est issuant hors de la terre, et del tender d'auter summe en grosse, que ne passe issuant hors d'ascun terre.*

land, which is a rent secke. For if the feoffor bee seised once of this rent, and after hee commeth upon the land, &c. and the rent is denied him, he may have an assise of *Novel Disseisin.* For albeit he may enter by reason of the condition broken, &c. yet hee may choose either to relinquish his entrie, or to have an assise, &c. And so there is a diversitie, as to the tender of a rent which is issuing out of the land, and of the tender of another summe in grosse, which is not issuing out of any land.

HERE the diversitie appeareth betweene a summe in grosse, and a rent issuing out of the land, as hath beene touched before.

" *Uncore il poet eslier*, scilicet, *de relinquisher son entry, ou de aver un assise.*"

(Ant. 145. a.) 14. E 3. Entre congeable 45. 14. Ass. 11. 45. Ass. 5. 6. H. 7. 3. 17. E. 3. 73. Pl. Com. 133. 22. H. 6. 57. (3. Rep. 64, 65.) (1. Roll. Abr. 475. Post. 373. a. Noy 7.)

Here it appeareth, that if the condition be broken for non payment of the rent, yet if the feoffor bringeth an assise for the rent due at that time, he shal never enter for the condition broken, because hee affirmeth the rent to have a continuance, and thereby wayveth the condition. And so it is if the rent had had a clause of distresse annexed unto it, if the feoffor had destrained for the rent, for non payment whereof the condition was broken, he should never enter for the condition broken, but he may receive that rent and acquite the same, and yet enter for the condition broken. But if he accept a rent due at a day after, hee shall not enter for the condition broken, because he thereby affirmeth the lease to have a continuance (1).

(1. Roll. Abr. 445, 446.) (2. Cro. 13, 14.)

Sect. 342.

ET pur ceo il serra bone et sure chose pur celuy que voet faire tiel feoffment en mortgage, de mitter un especial lieu lou les deniers seront payes, et le pluis especiall que est mis, le melior est pur le feoffor. Sicome A. *infeoffe* B. *a aver a luy et a ses heires, sur tiel condition, que si* A. *paya a* B. *en le Feast de Saint Michael L'Archangell procheine a vener, en esglise cathedrall de Paules en Londres, deins quater heures procheine devant le heure de noone de mesme le Feast, a le Rood loft de * l. Rood de le*

AND therefore it wil be a good and sure thing for him that will make such feoffment in morgage, to appoint an especial place (2) where the money shall be payd, and the more speciall that it bee put, the better it is for the feoffor. As if *A.* infeoffe *B.* to have to him and to his heires, upon such condition, that if *A.* pay to *B.* on the Feast of Saint Michael the Arch-Angell next comming, in the cathedrall church of St. Paul's in London, within foure houres next before the hour

[212. a.]

(1) [See Note 111.]
(2) [See Note 112.]

* *le Rood de le*, not in L. and M. nor Roh.

le North doore deins mesme le esglise, ou le tombe de S. Erkenwald, ou al huis de tiel chappell, ou a tiel piller, deins mesme l'esglise, que adonque bien list al avantdit A. et a ses heires d'entrer, &c. en tiel case il ne besoigne de querer le feoffee en auter lieu, ne d'estre en auter lieu, forsque en le lieu comprise en l'endenture, ne d'estre la pluis longe temps que le temps specifie en mesme l'endenture, pur tender ou payer le money a le feoffee, &c.

hour of noone of the same Feast, at the Rood loft of the Rood of the North doore within the same church, or at the tombe of Saint Erkenwald, or at the doore of such a chappell, or at such a pillar, within the same church, that then it shal be lawfull to the aforesaid *A.* and his heires to enter, &c. in this case he needeth not to seek the feoffee in an other place, nor to bee in any other place, but in the place comprised in the indenture, nor to bee there longer than the time specified in the same indenture, to tender or pay the money to the feoffee, &c.

HERE is good counsell and advice given, to set downe in conveyances every thing in certaintie and particularitie, for certaintie is the mother of quietnesse and repose, and incertaintie the cause of variance and contentions; and for obtaining of the one, and avoyding of the other, the best meane is, in all assurances, to take counsell of learned and well-experienced men, and not to trust onely without advice to a precedent. For as the rule is concerning the state of a man's bodie, *Nullum medicamentum est idem omnibus,* so in the state and assurance of a man's land, *Nullum exemplum est idem omnibus.*

"*Al tombe de Saint Erkenwald, &c.*" This *Erkenwald* was a younger sonne of *Anna,* king of the *East Saxons,* and was first abbot of *Chersey* in *Surrey* which he had founded, and after bishop of *London,* a holy and devout man, and lieth buried in the south isle, above the quire in Saint *Paul's* church, where the tombe yet remaineth, that *Littleton* speaketh of in this place: he flourished about the yeare of our Lord 680.

The residue of this Section and the (*&c.*) are evident.

Sect. 343.

ITEM, en tiel case, lou le lieu † de payment est limitte, le feoffee n'est ‡ oblige de receiver le payment en nul auter lieu forsque en mesme le lieu issint limit. Mes uncore si il resceivst le payment en auter lieu ceo est assets bone, et auxy fort pur le feoffor sicome le receit ust esté en mesme le lieu issint limit, &c.

ALSO, in such case, where the place of payment is limited, the feoffee is not bound to receive the payment in any other place but in the same place so limitted. But yet if he doe receive the payment in another place, this is good enough and as strong for the feoffor as if the receipt had beene in the same place so limited, &c.

† *de payment,* not in L. and M. nor Roh. ‡ *pas* added in L. and M. and Roh.

HEREBY

(6. Rep. 46. b. 47. Plo. 69. b. 5. Rep. 117.)

HEREBY it appeareth that the place is but a circumstance; and therefore if the obligee receiveth it at any other place, it is sufficient, though he be not bound to receive it at any other place. And so it is if the mony be to be paid on such a feast, [212. b.] yet if the money be tendred and received at any time before the day, it is sufficient. (1)

Sect. 344.

*ITEM, en tiel case de feoffment en mortgage, si le feoffor paya al feoffee un chival, ou hanap d'argent, ou un annel d'or, ou auter tiel chose en plein satisfaction del money, et l'auter ceo receivst, ceo est assets bone, et auxy fort sicome il ust receive la summe del money, coment que le chival ou l'auter chose ne fuit de vintisme part del value de summe de le money, pur ceo que l'auter avoit ceo accept en pleine satisfaction *.*

ALSO, in the case of feoffment in morgage, if the feoffor payeth to the feoffee a horse, or a cup of silver, or a ring of gold, or any such other thing in ful satisfaction of the money, and the other receiveth it, this is good enough, and as strong as if hee had received the summe of money, though the horse or the other thing were not of the twentieth part of the value of the sum of money, because that the other hath accepted it in ful satisfaction.

(Dyer 1.) 3. H. 7. 4. b. 9. H. 7. 16. 11. H. 7. 20, 21. 19. E. 4. 1. b. 47. E. 3. 24. 22. E. 4. 24. 37. H. 6. 26. Li. 9 fo. 78. Peytoe's case. (1. Roll. Rep. 296.) 12. H. 4. 23. * Peytoe's case ubi supra. (Ant. 207.)

HEREUPON are many diversities worthie of observation.

First, there is a diversitie, when the condition is for payment of money; and when for the deliverie of a horse, a robe, a ring, or the like: for where it is for payment of money, there if the feoffee or obligee accept an horse, &c. in satisfaction, this is good: but if the condition were for the deliverie of a horse, or robe, there albeit the obligee or feoffee accept money or any other thing for the horse, &c. it is no performance of the condition. The like law is, if the condition bee to acknowledge a recognizance of twentie pounds, &c. if the obligee or feoffee accept twenty pounds in satisfaction of the condition, it is not sufficient in law, * but notwithstanding such acceptance, the condition is broken. And so it is of all other collaterall conditions, though the obligee or feoffee himselfe accept it.

4. H. 7. 4. Dy. 35. H. 8. 56. 27. H. 8. 1. (Ant. 208. b.)

Secondly, in case when the condition is for payment of money, there is a diversitie when the money is to be payd to the partie, and when to an estranger; for when it is to bee payd to an estranger, there if the stranger accept an horse or any collaterall thing in satisfaction of the money, it is no performance of the condition, because the condition in that case is strictly to be performed. But if the condition be, that a stranger shal pay to the obligee or feoffee a sum of money, there the obligee or feoffee may receive a horse, &c. in satisfaction.

Lib. 5. fo. 117. Pinnel's case.

Thirdly, where the condition is for payment of twentie pounds, the obligor or feoffor cannot at the time appointed pay a lesser summe in satisfaction of the whole, because it is apparant that a lesser

(1) [See Note 113.] * *&c.* added in L. and M. and Roh.

leſſer ſumme of money cannot be a ſatisfaction of a greater. But if the obligee or feoffee doe at the day receive part, and thereof make an acquittance under his ſeale in full ſatisfaction of the whole, it is ſufficient, by reaſon the deed amounteth to an acquittance of the whole. If the obligor or leſſor pay a leſſer ſumme either before the day, or at another place than is limited by the condition, and the obligee or feoffee receiveth it, this is a good ſatisfaction.

26. H. 6. tit. Barre 37. (Sid. 44. Poſt. 373. a. Mo. 47.)

Fourthly, not onely things in poſſeſſion may be given in ſatisfaction, (whereof *Littleton* putteth his caſe,) but alſo if the obligee or feoffee accept a ſtatute or a bond in ſatisfaction of the money, it is a good ſatisfaction.

30. E. 3. 23. (Hob. 68, 69.)

[213. a.] If the obligor or feoffor be bound by condition to pay an hundred markes at a certaine day, and at the day the parties doe account together, and for that the feoffee or obligee did owe twentie pound to the obligor or feoffor, that ſumme is allowed, and the reſidue of the hundred markes paid, this is a good ſatisfaction, and yet the twenty pound was a choſe in action, and no payment was made thereof, but by way of retainer or diſcharge (1).

11. R. 2. tit. Barre 3. 43. (1. Roll. Abr. 470. 604.) (Noy. 110. 5. Rep. 117.) 37. H. 6. 26. 46. E. 3. 33. 34. H. 6. 17. 12. H. 8. 1. b.

" *En pleine ſatisfaction.*" *Nota*, in ſatisfaction and in full ſatisfaction is all one.

Sect. 345.

*ITEM ſi home enfeoffa un auter * ſur condition, que il et ſes heires rendront a un eſtrange home & a ſes heires un annuel rent de 20 s. &c. et ſi il ou ſes heires failont de payment de ceo, que adonques bien lirroit al feoffor et a ſes heires de entrer, ceo eſt bon condition : et uncore en ceſt cas, coment que tiel annuall payment eſt appel'e en l'endenture un annuall rent, ceo n'eſt pas properment rent. Car s'il ſerroit rent, il covient eſtre rent ſervice, ou rent charge, ou rent ſecke, et † il n'eſt aſcun de eux. Car ſi l'eſtrange fuit ſeiſie de ceo, et puis il fuit a luy denie, il n'avera unque aſſiſe de ceo, pur ceo que il n'eſt ‡ pas iſſuant ‖ hors d'aſcun tenements; et iſſint l'eſtrange n'ad aſcun remedie, ſi tiel annual rent ſoit aderere en ceſt cas, mes que le feoffor ou ſes heires poient entrer, &c. Et uncore ſi le feoffor ou ſes heires entront pur default de payment, adonque tiel rent eſt ale a touts jours. Et iſſint tiel rent § n'eſt forſque un peine aſ-*

ſiſe

ALSO if a man infeoffe an other upon condition, that hee and his heires ſhall render to a ſtranger and to his heires a yearely rent of 20 ſhillings, &c. and if hee or his heires faile of payment thereof, that then it ſhall bee lawfull to the feoffor and his heires to enter, this is a good condition : and yet in this caſe, albeit ſuch annuall payment be called in the indenture a yearely rent, this is not properly a rent. For if it ſhould bee a rent, it muſt bee rent ſervice, rent charge, or a rent ſecke, and it is not any of theſe. For if the ſtranger were ſeiſed of this, and after it were denied him, hee ſhall never have an aſſiſe of this, becauſe that it is not iſſuing out of any tenements; and ſo the ſtranger hath not any remedy, if ſuch yearely rent be behind in this caſe, but that the feoffor or his heires may enter, &c. And yet if the feoffor or his heires enter for default of payment, then ſuch rent is

taken

(1) [See Note 114.]
* *en fee* added L. and M. and Roh.
† *que* added L. and M. and Roh.
‡ *pas* not in L. and M.
‖ *hors* not in L. and M.
§ *n'eſt* — *eſt*, L. and M. and Roh.

fesse a le tenant et ses heires, que s'ils ne voilent payer ceo solonque la forme del indenture, ils perdront leur terre per l'entrie d'l feoffor ou ses heires pur default de paiment. Et en cest cas il semble que le feoffee et ses heires doyent querer le estranger et heires s'ils sont deins Engleterre, † pur ceo que nul lieu est limit l'ou le payment serra fait, et pur ceo que tiel rent n'est pas issuant ‡ hors d'ascun terre, &c.

taken away for ever. And so such a a rent is but as a paine set upon the tenant and his heires, that if they will not pay this according to the forme of the indenture, they shall lose their land by the entrie of the feoffor or his heires for default of payment. And in this case it seemeth that the feoffee and his heires ought to seeke the stranger and his heires if they bee within *England*, because there is no place limited where the payment shall bee made, and for that such rent is not issuing out of any land, &c.

(Dr. and Stud. cap. 20.)
[a] Lib. 8. fol. 70. 71.
(Plo. 243. sera hon in case le Roy. Ant. 47. a. Cro. Car. 288. Ant. 143. b.)

" *RENDRONT a un estrange home un annuel rent, &c.*"
This reservation is meerely void [a] for the reasons hereafter in this *section* alleadged by *Littleton*, and also for that no estate moveth from the stranger, and that he is not partie to the deed.

And albeit it bee a voyde reservation, and can be no rent, and the words of the condition be, that if the feoffee or his heires faile of payment of it, (that is of the annuall rent) that then, &c. yet it appeareth that the condition is good, and annuall rent shall bee taken for an annuall summe of money in grosse, and not in the proper signification thereof, *viz.* to bee a rent issuing out of land, which is to bee observed, that words in a condition shall bee taken out of their proper sense, *ut res magis valeat quam pereat*, and so in like cases it is holden [b] in our bookes.

[b] 6. E. 2. entr. cong. 55. recipere. 8. Ass. 34. revertere.

(1. Rep. 76. Godbolt 448.)
(Ant. 148. a. Sect. 221.)

But if *A.* bee seised of certaine lands and *A.* and *B.* joyne in a feoffment in fee reserving a rent to them both and their heires, and the feoffee grant that it shall be lawfull for them and their heires to distreine for the rent, this is a good grant of a rent to them both, because hee is partie to the deed, and the clause of distresse is a grant of the rent to *A.* and *B.* as it appeareth before in the chapter of rents. But if *B.* had beene a stranger to the deed, then *B.* had taken nothing. And upon this diversitie are all the bookes [c], which *primâ facie* seeme to vary, reconciled.

[213. b.]

[c] 18. E. 2. Ass. 381. 26. H. 8. 2. 13. E. 2. feoffments & faits 108. 31. Ass. pl. 31.
[d] Vide Sect. 381.

" *Car s'il serra rent, il covient estre rent service, rent charge, ou rent secke, et il n'est nul de eux.*" This is a good *logicall* argument *à divisione, & argumentum à divisione est fortissimum in lege.* [d] *Littleton* useth this argument elsewhere, where see more of this matter.

" *Pur default de payment.*" Note here, seeing it is but a summe in grosse, there need no demand of the rent; for *Littleton* here saith, that the feoffee ought to seeke the person of the stranger to pay him the summe of money, because it is a summe in grosse and not issuing out of the land.

† *pur ceo que nul lieu est limit l'ou le payment serra fait, et*, not in L. and M. nor Roh.

‡ *hors* not in L. and M. nor Roh.

Sect.

Sect. 346.

ET hic nota deux choses: un est, que nul rent (que properment est dit rent) poit estre reserve sur ascun feoffment, done, ou leas, forsque tantsolement al feoffor, ou al donor, ou al lessor, ou a lour heires, & en nul ‖ maner § il poit estre reserve a ascun estrange person. Mes si deux joyntenants font un leas per fait endent, reservant a un de eux un certaine annuall rent, ceo est assets bon a luy a que le rent est reserve, pur ceo que il est privy a le lease & nemy estrange a le leas, &c.

AND here note two things: one is, that no rent (which is properly said a rent) may be reserved upon any feoffment, gift, or lease, but onely to the feoffor, or to the donor, or to the lessor, or to their heires, and in no manner it may bee reserved to any strange person. But if two jointenants make a lease by deed indented, reserving to one of them a certain yearely rent, this is good enough to him to whom the rent is reserved, for that hee is privie to the lease and not a stranger to the lease, &c.

"*AL feoffor, donor, &c. ou a lour heires.*" Hereby it may seem that if a man make a feoffment, gift, or lease, that (omitting himselfe) he may reserve a rent to his heires (1). But *Littleton* is not so to be understood; his meaning is, that either the feoffor, &c. may reserve the rent to himselfe only, or to himselfe and his heires. And yet it is holden [e] in our bookes, that a man may make a feoffment in fee reserving a rent of forty shillings to [214. a.] the feoffor for tearme of his life, and after his decease, a pound of comyne to his heires, that this is good.

(Hob. 130. 2. Roll. Abr. 447. Post. 386. 8. Rep. 71. Ant. 39. b.)

[e] 5. E. 3. 27, 28. (Ant. 164. a.) (10. Rep. 106. Hob. 130.)

If a man make a feoffement in fee, reserving a rent to him or his heirs, it is good [f] to him for tearme of his life, and void to his heire.

(Ant. 47. a.) [f] Lib. 5. fol. 111. Mallorie's case.

"*Mes si 2. joyntenants font un lease per fait indent, &c.*" (1) This case being by deed indented, is evident, and it hath been touched before; but if that two joyntenants without a deed indented make a lease for life, reserving a rent to one of them, it shall enure to them both in respect of the joynt reversion. And so it is of a surrender to one of them, it shall enure to them both.

5. E. 4. 4. a. 27. H. 8. 16. Vide Sect. 58. (Post. 318. a. Ant. 47. a.)

If two joyntenants, the one for life, and the other in fee, joyne in a lease for life, or a gift in tayle, reserving a rent, the rent shal enure to them both; for if the particular estate determine, they shall be joyntenants againe in possession. But if tenant for life, and he in the reversion joyn in a lease for life, or a gift in taile by deed, reserving a rent, this shall enure to the tenant for life onely, during his life, and after to him in the reversion, for every one grants that which he may lawfully grant; and if at the common law they had made a feoffment in fee generally, the feoffee should have

(Ant. 192. a. 6. Rep. 15. a. Ant. 42. a. 45. a. 53. b. 193. a.)

Vide Sect. 58.

‖ *auter* added in L. and M. and Roh.
§ *il* not in L. and M. nor Roh.
(1) [See Note 115.]

[214. a.]
(1) [See Note 116.]

have holden of the tenant for life during his life, and after of him in reversion, and so it was holden [g] in the King's Bench.

[g] Mich. 36. & 37. Eliz.

Sect. 347.

*LE second chose * est, que nul entrie ou reentrie (que est tout un) † poit etre reserve ne done a ascun person, forsque tantsolement al feoffor, ou al donor, ou al lessor, ou a lour heires: & tiel ‡ reenter ne poyt estre grant a un auter person. Car si home lessa ‖ terre a un auter pur terme de vie per indenture, rendant al lessor et a ses heires certaine rent, & pur default de payment un reentry, &c. si apres le lessor per un fait granta le reversion de la terre a un auter en fee, et le tenant a terme de vie atturna, &c. si le rent apres soit aderere, le grantee de le reversion poit distreiner pur le rent, pur ceo que le rent est incident a le reversion; mes il ne poit entrer en la terre, & ouste le tenant, sicome le lessor puissoit ou ses heires, si le reversion ust este continue en eux, &c. Et en cest case l'entrie est tolle a touts temps; car le grantee de le reversion ne poit entrer,* causâ quâ suprà. *Et le lessor ne ses heires ne poyent enter; car si le lessor puissoit entrer, donques il covient que il serroit § en son primer estate, &c. et ceo ne poit estre, pur ceo que il ad alien de luy le reversion.*

THE second thing is, that no entry nor reentry (which is all one) may be reserved or given to any person, but only to the feoffor, or to the donor, or to the lessor, or to their heires: and such reentrie cannot be given to any other person. For if a man letteth land to another for tearme of life by indenture, rendring to the lessor and to his heires a certaine rent, and for default of payment a reentry, &c. if afterward the lessor by a deed granteth the reversion of the land to another in fee, and the tenant for terme of life attorne, &c. if the rent be after behind, the grantee of a reversion may distreine for the rent, because that the rent is incident to the reversion; but he may not enter into the land, and ouste the tenant, as the lessor might have done or his heires, if the reversion had beene continued in them, &c. And in this case the entrie is taken away for ever; for the grantee of the reversion cannot enter, *causâ quâ suprà*. And the lessor nor his heires cannot enter; for if the lessor might enter, then hee ought to be in his former state, &c. and this may not bee, because hee hath aliened from him the reversion.

(1. Roll. Abr. 473.)

"QUE nul entrie, &c." Here *Littleton* reciteth one of the maximes of the common law; and the reason hereof is, for avoyding of maintenance, suppression of right, and stirring up of suites: and therefore nothing in action, entrie, or re-entrie, can bee granted over; for so under colour thereof pretended titles might bee granted to great men, wherby right might bee trodden downe, and the weake oppressed, which the common law forbiddeth, as men to grant before they be in possession.

"Pur

* *est* not in Roh. but in L. and M.
† *ne* added in L. and M. and Roh.
‡ *reenter—rent* in L. and M. and Roh.
‖ *certeine* added in L. and M. and Roh.
§ *en—a* in L. and M. and Roh.

[214. b.] "*Pur default de payment un reentrie, &c.*" Hereupon is to bee collected divers diversities. First, betweene a condition that requireth a re-entrie, and a limitation that *ipso facto* determineth the estate without any entry. Of this first sort no stranger, as *Littleton* saith, shall take any advantage, as hath beene said. But of limitations it is otherwise. As if a man make a lease *quousque*, that is, untill *I. S.* come from *Rome*, the lessor grant the reversion over to a stranger, *I. S.* comes from *Rome*, the grantee shal take advantage of it and enter, because the estate by the expresse limitation was determined.

(10. Rep. 42.)

(Plo. 242. a. 1. Roll. Abr. 411. Post. 379. a.)

So it is if a man make a lease to a woman *quamdiu casta vixerit*, or if a man make a lease for life to a widow, *si tamdiu in purâ viduitate viveret*. So it is if a man make a lease for a 100 yeares if the lessee live so long, the lessor grants over the reversion, the lessee dies, the grantee may enter, *causâ quâ suprà*.

Regitter 246. Pl. Com. 27. 34. E. 3. Formedon 68. F N. B. 201 Lib. 10. fo. 36. Mary Portington's case.

2. Another diversitie is betweene a condition annexed to a freehold, and a condition annexed to a lease for years.

For if a man make a gift in taile for a lease for life upon condition, that if the donee or lessee goeth not to *Rome* before such a day the gift or lease shall cease or be void, the grantee of the reversion shall never take advantage of this condition, because the estate cannot cease before an entrie; but if the lease had beene but for yeares, there the grantee should have taken advantage of the like condition, because the lease for yeares *ipso facto* by the breach of the condition without any entry was void; for a lease for yeares may begin without ceremony, and so may end without ceremony; but an estate of freehold cannot begin nor end without ceremony. And of a voide thing an estranger may take benefit, but not of a voidable estate by entry.

(Plo. 242. a.) Brooke tit. Condition in Abr. 11. H. 7. L'opinion de Bromley. 10. E. 52. 10. Ass. Pl. 24. Pl. Com. 36. 11. H. 7. 17. 19. R. 2. Done 10. (1. Roll. Abr. 475. Noy 7. 3. Rep. 64. b. 65. 8. Rep. 95. Post. 215. b.)

"*Al feoffor, ou al donor, &c. ou a lour heires, &c.*" Here is to be observed a diversitie betweene a reservation of a rent and a re-entry; for (as it hath beene said) a rent cannot be reserved to the heire of the feoffor, but the heire may take advantage of a condition, which the feoffor could never doe. As if I infeoffe another of an acre of ground upon condition that if mine heire pay to the feoffee, &c. 20 shillings, that he and his heires shall re-enter, this condition is good; and if after my decease my heire pay the 20 shillings, hee shall re-enter, for he is privy in blood, and enjoy the land as heire to me.

Pl. Com. 313. 314. in Scolasticae's cas. (Hob. 130.) 15. E. 4. 14. a.

"*Forsque tantsolement al feoffor, &c. ou a lour heires.*" Our author speaketh here of naturall persons for an example, for if a bishop, archdeacon, parson, prebend, or any other body politique or corporate, ecclesiastical or temporal, make a lease, &c. upon condition, his successor may enter for the condition broken, for they are privy in right.

21. H. 7. 18. a. (Ant. 46. b.)

And so if a man have a lease for yeares and demise or grant the same upon condition, &c. and die, his executors or administrators shall enter for the condition broken, for they are privie in right, and represent the person of the dead.

215. a.] [y] If *cestuy que use* had made a lease for yeares, &c. upon condition, the feoffees should not enter for the condition broken, for they are privie in estate, but not privie in blood.

[y] 27. H. 8. 1.

Another diversitie is in case of a lease for yeares, where the condition is that the lease shall cease, or be void, as is aforesaid, and where the condition is, that the lessor shall re-enter, for there the

(4. Rep. 51. Ant. 211. b. 1. Roll. Abr. 475. 3. Rep. 64.)

the grantee, as *Littleton* saith, shall never take benefit of the condition.

Pl. Com. Browning's case. 136.

And it is to be observed, that where the estate or lease is *ipso facto* voide by the condition or limitation, no acceptance of the rent after can make it to have a continuance: otherwise it is of an estate or lease voydable by entrie. (1)

Another diversitie is betweene conditions in deed, whereof sufficient hath beene said before, and conditions in law. As if a man make a lease for life, there is a condition in law annexed unto it, that if the lessee doth make a greater estate, &c. that then the lessor may enter. Of this and the like conditions in law, which doe give an entrie to the lessor, the lessor himselfe and his heires shall not onely take benefit of it, but also his assignee and the lord by escheat, every one for the condition in law broken in their owne time. Another diversity there is betweene the judgement of the common law, whereof *Littleton* wrote, and the law at this day by force of the statute [*] of 32. *H.* 8. cap. 34. [*a*] For by the common law no grantee or assignee of the reversion could (as hath been said) take advantage of a re entrie by force of any condition. For at the common law, if a man had made a lease for life reserving a rent, &c. and if the rent be behind a re-entrie, and the lessor grant the reversion over, the grantee should take no benefit of the condition, for the cause before rehearsed. But now by the said statute of 32. *H.* 8. the grantee may take advantage therof, and upon demand of the rent, and non-payment, he may re-enter. By which act it is provided, that as well every person which shall have any grant of the king of any reversion, &c. of any lands, &c. which pertained to monasteries, &c. as also all other persons being grantees or assignees, &c. to or by any other person or persons, and their heires, executors, successors, and assignees shal have like advantage against the lessees, &c. by entry for non-payment of the rent, or for doing of waste or other forfeiture, &c. as the said lessors or grantors themselves ought or might have had. Upon this act divers resolutions and judgements have beene given, which are necessary to be knowne.

(1. Saun. 237. 238, 239, 240, 241.)
[*] 32. H. 8. cap. 34. in le preamble.
[*a*] 26. H. 6. tit. ent. cog. 49.
(Plo. 175. b.)

1. That the said statute is generall, *viz.* [*b*] that the grantee of the reversion of every common person as well as of the king shall take advantage of conditions.

2. That the statute doth extend to grants made by the successors of the king, albeit the king be only named in the act.

3. That where the statute speaketh of lessees, that the same doth not extend to gifts in taile.

4. That where the statute speakes of grantees and assignees of the reversion, [*d*] that an assignee of part of the state of the reversion may take advantage of the condition. As if lessee for life be, &c. and the reversion is granted for life, &c. So if lessee for yeares, &c. bee, and the reversion is granted for yeares, the grantee for yeares shall take benefit of the condition in respect of this word (*executors*) in the act.

[*b*] Pl. Com. Hill. and Grange's case 175, 176. M. 10. & 11. Eliz. 180. Dier. ibid.

14. Eliz. Dyer 309. Wynter's case.

[*d*] Pl. Com. Kidwellye's case 69. Vid Dyer Mich. 14. & 15. Eliz. 309. (1. Roll. Abr. 472. Post. 385. a. Ante 148. a. 1. Roll. Abr. 471. Mo. 93.) Vide 7. E. 3. 54. Simile adjudged in Communi Banco in the Lord Dyer's time. P. 17. Eliz. Mich. 14. & 15. Eliz. Dyer 309. adjudged Winter's case.

5. That a grantee of part of the reversion shall not [*e*] take advantage of the condition; as if the lease be of three acres, re-

[*e*] Lib. 5. fo. 54. Knight's case. Winter's case ubi supra. Knight's case ubi supra.

serving

(1) [See Note 117.]

ſerving a rent upon condition, and the reverſion is granted of two acres, the rent ſhall be apportioned by the act of the parties, but the condition is deſtroyed, for that it is entire and againſt common right.

6. That in the king's caſe, the condition in that caſe is not deſtroyed, but remaines ſtill in the king.

7. By act in law a condition may bee apportioned in the caſe of a common perſon; as if a leaſe for yeares be made of two acres, one of the nature of Burrough Engliſh, the other at the common law, and the leſſor having iſſue two ſonnes, dieth, each of them ſhall enter for the condition broken, and likewiſe a condition ſhall be apportioned by the act and wrong of the leſſee, as hath been ſaid in the chapter of Rents.

Lib. 4. fo. 120. Dumper's caſe. (4. Leo. 27, 28, 29, 30. Mo. 202, 203.)

8. If a leaſe for life be made, reſerving a rent upon condition, &c. the leſſor levies a fine of the reverſion, he is grantee or aſſignee of the reverſion; but without atturnment hee ſhall not take advantage of the condition, for the makers of the ſtatute intended to have all neceſſary incidents obſerved, otherwiſe it might be miſchievous to the leſſee. (2)

Reſolved in Duke's caſe. Paſch. 20. Eliz. in Communi Banco. Mallorie's caſe lib. 5. 112. b.

9. There is a diverſity betweene a condition that is compulſory, and a power of revocation that is voluntary: for a man that hath a power of revocation, may by his owne act extinguiſh his power of revocation in part, as by levying of a fine of part; and yet the power ſhall remaine for the reſidue, becauſe it is in nature of a limitation, and not of a condition; and ſo it was reſolved [b] in the earle of Shrewſburie's caſe in the court of wards, *Paſch.* 39. *Eliz.* *and Mich.* 40 & 41. *Eliz.*

(1. Roll. 472. Hob. 313. Poſt. 237. 265. b. 1. Rep. 112. 113.)

[b] 14. Eliz. Dyer 39.

10. If the leſſor bargaine and ſell the reverſion by deed indented and inrolled, the bargainee is not in the *per* by the bargainor, and [215. b.] yet hee is an aſſignee within the ſtatute. So if the leſſor grant the reverſion in fee to the uſe of *A.* and his heirs, *A.* is a ſufficient aſſignee within the ſtatute, becauſe he comes in by the act and limitation of the partie, albeit he is in the *poſt*, and the words of the ſtatute be, *to or by*, and they be aſſignees to him although they be not by him: but ſuch as come in meerly by act in law, as the lord of the villeine, the lord by eſcheat, the lord that entreth or claimeth for mortmaine, or the like, ſhall not take benefit of this ſtatute.

(1. Rep. 173. b. 4. Rep. 119. b.) (1. Roll. Abr. 422.) (3. Rep. 62. b.)

11. If the leſſor in the caſe before bargaine and ſell the reverſion by deed indented and inrolled, or if the leſſor make a feoffment in fee, and the leſſee re-enter, the grantee or feoffee ſhall not take any advantage of any condition, without making notice to the leſſee.

Lib. 5. fo. 113. Mallorie's caſe. Lib. 8. fol. 92. France's caſe. (Cro. Jac. 9. 1. Roll. 46.)

12. Albeit the whole words of the ſtatute be, for non-payment of the rent, or for doing of waſt or other forfeiture, yet the grantees or aſſignees ſhall not take benefit of every forfeiture, by force of a condition, but only of ſuch conditions as either are incident to the reverſion, as rent, or for the benefit of the ſtate, as for not doing of waſt, for keeping the houſes in reparations, for making of fences, ſcouring of ditches, for preſerving of woods, or ſuch like, and not for the payment of any ſumme in groſſe, delivery of corne, wood, or the like, ſo as other forfeiture ſhall be taken for other forfeitures like to thoſe examples which were there put,

And ſo was it reſolved in Wynter's caſe, Mich. 14. and 15. Eliz. in Communi Banco, and oftentimes ſince. Vide Dyer 309. (Plo. 242. 1. Saun. 240. 1. Leo. 62.)

(2) [See Note 118.]

put, *(videlicet)* of payment of rent, and not doing of wast, which are for the benefit of the reversion. (1)

Sect. 348.

*ITEM si soyt seignior et tenant, et le tenant fait un tiel lease pur terme de vie, rendant a lessor et a ses heires tiel annual rent, et pur default de payment un re-entrie, &c. si apres le lessor morust sans heire durant la vie le tenaunt a terme de vie, per que le reversion devient al seignior per voy d'escheat, et puis le rent de le tenaunt a terme de vie soit aderere, le seignior poet destreiner le tenant pur le rent arere; mes il ne poet entrer en la terre per force del condition, &c. pur ceo que il n'est pas heire al * lessor, &c.*

ALSO if lord and tenant bee, and the tenant make a lease for terme of life, rendering to the lessor and his heyres such an annuall rent, and for default of payment a re-entrie, &c. if after the lessor dyeth without heire during the life of the tenant for life, whereby the reversion commeth to the lord by way of escheat, and after the rent of the tenant for life is behind, the lord may distrein the tenant for the rent behind; but he may not enter into the land by force of the condition &c. because that hee is not heire to the lessor, &c.

(F.N.B. 144. b.) "*AL seigniour per voy de escheat, &c.*"

Note, here it appeareth, that the lord by escheat shall distreine for the rent, and yet the rent was reserved to the lessor and his heires; but both assignees in deed and assignees in law shal have the rent, because the rent being reserved of inheritance to him and his heirs, is incident to the reversion, and goeth with the same. But if the rent were reserved to him and his assignes, and the lessor assigned over the reversion, and dyeth, the assignee shall not have the rent after his decease, because the rent determined by his death, for that it was not reserved to him, his heirs, and assignes.

19. E. 3. Resceit 14.

(Ant. 1. b. 47. a.)

"*Mes il ne poet entrer en la terre pur force del condition, &c.*"

Hereby it appeareth, that at the common law neither assignes in deed nor assignes in law could have taken the benefit of either entrie or re-entrie, by force of a condition.

"*Pur ceo que il n'est pas heire al lessor, &c.*"

The gardian in chivalrie [f] or in socage shall in the right of the heire take benefit of a condition by entrie or re-entrie, by the common law, and so it is here implyed.

[f] 21. H 7. 18. 17. Ass. 20. 19. E. 3. Gard. 113, 114. 18. Ass. pl. 18. lib. 7. fol. 7. The earl of Bedford's case.

(1) [See Note 118.] * *lessor—feoffer*, L. and M. and Roh.

[216. a.]

Sect. 349.

(8. Rep. 73. Plow. 481.) (Ant. 26.)

*ITEM si terre soit graunt a un * home pur terme de deux ans sur tiel condition, que s'il payeroit al grantor deins les dits deux ans 40 markes, † adonques il averoit la terre a luy et a ses heires, &c. en cest case si le grantee enter per force de le grant, sans ascun liverie de seisin fait a luy per le grantor, et puis il paya al grantor les 40 markes deins les deux ans, uncore il n'ad riens en la terre forsque pur terme de deux ans, pur ceo que nul liverie de seisin a luy fuit fait al commencement. Car s'il averoit franktenement et fee en cest case, pur ceo que il ad performe le condition, donque il averoit franktenement per force del prime graunt, l'ou nul liverie de seisin de ceo fuit fait, que serroit ‡ inconvenient, &c. Mes si le grantor ust fait liverie de seisin al grantee per force de la grant, donque averoit le grantee le franktenement et le fee sur mesme le condition.*

ALSO if land be granted to a man for terme of two yeares upon such condition, that if hee shall pay to the grantor within the said two yeares fortie marks, then he shal have the land to him and to his heyres, &c. in this case if the grantee enter by force of the grant, without any liverie of seisin made unto him by the grantor, and after he payeth the grantor the forty markes within the two yeares, yet he hath nothing in the land but for terme of two yeares, because no liverie of seisin was made unto him at the beginning. For if he should have a freehold and fee in this case, because he hath performed the condition, then he should have a freehold by force of the first grant, where no liverie of seisin was made of this, which would be inconvenient, &c. But if the grantor had made liverie of seisin to the grantee by force of the grant, then should the grantee have the freehold and the fee upon the same condition.

HERE sixe things are to be observed. First, *Littleton* here putteth an example of a condition precedent (1). Secondly, that such a condition which createth an estate may be made by paroll without deed. Thirdly, that liverie of seisin in this case must bee made before the lessee enter, (as *Littleton* here saith at the beginning) for after his entrie livery made to him that is in possession is void, as hath been said. Fourthly, that if no liverie of seisin be made, that no fee simple doth passe, although the money be paid. Fifthly, that it is inconvenient that the fee simple should passe in this case without livery of seisin. Sixtly, that *argumentum ab inconvenienti*, is forcible in law, as often hath beene and shall be observed. See more of this kind of condition in the Section next following (2).

Vide Sect. 60. (Ant. 48. a.)

"*Et a ses heires, &c.*" Here (*&c.*) implyeth an estate in taile, or a lease for life.

* *home* not in L. and M. nor Roh.

† *que* added in L. and M. and Roh.

‡ *inconvenient, &c.—encontre reason* in L. and M. and Roh.

(1) See some observations on conditions precedent, and conditions subsequent, in the last note upon this chapter.

(2) [See Note 119.]

Sect. 350. [216. b.]

ITEM si terre soyt graunt a un home pur terme de 5 ans, sur condition, que s'il pay al grantor deins les deux primer ans 40 markes, que adonque il avercit fee, ou auterment forsque pur terme de les 5 ans, et liverie de seisin est fait a luy per force de le graunt, ore il ad fee simple conditionell, &c. Et si en ceo case le grauntee ne paia my al grantor les 40 markes deins les primers deux ans, donques immediate apres mesmes les deux ans passes, le fee et le franktenement est et serra adjudge en le grantor, pur ceo que le grantor ne poet apres les dits deux ans maintenant enter sur le grauntee, pur ceo que le grantee ad uncore title per trois ans d'aver et occupier la terre per force de mesme le grant. Et issint pur ceo que le condition del part le grantee est enfreint, et le grauntor ne poet entrer, la ley mittera le fee et le franktenement en le grantor. Car si le grantee en cest case fait wast, donques apres le enfreinder de le condition, &c. apres les deux ans, le grantor avera son briefe de wast. Et ceo est bone proofe adonque, que le reversion est en luy, &c.

ALSO if land be granted to a man for term of five yeares, upon condition, that if he pay to the grantor within the two first yeares forty markes, that then he shal have fee, or otherwise but for terme of the five yeares, and livery of seisin is made to him by force of the grant, now he hath a fee simple conditionall, &c. And if in this case the grantee doe not pay to the grantor the fortie markes within the first two yeares, then immediately after the said two yeares past, the fee & the freehold is and shall be adjudged in the grantor, because that the grantor cannot after the said two yeares presently enter upon the grauntee, for that the grauntee hath yet title by three yeares to have and occupie the land by force of the same grant. And so because that the condition of the part of the grantee is broken, and the grantor cannot enter, the law will put the fee and the freehold in the grantor. For if the graumtee in this case makes wast, then after the breach of the condition, &c. and after the two yeares, the grantor shall have his writ of waste. And this is a good proofe then, that the reversion is in him, &c.

(5. Rep. 98.)

"ORE il ad fee simple conditionall, &c." The like is of an estate in taile, or for life. Many are of opinion against *Littleton* in this case, and their reason is, because the fee simple is to commence upon a condition precedent, and therfore cannot passe until the condition bee performed; and that here *Littleton* of a condition precedent doth (before the performance thereof) make it subsequent: and for proofe of their opinion they avouch many successions of authorities that no fee simple should passe before the condition performed. 31. *E.* 1. *tit. feoffments & faits* 119. *A.* letteth a mannor to *B.* for term of twenty years, and the deed would, that after the terme of twenty yeares that *B.* and his heirs should hold the said mannor for ever by twelve pounds rent, *A.* taketh a wife and dyeth before the term be past, the wife of *A.* demands dower. And there *Hayland* chiefe justice saith, that the fee and the frank-tenement doth repose in the person of the lessor untill the terme be past, for before that the condition is not performed; for if the lessor had aliened the land before the end of the terme, *B.* should not recover by a writ of assise, and by the death of the lessor the chiefe lord should

31. E. 1. tit. feoffments & faits 119.

[217. a.] should have had the wardship of the heire of the lessor, and by judgement the wife recovered dower, for the termor could not have fee, all which be the words of that booke.

12. *E*. 2. *tit. voucher* 265. *I*. letteth lands to *B*. for eight yeares, and if the lessor pay not a hundred markes to the lessee at the end of the tearme, that then he shall have fee: by the non-payment of the mony, the fee and franktenement accrueth to him, and before, the lessee cannot be impleaded in a *præcipe*, neither shall he vouch.

12. E. 2. tit. voucher 265. (8. Rep. 73. Plow. 481.)

[*x*] 7. *E*. 3. 10. *I*. letteth certaine lands to *N*. for the terme of ten yeares, rendring a hundred shillings by the yeare to him and his heires, and granted by deed, that if he held the lands over to him and his heires, that he should render by the yeare twenty pounds: the lessor during the tearme brought an action of debt for the rent. And there *Herle* chiefe justice of the Common Pleas giveth the rule, that during the tearme the lessee had but for yeares, and therefore the action of debt maintenable.

[*x*] 7. E. 3. 10. Pl. Com. Saye's case 272.

[*y*] 44. *E*. 3. *tit. attaint*. 22. and 43. *Ass. p*. 41. *D*. and *A*. infeoffe the two plaintifes in the assise, they let those lands to *S*. for tearme of nine yeares upon condition, that if the plaintife in the assise pay a hundred shillings to *S*. during the tearme, that *S*. shall have it but for nine yeares, and if they pay it not, that *S*. shall have fee. *S*. continueth his estate by one yeare, and after granteth his estate to one *H*. which *H* continueth his estate by two yeares, and granted the residue of the tearme to *R*. and within the tearme of nine yeares the plaintifes in the assise pay the hundred shillings to *S*. *R*. continueth his possession after the tearme, and infeoffeth *D*. which infeoffeth the lord *Furnivall*, against whom and others without any claim or entry made by the plaintifes, after the nine yeares ended he brought his assise, and after adjournment recovered.

[*y*] 44. E. 3. tit. attaint. 22. 43. Ass. p. 41.

[*z*] 10. *E*. 3. 39. & 40. *R*. doth let certaine lands to *I*. for tearme of twelve yeares, and in suretie of his tearme he maketh a charter of the fee upon condition, that if he be disturbed within the tearme, that he cannot hold the lands untill the end of the tearme, that then he shall hold the lands to him and his heires for ever, and seisin was delivered upon the one charter and the other. *R*. within the tearme plowed and sowed the land, and tooke the profits against the will of *I*. and *I*. upon this disturbance had fee and recovered in assise.

[*z*] 10. E. 3. 39, 40. 10. Ass. 15. tit. Ass. 161, Pl. Com. Browning's case 135.

6. *R*. 2. *tit. Quid juris clamat* 20. If a lease be made for a tearme upon condition, if the lessee pay a certain summe within the tearme, that then he shall have fee, if he pay the money he shall have the fee, but if before the day of payment the lessor levieth a fine to another, the lessee ought to attorn by protestation, and if he pay the money, the conusee shal have it, and the conusee shall have the rent reserved untill the day of payment; and if land be letten for tearme of yeares upon condition, that if the lessee be ousted within the tearme by the lessor, that he shall have fee, if he be ousted, he shall have fee by the condition, and notwithstanding he shall not have any assise, but he must hap possession after the ouster, and of this he shall have an assise.

6. R. 2. tit. quid juris clamat. 20.

And generally the bookes (*) are cited that make a diversitie betweena condition precedent and a condition subsequent.

(*) 15. H. 7. 1. a. 14. H. 8. 18. 20. 3. H. 6. 6. b.

And lastly, they cite *Dier*, [*a*] 10. *Eliz*. 281. and in *Say* and *Fuller*'s case, *Pl. Com*, 272. the opinions of *Dyer* and *Browne*.

[*a*] Dyer 10. Eliz 281. Pl. Com. 272.

Notwithstanding al this there are those that defend the opinion of *Littleton*, both by reason and authority. By reason, for that by the

the rule of law a liverie of seisin must passe a present freehold to some person, and cannot give a freehold *in futuro*, as it must doe in this case, if after liverie of seisin made the freehold and inheritance should not passe presently, but expect untill the condition be performed; and therefore if a lease for yeares be made to begin at *Michaelmas*, the remainder over to another in fee, if the lessor make liverie of seisin before *Michaelmas*, the liverie is voide, because if it should worke at all it must take effect presently, and cannot expect.

Vide Litt. in the chapter of tenants for yeares.

Secondly, they say that when the lessor makes liverie to the lessee, it cannot stand with any reason that against his owne liverie of seisin, a freehold should remaine in the lessor, seeing there is a person able to take it. But if a man by deed make a lease for yeares the remainder to the right heires of *I. S.* and the lessor make liverie to the lessee *secundum formam chartæ*, this livery is voyd, because during the life of *I. S.* his right heire cannot take (for *nemo est hæres viventis*), and in that case the freehold shall not remaine in the lessor, and expect the death of *I. S.* during the tearme; for albeit *I. S.* die during the tearme, yet the remainder is void, because a liverie of seisin cannot expect.

(1. Rep. 130. 2. Rep. 67. a. Post. 378. a.)

And they say further, that seeing all the bookes aforesaid prove that such a condition is good, and that the livery made to the lessee is effectuall, by consequence the freehold and inheritance must passe presently or not at all.

(2. Rep. 55.)

[217. b.]

And it is not rare, say they, in our bookes that words shall be transposed and marshalled so as the feoffment or grant may take effect. [b] As if a man in the moneth of *February* make a lease for yeares reserving a yearely rent payable at the feasts of Saint *Michael* the Archangell, and the Annuntiation of our Lady, during the tearme, the law (in this case of reservation) shall make transposition of the feasts, *viz.* at the feasts of the Annunciation, and of Saint *Michael* the Archangel, that the rent may be paid yearely during the tearme. And so it is [c] in case of a grant of an annuitie. And further they take a diversitie in this case betweene a lease for life and a lease for yeares. For in case of a lease for life with such a condition to have fee, they agree that the fee simple passeth not before the performance of the condition, for that the livery may presently worke upon the freehold; but otherwise it is in the case of a lease for years. Also they take a diversitie between inheritances that lie in grant and inheritances that lie in livery. For they agree that if a man grant an advowson for yeares upon condition, that if the grantee pay twenty shillings, &c. within the tearme, that then he shall have fee, the grantee shall not have fee untill the condition be performed. *Et sic de similibus.* But otherwise it is where liverie of seisin is requisite, and therefore if the king make such a lease for yeares upon such a condition, the fee simple shall not passe presently, because in that case no livery is made.

[b] Hill & Grange Pl. Com. 171.

[c] 10. E. 3. Seignior Stafford's case, lib. 8. fol. 74. Pl. Com. Nichol's case 487.

They also make severall answers to the authorities before cited. For as to the case in 31. *E.* 1. they say that either the case is misreported, or else the law is against the judgement. For the case is but this, that a man make a lease of a mannor to *B.* for twenty yeares, and that after the twentie yeares *B.* shall hold the mannor to him and his heires by 12 pound rent and (as it must be intended) maketh livery of seisin, in this case it is cleere (say they) that *B.* hath a fee simple *maintenant*, for there is no condition precedent in the case.

As for the case in 12. *E.* 2. the case (as it is put in the booke) is, that *John de Marre* made a charter to *John de Burford* of fee simple,

Seignior Stafford's case ... supra.

and

and the same day it was covenanted betweene them that *John de Burford* should hold the same tenements for eight years, and if he did not pay a hundred markes at the end of the tearme that the land shall remaine to *John de Burford* and his heires. In which case, say they, there is direct repugnancy; for, first, the charter of the fee simple was absolute, and after the same day it was covenanted between them, &c. this covenant being made after the charter, could neither alter the absolute charter, nor upon a condition precedent give him a fee simple that had a fee simple before.

To all the other bookes, *viz.* 7. *E.* 3. 10. *E.* 3. 10. *Ass.* 44. *E.* 3. 43. *Ass.* and 6. *R.* 2. they say, that being rightly understood they are good law; for in some of these bookes, as namely in 10. *E.* 3. 10. *Ass.* &c. it appeareth that there was a charter made in surety of the tearm, which, say they, must be intended thus, *viz.* a man maketh a lease for yeares, the lessee enters and the lessor makes a charter to the lessee, and thereby doth grant unto him, that if he pay unto the lessor a hundred markes during the tearme, that then he shall have and hold the lands to him and to his heires.

In this case, say they, there need no livery of seisin, but doth enure as an executory grant by increasing of the state, and in that case, without question, the fee simple passeth not before the condition performed.

Pl. Com. in Nichol's case 487.

And therefore *Littleton* warily putteth his case of an estate made all at one time by one conveyance, and a livery made thereupon.

For *Littleton* himselfe in the *Section* before saith, that in that case without a livery nothing passeth of the freehold and inheritance.

And this diversity (say they) is proved by books; and thereupon they cite [*d*] 10. *E.* 3. 54. In a writ of dower the tenant vouched to warranty; the vouchee as to part pleaded that the husband was never seised of any estate whereof she might be endowed; as to the residue the tenant pleaded that he lessed to the husband in gage upon condition that if the lessor paid ten markes at a certaine day, that he should re-enter, and if he failed of payment, that the land should remaine to the husband and his heires, which must be intended to be done by one entire act, and pleaded that he paid the money at the day, which is allowed to be a good plea: *Ergo*, the fee simple passed by the livery, otherwise the plea had amounted that the husband was never seised, &c. And say they, that it cannot be intended that the judges should be of one opinion in *Trinitie* tearme, and of another opinion in *Michaelmasse* tearm in the same yeare, and therefore (they hold) their severall opinions are in respect of the said diversitie of the cases.

[*d*] 10. E. 3. 54.

[*e*] 32. *E.* 3. *tit. garr.* 30. A tenant by the curtesie made a lease for yeares, and in surety of the tearme, &c. made a charter in fee simple, and made livery according to the charter (note a speciall mention made of livery in this case); and issue being taken in an assise, whether the tenant by the courtesie demised in fee, upon the speciall matter found, it was adjudged that a fee simple passed, and that the heire might enter for a forfeiture, which, say they, in case of livery is an expresse judgement in the point agreeing with the opinion of *Littleton*.

[*e*] 32. E. 3. tit. garr. 30.

[218. a.]

[*f*] 43. *E.* 3. 35. In an action of wast against one in lands which hee held for tearme of yeares, *Belknap* pleaded thus for the defendant: that the defendant was seised in fee, and infeoffed the plaintife,

[*f*] 43. E. 3. 35.

plaintife, &c. and after the plaintife demised the land back againe to the defendant for yeares upon condition, that if the defendant paid certaine money, &c. that then the defendant might retaine the land to him and to his heires, and if not, the plaintife might enter, &c. and pleaded that the tearme endured, and that the day of payment was not come, and demanded judgement, if the plaintife may maintaine an action of waste, inasmuch as the defendant had now a fee simple, and shewed forth the indenture of lease with the condition (which agreeth with *Littleton's* case) all being done at one time, and by one deed, and a livery intended, and with *Littleton's* opinion also. It is true, say they, that *Cavendish* accounsell with the plaintife offered to demurre, but never proceeded. (*g*) *Vide* 20. *Ass. pl.* 20.

(*g*) 20. Ass. pl. 20.

Other authorities they cite, but these (as I take it) are the principall, and therefore for avoyding of tediousnesse, having I feare beene too long upon this point, the others I omit. Only this they adde, that *Littleton* had seene and considered of the said bookes, and have set downe his opinion where livery of seisin is made upon a conveyance made at one time, as hath beene said, that he hath fee simple conditionall.

Lib. 8. fo. 90. France's case. (Dyer 45. Plow. 7. a.)

Benigne lector, utere tuo judicio, nihil enim, impedio. Conditio beneficialis quæ statum construit benignè secundum verborum intentionem est interpretanda, odiosa autem quæ statum destruit strictè secundum verborum proprietatem est accipienda.

A lease is made to a man and a woman for their lives upon condition, that which of them two shall first marry, that one shall have fee, they entermarry, neither of them shall have fee, for the incertainty.

(Plo. 481. a. Ant. 206. a. b.)

Note, If the condition be to increase an estate (that is to say) to have fee upon payment of money to the lessor or his heires at a certaine day, before the day the lessor is attainted of treason or felony, and also before the day is executed, now is the condition become impossible by the act and offence of the lessor, and yet the lessee shall not have fee, because a precedent condition to encrease an estate must be performed, and if it become impossible, no estate shal rise.

Pl. Com. Browning & Beston's case 133. b. (2. Rep. 53. b.)

" *Pur ceo que le grantor ne poet entrer, &c.*" Regularly when any man will take advantage of a condition, if hee may enter hee must enter, and when he cannot enter he must make a claime, and the reason is, for that a free-hold and inheritance shall not cease without entry or clayme, and also the feoffor or grantor may waive the condition at his pleasure.

Vi. Littleton cap. Villein.

As if a man grant an advowson to a man and to his heires upon condition, that if the grantor, &c. pay 20 pound on such a day, &c. the state of the grantee shall cease or be utterly void, (1) the grantor payeth the money, yet the state is not revested in the grantor before a claime, and that claim must be made at the church. (*d*) And so it is of a reversion or remainder of a rent, or common, or the like, there must be a claime before the state be revested in the grantor by force of the condition, and that claime must be made upon the land.

(*d*) Pl. Com. Browning's case 133. b.

42. E. 3. 1.

A fortiori, in case of a feoffment which passeth by livery of seisin, there must be a re-entry by force of the condition before the state be voyd.

If

(1) Acc. 2. And. 8.

If a man bargaineth and selleth land by deed indented and inrolled with a *proviso*, that if the bargainer pay, &c. that then the state shal cease and be void, he payeth the money, the state is not revested in the bargainer before a re-entry, (2) and so it is if a bargain and sale be made of a reversion, remainder, advowson, rent, common, &c. And so it is if lands bee devised to a man and to his heirs upon condition, that if the devisee pay not 20 pound at such a day, that his estate shall cease and be void, the money is not paid, the state shall not be vested in the heir before an entry. And so it is of the reversion or remainder, an advowson, rent, common, or the like. (3)

Lib. 2. fo. 50. Sir Hugh Cholmley's case.

(6. Rep. 34. a. b. Plo. 242. a.)

But the said rule hath divers exceptions. First, in this present case of *Littleton*, for that he can make no entry, he shall not be driven to make any claime to the reversion: for seeing by construction of law the freehold and inheritance passeth *maintenant* out of the lessor; by the like construction, the freehold and inheritance by the default of the lessee shall be revested in the lessor without entrie or claime.

Vid. Lib. 1 fo. 174. Dig's case. 20. E. 4. 18. 19.

2. If I grant a rent charge in fee out of my land upon condition, there if the condition be broken, the rent shall be extinct in my land, because I (that am in possession of the land) need make no claime upon the land, and therefore the law shall adjudge the rent voide without any claime.

Pl. Com. Browning's case 133. b. 20. E. 4. 19.

3. If a man make a feoffment unto me in fee upon condition that I shall pay unto him 20 pound at a day, &c. before the day I let [218. b.] unto him the land for yeares reserving a rent, and after faile of payment, the feoffee shall retaine the land to him and to his heirs, and the rent is determined and extinct, for that the feoffor could not enter, nor need not claime upon the land, for that he himselfe was in possession, and the condition being collaterall is not suspended by the lease, otherwise it is of rent reserved.

20. E. 4. 19. 20. H. 7. 4. b. (4. Rep. 53.) (1. Rep. 97.)

4. If a man by his deed in consideration of fatherly love, &c. covenant to stand seised to the use of himselfe for life, and after his decease to the use of his eldest sonne in taile, the remainder to his second sonne in taile, the remainder to his third sonne in fee with a *proviso* of revocation, &c. the father doth make a revocation according to the *proviso*, the whole estate is *maintenant* revested in him without entry or claime for the cause aforesaid.

Lib. 1. 174. Digge's case. (Parl. Rot. 237. a. 265. b. Anc. 215. a.)

"*Le grantee ad uncore title pur 3 ans.*" By this it appeareth that albeit the lessee had *pro tempore* a fee simple, yet after that fee simple is devested out of him, and vested in the lessor, he shall hold the lands for three yeares by the expresse limitation of the parties.

If a man make a lease for 40 years, the lessee afterwards taketh a lease for 20 yeares upon condition that if he doth such an act, that then the lease for 20 yeares shall be void, and after the lessee breake the condition, by force whereof the second lease is void, notwithstanding the lease for 40 yeares is surrendred, for the condition was annexed to the lease for 20 yeares, but the surrender was absolute. So it is if a man make a lease for 40 yeares, and the lessor grant the reversion to the lessee upon condition, and after the condition is broken, the tearme was absolutely surrendred. And the diversitie is when the lessor grants the reversion to the lessee upon condition, and when the lessee grants or surrenders his estate to the lessor; for a condition annexed to a surrender may revest the particular estate, because

Pl. Com. in Fulmerstone's case 107. b. (2. Roll. Abr. 494, 495. 497, 498, 499.) (5. Rep. 11. a. 1. Roll. Abr. 412.)

7. E. 4. 29. 14. E. 4. 6. 45. E. 3.

(2) [See Note 120.] (3) [See Note 121.]

because the surrender is conditionall. But when the lessor grants the reversion to the lessee upon condition, there the condition is annexed to the reversion and the surrender absolute. (1)

8. E. 2. Ass. 395. A gardian in chivalrie took a feoffment of the infant within age that was in his ward, and the infant brought an assise, and the gardian shall be adjudged a disseisor, which proveth that the feoffment as against the infant was voyd, and yet by acceptance thereof the interest of the gardian was surrendred.

30. E. 3. 27. A man maketh a lease for tearme of life by deed, reserving the first seven yeares a rose, and if the lessee will hold the land after the seven yeares, to pay a rent in money; the lessee will not hold over, but surrender his tearme: in this case in judgement of law he had but a tearme for seven yeares. And so it is if a man make a lease for life, and if the lessee within one yeare pay not 20 shillings, that he shall have but a tearme for two yeares, if hee pay not the money the estate for life is determined, and he shall have the land but for two yeares.

" *Ceo est bone proofe adonques, que le reversion est in luy, &c.*" Here is implyed that no man can have an action of waste, unlesse the reversion be in him, and by the authoritie of our author the reason of a case, and well applyed, is a good proofe in law. (2)

Sect. 351.

MES en tiels cases de feoffment sur condition, l'ou le feoffor poit loyalment entrer pur le condition enfreint; &c. * *la le feoffor n'ad le franktenement devant son entrie, &c.*

BUT in such cases of feoffment upon condition, where the feoffor may lawfully enter for the condition broken, &c. there the feoffor hath not the freehold before his entrie, &c. (3)

This upon that which hath beene said is evident, and needeth no further explanation.

Sect. 352.

ITEM, si feoffment soit fait sur tiel condition, que le feoffee donera le terre al feoffor, et a la feme del feoffor, a aver et tener a eux, et a les heires de lour deux corps engendres, et pur default de tiel issue, le remainder al droit heires le feoffor. En ceo cas si le baron devy, vivant la feme, devant ascun

[219. a.]

ALSO if a feoffment be made upon such condition, that the feoffee shal give the land to the feoffor, and to the wife of the feoffor, to have and to hold to them and to the heires of their two bodyes engendred, and for default of such issue, the remainder to the right heires of the

* *la*—*l'ou* in L. and M. and Roh.

(1) See also Dyer 143. 2. Roll. Abr. 495.

(2) [See Note 122.]

(3) [See Note 123.]

ascun estate en le taile fait a eux, * *&c. donques doit le feoffee per la ley faire estate a la feme cy pres le condition, et auxy cy pres l'entent de le condition que il poit faire, cestascavoir, de lesser la terre al femme pur terme de vie sans impeachment de wast, le remainder apres son decease a les heires de † corps sa baron de luy engendres, et pur default de tiel issue, le remainder al droit heires le baron. Et la cause pur que le lease serra en cest cas a la feme sole sans impeachment de wast, est pur ceo que le condition est, que l'estate serra fait al baron et a sa feme en ‡ taile. Et si tiel estate ust este fait en le vie le baron, donques apres le mort le baron el ‖ ust ewe estate ent en le taile; quel estate est sans impeachment de wast. Et issint il est reason, que cy pres que home poit faire estate a l'entent de condition, &c. que il serroit § fait, &c. comment que ¶ el ne poit aver estate en ⸸ taile sicome el ** puissoit aver si le done en le taile ust estre fait a †† sa baron et ‡‡ a luy en le vie ⸸⸸ sa baron.*

the feoffor. In this case if the husband dyeth, living the wife, before any estate in taile made unto them, &c. then ought the feoffee by the law to make an estate to the wife as neer the condition, and also as neere to the entent of the condition as he may make it, (1) that is to say, to let the land to the wife for terme of life without impeachment of waste, (2) the remainder after his decease to the heires of the body of her husband on her begotten, (3) and for default of such issue, the remainder to the right heires of the husband. And the cause why the lease shall bee in this case to the wife alone without impeachment of waste is, for that the condition is, that the estate shal be made to the husband and to his wife in taile. And if such estate had been made in the life of the husband, then after the death of the husband shee should have had an estate in taile, which estate is without impeachment of waste. And so it is reason, that as neare as a man can make the estate to the intent of the condition, &c. that it should bee made, &c. albeit she cannot have estate in taile, as she might have had if the gift in taile had been made to her husband and to her in the life of her husband, &c.

"QUE le feoffee donera, &c." Here is no time limited, therefore the feoffee by the law hath time during his life, unlesse he be hastened by the request of the feoffor or the heires of his body, as *Littleton* saith in the next section.

3. Mar. 134. Dyer 14. Eliz. Dyer. 311. b. 2. H. 4. 5. 44. E. 3. 9.

Lib. 2. fo. 79, 80, 81. in Seignior Cromwel's case. (Ant. 208. b. 1. Roll. Abr. 429. 1. Roll. Abr. 614, 615. a.) (2. Rep. 59.)

" *Si le baron devie, &c.*" But in this case, if the feoffee dyeth before any feoffment made, then is the condition broken, because he made not the estates, &c. within the time prescribed by the law. But if the feoffment bee made upon condition that the feoffee before the feast of St. *Michael* the Archangell next following give the land to the feoffor and to his wife in taile, *ut supra*, and before the day the feoffee

(Sect. 337.)

15. H. 7. 13. 33. H. 6. 26, 27. 9. Eliz. Dyer 262. Pl. Com. 456. Lib. 2. fo. 79. Seignior Cromwell's case. (Sect. 334.)

* *&c.* not in L. and M. nor Roh.

† *les corps de son baron et de luy engendres,* in L. and M. and Roh.

‡ *le* added in L. and M. and Roh.

‖ *ust ewe—ad ewe,* in L. and M. and Roh.

§ *fait* not in L. and M. nor Roh.

¶ *el—il* in L. and M. and Roh.

⸸ *le* added in L. and M. and Roh.

** *el—il* in L. and M. and Roh

†† *sa—son* in L. and M. and Roh.

‡‡ *a* not in L. and M. and Roh.

⸸⸸ *sa—son* in L. and M. and Roh.

(1) [See Note 124.] (2) [See Note 125.] (3) [See Note 126.]

4

fee dieth, the state of the heire of the feoffee shall be absolute, because a certaine time is limited by the mutual agreement of the parties, within which time the condition becommeth impossible by the act of God, as hath been said before, and therefore it is necessary when a day is limited, to adde to the condition, that the feoffee or his heires doe performe the condition; but when no time is limited, then the feoffee at his perill must performe the condition during his life (although there be no request made) or else the feoffor or his heires may re-enter.

(1. Roll. Abr. 449. Ant. 206. a.)
(2. Rep. 79. a. 6. Rep. 30. b.)

" *Fait a eux, &c.*" Here the (*&c.*) implyeth according to the condition with the remainder over.

" *Al feoffor & a la feme, &c.*" Here it appeareth that albeit the *feme* bee a stranger, yet the feoffee is not bound to make it within convenient time, because the feoffor who is privy to the condition is to take joyntly with her. And so it is if the condition be to enfeoffe the feoffor and an estranger, the feoffee hath time during his life unlesse he be hastened by request. Otherwise it is (as hath beene said) where the condition is to enfeoffe a stranger or strangers onely.

27. E. 3. Dower 135. Seignior Cromwel's case ubi supra.
(6. Rep. 30. b.)
(1. Roll. Abr. 452.)
(1. Roll. Abr. 428.)

[219. b.]

If a man make a feoffment in fee, upon condition that the feoffee shall make a gift in taile to the feoffor, the remainder to a stranger in fee, there the feoffee hath time during his life, as is aforesaid, because the feoffor who is partie, and privy to the condition, is to take the first estate. But if the condition were to make a gift in taile to a stranger, the remainder to the feoffor in fee, there the feoffee ought to doe it in convenient time, for that the stranger is not privy to the condition, and he ought to have the profits presently, as before hath beene said.

Seignior Cromwel's case ubi supra.
(2. Rep. 79. Ant. 208. b.)

" *De faire estate al feme cy pres le condition, et auxy cy pres l'entent del condition que il poit faire, &c.*"

A. infeoffe *B.* upon condition that *B.* shall make an estate in frankmariage to *C.* with one such as is the daughter of the feoffor; in this case he cannot make an estate in frankmarriage, because the estate must move from the feoffee, and the daughter is not of his blood, but yet he must make an estate to them for their lives, for this is as neer the condition as he can. And so it is if the condition be, to make to *A.* (which is a meer layman) an estate in frankalmoigne, yet must he make an estate to him for his life, for the reason here yeelded by *Littleton*.

(Ant. 21. b.)

A diversitie is to be understood between conditions that are to create an estate, and conditions that are to destroy an estate: for here it appeareth, that a condition that is to create an estate, is to be performed by construction of law, as neere the condition as may be, and according to the entent and meaning of the condition, albeit the letter and words of the condition cannot be performed: but otherwise it is of a condition that destroyeth an estate, for that is to be taken strictly, unlesse it be in certaine speciall cases: and of this somewhat hath beene said before in this chapter.

(1. Roll. Abr. 426. Plow. 7. a. Dyer 45. a.)

As if a man morgage his land to *W.* upon condition, that if the morgageor and *I. S.* pay twenty shillings at such a day to the morgagee, that then he shall re-enter, the morgageor dieth before the day, *I. S.* paies the money to the morgagee, this is a good performance of the condition, and yet the letter of the condition is not performed.

30. H. 8. tit. Condit. Br. 190. V. 33. H. 8. tit. Joint. Br. 62.

formed. But if the morgageor had been alive at the day, and he would not pay the money, but refused to pay the same, and *I. S.* alone had tendred the money, the morgagee might have refused it. But if a man make a lease to two for yeares, with a *proviso*, if the lessees dye during the tearm, the lessor shall re-enter, one lessee alien his part and dye, the other lessee cannot re-enter, but the assignee shall enjoy the tearm so long as the survivor liveth, and the reason is, because the lease by the *proviso* is not to cease til both be dead. But in the former case, albeit the morgageor be dead, yet the act of God shall not disable *I. S.* to pay the money, for thereby the morgagee receives no prejudice. And so it is in that case, if *I. S.* had died before the day, the morgageor might have paid it.

And here is to be observed a diversity when the feoffee dyeth, for then (as hath been said) the condition is broken, and when the feoffor dyeth, for then the estate is to be made as neer the intent of the condition as may be.

Lib. 2. fo. 79. 80. 81. Seignior Cromwel's case. 2. H. 4. 5.

" *Al feme pur terme de sa vie sans impeachment de wast.*"

Here it appeareth, that this estate for life ought to be without impeachment of wast, and yet if the wife doth accept of any estate for life without this clause, without impeachment of wast, it is good, because the state for life is the substance of the grant, and the privilege to be without impeachment of wast is collaterall, and onely for the benefit of the wife, and the omission of it onely for the benefit of the heire. (1)

2. H. 4. 5. Seignior Cromwel's case ubi supra.

[220. a.] Also if the wife take husband before request made, and then they make request, and the state is made to the husband and wife, during the life of the wife, this is a good performance of the condition, albeit the estate be made to the husband and wife, where *Littleton* saith it is to be made to the wife, but it is all one in substance, seeing that the limitation is during the life of the wife.

(1. Sid. 268. 303. 304. 442. Ant. 207. a. Cro. El. 45.) (1. Roll. Abr. 426.)

" *Sauns impeachment de wast,*" *Absque impetitione vasti*, (that is) without any challenge or impeachment of waste, and by force hereof the lessee may cut downe the trees and convert them to his owne use. Otherwise it is if the words were *sauns impeachment per ascun action de wast*, for then the discharge extends but to the action, and not to the trees themselves, and in that case the lessor shall have them (1).

(Cro. Car. 242.) (Cro. Jac. 216.) See in my Reports lib. 11. fo. 83. lib. 9. fo. 9. li. 2. 23.

And it is to be observed, that after the decease of the husband the state is not to be made to the wife and the heires of her body by her late husband ingendred, and so to have an estate of inheritance as she should have had by survivor, if the estate had bin made according to the condition, but only an estate for life without impeachment of wast, &c. for that by the authoritie of *Littleton* is not so neere the intent of the condition as the case that *Littleton* putteth. But I will search no further into this case, but leave it to the learned and judicious reader.

(4. Rep. 63. a.)

" *Et apres son decease a les heires del corps le baron de luy engendres.*"

(Ant. 20. b. 26. b. 27. a.)

Note here, admit that there were two issues in taile, the remainder shal presently vest only in the eldest, and yet if he dieth without issue, it shall *per formam doni* vest in the youngest, as hath beene said in

[220. a.]

(1) [See Note 127.] (1) [See Note 128.]

in the chapter of Estate taile: (2) and so it is *tacitè* proved here, for otherwise the condition (if there were two issues) could not be performed.

Sect. 353.

*ITEM en cest case si le baron et la feme ont issue, et devient devant le done en le taile fait a eux, &c. donques le feoffee doit faire estate al issue et a les heires de corps son pere et son mere engendres, et pur default de tiel issue, le remainder a les droit heires le baron, &c. Et mesme la ley est en auters cases semblables. Et si tiel feoffee ne voet faire tiel estate, &c. quant il est reasonablement requise per eux que devoyent aver estate per force de le condition, &c. donque poet le feoffor ou ses heires entrer *.*

ALSO in this case if the husband and wife have issue, and die before the gift in taile made to them, &c. then the feoffee ought to make an estate to the issue, and to the heires of the body of his father and his mother begotten, and for default of such issue, &c. the remainder to the right heires of the husband, &c. And the same law is in other like cases: and if such a feoffee will not take such estate, &c. when he is reasonably required by them which ought to have the state by force of the condition, &c. then may the feoffor or his heires enter.

"*QUANT il est reasonablement requise per eux queux devoyent aver estate per force de le condition.*" Note here it appeareth, that the feoffee hath time during his life to make the estate, unlesse he be reasonably required by them that are to take the estate. This is to be intended of parties or privies, and not of meere strangers, for there (as hath beene said) the state must be made in convenient time.

(2. Rep. 78. b. 79.)

(Ant. 222. b. 214. b. 208. b.)

And concerning the request it is to be knowne, that when the request is made, the party or privy must request the feoffee at a time certain to be upon the land, and to make the state according to the condition, for seeing no time certain is prescribed for the making of the statè, and it is incertain when the request shall bee made, such request and notice must be made as hath bin said before in this chapter. And of this section, with the (*&c.*) there needeth not, upon that which hath beene said, any farther explication.

(8. Rep. 89. b.)

Sect. 354.

[220.]

ITEM si feoffment soit fait sur condition, que le feoffee † re-infeoffera plusors homes, a aver et tener a eux

ALSO if a feoffment bee made upon condition, that if the feoffee shall re-enfeoffe many men, to have

* *&c.* added in L. and M. and Roh. † *re-infeoffera—infeoffera*, L. and M. and Roh.

(2) See 1. Rep. 95. 3. Rep. 61. 11. Rep. 80. and the note page 488. in Mr. Douglas's Reports.

eux et a lour heires a touts jours, et touts ceux que devoient aver estate moront devant ascun estate fait a eux, donque doit le feoffee faire estate al heire celuy que survesquist de eux, a aver et tener a luy et a les heires celuy que survesquist †.

have and to hold to them and to their heirs for ever, & all they which ought to have estate dye before any estate made to them, then ought the feoffee to make estate to the heire of him which survives of them, to have and to hold to him and to the heires of him which surviveth (1).

"QUE *le feoffee re-infeoffera plusors homes.*" By the re-feoffement it is implied to be made to the feoffors, for a feoffement over to strangers cannot be said a re-feoffement, and if the feoffement should be made over to strangers onely, then, as hath beene often said, it must bee made in convenient time. (2. Rep. 70.)

"*Al heire celuy que survesquist, a aver & tener a luy & a les heires celuy que survesquist.*" Hereupon questions have beene made, wherefore the *habendum* is not to the heires of the heire, and for what reason it is by *Littleton* limited to the heires of the survivor. And the cause is, for that if it were made to the heires of the heire, then some persons by possibility should be inheritable to the land, which should not have inherited if the estate had beene made to the survivor and his heires, and consequently the condition broken.

For example, if the survivor tooke to wife *Alice Fairefield*, in this case if the limitation were to the sonne and his heires, then if the sonne should dye without heires of his father, the blood of the *Fairefields* (being the blood of his mother) should inherit. But if the limitation be to the right heires of the father, then should not the blood of the *Fairefields* by any possibility inherit, for then it is as much as if the state had beene made to the survivor and his heires: and therefore these words (*et à les heires celuy que survesquist*), which many have thought superfluous, are verie materiall. Note well this kind of fee simple, for it is worthy the observation: but sufficient hath beene said to open the meaning of *Littleton*, and therefore I will dive no deeper into this point, but leave it to the further consideration of the learned reader. (2) (Ant. 12. a.) Vide Sect. 4.

Sect. 355.

ITEM si feoffment soit fait sur condition d'enfeoffer un auter, ou ‡ *de doner en* ‖ *taile a un auter, &c. si le feoffee devant le performance del condition enfeoffa un estranger, ou fait un lease pur terme de vie, donques poet le feoffor et ses heires entrer, &c. pur ceo que il ad luy mesme disable de performer*

ALSO if a feoffement be made upon condition to enfeoffe another, or to make a gift in taile to another, &c. if the feoffee before the performance of the condition enfeoffe a stranger, or make a lease for life, then may the feoffor and his heirs enter, &c. because he hath disabled himselfe

† *&c.* added in L. and M. and Roh.
‡ *de* not in L. and M. nor Roh.
‖ *le* added in L. and M. and Roh.

(1) [See Note 129.]

(2) See the note 2. on page 12. b.

former le condition entant que il ad fait estate a un auter, &c.

(1) himselfe to performe the condition, inasmuch as he hath made an estate to another, &c.

LITTLETON having spoken of defaults of performance, or expresse breaches of conditions, speaketh now in what cases the feoffee in judgement of law doth disable himselfe to perform the condition: and of disabilities some bee by act of the party, and some by act in law.

"*Ou a doner en taile a un auter, &c.*" Here is implied an estate for life or for yeares, &c.

13. H. 7. 23. b. 32. E. 3. barre 264. 21. Ass. 28. 38. Ass. pl. 7.

(2. Rep. 59. 1. Roll. Abr. 447.)

[221. a.]

"*Enfeoffe un estranger ou fait un lease pur terme de vie.*" This is a disabilitie by the act of the partie, for herein the feoffee hath disabled himself to make the feoffment or other estate according to the condition. And to speake once for all, the feoffee is disabled when he cannot convey the land over according to the condition in the same plight, qualitie, and freedome as the land was conveyed to him, for so the law requireth the same, as shall manifestly appeare hereafter. And here where our author speaketh of a feoffment, he includeth an estate taile as well as the fee simple.

(4. Rep. 52.) (5. Rep. 95.)

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*EN mesme le manner est, si le feoffee, devant le condition performe, lessa mesme la terre a un estranger pur terme des ans; en cest case le feoffor et ses heires poyent entrer, &c. pur ceo que le feoffee ad luy disable de faire estate de les tenements accordant a ceo que estoit en les tenements, quant estate ent fuit fait a luy. Car s'il voile faire estate * de les tenements accordant a le condition, &c. donques poit le lessee pur terme d'ans enter et ouste mesme celuy a que l'estate est fait, &c. et occupier ceo durant son terme †.*

IN the same manner it is, if the feoffee, before the condition performed, letteth the same land to a stranger for tearme of yeares; in this case the feoffor and his heires may enter, &c. because the feoffee hath disabled him to make an estate of the tenements according to that which was in the tenements, when the state thereof was made unto him. For if hee will make an estate of the tenements according to the condition, &c. then may the lessee for yeares enter and oust him to whom the estate is made, &c. and occupy this during his tearme.

"*SI le feoffee devant le condition performe lessa mesme la terre a un estranger pur terme des ans, &c.*" Here the *&c.* implyeth a lease to take effect *in futuro* as well as *in praesenti*, also a lease for one yeare or halfe a yeare, &c.

The reason of this is evidently set downe before. And againe, of disabilities some be by act *in praesenti*, whereof *Littleton* hath put two examples, and some *in futuro*, whereof now hee will speake in the next Section.

* *de les tenements* not in L. and M. nor Roh. † *&c.* added in L. and M. and Roh.

(1) Upon the doctrine of this and the three following Sections, see Vin. Abr. vol. 5. p. 221, 225.

Sect. 357.

ET plusors ont dit, que si tiel feoffment soit fait a un home sole sur mesme condition, et devant que il ad performe mesme la condition il prent feme, * *donques le feoffor et ses heires maintenant poient entrer, pur ceo que s'il fesoit estate accordant a la condition, et puis morust, donques* † *la feme serra endowe, et poit recover sa dower per briefe de dower, &c. et issint per le prisel del feme les tenements sont mis en un auter plite que ne fueront al temps de feoffment sur condition, pur ceo que adonques nul tiel* ‡ *feme fuit dowable, ne serroit dowe per la ley, &c.*

AND many have said, that if such feoffment be made to a single man upon the same condition, and before hee hath performed the same condition he taketh wife, then the feoffor and his heires *maintenant* may enter, because, if he hath made an estate according to the condition, and after dieth, then the wife shall be endowed, and may recover her dower by a writ of dower, &c. and so by the taking of a wife, the tenements bee put in another plight then they were at the time of the feoffment upon condition, for that then no such wife was dowable, nor should bee endowed by the law, &c.

FIRST, here is an example of a disability both by act in law and *in futuro,* for by mariage the wife is entitled by law to dower, after the death of her husband.

[221. b.] Secondly, it [a] appeareth that albeit the wife by the marriage is but intitled to have dower, and the estate which she is to have *in futuro,* viz. after the decease of her husband, yet it is a present cause of entrie. As a lease for yeares to begin at a day to come is a present disabilitie and cause of re-entrie, for that the land is not in that freedome and plight as it was conveyed to the feoffee, and after the state made over according to the condition the land shall be charged therewith.

[a] 13. H. 7. 23. b. 34. E. 3. dower 127. M. 27. E. 3. tit. dower 135. 28. Ass. Pl. 4. 11. H. 7. 7. 6. lib. 2. fol. 59. b. (5. Rep. 20. b. 21. a.) Julius Winnington's case, lib. 2. fol. 59. 60. (1. Roll. Abr. 447.)

"*En un auter plight.*" Plight is an old English word, and here signifieth not onely the estate but the habit and qualitie of the land, and extendeth to rent charges, and to a possibility of dower. *Vide* Sect. 289. where plight is taken for an estate or interest of and in the land it selfe, and extendeth not to a rent charge out of the land.

"*A un home sole.*" For if the feoffee were married at the time of the feoffement, then the dower can bee no disabilitie, because the land shall remaine in such plight as it was at the time of the feoffment made unto him.

"*Donques le feoffor et ses heires maintenant poient entrer.*" Here it appeareth, that seeing that for this title or possibilitie the feoffor may presently enter, that albeit the wife happen to dye before the husband,

* *donques—que* in L. and M. and Roh.
† *la—sa* in L. and M. and Roh.
‡ *feme* not in L. and M. nor Roh.

band, so as this title or possibilitie tooke no effect, yet the feoffor may re-enter, for the feoffee being disabled at any time though the same continue not, yet the feoffor may re-enter, for in that case he that is once disabled is ever disabled. And herein a diversitie is to be observed betweene a disabilitie for a time on the part of the feoffee, and a disability for a time of the part of the feoffor. For if a man maketh a feoffment in fee upon condition that the feoffee before such a day shall re-infeoffe the feoffor, the feoffee taketh wife, and the wife dyeth before the day, yet may the feoffor re-enter.

(5. Rep. 21. a.)

So it is if the feoffee before the day entreth into religion, and is professed, and before the day is deraigned, yet the feoffor may re-enter.

21. E. 4. 55.

So it is if the feoffee before the day make a feoffment in fee, and before the day take back an estate to him and his heires, yet the feoffor may re-enter.

Albeit in these cases a certaine day is limited, yet the feoffee being once disabled is ever disabled. And so it is when no time is limited by the parties, but the time is appointed by the law.

But if a man make a feoffment in fee upon condition, that if the feoffor or his heirs pay a certaine sum of money before such a day, the feoffor commit treason, is attainted and executed, now is there a disabilitie on the part of the feoffor, for he hath no heir; but if the heire be restored before the day he may performe the condition, as it was resolved * *Trin.* 18. *Eliz. in Communi Banco* in sir *Thomas Wiat*'s case, which I heard and observed. Otherwise it is if such a disabilitie had growne on the part of the feoffee; and the reason of the diversitie is, for that, as *Littleton* saith, *maintenant* by the disabilitie of the feoffee, the condition is broken, and the feoffor may enter, but so it is not by the disability of the feoffor, or his heires; for if they performe the condition within the time, it is sufficient, for that they may at any time performe the condition before the day. And so it is if the feoffor enter into religion, and before the day is deraigned, he may performe the condition for the cause aforesaid. *Et sic de similibus.* The (*&c.*) in this Section are sufficiently explaned.

(2. Rep. 79. a.)

* Trin. 18. Eliz. in Communi Banco in Sir Thomas Wiat's case.

(Plo. 553. a. 554. Cro. Car. 427. Hob. 334.)

[222. a

Sect. 358.

En mesme le maner est, si le feoffee charge la terre per son fait d'un rent charge devant le performance d'l condition, ou soit oblige en un estatute de le staple, ou statute merchant, en tielx cases le feoffor et ses heires poyent entrer, &c causâ quà suprà. *Car quecunque que vennst a les tenements per le feoffment de le feoffee,* * *eux covient estre liables, et estre mis en execution per force de l'estatute merchant ou de statute del staple.* † Quære. *Mes quant le feoffor*

In the same manner it is, if the feoffee charge the land by his deed with a rent charge before the performance of the condition, or be bound in a statute staple, or statute merchant, in these cases the feoffor and his heires may enter, &c. *causâ quâ suprà.* For whosoever commeth to the lands by the feoffment of the feoffee, they ought to be lyable, and put in execution by force of the statute merchant, or of the statute staple. *Quære.* But when the feoffor

* *eux—donques les tenements*, L. and M. and Roh.

† *Quære—&c.* L. and M. and Roh.

for ou ses heires, pur les causes avant dits, averont entrer, come ils devoyent, come il semble, &c. donques touts tiels choses que devant tiel entrie puissent troubler ou encumber les tenements issint dones sur condition, &c. quant a mesmes les tenements sont oustrement defeats.

for or his heires, for the causes aforesaid, shal have entred, as it seemes they ought, &c. then all such things which before such entry might trouble or incumber the land so given upon condition, &c. as to the same land, are altogether defeated.

"POYENT *entrer, &c.*" And here it is to be understood, that the grant of the rent charge is a present disability of the feoffee, and therefore albeit the grantee doth bring a writ of annuitie, and discharge the land of it, *ab initio*, yet the cause of entrie being once given by the act of the feoffee the feoffor may re-enter. And so it is if the grant of the rent charge were made for life, and the grantee died before any day of payment, yet the feoffor may re-enter.

13. H. 7. 23. b. 44. E. 3. 9. b. 20. E. 3. 73. 20. H. 6. 34. Iulius Wynnington's case ubi supra. (1. Roll. Abr. 447.) (5. Rep. 20. b.)

The like law is of any judgement given against the feoffee wherin debt or dammages are recovered.

"*Ou soit oblige en un statute de la staple, &c.*" If the feoffee be disseised, and after bind himself in a statute staple, or merchant, or in a recognizance, or take wife, this is no disabilitie in him, for that during the disseisin the land is not charged therewith, neither is the land in the hands of the disseisor liable thereunto. And in that case if the wife die or the conusee release the statute or recognizance, and after the disseisee doth enter, there is no disabilitie at all, because the land was never charged therewith, and therefore in that case the feoffee may enter and performe the condition in the same plight and freedome as it was conveyed unto him.

Lib. 2. fo. 59, 60. Iulius Wynnington's case. (2. Rep. 79. a. 10. Rep. 49. b.)

And it is to be observed, that *Littleton* putteth these cases as examples, for there are some other disabilities implyed, that are not here expressed.

18. Ass. Pl. ultimo. 19. E. 3. 39. Lib. 2. fo. 80. b. Signor Cromwel's case. (4. Rep. 119.)

The Lord *Clifford* did hold his barony and the sherifwick of *Westmerland* of the king by grand serjanty *in capite*, and the king gave him licence that he might infeoffe thereof divers chaplains in fee, so that they should give the same to the Lord *Clifford* and the heires males of his body, the remainder over, &c. the Lord *Clifford* according to the licence infeoffed the chaplains, and before they made the reconveyance the Lord *Clifford* dyed, and it was adjudged that the heir might enter for the condition broken. For in this case the feoffees were bound by law to have made the gift in taile to the Lord *Clifford* himselfe, albeit hee never made any request, for otherwise they pursued not the licence, and if they should make the state to the issue of the Lord *Clifford*, then might the king seise the barony, &c. for default of a licence, and that in default of the feoffees. And then the same should not be in the same plight and freedome as it was at the time of the feoffement made upon condition, which is worthy of observation.

[222. b.]

(Ant. Sect. 354. 1. Roll. Abr. 454.)

If a man grant an advowson upon condition that the grantee shall regrant the same to the grantor in taile; in this case, if the church become void before the regrant or before any request made by the grantor, he may take advantage of the condition, because the advowson is not in the same plight as it was at the time of the grant upon condition. And so was it resolved, (*) *Pasch.* 14. *Eliz. in Communi*

(2. Rep. 79. 1. Leo. 167.)

(*) Pasch. 14. Eliz. 311. Dyer

Cummuni Banco, betweene *Andrewes* and *Blunt,* which I heard and observed, and which my Lord *Dier* hath omitted out of his report of that case, and therefore the grantee in that case at his perill must regrant it before the church become voide, or else he is disabled, otherwise he hath time during his life if he be not hastened by request.

44. E 3. 9. If the feoffee suffer a recovery by default upon a fained title, before execution sued the feoffor may re-enter for this disability. *Et sic de similibus.*

Sect. 359.

*ITEM, si un home fait un fait de feoffment a un auter, et en le fait est nul condition, &c. et quant le feoffor a luy voyle faire liverie de seisin per force de mesme le fait, il fait a luy le livery de seisin sur certaine condition *; en cest cas rien de les tenements passa per le fait, pur ceo que le condition n'est comprise deins le fait, et le feoffment est en tiel force sicome nul tiel fait ust este fait.*

ALSO, if a man make a deed of feoffment to another, and in the deed there is no condition, &c. and when the feoffor will make liverie of seisin unto him by force of the same deed, hee makes livery of seisin unto him upon certain condition; in this case nothing of the tenements passeth by the deed, for that the condition is not comprised within the deed, and the feoffment is in like force as if no such deed had beene made.

"*ET en le fait est nul condition, &c.*" either in deed or in law.

(4. Rep 25. a.) 28. E. 3. 19. 36. 17. Ass. p. 20. 8. H. 5 8. 27. H. 6. "*Et le feoffment est en tiel force sicome nul tiel fait ust este fait.*" And the reason hereof is, for that the estate passeth by the livery of seisin (1). And in this case the feoffor upon the deliverie of seisin must expresse the state to him and his heirs, or to the heires of his body, &c.

34. Ass. pl. 1. If an agreement bee made betweene two, that the one shall enfeoffe the other upon condition in surety of the paiment of certaine money, and after the livery is made to him and his heires generally, the state is holden by some to be upon condition, inasmuch as the intent of the parties was not changed at any time, but continued at the time of the livery (2).

13. E. 3. tit. Estoppell 177. 19. E. 3. ibid. 184. If a man make a charter of feoffment in fee, and the feoffor deliver seisin for life, the feoffee shall hold it but for life; but if the livery be expresly for life, and also according to the deed, the whole fee simple shall passe, because it hath a reference to the deed.

* *&c.* added in L. and M. and Roh.

(1) Vid. ant. 48. (2) [See Note 130.]

Sect. 360.

[223. a.] *ITEM, si feoffment soit fait sur tiel condition, que le feoffee ne aliera la terre a nulluy, cest condition est voide, pur ceo que quant home est enfeoffe * de terres ou tenements, il ad power de eux aliener a ascun person per la ley. Car si tiel condition serroit bone, donque la condition luy ousteroit de tout le power que la ley luy dona, le quel serroit enconter reason, & pur ceo tiel condition est voyde.*

ALSO, if a feoffment be made upon this condition, that the feoffee shall not alien the land to any, this condition is void, because when a man is infeoffed of lands or tenements, he hath power to alien them to any person by the law. For if such a condition should bee good, then the condition should oust him of all the power which the law gives him, which should bee against reason, and therefore such a condition is voide.

"*ITEM, si feoffment soit fait, &c.*" And the like law is of a devise in fee upon condition that the devisee shall not alien (1), the condition is voide, and so it is of a grant, release, confirmation, or any other conveyance whereby a fee simple doth passe. For it is absurd and repugnant to reason that he, that hath no possibility to have the land revert to him, should restrain his feoffee in fee simple of all his power to alien. And so it is if a man bee possessed of a lease for yeares, or of a horse, or of any other chattell reall or personall, and give or sell his whole interest or propertie therein upon condition that the donee or vendee shal not alien the same, the same is void, because his whole interest and propertie is out of him, so as he hath no possibilitie of a reverter, and it is against trade and traffique, and bargaining and contracting betweene man and man: and it is within the reason of our author that it should ouster him of all power given to him. *Iniquum est ingenuis hominibus non esse liberam rerum suarum alienationem*; and *rerum suarum quilibet est moderator, & arbiter.* And againe, *regulariter non valet pactum de re meâ non alienendâ.* But these are to be understood of conditions annexed to the grant or sale it selfe in respect of the repugnancy, and not to any other collaterall thing, as hereafter shall appeare. Where our author putteth his case of a feoffment of land, that is put but for an example: for if a man be seised of a seigniory, or a rent, or an advowson, or common, or any other inheritance that lyeth in grant, and by his deed granteth the same to a man and to his heirs upon condition that he shall not alien, this condition is voide. But some have said that a man may grant a rent charge newly created out of lands to a man and to his heires upon condition that he shall not alien that, that is good, because the rent is of his owne creation; but this is against the reason and opinion of our author, and against the height and puritie of a fee simple.

(Ant. 206. 1. Rep. 85. 21. H. 6. 34. a. 8. H. 7. 10. b. 33. Ass. 11. 24. Doct. and Stud. 39. 124. 13. H. 7. 25. (5. Rep. 56. a.) Argumentum ex absurdo. Vid. Sect. 722.)

(10. Rep. 39. Hob. 170.)

A man before the statute of *quia emptores terrarum* might have made a feoffment in fee, and added further, that if he or his heires did alien without licence, that he should pay a fine, then this had been good. And

14. H. 4. 13. H. 7. 25.

* *de—en*, L. and M. (1) [See Note 131.]

21. H. 7. 8. lib. 5. 56. Knight's case.

And so it is said, that when the lord might have restrained the alienation of his tenant by condition, because the lord had a possibilitie of reverter; and so it is in the king's case at this day, because he may reserve a tenure to himselfe.

If *A.* be seised of Black Acre in fee, and *B.* infeoffeth him of White Acre upon condition that *A.* shall not alien Black Acre, the condition is good, for the condition is annexed to other land, and ousteth not the feoffee of his power to alien the land whereof the feoffment is made, and so no repugnancy to the state passed by the feoffment; and so it is of gifts, or sales of chattels reals or personals.

Sect. 361.

*MES si le condition soit tiel, que le feoffee ne alienera a un tiel, nosmant son nosme, ou a ascun de * ses heires, ou de issues d'un tiel, &c. ou* hujusmodi, *les queux conditions ne tollent tout la power d'alienation del feoffee, &c. donque tiel condition est bone.*

BUT if the condition be such, that the feoffee shal not alien to such a one, naming his name, or to any of his heires, or of the issues of such a one, &c. or the like, which conditions doe not take away all power of alienation from the feoffee, &c. then such condition is good.

Pl. Com. 77. a. 8. H. 7. 10. b. 21. E. 4. 47. a. (Dyer 45. a. 11. Rep. 74. a.)

IF a feoffment in fee bee made upon condition that the feoffee shall not infeoffe *I. S.* or any of his heirs or issues, &c. this is good, for he doth not restraine the feoffee of all his power: the reason here yeelded by our author is worthy of observation. And in this case if the feoffee enfeoffe *I. N.* of entent and purpose that hee shall enfeoffe *I. S.* some hold that this is a breach of the condition, for *quando aliquid prohibetur fieri, ex directo prohibetur & per obliquum.*

[223. b.]

10. H. 7. 11. Doct. and Stud. 124. 13. H. 7. 23. Bracton lib. 1. fol. 13. a.

If a feoffment bee made upon condition that the feoffee shall not alien in mortmaine, this is good, because such alienation is prohibited by law, and regularly whatsoever is prohibited by the law, may be prohibited by condition, be it *malum prohibitum*, or *malum in se.* In ancient deeds of feoffment in fee there was most commonly a clause, *quod licitum sit donatori rem datam dare vel vendere cui voluerit, exceptis viris religiosis & Judæis.*

Sect. 362.

ITEM, si tenements soient donees en le taile sur tiel condition, que le tenant en le taile ne ses heires † ne alieneront en fee, ‡ ne en le taile, ne pur terme d'auter vie, forsque pur lour vies demesne, &c. tiel condition est bone. Et la cause est, pur ceo que quant

ALSO, if lands bee given in taile upon condition, that the tenant in taile nor his heires shall not alien in fee, nor in taile, nor for terme of another's life, but only for their owne lives, &c. such condition is good. And the reason is, for that when

* *ses* not in L. and M.
† *&c.* added in L. and M.
‡ *ne—ou* in L. and M.

quant il fist tiel alienation et discontinuance de le taile il fait le contrarie a l'entent le donor, pur que l'estatute de W. 2. ‖ cap. 1. *fuit fait, per que l'estatute les estates en le taile sont ordeines.*

when hee maketh such alienation and discontinuance of the entaile, hee doth contrary to the intent of the donor, for which the statute of *W.* 2. *cap.* 1. was made, by which statute the estates in taile are ordained (1).

NOTE here, the double negative in legall construction shall not hinder the negative, *viz. sub conditione quòd ipse nec hæredes sui non alienarent.* And therefore the grammaticall construction is not alwayes in judgment of law to be followed.

33. Ass. 11. 24. lib. 6. 40. 41. Mildmaye's case. 21. H. 6. 33. 13. H. 7. 23. 21. H. 7. 11. Vid. Sect. 220. acc. (Cro. Car. 555. Hob. 191. Cro. Jac. 307. Ant. 146. b. 10. Rep. 130. 4. Rep. 14.)

"*Forsque pur lour vies demesne, &c.*" And yet if a man make a gift in taile upon condition that he shall not make a lease for his owne life, albeit the state be lawfull, yet the condition is good, because the reversion is in the donor. As if a man make a lease for life or years upon condition, that they shall not grant over their estate or let the land to others, this is good, and yet the grant or lease should bee lawfull. (*) If a man make a gift in taile upon condition that he shall not make a lease for three lives or 21 yeares according to the statute of 32. *H.* 8. the condition is good, for the statute doth give him power to make such leases, which may be restrained by condition, and by his owne agreement; for this power is not incident to the estate, but given to him collaterally by the act, according to that rule of law, *quilibet potest renunciare juri pro se introducto.*

(6. Rep. 43. a. contra.) 21. H. 6. 33. 13. H. 7. 23. 24. 27. H. 8. 17. 19. 31. H. 8. Dyer 45. (3. Rep. 64.) (*) Dier 33. H. 8. fo. 48. 49. (10. Rep. 38. 39. 1. Roll. Abr. 418.)

"*Quant il fist tiel alienation & discontinuance del state taile.*" And therefore if a gift in taile be made upon condition, that the donee, &c. shall not alien, this condition is good to some intents, and void to some; for, as to all those alienations which amount to any discontinuance of the state taile (as *Littleton* here speaketh;) or is against the statute of *Westminster* 2. the condition is good without question. But as to a common recoverie the condition is voyd, because this is no [224. a.] discontinuance, but a barre, and this common recovery is not restrained by the said statute of *W.* 2. And therefore such a condition is repugnant to the estate taile; for it is to be observed, that to this estate taile there be divers incidents. First, to be dispunished of wast. Secondly, that the wife of the donee in taile shall be endowed. Thirdly, that the husband of a feme donee after issue shal be tenant by the curtesie. Fourthly, that tenant in taile may suffer a common recoverie (1): and therfore if a man make a gift in taile, upon condition to restraine him of any of these incidents, the condition is repugnant and void in law. And it is to be observed, (*) that a collateral warranty or a lineal with assets in respect of the recompence, is not restrained by the statute of *Donis conditionalibus*, no more is the common recovery in respect of the intended recompence. And *Littleton*, to the intent to exclude the common recovery, saith, *tiel alienation et discontinuance*, joyning them together.

Vid. lib. 6. 40. 41. Sir Anth. Mildmaie's case. (1. Rep. 84. 1. Roll. Abr. 418.) (1. Roll. Abr. 412. 418. 10. Rep. 35. b.) 22. E. 3. 9. 17. El. 343. Dyer. (*) 13. H. 7. 24. b.

If a man before the statute of *Donis conditionalibus* had made a gift to a man and to the heirs of his body, upon condition, that after

‖ *cap.* 1. added in L. and M.
(1) [See Note 132.]

[224. a.]
(1) [See Note 133.]

ter issue he should not have power to sell, this condition should have bin repugnant and void (2). *Pari ratione*, after the statute a man makes a gift in taile, the law *tacitè* gives him power to suffer a common recovery; therefore to add a condition, that he shal have no power to suffer a common recoverie, is repugnant and voyd.

10. H. 7. 11. 13. H. 7. 23. Lib 6. 41. b. in Sir Anthony Mildemaye's case, ubi supra. (Hob. 261. 1. Roll. Abr. 421.)

If a man make a feoffment to a baron and feme in fee, upon condition, that they shall not alien, to some intent this is good, and to some intent it is void: for to restrain an alienation by feoffment, or alienation by deed, it is good, because such an alienation is tortious and voidable: but to restraine their alienation by fine is repugnant and void, because it is lawfull and unavoidable.

It is said, that if a man infeoffe an infant in fee, upon condition, that hee shall not alien, this is good to restraine alienations during his minoritie, but not after his full age.

Doctor & Student. 124.

It is likewise said, that a man by licence may give land to a bishop and his successors, or to an abbot and his successors, and add a condition to it, that they shall not without the consent of their chapiter or covent, alien, because it was intended a mortmain, that is, that it should for ever continue in that see or house, for that they had it *en auter droit*, for religious and good uses.

10. H. 7. 11. Doct. & Stud. 124. 13. H. 7. 23.

"*Le statute de W. 2. cap. 1.*" Hereby it appeareth, that whatsoever is prohibited by the intent of any act of parliament, may be prohibited by condition, as hath beene said.

Sect. 363.

*CAR il est prove per les parols comprises en mesme l'estatute, * que la volunt del donor en tiels cases serroit observe, et quant le tenant en le taile fait † tiel discontinuance, il fait le contrarie a ceo, &c. Et auxy en estates en le taile d'ascun tenements, quant le reversion de fee simple, ‡ ou remainder en fee simple est en auters persons, quant tiel discontinuance est fait, donques le fee simple ‖ en le remainder est discontinue. Et pur § ceo que le tenant en taile ne ferra tiel chose encounter le profit ¶ de ses issues, & bone droit, tiel condition est bone, come est avauntdit, ✝ &c.*

FOR it is proved by the words comprised in the same statute, that the will of the donor in such cases shall be observed, and when the tenant in taile maketh such discontinuance, hee doth contrary to that, &c. And also in estates in taile of any tenements, when the reversion of the fee simple, or the remainder of the fee simple is in other persons, when such discontinuance is made, then the fee simple in the remainder is discontinued. And because tenant in taile shall doe no such thing against the profits of his issues, and good right, such condition is good, as is aforesaid, &c.

"*QUANT*

* *que fuit al entent de le fesance de mesme l'estatute*, added in L. and M. and Roh.

† *tiel—un*, L. and M. and Roh.

‡ *ou remainder en fee simple*, not in L. and M. and Roh.

‖ *en la reversion ou le fee simple*, added in L. and M. and Roh.

§ *ceo—ouster* in L. and M. and Roh.

¶ *de ses issues*, not in L. and M. nor Roh.

✝ *&c.* not in L. and M. nor Roh.

(2) [See Note 134.]

"QUANT le reversion ou rem' en fee est en auters persons." Put the case that a man make a gift in taile to *A.* the remainder to him and to his heires, upon condition that he shall not alien; as to the state taile the condition is good, for such alienation is prohibited, as hath been said, by the said statute. But as to the fee simple, some say it is repugnant and voyd, for the reason that *Littleton* hath yeelded: and therefore some are of opinion, that this is a good condition, and shall defeat the alienation for the estate taile onely, and leave the fee simple in the alienee, for that the condition did in law extend onely to the state taile, and not to the remainder.

(Post. 298. 333. 338.) (1. Roll. Abr. 407. 472. 474. Cro. Eliz. 360.) 11. H. 7. 6. 13. H. 7. 23. 24. Dyer 2. & 3. Phil. & Ma. 127. b.

[224. b.] "*Encounter le profit de ses issues.*" Hereby it appeareth, that to restrain tenant in taile from alienation against the profit of his issues, is good, for that agreeth with the will of the donor, and the intent of the statute *.

But a gift in taile may be made upon condition, that tenant in taile, &c. may alien for the profit of his issues, and that hath been holden to be good, and not restrained by the said statute, and seemeth to agree with the reason of *Littleton*, because in that case, *Voluntas donatoris observetur, &c.* and it must be for the profit of the issues.

* 46. E. 3. 4. (1. Roll. Abr. 418.)

Sect. 364.

ITEM home poit doner terres en taile sur tiel condition, que si le tenant en le taile ou ses heires alienont en fee ou en taile, ou pur terme d'auter vie, &c. et auxy que si touts l'issues veignants del tenant en le taile soient morts sans issue, que adonques bien lirroit al donor et a ses heires de entrer, &c. Et per tiel voy le droit ‖ *de le taile poet estre salve apres* ¶ *discontinuance, al issue en le taile, si ascun* + *y soit; issint que per voy d'entre del donor ou de ses heires, le taile ne serra my defeat per tiel condition:* + Quære hoc. *Et uncore si le tenant en le taile en ceo case, ou ses heires, font ascun discontinuance, celuy en le reversion ou ses heires, apres ceo que le taile est determine pur default de issue, &c. poyent entrer en le terre per force de mesme le condition, et ne serront my* § *cohert de suer briefe de formdon en le reverter.*

ALSO a man may give lands in taile upon such condition, that if the tenant in taile or his heires alien in fee or in taile, or for terme of another man's life, &c. and also that if all the issue comming of the tenant in taile be dead without issue, that then it shall be lawfull for the donor and for his heires to enter, &c. And by this way the right of the taile may be saved after discontinuance, to the issue in taile, if there bee any; so as by way of entry of the donor or of his heires, the taile shall not be defeated by such condition: *Quære hoc.* And yet if the tenant in taile in this case, or his heirs, make any discontinuance, he in the reversion or his heires, after that the taile is determined for default of issue, &c. may enter into the land by force of the same condition, and shall not be compelled to sue a writ of formedon in the reverter.

"ALIENONT,

‖ *de—en* in L. and M. and Roh.
¶ *tiel* added in L. and M. and Roh.
+ *issue* added in L. and M. and Roh.

+ *Quære hoc,* not in L. and M. nor Roh.
§ *cohert—arte* in L. and M. and Roh.

21. H. 7. 11.
(1. Rep. 16. 84.)

" ALIENONT, &c. et auxy si touts les issues soient morts, &c." Note, *Littleton* purposely made parcell of the condition in the copulative, that the tenant in taile should alien, &c. For if a gift in taile be made to a man and to the heirs of his body, and if he die without heirs of his body, that then the donor and his heires shall re-enter, this is a voyd condition; for when the issues faile, the estate determineth by the expresse limitation, and consequently the adding of the condition to defeate that which is determined by the limitation of the estate, is void, (1) and in that case the wife of the donee shall be endowed, &c. And therefore *Littleton*, to make the condition good, added an alienation, which amounted to a wrong, and hee restrained not the alienation onely, (for then presently upon the alienation the donor, &c. might re-enter and defeat the estate taile) but added, and die without issue, to the end [225. a.] that the right of the estate in taile might be preserved, and not defeated by the condition, but might be recovered againe by the issue in tayle in a *formedon*.

(Dyer 343. b.)

(Mo. 39.)

And *Littleton* expressely saith, that the donor and his heirs after the discontinuance, and after that the estate tayle is determined, may re-enter, which is the intention and true meaning of *Littleton* in this place. And where it is said in this section *(quære hoc)*, this is added by some that understood not this case, and is not in the originall.

(Sid. 437. 8. Rep. 85. b.)
[a] Bracton lib. 2. fo. 19. Vide Pl.Com. 76. in Wimbeshe's case, & fol. 107. in Fulmerston's case. Bracton ubi supra.

Note, that in a condition consisting of divers parts in the conjunctive, as here in the case of *Littleton*, both parts must be performed, according to the old rule, [a] *Si plures conditiones ascriptæ fuerunt donationi conjunctim, omnibus est parendum et ad veritatem copulativè requiritur quòd utraque pars sit vera.* But otherwise it is when the condition is in the disjunctive, (1) for the same author in that case saith, *Si divisim cuilibet, vel alteri eorum satis est obtemperare. Et in disjunctivis sufficit alteram partem esse veram.* What then if the condition or limitation be both in the conjunctive and disjunctive: As if a man make a lease to the husband and wife for the tearme of one and twenty yeares, if the husband and wife or any child betweene them so long shall live, and then the wife dyeth without issue; shall the lease determine, or continue during the life of the husband? And the answer is, that it shall continue for the disjunctive referreth to the whole, and disjoyneth not only the latter part, as to the child, but also to the baron and fem, so as the sense is, if the baron, fem, or any child shall so long live.

(4. Rep. 52. b.)
So it was adjudged in Communi Banco Pasch. 30. Eliz. inter Baldwyn & Cocke, commonly called Trupennie's case.

(5 Rep. 112.)
[b] Hill. 35. Eliz. en trespasse per le Seignior Mordant vers George Vaux so adjudged in the King's Bench.

[b] And so it is if an use be limited to certaine persons, untill *A.* shall come from beyond sea, and attain unto his full age, or dye, if he doth come from beyond sea, or attaine to his full age, the use doth cease.

(1) See Boraston's case, 3. Rep. 19. Webb v. Herring, Cro. Ja. 416. King v. Rumball, Cro. Ja. 448. Chadock v. Cowley, ibid. 693. Fortescue v. Abbott, Poll. 479. and Sir Thomas Jones, 79; and Goodtitle v. Whitby, 1. Burr. 228. See also 1. P. W. 170;—and Mr. Fearne's Essay on Contingent Remainders, p. 167.

[225. a.]
(1) [See Note 235.]

Sect. 365.

ITEM, home ne poit pleder en ascun action, que estate fuit fait en fee, ou en fee taile, ou pur terme de vie, sur condition, † s'il ne voucha un record de ceo, ou monstra un escript south seale, provant mesme la condition. Car il est un common erudition, que home per plee ne defeatera ascun estate de franktenement per force d'ascun tiel condition, sinon que il monstra le proofe de condition en escript, &c. sinon que ceo soit en ascuns especiall cases, &c. Mes de chattels reals, sicome de leas fait a terme d'ans, ou de grants de gards fait per gardeins in chivalrie, & hujusmodi, &c. home poit pleder que tiels leases ou grants fueront faits sur condition, &c. sans monstre ascun escript de le condition. Issint en mesme le maner home poit faire de dones & grants de chattels personals, & de contracts personals, &c.

ALSO a man cannot plead in any action, that an estate was made in fee, or in fee tayle, or for terme of life, upon condition, if he doth not vouch a record of this, or shew a writing under seale, proving the same condition. For it is a common learning, that a man by plea shal not defeat any estate of freehold by force of any such condition, unlesse he sheweth the proofe of the condition in writing, &c. unlesse it bee in some speciall cases, &c. But of chattels reals, as of a lease for yeares, or of grants of wards made by gardians in chivalrie, and such like, &c. a man may plead that such leases or grants were made upon condition, &c. without shewing any writing of the condition. So in the same manner a man may doe of gifts and grants of chattels personals, and of contracts personals, &c.

"EN *ascun action.*" Bee the action reall, personall, or mixt, if a condition be pleaded to defeat a freehold, it is regularly true, that a deed must bee shewed forth [a] in court (2). And the reason why the deed shall bee shewed forth to the court is, for that to every deed there be two things requisite: the one, that it be sufficient in law, and this is called the legall part, and therefore the judgment of that belongeth to the judges of the law: the other concernes matter of fact, as sealing and delivery, and this belongs to the jurors. And because every deed ought to approve itselfe, and be proved by others too; it must approve it selfe upon the shewing of it forth in court in two manners.

39. E. 3. 22. 4. E. 4. 35. a. 9. E. 4. 25. b. 26. a. 6. H. 7. 8. b. 11. H. 7. 22. b. 7. H. 6. 7. 14. H. 8. 22. b. 28. Ass. p. 1. (1. Sid. 50.) [a] Lib. 10. fol. 92. Doctor Layfield's case. 7. E. 3. 57. 25. E. 3. 41. 41. E. 3. 10. acc. (Ant. 6. a.) (10. Rep. 92.)

First, as to the composition of the words, that it bee sufficient in law, and that the court shall adjudge.

[225. b.] Secondly, of ancient time if the deed appeared to bee rased or interlined in places materiall, the judges adjudged upon their view, the deed to be voyd (1). But of latter time, the judges have left that to the jurors to try whether the rasing or interlining were before the deliverie.

11. Rep. 26. b. Dyer 261. b. (1. Roll. Abr. 208. Cro. Car. 399. Doct. Pla. 260.) (Post. 227. 2. Cro. 217.)

And

† *que* added in L. and M. and Roh.

(2) See 2. Bulst. 259. 260. 6. Mod. 237. 2. Salk. 498. (1) [See Note 136.]

45. E. 3. 21. a. Post. 308. b. 338. a. sect. 214.)

And there is a difference betweene a rent, and a re-entry; for upon a gift in taile, or a lease for life, a rent may be reserved without deed, but a condition with a re-entrie cannot bee reserved in those cases without deed.

Lib. 5. fol. 52. 53, &c. Page's case. 6 Rep. 2. cap. 4. (5. Rep. 74 76. 10. Rep. 92.) [b] Vide 32. H. 8. in Pattents Br. 12. H. 7. 12. b.

" *Escript south seale.* Which *Littleton* intendeth to bee a deed under seale.

And well said *Littleton, a deed under seale.* For though the deed be inrolled, yet hee cannot plead the inrolment thereof, though it be of record. And though it be exemplified under the great seale, [b] yet must he shew forth the deed it selfe under seale, as *Littleton* here saith, and not the exemplification (2). And so when *Littleton* wrote, no *constat*, or *inspeximus*, of the king's letters patents were availeable to be shewed forth in court, but the letters patents themselves under seale. For both the *constat* and *inspeximus* are but exemplifications of the inrolment of the charters, or letters patents: and this appeareth by the resolution of two severall [c] parliaments, one holden in the third and fourth yeare of king *Edward* the sixt, and the other in the thirteenth yeare of queene *Elizabeth*. But now by those statutes the exemplification or *constat* under the great seale of the inrolment of any letters patents made since the fourth day of February *anno* 27. *H.* 8. or after to be made, shal be sufficient to be pleaded and shewed forth in court, aswel against the king, as any other person by the patentees themselves (whereof there was some doubt [d] conceived upon the said statute of *E.* 6.) and by all and every other person and persons clayming by, from, or under them. Which statutes are general and beneficiall, and especially the act of 13. *Eliz.* for that extends not only to lands, tenements, and hereditaments, but to every other thing whatsoever, and ought to be favourably construed for advancement of the remedie and right of the subject (3).

(2. Inst. 672. 5. Rep. 52. 53.) [c] 3. & 4. E. 6. cap. 4. and 13. Eliz. cap. 6. [d] Dyer 1. Eliz. 167. (Hard. 118.) (2. Sid. 145.) (1. Mod. 117.)

The difference betweene a *constat*, *inspeximus*, and a *vidimus*, you may reade [e] at large in *Page's* case. But none of them by law ought to be had, but only of the inrolment of record, and not of a deed or any other writing that is not of record, and no deed, &c. can be inrolled, unlesse it be duely and lawfully acknowledged.

[e] Lib. 8. fol. 8. in the Prince's case. Vide Page's case ubi supra.

33. E. 3. gard. 162. 20. H. 3. darrein present. 13. 35. H. 6. tit. monstrans des faits 118. [f] 20 H. 7. 5. (5. Rep. 75. a.) (2. Cro. 217.) (10. Rep. 93. 94.) 35. H. 6. tit. monstrans des faits 11. b. 7. H. 6. 17. H. 5. 5. 3. H. 6. 21. 33. H. 6. 1. 14. H. 8. 8. [f] 35. H. 6. ubi supra.

" *Si non que soit en ascun especiall cases, &c.*" Hereby is implyed, that if a gardian in chivalrie in the right of the heire entreth for a condition broken, hee shall plead the state upon condition without shewing of any deed, because his interest is created by the law. And so it is [f] of a tenant by statute merchant or staple, or tenant by *elegit*.

Likewise tenant in dower shall plead a condition, &c. without shewing of the deed. And the reason of these and the like cases, is, for that the law doth create these estates, and they come not in by him that entred for the condition broken, so as they might provide for the shewing of the deed, but they come to the land by authoritie of law, and therefore the law will allow them to plead the condition without shewing of it.

[f] But the lord by escheat, albeit his estate be created by law, shall not plead a condition to defeat a freehold without shewing of it, because the deed doth belong unto him. [226. a.]

A tenant

(2) On giving deeds of bargain and sale in evidence, see Bull. Ni. Pri. 255.; 10. Ann. c. 18.; and 8. G. 2. c. 6. sec. 21.

(3) See also 27. Eliz. 9. and Bull. Ni. Pri. 226.

A tenant by the curtesie shall not [g] plead a condition made by his wife, and a re-entry for the condition broken without shewing the deed; for albeit his estate be created by law, yet the law presumeth that he had the possession of the deedes and evidences belonging to his wife.

[g] 35. H. 6. ubi supra.

[h] But lessees for yeares, and all others that claime by any conveyance from the party or justifie as servant by commandement, &c. must shew the deed.

[h] 14. H. 8. 8. Pl. com. 149. (10. Rep. 92, 93.)

[i] R. brought an *ejectione firmæ* against E. for ejecting him out of the mannor of D. which he held for terme of yeares of the demise of C. E. the defendant pleaded that B. gave the said mannor to P. and *Katherine* his wife in taile, who had issue E. the defendant, and after the donees infeoffed C. of the mannor, upon condition that hee should demise the mannor for yeares to R. the plaintife, the remainder to the husband and to the wife, &c. C. did demise the land to R. the plaintife for yeares, but kept the reversion to himselfe, wherefore *Katherine* after the decease of her husband entred upon the plaintife, &c. for the condition broken, and died; after whose decease the land descended to E. the issue in taile, &c. now defendant, judgement upon action, exception was taken against this plea, because E. the defendant maintained his entry by force of a condition broken, and shewed forth no deed, and the plea was ruled to be good, because the thing was executed, and therefore hee need not shew forth the deed. *Nota*, the defendant being issue in taile was remitted to the estate taile. (1)

[i] 44. E. 3. 22. (6. Rep. 38.) (Cro. Car. 442.) See after this chapter, sect. 366. 7. Rep. Ughtred's case.

In a *præcipe quòd reddat* against S. who pleaded that R. was seised, and infeoffed him in morgage upon condition of payment of certaine money at a day, and said that R. paid the money at the day, and entred judgement of the writ: exception was taken to this plea, for that he shewed forth no deed of the condition, and it was ruled that hee need not shew forth the deed for two causes. 1. That he ought not to shew any deed to the demandant, because the demandant is a stranger. 2. It might be when R. paid the money, and the condition performed, that the deed was rebailed to R. and thereupon the plea was adjudged good, and the writ abated.

11. Ed. 3. tit. Monstrans des faits. 175. 45. E. 3. 8. (Cro. Car. 372.)

If land be morgaged upon condition, and the morgagee letteth the lands for yeares, reserving a rent, the condition is performed, the morgagor re-enters, in an action of debt brought for the rent the lessee shall plead the condition and the re-entry without shewing forth any deed.

45. E. 3. 8. b. Finch.

In an assise the tenant pleads a feoffment of the ancester of the plaintife unto him, &c. the plaintife saith that the feoffment was upon condition, &c. and that the condition was broken, and pleades a re-entry, and that the tenant entred and tooke away the chest in which the deed was and yet detaineth the same, the plaintife shall not in this case be enforced to shew the deed.

10. H. 4. 9. b. 43. E. 3. Vide 10. E. 3. 41. Simile in dower.

If a woman give lands to a man and his heires by deed or without generally, she may in pleading averre the same to be *causâ matrimonii prælocuti*, albeit she hath nothing in writing to prove the same, the reason whereof see *Sect.* 330.

12. E. 1. Feoffments & Faits 114. F. N. B. 105. b. 13. R. 2. Monstrans des faits 165.

"*Mes des chattels realls, sicome lease fait a volunt a terme des ans, &c.*" This is apparant.

4. E. 4. 35. &c. 11. H. 7. 22. b. 6. H. 7. 8.

9. E. 4. 25. 26. 14. H. 8. 22. b. (Doc. Pla. 51.) (See Plo. 23. a.) (1. Roll. Abr. 413.)

(1) [See Note 137.]

Sect. 366.

ITEM, coment que home en ascun action ne poit pleder un condition que toucha & concerna franktenement, sauns monstrer escript de ceo, come est avantdit, uncore home poit estre aide sur tiel condition per verdict de xii. homes prise a large en assise de novel disseisin, *ou en ascun auter action, l'ou les justices voilent prender* * *le verdict de xii. jurors a large. Sicome mittomus, que home seisie de certaine terre en fee lessa mesme la terre a un auter pur terme de vie sans fait, sur condition de render al lessor un certaine rent, & pur default de paiment un re-entrie, &c. per force de quel le lessee est seisie come de franktenement, et puis le rent est aderere, per que le lessor enter en la terre, et puis le lessee arraigne un* assise de novel disseisin *de la terre envers le lessor, le quel plead que il fist nul tort ne nul disseisin, et sur ceo l'assise soit prise; en cest case les recognitors de l'assise poyent dire et render a les justices lour verdict a large sur tout le matter, come a dire, que le defendant fuit seisie de la terre en son demesne come de fee, et issint seisie, mesme la terre lesse al plaintife pur terme de sa vie, rendant al lessour tiel annuel rent paiable a tiel feast, &c. sur tiel condition, que si le rent fuit aderere a ascun tiel feast † a que doit estre pay, donques bien lirroit al lessor d'entrer, &c. per force de quel lease le plaintife fuit seisie en son demesne come de franktenement, et que puis apres le rent fuit aderere a tiel feast, ‡ &c. per que le lessor entra en le terre sur le possession le lessee, et prieroit le discretion de les justices, si ceo soit un disseisin fait al plaintife ou nemy; ‖ donque per ceo que appiert a les justices, que ceo fuit nul disseisin fait al plaintife,*

ALSO, albeit a man cannot in any action pleade a condition which toucheth, & concernes a freehold, without shewing writing of this, as is aforesaid, yet a man may be aided upon such a condition by the verdict of 12 men taken at large in an assise of *novel disseisin*, or in any other action where the justices will take the verdict of 12 jurors at large. As put the case, a man seised of certaine land in fee letteth the same land to another for terme of life without deed, upon condition to render to the lessor a certaine rent, and for default of payment a re-entrie, &c. by force whereof the lessee is seised as of freehold, and after the rent is behinde, by which the lessor entereth into the land, and after the lessee araine an assise of *novel disseisin* of the land against the lessor, who pleads that he did no wrong nor disseisin, and upon this the assise is taken; in this case the recognitors of the assise may say and render to the justices their verdict at large upon the whole matter, as to say, that the defendant was seised of the land in his demesne as of fee, and so seised, let the same land to the plaintife for terme of his life, rendring to the lessor such a yearely rent payable at such a feast, &c. upon such condition, that if the rent were behinde at any such feast at which it ought to bee paid, then it should bee lawfull for the lessor to enter, &c. by force of which lease the plaintife was seised in his demesne as of freehold, and that afterwards the rent was behinde at such a feast, &c. by which the lessor entred into the land upon the possession of the lessee, and prayed the discretion

* *le—per* in L. and M. and Roh.
† *a* not in L. and M. nor Roh.
‡ *Ad* added L. and M. and Roh.
‖ *Et* added in L. and M. and Roh.

tife, entant que l'entrie de le lessour fuit congeable sur luy; les justices doyent doner judgement que le plaintife ne prendra riens per son briefe d'assise. Et issint en tiel cas le lessor serra aide, et uncore nul escripture unques fuit fait del condition. Car cibien que les jurors poient aver conusance de le ‡ lease auxybien ils poient aver conusance de le condition que fuit declare & rehearse sur le leas.

discretion of the justices, if this bee a disseisin done to the plaintife or not; then for that it appeareth to the justices, that this was no disseisin to the plaintife, insomuch as the entrie of the lessor was congeable on him; the justices ought to give judgement that the plaintife shall not take any thing by his writ of assise. And so in such case the lessor shall bee aided, and yet no writing was ever made of the condition. For as well as the jurors may have conusance of the lease, they also as well may have conusance of the condition which was declared and rehearsed upon the lease.

"VERDIT, or *verdict de* 12 *homes*." (2) *Veredictum, quasi dictum veritatis,* as *judicium est quasi juris dictum. Et sicut ad quæstionem juris, non respondent juratores sed judices: sic ad quæstionem facti non respondent judices sed juratores.* For jurors are to try the fact, and the judges ought to judge according to the law that riseth upon the fact, for *ex facto jus oritur.*

[226. b.]

(Post. 253. b. 261. b.) Lib. 8. fo. 155. Lib. 9. fo. 13. Lib. 11. fo. 10. (Plo. 93. 2. Inst. 425. 2. Roll. Abr. 693, 694. 698, 699, 700. 711. 717. 725. Hob. 117. 4. Rep. 65. b. Cro. El. 699. 1. Sid. 27. 191. 194. 203. 9. Rep. 67. b.)

"*Prise a large.*" There be two kindes of verdicts; *viz.* one generall, and another at large or especiall. As in an assise of *novel disseisin,* brought by *A.* against *B.* the plaintife makes his plaint, *Quòd B. disseisivit eum de* 20 *acris terræ cum pertinentiis*; the tenant pleades, *Quòd ipse nullam injuriam seu disseisinam præfato A. inde fecit, &c.* The recognitors of the assise doe finde, *Quod prædict. A. injustè & sine judicio disseisivit prædict. B. de prædict.* 20 *acris terræ cum pertinent' &c.* This is a generall verdict. The like law it is if they finde it negatively. And *Littleton* here putteth a case of a verdict at large, or a speciall verdict; and it is therefore called a speciall verdict, or a verdict at large, because they finde the speciall matter at large, and leave the judgement of law thereupon to the court, of which kinde of verdict it is said, [*l*] *Omnis conclusio boni & veri judicii sequitur ex bonis & veris præmissis et dictis juratorum.*

(9. Rep. 12. 13.)

(Plo. 93. a.) (Post. 227. 228.)

[*l*] Trin. 33 E. 1. Coram Rege Nott. in Thesaur.

And though *Littleton* here puts his case of a verdict at large upon a generall issue (which in the case hee putts it was necessary for the tenant to pleade) yet when issue is joyned upon some speciall point, the jury, as shall be said hereafter in this section, may finde the speciall matter if it be doubtfull in law, for as much doubt may arise upon one point upon the speciall issue as upon the generall issue. And as a speciall verdict may be found in Common Pleas, so may it also bee found in Pleas of the Crowne, or criminal causes that concerne life or member.

[227. a.]

43. Ass. 31. Stanf. pl. cor. 164, 165. 3. E. 3. coron. 284. 286, 287. 44. E. 3. 44. 41. E. 3. Coron. 451. (Cro. Eliz. 474. Ib. 471. 113. 114. 653. 6. Rep. 46. b.)

A verdict

‡ *lease, auxybien ils poient aver conusance de le,* not in L. and M. nor Roh.

(2) See Bacon Abr. vol. 5. 281. Vin. vol. 21. 373. Com. Dig. Abatement, (I. 34.) Amendment, (P.) Appeals, (G. 14.) Estoppel, (E. 10.) Evidence, (A. 5.) Pleader, (C. 87. E. 38. R. 13. S. 1.) Prerogative, (D. 76.)

40. E. 3. 15.
20. E. 3. amendment. 57.
18. E. 3. 49. in Cessavit.
30. E. 3. 23.
7. H. 4. 39.
(8. Rep. 65.)
17 E. 3. 47.
18. E. 3. 48.
22. E. 3. 1.
18. E. 3. 56.
15. E. 3. Judgement. 58.
2. H. 5. 3.
7. H. 6. 5.
7. E. 4. 24.
28. H. 6. 10.
(Cro. Jac. 31.
2. Roll. Abr. 722. 10. Rep. 119. Hob. 64. 6. Rep. 47. 2. Roll. Abr. 702. 706. Dyer 346. b. 300. b. Post. 303. a. b. Doctr. Pla. 288, 289. Hob. 54. Cro. El. 174. 2. Roll. Abr. 708. Hob. 18. 9. Rep. 67. b. 112. 4. Rep. 65. Ant. 114. b. Cro. El. 110. 10. Rep. 97. b.)

A verdict finding matter incertainely or ambiguously is insufficient, and no judgement shall be given thereupon; as if an executor plead *pleinment administre*, and issue is joyned thereupon, and the jury finde that the defendant have goods within his hands to be administred, but finde not to what value, this is incertaine, and therefore insufficient.

A verdict that finds part of the issue, and finding nothing for the residue, this is insufficient for the whole, because they have not tried the whole issue wherewith they are charged. As if an information of intrusion bee brought against one for intruding into a messuage, and 100 acres of land, upon the generall issue the jury finde against the defendant for the land, but saith nothing for the house, this is insufficient for the whole, and so was it twice adjudged. [m] But if the jury give a verdict of the whole issue, and of more &c. that which is more is surplusage, and shall not [a] stay judgement; for *Utile per inutile non vitiatur*, but necessarie incidents required by law the jury may finde.

[m] Hil. 25. Eliz. in a writ of error betweene Brace and the Queene in the Exchequer chamber Mich. 28. & 29. Eliz. inter Gomersal & Gomersal in account in the King's bench. [a] 32. E. 3. Cessavit. 25. Vid. Sect. 484, 485. (Post. 282.) Vid. Sect. 58. 13. E. 3. garr. 26. 15. E. 3. Ass. 322. 17. E. 3. 6. 18. Ass. 2. 35. Ass. 8.

If the matter and substance of the issue bee found, it is sufficient, as *Littleton* himselfe sayeth hereafter.

Estoppells which bind the interest of the land, as the taking of a lease of a man's owne land by deed indented, and the like, being specially found by the jurie, the court ought to judge according to the speciall matter; for albeit estoppels regularly must be pleaded and relied upon by an apt conclusion, and the jury is sworne *ad veritatem dicendam*, yet when they finde *veritatem facti*, they pursue well their oath, and the court ought to adjudge according to law. [b] So may the jurie find a warrantie being given in evidence, though it be not pleaded, because it bindeth the right, unlesse it be in a writ of right, when the mise is joyned upon the meere right.

[b] 1. H. 4. 6. b. 27. H, 8. 22. b. Pl. Com. 515. Lib. 4. fo. 53. Rawlins' case, & ibid. Pledol's case. Hil. 31. Eliz. betweene Sutton and Dicons in the Common Place, the case of the lease for yeares by deed indented. 34. E. 3. Droit. 29. (Post. 352. Ant. 47. b. Doc. Pla. 164. Post. 283. Cro. El. 141.)

[c] 7. R. 2. Corone. 108. Plo. Com. Freeman's case 211. 11. H. 4. 2. 20. Ass. 12. 16. Ass. 16. 22. Ass. 23. 5. H. 7. 22.

[227. b.]

[c] After the verdict recorded, the jury cannot vary from it, but before it be recorded they may vary from the first offer of their verdict, and that verdict which is recorded shall stand: also they may vary from a privy verdict.

An issue found by verdict shall alwayes be intended true untill it be reversed by attaint, and thereupon upon the attaint no *supersedeas* is grantable by law.

Pasch. 24. H. 8. of the report of Justice Spilman in the King's Bench.
11. H. 4. 17.
35. H. 6. Examin. 17.
29. H. 8. 37. Dier. (1. Vent. 125.) 35. H. 8. 55. 4. et 5. Eliz. 218. 14. H. 7. 1. 20. H. 7. 3.

If the jurie after their evidence given unto them at the barre, doe at their owne charges eat or drinke either before or after they be agreed on their verdict, it is finable, but it shall not avoid the verdict: but if before they be agreed on their verdict, they eate or drinke at the charge of the plaintife, if the verdict be given for him, it shall avoid the verdict: but if it be given for the defendant,

it shall not avoid it, & *sic è converso*. [*d*] But if after they be agreed on their verdict they eat or drinke at the charge of him for whom they doe passe, it shall not avoid the verdict.

[*d*] Pasch. 6. E. 6. in the Common Place.

[*e*] If the plaintife after evidence given, and the jury departed from the barre, or any for him, doe deliver any letter from the plaintife to any of the jury concerning the matter in issue, or any evidence, or any escrowle touching the matter in issue, which was not given in evidence, it shall avoid the verdict, if it be found for the plaintife, but not if it be found for the defendant, & *sic è converso*. But if the jury carry away any writing unsealed, which was given in evidence in open court, this shall not avoid their verdict, albeit they should not have carryed it with them.

[*e*] 11. H. 4. 16 17. 3. Mar. Jurors Br. 8. Vide Dier ub supra. (2. Roll. Abr. 713. 814. 1. Leo. 18. Cro. Jac. 121. Sid. 225.) Pasch. 6. E. 6. ubi supra.

By the law of England a jury after their evidence given upon the issue, ought to be kept together in some convenient place, without meat or drinke, fire or candle, which some bookes [*f*] call an imprisonment, and without speech with any, unlesse it be the bailife, and with him onely if they be agreed. After they be agreed they may in causes between party and party give a verdict, and if the court be risen, give a privy verdict before any of the judges of the court, and then they may eat and drinke, and the next morning in open court they may either affirme or alter their privy verdict, and that which is given in court shall stand. But in criminall cases of life or member, the jury can give no privy verdict, but they must give it openly in court. And hereby appeareth another division of verdicts, *viz.* a publique verdict openly given in court, and a privy verdict given out of the court before any of the judges, as is aforesaid.

(Mo. 452. 2. Roll. Abr. 714, 715, 716.) [*f*] 24. E. 3. 75. (1. Cro. Jac. 141. 616.)

A jury sworne and charged in case of life or member, cannot be discharged by the court or any other, but they ought to give a verdict. And the king cannot be non-suit, for he is in judgement of law ever present in court: but a common person may be nonsuit.

21. E. 3. 18. (Ant. 139. b. 9. Rep. 13.)

" *En assise de novel disseisin, ou en ascun auter action*, &c." Here it is to bee observed, that a speciall verdict, or at large, may be given in any action, and upon any issue, be the issue generall or speciall: and albeit there be some contrary opinions in our bookes, yet the law is now setled in this point.

W. 2. cap. 30. 7. H. 4. 11. 8. E. 4. 29. 9. H. 7. 13. 23. H. 8. tit. verdit. Br. 85. 11. Eliz. Dier. 283, 284.

" *Per que le lessor entra.*" Here it appeareth that the condition is executed by re-entry, and yet the lessor after his re-entry shall not, by the opinion of *Littleton*, plead the condition without shewing the deed, because he was partie and privie to the condition, for the parties must shew forth the deed, unlesse it be by the act and wrong of his adversary, as hath beene said; [*m*] but an estranger which is not privie to the condition, nor claimeth under the same, as in the cases abovesaid appeareth, shall not after the condition is executed in pleading be inforced to shew forth the deed: and by this diversitie all the bookes and authorities in law which seeme to be at variance are reconciled. See also for this matter the section next following.

3. E. 3. Itinere North. 284. 286. 43. Ass. 31. 26. H. 8. 5. 44. E. 3. 44. F. tit. Coron. 94. 44. Ass. 17. 45. E. 3. 20. Pl. Com. 92. 9. H. 7. 3. Vide Lib. 9. 12. 13. Dowman's case. And see there many other authorities. 31. Ass. pl. 21. 10. H. 4. 9. (Sid. 369. 6. Rep. 38.)

[*m*] See more before in this chapter, sect. 365.

" *Les recognitors del assise poient dire*, &c." Here it appeareth that the jurors may finde the fact, albeit the deed be not shewed in evidence,

10. Ass. p. 9. 21. Ass. 28. 17. Ass. 20. 31. Ass. 21.

23. Ass. 2. 39. E. 3. 28. 44. E. 3. 22.

evidence, and the rather for that the condition upon the livery (as hath beene said) is good, albeit there be no deed at all.

10. H. 4. 9. 7. H. 5. 5. 9. E. 4. 26. 18. E. 4. 12. 15. E. 4. 16, 17. 11. H. 7. 22. (Ant. 225. Cro. Jac. 336.)

"*Et prieront le discretion des justices.*" That is to say, they (having declared the speciall matter) pray the discretion of the justices; which is as much to say, as, that they would discerne what the law adjudgeth thereupon, whether for the demandant, or for the tenant: for as by the authoritie of *Littleton, discretio est discernere per legem, quid sit justum,* that is, to discerne by the right line of law, and not by the crooked cord of private opinion, which the vulgar call discretion: *Si à jure discedas, vagus eris, & erunt omnia omnibus incerta:* and therefore commissions that authorise any to proceed, *secundum sanas discretiones vestras,* is as much to say, as, *secundum legem & consuetudinem Angliæ.*

Lib. 10. fo. 4. case de Sewers.

"*Car cibien come les jurors poient aver conusance, &c.*" Hereby it appeareth that they that have conusance of any thing, are to have conusance also of all incidents and dependants thereupon, for an incident is a thing necessarily depending upon another.

1. E. 3. 17. in Gracye's case.

If a deed be made and dated in a forraine kingdome, of lands within England, yet if liverie and seisin be made, *secundum formam cartæ,* the land shall passe, for it passeth by the liverie. [228. a.]

Sect. 367.

*EN mesme le manner est de feoffement en fee, ou done en le taile, sur condition, coment que nul escripture unque fuet fait de ceo *. Et sicome est dit de verdict a large en assise, &c. en mesme le manner est en briefe d'entre foundue sur disseisin; et en touts auters actions ou les justices voylent prender le verdict a large, y † la ou tiel verdict a large est fait, la manner del entrie entire est mis en l'issue, &c.*

IN the same manner it is of a feoffement in fee, or a gift in taile, upon condition, although no writing were ever made of it. And as it is sayd of a verdict at large in an assise, &c. in the same manner it is of a writ of entrie founded upon a disseisin; and in all other actions where the justices will take the verdict at large, there where such verdict at large is made, the manner of the whole entrie is put in the issue, &c.

AND it is to be observed, that the court cannot refuse a speciall verdict, if it bee pertinent to the matter put in issue. See the section next preceding.

(9. Rep. 13.) See the section next following. (10. Rep. 118. Ant. 226.)

"*Verdict a large.*" It is called a verdict at large because it findeth the matter at large, and leaves it to the judgement of the court: or it is called a special verdict, because it findeth the speciall matter, &c. So as hereby it appeareth, that a verdict (as hath beene said) is two fold, *viz,* a verdict at large, or a speciall verdict,

* &c. L. and M. and Roh.
† *par la ou tiel verdict a large fait la nature de matter mys en l'issue,* L. and M. and Roh.

verdict, (which is all one) whereof *Littleton* here speaketh; and a generall verdict that is generally found according to the issue, as if the issue be not guilty, to finde the partie guiltie or not guiltie generally, & *sic de cæteris*. There is also a verdict given in open court, and a privy verdict given out of court before any of the judges of the court, so called because it ought to bee kept secret and privie from each of the parties, before it be affirmed in court.

See the next preceding section.

Sect. 368.

ITEM en tiel case l'ou l'enquest poit dire lour verdict a large, s'ils voilent prendre sur eux le conusance de la ley sur le matter, ils poient dire lour verdict generalment, come est mis en lour charge; come en le case avantdit ils poient bien dire, que le lessor ne disseisa pas le lessee, s'ils voilent, &c.

ALSO in such case where the enquest may give their verdict at large, if they will take upon them the knowledge of the law upon the matter, they may give their verdict generally, as is put in their charge; as in the case aforesaid they may well say, that the lessor did not disseise the lessee, if they will, &c.

ALTHOUGH the jurie if they will take upon them (as *Littleton* here saith) the knowledge of the law, may give a generall verdict, yet it is dangerous for them so to doe, for if they doe mistake the law, they runne into the danger of an attaint; therefore to find the speciall matter is the safest way where the case is doubtfull.

(8. Rep. 65.)

(4. Rep. 53.)

[228. b.]

Sect. 369.

ITEM en mesme le case, si le case fuit tiel, que apres ceo, que le lessor avoit enter pur default de payment, &c. que le lessee ust enter sur le lessor, et luy disseisist, en cest case si le lessor arraigne un assise envers le lessee, le lessee luy puit barre de l'assise; car il poit pleader envers luy en bar, coment le lessor que est plaintife fist un lease al defendant pur terme de sa vie, savant le reversion al plaintife, quel est bone plea en barre, entant que il conust le reversion estre al plaintife. * *En cest case le plaintife n'ad* † *ascun matter de luy ayder, forsque le condition fait sur le leas, et ceo il ne poet pleader, pur ceo que il n'ad ascun escripture de ceo: et entant que*

ALSO in the same case, if the case were such, that after that, that the lessor had entred for default of payment, &c. that the lessee had entered upon the lessor, and him disseised, in this case if the lessor arraigne an assise against the lessee, the lessee may barre him of the assise; for hee may pleade against him in bar, how the lessor who is pl. made a lease to the defen. for term of his life, saving the reversion to the pl. which is a good plea in bar, insomuch as hee acknowledges the reversion to be to the pl. In this case the plaintif hath no matter to ayd himselfe, but the condition made upon the lease, & this he

* *Et* added in L. and M. and Roh.

† *ascun* not in L. and M. nor Roh.

que il ne poet respondre al barre, il serra barre. Et issint en cest case poyes veier que home est ‡ disseisie, et uncore il n'avera assise. Et uncore si le lessee soit plaintife, et le lessor defendant, il barrera le lessee per verdict d'assise, &c. Mes en cest case l'ou le lessee est defendant, si il ne voile plead le dit plea en barre, mes plead nul tort, nul disseisin, donques le lessor recovera per assise, causâ quâ suprà.

he cannot plead, because he hath not any writing of this: and inasmuch as he cannot answere the bar, he shal be barred. And so in this case you may see that a man is disseised, & yet he shal not have assise. And yet if the lessee be pl. and the lessor def. he shall bar the lessee by verdict of the assise, &c. But in this case where the lessee is def. if he wil not plead the said plea in bar, but plead *nul tort, nul diss.* then the lessor shal recover by assise, *causâ quâ suprà.*

" *PUR ceo que il n'ad ascun escripture de ceo.*" Hereby it also appeareth, that albeit the condition was executed by reentrie, yet the lessor cannot plead it without shewing of a deed. But of this matter sufficient hath beene said before in the two next preceding sections.

18. E. 4. 10.
12. Ass. 38.
10. Ass. 16.
26. H. 6. Bar. 9.
38. Ass. 26. 4.
31. Ass. 26.
39. Ass. 3.
43. Ass. 18.
44. Ass. 3.
18. E. 3. Ass. 77.
31. E. 3. ibid.
97. 18. Ass. 22.
4. Eliz. Dyer 207.
8. Eliz. Dyer 246.
(Ant. 201. a.)

" *Quel est bone plea en barre.*" In a case where there have beene some varietie of opinions in our books, *Littleton* here cleereth the doubt, and that upon a good ground. For hee himselfe reporteth in our bookes, that it was holden by all the justices of England, that a lease for life, the reversion to the plaintife, was a good barre in an assise, and also that a lease for yeares, the reversion to the plaintife, might bee pleaded in an assise: and so of a feoffment in fee with warrantie. And herein the diversitie of pleading is to be observed; for in the case here put by *Littleton* of a lease for life, the tenant shall pleade it in barre; but in a case of a lease for yeares, or an estate of tenant by statute or *elegit*, the defendant shall not plead in bar, as to say, *assisa non, &c.* but justifie by force of the lease, &c. and conclude, *& issint sans tort*. And if the tenant of the freehold be not named, he shall pleade *nul tenant de franktenement nosme en le briefe:* and in the case of the feoffment with warranty, he must relie upon the warrantie.

[229. a.]

Sect. 370.

ITEM pur ceo que tielx conditions sont plus communement mis & especifies en faits endentes, ascun petit chose serra icy dit (a toy, mon fits) de endenture, et de fait poll concernants conditions. Et est ascavoir, que si l'endenture soit bipartite, ou tripartite, ou quadripartite, touts les partes de

AND for that such conditions are most commonly put and specified in deeds indented, somewhat shall bee here said (to thee, my sonne) of an indenture, (1) and of a deed pol (2) concerning conditions. And it is to bee understood, that if the indenture be bipartite, or tripartite, or quadripartite,

‡ *disseisie—seisie,* L. and M. and Roh.

(1) [See Note 138.] (2) [See Note 139.]

de l'endenture ne sont que un fait en ley, & chescun part de l'endenture est de auxy grande force et effect, sicome touts les parts ensemble,

partite, all the parts of the indenture are but one deed in law, and every part of the indenture is of as great force and effect, as all the parts together be. (3)

"EN *faits endentes.*" Those are called by severall names, as *scriptum indentatum, carta indentata, scriptura indentata, indentura, literæ indentatæ.* An indenture is a writing containing a conveyance, bargaine, contract, covenants, or agreements betweene two or more, and is indented in the top or side answerable to another that likewise comprehendeth the self same matter, and is called an indenture, for that it is so indented, and is called in Greeke συμγραφον.

Vid. sect. 217. (Ant. 143. b.)

If a deed beginneth, *hæc indentura, &c.* and in troth the parchment or paper is not indented, this is no indenture, because words cannot make it indented. But if the deed be actually indented, and there be no words of indenture in the deed, yet it is an indenture in law; for it may be an indenture without words, but not by words without indenting.

Lib. 5. fo. 20. Stile's case. (2. Roll. Abr. 22. 2. Inst. 672.) (1. Rep. 173. b.)

" *En faits indent.*" And here it is to be understood, that it ought to be in parchment or in paper. For if a writing be made upon a peece of wood, or upon a peece of linen, or in the barke of a tree, or on a stone, or the like, &c. and the same be sealed or delivered, yet is it no deed, for a deed must be written either in parchment or paper, as before is said, for the writing upon these is least subject to alteration or corruption.

(Ant. 35. b. 36. a.) 14. E. 3. Ley 79. 4. E. 2. Fines 116. 4. E. 2. Ley 68. 2. R. 2. Det. 4. 27. H. 6. 9. F. N. B. 122. I. (2. Roll. Abr. 21.)

" *Si l'endenture soit bipartite, ou tripartite, ou quadripartite, &c.*" *Bipartite* is, when there be two parts and two parties to the deed. *Tripartite,* when there are three parts and three parties; and so of *quadripartite, quinquepartite,* &c.

" *Et de fait poll.*" A deed poll is that which is plaine without any indenting, so called because it is cut even, or polled. Every deed that is pleaded shall be intended to bee a deed poll, unlesse it be alleaged to be indented.

" *Touts les parts del endenture ne sont que un en ley.*" If a man by deed indented make a gift in taile, and the donee dyeth without issue, that part of the indenture which belonged to the donee doth now belong to the donor, for both parts doe make but one deed in law.

38. H. 6. 24, 25. 9. H. 6. 35. 35. H. 6. 34. 9. E. 3. 18. 9. E. 4. 18. Pl. Com. 134.

" *Et chescun part del indenture est de auxy grand force, &c.*" This is manifest of it selfe, and is proved by the bookes aforesaid.

It is to be observed, that if the feoffor, donor, or lessor seale the part of the indenture belonging to the feoffee, &c. the indenture is good, albeit the feoffee never sealeth the counterpart belonging to the feoffor, &c.

(3) [See Note 140.]

Sect. 371.

[229. b.]

ET feasance de indenture est en deux maners. Un est de faire eux en le tierce person. Un auter est de faire eux en le primer person. Le feasance en le tierce person est come en tiel forme.

Hæc indentura facta inter *R.* de *P.* ex unâ parte, & *V.* de *D.* ex alterâ parte, testatur, quòd prædictus *R.* de *P.* dedit & concessit, & hâc præsenti cartâ indentatâ confirmavit præfato *V.* de *D.* talem terram, &c. Habendum & tenendum, * &c. sub conditione, † &c. In cujus rei testimonium partes prædictæ sigilla sua ‡ præsentibus alternatim apposuerunt. *Vel sic:* In cujus rei testimonium uni parti hujus indenturæ penes præfatum *V.* de *D.* remanenti, prædict' *R.* de *P.* sigillum suum apposuit, alteri verò parti ejusdem indenturæ penes *R.* de *P.* remanenti, idem *V.* de *D.* sigillum suum apposuit. Dat' &c.

Tiel endenture est appel endenture fait en le tierce person, pur ceo que les verbes, &c. sont en la tierce person. Et tiel forme d'endentures est de pluis sure feasance, pur ceo que est pluis communement use, &c.

AND the making of an indenture is in two manners. One is to make them in the third person. Another is to make them in the first person. The making in the third person is in this forme.

This indenture made between R. *of* P. *of the one part, and* V. *of* D. *of the other part, witnesseth, that the said* R. *of* P. *hath granted, and by this present charter indented confirmed to the aforesaid* V. *of* D. *such land, &c. To have and to hold, &c. upon condition, &c. In witnesse whereof the parties aforesaid to these presents interchangeably have put their seales.* Or thus: *In witnesse whereof to the one part of this indenture remaining with the said* V. *of* D. *the said* R. *of* P. *hath put his seale, and to the other part of the same indenture remaining with the said* R. *of* P. *the said* V. *of* D. *hath put his seale. Dated, &c.*

Such an indenture is called an indenture made in the third person, because the verbes, &c. are in the third person. And this forme of indentures is the most sure making, because it is most commonly used, &c.

9. E. 3. 18. Vide the books afore rehearsed.

"*ET le feasance del indenture est en deux maners, &c.*" Here is another of our author's perfect divisions. In this and the next section following *Littleton* doth illustrate his meaning, by setting downe formes and examples which do effectually teach.

Vide 40. E. 3. 2. 7. H. 7. 14. Dier 28. H. 8. 19. lib. 2. fol. 4. & 5. Goddard's case. (Ant. 6. a.)

In these two formes there are to be observed (amongst other) three generall parts of the same, *viz.* the premises, the *habendum*, and the *in cujus rei testimonium*. But hereof hath been spoken at large, *Sect.* 1. 4. & 40. for *Littleton* speaketh not here of the deliverie, but onely of the context or words of the deed.

17. Eliz. Dier 342. 1. R. 3. 14. H. 6. 28. Pab. 12. H. 4. 12. 30. Ass. 31.

"*Pur ceo que est le pluis communement use.*" Here it appeareth that which is most commonly used in conveyances is the surest way. *A communi observantiâ non est recedendum, & minimè mutanda sunt quæ certam habuerunt interpretationem. Magister rerum usus.* It is provided by the statute of 38. *E.* 3. *cap.* 4. that all penal bonds in the third

* &c. not in L. and M. nor Roh.
† &c. not in L. and M. nor Roh.
‡ *præsentibus* not in L. and M. nor Roh.

[330. a.] third person be void and holden for none, wherein some of our bookes [d] seem to differ, but they being rightly understood, there is no difference at all. For the statute is to be intended of bonds taken in other courts out of the realme, and so it appeareth by the preamble of that act. And it was principally intended of the courts of *Rome*, and so it appeareth by justice *Hankford*, in 2. *H.* 4. in which courts bonds were taken in the third person, so as such bonds made out of the realm are void; but other bonds, in the third person, are resolved to be good, as wel as indentures in the third person, by the opinion of the whole court in 8. *E.* 4. (1)

[d] 40. E. 3. 1. 2. H. 4. 10. 8. E. 4. 5.

Sect. 372.

*LE feasance de indenture en le primer person est * come en tiel forme.* Omnibus Christi fidelibus ad quos præsentes literæ indentatæ pervenerint, *A.* de *B.* salutem in domino sempiternam. Sciatis me dedisse, concessisse, & hâc præsenti cartâ meâ indentatâ confirmâsse *C.* de *D.* talem terram, &c. *Vel sic:* Sciant præsentes & futuri, quòd ego *A.* de *B.* dedi, concessi, & hâc præsenti cartâ meâ indentatâ confirmavi *C.* de *D.* talem terram, &c. Habendum † & tenendum, &c. sub conditione sequenti, &c. In cujus rei testimonium tam ego prædictus *A.* de *B.* quàm prædictus *C.* de *D.* his indenturis sigilla nostra alternatim apposuimus. *Vel sic:* In cujus rei testimonium ‡ ego præfatus *A.* uni parti hujus indenturæ sigillum meum apposui, alteri verò parti ejusdem indenturæ prædictæ *C.* de *D.* sigillum suum apposuit, &c.

THE making of an indenture in the first person is as in this forme. *To all Christian people to whom these presents indented shall come,* A. *of* B. *sends greeting in our Lord God everlasting. Know yee mee to have given, granted, and by this my present deed indented confirmed to* C. *of* D. *such land, &c.* Or thus: *Know all men present and to come, that I* A. *of* B. *have given, granted, and by this my present deed indented confirmed to* C. *of* D. *such land, &c. To have and to hold, &c. upon condition following, &c. In witnesse whereof, aswell I the said* A. *of* B. *as the aforesaid* C. *of* D. *to these indentures have interchangeably put our seales.* Or thus: *In witnesse whereof I the aforesaid* A. *to the one part of this indenture have put my seale, and to the other part of the same indenture the said* C. *of* D. *hath put his seale, &c.*

HERE *Littleton* sets down three formes of deeds indented in the first person, *brevis via per exempla, longa per præcepta.* It is requisite for everie student to get presidents and approved formes not onely of deeds according to the example of *Littleton*, but of fines, and other conveyances, and assurances, and specially of good and perfect pleading, and of the right entries, and formes of judgements, which will stand him in great stead, both while he studies, and after when he shall give counsell. It is a safe thing to follow approved presidents, for *nihil simul inventum est, & perfectum.*

Vid. Sect. 371.

* *come* not in L. and M. nor Roh.
† *et tenendum,* not in L. and M. nor Roh.
‡ *ego præfatus et,* not in L. and M. nor Roh.

(1) See Mr. Reeves's accurate and learned History of the English Law, vol. 2. p. 67.

Sect. 373.

*ET il semble que tiel endenture ‖ que est fait en le primer person est auxy bone en la ley, sicome l'indenture fait en le tierce person, quant ambideux parties ont a ceo mise lour seals; car * si en l'indenture fait en le tierce person, ou en le primer person, † mention soit fait que le grantor avoit mise solement son seale, & nemy le grauntee, donques est l'indenture taut solement le fait le grauntor. Mes l'ou mention est fait que le grauntee ad mis ‡ son seale a l'indenture, &c. donques est l'indenture auxy bien le fait le grantee come le fait le grantor. Issint il est le fait d'ambideux, & auxy chescun part de l'indenture est le fait d'ambideux parties en tiel case.*

AND it seemeth that such indenture which is made in the first person is as good in law, as the indenture made in the third person, when both parties have put to this their seales; for if in the indenture made in the third person, or in the first person, mention be made that the grantor onely hath put his seale, and not the grantee, then is the indenture onely the deed of the grantor. But where mention is made that the grantee hath put to his seale to the indenture, &c. then is the indenture as well the deed of the grantee as the deed of the grantor. So is it the deed of them both, and also each part of the indenture is the deed of both parties in this case.

[230. b.]

(2 Inst. 673. Ant. 52. b. 2. Roll Abr. 22.)

HERE is to be observed, that albeit the words in this indenture be onely the words of the feoffor, yet if the feoffee put his seale to the one part of the indenture, it is the deed of them both. And in this speciall case to make it the deed of the feoffee, it appeareth by *Littleton*, that mention must be made in the deed, that hee hath put to his seale, for that he is no way made partie to make it, being made in the first person, but onely by the clause of putting his seale thereunto. Otherwise it is of a deed indented in the third person, as before it appeareth, for there hee is made partie to the deed in the beginning. And *Littleton*'s rule is true, that every part of an indenture is the dede of both parties; for, as it hath beene said, both parts make but one deed in law in that case.

Sect. 374.

ITEM si estate soit fait per indenture a un home pur terme de sa vie, le remainder a un auter en fee sur certaine condition, &c. & si le tenant a terme de vie avoit mis son seale al part de l'indenture, & puis morust, & il que est en le remainder entre en la terre per force de son remainder, &c. en cest cas il est tenus de performer touts les conditions

ALSO if an estate bee made by indenture to one for terme of his life, the remainder to another in fee upon a certaine condition, &c. and if the tenant for life have put his seale to the part of the indenture, and after dieth, and he in the remainder entreth into the land by force of his remainder, &c. in this case hee is tied to performe

‖ *que est* not in L. and M. nor Roh.
* *si* not in L. and M. nor Roh.
† *si* added in L. and M. and Roh.
‡ *son seale* not in L. and M. nor Roh.
‖ *et* added in L. and M. and Roh.

tions comprise en l'endenture, sicome le tenant a terme de vie devoit faire en sa vie, et uncore cestuy en le remainder ne unques en seale ascun part del endenture. Mes la cause est, que entant que il enter et agreea d'aver les terres per force del endenture, il est tenus de performer les conditions deins mesme l'endenture, s'il voile aver la terre, &c.

performe all the conditions comprised in the indenture, as the tenant for life ought to have done in his life time, and yet he in the remainder never sealed any part of the indenture. But the cause is, for that inasmuch as hee entred and agreed to have the lands by force of the indenture, hee is bound to performe the conditions within the same indenture, if he will have the land, &c.

" SUR *certaine condition, &c.*" Here by this (*&c.*) is implied, that the condition in this case doth extend both to the estate for life, and to the remainder, but by speciall limitation it may extend to any one of them, and not to the other. And albeit he in the remainder be no party to the indenture (the parties thereunto only being the lessor and the tenant for life) yet when hee in the remainder entreth and agreeth to have the lands by force of the (1) indenture, he is bound to performe the conditions contained in the indenture. And here is also a diversitie to be understood, that any estranger to the indenture may take by way of remainder, but he cannot in this case take any present estate in possession, because he is an estranger to the deed. (1)

(1. Roll. Abr. 422. 474.)
(10. Rep. Doct. Ball's case cited in Portington's case.)
2. Cro. 240. 399. 522.)
[231. a.]
(2. Inst. 673.)
(2. Roll. Abr. 22.)

If *A.* by deed indented betweene him and *B.* letteth lands to *B.* for life, the remainder to *C.* in fee reserving a rent, tenant for life dieth, he in the remainder entreth into the lands, he shal be bound to pay the rent, for the cause and reason before yeelded by *Littleton.* An indenture of lease is engrossed betweene *A.* of the one part, and *D.* and *R.* of the other part, which purporteth a demise for yeares by *A.* to *D.* and *R.* *A.* sealeth and delivereth the indenture to *D.* and *D.* sealeth the counterpane to *A.* but *R.* did not seale and deliver it. And by the same indenture it is mentioned, that *D.* and *R.* did grant to be bound to the plaintife in 20 pound in case that certaine conditions comprised in the indenture were not performed. And for this 20 pound *A.* brought an action against *D.* onely, and shewed forth the indenture. The defendant pleaded, that it is proved by the indenture that the demise by indenture was made to *D.* and *R.* which *R.* is in full life and not named in the writ, judgment of the writ. The plaintife replyed, that *R.* did never seale and deliver the indenture, and so his writ was good against *D.* sole. And there the counsell of the plaintife tooke a diversitie betweene a rent reserved which is parcell of the lease, and the land charged therewith, and a summe in grosse, as here the twenty pound is; for as to the rent they agreed that by the agreement of *R.* to the lease, he was bound to pay it, but for the 20 pound that is a summe in grosse, and collateral to the lease, and not annexed to the land, and groweth due onely by the deed, and therefore *R.* said hee was not chargeable therewith, for that he had not sealed and delivered the deed. But inasmuch as hee had agreed to the lease which was made by indenture, he was chargeable by the indenture for the same summe in grosse; and for that *R.* was not named in the writ, it was adjudged that the writ did abate.

50. E. 3. 22.
3. H. 6. 26. b.
(1. Roll. 474.)
(5. Rep. 16.)
38. E. 3. 8. a.
3. H. 6. 26. b.
Vide 45. E. 3. 11. 12.

" *Aver*

[231. a.]

(1) [See Note 141.] (1) [See Note 142.]

"*Aver la terre, &c.*" Here is implyed an ancient maxime of the law, *viz. Qui sentit commodum sentire debet et onus, et transit terra cum onere.*

{5. Rep. 76.} {1. Rep. 38.}

Sect. 375.

ITEM si feoffment soit fait per fait poll sur condition, * *et pur ceo que le condition n'est pas performe le feoffor entra et happa la possession de le fait poll, si le feoffee port un action de cel entrie envers le feoffor, il ad este question si le feoffor poit pleder le condition per le dit fait poll encounter le feoffee. Et ascuns ont dit que non, entant que il semble a eux que un fait poll, et le propertie de mesme le fait appertient a celuy a que le fait est fait, et nemy a celuy que fist le fait. Et entant que tiel fait ne attient al feoffor, il semble a eux que il ne poit pas ceo pleder.* † *Et auters ont dit le contrarie, et ont monstre divers causes. Un est, si le case fuit tiel, que en action perenter eux, si le feoffee pleder mesme le fait, et monstre* ‡ *est* ‡ *al court, en cest cas entant que le fait est en court, le feoffor poit monstrer al court coment en le fait sont divers conditions d'estre performes* ‖ *de le part le feoffee, &c. et pur ceo que ils ne fueront performes, il enter, &c. et a ceo il serra resceive. Per mesme le reason quant le feoffor ad le fait en paigne, et ceo monstra a le court, il serra* § *bien resceive de ceo pleder, &c. et nosment quant le feoffor est privie al fait, car* ¶ *covient estre privie al fait quant il fist le fait, &c.*

ALSO if a feoffment bee made by deed poll upon condition, and for that the condition is not performed the feoffor entreth and getteth the possession of the deed poll, if the feoffee brings an action for this entrie against the feoffor, it hath beene a question if the feoffor may plead the condition by the said deed poll against the feoffee. And some have said hee cannot, inasmuch as it seemes unto them that a deed poll, and the propertie of the same deed belongeth to him to whom the deed is made, and not to him which maketh the deed. And inasmuch as such a deed doth not appertaine to the feoffor, it seemes unto them that he cannot plead it. And others have said the contrary, and have shewed divers reasons. One is, If the case were such, that in an action betweene them, if the feoffee pleade the same deed, and shew it to the court, in this case insomuch as the deed is in court, the feoffor may shew to the court how in the deed there are divers conditions to be performed of the part of the feoffee, &c. and because they were not performed he entred, &c. and to this he shall be received. By the same reason when the feoffor hath the deed in hand, and shew this to the court, he shall well be received to pleade it, &c. and namely when the feoffor is privy to the *fait*, for hee must be privie to the deed when he makes the deed, &c.

[231. b.]

[*a*] Vid. sect. 370. 302. 340.

HERE the latter opinion is cleere law at this day, and is *Littleton*'s owne opinion [*a*], as before hath beene observed.

"*Ont*

* *&c.* added in L. and M. and Roh.
† *&c.* added in L. and M.
‡ *ceo*, L. and M. and Roh.
‡ *est* not in L. and M. nor Roh.
‖ *de le part de feoffee, &c. et pur ceo que ils ne fueront performes*, not in L. and M. nor Roh.
§ *de ceo* added in L. and M.
¶ *il* added in L. and M. and Roh.

2

"*Ont monstre divers causes.*"

Felix qui potuit rerum cognoscere causas.
Et ratio melior semper prævalet.

"*Entant que le fait est en court, &c.*" And herewith doe agree [b] many authorities in law. [c] And if the deed remaine in one court, it may be pleaded in another court, without shewing forth; *quia lex non cogit ad impossibilia.*

24. E. 3. 73. 45. E. 3. Monstrans des faits. 55. [b] 40. Ass. 34. lib. 5. 75. b. Wymark's case. [c] 12. H. 4. 8. 42. E. 3. 27. Wymark's case, ubi supra. 38. H. 6. 2. 41. Ass. 29. 12. H. 4. 8. 7. H. 4. 39. 11. H. 4. 73. 45. E. 3. 11. F. N. B. 243.

"*De part le feoffee, &c.*" Here also is implyed if the condition be to be performed on the part of the feoffor or by a stranger; and it is to be understood that when a deed is shewed forth to the court, the deed shall remaine in court all that tearm in the custody of the *custos brevium*, but at the end of the tearme (if the deed be not denied) then the law adjudgeth the deed in the custody of the party to whom it belongeth, for a man's evidences are as it were the sinewes of his land. But if the deed be denied, then the deed in judgment of law remaineth in court untill the plea be determined (1). The residue of this section needeth no explication.

(5. Rep. 75. 76.)

[232. a.]

Sect. 376.

*AUXY si deux homes font un trespas a un auter, le quel release a un d'eux per son fait touts actions personals, & nient obstant il suist action de trespasse envers l'auter, le defendant bien poit monstrer que le trespasse fuit fait per luy, et per un auter son companion, et que le plaintife per * son fait que il monstre avant relessa a son companion touts actions personals, judgment si action, &c. et uncore tiel fait appertient a son companion, & nemy a luy. Mes pur ceo que il poit aver advantage per le fait, si voit monstrer le fait al court, il poit † ceo bien pleder, &c. Per mesme le reason ‡ poit le feoffor en l'auter cas, quant § il doit aver advantage per le condition ‖ compris deins le fait poll ¶.*

ALSO if two men doe a tresspasse to another, who releases to one of them by his deed all actions personalls, and notwithstanding sueth an action of trespasse against the other, the defendant may wel shew that the trespasse was done by him, and by another his fellow, and that the plaintife by his deed (which he sheweth forth) released to his fellow all actions personals, and demand the judgement, &c. and yet such deed belongeth to his fellow, and not to him. But because hee may have advantage by the deed, if hee will shew the deed to the court, he may well plead this, &c. By the same reason may the feoffor in the other case, when he ought to have advantage by the condition comprised within the deed poll.

* *son—le*, L. and M. and Roh.
† *pur* added L. and M.
‡ *poit le feoffor* not in L. and M. nor Roh.
§ *le feoffor*, L. and M. and Roh.
‖ *compris* not in L. and M. nor Roh.
¶ *&c.* added L. and M. and Roh.

(1) [See Note 143.]

27. E. 3. 83.
13. E. 4. 2.
15. E. 4. 26.
21. E. 4. 72.
22. E. 4. 7.
8. H. 6. 15.
20. H. 6. 41.
21. H. 6.
Arbitrement 41.
2. R. 3. 9. a.
14. H. 8. 10.
34. H. 8. tit. Estrange al fait 21.
3. H. 6. 18. 26.

"*SI deux homes font un trespasse a un auter, &c.*" Here by this section it is to bee understood, that when divers doe a trespasse, the same is joynt or severall at the wil of him to whom the wrong is done, yet if he release to one of them, all are discharged, because his own deed shall be taken most strongly against himselfe, but otherwise it is in case of appeale of death, &c. As if two men bee joyntly and severally bounden in an obligation, if the obligee release to one of them, both are discharged; and seeing the trespassers are parties and privies in wrong, the one shall not plead a release to the other without shewing of it forth, albeit the deede appertaine to the other. (1)

(11. Rep. 5. 2. Roll. Abr. 412. Hob. 66. 2. Sid. 41. Ant. 125. b.)

13. E. 2. tit. Monstrans des faits. 42.
(Plo. 439. b.
Dyer 344.
6. Rep. 7.
10. Rep. 93. b.)

If an action of debt upon an obligation bee brought against an heire, he may pleade in barre a release made by the obligee to the executors. But albeit the deed belong to another, yet must he shew it forth, for both of them are privie to the testator.

"*Per mesme le reason.*" *Ubi eadem ratio, ibi idem jus.*

Sect. 377.

*AUXY si le feoffee donast ou grantast le fait poll al feoffor, tiel grant serra bone, et donques le fait & le propertie del fait appertient al feoffor, &c. Et quant le feoffor ad le fait en poigne, et * est plead al court, il serra plus tost entendue, que il vient al fait per loyal meane, que per tortious meane. Et issint a eux semble que le feoffor poet bien pleder tiel fait polle que comprent condition, &c. s'il ad le fait en poigne.* † Ideo semper quære de dubiis, quia per rationes pervenitur ad legitimam rationem, &c.

ALSO if the feoffee granteth the deed to the feoffor, such grant shall bee good, and then the deed and the propertie therof belongeth to the feoffor, &c. And when the feoffor hath the deed in hand, and is pleaded to the court, it shall be rather intended, that he commeth to the deed by lawfull meanes, then by a wrongfull mean. And so it seemeth unto them, that the feoffor may wel plead such deed poll which compriseth the condition, &c. if he hath the same in hand. *Ideo semper quære de dubiis, quia per rationes pervenitur ad legitimam rationem, &c.*

(1. Rep. 1.)

"*LE propertie del fait appertient al feoffor.*" Hereby it appeareth that a man may give or grant his deed to another, and such a grant by *paroll* is good. And it is alsо implied, that if a man hath an obligation, though he cannot grant the thing in action, yet hee may give or grant the deed, *viz.* the parchment and waxe to another, who may cancell and use the same at his pleasure. (1)

(Ant. 214. a. Post. 260. 280. 2. Roll. Abr. 45. 46. 48. 1. Sid. 212, 213.)

[232. b.]

"*Serra*

* *est—ceo*, L. and M. and Roh. † *&c.* added L. and M. and Roh.

(1) [See Note 144.] [232. b.] (1) [See Note 145.]

"*Serra plus tost entend', que il vient al fait per loyall meane, que per tortious meane.*" *Omnia presumuntur legitimè facta, donec probetur in contrarium. Injuria non præsumitur.*

"*Quære de dubiis.*" There be three kinds of unhappie men.

1. *Qui scit & non docet*, Hee that hath knowledge and teacheth not.

2. *Qui docet & non vivit*, He that teacheth, and liveth not thereafter.

3. *Qui nescit, & non interrogat*, He that knoweth not, and doth not enquire to understand. Therefore *Littleton* saith, *Quære de dubiis.*

Infelix cujus nulli sapientia prodest.
Infelix qui recta docet, cum vivit iniquè.
Infelix qui pauca sapit spernitque doceri.

"*Quia per rationes pervenitur ad legitimam rationem.*" For *Ratio est radius divini luminis.* And by reasoning and debating of grave learned men the darknesse of ignorance is expelled, and by the light of legall reason the right is discerned, and therupon judgment given according to law, which is the perfection of reason. This is of *Littleton* here called *legitima ratio*, whereunto no man can attaine but by long studie, often conference, long experience, and continuall observation.

Certaine it is, that in matters of difficultie the more seriously they are debated and argued, the more truely they are resolved, and thereby new inventions justly avoided.

Inter cuncta leges, & percunctabere doctos.

Sect. 378.

ESTATES que homes ont sur condition en ley, sont tiels estates que ont un condition per la ley a eux annex, comment que ne soit specifie en escript. Si come home grant per son fait a un auter l'office de parkership de un park a auter, et occupier mesme l'office pur terme de son vie, l'estate que il ad en l'office est sur condition en ley, s'estascavoir, que le parker bien et loyalment gardera le park, et ferra ceo que a tiel office appertient a faire, ou autrement bien lirroit al grauntor et a ses heires de luy ouste, et de granter ceo a un auter s'il voit, &c. Et tiel condition que est entendus per la ley estre annexe a ascun chose, est auxy fort sicome

ESTATES which men have upon condition in law, are such estates which have a condition by the law to them annexed, albeit that it be not specified in writing. As if a man grant by his deed to another the office of parkership of a park, to have and occupie the same office for terme of his life, the estate which he hath in the office is upon condition in law, to wit, that the parker shall well and lawfully keepe the parke, and shall doe that which to such office belongeth to doe, or otherwise it shall be lawful to the grantor and his heires to oust him, and to grant it to another if he will, &c. And such condition

fiome la condition fuissoit mis * *en escript.*

dition as is intended by the law to be annexed to any thing, is as strong as if the condition were put in writing.

" *CONDITION en ley, &c.*" *Littleton* having spoken of conditions in deed, now according to his owne division commeth to speake of conditions in law.

" *Que ne soit specifie en escript.*" A condition in law is that which the law intendeth or implyeth without expresse words in the deed.

(Ant. 2 a. 115. a. Cro Car. 59, 60. 3. Inst. 76. 4. Inst. 289. Hutt. 86, 87.)

[233. a.]

" *Que le parker bien et loyalment gardera le parke, &c.*" *Parke*, this should be written *parque*, which is a *French* word, and signifieth that which we vulgarly call a parke, of the *French* word *parquer*, to imparke, to inclose. It is called in *Domesday*, *Parcus*. In law it signifieth a great quantity of ground inclosed, priviledged for wild beasts of chase by prescription, or by the king's grant.

(8. Rep. 136.) (F.N.B. 164.d.) (5. Rep. 104.b) [d] Hill. 13. E. 3. coram rege in Thesaur. (7. Rep. 15.) [*] 38. E. 3. rot. patent pars 1. m. 10.

The beasts of parque, or chase, properly extend to the bucke, the doe, the foxe, the marten, the roe, but in a common and legall sense, to all the beasts of the forrest. There be both beasts and fowles of the warren. Beasts, as hares, conies, and roes called in records [d] *Capreoli.* Fowles of two sorts, viz. *Terrestres* and *Aquatiles. Terrestres* of two sorts, *Silvestres* and *Campestres: Campestres*, as partridge, quaile, raile, &c. *Silvestres*, as phesant, woodcocke, &c. *Aquatiles*, as mallard, herne, &c. whereof I have seen in this record [*]: *Rex concessit Johanni de Beverly Armigero suo quòd ipse cum quibuscunque canibus suis ad quascunque bestias feras regis in quibuscunque forestis, parcis suis quotiescunque voluerit venari possit, et quoscunque falcones possit permittere volare ad quascunque aves de warrenâ in quibuscunque ripariis, &c.*

[e] Hill. 13. E. 3. coram rege in Thesaur.

It is resolved [e] by the justices and the king's counsell, that *capreoli, id est* roes, *non sunt bestiæ de forestâ, eò quòd fugant alias feras.* Beasts of forrests be properly hart, hind, bucke, hare, boare, and wolfe, but legally all wild beasts of venery.

Vide Sect. 1.

A forest and chase are not, but a parke must be inclosed. The forest and chase doe differ in offices and lawes: every forest is a chase, but every chase is not a forest. A subject may have a forest by especiall grant of the king, as the duke of *Lancaster* and abbot of *Whitbie* had.

Vide Bract. fo. 231. & 316. Britton fo. 34. Fleta lib. 2. cap. 34, 35.

Ockam cap. quid regis foresta, saith, *Foresta est tuta ferarum mansio non quarumlibet, sed silvestrium, non quibuslibet in locis, sed certis, et ad hoc idoneis; unde foresta* E. *mutata in* O. *quasi foresta, hoc est, ferarum statio.*

Pudzeld or *Woodgeld* is to be free from payment of money for taking of wood in any forest. But let us now returne to our *Littleton.*

(9. Rep. 50. Sid. 14.) 5. E. 4. 15. b. L. 5. E. 4. 26. Pl. Com. 379, 480.

In this Section *Littleton* putteth an example of a condition in law annexed to the office of the keeper of a park, but this example must be understood with a distinction; for if the parker doth not attend on the parke one or two, &c. dayes, this is no forfeiture of the office of parkership; but if in his default any deere be killed, and so a damage to the lord, that is a forfeiture: for (that it may be said once

* *ou mustre*, added in L. and M. and Roh.

once for all) non-user of itselfe without some speciall damage is no forfeiture of private offices, but non-user of publique offices which concern the administration of justice, or the common wealth, is of it self a cause of forfeiture.

2. H. 7. 11. 30. A. 6. 32, &c. (Cro. Rep. 11; And. Curl case.)

" *Luy ouster s'il voit, &c.*" *Littleton* here speaketh of an ouster by force of a condition in law, therefore it is to be seen in what other cases the grantor may lawfully oust his officer. (1)

There is a diversitie between officers that have no other profit, but a collaterall certain fee, for there the grantor may discharge him of his service, as to be a bayly, receiver, surveyor, auditor, or the like, the exercise whereof is but labour and charge to him, but hee must have his fee: for the maine rule of law is, that no man can frustrate or derogate from his owne grant to the prejudice of the grantee. And where albeit the grantee hath no other profit but his fee, yet that fee is to be perceived and taken out of the profits appertaining to the lord within his office, for there the grantor cannot discharge him of his service or attendance, for that may turn to the prejudice of the grantee, if the grantor will not grant the office at all. But in all cases where the officer relinquisheth his office, and refuseth to attend, he loseth his office, fee, profit, and all.

[233. b.]

18. E. 4. 8. 31. H. 8. grants Br. 134. 34. H. 8. ibid. 93. 11. Eliz. Dyer 285. (Plo. 379. b. 381. b. F. N. B. 164. Sid 74. 81. 2. Roll. Abr. 153. 9. Rep. 50. Cro. Car. 55, 56. 59, 60, 61.)

There is another diversity where the grantee, besides his certaine fee, hath profits and availes by reason of his office; there the grantor cannot discharge him of his service or attendance, for that should be to the prejudice of the grantee. As if a man doth grant to another the office of the stewardship of his courts of his mannors with a certain fee, the grantor cannot discharge him of his service and attendance, because he hath other profits and fees belonging to his office, which he should lose if he were discharged of his office. And as in the case which *Littleton* here putteth of the office of the keeper of a parke, for that hee hath not onely his fee certaine, but profits and availes also, in respect of his office, as deere skinnes, shoulders, &c. But now let us proceed and see what other particular forfeitures in law bee of this office here spoken of by *Littleton*, and somewhat of conditions in law in generall.

22. H. 6. 10. 3. 6. E. 6. Dier 71.

And it is to be understood, that if any keeper kill any deere without warrant, or fell or cut any trees, woods, or underwoods, and convert them to his owne use, it is a forfeiture of his office, for the destruction of vert is, by a meane, destruction of venison. So it is if he pull downe the lodge, or any house within the park for putting of hay into it for feeding of the deere or such like, it is a forfeiture; and the reason wherefore the office in these and in like cases shall be forfeited [f] is, *quia in quo quis delinquit in eo de jure est puniendus.*

(Ant. 54. a.) 15. E. 4. 3. b. 5. E. 4. 26. 28. H. 8. Bendloes enter evesque de Londres & Heron. lib. 9. fo. 50 95 96. 99.

As to conditions in law, you shal understand they bee of two natures, that is to say, by the common law, and by statute. And those by the common law are of two natures, that is to say, the one is founded upon skill and confidence, the other without skill or confidence: upon skill and confidence, as here the office of parkership, and other offices in the next Section mentioned, and the like.

[f] Mich. 33. E. 1. coram rege in Thesaur. l'evesque de Durham's case. Pl. Com. 373. a. Sir Henrie Nevill's case.

Touching conditions in law without skill, &c. some be by the common law, and some by the statute. By the common law as to every estate of tenant by the courtesie, tenant in tayle after possibility of issue extinct, tenant in dower, tenant for life, tenant for years,

21. E. 4. 20. 93. (1. Rep. 14. b.) Lib. 8. fo. 44. Wittingham's case.

(1) [See Note 146.]

years, tenant by statute merchant or staple, tenant by *elegit*, gardian, &c. there is a condition in law secretly annexed to their estates, that if they alien in fee, (1) &c. that he in the reversion or remainder may enter, *et sic de similibus*, or if they claime a greater estate in court of record, and the like.

Concerning conditions in law founded upon statutes, for some of them an entrie is given, and for some other a recovery by action: where an entrie is given, as upon an alienation in mortmaine, &c. and the like: where an action is given, as for waste against tenant for life and yeares, and the like.

" *Et tiel condition que est entendus per la ley estre annex a ascun chose, est auxi fort, &c.*" Here it is worthy the observation to take a view of the divisions aforesaid in some particular case. As for example. Admit that an office of parkershippe bee granted or descend to an infant or feme covert, if the conditions in law annexed to this office which require skill and confidence be not observed and fulfilled, the office is lost for ever, because, as *Littleton* saith here, it is as strong as an expresse condition. But if a lease for life be made to a fem covert, or an infant, and they by charter of feoffment alien in fee, the breach of this condition in law, that is, without skill, &c. is no absolute forfeiture of their estate. So of a condition in law given by statute, which giveth an entrie onely. As if an infant or feme covert with her husband aliens by charter of feoffment in *mortmaine*, this is no barre to the infant, or feme covert. But if a recovery be had against an infant or fem covert in an action of waste, there they are bound and barred for ever.

(Cro. Car. 279.) Lib. 8. fo. 44. Wittingham's case. (Mo. 92. 1. Cro. 7. 9. Rep. 72. Plo. 205. Ant. 180.)

And it is to be observed, that a condition in law by force of a statute which giveth a recovery, is in some cases more strong than a condition in law without a recovery. For if lessee for life make a lease for yeares, and after enter into the land, and make waste, and the lessor recover in an action of waste, he shall avoid the lease made before the waste done. But if the lessee for life make a lease for years, and after enter upon him, and make a feoffment in fee, this forfeiture shall not avoid the lease for yeares. Nor in any of the said cases a precedent rent granted out of the land shal be avoyded. For if lessee for life grant a rent charge, and after doth waste, and the lessor recovereth in an action of wast, he shall hold the land charged during the life of the tenant for life, but if the rent were granted after the waste done, the lessor shall avoid it.

(Ant. 183. a.)

[234.

And the reason wherefore the lease for years in the case aforesaid shall be avoyded, is because of necessitie the action of waste must be brought against the lessee for life, which in that case must bind the lessee for yeares, or else by the act of the lessee for life the lessor should be barred to recover *locum vastatum*, which the statute giveth. (1)

(Ant. 54.)

If a man hath an office for life which requireth skill and confidence, to which office he hath a house belonging, and chargeth the house with a rent during his life, and after commit a forfeiture of his office, the rent charge shall not be avoyded during his life, for regularly a man that taketh advantage of a condition in law shal take the land with such charge as he finds it. And therefore *Littleton* is here to be understood, that a condition in law is as strong as a condition

(Post. 338. b.)

2

[234. a.]

(1) [See Note 147.] (1) [See Note 148.]

dition in deed, as to avoid the estate or interest it selfe, but not to avoide precedent charges, but in some particular cases, as by that which hath beene said appeareth.

There be at this day more conditions in law annexed to offices than were when *Littleton* wrote: for example, for offices in any wise touching the administration or execution of justice, or clerkship in any court of record, or concerning the king's treasure, revenue, account, customes, alnage, auditorship, king's surveyor, or keeping of any of his majesties castles, forts, &c. For if any of these officers bargaine or sell any of the said offices or any deputation of the same, or take any money or profit, or any promise, covenant, bond, or assurance, to have any money or reward for the same, the person so bargaining or selling or that shal take any such promise, covenant, bond, or assurance, shall not only forfeit his estate, but also every person so buying, giving or assuring, be adjudged a disabled person to have or enjoy the same office or offices, deputation or deputations, &c. and that all such bargains, sales, promises, covenants, and assurances, as be before specified, shall be voide, except as in the said act is excepted.

3. H. 7. ca. 12. Auditor, receiver, bailife, keeper of a castle, master of the game, keeper or parker of any forrest, parke, chase, &c. 7. E. 6. ca. 1. Treasurer, receiver, collector, bailife, &c. (Vid. Ant. 3. 6. 11. Rep. 89.) 5. E. 6. ca. 16. (Cro. Car. 557. Cro. Jac. 386. 3. Inst. 154.)

Sir *Robert Vernon*, knight, being coferer of the king's house of the king's gift, and having the receit of a great summe of money yearely of the king's revenue, did for a certaine summe of money bargain and sell the same to sir *A. I.* and agreed to surrender the said office to the king, to the entent a grant might be made to sir *A.* who surrendred it accordingly: and thereupon sir *A.* was by the king's appointment admitted and sworne coferer. And it was resolved by sir *Thomas Egerton*, lord chancellour, the chiefe justice, and others to whom the king referred the same, that the said office was void by the said statute, and that sir *A.* was disabled to have or to take the said office, and that no *non obstante* could dispence with this act to enable the said sir *A.* for the reason and cause before-mentioned, Sect. 180. And hereupon sir *A.* was removed, and sir *Marmaduke Darrell* sworne (by the kinge's commandement) in his place. And note, that all promises, bonds and assurances as wel on the part of the bargainor as of the bargainee, are void by the same act. [*] *Nullâ aliâ re magis Romana respublica interiit, quàm quòd magistratûs officia venalia erant.*

Mich. 13. Jacobi Regis.

Lib. 3. fo. 83. Colshil's case.

[*] Ærod. fo. 353.)

[g] *Jugurtha* going from *Rome*, said to the city, *Vale venalis civitas, mox peritura si emptorem invenias.*

[g] Salust.

Therefore by the law of *England* it is further provided, that no officer or minister of the king shall be ordained or made for any gift or brocage, favour or affection, nor that any which pursueth by him or any other, privily or openly, to be in any manner of office, shall be put in the same office or in any other, but that all such officers shall be made of the best and most lawfull men and sufficient: a law worthy to be written in letters of gold, but more worthy to be put in due execution. For certainly never shall justice be duely administred, but when the officers and ministers of justice be of such quality, and come to their places in such manner, as by this law is required.

12. R. 2. ca. 2.

" *Tiel condition que est entendus per la ley estre annex a ascun chose, est auxy fort sicome la condition fuit mise in escript.*" And this accords with that ancient rule, *Utique fortior et potentior est dispositio legis quàm hominis.*

Vide Sect. 419. 429, 430.

Sect. 379.

*EN mesme le maner est de grants d'offices de seneschal, constabularie, bedelary, bailiwick, ou auters offices, &c. Mes si tiel office soit grant a un home, a aver et occupier per luy ou son deputie, donque si l'office soit occupy per luy ou per son deputie, sicome il devoit per le ley estre occupie, ceo suffist pur luy, ou auterment * le grantor et ses heires poient ouste † le grantee, come est avantdit.*

IN this manner it is of grants of the offices of steward, constable, bedelarie, bayliwick, or other offices, &c. But if such office bee granted to a man, to have and to occupie by himselfe or his deputie, then if the office bee occupied by him or his deputie, as it ought by the law to bee occupied, this sufficeth for him, or otherwise the grantor and his-heires may ouste the grantee, as is aforesaid.

21. E. 4. 20. Pl. Com. 379. (Ant. 61. a.)

" *SENESCHALL.*" Of this I have spoken before.

8. E. 4. 6. (5. Rep. 59)

" *Constabularie.*" Of this likewise something hath beene spoken before. But a constable is often taken in the law for a warden or keeper, as *Constabularius castri de Dover et 5. portuum*; for the warden of the castle of *Dover* and the Cinque ports, &c. So as in this sense *Constabularius* is taken for *Castellanus*, and this is proved by the statute (*) of *W.* 1. *ca.* 7. *Des prises des Constables ou Castellains faitz des auters, &c.* And *Magna Carta*, (*b*) *c.* 19. *Nullus constabularius vel ejus ballivus capiat blada vel alia catalla alicujus qui non sit de villâ, ubi castrum suum situm est, &c. Stanford fo.* 152. *Constabularius Turris London*, for *Custos Turris*, 32. *H.* 8. *ca.* 28. Constable of the Forest, for the Keeper of the Forest.

[234. b.

(*) W. 1. ca. 7.
[*b*] Magna Carta, ca. 19.
Stanf. fo. 152.
32. H. 8. ca. 28.

" *Bedelarie.*" Bedell is derived of the *French* word *Beadeau*, which signifies a messenger of the court, or under baylife, in *Latine Bedellus.*

And the oath of a bedell of a manor is, that he shall duly and truly execute all such attachements and other proces as shall be directed to him from the lord or steward of his court, and that he shall present all pound breaches, which shall happen within his office, and all chattels wayved, and estrayes.

" *Bayliwicke.*" Of this sufficient hath beene said before.

* *le grantor*—*il*, L. and M. and Roh. † *le grantee* not in L. and M. nor Roh.

Sect. 380.

ITEM, estates de terres ou tenements purront estre sur condition en ley, coment que sur l'estate fait ne fuit ascun mention ou rehersal fait de le condition. Sicome mittomus que un leas soit fait a le baron et a sa feme, a aver et tener a eux durant le coverture enter eux; en cest cas ils ont estate pur terme de lour deux vies sur condition en ley, scilicet, *si un de eux devie, ou que divorce soit fait enter eux, donque bien lirroit a le lessor et a ses heires d'entrer, &c.*

ALSO, estates of lands or tenements may bee made upon condition in law, albeit upon the estate made there was not any mention or rehersall made of this condition. As put the case that a lease be made to the husband and wife, to have and to hold to them during the coverture betweene them; in this case they have an estate for terme of their two lives upon condition in law, *scil.* if one of them die, or that there be a divorce between them, then it shall bee lawfull for the lessor and his heires to enter, &c.

HERE *Littleton* termeth words of limitation to be conditions in law: for his first example is, (1. Roll. Abr. 411. Ant. 214. b. Post. 242.)

" *Durant le coverture enter eux,*" *durante coopertura inter eos.* This word (*durante*) is properly a word of limitation, as *durante viduitate,* or *durante virginitate,* or *durante vitâ, &c.* And properly a condition in law is, as hath beene said, where the law createth the same without any expresse words. 37. H. 6. 27.

Dum also maketh a limitation; as if a lease be made, *dum sola fuerit,* or *dum sola et casta vixerit. Dummodo* is also a word of limitation; as *dummodo solveret talem redditum. Quamdiu* also is a word of limitation, for if a man grant a rent out of the mannor of *D. quamdiu* the grantor shall bee dwelling upon the mannor, this is good, or *quamdiu se bene gesserit.* [235. a.] 3. E. 3. 15. 3. Ass. Pl. (Ant. 214. b. 4. Rep. 3. a.) 14. E. 2. Grant 92. (10. Rep. 42. Plo. 242. a.

Vaughan 32. 4. Rep. 33. 37. H. 6. 27. (9. Rep. 95.) (Ant. 214. b. 4. Rep. 3. a.) 14. E. 2. Grant. 92. (10. Rep. 42. Plo. 242. a. Vaughan 32. 4. Rep. 33.) 37. H. 6. 27. (9. Rep. 95.)

And so by these words, *donec, quousque, usque ad, tamdiu, ubicunque.* 10. Ass. 4. 6. E. 3. 8, 9. 21. 3. E. 3. 18. Annuitie 40.

" *Si l'un de eux devie, &c.*" For if any of them die the coverture is dissolved, and consequently the state determined by the limitation. 19. H. 6. 54. Temps E. 1. Annuitie 150. 11. Ass. p. 8.

21. Ass. p. 18. 26. E. 3. 69. 7. E. 4. 16. 9. E. 4. 25, 26. 9. H. 6. 39. 14. H. 8. 13.

" *Ou que divorce soit fait enter eux, &c.*" Here is a distinction to be understood: for there bee two kinde of divorces, *viz.* one, *à vinculo matrimonii,** and the other *à mensa et thoro. Divortium dicitur à divertendo,* or *divortendo, quia vir divertitur ab uxore.* Divorces *à vinculo matrimonii* are these: *Causâ præcontractûs, causâ metûs, causâ impotentiæ seu frigiditatis, causâ affinitatis, causâ consanguinitatis, &c.* And I reade in an ancient record, *coram rege Ter-*

* 47. E. 3. 27. 39. E. 3. 32, 33. 11. H. 4. 14. 76. Bracton fo. 298. 18. E. 4. 8. 24. H. 8.

bastards. Br. 44. 39. E. 1. bastard 21. 22. E. 4. tit. Consultat. 5. 6. E. 3. 249. 25. E. 3. 39.

mino Pasch. 30. *E.* 1. *William de Cheadworthe*'s case, that he was divorced from his wife, for that he did carnally know her daughter before he married the mother; all which are causes of divorce preceding the marriage.

(1. Sid. 64. 1. Rol. Abr. 341. 360. 681.)

A mensa et thoro, as *causa adulterii*, which dissolveth not the marriage *à vinculo matrimonii*, for it is subsequent to the marriage. And the divorce that *Littleton* here speaketh of is intended of such divorces [*] as dissolve the marriage *à vinculo matrimonii*, and maketh the issue bastard, because they were not *justæ nuptiæ*. And therefore in *Littleton*'s case though the husband and wife be divorced *causa adulterii*, yet the freehold continueth, because the coverture continueth. And it is further to be understood, that many divorces that were of force by the canon law when *Littleton* wrote, are not at this day in force; for by the statute of 32. *H.* 8. *ca.* 38. it is declared that all persons be lawfull (that is, may lawfully marry) that be not prohibited by God's law to marry, that is to say, that be not prohibited by the Leviticall degrees.

[*] Vid. Sect. 399. (See 13. 118. 5 Rep. 98. 7 Rep. 42. Cro. Car. 463. 2. Inst. 682. Vaug. 221. 319. 321.) 32. H. 8. ca. 38.

A man married the daughter of the sister of his first wife, and was drawne in question in the ecclesiasticall court for this marriage, alleging the same to be against the canons; and it was resolved [x] by the court of common-pleas, upon consideration had of the said statute, that the marriage could not be impeached, for that the same was declared by the said act of parliament to be good, inasmuch as it was not prohibited by the Levitical degrees, *et sic de similibus*. (1)

[x] Tr. 2. Jac. Rot. 1032. Richard's Parson's case. (Cont. 1. Cro. 228. Acc. Mo. 907. Vid. Sid. 434.)

Sect. 381.

ET que ils ont estate pur terme de leur deux vies, probatur sic: *Chescun home que ad estate de franktenement en ascun terres ou tenements, ou il ad estate en fee, ou en fee taile, ou pur terme de sa vie demesne, ou pur terme d'auter vie, et per tiel lease ils ont franktenement, mes ils n'ont per cest grant fee, ne fee taile, ne pur terme d'auter vie,* ergo, *ils ont estate pur terme de lour vies, mes ceo est sur condition en ley en le forme avantdit; et en cest cas s'ils fieront wast, le feoffor avera envers eux briefe de wast supposant per son briefe,* quod tenet ad terminum vitæ, &c. † *mes en son count il declare coment et en quel maner le leas fuit fait.*

AND that they have an estate for term of their two lives is proved thus: Every man that hath an estate of freehold in any lands or tenements, either he hath an estate in fee, or in fee taile, or for terme of his own life, or for terme of another man's life, and by such a lease they have a freehold, but they have not by this grant fee, nor fee taile, nor for terme of another's life, *ergo*, they have an estate for terme of their owne lives, but this is upon condition in lawe in forme aforesaid; and in this case if they shal do wast, the feoffor shall have a writ of waste against them, supposing by his writ, *quod tenet ad terminum vitæ, &c.* but in this count he shall declare how and in what maner the lease was made.

[235. b.]

† mes—et, L. and M. and Roh.

(1) [See Note 149.]

"PROBATUR sic." By this argument logically drawne *à divisione*, it appeareth, how necessary it is that our student should (as *Littleton* did) come from one of the universities to the studie of the common law, where he may learne the liberall arts, and especially logick, for that teacheth a man not onely by just argument to conclude the matter in question, but to discerne betweene truth and falsehood, and to use a good method in his studie, and probably to speake to any legall question, and is defined thus, *dialectica est scientia probabiliter de quovis themate disserendi*, whereby it appeareth how necessary it is for our student.

Pl. Com. 561. b. Vid. sect. 345. simile.

"*Supposant per son briefe*, quòd tenet ad terminum vitæ, &c." This and the rest of this section is evident and plaine.

37. H. 6. 27.

Sect. 382.

EN mesme le manner est, si un abbe fait un lease a un home, a aver et tener a luy durant le temps que le lessor est abbe; en cest case le lessee ad estate pur terme de sa vie demesne: mes ceo est sur condition en ley, scilicet, *que si l'abbe resigna, ou soit depose, que bien lirroit a son successor d'entrer, &c.*

IN the same maner it is, if an abbot make a lease to a man for yeares, to have and to hold to him during the time that the lessor is abbot; in this case the lessee hath an estate for term of his own life: but this is upon condition in law, *scilicet*, That if the abbot resigne, or be deposed, that then it shall be lawfull for his successor to enter, &c.

"*SI un Abbe.*" So it is of a bishop, archdeacon, and other ecclesiasticall or temporall body politique or corporate, or of any officer or graduate, or the like.

Vid. Bract. lib. 5. 414. (Plo. 242.)

"*Resigne ou soit depose*," And so it is of a translation and cession.

Sect. 383.

ITEM home poit veier en le Livre d'Assise, viz. anno 38. E. 3. ‡ p. 3. *un plea d'Ass. en cest forme que ensuist:* scilicet, *Un assise de* Novel Disseisin *auterfoits fuit port vers* A. *que pleda al assise, et trove fuit per verdict, que l'auncestor le plantif devisa ses tenements a vendre per le defendant, que fuit son executor, et de faire distribution des deniers pur son alme: et fuit trove, que maintenant apres la mort le testator,*

ALSO a man may see in the Book of Assises, *an.* 38. *E.* 3. *p.* 3. a plea of Assise in this form following, *scilicet*, An assise of *Novel Disseisin* was sometime brought against *A*, who pleaded to the assise, and it was found by verdict, that the ancestour of the plaintife devised his lands to bee sold by the defendant, who was his executor, and to make distribution of the money for his soule: and it was found,

‡ *p.* 3. not in. L, and M, nor Roh.

tor, un home luy tendist certaine summe de deniers pur les tenements, mes non pas al value, et que le executor puis avoit tenus les tenements en sa main demesne per deux ans, al entent de les vender pluis chier a ascun auter; et trove fuit que il avoit tout temps prist les profits de les tenements a son use demesne, sans rien faire pur l'alme le mort, &c. Moubray * *justice disoit, l'executor en tiel case est tenus per la ley a faire le vender a pluis tost que il purroit apres la mort son testator, et trove est que il refuse de faire vendre, & issint de avoit un default en luy, et issint per force del devise il fuist tenus d'aver mis touts le profits † avenants de les tenements al use le mort, et trove est que il ad prise a son use demesne, et issint auter default en luy. Per que fuit adjudge, que le plaintife recovera.* ‡ *Et issint appiert per le dit judgement, que per force del dit devise, l'executor n'avoit estate ne poyer en les tenements, forsque sur condition en ley.*

found, that presently after the death of the testator, one tendred to him a certaine sum of mony for the lands, but not to the value, and that the executor afterwards held the lands in his own hands two yeares, to the entent to sell the same dearer to some other; and it was found that he had all the time taken the profits of the lands to his owne use without doing any thing for the soule of the deceased, &c. *Moubray* justice said, the executor in this case is bound by the law to make the sale as soone as he may after the death of his testator, and it is found that hee refused to make sale, and so there was a default in him, and so by force of the devise he was bound to put all the profits comming of the lands to the use of the dead, and it is found that he tooke them to his owne use, and so another default in him. Wherefore it was adjudged, that the Pl'. should recover. And so it appeareth by the said judgement, that by force of the said devise the executour had no estate nor power in the lands, but upon condition in law.

"LIVRE d'Assises" is a booke of the Reports of Cases in the raigne of king *Edward* the Third, and it is called the Booke of *Assises*, because the greatest part of the cases therein are upon writs of *assises* brought as hath been said, and which hath beene cited before.

[236. a.]

"*Devisa les tenements a vendre per son executor.*" This must be intended to be of lands devisable by custome, for lands by the common law were not devisable (as hath been said): for in this section is implyed a diversity, *viz.* when a man deviseth that his executor shal sell the land, there the lands descend in the meane time to the heire, and untill the sale bee made, the heire may enter and take the profits. But when the land is devised to his executor to be sold, there the devise taketh away the descent, and vesteth the state of the land in the executor, and he may enter and take the profits, and make sale according to the devise. And here it appeareth by our author, that when a man deviseth his tenements to be sold by his executors, it is all one as if he had devised his tenements to his executors to be sold: and the reason is, because he deviseth the tenements whereby hee breakes the descent. (1)

(Latch. 9. Ant. 113. a. 181.)

"*Mowbray*,"

* *justice disoit*, not in L. and M. nor Roh.

† *avenants—prevenantes*, L. and M. and Roh.

‡ *&c.* added in L. and M. and Roh.

(1) [See Note 150.]

"*Mowbray.*" *John Mowbray* was a reverend judge of the court of common pleas, and descended of a noble family.

"*L'executor en tiel case est tenus per la ley a faire le vender a pluis tost que il purroit apres la mort son testator, &c.*" And the reason hereof is, for that the meane profits taken before the sale, shall not bee assets, so as he may be compellable to pay debts with the same, and therefore the law will inforce him to sell the lands as soone as he can, for otherwise hee shall take advantage of his owne laches: but if a man devise that his executor shall sell his land, there he may sell it at any time, for that he hath but a bare power, and no profit. And by this case it appeareth what construction the law maketh for the speedy payment of debts. And here is to be observed, that many words in a will doe make a condition in law, that make no condition in a deed: As here to devise lands to an executor *ad vendendum*, so if lands be devised to one *ad solvendum* 20 *l.* to *I. S.* or paying twentie pounds to *I. N.* this amounts to a condition. And *Crickmer's* case was this, A man seised of certaine lands holden in socage had issue two daughters *A.* and *B.* and devised all his lands to *A.* and her heires, to pay unto *B.* a certaine summe of money at a certaine day and place; the money was not paid, and it was adjudged, That these words, "to pay," &c. did amount in a will to a condition; and the reason was, for that the land was devised to *A.* for that purpose, otherwise *B.* to whom the money was appointed to be paid, should be remedilesse, *et interest reipublicæ suprema hominum testamenta rata haberi*: and the lessee of *B.* upon an actuall ejectment recovered the moitie of the land against *A.*

(4. Rep. 81. b.)

[236. b.]

(3. Cro. 19. 21. a.)

Mich. 31. & 32. El. in the King's Bench. Crickmer's case adjudge. Dy. 6. E. 6. fo. 74. 7. E. 6. 70. (1. Leo. 174. 10. Rep. 41. Cro. Car. 185.)

"*Et issint appiert per le judgement, &c.*" This conclusion upon a judgment is of great authoritie in law, *quia judicium pro veritate accipitur*, and, as it hath beene said, *judicium* is *quasi juris dictum*.

Sect. 384.

† *ET mults auters choses et cases y sont d'estates sur condition en la ley, et en tiels cases il ne besoigne d'aver monstre ascun fait, rehearsant la condition, pur ceo que la ley en luy mesme purport le condition, &c.*

Ex paucis dictis intendere plurima possis.

Plus serra dit de conditions en le ‡ *prochein chapter, en le chapter de Releases, et en le chapter de Discontinuance.*

AND many other things there are of estates upon condition in law, and in such cases hee needed not to have shewed any deed, rehearsing the condition, for that the law it selfe purporteth the condition, &c.

Ex paucis dictis intendere plurima possis.

More shall be said of conditions in the next chapter, in the chapter of Releases, and in the chapter of Discontinuance.

† *Et mults auters choses et cases y sont d'estates sur condition en la ley*, not in L. and M. nor Roh.

‡ *prochein chapter—chapitre de discentz que tollent entres*, L. and M. and Roh.

HEREBY

9 E. 4. 56.
17 Ass.
6. Rep. 73.)

HEREBY it appeareth, that limitations (which, as hath beene said, *Littleton* termeth conditions in law) may be pleaded without deed: and the reason of our author is observable, because the law in itselfe purporteth the condition, whereof somewhat hath bin said before, and therfore looke backe to the conditions in law, or words of limitation, and withall that a stranger may take advantage of a limitation, as hath beene said.

(See 214. b.)

Vid. Sect. 220.

Littleton having spoken at large of conditions in deed and in law, somewhat seemeth necessary to bee said of defeasances, whereby the state or right of freehold and inheritance may be defeated and avoyded.

Bract. li. 2. fo. 16, 17. Ass. p. 2. 5. E. 3. 42. E. 3. 1. 43. E. 17. 43. Ass. 12. 7. H. 6. 43. 8. H. 6. 23. 32. E. 3 Annu. 30. 5. E. 3. Annuity 44. 30. Ass. p. 1. 30. Ass. p. 11. 31. Ass. 32. (Ant. 207. a. 1. Roll. Abr. 590.)

" *Defeasance,*" *Defeisantia*, is fetched from the French word *defaire, i. e.* to defeat or undoe, *infectum reddere quod factum est*. There is a diversitie between inheritances executed, and inheritances executorie; as lands executed by livery, &c cannot by indenture of defeasance be defeated afterwards. And so if a disseisee release a disseisor, it cannot bee defeated by indentures of defeasance made afterwards; but at the time of the release or feoffment, &c. the same may be defeated by indentures of defeasance, for it is a maxime in law, *Quæ incontinenti fiunt in esse videntur*. (1)

[237. a.]

20. Ass. pl. 7. 7. E. 4. 29. Browning and Beston's case, Pl. Com. 131. 28 H. 8. Dier 6. 27. H. 8. 15. 19. R. 2. done 10. Albanie's case, ub. s. 107.

But rents, annuities, conditions, warranties, and such like, that be inheritances executorie, may be defeated by defeasances made, either at that time, or any time after: and so the law is of statutes, recognizances, obligations, and other things executorie.

" *Ex paucis dictis intendere plurima possis.*"

Verses at the first were invented for the helpe of memorie, and it standeth well with the gravitie of our lawyer to cite them. By this verse of our author, inferences and conclusions in like cases are warrantable.

(6. Rep. 32. 3. Rep. Twyne's case.) (*) 27. H. 8. cap. 10. (Cro. Car. 472. Hob. 348. 9. Rep. 107. 1. Rep. 173. 175.)

Lastly, somewhat were necessarie to be spoken concerning clauses of provisoes, containing power of revocation, which since *Littleton* wrote are crept into voluntarie conveyances, which passe by raising of uses, being executed by the (*) statute of 27. *H.* 8. and are become verie frequent, and the inheritance of many depend thereupon. As if a man seised of lands in fee, and having issue divers sonnes, by deed indented, covenanteth in consideration of fatherly love, and for the advancement of the blood, or upon any other good consideration, to stand seised of three acres of land to the use of himselfe for life, and after to the use of *Thomas* his eldest son in taile; and for default of such issue, to the use of his second son in taile, with divers like remainders over; with a proviso that it shall be lawfull for the covenantor at any time during his life to revoke any of the said uses, &c. this proviso being coupled with an use, is allowed to be good, and not repugnant to the former states. But in case of a feoffment, or other conveyance, whereby the feoffee or grantee, &c. is in by the common law, such a proviso were merely repugnant and void.

And

(1) [See Note 151.]

And first, in the case aforesaid, if the covenantor, who had an estate for life, doe revoke the uses according to his power, he is seised againe in fee simple without entrie or claime.

Secondly, he may revoke part at one time, and part at another.

Thirdly, If he make a feoffment in fee, or levie a fine, &c. of any part, this doth extinguish his power but for that part; whereas in that case the whole condition is extinct. But if it be made of the whole, all the power is extinguished; so as to some purposes it is of the nature of a condition, and to other purposes in nature of a limitation.

Lib. 1. fol. 173, 174. Digge's case, lib. 1. fol. 107. Albanie's case, lib. 10. fol. 143. Scrope's case, lib. 7. fol. 12, 13. Sir Francis Englefield's case. (2. Roll. Abr. 263. 1. Roll. Abr. 331.)

Fourthly, If hee that hath such power of revocation hath no present interest in the land, nor by the ceasor of the state shall have nothing, then his feoffment or fine, &c. of the land is no extinguishment of his power, because it is meere collaterall to the land.

Fiftly, By the same conveyance that the old uses be revoked, may new be created or limited, where the former cease *ipso facto* by the revocation, without either entrie or claime.

Sixtly, That these revocations are favourably interpreted, because many men's inheritances depend on the same. (1) And here I may apply the abovesaid verse:

Ex paucis dictis intendere plurima possis.

(1) [See Note 152.]

CHAP.

CHAP. 6. Discents que tollent Entries. Sect. 385.

*DISCENTS que tollent entries sont en deux maners, cest ascavoir, ou discent est en fee, ou en fee taile. Discents en fee que tollent entries * sont, sicome home seisie de certaines terres ou tenements est per un auter disseisie, & le disseisor ad issue et morust de tiel estate seisie, ore les tenements discendont al issue del disseisor per course de la ley, come heire a luy. Et pur ceo que la ley mitte les terres ou tenements sur l'issue per force del discent, issint que l'issue vient a les tenements per course de ley, et nemy per son fait demesne, l'entrie le disseisee est tolle, & il est mis de suer un briefe* d'entre sur disseisin *envers le heire le disseisor, de recoverer la terre* †.

DISCENTS which toll entries are in two manners, to wit, where the discent is in fee, or in fee taile. Discents in fee which toll entries are, as if a man seised of certaine lands or tenements is by another disseised, and the disseisor hath issue, and dieth of such estate seised, now the lands discend to the issue of the disseisor by course of law, as heire unto him. And because the law cast the lands or tenements upon the issue by force of the discent, so as the issue commeth to the lands by course of law, and not by his owne act, the entrie of the disseisee is taken away, and he is put to sue a writ of *entrie sur disseisin* against the heire of the disseisor, to recover the land.

Mirror, cap. 2. sect. 5. Bracton, lib. 5. fol. 370. and 434. Britton fol. 115. 215. Vide Sect. 5. (Sid. 198. Ant. 13. b. Ant. 163.)

"*DISCENTS.*" This word commeth of the Latine word *discendere, id est, ex loco superiore in inferiorem movere*; and in legall understanding it is taken when land, &c. after the death of the ancestor is cast by course of law upon the heire, which the law calleth a discent. And this is the noblest and worthiest meanes whereby lands are derived from one to another, because it is wrought and vested by the act of law, and right of blood, unto the worthiest and next of the blood and kindred of the ancestor, and therefore it hath not in the common law altogether the same signification that it hath in the civill law; for the civilians call him, *hæredem, qui ex testamento succedit in universum jus testatoris.* But by the common law he is only heire which succeedeth by right of blood. And this agreeth well with the etymologie of the word (heire) to whom the lands discend, for *hæres dicitur ab hærendo, quia qui hæres est hæret, hoc est, proximus est sanguine illi cujus est hæres.* So as hee that is *hæres, sanguinis est hæres, & herus hereditatis.* [237. b.]

(Ant. 7. b.)

"*Discents que tollent entries sont en deux manners.*" Here is an exact and perfect division made by our author, and yet withall plaine and perspicuous.

Now, as a discent is the worthiest meanes to come to lands, &c. so hath the heire more privileges than any other that by other order or meanes come to the lands, &c. as shall appeare hereafter.

* Bracton lib. 4. fol. 162. & 209. Britton fol. 115

Nota, In ancient time * if the disseisor had beene in long possession, the disseisee could not have entred upon him. [*a*] Likewise the disseisee

9 Ass. 15. Fleta lib. 4. cap. 2. 29. Ass. 5. 54. [*a*] 50. E. 3. 21. 26. Ass. 12. 1. Ass. 13. 21. Ass. 28. 20. H. 3. 43. Assise 17. Ass. 432.

* *sont—est*, L. and M. and Roh. † *&c.* added in L. and M. and Roh.

seisee could not have entred upon the feoffee of the disseisor, if he had continued a yeare and a day in quiet possession. But the law is changed in both these cases, only the dying seised being an act in law, doth hold at this day, and this seemeth to be verie ancient, for this was the law before the Conquest. [b] *Porro autem quam maritus sine lite et controversia sedem incoluerit, eam conjux et proles sine controversiâ possidento, si qua in illum lis fuerit illata viventem, eam hæredes ad se (perinde atque is vivus) accipiunto.*

[b] Lamb. explicat. fol. 120. 70.

And one of the reasons of this ancient law may be, that the heire cannot suddenly by entendment of law know the true state of his title. And for that many advantages follow the possession and tenant, the law taketh away the entrie of him that would not enter upon the ancestor, who is presumed to know his title, and driveth him to his action against the heire that may be ignorant thereof.

" *Et morust de tiel estate seisie.*" To a discent that taketh away an entrie, a dying seised is necessarie, as here it appeareth; but a man to other purposes may have lands by discent, though his ancestor died not seised, as hath beene said before.

11. H. 7. 12. 40. E. 3. 24.

" *Des terres ou tenements.*" That is, of such tenements as be corporeall, and doe lye in liverie, and not of inheritances which lye in grant, as advowsons, rents, commons in grosse, and such like, which bee inheritances incorporeall, and yet are included within this word (tenements). For discents of them doe not put him that right hath to an action; and the reason of this diversitie is, for that houses serve for the habitation of men, and lands to be manured for their sustenance, and therefore the heire after a discent shall not be molested or disturbed in them by entrie.

33. E. 3. gard. 162. 6. H. 4. 4. 39 E. 3. 36. 15. E. 4. 14. F. N. B. 143. q. 7. H. 4. 12. 5. 2. Ass. p. 9. 21. E. 3. 2.

" *Est pur un auter disseisie.*" The like law is of an abatement or intrusion, and of their feoffees, or donees, &c.

[238. a.]

Upon the words of *Littleton* a diversitie may be collected, that if a recoverie be had by *A.* against *B.* and before execution *B.* die seised, this discent shall not take away the entrie of the recoveror. But if after execution *B.* had disseised the recoveror and died seised, this discent shall take away the entrie of the recoveror within the expresse words of *Littleton:* and so it is in case of a fine.

(8. Rep. 101.) (6. Co. 51. b.) 33. E. 3. tit. 9. Entrie conge 51. 45. E. 3. quare Imp. 139. 27. b. 3. 88. 9. H. 6. 49.

21. H. 6. 17. 3. E. 4. 6. 12. E. 4. 19. 3. H. 7. 3. 6. E. 4. 14. 7. H. 7. 15. 5. H. 7. 31. 10. H. 7. 5. b.

(n) A recoverie is had against tenant for life, where the remainder is over in fee, tenant for life dieth, he in remainder entreth before execution, and dieth seised, the entrie of the recoveror is lawfull, because he is privie in estate; otherwise it is if the discent had beene after execution.

(n) 5. H. 7. 2.

A. recovereth an advowson against *B.* in a writ of right, and hath judgement finall; the incumbent dieth; *B.* by usurpation presents to the church, and his clarke is admitted and instituted; *B.* dieth; *A.* is put out of possession, and the heire of *B.* is not so bound by the judgement either in blood or estate but that he shall present. (o) *B.* levies a fine to *A.* of an advowson to him and his heires; after the church becomes void; *B.* presents by usurpation, and his clarke is admitted and instituted: this shall put *A.* the conusee out of possession. And the reason of these two cases is, for that at the common law, every presentation to a church did put the rightfull pa-

45. E. 3. quare Imp. 139.

(o) 8. E. 2. quare Imp. 166. (6. Co. 48.)

tron out of possession, and did put him to his writ of right, whether the presentation were by title or without, and therefore albeit the usurpation were in both the said cases before execution, yet it put the rightfull patron out of possession. So note a diversitie betweene a recoverie of land, and of an advowson.

" *L'entrie le disseisee est tolle.*" (1) Here is one of the privileges which the law giveth to the heire by discent of houses and lands.

(*p*) L'estatute de 32. H. 8. cap. 33. Vide Sect. 422. 426.

(*q*) 37. H. 6. 1.

Pl. Com. 47. in Wimbesshe's case.

(*p*) At the common law if the disseisor, abator, or intrudor had died seised soone after the wrong done, the disseisee and his heires had been barred of his and their entrie without any time limited by law; but now by the statute (*q*) made since *Littleton* wrote, it is enacted, that except such disseisor hath been in the peaceable possession of such mannors, lands, &c. whereof he shall die seised by the space of five yeares next after such disseisin, &c. without entrie or continuall claime, &c. that there such dying seised, &c. shall not take away the entrie of such person or persons, &c. But after the five yeares the disseisee must take such continuall claime as our author hath taught us, the learning whereof is necessarie to be knowne. And it is said that abators and intrudors are out of this statute, (2) because the statute is penall, and extends only to a disseisor, and that was the most common mischiefe. *Et ad ea quæ frequentiùs accidunt jura adaptantur.*

(11. Co. 46. Mo. 151.) Mich. 4. & 5. Eliz. Dier 219. acc.

(Post. 246. a.)

The feoffee of a disseisor is out of the said statute, and remaines as at the common law. But to a disseisor, the statute is taken favourably for advancement of the ancient right; for whether the disseisin be without force, or with force, it is within the statute. And albeit the statute speake of him that at the time of such discent had title of entrie, &c. or his heires, yet the successors of bodies politique or corporate, so you hold yourselfe to a disseisin, are within the remedie of this statute, for the statute extendeth cleerely to the predecessor, being disseised; and consequently without naming of his successor extendeth to him, for he is the person that at the time of such discent had title of entrie.

Vide Pl. Com. 47. ubi supra.

But if a man make a lease for life, and the lessee for life is disseised, and the disseisor die seised within five yeeres, the lessee for life may enter; but if he die before he doth enter, it is said that the entrie of him in the reversion is not lawfull, because his entrie was not lawfull upon the disseisor at the time of the discent, as the statute speaketh. But if lessee for life had died first, and then the disseisor had died seised, he in the reversion had beene within the remedie of the statute, because he had title of entrie at the time of the discent, as the statute speaketh, and so within the expresse letter of the statute, albeit the disseisin was not immediate to him, and the like is to be said of a remainder, &c.

F. N. B. 191.

" *Briefe d'entrie sur disseisin,* Breve de ingressu super disseisinam." Of this writ somewhat shall be said in the next section.

(1) [See Note 153.] (2) [See Note 154.]

Sect. 386.

DISCENTS en taile que tollent entries * *sont, sicome home est disseisie, et le disseisor dona mesme la terre a un auter en le taile, et le tenant en le taile ad issue et morust de tiel estate seisie, et l'issue enter; en cest case l'enter le disseisee est tolle, et il est mis de suer envers l'issue de le tenant en taile un briefe* d'entre sur disseisin †.

DISCENTS in tayle which take away entries are, as if a man bee disseised, and the disseisor giveth the same land to another in taile, and the tenant in taile hath issue and dieth of such estate seised, and the issue enter; in this case the entrie of the disseisee is taken away, and he is put to sue against the issue of the tenant in taile a writ of *Entrie sur disseisin*.

" *MORUST de tiel estate seisie.*"

[238. b.] If a disseisor make a gift in tayle, and the donee discontinueth in fee, and disseise the discontinuee, and dieth seised, this discent shall not take away the entrie of the disseisee, for the discent of the fee simple is vanished and gone, by the remitter; and albeit the issue be in by force of the estate taile, yet the donee died not seised of that estate, and of necessitie there must be a dying seised, as hath beene said, which is a point worthy of observation, and implyeth many things.

" *En cest case l'entrie le disseisee est tolle.*"

If a disseisor make a gift in taile, and the donee hath issue and dieth seised, now is the entrie of the disseisee taken away; but if the issue die without issue, so as the estate taile which discended is spent, the entrie of the disseisee is revived, and he may enter upon him in the reversion or remainder.

9. H. 7. 24. (Post. 240.)

So if there be grandfather, father and son, and the son disseiseth one, and infeoffeth the grandfather who dieth seised, and the land discendeth to the father, now is the entrie of the disseisee taken away; but if the father dieth seised, and the land descendeth to the sonne, now is the entrie of the disseisee revived, and he may enter upon the son, who shall take no advantage of the discent, because he did the wrong unto the disseisee. But in the case abovesaid some have said, that where after such discent to the father, he made a lease to the son for terme of another man's life, upon whom the disseisee entred, that the son brought an assise and recovered; and the reason that hath beene yeelded is, for that the son had not the fee simple which he gained by disseisin, but is a purchaser of the free-hold only from the father, and the discent remaine not purged. Contrarie it were, as it is there said, if the son were heire to the discent. But the booke cited there in *Fitzherb. tit.* title *placit.* 6. doth not warrant that case, and I hold the law to be contrarie, *viz.* that the disseisee in that case shall enter upon the disseisor, aswell as if the father had conveyed the whole fee simple to the son, for in that case also the discent to the father is not purged. If a disseisor make a lease to an infant

13. H. 4. 8, 9. 33. H. 6. 5. b. per Moyle. 34. H. 6. 11. a. per Curiam. Vide Sect. 395. (Ant. 206. b.)

13. E. 3. Br. tit. Entrie Cong. 127. (Post. 241. a. sect. 395.)

* *sont—est*, L. and M. and Roh. † *&c.* added in L. and M. and Roh.

infant for life, and he is disseised, and a discent cast, the infant enters, the entrie of the disseisee is lawfull upon him. More shall be said of the like matter in this chapter hereafter in his proper place, *Sect.* 393. 395.

(Sect. 408. F. N. B. 192. d.)

" *Briefe d'entrie sur disseisin.* Breve de ingressu super disseisinam." This writ lieth only upon a disseisin made to the demandant or to some of his ancestors, and of this writ there be foure kindes. The first is a writ that lieth for the disseisee against the disseisor upon a disseisin done by himselfe, and this is called a writ of entrie in the nature of an assise. The second is a writ of *entrie sur disseisin en le per*, whereof *Littleton* here speaketh, for the heire by discent is in the *per* by his ancestor: so it is if the disseisor make a feoffment in fee, a gift in taile, or a lease for life, for they are in the *per* by the disseisor. (*) The third is a writ of entrie *sur disseisin en le per & cui*; as where *A.* being the feoffee of *D.* the disseisor maketh a feoffment over to *B.* there the disseisee shall have a writ of entrie *sur disseisin* of lands, &c. in which *B.* had no entrie but by *A.* to whom *D.* demised the same, who unjustly and without judgement disseised the demandant. These are called *gradus*, degrees, which are to be observed, or else the writ is abatable; for *sicut natura non facit saltum, ita nec lex.*

19. H. 6. 56. 9. H. 5. 9. Bracton lib. 5. fol. 219. b. & 318. Brit. fol. 264, 265. Fleta lib. 5. cap. 35. 5. E. 3. 216. (*) 22. E. 3. 1. b. 7. E. 3. 25. F. N. B. 192.

The fourth is a writ of *entrie sur disseisin in le post*, which lieth when after a disseisin the land is removed from hand to hand beyond the degrees; and it is called *in le post*, because the words of the writ be, *post disseisinam quam D. injustè, &c. fecit, &c.* The formes of these writs you shall read in the *Register* and *F. N. B.* and therefore it were needlesse to recite them here. So then a degree is of two sorts; either by act in law, whereof *Littleton* here putteth an example of a discent, or by act of the partie, by lawfull conveyance, as is aforesaid. But it is to be understood, that at the common law, if the lands were conveyed out of the degrees, the demandant was driven to his writ of right, in respect of such long possession in so many men's hands, which the law doth ever respect and favour. And therefore by the statute [a] of *Marlebridge*, the writ of *entrie in le post* is given: *Provisum est etiam quòd si alienationes illæ de quibus breve de ingressu dari consuevit, per tot gradus fiant, per quot breve illud in formâ priùs usitata fieri non possit habeant conquerentes breve ad recuperandam seisinam suam sine mentione graduum, ad cujuscunque manus per hujusmodi alienationes res illa devenerit, per breve originale, & per commune consilium domini regis inde providendum, &c.* (1)

14. H. 4. 40. (6. Co. 9. b.)

[a] Marlebr. cap. 29. 24. E. 3. 70.

[239. a]

Now it is necessarie to be knowne, what doth make a degree. First, no estate gained by wrong doth make a degree, and therefore neither abatement, intrusion, or disseisin upon disseisin, doth make a degree. Neither doth everie change by lawfull title worke a degree, as if a bishop or an abbot, or the like, disseise one and die, where his successor is in by lawfull title; for though the parson be altered, yet the right remaines where it was, *viz.* in the church, and both of them seised in the same right, *viz.* in the right of the church, and therefore in that verie case *Bracton* [b] demands the question, *An faciunt gradum de abbate in abbatem sicut de hærede in hæredem? Et videtur quòd non magis, quàm in computatione descensûs, quia et si alteratur persona*

Bracton ubi supra. Britton ubi supra. Fleta ubi supra. 4. E. 2. brev. 790. 21. H. 6. 8. (2. Inst. 155. Stat. Marl. 30. Post. Sec. 413.) [b] Bracton lib. 4. fol. 321. 5. E. 3. 38. 5. E. 2. entrie 66. 21. H. 4. 83.

(1) [See Note 155.]

sona, non propter hoc alternatur dignitas, sed semper manet. And herewith agreeth [c] *Fleta.*

Also an estate made to the king doth make no degree, and therefore if a disseisor by deed inrolled convey the land to the king, and the king by his charter granteth it over, the disseisee cannot have a writ of *entrie in le per & cui,* but in *le post,* for the king's charter is so high a matter of record, as it maketh no degree.

Also an estate of a tenant by the curtesie, or of the lord by escheat, or of an execution of an use, by the statute of 27. *H.* 8. or by judgement, or recoverie, or of any others that come in in the *Post,* worke no degree. [d] But a tenancie in dower by assignement of the heire doth worke a degree, because she is in by her husband; but assignement of dower by a disseisor worketh no degree, but is in the *Post,* as hereafter shall be said in his proper place.

When the degrees are past, so as a writ of entrie in the *Post* doth lye, yet by event it may be brought within the degrees againe; as if the disseisor infeoffe *A.* who infeoffes *B.* who infeoffes *C.* or if the disseisor die seised, and the land discend to *A.* and from him to *C.* now are the degrees past; and yet if *C.* infeoffe *A.* or *B.* now it is brought within the degrees againe.

If the disseisor make a lease for life, the remainder in fee, tenant for life dieth, he in the remainder is in the *Per,* because he now claimeth immediately from the disseisor, and both these estates make but one degree. (2)

Note, there bee divers other writs of entrie besides this writ of entrie *sur disseisin,* whereof *Littleton* here speakes; as a writ of entrie *ad terminum qui præteriit, in casu proviso, in consimili casu, ad communem legem, sine assensu capituli, dum fuit infra ætatem, dum non fuit compos mentis, cui in vitâ, sur cui in vitâ, intrusion, cessavit,* and the like; and that which hath beene said of one, may be applyed to all.

[c] Fleta, lib. 5. cap. 34. 3. H. 3. entrie 11. 22. E. 3. 7. F. N. B. 191. k. (Post. 318. a.) 5. E. 2. entrie 66. 7. E. 3. 360.

[d] 36. H. 6. dower 30.

44 E. 3. 4. 5. 39. E. 3. 25. 5. H. 7. 6. 3. H. 6. 38.

50. E. 3. 27.

(F. N. B. 192. a.)

(8. Rep. 86.)

Sect. 387.

*Et nota, que en tiels discents que tollent entries, il covient que home morust seisie en son demesne come de fee, ou en son demesne come de fee taile. Car un morant seisie pur terme de vie, ne pur terme d'auter vie, ne unquez tollent entre *.*

AND note, that in such discents which take away entries, it behoveth that a man die seised in his demesne as of fee, or in his demesne as of fee taile. For a dying seised for terme of life, or for terme of another man's life, doth never take away an entry.

IF a disseisor make a lease to a man and to his heires during the life of *I. S.* and the lessee dieth, living *I. S.* this shall not take away the entrie of the disseisee, because he that died seised had but a freehold only, and heires in that case were added to prevent the occupant, for the heire in that case shall not have his age, as it was adjudged in [d] Lamb's case (3).

Dier 8. El. 2. 253. 7. H. 4. 46. 8. H. 4. 15. 17. E. 3. 48. 11. H. 4. 42. (1. Rep. 140. b.) [d] Pasch. 16. Eliz. in communi banco. (Ant. 41. b.) 3. E. 3. tit. Entr. Cong. 58. F. N. B. 145. m. 9. H. 7. 25. a.

But

* &c. added L. and M. and Roh.

(2) [See Note 156.] (3) See note 4, page 241. a.

But if hee in the reversion disseise his tenant for life, and dieth seised, this discent shall take away the entrie of the tenant for life (4).

9. H. 7. 25. (Hob. 323.)

So it is if there be tenant for life, the remainder in taile, the remainder in fee, and tenant in taile disseiseth the tenant for life and dieth seised, this shall take away the entrie of the tenant for life.

(Post. 276. a.) (Plo. 546. a.)

But if the king's tenant for life be disseised, and the disseisor die seised, this discent shall not take away the entrie of the lessee for life, because the disseisor had but a bare estate of freehold during the life of the lessee, and *Littleton* saith, that a discent of an estate for terme of another man's life shall not take away an entrie (5).

Temps E. 1. Reliefe 12. Dier 14. Eliz. 308. 40. E. 3. 9. b. (*) 24. E. 3. 47. (8. Rep. 99.)

" *En son demesne come de fee.*" If an infant bee disseised, and the disseisor die seised, and after the infant commeth to full age, and the heire of the disseisor die before he entreth, albeit he died not seised of an actuall seisin (1), but of a seisin in law, yet that dying seised shall take away the entrie of the disseisee. (*) And yet in pleading the second heire shall (as hath beene said) make himselfe heire to the disseisor, and that land shall not be recovered in value for the warrantie made of other lands by the first heire; but though the first heire had but a seisin in law, yet he is within the words of *Littleton*, for he was seised and died seised in his demesne as of fee.

[239. b.

Sect. 388.

*ITEM, un discent de reversion, ou de remainder, ne unques tollent entrie *. Issint que en tiels cases que tollent entries per force de discents, il covient que celuy que morust seisie ad fee et franktenement al temps de son morant †, ou fee taile et franktenement al temps de son morant, ou auterment tiel discent ne tolle entre.*

ALSO, a discent of a reversion, or of a remainder, doth not take away an entrie. So as in those cases which take away entries by force of discents, it behoveth that hee dieth seised of fee and freehold at the time of his decease, or of fee taile and freehold at the time of his death, or otherwise such discent doth not take away an entrie.

AND therefore if a disseisor make a lease for yeares, and die seised of the reversion, this discent shall take away the entrie of the disseisee, because hee died seised of the fee and franktenement. Like law it is if the land be extended upon a statute, judgement, or recognizance, and so it is in case of a remainder.

But if he had made a lease for life, and die seised of the reversion, this discent shall not take away the entrie of the disseisee, for that though he had the fee, yet he had not the franktenement. (2)

Vide Sect. 302. 303.

So it is of a tenant in taile *mutatis mutandis*; and note, the law doth ever give great respect to the estate of freehold, though it be but for terme of life.

If

* *&c.* added in L. M. and Roh.
† *ou fee taile et franktenement al temps de son morant*, not in L. and M. nor Roh.

(4) [See Note 157.]
(5) [See Note 158.]
(1) [See Note 159.]
(2) [See Note 160.]

If a disseisor make a lease for terme of his own life, and dieth, this discent shall not take away the entrie of the disseisee; for though the fee and franktenement discend to the heire of the disseisor, yet the disseisor died not seised of the fee and franktenement: and *Littleton* saith, that unlesse he hath the fee and franktenement at the time of his decease, such descent shall not take away the entrie. (3)

Sect. 389.

ITEM, come est dit de discents que discendont al issue de ceux que moront seisies, &c. mesme la ley est lou ils n'ont ascun issue, mes les tenements discendont al frere, soer, uncle, ou auter cosin de celuy que morust seisie ‡.

ALSO, as it is said of discents which discend to the issue of them which die seised, &c. the same law is where they have no issue, but the lands discend to the brother, sister, uncle, or other cousin of him which dieth seised.

BY this it appeareth, that a discent, in the collateral line doth take away an entrie, as well as in the lineall.

"*Morout seisies, &c.*" Here (*&c.*) implieth fee simple, or fee taile.

[240. a.]

Sect. 390.

ITEM, si soit seignior et tenant, et le tenant soit disseisie, et le disseisor aliena a un auter en fee, et l'alienee devie sans heire, et le seignior enter come en son escheat: en cest case le disseisee poit enter sur le seignior, pur ceo que le seignior ne vient a la terre per discent, mes per voy d'escheat.

ALSO, if there bee lord and tenant, and the tenant be disseised, and the disseisor alien to another in fee, and the alienee die without issue, and the lord enter as in his escheat: in this case the disseisee may enter upon the lord, because the lord commeth not to the land by discent, but by way of escheat (1).

"*LE disseisee poit enter sur le seignior, &c.*" For albeit the alienee of the disseisor die seised, and the lord by escheat commeth to the land by act in law, yet because the land discendeth not to him, the entrie of the disseisee in respect of the escheat shall not be taken away. For a dying seised, and a discent, and not a dying seised and an escheat, doth take away the entrie: for (as hath beene said) the discent is the worthier title. But in that case, if the lord by escheat die seised, and the land discend to his heire, that

(F.N.B.144.a.)

‡ *&c.* added L. and M. and Roh.

(3) [See Note 161.]   (1) [See Note 162.]

37. H. 6. 1. 9. H. 7. 24. b. (Post. 364. b.) (Ant. 238. b.)

that discent shall take away the entrie of the disseisee. So it is if the disseisor die seised, and the heire of the disseisor dieth without heire, the disseisee cannot enter upon the lord by escheat. So as there is a diversitie as touching the discent, when after a discent cast, the issue in taile dieth without issue, and when after a discent cast, the heire in fee simple dieth without heire: for he in the reversion, or remainder, upon a state taile claimeth in above the state taile, but the lord by escheat claimeth in under the heire in fee simple.

Sect. 391.

ITEM, si home seisie de certaine terre en fee, ou en fee taile, sur condition de render certaine rent, ou sur auter condition, coment que tiel tenant seisie en fee, ou en fee taile, morust seisie, uncore si le condition soit enfreint en lour vies, ou apres lour decease, ceo ne tollera pas l'entrie del feoffor, ou del donor, ou de lour heires, pur ceo que le tenancie est charge ove le condition, et l'estate del tenant est conditionall, en queconque mains que le tenancie vient, &c.

ALSO, if a man be seised of certain land in fee, or in fee taile, upon condition to render certain rent, or upon other condition, albeit such tenant seised in fee, or in fee taile, dieth seised, yet if the condition bee broken in their lives, or after their decease, this shall not take away the entrie of the feoffor or donor, or of their heires, for that the tenancie is charged with the condition, and the state of the tenant is conditionall, in whose hands soever that the tenancie commeth, &c.

33. Ass. 11. 24. 21. H. 6. 17.

UPON these two sections is to bee observed a diversitie betweene a right, for the which the law giveth a remedie by action, and a title, for the which the law giveth no remedie by action, but by entrie only (2). For example, the feoffee upon condition in this case hath a right to the land, and therefore his entrie may be taken away, because hee may recover his right by action; but the feoffor or donor that hath but a condition, his title of entrie cannot be taken away by any discent, because he hath no remedie by action to recover the land, and therefore if a discent should take away his entrie, it should barre him for ever. And the law is all one whether the discent were before the condition broken, or after.

33. Ass. 11. 24. (Ant. 205.) Brook tit. Mortmaine 6. 47. E. 3. 11. 21. E. 3. 17. 40. Ass. 13.

[240. b.]

Also hee that hath a title to enter upon a mortmaine, shall not be barred by a discent, because then he should bee without all remedie. And so it is in case where a woman hath a title to enter *causâ matrimonii praelocuti*, no discent shall take away her entrie, because shee hath but a title, and no remedie by action. (1)

(2) [See Note 163.] (1) [See Note 164.]

Sect. 392.

*ITEM, si tiel tenant sur condition soit disseisie, et le disseisor devie ent seisie, et la terre descendist al heire le disseisor, ore le entrie le tenant sur condition, que fuist disseisie, est toll. Mes uncore si le condition soit enfreint *, donque poit le feoffor ou le donor que, fierent estate sur condition, ou lour heirs, enter,* causâ quâ supra.

ALSO, if such tenant upon condition be disseised, and the disseisor die therof seised, and the land discend to the heire of the disseisor, now the entrie of the tenant upon condition, who was disseised, is taken away. Yet if the condition be broken, the feoffor or the donor which made the estate, upon condition, or their heires, may enter, *causâ quâ supra.*

IF a man be seised of lands in fee, and by his last will in writing deviseth the same to another in fee, and dieth, after whose decease the freehold in law is cast upon the devisee, and the heire, before any entrie made by the devisee, entreth, and dieth seised, this discent shall not take away the entrie of the devisee; for if the discent, which is an act in law, should take away his entrie, the law should barre him of his right, and leave him utterly without remedie. (2) And so it is of him that entreth for consent to a ravishment; and so it was resolved in the case of *Martin Trotte* of London [n] *Pasche* 32. *El. in Com. Banco*; and accordingly was the opinion of the court of common pleas, [o] *Pasch.* 1 *Jac. Reg.* To this may be added as a like case, the king's patentee before he enter, &c. Another reason wherefore a discent shall not take away the entrie of him that hath a title to enter by force of a condition, &c. is, for that the condition remaines in the same essence that it was in at the time of the creation of it, and cannot be divested or put out of possession, as lands and tenements may (3).

[n] Pasch. 32. Eliz. in Communi Banco 7. R. 2. Scir. Fac, 3. 41. E. 3. 14. per Finchden.
[o] Pasch. 1. Jac. Regis in Communi Banco.

Sect. 393.

ITEM, si un disseisor devie seisie, &c. et son heire enter, &c. lequel endowa la feme le disseisor de la tierce part de les tenements, &c. en cest cas quant a cest tierce part que est assigne a la feme en dower, maintenant apres ceo que la feme enter, et ad le possession de mesme la tierce part, le disseisee poit loyalment enter sur la possession le feme en mesme la tierce part. Et la cause est,

ALSO, if a disseisor die seised, &c. and his heire enter, &c. who endoweth the wife of the disseisor of the third part of the land, &c. in this case as to this part which is assigned to the wife in dower, presently after the wife entreth, and hath the possession of the same third part, the disseisee may lawfully enter upon the possession of the wife into the same third part. And

* *&c.* added in L. and M. but not in Roh.

(2) [See Note 165.] (3) [See Note 166.]

*est, pur ceo que quant la feme ad son dower, el serra adjudge eins immediate per son baron, et nemy per l'heire; et issint quant a le franktenement de mesme la tierce part, le discent est defeate *. Et issint poies veir, que devant le endowment le disseisee ne poit enter en ascun part, &c. et apres le dowment il poit enter † sur la feme, &c. mes uncore il ne poit enter sur les auters deux parts que l'heire le disseisor ad per le discent ‡.*

And the reason is, for that when the wife hath her dower, she shall be adjudged in immediately by her husband, & not by the heire (1); and so as to the freehold of the same third part, the discent is defeated. And so you may see, that before the endowment the disseisee could not enter into any part, &c. and after the endowment he may enter upon the wife, &c. but yet hee cannot enter upon the other two parts which the heire of the disseisor hath by the discent (2).

"DEVIE *seisie, &c.*" viz. in fee simple or in fee tayle.

"*Et son heire enter, &c.*" So as he hath an actuall fee simple.

"*De la 3. part de les tenements, &c.*" id est, in severaltie.

By this section it appeareth, that an entrie being taken away by the discent, is revived by the endowment, albeit the tenant in dower shall have it but for her life. And the cause is, for that although the heire entred, yet when the wife is endowed she shall not be in by the heire, [a] but immediately by her husband being the disseisor, who is in for her life by a title paramount the dying seised and discent, and therefore in judgement of law, the discent as to the freehold, and the possession which the heire had is taken away by the endowment; for that the law adjudgeth no meane seisin betweene the husband and the wife. [241, a.]

[a] 8. E. 2. Entrie 75. 19. E. 2. Dower 171. 5. E. 2. Entrie 66. 24. E. 3. 32. 40. 38. Ass. Pl. 26. 43. E. 3. 32. 45. E. 3. 9. b. 11. H. 4. 11. 7. H. 5. 3. 10. E. 3. 27, 28. 36. H. 6. Dower 30.

31. E. 1. Mesne 55. (F. N. B. 136.)

If there bee lord, mesne and tenant, the mesne doth grant to the tenant to acquite him against the lord and his heires, the lord dies, his wife hath the seigniorie assigned to her for her dower, and distraines the tenant; albeit the grant was to acquite him against the lord and his heires only, yet because shee continued the estate of her husband, and the reversion remained in the heire, this grant of acquitall did extend to the wife, which is a notable case.

If after the dying seised of the disseisor, the disseisee abate, against whom the wife of the disseisor recover by confession in a writ of dower, in that case, though the discent bee avoided as *Littleton* here saith, yet the disseisee shall not enter upon the tenant in dower, because the recoverie was against himselfe; but if he had assigned dower to her *in pais*, some say hee should enter upon her (3).

10. E. 3. 26. (7. Rep. 9. a.)

A man makes a gift in taile reserving twentie shillings rent, and dies, the donee takes wife, and dieth without issue, the heire of the donor entreth and endoweth the wife, shee is so in of the estate of her husband, that albeit the estate taile be spent, and the rent reserved thereupon determined, yet after she be endowed, she shall be attendant

* *&c.* added in L. and M. and Roh.
† *sur la feme,* not in L. and M. nor Roh.
‡ *&c.* added in L. and M. and Roh.

(1) [See Note 167.]
(2) [See Note 168.]
(3) [See Note 169.]

attendant to the heire in respect of the said rent. And so it is of lord and tenant, the wife that is endowed shall be attendant for the due services; but if any services be encroached, albeit that encroachment shall binde the heire, yet the wife shall be contributorie but for the services of right due (4).

" *Issint poies veir, que devant le dowment le disseisee ne poit enter, et apres l'endowment il poit enter, &c.*" The like hath beene said before in this chapter, *Sect.* 386. where the entrie of the disseisee may be taken away for a time, and by matter *ex post facto* revived againe.

Nota, albeit the disseisor after a discent taketh to him but an estate for life, yet when the disseisee doth enter upon him, he shall thereby devest the reversion, for the estate of freehold is that whereupon a *præcipe* doth lye, and therefore the entrie of the disseisee is as available in law, as if he had recovered it in a *præcipe*. And so it is if a disseisor make a lease for life, and grant the reversion to the king, the entrie of the disseisee upon the tenant for life shall devest the reversion out of the king in the same manner as if the disseisee had recovered the lands against the tenant for life in a *præcipe*.

Vide Sect. 302. 388 25. E. 3 42. Pl. Com. 553. (Post. 354. b. Dyer 31. b.) (1. Roll. Abr. 658. Ant. 55. b.)

[241. b.]

Sect. 394.

*ITEM, si un feme soit seisie de terre en fee, dont jeo aye droit et title d'entre, si la feme prent baron, et ont issue enter eux, et puis la feme devie seisie, et apres le baron devie, et l'issue enter, &c. en cest case jeo * poy enter sur le possession l'issue, pur ceo que l'issue ne vient a les tenements immediate per discent apres la mort sa mere, &c. † eins per le mort del pier.* (1)

Contrarium tenetur P. 9. Hen. 7. *per tout le court*, & M. 37. H. 6.

ALSO, if a woman be seised of land in fee, whereof I have right and title to enter, if the woman take husband and have issue betweene them, and after the wife die seised, and after the husband die, and the issue enter, &c. in this case I may enter upon the possession of the issue, for that the issue comes not to the lands immediately by discent after the death of the mother, &c. but by the death of the father.

Contrarium tenetur P. 9. H. 7. per tout le court, & M. 37. H. 6.

" *EN cest case jeo poy enter sur le possession l'issue, &c.*"

For here was but a discent of a reversion at the time of the dying seised, for the estate of the tenant by the courtesie had commencement by the having of issue, and is consummate by the death of the wife, so as the fee & franktenement did not after the decease of the wife descend to the heire, and albeit the tenant by the courtesie dieth afterwards, and that the franktenement is cast upon the heire, so as now he hath the fee and franktenement by discent, yet because the

Vide 9. H. 7. 24. and 37. H. 6. 1. See before the chapter of Homage. (3. Rep. 34. a.)

* *poy* not in L. and M. and Roh.

† *eins per le mort del pier*, and the note that follows, not in L. and M. nor Roh.

(4) [See Note 170.] (1) [See Note 171.]

the heire came not to the fee and franktenement at once, immediately after the decease of the wife, such a mediate discent shall not take away the entrie of the disseisee. On the other side, an immediate discent may take away an entrie for a time, and mediately may be avoided by matter *ex post facto*, as hath beene said. But if a dying seised taketh not away the entrie of him that right hath at the time of the discent, it shall not by any matter *ex post facto* take away his entrie.

If a disseisor die without heire, his wife privement enseint with an issue, and after the issue is borne, who entreth into the land, he hath the land by discent, and yet thereby the entrie of the disseisee shall not be taken away, because, as *Littleton* here saith, the issue commeth not to the lands immediately by discent, after the decease of the father.

And so it is if a disseisor make a gift in taile, the remainder in fee, and the donee dieth without issue, leaving his wife privement enseint with a sonne, and he in the remainder enters, and after the sonne is borne, who entreth into the land, this discent shall not take away the entrie of the disseisee, *causâ quâ supra*.

" *Contrarium tenetur, &c.*" This is an addition, and therefore to be passed over. And at this day, this case of *Littleton* is holden for cleere law.

(Ant. 238. b.)

Sect. 395.

ITEM, si un disseisor enfeoffa son pier en fee, et le pier morust de tiel estate seisie, per que les tenements discendont a le disseisor, ‡ *come fits et heire, &c. en cest case le disseisee bien poit enter sur le disseisor, nient obstant le discent, pur ceo que quant al disseisin, le disseisor serra adjudge eins forsque come disseisor, nient obstant le discent,* ‖ quia particeps criminis.

ALSO, if a disseisor enfeoffe his father in fee, and the father die seised of such estate, by which the land descend to the disseisor, as sonne and heire, &c. in this case the disseisee may well enter upon the disseisor, notwithstanding the discent, for that as to the disseisin, the disseisor shall bee adjudged in but as a disseisor, notwithstanding the discent, *quia particeps criminis*. (1)

[242. a.]

15. E. 4. 23. a.
31. E. 4. 2.
38. E. 4. 25. a.
33. H. 6. 5. b.
34. H. 6. 11.
12. H. 8. 9.
14. H. 8. 3. 9.
18. H. 8. 5.
5. H. 7.
29. Ass. 54. 39. E. 3. 25, 26. (Post. Sect. 409.)

OF this sufficient hath beene said before in this chapter, Sect. 386. And regularly it is true, that albeit a discent be cast, and the entrie of the disseisee taken away, yet if the disseisor commeth to the land againe, either by discent or purchase, of any estate or freehold, which is implyed in the (&c.) the disseisee may enter upon him, or have his assise against him, as if no discent or meane conveyance had beene, *quia particeps criminis*.

‡ *ent* added in L. and M. ‖ *&c.* added: *quia particeps criminis*, not in L. and M.

(1) [See Note 172.]

Sect. 396.

ITEM, si home seisie de certaine terre en fee ad issue deux fits, et morust seisie, et le puisne fits entra per abatement en la terre, quel ad issue, et de ceo morust seisie, et les tenements discendont al issue, et l'issue entra en la terre : en cest case le fits eigne, ou son heire, poit enter per la ley sur l'issue del fits puisne, nient contristeant le discent, pur ceo que quant le fits puisne abatist en la terre apres le mort son pier devant ascun entrie per le fits eigne † fait, la ley intendra que il entra en claymant come heyre a son pier. Et pur ceo que l'eigne fits clayma per mesme le title, cestascavoir, come heyre a son pier, il et ses heires poient enter sur l'issue de puisne ‡ fits, nient obstant le discent, &c. pur ceo que ils claymont per un mesme title. Et en mesme le maner il serra, si fueront plusors discents de un issue a un auter issue del puisne fits.

ALSO, if a man seised of certaine land in fee have issue two sons, and die seised, and the younger sonne enter by abatement into the land, and hath issue, and dieth seised thereof, and the land descend to his issue, and the issue enters into the land: in this case the eldest sonne, or his heire, may enter by the law upon the issue of the younger son, notwithstanding the discent, because that when the younger son abated into the land after the death of his father before any entrie made by the eldest sonne, the law intend that hee entred claiming as heire to his father. And for that the eldest sonne claimes by the same title, that is to say, as heire to his father, hee and his heires may enter upon the issue of the younger son, notwithstanding the discent, &c. because they claime by the same title. And in the same manner it shall be, if there were more discents from one issue to another issue of the younger sonne (1).

Sect. 397.

MES en tiel case, si le pier fuit seisie de certaine terres en fee, et ad issue deux fits, et devie, et l'eigne ‖ fits enter, et est seisie, &c. et puis le puisne frere luy disseisist, per quel disseisin il est seisie en fee, et ad issue, et de tiel estate morust seisie, donques l'eigne frere ne poit enter, mes est mis a son briefe d'entre sur disseisin, &c. § *de recoverer la terre. Et la cause est, pur ceo que le puisne frere vient a les tenements per tortious disseisin fait a son eigne frere, et per el tort la ley ne poit entender*

BUT in this case, if the father were seised of certaine lands in fee, and hath issue two sons, and die, and the eldest sonne enter, and is seised, &c. and after the yonger brother disseiseth him, by which disseisin he is seised in fee, and hath issue, and of this estate dieth seised, then the elder brother cannot enter, but is put to his writ of *entrie sur disseisin, &c.* to recover the land. And the cause is, for that the youngest brother commeth to the lands by wrongfull disseisin

† *fait* not in L. and M.
‡ *fits—frere*, L. and M. and Roh.
‖ *fits—frere*, L. and M. and Roh.
§ *&c.* not in L. and M. nor Roh.

(1) [See Note 173.]

entender que il claime come heire a son pier, nient pluis que un estrange person que ust disseisie l'eigne frere ‡ *que n'avoit ascun title,* &c. *Et issint poyes veier la diversitie, lou le puisne frere enter apres le mort le pier devant ascun entrie fait per l'eigne frere en tiel cas,* ‖ *et ou l'eigne frere enter apres la mort son pier, et puis est disseisie per le puisne frere, lou le puisne frere puis morust seisie* §.

disseisin done to his elder brother, and for this wrong the law cannot intend that he claimeth as heire to his father, no more than if a stranger had disseised the elder brother which had no title, &c. And so you may see the diversitie, where the younger brother entreth after the death of the father before any entrie made by the elder brother in this case, and where the elder brother enters after the death of his father, and after is disseised by the younger brother, where the younger after dieth seised.

(Plow. 306. a.)

"*EN cest case le fits eigne,* &c. *poit entrer sur l'issue del fits puisne,* &c." And the reason hereof is, for that the law intendeth the youngest sonne entred claiming the land as heire to his father, and because the eldest sonne claimeth also by the same title, *viz.* as heire to his father, therefore hee and his heires may enter upon the second sonne and his heires, in respect of the privitie of the blood betweene them, and of the same claime by one title, albeit the youngest son gained a fee simple by his entrie: for *Littleton* here calleth it an abatement, which proveth the gaining of a fee simple.

Bract. lib. 4. fol. 261. 282, 283. Britton fol. 180, 181. Fleta lib. 5. cap. 1, 2, &c. Mord. 47.

And it is to be observed, that *assisa mortis antecessoris non tenet inter conjunctas personas sicut fratres & sorores,* &c. for these are privie in bloud, but it lyeth against strangers, and then damages are to be recovered against a stranger, but not against his brother.

20. E. 3. Darr. present. 13. 12. H. 3. Mord. pl. ultim. 13. E. 1. 29. Ass. 11. F. N. B. 196. b. (8. Rep. 42.) (Post. 271. a.)

Pasch. 3. E. 3. Coram Rege Kanc. in Thesaur.

Lands were given to the husband and wife, and to the heires of their two bodies, they had issue a daughter, the wife died, the husband had issue by another wife foure sons and died, the eldest sonne abated and died seised, this discent did take away the entrie of the daughters, because they claimed not by one title. And in ancient bookes the eldest sonne is called *hæres propinquus,* and the younger sonne *hæres remotus.* And albeit the eldest sonne hath issue and dieth, and that after his decease the youngest son or his heire entreth, and many discents be cast in his line, yet may the heires of the eldest sonne enter in respect of the privitie of the bloud, and of the same claime by one title; but if the youngest sonne make a feoffment in fee, and the feoffee die seised, that discent shall take away the entrie of the eldest, in respect that the privitie of the bloud faileth. And admit that the youngest sonne be of the halfe bloud to his brother, yet he is of the whole bloud to his father; and therefore if he entreth by abatement, and dieth seised, it shall not barre his elder brother of his entrie. But if the eldest sonne entreth, and gaineth an actuall possession and seisin, then the entrie of the youngest is a disseisin. And then a dying seised shall take away the entrie of the eldest, for *possessio terræ* must be *vacua* when the youngest sonne enters by

[242. b.]

8. E. 2. Ass. 380. 40. E. 3. 24. b. 19. Ass. 24.

Vid. Brooke tit. Entrie 27.

(Roll. Abr. 628, 629.)

(4. Rep. 58.)

‡ *frere* not in L. and M. nor Roh.
‖ &c. added in L. and M. and Roh.
§ &c. added in L. and M. and Roh.

by abatement, as *Littleton* saith, because he hath more colour in that case to claime, as heire to his father, who last was actually seised. Therefore if after the decease of the father, an estranger doth first enter and abate, upon whom the youngest sonne entreth and disseise him and die seised, this discent shall binde the eldest, for he entred by disseisin, and not by abatement.

[243. a.] If a man bee seised of lands of the nature of burgh English, and hath issue two sonnes and die, and the eldest sonne before any entrie made by the youngest, entreth into the land by abatement, and dieth seised, this shall not take away the entrie of the youngest brother. *Et sic de similibus.* And these and the like cases are all within the reason and rule of our author. And where our author speaketh only of an abatement, so it is not an intrusion; for if the father make a lease for life, and hath issue two sonnes and dieth, and the tenant for life dieth, and the youngest sonne intrude, and die seised, this discent shall not take away the entrie of the eldest. But if the father hath made a lease for yeares, it had beene otherwise, for that the possession of the lessee for yeares maketh an actuall freehold in the eldest sonne. And it is to be observed, that the reason of *Littleton* in this case (for that both the brethren hold by one title) holdeth also in many other cases.

(1. Roll. Abr. 629. Ant. 15. a.)

If two coperceners make partition to present by turne, and one of them usurpe in the turne of the other, this usurpation shall not put the other out of possession, because they claime by one title.

22. E. 4. 4. (F. N. B. 34. Ant. 186. b.)

If two coperceners be, and they severally present to the ordinanarie, yet the church is not litigious, because they claime all by one title. (1).

Doctor & Stud. cap. 30. fol. 117.

If upon a writ of *diem clausit extremum*, the youngest sonne be found heire, the eldest son hath no remedy by the common law, because they claimed by one title; but otherwise it is, if they claime by severall titles, as it appeareth in our bookes (2). But this is now holpen by a statute * made since *Littleton* wrote.

12. E. 4. 18.

* 2. E. 6. cap. 8. 2. H. 7. 12. a. See the Section next following.

If two parsons be in debate for tithes, which amount to above the fourth part, and one man is patron of both churches, no *indicavit* doth lye, for that both incumbents claime by one and the same patron. *Et sic de similibus.*

And where *Littleton* saith, seised of lands in fee, the same law it is if a man bee seised of lands in taile, and hath issue two sonnes *mutatis mutandis.*

" *Et est seisie, &c.*" That is to say, actually seised, either by entrie, as *Littleton* here putteth it, or by possession of the lessee for yeares, or the like.

(Post. 245. a.)

" *N'avoit ascun title, &c.*" That is to say, any pretence or semblance of title, as the younger brother here hath; and in many other cases, there is a great diversitie holden in our bookes [o] where one hath a colour or pretence of right, and when he hath none at all, whereof you may read plentifully in our bookes.

[o] 2. E. 2. bastardie 19. 21. E. 3. 34. 22. Ass. 85. 39. E. 3. 26. 17. E. 3. 59. 11. E. 3. Ass. 88. 21. H. 6. 14. 11. E. 3. age 3. Vide Sect. 400. & cap. Garran.

(1) Acc. Dig. p. 1. c. 3.—See 7th Ann. c. 18. (2) [See Note 174.]

Sect. 398.

EN mesme le maner est, si home seisie de certaine terre en fee ad issue deux files et devie, l'eigne file entra en la terre claymant tout la terre a luy, et ent solement prist les profits, et ad issue et morust seisie, per que son issue enter, quel issue ad issue et devie seisie, et le second issue enter †, & sic ultra, *uncore le puisne file ou son issue, quant a le moitie poit enter sur quecunque issue de l'eigne file, nient obstant tiel discent, pur ceo que ils claimont per un mesme title, &c. Mes en tiel case si ambideux soers avoyant enter apres la mort lour pier, et ent fueront seisies, et puis l'eigne soer ust disseisie la puisne soer de ceo que a luy affiert, et ent fuit seisie en fee, et ad issue, et de tiel estate morust seisie, per que les tenements discendont al issue del eigne soer donque le puisne soer ne ses heires ne poient enter, &c.* causâ quâ supra, &c.

IN the same manner it is, if a man seised of certaine land in fee, hath issue two daughters and dieth, the eldest daughter entreth into the land claiming all to her, and thereof onely taketh the profits, and hath issue and dieth seised, by which her issue enter, which issue hath issue and dieth seised, and the second issue enter, *& sic ultra*, yet the younger daughter or her issue as to the moitie may enter upon any issue whatsoever of the elder daughter notwithstanding such discent, for that they claime by one same title, &c. But in such case where both sisters have entred after the death of their father, and were thereof seized, and after the eldest sister had disseised the younger of her part, and was thereof seised in fee, and hath issue, and of such estate dieth seised, whereby the lands descend to the issue of the elder sister, then the younger sister nor her heirs cannot enter, &c. *causâ quâ supra, &c.*

[243. b.]

(Hob. 120. Post. 373. b. Ant. 198.) 21. Ass. 19. 21. E. 3. 7. 27. 32. 26. Ass. 2. 27. Ass. 68. 36. Ass. p. 1. 43. E. 3. 19. 4. H. 7. 10. 16. H. 7. 4. (Mo. 60.) See more of this in the chapter of Warrantie, Sect. 710. 28. Ass. 30. Vide Sect. 710. (4. Leo. 52. Ant. 174. a.)

"*CLAIMONT tout la terre.*" Here it appeareth, that when the one coparcener doth specially enter, claiming the whole land, and taking the whole profits, that she gaines the one moitie, *viz.* of her sister by abatement, and yet her dying seised shall not take away the entrie of her sister; whereas when one coparcener enters generally, and taketh the profits, this shall be accounted in law the entrie of them both, and no divesting of the moitie of her sister (1).

If one coparcener enter claiming the whole, and make a feoffment in fee, and take backe an estate to her and her heires, and hath issue and die seised, this discent shall take away the entrie of the other sister, because by the feoffment the privitie of the coparcenarie was destroyed.

"*Claimont per un mesme title, &c.*" Of this sufficient hath beene said in the next precedent Section.

"*Ne poient enter, &c.*" Of this there hath beene also spoken in the same Section.

† &c. added L. and M. and Roh.

(1) [See Note 175.]

Sect. 399.

ITEM, si home est seisie de certaine terre en fee, et ad issue deux fits, et l'eigne fits est bastard, et le puisne frere est mulier, et le pier devie, et le bastard enter enclaimant come heire a son pier, et occupia la terre tout sa vie, sans ascun entre fait sur luy per le mulier, et le bastard ad issue, et morust seisie de tiel estate en fee, et la terre discendist a son issue, et son issue enter, &c. en cest case le mulier est sans remedie, car il ne poit enter, ne aver ascun action pur recoverer la terre, pur ceo que est un antient ley en tiel case use, &c. *

ALSO, if a man be seised of certain lands in fee, and hath issue two sonnes, and the elder is a bastard, and the younger *mulier*, and the father die, and the bastard entreth claiming as heire to his father, and occupieth the land all his life, without any entrie made upon him by the *mulier*, and the bastard hath issue, and dieth seised of such estate in fee, and the land descend to his issue, and his issue entreth, &c. in this case the *mulier* is without remedie, for he may not enter, nor have any action to recover the land, because there is an ancient law in this case used, &c.

"*SEISIE en fee.*" For this holds not in case of an estate taile.

Pl. Com. 57. 39. E. 3. Le darreine case.

"*Mulier, seu filius mulieratus.*" *Mulier* hath three significations. First, *Sub nomine mulieris continetur quælibet fæmina.* Secondly, *Propriè sub nomine mulieris, continetur virgo.* Thirdly, *Appellatione mulieris, in legibus Angliæ, continetur uxor. Et sic filius natus vel filia nata ex justâ uxore, appellatur in legibus Angliæ filius mulieratus, seu filia mulierata,* a sonne *mulier,* or a daughter *mulier. Sicut bastardus* (2) *dicitur à Græco verbo Bassaris, i. e. meretrix, seu concubina, quia procreatur ex meretrice seu concubinâ.* In English, hee is called base borne, and thereupon some say, that a bastard is as much to say, as one that is a base naturall, for *aerd* signifieth nature. I read in *Fleta,* [p] that there bee three kindes of bastards, *viz. manser, nothus, & spurius,* which are described in two old verses:

[244. a.]

Manseribus scortum, notho mœchus dedit ortum.
Ut seges è spicâ, sic spurius est ab amicâ. (1)

Lib. 8. fol. 101, 102. Sir Rich. Lechford's case. (2. Roll. Abr. 584. 586. Doctor & Stud. 68, 69.) Glanvil. lib. 7. cap. 2. Bract. lib. 5. cap. 19. Brit. cap. 70. Vide Sect. 188. [p] Flet. lib. 1. cap. 5. Vide Sect. 380. (1. Roll. Abr. 356, 357, 358, 359. Cro. Jac. 541. Godb. 281. Palm. 9. 4. Inst. 36.)

But we terme them all by the name of bastards, that be borne out of lawfull marriage. By the common law, [r] if the husband be within the foure seas, that is, within the jurisdiction of the king of England, if the wife hath issue, no proofe is to be admitted to prove the childe a bastard, (for in that case *filiatio non potest probari*)

[r] Bract. lib. 4. fol. 278, 279. 7. H. 4. 9. 43. E. 3. 19. 41. E. 3. 7. 44. E. 3. 10. 29. Ass. 54. 98. Ass. 14. 1. H. 6. 7. 19. H. 6. 17. 39. E. 3. 13.

* *&c.* not in L. and M. nor Roh.

(2) [See Note 176.] (1) [See Note 177.]

bari) unlesse the husband hath an apparent impossibilitie of procreation; as if the husband be but eight yeares old, or under the age of procreation, such issue is bastard, albeit he be borne within mariage. (2) [*f*] But if the issue be borne within a moneth or a day after mariage, betweene parties of full lawfull age, the childe is legitimate. (3)

[*f*] 18. E. 4. 28. (1. Salk. 120.)

" *Discendist a son issue.*" For if the bastard dieth seised without issue, and the lord by escheat entreth, this dying seised shall not barre the *mulier*, because there is no discent. If the bastard enter, and the *mulier* dieth, his wife privement enseint with a sonne, the bastard hath issue and dieth seised, the sonne is borne, his right is bound for ever. But if the bastard dieth seised, his wife enseint with a sonne, the *mulier* enter, the sonne is borne, the issue of the bastard is barred: for *Littleton* putteth his case, that there must not only be a dying seised, but also a discent to his issue.

(Post. 260. 273. 2. Roll. Abr. 624. 8. Rep. 101. b. Ant. 15. a. 7. Rep. 42.)

" *Et son issue enter, &c.*" And so it is to be understood, albeit the *mulier*, after the decease of the bastard, doth enter before the heire of the bastard; for the discent bindeth, and not the entrie of the heire.

" *Le mulier est sans remedie.*" Hereby it appeareth that this discent differeth from other discents, for this discent barreth the right of the *mulier*, whereas other discents doe take away the entrie only of him that right hath, and leaveth him to his action, but here by the dying seised of the bastard, his issue is become lawfull heire. [*a*] It is holden that if the *mulier* bee within age at the time of the dying seised, that neverthelesse hee shall bee barred, because the issue of the bastard is in judgement of law become lawfull heire, and the law doth preferre legitimation, before the privilege of infancie.

Lib. 8. 101, 102. Sir Rich. Lechford's case.

[*a*] 5. E. 2. Discent. Br. 49. 31. Ass. 18. 22. 33. E. 3. Verdict. 48. 36. Ass. 2. Pl. Com. Stowel's case. 10. E. 3. 2.

And the reason of this case is, for that *Justum non est aliquem post mortem facere bastardum, qui toto tempore vitæ suæ pro legitimo habebatur.* And so it seemeth to be, that if a man hath issue a sonne being bastard eigne, and a daughter, and the daughter is married, the father dieth, the sonne entreth and dieth seised, this shall barre the feme covert. And the discent in this case of services, rents, reversions, expectant upon estates taile, or for life, whereupon rents are reserved, &c. shall binde the right of the *mulier*, but a discent of these shall not drive them, that right have, to an action.

13. E. 1. tit. Bastardie 28. (Post. 246. a. 5. Rep. 98.) 14. E. 2. Bastardie 26.

So if the bastard dieth seised, and his issue endoweth the wife of the bastard, yet is not the entrie of the *mulier* lawfull upon the tenant in dower, for his right was barred by the discent.

Sir Rich. Lechford's case, ubi supra. (Ant. 241.)

If the bastard eigne entreth into the land, and hath issue, and entreth into religion, this discent shall barre the right of the *mulier*.

20. H. 3. Bastardie 29. (Post. 248.)

" *Ad issue deux fits.*" If a man hath issue such a bastard as is aforesaid, and dieth, and the bastard entreth and dieth seised, and the land descendeth to his issue, the collaterall heire of the father is bound, as well as where there be two sonnes.

Hill. 18. E. 3. cor. Reg. Rot. 144. Ebor. 17. E. 3. 59. F. tit. Bastard. 32.

Sir Rich. Lechford's case, ubi supra. See afterwards in the Chapter of Warranties. (Post. 368. a.)

And

(2) [See Note 178.] (3) See note 1. to page 245. a.

And where our author speaketh of sonnes, so it is if a man hath issue two daughters, the eldest being a bastard, and they enter and occupie peaceably as heires; now the law in favour of legitimation shall not adjudge the whole possession in the *mulier*, (who then had the only right) but in both, so as if the bastard hath issue and dieth, her issue shall inherit.

[244. b.] [*b*] And in the same case, if both daughters enter and make partition, this partition shall binde the *mulier* for ever.

[*c*] And an assise of *mort d'ancester* lieth not betweene the bastard and the *mulier* in respect of the proximitie of bloud.

And the bastard being impleaded or vouched shall have his age.

" *Et le bastard enter come heire a son pier.*" If a man hath issue bastard eigne and *mulier puisne*, and the bastard in the life of the father hath issue and dieth, and then the father dieth seised, and the sonne of the bastard entreth, as heire to his grandfather, and dieth seised, this discent shall binde the *mulier*.

" *Pur ceo que est antient ley en tiel case use, &c.*" As hereafter in our Commentarie upon the two next Sections shall appeare, by our antient bookes, and the antient statutes of the realme. And here is implyed how necessarie it is, after the example of our author, to looke into the antiquities, than which nothing is more venerable, profitable, and pleasant. (1)

[*b*] 2. E. 3. tit. bastardie 15. 21. E. 3. 34. b. 30. Ass. p. 7. Sir Rich. Lechford's case, ubi sup.
[*c*] Britt. cap. 73. 20. E. 3. Vouch. 129. 11. E. 3. Age 3. 5. H 7. 2. Sir Rich. Lechford's case, ubi sup.
(Ant. 170. b.)

Sect. 400.

MES il ad estre l'opinion d'ascuns, que ceo serra intendue lou le pier ad un fits bastard per un feme, et puis espousa mesme la feme, et apres le espousels il ad issue per mesme la feme un fits, ou un file mulier, et puis le pier morust, &c. si tiel bastard enter, &c. et ad issue et devie seisie, &c. donque avera l'issue de tiel bastard le terre cleerement a luy, come avant est dit, &c. et nemy ascun auter bastard la mere que ne fuit unque espouse a son pier. Et ceo semble bone et reasonable opinion: car tiel bastard née devant espousels celebres perenter son pier et sa mere, per la ley de saint esglise est mulier, coment que per la ley del terre il est bastard, et issint il ad un colour d'entrer come heire a son pier, pur ceo que il est per un ley mulier, &c. scilicet, *per la ley de saint esglise. Mes auterment*

BUT it hath beene the opinion of some, that this shall be intended where the father hath a sonne bastard by a woman, and after marrieth the same woman, and after the espousels he hath issue by the same woman a son or a daughter, and after the father dieth, &c. if such bastard entreth, &c. and hath issue and die seised, &c. then shall the issue of such bastard have the land cleerely to him, as it is said before, &c. and not any other bastard of the mother which was never married to his father. And this seemeth to be a good and reasonable opinion: for such a bastard borne before marriage celebrated betweene his father and his mother, by the law of holy church is *mulier*, albeit by the law of the land he is a bastard, and so he hath a colour to enter as heire to his father,

(1) [See Note 179.]

Pl. Com. Parson de Honylane's case, 91. 35. H. 6. 24. 21. H. 6. 9. 1. E. 4. 3. 21. E. 4. 5. 5. E. 4. 60.

"*Interrupt le possession del bastard, &c.*" If the bastard invite the *mulier* to see his house, and to see pictures, &c. or to dine with him, or to hawk, hunt, or sport with him, or such like upon the land descended, and the *mulier* commeth upon the land accordingly, this is no interruption, because he came in by the consent of the bastard, and therefore the comming upon the land can be no tresspasse; but if the *mulier* commeth upon the ground of his own head, and cutteth downe a tree, or diggeth the soile, or take any profit, these shall be interruptions; for rather than the bastard shall punish him in an action of trespasse, the act shall amount in law to an entry, because he hath a right of entry. So it is if the *mulier* put any of his beasts into the ground, or command a stranger to put on his beasts, these doe amount to an entry; for albeit in these cases the *mulier* doth not use any express words of entry, yet these, and such like acts, doe without any words amount in law to an entrie; for acts without words may make an entry, but words without an act (*viz.* entry into the land, &c.) cannot make an entry, (all which interruptions are implied in the said *&c.*) More shall be said hereafter of Interruptions, in the chapter of Continuall Claime.

Sect. 402.

ITEM, si un enfant deins age ad tiel cause de entry en ascuns terres ou tenements sur un auter, que est seisie en fee, ou en fee taile de mesme les terres ou tenements, si tiel home que est tielment seisie, morust de tiel estate seisie, et les terres discendent a son issue durant le temps que l'enfant est deins age, tiel discent ne tollera l'entry l'enfant, mes que il poit enter sur le issue que est eins per discent, &c. pur ceo que nul laches serra adjudge en un enfant deins age en tiel case.

ALSO, if an infant within age hath such cause to enter into any lands or tenements upon another, which is seised in fee, or in fee taile of the same lands or tenements, if such man who is so seised, dieth of such estate seised, and the lands descend to his issue during the time that the infant is within age, such discent shall not take away the entry (2) of the infant, but that hee may enter upon the issue which is in by discent, for that no laches shall be adjudged in an infant within age in such a case.

Brooke tit. discent. 40.

"*SI un enfant deins age ad cause d'entrer.*" If a man seised of lands in fee die, his wife *privement enseint* with a son, and a stranger abate and die seised, and after the sonne is borne, hee shall bee bound by the discent, (1) because hee at the time of the discent had no right to enter, and this is to be gathered upon these words of *Littleton*, *ad cause d'entrer*, which at the time of the discent he hath not.

20. H. 6. 28. b. 2. E. 4. 25, 26. 15. E. 4. discent. 30.

"*Est eins per discent, &c.*" Here is implyed any other heire, collaterall or lineall.

An

(1) [See Note 182.] (2) [See Note 183.]

146. a.] An infant is accounted in law (as hath beene often said,) [d] untill he passeth the age of 21 yeares, and certaine privileges hee hath in respect of his infancy.

[d] Vide Sect. 259. 403.

" *Nul laches serra adjudge en le enfant deins age en tiel case.*"

And *Littleton* well added *(en tiel case)* that is, in case of discent, for in some other cases, laches shall prejudice an infant. As laches shall be adjudged in an infant, if he present not to a church within six moneths, for the law respecteth more the privilege of the church (that the cure bee served) than the privilege of infancy. And so the publike repose of the realme, concerning mens freeholds and inheritances, shall be preferred before the privilege of infancy, in case of a fine, where the time begins in the time of the ancestor. So non-claime of a villaine of an infant by a yeare and a day, who hath fled into ancient demesne, shall take away the seisure of the infant. And if an infant bring not an appeale of the death of his ancestor within a yeare and a day, he is barred of his appeale for ever, for the law respects more liberty and life than the privilege of infancy. And here it is to be observed, that *Littleton* putteth his case, that an infant shall enter upon a discent, when a stranger dieth seised, but hee put it not so before, in the case of the bastard eigne. *B*. tenant in taile infeoffeth *A*. in fee, *A*. hath issue within age and dieth, *B*. abateth and dieth seised; the issue of *A*. being still within age, this discent shall binde [e] the infant, for the issue in taile is remitted: and the law doth more respect an ancient right in this case, than the privilege of an infant that had but a defeasible estate. And it is said [f] if the king die seised of lands, and the land descend to his successor, that this shall bind an infant, for that the privilege of an infant in this case holds not against the king (1).

33. E. 3. quar. imp. 46. (Ant. 171. a. Post. 337. b. 350. b. 380.)

Pl. Com. 372. (F. N. B. 33. b. 6. Rep. 48. b. 3. Rep. 84.)

(Post. 348. a. 357. a.)

[e] 11. E. 4. 1, 2. F. N. B. 35. m.

[f] 35. H. 6. 60.

Sect. 403.

ITEM, si le baron et sa feme, come en droit la feme, ont title et droit d'enter en tenements que un auter ad en fee, ou en fee taile, et tiel tenant morust seisie, &c. en tiel case l'entrie le baron est tolle sur l'heire que est eins per discent. Mes si le baron devie, donque la feme bien poit enter sur le issue que est eins per discent, pur ceo que laches le baron ne turnera la feme ne ses heires en prejudice ne en dammage en tiel cas, mes que la feme et ses heirs bien poient enter, lou tiel discent est eschue durant le coverture.

ALSO, if husband and wife, as in right of the wife, have title and right to enter into lands which another hath in fee, or in fee tayle, and such tenant dieth seised, &c. in such case the entry of the husband is taken away upon the heire which is in by discent. But if the husband die, then the wife may well enter upon the issue which is in by discent, for that no laches of the husband shall turn the wife or her heires to any prejudice nor losse in such case, but that the wife and her heires may well enter, where such discent is eschued during the coverture.

(1) [See Note 184.]

"SI baron et feme, come en droit sa feme, ont title et droit d'enter, &c. et tiel tenant morust seisie, &c."

9. H. 7. 24. a.
2. E. 4. 25.
7. E. 3. 47. b.
20. H. 6. 28. b.
42. E. 3. 12.
15. E. 4.
discent. 30.

These words are generall, but are particularly to bee understood, *viz.* when the wrong was done to the wife during the coverture; for if a feme sole be seised of lands in fee, and is disseised, and then taketh husband; in this case the husband and wife, as in the right of the wife, have right to enter, and yet the dying seised of the disseisor in that case shall take away the entry of the wife after the death of her husband; and the reason is aswell for that shee herselfe when shee was sole, might have entred and recontinued the possession, as also it shall be accounted her folly that shee would take such a husband which would not enter before the discent.

9. H. 7. 24.

[246. b.]

But there if the woman were within age at the time of her taking of husband, then the dying seised shall not after the decease of her husband take away her entry; because no folly can bee accounted in her, for that shee was within age when shee tooke husband, and after coverture she cannot enter without her husband; all which is implyed in the said (&c.)

Vid. Sect. 492.
(Hob. 96.
Ant. 233. b.
1. Lev. 266.
8. Rep. 100.
1. Roll. 421.
Plo. 236.)

"*Laches le baron ne turnera la fem, &c. al prejudice, &c.*" *Laches* signifieth in the common law, retchlesnesse, or negligence, *et negligentia semper habet infortunium comitem.* Here is a diversity to be observed, that albeit regularly no laches shall be accounted in infants, or feme coverts, as is aforesaid, for not entry or clayme to avoid discents, yet laches shall be accounted in them for no performance of a condition annexed to the state of the land. For if a feme be infeoffed either before or after marriage, reserving a rent, and for default of payment a re-entrie; in that case, the laches of the baron shall disherit the wife for ever. And so it is [n] of an infant; his laches, for not performing of a condition annexed to a state, either made to his ancestor or to himselfe, shall barre him of the right of the land for ever.

20. H. 6. 28. b.
[n] 31. Ass p. 17.
42. E. 3. 1.
Pl. Com. 55.
10. H. 7.
13. H. 7.
35. H. 6. 41.
Pl. Com. 136. b.
Fleta lib. 2.
cap. 5e.

If a man make a feoffment in fee to another reserving a rent, and if he pay not the rent within a moneth, that he shall double the rent, and the feoffee dieth, his heire within age, the infant payeth not the rent, he shall not by this laches forfeit any thing. But otherwise it is of a feme covert; and the reason and cause of this diversity is, for that the infant is provided for by the statute, [o] *non current usuræ contra aliquem infra ætatem existen' &c.* But that statute doth not extend to a feme covert, neither doth that statute extend to a condition of a re-entry; which an infant ought to performe, for the forfeiture thereof cannot bee called *usura.*

[o] Le statute de Merton ca. 5.

* Sect. 404.

MES la court tient, lou tiel title est done al feme sole, que puis prent baron que n'entra pas, eins suffer un discent, &c. la auter est, car serra dit

BUT the court holdeth, where such title is given to a fem sole, who after taketh husband which doth not enter, but suffer a discent, &c. there

* This Section is not in L. and M. nor Roh.

dit la folly le feme de prendre tiel baron que n'entre en temps, &c.

there otherwise it is, for it shall be said the folly of the wife to take such a husband which entered not in time, &c.

THIS is added, and therefore, as formerly I have done, I meddle not withall; howbeit the opinion is holden for law, as it appeareth in the section next precedent.

9. H. 7. 24.

Sect. 405.

ITEM, si home que est de non sane memorie, que est a dire en Latin, qui non est compos mentis, *ad cause d'entre en ascuns tiels tenements, si tiel discent,* ut supra, *soit ewe en sa vie durant le temps que il fuit de non sane memorie, et puis devia, son heire bien poit enter sur luy que est eins per discent. Et en cest case poyes veier un cas, que l'heire poit enter, et uncore son ancester que avoit mesme le title ne puissoit enter. Car celuy que fuit hors de sa memorie al temps de tiel discent, s'il voile enter apres tiel discent, si action sur ceo soit sue envers luy, il n'ad riens pur luy a pleder, ou de luy ayder, mes a dire, que il fuit de non sane memorie al temps de tiel discent, &c. Et a ceo ne serra il resceive a dire, pur ceo que nul home de pleine age serra resceive en ascun plee per la ley a * disabler le person demesne, mes le heire bien poit disabler le person son auncester pur son advantage † demesne en tiel cas, pur ceo que nul laches poit estre adjudge per la ley en celuy que ad nul discretion en tiel case.*

ALSO, if a man which is of non sane memory, that is to say in Latine, *qui non est compos mentis,* hath cause to enter into any such tenements, if such discent, *ut supra,* bee had in his life during the time that hee was not of sound memorie, and after dieth, his heire may well enter upon him which is in by discent. And in this case you may see a case, where the heire may enter, and yet his ancestor which had the same title could not enter. For hee which was out of his memorie at the time of such discent, if hee will enter after such a discent, if an action upon this be sued against him, he hath nothing to plead for himselfe, or to helpe him, but to say, that hee was not of sane memorie at the time of such discent, &c. And he shall not bee received to say this, for that no man of full age shall bee received in any plea by the law to disable his owne person, but the heire may well disable the person of his ancestor for his owne advantage in such case, for that no laches may bee adjudged by the law in him which hath no discretion in such case.

HERE *Littleton* explaineth a man of no sound memorie to be *non compos mentis.* Many times (as here it appeareth) the Latin word explaineth the true sense, and calleth him not *amens, demens, furiosus, lunaticus, fatuus, stultus,* or the like, for *non compos mentis* is most sure and legall. (1)

Pl. Com. fo. 368. b. per Sanders. lib. 4. fo. 127. 182. Beverley's case. Mirror cap. 1. sect. 9. ca. 5. sect. 1. Bract. fo. 165. and 420. Britton fo. 167. b. 217. 66. Fleta li. 6. c. 39. Fitz. N. B. 222. b. Stanf. Prer. 33, 34. (Hob. 96. Sid. 112.)

* *destultifer et* added L. and M. and Roh. † *demesne—del heire,* L. and M. and Roh.

(1) [See Note 185.]

(2. Inst 14.)
Lib. 4. 124, 125. Beverleye's case.
(8. Rep. 170.)
(Plo. Com. 19.)

[247. a.]

Non compos mentis is of foure sorts; 1. *Ideota*, which from his nativitie, by a perpetuall infirmitie, is *non compos mentis*. 2. Hee that by sicknesse, griefe, or other accident, wholly loseth his memorie and understanding. 3. A lunatique that hath sometime his understanding and sometime not, *aliquando gaudet lucidis intervallis*, and therefore he is called *non compos mentis*, so long as he hath not understanding. Lastly, hee that by his owne vitious act for a time depriveth himselfe of his memorie and understanding, as he that is drunken. But that kinde of *non compos mentis* shall give no privilege or benefit to him or to his heires. And a discent shall (1) take away the entrie of an ideot, albeit the want of understanding was perpetuall; for *Littleton* speaketh generally of a man of non sane memorie. So likewise if a man that becomes *non compos mentis* by accident, as is aforesaid, be disseised and suffer a discent, albeit he recover his memorie and understanding againe, yet hee shall never avoid the discent; and so it is *à fortiori* of one that hath *lucida intervalla*. As for a drunkard, who is *voluntarius dæmon*, he hath (as hath beene said) no privilege thereby, but what hurt or ill soever he doth, his drunkennesse doth aggravate it: *Omne crimen ebrietas & incendit, & detegit*.

(4. Rep. 123. b. F. N. B. 232.) 39. H. 6. 42. b. Abb. Ass. 89. b. F. N. B. 202. 5. E. 3. 70. Britton cap. 28. fol. 66. 25. Ass. pl. 4. 35. Ass. pl. 10.

If an ideot make a feoffment in fee, he shall in pleading never avoid it, by saying that hee was an ideot at the time of his feoffment, and so had beene from his nativitie. But upon an office found for the king, the king shall avoid the feoffment, for the benefit of the ideot, whose custodie the law giveth to the king.

32. E. 3. tit. Scire fac. 160. Stanf. Pr. 34. F. N. B. 202. a. Beverleye's case, lib. 4. 126, 127, 128. Vide Br. tit. Dum fuit infra ætatem 5.

So it is of a *non compos mentis* by accident, and of him *qui gaudet lucidis intervallis*, if an estate be made during his lunacie: for albeit the parties themselves cannot bee received to disable themselves, yet twelve men upon their oathes may finde the truth of the matter. But if any of them alien by fine or recoverie, this shall not onely binde himselfe, but his heires also. (2) As amongst other things requisite to be knowen, these cases you shall finde at large in my Commentaries, whereunto, for brevitie, I referre the reader; upon all which bookes there have beene foure severall opinions concerning the alienation, or other act of a man that is *non compos mentis*, &c. For, first, some are of opinion, that hee may avoid his

[247. b.]

owne act by entrie, or plea. Secondly, others are of opinion, that he may avoid it by writ, and not by plea. Thirdly, others, that he may avoid it either by plea, or by writ; and of this opinion is *Fitzherbert* in his *Natura Brevium, ubi supra*. And *Littleton* here is of opinion, that neither by plea, nor by writ, nor otherwise, he himselfe shall avoid it, but his heire (in respect his ancestor was *non compos mentis*) shall avoid it by entrie, plea, or writ. And herewith the greatest authorities of our bookes agree; and so was it resolved with *Littleton* in *Beverleye*'s case; [r] where it is said, that it is a maxim of the common law, that the partie shall not disable himselfe. But this holdeth only in civil causes; for in criminall causes, as felonie, &c. the act and wrong of a madman shall not bee imputed to him, for that in those causes, *actus non facit reum, nisi mens sit rea*, and he is *amens (id est) sine mente*, without his minde or discretion; and *furiosus solo furore punitur*, a madman is only punished

[r] Lib. 4. fol. 126, 127. (Plo. 19. a. F. N. B. 232.)

(1) In all the editions except the first, the word *not* is here erroneously inserted.

(2) [See Note 186.]

nished by his madnesse. And so it is of an infant, untill he be of the age of fourteene, which in law is accounted the age of discretion.

26. Ass. 27. 21. H. 7. 31. Stanford 16. b. 8. E. 2. Coron. 412. 414. 351. 22. E. 3. ibid. 224. Beverley's case, ubi supra. F. N. B. 202. D. 3. H. 7. 2. Vide 3. E. 3. tit. Entrie Cong. Statham.

"*Et en cest case poyes veir un case, &c.*" And though *Littleton* saith (one case), yet other cases may be found to the same end. For if there be grandfather, father, and son, and the father disseise the grandfather, and make a feoffment in fee, without warrantie, the grandfather dieth, albeit the right descend to the father, he cannot by this right descended, enter against his owne feoffment; but if he die, the sonne shall enter, and avoid the estate of the feoffee.

22. E. 4. 8. 39. H. 6. 4. Abbr. Ass. 89. 39. H. 6. 43. (Post. 265.)

So if the grandfather be tenant in taile, and the father disseise him, *ut supra, mutatis mutandis.*

15. E. 4. tit. Discent 30.

If lands be given to two and to the heires of one of them, he that hath the fee simple shall not have an action of waste upon the statute of *Gloucester*, against the joyntenant for life, but his heire shall maintaine an action of waste against him, upon the statute of *Gloucester*; so the heire shall maintaine that action, which the ancestor could not.

(Ant. 53. b. 200. b.)

Sect. 406.

ET si tiel home de non sane memorie fait feoffment, &c. il * *mesme ne poit enter, ne aver briefe appell'* Dum non fuit compos mentis, &c. causâ quâ supra: *mes apres* † *la mort son heire bien poit enter, ou aver le dit briefe* Dum non fuit compos mentis *a son election.* ‡ *Mesme la ley est lou enfant deins age fait feoffement, et devie, son heire poit enter, ou aver un briefe de* Dum fuit infra ætatem, &c.

AND if such a man of non sane memorie make a feoffment, &c. hee himselfe cannot enter, nor have a writ called *Dum non fuit compos mentis, &c. causâ quâ supra*: but after his death his heire may well enter, or have the said writ of *Dum non fuit compos mentis* at his choice. The same law is where an infant within age maketh a feoffment, and dieth, his heire may enter, or have a writ of *Dum fuit infra ætatem, &c.*

"*FAIT feoffment, &c.*" Or any other like conveyance *in pais*; but fines and other assurances of record are not implyed in this (*&c.*)

"*Mesme la ley d'un enfant.*" This is true, as to the bringing of a *Dum fuit infra ætatem, &c.* but without question the infant in that case might have entered, as it appeareth in the next Section. (1)

"*Briefe*

* *mesme* not in L. and M. nor Roh. † *la—sa* L. and M. and Roh.
‡ *&c.* added L. and M. and Roh. The rest of this Section not in L. and M. nor Roh.

(1) See the observation of Mr. Dunning on this passage in his argument in the case of Zouch ex demiss. Abbot and Hallett v. Parsons and Hallett, 3. Burr. 1794.

" *Briefe* Dum non fuit compos mentis." This writ (as it appeareth by our author) lieth for the heire of him that was *non compos mentis*, and not for himselfe; but a *Dum fuit infra ætatem* lieth as well for the ancestor himself after his full age, as for his heire.

Sect. 407.

[248. a]

*ITEM, si jeo sue * disseisie per un enfant deins age, lequel aliena a un auter en fee, et l'alienee devie seisie, et les tenements discendont a son heire, † esteant l'enfant deins age, mon entry est tolle, &c. ‡*

ALSO, if I be disseised by an infant within age, who alieneth to another in fee, and the alienee dieth seised, and the lands descend to his heire, being an infant within age, my entrie is taken away, &c. (1)

Sect. 408.

MES si l'enfant deins age enter sur l'heire que est § eins per discent, come il bien poit, pur ceo que ‖ mesme le discent fuit durant son nonage, donque jeo bien puisse enter sur le disseisor, pur ceo que per son entrie il ad defeat et anient le discent.

BUT if the infant within age enter upon the heire which is in by discent, as he well may, for that the same discent was during his nonage, then I may well enter upon the disseisor, because by his entrie hee hath defeated and taken away the discent.

Vide the next Sect. following.

HERE it appeareth, that the entrie of the infant is lawfull, and giveth advantage to the disseisee to enter also, because the discent, which was the impediment, is avoided. And it is to be observed, that if the discent be cast, the infant being within age, he may enter at any time, either within age, or after his full age.

43. E. 3. tit. Entr. Cong. Vet. N. B. 126. b. F. N. B. 192. 45. E. 3. 21.

And so it is if an infant make a feoffment, &c. he may enter either within age, or at any time after his full age, and so in both cases may his heire.

Sect. 409.

*EN mesme le manner est, lou jeo sue disseisie, et le disseisor fait feoffment en fee sur condition, et le feoffee morust de tiel estate seisie, ¶ jeo ne purroy ** my enter sur †† l'heire le feoffee:*

IN the same manner it is, where I am disseised, and the disseisor make a feoffment in fee upon condition, and the feoffee die of such estate seised, I may not enter upon the heire of

* *disseisie* not in Roh. but in L. and M.
† *et* added L. and M. and Roh.
‡ *&c.* not in L. and M. nor Roh.
§ *eins—heire*, L. and M. and Roh.
‖ *mesme* not in L. and M. but in Roh.
¶ *&c.* added L. and M. and Roh.
** *my* not in L. and M. nor Roh.
†† *l'heire—la terre*, L. and M. and Roh.

(1) [See Note 187.]

feoffee: mes si le condition soit enfreint, issint que pur cel cause le feoffor enter sur l'heire, ore jeo bien puisse enter, pur ceo que quant le feoffor ou ses heires entront pur le condition enfreint, le discent est ousterment defeat, &c. ‡‡

of the feoffee: but if the condition bee broken, so as for this cause the feoffor enter upon the heire, now I may well enter, for that when the feoffor or his heires enter for the condition broken, the discent is utterly defeated, &c.

THE reason hereof is apparent, for *cessante causâ, cessat causatum.* Tenant *in capite* maketh a feoffment in fee to the use of the feoffee and his heires, untill the feoffor pay an hundred pounds to him or his heires, the feoffee dieth his heire within age, now hath the king the wardship of the bodie, and is intituled to the gard of the land. But if the feoffor pay the hundred pounds according to the limitation, the wardship is devested, both for the body and the land, and so it is in case of a condition: for, as *Littleton* here saith, the discent, which is the cause of wardship, is utterly defeated. And by these two last cases which *Littleton* hath here put, it appeareth, that there is no difference, where the discent is disaffirmed by a right paramount, as where the state was never lawfull, (as in the case of an infant,) and where the discent is affirmed for a time, the estate being lawfull, and being after defeated by matter *ex post facto*, by a title of re-entry.

Vide the Sect. next precedent. Dyer 13. El. fol. 298, 299. (Ant. 5. 395.)

(Ant. 76. b.)

[248. b.]

Sect. 410.

ITEM, si jeo soy disseisie, et le disseisor ad issue et enter en religion, per force de quel les tenements discendont a son issue, en cest case jeo bien puisse enter sur l'issue, et uncore la fuit un discent. Mes pur ceo que tiel discent vient al issue per fait le pier, scilicet, *pur ceo que il enter en religion, &c. et le discent ne vient a luy per fait de Dieu,* scilicet, *per mort, &c. mon entre est congeable. Car si jeo arraigne un assise de* novel disseisin *envers mon disseisor, coment que il puit enter en religion, ceo ne abatera ny mon briefe, mes mon briefe (ceo non obstant) estoyera en sa force, et* * *mon recovere vers luy serra bonne.* † *Et per mesme le reason le discent que aveigne a son issue per son fait demesne, ne tollera moy de mon entrie, &c.*

ALSO, if I be disseised, and the disseisor hath issue and entreth into religion, by force whereof the lands descend to his issue, in this case I may well enter upon the issue, and yet there was a discent. But for that such discent commeth to the issue by the act of the father, *scilicet*, for that he entred into religion, &c. and the discent came not unto him by the act of God, *(scilicet)* by death, &c. my entry is congeable. For if I arraigne an assise of *novel disseisin* against my disseisor, albeit he after enter into religion, this shall not abate my writ, but my writ (notwithstanding this) shall stand in his force, and my recovery against him shall bee good. And by the same reason the discent which commeth to his issue by his own act, shal not take from me my entry, &c.

‡‡ *&c.* not in L. and M. nor Roh.
* *mon recovere* not in L. and M. nor Roh.
† *Et* not in L. and M. nor Roh.

Vid. Sect. 200. (Ant. 132.)

" *ENTRE en religion, &c.*" Here is implied profession. This discent shall not barre the entry of the disseisee, for that the discent commeth by the deed of the father, because he entred into religion, wherein there is an excellent point worthy of observation: for albeit the entry into religion make not the discent, but the profession, whereof you have read before, *Sect.* 200. yet here you may learne by *Littleton*, that the law respects the originall act, and that is, his entry into religion, which is his owne act, whereupon the profession followed; whereby the discent hapned; for, *Cujusque rei potissima pars, principium est.* And againe, *Origo rei inspici debet*, whereof you shall make great use in reading of our bookes. * Here *Littleton* attributeth the cause of the discent to his entry into religion, which was his owne act, whereas a discent doth not take away an entry unlesse it commeth by death, which as *Littleton* saith, is the act of God, and no glorious pretext of an act (no, though it bee of religion) shall work a wrong to a stranger, that hath right, to barre him of his entrie. But it is said, that in the case of the bastard eigne, and *mulier puisne*, such a discent shall bind the *mulier*, as before hath beene said, and such an heire that commeth in by such a discent, shall have his age.

(Ant: 126. b. 238. b. 3. Rep. 61.)

* Vid. Pl. Com. Dame Hale's case.

6. E. 3. 41, &c.

10. E. 3. 55. (Ant. 244.)

" *Car si jeo arraigne un assise, &c.*" *Nota*, if a man be tenant or defendant in a reall or personall action, and hanging the suit the tenant or defendant entreth into religion, by this the writ is not abated, because it is by his owne act. And so it is of a resignation; but otherwise it is of a deposition, or deprivation, because he is expelled by judgment, and yet his offence, &c. was the cause thereof, *sed in præsumptione legis, judicium redditur in invitum.*

3. H. 6. 41. 10. H. 6. 10. b. 18. E. 4. 19. 9. E. 4. 25. 52. 7. E. 4. 15. 18. E. 3. 24, 25. E. 3. 39. 46. E. 3. 25. 30. E. 1. Briefe 885. Bracton lib. 4. fo. 182. & lib. 5. fo. 414. 12. R. 2. Briefe 936. 15. Ass. pl. 8.

" *Moy de mon entry, &c.*" Here is implyed, or any of my heires.

Sect. 411.

*ITEM, si jeo lesse a un home certaine terres pur terme de 20 ans, et un auter moy disseisist, et ousta le termor, et devie seisie, et les tenements discendont a son heire, jeo ne purroy enter; et uncore le lessee pur terme d'ans bienpuit enter, pur ceo que il per son entry ne ousta l'heire que est eins per discent de le franktenement que est a luy discendus, mes solement * claime d'aver les tenements pur terme d'ans, lequel n'est † pas expulsement de le franktenement del heire que est eins per discent. Mes auterment est ou mon tenant*

ALSO, if I let unto a man certain lands for the terme of twenty yeares, and another disseiseth me, and oust the termor, and die seised, and the lands descend to his heire, I may not enter; and yet the lessee for yeares may well enter, because that by his entry hee doth not ouste the heire who is in by discent of the freehold which is descended unto him, but only claymeth to have the lands for terme of yeares, which is no expulsion from the freehold of the heire who is in by discent. But otherwise it

* *claime* not in L. and M. nor Roh. † *pas* not in L. and M. nor Roh.

nant a terme de vie est ‡ *disseisie*, causa patet, &c. ‖

it is where my tenant for terme of life is disseised, *causa patet*, &c. (1)

" *PUR terme de* 20 *ans*." It is cleere that a discent shall not take away the entrie of a lessee for yeares, as our author here saith, nor of a tenant by *elegit*, or tenant by statute merchant, or such like, as have but a chattle and no freehold; and the reason is, for that by their entry upon the heire by discent, they take no freehold (which, as often hath bin observed, is so much respected in law) from him; but otherwise it is of an estate for life, or any higher estate. And as a discent of a freehold and inheritance shall take away the entry of him that right hath to a freehold, or inheritance, so a discent of a freehold and inheritance cannot take away the entry of him that hath but a chattle, for that no discent or dying seised can be of the same.

(2) A man seised of an advowson in fee, grants three avoydances one after another, and after the church becommeth void, and the grantor presents, and his clarke is admitted and instituted, and after the church becomes void againe, the grantee may present to the second avoydance, for that he was not put out of the possession thereof; for as the lessor having the freehold and inheritance cannot disseise his lessee for years, having but a chattle, that any discent may be cast, to take away his entry (as *Littleton* here saith); so in the said case the grantor hath the franktenement and fee of the advowson rightfully, so as he cannot make any usurpation, to gaine any estate, or to put the grantee so out of possession as that he should not present, no more than the lessee for yeares in this case, to enter. Also in respect of the privitie that is betweene them, the usurpation of the grantor shall not put the grantee out of possession for the two latter avoydances. And this was resolved [a] by all the judges of the court of common pleas, which I myselfe heard and observed.

(See 2. Roll. Abr. 371. Hob. 322, 323. 5. Rep. 57. 102.)

[a] Hil. 18. Eliz. in commun banco.

Sect. 412.

ITEM, il est dit que si home est seisie de tenements en fee per occupation en temps de guerre, et ent morust seisie en temps de guerre, et les tenements discendont a son heire, tiel discent ne oustera ascun home de son entry; et de ceo home poit vier en un plee sur un briefe de ail, an. 7. E. 2.

ALSO, it is said, that if a man be seised of lands in fee by occupation in time of warre, and thereof dieth seised in the time of warre, and the tenements descend to his heire, such discent shall not oust any man of his entry; and of this a man may see in a plea upon a writ of aiel, 7. E. 2.

" *PER occupation en temps de guerre*."
First, it is necessarie to be knowne, what shall bee said time of peace, *tempus pacis*; and what shall be said *tempus belli*, *sive*

(4. Inst. 125.)

‡ *disseisie*—*seisie*, &c. L. and M. and Roh. ‖ &c. not in L. and M. nor Roh.

(1) [See Note 188.] (2) [See Note 189.]

sive guerræ, time of warre. *Tempus pacis est quando cancellaria, & aliæ curiæ regis sunt apertæ, quibus lex fiebat cuicunque prout fieri consuevit.* And so it was adjudged in the case of *Roger Mortimer*, and of *Thomas* earle of *Lancaster*. *Utrùm terra sit guerrina necne, naturaliter debet judicari per recorda regis, & eorum, qui curias regis per legem terræ custodiunt, & gubernant, sed non alio modo.* [249. b.

Inter brevia de anno 1. E. 3. parte 1. & pasch. 28. E. 3. inter adjudicata coram rege. lib. 2. fol. 37. in thesaur. Pasch. 39. E. 3. inter adjudicata coram rege in thesaur. lib. 2. fol. 92. (Cro. Car. 71.) 14. E. 3. tit. scire facias 122. but more fully in the record at large.

And therefore when the courts of justice be open, and the judges and ministers of the same may by law protect men from wrong and violence, and distribute justice to all, it is said to be time of peace. So, when by invasion, insurrection, rebellions, or such like, the peaceable course of justice is disturbed and stopped, so as the courts of justice be as it were shut up, *et silent leges inter arma*, then it is said to be time of warre. And the triall hereof is by the records, and judges of the court of justice; for by them it will appeare, whether justice had her equall course of proceeding at that time or no, and this shall not be tried by jury.

If a man be disseised in time of peace, and the discent is cast in time of warre, this shall not take away the entry of the disseisee.

Bracton lib. 4. fol. 240.

Item tempore pacis, quod dicitur ad differentiam eorum quæ fuerunt tempore belli, quod idem est, quod tempore guerrino, quod nihil differt à tempore juris, & injuriæ; est enim tempus injuriæ, cum fuerunt oppressiones violentæ, quibus resisti non potest & disseisinæ injustæ.

So as hereby it also appeareth, that time of peace is the time of law and right, and time of warre is the time of violent oppression, which cannot be resisted by the equall course of law. And therefore in all reall actions, the expleas, or taking of the profits, are layed *tempore pacis*, for if they were taken *tempore belli*, they are not accounted of in law (1).

Ingham cap. de novel disseisin.

" *Per occupation.*" *Occupation* is a word of art, and signifieth a putting out of a man's freehold in time of warre; and it is all one with a disseisin in time of peace, saving that it is not so dangerous as it appeareth here by *Littleton*; and therefore the law gave a writ in that case of *occupavit*, so called, by reason of that word in the writ, in stead of *disseisivit*, in the *assise* of *novel disseisin*, if the disseisin had beene done in time of peace; whereby it appeareth, how aptly both in this, and in all other places, *Littleton* thorow his whole booke speaketh. But albeit *occupatio*, whereof *Littleton* here speaketh, is used only in the said writ (2) and in none other, (that I can finde or remember) yet hath it beene used commonly in conveyances and leases, to limit, or make certaine precedent words, as *ad tunc in tenurâ & occupatione*. But *occupatio* is applyed to the possession, be it lawfull or unlawfull; it hath also crept into some acts of parliament, as 4. *H.* 7. *cap.* 19. 39. *Eliz. cap.* 1. and others; and *occupare* is sometimes taken to conquer.

Lib. 4. fol. 49, 50. Ognel's case.

" *Et de ceo home poit vier en un plea sur briefe de aiel, anno* 7. *E.* 2." Hereby it appeares, that ancient termes or yeares, after the example of *Littleton*, are to bee cited and vouched, for confirmation of the law, albeit they were never printed: and that of those yeares, those

(1) [See Note 190.] (2) [See Note 191.]

those especially of *E.* 1. *H.* 3. *&c.* are worthy of the reading and observation; a great number of which I have seene and observed, which in mine opinion doe give a great light, not onely to the understanding and reason of the common law, (which *Fitzherbert* either saw not, or were by him omitted) but also to the true exposition of the ancient statutes made in those times. Yet mine advice is, that they be read in their time. For after our studient is enabled and armed to set on our yeare bookes, or reports of the law, let him reade first the latter reports, for two causes. First, for that for the most part the latter judgements and resolutions are the surest, and therefore it is the best to season him with them in the beginning, both for the settling of his judgment, and for the retaining of them in memorie. Secondly, for that the latter are more facile and easier to be understood, than the more ancient: but after the reading of them, then to reade these others before mentioned, and all the ancient authors that have written of our law; for I would wish our studient to be a compleat lawyer. But now to returne. As it is in case of discent, so it is in case of presentation, for no usurpation in time of warre putteth the right patron out of possession, albeit the incumbent come in by institution and induction: and time of warre doth not onely give privilege to them that be in warre, but to all others within the kingdome; and although the admission and institution be in time of peace, yet if the presentment were in time of warre, it putteth not the right patron out of possession.

6. E. 3. 41. 7. E. 3. darr. pres. 2. 18. E. 2. quar. imp. 175. F. N. B. 33.

[250. a.]

Sect. 413.

*ITEM, * que nul morant seisie (ou les tenements viendront a un auter per succession) † tollera l'entre d'ascun person, &c. ‡ Come de prelates, abbots, priors, deans, ou parson d'esglise, ‖ ou d'auters corps politicke, &c. coment que ils fueront xx. morants seisie, et xx. successors, ceo ne tolle jammes ascun home de son entrie §.*

Plus serra dit de discents en le prochein ¶ chapter.

ALSO, that no dying seised (where the tenements come to another by succession) shall take away the entrie of any person, &c. As of prelates, abbots, priors, deanes, or of the parson of a church, or of other bodies politike, &c. albeit there were xx. dyings seised, and xx. successors, this shall not put any man from his entrie.

More shall be said of discents in the next chapter.

"*PER succession.*" This in the common law is applied only to bodies politike, or corporate, which have succession perpetuall, and not to naturall men: as to a bishop and his successors, or to an abbot, deane, archdeacon, prebend, parson, &c. and their successors, and not to *I. S.* of any other naturall body and his successors, but to him and his heires. And the successor of any of these is in the *post*, and the heire of the naturall man is in the *per*; and *succedere* is derived of *sub* and *cedere*.

Vid. Sect. 1. 7. E. 3. 25. a. 5. E. 3. 13. & 31.

" *Corps*

* *que* not in L. and M. nor Roh.
† *ne* added in L. and M. and Roh.
‡ *come—quar.* L. and M. and Roh.
‖ *ou d'auters corps politike,* not in L. and M. nor Roh.
§ *&c.* added L. and M. and Roh.
¶ *prochein chapitre—chapitre de continuelle clayme,* L. and M. and Roh.

" *Corps politique, &c.*" This is a body to take in succession, framed (as to that capacity) by policie, and thereupon it is called here by *Littleton* a body politike; and it is also called a corporation, or a body incorporate, because the persons are made into a body, and are of capacity to take and grant, &c. And this body politike, or incorporate, may commence, and be established three manner of ways, *viz.* by prescription, by letters patents, or by act of parliament. Every body politike, or corporate, is either ecclesiasticall or lay: ecclesiastical, either regular, as abbots, priors, &c. or secular, as bishops, deanes, archdeacons, parsons, vicars, &c. lay, as maior and communaltie, baylifes and burgesses, &c. Also every body politike, or corporate, is either elective, presentative, collative, or donative. And againe it is either sole, or aggregate of many; as you may reade in the Third Part of my Commentaries. And this body politike, or corporate, aggregate of many, is by the civilians called *collegium*, or *universitas*.

Lib. 3. fo. 73. in the case of the Deane and Chapter of Norwich. (1. Sid. 162. 11. Rep. 77. a.)

CHAP.

Chap. 7. Continuall Claime. (1) Sect. 414.

*CONTINUAL claime est ‡ la lou home ad droit et title d'entrer en ascuns terres ou tenements dont ** auter est seisie en fee, ou en fee taile, si cesty que ad title d'entrer fait continuall claime a les terres ou tenements devant le morant seisie de celuy que tient les tenements, donques coment que tiel tenant morust eit seisi, et les terres ou tenements discendront a son heire, uncore poit celuy que avoit fait tiel claime, ou son heire, enter en les terres ou tenements issint discendus, per cause de le continual claime fait, nient contristiant le discent. Sicome en case que home soit disseisie, et le disseisee fait continual claime a les tenements en la vie le disseisor, coment que le disseisor devie seisie en fee, et la terre discendist a son heire, uncore poit le disseisee enter sur la possession le heire, nient obstant le discent *.*

CONTINUAL claim is where a man hath right and title to enter into any lands or tenements whereof another is seised in fee, or in fee tail, if hee which hath title to enter makes continuall claime to the lands or tenements before the dying seised of him which holdeth the tenements, then albeit that such tenant dieth therof seised, and the lands or tenements descend to his heire, yet may he who hath made such continual claime, or his heire, enter into the lands or tenements so descended, by reason of the continuall claime made, notwithstanding the discent. As in case that a man bee disseised, and the disseisee makes continuall claime to the tenements in the life of the disseisor, although that the disseisor dieth seised in fee, and the land descend to his heire, yet may the disseisee enter upon the possession of the heire, notwithstanding the discent.

HERE our Author first describeth what a continuall claime is. It is called *continuum clameum,* because at the common law it must have beene made within every yeare and day, as *Littleton* here teacheth. And yet if hee that right hath, maketh claime, and the ter-tenant dieth within the yeare and the day, this claime though it [250. b.] bee but once * made (as hath beene said) shall preserve the entry of him that maketh the claime (1).

Mirror cap. 1. § 15. & § 18. Bracton li. 5. fo. 435, 436. Britton 107. b. 126. 4. Fleta lib. 6. cap. 52, 53. Vid. Sect. 424. Vid. Sect. 385. 32. H. 8. c. 33. * Vid. Sect 424.

" *Ad droit et title d'enter.*" And yet in some cases, a continuall claime may be made by him that hath right, and cannot enter.

If tenant for years, tenant by statute staple, merchant, or *elegit,* be ousted, and he in the reversion disseised, the lessor, or he in reversion, may enter to the intent to make his claime, and yet his entry as to take any profits, is not lawfull during the terme. And in the same manner, the lessor or he in the reversion in that case may enter to avoid a collaterall warranty, or the lessor in that case may recover in any assise. And so (as some have holden) may

Dyer 19. El. Pl. Com. 374. 15. H. 7. 3, 4. Jacobin's case. 28. H. 6. 28.

‡ *per* added L. and M.
** *un* added L. and M.

* *&c.* added in L. and M. and Roh.

(1) [See Note 192.]

[250. b.]
(1) [See Note 193.]

Vid. Sect. 442. 45. E. 3. 21.

may the lessor enter in case of a lease for life, to this intent, to avoid a discent, or a warranty.

7. H. 6. 40. Contin. Claime 1. Downcler's case. 5 E. 4. 4. (Plo. 191. a.) (9. Rep. 106.) (1. Rep. 67. a.)

If the disseisee make continuall claime, and the disseisor die seised within the yeare, his heire within age, and by office the king is intitled to the wardship, albeit the entry of the disseisee bee not lawfull, yet may he make continuall claime to avoid a discent, and so in the like.

(1. Roll. Abr. 630.)

"*Uncore poit celuy que fait tiel clayme ou son heire enter.*" This is to be understood in this manner: that if the father make claime, and the disseisor dieth, and then the father dieth, that his heire may enter, because the discent was cast in the father's time, and the right of entry which the father gained by his claime, shall descend to his heire. But if the father make continuall claime, and dieth, and the sonne make no continuall claime, and within the yeare and day after the claime made by the father, the disseisor dieth, this shall take away the entrie of the sonne, for that the discent was cast in his time, and the claime made by the father shall not availe him, that might have claimed himselfe. And of this opinion was *Littleton* himselfe in our bookes, where he holdeth, that no continuall claime can avoid a discent, unlesse it be made by him that hath title to enter, and in whose life the dying seised was. See more of this matter hereafter, in this chapter, Sect. 416.

Bracton lib. 5. fo. 436. Fleta lib. 5. cap. 52, 53. 22. H. 6. 37. 9. H. 4. 5. a. 15. E. 4. 22. a.

23. H. 6. 37.

And as here *Littleton* putteth his case of the ancestor and heire, so it holdeth in all respects, of the predecessor and successor.

(1. Rep. 14. a.)

Sect. 415.

[251. a.]

*En mesme le maner est, si tenant a terme de vie alien en fee, celuy en le reversion ou celuy en le remainder poit enter sur l'alienee. Et si tiel alienee devie seisie de tiel estate sans continual claime fait a les tenements, devant le morant seisi del alienee, et les tenements per cause del morant seisi del alienee discendont * a son heire, donques ne poit celuy en le reversion ne celuy en le remainder enter. Mes † si celuy en le reversion ou celuy en le remainder, que ad cause d'entre sur l'alienee, fait continual claime a les tenements devant le morant seisi del alienee, donques tiel home poit enter apres la mort l'alienee, auxy bien come il puissoit ‡ en sa vie §.*

In the same manner it is, if tenant for life alien in fee, hee in the reversion or he in the remainder may enter upon the alienee. And if such alienee dieth seised of such estate without continuall claime made to the tenements, before the dying seised of the alienee, and the lands by reason of the dying seised of the alienee descend to his heire, then cannot he in the reversion nor hee in the remainder enter. But if hee in the reversion or in the remainder, who hath cause to enter upon the alienee, make continuall claime to the land before the dying seised of the alienee, then such a man may enter after the death of the alienee, as well as he might in his life-time.

BY

* *a son heire,—al heire del aliene,* L. and M. and Roh.

† *si* not in L. and M. nor Roh.

‡ *puissoit en—poet a,* L. and M. and Roh.

§ *&c.* L. and M.

8

BY this it appeareth, that a continuall claime may be made as well where the lands are in the hands of a feoffee, &c. by title, as in the hands of a disseisor, abator, or intrudor, by wrong, as before hath beene noted. (1)

Sect. 416.

*ITEM, si terre soit lesse a un home pur terme de sa vie, le remainder a un auter a terme de vie, le remainder a la tierce en fee, si le tenant a terme de vie aliena a un auter en fee, et celuy en le remainder pur terme de vie fait continual claime a la terre devant le morant seisie d'alienee, et puis l'alienee morust seisie, * et puis apres celuy en le remainder pur terme de vie morust devaunt ascun entrie fait per luy, en ceo cas celuy en le remainder en fee poit enter † sur heire l'alienee, per cause de continual claime fait per luy que avoit le remainder pur terme de sa vie, pur ceo que tiel droit que il averoit d'entre, ‡ alera et remaindra a celuy en le remainder apres luy, entant que celuy en le remainder en fee § ne puissoit pas enter sur l'alienee en fee durant la vie celuy en le remainder pur terme de ‖ sa vie, et pur ceo ** que il ne puissoit adonques faire continual claim. †† (Car nul poit faire continual claim mes quant il ad title d'entrie, &c.)*

ALSO, if land be let to a man for terme of his life, the remainder to another for terme of life, the remainder to the third in fee, if tenant for life alien to another in fee, and he in the remainder for life maketh continuall claime to the land before the dying seised of the alienee, and after the alienee dieth seised, and after he in the remainder for life die before any entrie made by him, in this case he in the remainder in fee may enter upon the heire of the alienee, by reason of the continuall claime made by him which had the remainder for life, because that such right as hee had of entrie, shall goe and remaine to him in the remainder after him, insomuch as hee in the remainder in fee could not enter upon the alienee in fee during the life of him in the remainder for life, and for that hee could not then make continuall claim. (For none can make continuall claime but when hee hath title to enter, &c.)

"*ALIEN a un auter en fee.*" It is to be observed, that a forfeiture may be made by the alienation of a particular tenant, two manner of wayes; either *in pais*, or by matter of record. (1. Roll. Abr. 630.)

In pais, of lands and tenements which lie in livery (whereof *Littleton* intendeth his case) where a greater estate passeth by livery, than the particular tenant may lawfully make, whereby the reversion or remainder is devested, as here in the example that *Littleton* putteth when tenant for life alieneth in fee, which must bee understood of a feoffment, fine or recoverie by consent. [51.b.] Vide Sect. 581. 609, 610, 611. (1. Rep. 14.)

If tenant for life, and hee in the remainder for life in *Littleton*'s case, hath joyned in a feoffment in fee, this had beene a forfeiture of 17. El. Dy. 339. 16. El. Dy. 324.

* *&c.* added L. and M. and Roh.
† *&c.* added L. and M. and Roh.
‡ *ne* in L. and M. and Roh.
§ *que* added in L. and M. and Roh.
‖ *sa* not in L. and M. nor Roh.
** *que* not in L. and M. nor Roh.
†† *(Car nul poit faire continual claim)* not in L. and M. nor Roh.

(1) [See Note 194.]

of both their estates, because hee in the remainder is *particeps injuriæ*. And so it is if hee in the remainder for life had entred, and disseised tenant for life, and made a feoffment in fee, this had beene a forfeiture of the right of his remainder. (1)

33. E. 3. Devise 21. 15. E. 4. 9. Vide Sect. 608, 609, 610. (1. Roll. Abr. 854.)

A particular estate of any thing that lies in grant, cannot be forfeited by any grant in fee by deed. As if tenant for life or yeares of an advowson, rent, common, or of a reversion or remainder of land, by deed grant the same in fee, this is no forfeiture of their estates, for that nothing passes thereby, but that which lawfully may passe; and of that opinion is *Littleton* in our bookes.

(1. Rep. 76. b. 35. H. 6. 62. Tr. 32. El. in Informat. de intrusion vers Robinson pur le Manor de Drayton Basset, so resolved by the court of exchequer.

But if tenant for life or yeares of land, the reversion or remainder being in the king, make a feoffment in fee, this is a forfeiture, and yet no reversion or remainder is divested out of the king; and the reason is, in respect of the solemnitie of the feoffment by liverie, tending to the king's disherison. (2)

By matter of record, and that by three manner of wayes. First, by alienation. Secondly, by claiming a greater estate than he ought. Thirdly, by affirming the reversion or remainder to be in a stranger.

(Post. 332. b. 1. Leo. 40. 1. Roll. Abr. 855.)

First, by alienation; and that of two sorts, *viz.* by alienation divesting, or not divesting, the reversion or remainder. Divesting, as by levying of a fine, or suffering a common recoverie of lands, whereby the reversion or remainder is divested: not divesting, as by levying of a fine in fee, of an advowson, rent, common, or any other thing that lieth in grant: and of this opinion is *Littleton* in our bookes. * And so note two diversities: first, between a grant by fine (which is of record) and a grant by deed *in pais*; and yet in this they both agree, that the reversion or remainder in neither case is divested: secondly, betweene a matter of record, as a fine, &c. and a deed recorded, as a deed inrolled, for that worketh no forfeiture, because the deed is the originall.

* 15. E. 4. 9. 31. E. 3. Gr. 62. 14 E. 3. 9. Avow. 117.

45. E. 2. Judg. 37. 6. E. 3. 49. 9. E. 3. 4. 18. E. 2. Fines 120. 15. E. 4. 20. 36. H 6. 29. 2. H. 6. 9. 4. El. Dy. 9. H. 5. 14. 22. Ass. 31. 18. E. 3. 28. 16 Ass. 16. (Mo. 77. 212. 1. Rep. 16.)

Secondly, by claime; and that may be in two sorts, either expresse or implyed. Expresse, as if tenant for life will in court of record claime fee, or if lessee for yeares be ousted, and he will bring an assise *ut de libero tenemento*. Implyed, as if in a writ of right brought against him, he will take upon him to joyne the mise upon the meere right, which none but tenant in fee simple ought to doe. So if lessee for yeares doe lose in a *præcipe*, and will bring a writ of error, for error in processe, this is a forfeiture. (3)

21. E. 3. 14. a. 5. E. 4. 2. 24. H. 8. Forf. Br. 87. li. 2. fol. 55, 56. Buckler's case. 27. E. 3. 77. 17 E. 3. 7. a. 39. E. 3. 16. 29. E. 3. 24. 5. Ass. 5. 5. E. 3. entr. cong. 42. 14. E. 3.

[252]

Thirdly, by affirming the reversion or remainder to be in a stranger, and that either actively or passively. Actively, by five manner of wayes. As first, if tenant for life pray in aid of a stranger, whereby he affirmes the reversion to be in him. Secondly, if he atturne to the grant of a stranger; and there note also a diversitie betweene an atturnement of record to a stranger, and an atturnement *in pais*, for an atturnement *in pais* worketh no forfeiture. Thirdly, if a stranger bring a writ of entrie *in casu proviso*, and suppose the reversion to be in him, if the tenant for life confesse the action, this is a forfeiture. Fourthly, if tenant for life plead covinously, to the disherison of him in the reversion, this is a forfeiture.

(1) See the observations on feoffments introduced in the notes to the next chapter.

(2) See ant. 233. b. note.

(3) [See Note 195.]

feiture. Fifthly, if a stranger bring an action of waste against lessee for life, and he plead *nul wast fait*, this is a forfeiture; or the like.

receit 135. 3. E. 3. 32. 24 E. 3. 68. 1 H. 7.

(1. Roll. Abr. 852. 3. Rep. 4. b. 1. Leo. 264. 9. Rep. 106.)

Passively, as if tenant for life accept a fine of a stranger, *sur counsans de droit come ceo, &c.* for hereby he affirmes of record, the reversion to be in a stranger. (1)

3. Mar. Dy. 148.

Littleton here speaketh of the forfeiture of an estate; and here it is to be knowen, that the right of a particular estate may be forfeited also, and that he that hath but a right of a remainder or reversion, shall take benefit of the forfeiture. As if tenant for life be disseised, and hee levie a fine to the disseisor, he in the reversion or remainder shall presently enter upon the disseisor for the forfeiture. And so it is if the lessee after the disseisin had levied a fine to a stranger, though to some respects, *partes finis nihil habuerunt*, yet it is a forfeiture of his right.

Lib. 2. fol. 55. Buckler's case.

Littleton here speaketh of an alienation in fee absolutely, but so it is if the lessee for life make a lease for any other man's life, or a gift in taile. If *A.* be tenant for life, and make a lease to *B.* for his life, and *B.* dieth, and the lessee re-entreth, yet the forfeiture remaineth.

13. E. 4. 4.

If tenant for life make a lease for life, or a gift in taile, or a feoffment in fee, upon condition, and entreth for the condition broken, yet the forfeiture remaineth. *Littleton* speaketh of an estate for life; so it is of tenant in taile *apres possibilitie*, tenant by the courtesie, tenant in dower, or of him that hath an estate to him and his heires, during the life of *I. S.* &c. and so of tenant for yeares, tenant by statute merchant, statute staple, or *elegit*.

(Ant. 202. b.) 39. Ass. 15. 43. E. 3. ent. cong. 30. 2. H. 5. 7. 39. E. 3. 16. 45. E. 3. 25. (Ant. 28. a. 42. a.)

Littleton saith, that where the alienation in fee is made to another, which must be intended a stranger, for if it be made to him in reversion or remainder, it amounts to a surrender of his estate, as at large hath beene spoken in the chapter of tenant for life.

By *Littleton* it appeareth, that tenant for life in remainder may enter for the forfeiture of the first tenant for life, and that if the tenant for life in remainder make continuall claime, and the alienee die seised, then may he in the remainder for life enter; and if he die before he do enter, then he in the remainder in fee shall enter, because he in the remainder in fee could not make any claime (2); and therefore the right of entrie, which tenant for life in remainder gained by his entrie, (3) shall goe to him in the remainder in fee, in respect of the privitie of estate: and so it is of him in the reversion in fee in like case, for he is also privie in estate.

(1. Roll. Abr. 630.)

If two joyntenants be disseised, and the one of them make continuall claime and dieth, the survivor shall take benefit of his continuall claime in respect of the privitie of their estate.

But if tenant for life make continuall claime, this shall not give any benefit to him in the remainder, unlesse the disseisor died in the life of tenant for life, for the cause abovesaid, *Sectione* 414.

If tenant in taile, the remainder in fee with garrantie, have judgement to recover in value, and dieth before execution without issue,

(1) [See Note 196.]

(2) *i. e.* during the life of him in the remainder for life.

(3) The word *entry* appears to be printed in this case by mistake, instead of the word *claim*, which the context seems to require.

issue, he in the remainder shall sue execution, for he hath right thereunto, and is privie in estate.

In the same manner, if a seigniorie be granted by fine to one for life, the remainder in fee, the grantee for life dieth, he in the remainder shall have a *per quæ servitia*, for he hath right to the remainder, and is privie in estate. Here also it appeareth, that none can make continuall claime, but he that hath right to enter.

Sect. 417.

MES est a veier a toy (mon fits) coment et en quel manner tiel continual claime serra fait: et ceo bien apprender, trois choses sont a intender. La 1. *chose est, si home ad cause d'entre en ascuns terres ou tenements que sont en divers villes deins un mesme countie, s'il enter en un parcel de les terres ou tenements que sont en un ville, en nosme de touts ses terres ou tenements as queux il ad droit d'enter deins touts les villes de mesme le countie;* * *per tiel entrie il avera auxy bone possession et seisin de* † *touts terres ou tenements dont il ad title d'entrie, sicome il avoit enter* ‡ *en fait en chescun parcel: et ceo semble grand reason.*

BUT it is to be seene of thee (my son) how and in what manner such continuall claime shall be made: and to learne this wel, three things are to be understood. The first thing is, if a man hath cause to enter into any lands or tenements in divers townes in one same countie, if he enter into one parcell of the lands or tenements which are in one towne, in the name of all the lands or tenements into the which he hath right to enter within all the townes of the same countie; by such entrie he shall have as good a possession and seisin of all the lands and tenements whereof he hath title of entrie, as if hee had entred in deed into every parcell: and this seemeth great reason.

(Plo. 355. b. 359. a. 2. Inst. 518. 3. Rep. 91. a.)

(Post. 263. b.)

This hath beene adjudged, Mich. 14. & 15. Eliz. Rot. 1458. in the Earl of Arundell's case.

"*SI home ad cause d'entrer en ascuns terres ou tenements, &c.*" It is not sufficient to tell one generally what he should doe, but to direct him how, and in what manner he shall doe it, as *Litleton* doth in this place. And here, the generall rules of our author are to bee understood, that the entrie of a man, to recontinue his inheritance or freehold, must ensue his action for recoverie of the same. As if three men disseise me severally, of three severall acres of land, being all in one countie, and I enter in one acre, in the name of all the three acres, this is good for no more but for that acre which I entered into, because each disseisor is a severall tenant of the freehold, and as I must have severall actions against them, for the recoverie of the land, so mine entrie must be severall. [252.

(4. Leo. 8.)
(1. Leo. 36.)
(1. Roll. Abr. 738.)
(1. Leo. 51.)

And so it is if one man disseise mee of three acres of ground, and letteth the same severally to three persons for their lives, &c. there the entrie upon one lessee, in the name of the whole, is good for no more than that acre that he hath in his possession. But if the disseisor had letten severally the said three acres to three persons for yeares, there the entrie upon one of the lessees, in the name

* *et* added in L. and M. and Roh.
† *touts—tiels*, L. and M. and Roh.
‡ *en fait* not in L. and M. nor Roh.

name of all the three acres, shall recontinue and revest all the three acres in the disseisee, for that the disseisee might have had one assise against the disseisor, because he remained tenant of the freehold for all the three acres, and therefore one entrie shall serve for the whole.

If one disseise me of one acre at one time, and after disseise me of another acre in the same countie at another time, in this case mine entrie into one of them in the name of both is good: for that one assise might be brought against him for both disseisins.

7. Ass. 18.
12. E. 4. 10.
36. H. 6. 27.
32. Ass. pl. 1.

But if I infeoffe one of one acre of ground upon condition, and at another time I infeoffe the same man of another acre in the same countie upon condition also, and both the conditions are broken, an entrie into one acre in the name of both is not sufficient, for that I have no right to the land, nor action to recover the same, but a bare title, and therefore severall entries must be made into the same, in respect of the severall conditions. But an entrie in one part of the land, in the name of all the land subject to one condition, is good, although the parcels be severall, and in severall townes. And so note a diversitie betweene severall rights of entrie, and severall titles of entrie, by force of a condition (1).

11. H. 7. 25.
Dyer.
16. El. 337.

" *Deins mesme la countie.*" For if the lands lye in severall counties, there must be severall actions, and consequently severall entries, as hath beene said.

" *En nosme de tout, &c.*" If one disseise me of two severall acres in one countie, and I enter into one of them generally, without saying, In the name of both; this shall revest only that acre wherein entrie is made, as hath beene said; and that is proved by our bookes, which say, that if I bring an assise of two acres, if I enter into one hanging the writ, albeit it shall revest that only acre, yet the writ shall abate.

5. H. 7. 7.
4. E. 4. 19.
12. E. 4. 11. a.
(Ant. 52. 180. b.)
(10. Rep. Lampet's case.)
(Plo. Com. 91.)

" *Dont il ad title d'entrie.*" Here in a large sense, title of entrie is taken for a right of entrie.

[253. a.]

Sect. 418.

(9. Rep. 136. b.)
(Ant. 48, 49, 50. Post. 259. a.)
(2. Rep. 31.)

CAR si home voile enfeoffer un auter sans fait de certaine terres ou tenements que il ad deins plusours villes en un countie, et il voile liverer seisin al feoffee de parcel de tenements deins un ville en nosme de touts les terres ou tenements que il ad en mesme le ville, et en les auters villes, &c. touts les dits tenements, &c. passont per force de le dit livery de seisin a celuy a que tiel feoffement en tiel maner est fait, et uncore celuy a que tiel livery

FOR if a man will enfeoffe another without deed of certaine lands or tenements which he hath in many townes in one countie, and he will deliver seisin to the feoffee of parcell of the tenements within one towne in the name of all the lands or tenements which he hath in the same towne, and in other townes, &c. all the said tenements, &c. passe by force of the said livery of seisin to him to whom such feoffment in such manner is made, and

(1) [See Note 197.]

*livery de seisin fuit fait, n'avoit droit * en touts les terres ou tenements en touts les villes, mes per cause de livery de seisin fait de parcel de les terres ou tenements en un ville :* à multò fortiori, *il semble bone reason que quant home ad title d'enter en les terres ou tenements en divers villes deins un mesme county, devant ascun entry per luy fait, que per l'entry fait per luy en parcel de les terres en un ville, en le nosme de touts les terres et tenements as queux il ad title d'enter deins mesme le countie, ceo † vest un seisin de touts en luy, et per tiel entry il ad possession et seisin en fait, sicome il avoit enter en chescun parcel, &c.*

and yet hee to whom such livery of seisin was made, hath no right in all the lands or tenements in all the townes, but by reason of the livery of seisin made of parcell of the lands or tenements in one towne: *à multò fortiori*, it seemeth good reason that when a man hath title to enter into the lands or tenements in divers townes in one same county, before entry by him made, that by the entry made by him into parcell of the lands in one towne, in the name of all the lands and tenements to which he hath title to enter within the same county, this shall vest a seisin of all in him, and by such entry hee hath possession and seisin in deed, as if he had entred into every parcell.

38. E. 3. 11. 38. Ass. 23.

THIS is evident, but here is a diversity betweene a feoffment and an entry; for a man may make a feoffment of lands in another county, and make livery of seisin within the view, albeit he might peaceably enter and make actuall livery; and so may he shew the recognitors in an assise, the view of lands in another county; but a man cannot make an entry into lands within the view where he may enter without any feare (for it is (*) one thing to invest, and another to devest), as hereafter shall be said in the Section next following.

(*) Vid. Sect. next following.

Vid. Sect. 438.

" *A multò fortiori.*" Or *à minore ad majus*, is an argument frequent in our author, and in our bookes, the force of argument in this place standing thus: if it be so in a feoffment passing a new right, much more it is for the restitution of an antient right, as the worthier and more respected in law, which holdeth affirmatively, as our author here teacheth us.

The three, (*&c.*) in this Section need no explication.

Sect. 419.

[253. b.]

LE second chose est a entender, que si home ad title d'enter en ascuns terres ou tenements, s'il ne osast enter en mesmes les terres ou tenements, ne en ascun parcel de ceo per doubt de battery, ou per doubt de mayhem, ou per doubt de mort, s'il alast et approch auxy pres les tenements come il osast pur tiel

THE second thing to be understood is, that if a man hath title to enter into any lands or tenements, if he dares not enter into the same lands or tenements, nor into any parcell thereof for doubt of beating, or for doubt of mayming, or for doubt of death, if he goeth and approach

* *ex—a*, L. and M. and Roh.

† *vest—est*, L. and M. and Roh.

*tiel doubt, et claime per parol les tenements estre les soens, maintenant per tiel claime, il ad un possession et seisin en les tenements, auxy bien come * s'il ust enter en fait, coment que il n'avoit unque possession ou seisin de mesme les † terres ou tenements devant le dit claime.*

proach as neere to the tenements as hee dare for such doubt, and by word claime the lands to bee his, presently by such claime he hath a possession and seisin in the lands, as well as if hee had entred in deed, although hee never had possession or seisin of the same lands or tenements before the said claime.

HERE is to be observed, that every doubt or feare is not sufficient, for it must concerne the safety of the person of a man, and not his houses or goods; for if hee feare the burning of his houses, or the taking away or spoiling of his goods, this is not sufficient, because hee may recover the same, or dammages to the value without any corporall hurt.

Vide the Sect. preceding. (2. Roll. Abr. 124. 2. Inst. 483.) 7. E. 4. 21. 39. H. 6. 5.

Again, if the feare doe concern the person, yet it must not bee a vaine feare, but such as may befall a constant man; as if the adverse partie lie in wait in the way with weapons, or by words menace to beat, mayhem, or kill him that would enter; and so in pleading must hee shew some just cause of feare, for feare of it selfe is internall and secret. But in a speciall verdict, if the jurors doe finde that the disseisee did not enter for feare of corporall hurt, this is sufficient, and shall be intended that they had evidence to prove the same. *Talis enim debet esse metus qui cadere potest in virum constantem, et qui in se continet mortis periculum, et corporis cruciatum. Et nemo tenetur se infortuniis et periculis exponere.*

(9. Rep. 23.) 39. E. 3. 28. 11. R. 2. tit. dures 2. 12. H. 4. 19, 20. Bract. lib. 2. fol. 16. b. Britton fol. 19. 66. Fleta lib. 3. cap. 7. and lib. 2. cap. 54. 49. E. 3. 14. 14. H. 4. 13. 39. Ass. 11. 11. H. 6. 51. 38. H. 6. 27. 39. H. 6. 36. 5. 20. H. 6. 28. 4. E. 4. 17. 12. E. 4. 7. 28. H. 6. 8. 41. E. 3. 9. 11. H. 4. 6. 8. Ass. 25. Vid. Sect. 434. W. 2. cap. 49. 13. H. 4. dures 20.

And it seemeth that feare of imprisonment is also sufficient, for such a feare sufficeth to avoid a bond or a deed; for the law hath a speciall regard to the safety and liberty of a man. And imprisonment is a corporall dammage, a restraint of liberty, and a kind of captivity. But see in the Second Part of the Institutes, *W.* 2. *cap.* 49. a notable diversity betweene a claime or an entry into land, and the avoidance of an act or deed for feare of battery.

" *Per tiel claime il ad un possession et seisin, &c.*" Here is to be observed, that there be two manner of entries, *viz.* an entry in deed, and an entry in law. An entry in deed is sufficiently knowne. An entry in law is when such a claime is made as is here expressed, which entry in law is as strong and as forcible in law as an entry in deed, and that as well where the lands are in the hands of one by title as by wrong. And therefore upon such an entry in law an assise doth lie, as well as upon an entry in deed, and such an entry in law shall avoid a warranty, &c.

Vid. Sect. 378. 11. H. 6. 51. (Post. 256. b.)

But here is a diversity to be observed betweene an entry in law and an entry in deed, for that a continuall claime of the disseisee being an entry in law, shall vest the possession and seisin in him for his advantage, but not for his disadvantage. And therefore if the disseisee bring an assise, and hanging the assise he make continuall claime,

Vid. Sect. 442. Pl. Com. 93. in Ass. de-fresh-force. The parson of Honylane's case.

* *st* not in L. and M. nor Roh. † *terres ou* not in L. and M. nor Roh.

claime, this shall not abate the assise, but he shall recover dammages from the beginning; but otherwise it is of an entry in deed. See more of this matter after in this chapter, Sect. 422.

Sect. 420.

ET que la ley est tiel, il est bien prove per un plee d'un assise en le liver d'assise, an. 38. E. 3. p. * 32. *le tenor de quel ensuist en tiel forme. En le county de* Dorset, *devant les justices, trove fuit per verdict d'assise, que le plaintife que aveit droit per discent de heritage d'aver les tenements mis en plaint, al temps del morant son ancester fuit demurrant en le ville ou les tenements fueront, † et per parolx claime les tenements enter ses vicines, mes pur doubt de mort il n'osa approcher les tenements, mes port l'assise, et sur cest matter trove, agard fuit que il recovera, &c.*

AND that the law is so, it is well proved by a plea of an assise in the booke of assises, *an.* 38. *E.* 3. *p.* 32. the tenor whereof followeth in this manner. In the county of *Dorset*, before the justices, it was found by verdict of assise, that the plaintiff which had right by discent of inheritance to have the tenements put in plaint, at the decease of his ancestor was abiding in the towne where the tenements were, and by paroll claimed the tenements amongst his neighbours, but for feare of death hee durst not approach the tenements, but bringeth his assise, and upon this matter found, it was awarded that he should recover, &c.

38. Ass. p. 23.

HERE it appeareth that our booke cases are the best proofes what the law is, *Argumentum ab autboritate est fortissimum in lege.* And for proofe of the law in this particular case, *Littleton* here citeth a case in 38. E. 3. but it is misprinted, for the originall, according to the truth, is in the Booke of *Assises*, 38. E. 3. p. 23. and not *placito* 32. for there be not so many pleas in that yeare. And after the example of *Littleton*, booke cases are principally to be cited for deciding of cases in question, and not any private opinion, *teste meipso.* More shall be said of the matter implyed in this Section in the next following.

Sect. 421.

LA tierce chose est a entender deins quel temps ‡ et per quel temps le claime que est dit continual claime servera et aidera celuy que fist le claime, et ses heires. Et quant a ceo est ascavoir, que celuy que ad title d'enter, quant il voiet faire son claime, si il osast approacher la terre, donques il covient aler,

THE third thing is to know within what time and by what time the claim which is said continuall claime shall serve and aid him that maketh the claime, and his heires. And as to this it is to be understood, that hee which hath title to enter, when he will make his claime, if hee dare

* p. 32. not in L. and M. nor Roh.
† *&c.* added L. and M. and Roh.

‡ *et per quel temps* not in L. and M. nor Roh.

*aler a la terre, ou a parcel de ceo, * et faire son claime; et s'il n'osast approcher la terre pur doubt ou pavor de batterie, ou mayhem, ou mort, donques covient a luy d'aler et approcher auxypres come il osast vers la terre, ou † parcel de ceo, ‡ a faire son claime.*

dare approach the land, then he ought to goe to the land, or to parcell of it, and make his claime; and if hee dare not approach the land for doubt or feare of beating, or maiming, or death, then ought hee to goe and approch as neere as hee dare towards the land, or parcell of it, to make his claime.

"COVIENT *a luy d'aller et approcher auxipres, &c.*" By this it should seeme, that by the authority of our author, if the disseisee commeth as neere to the land as he dare, &c. and maketh his claime, this should be sufficient, albeit he be not within the view.

And the great authoritie of the booke * in 9. H. 4. (being by the whole court) is not against this; for that case is put where there is no such feare, as here our author mentioneth, in him that makes the continuall claime, and then he that makes the continuall claime ought to bee within the view of the land; and therefore the authoritie of this booke, as it is commonly conceived, is not against the opinion of our author in the point aforesaid. But then it is further objected, that the said booke is against another opinion of our author in this Section, *viz.* that where there is no feare, &c. hee that maketh a continuall claime * ought to go to the land or to parcell thereof to make his claime, and therefore in that case he cannot make a claime within the view of the land. To this it is answered, that where a continuall claime shall devest any estate in any other person in any lands or tenements, there, as it hath beene said, he that maketh the claime ought to enter into the land, or some part thereof, according to the opinion of our author: but where the claime is not to devest any estate, but to bring him that maketh it into actuall possession, there a claime within the view sufficeth; as upon a discent, the heire having the freehold in law may claime land within the view to bring himselfe into actual possession, and in that sense is the opinion of *Hull* and the court to be intended. *Et sic in similibus.* But yet the entry into some parcell in the name of the residue is the surest way. (1)

[254. b.]

* 9. H. 4. 5.

* 11. H. 6. 31. agreeth with our author in this point.

(3. Rep. 25. Ant. 15. Ant. 245.)

Vid. Sect. 177.

Sect. 422.

ET si son adversarie que occupia le terre, morust seisie en fee, ou en fee taile, deins l'an et le jour apres tiel claim, per que les tenements discendont a son fits come heire a luy, uncore poit celuy que fist le claime entrer sur le possession le heire, ‡ &c.

AND if his adversary who occupieth the land, dieth seised in fee, or in fee taile, within the yeare and a day after such claime, whereby the lands descend to his sonne as heire to him, yet may hee which make the claime enter upon the possession of the heire, &c.

"DEINS

* *a* added in L. and M. and Roh.
† *a—et*, L. and M. and Roh.
‡ *&c.* not in L. and M. nor Roh.

(1) [See Note 198.]

Vid. Sect. 385. 426. 9. H. 4. 5. 14. H. 4. 36. 7. E. 3 37. Pl. Com. 356, 357. 367. Mirror, cap. 2. § 18. Britton fol. 45. b. & 126. (Post 262. a.)

(Ant. 130. b.)

"DEINS l'an et le jour." It is to bee observed, that the law in many cases hath limited a yeare and a day to be a legall and convenient time for many purposes. As at the common law, upon a fine or finall judgement given in a writ of right, the party grieved had a yeare and a day to make his claime. So the wife or heire hath a yeare and a day to bring an appeale of death. If a villeine remained in antient demesne a yeare and a day, he is privileged. If a man be wounded or poysoned, &c. and dieth thereof within the yeare and the day, it is felony. By the antient law if the feoffee of a disseisor had continued a yeare and a day, the entry of the disseisee for his negligence had beene taken away. After judgement given in a reall action, the plaintife within the yeare and the day may have a *habere facias seisinam*, and in an action of debt, &c. a *capias, fieri facias*, or a *levari facias*. A protection shall be allowed but for a yeare and a day, and no longer, and in many other cases.

Vid. Sect. 385.

But this time of a yeare and a day in case of continuall claime is, since our author wrote, altered by the said statute of 32. *H.* 8. *ca.* 33. as before it appeareth.

Sect. 423.

[255. a.]

MES en cest cas apres l'an et le jour que tiel claime fuit fait, * *si le pere donques morust seisi ademaine procheine apres l'an et le jour, ou* † *un auter jour apres, &c. donques ne poit celuy que fist le claime entrer: et pur ceo si celuy que fist le claime voit estre sure a touts temps que son entre ne serra toll per tiel discent, &c. il covient a luy que deins l'an et le jour apres le primer claime* ‡ *fait, de faire un auter claime en le forme avantdit, et deins l'an et le jour apres le second claime* ‖ *fait, de faire le tierce claime en mesme le maner, et deins l'an et le jour de le tierce claime de faire un auter claime, et issint ouster, c'est asçavoir, de faire un claime deins chescun an et jour procheine apres chescun claime fait durant la vie son adversarie, et donques a quecunques temps que son adversarie morust seisi, son entrie ne serra tolle per nul tiel discent. Et tiel claime en tiel maner* § *fait, est pluis communement*

BUT in this case after the yeare and the day that such claime was made, if the father then died seised the morrow next after the yeare and the day, or any other day after, &c. then cannot hee which made the claime enter: and therefore if hee which made the claime will be sure at all times that his entrie shall not be taken away by such discent, &c. it behoveth him that within the yeare and the day after the first claime made, to make another claime in forme aforesaid, and within the yeare and the day after the second claime made, to make the third claime in the same manner, and within the yeare and the day after the third claime to make another claime, and so over, that is to say, to make a claime within everie yeare and day next after everie claime made during the life of his adversarie, and then at what time soever his adversarie dieth seised, his entrie shall not

* *si nul auter clayme fuist fait*, added in L. and M. and Roh.
† *a* added in L. and M. and Roh.
‡ *fait* not in L. and M. nor Roh.
‖ *fait* not in L. and M. nor Roh.
§ *d'estre* added in L. and M. and Roh.

ment prise et nosme Continual Claime de luy que fist le claime.

not be taken away by any discent. And such claime in such manner made, is most commonly taken and named Continuall Claime of him which maketh the claime, &c.

IT is to be observed, that the yeare and the day shall bee accounted, as the day whereon the claime was made shall be accounted one: as for example, if the claime were made 2. *die Martii*, that day shall be accounted for one; for *Littleton* saith in the Section next before (after the claime made) and then the yeare must end the first day of *March*, and the day after is the second day of *March*.

Vid. Sect. 385. (Ant. 46. b.)

See for the computation of the yeare, *de anno bisextili*, and of the day naturall and artificiall, and other parts of the yeare, [a] *Bracton*, [b] *Britton*, and [c] *Fleta* excellent matter.

[a] Bract. fol. 264. 344. 359. (2. Roll. Abr. 1521.) [b] Britton fol. 209. [c] Fleta lib. 6. cap. 11. Statute de anno Bisextili. 21. H. 3. Dier 17. Eliz. 345.

Sect. 424.

[255. b.]

*MES uncore en le cas avantdit, lou son adversarie morust deins l'an et la jour procheine apres le * claime, ceo est en ley un continual claime, entant que l'adversarie deins l'an et le jour procheine apres mesme la claime morust. Car il ne besoigne a celuy que fist son claime de faire ascun auter claime, mes a quel temps que il † voit deins mesme l'an et jour, &c.*

BUT yet in the case aforesaid, where his adversarie dieth within the yeare and the day next after the claime, this is in law a continuall claime, insomuch as his adversarie within the yeare and the day next after the same claime dieth. For hee which made his claime needeth not to make any other claime, but at what time hee will within the same yeare and day, &c.

This is evident.

Vid. Sect. 414.

Sect. 425.

(Vid. Stat. 32. H. 8. c. 33.)

ITEM, si l'adversarie soit disseisie deins l'an et le jour apres tiel claime, et le disseisor ent morust seisie deins l'an et le jour, &c. tiel morant seisie ne grievera my celuy que fist le claime, mes que il poit enter, &c. Car quecunque soit que morust seisie deins l'an et le jour procheine apres tiel claime fait, ceo ne grievera my celuy que fist le claime, mes que il poit enter, &c. coment

ALSO, if the adversarie be disseised within the yeare and the day after such claime, and the disseisor thereof dieth seised within the yeare and the day, &c. such dying seised shall not grieve him which made the claime, but that he may enter, &c. For whosoever hee be that dieth seised within the yeare and the day after such claim made, this shall

* *primer* added L. and M. and Roh. † *voit* not in L. and M. nor Roh.

ement que fueront plusors morant seisie, et plusors discents deins mesme l'an et le jour, &c.

shall not hurt him that made the claime, but that hee may enter, &c. albeit there were many dyings seised, and many discents within the same yeare and day, &c.

HERE it appeareth, that the continuall claime doth not only extend to the first disseisor, in whose possession it was made, but to any other disseisor, that dieth seised within the yeare and day after the continuall claime made. And whereas our author speaketh of a second disseisor, &c. herein is likewise implyed not only abators and intruders, but the feoffees or donees of the disseisors, abators, or intruders, and any other feoffee or donee immediate or mediate, dying seised within the yeare and day, of such continuall claime made.

Sect. 426.

*ITEM, si home soit disseisie, et le disseisor morust seisie deins l'an et le jour prochein apres le disseisin fait, per que les tenements discendont a son heire, en cest case l'entrie le disseisee est toll, car l'an et le jour que aidroit le disseisee en tiel case *, ne serra pris de temps de title d'entre a luy accrue, mes tantsolement de temps del claime per luy fait en le manner avant dit. Et pur cel cause il serroit bone pur tiel disseisee pur faire son claime † en auxy breve temps que il puissoit apres le disseisin, &c.*

ALSO, if a man be disseised, and the disseisor dieth seised within the yeare and day next after the disseisin made, whereby the tenements descend to his heire, in this case the entrie of the disseisee is taken away, for the yeare and day which should aid the disseisee in such case, shall not bee taken from the time of title of entrie accrued unto him, but only from the time of the claime made by him in manner aforesaid. And for this cause it shall be good for such disseisee to make his claime in as short time as he can after the disseisin, &c.

[256. a.]

32. H. 8. cap. 33. Vide Sect. 385. 422. (Ant. 238. a.)

THIS in case of a disseisor is now holpen by the statute made since *Littleton* wrote, as hath beene said; for if the disseisor die seised within five yeares after the disseisin, though there be no continuall claime made, it shall not take away the entrie of the disseisee, but after the five yeares there must be such continuall claime as was at the common law: but that statute extendeth not to any feoffee or donee of the disseisor immediate or mediate, but they remaine still at the common law, as hath beene said.

* *&c.* added L. and M. † *&c.* added L. and M.

Sect. 427.

ITEM, si tiel disseisor occupia la terre per xl. ans, ou per ‡ plusors ans, sans ascun claime fait per le disseisee, &c. § et le disseisee per petit space devaunt le mort del disseisor fait un claime en le forme avantdit, si issint fortunast que deins l'an et le jour apres tiel claime le disseisor morust, &c. l'entrie le disseisee est congeable, &c. Et pur ceo il serroit bone pur tiel home que ne fist claime, que ad bone title d'entrie ‖, quant il oyet que son adversarie gist languishment, de faire son claime, &c.

ALSO, if such disseisor occupieth the lands fortie yeares, or more yeares, without any claime made by the disseisee, &c. and the disseisee a little before the death of the disseisor makes a claime in the forme aforesaid, if so it fortuneth that within the yeare and the day after such claime the disseisor die, &c. the entrie of the disseisee is congeable, &c. And therefore it shall bee good for such a man which hath not made claime, and which hath good title of entrie, when hee heareth that his adversarie lieth languishing, to make his claime, &c.

THIS is evident enough, and in respect of that which hath beene said, needeth not to be explained.

Sect. 428.

ITEM, sicome est dit en les cases mises, lou home ad title d'entre pur cause d'un disseisin, &c. mesme la ley est lou home ad droit d'entre per cause de ascun auter title, &c.

ALSO, as it is said in the cases put, where a man hath title of entrie by cause of a disseisin, &c. the same law is where a man hath right to enter by cause of another title, &c.

HERE title is taken in his large sense, to include a right.

[256. b.] "*Ascun auter title, &c.*" Here is implyed abators or intruders, and not only their disseisors, but the feoffees or donees of disseisors, abators, or intruders, or any other so long as the entrie is congeable.

Sect. 429.

*ITEM, de les dits * presidents poies scaver (mon fits) deux choses. Un est, lou home ad title d'entre sur un tenant en le taile, s'il fist un tiel claime a la terre, donques est l'estate taile defeat, car cel claime est come entre fait per luy, et est de mesme l'effect en ley, sicome*

ALSO, of the said foresaying thou mayst know (my sonne) two things. One is, where a man hath title to enter upon a tenant in taile, if he maketh such a claime to the land, then is the estate taile defeated, for this claime is as an entrie made

‡ *plus* added L. and M.
§ *et* not in L. and M.
‖ *&c.* added L. and M.
* *dites precedents* L. and M.

sicome il fuissoit sur mesmes tenements, et ust entrer en mesmes les tenements, come devant est dit. † *Et donques quant le tenant en le taile immediate puis tiel claime continua son occupation en les tenements, ceo est un disseisin fait de mesmes les tenements a celuy que fist tiel claime*, et sic per consequens, *le tenant adonques ad fee simple.*

made by him, and is of the same effect in law, as if he had bin upon the same tenements, and had entred into the same, as before is said. And then when the tenant in taile immediately after such claime continue his occupation in the lands, this is a disseisin made of the same tenements to him which made such claime, and so by consequent, the tenant then hath a fee simple.

" *Presidents.*" This should be *precedents*, and so is the originall, and this agreeth with the right sense of *Littleton.*

(Ant. 233.) And here it appeareth, that a continuall claime, which is an entrie in law, is as strong as an entrie in deed.

Vide Sect. 650. and 659, &c. " *Title de entrie.*" Here *title de entrie* is taken in the large sense for right of entrie.

Sect. 430.

LE second chose est, que auxy sovent que il que ad droit d'entre fait tiel claime, ‡ *et ceo nient contristeant son adversary continua son occupation,* § *auxy sovent l'adversary fait tort et disseisin a celuy que fist le claime. Et par cel cause auxy sovent poit celuy que fist* ‖ *mesme le claime pur chescun tiel tort et disseisin fait a luy, aver un briefe de trespasse,* ⸸ Quare clausum fregit, &c. *et recovera ses damages, &c.*

THE second thing is, that as often as hee which hath right of entrie maketh such claime, and this notwithstanding his adversary continue his occupation, so often the adversary doth wrong and disseisin to him which made the claime. And for this cause so often may hee which makes the same claime for every such wrong and disseisin done unto him, have a writ of trespasse, *Quare clausum fregit, &c.* and recover his dammages, &c.

[257. a.

HEREBY also it appeareth, that an entry in law is equivalent to an entry in deed.

(2. Roll. Abr. 550. 1. Rep. 98. 2. Leo. 302. 20. H. 6. 15. 38. H. 6. 27.)

" *Avera breve de trespasse,* quare clausum fregit, *et recovera ses damages.*" The disseisee shall have an action of trespasse against the disseisor, and recover his dammages for the first entry without any regresse, but after regresse he may have an action of trespasse with a *continuando*, and recover as well for all the meane occupation as for the first entry. And here note, that *Littleton* doth here include costs within dammages.

† *Et* not in L. and M. nor Roh.
‡ *et ceo—&c.* L. and M. and Roh.
§ *&c.* added L. and M. and Roh.
‖ *mesme* not in L. and M. nor Roh.
⸸ Quare clausum fregit, *&c. et recovera ses damages, &c. ou il poit aver un briefe,* (the beginning of the next Section) not in L. and M. nor Roh. nor in MSS. before mentioned. It may be here observed, that the older copies of Littleton are not divided into Sections, which seem to have been first injudiciously marked by West in the edition 1585, though his divisions have been since retained for the convenience of citation.

Sect. 431.

OU il poit aver un briefe sur le statute le roy Richard *le second, fait l'an de son raigne* 5. *supposant per son briefe que son adversary avoit entrer en les terres* ‡ *ou tenements celuy que fist le claime, ou son entry ne fuit pas done per la ley, &c. et per tiel action il recovera ses dammages, &c. Et si le case fuit tiel, que l'adversary occupiast les tenements ove force et armes, ou ove multitude de gents a temps de tiel claime, &c.* ‖ *immediate apres mesme le claime poit celuy que fist le claime pur chescun tiel fait aver un briefe de forcible entry, et recovera ses treble dammages, &c.*

OR he may have a writ upon the statute of *R.* 2. made in the fifth yeare of his reigne, supposing by his writ that his adversarie had entred into the lands or tenements of him that made the claime, where his entry was not given by the law, &c. and by this action he shall recover his dammages, &c. And if the case were such, that the adversarie occupied the tenements with force and armes, or with a multitude of people at the time of such claime, &c. immediately after the same claime may hee which made the claim for every such act have a writ of forcible entry, and shall recover his treble dammages, &c. (1)

THIS is the statute of 5. *R.* 2. *cap.* 7.

(Doc. Pla. 381.) 37. H. 6. 35.
34. H. 6. 30. 13. H. 7. 15. 10. H. 6. 14. 2. E. 4. 18. 21. E. 4. 5. 74.
13. E. 2. 3. 27. Ass. 64. 38. Ass. 9. 44. E. 3. 20. 10. H. 7. 27.
Keylwey 1. b. 5. R. 2. cap. 7. (F. N. B. 248, 249.)

" *Per tiel action il recovera ses dammages.*"
This is to be understood, that he shall recover dammages for the first torcious entry, but not for the meane profits in this action, though he made a regresse. And here note, that also he shall recover his costs of suit, *expensæ litis,* which *Littleton* doth include within these words (dammages, &c.)

2. E. 4. 24. b. 9. E. 4. 4. b. 16. H. 7. 6. a.

" *Dammages.*" *Damna* in the common law hath a speciall signification for the recompence that is given by the jury to the plaintife or defendant, for the wrong the defendant hath done unto him. (2)

(2. Inst. 289. Post. 355. b. 10. Rep. 115, 116. 11. Rep. 56.)

" *Multitude.*" One or more may commit a force, three or more may commit an unlawfull assembly, a riot or a rout. A multitude here spoken of (as some have said) must be ten or more. *Multitudinem decem faciunt.* And so (say they) it is said *de grege hominum.* But I could never read it restrained by the common law to any certaine number, but left to the discretion of the judges. (3)

(3. Inst. 176. Hale's Pl. C. 137.) (See stat. 1. Geo. 1. c. 4.)

" Un

‡ *ou—et*, L. and M. and Roh.
‖ *immediate apres mesme le claime—donques*, L. and M. and Roh.

(1) [See Note 199.]
(2) Some observations on the progress of our law, with respect to damages, costs, and mesne profits, are to be found in note 1. fol. 355. b.
(3) [See Note 200.]

"*Un briefe de forcible entrie, et recovera ses treble dammages.*" This writ is grounded upon the statute of 8. *H.* 6. and lieth either where one entreth with force, or where he entreth peaceably and detaineth it with force, or where he entreth by force, and detaineth it by force. And in this action without any regresse the plaintife shall recover treble dammages, as well for the meane occupation as for the first entry by force of the statute. And albeit he shall recover treble dammages, yet shall he recover costs which shall be trebled also.

One may commit a forcible entry, as hath beene said, in respect of the armour or weapons which he hath that are not usually borne, or if he doe use violence, and threats to the terrour of another. And if three or foure goe to make a forcible entry, albeit one alone use the violence, all are guilty of force. If the master commeth with a greater number of servants than usually attend on him, it is a forcible entrie.

8. H. 6. cap. 9. 3. E. 4. 19. 24. F. N. B. 248. 11. E. 4. 11. b. 6. H. 7. 12. b. 22. H. 6. 37. 19. H. 6. Regifter 97. 22. H. 6. 57. F. N. B. 249. a. (2. Cro. 17. 19. 31. 148. 151. 199. 214. 633. 639. 1. Roll. Rep. 406. Sid. 97. 149. Noy 136. 1. Cro. 561. 2. Inst. 289. 4. Inst. 176. c. 15. 1. Leo. 327.) (15. R. 2. c. 2. 8. H. 6. c. 9. 23. H. 8. c. 15. 31. El. c. 11. 21. Jac. c. 15.)

It is to be understood, that there is a force implied in law, as every trespasse and rescous and disseisin implieth a force, and is *vi et armis*; and there is an actuall force, as with weapons, number of persons, &c. and when an entry is made with such actuall force, an action doth lie upon the said statute. (1) See before more of force and armes, *Sect.* 240.

10. H. 7. 12. 33. H. 6. 20.

Sect. 432.

*ITEM, * il est a veier, si le servant d'un home que ad title d'enter, poit per le commandement son master faire continual claime pur son master ou non.*

ALSO, it is to bee seene, if the servant of a man who hath title to enter, may by the commandement of his master make continuall claime for his master or not.

This needeth no explication.

Sect. 433.

ET il semble que en ascuns cases il poit ceo faire; car s'il per son commandement vient a ascun parcel de la terre, et la fait claime, &c. en le nosme son master, cest claime est assets bone pur son master, pur ceo que il fait tout ceo que son master covient faire

AND it seemeth that in some cases he may doe this: for if he by his commandement commeth to any parcell of the land, and there maketh claime, &c. in the name of his master, this claime is good enough for his master, for that he doth all that which his

* *il—icy*, L. and M. and Roh.

(1) [See Note 201.]

faire † ou devoit faire en tiel cas, &c. ‡ Auxy si le master dit a son servant, que il ne osast vener a la terre, ne ascun parcel de la terre, pur faire son claime, &c. et que il ne osast approcher pluis prochein a la terre forsque a tiel lieu appell Dale, et commanda son servant d'aler a mesme le lieu de Dale, et la faire un claime pur luy, &c. si le servant issint fait, &c. ceo semble auxy bone claime pur son master, sicome son master la fuit en ‖ proper person, pur ceo que le servant fist tout ceo que son master osast et devoit faire per la ley en tiel case, &c.

[258. a.]

his master should or ought to doe in such case, &c. Also if the master saith to his servant, that hee dares not come to the land, nor to any parcell of it, to make his claime, &c. and that he dare approch no neerer to the land than to such a place called Dale, and command his servant to goe to the same place of Dale, and there make a claime for him, &c. if the servant doth this, &c. this also seemeth a good claime for his master, as if his master were there in his proper person, for that the servant did all that which his master durst and ought to doe by the law in such a case, &c.

HERE it appeareth that where the servant doth all that which he is commanded, and which his master ought to doe, there it is as sufficient as if his master did it himselfe; for the rule is, *Qui per alium facit, per seipsum facere videtur.*

"*Per commandement.*" If an infant or any man of full age have any right of entrie into any lands, any stranger in the name and to the use of the infant or man of full age may enter into the lands, and this regularly shall vest the lands in them without any commandement, precedent, or agreement subsequent. (*) But if a disseisor levy a fine, with proclamation according to the statute, an estranger without a commandement precedent, or an agreement subsequent within the five yeares cannot enter in the name of the disseisee to avoid the fine. And that resolution was grounded upon the construction of the statute of 4. *H.* 7. *cap.* 24. But an assent subsequent within the five yeares should be sufficient. *Omnis enim ratihabitio retrotrahitur, et mandato æquiparatur,* as hath beene said.

7. E. 3. 69. a. b. 45. E. 3. Release. 28. 45. E. 3. tit. Briefe 589. 20. E. 3. 62. per Thorp. 11. Ass. p. 11. 39. Ass. p. 18. 10. H. 7. 12. a. 31. H. 8. tit. entr. Cong. et tit. Fauxifier recovery 29. (*) Lib. 9. fo. 106. a. the Lord Awdleye's case.

"*Auxy si le master dit a son servant que il ne osast, &c.*" Here it appeareth, that where the servant pursueth the commandement of his master, and doth all that which his master durst and ought to doe by the law, this is sufficient. And although the master feareth more than the servant, or admit that the servant hath no feare at all, yet if he goeth as farre as his master durst, and as he commanded, it is sufficient. And this is implyed in this Section.

† *ou devoit faire* not in L. and M. nor Roh.

‡ *Auxy* not in L. and M. nor Roh.

‖ *son* added in L. and M. and Roh.

Sect. 434.

*AUXY, si home soit cy languishant, ou cy decrepyte, que il ne poit per nul maner vener a le terre, ne a ascun † parcel d'ycel, ou si un recluse soit, que ne poit per cause de son order aler hors de sa meason, ‡ si tiel maner ‖ de person commaunda son servant d'aler et faire claime pur luy, et tiel servant ne osast aler a le terre, § ne a ascun parcel de ceo, pur doubt de batery, mayhem, ou mort, ¶ &c. et pur cel cause tiel servant vient auxy pres a la terre come il osast pur tiel ∤ doubt, et fait ** le claime, &c. pur son master, il semble que tiel claime pur son master est assets fort, et bon en ley. Car auterment son master serroit en tresgrand mischiefe; car il bien poit estre que tiel person que est languishant, decrepite, ou recluse, ne poit trover ascun servant que osast aler a la terre, ne †† ascun parcel de cel, pur faire le claime pur luy, &c.*

ALSO, if a man be so languishing, or so decrepite, that he cannot by any meanes come to the land, nor to any parcell of it, or if there bee a recluse, which may not by reason of his order goe out of his house, if such manner of person command his servant to goe and make claime for him, and such servant dare not goe to the land, nor to any parcell of it, for doubt of beating, mayhem, or death, &c. and for this cause the servant commeth as nere to the land as he dareth for such doubt, and maketh the claime, &c. for his master, it seemeth that such claime for his master is strong enough, and good in law. For otherwise his master should bee in a very great mischiefe; for it may well be that such person which is sicke, decrepit, or recluse, cannot finde any servant which dare go to the land, or to any parcell of it, to make the claime for him, &c.

(Ant. 52. a.) REGULARLY it is true, that where a man doth lesse than the commandement or authority committed unto him, there (the commandement or authority being not pursued) the act is void. And where a man doth that which he is authorised to doe and more, there it is good for that which is warranted, and void for the rest; yet both these rules have divers exceptions and limitations. (1) (Hob. 154.) (1. Leo. 285.)

For the first, *Littleton* here putteth a case where the servant doth lesse than he is commanded, and yet it sufficeth, for that *Impotentia excusat legem*; for seeing the master cannot, and the servant dare not, enter into the land, it sufficeth that he come as neere to the land as he dare.

11. H. 4. 3. 12. Ass. 24. 26. Ass. 39. (Perk. 38. b. Mo. 280.) See before Sect. 419.

If a man makes a letter of attorney to deliver seisin to *I. S.* upon condition, and the attorney delivereth it absolute, this is void: and so some hold if the warrant bee absolute, and hee delivereth seisin upon condition, the liverie is void. [258. b.

(2. Inst. 483.) (Ant. 243. b.)

"*Pur battery, mayhem, ou mort.*" See the Second Part of the Institutes, *W.* 2. *cap.* 49. a diversity betweene the making of an entry or claime, and the avoydance of an act or deed.

"*Auterment*

† *parcel* not in L. and M. nor Roh.
‡ *&c.* added in L. and M. and Roh.
‖ *de* not in L. and M.
§ *ne—ou*, L. and M. and Roh.
¶ *&c.* not in L. and M. nor Roh.
∤ *doubt—pavour*, in L. and M. and Roh.
** *le—tiel*, in L. and M. and Roh.
†† *a* added in L. and M. and Roh.

(1) [See Note 202.]

"*Autermént le master serroit en tresgrand mischiefe.*" *Argumentum ab inconvenienti est validum in lege, quia lex non permittit aliquod inconveniens.* And as hath beene often observed before, *Nihil quod est inconveniens est licitum.*

"*Recluse,*" *Reclusus, Heremita, seu Anchorita,* so called by the order of his religion; he is so mured or shut up, *quòd solus semper sit, et in clausurâ suâ sedet*; and can never come out of his place. *Seorsim enim et extra conversationem civilem hoc professionis genus semper habitat.* Note here, albeit the recluse or anchorite be shut up himselfe, so as he by his order is not to come out in person, yet to avoid a discent, he must command one to make claime, and such a recluse shall always appeare by attorney in such cases where others must appeare in proper person. *Impotentia enim excusat legem.*

46. E. 3. Petition 18. 33. H. 6. 8. 45. E. 3. 8. b. 30. a.

Sect. 435.

MES si le master de tiel servant soit de bone sane, et poit et osast bien aler a les tenements, ou a parcel de ceo, de faire son claime, &c. si tiel master commanda son servant d'aler a ascun parcel de la terre a faire claime pur luy, ‖ *et quant le servant est en alant de faire le commandement de son master, il oye per le voy tielx choses que il ne osast vener a ascun parcel de la terre pur faire le claime pur son master, et pur cel cause il vient auxy pres la terre come il osast pur doubt de mort, et la fait claime pur son master, et en le nosme de son master, &c. il semble que le doubt en le ley en tiel case serroit, si tiel claime availera son master ou nemy,* [259. a.] *pur ceo que le servant ne fist tout ceo que son master al temps de son commandement osast faire, &c.* Quære.

BUT if the master of such servant bee in good health, and can and dare well goe to the lands, or to parcell of it, to make his claime, &c. if such master command his servant to goe to any parcell of the land to make claime for him, and when the servant is in going to doe the commandement of his master, he heareth by the way such things as he dare not come to any parcell of the land to make the claime for his master, and therefore he commeth as neere to the land as he dare for doubt of death, and there maketh claime for his master, and in the name of his master, &c. it seemeth that the doubt in law in such case shall be, whether such claime shall availe his master or not, for that the servant did not all that which his master at the time of his commandement durst have done, &c. *Quære.*

THIS continuall claime is void, for that the servant doth lesse than that which is expressely commanded, and there is no impotencie or feare in the master.

(9. Rep. 79.)

‖ *&c.* added in L. and M. and Roh.

Sect. 436.

ITEM, ascuns ont dit, que lou home est en prison et est disseisie, et le disseisor moruст seisie durant le temps que le disseisee est en prison, per que les tenements discendont al heire del disseisor, ils ont dit, que ceo ne noiera my le disseisee que est en prison, mes que il bien poit enter, nient obstant tiel discent, pur ceo que il ne puissoit faire continual claime quant il fuit en prison.

ALSO, some have said, that where a man is in prison and is disseised, and the disseisor dieth seised during the time that the disseisee is in prison, whereby the tenements descend to the heire of the disseisor, they have said, that this shall not hurt the disseisee which is in prison, but that he well may enter, notwithstanding such a discent, because hee could not make continuall claim when he was in prison.

(1. Roll. Abr. 687.) 9. H. 7. 24. Pl. Com. 360. Bracton, lib. 5. fol. 436. Britton, fol. 116. b. Fleta, lib. 6. cap. 52, 53. & lib. 6. cap. 7. & 14.

"*QUANT home est en prison et est disseisie.*" For if hee bee disseised when he is at large, and the discent is cast during the time of his imprisonment, this discent shall binde him. *Excusatur autem quis quòd clameum suum non apposuerit, si tempore litigii in prisonâ detentus fuerit, ita quòd venire non possit, nec mittere, quia nulli vertitur in dubium, et ubi eadem ratio et idem jus erit, ideò videtur quòd excusari debet quis si per vim majorem, vel per fraudem, extra prisonam detentus fuerit, ita quòd venire non possit nec mittere, dum tamen hoc per certa judicia probari poterit.*

"*Pur ceo que il ne poit faire continual claime quant il fuit en prison.*" Here it is to bee observed by the authoritie of *Littleton*, that he is not enforced in this case by law to doe it by his servant or any other by his warrant or commandement, for things done by deputie are seldome well done, but everie man will see his owne businesse most effectually speeded and performed: and that it may be once spoken for all, the reason that a man imprisoned shall not be bound in this and the like cases is, for that by the intendment of law he is kept (as it is presumed in law) without intelligence of things abroad, and also that he hath not libertie to goe at large to make entrie or claime, or seeke counsell. And so note a diversitie betweene a recluse who might have intelligence, and a man in prison.

Pl. Com. 36c. In Stowel's case.

* Sect. 437.

MES l'opinion de touts les justices, p. 11. H. 7. fuit, que si le disseisin soit avant l'enprisonment, coment que le morant seisie soit il esteant en le prison, son entrie est tolle.

BUT the opinion *of all the justices, p. 11. H. 7.* was, that if the disseisin bee before the imprisonment, although the dying seised be he being in the prison, his entrie is taken away.

THIS

* This Section is not in L. and M, nor Roh, nor in the edit. 1577, which is esteemed more correct than the common copies.

THIS is of a new addition, and mistaken, for there is no such opinion, p. 11. H. 7. but it is, 9. H. 7. fol. 24. b.

[259. b.] *ET auxy, si tiel que est en prison soit utlage in action de debt ou trespasse, ou en appeale de robberie, &c. il reversera tiel utlagarie * envers luy pronounce, &c.*

AND also, if hee which is in prison be outlawed in an action of debt or trespasse, or in an appeale of robberie, &c. hee shall reverse this outlawry pronounced against him, &c.

"*IL reversera tiel utlagarie.*" *Nota*, the originall is, *reversera tiel utlagarie per briefe de error* (1), and so it would bee amended: for outlawries may bee reversed two manner of wayes, *viz.* by plea, or by writ of error. By plea, when the defendant commeth in upon the *capias utlagatum, &c.* hee may by plea reverse the same for matters apparent, as in respect of a *supersedeas*, omission of processe, variance, or other matter apparent in the record; and yet in these cases some hold, that in another terme the defendant is driven to his writ of error.

But for any matters in fact, as death, imprisonment, service of the king, &c. he is driven to his writ of error, unlesse it be in case of felonie, and there *in favorem vitæ* he may plead it.

But albeit imprisonment be a good cause to reverse an outlawrie, yet it must be by processe of law *in invitum*, and not by consent or covin, for such imprisonment shall not avoid the outlawrie, because upon the matter it is his owne act.

(Post. 260. a. Ant. 128. b.) (F. N. B. 236. 11. Rep. 8.) (2. Roll. Abr. 803, 804. 2. Inst. 665. 1. Leo. 22. 186.) Mirror cap. 3. Britton, fol. 21. Fleta, lib. 1. cap. 28. & lib. 2. cap. 59. Bracton, lib. 2. 2. E. 4. 1. 4. E. 4. 10. 21. E. 4. 73. 11. H. 7. 5. 21. H. 6. 50. 9. H. 4. 3.

21. H. 6. Utlary 36. 7. H. 6. 27. 21. E. 4. 88. 22. E. 4. 37. 18. E. 3. Villenage 47. 21. E. 4. 37. 33. H. 6. 45, 46. 44. E. 3. Villeine 41. 4. H. 4. 19. 11. H. 4. 34. 3. Eliz. Dyer 192. 2. Eliz. 176. 5. Eliz. ibid. 223. 19. H. 6. 2. 8. H. 6. 37. 37. H. 6. 19. (Doc. Pla. 230. 398.) (Ant. 248. b.) 8. H. 4. 7. 21. H. 7. 13. 10. H. 6. 58. 20. H. 6. 20. 21. H. 6. 55. 22. H. 6. 18. 39. H. 6. 1. 33. H. 6. 51. 45. 38. H. 6. 33. 21. E. 4. 94. 21. H. 7. 33. 5. H. 7. 1. 12. H. 6. 8. 11. H. 6. 67. 19. 1. E. 4. 2. 27. H. 8. 2. 38. Ass. pl. 17. Vide Sect. 439.

Sect. 438.

AUXY, si un recoverie soit † per default vers tiel que est en prison, il avoidera le judgement per briefe de error, pur ceo que il fuit en prison al temps de le default fait, &c. Et pur ceo que tiels matters de record ne noyeront celuy que est en prison, mes que ils serront reverses, &c. à multò fortiori, *il semble que un matter en fait,* scilicet, *tiel discent ewe quant il fuit en prison ne luy noyera, &c. specialment pur ceo que*

ALSO, if a recovery bee by default against such a one as is in prison, he shal avoid the judgement by a writ of error, because he was in prison at the time of the default made, &c. And for that such matters of record shal not hurt him which is in prison, but that they shall bee reversed, &c. *à multò fortiori*, it seemeth that a matter in fact, *scilicet*, such discent had when hee was in prison shall

* *per brief d'errour, &c. pur ceo qu'il fuist en prison al temps d'utlagarie,* added L. and M. and Roh. and in MSS.

† *ewe* added L. and M. and Roh.

(1) [See Note 203.]

que il ne puissoit aler hors de prison pur faire continuall claime, &c.

shall not hurt him, &c. especially seeing he could not goe out of prison to make continuall claime, &c.

5. E. 3. 50 b. 7. H. 6. 38.

THIS is evident enough.

Fleta, lib. 6. cap. 67. & 24. Vide W. 2. cap. 48. and the exposition thereof, 2. part Instit. 4. E. 2. Discent 51.

" *Per briefe d'error.*" For hee shall have no writ of disceit, because the summons was according to the law of the land, by summoners and veiors, and the land taken into the king's hand by the pernor.

" *Per default.*" *Default* is a French word, and *defalta* is legally taken for non-appearance in court. There bee divers causes allowed by law for saving a man's default; as, first, by imprisonment, whereof *Littleton* here speaketh. 2. *Per inundationem aquarum.* 3. *Per tempestatem.* 4. *Per pontem fractum.* 5. *Per navigium substractum per fraudem petentis, non enim debet quis se periculis et infortuniis gratis exponere, vel subjacere.* 6. *Per minorem ætatem.* 7. *Per defensionem summonitionis per legem.* 8. *Per mortem attornati si tenens in tempore non novit.* 9. *Si petens essoniatus sit.* 10. *Si placitum mittatur sine die.* 11. *Per breve de warrantiâ diei.* But sicknesse (as one holds) is no cause of saving a default, because it may be so artificially counterfeited, that it cannot be knowne.

Bracton, lib. 5. tract. 3. Fleta, lib. 6. cap. 7. 14. 3 H. 6. 46. 38. E. 3. 5. 21. H. 6. Barre. 66. 12. H. 4. 13. 50. E. 3. 9. 3. H. 6 48. 2. H. 4. 8. 5. H. 7. 3. F. N. B. 17. Bract. lib. 4. fol. 367. 369. Glan. lib. 1. cap. 8. 28. H. 6. 11. 4. H. 5. Challenge 153. Br. Saver. Def. 45. (Cro. Eliz. 306.)

[260. a.]

Glanvil. lib. 8. cap. 8. Bracton lib. 3. fol. 156. Britton in proemio & cap. 27.

" *Record,*" (1) *Recordum*, is a memoriall or remembrance in rolles of parchment, of the proceedings and acts of a court of justice which hath power to hold plea according to the course of the common law, of reall or mixt actions, or of actions *quare vi et armis*, or of personall actions, whereof the debt or dammage amounts to fortie shillings or above, which wee call Courts of Record, and are created by parliament, letters patents, or prescription.

Cicero. Virgil. Pl. Com. 79. b. Mich. 7. & 8. Eliz. Dier 242. 17. E. 3. 49. 37. H. 6. 21. b. 11. H. 4. 26. b. 21. H. 6. 34. Error. Br. 73. 7. H. 7. 4. 19. Ass. 7. lib. 4. fol. 52. in Rawlin's case. Glanvil. lib. 8. cap. 8. Bracton, lib. 3. fol. 156. Britton, cap. 27. lib. 6. fol. 11. Jenleman's case and 30. 45. lib. 7. fol. 30.

It is aptly derived of *recordari*, which is to keepe in memorie or record, as it is said, *quòd dicere nihil aliud est quàm recordari*; and in the same sense the poet useth it, *si rite audita recordor.* But legally records are restrained to the rolles of such only as are courts of record, and not the rolles of inferiour, nor of any other courts which proceed not *secundum legem et consuetudinem Angliæ.* And the rolles being the records or memorialls of the judges of the courts of record, import in them such incontrollable credit and veritie, as they admit no averment, plea, or proofe to the contrarie. And if such a record be alleaged, and it be pleaded that there is no such record, it shall be tried only by it selfe: and the reason hereof is apparent, for otherwise (as our old authors say, and that truly) there should never be any end of controversies, which should be inconvenient. Of courts of record you may read in my Reports; but yet during the terme wherein any judiciall act is done, the record remaineth in the brest of the judges of the court, and in their remembrance, and therefore the roll is alterable during that terme, as the judges shall direct; but when that terme is past, then the

(1) [See Note 204.]

the record is in the roll, and admitteth no alteration, averment, or proofe to the contrarie.

lib. 8. fol. 60. b. and 67. a. 7. H. 6. 28. 19. H. 6. 9.

If a grant by letters patents under the great seale be pleaded and shewed forth, the adverse partie cannot plead *nul tiel record*, for that it appeares to the court that there is such a record; but inasmuch as it is in nature of a conveyance, the partie may denie the operation thereof, therefore he may plead *non concessit*, and prove in evidence that the king had nothing in the thing granted, or the like, and so it was adjudged. But to return to *Littleton*: What then? shall a man that is in prison be privileged from suits or outlawries? Nothing lesse; for if the tenant or defendant be in prison, he shall upon motion, by order of the court, be brought to the barre, and either answer according to law, or else the same being recorded, the law shall proceed against him, and he shall take no advantage of his imprisonment.

(Doc. Pla. 307, 308. 1. Leo. 65.) 18. Eliz. Dier 353. 3. Mar. Di. 129. Pl. Com. 232. Seignior Berkeley's case. 16. H. 7. 11. b. 22. H. 8. Record. Br. 65. 39. H. 6. 4. 3. Eliz. Dier. 187. lib. 6. fol. 15. Eden's case. Mich. 31. & 32. El. Rot. 365. In Bankele Roy, inter Eden, & Franklyn, & Browne. (4. Rep. Hind's case.) 7. H. 6. 38. 8. H. 6. 16. Vide Sect. 418.

"A multò fortiori." Here is an argument, *à minori ad majus*, and the force of our author's argument is this: If a man in prison shall not be bound by a recoverie by default for want of answer in court of record in a reall action, which is matter of record (the height and strength whereof hath beene somewhat touched) *à multò fortiori*, a discent in the countrey, which is matter of deed, shall not for want of claime binde him that is in prison. And as the argument *à minori ad majus* doth ever hold (as our author hath alreadie told us) affirmatively, so the argument *à majori ad minus* doth ever hold negatively, as our author here teacheth us; and the reason hereof is this, *quod in minori valet, valebit in majori; et quod in majori non valet, nec valebit in minori.*

"*Pur ceo que il ne poit aler hors de prison, &c.*" By this it appeareth, that a man in prison by processe of law ought to be kept *in salvâ et arctâ custodiâ*, and by the law ought not to goe out, though it be with a keeper, and with the leave and sufferance of the gaoler: but yet imprisonment must be, *custodia, et non pœna*; for *carcer ad homines custodiendos, non ad puniendos dari debet.*

Sect. 439.

*EN mesme le manner il semble, lou home est hors du royalme en service le roy, pur besoigne del royalme, si tiel * home soit disseisie quant il est en service le roy, † et le disseisor morust seisie, le disseisee esteant en le service le roy, que tiel discent ne grieveroit le disseisee; mes pur ceo que il ne puissoit faire continual claime, ‡ il semble a eux, que quant il ‖ vient en Engleterre, il poit enter sur l'heire le disseisor,*

IN the same maner it seemeth, where a man is out of the realme in the king's service, for the businesse of the realme, if such a one be disseised when hee is in service of the king, and the disseisor dieth seised, &c. the disseisee being in the king's service, that such discent shall not hurt the disseisee; but for that hee could not make continuall claime, it seemes to them, that when hee commeth into England,

* *home* not in L. and M.

† *et le disseisor morust seisie, le disseisee esteant en le service le roy*, not in L. and M.

‡ *&c.* added in L. and M. and Roh.

‖ *revient*, L. and M.

sor, *&c*. *Car tiel home reversera un utlagarie* ‡ *pronounce envers luy durant le temps que il fuit en le service le roy*, *&c*. ergo, à multò fortiori, *avera aid et indempnitie per la ley en l'auter case*, *&c*.

England, he may enter upon the heire of the disseisor, &c. For such a man shal reverse an outlawrie pronounced against him during the time that hee was in the king's service, &c. therfore, *à multò fortiori*, he shall have aid and indemnitie by the law in the other case, &c.

6. R. 2. Protect. 46. Vide Sect. 198. 440, 441. (Cro. Car. 305. 5. Rep. Constable's case. 1. Roll. Abr. 528.) Rot. Pat. { 8. H. 3. 9. H. 3. 15. H. 3. Temps E. 1. Avowrie 192. Rot. Vascon. 22. E. 1. m. 8. Pat. 23. E. 1. 1. pars. Pat. 10. E. 2. 8. E. 2. Coron: 399. Stanf. Pl. Coron. 51.

"HORS *du royalme*," *(id est) extra regnum*; as much to say, as out of the power of the king of England, as of his crowne of England: for if a man be upon the sea of England, he is within the kingdom or realme of England, and within the ligeance of the king of England, as of his crowne of England. And yet *altum mare* is out of the jurisdiction of the common law, and within the jurisdiction of the lord admirall, whose jurisdiction is verie antient, and long before the reigne of *Edward* the third, as some have supposed, as may appeare by the lawes of *Oleron*, (so called, for that they were made by king *Richard* the first when he was there) that there had beene then an admirall time out of minde, and by many other antient records in the reignes of *Henrie* the third, *Edward* the first, and *Edward* the second, is most manifest. [260. b.]

Vide Sect. 677. (Hob. 212.)

See hereafter in another case, which *Littleton* put in his chapter of Remitter; there he saith, *ouster le mere*, beyond the sea. This great officer in the Saxon language is called *Aen mere al*, (*i. e.*) over all the sea, *præfectus maris*, *sive classis*, *archithalassus*: and in antient time the office of the admiraltie was called *custodia marinæ Angliæ*, or *maritimæ Angliæ*.

3. R. 3. Cont. Claime 13. 4. E. 3. 46.

And note *Littleton* saith not, beyond the sea, or *extra quatuor maria*, for a man *revera* may be *intra quatuor maria*, and yet out of the realme of England. But *intra quatuor maria*, or *extra*, is taken by construction to be within the realme of England, or the dominions of the same.

But here a question may be demanded, What if a man be out of the realme, and a recoverie is had against him in a *præcipe* by default, whether shall he avoid it in a writ of error, as well as he should doe the outlawrie, or if he had beene imprisoned at the time of such recoverie by default? And it seemeth that he shall not avoid the recoverie, for by that meanes a man might be infinitely delayed of his freehold and inheritance, whereof the law hath so great a regard. And few or none goe over, but it is either of their owne free will, or by suit, for what cause soever; and he is not in that case without his ordinarie remedie, either by his writ of higher nature, or by a *quòd ei deforceat*. But outlawrie in a personall action shall be avoided in that case, *quia de minimis non curat lex*, and otherwise he should be without remedie. See Section 437. and note the diversitie betweene that case of the imprisonment, and this of being beyond sea. And *Littleton* putteth the case of imprisonment, and omitteth the being beyond sea here: neither have I seene

‡ *que est* added L. and M.

I seene any booke to warrant, that he that is beyond sea shall in this case avoid the recoverie by default.

"*En service le roy.*" *Bracton* sheweth, that the exception of being beyond sea is, *quia fuit in servitio domini regis ultra mare, viz. apud talem locum*, and that case is cleere: but you shall heare the opinion of *Bracton* in the next Section, where hee is not in the service of the king.

Bract. lib. 5. fol. 436.

Sect. 440.

*ITEM, auters ont dit, que si ascun soit hors du royalme, coment que il ne soit en service le roy, si tiel home esteant hors de le royalme est disseisee en terres ou tenements deins le royalme, et le disseisor devy seisie, &c. le disseisee esteant hors du royalme, il semble a eux, que quant le disseisee vient deins le royalme, que il poit * enter sur l'heire le disseisor, et ceo semble a eux per deux causes. Un est, que celuy que est hors du royalme ne poit aver conusans del disseisin fait a luy per entendement de ley, nient pluis que chose fait hors du royalme poit estre try deins le royalme per le serement de 12. † et de compeller tiel home per la ley de faire continuall claime, lequel per l'entendement de le ley ne puit aver ascun notice ou conusance de tiel disseisin, ceo serra inconvenient, et nosmement quant tiel disseisin est fait a luy quant il est hors du royalme, et auxy le morant seisie fuit quant il fuit hors du royalme: car en tiel case il ne poit per nul possibility solonque common presumption faire continual claime; mes auterment serroit si tiel disseisee fuit deins le royalme al temps de le disseisin, ou al temps del morant del disseisour.*

ALSO, others have said, that if a man bee out of the realme, though hee bee not in the king's service, if such a man being out of the realme be disseised of lands or tenements within the realme, and the disseisor die seised, &c. the disseisee being out of the realme, it seemeth unto them, that when the disseisee commeth into the realme, that he may well enter upon the heire of the disseisor, &c. and this seemeth unto them for two causes. One is, that hee that is out of the realme cannot have knowledge of the disseisin made unto him by understanding of the law, no more than that a thing done out of the realme may bee tried within this realme by the oath of 12. men; and to compell such a man to make continuall claime, which by the understanding of the law can have no knowledge or conisance of such disseisin made or done, this shall be inconvenient, namely, when such a disseisin is done unto him when he was out of the realme, and also the dying seised was done when he was out of the realme: for in such case he may not by possibilitie after the common presumption make continuall claime; but otherwise it should be if the disseisee were within the realme at the time of the disseisin, or at the time of the dying seised of the disseisor.

AND herewith the ancient law of England is agreeable with *Littleton*, and the law at this day. So as it is *vetus & constans opinio. Excusatur etiam quis quod clameum non apposuerit, ut si toto*

[261. a.]

Bract. lib. 5. fol. 436. b. & 163. Brit. fol. 21. 216, 217. Flet. lib. 6. cap. 52.

* *bien* added in L. and M. and Roh. † *&c.* added in L. and M. and Roh.

53. 13. H. 4. Triall 6. 9. H. 4. 3. 21 H. 6. Error 27. 33. H. 6. 2. 21. H. 6. 34. 26. H. 8. cap. 18. 5. & 6. E. 6. cap. 11.

toto tempore litigii fuit ultra mare quâcunque occasione. And this is also agreeable with our yeare bookes. (1)

42. E. 3. 2. & 3. Vide Sect. 102. (Ant. 74. a.) (4. Inst. 123.) 8. H. 4. cap. 14. 13. H. 4. f. 4. 48. E. 3. 2. & 3.

"*Nient pluis que chose fait hors del royalm poet este trie deins le royalm per le serement de* 12." And in this rule of law there is warily and truly put by *Littleton*, these words *(by the oath of twelve men)* meaning by a jury. For by certificate a thing done beyond sea may be tried, as *Littleton* himselfe, *Sect.* 102. hath set downe. And all matters done out of the realme of England concerning war, combate, or deeds of armes, shall bee tried and termined before the constable and marshall of England, before whom the triall is by witnesses, or by combate, and their proceeding is according to the civill law, and not by the oath of twelve men, as *Littleton* here speaketh.

(Doc. Pla. 209.)

This rule here rehearsed by *Littleton*, is worthy of explication. If an alien (for example borne in France) bring a reall action, and the tenant plead that the demandant is an alien borne under the obedience of the French king, and out of the leigeance of the king of England; shall this case want triall, because the matter alleaged is out of the realme? then by the fiction of this plea, no demandant shall recover; therefore in this case, the demandant shall reply, that hee was borne at such a place in England, within the king's leigeance, and hereupon a jury of 12. shall bee charged, and if they have sufficient evidence that hee was borne in France, or in any other place out of the realme, then shall they finde, that hee was borne out of the king's alleageance, and if they have sufficient evidence that he was borne in *England*, or *Ireland*, or *Jernsey*, or *Jersey*, or elsewhere within the king's obedience, they shall finde that he was born within the king's leigeance. And this hath ever beene the pleading and manner of triall in that case. And so it is in the case that *Littleton* here putteth, if a man, in avoydance of a fine or a discent, alleage that hee was out of this realme in Spaine, at the time of levying of the fine and at the time of the disseisin and discent, the adverse party may alleage that he was at such a place in England, &c. whereupon issue shall be taken, and then in evidence he may prove that he was out of the realme, &c. which, upon sufficient evidence, the jurie ought to finde. And in both these cases and the like, in a special verdict the jury may finde that he was borne beyond sea, or was beyond sea at that time, &c.

20. E. 3. averment. 34. 27. Ass. 24. 32. H. 6. 25. 15. E. 4. 15. 7. H. 6. 15. 1. R. 3. 4. 6. H. 7. 6. 7. H. 7. 8. F. N. B. 196. 29. Ass. 11. 13. E. 1. mord. 47. 12. H. 3. ibid. 55. Lib. 7. fol. 26, 27. Calvin's case. Li. 6. f. 47. Dowdale's case.

[261. b.]

(7. Rep. 26, 27. Calv. case.)

The statute of 25. *E.* 3. *de proditionibus* doth declare, that it is treason by the common law to adhere to the enemies of the king within the realme, or without, if hee bee thereof proveablement attaint of overt fact, and that he shall forfeit all his lands, &c. A man must not imagine that seeing by the common law declared by authority of parliament, that adhering to the king's enemies without the realme, is high treason, and that the delinquent may be attainted thereof, &c. that this should want triall, for then the judgement of the common law, and declaration of the parliament, should be illusory, which no well advised man will thinke in a matter of so great consequence. But certaine it is, that for necessitie sake, the adherencie without the realme must be alleaged in some place within

(1) [See Note 205.]

within England. And if upon evidence they shall finde any adherencie out of the realme, they shall finde the delinquent guilty. But most commonly they indited him (if he had lands) in some county where his lands did lie, that were to be forfeited; and this, as appeareth in our bookes, was the common use. And so it is declared by the statute (*) of 35. *H.* 8. and that it shall be tried by twelve men of the countie, where the king's bench shall sit, and be determined before the justices of that bench, or else before such commissioners, and in such shire of the realme, as shall be assigned by the king's majestie's commission, and this statute for this point remaines in force at this day, and so it was resolved [a] by all the judges in my time, *viz.* in 33. *Eliz.* in the case of *Orurcke.* And *anno* [b] 34. *Eliz.* in sir *John Peror's* case done in Ireland, for that is out of the realme of England, and the case [c] in *Mich.* 19. & 20. *Eliz.* was utterly denied, and sir *Christopher Wray* himselfe (who is supposed to give his opinion in that case) protested that he never gave any such opinion, but did hold the contrary. When part of the act, especially the originall, is done in England, and part out of the realme, that part that is to be performed out of the realme, if issue be taken thereupon, shall be tried here by 12. men; and those twelve men shall come out of the place where the writ is brought. For example, (which ever doth illustrate) it was covenanted by indenture, by charter party, that a ship should sayle from *Blackney* haven in Norfolke, to *Muttrel* in Spaine, and there remaine by certaine dayes.

5. R. 2. triall. 54.

(*) 35. H. 8. cap. 2. Staunford. pl. cor. 90. (Cro. Car. 332.)

[a] 33. Eliz. case Orurke.

[b] 34. Eliz. case de Sir John Perot.

[c] Mich. 19. & 20. Eliz. Dier 360.

(20. H. 6. 8.) 48. E. 3. 3. 11. H. 7. 16. 1. R. 3. 4.

In an action of covenant brought upon this charter party, the indenture was alleaged to be made at *Thetford* in the county of Norfolke, and upon pleading, the issue was joyned, whether the said ship remained at *Muttrel* in Spaine by the said certaine dayes. And it was adjudged that this issue should be tried at *Thetford,* where the action was brought, because there the contract tooke his originall by making of the charter partie, and so hath it beene often adjudged in such like case.

(1, Roll. 532. Hob. 11. 4. Inst. 138. 140, 141. 7. Rep. 2. a. Sid. 367. Lut. 700. 710. 950.)

Pasch. 28. Eliz. in action de covenant inter Evangelist Constantine pl. & Hughgyn defendant in the king's bench. Li. 6. f. 47. Dowdale's case.

An obligation made beyond the seas may be sued here in England, in what place the plaintife will. What then if it beare date at *Bourdeaux* in *France,* where shall it be sued? And answer is made, that it may be alleaged to be made *in quodam loco vocat' Burdeaux* in *France,* in *Islington* in the county of *Middlesex,* and there it shall be tried, for whether there be such a place in *Islington* or no, is not traversable in that case. These points are necessary to be knowne in respect of the variety of opinions in our bookes. And of these thus much shall suffice, and now is *Littleton* worthy to be heard.

Vid. 32. H. 6. 25. 48. E. 3. 3. 11. H. 7. 16. 2. E. 2. obligation 15. (2. Cro. 76. Sid. 228. Hob. 11.)

" *Per entendement de le ley.*" *Vide,* for intendement of law, *Sect.* 99, 100. 110. 293. 377. 393. 406. 367. 462, 463, &c. 439.

Entendement de le ley.

" *Ceo serra inconvenient.*" Here also, as hath beene often said, appeareth, that *argumentum ab inconvenienti,* is strong in law.

Vide Sect. 269.

" *Autrement est si le disseisee fuit deins ce royalme al temps del disseisin, &c.*" So as if a man be disseised before he goeth over sea, or commeth into the realme againe before the discent, the discent shall take away his entrie.

Sect. 441. [262. a

UN auter matter ils allegeont pur prover que devant le statute fait en le temps de roy E. 3. an. * 34. cap 16. *de son raigne, per quel estatute non-claime est ouste, &c. le ley fuit tiel, que si un fine soit levy de certaine terres ou tenements, si ascun que fuit estrange al fine avoit droit d'aver et recover mesmes les terres ou tenements, s'il ne venust et fist son claime a ceo deins l'an et le jour procheine apres le fine levie, il serra barre a touts jours*, quia dicebatur, finis finem litibus imponebat. *Et que la ley fuit tiel, il est preve per l'estatute de Westminster* 2. De donis conditionalibus, *lou il est parle que si fine soit levie de les tenements en taile, &c.* quòd finis ipso jure sit nullus, nec habeant hæredes, aut illi ad quos spectat reversio licet fuerint plenæ ætatis in Angliâ, et extra prisonam) necessitat' apponere clameum suum, † &c. *Issint ceo prove, que si un estrange home que avoit droit a les tenements, s'il fuit hors de royalme al temps del fine levie, &c. n'avera dammage, coment que il ne fist son claime, &c. coment que tiel fine fuit matter de record: per greinder reason il semble a eux, que un disseisin et discent que est matter en fait, ne issint trope greevera celuy que fuit disseisie quant il fuit hors du royalme al temps de disseisin, et auxy al temps que le disseisor morust seisie, &c. mes que il bien poit enter, nient contristeant tiel discent.* ‡

ANOTHER matter they alleage for a proofe that before the statute of king *Edward* the Third, made the 34th yeare of his reigne, by which statute non-claim is ousted, &c. the law was such, that if a fine were levied of certaine lands or tenements, if any that was a stranger to the fine had right to have. and to recover the same lands or tenements, if he came not and made his claime thereof within a yeare and a day next after the fine levied, he shall be barred for ever, *quia dicebatur quòd finis finem litibus imponebat.* And that law was such, it is proved by the statute of West. the 2. *De donis conditionalibus*, where it is spoken if the fine bee levied of tenements given in the taile, &c. *quòd finis ipso jure sit nullus, nec habeant hæredes, aut illi ad quos spectat reversio (licet plenæ ætatis fuerint in Angliâ, et extra prisonam) necessitat' apponere clameum suum.* Soe it is proved that if a stranger that hath right unto the tenements, if he were out of the realme at the time of the fine levied, &c. shall have no dammage, though that hee made not his claim, &c. though that such fine was matter of record: by greater reason it seemeth unto them, that a disseisin and discent that is matter in deed, shall not so grieve him that was disseised when he was out of the realme at the time of that disseisin, and also at the time that the disseisor died seised, &c. but that he may well enter, notwithstanding such discent.

34. E. 3. cap. 16. (Ant. 254. b.) 4. H. 7. cap. 24. See as well this statute as the statute of 32. H.

HERE it appeareth, what the common law was before the said statute, for non-clayme upon a fine levied. But now since *Littleton* wrote, by the statute of 4. *H.* 7. five yeares after proclamations made upon the fine are given to him that right hath to make his claime, or pursue his action, where the common law gave him

* 34. *cap.* 16. not in L. and M. nor Roh.
† *&c.* not in L. and M. nor Roh.
‡ *&c.* added in L. and M. and Roh.

him but a yeare and a day. But this statute of 4. *H.* 7. extends only to fines, and not to non-claime upon a judgement in a writ of right, and therefore the said statute of 34. *E.* 3. here cited by *Littleton*, which oufteth non-claime only to fines levied, extendeth not to a judgement in a writ of right at this day, and therefore the common law in that case remaineth to this day, *viz.* that claime must bee made within a yeare and a day after judgement. (1) Also if a fine be levied without proclamations, or without so many as the law requireth, then the statute of non-claime doth extend to such a fine.

8. cap. 36. well expounded in my Reports. Lib. 3. fol. 84, 85, &c. case del fines per totum. lib. 1. fol. 96, 97. in Shelleye's case. lib. 2. fol. 93. Bingham's case. lib. 8. fol. 100. Lechford's case. lib. 9. fol. 139, 140, 141. Beaumond's case. lib. 10. fol. 49. b. Lampot's case, and 99. a. lib. 9. fol. 105, 106. Margaret Podger's case. lib. 5. fol. 124. Saffyn's case. lib. 10. 96, 97. Seymour's case. lib. 8. fol. 72. Grosleye's case. lib. 11. fol. 69. 71. 78. Pl. Com. in Smith's and Stapl. case, and in Stowe's case, and Howel's case, and Glanvil. li. 13. cap. 11. Bract. 435. Fleta, lib. 6. cap. 53. Brit. 216. (4. H. 7. c. 24. 32. H. 8. c. 36. 2. Cro. 101. 226.)

"*Dicebatur finis, quia finem litibus imponebat.*" (2) Here you may observe the etymologie of a fine. And herewith agreeth [a] antiquity: *Finis ideò dicitur finalis concordia, quia imponit finem litibus.* And after the example [b] of *Littleton*, it is good to search out the etymologie or right derivation of words; for *ignoratis terminis ignoratur et ars*, as hath beene often observed in other places. And the civilians call this judiciall concord, *transactionem judicialem de re immobili.*

[a] Glanvil. lib. 8. cap. 3. Bract. lib. 5. fol. 435. Fleta, lib. 6. cap. 52, 53. [b] Etymologies, &c. Vid. Sect. 74. 174. 194. 441. 520. 592.

[262. b.] "*Licet fuerit plenæ ætatis in Angliâ, et extra prisonam.*" In this act of 13. E. 1. *De donis conditionalibus* is one omitted, who is added in the statute *De modo levandi finis, viz. et sanæ memoriæ.* [c] But a fem-covert had no privilege of non-claime at the common law, as some have said, because she had a husband that might make claime for her. But yet *Bracton* saith, *Item excusatur uxor quæ sub potestate viri supposita, quòd clameum non apposuerit licet mittere possit*, and citeth a judgement in the point, *Trin.* 4. H. 3. in *Cusin's* case. But *Fleta* saith, *Excusatur si fuerit uxor alicujus, si fuerit per virum impedita, quòd non potuit apponere clameum.* Also they in reversion or remainder expectant upon any estate of freehold were barred by the common law; and yet they could make no claime, because, as hath beene said, it belonged to the particular tenant, and not to them because their entry was not lawfull; which was one of the principall causes of making of the said statute of 34. *E.* 3. which ousted non-claime. But these cases of coverture, and of them in reversion and remainder, are now without question holpen, and just provision made for the saving of their rights and titles, by the said statute of 4. *H.* 7. as by the said act appeareth.

Stat. de anno 13. E. 1. [c] Pl. Com. Stowel's case, 359. Bracton, lib. 5. fo. 436. Britton, fo. 216. b. Fleta, lib. 6. ca. 53. (4. H. 7. c. 24. 32. H. 8. c. 36. 2. Inst. 516.)

Sect. 442.

ITEM, quære si home soit disseisie, et il arraigne un assise envers le disseisor, et les recognitors de le assise chaunta

ALSO, inquire if a man be disseised, and he arraigne an assise against the disseisor, and the recognitors

(1) [See Note 206.] (2) [See Note 207.]

† *chaunta pur le plaintife, et les justices d'assise voyle estre advises de lour judgment, tanques al prochein assise, &c. et en* ‡ *le dementiers le disseisor morust seisie, &c. si le dit suit del assise serra* ‖ *pris en ley pur le dit disseisee un continuall claime, entant que nul default fuit en luy* §, *&c.*

tors of the assise chante (1) for the plaintife, and the justices of assise will bee advised of their judgements untill the next assise, &c. and in the meane season the disseisor dieth seised, &c. yet the said suit of the assise shall bee taken in law for the disseisee a continuall claime, insomuch that no default was in him, &c.

"*ARRAIGNE un assise.*" To arraigne the assise is to cause the tenant to be called to make the plaint, and to set the cause in such order as the tenant may bee enforced to answer thereunto; and is derived of the French word *arraigner*, which signifieth to order or set in right place. An arraignment is sometime called an astitution, of the verbe *astituo*, compounded of *ad* and *statuo*, that is, to place or set in order one by another. In the same sense that *Littleton* here useth it, it is used when an appeale is arraigned, both which are arraigned in French, but entred in Latin. And it is to bee observed, that *Littleton* saith here *arraigne un assise*, and saith not that the tenant is arraigned; and so of the appeale; for these are the suits of the subject, and no man is said to be arraigned, but merely at the suit of the king, upon an enditement found against him, or other record wherewith he is charged. And there the arraignment of the prisoner is to take order that he appeare, and for the certainty of the person to hold up his hand, and to plead a sufficient plea to the enditement or other record, whereupon they which follow for the king may orderly proceed.

[263. a.]

(10. Rep. 130.)

2. & 3. E. 6. c. 24. towards the end. Stanf. pl. cor. 105. C. 3. H. 7. ca. 1.

"*Justices d'assise.*" Justices of assise are assigned and constituted by the king of the judges and sages of the law, and are called justices of assise, for that the writs of assise of *novel disseisin*, (which in former times were accounted *festina remedia*, and very frequent and common) were returnable before them to be taken in their proper counties twice every yeare at the least, whereupon they had authority to give judgment and award seisin and execution: and therefore both for the number of them in times past, and for the greater authority they had then as justices of *nisi prius* (which was to trie issues only, except in *quare impedit*, and assises *de darreine presentment*, in which cases the justices of *nisi prius* might give judgment) they were denominated justices of assises: and divers acts of parliament have given to them great authority both in criminall causes and common pleas. These justices of assise have also commissions of *oier* and *terminer*, of gaole delivery and of the peace, of association, and *si non omnes* throughout their whole circuits, so as they are armed with ample, provident, but yet ordinary jurisdiction; for all their commissions are bounded with this expresse limitation, *facturi quod ad justitiam pertinet secundum legem et consuetudinem Angliæ*. And in former time, according to the originall institution and

Vid. Sect. 514. 233, 234. Magna Charta, 30. W. 2. ca. 3. 30. 39. Stat. de Ebor. ca. 3. 4. Artic. Sup. Cart. ca. 10. 4. E. 3. ca. 11. 7. R. 2. ca. 4. 27. E. 1. de finibus ca. 4. 28. E. 1. de appellatis. 4. E. 3. ca. 2. 2. H. 5. ca. 8. 3. H. 5. ca. 7. 13. H. 4. ca. 7. North. 2. E. 3. ca. 3. 2. E. 3. ca. 5. 14. H. 6. ca. 1. 21. H. 6 ca. 10. 3. H. 7. ca. 1.

† *chaunta—chaunteront*, in L. and M. and *chanteront* in Roh.
‡ *le* not in L. and M.
‖ *pris* not in L. and M. nor Roh.
§ *&c.* not in L. and M. nor Roh.

(1) *i. e.* Find, or give th ir verdict.

and their commission, both the justices joined both in common pleas and pleas of the crowne.

33. H. 8. c. 9. 34. & 35. H. 8. ca. 14.

2. & 3. E. 6. ca. 24. 1. E. 6. ca. 7. 2. Mar. Dier 99. 3. & 4. Eliz. Dier 205. (F. N. B. 240. c. 4. Inf. 161.)

"*Si le dit suit del assise serra prise en ley, &c. un continual claime.*" And it is holden at this day that it shall amount to a claime, for that there was no default in him, as *Littleton* saith. (*d*) Some have objected, that if the bringing of an assise should amount to continuall claime, and every continuall claime made by the disseisee vest the possession and freehold in him, therefore if bringing the assise, &c. should amount to a continuall claime, that then the writ should abate. But hereunto it hath beene answered in this chapter, that a continuall claime is an entry by construction of law for the advantage of the disseisee, but not for his disadvantage.

(*d*) See before in this chapter, Sect. 419. Vide Sect. 416. (2. Ed. 3. 8. 14. Ed. 3. 14.) (Ant. 253. b.)

In a writ of entry *sur disseisin* against one, supposing that he had not entred but by *S.* who disseised him, the tenant said that *S.* died seised, and the land descended to him, and prayed his age; the plaintife counterpleaded his age, for that he arraigned an assise against *S.* who died hanging the assise, and he was ousted of his age, for that the bringing of the assise amounted to a claime.

24. E. 3. 25. 9. E. 2. age. 141. 15. E. 3. Counterplea de gar. 5.

If tenant in dower alien in fee with warranty, and the heire in the reversion bring a writ of entry *in casu proviso, &c.* and hanging the plea the tenant dieth, the heire shall not be rebutted or barred by this warranty, for that the *præcipe* did amount to a continuall claime. And herewith agreeth (*) antiquity: *Et si clameum non apposuerit, sufficit tamen si ille vel antecessor suus faciat quod tantundem valeat, ut si placitum moverit tenentem vel fecerit rem litigiosam; quia sicut plus est facto appellare quàm verbo, ita plus est clameum apponere facto quàm verbo: et ad hoc facit de termino Sanctæ Trinitatis, anno regni regis H. 3. 15. in com. Hunt. de quâdam Guldeburgâ, cui objectum fuit, quòd clameum non apposuit, et ipsa respondit, quòd fecit quod tantundem valet, quia tempore finis facti implacitavit tenentem per aliud breve, &c.*

3. E. 3. tit. garrantie 62.

(*) Fleta, lib. 6. ca. 52. Bract. lib. 5. fo. 436.

If the goods of a villeine (before any seisure made by the lord) be distreined, the lord may have a replevyn; and notwithstanding before the bringing of the writ he had no property, yet the very bringing of the writ doth amount to a claime of the goods, and vesteth the property in the lord.

33. E. 3. Replevin. 43. 42. E. 3. 18. b. 9. H. 6. 25.

"*Entant que nul default fuit en luy, &c.*" Hereby it is implyed, that our author inclined to this opinion, that it should amount to a claime, for that no default was in him; *et nemo debet rem suam sine facto aut defectu suo amittere,* as the rule is.

[263. b.]

Sect. 443.

ITEM, quære *si un abbe de un monasterie morust, et durant le temps de vacation un home torciousement enter en certaine parcel de terre del monastery, claymant la terre a luy et*

ALSO, inquire if an abbot of a monasterie die, and during the time of vacation a man wrongfully entreth in certaine parcels of land of the monasterie, claiming the land unto

*et a ses heires, et de tiel estate morust seisie, et la terre discendist a son heire, et puis apres un * est elect, et fait abbe de mesme la monasterie, si † mesme l'abbe poit enter sur le heire ou nemy. Et il semble a ascuns, que l'abbe bien poit enter en ceo cas, pur ceo que le covent en temps de vacance ne fuit ascun person able de faire continual claime; car nient pluis que ils sont personable de ‡ suer action, nient pluis ils sont able de faire continual claime, car le covent § n'est forsque ‖ un mort corps sans teste; car en temps de vacation un graunt fait a eux, ou per eux, est void; et en cest case l'abbe ne poit aver briefe* d'entre sur disseisin *envers le heire, pur ceo que il ne fuit unques disseisee. Et si l'abbe ne puissoit enter en ceo case, donques il serra mis a son briefe de droit, ⸸ &c. lequel serra trope dure pur le meason: per que semble a eux, que l'abbe bien poit enter, &c.*

unto him and his heires, and of that estate dieth seised, and the land descendeth unto his heires, and after that an abbot is chosen, and made abbot of the monasterie, a question is, if the abbot may enter upon the heire or not. And it seemeth to some, that the abbot may well enter in this case, for this, that the covent in time of vacation was no person able to make continuall claime; for no more than they be personable to sue an action, no more be they able to make continuall claime, for the covent is but a dead bodie without head; for in time of vacation a grant made unto them is void; and in this case an abbot may not have a writ of *entrie upon disseisin* against the heire, for this, that hee was never disseised. And if the abbot may not enter in this case, then hee shall bee put into his writ of right, &c. which shall bee hard for the house: by which it seemeth to them, that the abbot may well enter, &c.

Quæras de dubiis, legem bene discere si vis:
Quærere dat sapere, quæ sunt legitima verè ¶.

Quæras de dubijs, legem bene discere si vis:
Quærere dat sapere, quæ sunt legitima verè.

(Post. 331. a. 342. b. 345. a.) (Dyer 71. a.) (2. Roll. Abr. 339.)

HERE, first, it is to be observed, that albeit the freehold and inheritance is in this case in no person, but in abeyance or in consideration of law, yet an entrie and claime by one that hath no right shall gaine the inheritance by wrong. For here *Littleton* saith, and of such estate died seised, &c. And so it is in case of a bishop, parson, vicar, prebend, or any other sole corporation. And in the statute of *Merlebridge* it is called an intrusion.

Merleb. cap. 28.

(5. Rep. 21.)

(F. N. B. 34. m. W. 2. cap. 5.)

Secondly, that seeing by the death of the abbot (which is the act of God) no person is able to make continuall claime, therefore a discent during that time shall not prejudice the successor; for, as hath beene said, *Impotentia excusat legem.* If an usurpation bee had to a church in time of vacation, this shall not prejudice the successor, to put him out of possession, but that at the next avoidance hee shall present.

" *Nient*

* *abbe* added L. and M. and Roh.
† *mesme* not in L. and M. nor Roh.
‡ *suer—faire*, L. and M. and Roh.
§ *n'est—est*, L. and M. and Roh.
‖ *come* added L. and M. and Roh.
⸸ *&c.* not in L. and M.
¶ *verè* not in L. and M. nor is any part of these two verses in the Camb. MSS.

"*Nient pluis que ils sont able de suer action, &c.*" Here that which hath in this chapter beene said is confirmed, *viz.* That the entrie or continuall claime must pursue the action.

(8. Rep. 88. Ant. 252. b.)

"*Car le covent n'est forsque un mort person, &c.*" This is *ratio una*, but not *unica*: for though the rest of the corporation be no mort persons, as the chapter in case of deane and chapter, or the commonaltie in case of mayor and commonaltie; yet cannot they when there is no deane or maior make claime, because they have neither abilitie nor capacitie to take or to sue any action, as our author here saith.

[264. a.] "*Car en temps de vacation un graunt fait a eux ou per eux, est void, &c.*" And the reason is, because the body politique which is capable, is not complete, but wanteth the head. But this is to be understood of an immediate grant; for if during the vacation of the abathie of Dale, a lease for life, or a gift in taile be made, the remainder to the abbot of Dale and his successors, this remainder is good, if there be an abbot made during the particular estate.

2. H. 7. 13. 40. Ass. 26. 34. E. 3. Garrantie 69. (Post. 378.) (Ant. 239. a.)

If there be maior and commonaltie of *D.* and the maior dieth, a graunt made to the maior and commonaltie of *D.* is void for the cause aforesaid; but in that case, if a lease for life be made, the remainder to the maior and commonaltie of *D.* the remainder is good, if there bee a maior elected during the particular estate.

(10. Rep. 1. Ant. 85. 250. a. 3. a. lib. 10. Lampett's case. lib. 6. Bishop of Wells's case. lib. 1. Rector of Cheddington's case.)

"*Poit enter, &c.*" Here by this (*&c.*) is implyed, or make his continuall claime in such sort as hath beene before expressed.

Quæras de dubiis, legem bene discere si vis:
Quærere dat sapere, quæ sunt legitima verè.

Here *Littleton* expresseth an excellent meanes to attaine to the reason of the law, by enquiring of, and conference had with, learned men, of doubtfull cases:

Inter cuncta leges, & per cunctabere doctos.

Horat.

For as *collatio peperit artes*, so *collatio perficit artes*: and this must bee continuall; for as knowledge increaseth, so doubts therewith increase also; *Crescente scientiâ, crescunt simul et dubitationes.*

And here *Littleton* citeth verie aptly two verses; for it is truly said, that *Authoritates philosophorum medicorum et poetarum sunt in causis allegandæ et tenendæ*: and our author doth cite a verse for memorie, but it is worthy of memorie.

Chap. 8. Of Releases. (1) Sect. 444.

RELEASES sont en divers manners, cestascavoir, releases de tout le droit que home ad en terres ou tenements, ‡ *et releases de actions personals et reals, et auters choses. Releases de tout le droit que homes ont en terres ou tenements, &c. sont communement fait en tiel form ou de tiel effect:*

RELEASES are in divers manners, *viz.* releases of all the right which a man hath in lands or tenements, and releases of actions personalls and realls, and other things. Releases of all the right which men have in lands and tenements, &c. are commonly made in this forme, or of this effect:

Vide Mir. cap. 2. sect. 17.
Vide Brit. 101. Bract. li 5. Tract. de Except. & lib. 4. fol. 318. b. Fleta, lib. 3. cap. 14.

HERE our author beginneth with a division of releases.

These words must be referred thus: releases are of two sorts, *viz.* a release of all the right which a man hath either in lands and tenements, or in goods and chattels: or there is a release of actions reall, of or in lands or tenements: or personall, of or in goods or chattels: or mixt, partly in the realty, and partly in the personaltie. [264. b

Vide Sect. 492.

"*Release,*" *Relaxatio.* Of the etymologie of this word you have heard before. *Fleta* [a] calleth it *charta de quietâ clamantiâ.*

[a] Fleta, ubi supra.

Sect. 445.

NOverint universi per præsentes, me A. de B. remisisse, relaxâsse, et omninò de me et hæredibus meis quietum clamâsse: *vel sic,* pro me et hæredibus meis quietum clamâsse C. de D. totum jus, titulum, et clameum quæ habui, habeo, vel quovismodo in futur. habere potero, de et in uno messuagio cum pertinentiis in F. &c. *Et est ascavoire, que ceux verbs* remisisse, et quietum clamâsse, *sont de un tiel effect sicome tiels verbs,* relaxâsse.

KNow all men by these presents, that I A. of B. have remised, released, and altogether from me and my heires quiet claimed: or thus, *for mee and my heires quiet claimed to C. of D. all the right, title, and claim which I have, or by any meanes may have, of and in one messuage with the appurtenances in F. &c.* And it is to bee understood, that these words, *remisisse, et quietum clamâsse,* are of the same effect as these words, *relaxâsse.*

"NOverint universi per præsentes, &c." Here *Littleton* sheweth presidents of releases of right: and presidents doe both teach and illustrate, and therefore our studient is to be well stored with presidents of all kindes.

"Remisisse, relaxâsse, et quietum clamâsse." Here *Littleton* sheweth, that there be three proper words of release, and bee much of one effect: besides, there is *renunciare, acquietare,* and there bee many

Bract. lib. 4. fol. 308.
Fleta, ubi sup.
9 H. 6 35.
24. E. 3. 24.
13. H. 4. cntr. congeab. 57. (2. Roll. Abr. 400. 403. 9. Rep. 52.)

(1) [See Note 208.] ‡ &c. added in L. and M.

many other words of release; as if the lessor grants to the lessee for life, that he shall be discharged of the rent, this is a good release. *Vide* Sect. 532.

And it is to bee understood, that there bee releases in deed, or expresse releases, whereof *Littleton* heere hath shewed an example. These expresse releases must of necessitie be by deed. There be also releases in law, and they are sometime by deed, and sometime without deed. As if the lord disseise the tenant, and maketh a feoffment in fee by deed or without deed, this is a release of the seigniorie. And so it is if the disseisee disseise the heire of the disseisor, and make a feoffment in fee by deed or without deed, this is a release in law of the right. And the same law it is of a right in action.

27. H. 8 29. of an use. 34. H. 6. 44. of an attaint. 3. E. 3. 38. 21. E. 4. 81. Pl. Com. Delamere's case. (8. Rep. 136. Plo. 185, 186. 5. Rep. 29.)

Hob. 10. 1. Sid. 79. 1. Roll. Abr. 934. Plo. 36.

If the obligor make the obligee his executor, this is a release in law of the action, but the dutie remaines, for the which the executor may retaine so much goods of the testator. (1)

8. E. 4. 3. 21. E. 4. 2.

If the feme obligee take the obligor to husband, this is a release in law. The like law is, if there be two femes obligees, and the one take the debtor to husband. (2)

11. H. 7. 4. 20. H. 7. 29. 8. E. 4. 3.

If an infant of the age of seventeene yeares release a debt, this is void; but if an infant make the debtor his executor, this is a good release in law of the action. (3)

But if a feme executrix take the debtor to husband, this is no release in law, for that should be a wrong to the dead, and in law worke a *devastavit*, which an act in law shall never worke. And so it was adjudged in the king's bench, *Mich.* 30. & 31. *Eliz.* in which case I was of counsell.

But it is to be observed, that there is a diversitie betweene a release in deed, and a release in law; for if the heire of the disseisor make a lease for life, and the disseisee release his right to the lessee for his life, his right is gone for ever. But if the disseisee doth disseise the heire of the disseisor and make a lease for life, by this release in law the right is released but during the life of the lessee; for a release in law shall be expounded more favourable, according [265. a.] to the intent and meaning of the parties, than a release in deed, which is the act of the partie, and shall be taken most strongly against himselfe, and so in the case aforesaid, where the debtor is made executor.

30. E. 3. 24. 32. E. 3. tit. scire fac. 102. (Mo. 236. 1. Leo. 320. 8. Rep. 152. Plo. 184. a. Finch. 294.)

"*Totum jus, titulum, et clameum.*" But note, that *jus*, or right, in generall signification includeth not onely a right for the which a writ of right doth lie, but also any title or claime, either by force of a condition, mortmaine, or the like, for the which no action is given by law, but only an entry.

(10. Rep. 47.

(1) [See Note 209.]
(2) [See Note 210.]
(3) [See Note 211.]

Sect. 446.

ITEM, ceux parolx que sont communement mis en tielx faits de releases, * scilicet (quæ quovismodo in futurum habere potero) *sont sicome voides en le ley; car nul droit passa per un release, forsque le droit que le relessor ad al temps de le releas fait. Car si soit pier et fits, et le pier soit disseisee, et le fits (vivant son pier) relessa per son fait a le disseisor tout le droit que il ad ou aver puissoit en mesmes les tenements sans clause de garrantie, &c. et puis le pier morust, &c. le fits poit loyalment enter sur la possession le disseisor, pur ceo que il n'avoit* † *droit en la terre* ‡ *en la vie son pier, mes le droit discendist a luy per discent apres le releas fait per le mort son pere, &c.*

ALSO, these words which are commonly put in such releases, *scilicet (quæ quovismodo in futurum habere potero)* are as voide in law; for no right passeth by a release, but the right which the releasor hath at the time of the release made. (1) For if there be father and sonne, and the father bee disseised, and the sonne (living his father) releaseth by his deed to the disseisor all the right which he hath or may have in the same tenements without clause of warrantie, &c. and after the father dieth, &c. the sonne may lawfully enter upon the possession of the disseisor, for that hee had no right in the land in his father's life, but the right descended to him after the release made by the death of his father, &c.

NOTE, a man may have a present right, though it cannot take effect in possession, but *in futuro*. (2)

(2. Roll. Abr. 400. 8. Rep. Edw. Altham's case.)

As hee that hath a right to a reversion or remainder, and such a right he that hath it, may presently release. But here in the case which *Littleton* puts, where the sonne release in the life of his father, this release is void, [a] because he hath no right at all at the time of the release made, but all the right was at that time in the father; but after the decease of the father, the sonne shall enter into the land against his owne release.

[a] Britton, fol. 101. 17. E. 3. 67. 42. E. 3. 21. 10. H. 6. 4. 25. Ass. 7. 27. E. 3. Execution 130. 11. Rep. 112. b.

16. E. 3. Barre 245. Hoe's case, 5. part. f. 70, 71.

The baron make a lease for life and dieth, the release made by the wife of her dower to him in reversion is good, albeit shee hath no cause of action against him *in præsenti*.

(Sect. 706.)

"*Sans clause de garrantie.*" For if there bee a warrantie annexed to the release, then the sonne shall be barred. For albeit the release cannot barre the right for the cause aforesaid, yet the warranty may rebutt, and barre him and his heires of a future right which was not in him at that time: and the reason (which in all cases is to be sought out) wherefore a warrantie being a covenant reall should barre a future right, is for avoiding of circuitie of action (which is not favoured in law); as he that made the warrantie should recover the land against the ter-tenant, and he by force

10. H. 6. 29.

* *scil.—&c.* in L. and M. and Roh.
† *nul* added in L. and M. and Roh.
‡ *quant il relessasses*, added in L. and M. and Roh.

(1) [See Note 212.] (2) [See Note 213.]

force of the warrantie to have as much in value against the same person: yet is there a diversity betweene a warrantie and a feoffment; [265. b.] [b] for if there be grandfather, father, and sonne, and the father disseiseth the grandfather, and make a feoffment in fee, the grandfather dieth, the father against his owne feoffment shall not enter; but if he die, his sonne shall enter. And so note a diversity betweene a release, a feoffment, and a warrantie: a release in that case is void: a feoffment is good against the feoffor, but not against his heire; a warrantie is good both against himselfe and his heires. (1)

[b] 39. H. 6. 43. 21. E. 4. 81. 15. E. 4. tit. Entr. Cong. 21. 9. H. 7. 1. b. 2. E. 3. 38. (Post. 339. a.) 10. E. 2. confirmation 24. 8. E. 2. garr. 62. 11. H. 4. 33. 43. E. 3. 17. 42. E. 3 24. per Finchden. 17. E. 3. 67.

And here are three diversities worthy of observation, *viz.* First, betweene a power or an authority, and a right. Secondly, betweene powers and authorities themselves. Thirdly, betweene a right and a possibilitie.

Lib. 1. fol. 112, 113. in Albanie's case. (9. Rep. 75.) (1. Roll. Rep. 197.)

As to the first, if a man by his last will deviseth that his executors shall sell his land, and dieth, if the executors release all their right and title in the land to the heire, this is void, for that they have neither right nor title to the land, but only a bare authority, which is not within *Littleton*'s case of a release of a right. And so it is if *cesty que use* had devised that his feoffees should have sold the land. Albeit they had made a feoffment over, yet might they sell the use, for their authority in that case is not given away by the livery.

15. H. 7. 11.

As to the second, there is a diversity betweene such powers or authorities as are only to the use of a stranger, and nothing for the benefit of him that made the release (as in the case before) and a power or authority which respecteth the benefit of the releasor; as in these usuall powers of revocation, when the feoffor, &c. hath a power to alter, change, determine, or revoke the uses (being intended for his benefit) he may release; and where the estates before were defeasible, he may by his release make them absolute, and seclude himselfe from any alteration or revocation, as it hath beene resolved; which diversity you may read in [m] *Albanie*'s case. (2)

(1. Rep. 111. a. 173. Ant. 215. a. 218. b. 237. a.)

[m] Lib 1. Albanie's case, ubi supra.

As to the third, before judgement the plaintife in an action of debt releaseth to the baile in the king's bench all demands; and after judgement is given, this shall not barre the plaintife to have execution against the baile, because at the time of the release he had but a meere possibility, and neither *jus in re*, nor *jus ad rem*, but the duty is to commence after upon a contingent, and therefore could not be released presently. So if the conusee of a statute, &c. release to the conusor all his right in the land, yet afterwards he may sue execution; for he hath no right in the land till execution, but only a possibilitie; and so have I knowne it adjudged. (3)

Lib. 5. Hoe's case 70, 71. 10. H. 6. 4.

25. Ass. p. 7. 27. E. 3. Execution 130. Pasch. 38. Eliz. Rot. 521. inter Borough et Gray. (2. Roll. Abr. 404. 408. Hob. 46. 2. Cro. 401 449.)

(1) [See Note 214.]

(2) See note 2. to page 113. The doctrine of the suspension and extinction of powers will be considered in a note to the chapter of Discontinuance.

(3) [See Note 215.]

Sect. 447.

ITEM, en releases de tout le droit que home ad en certein terres, &c. il covient a celuy a que le releas est fait en * *ascun cas, que il ad le franktenement en les terres* † *en fait, ou en ley, al temps de releas fait, &c.* ‡ *Car en chescun cas lou celuy a que le releas est fait, ad franktenement en fait, ou franktenement en ley, al temps del releas,* ‖ *&c.* § *donque le releas est bone,*

ALSO, in releases of all the right which a man hath in certaine lands, &c. it behooveth him to whom the release is made in any case, that hee hath the freehold in the lands in deed, or in law, at the time of the release made, &c. For in every case where he to whom the release is made, hath the freehold in deed, or in law, at the time of the release, &c. there the release is good. (4)

49. E. 3. 28.

"*DE tout le droit.*" This must be intended of a bare right, and not of a release of right, whereby any estate passeth, as to a lessee for yeares, &c. as shall be said hereafter. Also it must be intended of a release of a right of freehold at the least, and not to a right for any terme for yeares or chattle reall; as if lessee for yeares bee ousted, and hee in the reversion disseised, and the disseisor maketh a lease for yeares, the first lessee may release unto him. All which is implyed in the first *&c.* Also in some case a release of a right made to one that hath neither freehold in deed, nor freehold in law, is good and available in law, [c] as the demandant may release to the vouchee, and yet the vouchee hath nothing in the land: but the reason of that is, for that when the vouchee entereth into the warrantie, he becommeth tenant to the demandant, and may render the land to him, in respect of the privitie; but an estranger cannot release to the vouchee, because, *in rei veritate*, he is not tenant of the land.

(Doct. and Stud. 18. a. 10 Rep. 48. b. Post. 276. a.)

[c] 7. E. 4. 13. 20. H. 6. 29. 5. H. 7. 41. 18. E. 3. 12. 8. H. 4. 5. 5. E. 3. 36. 5. E. 3. 46. Vide Sect. 490, 491. (Post. 284. b. 1. Rep. 87. b. 3. Rep. 29. b.)

[d] And so it is if the tenant alien hanging the *præcipe*, the release of the demandant to the tenant to the *præcipe* is good, and yet he hath nothing in the land.

[266. a.

[d] 10. E. 4. 14. 12. Ass. p. 41. 8. E. 3. 21. 46. E. 3. 6. b. 8. H. 6. 23. 21. H. 7. 41. (Post. 284. a. 8. Rep. 148. 5. Rep. 24. b. 2. Cro. 151.)

In time of vacation an annuity, that the person ought to pay, may be released to the patron in respect of the privity; but a release to the ordinary only seemeth not good, because the annuitie is temporall.

If a disseisor make a lease for life, the disseisee may release to him; for to such a release of a bare right there needs no privity, as shall be said hereafter. But if the disseisor make a lease for yeares, the disseisee cannot release to him, because he hath no estate of freehold. And yet in some case a right of freehold shall drowne in a chattell; as if a feme hath a right of dower she may release to the gardein in chivalry, and her right of freehold shall drowne in the chattle, because the writ of dower doth lie against him, and the heire shall take advantage of it. And it is to be observed,

* *ascun—tiel*, in L. and M. and Roh.
† *&c.* added in L. and M. and Roh.
‡ *&c.* not in L. and M. nor Roh.
‖ *fait* added in L. and M. and Roh.
§ *donque* not in L. and M. nor Roh.

(4) Ant. 1st note to this Chapter.

served, that by the antient maxime of the common law, a right of entrie, or a chose in action, cannot be granted or transferred to a stranger, and thereby is avoyded great oppression, injurie, and injustice. *Nul charter, nul vende, ne nul done vault perpetualment si le donor n'est seisie al temps de contracts de 2. droits, s. del droit de possession, et del droit del propertie.* And therefore well saith *Littleton,* that he to whom a release of a right is made must have a freehold.

(Dyer 30. b. 2. Cro. 105.)

Mirror, cap. 2. §. 17. (2. Roll. Abr. 45, 46, 47, 48. Ant. 214. a. 232. b. Post. 280.)

For the better understanding of transferring of naked rights to lands or tenements, either by release, feoffment, or otherwise, it is to be knowne, that there is *jus proprietatis,* a right of ownership, *jus possessionis,* a right of seisin or possession, and *jus proprietatis & possessionis,* a right both of property and possession: and this is antiently called *jus duplicatum,* or *droit droit.* For example, if a man be disseised of an acre of land, the disseisee hath *jus proprietatis,* the disseisor hath *jus possessionis;* and if the disseisee release to the disseisor, hee hath *jus proprietatis et possessionis.* (1) And regularly it holdeth true, that when a naked right to land is released to one that hath *jus possessionis,* and another by a meane title recover the land from him, the right of possession shall draw the naked right with it, and shall not leave a right in him to whom the release is made. For example, if the heire of the disseisor being in by discent *A.* doth disseise him, the disseisee release to *A.* now hath *A* the meere right to the land. But if the heire of the disseisor enter into the land, and regaine the possession, that shall draw with it the meere right to the land, and shall not regaine the possession only, and leave the meere right in *A.* but by the recontinuance of the possession, the meere right is therewith vested in the heire of the disseisor.

Mirror ubi supra. Bracton, lib. 2. fol. 32. Britton, fol. 89. 121. Bracton, lib. 5. fol. 372.

(2. Rep. 56. Sect. 473. Post. 283. b. 286. a.)

But if the donee in taile discontinue in fee, now is the reversion of the donor turned to a naked right. If the donor release to the discontinuee and die, and the issue in taile doth recover the land against the discontinuee, he shall leave the reversion in the discontinuee; for the issue in taile can recover but the estate taile onely, and by consequence must leave the reversion in the discontinuee, for the donor cannot have it against his release: but if the disseisee enter upon the heire of the disseisor, and infeoffe *A.* in fee, and the heire of the disseisor recover the whole estate, that shall draw with it the meere right, and leave nothing in the feoffee. *Nota* the diversity. Another diversity is observable when the naked right is precedent before the acquisition of the defeasible estate, for there the recontinuance of the defeasible estate shall not draw with it the preceding right. [e] As if the disseisee disseise the heire of the disseisor, albeit the heire recover the land against the disseisee, yet shall he leave the preceding right in the disseisee. So if a woman that hath right of dower disseise the heire, and he recover the land against her, yet shall he leave the right of dower in her.

(Post. 319. a.)

[e] 5. Ass. 1. 10. Ass. 16. 50. E. 3. 7. 4. E. 3. Estopp. 133. 30. Ass. 5.

11. E. 3. Entrie 56. 12. Ass. 41. 27. E. 3. 84. 488. (6. Rep. 70. a.)

Another diversity is to be noted, when the meere right is subsequent, and transferred by act in law; there, albeit the possession be recontinued, yet that shall not draw the naked right with it, but shall leave it in him: as if the heire of the disseisor be disseised, and the disseisor infeoffe the heire apparent of the disseisee being of full age,

(1) [See Note 216.]

23. H. 8. tit. Restore al action. Br. 5. 50. E. 3. 7. Vid. Sect 473. 475. 478. 487.

age, and then the disseisee dieth, and the naked right descend to him, and the heire of the disseisor recover the land against him, yet doth he leave the naked right in the heire of the disseisee. So if the discontinuee of tenant in taile infeoffe the issue in taile of full age, and tenant in taile die, and then the discontinuee recover the land against him, yet he leaveth the naked right in the issue. [e] But if the heire of the disseisor be disseised, and the disseisee release to the disseisor upon condition, if the condition be broken, it shall revest the naked right. And so if the disseisee hath entred upon the heire of the disseisor, and made a feoffment in fee, upon condition, if he entred for the condition broken, and the heir of the disseisor entred upon him, the naked right should be left in the disseisee. But if the heire of the disseisor had entred before the condition broken, then the right of the disseisee had beene gone for ever. But now let us heare what *Littleton* saith.

[e] 38. E. 3. 26. 9. H. 7. 24. (Post. 270. a. 4. Rep. 9. b.)

Sect. 448. [266. b.

*FRanktenement en ley est, sicome un home disseisist un auter, et * moruft seisie, per que les tenements discendont a son fits, coment que son fits ne entra pas en les tenements, uncore il ad un franktenement en ley, quel per force de discent est ject sur luy, et pur ceo un releas fait a luy, issint esteant seisie de franktenement en ley, est assets bon; et s'il prent feme issint esteant seisie en ley, coment que il ne unque enter pas en fait, et moruft, son feme serra endow.* †

FReehold in law is, as if a man disseiseth another, and dieth seised, whereby the tenements descend to his sonne, albeit that his sonne doth not enter into the tenements, yet hee hath a freehold in law, which by force of the discent is cast upon him, and therefore a release made to him, so being seised of a freehold in law, is good enough; and if he taketh wife being so seised in law, although he never enter in deed, and dieth, his wife shal be endowed.

(Doct. and Stud. 17. a.)

[a] Bract. li. 4. f. 206. 236. Britton, fol. 83. b. Fleta, lib. 3. cap. 15. Vid. Sect. 680.

HERE *Littleton* describeth what a freehold in law is, for he had spoke before in many places of freeholds in deed. This *Bracton* calleth [a] *civilem et naturalem possessionem seu seisinam.* The naturall seisin is the freehold in deed, and the civill the freehold in law. (1)

42. E. 3. 20. 10. H. 6. 14. 37. E. 3. 78. 2. E. 3. 33. (5. Rep. 123. b.) (Mo. 141.)

If a man levie a fine to a man *sur conusance de droit come ceo que il ad de son done*, or a fine *sur conusance de droit tantum*; these be feoffments of record, and the conusee hath a freehold in law in him before hee entreth.

11. H. 4. 61. 21. H. 7. 12.

Upon an exchange, the parties have neither freehold in deed, nor in law, before they enter; so upon a partition the freehold is not removed untill an entry.

[g] 32. E. 3. barre 262. 41. Ass. 2. 13. H. 4. surrender, 10.

[g] If tenant for life by the agreement of him in the reversion surrender unto him; he in the reversion hath a freehold in law in him

* *ent* added L. and M. and Roh. † *&c.* added L. and M. and Roh.

(1) [See Note 217.]

him before he enter. [b] Upon a livery within the view no freehold is vested before an entrie.

[b] 38. E. 3. 12.

If a man doth bargaine and sell land by deed indented and inrolled, the freehold in law doth passe presently. And so when uses are raised by covenant upon good consideration.

If a tenant in a *præcipe* being seised of lands in fee, confesse himselfe to be a villeine to an estranger, and to hold the land in villenage of him, the estranger by this acknowledgement is actually seised of the freehold and inheritance without any entry. But let us returne to *Littleton*.

17. E. 3. 77. 18. E. 4. 25.

Sect. 449.

(Plo. 352.)

ITEM, en ascuns cases de releases de tout le droit, coment que celuy a que le release est fait n'ad riens en le franktenement en fait ne en ley, uncore le release est assets bone. Sicome le disseisor lessa la terre que il ad per disseisin a un auter pur terme de sa vie, savant le reversion a luy, si le disseisee ou son heire relessa al disseisor tout le droit, &c. cel release est bone, pur ceo que celuy a que le release est fait, avoit en luy un reversion al temps del release fait.

[267. a.]

ALSO, in some cases of releases of all the right, albeit (2) that he to whom the release is made hath nothing in the freehold in deed nor in law, yet the release is good enough. As if the disseisor letteth the land which hee hath by disseisin to another for terme of his life, saving the reversion to him, if the disseisee or his heire release to the disseisor all the right, &c. this release is good, because hee to whom the release is made, had in law a reversion at the time of the release made (1).

HERE *Littleton* addeth a limitation to the next precedent Section, *viz.* that a release of all the right may be good to him in reversion, albeit he hath nothing in the freehold, because he hath an estate in him.

7. E. 4. 13. 14. H. 4. 3. b. 41. E. 3. 17. 49. E. 3. 28. case ult.

"*Tout le droit, &c.*" Or title, interest, demand, or the like; and so it is if he in the reversion hath an estate for life or in taile in reversion, as in the like case it appeareth in the next Section.

Sect. 450.

*EN mesme le maner est, lou leas est fait a un home pur terme de vie, le remainder a un auter pur terme de * auter vie, le remainder a le tierce en le*

IN the same manner it is, where a lease is made to a man for terme of life, the remainder to another for terme of another man's life, the remainder

* auter not in L. and M. nor Roh. nor in Cambr. MSS.

(2) [See Note 218.] (1) [See Note 219.]

le taile, le remainder a le quart en fee, si un estranger que droit ad a la terre relessa tout son droit a ascun de eux en le remainder, tiel release est bone, pur ceo que chescun de eux ad un remainder en fait vestue en luy.

remainder to the third in taile, the remainder to the fourth in fee, if a stranger which hath right to the land releaseth all his right to any of them in the remainder, such release is good, because everie of them hath a remainder in deed vested in him.

7. E. 4. 13. 41. E. 3. 7. 17. E. 3. 54. 18. E. 2. Tit. Entrie 74. 3. E. 2. Tit. Entrie 7. F. N. B. 207. E.

HERE is another limitation, that a release is good to him in the remainder, albeit hee hath nothing in the freehold in possession, because he hath an estate in him, as hath beene said. In both these limitations it is to be observed, that the state which maketh a man tenant to the *præcipe*, is said to be the freehold, as here the state of tenant for life, and not the reversion in fee.

Sect. 451.

MES si le tenant a terme de vie soit disseisie, et puis celuy que ad droit (esteant le possession en le disseisor) relessa a un de eux a que le remainder fuit fait tout † son droit, cel release est void, pur ceo que il n'avoit ‡ un remainder en fait al temps de release fait, forsque tantsolement un droit del remainder.

BUT if the tenant for terme of life be disseised, and afterwards he that hath right (the possession being in the disseisor) releaseth to one of them to whom the remainder was made all his right, this release is void, because hee had not a remainder in deed at the time of the release made, but only a right of a remainder.

Vide Sect. 454.

"*FOrsque tantsolement un droit del remainder.*" For a release of a right to one that hath but a bare right regularly is void; for, as *Littleton* hath before said, hee to whom a release is made of a bare right in lands and tenements, must have either a freehold in deed or in law in possession, or a state in remainder or reversion in fee or fee taile, or for life.

Sect. 452.

[267. b.]

ET nota, que chescun release fait a celuy que ad un reversion ou un remainder en fait, servera et aidera celuy que ad le franktenement, auxybien come a celuy a que le release fuit fait, si le tenant avoit le release en son poigne ⸸ de pleader.

AND note, that every release made to him which hath a reversion or a remainder in deed, shall serve and aid him who hath the freehold, as well as him to whom the release was made, if the tenant hath the release in his hand to plead.

† *son—le*, L. and M. and Roh.
‡ *en luy* added L. and M. and Roh.
⸸ *de pleader* not in L. and M. nor Roh.

Sect. 453.

ET en mesme le manner † est lou un release ‡ est fait al tenant pur terme de vie, ou al tenant en le taile, ‖ ceo urera a eux en le reversion, ou a eux en le remainder, auxybien come al tenant de franktenement, et averont auxy grand advantage de cel, s'ils ceo peyent monstre §.

IN the same manner it is where a release is made to the tenant for life, or to the tenant in taile, this shall enure to them in the reversion, or to them in the remainder, as well as to the tenant of the freehold, and they shall have as great advantage of this, if they can shew it.

BY this it appeareth, that as a release made of a right to him in reversion or remainder, shall aid and benefit him that hath the particular estate for yeares, life, or estate taile, so a release of a right made to a particular tenant for life, or in taile, shall aid and benefit him or them in the remainder.

If two tenants in common of land graunt a rent charge of 40 s. out of the same to one in fee, and the grantee release to one of them, this shall extinguish but twentie shillings, for that the graunt in judgement of law was severall. (1) So it is if two men be seised of severall acres, and grant a rent *ut supra*. But there is a diversitie betweene severall estates in severall lands, and severall estates in one land; for if one be tenant for life of lands, the reversion in fee over to another, if they two joyne in a grant of a rent out of the lands, if the grantee releaseth either to him in the reversion, or to tenant for life, the whole rent is extinguished, for it is but one rent, and issueth out of both estates, and so note the diversitie. (2)

(2. Roll. Abr. 414 Post. 275. a. 279. b. 285. b. 297. a. Ant. 147. b. 197.)

(1. Rep. Mayoe's case.)

" *Si le tenant ad le fait en son poigne a pleader.*" And so it is in both cases: for albeit he in the reversion or remainder is a stranger to the deed, when the release is made to the tenant, and the tenant for life or in taile is a stranger to the deed, when the release is made to him in reversion or remainder, yet seeing they are privies in estate, none of them in pleading shall take benefit thereof, without shewing the same in court, which is worthy to be observed.

35. H. 6. 8.

" *S'ils ceo poient monstre.*" The one cannot plead the release made to the other without shewing of it, for that they are privie in estate, as hath beene said. The residue of these two Sections needs no explication.

(Ant. 232 a. Hob. 66. 2. Roll. Abr. 412.)

† *est lou* not in L. and M. nor Roh.
‡ *est* not in L. and M. nor Roh.
‖ *ceo* not in L. and M. nor Roh.
§ *&c.* added in L. and M. and Roh

(1) [See Note 220.] (2) [See Note 221.]

Sect. 454.

ITEM, si soit seignior et tenant, et le tenant soit disseisee, et le seignior relessa al disseisee tout le droit que il avoit en le seigniorie ou en le terre, cel relesse est bone, et le seigniorie est extinct: et ceo est pur cause del privitie que est perenter le seignior et le disseisee. Car si les avers le disseisee saient pris, et de eux le disseisee suist un replevin envers le seignior, il compellera le seignior d'avowrer sur luy; car s'il avower sur le disseisor, donques sur le matter monstre l'avowrie abatera, car le disseisee est tenant a luy en droit et en la ley.

ALSO, if there bee lord and tenant, and the tenant be disseised, and the lord releaseth to the disseisee all the right which he hath in the seigniorie or in the land, this release is good, and the seigniorie is extinct: and this is by reason of the privitie which is betweene the lord and the disseisee. For if the beasts of the disseisee be taken, and of them the disseisee sueth a replevin against the lord, hee shall compell the lord to avow upon him; for if hee avow upon the disseisor, then upon the matter shewn the avowrie shall abate, for the disseisee is tenant to him in right and in law. (1)

HEREUPON may bee collected and observed two diversities: first, betweene a seigniorie or rent service, and a rent charge: for a seigniorie or rent service may bee released and extinguished to him that hath but a bare right in the land. And the reason hereof is, in respect of the privitie betweene the lord and the tenant in right; for he is not only as tenant to the avowrie, but if hee die his heire within age, hee shall bee in ward; and if of full age, hee shall pay releefe; and if he die without heire, the land shall escheat. But there is no such privitie in case of a rent charge, for there the charge only lieth upon the land. (3. Rep. 35. b.)

The second diversitie is betweene a seigniorie and a bare right to land; for a release of a bare right to land to one that hath but a bare right is void, as hath beene said. But here in the case of our author, a release of a seigniorie to him that hath but a right, is good to extinguish the seigniorie. (Vid. Sect. 451.)

Nota, a seigniorie, rent, or right, either *in præsenti*, or *in futuro*, may be released five manner of wayes, and the first three without any privitie. First, to the tenant of the freehold in deed or in law. Secondly, to him in remainder. Thirdly, to him in the reversion. The other two in respect of privitie: as, first, here the lord releaseth his seigniorie to the tenant being disseised, having but a right, and no estate at all: secondly, in respect of the privitie, without any estate or right; as by the demandant to the vouchee, or donor to the donee, after the donee hath discontinued in fee, as appeareth hereafter in this chapter. (Lib. 10. fol. 48. Lampet's case. (Post. 275. 2. Roll. Abr. 402.) Sect. 455.)

"*Per cause de privitie, &c.*" See for this word *(privitie)*, Sect. 461.

"It

(1) Here the release operates by way of extinguishment. See post. 279. b.

"*Il compellera le seignior d'avowrer sur luy, &c.*" This is regularly true; but if the lord hath accepted services of the disseisor, then the disseisee cannot enforce the lord to avow upon him, though his beasts be taken, &c. (2)

20. H. 6. 9. b. 41. E. 3. 26. 48. E. 3. 9. 2. E. 4. 6. a.

If a man hath title to have a writ of escheat, if he accept homage or fealtie of the tenant, he is barred of his writ of escheat; but if he accept rent of the tenant, that is no bar to him, for it may be received by the hands of a baylife. [*d*] But some doe hold, that if there be lord and tenant, and the tenant be disseised, and the disseisee die without heire, the lord accepts rent by the hands of the disseisor, this is no barre to him. Contrarie it is, if he avow for the rent in court of record, or if he take a corporall service, as homage or fealtie, for the disseisor is in by wrong: but if the lord accept the rent by the hands of the heire of the disseisor, or of his feoffee, because they be in by title, this shall barre him of his escheat, which [268. b.] is to bee understood of a discent or feoffment, after the title of escheat accrued: (*e*) for if the disseisor make a feoffment in fee, or die seised, and after the disseisee die without heire, then there is no escheat at all, because the lord hath a tenant in by title. And when *Littleton* wrote, the disseisee in the case here put, should have compelled the lord to have avowed upon him, as *Littleton* holdeth. But now this is altered by a latter statute of (*f*) 21. H. 8. For whereas by fines, recoveries, grants, and secret feoffments, &c. made by tenants to persons unknowne, the lords were put from knowledge of their tenants, upon whom by order of law they should make their avowrie, &c. it is by that statute enacted, that if the lord shall distreine upon the lands and tenements holden, &c. that he may avow, &c. upon the same lands, &c. as in lands, &c. within his fee or seigniorie, &c. without naming of any person certaine, and without making avowrie upon a person certaine. Upon which statute these foure points are to be observed. First, that the lord hath still election either to avow according to the common law, by force of the statute, by reason of this word (*may*). Secondly, albeit the purview of the act be generall, yet all necessary incidents are to be supplyed, and the scope and end of the act to be taken: and therefore, though he need not to make his avowrie upon any person certaine, yet he must alleage seisin by the hands of some tenant in certaine, within fortie yeares. Thirdly, that if the avowrie be made according to the statute, everie plaintife in the replevin, or second deliverance, be he termor or other, may have everie answer to the avowrie that is sufficient; and also have aid, and everie other advantage in law (disclaimer only except); for disclaime he cannot, because in that case the avowrie is made upon no certaine person. Fourthly, where the words of the statute be, if the lord distreine upon the lands and tenements holden, yet if the lord come to distreine, and the tenant enchase his beasts which were within the view out of the land holden, and there the lord distreine, albeit the distresse be taken out of his fee and seigniorie in that case, yet is it within the said statute: for in judgment of law the distresse is lawfull, and as taken within his fee and seigniorie; and this statute being made to suppresse fraud, is to be taken by equitie (1).

31. E. 1. Discent 17. 26. E. 3. 72. 4. H. 6. 21. F. N. B. 144. o. [*d*] 7. E. 6. tit. Escheat. Br. 18. (9. Rep. 22. 1. Roll. Abr. 316. b.) (*e*) 7. H. 4. 17. 3. R. 2. entr. cong. 38. 2. H. 4. 8. 6. H. 7. 9. Vide Sect. 556. (*f*) 21. H. 8. cap. 19. (Hob. 242.) Lib. 9. fol. 136. Ascough's case. 27. H. 8. fol. 4. 32. H. 8. cap. 2. Lib. 9. fol. 36. Bucknal's case. 34. H. 8. Avowrie Br. 113. 27. H. 8. 4. & 20. Bucknal's case ubi supra. Lib. 9. fol. 22. in case d'avowrie. 44. E. 3. 20. 11. H. 7. 4. 21. H. 7. 40. 34. H. 6. 18. 16. E. 4. 10. (Ant. 161.) 6. R. 2. Rescous. 11.

(2) [See Note 222.] (1) See the following page. Gilb. Distr. 189. Lord Raym. 257.

Sect. 455.

ITEM, si terre soit done a un home en taile, reservant al donor et a ses heires un certaine rent, si le donee soit disseisie, et puis le donor relessa al donee et a ses heires tout le droit que il avoit en la terre, et puis le donee enter en la terre sur le disseisor; en cest case le rent est ale, pur ceo que le disseisee al temps de release fait, fuit tenant en droit et en la ley al donor, et avowrie a fine force covient de estre fait sur luy per le donor pur le rent aderere, &c. Mes uncore rien de droit de terres, scilicet, *de le droit de le reversion,* * *passera per tiel release, pur ceo que le donee a que le release est fait, adonque n'avoit riens en la terre forsque tantsolement un droit, et issint le droit del terre ne puissoit* † *adonques passer al donee per tiel release.*

ALSO, if land be given to a man in taile, reserving to the donor and to his heires a certaine rent, if the donee be disseised, and after the donor release to the donee and his heires all the right which hee hath in the land, and after the donee enter into the land upon the disseisor; in this case the rent is gone, for that the disseisee at the time of the release made, was tenant in right and in law to the donor, and the avowrie of fine (2) force ought to bee made upon him by the donor for the rent behinde, &c. But yet nothing of the right of the lands, *(scilicet)* of the reversion, shall passe by such release, for that the donee to whom the release is made, then had nothing in the land but onely a right, and so the right of the land could not then passe to the donee by such release.

Vide Sect. 454. 2. H. 5. tit. grant. 43. 14. H. 4. 38. li. 3. fol. 29. lib. 6. 58. Lampet's case ubi supra. (Ant. 46. Post. 348.) [m] 10. E. 3. 26. 48. E. 3. 8. b. 31. E. 3. gard. 116. 5. E. 4. 3. 7. E. 4. 27. 15. E. 4. 13. [n] Trin. 18. El. z. sir Thomas Wiat's case in communi banco.

[269. a.]

"*SI le donee soit disseisie, &c.*" This is evident by that which hath beene said. But admit that the donee maketh a feoffment in fee, and the donor release unto him and his heires all the right in the land, this shall extinguish the rent, because the lord must avow upon him, and yet the tenant in taile after the feoffment hath no right in the land. But the reason is in respect of the privity, and that the [m] donor is by necessity compellable to avow upon him only; for if he should avow upon the discontinuee, then it should appeare of his owne shewing that the reversion whereunto the rent is incident, should be out of him, and consequently the avowrie should abate; and so was it [n] resolved *Trin.* 18. *Eliz.* in the court of common pleas in sir *Thomas Wiat*'s case, which I heard and observed. And *Littleton* saith here, that in case of the disseisin of fine force, the avowrie must be made upon the donee.

"*Uncore riens de droit, &c. de reversion, &c.*" Here the diversitie aforesaid betweene the rent service and a bare right to the land appeareth.

* *adonques ne* added L. and M. and Roh. † *adonques* not in L. and M.

(2) That is, of necessity.

Sect. 456.

En mesme le manner est, si leas soit * *a un pur terme de vie, reservant al lessor et a ses heires certaine rent, si le lessee soit disseisie, et puis lessor relessa al lessee et a ses heires tout le droit que il ad en la terre, et apres le lessee enter, coment que en cest cas le rent est extinct, uncore rien del droit de la reversion passera,* causâ quâ supra.

In the same manner it is, if a lease be made to one for terme of life, reserving to the lessor and to his heires a certaine rent, if the lessee be disseised, and after the lessor release to the lessee and to his heires all the right which he hath in the land, and after the lessee entreth, albeit in this case the rent is extinct, yet nothing of the right of the reversion shall passe, *causâ quâ supra.*

HEREBY the diversity is made apparent betweene a release of a rent service out of land, and a release of right to land, in this Section.

Sect. 457.

Mes si soit veray seignior et veray tenant, et le tenant fait un feoffment en fee, lequel feoffee ne unque devient tenant al seignior, † *si le seignior relessa al feoffor tout son droit, &c. cest releas est en tout void, pur ceo que le feoffor ad nul droit en la terre, et il n'est tenant en droit al seignior, mes tenant solement tenant quant al avowry faire, et il ne unques compellera le seignior d'avower sur luy, car le seignior avowera sur le feoffee s'il voile.*

But if there be very lord and very tenant, and the tenant maketh a feoffment in fee, the which feoffee doth never become tenant to the lord, if the lord release to the feoffor all his right, &c. this release is altogether void, because the feoffor hath no right in the land, and he is not tenant in right to the lord, but only tenant as to make the avowrie, and hee shall never compell the lord to avow upon him, for the lord shall avow upon the feoffee if hee will.

"*Veray seignior et veray tenant.*" This is to be understood of a lord in fee simple, and of a tenant of like estate.

There be foure manner of avowries for rents and services, &c. *viz.* 1. *Super verum tenentem*, as in the case here put. 2. *Super verum tenentem in formâ prædictâ*, as where a lease for life, or a gift in taile bee made, the remainder in fee. 3. Upon one as upon his tenant by the mannor omitting (*verse*); and this is when the lord hath a particular estate in the seigniorie, and so shall the donor [269. b.] upon the donee, or lessor upon the lessee. 4. *Sur le matter en la terre*, as within his fee and seigniorie. As where the tenant by knights service maketh a lease for life reserving a rent, and die his heire within age, the gardeine shall avowe upon the lessee, *scilicet*, *super materiam prædictam in terris et tenementis prædictis ut infra feodum et dominium suum.* Now by the statute the very lord may avow, as

Vide Ascough's case, l. 9. f. 135, 136. 20. H. 6. 9. 2. H. 4. 24. 12. E. 4. 2. 26. H. 6. avowrie 17. 9. Eliz. Dier 257. 5. H. 7. 11. 7. E. 4. 24. 20. E. 3. avow. 131. (9. Rep. 135. b. 21. H. 8. c. 19.) 47. E. 3. fol. ultimo.

38. H. 6. 23. (Doc. Pla. 53.) 21. H. 8. cap. 19. (Post. 345.)

* *fait* added in L. and M. and Roh. † *&c.* added in L. and M. and Roh.

as in lands within his fee and seigniorie, without avowing upon any person in certaine. (1)

Here appeareth the diversity betweene a tenant in taile, and a tenant in fee simple; for albeit tenant in taile make a feoffment in fee, yet the right of the entaile remaine, and shall descend to the issue in taile. But when the tenant in fee simple make a feoffment in fee, no right at all remaine of his estate, but the whole is transferred to the feoffee.

Also the lord is not compellable in that case to avow upon the feoffor; but if he will, as *Littleton* here saith, he may avow on the feoffee; but so it is not, as hath beene said, in case of tenant in taile.

(Doc. Pla. 321.)

Note a diversity betweene actions and acts which concerne the right, and actions and acts which concerne the possession only. For a writ of customes and services lieth not against the feoffor, nor a release to him shall extinguish the seigniorie. So if a rescous be made, an assise shall not lie against the feoffor, and him that made the rescous, because the feoffee is tenant, and in assise; the surplusage incroached shall be avoided. For these actions and acts concerne the right; but of a seisin and an avowrie which concerne the possession, it is otherwise. And if the lord release to the feoffor, this is good betweene them, as to the possession and discharge of the arrerages, but the feoffee shall not take benefit of it, for that, as hath beene said, it extendeth not to the right. But the feoffor shall plead a release to the feoffee, for thereby the seigniorie is extinct; as if lessee for life doth waste, and grant over his estate, and the lessor release to the grantee, in an action of waste against the lessee, he shall plead the release, and yet he hath nothing in the land. And so in waste shall tenant in dower or by the courtesie in the like case, and the vouchee, and the tenant in a *præcipe* after a feoffment made. And so in a *contra formam collationis*.

4. E. 3. 22.
7. E. 3. 8.
7. E. 4. 27.
29. H. 8. tit. avowrie.
Br. 111. li. 3. fol. 65, 66.
Pennant's case.
7. H. 4. 14.
2. E. 4. 6.
34. H. 6 46.
37. H. 6.
29. H. 8. avowrie.
(6. Rep. 58. b.)

"*Le feoffee ne unques deveigne tenant.*" *Nota* here an excellent point of learning, *viz.* if there be lord and tenant, and the rent is behind by divers yeares, and the tenant make a feoffment in fee, if the lord accept the service or rent of the feoffee due in his time, he shall lose the arrerages due in the time of the feoffor; for after such acceptance he shall not avow upon the feoffor, nor upon the feoffee for the arrerages incurred in the time of the feoffor. But in that case if the feoffor dieth, albeit the lord accept the rent or service by the hand of the feoffee due in his time, he shall not lose the arrerages, for now the law compelleth him to avow upon the feoffee, (2) and that which the law compelleth him unto, shall not prejudice him.

So it is, and for the same reason, if there be lord, mesne, and tenant, and the rent due by the mesne is behinde, and after the tenant fore-judge the mesne, and the lord receive the services of the mesne which issue out of the tenancie, he shall not be barred of the arrerages which issued out of the mesnalty; and so if the rent be behinde, and the tenant dieth, the acceptance of the services by the hand of the heire shall not barre him of the arrerages; for in these cases albeit the persons be altered, yet the lord doth accept the services of him which only ought to doe them. (3)

But

(1) [See Note 223.] (3) [See Note 225.]
(2) [See Note 224.]

But as long as the feoffor liveth, the lord shall not be compelled to avow upon the feoffee, unlesse he giveth the lord notice, and tender unto him all the arrerages.

4. E. 3. 22.
47. E. 3. 4.

But now by the statute the lord may avow upon the lands so holden, as in lands within his fee or seigniory, without naming of any person certaine to bee tenant of the same, and without making of any avowrie upon any person certaine, as hath beene said, which hath much altered the common law in the cases abovesaid, for the benefit and safety of the lord.

21. H. 8. cap. 91.

But yet these cases are necessary to be knowne (for which purpose I have added them), for that the lord may avow still at the common law if he will.

170. a.]

Sect. 458.

AUTERMENT est lou le veray tenant est disseisie, come en le cas avantdit; car si le veray tenant que est disseisie, teigne del seignior per service de chivaler et morust (son heire esteant deins age), le seignior avera et seisera le garde del heire, et issint n'avera il my le gard del feoffor que fist le feoffment en fee, &c. issint il est graund diversity enter les deux cases, &c.

OTHERWISE it is where the very tenant is disseised, as in the case aforesaid; for if the very tenant who is disseised, hold of the lord by knights service and dieth (his heire being within age), the lord shall have and seize the wardship of the heire, and so shall he not have the ward of the feoffor that made the feoffment in fee, &c. so there is a great diversitie betweene these two cases.

Of this sufficient hath beene said before.

12. H. 4. 13. 36. E. 3. tit. gard. 10. 6. H. 7. 9. 37. H. 6. 1. 32. H. 6. 27. 7. E. 6. tit. gard. Br. (Post. 345. b.)

Sect. 459.

*ITEM, si un home lessa a un auter son terre pur terme d'ans, si le lessor relessa al lessee tout son droit, &c. devant que le lessee avoit enter en mesme le terre per force de mesme le leas, tiel releas est void, pur ceo que le lessee n'avoit possession en la terre al temps del releas fait, mes tantsolement un droit d'aver mesme la terre per force de mesme le leas. Mes si le lessee enter en mesme la terre, et ent eit possession per force de mesme le leas, donque tiel releas fait a luy per le feoffor, ou per son heire, est * sufficient a luy per cause del privitie*

ALSO, if a man letteth to another his land for terme of yeares, if the lessor release to the lessee all his right, &c. before that the lessee had entred into the same land by force of the same lease, such release is void, for that the lessee had not possession in the land at the time of the release made, but only a right to have the same land by force of the lease. But if the lessee enter into the land, and hath possession of it by force of the said lease, then such release made to him by the feoffor, or by his heire, is

* *bon et* added L. and M. and Roh.

privitie que per force del leas est perenter eux, &c.

is sufficient to him by reason of the privitie which by force of the lease is between them, &c. (1)

49. E. 3. 28.
32 H. 6. 8.
37. H. 6. 18.
22. E. 4. 37.
4. H. 7. 10.
15. H. 7. 14.

" DEVANT *que le lessee avoit enter, &c.*" For before entry the lessee hath but *interesse termini*, an interest of a terme, and no possession, and therefore a release which enures by way of enlarging of an estate cannot worke without a possession, (2) for before possession there is no reversion; and yet if a tenant for twenty yeares in possession make a lease to *B.* for five yeares, and *B.* enter, a release to the first lessee is good, for he had an actuall possession, and the possession of his lessee is his possession. And so it is if a man make a lease for yeares, the remainder for yeares, and the first lessee doth enter, a release to him in the remainder for yeares is good to enlarge his estate. (3)

22. E. 4. Surrender. 6.
(Post. 273. a.)

But if a man make a lease for yeares to beginne presently, reserving a rent, if before the lessee doth enter the lessor releaseth all the right that hee hath in the land, albeit this release cannot enlarge his estate, yet it shall in respect of the privity extinguish the rent. And so it is if a lease be made to beginne at *Michaelmas*, reserving a rent, and before the day the lessor release all the right that hee hath in the land, this cannot enure to enlarge the estate but to extinguish the rent in respect of the privity, as it was resolved, [*b*] in the exchequer, which I observed.

(Ant. 46. b.)

[270. b.]

[*b*] Mich. 39. & 40. Eliz. in Scaccario, betweene sir Henrie Woodhouse and sir William Paston.

A man granteth the next avoidance of an advowson to two, the one of them may before the church become void release to the other; for although the grantor cannot release to them to increase their estate, because their interest is future, and not in possession, yet one of them to extinguish his interest may release to the other in respect of the privity. But after the church become void, then such a release is void, because then it is (as it were) but a thing in action. And this was resolved [*c*] by the whole court of common pleas, which I myselfe heard and observed. And by consequent in the case of *Littleton*, if a lease for yeares be made to two, albeit the lessor before they enter cannot release to them to enlarge their estate, yet one of them may before entry release to the other.

[*c*] Pasch. 38. Eliz. in quare impedit per Bennet, vers. l'evesque de Norwich in communi banco.

Pl. Com. 423.

" *Mes tantsolement un droit, &c.*" Which is not so to be understood that he hath but a naked right, for then he could not grant it over; but seeing he hath *interesse termini*, before entrie, he may grant it over, albeit for want of an actuall possession, he is not capable of a release to enlarge his estate.

" *Mes si le lessee enter en mesme le terre, &c.*" This is evident. And herein note a diversity betweene a lease for life, and for yeares, for before the lessee for yeares enter, a release cannot be made unto him: but if a man make a lease for life, the remainder for life, and the first lessee dieth, a release to him in the remainder and to his heires is good before hee doth enter to enlarge his estate,

(1) On releases which operate by enlargement, see post. 273. a.

(2) [See Note 226.]

(3) [See Note 227.]

estate, for that he hath an estate of a freehold in law in him, which may be enlarged by release before entrie.

And where our author speaketh only of a lessee for yeares, the same law it is of a tenant by statute merchant or staple, or tenant by *elegit*, or the like.

25. E. 3. 53.
31. E. 3. Confirmat. 14.
31. Ass. Pl. 13.

Sect. 460.

EN mesme le maner est, come il semble, ou lease est fait a un home a tener de le lessor a sa volunt, per force de quel leas le lessee eit possession: si le lessor en cest case fait un releas al lessee de tout son droit, &c. cest releas est assets bon pur le privity que est perenter eux; car en vain serra de faire estate per un liverie de seisin a un auter, lou il ad possession de mesmes les tenements per le leas de mesme celuy devant, &c.

* Sed contrarium tenetur, P. 2. Ed. 4. *per touts les justices.*

IN the same manner it is, as it seemeth, where a lease is made to a man to hold of the lessor at his will, by force of which lease the lessee hath possession: if the lessor in this case make a release to the lessee of all his right, &c. this release is good enough for the privity which is betweene them; for it shall bee in vaine to make an estate by a livery of seisin to another, where he hath possession of the same land by the lease of the same man before, &c.

But the contrarie is holden, *Pasch.* 2. *E.* 4. by all the justices. *

BY these two Sections is to be observed, a diversity between a tenant at will, and a tenant at sufferance; for a release to a tenant at will is good, because betweene them there is a possession with a privity; but a release to a tenant at sufferance is void, because he hath a possession without privity. As if lessee for yeares hold over his terme, &c. a release to him is void, for that there is no privity betweene them; and so are the books that speake of this matter to be understood. (1)

21. H. 6. 37.
2. E. 4. 6. b.
7. E. 4. 27.
3. E. 4. 16.
29. H. 6. Release 6.
(5. Rep. 13.
2. Sid. 153.
Ant. 47. Cro. Jac. 169.)

" *Sed contrarium tenetur, &c.*" This is of a new addition, and the booke here cited ill understood, for it is to be understood of a tenant at sufferance.

[271. a.]

Sect. 461.

MES lou home de sa teste demesne occupia terres ou tenements a la volunt celuy que ad † le franktenement, et tiel occupier ne claima riens forsque

BUT where a man of his owne head occupieth lands or tenements at the will of him which hath the freehold, and such occupier claimeth

* This paragraph is not in L. and M. nor Roh. † *ent* added L. and M. and Roh.

(1) [See Note 228.]

forsque a volunt, &c. si celuy que ad le franktenement voile releaser tout son droit al occupier, &c. tiel release est void, pur ceo que nul privitie est perenter eux per lease fait al occupier, ne per auter manner, &c.

eth nothing but at will, &c. if hee which hath the freehold will release all his right to the occupier, &c. this release is void, because there is no privitie betweene them by the lease made to the occupier, nor by other manner, &c.

Vide Sect. 68. (1. Roll Abr. 658. Ant. 57. Cro. Car. 303.)

"DE *sa teste demesne occupia.*" Hee doth not say, *de sa teste demesne enter*, &c. so as this is to bee understood of a tenant at sufferance, *viz.* where a man commeth to the possession first lawfully, and holdeth over.

(m) Temps H. 8. tit. tenant a volunt. Br. 15. 2. E. 4. 38. 18. E. 4. 25. 39. E. 3. 28. 12. E. 3. Ass. 86. 11. E. 3. ibid. 87. 12. Ass. 21. 13. E. 3. Ass. 92.

(m) For if a man entreth into land of his owne wrong, and take the profits, his words to hold it at the will of the owner cannot qualifie his wrong, but hee is a disseisor, (1) and then the release to him is good; or if the owner consented thereunto, then hee is a tenant at will, and that way also the release is good. But there is a diversitie when one commeth to a particular estate in land by the act of the partie, and when by act in law; for if the gardein hold over, he is an abator, because his interest came by act in law. (2)

28. Ass. 11. 34. Ass. 10. 10. E 3. 41. 8. E. 3. 63. (1 Roll. Abr. 662. Post. 277.)
Vide 2. part of the Institutes. Marlb. cap. 16. 10. E. 4. 9. 10. (1. Roll. Abr. 861. Ant. 56. a.)

Old N. B. 117. 137. Lib. 3. fo. 23. Walker's case. Lib. 4. fol. 123, 124. Vide Sect. 454.

"*Nul privitie.*" *Privitie* is a word common aswell to the English as to the French, and in the understanding of the common law is fourefold.

1. As privies in estate, whereof *Littleton* here speaketh; as betweene the donor and donee, lessor and lessee, which privitie is ever immediate.

(8. Rep. 42. b.) 2. Privies in bloud; as the heire to the ancestor, or betweene coparceners, &c.

(Ant. 242. a) 3. Privies in representation; as executors, &c. to the testator.

And fourthly, privities in tenure, as the lord and tenant, &c. which may be reduced to two generall heads, privies in deed, and privies in law.

Sect. 462, 463.

ITEM, si home enfeoffe auters homes de sa terre sur confidence, et al entent de performer sa darreine volunt, et le feoffor occupiast mesme la terre a la volunt de ses feoffees, et puis les feoffees relessont per lour fait a lour feoffor tout lour droit, &c. ceo ad este un question, si tiel release soit bon ou non. Et ascuns ont dit, que tiel release est voyd, pur ceo que nul privitie fuit perenter les feoffees et lour feoffor, entant

ALSO, if a man enfeoffe other men of his land upon confidence, and to the intent to performe his last will, and the feoffor occupieth the same land at the will of his feoffees, and after the feoffees release by their deed to their feoffor all their right, &c. this hath beene a question if such release be good or no. And some have said, that such release is void, because there was no privitie betweene

(1) [See Note 229.] (2) [See Note 230.]

tant que nul lease fuit fait apres tiel feoffment per les feoffees al feoffor, a tener a lour volunt. Et ascuns ont dit le contrarie, et ceo per deux causes.

betweene the feoffees and their feoffor, insomuch as no lease was made after such feoffment by the feoffees to the feoffor, to hold at their will: and some have said the contrarie, and that for two causes.

Sect. 463.

UN est, que quant tiel feoffment est fait sur confidence a performer la volunt del feoffor, il serra intendue per la ley, que le feoffor doit maintenant occupier la terre a la volunt de ses feoffees; et issint il est tiel manner de privitie enter eux, sicome home fait un feoffment as auters, et ils incontinent sur le feoffment voylent et granteront, que lour feoffor occupiera la terre a lour volunt, &c.

ONE is, than when such feoffment is made upon confidence to performe the will of the feoffor, it shall bee intended by the law, that the feoffor ought presently to occupie the land at the will of his feoffees; and so there is the like kinde of privitie betweene them, as if a man make a feoffment to others, and they immediately upon the feoffment will and grant, that their feoffor shall occupy the land at their will, &c.

HERE is a question moved, and the reasons of both sides shewed, and as it hath beene observed, the latter opinion is the better, being *Littleton*'s owne opinion.

12. E. 4. 12. b. 15. E. 4. 9. H. 7. 25. Vide Sect. 302. 176. 340.

" *Il serra entendue per la ley que le feoffor doit maintenant occupie la terre a la volunt de les feoffees.*" For intendments of law mentioned by our author, see the Section in the margent.

4. E. 4. 8. b. 9. H. 7. fol. ultimo. 15. H. 7. 2. b. 14. H. 8. 9. a. Sect. 99, 100. 110. 367. 377. 393. 406 440.

[271. b.] Here is to bee observed the intendment of law, that when a feoffment is made to a future use, as to the performance of his last will, the feoffees shall bee seised to the use of the feoffor and of his heires in the meane time.

35. H. 6. Subpena, 22. 15. H. 7. 12. b. 37. H. 6. 36. 11. H. 4. 52. 7. H. 4. 22. 1. Mar. 111. Dier. (6. Rep. 18. a.) (Ant. 111. b. 112. a.) (2. Rep. 58.)

Ipsæ etenim leges cupiunt ut jure regantur.

And reason would that seeing the feoffment is made without consideration, and the feoffor hath not disposed of the profits in the meane time, that by construction and intendment of law the feoffor ought to occupie the same in the meane time. And so it is when the feoffor disposeth the profits for a particular time *in præsenti*, the use of the inheritance shall be to the feoffor and his heires, as a thing not disposed of; wherein it is to be observed, that lands and tenements conveyed upon confidences, uses, and trusts, are to be ruled and decided, if question groweth upon the confidences, uses or trusts, by the judges of the law; for that it ap-

(1. Roll. Abr. 859. Sid. 458. Dyer. 186. a.) 35. H. 6. Subpena, 22. 30. H. 6. tit. Devise.

peareth by this and the next Section, they are within the entendment and construction of the lawes of the realme (1).

(Ant. 111. b. 114. a) And it is to be observed (as hath beene said) that there is a diversitie betweene a feoffment of lands at this day upon confidence, or to the intent to performe his last will, and a feoffment to the use of such person and persons, and of such estate and estates, as hee shall appoint by his last will: for, in the first case, the land passeth by the will, and not by the feoffment; for after the feoffment the feoffor was seised in fee simple, as he was before; but in the latter case, the will pursuing his power is but a direction of the uses of the feoffment, and the estates passe by execution of the uses, which were raised upon the feoffment; but in both cases the feoffees are seised to the use of the feoffor and his heires in the mean time: and all this and much more concerning this matter hath beene adjudged.

Lib. 6 fol. 17, 18. Sir Edward Clere's case.

Dillon & Frayn's case, l. 1. &c. fol. 113.

Note, uses are raised either by transmutation of the estate, as by fine, feoffment, common recoverie, &c. or out of the state of the owner of the land, by bargaine and sale by deed indented and inrolled, or by covenant upon lawfull consideration, whereof you may read plentifully in my *Reports*.

(2. Roll. Abr. 797. 1. Rep. 129. b. 192. b. Stat. 27. H. 8. c. 10. Plow. 348. 1. Rep. 127. Sid. 26.)

A feoffee to the use of *A.* and his heires, before the statute of 27. *H.* 8. for money bargaineth and selleth the land to *C.* and his heires, who hath no notice of the former use; yet no use passeth by this bargaine and sale, for there cannot be two uses in *esse*, of one and the same land; and seeing there is no transmutation of possession by the terre-tenant, the former use can neither be extinct nor altered. And if there could be two uses of one and the same land, then could not the said statute execute either of them for the uncertaintie. But if *A.* disseise one to the use of *B.* and *A.* doth bargaine and sell the land for money to *C.* *C.* hath an use; and here be two uses of one land, but of severall natures; the one, *viz.* upon the bargaine and sale to be executed by the statute, and the other not. [272. a.]

(Ant. 22. b.)

But since *Littleton* wrote, all uses are transferred by act of Parliament [c] into possession, so as the case which *Littleton* here puts is thereby altogether altered. Yet it is necessarie to bee knowen, what the common law was before the making of the statute, and may serve for the knowledge of the law in like case.

[c] 27. H. 8. cap. 10. (Dr. and Stud. 98. a.)

" *Incontinent sur le feoffment.*" *Quæ incontinenti fiunt in esse vident'.*

" *A lour volunt, &c.*" Here is implyed, everie tenancie at will is at the will of both parties, as before in his proper place hath beene shewed.

(1) [See Note 231.]

Sect.

Sect. 464.

UN auter cause ils allegeont, que si tiel terre vault xl. s. per an, &c. donque tiel feoffor serra jure en assises et en auters enquests en plees realx, et auxy en plees personals, de quel graund sum que les plaintifes voilent counter, * *&c. Et ceo est per le common ley de la terre.* Ergo, *ceo est pur un graund cause. Et la cause est, que la ley voet que tiels feoffors et lour heires doient occupier, &c. et prender et enjoyer touts maner de profits, issues, et revenues, &c. sicome les tenements fueront lour mesmes, sans interruption de les feoffees, nient obstant tiel feoffment.* Ergo, *mesme la ley done privitie perenter tiels feoffors et les feoffees sur confidence, &c. pur queux causes ils ont dit, que tiels releases faits per tiels feoffees sur confidence a lour feoffor ou a ses heires, &c. issint occupant la terre,* † *serra assets bon: et cest le melior opinion, come il semble, &c.*

‡ Quære, *car ceo semble nul ley a cet jour.*

ANOTHER cause they alleage, that if such land bee worth fortie shillings a yeare, &c. then such feoffor shall be sworn in assise and other enquests in plees reals, and also in plees personals, of what great sum soever the plaintiffe will declare, &c. And this is by the common law of the land. *Ergo*, this is for a great cause. And the cause is, for that the law will that such feoffors and their heires ought to occupie, &c. and take and enjoy all manner of profits, issues, & revenues, &c. as if the lands were their own, without interruption of the feoffees, notwithstanding such feoffment. *Ergo*, the same law giveth a privitie between such feoffors and the feoffees upon confidence, &c. for which causes they have said, that such releases made by such feoffees upon confidence to their feoffor or to his heirs, &c. so occupying the lands, shall bee good enough: and this is the better opinion, as it seemeth.

Quære, for this seemeth no law at this day.

BY the statute of 2. *H.* 5. cap. 3. statute 2. it is enacted, that, in three cases, he that passeth in an enquest, ought to have lands and tenements to the value of fortie shillings, *viz.* First, upon triall of the death of a man. Secondly, in plea reall betweene partie and partie. And thirdly, in plea personall, where the debt or the dammages in the declaration amount unto fortie markes. (1) And it is worth the noting, that the judges that were at the making of that statute did construe it by equitie: for where the statute speakes in the disjunctive debt or dammages, they adjudged that where the debt and damages amounted to fortie markes, that it was within the statute. *Fortescue* [*f*] saith, *Ubi damna vel debitum in personalibus actionibus non excedunt quadraginta marcas monetæ Anglicanæ, hinc non requiritur, quòd juratores in actionibus hujusmodi tantum expendere possint: habebunt tamen terram vel redditum ad valorem competentem, juxta discretionem justitiariorum, &c.* And forasmuch as at the time of the making of this statute, the

(Ant. 156. b.) 28. H. 8. Dy. fol 9. Vid. W. 2. cap. 38.] L'estat. de 21. E. 1. de juratis ponendis in assisis, &c. (Fortescue 62. a. 27. El. c. 6. Ant. 157. a.)

9. H. 5. fol. 5. [*f*] Fortesc. cap. 15.

* *&c.* not in L. and M. nor Roh.
† *&c.* added L. and M. and Roh.
‡ This paragraph not in L. and M. nor Roh.

(1) [See Note 232.]

the greater part of the lands in England in those troublesome and dangerous times (when that unhappie controversie betweene the houses of Yorke and Lancaster was begun) were in use; and the statute was made to remedie a mischiefe, that the sheriffe used to return simple men of small or no understanding; and therefore the statute provided, that hee should returne sufficient men: and albeit in law the land was the feoffees, yet for that they had it but upon trust, and *cesty que use* tooke the whole profits, as our author here saith, and in equity and conscience the land was his, therefore the judges, for advancement and expedition of justice, extended the statute (against the letter) to *cesty que use*, and not to the feoffees. (1)

15. H. 7. 13. b. 13. H. 7. 7. b. 5. E. 4. 7. a.

[272. b.]

[*n*] But note, if a man hath a freehold *pur terme d'auter vie*, or is seised in his wife's right, and is returned on a jurie, yet if after he be returned, *cesty que vie*, or his wife die, hee may be challenged; and so it is if after the returne the lands be evicted.

[*n*] 3. H. 6. 39. Challeng. 19. 21. H. 6. 39. (Ant. 157. a.)

" *Et ceo est per le common ley.*" Here three things are to be observed. First, that the surest construction of a statute is by the rule and reason of the common law. Secondly, that uses were at the common law. Thirdly, that now seeing the statute [*g*] of 27. *H.* 8. *cap.* 10. which hath beene enacted since *Littleton* wrote, hath transferred the possession to the use, this case holdeth not at this day; but this latter opinion before that statute was good law, as *Littleton* here taketh it.

[*g*] 27. H. 8. cap. 10.

" *Mesme la ley done privitie, &c.*" Hereof it followeth, that when the law gives to any man any estate or possession, the law giveth also a privitie and other necessaries to the same, and *Littleton* concludeth it with an illative, *ergo, mesme la ley done privitie*, which is verie observable for a conclusion in other cases.

(8. Rep. 42. b.)

And the (*quære*) here made in the end of this Section is not in the originall, but added by some other, and therefore to be rejected.

(Ante 156. b.)

Also since *Littleton* wrote, the said statute of 2. *H.* 5. is altered: for where that statute limited fortie shillings, now a latter statute hath raised it to foure pounds, and so it ought to be contained in the *venire facias*.

27. El. cap. 6.

Nota, an use is a trust or confidence reposed in some other, which is not issuing out of the land, but as a thing collaterall, annexed in privitie to the estate of the land, and to the person touching the land, *scilicet*, that *cesty que use* shall take the profit, and that the terre-tenant shall make an estate according to his direction. So as *cesty que use* had neither *jus in re*, nor *jus ad rem*, but only a confidence and trust, for which he had no remedie by the common law, but for breach of trust his remedie was only by *subpœna* in chancerie: and yet the judges, for the cause aforesaid, made the said construction upon the said statute.

Pl. Com. 352. b. in Delamere's case, and 349. b. Lib. 1. fol. 121, 122. 127. 140. in Chudleye's case. Lib. 2. fol. 58. 78. Lib. 6. fol. 64. Lib. 7. fol. 13. & 34.

Now how jurors shall bee returned, both in common plees, and also in plees of the crowne, and in what manner evidence shall be given to them, and how they shall be kept, untill they give their verdict, you may read in *Fortescue*, and therefore need not to be here inserted.

Fortesc. cap. 25, 26, 27.

(1) See lord Bacon's reading on the statute of uses, p. 8. *accord.* edit. 1785.

Sect. 465.

*ITEM, releases solonque le matter en fait, ascun foits ont lour effect per force d'enlarger l'estate celuy a que le release est fait. Sicome jeo lessa certain terre a un home pur terme des ans, per force de que il est en possession, et puis jeo relessa a luy tout le droit que jeo aye en le terre sans pluis parolx mitter en le fait, et deliver a luy le fait, donques il ad estate forsque pur terme de sa vie. Et la cause est, pur ceo que quant le reversion ou le remainder est en un home lequel voile enlarger per son releas l'estate le tenant, &c. il n'avera pluis greinder estate, mes en * tiel manner et forme sicome † tiel feoffor fuit seisie en fee, et vollcit per son fait faire estate a un en certaine forme, et deliver a luy seisin per force de mesme le fait: si en tiel fait de feoffement ne soit ascun parol de enheritance, ‡ donques il ad forsque estate pur terme de vie; et issint il est en tiels releases faits per ‖ eux en la reversion ou en le remainder. Car si jeo lessa la terre a un home pur terme de sa vie, et puis jeo relessa a luy tout mon droit sauns plus dire en le releas, son estate n'est my enlarge. Mes si jeo relessa a luy et a ses heires, donques il ad fee simple; et si jeo relessa a luy et a ses heires de son corps engendres, donques il ad fee taile, &c. Et issint il covient de specifier en le fait quel estate celuy a que le releas est fait avera.*

[273.a.]

ALSO, releases according to the matter in fact, sometimes have their effect by force to enlarge the state of him to whom the release is made. (1) As if I let certaine land to one for terme of yeares, by force whereof hee is in possession, and after I release to him all the right which I have in the land without putting more words in the deed, and deliver to him the deed, then hath hee an estate but for terme of his life. And the reason is, for that when the reversion or remaynder is in a man who will by his release inlarge the estate of the tenant, &c. hee shall have no greater estate, but in such manner and forme as if such lessor were seised in fee, and by his deed will make an estate to one in a certain forme, and deliver to him seisin by force of the same deed: if in such deed of feoffement there be not any word of inheritance, then he hath but an estate for life; and so it is in such releases made by those in the reversion or in the remainder. For if I let land to a man for terme of his life, and after I release to him all my right without more saying in the release, his estate is not enlarged. But if I release to him and to his heires, then he hath a fee simple; and if I release to him and to his heires of his bodie begotten, then hee hath a fee taile, &c. And so it behoveth to specifie in the deed what estate hee to whom the release is made shall have.

IT is a certaine rule, that when a release doth enure by way of enlarging of an estate, that there must be privitie of estate, as betweene lessor and lessee, donor and donee. For if *A.* make a lease to *B.* for life, and the lessee maketh a lease for yeares, and after *A.* releaseth to the lessee for yeares, and his heires, this release is

Flet. lib. 5. cap. 34. 15. H. 7. 14. 22. E. 4. 4. (Post. 296. a.)

* *tiel—la*, L. and M. and Roh.
† *si* added in L. and M. and Roh.
‡ *&c.* added L. and M. and Roh.
‖ *per eux* not in L. and M. nor Roh.

(1) [See Note 233.]

is void to enlarge the eſtate, becauſe there is no privity betweene *A.* and the leſſee for yeares.

(Ant. 270. a.) If a man make a leaſe for twenty yeares, and the leſſee make a leaſe for ten yeares, if the firſt leſſor doth releaſe to the ſecond leſſee, and his heires, this releaſe is void for the cauſe aforeſaid.

For the ſame cauſe, if the donee in taile make a leaſe for his owne life, and the donor releaſe to the leſſee and his heires, this releaſe is void to enlarge the eſtate.

(Ant. 264. a. Poſt. 285. b. Sect. 490, 491.) And as privity is neceſſarie in this caſe, ſo privity only is not ſufficient. As if an infant make a leaſe for life, and the leſſee granteth over his eſtate with warranty, the infant at full age bringeth a *dum fuit infra ætatem*, the tenant voucheth his grantor, who entereth into warranty, the demandant releaſeth to him and his heires; here is privitie in law, and a tenancie in ſuppoſition of law: and yet becauſe hee *in rei veritate* hath no eſtate, it cannot enure to him by way of inlargement; for how can his eſtate be inlarged, that hath not any?

(Ant. 53. a. 54. a.) If a tenant by the courteſie grant over his eſtate, yet he is tenant as to an action of waſte, attornement, &c. and yet a releaſe to him and his heires cannot enure to enlarge his eſtate that hath no eſtate at all.

(2. Roll. Abr. 400.) But if a man make a leaſe for yeares, the remainder for life, a releaſe by the leſſor to the leſſee for yeares, and to his heires, is good, for that he hath both a privity and an eſtate; and the releaſe alſo to him in the remainder for life and his heires, is good alſo.

48. E. 3. 16. a. per Perſay et Finchden. 41. E. 3. 17. a. 7. E. 4. 17. (Ant. 54. a.) If I grant the reverſion of my tenant for life to another for life, now ſhall not I have an action of waſte: (2) but if I releaſe to the grantee for life, and his heires, now hee hath the fee ſimple, and ſhall puniſh the waſte done after (1). [273. b.]

It is further to be obſerved, that to a releaſe that enureth by way of enlargement of the eſtate, there is not only required privity, as hath beene ſaid, and an eſtate alſo, but ſufficient words in law to raiſe or create a new eſtate. If a man make a leaſe to *A.* for terme of the life of *B.* and after releaſe to *A.* all his right in the land, by this, *A.* hath an eſtate for terme of his owne life; for a leaſe for terme of his owne life is higher in judgement of law, than an eſtate for terme of another man's life. (Ant. 42. a.)

16. H. 6. releaſe 45. 22. E. 2. releaſe. Statham. (a) 13. H. 4. 6. Stanf. prer. 7. b. 18. E. 4. 5. 22. Aſſ. 12. 11. H. 7. 19. 10. H. 6. 11. (Poſt. 299. a. Ant. 270. b.) If a feme covert be tenant for life, a releaſe to the huſband and his heires is good, for there is both privity and an eſtate in the huſband, whereupon the releaſe may ſufficiently enure by way of enlargement (a); for by the entermarriage he gaineth a freehold in his wife's right.

" *Tout le droit.*" *Vide* Sect. 650.

" *Pur terme des ans.*" So it is if a releaſe be made to tenant by ſtatute, ſtaple or merchant, or tenant by *elegit*, as hath beene ſaid; and ſo likewiſe to gardeine in chivalrie which holdeth in for the value, by him in the reverſion of all his right in the land, by this a freehold paſſeth for the life of him to whom the releaſe is made, for that is the greateſt eſtate that can paſſe without apt words of inheritance.

If

(2) [See Note 234.] (1) [See Note 235.]

If a man make a lease for ten yeares, the remainder for twenty yeares, he in the remainder releaseth all his right to the lessee, he shall have an estate for thirty yeares; for one chattle cannot drowne another, and yeares cannot be consumed in yeares.

(1. Leo. 303. 323. Ant. 193. b.)

" *Mes si jeo release a luy et a ses heires, &c.*" Here it is to bee observed, that when a release doth enure by way of enlargement of an estate, no inheritance either in fee simple or fee taile, can passe without apt words of inheritance.

But there is a diversity betweene a release that enureth by way of enlargement of the state and by way of *mitter l'estate* (2); for when an estate passeth by way of *mitter l'estate*, there sometime there need not any words of inheritance. As if a joynt estate be made to the husband and to his wife, and to a third person and to their heires, the third person releaseth all his right to the husband, this shall enure by way of *mitter l'estate*, and not by way of enlargement of the estate, because the husband had a fee simple, and needeth not to have any words of inheritance. So it is if the release had been made to the wife.

9. Eliz. Dier. 263. 10. Eliz. Bendloes. Litt. lib. 3. fol. 68, 69, 70. b. 130. b.

See before in the chapter of Fee Simple, 9.

(*b*) If there be three joyntenants, and one release to one of the other all his right, this enureth by way of *mitter l'estate*, and passeth the whole fee simple without these words (heires). But if there be two joyntenants, and the one of them release all his right to the other, this doth not to all purposes enure by way of *mitter l'estate*, for it maketh no degree, and hee to whom the release is made shall for many purposes be adjudged in from the first feoffor, and this release shall vest all in the other joyntenant without these words (heires).

(*b*) 40. E. 3. 41. 46. E. 3. 19. H. 6. 33. H. 6. 5. 10. E. 4. 3.

But if there be two coparceners, and the one release all his right to the other, this shall enure by way of *mitter l'estate*, and shall make a degree, and without these words (heires) shall passe the whole fee simple. And it is to be observed, that to releases that enure by way of *mitter l'estate*, there must be privity of estate at the time of the release.

10. E. 4. 3. b. 37. H. 8. tit. alienation. Br. 31. 31. H. 4. 8. 40. Ass. 5. 9. Eliz. Dier. 263.

If two coparceners be of a rent, and the one of them take the ter-tenant to husband, the other may release to her, notwithstanding the rent be in suspence, and it shall enure by way of *mitter l'estate*, and she may release also to the ter-tenant, and that shall enure by way of extinguishment: but if she release to her sister and to her husband, it is good to bee seene how it shall enure.

(2. Roll. Abr. 403. 10. E. 4. 3. b.)

Littleton having now spoken of releases that enure by way of enlargement of the estate, and of releases that enure by way of *mitter l'estate*, proceedeth to releases that enure by way of *mitter le droit*. So as of that which hath beene and shall bee said by our author of releases, it appeareth that some doe enure by way of enlargement of estate, some by way of *mitter l'estate*, some by way of *mitter le droit*, by way of entrie and feoffment, and some by extinguishment.

Vid. Litt. fol. 68, 69. (8. H. 4. 8.) (Post. 230. a.)

(2) [See Note 236.]

Sect. 466.

ITEM, ascuns foits releases urera de mitter, et vester le droit celuy que fait le release a celuy a que le releas est fait. Sicome un home est disseisi, et il relessa a son disseisor tout le droit que il ad, en cest cas le disseisor ad son droit, issint que lou son estate adevant fuit torcious, ore per tiel releas il est fait loyal et droiturel.

ALSO, sometimes releases shall enure *de mitter*, and vest the right of him which makes the release to him to whom the release is made. As if a man be disseised, and he releaseth to his disseisor all his right, in this case the disseisor hath his right, so as where before his state was wrongfull, now by this release it is made lawfull and right. (1)

"*ET il relessa a son disseisor, &c.*" This release so putteth the right of the disseisee to the disseisor, that it changeth the quality of the estate of the disseisor; for where his estate was before wrongfull, it is by this release made lawfull. But how farre, and to what respects his estate is changed, shall be said hereafter in this chapter in his proper place.

Sect. 467.

MES hic nota, *que quant home est seisi en fee simple d'ascun terres ou tenements, et un auter voile releaser a luy tout le droit que il ad en mesmes les tenements, il ne besoigne de parler de les heires celuy a que le releas est fait, pur ceo que il avoit fee simple al temps de releas fait. Car si releas fuit fait a luy* * *pur un jour, ou pur un heure, ceo serroit auxy fort a luy en ley, sicome il ust releas a luy et a ses heires. Car quant son droit fuit ale de luy a un foits per son releas sans ascun condition, &c. a celuy que ad fee simple, il est ale a touts jours.*

BUT here note, that when a man is seised in fee simple of any lands or tenements, and another will release to him all the right which he hath in the same tenements, he needeth not to speake of the heires of him to whom the release is made, for that he hath a fee simple at the time of the release made. For if the release was made to him for a day, or an houre, this shall bee as strong to him in law, as if he had released to him and his heires. For when his right was once gone from him by his release without any condition, &c. to him that hath the fee simple, it is gone for ever.

"*IL ne besoigne a parler de les heires, &c.*" And the reason of *Littleton* hereof is, for that the disseisor hath a fee simple at the time of the release made. And this appeareth by that which hath beene said before, so as regularly hee that hath a fee simple

(Post. 280. a.)

* *et a ses heires* added L. and M. and Roh.

(1) [See Note 237.]

ple at the time of the release made of a right, &c. needeth not speake of his heires.

"*Car si release fuit fait a luy pur un jour, &c.*" For the diversity is betweene a release of part of the estate of a right, and between a release of a right in part of the land. And therefore *Littleton* here saith, that a release of a right for a day or an houre is of as good force, as if he had released his right to him and his heires. But if a man be disseised of two acres, he may release his right in one of them, and yet enter into the other.

Vide 6. E. 3. 17. 12. E. 4. tit. Descent. F. 29.

(Ant. 252. a.)

[274. b.] "*Sans ascun condition, &c.*" Herein is implyed two diversities: first, betweene the quantity of the estate in a right, and the quality thereof; for albeit the disseisee cannot release part of the estate, as hath beene said, yet may he release his right upon condition, as here it appeareth by *Littleton*, [c] and it agreeth with our bookes.

Also here is another diversity betweene a right, whereof *Littleton* putteth his case, which is favoured in law, and a condition created by the party which is odious in law, for that it defeateth estates. And therefore if a condition be released upon condition, the release is good, and the condition void.

[c] 4. E. 2. Release 50. 43. Ass. 12. 17. Ass. 2. 31. Ass. 13. 21. H. 24.

What things may be done upon condition, is too large a matter to handle in this place, our author having treated of Conditions before: only to give a touch of some things omitted there, shall suffice. An expresse manumission of a villeine cannot be upon condition, for once free in that case, and ever free; also an attornment to a grantee upon condition, the condition is void because the grant is once settled. But this is to be understood of a condition subsequent, and not of a condition precedent; for in both those cases, the condition precedent is good. But letters patents of denization made to an alien, may be either upon condition subsequent or precedent; and so may the king make a charter of pardon to a man of his life upon condition, as is abovesaid.

(6. Rep. 62. a. Post. 297. a. 300. b.)

Rot. Parliament 18. H. 6. num. 29. Ap. Gwilliam's case. 10. E. 3. cap. 2. 3. H. 7. f. 6.

Sect. 468.

(2. Roll. Abr. 402.)

*MES lou * home ad un reversion en fee simple, ou un remainder en fee simple, al temps de releas fait, la s'il voyle releaser al tenant pur terme d'ans, ou pur terme de vie, ou al tenant en le taile, il covient a determiner l'estate que celuy a que le releas est fait avera per force de mesme le releas, pur ceo que tiel releas enurera pur enlarger l'estate de celuy a que le releas est fait.* †

BUT where a man hath a reversion in fee simple, or a remainder in fee simple, at the time of the release made, there if he will release to the tenant for yeares, or for life, or to the tenant in taile, hee ought to determine the estate which he to whom the release is made shal have by force of the same release, for that such release shall enure to enlarge the estate of him to whom the release is made. (1)

Of this sufficient hath beene said before.

* *home—un*, L. and M. and Roh. † *&c.* added L. and M. and Roh.

(1) [See Note 238.]

Sect. 469.

MES auterment est lou home ad forsque droit a la terre, et n'ad riens en le reversion ne en le remainder en fait. Car si tiel home relessa tout son droit a un que est tenant de le franktenement, tout son droit est ale, coment que nul mention soit fait de les heires celuy a que le releas est fait. Car si jeo lessa terres ‖ *a un home pur terme de sa vie, si jeo puis release a luy pur enlarger son estate, il covient que jeo relessa a luy et a ses heires de son corps engender,* * *ou a luy et a ses heires, ou per tiels parols, A aver et tener a luy et a ses heires* † *de son corps engendres,* ‡ *ou a les heires males de son corps engendres, ou tiels semblables estates, ou autrement il n'ad plus greinde estate que il avoit adevant.*

BUT otherwise it is where a man hath but a right to the land, and hath nothing in the reversion nor in the remainder in deed. For if such a man release all his right to one which is tenant in the freehold, all his right is gone, albeit no mention be made of the heires of him to whom the release is made. For if I let lands to one for terme of his life, if I after release to him to enlarge his estate, it hehoveth that I release to him and to his heires of his body engendred, or to him and his heires, or by these words, To have and to hold to him and to his heires of his bodie engendred, or to the heires males of his bodie engendred, or such like estates, or otherwise hee hath no greater estate than hee had before.

[275. a.]

(Ant. 266.) "*A UN que est tenant de franktenement.*" Here it appeareth, that to a release of a right, made to any that hath an estate of freehold in deed or in law, no privitie at all is requisite. As if a disseisor make a lease for life, if the disseisee release to the lessee, this is good, and directly within the rule of *Littleton*, because the lessee hath an estate of freehold, albeit there be no privitie. And so it is if a disseisor make a lease to *A.* and his heires during the life of *B.* and *A.* dieth, a release by the disseisee to his heire, before hee doth actually enter, is good.

Sect. 470.

(Post. 327.)

MES si mon tenant a terme de vie lessa mesme la terre ouster a un auter pur terme de vie de son lessee, le remainder a un auter en fee, ore si jeo relessa a celuy a que mon tenant lessast pur terme de vie, § *ceo serra barre a touts jours, coment que nul mention soit fait de ses heires, pur ceo que al*

BUT if my tenant for life letteth the same land over to another for terme of the life of his lessee, the remainder to another in fee, now if I release to him to whom my tenant made a lease for terme of life, I shall bee barred for ever, albeit that no mention be made of his heires, for

‖ *ou tenements* added L. and M. and Roh.
* *ou* not in L. and M. nor Roh.
† *males* added L. and M. and Roh.
‡ *ou a les heires males de son corps engendres* not in L. and M. nor Roh.
§ *ceo—jeo*, L. and M. and Roh.

al temps de release fait jeo avoy nul reversion, mes tantsolement un droit d'aver la reversion. Car per tiel leas, et le remainder ouster, que mon tenant fist en ceo cas, mon reversion fuit discontinue, ‖ &c. et tiel release urera a celuy en le remainder, d'aver advantage de ceo, auxibien come al tenant a terme de vie.

for that at the time of the release made I had no reversion, but only a right to have the reversion. For by such a release, and the remainder over, which my tenant made in this case, my reversion was discontinued, &c. and this release shall enure to him in the remainder, to have advantage of it, aswell as to the tenant for terme of life (1).

LITTLETON having before spoken of releases which enure by way of enlargement, by way of *mitter l'estate,* and by way of *mitter le droit,* here speaketh of a release of a right which in some respects enureth by way of extinguishment; as in this case which *Littleton* here putteth, the release to the lessee of the lessee doth not enure by way of *mitter le droit,* for then should he have the whole right, but as it were by way of extinguishment, in respect of him that made the release, and that it shall enure to him in the remainder, which is a qualitie of an inheritance extinguished. But yet the right is not extinct in deed, as shall be said hereafter in this chapter. (Post. 279.) [275. b.]

" *Mon reversion fuit discontinue, &c.*" Here discontinue is in a large sense taken for devested, though the entrie of the lessor be not taken away, which is implyed in this (*&c.*) (Post. 327. b.)

Sect. 471.

CAR a tel intent le tenant a terme de vie et celuy en le remainder sont sicome un tenant en ley, et sont sicome un tenant fuit sole seisie en son demesne come de fee al temps de tiel release fait a luy, &c.

FOR to this intent the tenant for terme of life and he in the remainder are as one tenant in law, and are as if one tenant were sole seised in his demesne as of fee at the time of such release made unto him, &c.

" *SONT come un tenant en ley.*" Which is certainly true in this case of remainder, and so it is also in case of a reversion; as if a disseisor make a lease for life, and the disseisee doth release all his right to the lessee, this release shall enure to him in the reversion, albeit they have severall estates, as hath beene said, which is implyed in this (*&c.*)

But if a disseisor make a lease for life, the remainder in fee, albeit they to some purposes (as here is said) are as one tenant in law, yet if the disseisee release all actions to the tenant for life, after the death of the tenant for life, he in the remainder shall not take benefit of this release, for it extended only to the tenant for life, as it is holden [a] in *Edward Altham*'s case. And in like manner,

[a] Lib. 8. fol. 148. Edw. Altham's case. (Post. Sect. 494.)

‖ *&c.* not in L. and M. and Roh.

(1) [See Note 239.]

manner, if the disseisor make a lease for life, and the disseisee release all actions to the lessee, this inureth not to him in the reversion; and so our author is to be understood of a release of rights, and not of a release of actions, to the tenant for life, as to or for the benefit of him in the remainder or reversion.

Sect. 472.

*ITEM, si home soit disseisie per deux, s'il relessa a un d'eux, il tiendra son compaignion hors de terre, et per tiel release il avera le sole possession et estate en la terre. Mes si un disseisor enfeoffa deux en fee, et le disseisee relessa a l'un des feoffees, ceo urera a ambideux de les feoffees, et la cause de diversity entre ceux deux cases est assets preignant. * Pur ceo que ils veignont eins per feoffment, et l'auters per tort, &c.*

ALSO, if a man be disseised by two, if he release to one of them (1), hee shall hold his companion out of the land, and by such release hee shall have the sole possession and estate in the land. But if a disseisor infeoffe two in fee, and the disseisee release to one of the feoffees, this shal inure to both the feoffees, and the cause of the diversity between these two cases is pregnant enough. For that they come in by feoffment, and the others by wrong, &c.

21. H. 6. 41. (Ant. 194. a. b.)

"*SI home soit disseisie, &c.*" This is to bee understood where tenant in fee simple is disseised and release; for if tenant for life be disseised by two, and he releaseth to one of them, this shall inure to them both; for he to whom the release is made, hath a longer estate than hee that releaseth, and therefore cannot inure to him alone, to hold out his companion, for then should the release inure by way of entrie and grant of his estate; and consequently the disseisor, to whom the release is made, should become tenant for life, and the reversion revested in the lessor, [*b*] which strange transmutation and change of estates in this case the law will not suffer. But if lessee for yeares be ousted, and he in the reversion disseised, and the lessee release to the disseisor, the disseisee may enter, for the terme for yeares is extinct and determined. But otherwise it is in case of a lessee for life, for the disseisor hath a freehold, whereupon the release of tenant for life may enure; but the disseisor hath no terme for yeares, whereupon the release of the lessee for yeares may enure.

[*b*] 13. E. 4. tit. Discent. F. 29.

[276. a.]

(Ant. 265. b. Ant. 239. a.)

And so it is if donee in taile be disseised by two, and releaseth to one of them, it shall enure to them both. But if the king's tenant for life be disseised by two, and he releaseth to one of them, he shall hold out his companion, for the disseisor gained but the estate for life. So if two joyntenants make a lease for life, and after doe disseise the tenant for life, and he release to one of them, he shall hold out his companion, for the disseisin was but of an estate for life.

If

* The remainder of this Section not in L. and M. nor Roh.

(1) [See Note 240.]

If tenant for life be disseised by two, and he in the reversion and tenant for life joyne in a release to one of the disseisors, he shall hold his companion out, and yet it cannot enure by way of entrie and feoffment. But if they severally release their severall rights, their severall releases shall enure to both the disseisors.

But here in *Littleton's* case, where tenant in fee simple is disseised by two, and releaseth to one of them, this for many purposes enureth by way of entrie and feoffment, and therefore he to whom the release is made shall hold out his companion, and be made sole tenant of the fee simple. And this holdeth not only in case of a disseisin, but also in case of intrusion and abatement: but necessarily he to whom the release is made must bee in by wrong, and not by title.

If two men doe gaine an advowson by usurpation, and the right patron releaseth to one of them, he shall not hold out his companion, but it shall enure to them both; for seeing their clerke came in by admission and institution, which are judiciall acts, they are not merely in by wrong: for an usurpation shall cause a remitter, as it appeareth in *F. N. B.* 31. *m.*

But if a lease for life be made, the remainder for life, the remainder in fee, and he in remainder for life disseiseth the tenant for life, and then tenant for life dieth, the disseisin is purged, and he in the remainder for life hath but an estate for life. And so note a diversitie where the particular estate for life is precedent, and when subsequent.

19. H. 6. 22. 38. H. 6. 28. Case de occupant. (Ant. 42. b.)

Where our author putteth his case of one disseised, put the case that two joyntenants in fee be disseised by two, and one of the disseisees release to one of the disseisors all his right, he shall not hold out his companion, because the release is but of the moytie, without any certaintie. If a man be disseised by two women, and one of them take husband, and the disseisee release to the husband, this shall enure to the advantage of both the disseisors, because the husband was no wrong doer, but in a manner in by title.

(Post. 278. a.)

"*Il avera le sole possession et estate.*" If two disseisors be, and they make a lease for life, and the disseisee release to one of them, this shall enure to them both, and to the benefit of the lessee for life also: for he cannot by the release have the sole possession and estate, for part of the estate is in another.

And so it is (as it seemeth) if the disseisors make a lease for yeares, and the disseisee release to one of them, this shall enure to them both, for by the release he cannot have the sole possession: and it appeareth by *Littleton*, that he must have the sole possession, and hold his companion out. But the morgagee upon condition, having broken the condition, is disseised by two, the morgagor having title of entrie for the condition broken, release to the one disseisor, albeit they be in by wrong, yet the release shall enure to them both for two causes: first, for that they are not wrong doers to the morgagor, but to the morgagee; and by *Littleton's* case it appeareth, that wrong is done to him that made the release: secondly, that hee that makes the release hath but a title by force of a condition, and *Littleton's* case is of a right. Like law of an entrie for mortmaine, or a consent to ravishment, &c.

"*Mes si un disseisor infeoffa deux, &c.*" And the reason of this diversitie is, for that the feoffees are in by title, and are presumed

21. H. 6. 41. (Ant. 194. b. 5. Rep. 90.)

 to

to have a warrantie, which is much favoured in law, and the disseisors are meerely in by wrong. And the equitie of the law doth preserve in this case the benefit of the estranger to the release comming in by one joynt title.

" *Pur ceo que ils veignont eins per feoffment, et l'auters per tort.*" This is of a new addition, and not in the originall, and therefore I passe it over.

Sect. 473.

[276.b

*ITEM, si jeo sue disseisie, et mon disseisor est disseisie, si jeo release a le disseisor de mon disseisor, jeo n'avera a unque assise ne entra sur * le disseisor, pur ceo que son disseisor ad mon droit per mon release, &c. † Et issint il semble en tiel cas, si soyent xx. disseisors, chescun apres auter, et jeo relessa a le darreine disseisor, ‡ celuy disseisor barrera touts les auters de lour actions et lour titles. Et la cause est, § come il semble, pur ceo que en mults cases, quant un home ad loyal title d'entre, ‖ coment que il n'entra pas, il defeatera touts meane titles per son release, &c. Mes ceo n'est ¶ my en chescun case, come serra dit apres.*

ALSO, if I bee disseised, and my disseisor is disseised, if I release to the disseisor of my disseisor, I shall not have an assise nor enter upon the disseisor, because his disseisor hath my right by my release, &c. And so it seemeth in this case, if there be xx. disseised one after another, and I release to the last disseisor, this disseisor shall barre all the others of their actions and their titles. And the cause is, as it seemeth, for that in many cases, when a man hath lawfull title of entrie, although he doth not enter, hee shall defeat all meane titles by his release, &c. But this holds not in everie case, as shall be said hereafter (1).

HERE it is to be observed, that a release by one whose entry is lawfull to him that is in by wrong, shall purge and take away all meane estates and titles. And where our author first putteth his case of two estates by wrong, and after of twentie disseisins, all estates be wrong.

(Post. 277. b. 278. a.)
21. H. 6. 41.
11. H. 4. 33.
9. H. 7. 25.
2. E. 4 16.
21 E. 4. 78.

If *A.* disseise *B.* who enfeoffeth *C.* with warrantie, who enfeoffeth *D.* with warrantie, and *E.* disseiseth *D.* to whom *B.* the first disseisee releaseth, this doth defeat all the meane estates and warranties, because the release of *B.* is made to a disseisor, and his entrie is lawfull.

12. Ass. 22. Vide 3. H. 6. 38.

* *le—son*, L. and M. and Roh.
† *et* not in L. and M. nor Roh.
‡ *celuy disseisor—il*, L. and M. and Roh.
§ *come il semble* not in L. and M. nor Roh.
‖ *coment que il n'entra pas—et entre*, L. and M. and Roh.
¶ *my—pas*, L. and M. and Roh.

(1) [See Note 241.]

Sect. 474.

*ITEM, si mon disseisor lessa les tenements dont il moy disseisist a un * auter home pur terme de vie, et puis le tenant a terme de vie aliena en fee, et jeo relessa al alienee, &c. donque mon disseisor ne poit enter,* causâ quâ supra, *coment que a un foits l'alienation fuit a son disenheritance, &c.*

ALSO, if my disseisor letteth the tenements whereof he disseised mee to another for terme of life, and after the tenant for terme of life alieneth in fee, and I release to the alienee, &c. then my disseisor cannot enter, *causâ quâ supra,* albeit that at one time the alienation was to his disinheritance, &c.

"*ITEM, si mon disseisor lessa, &c.*" If the disseisor make a lease for life, and the lessee maketh a feoffment in fee, and the disseisee releaseth to the feoffee, the disseisor shall not enter upon the feoffee; for albeit the release to one joynt feoffee of a disseisor, as hath beene said, shall not exclude the other, yet a release to the feoffee of a tenant for life in this case shall take away the entrie of [277. a.] the disseisor for the alienation which was made to his disinheritance, hee having the inheritance by disseisin, so as hee could have no warranty annexed to it, and tenant for life hath forfeited his estate. But if the entry of the disseisee were not lawfull, it is otherwise. As if a man make a lease for life, and the lessee for life is disseised, and that disseisor is disseised, and he in the reversion releaseth to the second disseisor, the first disseisor shall enter upon the second disseisor, and his entry is lawfull; and if the lessee for life re-enter, he shall leave the reversion in the first disseisor; and the cause is, for that the entry of the disseisor at the time of the release made was not lawfull. And the booke of [m] 9. *H.* 7. 25. is to be intended of an estate taile *mutatis mutandis.*

(8. Rep. 148. Sect. 447. 6. Rep. 70. Hob. 279.)

[m] 9. H. 7. 25.

If, in the case aforesaid, the disseisor make a lease for life, and the lessee infeoffeth two, and the disseisee release to one of the feoffees, this shall barre the disseisor, as hath beene said; but yet he shall not hold out his companion for the cause aforesaid.

Sect. 475.

ITEM, si home soit disseisee, lequel ad fits deins age et morust, et esteant le fits deins age le disseisor morust seisi, et la terre discendist a son heire, et un estrange abate, et puis le fits le disseisee, quant il vient a son plein age, relessa tout son droit a l'abator; en cest case l'heire le disseisor n'avera assise de mordancester

ALSO, if a man be disseised, who hath a sonne within age and dieth, and the sonne being within age the disseisor dieth seised, and the land descend to his heire, (1) and a stranger abate, and after the sonne of the disseisee, when hee commeth to his full age, releaseth all his right to the abator;

* *auter* not in L. and M. nor Roh.

(1) [See Note 242.]

d'ancester envers l'abator, mes serra bar, * *pur ceo que l'abator ad le droit del fits le disseisce per son releas, et l'entry le fits fuit congeable,* † *pur ceo que il fuit deins age al temps del discent, &c.*

tor; in this case the heire of the disseisor shall not have an assise of mord'ancester against the abator; but shall bee barred, because the abator hath the right of the sonne of the disseisee by his release, and the entry of the sonne was congeable, for that hee was within age at the time of the discent, &c.

THE reason of this case is, for that the entry of the heire is congeable, and the abator is in the land by wrong.

Vet. N. B. 115. Britton, cap. 51. Bracton, lib. 4. cap. 2. F. N. B. 203. f. W. 1. ca. 17.

"*Abate*" is both an English and French word, and signifieth in his proper sense to diminish or take away, as here by his entrie he diminisheth and taketh away, the freehold in law descended to the heire; and so it is said to abate an account, signifying subtraction or withdrawing, &c. and to abate the courage of a man. In another sense it signifyeth to prostrate, beat downe, or overthrow, as to abate castles, houses, and the like, and to abate a writ; and hereof commeth a word of art, *abatamentum*, which is an entrie by interposition. Now the difference *inter disseisinam, abatamentum, intrusionem, deforciamentum, et usurpationem, et purpresturam*, is this.

A disseisin is a wrongfull putting out of him that is actually seised of a freehold. And abatement is when a man died seised of an estate of inheritance, and betweene the death and the entry of the heire, an estranger doth interpose himselfe, and abate.

[n] F. N. B. 203. Fleta li. 4. cap. 30.

Intrusion first properly [n] is, when the ancestor died seised of any estate of inheritance expectant upon an estate for life, and then tenant for life dieth, and betweene the death and the entry of the heire an estranger doth interpose himselfe and intrude.

[o] Pl. Com. case de mynes.

Secondly, [o] he that entreth upon any of the king's demesnes, and taketh the profits, is said to intrude upon the king's possession.

[p] F. N. B. 141. f. g. h.

[277. b.]

Thirdly, [p] when the heire in ward entreth at his full age without satisfaction for his mariage, the writ saith *quòd intrusit*.

Deforciamentum comprehendeth not only these aforenamed, but any man that holdeth land whereunto another man hath right, be it by discent or purchase, is said to be a deforceor.

Usurpation hath two significations in the common law: one, when an estranger that no right hath presenteth to a church, and his clerke is admitted and instituted, hee is said to bee an usurper, and the wrongfull act that he hath done is called an usurpation.

Secondly, when any subject doth use, without lawfull warrant, royal franchises, he is said to usurpe upon the king those franchises.

[q] Glanvil. lib. 9. cap. 11. Britton fol. 28, 29. (Cro. Car. 17. 2. Inst. 278.)

Purprestura, or *pourprestura*, a purpresture. [q] *Purprestura est, &c. generaliter quoties aliquid fit ad nocumentum regii tenementi, vel regiæ viæ (vel aliquarum publicarum) vel civitatis, &c.* And because it is properly when there is a house builded, or an enclosure made of any part of the king's demesnes, or of an highway, or a common

* *d'assise* added in L. and M. and Roh. † *&c.* added in L. and M. and Roh.

common street or publike water, or such like publike things, it is derived of the French word *pourpris*, which signifieth an inclosure, but specially applied, as is aforesaid, by the common law.

Sect. 476.

*MES si * home soit disseisie, et le disseisor fait feoffment sur condition, cestascavoir, de rendre a luy certaine rent, et pur default de payment un re-entre, &c. si le disseisee relessa al feoffee sur condition, uncore ceo † n'amendra l'estate le feoffee sur condition; car nient obstant tiel releas, uncore son estate est sur condition, sicome il fuit devant.*

‡ Et cum hoc concordat opinio omnium justiciariorum, P. 9. H. 7.

BUT if a man be disseised, and the disseisor maketh a feoffement upon condition, *viz.* to render to him a certaine rent, and for default of payment a re-entry, &c. if the disseisee release to the feoffee upon condition, yet this shall not amend the estate of the feoffee upon condition; for notwithstanding such release, yet his estate is upon condition, as it was before (1).

And with this agreeth the opinion of all the justices, *Pasch.* 9. *H.* 7.

HERE the entry of the disseisee is congeable, and yet the release doth not avoid the condition, because the feoffee is in by title, as hath beene said, and may have a warranty. (2) And herein our author expresseth a diversitie betweene a condition in law, and a condition in deed; for in the case before when the disseisee releaseth to the feoffee of the tenant for life, the condition in law is taken away, but otherwise it is in this case of a condition in deed. (9. H. 7. 25.)

But if the feoffee upon condition make a feoffment in fee over without any condition, and the disseisee release to the second feoffee, the condition is destroyed by the release before the condition broken or after. For the state of the second feoffee was not upon any expresse condition, as *Littleton* here putteth his case, and he may have advantage of the release, because it is not against his owne proper acceptance, as *Littleton* speaketh in the next Section. ((Sect. 415.) Lib. 1. f. 147. Mayowe's case.)

But if it be a wrongfull title, such a title is taken away by a release; as if *A.* disseised *B.* to the use of *C.* *B.* release to *A.* this shall take away the agreement of *C.* to the disseisin, because it should make him a wrong doer: as if the disseisor be disseised, the disseisee releaseth to the second disseisee, this taketh away the right the first disseisor had against the second, and a relation of an estate gained by wrong shall never defeat an estate subsequent gained by right, against a single opinion, not affirmed by any other in one of our bookes. (14. H. 8. 18. per Port. (Ant. 271. a. 276. b.))

* *ascun* added in L. and M. and Roh. Vell. M. S.

† *n'amendra—ne abatera,* L. and M. and Roh. *ne alterast,* Pap. M. S. *n'avoidera,*

‡ This paragraph not in L. and M. nor Roh.

(1) [See Note 243.] (2) [See Note 244.]

Sect. 477.

ET mesme le manner est lou home soit disseisie de certeine terre, et le disseisor grant un rent-charge hors de mesme la terre, &c. coment que apres le disseisee relessa al disseisor, &c. uncore le rent-charge demurt en sa force. Et la cause en ceux deux cases est ceo, que home n' avera advantage per tiel releas que serra encounter son proper acceptance, et encounter son grant demesne. Et coment que ascuns ont dit, que lou l'entre de home est congeable sur un tenant, s'il releasist a mesme le tenant, que ceo availeroit a le tenant, sicome il ust enter sur le tenant, et puis luy enfeoffa, &c. ceo n'est pas voier en chescun cas. Car en le primer cas de ceux deux avantdits cases, si le disseisee ust enter sur le feoffee sur condition, et puis luy enfeoffa, donques est le condition tout defeat et avoid. Et issint en le second case, si le disseisee entrast et enfeoffa celuy que grant a le rent-charge, donques est le rent-charge anient et avoid, mes il n'est pas void per ascun tiel releas sans entry fait, &c.

IN the same manner it is where a man is disseised of certaine lands, and the disseisor grant a rent-charge out of the same land, &c. albeit the disseisee doth afterwards release to the disseisor, &c. yet the rent-charge remaynes in force. And the reason in these two cases is this, that a man shall not have advantage by such release which shall bee against his proper acceptance, and against his own grant. And albeit some have said, that where the entry of a man is congeable upon a tenant, if hee releases to the same tenant, that this shall availe the tenant, as if he had entered upon the tenant, and after enfeoffed him, &c. this is not true in every case. For in the first case of these two cases aforesaid, if the disseisee had entered upon the feoffee upon condition, and after enfeoffed him, then is the condition wholly defeated and avoided. And so in the second case, if the disseisee entereth and enfeoffeth him who granted the rent-charge, then is the rent-charge taken away and avoided, but it is not void by any such release without entrie made, &c.

[278. a]

"ET *le disseisor grant un rent-charge, &c.*" Here is implyed commons or any other profit out of the lands. And the reason is, because he shall not avoid his owne grant by a release hee himselfe hath acquired since the grant: but if the disseisor in that case be disseised, and the disseisee release to the second disseisor, he shall avoid it, as by that which hath beene said, *Sect.* 473. appeareth. So likewise if *A.* and *B.* bee joint disseisors, and *B.* grant a rent-charge, and the disseisee release to *A.* all his right, *A.* shall avoid the rent-charge, because it was not granted by him, and so not within the reason of our author.

(6. Rep. 78. b.) (7. Rep. 38.) (Post. 349. a) (Mo. 95)

If there bee two femes joint disseisors, and the one taketh husband, and the disseisee release to the other, shee is sole seised, and shal hold out the husband and wife.

(Ant. 276. a.)

If two disseisors bee, and they infeoffe another, and take backe an estate for life or in fee, albeit they remaine disseisors to the disseisee as to have an assise against them, yet if he release to one of them, he shall not hold out his companion, because their state in the land is by feoffment.

If

If there be two disseisors, and they be disseised, and they release to their disseisor, and after disseise him, and then the disseisee release to one or both of them, yet the second disseisor shall reenter, for they shall not hold the land against their owne release; for *Littleton* here saith, that they shall not avoid their owne grant, and by like reason they shall not avoid their owne release, *et sic de similibus*.

"*Come s'il ust enter sur le tenant et luy enfeoffe.*" Here is another kinde of release, *viz.* a release which enureth by way of entry and feoffment; for if a disseisee release to one of the disseisors to some purpose, this shall enure by way of entry and feoffment, *viz.* as to hold out his companion. But as to a rent-charge granted by him, it shall not enure by way of entrie and feoffment; for if the disseisee had entred and enfeoffed him, the rent charge had beene avoided. But it is a certaine rule, that when the entry of a man is congeable, and he releaseth to one that is in by title, (as hereto the feoffee upon condition is) it shall never enure by way of entry and feoffment, either to avoid a condition with which he accepted the land charged, or his owne grant, or to hold out his companion.

(Ant. 194.)

[278. b.]

And where it appeareth by our author, that acts done by the disseisor shall not be avoided by the release of the disseisee, it is to be noted, that acts made to the disseisor himselfe shall not be avoyded by the alteration of his estate by the release of the disseisee; as if the lord before the release had confirmed the estate of the disseisor to hold by lesser services, the disseisor shall take advantage of it, and so of estovers to be burnt in the house, and the like law of a warrantie made unto him.

(Dr. and Student, 50. a.)

If the heire of the disseisor indow his wife *ex assensu patris*, and the disseisee release to the disseisor, he shall not avoide the indowment, for that is like the case put by *Littleton* of the rent-charge.

If an alien be a disseisor, and obtaine letters of denization, and then the disseisee release unto him, the king shall not have the land, for the release hath altered the estate, and it is as it were a new purchase; otherwise it is if the alien had beene the feoffee of a disseisor.

If the lord disseise the tenant, and is disseised, the disseisee release to the second disseisor, yet the seigniorie is not revived, for betweene the parties the release enures by way of entrie and feoffment as to the land; but not having regard to the seigniorie, and for that the possession was never actually removed or revested from the disseisor, who claimeth under the lord, the seigniorie is not revived. But if the lord and a stranger disseise the tenant, and the disseisee release to the stranger, there the seigniorie by operation of law is revived, for the whole is vested in the stranger which never claimed under the lord: and in that case, if the lord had died, and the land had survived, the seigniorie had beene revived. But if the lord had disseised the tenant, and beene disseised by two, and the disseisee released to one of them, the seigniorie is not revived, because he claimed (as hath beene said) under the lord.

Sect. 478.

ITEM, si home soit disseisie per un enfant * *lequel aliena en fee, et alienee devie seisi, et son heire enter, esteant* † *le disseisor deins age, ore est en election* ‡ *le disseisour d'aver un briefe* ‖ *de* dum fuit infra ætatem, *ou briefe de droit envers le heire del alienee, et quel briefe de eux que il esliera, il doit recover per la ley,* § *&c. Et auxi il poit enter en la terre sans ascun recoverie, et en cest case l'entre le disseisie est tolle, &c. Mes en cest cas si le disseisie relessa son droit al heire del alienee, et puis le disseisor porta briefe de droit envers l'heire d'alienee, et il joyne le mise sur le mere droit, &c. le graunde assise doit trouver per la ley, que le tenant ad pluis mere droit* ⸸ *que ad le disseisor,* ¶ *&c. pur ceo que le tenant ad le droit le disseisie per son release, lequel est pluis ancient et pluis mere droit: car per tiel leas tout le droit le disseisee passa a le tenant, et est en le tenant. Et a ceo que ascuns ont dit, que en tiel case lou home que ad droit al terres ou tenements (mes son entrie n'est pas congeable) s'il relessa al tenant* ** *tout son droit, &c. que tiel release urcra per voy d'extinguishment. Quant a ceo il puit estre dit, que ceo est* †† *voyer quant a celuy que relessa; car per son release il ad luy demise* ‡‡ *quietment de* ⸸⸸ *son droit, quant a son person, mes uncore* ‖‖ *le droit que il avoit bien poit passer a le tenant per son release. Car enconvenient serroit que tiel ancient droit serroit extinct tout*

ALSO, if a man bee disseised by an infant who alien in fee, and the alienee dieth seised, and his heire entreth, the disseisor being within age, now is it in the election of the disseisor to have a writ of *dum fuit infra ætatem*, or a writ of right against the heire of the alienee, and which writ of them hee shall chuse, hee ought to recover by the law, &c. And also he may enter into the land without any recovery, and in this case the entrie of the disseisee is taken away, &c. But in this case if the disseisee release his right to the heire of the alienee, and after the disseisor bringeth a writ of right against the heire of the alienee, and hee joyne the mise upon the meere right, &c. the great assise ought to finde by the law, that the tenant hath more meere right than the disseisor, &c. for that the tenant hath the right of the disseisee by his release, the which is the most ancient and most meere right: for by such release all the right of the disseisee passeth to the tenant, and is in the tenant. And to this some have said, that in this case where a man which hath right to lands or tenements (but his entrie is not congeable) if he release to the tenant all his right, &c. that such release shal enure by way of extinguishment. As to this it may bee said, that this is true as to him which releaseth; for by his release hee hath dismissed himselfe quite of his right as to his person,

* *deins age* added in L. and M. and Roh.

† *le disseisor—l'alienour,* in L. and M. and Roh.

‡ *le disseisor—d'alienour,* L. and M. and Roh.

‖ *de* not in L. and M. nor Roh.

§ *&c.* not in L. and M. nor Roh.

⸸ *&c.* added L. and M. and Roh.

¶ *&c.* not in L. and M. nor Roh.

** *&c.* added L. and M. and Roh.

†† *voyer—verite,* L. and M. and Roh.

‡‡ *quietment* not in L. and M. nor Roh. —*nettement,* MSS.

⸸⸸ *tout* added L. and M. and Roh.

‖‖ *Le droit que il avoit bien poet passer a le tenant per son release,* not in the Vell. MS. but omitted most probably through mistake.

tout oufterment, &c. car il est communement dit, que droit ne poit pas morier.

person, but yet the right which hee hath may well passe to the tenant by his release. For it should bee inconvenient that such an ancient right should bee extinct altogether, &c. for it is commonly said, that a right cannot die.

" QUEL briefe de eux il esliera, &c." Note, many times in one case the law doth give a man severall remedies, and of severall kindes, as in this case by action and by entry; by action, either a writ of right, or *dum fuit infra ætatem*.

(Ant. 45. a.) Vid. Sect. 514. 28. E. 3. 98. 9. E. 4. 46. 21. E. 4. 55. 41. E. 3. 10. 2. H. 4. 12.

" *Et puis le disseisor porta briefe de droit, &c.*" Here it appeareth that there is a great art and knowledge for a man that hath divers remedies to chuse his aptest remedie; as in this case, if he bring his writ of right, the disseisor shall be barred, but if he had entred upon the heire of the alienee, he should have enjoyed the land for ever. For in that case the heire of the alienee after such an entrie shall never have a writ of right, no more then if the disseisee entreth upon the heire of the disseisor, and make a feoffment in fee, if the heire of the disseisor re-enter he shall detaine the land for ever, and the feoffee shall not maintaine any writ of right; for a bare right shall never be left in the feoffee, but shall ever follow the possession, as hath beene said: but if the disseisee entreth upon the heire of the disseisor, and make a feoffment in fee upon condition, and entreth for the condition broken before the heire of the disseisor enter, hee is restored to his right againe.

[279. a.]

(Ant. 266. a.) 38. E. 3. 16. 24. H. 8. Restore al primer action. 5. Vide Sect. 447.

A man maketh a gift in taile, the remainder in fee, tenant in taile dieth without issue, an estranger intrude, and he in the remainder brings a formedon, and recovereth by default, and maketh a feoffment in fee, the intrudor reverse the recoverie in a writ of disceit and entreth, he shall detaine the land for ever, and the feoffee shall not have a writ of right.

9. H. 7. 24.

And so likewise if a disseisor die seised and a stranger abate, and the disseisee release to him, the heire of the disseisor shall enter and detaine the land for ever. For the right to the possession shall draw the right of the land to it, and shall not leave a right in him to whom the release is made, as hath been said before in the 447. Section.

9. H. 7. 24.

" *Le droit del disseisee passa al tenant, et est en le tenant.*" For seeing the tenant hath the whole fee simple, he is capable of the whole right of the disseisee, and, as *Littleton* here saith, the right is in the tenant.

" *Inconvenient serroit.*" Here againe, as hath beene often observed, an argument *ab inconvenienti* is forcible in law; and that judges by the authoritie of our author are to judge of inconveniences as of things unlawfull, as hereby and by many other places it appeareth.

Vide Sect. 87. 138, 139. 231. 269. 440. 722.

[279. b.]

" *Un droit ne poit pas morier.*" *Dormit aliquando jus, moritur nunquam.* For of such an high estimation is right in the eye of the law, as the law preserveth it from death and destruction: trodden downe it may bee, but never trodden out. For where it hath beene

beene said, that a release of right doth in some cases enure by way of extinguishment; it is so to be understood, either (as *Littleton* doth here) in respect of him that makes the release, or in respect that by construction of law it enureth not alone to him to whom it is made, but to others also who be estrangers to the release, which, as hath beene said, is a qualitie of an inheritance extinguished.

14. H. 8. 6. b.

As if there be lord and tenant, and the tenant maketh a lease for life, the remainder in fee, if the lord release to the tenant for life, the rent is wholly extinguished, and he in the remainder shall take benefit thereof; even so when the heire of a disseisor is disseised, and the disseisor make a lease for life, the remainder in fee, if the first disseisee release to the tenant for life, this is said to enure by way of extinguishment, for that it shall enure to him in the remainder, who is a stranger to the release; and yet in truth the right is not extinct, but doth follow the possession, *viz.* the tenant for life hath it during his time, and he in the remainder to him and to his heires, and the right of the inheritance is in him in the remainder; for a right to land cannot die or be extinct in deed; and therefore if, after the death of tenant for life, the heire of the disseisor bring a writ of right against him in the remainder, and he joyne the mise upon the meere right, it shall be found for him, because in judgment of law he hath by the said release the right of the first disseisee.

Sect. 479.

*MES releases que enurera per voy d'extinguishment. envers touts persons, sont lou celuy a que le releas est fait, ne poit aver ceo que a luy est releas. Sicome si soyent seignior et tenant, et le seignior relessa al tenant tout le droit que il ad en la seigniory, ou tout le droit que il ad en le terre, &c. tiel releas va per voy de extinguishment envers touts persons, pur ceo que le tenant ne poit aver * service pur prender de luy mesme.*

BUT releases which enure by way of extinguishment (1) against all persons, are where hee to whom the release is made, cannot have that which to him is released. As if there bee lord and tenant, and the lord release to the tenant all the right which hee hath in the seigniory, or all the right which he hath in the land, &c. this release goeth by way of extinguishment against all persons, because that the tenant cannot have service to receive of himselfe.

14. H 8 fol. 5, 6. 11. H 7 25. 30. H. 6. tit. barre. 39. 38. E. 3. 10.

HERE *Littleton* putteth a diversity betweene releases which enure by way of extinguishment against all persons, and whereof all persons may take advantage, and releases which in respect of some persons enure by way of extinguishment, and of other persons by way of *mitter le droit*: or betweene releases which in deed enure by extinguishment, for that hee to whom the release is made cannot have the thing released, and releases which, having some quality of such releases, are said to enure by way of extinguishment, but in troth doe not, for that he to whom the release is made may

* *service pour prender—ceo*, L. and M. and Roh.

(1) Here Littleton returns to releases by extinguishment. See ant. 268.

may receive and take the thing released. And here *Littleton* putteth cases where releases do absolutely enure by extinguishment without exception, having respect to all persons. And first of the lord and tenant: secondly, of the rent-charge: thirdly, of the common of pasture.

Sect. 480.

*EN mesme la maner est de releas fait al tenant del terre de un rent-charge ou common de pasture, &c. pur ceo que le tenant ne poit aver ceo que a luy est relesse, &c. issint tiels releases urera * per extinguishment en touts voyes.*

IN' the same manner is it of a release made to the tenant of the land of a rent-charge or common of pasture, &c. because the tenant cannot have that which to him is released, &c. so such releases shall enure by way of extinguishment in all wayes.

[280. a.] FIRST, of the lord and tenant, and the lord release to the tenant his seigniorie, this must of necessity enure by way of extinguishment to all men; for the tenant cannot have service to be taken of himselfe, nor one man can be both lord and tenant. The second is of a rent-charge; a man cannot have land and a rent issuing out of the same land. Thirdly, a man cannot have land and a common of pasture issuing out of the same land, *et sic de cæteris*. For in all these cases and the like he to whom the release is made cannot have and enjoy the thing that is released. But in the case of the right of the land, the tenant of the land may take and enjoy it for strengthening his estate therein. (2. Roll. Abr. 405.)

The mesne being a feme enter marrie with the tenant peravaile, if the lord release to the feme, the seigniorie only is extinct; but if hee release to the husband, both seigniorie and mesnaltie are extinct. And in this case, if the lord release to the husband and wife, it is a question how the release shall enure; but it is no question but that a release may be made to a mesnaltie or a seigniory suspended in part of the estate. (Ant. 273. b.)

But here observe a diversity where a release enureth by way of extinguishment of an inheritance, which is in possession and may be granted over, and a release of a right, or an action to lands which cannot be granted over. [r] For the lord may release his seigniorie to the tenant of the land for life or in taile, *et sic de cæteris*. But so cannot one release a right or an action; for if it be released but for an houre, it is extinct for ever, as hath beene said. (274. a. 1. Roll. Abr. 412.) (Ant. 214. a. 232. b. 266. a.) [r] 13. E. 3. tit. Extinguishment. Brooke 45. et tit. Voucher. F. 120.

And two things are to be observed here. First, that by the release of all the right in the land the seigniorie is extinct, as well as by the release of all the right in the seigniorie, for the seigniorie issueth out of the land. Secondly, that by the release of all his right in the seigniorie or the land, the whole seigniorie is extinct without any words of inheritance. If the tenancie be given to a lord and to a stranger, and to the heires of the stranger, the lord release to his companion all the right in the land, this release doth not onely passe his estate in the tenancie, but extinguisheth also his right in the (30. E. 3. 13. 19. H. 6. 19. 21. E. 3. 33. 38. Ass. 17. 11. H. 4. tit. Release, 21. 18. E 2. ibid. 5. 26. H. 8. 5. 41. Ass. 6.)

* *per extinguishment en touts voyes,— toutz foitz per voie d'extientisement envers toutz persons*, L. and M. and Roh.

the seigniorie, and so one release enures to extinguish severall rights in one and the same land.

If there be lord and tenant by fealty and rent, the lord granteth the seigniorie for yeares, and the tenant attorneth, the lord releaseth his seigniorie to the tenant for years, and to the tenant of the land generally, the whole seigniorie is extinct, and the state of the lessee also. But if the release had beene to them and their heires, then the lessee had had the inheritance of the one moitie, and the other moitie had beene extinct. And the reason of this diversity is, because when the release is made generally, it can enure to the lessee but for life, because it enureth by way of enlargement of estate, and being made to the tenant of the land, it enureth by way of extinguishment, as *Littleton* here saith, and then there cannot remaine a particular estate in the seigniorie for life. But when the release is made to them and their heires, each one takes a moitie, the one by way of encreasing of the state, and the other by extinguishment.

(Ant. 152. b.) (Mo. 59.)

Sect. 481.

ITEM, de prover que le graund assise doit passer pur le demandant, en le case avantdit, jeo aye oye sovent * *la lecture de l'estatute de Westminster second, que commence,* In casu quo vir amiserit per defaltam tenementum quod fuit jus uxoris suæ, &c. *que a le common ley devant* † *mesme l'estatute, si lease soit fait* ‡ *a un home pur terme de vie, le remainder ouster en fee, et un estrange per feint action ust recover envers le tenant a terme de vie per default, et puis* ‡ *le tenant morust, celuy en le remainder n'avoit ascuns remedie devant le statute, pur ceo que il n'avoit ascun possession del terre.*

ALSO, to prove that the graund assise ought to passe for the demandant, in the case aforesaid, I have often heard the reading of the statute of West. 2. which begunne thus: *In casu quo vir amiserit per defaltam tenementum quod fuit jus uxoris suæ, &c.* that at the common law before the sayd statute, if a lease were made to a man for terme of life, the remainder over in fee, and a stranger by feigned action recovered against the tenant for life by default, and after the tenant dieth, he in the remainder had no remedie before the statute, because hee had not any possession of the land.

(2. Inst. 345.)

"*JEO aye oye sovent la lecture de West.* 2." Here it is to be observed, of what authoritie antient lectures or readings upon statutes were, for that they had five excellent qualities. First, they declared what the common law was before the making of the statute, as here it appeareth. Secondly, they opened the true sense and meaning of the statute. Thirdly, their cases were briefe, having at the most one poynt at the common law, and another upon the statute. Fourthly, plaine and perspicuous, for then the honour of the reader was to excell others in authorities, arguments, and reasons for proofe of his opinion, and for confutation of the objections against it. Fifthly, they read, to suppresse subtill inventions to creepe out of the statute. But now readings having lost the said former

[280. b.]

* *en* added L. and M. and Roh.
† *mesme* not in L. and M. nor Roh.
‡ *a une home—al tenant*, L. and M. and Roh.
‡ *le tenant* not in L. and M. nor Roh.

former qualities, have lost also their former authorities: for now the cases are long, obscure, and intricate, full of new conceits, liker rather to riddles than lectures, which when they are opened they vanish away like smoke, and the readers are like to lapwings, who seeme to bee neerest their nests when they are farthest from them, and all their studie is to find nice evasions out of the statute. By the authority of *Littleton*, ancient readings may be cited for proofe of the law; but new readings have not that honour, for that they are so obscure and darke.

" *L'estatute de W.* 2." Which is the third chapter.

" *Le remainder ouster en fee.*" Here is to be observed, that although the statute speaketh of a reversion [a], yet by the authority of *Littleton* a remainder is within the statute.

See the statute of 14. *Eliz. cap.* 8. which provideth fully for him in the remainder.

" *Feint action.*" *Feint* is a participle of the French word *feindre* which is to feigne or falsely pretend, so as a feint action is a false action.

" *N'avoit ascun remedie devant l'estatute.*" [b] Here it appeareth by *Littleton*, that if a man maketh a lease for life, the remainder in fee, and tenant for life suffereth a recovery by default, that he in the remainder should not have a formedon by the common law: for *Littleton* saith, that he hath not any remedy before the statute. Neither is there any such writ in that case in the Register, albeit in some bookes mention is made of such a writ.

[a] 24. E. 3. 35. 28 E. 3. 96. 18. E. 2. Entrie 74. 3. E. 2. Entrie 7. 6. E. 3. 24. 7. E. 3. Ent. 62. 7. E. 3. 54. 55. 15. E. 4. 15. F. N. B. 217 d. Register 241.

[b] W. 2. cap. 5. Vide 34. E. 3. Formdon 31. 11. E. 3. ibid. 31. 8. E. 3. 59. F. N. B. 217. d. 7. H. 7. 13.

Sect. 482.

MES si celuy en le remainder ust enter sur le tenant a terme de vie et luy disseisist, et apres le tenaunt intra sur luy, et apres le tenant a terme de vie per tiel recovery perde per default et morust, ore celuy en le remainder bien poit aver briefe de droit envers celuy que recovera, pur ceo que le mise serra joine solement sur le mere droit, &c. Uncore en cest case, le seisin de celuy en le remainder fuit defeat per entrie del tenant a terme de vie. Mes peradventure ascuns voilent argue et dire, que il n'avera briefe de droit en cest case, pur ceo que quant le mise est joine, il est joine en tiel maner, (scilicet) *si le tenant ad plus mere droit en le terre en le manner come il tyent, que le demandant ad en le maner come il demanda,*

BUT if he in the remainder had entered upon the tenant for life, and disseised him, and after the tenant enter upon him, and after the tenaunt for life by such recoverie lose by default and die, now he in the remainder may well have a writ of right against him which recovers, because the mise shal be joined only upon the mere right, &c. Yet in this case the seisin of him in the remainder was defeated by the entry of the tenant for life. But peradventure some will argue and say, that hee shall not have a writ of right in this case, for that when the mise is joyned, it is joyned in this manner, (*scilicet*) if the tenaunt hath more mere right in the land in the manner as he holdeth, than the demandant

manda, et pur ceo que le seisin del demandant fuit defeat per l'entry de le tenant a terme de vie, &c. donque il ad nul droit en le manner come il demaund.

demandant hath in the manner as hee demandeth, and for that the seisin of the demandant was defeated by the entry of the tenant for term of life, &c. then he hath no right in the manner as he demandeth.

38. E. 3. 3. Tit. Juris Utrum 1.

HERE a disseisin gotten by wrong, and defeated by the entrie of him that right hath, is sufficient to maintaine a writ of right against the recoveror in this case, for albeit the seisin is defeated betweene the lessee for life and him in the remainder, yet having regard to the recoveror, who is a meere stranger, and hath no title, it is sufficient against him. But otherwise it is against the party himselfe that defeated the seisin, and the law is propense to give remedie to him that right hath. And where some have thought, that there is no authority in law to warrant *Littleton*'s opinion herein, they are greatly mistaken, for *Littleton* hath good warrant for all that he hath written.

[281. a.

7. E. 3. 62.
38. E. 3. 37.
tit. Jur. Utr. 1.
(Post. 315. a.)

Lands are letten to *A.* for life, the remainder to *B.* for life, the remainder to the right heirs of *A. A.* dieth, *B.* entreth and dieth, a stranger intrudeth, the heire of *A.* shall have a writ of right of the seisin which *A.* had as tenant for life.

(Ant. 184. a. b.)

Lands are letten to *A.* and *B.* and to the heires of *A. A.* dyeth, a recovery is had against *B.* the heire of *A.* shall have a writ of right of the whole, for every joyntenant is seised *per my et per tout.*

If lands be given in tayle, the remainder to *A.* in fee, the donee dyeth without issue, his wife *privement enseint*, *A.* entreth, the issue is borne and entreth upon him and dyeth without issue, *A.* shall have a writ of right, of the seisin which he had.

4. E. 3. 16, 17.

If lands be given in tayle to *A.* the remainder to his right heires, *A.* dieth without issue, the collaterall heire of *A.* shall have writ of right of the seisin of *A.*

(Ant. 14. b.
15. a.)
40. E. 3. 8.
42. E. 3. 20.
37. Ass. 4.
24. E. 4. 24.

And so note a diversity betweene a seisin to cause *possessio fratris, &c.* for there is required a more actuall seisin, and a seisin to maintaine a writ of right. And hereby also are the (*&c.*) in this Section explained.

7. H. 5. 4. 11. H. 4. 11.

(Yelv. 148.
Hob. 73. 105.)
(6. Rep. 24.)

Sect. 483.

ACEO poit estre dit, que ceux parols (modo et formâ prout, &c.) *in mults des cases sont parols de forme de pleder, et nemy parols de substance. Car si home port briefe d'entre* in casu proviso, *del alienation fait per le tenant en dower a son disinheritance, et counta del alienation fait en fee, et le tenant dit, que il ne aliena pas en le manner come le demaundant ad declare, et sur ceo sount a issue, et trove est per ver-*

TO this it may bee said, that these words *(modo et formâ prout, &c.)* in many cases are words of forme of pleading, and not words of substance. For if a man bring a writ of entrie *in casu proviso*, of the alienation made by the tenant in dower to his disinheritance, and counteth of the alienation made in fee, and the tenant saith, that he did not alien in maner as the demandant hath declared, and upon this

[281. b.

dict, que le tenant alyenast en le taile, ou pur terme d'auter vie, le demaundant recovera: uncore l'alyenation ne fuit en le manner come le demaundant avoit declare, &c,

they are at issue, and it is found by verdict, that the tenant aliened in taile, or for tearme of another man's life, the demandant shall recover: yet the alienation was not in manner as the demandant hath declared, &c,

WHERE *modo et formâ* are of the substance of the issue, and where but words of forme, this diversity is to be observed. [*c*] Where the issue taken goeth to the point of the writ or action, there *modo et formâ* are but words of forme, as here in the case of the writ of entrie *in casu proviso*, and so is the (*&c.*) well explained in this Section. But otherwise it is when a collaterall point in pleading is traversed; as if a feoffment be alleadged by two, and this is traversed *modo et formâ*, and it is found the feoffment of one, there *modo et formâ* is materiall. So if a feoffment be pleaded by deede, and it is traversed *absque hoc quòd feoffavit modo et formâ* upon this collaterall issue, *modo et formâ* are so essentiall, as the jury cannot find a feoffment without deed.

[*c*] 9. H. 6. 1. 40. E. 3. 35. 21. E. 4. 22. F. N. B. 206. g. 40. E. 3. 5. 32. H. 8. issue. Br. 80. Vid. Sect. sequent. 12. E. 4. 4. (Doc. Pla. 175. 199. 344, 345.)

Sect. 484.

AUXY, si soient seignior et tenant, et le tenant tient del seignior per fealtie solement, * *et le seignior distreine le tenant pur rent, et le tenant porta briefe de trespas envers son seignior de ses avers issint prises, et le seignior plede que le tenant tient de luy per fealtie et certain rent, et pur le rent arere il vient a distreiner, &c, et demaunde judgement de briefe port vers luy,* quare vi et armis, &c. *et l'auter dit, que il ne tient de luy en le maner come il suppose, et sur ceo sont a issue, et trove est per verdict que il tient de luy per fealtie tantùm; en cest case le briefe abatera, et uncore il ne tient de luy en le maner come le seignior avoit dit. Car le matter de l'issue est, lequel le tenant tient de luy ou nemy; car s'il tient de luy, coment que le seignior distreina le tenant pur auter services que ne doit aver, uncore tiel briefe de trespasse,* quare vi et armis, &c. *ne gist envers le seignior, mes serra abate.*

ALSO, if there bee lord and tenant, and the tenant hold of the lord by fealty only, and the lord distreine the tenant for rent, and the tenant bringeth a writ of trespasse against his lord for his cattell so taken, and the lord plead that the tenant holds of him by fealtie and certaine rent, and for the rent behinde he came to distreine, &c. and demand judgement of the writ brought against him, *quare vi et armis, &c.* and the other saith that hee doth not hold of him in the manner as he suppose, and upon this they are at issue, and it is found by verdict that he holdeth of him by fealty onely; in this case the writ shall abate, and yet hee doth not hold of him in the manner as the lord hath said. For the matter of the issue is, whether the tenant holdeth of him or no; for if hee holdeth of him, although that the lord distreine the tenant for other services which he ought not to have, yet such writ of tresspasse *quare vi et armis, &c.* doth not lie against the lord, but shall abate.

* *et—si*, L. and M. and Roh.

Vid. Sect. preced. (8. Co. 89. Sid. 15.) 10. E. 4. 7. 8. E. 4. 15. 20. E. 4. 3. 21. E 4. 3. Verebr. cap. 3. (Doc. Pla. 191. 344.)

"*TROVE est per verdict, que il tient per fealtie tantum.*" Here is another diversitie to be observed: That albeit the issue bee upon a collaterall point, yet if by the finding of part of the issue, it shall appeare to the court that no such action lieth for the plaintife no more than if the whole had been found, there *modo et formâ* are but words of forme, as here in the case which *Littleton* putteth of the lord and tenant appeareth.

(9 Rep. 33.) (Doc. Pla. 191. Ant. 227. 2. Roll Abr. 704. 708. Sid. 5. Hob. 18. 73. 81. Doc. Pla. 355. 344, 345.) Pl. Com. 101. (9. Rep. 348.

"*Car le matter del issue est lequel il tient de luy ou nemy, &c.*"

Here it appeareth, that if the matter of the issue be found, it is sufficient. And this rule holds in criminall causes. For if *A.* be appealed, or indicted of murder, *viz.* that hee of malice prepensed killed *I. A.* pleadeth that he is not guilty *modo et formâ*, yet the jury m[ay fi]nd the defendant guiltie of manslaughter without malice prepensed, because the killing of *I.* is the matter, and malice prepensed is but a circumstance.

[282. a]

1. Cro. 14. 16. Haw. P. C. 266.)

6. E. 3. 41. b. 25. E. 3. 50. 9. H. 7. 3. 13. H. 7. 14. 29. E. 3. 38. (Sid. 21, 22.) (Doc. Pla. 348.) [d] 8. E. 3. 70. 8. Ass. 29. & 39. 9. E. 3. 338. 24. E. 3. 34. 5. H. 4. 2. 7. H. 4. 11. Pl. Com. 92. 3. Mar. Dier 116. 40. E. 3. 35. Dier 2. & 3. Ph. & Mar. 115. b. Trin. 22. Eliz. Rot. 920. Wolman's case.

In assise of *darreine presentment*, if the plaintife alleage the avoydance of the church by privation, and the jury find the voydance by death, the plaintife shall have judgment; for the manner of voydance is not the title of the plaintife, but the voydance is the matter.

[d] If a gardeine of an hospitall bring an assise against the ordinary, he pleadeth that in his visitation he deprived him as ordinary, whereupon issue is taken, and it is found that he deprived him as patron, the ordinary shall have judgement, for the deprivation is the substance of the matter.

The lessee covenant with the lessor not to cut downe any trees, and bind himself in a bond of forty pounds for performance of covenants, the lessee cut downe ten trees, the lessor bringeth an action of debt upon the bond, and assigneth a breach that the lessee cutteth down twenty trees, whereupon issue is joined, and the jury finde that the lessee cut downe ten, judgement shall be given for the plaintife; for sufficient matter of the issue is found for the plaintife.

41. E. 3. 28. 34. Ass. 3. 30. Ass. 5. 33. E. 3. verdict 47. 22. E. 3. 1. b. 18. E. 3. 48. 31. E. 3. account 58. 28. Ass. 48. (2. Roll. Abr. 704. 719.)

Sect. 485.

*AUXY, * en briefe de trespasse de batterie, ou des biens emports, si le defendant plede de rien culpable, en le manner come le plaintife suppose, et trove est que le defendant est culpable en auter vi[ll]e, ou a auter jour que le plaintife suppose, uncore il recovera. Et † issint en ‡ plusors auters cases ceux parols,* scilicet, *en le maner come le*

ALSO, in a writ of trespasse for batterie, or for goods carried away, if the defendant plead not guilty, in manner as the plaintife suppose, and it is found that the defendant is guiltie in another towne, or at another day than the plaintife supposes, yet hee shall recover. And so in many other cases these words, *viz.* in manner

* *en—un*, L. and M. and Roh.
† *issint* not in L. and M. nor Roh.
‡ *moltes* added in L. and M. and Roh.

le demaundant ou le plaintife ad suppose, ne font ascun ‡ matter de substance del issue: car en briefe de droit, lou le mise est joyne sur le mere droit, il est a tant a dire, et a tiel effect, scilicet, *lequel ad pluis mere droit, le tenant ou le demandant al chose en demand.*

manner as the demandant or the plaintife hath supposed, do not make any matter of substance of the issue: for in a writ of right, where the mise is joyned upon the meere right, that is as much as to say, and to such effect, *viz.* whether the tenant or demaundant hath more meere right to the thing in demand.

"*EN briefe de trespasse de battery, et des biens emports, &c.*" (11. Rep. 5.)

Here *Littleton* speaketh of actions brought for things transitory. In which cases the wrong being done in one towne, the plaintife may not only alledge it in another towne, as *Littleton* here saith, but also in another county, and the jurors upon not guilty pleaded are bound to find for the plaintife. (7. Rep. 2. b. 2. Roll. Abr. 688. Doc. Pla. 93. 369. 386.)

[282. b.] Neither can the assault, battery, or taking of goods, &c. alledged in another county, be traversed without speciall cause of justification which extendeth to some certaine place; as if a constable of a towne in another county arrest the body of a man that breaketh the peace, there he may traverse the county (but he must not rest there) but all other places saving in the towne whereof he is constable. And so it is of taking of goods, if the defendant justifie for damage feasant in another county, he must traverse as before. But where the cause of the justification is not restrained to a certaine place, that is so locall as it cannot be alledged in any other towne, as in the cases before alledged, and the like, then albeit the action bee brought in a forraine countie, yet he must alledge his justification in the county where the action is brought. As if a man be beaten in the county of *Middlesex*, and hee bringeth his action in the county of *Buck.* the defendant cannot pleade that the plaintife assaulted him in the county of *Midd. &c.* and traverse the county, but he must pleade his justification in the county of *Buck.* for that the cause of his justification is good in any place. And so it is in case of bailement of goods, and other cases for transitory things; as for example. (1. Roll. Abr. 335. Hob. 103, 104. Doc. Pla. 367. 5. Rep. 77.) (1. Rep. 1. 396. 6. Rep. 65. b.) (Doc. Pla. 367. 2. Cro. 45. 372. Noy 57. 3. Cro. 353. Doc. Pla. 361.) (1. Leo. 39. Sid. 234. 294. 3. Rep. 52. b. Ant. 145. b. Doc Pla. 43. 2. Sid. 118. Cro. El. 99.)

In an action upon the case the plaintife declared for speaking of slanderous words, which is transitory, and laid the words to be spoken in *London*, the defendant pleaded a concord for speaking of words in all the counties of England, saving in *London*, and traversed the speaking of the words in *London*: the plaintife in his replication denied the concord, whereupon the defendant demurred, and judgment was given for the plaintife. For the court said, that if the concord in that case should not be traversed, it would follow, that by a new and subtile invention of pleading, an ancient principle in law (that for transitorie causes of action the plaintife might alledge the same in what place or county he would) should be subverted, which ought not to be suffered; and therefore the judges of both courts allowed a traverse upon a traverse in that case: and the wisedome of the judges and sages of the law have alwayes suppressed new and subtile inventions in derogation of the common law. And therefore the (Trin. 30. Eliz. in the king's bench, betweene Inglebert and Jones. And herewith agreeth a judgement in the court of com. pleas, Pasch. 38. Eliz. Rot. 1655.)

‡ *matter—manner*, L. and M. and Roh.

[e] 38. E. 3. 1. (1. Cro. 105. Art. 72. Mo. 350. 2. Cro. 372.)
[f] 2. H. 4. 18.

the judges say in one booke [e], We will not change the law which alwayes hath been used. And another saith [f], It is better that it be turned to a default, than the law should be changed, or any innovation made.

31. E. 3. Gager. deliver. 5.

A man did grant a rent, with a new invented clause of distresse, *viz.* that the grantee should hold the distresse against gages and pledges; and yet by the whole court he shall gage deliverance, for otherwise by this new invention all replevyes shall be taken away.

[*] 42. Ass. 12. 4. E. 3. ca. 5. 18. E. 3. ca. 1. & ca. 6. 4. H. 4. ca. 2.

[*] See many other new inventions in derogation of the common law disallowed by the judges, and by the court of parliament.

[b] Li. 6. fo. 46, 47. Dowdale's case. 3. E. 3.

[b] Where the jury is bound to finde aswell locall things in many cases as transitory in other counties, see at large in my Reports.

Ass. 446. 27. E. 3. 86. 1. Ass. 16. 3. Ass. 4. 6. Ass. 4. 5. Ass. 7. 18. E. 3. 38. 21. Ass. 8. 29. Ass. 5. 44. E. 3. 6. b. 14. H. 4. 35. 5. H. 5. 2. 10. H. 6. 13. 21. H. 6. 51. 37. H. 6. 2. 7. E. 4. 45. 18. E. 4. 1. 22. E. 4. 19. 13. H. 7. 17. 2. Mar. Br. attaint. 104. 10. Eliz. Dier 171.

[i] 19. H. 6. 48. 21. H. 6. 16. 43. E. 3. 23. b. 46. E. 3. 3. a. 9. H. 6. 62. 21. H. 6. 27. 14. H. 8. 24. 18. E. 4. 1. 20. H. 6. 2. 34. H. 6 42. 14. H. 6. 21, 22 4 H. 6. 13 33. H. 6. 25. 12. E. 4. 12. 28. H. 8. Dier 29. 21. E. 4. 19. 80. 27. H. 8. 19. 12. H. 8. 1. 11. H. 4. 65. 19. H. 8. 6. (Hob. 134. 1. Leo. 301. Cro. Car. 514. Cro. Ja. 366.) 25. H. 8. Br. (Dec. Pla. 197.) 22. H. 6. 33. (4. Rep. 33. 2. Rol. Rep. 491. Post. 303. 1. Leo. 228.)

By this which hath beene said you shall know the law as it is now in use in these cases, and the better understand our [i] books, when you shall reade them concerning as well locall as transitory things, wherein you shall finde great variety of opinion in our bookes.

" *Si le defendant plead de rien culpable.*" This is a good issue, if the defendant committed no battery at all; but regularly by the common law if the defendant hath cause of justification or excuse, then can he not pleade not guilty, for then upon the evidence it shall be found against him, for that he confesseth the battery, and upon that issue cannot justifie it, but he must pleade the speciall matter, and confesse and justifie the battery.

The like law is in other cases, and therefore this is a learning necessary to be knowne, for that the losse of most causes dependeth thereupon. As if in battery the defendant may justifie the same to be done of the plaintife's owne assault, he must pleade it specially, and must not pleade the generall issue, and so of the like. In trespasse of breaking his close, upon not guilty he cannot give in evidence, that the beasts came thorow the plaintife's hedge, which he ought to keep, nor upon the generall issue justifie by reason of a rent-charge, common, or the like. [283. a]

In detinue the defendant pleadeth *non detinet*, he cannot give in evidence, that the goods were pawned to him for money, and that it is not paid, but must pleade it; but he may give in evidence a gift from the plaintife, for that proveth he detaineth not the plaintife's goods.

[d] 12. H. 8. 2. 19. E. 3. Wast. 30. 20. E. 3. Wast. 32.
[e] 10. Eliz. Dier 276. 2. Mar. Dier 212.

[d] So in an action of waste, upon the plea *nul wast fait*, he may give in evidence any thing that proveth it no waste, as by tempest, by lightening, by enemies, and the like; but he cannot give in evidence justifiable waste, as to repaire the house, or the like. [e] If one doth waste, and before the action brought the lessee repair-

eth

eth it, and after the lessor bringeth an action of waste, and the lessee pleade *quòd non fecit vastum*, he cannot give in evidence the especiall matter.

If two men be bound in a bond jointly, and the one is sued alone, he may plead this matter in abatement of the writ; but he cannot plead *non est factum*, for it is his deed, though it be not his sole deed. [*f*] See in *Whelpdale's* case, where a man may safely plead *non est factum*, and where not, and the former books that treat of that matter well reconciled.

(1. Sid. 450. Doc. Pla. 198.)

[*f*] Lib. 5. fo. 119. Whelpdale's case. 7. E. 4. 5.

7. E. 6. Br. non est fact. 14. 1. H. 7. 15. 14. H. 8. 28. Pl. Com. Dive and Man case 36. H. 8. Dier 59. 2. Mar. Dier 112. 1. Eliz. Di. 167.

[*g*] Upon *plenè administravit* pleaded by an executour, *et issint riens inter maines*, if it be proved that he hath goods in his hands which were the testatour's, he may give in evidence that he hath paid to that value of his owne mony, and need not plead it specially. (1)

[*g*] Hill. 10. H. 8. Rot. 323. in com. banc. et Mich. 6. E. 6. in com. banco. Bendloes.

In an assise, if the tenant plead *nul tort nul disseisin*, he cannot give in evidence a release after the disseisin; but a release before the disseisin he may, for then there is no disseisin upon the matter.

7. H. 5. 9. 6. H. 7. 10. 34. E. 3. Droit. 29.

In a writ of right, if the tenant joyne the mise upon the meere right, he cannot give in evidence a collaterall warranty; for he hath not any right by it, and therefore it ought to have been pleaded.

9. E. 3. 32. 8. E. 3. 24. 33. E. 3. Verd. 18. H. 6. 24. 39. H. 6. 38. 18. E. 3. 19. Pl. Com. 81. 173. 21. H. 7. 76. 16. Kielw. 21. E. 4. 11. 22. E. 4. 45. 13. H. 7. 13. Stanf. Pl. Cor. 15. 22. Ass. 55. 37. H. 6. 21. (Doc. Pla. 198. Ant. 287. a. Hob. 174. Post. 303. b.)

Of this learning you shall reade plentifully in our bookes, and in my Reports. This little taste shall here suffice to make the reader capable of the rest. Regularly whensoever a man doth any thing by force of a warrant or authority, he must plead it.

But all that hath been said must be under two cautions: first, that whensoever a man cannot have advantage of the speciall matter by way of pleading, there he shall take advantage of it in the evidence. For example, the rule of law is, that a man cannot justifie in the killing or death of a man; and therefore in that case, he shall be received to give the especiall matter in evidence, as that it was *se defendendo*, or in defence of his house in the night against theeves and robbers, or the like.

Secondly, that in any action upon the case, trespasse, battery, or of false imprisonment against any justice of peace, maior, or bailife of city or towne corporate, headborough, port-reve, constable, tithingman, collector of subsidy or fifteen, in any his majesty's courts in *Westminster*, or elsewhere, concerning any thing by any of them done by reason of any of their offices aforesaid, and all other in their aide or assistance, or by their commandement, &c. they may pleade the generall issue, and give the speciall matter for their excuse or justification in evidence.

7. Ja. ca. 5.

In an action of trespasse or other suit against any person for taking of any distresse or other act doing by force of the commission of sewers, the defendant in any such action shall and may make avowry, conusance, or justification generally, that it was done by authority of the commission of sewers for lotte or taxe assessed by that commission, &c. and the plaintife shall reply he did it of his owne wrong without such cause. And both these acts were made for avoiding of prolixity and captiousnesse of pleading, tending to the

23. H. 8. ca. 5.

(1) [See Note 245.]

the great charge and danger of officers and ministers of justice, &c. Evidence, *evidentia*. This word in legall understanding doth not only containe matters of record, as letters patents, fines, recoveries, inrolments, and the like, and writings under seale, as charters and deeds, and other writings without seale, as court rolles, accounts, and the like, which are called evidences *instrumenta*, but in a larger sense it containeth also *testimonia*, the testimony of witnesses, and other proofes to be produced and given to a jury, for the finding of any issue joined betweene the parties. And it is called evidence, because thereby the point in issue is to be made evident to the jury. *Probationes debent esse evidentes (id est) perspicuae et faciles intelligi.* But let us now returne to *Littleton*.

[b] 19. H. 6. 47. 5. E. 4. 5. 21. E. 4. 66. (Cro. Jac. 366. 1. Cro. 501. 514, 515. 228, 229. 2. Cro. 202. Sid. 308.

" *Ou a auter jour que le plaintife suppose.*" [b] As if the trespasse were done the fourth of May, and the plaintife alledgeth the same to be done the fifth of May, or the first of May, when no trespasse was done; yet if upon the evidence it falleth out that the trespasse was done before the action brought, it sufficeth: and this is warranted by *Littleton*, who speaketh indefinitely, that the jury may find the defendant guilty at another day than the plaintife supposeth.

" *Et a tiel effect.*" Here is to be observed, that the law of England respecteth the effect and substance of the matter, and not every nicety of forme or circumstance: *Qui haeret in literâ, haeret in cortice, et apices juris non sunt jura.*

[283. b.

Sect. 486.

*ITEM, si home soit disseisie, et le disseisor devie seisie, &c. et son fits et heire est eins per discent, et le disseisee enter sur l'heire disseisor, lequel entrie est un disseisin, &c. si l'heire port assise, ou briefe * de entre en nature de assise, il recovera.*

ALSO, if a man be disseised, and the disseisor dyeth seised, &c. and his sonne and heire is in by discent, and the disseisee enter upon the heire of the disseisor, which entrie is a disseisin, &c. if the heire bring an assise, or a writ of entrie in nature of an assise, hee shall recover.

AND the reason hereof is, for that in the writ of right mentioned in the next Section, the charge of the grand assise upon their oath is upon the meere right, and not upon the possession.

* *de entre en nature de assise il recovera. Mes si l'heire port* (the beginning of next Section) not in L. and M. nor Roh. but in both MSS.

Sect. 487.

MES si l'heire port briefe de droit envers le disseisee, il serra barre, pur ceo que quant le graund assise est jure, lour serement est sur le mere droit, et nemy sur le possessi:n. Car si l'heire le disseisor † *suist un assise de* novel disseisin, *ou briefe* d'entre *en nature d'assise, et recoverast vers le disseisee, et suist execution, uncore poit le disseisee aver briefe* d'entre en le per *envers luy de le disseisin fait a luy per son pere, ou il poit aver envers l'heire briefe de droit.*

BUT if the heyre bring a writ of right against the disseisee, he shall bee barred, for that when the graund assise is sworne, their oath is upon the meere right, and not upon the possession. For if the heyre of the disseisor sue an assise of *novel disseisin*, or a writ of *entrie* in nature of an assise, and recovers against the disseisee, and sueth execution, yet may the disseisee have a writ of *entrie* in the *per* against him, for the disseisin made to him by his father, or he may have against the heire a writ of right.

"*CAR si le heire le disseisor, &c.*" Here is a diversity to be observed concerning that which hath been said, when the possession shall draw the right of the land to it, and when not. And therefore when the possession is first, and then a right commeth thereunto, the entry of him that hath right to the possession shall gaine also the right which, as before it appeareth in those cases there put, followeth the possession, and the right of possession draweth the right unto it; but when the right is first, and then the possession commeth to the right, albeit the possession be defeated, (as here in *Littleton*'s case it is by the heire of the disseisor) yet the right of the disseisee remaineth.

(Ant. 266. a.)

6. E. 3. 7.

Vid. Sect. 447.

"*Briefe d'entrie en le per.*" *A.* dyeth seised, and the land descendeth to *B.* his sonne; before he entreth, an estranger abateth and dyeth seised, *B.* entreth, against whom the heire of the abator recovereth in an assise, *B.* may have a writ of *mort d'ancester*, and recover the land against him. And if the disseisin had beene done to *A.* &c. then after the recovery in the assise, *B.* should have had a writ of *entrie* in the *per*, because the heyre that is in by discent is in the *per*.

5. Ass. 1.
10. Ass 16.

[284. a.]

Sect. 488.

MES si le heyre doit recover envers le disseisee en le case avantdit per briefe de droit, donque tout son droit serroit clerement ale, pur ceo que judgement final serroit done envers luy, que serroit encounter reason lou le disseisee ad le pluis meere droit, &c.

BUT if the heire ought to recover against the disseisee in the case aforesaid by a writ of right, then all his right should be cleerely taken away, for that judgement finall shall bee given against him, which should bee against reason where the disseisee hath the more meere right.

† *suist—porta*, L. and M. and Roh.

"*Judgement final.*" The forme whereof you shall see in the last Section of this chapter.

Vid. Sect. 87. &c. (Post. 295. b.) "*Que serra encounter reason.*" *Argumentum ab inconvenienti.*

Sect. 489.

ET saches, mon fits, que en briefe de droit, apres ceo que les quater chivalers ont eslie le grand assise, donques il n'ad pluis greinder delay que en un brief de formedon, *apres ceo que les parties sont a issue, &c. Et si le mise soit joyne sur le battaile, donques il ad meindre delay.*

AND know (my sonne) that in a writ of right, after the foure knights have chosen the grand assise, then he hath no greater delay than in a writ of *formedon*, after the parties be at issue, &c. And if the mise bee joyned upon battaile, then hee hath lesser delay.

(Post. 294. b.) "*BATTAILE.*" See for this word in the last Section of this chapter.

(5. Rep. 104.) "*Issue, &c.*" Or demurrer, which is an issue in law.

(2. Inst. 244.) (Ant. 266, 267.)

Sect. 490.

ITEM, release de tout le droit, &c. en ascun case est bone, fait a celuy que est suppose tenant en ley, coment que il n'ad riens en les tenements. Sicome en præcipe quòd reddat, *si le tenant aliena la terre pendant le briefe, et puis le demaundant relessa a luy tout son droit, &c. cel release est bone, pur ceo que il est suppose d'estre tenant per le suit del demandant, et uncore il n'ad riens en la terre al temps de release fait.*

ALSO, a release of all the right, &c. in some case is good, made to him which is supposed tenant in law, albeit he hath nothing in the tenements. As in a *præcipe quòd reddat*, if the tenant alien the land hanging the writ, and after the demandant releaseth to him all his right, &c. this release is good, for that he is supposed to be tenant by the suit of the demandant, and yet hee hath nothing in the land at the time of the release made.

[284. b.]

Sect. 491.

EN mesme le manner est si en præcipe quòd reddat *le tenant vouche, et le vouchee entre en le garrantie, si apres le demandant relessa al vouchee tout son droit *, ceo est assets bone, pur ceo*

IN the same manner it is in a *præcipe quòd reddat* the tenant vouch, and the vouchee enters into warranty, if afterward the demandant release to the vouchee all his right, this is good enough,

* *&c.* added L. and M. and Roh.

deo que le vouchee apres ceo que il avoit enter en le garrantie, est tenant en ley al demandant, † *&c.*

enough, for that the vouchee after he hath entred into warranty, is tenant in law to the demandant, &c.

HERE it doth appeare, that there is a tenant in deed and a tenant in law, and *Littleton* in this and the next Section putteth two examples of tenants in law, *viz.* [*b*] the tenant to a *præcipe* after alienation, and of the vouchee, whereof somewhat hath been said before.

And it is observable, that *Littleton* saith, that in both cases hee is tenant in law to the demandant, and yet he hath nothing in the land. And therefore if after the vouchee hath entered into warranty, and become tenant in law, an ancestor collaterall of the demandant releaseth to the vouchee with warranty, he shall not plead this against the demandant, for that the release by the estranger is voide, which, besides the authorities before vouched, appeareth by *Littleton* himselfe; * for he saith, that he is tenant in law to the demandant, whereby he excludeth that he is tenant in respect of any estranger.

[*b*] 10. E. 4. 13. 12. Ass. 41. 22. Ass. 13. 23. E. 3. 21. 25. E. 3. 40. 38. E. 3. 10. 11. 7. E. 3. 6. 19. E. 3. tit. Resceit. 34. E. 3. tit. Resceit. 9. E. 4. 16. 39. H. 6. 40. 17. Ass. 24. 8. H. 7. 5. 20. Ass. 2. 14. E. 3. Procedendo 4. 9. E. 3. 17. 31. E. 3. Quare Imp. 2. Dyer. 17. Eliz. 341. Sect. 487.

* Vi. devant Sect. 447. (Ante 265. b. 273. a.)

Sect. 492.

ITEM, quant al releases d'actions, reals et personals, il est issint, que ascuns actions sont mixt en le realty et en le personaltie: sicome un action de waste sue envers tenant a terme de vie; cest action est ‡ *en le realtie, pur ceo que le lieu waste serra recover; et auxy en le personaltie, pur ceo que treble damages serront recovers pur le* ‖ *tortious wast fait per le tenant; et pur ceo en cest action un releas d'actions reals est bon plee en barre, et issint est un releas d'actions personals.*

ALSO, as to releases of actions, realls and personals, it is thus: Some actions are mixt in the realty and in the personalty: as an action of wast sued against tenant for life; this action is in the realtie, because the place wasted shall bee recovered; and also in the personaltie, because treble damages shall bee recovered for the wrongfull waste done by the tenant; and therefore in this action a release of actions reals is a good plea in barre, and so is a release of actions personals.

NOTA, there be two kind of actions, *viz.* one that concern the pleas of the crowne, *placita coronæ*, or *placita criminalia*; another that concerne common pleas, *placita communia, seu civilia*. Of that which concerneth pleas of the crowne, *Littleton* speaketh hereafter in this chapter. Of actions concerning common pleas, *Littleton* speaketh in this place. And these are threefold (that is to say), reall, personall, and mixt. *Placitorum aliud personale, aliud reale, aliud mixtum.* Or, *Actionum quædam sunt in rem, quædam in personam, et quædam mixtæ.* And generally, *actio* is defined, [*i*] *Actio nihil aliud est quàm jus prosequendi in judicio quod sibi debetur.* Or, *Action n'est auter chose que loyall demande de son droit.*

[285. a.]

Glan. li. 1. ca. 1. Bract. li. 3. fo. 101. Brit. fo. 71. Flet. li. 1. ca. 15. & 16. Mir. ca. 2. § 1. Bract. ub. sup. Flet. li. 1. ca. 2. (Plo. 484.)

[*i*] Vide Sect. 444. Bract. lib. 3. fol. 98. Fleta lib. 1. cap. 15. Mirror cap. 2. § 1.

† *&c.* not in L. and M. nor Roh.
‡ *en* not in L. and M. nor Roh.
‖ *tortious wast*—*tort et wast*, L. and M. and Roh.

[k] Lib. 8. 151. Altham's case. 35. H. 8. Dier 57. 5. Mar. 217. Vide 36. H. 6. 8.

[k] And by the release of all actions, causes of action be released; but within a submission of all actions to arbitrement, causes of action are not contained. Vide 42. E. 3. 22. 23. (5. Rep. 8. a. 103. 77. b.)

(Cro. Car. 171.)

"*Tenant pur vie.*" And so it is if it be brought against tenant for yeares, because it agreeth with the reason of *Littleton* here rendred, *viz.* that the place wasted shall be recovered, and therefore soundeth in the realty.

"*Auxy en le personaltie, per ceo que treble damages serra recovers,*" which doe sound in the personaltie. Wherefore *Littleton* concludeth, that in an action mixt a release of all actions reals is a good barre, and so is a release of all actions personals.

And here is to be observed a diversity betweene the act of the party, and an act in law; for a man by his owne act cannot alter the nature of his action; and therefore if the lessee for life or lessee for yeares doe waste, now is an action of waste given to the lessor, wherein he shall recover two things, *viz.* the place wasted, and treble damages: in this case if the lessor release all actions realls, he shall not have an action of waste in the personalty only; and if he release all actions personals, he shall not have an action of waste in the realty only.

[l] 19. H. 6. 66. 34. H. 6. 14. 11. R. 2. Wast. 99. 14. H. 8. 14. 23. H. 8. Br. Waste. (5. Rep. 75.) (Noy 118.)

[l] And so it is if the lessee doth waste, and after surrendreth to the lessor his estate, and the lessor accept thereof, the lessor shall not have an action of waste.

But by act in law the nature of the action may be changed; as if a man make a lease *pur terme d'auter vie*, and the lessee doth waste, and then *cesty que vie* dyeth, an action of waste shall lye for damages only, because the other is determined by act in law.

11. H. 6. 43. 9. E. 4. 50. 24. E. 3. 72. 18. E. 3. 28. 9. H. 6. 30. (7. Rep. 77. 80. a.) (Sid. 61. Hob. 322.)

And againe, hereupon is another diversity to be observed, that in case when an action is well begun, and part of the action determineth by act in law, and yet the like action for the residue is given, there the writ shall not abate, but proceed. But where by the determination of part the like action remaineth not for the residue, there the action well commenced shall abate. As if an action of waste be brought against tenant *pur terme d'auter vie*, and hanging the writ *cesty que vie* dyeth, the writ shall not abate, but the plaintife shall recover damages only, because if *cesty que vie* had died before any action brought, the lessor might have an action of waste for the damages. So if an *ejectione firmæ* be brought, and the terme incurreth hanging the action, yet the action shall proceed for damages only, because an *ejectione* doth lye after the terme for damages only. But if tenant *per auter vie* bring an assise, and *cesty que vie* dyeth hanging the writ, albeit the writ were well commenced, yet the writ shall abate, because no assise can be maintainable for damages only.

2. H. 4. 22. 6. E. 2. briefe 807. (Ant. 53. b. Plo. 18. b.)

So if an action of waste be brought by baron and fem in remainder, in especiall tayle, and hanging the writ the wife dieth without issue, the writ shall abate, because every kind of action of waste must be *ad exhæredationem*.

34. H. 6. 10. 9. E. 4. 39. 14. H. 7. 31. 18. E. 3. Scire facias 10. (Wm Jones 215. Cro. Car. 171. 5. Rep. 48. b.)

If a writ of annuity be brought, and the annuity determineth hanging the writ, the writ faileth for ever, because no like action can be maintained for the arrerages only, but for the annuity and arrerages.

But where damages only are to be recovered, there albeit by act in law the like action lyeth not afterwards, yet the action well commenced shall proceed; [m] as if a conspiracy be brought against two, and one of them dyeth hanging the writ, it shall proceed.

And in an assise of *novel disseisin*, a writ of annuity, *quare impedit*, and other mixt actions, (1), a release of actions reals is a good plea, and so it is of a release of actions personals.

[m] 22. R. 2. briefe 888. 18. E. 4. 1. (Doc. Pla. 47.) (Ray. 180. and 176. S. C.) (1. Saun. 228. S. C. 1. Vent. 12. & 18. 2. H. 4. 13. 9. H. 6. 57. Mo. 133. contra.) (2. Roll. Abr. 411. 2. Co. 68. a. Ant. 197. b.) 30. H. 4. Barre 59.

But if three jointenants be disseised, and they arraigne an assise, and one of them release to the disseisor all actions personals, this shall barre him, but it shall not barre the other plaintife; for having regard to them the realty shall bee preferred, *et omne majus trahit ad se minus dignum*. [n] And in a writ of ward brought by two, the release of the one shall not grieve the other, but shall enure to his benefit, for he shall recover the whole ward, and hold his companion out.

[n] 30. H. 6. ubi supra. 45. E. 3. fol. 6. 18. E. 3. fol. 56. 21. H. 6. 18. a. (Doc. Pla. 47. 301.) (W. Jones. 215. contra.)

[285. b.] But here a diversity is to be observed betweene reall actions, wherein damages are to bee recovered at the common law, as in an assise, &c. and reall actions where damages are not to be recovered by the common law, but are given by the [o] statute, for there a release of all actions personals is no barre, as in the writ of dower, *entrie sur disseisin in le per, &c. mord'anc', diel, &c.*

[o] Merton cap. 1. in dower. Gloc. cap. 1.

* Sect. 493.

(5. Rep. 97.)

ET en quare impedit, *un releas d'actions personals est bone plee, et issint est un release d'actions reals*, per Martin, quod fuit concessum. Hill. 9. H. 6. 57.

AND in a *quare impedit*, a release of actions personals is a good plea, and so is a release of actions reals, *per Martin, quod fuit concessum. Hill.* 9. *H.* 6. *fol.* 57.

THIS is an addition to *Littleton*, which although it be law, and the booke truly cited, yet I passe it over. But yet note by the way, that a release of actions personals is also a good barre in a *quare impedit*, because it is an action mixt.

9. H. 6. 57. 22. H. 6. 27. b.

Sect. 494.

ET mesme le maner est en assise de novel disseisin, *pur ceo que il est mixt en le realtie et en le personalty. Mes si un tiel assise soit arraigne enter le*

IN the same manner it is in an assise of *novel disseisin*, for that it is mixt in the realtie and in the personaltie. But if such an assise bee arraigned

* This Section is not in L. and M. nor Roh.

(1) [See Note 246.]

(9. Rep. 52.)

Sect. 497.

EN mesme le maner est de choses personals; sicome home a tort prent mes biens, si jeo relessa a luy touts actions personals, uncore jeo puisse per le ley prender mes biens hors de son possession.

IN the same manner is it of things personall; as if a man by wrong take away my goods, if I release to him all actions personals, yet I may by the law take my goods out of his possession.

This of it selfe is evident.

Sect. 498.

*AUXY, si jeo ay * ascun cause d'auter briefe de detinue de mes biens vers un auter, coment que jeo relessa a luy touts actions personals, uncore jeo puisse † per le ley prendre mes bien hors de son possession, pur ceo que nul droit de les biens est relesse a luy, mes solement l'action, &c.*

ALSO, if I have any cause to have a writ of detinue of my goods against another, albeit that I release to him all actions personals, yet I may by the law take my goods out of his possession, because no right of the goods is released to him, but only the action, &c.

(Coke's Ent. 170. b.) (10. Rep. 119. b. 2. Cro. 681.) Glanvil. lib. 10. cap. 13. (F. N. B. 138. a.) (1. Roll. Abr. 606.) (7. Roll. Abr. 505.) (Doc. Pla. 124, 125.) 41. E. 3. 2. (1. Roll. Abr. 5. Noy.) [t] 41. E. 3. 2. 8. H. 6. 18. 28, 29. 21. E. 3. 28. 3. H. 6. 19. 30. H. 6. 4. 6. H. 6. 18.

"BRIEFE *de detinue.*" *Breve de detentione dicitur à detinendo,* because *detinet* is the principall word in the writ. And it lyeth where any man comes to goods eyther by delivery, or by finding. In this writ the plaintife shall recover the thing detained, and therefore it must bee so certaine as it may be knowne, and for that cause it lyeth not for mony out of a bagge, or chest; and so of corne out of a sacke, and the like, these cannot be knowne from other. [t] A man shall have an action of detinue of charters which concern the inheritance of his land if hee know the certainty of them, and what land they concerne, or if they be in bagge sealed, or chest locked, though he knoweth not the certainty of them: and it is good policie (if possibly he can) in that case to declare of one charter in especiall, [u] and then the defendant shall not wage his law. [x] An action of detinue for charters doth sound in the realty, for therein summons and severance lyeth; and in detinue of goods a *capias* doth lye; but for charters in speciall a *capias* lyeth not, and yet a release of actions personals in a writ of detinue of charters is a good barre.

(9. Rep. 18. 78. b. F. N. B. 138.) (10. Rep. 51. b.) [u] 10. H. 6. 20. 21. H. 6. 1. 14. H. 6. 4. 14. H. 4. 23, 24. 27. (Post. 295.) [x] 20. H. 6. 45. 19. E. 3. Severance 14. 31. E. 3. ib. 32. 42. E. 3. 13. 40. E. 3. 35. (10. Rep. 135.) (Doc. Pla. 125.)

* *ascun* not in L. and M. nor Roh. † *per le ley* not in L. and M. nor Roh.

Sect. 499.

ITEM, si home soit disseisie, et le disseisor fait feoffment a divers persons a son use ‡, *et le disseisor continualment prist les profits, &c. et le disseisee relessa a luy touts actions reals, et puis il suist vers luy breve d'entre en nature d'assise per cause de le statute, pur ceo que il prent les profits, &c.* Quære, *coment le disseisor serra aide per le dit releas; car s'il voile pleder le releas generalment, donques le demandant poit dire, que il n'avoit riens en le franktenement al temps del releas fait; et s'il pleda releas specialment, donques il covient * conustre un disseisin, et donques puit le demandant enter en le terre, &c. per son conusans de le disseisin, &c. mes peradventure per especial pleader il luy poit barrer de l'action* † *que il suist, &c. coment le demandant poit enter.*

ALSO, if a man be disseised, and the disseisor maketh a feoffment to divers persons to his use, and the disseisor continually taketh the profits, &c. and the disseisee release to him all actions reals, and after hee sueth against him a writ of entrie in nature of an assise by reason of the statute, because hee taketh the profits, &c. *Quære*, how the disseisor shall bee ayded by the said release; for if hee will plead the release generally, then the demandant may say, that hee had nothing in the freehold at the time of the release made; and if hee plead the release specially, then he must acknowledge a disseisin, and then may the demandant enter into the land, &c. by his acknowledgment of the disseisin, &c. but peradventure by speciall pleading he may barre him of the action which he sueth, &c. though the demandant may enter.

" PER *cause del statute*." That is to say, the statute of 4. *H.* 4. *ca.* 7. and 11. *H.* 6. *ca.* 4.

[287. a.] " *Car s'il voet pleder le release generalment*." Here it appeareth, that when the statute had given the action reall against the pernor of the profits, it enableth him to take and pleade a release of all actions reals, and yet he hath neither *jus in re*, nor *jus ad rem*, which point is worthy of observation for manifestation of the equity of the law. (5. Rep. 77.) 3. H. 7. 2.

" *Donques il covient conustre un disseisin, &c.*" In a writ of dower the tenant pleaded that before the writ purchased *A.* was seised of the land, &c. untill by the tenant himselfe hee was disseised, and that hanging the writ *A.* recovered against him, &c. judgment of the writ, and adjudged a good plea, in which plea the tenant confessed a disseisin in himselfe. (8. Rep. 150.) 15. E. 4 4. b. (Doc. Pla. 343.)

" *Donques poit le demandant enter*." So might hee have done in this case that *Littleton* putteth, albeit the tenant confessed no disseisin. And therefore it is no prejudice to the tenant to confesse a disseisin in himselfe, &c. and then, as *Littleton* here holdeth, the action shall be barred.

But

‡ *&c.* added L. and M. and Roh.
* *de* added in L. and M. and Roh.
† *que il suist, &c.* not in L. and M. nor Roh.

28. H. 8. Dier 52. 27. H. 8. c. 10.

But the reader is to observe, that now by the statute of 27. *H.* 8. *cap.* 10. which execute the possession to the use, all the statutes against *cesty que use*, or pernor of the profits, have lost their force.

Sect. 500.

ITEM, si home suist appeale de felony del mort son ancester envers un auter, coment que l'appellant relessa al defendant touts maners d'actions reals et personals, ceo ne aidera my le defendant, pur ceo que cest appeal n'est pas action real, entant que l'appellant ne recovera ascun realtie en tiel appeale: ne tiel appeale n'est pas action personal, entant que le tort fuit fait a son auncestor, et nemy a luy. Mes s'il relessa a le defendant touts manners actions, donque il serra bone barre en appeale. Et issint home poit veyer que release de touts maners d'actions est melior que releas de actions reals et personals, &c.

ALSO, if a man sue an appeale of felony of the death of his ancester against another, though the appellant release to the defendant all manner of actions reall and personall, this shall not aide the defendant, for that this appeale is not an action reall, in as much as the appellant shall not recover any realtie in such appeale: neither is such appeale an action personall, in as much as the wrong was done to his ancestor, and not to him. But if hee release to the defendant all manner of actions, then it shal be a good barre in an appeale. And so a man may see that a release of all manner of actions is better than a release of actions reals and personals, &c.

OUR author having spoken of common pleas, now treateth of certaine pleas criminall, or pleas of the crowne, whereof it is said, [a] *Item, criminalium alia majora, alia minora, alia maxima, secundum criminum quantitatem; sunt enim crimina majora et dicuntur capitalia eò quòd ultimum inducunt supplicium, &c. Minora verò, quæ fustigationem inducunt, vel pœnam pilloralem, vel tumboralem, vel carceris inclusionem,* &c.

[a] Bract. lib. 3. fo. 101. b.

[287. b.]

[b] *Criminalium quædam sententialiter mortem inducunt, quædam verò minimè.* [c] *De peche est briefe division, car est mortal ou venial solonque ceo que appiert es paines.* And that crime is called mortall or corporall: mortall, because it deserveth death; and such crimes are called veniall, as may be redeemed or satisfied by some other punishment than by death.

[b] Flet. lib. 1. cap. 15.
[c] Mir. ca. 1. § 4. & ca. 4. des paines en divers manners.

"*Appeale de felonie.*" [x] *Appellum* signifieth *accusatio*, an accusation, and therefore to appeale a man is as much as to accuse him; and in [y] ancient bookes he that doth appeale is called *accusator*, and is peculiarly in legall signification applyed to appeales of three sorts. First, of wrong to his ancestor, whose heire male he is, and that is onely of death, whereof our author here speaketh. The second is of wrong to the husband, and is by the wife only of the death of her husband to be prosecuted. The third is of wrongs done to the appellants themselves, as robbery, rape, and mayhem. The word *appellum* is derived of *appeller*, to call, because *appellans vocat reum in judicium*, he calleth the defendant to judgement, and the plaintife is called the appellant.

[x] Mir. ca. 2. § 7. Bract. lib. 3. fo. 137. Brit. ca. 22, 23. Flet. li. 1. ca. 31, 32, 33. (4. Rep. 39.) (3. Inst. 131.)
[y] Glanvil. lib. 7. cap. 9. et lib. 14. ca. 1. et 3.

"Appeale,"

"*Appeale*," *Appellatio*, is a removing of a cause in any ecclesiasticall court to a superior; but of this there needeth no speech in this place.

24. H. 8. ca. 12. 1. El. ca. 1.

"*De mort*." Appeale of death is of two sorts, of murder and of homicide. Murder is when one is slaine with a man's will, and with malice prepensed or forethought. Homicide, as it is legally taken, is when one is slaine with a man's will, but not with malice prepensed. Chance-medly, or *per infortunium*, is when one is slaine casually, and by misadventure, without the will of him that doth the act, whereupon death insueth; but of this no appeale doth lye. Murder commeth of the Saxon word *mordreu*.

(4 Rep. 40. 43. 3. Inst. 47.)

Were is an old Saxon word sometime written *wera*, and signifieth the price of the life of a man, *estimatio capitis*, that is, so much as one paid for the killing of a man; by which it appeareth, that such government was in those dayes, as slaughters of men were most rarely committed, as master *Lambard* collecteth. And you shall not reade of any insurrection or rebellion before the Conquest, when the view of frankpledge and other ancient lawes of this realme were in their right use.

Lamb. Expos. verb. Estimatio. Flet. lib. 1. ca. 42. Hoved. fo. 344.

"*Mes s'il release al defendant touts manners d'actions, &c.*" And the reason is, for that then all actions, as well criminall as reall, personall and mixt, be released. But a release of all actions reall and personall cannot barre an appeale of death, because that release extendeth to common or civill actions, and not to actions criminall: but releases of all actions criminall or mortall, or concerning pleas of the crowne, are good barres in an appeale of death, and so the (*&c.*) in the end of the Section is well explained.

(4 Rep. 45. 47.) (Doc. Pla. 97.) 21. H. 6. 16.

[288. a.]

Sect. 501.

*ITEM, en appeale de robberie, si le defendant voile pleader un release de l'appellant de touts actions personals, ceo semble nul plee; car action de l'appeale, lou l'appellee aura judgement de mort, &c. est pluis hault que action personal est, et n'est pas properment dit action personal: et pur ceo si le defendant voiloit plead un release del appellant de barrer luy d'appeale, en cest case il covient d'aver un release de touts manners * d'appeals, ou touts manners d'actions, come il semble, &c.*

ALSO, in an appeale of robberie, if the defendant will plead a release of the appellant of all actions personals, this seemeth no plea; for an action of appeal where the appellee shall have judgment of death, &c. is higher than an action personall is, and is not properly called an action personall: and there if the defendant will plead a release of the appellant to barre him of the appeale, in this case hee must have a release of all manner of appeales, or all manner of actions, as it seemeth, &c.

"ROBBERIE." *Roboria*, properly is when there is a felonious taking away of a man's goods from his person: and it is called robbery, because the goods are taken as it were *de la robe*, from

22. Ass. 39.

* *d'accions* added L. and M.

W. 1. cap. 20. from the robe, that is, from the perſon; but ſometimes it is taken in a larger ſenſe.

(3. Inſt. 68. Dy 39. 2. Cro. Car. 531.) "*Judgement de mort, &c.*" By this (*&c.*) is implyed appeales of rape, of arſon or burning, of felony or larceny, for therein alſo is judgment of death, and are within our author's reaſon.

V. Sect. 508. (Poſt. 291. b.) "*Come il ſemble, &c.*" It is to be underſtood, that, firſt, a releaſe of all actions criminall, mortall, or concerning pleas of the crowne; ſecondly, a releaſe of all actions generally; thirdly, a releaſe of all appeales; and laſtly, a releaſe of all demands, are good barres in all theſe kinds of appeales.

Sect. 502.

MES en appeale de mailem un releaſe de touts manners d'actions perſonals eſt bone plee en barre, pur ceo que en tiel action il ne recovera forſque damages, &c.

BUT in appeale of mayhem a releaſe of all manner of actions perſonals is a good plea in barre, for that in ſuch an action hee ſhall recover nothing but damages.

Mir. ca. 1. § 9. Glan. li. 14. ca. 7. Bract. lib. 3. Tract. 2. ca. 24. Brit. fo. 48. ca. 25. Flet. lib. 1. ca. 38. Stanf. Pl. Cor. fo. 38. b. "MAYHEM," *mahemium, membri mutilatio*, or *obtruncatio*, commeth of the French word *mehaigne*, and ſignifieth a corporall hurt, whereby hee loſeth a member, by reaſon whereof hee is leſſe able to fight; as by putting out his eye, beating out his foreteeth, breaking his ſkull, ſtriking off his arme, hand, or finger, cutting off his legge or foot, or whereby he loſeth the uſe of any of his ſaid members.

(3. Inſt. 118. 4. Rep. 43. 45. Ant. 126.) 28. E. 3. 94. 8. H. 4. 21.

"*Damages, &c.*" Vide Sect. 194.

21. H. 6. 16. (Ant. 127. a. 9. Rep. 52.) "*Releaſe de touts manners actions perſonals eſt bone plea, &c.*" And the reaſon is, for that every action wherein damages only are recovered by the plaintiſe, is in law taken for an action perſonall.

Sect. 503. [288. b.]

ITEM, ſi home ſoit utlage en action perſonal per proces ſur la original, et port breve d'error, ſi celuy a que ſuit il fuit utlage, voile pleader envers luy un releas de touts manners d'actions perſonals, ceo ſemble nul plee; car per le dit action il ne recovera rien en perſonaltie forſque tantſolement de reverſer le utlagarie: mes un releaſe de briefe d'error eſt bone plea.

ALSO, if a man bee outlawed in an action perſonall by proceſſe upon the originall, and bringeth a writ of errour, if he at whoſe ſuit he was outlawed, will pleade againſt him a releaſe of all manner of actions perſonals, this ſeemeth no plea; for by the ſaid action, hee ſhall recover nothing in the perſonaltie, but only to reverſe the outlawrie: but a releaſe of the writ of errour is a good plea.

"BRIEFE

"*BRIEFE de error.*" This writ lyeth when a man is grieved by any error in the foundation, proceeding, judgment, or execution, and thereupon it is called *breve de errore corrigendo.* But without a judgment, or an award in nature of a judgment, no writ of error doth lie; for the words of the writ be, *si judicium redditum sit:* and that judgement must regularly be given by judges of record, and in a court of record, and not by any other inferiour judges in base courts, for thereupon a writ of false judgement doth lye. In this case of utlawry upon processe, the judgement is given (in the county court, which is no court of record) by the coroners (saving in London judgement is given by the recorder, and not by the maior, who is coroner by the custome of the city): for after the defendant is *quinto exactus*, and maketh default, the judgement is, *ideo utlagetur per judicium coronatorum*; and in London, *per judicium recordatoris:* so as by the outlawry, the plaintife recovers nothing, but the king taketh the whole benefit thereof; for the law did intend, that the defendant would rather appeare and answer the plaintife, &c. than to forfeit all his goods and chattels, debts and duties to the king, by his default and contumacie. But *Littleton* is to be intended, that the sherife doe returne the *exigent* whereby the outlawry appeares of record, or that the outlawry be removed by *certiorari*, for before that time that the outlawry appeare of record, the defendant doth not forfeit his goods, nor the plaintife can be disabled, nor any writ of error doth lye in that case. And this is the cause that the goods of outlawes cannot be claimed by prescription, because they are not forfeited untill the outlawry appeare of record. *Vide Sect.* 197. where it appeareth by *Littleton*, that the plaintife cannot be disabled by outlawry, unlesse it appeareth of record.

V. li. 11. fo. 39. 41. in Metcalfe's case upon what judgements and awards a writ of error doth lie. (Cro. Car. 66.) (3. Rep. 1. Cro. Jac. 5.) Li. 5. fo. 111. Foxley's case. Li. 7. fo. 11, 12. Jentleman's case. (Cro. Car. 63. Noy 68. 1. Roll. 750. 11. Rep. 38. F. N. B. 17. Ant. 117. b. 8. Rep. 141.) 15. Eliz. Dyer. 317. (Ant. 128. b.) Lib. 9. fol. 119. 8. Zanchar's case. (5. Rep. 111.) (Ant. 114.) 28. Ass. 49. 12. E. 3. Utlag. 3. 38. E. 3. 13. Mich. 4. & 5. El. Dyer fo. 222. Vid. Sect. 197. (6. Rep. 25. F. N. B. 20. b. 22. b.)

"*Car per le dit action il recovera rien en le personaltie.*" Hereupon is to be observed a diversity, when by the writ of error the plaintife shall recover, or be restored to any personall thing, as debt, damage, or the like; for then by the reason that *Littleton* here yeeldeth, the release of all actions personals is a good plea, for that the plaintife is to recover, or to be restored to something in the personalty. And so likewise when land is to be recovered, or to be restored in a writ of error, a release of all actions reals is a good barre. But where by a writ of error the plaintife shall not bee restored to any personall or reall thing, then a release of all actions reall or personall is no barre; and therefore *Littleton* here putteth his case with great caution. If a man (saith he) by processe upon the originall be outlawed, there in deed he shall be restored to nothing in the personalty against the plaintife. But where by the outlawry he forfeited all his goods and chattels to the king, he shall be restored to them; also thereby he shall be restored to the law, and to be of ability to sue, &c. But if the plaintife, in a personall action, recover any debt, &c. or damages, and bee outlawed after judgement, there in a writ of error brought by the defendant upon the principall judgement, a release of all actions personals is a good plea. And so it is where a judgement is given in a reall action, a release of all actions reals is a good barre in a writ of error brought thereupon.

1. H. 4. 6.

(1. H. 4. 6. 8. Rep. 152. 156. 8. H. 6. c. 12. 32. H. 8. 30. 18. Eliz. 14. Cro. Car. 272. 878. 5. Rep. 41, 42.)

[289. a.] If the tenant in a reall action release to the demandant after recovery his right in the land, he shall not have a writ of error, for that he cannot be restored to the land.

9. H. 6. 47.

And so it is if debt, &c. or dammages be recovered in a personall action by false verdict, and the defendant bringeth a writ of attaint, a [a] release of all actions personal is a good barre of the attaint; for thereby the plaintife is to be restored to the debt, &c. or damages which he lost: the like law is if a judgement be given upon a false verdict in a reall action, a release of all actions real is a good barre in an attaint. For both the writ of error and the writ of attaint doe insue the nature of the former action, &c.

[a] 26. H. 8. 3. b. 13. E. 4. 1. 2.

34. H. 6. 31. 35. H. 6. 19. 20. Ass 35. 47. E. 3. 6. 24. E. 3. 37. (5. Rep. 86.)

And so it is if a writ of *audita querela* be brought by the defendant in the former action to discharge himselfe of an execution, a release of all actions personal is a good barre, because he is to discharge himselfe of a personall execution.

(6. Rep. 25.)

" *Mes un release de briefe de error est bone plea, &c.*" So as in this speciall case here put by *Littleton*, wherein the plaintife is to recover or be restored to nothing against the party; yet for that the plaintife in the former action is privy to the record, a release of a writ of error to him is sufficient to barre the plaintife in the writ of error of the suit, and vexation by the writ of error. And so note that an action reall or personall doth imply a recovery of something in the realty or personalty, or a restitution to the same, but a writ (1) implyeth neither of them, which is worthy of observation.

Sect. 504.

ITEM, si home recovera debt ou damages, et il relessa al defendant touts maners d'actions, uncore il puit loialment suer execution per capias ad satisfaciendum, *ou per* elegit, *ou* fieri facias: *car execution per tiel briefe ne poit estre dit action.*

ALSO, if a man recover debt or damages, and he releaseth to the defendant all manner of actions, yet hee may lawfully sue execution by *capias ad satisfaciendum*, or by *elegit*, or *fieri facias:* for execution upon such a writ cannot bee said an action.

Vide Sect. 233. (5. Rep. 88, 89. 8. Rep. 153. a.) 8. E. 3. 9. 4. E. 3. Attorney 18. 33. H. 6. 49. 34. H. 6. 51. [b] 13. H. 4. Release 53. 19. H. 6. 3. 26. H. 6. Execution 7.

HERE appeareth a diversity betweene an action and an execution. For regularly an action is said in its proper sense to continue until judgement bee given, and after judgement then doth processe of execution begin; and therefore a release of all actions regularly is [b] no barre of execution, for the execution doth beginne when the action doth end. And therefore the foundation of the first is an originall writ, and doth determine by the judgement; and writs of execution are called judiciall, because they are grounded upon the judgement.

" *Per cap. ad satisfaciendum.*" This is a judiciall writ for the taking of the body in execution untill hee hath made satisfaction: where a *capias ad satisfaciendum* lyeth at the common law; and where it is given by statute, you may reade at large in my Reports.

Sir William Herbert's case, lib. 3. fo. 11, 12.

I have read two ancient records touching the taking of the body in execution, whereof, to my remembrance, I never read any touch

(1) That is, a writ of error.

touch in our bookes, yet will I recite them, and leave them to the judicious reader. *William de Walton* brought an action of trespasse of breaking his close against *John Martin*, and upon not guilty pleaded, hee was found guilty and damages assessed; whereupon judgement was given that the plaintife should recover his damages, *et quòd prædictus Johannes capiatur.* And the record saith, *Quòd prædictus Johannes venit coram domino rege et reddidit se prisonæ, et quia constat curiæ per inspectionem corporis ipsius Johannis, quòd idem Johannes est talis ætatis quòd pœnam imprisonamenti subire non potest, ideo dictum est ei, quòd eat inde sine die.* The other record is, That *Ellen Allot* brought an appeale of robbery against *John Boskiseleke* clerke, *Richard Charta*, and others, who pleaded not guilty, and were not found guilty: whereupon judgement was given that they should goe quite, *et prædicta Elena pro falso appello suo committatur prisonæ, &c.* (for [b] by the statute she ought to be imprisoned in that case for a yeare. But the record saith, *Quia eadem Elena pregnans fuit, et in periculo mortis, ipsa dimittitur per manucaptionem, &c. ad habendum corpus usque quind. Michaelis, &c.* (2)

Pasch. 14. E. 3. Rot. 106. coram Rege in Thesaur. Surrey. (Cro. Jac. 356.)

Mich. 41. E. 3. Rot. 27. coram Rege Cornub. in Thesaur.

[b] W. 2 cap. 12. (Siderf 236. Hutton 118.)

[289. b.] There be certaine maximes in the law concerning executions, as taking some instead of many. *Ea quæ in curiâ nostrâ ritè acta sunt, debitæ executioni demandari debent. Parum est latam esse sententiam nisi mandetur executioni. Executio juris non habet injuriam. Executio est fructus et finis legis. Juris effectus in executione consistit. Prosecutio legis est gravis vexatio, executio legis coronat opus. Boni judicis est judicium sine dilatione mandare executioni. Favorabiliores sunt executiones aliis processibus quibuscunque.* But now let us heare what *Littleton* saith.

" *Per elegit.*" This is also a judiciall writ, and is given by the statute eyther upon a recovery for debt or damages, or upon a recognizance in any court. And it is called a writ of *elegit*, for that according to the statute that saith, [c] *Sit de cæterò in electione illius, &c. sequi breve quòd vicecomes fieri faciat, &c. vel quòd liberet ei, &c.* The words of the writ bee, *Elegit sibi liberari, &c.* And thereupon it is called an *elegit*. By this writ the sherife shall deliver to the plaintife *omnia catalla debitoris (exceptis bobus & afris carucæ) et medietatem terræ.* And this must be done by an inquest to be taken by the sherife.

(5. Rep. 88. a.)

[c] W. 2 cap. 18. (Plowd. 178. b.)

When *Littleton* wrote, by force of certaine acts [d] of parliament, execution might bee had of lands (besides by force of the *elegit*) upon statutes merchant, statutes staple, and recognizances taken in some court of record; and since he wrote, upon a recognizance or bond taken by force of the statute [*] of 23. *H.* 8. before one of the chief justices, or the maior of the staple, and recorder of London out of terme, which hath the effect of a statute staple. The manner of the executions upon body, lands, and goods, appeareth in the statutes quoted in the margent.

[d] 11. E. 1. Stat. de Acton Burnell 13. E. 1. de mercatoribus. 27. E. 3. cap. 22. Vide Fleta, li. 2. cap. 57. 25. E. 3. 53. (6. Rep. 44.) [*] 23. H. 8. cap. 6.

Since *Littleton* wrote, a profitable statute hath been made [e] concerning executions of lands, tenements, and hereditaments, whereby it is provided, that if after such lands, &c. be had and delivered in execution upon a just or lawfull title, wherewithall the said lands, &c. were liable, tied, or bound at such time, as they were delivered or

[e] 32. H. 8. cap. 5. (5. Rep. 86. b. 2 Inst. 677. b.)

(2) The record at large is stated in 12 Rep. fol. 126.

or taken into execution, shall be recovered, devested, taken, or evicted out of, or from the possession of any such person, &c. before such times, as the said tenants by execution, their executors or assignes, shall have fully levied their debt and damages, for the which the said lands, &c. were taken in execution; then every such recoveror, obligee, and recognizee, shall have a *scire facias* out of the same court from whence the former execution did proceed, against such person or persons as the former execution was pursued, their heires, executors or assignes, to have execution of other lands, &c. liable and to be taken in execution for the residue of the debt or damages. *Sed opus est interprete.*

Lib. 4. fol. 66. Fulwood's case.

(4. Rep. 81. 2. Inst. 678.)

Therefore, first, it is to be knowne, that where the tenant by execution hath remedy given to him by law after eviction, there the statute extendeth not to it; for the act saith, by reason whereof the said recoverors, obligees, and recognizees, have been cleerly set without remedy, &c. and the body referreth to the preamble, and the party ought not to have double satisfaction, one by the former lawes, and another by this statute.

(Cro. 338.)

And therefore if part of the land, &c. be evicted from the tenant by execution, this statute extendeth not to it; because he should hold the residue, till he be fully satisfied, and he must be contented if all be evicted saving one acre to hold that, though it be but a poore remedy: for no new execution in that case hee can have upon this statute. Therefore if the conusee hath remedy *in præsenti* for part, or *in futuro* for all, or part, this statute extendeth not to it.

Secondly, if a man be bound to *A.* in a statute of a thousand pounds, and by a latter statute to *B.* in a hundred pounds, and *B.* first extendeth, and then *A.* extendeth and taketh the land from *B.* yet *B.* shall have no aide of the statute, because after the extent of *A. B.* shall re-enjoy the land, by force of his former execution.

Thirdly, If the wife of the conusor recover dower against the tenant by execution, he shall hold over, and shall have no aide of this statute.

Fourthly, If a man put out his lessee for yeares, or disseise his lessee for life, and after knowledge a statute and execution is sued against him, and the lessees re-enter, the tenant by execution after the leases ended, shall hold over, and have no aide of this statute.

Fifthly, This statute must not be taken literally, but according to the meaning; therefore where the letter is untill he, &c. or his assignes shall fully and wholly have levied the whole debt or damages; if he hath assigned severall parcels to severall assignes, yet all they shall have the land but till the whole debt be paid.

Sixthly, where the words be, for the which the said lands, &c. were delivered in execution. A disseisor conveys lands to the king, who granteth the same over to *A.* and his heires to hold by fealty, and twenty pound rent, and after granteth the seigniory to *B. B.* knowledgeth a statute, and execution is sued of the seigniory. *A.* dieth without heire, and the conusee entereth, and is evicted by the disseisee; he shall have the aide of this statute; and yet it is out of the letter of the law, for the seigniory was delivered in execution and not the tenancy; but he was tenant by execution of those lands, and therefore within the statute. But the perquisite of a villeine being evicted is out of the statute, for he is tenant in fee simple thereof, and not tenant by execution.

[290. a]

Seventhly, Where the words be (delivered and taken in execution), yet if after the *liberate*, the conusee entereth (as he may) so as

the land is never delivered, yet is he within the remedy of this ſtatute, for he is tenant by execution.

Eighthly, Where the ſtatute ſaith, then every ſuch recoveror, obligee, and recognizee ſhall, &c. and ſaith not, their executors, adminiſtrators, or aſſignes, but they are omitted in this materiall place, yet by a benigne interpretation this ſtatute ſhall extend to them, becauſe they are mentioned in the next precedent clauſe of the eviction, and the remedy muſt by conſtruction be extended to all the perſons that appeare by the act to be grieved; a point worthy the obſervation. (Ant. 268. b.)

Ninthly, Where the ſtatute giveth a *ſcire fac'* out of the ſame court, &c. if the record be removed by writ of error into another court, and there affirmed, the tenant by execution that is evicted ſhall have a *ſcire fac'* by the equity of this ſtatute out of that court, becauſe the *ſcire fac'* muſt be grounded upon the record. *Et ſic de ſimilibus.* (F. N. B. 265. d.)

Tenthly, Where the ſtatute giveth the *ſcire fac'* againſt ſuch perſon or perſons, &c. that were parties to the firſt execution, their heires, executors or aſſignes, &c. this muſt not be taken ſo generally as the letter is; for if the firſt execution were had againſt a purchaſor, &c. ſo as nothing was liable in his hands but the land recovered; if this land be evicted from tenant by execution, no *ſcire fac'* ſhall be awarded againſt him, his heires, executors, or aſſignes. But if he hath other lands ſubject to the execution, then a *ſcire fac'* lyeth againſt him or his aſſignes, but not againſt his executors; neither in that caſe can he have a *ſcire fac'* upon this ſtatute againſt the firſt debtor or recognizor, becauſe it giveth it onely againſt him, &c. that was party to the firſt execution, his heires, executors, or aſſignes. But if there be ſeverall aſſignes of ſeverall parcels of lands ſubject to the execution, one *ſcire fac'* upon this ſtatute ſhall lye againſt all the aſſignes. *Sed eſt modus in rebus.* This little taſte ſhall give a light to the diligent reader, not only to ſee into the ſecrets of this ſtatute, but to others alſo of like nature.

And by the ſtatute of 23. *H.* 8. *cap.* 6. it is provided, that the obligee, &c. ſhall have in every point againſt ſuch recogniſor, &c. like proces, execution, commodity and advantage in every behalfe, as hath been had or made upon the ſtatute ſtaple, and under ſuch maner and forme, as is for the ſame ſtatute ſtaple provided: by force of which branch, if the tenant by execution by force of the act of 23. *H.* 8. be evicted, he ſhall have the remedy provided for tenants by execution upon a ſtatute ſtaple by the act of 32. *H.* 8. In like manner by force of that clauſe of 23. *H.* 8. if the extendors upon a ſtatute ſtaple, &c. doe extend the lands, &c. at too high a rate, the obligee may pray that the extendors themſelves may take the lands, &c. at that rate, &c. by force of the ſaid ſtatutes of *Acton Burnel* and *De Mercatoribus*. Alſo no execution ſhall be ſued againſt the heire within age. (40. E. 3. 26. b. 44. E. 3. fol. 10. 2. H. 4. 17. 15. H. 7. 15.)

But note, that upon a writ of *elegit* the plaintiſe cannot make any ſuch prayer, becauſe thoſe ancient ſtatutes doe extend to a ſtatute merchant, or a ſtatute ſtaple only, and neither to a recovery of debt or damages, nor to a recognizance in court; and ſo hath it been reſolved [*f*].

[*f*] Mich. 4. & 5. Ph. and Mar. Bendloes, by all the juſtices of the common pleas. (Plowd. 82. b. 205. b.)

Nota, it appeareth by the preamble of the ſaid act of 32. *H.* 8. and by divers [*g*] bookes, that after a full and perfect execution had

[*g*] 15. E. 3. Extent. 7. 22. E. 3. Recovery in value

22. 31. E. 3. Exten. 13. 17. E. 3. 76. 15. E. 3. fcire fac. 115. 7. H. 4. 19. 22. Aff. 44. 22. E. 3. fol. ult. 44. E. 3. 10. 9. H. 7. 9. 25. H. 7. 15. 13. Eliz. Dier 299. 29. H. 8. Stat Merchant Br. 40. (2. Cro. 13.)

had by extent returned and of record, there fhall never be any re-extent upon any eviction; but if the extent be infufficient in law, there may goe out a new extent.

[b] 11. E. 3. age 4. 15. E. 3. age 95. 24. E. 3. 28. 29. Aff. 37. 29. E. 3. 50. 47. Aff. 4. 47. E. 3. 7. Lib. 3. fol. 13. fir William Herbert's cafe. Brooke, age 33. (2. Cro. 338. 694. Siderf. 184.) [i] Temps E. 1. Aff. 402. 417. 16. H. 7. 6. Livre d'entr. 545. Brooke, age 33. (1. Cro. 295.)

[b] If a man have a judgement given againft him for debt or damages, or be bound in a recognizance, and dieth his heire within age, or having two daughters, and the one within age; no execution fhall be fued of the lands by *elegit* during the minority, albeit the heire is not fpecially bound, but charged as *terre tenant* [i]; and fo againft an heire within age no execution fhall be fued upon a ftatute merchant or ftaple, nor upon the obligation or recognizance upon the ftatute of 23. *H.* 8. for it is excepted in the proces againft the heire. Neither if the heire within age indow his mother fhall execution be fued againft her during his minority. (1.)

[k] 27. E. 3. cap. 22.

Note, that by the ftatute [k] of 27. *E.* 3. the execution of lands upon a ftatute ftaple is referred to the ftatute merchant, and by the ftatute *De Mercatoribus* no execution fhall be had againft the heire fo long as he is within age.

[l] 13. Eliz. cap. 5. Li. 3. fo. 80. &c. Twyne's cafe. Li. 5. fo. 60. Gooche's cafe. Lib 6. fo. 18. Pakeman's cafe. Lib. 10. fo. 56. the Chanc. of Oxford's cafe. See the Statutes of 3. H. 7. cap. 4. & 50. E. 3. cap. 6. Mich. 12. & 13. Eliz. Dier 295. 18. Eliz. 351. Dier. (8. Rep. 132.)

Alfo fince *Littleton* wrote, there is a right profitable ftatute [l] made againft fraudulent feoffments, gifts, grants, &c. judgements and executions, as well of lands and tenements, as of goods and [290. b.] chattels, to delay, hinder, or defraud creditors and others of their juft and lawfull actions, fuites, debts, damages, penalties, forfeitures, heriots, mortuaries, and releafes, for the expofition of which and other ftatutes, fee the authorities quoted in the margent. (1)

And it is to be obferved, that the words of the faid act of 13. *Eliz.* are, *Be it therefore declared, ordained, and enacted*; and therefore like cafes in femblable mifchiefe fhall be taken within the remedy of this act, by reafon of this word *(declared)*; whereby it appeareth, what the law was before the making of this act. But let us now returne to *Littleton*.

W. 2. cap. 18.

"*Fieri facias.*" This is a writ mentioned in the faid ftatute, but is a writ of execution at the common law. And it is called a *fieri facias,* becaufe the words of the writ directed to the fherife be, *quod fieri facias de bonis & catallis, &c.* and of thofe words the writ taketh its denomination.

[m] Lib. 3. fol. 11. fir William Herbert's cafe. (Hob. 283.)

But note, that a *capias ad fatisfaciendum* is not mentioned in the faid ftatute, becaufe no *capias ad fatisfac'* did lye at the common law upon a judgement for debt, &c. or damages, but only when the originall action was *quare vi & armis, &c.* But latter ftatutes have given a *capias ad fatisfac'* where debt, &c. or damages are recovered; as it appeareth at large [m] in fir *William Herbert's* cafe, whereunto I referre the reader. (F. N. B. 104.)

And

(1) [See Note 248.]

[290. b.]
(1) [See Note 249.]

And it is to be observed, that these three writs of execution ought to be sued out within the yeare and the day after judgement; but if the plaintife sueth out any of them within the yeare, he may continue the same after the yeare untill he hath execution. And to none of these writs of executions the defendant can pleade; but if he hath any matter since the judgement to discharge him of execution, he may have an *audita querela*, and relieve himselfe that way, but pleade he cannot. As if the plaintife after release unto the defendant all executions, yet in none of these three writs he shall pleade it, but is driven to his *audita querela*, as hath been said.

Sect. 505.

MES si apres l'an et jour le plaintife voit suer un scire facias, * *a sacher si le defendant poit rien dire pur que le plaintife n'avera execution, donques il semble que tiel releas de touts actions serra bon plee en barre. Mes ascuns ont semble contrary, entant que le briefe de* scire facias *est un briefe d'execution, et est d'aver execution, &c. Mes uncore entant que sur mesme le briefe le defendant poit pleader divers matters puis le judgement rendue de luy ouster d'execution, come utlagary, † &c. et divers auters matters ‡, ceo bien poit estre dit action, &c.*

BUT if after the yeare and day the plaintife will sue a *scire facias*, to know if the defendant can say any thing why the plaintife should not have execution, then it seemeth that such release of all actions shall be a good plea in barre. But to some seemes the contrary, in as much as the writ of *scire facias* is a writ of execution, and is to have execution, &c. But yet in as much as upon the same writ the defendant may plead divers matters after judgement given to oust him of execution, as outlawry, &c. and divers other matters, this may bee well said an action, &c.

"* SCIRE *facias*." This is a judiciall writ, and properly lyeth after the yeare and day after judgement given; and is so called, because the words of the writ to the sherife bee, *quòd scire facias præfat' T.* (being the defendant) *quòd sit coram, &c. ostensurus si quid pro se habeat aut dicere sciat, quare, &c.* So as by the writ it appeareth, that the defendant is to be warned to plead any matter in barre of execution; and therefore albeit it be a judiciall writ, yet because the defendant may thereupon pleade, this *scire facias* is accounted in law to bee in nature of an action; and therefore [n] a release of all actions is a good barre of the same, and likewise a release of executions is a good barre in a *scire facias*. This writ was given in this case by the statute of W. 2. for at the common law if the plaintife had surceased to sue execution by *fieri facias*, or *levari facias*, a yeare and a day, hee had been driven to his new originall.

(Cro. Car. 240. 255. 328.)

[n] 19. H. 6. 3. 18. E. 4. 7. (8. Rep. 152.) (Doc. Plac. 330.) (Cro. Jac. 364.) W. 2. ca. 45. 8. E 3. 297, 298. 18. E. 3. 33. Lib. 3. fol. 12. sir William Herbert's case. Fleta li. 2. cap. 12.

[291. a.]

"*Ceo bien poet estre dit action.*" Here is to be observed, that every writ whereunto the defendant may plead, be it originall or judiciall, is in law an action.

* *a sacher si le defendant poit rien dire pur que le plaintife n'avera—d'aver*, L. and M. and Roh.

† *&c.* not in L. and M. nor Roh.

‡ *et pur* added L. and M. and Roh.

Sect. 506.

ET jeo croy, que en un scire facias *hors d'un fine, un releas de touts manners d'actions est bon plee en barre.*

AND I take it that, in a *scire facias* upon a fine, a release of all manner of actions is a good plea in barre.

This upon that which hath been said, is evident of it selfe.

Sect. 507.

MES lou home recovera debt ou damages, et est accorde perenter eux que le plaintife † *ne suera execution, donques il covient que le plaintife fait un releas a luy de touts maners d'executions* ‡.

BUT where a man recovereth debt or damages, and it is agreed betweene them that the plaintife shall not sue execution, then it behoveth that the plaintife make a release to him of all manner of executions.

"*IL covient.*" Albeit *Littleton* here saith, hee ought or must, &c. yet there bee other words which will release an execution without expresse words of a release of execution.

19. H. 6. 4. 26. H. 6. Execution 7. Li. 8. fo. 153. Ed. Altham's case. Vid. Brooke, tit. Releases, 87.

As if a man release all suites, the execution is gone; for no man can have execution without prayer and suit, but the king only; and therefore if the king releaseth all suites, it is no barre of his execution because in the king's case the judges ought to award execution *ex officio* without any suite; but a release of executions doth barre the king in that case. And so note a diversity between a release of all actions, and a release of all suites.

26. H. 6. tit. Execution 7.

So if the body of a man be taken in execution, and the plaintife releaseth all actions, yet shall he remaine in execution; but if he release all debts or duties, he is to be discharged of the execution, because the debt or duty it selfe is discharged.

20. Ass. p. 7. (6. Rep. 13. b.) (10. Rep. 47.)

In the same manner if execution be sued upon a recognizance by *elegit*, and the conusee by deed make a defeasance, that if the conusor doth such an act, that then the recognizance shall be voide; by this the execution is discharged.

26. H. 6. ubi supra.

So it is if judgement be given in an action of debt, and the body of the defendant is taken in execution by a *capias ad satisfaciendum*, and after the plaintife releaseth the judgement, by this the body shall be discharged of the execution.

If the plaintife after judgement release all demands, the execution is discharged, as shall appeare by that which next hereafter shall be said.

20. H. 6. 6. per Pastor.

If *A.* be accountable to *B.* and *B.* releaseth him all his duties, this is no barre in an action of account, for duties extend to things certaine, and what shall fall out upon the account is incertaine; and albeit the Latine word is *debita*, yet duties doe extend to all things due

† *ne suera execution—serroit suste d'action,* L. and M. and Roh.

‡ &c. added L. and M.

due that is certaine, and therefore dischargeth judgements in personall actions, and executions also.

[291. b.]

Sect. 508.

*ITEM, si home relessa a un auter touts manners * de demands, ceo est le plus melior release † a luy a que le release est fait ‡, que il poet aver, et plus urera a son avantage. Car per tiel release de touts manners § de demands, touts maners d'actions reals, personals, et actions d'appeale, sont ales et extincts, et touts manners d'executions sont ales et extincts.*

ALSO, if a man release to another all maner of demands, this is the best release to him to whom the release is made, that hee can have, and shall enure most to his advantage. For by such release of all manner of demands, all maner of actions reals, personals, and actions of appeale, are taken away and extinct, and all manner of executions are taken away and extinct.

" *TOUTS manners de demands.*"

(5. Rep. 56. a.) (Cro. Jac. 623.) (Sid. 141.)

" *Demande,*" *Demandum,* is a word of art, and in the understanding of the common law is of so large an extent, as no other one word in the law is, unlesse it be *clameum,* whereof *Littleton* maketh mention, *Sect.* 445. And here is to be observed, that there bee two kinde of demands or claimes, viz. a demand or claime in deed, and a demand or claime in law; or an expresse, and an implied demand or claime. *Littleton* here putteth examples of both: and first he speaketh of reall actions, wherein hee that bringeth his action maketh his demand, and therefore hee is properly called a demandant; and hee that defendeth is called tenant, because hee is tenant of the freehold of the land.

Lit. Sect. 445. Bract. li. 1. cap. 10. Pl. Com. Steill's case. 359, &c. (8. Rep. Altham's case, fol. 151.)

Of demands implied, or in law, *Littleton* putteth examples: First, of all actions personals: secondly, of appeales: for in both those cases he that bringeth the suit is called plaintife, and not demandant, and he that defendeth is called defendant. Thirdly, of executions. Fourthly, of title or right of entry, eyther by force of a condition, or by any former right, which merely is a demand or claime in law; but otherwise it is in the king's case. Fifthly, of a rent service, rent charge, common of pasture, &c. which also are meere demands or claimes in law. (1) All which *Littleton* here, and in the two next Sections following, putteth but for examples; for by the release of all demands, other things also be released, as rents seck, all mixt actions, a warranty which is a covenant reall, and all other covenants reall and personall, estovers, all manner of commons and profits apprender, conditions before they be broken or performed, or after, annuities, recognizances, statutes merchant or of the staple, obligations, contracts, &c. are released and discharged. (2)

(2. Cro. 487.) 38. H. 8. tit. Releas. Br. 9. 6. H. 7. 15. 19. H. 6. 3. 4. 20. Ass. Pl. 5. 40. E. 3. 22. 49. E. 3. 7. b. 50. Ass. Pl. 6. 14. H. 4. 8. 13. R. 2. tit. Avow. 89. Lib. 8. fo. 153. Ed. Altham's case. Lit. 170. Sect. 748. Dyer 5. El. 217. (Yelv. 214.) (Cro. Jac. 170, 171.) (10. Rep. 51. b.)

* *de* not in L. and M. nor Roh.
† *a luy—que celuy,* L. and M. and Roh.
‡ *que il,* not in L. and M. nor Roh.
§ *de* not in L. and M. nor Roh.

(1) [See Note 250.] (2) [See Note 251.]

(10. Rep. 47.)
(1. Lev. 99.)
(3. Lev. 274.)

Sect. 509.

ET si home ad title de entry en ascuns terres ou tenements, per tiel release son title est ale.

‖ Sed quære de hoc; *car* Fitz-James *chiefe justice de Engleterre tient le contrary, pur ceo que entre ne poit properment estre dit demande*, P. 19. H. 8. *

AND if a man hath title of entry into any lands or tenements, by such a release his title is taken away.

Sed quære de hoc; for *Fitz-James* chiefe justice of England holdeth the contrary, because an entrie cannot bee properly said a demand.

34. H. 8. tit. Releas. B. 9. Chauncey's case. Lib. 8. fo. 153. Ed. Altham's case.

[292. a.]

"TITLE." Here title is taken in the largest sense, including right also.

* "Sed quære, &c." This is an addition, and no part of *Littleton*, and the opinion here cited cleerely against law.

Sect. 510.

ET si home ad rent service ou rent charge, ou common de pasture, &c. per tiel release de touts manners de demaunds fait al tenaunts de la terre dont le service ou le rent est issuant, ou en † que le common est, le service, le rent, et le common, est ale et extinct, &c.

AND if a man hath a rent service or rent charge, or common of pasture, &c. by such a release of all manner of demands made to the tenants of the land out of which the service or the rent is issuing, or in which the common is, the service, the rent, and the common, is taken away and extinct, &c.

This upon that which hath been said, needeth no further explication.

Sect. 511.

ITEM, si home relessa a un auter touts manners de quarrels, ou touts controversies ou debates enter eux, &c. quære, *a quel matter et a quel effect tiels parols soy extendont, &c.*

ALSO, if a man releaseth to another all manner of quarrels, or all controversies or debates betweene them, &c. *quære*, to what matter and to what effect such words shall extend themselves, &c.

40. E. 3. 47. b. Ed. Altham's case, ubi supra. 35. H. 8. Dier. 57. 9. E. 4. 44.

"QUARRELS," *Querela, à querendo.* This properly concerneth personall actions, or mixt, at the highest; for the plaintife in them is called *querens*, and in most of the writs it is said, *queritur*.

‖ This paragraph not in L, and M. nor Roh.

† *que—quelle terre*, L. and M. and Roh.

queritur. And yet if a man release all *querelès* (a man's deed being taken most strongly against himself) it is as beneficiall as all actions; for by it all actions, reall and personall, are released. And by the release of all quarrels, all causes of actions are released thereby, albeit no action be then depending for the same.

(9. Rep. 52.)
39. H. 6. 9.

" *Quarrels.*" Controversies and debates are *synonima*, and of one signification. *Litis nomen omnem actionem significat, sive in rem, sive in personam sit.* If a man release *omnes loquelas*, it is as large as *omnes actiones*; for *omnis actio est loquela*, and it extendeth as well to actions in courts of record, as base courts; for the writ of error saith, *in recordo et processu, &c. loquela quæ fuit inter, &c.* And so the writ of false judgement saith, *recordari facias loquelam*, where the judgement was given in the county court. *Omnes exactiones* seeme to be large words; for *exactio derivatur ab exigendo*, and *exigere* signifieth to enquire or demand.

Lib. 8. fol. 153. Altham's case.
21. H. 6. 16. a.
F. N. B. 23. 18.
50. Ass. 6.
40. E. 3. 22.
13. R. 2. Avowrie 89.

Sect. 512.

*ITEM, si home per son fait soit oblige a un auter en certaine summe de money, a payer al feast de S. Michael prochein ensuant, * si le obligee devant le dit feast relessa al obligor touts actions, il serra barre del dutie a touts temps, et uncore il ne puissoit aver action al temps de release fait.*

ALSO, if a man by his deede bee bound to another in a certaine summe of money, to pay at the feast of Saint *Michael* next ensuing, if the obligee before the said feast release to the obligor all actions, he shall be barred of the duety for ever, and yet hee could not have an action at the time of the release made.

[292. b.] " *RELESSA al obligor touts actions, &c.*" The reason of this case is, for that the debt is a thing consisting meerely in action; and therefore albeit no action lyeth for the debt, because it is *debitum in præsenti, quamvis sit solvendum in futuro*, yet because the right of action is in him, the release of all actions is a discharge of the debt it selfe. [o] And so may an executor before probate release an action; and yet before probate he can have no action, because the right of the action is in him, and so it was adjudged. And some say, that an ordinary may release an action, and yet he can have none. But if a man by deed doth covenant to build an house or make an estate, and before the covenant broken, the covenantee releaseth to him all actions, suits, and quarrels, this doth not discharge the covenant it selfe, because at the time of the release, *nihil fuit debitum*, there was no debt or duty, or cause of action in being. But in that case a release of all covenants is a good discharge of the covenant before it be broken.

(Dyer 307. a. Cro. Car. 426.)
(2. Roll. 410. 412.)
11. H. 4. 41. 43.
(9. Rep. 37, 38. 2. Inst. 398.)
[o] Trin. 2. Ja. in Com. Banco, inter Middleton & Rinnot.
18 H. 6. 23. b.
Pl. Com. 277, 278. in Gresbroke's case per Weston.
5 Eliz. Dier. 217.
Altham's case ubi supra.
(10. Rep. 51. b. 1. Rep. 112. b. 2. Cro. 222. 571. Sid. 85. Hob. 216.)

* *&c.* added L. and M. and Roh.

Sect. 513.

MES si home lessa terre a un auter pur terme d'un an, rendant a luy al feast de S. Michael prochein ensuant 40 s. et puis devant mesme le feast il relessa al lessee touts acts, uncore apres mesme le feast il avera act de debt pur non payment de les 40 s. nient obstant le dit releas. Stude causam diversitatis *enter les deux cases.*

BUT if a man letteth land to another for a yeare, to yeeld to him at the feast of S. *Mich.* next insuing 40 s. and afterwards before the same feast hee releaseth to the lessee all actions, yet after the same feast hee shall have an action of debt for the non payment of the 40 s. notwithstanding the said release. *Stude causam diversitatis* betweene these two cases.

9. H. 7. 5. a. (8. Rep. 153.) 45. E. 3. 8. 17. H. 6. 26. 13. H. 4. Avowrie 240. (Ant. 47. b. Yelv. 67. F. N. B. 131. a. Cro. Jac. 505.) 30. E. 3. 13. b. 47. E. 3. 24. 10. H. 2. Execution 137. 16. E. 2. ib. 138. 26. E. 3. Scire fac. 4. F. N. B. 267. 9. E. 3. 7. (5. Rep. 18.) 5. Mar. Action sur le case. Br. 108. 3. Mar. Dier 113. Lib. 4. fol. 94. Slade's case. Li. 5. fo. 81. b. Forde's case. 39. H. 6. 28. b. 5. E. 4. 45. 2. H. 4. 13.

"*RELEASE touts actions.*" This release shall not barre the lessor of his rent, because it was neither *debitum* nor *solvendum* at the time of the release made; for if the land be evicted from the lessee before the rent become due, the rent is avoyded; for it is to be paid out of the profits of the land, and it is a thing not meerely in action, because it may be granted over. But the lessor before the day may acquite or release the rent. But if a man be bound in a bond or by contract to another to pay a hundred pounds at five several daies, he shall not have an action of debt before the last day be past: and so note a diversity betweene duties which touch the realty, and the meere personalty. But if a man be bound in a recognizance to pay a hundred pound at five severall dayes, presently after the first day of payment he shall have execution upon the recognizance for that summe, and shall not tarry till the last bee past, for that it is in the nature of severall judgements. And so note a diversity between a debt due by recognizance, and a debt due by bond or contract. And so it is of a covenant or promise, after the first default an action of covenant, or an action upon the case doth lie, for they are severall in their nature. Lastly, note a diversity between debts and covenants, or promises.

If a man hath an annuity for terme of yeares, or for life, or in fee, and he before it be behind doth release all actions, this shall not release the annuity, for it is not meerely in action, because it may be granted over.

12. R. 2. Release 29. (See Mo. 13. Bend. 57. Cro. Eliz. 807. Cro. Car. 241. Cro. El. 118. 2. Leo. 107. 2. Cro. 504. Cro. El. 776. 4. Rep. 94. Litt Rep. 61. S. C. 2. Saund. 337. 3. Mod. 153. S. C. Salk. 65.)

Sect. 514.

ITEM, ou home voile suer briefe de droit, il covient que il counta del seisin de luy, ou de ses ancestors, et auxy que le seisin fuit en temps de mesme le roy,

ALSO, where a man will sue a writ of right, it behoveth that he counteth of the seisin of himselfe, or of his ancestors, and also that the seisin was

roy, come il counta en son count. Car cest un ancient ley use, come appiert per le report d'un plee en le eire de Nottingham *, titulo Droit en Fitzherbert, cap. 26. *en tiel forme que ensuist. John Barre port son briefe de droit envers Reynold de Assington, et demaunda certaine tenements, &c.* † *ou le mise est joyne en le bank, et originall et le proces fueront demandes devant justices errants, ou les parties viendront, et les* ‡ 12 *chivalers fieront lour serement sans challenge des parties, d'estre allowes, pur ceo que election fuit fait per assent des parties, ove les quater chivalers, et le serement fuit tiel: Que jeo verity dirre, &c. lequel* R. *de* A. *ad plus mere droit a tener les tenements que John Barre demanda vers luy per son briefe de droit, ou John de aver eux, sicome il demaund, et pur rien dirra que le verity* ‖ *ne dirra, sicome moy ayde Dieu, &c. sans dire a lour escient. Et tiel serement serra fait en attaint, et en battaile, et* § *en ley gager, car eux mittont chescun chose a fine. Mes John Barre counta del seisin d'un Rafe son ancester en temps le roy Henry, et Reynolde sur le mise joyne tendist demy mark pur le temps, &c. Et sur ceo* Herle, *justice, dit al grand assise, apres ceo que ils fueront charges sur le mere droit, Vous gentes, Reynold donast demy marke al roy pur le temps,* ¶ *al entent que si* ⸸ *vous troves que l'auncester* ** *John ne fuit pas seisie en le temps que le demaundant ad count,* †† *vous n'enquires plus avant del droit; et pur ceo vous nous dires, lequel l'auncester John, Rafe per nosme, fuit seisie en temps le roy Henry, come il ad count, ou non. Et si vous troves que il ne fuit seisie en cel temps, vous n'enquires nient pluis; et si vous troves que*

was in the same king's time, as he pleadeth in his plea. For this is an ancient law used, as appeareth by the report of a plea in the eire of *Nottingham, tit. Droit in Fitzherbert, cap.* 26. in this forme following. *John Barre* brought his writ of right against *Reynold* of *Assington*, and demanded certaine lands, &c. where the mise is joyned in banke, and the originall and the processe were sent before the justices errants, where the parties came, and the twelve knights were sworne without challenge of the parties, to be allowed, because that choise was made by assent of the parties, with the foure knights, and the oath was this: That I shall say the truth &c. whether *R.* of *A.* hath more meere right to hold the tenements which *John Barre* demandeth against him by his writ of right, or *John* to have them, as hee demandeth, and for nothing to let to say the truth, so helpe mee God, &c. without saying to their knowledge. And the like oath shall bee made in an attaint, and in battaile, and in wager of law, for these doe bring every thing to an end. But *John Barre* counted of the seisin of one *Ralfe* his ancestor in the time of king *Henry*, and *Reynold* upon the mise joyned tendred halfe a marke for the time, &c. And hereupon *Herle*, justice, said to the grand assise after that they were charged upon the meere right, You good men, *Reynold* gave halfe a marke to the king for the time, to the intent that if you find that the ancestor of *John* was not seised in the time that the demandant hath pleaded, you shall enquire no further upon the right; and for this, you shal tell us, whether the ancestor of *John* (Rafe

* *titulo Droit en Fitzherbert, cap.* 26. not in L. and M. nor Roh.

† *ou* not in L. and M. nor Roh.

‡ 12 not in L. and M. nor Roh.

‖ *ne—jeo*, L. and M. and Roh.

§ *en—le*, L. and M. and Roh.

¶ *al entent—et ceo sert*, L. and M. and Roh. and in MSS.

⸸ *vous—home*, L. and M. and Roh.

** *John* not in L. and M. nor Roh.

†† *vous—home*, L. and M. and Roh. and MSS.

*que il fuit seisie, donques enquires ouster del * briefe. Et puis le graund assise reviendroit ove lour verdict, et disont, que Rafe † ne fuit pas seisie en temps le roy H. per que fuit agard que Reynold tiendroit les tenements vers luy demandes, a luy et ses heires quites de John Barre et ses heires a remnant. Et John en le mercie, &c. Et le cause pur que jeo aye monstre icy a toy, mon fits, cest plee, est, pur prover le matter precedent que est dit en briefe de droit, &c. car il semble per cest plee, que si Reinold n'avoit pas tendue demy marke pur enquirer del temps, &c. donques le graund assise duissoit estre charge tantsolement del mere droit, et nemy del possession, &c. ‡ Et issint que touts foits en briefe de droit, si le possession dont le demandant counta soit en temps le roy, come il avoit counte, donques le charge del grande assise serra tantsolement sur le mere droit, coment que le possession fuit encounter le ley, come il est dit adevant en cest chapter, &c.*

(*Ralfe* by name) were seised in king *Henries* time, as he hath pleaded, or not. And if you find that he was not seised in this time, you shall enquire no more; and if you find that he was seised, then you shall enquire further of the writ. And after the grand assise came in with their verdict, and said, that *Ralfe* was not seised in the time of king *Henry*, whereby it was awarded that *Reynold* should hold the tenements demanded against him, to him and his heires quite of *John Barre* and his heires to the remnant. And *John* in mercy, &c. And the reason why I have shewed to thee, my son, this plea, is, to prove the matter precedent which is said in a writ of right; for it seemeth by this plea, that if *Reynold* had not tendred the halfe marke to enquire of the time, &c. then the grand assise ought to be charged onely to enquire of the meere right, and not of the possession, &c. And so alwayes in a writ of right, if the possession wherof the demandant counteth bee in the king's time, as hee hath pleaded, then the charge of the grand assise shall be only upon the meere right, although that the possession were against the law, as it is said before in this chapter, &c.

(Ant. 279. a.) For the time of limitation, see the statute of 32. H. 8. cap. 2. Vide Sect. 170. (8. Rep. 65. Hob. 240.) F. N. B. 30. a. 2. E. 3. 27. Littl. 112. a.

" *IL covient que il counta del seisin de luy ou de ses auncestors.*" For if neyther hee nor any of his ancestors were seised of the land, &c. within the time of limitation, he cannot maintaine a writ of right; for the seisin of him of whom the demaundant himselfe purchased the land, &c. availeth not.

And so it is in a writ of right of advowson.

" *Auxy que le seisin fuit en temps de mesme le roy come il counta.*" Hereby it appeareth, that not onely a seisin (as hath beene said) is requisite, but also that the seisin be had in the time of the same king, according to his count.

" *Report* " commeth of the Latine word *Reportare, à re et porto, id est, referre, à re et fero.* And in the common law, it signifieth a publike relation, or a bringing againe to memory cases judicially argued, debated, resolved, or adjudged in any of the king's courts of justice, together with such causes and reasons as were delivered by the judges of the same; and in this sense *Littleton* useth the word in this place.

" *En*

* *briefe—droit*, L. and M. and Roh.
† *ne* not in L. and M. nor Roh.
‡ *et* not in L. and M. nor Roh.

" *En le eire de Nottingham.*" *Eire, Iter.* And it signifieth the court of the justices in *eire*, and thereupon they were called *justitiarii itinerantes*, in respect that the justices residing at Westminster were called *justitiarii residentes*, and were much like in this respect to the justices of assise at this day, although for authority and manner of proceeding (whereof you shall reade [*p*] in the ancient authors of the law) farre different. And as the power of the justices of assises by many acts of parliament and other commissions increased, so these justices itinerant by little and little vanished away. And it is certaine, that the authority of justices of assises itinerant through the whole realme, and the institution of justices of peace in every county being duely performed, are the most excellent meanes for the preservation of the king's peace, and quiet of the realme, of any other in the Christian world.

[293. b.]

(4. Inst. 184.)

[*p*] Mirror, cap. 2. sect. 3. and sect. 15. and ca. 4. le office des Justices in Eire. Glanv. li. 9. cap. 11. Li. 8. cap. primo. Britt. fol. 1. b. 7, 8. &c. Bract. lib 3. f. 115, &c.

Flet. li. 1. ca. 15, &c. 4. E. 3. 32. 6. E. 3. 35. 23. E. 3. 21. 15. H. 7. 5.
Vide Sect. 442. 233, 234.

" *De Nottingham.*" This should bee *Northampton*, according to the originall.

This report whereof *Littleton* here maketh mention, you shall finde an abstract of it in 3. *E.* 3. since *Littleton*'s time, put in print by *Fitzherbert* when he was serjant in 11. *H.* 8. and is not in the Reports or bookes at large. And yet here it appeareth, that they be of great authority, and vouched by *Littleton* himselfe for the proofe of a maine point in law. And hereby it also appeareth how necessary it is to reade records and pleas reported or recorded, though they were never printed. For those and the like records are *veritatis et vetustatis vestigia.*

3. E. 3. tit. Droit. F. 26.

[294. a.]

" *Tit. droit in* Fitzherbert, 26." is of a new addition, and therefore though it bee true, yet not to bee allowed.

" *Et le original et le proces fuera demande devant justices itinerants.*" For it is to be understood, that all pleas either in the realty or personalty that were begunne and not determined before justices in eire, were adjourned by them into the court of common pleas.

4. E. 3. 41. Peverel's case. Mirror, Glanvil, Bracton, Britton, Fleta, } ubi supra

" *Les 12 chivalers fieront lour serement sauns challenge, &c. pur ceo que le election fuit fait per assent des parties ove les 4 chivalers.*"

Here are foure things to be observed.

First, that *omnis consensus tollit errorem*, and against his owne consent he cannot challenge the twelve.

30. E. 1. tit. challenge 172. 21. E. 4. 77. 39. E. 3. 1. (Cro. El. 664.)

44. E. 3. 6. 11. H. 6. 13.

Secondly, that the foure knights electors of the grand assise are not to be challenged, for that in law they bee judges to that purpose, and judges or justices cannot bee challenged. And that is the reason that noblemen, that in case of high treason are to passe upon a peere of the realme, cannot be challenged, because they are judges of the fact, and the *Magna Charta* saith, *per judicium parium suorum.*

4. E. 3. 13.

Magna Charta cap. 29.

Thirdly, that the twelve before any assent may be challenged before the foure knights electors, but after assent or return of the pannell before the justices, there shall be no challenge to the pannell nor to the polles.

39. E. 3. 2. 7. H. 4. 20.

Fourthly,

7. H. 4. 20.

Fourthly, if there be not foure knights for electors in that county, the next to them in that county shall be taken; *ne curia regis deficeret in justitiâ exhibendâ.*

[294. b.]

" *Sauns dire a leur escient.*" And here it appeareth, that where the judgement is finall, there the oath of the grand assise or jury is absolute, and not to their knowledge, as here in the writ of right, in the attaint, and in wager of law, for the judgement in every of these three is finall.

Vide Sect. 193.

Registrum.

" *Le mise est joyne.*" *Mise* is a word of art appropriated only to a writ of right, so called because both parties have put themselves upon the meere right to be tryed by grand assise or by battaile: so as that which in all other actions is called an issue, in a writ of right in that case is called a mise. And in this sense *Littleton* taketh it here. But in a writ of right if a collaterall point is to be tryed, there it is called an issue; and is derived of this word (*missum*), because the whole cause is put upon this point. It is also taken for expences, as *misæ & custagia.* And sometime it signifieth a customary grant to the king, or lords marchers of Wales by their tenants at their first comming to their lands.

33. H. 8. ca. 13. 3. E. 6. ca. 36.

10. E. 3. 20. 31. E. 3. droit 11. 22. E. 3. 17. 18. H. 3. droit 62. 33. E. 3. ib. 39. Lamb. explicat. verborum verbo Mancusa.

" *Tender di marke al roy.*" Master *Lambard* saith, that *mancusa & marca Saxonicè Mancup. 7. Mearc' Nummus* 30 *valens denarios.* And this *mearc*, now called a marke, being an old Saxon word, is the cause that England most commonly reckoned by markes. *Libra Saxonicè* is a *pund, à pondo,* which is called so untill this day. *Solidus, qui apud nos est pars libræ vicesima, denarios per id temporis continebat quinque, nunc duodecim*; and *scilling* is a Saxon word, and with us used to this day. Pennye, *Saxonicè pennig, Latinè denarius*; but the value of these have not been alwayes one.

F. N. B. 31. c. 3. 1. E. 3. droit 15. 6. E. 3. ibid. 24.

In a writ of right of advowson brought by the king, the tenant shall not tender the *di*-marke, because *nullum tempus occurrit regi*; and therefore the king shall alledge, that hee or his progenitor was seised, without shewing any time.

Mirror, ca. 1. § 17. ca. 3. de Attaint. ca. 5. § 1. Bract. fo. 288, 289. &c. 292. Brit. fol. 241. 245, 246, &c. Flet. li. 5. ca. 21. & 34. Fortescue ca. 26. (3. Inst. 163. 222.)

" *En attaint.*" *Attincta* is a writ that lyeth where a false verdict in court of record upon an issue joyned by the parties is given. And of ancient writers it is called *breve de convictione*; and is derived of the participle *tinctus*, or *attinctus*, for that if the petty jury be attainted of a false oath, they are stained with perjury, and become infamous for ever; for the judgement at the common law in the attaint importeth eight great and grievous punishments. 1. *Quòd amittat liberam legem imperpetuum,* that is, he shall be so infamous as he shall never be received to be a witnesse, or of any jury. 2. *Quòd foris faciant omnia bona & catalla sua.* 3. *Quòd terræ et tenementa in manus domini regis capiantur.* 4. *Quòd uxores & liberi extra domus suas ejicerentur.* 5. *Quòd domus suæ prostrentur.* 6. *Quòd arbores suæ extirpentur.* 7. *Quòd prata sua arentur.* Et 8. *Quòd corpora sua carceri mancipentur.* So odious is perjury in this case in the eye of the common law, and the severity of this punishment is to this end, *ut pœna ad paucos, metus ad omnes perveniat*; for there is *misericordia puniens*, and there is *crudelitas parcens.* And seeing all tryals of reall, personall, and mixt actions depend upon

the oath of 12 men, prudent antiquity inflicted a strange and severe punishment upon them, if they were attainted of perjury.

But since *Littleton* wrote, a statute hath beene made in mitigation of the severity of the common law, in case when the petite jury is attainted, and therefore it is taken by equity. For where the statute saith, that the party grieved shall have an attaint against the party which shall have judgement upon the verdict, yet an attaint shall be maintained upon that statute against the executors of the party. *Et sic de similibus.* [a] But see the statute and authorities quoted in the margent. Only I thought good to observe three things.

First, that no attaint can be maintained upon this statute but between party and party.

Secondly, that no conusance can be granted upon any attaint, because all attaints are to be taken either before the king in his bench, or before the justices of the common place, and in no other courts, &c.

Thirdly, consider what pleas may bee pleaded in an attaint by force of this act, and what not.

[a] 23. H. 8. ca. 3. 3. Eliz. Dyer. 201. 7. E. 6. ibidem 81. 3. Mar. ibidem 129. 7. Eliz. ibidem 235. 24. H. 8. Br. Attaint. 96. 4. Mar. ib. 127. 20. H. 7. 5. 42. E. 3. 26. F. N. B. 107. D. Mirror ca. 1. § 3. ca. 3. § ca. 5. § 1. Bracton lib. 3. 141. b. & fo. 320. 331. Glanvil. lib. 2. cap. 3, 4, 5. Lib. 8. ca. 9. Lib. 4. ca. 1. Brit. fo. 40, 42, 43. 81. 175. 190. Fleta lib. 1. ca. 32. & lib. 2. cap. 48.

"*En battaile,*" *Duellum, monomachia*, and it signifieth in the common law a tryall by single fight, by battaile or combate, *monomachia* (1). [b] And in the writ of right neither the tenant or demandant shall fight for themselves, but finde a champion to fight for them; because if either the demandant or tenant should be slaine, no judgement could be given for the lands or tenements in question. But in an appeale the defendant shall fight for himselfe, and so shall the plaintife also; for there if the defendant be slaine, the plaintife hath the effect of his suite, that is, the death of the defendant; the order and solemnity whereof you may reade in our ancient and latter bookes. And this the law did institute when the tenant failed of his witnesses, or evidences, or other proofes; and the presumption of law is, that God will give victory to him that hath right.

[b] 4. E. 3. 41. 17 E. 3. 19. H. 6. 35. 1. H. 4. 3. 30. E. 3. 20. 29. E. 3. 12. 13. H. 4. 4. Stan. 174. 178. 17. Eliz. Dyer. 9. E. 4. 35. 1. H. 6. 6. 3. H. 6. 55. Vid. li. 9. fo. 32. b. & 33. b. Mirror ca. 4. del office des justices, &c. Glanvil. li 1. cap. 9. Lib. 8. cap. 8. Lib. 10. cap. 5. Bract. li. 3. tract. 2. ca. 37. & li. 5. fol. 410. Britton fol. 56. Fleta lib. 2. ca. 56. 63.

"*Ley gager,*" *Vadiare legem*; and there is also *facere legem*, by making of his law. That is, to take an oath (for example) that hee oweth not the debt demanded of him upon a simple contract, nor any penny thereof. And it is called wager of law, because of [295. a.] ancient time he put in surety to make his law at such a day; and it is called making of his law, because the law doth give such a speciall benefit to the defendant to barre the plaintife for ever in that case, [r] But he ought to bring with him eleven persons of his neighbours that will avow upon their oath, that in their consciences he saith truth, so as he himselfe must bee sworne *de fidelitate*, and the eleven *de credulitate*.

Bracton lib. 5. fol. 410. Fleta lib. 2. ca. 63. Diversities des Courts. (4. Rep. Slade's case, 93.)

[r] Magna Carta, ca. 28. 33. H. 6. 8.

And

(1) Upon this subject, see 3. Black. ch. 22. sect. 5. and 6. and the notes to the 1st vol. of Dr. Robertson's History of Charles the Vth.—The reader will also find some curious and interesting particulars upon this head, in *Pere le Brun, Traité de quelques pratiques superstitieuses qui ont seduit le peuple, et embarassé les sçavants.*

And wager of law lieth not when there is a specialty, or deed to charge the defendant, but when it groweth by word, so as he may pay or satisfie the party in secret, whereof the defendant having no testimony of witnesses may wage his law, and thereby the plaintife is perpetually barred, as *Littleton* here saith; for the law presumeth that no man will forsweare himselfe for any worldly thing; but mens consciences doe grow so large (specially in this case passing with impunity) as they choose rather to bring an action upon the case upon his promise, wherein (because it is *trespasse sur le case*) hee cannot wage his law, than an action of debt.

33. H. 6. 32.

A man outlawed or attainted in an attaint, or upon an inditement of conspiracy, or of perjury, or otherwise, whereby he become infamous, shall not wage his law.

11. H. 6. 40. 15. E. 4. 2. (Cro. Eliz. 161.)

A man under the age of 21 yeares shall not wage his law; but a feme covert, together with her husband, shall wage her law.

32. H. 6. 24. 8. H. 5. Ley. 66. 35. H. 8. Ley. Br. 102.

When the suite is for the king, or for his benefit, as in a *quo minus*, the defendant shall not wage his law.

26. E. 3. 63. b. 21. H. 6. 42.

If an infant be plaintife, the defendant shall not wage his law. An alien shall wage his law in that language he can speake.

44. E. 3. 32. 18. E. 3. 4. 24. E. 3. 39. (4. Rep. 95. b.)

In no case where a contempt, trespasse, deceit, or injury is supposed in the defendant, he shall wage his law, because the law will not trust him with an oath to discharge himselfe in those cases; only in some cases in dett, detinue, accompt, the defendant is allowed by law to wage his law.

15. E. 4. 16. 10. E. 4. 5. (3. Cro. 790. 919.) [d] 33. H. 6. 24. 13. H. 7. 3. a. 22. H. 6. 41. 1. H. 6. 1. b. 8. H. 6 11. 18. H. 8. 3. 3. E. 3. 28. 11. H. 4. 54. 5. H. 5. 13. 21. H. 6. 30. 24. E. 3. Ley. 63. 30. E. 3. 19. 9. E. 4. 1. 34. H. 8. Ley Gager. Br. 97.

In an action of account against a receiver, upon a receipt of money by the hand of another person for account render (unlesse it be by the hands of his wife, or of his commoigne) the defendant shall not wage his law, because the receipt is the ground of the action, which lyeth not in privity betweene the plaintife and defendant, but in the notice of a third person, and such a receipt is traversable. [d] But in an action of debt upon an arbitrament, or in an action of detinue by the bailement of another's hand, the defendant shall wage his law, because the *debet* and the *detinet* is the ground of those actions, and the contract or bailement, though it be by another hand, is but the conveyance, and not traversable. In an action of account against a bailife of a mannor, the defendant cannot wage his law, because it foundeth in the realty. In an action of debt which concerns the realty, as for debt for a rent upon a lease for yeares, or an action of detinue for detaining an indenture of a lease for yeares, the defendant shall not wage his law, much lesse for charters or deedes which concerne inheritance.

10. H. 6. 7. 1. H. 7. 25. 6. Eliz. Bendloes.

In an action of debt for a fine or amerciament in a leete, the defendant shall not wage his law, because the leete is a court of record; but in an action of debt for an amerciament in a court baron the defendant shall wage his law, for that it is no court of record.

9. H. 5. 3. 8. H. 6. 15. 22. H. 6. 35. 38. H. 6. 6.

In debt upon an account, before auditors, the defendant shall not wage his law, and this by construction of the statute of *W.* 2. *cap.* 11. which giveth them great authority, and saith, *coram auditoribus*, and therefore of an account before one auditor the law lyeth. So if the lord before auditors be found in surplusage, in an action of debt brought by the accomptant, the lord shall not wage his law by construction also upon this statute, as an incident rising upon the account.

14. H. 6. 62. 38. H. 6. 6.

28. H. 6. 4. 19 H. 6. 20. 22. H. 6. 13. 39. H. 6. 18.

In an action of debt by a gaoler against the prisoner for his victuals, the defendant shall not wage his law, for he cannot refuse the

the prisoner, and ought not to suffer him to die for default of sustenance; otherwise it is for tabling of a man at large.

In an action of debt brought by an attorney for his fees, the defendant shall not wage his law, because he is compellable to be his attorney. And so if a servant be retained according to the statute of labourers in an action of debt for his salary, his master shall not wage his law, because he was compellable to serve; otherwise it is, if he be not retained according to the statute (1)

21. H. 6. 4.
38. H. 6. 22.
39. H. 6. 18.

Wheresoever a man is charged as executor or administrator, he shall not wage his law, for no man shall wage his law of another man's deed, but in case of a successor of an abbot, for that the house never dyeth.

5. H. 6. 38.
1. H. 7. 25.
13. H. 7.

In debt upon a penalty given by statute, the defendant shall not wage his law. There is another kinde of wager of law in a reall action, of *non summons*, but thereof *Littleton* speaketh not.

10. H. 7. 18.

[295. b.] " *Et sur ceo* Herle *justice dit, &c.*" Hereby it appeareth, that it is the office of the judges to instruct the grand assise or jury in points of law; for as the grand assise or other jurors are triers of the matters of fact, *ad questionem facti non respondent judices*, so *ad questionem juris non respondent juratores*. And accordingly the judge in this case directed the grand assise, viz. if they found that, &c.

" *Per que fuit agard.*" Here are two things to be observed. First, the form of a judgement finall. Secondly, that a judgement finall is to bee given in this particular case. For the forme of the finall judgement for the tenant is here expressed, that the tenant shall hold the tenements demanded against him, to him and his heirs quite of the demandant and his heires for ever, and the demandant in the mercy. *Quòd tenens teneat terram illam sibi et haeredibus suis in pace versus petentem, & haeredes suos in perpetuum.*

Glanv. li. 12. cap. 1. &c.
Bracton li. 5. fo. 328.
Lib. 5. fol. 85. Penrin's case.

For the second point, seeing the mise is joyned upon the meer right, albeit the verdict of the grand assise be given upon another point, yet judgement finall shall be given. And so it is if the tenant after the mise joyned make default, or confesse the action, or if the demandant be non-suite; and yet in none of these cases they of the grand assise gave their verdict upon the meere right.

34. E. 3. Judgm. 256. adjudge accord. 13. H. 4. Judgm. 245.
10. H. 6. 8.
20. H. 6. 38. b.
21. H. 6. 34. b.
26. H. 8. 8. b.
1. Mar. Dy. 98.
Li. 5. fo. 85. Penrin's case. F. N. B. 5. 11. 31.

" *Come est avantdit.*" Vid. Sect. 478.

(1) [See Note 252.]

Chap. 9. Of Confirmation. Sect. 515.

FAIT de confirmation est communement en tiel forme, ou a tiel effect: Noverint universi, &c. me A. de B. ratificâsse, approbâsse et confirmâsse C. de D. statum & possessionem, quos habeo, de, & in uno messuagio, &c. cum pertinentibus in F. &c.

A DEEDE of confirmation is commonly in this forme, or to this effect: *Know all men, &c. that I A. of B. have ratified, approved, and confirmed to C. of D. the estate and possession which I have, of, and in one messuage, &c. with the appurtenances in F. &c.*

Bract. li. 2. fol. 32. b. & 58, 59. Brit 235. * Lit. pag. sequen. Bract. li. 2. 58.

HERE first our author shewes what a confirmation is:

"*Confirmation.*" *Confirmatio* commeth of the verbe * *confirmare, quod est firmum facere*; and therefore it is said, that *confirmatio omnes supplet defectus, licèt id quod actum est ab initio, non valuit.* A confirmation is a conveyance of an estate or right *in esse*, whereby a voidable estate is made sure and unavoidable, or whereby a particular estate is encreased.

Bract. li. 2. fol. 27. 58. 38. H. 6. 34. 37. Pl. Com. Count de Leicester's case. (3. Rep. 64. b.) 10. E. 2. Confirm. 24. 32. F. 3. 9. [c] Fleta lib. 3. cap. 14. & lib. 3. cap. 3.

A confirmation doth not strengthen a voide estate. *Confirmatio est nulla ubi donum præcedens est invalidum, & ubi donatio nulla omnino nec valebit confirmatio:* for a confirmation may make a voidable or defeasible estate good, but it cannot worke upon an estate that is voide in law. *Non valet confirmatio nisi ille qui confirmat sit in possessione rei, vel juris unde fieri debet confirmatio, & eodem modo nisi ille cui confirmatio fit, sit in possessione.* And another saith, [c] *Confirmare est id quod prius infirmum fuit firmare. Et donationum alia incepta, & defectiva, & post tempus confirmata, confirmatio enim omnem supplet defectum, poterit enim esse in pendenti donec per ratibabitionem hæredis cùm ad ætatem pervenerit roboretur.* (1)

44. Ass. 3.

"*Ratificâsse.*" *Ratificare est ratum facere*, and is *æquipollent* to *confirmare*, which, as hath been said, is *firmum facere.*

"*Approbâsse*" cometh of *ad* and *probo*, which is to make perfect and good.

Li. 9. fo. 142. Beamond's case. Flet. li. 3. cap. 14.

"*Confirmâsse.*" Here it is to be observed, that there bee two kindes of confirmations, *viz.* confirmations expresse or in deed, whereof *Littleton* hath here put these three examples, and confirmations implied, or in law, whereof *Littleton* hereafter speaketh in this chapter. *Quælibet confirmatio, aut est perficiens, crescens, aut diminuens*; and of all these *Littleton* putteth examples in this chapter. And hereof *Fleta* saith, *carta autem de confirmatione est illa quæ alterius factum consolidat & confirmat, & nihil novi attribuit, quandoque tamen confirmat & addit.* (2)

(1) [See Note 253.]
(2) See 9. Rep. 142. where sir Edward Coke brings examples of these different operations of a confirmation.

[296. a.]

Sect. 516.

*ET en ascun case un fait de confirmation est bone et available, lou en tiel case un fait de release n'est passe bone ne available. Sicome jeo lessa terre a un home pur terme de sa vie, lequel lessa mesme la terre a un auter pur terme de xl. ans, per force de quel il est en possession; si jeo per mon fait confirme l'estate del tenant a terme d'ans, et puis le tenant a terme de vie morust durant le terme des * ans, jeo ne puis enter en la terre durant le dit terme.*

AND in some case a deede of confirmation is good and available, where in the same case a deede of release is not good nor availeable. As if I let land to a man for terme of his life, who letteth the same to another for terme of forty yeares, by force of which he is in possession; if I by my deed confirme the estate of the tenant for yeares, and after the tenant for life dieth during the terme of yeares, I cannot enter into the land during the said terme.

LITTLETON in this chapter putteth eight diversities betweene a confirmation and a release; (1) and thereof for illustration here hee putteth two cases in this and the next Section, which upon that which hath beene said in the precedent chapters, is sufficiently explained. Onely in both these cases this is to bee observed, that where a confirmation shall enlarge an estate, there privity is required, as well as in the case of the release, as by many examples which *Littleton* puts in this chapter appeareth. And note, here is the first case wherein a release and a confirmation doe differ:

49. E. 3. 32.
(1. Roll. Abr. 482.)
9. H. 6. 22. tit. release 44.

Lessee for life made a lease for thirty yeares, and after the lessor and lessee for life made a lease for sixty yeares to another, which lease for sixty yeares the lessor did first confirme, and after the lessor confirmed the lease for thirty yeares, and after tenant for life dyed within the thirty yeares; and it was adjudged [*d*], that the lease for thirty yeares was determined by the death of lessee for life, and that the lessee for sixty yeares might enter; for that albeit the lease for sixty yeares was the latter in time, yet was it of greater force in law, for that the lessor who had power to confirme which of them he would, did first confirme the second lease.

(Cro. Car. 284. 1. Roll. Abr. 483. 500. Mo. 67. Dyer 218 b. Hob. 165. Post. 310. a.)
[*d*] Inter Unwel & Lodge, temp. Reg. Eliz. (Hob. 7.)

In this chapter is also to be observed eight cases, wherein a release and a confirmation have the like operation in law.

Sect. 517.

UNCORE si jeo per mon fait de release avoy releas al tenant a terme d'ans en la vie le tenant a terme de

YET if I by my deed of release had released to the tenant for yeares in the lifetime of the tenant for

* *xl.* added L. M. and Roh.

(1) He also mentions eight instances in which they agree.

de vie, cel release serra voyd, pur ceo que adonques ne fuit ascun privity perenter † moy et le tenant a terme d'ans: car release n'est available al tenant a terme d'ans, mes lou est un privitie perenter luy et celuy que relessast.

for life, this release shall be voide, for that then there was not any privity between me and the tenant for years: for a release is not available to the tenant for yeares, but where there is a privitie betweene him and him that releaseth. (2)

This belongeth to the first diversity between a release and a confirmation.

Sect. 518.

[296. b.]

EN mesme le manner est, si jeo soy disseisie, et le disseisor fait un lease a un auter pur terme d'ans, si jeo relessa al termor, ceo est voyde: mes si jeo confirma ‡ l'estate le termor, ceo est bone et effectual.

IN the same manner it is, if I be disseised, and the disseisor make a lease to another for term of yeares, if I release to the termor, this is void: but if I confirme the estate of the termor, this is good and effectuall.

HERE is the second diversitie betweene a release and a confirmation. But if the disseisor make a lease for yeares to begin at Michaelmasse, and the disseisee confirme his estate, this is voide, because he hath but *interesse termini*, and no estate in him, whereupon a confirmation may enure.

4. H. 7. 10. by Read.
22. E. 4. 36.

(5. Rep. 81.)

Sect. 519.

ITEM, si jeo soy disseisie, et jeo confirma l'estate le disseisor, il ad bone et droiturel estate en fee simple, coment que en le fait de confirmation nul mention est fait de ses heires, pur ceo que il avoit fee simple al temps de confirmation. Car en tiel case si le disseisee confirma l'estate le disseisor, a aver et tener a luy et a ses heires de son corps engendres, ou a aver et tener a luy pur le terme de sa vie, uncore le disseisor ad fee simple, et est seisie en son demesne come de fee, pur ceo que quant son estate fuit confirme, donque il avoit fee simple, et tiel fait ne poit changer son estate, sans entry ‖ fait sur luy, &c.

ALSO, if I be disseised, and I confirme the estate of the disseisor, hee hath a good and rightfull estate in fee simple, albeit in the deede of confirmation no mention be made of his heires, because hee had fee simple at the time of the confirmation. For in such case if the disseisee confirme the state of the disseisor, to have and to hold to him and his heires of his body engendred, or to have and to hold to him for term of his life, yet the disseisor hath a fee simple, and is seised in his demesne as of fee, because when his estate was confirmed, he had then a fee simple, and such deed cannot change his estate, without entry made upon him, &c.

HERE

† *moy et le tenant a terme d'ans,—luy et moy*, L. and M. and Roh.
‡ *l'estate de termor,—son estate*, L. and M. and Roh.

‖ *fait* not in L. and M. nor Roh.

(2) [See Note 254.]

HERE is the first case wherein the release and confirmation doth agree, viz. a confirmation to a disseisor in taile, or for any particular estate, is of the like force as a release to a disseisor, during such estate, which in both cases is good for ever. In the same manner it is, if the disseisor make a gift in taile, and the disseisee confirme the estate of the donee for the life of the donee, this confirmation enures to the whole estate taile; for a confirmation can make no fraction of any estate, to extend but to part of the estate only. *Et sic de cæteris.* (1)

19. H. 6. 22.
6. E. 3.
Confirm. 4.

[297. a.]

Sect. 520.

*EN mesme le manner est, si son estate soit confirme pur terme de un jour, ou pur terme d'un heure, il ad bon estate en fee simple, pur ceo que * son estate en fee simple fuits un foits confirme.* Quia confirmare idem est, quòd firmum facere, &c.

IN the same manner it is, if his estate bee confirmed for terme of a day, or for terme of an houre, hee hath a good estate in fee simple, for this, that his estate in fee simple was once confirmed. *Quia confirmare idem est, quòd firmum facere, &c.*

HERE is the second case wherin the release and confirmation doe agree. The reason of this is, for that the disseisor hath a fee simple; and therefore if his estate be confirmed but for an houre, it is good for ever, because (saith *Littleton*) *confirmare idem est, quòd firmum facere.*

Nota, a diversity betweene a bare assent without any right or interest, and an assent coupled with a right or interest; and therefore an attornement cannot be made for a time nor upon condition; but if the person make a lease for a hundred yeares, the patron and the ordinary may confirme fifty of the yeares, for they have an interest, and may charge in time of vacation. And so if a disseisor make a lease for an hundred yeares, the disseisee may confirme parcel of those yeares; but then it must be by apt words, for he must not confirme the lease, or demise, or the estate of the lessee, for then the addition for parcell of the terme should be repugnant when the whole was confirmed before, but the confirmation must be of the land for part of the terme. So may the confirmation be of part of the land; as if it be of forty acres, he may confirme twenty, &c. So if tenant for life make a lease for an hundred yeares, the lessor may confirme eyther for part of the terme, or for part of the land. But an estate of free-hold cannot bee confirmed for part of the estate, for that the estate is intire, and not severall, as yeares be (1).

Lib. 5. fol. 81. Forde's case.
(Ant. 274. a.)
(Post. 300. b.)

(1. Roll. Abr. 412.)

* *son* not in L. and M. nor Roh.

[297. a.]

(1) [See Note 255.] (1) [See Note 256.]

Sect. 521.

*ITEM, si mon disseisor fait un leas a terme de vie, le remainder ouster en fee, si jeo releas al tenant a terme de vie, ceo urera a celuy en le remainder. Mes si jeo confirme l'estate de le tenant a terme de vie, uncore apres son decease jeo puis bien enter, pur ceo que * riens est confirme forsque l'estate le tenant a terme de vie, issint que apres son decease, jeo puis enter. Mes quant jeo relessa tout mon droit al tenant a terme de vie, ceo urera a celuy en le remainder ou en le reversion, pur ceo que tout mon droit est ale per tiel releas. Mes en cest cas, si le disseisee confirme l'estate et le title celuy en le remainder sans ascun confirmation fait a tenant a terme de vie, le disseisee ne poit enter sur le tenant a terme de vie, pur ceo que le remainder est dependant sur l'estate le tenant a terme de vie; et si son estate serroit defeate, le remainder serroit defeate per l'entrie le disseisee, et ceo ne serra reason que il per son entre defeateroit le remainder encounter son confirmation, &c.*

ALSO, if my disseisor maketh a lease for life, the remainder over in fee, if I release to the tenant for life, this shall enure to him in the remainder. But if I confirme the estate of the tenant for tearme of life, yet after his decease I may well enter, because nothing is confirmed but the estate of the tenant for life, so that after his decease I may enter. But when I release all my right to the tenant for life, this shall enure to him in the remainder or in the reversion, because all my right is gone by such release. But in this case, if the disseisee confirme the estate and title of him in the remainder without any confirmation made to tenant for life, the disseisee cannot enter upon the tenant for terme of life, for that the remainder is depending upon the state for life; and if his estate should be defeated, the remainder should be defeated by the entry of the disseisee, and it is no reason that he by his entry should defeat the remainder against his confirmation, &c.

HERE is the third case wherein the release and confirmation differ, for the confirmation to the tenant for life doth not enure to him in the remainder.

And so it is when the severall estates be in one person; as if the disseisor make a gift in taile, the remaynder to the right heires of tenant in taile, if the disseisee confirme the estate in taile, it shall not extend to the fee simple, no more than if the disseisor had made a gift in taile, the remainder for life, the remainder to the right heires of tenant in taile; this extendeth onely to the estate taile, and not to the remainder for life, nor to the remainder in fee. [297. b] But if the disseisor make a lease for life to *A.* and *B.* and the disseisee confirme the estate of *A. B.* shall take advantage thereof; for the estate of *A.* which was confirmed was joynt with *B.* and in that case the disseisee shall not enter into the land, and devest the moity of *B.*

(Ant. 52. a.) (Post. 310. a. 315. a. 319. a.) (1. Roll. Abr. 302.)

If the disseisor infeoffs *A.* and *B.* and the heires of *B.* if the disseisee confirme the estate of *B.* for his life, this shall not only extend to his companion, as hath beene said, but to his whole fee simple,

(Sid. 83.)

* aul added L. and M. and Roh. et not in L. and M. nor Roh.

simple, because to many purposes hee had the whole fee simple in him, and the confirmation shall bee taken most strong against him that made it.

(1. Cro. 321. (Ant. 182.)

Tenant in tayle discontinueth in fee and dyeth, the discontinuee make a lease for life, and granteth the reversion to the issue, he shall not have a formedon against tenant for life; for by his formedon he must recover estate of inheritance, and the lessee for life hath not the inheritance, but the issue in taile himselfe hath it.

If feoffee upon condition make a lease for life, or a gift in taile, and the feoffor release the condition to the feoffee, he shall not enter upon the lessee or donee, because he cannot regaine his ancient estate.

(Ant. 202. a.)

If the feoffee upon condition make a lease for life, the remainder in fee, if the feoffor release the condition to the lessee for life, it shall enure to him in the remainder; as well as in the case of the right, or of a rent, &c.

If a feme disseisoresse make a feoffment in fee to the use of *A.* for life, and after to the use of herselfe in taile, and the remainder to the use of *B.* in fee, and then taketh husband the disseisee, and he releaseth to *A.* all his right, this shall enure to *B.* and to his own wife also; for by the rule of *Littleton* it must enure to all in the remainder (1).

But if *A.* letteth to *B.* for life, and *B.* maketh a lease to *C.* for his life, the remainder to *A.* in fee, *A.* releaseth to *C.* all his right, this is good to perfect the estate of *C.* for his life. But when *C.* dyeth, *A.* shall be in of his old estate, for his release could not enure to himselfe to perfect his defeasible remainder, but his ancient right remaineth. And note, that in these two cases the fee is devested and vested all at one instant; in the same manner as if tenant in taile make a lease for life, at the same instant the estate taile is devested out of the donee, and the reversion in fee out of the donor, and a new fee vested in tenant in taile. And so if the husband make a lease for life of his wife's land, he devesteth his owne estate, that he hath in her right, and the inheritance of his wife, and at the same instant vested a new reversion in fee in himselfe.

[298. a.] "*Mes en cest case si le disseisee confirme l'estate et title celuy en le remaynder.*" Here is the third case wherein the release and confirmation doe agree, for the confirmation made to him in the remainder shall availe the tenant for life, as much as the release shall.

Vid. 29. Ass. 19. 30. H. 8. Recov. en value. Br. 30. 13. E. 3. entr. cong. Br. 127.

Pl. Com. Delamere's case.

Vid. Sect. 374.

"*Pur ceo que le remainder est dependant, &c.*" By this some have gathered, that if a disseisor make a lease for life, reserving the reversion to himselfe, and the disseisee confirmeth the state of the disseisor, that he may enter upon the lessee, because the estate of him in the reversion dependeth not upon the state for life as the remainder: but all is one, for by the confirmation made to him in the reversion, all the right of him that confirmeth is gone, as well as when he maketh it to him in remainder; and he cannot by his entry avoide the estate of the lessee for life, but hee must avoide the state of the lessor, which against his owne confirmation he cannot doe; and it hath been adjudged, that if a disseisor make a lease

(Mo 91.)

Reported by sir John Popham, chiefe justice.

(1) [See Note 257.]

(Post. 302. a.) (6. Rep. 40.) (Sid. 360.) (1. Saun. 149, 150. Ant. 224. a.)

lease for life, and after levie a fine of the reversion with proclamations, and the five years passe, so as the disseisee is for the reversion barred, he shall not enter upon the lessee for life.

" *Le remainder serra defeat.*" It is regularly true, that when the particular estate is defeated, that the remainder thereby shall be also defeated, but it faileth in divers cases.

Vid. Pl. Com. Colthirst's case, (Post. 333. a. b.)

For where the particular estate and the remainder depend upon one title, there the defeating of the particular estate is a defeating of the remainder. But where the particular estate is defeasible, and the remainder by good title, there though the particular estate be defeated, the remainder is good. As if the lessor disseise *A.* lessee for life, and make a lease to *B.* for the life of *A.* the remainder to *C.* in fee, albeit *A.* re-enter, and defeate the estate for life, yet the remainder to *C.* being once vested by good title shall not be avoided; for it were against reason, that the lessor should have the remainder againe, against his owne livery; and this is well warranted by the reason of *Littleton* in this case. So it is if a lease be made to an infant for life, the remainder in fee, the infant at his full age disagree to the estate for life, yet the remainder is good, for that it was once vested by good title; for in both these cases there was a particular estate at the time of the remainder created.

27. E. 3. 48.

If a lease be made to *A.* for the life of *B.* the remainder to *C.* in fee, *A.* dyeth before an occupant entreth, here is a remainder without a particular estate, and yet the remainder continueth good. (1)

3. E. 3. Abb. Ass. (Plo. 35. a. Vaugh. 200. Moore 664. Yelv. 9. 2. Roll. Abr. 415. 7. H. 4. 6. 1. Rep. 66. Noy. 47.) 7. H. 4. 6.

A rent is granted to the tenant of the land for life, the remainder in fee, this is a good remainder, albeit the particular estate continued not; for *eo instante* that he tooke the particular estate, *eo instante* the remainder vested, and the suspension in judgement of law grew after the taking of the particular estate (2)

If a man grant a rent to *B.* for the life of *Alice*, the remainder to the heires of the body of *Alice*, this is a good remainder, and yet it must vest upon an instant. (3)

Sect. 522.

*ITEM, si sont deux disseisors, et le disseisee relessa a un de eux, il tiendra son compagnion hors de la terre. Mes si le disseisee confirma l'estate de l'un, sans pluis * dire en le fait, ascuns diont que il ne tiendra son compagnion dehors, mes tiendra joyntment ove luy, pur ceo que † riens fuit confirme forsque son estate que fuit joynt, &c.*

ALSO, if there bee two disseisors, and the disseisee releaseth to one of them, hee shall hold his companion out of the land. But if the disseisee confirme the estate of the one, without more saying in the deede, some say that hee shall not hold his companion out, but shall hold joyntly with him, for that nothing was confirmed but his estate, which was joynt, &c.

* *dire—parlance*, L. and M. and Roh. † *nul* added L. and M. and Roh.

(1) But since the stat. 29. Car. 2. c. 3. 14. Geo. 2. c. 20. no such vacancy can happen.

(2) [See Note 258.]

(3) [See Note 259.]

THIS

THIS is the fourth case wherein the release and the confirmation seeme to differ, being made unto one of the disseisors.

"*Confirme forsque son estate, &c.*" Hereby it appeareth, that if the disseisee confirme the estate of the one disseisor in the lands, to have and to hold the lands or tenements, or the right of the disseisee, to him and his heires, hee shall hold out the other disseisor; and that appeareth by *Littleton*, first, upon these words (*confirme the state of one*) without more saying in the deede, viz. to have and to hold the lands, &c. Secondly, the reason of *Littleton* in expresse words is, for that nothing was confirmed but his estate which was joynt. Thirdly, the next two Sections make it plaine where the *habendum* is added.

[298. b.]

Hereby also it appeareth, that a release is more forcible in law than a confirmation. If the disseisee and a stranger disseise the heire of the disseisor, and the disseisee confirme the estate of his companion, this shall not extinguish his right that was suspended: so as if the heire or the disseisor re-enter, the right of the disseisee is revived. And so it is if the grantee of a rent-charge and an estranger disseise the tenant of the land, and the grantee confirme the estate of his companion, the tenant of the land re-enter, the rent is revived; for the confirmation extended not to the rent suspended, otherwise it is of a release in both cases.

Sect. 523.

ET pur ceo ascuns ont dit, que si deux joyntenants sont, et l'un confirme l'estate l'auter, que il n'ad forsque joint estate, sicome il avoit adevant. Mes s'il ad tiels parols en le fait de confirmation, a aver et tener a luy et a ses heires touts les tenements dont mention est fait en le confirmation, donques il ad estate sole en les tenements, * *&c. Et pur ceo il est bone et sure chose en chescun confirmation d'aver ceux parolx; a aver et tener les tenements, &c. en fee, ou en fee taile, ou pur terme de vie, ou pur terme d'ans, solonque ceo que le cas* † *est, ou le matter gist.*

AND for this some have said, that if two joyntenants bee, and the one confirme the estate of the other, that he hath but a joynt estate, as he had before. But if hee hath such words in the deede of confirmation, to have and to hold to him and to his heires all the tenements whereof mention is made in the confirmation, then he hath a sole estate in the tenements, &c. And therefore it is a good and sure thing in every confirmation to have these words; to have and to hold the tenements, &c. in fee, or in fee taile, or for terme of life, or for terme of yeares, according as the case is or the matter lyeth.

AND this confirmation leaveth the state as it was, and doth not amount to any severance of the joynture, as some have said.

"*Mes s'il ad tiels parols en le fait, &c.*" This is plaine and evident enough.

34. E. 3. tit. Confirm. pl. 19.

"*Et pur ceo il est bone et sure chose, &c.*" This is good counsell, and worthy to be observed.

* *&c.* not in L. and M. nor Roh. † *est* not in L. and M. nor Roh.

Sect. 524.

*CAR al entent d'ascuns, si home lessa terre a un auter pur terme de vie, et puis confirma son estate que il ad en mesme la terre, a aver et tener son estate a luy et a ses heires, cest confirmation quant a ses heires est void, car ses heires ne poient aver son estate, que * ne fuit forsque pur terme de son vie. Mes s'il confirma son estate per ceux parolx, a aver mesme le terre a luy et a ses heires, cest confirmation fait fee simple en cest case a luy en la terre, pur ceo que † les parolx a aver et tener, &c. va a le terre, et nemy al estate que il ad, &c.*

FOR to the intent of some, if a man letteth land to another for life, and after confirme his estate which hee hath in the same land, to have and to hold his estate to him and to his heires, this confirmation as to his heires is voide, for his heires cannot have his estate, which was not but for terme of his life. But if he confirme his estate by these words, to have the same land to him and to his heires, this confirmation maketh a fee simple in this case to him in the land, for that the words to have and to hold, &c. goeth to the land, and not to the estate which hee hath, &c.

(1. Roll. Abr. 482.) 38. E. 3. 40. (Plo. 158. a.)

HERE the diversity is apparent betweene a confirmation of the estate for life in the land to have and to hold the said state in the land to him and his heire, this cannot enlarge his estate, for his estate being but for life, that estate cannot bee extended to his heires. But in that case if he confirme the state for life in the land in the premisses of the deed, and the *habendum* is in this sort, to have and to hold the land to him and his heires, this shall enlarge his estate, and create in him a fee simple.

[299. a.]

[e] Vid. Pl. Com. in Throgmorton's case, fol. 147. a. Wrottesleye's case, 197. (2. Rep. 23.)

Wherein is to bee noted, [e] that the *habendum* and the premisses doe in substance well agree together, and that the *habendum* may enlarge the premisses, but not abridge the same (1)

And seeing that in conveyances, limitations of remainders are usuall and common assurances, it is dangerous by conceipts or nice distinctions to bring them in question, as have in latter time beene attempted.

" *Son estate.*" Vid. Sect. 650.

Sect. 525.

ITEM, si jeo lessa certaine terre a un feme sole pur terme de sa vie, laquel prent baron, et puis jeo confirma l'estate

ALSO, if I let certaine land to a feme sole for terme of her life, who taketh husband, and after I confirme

* *ne* not in L. and M. nor Roh. † *les parolx—le* L. and M. and Roh.

(1) On the operation of an habendum in a deed, see ant. 21. a. Vin. Abr. Grant. J. K. L. and M.

l'estate le baron et sa feme, a aver et tener ‡ *pur terme de leur deux vies; en cest case le baron ne tient jointment ove sa feme, mes tient en droit de sa feme pur terme de sa vie. Mes cest confirmation urera a le baron per voy de remainder pur terme de sa vie, s'il survequist sa feme.*

firme the estate of the husband and wife, to have and to hold for terme of their two lives; in this case the husband doth not hold joyntly with his wife, but holdeth in right of his wife for term of her life. But this confirmation shall enure to the husband by way of remainder for terme of his life, if hee surviveth his wife.

HERE is the fourth case wherein the release and confirmation doe agree; and in this case it is to be observed, that the baron hath such an estate in the land in the right of his wife as hee is capable of a confirmation to enlarge his estate; and therefore if the confirmation had been made of his estate to him alone, to have and to hold the land to him and to his heires, this had been good to have conveyed the fee simple to him after the decease of his wife: for if in this case a release be made to the husband and his heires, this is sufficient to convey the inheritance of the land to the husband. (2)

Vid. Sect. 573. (Sid. 83. 361.) (2. Roll. Abr. 829.)

(Ant. 273. b.) 16. H. 6. tit. Release 45. 22. E. 3. tit. Release. Statham.

[299. b.]

"*Ne tient jointment ove sa feme.*" For two causes. First, because the wife hath the whole for her life. Secondly, joyntenants must (as hath been before said in the chapter of Joyntenants) come in by one title. But in this case if the confirmation had been made to the husband and wife, to have and to hold the land to them two and to their heires, they had been joyntenants of the fee simple, and the husband seised in the right of his wife for her life; for the husband and the wife cannot take by moities during the coverture.

(4 Rep. 29.)

18. E. 3. 20. (1. Roll. Rep. 230. 317. 438. 3. Leo. 4. a. Ant. 184. a. 187. a. Post. 351. a.)

If a man letteth land to the husband and wife, to have and to hold the one moity to the husband for terme of his life, and the other moity to the wife for her life, and the lessor confirme the estate of them both in the land, to have and to hold to them and to their heires; by this confirmation as to the moity of the husband, it enureth only to the husband and his heires, for the wife had nothing in that moity; but as to the moity of the wife, they are joyntenants, as hath bin said; for the husband hath such an estate in his wife's moity, in her right, as is capable of a confirmation. But if such a lease for life be made to two men by severall moities, and the lessor confirme their estates in the land, to have and to hold to them and to their heires, they are tenants in common of the inheritance; for regularly the confirmation shall enure according to the quality and nature of the estate which it doth enlarge and increase.

18. Ass. p. 3. 18. E. 3. Confir. 17. 17. E. 3. 68. 28. E. 3. 94. 40. E. 3. 8. Ass. 20.

If a lease for life be made to *A.* the remainder to *B.* for life, and the lessor confirme their estates in the land, to have and to hold to them and their heires, *A.* taketh one moity to him and his heires, and therefore of the one moity he is seised for life, the remainder to *B.* for life, and then to him and his heires: of the other moity *A.* is seised for life, the immediate inheritance to *B.* and his heires; because

‡ *la terre* added L. and M. and Roh.

(2) [See Note 260.]

because as to the moity which *B.* takes, the same is executed: as if the reversion be granted to tenant for life, and to a stranger, it is executed for one moity, (as hath been said before) and therefore in this case they are tenants in common.

30. H. 6. 9. (Ant. 182. b.)

If lands be given to two men, and to the heires of their two bodies begotten, and the donor confirmeth their two estates in the land, to have and to hold the land to them two and to their heires: in this case some are of opinion, that they shall be joyntenants of the fee simple, because the donees were joyntenants for life, and (say they) the confirmation must enure according to the estate which they have in possession, and that was joynt. But others hold the contrary. For, first, they say, that the donees have to some purposes severall inheritances executed, though between the donees survivor shall hold for their lives. Secondly, they say, that when the whole estate, which comprehendeth severall inheritances, is confirmed, the confirmation must enure according to the severall inheritances, which is the greater and most perdurable estate, and therefore that the donees shall be tenants in common of the inheritance in this case.

Vid. Sect. 573.

" *Per vey de remainder, &c.*" Here some question hath been made of this terme remainder, without any cause at all, because in law it is in nature of a remainder. For in case of a fine, when a reversion expectant upon an estate for life in *A.* is granted to *B.* *et quæ ad ipsum reverti debet post mortem A. præfato B. & hæredibus suis remaneant, &c.* and a more colourable exception might be taken against this word *remaneant* there, than in the case of *Littleton.*

Pl. Com. Colthirst's case. Doct. & Stud. ca. 21.

It is true, that in * 16. *H.* 6. it is called a reversion: in [o] 9. *E.* 4. it is called a remainder: in [p] 6. *E.* 3. it is said, that by the confirmation an estate accrued to the husband for terme of his life. In [q] 17. *E.* 3. the husband, living the wife, shall have nothing but in abeyance after the death of his wife. But lest there should bee *pugna verborum*, which learned and wise men ever avoide, all do resolve, that the estate of the husband is good, and that it doth enure by way of increase and inlargement of his estate.

* 16. H. 6. tit. Release 45.
[o] 9. E. 4. 18.
[p] 6. E. 3. 9.
[q] 17. E. 3. 68. b.

And albeit in this case of *Littleton*, the husband by the confirmation gaineth an estate for life in remainder, (as *Littleton* termeth it) yet if the husband doth waste, an action of waste shall lie against him and his wife, notwithstanding the meane remainder, because the husband himselfe committeth the waste, and doth the wrong; and therefore shall not excuse himselfe for his committing of waste, in respect he himselfe hath the remainder; no more than if a man lesseth to *A.* during the life of *B.* the remainder to him during the life of *C.* if he commit waste, an action of waste shall lie against him. (1)

17. E. 3. 68. b. Vi. Paget's case, lib. 5. fo. 76. b. (Ant. 54. a.)

(1) [See Note 262.]

Sect.

Sect. 526.

MES si jeo lessa al feme sole terre pur terme d'ans, lequel prent baron, et puis jeo confirma l'estate le baron et sa feme, a aver et tener la terre pur terme de lour deux vies: en cest case ils ont joynt estate en le franktenement de la terre, pur ceo que la feme n'avoit franktenement advant, &c.

BUT if I let land to a feme sole for terme of yeares, who taketh husband, and after I confirm the estate of the husband and his wife, to have and to hold the land for term of their two lives: in this case they have a joynt estate in the freehold of the land, for that the wife had no freehold before, &c.

THIS is the fifth case wherein the release and confirmation doe agree: and it is to be observed, that chattels reals, as leases for yeares, wardships, and the like, are not given to the husband absolutely (as all chattels personals are), by the intermarriage, but conditionally if the husband happen to survive her, and he hath power to alien them, at his pleasure: but in the mean time the husband is possessed of the chattels reall in her right.

[300. a.]

5. E. 3. 17. b. Pl. Com. 418. b. 38. H. 6. 23. 14. H. 4. 12. 38. E. 3. 35. Pl. Com. Dame Hale's case. 50. Ass. p. 15. 4. H. 6. 5.

7. H. 6. 1. 9. H. 6. 52. 37. Li. Ass. 21. H. 7. 29. 21. E. 4. 40. 26. H. 8. 7. (Ant. 46. b. Post. 351. a.)

Secondly, that the husband hath such a possession in her right of the chattell, as is capable of a confirmation or of a release.

Thirdly, that the confirmation in this case to the husband and wife for their lives, maketh them joyntenants for life, because a chattell of a feme covert may be drowned: and so note a diversity betweene a lease for life and a lease for yeares made to a feme covert; for her estate of freehold cannot be altered by the confirmation made to her husband and her, as the terme for yeares may, whereof her husband may make disposition at his pleasure. (1)

(Ant. 273. b. Ant. 276. a. Ant. 299. a.)

Sect. 527.

ITEM, si mon disseisor granta a un rent charge hors de la terre dont il moy disseisist, et jeo rehersant le dit grant confirma mesme le grant, et tout ceo que est comprise deins mesme le graunt, et puis jeo enter sur le disseisor; quære, *en cest case, si le terre soit discharge de le rent ou nemy*.*

ALSO, if my disseisor granteth to one a rent charge out of the land whereof he disseised mee, and I rehearsing the sayde grant confirme the same grant, and all that which is comprised within the same grant, and after I enter upon the disseisor; *quære*, in this case, if the land be discharged of the rent or no.

THIS is the fifth case wherein the release and confirmation doe differ; for a release to the grantee in this case [a] were voide. It is holden by some authority since *Littleton* wrote, that the disseisee

[a] 21. H. 7. 28. Lib. 1. fol. 147. Anne Mayow's case. 3. H. 4. 10.

* *&c.* added in L. and M. and Roh.

(1) [See Note 262.]

feiſee after his re-entry ſhall not avoide the rent charge againſt his own confirmation: and there a generall rule is taken, that ſuch a thing as I may defeate by my entry, I may make good by my confirmation.

Li. 1. fo. 147, 148. Anne Mayow's caſe. (Poſt. Sect. 529.)

If the feoffee upon condition grant a rent charge in fee, and the feoffor confirmeth it, and after the condition is broken, and the feoffor enter, he ſhall not avoide the rent charge. And ſo it is if the heire of the diſſeiſor grant a rent charge, and the diſſeiſee confirmeth it, and after recover the land, he ſhall not avoide the rent: and yet in neither of theſe caſes his entry was congeable at the time of the confirmation. (2)

Sect. 528.

*ITEM, ſi un parſon d'un eſgliſe charge * le glebe de ſon eſgliſe per ſon fait, et puis le patron et l'ordinarie confirmont meſme le grant, † et tout ceo que eſt compriſe deins meſme le grant, donques le grant eſtoyera en ſa force, ſolonque le purport de meſme le graunt. Mes en tiel caſe covient que le patron eit fee ſimple en le vouſon; car s'il ‡ n'ad eſtate en lavowſon forſque pur terme de vie, ou en le taile, donque le grant ‡ ne eſtoyera forſque durant ſa vie, et la vie le parſon que grantaſt, &c.*

ALSO, if a parſon of a church charge the glebe land of his church by his deed, and after the patron and ordinary confirme the ſame grant, and all that is compriſed in the ſame grant, then the grant ſhall ſtand in his force, according to the purport of the ſame graunt. But in this caſe it behoveth that the patron hath a fee ſimple in the advowſon; for if he hath but an eſtate for life, or in taile, in the advowſon, then the graunt ſhall not ſtand, but during his life, and the life of the parſon which granted, &c.

Glanv. li. 13. ca. 23. 24, 25. Bract. li 4. ca. 285, &c. Brit. fo. 234. b. &c. Fleta li. 5. ca. 19, 20. & lib 6. ca 18. Reg. F. N. B. 48, 49. Brit. ubi ſupra.

"PARSON," *Perſona*. In the legall ſignification it is taken for the rector of a church parochiall, and is called *perſona eccleſiæ*, becauſe he aſſumeth and taketh upon him the parſon of the church, and is ſaid to be ſeiſed *in jure eccleſiæ*, and the law had an excellent end therein, viz. that in his perſon the church might ſue for and defend her right; and alſo be ſued by any that had an elder and better right; and when the church is full, it is ſaid to be *plena & conſulta* of ſuch a one parſon thereof, that is, full and provided of a parſon, that may *vicem ſeu perſonam ejus gerere*.

[300. b.]

Perſona impersonata, parſon, imperſonee is the rector, that is in poſſeſſion of the church parochiall, be it preſentative, or impropriate, and of whom the church is full.

8. E. 3. 26. 43. 38 E. 3. 4. 3. Mar. Dyer. 123.

Here are divers things to bee noted. Firſt, that the confirmation is of the grant, which in deed is but a meere aſſent by deed to the grant; and therefore it is holden, that if there be a parſon, patron, and ordinary, and the patron and ordinary give licence by deede to the parſon to grant a rent charge out of the glebe, and the parſon granteth the rent charge accordingly, this is good, and ſhall binde the ſucceſſor; and yet here is no confirmation ſubſequent, but a licence precedent.

7. H. 4. 15. (Mo. 67.)

Secondly,

* *le—un*, L. and M. and Roh.
† *et touts ceque eſt compriſe deins meſme le grant*, not in L. and M. nor Roh.
‡ *n'ad—ad*, L. and M. and Roh.
‡ *ne* not in L. and M. nor Roh.

(2) [See Note 263.]

Secondly, The ordinary alone, without the deane and chapter, may agree thereunto, either by licence precedent, or confirmation subsequent; for that the deane and chapter hath nothing to doe with that which the bishop doth as ordinary, in the life-time of the bishop.

Thirdly, [b] but if the bishop be patron, there the bishop cannot confirme alone, but the deane and chapter must confirme also; for the advowson or patronage is parcell of the possession of the bishopricke; and therefore the bishop, without the deane and chapter, cannot make the grant good, but only during his owne life, after the decease of the incumbent, either by licence precedent, or confirmation subsequent.

(1 Roll. Abr. 479. 481.)

[b] 19. El. Dy. 356, 357. 11. H. 6. 9. 33. H. 8. tit. Charge. Br. 58. (Post. 329. a.)

A. parson of *D.* is patron of the church of *S.* as belonging to his church, and presents *B.* who by consent of *A.* and of the ordinary, grants a rent charge out of the glebe; this is not good to make the rent charge perpetuall, without the assent of the patron of *A.* no more than the assent of the bishop who is patron, without the deane and chapter, or no more than the assent of the patron, being tenant in taile or for life, as *Littleton* saith. And *Littleton* here saith, that the patron that confirmes must have a fee simple, meaning to make the charge perpetuall. (1) And *Littleton* after saith, that in the case of the parson the fee is in abeyance, and seeing the consent of the patron is in respect of his interest as heire, it appeareth by *Littleton*, he may consent upon condition; otherwise it is of an attornement, because that is a bare assent. Also if the estate of the patron be conditionall, and he confirmeth, and after the condition is broken, his confirmation is voide.

See more of these kinds of confirmations in my Reports. Li. 2. 39. & 24. Li. 1. 153. lib. 4. 23, 24. l b. 5. fol. 31. 81. Lib. 10. 6. Lib. 11. 19. Lib. 6. 34.) (Ant. 274. b. 297. a. Sid. 75.)

Fourthly, he that is patron must be patron in fee simple; for if hee be tenant in taile, or tenant for life, his confirmation or agreement is not good to bind any successor, but such as come into the church during his life. But if the patron be tenant in taile, and discontinue the estate in taile, the lease shall stand good during the discontinuance; or if the estate taile be barred, it shall stand good for ever.

31. E. 3. Grant. 61. 26. Ass. 38. 8. Eliz. Dy. 252. Vid. lib. 3. fol. 73. Le case de deane & chapter de Norwich. (1. Lev. 112. 1. Roll. Ab. 482. 2. Roll. Abr. 339.)

But here is to be observed a diversity betweene a sole corporation, as parson, prebend, vicar, and the like, that have not the absolute fee in them, for to their grants the patron must give his consent. But if there be a corporation aggregate of many, as dean and chapter, master, fellowes, and schollars of a colledge, abbot or prior, and covent, and the like, or any sole corporation that hath the absolute fee, as a bishop with consent of the dean and chapter, they may by the common law make any grant of or out of their possessions, without their founder or patron, albeit the abbot or prior, &c. were presentable: and so it is of a bishop, because the whole estate and right of the land was in them, and they may respectively maintaine a writ of right.

12. H. 4. 11. 19. E. 3. 7. 7. Eliz. Dyer. 238. 11. H. 6. 9. 10. Eliz. Dy. 6. E. 3. 10. 2. E. 3. 29. 9. E. 4. 6. 2. H. 4. 11. 38. E. 3. 19. 25. E. 3. 54.

[301. a.] If a bishop hath two chapters, and he maketh a grant, both chapters must confirme it, or else the successor shall avoide it. But if one of the chapters be dissolved, then the confirmation of the other sufficeth; but it needeth not the confirmation of the king, who is founder and patron of all bishoprickes. (1)

Temps R. 2. tit. grant. 104. 50 E. 3. tit. Assise Statham. 11. Eliz. Dyer. 282.

And note a diversity between a confirmation of an estate, and a confirmation of a deed; for if the disseisor make a charter of feoffment

(1) [See Note 264.]

[301. a.]

(1) For the confirmation of leases made by ecclesiastical persons, see Bacon's Abr. tit. Leases.

feoffment to *A.* with a letter of attorney, and before livery the disseisee confirme the estate of *A.* or the deed made to *A.* this is cleerely voide, though livery be made after. But if a bishop had made a charter of feoffment with a letter of attorney, and the deane and chapter before livery confirme the deed, this is a good confirmation, and livery made afterwards is good. And so it hath been adjudged.

The like law is of a confirmation of a deed of grant of a reversion before attornment.

In the same manner it is if a bishop at the common law had granted lands to the king in fee by deed, and the deane and chapter by their deed confirme the deed of the bishop, and after the deed of the bishop is inrolled, this is good, albeit the confirmation of the deane and chapter be not inrolled; for the assent upon the matter is made to the bishop.

33. E. 3. Confirm. 22. 31. E. 3. Abb. 10. 21. H. 7. 1. Vid. Sect. 393. & 643. [e] 13. Eliz. cap. 10. 1. Eliz. cap. 19. 18. Eliz. ca. 11. 1. Jac. cap. 3. Vid. Sect. 593. & 648.

But this confirmation that *Littleton* here speaketh of must be made in the life, and during the incumbency of the person; and so in the life of the bishop, or of any other sole corporation. But it is to be knowne that grants made by parsons, prebends, vicars, bishops, master and fellowes of any colledge, deane and chapter, master or gardeine of any hospitall, or any having any spirituall or ecclesiasticall living are restrained by [e] divers acts of parliament, so as they cannot grant any rent charge, or to make any alienation, or to make any leases other than such as are mentioned in those acts, which you may reade at large, and the expositions upon the same, in my [*] Commentaries.

[*] Li. 2. fo. 46. lib. 4. 76. & 120. li. 5. 9. 6. 14. li. 6. 37. lib. 7, 8. lib. 11. 67.

Sect. 529.

ITEM, si home lessa terre pur terme de vie, le quel tenant a terme de vie charge la terre ove un rent en fee, et celuy en le reversion confirma mesme le grant, le charge est assets bone et effectuall.

ALSO, if a man letteth land for term of life, the which tenant for life charge the land with a rent in fee, and hee in the reversion confirme the same grant, the charge is good enough and effectuall.

26. Ass. pl. 38. 45. Ass. pl. 13. Lib. 1. fol. 147. Anne Mayowe's case. (1. Roll. Abr. 483.) 14. Ass. pl 14.

HERE is a diversity to bee observed, where the determination of the rent is expressed in the deed, and when it is implyed in law. For when tenant for life granteth a rent in fee, this by law is determined by his death; and yet a confirmation of the grant by him in the reversion makes that grant good for ever, without words of inlargement, or clause of distresse, which would amount to a new grant. And yet if the tenant for life had granted a rent to another and his heires by expresse words, during the life of the grantor, and the lessor had confirmed that grant, that grant should determine by the death of tenant for life.

Tenant for life upon a condition grant a rent in fee, the lessor confirme the grant, and after the condition is broken, the lessor re-enter, he shall not avoide the grant.

Sect. 530.

ITEM, si soit un perpetual chantarie, dont l'ordinarie n'ad rien a medler ne a faire; quære, *si le patron del chauntery, et le chapleine de mesme le chauntery poient charge le chauntery ove un rent charge en perpetuitie.*

ALSO, if there bee a perpetuall chanterie, wherewith the ordinary hath nothing to doe or meddle; *quære*, if the patron of the chantery, and the chapleine of the same chantery may charge the chantery with a rent charge in perpetuitie.

THIS is meant of a chauntery donative wherewith the ordinary hath not to deale, and by this grant, when *Littleton* wrote, the chauntery should have been charged for ever, because no other had any interest in this chantery save only the patron and chauntry priest, and the grant is made *concurrentibus hiis quæ in jure requiruntur*. But since *Littleton* wrote, all, and all manner of free chappels and chaunteries perpetuall, whereof *Littleton* here speakes, are by [a] acts of parliament given to the crowne, and the bodies politike thereof dissolved. See hereafter, *Section* 648. more at large of all this present *Section*.

[301. b.]

Vid. Sect. 648. (Cro. Jac. 63.) (10. Rep Lampet's case.) (Post. 344.)

[a] 37. H. 8. ca. 4. 1. E. 6. c. 14.

Sect. 531.

ITEM, en ascun cas cest verbe dedi, * *ou cest verbe* concessi, *ad mesme l'effect en substance, et urera a mesme l'entent, come cest verbe* confirmavi. *Sicome jeo sue disseisie d'un carue de terre, et* † *jeo face tiel fait*; Sciant præsentes, &c. quòd dedi *a le disseisor*, ‡ *&c.* vel quòd concessi *a le dit disseisor, le dit carue, &c. et jeo deliver tantsolement le fait a luy sauns ascun livery de seisin del terre, c'est un bone confirmation, et auxy fort en ley, sicome il avoit en le fait cest verbe* confirmavi, &c.

ALSO, in some case this verbe *dedi*, or this verbe *concessi*, hath the same effect in substance, and shall enure to the same intent, as this verbe *confirmavi*. As if I bee disseised of a carue of land, and I make such a deed; *Sciant præsentes, &c. quòd dedi* to the disseisor, &c. or *quòd concessi* to the said disseisor, the said carue, &c. and I deliver onely the deed to him without any liverie of seisin of the land, this is a good confirmation, and as strong in law, as if there had beene in the deed this verbe *confirmavi, &c.*

HERE *Littleton* proceedeth, according to the former division, to shew words that in law do amount to a confirmation. And here is to bee observed, that some words are large, and have a generall extent, and some have a proper and particular application. The former sort may contain the latter; as *dedi*, or *concessi*, may amount

Bra. li. 2. fo 59. b. 21. H. 6. feoffments &

* *ou—et*, L. and M. and Roh.
† *puis* added L. and M. and Roh.
‡ *&c.* VEL QUOD CONCESSI *a le disseisor, &c.* not in L. and M. nor Roh.

faits 103. 22. H. 6. 42. 14. H. 4. 36. 19. H. 6. 44.

amount to a grant, a feoffment, a gift, a lease, a release, a confirmation, a surrender, &c. and it is in the election of the party to use to which of these purposes he will.

7. H. 7. 16. 32. E. 3. briefe 291. Brooke tit. Confirm. 20 14. H. 7. 2. 37. H. 6. 17. Dyer 8. Eliz. 4. H. 7. 10. 22. E. 4. 36. 40. E. 3. 41. (Sid. 452. Plo. 196. 5. Rep. 17. a. 1. Roll. Abr. 482. Noy 68.)

Bracton. lib. 2. fol. 59. b.

Est autem confirmatio quasi quædam ratihabitio, sufficit tamen quandoque per se, si etiam in se contineat donationem, ut si dicat quis, dedi et confirmavi, licèt juvari possit ex aliquâ donatione præcedente.

(4. Rep. 8c. b. 2. Cro. 169. Mo. 34. Plo. 397, 398.)

But a release, confirmation, or surrender, &c. cannot amount to a grant, &c. nor a surrender to a confirmation, or to a release, &c. because these bee proper and peculiar manner of conveyances, and are destined to a speciall end. (1)

[e] 32. E. 3. briefe 291. Brooke tit. Confirm. 20. Vid. le stat. de Gloc. ca. 4. [f] 7. E. 3. 9. Bracton. (Plo. 159.)

"*Dedi et concessi, &c.*" Here is implyed that there be more words than *dedi* and *concessi*, that will amount to a confirmation, as *dimisi*. [e] In ancient statutes and in originall writs, as in the writ of entry *in casu proviso*, *in consimili casu ad communem legem*, and many others, this word *dimisi* is not applyed only to a lease for life, but to a gift in taile, and to a state in fee. [f] Also if a man make a lease to *A*. for yeares, and after by his deed the lessor *voluit quòd haberet et teneret terram pro termino vitæ suæ*; this is adjudged by this verbe (*volo*) to bee a good confirmation for terme of his life. *Benignè enim faciendæ sunt interpretationes cartarum propter simplicitatem laicorum ut res magis valeat quàm pereat.*

14. H. 4. 36. Lib. 5 fol. 15. in Newcomen's case.

And he to whom such a deed comprehending *dedi, &c.* is made, may plead it as a grant, as a release, or as a confirmation, at his election. (2)

[302. a.]

(Ant. 280. 298. 5. Rep. 15, 16.)

If a parson and ordinary make a lease for yeares of the glebe to the patron, and the patron by his deede granteth it over, or if the disseisor granteth a rent to the disseisee, and he by his deed granteth it over, and after re-enter; in both these cases one and the same words doe amount both to a grant, and to a confirmation in judgement of law of one and the same thing, *ne res pereat*. And so it is if a disseisor make a lease for life, or a gift in taile, the remainder to the disseisee in fee, the disseisee by his deed granteth over the remainder, the particular tenant attorneth, the disseisee shall not enter upon the tenant for life, or in taile, for then he should avoide his owne grant, which amounted to a grant of the estate, and a confirmation also.

(Sid. 453.)

Sect. 532.

*ITEM, si jeo lessa terre a un home pur terme d'ans, per force de quel il est * en possession, &c. et puis jeo face un fait a luy, &c.* quòd dedi & concessi,	ALSO, if I let land to a man for terme of yeares, by force whereof he is in possession, &c. and after I make a deede to him, &c. *quòd dedi & con-*

* *en possession, &c.—possessione*, L. and M. and Roh.

(1) The effect of the word grant, in implying a warranty, will be considered in a note on the chapter of Warranty.

(2) [See Note 265.]

cessi, &c. *le dit terre, a aver pur terme de sa vie, et delivera a luy le fait, &c. donques maintenant il ad estate en le terre pur terme de * sa vie.*

& *concessi, &c.* the said land, to have for terme of his life, and I deliver to him the deed, &c. then presently hee hath an estate in the land for terme of his life.

HERE is the sixth case wherein the confirmation and the release doe agree, and is evident, and needeth no explication.

Sect. 533.

ET si jeo die en le fait, a aver et tener a luy et a ses heires de son corps engendres, il ad estate en fee taile. Et si jeo die en le fait, a aver et tener a luy et a ses heires, il ad estate en fee simple. Car ceo urera a luy per force de † confirmation d'enlarger son estate.

AND if I say in the deede, to have and to hold to him and to his heires of his body ingendred, hee hath an estate in fee taile. And if I say in the deed, to have and to hold to him and to his heires, he hath an estate in fee simple. For this shall enure to him by force of the confirmation to inlarge his estate.

THIS also is evident, and needeth no explication, saving that whensoever a confirmation doth inlarge and give an estate of inheritance, there ought to be apt words (as *Littleton* here expresseth them) used for the same.

Sect. 534.

ITEM, si home soit disseisie, et le disseisor devie seisie, et son heire est eins per discent, et puis le disseisee et l'heire ‡ le disseisor font jointment un fait a un auter en fee, et livery de seisin sur ceo est fait (quant al heire le disseisor que ensealast le fait) les tenements passont ⁑ et uront per mesme le fait per voy de feoffment; et quant al disseisee que ensealast mesme le fait, ceo ne urera § sinon per voy de confirmation. Mes si le disseisee en cest cas port briefe d'entre en le per *et* cui *envers l'alienee ‖ del heire le disseisor*; quære, *coment il pledra*

ALSO, if a man be disseised, and the disseisor die seised, and his heire is in by discent, and after the disseisee and the heire of the disseisor make joyntly a deede to another in fee, and livery of seisin is made upon this, (as to the heire of the disseisor that sealed the deed) the tenements doe passe and enure by the same deed by way of feoffment; and as to the disseisee who sealed the same deed, this shall enure but by way of confirmation. But if the disseisee in this case brings a writ of entrie in the *per* and

* *sa* not in L. and M. nor Roh.

† *confirmation—confirmament*, L. and M. and Roh.

‡ *le disseisor* not in L. and M. nor Roh.

⁑ *et uront* not in L. and M. nor Roh.

§ *sinon—mes*, L. and M. and Roh

‖ *del—le*, L. and M. and Roh

dra cel fait envers le demandant per voy de confirmation, * *&c. Et saches, mon fits, que est un des pluis honorables, laudables, et profitables choses en nostre ley, de aver le science de bien pleder en actions reals et personals; et pur ceo jeo toy counsaile especialment de mitter* † *ton courage et cure de ceo apprender.* ‡

and *cui* against the alienee of the heire of the disseisor; *quære*, how he shall plead this deede against the demandant by way of confirmation, &c. And know, my son, that it is one of the most honorable, laudable, and profitable things in our law, to have the science of well pleading in actions reals and personals; and therefore I counsaile thee especially to imploy thy courage and care to learne this.

"QUANT al heire del disseisor, &c. les tenements passont per voy de feoffment." For the land shall ever passe from him that hath the state of the land in him. As if *cesty que use* and his feoffees after the statute of 1. *R.* 3. and before the statute of 27. *H.* 8. *cap.* 10. had joyned in a feoffment, it shall be the feoffment of the feoffees, because the state of the land was in him. [302. b.]

21. H. 7. 34. b. Pl. Com. 59. a. in Wimbishe's case. (6. Rep. 15. a.)

So it is if the tenant for life, and hee in the remainder or reversion in fee, joyne in a feoffment by deede. The livery of the freehold shall move from the lessee, and the inheritance from him in the reversion or remainder, from each of them according to his estate. For it cannot bee adjudged by law, that the feoffment of tenant for life doth draw the reversion or remainder out of the lessor or him in remainder, or doth worke a wrong because they joyned together. (1)

Pl. Com. 59. a. Pl. Com. 140. in Browning's case. 2. H. 5. 7. 13. H. 7. 14. 13. E. 4. 4. a. 27. H. 8. 13. M. 16. & 17. Eliz. 339. (Sid. 83.)

(1. Roll. Abr. 633.) (Ant. 45. a.) (1. Rep. 76, 77.)

If there bee tenant for life, the remaynder in tayle, &c. and tenant for life and he in the remainder in tayle levie a fine, this is no discontinuance or devesting of any estate in remainder, but each of them passe that which they have power and authority to passe."

Lib. 1. fo. 76. Bredon's case. (Ant. 251. b.)

A. tenant for life, the remainder to *B.* for life, the remainder in tayle, the remainder to the right heires of *B.* *A.* and *B.* joyne in a feoffment by deede, albeit it may be said that this is the feoffment of *A.* and the confirmation of *B.* and consequently hee in the remainder in tayle cannot enter for the forfeiture during the life of *B.* but because *B.* joyned in the feoffment, which was torcious to him in the remainder in taile, and is *particeps criminis*, therefore they forfeited both their estates, and he in the remainder in tayle might enter for the forfeiture. But if he in the reversion in fee and tenant for life joyne in a feoffment by paroll, this shall be (as some hold) first, a surrender of the estate of tenant for life, and then the feoffment of him in the reversion; for, otherwise, if the whole should passe from the lessee, then he in the reversion might enter for the forfeiture, and every man's act *(ut res magis valeat)* shall be construed most strongly against himselfe.

17. Eliz. Dyer 339. (1. Leo. 31.)

(1. Leo. 37. 262.)

And it is to be observed that *Littleton* here putteth a discent, so as the entry of the disseisee is not lawfull; for if the disseisor and disseisee

* *&c.* not in L. and M. nor Roh.
† *tout* added L. and M. and Roh.
‡ *&c.* added L. and M. and Roh.

(1) [See Note 266.]

disseisee joyne in a charter of feoffment, and enter into the land, and make livery, it shall be accounted the feoffment of the disseisee, and the confirmation of the disseisor.

[303. a.] "*Quære coment il pledera cest fait, &c.*" Hee may pleade the feoffment of the heire of the disseisor, and the confirmation of the disseisee as it hath been pleaded and allowed.

Lib. 5. fo. 146, 147. Mayowe's case.

"*Et saches, mon fits, que est un de pluis honorable, &c.*" Here is to bee observed the excellency of good pleading, and *Littleton*'s grave advice, that the student should imploy his courage and care for the attaining thereof; which hee shall attaine unto by three meanes: first, by reading; secondly, by observation; and thirdly, by use and exercise. For in ancient time the serjeants and apprentices of law did draw their owne pleadings, which made them good pleaders. And in this sense *placitum* may be derived *à placendo, quia omnibus placet.*

See my Preface to the 9. Booke of my Reports. (Ante 17. a. 126. b. 181. a. 283. a. Sid. 339.)

Now seeing good pleading is so honourable and excellent, and that many a good cause is daily lost for want of good and orderly pleading, it is necessary to set downe some few rules (amongst many) of the same, to facilitate this learning, that is so highly commended to the studious reader. For when I diligently consider the course of our bookes of years and termes from the beginning of the raigne of *Edw.* 3. I observe, that more jangling and questions grow upon the manner of pleading, and exceptions to forme, than upon the matter it selfe, and infinite causes lost or delayed for want of good pleading. Therefore it is a necessary part of a good common lawyer to be a good prothonotary. And now wee will performe our promise.

The order of good pleading is to be observed, which being inverted great prejudice may grow to the party, tending to the subversion of law. *Ordine placitandi servato, servatur & jus, &c.*

First, in good order of pleading a man must pleade to the jurisdiction of the court. Secondly, to the person; and therein first to the person of the plaintife, and then to the person of the defendant. Thirdly, to the count. Fourthly, to the writ. Fifthly, to the action, &c. [a] which order and forme of pleading you shall reade in the ancient authors agreeable to the law at this day; and if the defendant misorder any of these, he loseth the benefit of the former.

[a] Bracton li. 5. fo. 400. Britton fo. 41. a. & 122. Fleta li. 6. ca. 35, 36, &c.

The count must be agreeable and conforme to the writ, the barre to the count, &c. and the judgement to the count; for none of them must be narrower or broader than the other.

40. E. 3. 9. b. 17. E. 3. 74. 8. E. 3. 5. & 9. 35. H. 6. 12.

A count or declaration, which anciently and yet is called *narratio*, ought to containe two things [b] viz. certainty and verity, for that it is the foundation of the suite, whereunto the adverse party must answer, and whereupon the court is to give his judgement: [c] *Certa debet esse intentio et narratio, et certum fundamentum, et certa res quæ deducitur in judicium.* But it must be understood that there be three kinde of certainties: first, to a common intent, and that is sufficient in a barre which is to defend the party and to excuse him. [d] Secondly, a certaine intent in generall, as in counts, replications, and other pleadings of the plaintife, that is to convince the defendant, and so in inditements, &c. Thirdly, a certaine intent in every particular, as in estoppels.

[b] Pl. Com. fo. 121, 122. 3. E. 4. 21. Vid lib. 5. fo. 120, 121.

[c] Bracton lib. 2. fo. 140.

[d] Lib. 5. 120, 121. Long's case. Pl Com. 56. Wimbish's case.

He

[e] 7. H. 6. 17. 32. H. 6. 12. 15. Pl Com. 33. b.

[e] He pleadeth a plea in abatement of the writ (which of ancient times was, and yet is called *breve*) or a plea after the latter continuance, ought to plead it certainly.

[f] 34 H 6. 48. 8 H. 5. 4. b. 21. E. 4. 52. 5. E. 3. 15. 39. H. 6. 3. 10. H. 6. 2. 21. H. 7. 26.

[f] The ancient formes of courts are to be duly observed, as *cum dimisit*, or *cum dedit*, and not to say, that he was seised and demised, &c. (And yet if he say so, it maketh not the count vicious) [g] but in a barre replication or other kinde of pleading, the party must alledge a seisin in the lessor or donor, and ancient formes of pleading are also to be observed.

[g] 48. E. 3. 8. 2. H. 4. 13. 6. H. 4. 2. b. 10. E. 4. 2. F. N. B. 156. c. 11. E. 3. Aide 32. 9. H. 6 59. 10. E. 4. 4.

[h] Pl Com. Bret's case, 342. 27. H. 8. 27. 27. H. 6. 9. H. 7.

[h] Counts, or such as be in nature of counts, (as an avowry, wherein the defendant is an actor) need not to be averred, but all other pleas in the affirmative ought to be averred, *et hoc paratum est verificare, &c.* but pleas meerly in the negative ought not to be averred, because a negative cannot be proved.

[i] 40. E. 3. 31, 32, 33. 41. E. 3. 11. 9. H. 6. 46. 27. E. 3. 81.

[i] Where there is but one tenant or one defendant, he cannot have two such pleas, as each of them doe goe to the whole: but where there are divers, each of them may pleade severall pleas which extend to the whole (1).

44. E. 3. 23. 45. E. 3. Double plea 39. 43. E. 3. 21. 36 H. 6. 29. 37. H. 6. 23. 33. H. 6. 51. 15. E. 4. 25. 7. H. 4 12. 41. E. 3. Double plea 78.

[k] Pl. Com. 81. 11. H. 4. 89. 34. H. 6. 48. 19 R. 2. Action sur le case. 52.

[k] That which is alledged by way of conveyance or inducement to the substance of the matter need not to be so certainly alledged, as that which is the substance it selfe.

22. E. 3. 19. 30. E. 3. 9.

[l] 5. H. 7. 8. 6. E. 4 2. 21 E. 4. 44.

[l] Every plea must be direct, and not by way of argument, or rehearsall.

27. H. 8. 4. 22. H. 6. 17. E. 4. 7. 22. E. 4. 8.

[m] Pl Com. 65. a. b. & 100. 376. & 410. 22. H. 6 38. 19. H. 6. 49. 37. H. 6. 14. 36 H. 6. 5. 21. E. 4 54. 11. H. 6. 15. 38. H. 6. 23. 42. Ass. 3. 48. E. 3. 11. 4. E. 4. 12. 9. E. 3. 46.

[m] Where a matter of record is the foundation or ground of the suite of the plaintife, or of the substance of the plea, there it ought to be certainly and truly alledged; otherwise it is, where it is but conveyance. But the proceedings and sentences in the ecclesiasticall courts may be alledged summarily; as that a divorce was had between such parties, for such a cause, and before such a judge, and *concurrentibus hiis quæ in jure requiruntur*; for the judge must be alledged, to the intent the court may write to him if it be denied.

Good matter must be pleaded in good forme, in apt time, and in due order, or otherwise great advantages may be lost.

21. E. 4. 52. 35. H. 6. 35. 10. H. 7. 9. 15. 11. H. 7. 8. 22. E. 3. 2. 34. H. 6. 27. 12. H. 8. 5, 6. 7. E. 4 32. 9. E. 4. 24. 8. E. 4. 31. 8. Ass. 29. 5. E. 4. 70. 3 E. 4. 1.

[n] 35. H. 6. 35. 21. E. 4. 51. 9. H 4. 5. 19. H. 6. 73. 5. E 4. 12. 10 E. 4. 18. 13. H. 7. 18.

[303. b]

[n] Generall estates in fee simple may be generally alledged, but the commencement of estates tayle, and other particular estates regularly must be shewed, unlesse in some cases where they are alledged by way of inducement, and the life of tenant in taile, or for life, ought to be averred.

36. H. 8. Pleadin Br. 160.

When

(1) [See Note 267.]

[o] When any speciall and substantiall matter is alledged by either party, that ought to bee especially answered, and not to be passed over by a generall pleading.

[o] V. Sect. 193. 3. H. 6. 47. 41. E. 3. 22. 9. Ass. 9. 22. Ass. 45. 2. E. 3. 42. 13. E. 3. Anc. Demesne 15. 20. E. 3. ib. 45. 7. H. 7. 8. Lib. 10. fo. 91. Li. 11. fo. 10.

[p] The plea of every man shall be construed strongly against him that pleadeth it, for everie man is presumed to make the best of his owne case: *ambiguum placitum interpretari debet contra proferentem.*

[p] 3. H. 7. 3. 26. Ass. 10. 14. H. 4. 4. b. 27. H. 6 8. b. 21. H 6. Debt. 43. 7. H. 6. 24. 31. 35. H. 6. 48. 47. E. 3. 14. Pl. Com. 46. a. Li. 3. fo. 59. Linc. Col. case.

[q] Every plea that a man pleadeth ought to be triable, for without triall the cause can receive no end: *et expedit reipublicæ ut sit finis litium.*

[q] 22. E. 4. 40. 2. 3. 20. E. 4. 10. 21. E. 4. 36. 22. H. 6. 50.

[r] The tenant before his default saved, may plead all pleas which prove the writ abated, as death, &c. or matters apparent in the writ; but no plea, which prove it abateable, as taking of husband, &c.

[r] 40. E. 3. 40. 43. 46. 41. E. 3. 2. 18. E. 3. 16. 26. E. 3. 68. 42. E. 3. 3. 10. 46. 6. E. 3. 37. 8. E. 3. 20. 10. E. 3. 60. 14. H. 4. 15. 12. E. 4. 2. 38. E. 3. 28. 7. H. 7. 3.

[s] When a man is authorised to doe any thing by the common law, by grant, commission, act of parliament, or by custome, he ought to pursue the substance and effect of the same accordingly.

[s] 10. E. 4. 3. 27. H. 6. 8. 8. H. 7. 13. 9. H. 7. 26. 37. H. 6. 1. 27. H. 8. 13. 21. H. 7. 25. 11. H. 4. 33. Pl. Com. 79. 16. E. 4. 10. 1. H. 7. 33. 20. H. 7. 1. 6. E. 4. 4, 5. 21. E. 4. 54. 22. H. 6. 47. 11. H. 6. 8. 25. E. 3. 50. b. 23. Ass. 7. 2. Eliz. Dyer 184.

[t] All necessary circumstances implied by law in the plea need not to be expressed, as in the plea of a feoffment of a mannor, livery and attornement are implied.

[t] Pl. Com. 149. b. & 105. a. 37. H. 6. 38.

[u] When a count, barre, replication, &c. is defective in respect of omission of some circumstance, as time, place, &c. there it may be made good by the plea of the adverse party; but if it be insufficient in matter, it cannot be salved.

[u] 18. E 4. 16. b. 22. E. 4. 2. 76. 5. H. 7. 13. 38. H. 6. 17, 18, 19. 18. E. 3. 34. Pl. Com. 229. b. Lib. 8. 133. Turner's case.

[w] Every man shall plead such pleas as are pertinent for him, according to the quality of his case, estate, or interest, as disseisors, tenants, incumbents, ordinaries, and the like.

[w] 5. H. 7. 34. 5. E. 3. 26. 22. H. 6. 28.

[x] Surplusage shall never make the plea vicious, but where it is contrarient to the matter before. (1)

[x] 19. H. 6. 30. 32. Pl. Com. 232. b. & fo. 502. per Dyer & 503.

[y] That which is apparent to the court by necessary collection out of the record need not to be averred.

[y] 13. H. 4. 17. 10. E. 4. 18. 33. H. 6. 54. 35. H. 6. 30. 21. H. 7. 32. Bract. li. 3. fo. 154. Pl. Com. 87. b. 26. H. 6. Gard. 58.

[a] A man is bound to performe all the covenants in an indenture: if all the covenants be in the affirmative, he may generally plead

[a] 2. H. 7. 15. 4. H. 7. 12. 10. H. 7. 12. 13. H. 7. 19. 26. H. 8. 5. b.

(1) And then it does, because the plaintiff cannot discern what to answer to in his replication. Note to the 11th edition.

plead performance of all; but if any be in the negative, to so many he must plead specially (for a negative cannot be performed), and to the rest generally. [b] So if any be in the disjunctive, he must shew which of them he hath performed. So if any are to be done of record, he must shew that specially, and cannot involve that in generall pleading.

[b] Li. 8. fo. 133. Turner's case, & fo. 120. Bonham's case. Li. 9. 25. 61. Li. 10. 100.

[c] In many cases the law doth allow generall pleading, for avoyding of prolixity and tediousnesse, and that the particular shall come on the other side.

[c] 12. H. 8. 6, 7. 2. R. 3. 17. 14. E. 4. 7. 9. E. 4. 19.

[d] Pleadings which amount to the generall issue are not to be allowed; but the generall issue is to be entred. *Vi. Sect.* 10. 485. 499.

[d] 44. E. 3. 2. 34. H. 6. 5. 10. H. 6. 6. & 17. 12. E. 4. 11. 14. 14. H. 8. 24. 7. E. 3. 12. 17. E. 3. 44.

[e] Every plea ought to have his proper conclusion, as a plea to the writ to conclude to the writ, a plea in barre to conclude to the action, an estoppell to relie upon the estoppells: *et sic de similibus.*

[e] 18. H. 6. 33. 22. H. 6. 53. 36. H. 6. 17, 38. H. 6. 18. 25. 5. E. 3. 15, 16. 22. Ass. 33. 2. Eliz. Dyer 184.

[f] When the conclusion of a plea, *et issint, et sic,* is in the affirmative, it shall not wave the speciall matter, for there the speciall matter is the substance and foundation of the conclusion, and affirmed by the same. But where the conclusion is in the negative, there the speciall matter regularly is waved.

[f] Pl. Com. 14, 15. 2. E. 4. 18. 39. E. 3. 14. 32, 33. 8. E. 3. 57. Qu. Imp. 25. 18. H. 6. 30. 7. 4. 18. 38. Ass. 14. 24. E. 3. 48. 22. E. 3. 13. 38. H. 6. 25. 32. H. 6. 14. 19. H. 8. 7. 27. H. 8. 12. b.

[g] Whensoever speciall matter is pleaded, and the conclusion *(et sic)* is to the point of the writ or action, the speciall matter is waved.

[g] 7. E. 4. 26. 11. H. 7. 4. 12. H. 7. 6. 33. H. 6. 9. 37. 43.

The names of legall records are, a writ, a count, a barre, a replication, a rejoynder, a rebutter, a surrebutter, &c.

[h] New and subtill devices and inventions of pleading ought not to alter any principle of law, whereof you have heard plentifully before.

[h] V. Sect. 485.

The count or declaration is an exposition of the writ, and addeth time, place, and other necessary circumstances, that the same may be triable; and any imperfection in the count doth abate the writ.

Pleadings are divided into barres, replications, rejoynders, surrejoynders, rebutters, and surrebutters, &c. They are words of art, and are called barres, *barræ,* so called, because it barreth the plaintife of this action. *Replicationes, à replicando; rejunctiones, à rejungendo; rebutter,* of the French word, *rebouter, i. e. à repellendo,* to put backe or avoide, and so of surrebutter.

But each party must take heed of the ordering of the matter of his pleading, lest his replication depart from his count, or his rejoynder from his barre; *et sic de cæteris,*

[i] In ancient writers a barre is called *exceptio peremptoria:* a replication was then called *replicatio,* as now it is; a rejoinder, *triplicatio;* a surrejoinder, *quadriplicatio; et sic ulterius in infinitum.*

[i] Bract. li. 5. fo. 400. Flet. li. 6. ca. 37.

[304. a.]

A departure in pleading is said to be when the second plea containeth matter not pursuant to his former, and which fortifieth not the same, and thereupon it is called *decessus,* because he departeth from his former plea; and therefore whensoever the rejoynder (taking one example for all) containeth matter subsequent to the matter

(Sid. 10. 77. 176 277. Finch 391. 2. Cro. 264.) 39. E. 3. 13. b. 39. H. 6. 15. 6. H. 7. 8.

ter

ter of the barre, and not fortifying the same, this is regularly a departure, because it leaveth the former, and goeth to another matter. As if in an assise the tenant plead a discent from his father, and giveth a colour, the demandant intituleth himselfe by a feoffement from the tenant himselfe, the plaintife cannot say, that that feoffement was upon condition, and to shew the condition broken; for that should be a cleare departure from his barre, because it containeth matter subsequent. But in an assise, if the tenant pleadeth in barre, that *I. S.* was seised and infeoffed him, &c. and the plaintife sheweth, that he himselfe was seised in fee, until by *I. S.* disseised, who infeoffed the tenant, and he re-entred, the defendant may plead a release of the plaintife to *I. S.* for this doth fortifie the barre.

21. H. 6. 32. Pl. Com. 105. 1. Mar. Dyer. 95. 28. H. 8. ib. 31. (Doc. Pla. 119. 1. Cro. 228, 229. 257.) 6. H. 7. 8. 3. H. 6. Departure 2.

If a man plead performance of covenants, and the plaintife reply, that he did not such an act according to his covenant, the defendant saith, that he offered to do it, and the plaintife refused it; this is a departure, because the matter is not pursuant; for it is one thing to doe a thing, and another to offer to doe it, and the other refused to doe it: therefore that should have been pleaded in the former plea. *Vide & cave* in a *quare impedit*, what plea shall be safely pleaded *in primo placito*.

(Sid. 10. 77. 180. 404.) 8. El. Dy. 253. 23. El. Dy. 271. 6. E. 3. 3. 40. E. 3. 32. 43. E. 3. 32. 43. E. 3. 11. 1. E. 4. 4. 18. E. 4. 24.

When a man in his former plea pleadeth an estate made by the common law, in the second plea regularly he shall not make it good by an act of parliament. So when in his former plea he intituleth himselfe generally by the common law, in his second plea he shall not enable himselfe by a custome, but should have pleaded it first.

5. H. 7. 27. 8. H. 6. 11. 33. H. 6. 14. (Cro. Car. 257. 1. Saund. 83. 189.)

If a man plead an estate generally, (as for example a feoffement in fee) he in his second plea shall not maintain it by other matter *tantamount* in law, as by a disseisin and release, or by a lease and release, or a gift in tayle in barre, and in the second plea a recovery in value; for this is a departure: but he in that case shall count of a gift, and maintaine it in his replication by a recovery in value, because he could have no other count.

Pl. Com. 105. b. Fulmerston's case. 21. H. 7. 25. 27. H. 8. 3. 21. H. 7. 17. 37. H. 6. 5. 38. H. 6. 25. (Saund. 142. S.C. 1. Leo. 81. S.C. Raym. 60. Sid. 142.) 21. H. 7. 25. 1. E. 4. 4. 3. H. 7. 5. 7. H. 7. 2.

See more of this matter, where the plaintife varying from time or place alledged in the count of actions transitory, shall commit no departure.

Vid. Sect. 485.

The plea that containes duplicity or multiplicity of distinct matter to one and the same thing, whereunto severall answers (admitting each of them to be good) are required, is not allowable in law. And this rule you see extendeth to pleas perpetuall or peremptory, and not to pleas dilatory; for in their time and place a man may use divers of them; and hereof ancient writers * speake notably: *Sicut actor unâ actione debet experiri saltem illâ durante, sic oportet tenentem unâ exceptione, dum tamen peremptoria (quod de dilatoriis non est tenendum); quia si liceret pluribus uti exceptionibus peremptoriis simul & semel, sicut fieri poterit in dilatoriis, sic sequeretur, quòd si in probatione unius defecerit, ad aliam probandam possit habere recursum, quod non est permissibile, non magis quàm aliquem se defendere duobus baculis in duello, cùm unus tantùm sufficiat.*

Pl. Com. 139. 142.

* Fleta li. 6. 35. Bracton li. 5. fol. 400.

But where the tenant or defendant may pleade a generall issue, thereupon the generall issue pleaded, he may give in evidence as many

many distinct matters to barre the action or right of the demandant or plaintife, as he can. (1)

17. E. 3. 73. (Doc. Pla. 135.) A speciall verdict may containe double or treble matter; and therefore in those cases the tenant or defendant may eyther make choice of one matter, and to plead it to barre the demandant or plaintife, or to plead the generall issue, and to take advantage of all; or he may plead to part one of the pleas in barre, and to another part another plea; and his conclusion of his plea shall avoide 39. H. 6. 27. doublenesse, and hereby neither the court nor the jury is so much inveigled, as if one plea should containe divers distinct matters. And if the tenant make choice of one plea in barre, and that be found against him, yet he may resort to an action of an higher nature, and take advantage of any other matter. And the law in this point is by them that understand not the reason thereof misliked, saying, *Nemo prohibetur pluribus defensionibus uti.* (Ante 139. a.)

And it is worthy of observation, that in the raignes of *Edward* the second, *Edward* the first, and upwards, the pleadings were plain and sensible, but nothing curious, evermore having chiefe respect to matter, and not to formes of words, and were often holpen with a *quæsitum est*, and then the questions moved by the court, and the answers by the parties were alsо entred into the rolle. But even in those dayes the formes of the register of originall writs were then punctually observed, and matters in law excellently debated and resolved; and where any great difficulty was, then it was resolved by all the judges and sages of the law (who were for matters in law called *concilium regis*) and their assembly and resolution was entred into the rolle. As for example, in the great case in a *quare impedit*, between the king and the prior of Worcester, concerning an appropriation, whether it were a mortmaine, the record saith, *ad quem diem venit prædictus prior per attornatum suum, &c. Et examinatis et intellectis recordo et processu coram toto concilio tam thesaurario et baronibus de scaccario quàm cancellario, ac etiam justiciariis de utroque banco inspectâ causâ, pro quâ, pro domino rege dicunt, quòd ad ipsum regem pertinet præsentare, &c. consideratum est, &c.* For in those dayes though the chancellor and treasurer were for the most part men of the church, yet were they expert and learned in the lawes of the realme.

Hil. 32. E. 1. cor. Reg. in fine rotul.

[304. b.]

As for example, in the time of the Conqueror, *Egelricus episcopus Cicestrensis vir antiquissimus, et in legibus sapientissimus,* as elsewhere I have said.

[a] Ockam, fo. 17.

[a] *Nigellus episcopus Eliensis Hen. 1. thesaurarius in temporibus suis incomparabilem habuit scaccarii scientiam, et de eâdem scripsit optimè.*

[b] Pasch. 5. R. 1. cor. Rege.

[b] *Henricus Cant. episcopus, H. Dunelm' episcopus, Willielmus Eliensis episcopus, G. Roffens. episcopus.*

[c] 1. H. 3. Rot. pat. Bract. sæpe.

[c] *Martinus de Pateshul clericus decanus Divi Pauli London' constitutus fuit capitalis justic' de banco, quia in legibus hujus regni peritissimus.*

[d] Bract. sæpe.

[d] *Will'us de Raleigh clericus justiciarius domini regis.*

[e] 8. E. 3. 31.

[e] *Johannes episcopus Carliensis tempore H. 3.*

Robertus Passelewe episcopus Cicestrensis tempore H. 3.

[f] Rot. pat. 24 H. 3.

[f] *Robertus de Lexintonio clericus constitutus capitalis justic'. de banco.*

Johannes

(1) [See Note 268.]

[g] *Johannes Britton episcopus Hereford.*

[h] *Henricus de Stanton clericus constitutus fuit capitalis justic'ar'us ad placita*; with many others. And so were divers and many of the nobility, who when matters of great difficultie were brought into the upper house of parliament by writ of error, adjournement, or other parliamentary course, did by the assistance of the reverend judges, who ever attended in that court, judge and determine the same as by former and ancient records, and specially by the said record of 5. *R.* 1. doe manifestly appeare; and therefore the lords of parliament were called for those purposes, *concilium regis*; and like to the aforementioned record there be very many.

[g] Libere jus de legibus extat script. temp. E. 1.

[h] Rot. pat. 17. E. 2.

In the raigne of *Edward* the third, pleadings grew to perfection both without lamenesse and curiosity; for then the judges and professors of the law were excellently learned, and then knowledge of the law flourished, the serjeants of the law, &c. drew their owne pleadings; and therefore truly said that reverend justice *Thirning*, in the raigne of *H.* 4. that in the time of *Edw.* 3. the law was in a higher degree than it had been any time before; for (saith he) before that time the manner of pleading was but feeble in comparison of that it was afterward in the raigne of the same king.

12. H. 4. 3.

In the time of *Henrie* the Sixth the judges gave a quicker eare to exceptions to pleadings, than either their predecessors did, or the judges in the raigne of *Edw.* the fourth, when our author flourished, or since that time have done, giving no way to nice exceptions, so long as the substance of the matter were sufficiently shewed. And as in the raigne of king *Edward* the third, by an act of parliament * it is provided, that counts or declarations should not abate so long as the matter of the action be fully shewed in the declaration and writ; so since our author wrote, in the raigne of queene *Elizabeth*, provision is made, that after demurrer the judges shall give judgement according to the right of the cause and matter in law, without regarding any imperfection, defect, or want of forme in any writ, retorne, plaint, declaration, or other pleading or course of proceeding whatsoever, except such as the party demurring shall specially shew. In which acts appeals and indictments of felony, murder, or treason concerning man's life, and the forfeiture of his lands and goods, are excepted. An excellent and a profitable law, concurring with the wisedome and judgement of ancient and latter times, that have disallowed curious and nice exceptions tending to the overthrow or delay of justice; *apices juris non sunt jura*: yet it is good for a learned professor to make all things plain and perfect, and not to trust to the after aide or amendment by force of any statute, lest his client's cause matcheth not therewith; and as it is in physicke for the health of a man's body, so it is in remedies for the safety of a man's cause. In law, *præstat cautela quàm medela*.

(Hob. 332. Ante 72. a.)

* 36 E. 3. ca. 15. 46. E. 3. 21. Dy. 299. Li. 8. fo. 161. Li. 10. fo. 132. (Doc. Pla. 116.) Li. 10. fo. 88. Pl. Com. 421.

But now let us returne to our author.

(Sid. 175, 176.)
(Doc. Pla. 70.
118. 136. 138. 254.) (11. Rep. 52. a.)

Sect. 535, 536, 537.

*ITEM, si soyent seignior et tenant, * mesque le seignior confirma l'estate que le tenant ad en les tenements, uncore le seigniorie entierment demurt a le seignior come il fuit adevant.*

ALSO, if there be lord and tenant, albeit the lord confirme the estate which the tenaunt hath in the tenements, yet the seigniorie remaineth entire to the lord as it was before.

[305. a.]

Sect. 536.

EN mesme le manner est, si home ad un rent charge hors de certeine terre, et il confirma l'estate que le tenant ad en la terre, uncore demurt a le confirmor le rent charge.

IN the same manner is it, if a man hath a rent charge out of certaine land, and hee confirme the estate which the tenant hath in the land, yet the rent charge remayneth to the confirmor.

Sect. 537.

EN mesme le manner est, si un home ad common de pasture † en auter terre, s'il confirma estate de le tenant de la terre, rien departera de luy de son common; mes ceo nient obstant de common demurt a luy come fuit adevant.

IN the same manner it is, if a man hath common of pasture in other land, if he confirme the estate of the tenant of the land, nothing shall passe from him of his common; but notwithstanding this, the common shall remayne to him as it was before.

HERE is the sixth case wherein the release and confirmation doe differ; for by the release of the seigniory, rent charge or common are extinct. And so these three Sections be evident, and need no explication, saving that some doe gather upon these two last Sections and the next ensuing, that a man cannot abridge a rent charge or common pasture by a confirmation, as he may doe a rent service in respect of the privitie betweene the lord and tenant, so as (say they) a tenure may be abridged by a confirmation, but not a rent charge or common: and therefore *Littleton* beginneth the next Section with an adverbe adversative, viz. (*mes* but) &c. But a man may release part of his rent charge, or common, &c.

* *mesque—et*, L. and M. and Roh. † *en—ou*, L. and M. and Roh.

Sect.

Sect. 538.

MES si soient seignior et tenant, lequel tenant tient de son seignior per le service de fealtie et 20 s. de rent, si le seignior per son fait confirma l'estate le tenant, a tener per 12 d. ou per un denier, ou per un maile: en cest case le tenant est discharge de touts les auters services, et ne rendra rien a le seignior, forsque ceo que est comprise deins mesme le confirmation.

BUT if there be lord and tenant, which tenant holdeth of his lord by the service of fealtie and 20 shillings rent, if the lord by his deed confirme the estate of the tenant, to hold by 12 pence, or by a penny, or by a halfe peny: in this case the tenant is discharged of all the other services, and shall render nothing to the lord, but that which is comprised in the same confirmation.

AND the reason wherefore no service of another cannot be reserved upon the confirmation is, because as long as the state of the land continueth, it cannot by the confirmation of the lord be charged with any new service. So as it is evident that the lord by his confirmation may diminish and abridge the services, but to reserve upon the confirmation new services he cannot, so long as the former estate in the tenancie continueth. And as where a confirmation doth inlarge an estate in land, there ought to be privitie, as hath beene said; so regularly where a confirmation doth abridge services, there ought to be privitie also.

28. E. 3. 92, 93. 26. Ass. 37. 6. Eliz. Dier 230. b. 7. E. 4. 25. a. 21. E. 4. 62. per Brian. 10. E. 3. tit. avowrie 100. (9. Rep. 33.)

[305. b.]

And therefore here *Littleton* putteth his case of lord and tenant betweene whom there is privitie. And therefore if there be lord, mesne and tenant, the lord cannot confirme the estate of the tenant to hold of him by lesser services, but this is void, for that there is no privitie betweene them, and a confirmation cannot make such an alteration of tenures.

7. E. 3. 19. 22. E. 3. 18. b.

And the case in 4. *E.* 3. maketh nothing against this opinion; for there the case in substance is this: *John de Bonvile* held certaine lands of *Ralfe Vernon*, and before the statute of *quia emptores terrarum*, levied a fine of the same lands to the abbot of *Cogsall* and his successors to hold of the chiefe lord (which was *Ralfe Vernon*) by the services due and accustomed. *Ralfe Vernon* made a charter to the said abbot in these words: *Concessi etiam eidem abbati et successoribus suis relaxavi et quietum clamavi totum jus, &c. quod habeo, vel potero habere in omnibus tenementis quæ idem abbas habet de dono Johannis de Bonvile, tenendum de me et hæredibus meis in puram et perpetuam eleemosinam*; and adjudged, that it was a good tenure in frankalmoigne: which case proveth nothing that the lord paramount may by his confirmation to the tenant peravaile extinct the mesnaltie (as it is abridged by master *Fitzherbert* in the title of Confirmation, pl. 21.) for the immediate lord did there make the said charter, and not any lord paramount. (And therefore it is ever good to relie upon the bookes at large, for many times *compendia sunt dispendia*, and *meliùs est petere fontes, quàm sectari rivulos*). And of this opinion was master *Plowden* upon good advisement and consideration.

4. E. 3. 19.

And

4. E. 3. 19.
9. E. 3. 1.
12. E. 4. 11.
16. E. 3. fines 4.
6. Eliz. Dier 230.

And here is the seventh case wherein the release and confirmation doth agree; for if there be lord and tenant by fealty and twenty shillings rent, the lord may release all his right in the seigniorie or in the tenancie, saving fealtie and ten shillings rent; but he cannot save a new kinde of service, for he may aswell abridge his services upon a release as upon a confirmation. And as there is required privitie when the lord abridgeth the services of his tenant by his confirmation; so must there be also, when the lord by his release abridgeth the services of his tenant. And therefore the lord paramount cannot release to the tenant peravaile saving to him part of his services, but the saving in that case is void (1).

(Ant. 47. a.)
(Plo. 563. b.)
Britton f. 57. 177. 40. E. 3. 21. 47, 48.
18. E. 3. 26.
50. Ass. 6.
14. H. 4. 8.

"*Et rendra rien a son seignior forsque ceo que est comprise, &c.*" Which words are thus to be understood; that the tenant shall not render any more rent or annuall service to the lord than is contained in the deed; but other things notwithstanding the said confirmation the tenant shall yeeld to the lord, as releefe, ayde *pur file marier*, and ayde *pur faire fitz chivaler*, because these are incidents to the tenure that remaine, and shall not be discharged without speciall words, by the generall words of all other actions, services and demands. And so if a man hold of me by knight's service, rent, suit, &c. and I release to him all my right in the seigniorie, excepting the tenure by knight's service, or confirme his estate to hold of me by knight's service only for all manner of services, exactions, and demands; yet shall the lord have ward, marriage, releefe, ayde *pur file marier, et pur faire fitz chivaler*, for these be incidents to the tenure that remaine. But it is holden, that if a man make a gift in taile by deed reserving two shillings rent *a luy et ses heires pro omnibus et omnimodis servitiis, exactionibus secularibus et cunctis demandis*, if the donee die his heire of full age, the donor shall have no releefe, because in the originall deed of the gift in taile it is expresly limited, that by the service of two shillings rent he shall be quite of all demands (and releefe lieth in demand); and by reason of those words, say they, there cannot any releefe become due; but some doe hold the contrary in that case.

(Ant. 76. a.)

13. R. 2. tit. avowrie 89. Nota dictum. Fitzh.

(Ant. 23. a.)

Sect. 539.

*MES si le seignior voile per fait de confirmation, que le tenant en cest cas doit render a luy un esperver ou un rose annualment a tiel feast, &c. cest * confirmation est voide, pur ceo que il reserva a luy un novel chose que ne fuit parcel de ses services devant la confirmation: et issint le seignior poit bien per tiel confirmation abridger les services † per queux le tenant tient de luy,*

BUT if the lord will by his deed of confirmation, that the tenant in this case shall yeeld to him a hawke or a rose yearly at such a feast, &c. this confirmation is void, because hee reserveth to him a new thing which was not parcell of his services before the confirmation: and so the lord may well by such confirmation abridge the services by which the tenant holdeth

[306. a.]

* *confirmation—reservacion*, L. and M. and Roh.

† *per queux le tenant tient de luy*, not in L. and M. nor Roh.

(1) [See Note 269.]

luy, mes il ne poit reserver a luy novel services.

eth of him, but hee cannot reserve to him new services.

THIS upon that which hath beene said before in the next preceding Section is evident, and needeth no further explication.

Sect. 540.

*ITEM, si soit seignior ‡, mesne, et tenant, et le tenant est un abbe, que tient de mesne per certaine service annualment, le quel n'ad ascun cause § d'aver acquitance envers son mesne, pur porter briefe de mesne, ‖ &c. en cest cas, si le mesne confirma l'estate que l'abbe ad en la terre, a aver et tener la terre a luy et a ses successors en frankalmoigne, &c. en cest cas le confirmation est bone, et adonques l'abbe tiendra de le mesne en frankalmoigne. Et la cause est, pur ceo que, nul novel service est reserve, car touts les services especialment specifies sont extincts, et nul rent est reserve ¶ al mesne, forsque ** que l'abbe tient de luy la terre, et ceo fist †† il devant la confirmation; car celuy que tient en frankalmoigne ne doit faire ascun corporall service; issint ‡‡ que per tiel confirmation il appiert, que le mesne ne reserva a luy ascun novel service, mes que les tenements serront tenus de luy come ceo fuit devant.* [306. b.] *Et en cest case l'abbe avera un briefe de mesne, s'il soit distreine en son default, per force de le dit confirmation, lou per case il ne puissoit aver * un briefe adevant, &c.*

ALSO, if there be lord, mesne, and tenant, and the tenant is an abbot, that holdeth of the mesne by certaine services yearly, the which hath no cause to have acquitance against his mesne, for to bring a writ of mesne, &c. in this case, if the mesne confirme the estate that the abbot hath in the land, to have and to hold the land unto him & his successors in frankalmoigne, or free almes, &c. in this case this confirmation is good, and then the abbot holdeth of the mesne in frankalmoigne. And the cause is, for that no new service is reserved, for all the services specially specified bee extinct, and no rent is reserved to the mesne, but the abbot shall hold the land of him as it was before the confirmation; for he that holdeth in frankalmoigne ought to doe no bodily service; so that by such confirmation it appeareth, the mesne shall not reserve unto him no new service, but that the lands shall bee holden of him as it was before. And in this case the abbot shall have a writ of mesne, if hee bee distrained in his default, by force of the said confirmation, where per case hee might not have such a writ before.

HERE our author having seene the former bookes putteth his case, that the mesne maketh the confirmation to hold in frankalmoigne, and not the lord paramount.

4. E. 3. 19. 22 E. 3. 15. b. the lord Wake's case. 10. E. 3. 5. 15. E. 3. con-

" *Et*

‡ *mesne—mesme*, L. and M. but not in Roh.
§ *per cas* added L. and M. and Roh.
‖ *&c.* not in L. and M. nor Roh.
¶ *al mesne* not in L. and M. nor Roh.
** *que* not in L. and M.
†† *il—a lui*, L. and M. and Roh.
‡‡ *que* not in L. and M. nor Roh.
* *un—tiel*, L. and M. and Roh.

firmat. 8.
4. E. 3. 19, 20.
F. N. B. 136.
h. & q.
4. E. 4. 35.
31. E. 1. Mesne
55. 11. E. 3.
Avowrie 100.

"*Et en cest case l'abbe avera briefe de mesne.*" Here is to bee noted, that upon a confirmation to hold in freealmoigne there lyeth a writ of mesne, albeit the cause of acquitall beginne after the seignior. And so upon such a confirmation the tenant shall have, *contra formam feoffamenti.*

22. E. 3. 18. b. 30. E. 3. 13. 16. H. 3. Avowrie 243. (9. Rep. 130.)

Sect. 541.

ITEM, si jeo sue seisie d'un villein come de villein en gros, et un auter luy prent hors de ma possession, enclaimant luy d'estre son villeine † la ou il n'avoit ascun droit d'aver luy come son villeine, et puis jeo confirma a luy l'estate que il ad en mon villeine, cest confirmation semble void, pur ceo que nul poit aver possession de un home come de villeine en grosse, si non celuy que ad droit de luy aver come son villein en grosse. Et issint entant que celuy a que le confirmation fuit fait, ne fuit seisie de luy come de son villeine a le temps de confirmation fait, tiel confirmation est void.

ALSO, if I be seised of a villeine as of a villeine in grosse, and another taketh him out of my possession, clayming him to bee his villein there where hee hath no right to have him as his villeine, and after I confirme to him the estate which hee hath in my villeine, this confirmation seemeth to be voide, for that none may have possession of a man as of a villeine in grosse, but he which hath right to have him as his villeine in grosse. And so inasmuch as hee to whom the confirmation was made, was not seised of him as of his villeine at the time of the confirmation made, such confirmation is void.

45. E. 3. 10.
30. H. 6. tit. barre 59.
Registrum 102.
1. H. 6. cap. 5.
(Post. 323. a.)
Brooke tit. propertie 28.
(Sect. 589, 590, 591.)
[a] Bracton lib. 2. 59. b. 24. E. 3. tit. discont. 16.
42. E. 3. 18.
40. E. 3. 17.
43. E. 3. 4.
9. E. 4. 38.
Dier. 10. Eliz. Growche's case.

HERE is to be observed a diversity betweene the custodie of the body of a ward within age, and a right of inheritance in the body of a villeine in grosse; for a man may bee put out of possession of the custodie of his ward, but not of his villeine in grosse, no more than a man can bee of his prisoner which he hath taken in warre.

Also of things that are in grant, as rents, commons, and the like, it is at the election of the party whether hee will be disseised of them or no, as shall bee said after in his proper place. (1) But of a villeine in grosse he cannot at all be disseised. [a] *Non valet confirmatio nisi ille qui confirmat sit in possessione rei vel juris unde fieri debet confirmatio, & eadem modo nisi ille cui confirmatio fit, sit in possessione.*

And materially doth *Littleton* put his case of a villeine in grosse; for of a villeine regardant to a mannor, the lord may be put out of possession; for by putting him out of possession of the mannor, which is the principall, hee may likewise bee put out of possession of the villeine regardant, which is but accessory. And by the recovery of the mannor the villeine is recovered. But if another doth take away my villeine in grosse or regardant, he gaineth no possession

† *la ou il n'avoit ascun droit d'aver luy come son villeine,* not in L. and M. nor Roh.

(1) See ant. 239. note 1.

possession of him. And this doth well appeare by the writ of *nativo habendo*, for that writ is not brought against any person in [307. a.] certaine (because no man can gaine the possession of him. But the writ is to this effect: *Rex vic' salutem. Praecipimus tibi, quòd justè et sine dilatione habere facias A. B. nativum et fugitivum suum, &c. ubicunque inventus fuerit, &c. et prohibemus super forisfacturam nostram ne quis eum injustè detineat*; so as detaine him one may, but to possesse himselfe of him, and to dispossesse the lord, he cannot.

(Ant. 303. a.)

And if a man might have beene dispossessed of a villeine in grosse, or of a villeine regardant (unlesse he be dispossessed of the mannor also, as hath beene said), the law would have given a remedie against the wrong doer, as the law doth in the case of a ward.

Now, seeing it doth appeare by our bookes [a] (and by *Littleton* himselfe by implication speaking only of a villeine in grosse) that if a man be disseised of the mannor whereunto the villeine is regardant, he is out of possession of his villeine, and so an advowson appendant, and the like. Hereby (*Littleton* putting his case of a villeine in grosse) and by divers authorities a point controverted in our bookes [*] is resolved, viz. that by the grant of the mannor without saying *cum pertinentiis*, the villeine regardant, advowson appendant, and the like, doe passe: for if the disseisor shall gaine them as incidents to the mannor, whose estate is wrongfull, *à multò fortiori* the feoffee, who commeth to his estate by lawfull conveyance, shall have them as incidents. But where the entrie of the disseisee is lawfull, he may seise the villeine regardant, or present to the advowson, &c. before he enter into the mannor: otherwise it is where his entrie is not lawfull; and so are the ancient authors [b] to be intended (1).

[a] Bracton, fol. 243. Britton, fol. 126. (5. Rep. 11. b. Ant. 77. a. 121. b.)

[*] 9. E. 4. 38. 3. H 4. 15. 18. E. 3. 44. 16. E. 3. Quar. Imp. 146. 19. R. 2. Treso. 255. 19. H. 6. 33. 21. H. 6. 9. 33. H. 6. 33. 5. H. 7. 36. 38. 10. H. 7. 9. F. N. B. 33. 9. 22. H. 6. 33. per Moyle. 30. E. 3. 31. 39. E. 3. 21. 43. E. 3. 12. (Plowd. 258. a. Ant. 122. b. Post. 349. b. 363. b.)

[b] Bracton, fol. 242, 243. Britton, fol. 126. Fleta, acc.

Sect. 542.

MES en cest cas, si tiels parols fueront en le fait, * *&c.* Sciatis me dedisse et concessisse † tali, &c. talem villanum meum, *c'est bone*; *mes ceo urera per force et voy de grant, et nemy per voy de confirmation, &c.*

BUT in this case, if these words were in the deed, &c. *Sciatis me dedisse et concessisse tali, &c. talem villanum meum*, this is good; but this shall enure by force and way of grant, and not by way of confirmation, &c.

HERE it is to be observed, that a man hath an inheritance in a villeine, whereof the wife of the lord shall be endowed, as hath beene said; for in him a man may have an estate in fee or fee taile for life or yeeres. And therefore *Littleton* is here to be understood, that in the grant there were these words *(his heires)* or else nothing passed but for life, as of other things that lie in grant.

2. H. 6. F. N. B. 77. a. b.

24. E. 3. Discont 16.

* *&c.* not in L. and M. nor Roh. † *tali* not in L. and M. nor Roh.

(1) See the Chapter on Villenage.

Sect. 543.

ET ‡ ascun foits ceux verbs dedi et conceffi *ureront per voy d'extinguishm et del chose done ou grant; sicome un tenant tient de son seignior per certeine rent, et le seignior grunta per son fait a le tenant et a ses heires le rent, &c. ceo urera a le tenant per voy d'extinguishment, car per cel grant le rent est extinct, &c.*

AND sometimes these verbes *dedi et concessi* shall enure by way of extinguishment of the thing given or granted; as if a tenant hold of his lord by certaine rent, and the lord grant by his deed to the tenant and his heires the rent, &c. this shall enure to the tenant by way of extinguishment, for by this grant the rent is extinct, &c.

3. E. 3. 12. & 3. Aff. 7.

And this grant of the rent shall enure by way of release.

(2 Roll. 405.)

Sect. 544.

[307. b.]

*EN mesme le manner est lou * un ad un rent charge hors de certaine terre, et il graunta al tenant de la terre le rent charge, &c. Et la cause est, pur ceo que appiert, per les parols del grant, que le volunt le donor est, que le tenant avera le rent, &c. Et entant que il ne puit aver ne perceiver ascun rent hors de son terre demesne, pur ceo le fait serra entendue et pris pur le pluis advantage et availe pur le tenaunt que puit estre pris, et ceo est per voy d'extinguishment.*

IN the same manner it is where one hath a rent charge out of certaine land, and hee grant to the tenant of the land the rent charge, &c. And the reason is, for that it appeareth, by the words of the grant, that the will of the donor is, that the tenant shall have the rent, &c. And inasmuch as hee cannot have or perceive any rent out of his owne land, therefore the deed shall be intended and taken for the most advantage and availe for the tenant that it may be taken, and this is by way of extinguishment.

34. H. 6. fol. 41. (Ante 280. a.)

BUT if the grantee of the rent-charge granteth it to the tenant of the land and a stranger, it shall be extinguished but for the moitie: and so it is of a seigniorie.

Sect. 545.

ITEM, si jeo lessa terre a un home pur terme d'ans, et puis jeo confirma son estate sans pluis parolx mitter en le fait, per cel il n'ad pluis greinder estate que pur terme d'ans, sicome il avoit adevant.

ALSO, if I let land to a man for terme of yeares, and after I confirme his estate without putting more words in the deed, by this he hath no greater estate than for terme of yeares, as hee had before.

‡ *et—item*, L. and M. and Roh.

* *un—home*, L. and M. and Roh.

Sect. 546.

MES si jeo relessa a luy mon droit que jeo aye en la terre sans plus † parols mitter en le fait, il ad estate de franktenement. ‡ Issint poyes entend, mon fits, divers grands diversities perenter releases et confirmations.

BUT if I release to him all my right which I have in the land without putting more words in the deed, hee hath an estate of freehold (1). So thou maist understand (my sonne) divers great diversities betweene releases and confirmations.

In these two Sections is the seventh case wherein a release and confirmation doe differ.

[308. a.]

Sect. 547.

(Ant. 296.)

ITEM, si jeo esteant deins age lessa terre a un auter pur terme de xx. ans, et puis il graunte le terre a un auter pur terme de x. ans, issint il granta forsque parcel de son terme: en cest case quant jeo sue de pleine age, si jeo relessa al grauntee de mon lessee, &c. cest release est voyd, pur ceo que il n'y ad ascun privitie perenter luy et moy, &c. Mes si jeo confirme son estate, donque cest confirmation est bone. Mes si mon lessee graunta tout son estate a un auter, donques mon release fait a le grantee est bone et effectual.

ALSO, if I being within age let land to another for terme of xx. yeares, and after he granteth the land to another for term of x. years, so hee granteth but parcell of his terme: in this case when I am of full age, if I release to the grantee of my lessee, &c. this release is void, because there is no privitie betweene him and me, &c. But if I confirme his estate, then this confirmation is good. But if my lessee grant all his estate to another, then my release made to the grantee is good and effectuall. (1)

HERE are two things to be observed: First, that the lease of an enfant in this case is not void but voidable. Secondly, this is the eighth case put by *Littleton*, wherein the release and confirmation doe differ.

7. E. 4. 6. b. 18. E. 4. 2. 9. H. 7. 24. (Cro. Jac. 320. Sid. 42. 1. Roll. 729, 730.)

† *parols* not in L. and M. nor Roh.

‡ *et* added in L. and M. and Roh.

(1) [See Note 270.]

[308. a.] (1) [See Note 271.]

(Sid. 285.)
(Mo. 30.)

Sect. 548.

ITEM, si home granta un rent charge issuant hors de son terre a un auter pur terme de son vie, et puis il confirma son estate en le dit rent, a aver et tener a luy en fee taile ou en fee simple; cest confirmation est void quant a enlarger son estate, pur ceo que celuy que confirme n'avoit ascun reversion en le rent.

ALSO, if a man grant a rent-charge issuing out of his land to another for terme of his life, and after hee confirmeth his estate in the said rent, to have and to hold to him in fee taile or in fee simple; this confirmation is void as to inlarge his estate, because hee that confirmeth hath not any reversion in the rent.

(2. Roll. 415.)
21. E. 3. 47.
25 E 4. 8. b.
Pl. Com. 35.
8. H. 4. 19.
(Ant. 148. a.
Post. 317. a.)

HERE the diversitie is apparant, betweene a rent newly created and a rent in *esse*: which needeth no explication. Only this is to be observed, that *Littleton* intendeth his deed of confirmation not to containe any clause of distresse; for otherwise, as to the confirmation the deed is void, but the clause of distresse doth amount to a new grant, as in the Chapter of Rents hath beene said.

(Post. 366. a.
Finch 234.)

Sect. 549.

*MES si home soit seisie en fee de rent service ou de rent charge, et il grant le rent a un auter pur terme de vie, et le tenant atturna, et puis il confirma l'estate de le grantee en fee taile, ou en fee simple, cest confirmation est bone, quant a enlarger son estate solonques les parols le confirmation, pur ceo que celuy que confirmast * al temps de confirmation avoit un reversion del rent.*

BUT if a man be seised in fee of rent service or rent charge, and he grant the rent to another for life, and the tenant attorneth, and after hee confirmeth the estate of the grantee in fee taile, or in fee simple, this confirmation is good, as to enlarge his estate according to the words of the confirmation, for that he which confirmed at the time of confirmation had a reversion of the rent.

[308. b.]

HERE is the eighth case wherein the release and confirmation doth agree: and it is here to be observed, that to the grant of the estate for life, *Littleton* doth put an attornement, because it is requisite; but to the confirmation to the grantee of the rent to enlarge his estate, there is none necessary, and therefore he putteth none: but of this more shall be said in the Chapter of Attornement, *Sect.* 556, 557.

* *l'estate* added L. and M.

Sect. 550.

MES en cas avantdit lou home graunt un rent charge a un auter pur terme de vie, s'il voile que le grantee avroit estate en le taile, ou en fee, il covient que le fait de grant del rent charge pur terme de vie, soit surrender ou cancell, et donques de faire un novel fait d'autiel rent charge, a aver et perceiver a le grantee en le taile ou en fee, &c. Ex paucis † plurima concipit ingenium.

BUT in the case aforesaid where a man grants a rent charge to another for terme of life, if he will that the grantee should have an estate in taile, or in fee, it behoveth that the deed of grant of the rent charge for terme of life be surrendred or cancelled, and then to make a new deed of the like rent charge, to have and perceive to the grantee in tayle or in fee, &c. *Ex paucis plurima concipit ingenium.*

" *SURRENDER ou cancel.*" (1) Note by cancellation of the deed the rent which lieth only in grant ceaseth (as here it appeareth) as well as by the surrender. And the reason wherefore (if the grantor make a new grant of the rent, and not enlarge it by way of confirmation, as *Littleton* must be intended) the deed should be surrendred or cancelled, is lest the grantor should be doubly charged, viz. with the old grant for life, and with the new grant in fee; or, as hath beene said, the grantor may grant to the grantee for life and his heires, that he and his heires shall distreine for the rent, &c. and this shall amount to a new grant, and yet amount to no double charge, whereof you may see before in the Chapter of Rents.

Vid. Sect. 636. (Cro. Car. 399. Ant. 148. a. 225. b. 10. Rep. 66. Plowd. 237. a. Post. 338. 1. Ven. 297.)

† *plurima concipit ingenium—dictis*, &c. L. and M.

(1) See ant. 226. note 2.

Chap. 10. Of Attornement. Sect. 551. [309.a.

*ATTORNEMENT est, come si soit seignior et tenant, et le seignior voile granter per son fait les services de son tenant a un auter pur terme d'ans, ou pur terme de vie, ou en taile, ou en fee, il covient que le tenant atturna al grauntee en le vie le grantor, per force et vertue del grant, ou auterment le grant est void. Et atturnement est nul auter en effect, forsque quant le tenant ad oye del grant fait per son seignior, que mesme le tenant agrea per parol a le dit grant, sicome adire a le grauntee, Jea moy agree a le grant fait a vous, * &c. ou, Jeo, sue † bien content de le graunt fait a vous; mais le pluis common atturnement est, adire, ‡ Sir, jeo atturna a vous per force del dit graunt, ou jeo deveigne vostre tenant, &c. ou ‖ liverer al grantee un denier, ou un maile, ou un farthing, per voy d'attornement.*

ATTORNEMENT is, as if there bee lord and tenant, and the lord will grant by his deed the services of his tenant to another for terme of yeares, or for terme of life, or in taile, or in fee, the tenant must attorne to the grantee in the life of the grantor, by force and vertue of the grant, or otherwise the grant is void. And attornement is no other in effect, but when the tenant hath heard of the grant made by his lord, that the same tenant do agree by word to the said grant, as to say to the grantee, I agree to the grant made to you, &c. or I am well content with the grant made to you; but the most common attornment is, to say, Sir, I attorne to you by force of the said grant, or I become your tenant, &c. or to deliver to the grantee a pennie, or a halfepennie, or a farthing, by way of attornement.

Bracton, lib. 2. fol. 81. Britton, f. 105. b. 176, et 177. Fleta, lib. 3. cap. 6. (1. Roll. Abr. 293.) (1. Rep. 68.) [a] Bracton, lib. 2. fo 81. b. Fleta. Britton, ubi supra.

"*ATTORNMENT*" is an agreement of the tenant to the grant of the seigniorie, or of a rent, or of the donee in tayle, or tenant for life or yeeres, to a grant of a reversion or remainder made to another. It is an ancient word of art, and in the common law signifieth a torning, or attorning from one to another. Wee use also *attornamentum* as a Latine word, and *attornare* to attorne. And so *Bracton* [a] useth it. *Item videndum, est si dominus attornare possit alicui homagium et servitium tenentis sui contra voluntatem ipsius tenentis, et videtur quòd non.*

Bracton, lib. 2. fo. 81. a. Britton, ubi supra.

And the reason why an attornment is requisite, is yeelded in old bookes to be, *Si dominus attornare possit servitium tenentis contra voluntatem tenentis, tale sequeretur inconveniens, quòd possit eum subjugare capitali inimico suo, et per quod teneretur sacramentum fidelitatis facere ei qui eum damnificare intenderet.* (1)

Vide Litt. fol. 128. 11. H. 7. 19. Lib. 1. fol. 104, 105. Shelleye's case.

"*Il covient que le tenant attorna al grantee en la vie del grantor, &c.*" And so must he also in the life of the grantee; and this is understood of a grant by deed. And the reason hereof is, for that every grant must take effect as to the substance thereof in the life both of the grantor and the grantee. And in this case if the grantor

* *&c.* not in L. and M. nor Roh.
† *bien* not in L. and M. nor Roh.
‡ *&c.* added in L. and M. and Roh.
‖ *liverer—deliverer*, L. and M. and Roh.

(1) [See Note 272.]

grantor dieth before attornement, the seigniorie, rent, reversion, or remainder descend to his heire; and therefore after his decease the attornement commeth too late: so likewise if the grantee dieth before attornement, an attornement to the heire is void, for nothing descended to him: and if he should take, he should take it as a purchasor, where the heires were added but as words of limitation of the estate, and not to take as purchasors.

[309. b.]

40. Ass. 19. 34. H. 6. 7. 20. H. 6. 7. (Doct. and Stud. 86. a.) (9. Rep. 84. Sect. 564.)

But if the grant were by fine, then albeit the conusor or conusee dieth, yet the grant is good. For by fine levied the state doth passe to the conusee and his heires; and the attornment to the conusee or his heires at any time to make privitie to distraine is sufficient. But all this is to be taken as *Littleton* understood it, viz. of such grants as have their operation by the common law. For since *Littleton* wrote, if a fine be levied of a seigniorie, &c. to another to the use of a third person and his heires, he and his heires shall distraine without any attornment, because he is in by the statute of 27. *H.* 8. *cap.* 10. by transferring of the state to the use, and so he is in by act in law.

34. H. 6. 7. 20. H. 6. 7.

Bracton, lib. 2. fol. 81, 82. acc.

Lib. 6. fol. 68. Sir Moyle Finche's case.

And so it is, and for the same cause, if a man at this day by deed indented and inrolled according to the statute, bargaineth and selleth a seigniorie, &c. to another, the seigniorie shall passe to him without any attornement; and so it is of a rent, a reversion, and a remainder. So as the law is much changed, and the ancient privilege of tenants, donees, and lessees much altered concerning attornement since *Littleton* wrote.

(2 Cro. 193. Post. 321. 6. Rep. 68.) 27. H. 8. cap. 16. Vide Sect. 584.

But if the conusee of a fine before any attornement by deed indented and inrolled, bargaineth and selleth the seigniorie to another, the bargainee shall not distraine, because the bargainor could not distraine. *Et sic de similibus*; for *nemo potest plus juris ad alium transferre quàm ipse habet. Vide Sect.* 149. where upon a recovery, the recoveror shall distraine and avow without attornement.

(Ant. 104. b. Post. 321. b. 5. Rep. 113.) Lib. 6. ubi supra. Vide Sect. 149.

A grant to the king, or by the king to another, is good without attornement, by his prerogative.

49. E. 3. 4. 34. H. 6. 8. 6. E. 4. 13.

" *Attornement est nul auter en effect, &c.*" It is to be understood that there be two kinde of attornements, viz. an attornement in deed or expresse, and an attornement in law or implicite. Of attornement expresse or in deed *Littleton* speaketh here, and of attornement in law he speaketh after in this chapter. And to both these kinds of attornements there is an incident inseparable, that is, that the tenant hath notice of the grant; for (an attornement being an agreement or consent to the grant, &c.) he cannot agree or consent to that which he knoweth not. And the usuall pleading is, to which grant the tenant attorned. And therefore if a bayly of a mannor who used to receive the rents of the tenants, purchase the mannor, and the tenants having no notice of the purchase, continue the payment of the rents to him, this is no attornement. So if the lord levie a fine of the seigniorie, and by fine take backe an estate in fee, the tenant continueth the payment of the rent to the first conusor without notice of the fines, this is no attornement. But it is to be knowne, that there be two kinde of notices, viz. a notice in deed or expresse, whereof *Littleton* here speaketh, when he saith, that the tenant agreeth to the grant, and a notice in law or implied, whereof *Littleton* hereafter speaketh in this chapter.

(Post. 314. b. 1. Roll. Ab. 294. Sect. 564. 1. Rep. Alton Wood's case. 8. Rep. 89. 1. Roll. Rep. 301. 1. Cro. 441. Jones 376)

Lib. 2. fol. 67. b. Tooker's case. 13. Eliz. Dier 302. Tooker's case ubi supra.

Lib. 2. Tooker's case ubi supra.

" *Del grant fait per son seignior.*" Here is to be seene when the thing granted is altered, what becommeth of the attornement.

If there be lord, mesne and tenant, and the mesne grant over his mesnaltie by deed, the lord releaseth to the tenant, whereby the mesnaltie is extinct, and there is a rent by surplusage, an attornement to the grant of this rent secke is good, although the qualitie of that part of the rent is altered, because it is altered by act in law.

If a reversion of two acres be granted by deed, and the lessor before attornement levie a fine of one of them, and the tenant atturne to the grantee by deed, this is good for the other acre.

[a] 18. E. 3. tit. Variance, 63. 22. E. 3. 18. Tooker's case ubi supra. (Post. 314.)

[a] If the reversion be granted of three acres, and the lessee agree to the said grant for one acre, this is good for all three; and so it is of an attornement in law, if the reversion of three acres be granted, and the lessee surrender one of the acres to the grantee, this attornement shall be good for the whole reversion of the three acres according to the grant.

" *Et le tenant agrea.*" Hereafter in this chapter *Littleton* doth teach what manner of tenant shall attorne.

" *Agrea per parol, &c.*" And so hee may, and more safely by his deed in writing.

39. H. 6. 3. Tooker's case ubi supra.

" *Sicome adire a le grantee, &c.*" Here is to be seene to what manner of grantees the attornement is good. Regularly the attornement must be according to the grant, either expresly or impliedly. Of the first *Littleton* hath here spoken.

(Post. 313. a. Ant. 52. a. 297. b. 296. a.)

[310. a.]

Impliedly, as if a reversion be granted to two by deed, and the lessee attorne to one of them according to the grant, this attornement is good, but not to vest the reversion only in him to whom attornement is made; but it shall enure to both the grantees, for that is according to the grant, and for that it cannot vest the reversion only in him to whom the attornement is made. And so it is if one grantee dieth, the attornement to the survivor is good.

Tooker's case ubi supra. 21. H. 7. 12.

If the lord grant by deed his seigniorie to *A.* for life, the remainder to *B.* in fee, *A.* dieth, and then the tenant attorne to *B.* this attornement is void, because it is not according to the grant; for then *B.* should have a remainder without any particular estate.

20. H. 6. 7. (Ant. 298. a.)

If a reversion be granted to a man and a woman, they are to have moities in law; but if they entermarrie and then attornement is had, they shall have no moities (and yet by the purport of the grant they are to have moities), because it is by act in law.

Tooker's case ubi supra. Pl. Com. 187. 483. (Ant. 187. b.)

If a feme grant a reversion to a man in fee, and marry with the grantee, the lessee attorne to the husband, this is a good attornement in law to the husband.

2. R. 2. tit. Attornement 8. Lib. 4. f. 61. Hemling's case. (Mo. 91. con. 1. Leo. 58.)

If a reversion be granted by deed to the use of *I. S.* and the lessee hearing the deed read, or having notice of the contents thereof attorne to *cesty que use*, this is an implied attornement to the grantee.

If a reversion be granted for life, the remainder in taile, the remainder in fee, the attornement to the grantee for life shall enure to them in the remainder, to vest the remainder in them.

Temps E. 1. Attorn. 22. 18. E. 4. 7. (Ant. 212. b. 312. b. 6 Rep. 63. 5 Rep. Ford's case. 1. Roll. Abr. 412. 3. Leo. 17. 4. Leo. 23.)

And in those cases if the tenant should say, that I doe attorne to the grantee for life, but that it shall not benefit any of them in remainder after his death, yet the attornement is good to them all;

for having attorned to the tenant for life, the law (which he cannot controll) doth vest all the remainder. And of this more shall be said hereafter in this chapter.

Littleton here putteth five examples of an expresse attornement, but of them the last is the best, because the eare is not only a witnesse of the words, but the eye of the delivery of the penny, &c. and so there is *dictum et factum*. And any other words which import an agreement or assent to the grant, doe amount to an attornement. And albeit these five expresse attornements be all set down by *Littleton*, to be made to the person of the grantee [*b*], yet an attornement in the absence of the grantee is sufficient; for if he doth agree to the grant either in his presence or in his absence, it is sufficient.

[*b*] Lib. 2. fol. 68, 69. Tooker's case. 28. H. 8. tit. Attornement Br. 40. (10. Rep. 52. Cro. Car. 440. 1. Roll. Abr. 300. Dyer 298. a.)

Sect. 552.

*ITEM, si le seignior graunt le service de son tenant a un home, et puis per un fait portant un darreine date il granta mesmes les services a un auter, et le tenant atterne a le second grantee, ore le dit * grauntee ad les services; et coment que apres le tenant voile atterner a le primer grauntee, c'est clerement void, &c.*

ALSO, if the lord grant the service of his tenant to one man, and after by his deed bearing a later date hee grant the same services to another, and the tenant attorne to the second grantee, now the said grantee hath the services; and albeit afterwards the tenant will attorne to the first grantee, this is clearely void, &c.

HERE it is to be observed, that *Littleton* expresseth not what estate is granted, and very materially; for if the former grant were in fee, and the latter grant were for life, and the tenant doth first attorne to the second grantee, he cannot after attorne to the first grantee to make the fee simple passe, for that should not be according to the grant; but in that case the attornement to the first is countermanded. And so it is if a reversion expectant upon an estate for life be granted to another in fee, and after the grantor before attornement confirme the estate of the lessee in taile, the attornement to the grantee for the fee simple is void.

(Cro. Car. 284. 1. Roll. Abr. 500. Ant. 296. a.)

In the same manner, if a reversion upon an estate for yeeres be granted in fee, and the lessor confirme the estate of the lessee for life, he cannot afterwards attorne.

[310. b.] If a feme sole maketh a lease for life or yeares, reserving a rent, and granteth the reversion in fee, and taketh husband, this is a countermand of the attornement.

11. H. 7. 19. 2. R. 2. ubi supra.

Where our author putteth his case of the whole reversion, if two coparceners bee of a reversion, and one of them granteth her moity by fine, the conusee shall have a *quid juris clamat* for the moitie.

P. 3. Eliz. Bendloes. Hemling's case ubi supra. (1. Roll. Abr. 299)

If in the case that our author here putteth of severall grantees, if the tenant attorne to both of them, the attornement is void, because it is not according to the grant. If a reversion be granted for life, and after it is granted to the same grantee for yeares, and the lessee

11. H. 7. 12.

* *dit—second*, L. and M. and Roh.

see attorneth to both grants, it is voide for the incertaintie: & *sic e converso*, if the lord by one deed grant his seigniorie to *I.* bishop of *London* and to his heires, and by another deed to *I.* bishop of *London* and to his successors, and the tenant attorne to both grants, the attornement is void; for albeit the grantee be but one, yet he hath severall capacities, and the grants are severall, and the attornement is not according to either of the grants.

(Ant. 10c. a. No. 84.)

But if *A.* grant the reversion of *Black-Acre* or *White-Acre*, and the lessee attorne to the grant, and after the grantee maketh his election, this attornement is good; for albeit the state was incertaine, yet he attorned to the grant in such sort as it was made: and so note a diversity betweene one grant and severall grants, and observe in this case an attornement good in expectation, and yet nothing passed at the time of the attornement, but by the election subsequent.

Sect. 553.

*ITEM, si home soit seisie de un mannor, quel mannor est parcel en demesne, et parcel en service, s'il voile aliener cel mannor a un auter, il covient que per force del alienation, que touts les tenants que teignont del alienor come de son mannor * attornerent al alienee, ou auterment les services demurront continualment en l'alienor, forprise tenants a volunt †; car il ne besoigne que tenants a volunt atturnent sur tiel alienation, &c. ‡*

ALSO, if a man bee seised of a mannor, which mannor is parcell in demesne, and parcell in service, if hee will alien this mannor to another, it behooveth that by force of the alienation, all the tenants which hold of the alienor as of his mannor doe attorne to the alienee, or otherwise the services remaine continually in the alienor, saving the tenants at will; for it needeth not that tenants at will doe attorne upon such alienation, &c.

HERE it is to bee observed, that when a man maketh a feoffment of a mannor, the services doe not passe, but remaine in the feoffor untill the freeholders doe attorne; and when they doe attorne, the attornement shall have relation to some purpose, and not to other. For albeit the attornement bee made many yeares after the feoffment, yet it shall have relation to make it passe out of the feoffor *ab initio* even by the liverie upon the feoffment, but not to charge the tenants with any meane arrerages, or for waste in the meane time or the like.

Temps E. 2. Attornement. 48. E. 3 15. (Sid. 310. 312. 373 Ant. 263. a. Post. 341. a. 3. Rep. 29. 1. Leo. 208.)

If a reversion of land bee granted to an alien by deed, and before attornement the alien is made denizen, and then the attornement is made, the king, upon office found, shall have the land: for as to the estate betweene the parties, it passeth by the deed *ab initio*. (1)

(2. Roll Abr. 394. 395. Plo. 482. b. 483. a. Ant. 270. b. 279. b.)

If a man plead a feoffment of a mannor, hee need not plead an attornement of the tenants; but (if it be materiall) it must be denied or pleaded of the other side.

Pasch. 5. E. 3. coram rege. Sussex in Thesaur.

And

* *&c.* added L. and M. and Roh.

† *&c.* added in L. and M. and Roh.

‡ *sur ceo que mesmes les terres et tenements que ils teignont a volunte passont al aliene per force de tiel alienation*, added in L. and M. and Roh. and in MSS.

(1) [See Note 273.]

And upon consideration had of all the bookes touching this point, whether the services of the freeholders doe passe, wherein there have beene three severall opinions, viz. some have holden that the services doe passe in the right by the livery as parcell of the mannor, but not to avow without attornement, as in the case of the fine. And others have holden, that they both passe in right and in possession to distreine without attornement. And the third opinion is, that in this case the said services passe neither in possession nor in right, but untill attornement remaine continually in the alienor, as *Littleton* here holdeth. [311. a.] And so it was resolved *Pasch.* 15. *Eliz.* betweene *Brasbitch* and *Barwell*, according to the opinion of our author. And I never yet knew any of *Littleton*'s cases (albeit I have knowne many of them) to be brought in question, but in the end the judges concurred with our author.

21. E. 3. 47. 34. E. 3. Double plea. 24. 42. Ass. p. 6. 43. Ass. p. 20. 30. E. 3. 29. E. 3. 26. E. 3. per quæ servicia 21. 8. H. 4. 1. b. 12. H. 4. 20. H. 6 7. 35. H. 6. 9. E. 4. 33. 13. H. 7. 14. a. 1. H. 7. 31. 4. E 6. Attornement, Br. 38.

Vid. Hill. 14. Eliz. Rot. 508. in Communi Banco.

And where our author speaketh of the attornement of the freeholders, if the lord make a lease for yeares or for life of a mannor, and the freeholders attorne to the lessee, if after the reversion of the mannor be granted, the attornement of the lessee for yeares or life shall binde the freeholders: for by their former attornement, they have put the attornement into the mouth of the lessee.

9. E. 2 tit. Attornement 18. b. 19. E. 2. ibid. 19. 21. E. 3. 47. 5. H. 5. 12. b. Vid. Lit. Sect. 549. & 556.

"*Forsprise tenant a volunt, &c.*" Here is implied tenant at will or by copie of court roll according to the custom of the mannor, so as the freehold and inheritance both of lands in the hands of tenant at will by the common law or by custome shall passe both in right and in possession without any attornement. (1)

Sect. 554.

ITEM, si soient seignior en tenant, et le tenant lessa la terre a un auter pur terme de vie, ou dona la terre en le taile savant le reversion a luy, &c. si le seignior en tiel cas granta son seigniory a un auter, il covient que celuy en le reversion atturna al grauntee, et nemy le tenant a terme de vie, ou le tenant en le taile, pur ceo que en cest cas celuy en le reversion est tenant al seignior, et nemy le tenant a terme de vie, ne le tenant en le taile.

ALSO, if there bee lord and tenant, and the tenant letteth the land to another for term of life, or giveth the land in taile saving the reversion to himselfe, &c. if the lord in such case grant his seigniory to another, it behoveth that hee in the reversion attorne to the grantee, and not the tenant for terme of life, or the tenant in taile, because that in this case he in the reversion is tenant to the lord, and not the tenant for terme of life, nor the tenant in taile.

FOR it is a maxime in law, that no man shall attorne to any grant of any seigniorie, rent service, reversion or remainder, but he that is immediately privie to the grantor; and because in this case there is no privitie betweene the lord and the tenant for life,

(8. Rep. 42.)

(1) For the difference between seisin and attornement, see Brediman's case, 6. Rep. 56. b.

life, or donee in taile, but only betweene the lord and him in the reversion; for in this case the attornement of him in the reversion only is good.

"*Savant le reversion a luy, &c.*" That is to say, without limitation of any remainder over; and this is but to make his opinion plaine as to the point that he putteth it.

Sect. 555.

*EN mesme le manner est lou sont seigniour, mesne et tenant, * si le seigniour voile granter les services del mesne, coment que il ne fait ascun mention en son grant del mesne, uncore il covient que le mesne atturna, † &c. et nemy le tenant peravaile, &c. pur ceo que le mesne est tenant a luy, &c.*

IN the same manner is it where there are lord, mesne and tenant, if the lord will grant the services of the mesne, albeit hee maketh no mention in his grant of the mesne, yet the mesne ought to attorne, &c. and not the tenant peravaile, &c. for that the mesne is tenant unto him, &c. [311. b.]

This standeth upon the same reason that the next precedent case did.

Sect. 556.

MES auterment est lou certaine terre est charge d'un rent charge ou rent seck; car en tiel case si celuy que ad le rent charge ceo grant a un auter, il covient que le tenant del franktenement atturna al grantee, pur ceo que le franktenement est charge ove le rent, &c. Et en rent charge nul avowrie doit estre fait sur ascun person pur le distresse prise, &c. mes il avowra le prise bone et droiturel, come en terres ou tenements issint charges a son distresse, &c.

BUT otherwise it is where certaine land is charged with a rent-charge or rent secke; for in such case if he which hath the rent-charge grant this to another, it behooveth that the tenant of the freehold attorn to the grantee, for that the freehold is charged with the rent, &c. And in a rent-charge no avowrie ought to be made upon any person for the distresse taken, &c. but hee shall avow the prisel to bee good and rightfull, as in lands or tenements so charged with his distresse, &c.

(6. Rep. 59. a.) HERE is to be observed a diversitie betweene a rent service and a rent charge, or a rent secke; for as to the rent service, no man (as hath beene said) can attorne, but he that is privie; so (21. H. 6. 9. b.) in case of a rent charge, it behooveth that the tenant of the freehold doth attorne to the grantee, without respect of any privitie. (2. Rep. 67.) And therefore the disseisor onely, in the case of a grant of a rent charge, shall attorne, because he is (as *Littleton* saith) tenant of the freehold; but in case of a grant of a rent service, the attornement of a disseisee sufficeth.

If

* *si—et* L. and M. and Roh. † *&c.* not in L. and M. nor Roh.

If there be lord and tenant by homage, fealtie, and rent, the tenant is disseised, the lord granteth the rent to another, the disseisee attorneth, this is void: but if he had granted over his whole seigniorie, the attornement had beene good; and the reason of this diversitie is here given by our author, for that when the rent was granted onely, it passed as a rent secke, and consequently the disseisor being terre-tenant, must attorne. But when the seigniorie is granted, then the disseisee in respect of the privitie may attorne. (6. Rep. 39. a.)

" *Covient que le tenant del franktenement, &c.*" And therefore if the tenant of the land charged with a rent charge or a rent secke make a lease for life, and he that hath the rent charge or rent secke granteth it over, the tenant for life shall attorne, for he is tenant of the freehold, according to the expresse saying of our author, and (as hath beene said) there needeth no privitie.

And it was holden by *Dyer* chiefe justice of the court of common pleas, and *Mounson* justice, in the argument of *Bracebridge*'s case abovesaid, and not denied, that if he that hath a rent charge granteth it over for life, and the tenant of the land attorne thereunto, and after he granteth the reversion of the rent charge, that the grantee for life may attorne alone; and that these words of *Littleton* are to be understood when a rent charge or rent secke is granted in possession: and therewith agreeth 46. *E.* 3. where it appeareth, that the *quid juris clamat*, in that case, did lie against the grantee for life. (1. Leon. 265 a.)

A man maketh a lease for life, and after grants to *A.* a rent charge out of the reversion, *A.* granteth the rent over, he in the reversion must attorne, and not the tenant of the freehold; for that the freehold is not charged with the rent; for a release made to him by the grantee doth not extinguish the rent. And *Littleton* is to be understood, that the tenant of the freehold must atturne when the freehold is charged. (46. E. 3. 27. 2. H. 6. 9. Vi. Lit. Sect. 549. & 553.)

[312. a.] " *Et en rent charge nul avowrie doit estre fait sur ascun person, &c.*" This is the reason that *Littleton* giveth of the difference betweene the rent service and the rent charge. Now it may bee said, that this reason is taken away by the statute of 21. *H.* 8. for by that statute the lord needs not avow for any rent or service upon any person in certaine; and then by *Littleton*'s reason there needeth no privitie to the attornement of a seigniorie; for (say they) *cessante causâ vel ratione legis, cessat lex*, as at the common law no aid was grantable of a stranger to an avowrie; because the avowrie was made of a certaine person: but now the avowrie being made by the said act of 21. *H.* 8. upon no person, therefore the reason of the law being changed, the law itselfe is also changed; and consequently in an avowrie according to that act, aid shall be granted of any man, and the like in many other cases; which case is granted to be good law: but albeit the lord (as hath beene said) may take benefit of the statute, yet may he avow still at his election upon the person of his tenant. And albeit the manner of the avowrie be altered, yet the privitie (which is the true cause of the said difference) remaineth still as to an attornement. (21. H. 8. cap. 19. Vide Sect. 454. 27. H. 8. 4. b. (Doc. Plac. 25. 26.))

" *Rent charge, &c.*" It is to be observed, to what kinde of inheritances being granted, an attornement is requisite. And in this

21. H. 7. 1. (1. Roll. Abr. 292, 293.) 1. H. 5. 1. 37. Ass 14. 36. Ass. pl. 3. 31. H. 8. tit. Attornement Br. 59. (Ant. 303. b.)

chapter *Littleton* speaketh of five. First, of a seigniorie, rent service, &c. Secondly, of a rent charge. Thirdly, of a rent secke. And hereafter in this chapter of two more, viz. of a reversion and remainder of lands; for the tenant shall never need to attorne but where there is tenure, attendance, remainder, or payment of a rent out of land. And therefore if an annuitie, common of pasture, common of estovers, or the like, be granted for life or yeeres, &c. the reversion may be granted without any attornement; and albeit sometimes in some of these cases, or the like, an attornement be pleaded, yet it is surplusage, and more than needeth, because in none of them there is any tenure, attendance, remainder, or payment out of land.

Sect. 557.

*ITEM, si soit seignior et tenant, et le tenant lessa son tenement a un auter pur terme de vie, le remainder a un auter en fee, et puis le seignior granta les services a un auter, &c. et le tenant a terme de vie attorna, ceo est assets bone, pur ceo que le tenant a terme de vie est tenaunt en cest case al seignior, &c. et celuy en le remainder ne poit estre dit tenant al seignior, quant a cel entent, forsque apres la mort le tenant a terme de vie: uncore en cest case si celuy en le remainder morust sans heire, le seignior avera le remainder per voy d'escheate, pur ceo que coment que le seignior en tiel cas * covient d'avower sur le tenant a terme de vie, &c. uncore tout l'entier tenement, quant a touts les estates de franktenement ou de fee simple, ou auterment, &c. en tiel cas sont ensemble tenus de le seignior, &c.*

† *Mes nemy de faire avowrie sur eux touts ensemble.* M. 3. H. 6.

ALSO, if there be lord and tenant, and the tenant letteth his tenement to another for terme of life, the remainder to another in fee, and after the lord grant the services to another, &c. and the tenant for life attorne, this is good enough, for that the tenant for life is tenant in this case to the lord, &c. and he in the remainder cannot be said to be tenant to the lord, as to this intent, untill after the death of the tenant for life: yet in this case if hee in the remainder dieth without heire, the lord shall have the remainder by way of escheat, because that albeit the lord in such case ought to avow upon the tenant for life, &c. yet the whole entire tenement, as to all the estates of the freehold or of fee simple, or otherwise, &c. in such case are together holden of the lord, &c.

But not to make avowrie upon them all together. *M. 3. H. 6.*

[312. b.]

25. E. 3. Attorn. 10. 12. E. 4. 4. 18. H. 6. 2. 9. E. 2. tit. Attorn. 18. 18. E. 4. 7. Temps E. 1. Attorn. 22. Vide Sect. 580. (3. Rep. 66. Ant. 310. a. Post. 320. b.)

"*ET le tenant a terme de vie attorna, &c.*" For he that is (as hath beene said) privie and immediately tenant to the lord must attorne; and that is in this case: the tenant for life, and so of the other side if a seigniorie be granted to one for life, the remainder to another in fee, the attornement to the tenant for life is an attornement to the remainder also; unlesse it be that they in the remainder ought to have acquitall, or other privilege (whereof they should be prejudiced); and then albeit an attornement be had

* *covient d'avower—d'avowera*, L. and M. and Roh.

† This paragraph not in L. and M. nor Roh.

had to the tenant for life, and he acknowledge the acquitall, &c. yet after his decease, he in remainder shall not distreyne untill he acknowledge the acquitall, notwithstanding the attornement of the tenant for life.

"*Avera le remainder per voy d'escheat.*" For the remainder is holden of the lord, but not immediately holden; and in this case, by the escheat of the remainder the seigniorie is extinct; for the fee simple of the seigniorie being extinct, there cannot remaine a particular estate for life thereof, in respect of the tenure and attendance over; and of this opinion is *Littleton*, [a] himselfe in our bookes. But otherwise it is of a rent charge in fee; for if that be granted for life, and after he in the reversion purchase the land, so as the reversion of the rent charge is extinct, yet the grantee for life shall enjoy the rent during his life, for there is no tenure or attendance in this case.

(9. Rep. 134. b. Ant. 280. a.)

3. H. 6. 1. Old Tenures, 107. [a] 15. E. 4. 13. a. (1. Leon. 225.)

"*Mes nemy de faire avowrie.*" This is added to *Littleton*, but it is consonant to law, and the authoritie truly cited.

M. 3. H. 6. 1.

Sect. 558.

ITEM, si soit seignior et tenant, et le tenant lessa les tenements a un feme pur terme de vie, le remainder ouster en fee, et la feme prent baron, et puis le seignior granta les services, &c. a le baron et ses heires; en cest case le service est mis en suspence durant le coverture. Mes si la feme devie vivant le baron, le baron et ses heires averont le rent de ceux en le remainder, &c. Et en ceo case il ne besoigne ascun attornement per parol, &c. pur ceo que le baron que doit attorne, accepta le fait del graunt de les services, &c. le quel acceptance est un attornment en la ley.

ALSO, if there be lord and tenant, and the tenant letteth the tenements to a woman for life, the remainder over in fee, and the woman taketh husband, and after the lord grant the services, &c. to the husband and his heires; in this case the service is put in suspence during the coverture. But if the wife die living the husband, the husband and his heires shall have the rent of them in the remainder, &c. And in this case there needeth no attornement by parol, &c. for that the husband which ought to attorne, accepted the deed of grant of the services, &c. the which acceptance is an attornment in the law.

"*LE quel acceptance est un attornment en la ley, &c.*" *Littleton* having spoken (as hath beene said) of attornements in deed, so expresse, now commeth to speake of attornements in law, or implied; and having before set downe five expresse attornements in deed, doth in this chapter enumerate seven attornments in law. Here it is to be understood, that the expresse attornement of the husband will binde the wife after the coverture, and in as much as this acceptance of the grant is an attornement in law, without a word of attornement the seigniorie shall passe. And this is the first example that *Littleton* putteth of an attornement in law, which amounteth

[313. a.]

3. E. 3. 42. 15. E. 3. Attornement, 11. (6. Rep. 63. 9. Rep. 85. 2. Roll. Abr. 424.) 44. E. 3. tit. Fines 37. 11. E. 4. 4. (1. Roll. Abr. 303.)

(Ant. 280. a. 301. 310.) amounteth to an expresse attornement, for that it is an agreement to the grant.

If the lord grant his seigniorie to the tenant of the land, and to a stranger, and the tenant accept the deed, this acceptance is a good attornement to extinguish the one moitie, and to vest the other moitie in the grantee, as hath beene said.

Sect. 559.

*EN mesme le manner est, si soyent seignior et tenant, et le tenant prent feme, et puis le seignior granta les services a la feme et ses heires, et le baron accepta le fait; en cest cas apres la mort le baron, la feme et ses heires averont les services, &c. car per le acceptance * del fait per le baron, ceo est bone attornement, &c. coment que durant le coverture les services sont mis en suspence, &c.*

IN the same manner is it, if there be lord and tenant, and the tenant taketh wife, and after the lord grant his services to the wife and his heires, and the husband accepteth the deed; in this case after the death of the husband the wife and her heires shall have the services, &c. for by the acceptance of the deed by the husband, this is a good attornement, &c. albeit during the coverture the services shall be put in suspence, &c.

(1. Roll. Abr. 938, 939, 940.) HERE is the second example that *Littleton* putteth of an attornement in law, and standeth upon the former reason.

(Ant. 148. b.) (4. Rep. 52.) (Cro. Car. 101.) " *Sont mise en suspence.*" Suspence commeth of *suspendeo*, and in legall understanding is taken when a seigniorie, rent, profit apprender, &c. by reason of unitie of possession of the seigniorie, rent, &c. and of the land out of which they issue, are not *in esse* for a time, *et tunc dormiunt*, but may be revived or awaked. And they are said to be extinguished when they are gone for ever, *et tunc moriuntur*, and can never be revived; that is, when one man hath as high and perdurable an estate in the one as in the other.

Sect. 560.

ITEM, si soyent seignior et tenant, et le tenant granta les tenements a un home pur terme de sa vie, le remainder a un auter en fee, si le seignior granta les services a le tenant a terme de vie † en fee, en cest cas le tenant a terme de vie ad fee en les services; mes les services sont mis en suspence durant sa vie. Mes les heires ‡ le tenant a terme de vie averont les services

ALSO, if there be lord and tenant, and the tenant grant the tenements to a man for terme of his life, the remainder to another in fee, if the lord grant the services to the tenant for life in fee, in this case the tenant for terme of life hath a fee in the services; but the services are put in suspence during his life. But the heires of the tenant for life shall have the

* *del fait per* not in L. and M. nor Roh.
† *en fee* not in L. and M. nor Roh.
‡ *le tenant a terme de vie,* not in L. and M. nor Roh.

services apres † *son decease, &c.* ‡ *Et en cest cas il ne besoigne* § *attornement; car per l'acceptance del fait de celuy que doit attourner, &c. est ceo attournement de luy mesme* ‖.

the services after his decease, &c. And in this case there needeth no attornement; for by the acceptance of the deed by him which ought to attorne, &c. this is an attornement of it selfe.

HERE is the third case that *Littleton* putteth of an attornement in law. And it is to bee observed, that albeit a grant, as hath beene said, may enure by way of release, and a release to the tenant for life doth worke an absolute extinguishment, whereof he in the remainder shall take benefit, yet the law shall never make any construction against the purport of the grant to the prejudice of any, or against the meaning of the parties as here it should; for if by construction it should enure to a release, the heires of the tenant for life should be disherited of the rent; and therefore *Littleton* here saith, that the heires of the grantee shall have the seigniorie after his death. And here is an attornement in law to a grant suspended that cannot take effect in the grantee so long as he liveth, but shall take effect in his heires by descent; for the inheritance of the seigniorie was in the tenant for life, and the suspension onely during his life.

[313. b.]

(Siderf. 25.)

Sect. 561.

(Ant. 279.)

MES lou le tenant ad cy grand et haut estate en les tenements sicome le seignior ad en le seigniory; en tiel case, si le seignior graunta les services al tenant en fee, ceo urera per voy d'extinguishment. Causa patet.

BUT where the tenant hath as great and as high estate in the tenements as the lord hath in the seigniory; in such case, if the lord grant the services to the tenant in fee, this shall enure by way of extinguishment. *Causa patet.*

HERE *Littleton* intendeth not onely as great and high an estate, but as perdurable also, as hath beene said; for a disseisor or tenant in fee upon condition hath as high and great an estate, but not so perdurable an estate, as shall make an extinguishment.

Sect. 562.

ITEM, si soyent seignior et tenant, et le tenant fait un leas a un home pur terme de sa vie, savant le reversion a luy, si le seignior granta le seigniorie

ALSO, if there bee lord and tenant, and the tenant maketh a lease to a man for terme of his life, saving the reversion to himselfe, if the lord

† *son* not in L. and M. nor Rob.
‡ *&c.* not in L. and M. nor Rob.
§ *ascun* added L. and M. and Rob.
‖ *&c.* added L. and M. and Rob.

niorie a le tenant a terme de vie en fee; en cest case il covient que celuy en le reversion attorna al tenant a terme de vie per force de cel grant, ou autrement le grant est voide, pur ceo que celuy en le reversion est tenant al seignior, &c.

* *Et uncore il ne tiendra del tenant a terme de vie durant sa vie.* Causa patet.

lord grant the seigniory to tenant for life in fee; in this case it behoveth that he in the reversion must attorne to the tenant for life by force of this grant, or otherwise the grant is voide, for that hee in the reversion is tenant to the lord, &c.

* Yet hee shall not hold of the tenant for life during his life. *Causa patet, &c.*

HERE in this case he in the reversion of the tenancy must attorne, because he is the tenant to the lord; and yet the seigniorie shall be suspended during the life of the grantee, because hee hath an estate for life in the tenancie, but his heires shall enjoy the seigniorie by discent.

" *Uncore il ne tient, &c.*" This is added, and not in the originall, and is against law, and therefore to be rejected. [314. a]

" *Tenant al seignior, &c.*" Here is to bee understood a diversity when the whole estate in the seigniory is suspended, and when but part of the estate in the seigniory is suspended. And in this case the seigniorie is suspended but for terme of life; [a] and therefore as to all things concerning the right it hath his being; but as to the possession during the particular estate the grantee shall take no benefit of it; therefore during that time he shall have no rent, service, wardship, release, harriot, or the like, because these belong to the possession: but if the tenant dieth without heire, the tenancie shall escheat unto the grantee, for that is in the right; and yet when the seigniorie is revived by the death of the tenant, there shall be wardship; as if the tenant marry with the seignioresse and dieth, his heire within age, the wife shall have the wardship of the heire. Also in the case that *Littleton* here putteth, albeit the seigniorie be suspended but for life, yet some hold that he cannot grant it over, because the grantee tooke it suspended, and it was never *in esse* in him. But if the tenant make a lease for yeares or for life to the lord, there the lord may grant it over, because the seigniorie was *in esse* in him, and the fee simple of the seigniorie is not suspended. But if the lord disseise the tenant, or the tenant enfeoffe the lord upon condition, there the whole estate in the seigniorie is suspended, and therefore he cannot during the suspension take benefit of any escheat, or grant over his seigniorie.

[a] 34. Ass. p. 15.

16. E. 3. tit. Voucher 88.

5. E. 3. Twong's case. (Ant. 298. b.)

Sect. 563.

ITEM, si soient seignior et tenant, et le tenant tient del seignior per xx. maners des services, et le seignior granta son seigniory a un auter; si le tenant

ALSO, if there bee lord and tenant, and the tenant holdeth of the lord by xx. manner of services, and the lord grant his seigniory to another;

* This paragraph not in L. and M. nor Roh.

tenant paya en fait ascun parcel d'ascun de les services al grauntee, ceo est bone attornment, de et pur touts les services, coment que l'entent de le tenant fuit d'attourner forsque de cel parcel, pur ceo que le seigniory est † entier, coment que ils sont divers maners des services que le tenant doit faire, &c.

another; if the tenant pay in deed any parcell of any of the services to the grantee, this is a good attornement, of and for all the services, albeit the intent of the tenant was to attorne but for this parcell, for that the seigniorie is intire, although there bee divers manner of services which the tenant ought to doe, &c.

HERE it appeareth that an attornement being made for parcell, is good for the whole; for seeing hee hath attorned for part, it cannot bee void for that, and good it cannot be unlesse it be for the whole: but of this sufficient hath beene said before in this chapter.

4. E. 3. 55. Malman's case. 29. E. 3. 53. 5. E. 4. 2. 22. Ass. 66. 7. H. 4. 10. 35. H. 6. 8. per Prisott. (Ant. 309. b.)

"*Paya ascun parcell des services.*" Here is the fourth example of an attornement in law; for payment of any parcell of the services is an agreement in law to the grant.

40. E. 3. 34. (4. Rep. 8.)

[314. b.]

"*Coment que l'entent del tenant fuit d'attorner, &c.*" *Quia intentio inservire debet legibus, non leges intentioni.* And yet as farre as it may stand with the rule of law, it is honourable for all judges to judge according to the intention of the parties, and so they ought to doe. And of this somewhat in this chapter hath beene said before.

(Sidert. 283. 4. Rep. 85. a.) 20. H. 6. (1. Rep. 101. b. 104. a. Doctor & Student 52. a. 1. Roll. Abr. 419. Cro. Car. 1. 401. Dyer 4. a. Post. 367. a. Ant. 20. 47. b. 48. b. 2. Rep. 23. 4. Rep. 81. a. Ant. 42. 213. a. 217. b. 222. b. 229. a. 1. Roll. Abr. 303.)

Sect. 564.

ITEM, si soit seignior et tenant, et le tenant tient del seignior per plusors maners des services, et le seignior granta les services a un auter per fine; si le grantee sua un scire facias *hors del mesme fine pur ascun parcel de les services et ad judgement de recover, cel judgemen est bone attornement en ley pur touts les services.* *

ALSO, if there bee lord and tenant, and the tenant holdeth of the lord by many kinde of services, and the lord grant the services to another by fine; if the grantee sue a *scire facias* out of the same fine for any parcell of the services, and hath judgment to recover, this judgment is a good attornement in law for all the services.

HERE is to be observed, that this judgment in the *scire facias* (which is no more but that the demandant shall have execution, &c.) is a good attornement, albeit it is presumed that *judicium redditur in invitum*, and that an attornement in law of any part

48. E. 3. 24. 3. E. 3. quod juris clamat. 4. E. 3. 28, 29. 37 H. 6 14. per Moyle. 17. E. 3. 29.

† *forsque un et* added L. and M. and Roh. * *&c.* added in L. and M. and Roh.

(Ant. 248. b. 6. Rep. 64. b.) part is good for the whole. And this is the fifth example that *Littleton* putteth of an attornment in law.

(5. Rep. 133. Sect. 551. Cro. Car. 284. 2. Rep. 67. b. Sect. 579. 1. Roll. Abr. 294. Ant. 309. a.) (1. Sid. 139. 1. Lev. 28.) Note, that in case of a deede nothing passeth before attornement, as hath beene said. In the case of the fine, the thing granted passeth as to the state, but not to distraine, &c. without attornement. In the case of the king the thing granted doth passe both in estate and in privitie to distraine, &c. without attornement, unlesse it be of lands or tenements that are parcell of the dutchy of *Lancaster*, and lie out of the county palatine. (1)

Sect. 565.

(Ant. 159. b. 160. a.)

ITEM, si le seignior d'un rent service graunta les services a un auter, et le tenant attorna per un denier, et puis le grantee distraine pur le rent arere, et le tenant a luy fait rescous; en ceo cas le grauntee n'avera assise del rent, forsque briefe de rescous, pur ceo que le done del denier per le tenant † ne fuit forsque per voy d'attornement, &c. Mes si le tenant avoit done a le grauntee le dit denier come parcel de le rent, ou un maile ou un farthing per voy de seisin del rent, donque ceo est bone attornement, et auxy est bon seisin al grauntee del rent; et donques sur tiel rescous le grantee avera assise, &c.

ALSO, if the lord of a rent-service grant the services to another, and the tenant attorne by a penny, and after the grantee distraine for the rent behinde, and the tenant make rescous; in this case the grantee shall not have an assise for the rent, but a writ of rescouse, because the giving of the penny by the tenant was not but by way of attornement, &c. But if the tenant had given to the grantee the said penny as parcell of the rent, or a halfe penny or a farthing by way of seisin of the rent, then this is a good attornement, and also it is a good seisin to the grantee of the rent; and then upon such rescous the grantee shall have an assise, &c. [315. a.]

39. H. 6. 3. 26. 5. E. 4. 2. Vide Sect. 235. 25. E. 3. 44. 49. E. 3. 15. 37. H. 6. 39. 49 Ass. p. 6. 34. H. 6. 42. 15. E. 3. Execution 63. 40. E. 3. 22. 28. H. 6. 6. b. 7. H. 4. 2. tit. Attorney Br. 97. (6 Rep. 59.) (Ant. 281. a.)

HEREUPON is to be observed a diversitie betweene money given by way of attornement, and where it is given as parcell of the rent by way of seisin of the rent. For albeit the rent be not due before the day, yet a payment of parcell of the rent beforehand is an actuall seisin of the rent to have an assise. And so it is if he give an oxe, a horse, a sheepe, a knife, or any other valuable thing in name of seisin of the rent before-hand, this is good. And therefore a payment in name of seisin is more beneficiall for the grantee, because that is both an actuall seisin and an attornement in law; and yet being given before the day in which the rent is due, it shall not be abated out of the rent. So as to give seisin of the rent, it is taken for part of the rent; but as to the payment of the rent, it is accounted as no part of the rent; and the reason of the diversitie is, for that remedies to come to rights or duties are ever taken favourably. Here also appeareth that there is an actuall seisin, or a seisin in deed of a rent, whereof (as *Littleton* here speak-eth)

(1) See Pl. Com. 231. 4. Inst. 209. † *ne* not in L. and M. nor Roh.

eth) an assise doth lie; and a seisin in law which the grantee hath by attornement before actuall possession. (1)

Sect. 566.

*ITEM, si sont plusors jointenants * que teignont per certaine services, et le seignior graunta a un auter les services, et un de les jointenants attorna al grauntee, ceo est auxy bon, sicome touts † ussent attorne, pur ceo que le seigniory est entier, &c.*

ALSO, if there bee many jointenants which hold by certaine services, and the lord grant to another the services, and one of the joyntenants attorne to the grantee, this is as good as if all had attorned, for that the seigniory is entire, &c.

HERE is to be observed what manner of tenants shall attorne to the grant. And first, [b] if there be two or more jointenants, and one of them attorne, it is sufficient: for, as it hath beene often said, there cannot be an attornement in part. And albeit there is great authoritie against *Littleton*, yet the law hath beene adjudged according to *Littleton's* opinion, as it hath beene in other of his cases when they have come in question: and as it is of an attornement, so it is of a seisin; a seisin of a rent by the hands of one joyntenant is good for all, and a seisin of part of the rent is a good seisin of the whole.

[c] If either the grantor or the grantee die, the attornement is countermanded; but if the tenant die, he that hath his estate may attorne at any time. If the tenant grant over his estate, his assignee may attorne.

[d] If an infant hath lands by purchase or by descent, he shall be compelled to attorne in a *per quæ servitia*, and no mischiefe to the infant; for when he commeth to full age, he may disclaime to hold of him, or he may say that he holds by lesser services: but there should be a greater mischiefe for the lord if the attornement of an infant should not be good, for he should lose his services in the meane time.

If an infant be a lessee, he shall be compelled to attorne in a *quid juris clamat*. The attornement of an infant to a grant by deed is good, and shall binde him, because it is a lawfull act, albeit he be not upon that grant by deed compellable to attorne. Of baron and fem *Littleton* putteth many cases in this chapter.

[e] A man that is deafe and dumbe, and yet hath understanding, may attorne by signes: [f] but one that is not *compos mentis* cannot attorne, for he that hath no understanding cannot agree to the grant.

What conveyances shall be good without attornements more shall be said in this chapter in his proper place.

(1. Roll. Abr. 302.)
(2. Rep. 67.)
[b] 39. H. 6. 3. 26.
See Tooker's case ubi supra, and the authorities there cited.
(2. Roll. Abr. 424. Ant. 297. b.)
[c] Vid. Lib. 4. fol. 8. Lib. 6. fol. 57. Lib. 9. fol. 34. Vid. 4. H. 6. 29. 18. E. 4. 10.
[d] 42. E. 3. Age 33. 26. E. 3. 62. 37. H. 8. tit. Attorne. Br. 26. E. 3. 62. 26. Ass. 27. 32. E. 3. tit. per quæ servic. 9. 2. E. 2. Attorn. 78. 2. E. 2. ibid. 77. 18. H. 6. 2. Lib. 9. f. 84, 85. Conye's case. 4. Mar. Dier 137. 21. E. 3. Age 85. 7. E. 2. Age 140.
[e] 26. E. 3. 63.
[f] 18. E. 3. 53.

* *que—et*, L. and M. and Roh. † *ussent attorne—attornerent*, L. and M. and Roh.

(1) [See Note 274.]

Sect. 567.

[315. b.]

ITEM, si home lessa tenements a terme d'ans, per force de quel lease * *le lessee est seisie, et puis le lessor per son fait granta le reversion a auter pur terme de vie, ou en taile, ou en fee; il covient en tiel case que le tenant a terme d'ans attorna, ou autrement rien passera a tiel grauntee per tiel fait. Et si en cest case le tenant a terme d'ans attorna al grantee, donque maintenant passera le franketenement al grauntee per tiel atturnement sauns ascun liverie de seisin, &c. pur ceo que si ascun liverie de seisin,* † *&c. serra au besoigne d'estre fait en cel case, donque le tenant a terme d'ans serroit al temps de liverie de seisin ouste de son possession,* ‡ *le quel serroit encounter reason, &c.*

ALSO, if a man letteth tenements for terme of yeares, by force of which lease the lessee is seised, and after the lessor by his deed grant the reversion to another for terme of life, or in taile, or in fee; it behoveth in such case that the tenant for yeares attorne, or otherwise nothing shall passe to such grantee by such deed. And if in this case the tenaunt for yeares attorne to the grantee, then the freehold shall presently passe to the grantee by such attornement without any liverie of seisin, &c. because if any liverie of seisin, &c. should be or were needfull to bee made, then the tenant for yeares should be at the time of the livery of seisin ousted of his possession, which should bee against reason, &c.

HERE *Littleton* having spoken of grants of seigniories and rent charges, and rents secke issuing out of land, here treateth of a grant of a reversion of land upon an estate for yeares; seeing this grant of the reversion must be by deed, and the agreement of the lessee for yeares requisite thereunto, the freehold and inheritance doe passe thereby, as well as by liverie of seisin, if it were in possession: and the grant of the reversion by deed with the attornement of the lessee, doe countervaile in law a feoffment by liverie, as to the passing of the freehold and inheritance.

[g] 6. E. 3. 55. 25. E. 3. 53. Brook. tit. Attorn. 48. 32. E. 3. Scir. fac. 101. Dy. 1. 2. (Ante 113. a. 181. b.)

" *A terme d'ans.*" [g] And yet a tenant by statute merchant, or tenant by statute staple, or by *elegit*, must also attorne; for the grantee may have a *venire facias ad computandum*, or tender the money, &c. and discharge the land; and if the reversion be granted by fine, they shall be compelled to attorne in a *quid juris clamat*.

And so the executors that have the land untill the debts bee paid must attorne upon the grant of the reversion, although they have not any certaine terme for yeares.

* *le lessee* not in L. and M. nor Roh.

† *&c.* not in L. and M. nor Roh.

‡ *le quel*—*que*, L. and M. and Roh.

Sect. 568.

ITEM, si tenements soient lesses a un home pur terme de vie, ou done en le taile, savant le reversion, &c. si celuy en le reversion en tiel case granta le reversion a un auter per son fait, il covient que le tenaunt de la terre attourna al grantee en la vie le grantor, ou auterment le graunt est voyd. *

ALSO, if tenements be letten to a man for terme of life, or given in taile, saving the reversion, &c. if hee in the reversion in such case grant the reversion to another by his deed, it behooveth that the tenant of the land attorne to the grantee in the life of the grantor, or otherwise the grant is voyd.

HERE *Littleton* speaketh of a reversion expectant upon an estate for life, or a gift in taile.

[316. a.] "*Il covient que le tenant de la terre attorne al grauntee, &c.*" Let us therefore speake first of tenant for life: and yet in some case albeit tenant for life hath granted over his estate, yet he shall attorne. [*a*] As if tenant in dower or by the curtesie grant over his or her estate, and the heire grant over the reversion, the tenant in dower or by the curtesie may atturne, because at the time of the grant made they were attendant to the heire in reversion, and the grantee cannot be tenant in dower, or tenant by the curtesie. And if the reversion be granted by fine, the fine must suppose that the tenant in dower or by the curtesie did hold the land, albeit they had formerly granted over their estate, and albeit the reversion doth passe by the fine; yet the *quid juris clamat* must be brought against him that was tenant at the time of the note levied. But yet after the reversion is granted over, the grantee shall not have any action of waste against the tenant in dower or by the curtesie, but the action of wast must be brought against their assignee, and not against themselves; for tenant by the curtesie or tenant in dower cannot hold of any but of the heire: and therefore in respect of the privitie, they shall attorne and be subject to an action of wast, as long as the reversion remaineth in the heire, albeit they have granted over their whole estate. And it is worthy of the observation, that if the grantee of the reversion doth bring an action of wast against the assignee of the tenant by the curtesie, [*b*] the pl. must rehearse the stat. which proveth that no prohibition of waste in that case lay at the common law, as it did if the heire had brought it against the tenant by the curtesie itselfe: and therefore some doe hold, that if the heire doe grant over the reversion, that the attornment of the assignee of the tenant by the curtesie, or of tenant in dower is sufficient, because they afterward must be attendant and subject to the action of waste.

[*a*] 10. H. 4. tit. Attorn. 16. 11. H. 4. 18. 30. E. 3. 16. 38. E. 3. 23. 18. E. 3. 3. 10. E. 3. quid juris clam. 41. 41. E. 3. 18. Temps E. 1. tit. Wast. 122. (Ant. 54. a.) F. N. B. 55. E. Regist. f. 72. 4. E. 3. 26. (3. Rep. 23. b.)

[*b*] Regist. 72.

If the reversion of lessee for life be granted, and lessee for life assigne over his estate, the lessee cannot attorne; but the attornement of the assignee is good, because (as *Littleton* here saith) it behooveth that the tenant of the land doe attorne, and after the assignement

18. E. 4. 10. b. 26. E. 3. 62.

* *&c.* added L. and M. and Roh.

ment there is no tenure or attendance, &c. betweene the lessee and him in reversion.

5. H. 5. 10.

If lessee for life assigneth over his estate upon condition, he having nothing in him but a condition shall not attorne; but the assignee may attorne, because he is tenant of the land.

Sect. 569.

EN mesme le maner est, si terre soit † done en taile, ou lesse a un home pur terme de vie, le remainder a un auter ‡ en fee, si celuy en le remainder voile granter cest remainder a un auter, &c. si le tenant de la terre atturna en la vie le grantor, donques le grant de tiel remainder est bon, ou auterment nemy.

IN the same manner is it, if land be granted in taile, or let to a man for terme of life, the remainder to another in fee, if he in the remainder will graunt this remainder to another, &c. if the tenant of the land attorne in the life of the grantor, then the grant of such a remainder is good, or otherwise not.

12. E. 4. 3, 4. 3. E. 4. 11. 43. E. 3. 1. 46. E. 3. 13. (9. Rep. 85. b.) (Ant. 27. b.) 5. H. 5. (11. Rep. 79.) 20. E. 3. quid juris clam. 50. [c] See the chap. of tenant in taile after possibilitie of issue extinct; and Ewin's case there cited to be adjudged.

LITTLETON also speaketh here of an attornement by tenant in taile; and true it is that he may attorne; but where the reversion is granted by fine, he is not compellable to attorn, because he hath an estate of inheritance which may continue for ever. And so it is of a tenant in taile after possibilitie of issue extinct, he shall not be compelled to attorne for the inheritance which was once in him. [c] But if tenant in taile after possibilitie of issue extinct grant over his estate, his assignee shall be compelled to attorn, because he never had but a bare state for life.

[316. b.]

But as to tenant in taile, note a diversitie betweene a *quid juris clamat*, and a *quem redditum reddit*, or a *per quæ servicia*; for against a tenant in taile, no *quid juris clamat* lieth, as is aforesaid. But if a man make a gift in taile, the remainder in fee, and the seigniorie or rent charge issuing out of the land be granted by fine, the connusee shall maintaine a *per quæ servicia*, or a *quem redditum*, and compell him to attorne; for herein his estate of inheritance is no privilege to him, for that a tenant in fee simple (as his estate was at the common law) is also compellable in these cases to attorne.

Sect. 570.

(11. Rep. 79.)

* *P. 12. E. 4. Et la est tenus per tout le court, que tenant en taile ne serra arct d'atturner, mes s'il atturna* gratis, *c'est assets bone.*

P. 12. *Edw.* 4. It is there holden by the whole court, that tenant in taile shall not be compelled to attorne, but if he will attorne *gratis*, it is good enough.

† *done en taile ou*, not in L. and M. nor Roh.

‡ *en fee—&c*, L. and M.

* This paragraph not in L. and M. nor Roh.

THIS is added to *Littleton*, and therefore though it be good law, and the booke truly cited, yet I passe it over. 12. E. 4. 3, 4.

Sect. 571.

ITEM, si terre soit lesse a un home pur terme d'ans, le remainder a un auter pur terme de vie, reservant al lessour un certaine rent per an, et liverie de seisin sur ceo est fait al tenant pur terme d'ans; si cestuy en le reversion en cest case granta le reversion a un auter, † &c. et le tenant que est en le remainder apres le terme d'ans ‡ soy attourna, ceo est bone attournement, et celuy a que cest reversion est graunt, per force de tiel attournement distreynera le tenant a terme d'ans pur le rent due apres tiel attornment, coment que le tenant a terme d'ans ne unques attournast a luy. Et la cause est, pur ceo que lou le reversion est dependant sur l'estate del franktenement, suffist que le tenant del franktenement attourna sur tiel grant del reversion, &c.

ALSO, if land bee let to a man for years, the remainder to another for life, reserving to the lessor a certaine rent by the yeare, and liverie of seisin upon this is made to the tenant for yeares; if hee in the reversion in this case grant the reversion to another, &c. and the tenant which is in the remainder after the terme of yeares attorne, this is a good attornement, and hee to whom this reversion is granted by force of such attornement shall distreine the tenant for yeares for the rent due after such attornement, albeit that the tenant for yeares did never attorne unto him. And the cause is, for that where the reversion is depending upon an estate of freehold, it sufficeth that the tenant of the freehold doe attorne upon such a grant of the reversion, &c.

"SUFFIST *que le tenant del franktenement attorna.*" (1) Note, *Littleton* saith not here, that the tenant of the franktenement [317. a.] ought in this case to attorne, but that it sufficeth that he doth attorne. And I heard sir *James Dier* chiefe justice of the common pleas hold, that in this case if the tenant for yeares did attorne, it would vest the reversion; for seeing the estate for yeares is able to support the estate for life, he shall binde him in the remainder by his attornement in respect of his estate and privitie.

Pasch. 15. Eliz. in Brasbritche's case, in Communi Banco.

Sect. 572.

(Ant. 143. a. 150. b. 247. a. 308. a.) (2. Roll. Abr. 60. 424.)

ET est ascavoir, que lou un leas a terme d'ans ou a terme de vie, ou done en taile, est fait a ascun home, reservant a tiel lessor ou donor un certaine rent, &c. si tiel lessor ou donor graunta son reversion a un auter, et le tenant del terre attourna, le rent passa al

AND it is to be understood, that where a lease for yeares or for life, or a gift in taile, is made to any man, reserving to such lessor or donor a certaine rent, &c. if such lessor or donor grant his reversion to another, and the tenant of the land attorne, the rent

† *&c.* not in L. and M. nor Roh. ‡ *soy* not in L. and M. nor Roh.

(1) [See Note 275.]

al grauntee, coment que en le fait del grant de reversion nul mention soit fait de le rent, pur ceo que le rent est incident al reversion en tiel case, et nemy è converso, &c. *Car si home voile graunter le rent en tiel case a un auter, reservant a luy le reversion del terre, coment que le tenant attorna a le grauntee, ceo serra forsque un rent secke, &c.*

rent passeth to the grantee, although that in the deed of the grant of the reversion no mention be made of the rent, for that the rent is incident to the reversion in such case, and not *è converso, &c.* For if a man will grant the rent in such case to another, reserving to him the reversion of the land, albeit the tenant attorne to the grantee, this shall bee but a rent secke, &c.

Of this *Littleton* hath spoken before in the chapter of Rents.

Sect. 573.

(Plowd. 25. b.)

ITEM, si home lessa terre a un auter pur terme de sa vie, et puis il confirma per son fait l'estate del tenant a terme de vie, le remainder a un auter en fee, et le tenant a terme de vie accepta le fait, donques est le remainder en fait en celuy a que le remainder est done ou limitte per mesme le fait. * *Car per l'acceptance del tenant a terme de vie* † *de le fait, ceo est un agreement de luy, et issint un attornement en ley. Mes uncore celuy en le remainder n'avera ascun action de waste ne auter benefit per tiel remainder, si non que il avoit le dit fait en poigne, per que le remainder fuit taile ou graunt a luy. Et pur ceo que en tiel cas le tenant a terme de vie voile per cas* ‡ *reteigner le fait a luy, a cel entent, que celuy en le remainder n'averoit ascun action de waste envers luy, pur ceo que il ne poit vener d'aver le fait en sa possession,* ‖ *il serra bone* § *et sure chose en tiel cas pur celuy en le remainder, que un fait endent soit fait per celuy que voile faire tiel confirmation, et le remaynder ouster, &c. et que celuy que fait tiel confirmation delivera un part del indenture al tenant a terme de vie, et le auter*

ALSO, if a man let land to another for his life, and after hee confirme by his deed the estate of the tenant for life, the remaynder to another in fee, and the tenant for life accepteth the deed, then is the remaynder in fait in him to whom the remaynder is given or limited by the same deed. For by the acceptance of the tenant for life of the deed, this is an agreement of him, and so an attornement in law. But yet hee in the remaynder shall not have any action of waste nor other benefit by such remaynder, unlesse that hee hath the said deed in hand, whereby the remaynder was entayled or granted to him. And because that in such case the tenant for life peradventure will retaine the deed to him, to this intent, that he in the remaynder should not have any action of waste against him, for that hee cannot come to have the deed in his possession, it will be a good and sure thing in such case for him in the remaynder, that a deed indented bee made by him which will make such confirmation, and the remaynder over, &c. and that hee which maketh such

[317. b.]

* *Car* not in L. and M. nor Roh.
† *de le fait* not in L. and M. nor Roh.
‡ *reteigner—resceiver*, L. and M. and Roh.
‖ *et pur ceo* added L. and M. and Roh.
§ *et sure chose* not in L. and M. nor Roh.

auter part a celuy que avera le remainder. Et donque il per monstrance de le part del endenture poit aver action de wast envers le tenant a terme de vie, et touts auters advantages que celuy en le remainder poit aver en tiel case, &c.

such confirmation deliver one part of the indenture to the tenant for life, and the other part to him that shall have the remaynder. And then he by shewing of that part of the indenture) may have an action of waste against the tenant for life, and all other advantages that he in the remainder may have in such a case, &c.

HERE *Littleton* putteth a case of a remainder whereunto an attornement is requisite. And this is the sixth example of an attornement in law.

(1. Roll. Abr. 301.) Vid. Sect. 325. 575.

"*Remaynder a un auter, &c.*" Of this sufficient hath beene said in the chapter of Confirmation, Sect. 525.

Vide Pl. Com. in Colthirst's case. Doct. and Stud. cap. 20. fol. 93, 94. 8. R. 2. in waste in livre escrite. 17. E. 3. Confirmat. 4. 35. H. 6. fol. 8. 14. H. 8.

"*Si non que il avoit le fait en poigne.*" And albeit he hath no remedy to come to the deed during the life of tenant for life, yet because he is privie in estate, he shall not maintaine an action of waste without shewing the deed; but when the remainder is once executed, he shall not need to shew the deed.

Pl. Com. 149. in Throckmorton's case.

"*Il serra bone et sure chose, &c.*" Hereby it appeareth how necessary it is to use learned advice in a man's conveyance, for thereby shall be prevented many questions, and not to follow the advice of him that is experimented only. For as in physicke, *Nullum medicamentum est idem omnibus*, so in law one forme or presidient of conveyance will not fit all cases.

45. E. 3. 14, 15. 11. H. 4. 39. 14. H. 4. 31. (Ant. 10. a.)

[318. a.]

Sect. 574.

*ITEM, si deux joyntenants sont, les queux lessont lour terre a un auter pur terme de vie, rendant a eux et a lour heires certaine rent per an; en cest case si un des joyntenants en le reversion relessa a l'auter joyntenant en mesme le reversion, cest releas est bone, et celuy a que le releas est fait avera solement le rent del tenant a terme de vie, et avera solement un briefe de waste envers luy, coment que il ne unques attorneroit per force de tiel releas, * &c. Et la cause est, pur le privity que un foits fuit perenter le tenant a terme de vie et eux en le reversion.*

ALSO, if two joyntenants be, who let their land to another for terme of life, rendring to them and to their heires a certaine yearely rent; in this case if one of the joyntenants in the reversion release to the other joyntenant in the same reversion, this release is good, and he to whom the release is made shall have only the rent of the tenant for life, and shall only have a writ of waste against him, although hee never attorned by force of such release, &c. And the reason is, for the privitie which once was betweene the tenant for life and them in the reversion.

* &c. not in L. and M. nor Roh.

(6. Rep. 78. 2. Roll. Abr. 403. Ant. 193. a.)

"*DEUX jointenants.*" And so it is (as it is here to be understood) albeit there be three or more joyntenants, and one of them releaseth to one of the other.

(Ant. 238.)

It is true, that there is a difference betweene these releases; for the release in the one case maketh no degree, but hee to whom the release is made is supposed in from the first feoffor; and in the other it worketh a degree, and hee to whom the release is made is in the *per* by him; yet in neither of these cases there is requisite any attornement, for both of them are within *Littleton*'s reason (for the privitie, &c.)

2. Eliz. Dier. 276. (Ant. 185. a.)

"*Par le privitie, &c.*" For if one joyntenant make a lease for yeares, reserving a rent, and dieth, the survivor shall not have the rent; and therefore *Littleton* here addeth materially, for the privitie that was betweene the tenant for life and them in the reversion.

45. E. 3. 6. b. 13. Eliz. Dier. 288. Lib. 3. fol. 86. justice Windham's case.

And here it is good to be seene what grantors or others that make conveyances, &c. are such as their grants or conveyances are either good without attornement, or where the tenant is no way compellable to attorn. Tenant for life shall not be compelled to attorne in a *quid juris clamat* upon a grant of a reversion by fine holden of the king in chiefe without licence; but the reason hereof is not because the tenant for life might be charged with the fine, for his estate was more ancient than the fine levied, but because the court will not suffer a prejudice to the king, and the king may seise the reversion and rent, and so the tenant shall be attendant to another. Also it is a generall rule, that when the grant by fine is defeasible, there the tenant shall not be compelled to attorne.

36. H. 6. 24. (1. Roll. Abr. 297.)

As if an infant levie a fine, this is defeasible by writ of error during his minoritie, and therefore the tenant shall not be compelled to attorne.

5. E. 3. 25. 31. E. 3. antient demesne 16.

So if the land be holden in ancient demesne, and he in the reversion levieth a fine of the reversion at the common law, the tenant shall not be compellable to attorne, because the estate that passed is reversible in a writ of deceit.

24. E. 3. 25. b. 37. H. 6. 33. 48. E. 3. 23.

So if tenant in taile had levied a fine, the tenant should not be compelled to attorne, because it was defeasible by the issue in taile.

(*) Lib. 3. fol. 86. justice Windham's case.

But now the statutes of 4. *H.* 7. and 32. *H.* 8. having given a further strength to fines to barre the issue in taile, the reason of the common law being taken away, the tenant in this case shall be compelled to attorne, as it was adjudged (*) in justice *Windham*'s case.

17. E. 3. 7. 22. E. 3. 18.

If an alienation be in mortmaine, the tenant shall not be compelled to attorne, because the lord paramount may defeat it.

Sect. 575.

[318.b.]

(1. Roll. Abr. 301.)

*EN mesme le maner, et pur mesme la cause, est, lou home lessa terre a un auter pur terme de vie, le remainder a un auter pur terme de vie, reservant le reversion al * lessour; en cest*

IN the same manner, and for the same cause, is it, where a man letteth land to another for life, the remainder to another for life, reserving the reversion to the lessor; in this case

* *lessour*—*luy*, L. and M. and Roh.

cest cas si celuy en le reversion relessa a celuy en le remainder et a ses heires tout son droit, &c. donques celuy en le remainder ad un fee, &c. et il avera un briefe de wast envers le tenant a terme de vie sans ascun attornement de luy, &c.

case if hee in the reversion releaseth to him in the remainder and to his heires all his right, &c. then he in the remainder hath a fee, &c. and hee shall have a writ of wast against the tenant for life without any attornement of him, &c.

This needeth no explication.

Vide Sect. 549. 553. 556.

Sect. 576.

ITEM, si home lessa terres ou tenements a un auter pur terme des ans, et puis il ousta son termour, et ent enfeoffa un auter en fee, et puis le tenant a terme d'ans enter sur le feoffee, en claimant son terme, &c. et puis fait wast; en cest case le feoffee avera per la ley un briefe de wast envers luy, et uncore il n'attornast pas † a luy. Et la cause est, come jeo suppose, pur ceo que celuy que ad droit de aver terres ou tenements pur terme d'ans, ‡ ou auterment, ne serroit per la ley misconusant de les feoffments que fuerent faits de et sur mesmes les terres, &c. Et entant que per tiel feoffment le tenant a terme d'ans fuit ⸸ mis hors de son possession, et per son entre il causast le reversion d'estre a celuy a que le feoffment fuit fait, ceo est bon attornement; car celuy a que le feoffment fuit fait, avoit nul reversion devaunt que le tenant a terme d'ans avoit enter sur luy, pur ceo que il fuit ‖ en possession en son demesne come de fee, et pur l'entrie del tenant a terme d'ans il y ad forsque un reversion, quel est per le fait le tenant a terme d'ans, scilicet, per son entrie, &c.

ALSO, if a man lett lands or tenements to another for terme of yeares, and after he ousts his termor, and thereof enfeoffe another in fee, and after the tenant for yeares enter upon the feoffee, clayming his term, &c. and after doth waste; in this case the feoffee shall have by law a writ of waste against him, and yet hee did not attorne unto him. And the cause is, as I suppose, for that he which hath right to have lands or tenements for yeares, or otherwise, should not by law bee misconusant of the feoffments which were made of and upon the same lands, &c. And inasmuch as by such feoffment the tenant for yeares was put out of his possession, and by his entrie he caused the reversion to bee to him to whom the feoffment was made, this is a good attornement; for he to whom the feoffment was made, had no reversion before the tenant for years had entred upon him, for that he was in possession in his demesne as of fee, and by the entrie of the tenant for yeares, hee hath but a reversion, which is by the act of the tenant for yeares, scilicet, by his entrie, &c.

† *a luy* not in L. and M. nor Roh.
‡ *ou auterment* not in L. and M. nor Roh.
⸸ *Mis hors de son possession, et per son entrie il causa le reversion d'estre a celuy a que le feoffment fuit,* not in L. and M. nor Roh.
‖ *en possession*—*seisie,* L. and M. and Roh.

Sect. 577.

MESME la ley est, come il semble, lou un leas est fait pur terme de vie, savant le reversion al lessour, si le lessour disseisist le lessee, et fait feoffment en fee, si le tenant a terme de vie enter et fuit wast, le feoffee avera briefe de waste sans ascun auter attournement, causâ quâ supra, &c.

THE same law is, as it seemeth, where a lease is made for life, saving the reversion to the lessor, if the lessor disseise the lessee, and make a feoffment in fee, if the tenant for life enter and make waste, the feoffee shall have a writ of waste without any other attornement, *causâ quâ supra, &c.* (1)

(6. Rep. 69. a.)

THERE have been now in all seven examples, that *Littleton* putteth of an attornement in law, and here he putteth two cases also of a notice in law. And the reason of both these are here rendred by *Littleton*. First for the notice, *Littleton* saith that the lessee shall not by law be misconusant of the feoffments that were made of and upon the same land. And the reason of the attornement is, because the whole fee simple passeth by the feoffment, and the lessee by his regresse leaveth the reversion in the feoffee, which (saith *Littleton*) is a good attornement. The same law it is of a tenant by statute merchant or staple, or *elegit*. And so it is of a lease for life, as *Littleton* here saith; and so it was resolved [e] in *Brasbritche*'s case, and after in the deane of *Paul*'s his case in the common place. But shall the lessee in this case whether hee will or no doe an act that amounts to an attornement, viz. by his regresse, or else lose the profit of his land? And some doe hold, that in that case if the lessee for life doe recover in an assise, this is no attornement, because hee comes to it by course of law, and not by his voluntary act. And yet in that case, as in the case of the fine, the state of the reversion is in the feoffee. [f] But others doe hold it all one in case of a recovery, and a regresse.

46. E. 3. 30. b. 2. H. 5. 4. 5. H. 5. 12. 34 H. 6. 6. 18. E. 3 47. 9. H. 6. 10. (5. Rep. 113 b.) [e Brasbritche's case P. 15 Eliz. Dean of Paul's case 20. Eliz. (34. H. 6. 7.)

[319. a.]

[f] 18. E. 3. 48. b. Lib. 6. fol. 60. b. Sir Moyle Finche's case.

[g] If the lessor disseise tenant for life or ouste tenant for yeares, and maketh a feoffment in fee, by this the rent reserved upon the lease for life or yeares is not extinguished, but by the regresse of the lessee the rent is revived, because it is incident to the reversion: and so hath it beene adjudged. But if a man be seised of a rent in fee, and disseise the tenant of the land, and make a feoffment in fee, the tenant re-entreth, this rent is not revived. And so note a diversitie between a rent incident to a reversion, and a rent not incident to a reversion.

[g] 9. H. 6. 16. Deane of Paul's case, ubi supra. (Post. 321. b.) (6. Rep. 70. a.)

If two joynt lessees for yeares or for life be ousted or disseised by the lessor, and he enfeoffe another, if one of the lessees re-enter, this is a good attornement, and shall binde both; for an attornement in law is as strong as an attornement in deed.

(Ant. 297. b. 2. Rep. 67. a.)

If a man make a lease for life, and then grant the reversion for life, and the lessee attorne, and after the lessor disseise the lessee for life, and make a feoffment in fee, and the lessee re-enter, this shall leave a reversion in the grantee for life, and another reversion in the feoffee, and yet this is no attornement in law of the grantee

(6. Rep. 69. Mo. 99. Ant. 266. a.)

(1) [See Note 276.]

grantee for life, because he doth no act, nor assent to any which might amount to an attornement in law. *Et res inter alios acta alteri nocere non debet.* Neither hath the grantee for life the land in possession, so as he may well be misconusant of the feoffment made upon the land, and so out of the reason of *Littleton*. But yet the reversion in fee doth passe to the feoffee. (2. Rep. 671.)

[319. b.] Sect. 578.

ITEM, si leas soit fait pur terme de vie, le remainder a un auter en le taile, le remainder ouster a les droit heires le tenant a terme de vie; en cest case, si le tenant a terme de vie granta son remainder en fee a auter per son fait, cel remainder maintenant passa per le fait sans ascun attournment, * *&c. car si ascun doit attorne en cest case, ceo serroit le tenant a terme de vie, et en vain serroit que il atturneroit sur son grant demesne, &c.*

ALSO, if a lease be made for life, the remainder to another in taile, the remainder over to the right heires of the tenant for life; in this case, if the tenant for life grant his remainder in fee to another by his deede, this remainder maintenant passeth by the deede without any attornement, &c. for that if any ought to attourne in this case, it should be the tenant for life, and in vaine it were that he should attorne upon his owne grant, *&c.*

HERE it appeareth, that where the ancestor taketh an estate of freehold, and after a remainder is limited to his right heires, that the fee simple vesteth in himself, as well as if it had beene limited to him and his heires; for his right heires are in this case words of limitation of estate, and not of purchase. Otherwise it is where the ancestor taketh but an estate for yeares: as if a lease for yeares be made to *A.* the remainder to *B.* in tayle, the remainder to the right heires of *A.* there the remainder vesteth not in *A.* but the right heires shall take by purchase if *A.* dies during the estate taile: for as the ancestor and the heire are *correlatives* of inheritances, so are the testator and executor, or the intestate and administrator of chattels. And so it is if *A.* make a feoffment in fee to the use of *B.* for life, and after to the use of *C.* for life or in taile, and after to the use of the right heires of *B.* *B.* hath the fee simple in him, as well when it is by way of limitation of use, as when it is by act executed. (1) (Ant. 13. b. 1. Roll. Abr. 127.) (1. Rep. 66.) (Ant. 54. b.) (1. Roll. Abr. 627.)

" *En vaine serroit, &c.*" *Quod vanum et inutile est lex non requirit. Lex est ratio summa, quæ jubet quæ sunt utilia et necessaria, et contraria prohibet*; and arguments drawne from hence are forcible in law. Vid. Sect. 194. 273.

* *&c.* not in L. and M. nor Roh.

(1) The observation of Mr. Douglas upon this point (note to page 506 of his Reports) deserves the reader's most serious attention.

Sect. 579.

ITEM, si soit seignior et tenant, et le tenant tient del seignior per certaine rent, et service de chivaler, si le seignior granta les services de son tenant per fine, les services sont maintenant en le grantee per force del fine; mes uncore le seignior ne poet pas distreyne per ascun parcel de les services sans attournment: mes si le tenant devia (son heire deins age) le seignior avera le gard del corps del heire, et de ses terres, &c. coment que il ne unque atturnast, pur ceo que le seigniorie fuit en le grantee maintenant per force del fine. Et auxy en tiel cas, si le tenant morust sans heire, le seignior avera les tenements per voy d'escheat.

ALSO, if there be lord and tenant, and the tenant holdeth of the lord by certaine rent, and knight's service, if the lord grant the services of his tenant by fine, the services are presently in the grantee by force of the fine; but yet the lord may not distreine for any parcell of the services, without attornement: but if the tenant dieth, his heire within age, the lord shall have the wardship of the bodie of the heire, and of his lands, &c. albeit he never attorned, because that the seigniorie was in the grantee presently by force of the fine. And also in such case if the tenant die without heire, the lord shall have the tenancie by way of escheat.

[320. a.]

HERE *Littleton* beginneth to shew what advantages the conusee of a fine may take before attornement, and what not.

[b] First, he cannot distreyne, because an avowrie is in lieu of an action; and thereupon privitie is requisite. So likewise, and for the same cause, he can have no action of waste, nor writ of entrie, *ad communem legem*, or *in consimili casu*, or *in casu proviso*, writ of customes and services, nor writ of ward, &c. (1)

But if a man make a lease for yeares, and grant the reversion by fine, if the lessee be ousted, and the conusee disseised, the conusee, without attornement, shall maintaine an assise; for this writ is maintained against a stranger, where there needeth no privitie. And such things as the lord may seise, or enter into without suing any action, there the conusee, before any attornement, may take benefit thereof; as to seise a ward or heriot; or to enter into the lands or tenements of a ward; or escheated to him; or to enter for an alienation of tenant for life or yeares; or of tenant by statute merchant, staple, or *elegit*, to his disherison.

[b] 8. E. 3. 44. 26. E. 3. 63. 10. H. 6. 16. 34. H. 6. 7. 12. E. 4. 4. 40. E. 3. 7. 5. H. 5. 12. 48. E. 3. 15. b. 3. E. 2. droit. 33. (F. N. B. 60. Sect. 564. 4. Inst. 209, 210.)

Sect. 580, 581, 582.

EN mesme le manner est, si home granta le reversion de son tenant a terme de vie a un auter per fine, le reversion passa maintenant al grantee per

IN the same manner it is, if a man graunt the reversion of his tenant for life to another by fine, the reversion maintenant passeth to the grantee by

(1) [See Note 277.]

par force del fine, mes le grantee jammes n'avera action de wast sans atturnment, &c.

by force of the fine, but the grantee shall never have an action of wast without attornment, &c.

Sect. 581.

*MES uncore si le tenant a terme de vie alienast en fee, le grantee poet enter, * &c. pur ceo que le reversion fuit en luy per force del fine, et tiel alienation fuit a son disheritance.*

BUT yet if the tenant for life alieneth in fee, the grantee may enter, &c. because the reversion was in him by force of the fine, and such alienation was to his disheritance.

Sect. 582.

MES en † ceo cas lou le seignior granta les services de son tenant per fine, le tenant devie (son heire esteant de plein age) le grantee per le fine n'avera reliefe, ne unques distreynera pur reliefe, sinon que il ‡ avoit l'attornement del tenaunt que morust: ‡ car de tiel chose que gist en distresse, sur que le breve de replevin est sue, &c. home doit et covient d'avower le prisel bone et droiturel, &c. et la covient estre attornement del tenant, coment que le graunt de tiel chose soit per fine: mes d'aver le gard de les terres ou tenements issint tenus durant le nonage le heire, ou de eux aver per voy d'escheat, la ne besoigne ascun distresse, &c. mes un entrie en la terre per force de le droit del seigniory que le grantee ad per force del fine, &c. Sic vide diversitatem §.

BUT in this case where the lord granteth the services of his tenant by fine, if the tenant die (his heire being of ful age) the grantee by the fine shall not have reliefe, nor shal ever distreine for reliefe, unlesse that hee hath the attornement of the tenant that dieth: for of such a thing which lieth in distresse, whereupon the writ of replevin is sued, &c. a man must and ought to avow the taking good and rightfull, &c. and there there ought to be an attornment of the tenant, although the graunt of such a thing be by fine: but to have the wardship of the lands or tenements so holden during the nonage of the heire, or to have them by way of escheat, there needs no distresse, &c. but an entrie into the land by force of the right of the seigniorie, which the grauntee hath by force of the fine, &c. *Sic vide diversitatem, &c.*

IT is said in our books that if tenaunt for life have a privilege not to be impeachable of waste, or any other privilege, if he doth attorne without saving his privilege, that hee hath lost it; which is so to be understood, where he attornes in a *quid juris clamat* brought by the conusee of a fine, that if he claimeth not his privilege,

40. E. 3. 7.
43. E. 3. 5.
48. E. 3. [illegible]
45. E. 3. 6.
21. E. 3. 48.
24. E. 3. 32.
39. H. 6. 25.

* *&c.* not in L. and M. nor Roh.
† *ceo* not in L. and M. nor Roh.
‡ *avoit l'attornement—fusoit attournement*, L. and M. and Roh.
‡ *&c.* added L. and M. and Roh.
§ *&c.* added L. and M. and Roh.

F. N. B. 136. b. (3. Rep. 86. 11. Rep. 79. 1. Roll. Abr. 412. 296. Ante 274. b.)

lege, but attorne generally, his privilege is lost, for that the writ supposeth him to be but a bare tenant for life; and by his generall attornement, according to the writ, he is barred for ever to claime any privilege but a bare estate for life. But if upon a grant of the reversion by deed, the tenant for life doth attorne, he loseth no privilege; for there can be no conclusion or barre by the attornement *in paiis:* and so it is of an attornement in law. As if the lessor disseise the lessee for life, and make a feoffement in fee, and the lessee re-enter; this is an attornement in law, which shall not prejudice him of any privilege: so it is if the lessor levie a fine of [320. b. the reversion, and the conusee die without heire, whereby the reversion escheateth, in this case the law doth supply an attornment, and therefore the lessee shall lose no privilege. But in the *quid juris clamat*, if the lessee shew his estate and his privilege, and is ready, saving to him his privilege, &c. to attorne, hereby either his privilege shall bee allowed and entred of record, or he shall not be compelled to attorne: [*b*] and if the plaintiff be within age, so as hee cannot acknowledge the privilege, the tenant shall not be compelled to attorne untill his full age, when he may acknowledge it. But otherwise it is (as some hold) if a *quid juris clamat* be brought by baron and feme, the privilege shall be entred into the rolle, notwithstanding shee is a feme covert. And in a *per quæ servicia* brought by the conusee of the mesne; the tenant may shew that he holds by homage auncestrell, and saving to him his warrantie and acquitall, he is readie to attorne. In the same manner, if the tenant hath any other acquitall, and the mesne levie a fine to one for life, the remainder to another in fee, the tenant for life bringeth a *per quæ servicia*, and the tenant is ready to attorne, saving his acquitall, and the plaintife acknowledgeth it, and thereupon the tenant attorne, tenant for life dieth; in this case albeit regularly the attornement to the tenant for life is an attornement to him in the remainder, yet in this case hee in the remainder shall not distreine, till he hath acknowledged the acquitall, which must be in a *per quæ servicia*, brought by him against the tenant.

(5. Rep. 39. b.) (Ant. 157. b) [*b*] 43. E. 3. 5. (6. Rep 4. a. 9. Rep. 85. b.) 45. E. 3. 11. a. Vet. N. B. in per quæ servicia. 5. E. 3. Mesne 56. & per quæ servicia 16. 37. H. 6. 33. 39. H. 6. 25. 18. E. 4. 7. (7. Rep. 4. b.) Vid. Sect. 557.

" *Alien en fee, &c.*" Of this sufficient hath beene said in the next precedent Section.

" *N'avera reliefe, &c.*" Of this sufficient hath beene said in the next precedent Section.

Sect. 583. [321. a

*ITEM, si soit seignior mesne et tenant, et le mesne graunta per fine les services de son tenant a un auter en fee, et puis le grantee morust sans heire, ore les services del mesnaltie deviendront et escheate al seignior paramont per voy d'escheat; * et si apres les services del*

ALSO, if there be lord, mesne and tenant, and the mesne grant by fine the services of his tenant to another in fee, and after the grantee die without heire, now the services of the mesnaltie shall come and escheate to the lord paramont by way of escheat;

* *et* not in L. and M. nor Roh.

del mesnaltie sont aderere, en cest cas celuy que fuit seignior paramont poit distreiner le tenant, nient obstant que le tenant ne unques atturnast: et le cause est, pur ceo que le mesnaltie fuit en fait en le grantee per force de le † dit fine, et le seignior paramont puissoit avower sur le grantee, pur ceo que il fuit son tenant en fait, coment que il ne serroit a ceo compelle, &c. Mes si le grantor en cest case deviast sans heire en la vie le grantee, donque il serroit compelle d'avower sur le grantee; et auxy entant que le seigniour paramont ne claime le mesnaltie per force del graunt fait per fine levie per le mesne, ‡ mes per vertue de son seigniorie paramont, ‖ scilicet, *per voy d'escheat, il avowa sur le tenant pur les services que le mesne avoit, &c. coment que le tenant ne unques at[illegible] pas.*

escheat; and if afterwards the services of the mesnaltie bee behind, in this case hee which was lord paramont may distreine the tenant, notwithstanding that the tenant did never attorne: and the cause is, for the mesnaltie was in deed in the grantee by force of the said fine, and the lord paramont may avow upon the grantee, because in deed hee was his tenant, albeit hee shall not be compelled to this, &c. But if the grantor in this case had died without heire in the life of the grantee, then he should bee compelled to avow upon the grantee; and also in as much the lord paramont doth not claime the mesnaltie by force of the grant made by fine levied by the mesne, but by vertue of his seigniorie paramont, *viz.* by way of escheat, he shall avow upon the tenant for the services which the mesne had, &c. albeit that the tenant did never attorne.

HERE *Littleton* putteth the case where one that claimeth under a conusee by fine may distraine or maintaine any action, albeit there was never any attornement made to the conusee, or to him that hath his estate. 5. H. 7. 18.

45. E. 3. 2.
34. H. 6. 7.
37 H. 6 38.
39. H. 6. 32. per curiam.

And here is a diversitie betweene an act in law that giveth one inheritance in lieu of another, and an act in law that conveyeth the estate of the conusee only. Of the former *Littleton* here putteth an example of the escheat of the mesnaltie which drowneth the seigniorie paramont; and therefore reason would that the lord by this act in law should have as much benefit of the mesnaltie escheated, as he had of the seigniorie that is drowned; and the rather for that the law casteth it upon him, and hee hath no remedie to compell the tenant to attorne. Another reason hereof *Littleton* here yeeldeth, because the lord commeth to the mesnaltie by a seigniorie paramont, and therefore there needeth no attornement. [c] As if lessee for life be of a mannor, and he surrender his estate to the lessor, there needeth no attornement of the tenant's, because the lessor is in by a title paramount. But if the conusee dieth, and the law casteth his seigniorie upon his heire by descent, he shall not be in any better estate than his ancestor was, because he claimeth as heire meerely by the conusee.

Lib. 6. fol. 68. Sir Moyle Finche's case.

[321. b.]

[c] Temps E. 2. Attorn. 18. 39 H. 6. 38. per Prisot.

(Ant. 104. b. 309. b.)

So it is (as hath beene said) if the conusee of a fine before attornement bargaineth and selleth the seigniorie by deed indented and inrolled, the bargainee shall not distraine, because the bargainor, from whom the seigniorie moveth, had never actuall possession.

(5. Rep. 113.)

So

† *dit* not in L. and M. nor Roh.
‡ *&c.* added L. and M. and Roh.
‖ *scilicet*, not in L. and M. nor Roh.

Sir Moyle Finche's case, ubi supra.

So and for the same reason if a reversion be granted by fine, and the conusee before attornement disseise the tenant for life and make a feoffment in fee, and the lessee re-enter, the feoffee shall not distraine.

Sect. 584.

EN mesme le maner est, lou le reversion d'un tenant a terme de vie soit grant per fine a un auter en fee, et le grantee apres morust sans heire, ore le seignior ad le reversion per voy d'escheat; et si apres le tenant fait wast, le seignior avera briefe de wast envers luy, nient contristeant que il ne unques atturna, causâ quâ supra. *Mes lou un home claime per force del graunt fait per le fine,* † scilicet, *come heire, ou come assignee, &c. la il ne distreinera* ‡ *ne avowera, ne avera action de wast, &c. sans attornement.*

IN the same manner it is, where the reversion of a tenant for life is granted by fine to another in fee, and the grantee afterwards dieth without heire, now the lord hath the reversion by way of escheat; and if after the tenant maketh wast, the lord shall have a writ of waste against him, notwithstanding that he never attorned, *causâ quâ supra.* But where a man claimeth by force of the grant made by the fine, *scil.* as heire, or as assignee, &c. there hee shall not distraine nor avowe, nor have an action of waste, &c. without attornement.

(Ant. 104. b.)

[d] 45. E. 3. 2. 34. H. 6. 7. 5. H. 7. 18 per curiam. 13. H. 4. avowrie 237. (4. Rep. 64. 1. Roll. Abr. 293. Ant. 153. a.) Lib. 6. fol. 68. in Sir Moyle Finche's case.

HERE *Littleton* expresseth two diversities. First, betweene an act in law, and the grant of the party. This case is put of an [d] escheat, which is a meere act in law, but so it is when it is partly by act in law, and partly by the act of the party; as if the conusee of a statute merchant extendeth a seigniorie or rent, hee shall distraine without any attornement. If a man make a lease for life or yeares, and after levie a fine to *A.* to the use of *B.* and his heires, *B.* shall distraine and have an action of waste, albeit the conusee never had any attornement, because the reversion is vested in him by force of the statute, and hath no remedy to compell the lessee to attorne.

(Mo. 92. 68.) 27. H. 8. cap. 10.

(Ant. 309. 2. Cro. 193. 5. Rep. 113. a. 6. Rep. 68. b. 10. Rep. 45.)

And so it is of a bargaine and sale by deed indented and inrolled, but this is by force of a statute since *Littleton* wrote.

Secondly, where he that commeth in by act in law is in the *per*, as the heire of the conusee, who setteth in his ancestor's seat, *tanquam pars antecessoris de sanguine*, and the lord by escheat, which is an estranger, and commeth in meerely in the *post*.

† *&c.* added L. and M. and Roh.
‡ *ne avowera* not in L. and M. nor Roh. nor in MSS.

Sect. 585.

(F. N. B. 121. a.)

[322. a.]

ITEM, en ancient boroughs et cities, lou terres et tenements deins mesme les boroughes et cities sont devisable per testament per custome et use, &c. si en tiel § borough ou citie home soit seisie de rent service, ou de rent charge, et devisa cel rent ou service a un auter per son testament et morust; en cest cas celuy a que tiel devise est fait, poit distreiner le tenant pur le rent ou service aderere, coment que le tenant n'attorna pas.

ALSO, in ancient boroughes and cities, where lands and tenements within the same boroughes and cities are devisable by testament by custome and use, &c. if in such borough or citie a man be seised of a rent service, or of a rent charge, and deviseth such rent or service to another by his testament and dieth; in this case, he to whom such devise is made, may distreine the tenant for the rent or service arere, although the tenant did never attorne.

HERE doth *Littleton* put a case where a man may have a seigniory, rent, reversion, or remainder meerely by the act of the party, and may distraine, and have any action without any attornement, and that is by devise of lands devisable by custome when *Littleton* wrote, by the last will and testament of the owner.

6. 6. 5. [illegible] 18. 19. H. 6. 24. 21. H. 6. 38. F. N. B. 121. a.

Sect. 586.

(6 Rep. 23.) (5. Rep. 68.)

(1. Rep. 120. 3. Rep. 19. 6. Rep. 16. 81.) (8. Rep. 94.) (10. Rep. 46. 87.) (4. Rep. 66.)

EN mesme le maner est, lou home lessa tiels tenements devisables a un auter pur terme de vie, ou pur terme d'ans, et devisa le reversion per son testament a un auter en fee, ou en fee taile, et morust, et puis le tenant fait wast, celuy a que le devise fuit fait avera briefe de wast, coment que le tenant ne unque attorna. Et la cause est, pur ceo que la volunt le devisour fait per son testament serra performe solonque l'entent del devisour; et si l'effect de ceo girroit sur l'attournement del tenant, † donques per case le tenant ne voyle unques atturner, et donques le volunt del devisor ne serroit unque performe, ‡ &c. et pur ceo le devisee distreinera, &c. ou avera action de wast, &c. sans attournement. Car si home devisa tiels tenements a un auter per son

IN the same manner is it, where a man letteth such tenements devisable to another for life, or for yeares, and deviseth the reversion by his testament to another in fee, or in fee taile, and dyeth, and after the tenant commits waste, he to whom the devise was made shall have a writ of waste, although the tenant doth never attorne. And the reason is, for that the will of the devisor made by his testament shall bee performed according to the intent of the devisor; and if the effect of this should lye upon the attornement of the tenant, then perchance the tenant would never attorne, and then the will of the devisor should never bee performed, &c. and for this the devisee shall distraine, &c. or he shall have an action of waste, &c.

§ *cas* added L. and M. and Roh.
† *&c.* added L. and M. and Roh.
‡ *&c.* not in L. and M. nor Roh.

son testament, habendum sibi imperpetuum, *et moruſt, et le deviſee enter, il ad fee ſimple*, causâ quâ ſupra; * *uncore* † *ſi fa t de feoffment uſt eſte* ‡ *fait a luy per le deviſor en ſa vie de meſmes les tenements*, habendum sibi imperpetuum, *et livery de ſeiſin ſur ceo fuit fait, il n'averoit eſtate forſque pur terme de ſa vie.*

&c. without attornement. For if a man deviſeth ſuch tenements to another by his teſtament, *habendum ſibi imperpetuum*, and dieth, and the deviſee enter, hee hath a fee ſimple, *cauſâ quâ ſupra*; yet if a deed of feoffment had beene made to him by the deviſor of the ſame tenements, *habendum ſibi imperpetuum*, and livery of ſeiſin were made upon this, hee ſhould have an eſtate but for terme of his life.

[322.b.]

BOTH this and the preceding caſe ſtand upon one and the ſame reaſon, which *Littleton* here yeeldeth, viz. becauſe that the will of the deviſor expreſſed by his teſtament ſhall be performed according to the intent of the deviſor; and it ſhall not lie in the power of the tenant or leſſee to fruſtrate the will of the deviſor by denying his attornment. Here *Littleton* mentioneth a maxime of the common law, viz. *Quòd ultima voluntas teſtatoris eſt perimplenda ſecundum veram intentionem ſuam*; and, *Reipublicæ intereſt ſuprema hominum teſtamenta rata haberi.*

(... Roll. Abr. 293.) Vide Sect. ... Bracton lib. ... f. 11. & f. 60. Fleta lib. 2. cap. 15. Britton fol. 78. & f. 212. b. (6. Rep. 23. Ant. 9. b.)

"Teſtament," *Teſtamentum, i. e. teſtatio mentis*, which is made *nullo præſentis metu periculi, ſed ſolâ cogitatione mortalitatis. Omne teſtamentum morte conſummatum.*

22. E. 3. 16. 34. H. 6. 7. 15. H. 7. 12. 19. H. 8. 4.

"*Car ſi home deviſa tiels tenements a un auter, &c.*" Here *Littleton* putteth a caſe where the intent of the teſtator ſhall be taken, viz. where a man by deviſe ſhall have a fee ſimple without the words (heires); and here *Littleton* putteth the diverſitie betweene a will and a feoffment.

Vide Sect. 167.

Now by the ſtatutes of 32. and 34. *H.* 8. (as hath beene ſaid in the chapter of Burgage) lands, tenements, and hereditaments are deviſable, as by the ſaid acts doe appeare.

Sect. 587.

ITEM, ſi home ſeiſie d'un mannor quel eſt parcel en demeſne et parcel en ſervice, et ent ſoit diſſeiſie, mes les tenants que teignont del mannor ne unque attournant § *a le diſſeiſor; en ceſt cas, coment que le diſſeiſor moruſt ſeiſie, et ſon heire ſoit eins per diſcent, &c. uncore poit le diſſeiſee diſtreine pur le rent arere, et aver les ſervices, &c. Mes ſi les tenants viendront al diſſeiſor, et diont, Nous deveignomus voſtre tenants,*

ALSO, if a man bee ſeiſed of a mannor which is parcell in demeſne and parcell in ſervice, and is thereof diſſeiſed, but the tenants which hold of the mannor doe never attorne to the diſſeiſor; in this caſe, albeit the diſſeiſor dieth ſeiſed, and his heire is in by diſcent, &c. yet may the diſſeiſee diſtreine for the rent behinde, and have the ſervices, &c. But if the tenants come to the diſſeiſor and ſay, We

* *et* added L. and M. and Roh.
† *ſi—le*, L. and M. and Roh.
‡ *uſt eſte—fuit*, L. and M.
§ *a le—de le*, L. and M. and Roh.

tenants, &c. ou auter attournement a luy fesoyent, &c. et puis le disseisor morust seise, donque le disseisee ne poit distreine pur le rent, &c. pur ceo que tout le manor discendist al heire le disseisor, &c.

We become your tenants, &c. or make to him some other attornement, &c. and after the disseisor dieth seised, then the disseisee cannot distraine for the rent, &c. for that all the mannor descendeth to the heire of the disseisor, &c.

LITTLETON having spoken of estates gained by lawful conveyances, doth now speake of estates gained by wrong; and here putteth a case of a disseisin of a mannor, where it appeareth, that the disseisor cannot disseise the lord of the rents or services without the attornement of the tenants to the disseisor; for seeing an attornement is requisite to a feoffment and other lawfull conveyances, *à fortiori*, a disseisor or other wrong doer shall not gaine them without attornement. The like law is of an abator and an intrudor. But albeit the disseisor hath once gotten the attornement of the tenants and payment of their rents, yet may they refuse afterwards for avoiding of their double charge. And here the attornement of the tenant of a mannor to a disseisor of the demeanes shall dispossesse the lord of the rents and services parcell of the mannor, because both demeanes, rents and services make but one entire mannor, and the demeanes are the principall: but otherwise it is of rents and services in grosse, as in this next Section our author teacheth us.

(6. Rep. 69. a.)

[323. a.]

6. H. 7. 14.
11. H. 7. [illegible]
11. H. 4. [illegible]
(Cro. Car. 303.
Ant. 180.)

(1. Roll. Abr. 662.)

Sect. 588.

(Cro. Car. 303.
Roll. Abr. 658.)
F. N. B. 179. k. (Ant. 180. b. 2. Siderf. 75.)

*MES si un tient de moy per rent service, le quel est un service en grosse, * et nient per reason de mon mannor, et un auter que nul droit ad, † claima le rent, ‡ et receive et prent mesme le rent de mon tenant per cohersion de distres, ou per auter forme, et disseisist moy per tiel prender de rent; coment que tiel disseisor morust issint seisie en pernant de rent, uncore apres sa mort jeo puissoy bien distreiner le tenant pur le rent que fuit aderere devant le ‖ decease del disseisor, et auxy apres son decease. Et la cause est, pur ceo que tiel disseisor n'est pas mon disseisor forsque a ma election et ma volunt. Car coment que il prent le rent de*

BUT if one holdeth of mee by rent service, which is a service in grosse, and not by reason of my mannor, and another that hath no right, claimeth the rent, and receives and taketh the same rent of my tenant by coertion of distresse, or by other forme, and disseiseth mee by such taking of the rent, albeit such disseisor dieth so seised in taking of the rent, yet after his death I may well distreine the tenant for the rent which was behinde before the decease of the disseisor, and also after his decease. And the cause is, for that such disseisor is not my disseisor but at my election and will. For albeit he taketh the rent of my tenant,

* *et nient per reason de mon mannor*, not in L. and M. nor Roh.
† *claima—claimant mesme*, L. and M. and Roh.
‡ *et receive—a receiver*, L. and M. and Roh.
‖ *decease—distress*, L. and M. and Roh.

de mon tenant, &c. uncore jeo puissoy a touts foits distreiner mon tenant pur le rent arere §, issint que il est a moy forsque sicome jeo voile sufferer le tenant estre per tant de temps arere ✝ pur paier a moy meme le rent, &c.

tenant, &c. yet I may at all times distreine my tenant for the rent behinde, so as it is to mee but as if I will suffer the tenant to bee so long time behinde in payment of the same rent unto me, &c.

Sect. 589.

(5. Rep. 77.)

CAR le payment de mon tenant a un auter a que il ne doit pas payer, n'est pas disseisin a moy, ne oustra moy pas de mon rent sans ma volunt ¶ et ma election, &c. Car coment que jeo puissoy aver assise envers tiel pernor, uncore ceo est a mon election, si jeo voile prender luy come mon disseisor, ou non. Issint tiels discents de rents en gros ne ousteront pas le seignior de distreyner, mes a chescun temps ils poyent bien distreiner pur le rent arere, &c. Et en cest case si apres le distresse de luy que issint torciousment prist le rent jeo graunt per mon fait le service a un auter, et le tenant attourna, ceo est assets bone, et les services per tiel grant et attournement maintenant sont en le grantee, &c. Mes auterment est lou le rent est parcel del manor, et le disseisor morust seisie del manor entier, come en le case procheine avant est dit, &c.

FOR the payment of my tenant to another to whom hee ought not to pay, is no disseisin to me, nor shall oust me of my rent without my will and election, &c. For although I may have an assise against such pernor, yet this is at my election, whether I will take him as my disseisor, or no. So such discents of rents in grosse shall not oust the lord of his distresse, but at any time he may well distreyne for the rent behinde, &c. And in this case if after the distresse of him which so wrongfully tooke the rent, I grant by my deed the service to another, and the tenaunt attorne, this is good enough, and the services by such grant and attornement are presently in the grantee, &c. But otherwise it is where the rent is parcell of a mannor, and the disseisor dieth seised of the whole mannor, as in the case next before is sayd, &c.

[323. b.]

(2. Rep. 37. 9 Rep. 51. Hob. 322.)

HERE *Littleton* putteth a diversitie betweene a rent service parcel of a mannor, whereof he had spoken before, and a rent service in grosse. For a man cannot be disseised of a rent service in grosse, rent charge, or rent secke, by attornement or payment of the rent to a stranger, but at his election; for the rule of law is, *Nemo redditum alterius invito domino percipere aut possidere potest*; and our author hath before * taught us what be disseisins of rents services, rents charges, and rent secks, and payment to a stranger is none of them, but at the lord's election, as our author here saith.

* Vid. Sect. 237, 238, 239, 240. (Cro. Car. 303.)

"*Pernor*," *i. e.* the taker of my rent. But if the disseisee bring an assise against such a pernor, then he doth admit himselfe out of possession.

24. E. 3. 4. 1. E. 5. 5. See the authorities there following in the next

"*Discents.*"

§ *&c.* added L. and M. and Roh.
✝ *pur—de*, L. and M. and Roh.
¶ *et—ou sans*, L. and M. and Roh.

Discent." A discent of a rent in grosse bindeth not the right owner but that he may distreyne, albeit he admitted himselfe out of possession, and determined his election, as by bringing of an assise, &c.

If the tenant of the land pay the rent to a stranger which hath no right thereunto, and the right owner release to him, this release is good, because he thereby admitted himselfe to bee out of possession. But if the tenant had given him any thing in name of attornement, and the right owner had released to him, this release had beene void, because an attornement only can be no disseisin of the rent.

paroffe.
5. E. 4. 1.
23. H. 3. tit. Aff. 439.
24. E. 3. 40. 34.
16. Aff. p. 15.
16. E. 3. Release 56. 1. E. 5. 5.
F.N.B. 179. E.
15. E. 4. 8.
Flet. li. 4. ca. 12.

" *Jeo grant per mon fait, &c.*" This also proveth, that the right owner is not out of possession, and that this grant over is a demonstration of his election that hee is in possession.

(Ant. Sect. 541.)

Sect. 590.

(Cro. Car. 303.) (Dyer 94. b.) (8. Rep. 89.)

[324. a.]

ITEM, si jeo sue seisie d'un manor, parcel en demesne, et parcel en service, et jeo done certaine acres del terre, parcel de demesne de mesme le manor, a un auter en le taile, rendant a moy et a mes heires un certaine rent, &c. si en cest case jeo sue disseisie de la manor, et touts les tenants atturnont et payont lour rents al disseisor, et auxy le dit tenant en le taile paya le rent per moy reserve, al disseisor, et puis le disseisor morust seisie, * *&c. et son heire entra, et est eins per discent, uncore en cest case jeo puisse bien distreigner le tenant en le taile, et ses heires, pur le rent per moy reserve sur le done,* scilicet, *auxy-bien pur le rent esteant aderere devant le descent al heire le disseisor, et auxy pur le rent que happa d'estre aderere apres mesme le discent, nient obstant tiel morant seisie del disseisor, &c. Et la cause est, pur ceo que quant home dona tenements* † *en le taile, savant le reversion a luy, et il sur le dit done reserva a luy un rent ou auters services, tout le rent et les services sont incidents a la reversion; et quant un home ad un reversion, il ne puissoit estre ouste de son reversion per le fait d'un*

ALSO, if I be seised of a mannor, parcell in demesne, and parcell in service, and I give certaine acres of the land, parcell of the demesne of the same mannor, to another in taile, yeelding to mee and to my heires a certaine rent, &c. if in this case I be disseised of the mannor, and all the tenaunts attorne and pay their rents to the disseisor, and also the sayd tenant in taile pay the rent by me reserved, to the disseisor, and after the disseisor dieth seised, &c. and his heire enter, and is in by discent, yet in this case I may wel distreyne the tenant in taile, and his heires, for the rent by me reserved upon the gift, *scilicet*, as well for the rent being behinde before the discent to the heire of the disseisor, as also for the rent which happeth to be behind after the same discent, notwithstanding such dying seised of the disseisor, &c. And the reason is, for that when a man giveth lands in taile, saving the reversion to himselfe, and hee upon the sayd gift reserveth to himselfe a rent or other services, all the rent and services are incident to the reversion; and when a man

* &c. not in L. and M. nor Roh. † *a un auter* added in L. and M. and Roh.

d'un estrange [illegible] *sinon que le tenant soit ouste de son* [illegible]*ate et possession, &c. Car si longement * que le tenant en le taile et ses heires continuont lour possession per force de mon done, cy longement est le reversion en moy et en mes heires: et entant que le rent et les services reserves sur tiel done sont incidents et dependants al reversion, quecunque que ad le reversion, avera mesme le rent et services, &c.*

a man hath a reversion h[illegible]nnot be ousted of his reversion by the act of a stranger, unlesse that the tenaunt be ousted of his estate and possession, &c. For as long as the tenant in taile and his heires continue their possession by force of my gift, so long is the reversion in me and in my heires: and in as much as the rent and services reserved upon such gift be incident and depending upon the reversion, whosoever hath the reversion, shall have the same rent and services, &c.

Sect. 591.

[324. b.]

EN mesme le maner est, lou jeo lessa parcel del demesne del manor a un auter pur terme de vie, ou pur terme d'ans, rendant a moy certaine rent, &c. coment que jeo soy disseisie del manor, &c. et le disseisor morust seisie, † &c. et son heire ‡ esteant eins per discent, uncore jeo distreiner pur le rent arere ut supra, *nient obstant tiel discent; car quant home ad fait tiel done en taile, ou tiel leas pur terme de vie, ou pur terme d'ans, del parcel de le demesne de un manor, &c. savant le reversion a tiel donour ou lessour, &c. et puis il soit disseisie de la manor, &c. tiel reversion apres tiel disseisin est sever del manor en* [illegible]*it, coment que ne soit sever en droit. ‡ Et issint poyes veier (mon fits) diversitie, lou il y ad un manor parcel en demesne et parcel en services, les queux services sont parcel de mesne le manor* [illegible]*nt incidents a ascun reversion, &c. et lou ils sont incidents al reversion, &c.*

IN the same manner is it, where I let parcell of the demesnes of the mannor to another for terme of life, or for terme of yeares, rendring to mee a certaine rent, &c. albeit I be disseised of the mannor, &c. and the disseisor die seised, &c. and his heire bee in by discent, yet I may distreine for the rent arere *ut supra*, notwithstanding such discent; for when a man hath made such a gift in taile, or such a lease for life, or for yeares, of parcell of the demesnes of a mannor, &c. saving the reversion to such donor or lessor, &c. and after he is disseised of the mannor, &c. such reversion after such disseisin is severed from the mannor in deed, though it be not severed in right. And so thou mayst see (my sonne) a diversitie, where there is a mannor parcell in demesne and parcell in services, which services are parcell of the same mannor not incident to any reversion, &c. and where they are incident to the reversion, &c.

(Cro. Car. 303. 1. Roll. Abr. 658. 11. Rep. 47, 48. Plowd. 297. b.)

HERE *Littleton* putteth a diversitie betweene rents and services parcell of a mannor (whereof he had spoken before) and rents and services incident to a reversion parcell of a mannor.

And

* *en ceo cas* added L. and M. and Roh.
† *&c.* not in L. and M.
‡ *esteant* not in L. and M. nor Roh.
‡ *&c.* added L. and M. and Roh.

And the reason of this diversitie is, for that as long as the donee in taile, lessee for life, or lessee for yeares, are in possession, they preserve the reversion in the donor or lessor; and so long as the reversion continue in the donor or lessor, so long do the rents and services which are incident to the reversion belong to the donor or lessor. Neither can the donor or lessor be put out of his reversion, unlesse the donee or lessee be put out of their possession; and if the donee or lessee be put out of their possession, then consequently is the donor or lessor put out of their reversion. But if the donee or lessee make a regresse, and regaine their estate and possession, thereby doe they *ipso facto* revest the reversion in the donor or lessor.

And here is to be observed, that when a man is seised of a mannor, and maketh a gift in taile, or lease for life, &c. of parcell of the demesne of the mannor, [*a*] the reversion is part of the mannor, and by the grant of the mannor the reversion shall passe with the attornement of the donee or lessee. But if the lord make a gift in taile, or a lease for life of the whole mannor, excepting *Blacke-Acre*, parcell of the demesnes of the mannor, and after he granteth away his mannor; *Blacke-Acre* shall not passe; because during the estate taile, or lease for life, it is severed from the mannor. And so note a diversitie, that a reversion of part may be parcell of a mannor in possession, but a part in possession cannot be parcell of the reversion of a mannor expectant upon any estate of freehold. But if a man make a lease for yeares of a mannor, excepting Blacke Acre, and after granteth away the mannor, Blacke Acre shall passe, because the freehold being entire, it remaineth parcell of the mannor, and one *præcipe* of the whole mannor shall serve. But otherwise it is in case of the gift in taile or lease for life excepting any part, there must be severall writs of *præcipe*, because the freehold is severall.

[*a*] 18. Ass. 38. H. 6. 33. Pl. Com. Fulmerstone's case 103. Lib. 5. fol. 11, 12. 25. 19. E. 2. Briefe 845. 4. E. 3. Briefe 713. (Post. 349. 11. Rep. 50. b.)

[325. a.]

CHAP.

Chap. 11. Of Discontinuance. Sect. 592.

Discontinuance est un ancient parol en la ley, et ad divers significations, &c. Mes quant a un entent il ad tiel signification, scilicet, lou un home ad alien a un auter certaine terres ou tenements et morust, et un auter ad droit de aver mesmes les terres ou tenements, mes il ne poit entrer en eux cause de tiel alienation, &c.

Discontinuance is an ancient word in the law, and hath divers significations, &c. But as to one intent it hath this signification, *viz.* where a man hath aliened to another certaine lands or tenements and dieth, and another hath right to have the same lands or tenements, but hee may not enter into them because of such an alienation, &c.

Vide Sect. 637.

"*Discontinuance*" is a word compounded of *de* and *continuo*, for *continuare* is to continue without intermission. Now by addition of *de (euphoniæ gratiâ dis* to it) which is a privative, it signifieth an intermission. *Discontinuare nihil aliud significat quàm intermittere, desuescere, interrumpere.* And as our author saith, [a] it is a very ancient word in law (1).

[a] 8. H. 4. 8. b. 11. H. 4. 85. b.

(10. Rep. 97.)

A discontinuance of estates in lands or tenements is properly (in legall understanding) an alienation made or suffered by tenant in taile, or by any that is seised in *auter droit*, whereby the issue in taile, or the heire or successor, or those in reversion or remainder, are driven to their action, and cannot enter.

All which is implied by the description of our author, and by the (*&c.*) in the end of this Section.

I have added (properly) by good warrant of our author himselfe, for *Sectione* 470. he useth discontinuance for a devesting or displacing of a reversion, though the entrie be not taken away.

(1. Roll. Abr. 130. 485.)

This discontinuance consisteth in doing or suffering an act to be done, as hereafter shall appeare. And where our author saith, that it hath divers significations, there is also a discontinuance of processe consisting in not doing, where the processe is not continued, concerning which there is an excellent statute made in furtherance of justice in [b] 1. *E.* 6. and is well expounded in my Reports, and therefore need not here to be inserted.

[b] Vide the Statutes of 1. E. 6. ca. 7. & 31. Eliz. c. 1. lib. 7. f. 30, 31. &c. le case de discontinuance de proces. (1. Sid. 173. 2. Cro. 284.) 39. E. 3. 7. a. 46. E. 3. 30. 37. H. 6. 25, 26. 9. E. 4. 18. 12. E. 4.

There is another erroneous proceeding, and that consisteth in misdoing; as when one processe is awarded instead of another, or when a day is given which is not legall, this is called a miscontinuance, and if the tenant or defendant make default, it is error; but if he appeare, then the miscontinuance is salved, otherwise it is of a discontinuance. But let us returne to the discontinuance of estates in lands, whereof *Littleton* doth treat in this Chapter.

Vide Sect. 74. 174. 194. 441. 520.

"*Significations.*" Here (as in many other places) it appeareth how necessary it is to know the signification of words.

And in this Chapter it appeareth, that when *Littleton* wrote, the estate in lands and tenements might have beene discontinued five manner of wayes, *viz.* by feoffment, by fine, by release with warranie,

(1) [See Note 278.]

rantie, confirmation with warrantie, and by suffering of a recovery [325. b.] in a *præcipe quòd reddat*. And this was to the prejudice of five kinds of persons, *viz.* of wives, of heires, of successors, of those in reversion, and of those in remainder. But for wives, and their heires, and for successors, the law is altered by acts of parliament since *Littleton* wrote, as in this Chapter in their proper places shall appeare.

Sect. 593.

SICOME un abbe seisie de certaine terres ou tenements en fee, et alienast mesmes les terres ou tenements a un auter en fee, ou en fee taile, ou pur terme de vie, et * *puis l'abbe morust, son successor ne poit enter en les dits terres ou tenements, coment que il ad droit eux aver come en droit de son meason, mes il est mis a son action de recoverer mesmes les terres ou tenements, quel est appelle,* breve de ingressu sine assensu capituli, &c. †

AS if an abbot be seised of certaine lands or tenements in fee, and alieneth the same lands or tenements to another in fee, or in fee taile, or for terme of life, and after the abbot dieth, his successor cannot enter into the said lands or tenements, albeit he hath right to have them as in right of his house, but he is put to his action to recover the same lands or tenements, which is called a writ, *breve de ingressu sine assensu capituli, &c.*

HERE *Littleton* putteth an example of a discontinuance made by one seised in *auter droit*, as by an abbot who had a fee simple in the right of his monastery, and therefore his alienation without the assent of his covent had beene a discontinuance at the common law, and had driven his successor to a writ *de ingressu sine assensu capituli*.

"*De ingressu sine assensu capituli, &c.*" It is called so because the alienation was *sine assensu capituli*; for if it had beene *cum assensu capituli*, it should have beene a barre to the successor. And because the successor could not enter, the common law gave him this writ, and is so called of these words contained in the writ, which writ you may read in the Register and *Fitzherbert's N. B.* [Regist. Orig. fo. 230. F. N. B. 195. Bracton' li. 4. fol. 323. Fleta lib. 5. ca. 34.]

And here is to be noted, that in law the covent, albeit they be regular and dead persons in law, yet are they said in law to be *capitulum* to the abbot, as well as the deane and chapter, that be secular to the bishop. But it is to be observed and implied in this (*&c.*) that, a sole body politike that hath the absolute right in them, as an abbot, bishop, and the like, may make a discontinuance; but a corporation aggregate of many, as deane and chapter, warden and chaplaines, master and fellowes, maior and comminaltie, &c. cannot make any discontinuance; for if they joyne, the grant is good; and if the deane, warden, master, or maior make it alone where the body is aggregate of many, it is void, and worketh a disseisin. But now [21. E. 4. 26. (Plo. 536.) (Ant. 85. a.) (Post. 341. b.) (11. Rep. Magdalen College's case.)]

* *puis* not in L. and M. nor Roh. † *&c.* not in L. and M. nor Roh.

now (as hath beene said) by the statute of 27. *H.* 8. and 31. *H.* 8. all the abbots, priors, and other religious persons are so dissolved, as there be none remaining this day, and by the statutes of 1 *Eliz.* and 13. *Eliz. cap.* 10. and 1. *Jac. cap.* 3. bishops and all other ecclesiasticall persons are disabled to alien or discontinue any of their ecclesiasticall livings, as by the same acts doth appeare (1).

See more of this matter hereafter in this chapter, Sect. 648. and before Sect. 528.

Sect. 594.

ITEM, si home seisie de terre come en droit de sa feme, * *&c. et ent enfeoffa un auter,* † *&c. et morust, la feme ne puit enter, mes est mis a son action, lequel est appel,* cui in vitâ, &c.

ALSO, if a man be seised of land as in right of his wife, &c. and thereof infeoffe another, &c. and dieth, the wife may not enter, but is put to her action, the which is called, *cui in vitâ, &c.*

"*EN droit sa feme, &c.*" (2) That is to say, in fee simple, fee taile, or for life. Here *Littleton* putteth another case where a man is seised in *auter droit*, and may make a discontinuance, as the husband seised in the right of his wife, and therefore the common law gave her a *cui in vitâ*, and her heire a *sur cui in vitâ*, because they could not enter. But this is altered since our author wrote, by the statute of 32. *H.* 8. by the purview of which statute, the wife and her heires after the decease of her husband may enter into the lands or tenements of the wife, notwithstanding the alienation of her husband.

[326. a.

Bracton lib. 4. f. 201. & 22. & 324. Fleta lib. 5. ca. 34. & 36. F. N. B. 193. Regist. 32. H. 8. cap. 28.

And here is one of the alienations to make a discontinuance, *viz.* a feoffment; and where our author speaketh of a husband seised in the right of his wife, so it is where the husband and wife are joyntly seised to them and their heires of an estate made during the coverture, and the husband make a feoffment in fee, and dieth, the wife now may enter within that statute, although it was the inheritance of them both. And so it is if the feoffment be made by the husband and wife, (albeit the words of the statute be by the husband only) for in substance this is the act of the husband only. (1)

(1. Roll. Abr. 634. Ant. 187. b.)

Dier. 4. & 5. Ph & Marie 146. 5. Eliz. Dier. 191. Lib. 8. fol. 71, 72. Greveleye's case. (9. Rep. 140. a.)

If the husband cause a *præcipe quòd reddat* upon a faint title to be brought against him and his wife, and suffereth a recovery without any voucher, and execution to be had against him and his wife, yet this is holpen by the statute; for this by like construction is the act of the husband, and the words of the statute be, *made, suffered,* or *done.*

Greveleye's case ubi supra (2. Inst. 343.)

If the husband make a feoffment in fee of the lands which he holdeth in the right of his wife, and after they are divorced *causâ præcontractûs*, yet the woman may enter within the purview of that statute, and is not driven to her writ of *cui ante divortium*, as she was

(F. N. B. 205. f. 7. Rep. 42. 4. Rep. 29.)

* *&c.* not in L. and M. nor Roh.

† *&c.* not in L. and M. nor Roh.

(1) [See Note 279.]
(2) [See Note 280.]

[326. a.]
(1) But a fine levied both by husband and wife of her lands, is not within the statute; and it operates as a bar to her and her heirs, of all her estate and interest in the land. See 2. Rep. 57. b. 77. b.

was at the common law, albeit the entrie be by the statute given to the wife, and now upon the matter she was never his lawfull wife. But it sufficeth that she was his wife *de facto* at the time of the alienation, and where her husband dieth she cannot be his wife at the time of the entrie.

If the husband levie a fine with proclamations, and dieth, the wife must enter or avoid the estate of the conusee within five yeares, or else she is barred for ever by the statute of 4. *H.* 7. for the statute of 32. *H.* 8. doth helpe the discontinuance but not the barre; and the statute speaketh of a fine, and not of a fine with proclamations.

6. E. 6. Dier. 72. b.
4. H. 7. c. 24.

If lands be given to the husband and wife, and to the heires of their two bodies, and the husband maketh a feoffment in fee and dieth, the wife is holpen by the said statute, as hath beene said, and so is the issue of both their bodies. Feme tenant in taile taketh husband, the husband maketh a feoffment in fee, the wife before entrie dieth without issue, he in the reversion or remainder may enter. For, first, the reversion or remainder cannot be discontinued in this case, because the estate taile is not discontinued. Secondly, the words of the statute be, *shall not be prejudiciall or hurtfull to the wife or her heires, or such as shall have right title or interest by the death of such wife, but that the same wife and her heires, and such other to whom such right shall appertaine after her decease, shall or lawfully may enter into all such mannors, lands, &c. according to their rights and titles therein:* by which words the entrie of him in the reversion or remainder in that case is preserved. The husband is tenant in taile, the remainder to the wife in taile, the husband make a feoffment in fee; by this the husband by the common law did not only discontinue his owne estate taile, but his wife's remainder: but at this day after the death of the husband without issue, the wife may enter by the said act of 32. *H.* 8. If the husband hath issue, and maketh a feoffement in fee of his wife's land, and the wife dieth, the heire of the wife shall not enter during the husband's life, neither by the common law nor by the statute.

Greveleye's case ubi supra. Pasch. 7 Jac. (Hob. 261. 9. Rep. 140) (Dyer. 224. a. 3. Inst. 216.)

8. E. 2. tit cui in vitâ 26. 34. E 1. ibidem 30. 10. E. 3. 12. Dier. 21. Eliz. 363.

" *Cui in vitâ, &c.*" Here is also implied a *sur cui in vitâ* also for the heire. This writ here mentioned in our author is so called of those words contained in the writ, which you may reade in the Register and *Fitzherbert's N. B.*

[326. b.] Sect. 595.

ITEM, si tenant en taile de certaine terre ent enfeoffa un auter, &c. et ad issue et morust, son issue ne poit pas enter en la terre, coment que il ad title et droit a ceo, mes est mis a son action, que est appel formedon *en le discender, &c.*

ALSO, if tenant in taile of certaine land thereof enfeoffe another, &c. and hath issue and dieth, his issue may not enter into the land, albeit he hath title and right to this, but is put to his action, which is called a *formedon in le discender, &c.* (1)

" *ENFEOFFA*

(1) [See Note 281.]

"*ENFEOFFA un auter, &c.*" Here is implied, or make a gift in taile or an estate for life. Here *Littleton* putteth a third example of a discontinuance made by tenant in taile so as his issue is put to his *formedon* in the discender, which is given to the issue in taile by the statute of 13. *E.* 1. *cap.* 1. because he cannot enter.

Fleta lib. 5. cap. 34. F. N B. 211, 212. Registr. (4. Rep. 3. b. Post. 365. b.)

"*Tenant en taile.*" This extendeth as well to a woman tenant in taile as to a man, and was generally good law when *Littleton* wrote; but now by the statute of [d] 11. *H.* 7. if the woman hath any estate in taile joyntly with her husband, or only to her selfe or to her use in any lands or hereditaments of the inheritance or purchase of her husband, or given to the husband and wife in taile by any of the ancestors of the husband, or by any other person seised to the use of the husband or his ancestors, and shall hereafter being sole or with any other after taken husband discontinue, &c. the same; every such discontinuance shall be void; and that it shall be lawfull for every person to whom the interest, title, or inheritance, after the decease of the said woman should appertaine, to enter, &c. So as if such a feme tenant in taile doe make any discontinuance in fee, in taile, or for life, although it be without warrantie, yet this doth not take away the entry after her death, either of the issue or of him in reversion or remainder. This statute hath beene excellently expounded by divers resolutions and judgements [e] which I have quoted in the margent, and are worthy of due observation.

[d] 11. H. 7. ca. 20. Vide Sect. 697. (3. Cro. 244. 1. Rep. 102. b. 3. Rep. Lin. Coll Case. 10. Rep. 39. b. 6. Rep. 9. b. Bend. 4c. Hob. 332. Jo. 31. Cro. El. 2.)

If lands were entailed to a man and to his wife, and to the heires of their two bodies, and the husband had made a feoffment in fee and died, and then the wife died, this had beene a discontinuance at the common law: for the title of the issue is as heire of both their bodies, and not as heire to any one of them, and his entrie must ensue his title or action.

[e] Lib. 3. fol. 50, 51. Sir GeorgeBrowne's case eodem lib. fol. 60, &c. Linc. Coll. case. Lib. 1. fol. 176. Mildemaye's case. Dier 3. & 4. Ph. & Mar. 146. Idem 8. Eliz. 248. 17. Eliz. 340. Idem 19. Eliz. 354. Idem 20. Eliz. 362. 27. H. 8. 23. Lib. 5. fol. 79. Fitzh. case. Lib. 8. fol 71, 72. Greveleye's case. (F. N. B. 211. 217. 8. Rep. 88.)

"*De formedon.*" *De formâ donationis,* so called because the writ doth comprehend the forme of the gift. And there be three kinde of writs of formedon, *viz.* The first in the discender to be brought by the issue in taile, which claime by discent *per formam doni.* The second is in the reverter, which lieth for him in the reversion or his heires or assignes after the state taile be spent. The third is the remainder, which the law giveth to him in the remainder, his heires or assignes, after the determination of the estate taile; of all which you may reade in the Register and *F. N. B.*

Here *Littleton* sheweth that the issue in taile shall have a formedon in the discender. What other actions tenant in taile may have, and not have, is good to be seene.

[a] Tenant in taile shall have a *quod permittat.*

[b] Tenant in taile shall have a writ of customes and services *in le debet, et solet,* but shall not have it in the *debet* only.

[c] In like manner he shall have a *secta ad molendinum in le debet et solet,* but not in the *debet tantum.*

[d] Tenant in taile shall have a writ of *entre in consimili casu* and an *admesurement,* and a *nativo habendo, cessavit, escheat, waste,* and the like.

[e] But tenant in taile shall not have a writ of right *sur disclaymer,* nor a *quo jure,* nor a *ne injuste vexes,* nor a *nuper obiit,* or *rationabile parte,*

[a] 4. E. 3. 38. 43. E. 3. 25. A. E. 4. 25. F. N. B. 124. [b] 2. E. 2. Droit 28. [c] F. N. B 123. [d] 21. E. 3. 11. 5. E. 3. 23. 11. H. 4. 49. [e] 2. E. 3. Droit. 28. 13. H. 7. 24.

parte, nor a *mordancester*, nor a *sur cui in vitâ*; for these and the like, none but tenant in fee shall have: and the highest writ that a tenant in taile can have is a formedon.

5. E. 4. 2.
20. E. 3.
Avowrie 131.
F. N. B. 10.
46. E. 3. tit. cui in vita, 33.

[327. a.]

Sect. 596.

ITEM, si soit tenant en le taile, le reversion esteant al donor et a ses heires, si le tenant fait feoffment, * &c. *et morust sans issue, celuy en le reversion ne poit enter, mes est mis a son action de* formedon *en le reverter.* †

ALSO, if there bee tenant in taile, the reversion being to the donor and his heires, if the tenant make a feoffment, &c. and die without issue, hee in the reversion cannot enter, but is put to his action of *formedon in le reverter* (1).

Sect. 597.

EN mesme le manner est, lou tenant en le taile ‡ *seisie de certaine terre dont le remainder est a un auter en le taile, ou a un auter en fee. Si le tenant en le taile alienast en fee, ou en fee taile,* ‖ *et puis deviast sans issue, ceux en le remainder ne poient enter, mes sont mis a lour briefe de* formedon *en le remainder, &c. et pur ceo que per force de tielx feoffments et alyenations en les cases avanditz, et en semblables* § *cases, ceux queux ont title et droit apres la mort de tiel feoffour ou alienour ne poient pas enter, mes sont mises a lour actions,* ut supra; *et pur ceo cause tiels feoffments et alienations sont appels discontinuances.*

IN the same manner is it, where tenant in taile is seised of certaine land whereof the remainder is to another in taile, or to another in fee. If the tenant in taile alien in fee, or in fee-taile, and after die without issue, they in the remainder may not enter, but are put to their writ of *formedon* in the remainder, &c. (2) and for that that by force of such feoffments and alienations in the cases aforesaid, and the like cases, they that have title and right after the death of such a feoffor or alienor may not enter, but are put to their actions, *ut supra*; and for this cause such feoffments and alienations are called discontinuances.

"*FAIT feoffment, &c.*" Here is implied fee simple, fee taile, or estate for life; and in this and the next Section *Littleton* putteth two cases, where if the issues in taile faile, they in the reversion and remainder are driven to their *formedon* in reversion or remainder; and this remaineth as it was when *Littleton* wrote, not altered by any statute. And the reason whereof these alienations in the severall cases in this and the next Section doe make a discontinuance,

(F. N. B. 215.)

* *&c.* not in L. and M. nor Roh.
† *&c.* added L. and M. and Roh.
‡ *seisie* not in L. and M. nor Roh.
‖ *&c.* added L. and M. and Roh.
§ *auters* added L. and M. and Roh.

(1) [See Note 282.] (2) [See Note 283.]

continuance, and put him in the reversion or remainder that right had to his action, and tooke away his entry, was, for that he was privy in estate, and for the benefit of the purchasor, and for the safeguard of his warrantie, so as every man's right might be preserved, *viz.* to the demandant for his ancient right, and to the feoffee for the benefit of his warrantie, which was founded upon great reason and equitie: which benefit of the warrantie should be prevented and avoided if the entrie of him that right had were lawfull, and thereby also the danger that many times happeneth by taking of possessions was warily prevented by law. But then it may be demanded, seeing that there was no reversion or remainder expectant upon any estate taile at the common law, nor the issue in taile had any remedy by the common law, if the tenant in taile had aliened, then by what law is the alienation of tenant in taile a discontinuance at this day to the issue in taile, or to him in reversion or remainder? Whereunto it is thus answered, that it is provided by the statute of *W.* 2. *ca.* 1. *De donis conditionalibus, quòd non habeant illi quibus tenementum sic fuerit datum potestatem alienandi, &c.* Upon these words the sages of the law have construed the said Act according to the rule and reason of the common law, and that in divers and sundry variable manners. For some alienations of tenant in taile, they have adjudged voydable by the issue in taile by action only: some at the election of the issue in taile to avoid it by action, entry, or claime; some are meerely void by the death of the tenant in taile: which severall constructions were made upon the selfe-same words aforesaid.

Vide Sect. 592. 597. 601. 637, 638.
(F.N.B. 217. b.)
(6. Rep. 3.)
30. E. 1. Formedon 65.
19. E. 2. Formedon 61.
18. E. 3. 46.
12. E. 4. 3.
(Cro. Car. 405.)
(1. Roll. Abr. 632.)
(Post. 356. a.)
(Sid. 83.)
(Ant. 301.)

[327. b.]

As for example, If tenant in taile make a feoffement in fee, this drives the issue in taile to his action, which is called in law a Discontinuance; and this construction was made, for that at the common law the feoffement of an abbot or bishop, or of the husband seised in the right of his wife, did worke a discontinuance, and did drive the successor and the wife to their action, and foreclosed them of their entrie: and as the entrie of the issue was taken away, so consequently of them in reversion and remainder. Also if an abbot, bishop, or husband in the right of his wife, seised of a rent, or of any other inheritance that lieth in grant, had aliened, it was in the election of the successor or wife after the death of her husband to claime the rent, &c. or to bring an action, for that alienation did not worke a discontinuance; and so it is by construction in case of tenant in taile. Lastly, if the abbot, bishop, or husband, had granted a rent newly created out of the land, &c. to another in fee, this had utterly ceased by their death; and so it is also by construction in case of tenant in taile. So as these words *(non habent potestatem alienandi)* doe worke these effects, *viz.* as to lands, that a feoffment barreth not the issue, &c. of his action, but worketh a discontinuance to barre him of his entrie: as to rents or any thing *in esse*, that lie in grant, that the said words doe take away his power to make any discontinuance: as to rents, &c. newly created, that they take away his power to make them to continue longer than during his life.

18. E. 3. 12.
19. E. 3.
Bre. 468.
24 E. 3. 28.
36. Ass. 8.
22. R. 2.
Discon. 50.
5. E. 4. 3.
4. H. 7. 17.
33. E. 3.
Formdon, 47.
& 13. H. 7.
Pl. Com. 426.
Smith & Stapleton's case.
(3 Rep. 85.)
(1. Leo. 66.)
(Plo. 437.)

But there is a diversitie betweene an alienation working a discontinuance of an estate which taketh away an entrie, and an alienation working, divesting or displacing of estates which taketh away no entry. As if there be tenant for life, the remainder to *A.* in taile, the remainder to *B.* in fee, if tenant for life doth alien in fee,

this

this doth divest and displace the remainders, but worketh no discontinuance. And therein it is to be observed, that to everie discontinuance there is necessary a divesting, or displacing of the estate, and turning the same to a right: for if it be not turned to a right, they that have the estate cannot be driven to an action. And that is the reason that such inheritances as lie in grant, cannot by grant be discontinued, because such a grant divesteth no estate, but passeth onely that which he may lawfully grant, and so the estate itselfe doth descend, revert, or remaine, as shall be said hereafter in this Chapter.

A. maketh a gift in taile to *B.* who maketh a gift in taile to *C.* *C.* maketh a feoffment in fee and dieth without issue, *B.* hath issue and dieth, the issue of *B.* shall enter; for albeit the feoffment of *C.* did discontinue the reversion of the fee simple which *B.* hath gained upon the estate taile made to *C.* yet could it not discountinue the right of intaile which *B.* had, which was discontinued before: and therefore when *C.* died without issue, then did the discontinuance of the estate taile of *B.* which passed by his liverie, cease, and consequently the entrie of the issue of *B.* lawfull; which case may open the reason of many other cases.

(10. Rep. 95.)

Also note, that a discontinuance made by the husband, did take away the entrie only of the wife and her heires by the common law, and not of any other which claimed by title paramount above the discontinuance. As if lands had beene given to the husband and wife, and to a third person, and to their heires, and the husband had made a feoffment in fee, this had beene a discontinuance of the one moitie, and a disseisin of the other moitie: if the husband had died, and then the wife had died, the survivor should have entred into the whole, for hee claimed not under the discontinuance, but by title paramount from the first feoffor; and seeing the right by law doth survive, the law doth give him a remedie to take advantage thereof by entry, for other remedie for that moitie he could not have.

"*Fee, ou fee taile.*" And so it is of an estate for life.

Sect. 598.

[328. a.]

ITEM, si tenant en taile soit disseisie, et il relessa per son fait a le disseisor et a ses heires tout le droit lequel il ad en mesme les tenements, ceo n'est pas discontinuance, pur ceo que rien de droit passa al disseisor forsque pur terme de vie del tenant en le taile que fist le release, &c.

ALSO, if tenant in taile be disseised, and he release by his deed to the disseisour and to his heires all the right which he hath in the same tenements, this is no discontinuance, for that nothing of the right passeth to the disseisor, but for terme of the life of tenant in taile which made the release, &c.

Sect. 599.

(2. Rep. 31.)

MES per feoffment del tenant en le taile, fee simple passa per mesme le feoffement per force de liverie de seisin, &c.

BUT by the feoffment of tenant in taile, fee simple passeth by the same feoffment by force of the liverie of seisin, &c.

Sect. 600.

MES per force d'un release rien passera forsque le droit que il poet loyalment et droituralment relesser, sans leyde ou damage as auters persons queux ent averont droit apres son decease, &c. Issint il est graund diversity perenter un feoffement d'un tenant en le taile, et un release fait per tenant en le taile.

BUT by force of a release nothing shall passe but the right which he may lawfully and rightfully release, without hurt or dammage to other persons who shall have right therein after his decease, &c. So there is great diversitie betweene a feoffement of tenant in taile, and a release made by tenant in taile.

OUR author having put examples of estates passing by transmutation of an estate and possession, doth in this and the two Sections following put a diversitie betweene a feoffment and a release or confirmation of a bare right; for it is a rule in law, that the disseisee or any other that hath a right only by his release or confirmation, cannot make any discontinuance, because nothing can passe thereby but that which may lawfully passe. But otherwise it is of a feoffment in respect of the liverie of seisin, for that it is the most solemne and common assurance in the country, and to be maintained for the common quiet of the realme: and by the feoffment the freehold (which is so much esteemed in law) doth passe by open liverie to the feoffee, and by the release a bare right.

9. E. 4. 18.
12. E. 4. 11.
5. H. 4. 2.
21. H. 6. 58.
(Post. 329, 330.)

Sect. 601.

*MES il est dit, que si le tenant en taile en cest cas relessa a son disseisor, et oblige luy et ses heires a garrantie, * et morust, et cest garranty discendist a son issue, † ceo est discontinuance per cause de le garrantie ‡.*

BUT it is said, that if the tenant in taile in this case release to his disseisor, and bind him and his heires to warrantie, and dieth, and this warrantie descend to his issue, this is a discontinuance, by reason of the warrantie.

* *&c.* added L. and M. and Roh.
† *donques* added L. and M. and Roh.
‡ *&c.* added L. and M. and Roh.

THE

THE reason why the addition of the warrantie in this case maketh a discontinuance, is that which hath beene said, *viz.* If the issue in taile should enter, the warrantie (which is so much favoured in law) should be destroyed: and therefore to the end that if assets in fee simple doe descend, he to whom the release is made, may plead the same, and barre the demandant: by which meanes all rights and advantages are saved. And that I may note it once for all, an *(il est dit)* with *Littleton*, is as good as a *concessum* in a booke case.

[328. b.]

3. H. 4. 9. 22. R. 2. Discon. 50. 12. E. 4. 11. 21. H. 7. 9. 43. E. 3. 8. 15. E. 4. tit. Discon. 30. Vi. Sect 596. 602. 637. 658. (3. Rep. 85.) (Post. 632, 633.)

Sect. 602.

MES si un home ad issue fits per sa feme, et sa feme morust, et puis il prent auter feme, et tenements sont dones a luy et a sa second feme, et a les heires de lour deux corps engendres, et ils ont issue un auter fits, et le second feme morust, et puis le tenant en le taile est disseisie, et il relessa al disseisor tout son droit, &c. et oblige luy et ses heires a le garrantie, &c. et devia, ceo n'est pas discontinuance al issue en le taile per le second feme, mes il poit bien enter, § *pur ceo que le garrantie discendist a son eigne frere que son pier avoit per le primer feme,* ‖ *&c.*

BUT if a man hath issue a sonne by his wife, and his wife dieth, and after hee taketh another wife, and tenements are given to him and to his second wife, and to the heires of their two bodies engendred, and they have issue another sonne, and the second wife dieth, and after the tenant in taile is disseised, and hee release to the disseisor all his right, &c. and bind him and his heires to warrantie, &c. and die, this is no discontinuance to the issue in taile by the second wife, but he may well enter, for that the warrantie descendeth to his elder brother which his father had by the first wife, &c.

Sect. 603.

(8. Rep. 86.)

EN mesme le manner est, lou tenements sont discendable a le fits puisne solonques le custome de Burgh English, queux sont entailes, &c. et le tenant en le taile ad deux fits, et est disseisie, et il relessa a son disseisor tout son droit ove garrantie, &c. et morust, le puisne fits poit enter sur le disseisor, nient obstant le garrantie, pur ceo que le garrantie discendist al eigne fits: car touts foits le garrantie discendera a celuy que est heire per le common ley.

[329. a.]

IN the same manner is it, where lands are descendible to the youngest sonne after the custome of Burrough-English, which are entayled, &c. and the tenaunt in taile hath two sonnes, and is disseised, and he releaseth to his disseisour all his right with warrantie, &c. and dieth, the younger sonne may enter upon the disseisor, notwithstanding the warranty, for that the warrantie descendeth to the elder son: for alwayes the warrantie shall descend to him who is heire by the common law.

§ *&c.* added L. and M. and Roh. ‖ *&c.* not in L. and M. nor Roh.

BY these two examples in this and the Section next following, it appeareth that a warrantie being added to a release or confirmation, and descending upon him that right hath to the lands, maketh a discontinuance; otherwise it is out of the reason of the law, and worketh no discontinuance, if the warrantie descendeth upon another.

" *Ove garrantie, &c.*" Here is implied that he doth binde him and his heires to warrant to the releasee and his heires.

13. H. 4. Garrantie 94. 19. R. 2. Garrantie 100. (Post. 376. a.)

" *Touts foits le garrantie discendist sur le heire al common ley.*" This is a maxime of the common law, and hereof more shall be said in the Chapter of Warrantie, *Sections* 718. 735. 736. 737. so as it is not the warrantie only that maketh a discontinuance, but the warrantie and the discent upon him that right hath together.

Sect. 604.

ITEM, si un abbe soit disseise, et il relessa a le disseisor ovesque garrantie, ceo n'est pas discontinuance a son successor, pur ceo que rien passa per cel releas forsque le droit que il ad durant le temps que il est abbe, et le garrantie est expire per son privation, ou per sa mort.

ALSO, if an abbot be disseised, and hee releaseth to the disseisor with warrantie, this is no discontinuance to his successor, because nothing passeth by this release but the right which hee hath during the time that he is abbot, and the warrantie is expired by his privation, or by his death.

(3. Rep. 73.)

THE reason hereof yeelded by *Littleton* is, for that the warrantie is expired by his privation or death.

" *Per son privation, ou per sa mort.*" Note, that privation is here resembled to death, and so is translation also. Wherein this diversitie is worthy of observation, that when a bishop, &c. make an estate, lease, grant of a rent-charge, warranty, or any other act which may tend to the diminution of the revenues of the bishopricke, &c. which should maintaine the successor, there the privation or translation of the bishop, &c. is all one with his death. But where the bishop is patron and ordinary, and confirmeth a lease made by the parson without the deane and chapter, and after the parson dieth, and the bishop collateth another, and then is translated, yet his confirmation remaineth good; for the revenues that are to maintaine the successor are not thereby diminished. And the like diversitie doth hold in case of resignation, notwithstanding [m] the authoritie to the contrary.

Vide 29. E. 3. 16. (Ant. 300. b.) (Dyer. 356.)

[m] 29. E. 3. 16. tit. garrant. 99.

Sect. 605.

ITEM, si home seisie en droit sa feme est disseisie, et il relessa, &c. ove garrantie, ceo n'est pas discontinuance a la feme, si el survesquist son baron, mes que el poit enter, &c. Causa patet.

ALSO, if a man seised in the right of his wife be disseised, and he releaseth, &c. with warrantie, this is no discontinuance to the wife, if shee surviveth her husband, but that she may enter, &c. *Causa patet.*

THIS is evident, unlesse the wife be heire to the husband (as by law she may be), and then it is a discontinuance for the cause aforesaid.

[329. b.]

Sect. 606.

(1. Saund. 261.)

*ITEM, si tenant en taile de certaine terre lessa mesme la terre a un auter pur terme des ans, per force de quel le lessee en eit possession, en quel possession le tenant en taile per son fait relessa tout le droit que il avoit en mesme le terre, a aver et tener a le lessee et a ses heires a touts jours; ceo n'est pas discontinuance, mes apres le decease le tenant en taile, son issue poit bien enter, pur ceo que per tiel release riens passa forsque pur terme de * la vie de le tenant en le taile.*

ALSO, if tenant in tayle of certaine land letteth the same land to another for terme of yeares, by force whereof the lessee hath thereof possession, in whose possession the tenant in tayle by his deed releaseth all the right that he hath in the same land, to have and to hold to the lessee and to his heires for ever; this is no discontinuance, but after the decease of the tenant in tayle, his issue may well enter, because by such release nothing passeth but for terme of the life of the tenant in tayle.

" *CAR per tiel releas riens passa.*" Here is one of the maximes of the common law rehearsed by our author, whereof he doth put divers examples hereafter.

Sect. 607.

(3. Rep. 85. b.)

EN mesme le manner est, si le tenant en le taile confirma l'estate le lessee pur terme des ans, a aver et tener a luy et a ses heires, ceo n'est pas discontinuance, pur ceo que riens passa per tiel confirmation forsque l'estate que le tenant en le taile avoit pur terme de sa vie, &c.

IN the same manner it is, if the tenant in tayle confirme the estate of the lessee for yeares, to have and to hold to him and to his heires, this is no discontinuance, for that nothing passeth by such confirmation but the estate which the tenant in tayle hath for terme of his life, &c.

* *la—son,* L. and M. and Roh.

" RIENS

(Ant. 328.) "RIENS passa per tiel confirmation." Here is another of the maximes of the common law rehearsed by our author, whereof he putteth examples hereafter.

More shall be said hereof in the next Section following.

Sect. 608.

ITEM, si tenant en taile apres tiel leas granta le reversion en fee per son fait a auter, et voile que apres le terme fine, que mesme le terre remaindroit a le grantee et a ses heires a touts jours, et le tenant a terme d'ans atturna, ceo n'est pas discontinuance. Car tiels choses queux passont en tiels cases de tenant en le taile tantsolement per voy de graunt, ou per confirmation, ou per tiel release, rien poit passer pur faire estate a celuy a que tiel graunt, ou confirmation, ou release, est fait, forsque ceo que le tenant en taile poit droiturelment faire, et ceo n'est forsque pur terme de sa vie, &c.*

ALSO, if tenant in taile after such lease grant the reversion in fee by his deed to another, and willeth that after the terme ended, that the same land shall remaine to the grantee and his heires for ever, and the tenant for yeares attorne, this is no discontinuance. For such things which passe in such cases of tenant in taile only by way of grant, or by confirmation, or by such release, nothing can passe to make an estate to him to whom such grant, or confirmation, or release, is made, but that which the tenant in taile may rightfully make, and this is but for terme of his life, &c.

[330. a.]

Sect. 609.

(Ant. 251. b.)

CAR si jeo lessa terre a un home pur terme de sa vie, &c. et le tenant a terme de vie lesse mesme la terre a un auter pur terme des ans, &c. et puis mon tenant a terme de vie graunta le reversion a un auter en fee, et le tenant a terme des ans atturna, en cest case le grantee † n'ad en le franktenement forsque ‡ estate pur terme de vie son grauntor, &c. et jeo que suis en le reversion de fee simple, ne puisse enter per force de cel grant del reversion fait per mon tenant a terme de vie, pur ceo que per tiel grant mon reversion n'est pas discontinue, mes tout temps demurt a moy, sicome il fuit adevant, nient obstant tiel grant del reversion fait al grantee, a luy et a ses heires, &c. pur ceo que riens passa per force de tiel grant,

FOR if I lett land to a man for terme of his life, &c. and the tenant for life letteth the same land to another for terme of years, &c. and after my tenant for life grant the reversion to another in fee, and the tenant for yeares attorne, in this case the grantee hath in the freehold but an estate for terme of the life of his grantor, &c. and I which am in the reversion of the fee simple may not enter by force of this grant of the reversion made by my tenant for life, for that by such grant my reversion is not discontinued, but alwayes remaines unto me, as it was before, notwithstanding such grant of the reversion made to the grantee, to him and to his heires, &c. because nothing passed

* *et ceo n'est—&c. est,* L. and M. and Roh.

† *n'ad—ads,* L. and M. and Roh.

‡ *estate* not in L. and M. nor Roh.

grant, forsque estate que le grantor avoit, &c.

passed by force of such grant, but the estate which the grantor hath, &c. (1)

[330. b.]

Sect. 610.

(Ant. 328, 329.)

EN mesme le maner est, si le tenant a terme de vie per son fait confirme l'estate son lessee pur terme des ans, a aver et tener a luy et a ses heires, ou relessa a son lessee et a ses heires, uncore le lessee a terme d'ans n'ad estate forsque pur terme de vie de le tenant a terme de vie, &c.

IN the same manner is it, if tenant for terme of life by his deed confirme the estate of his lessee for yeares, to have and to hold to him and his heires, or release to his lessee and his heires, yet the lessee for yeares hath an estate but for terme of the life of the tenant for life, &c.

" *CAR tiels choses que passont en tiels cases de tenant en le taile, &c.*" Here is rehearsed another ancient maxime of the common law touching grants; and hereby it appeareth that a feoffment in fee (albeit it be by *parol)* is of a greater operation and estimation in law, than a grant of a reversion by deed, though it be inrolled, and attornement of the lessee for yeares of a release, or a confirmation by deed, for the reasons aforesaid. And this is manifested by the examples which our author here in these three Sections putteth.

Sect. 611.

MES auterment est quant tenant a terme de vie fait un feoffment en fee, car per tiel feoffment le fee simple passa. Car tenant a terme d'ans poit faire feoffment en fee, et per son feoffment le fee simple passera, et uncore il n'avoit al temps del feoffment fait forsque estate pur terme d'ans, &c.

BUT otherwise it is when tenant for life maketh a feoffment in fee, for by such a feoffment the fee simple passeth. For tenant for yeares may make a feoffment in fee, and by his feoffment the fee simple shall passe, and yet he had at the time of the feoffment made but an estate for terme of yeares, &c. (1)

" *FORSQUE estate pur terme d'ans, &c.*" Here it is implied, that albeit the feoffment made by lessee for yeares be a feoffment between the feoffor and feoffee, and that by this feoffment the fee simple passeth by force of the livery, yet is it a disseisin to the lessor. And here it is worthy to be observed, that our author saith, that tenant for terme of yeares may make a feoffment; whereupon it followeth, that the feoffor may thereunto annex a warrantie, whereupon the feoffee may vouch him: but of this you shall reade more in the Chapter of Warranties, Sect. 698.

(Post 367. a.)

(1) [See Note 284.] (1) [See Note 285.]

Sect. 612.

*ITEM, si tenant en le taile granta son terre a un auter pur terme de vie de mesme le tenant en taile, et livrer a luy seisin, &c. et apres per son fait il relessa a le tenant et a ses heires tout le droit que il avoyt en mesme la terre; en cest cas l'estate del tenant de la terre n'est pas enlarge per force de tiel releas, pur ceo que quant le tenant avoit l'estate en le terre pur terme de vie de le tenant en le taile, donque il avoit tout le droit que le tenant en le taile puissoit droiturelment granter ou relesser: * issint que per tiel releas nul droit passa, entant que son droit fuit ale adevant.*

ALSO, if tenant in taile grant his land to another for terme of the life of the said tenant in taile, and deliver to him seisin, &c. and after by his deed hee releaseth to the tenant and to his heires all the right which [331. a.] hee hath in the same land; in this case the estate of the tenant of the land is not enlarged by force of such release, for that when the tenant had the estate in the land for terme of the life of the tenant in taile, hee had then all the right which tenant in taile could rightfully grant or release: so as by this release no right passeth, inasmuch as his right was gone before.

Sect. 613.

(1. Saund. 26. 3. Rep. 84.)

ITEM, si tenant en le taile per son fait grant a un auter tout son estate que il avoit en les tenements a luy tailes, a aver et tener tout son estate al auter, et a ses heires a touts jours, et delivera a luy seisin accordant; en cest cas le tenant a que l'alienation fuit fait, n'ad auter estate forsque pur terme de vie del tenant en taile. Et issint il poit bien estre prove, que le tenant en taile ne poit pas grounter ne aliener, ne faire ascun droiturel estate de franktenement a auter person, forsque pur terme de sa vie demesne, &c.

ALSO, if tenant in taile by his deed grant to another all his estate which hee hath in the tenements to him entailed, to have and to hold all his estate to the other, and to his heires for ever, and deliver to him seisin accordingly; in this case the tenant to whom the alienation was made, hath no other estate but for terme of the life of tenant in taile. And so it may bee well proved, that tenant in taile cannot grant nor alien, nor make any rightfull estate of freehold to another person, but for terme of his owne life only, &c. (1)

(Post. 342. b. 345. a. Ant. 263. b.)

THE meaning of *Littleton* in both these cases, in this and in the Section next preceding is, that having regard to the issue in taile, and to them in reversion or remainder, tenant in taile cannot lawfully make a greater estate than for terme of his life; and therefore this release or grant is no discontinuance. But in regard of himselfe, this release or grant leaveth no reversion in him, but puts the same in abeiance, so as after this release or grant made he shall not have any action of waste, &c.

13. H. 7. 10. a. Brooke Release, 95.

" *Grant*

* *&c.* added L. and M. and Roh.

(1) [See Note 286.]

"*Grant tout son estate.*" *Vid. Sect.* 650. Action of waste, &c. there is implied that he shall not enter for a forfeiture, if after the release or grant the lessee maketh a feoffment in fee.

Sect. 614.

CAR si jeo done terre a un home en taile, savant le reversion a moy, et puis le tenant en le taile enfeoffa un auter en fee, le feoffee n'ad pas droiturel estate en les tenements pur deux causes. Un est, pur ceo que per tiel feoffment ma reversion est discontinue, le quel est a tort fait, et nemy a droit fait. Un auter cause est, si le tenant en taile morust, et son issue suist briefe de formedon *envers le feoffee, le briefe dirra, et auxy le count, &c. que le feoffee a tort luy deforce, &c.* Ergo *s'il a tort luy deforce, &c. il n'ad pas droiturel estate.*

FOR if I give land to a man in taile, saving the reversion to my selfe, and after the tenant in taile enfeoffeth another in fee, the feoffee hath no rightfull estate in the tenements for two causes. One is, for that by such feoffment my reversion is discontinued, the which is a wrong and not a rightfull act. Another cause is, if the tenant in taile dieth, and his issue bring a writ of *formedon* against the feoffee, the writ and also the declaration shall say, &c. that the feoffee by wrong him deforces, &c. *Ergo* if he deforceth him by wrong, he hath no right estate.

[331. b.] HERE *Littleton* proveth, that the feoffee of tenant in taile hath no rightfull estate, having respect to two persons; the one is to the donor, whose reversion is divested and displaced; and the other to the issue in taile, who is driven to his action to recover his right.

(F. N. B. 211. b.)

"*A tort luy deforce.*" [n] *Deforciare* is a word of art, and cannot be expressed by any other word; for it signifieth, to with hold lands or tenements from the right owner; in which case either the entrie of the right owner is taken away, or the deforceor holdeth it so fast, as the right owner is driven to his reall *præcipe*, wherein it is said, *unde A. eum injustè deforceat*, or the deforceor so disturbeth the right owner, as he cannot enjoy his owne: and therefore it is said, *Per hoc autem quod dicitur in brevi ultimæ præsentationis deforceant, videtur quibusdam quòd querens innuat per hoc quòd deforceans sit in seisinâ, sicut in brevi de recto, sed reverâ non est ita, sed satis deforceat qui possessorem uti seisina non permiserit omninò vel minùs commodè impediat præsentando, appellando, impetrando, secundum quod dicitur de disseisitore, satisfacit disseisinam, qui uti non permisit possessorem vel minùs commodè licèt omninò non expellat.* In this case that *Littleton* putteth, the discontinuee being in by wrong, is no disseisor, abator, or intrudor, but a deforceor; and hereof commeth Deforcement, and thus did antiquitie describe it: [o] *Deforcement, come si ascun enter en auter tenement tant come le veray seignior est al market, ou ailors, et retorne, et ne poet aver entre eins est celuy deforce et debotue.* And for that at the first the withholding was with violence and force, it was called a deforcement of the lands or tenements; but now it is generally extended to all kinde of wrongfull withholding

[n] Bract. li. 4. fol. 238. Flet. lib. 5. cap. 11.

Bract. & Flet. ubi supra.

[o] Mir. cap. 2. sect. 25. (5 Rep. 85. 2. Inst. 350.)

Westm. 2. cap. 4.

of lands or tenements from the right owner. There is a writ called a *quod ei deforceat*, and lieth where tenant in taile, or tenant for life, loseth by default, by the statute he shall have a *quod ei deforceat* against the recoveror, and yet he commeth in by course of law. (1)

Sect. 615.

ITEM, si terre soit lesse a un home pur terme de sa vie, le remainder a un auter en le taile, si celuy en le remainder voile graunter son remainder a un auter en fee per son fait, et le tenant a terme de vie atturna, ceo n'est pas discontinuance de le remainder *.

ALSO, if land bee let to a man for terme of his life, the remainder to another in taile, if he in the remainder will grant his remainder to another in fee by his deed, and the tenaunt for life attorne, this is no discontinuance of the remainder.

Sect. 616.

[332. a.]

ITEM, si home ad rent service ou rent charge en taile, et il graunta le dit rent a un auter en fee, et le tenaunt attorna, † *ceo n'est pas discontinuance, &c.*

ALSO, if a man hath a rent service or rent charge in taile, and hee grant the sayd rent to another in fee, and the tenaunt attorne, this is no discontinuance, &c.

Sect. 617.

ITEM, si home soit tenant en taile de un advowson en grosse, ou de un common en grosse, s'il per son fait voile graunt l'advowson ou le common a un auter en fee, ceo n'est pas discontinuance; car en tielx cases les grantees n'ont estate forsque pur terme de vie de le tenant en taile que fist le grant, &c.

ALSO, if a man bee tenaunt in taile of an advowson in grosse, or of a common in grosse, if he by his deed will graunt the advowson or common to another in fee, this is no discontinuance; for in such cases the grauntees have no estate but for terme of the life of tenant in taile that made the grant, &c.

Bract. l. 2. f. 3. & f. 366-378. Brit. f. 187. Mir. ca. 2. sect. 17. Flet. lib. 3. ca. 15. (Post. 335.) [p] 5. E. 3. 58. 21. E. 3. 37, 38. 43. E. 3. 1. b. 11. H. 6. 4. 5. H. 7. 37. 18. H. 8. 16. El. Dy. 323. b.

BY the cases in these three Sections it appeareth, that if a remainder or a rent service, or a rent charge, or an advowson, or a common, or any other inheritance that lieth in grant, be granted by tenant in taile, it is no discontinuance, as formerly hath beene said.

[p] Note, here is an advowson named by *Littleton*, as a thing that lieth in grant, and passeth not by liverie of seisin.

* *&c.* added L. and M. and Roh. † *&c.* added L. and M. and Roh.

(1) [See Note 286 *.]

Sect. 618.

ET nota, que de tiels choses que passont per voy de graunt, per fait fait en pays, † *et sans livery, la tiel graunt ne fait pas discontinuance, come en les cases avantdits,* ‡ *et en auter cases semblables, &c.* ‖ *Et coment que tiels choses sont graunts en fee, per fine levie en le court le roy, &c. uncore ceo ne fait discontinuance, &c.*

AND note, that of such things as passe by way of grant, by deed made in the countrie, and without livery, there such grant maketh no discontinuance, as in the cases aforesayd, and in other like cases, &c. And albeit such things bee graunted in fee, by fine levied in the king's court, &c. yet this maketh not a discontinuance, &c.

HERE is the generall reason yeelded of the precedent cases and the like; for that it is a maxime in law, that a grant [d] by deed of such things as doe lie in grant, and not in liverie of seisin, doe worke no discontinuance. (1) But the particular reason is, for that of such things the grant of tenant in taile worketh no wrong, either to the issue in taile, or to him in reversion or remainder; for nothing doth passe but onely during the life of tenant in taile, which is lawfull, and every discontinuance worketh a wrong, as hath beene said.

22. R. 2. Discon. 56. 38. H. 8. Discon. 35. Brooke. 19 E. 3. Bre. 468. 18. Ass. p. 2.

[d] 6. E. 3. 56. 32. E. 3. Discont. 3. 33. Ass. 8. 4. H. 7. 17. 21. H. 7. 42. 15. H. 7. 19. 21. H. 6. 52, 53. 5. E. 4. 3. 21. E. 4. 5. Pl. Com. 435.

[332. b.] [q] If tenant in taile of a rent service, &c. or of a reversion, or remainder in taile, &c. grant the same in fee with warrantie, and leaveth assets in fee simple, and dieth, this is neither barre nor discontinuance to the issue in taile; but he may distraine for the rent or service, or enter into the land after the decease of tenant for life. But if the issue bringeth a formedon in the discender, and admit himselfe out of possession, then he shall be barred by the warrantie and assets.

[q] 33. E. 3. Formed. 47. 13. H. 7. 10. 36. Ass. 8. 4. H. 7. 17. (3. Rep. 84, 85. 9. Rep. 51. a.)

[r] Tenant in taile of a rent disseiseth the tenant of the land, and maketh a feoffement in fee with warrantie and dieth, this is no discontinuance of the rent, but the issue may distreyne for the same; and albeit the warrantie extend to the rent, yet by the rule of *Littleton* it lieth not in discontinuance: and where the thing doth lie in liverie, as lands and tenements, yet if to the conveyance of the freehold or inheritance no liverie of seisin is requisite, it worketh no discontinuance. [s] As if tenant in taile exchange lands, &c. or if the king being tenant in taile, grant by his letters patents the lands in fee, there is no discontinuance wrought.

[r] 3. H. 7. 12. (Mo. 634.) 9. E. 4. 22. (1. Roll. Abr. 632. Sir Edward Seymour's case. 10. Rep. 95.)

[s] 38. H. 8. Paten. Br. 101. Pl. Com. 233. Li. 1. f. 26. Alton Wood's case.

"*Per fine.*" Of a thing that lieth in grant, though it be granted by fine, yet it worketh no discontinuance; and this is regularly true.

(Ant. 251. b.) 48. E. 3. 23. (2. Sid. 65.)

If

† *et sans livery, la—&c. lou,* L. and M. and Roh.

‡ *et en—ou,* L. and M. and Roh.

‖ *Et* not in L. and M. nor Roh.

(1) [See Note 287.]

[r] 15. E. 4. tit. Discont. 30. 6. H. 56, 57. (1. Rep. 76. 1. Roll. Rep. 188. 1. Sid 83.)

[r] If tenant in taile make a lease for yeares of lands, and after levie a fine, this is a discontinuance; for a fine is a feoffment of record, and the freehold passeth. But if tenant in taile maketh a lease for his owne life, and after levie a fine, this is no discontinuance, because the reversion expectant upon a state of freehold which lieth onely in grant passeth thereby. (1)

Sect. 619.

[† NOTA, *si jeo done terre a un auter en taile, et il lessa mesme la terre a un auter pur terme d'ans, et puis le lessor graunta le reversion a un auter en fee, et le tenant a terme d'ans atturna al grantee, et le terme est expire durant la vie le tenant en taile, per que le grantee enter, et puis le tenant en taile ad issue et devie; en ceo case ceo n'est discontinuance, nient obstant que le grant soit execute en la vie le tenaunt en taile, pur ceo que al temps de lease fait a terme d'ans, nul novel fee simple fuit reserve en le lessor, eins le reversion demurt a luy en tayle, sicome il fuit devant le lease fait.* *]

NOTE, if I give land to another in taile, and hee letteth the same land to another for terme of yeares, and after the lessor graunteth the reversion to another in fee, and the tenant for yeares attorne to the grantee, and the terme expireth during the life of the tenant in tayle, by which the grauntee enter, and after the tenant in taile hath issue and die; in this case this is no discontinuance, notwithstanding the grant be executed in the life of the tenant in taile, for that at the time of the lease made for yeares, no new fee simple was reserved in the lessor, but the reversion remained to him in taile, as it was before the lease made.

* THIS is added to *Littleton*, and not in the originall, and therefore I purposely omit it: yet is the case good in law, because neither the lease for yeares, nor the grant of the reversion, divesteth any estate.

Sect. 620.

[333. a]

‡ *MES si le tenant en taile fait leas a terme de vie le lessee, &c. en cest case le tenant en le tayle ad ‡ fait un novel reversion de ‖ fee simple en luy; pur ceo que quant il fist leas pur terme de vie, &c. il discontinua le taile,*

BUT if the tenant in taile make a lease for terme of the life of the lessee, &c. in this case the tenant in tayle hath made a new reversion of the fee simple in him; because when hee made the lease for life, &c. he discontinued

† *Nota—item*, L. and M. and Roh. No part of these Sections within crochets, is in L. and M. and Roh.

‡ In L. and M. and MSS. this Section begins thus: *Si jeo doue terre a un auter en le tail, et il lessa mesme la terre a un auter pur terme de vie, &c.*

‡ *en* added L. and M.

‖ *de—en*, L. and M.

(1) [See Note 288.]

taile ‡, *&c. per force de mesme le leas, et auxy il discontinua ma reversion, &c. Et il covient que la reversion de fee simple soit en ascun person en tiel cas: et il ne poit estre en moy que sue donor, entant que mon reversion est discontinue; ergo il covient que la reversion de fee soit en le tenant en le taile, que discontinua ma reversion per tiel leas, &c. Et si en cest case le tenant en le taile graunta per son fait cest reversion en fee a un auter, et le tenant a terme de vie atturna, &c. et puis le tenant a terme de vie morust, vivant le tenant en le taile, et le grantee de le reversion entra, &c. en la vie le tenant en le taile, donques ceo est un discontinuance en fee; et si apres le tenant en le taile morust, son issue ne poit enter, mes est mis a son briefe de* formedon. *Et la cause est, pur ceo que cestuy que avoit le grant de tiel reversion en fee simple, avoit le seisin et execution de mesmes les terres ou tenements, d'aver a luy et a ses heires en son demesne come de fee, en la vie le tenant en taile.* * [*Et ceo est per force de grant de mesme le tenant en taile.*

continued the tayle, &c. by force of the same lease, and also hee discontinued my reversion, &c. And it behoveth that the reversion of the fee simple be in some person in such case: and it cannot be in me which am the donor, inasmuch as my reversion is discontinued; *ergo* the reversion of the fee ought to be in the tenant in tayle, who discontinued my reversion by lease, &c. And if in this case the tenant in tayle grant by his deed this reversion in fee to another, and the tenant for life attorne, &c. and after the tenant for life dieth, living the tenant in taile, and the grantee of the reversion enter, &c. in the life of the tenant in taile, then this is a discontinuance in fee; and if after the tenant in tayle dieth, his issue may not enter, but is put to his writ of *formedon*. And the cause is, for that he which hath the grant of such reversion in fee simple, hath the seisin and execution of the same lands or tenements, to have to him and to his heires in his demesne as of fee, in the life of the tenant in taile. And this is by force of the grant of the said tenant in tayle.

"*PUR terme de vie del lessee, &c.*" Here is implied, or for terme of another man's life. (1)

(1. Roll. 633.)

"*Novel reversion de fee simple.*" Which must bee understood of a fee simple determinable upon the life of the lessee, which our author here calleth a fee simple; for if the lessee dieth, the donee is tenant in taile againe, as hee was before: and that is the reason that if in that case hee granteth over the reversion and dieth; and after the death of tenant in taile, the lessee dieth; the entry of the issue is lawfull, because by the death of the lessee the discontinuance is determined; and consequently the grant made of the reversion gained upon that discontinuance, is void also.

15. E. 4. tit. Discont. 30.

(Cro. Car. 156.)

If tenant in taile maketh a lease for three lives according to the statute of 32. *H.* 8. that is no discontinuance of the estate taile or of the reversion, because it is authorised by act of parliament, whereunto every man in judgement of law is partie.

32. H. 8. cap. 28.

And

‡ *le taile, &c. per force de mesme le leas, et auxy il discontinua,* not in L. and M. nor Roh.

* No part of this or of the following Section within crotchets is in L. and M. and Roh.

(1) [See Note 289.]

[u] 38. E. 3. 32. 18. Ass. 2. 18. E. 3. 54. 22. H. 6. 24. (8. Rep. 71.)

And yet in some cases the freehold may be discontinued and not the reversion. [u] As if the husband and wife make a lease for life by deed (2) of the wife's land, reserving a rent, the husband dieth; this was a discontinuance at the common law for life; and yet the reversion was not discontinued, but remained in the wife. Otherwise it is if the husband had made the lease alone.

[333.b]

21. H. 6. 52. 15. E. 4. tit. Discont. 30.

" *Et puis le tenant a terme de vie moruss*, &c." The like law it is if the tenant for life surrender to the grantee, or if the grantee recover in an action of waste, or enter for the forfeiture.

32. E. 3. Discont. 2. 43. E. 3 Entr. Cong. 31. 3. H. 4 9. 22. R. 2. Discont. 50. 34. Ass. 6. Pl. 4. 38. Ass. 6. p. 6. 43. Ass. 6. 48. 18. E. 3. 43. 21. H. 6. 52. 15. E. 4. tit. Discontinuance 30. Brooke tit. Discont. 3. & 14. 4. H. 7. 17. 21. H. 7. 11.

" *Avoit seisin et execution.*" And here it is to be observed, that when the reversion in this case is executed in the life of tenant in taile, it is equivalent in judgement of law to a feoffment in fee, for the state for life passed by livery.

[w] 21. H. 6. 52, 53.

[w] If tenant in taile make a lease for life, the remainder in fee, this is an absolute discontinuance, albeit the remainder be not executed in the life of tenant in taile, because all is one estate, and passeth by one livery. And so note a diversitie betweene a grant of a reversion, and a limitation of a remainder. *B.* tenant in taile maketh a gift in taile to *A.* and after *B.* releaseth to *A.* and his heires, and after *A.* dieth without issue; the issue of the first donee may enter upon the collaterall heire, because *A.* had not seisin and execution of the reversion of the land in his demesne as of fee, as *Littleton* here speaketh. But if tenant in taile make a lease for the life of the lessee, and after releaseth to him and his heires, this is an absolute discontinuance; because the fee simple is executed in the life of tenant in taile.

[y] 34. E. 1. quare impedit 179 22. E. 3. 6. 17. E. 3. 3. 33. E. 3. quare imp. 196. 23. Ass. 8. 50. E. 3. 26. (Ant. 298. Post. 349. b. F. N. B. 32. 1. Roll. Abr. 632. 1. Rep. 76.)

[y] If tenant in taile of a mannor whereunto an advowson is appendant, maketh a feoffment in fee by deed (as it ought to be) of one acre with the advowson, and the church becommeth void, and the feoffee present, tenant in taile dieth, the church becommeth void; the issue shall not present untill he hath re-continued the acre. But if the feoffee had not executed the same by presentment, then the issue in taile should have presented. And so was it at the common law, of the husband seised in the right of his wife, *mutatis mutandis*.

36. Ass. 8. 42. E. 3. 20. 22. R. 2. Discont. 50. (Sect. 601. 638.) 21. H. 6. 52, 53. Brooke tit. Discont. 3. 21. H. 7 11. Lib. 1. fol. 85. Lib. 10. fol. 96, 97. (W. Jones 210. Cro. Car. 156.)

If a fine be levied to a tenant in taile, and he granteth and rendreth the land to him and his heires, and die before execution, this is no discontinuance. Otherwise it is, if it had beene executed in the life of tenant in taile.

If tenant in taile make a lease for life of the lessee, and after grant the reversion with warrantie, and dieth before execution, this is no discontinuance; because the discontinuance was (as hath beene said) but for life, and the warrantie cannot enlarge the same. (1)

(*) 15. E. 4. Discont. 30. Vide Sect. 642.

" *Et ceo est per force del grant de mesme le tenant en tayle.*" Hereupon *Littleton* himselfe is of the same opinion, (*) as it appeareth he was in our

(2) [See Note 290.] (1) [See Note 291.]

our bookes; that if tenant in taile make a lease for life, and grant the reversion in fee, and the lessee attorne, and that grantee granteth it over, and the lessee attorne, and then the lessee for life dieth, so as the reversion is executed in the life of tenant in taile, yet this is no discontinuance, but that after the death of tenant in taile the issue may enter; because (as *Littleton* here saith) he is not in of the grant of the tenant in taile, but of his grantee.

If at this day tenant in taile make a lease for life, and after by deed indented and inrolled according to the statute he bargaineth and selleth the reversion to another in fee, and the lessee dieth, so as the reversion is executed in the life of tenant in taile; albeit the bargainee is not in the *per* by the tenant in taile, yet inasmuch as he claimeth the reversion immediately from him, which is executed in his lifetime, this is a discontinuance. And so it is, and for the same cause, if tenant in taile had granted the reversion to the use of another and his heires. If tenant in taile maketh a lease for life, and after disseiseth the lessee for life, and maketh a feoffment in fee, the lessee dieth, and then tenant in taile dieth; albeit the fee be executed, yet for that the fee was not executed by lawfull meanes, (as in all the cases of *Littleton* it appeareth it ought to be) it is no discontinuance.

Sect. 621.

[334. a.]

(Post. 335. b. mesme le case.)

EN mesme le manner serra, si en le case avantdit le tenant a terme de vie apres l'attournement al grantee ust alien en fee, et le grantee ust enter pur forfeiture de son estate, et puis le tenant en taile ust devie, c'est un discontinuance, causâ quâ supra.]

IN the same manner shall it be, if in the case aforesaid the tenant for terme of life after the attornement to the grantee had aliened in fee, and the grantee had entred by forfeiture of his estate, and after the tenant in tayle had died, this is a discontinuance, *causâ quâ supra.*

THIS is added in this place, but in the originall it commeth in after in this Chapter *.

21. H. 6. 52, 53. 15. E. 4. Discont. 30.

Sect. 622.

(Sir W. Jones 209. Cro. Car. 156.)

MES en cest cas, si tenant en taile que granta le reversion, &c. morust, vivant le tenant a terme de vie, et puis le tenant a terme de vie morust, et puis celuy a que le reversion fuit graunt enter, &c. donque ceo n'est pas discontinuance, mes que l'issue del tenant en

BUT in this case, if tenant in taile that grants the reversion, &c. dieth, living the tenant for life, and after the tenant for life dieth, and after hee to whom the reversion was granted enter, &c. then this is no discontinuance, but that the issue of the tenant in

* But it does not appear in this Chapter in L. and M. nor Roh. nor in MSS.

en taile poit bien enter sur le grauntee del reversion; pur ceo que le reversion que le grauntee avoit, &c. ne fuit execute, &c. en le vie le tenant en taile, &c. Et issint il est graund diversity quant tenant en taile fait un leas pur terme d'ans, et lou il fait leas pur terme de vie; car en l'un cas il ad reversion en taile, et en l'auter cas il ad un reversion en fee.

in tayle may well enter upon the grantee of the reversion; because the reversion which the grantee had, &c. was not executed, &c. in the life of the tenant in taile, &c. And so there is a great diversitie when tenant in tayle maketh a lease for yeares, and where hee maketh a lease for life; for in the one case hee hath a reversion in tayle, and in the ot er case hee hath a reversion in fee. (1)

OF this sufficient hath beene said before, and is of itselfe manifest, and needeth no explication.

18. Ass. 6. 21. H. 6. 53.

Like law was at the common law of a husband seised of land in right of his wife, *mutatis mutandis*.

Sect. 623.

[334. b.]

*CAR si terre soit done a un home et a ses heires males de son corps engendres, le quel ad issue deux fits, et l'eigne fits ad issue file et devy, * et le tenant en taile fait un leas pur terme des ans et devy, ore le reversion discendist a le fits puisne, pur ceo que le reversion fuit forsque en le taile, et le fits puisne est heire male, &c. Mes si le tenant ust fait un leas pur terme de vie, &c. et puis morust, ore le reversion discendist a le file del eigne fits, pur ceo que le reversion est en fee simple, et la file est heire general, &c.*

FOR if land bee given to a man and to his heires males of his body engendred, who hath issue two sonnes, and the eldest sonne hath issue a daughter and dieth, and the tenant in tayle maketh a lease for yeares and die, now the reversion descendeth to the younger sonne, for that the reversion was but in the taile, and the youngest sonne is heire male, &c. But if the tenant had made a lease for life, &c. and after died, now the reversion descendeth to the daughter of the elder brother, for that the reversion is in the fee simple, and the daughter is heire generall, &c. (1)

This is evident also, and needeth no explantion.

Sect. 624.

ITEM, si home soit seisie en taile de terres devisables per testament, &c. et il ceo devisa a un auter en fee, et morust, et l'auter enter, &c. ceo n'est pas discontinuance, pur ceo que nul discontinuance

ALSO, if a man be seised in taile of lands devisable by testament, &c. and hee deviseth this to another in fee, and dieth, and the other enter, &c. this is no discontinuance, for that no

* *et le tenant en taile fait un leas pur terme des ans, et devy*, not in L. and M. nor Roh.

[334. b.]

(1) See the note on the following Section. (1) [See Note 292.]

continuance fuit fait en la vie del tenant en le taile, &c.

no discontinuance was made in the life of the tenant in taile, &c.

THIS is manifest, and needeth no explanation: only this is to be observed, that no discontinuance can be made by tenant in taile, but such as is made and taketh effect in his life-time, which is here implied in the (*&c.*)

9. E. 4. 22. 28. H. 6. 14. Vid. 18. E. 3. 8. (Cro. Car. 405.) 1. Roll. Abr. 633.)

Sect. 625.

ITEM, si terre soit done en taile, savant le reversion al donor, et puis le tenant en taile per son fait enfeoffa le donor, a aver et tener a luy et a ses heires a touts jours, et liver a luy seisin accordant, &c. ceo n'est pas discontinuance, pur ceo que nul poit discontinuer l'estate en le taile, sinon que il discontinue le reversion celuy que ad le reversion, &c. ou le remainder, si ascun ad le remainder, &c. Et entant que per tiel feoffment fait a le donor (le reversion adonques esteant en luy) son reversion ne fuit discontinue ne alterate, &c. cest feoffment n'est pas discontinuance, &c.

ALSO, if land be given in taile, saving the reversion to the donor, and after the tenant in taile by his deed enfeoffe the donor, to have and to hold to him and to his heires for ever, and deliver to him seisin accordingly, &c, this is no discontinuance, because none can discontinue the estate taile, unlesse he discontinueth the reversion of him who hath the reversion, &c. or remainder, if any hath the remainder, &c. And inasmuch as by such feoffment made to the donor (the reversion then being in him) his reversion was not discontinued nor altred, &c. this feoffment is no discontinuance, &c.

AND of this opinion is *Littleton* [a] in our bookes, and saith that so it was adjudged.

[a] 9. E. 4. 24. b.

[335. a.] "*Enfeoffe le donor, &c.*" This must be understood where the reversion of the donor is immediately expectant upon the estate of the donee; [b] for if a man make a gift in taile the remainder in taile, reserving the reversion to himselfe: in this case if the donee enfeoffe the donor, this is a discontinuance, because there is a meane estate; and so doth *Littleton* here put his case of a reversion immediately expectant upon the gift in taile. Also it is to be intended of a feoffment made to the donor solely or only; for if the donee enfeoffe the donor and a stranger, this is a discontinuance of the whole land.

Lib. 1. fol. 140. in Chudlye's case. (1. Roll. Abr. 634.) [b] 41. Ass. 2. 41. E. 3. 2. (1. Rep. 146. b.) (Ant. 42. a.) 28. H. 8. Dier 12.

But if tenant for life make a lease for his owne life to the lessor, the remainder to the lessor and an estranger in fee: in this case forasmuch as the limitation of the fee should worke the wrong, it enureth to the lessor as a surrender for the one moytie, and a forfeiture as to the remainder of the stranger; for he cannot give to the lessor that which he had before, as our author here saith; and as to the remainder to the stranger, it is a forfeiture for his moytie, and when the lessor entreth, he shall take the benefit of it. But if two joyntenants be, and one of them enfeoffe his companion and a stranger,

(1. Rep. 76. b. Sid. 361.) (Dyer 12. b.) (Ant. 169. a. 186. a. 193. b. 200. b. 2. Roll

Abr. 86. 403. 1. Rep. 100. b. 4. Leo. 23.)

a stranger, and make livery to the stranger; this shall vest only in the stranger, because the livery cannot enure to his companion.

40. Ass. 36. 21. Ass. 36. 18. E. 3. 45. F. N. B. 142. a. Pl. Com. 555. [c] 33. H. 8. tit. Taile. Br. 41. Pl. Com. ubi supra.

" *Nul poit discontinuer l'estate en taile, sinon que il discontinue le " reversion, &c. ou le remainder, &c.*" And therefore for this cause, if the reversion or remainder be in the king, the tenant in taile cannot discontinue the estate taile. [c] But tenant in taile, the reversion in the king, might have barred the estate taile by a common recovery, untill the statute of 34. *H.* 8. *ca.* 20. which restraineth such a tenant in taile; but that common recovery neither barred nor discontinued the king's reversion. (1)

[d] 27. Ass. p. 60. 29. Ass. 43. 21. Ass. 11. 26. Ass. 11. 18. E. 3. 45. (Ant. 333. b. Post. 336.)

Note, the reversion may be revested, and yet the discontinuance remaine. [d] As if a feme covert be tenant for life, and the husband make a feoffment in fee, and the lessor enter for the forfeiture; here is the reversion revested, and yet the discontinuance remained at the common law.

(1. Roll. Abr. 633.)

Sect. 626.

EN mesme le maner est, lou terres sont dones a un home en taile, le remainder a un auter en fee, et le tenant en taile enfeoffa celuy que est en le remainder, a aver et tener a luy et a ses heires; ceo n'est pas discontinuance, causâ quâ suprà.

IN the same manner is it, where lands are given to a man in taile, the remainder to another in fee, and the tenant in taile enfeoffe him that is in the remainder, to have and to hold to him and to his heires; this is no discontinuance, *causâ quâ suprà.* (2)

" *LE remainder a un auter.*" Here it appeareth that (as hath beene said in case of a reversion) the remainder must be immediately expectant upon the estate taile.

Sect. 627.

[335. b.]

*ITEM, si un abbe ad un reversion, ou rent service, ou rent charge, et voile graunter * cel reversion, ou rent service, ou rent charge, a un auter en fee, et le tenant atturna, &c. ceo n'est pas discontinuance.*

ALSO, if an abbot hath a reversion, or a rent service, or a rent charge, and he will grant this reversion, or rent service, or rent charge, to another in fee, and the tenant attorne, &c. this is no discontinuance.

Of inheritances that lie in grant, sufficient hath beene said before.

* *cel reversion, ou rent service, ou rent charge,—un d'eux,* L. and M. and Roh. but as above in MSS.

(1) See Stone v. Newman, 2. Cro. 427. (2) [See Note 293.]

Sect. 628.

EN mesme le manner lou abbe est seisie d'un advowson, ou de tielx choses que passont per voy d'un grant sans liverie de seisin, &c.

IN the same manner where an abbot is seised of an advowson, or of such things which passe by way of grant without liverie of seisin, &c.

HERE it appeareth, (as hath beene said) that an advowson doth not lie in liverie, but in grant.

Sect. 629.

(Ant. 234. a.)

ITEM, si tenant en taile lessa sa terre a un auter pur terme de vie, et puis il graunta en fee le reversion a un auter, et le tenant atturna, et puis le tenant a terme de vie aliena en fee, et le grantee de reversion entra, &c. en le vie le tenant en le taile, et puis le tenant en le taile morust, son issue ne poit enter, mes est mis a son briefe de formedon, *pur ceo que le reversion en fee simple que le grauntor avoit per le grant del tenant en le taile, fuit execute en le vie de mesme le tenaunt en le taile, et pur ceo est un discontinuance en fee, &c.*

ALSO, if tenant in tayle letteth his land to another for life, and after he granteth in fee the reversion to another, and the tenant attorne, and after the tenant for life alien in fee, and the grauntee of the reversion enter, &c. in the life of the tenant in taile, and after the tenant in taile dieth, his issue shall not enter, but is put to his writ of *formedon*, because the reversion in fee simple which the grauntor had by the graunt of the tenant in tayle, was executed in the life of the same tenant in tayle, and therefore it is a discontinuance in fee, &c.

Of this sufficient hath beene said before.

[336. a.]

Sect. 630.

(1. Roll. Abr. 631.)

ET nota, que ascuns font discontinuances pur terme de vie. Sicome tenaunt en le taile fait un lease pur terme de vie, savant le reversion a luy auxy longement que le reversion est al tenant en taile, ou a ses heires; ceo n'est discontinuance, forsque durant la vie le tenant a terme de vie, &c. Et si tiel tenant en taile dona les tenements a un auter en taile, savant le reversion, donques ceo est discontinuance durant le second taile, &c.

AND note, that some make discontinuances for terme of life. As if tenant in tayle make a lease for life, saving the reversion to him as long as the reversion is to the tenaunt in tayle, or to his heyres; this is no discontinuance but during the life of tenant for life, &c. And if such tenant in taile giveth the lands to another in tayle, saving the reversion, then this is a discontinuance during the second tayle, &c.

THIS

THIS is manifest, and hath beene handled before, and needeth no explanation; onely this is to be observed, where *Littleton* putteth hereafter cases of discontinuances by feoffement, &c. he hath a double entendment. First, by feoffement, or by any other conveyance which may make a discontinuance. Secondly, (*&c.*) implieth a discontinuance by a gift in taile, or a lease for life, &c.

Sect. 631.

MES lou le tenant en tayle fait un lease pur terme d'ans, ou pur terme de vie, le remainder a un auter en fee, et delivera liverie de seisin accordant, ceo est discontinuance en fee, pur ceo que le fee simple passa per force de liverie de seisin, &c.

BUT where the tenant in tayle maketh a lease for yeares or for life, the remainder to another in fee, and delivereth liverie of seisin accordingly, this is a discontinuance in fee, for that the fee simple passeth by force of the liverie of seisin, &c.

This is evident also, and hereof sufficient hath beene spoken before.

Sect. 632.

ET est ascavoir, que ascuns tiels discontinuances sont fait sur condition, &c. et pur ceo que les conditions sont enfreints, &c. ou pur auters causes, solonque le course de la ley, tiels estates sont defeates, donques sont les discontinuances defeats, et ne tollent ascun home per force de eux de son entrie, &c. * *Come si le baron soit seisie de certaine terre en droit sa feme, et fait feoffement en fee sur condition, et devie, si le heire apres enter sur le feoffee pur le condition enfreint, l'entrie la feme est congeable sur le heire, pur ceo que per l'entrie del heire le discontinuance est defeat, come est adjudge.*

AND it is to be understood, that some such discontinuances are made upon condition, &c. and for that the conditions be broken, &c. or for other causes, according to the course of law, such estates are defeated, then are the discontinuances defeated, and shall not by force of them take any man from his entrie, &c. As if the husband be seised of certaine land in right of his wife, and maketh a feoffement in fee upon condition, and dyeth, if the heire after enter upon the feoffee for the condition broken, the entrie of the wife was congeable upon the heire, for that by the entry of the heire the discontinuance is defeated, as is adjudged.

"*DISCONTINUANCES fait sur condition, &c.*" Here is to be understood a diversitie betweene a condition in deed, whereof *Littleton* here speaketh, and a condition in law, whereof somewhat hath beene said before in this chapter, viz. where the feme is tenant for life, and the husband maketh a feoffement in fee, and the lessor entreth for the condition in law.

(Ant. 335. a.) [336. b.]

"*Conditions*

* The remaining part of the above Section is not in L. and M. nor Roh. nor in Pynson, nor MSS. But in all, the case of the grandfather, father, and son, Sect. 637. is here inserted, with some small variation.

"*Conditions sont restreints, &c.*" Here is implied, or any cause given either by disabilitie of the feoffees, or by any condition performed on the part of the feoffor, or otherwise, whereby the state is in any sort avoided.

"*Come si le baron soit seisie de certaine terre en droit sa feme, &c.*" Here it appeareth, that for the condition broken, the heire of the husband may enter; for albeit no right descend from the husband to his heire, yet the title of entry by force of the condition which the husband created upon the feoffement, and reserved to him and his heirs, doth descend to his heire; and *Littleton* saith truly, that so it hath beene adjudged.

(2. Rep. 59.)

4. H. 6. 2. 9. H. 7. 24. b. Lib. 8. fol. 43. 44. Whittingham's case.

"*Sur le heire.*" *Nota*, when the heire in this case hath entred for the condition broken, and hath avoided the feoffement, the estate of the heire vanisheth away, and presently the estate vesteth in the feme or her heires, without any entry or claime by her or them; for the heire entreth in respect of the condition, upon the reall contract, and not of any right, as hath beene said; and if the husband himselfe had re-entred, the state had vested in his wife: and therefore where *Littleton* and our bookes say, that the wife shall enter upon the heire, the meaning is, that after the re-entry of the heire she may enter.

(Ant. 12. b. 46. b. 202. a.)

Whittingham's case, ubi supra.

Sect. 633.

ITEM, si feme inheritrix que ad un baron, quel baron est deins age, et il esteant deins age fait un feoffment de les tenements son feme en fee, et morust, il ad este question, si la feme poit enter, ou non, &c. Et il semble a ascuns, que l'entry la feme apres la mort sa baron, est congeable en cest cas. Car quant sa baron feasoit tiel feoffment, &c. il puissoit bien enter, nient contristeant tiel feoffment, &c. durant la coverture; et il ne puissoit enter en son droit demesne, mes en le droit la feme: ergo, *tiel droit que il avoit d'entrer en droit sa feme, &c. cest droit d'entrer demurt al feme apres son decease.*

ALSO, if a woman inheritrix hath a husband who is within age, and hee beeing within age maketh a feoffement of the tenements of his wife in fee, and dieth, it hath beene a question, if the wife may enter or not, &c. And it seemeth to some, that the entrie of the wife after the death of her husband, is congeable in this case. For when her husband made such feoffment, &c. he might well enter, notwithstanding such feoffment, &c. during the coverture; and he could not enter in his owne right, but in the right of his wife: *ergo*, such right as hee had to enter in the right of his wife, &c. this right of entrie remayneth to the wife after his decease.

THE reason here rendred by *Littleton* is, for that the husband cannot enter in his owne right, but in the right of his wife; and the heire of the husband cannot enter, for no right or title descends unto him, and the wife in this case shall take benefit of the nonage of her husband, and enter into the land.

Whittingham's case, ubi supra.

If an infant be tenant for another man's life, and make a feoffement in fee, and *cesty que vie* dieth, the infant himselfe shal not enter, because he hath no right at all.

If the husband within age take to wife feme tenant in taile generall, and the husband make a gift in taile and dieth within age, in this case the wife may enter, as *Littleton* here holdeth, or the heire of the husband in respect of the new reversion descended unto him may enter. But if the heire enter, presently thereupon his estate vanisheth. If tenant in taile being within the age of one and twenty yeeres make a feoffment in fee, and after is attainted of felony and dieth, the entry of the issue is not lawfull; for his entry is not lawfull in respect of his estate only, but of his blood also which is corrupted; and therefore in that case he is driven to his *formedon*.

[337. a.]

(8. Rep. 43.)

If husband and wife be both within age, and they by deed indented joyne in a feoffment reserving a rent, the husband dieth, the wife may enter, or have a *dum fuit infra ætatem*. But if she were of full age, she shall not have a *dum fuit infra ætatem*, for the nonage of her husband, albeit they be but one person in law.

14. E. 3. Bre. 281. 14. E. 3. Dum fuit infra ætatem 6. F. N. B. 192. (1. Roll. Abr. 634.)

Sect. 634.

ET il y ad esté dit, que si deux joyntenants esteants deins age font un feoffment en fee, et l'un des enfants devy, et l'auter survesquist; entant que les ambideux enfants puissont enter joyntment en lour vies, cel droit accruist tout a luy que survesquist, et pur ceo celuy que survesquist poit enter en l'entiertie, &c. Et auxy l'heire le baron que fist le feoffment deins age ne poit enter, &c. pur ceo que nul droit discendist a tiel heire en le cas avantdit, pur ceo que le baron n'avoit unques riens forsque en droit de sa feme, &c.

AND it hath beene said, that if two joyntenants being within age make a feoffement in fee, and one of the infants die, and the other surviveth; in as much as both the infants might enter joyntly in their lives, this right accrueth all to him which surviveth, and therefore hee that surviveth may enter into the whole, &c. And also the heire of the husband which made the feoffment within age cannot enter, &c. because no right descendeth to such heire in the case aforesaid, for that the husband had never any thing but in right of his wife, &c.

21. E. 3. 50. 18. E. 2. Bre. 831. 6. E. 3. 4. 9. H. 6. 6. 19. H 6. 6. 39. H. 6. 42. 34. H. 6. 31. F. N. B. 192. See of this in the Chapter of Joyntenants. (8. Rep. Whittingham's case.)

"*POIT enter en l'entiertie, &c.*" And the reason hereof is implied in this (*&c.*) for that they may joyne in a writ of right, and therefore the right shall survive. But they cannot joyne in a *dum fuit infra ætatem*, because the nonage of the one is not the nonage of the other. In this case, if one joyntenant had made a feoffment in fee and died, the right should not have survived, for the joynture was severed for a time. If two joyntenants be, and the one is of full age, and the other within age, and both they make a feoffment in fee, and he of full age dieth, the infant shall enter, or have a *dum fuit infra ætatem* but for the moitie,

[337. b.]

Sect.

Sect. 635.

(F. N. B. 192. a. 5. Rep. 27. 29. 6. Rep. 3. 9. Rep. 84. b. 8. Rep. 42.)

ET auxy quant un enfant fait un feoffment esteant deins age, ceo ne luy greevera ne ledra, mes que il poit enter bien, &c. car ceo serroit encounter reason, que tiel feoffment fait per celuy que ne fuit able de faire tiel feoffment, greevera ou ledera auter, de toller eux de lour entre, &c. Et pur ceux causes il semble a ascuns, que apres la mort de tiel baron issint esteant deins age al temps de le feoffment, &c. que sa feme bien poit enter, &c.

AND also when an infant make a feoffment being within age, this shall neither grieve nor hurt him, but that hee may well enter, &c. for it should be against reason, that such feoffment made by him that was not able to make such a feoffment, shall grieve or hurt another, to take them from their entry, &c. And for these reasons it seemeth to some, that after the death of such husband so being within age at the time of the feoffment, &c. that his wife may well enter, &c.

"*MES que il poit enter bien, &c.*" Here is implied, that he might enter either within age, or at any time after full age, and likewise after his death his heire may enter. *Meliorem enim conditionem facere potest minor deteriorem nequaquam.*

Bract. fol. 14. Britton fol. 88. a. Fleta lib. 3. cap. 3. (Post. 350. b. 380. b.)

Nota, A speciall heire shall take advantage of the infancie of the ancestor. As if tenant in taile of an acre of the custome of borow English make a feoffment in fee within age, and dieth, the youngest sonne shall avoid it; for he is privie in bloud, and claimeth by discent from the infant.

And so if tenant in taile to him and the heires females of his bodie make a feoffment in fee and dieth within age, having issue a sonne and a daughter, the daughter shall avoid the feoffment. And so note, that a cause to enter by reason of infancie is not like to conditions, warranties, and estoppels, which ever descend to the heire at the common law.

(8. Rep. 54. Ant. 12. a.)

The residue of this Section upon that which hath beene said is evident.

Sect. 636.

ITEM, si feme inheritrix prent baron, et ont issue fits, et le baron morust, et el prent auter baron, et le second baron lessa la terre que il ad en droit sa feme a un auter pur terme de sa vie, et puis la feme morust, et puis le tenant a terme de vie surrendist son estate a le second baron, &c. quære, *si le fits le feme poit enter en cest cas sur le second*

ALSO, if a woman inheritrix taketh husband, and they have issue a sonne, and the husband dieth, and she takes another husband, and the second husband letteth the land which he hath in right of his wife to another for terme of his life, and after the wife dieth, and after the tenant for life surrendereth his estate to the second husband,

*second baron durant la vie le tenant a terme de vie, * &c. Mes il est cleere ley, que apres la mort le tenant a terme de vie, le fits la feme poit enter; pur ceo que le discontinuance, que fuit tantsolement pur terme de vie, est determine, &c. per la mort de mesme le tenant a terme de vie †.*

husband, &c. *quære*, if the sonne of the wife may enter in this case upon the second husband during the life of tenant for life, &c. But it is cleere law, that after the death of the tenant for life, the son of the wife may enter; because the discontinuance, which was only for terme of life, is determined, &c. by the death of the same tenant for life.

(Ante 218. b. Perk. 581. 2. Roll. Abr. 494.)

"SURRENDER," *sursum redditio*, properly is a yeelding up of an estate for life or yeares to him that hath an immediate estate in reversion or remainder, wherein the estate for life or yeares may drowne by mutuall agreement betweene them. (1)

(Ant. 218. b.)

Note, there be three kinde of surrenders, viz. a surrender properly taken at the common law, which is here before described, and whereof *Littleton* speaketh. (1) Secondly, a surrender by custome of lands holden by copy, or of customary estates, whereof you have read before, *Sect.* 74. and a surrender improperly taken (as appeare before, *Sect.* 550.) of a deed. And so of a surrender of a patent, and of a rent newly created, and of a fee simple to the king.

[338. a]

(9. Rep. 75.) 2. Eliz. Dier. 176. 14. H. 7. 3. 27. Ass. 37. 49. E. 3. 2. 11. H. 4. 2. 12. H. 4. 21. 13. H. 4. 13.

A surrender properly taken is of two sorts, viz. a surrender in deed, or by expresse words, (whereof *Littleton* here putteth an example) and a surrender in law wrought by consequent by operation of law. *Littleton* here putteth his case of a surrender of an estate in possession, for a right cannot bee surrendered. And it is to be noted, that a surrender in law is in some cases of greater force than a surrender in deed. As if a man make a lease for yeares to begin at *Michaelmasse* next, this future interest cannot be surrendred, because there is no reversion wherein it may drowne; but by a surrender in law it may be drowned. As if the lessee before *Michaelmasse* take a new lease for yeares either to begin presently, or at *Michaelmasse*, this is a surrender in law of the former lease. *Fortior & æquior est dispositio legis quam hominis.* (2)

14. H. 8. 15. 37. H. 6. 17. 21. H. 7. 6. 40. E. 3. 24. 31. Ass. 26. 50. E. 3. 6. 44. Ass. 3. 35. H. 8. Dier 37. 8. Ass. 20. 4 Ma. Dier. 141. 21. Eliz. Dier. 280. 6. H. 7. 9. 37. H 6. 17. 21. H. 7. 6. 14. H. 7. 4. Lib. 6. f. 69. Sir Moyle Finche's case. (5. Rep. 11. 1. Leo. 323. 4. Rep. 53.) (10 Rep. 67. 6. Rep. 69. Cro. Jac. 84. 2. Roll. Abr. 494. Ant. 47. b. Dyer 58.) 19 H. 6. 33. 27. Ass. 46. 14. H. 7. 4. 1. H. 6. 1. Pl. Com. 541.

Also there is a surrender without deed, whereof *Littleton* putteth here an example of an estate for life of lands, which may be surrendred without deed, and without livery of seisin; because it is but a yeelding, or a restoring of the state againe to him in the immediate reversion or remainder, which are alwayes favoured in law. And there is also a surrender by deed; and that is of things that lie in grant, whereof a particular estate cannot commence without deed, and by consequent the estate cannot be surrendred without deed. But in the example that *Littleton* here putteth, the estate

* &c. not in L. and M. nor Roh. † &c. added L. and M. and Roh.

(1) [See Note 294.]

[338. a.]
(1) [See Note 295.]
(2) [See Note 296.]

estate might commence without deed, and therefore might bee surrendred without deed. And albeit a particular estate be made of lands by deed, yet may it be surrendred without deed, in respect of the nature and qualitie of the thing demised, because the particular estate might have beene made without deed; and so on the other side. If a man be tenant by the courtesie, or tenant in dower of an advowson, rent, or other thing that lies in grant; albeit there the estate begin without deed, yet in respect of the nature and qualitie of the thing that lies in grant, it cannot be surrendred without deed. And so if a lease for life be made of lands, the remainder for life; albeit the remainder for life began without deed, yet because remainders and reversions, though they be of lands, are things that lie in grant, they cannot be surrendred without deed. See in my Reports plentifull matter of surrenders.

(Ant. 225. b. Cro. Car. 399. 2. Roll. Abr. 498.)

" *Quære, si le fits la feme poit enter, &c.*" Here *Littleton* maketh a *quære*. So as grave and learned men may doubt, without any imputation to them; for the most learned doubteth most, and the more ignorant for the most part are the more bold and peremptory.

(10. Rep. 66, 67.)

It is holden of some, that after the surrender the issue in taile during the life of tenant for life may enter; for that having regard to the issue, the state for life is drowned, and consequently the inheritance gained by the lease is by the acceptance of the surrender vanished and gone: as if tenant in taile make a lease for life, whereby he gaineth a new reversion (as hath beene said) if tenant for life surrender to the tenant in taile, the estate for life being drowned, the reversion gained by wrong is vanished and gone, and he is tenant in taile againe against the opinion *obiter* of *Portington*, 21. *H.* 6. 53.

[338. b.]

21. H. 6. 53.

But herein are two diversities worthy of observation. The first is, that having regard to the parties to the surrender, the estate is absolutely drowned, as in this case betweene the lessee and the second baron. But having regard to strangers, who were not parties or privies thereunto, lest by a voluntary surrender they may receive prejudice touching any right or interest they had before the surrender, the estate surrendred hath in consideration of law a continuance. (1) As if a reversion be granted with warrantie, and tenant for life surrender, the grantee shall not have execution in value against the grantor, who is a stranger during the life of tenant for life; for this surrender shall worke no prejudice to the grantor who is a stranger.

(Ant. 185. 8. Rep. 145.)

45. E. 3. 13. 5. H. 5. 9. 9. E. 4. 18.

So if tenant for life surrender to him in reversion being within age, he shall not have his age; for that should be a prejudice to a stranger, who is to become demandant in a reall action.

40 E. 3. 13. 9. E. 4. 18. 1. H. 6. 1. 24. E. 3. 77.

If tenant for life grant a rent charge, and after surrender, yet the rent remaineth, for to that purpose he commeth in under the charge. *Causâ quâ supra.*

5. H. 5. 8. 26. Ass. 38. 7. H. 6. b.

If a bishop be seised of a rent charge in fee, the tenant of the land enfeoffe the bishop and his successors, the lord enter for the mortmaine, he shall hold it discharged of the rent; for the entrie for the mortmaine affirmeth the alienation in mortmaine, and the lord claimeth under his estate; but if tenant for life grant a rent in

(6. Rep. 79. 7. Rep. 38. Ant. 184. b.)

(1) On the surrender of terms of years by one termor for years to another termor for years, see Hughes v. Robotham, 1st Cro. 302.

in fee, and after infeoffe the grantee, and the lessor enter for the forfeiture, the rent is revived, for the lessor doth claime above the feoffment. But if I grant the reversion of my tenant for life to another for terme of his life, and tenant for life attorne, now is the waste of tenant for life dispunishable. (2) Afterwards I release to the grantee for life and his heires, or grant the reversion to him and his heires; now albeit the tenant for life be a stranger to it, yet because he attorned to the grantee for life, the estate for life which the grantee had shall have no continuance in the eye of the law as to him, but he shall be punished for waste done afterward.

(Ant. 234.) 48. E. 3 16. (Mo. 94.)

The second diversitie is, that for the benefit of an estranger the estate for life is absolutely determined. As if he in the reversion make a lease for yeares, or grant a rent charge, &c. and then the lessee for life surrender, the lease or rent shall commence *maintenant*. So in the case of *Littleton*, first, betweene the lessee and the second husband, the state for life is determined; and secondly, for the benefit of the issue it shall be so adjudged in law. Here note a diversitie, when it is to the prejudice of a stranger, and when it is for his benefit.

(Pla. Com. 198.)

If a man maketh a lease to *A.* for life, reserving a rent of 40 shillings to him and his heires, the remainder to *B.* for life, the lessor grant the reversion in fee to *B.* *A.* attorne, *B.* shall not have the rent; for that although the fee simple doe drowne the remainder for life betweene them, yet as to a stranger it is *in esse*; and therefore *B.* shall not have the rent, but his heire shall have it.

A master of an hospitall being a sole corporation, by the consent of his brethren makes a lease for yeares of part of the possessions of the hospitall; afterwards the lessee for yeares is made master, the terme is drowned; for a man cannot have a terme for yeares in his owne right and a freehold in *auter droit* to consist together (as if a man lessee for yeares take a feme lessor to wife). (3) [a] But a man may have a freehold in his owne right and a terme in *auter droit*: and therefore if a man lessor take the feme lessee to wife, the terme is not drowned, but he is possessed of the terme in her right during the coverture. [b] So if the lessee make the lessor his executor, the terme is not drowned. *Causâ quâ supra.* (4)

(4. Leo. 37. Hob. 3.) Adjudge Mich. 16. & 17. Eliz. int. Turner pl. & Gray def. in ejectione firmæ in communi banco Rot. 945. Sir Francis Fleming's case. [a] 6. H. 4. 7. Pl. Com. 418. [b] 32. H. 8. Br. surrender 52.

But if it had beene a corporation aggregate of many, the making of the lessee master had not extinguished the terme, no more than if the lessee had beene made one of the brethren of the hospitall.

(2. Cro. 275. Mo. 54.)

* Sect. 637.

[*NOTA, que un estate taile ne poit este discontinue, mes la ou cestuy que fait le discontinuance fuit un foits seisie per force de le taile, sinon que soit*

NOTE, that an estate taile cannot bee discontinued, but there where hee that makes the discontinuance was once seised by force of the taile, unles it

* The part of this Section within crotchets is not either in L. and M. nor Roh. nor MSS. and the remainder of this Section in those copies immediately follows (with a small variation) that part of the work which is distinguished by Sect. 632.

(2) See note 2. ante 218. b.

(3) *Cont.* Lichden v. Winsmore, 1. Roll. Abr. 934.

(4) [See Note 297.]

soit per reason de garrantie, &c. Come si soit aiel, pier, et fits, * *et l'ayel soit tenant en taile, et est disseisie per le pier que est son fits, et le pier fait un feoffment de ceo sans garranty et devie, et puis l'aiel devie, le fits bien poit enter sur le feoffee, pur ceo que ceo ne fuit pas discontinuance, entant que le pier ne fuit seisie per force de le taile al temps del feoffment, &c. mes fuit seisie en fee per le disseisin fait al ayel.*

it be by reason of a warranty, &c. As if there be grandfather, father, and son, and the grandfather is tenant in taile, and is disseised by the father who is his son, and the father maketh a feoffment of this without warranty and die, and afterwards the grandfather dies, the son may wel enter upon the feoffee, because this was no discontinuance, inasmuch as the father was not seised by force of the entaile at the time of the feoffment, &c. but was seised in fee by the disseisin of the grandfather.

"*UN foits.*" Here it is to bee observed, that it is not necessary that the tenant in taile bee ever seised of an estate taile at the time when the discontinuance of the whole estate is begun: as if tenant in taile make a lease for life, whereby he gaineth, as hath beene said, a fee simple by wrong; in this case if he grant the reversion in fee, and the lessee dieth, the whole estate is discontinued; and yet at the time of the grant (by which the discontinuance continueth) hee was not seised by force of the taile; and therefore *Littleton* materially added these words *(un foits)* that is, that hee was once seised by force of the estate taile: and seeing that (as hath beene said) a discontinuance is a privation, the rule of law agreeth well with the rule of philosophie, that *omnis privatio præsupponit habitum,* and therefore he cannot discontinue that estate which he never had.

[339. a.]

Vide Sect. 658. (1. Roll. Abr. 634.)

Vide Sect. 592, 596, 597. 601. 640. 658.

"*Sinon que il soit per reason del garrantie, &c.*" For in many cases a warrantie added to a conveyance is said to make a discontinuance *ab effectu,* although he that made the conveyance was never seised by force of the estate taile, because it taketh away the entrie of him that right hath, as a discontinuance doth. As if tenant in taile be disseised and dieth, and the issue in taile release to the disseisor with warrantie; in this case the issue was never seised by force of the taile; and yet this hath the effect of a discontinuance by reason of the warrantie, and the reason hereof appeareth before in this Chapter.

9. E. 4. 19. 12. E. 4. 11. 21. E. 4. 97.

"*Le fits poet enter.*" But if the father that made the feoffment had survived the grandfather, he should never have entred against his own feoffment; but albeit the father had survived, yet after his decease the sonne should have entred, for the reason here yeelded by *Littleton.* But if the feoffment had beene with warrantie, then it had wrought the effect of a discontinuance: and therefore *Littleton* saith *sans garranty,* without warrantie.

15. E. 4. Discont. 30. & entr. Cong. 21. 21. E. 4. 97. 9. E. 4. 19. 39. H. 6. 45. 21. H. 6. 52. 12. E. 4. 11. 1. Mar. Dier. 98. (Ant. 265.)

* *et l'ayel soit tenant en taile, et est disseisie per le pier que est son fits,* not in L. and M.

Sect. 638.

*ITEM, si tenant en taile fait un lease a un auter pur terme de vie, et le tenant en taile ad issue et devie, et le reversion descendist a son issue, et puis l'issue granta le reversion a luy discendue, a un auter en fee, et le tenant a terme de vie attourna * et devie, et le grantee del reversion enter, &c. et est seisie en fee en la vie del issue, et puis issue en le taile ad issue fits et devie, il semble que ceo n'est pas discontinuance a le fits, mes que le fitz poit enter, &c. pur ceo que son pier, a que le reversion de fee simple discendist, &c. n'avoit unques riens en la terre per force de le taile, &c.*

ALSO, if tenant in taile make a lease to another for terme of life, and the tenant in tayle hath issue and dieth, and the reversion descendeth to his issue, and after the issue granteth the reversion to him descended, to another in fee, and the tenant for life attorne and die, and the grantee of the reversion enter, &c. and is seised in fee in the life of the issue, and after the issue in tayle hath issue a son and dieth, it seemes that this is no discontinuance to the son, but that the son may enter, &c. for that his father, to whom the reversion of the fee simple descended, had never any thing in the land by force of the entaile, &c. [339. b.]

15. E. 4. Discont. 30. 43. Ed. 3. 6.

OF this opinion is *Littleton* in our bookes.

21. H. 6. 52. 4. H. 7. 17. (1. Roll. Abr. 634.) (4. Leo. 39. 160. 156.)

" *Le grantee del reversion enter, &c.*" Here it is to be understood and observed, that in this case of the grant of the reversion *Littleton* doth not say *sans garrantie*; because if a warrantie had been added, it had wrought no discontinuance, for that (as hath beene said) the discontinuance in judgement of law was but for life: but when the addition of a warrantie doth worke a discontinuance, then *Littleton* saith, *sans garrantie*, as you may observe often in this Chapter.

21. H. 6. 52, 53. (Ant. 333.)

Sect. 639.

CAR si home seisie en droit sa feme, lessa mesme la terre a un auter pur terme de vie, ore est le reversion de fee simple a le baron, &c. Et si le baron morust, vivant sa feme et le tenant a terme de vie, † et le reversion discendist al heire le baron, si le heire le baron grant le reversion a un auter en fee, et le tenant atturna, &c. et puis le tenaunt a terme de vie morust, et le grauntee del reversion en cel case enter: ‡ en cest case ceo n'est pas discontinuance

FOR if a man seised in the right of his wife, letteth the same land to another for terme of life, now is the reversion of the fee simple to the husband, &c. And if the husband dieth, living his wife and the tenant for life, and the reversion descend to the heire of the husband, if the heire of the husband grant the reversion to another in fee, and the tenant attorne, &c. and afterwards the tenant for life dieth, and the grantee of the reversion

* *et devie, et le grantor del reversion enter, &c.—&c, et puis le tenant a terme de vie morust, et celuy en le reversion entra, &c.* L. and M. and Roh.

† *et* not in L. and M. nor Roh.

‡ *en cest cas* not in L. and M. nor Roh.

ance a la feme, mes la feme bien poit enter sur le grantee, &c. pur ceo que le grantor n'avoit riens al temps del graunt, en le droit la feme, quant il fist le graunt del reversion.

reversion in this case enter: in this case this is no discontinuance to the wife, but she may well enter upon the grantee, &c. because the grantor had nothing at the time of the graunt, in the right of his wife, when hee made the graunt of the reversion.

"*CAR si home seisie en droit sa feme, lessa, &c.*" Here *Littleton* putteth his case where the baron onely makes a lease for life; for if he and his wife joyne in a lease by deed, there the reversion is not discontinued. See before, *Sect.* 620. More need not to be said hereof, in respect the like case of tenant in taile hath been explained before.

14. E. 3. Discont. 5. 18. Ass. p. 2. 18. E. 3. 54. 38. E. 3. 32. 22. H. 6. 24. 21. H. 6. 52, 53. 15. E. 4. Discont. 30.

[340. a.]

Sect. 640.

(1. Roll. 634.)

ET issint il semble, coment que homes queux sont inheritables per force de le taile, et ils ne fueront unques seisies per force de mesme le taile, que tiel feoffements ou grants per eux fait sans clause de warrantie, n'est pas discontinuance a lour issues apres lour decease, mes que lour issues poyent bien enter, &c. coment que ceux queux fierent tielz grants en lour vies fueront forbarres d'entrer per lour fait demesne, &c.

AND so it seemeth, that men which are inheritable by force of an entaile, and never were seised by force of the same entaile, that such feoffements or grants by them made without clause of warrantie, is no discontinuance to their issues after their decease, but that their issues may well enter, &c. albeit they which made such graunts in their lives were forebarred to enter by their owne act, &c.

Sect. 641.

(10. Rep. 95.)

*ET si le tenant en taile ad issue deux fits, et l'eigne disseisist son pier, et ent fait feoffment en fee sans clause de garrantie, et devia sans issue, et puis le pier devie, le puisne fits poit bien enter sur le feoffee; pur ceo que le feoffment son eigne frere ne poit estre discontinuance, pur ceo que il ne fuit unques seisie per force de mesme le taile. Car il semble encounter reason, que per matter en fait, &c. sans clause de garrantie, home poit discontinuer un * fait, &c. que*

AND if tenant in taile hath issue two sonnes, and the eldest disseiseth his father, and thereof maketh a feoffement in fee without clause of warrantie, and die without issue, and after the father die, the youngest son may well enter upon the feoffee; for that the feoffement of his elder brother cannot be a discontinuance, because he was never seised by force of the same tayle. For it seemeth to be against reason, that by matter

* *fait—tail*, L. and M.

que ne fuit unques seise per force de mesme le taile *.

ter in fact, &c. without clause of warrantie, a man should discontinue a deed, &c. that was never seised by force of the same taile.

Vide Sect. 592. 596, 597. 602. 658.

NOTE, there also in these two Sections appeareth, that (as hath beene said before) a warrantie, though he were never seised by force of the taile, may worke the effect of a discontinuance.

" *Home poet discontinuer un fait, &c.*" This is mistaken, and should be, *Home poet discontinuer un taile*; and so is the originall.

Sect. 642.

[340. b.]

† *NOTA, si soit seignior et tenant, et le tenant dona les tenements a un auter en* ⸸ *taile, le remainder a un auter en fee, et puis le tenant en taile fait un leas a un home pur terme de vie, &c. savant le reversion, &c. et puis granta le reversion a un auter en fee, et le tenant a terme de vie atturna, &c. et puis le grantee del reversion morust sans heire, ore mesme le reversion devient al seignior per voy d'escheate. Si en cest cas le tenant a terme de vie deviast, et le seignior per force de son escheate enter en la vie le tenant en le taile, et puis le tenant en le taile morust, il semble en ceo cas que ceo n'est pas discontinuance al issue en le taile, ne a celuy en le remainder, mes que il poit bien enter, pur ceo que le seignior est eins per voy d'escheat, et nemy per le tenant en le taile, &c. Mes* secus esset, *si le reversion ust este execute en le grantee en le vie de tenant en le taile, car adonque ust le grantee est eins en les tenements per le tenant en le tayle,* ‡ *&c.*

NOTE, if there be lord and tenant, and the tenant giveth lands to another in taile, the remainder to another in fee, and after the tenant in taile makes a lease to a man for a terme of life, &c. saving the reversion, &c. and after granteth the reversion to another in fee, and the tenant for life attorne, &c. and after the grantee of the reversion die without heire, now the same reversion commeth to the lord by way of escheat. If in this case the tenant for life dieth, and the lord by force of his escheat enter in the life of tenant in taile, and after the tenant in taile dieth, it seemeth in this case that this is no discontinuance to the issue in taile, nor to him in the remainder, but that he may well enter, because the lord is in by way of escheat, and not by the tenant in tayle. But otherwise it should bee, if the reversion had beene executed in the grantee, in the life of tenant in tayle, for then had the grantee been in the tenements by the tenant in taile, &c.

Vide Sect. 620.

THE reason of this case is here rendred (as before it was in this Chapter), that albeit the reversion be executed in the lord by escheat in the life of tenant in taile, yet because he is not in by the tenant in taile but by escheat, it worketh no discontinuance.

But

* *&c.* added in L. and M. and Roh.

† *Nota,—Item,* L. and M. and Roh.

⸸ *taile, le remainder a un auter en,* not in L. and M. nor Roh.

‡ *&c.* not in L. and M. nor Roh.

But if it had beene executed in the life of tenant in taile in the grantee which was in by tenant in taile, then the lord by escheat should have taken advantage of it. But of this sufficient hath beene said before in this Chapter.

Lib. 1. fol. 136. Lib. 3. fol. 62, 63.

Sect. 643, 644, & 645.

ITEM, si un parson d'un esglise ou un vicar d'un esglise, alien certaine terres ou tenements parcel de son glebe, &c. a un auter en fee, et morust, ou resigne, &c. son successor poit bien enter, nient contristeant tiel alienation, come est dit en un Nota 2. H. 4. *Terme Mich.* quod sic incipit.

ALSO, if a parson of a church or vicar of a church alien certaine lands or tenements parcell of his glebe, &c. to another in fee, and die or resigne, &c. his successor may well enter, notwithstanding such alienation, as is said in a *Nota* 2. *H.* 4. *Termino Mich.* which beginneth thus.

Sect. 644.

NOTA quod dictum fuit pro lege, *en un briefe de accompt port per un master d'un college * vers un chapleine, que si un parson, ou un vicar, graunt certaine terre quel est de droit son esglise a un auter et devie, ou permute, le successor poit enter, &c. Et jeo croy que la cause est, pur ceo que le parson, ou vicar, que est seisie, &c. come en droit de son esglise, n'ad pas droit de fee simple en les tenements, † et le droit de fee simple de ceo demurt en ascun auter person; et pur cel cause son successor poit bien enter, nient contristeant tiel alienation, &c.*

NOTA quod dictum fuit pro lege, in a writ of account brought by a master of a college against a chaplaine, that if a parson, or vicar, grant certaine land which is of the right of his church to another and die, or changeth, the successor may enter, &c. And I take the cause to bee, for that the parson, or vicar, that is seised, &c. as in right of his church, hath no right of the fee simple in the tenements, but the right of the fee simple abideth in another person; and for this cause his successour may well enter, notwithstanding such alienation, &c.

Sect. 645.

CAR un evesque poit aver breve de droit de ‡ tenements de droit de son esglise, pur ceo que le droit est en son chapiter, et le fee simple demurrant en luy

FOR a bishop may have a writ of right of the tenements of the right of his church, for that the right is in his chapiter, and the fee simple abideth

* *vers un chapleine—d'un chastel,* L. and M. and Roh.
† *et—ne,* L. and M. and Roh.

‡ *tenements de droit de son esglise, pur ceo que le droit est en son chapiter, et le*—not in L. and M. nor Roh.

luy et en son chapiter. Et un deane poit aver breve de droit, pur ceo que le droit demurt en luy. ‡ *Et un abbe poit aver briefe de droit, pur ceo que le droit demurt en luy et en son covent. Et un master d'un hospitall poit aver briefe de droit, pur ceo que le droit demurt en luy et en ses confreres, &c.* Et sic de aliis § casibus consimilibus.‖ *Mes un parson ou un vicar ne poit aver briefe de droit, &c.*

abideth in him and in his chapiter. And a deane may have a writ of right, because the right remaynes in him. And an abbot may have a writ of right, for that the right remaynes in him and in his covent. And a master of an hospitall may have a writ of right, because the right remaineth in him and in his confreres, &c. And so of other like cases. But a parson or vicar cannot have a writ of right, &c.

[341. a.]

"*PARCEL de son glebe, &c.*" In whom the fee simple of the glebe is, is a question in our bookes. [a] Some hold that it is in the patron; but that cannot be for two reasons. First, for that in the beginning the land was given to the parson and his successors, and the patron is no successor. Secondly, the words of the writ of *juris utrum* be, *si sit libera eleemosina ecclesiæ de D.* and not of the patron. Some others doe hold that the fee simple is in the patron and ordinary; but this cannot be, for the causes above said: and therefore, of necessitie, the fee simple is in abeyance, as *Littleton* saith. And this was provided by the providence and wisdome of the law; for that the parson and vicar have *curam animarum*, and were bound to celebrate divine service, and administer the sacraments; and therefore no act of the predecessor should make a discontinuance to take away the entry of the successor, and to drive him to a reall action, wherby he should be destitute of maintenance in the meane time. Upon consideration of all our bookes I observe this diversitie: that a parson or vicar, for the benefit of the church and of his successor, is in some cases esteemed in law to have a fee simple qualified; but to doe any thing to the prejudice of his successor in many cases, the law adjudgeth him to have in effect but an estate for life. *Causæ ecclesiæ publicis causis æquiparantur:* and *Summa ratio est quæ pro religione facit.* And *Ecclesia fungitur vice minoris, meliorem facere potest conditionem suam, deteriorem nequaquam.*

[a] 8. H. 6. 24. 12. H. 8. 8.

Vide Registr. 307. 45. E. 3. tit. Eschange. 12. H. 8. 9. (F. N. B. 48, 49. a.) (F. N. B. 19. L. Dyer 71. a. 2. Roll. Abr. 339.)

Bracton lib. 4. fol. 226. Brit. fol. 143.

As a parson, vicar, archdeacon, prebend, chantery priest, and the like, may have an action of waste, and in the writ it shall be said, *ad exhæredationem ecclesiæ, &c. ipsius B.* or *præbendæ ipsius A.*

F. N. B. 55. D. & 57. E. F. 10. H. 7. 5.

And the parson, &c. that maketh a lease for life, shall have a *consimili casu* during the life of the lessee, and a writ of entrie *ad communem legem* after his death, or a writ *ad terminum qui præteriit*, or a *quod permittat* in the *debet*, and none can maintaine any of these writs, but a tenant in fee simple or fee tayle.

[341. b.]

F. N. B. 49. l. m. n. 20. E. 3. tit. Juris utrum. Temps E. 3. Juris utrum 14. 1. 14. E. 3. Ibid. 24. F. N. B. 50. 30. E. 3. 26. 21. E. 3. 11. tit. Entrie 10. F. N. B. 206. F. Registr. 237. 4. E. 4. 2. 8. E. 3. tit. Entrie 3. 7. H. 3. 54, 55. (Ant. 67. a.)

And a parson, &c. may receive homage, which tenant for life cannot doe. *Temps E. 1. Incumbent* 19.

[c] Likewise a parson, &c. shall have a writ of mesne, and a *contra formam feoffamenti.*

[c] F. N. B. 49. L. 50. a.

But

‡ *Et un abbe poit aver briefe de droit, pur ceo que le droit demurt en luy,* not in L. and M. nor Roh.

§ [illegible] L. and M. and Roh.

‖ *&c.* [illegible]d L. and M. and Roh.

But a parson cannot make a discontinuance, as *Littleton* here teacheth; for that should be to the prejudice of his successor to take away his entrie, and to drive him to a reall action.

Also if a parson, &c. make a lease for yeares, reserving a rent, and dieth, the lease is determined by his death; as if tenant for life had made a lease, no acceptance of the rent by the successor can make it good. Also in a reall action a parson, vicar, archdeacon, prebend, &c. shall have aid of the patron and ordinarie, as tenant for life shall have. So as it is evident, that to many purposes a parson hath but in effect an estate for life, and to many a qualified fee simple, but the entire fee and right is not in him; and that is the reason that hee cannot discontinue the fee simple that he hath not, nor ever had; for, as it hath beene said, *Omnis privatio præsupponit habitum*. And for the same cause he cannot have a writ of right right, nor a writ of right in its nature; as a writ of right *sur disclaimer* of customes and services, *ne in justè vexes*, *rationabilibus divisis*, *quo jure*, and the like.

(1. Roll. Abr. 476. 479. 488. Cro. Car. 38. 5. Rep. 81. 2. Roll. Abr. 63. 334.) 20. E. 3. tit. Aid. 30. 25. E. 3. 54. 8. E. 3. 45. 8. H. 6. 24. 11. H. 6. 9. 6. E. 3. 45. 43. Ass. Pl. 13. F. N. B. 129. (Plo. 538.)

But here it appeareth by *Littleton*, that such bodies politike or corporate as have a sole seisin, and may have a writ of right, for that the fee and right is in them (albeit they cannot absolutely convey away their lands, &c. without assent of others), may make a discontinuance; as a bishop, an abbot, a deane, a master of an hospitall, and the like. But this is to bee understood where a deane or a master of an hospitall, &c. are solely seised of distinct possessions: for if the bodie that is seised be aggregate of many, as the deane and chapiter, master and confreres, &c. then the feoffment of the deane or master is so farre from a discontinuance as it is a disseisin.

(2. Cro. 200. Ass. 325. b. Plo. 356. Doc. Pla. 27. 271.)

And these that have the fee and right in them shall not have aid in respect of their high and large estate, albeit any of them be presentable: but a deane that is collative shall have aid of the king.

And it is to be observed, that the remedie is ever agreeable to the right: and therefore the bishop, deane, master of an hospitall, that hath college and common seale, or the like, shall have a writ of right right, which is the highest remedie, for that they have the highest estate.

44. E. 3. 11. 11. H. 4. 68. 9. E. 4. 16. 18. E. 3. 7. 6. E. 3. 11. 5. E. 2. Aid 167. 12. H. 4. 11. 32. E. 3. Aid. 39. 38. E. 3. 19. 14. E. 3. Juris utrum 4.

[342. a.] Here *Littleton* citeth the booke case, *Mich*. 2. *H*. 4. as an authoritie whereupon he groundeth his opinion. And it is to be observed, that the yeares of *H*. 4. were published before *Littleton* did write.

But at this day, the bishop, deane, master of an hospitall, or the like, that have the fee and right in them, as hath beene said, cannot discontinue; neither can they or any parson, vicar, archdeacon, prebend, or any other having any ecclesiasticall living, with assent of deane and chapiter, patron and ordinary, or the consent of any others, make any lease, gift, grant or conveyance, estate, charge or incumberance to binde his successor other than for terme of one and twentie yeares, or three lives in possession, whereupon the accustomed rent or more shall be reserved. These be excellent lawes, and have beene well expounded for the maintenance of religion and the good of God's church; for otherwise it is to bee feared that holy church would lose more than it would gaine in these dayes.

Vide Sect. 527. 593, &c. 1. Eliz. c. 18. 13. Eliz. c. 10. 1. Jacobi cap. 3.

Lib 2. fol. 46. Lib. 4. fol. 76. & 20. Lib. 5. fol. 9. & 14. Lib. 6. fol. 37 Lib. 7. fol. 8.

Lib. 11. fol. 67. 37. H. 8. 31. H. 8. 32. H. 8. 37. H. 8. 1. E. 6, &c.

But where *Littleton*, in this and other Sections, makes mention of masters of hospitals, the reader must know, that since *Littleton* wrote, there hath beene a great alteration made by divers acts of parliament concerning hospitals.

[e] Pasch. 24. Eliz. the Lord Cheneye's case. Lib. 2. fol. 48, 49. Evesque de Canterburie's case.

(2. Sid. 48.)

" *Master del hospitall.*" These points concerning hospitals were resolved [e] by the justices.

First, that no hospitall was given to the crowne by the statute of 27. *H.* 8. nor any hospitall is within the statute of 31. *H.* 8. of monasteries, but only religious and ecclesiasticall hospitals, and that no lay hospitall was within those statutes.

Secondly, if upon the foundation of any lay hospitall or after it was ordained, that one or divers priests should be maintained within the hospitall to celebrate divine service to the poore, and to pray for the soule of the founder, and all christian soules, or the like; and that the poore of such hospitall should make the like orisons, yet such an hospitall is not within the said statutes; for the hospitall is lay, and not religious; and all or the most part of antient lay hospitals were founded or ordained after the like sort; and the makers of those statutes never intended to overthrow workes of charitie, but to take away the abuse.

Lib. 1. f. 24. Porter's case.

Thirdly, that no hospitall was given to the king by the statute of 37. *H.* 8. but in two cases, where the donors, founders or patrons, &c. had entred and expulsed the priests, wardens, &c. betweene the fourth day of Februarie, *Anno* 27. *H.* 8. and the five and twentieth of December, *Anno* 37. *H.* 8. or where king *Henry* the eighth, by commission according to that act, should enter and seise the same; but that determined by the death of that king.

Porter's case ubi supra. Lib. 4. 111. 113, 114. 116. in Lambert's case. Ecclesiasticus c. 34. ver. 22. (8. Rep. 131. a.)

Fourthly, that the statute of 1. *E.* 6. extended not to any hospitall whatsoever, either lay or religious, as by the same appeareth.

And I was of counsell with the lord *Cheney* in this case, which, seeing it may doe good for maintenance of charitable uses, I thought good summarily to report it. To this I will adde, *Panis pauperum vita pauperum; qui defraudat eos vir sanguinis est.*

Nota, Of hospitals, some are corporations aggregate of many; as of master or warden, &c. and his confreres: some, where the master or warden hath only the estate of inheritance in him, and the brethren or sisters power to consent, having college and common seale: some, where the master or warden hath the state in him, but hath no college and common seale; and such a master or warden shall have a *juris utrùm:* and of these hospitals some bee eligible, some donative, and some presentable.

24. E. 3. juris utrum 4.

Sect. 646.

(F. N. B. 48.)

MES le pluis haut briefe que ils poient aver est le briefe de juris utrùm, *le quel est graund proofe que le droit de fee n'est en eux, ne en nul auters, &c. Mes le droit de fee simple est en abeiance, &c. ceo est a dire, que il est tantsolement en le remembrance, entendement et consideration de la ley, &c.*

BUT the highest writ that they can have is the writ of *juris utrùm*, which is a great proofe that the right of fee is not in them, nor in any others, &c. But the right of the fee simple is in abeiance, that is to say, that it is only in the remembrance, intendment and consideration

[342. b.] * &c. *Car moy semble que tiel chose* † *et tiel droit que est dit en divers livres estre en abeyance, est* ‡ *a tant a dire en Latyne (scilicet)*, Talis res, vel tale rectum, quæ vel quod non est in homine adtunc superstite, sed tantummodo est, et consistit in consideratione et intelligentiâ legis, ‡ et quod alii dixerunt, talem rem aut tale rectum fore in nubibus. *Mes jeo suppose que ils intenderont per ceux parols*, in nubibus, &c. *come jeo aye dit adevant.* §

of the law, &c. for it seemeth to me, that such a thing and such a right which is sayd in divers bookes to be in abeyance, is as much to say in Latine (scilicet), *Talis res, vel tale rectum, quæ vel quod non est in homine adtunc superstite, sed tantummodo est, et consistit in consideratione et intelligentiâ legis, et quod alii dixerunt, talem rem aut tale rectum fore in nubibus* But I suppose, that they meane by these words *(in nubibus, &c.)*, as I have said before.

"*En abeiance.*" (1) That is, in expectation, of the French word *bayer*, to expect. For when a parson dieth, wee say that the freehold is in abeyance, because a successor is in expectation to take it; and here note the necessitie of the true interpretation of words.

24. E. 3. 63. Vi. Sect. 648, 649, 650, 651. Vide Sect. 1. (Hob. 338. Ant. 263. b. 2 Roll. 339. Post. 345 a. 1. Rep. 66.)

If tenant *pur terme d'auter vie* dieth, the freehold is said to be in abeyance untill the occupant entreth. If a man make a lease for life, the remainder to the right heires of *I. S.* the fee simple is in abeyance untill *I. S.* dieth. And so in the case of the parson, the fee and right is in abeiance, that is, in expectation, in remembrance, entendment, or consideration of law, 1. *In consideratione sive intelligentiâ legis*, because it is not in any man then living; and the right that is in abeiance is said to be *in nubibus*, in the clouds, and therein hath a qualitie of fame whereof the poet speaketh:

Ingrediturque solo, et caput inter nubila condit. Virg. 4. Æneid.

Sect. 647.

ITEM, si un parson d'un esglise devie, ore le franktenement del glebe del parsonage est en nulluy durant le temps que le parsonage est voide, mes in abeiance; c'estascavoir, in consideration et en le intelligence de le ley, tanque un auter soit fait parson de mesme l'esglise; et immediat quant un auter est ‖ *fait parson, le franktenement en fait est en luy come successor.* ¶

ALSO, if a parson of a church dieth, now the freehold of the glebe of the parsonage is in none during the time that the parsonage is voide, but in abeiance, viz. in consideration and in the understanding of the law, untill another be made parson of the same church; and immediatly when another is made parson, the freehold in deed is in him as successor.

"Si

* &c. not in L. and M. nor Roh.
† *et—en*, L. and M. and Roh.
‡ &c. added L. and M. and Roh.
‡ *Mes jeo suppose que ils intenderont per ceux parols, in nubibus, &c.* not in L. and M. nor Roh.
§ &c. added L. and M. and Roh.
‖ *fait* not in L. and M. nor Roh.
¶ &c. added L. and M. and Roh.

(1) [See Note 298.]

"*SI un parson d'un esglise devie, &c.*" So it is of a bishop, abbot, deane, archdeacon, prebend, vicar, and of every other sole corporation or body politike, presentative, elective, or donative, which inheritances put in abeiance are by some called *hæreditates jacentes*; and some say, *que le fee est en balaunce.*

Bract. li. 1. c. 2. Brit. f. 249.

Sect. 648.

ITEM, ascuns peradventure voilent arguer et dire, que entant que un parson ove l'assent del patron et ordinarie, poit granter un rent charge hors del glebe del parsonage en fee, et issint charger le glebe del parsonage perpetualment, ergo *ils ont fee simple, ou deux ou un de eux avoit fee simple* * *al meins* †. *A ceo poit estre responduе, que il est principle en le ley, que de chescuns terres il y ad fee simple, &c. en ascun home, ou* ‡ *auterment le fee simple est en abeyance* ‖. *Et un auter principle est, que chescun terre de fee simple poit estre charge de un rent-charge en fee per un vey ou per auter. Et quant tiel rent est graunt per le fait le parson, et le patron, et l'ordinarie, &c. en fee, nul avera prejudice ou parde per force de tiel grant, forsque les* § *grantors en lour vies, et les heires le patron, et les successors del ordinary apres lour decease. Et apres tiel charge, si le* ** *parson devie, son successour ne poit vener a le dit esglise de estre parson de mesme le esglise per la ley, forsque per presentment del patron, et admission et institution del ordinarie.* †† *Et pur cel cause il covient que le successor soy teigne content, et agree de ceo que son patron et l'ordinarie loyalment fesoyent adevant, &c. Mes ceo n'est proofe que le fee simple, &c. est en le patron et l'ordinarie, ou en ascun de eux, &c. Mes la cause que tiel grant de rent-charge* ‡‡ *est bone,*

ALSO, some peradventure wil argue and say, that inasmuch as a parson with the assent of the patron and ordinary, may grant a rent charge out of the glebe of the parsonage in fee, and so charge the glebe of the parsonage perpetually, *ergo* they have a fee simple, or two or one of them have a fee simple at the least. To this may bee answered, that it is a principle in law, that of everie land there is a fee simple, &c. in some bodie, or otherwise the fee simple is in abeyance. And there is another principle, that every land of fee simple may bee charged with a rent charge in fee by one way or other. And when such rent is granted by the deed of the parson, and the patron, and ordinarie, &c. in fee, none shall have prejudice or losse by force of such grant, but the grantors in their lives, and the heires of the patron, and the successours of the ordinarie after their decease. And after such charge if the parson die, his successor cannot come to the sayd church to be parson of the same by the law, but by the presentment of the patron, and admission and institution of the ordinarie. And for this cause the successour ought to hold himselfe content, and agree to that which his patron and the ordinarie have lawfully done before, &c. But this is no proofe that the fee simple, &c. is in the patron and the ordinarie, or in either

* *al—an*, L. and M. and Roh.
†. *&c.* added L. and M. and Roh.
‡ *auterment* not in L. and M. nor Roh.
‖ *&c.* added L. and M. and Roh.
§ *grantors—grantees*, L. and M. and Roh.
** *parson* not in L. and M. nor Roh.
†† *&c.* added L. and M. and Roh.
‡‡ *&c.* added L. and M. and Roh.

bone, est, pur ceo que ceux queux averont interest, &c. en la dit esglise, scilicet, le patron solonque la ley temporal, et l'ordinarie solonque la ley spiritual, fueront assentus, ou parties a tiel charge, &c. Et ceo semble estre la verie cause que tiel glebe poit estre charge en perpetuitie, ‖ *&c.*

either of them, &c. But the cause that such graunt of rent-charge is good, is, for that they who have the interest, &c. in the sayd church, viz. the patron according to the law temporall, and the ordinarie according to the law spiritual, were assenting, or parties to such charge, &c. And this seemeth to be the true cause why such glebe may be charged in perpetuitie, &c.

"*IL est un principle en la ley, &c.*" *Principium, quod est quasi primum caput*, from which many cases have their originall or beginning, which is so strong, as it suffereth no contradiction; and therefore it is said in our books, that ancient principles of the law [a] ought not to be disputed, *Contra negantem principia non est disputandum*. That which our author here calleth a principle, *Sect.* 3. & 90. he calleth a maxime.

(Ant. 10. b.)

[a] 11. H. 4. 9.

Sect. 3. & 90.

Here *Littleton* in answer to an objection alleageth two principles. First,

"*Que de chescun terre il y ad fee simple, &c.*" This is *perspicuè verum*, and needeth no explanation. Secondly,

"*Chescun terre de fee simple poet estre charge en fee per un voy ou auter.*" Hereby it appeareth, that albeit the right of the fee simple be in abeyance, yet it may be charged by one way or another. And so it may be aliened in fee, albeit the right of the fee be in abeyance, or in consideration of law. And herein is a diversitie worthy the observation to be made, that when the right of fee simple is perpetually by judgement of law in abeyance, without any expectation to come *in esse*, there he that hath the qualified fee, *concurrentibus hiis quæ in jure requiruntur*, may charge or alien it, as in the case of parson, vicar, prebend, &c. But where the fee simple is in abeyance, and by possibilitie may every houre come *in esse*, there the fee simple cannot be charged untill it commeth *in esse*. (1) As if a lease for life be made, the remainder to the right heires of *I. S.* the fee simple cannot be charged till *I. S.* be dead. And so is *Littleton* to be understood, viz. that either it may be charged *in præsenti*, or *in futuro*.

(Lampet's case, 10. Rep. 46. b.)

[343. b.]

(2. Roll. 418, 419.)

"*Chescun terre de fee simple.*" And so it is of lands entailed, for they may be charged in fee also; for the estate taile may be cut off by fine or recovery. Also the estate taile may continue, and yet tenant in taile may lawfully charge the land and binde the issue in taile. As if a disseisor make a gift in taile, and the donee in consideration of a release by the disseisee of all his right to the donee, granteth a rent charge to the disseisee and his heires, proportionable to the value of his right, this shall binde the issue in taile. *Vide Sect.* 1. *Bridgewater*'s case; which lands, by the rule of

44. E. 3. 21, 22.

(Plo. Com. 436.)

Vide Sect. 1. Bridgewater's case, & 59.

‖ *&c.* not in L. and M. nor Roh.

(1) On the question, whether the fee simple, during the suspence of a contingent remainder, remains in the grantor, or is in abeyance, see Mr. Fearne's Essay on Contingent Remainders, 3d ed. 275.

of *Littleton*, may be charged: and therefore if the owner of those thirteene acres grant a rent-charge out of those thirteene acres generally, lying in the meadow of eightie, without mentioning where they lie particularly; there, as the state in the land removes, the charge shall remove also. But since our author wrote, all ecclesiasticall persons are disabled to charge in fee any of their ecclesiasticall possessions, as before hath beene spoken of at large.

Vide Sect. 593. (Doct. and Stud. 50. a.) 31. E. 1. tit. Grant 90. 8 R. 2. Annuit. 53. (2. Cro. 197.)

" *Et quant tiel rent est grant, &c.*" This is an excellent interpretation and limitation of the said principle, viz. that none shall have prejudice or losse by any such grant, but such as are partie or privie thereunto; as the patron and his heires, the ordinary and his successors, and the parson and his successors; which successors of the parson are to be presented by the patron or his heires, and admitted and instituted by the ordinary or his successors. The like is to be said of an archdeacon, prebend, vicar, chauntrie priest, and the like.

(5. Rep. 81.) 16. E. 3. Annuit. 24. 40. E. 3. 30. 3. E. 3. 17. Reg. 38. (Doct. & Stud. 56. b.) 6. E. 3. 4. 55. 7. E. 3. 40, 41. F. N. B. 152. 17. E. 3. 32. 39. E. 3. 17. b. 11. H. 4. 68. 8. H. 3. 23. Vi. Sect. 132. 530. 11. E. 3. Jur. utr. 3. 8. Ass. 29. 31. 13. Ass. 2. 14. H. 3. Quar. Imp. 183. 17. E. 3. 12. 64. 14. H. 4. 11. F. N. B. 33. c. 16. c. 3. Bre. 660. 13. E. 4. 3. 6. H. 7. 14. Vid. Sect. 530. 22. H. 6. 26. F. N. B. 35. c.

" *Per le fait le parson, et patron, et l'ordinarie, &c.*" Yet if the parson die, and in time of vacation the patron, of the assent of the ordinary, or the patron and ordinary grant an annuitie or rent-charge out of the glebe, this shall (as hath beene said) binde the succeeding parsons for ever.

If there be parson, patron, and ordinary, and the parson by the ordinance and assent of the ordinarie grant an annuitie to another, having *quid pro quo* in consideration thereof, this shall binde the successor of the parson, without the consent of the patron. [344. a]

A church parochiall may be donative and exempt from all ordinarie jurisdiction, and the incumbent may resigne to the patron, and not to the ordinarie; neither can the ordinarie visit, but the patron by commissioners to be appointed by him. And by *Littleton*'s rule, the patron and incumbent may charge the glebe; and albeit it be donative by a layman, yet *mere laicus* is not capable of it, but an able clerke *infra sacros ordines* is; for albeit hee come in by lay donation, and not by admission or institution, yet his function is spirituall: and if such a clerke donative be disturbed, the patron shall have a *quare impedit* of this church donative, and the writ shall say, *quod permittat ipsum præsentare ad ecclesiam, &c.* and declare the speciall matter in his declaration. And so it is of a prebend, chantery, chappell, donative, and the like; and no laps shall incurre to the ordinary, except it be so specially provided in the foundation. But if the patron of such a church, chantery, chappell, &c. donative, doth once present to the ordinarie, and his clerke is admitted and instituted, it is now become presentable, and never shall be donative after, and then laps shall incurre to the ordinary, as it shall of other benefices presentable. But a presentation to such a donative by a stranger, and admission and institution thereupon, is meerely void. And all this was resolved by the whole court of king's bench, for the rectorie parochiall donative of Saint *Burian* in the countie of Cornewall.

Hil. 1. Jac. coram Reg. rot. 601. inter Wil. Fairchild, pl. & Wil. Gayer def. in Trespas.

17. E. 3. 40. 6. E. 3. 10. 25. E. 3. ca. Unico de Provisor. Math. Par. pa. 10. & 62.

It appeareth by our bookes, and by divers acts of parliament, that at the first all the bishopricks in England were of the king's foundation, and donative *per traditionem baculi, (id est,* the crosier, which was the pastorall staffe, *& annuli,* the ring whereby hee was married to the church. And king *Henry* the first being requested by

by the bishop of Rome to make them elective, refused it: but king *John* by his charter bearing date *quinto Junii, anno decimo septimo*, granted that the bishopricks should be eligible. If the king doth found a church, hospitall, or free chappell donative, he may exempt the same from ordinarie jurisdiction, and then his chancellor shall visit the same. Nay, if the king doe found the same without any speciall exemption, the ordinarie is not, but the king's chancellor, to visit the same. Now as the king may create donatives exempt from the visitation of the ordinarie, so he may by his charter licence any subject to found such a church or chappell, and to ordaine that it shall be donative, and not presentable, and to be visited by the founder, and not by the ordinarie. And thus beganne donatives in England, whereof common persons were patrons.

F. N. B. 35. E. 42. A. B. 27. E. 3. 8. & 85. 8. Ass. 29. 8. E. 3. Ass. 150. 18. E. 3. Scire Fac. 11. 6. H. 7. 14. 16. E. 3. Briefe 660. 21. E. 3. 60. Regist. 40. Dyer. 10. Eli. f. 273.

14. El. ca. 5. 2. H. 5. c. 1. (F. N. B. 35. a.)

" *Ordinarie.*" *Ordinarius* is hee that hath ordinarie jurisdiction in causes ecclesiasticall, immediate to the king and his courts of common law, for the better execution of justice, as the bishop or any other that hath exempt and immediate jurisdiction in causes ecclesiasticall.

(9. Rep. 39. 4. Inst. 338. Ant. 96. a.)

" *Ley temporel.*" Which consisteth of three parts, viz. First, on the common law, expressed in our bookes of law, and judiciall records. Secondly, on statutes contained in acts and records of parliament. And thirdly, on customes grounded upon reason, and used time out of minde; and the construction and determination of these doe belong to the judges of the realme.

(Ant. 110. 115. b.)

" *Ley spiritual, &c.*" That is, the ecclesiasticall lawes allowed by the lawes of this realme, viz. which are not against the common law (whereof the king's prerogative is a principall part) nor against the statutes and customes of the realme; and regularly according to such ecclesiasticall lawes, the ordinarie and other ecclesiasticall judges doe proceed in causes within their conusance. And this jurisdiction was so bounded by the antient common lawes of the realme, and so declared by act of parliament.

(12. Rep. 72.) The Statute of 25. H. 8. c. 19. 33. H. 6. 34. 32. H. 6. 28.

" *Admission & institution.*" In proprietie of speech, admission is, when the bishop upon examination admitteth him to be able, and saith, *Admitto te habilem.* [d] Institution is, when the bishop saith, *Instituo te rectorem talis ecclesiæ cum curâ animarum, & accipe curam tuam & meam.* [e] But sometimes in a more large sense, *admissus* doth include *institutus* also: *cujus præsentatus sit admissus, (i. e.) institutus.* And it is to observed, that institution is a good plenartie against a common person (but not against the king, unlesse he be inducted); and that is the cause that regularly plenartie shall be tried by the bishop, because the church is full by institution, which is a spirituall act; but void or not void shall be tried by the common law.

[d] Lib. 4. f. 75. & 79. Lib. 6. f. 49. Lib. 7. fo. 46.

[e] W. 2. cap. 5. 13. E. 1.

22. H. 6. 27. 38. E. 3. 4.

At the common law, if an estranger had presented his clerke, and he had beene admitted and instituted to a church, whereof any subject had beene lawfull patron, the patron had no other remedy to recover his advowson, but a writ of right of advowson, wherein the incumbent was not to be removed: and so it was at the common law, if an usurpation had beene had upon an infant or feme covert,

[4. b.]

Glanvill lib. 13. c. 18, 19, 20. Mirror cap. 5. § 5. Bracton lib. 4. fo. 238. 240. 244, &c. 291. Flet. lib. 5. c. 11. 16, 17. Brit. f. 222, 223, 224.

6. E. 3. 28. 39. 52. 39. E. 3. 24. 43. E. 3. 25. 45. E. 3. Quar. imp. 139. 20. E. 2. Com. 22. 31. E. 1. Quar. imp. 186. (5. Rep. 57. 97. Lib. 6. 49, 50. b. 6. Rep. Green's case. 2. Cro. 385. F. N. B. 33. h.)

covert, having an advowson by discent, or upon tenant for life, &c. the infant, feme covert, and he in the reversion were driven to their writ of right of advowson; for at the common law, if the church were once full, the incumbent could not be removed, and plenartie generally was a good plea in a *quare impedit*, or assise of *darreine presentment*; and the reason of this was, to the intent that the incumbent might quietly intend and applie himselfe to his spirituall charge. And secondly, the law intended, that the bishop that had cure of soules within his diocesse, would admit and institute an able man for the discharge of his dutie and his owne; and that the bishop would doe right to every patron within his diocesse. But at the common law, if any had usurped upon the king, and his presentee had beene admitted, instituted, and inducted, (for without induction the church had not beene full against the king) the king might have removed him by *quare impedit*, and beene restored to his presentation; for therein he hath a prerogative, *quòd nullum tempus occurrit regi*; but he could not present, for the plenartie barred him of that; neither could he remove him any way but by action, to the end the church might be the more quiet in the meane time. [*] Neither did the king recover dammages in his *quare impedit* at the common law. But the said statute [*a*] hath altered the common law in the cases aforesaid; as namely, *Quoad hoc, quòd si pars rea accipiat de plenitudine ecclesiæ per suam propriam præsentationem, non propter illam plenitudinem remaneat loquela, dummodo breve infra tempus semestre impetretur, &c.* and also hath provided remedy in the other cases, as by the said act appeareth.

F. N. B. 36. k. 243. a. 35. E. 3. ca. 3. 13. R. 2. ca. 1. 4. H. 4. ca. 21. 2. H. fol. 19. [*] Li. 6. fol. 51. Li. 7. fo. 19. 34. H. 6. Dam. 17. 34. H. 6. 28. 12. E. 3. Champerty 9. 18. E. 3. 2. Temps E. 1. Quar. imp. 181. [*a*] W. 2. ca. 5. 13. E. 1.

[*g*] 45. E. 3. 53. 38. E. 3. 4. 25. E. 3. 47. 13. El. Dy. 292. Reg. 302, &c. 18. El. Dy. 348. 14. E. 4. 2. 7. H. 4. 32. 31. E. 1. Quar. imp. 185. W. 2 ub. sup. [*b*] 17. E. 3. 64. 4. Inst. 356. 6. Rep. 29. a. 50. a.)

[*g*] And if the king doe present to a church, and his clerke is admitted and instituted, yet before induction the king may repeale and revoke his presentation. But regularly no man can be put out of possession of his advowson, but by admission and institution upon an usurpation by a presentation to the church, *cùm aliquis jus præsentandi non habens præsentaverit, &c.* and not by collation of the bishop: [*b*] and therefore if the bishop collate without title, and his clerke is inducted, this shall not put the rightfull patron out of possession; for it shall be taken to be only provisionally made for celebration of divine service until the patron doe present; and therefore he is not driven to his *quare impedit*, or assise of *darreine presentment*, in that case; but an usurpation by collation shall take away the right of collation that is in another. (1)

(3. Rep. 30. a. 50. a.)

9. H. 6. 32. & 56. 19. H. 6. 68. (7. Rep. 27. Cro. Car. 74. Doct. & Stud. 11. b. Lib. 6. 51. Ant. 17. b.)

It is to be observed, that an usurpation upon a presentation shall not only put out of possession him that hath right of presentation, but right of collation also. Therefore at this day the incumbent shall be removed in a *quare impedit*, or assise of *darreine presentment*, if there be not a plenartie by six moneths before the *teste* of the writ; but then the incumbent must be named in the writ, or else he shall never be removed: yet at the common law, if the ordinary refused to admit and institute the clerke of the patron, or when any disturbed him to present, so as he could not preferre his clerke, he might have his *quare impedit*, or assise *de darreine presentment*; and if the church were not full, have a writ to the bishop to admit his clerke: but so odious was symonie in the eye of the common law, that before the statute of *W.* 2. he recovered no dammages.

(1) V. stat. 7. Ann. c. 18.

At the common law, if hanging the *quare impedit* against the ordinary for refusing of his clerke, and before the church were full, the patron brought a *quare impedit* against the bishop, and hanging the suit, the bishop admit and institute a clerke at the presentation of another, in this case if judgement be given for the patron against the bishop, the patron shall have a writ to the bishop, and remove the incumbent that came in *pendente lite* by usurpation, for *pendente lite nihil innovetur*, and therefore at the common law it was good policie to bring the *quare impedit* against the bishop as speedily as might be. And it is to be observed, that albeit the clerke that comes in *pendente lite*, by usurpation, shall be removed; yet if the rightfull patron, being a stranger to the writ, present *pendente lite*, and his clerke is admitted and instituted, he shall not be removed; for else by the bringing of such *quare impedit* against the ordinary, the rightfull patron might be defeated of his presentation: and therefore ever after the statute of *Westm.* 2. amongst other things it was enquired *ex officio*, if the church were full, and of whose presentation, &c. and if the plaintife should have a writ to the bishop, and his clerke admitted, (as in most cases hee ought) yet may the rightfull incumbent have his remedie by law.

(10. Rep. 53. 5. Rep. 102. 6. Rep. 51. Hob. 201. 2. Cro. 93.) 18. E. 2. Presentment 20. 50. E. 3. Encumbent 10. 21. H. 7. 8. a. & b. 9. Eliz. Dyer. 260. F. N. B. 32. 14. H. 8. 31.

19. E. 2. Dar. Pres. 21. 10. E. 3. 17. 9. H. 6. 31.

And as it was good policie (as hath beene said) to bring a *quare impedit* as speedily as might be against the bishop, so it is good policie at this day to name the bishop in the *quare impedit*, for then he shall not present by laps. But seeing the bishop shall not present by laps, because he is named in the writ, what then, after that the time be devolved to the metropolitan, shall not he present by laps, because he is not named? To this it is answered, that he shal not in that case present by laps; for the metropolitan shal never present or collate by laps after six moneths, but when the immediate ordinary might have collated by laps within the six moneths, and had surceased his time. And so it is if the time be [345. a.] devolved to the king for the first step or beginning faileth; and in humane things, *Quod non habet principium, non habet finem.* And all these points were resolved [*] in a writ of error brought by *Richard* bishop of London and *John Lancaster* against *Anthony Lowe* upon a judgement given against them in a *quare impedit* in the common-place for the church of Winbishe. But now let us heare what our author will say unto us.

30. E. 3. tit. Quar. imp. Stath. 46. E. 3. 15. 9. H. 6. 32. 56. 19. H. 6. 68. L. 5. E. 4. 115. 9. E. 4. 30.

11. H. 4. 80. (Hob. 154.)

[*] Mich. 3. Jacobi. (6. Rep. 48. b. 2. Cro. 92.)

Sect. 649.

ITEM, si tenant en taile ad issue et soit disseisie, et puis il relessa per son fait tout son droit a le disseisor: en cest case nul droit de taile poit estre en le tenant en taile, pur ceo que il avoit releas tout son droit. Et nul droit poit estre en l'issue en le taile durant le vie son pere. Et tiel droit del enheritance en le taile n'est pas tout ousterment expire

ALSO, if tenant in tayle hath issue and is disseised, and after he releaseth by his deed all his right to the disseisor: in this case no right of taile can be in the tenant in taile, because hee hath released all his right. And no right can bee in the issue in taile during the life of his father. And such right of the inheritance in the taile

pire per force de tiel releas, &c. Ergo, il covient que tiel droit demurt en abeiance *, ut supra, *durant la vie le tenant en taile que relessa, &c. et apres son decease donque est tiel droit maintenant en son issue en fait, &c.*

taile is not altogether expired by force of such release, &c. *Ergo*, it must needs be that such right remaine in abeiance, *ut supra*, during the life of tenant in taile that releaseth, &c. and after his decease such right presently is in his issue in deed, &c.

Sect. 650.

EN mesme le maner est, lou tenant en taile granta tout son estate a un auter; en cest cas le grauntee n'ad estate forsque pur terme de vie del tenant en le taile, et le reversion de le taile n'est pas en le tenant in taile, pur ceo que il avoit graunt tout son estate et son droit, &c. Et si le tenant a que le graunt fuit fait fist wast, le tenant en le taile ne unque avera briefe de wast, pur ceo que nul reversion est en luy. Mes le reversion et le enheritance de le taile, durant le vie le tenant en le taile, est en abeiance, cestascavoir, tantsolement en le remembrance, consideration, et intelligence de la ley †.

IN the same manner it is, where tenant in taile grant all his estate to another; in this case the grantee hath no estate but for terme of life of the tenant in taile, and the reversion of the taile is not in the tenant in taile, because he hath granted all his estate and his right, &c. And if the tenant to whom the grant was made make waste, the tenant in taile shall not have a writ of waste, for that no reversion is in him. But the reversion and inheritance of the taile, during the life of the tenant in taile, is in abeiance, that is to say, only in the remembrance, consideration, and intelligence of the law.

(Hob. 338.) Pl. Com. fol. 562, 563. in Walsingham's case. 14. E. 3. Discont. 5. (Cro. Car. 427. 8, 9. Ant. 217. a. Dyer 71. a.) 19. H. 6. 60. 29. Ass. p. Walsingham's case, ubi supra.

LITTLETON having declared where a fee is in abeyance, and where a freehold and fee is in abeyance by act in law, and where a fee that is in abeyance may be charged; here he putteth two cases where a right of an estate taile may be in abeyance by the act of the partie, which are so cleare and evident, as there needs no further proofe or argument, than *Littleton* hath justly and artificially made, albeit some objections of no weight have beene made against it. If tenant in taile of lands holden of the king be attainted of felonie, and the king after office seiseth the same, the estate taile is in abeyance, there said to be in suspence.

(Ant. 263. b. 299. b. 331. a. 342. b.)

Vide Sect. 65. 524, 525, 526. 44. E. 3. 10. 14. Ass. 28. 43. Ass. 8. 5. H. 7. 30. 44. Ass. 28. 44. E. 3. 10.

" *Grant son estate, concedit statum suum.*" State or estate signifieth such inheritance, freehold terme for yeares, tenancie by statute merchant, staple, *elegit*, or the like, as any man hath in lands or tenements, &c. And by the grant of his estate, &c. as much as he can grant shall passe, as here by *Littleton*'s case appeareth. Tenant for life, the remainder in taile, the remainder to the right heires of tenant for life, tenant for life grant *totum statum suum* to a man and his heires, both estates doe passe.

" *Right,*"

* *&c.* added L. and M. and Roh.

† *&c.* added L. and M. and Roh.

"*Right,*" *Jus, sive rectum,* (which *Littleton* often useth) signifieth properly, and specially in writs and pleadings, when an estate is turned to a right, as by discontinuance, disseisin, &c. where it shall bee said, *quòd jus descendit et non terra*. But (Right) doth also include the estate *in esse* in conveyances; and therefore if tenant in fee simple make a lease for yeares, and release all his right in the land to the lessee and his heires, the whole estate in fee simple passeth.

(Plo. 484.) [345. b.] 20. H. 6. 9. Vide Sect. 465. Pl. Com. 484. Lib. 8. fol. 153. Altham's case. 39. H. 6. 38.

And so commonly in fines, the right of the land includeth and passeth the state of the land; as *A. cognovit tenementa prædicta esse jus ipsius B. &c.* And the statute [a] saith, *jus suum defendere* (which is) *statum suum*. And note that there is *jus recuperandi, jus intrandi, jus habendi, jus retinendi, jus percipiendi, jus possidendi*.

(1. Cro. 429.) [a] W. 2. cap. 3. Pl. Com. 484. & 487. b.

Title, properly, (as some say) is, when a man hath a lawfull cause of entry into lands whereof another is seised, for the which hee can have no action, as title of condition, title of mortmaine, &c. But legally this word (Title) includeth a right also, as you shall perceive in many places in *Littleton*: and title is the more generall word; for every right is a title, but every title is not such a right for which an action lieth; and therefore *Titulus est justa causa possidendi quod nostrum est*, and signifieth the meanes whereby a man commeth to land, as his title is by fine or by feoffment, &c. And when the plaintife in assise maketh himselfe a title, the tenant may say, *Veniat assisa super titulum*; which is as much to say, as upon the title which the plaintife hath made by that particular conveyance. *Et dicitur titulus à tuendo*, because by it he holdeth and defendeth his land; and as by a release of a right a title is released, so by release of a title a right is released also. See more hereof in *Fitzherbert* and *Brookes'* Abridgements in the title of *Title*.

Vid. Sect. 429. 659, &c. (Post. 347. b.) 6. H. 7. 8. 2. Altham's case ubi supra.

"*Interest.*" *Interesse* is vulgarly taken for a terme or chattle reall, and more particularly for a future tearme; in which case it is said in pleading, that he is possessed *de interesse termini*. But *ex vi termini*, in legall understanding, it extendeth to estates, rights, and titles, that a man hath of, in, to, or out of lands; for he is truly said to have an interest in them: and by the grant of *totum interesse suum* in such lands, as well reversions as possessions in fee simple shall passe. And all these words singularly spoken are *nomina collectiva*; for by the grant of *totum statum suum* in lands, all his estates therein passe. *Et sic de cæteris*.

Pl. Com. fol. 374. in feignior Zouche's case; & fol. 487. & 448. in Nichol's case. 23 H. 8. tit. Br. 32. 35 H. 8. Grant. Br. 150. Vide 16. Eliz. Dier 325. b. Titulum.

"*Ne unques avera briefe de wast, &c.*" So it is if tenant for life be, the remainder in taile, and he in the remainder release to the tenant for life, all his right and state in the land. Hereby it is said in our bookes, that the estate of the lessee is not inlarged, but the release serveth to this purpose, to put the estate taile into abeyance, so as after that he in the remainder cannot have an action of waste; yet in that case (saving reformation) the lessee for life hath an estate for the life of tenant in taile expectant upon his owne life. But if tenant in fee release to his tenant for life all his right, yet he shall have an action of waste. And if tenant in taile make a lease for his owne life, he shall have an action of waste.

43. Ass. p. 19. 41. E. 3. tit. Waste 83. 11. H. 4. 67. 13. H. 7. 10. Pl. Com. 482. per Dier. 27. H. 8. 20. 42. E. 3. 23. F. N. B. 60. H. 41. E. 3. Waste 83. 42. E. 3. 18.

Sect. 651.

(Ant. 342. a. F. N. B. 194.)

ITEM, si un evesque alien terres que sont parcel de son evesquery et devie, ceo est un discontinuance a son successor, pur ceo que il ne poit enter, mes est mis a son briefe de ingressu sine assensu capituli.

ALSO, if a bishop alien lands which are parcell of his bishopricke and die, this is a discontinuance to his successor, because he cannot enter, but is put to his writ of *de ingressu sine assensu capituli.*

OF this sufficient hath beene said (how the law standeth at this day) before in this Chapter.

Sect. 652.

(Ant. 342. a)

ITEM, si un dean alien terres * *queux il ad en droit de luy et son chapiter, et morust, son successor* † *poit enter.* ‡ *Mes si le deane est sole seisie come en droit son deanry, donque son alienation est discontinuance a son successor, come est dit adevant.*

ALSO, if a deane alien lands which he hath in right of him and his chapter, and dieth, his successor may enter. But if the deane bee sole seised as in right of his deanry, then his alienation is a discontinuance to his successor, as is said before.

22. E. 4. tit. Feoffment, & Faits, 29. 21. E. 4. 85, 86.

HEREOF also that which was necessary is before said in this Chapter, and *Littleton*'s owne words are plaine and evident.

Sect. 653.

ITEM, peradventure ascuns voilont arguer et dire, que si un abbe et son covent sont seisies en lour demesne come de fee de certaine terres a eux et a lour successors, &c. et l'abbe sans assent de son covent alien mesmes les terres a un auter et devie, ceo est un discontinuance a son successor, &c.

ALSO, peradventure some will argue and say, that if an abbot and his covent bee seised in their demesne as of fee of certaine lands to them and to their successors, &c. and the abbot without the assent of his covent alien the same lands to another and die, this is a discontinuance to his successor, &c.

* *queux il ad en droit de luy et son chapter,——parcel de son deanrie,* L. and M. and Roh.

† *ne* added L. and M. and Roh.

‡ *Mes poit aver briefe de ingressu sine assensu episcopi et capituli, &c.* added L. and M. and Roh. and MSS.

Sect. 654.

[346. b.]

*PER mesme reason ils vailent dire, que lou un dean * en chapter sont seisies de certain terre a eux et a lour successors, si le deane alien mesme la terre, &c. ceo serroit un discontinuance a son successor, issint que son successor ne poit enter, &c. A ceo poit estre respondue, que il y ad grand diversitie perenter les † deux cases.*

BY the same reason they will say, that where a deane and chapter are seised of certaine lands to them and their successors, if the deane alien the same lands, &c. this shall be a discontinuance to his successor, so as his successor cannot enter, &c. To this it may be answered, that there is a great diversitie betweene these two cases.

Sect. 655.

(Ant. 342. a.)

CAR quant un abbe et le covent sont seisies ⸸, uncore s'ils sont disseisie, l'abbe avera assise en son nosme demesne, sans nosmer le covent, ‡ &c. Et si ascun voile suer præcipe quòd reddat, &c. *de mesmes les terres quant ils fueront en le maine l'abbe et covent, il covient que tiel action real soit sue envers l'abbe solement sans nosme la covent ‖, pur ceo que touts sont morts persons en la ley, forsque l'abbe que est le soveraigne, &c. Et ceo est per cause del soveraigntie §; car auterment il serroit forsque come ¶ un de les auters moignes de le covent, &c.*

FOR when an abbot and the covent are seised, yet if they bee disseised, the abbot shall have an assise in his owne name, without naming the covent, &c. And if any will sue a *præcipe quòd reddat, &c.* of the same lands when they were in the hands of the abbot and covent, it behoveth that such action reall be sued against the abbot only without naming the covent, because they are all dead persons in law, but the abbot who is the soveraigne, &c. And this is by reason of the soveraignty; for otherwise he should bee but as one of the other monkes of the covent, &c.

Sect. 656.

MES un dean et le chapter ne sont mort persons en la ley, &c. car chescun de eux poit aver action per soy en divers cases. Et de tiels terres ou tenements que le deane et chapter ont

BUT deane and chapter are not dead persons in law, &c. for every of them may have an action by himselfe in divers cases. And of such lands or tenements as the deane and chapter

* *en—et le*, L. and M. and Roh.
† *dites* added L. and M. and Roh.
⸸ *&c.* added L. and M. and Roh.
‡ *&c.* not in L. and M. nor Roh.
‖ *&c.* added L. and M. and Roh.
§ *&c.* added L. and M. and Roh.
¶ *un* not in L. and M. nor Roh.

ont en common, &c. s'ils soient disseisies, le deane et chapter averont un assise, et nemy le deane sole, * *&c. Et si auter voile aver action real de tiels terres ou tenements envers le deane, &c. il covient de suer envers le deane et chapter, et nemy envers le deane sole, &c. et issint il appiert grand diversitie perenter les deux cases, &c.*

chapter have in common, &c. if they bee disseised, the deane and chapter shall have an assise, and not the deane alone, &c. And if another will have an action reall for such lands or tenements against the deane, &c. he must sue against the deane and chapter, and not against the deane alone, &c. and [347. a.] so there appeareth a great diversitie betweene the two cases, &c.

(10. Rep. 132. F. N. B. 2. e. 131. e. 192. b.)

THESE are apparent, and need no explanation. Saving in the 655. Section mention is made of the *præcipe quod reddat*, which in this place is intended of a reall action whereby land is demanded, and is so called of the words in every such writ.

Vid. Sect. 200. 8. E. 3. 27. 11. H. 4. 84. 21. E. 4. 86. 11. H. 7. 12.

And the reason of this diversitie betweene the case of the abbot and covent, and deane and chapter is, for that (as hath beene said) the monkes are regular, and civilly dead, and the chapter are secular, and persons able and capable in law. But by the policie of law the abbot himselfe (here termed the soveraigne) albeit he be a monke and regular, yet hath he capacitie and abilitie to sue and be sued, to enfeoffe, give, demise, and lease to others, and to purchase and take from others; for otherwise they which right have should not have their lawfull remedie, nor the house remedie against any other that did them wrong: neither could the house without such capacitie and abilitie stand. And the covent have no other abilitie or capacitie, but only to assent to estates made to the abbot, and to estates made by him, which for necessitie's sake, though they be civilly dead, they may doe.

Sect. 657.

(Ante 342. a.)
(Plo. 22. b.)

ITEM, si le master d'un hospitall discontinue certaine terre de son hospitall, son successor ne poit enter, mes est mis a son briefe de ingressu sine assensu confratrum et † consororum, &c. *Et touts tiels briefes pleinment appearont en le Register, &c.*

ALSO, if the master of an hospitall discontinue certaine land of his hospitall, his successor cannot enter, but is put to his writ of *de ingressu sine assensu confratrum et consororum, &c.* And all such writs fully appeare in the Register, &c.

THIS must also be understood where the master of the hospitall hath sole and distinct possessions, and not where he and his brethren are seised as a body politike aggregate of many. And here *Littleton* (as divers times before) doth cite the Register.

* *&c.* not in L. and M. nor Roh. † *consororum—sororum*, L. and M. and Roh.

Sect. 658.

(1. Roll. Abr. 634.)

ITEM, si terre soit lesse a un home pur terme de sa vie, le remainder a un auter en le taile, savant le reversion al lessor, et puis celuy en le remainder disseisist le tenant a terme de vie, et fait un feoffment a un auter en fee, et puis morust sans issue, et le tenant a terme de vie morust; il semble en cest cas, que celuy en la reversion bien puit enter sur le feoffee, pur ceo que celuy en le remainder que fist le feoffment, ne fuit unque seisie en le taile per force de mesme le remainder, &c.

ALSO, if land be lett to a man for terme of his life, the remainder to another in taile, saving the reversion to the lessor, and after he in the remainder disseiseth the tenant for terme of life, and maketh a feoffment to another in fee, and after dyeth without issue, and the tenant for life dyeth; it seemeth in this case, that hee in the reversion may well enter upon the feoffee, because he in the remainder which made the feoffment, was never seised in taile by force of the same remainder, &c.

[347. b.] HERE it appeareth, that albeit the feoffor hath an estate taile in him expectant upon an estate for life, yet his feoffement worketh no discontinuance. Wherein *Littleton* doth adde a limitation to that which in this Chapter he had generally said, viz. That an estate taile cannot be discontinued, but where he that maketh the discontinuance was once seised by force of the taile; which is to be understood, when he is seised of the freehold and inheritance of the estate in taile, and not where he is seised of a remainder or a reversion expectant upon a freehold; which freehold (as often hath beene said) is ever much respected in law.

Vid. Sect. 637. 592. 596, 597. 601. 640, 641. (10. Rep. 35. 1. Roll. Abr. 634.)

Chap. 12. Of Remitter. Sect. 659.

*REMITTER est un antient terme en la ley, et est lou home ad deux titles a terres ou tenements, scilicet, un pluis antient title, et un auter title pluis darrein; et s'il vient a la terre per le pluis darreine title, uncore la ley luy adjudgera eins per force del pluis eigne title, pur ceo que le pluis eigne title est le pluis sure title, et pluis digne title. Et donque quant home est adjudge eins per force de son eigne title, ceo est a luy dit un remitter, pur ceo que la ley luy mitter d'estre eins en la terre per le pluis eigne * et sure title. Sicome tenant en le taile discontinua la taile, et puis il disseisist son discontinuee, et issint morust seisie, per que les tenements discendont a son issue ou cosine inheritable per force de le taile; en cest case, ceo est a luy a que les tenements discendont, que ad droit per force de le taile un remitter a le taile, pur ceo que la ley luy mitte et adjudge d'estre eins per force de le taile, que est son eigne title: car s'il serroit eins per force de le discent, donques le discontinuee puissoit aver briefe de* entre sur disseisin *en le* per *envers luy, et recoveroit les tenements et ses dammages, † &c. Mes entant que il est eins en son remitter per force de le taile, le title et le interest le discontinuee est tout oustermont anient et defeat, &c.*

REMITTER is an antient terme in the law, and is where a man hath two titles to lands or tenements, viz. one a more antient title, and another a more latter title; and if he come to the land by a latter title, yet the law will adjudge him in by force of the elder title, because the elder title is the more sure and more worthie title. And then when a man is adjudged in by force of his elder title, this is sayd a remitter in him, for that the law doth admit him to be in the land by the elder and surer title. As if tenaunt in taile discontinue the taile, and after hee disseiseth his discontinuee, and so dieth seised, whereby the tenements descend to his issue or cosine inheritable by force of the taile; in this case, this is to him to whom the tenements descend, who hath right by force of the tayle a remitter to the tayle, because the law shall put and adjudge him to bee in by force of the tayle, which is his elder title: for if hee should bee in by force of the discent, then the discontinuee might have a writ of entrie *sur disseisin* in the *per* against him, and should recover the tenements and his dammages, &c. But inasmuch as he is in his remitter by force of the taile, the title and interest of the discontinuee is quite taken away and defeated, &c. (1)

HERE our author having next before treated of a Discontinuance, very aptly beginneth this Chapter with a description of a Remitter.

(2. Roll. Abr. 422.)

"*Remitter est un antient terme en la ley,*" and is derived of the Latine verbe *remittere*, which hath two significations; either, to restore and set up againe, or to cease. Therefore a remitter is an operation in law upon the meeting of an ancient right remediable, and a latter state in one person where there is no follie in him, whereby

* *et sure* not in L. and M. nor Roh. † *&c.* not in L. and M. nor Roh.

(1) [See Note 300.]

whereby the ancient right is restored and set up againe, and the new defeasible estate ceased and vanished away. And the reason hereof is, for that the law preferreth a sure and constant right, though it be little, before a great estate by wrong and defeasible; and therefore the first and more ancient is the most sure and more worthy title; *Quod prius est, verius est, & quod prius est tempore, potius est jure:* [a] therefore many bookes in stead of remitter say, that he is *en son primer estate*, or *en son melior droit*, or *en son melior estate*, or the like. (1)

[a] 25. Ass. pl. 4. 35. Ass. pl. 11. 26. E. 3. 69. 11. H. 4. 50. a. 41. E. 3. 17. b. Et tit. Remit. 11. 6. E. 3. 17.

" *Lou home ad deux titles.*" Here this word (Titles) is taken in the largest sense, including rights: for being properly taken, [b] as in case of a condition, mortmaine, assent to a ravisher, and the like, there is no remitter wrought unto them, because these are but bare titles of entrie, for the which no action is given; but a remitter must be to a precedent right: and *Littleton* in this Chapter putteth all his cases onely of remitters, to rights remediable.

348. a.]

(8. Rep. 153.) [b] Vide Sect. 429. & 659. &c. 34. H. 8. tit. Remitter Br. 50. 44. E. 3. Attaint. 22. 38. Ass. pl. 7. (Plo. 484. Ant. 345.) (2. Roll. Abr. 421.)

" *Et un auter title pluis darreine, &c.*" Here is to be observed, that an estate must worke a remitter to an ancient right; for albeit two rights doe descend, there can be no remitter, because one right cannot worke a remitter to another: for regularly to every remitter there be two incidents, viz. an ancient right and a defeasible estate of freehold comming together.

19. H. 6. 59. 78. 45. tit. Entre Cong. 3. Pl. Com. 246. a. (3. Rep. 1.)

" *Le pluis eigne title est le pluis sure title, et pluis digne title.*" So as the eldest title is worthily (as hath beene said) preferred, because it is the more sure and more worthy.

" *Sicome tenant en taile discontinue le taile, &c.*" Here our author, according to his accustomed manner, to illustrate his description putteth an example of a remitter, where the law preferreth the ancient estate by right, before a new estate defeasible. And this remitter is wrought by an estate cast upon the issue in taile by discent, which is an act in law, and the discent of the land in possession, and the right of estate taile descend together.

19. H. 6. 61. fin.

" *Est tout ousterment anient et defeat, &c.*" Here be two things implied and to be understood: First, that this remitter is wrought in this case by operation of law upon the freehold in law descended without any entrie. Secondly, that the law so favoureth a remitter (being a restoring to right), that if the discontinuee be an infant or a feme covert, and tenant in taile after a discontinuance disseise them and die seised, the issue shall be remitted without any respect of the privilege of infancie or coverture; and therefore our author said, *le title et interest le discontinuee est tout ousterment anient et defeat.*

(Post. 390. a. Ant. 246. a. Post. 357. a.) 11. E. 4. 1.

" *Donques le discontinuee, &c.*" Here is a reason added in this particular case, that fitteth not other cases of remitter; for in this case

11. E. 3. tit. Ass. 85. 4. E. 4. 35. 11. R. 2.

(1) [See Note 299.]

Br. 242. 30. E. 3. 8. 6. E. 3 7. case and many other, the law that abhorreth suits of vexation, doth avoid circuitie of action; for the rule is, *Circuitus est evitandus.*

19. H. 6. 63. 24. E. 3. 70. 24. H. 4. 29. 10. H. 7. 12. F. N. B. Mesne & Wast.

Sect. 660.

*ITEM, si le tenant en tayle enfeoffa son fits en fee, ou son cosine inheritable per force de le taile, le quel fits ou cosin al temps de feoffment est deins age, et puis le tenant en le taile devia, et celuy a que le feoffment fuit fait est son heyre per force de le taile; ceo est un remitter al heire en le taile a que le feoffment fuit fait. Car coment que durant la vie le tenant en le taile que fist le feoffment, tiel heire serra adjudge eins per force de le feoffment, uncore apres la mort le tenant en le tayle, l'heire serra adjudge eins per force de le taile, et nemy per force de le feoffment. * Car coment que tiel heire fuit de pleine age al temps de le mort de le tenaunt en le taile que fist le feoffment, ceo ne fait ascun matter, si l'heire fuit deins age al temps del feoffment fait a luy. Et si tiel heire esteant deins age al temps de tiel feoffement, vient al pleine age, vivant le tenant en le taile que fist le feoffment, et issint esteant de pleine age, il charge per son fait mesme la terre ove un common de pasture, ou ove un rent charge, et puis le tenant en le taile morust; ore il semble que le terre est discharge del common, et de le rent, pur ceo que le heire est eins de auter estate en la terre que il fuit al temps de le charge fait, entant que il est en son remitter per force de le tayle, et issint l'estate que il avoit al temps de le charge, est ousterment defeat, † &c.*

ALSO, if tenant in tayle infeoffe his sonne in fee, or his cosine inheritable by force of the taile, which sonne or cosine at the time of the feoffment is within age, and after the tenant in taile dieth, and hee to whom the feoffement was made is his heire by force of the taile; this is a remitter to the heire in taile to whom the feoffement was made. For albeit that during the life of the tenant in tayle who made the feoffement, such heire shall bee adjudged in by force of the feoffement, yet after the death of tenant in taile, the heire shall be adjudged in by force of the taile, and not by force of the feoffment. For altho' such heire were of full age at the time of the death of the tenant in taile who made the feoffment, this makes no matter, if the heire were within age at the time of the feoffement made unto him. And if such heire beeing within age at the time of such feoffment, commeth to full age, living the tenant in tayle that made the feoffement, and so being of full age he charges by his deed the same land with a common of pasture, or with a rent charge, and after the tenant in tayle dieth; now it seemeth that the land is discharged of the common, and of the rent, for that the heire is in of another estate in the land than he was at the time of the charge made, in as much as hee is in his remitter by force of the tayle, and so the estate which hee had at the time of the charge, is utterly defeated, &c. (1)

[348. b.]

* Car not in L. and M. nor Roh. † &c. not in L. and M. nor Roh.

(1) [See Note 301.]

OUR author having put one example where both the rights descend together, now puts another example, where the issue in taile claimeth by purchase in the life of tenant in taile, and the ancient right descendeth after to the same issue.

Temps E. 1. Remit. 13. 11. E. 3. Age. 5. 38. E. 3. 24. 40. E. 3. 43. 21. E. 4. 19.

"*Car coment que tiel heire fuit de pleine age al temps del mort, &c.*" The reason is, because no follie can be adjudged in the infant at the time of the acceptance of the feoffement. Therefore the law respecteth the time of the feoffement, and not the time of the death: and albeit he might have waived the estate which he had by the feoffement at his full age, yet here it appeareth, that the right of the estate taile descending to him either within age, or of full age, shall work a remitter in him; for that the waiver of the state should have beene to his losse and prejudice.

Since *Littleton* wrote, and after the statute of 27. *H.* 8. *cap.* 10. if tenant in taile make a feoffement in fee to the use of his issue being within age, and his heires, and dieth, and the right of the estate taile descend to the issue being within age; yet he is not remitted, because the statute executeth the possession in such plite, manner and forme, as the use was limited: *Et sic de similibus*, so as there is a great change of remitters since *Littleton* wrote. (1)

27. H. 8. c. 10. of Uses. 35. H. 8. Dy. 54. b. 6. E. 6. ib. 77. 1. & 2. P. & M. 116. 1. & 2. P. & M. 129. 191. 28. H. 8. 23. b. (Dyer 206.

Pl. Com. Amy Townshend's case, fol. 111. 34. H. 8. tit. Remit. Br. 49. Sid. 63. 1. Leo. 91. Hob. 255. 298.)

But if the issue in taile in that case waive the possession, and bring a formedon in the discender, and recover against the feoffees, he shall thereby bee remitted to the estate taile; otherwise the lands may be so incumbred, as the issue in taile should be at a great inconvenience: but if no formedon be brought, if that issue dieth, his issue shall be remitted; because a state in fee simple at the common law descendeth unto him.

Pl. Com. ub. sup.

(2. Roll. Abr. 419. 421. 1. Roll Rep. 260.)

[349. a.] "*Esteant de pleine age, il charge per son fait, &c.*" The reason is, because the grantor had not any right of the estate in taile in him at the time of the grant, but only the estate in fee simple gained by the feoffment, which (as *Littleton* here saith) is wholly defeated. And the state of the land out of which the rent issued, being defeated, the rent is defeated also.

(2. Roll. Abr. 419. 421. 3. Rep. 5. b. Hob. 45.)

But if tenant in taile make a lease for life whereby he gaineth a new reversion in fee, so long as tenant for life liveth, and he granteth a rent-charge out of the reversion, and after tenant for life dieth, whereby the grantor becommeth tenant in taile againe, and the reversion in fee defeated; yet because the grantor had a right of the entaile in him, cloathed with a defeasible fee simple, the rent-charge remaineth good against him, but not against his issue; which diversitie is worthy of observation, for it openeth the reason of many cases.

11. H. 7. 21. Edriche's case. (Mo. 319. 1. Rep. 148. Ant. 278. a.)

If the heire apparent of the disseisee disseise the disseisor, and grant a rent-charge, and then the disseisee dieth, the grantor shall hold it discharged; for there a new writ of entrie doth descend unto him, and therefore he is remitted.

(2. Roll. Abr. 422.)

So

(1) The effect of this statute on the doctrine of Remitter is very fully explained in Duncombe v. Wingfield, Hob. 254. See 2. Leo. 222. Sid. 63. Dyer, 351.

So if the father disseise the grandfather, and granteth a rent-charge, and dieth, now is the entry of the grandfather taken away, if after the grandfather dieth, the sonne is remitted, and he shall avoid the charge. So as where our author putteth his example of a fee taile, it holdeth also in case of a fee simple.

"*Un common de pasture, ou un rent charge, &c.*" Here *Littleton* putteth his case of things granted out of the land. But what if the issue at full age by deed indented or deed poll make a lease for yeares of the land, and after by the death of tenant in taile he is remitted, whether shall he avoid the lease or no? And it is holden he shall not, because it is made of the land it selfe, and the land is become by the lease in another plight than it is in the case of a grant of a rent-charge, which I gather out of our author's owne words in another place.

23. H. 8. Dier 51. b.

Vide Sect. 289.

"*La terre est discharge del rent, &c.*" *Littleton* doth adde these words materially, because the whole grant is not thereby avoided, but the land discharged of the rent-charge; for the grantee shall have notwithstanding a writ of annuitie, and charge the person of the grantor.

Li. 2. f. 36. b. Ward's case.

Sect. 661.

ITEM, un principall cause pur que tiel heire en les cases avantdits, et auters cases semblables, serra dit en son remitter, est pur ceo que il n'y ad ascun person envers que il poet suer son briefe de formedon. Car envers luy mesme il ne poit suer, et il ne poit suer envers nul auter, car nul auter est tenant del franktenement; et pur cel cause la ley luy adjudge eins en son remitter, scilicet, en tiel plite, sicome il avoit loialment recover mesme la terre envers un auter, &c.

ALSO, a principall cause why such heire in the cases aforesaid, and other like cases, shall bee said in his remitter, is for that there is not any person against whom he may sue his writ of *formedon*. For against himselfe he cannot sue, and hee cannot sue against any other, for none other is tenant of the freehold; and for this cause the law doth adjudge him in his remitter, *scilicet*, in such plite, as if hee had lawfully recovered the same land against another, &c.

"*UN principall cause pur que, &c.*" And of this opinion is [d] *Littleton* in our bookes.

[d] 12. E. 4. 20. 41. E. 3. 18. 11. H. 4. 50.

"*Il n'ad ascun person envers que, &c. sicome il avoit loialment recover mesme la terre vers un auter, &c.*" Here it is to be understood, that regularly a man shall not be remitted to a right remedilesse, for the which he can have no action; for *Littleton* here saith, that there is no person against whom the issue when he commeth to the land without folly may bring his action; and saith also, that this is the principall cause of the remitter; for neither an action without a right, nor a right without an action, can make a remitter. As if tenant in taile suffer a common recovery in which there is error, and after tenant in taile disseiseth the recoveror and dieth, here the

(6. Rep. 58. b. 1. Sid. 63. 2. Roll. Abr. 419.)

Lib. 3. f. 3. the Marquesse of Winchester's case. (3. Rep. 3.)

[349. b.]

issue in taile hath an action, viz. a writ of error; but as long as the recoverie remaineth in force, he hath no right, and therefore in that case there is no remitter. (1)

If B. purchase an advowson, and suffereth an usurpation and six moneths to passe, and after the usurper granteth the advowson to B. and his heires, B. dieth, his heire is not remitted, because his right to the advowson was remedilesse, viz. a right without an action. (2)

Tenant in taile of a mannor whereunto an advowson is appendant maketh a discontinuance, the discontinuee granteth the advowson to tenant in taile and his heires, tenant in taile dieth, the issue is not remitted to the advowson, because the issue had no action to recover the advowson before he recovered the mannor whereunto the advowson was appendant. And so it is of all other inheritances regardant, appendant, or appurtenant; a man shall never be remitted to any of them before he recontinueth the mannor, &c. whereunto they are regardant, appendant, or belonging.

(Ant. 122. b) 5. H. 7. 35.

Car nul ne poet claimer droit en les appurtenances ne en les accessories que nul droit ad en le principall.

Britton fol. 126.

[e] *Item, excipi potest, &c. quamvis jus habeat in tenemento et pertinentiis, primò recuperare debet tenementum ad quod pertinet advocatio, et tunc postea præsentet et non ante, et de hâc materiâ in Rotulo de termino Sancti Michaelis, anno regis Henrici tertio in comitatu Norff. de Thomâ Bardolfe.*

[e] Bract. li. 4. f. 243. b.

But, on the other side, if a man be remitted to the principall, he shall also be remitted to the appendant or accessory, albeit it were severed by the discontinuee, or other wrong doer. And therefore if tenant in taile be of a mannor whereunto an advowson is appendant, and infeoffeth A. of the mannor with the appurtenances, A. re-infeoffeth the tenant in taile, saving to himselfe the advowson, tenant in taile dieth; his issue being remitted to the mannor, is consequently remitted to the advowson, although at that time it was severed from the mannor. So it is in the same case if tenant in taile had beene disseised, and the disseisor suffer an usurpation, if the disseisee enter into the mannor, he is also remitted to the advowson.

8. R. 2. Quare Imp. 199. 2. H. 4. 18. 14. H. 6. 15, 16. 8. H. 6. 17. 33. H. 6. 15. F. N. B. 35. B. & 36. F. 24. E. 3. Discont. 16. 33. H. 8. Dier 48. b. (Ant. 324. b. 333. b. Post. 363. b.)

Sect. 662.

ITEM, si terre soit taile a un home et a sa feme, et a les heires de lour deux corps engendres les queux ont issue file, et le feme devy, et le baron prent auter feme, et ad issue un auter file, et discontinua le taile, et puis disseisie le discontinuee et issint morust seisie, ore le terre discendera a les deux files. [350. a.] ** Et en cest cas quant al eigne file,*

ALSO, if land be entailed to a man and to his wife, and to the heires of their two bodies begotten, who have issue a daughter, and the wife dieth, and the husband taketh another wife, and hath issue another daughter, and discontinue the taile, and after he disseiseth the discontinuee and so dye seised, now the land shal

* *Et* not in L. and M. nor Roh.

(1) [See Note 302.]

(2) This seems to be altered by the aforementioned statute of 7. Ann. c. 18. *Note to the 11th edition.*

file, que est inheritable per force de le tayle, ceo † *n'est un remitter forsque de le moity. Et quant al auter moity, el est mis a suer son action de* formedon *envers sa soer. Car en cest cas les deux soers ne sont pas tenants en parcenary, mes sont tenants en common, pur ceo que ils sont eins per divers titles. Car l'un soer est eins en son remitter per force de le taile, quant a ceo que a luy affiert; et l'auter soer est eins quant a ceo que a luy affiert en fee simple per le discent son pier,* ‡ *&c.*

shal descend to the two daughters. And in this case as to the eldest daughter, who is inheritable by force of the tayle, this is no remitter but of the moitie. And as to the other moitie, she is put to sue her action of *formedon* against her sister. For in this case the two sisters are not tenants in parcenarie, but they are tenants in common, for that they are in by divers titles. For the one sister is in in her remitter by force of the entaile, as to that which to her belongeth; and the other sister is in as to that to her belongeth in fee simple by the discent of her father, &c.

44. E. 3. 26. 19. H. 6 59. (Plo. 246. a.)

"*CEO n'est remitter forsque par le moitie, &c.*" Here *Littleton* putteth a case where the issue in taile shall be remitted to a moitie, because but a moity of the land descended unto her, and there cannot be any remitter, but for so much as commeth to the issue by discent, or by any other meanes without his folly; and in this case by act in law the coparcenary is defeated, for the daughters are in by severall titles, viz. the eldest daughter is tenant in taile *per formam doni*, by the remitter of the one moitie; and the youngest seised in fee simple by discent of the other moitie, against whom the other sister in taile may have her *formedon*. (1)

Sect. 663.

EN mesme le manner est, si tenant en tayle enfeoffa son heire apparant en le taile (esteant l'heire deins age), et un auter jointenant en fee, et le tenant en tayle morust; ore l'heire en tayle est en son remitter quant a l'un moity, et quant a l'auter moitie il est mis a son briefe de formedon, ‖ *&c.*

IN the same manner it is, if tenant in taile enfeoffe his heire apparant in tayle (the heire being within age) and another jointenant in fee, and the tenant in tayle dieth; now the heire entayle is in his remitter as to the one moitie, and as to the other moitie hee is put to his writ of *formedon*, &c.

(2. Roll. Abr. 41.) Vide Sect. 288.

"*LE heire, &c. est en son remitter quant a l'un moitie, &c.*" Hereby it appeareth that albeit joyntenants be seised *pro indiviso per my et per tout*, yet each of them hath in judgement of law but a right to a moitie; and therefore the issue in taile in this case is remitted but to a moity, and is tenant in common but with the other feoffee. And so it is if the discontinuee, after the death of tenant in tayle, make a charter of feoffment to the issue in tayle, being within

† *n'est—est*, L. and M. and Roh.
‡ *&c.* not in L. and M. nor Roh.
‖ *&c.* not in L. and M. nor Roh.

(1) [See Note 303.]

within age, who hath right, and to a stranger in fee, and make livery to the infant in name of both; the issue is not remitted to the whole, but to the halfe: for first he taketh the fee simple, and after the remitter is wrought by operation of law, and therefore can remit him but to a moitie. But of this sufficient hath beene said in the Chapter of Joyntenants.

[350. b.]

Sect. 664.

*ITEM, si tenant en taile enfeoffa son heire apparant, l'heire esteant de pleine age al temps de feoffment, et puis le tenant en taile morust; ceo n'est remitter al heire, pur ceo que il fuit sa folly, que il esteant de pleine age voile prendre tiel feoffment, &c. Mes tiel folly ne poit estre adjudge en l'heire esteant deins age * al temps del feoffment, &c.*

ALSO, if tenant in tail enfeoffe his heire apparant, the heire being of full age at the time of the feoffment, and after tenant in taile dieth; this is no remitter to the heire, because it was his folly, that being of full age hee would take such feoffment, &c. But such folly cannot be adjudged in the heire being within age at the time of the feoffment, &c.

BY this feoffment albeit the heire apparent hath some benefit in the life of his ancestor, yet is he thereby (besides his owne) subject during his life to all charges and incumbrances made or suffered by his ancestor. And therefore our author saith well, *que il fuit son folly que il esteant de pleine age voile prender tiel feoffment*, but folly shall not be judged in one within age in respect of his tender yeares, and want of experience.

(Ant. 171. b. 187. a. 246. a. 337. b. 308. b.) 40. E. 3. 44. 18. E. 4. 25.

Sect. 665.

ITEM, si tenant en taile enfeoffa un feme en fee, et morust, et son issue deins age prent mesme la feme † a feme; ceo est un remitter al enfant ‡ deins age, et la feme donque n'ad rien, pur ceo que le baron et la feme sont forsque come un person en ley. Et en cest cas le baron ne poit suer briefe de formedon, *sinon que il voilcit suer envers luy mesme, le quel serroit enconvenient; et pur cel cause la ley adjudgera l'heire en son remitter, pur ceo que nul folly poit estre ‖ adjudge en luy esteant deins age al temps d'espousels, &c. Et si l'heire soit en son remitter per*

ALSO, if tenant in taile enfeoffe a woman in fee, and dyeth, and his issue within age taketh the same woman to wife; this is a remitter to the infant within age, and the wife then hath nothing, for that the husband and his wife are but as one person in law. And in this case the husband cannot sue a writ of *formedon*, unlesse he will sue against himselfe, which should bee inconvenient; and for this cause the law adjudgeth the heire in his remitter, for that no folly can bee adjudged in him being within age at the time of the espousels, &c. And

* *&c.* added L. and M. and Roh.
† *a feme* not in L. and M. nor Roh.
‡ *deins age* not in L. and M. nor Roh.
‖ *adjudge—avette*, L. and M. and Roh.

*per force de le tail, il ensuist per reason, que la feme n'ad riens, &c. Car entant que le baron et sa feme sont come un person, la terre ne poit estre severe per moities; et pur cel cause le baron est en son remitter de l'entiertie. Mes auterment est si tiel heire fuit de pleine age al temps de les espousels, car donques le heire n'ad riens forsque en droit sa feme, * &c.*

And if the heire bee in his remitter by force of the entaile, it followeth by reason, that the wife hath nothing, &c. For inasmuch as the husband and wife be as one person, the land cannot be parted by moities; and for this cause the husband is in his remitter of the whole. But otherwise it is if such heire were of full age at the time of espousels, for then the heire hath nothing but in right of his wife, &c.

(Ant. 202. b.) HERE *Littleton* putteth a case where the husband within age by the intermarriage may be remitted, albeit he gaineth but a freehold during the coverture *en auter droit*.

Also here is to bee observed, that the estate which doth in this case worke the remitter, could not have continuance after the decease of the wife. And so on the other side, if the husband make a discontinuance, and take backe an estate to him and his wife, during the life of the husband, this is a remitter to the wife presently, albeit the estate is not by the limitation to have continuance after the decease of the husband; which case is proved by the reason of the case which our author here putteth. And here our author observeth the diversity when the husband is within age, and when hee is of full age; for when he is within age, no folly can be adjudged in him, as in this Chapter hath beene often said.

[351. a.] Here is also to bee noted, that presently by the marriage within age, the husband is remitted, and the freehold and inheritance of the wife banished cleane away.

(4. Rep. 29.) "*Prist mesme la feme al feme.*" Here it is good to be seene what things are given to the husband by marriage. (1) First, it appeareth here by *Littleton*, that if a man taketh to wife a woman seised in fee [*f*], he gaineth by the intermarriage an estate of freehold in her right, which estate is sufficient to worke a remitter, and yet the estate which the husband gaineth dependeth upon uncertaintie, and consisteth in privitie [*g*]; for if the wife be attainted of felony, the lord by escheat shall enter and put out the husband: otherwise it is if the felonie be committed after issue had. Also, if the husband be attainted of felonie, the king gaineth no freehold, but a pernancie of the profits during the coverture, and the freehold remaineth in the wife. [*b*] Secondly, if she were possessed of a terme for yeares, yet he is possessed in her right; but he hath power to dispose thereof by grant or demise; and if he be outlawed or attainted, they are gifts in law.

[*f*] 13. H. 4. 6. Stanf. l. 7. b. 18. E. 4. 5. 11. H. 7. 19. 10. H. 6. 11. 7. H. 6. 9. b. Vide Sect. 58. [*g*] 4. Ass. p. 4. 4. E. 3. Ass. 166. (1. Rep. 50. a. 1. Roll. Abr. 343, 344. 5. Rep 17. Hob. 285.) [*b*] Pl. Com. fol. 260. b. Dame Hale's case. 50. Ass. 5. 38. H. 6. 23. 21. E. 4. 35. 7. E. 4. 6. 7. H. 7. 2. 10. H. 6. 11.

[*] Mich 26. & 27. Eliz inter Amnor & Lod- [*] Upon an execution against the husband for his debt, the sheriffe may sell the terme during her life; but the husband can make

* *&c.* not in L. and M. nor Roh.

(1) [See Note 304.]

make no disposition thereof by his last will. Also, if he make no disposition or forfeiture of it in his life, yet it is a gift in law unto him if he doe survive his wife; but if he make no disposition, and die before his wife, she shall have it againe. And the same law is of estates by statute merchant, statute staple, *elegit*, wardships, and other chattels realls in possession.

ington in briefe de error adjudge in both Courts. Lib. 8. fol. 96. Mat. Manning's case.

But if the husband charge the chattell reall of his wife, it shall not binde the wife if shee survive him.

7. H. 6. fol. 2. (1. Roll. Abr. 346.)

If a feme sole be possessed of a chattell reall, and be thereof dispossessed, and then taketh husband, and the wife dieth, and the husband surviveth, this right is not given to the husband by the intermarriage, but the executors or administrators of the wife shall have it; so it is if the wife hath but a possibilitie.

Vid. Sect. 58.

In the same manner it is if the wife be possessed of chattels reals *en auter droit*, as executrix or administratrix, or as gardeine in socage, &c. and she intermarrieth, the law maketh no gift of them to the husband, although he surviveth her. In the same manner if a woman grant a terme to her owne use, taketh husband, and dieth, the husband surviving shall not have this trust, but the executors or administrators of the wife [i]; for it consisteth in privitie: and so hath it beene resolved by the justices. Chattels reals consisting meerely in action the husband shall not have by the intermarriage, unlesse he recovereth them in the life of the wife, albeit he survive the wife; as a writ of right of ward, a *valore maritagii*, a forfeiture of marriage, and the like, whereunto the wife was intitled before the marriage.

Pl. Com. fo. 294. Osborne's case, and there fol. 192. b. Wrotesley's case.

[i] Pasch. 32. Eliz. in Cancellar. in Witham's case. Hill. 38. Eliz. in Cancella in Waterhouse's case. Wrotesley's case, ubi sup.

But chattels reals being of a mixt nature, viz. partly in possession, and partly in action, which happen during the coverture, the husband shall have by the intermarriage, if hee survive his wife, albeit he reduceth them not into possession in her life-time; but if the wife surviveth him, she shall have them. As if the husband be seised of a rent service, charge, or seck, in the right of his wife, the rent become due during the coverture, the wife dieth, the husband shall have the arrerages; but if the wife survive the husband, she shall have them, and not the executors of the husband. So it is of an advowson, if the church become voyd during the coverture [k], he may have a *quare impedit* in his owne name, as some hold: but the wife shall have it if she survive him; and the husband, if he survive her: *et sic de similibus.*

13. E. 3. Quar. Imp. 57. 14. H. 4. 12. 38. E. 3. 35. b. 50. E. 3. 13. 10. H. 6. 11. F. N. B. 121. 22. H. 6. 25. 29. E. 3. 40. 11. R. 2. Account 49. 12. R. 2. Briefe 639. 5. E. 3. Execut. 99. [k] 50. E. 3. 13. 28. H. 6. 9. 7. H. 7. 2.

[351. b.] But if the arrerages had become due, or the church had fallen voyd before the marriage, there they were meerely in action before the marriage; and therefore the husband should not have them by the common law, although he survived her. And so it is of releeses, *mutatis mutandis.* [l] But now by the statute of 32. *H.* 8. *cap.* 37, if the husband survive the wife, he shall have the arrerages as well incurred before the marriage, as after.

26. E. 3. 64. 10. H. 6. 11. F. N. B. 121. 22. H. 6. 25. [l] Lib. 4. fol. 51. in Engel's case. Hil. 17. El. Rot. 457. in Com. Banco, Sharp's case. 21. E. 4. 4. 21. H. 7. 29. 11. H. 7. 4. 26. H. 8. 7. 43. E. 3. 10. 3. H. 6. 23. 37. 4. H. 6. 5. 14. E. 2. Det. 73. 5. E. 2. Ibid. 169. 30. E. 3. 48. E. 3. 12. 12. R. 2. Bre. 638, 639. 16. E. 4. 8. 16. H. 6. Bre. 939.

But the marriage is an absolute gift of all chattels personals in possession in her owne right, whether the husband survive the wife or no; but if they be in action, as debts by obligation, contract, or otherwise,

otherwise, the husband shall not have them unlesse he and his wife recover them. And of personall goods, *en auter droit*, as executrix or administratrix, &c. the marriage is no gift of them to the husband, although he survive his wife. (1)

[*m*] 43. E. 3. 8. V. 10. H. 6. 11. 39. E. 3. 17.

[*m*] If an estray happen within the mannor of the wife, if the husband die before seisure, the wife shall have it, for that the propertie was not in the wife before seisure.

But as to personall goods, there is a diversitie worthy of observation betweene a propertie in personall goods (as is aforesaid) and a bare possession; for if personall goods be bailed to a feme, or if she finde goods, or if goods come to her hands as executrix to a bailiffe, and taketh a husband, this bare possession is not given to the husband, but the action of detinue must be brought against the husband and wife.

But now let us heare *Littleton*.

Vide Sect. 87, &c.

" *Le quel serra inconvenient.*" This argument *ab inconvenienti*, our author hath used in many places.

Sect. 666.

(Ant 350. b.)

*ITEM, si feme seisie de certaine terre en fee prent baron, le quel aliena mesme la terre a un auter en fee, * l'alienee lessa mesme la terre al baron et sa feme pur terme de lour deux vies, savant le reversion al lessor et a ses heires; en cest cas la feme est eins en son remitter, et el est seisie en fait en son demesne come de fee, sicome el fuit adevant, pur ceo que le reprisel del estate serra adjudge en ley le fait le baron, et nemy le fait la feme; issint nul folly poit estre adjudge en la feme, que est covert en tiel case. Et en cest case le lessor n'ad † rien en le reversion, pur ceo que la feme est seisie en fee, ‡ &c.*

ALSO, if a woman seised of certaine land in fee taketh husband, who alieneth the same land to another in fee, the alienee letteth the same land to the husband and wife for terme of their two lives, saving the reversion to the lessor and to his heires; in this case the wife is in her remitter, and she is seised in deed in her demesne as of fee, as shee was before, because the taking backe of the estate shall be adjudged in law the fact of the husband, and not the fact of the wife; so no folly can be adjudged in the wife, which is covert in such case. And in this case the lessor hath nothing in the reversion, for that the wife is seised in fee, &c.

21. E. 3. 26. 29. E. 3. 43. 41. E. 3. Remit. 11. 19. E. 3. Remit. 14. 35. Ass. 12. 38. E. 3. 24.

" *LA feme est son remitter.*" By this it appeareth, that albeit there be no moities betweene husband and wife, yet this is a remitter presently, and standeth not upon the survivor of the wife, as some have thought: for if the estate gained by intermarriage be a sufficient estate to worke a remitter; *à fortiori*, an estate made to the husband and wife shall worke a remitter in the wife. And so

* *et* added L. and M. and Roh.

† *ascun* added L. and M. and Roh.

‡ *&c.* not in L. and M. nor Roh.

(1) [See Note 305.]

so it is if tenant in taile infeoffe his issue being within age, and his wife in fee, and dieth; this is a remitter to the issue presently, by the death of tenant in taile; though some have thought the contrarie.

11. R. 2. Remit. 12.

39. E. 3. 29, 30. 41. E. 3. 17. 46. E. 3. 20. b. 26. E. 3. 69. Vi. Sect. 676. 44. E. 3. 17.

[52. a.] Here also it appeareth, that no follie in this case can be adjudged in a feme covert, for the taking backe of the estate shall be adjudged in law the act of the husband.

The Marques of Winch. case, ub. sup. (Hob. 71.)

Note in the case of the feme covert, she may be remitted in the life of the discontinuor, because she hath a present right: but in the case of tenant in taile, the issue cannot be remitted in the life of the discontinuor, because the issue hath no right untill his decease.

Sect. 667.

*MES en cest case si le lessour voile suer action de wast vers le baron et sa feme, pur ceo que le baron avoit fait wast, le baron ne poit barrer le lessor pur monstre ceo, que le reprisel del estate fait a luy et a son feme fuit un remitter a sa feme, pur ceo que le baron est estoppe a dire ceo * que est encounter son feoffment, et son reprisel demesne del estate pur terme de vie a luy et a sa feme. Et uncore le lessor n'ad † un reversion, pur ceo que le fee simple est en la feme. Et issint home poit veier un matter en ceo case, que home serra estoppe per un matter en fait, coment que nul escripture soit fait per fait indent ou auterment.*

BUT in this case if the lessor will sue an action of wast against the husband and his wife, for that the husband hath committed wast, the husband cannot barre the lessor by shewing this, that the taking backe of the estate to him and to his wife was a remitter to his wife, because the husband is stopped to say that which is against his owne feoffement, and taking backe of the estate for terme of life to him and to his wife. And yet the lessor hath no reversion, for that the fee simple is in the wife. And so a man may see one thing in this case, that a man shall bee stopped by matter in fact, though there bee no writing by deed indented, or otherwise.

" *PUR ceo que baron est estoppe a dire, &c.*"

† "*Estoppe*" commeth of the French word *estoupe*, from whence the English word stopped: and it is called an estoppel or conclusion, because a man's owne act or acceptance stoppeth or closeth up his mouth to alleage or plead the truth: and *Littleton's* case here proveth this description.

Li. 2. f. 4. b. Goddard's case. V. Sect. 41. & 693. 695. 679. (Post. 363. b.)

Touching estoppels, which is an excellent and curious kinde of learning, it is to be observed, that there be three kinde of estoppels, viz. by matter of record, by matter in writing, and by matter *in paiis*.

(Cro. Car. 388. 1. Roll. Abr. 865.)

[a] By matter of record, viz. by letters patents, fine, recoverie, pleading, taking of continuance, confession, imparlance, warrant of atturney, admittance.

[a] 43. Ass. 29. 8. H. 4. 7, 8. 22. Ass. 54. 15. E. 3. Estop. 239. 4. E. 3. fo. 133. (1. Roll. Abr. 862.)

* *que est* not in L. and M. nor Roh. † *un*—*null*, L. and M. and Rch.

[b] 4. H. 4. 1. 8. H. 7. 6. 13. H. 7. 24. 15. E. 4. 28.

[b] By matter in writing, as by deed indented, by making of an acquittance by deed indented or deed poll, [c] by defeasance by deed indented or deed poll.

41. E. 3. Estop. 12. 12. R. 2. ib. 212. [c] 8. R. 2. Estop. 283. 35. H. 6. 18. 3. H. 6. 16. 16. H. 7. 5. 34. H. 6. 19. 14. H. 4. 29.

(1. Leo. 82. 158. 4. Rep. 53. 8. Rep. 53, 54.)

By matter *in pais*, as by liverie, by entry, by acceptance of rent, by partition, and by acceptance of an estate, as here in the case that *Littleton* putteth; whereof *Littleton* maketh a speciall observation, that a man shall be estopped by matter in the country, without any writing. (1)

To make the reader more capable of the learning of estoppels, these few rules, amongst others, are to be knowne.

[d] 33. H. 6. 19. 50. 30. H. 6. 2. 31. E. 3. Estop. 240. 33. Ass. 18. 30. Ass. 51. 14. Ass. 9. 18. E. 4. 1. (3. Mod. 141.) [e] 8. Ass. 53. Br. Fines, 73.

[d] First, that every estoppel ought to be reciprocall, that is, to binde both parties; and this is the reason, that regularly a stranger shall neither take advantage, nor be bound by the estoppell: [e] privies in bloud, as the heire; privies in estate, as the feoffee, lessee, &c.; privies in law, as the lords by escheat; tenant by the curtesie, tenant in dower, the incumbent of a benefice, and others that come under by act in law, or in the *post*, shall be bound and take advantage of estoppels; and that a rebutter is a kinde of estoppell.

[352. b.]

8. H. 6. 17. 21. E. 3. 35. 38. E. 3. 31. 20. E. 3. Estop. 187.

[f] 21. E. 4. 4. 23. Ass. 14. 17. H. 6. Estop. 273.

[f] Secondly, that every estoppell, because it concludeth a man to alleadge the truth, must be certaine to every intent, and not to be taken by argument or inference.

18. E. 3. 30. 7. H. 7. 6. & 16.

[g] 46. E. 3. 33. 29. Ass. 38. Pl. Com. 398.

[g] Thirdly, every estoppell ought to be a precise affirmation of that which maketh the estoppell, and not be spoken impersonally; as if it be said, *Ut dicitur, quia impersonalitas non concludit, nec ligat: impersonalis dicitur, quia sine personâ.* [h] Neither doth a recitall conclude, because it is no direct affirmation.

[h] 35. H. 6. 33. 46. E. 3. 12. 49. E. 3. 14.

8. Ass. 3. 45. Ass. 5. 3. El. Dy. 196. 11. El. ib. 280. 9. H. 6. 60.

[i] 5. E. 4. 7. 8. E. 4. 19. 10. E. 4. 12.

[i] Fourthly, a matter alleaged that is neither traversable nor materiall, shall not estoppe.

22. E. 4. 38. 32. Ass. 9. 35. H. 6. 20.

[k] 33. H. 6. 16. 4. E. 3. 22. 6. H. 4. 7.

[k] Fifthly, regularly a man shall not be concluded by acceptance or the like, before the title accrued.

31. E. 1. Gard. 155. F. N. B. 142. E.

[l] 12. H. 7. 4. 20. H. 6. 29. 3. H. 4. 9.

[l] Sixthly, estoppell against estoppell doth put the matter at large.

41. E. 3. 4. 11. H. 4. 30.

[m] 2. R. 3. 14. 2. R. 2. Estoppell. 20. 40. E. 3. 21. 12. E. 4. 13. 18. E. 3. 31. 35. 44. E. 3. 45. 27. Ass. 27.

[m] Seventhly, matters alleaged by way of supposall in counts, shall not conclude after non-suit: otherwise it is after judgement given; and after non-suit, albeit the supposall in the count shall not conclude, yet the barre, title, replication, or other pleading of either partie, which is precisely alleaged, shall conclude after non-suit; and hereby are the bookes reconciled.

45. E. 3. 2. 21. H. 7. 24. 5. E. 4. 7. 7. E. 4. 19. 3. E. 4. 11. 4. E. 3. 54. 7. E. 6. Br. Estop. 162. 11. H. 4. 30. 30. E. 3. 21. 31. Ass. 14.

(1) [See Note 306.]

Eighthly,

Eighthly, where the veritie is apparant in the same record, there the adverse party shall not be estopped to take advantage of the truth; for he cannot be estopped to alleage the truth, when the truth appeareth of record. [n] If a fine be levied without any originall, it is voydable, but not void; but if an originall be brought, and a *retraxit* entred, and after that a concord is made, or a fine levied, this is void, in respect the veritie appeareth of record. [o] An impropriation is made after the death of an incumbent, to a bishop and his successors; the bishop by indenture demiseth the parsonage for fortie yeares, to begin after the death of the incumbent; the deane and chapiter confirmeth it, the incumbent dieth; this demise shall not conclude, for that it appeareth that he had nothing in the impropriation till after the death of the incumbent.

[n] 37. Ass. 17. 38. H. 6. 12. 5. El. Dy. 222.

[o] 7. El. Dy. 244.

[p] Ninthly, where the record of the estoppell doth run to the disabilitie or legitimation of the person, there all strangers shall take benefit of that record; as outlawrie, excommengement, profession, attainder of *præmunire*, of felonie, &c. bastardie, muliertie, and shall conclude the partie, though they be strangers to the record. *Vide in Littleton cap. Villenage, Sect.* 196, 197, &c. But of a record concerning the name of the person, qualitie, or addition, no estranger shall take advantage, because he shall not be bound by it. But *nota*, reader, that in case of the muliertie *primâ facie*, an estranger shall take benefit of it, &c. But yet because he may be a *mulier* by the ecclesiasticall law, and a bastard by the common law, therefore against such a certificate pleaded, the adverse partie may alleage the speciall matter, and confesse the certificate of the bishop according to the eclesiasticall law, and alleage further the speciall matter according to the common law, whereunto the adverse partie must answer; and so are the books that treat of this matter to be reconciled. (1) But now let us returne to *Littleton*.

[p] Bract. f. 420. 26. Ass. 64. 39. Ass. 10. 11. H. 4. 84. 7 H. 6. 7. 33. Ass. 5. 11. E. 3. Estop. 229. 21. E. 3. 39. 19. R. 2. Estop. 282. 3. E. 3. ib. 23. 33. E. 3. Estop. Stath. Le stat. de 9. H. 6. ca. 11. 30. H. 6. 2. Doct. & Stud. 69. 34. H. 6. 39. 18. E. 4. 1. b. 10. E. 4. 16.

Sect. 668.

MES si en action de wast le baron fait default a le graund distresse, et la feme pria d'estre receive et soit receive, el monstra bien tout le matter, et coment el est en son remitter, et el barrera le lessor de son action, * *&c.*

BUT if in the action of wast the husband make default to the grand distresse, and the wife pray to be received, and is received, shee may well shew the whole matter, and how shee is in her remitter, and shee shall barre the lessor of his action, &c.

"*LA feme pria d'estre resceive et soit resceive.*" Receipt, *receptio*, commeth of the Latine verbe *recipere*, so called because the wife, upon the default of her husband, is received as a feme sole alone, without her husband, to defend her right; and it is also called *defensio juris*; and in this case the wife may bee received by the [a] statute: and yet [b] ancient authors who wrote before the statute, doe speake of a kind of receit at the common law.

(Ant. 192. b.)

20. E. 1. Defensio juris

[a] W. 2. ca. 3

[b] Bract. f 393. Mir. lib. 3. cap. Exceptions.

* *&c.* not in L. and M. nor Roh.

(1) See note 1. to page 245. 2.

law. The civilians call resceit, *admissionem tertii pro suo interesse*, which more properly is resembled to the receit of him in the reversion or remainder, that is no part to the writ.

Sect. 669.

CAR en chescun cas lou feme est receive pur default son baron, el pledera et avera mesme l'advantage en plee pledant, come el fuissoit feme sole, * *&c. Et coment que l'alienee fist le leas al baron et a sa feme per fait endent, uncore ceo est remitter a la feme. Et auxy, coment que l'alienee rendist mesme la terre al baron et a sa feme per fine pur terme de lour vies, uncore ceo est un remitter al feme, pur ceo que feme covert que prent estate per fine, ne serra my examine per les justices,* † *&c.*

FOR in every case where the wife is received for default of her husband, she shall plead and have the same advantage in pleading, as shee were a woman sole, &c. And albeit that the alienee made the lease to the husband and wife by deed indented, yet this is a remitter to the wife. And also, albeit the alienee rendereth the same land to the husband and his wife by fine for terme of their lives, yet this is a remitter to the wife, because a feme covert which takes an estate by fine, shall not be examined by the justices, &c.

"*COME el fuissoit feme sole, &c.*" In this Section foure things are to be understood.

First, when a feme covert is received, that she shall plead as if she were sole. And this is regularly true, yet holdeth not in all cases; [c] for if a feme covert be received in an assise, and plead a record and faile, therefore she shall not be adjudged a disseisor, as shee should be if shee were sole, &c. So if a feme covert onely levie a fine executorie, and a *scire facias* is brought against her and her husband, if shee be received upon the default of her husband, shee shall barre the conusee, which if she had been sole, shee could not doe, and in some other cases.

[c] 37. Ass. 1.

17. Ass. 17. 29. E. 3. 43. 5. E. 3. Voucher 178.

Secondly, that though the estate taken backe be by deed indented, yet that shall not hinder the remitter in case of a feme covert, or an infant.

Thirdly, that though it be by fine *sur render*, yet that shall not hinder the remitter; because a feme covert is not to be examined upon any fine, but when shee and her husband passe some estate or interest, or release her right by a fine of the lands or tenements.

(10. Rep. 43.)

Fourthly, if the husband levie a fine of his wife's lands, and the conusee grant and render the land to the husband and wife, although the wife be not partie to the originall, nor to the conusans, and therefore she ought not by the law to take any present estate but by way of remainder only; yet here it is proved by *Littleton*, that the grant and render *de facto* to the wife *in præsenti* is not void; for then it could not worke a remitter, but voidable by writ of error; and that avoidable estate doth worke a remitter. (1)

Trin. 27. Eliz. inter Owen & Morgan. Rot. 276. in banco communi. Li. 3. fol. 5. the marquesse of Winchester's case. 7. E. 3. 64. 13. E. 3. Voucher 119.

"Ne

* *&c.* not in L. and M. nor Roh. † *&c.* not in L. and M. nor Roh.

(1) [See Note 307.]

"*Ne serra my examine per les justices, &c.*" The examination of a feme covert ought to be secret; and the effect is to examine her, whether shee be content to levie a fine of such lands (naming them particularly and distinctly, and the state that passeth by the fine) of her owne voluntary free will, and not by threats, menaces, or any other compulsorie meanes. (3. Rep. 5. a.)

Sect. 670.

[353. b.]

ET hic nota, *que quant ascun chose passera de la feme que est covert de baron per force d'un fine: sicome le baron et la feme fesont un conusance de droit a un auter, &c. ou fesoyent un grant et render a un auter, ou relessent per fine a auter*, et sic de similibus, *lou le droit del feme passeroit del feme per force de mesme le fine; en touts tielx cases la feme serra examine devaunt que la fine soit accept, pur ceo que tiels fines concluderont tiels femes coverts a touts jours,* * *&c. Mes lou riens est move en le fine forsque tantsolement que le baron et la feme preignont estate per force de mesme le fine, ceo ne concluder la feme; pur ceo que en tiel cas el jammes ne serra my examine,* † *&c.*

AND here note, that when any thing shall passe from the wife which is covert of a husband by force of a fine: as if the husband and wife make conusance of right to another, &c. or make a grant and render to another, or release by fine unto another, *et sic de similibus*, where the right of the wife shall passe from the wife by force of the same fine; in all such cases the wife shall be examined before that the fine be taken, because that such fines shall conclude such femes coverts for ever. But where nothing is moved in the fine but onely that the husband and wife doe take an estate by force of the said fine, this shall not conclude the wife; for that in such case she shall not be at all examined, &c.

"*QUANT ascun chose passera de la feme covert, &c. per force d'un fine, &c.*" And of this opinion is [d] *Littleton* in our bookes.

* Therefore if the husband and wife be tenants in speciall tayle, and they levie a fine at the common law, and after the husband and wife take backe an estate to them and their heires; in this case the estate tayle is not barred; and yet against a fine levied by her selfe she cannot be remitted, because thereupon she was examined: but in that case if the land descend to her issue, he shall be remitted. (1)

[d] 15. E. 4. 28. 24. E. 3. 32. 42. E. 3. 6. 3. H. 6. 42. 20. E. 3. tit. Cui in vita 10. [*] 29. E. 3. 43. 46. E. 3. 5.

Sect. 671.

ITEM, si tenant en taile discontinua le taile, et ad ‡ *issue file, et morust, et la file esteant de pleine age prent*

ALSO, if tenant in taile discontinue the taile, and hath issue a daughter, and dieth, and the daughter being

* *&c.* not in L. and M. nor Roh.
† *&c.* not in L. and M. nor Roh.
‡ *issue* not in L. and M. nor Roh.

(1) [See Note 308.]

prent baron, et le discontinuee fait un releas de ceo al baron et a sa feme pur terme de lour vies, ceo est un remitter al feme, et la feme est eins per force de le taile, causâ quâ supra.

being of full age taketh husband, and the discontinuee make a release of this to the husband and wife for terme of their lives, this is a remitter to the wife, and the wife is in by force of the taile, *causâ quâ supra, &c.*

"*ET la feme esteant de plein age prent baron, &c.*" Here it appeareth, that her full age when she tooke baron is not materiall, but her coverture at the taking backe of the estate. And so note a diversitie betweene a remitter and a discent: for if a woman be disseised, and being of ful age taketh husband, and then the disseisor dieth seised, this discent shall binde the wife, albeit she was covert when the discent was cast, because she was of full age when she tooke husband, as appeareth before in the Chapter of Discents. But albeit the wife that hath an ancient right, and being of full age, taketh a husband, and the discontinuee letteth the land to the husband and wife for their lives, this is a remitter to the wife; for remitters to ancient rights are favoured in law.

(Ante 246.)

Sect. 672.

[354. a.]

(Hob. 260.)

ITEM, si terre soit done a le baron et a sa feme, aver et tener a eux et a les heirs de lour deux corps engendres, et puis le baron aliena la terre en fee, et reprent estate a luy et a sa feme pur terme de lour deux vies; en cest cas il est remitter en fait a le baron et a sa feme, maugre le baron. Car il ne poit estre un remitter en cest cas a la feme, sinon que soit un remitter a le baron, pur ceo que le baron et sa feme sont tout un mesme person en ley, coment que le baron est estoppe de claymer. * *Et pur ceo, ceo est un remitter en luy encounter son alienation et son reprisel demesne, come est dit adevant* †.

ALSO, if land be given to the husband and to his wife, to have and to hold to them and to the heirs of their two bodies begotten, and after the husband alien the land in fee, and take backe an estate to him and to his wife for terme of their two lives; in this case this is a remitter in deed to the husband and to his wife, mauger the husband. For it cannot be a remitter in this case to the wife, unlesse it be a remitter to the husband, because the husband and wife are all one same person in law, though the husband be stopped to claime it. And therefore this is a remitter against his owne alienation and reprisel, as is said before.

HERE it appeareth, that the husband against his owne alienation, if he had taken the estate to him alone, could not have beene remitted. But when the estate is made to the husband and wife, albeit they be but one person in law, and no moities betweene them; yet for that the wife cannot be remitted in this case, unlesse the husband be remitted also, and for that remitters, as hath beene often said, are favoured in law, because thereby the more antient

(Hob. 255.)

* *Et pur ceo* not in L. and M. nor Roh. † *&c.* added L. and M. and Roh.

and better rights are restored againe; therefore in this case, in judgement of law, both husband and wife are remitted; which is worthy of great observation.

Sect. 673.

ITEM, si terre soit done a un feme en taile, le remainder a un auter en tayle, le remainder a le tierce en tayle, le remainder al quart en fee, et la feme prent baron, et le baron discontinua la terre en fee; per cel discontinuance touts les remainders sont discontinues. Car si la feme deviast sans issue, ceux en le remainder n'averont ascun remedie forsque de suer lour briefes de formedon *en le remainder, quant il avient a lour temps *. Mes si apres tiel discontinuance, estate soit fait a le baron et sa feme pur terme de lour deux vies, ou pur terme d'auter vie, ou auter estate, &c. pur ceo que ceo est un remitter al feme, ceo est † auxy un remitter a touts ceux en le remainder. Car apres ceo que la feme que est en son remitter morust sans issue, ceux en le remainder poyent enter, &c. sans ascun action suer, &c. En mesme le maner est de ceux que ount la reversion apres tiel tailes ‡.*

[354. b.]

ALSO, if land be given to a woman in taile, the remainder to another in taile, the remainder to the third in taile, the remainder to the fourth in fee, and the woman taketh husband, and the husband discontinue the land in fee; by this discontinuance all the remainders are discontinued. For if the wife die without issue, they in the remainder shall not have any remedie but to sue their writs of *formedon* in the remainder, when it comes to their times. But if after such discontinuance, an estate be made to the husband and wife for terme of their two lives, or for terme of another man's life, or other estate, &c. for that this is a remitter to the wife, this is also a remitter to all them in the remainder. For after that that the wife which is in her remitter be dead without issue, they in the remainder may enter, &c. without any action suing, &c. In the same manner is it of those which have the reversion after such entailes.

LITTLETON having spoken of remitters to the issue in taile, who is privie in bloud, and to the wife, who is privie in person, now he speaketh of remitters to them in reversion or remainder expectant, upon an estate taile, who are privie in estate. And this case proveth that the wife is remitted presently; for the equitie of the law requireth, that as the discontinuance of the estate in taile is a discontinuance of the reversion or remainder; so, that the remitter to the estate in taile, should be a remitter to them in the reversion or remainder.

41. E. 3. 17. 41. Ass. 1. 36. Ass. p. 4.

Tenant for life the remainder to *A.* in taile, the remainder to *B.* in fee, tenant for life is disseised, a collaterall ancestor of *A.* releaseth with warrantie and dieth, whereby the estate taile is barred; the tenant for life re-entreth, the disseisor hath an estate in fee simple

44 Ass. p. 15. 44. E. 3. 30. (2. Roll. Ab. 4:1. 3. Cro. 145. W. Jones, 199.) 20. E. 3. Aid. 29

* &c. added L. and M. and Roh.
† *auxy* not in L. and M. nor Roh.
‡ &c. added L. and M. and Roh.

ple determinable upon the state taile, and the remainder of B. is revested in him; and so note in this case the estate for life and the remainder in fee are revested and remitted, and an estate of inheritance left in the disseisor. If a fine be levied *sur grant et render* to one for life or in taile, the remainder in fee, if tenant for life, or in taile, execute the estate for life or in taile, this is an execution of the remainder.

Vid. Pl. Com. 489. Nichol's case, & fol. 553. in Walsingham's case. 17. Eliz. Dier. 344. 25. E. 3. 48. tit. Resceit. 28. 49. E. 3. 16. [a] Seignior Stafford's case. lib. 8. fol. 76. b. [b] Cholmley's case, lib 2. 53. 7. R. 2. Aide le Roy, 61. 22. E. 3. 7.

A gift in taile is made to *B.* the remainder to *C.* in fee, *B.* discontinueth and taketh backe an estate in taile, the remainder in fee to the king by deed inrolled; tenant in taile dieth, his issue is remitted, and consequently the remainder, as *Littleton* here saith; and the diversity is [a] betweene an act in law, for that may devest an estate out of the king, and a tortious act, or entry, or a false and a feined recovery against tenant for life or in taile, which shall never devest any estate, remainder, or reversion out of the king. [b] But a recovery by good title against tenant for life, or in taile, where the remainder is to the king by defeasible title, shall devest the remainder out of the king, and restore and remit the right owners. (1)

Sect. 674, 675.

ITEM, si home lessa un mease a un feme pur terme de sa vie, savant le reversion al lessour, et puis un suist un feint et faux action envers la feme, et recoverast le mease envers luy per default, issint que la feme puit aver envers luy un quod ei deforceat, *solonque le statute de Westm. 2. ore le reversion le lessor est discontinue, issint que il ne poit aver ascun action de wast. Mes en cest case si la feme prent baron, et celuy que recoverast lessa le mease al baron et a sa feme pur terme de lour deux vies, la feme est eins en son remitter per force del primer lease.*

ALSO, if a man let a house to a woman for terme of her life, saving the reversion to the lessor, and after one sue a feyned and false action against the woman, and recovereth the house against her by default, so as the woman may have against him a *quod ei deforceat*, according to the statute of Westm. 2. now the reversion of the lessor is discontinued, so that he cannot have any action of waste. But in this case if the woman take husband, and he which recovereth let the house to the husband and his wife for terme of their two lives, the wife is in her remitter by force of the first lease.

Sect. 675.

ET si le baron et la feme font wast, le primer lessor avera envers eux breve de wast, pur ceo que entant que la feme

AND if the husband and wife make waste, the first lessor shall have a writ of wast against them, for that inasmuch

(1) [See Note 309.]

*feme est en son remitter, il est remise a son reversion. Mes semble en cest cas, si celuy que recoverast per le faux action, voile porter auter briefe de wast envers le baron et sa feme, le baron n'ad auter remedy envers luy, mes de faire default a la graund distres, &c. et causer la feme d'estre receive, et de pleder cel matter envers le second lessor, et monstrer coment l'action per que il recoverast fuit faux et feint en ley, &c. issint le feme poit * luy barrer, &c.*

asmuch as the wife is in her remitter, he is remitted to his reversion. But it seemeth in this case, if hee that recovereth by the false action, will bring another writ of waste against the husband and his wife, the husband hath no other remedie against him, but to make default to the grand distresse, &c. and cause the wife to be received, and to plead this matter against the second lessor, and shew how the action wherby hee recovered was false and fained in law, &c. so the wife may bar him.

" FEINT et faux action," i. *Actio ficta et falsa*, but hereof *Littleton* speaketh himselfe in this Chapter. (5. Rep. 85. 2. Inst. 350. 11. Rep. 62.)

" *Quod ei deforceat*," is a writ that is given by [c] statute to any tenant for life or in tayle upon a recovery by default against them [355. a.] in a *præcipe*, and lyeth against the recoveror and his heires, in which case the particular tenant was without remedie at the common law, because hee could not have a writ of right. And it is called a *quod ei deforceat*, for that they are part of the words of that writ, viz. *Præcipe A. quod, &c. reddat B. unum mesuagium, &c. quod clamat esse jus et maritagium suum, et quod idem A. ei injustè deforceat.*

[c] W. 2. cap. 4. (Ant. 331. b.) Bracton lib. 4. 367. Fleta lib. 5. cap. 22. & li. 6. cap. 14. 7. E. 3. 62. F. N. B. 155. (6. Rep 8. b.) (Cro. Jac. 292. Cro. Car. 178. 444.)

" *Recoverast, &c. per default.*" There hath beene a question in our bookes upon these words (by default): as for example, whether a recoverie had by default in an action of waste against tenant in dower, or by the courtesie, a *quod ei deforceat* lyeth by the said statute. And divers hold opinion, that in that case no *quod ei deforceat* lieth, for that judgement is not given by default; for notwithstanding the default, there goeth out a writ to enquire *de vasto facto, et quod vastum prædictum* A. *(le defendant) fecit*; so as the defendant may give evidence, and the jurors may finde for the defendant, that no waste was done: as in the assise albeit it bee awarded by default, yet may the tenant give evidence, and the recognitors of the assise may finde for the tenant; and therefore in those cases, the defendant or tenant *non amittit per defaltam*, as the statute and *Littleton* speaketh, and they cite *F. N. B.* in the point. (1)

(F. N. B. 155. b.) W. 2. cap. 4. F. N. B. fol. 155. E.

Secondly, they hold that a *quod ei deforceat* lieth where the tenant can have no remedie by attaint; but in this case (say they) an attaint doth lie. 3. H. 6. 29.

2. H. 4. 2. 21. H. 6. 56. 41. E. 3. 8. 22. E. 3. 19.

Thirdly, they hold, that in an action of waste although it be brought against a tenant in dower, or tenant by the courtesie that have a freehold, yet the dammages are the principall; for they were recoverable against tenant in dower and by the courtesie by [355. b.] the common law; and the statute of *Glocester* gave the place wasted but

(8. Rep. 85.)

* *luy* not in L. and M. nor Roh.

(1) [See Note 330.]

but for a penaltie, so as the nature of the action (say they) remaineth still to bee personall, for that the dammages are the principall: [d] and in proofe hereof they cite divers authorities in law. And if two bring an action of waste, the release of one of them is a good barre against the other, [e] and so resolved by the whole court; which proveth (say they) that the dammages are the principall; for if the land were the principall, the release of one of them should not barre the other, no more than in an assise, a writ of ward, an *ejectione firmæ*, &c.

(7. Rep. 68. b.)
[d] 34. H. 6 7.
40. E. 3. 37.
& 38. E. 3.
[e] 9. H. 5. 15.
30. H. 6. tit.
Rec. 59.

Lastly, they say, that in actions where dammages are to be recovered, and the land is the principall, the demandant never counteth to dammages, and yet shall recover them: but in an action of waste the plaintiffe counteth to his dammage; and if the dammages be the principall, then cleerely no *quod ei deforceat* lieth.

Others doe hold the contrarie: and as to the first they say, that albeit that in the writ of waste, judgement is not only given upon the default, yet the default is the principall, and the cause of awarding of the writ to enquire of the waste as an incident thereunto: and the law alwayes hath respect to the first and principall cause; and therefore upon such a recoverie [*] a writ of deceit lieth; and that writ lieth not but where the recoverie is by default. So in an action of waste against the husband and wife, upon the default of the husband, the wife shal be received; and yet the statute there speaketh also, *per defaltam*. So upon such a recoverie in waste against the baron and feme by default, the wife shall have a *cui in vitâ* by the statute; and it speaketh where the recoverie is *per defaltam*. And albeit the defendant may give in evidence, if he knoweth it; yet when he makes default, the law presumeth he knoweth not of it, and it may be that he in truth knew not of it; and therefore it is reason, that seeing the statute, that is a beneficiall statute, hath given it him, that he be admitted to his *quod ei deforceat*, in which writ the truth and right shall be tried. And so it is of a recoverie by default in an assise; albeit the recognitors of the assise give a verdict, a *quod ei deforceat* lieth. And all this as to this point was resolved by the whole court of common pleas; and so the doubt in 41. *E.* 3. 8. well resolved. *Nota*, if tenant for life make default after default, and he in the reversion is received and plead to issue, and it is found by verdict for the demandant, the default and the verdict are causes of the judgement; and yet the tenant shall have a *quod ei deforceat*.

[*] 17. E. 3. 58.
29. E. 3. 42.
F. N. B. 98. b.
12. H. 4. 4.
19. E. 2.
Disceit 56.
W. 2. cap. 3.
3. H. 4. fol. 1.
W. 2. ca. 3.
9. E. 4. 16.

41. E. 3. 8. b.
2. H. 4. 2.
21. H. 6. 56.
44. E. 3. 42.
Br. tit. quod ei deforc. 4. Pasch. 33. El. Rot. 1125. inter Ed. Elmer & El. sa feme, ten. en dower demandants, & Wil. Thacker ten. in quod ei deforceat. (Cro. Eliz. 263.)

As to the second objection, that the defendant may have an attaint. First it was utterly denied of the other part, [f] that an attaint did lie in this case; for though it be taken by the oath of twelve men, yet it is but an enquest of office, whereupon no attaint did lye on either partie, as upon an enquirie of collusion, although it be by one jurie, nor upon a verdict of *quale jus*. Secondly, admitting that an attaint did lie in that case, yet it followeth not *ex consequenti*, that a *quod ei deforceat* did not lie; [g] for if an assise bee taken by default, a *quod ei deforceat* doth lie; and yet the partie may have an attaint; for this is no enquest of office, but a recognition by the recognitors of an assise, who were returned the first day, and not returned upon the awarding of the assise by default. And as to the second objection, of this opinion was the whole court in

[f] 33. E. 3. quod ei deforc. Pl. ult. F. N. B. 156. V. Flet. l. 5. c. 21.
48. E. 3. 19.
40. Ass. 23.
33. H 6. 25.
39. H. 6. 1.
F. N. B. 107.
[g] 17. E. 2. Attaint 69.
21. H. 6. 56.
34. H. 6. 12.

in *Edward Elmer's* case above mentioned. As to the third objection, that the dammages should bee the principall, because they were at the common law; that is an argument (say the other side) that they are more antient, but not that they are more principall; and treble dammages were not at the common law (for the common law never giveth more dammage than the losse amounteth unto), but are given by the statute of *Glocester*; but the place wasted is worthier being in the realtie, than dammages that be in the personaltie: *Et omne majus dignum trahit ad se minus dignum, quamvis minus dignum sit antiquius et à digniori debet fieri denominatio.* And it is confessed, that in an action of waste against tenant for life, or for yeares, the place wasted is the principall, because the statute of *Glocester* doth give the place wasted and treble dammages at one time; for no prohibition or action of waste lay against them at the common law; and in an action of waste, if the defendant confesse the action, the plaintiffe may have judgement for the place wasted, and release the dammages; which proveth (and so *Fitzherbert* collecteth) that the dammages are not the principall: for a man shall never release the principall and have judgement of the accessorie: and an action of waste against tenant for life, is as reall as an action against tenant in dower. And as to the case of 9. *H.* 5. cited on the other side, it was answered, that it was an action in the *tenuit*, which is only in the personaltie, and then the release of the one doth bar both; neither could summons and severance lie in that case; [*b*] but in an action of waste (in the *tenet*), either against tenant for life or for yeares, the release of the one doth not barre the other; and in both those cases summons and severance doth lie: and this point was also resolved accordingly in *Edward Elmer's* case. But when these three points were resolved by the court for the demandant, then the councell of the tenant moved in arrest of judgement another point, viz. that the judgement was given upon a *nihil dicit*, which is alwayes after appearance, and not *per defaltam*; and thereupon judgement was stayed. (1)

(1. Cro. 414. Mo. 184. F. N. B. 107. c. 6. Rep. 8. b. 11. Rep. 5.)

34. H. 6. 7. Wast 50.

(10. Rep. 113. 1. Leo. 297. 6. Rep. 44.)

[*b*] 6. E. 3. 47. 48. E. 3. 19. (2. Rep. 68. b. Ant. 139. a. 285. a.)

[356. a.] But to returne to *Littleton*. Here he openeth a secret of law; for the cause of this remitter is, for that the tenant for life in this case might have a *quod ei deforceat*, for so *Littleton* saith: *issint que il poit aver quod ei deforceat:* Now it appeareth by our bookes, that the tenant for life at the common law was remedilesse, because he could not have (as hath beene sayd) a writ of right; and consequently the feme covert in this case could not bee remitted by the taking of an estate to her husband and her, because her right was remedilesse, and could have no action. But when an act of parliament or a custome doth alter the reason and cause thereof, thereby the common law it selfe is altered, if the act of parliament and custome be pursued; for *Alteratâ causâ et ratione legis, alteratur et lex, et cessante causâ seu ratione legis cessat et lex:* as in this case the statute of *W.* 2. giving remedie to this feme tenant for life, in this it giveth her abilitie to bee remitted, because her right is not now remedilesse, but shee hath an action to recover it.

(8. Rep. 62. 356. F. N. B. 155. b. 2. Inst. 350.)

And *Littleton* warily putteth his case, that the recoverie was had against the feme while she was sole; for there was a time when it was a question, whether a recoverie beeing had by default against the husband and wife, (the wife being tenant for life) the said statute

Vide for the cases upon this ground, 14. H. 7. 11. per Fineux. 27. H. 8. 4. b. Aid. 35. H. 6. Gard. 72. 29. E. 3. 5. per Wilbie Custome. Lib. 3. fol. 86. Justice Windham's case. a. & b.

(1) [See Note 311.]

tute gave a *quod ei deforceat* to the husband and wife, for that the statute gave it against tenant in dower and tenant for life, &c. and here the husband is not tenant for life, but seised in the right of his wife, and therefore out of the statute: and of this opinion is one [g] booke; but (*Apices juris non sunt jura, et parum differunt quæ re concordant*) the contrarie hath beene adjudged, and so that point is now in peace: and the like in case of receit for him in reversion. But if the husband and wife lose by default, and the husband die, the wife shall not have a *quod ei deforceat*; for a *cui in vitâ* is given to her in that case by a former statute, viz. *W.* 2. *cap.* 3. These things are worthy of due observation, and points of excellent learning; and *Littleton* in our bookes speakes of another kinde of *quod ei deforceat* at the common law, upon a disseisin, which you may read. But now let us heare him in his booke.

[g] 4. E. 3. 38. 33. E. 3. Avowr 255. 4. E. 3. 4. F N. B. 156. a. 5. E. 3. 5. 2. E. 4. 13. F. N. B. 156. C. 33. H. 6 46. 2. E. 4. 11. 19. E. 4. 2.

" *Le reversion est discontinue, issint que il ne poit aver action de " waste.*" Here it appeareth, that when the reversion is devested, the lessor cannot have an action of waste, because the writ is, that the lessee did waste *ad exhæredationem* of the lessor, and that inheritance must continue at the time of the action brought. And it is to bee observed, that in an action of waste brought by the lessor against the lessee, the lessee in respect of the privitie cannot plead generally, *riens en le reversion*, viz. [h] that the lessor hath nothing in the reversion, but he must shew how and by what meanes the reversion is devested out of him; and this holdeth (as hath been said) betweene the lessor and the lessee: but if the grantee of a reversion bringeth an action of waste, the lessee may plead generally, that he hath nothing in the reversion. And yet in some speciall cases an action of waste shall lie, albeit the lessor had nothing in the reversion at the time of the waste done. As if tenant for life make a feoffment in fee upon condition, and waste is done, and after the lessee re-enter for the condition broken; in this case the lessor shall have an action of waste. And so if a bishop make a lease for life or yeares, and the bishop die, the lessee, the see being void, doth waste, the successor shall have an action of waste. So if lessee for life be disseised, and waste is done, the lessee re-enter, an action of waste shall be maintained against the lessee; and so in like cases: and yet in none of these cases the plaintiffe in the action of waste had any thing in the reversion at the time of the waste made; but these especiall cases have their severall and especiall reasons, as the learned reader will easily finde out.

45. E. 3. 21. 44. E. 3. 34, 35. F. N. B. 60. 23. H. 8. tit. Wast. Br. 138. (Cro. Car. 405. Ant. 327. a. 334. b.) [h] 46. E. 3. 20. 2. H. 6. 17. 30. H. 6. 7. (Ant. 54. a. Mo. 52.) (F. N. B. 112. b.) (Post. 362. a.)

Here note, that albeit the action be false and feigned, yet is the recoverie so much respected in law, as it worketh a discontinuance. [i] But if tenant for life suffer a common recoverie, or any other recoverie by covine and consent betweene the tenant for life and the recoveror, this is a forfeiture of his estate, and he in the reversion may presently enter for the forfeiture. Since our author wrote, the statute of 14 *El. cap.* 8. hath beene made concerning this matter, which is to be considered, [k] and hath beene well construed and expounded, and needs not here to be repeated.

And it is to be observed, that although the discontinuance groweth by matter of record, yet the remitter may be wrought by matter *in pais*: and of the residue of these two Sections sufficient hath beene said before.

[i] 5. Ass. pl. 3. 5. E. 3. Ent. Cong. 42. 15. E. 3. Age 95. 41. E. 3. 18. per Finchden. 22. E. 3. 2 b. Lib. 1. fol. 15. Sir Will. Pelham's case. 14. El. cap. 8. [k] Lib. 3. fol. 60. Lib. 1. f. 15.

Sect.

[56. b.]

Sect. 676.

(2. Inst. 343. F. N. B. 193. a.)

*ITEM, si le baron discontinua le terre de sa feme, et puis reprist estate a luy et a sa feme, et al tierce person pur terme de lour vies, ou en fee, ceo * n'est un remitter a la feme, forsque quant a la moity; et pur l'auter moity el covient apres la mort son baron de suer un briefe de* cui in vitâ †.

ALSO, if the husband discontinue the land of his wife, and after taketh backe an estate to him and to his wife, and to a third person for terme of their lives, or in fee, this is no remitter to the wife, but as to the moitie; and for the other moitie shee must after the death of her husband sue a writ of *cui in vitâ*.

"*CEO n'est remitter forsque quant al moitie, &c.*" Albeit there is authoritie in our bookes to the contrarie, yet the law is taken as *Littleton* here holdeth it, and as before it appeareth in the like case in this Chapter, and for the reason therein expressed.

44. E. 3. 17.
44. Ass. 2.
43. Ass. 3.
Vid. Sect. 666.

Sect. 677.

ITEM, si le baron discontinue la terme sa feme, et ala ouster le mere, et le discontinuee lessa mesme la terre al feme pur terme de sa vie, et liver a luy seisin; et puis le baron revyent, et agreea a cel liverie de seisin, ceo est un remitter a la feme: et uncore si la feme fuissoit sole al temps de le leas fait a luy, ceo ne serroit a luy un remitter. Mes entant que el fuit covert de baron al temps de la leas, et de le liverie de seisin fait a luy, coment que el prist solement le liverie de seisin, ceo fuit un remitter a luy, pur ceo que feme covert serra adjudge sicome enfant deins age en tiel cas, &c. Quære *en cest cas si le baron quant il revient, voil disagree a le leas et livery de seisin fait a son feme en son absence, si ‡ ceo oustera son feme de son remitter ‖, ou nemy, &c.*

ALSO, if the husband discontinue the land of his wife, and goeth beyond sea, and the discontinuee let the same land to the wife for terme of her life, and deliver to her seisin; and after the husband commeth backe, and agreeth to this liverie of seisin, this is a remitter to the wife: and yet if the wife had beene sole at the time of the lease made to her, this should not be to her a remitter. But inasmuch as she was covert baron at the time of the lease, and liverie of seisin made unto her, albeit shee taketh only the liverie of seisin, this was a remitter to her because a feme covert shall be adjudged as an infant within age in such a case, &c. *Quære* in this case if the husband when hee comes backe, will disagree to the lease and livery of seisin made to his wife in his absence, if this shall ouste his wife of her remitter, or not, &c.

"ET

* *n'est—est*, L. and M. and Roh.
† *&c.* added L. and M. and Roh.
‡ *ceo—jeo*, L. and M. and Roh.
‖ *ou nemy, &c.* not in L. and M. nor Roh. nor MSS.

15. E. 4. 1. b. 7. H. 4. 17. 1. H. 7. 16. b. 39. E. 3. 30. 27. H. 8. 24.

"*ET puis le baron revient, et agreea, &c.*" In this case the estate is in the feme covert presently by the liverie before any agreement by the husband; and of this opinion is *Littleton* in our bookes.

(4. Inst. 146.)

"*Ala ouster le mere.*" If hee had beene within the realme, it doth not alter the case.

"*Quære en cest case si le baron, &c.*" Here is a question moved by *Littleton*, whether the disagreement of the husband shall ouste the wife of her remitter. And it seemeth that the disagreement shall not devest the remitter.

First, because the state made to the wife which wrought the remitter is banished and wholly defeated, and therefore no disagreement of the husband can devest the state gained by the lease, which by the remitter was devested before.

Secondly, for that the law having once restored her antient and better right, will not suffer the disagreement of the husband to devest it out of her, and to revive the discontinuance, and revest the wrongfull estate in the discontinuee. [357. a

Thirdly, for that remitters tending to the advancement of ancient rights are favoured in law.

41. E. 3. 18. (Plo. 114. b.) 18. Eliz. Dier. 351.

And so it is for the same causes, if the wife survive her husband, she cannot claime in by the purchase made during the coverture; but the law adjudgeth her in her better right. But if both estates be waiveable, there albeit the wife *primâ facie* is remitted; yet after the decease of her husband, she may elect which of the estates she will. As if lands be given to the husband and wife, and their heires, the husband make a feoffment in fee, the feoffee giveth the land to the husband and wife and the heires of their two bodies, the husband dieth; in this case the wife may elect which of the estates shee will; for both estates are waiveable, and her time of election and power of wayver accrewed to her first after the decease of her husband. If lands be given to a man and the heires females of his body, and he maketh a feoffment in fee, and take backe an estate to him and his heires, and dieth, having issue a daughter, leaving his wife *grossement enseint* with a sonne and dieth, the daughter is remitted; and albeit the sonne be afterward borne, he shall not devest the remitter. (1)

(2. Rep. 37. 9. Rep. 26. b. 32. a. 2. Roll. Abr. 421, 422, 423. 9. Rep. 140. b. 2. Cro. 489. Ante 246. a. 348. 3. Leon. 2.)

Sect. 678.

ITEM, si le baron discontinua les tenements son feme, et le discontinuee est disseisie, et puis le disseisour lessa mesmes les tenements a le baron et a son feme pur terme de vie, ceo est un remitter a la feme. Mes si le baron et son feme fueront de covin ‡ et consent que

ALSO, if the husband discontinue the lands of his wife, and the discontinuee is disseised, and after the disseisor letteth the same lands to the husband and wife for terme of life, this is a remitter to the wife. But if the husband and his wife were of covine

‡ *et—ou*, L. and M. and Roh.

(1) [See Note 312.]

que le disseisin doit estre fait, donques il n'est remitter a son feme, pur ceo que el est disseiseresse. Mes si le baron fuit de covin et consent a le disseisin, et nemy la feme, donque tiel leas fait al feme est un remitter, pur ceo que nul default fuit en la feme.

vine and consent that the disseisin should be made, then it is no remitter to his wife, because she is a disseiseresse. But if the husband were of covin and consent to the disseisin, and not the wife, then such lease made to the wife is a remitter, for that no default was in the wife.

"*ET puis le disseisor lessa mesme les tenements, &c.*" Note, so much are remitters favoured in law, that the state made by the disseisor (which commeth to the land by wrong, and upon whom the entry of the discontinuee is lawfull) doth remit the wife, and devesteth all out of the discontinuee, albeit he hath a warrantie of the land.

18. E. 4. 2. b. (F. N. B. 98. c.)

"*Mes si le baron et feme fuerent de covin et consent, &c.*" Here it appeareth that covin and consent of the husband and wife doth hinder the remitter of the wife; for covine and consent in many cases to do a wrong, doth choak a meere right, and the ill manner doth make a good matter unlawfull.

18. E. 4. ubi supra. (3. Rep. 71.)

[357. b.]

"*Covin,*" *Covina*, commeth of the French word *Convine*, and is a secret assent determined in the hearts of two or more to the defrauding and prejudice of another.

Pl. Com. 546. in Wimbishe's case. (Ant. 35. a. F. N. B. 98. d.) 4. Rep. 82. b.

A woman is lawfully intitled to have dower, and she is of covine and consent, that one shall disseise the tenant of the land, against whom she may recover her lawfull dower, all which is done accordingly; the tenant may lawfully enter upon her, and avoid the recovery in respect of the covine. But if a disseisor, intruder, or abator, doe endow a woman that hath lawfull title of dower, this is good, and shall binde him that right hath, if there were no such covine or consent before the disseisin, abatement, or intrusion.

44. E. 3. 46. 11. H. 4. 60. 44. Ass. 29. 19. H. 8. 12. 18. H. 8. 5. 11. E. 4. 2. 7. H. 7. 11. (3. Rep. 78. Plo. 51. a. 54. Ant. 35. a.)

And so it is in all cases where a man hath a rightfull and just cause of action; yet if he of covine and consent doe raise up a tenant by wrong against whom he may recover, the covine doth suffocate the right, so as the recovery, though it be upon a good title, shall not binde or restore the demandant to his right.

41. Ass. p. 28. 25. Ass. p. 1. 27. Ass. 74. 15. E. 4. 4. a. 12. Ass. p. 10.

If tenant in taile and his issue disseise the discontinuee to the use of the father, and the father dieth, and the land descendeth to the issue, he is not remitted against the discontinuee in respect he was privie and partie to the wrong; but in respect of all others he is remitted, and shall deraigne the first warrantie. And so note a man may be remitted against one, and not against another.

11. E. 4. 2. 15. E. 4. 23. 14. H. 8. 13. 33. H. 6. 5. 12. E. 4. 21. b.

A. and *B.* joyntenants be intitled to a reall action against the heire of the disseisor, *A.* cause the heire to be disseised, against whom *A.* and *B.* recover and sue execution. *B.* is remitted, for that he was not partie to the covine, and shall hold in common with *A.*; but *A.* is not remitted, for the reason that *Littleton* here sheweth.

"*Pur*

F. N. B. 179. g. 12. E. 4. 9. 35. Aff. 5. 44. E. 3. 9. 23. 13 Aff. 1. Temps E. 1. Waste 128. 16. Aff. p. 7. 21. E. 4. 53. 21. H. 7. 35. 3. H. 4. 17. (1. Roll. Abr. 278. 660. F. N. B. 117. g.)

"*Pur ceo que el est disseiforesse.*" *Nota*, it is regularly true, that a feme covert cannot be a disseisoresse by her commandement or procurement precedent, nor by her assent or agreement subsequent; but by her actuall entry, or proper act, she may be a disseisoresse. And therefore some doe hold that *Littleton* must be intended, that the husband and wife were present when the disseisin was done; and others doe hold that *Littleton* is good law, albeit she were absent; for that if her procurement or agreement be to doe a wrong, to cause a remitter unto her in this speciall case, she shall faile of her end, and remitted she shall not be; but in this speciall case she shall be holden as a disseisoresse by her covine and consent *quatenus* to hinder the remitter. And here it appeareth, that albeit the husband be of covine and consent, &c.; yet if the wife were not of covine and consent also, she shall be remitted, because, as *Littleton* saith, there was no default in the wife.

Sect. 679.

(4. Rep. 52.)

ITEM, si tiel discontinuee fesoit estate de franktenement al baron et a son feme per fait endent sur condition, scilicet, reservant al discontinuee un certaine rent, et pur default de payment un re-entry, et pur ceo que le rent est aderere le discontinuee enter; donques de cel entrie le feme avera un assise de novel disseisin, *apres la mort son baron envers le discontinuee, pur ceo que le condition fuit tout ousterment aniente, entant que la feme fuit en son remitter; uncore le baron ovesque sa feme ne poient aver assise, pur ceo que le baron est estoppe, &c.*

ALSO, if such discontinuee make an estate of freehold to the husband and wife by deed indented upon condition, *scilicet*, reserving to the discontinuee a certain rent, and for default of payment a re-entrie, and for that the rent is behind the discontinuee enter; then for this entrie the wife shall have an assise of *novel disseisin*, after the death of her husband against the discontinuee, because the condition was altogether taken away, inasmuch as the wife was in her remitter; yet the husband with his wife cannot have an assise, because the husband is estopped, &c.

[358. a.]

Pl. Com. in Amy Townshend's case. 12. R. 2. tit. Remitter. 12.

IT is hereby to be observed, that the wife is presently remitted, and that the conditions, and rents, and all other things annexed to, or reserved upon the state (that is vanished and defeated by the remitter) are defeated also. (1)

Sect. 680, 681.

(Sid. 69.) (Hob. 260.)

ITEM, si le baron discontinua les tenements sa feme, et reprist estate a luy pur terme de sa vie, le remainder apres son decease a sa feme pur terme de

ALSO, if the husband discontinue the tenements of his wife, and take backe an estate to him for life, the remainder after his decease to his wife

(1) [See Note 313.]

*de sa vie; en cest cas ceo n'est un remitter a la feme durant la vie le baron, pur ceo que durant la vie le baron, la feme n'ad riens en le franktenement. Mes si en ceo cas la feme survesquist le baron, ceo est un remitter a la feme, pur ceo que un franktenement en ley est ject sur luy maugre le soen. * Et entant que el ne poit aver action envers nul auter person, et envers luy mesme el ne poit aver action, pur ceo el est en son remitter. Car en cest cas coment que la feme ne entra pas en les tenements, uncore un estrange que ad cause de aver action, poit suer son action envers la feme de mesmes les tenements, pur ceo que el est tenant en ley, coment que el ne soit tenant en fait.*

wife for terme of her life; in this case this is no remitter to the wife during the life of the husband, for that during the life of the husband, the wife hath nothing in the freehold. But if in this case the wife surviveth the husband, this is a remitter to the wife, because a freehold in law is cast upon her against her will. And inasmuch as she cannot have an action against any other person, and against her selfe shee cannot have any action, therefore she is in her remitter. For in this case although the wife doth not enter into the tenements, yet a stranger which hath cause to have an action, may sue his action against the wife for the same tenements, because shee is tenant in law, albeit that she be not tenant in deed.

Sect. 681.

(4. Rep. 8.) (Plo. 416 b.)

CAR tenant de franktenement en fait est celuy, que, s'il soit disseisie de † franktenement, il poit aver assise: mes tenant de franktenement en ley devant son entre ⸸ en fait, n'avera my assise. Et si home ‡ soit seisie ‖ de certeine terre, § et ad issue fits quel prent feme, et le pier devie seisie, et puis le fits devie devant ascun entrie fait per luy en la terre, le feme le fits serra endowe en le terre, et uncore il n'avoit nul franktenement en fait, mes il avoit un fee et franktenement en ley. Et issint nota, que præcipe quòd reddat *poit auxybien estre maintenus envers celuy que ad franktenement en ley, sicome envers celuy que ad le franktenement en fait.*

358. b]

FOR tenant of freehold in deed is he, who, if hee be disseised of the freehold, may have an assise: but tenant of freehold in law before his entrie in deed, shall not have an assise. And if a man bee seised of certaine land, and hath issue a sonne who taketh wife, and the father dieth seised, and after the sonne dies before any entrie made by him into the land, the wife of the sonne shall be endowed in the land, and yet he had no freehold in deed, but hee had a fee and freehold in law. And so note, that a *præcipe quòd reddat* may as well bee maintained against him that hath the freehold in law, as against him that hath the freehold in deed.

HERE five things are to be observed. First, that a remainder expectant upon an estate for life worketh no remitter, but when it fall in possession: for before his time he can have no action, and no

18. H. 8. 3. (3. Rep. 20. a.)

* *soen—feme*, Paper M. S.
† *son* added L. and M. and Roh.
⸸ *en fait* not in L. and M. nor Roh.
‡ *soit* not in L. and M. nor Roh.
‖ *en fee* added L. and M. and Roh.
§ *et* not in L. and M. nor Roh.

no freehold is in him. Secondly, though the woman might waive the remainder, yet because she is presently by the death of the husband tenant to the *præcipe*, it is within the rule of remitter, and her power of waiver is not materiall. Thirdly, that a freehold in law being cast upon the woman by act of law, without any thing done or assented to by her, doth remit her, albeit she be then sole and of full age. Fourthly, that a *præcipe* lyeth against one that hath but a freehold in law. Fifthly, that a woman shall be endowed where the husband hath the inheritance, and but a freehold in law, as hath beene said in the Chapter of Dower.

Vide Sect. 447. Bracton Lib. 4. fol. 206. 237. Britton 83. b. Fleta lib. 3. cap. 15. (Plo. 229. b. 230. a. Cro. Car. 338. Hob. 256.)

Sect. 682.

ITEM, si tenant en taile ad issue deux fits de pleine age, et il lessa la terre taile al eigne fits pur terme de sa vie, le remainder al fits puisne pur terme de sa vie, et puis le tenant en taile morust; en cest cas l'eigne fits n'est pas en son remitter, pur ceo que il prent estate de son pier. Mes si l'eigne fits morust sauns issue de son corps, donque ceo est un remitter al puisne frere, pur ceo que il est heire en le tayle, et un franktenement en le ley est escheate, et jecte sur luy per force de le remainder, et il y ad nul envers que il poit suer son action *.

ALSO, if tenant in taile hath issue two sons of full age, and he letteth the land tailed to the eldest son for terme of his life, the remainder to the younger son for terme of his life, and after the tenant in taile dieth; in this case the eldest sonne is not in his remitter, because hee tooke an estate of his father. But if the eldest die without issue of his bodie, then this is a remitter to the younger brother, because he is heire in taile, and a freehold in law is escheated, and cast upon him by force of the remainder, and there is none against whom he may sue his action.

[a] 12. E. 4. 20.

[b] Sect. 684, 685.

OF this opinion is [a] *Littleton* in our bookes; and of this sufficient hath beene said in the next Section before. See hereafter [b] some explanation hereof.

Sect. 683.

[359. a.]

(2. Roll. Abr. 420.)

EN mesme le maner est, lou home soit disseisie, et le disseisor morust seisie, et les tenements discendont a son heire, et l'heire le disseisor fait un leas a un home de mesmes les tenements pur terme de † vie, le remainder a le disseisee pur terme de vie, ou en taile, ou en fee, ‡ le tenant a terme de vie morust, ore

IN the same manner it is where a man is disseised, and the disseisor dieth seised, and the tenements descend to his heire, and the heire of the disseisor make a lease to a man of the same tenements for terme of life, the remainder to the disseisee for terme of life, or in taile, or in fee, the tenant

* *&c.* added L. and M. and Roh.
† *son* added L. and M. and Roh.
‡ *et* added in L. and M. and Roh.

ore ceo est un remitter al disseisee, &c. causâ quâ supra, ‡ *&c.*

nant for life dieth, now this is a remitter to the disseisee, &c. *causâ quâ supra, &c.*

AND this standeth upon the same reason that the cases in the two Sections precedent doe. See the next Section following.

Sect. 684.

§* *NOTA, si tenant en taile enfeoffa son fits et un auter per son fait de la terre taile, en fee, et livery de seisin est fait a l'auter accordant al fait,* ‖ *et le fits rien consusant de ceo* ¶ *agreea a le feoffment, et puis celuy que prist le livery de seisin devy, et le fits ne occupia la terre, ne prent ascun profit del terre durant la vie le pier, et puis le pier morust, ore ceo est un remitter al fits, pur ceo que le franktenement est ject sur luy per le survivor; et nul default fuit en luy, pur ceo que il ne unque agreea, &c. en la vie son pier, et il ad nul envers que il poit suer briefe de* formedon, *&c.*

NOTE, if tenant in taile infeoffe his sonne and another by his deed of the land intailed, in fee, and livery of seisin is made to the other according to the deed, and the son not knowing of this agreeth not to the feoffement, and after hee which tooke the livery of seisin dieth, and the son doth not occupie the land, nor taketh any profit of the land during the life of the father, and after the father dieth, now this is a remitter to the sonne, because the freehold is cast upon him by the survivor; and no default was in him, because he did never agree, &c. in the life of his father, and hee hath none against whom hee may sue a writ of *formedon*, &c.

* IT should seeme by this marke, that this was an addition to *Littleton*; but it is of *Littleton*'s owne worke, and agreeth with the originall, saving the originall begun this Section thus: *Item si tenant en taile, &c.*

" *Per son fait, &c.*" Here *Littleton* materially addeth by his deed; for if a man intendeth to [b] make a feoffement by *parol* to *A.* and *B.* and he and *B.* come upon the land, *A.* being absent, and make livery to *B.* in the name both of *B.* and *A.* and to their heires, this shall enure onely to *B.*; for neither can a man absent take livery, nor make livery without deed.

(Ant. 49. b. 52. a. 297. b.) [b] Temps H. 8. Feoffements. Br. 72. 40. E. 3. 41 10. E. 4. 1. a. 15. E. 4. 18. 22. H. 6. 12. 18. E. 4. 12.

" *Et liverie de seisin est fait a l'auter accordant al fait, &c.*" Note, livery being made to one according to the deede, enureth to both, because the deede whereunto the livery referreth is made to both; for the rule is, that *Verba relata hoc maximè operantur per referentiam ut in eis in esse videntur.*

(9. Rep. 136.) (Ant. 49. b. 52. a.)

[59. b.] " *Et le fits nient consusant de ceo, ne agreea a le feoffement.*" Here it appeareth, that if the sonne be consusant, and agreeth to the

‡ *&c.* not in L. and M. nor Roh.
§ *Nota—item*, L. and M. and Roh.
‖ *et* not in L. and M. nor Roh.
¶ *ne* added L. and M. and Roh.

the feoffement, &c. this is no remitter to him. And therefore if the feoffement were made by deed indented, and the sonne with the other sealeth the counterpart, and then the feoffor maketh livery to the other according to the deed, and the other dieth, the son is not remitted, because he was conusant of the feoffement, and agreed to the same; and *Littleton* saith in the case that he putteth, that there was no default in the son, because he agreed not to the feoffement in the life of the father: and so it seemeth, that if *A.* be seised in taile, and have issue two sons, and by deed indented betweene him of the one part, and the sons of the other part, maketh a lease to the eldest for life, the remainder to the second in fee, and dieth, and the eldest son dieth without issue, the second son is not remitted, because he agreed to the remainder in the life of the father; or if the like estate had been made by parol, if in the life of the father the tenant for life had beene impleaded, and made default, and he in the remainder had beene received, and thereby agreed to the remainder, after the death of the father and the eldest son without issue, the second son should not be remitted, because he agreed to the remainder in the life of the father; all which is well warranted by the reason yeelded by our author in this Section.

Vide Sect. 682.

Sect. 685.

CAR si home soit disseisie de certaine terre, et le disseisor fait un fait de feoffment per que il infeoffa B. C. *et* D. *et le liverie de seisin est fait a* B. *et* C. *mes* D. *ne fuit al liverie de seisin, ne unque agreea a le feoffment, ne unque voile prender les profits, &c. et puis* B. *et* C. *devieront, et* D. *eux survesquist, et le disseisee port son briefe* sur disseisin en le per *envers* D. * *il monstra tout le matter,* † *coment il ne unques agreea a le feoffment, et issint il dischargera a luy de damages, issint que le demandant ne recovera ascuns dammages envers luy, coment que il soit tenant del franktenement del terre. Et uncore le statute de* Gloucester, ‡ cap. 1. *voit, que le disseisee recovera damages en briefe de* entre, *founduc sur* § *disseisin vers celuy que est trouve tenant. Et ceo est un proofe en l'auter case, que entant que l'issue en le taile avient a le franktenement, et* ‖ *nemy per*

FOR if a man be disseised of certaine land, and the disseisour make a deed of feoffement whereby he infeoffeth *B. C.* and *D.* and liverie of seisin is made to *B.* and *C.* but *D.* was not at the liverie of seisin, nor ever agreed to the feoffment, nor ever would take the profits, &c. and after *B.* and *C.* die, and *D.* survive them, and the disseisee bringeth his writ upon disseisin in the *per* against *D.* hee shall shew all the matter, how he never agreed to the feoffement, and hee shall discharge himselfe of dammages, so as the demaundant shall recover no dammages against him, although he be tenant of the freehold of the land. And yet the statute of *Gloucester, cap.* 1. will, that the disseisee shall recover dammages in a writ of entrie founded upon a disseisin against him which is found tenant. And this is a proofe in the other case that forasmuch

[360.

* *il—mesme celuy* D. L. and M. and Roh.
† *et* added L. and M. and Roh.
‡ *cap.* 1. not in L. and M. nor Roh.
§ *le novel* added L. and M. and Roh.
‖ *ceo* added L. and M. and Roh.

per son fait, ne per son agreement, † *mes apres la mort son pier, ceo est un remitter a luy, entant que il ne poit suer action de* formedon *envers nul auter person, &c.*

much as the issue in taile came to the freehold, and not by his act, nor by his agreement, but after the death of his father, therefore this is a remitter to him, inasmuch as he cannot sue an action of *formedon* against any other person, &c.

THIS case standeth upon the same reason that the next precedent case doth.

(8. Rep. 1. Post. 365. b. 366. a. 369 381. Ant. 11. b. 115. a. Plo. 365.)

" *Mes celuy que est trove tenant, &c.*" Here it appeareth, that acts of parliament are to be so construed, as no man that is innocent, or free from injurie or wrong, be by a literall construction punished or endamaged: and therefore in this case, albeit the letter of the statute is generally to give dammages against him that is found tenant, and the case that *Littleton* here putteth, *D.* being survivor, is consequently found tenant of the land; yet because he waived the estate, and never agreed to the feoffment, nor tooke any profits, he shall not be charged with the dammages.

Sect. 686, 687.

(2. Roll. Abr. 522.)

ITEM, si un abbe aliena la terre de son meason a un auter en fee, et l'alienee per son fait charge la terre ove un rent charge en fee, et puis l'alienee infeoffe l'abbe ove licence, a aver et tener al abbe et a ses successors a touts jours, et puis l'abbe morust, et un auter est eslieu, et fait abbe: en cest case l'abbe que est le successor, et son covent, sont en lour remitter, et tiendront la terre discharge, pur ceo que mesme l'abbe ne poit aver ascun action, ‡ *ne briefe* d'entre sine assensu capituli, *de mesme la terre envers nul auter person.* (1)

ALSO, if an abbot alien the land of his house to another in fee; and the alienee by his deed charge the land with a rent-charge in fee, and after the alienee infeoffe the abbot with licence, to have and to hold to the abbot and to his successors for ever, and after the abbot die, and another is chosen, and made abbot: in this case the abbot that is the successor, and his covent, are in their remitter, and shall hold the land discharged, because the same abbot cannot have an action, nor a writ of *entre sine assensu capituli*, of the same land against any other person.

Sect. 687.

EN mesme le maner est, lou un evesque, ou un deane, ou auters tiels persons aliena, &c: sans assent, &c.

IN the same manner it is, where a bishop or a deane, or other such persons alien, &c. without assent &c. and

† *mes—que*, L. and M. and Roh.

‡ *ne—de*, L. and M. and Roh

(1) [See Note 314.]

&c. et l'alienee charge la terre, &c. et puis l'evesque reprist estate de mesme la terre per licence, a luy et a ses successors, et puis l'evesque devie; son successor est en son remitter, come en droit de son esglise, et defeatera le charge, &c. causâ quâ supra, &c.

and the alienee charge the land, &c. and after the bishop takes backe an estate of the same land by licence, to him and his successours, and after the bishop dieth; his successor is in his remitter, as in right of his church, and shall defeat the charge, &c. *causâ quâ supra.*

[360. b.

OUR author having spoken of remitters to singular or naturall persons, as issues in taile, and to feme coverts, and to their heires, and to them in reversion or remainder, and their heires; now he speaketh of remitters to bodies politike and incorporate, as to abbots, bishops, deanes, &c. And as discents doe remit the heire which comes in the *per*, so succession doth remit the successor, albeit he commeth in the *post*. And so in other cases where the issue in taile of full age shall be remitted, there in the like case shall the successor be remitted also, and defeat all meane charges and incumbrances.

"*Ove licence, &c.*" That is, of the king and the lords immediate and mediate, to dispense with the statutes of mortmaine; whereof see more before, *Sect.* 140.

Sect. 688.

ITEM, si home suist faux action envers le tenant en taile, sicome home voile suer envers luy un briefe d'entre en le post, *supposant per son briefe que le tenant en taile n'ad pas entre sinon per* A. *de* B. *que disseisist l'ayel le demandant, et ceo est faux, et il recover envers le tenant en le taile per default, et suist execution, et puis le tenant en taile morust, son issue poit aver briefe de* formedon *envers luy que recovera; et s'il voile pleader le recoverie envers le tenant en taile, l'issue poit dire, que le dit* A. *de* B. *ne disseisist poynt l'ayel celuy que recoverast, en le maner come son briefe supposa, et issint il fauxera* * *le recoverie. Auxy* posito *que ceo fuit voyer, que le dit* A. *de* B. *disseisist l'ayel le demandant que recoverast, et que apres le disseisin le demandant, ou son pier, ou son ayel per un fait avoyent relesse al tenant en taile tout le droit que il*

ALSO, if a man sue a false action against tenant in taile, as if one will sue against him a writ of entrie in the *post*, supposing by his writ that the tenant in taile had not his entrie but by *A.* of *B.* who disseised the grandfather of the demandant, and this is false, and he recovereth against the tenant in taile by default, and sueth execution, and after the tenant in taile dieth, his issue may have a writ of *formedon* against him which recovereth; and if hee will plead the recoverie against the tenant in taile, the issue may say, that the said *A.* of *B.* did not disseise the grandfather of him which recovered, in manner as his writ suppose, and so he shall falsifie his recovery. And admit this were true, that the said *A.* of *B.* did disseise the grandfather of the demandant which recovered, and that after the disseisin, the

* *le—son*, L. and M. and Roh.

361. a.] *il avoit en la terre, &c. et ceo nient contristeant il suist un briefe* d'entre en le post *envers le tenant en taile, en le manner come est avauntdit, et le tenaunt en taile pleda a celuy, que le dit* A. *de* B. *ne disseisist pas son ayel, en le manner come son briefe supposa; et sur ceo sont a issue, et l'issue est trove pur le demandant, per que il ad judgement de recover, et suist execution; et puis le tenant en le taile morust, son issue poit avoir un briefe de* formedon *envers celuy que recovera; et s'il voile plead le recoverie per l'action trie envers son pier * que fuit tenant en taile, donque il poit monstrer et pleader le release fait al son pier, et issint l'action que fuit sue, feint en ley †.*

the demandant, or his father, or his grandfather by a deed had released to the tenant in taile all the right which hee had in the land, &c. and notwithstanding this hee sueth a writ of entrie in the *post* against the tenant in taile, in manner as is aforesaid, and the tenant in taile plead to him, that the said *A.* of *B.* did not disseise his grandfather, in such manner as his writ suppose; and upon this they are at issue, and the issue is found for the demandant, wherby he hath judgment to recover, and sueth execution; and after the tenant in taile dieth, his issue may have a writ of *formedon* against him that recovered; and if he will plead the recovery by the action tried against his father who was tenant in taile, then he may shew and plead the release made to his father, and so the action which was sued, feint in law.

"*IL recovera envers le tenant en taile per default.*" *Littleton* addeth (by default) because if the [c] recovery passed upon an issue tried by verdict, he shall never falsifie in the point tried, because an attaint might have beene had against the jurors; and albeit all the jurors be dead, so as the attaint doe faile, yet the issue in taile shall not falsifie in the point tried, which, untill it be lawfully avoided, *pro veritate accipitur.* As if the tenant in taile be impleaded in a *formedon,* and he traverseth the gift, and it is tried against him, and thereupon the demandant recover; in this case the issue in taile shall not falsifie in the point tried; but he may falsifie the recovery by any other matter: as that the tenant in taile might have pleaded a collaterall warrantie, or a release, as *Littleton* here putteth the case, or to confesse and avoid the point tried. And *Litleton*'s case holdeth not only in a recovery by default, whereof he speaketh, but also upon a *nihil dicit,* or confession or demurrer.

[c] 12. E. 4. 19. 13. E. 4. 3. 11. H. 4. 89. 7. H. 4. 17. 14. H. 7. 10, 11. 28. Ass. 32. 52. 34. Ass. 7. 10. H. 6. 5. 19. H. 6. 39. Brooke tit. Fauxifier de Recoverie 55. 22. H. 6. 28. 34. H. 6. 2. 26. H. 6. 32. 36. H. 6. Fauxer. de Recoverie 27.

(6. Rep. 7. 1. Roll. Rep. 443.)

Sect. 689.

ET il semble, que feint action est autant a dire en Englissh, a fained action, *c'estascavoir, tiel action que coment que les parolx de le briefe sont voyers, uncore per certaine causes il n'ad cause ne title per la ley de recover per*

AND it seemeth, that a faint action is as much to say in English, *a fained action,* that is to say, such an action as albeit the words of the writ be true, yet for certaine causes hee hath no cause nor title by the law to recover

* *que fuit* not in L. and M. nor Roh.

† *&c.* added L. and M. and Roh.

*per mesme l'action. Et faux action est, lou les parolx de briefe sont faux. Et en les deux cases avantdits, si le cas fuit tiel, que apres tiel recovery, et execution en' fait, le tenant en taile ust disseisie celuy que recovera, et ent morust seisie, per que la terre discendist a son issue, ceo est un remitter al issue, et l'issue est eins per force de le taile; et pur cel cause jeo aye mis les deux cases precedents, pur enformer toy, mon fits, que l'issue en taile per force d'un discent fait a luy apres un recovery et execution * fait envers son auncester, poit estre auxy bien en son remitter, sicome il serroit per le discent fait a luy apres un discontinuance fait per son auncester de les terres tayles per feoffement en pais, ou auterment, &c.*

recover by the same action. And a false action is, where the words of the writ bee false. And in these two cases aforesaid, if the case were such, that after such recovery, and execution thereupon done, the tenant in tayle had disseised him that recovered, and thereof died seised, whereby the land descended to his issue, this is a remitter to the issue, and the issue is in by force of the taile; and for this cause I have put these two cases precedent, to enforme thee (my sonne) that the issue in taile by force of a discent made unto him after a recovery and execution made against his ancestour, may be as well in his remitter, as he should be by the discent made to him after a discontinuance made by his ancestour of the entayled lands by feoffment in the countrie, or otherwise, &c.

[361.b.]

HERE *Littleton* explaineth what a faint action is, and what a false action is, which is plaine and perspicuous. And here it is to be observed, that a remitter may be had after a recovery upon a faint action by a disseisin and a discent, aswell as by a discent after a discontinuance by a feoffement, &c.

Sect. 690.

ITEM, en les cases avantdits, si le cas fuit tiel, que apres ceo que le demandant avoit judgement de recover envers le tenant en taile, et mesme le tenant en taile morust devaunt ascun execution ewe envers luy, per que les tenements discendent a son issue, et celuy que recovera suist un scire facias *hors de le judgement d'aver execution de le judgement envers l'issue en taile, l'issue pledera le matter come avaunt est dit; et issint prova que le † dit recovery fuit faux ou feint en ley, et issint luy barrera d'aver execution de le judgement ‡.*

ALSO, in the cases aforesaid, if the case were such, that after that the demandant have judgement to recover against the tenant in tayle, and the same tenant in tayle dieth before any execution had against him, whereby the tenements descend to his issue, and he who recovereth sueth a *scire facias* out of the judgement to have execution of the judgement against the issue in taile, the issue shal plead the matter as aforesaid; and so prove that the said recovery was false or faint in law, and so shall barre him to have execution of the judgement.

* *ent* added L. and M. and Roh.
† *dit* not in L. and M. nor Roh.
‡ *&c.* added L. and M. and Roh.

HERE it appeareth, that if a judgement be given against a tenant in taile upon a faint or false action, and tenant in taile die before execution, no execution can be sued against the issue in tayle. But if in a common recoverie judgement bee had against tenant in tayle where he voucheth, and hath judgement to recover over in value, albeit the tenant in tayle dyeth before execution, yet the recoveror shall execute the judgement against the issue in tayle in respect of the intended recompence; and for that it is the common assurance of the realme, and is well warranted [d] by our bookes, and was not invented by justice *Choke*, who was a grave and learned judge in the time of *E.* 4. (as some hold by tradition); but it may bee that it was upon former authorities and opinions of judges discovered by him, assented unto by the rest of the judges.

28. Ass. 32. 34. Ass. pl. 7. 15. E. 3. Age 95. 11. H. 4. 89. 7. H. 4. 17. 33. E. 3. Entrie Cong. 31. 21. H. 6. 13. 10. H. 6. 6. 12. E. 4. 20. 14. H. 7. 11. 23. Eliz. Dier 376. Lib. 1. fol. 106. Shelley's case. Pl. Com. 55.

[362. a.]

(Cro. Car. 388. Plo. 14.) See hereafter Sect. 709. 15. E. 3. Briefe 324. 42. E. 3. 53. 44. E. 3. 21. 48. E. 3. 11. 1. E. 4. 5. 5. E. 4. 2. [d] 12. E. 4. 20. Dier. 23. Eliz. 376. Lib. 10. fol. 37, 38. in Mary Portington's case.

If a recoverie bee had against tenant for life without consent or covine, though it be without title, and execution be had, and tenant for life dieth, the reversion or remainder is discontinued, so as he in the reversion or remainder cannot enter; but if such a recovery be had by agreement and covine betweene the demandant and the tenant for life, then, as hath beene said, it is a forfeiture of the estate for life, and he in the reversion or remainder may enter for the forfeiture. So it is if the tenant for life suffer a common recovery at this day, it is a forfeiture of his estate; for a common recovery is a common conveyance or assurance, whereof the law taketh knowledge. Since *Littleton* wrote, there were two statutes [e] made for preservation of remainders and reversions expectant upon any manner of estate for life; the one in 32 *H.* 8. the other in 14. *Eliz.*: but 32. *H.* 8. extended not to recoveries, when tenant for life came in as vouchee, &c. and therefore that act is repealed by 14. *Eliz.* and full remedie provided for preservation of the entrie of them in reversion or remainder. But the statute of 14. *Eliz.* extendeth not to any recovery, unlesse it be by agreement or covine. Secondly, [f] if there be tenant for life, remainder in taile, the reversion or remainder in fee, if tenant for life be impleaded by agreement, and he vouche tenant in taile, and he vouch over the common vouchee, this shall barre the reversion or remainder in fee, although he in the reversion or remainder did never assent to the recovery; because it was not the intent of the act to extend to such a recovery, in which a tenant in taile was vouched; for he hath power by common recovery, if he were in possession, to cut off all reversions and remainders. And so if tenant for life had surrendred to him in remainder in taile, he might have barred the remainders and reversions expectant upon his estate. Thirdly, where the proviso of that act speaketh of an assent of record by him in reversion or remainder, it is to be understood, that such assent must appeare upon the same record, either upon a voucher, *aid prier*, receit, or the like; for it cannot appeare of record, unlesse it be done in course of law, and not by any extrajudiciall entrie, or by *memorandum*.

5. Ass. 3. 5. E. 3. Entre Cong. 42. Li. 1. fol. 15, 16. Sir William Pelham's case. (6. Rep. 8. b. Ant. 356. a.)

[e] 32. H. 8. cap. 31. 14. Eliz. cap. 8. (Sect. 675. 10. Rep. 49.)

[f] Lib. 3. fol. 60, 61. Lincolne Colledge case.

(2. Roll. Abr. 23. 146.)

Sect.

Sect. 691.

ITEM, si tenant en taile discontinua le taile, et morust, et son issue port son briefe de formedon *envers le discontinuee (esteant tenant de franktenement del terre) et le discontinuee pleda que il n'est tenant, mes oustermant disclaima de le tenancy en la terre; en cest cas le judgement serra, que le tenant alast sans jour, et apres tiel judgement l'issue en le taile que est demandant poit entrer en la terre, nyent contristeant le discontinuance, et per tiel entrie il serra adjudge eins en son remitter. Et la cause est, pur ceo que si ascun home suist* præcipe quòd reddat *envers ascun tenant de franktenement, en quel action le demandant ne recovera damages, et le tenant pledast nontenure,* * *ou auterment disclaima en le tenancie, le demandant ne poit averrer son briefe,* † *et dirra que il est tenant, come le briefe suppose. Et pur cel cause le demandant apres ceo que judgement est done que le tenant alast sans jour, poit entrer en les tenements demands, le quel serra auxy graund advantage a luy en ley, sicome il avoit judgement de recoverer envers le tenant, et per tiel entrie il est en son remitter per force del taile. Mes lou le demandant recovera dammages envers le tenant, la le demandant poit averer, que il est tenant, come le briefe suppose, et ceo pur l'advantage del demandant pur recoverer ses damages, ou auterment il ne recoveroit ses damages, queux sont* ‡ *ou fueront a luy dones per la ley.*

ALSO, if tenant in taile discontinue the taile, and dieth, and his issue bringeth his writ of *formedon* against the discontinuee (being tenant of the freehold of the land) and the discontinuee plead that he is not tenant, but utterly disclaymeth from the tenancy in the land; in this case the judgement shall be, that the tenant goeth without day, and after such judgement the issue in the taile that is demandant may enter into the land, notwithstanding the discontinuance, and by such entrie hee shall be adjudged in his remitter. And the reason is, for that if any man sue a *præcipe quòd reddat* against any tenant of the freehold, in which action the demandant shall not recover damages, and the tenant pleads nontenure, or otherwise disclaime in the tenancie, the demandant cannot averre his writ, and say that hee is tenant, as the writ supposeth. And for this cause the demandant after that that judgement is given that the tenant shall goe without day, may enter into the tenements demanded, the which shall bee as great an advantage to him in law, as if he had judgement to recover against the tenant, and by such entry hee is in his remitter by force of the entaile. But where the demandant shall recover damages against the tenant, there the demandant may averre, that he is tenant, as the writ supposeth, and that for the advantage of the demandant to recover his dammages, or otherwise hee shall not recover his dammages, which are or were given to him by the law.

(Doct. Pla. 133.)
5. E. 4. 1.
36. H. 6. 29.
6. E. 3. 8.
4. E. 4. 38.
(3. Rep. 26.)

HERE it appeareth, that upon the plea of nontenure, or of disclaimer of the tenant in a *formedon* in the discender, albeit the expresse judgement be that the tenant shall goe without day, yet in judgement of law the demandant may enter according to the title of

* *ou—mes*, L. and M. and Roh.
† *et dirra*, not in L. and M. nor Roh.
‡ *ou fueront* not in L. and M. nor Roh.

of his writ, and bee seised in tayle, notwithstanding the discontinuance. And here, *Littleton* saith, the demandant shall be adjudged in his remitter; where hee taketh remitter in a large sense: for in this case the demandant hath not two rights, but hath onely one antient right, and restored to the same by course of law; and so remitter here is taken for a recontinuance of the right.

Non tenure. Vide Bracton, lib. 5. fol. 431. 432. & 414. Britton, cap. 84.

[362. b.] " *Ou le demandant ne recovera damages.*" Here is to bee observed, that in such a *præcipe* where the demandant is to recover dammages, if the tenant pleade non-tenure or disclaime, [*f*] there the demandant may averre him to be tenant of the land, as his writ suppose for the benefit of his damages, which otherwise hee should lose, or pray judgement and enter. [*g*] But where no damages are to bee recovered, as in a *formedon* in the discender, and the like, there hee cannot averre him tenant, but pray his judgement and enter, for thereby hee hath the effect of his suite: *Et frustrà fit per plura, quod fieri potest per pauciora.*

7. H. 6. 17. 5. E. 4. 1. (5. Rep. 68. Doct. Pla. 49.)

[*f*] 13. H. 7. 12. 36. H. 6. 29. 22. H. 6. 44. 4. E. 4. 38. 5. E. 4. 1. 6. E. 3. 8. (7. Rep. 40.) [*g*] 8. E. 3. 434. 24. E. 3. 9. 11. H. 4. 16. &

" *Averrer.*" To averre or avouch, or verifie, *verificare*, whereof commeth *verificatio*, an averment; and is so said as well in English as in French; and is two-fold, viz. generall and particular. A generall averment, which is the conclusion of every plea to the writ, or in barre of replications and other pleadings (for counts or avowries in nature of counts need not bee averred) containing matter affirmative, ought to bee averred, *et hoc paratus est verificare, &c.* Particular averments are, as when the life of tenant for life, or tenant in taile, are averred; and there, tho' this word (*verificare*) be not used, but the matter avouched and affirmed, it is upon the matter an averment. And an averment containeth as well the matter as the forme thereof.

(Ant. 303. a.)

" *Que le tenant alast sans jour,*" *Quòd tenens eat sine die.* This is the entrie of the judgement in that case, that the tenant shall goe without day, that is, to be discharged of further attendance; and this is sometime finall for that action, whereof *Littleton* here putteth an example; and sometime temporarie, whereof *Littleton* also hath put an example: as when excommengement is pleaded in disabilitie of the plaintiffe or demandant, there the award is, that the tenant or defendant shall goe without day; and yet when the demandant or plaintiffe have purchased his letters of absolution, upon shewing them to the court, he may have a resommons or reattachment to recontinue the cause againe. But it is to be knowne, that when judgement is given for the tenant or defendant upon a plea in barre, or to the writ, &c. the judgement is all one, viz. *quod tenens*, or *defendens eat inde sine die*, and shall have reference to the nature and matter of the plea, and so be taken either to goe in barre, or to the writ. So when judgement is given against the plaintiffe, either in barre of his action, or in abatement of his writ, &c. the judgement is all one, viz. *nihil capiat per breve*; and it appeareth by the record, whether the plea did goe in barre, or to the writ. And the cause of the judgement is never entred in the record in any case; for that upon consideration had of the record, it appeareth therein.

[363. a.]

(9. Rep. 7. Sid. 265. 310.)

Vide Sect. 201. (8. Rep. 68.)

3. H. 4. 2. 11.

(Ant. 135. b.)

Sect. 692.

(F. N. B. 192. b. 1. Roll. Abr. 631. Doct. Pla. 133.) (3. Lev. 330.)

ITEM, si home soit disseisie, et le disseisor devy, son heire esteant eins per discent, ore l'entrie de le disseisee est tolle; et si le disseisee porta son briefe d'entrie sur disseisin en le per, envers l'heire, et l'heire disclaime en le tenancy, &c. le demandant poit averer son briefe que il est tenant come le briefe suppose, s'il voit, pur recoverer ses damages: mes uncore s'il voit relinquisher le averment, &c. il poit loyalment entrer en la terre per cause del disclaimer, nient obstant que son entrie adevant fuit tolle. Et ceo fuit adjudge devant mon master sir R. Danby, *jades chiefe justice de la common banke et ses compagnions, &c.*

ALSO, if a man be disseised, and the disseisor die, his heire being in by discent, now the entrie of the disseisee is taken away; and if the disseisee bring his writ of entrie *sur disseisin* in the *per*, against the heire, and the heire disclaime in the tenancie, &c. the demandant may averre his writ that hee is tenant as the writ suppose, if he will, to recover his dammages: but yet if hee will relinquish the averment, &c. he may lawfully enter into the land because of the disclaimer, notwithstanding that his entrie before was taken away. And this was adjudged before my master sir *R. Danby*, late chiefe justice of the common place and his companions, &c.

"*ITEM, si home soit disseisie, &c.*" Albeit in this case, and in the case before, the entrie of the demandant is his owne act, and the demandant hath no expresse judgement to recover, yet shall he be remitted; because he in judgement of the law shall be in according to the title of his writ, and by his entrie defeat the discontinuance, and consequently is remitted to his antient estate.

36. H. 6. f. 29.

"*Sir Robert Danby,*" knight, was a gentleman of an ancient and faire descended family, and chiefe-justice of the court of common-pleas; a grave, reverend, and learned judge, of whom our author speaketh here with verie great reverence, as you may perceive. And here is to be noted how necessarie it is, after the example of our author, to observe the judgements and resolutions of the sages of the law.

5. E. 4. 41.
4. E. 4. 38.

[363. b.]

Sect. 693.

*ITEM, lou l'entry d'un home est congeable, coment que il prent estate a luy quant il est de pleine age pur terme de vie, ou en taile, ou en fee, ceo est un remitter a luy, si tiel prisel de estate ne soit per fait indent, ou per matter de record, que * concludera ou estoppera.*

ALSO, where the entrie of a man is congeable, although that he takes an estate to him when hee is of full age for terme of life, or in taile, or in fee, this is a remitter to him, if such taking of the estate be not by deed indented, or by matter of record,

* *luy* added L. and M. and Roh.

estoppera. Car si home soit disseisie, et † *reprent estate de le disseisor sans fait, ou per fait polle, ceo est* ‡ *un remitter al disseisee,* ‖ *&c.*

record, which shall conclude or estop him. For if a man be disseised, and takes backe an estate from the disseisor without deed, or by deed poll, this is a remitter to the disseisee, &c.

HERE appeareth a diversitie betweene a right of entrie and a right of action; for if a man of full age having but a right of action, taketh an estate to him, hee is not remitted: but where hee hath a right of entrie, and taketh an estate, he by his entrie is remitted, because his entrie is lawfull. And if the disseisor infeoffe the disseisee and others, the disseisee is remitted to the whole, for his entrie is lawfull: otherwise it is if his entrie were taken away.

29. Ass. p. 26. 43. Ass. p. 3. 11. H. 7. 2d. 3. H. 6. 19. 40. E. 3. 43. (Sect. 683.) (Hob. 256.) (Ant. 49. b. 350. a.)

" *Lou l'entrie est congeable.*" *A.* is disseised of a mannor, whereunto an advowson is appendant, an estranger usurpe to the advowson, if the disseisee enter into the mannor, the advowson is recontinued againe, which was severed by the usurpation. And so it is if tenant in tayle be of a mannor whereunto an advowson is appendant, the tenant in taile discontinueth in fee, the discontinuee granteth away the advowson in fee, and dieth, the issue in tayle recontinueth the mannor by recoverie, he is thereby remitted to the advowson; and in both cases hee that right hath shall present when the church becommeth voyd.

8. R. 2. Quar. imp. 199. 19. H. 6. 30. 8. H. 6. 17. 21. H. 6. 2. 3. H. 4. 8. 14. H. 6. 15, 16. 37. H. 6. 18. 26. H. 8. 4. F. N. B. 36. f. & 35. b. (3. Rep. 3. b. Sect. 661.)

The patron of a benefice is outlawed, and the church becommeth voyd, an estranger usurpeth, and six moneths passe, the king doth recover in a *quare impedit*, and remove the incumbent, &c. the advowson is recontinued to the rightfull patron. And so note a diversitie betweene a recontinuance and a remitter; for a remitter cannot be properly, unlesse there be two titles; but a recontinuance may be where there is but one.

22. Ass. p. 33. en le case de Theobald Grinvile. (3. Rep. 3.)

" *Per fait indent, &c.*" Here it appeareth, that if the disseisor by deed indented make a lease for life, or a gift in taile, or a feoffment in fee, whereunto liverie of seisin is requisite; yet the deed indented shall not suffer the liverie made according to the forme and effect of the indenture, to worke any remitter to the disseisee, but shall estop the disseisee to claime his former estate; and if the disseisor upon the feoffment doth reserve any rent or condition, &c. the rent or condition is good: and the reason wherefore a deed indented shall conclude the taker more than the deed poll, is, for that the deed poll is only the deed of the feoffor, donor, and lessor; but the deed indented is the deed of both parties, and therefore aswell the taker as the giver is concluded.

13. H. 4. 5. 3. H. 4. 17. 8. H. 4. 8. 12. H. 4. 19. 35. Ass. 8. 17. Ass. 3. 29. Ass. 53. 43. E. 3. 17. Parker's case 44. E. 3. Estop. 10. 21. H. 6. 2. per Paston. 8. H. 6. 17. per Cotismore. (1. Roll. Abr. 863. 878. 4. Rep. 52.)

" *Ou per record.*" As by fine, deed indented, and inrolled, and the like.

† *reprent—ent prent*, L. and M. and Roh.

‡ *un—bon*, L. and M. and Roh.

‖ *&c.* not in L. and M. nor Roh.

Sect. 694.

ITEM, si home lessa terre pur terme de vie a un auter, le quel aliena a un auter en fee, et l'alienee fait estate a le lessor, ceo est un remitter al lessor, pur ceo que son entrie fuit congeable, * *&c.*

ALSO, if a man let land for terme of life to another, who alieneth to another in fee, and the alienee make an estate to the lessor, this is a remitter to the lessor, because his entrie was congeable, &c.

This is evident enough upon that which hath beene said.

Sect. 695.

(Hob. 256.)

ITEM, si home soit disseisie, et le disseisor lessa la terre al disseisee per fait pol, ou sans fait, pur terme des ans, per que le disseisee entra, cest entre est un remitter a le disseisee. Car en tiel case lou l'entre d'un home est congeable, et un lease est fait a luy, coment que il claima per parolx en paiis, que il ad estate per force de tiel lease, ou dit overtment, que il ne claima riens en la terre sinon per force de tiel lease, uncore ceo est un remitter a luy, car tiel † *disclaimer en le paiis n'est riens a purpose. Mes s'il* ‡ *disclaimer en court de record, que il* ‖ *n'ad estate forsque per force de tiel lease, et nemy auterment, donque il est conclude, &c.*

ALSO, if a man bee disseised, and the disseisor let the land to the disseisee by deed pol, or without deed, for terme of yeares, by which the disseisee entreth, this entrie is a remitter to the disseisee. For in such case where the entrie of a man is congeable, and a lease is made to him, albeit that he claimeth by words *in paiis*, that he hath estate by force of such lease, or saith openly, that he claimeth nothing in the land but by force of such lease, yet this is a remitter to him, for that such disclaimer *in paiis* is nothing to the purpose. But if hee disclaime in court of record, that he hath no estate but by force of such lease, and not otherwise, then is he concluded, &c.

(3. Rep. 25.) HERE appeareth a diversitie betweene a claime *in paiis* of an estate, and a claime of record, for a claime *in paiis* shall not hinder a remitter. Otherwise it is of a claime of record, because that doth worke a conclusion.

Sect. 696.

ITEM, si deux joyntenaunts seisie de certaine tenements en fee, l'un esteant le pleine age, l'auter deins age, sont

ALSO, if two joyntenants seised of certaine tenements in fee, the one being of full age, the other within age,

* *&c.* not in L. and M. nor Roh.

† *disclaimer—clayme*, L. and M. and Roh.

‡ *disclaimer—clayme*, L. and M. and Roh.

‖ *n'ad—ad*, L. and M. and Roh.

sont disseisies, * *&c. et le disseisor morust seisie, et son issue entra, l'un de les joyntenants esteant adonques deins age, et apres que il vient al pleine age, l'heire le disseisor lessa les tenements a mesmes les joyntenants pur terme de lour* † *deux vies, ceo est un remitter (quant al moitie) a celuy que fuit deins age, pur ceo que il est seisie de cest moitie que affiert a luy en fee, pur ceo que son entre fuit congeable. Mes l'auter jointenaunt n'ad en l'auter moitie forsque estate pur terme de sa vie per force de le lease, pur ceo que son entre fuit tolle, &c.*

age, bee disseised, &c. and the disseisor die seised, and his issue enter, the one of the joyntenants being then within age, and after that he commeth to full age, the heire of the disseisor letteth the tenements to the same joyntenants for terme of their two lives, this is a remitter (as to the moitie) to him that was within age, because hee is seised of the moitie which belongeth to him in fee, for that his entrie was congeable. But the other joyntenant hath in the other moity but an estate for terme of his life by force of the lease, because his entry was taken away, &c.

HERE note a diversitie worthy the observation, that where joyntenants or coparceners have one and the same remedie, if the one enter, the other shall enter also: but where remedies bee severall, there it is otherwise. As if two joyntenants or coparceners joyne in a reall action, where their entrie is not lawfull, and the one is summoned and severed, and the other pursueth and recovereth the moitie, the other joyntenant or coparcener shall enter and take the profits with her, because their remedie was one and the same. But where two coparceners be, and they are disseised, and a discent is cast, and they have issue and die, if the issue of the one recover her moitie, the other shall not enter with her, because their remedies were severall; and yet when both have recovered, they are coparceners againe. So here in this case that *Littleton* putteth, the two joyntenants have not equall remedie; for the infant hath a right of entry, and the other a right of action; and therefore the infant being remitted to a moitie, the other shall not enter and take the profits with her.

(2. Inst. 308.)

[364. b.]

10. H. 6. 10. 19. H. 6. 45. 31. H. 6. tit. Ent. Cong. 54.

If *A.* and *B.* joyntenants in fee, be disseised by the father of *A.* who dieth seised, his sonne and heire entreth, he is remitted to the whole, and his companion shall take advantage thereof. Otherwise here in the case of *Littleton*, for that the advantage is given to the infant, more in respect of his person, than of his right; whereof his companion shall take no advantage. But if the grandfather had disseised the joyntenants, and the land had descended to the father, and from him to *A.* and then *A.* had died, the entrie of the other should be taken away by the first discent; and therefore he should not enter with the heire of *A.*

But here in the case of *Littleton*, if after the discent the other joyntenant had died, and the infant survived, some say that he should have entred into the whole, because hee is now, in judgement of law, solely in by the first feoffment, and he claimeth not under the discent.

Vide 35. Ass. pl. ultim.

* *&c.* not in L. and M. nor Roh. † *deux* not in L. and M. nor Roh.

CHAP. 13. Of Warrantie. Sect. 697.

IL est communement dit, que trois garranties y sont, scilicet, garrantie lineal, garrantie collateral, et garrantie que commence per disseisin. Et est ascavoir, que devant l'estatute de Gloucester touts garranties queux discendont a eux queux sont heires a eux queux fesoyent les garranties, fueront barres a mesmes les heires a demander ascuns terres ou tenements encounter les garranties, foreprise les garranties queux commencerent per disseisin; car tiel garrantie ne fuit unque barre al heire, pur ceo que le garrantie commence per tort, scilicet, per disseisin.

IT is commonly said, that there bee three warranties, *scilicet*, warrantie lineall, warrantie collaterall, and warrantie that commence by disseisin. And it is to be understood, that before the statute of *Gloucester* all warranties which descended to them which are heires to those who made the warranties, were barres to the same heires to demand any lands or tenements against the warranties, except the warranties which commence by disseisin; for such warrantie was no barre to the heire, for that the warrantie commenced by wrong, viz. by disseisin.

Vide Sect. 288. 331. (Vaughan 375.) (1. Rep. 1.)

"*IL est communement dit.*" Here by the opinion of *Littleton*, *communis opinio* is of authoritie, and stands with the rule of law, *A communi observantia non est recedendum*: and againe, *Minimè mutanda sunt quæ certam habuerunt interpretationem.* [365. a.]

Bract. lib. 2. fol. 37. Lib. 5. fol. 380, 381, &c. Glanvill. lib. 3. cap. 1, 2, 3. Lib. 7. cap. 2, 3. Lib. 9. ca. 4.

Here our authour beginneth this Chapter with an exact division of warranties. A warrantie is a covenant reall annexed to lands or tenements, whereby a man and his heires are bound to warrant the same; and either upon voucher, or by judgement in a writ of *warrantia cartæ*, to yeeld other lands and tenements (which in old bookes is called *in excambio*) to the value of those that shall bee evicted by a former title, or else may bee used by way of *rebutter*. (1)

Britton ca. 105. fol. 249, 250, &c. & fol. 88. 106. b. 196, 197. Fleta lib. 5. cap. 15. Lib. 6. cap. 23. Mirr. cap. 2. §. 17. 38. E. 3. 21. 45. E. 3. 18.

(Ant. 303. b. 2. Roll. Abr. 775, 776. Cro. Jac. 4.) [c] Britton fol. 197. b. [d] Bract. lib. 5. fol. 380. [e] Fleta lib. 5. cap. 15.

"*Rebouter*" is a French word, and is in Latine *repellere*, to repell or barre; that is, in the understanding of the common law, the action of the heire by the warrantie of his ancestor; and this is called to rebut or repell. [c] *Britton* saith, *Garranter en un sence signifie a defender son tenant en sa seisin, et en auter sence signifie que si il ne defende que le garrant luy, soit tenue a eschanges, et de faire son gree a la vaillaunce.* [d] *Bracton* saith, *Warrantizare nihil aliud est, quàm defendere et acquietare tenentem qui warrantum vocavit in seisinâ suâ.* [e] *Fleta* saith, *Warrantizare nihil aliud est quàm possidentem vocantem defendere et acquietare in suâ seisinâ vel possessione erga petentem, &c. et tenens de re warranti excambium habebit ad valentiam.*

Lib. 4. fol. 81. Noke's case. (F. N. B. 134. b.)

It is to be observed, that there be two kinde of warranties, that is to say, *warrantia expressa et tacita*, vulgarly said warrantie in deed, because they be expressed; and warranties in law, because the law doth tacitely imply them. And this division of warranties that

(1) [See Note 315.]

that *Littleton* here speaketh of, he intendeth of warranties in deed. And of warranties in law, more shall be said hereafter in this Chapter. As for promises or contracts annexed to chattels reall or personall, they are not intended by our author in his said division, but only warranties concerning freeholds and inheritances.

Vid. Sect. 733. (2. Roll. Abr. 738. Sid. 178. Cro. Ja. 4. Ant. 101. b. Post. 384. a. 1. Roll. Rep. 316. Cro. Jac. 386. 3. Bulst. 95. Poph. 143. Bridg. 128. Owen 60. 3. Mod. 261. S. C. Shower 68.)

"*Devant le statute de Gloucester.*" This statute was made at a parliament holden at *Glocester* in the sixth yeare of the reigne of king *E.* 1. and therefore it is called the statute of *Glocester.*

"*Sont barres a mesmes les heires a demander ascuns terres, &c.*" For the statute, as hath beene said, being made in 6. *E.* 1. (was before the statute of *donis conditionalibus*, which was enacted 13. *Edward* 1.) when all states of inheritance were fee simple. But after the statute of 13. *Edward* 1. the heire in tayle is not barred by the warrantie of his ancestour, unlesse there be assets, as shall be said hereafter more largely in this Chapter.

Gloc. cap. 3. Vid. Sect. 724, 725. & 727, &c. (2. Inst. 293.) Bracton lib. 4. fol. 321. b.

Fleta lib. 5. cap. 34. 7. E. 3. Garr. 47.

(8. Rep. 52, 53.)

By the statute of *Glocester* foure things are enacted.

First, that if a tenant by the courtesie alien with warrantie and dieth, that this shall bee no barre to the heire in a writ of *mordancester*, without assets in fee simple; and if lands or tenements descend to the heire from the father, he shall be barred, having regard to the value thereof.

[365. b.] Secondly, that if the heire, for want of assets at that time descended, doth recover the lands of his mother by force of this act, and afterwards assets descend to the heire from the father, then the tenant shall recover against the heire the inheritance of the mother by a writ of false judgement, which shall issue out of the record, to resummon him that ought to warrant, as it hath beene done in other cases, where the heire being vouched commeth into the court, and pleadeth that he hath nothing by discent.

Thirdly, that the issue of the sonne shall recover by a writ of *cosinage, aiel,* and *besaiel.*

And lastly, that the heire of the wife, after the death of the father and mother, shall not bee barred of his action to demand the heritage of the mother by writ of entrie, which his father aliened in the time of his mother, whereof no fine was levied in the king's court.

Concerning the first, there be two points in law to be observed. (Ant. 54. b.)

First, albeit the statute in this article name a writ of *mordancester*, and after writs of *cosinage, aiel,* and *besaiel* [e]; yet a writ of right, a *formedon*, a writ of entry *ad communem legem*, and all other like actions, are within the purview of this statute; for those actions are put but for examples.

[e] 11. E. 2. tit. Garr. 83. 4. E. 3. Garr. 63. 18. E. 3. 51. Pl. Com. 11c.

7. E. 3. 53. Temps E. 1. Garr. 87.

Secondly, where it is said in the said act (if the tenant by the courtesie alien), yet this release with warrantie to a disseisor, &c. is within the purview of the statute, for that it is in equall mischiefe; and if that evasion might take place, the statute should have beene made in vaine.

27. E. 3. 8, 9. 14. E. 4. Gar. 5. Dier quarto Mar. 143. a.

If tenant by the courtesie be of a seigniorie, and the tenancie escheate unto him, and after he alieneth with warrantie, this shall

22. Aff 9. & 37. Temps E. 1. Gar. 86.

[o] 11. H. 7. cap. 20. (Post. 380. a. 381. a.)

not binde the issue, unlesse assets descend; for it is in equall mischiefe. But notwithstanding this statute, if feme tenant in dower had aliened in fee with warranty and died, the warranty had bound the heire untill the statute [o] of 11. *H.* 7. since our author wrote: by which statute the heire may enter, notwithstanding such warrantie.

18. E. 3. 9.

(Hob. 31. 8. Rep. 54. a.)

But note, there is a diversitie betweene a warranty on the part of the mother, and an estoppell; for an estoppell of the part of the mother shall not binde the heire, when hee claimeth from the father: as if lands bee given to the husband and wife, and to the heires of the husband, the husband make a gift in taile, and dieth, the wife recovereth in a *cui in vitâ* against the donee, supposing that she had fee simple, and make a feoffement and dyeth, the donee dyeth without issue, the issue of the husband and wife bring a *formedon* in the reverter against the feoffee; and notwithstanding that he was heire to the estoppell, and the mother was estopped, yet for that he claimed the land as heire to his father, hee was not estopped. Note, that warranties are favoured in law, being part of a man's assurance; but estoppels are odious.

21. R. 2. Judgement. 263. (2. Roll. Abr. 776. 8. Rep. 53. b. Ant. 326. a. Doct. & Stud. 44. b. 1. Leo. 261.)

If a feme heire of a disseisor infeoffeth me with warrantie, and marrieth with the disseisee, if after the disseisee bring a *præcipe* against me, I shall rebut him, in respect of the warrantie of his wife, and yet he demandeth the land in another's right. And so if, the husband and wife demand the right of the wife, a warrantie of the collaterall ancestor of the husband shall barre.

11. H. 7. cap. 20. Vid. Sect. 595. See this statute of 11. H. 7. c. 20. well expounded, Lib. 1. fol. 176. in sir Anthony Mildmaye's case. 3 & 4. Ph. & Mar. Dier 146. Lib. 3. fol. 59, 60, 61, 62. Lincolne Coll. case. Pl. Com. fol. 56. 20. Eliz. Dier 362. Doct & Student 55. 8. Eliz. Dier. 248. 19. Eliz. Dier 354. 21. Eliz. ibid. 362. Lib. 3. fol. 50, 51. sir George Browne's case. Lib. 5. fol. 79. Fitzh. case. 27. H. 8. 23.

If a woman had beene tenant for life, the remainder or reversion to her next heire, and the woman had aliened in fee and died, this warrantie had barred her heire in remainder or reversion; but this is partly holpen by the said act of 11. *H.* 7. viz. where the woman hath any estate for life of the inheritance or purchase of her husband, or given to her by any of the ancestors of the husband, or by any other person seised to the use of her husband, or of any of his ancestors, there her alienation, release, or confirmation with warrantie, shall not binde the heire.

[f] Mich. 13. Jac. inter Harley & West in ejectione firmæ in Communi Banco. Lincoln.

To the authorities quoted in the margent, which may serve as commentaries upon the said statute, I will only adde two cases. The one was [f] A man seised of lands in fee levied a fine to the use of himselfe for life, and after to the use of his wife, and of the heires males of her body by him begotten for her jointure, and had issue male, and after he and his wife levied a fine, and suffered a common recovery, the husband and wife died, and the issue male entred by force of the said statute of 11. *H.* 7. And it was holden by the justices of assise, (the case comming downe to be tried by *nisi prius*), that the entry of the issue male was lawfull: and yet this case is out of the letter of the statute; for she neither levied the fine, &c. being sole, or with any other after-taken husband, but is by herselfe with her husband that made the joynture. *Sed qui hæret in literâ hæret in cortice*; and this case being in the same mischiefe, is therefore within the remedy of the statute, by the intendment of the makers of the same, to avoid the disherison of heires who were provided for by the said joynture, and especially by

the

the husband himselfe that made the joynture, which (as it was said) is a stronger case than the example set downe in the statute. The [366. a.] other was, [g] A man is seised of lands in the right of his wife, and they two levie a fine, and the conusee grant and rendereth the land to the husband and wife in speciall tayle, the remainder to the right heires of the wife, they have issue, the husband dyeth, the wife taketh another husband, and they two levie a fine in fee, and the issue entereth, this is directly within the letter of the statute, and yet it is out of the meaning; because the state of the land moved from the wife, so as it was the purchase of the husband in letter, and not in meaning. But where the woman is tenant for life, by the gift or conveyance of any other, her alienation with warrantie shall binde the heire at this day. So if a man bee tenant for life (otherwise than as tenant by the courtesie) and alien in fee with warrantie, and dieth, this shall at this day binde the heire, that hath the reversion or remainder by the common law not holpen by any statute. But all this is to be understood, unlesse the heire that hath the reversion or remainder doth avoid the estate so aliened in the life of the ancestour; for then the estate being avoided, the warrantie being annexed unto the estate, is avoided also; whereof more shall be said in this Chapter in his proper place. And therefore it is necessary for the heire in such cases to make an entry as soone as he hath notice or probable suspicion of such an alienation.

[g] Pasch. 17. El.z. (4. Rep. 10. Ant. 360. a. 115. a. Post. 369. a. 381. a. Sid. 24. Plo. 105. a. Dyer 64. b. Jo. 31. Hob. 332. Cro. Eliz. 2. 2. Cro. 475. Ben. 40. 2. Inst. 681. W. Jones 13. & 254. Palm. 2. 32. 216. Cro. Car. 244. pl. 464. Com. Banco. Latton's case, which I myselfe heard and observed. (2. Roll. Abr. 141. Moor. 93.) Sect 725.

(1. Rep. 66. Post. 367. b. 388. b. 10. Rep. 95.)

As to the second clause of the statute of *Glocester*, there are two points of law to be observed.

First, that by the expresse purview of the statute, if assets doe after discend from the father, then the tenant shall have recovery or restitution of the lands of the mother. But in a *formedon*, if at the time of the warrantie pleaded no assets be discended, whereby the demandant recovereth, if after assets discend, there the tenant shall have a *scire facias* for the assets, and not for the land intailed. And the reason hereof is, that if in this case the tenant should be restored to the land intailed, then if the issue in taile aliened the assets, his issue should recover in a *formedon*; and therefore the sages of the law, to prevent future occasions of suits, resolved the said diversitie in the cases abovesaid, upon consideration and construction of the statute of *Glocester*, and of the statute *de donis conditionalibus*.

Pl. Com. Fulmerstone's case, 110. a. Lib. 8. fol. 53. Sym's case.

Secondly, it is to bee observed, that after assets discended, the recoverie shall bee by writ of judgement, which shall issue out of the rolle of the justices, &c. And here two things are to be declared and explained. First, by what writ, &c. and that is cleere, viz. by *scire facias*. But the second is more difficult; and that is, upon what manner of judgement the *scire facias* is to be grounded: for explanation whereof it is to be understood, that if the tenant will have benefit of the statute, he must plead the warrantie, and acknowledge the title of the demandant, and pray that the advantage of the statute may bee saved unto him, and then if after assets discend, the tenant upon this record shall have a *scire facias*: and if ascets discend but for part, he shall have a *scire facias* for so much. But if the tenant plead the warrantie, and plead further that assets discended, &c. and the demandant taketh issue that assets discended not, &c. which issue is found for the demandant, whereupon

Lib. 8. fol. 53, 54. Sym's case. Ibid. 134. Mary Shipley's case. (Doct. Pla. 189. 2. Cro. 15. And 35. a. 326. a.)

upon he recovereth, the tenant, albeit assets doe after discend, shall never have a *scire facias* upon the said judgement; for that by his false plea he hath lost the benefit of the said statute.

8. E. 2. tit. Gar. 81. 18. E. 3. 51.

Touching the third, sufficient hath beene spoken before. For the last, it is to be observed, that if the husband be seised of lands in the right of his wife, and maketh a feoffement in fee with warrantie, the wife dieth, and the husband dieth, this warrantie shall not binde the heire of the wife without assets, albeit the husband be not tenant by the curtesie. But of this you shall reade more hereafter.

Vide Sect. 725.

In the meane time know this, that the learning of warranties is one of the most curious and cunning learnings of the law, and of great use and consequence. (1)

(2. Roll. Abr. 774. Hob. 14. 28. 2. Saund. 183.)

" *A demander ascuns terres ou tenements*." A warrantie may not only be annexed to freeholds, or inheritances corporeall, which passe by livery, as houses and lands, but also to freeholds or inheritances incorporeall, which lye in grant, as advowsons; and to rents, commons, estovers, and the like, which issue out of lands or tenements. And not onely to inheritances *in esse*, but also to rents, commons, estovers, &c. newly created. As a man (some say) may grant a rent, &c. out of land for life, in tayle, or in fee with warrantie; for although there can be no title precedent to the rent, yet there may be a title precedent to the land, out of which it issueth before the grant of the rent, which rent may bee avoided by the recovery of the land; in which case the grantee may helpe himselfe by a *warrantia cartæ*, upon the especiall matter. And so a warrantie in law may extend to a rent, &c. newly created; and therefore if a rent newly created be granted in exchange for an acre of land, this exchange is good, and every exchange implyeth a warrantie in law. And so a rent newly created may be granted for oweltie of partition.

2. H. 4. 13. 30. H. 8. Dier. 41. Temps E. 1. Admesurement 16. 32. E. 1. Voucher 294. 30. E. 1. Exchange 16. 9. E. 4. 15. E. 4. 9. 29. Ass. 13. (F. N. B. 134. Ante 50. b. 101. b. 308. nota. Post. 389. a.)

Vide Sect. 741. 45. E. 3. Voucher 72. 9. E. 3. 78. 18. E. 3. 55. 30. E. 3. 30. 21. H. 7. 9. 3. H. 7. 4. 7. H. 4. 17. 10. E. 4. 9. b. 21. E. 4. 26.

[366. b.]

A man seised of a rent secke issuing out of the mannor of *Dale*, taketh a wife, the husband releaseth to the terre-tenant, and warranteth *tenementa prædicta*, and dieth, the wife bringeth a writ of dower of the rent, the terre-tenant shall vouche, for that albeit the release enured by way of extinguishment, yet the warrantie extended to it; and by warranting of the land, all rents, &c. issuing out of the land, that are suspended or discharged at the time of the warrantie created, are warranted also.

14. H. 8. 30. H. 8. Dier. 42. (2. Roll. Abr. 744.)

Sect. 698.

GARRANTY que commence per disseisin est en tiel forme: sicome lou il est pier et fits, et le fits purchase terre, &c. et lessa mesme la terre a son pier pur

WARRANTIE that commences by disseisin is in this manner: as where there is father and son, and the sonne purchaseth land, &c.

(1) Upon the alterations made by the statute law in the doctrine of warranty, see note 1. 373. b.

pur terme d'ans, et pier per son fait ent enfeoffa un auter en fee, et oblige luy et ses beires a garranty, et le pier devy, per que le garranty discendist al fits, ceo garranty ne barrera my le fits; car nient obstant cel garrantie le fits poit bien enter en la terre, ou aver un assise envers l'alienee s'il voit, pur ceo que le garrantie commence per disseisin; car quant le pier que n'avoit estate forsque pur terme des ans, fist un feoffement en fee, ceo fuit un disseisin al fits del franktenement que adonques fuist en le fits. En mesme le maner est, si le fits lessa a le pier la terre a tener a volunt, et puis le pier fait un feoffment ove garrantie, &c. Et sicome est dit de pier, issint poit estre dit de chescun auter auncester &c. En mesme le maner est, si tenaunt per elegit, *tenaunt per statute merchant, ou tenant per statute de le staple, fait feoffment en fee ovesque garrantie,* † *ceo ne barrera my l'beire que doit aver la terre, pur ceo que tiels garranties commencerent per disseisin.*

&c. and letteth the same land to his father for terme of yeares, and the father by his deed thereof infeoffeth another in fee, and bindes him and his heires to warrantie, and the father dies, whereby the warrantie descendeth to the son, this warrantie shall not barre the sonne; for notwithstanding this warrantie the sonne may well enter into the land, or have an assise against the alienee if he will, because the warrantie commenced by disseisin; for when the father which had but an estate for terme of yeares, made a feoffement in fee, this was a disseisin to the sonne of the freehold which then was in the sonne. In the same manner it is, if the sonne letteth to the father the land to hold at will, and after the father make a feoffment with warrantie, &c. And as it is said of the father, so it may be said of every other ancester, &c. In the same manner is it, if tenant by *elegit*, tenant by statute merchant, or tenant by statute staple, make a feoffment in fee with warranty, this shal not bar the heire which ought to have the land, because such warranties commence by disseisin.

"*GARRANTY que commence per disseisin, &c.*" (1) It is called a warranty that commenceth by disseisin, because regularly the conveyance whereunto the warranty is annexed doth worke a disseisin.

(Doct. & Stud. 155. a. b.)

In this Section *Littleton* putteth five examples of a warrantie commencing by disseisin, viz. of a feoffement made with warranty by tenant for yeares, by tenant at will, by tenant by *elegit*, by tenant by statute merchant, and by tenant by statute staple: all these and the other examples that *Littleton* putteth of this kinde of warranties in the succeeding Sections, have foure qualities.

7. E. 3. 41. 43. E. 3. 17. 50. E. 3. 12. Vide Sect. 612. (2. Inst. 154. 1. Roll. Abr. 663. 3. Rep. 37.)

First, that the disseisin is done immediately to the heire that is to be bound; and yet if the father bee tenant for life, the remainder to the sonne in fee, the father by covine and consent maketh a lease for yeares, to the end that the lessee shall make a feoffement in fee, to whom the father shal release with warrantie, and all is executed accordingly, the father dyeth, this warrantie shall not binde, albeit the disseisin was not done immediately to the sonne; for the feoffement of the lessee is a disseisin to the father, who is *particeps criminis.*

Lib. 5. fol. 79. b. Fitzherbert's case. (Cro. Car. 483. 2. Roll. Abr. 741.)

† *&c.* added L. and M. and Roh.

(1) [See Note 316.]

31 E. 3. tit. Garrantie 28. (5. Rep. 50. a.) (2 Roll. Abr. 772, 773. Ant. 32. a. 56. a. 171. a 179. a. F. N. B. 149. c.)

minis. So it is if one brother make a gift in tayle to another, and the uncle disseise the donee, and infeoffeth another with warrantie, the uncle dieth, and the warrantie descendeth upon the donor, and then the donee dyeth without issue, albeit the disseisin was done to the donee and not to the donor, yet the warrantie shall not binde him. The father, the sonne, and a third person are joyntenants in fee, the father maketh a feoffment in fee of the whole with warrantie, and dieth, the sonne dieth, the third person shall not only avoyd the feoffment for his owne part, but also for the part of the sonne; and he shall take advantage that the warrantie commenced by disseisin, though the disseisin was done to another.

[367. a]

(Cro. Car. 483.)

The second qualitie appearing in *Littleton's* examples is, that the warrantie and disseisin are *simul et semel*, both at one and the same time. [y] And yet if a man commit a disseisin of intent to make a feoffment in fee with warrantie, albeit he make the feoffment many yeares after the disseisin, notwithstanding because the warrantie was done to that intent and purpose, the law shall adjudge upon the whole matter, and by the intent couple the disseisin and the warrantie together.

[y] 19. H. 8. 12. Lib. 5. fol. 79. b. Fitzh. case. (Plowd. 51. a. 3. Rep. 78. Post. 369. a. 371. a. 9. Rep. 81. a. Ant. 314. b. 5. Rep. 78.)

The third qualitie is, that the warrantie that commenceth by disseisin by all these examples (if it should binde) should binde as a collaterall warrantie, and therefore commencing by disseisin shall not binde at all.

(1. Leon. 304, 305. Cro. Car. 383.) Vide Sect 611. 699. Bract. fol. 216. 223, 224. Fleta lib. 4. cap. 17. 1, 2. Britton, cap. Disseisin. 50. E. 3 12. b. 8. H 7. 5 7 E 3. 11. 14. E. 3. Feoffments et faits 67. 18. E. 3. Issue 36. 4. E. 2. Briefe 790. 19 E. 2. Ass. 400. 43. E 3 7. 17. E. 3. 41. 43. E. 3. Diss. 5. 3. E. 4. 17. 12. E. 4. 12. 10. E. 4. 18. F. N. B. 201. Lib. 3. fol. 78. in Fermor's case. [*] Temps E. 1. Counterplea de Voucher 126. 50. E. 3. ibidem 124. Vide W. 1. cap. 48. in the second

"*Ne barrera my le heire, &c.*" For by the authoritie of our author himselfe, a lessee for yeares may make a feoffment, and by his feoffment a fee simple shall passe; so as albeit as to the lessor it worketh by disseisin, yet betweene the parties the warrantie annexed to such estate standeth good; upon which the feoffee may vouch the feoffor or his heires, as by force of a lineall warrantie. And therefore if a lessee for yeares, or tenant by *elegit, &c.* or a disseisor incontinent make a feoffment in fee with warrantie, if the feoffee be impleaded, hee shall vouch the feoffor, and after him his heire also; because this is a covenant reall, which binde him and his heires to recompence in value, if they have assets by discent to recompence; for there is a feoffment *de facto*, and a feoffment *de jure*: [*] and a feoffment *de facto* made by them that have such interest or possession as is aforesaid, is good betweene the parties, and against all men but only against him that hath right. And therefore if the lord be gardeine of the land, or if the tenant maketh a lease to the lord for yeares, or if the lord be tenant by statute merchant or staple, or by *elegit* of the tenancie, and make a feoffment in fee, hee hereby doth extinguish his seigniorie, although having regard to the lessor it is a disseisin.

The fourth qualitie is a disseisin; but that is put for an example; and the rather, for that it is most usuall and frequent: but a warrantie that commenceth by abatement or intrusion (that is, when the abatement or intrusion is made of intent to make a feoffment in fee with warrantie), shall not binde the right heire, no more than a warranty that commenceth by disseisin, because all doe commence by wrong. And so it is if the tenant dieth without heire, and an ancestor of the lord enter before the entrie of the lord, and make a feoffment in fee with warrantie, and dieth, this warrantie

shall

shall not binde the lord, because it commenceth by wrong, being in nature of an abatement. *Et sic de similibus.* (1)

part of the Institutes. (10. Rep. 95. 2. Roll. Abr. 740.)

Sect. 699.

[367. b.]

ITEM, si gardein en chivalrie, ou gardein en socage, fait un feoffment en fee, ou en fee taile, ou pur terme de vie, ovesque garrantie, &c. tiels garranties ne sont pas barres a les heires as queux les terres serront discendus, pur ceo que ils commence per disseisin.

ALSO, if a gardeine in chivalrie, or gardeine in socage, make a feoffment in fee, or in fee taile, or for life, with warrantie, &c. such warranties are not barres to the heyres to whom the lands shall bee discended, because they commence by disseisin.

HERE *Littleton* addeth the case of gardeine in chivalrie, and gardeine in socage, and gardeine because nurture is also in the same case.

16. E. 3. Gar. 20. 8. Ass. 2. 43. E. 3. 7. and the books abovesaid. Vide Sect. 698. (3. Rep. 37.)

Sect. 700.

*ITEM, si le pier et le fits purchase certaine terres ou tenements, a aver et tener a eux joyntment, &c. et puis le pier alien * l'entier a un auter, et oblige luy et ses heires a garrantie, &c. et puis le pier devie, cel garrantie ne barrera my le fits de le moitie que a luy affiert de les dits terres ou tenements, pur ceo que quaunt a cel moitie que affiert a le fits, le garrantie commence per disseisin, &c.*

ALSO, if father and sonne purchase certaine lands or tenements, to have and to hold to them joyntly, &c. and after the father alien the whole to another, and binde him and his heires to warrantie, &c. and after the father dieth, this warrantie shall not barre the sonne of the moitie that belongs to him of the said lands or tenements, because as to that moitie which belongs to the sonne, the warrantie commences by disseisin, &c.

"*AVER et tener a eux jointment, &c.*" This is to bee intended of a joynt purchase in fee; for if the purchase were to the father and the sonne, and the heires of the sonne, and the father maketh a feoffment in fee with warrantie, if the sonne entreth in the life of the father, and the feoffee re-enter, the father dieth, the sonne shall have an assise of the whole; and so is the booke of 22. *H.* 6. to be understood. But if the sonne had not entred in the life of the father, then for the father's moitie it had beene a bar to the sonne, for that therein he had an estate for life; and therefore the warrantie as to that moitie had beene collaterall to the sonne, and by disseisin for the sonne's moitie; and so a warrantie defeated in part, and stand good in part. And this appeareth

13. Ass. 8. 13. E. 3. Gar. 24, 25. 37. 22. H. 6. 51. 8. H. 7. 6. (5. Rep. 79.) (Post. 393. a.) (1. Rep. 66.)

* *l'entier—l'entierte*, L. and M. and Roh.

(1) [See Note 317.]

eth by the example that *Littleton* hath put: But if the purchase had beene to the father and sonne, and to the heires of the father, then the entrie of the sonne in the life of the father, as to the avoydance of the warrantie, had not availed him, because his father lawfully conveyed away his moitie. (1)

(F.N.B. 192. a.)

If a man of full age and an infant make a feoffment in fee with warrantie, this warrantie is not void in part, and good in part; but it is good for the whole against the man of full age, and voyd against the infant: for albeit the feoffment of an infant passing by liverie of seisin be voydable, yet his warrantie, which taketh effect only by deed, is meerely voyd.

Temps E. 1. Vouch. 207. 39. E. 3. 26. John London's case, 14. H 6. (8. Rep. 42. Plowd. 66. b. 5. Rep. 119.)

Sect. 701.

[368. a.]

ITEM, si A. *de* B. *soit seisie d'un mese, et* F. *de* G. *que nul droit ad d'entrer en mesme le mease, claimaunt mesme le mease, a tener a luy et a ses heires, entra en mesme le mease, mes le dit* A. *de* B. *adonque est continualment demurrant en mesme le mease: en cest cas le possession de franktenement serra tout temps adjudge en* A. *de* B. *et nemy en* F. *de* G, *pur ceo que en tiel case lou deux sont en un mease, ou auters tenements, et l'un claima per l'un title, et l'auter per l'auter title, la ley adjudgera celuy en possession que ad droit d'aver le possession de mesmes les tenements. Mes si en le case avantdit, le dit* F. *de* G. *fait un feoffment a certaine barrettors et extortioners en le pais, pur maintenance de eux aver de mesme le mease, per un fait de feoffment ove garrantie, per force de quel le dit* A. *de* B. *ne osast pas demurrer en le mease, mes * alast hors de le mease, cest garrantie commence per disseisin, pur ceo que tiel feoffment fuit la cause que le dit* A. *de* B. *relinquist le possession de mesme le mease* †.

ALSO, if *A.* of *B.* bee seised of a mese, and *F.* of *G.* that no right hath to enter into the same mese, claiming the sayd mese, to hold to him and to his heires, entreth into the sayd mese, but the same *A.* of *B.* is then continually abiding in the same mease: in this case the possession of the freehold shall bee alwayes adjudged in *A.* of *B.* and not in *F.* of *G.* because in such case where two bee in one house, or other tenements, and the one claimeth by one title, and the other by another title, the law shal adjudge him in possession that hath right to have the possession of the same tenements. But if in the case aforesayd, the sayd *F.* of *G.* make a feoffment to certaine barrettors and extortioners in the countrie, to have maintenance from them of the sayd house, by a deed of feoffment with warrantie, by force whereof the said *A.* of *B.* dare not abide in the house, but goeth out of the same, this warrantie commenceth by disseisin, because such feoffment was the cause that the sayd *A.* of *B.* relinquished the possession of the same house.

"*LOU deux sont en un mese, &c. et l'un claima per l'un title, et* "*l'auter per auter title, &c.*" For the rule is, *Duo non possunt in solido unam rem possidere.*

(Ant. 194. a. 244. a. 1. Roll. Abr. 661. 662. Plowd. 233. b.) 19. H. 6. fol. 28. b. per Newton. (Siderf. 385. a. Ant. 180. b. 181. a.)

* *se en* added L. and M. and Roh. † *&c.* added L. and M. and Roh.

(1) [See Note 318.]

These words of our author be significant and materiall: [b] for if a man hath issue two daughters, bastard eigne and mulier puisne, and die seised, and they both enter generally, the sole possession shall not bee adjudged only in the mulier, because they both claime by one and the same title; and not one by one title, and the other by another title, as our author here saith.

[b] 17. E. 3. 59. 11. Ass. p. 23. (Perk 84. 8. Rep. 101. b. Hob. 120. Ant. 189. 244. 10. Rep. Lampet's case.)

[i] If the tenaunt in an assise of an house desire the plaintiffe to dine with him in the house, which the plaintiffe doth accordingly, and so they bee both in the house; and in truth one pretendeth one title, and the other another title; yet the law in this case shall not adjudge the possession in him that right hath; because our author here saith, hee claimed not his right, and it should be to his prejudice if the law should adjudge him possession; and a trespasser hee cannot bee, because hee was invited by the tenant in the assise.

[i] Pl. Com. 92. the Parson of Honey Lane's case. (Ant. 245 b. Plowd. 93. a. b.)

" *Barretters.*" A barrettor is a common moover and exciter, or maintainer of suits, quarrels, or parts, either in courts or elsewhere in the countrey. In courts, as in courts of record, or not of record; as in the countie, hundred, or other inferiour courts. In the countrie in three manners: first, in disturbance of the peace: secondly, in taking or keeping of possessions of lands in controversie, not only by force, but also by subtiltie and a deceit, and most commonly in suppression of truth and right: thirdly, by false inventions, and sowing of calumniations, rumors, and reports, whereby discord and disquiet may grow betweene neighbours.

[368. b.]

See the Inditement of a common Barretor. W. 1. cap. 12. & 32. 40. E. 3. 33. Lib. 8. fol. 36. b. Case de Barretrie. (3. Inst. 175. Siderf. 282. 2. Roll. Abr. 355.) (1. Roll. Abr. 353.)

" *Barretor*" is derived of this word (*barret*) which signifieth not only a wrangling suit, but also such brawles and quarrels in the countrey, as are aforesaid.

33. E. 1. Stat. de Conspiracie. Lib. 8. ubi supra. (3. Rep. 36.)

" *Extortioners.*" Extortion, in his proper sense, is a great misprision, by wresting or unlawfully taking by any officer, by colour of his office, any money or valuable thing of or from any man, either that is not due, or more than is due, or before it be due; *quod non est debitum, vel quod est ultra debitum, vel ante tempus quod est debitum:* for this is to be knowne, that it is provided by the [l] statute of *W.* 1. that no sheriffe, nor any other minister of the king, shall take any reward for doing of his office, but only that which the king alloweth him, upon paine that hee shall render double to the partie, and be punished at the king's pleasure. And this was the antient common law, and was punishable by fine and imprisonment; but the statute added the aforesaid penaltie. But some latter statutes having permitted them to take in some cases; by colour thereof, the king's officers and ministers, as sheriffes, coroners, escheators, feodaries, gaolers, and the like, doe offend in most cases; and seeing this act yet standeth in force, they cannot take any thing but where and so farre as latter statutes have allowed unto them. But yet such reasonable fees as have beene allowed by the courts of justice of antient time to inferiour ministers and attendants of courts for their labour and attendance, if it be asked and taken of the subject, is no extortion.

P. Com. fol. 64. Lib. 10. fol. 101, 102. Beausage's case. (3. Inst. 149.)

[l] W. 1. c. 26, &c. W. 1. c. 10. 42. E. 3. 5. 27. Ass. 14. Pl. Com. 68. (2. Roll. Abr. 32.)

(Plowd. 465. Noy. 111. 2. Roll. Abr. 32.) 23. H. 6 c. 10. 33. H. 6. 22. 21. H. 7. 17. Stanf. 49. 3. E. 3. Con. 372.

And all this was resolved [n] by the whole court of king's bench, betweene *Shurley* plaintiffe and *Packer* deputie of one of the sheriffes of London, in an action upon the case in the king's bench.

[n] Hil. 13. Jac. Reg.

See the statute of 21. *H.* 8. *cap.* 5. setting downe the fees of ordinaries, registers, and other officers, in certaine cases, and many other statutes; as for example, the statute of 19. *H.* 7. *cap.* 8. against taking of shewage (that is, taking of any thing for shewing of wares and merchandises that be truly customed to the king before) and the like.

Pl. Com. in Dine and Manningham's case. Mir. cap. 5. § 1.

Of this crime it is said, that it is no other than robberie: and another saith, that it is more odious than robberie; for robberie is apparant, and hath the face of a crime; but extortion puts on the visure of vertue, for expedition of justice, and the like; and it is ever accompanied with the grievous sinne of perjurie.

7. E. 4. 21.

But largely extortion is taken for any oppression by extort power, or by colour or pretence of right; and so *Littleton* taketh it in this place. *Extortio* is derived from the verbe *extorqueo*; and it is called *crimen expilationis*, or *concussionis*: and here barretors and extortioners are put but for examples; for if the feoffment be made to any other person or persons, the law is all one.

(3. Inst. 175. 2 Inst. 212. Dyer, 555, 556. Sid. 212, 213. Noy. 52.)

"*Pur maintenance de eux aver.*" Maintenance, *manutenentia*, is derived of the verbe *manutenere*, and signifieth in law, a taking in hand, bearing up or upholding of quarrels and sides, to the disturbance or hindrance of common right; *Culpa est rei se immiscere ad se non pertinenti*; and it is twofold, one in the countrey, and another in the court. For quarrels and sides in the court, [k] the statutes have inflicted grievous punishments. But this kinde of maintenance of quarrels and sides in the countrey, is punishable only at the suit of the king, [r] as it hath beene resolved. And this maintenance is called *manutenentia*, or *manutentio ruralis*, for example, as to take possessions, or keepe possessions, whereof *Littleton* here speaketh, or the like. (1)

[k] 1. E. 3. cap. 14. 20. E. 3. cap. 4, 5.

[r] Mich. 7. Ja. in the Starre-Chamber. (Doc. Plac. 240.)

The other is called *curialis*, because it is done *pendente placito*, in the courts of justice; and this was an offence at the common law, and is threefold.

First, to maintaine to have part of the land, or any thing out of the land, or part of the debt, or other thing in plea or suit; and this is called *cambipartia*, champertie.

The second is, when one maintaineth the one side, without having any part of the thing in plea, or suit; and this maintenance is twofold, generall maintenance, and speciall maintenance; whereof you shall reade at large in our bookes, which were too long here to be inserted. [369. a.]

33. E. 1. Stat. 2. in fine. Regist. 183. 6. E. 3. 33. 22 H. 6. 7. 9. H. 7. 22. (2. Roll. Abr. 114.) 30. Ass. 5. 19. E. 4. 3. 20. H. 6. 12. 34. H. 6. 2. 11. H. 6. 11. 8. H. 5. 8. 10. E. 4. 19. W. 1. cap. 25. 28, W. 2. cap. 49. Artic. super Cart. cap. 11. F. N. B. 171, 172. Mirror cap. 2. § 5. (Mo. 61 Ant. 157. Hob. 294)

[u] 13 H. 4. 16. b. F. N. B. 171. 11. H. 6. 10. 37. H. 6. 31.

The third is when [u] one laboureth the jury, if it be but to appeare, or if he instruct them, or put them in feare, or the like, he is a maintainer, and he is in law called an embraceor, and an action of maintenance lyeth against him; and if he take money, a *decies tantum* may be brought against him. And whether the jury passe for his side or no, or whether the jurie give any verdict at all, yet shall he be punished as a maintainer or embraceor either at the suit of the king or partie.

Here

(1) [See Note 319.]

Here in this case that *Littleton* putteth, the feoffement is void by the statute [a] of 1. *R.* 2.; for thereby it is enacted, that feoffements made for maintenance shall be holden for none, and of no value, so as *Littleton* putteth his case at the common law; for he seemeth to allow the feoffement, where he saith, *tiel feoffment fuit le cause, &c.*; but some have said that the feoffement is not voide betweene the feoffor and feoffee, but to him that right hath.

[a] 1. R. 2. cap. 9. Vid. 27. H. 2. fol. 23.

Now, since *Littleton* wrote, there is a notable statute [b] made in suppression of the causes of unlawfull maintenance (which is the most dangerous enemie that justice hath), the effect of which statute is,

[b] 32. H. 8. cap. 9. (Plowd. 79. a.)

First, that no person shall bargaine, buy, or sell, or obtaine any pretenced rights or titles.

(2. Roll. Abr. 113, 114. Hob. 115.)

Secondly, or take, promise, grant, or covenant to have any right or title of any person in or to any lands, tenements, or hereditaments; but if such person which so shall bargaine, &c. their ancestors, or they by whom he or they claime the same, have beene in possession of the same, or of the reversion or remainder thereof, or taken the rents or profits thereof by the space of one whole yeare, &c. upon paine to forfeit the whole value of the lands, &c. and the buyer or taker, &c. knowing the same, to forfeit also the value.

(1. Leon. 167. 208. Plowd. 89. a.)

Thirdly, provided that it shall be lawfull for any person, being in lawfull possession, by taking of the yearely farme, rents or profits, to obtaine and get the pretenced right or title, &c. of any lands whereof he or they shall be in lawfull possession.

For the better understanding of which statute, you must observe, that title or right may be pretenced two manner of wayes:

First, when it is meerely in pretence or supposition, and nothing in verity.

(1. Cro. 232, 233.)

Secondly, when it is a good right or title in verity, and made pretenced by the act of the partie; and both these are within the said statute: for example, if *A.* be lawfull owner of land, and is in possession, *B.* that hath no right thereunto granteth to, or contracteth for the land with another, the grantor and the grantee (albeit the grant be meerely void) are within the danger of the statute; for *B.* hath no right at all, but only in pretence. If *A.* be disseised in this case, *A.* hath a good lawfull right; yet if *A.* being out of possession, granteth to, or contracteth for the land with another, he hath now made his good right of entrie pretenced within the statute, and both the grantor and grantee within the danger thereof. *A fortiori* of a right in action. *Quod nota.*

Pl. Com. fol. 80, &c. Partridge's case.

It is further to be knowne, that a right or title may be considered three manner of wayes.

First, as it is naked and without possession. Secondly, when the absolute right commeth by release or otherwise to a wrongfull possession; and no third person hath either *jus proprietatis*, or *jus possessionis*. The third, when he hath a good right, and a wrongfull possession. As to the first, somewhat hath beene said and more shall be said hereafter. As to the second, taking the former example, if *A.* be disseised, and the disseisee release unto him, he may presently sell, grant, or contract for the land, and need not tarrie a yeere; for it is a rule upon this statute, that whosoever hath the absolute ownership of any land, tenements, or hereditaments (as in this

Pl. Com. Partridge's case ubi sup. 6. E. 6.

Brooke tit. Maintenance 38.

(Cro. Car. 388. Plowd. 89. a.)

this case the disseisor hath), there such owner may at his pleasure bargaine, grant, or contract for the land, for no person can thereby be prejudiced or grieved. And so if a man mortgage his land, and after redeeme the same; or if a man recover land upon a former title, or be remitted to an ancient right, he may at any time bargaine, grant, or contract for the land, for the reason aforesaid. As to the third, if in the case aforesaid the disseisor dieth seised, and *A.* the disseisee entreth, and disseise the heire of the disseisor, albeit he hath an antient right, yet seeing the possession is unlawfull, if he bargaine or contract for the land before hee hath beene in possession by the space of a yeare, he is within the danger of the statute, because the heire of the disseisor hath right to the possession, and he is thereby grieved, *et sic de similibus:* and albeit he that hath a pretenced right (and none in verity) getteth the possession wrongfully, yet the statute extendeth unto him, aswell as where he is out of possession.

23. Eliz. Dier 374. Pl. Com. Partridge's case, f. 87.

[a] Mich. 30. & 31. Eliz. 2811. inter Finch. & Cockham in Com. Banc. (Mo. 266.) (2. Roll. Abr. 114.)

[b] Lib. 4. fol. 26. Copihold cases.

Note, the words of the statute be (any pretenced right), therefore a lease for yeares is within the statute; for the statute saith not (the right), but (any right), and the offendour shall forfeit the whole value of the land. And where the statute speaketh of rights in the plurall number, yet any one right is within the statute. [a] But yet if a man make a lease for yeares to another to the intent to trie the title in an *ejectione firmæ*, that is out of the statute, because it is in a kinde of course of law; but if it be made to a great man, or any other to sway or countenance the cause, that is within this statute.

[369. b.]

Also the statute speakes (of any right or title to any land, &c.) [b] A customary right, or a pretence thereof to lands holden by copie, is within this statute.

6. E. 6. tit. Maintenance Brooke 38.

(5. Rep. 60.)

The said proviso (which is rather added for explanation, than of any necessitie) extendeth only to a pretenced right or title, and to a good and cleare right; and therefore without question, any that hath a just and lawfull estate may obtaine any pretenced right by release or otherwise; for that cannot be to the prejudice of any: nay, as hath beene said, a disseisor that hath a wrongfull estate may obtaine a release of the disseisee, and that is not within the body of the act, and consequently standeth not in need of any proviso to protect him.

[c] 34. H. 8. Dier 52.

And therefore [c] if there be tenant for life, the remainder in fee by lawfull and just title, he in the remainder may obtaine and get the pretenced right or title of any stranger, not only for that the particular estate and the remainder are all one, but for that it is a meane to extinguish the seeds of troubles and suits, and cannot be to the prejudice of any, as hath beene said. And where the statute saith, (being in lawfull possession by taking the yearely rent, &c.) those words are but explanatory, and put for example; for howsoever he be lawfully seised in possession, reversion, or remainder, it sufficeth though he never tooke profit. But the matter observable upon this proviso, which is worthy of observation, is, that if a disseisor make a lease for life, lives, or yeares, the remainder for life, in tayle, or in fee, he in remainder cannot take a promise or covenant, that when the disseisee hath entred upon the land, or recovered the same, that then he should convey the land to any of them in remainder, thereby to avoid the particular estate, or the interest or estate of any other; for the words of the proviso be

(buy,

(buy, obtaine, get, or have by any reasonable way or meane) and that is not by promise or covenant to convey the land after entry or recovery; for that is neither lawfull, being against the expresse purview of the body of the act, and not reasonable, because it is to the prejudice of a third person. But the reasonable way or meane intended by the statute, is by release or confirmation, or such conveyances as amount to as-much: and this agreeth with the letter of the law, viz. the pretenced right or title of any other person; and rights and titles are by release or confirmation, as by reasonable wayes and meanes lawfully transferred and extinct: and the words of promise or covenant, &c. which are prohibited by the body of the act, are omitted in the proviso.

"*Relinquist le possession, &c.*" This must be understood, that before livery of seisin upon the feoffement, *A. de B.* departed out of the house; for otherwise the livery and seisin should be void, because *A. de B.* was in possession. And *Littleton* here saith, *per un fait de feoffment*, so as albeit the deed were made before the departure it is not materiall; but the departure must be before the livery of seisin, for that doth worke the disseisin. And yet that which *Littleton* saith is true, that the feoffement was the cause that he relinquished his possession; for otherwise he would not have done it.

(2. Rep. 31. Ant. 48. b.)

But admit that *A. de B.* had departed for any other cause, yet if *F. de G.* enter and enfeoffe certaine barretors or extortioners, or any other with warrantie, this is a warrantie that commenceth by disseisin, for that the feoffement worketh a disseisin.

Sect. 702.

ITEM, si home que nul droit ad d'entrer en auters tenements, entra en mesmes les tenements, et incontinent ent fait un feoffement as auters per son fait ove garrantie, et deliver a eux seisin, cel garrantie commence per disseisin, pur ceo que le disseisin et le feoffement fueront faits quasi uno tempore. *Et que ceo est ley, poiez veier en un plee* * M. 11. Ed. 3. *en un briefe de* formedon *en le reverter.*

ALSO, if a man which hath no right to enter into other tenements, enter into the same tenements, and incontinently make a feoffement therof to others by his deed with warranty, and deliver to them seisin, this warranty commence by disseisin, because the disseisin and feoffment were made as it were at one time. And that this is law, you may see in a plee *M.* 11. *E.* 3. in a writ of *formedon* in the reverter.

THIS doth explaine that which hath beene said before. And albeit *Littleton* useth the words (and incontinently thereof make a feoffement); and that in this case of *Littleton* the disseisin and feoffement were made (*quasi uno tempore*); yet if the disseisin were made to the intent to make a feoffment with warrantie, albeit the feoffement be long after this (as hath beene said) is a warrantie that commenceth by disseisin.

See before in the Chapter of Releases. (5. Rep. 79.) 46. E. 3. 6.

[370. a.]

"*Mich.*

* *M.* 11.—*anno* xxxi. L. and M. and Roh.

[d] 31. E. 3. tit. Garr. 28.

" *Mich.* 11. *E.* 3." This is mistaken, and should be [d] 31. *E.* 3. and so is the originall, which case you shall see in Master *Fitzherbert*'s Abridgement, for there is no booke at large of that yeare. Hereby you may perceive that learned men looke not only to the cases reported, but unto records, as you may see *Littleton* did; for *Fitzherbert* put this case in print long after, as elsewhere hath beene shewed.

Sect. 703.

GARRANTY lineal est, lou home seisie de terres en fee, † *fait feoffement per son fait a un auter, et oblige luy et ses heires a garranty, et ad issue et morust, et le garrantie discendist a son issue, ceo est lineal garranty. Et la cause pur ceo que* ‡ *est dit lineal garrantie, n'est pur ceo que le garranty discendist de le pier a son heire; mes la cause est, pur ceo que si nul tiel fait ove garranty fuissoit fait per le pier, donque le droit de les tenements discenderoit al heire, et l'heire conveyeroit le discent de* ‖ *son pier, &c.*

WARRANTY lineall is, where a man seised of lands in fee, maketh a feoffement by his deed to another, and binds himselfe and his heires to warrantie, and hath issue and die, and the warranty descend to his issue, that is a lineal warranty. And the cause why this is called lineall warrantie, is not because the warrantie descendeth from the father to his heire; but the cause is, for that if no such deed with warrantie had beene made by the father, then the right of the tenements should descend to the heire, and the heire should convey the discent from his father, &c.

(1. Rep. 1.)

(Post. 371. a. 375. a.)

(3. Rep. 59.) 35. E. 3. Garr. 73.

" *GARRANTY lineal, &c.*" A warrantie lineall is a covenant reall annexed to the land by him which either was owner, or might have inherited the land, and from whom his heire lineall or collaterall might by possibilitie have claimed the land as heire from him that made the warranty; whereof *Littleton* himselfe putteth divers cases, which shall be explained in their proper places. And in this case put in this Section, *Littleton* (once for all) sheweth, that the reason of the example here put, is because if no such alienation with warrantie (for so is *Littleton* to be intended) had beene made, the very lands had descended to the heire, so as the case being put of lands in fee simple, the alienation without the warrantie had barred the heire. And note, that it is called a lineall warrantie (1), not because it must descend upon the lineall heire; for be the heire lineall or collaterall, if by possibility he might claime the land from him that made the warrantie, it is lineall; having regard to the warrantie, and title of the land. And also it is called lineall, in respect that the warrantie made by him that had no right or possibility of right to the land, is called collaterall, in regard that it is collaterall to the title of the land. And it is also to be observed, that in all the cases that *Littleton* hath put, or shall put;

† *et* added L. and M. and Roh.
‡ *ceo* added L. and M. and Roh.
‖ *son—le*, L. and M. and Roh.

(1) [See Note 326.]

pot, the lineall or collaterall warranty doth binde the heire; and therefore the successour claiming in another right, shall not be bound by the warrantie of any naturall ancestour. For which cause [c] in a *juris utrum* brought by a parson of a church, the collaterall warrantie of his ancestour is no barre, for that he demandeth the land in the right of his church in his politike capacitie, and the warrantie descendeth on him in his naturall capacitie. [d] But some have holden, that if a parson bring an assise, that a collaterall warranty of his ancestour shall binde him; and their reason is, for that the assise is brought of his possession and seisin, and he shall recover the meane profits to his owne use: but seeing he is seised of the freehold, whereof the assise is brought *in jure ecclesiæ*, which is in another right than the warrantie, it seemeth that it should not be any barre in the assise. The like law is of a bishop, archdeacon, deane, master of an hospitall, and the like, of their sole possessions, and of the prebend, vicar, and the like.

[c] 27. H. 6. Garr. 48.

[d] 34. E. 3. Garr. 71.

370. b.]

"*Et oblige luy et ses heires.*" [*] King *H.* 3. gave a mannor to *Edmund* earle of Cornwall, and to the heires of his body, saving the possibilitie of reverter, and died: the earle, before the statute of *W.* 2. *cap.* 1. *de donis conditionalibus*, by deed gave the said mannor to another in fee with warrantie in exchange for another mannor, and after the said statute in the 28. yeare of *E.* 1. dieth without issue, leaving assets in fee simple; which warrantie and assets descended upon king *E.* 1. as cosin germaine and heire of the said earle, viz. son and heire of king *Henry* the third, brother of *Richard* earle of Cornwall, father of the said earle *Edmund*. And it was adjudged, that the king, as heire to the said earle *Edmund*, was by the said warrantie and assets barred of the possibilitie of reverter, which he had expectant upon the said gift, albeit the warrantie and assets descended upon the naturall body of king *E.* 1. as heire to a subject; and king *E.* 1. claimed the said mannor, as in his reverter *in jure coronæ* in the capacity of his body politike, in which right he was seised before the gift. In this case, how by the death of the said earle *Edmund* without issue, the king's title by reverter, and the warrantie and assets came together, and that the warrantie was collaterall, yet the king shall not be barred without assets, as a subject shall be; and many other things are to be observed in this case, which the learned reader will observe. (1)

[*] 45. Ass. 6. 6. E. 3. 56. Pl. Com. 234. & 553, 554. (8. Rep. 1. Ant. 19. b.)

Vide 27. H. 6. Garr. 48. 34. E. 3. Garr. 71.

Vide Sect. 711, 712. (Hob. 339. 9. Rep. 132. b. Vaug. 379.)

Sect. 704.

(8. Rep. 51.)

*CAR si soit pier et fits, et le fits purchase * terres en fee, et le pier de ceo disseisist son fits, et † aliena a un auter en fee per son fait, et per mesme le fait oblige luy et ses heires a garranter mesmes les tenements, &c. et le pier morust; ore est le fits barre d'aver les*

FOR if there be father and sonne, and the sonne purchase lands in fee, and the father of this disseiseth his sonne, and alieneth to another in fee by his deed, and by the same deed binde him and his heires to warrant the same tenements, &c. and the father

* *terres—tenements*, L. and M. and Roh. † *ceo* added L. and M. and Roh.

(1) [See Note 321.]

les dits tenements; car il ne poit per ascun suit, ne per auter meane de la ley, aver mesmes les terres per cause del dit garrantie. Et ceo est un collateral garranty; et uncore le garranty discendist lynealment de le pier a le fits.

ther dieth; now is the son barred to have the said tenements; for he cannot by any suit, nor by other meane of law, have the same lands by cause of the said warrantie. And this is a collaterall warrantie; and yet the warrantie descendeth lineally from the father to the sonne.

Sect. 705.

MES pur ceo que si nul tiel fait ove garrantie ust estre fait, le fits en nul maner puissoit conveyer le title que il ad a les tenements de son pier a luy, entant que son pier n'avoit ascun estate en droit en les tenements; pur ceo tiel garrantie est appel collateral garrantie, entant que celuy que fist le garrantie est collateral a le title de les tenements: et ceo est a tant a dire, que cestuy a que le garrantie discendist, ne puissoit a luy conveyer le title que il ad de les tenements per my cestuy que fist le garrantie, en cas que nul tiel garrantie fuit fait.

BUT because if no such deed with warrantie had beene made, the sonne in no manner could convey the title which hee hath to the tenements from his father unto him, inasmuch as his father had no estate in right in the lands; wherefore such warrantie is called collaterall warrantie, inasmuch as he that maketh the warrantie is collaterall to the title of the tenements: and this is asmuch to say, as hee to whom the warrantie descendeth, could not convey to him the title which hee hath in the tenements by him that made the warrantie, in case that no such warrantie were made.

[371. a.]

5. E. 3. 14. 46. E. 3. 6. 19. H. 8. 12. 8. R. 2. Gar. 100. Vid. Sect. 716.

HERE *Littleton* putteth an example, proving that it is not called lineall, because it descendeth lineally from the father to the son; for in this case the warrantie descendeth lineally, and yet is a collaterall warrantie. In this example you must intend that the disseisin was not of intent to alien with warrantie to barre the sonne; but here the disseisin being done to the sonne, without any such intent, the alienation afterwards with warrantie doth barre the sonne; because that albeit the warrantie doth lineally descend, yet seeing the title is collaterall, that is, that the sonne claimeth not the land as heire to his father, therefore in respect of the title it is a collaterall warrantie. And thus doth *Littleton* agree [e] with the authoritie of our bookes. So as the diversities do stand thus. First, where the disseisin and feoffement are *uno tempore*, and where at severall times. Secondly, where the disseisin is with intent to alien with warrantie, and where the disseisin is made without such intent, and the alienation with warrantie afterwards made.

[e] 46. E. 3. 6. 5. E. 3. 14. 19. H. 8. 12.

Sect. 706.

ITEM, si soit aiel, pier, et fits, et le aiel soit disseisie, en que possession le pier releas per son fait ove garrantie, &c. et morust, et puis l'aiel morust; ore le fits est barre d'aver les tenements per le garrantie del pier. Et ceo est appel lineal garrantie, pur ceo que si nul tiel garrantie fuit, le fits ne puissoit conveyer le droit de les tenements a luy, ne monstre coment il est heire al aiel forsque per meane del pier.

ALSO, if there bee grandfather, father, and son, and the grandfather is disseised, in whose possession the father releaseth by his deed with warrantie, &c. and dieth, and after the grandfather dieth; now the son is barred to have the tenements by the warranty of the father. And this is called a lineall warrantie, because if no such warrantie were, the son could not convey the right of the tenements to him, nor shew how hee is heire to the grandfather but by means of the father.

HERE *Littleton* putteth an example where the son must claime the land as heire to his grandfather; and yet because hee cannot make himselfe heire to his grandfather but by his father, it is lineall.

1. H. 4. 33. 35. E. 3. Gar. 73.

And it is to bee observed, that the warrantie in this case descended upon the son, before the discent of the right, which happened by the death of the grandfather, in whom the right was. *Vide Littleton Cap. de Releases,* and after in this Chapter, *Sect.* 707. and 741.

"*Pier release per son fait ove garrantie.*" [*f*] It is to be knowne, that upon everie conveyance of lands, tenements, or hereditaments, as upon fines, feoffments, gifts, &c. releases and confirmations made to the tenant of the land, a warrantie may bee made, albeit hee that makes the release or confirmation, hath no right to the land, &c.; but some doe hold, that by release or confirmation, where there is no estate created, or transmutation of possession, a warrantie cannot be made to the assignee.

[371. b.]

(3. Rep. 59. Ant. 265. a. Post. 386.) [*f*] 14. E. 3. Voucher 108. 16. E. 3. ibid. 87. 18. E. 3. ibid. 6. 10. E. 3. 52. 21. E. 3. 27. 11. H. 4. 22. (Post. 385. a.)

44. E. 3. Cont. de Vouch. 22. 12. H. 7. 1. Vide Sect. 733. 738. 745.

Sect. 707.

ITEM, si home ad issue deux fits et est disseisie, et l'eigne fits relessa al disseisor per son fait ove garranty, &c, et morust sans issue, et apres ceo le pier morust, ceo est un lineall garrantie al puisne fits, pur ceo que coment que l'eigne fits morust en la vie le pier, uncore pur ceo que per possibilitie il puissoit estre, que il puissoit conveier a luy le title del terre per son eigne frere, si nul tiel

ALSO, if a man hath issue two sonnes and is disseised, and the eldest sonne release to the disseisor by his deed with warrantie, &c. and dies without issue, and afterwards the father dieth, this is a lineall warrantie to the younger sonne, because albeit the eldest sonne died in the life of the father, yet by possibilitie it might have beene, that hee might convey to him the

*tiel garrantie fuissoit. Car il puissoit estre, que apres la mort le pier l'eigne frere entroit en les tenements et morust sans issue, et donque le puisne fits conveyera a luy le title per l'eigne * fits. Mes en tiel cas, si le puisne fits relesse ove garrantie a le disseisor, et morust sans issue, ceo est un collateral garrantie al eigne † fits, pur ceo que de tiel terre que fuit al pier, l'eigne per nul possibilitie poit conveyer a luy le title per meane de le puisne ‡ fits.*

the title of the land by his elder brother, if no such warrantie had beene. For it might bee, that after the death of the father the elder brother entred into the tenements and died without issue, and then the yonger sonne shall convey to him the title by the elder son. But in this case, if the younger sonne releaseth with warrantie to the disseisor, and dieth without issue, this is a collaterall warrantie to the elder son, because that of such land as was the father's, the elder by no possibilitie can convey to him the title by meanes of the younger son.

35. E. 3. Gar. 73. 11. H. 4. 33. (1. Rep. 66.)

HERE *Littleton* putteth an example, where the heire that is to be barred by the warrantie, is not to make his discent by him that made the warrantie, as in the case before; and yet because by possibilitie he might have claimed by the eldest sonne, if he had survived the father, and died without issue, and so the younger brother might by possibilitie have beene heire to him, the warrantie is lineall.

And here it is to be noted, that the warrantie of the eldest sonne descended before the right descended; whereof more shall be said hereafter, *Sect.* 741.; and the opinion of *Littleton* in this case is holden for law, against the opinions in 35. *E.* 3. *Gar.* 73.

9. E. 3. 16. 38 E. 3 21. 46. E. 3. 26. 8. R. 2. Gar. 101. (2. Roll. Abr. 773.)

"*Mes en tiel case le puisne fits release ove garrantie, &c.*" This warrantie in this case is collaterall to the eldest sonne, and to the issues of his bodie; but if the eldest sonne dieth without issue of his bodie, then the warrantie is lineall to the issues of the bodie of the youngest: and so the warrantie that was collaterall to some persons, may become lineall to others.

Sect. 708.

[372.a]

ITEM, si tenant en le taile ad issue trois fits, et discontinue le taile en fee, et le mulnes fits relessa per son fait al discontinuee, et oblige luy et ses heires a garrantie, &c. et puis le tenant en le taile morust, et le mulnes fits morust sans issue, ore l'eigne fits est barre d'aver ascun recoverie per briefe de formedon, *pur ceo que le garrantie del mulnes frere est collateral a luy, entant que il ne poit per nul manner conveyer a luy per force del taile ascun discent per*

ALSO, if tenaunt in taile hath issue three sonnes, and discontinue the tayle in fee, and the middle son release by his deed to the discontinuee, and binde him and his heires to warrantie, &c. and after the tenant in taile dieth, and the middle son dieth without issue, now the eldest sonne is barred to have any recoverie by writ of *formedon*, because the warrantie of the middle brother is collaterall to him, inasmuch as hee can by no meanes

* *fits* not in L. and M. nor Roh.
† *fits* not in L. and M. nor Roh.
‡ *fits* not in L. and M. nor Roh.

per le mulnes, et pur ceo c'est un collateral garrantie. Mes en cest cas si l'eigne fits devie sans issue, ore le puisne frere poit bien aver un briefe de formdon *en le discender, et recovera mesme le terre, pur ceo que le garrantie del mulnes est lineal al fits puisne, pur ceo que il puissoit estre que per possibilitie le mulnes puissoit estre seisie per force del taile apres la mort son eigne frere, et donque le puisne frere puissoit conveyer son title de discent per le mulnes.*

meanes convey to him by force of the tayle any discent by the middle, and therefore this is a collateral warrantie. But in this case if the eldest sonne die without issue, now the youngest brother may well have a writ of *formdon* in the discender, and shall recover the same land, because the warrantie of the middle is lineall to the youngest son, for that it might bee that by possibilitie the middle might bee seised by force of the taile after the death of his eldest brother, and then the youngest brother might convey his title of discent by the middle brother.

HEREBY it also appeareth, that a warrantie that is collaterall in respect of some persons, may afterwards become lineall in respect of others. Whereupon it followeth, [*] that a collateral warrantie doth not give a right, but bindeth only a right so long as the same continueth: but if the collaterall warrantie be determined, removed, or defeated, the right is revived. [f] And yet in an assise the plaintiffe hath made his title by a collateral warrantie.

(Dr. and Stud. 153. b.) 8. R. 2. Gar. 101. [*] 43. Ass. 44. 24. H. 8. tit. Taile. Br. 7. H. 5, 6. tit. Ass. 359. 34. E. 3. [f] 16. Ass. p. 16.

Droit 29. 19. H. 6. 59. 21. H. 7. 40. 5. H. 7. 29. 3. H. 7. 9. b. 27. Ass. 74. 29. Ass. 50. 43. Ass. 8. 14. H. 4. 13. 19. H. 6. 60.

"*Barre*" is a word common aswell to the English as to the French, of which commeth the nowne, a bar, *barra*. It signifieth legally a destruction for ever, or taking away for a time of the action of him that right hath. And *barra* is an Italian word, and signifieth barre, as we use it; and it is called a plea in barre, when such a barre is pleaded. Here *Littleton* putteth an example of a barre of an estate taile by a collaterall warranty. It is to be observed, that in some cases an estate taile may be barred by some acts of parliament made since *Littleton* wrote; and in some cases an estate taile cannot be barred, which might when *Littleton* wrote have been barred. For example, if tenant in tayle levie a fine with proclamations according to the statute, this is a barre to the estate taile, but not to him in reversion or remainder, if hee maketh his claime, or pursue his action within five yeares after the state taile spent.

(Doc. Plac. 54.) (Dr. and Stud. 56. a.) 4. H. 7. c. 24. & 32. H. 8. c. 36. (10. Rep. 43.)

[b] If a gift be made to the eldest sonne, and to the heires of his bodie, the remainder to the father and to the heires of his bodie, the father dieth, the eldest sonne levieth a fine with proclamations, [372. b.] and dieth without issue; this shall barre the second sonne, for the remainder descended to the eldest.

[b] Dalison 2. El. & 7. El. Vide lib. 3. fol. 84. le case de Fines. (3. Leon. 10.)

If tenant in taile be disseised, or have a right of action, and the tenant of the land levie a fine with proclamations, and five yeares passe, the right of the estate taile is barred.

(Ant. 120. b. 9. Rep. 104. Plowd. 374. a. 375. a. Cro. Eliz. 896. Noy 46. Dyer, 3. b. 133. a.)

[b] If tenant in taile in possession, or that hath a right of entrie, bee attainted of high-treason, the estate taile is barred, and the land is forfeited to the king; and none of these were barred when *Littleton*

[b] 26. H. 8. cap. 13. 33. H. 8. cap. 20. 5. E. 6. c. 11. Stanf. Pl. Coron. 18.

Littleton wrote. A lineall warrantie and assets was a barre to the estate taile when *Littleton* wrote; whereof more shall be said hereafter.

[c] 12. E. 4. 19. Taltarum's case.

[d] Vide devant Sect. 690. Vid. Lib. 3. fol. 5. Cuppledick's case, & fol. 94. 97. 106. Lib. 1. fol. 62. Capel's case. Lib 2. fol. 16. 52. 74. 77. Lib. 6. fol. 41, 42. Lib. 10. fol. 37. Marie Portington's case. (Ante 335. a.)

[c] A common recoverie with a voucher over, and a judgement to recover in value, was a barre of the estate taile when *Littleton* wrote. [d] And of common recoveries there bee two sorts, viz. one with a single voucher, and another with a double voucher, and that is more common and more safe: there may be more vouchers over.

[e] 38. H. 8. taile Br. 41. Pl. Com. fol. 555. 29. H. 8. Dier 52.

[f] 34. H. 8. cap. 20.

[e] If the king had made a gift in taile, and the donee had suffered a common recoverie, this should have barred the estate taile in *Littleton*'s time, but not the reversion or remainder in the king. And so if such a donee had levied a fine with proclamations after the statute of 4. *H.* 7. this had barred the estate taile, although the reversion was in the king. (1) [f] But since *Littleton* wrote, a common recoverie had against tenant in taile of the king's gift, or such a fine levied by him, the reversion continuing in the crowne, is no barre to the estate taile, by the statute of 34. *H.* 8. (2) And where the words of the statute be (whereof the reversion or remainder at the time of such recoverie had, shall be in the king) these ten things are to be observed upon the construction of that act. (3)

First, that the estate taile must bee created by a king, and not by any subject, albeit the king be his heire to the reversion; for the preamble speakes of gifts made to subjects, and none can have subjects but the king. And also in the preamble it is said (for service done to the kings of the realme) and the body of the act referreth to the preamble. [g] And therefore if the duke of *Lancaster* had made a gift in taile, and the reversion descended to the king, yet was not that estate taile restrained by that statute; and so of the like.

[g] Trin. 23. Eliz. inter Dively & Ashton resolved in the Court of Wards. Lib. 2. fol. 15. & 16. in Wiseman's case.

Secondly, if the king grant over the reversion, then a recoverie suffered will barre the state taile, because the king had no reversion at the time of the recoverie.

Lib. 8. fol. 77, 78. the Lord Stafford's case. (2. Roll. 394.)

Thirdly, if the king make a gift in taile, the remainder in taile, or grant the reversion in taile, keeping the reversion in the crowne, a recoverie against tenant in taile in possession shall neither barre the estate taile in possession by the expresse purview of the statute, nor by consequence the state in remainder or reversion; for that the reversion or remainder cannot be barred, but where the estate taile in possession is barred.

Lib. 2. fol. 15, 16. Wiseman's case. Lib. 2. fol. 52. Cholmleye's case.

Fourthly, if a subject make a gift in taile, the remainder to the king in fee, albeit the words of the statute be, (whereof the reversion or remainder of the same, &c.) yet seeing the estate in taile was not created by a king, as hath beene said, the estate taile may bee barred by a common recoverie.

(Mo. 115. 195. 2 Rep. 15. b. 1. Cro. 430.)

Fifthly, if Prince *Henrie*, sonne of *Henrie* the Seventh, had made a gift in taile, the remainder to *Henrie* the Seventh in fee, which remainder by the death of *Henrie* the Seventh had descended to *Henrie* the Eighth, so as he had the remainder by discent; yet might tenant in taile, for the cause aforesaid, barre the estate taile by a common recoverie.

Sixthly,

(1) [See Note 322.]
(2) Upon this act see Mr. Cruise's Essay on Recoveries, 2d ed. 255.
(3) [See Note 323.]

Sixthly, the word (remainder) in the ſtatute is no vaine word; for the words of the preamble be, the king hath given or granted, or otherwiſe provided to his ſervants and ſubjects. The word (reverſion) in the body of the act hath reference to theſe words (given or granted); and (remainder) hath reference to theſe words (otherwiſe provided.) As if the king in conſideration of money, or of aſſurance of land, or for other conſideration by way of proviſion, procure a ſubject by deed indented and inrolled, to make a gift in taile to one of his ſervants and ſubjects for recompence of ſervice, or other conſideration, the remainder to the king in fee, and all this appeare of record; this is a good proviſion within the ſtatute, and the tenant in taile cannot by a common recoverie barre the eſtate taile. So it is, if the remainder be limited to the king in taile; but if the remainder bee limited to the king for yeares, or for life, that is no ſuch remainder as it is intended by the ſtatute, becauſe it is of no remainder of continuance, as it ought to be, as it appeareth by the preamble; and it ought to have ſome affinitie with a reverſion, wherewith it is joyned.

Lib. 2. fol. 16. Wiſeman's caſe.

Seventhly, where a common recoverie cannot barre the ſtate taile by force of the ſaid ſtatute, there a fine levied in fee, in taile, for lives, or yeares, with proclamations according to the ſtatutes, ſhall not barre the ſtate taile, or the iſſue in taile, where the reverſion or remainder is in the king, as is aforeſaid, by reaſon of theſe words in the ſaid act (the ſaid recovery, or any other thing or things hereafter to be had, done, or ſuffered by or againſt any ſuch tenant in taile to the contrary notwithſtanding), which words include a fine levied by ſuch a donee, and reſtraineth the ſame.

373. a.]

So reſolved Paſch. 31. Eliz. Rot. 1645. in Notley's caſe in Communi Banco.

Eightly, but where a common recovery ſhall barre the eſtate taile, notwithſtanding that ſtatute, there a fine with proclamations ſhall barre the ſame alſo.

(8. Rep. 77.)

Ninthly, where the ſaid latter words of the ſtatute be (had, done, or ſuffered by or againſt any ſuch tenant in taile), the ſenſe and conſtruction is, where tenant in taile is partie or privie to the act, be it by doing or ſuffering that which ſhould worke the barre, and not by meere permiſſion, he being a ſtranger to the act. (1)

(3. Cro. 430. Cro. Eliz. 595. Sid. 166. 4. Leon. 40. Moor 467.)

As if tenant in tayle of the gift of the king, the reverſion to the king expectant, is diſſeiſed, and the diſſeiſor levie a fine, and five yeares paſſe, this ſhall barre the eſtate taile (2): and ſo if a collaterall anceſtour of the donee releaſe with warrantie, and the donee ſuffer the warrantie to deſcend without any entry made in the life of the anceſtour, this ſhall binde the tenant in tayle, becauſe he is not party or privie to any act, either done or ſuffered by or againſt him.

So holden Trin. 39. Eliz. Rot. 1914. inter Stratford & Dover in Communi Banco.

(Hob. 332. 2. Roll. Abr. 773.)

Tenthly, albeit the preamble of the ſtatute extend onely to gifts in taile made by the kings of England before the act (viz. hath given and granted, &c.), and the body of the act referreth to the preamble (viz. that no ſuch feigned recovery hereafter to be had againſt ſuch tenant in taile), ſo as this word (ſuch) may ſeeme to couple the body and the preamble together; yet in this caſe (ſuch) ſhall be taken for ſuch in equall miſchiefe, or in like caſe; and by divers parts of the act it appeareth, that the makers of the act intended to extend it to future gifts; and ſo is the law taken at this day without queſtion.

A recovery

(1) [See Note 324.] (2) [See Note 325.]

31. E. 3. Judgement 252. 3. H. 6. 55. 10. H. 6. 5. 14. E. 4. 5. b. 15. E. 4. 8. F. N. B. 134. b. Pl. Com. 237. 28. E. 3. 95. F. N. B. 28. l.

A recovery in a writ of right against tenant in taile without a voucher, is no barre of any gift in taile.

If tenant in taile the remainder over in fee cesse, and the lord recover in a *cessavit*, this shall not barre the estate taile, for the issue shall recover in a *formedon*; neither were either of these barres when *Littleton* wrote. But let us now heare *Littleton*.

Sect. 709.

ITEM, si tenant en taile discontinua le taile, et ad issue et devy, et l'uncle del issue relessa al discontinuee ove garrantie, &c. et morust sans issue, ceo est collateral garranty al issue en taile, pur ceo que le garrantie discendist sur l'issue, le quel ne poit soy conveyer a le taile per meane de son uncle.

ALSO, if tenant in taile disconti-nue the taile, and hath issue and dieth, and the uncle of the issue release to the discontinuee with warrantie, &c. and dieth without issue, this is a collaterall warranty to the issue in tayle, because the warranty descendeth upon the issue, that cannot convey himselfe to the entayle by meanes of his uncle.

Pl. Com. fol. 307. a. in Sharington's case. (2. Roll. Abr. 745.) (Post. 374. b.) (3. Rep. 59.) (Ante 6. b.)

THE reason wherefore the warrantie of the uncle having no right to the land entailed shall barre the issue in tayle is, for that the law presumeth that the uncle would not unnaturally disherit his lawfull heire, being of his owne bloud, of that right which the uncle never had but came to the heire by another meane, unlesse hee would leave him greater advancement. *Nemo præsumitur alienam posteritatem suæ prætulisse.* And in this case the law will admit no proofe against that which the law presumeth. And so it is of all other collaterall warranties; for no man is presumed to doe any thing against nature.

[k] 11. H. 4. 55. 10. Eliz. Dier 271. [l] 7. H. 4. 9.

[k] And the like holdeth in some other cases: as if a rent be behinde for twentie yeares, and the lord make an acquittance for the last that is due, all the rest are presumed to be paid; and the law will admit no proofe against this presumption (3). [l] So if a man be within the foure seas, and his wife hath a childe, the law presumeth that it is the childe of the husband; and against this presumption the law will admit no proofe. (4)

[m] 3. E. 3. Corone Stans.

[m] If a man that is innocent be accused of felony, and for fear flieth from the same, albeit he judicially acquitteth himselfe of the felonie, yet if it be found that he fled for the felonie, he shall, notwithstanding his innocencie, forfeit all his goods and chattels, debts and duties; for as to the forfeiture of them, the law will admit no proofe against the presumption in law grounded upon his flight: and so in many other cases. But yet the generall rule is, *Quod stabitur præsumptioni donec probetur in contrarium*; but, as you see, it hath many exceptions.

[373. b.]

Bracton lib. 5. cap. 9.

[n] Rot. Parliament. 50. E. 3. num. 77.

[n] It hath beene attempted in parliament, that a statute might be made, that no man should be barred by a warrantie collaterall, but

(3) [See Note 326.] (4) But see ant. 244. a. note 2.

but where assets descend from the same ancestor (1); but it never tooke effect, for that it should weaken common assurances. (2)

Sect. 710.

*ITEM, si le tenant en tayle ad issue deux files et morust, et l'eigne entra en le entierty, et ent fait un feoffement en fee ove garrantie, &c. et puis l'eigne file morust sans issue; en cest cas le puisne file est barre quant al un moitie, et quant al auter moitie el n'est pas barre. Car quant a la moitie que affiert a le puisne file, el est barre, pur ceo que quant a cel * part el ne poit conveyer le discent per my le maine de son eigne soer, et pur ceo quant a cel moitie, ceo est un collateral garrantie. Mes quant al auter moity, que affiert a son eigne soer, le garrantie n'est pas barre a le puisne soer, pur ceo que el poit conveyer son discent quant a cel moitie que affiert a son eigne soer per mesme le eigne soer, issint quant a cest moitie que affiert al eigne soer, le garrantie est lineal al puisne soer.*

ALSO, if the tenant in tayle hath issue two daughters and dieth, and the elder entreth into the whole, and thereof maketh a feoffement in fee with warrantie, &c. and after the elder daughter dieth without issue; in this case the younger daughter is barred as to the one moitie, and as to the other moitie shee is not barred. For as to the moity which belongeth to the younger daughter, shee is barred, because as to this part shee cannot convey the discent by meanes of her elder sister, and therefore as to this moitie, this is a collaterall warrantie. But as to the other moitie, which belongeth to her elder sister, the warrantie is no bar to the younger sister, because shee may convey her discent as to that moitie which belongeth to her elder sister by the same elder sister, so as to this moitie which belongeth to the elder sister, the warrantie is lineall to the younger sister.

Sect. 711.

ET nota, que quant a celuy que demanda fee simple per ascun de ses auncesters, il serra barre per warrantie lineal que discendist sur luy, sinon que soit restraine per ascun estatute.

AND note, that as to him that demandeth fee simple by any of his ancestors, he shall be barred by warrantie lineall which descendeth upon him, unlesse he be restrained by some statute.

Sect. 712.

MES il que demande fee taile per briefe de formedon *en discender, ne serra my barre per lineal garrantie, sinon*

BUT hee that demandeth fee tayle by writ of *formedon* in *discender*, shall not bee barred by lineall warrantie,

* *part—moyte que affiert a luy*, L. and M. and Roh.

(1) [See Note 327.] (2) [See Note 328.]

ſinon que il ad aſſets per diſcent en fee ſimple per meſme l'aunceſter que fiſt le garranty. Mes collateral garrantie eſt barre a celuy que demanda fee, et auxy a celuy que demanda fee taile ſans aſcun auter diſcent de fee ſimple, ſinon en caſes queux ſont reſtraines per les eſtatutes, et auters caſes pur certaine cauſes, come ſerra dit en apres.

tie, unleſſe hee hath aſſets by diſcent in fee ſimple by the ſame anceſtour that made the warrantie. But collaterall warrantie is a barre to him that demandeth fee, and alſo to him that demandeth fee tayle without any other diſcent of fee ſimple, except in caſes which are reſtrained by the ſtatutes, and in other caſes for certaine cauſes, as ſhall be ſaid hereafter. (1)

5. E. 2. Garr. 78. Lib. 8. fol. 41. Sym's caſe.

(10. Rep. 95.)

(Ante 367. b.)
(2. Cro. 217, 218.)

"*AD iſſue deux files.*" If huſband and wife, tenants in eſpeciall tayle, have iſſue a daughter, and the wife die, the huſband by a ſecond wife hath iſſue another daughter, and diſcontinueth in fee and dieth, a collaterall anceſtor of the daughters releaſeth to the diſcontinuee with warranty and dieth, the warrantie deſcendeth upon both daughters, yet the iſſue in taile ſhall bee barred of the whole; for in judgement of law the entire warrantie deſcendeth upon both of them.

(Ant. 189. a. 243. b.)
See before in the Chapter of Diſcent, Sect. 398.

"*Et l'eigne enter en l'entiertie, et ent fait un feoffement, &c.*" Here it is to bee underſtood, that when one coparcener doth generally enter into the whole, this doth not deveſt the eſtate which deſcendeth by the law to the other, unleſſe ſhee that doth enter claimeth the whole, and taketh the profits of the whole; for that ſhall deveſt the freehold in law of the other parcener.

Otherwiſe it is after the parceners be actually ſeiſed, the taking of the whole profits, or any claime made by the one, cannot put the other out of poſſeſſion without an actuall putting out or diſſeiſin. And in this caſe of *Littleton*, when one coparcener entreth into the whole, and maketh a feoffement of the whole, this deveſteth the freehold in law out of the other coparcener. [374. a.]

Now ſeeing the entrie in this caſe of *Littleton* deveſted not the eſtate of the other parcener, if no further proceeding had beene, then it is to be demanded, that ſeeing the feoffement doth worke the wrong, and bee the wrong either a diſſeiſin, or in nature of an abatement, how can the warrantie annexed to that feoffement that wrought the wrong be collaterall, or binde the youngeſt ſiſter for her part? To this it is anſwered, that when the one ſiſter entreth into the whole, the poſſeſſion being void, and maketh a feoffement in fee, this act ſubſequent doth ſo explaine the entry precedent into the whole, that now by conſtruction of law, ſhe was only ſeiſed of the whole, and this feoffement can bee no diſſeiſin, becauſe the other ſiſter was never ſeiſed; nor any abatement, becauſe they both made but one heire to the anceſtour, and one freehold and inheritance deſcended to them. So as in judgement of law the warrantie doth not commence by diſſeiſin or by abatement, and without queſtion her entrie was no intruſion.

Pl. Com. 543.
(5. Rep. 51. Poſt. 377. a.)

(Sect. 398. Poſt. 393. b.)

Tenant in tayle hath iſſue two daughters, and diſcontinueth in fee, the youngeſt diſſeiſeth the diſcontinuee to the uſe of herſelfe and her ſiſter, the diſcontinuee ouſteth her, againſt whom ſhe recovereth

(1) The obſervations of Lord Vaughan on this Section and the comment upon it, deſerve attentive peruſal. See Vaugh. 375.

vereth in an assise, the eldest agreeth to the disseisin, as she may, against her sister, and become joyntenant with her. And thus is the booke in the 21. Assise [n] to be intended, the case being no other in effect; but *A.* disseiseth one to the use of himselfe and *B*, *B*. agreeth; by this he is joyntenant with *A*.

[n] 21. Ass. 19. (Ant. 180.)

374. b.] " *Et nota, que quant a celuy que demanda fee simple, &c.*" In these two Sections there are expressed foure legall conclusions:

First, that a lineall warrantie doth binde the right of a fee simple.

Secondly, that a lineall warrantie doth not binde the right of an estate taile, for that it is restrained by the statute of *donis conditionalibus*.

Thirdly, that a lineall warranty and assets is a barre of the right in taile, and is not restrained (as hath beene said) by the said act.

Fourthly, that a collaterall warrantie made by a collaterall ancestor of the donee, doth binde the right of an estate taile, albeit there be no assets; and the reason thereof is upon the statute of *donis conditionalibus*, for that it is not made by the tenant in taile, &c. as the lineall warrantie is.

3. E. 3. 22. 4. E. 3. 28. 50. 6. E. 3. 56. 7. E. 3. 54. 57. 9. E. 3. 16. 10. E. 3. 14. 15. E. 3. Garr. 27. 2c. E. 3. Ibid. 39. 25. E. 3. 50. 27. E. 3. 83. 41. E. 3. Garr. 16. Mich. 38. E. 3. Coram Rege Abbot de Colchester's case. 45. Ass 6. Pl. Com. 554. 19. E. 4. 10. Vid. Sect. 703. 747.

To this may be added, that the warranty of the donee in taile, which is collaterall to the donor, or to him in remainder, being heire to him, doth binde them without any assets. For though the alienation of the donee after issue doth not barre the donor, which was the mischiefe provided for by the act, yet the warranty being collaterall doth barre both of them; for the act restraineth not that warranty, but it remaineth at the common law, as *Littleton* after saith: and in like manner the warranty of the donee doth barre him in the remainder.

(Moor 96. accord. Vaugh. 382. contra. See Vaugh. 365.)

" *Assets*, (id est) quod tantundem valet," sufficient by discent.

Note, assets requisite to make a lineall warranty a barre must have six qualities. First, it must be assets (that is) of equall value or more at the time of the discent. Secondly, it must be of discent, and not by purchase or gift. Thirdly, as *Littleton* here saith, it must be assets in fee simple, and not in taile, or for another man's life. Fourthly, it must descend to him as heire to the same ancestor that made the warranty, as *Littleton* also here saith. Fifthly, it must be of lands or tenements, or rents, or services valuable, or other profits issuing out of lands or tenements, and not personall inheritances, as annuities and the like. Sixthly, it must be in state or interest, and not in use or right of actions or rights of entry, for they are no assets until they be brought into possession. [a] But if a rent in fee simple issuing out of the land of the heire descend unto him whereby it is extinct, yet this is assets, and to this purpose hath in judgement of law a continuance.

[b] A seigniory in fee almoigne is no assets, because it is not valuable, and therefore not to be extended; and so it seemeth of a seigniory of homage and fealty. But an advowson is assets, whereof [c] *Fleta* saith; *Item de ecclesiis quæ ad donationem domini pertinent quot sunt, et quæ, et ubi, et quantum valeat quæ liber ecclesia per*

Fleta lib. 2. ca. 65. Britton 185. 4. E. 3. Garr. 63. 16. E. 3. Ass. 4. 43. E. 3. 9. 7. H. 6 3. 11. H. 4. 20. (2. Roll. Abr. 774, 775.)

24. E. 3. 47.

(6. Rep. 56.)

[a] 31. E. 3. Ass. 5. 13. E. 3. Recoverie in value 17. Lib. 3. fol. 31. Butler & Baker's case.

[b] 14. E. 3. Mesne 7. Registrem 293.

[c] Fleta, lib. 2. cap. 65.

Britton fol. 185. Extent. manerii. 5. H. 7. 37. 32. H. 6. 21. 33. E. 3. Garr. 102.

per annum secundum veram ipsius æstimationem, et pro marcâ solidus extendatur, ut si ecclesia centum marcas valeat per annum, ad centum solidos extendatur advocatio per annum. (1) And herewith agreeth *Britton*, and others have reckoned a shilling in the pound; and *Britton* addeth further, *mes si la advowson duist estre vendue, adonques serr' le reasonable price solonque le value en un an a cel extent.* Wherein it is to be observed, that antiquitie did ever reckon by markes.

Sect. 713.

ITEM, si terre soit done a un home et a les heires de son corps engendres, le quel prent feme, et ont issue fits enter eux, et le baron discontinua le taile en fee et devy, et puis la feme relessa al discontinuee en fee ove garrantie, &c. et morust, et le garrantie discendist a le fits, ceo est un collateral garrantie.

ALSO, if land be given to a man, and to the heires of his bodie begotten, who taketh wife, and have issue a son betweene them, and the husband discontinues the taile in fee and dieth, and after the wife releaseth to the discontinuee in fee with warrantie, &c. and dieth, and the warranty descends to the son, this is a collaterall warrantie.

THIS case standeth upon the same reason that divers other formerly put by our author doe, viz. that because the heire claimeth only from the father *per formam doni*, and nothing from the wife, that therefore the warrantie of the wife is collaterall, and the warrantie made by any ancestor male or female of the wife bindeth; and here the warrantie descendeth after the discent of the right.

Sect. 714.

[375. a.]

(9. Rep. 143. a. Ant. 187. a.)

MES si tenements soyent dones a le baron et a sa feme, et a les heires de lour deux corps engendres, queux ont issue fits, et le baron discontinua le taile et morust, et puis la feme relessa ove garrantie et morust, cest garrantie n'est forsque un lineal garrantie a le fits; car le fits ne serra barre en ceo cas de suer son breve de formedon, *sinon que il ad assets per discent en fee simple per sa mere, pur ceo que lour issue en briefe de* formedon *covient conveyer a luy le droit come heire a son pere et a sa mere de lour * deux corps engendres per forme del*

BUT if lands be given to the husband and wife, and to the heires of their two bodies begotten, who have issue a son, and the husband discontinue the taile and dieth, and after the wife release with warrantie and dieth, this warrantie is but a lineall warrantie to the son; for the sonne shall not be barred in this case to sue his writ of *formedon*, unlesse that hee hath assets by discent in fee simple by his mother, because their issue in the writ of *formedon* ought to convey to him the right as heire to his father and mother

* *deux* not in L. and M. nor Roh.

(1) Bro. *Assets per Discent* 21. contra.

del done; et issint en tiel case, le garrantie de le pere et le garrantie de la mere ne sont forsque lineal garrantie al heire, &c.

mother of their two bodies begotten *per formam doni*; and so in this case the warrantie of the father and the warrantie of the mother are but lineall warrantie to the heire, &c.

HERE is a point worthy of observation, that albeit in this case the issue in taile must claime as heire of both their bodies, yet the warrantie of either of them is lineall to the issue; and yet the issue cannot claime as heire to either of them alone, but of both.

35. E. 3. tit. Gar. 73.

(2. Roll. Abr. 741. Ant. 187. a. Sect. 25.)

If lands be given to a man and to a woman unmarried, and the heires of their two bodies, and they entermarrie, and are disseised, and the husband release with warrantie, the wife dieth, the husband dieth, albeit the donees did take by moities, yet the warrantie is lineall for the whole, because, as our author here saith, the issue must in a *formedon* convey to him the right as heire to his father and his mother of their two bodies engendred; and therefore it is collaterall for no part.

Sect. 715.

ET nota, que en chescun cas ou home demanda tenements en fee taile per briefe de formedon, *si ascun del issue en le taile que avoit possession, ou que n'avoit ascun possession, fait un garrantie, &c. si celuy que suist le briefe de* formedon *puissoit per ascun possibilitie, per matter que puissoit estre en fait, conveyer a luy, per my celuy que fist le garrantie performe del done,* * *ceo est un lineal garrantie, et nemy collateral.*

[375. b.]

AND note, that in everie case where a man demandeth lands in fee taile by writ of *formedon*, if any of the issue in taile that hath possession, or that hath not possession, make a warrantie, &c. if hee which sueth the writ of *formedon* might by any possibilitie, by matter which might be *en fait*, convey to him, by him that made the warrantie *per formam doni*, this is a lineall warrantie, and not collaterall.

OF this sufficient hath beene said before, *sed nunquàm nimis dicitur quod nunquàm satis dicitur*; for it is a point of great use and consequence.

35. E. 3. Gar. 73.

Sect. 716.

(Vaugh. 377.) (8. Rep. 51.) (Vaugh. 367. 377.)

ITEM, si home ad issue trois fits, et il dona terre al eigne fits, a aver et tener a luy et a les heires de son corps engendres, et pur default de tiel issue, le remainder al mulnes fits, a luy et a les heires de son corps engendres, et pur default de tiel issue † *del mulnes, le remainder*

ALSO, if a man hath issue three sonnes, and giveth land to the eldest sonne, to have and to hold to him and to the heires of his bodie begotten, and for default of such issue, the remainder to the middle sonne, to him and to the heires of his bodie begotten,

* *&c.* added L. and M. and Roh. † *del mulnes* not in L. and M. nor Roh.

remainder al puisne fits, et les heires de son corps engendres; en cest cas, si l'eigne ‡ *discontinua le taile en fee, et oblige luy et ses heyres a garrantie, et morust sans issue, ceo est un collateral garrantie al mulnes fits, et serra barre a demaunder mesme la terre per force del remainder; pur ceo que le remainder est son title, et son eigne frere est collateral a cel title, que commence per force del remainder. En mesme le maner est, si le mulnes fits avoit mesme la terre per force del remainder, pur ceo que son eigne frere ne fist ascun discontinuance, mes morust sans issue de son corps, et puis le mulnes fait un discontinuance ove garrantie, &c. et morust sans issue, ceo est un collateral garrantie a le puisne fits. Et auxy en cest case, si ascun de les dits fits soit disseisie, et le pere que fist le done, &c. relessa a le disseisor tout son droit* § *ove garrantie,* ¶ *ceo est un collateral garrantie a celuy fits sur que le garrantie discendist,* causâ quâ supra.

gotten, and for default of such issue of the middle sonne, the remainder to the youngest son, and to the heires of his bodie begotten; in this case, if the eldest discontinue the taile in fee, and binde him and his heires to warrantie, and dieth without issue, this is a collaterall warrantie to the middle son, and shall be a bar to demand the same land by force of the remainder; for that the remainder is his title, and his elder brother is collaterall to this title, which commenceth by force of the remainder. In the same manner it is, if the middle son hath the same land by force of the remainder, because his eldest brother made no discontinuance, but died without issue of his bodie, and after the middle make a discontinuance with warrantie, &c. and dieth without issue, this is a collaterall warrantie to the youngest son. And also in this case, if any of the said sonnes be disseised, and the father that made the gift, &c. releaseth to the disseisor all his right with warrantie, this is a collaterall warrantie to that son upon whom the warrantie descendeth, *causâ quâ supra.*

Sect. 717. [376.a.]

ET sic nota, *que lou home que est collateral a le title,* ∔ *et ceo release ove garrantie, &c. ceo est un collateral garrantie.*

AND so note, that where a man that is collaterall to the title, and releaseth this with warrantie, &c. this is a collaterall warrantie.

8. R. 2. Garr. 101. Vi. Sect. 704.

HERE it appeareth, that it is not adjudged in law a collaterall warrantie, in respect of the bloud, for the warrantie may be collaterall, albeit the bloud be lineall; and the warrantie may be lineall, albeit the bloud be collaterall, as hath beene said. But it is in law deemed a collaterall warrantie, in respect that he that maketh the warrantie is collaterall to the title of him upon whom the warrantie doth fall; as by the example which *Littleton* here putteth, and by that which hath beene formerly said, is manifest.

‡ *fitz* added L. and M. and Roh.
§ *&c.* added L. and M. and Roh.
¶ *&c.* added L. and M. and Roh.
∔ *&c.* added L. and M. and Roh.

Sect. 718.

ITEM, si pier dona terre a son eigne fits, a aver et tener a luy et a les heires males de son corps engendres, le remainder a le second fits, &c. si l'eigne fits alienast en fee ovesque garrantie, &c. et ad issue female, et morust sans issue male, ceo n'est pas collaterall garrantie al second fits, † *car il ne serra barre de son action de* formedon *en le remainder, pur ceo que le garrantie discendist al file del eigne fits, et nemy al second fits: car chescun garrantie que discendist, discendist a celuy que est heire a luy que fist le garrantie, per le common ley.*

ALSO, if a father giveth land to his eldest son, to have and to hold to him and to the heires males of his body begotten, the remainder to the second sonne, &c. if the eldest sonne alieneth in fee with warranty, &c. and hath issue female, and dieth without issue male, this is no collaterall warranty to the second son, for he shall not bee barred of his action of *formedon* in the remainder, because the warranty descended to the daughter of the elder son, and not to the second sonne: for every warrantie which descends, descendeth to him that is heire to him who made the warrantie, by the common law.

HERE is rehearsed a maxime of the common law, that every warrantie doth descend upon him that is heire to him that made the warrantie, by the common law, as by this example it appeareth.

Vid. Sect. 3. 603. 735. 736. 737. (Ant. 329. a. Cro. Eliz. 72.)

"*A celuy que est heire a luy que fist le garrantie per le common ley, &c.*" Hereupon many things worthy to be knowne are to be understood.

[a] First, that if a man infeoffeth another of an acre of ground with warrantie, and hath issue two sons, and dieth seised of another acre of land, of the nature of burrough English, the feoffee is impleaded, albeit the warrantie descendeth onely upon the eldest sonne, yet may he vouch them both; the one as heire to the warrantie, and the other as heire to the land: for if he should vouch the eldest son only, then should he not have the fruit of his warranty, viz. a recoverie in value; the youngest son only he cannot vouch, because he is not heire at the common law, upon whom the warrantie descendeth. (1)

[a] 40. E. 3. 14. (Mod. Rep. 96. 2. Cro. 218.)

[376. b.]

[b] So it is of heires in gavelkind, the eldest may bee vouched as heire to the warranty, and the other sonnes in respect of the inheritance descended unto them. [c] And in like sort, the heire at the common law, and the heire of the part of the mother, shall bee vouched: but the heire at the common law may be vouched alone in both these cases, at the election of the tenant: *et sic de similibus.* [d] In the same manner if a man dieth seised of certaine lands in fee, having issue a sonne and a daughter by one venter, and a sonne by another, the eldest sonne entreth and dieth, the land descends to the

[b] 22. E. 4. 10. 4. E. 3. 55. 27. H. 6. 1, 2. 11. E. 3. Det. 7. (8. Rep. 8. b.) [c] 49. Ass. 4. 38. E. 3. 22. (Hob. 25.) [d] 32. E. 3. Vouch. 94. 35. H. 6. 33.

† *car il ne serra barre—ne luy ledera,* L. and M. and Roh.

(1) 38. E. 3. 22. 43. E. 3. 19. 48. Ass. 41. 4. E. 3. 55. 21. E. 3. 46. 21. E. 3. 36. 11. H. 7. 12. 6. H. 7. 2. Hale's MSS.

the sister; in this case the warrantie descendeth on the sonne, and he may be vouched as heire, and the sister, as heire of the land: in which and the other case of burrough English, the sonne and heire by the common law having nothing by discent, the whole losse of the recoverie in value lieth upon the heires of the land, albeit they be no heires to the warrantie. Then put the case that there is a warrantie paramount, Who shall deraigne that warrantie? and to whom shall the recompence in value goe? Some have said, that as they are vouched together, so shall they avouch over, and that the recompence in value shall enure according to the losse; and that the effect must pursue the cause, as a recoverie in value by a warrantie of the part of the mother shall goe to the heire of the part of the mother, &c.

Pl. Com. 515.

Some others hold, that it is against the maxime of law, that they that are not heires to the warrantie should joyne in voucher, or to take benefit of the warrantie which descended not to them; but that the heire at the common law, to whom the warrantie descended, shall deraigne the warrantie, and recover in value; and that this doth stand with the rule of the common law.

(2. Cro. 218.)

Others hold the contrarie, and that this should be both against the rule of law, and against reason also; for by the rule of law [e] the vouchee shall never sue to have execution in value, untill execution be sued against him. But in this case execution can never be sued against the heire at the common law, therefore he cannot sue to have execution over in value. Secondly, it should be against reason, that the heire at the common law should have *totum lucrum*, and the speciall heires *totum damnum*. I finde in our bookes, [f] that this reason is yeelded, that the speciall heire should not be vouched only; for (say they) if the speciall heires should be vouched only, then could not they deraigne the warrantie over; which should be mischievous, that they should lose the benefit of the warrantie, if they should be vouched only. But if the heire at the common law were vouched with them, (as by the law he ought) all might be saved; and therefore studie well this point how it may be done.

[e] 17. E. 2. tit. Recover in value 33. 1. E. 3. 12. 33. E. 3. Judgm. 222. 14. E. 3. ib. 160. 10. E. 3. 52. 18. E 3. 51. Lib. 1. fol. 96. Shelleye's case. [f] 32. E. 3. Vouch. 94. per Greene. (Plowd. 11. a. Manxel's case.)

[g] If tenant in generall taile be, and a common recoverie is had against him and his wife, where his wife hath nothing, and they vouch, and have judgement to recover in value, tenant in taile dieth, and the wife surviveth; for that the issue in taile had the whole losse, the recompence shall enure wholly to him; and the wife, albeit she was partie to the judgement, shall have nothing in the recompence, for that she loseth nothing.

[g] Vide Pl. Com fol. 514. (3. Rep. 5. 10. Rep 35. Dr. and Stud. 41. b. 8. Rep. 101. b. See Cro. Eliz. 670.)

[h] If the bastard eigne enter and take the profits, he shall be vouched only, and not the bastard and the mulier; because the bastard is in appearance heire, and shall not disable himselfe.

[h] 17. E. 3. 59. 20. E. 3. Vouch. 129. 32. E. 3. Vouch. 94. 5. H. 7. 2.

[i] If a man be seised of lands in gavelkinde, and hath issue three sonnes, and by obligation bindeth himselfe and his heires and dieth, an action of debt shall be maintainable against all the three sonnes, for the heire is not chargeable unlesse he hath lands by discent.

[i] 11. H. 7. 12. 21. E. 3. tit. Det. 7. Dy. 5. El. 238. (Moor 74.)

[k] So if a man be seised of land on the part of his mother, and binde himselfe and his heires by obligation, and dieth, an action of debt shall lie against the heire on the part of the mother, without naming of the heire at the common law. And so note a

[k] 11. H. 7. 12. (2. Cro. 25. b. 218. 1. Siderf.

diverſitie betweene a perſonall lien of a bond, and a reall lien of a warrantie.

238. 271. 420. Hob. 15.)

Sect. 719.

* *NOTA, ſi terre ſoit done a un home, et a les heires males de ſon corps engendres, et pur default de tiel iſſue, le remainder ent a ſes heires females de ſon corps engendres, et puis le donee en le taile fait feoffment en fee oveſque garrantie accordant, et ad iſſue fits et file et moruſt, cel garrantie n'eſt forſque lineal garrantie a le fits a demaunder per briefe de* formedon en le diſcender; *et auxy il n'eſt forſque lineall a le file, a demaunder meſme la terre per briefe de* formedon en le remainder, *ſinon † frere deviaſt ſans iſſue male, pur ceo que el claime come heire female de la corps ſon pere engendres. Mes en ceſt cas, ſi ſon frere en ſa vie releaſaſt al diſcontinuee, &c. ove garrantie, &c. et puis moruſt ſauns iſſue, ceo eſt un collateral garrantie a le file, pur ceo que el ne poit conveyer a luy le droit que el ad per force de le remaynder per aſcun meane de diſcent per ſon frere, ‡ pur ceo ‡ que le frere eſt collateral a le title ſa ſoer, et pur ceo ſon garrantie eſt collateral, &c.*

NOTE, if land bee given to a man, and to the heirs males of his bodie begotten, and for default of ſuch iſſue, the remainder thereof to his heires females of his body begotten, and after the donee in tayle maketh a feoffement in fee with warrantie accordingly, and hath iſſue a ſon and a daughter and dieth, this warrantie is but a lineall warrantie to the ſonne to demand by a writ of *formedon* in the diſcender; and alſo it is but lineall to the daughter, to demand the ſame land by writ of *formedon* in the remaynder, *unleſſe the* brother dieth without iſſue male, becauſe ſhee claimeth as heire female of the bodie of her father ingendred. But in this caſe, if her brother in his life releaſe to the diſcontinuee, &c. with warrantie, &c. and after dieth without iſſue, this is a collaterall warranty to the daughter, becauſe ſhee cannot convey to her the right which ſhee hath by force of the remainder by any meanes of diſcent by her brother, for that the brother is collateral to the title of his ſiſter, and therefore his warranty is collaterall, &c.

HERE it appeareth, that [*l*] whenſoever the anceſtor taketh any eſtate of freehold, a limitation after in the ſame conveyance to any of his heires, are words of limitation, and not of purchaſe, albeit in words it be limited by way of remainder; (1) and therefore here the remainder, to the heires females, veſteth in the tenant in taile himſelfe. And it is good to bee knowne, that for learning ſake, and to find out the reaſon of the law, theſe limitations to

[377. a.]

[*l*] 24. E. 3. 36. 27. E. 3. age 103. 38. E. 3. 26. 40. E. 3. 9. 37. H. 8. Br. Noſme 1. & 40. & tit. Done & Rem. 61. (Ant. 17. b. 22 b. 2. Roll. Abr. 417.

* *Nota—Item*, L. and M. and Roh.

† *ſinon—ſi ſon*, L. and M. Roh. Pinſon, Redman, and MSS. This reading, which materially alters the ſenſe of the above paſſage of Littleton, was much relied on by lord Vaughan as above cited, and is alſo accordingly confirmed by edit. 1577, by R. Tottel; 1594, by C. Yetſweirt; and by that of 1639. It is however obſervable, that the text ſtood as above in the firſt edition of Coke upon Littleton, 1628, and in all the editions to the 9th incluſive.

‡ *et* added L. and M. and Roh.

‡ *que* not in L. and M. nor Roh.

(1) [See Note 329.]

1. Roll. Abr. 627, 628.) 1. H. 6. 4. 11. H. 6. 13, 14. 28. H. 6. Devis. 18. Statham. Devise Pl. Com. 414. 20 H. 6. 43. Vid. Litt. ca. Taile, Sect. 24. 37. H. 8. Br. done & rem. 61. & tit. nosme 1. & 40. (Ant. 25. a. b.) (Vaugh. 368. g. 376. Ant. 374. a.)

to the heires males of the bodie, and after to the heires females of the bodie may be put: but it is dangerous to use them in conveyances, for great inconveniencies may arise therupon; for if such a tenant in tayle hath issue divers sons, and they have issue divers daughters, and likewise if tenant in tayle hath issue divers daughters, and each of them hath issue sonnes, none of the daughters of the sons, nor the sonnes of the daughters, shall ever inherite to either of the said estates tayle: and so it is of the issues of the issues, for that (as hath beene said) the issues inheritable must make their claynie eyther onely by males, or onely by females, so as the females of the males, or males of the females, are wholly excluded to bee inheritable to eyther of the said estates tayle: but where the first limitation is to the heires males, let the limitation be, for default of such issue, to the heires of the bodie of the donee, and then all the issues, be they females of males, or males of females, are inheritable.

If a man give lands to a man, to have and to hold to him and the heires males of his bodie, and to him and to the heires females of his bodie, the estate to the heires females is in remaynder, and the daughters shall not inherite any part, so long as there is issue male; for the estate to the heires males is first limited, and shall be first served; and it is as much to say, and after to the heires females, and males in construction of law are to be preferred.

Sect. 720.

(9. Rep. 127.) (Plowd. 403. a.)

ITEM, jeo av oye dire, que en temps le roy Richard *le second, il y fuit un justice del common banke demurrant en* Kent, *appel* Richel, *que avoit issue divers fits, et son entent fuit, que son eigne fits averoit certaine terres et tenements a luy, et a les heires de son corps engendres; et pur default d'issue, le remainder a le second fits, &c. et issint a le tierce fits, &c. et pur ceo que il voile que nul de ses fits alieneroit, ou ferroit garrantie pur barrer ou leder les auters queux serront en le remainder, &c. il fist faire tiel indenture a tiel effect, c'estascavoir, que les terres et tenements fueront dones a son eigne fits sur tiel condition, que si l'eigne fits aliena en fee, ou en fee taile, &c. ou si ascun de ses fits alienast, &c. que adonque lour estate cessera et serroit void, et que adonque mesmes les terres et tenements immediate remaindront a le second fits, et a les heires de son corps engendres,*

ALSO, I have heard say, that in the time of king *Richard* the second, there was a justice of the common place, dwelling in *Kent*, called *Richel*, who had issue divers sonnes, and his intent was, that his eldest sonne should have certaine lands and tenements to him, and to the heires of his bodie begotten; and for default of issue, the remainder to the second sonne, &c. and so to the third sonne, &c. and because he would that none of his sons should alien, or make warrantie to bar or hurt the others that should be in the remainder, &c. he causeth an indenture to be made to this effect, viz. that the lands and tenements were given to his eldest son upon such condition, that if the eldest son alien in fee, or in fee taile, &c. or if any of his sons alien, &c. that then their estate should cease and be void, and that then the same lands and tenements

engendres, * et sic ultra, *le remainder as auters de ses fits, et livery de seisin fuit fait accordant.*

ments immediately should remain to the second son, and to the heires of his body begotten, *et sic ultra*, the remainder to his other sonnes, and livery of seisin was made accordingly.

"*JEO ay oye dire, &c.*" Those things that one hath by credible hearesay, by the example of our author, are worthy of observation. This invention, devised by justice *Richel* in the reigne of king *Richard* the second, who was an Irishman borne, and the like by *Thirning*, chiefe-justice in the reigne of *Henry* the fourth, were both full of imperfections; for *Nihil simul inventum est et perfectum*, and *Sæpe viatorem nova non vetus orbita fallit*: and therefore new inventions in assurances are dangerous. And hereby it may appeare, that it is not safe for any man (be he never so learned) to be of counsell with himselfe in his owne case, but to take advice of other great and learned men.

21. H. 6. f. 33. L. 6. f. 42. b. sir Anthony Mildmaye's case.

(1. Rep. 84.)

Non prosunt dominis quæ prosunt omnibus, artes.

And the reason hereof is, *in suo quisque negotio hebetior est, quàm in alieno.*

[*m*] And the same judge, in his owne name, &c. brought an action upon his case against others, and obtained a verdict so as the right of the cause was tried on his side; yet for that upon his owne shewing in his count the action did not lye, *ex assensu omnium justiciariorum præter querentem Richel*, judgement was given against him: but let us now leave this judge for example to others, and let us return to our author.

[*m*] 2. H. 4. f. 11. in Action sur le case.

[378. a.]

Sect. 721.

MES il semble per reason, que touts tielx remainders en la forme avantdit sont voides et de nul value, et ceo pur trois causes. Un cause est, pur ceo que chescun remainder que commence per un fait, il covient que le remainder soit en luy a que le remainder est tayle per force de mesme le fait, avant liverie de seisin est fait a luy que avera le franktenement; car en tiel case le nessance et le estre de le remainder est per le livery de seisin a celuy que avera le franktenement, et tiel remainder ne fuit al second fits al temps de livery de seisin en le cas avantdit, &c.

BUT it seemeth by reason, that all such remainders in the forme aforesaid are void and of no value, and that for three causes. One cause is, for that every remainder which beginneth by a deed, it behooveth that the remainder be in him to whom the remainder is entailed by force of the same deed, before the livery of seisin is made to him which shal have the freehold; for in such case the growing and the being of the remainder is by the livery of seisin to him that shall have the freehold, and such remainder was not to the second sonne at the time of the livery of seisin in the case aforesaid, &c.

HERE

* *ceo sur mesme condition, scilicet, que si le second fits alienast, &c. que adonques son estate cessera, et que adonques mesmes les terres et tenements remaindront al tierce fits, et a les heires de son corps engendres*, added L. and M. and Roh.

HERE our authour is of opinion, that these remainders in the forme aforesaid, are void and of no value for three causes.

(Plowd 25. a. 29. a. 2. Cro. 360.)

" *Un cause est, &c.*" Here hee setteth downe a rule concerning remainders, viz. every remainder which commenceth by a deed ought to vest in him to whom it is limited, when livery of seisin is made to him that hath the particular estate.

[n] 7 R. 2. Scire facias. (Ant. 354. b.)

First, *Littleton* saith by deed, [n] because if lands bee granted and rendred by fine for life, the remainder in taile, the remainder in fee, none of these remainders are in them in the remainder, untill the particular estate be executed.

(Cro. Eliz. 360.)

(2. Roll. Abr. 419.)

[o] 22. H. 6. tit. Feoffments & Faits, 99. 27. E. 3. 87. 11. R. 2. Detinue, 46. 2. H. 7. 13. 12. H. 7. 27. 27. H. 8. 42.

Secondly, that the remainder bee in him, &c. at the time of the livery. This is regularly true, but yet it hath divers exceptions. First, unlesse the person that is to take the remainder be not *in rerum naturâ*; [o] as if a lease for life be made, the remainder to the right heires of *I. S. I. S.* being then alive, it sufficeth that the inheritance passeth presently out of the lessour, but cannot vest in the heire of *I. S.* for that living his father he is not *in rerum naturâ*, for *non est hæres viventis*; so as the remainder is good upon this contingent, viz. if *I. S.* die during the life of the lessee, 12. E. 4. 2. 21. H. 7. 11. 7. H. 4. 23. 11. H. 4. 74. 18. H. 8. 3. 38. E. 3. 26. 30. Ass. 47. 6. R. 2. qu. Jur. clam. 20. (1. Rep. 94.)

[p] Pl Com. Colthirst's case, fol. 25. 29. (3. Rep. 20. 2. Rep. 57. a. b.)

[p] And so it is if a man make a lease for life to *A. B.* and *C.* and if *B.* survive *C.* then the remainder to *B.* and his heires. Here is another exception out of the said rule; for albeit the person be certaine, yet inasmuch as it depends upon the dying of *B.* before *C.* the remainder cannot vest in *C.* presently. And the reason of both these cases in effect is, because the remainder is to commence upon limitation of time, viz. upon the possibilitie of the death of one man before another, which is a common possibilitie.

(8. Rep. 73.)

(Hob. 130, 131.)

A man letteth lands for life upon condition to have fee, and warranteth the land *in formâ prædictâ*, afterward the lessee performeth the condition whereby the lessee hath fee, the warranty shall extend and increase according to the state. And so it is in that case if the lessor had died before the performance of the condition, the warrantie shall rise and increase according to the estate, and yet the lessor himselfe was never bound to the warrantie, but it hath relation from the first livery. And by this it appeareth that a warranty being a covenant reall executory, may extend to an estate *in futuro*, having an estate, whereupon it may worke in the beginning. But if a man grant a seigniorie for yeares upon condition to have fee with a warranty *in formâ prædictâ*, and after the condition is performed, this shall not extend to the fee, because the first estate was but for yeares, which was not capable of a warranty. And so it is, if a man make a lease for yeares, the remainder in fee, and warrant the land *in formâ prædictâ*, he in the remainder cannot take benefit of the warranty, because he is not partie to the deed; and immediately he cannot take, if he were partie to the deed, because he is named after the *habendum*, and the estate for yeares is not capable of a warrantie. And so it is if land be given to *A.* and *B.* so long as they joyntly together live, the remainder to the right heires of him that dieth first, and warrant

[378. b.

rant the land *in formâ prædictâ*; *A.* dieth, his heire shall have the warrantie; and yet the remainder vested not during the life of *A.* for the death of *A.* must precede the remainder, and yet shall the heire of *A.* have the land by discent.

(1. Rep. 17.)

Sect. 722.

*LE second cause est, si le primer fits alienast les tenements en fee, adonques est le franktenement et le fee simple en l'alienee, et en nul auter; et si le donour avoit ascun reversion, per tiel alienation le reversion est discontinue: donques coment per ascun reason poit * ceo estre que tiel remainder commencera son estre et son nessance immediate apres tiel alienation fait a un estrange, que ad per mesme l'alienation franktenement et fee simple, &c.? Et auxy si tiel remainder serroit bone, adonques purroit il enter sur l'alienee, lou il n'avoit ascun maner de droit avant l'alienation, que serra inconvenient.*

THE second cause is, if the first sonne alien the tenements in fee, then is the freehold and the fee simple in the alienee, and in none other; and if the donor had any reversion, by such alienation the reversion is discontinued: then how by any reason may it be, that such remainder shall commence his being and his growing immediately after such alienation made to a stranger, that hath by the same alienation a freehold and fee simple, &c.? And also if such remainder should bee good, then might hee enter upon the alienee, where he had no manner of right before the alienation, which should bee inconvenient.

"*SI le primer fits alienast, &c.*" By the alienation of the donee two things are wrought.

First, the franktenement and fee is in the alienee.

Secondly, the reversion is devested out of the donor. [q] And therefore by the alienation that transferreth the freehold and fee simple to the alienee, there can no remainder be raised and vested in the second sonne. [r] As if a man make a lease for life upon condition that if the lessor grant over the reversion, that then the lessee shall have fee; if the lessor grant the reversion by fine, the lessee shall not have fee; for when the fine transferreth the fee to the conusee, it should bee absurd, and repugnant to reason, that the same fine should worke an estate in the lessee; for one alienation cannot vest an estate of one and the same land to two severall persons at one time.

[q] 21. H. 7. 11. 27. H. 8. 24.

[r] 6. R. 2. quid juris clam. 20. (Perk. Sect. 729. fol. 275, 276. Dyer 209. a. Plowd. 487.) Argumentum ex absurdo. (5. Rep. 8. a.)

In a man's owne grant, which is ever taken most forcibly against himselfe, the reason of *Littleton* doth hold; for it hath beene resolved by the justices, [s] that if a man seised of an advowson in fee by his deed granteth the next presentation to *A.* and before the church becommeth void, by another deed grant the next presentation of the same church to *B.* the second grant is void, for *A.* had the same granted to him before; and the grantee shall not have the second avoydance by construction, to have the next avoydance, which the grantor might lawfully grant, for the grant of the next avoydance

[s] 20. H. 8. Presentments al Eglises. Br. 52. 33. H. 8. ib. 55. 29. H. 8. Dier 35. 11. Eliz. 282, 283. (5. Rep. 56.)

* *ceo* not in L. and M. nor Roh.

[r] 15. H. 7. 7. 19. E. 3. quar. imp. 154. (3. Cro. 790, 791.) (2. Cro. 691. contra Winch 04. s. c. Hob. 120. Ant. 189. a.)

avoydance doth not import the second presentation. [r] But if a man seised of an advowson in fee take wife; now by act in law is the wife intitled to the third presentation, if the husband die before. The husband grant the third presentation to another, the husband die, the heire shall present twice, the wife shall have the third presentation, and the grantee the fourth; for in this case it shall be taken the third presentation, which he might lawfully grant: and so note a diversitie betweene a title by act in law, and by act of the partie; for the act in law shall worke no prejudice to the grantee.

[379. a.]

(Ant. 214. b. 218. a.)

" *Auxi si tiel remainder serroit bone, &c.*" The force of this argument is, that seeing the estate of the alienee (albeit the words of the condition be, that the state should cease and be void) being an estate of inheritance in lands or tenements, cannot cease or be void before the state be defeated by entrie; then if this remainder should be good, then must it give an entrie upon the alienee to him that had no right before, which should be against the expresse rule of law, viz. that an entrie cannot be given to a stranger to avoid a voydable act, as before hath beene said in the Chapter of Conditions.

Vide Sect. 87, &c.

" *Lequel serra enconvenient.*" Here note three things. First, that whatsoever is against the rule of law is inconvenient. Secondly, that an argument *ab inconvenienti* is strong to prove it is against law, as often hath beene observed. Thirdly, that new inventions (though of a learned judge in his owne profession) are full of inconvenience, *Periculosum est res novas et inusitatas inducere.*

Eventus varios res nova semper habet.

Sect. 723.

LA tierce cause est, quant la condition est tiel, que si l'eigne fits alienast, &c. que son estate cessera ou serroit void, &c. donques apres tiel alienation, &c. poit le donor enter per force de tiel condition †, coment il semble; et issint le donor ou ses heires en tiel case doient pluis tost aver la terre que le second fits, que n'avoit ascun droit devant tiel alienation; et issint il semble que tielx remainders en le cas avantdit sont voides ‡.

THE third cause is, when the condition is such, that if the elder sonne alien, &c. that his estate shall cease or bee void, &c. then after such alienation, &c. may the donor enter by force of such condition, as it seemeth; and so the donor or his heires in such case ought sooner to have the land than the second sonne, that had not any right before such alienation; and so it seemeth that such remainders in the case aforesayd are void.

(1. Rep. 48. 62. 120. 10. Rep. 38. 9. Rep. 124. 6. Rep. 40. . Rep. 5c. 8. 224.)

HERE it is to bee observed, that part of the condition that prohibiteth the alienation made by tenant in taile is good in law, with such distinction as hath beene before said in the Chapter of

† &c. added L. and M. and Roh. ‡ &c. added L. and M. and Roh.

of Conditions. And the consequent of the condition, viz. that the lands should remaine to another, &c. is void in law, and by the opinion of *Littleton* the donor may re enter for the condition broken; for *Utile per inutile non vitiatur:* which being in case of a condition for the defeating of an estate, is worthy of observation.

(1. Roll. Abr. 408.)

And it is to bee noted, that after the death of the donor, the condition descendeth to the eldest sonne, and consequently his alienation doth extinguish the same for ever; wherein the weaknesse of this invention appeareth: and therefore *Littleton* here saith, that it seemeth that the donor may re-enter, and speaketh nothing of his heires. A man hath issue two sonnes, and maketh a gift in taile to the eldest, the remainder in fee to the puisne, upon condition, that the eldest shall not make any discontinuance with warrantie to barre him in the remainder; and if he doth, that then the puisne sonne and his heires shall re-enter, the eldest make a feoffment in fee with warrantie, the father dieth, the eldest sonne dieth without issue, the puisne may enter; but if the discontinuance had beene after the death of the father, the puisne could not have entred. In this case foure points are to be observed. First, as *Littleton* here saith, the entrie for the breach of the condition is [379. b.] given to the father, and not to the puisne sonne. Secondly, that by the death of the father the condition descends to the elder sonne, and is but suspended, and is revived by the death of the eldest sonne without issue, and descendeth to the youngest sonne. Thirdly, that the feoffment made in the life of the father cannot give away a condition that is collaterall, as it may doe a right. Fourthly, that a warrantie cannot binde a title of entrie for a condition broken (as hath beene said); but if the discontinuance had beene made after the death of the father, it had extinct the condition: which case is put to open the reason of our author's opinion. (1)

(10. Rep. 40. b.)
(10. Rep. 109.)
41. E. 3. fol.
Vid. Sect. 446.
(10. Rep. 95.)

In these last three Sections our author hath taught us an excellent point of learning, that when any innovation or new invention starts up, to trie it with the rules of the common law (as our author here hath done); for these be true touchstones to sever the pure gold from the drosse and sophistications of novelties and new inventions. And by this example you may perceive, that the rule of the old common law being soundly (as our author hath done) applyed to such novelties, it doth utterly crush them and bring them to nothing; and commonly a new invention doth offend against many rules and reasons (as here it appeareth) of the common law; and the antient judges and sages of the law have ever (as it appeareth [*] in our bookes) suppressed innovations and novelties in the beginning, as soone as they have offered to creepe up, lest the quiet of the common law might be disturbed: and so have [a] acts of parliament done the like, whereof by the authorities quoted in the margent, you may in stead of many others, upon this occasion take a little taste. But our excellent author, in all his three bookes, hath said nothing but *Ex veterum sapientium ore et more.*

(Plowd. 413. Ant. 282. b.)
[*] 31. E. 3. Gager deliverance 5. 22. Ass. 12. 38. E. 3. 1. 2. H. 4. 18, &c.
[a] 1. E. 3. cap. 15. stat. 3. 18. E. 3. cap. 1. & 6. 4. H. 4. ca. 2. 11. H. 6. c. 23. 2. E. 4. cap. 8, &c.

(1) [See Note 330.]

Sect. 724.

(2. Inst. 293. cap. 3.)

ITEM, a le common ley, devant l'estatute de Gloucester, *si tenant per le curtesie ust alien en fee ovesque garrantie *, apres son decease ceo fuit un barre al heire †, sicome appiert per les parols de mesme l'estatute: mes il est remedy per mesme l'estatute, que le garrantie de le tenant per le curtesie ne serroit my bar al heire, sinon que il y ad assets per discent per le tenant per le curtesie; car devant le dit estatute, ceo fuit un collateral garrantie al heire, pur ceo que il ne puissoit conveyer ascun title de discent a les tenements per le tenant per le curtesie, mes tantsolement per sa mere, ou auters de ses ancestors ‡; et ceo est le cause pur que il fuit collateral garrantie.*

ALSO, at the common law, before the statute of *Gloucester*, if tenant by the curtesie had aliened in fee with warrantie, after his decease this was a barre to the heire, as it appeareth by the words of the same statute: but it is remedied by the same statute, that the warrantie of tenant by the curtesie shall bee no barre to the heire, unlesse that hee hath assets by discent by the tenant by the curtesie; for before the sayd statute, this was a collaterall warrantie to the heire, for that hee could not convey any title of discent to the tenements by the tenant by the curtesie, but only by his mother, or other of his ancestors; and this is the cause why it was a collateral warrantie.

Sect. 725.

MES si home inheritor prent feme, les queux ont § fits enter eux, et le pier devie, et le fits entra en la terre, et endowa sa mere, et puis le mere alien ceo que el ad en sa dower, a un auter en fee ove garrantie accordant, et puis morust, et le garrantie discendist a le fits, ore le fits serra barre a demaunder mesme la terre per cause de la dit garrantie; pur ceo que tiel collateral garrantie de tenaunt en dower n'est pas remedie per ascun estatute. Mesme la ley est, lou tenaunt a terme de vie fait un alienation ovesque garrantie, &c. et morust, et le garrantie discendist a celuy que avoit le reversion ou le remainder ‖, ils serront barres per tiel garrantie ⸸.

BUT if a man inheritor taketh wife, who have issue a sonne betweene them, and the father dieth, and the sonne entreth into the land, and endow his mother, and after the mother alieneth that which shee hath in dower, to another in fee with warrantie accordant, and after dieth, and the warrantie descendeth to the sonne, now the son shall be barred to demand the same land by cause of the sayd warrantie; because that such collaterall warrantie of tenaunt in dower is not remedied by any statute. The same law is, where tenant for life maketh an alienation with warrantie, &c. and dieth, and the warranty descendeth to him which hath the reversion or the remainder, they shall be barred by such warrantie.

[380. a.]

OF

* *accord* added L. and M. and Roh.
† *&c.* added L. and M. and Roh.
‡ *&c.* added L. and M. and Roh.
§ *issue* added L. and M. and Roh.
‖ *&c.* added L. and M. and Roh.
⸸ *&c.* added L. and M. and Roh.

OF this and the subsequent Section sufficient hath beene sayd before in this Chapter, *Sect.* 697. (11. H. 7 cap. 20. Ant. 365. b.)

" *N'est pas remedie per ascun statute.*" But by a statute made since, this case is remedied, as you see before, *Sect.* 697.

Sect. 726.

ITEM; en le dit case, si issint fuit que quant le tenant en dower alienast, ‡ *&c. son heire fuit deins age, et auxy al temps que le garrantie discendist sur luy il fuit deins age; en cest cas l'heire poit apres enter sur l'alienee, nient contristeant le garrantie discendist, &c. pur ceo que nul lachesse serra adjudge en l'heire deins age, que il n'entra pas sur l'alienee en la vie le tenant en dower. Mes si l'heire fuit deins age al temps del alienation, &c. et puis il devient al pleine age en la vie de le tenant en dower, et issint esteant de pleine age il n'entra pas sur l'alienee en la vie de le tenant en dower, et puis le tenaunt en dower morust, &c. la peradventure l'heire serra barre per tiel garrantie; pur ceo que il serra recte sa follie, que il esteant de pleine age ne entra pas en la vie de le tenaunt en dower, &c.*

ALSO, in the case aforesaid, if it were so that when the tenant in dower aliened, &c. his heire was within age, and also at that time that the warrantie descended upon him hee was within age; in this case the heire may after enter upon the alienee, notwithstanding the warrantie descended, &c. because no lachesse shal be adjudged in the heire within age, that hee did not enter upon the alienee in the life of tenant in dower. But if the heire were within age at the time of the alienation, &c. and after he commeth to full age in the life of tenant in dower, and so being of full age he doth not enter upon the alienee in the life of tenant in dower, and after the tenant in dower dieth, &c. there peradventure the heire shall bee barred by such warrantie; because it shall bee accounted his folly, that he being of full age did not enter in the life of tenant in dower, &c.

HERE note this diversitie: if the heire bee within age at the time of the discent of the warrantie, he may enter and avoyd the estate either within age, or at any time after his full age: and *Littleton* saith well, that the infant in this case may enter upon the alienee; for if he bring his action against him, he shal be barred by this warrantie, so long as the state whereunto the warrantie is annexed continue, and be not defeated by entrie of the heire: but if hee be within age at the time of the alienation with warrantie, and become of full age before the discent of the warranty, the warranty shal barre him for ever. Our author putteth his cases where the entrie of the infant is lawfull; [a] for where the entrie of the infant is not lawfull when the warrantie descendeth, the warrantie doth binde the infant, as well as a man of full age; and the reason thereof is, because the state whereunto the warrantie was annexed, continueth and cannot be avoided but by action, in which action the warrantie

18. E. 4. 13. 35. H. 6. 63. 28. Ass. 28. 32. E. 3. Gar. 30. (1. Rep. 120. 140.) (2. Roll. Abr. 773.) 35. H. 6. 63.

[380. b.]

[a] 3. H. 7. 9. 35. H. 6. 63. Br. tit. War. 54. 33. H. 8. tit. War. Br. 84. Lib. 1. fol. 67. a. in Archer's case

‡ &c. added L. and M. and Roh.

warrantie is a barre: and for the same reason likewise it is of a feme covert, if her entrie be not lawful, a warrantie descending on her during the coverture, doth bind her. [w] And albeit the husband be within age at the discent of the warrantie, yet if the entrie of the wife be taken away, the warrantie shall binde the wife.

& 140. Cholley's case. (1. Rep. 66) [w] 18. E. 3. 3. (F. N. B. 192. g. 2. Inst. 483.)

[q] And herein a diversitie is to bee observed betweene matters of record done or suffered by an infant, and matters *in fait*; for matters *in fait* he shall avoid either within age, or at full age, as hath beene said: but matters of record, as statutes merchants and of the staple, recognizances knowledged by him, or a fine levied by him, recoverie against him by default in a reall action (saving in dower) must be avoyded by him, viz. statutes, &c. by *audita querela*, and the fine and recoverie (1) by writ of error during his minoritie, and the like. And the reason thereof is, because they are judiciall acts, and taken by a court or a judge, therefore the nonage of the partie, to avoyd the same, shall be tried by inspection of judges, and not by the countrey. And for that his nonage must be tried by inspection, this cannot be done after his full age: and so is the law clerely holden at this day, though there be some difference in our bookes. But if the age be inspected by the judges, and recorded that he is within age, albeit he come of full age before the reversall, yet may it be reversed after his full age. [*] And so was it resolved by the whole court of king's bench in the case of *Kekewiche*.

[q] 20. E. 3. Audit. quer. 27. F. N. B. 104. k. 6. E. 3. 30. 17. E. 3. 76. 17. Ass. 53. 17. 21. E. 2. 4. 13. E. 3. Aud. quer. 26. 18. E. 3. Infant 61. 16. H. 7. 5. 15. E. 4. 5. 8. H. 6. 30. 1. H. 7. 15. (10. Rep. 43. Siderf. 321, 322. F. N. B. 104. k. Moor. 76. 460. 9. Rep. 30. b. 12. Rep. 122, 123.) 6. H. 8. Saver de default Br. 50. 3. H. 6. 10. 1. Mar. Dy. 104. (Ant. 131. a. Noy 16.) (Cro. Jac. 59. Yelv. 88. contra.) [*] Pasch. 13. Ja. R. in the king's bench.

If lands had beene given to the husband and wife and their heires, and the husband had made a feoffment to another, to whom a collaterall ancestor of the wife had released and died, and the husband died, (and this had beene before the statute of 32. *H.* 8.) this warrantie had so bound her waiveable right, as she could not waive her estate, and claime dower. Otherwise it is of an estate determined: for if a disseisor make a lease to the husband and wife during the life of the husband, and the husband dieth, she may disagree to this estate determined, to save herselfe from dammages. And so note a diversitie betweene an estate determined, and an estate bound by warrantie.

"*Nul laches serra adjudge en le heire deins age.*" *Laches*, or *lasches*, is an old French word for slacknesse, or negligence, or not doing. And the rule (that no negligence shall be adjudged in an infant) is true, where he is thereby to be barred of his entrie in respect of a former right, as by a discent; or of his former right, (as *Littleton* doth here put an example) by a warrantie where his entrie is congeable. But otherwise it is of conditions, charges and penalties going out of or depending upon the originall conveyance, for the laches or negligence shall be adjudged in those cases aswell in the infant as in any other. [y] *Vide Pl. Com. Stowel's case per totum*. And see further there, where an infant being tenant for life or yeares, shall be punished for doing or suffering of waste; and where he claimeth by purchase, a *cessavit* shall lie against him, if he pay not his rent by two yeares. And some have said, if he have the tenancie by discent, and he himselfe cesse, a *cessavit* doth lie, and he shall not have his age because it is of his owne cesser,

(Ante 171, b. 246. a. 337. b. 350. b.).

[y] Pl. Com. Stowel's case, 355, &c. (2. Rep. 44. Moor. 92. 4. Rep. 4. b. 9. Rep. 85.)

31.

(1) [See Note 331.]

31. *E.* 3. *Age* 54. But other bookes (as some conceive them) be against that: *Vid.* 9. *Edw.* 3. 50. 28. *E.* 3. 99. 14. *E.* 3. *Age* 88. 2. *E.* and others, which books doe not prove that the *cessavit* doth not lye in that case, but the contrary, that hee shall have his age to the end, hee may at his full age certainly know what to plead, or what arrerages to tender; for the land was originally charged with the seigniorie and services.

[381. a.]

* Sect. 727.

(Ant. 52. b. 315.)

MES ore per l'estatute fait 11. H. 7. cap. 10. *il est ordeine, si ascun feme discontinue, alien, release, ou confirme ove garrantie ascun terres ou tenements que el tient en dower pur terme de vie, ou en tayle del done sa primer baron, ou de ses ancesters, ou del done d'ascun auter seisie al use le primer baron, ou de ses ancesters, que touts tiels garranties, &c. serront voides; et que bien lirroit a cestuy que avoit ceux terres ou tenements, apres la mort de mesme la feme d'entrer.*

BUT now by the statute made 11. *H.* 7. *cap.* 10. it is ordained, if any woman discontinue, alien, release, or confirme with warrantie any lands or tenements which she holdeth in dower for terme of life, or in taile of the gift of her first husband, or of his ancestors, or of the gift of any other seised to the use of the first husband, or of his ancestours, that all such warranties, &c. shall be void; and that it shall bee lawfull for him which hath these lands or tenements, after the death of the same woman to enter.

THIS is an addition to *Littleton,* and therefore to be passed over. And hereof sufficient hath beene said before, *Sect.* 697.

Sect. 728.

ITEM, il est parle en le fine de le dit estatute de Gloucester, *que parle del alienation ovesque garrantie fait per le tenant per le curtesie en cest forme. Ensement, en mesme le manner, ne soit l'heire le feme apres la mort la pere et le mere barre d'action, s'il demanda l'heritage ou le mariage sa mere per briefe* d'entre, *que son pere aliena en temps sa mere, dont nul fine est levy en la court le roy: et issint per force de mesme l'estatute, si le baron del feme aliena l'heritage ou mariage sa feme en fee ove garrantie, &c. per son fait*

ALSO, it is spoken in the end of the said statute of *Gloucester,* which speaketh of the alienation with warrantie made by the tenant by the courtesie in this forme. Also, in the same manner, the heire of the woman after the death of the father and mother shall not bee barred of action, if hee demandeth the heritage or the marriage of his mother by writ of entry, that his father aliened in his mother's time, whereof no fine is levied in the king's court: and so by force of the same statute, if the husband

* This Section not in L. and M. nor Roh.

*fait en pais, ceo est clere ley, que cest garranty ne barrera my l'heire, sinon que il n'ad assets per discent.** band of the wife alien the heritage or mariage of his wife in fee with warrantie, &c. by his deed in the countrey, it is cleere law, that this warranty shall not bar the heire, unlesse hee hath assets by discent.

(Ant. 115. a. 360. a. 365. b. 369. a.) [a] Pl. Com. f. 75. 7. E. 3. 89. (3. Rep. 31. 59. 4. Rep. 50. b. 68. 76.) Vide Bracton lib. 4. f. 321. Fleta lib. 5. cap. 34. (6. Rep. Gregory's case. 5. Rep. 60. 7. Rep. 37. 8. Rep. 20. 118. 138. Plowd. 204, 205, 206. a. 465. 487. a. 11. Rep. 62. b.)

"*DONT nul fine est levy en le court le roy, &c.*" Here are three things worthy of observation concerning the construction of statutes. First, that [a] it is the most naturall and genuine exposition of a statute to construe one part of the statute by another part of the same statute, for that best expresseth the meaning of the makers. As here the question upon the generall words of the statute is, whether a fine levied onely by a husband seised in the right of his wife with warranty shall barre the heire without assets. And it is well expounded by the former part of the act, whereby it is enacted that alienation made by tenant by the courtesie with warrantie shall not bar the heire, unlesse assets descend. And therefore it should be inconvenient to intend the statute in such [381. b.] manner, as that he that hath nothing but in the right of his wife should by his fine levied with warrantie barre the heire without assets. And this exposition is *ex visceribus actus.*

(10. Rep. 43.) [b] Pl. Com. 246. b. Seignior Barkleye's case. Li. 9. fol. 26. in case del Abbot de Strata mercella. [c] 11. H. 4. 80 9. E. 4. 12. 21. H. 6. 28. 4. E. 4. 31. 32. H. 4 Formedon 15.

Secondly, the words of an act of parliament must bee taken in a lawfull and rightfull sense; as here the words being (whereof no fine is levied in the king's court) are to be understood, whereof no fine is lawfully or rightfully levied in the king's court. And therefore [b] a fine levied by the husband alone, is not within the meaning of the statute, for that fine should worke a wrong to the wife; but a fine levied by the husband and wife is intended by the statute, for that fine is lawfull and worketh no wrong. [c] So the statute of *W. 2. cap.* 5. saith (*Ita quod episcopus ecclesiam conferat*) is construed, *Ita quod episcopus ecclesiam legitimè conferat*; and the like in a number of other cases in our bookes. And generally the rule is, *Quod non præstat impedimentum quod de jure non sortitur effectum.*

(6. Rep. 20.)

Thirdly, that construction must be made of a statute in suppression of the mischiefe, and in advancement of the remedie, as by this case it appeareth. For a fine levied by the husband only is within the letter of the law; but the mischiefe was, the heire was barred of the inheritance of his mother, by the warrantie of his father without assets: and this act intended to apply a remedy, viz. that it should not barre unlesse there were assets, and therefore the mischiefe is to be suppressed, and the remedie advanced. *Et qui hæret in literâ, hæret in cortice,* as often before hath beene said.

* *&c.* added L. and M. and Roh.

Sect. 729.

(2. Inst. 294.)

MES le doubt est, si le baron alienast l'heritage sa feme per fine levy en la court le roy ovesque garrantie, &c. si ceo barrera l'heire sans ascun discent en value. † *Et quant a ceo, jeo voile icy dire certaine reasons, que jeo ay oye dit en cest matter. Jeo ay oye mon master sir* Richard Newton, *jades chiefe justice de common banke, dire un foits en mesme le banke, que tiel garrantie que le baron fait per fine levie en le court le roy barrera l'heire, coment que il* ‡ *ad riens per discent, pur ceo que l'estatute dit (dont nul fine est levy en le court le roy)* ‖ ; *et issint per son opinion cel garrantie per fine* ⸸ *demurt uncore un collateral garrantie, come il fuit a le common ley, nient remedy per le dit estatute, pur ceo que le dit estatute except alienations per fine ove garrantie.*

[382. a.]

BUT the doubt is, if the husband alien the heritage of his wife by fine levied in the king's court with warrantie, &c. if this shall barre the heire without any discent in value. And as to this, I will here tell certaine reasons, which I have heard said in this matter. I have heard my master sir *Richard Newton*, late chiefe-justice of the common pleas, once say in the same court, that such warrantie as the husband maketh by fine levied in the king's court shall barre the heire, albeit hee hath nothing by discent, because the statute saith (whereof no fine is levied in the king's court); and so by his opinion this warrantie by fine remaineth yet a collaterall warrantie, as it was at the common law, not remedied by the said statute, because the said statute excepteth alienations by fine with warrantie.

Sect. 730.

ET ascuns auters ont dit, et uncore diont le contrarie, et ceo est lour proofe, que come per mesme le chapiter de dit estatute il est ordeine, que le garrantie le tenant per le curtesie ne serra my barre al heire, sinon que il ad assets per discent, &c. coment que le tenant per le curtesie levie un fine de mesmes les tenements ovesque garrantie, &c. auxy fortment come il poit faire, uncore cel garranty ne barra my l'heire, sinon que il ad assets per discent, &c. Et jeo croy que ceo est ley; et pur ceo ils diont, que serroit inconvenient d'entender l'estatute en tiel forme, que un home

AND some others have said, and yet doe say the contrary, and this is their proofe, that as by the same chapter of the said statute it is ordained, that the warrantie of the tenant by the courtesie shall be no barre to the heire, unlesse that he hath assets by discent, &c. although that the tenant by the courtesie levie a fine of the same tenements with warrantie, &c, as strongly as hee can, yet this warrantie shall not barre the heire, unlesse that hee hath assets by discent, &c. And I beleeve that this is law; and therefore they say, that it should be

† *&c.* added L. and M. and Roh.
‡ *ad—n'ad,* L. and M. and Roh.
‖ *&c.* added L. and M. and Roh.
⸸ *&c.* added L. and M. and Roh.

home que n'ad riens forsque en droit sa feme purroit per fine levie per luy † *de mesmes* ‡ *les tenements queux il ad forsque en droit sa feme ove garranty, &c. barre l'heire de mesmes les tenements sans ascun discent de fee simple, &c. lou le tenant per le curtesie ceo ne puit faire.*

be inconvenient to intend the statute in such maner, as a man that hath nothing but in right of his wife might by fine levied by him of the same tenements which he hath but in right of his wife with warrantie, &c. barre the heire of the same tenements without any discent of fee simple, &c. where the tenant by the courtesie cannot doe this.

Sect. 731.

(Plowd. 57. b. Ant. 115. a. 360. a. 369. a. 381. b.) (10. Rep. 43. Ant. 381. b.) (2. Inst. 294.)

MES ils ont dit, que le statute serra entend solonque cel forme, scilicet, *lou le statute* § *dit, dont nul fine est levie en court le roy, ceo est a dire, dont nul loial fine est droiturelment levy en la court le roy. Et ceo est, dont nul fine de le baron et sa feme soit levie en le court le roy, car al temps de le fesans del dit estatute, chescun estate de terres ou tenements que ascun home ou feme avoit, que discenderoit a son heire, fuit fee simple sans condition, ou sur certaine conditions en fait ou en ley. Et pur ceo que adonques tiel fine poit droiturelment estre levie per le baron et sa feme, et les heires le baron garronteront, &c. tiel garrantie barrera l'heire,* ⸸ *et issint ils dient que cest l'entendement de l'estatute, car si le baron et sa feme fieront un feoffement en fee per fait en pais, son heire apres le decease le baron et sa feme avera briefe* d'entre sur cui in vitâ, &c. *nient obstant le garrantie de le baron, donque si nul tiel exception fuit fait en l'estatute de le fine levie, &c. donque l'heire averoit le briefe* d'entre, &c. *nient obstant le fine levie per le baron et sa feme, pur ceo que les parolx de l'estatute devant l'exception de fine levie, &c. sont generals, &c. c'estascavoir, que l'heire la feme apres le mort le pere et la mere ne soit barre d'action, s'il demaund*

BUT they have said, that the statute shall bee intended after this manner, *scilicet*, where the statute saith, whereof no fine is levied in the king's court, that is to say, whereof no lawfull fine is rightfully levied in the king's court. And that is, whereof no fine of the husband and his wife is levied in the king's court, for at the time of the making of the said statute, every estate of lands or tenements that any man or woman had, which should descend to his heire, was fee simple without condition, or upon certain conditions in deed or in law. And because that then such fine might rightfully be levied by the husband and his wife, and the heires of the husband should warrant, &c. such warrantie shall barre the heire, and so they say that this is the meaning of the statute, for if the husband and his wife should make a feoffement in fee by deed in the countrie, his heire after the decease of the husband and wife shall have a writ of entrie *sur cui in vitâ, &c.* notwithstanding the warrantie of the husband, then if no such exception were made in the statute of the fine levied, &c. then the heire should have the writ of entrie, &c. notwithstanding the fine levied by the husband and his wife, because the words

[382. b.]

† *mesme* added L. and M. and Roh.
‡ *mesmes* not in L. and M. nor Roh.
§ *dit—parle*, L. and M. and Roh.
⸸ *&c.* added L. and M. and Roh.

maund l'heritage ou le mariage sa mere per briefe d'entre, *que son pere aliena en temps sa mere, et issint coment que le baron et la feme alienent per fine, uncore ceo est voier, que le baron aliena en temps la mere, et issint il serroit en case de l'estatute, sinon que tielx parolx fueront,* scilicet, *dont nul fine est levie en la court le roy; et issint ils diont,* [383. a.] *que ceo est a entender, dont nul fine per le baron et sa feme est levie en la court le roy, lequel est loialment levie en tiel case; car si les justices ont conusans, que home que n'ad riens forsque en droit sa feme, voile levier un fine en son nosme solement, ils ne voylont, ne* * *unque devoyent prender tiel fine d'estre levie per le baron solement sans* † *sa feme, &c.* Ideo quære *de cest matter, &c.* ‡

words of the statute before the exception of the fine levied, &c. are generall, viz. that the heire of the wife after the death of the father and mother is not barred of action, if he demand the heritage or the marriage of his mother by writ of entrie, that his father aliened in the time of his mother, and so albeit the husband and wife aliened by fine, yet this is true, that the husband aliened in the time of the mother, and so it should bee in that case of the statute, unlesse that such words were, viz. whereof no fine is levied in the king's court; and so they say, that this is to be understood, whereof no fine by the husband and his wife is levied in the king's court, the which is lawfully levied in such case; for if the justices have knowledge, that a man that hath nothing but in the right of his wife, will levie a fine in his name onely, they will not, neither ought they to take such fine to be levied by the husband alone without his wife, &c. *Ideo quære* of this matter, &c.

"*JEO ay oye mon maister sir* R. Newton, *&c.*" who was a gentleman of an ancient family; in Latine, *de novâ villâ*; in French, *de neufe ville*; and a reverend learned judge, and worthily advanced to be chiefe-justice of the court of common pleas, whom our authour remembers with great reverence, as by his words you may perceive, calling him his master, and citeth his opinion delivered once in the court of common pleas, which our authour heard and observed (whose example therein it is necessary for our student to follow); but the latter opinion (as hath beene before observed) being *Littleton*'s owne, is against the opinion of the lord *Newton* [*d*], and the law is holden cleerely with our authour at this day; and our authour (as in all other cases) hath good authoritie in law to warrant his opinion: *Nullius hominis authoritas tantum apud nos valere debet, ut meliora non sequeremur si quis attulerit.*

[*d*] Bracton 321. Fleta lib. 5. cap. 34. 8. E. 2. Gar. 81. 18. E. 3. 51. 7. E. 3. 84. Pl. Com. 57. (3. Rep. 77.) Sect. 731.

"*Car si les justices ont conusance, &c.*" Hereby it appeareth [*e*] that the judge, if hee knoweth it, ought not to take knowledge of a fine that worketh a wrong to a third person.

[*e*] 33. H. 6. 52. 5. E. 3. 56. 2. Eliz. Dier 178. 1. H. 7. 9. 1. Mar. 89. 4. E. 3. 41. 7. Eliz. Dier 246. Vide Sect. 87, &c.

"*Que serroit inconvenient.*" *Argumentum ab inconvenienti,* is very forcible in law, as often hath beene observed.

Of the rest of these three Sections sufficient hath beene said before.

* *unque* not in L. and M. nor Roh.
† *nosme* added L. and M. and Roh.
‡ *&c.* not in L. and M. nor Roh.

Sect. 732.

ITEM, est ascavoir, que en ceux parolx, ou l'heire demande l'heritage, ou le mariage sa mere, cest parol (ou) est un disjunctive, et est autant a dire, si l'heire demande le heritage sa mere, scilicet, les tenements que sa mere avoit en fee simple per discent ou per purchase, ou si l'heire demaund le mariage sa mere, c'estascavoir, les tenements que fueront dones a sa mere en frankmariage.

ALSO, it is to be understood, that in these words, where the heire demands the heritage, or the marriage of his mother, this word (or) is a disjunctive, and is asmuch to say, if the heire demand the heritage of his mother, viz. the tenements that his mother had in fee simple by discent or by purchase, or if the heire demaund the marriage of his mother, that is to say, the tenements that were given to his mother in frankmariage. [383. b.]

(Ant. 16. a.) Vide Sect. 9.

SOME doe expound heritage of the mother to be the lands which the mother hath by discent; and that construction is true, but the statute, by the authoritie of *Littleton*, extendeth alsо where the mother hath it by purchase in fee simple; for so saith *Littleton* himselfe, that this word (inheritance) is not only intended where a man hath lands by discent, but where a man hath a fee simple by purchase, because his heires may inherit him. And albeit it be true, that the statute extendeth to an estate in frankmariage acquired by purchase, yet doth it extend also to all estates in taile, aswell by discent as by purchase; for that frankmariage is put but for an example.

Sect. 733.

ITEM, come est move ‡ *en divers faits ceux parolx en Latyne,* Ego et hæredes mei * warrantizabimus et imperpetuum defendemus; *il est a veier quel effect ad cel parol,* defendemus, *en tiels faits; et il semble que il n'ad pas l'effect de garrantie, ne emprent en luy* † *la cause de garrantie; car s'il issint serroit, que il prent effect ou cause de garrantie, donques il serroit* ‡ *mitte en ascuns fines levies en la court le roy: et home ne veiet* ‖ *ceo unque que cest parol* defendemus *fuit en ascun fines, mes tantsolement cest parol* warrantizabimus; *per que semble, que cest parol*

ALSO, where it is contained in divers deedes these words in Latine, *Ego et hæredes mei warrantizabimus et imperpetuum defendemus*; it is to bee seene what effect this word (*defendemus*) hath in such deeds; and it seemeth that it hath not the effect of warrantie, nor comprehendeth in it the cause of warranty; for if it should be so, that it tooke the effect or cause of warrantie, then it should bee put into some fines levied in the king's court: and a man never saw that this word (*defendemus*) was in any fine, but only this word (*warrantizabimus*);

‡ *move—mote*, L. and M. and Roh.
* *&c.* added L. and M. and Roh.
† *la* not in L. and M. nor Roh.
‡ *mitte—mote*, L. and M. and Roh.
‖ *ceo* not in L. and M. nor Roh.

parol § *et verbe* warrantizo, ¶ *fait la garrantie, et est la cause de garrantie, et nul auter verbe en nostre ley.*

rantizabimus); by which it seemeth, that this word and verbe *(warrantizo)* maketh the warrantie, and is the cause of warrantie, and no other word in our law.

" EGO *et hæredes mei warrantizabimus, et imperpetuum defende-*" *mus.*" Wherein three things are to be observed. First, that *hæredes mei* are words of necessitie, for otherwise the heires are not bound. [a] Secondly, though in the clause of the warrantie it bee not mentioned to whom, &c. yet shall it be intended to the feoffee. [b] Thirdly, that the feoffor may by expresse words warrant the land for the life of the feoffee, or of the feoffor, &c. but the recoverie in value shall bee in fee. [c] Of this *Bracton* writeth in this manner: *Et ego et hæredes mei warrantizabimus tali et hæredibus suis tantum vel tali et hæredibus et assignatis et hæredibus assignatorum, vel assignatis assignatorum, et eorum hæredibus, et acquietabimus et defendemus eos totam terram illam cum pertinentiis, contra omnes gentes, &c. Per hoc autem quod dicit (ego et hæredes mei) obligat se et hæredes ad warrantiam propinquos, et remotos, præsentes et futuros, et succedentes in infinitum. Per hoc autem quod dicit (warrantizabimus) suscipit in se obligationem ad defendendum suum tenementum in possessione rei datæ et assignatos suos et eorum hæredes et omnes alios, &c. Per hoc autem quod dicit (acquietabimus) obligat se et hæredes suos ad acquietandum si quis plus petierit servitii vel aliud servitium quam in cartâ donationis continetur. Per hoc autem quod dicit (defendemus) obligat se et hæredes suos ad defendendum si quis velit servitutem ponere rei datæ contra formam suæ donationis.* [d] Hereby it appeareth, that neither *defendere* nor *acquietare* doth create a warrantie, but *warrantizare* only. And as *Ego et hæredes mei warrantizabimus, &c.* in Latine doe create a warrantie; so, I and my heires shall warrant, &c. in English, doth create a warrantie also.

[384. a.]

[a] 6. E. 2. Vouch. 238. 12. E. 2. ib. 262. 14. H. 4. 15.
[b] 38. E. 3. 14.
[c] Bract. fol. 37. 238. & Lib. 5. 380, 381. Brit. fol. 106. b. Flet. lib. 5. cap. 15. & Lib. 6. cap. 23. 35. H. 8. 8.) Gar. 90. F. N. B. 134. b. Brit. ubi sup. Flet. ubi sup. 11. H. 6. 48. 6. E. 2. Gar. 262.
[d] 46. E. 3. 28. 11. H. 4. 41. 6. E. 2. Vouch. 262. 2. E. 4. 15. a. (Moor 175.)

[e] If a man be bound to *A.* in an obligation to defend such lands to *A.* whereof the obligor had infeoffed him for twelve yeares, &c. in this case if he be ousted by a stranger without being impleaded, the obligation is forfeit: but if he bee bound to warrant the land, &c. the bond is not forfeited, unlesse the obligee be impleaded, and then the obligor must be readie to warrant, &c.

[e] 2. E. 4. 15. tit. Det. 71. (2. Roll. Abr. 396. Cro. Car. 5. Dyer 255. a. Ant. 201. b. 4. Rep. 80. 9. Rep. 61.)

" *Donques il serra mit en ascuns fines, &c.*" Here *Littleton* draweth an argument from the forme and words of a fine; and his reason is this: that seeing that a fine is the highest and surest kinde of assurance in law, if *defendemus* had the force of a warrantie, it would have beene contained in fines: and on the other side, seeing this word *warrantizo* is contained in fines to create a warrantie, that therefore that word doth imply a warrantie, and not the other.

" *Et nul auter verbe en nostre ley.*" Here it appeareth, that no other verbe in our law doth make a warrantie, but *warrantizo* only, which is only appropriated to create a warrantie.

46. E. 3. 28. Vide Sect. 1.

But,

§ *et verbe* not in L. and M. nor Roh.

¶ *as, &c.* added L. and M. *&c.* only added in Roh.

Sect. 697. [*] 31. E. 3. Vouch. 24. 12. Rich. 2. tit. Cont. de Vouch. 35. 29. E. 3. 48. 30 E. 3 6. b. Symken Symons case. 8. E. 3. 61. 12. E. 3. Vouch. 27. Temps E. 1. Vouch. 302. 3. H. 6. 17. [f] Le stat. de Bigamis, c. 6. 2. H. 7. 7. 6. H. 7. 2. 48. E. 3 2. 31. E. 1. tit. Vouch. 292. Fitz. N. B. 134. b. 6. E. 2. Vouch. 258. (Vaugh. 118.) (F. N. B. 134. b.)

But, *Qui benè distinguit benè docet*; and here of necessitie you must distinguish, [*] first, betweene a warrantie annexed to a freehold or inheritance, (whereof *Littleton* here speaketh) and a warrantie annexed to a ward, which is a chattell reall; for there, grant, demise, and the like, doe make a warrantie. And of warranties annexed to freeholds and inheritances, some be warranties in deed, and some be warranties in law. A warrantie in deed, or an expresse warrantie, (whereof *Littleton* here speaketh) is created only by this word *warrantizo*; but warranties in law are created by many other words; they be therefore called warranties in law, because in judgment of law they amount to a warrantie without this verbe *warrantizo*. [f] As *dedi* is a warrantie in law to the feoffee and his heires during the life of the feoffor, but *concessi* in a feoffment or fine implyeth no warrantie. (1) But before the statute of *quia emptores terrarum*, if a man had given lands by the word *dedi*, to have and to hold to him and to his heires, of the donor and his heires, by certain services, then not only the donor but his heires also had beene bound to warrantie: but if before that statute a man had given lands by this word *dedi*, to a man and to his heires for ever, to hold of the chiefe lord, there the feoffor had not beene bound to warrantie but during his life, as at this day he is.

And albeit the words of the statute of *bigamis* be, *in cartis autem ubi continentur (dedi et concessi, &c.)* yet if *dedi* be contained alone, it doth import a warrantie; for the statute doth conclude, *ipse tamen feoffatur in vitâ suâ ratione proprii doni sui tenetur warrantizare*; so as *dedi* is the word that implyeth warrantie, and not *concessi*. Also where the words of the statute bee further, *sine clausulâ quae continet warrantiam*, the meaning of the statute is, that *dedi* doth import a warrantie in law, albeit there bee an expresse warrantie in the deed.

[g] Hil. 14. El. in Com. Banc. [h] Lib 4. fol. 80. in Nokes' case. 8. E. 3. 69. 9. E. 3. 15. 10. E. 3. 11. 20. E. 3. Cont. de Gar. 7. 31. E. 3. Vouch. 280. 32. E. 3. ib. 102. 43. E. 3. 3. 2. E. 3. tit. Cui in vita 17. 3. E. 3. Formedon 44. [i] 4. E. 2. Vouch. 245. 22. E. 3. 3. 14. H. 6. 2. 29. H. 6. 14. Lib. 4. fol. 122. in Bustard's case. 15. E. 3. Bar. 255.

For if a man make a feoffement by *dedi*, and in the deed doth warrant the land against *I. S*, and his heires, yet *dedi* is a generall warrantie during the life of the feoffor; and so was the statute expounded in both points, [g] *Hil.* 14. *El.* in the court of common pleas, which I my selfe heard and observed. [h] And if a man make a lease for life reserving a rent, and adde an expresse warrantie, here the expresse warrantie doth not take away the warrantie in law, for he hath election to vouch by force of either of them. And in *Nokes'* case note a diversitie betweene a warrantie that is a covenant reall, and a warrantie concerning a chattell. [i] Also this word *excambium* doth imply a warrantie.

Also a partition implyeth a warrantie in law, as in the Chapter of Parceners appeareth. And homage auncestrell doth draw to it selfe warrantie, as hath beene said in the Chapter of Homage Auncestrell.

And it is to be observed, that the warrantie wrought by this word *dedi*, is a speciall warrantie, and extendeth to the heires of the feoffee during the life of the donor only. But upon the exchange and homage auncestrell the warrantie extendeth reciprocally to the heires, and against the heires of both parties: and in none of the cases the assignee shall vouch by force of any of these warranties, but in the case of the exchange and *dedi*, the assignee shall rebutt, but not in the case of homage ancestrell. [384. b]

43. E. 3. 3. Lib. 1. f. 96. Lib. 5. fol. 17. Spencer's case. Lib. 8. fol. 75. Sr. Stafford's case.

And

(1) [See Note 332.]

[k] And so no man shall have a writ of *contra formam collationis*, but only the feoffee and his heires which be privie to the deed; but an assignee may rebutt by force of the deed.

[k] 28. Ass. 33. 14 H. 4. 5. 18. E. 3. 18. 4. E. 2. Avowr. 201, & 202. 19. E. 3. Avowr. 201, 202. 11. E. 3. Avowr. 100. 30 H. 6. 7. 33. H. 8. Dyer 51. 10. H. 7. 11. b. F. N. B. 163. a.

[l] If a man make a gift in taile, or a lease for life of land, by deed or without deed, reserving a rent, or of a rent service by deed, this is a warrantie in law, and the donee or lessee being impleaded, shall vouch and recover in value. And this warrantie in law extendeth not only against the donor or lessor, and his heires, but also against his assignees of the reversion; and so likewise the assignee of lessee for life shall take benefit of this warrantie in law.

[l] 6. E. 2. Cont. de Vouch. 105. 5. E. 3. 67. 4. E. 2. ibid. 102. 6. E. 3. 11. 50. 7. E. 3. 6. 18. E. 3. 8. 22. E. 3. 3. 3. H. 7. 13. 6. H. 7. 2. 14. E. 3. Garr. 32. F. N. B. 134. g. 5. E. 3. 87. 20. E. 3. tit. Counterplea de Gar. 7.

[m] When dower is assigned there is a warrantie in law included, that the tenant in dower being impleaded, shall vouch and recover in value a third part of the two parts whereof she is dowable. (1)

[m] 4. E. 3. 36. 33. E. 3 tit. Cont. de Vouch. 122. 43. Ass. 32. 50. E. 3. 7. F. N. B. 149. m.

And it is to be understood, that a warrantie in law and assets is in some cases a good bar. [n] In a formedon in the discender the tenant may plead, that the ancestor of the demandant exchanged the land with the tenant for other lands taken in exchange, which descended to the demandant, whereunto he hath entred and agreed; or if he hath not entred and agreed unto the lands taken in exchange, then the tenant may plead the warrantie in law, and other assets descended.

[n] 14. H. 6. 2. 15. E. 3. Bar. 255.

[o] If tenant in taile of lands make a gift in taile, or a lease for life, rendring a rent, and dieth, and the issue bringeth a formedon in the discender, the reversion and rent shall not barre the demandant; because by his formedon he is to defeat the reversion and rent, *Et non potest adduci exceptio ejusdem rei, cujus petitur dissolutio.*

[o] 38. E. 3. 23, 23, 24. 13. E. 3. Gar. 35.

[p] But if other assets in fee simple doe descend, then this warrantie in law and assets is a good barre in the formedon.

[p] 16. E. 3. Age 45. 18. E. 3. 8. 31. E. 3. Gar. 29.

Here foure things are to be observed: first, that no warrantie in law doth barre any collaterall title, but is in nature of a lineall warrantie: wherein the equitie of the law is to be observed.

Secondly, that an expresse warrantie shall never binde the heires of him that maketh the warrantie, unlesse (as hath beene said) they be named: as for example, *Littleton* here saith *(Ego et hæredes mei)*; but in case of warranties in law, in many cases the heires shall bee bound to warrantie, albeit they be not named. (1. Rep. 10.)

Thirdly, that in some cases warranties in law doe extend to execution in value, of speciall lands, and not generally of lands descended in fee simple, as you may see at large in my Reports. Vide Lib. 4. fol. 121. Bustard's case.

[q] Fourthly, that warranties in law may be in some cases created without deed, as upon gifts in taile, leases for life, eschanges, and the like.

[q] 45. E. 3. 20. b.

And seeing somewhat hath beene said out of *Bracton* and other antient authors, concerning assignees, it is necessarie to shew who shall take advantage of a warrantie, as assignee by way of voucher, to have recompence in value.

If

(1) [See Note 333.]

[r] 14. E. 3. Gar. 33. 13. E. 1. Gar. 83.

[r] If a man infeoffe *A.* and *B.* to have and to hold to them and to their heires, with a clause of warrantie, *prædictis* A. *et* B. *et eorum hæredibus et assignatis*: in this case if *A.* dieth, and *B.* surviveth and dieth, and the heire of *B.* infeoffeth *C.* he shall vouch as assignee, and yet he is but the assignee of the heire of one of them; for in judgement of law the assignee of the heire is the assignee of the ancestor, and so the assignee of the assignee shall vouch *in infinitum*, within these words, (his assignes.)

Lib. 5. fol. 17. b. in Spenser's case. 38. E. 3. 21.

[s] 12. E. 2. Vouch. 263. 19. E. 2. Gar. 85. 13. E. 1. ib. 93. Lib. 5. fol. 17. Spenser's case. 7. E. 3. 34.

[s] If a man infeoffeth *A.* to have and to hold to him, his heires and assignes; *A.* infeoffeth *B.* and his heires, *B.* dieth, the heire of *B.* shall vouch as assignee to *A.*: so as heires of assignees, and assignees of assignes, and assignees of heires are within this word (assignes); which seemed to be a question in *Bracton*'s time. And the assignee shall not only vouch, but also have a *warrantia cartæ*.

10. E. 3. 9. 14. E. 3. Garr. 33. Bract. ubi sup. 9. E. 2. Garr. de Chart. 30. 36. E. 3. Gar. 1. 4. H. 8. Dy. 1. F. N. B. 135.

If a man doth warrant land to another without this word (heires), his heires shall not vouch: and regularly if he warrant land to a man and his heires, without naming assignes, his assignee shall not vouch. [t] But if the father be infeoffed with warrantie to him and his heires, the father infeoffeth his eldest son with warrantie and dieth, the law giveth to the sonne advantage of the warrantie made to his father, because by act in law the warrantie betweene the father and the sonne is extinct.

[t] 43. E. 3. 23. 26. E. 3. 68. (Ante 174. a. b. Post. 390. a.) 40. E 3. 14. 24 E. 3. 36. 11. H. 4. 94. 39. E. 3. 17. 5. E. 3. Age 19. Pl. Com. 418.

But note, there is a diversitie betweene a warrantie that is a covenant reall, which bindeth the partie to yeeld lands or tenements in recompence, and a covenant annexed to the land, which is to yeeld but dammages, for that a covenant is in many cases extended further than the warrantie. As for example:

[u] 42. E. 3. b. per Finchden.

[u] It hath beene adjudged, that where two coparceners made partition of land, and the one made a covenant with the other, to acquite her and her heires of a suit that issued out of the land the covenantee aliened. In that case the assignee shall have an action of covenant; and yet he was a stranger to the covenant, because the acquitall did runne with the land.

[385. a.]

(5. Rep. 18. a. in Spencer's case.)

[x] 42. E. 3. 3. a. Laur. Pakenham's case. 2 H. 4. 6. 6. H 4. 1. & 2. Ralfe Brabson's case. Lib. 5. fol. 17, 18. Spencer's case.

[x] *A.* seised of the mannor of *D.* whereof a chappell was parcell, a prior with the assent of his covent covenanteth by deed indented with *A.* and his heires to celebrate divine service in his said chappell weekely, for the lord of the said mannor, and his servants, &c. In this case the assignees shall have an action of covenant, albeit they were not named, for that the remedie by covenant doth runne with the land, to give dammages to the partie grieved, and was in a manner appurtenant to the mannor. [y] But if the covenant had beene with a stranger to celebrate divine service in the chappell of *A.* and his heires, there the assignee shall not have an action of covenant; for the covenant cannot be annexed to the mannor, because the covenantee was not seised of the mannor. See in *Spencer's* case before remembred, divers other diversities betweene warranties and covenants which yeeld but dammages.

[y] 2. H. 4. 6. Hen. Horne's case. 6. H. 4. 1. Lib. 5. fo. 17, 18. Spencer's case.

And here it is to be observed, that an assignee of part of the land shall vouche as assignee. [*] As if a man make a feoffement in fee of two acres to one, with warrantie to him, his heires and assignes, if he make a feoffement of one acre, that feoffee shall vouche as assignee; for there is a diversitie betweene the whole estate

[*] 18 E. 3. 52. 10. E. 3. 58. 5. E. 3. 40. 12. E. 3. Counterplea de

estate in part, and part of the estate in the whole, or of any part. As if a man hath a warrantie to him, his heires, and assignes, and he make a lease for life, or a gift in taile, the lessee or donee shall not vouch as assignee, because he hath not the estate in fee simple whereunto the warranty was annexed; but the lessee for life may pray in aide, or the lessee or donee may vouch the lessor or donor, and by this meanes hee shall take advantage of the warranty. But if a lease for life, or a gift in taile be made, the remainder over in fee, such a lessee or donee shall vouch as assignee, because the whole estate is out of the lessor, and the particular estate and the remainder doe in judgement of law to this purpose make but one estate.

Vouch. 42. 14. E. 3. Voucher 108. 5. E. 3. ibid. 178. 13. E. 3. ibid. 129. 40. E. 3. 22. 41. E. 3. Vouch. 69. & 100. 32. E. 3. ibid. 96. (Hob. 25.) And this diversitie was agreed Hill. 14. Eliz. in Communi Banco, which I heard and observed.

[a] If a man infeoffe three with warrantie to them and their heires, and one of them release to the other two, they shall vouch; but if he had released to one of the other, the warrantie had beene extinct for that part, for he is an assignee.

[b] If a man doth warrant land to two men and their heires, and the one make a feoffment in fee, yet the other shall vouch for his moitie. If a man at this day be infeoffed with warrantie to him, his heires, and assignes, and he make a gift in taile, the remainder in fee, the donee make a feoffement in fee, that feoffee shall not vouch as assignee, because no man shall vouch as assignee, but he that commeth in, in privitie of estate; but he must vouch his feoffor, and he to vouch as assignee, but such an assignee may rebutte. If the warrantie be made to a man and his heires without this word (assignes), yet the assignee, or any tenant of the land may rebutte. And albeit no man shall vouch or have a *warrantia cartæ*, either as partie, heire, or assignee, but in privitie of estate, yet any that is in of another estate, be it by disseisin, abatement, intrusion, usurpation, or otherwise, shall rebutte by force of the warrantie, as a thing annexed to the land, which sometime was doubted [c] in our bookes. But herein is a diversitie to be observed, when in the cases aforesaid he that rebutteth claimeth under the warrantie; and when he that would rebutte claimeth above the warranty, for there he shall not rebutte. And therefore if lands be given to two brethren in fee simple, with a warranty to the eldest and his heires, the eldest dieth without issue, the survivor albeit he be heire to him, yet shall he neither vouch nor rebutte, nor have a *warrantia cartæ*, because his title to the land is by relation above the fall of the warrantie, and he commeth not under the estate of him to whom the warrantie is made, as the disseisor, &c. doth.

[a] 40. E. 3. 14. 40. Ass. 5. 33. H. 6. 4. 37. H. 8. Alienation sans licence 31. 8. H. 4. 8. [b] 11. R. 2. Detin. 46. 7. E. 3. 35. 46. E. 3. 4. (See Vaugh. 388.)

[c] 38. E. 3. 21. 26. E. 3. 56. Lib. 10. fo. 96. b. Seymour's case. 7. E. 3. 34, 35. 8. E. 3. 10. 46. E. 3. 4. 10. E. 3. 42. 45. E. 3. 18. 10. Ass. 5. 35. Ass. 9. 21. Ass. 39. 88. 31. Ass. 13.

[d] If a man make a gift in taile at this day, and warrant the land to him, his heires and assignes, and after the donee make a feoffement and dieth without issue, the warrantie is expired as to any voucher or rebutter, for that the estate in taile whereunto it was knit is spent: otherwise it is, if the gift and feoffement had beene made before the statute of *donis conditionalibus*; for then both the donee and feoffee had a fee simple; and so are our bookes to be intended in this and the like cases.

[d] Lib. 3. fol. 62, 63. Lincolne College case.

[e] If *A.* be seised of lands in fee, and *B.* releaseth unto him or confirmeth his estate in fee with warrantie to him, his heires and assignes; all men agree this warrantie to be good: but some have holden, that no warrantie can be raised upon a bare release or con-

[e] 14. E. 3. Garr. 108. 12. H. 7. 1.

firmation without passing some estate or transmutation of possession.

[f] 11. H. 4. 22. 10. E. 3. 52. 21. E. 3. 27. Vid. Sect. 706. 738. & 745.

[f] But the law, as it appeareth by *Littleton* himselfe, is to the contrary, and that both the party, and (as some doe hold) his assignee shall vouch; but he that is vouched in that case must be present in court, and ready to enter into the warranty and to answer, and the tenant must shew forth the deed of release or confirmation with warrantie, to the intent the demandant may have an answer thereunto, and either deny the deed, or avoid it; for that at the time of the confirmation made, he to whom it was made, had nothing in the land, &c. for otherwise the demandant may counterplead the voucher by the statute of *W.* 1. viz. that neither vouchee nor any of his ancestors had any seisin whereof he might make a feoffement. And this is grounded upon the said statute of *W.* 1. the words whereof be, *S'il neit son garrantor en present,* (1) *que luy voile garranter de son gree, et maintenant enter en respons,* otherwise the tenant must be driven to his *warrantia cartæ.* [385. b]

W. 1. cap. 40.

Vide 20. E. 1. Statute de vocat. ad warrant.

[g] 22. H. 6. 15. 19. H. 6. 73. 26. H. 6. 73. 2. H. 4. 13.

[g] But a warrantie of it selfe cannot enlarge an estate; as if the lessor by deed release to his lessee for life, and warrant the land to the lessee and his heires, yet doth not this enlarge his estate.

41. E. 3. Garr. 15. 43. E. 3. 17. 43. Ass. 42. 12. Ass. 17. 12. E. 3. taile 3. 22. E. 4. 16. b. 44. E. 3. 10. 44. Ass. Bassingborn's. Ass. Lib. 10. fol. 97. Seymour's case.

[h] Lib. 3. fol. 63. Lincolne College case.

[h] If a man make a feoffement in fee with warrantie to him, his heires and assignes by deed (as it must be), and the feoffee enfeoffeth another by paroll, the second feoffee shall vouche, or have a *warrantia cartæ* (as hath beene said) as assignee, albeit he hath no deed of the assignment, because the deed comprehending the warrantie, doth extend to the assignees of the land; and he is a sufficient assignee, albeit he hath no deed.

[i] 29. E. 3. 70. 17. E. 2. Joinder in action. 1. 21. E. 4. 8.

[i] If a man infeoffe two, their heires and assignes, and one of them make a feoffement in fee, that feoffee shall not vouch as assignee. (2)

If a man make a feoffement in fee to *A.* his heires and assignes, *A.* infeoffeth *B.* in fee, who re-infeoffeth *A.* he or his assignes shall never vouche, for *A.* cannot be his owne assignee. But if *B.* had infeoffed the heire of *A.* he may vouche as assignee; for the heire of *A.* may be assignee to *A.* inasmuch as he claimeth not as heire.

[k] 14. H. 4. 3.

[k] If a man make a feoffement by deed of lands to *A.* to have and to hold to him and his heires, and bind him and his heires to warrant the land *in formâ prædictâ*; this warrantie shall extend to the feoffee and his heires: but if he had warranted the land to the feoffee, the warrantie had not extended to his heires, except the words had beene to him and his heires.

(Ant. 20. b.)

If a man letteth lands for life, the remainder in taile, the remainder *eâdem formâ*, this is a good estate taile, *quia idem semper refertur proximo præcedenti.* (3)

(1) i. e. if he have not his *warrantor* present.

(2) [See Note 334.]

(3) [See Note 335.]

Sect. 734.

ITEM, si tenant en taile soit seisie des * *terres devisables per testament solonque le custome, &c. et le tenant en tayle alien* † *mesmes les tenements a son frere en fee, et ad issue, et devie, et puis son frere devisa per son testament mesmes les tenements a un auter en fee, et oblige luy et ses heires a garrantie, &c. et morust sans issue; il semble que cest garrantie ne barrera my l'issue en tayle, s'il voit sues son briefe de* formedon, *pur ceo que cest garrantie ne discendera my al issue en le tayle, entant que le uncle del issue ne fuit my oblige a le garrantie en sa vie: ne* ‡ *que il ne puissoit garranter les tenements en sa vie, entant que le devise ne puissoit prender ascun execution ou effect, forsque apres son decease. Et entant que le uncle en son vie ne fuit tenus de garranter, tiel garrantie ne poit discender de luy al issue en le tayle, &c. car nul chose poit discender del auncester a son heire, sinon que mesme ceo fuit en l'auncester.*

ALSO, if tenant in taile be seised of lands devisable by testament after the custome, &c. and the tenant in the tayle alieneth the same tenements to his brother in fee, and hath issue, and dieth, and after his brother deviseth by his testament the same tenements to another in fee, and bindeth him and his heires to warrantie, &c. and dieth without issue; it seemeth that this warrantie shall not barre the issue in the taile, if hee will sue his writ of *formedon*, because that this warrantie shall not descend to the issue in tayle, in so much as the uncle of the issue was not bound to the same warrantie in his life-time: neither could hee warrant the tenements in his life, insomuch as the devise could not take any execution or effect until after his decease. (4) And insomuch as the uncle in his life was not held to warrantie, such warrantie may not descend from him to the issue in the tayle, &c. for nothing can descend from the ancestour to his heire, unlesse the same were in the ancestour. (1)

[386. a.]

HERE our author declareth one of the maximes of the common law, that the heire shall never be bound to any expresse warrantie, but where the ancestor was bound by the same warranty; for if the ancestor were not bound, it cannot descend upon the heire, which is the reason here yeelded by *Littleton*. [*l*] If a man make a feoffement in fee, and binde his heires to warrantie, this is void by the warrant of this maxime, as to the heire, because the ancestor himselfe was not bound. Also, if a man binde his heires to pay a summe of money, this is void. And of the other side, if a man binde himselfe to warranty, and binde not his heires, they be not bound; for he must say, as it appeareth before, *Ego et haeredes mei warrantizabimus, &c.* [*m*] And *Fleta* saith, *Nota quòd haeres non tenetur in Angliâ ad debita antecessoris reddenda, nisi per antecessorem ad hoc fuerit obligatus, praeterquàm debita regis tantùm: A fortiori* in case of warrantie, which is in the realtie.

(6. Rep. 33. 2. Cro. 570. 10. Rep. 95.)

[*l*] 31. E. 1. Grant. 85. (Hob. 130. Ant. 213. b.)

Bracton li. 2. fo. 37. 238. Britton fol. 106. b.

[*m*] Fleta, lib. 2. cap. 55. Britton fol. 65. b. 11. H. 6. 48 (4. Rep 80. Ante 209. a.)

But

* *terres—tenements*, L. and M. and Roh.
† *mesmes* not in L. and M. nor Roh.
‡ *que il ne* not in L. and M. nor Roh.

(4) [See Note 336.] (1) [See Note 337.]

But a warrantie in law may binde the heire, although it never bound the anceſtour, and may be created by a laſt will and teſtament. [n] As if a man deviſe lands to a man for life or in taile reſerving a rent, the deviſee for life or in taile ſhall take advantage of this warrantie in law, albeit the anceſtor was not bounden, and ſhall binde his heires alſo to warrantie, although they be not named. Alſo an expreſſe warrantie cannot be created without deed, and a will in writing is no deed, and therefore an expreſſe warrantie cannot be created by will.

[n] 18. E. 3. 8.

Sect. 735.

*AUXY, un garrantie ne poit aler * ſolonque la nature des tenements per le cuſtome, &c. mes tantſolement ſolonque le forme del common ley. Car ſi le tenant en taile ſoit ſeiſie des tenements en burgh Engliſh, lou le cuſtome eſt, que touts les tenements deins meſme le borough devoyent diſcender a le fits puiſne, et il diſcontinua le tayle ove garrantie, &c. et ad iſſue deux fits, et moruſt ſeiſie des auters terres ou tenements en meſme le burgh en fee ſimple a le value ou pluis de les tenements tailes, &c. uncore le puiſne fits avera un* formedon *de les † terres tailes, et ne ſerra my barre per le garrantie ſon pere, coment que aſſets a luy diſcendiſt en fee ſimple de meſme le pere, ſolonque le cuſtome, &c. pur ceo que le garrantie diſcendiſt a ſon eigne frere que eſt en pleine vie ‡, et nemy ſur le puiſne. ‖ Et en meſme le maner eſt de collaterall garrantie fait de tiels tenements, lou le garrantie diſcendiſt ſur l'eigne fits, &c. ceo ne barrera my le puiſne fits, &c.*

ALSO, a warranty cannot goe according to the nature of the tenements by the cuſtome, &c. but onely according to the forme of the common law. For if the tenant in taile be ſeiſed of tenements in borough Engliſh, where the cuſtome is, that all the tenements within the ſame borough ought to deſcend to the youngeſt ſonne, and hee diſcontinueth the taile with warranty, &c. and hath iſſue two ſonnes, and dyeth ſeiſed of other lands or tenements in the ſame borough in fee ſimple to the value or more of the lands entailed, &c. yet the youngeſt ſonne ſhall have a *formedon* of the lands tailed, and ſhall not bee barred by the warrantie of his father, albeit aſſets deſcended to him in fee ſimple from his ſaid father according to the cuſtome, &c. becauſe the warranty deſcendeth upon his elder brother who is in full life, and not upon the youngeſt. And in the ſame manner is it of collaterall warranty made of ſuch tenements, where the warranty deſcendeth upon the eldeſt ſonne, &c. this ſhall not barre the younger ſon, &c.

[386. b.]

* *ſolonque—ſans*, L. and M. and Roh.
† *terres—tenements*, L. and M. and Roh.
‡ *&c.* added L. and M. and Roh.
‖ *Et* not in L. and M. nor Roh.

Sect. 736.

(8. Rep. 86.)

EN mesme le maner est de tenements en le countie de Kent, queux sont appelles gavelkind, les queux tenements sont departibles enter les freres, &c. solonque la custome ‡; *si ascun tiel garrantie soit fait per son auncester, tiel garrantie discendera tantsolement al heire que est heire al common ley,* § *c'est a sçavoir, al eigne frere, solonque la conusans del common ley, et nemy a touts les heires queux sont heires de tiels tenements solonque le custome* ‖.

IN the same manner is it of lands in the county of Kent, that are called gavelkinde, which lands are dividable betweene the brothers, &c. according to the custome; if any such warrantie be made by his ancestor, such warrantie shall descend onely to the heire which is heire at the common law, that is to say, to the elder brother, according to the conusance of the common law, and not to all the heires that are heires of such tenements according to the custome.

HEREUPON a diversitie is to be observed betweene the lien reall, and the lien personall, for the lien reall, as the warrantie, doth ever descend to the heire at the common law; [n] but the lien personall doth binde the speciall heires, as all the heires in gavelkind, and the heire on the part of the mother, as hath beene said.

Vid. Sect. 603. 718. & 737. (2. Rep 25.) [n]. 11. E. 3. Dec. 7. 11. H. 7. 12.

[o] If two men make a feoffement in fee with a warranty, and the one die, the feoffee cannot vouche the survivor only, but the heire of him that is dead also; (1) but otherwise, if two joyntly binde themselves in an obligation, and the one die, the survivor only shall be charged.

[o] 17. E. 3. Joint. 41. 16. H. 7. 13. 29. E. 3. 46. 12. H. 7. 3. 22. E. 3. 1.

17. E. 3. 8. 30. E. 3. 40. 19. H. 6. 55. Lib. 3. fol. 14. Matthew Herbert's case. (1. Leon. 322. March. 125. Allen 41. Savil. 692. Clay. 3.)

Sect. 737.

ITEM, si tenant en le taile ad issue deux files per divers venters, et morust, et les files entront, et un estrange eux disseisist de mesmes les tenements, et l'un de ¶ *eux relessa per son fait a le disseisor tout son droit, et oblige luy et ses heires a garrantie, et morust sans issue: en cest case la soer que survesquist poit bien enter et ouster le disseisor de touts les tenements, pur ceo que tiel garrantie n'est pas discontinuance*

[387. a.]

ALSO, if tenant in taile hath issue two daughters by divers venters, and dieth, and the daughters enter, and a stranger disseiseth them of the same tenements, and one of them releaseth by her deed to the disseisor all her right, and binde her and her heires to warrantie, and die without issue: in this case the sister which surviveth may well enter, and oust the disseisor of all the tenements, because such warrantie

‡ *&c.* added L. and M. and Roh.

§ *c'est a sçavoir al eigne frere, solonque la conusans del common ley,* not in L. and M. nor Roh.

‖ *&c.* added L. and M. and Roh.

¶ *eux—les filles,* L. and M. and Roh.

(1) [See Note 338.]

tinuance ne collateral garrantie a la soer que survesquist, pur ceo que ils sont de demy sanke, et l'un ne peit estre heire a l'auter, solonque le cours del common ley. Mes auterment est, lou y sont files del tenant en taile per un mesme venter.

warrantie is no discontinuance nor collaterall warrantie to the sister that surviveth, for that they are of halfe bloud, and the one cannot be heire to the other, according to the course of the common law. But otherwise it is, where there bee daughters of tenant in taile by one venter.

THE reason of this is in respect of the halfe blood, whereof sufficient hath beene said in the first booke, in the Chapter of Fee Simple.

(Ante 12. a. 14. a.)

Two brothers be by demy venters; the eldest releaseth with warrantie to the disseisor of the uncle, and dieth without issue, the uncle dieth, the warrantie is removed, and the younger brother may enter into the land.

Sect. 738.

*ITEM, si tenant en taile lessa les tenements a un * home pur terme de vie, le remainder a un auter en fee, et un collateral auncester confirma le state del tenant a terme de vie, et oblige luy et ses heires a garrantie pur terme de vie del tenant a terme de vie, et morust, et le tenant en taile ad issue et devie; ore l'issue est barre a demander les tenements per briefe de* formedon *durant le vie le tenant a terme de vie, per cause del collateral garrantie discendu sur le issue en le taile. Mes apres le decease de le tenant a terme de vie, l'issue avera un † briefe de* formedon, &c.

ALSO, if tenant in taile letteth the lands to a man for terme of life, the remainder to another in fee, and a collaterall ancestor confirmeth the state of the tenant for life, and bindeth him and his heires to warrantie for terme of the life of the tenant for life, and dieth, and the tenant in taile hath issue and dies; now the issue is barred to demand the tenements by writ of *formedon* during the life of tenant for life, because of the collaterall warrantie descended upon the issue in taile. But after the decease of the tenant for life, the issue shall have a writ of *formedon*, &c.

Vide Sect. 733. & 706. (Ant. 385.)

HERE it appeareth, that a warrantie may be raised by a confirmation which transferreth neither estate nor right, whereof sufficient hath beene said before.

[p] 38. E. 3. 14. 16. E. 3. Vouch. 87.

" *A garrantie pur terme de vie, &c.*" [p] This proveth that a warrantie may be limited, and that a man may warrant lands aswell for terme of life or in taile, as in fee. (1)

(4. Rep. 80. Ant. 383. Hob. 156.)

If tenant in fee simple that hath a warrantie for life, either by an expresse warrantie or by *dedi*, be impleaded and vouch, hee shall recover a fee simple in value, albeit his warrantie were but for terme of life, because the warrantie extended in that case to the whole

* *home* not in L. and M. nor Roh. † *briefe de* not in L. and M. nor Roh.

(1) [See Note 339.]

whole estate of the feoffee in fee simple; (2) but in the case that *Littleton* here putteth, the tenant for life shall recover in value but an estate for life, because the warrantie doth extend to that estate only.

(2. Cro. 453.)

[387. b.] "*Un briefe de formedon, &c.*" Here is implyed, that a collaterall warrantie giveth no right, but shall barre only for life, and after the partie is restored to his action.

(F. N. B. 211. b. 217. b. 219. e.)

It is also to bee observed, that a warrantie may descend to the heires of him that made it during the life of another.

Sect. 739.

(9. Rep. 120.)

ET sur ceo jeo aye oye un reason, que cel case provera un auter case, scilicet, si un home lessa ses terres a un auter, a aver et tener a luy et a ses heires pur terme d'auter vie, et le lessee morust vivant celuy a que vie, &c. et un estrange enter en la terre que le heire le lessee luy poit ouster, † *&c. pur ceo que en le case procheine avantdit, entant que home poit obliger luy et ses heires a garrantie al tenant a terme de vie tantsolement, durant la vie le tenant a* ‡ *terme de vie, et cel garrantie discendist al heire celuy que fist le garrantie, lequel garrantie n'est pas garrantie d'enheritance, mes tantsolement pur terme d'auter vie: per mesme le reason lou tenements sont lesses a un home, a aver et tener a luy et a ses heires pur terme d'auter vie, si le* ‖ *lessee morust vivant celuy a que vie, son heire avera les tenements, vivant celuy a que vie, &c. Car ont dit, que si home grant un annuitie a un auter, a aver et perceiver a luy et a ses heires pur terme d'auter vie, si le grantee morust, &c. que apres* § *son mort son heire avera l'annuitie durant la vie celuy a que vie, &c.* Quære de istâ materiâ.

AND upon this I have heard a reason, that this case will prove another case, viz. if a man letteth his lands to another, to have and to hold to him and to his heires for terme of another's life, and the lessee dieth living *celuy a que vie, &c.* and a stranger entreth into the land that the heire of the lessee may put him out, &c. because in the case next aforesaid, inasmuch as a man may binde him and his heires to warrantie to tenant for life only, during the life of the tenant for life, and this warrantie descendeth to the heire of him which made the warrantie, the which warrantie is no warrantie of inheritance, but only for terme of another's life: by the same reason where lands are let to a man, to have and to hold to him and his heires for terme of another's life, if the lessee die living *celuy a que vie*, his heires shall have the lands, living *celuy a que vie, &c.* For they have said, that if a man grant an annuitie to another, to have and to take to him and his heires for terme of another's life, if the grantee die, &c. that after his death his heire shall have the annuitie during the life of *celuy a que vie, &c. Quære de istâ materiâ.*

"740

† *&c.* not in L. and M. nor Roh.
‡ *terme* not in L. and M. nor Roh.
‖ *lessee—pier*, L. and M. and Roh.
§ *son mort* not in L. and M. nor Roh.

(2) [See Note 340.]

"*JEO ay vye un reason.*" Here our student is taught after the example of our author, to observe everie thing that is worth the noting.

"*Si un home lessa terres a un auter, &c.*" This case is without question, [q] that the heire of the lessee shall have the land to prevent an occupant. And so it is (as *Littleton* here saith) in case of an annuitie, or of any other thing that lieth in grant, whereof there can be no occupant. And of this somewhat hath beene said in the Chapter of Discents. (1)

[q] 17. E. 3. 48. 18. E. 3. 12. 11. H. 4. 42. 7. H. 4. 46. 8. H. 4. 15. Dy. 8. El. 253. 18. H. 8. 3. 33. Ass. p. 17. 27. H. 8. 22. H. 6. 33. 21. H. 8. tit. Estat, Br. 50. 39. E. 3. 37. Vide Sect. 387. 19. E. 3. tit. Account. 56. (Ant. 41. b.)

Sect. 740.

*MES lou tiel lease ou grant est fait a un home et a ses heires pur terme d'ans, en cest case l'heire le lessee ou le grantee n'avera unques apres la mort le lessee ou le grantee cea que est issint lessee ou grant, pur cea que est chattel real, et * chateux realx per le common ley viendra al executors del grantee, ou del lessee, et nemy al heire.* †

BUT where such lease or grant is made to a man and to his heires for terme of yeares, in this case the heire of the lessee or the grantee shall not after the death of the lessee or the grantee have that which is so let or granted, because it is a chattell reall, and chattels realls by the common law shall come to the executors of the grantee, or of the lessee, and not to the heire.

11. E. 3. tit. Ass. 88. 11. Ass. 21. 30. Eli. Dy. 276. 19. Rep. 86. 5. Rep. 25. 33.)

HERE is a generall rule, that chattels reals aswell as chattels personals shall goe to the executors or administrators of the lessee, and not to his heires. For as estates of inheritance or freehold descendible shall go to the heire, so chattels, aswell reall as personall, shall goe to the executors or administrators.

[r] 24. E. 3. 26. F. N. B. 33. b. F. N. B. 34. a. (Ant. 90. Sect. 125.)

[r] But if the king's tenant by knight's service *in capite* be seised of a mannor, whereunto an advowson is appendant, and the church become void, the tenant dieth, his heire within age, the king shall present to the church, and not the executor or administrator: but if the land be holden of a common person, in that case the executor shall present, and not the gardeine.

[s] 40. E. 3. 14.

[s] If a bishop hath a ward fallen and dieth, the king shall not have the ward nor the successor, but the executor and the ward shall be assets in his hands. So it is of the heriot, releefe, and the like. [t] But if a church become void in the life of a bishop, and so remaine untill after his decease, the king shall present thereunto, and not the executor or administrator; for nothing can be taken for a presentment, and therefore it is no assets.

[t] 9. H. 6. 38. 11. H. 4. 7.

* *touts* added L. and M. and Roh. † *&c.* added L. and M. and Roh.

(1) But several alterations have been made in the law of occupancy, by statutes passed since sir Edward Coke's time. See ant. 41. b. note 5.

Sect. 741.

ITEM, en ascuns cases il poit estre, que coment que un collaterall garrantie soit fait en fee, &c. uncore tiel garrantie poit estre defeat et anient. Sicome tenant en taile discontinue le taile en fee, et le discontinuee est disseisie, et le frere del tenant en le taile relessa per son fait a le disseisor tout son droit, &c. ove garranty en fee, et morust sans issue, et le tenant en le taile ad issue et devie; ore l'issue est barre de son action per force del collateral garrantie discendue sur luy. Mes si apres ceo le discontinuee enter sur le disseisor, donques poit l'heire en le taile aver bien son action de formedon, &c. *pur ceo que le garrantie est aniente et defeate, car quant garrantie est fait a un home sur estate que adonques il avoit, si l'estate soit defeat, le garrantie est defeat.*

ALSO, in some cases it may bee, that albeit a collaterall warrantie be made in fee, &c. yet such a warrantie may be defeated and taken away. As if tenant in taile discontinue the taile in fee, and the discontinuee is disseised, and the brother of the tenant in taile releaseth by his deed to the disseisor all his right, &c. with warrantie in fee, and dieth without issue, and the tenant in taile hath issue and die; now the issue is barred of his action by force of the collaterall warrantie descended upon him. But if afterwards the discontinuee entreth upon the disseisor, then may the heire in taile have well his action of *formedon, &c.* because the warrantie is taken away and defeated, for when a warrantie is made to a man upon an estate which hee then had, if the estate be defeated, the warrantie is defeated. (1)

" *ET morust sans issue, &c.*" Here (as before in this Chapter hath been noted) the collaterall warrantie doth descend upon the issue in taile, before any right doth descend unto him, wherein this diversitie is to bee observed. Where the right is in *esse* in any of the ancestors of the heire, at the time of the discent of the collaterall warrantie, there albeit the warrantie descend first, and after the right doth descend, the collaterall warrantie shall binde, as here in this case of our author expressely appeareth. But where the right is not in *esse* in the heire, or any of his ancestors, at the time of the fall of the warrantie, there it shall not binde. [u] As if lord and tenant be, and the tenant make a feoffment in fee with warrantie, and after the feoffor purchase the seigniorie, and after the tenant cesse, the lord shall have a *cessavit*; for a warrantie doth extend to rights precedent, and never to any right that commenceth after the warrantie; whereof more shall be said in this Section. Also a warrantie shall never barre any estate that is in possession, reversion or remainder, that is not devested, displaced, or turned to a right before, or at the time of the fall of the warrantie.

[388. b.]

Vide Sect. 707.

(10. Rep. 95.)

[u] 7. E. 3. 48. 30. H. 8. 42.

(10. Rep. 95.)

[w] If a lease for life be made to the father, the remainder to his next heire, the father is disseised and releaseth with warrantie and dieth; this shall barre the heire, although the warrantie doth fall, and the remainder commeth in *esse* at one time.

[w] Lib. 1. fol. 67. Archer's case.

[y] If there be father and sonne, and the sonne hath a rent service, suit to a mill, rent charge, rent secke, common of pasture, or

[y] Temps E. 1. Voucher 296. 31. Ass. 13.

(1) [See Note 341.]

22. Aff. 36.
41. Aff. 6.
23. E. 3.
tit. Gar. 74.
Lib. 10. fol. 97.
E. Seymour's case.
(9. Rep. 106.)

or other profit *apprender* out of the land of the father, and the father maketh a feoffment in fee with warrantie, and dieth, this shall not barre the sonne of the rent, common, or other profit apprender, *quamvis clausula specialis warrantiæ vel acquietanciæ in cartis tenentium inseratur, quia in tali casu transit terra cum onere:* and he that is in seisin or possession need not to make any entrie or claime: and albeit the sonne after the feoffment with warrantie, and before the death of the father, had beene disseised, and so being out of possession, the warrantie descended upon him, yet the warrantie should not binde him, because at the time of the warrantie made, the sonne was in possession. [*] So if my collaterall ancestor release to my tenant for life, this shall not binde my reversion or remainder, because that the reversion or remainder continued in me. But if he that hath a rent, common, or any profit out of the land in taile, disseise the tenant of the land, and maketh a feoffment of the land, and warrant the land to the feoffee and his heires; [a] regularly the warrantie doth extend to all things issuing out of the land, that is to say, to warrant the land in such plight and manner, as it was at in the hand of the feoffor, at the time of the feoffment with warrantie; and the feoffee shall vouch, as of lands discharged of the rent, &c. at the time of the feoffment made.

[*] 45. E. 3. 31.
21. H. 7. 11.
Vide Sect. 698.

[a] 21. E. 4. 26.
21. H. 7. 9.
3. H. 7. 4.
7. H. 4. 17.
30. H. 8.
Dier 42.
30. E. 3. 30.
9. E. 3. 78.
45. E. 3.
Voucher 72.
F. N. B. 125.
14. H. 8. 6.
(Ant. 366. b.
Moor 56.)

A woman that hath a rent charge in fee entermarrieth with the tenant of the land, an estranger releaseth to the tenant of the land with warrantie; he shall not take advantage of this warrantie either by voucher or *warrantia cartæ*; for the wife, if her husband die, or the heire of the wife living the husband, cannot have an action for the rent upon a title before the warrantie made; for if the heire of the wife bring an assise of *mordancester*, this action is grounded after the warrantie, whereunto, as hath beene said, the warrantie shall not extend.

[389. a.]

(Ant. 366. b.)

So it is if the grantee of the rent grant it to the tenant of the land upon condition, which maketh a feoffement of the land with warrantie, this warrantie cannot extend to the rent, albeit the feoffement was made of the land discharged of the rent; for if the condition be broken, and the grantor be intituled to an action, this must of necessitie be grounded after the warrantie made.

(Ant. 202.)

But in the case aforesaid, when the woman grantee of the rent marrieth with the tenant, and the tenant maketh a feoffement in fee with warrantie, and dieth, in a *cui in vitâ* brought by the wife (as by law she may), [b] the feoffee shall vouche as of lands discharged at the time of the warranty made, for that her title is paramount: so if tenant in taile of a rent charge purchase the land, and make a feoffement with warrantie, if the issue bring a *formedon* of the rent, the tenant shall vouche *causâ quâ supra*.

[b] 7. H. 4. 17.

[*] But some doe hold, that a man shall not vouche, &c. as of land discharged of a rent service.

[*] 10. E. 4. 9. b.
18. E. 3. 55.
44. E. 3. 19.

[c] Also, no warrantie doth extend unto meere and naked titles, as by force of a condition with clause of re-entry, exchange, mortmaine, consent to the ravisher and the like, because that for these no action doth lye; and if no action can be brought, there can be neither voucher, writ of *warrantia cartæ*, nor rebutter, and they continue in such plight and essence as they were by their originall creation, and by no act can be displaced or devested out of their originall essence, and therefore cannot be bound by any warrantie.

[c] Lib. 10. fol. 97. E. Stymore's case.
22. Aff. pl. 38.
31. Aff. p. 13.
41. Aff. p. 6.
33. E. 3. Gar. 74.
(2. Cro. 593.
Dyer 224. a.
3. Inst. 216. 10. Rep. 98. b. Ant. 205. a. Plowd. 363. b.)

[d] And albeit a woman may have a writ of dower to recover her dower, yet because her title of dower cannot be devested out of the originall essence, a collaterall warrantie of the ancestor of the woman shall not barre her. So it is of a feoffement *causâ matrimonii prælocuti.*

[d] 34. E. 3. tit. droit 72. 21. E. 4. 82. (4. Rep. Vernon's case.)

[e] A warrantie doth not extend to any lease, though it be for many thousand yeares, or to estates of tenant by statute staple, or merchant, or *elegit*, or any other chattle, but only to freehold or inheritances, as it appeareth in all *Littleton*'s cases which he putteth in this Chapter. And this is the reason, that in all actions which lessee for yeares may have, a warrantie cannot be pleaded in barre, as in an action of trespasse, or upon the statute of 5. *R.* 2. and the like. But in those actions when the freehold or inheritances doe come in question, there the warrantie may be pleaded: but in such actions which none but a tenant of the freehold can have, as upon the statute of 8. *H.* 6. assise, or the like, there a warrantie may be pleaded in barre. (1)

[e] 21. E. 4. 18. 82. 1. H. 7. 12. 22. 11. H. 7. 15, 16. 20. H. 7. 2. b. 14. H. 7. 22. 43. E. 3. 25. per Finch. in quar. Imp. 15. H. 7. 9. Lib. 10. fol. 97. (Ant. 101. 366. Hob. 14. 28. 2. Saund. 180.)

" *Quant garrantie est fait a un home sur estate, que adonques il* " *avoit, si l'estate soit defeat, le garrantie est defeat.*" Here it appeareth, that although a collaterall warrantie be descended, [f] yet if the state whereunto the warrantie was annexed be defeated, albeit it be by a meere stranger (as in this case that *Littleton* here puts by the discontinuee) the warrantie is defeated; and although the discontinuance remaine, and no remitter wrought to the heire, yet the warrantie is defeated, and barre removed, so as the issue in taile may have his *formedon*, and recover the land. *Sublato principali tollitur adjunctum.* (2)

[f] 3. H. 7. 9. b. 16. E. 3. tit. Continual Claime 10. 9. H. 4. 8. Pl. Com. 158. (10. Rep. 95.)

Sect. 742.

*EN mesme le manner est, si le discontinuee fait feoffement en fee, reservant a luy un certaine rent, et pur default de payment un re-entry, &c. et un collateral * garrantie de ancester est fait a celuy feoffee que ad estate sur condition, &c. et morust sans issue, coment que cel garrantie discenderoit sur l'issue en taile, uncore si apres le rent soit aderere, et le discontinuee entra en la terre †, adonques avera l'issue en taile son recovery per briefe de* formedon, *pur ceo que le collateral garranty est defeat. Et issint si ascun tiel collateral garranty soit pleder envers l'issue en le taile, en son action de* formedon,

[389. b.]

IN the same manner it is, if the discontinuee make a feoffement in fee, reserving to him a certain rent, and for default of payment a re-entrie, &c. and a collaterall warrantie of the ancestour is made to the feoffee that hath the estate upon condition, &c. and dieth without issue, albeit that this warranty shall descend upon the issue in tayle, yet if after the rent be behind, and the discontinuee enter into the land, then shall the issue in taile have his recovery by writ of *formedon*, because the collaterall warranty is defeated. And so if any such collaterall warrantie be pleaded against the issue in

* *garrantie de ancester est fait—auncester relessa*, in L. and M. and Roh.

† *&c.* added L. and M. and Roh.

(1) [See Note 342.] (2) [See Note 343.]

medon, il poit moustrer le matter come est avantdit, coment le garrantie est defeat, &c. et issint il poit bien maintainer son action, ‡ *&c.*

in taile, in his action of *formedon*, he may shew the matter as is aforesaid, how the warrantie is defeated, &c. and so hee may well maintaine his action, &c.

(10. Rep. 95.) HERE *Littleton* putteth another case upon the same ground and reason, viz. where the state whereunto the warrantie is annexed is defeated, there the warrantie it selfe is defeated also, which is one of the maximes of the common law.

Sect. 743.

ITEM, si tenant en taile fait un feoffement a son uncle, et puis l'uncle fait un feoffement en fee ovesque garrantie, &c. a un auter, et puis le feoffee del uncle enfeoffa areremaine l'uncle en fee, et puis l'uncle enfeoffa un estrange en fee sans garrantie, et morust sauns issue, et le tenant en tayle morust, si issue en le taile voyle porte son breve de formedon *envers l'estrange que fuit le darrein feoffee,* ‡ *et ceo per l'uncle, l'issue ne serra unque barre per le garrantie que fuit fait per le uncle al dit primer feoffee de son uncle, pur ceo que le dit garrantie fuit defeat et anient, pur ceo que l'uncle a luy* ‖ *reprist cy grand estate de son* § *primer feoffee a que le garrantie fuit fait, sicome mesme le feoffee avoit de luy. Et la cause pur que le garrantie est anient en ceo cas est ceo, scilicet, que si le garrantie estoieroit en sa force, donque l'uncle garrantera a luy mesme, que ne poit estre.*

ALSO, if tenant in taile make a feoffement to his uncle, and after the uncle make a feoffement in fee with warranty, &c. to another, and after the feoffee of the uncle doth reenfeoffe againe the uncle in fee, and after the uncle enfeoffeth a stranger in fee without warrantie, and dieth without issue, and the tenant in tayle dieth, if the issue in tayle will bring his writ of *formedon* against the stranger that was the last feoffee, and that by the uncle, the issue shall not be barred by the warranty that was made by the uncle to the first feoffee of his uncle, for that the said warrantie was defeated and taken away, because the uncle tooke backe to him as great an estate from his first feoffee to whom the warrantie was made, as the same feoffee had from him. And the cause why the warranty is defeated is this, viz. that if the warrantie should stand in his force, then the uncle should warrant to himselfe, which cannot be.

(Vaugh. 389.) HERE *Littleton* putteth another case where a warrantie may be defeated, as when the uncle taketh backe as large an estate as he had made, the warrantie is defeated, because he cannot warrant land to himselfe. [*g*] And so it is if the uncle had made the warrantie to the feoffee, his heires and assignes, and taken backe an estate in fee, and after infeoffed another, yet the warrantie is defeated, for that he cannot be assignee to himselfe, and a man shall not

[390. a.]

[*g*] Temps E. 1. Voucher 266. 40. E. 3. 14. 44. E. 3. 38. 25. E. 3. 43. b.

‡ *&c.* not in L. and M. nor Roh.
‡ *&c.* added L. and M. and Roh.
‖ *reprist—prist*, L. and M. and Roh.
§ *dit* added in L. and M. and Roh.

not regularly vouche himselfe as assignee of a fee simple, and the law will not suffer things inutile and unprofitable. [b] And yet if the father be infeoffed with warrantie to him and his heires, the father infeoffeth his heire apparant in fee and dieth, he (as it hath beene said) shall vouch himselfe, and the heire in borow English, by reason the act in law determined the warrantie betweene the father and the sonne.

[i] But if a man maketh a feoffement in fee with warrantie to the feoffee, his heires and assignes, and the feoffee re-enfeoffeth the feoffor and his wife, or the feoffor and any other stranger, the warrantie remaineth still; or if two doe make a feoffement with warrantie to one and his heires and assignes, and the feoffee re-enfeoffe one of the feoffors, the warrantie doth also remaine.

26. E. 3. 68. 44. E. 3. Vouch. 106. 16. E. 3. Voucher 87. 19. E. 3. Vouchee 122. 17. E. 3. 73, 74. 20. H. 6. 29. (2. Roll. Abr. 739.) [b] 40. E. 3. 14. a. 41. E. 3. 25 a. (Ant. 384. Roll. Abr. 98. a.) [i] 11. H. 4. 20. 42. 17. E. 3. 47. 59. 18. E. 3. 56. 29. E. 3. 46. 39. E. 3. 9. (Vaugh. 389.)

Sect. 744.

*MES si le feoffee fesoit estate al uncle pur terme de vie, ou en taile, savant le reversion, &c. ou que il fait done en taile al uncle, ou un leas pur terme de vie, le remainder ouster, &c. en cest cas le garrantie n'est * pas tout ousterment anient, mes est mis en suspence durant l'estate que l'uncle ad. Car apres ceo que l'uncle est mort sans issue, † &c. donques celuy en le reversion, ou celuy en le remainder, barreroit l'issue en tayle en son briefe de* formedon *per le collateral garranty en tiel cas, &c. Mes auterment est lou l'uncle avoit auxy graund estate en la terre de le feoffee, a que le garrantie fuit fait, come le feoffee avoit de luy.* Causa patet.

BUT if the feoffee had made an estate to his uncle for terme of life, or in taile, saving the reversion, &c. or a gift in tayle to the uncle, or a lease for terme of life, the remainder over, &c. in this case the warrantie is not altogether taken away, but is put in suspence during the estate that the uncle hath. For after that that the uncle is dead without issue, &c. then he in the reversion, or he in the remainder, shall barre the issue in taile in his writ of *formedon* by the collaterall warranty in such case, &c. But otherwise it is where the uncle hath as great estate in the land of the feoffee to whom the warrantie was made, as the feoffee hath himselfe. *Causa patet.*

"*PUR terme de vie, ou en taile.*" Here it appeareth [k] that by taking a [l] lease for life, or a gift in taile, the warrantie is suspended.

A man infeoffeth a woman with warrantie, they intermarry and are impleaded, upon the default of the husband, the wife is received, she shal vouch her husband, &c. notwithstanding the warranty was put in suspence. [m] And so on the other side, if a woman infeoffe a man with warrantie, and they intermarry and are impleaded, the husband shall vouche himselfe and his wife by force of the said warrantie.

[k] 16. E. 3. Vouch. 87. 44. E. 3. 38. 26. E. 3. 56. 17. E. 3. 47. 10. E. 3. 30. 12. E. 3. Counterplea de vouch. 42. 14. E. 3. ib. 12. (4. Rep. 52.) [l] 6. E. 2. Vouch. 257. 3. E. 3. ib. 201. 5. E. 3. ib. 178. 18. E. 3. 52. 14. E. 3. Vouch. 109. 31. E. 3. ibid. 25. 43. E. 3. 7. 44. E. 3. 38. 32. E. 3. Voucher 102. [m] 4. E. 2. Voucher 243. 246.

An

* *pas* not in L. and M. nor Roh. † *&c.* added L. and M. and Roh.

der for the felony, nor forfeiture of his lands, or corruption of bloud. But in case of high-treason, if the partie refuse to answer according to law, or say nothing, hee shall have such judgement by attainder, as if he had beene convicted by verdict or confession. (1)

(3. Rep. 10. b.)

[*] Glanvil. lib. 14. ca. 15. Marlbr. ca. 25. W. 1. c. 15. [a] 3. E. 4. 14. 18. E. 4. 10. 23. Ass. 49. 1. E. 3. 13. Stanf. Pl. Cor. 102. E. 8. H. 4. 2. [b] 22. Ass. 49. (3. Inst. 47. 4. Rep. 40, 41, 42. 44.)

" *Felony.*" (*) *Ex vi termini significat quodlibet capitale crimen felleo animo perpetratum*, in which sense murder is said to be done *per feloniam*, and is so appropriated by law, as *felonicè* cannot be expressed by any other word. [a] And in antient times this word (*felonicè*) was of so large an extent as it included high-treason; and therefore in our antient bookes, by the pardon of all felonies, high-treason, or counterfeiting of the great seale, and of the king's coine, &c. was pardoned. [b] But afterwards it was resolved, that in the king's pardon or charter, this word (*felonie*) should only extend to common felonies, and that high-treason should not be comprehended under the same, and therefore ought to be specially named. And yet that a pardon of all felonies should extend to petite treason; wherefore by the law at this day under " (felony) in commissions, &c. is included petite treason homicide, burning of houses, burglarie, robberie, rape, &c medly, *se defendendo*, and petite larceny. [c] For such crimes for which any shall have this judgement, to be h the necke till he be dead, he shall forfeit all his lands in fe and his goods and chattels: for felony by chance-med *defendendo*, or petite larceny, he shall forfeit his goods and and no lands of any estate of freehold or inheritance. An lonies punishable according to the course of the common either by the common law, or by statute. There is also punishable by the civill law, because it is done upon t sea, as pyracie, robberie, or murder, whereof the common take no notice, because it could not be tried by twelve n this pyracie be tried before the lord admirall in the cour admiraltie, according to the civill law, and the delinque attainted, yet shall it worke no corruption of bloud, nor f of his lands; otherwise it is if he be attainted before comm by force of the statute of [d] 28. *H.* 8. By the expresse of that statute, about the end of the reigne of queene *E* certaine English pyrats, that had robbed on the sea merc *Venice*, in amitie with the queene, being not knowen, ob coronation pardon, whereby, amongst other things, the ki doned them all felonies. It was [e] resolved by all the j England upon conference and advisement, that this did no the pyracie; for seeing it was no felonie whereof the comn tooke consance, and the statute of 28. *H.* 8. did not a offence, but ordaine a triall and inflict punishment, the ought to be pardoned specially, or by words which tant and not by the generall name of felony; and according to solution the delinquents were attainted and executed.

[c] Stanf. praer. 45. b. 16. E. 3. Coron. 116. & 3. E. 3. Coron. 302.

(5. Rep. 120. 9. Rep. 65.)

(Vide Ant. 74. 3. Inst. 112. 1. H. P. C. 354, 355. Vol. 2. 12. 368. Salk. 85. contra.)

[d] 28. H. 8. cap. 15.

(3. Inst. 112.)

[e] Hill. 2. Jac. Regis.

Vide Mich. 7. & 8. Eliz. Dier 241. 14. Eliz. Dier 308. (4. Rep. 43.)

Pyrata commeth of the word πειράτης, which signifieth at sea. Attainder of heresie or *præmunire* worketh no cc of bloud, nor heresie, forfeiture of lands; but in case of *pr* forfeiture of lands in fee simple, but not of lands in taile merly hath been said. [f] By some statutes it is said, *fo ture de corps et de avoire*, or *sub forisfactura omnium quæ in suâ obtinet*, or to be at the king's will, body, lands, an

[f] Statute de Magna moneta tempore E. 1. 35. E. 1. de Carlisle. 20. E. 3. cap. 4. (Doct. & Stud. 115.)

(1) On the *peine forte et dure*, see Mr. justice Blackstone's Commentaries, vol. . . 25.

and the like, these are not extended to the losse of life or member, but to imprisonment, lands and goods. [g] But if an act of parliament saith, *Erit judgement de vit et member*, or *subeat judicium vitæ vel membrorum*, in that case judgement of death shall be given, as in case of felonie, viz. that he be hanged by the necke till he be dead, and consequently his bloud is corrupted (as our authour here saith), and shall forfeit as in case of felonie.

[391. b.]

[g] W. 2. cap. 34. Rot. Parl. 25. E. 1. 1. E. 2. de frang. prisonam. 14. E. 3 cap. 10. Stanf. Pl. Coron. 30, 31.

3. E. 3. Coron. 153. Brooke tit. Coron. 203. 9. E. 4. 26. (11. Rep. 2. 23. H. 8. 25. H. 8. 48. H. 6. by 18. Eliz. 25. Ed. 3.) (11. Rep. 291. 4. Inst. 123.) (4. Mod. 128. Show. 353.)

[b] There is also a court of the constable and marshall, who have conusance of contracts of deeds of armes, and of warre out of the realme and also of things touching warre within the realme, which may not be determined or discussed by the common law, and also all appeales of offences done out of the realme, and they proceed according to the civil law: but these things more properly ... another kind of treatise, and therefore I shall speake no ... f in this place, but only for the satisfaction of the stu... , to quote some authorities of law touching the juris... ...t court, that hee may have some taste thereof.

...e manner it is, if a man be attainted of high-treason, ... is also defeated.

...*st corrupt enter eux, &c.*" [*] Aptly is a man said ...d, *attinctus*, for that by his attainder of treason or ...oud is so stained and corrupted, as, first, his children ...res to him, nor to any other ancestor, and therefore ... cannot binde; for thereby heires only are to be ...

...f he were noble or gentle before, he and all his chil... ...ritie are by this attainder made base and ignoble, in ... nobilitie or gentrie which they had by their birth. ...is corruption of bloud is so high, that regularly it ...solutely salved but by authoritie of parliament: all ...red in the same (&c.). (1)

[b] Bract. lib. 4. fol. 248. 48. E. 3. 3. 13. R. 2. cap. 2. Rot. Parl. 21. R. 2. nu. 19. 1. H. 4 c. 14. 13. H. 4. 4. & 5. 37. H. 6. 21. Rot. Parl. 8. R. 2. nu. 31. Fortesc. cap. 32. Rot. Parl. 2. H. 4. 74. 11. H. 4. 24. 30. H. 6. 6. Stanf. Pl. Cor. 65. Stat. de Assignat. 4. E. 1. Br. Cor. 196. Rot. Parl. 2. H. 6. nu. 91 Rot. Parl. 5. H. 4 nu. 39. Rot. Vasc. 9. H. 4. nu. 14. 8. H. 6. nu. 38. 21. E. 4. 17. b. Catesby. 10. H. 7. per

...E. 2. Quar. Imp. 175. 6. E. 3. 41. Pasc. 14. E. 3. in Scac. le Count ... 39. E. 3. cor. Reg. Rot. 49. le Count. de Lanc. case. Rot. Parl. 28. E. 3. ...s case. Rot. Parl. 28. E. 3. nu. 13. le Countee de Arundel's case. [*] Stanf. 95. b. 27. E. 3. 77. 13. H. 4. 8. Vid. Lit. lib. 1. in the Chap. of Dower.

Sect. 746.

...*tenant en taile soit dis... ...puis fait release al disseisor ... en fee, et puis le tenant ...ttaint, ou utlage de felony, ... morust; en cest case l'issue ... enter sur le disseisor. Et la*

ALSO, if tenant in taile bee disseised, and after make a release to the disseisor with warrantie in fee, and after the tenant in taile is attaint, or outlawed of felony, and hath issue and dieth; in this case the issue in taile

...olicy and justice of our laws of ...his respect are most ably discussed in Mr. Yorke's celebrated Considerations on the Law of Forfeiture.

la cause est pur ceo, que * *rien fait discontinuance en cest case forsque le garrantie, et garrantie ne poit discender al issue en taile, pur ceo, que le sanke est corrupt perenter celuy que fist le garrantie et issue en taile.*

taile may enter upon the disseisor. And the cause is for this, that nothing maketh discontinuance in this case but the warrantie, and warrantie may not descend to the issue in taile, for this, that the bloud is corrupt between him that made the warrantie and the issue in taile.

Sect. 747.

CAR le garranty touts foits demurt a le common ley, et la common ley est, † *ove quant home est attaint ou utlage de felonie, quel utlagarie est un attainder en ley, que le sanke perenter luy et son fits, et touts auters queux serra dits ses heires, est corrupt, issint que* ‡ *riens per discent poit discender a ascun que poit estre dit son heire per le common ley. Et la feme de tiel home que issint est attaint de felonie, ne serra jammes endow de les tenements sa baron issint attaint. Et la cause est, pur ceo que homes pluis eschuerent de faire ascuns felonies.* ‡ *Mes l'issue en tayle quant a les tenements tailes n'est pas en tiel cas* § *barre, pur ceo que* ‖ *est enherite per force de le statute, et nemy per le course de common ley: et pur ceo tiel attainder de son pier ou de son ancestor en le tayle* ¶, *ne luy ouster de son droit per force de le taile, &c.*

FOR the warrantie alwayes abideth at the common law, and the common law is such, that when a man is attaint or outlawed of felony, which outlawrie is an attainder in law, that the bloud betweene him and his sonne, and all others which shall bee said his heires, is corrupt, so that nothing by discent may descend to any that may bee said his heire by the common law. And the wife of such a man that is so attaint, shal never be endowed of the tenements of her husband so attainted. And the cause is, for that men should more eschew to commit felonies. But the issue in taile as to the tenements tailed is not in such case barred, because hee is inheritable by force of the statute, and not by the course of the common law: and therefore such attainder of his father or of his ancestour in the taile, shall not put him out of his right by force of the taile, &c.

"LE *issue en taile poit enter.*" And the reason is, for that by the attainder of the father, it is now in judgement of law but a release without warrantie; for albeit the warrantie at the time of the release was effectuall, yet it worketh no discontinuance unlesse it descendeth upon the issue in taile; so as if it be defeated, extinct, or determined in the life of the tenant in taile, then no discontinuance is wrought: and so it is if tenant in taile hath issue, and releaseth to the disseisor with warrantie, and after is attainted of felonie, and after obtaineth his pardon and dieth, the issue in taile may

(1 Lwd. 252. a. 3. Inst. 241.)

* *nul* added L. and M. and Roh.
† *tiel* added L. and M. and Roh.
‡ *nul* added L. and M. and Roh.
‡ *&c.* added L. and M. and Roh.
§ *barre* not in L. and M. nor Roh.
‖ *il* added L. and M. and Roh.
¶ *&c.* added L. and M. and Roh.

may enter; [*] for the pardon doth not restore the bloud as to the warrantie, nor maketh the issue in that case inheritable to the warrantie. But if the issue in taile in that case had been attainted of felonie in the life of his father, and obtained his charter of pardon, and then his father had died, the issue cannot enter into the land in respect of the corruption of the bloud upon the attainder of himselfe. [b] And it is a generall rule, that having respect to all those whose bloud was corrupted at the time of the attainder, the pardon doth not remove the corruption of bloud neither upward nor downward. As if there be grandfather, father, and sonne, and the grandfather and father have divers other sonnes, if the father bee attainted of felonie and pardoned, yet doth the bloud remaine corrupted not onely above him and about him, but also to all his children borne at the time of his attainder. But in the case of *Littleton*, if tenant in taile at the time of his attainder had no issue, and after the obtaining of his pardon had issue, that issue should have beene bound by the warrantie; for by the pardon he was as a new creature, *tanquam filius terræ*, whose bloud upwards remaine corrupted; but for the issue had after the pardon, hee is inheritable to his father; and if his father had issue before the pardon, and hath issue also after and dieth, nothing can descend to the youngest, for that the eldest is living and disabled. But if the eldest sonne had died in the life of the father without issue, then the youngest should inherit.

[*] 27. E. 3. 77. 1. E. 3. 4. 6. E. 3. 55. 9. H. 5. 9. 31. E. 1. Discont. 17. 46. E. 3. Petit. 20. 26. Ass. 2. 49. Ass. 4. 29. Ass. 11. 13. H. 4. 8. 13. H. 7. 17. Pl. Com. in Walsingham's case. 3. E. 2. Discent. Br. 64. Stanf. Pl. Cor. 195, 196. See in the Chapter of Tenant by the Curtesie, touching this matter. (Plowd. 557. b. Ante 8. a.)

[b] Bract. lib. 3. fol. 132. 133. 276. & lib. 5. 374. Britt. fol. 215. b. Flet. lib. 1. cap. 28. (1. Cro. 435. Ant. 8. a.)

" *Le garrantie demurt al common ley.*" The collaterall warrantie is not restrained by the statute of *donis conditionalibus*, but a lineall warrantie is restrained by the statute, unlesse there be assets; as formerly at large hath beene said.

Vid. Sect. 711, 712.

192. a.

" *Et la feme de tiel home que issint est attaint, &c. ne serra jammes* " *endow, &c.*" It is to be observed, that the judgement against a man for felonie is, that he be hanged by the neck untill he be dead; but *implicativè*, (as hath beene said) he is punished first in his wife, that she shall lose her dower. Secondly, in his children, that they shall become base and ignoble; as hath beene said. Thirdly that he shall lose his posteritie, for his bloud is stained and corrupted, that they cannot inherit unto him or any other ancestor. Fourthly that he shall forfeit all his land and tenements which he hath in fee, and which he hath in taile, for terme of his life. And fifthly, all his goods and chattels. And thus severe it was at the common law; and the reason hereof was, that men should feare to commit felonies: *Ut pœna ad paucos, metus ad omnes perveniat*. And it is truly said, *Etsi meliores sunt quos ducit amor, tamen plures sunt quos corrigit timor*. And so it is *à fortiori* in case of high treason. But some acts of parliament have altered the common law in some of those points: first, by the statute of *donis conditionalibus*, lands intailed were not forfeited neither for felonie nor for treason, but for the life of tenant in taile. This act was made by king *Edward* the first, who (as our bookes [i] speake) was the most sage king that ever was: [k] and the cause wherefore this statute was made, was to preserve the inheritance in the bloud of them to whom the gift was made, notwithstanding any attainder of felonie or treason. And this act in historie is called *gentilitium municipale*; for that by this act the families of many noblemen and gentlemen were continued and preserved to their posterities. And this law continued

(8. Rep. 171. Ante 31. a. 37. a. 41. a.) (Lamb. 275, 276.) (3. Inst. 17. 47. Ant. 41. a.)

1. b.

[i] 5. E. 3. 14. 9. E. 3. 22. [k] 7. H. 4. 32. 19. H. 6. 71. See Lit. lib. 1. cap. Dow. Sect. 55. (7. Rep. 1.

in force from the thirteenth yeare of king *Edward* the first, untill the [l] twentie-sixth yeare of king *Henrie* the eighth, when by act of parliament estates in taile are forfeited by attainder of high-treason. But as to felonies (whereof our author here speaketh) the statute of *donis conditionalibus* doth yet remain in force, so as for attainder of felonie, lands or tenements entailed and not forfeited, but only (as hath beene said) during the life of tenant in taile, but the inheritance is preserved to the issues.

[l] 26. H. 8. cap. 13. 33. H. 8. cap. 20. 5. E. 6. ca. 11.

[m] The wife of a man attainted of high treason or petit treason shall not be received to demand dower, unlesse it be in certaine cases specially provided for. But the wife of a person attainted of misprision of treason, murther, or felonie, is dowable since our author wrote, [n] by the statute in that case made and provided, which is more favourable to the woman than the common law was.

[m] Staunf. Pl. Cor. 195.

[n] 1. E. 6. c. 13. 5. E. 6. c. 11. 5. El. ca. 1. & 11. 18. El. ca. 1.

[o] If a seigniorie be granted with warrantie, and the tenancie escheat, the seigniorie whereunto the warrantie was annexed is extinct, and consequently the warrantie defeated, and it shall not extend to the land; *et sic in similibus*.

12. H. 4. 3. Vide Sect. 55. (8. Rep. 171.)

If a collaterall ancestor release with warrantie, and enter into religion, now the warrantie doth binde; but if after he be deraigned, now it is defeated.

[o] 6. H. 4. 1. 45. E. 3. Vouch. 72. Pl. Com. 292.

16. E. 3. Age. 46. 18. H. 3. Vouch. 281. 33. E. 3. Garr. 77. See in the Chapter of Villenage, Sect. 200.

Sect. 748.

ITEM, si tenant en le taile enfeoffa son uncle, le quel enfeoffa un auter en fee ove garrantie, &c. si apres le feoffee per son fait relessa a son uncle touts manners des garranties, ou touts manners de covenants reals, ou touts manners de demandes, per tiel release le garrantie est extinct. Et si le garrantie en cel case soit pleade envers le heire en taile, que porta son briefe de formedon, *pur barrer le heire de son action, si l'heire avoit * le dit releas et ceo pledast, il defetera le plee en barre, &c. Et mults auters cases et matters y sont, per queux home poit defeater garrantie, &c.*

ALSO, if tenant in taile infeoffe his uncle, which infeoffes another in fee with warrantie, if after the feoffee by his deed release to his uncle all manner of warrantie, or all manner of covenants realls, or all manner of demands, by such release the warrantie is extinct. And if the warrantie in this case bee pleaded against the heire in taile that bringeth his writ of *formedon*, to barre the heire of his action, if the heire have and plead the said release, &c. he shall defeat the plee in barre, &c. And many other cases and matters there be, whereby a man may defeat a warrantie, &c.

(1. Rep. 112. b.)

LITTLETON having spoken in what cases warranties may bee defeated and extinguished by matter in law, now he sheweth how a warrantie may be discharged or defeated by a matter in deed: and hereupon he putteth an example of a release in three severall manners.

(5. Rep. 71. a.)

First, by a release of all warranties.

Secondly, by a release of all covenants reall.

Vide Lib. 8. fol. 153, 154. Altham's case.

46. E. 3. 2. 45. E. 3. 23. Vid. before in the Chapter of Releases. Sect. 508.

And

* *le dit releas et ceo pledast—et pledast le dit releas, &c.* in L. and M.

And thirdly, by a release of all demands. (Ant. 291. b.)

[q] If a man make a gift in taile with warrantie, this warrantie is also intailed, and therefore a release made by tenant in taile of the warrantie, shall not barre the issue, no more than his release shall bar the issue to bring an attaint upon a false verdict, or a writ of error upon an erroneous judgement given against the father, nor his gift can barre the issue of the deed that create the estate taile, nor of any other deed necessary for defence of the title.

[393. a.]

[q] 14. Ass. pl. 2. 3. Eliz. Dyer. 188. 9. E. 4. 52. b. (Plowd. 2. b. Manxel's case. Ant. 319. b. 20. a. 6. Rep. 7.)

"*Apres le feoffee releassa.*" *Littleton* here putteth his case where one is bound to warrant: put the case [r] then that two make a feoffement in fee, and warrant the land to the feoffee and his heires, and the feoffee release to one of the feoffors the warrantie, yet he shall vouche the other for the moytie. And so it is if one infeoffe two with warrantie, and the one release the warrantie, yet the other shall vouch for his moytie.

(5. Rep. 70.) [r] 45. E. 3. 23. (3. Rep. 24.)

"*Si le heire avoit le dit releas, &c.*" Here it appeareth, that the release being made to the uncle being his ancestor, the deed doth after the decease of the uncle belong to him, and therefore he cannot plead it, unlesse he sheweth it forth.

"*Et multz auters cases et matters y sont, per queux home poet defeater garrantie, &c.*" As namely by a defeasance, as other things executorie may. Also a warrantie may lose his force by taking benefit of the same. In a *præcipe* the tenant voucheth, and at the *sequatur sub suo periculo*, the tenant and the vouchee make default, whereupon the demandant hath judgement against the tenant. And afterwards the demandant brings a *scire facias* against the tenant to have execution; in this case the tenant may have a *warrantia cartæ*. And if in that case a stranger had brought a *præcipe* against the tenant, hee might have vouched againe, for by the judgement given against the tenant, the warranty lost not his force; but if the tenant had judgement to recover in value against the vouchee, hee should never vouche againe by reason of that warrantie, because hee had taken advantage of the warrantie. And it is to be observed, that upon the proces of *summoneas ad warrantizandum*, if the sherife returne the vouchee summoned, and he make default, the tenant shall have a *capias ad valentiam*; but if he returne that the vouchee had nothing, then after the *sicut alias et plures* a *sequatur sub suo periculo* shall issue; and there if the vouchee make default, the tenant shall not have judgement to recover in value; for he was never summoned; and it appeareth of record that he hath nothing, but in the *capias ad valentiam* it appeareth that he had assets, and he had beene summoned before: but in some speciall cases there shall be two recoveries in value upon one warrantie. As if a disseisor give lands to the husband and wife, and to the heires of the husband, the husband alieneth in fee with warrantie and dieth, the wife bringeth a *cui in vitâ*, the tenant vouche and recovereth in value, if after the death of the wife the disseisee bring a *præcipe* against the alienee, he shall vouch and recover in value againe.

(Vaugh. 387.) 43. E. 3. 17. M. Com. in Browning's case.

(Hob. 27.)

[s] So it is where the wife bringeth a writ of dower against the alienee, he shall recover in value, and after her death he shall recover in value againe, upon the same warrantie.

[s] 45. E. 3. Voucher 72.

In

(Hob. 22.) In the same manner it is if a man be seised of a rent by a defeasible title, and releaseth to the tenant of the land all his right in the land, and warranteth the land to him and his heires, if he be impleaded for the rent, he shall vouch and recover in value for the rent; and if after he be impleaded for the land, he shall vouche and recover in value againe for the land: but in these and the like cases, the reason is in respect of the severall estates recovered, but for one and the same estate he shall never recover but once in value; (Ant. 367. b.) and though the land recovered in value be evicted, yet shall he never take benefit of that warrantie after. And as warranties may be defeated in the whole, so they may be defeated as to part of the benefit that may be taken of the same. [r] As he that hath a warrantie may make a defeasance not to take any benefit by way of voucher: in the like manner that he shall take no advantage by way of *warrantia cartæ*, or by way of rebutter.

[r] 7. H. 6. 43. 13. Ass. 8. 13. E. 3. Garr. 24, 25. 37. 22. H. 6. 51. 8. H. 7. 6.

Sect. 749.

ET est ascavoir, que en mesme le manner come garrantie collateral poit estre defeat per matter en fait ou en ley; en mesme le manner poit lineal garrantie estre defeat, * *&c. Car si l'heire en taile porta briefe de* formedon, *et un lineal garranty de son ancester enheritable per force de le taile, soit plede envers luy, ove ceo, que assets a luy discendist de fee simple,* † *que il ad per mesme l'auncester que fist le garrantie; si l'heire que est demandant poit adnuller et defeater le garrantie, ceo suffist a luy: car le discent des auters tenements de fee simple ne fait riens pur barrer l'heire sans le garrantie, &c.*

AND it is to be understood, that in the same manner as the collaterall warrantie may bee defeated by matter in deed or in law; in the same manner may a lineall warrantie be defeated, &c. For if the heire in taile bringeth a writ of *formedon*, and a lineall warrantie of his ancestor inheritable by force of the taile, bee pleaded against him, with this, that assets descended to him of fee simple, which hee hath by the same ancestor that made the warrantie; if the heire that is demandant may adnull and defeat the warrantie, that sufficeth him: for the discent of other tenements of fee simple making nothing to barre the heire without the warrantie, &c.

HERE *Littleton* sheweth, that in the same manner that a collaterall warrantie may be defeated by matter in deed, or by matter in law, so may to all intents and purposes a lineall warrantie, whereof hee putteth an example of a lineall warrantie and assets.

Temps E. 1. Gar. 89. 34. E. 1. ibid. 88. 21. E. 2. ibid. 83. 4. E. 3. 24. 5. E. 3. 14. 40. E. 3. 9. 14. H. 4. 39.

"*Et un lineall garrantie, &c. ovesque ceo que assets a luy discendist,* "*&c.*" Here it appeareth by *Littleton*, that a lineall warrantie and assets is a good plea in a *formedon* in the discender; wherein it is to be knowen, that if tenant in taile alieneth with warrantie, and leave assets to descend; if the issue in taile doth alien the assets, and die, the issue of that issue shall recover the land, because the lineall warrantie descendeth only to him without assets; for neither

* *&c.* not in L. and M. nor Roh. † *que il ad* not in L. and M. nor Roh.

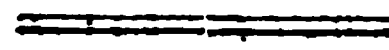
neither the pleading of the warrantie without the assets, nor the assets without the warrantie is any barre in the *formedon* in the discender. But if the issue to whom the warrantie and assets descended had brought a *formedon*, and by judgement had beene barred by reason of the warrantie and assets; in that case, albeit he alieneth the assets, yet the estate taile is barred for ever; for a barre in a *formedon* in the discender, which is a writ of the highest nature that an issue in taile can have, is a good barre in any other *formedon* in the discender, brought afterwards upon the same gift.

24. H. 8. taile Br. 33. 4. Mar. Dier 139. Lib. 10. fol. 37. 38. in Mary Portington's case. (8. Rep. 51.) (Ant. 374. a. b.) (10. Rep 38. Plowd. 440. a. b. Hob. 40. Moor. 55.)

ORE *jeo ay fait a toy, mon fits, trois livres.*

NOW I have made to thee, my sonne, three bookes.

"*A TOY, mon fitz, &c.*" Here our author calleth (as many times in these bookes he hath done) not only his sonne *Richard*, but everie studient of the law to be accounted his son, and worthily; for that seeing our author had the honour to be in his time the father of the law, and all good studients in the law justly account themselves the sonnes of the law (for otherwise they are not worthy of the profession), our author, as a carefull and provident father, as it hath manifestly appeared, gave excellent instructions in these his bookes, both to his owne sonne, and to his adopted sonnes, to make them from age to age the more apt and able to understand the arguments and reasons of the law.



[394. a.]

Tabula.

*Le primer Livre est de Estates que homes ount en terres * ou tenements: c'estascavoir,*

The first Book is of Estates which men have in lands and tenements: that is to say,

De Tenant en fee simple †† Cap. 1
De Tenant en fee taile 2
De Tenant en † fee taile apres possibilitie d'issue extinct 3
De Tenant per le curtesie d'Engleterre 4
De Tenant en dower 5
De Tenant a terme de vie 6
De Tenant pur terme des ans 7
De Tenant a volunt per le common ley 8
De Tenant a volunt per custome del mannor 9
‡ *De Tenant per le verge* 10

* *ou—et*, L. and M. and Roh.
† *fee—le*, L. and M. and Roh.
‡ *De tenant per le verge*, not in L. and M. nor Roh.

†† The numbers of the Chapters as above are not enumerated either in L. and M. or Roh.

Le

Le Second Livre. *

De Homage Cap. 1
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De Escuage 3
De Service de Chivaler 4
De Socage 5
De Frankalmoigne 6
De Homage Auncestrel 7
De Grand Serjeantie 8
De Petit Serjeantie 9
De Tenure en Burgage 10
De Tenure en Villenage 11
De † Rents 12

Et ceux deux petits Livres jeo ay fait a toy pur le melior entender de certaine Chapters de les antient Livre de Tenures.

And these two little Books I have made to thee for the better understanding of certaine Chapters of the antient Booke of Tenures.

"*MELIOUR entender, &c.*" And these Institutes have I collected and published to the end that these three Bookes of our author may be the better understood of the studious reader.

"*Antient Livre des Tenures.*" This booke may well be accounted antient, for it was composed in the raigne of king *Edward* the third, (as justice *Fitzherbert* saith) by a grave and discreet man.

Fitz. in his Preface to his N. B.

Le Tierce Livre. ‡

[394. b]

De Parceners ‖ solonque le course del common ley Cap. 1.
⸸*De Parceners solonque le custome* 2
De Jointenants 3
De ¶ Tenants en common 4
De Estates de terres et tenements sur condition 5
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De Releases 8
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De Attornements 10
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De Garranties. § 13

* *est* added L. and M. and Roh.

† *Rents*—iii. *maners de rentes*, scilicet, *rent service, rent charge, et rent sekke*, L. and M. and Roh.

‡ *est* added L. and M. and Roh.

‖ *solonque le course del common ley*, not in L. and M. and Roh.

⸸ *De parceners solonque le custome*, not in L. and M. nor Roh.

¶ *Tenants—tenements*, L. and M. and Roh.

§ *scilicet, garrauntie lyneall, garrauntie collaterall, et garrauntie que commence per disseisin*, added L. and M. and Roh.

Epilogus.

* *Epilogus.*

ET sachez, mon fitz, que jeo ne voile que tu croies, que tout ceo que jeo ay dit en les dits livres soit ley, car jeo ne ceo voile emprender ne presumer sur moy. Mes de tiels choses que ne sont pas ley, enquires et apprendres de mes sages masters apprises en la ley. Nient meins coment que certaines choses queux sont motes et specifies en les dits livres, ne sont pas ley, uncore tielx choses ferra toy plus apt et able de entender et apprender les arguments et les reasons del ley, &c. Car per les arguments et les reasons en la ley, home pluis tost aviendra a le certaintie et a la conusans de la ley.

AND know, my son, that I would not have thee beleeve, that all which I have said in these bookes is law, for I will not presume to take this upon me. But of those things that are not law, inquire and learne of my wise masters learned in the law. Notwithstanding albeit that certaine things which are moved and specified in the sayd bookes, are not altogether law, yet such things shall make thee more apt, and able to understand and apprehend the arguments and the reasons of the law, &c. For by the arguments and reasons in the law, a man more sooner shall come to the certaintie and knowledge of the law.

Lex plus laudatur quando ratione probatur.

"*JEO ne voile enprender de presumer, &c.*" Here observe the great modestie and mildnesse of our author, which is worthy of imitation; for *Nulla virtus, nulla scientia locum suum et dignitatem conservare potest sine modestiâ.* And herein our author followed the example of *Moses*, who was a judge, and the first writer of law; for he was *mitissimus omnium hominum qui fuit in terris*, as the holy historie testifieth of him.

"*Les arguments et les reasons del ley, &c.*" *Ratio est anima legis*; for then are we said to know the law, when we apprehend the reason of the law; that is, when we bring the reason of the law so to our owne reason, that wee perfectly understand it as our owne; and then, and never before, we have such an excellent and inseparable propertie and ownership therein, as wee can neither lose it, nor any man take it from us, and will direct us (the learning of the law is so chained together) in many other cases. But if by your studie and industrie you make not the reason of the law your owne, it is [395. a.] not possible for you long to retaine it in your memorie. And wel doth our author couple arguments and reasons together, *Quia argumenta ignota et obscura ad lucem rationis proferunt et reddunt splendida:* and therefore *argumentari et ratiocinari* are many times taken for one. And that our author may not speake any thing without authority, (which in these Institutes we have as we take it manifested) his opinion herein also agreeth with that of the learned and reverend chiefe justice of the court of common pleas, sir *Richard Hankford*, [y] *Home ne scavera de quel mettal un campane est, si ne soit bien bate, ne le ley bien conus sans disputation.* And another saith,

[y] 11. H. 4. 37.

* Not in L. and M. nor Roh.

[*] 41. E. 3. 22. Kirton. Vid. Sect. 377.

[*] *Jeo aye dispute cest matter pur la apprender la ley.* So as our author hath made a most excellent epilogue or conclusion with a grave advice and counsell, together with the reason thereof, which all good students are to know and follow; and with *scire* and *sequi* I will conclude our author's epilogue.

"*Lex plus laudatur quando ratione probatur.*"

Vid. Sect. 384. 443. 550.

This is the fourth time that our author hath cited verses.

When I had finished this worke of the first part of the Institutes, and looked backe and considered the multitude of the conclusions in law, the manifold diversities between cases and points of learning; the varietie almost infinite of authorities, antient, constant and moderne, and withall their amiable and admirable consent in so many successions of ages; the many changes and alterations of the common law, and additions to the same, even since our author wrote, by many acts of parliament, and that the like worke of Institutes had not been attempted by any of our profession whom I might imitate, I thought it safe for me to follow the grave and prudent example of our worthy author, not to take upon me, or presume that the reader should thinke that all that I have said herein to be law: yet this I may safely affirme, that there is nothing herein but may either open some windowes of the law, to let in more light to the student by diligent search to see the secrets of the law, or to move him to doubt, and withall to inable him to inquire and learne of the sages, what the law, together with the true reason thereof, in these cases is: or lastly, upon consideration had of our old bookes, lawes, and records, (which are full of venerable dignitie and antiquitie) to finde out where any alteration hath beene, upon what ground the law hath beene since changed; knowing for certaine, that the law is unknowen to him that knoweth not the reason thereof, and that the knowne certaintie of the law is the safetie of all. I had once intended, for the ease of our student, to have made a Table to these Institutes; but when I considered that Tables and Abridgements are most profitable to them that make them, I have left that worke to everie studious reader. And for a farewell to our jurisprudent, I wish unto him the gladsome light of jurisprudence, the lovelinesse of temperance, the stabilitie of fortitude, and the soliditie of justice.

FINIS.

A

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