(3. Rep. 62. b.)

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.

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

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.

And ſo was it reſolved in Wynter's caſe, Mich. 14. & 15. Eliz. in Communi Banco, and oftentimes ſince. Vide Dyer 309.

(Plo. 242. 1. Saun. 240. 1. Leo. 62.)

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

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(F. N. B. 144. b.)

AL ſeignior 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 per 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.

(*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.

The gardian in chivalrie (*f*) or in focage 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.

*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 ſueh 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.

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* *leſſor—feoffor*, L. and M. and Roh.

(1) *It has alſo been held upon this ſtatute, that if a man makes a leaſe for years upon condition that if the rent ſhould be in arrear, it ſhould be lawful to the leſſor and his aſſigns to re-enter, and then the leſſor aſſigns the reverſion over, and the leſſee attorns, and the leſſor dies, the grantee ſhall not take advantage of the condition for want of theſe words, his heirs, in the reſervation of the condition; the condition being that he and his aſſigns ſhall enter. By Brown, ſerj. who moved the caſe in C. B. ex relatione T. Hurſt. —It appears therefore, that this reſervation of condition is to be reſembled to ſuch a reſervation of rent as is mentioned before, in page 47. a. which determined by the death of the leſſor; but that nevertheleſs the grantee ſhall have advantage of the condition, during the life of the grantor, by the 32. H. 8.* Infra 215. *b. So note, the grantee of part of the reverſion in the whole ſhall take advantage of a condition; for to this purpoſe the grantee of a reverſion for life or years is an aſſignee within the 32. Henry 8, who may enter; which nevertheleſs is very different in the caſe of a warranty; for a leſſee for life, who has but part of the eſtate in the whole, is not aſſignee for voucher.* Infra 385. *b. On the other hand, the grantee of the whole eſtate in reverſion in part is not an aſſignee within the 32. Henry 8. as if the reverſioner in fee of 4 acres grants 2 acres in fee, the grantee cannot enter; which alſo is very different in the caſe of warranty, for the feoffee of 2 acres is an aſſignee for voucher.* Infra 315. *a.*—Lord Nott. MS.

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*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.

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

(Ant. 26.)

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.

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* *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) The neceſſity which there was in the old law, that there ſhould always be ſome perſon to do the feudal duties, to fill the poſſeſſion, and to anſwer the actions which might be brought for the fief, introduced the maxim, that the freehold could never be in abeyance. See 2. Wilſon, Bond v. Weſt, 165. But it was admitted, that there were ſome caſes in which the inheritance, when ſeparated from the freehold, might be ſo. The queſtion agitated in the commentary upon this and the following ſection, ariſes from the difficulty of aſcertaining where the freehold, in the caſe mentioned by Littleton, is to be. By the livery, it is taken out of the grantor; it muſt therefore veſt in the feoffee. Yet it ſeems difficult to conceive how it could be in the grantee, conſiſtently with the term of years. The opinion adopted by Littleton and Sir Edward Coke is conformable to what is ſaid in Lord Strafford's caſe, 8. Rep. 73. b.—It is to be obſerved, that tho' by conveyances at common law the freehold neceſſarily paſſes out of the grantor; and that if there is not ſome perſon in being in whom it can immediately veſt, the conveyance is void; that

Strafford's

is

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(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 *Wayland* chiefe juſtice ſaith, that the fee and the franktenement 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 have had the wardſhip

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

ITEM ſi terre ſoyt grant 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 averoit fee, ou autrement 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. et apres les

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 grauntee in this caſe makes waſt, then after the breach of the condition, &c. and after the two *deux*

is not the caſe with reſpect to wills, conveyances under the ſtatute of uſes, truſts in equity, or grants of rents *de novo*. For as to wills;—there is no immediate tranſfer of the freehold, as upon the death of the teſtator it veſts in the heir to anſwer the lord's ſervices and the ſtranger's writs. As to conveyances under the ſtatute of uſes;—till there is ſome perſon in being in whom the uſe can veſt, the poſſeſſion is not altered, but continues in the feoffor and his heirs. See 1. Inſt. 23. As to executory truſts, the legal eſtate immediately veſts and continues in the truſtee: and as to rents *de novo*, the tenant continues in poſſeſſion of the land out of which they iſſue. However, it is to be obſerved, that in caſes of wills, uſes, and truſts, if it be inconſiſtent with the eſtates *expreſſly* declared, that the freehold ſhould remain with the party (as if he has a term of years *expreſſly* given him), the law will not give him, by *implication*, an eſtate of freehold. See Pybus v. Mitford, 1. Vent. 352. Adams v. Savage, 2. Salk. 679. Penhay v. Hurrel, 2. Vern. 370. Speed v. Davis, 2. Salk. 675. In the ſame manner, if a perſon limits his eſtate to ſuch uſes as he ſhall appoint; and in the mean time, and until he makes an appointment, to the uſe of himſelf and his heirs; or if he limits it to the uſe of himſelf for life, and after his

deux ans, le grantor avera ſon briefe de waſt. Et ceo eſt bone proofe adonque, que le reverſion eſt en luy, &c.

yeares, the grantor ſhall have his writ of waſte. And this is a good proofe then, that the reverſion is in him, &c.

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.

[x] 7. *E.* 3. 10. *I.* letteth certaine lands to *N.* for the tearme 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. F. 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. *K.* 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 between a 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 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. a. Rep. 67. a. Poſt. 378. a.)

And

his deceaſe, to ſuch uſes as he ſhall appoint, and for want of appointment, to the uſe of his right heirs;—in both of theſe caſes, the ſettlor and his heirs have a qualified and determinable fee, until by an exerciſe of the power of appointment, an uſe veſts in the perſon to whom it is appointed; or till by the death of the ſettlor, without exerciſing his power, the exerciſe of it becomes impoſſible. To this fee dower is clearly incident. If the ſettlor makes an appointment, a new uſe ſprings up and veſts in the appointee; and the fee originally limited to the ſettlor ceaſes; and with it the right of the wife to her dower out of it: and from that time, the uſe appointed under the power takes effect, in the ſame manner as if it had been inſerted in the original deed, in the place of the power. But if no appointment is made, the fee, from being qualified and determinable, becomes ſimple and abſolute. It may be objected, that in the ſecond of theſe caſes, an eſtate for life is expreſsly limited to the ſettlor, and that the fee is therefore put in abeyance. But in the caſe of Leonard Lovie, 10 Rep. 78. where the eſtate was deviſed to Leonard Lovie expreſsly for his life, without impeachment of waſte, and afterwards to ſuch uſes as he ſhould appoint, and after ſeveral intermediate remainders to the uſe of his right heirs, it was reſolved, that the fee veſted in him till the appoint-

ment

(2. Rep. 55.)

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.

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

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.

[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.

Seignior Stafford's caſe ubi ſupra.

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, 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.

Pl. Com. in Nichol's caſe 487.

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.

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.

[d] 10. E. 3. 54.

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.

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

[e] 32. *E.* 3. *tit. garr.* 30. a tenant by the courteſie 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

ment was made. See alſo Sir Edward Cleere's caſe, 6. Rep. 18. It may alſo be objected, that a limitation to ſuch uſes as a perſon ſhall appoint, is incompatible with, or rendered void by, the ſubſequent limitation of the fee to him, as the ownerſhip of the fee carries with it every power of appointment But it is to be obſerved, that the owner of the fee cannot convey the inheritance, but by deed ſealed and delivered. Now he may limit a fee, under a power, by a mere inſtrument in writing, and without any of thoſe forms or ceremonies which the law requires for paſſing real property; which, clearly, is a power not included in the ownerſhip of the fee. It muſt, however, be noticed, that as a power of appointment is liable to be ſuſpended and deſtroyed, and as the exiſtence of the power is the only circumſtance which precludes the wife from her dower, in the caſe I have mentioned there always muſt be a poſſibility of danger in taking a title which depends upon it. Yet in ſome caſes the poſſibility is ſo ſmall as not to deſerve attention. Some remarks on the mode generally uſed for barring the wife's dower will be offered in the courſe of theſe annotations.

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*.

(*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, &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. (*f*) 43. E. 3. 35. (*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.

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

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.

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. (Plo. 481. a. Ant. 206. a. 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. Pl. Com. Browning & Beſton's caſe 133. b. (2. Rep. 53. b.)

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 veſted 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 veſted in the grantor by force of the condition, and that claime muſt be made upon the land. Vi. Littleton cap. Villein. (*d*) Pl. Com. Browning's caſe 133. b.

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. 42. E. 3. 1.

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 veſted 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 *mainteinant* out of the leſſor; by the like conſtruction, the freehold and inheritance by the default of the leſſee ſhall be veſted 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 unto him the land for yeares reſerving a rent, and after 20. E. 4. 19. 20. H. 7. 4. b. (4. Rep. 53.)

(1) Acc. 2. And. 8.

(2) Acc. 1. Rep. 174. a. as to the general principle; but the particular caſe there was, that *A.* covenanted to ſtand ſeized to the uſe of himſelf for life, with ſeveral remainders over; with a power of revocation.—By an exerciſe of this power, he revoked the uſes; and it was held, that the antient uſes were determined, without entry or claim, becauſe he himſelf was tenant for life of the land, and he could not enter upon himſelf; and no claim was neceſſary, as an expreſs revocation was as ſtrong as any claim could be.—See the following page.

(3) The entry, or claim, may be made either by the party himſelf, or by a ſtranger, by his order. 2. Cro. 57.

(1. Rep. 97.)

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.

[1] Lib. 1. 174. Digge's caſe.
[2] (Parl. Rot. 927. a. 265. b. Ant. 215. a.)

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.

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.

[3] Pl. Com. in Fulmerſtone's caſe. 107. b.
[4] (2. Roll. Abr. 494. 495. 497. 498. 499)
[5] (5. Rep. 11. a. 1. Roll. Abr. 412.) *Ex post. 273. b.*

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 years 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 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)

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

[7] 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.

[8] 50. 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)

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*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.

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[9] 5. Mar. 134. Dyer 14. Eliz. Dyer. 311. b. a. 11. 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.).

QUE le feoffee donera, &c. Here is no time limited, therefore the feoffee by the law hath time du-

ITEM ſi feoffment ſoit fait ſur tiel condition, que le feoffee donera le terre al feof-

ALSO if a feoffment be made upon ſuch condition, that the feoffee ſhal give the land to *for*,

* *la—lou* in L. and M. and Roh.

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

(2) No perſon is entitled to an action of waſte againſt a tenant for life, but he who has the *immediate* eſtate of inheritance in remainder or reverſion, expectant upon the eſtate for life. If between the eſtate of the tenant for life who commits waſte, and the ſubſequent eſtate of inheritance, there is interpoſed an eſtate of freehold, to any perſon *in eſſe*, then during the continuance of ſuch interpoſed eſtate, the action of waſte is ſuſpended; and if the firſt tenant for life dies during the continuance of ſuch interpoſed eſtate, the action is gone for ever. But though, while there is an eſtate for life interpoſed between the eſtate of the perſon committing waſte, and that of the reverſioner or remainder-man in fee; the remainder-man cannot bring his action of waſte: yet, if the waſte be done by cutting down trees, &c. ſuch remainder-man in fee may ſeize them; and if they are taken away, or made uſe of, before he ſeizes them, he may bring an action of trover. For, in the eye of the law, a remainder-man for life has not the property of the thing waſted; and even a tenant for life in poſſeſſion has not the abſolute property of it, but merely a right to the enjoyment or benefit of it, as long as it is annexed to the inheritance, of which it is conſidered a part, and therefore it belongs to the owner of the fee. See Ant. 53. b. 5th Rep. Pagett's caſe. Udal v. Udal, Alleyne 81. 3. P. W. 267. Bewick v. Whitehead, 22. Vin. Abr. 523. 2. Eq. Ca. Abr. 727. Rolt v. Somerville, 3. Atk. 757.

(3) For till entry it doth not appear; the feoffor having power at his election to void or continue the eſtate of the feoffee, which he will do. Note to the 11th edit.

for, et a la feme del feoffor, a aver et tener a eux, et a les heires de lour deux corps engendrès, 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 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, ceſtaſſavoir, deleſſer la terre al femme pur terme de vie ſans impeachment de waſt, le remainder apres ſon deceaſe a les heires de* †*le corps ſa baron et de luy engendres, et pur default de tiel iſſue, le remainder as 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*

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 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

ring 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. (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 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. (Sect. 337.) (1. Roll. Abr. 449. Ant. 2o6. 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

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)

27. E. 3. Dower 135. Seignior Cromwell's caſe ubi ſupra.

* *&c.* not in L. and M. nor Roh.
‡ *le* added in L. and M. and Roh.
† *les corps de ſon baron et de luy engendres*, in L. and M. and Roh.
‖ *uſt ewe—ad ewe*, in L. and M. and Roh.

(1) So where a feoffment was made on condition that the feoffees re-infeoffed the feoffor and his wife in tail, the remainder to the right heirs of the huſband; the huſband died; the wife married a ſecond huſband; the feoffees enfeoffed the ſecond huſband and his wife, for her life; — the remainder to the right heirs of the firſt huſband; it was held that the condition was well performed. Br. Abr. tit. Cond. pl. 33. And ſee Ibid. 70. Plo. 291.

(2) *Note, if land be given to the wife, and the heirs of the huſband of his body begotten, the wife ſhall have the eſtate for life, ſubject to waſte.— Sup. 26. b.; therefore ſuch conveyance is not by force.* Lord Nott. MS.

(3) It is with great pleaſure we preſent the reader with the following obſervations on this paſſage. Lord Chief-juſtice Wilmot, in his argument in the giving judgment in the caſe of Frogmorton, on demiſe of Robinſon v. Wharrey. 2. Blackſt. 728, remarks: "When an eſtate is limited to a huſband and wife, and the heirs of their two bodies; the word Heirs is a "word of limitation, becauſe an eſtate is given to both the perſons, from whoſe bodies the heirs are to iſſue. But when it is "given to one only, and the heirs of two, (as to the wife and the heirs of her and *d. B.*) there the word Heirs is a word of "purchaſe; for no eſtate tail can be made to one only, and the heirs of the body of that perſon and another. This appears from Litt. ſect. 352. according to the true reading collected from the original editions. The common editions make "the eſtate *cy pres*, therein mentioned, to be, to the widow and *les heirs de corps ſa baron de luy engendres*; which is not as "near as might be to the original eſtate intended, if the huſband had lived; *viz.* to the huſband and wife, and the heirs of "their

6. Rep. 30. b.)

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.

(1. Roll. Abr. 452.)

(1. Roll. Abr. 428.)

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.

*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.*

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.

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.

(Ant. 21. b.)

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.*

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.)

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

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. 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 that caſe, if *I. S.* had died before the day, the morgageor might have paid it.

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

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.

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.
(1. Sid. 268. 303. 304. 442. Ant. 207. a. Cro. El. 45.

Alſo if the wife take huſband before requeſt made, and then they make requeſt, and the ſtate is

* *ſait* not in L. and M. nor Roh.
‖ *el—il* in L. and M. and Roh.
† *ſa—ſon* in L. and M. and Roh.
† *el—il* in L. and M. and Roh.
§ *ſa—ſon* in L. and M. and Roh.
‡ *le* added in L. and M. and Roh.
¶ *a* not in L. and M. and Roh.

(1) Mr. Serj. Hawkins obſerves here, that the omiſſion of the privilege of being without impeachment of waſte, ſhall not give the heir of the feoffor, for whoſe benefit it was omitted, a re-entry, which would defeat the eſtate of the wife. P. 307. 2. Rep. 82. a.

" their two bodies. But the original edition by Letton and Macklinia, in Littleton's life-time, and the Rohan edition, which " is the next (both which my brother Blackſtone has) read it thus: *les heirs de les corps de ſon baron et luy engendres:* which " is quite conſonant to the original eſtate; and this eſtate, to the widow for life, and the heirs of the body of her huſband and " herſelf begotten, Littleton, in the ſame ſection, declares not to be an eſtate tail. The ſame is held in Dyer 99.—in Lane and " Pannel, 1. Roll. Rep. 438. and in Goſſage and Taylor, Style, 325. which, from a manuſcript of lord Hale, in poſſeſſion of " my brother Bathurſt, appears to have been firſt determined in Hil. 1651; which accounts for ſome expreſſions of chief-juſtice " Rolle, in Style's caſe, which was in T. Paſch. 1652."

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. 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. ii. 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 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.

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*ITEM en ceſt caſe ſi le baron et la feme ont iſſue, et deviont 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. quaunt 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 state, 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.)

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

(1) The privilege given by the words without impeachment of waste, is annexed to the privity of estate;—so that if the person to whom that privilege is given, changes his estate, he loses the privilege. 11. Rep. 83. b. Latch. 270.—It has been held that the intent of this clause is only to enable the tenant to cut down timber and open new mines, and that it does not extend to allow destructive or malicious waste; such as cutting down timber which serves for the shelter or ornament of the estate. See Vane v. Lord Bernard, 2. Vern. 738. Packington v. Packington, 5. Bac. Abr. 491. Rolt v. Lord Sommerville, 2. Ab. Eq. 759. Aston v. Aston, 1. Vin. 264. Peers v. Peers, 1. Vin. 521. 2. Atk. 283.

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

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{2. Rep. 70.}

QUE le feoffee re-infeoffera pluſors homes. By the re-feoffment 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.

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.

*ITEM ſi feoffment ſoit fait ſur condition, que le feoffee * re-infeoffera pluſors homes, a aver et tener a eux et a lour heires a touts jours, et touls 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 †.*

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

(Ant. 12. a.)

For example, if the ſurvivor tooke to wife *Alice Faireſield*, 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 *Faireſields* (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 *Faireſields* 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,

Vide Sect. 4.

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)

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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.

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 feoff-

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 *for*

* *re-infeoffera—infeoffera*, L. and M. and Roh. † *&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 whether there is a difference between an obligation and feoffment with condition to re-enfeoff.—Obligation on condition to give to the baron and feme and the heirs of the body of the feme before a certain day; and before the day the feme dies. The court was divided whether he ought to make it cy pres, in 8. Jac. B. R. Rot. 303. Roger and Scudamore, T. 37.—P. 4. E. 6. Bendl. n. 56. Obligation on condition to enfeoff B. and C. and their heirs before ſuch a day, and before the day B. dies, the obligation is diſcharged. Sir Ant. Brown's caſe. But this caſe was denied by the whole court. T. 40. E. C. B. C. C. n. 16. Obligation with condition that the obligor or his heirs ſhould enfeoff the obligee and his heirs before a certain day;—before the day the obligee dies: it was ruled that he ſhould enfeoff the heir. T. 40. El. C. B. Hone v. May, C. C. n. 16.—Ld. Hale's MSS.*

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

for & ſes heires entrer, &c. pur ceo que il ad luy meſme diſable de performer le condition, entant que il ad fait eſtate a un auter, &c.

may the feoffor and his heirs enter, &c. becauſe he hath diſabled (1) himſelfe to performe the condition, inaſmuch as he hath made an eſtate to another, &c.

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.

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, according to the condition in

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

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

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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 & ouſte meſme celuy a que l'eſtate eſt fait, &c. et occupier ceo durant ſont 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.

(4. Rep. 52.)

(5. Rep. 95.)

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 præſenti*, 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 præſenti*, whereof *Littleton* hath put two examples, and ſome *in futuro*, whereof now hee will ſpeake in the next ſection.

Sect. 357.

ET pluſors ont dit, que ſi tiel feoffment ſoit fait a un home ſole ſur meſme condition, & devant que il ad per-

AND many have ſaid, that if ſuch feoffment be made to a ſingle man upon the ſame condition, and before hee hath per-

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.

Secondly, it [a] appeareth that albeit the wife by the mariage is but intitled to have dower,

[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.

* *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.

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.

(5. Rep. 20. b. 21. a.) Julius Winnington's caſe, lib. 2. fol. 59. 60.

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.

(1. Roll. Abr. 447.)

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 & 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, 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 ſeoffor. For if a man maketh a feoffment in fee upon condition that the feoffee before ſuch a day ſhall re-enfeoffe 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.

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.

21. E. 4. 55.

Albeit in theſe caſes a certaine day be 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

(2. Rep. 79. a.) * Trin. 18. Eliz. in Communi Banco in Sir Thomas Wiat's caſe.

(Plo. 553. a. 554. Cro. Cax. 427. Hob. 384.)

*forme 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.*

formed 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.

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

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.

Sect. 358.

EN meſme le maner eſt, ſi le feoffee charge la terre per ſon fait d'un rent charge devant le performance del 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 quâ ſuprà. *Car quecunque que venuſt 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 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 ouſterment defeats.*

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 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 ſuprà. (1. Roll. Abr. 447.)

(5. Rep. 20. b.)

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

Ou ſoit oblige in 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. fol. 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. fol. 80. b. Sir 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

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

† *Quere—&c.* L. and M. and Roh.

(Ant. ſect. 354. 2. Roll. Abr. 454.)

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 cate 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 feoffment made upon condition, which is worthy of obſervation.

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

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 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.

(*) Paſch. 14. Eliz. 311. Dier.

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.

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

*ITEM, ſi un home fait un fait de feoffiment a un auter, & 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, & le feoffiment 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.

(4. Rep. 25. a.)

Et le feoffiment 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.

18. E. 3. 19. 36. 17. Aſſ. p. 20. 8. H. 5. 8. 27. H. 6.

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.

34. Aſſ. pl. 3.

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.

Sect. 360.

ITEM ſi feoffiment ſoit fait, &c. And

ITEM ſi feoffiment ſoit fait ſur tiel

ALSO if a feoffment be made con-

See case with my opinion dated 19. Apr. 1808.

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

(1) Vid. ant. 48.

*condition, que le feoffee ne alienera 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 cco tiel condition eſt voyde.*

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 againſtreaſon, and therefore ſuch a condition is voide,

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 alienandâ.* 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.

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 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.

(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. 23. (5. Rep. 56. a.)

Argumentum ex abſurdo. Vid. Sect 722.

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

14. H. 4. 13. H. 7. 23.

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

Sect. 361.

MES ſi le condition ſoit tiel, que le feoffee ne alienera a un tiel, noſmant ſon noſme, ou

BUT if the condition be ſuch, that the feoffee ſhal not alien to ſuch a one, naming his name, or to any of his

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

Pl. Com. 77. a. 8. H. 7. 10. b. 21. E. 4. 47. a.

* *de—en*, L. and M.

(1) *A deviſe in fee, on condition not to alien but to* I. S. *whether void? See Muſchamp's caſe, Bridg.* 132.—Lord Nott. MSS.

(Dyer 45. a. 11. Rep. 74. a.)

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.*

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

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*.

Bracton lib. 1. fol. 13. a.

In ancient deeds of feoffment in fee there was moſt commonly a clauſe, *quòd licitum ſit donatori rem datam daye vel vendere cui voluerit, exceptis viris religioſis & Judæis.*

*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.*

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.

Sect. 362.

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.)

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.

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 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.*

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 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).

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 proſe 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 diſcontinuance, but a barre, and this common recovery

Vid. lib. 6. 40. 41. Sir Anth. Mildmaie's caſe. (1. Rep. 84. 1. Roll. Abr. 418.)

* *ſes* not in L. and M. † *&c.* added in L. and M. ‡ *ne—ou* in L. and M. ‖ *cap.* 1. added in L. and M.

(1) A power of ſuffering a common recovery, and of levying a fine within the ſtatutes of 4. Hen. 7. and 32. Hen. 8. is ſo inſeparably inherent to the eſtate of a tenant in tail, that any condition or proviſo reſtraining or prohibiting it, is held to be repugnant to the nature of the eſtate, and therefore void. But it does not vitiate the grant of the eſtate tail to which it is annexed; becauſe (to uſe an expreſſion of lord Hobart) a condition annexed to an eſtate given is a divided clauſe from the grant, and therefore cannot fruſtrate the grant preceding it, neither in any thing expreſſed, nor in any thing implied, which is, of its nature, incident to and inſeparable from the thing granted. Hob. 170. But this doctrine does not extend to a feoffment, a fine at common law, or any other alienation which works a diſcontinuance, and is therefore conſidered in the law as tortious. A proviſo reſtrictive of an alienation of this nature may be annexed to an eſtate in tail, either as a condition to determine the eſtate, and give the donor and his heirs a right of re-entry, or by way of limitation, to make the eſtate of the tenant in tail ceaſe, and the lands remain over to a third perſon. But in theſe caſes the eſtate in tail muſt be made to ceaſe abſolutely; for a proviſo to make it void only during the life of the tenant in tail is void. See Litt. Sect. 720, 721, 722, 723. Scholaſtica's caſe, Plo. 403. Corbett's caſe, 1. Rep. 83. b. Jermyn v. Arſcot, cited in 1. Rep. 85. Mildmay's caſe, 6. Rep. 40. Mary Portington's caſe, 10. Rep. 37. b.

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.

(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 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.

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 unavoydable.

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.)

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.

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.

Doctor & Student. 124.

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.

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

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*

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 ſim-

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.

Encounter le profit

* *que ſuit 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.

(1) But this is altered by the 4. and 5. Ann. c. 16. whereby all collateral warranties by anceſtors, who have no eſtate of inheritance in poſſeſſion in the lands warranted, are made void againſt their heirs. The reſtraints which at different times have been laid on the free alienation of property, and the methods uſed to ſet them aſide, form one of the moſt intereſting parts of the hiſtory of every nation in which the feudal inſtitutions have prevailed. So far as the hiſtory of England is concerned in them, they have been diſcuſſed with great accuracy by Sir William Blackſtone, vol. 2. chap. 7. and Sir John Dalrymple, in his Hiſtory of the Feudal Law, chap. 3. and 4. The introduction of recoveries, and the circumſtances which led the way to them, are accurately ſtated and explained by Mr. Cruiſe, in his moſt excellent Eſſay on the Law of Recoveries. The reſtraints on the alienation of property are much greater in Scotland than they are in England. There, if a *tailzie* is guarded *with irritant and reſolutive clauſes*, the eſtate intailed cannot be carried off by the debt or deed of any of the heirs ſucceeding to it, in prejudice of the ſubſtitutes. This degree of tailzie differs from that of a *tailzie with prohibitory clauſes*. The proprietor of an eſtate of this nature, cannot convey it gratuitouſly, but he may diſpoſe of it for onerous cauſes, and it may be attached by his creditors; yet the ſubſtitutes, as creditors by virtue of the prohibitory clauſe, may by a proceſs, called in the law of Scotland *an Inhibition*, ſecure themſelves againſt future debts or contracts. A third degree of tailzie uſed in Scotland is called a *ſimple Diſtination*. This amounts to no more than a deſignation who is to ſucceed to the eſtate, in caſe the temporary proprietors of it make no diſpoſition of it; for it is defeaſible, and attachable by creditors. See Erſk. Inſt. 238. 360.

(2) Britton, in his chapter *on Conditional Purchaſes*, obſerves, that "if any purchaſe to him and his wife, and to the heirs of "them lawfully begotten, the donees have preſently but an *eſtate of freehold* for the term of their lives, and *the fee accrueth to* "*their*

ſit 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 *.

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

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.

* *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.

ple in the remainder is diſcontinued. And becauſe tenant in taile ſhall doe no ſuch thing againſt the profit of his iſſues, and good right, ſuch condition is good, as is aforeſaid, &c.

Sect. 364.

21. H. 7. 21.

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)

(1. Rep. 16. 84.)

(Dyer 343. b.)

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*

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

* *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. ‖ *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.

(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.

" *their iſſue*, if they had not iſſue before; and if they had no iſſue, then *the fee remains on the perſon of the donor until they* " *have iſſue*, and the purchaſe returns to the donor, if the purchaſor has no offspring, or if they have iſſue and that iſſue fails." But lord Coke in his 2d Inſt. 333. obſerves, that Britton takes the condition to be precedent, but that the donees had, at the common law, a fee ſimple conditional immediately by the gift. As a proof of this, he mentions, that if a gift was made to a man and the heirs of his body, and before iſſue, he had *before the ſtat. de donis* made a feoffment in fee, the donor could not enter for the forfeiture, but that the feoffment would have barred the iſſue had afterwards.

*en le terre per force de meſme le condition, et ne ſerront my * cohert de ſuer briefe de formdon en le reverter.*

the land by force of the ſame condition, and ſhall not be compelled to ſue a writ of formedon in the reverter.

but added, and die without iſſue, to the end 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*.

And *Littleton* expreſſely ſaith, that the donor and his heirs (Mo. 39.) 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.

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.

(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. (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] 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.

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

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. ſi-

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

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 (10. Rep. 92.) 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.)

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

Secondly,

* *cohert—arte* in L. and M. and Roh. † *que* added in L. and M. and Roh.

(1) If the condition of the obligation be in the disjunctive, and gives the obligor liberty to do one thing or another, at his election, and one of the things becomes impoſſible, the obligation, in ſome caſes, will be ſaved. See the diſtinctions taken in Laughter's caſe, Cro. Eliz. 398. Baker v. Moiſcomb, ibid. 864. Baſkett v. Baſkett, 2. Mod. 200.—Ant. 145.

(2) See 2. Bulſt. 259. 260. 6. Mod. 237. 1. Salk. 498.

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

(Poſt. 227. 2. Cro. 217.)

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.

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

And there is a difference betweene a rent, and a reentry; 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.

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

(5. Rep. 74. 76: 10. Rep. 92.)

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 generall 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).

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.

[b] Vide 32. H. 8. in Pattents Br. 12. H. 7. 12. b.

Concerning exemplification ſee 3. Inſt. 173.

(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.)

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

non 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 aſeun eſcript de le condition. Iſſint en meſme le maner home poit faire de dones & grants de chattels perſonals, & de contracts perſonals, &c.

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.

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.

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

(1) 'Tis to be preſumed, that an interlining, if the contrary is not proved, was made at the time of making the deed. 1. Keb. 21. Note to the 11th edit. On the raſure, or interlining, of deeds, breaking or defacing the ſeals of deeds, and cancelling deeds, ſee 1. Wood's Conv. 808. 809. Com. Dig. Faits, T. 1. 2.—and Vin. Abr. Faits, T. U. U. 2. X. X. 2. It is to be obſerved, that the cancelling of a deed does not diveſt the eſtate from the perſons in whom it is veſted by the deed. 1. Rep. in Cha. 100. and Gilb. Rep. 236.

(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.

[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. [f] 35. H. 6. ubi ſupra.

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. Mrns 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. 4. E. 4. 25. &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.)

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

Sect. 366.

ITEM, coment que home en aſcun action ne poit pleder un condition que touche & concerna franktenement, ſauns monſtrer eſcript de ceo, come eſt avantdit, uncore home poit eſtre aide ſur tiel condition per verdict de xii. homes

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

VERDIT, or verdict de 12 homes. (Poſt. 253. b. 261. b.)

(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 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. 47. 191. 194. 203. 9. Rep. 67. b.)

ex

(1) *This is the reaſon of this caſe, for now he claims above the condition, and therefore need not ſhew the deed. Infra*, 127. *b.*— Lord Nott. MSS.

(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.).

ex facto jus oritur.

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, *Quòd 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

43. Aſſ. 31. Stanſ. pl. cor. 164. 165. 3. E. 3. coron. 284. 286. 287. 44. E. 3. 44. 41. E. 3. Coron. 451.

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 adeirere, 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 plaintiſe 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* 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 arraine 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 *doit*

* *le—per* in L. and M. and Roh.

† *a* not in L. and M. nor Roh.

*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 adeרere 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, 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.*

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 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.

Pleas, ſo may it alſo bee found in Pleas of the Crowne, or criminal cauſes that concerne life or member. (Cro. Eliz. 474. Ib. 471. 113. 114. 653. 6. Rep. 46. b.)

A verdict finding matter incertainely or ambiguouſly is inſufficient, and no judgement ſhall be given thereupon; as if an executor plead *pleinement 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. 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.)

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 meſuage, 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 (*n*) ſtay judgement; for *Utile per inutile non vitiatur*, but neceſſarie incidents required by law the jury may finde. 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. 110. 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.)

(*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.

(*n*) 32. E. 3. Ceſſavit. 25.

(*c*) After Vid. ſect. 484. 485. (Poſt. 282.)

'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. Vid. ſect. 58. 13. E. 3. garr. 26. 15. E. 3. Aſs. 322. 17. E. 3. 6. 18. Aſs. 2. 35. Aſs. 8. (*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.)

* *An* added L. and M. and Roh. not in L. and M. nor Roh.

† *Et* added L. and M. and Roh.

‡ *leaſe, auxybien ils poient aver conuſance de le*

(c) 7. R. 2. Corone: 108. Plo. Com. Freman's caſe 211. 11. H. 4. 2. 20. Aſſ. 12. 16. Aſſ. 16. 22. Aſſ. 23. 5. H. 7. 22.

(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) 11. H. 4. 16. 17. 3. Mar. Jurors Br. 8. Vide Dier ubi ſupra. (2. Roll. Abr. 713. 814. 1. Leo. 18. Cro. Jac. 121. Sid. 225.)

(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.

Paſch. 6. E. 6. ubi ſupra. (Mo. 452. 2. Roll. Abr. 714. 715. 716.)

(f) 24. E. 3. 75. (1. Cro. Jac. 141. 616.)

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.

3. Inſt. 110.

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

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.

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. 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

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.

31. Aſſ. pl. 21. 10. H. 4. 9.

(m) See more before in this chapter, ſect. 365.

(Sid. 369. 6. Rep. 38.)

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.

10. Aſſ. p. 9. 21. Aſs. 28. 17. Aſs. 26. 31. Aſs. 21. 23. Aſs. 2. 39. E. 3. 28. 44. E. 3. 22. 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.)

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

Et prierent 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.

If

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

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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.

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, (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. (9. Rep. 13.) See the ſection next following. (10. Rep. 118. Ant. 286.) See the next preceding ſection.

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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.)

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

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PUR ceo que il n'ad aſcun eſcripture de ceo.

Hereby it alſo appeareth, that albeit the condition was executed by re-entrie, 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.

Quel eſt bone plea en barre.

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.

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 liſe, the reverſion to the plainrife, was a good barre in an aſſiſe, and alſo that a leaſe for yeares, the reverſion to theplaintife, 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

*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 il ne poet reſponder 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,* caulâ quâ ſuprà.

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 madeupon the leaſe, & this 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.*

yeares,

* *Et* added in L. and M. and Roh. † *aſcun* not in L. and M. nor Roh. ‡ *diſſeiſie—ſeiſſie*, L. and M. and Roh.

yeares, or an eſtate of tenant by ſtatute or *elegit*, the defendant ſhall not plead in bar, (Ant. 201. a.) 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.

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 l'endenture ne ſont que un fait en ley, & cheſcun part de l'endenture eſt de auxi grande force et effect, ſicome touts les parts enſemble.

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, 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 *συμγεαφον.* 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. *See ant. 143. b.* 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.

Sect.

(1) In addition to what has been obſerved in note 4, to page 143. b. it may be remarked, that all deeds were formerly called charters.—Before the indenting of them came into uſe, when there were more parties than one intereſted in them, there were as many parts of them taken as there were parties intereſted, and one part was delivered to each of the parties: theſe multiplied parts were called *Chartæ paricle*, or *paricolæ*. The *Chartæ paricle*, or *paricolæ*, were ſuperſeded, in a great meaſure, by the *Chartæ partitæ*. One part of the *Chartæ partitæ* was written on a piece of vellum or parchment, beginning about the middle and continuing to the end of each ſide. This prevailed as early as the times of the Saxons, as appears by the will of *Æthelnoyrd*, a nobleman of Kent, dated in 958; by that of prince Æthelſtan, eldeſt ſon of king Ethelred the 2d; by a charter of archbiſhop Eadſi, made about the year 1045; and by other Saxon documents preſerved in the library of Mr. Aſtle; in all which the parchments are cut in ſtraight lines. Straight lines continued to be generally uſed till the latter end of the reign of king Henry the 3d. Afterwards the cut through the parchment was made in a waiving or undulating line; and the practice of writing an intermediate ſentence, or drawing an intermediate figure, was generally diſuſed, and the word *Cyrographum* adopted. In proceſs of time it became the practice to indent this line in ſmall notches or angles. This practice begun with the lawyers, as early as the reign of king John; but was not adopted by the eccleſiaſtics till a much later period. This made the intermediate writing or drawing unneceſſary; and it ſeems to have been abandoned about the reign of Edward the 3d. But the practice of indenting deeds in the intermediate line, remained in uſe till the cloſe of the 14th century; it then ſeems to have declined; yet the practice of cutting a waiving or undulating line at the top of the parchment, on which every deed that is not a deed poll is written, has ever ſince continued. If the deed contains more than one ſkin of parchment, only the firſt ſkin of parchment is indented. Foreign diplomatiſts contend, that when the parchment on which a deed is written, is cut through the intermediate word or figure in a ſtraight line, it is properly called *Chirographum*; that when it is cut through the intermediate word or figure in a waiving line, it is properly called *Charta undulatoria*; and that it is then only properly called *Charta indenta*, or *indentura*, when it is cut through the intermediate word or figure in a waiving line, and that waiving line is indented or notched in the manner I have mentioned. But with us, every deed the top of which is cut in the undulating or waiving manner I have mentioned, is called an indenture. See Mr. Madox's preface to his Formulare, and the Nouveau Traité de Diplomatique, Vol. I. 351.

(2) This was called *charta de unâ parte*. Some deeds muſt be indented to be valid for the purpoſes for which they are uſed, as bargains and ſales by the ſtat. 27. H. 8. c. 16. leaſes by perſons ſeiſed in tail in right of their wives, or eccleſiaſtical perſons, by 32. H. 8. c. 28. a bargain and ſale of a bankrupt's eſtate by the 13. El. c. 7.—and ſee 43. El. c. 18.

(3) When the ſeveral parts of an indenture are interchangeably executed by the ſeveral parties, that part or copy which is executed by the grantor, is uſually called the original, and the reſt are called counterparts; tho' of late it is moſt frequent for all the parties to execute every part, which renders them all originals. 2. Bla. Com. ch. 20. ſ. 1.

Sect. 371.

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.

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.

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.

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.*

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.

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.

Vide 40. F. 3. 2. 7. H. 7. 11. Dier 28. H. 8. 19. lib. 2. fol 4. & 5. Goddard's caſe. (Ant. 6. a.)

17. Eliz. Dier 342. 1. R. 3. 14. H. 6. 28. Bab. 12. H. 4. 12. 30. Aſſ. 31.

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.

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.

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 perſon

* *&c.* not in L. and M. nor Roh. † *&c.* not in L. and M. nor Roh. ‡ *præſentibus* not in L. and M. nor Roh.

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. Orthus: *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.* Orthus: *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.

Sect. 373.

AND it ſeemeth that ſuch indenture which is made in the firſt perſon is as good in law, as the

ET il ſemble que tiel endenture || que eſt fait en le primer perſon eſt auxy bone en la ley,

* *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. || *que eſt* not in L. and M. nor Roh.

(1) See Mr. Reeves's accurate and learned Hiſtory of the Engliſh Law, vol. 2. p. 67.

*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 tant 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.*

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.

(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 only 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.

(1. Roll. Abr. 422. 474.)

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 in-

(10. Rep. Doct. Ball's caſe cited in Portington's caſe.)

(2. Cro. 240. 399. 522.)

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 compriſe en

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 all the conditions compriſed *l'en-*

* *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* addedin L. and M. and Roh.

(1) So where three were infeoffed by deed, and there were ſeveral covenants in the deed on the part of the feoffees, and only two of the feoffees ſealed the deed, the third entered and agreed to the eſtate conveyed by the deed, he was bound in a writ of covenant by the ſealing of his companions. 2. Roll. Rep. 63.—In 38. Ed. 3. p. 9. it is ſaid, that if land is leaſed to two for years, and only one puts his ſeal, but the other agrees to the leaſe, and enters, and takes the profits with him, he ſhall be charged to pay the rent, though he has not put his ſeal to the deed; but if there is a condition compriſed in the deed which is not parcel of the leaſe, but a condition in groſs, if he does not put his ſeal to the deed, tho' he is party to the leaſe, he is not party to the condition.

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.

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.

denture. 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) (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 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.*

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*

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 *ſemble*

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

(1) In Salter v. Hedgly, Carth. 76. lord chief-juſtice Holt held, that a party to a deed cannot covenant with one who is no party to it; — but that one who is no party to a deed may covenant with one who is a party, and oblige himſelf by ſealing of the deed.

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 ſueront performes, il enter, &c. et a ceo il ſerra reſceive. Per meſme le reaſon quant le feoffor ad le fait en poigne, 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.*

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.

(5. Rep. 76.)

(1. Rep. 38.)

[a] Vid. ſect. 170. 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 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.*

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.

[a] 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.

(5. Rep. 75. 76.)

Sect.

* *&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 ſueront performes*, not in L. and M. nor Roh. § *de ceo* added in L. and M.
¶ *il* added in L. and M. and Roh.

(1) But after, though the jury find the deed not to be the deed of the party, yet will not the court on motion detain the ſame, but will order it to be delivered to the party that brought it into court. 2. Sid. 131. Vid. Salk. 215. Note to the 11th edition.

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 treſpaſſe 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.

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 ſprivies 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)

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. 11. Rep. 5. 2. Roll. Abr. 412. Hob. 66. 2. Sid. 41. Ant. 125. 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.

13. E. 2. tit. Monſtrans des faits. 42.

(Plo. 439. b. Dyer 344. 6. Rep. 7. 10. Rep. 93. b.)

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

ALSO if the feoffee granteth the deed to the feoffor, ſuch grant ſhall bee good, and then the deed and the propertie therof belongeth

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.

(1. Rep. 1.)

* *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) 26. *H.* 6. *T. Barre* 37. *Obligee made an acquittance to one obligor, which was dated before the obligation, but was delivered afterwards; the other obligor pleads this in bar, and it was adjudged a* good *plea in bar. Nota, each was bound in the entirety, therefore it was joint and ſeveral.* 34. *H.* 6. *So in the caſe of the king, if he releaſes to one of the obligors, the other ſhall take advantage.* 5. *Rep.* 56. *contra.—And as a releaſe in deed to one obligor diſcharges the other, ſo of a releaſe in law, as* 8. *Rep.* 136, *Needham's caſe. A woman obligee marries the obligor, that is another ſort of diſcharge.* 264. *b.—But* 17. *Car. B. R. Two were bound jointly and ſeverally. The plaintiff ſued both, and afterwards entered a retraxit againſt one; whether that diſcharged the other was the queſtion. Berkley ſaid it was, for it amounts to a releaſe in law, as the plaintiff confeſſes thereby that he had not cauſe of action, and therefore he cannot have judgment, as in Hickmot's caſe,* 9. *Rep. and retraxit is a bar to an action; and the plaintiff by his own act has altered the deed from joint to ſeveral, and therefore the other ſhall have advantage of it. Cro. Juſt. contra; for a retraxit is only in the nature of an eſtoppell; and therefore the other ſhall not have advantage; neither is it a releaſe, though it be in the nature of a releaſe; and if the obligee ſues both, and then covenants with one not to ſue farther, that is in the nature of a releaſe, but the other ſhall not take advantage of it; and in* 21. *H.* 6. *it is ſaid, that there muſt be an actual releaſe to one obligor to diſcharge the other. See March. Rep.* 165.—*Pas.* 18. *Car. Hannan v. Roll. The obligee releaſes to one obligor; the other, in conſideration of the forbearance, undertakes to pay, and*

(Ant. 214. a. Poſt. 260. 280. 2. Roll. Abr. 45. 46. 48. 2. Sid. 212. 213.)

And it is alſo 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)

Serra pluis 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 thereupon 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.

*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.

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.*

Sect. 378.

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.

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

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 *par-*

* *eſt—ceo*, L. and M. and Roh. † *&c.* added L. and M. and Roh.

(1) It is to be obſerved, that the king was always an exception to this rule; for he might always either grant or receive a *choſe in action* by aſſignment.—The reaſon why, by the ſtrict rules of the common law, a *choſe in action* cannot be aſſigned or granted over, was, that it was thought to be a great encouragement to litigiouſneſs if a man were allowed to make over to a ſtranger his right of going to law. But this nicety is now diſregarded: though, in compliance with the antient principle, the form of aſſigning a *choſe in action* is in the nature of a declaration of truſt, and an agreement to permit the aſſignee to make uſe of the name of the aſſignor, in order to recover the poſſeſſion. And therefore, when in common acceptation a debt or bond is ſaid to be aſſigned over, it muſt ſtill be ſued in the original creditor's name; the perſon to whom it is transferred being rather an attorney than an aſſignee: and our courts of equity, conſidering that in a commercial country almoſt all perſonal property muſt neceſſarily lie in contract, will protect the aſſignment of a *choſe in action*, as much as the law will that of a *choſe in poſſeſſion*. Dyer 30. Br. Ab. tit. Choſe in action. 3. P. W. 199. 2. Bla. Com. Ch. 30.

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and in an action upon the caſe the matter was found ſpecially; and Rolls argued, that the debt was not abſolutely diſcharged, but only ſub modo, *viz if the other can have the releaſe to plead, and becauſe the forbearance was a good conſideration. But the court was of opinion, that the debt was abſolutely diſcharged, and therefore the conſideration was inſufficient.—See Hobart Rep. 70. Paker v. Sir John Lawrence. In treſpaſs againſt three, they divided on the pleading. Judgment againſt one. Then he entered a* noli proſequi *againſt the two others; it was held to be no diſcharge to him againſt whom judgment was had; for as to him, the action was determined by the judgment, and the others are divided from him, and not ſubject to the damages recovered againſt him;—but a* noli proſequi, *or non-ſuit before judgment againſt one, would diſcharge all.* Lord Nott. MS.

*parkerſhip de un park a auter, & occupier meſme l'office pur terme de ſon vie, l'eſtate que il ad en l'office eſt ſur condition en ley, ceſtaſcavoir, que le parker bien & loyalment gardera le park, & ferra ceo que a tiel office appertient a faire, ou auterment bien lirroit al grauntor & a ſes heires de luy ouſte, & 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 la condition fuiſſoit mis * en eſcript.*

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 as is intended by the law to be annexed to any thing, is as ſtrong as if the condition were put in writing.

Que le parker bien & 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.

(Ant. 2. a. 115. a. Cro. Car. 59. 60. 3. Inſt. 76. 4. Inſt. 289. Hutt. 86. 87.)

The beaſts of parque, or chaſe, properly extend to the bucke, the doe, the foxe, the matron, 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 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, & quoſcunque falcones poſſit permittere volare ad quaſcunque aves de warrenâ in quibuſcunque ripariis, &c.*

(8. Rep. 136.)

(F. N. B. 164. d.)

(5. Rep. 104. b.)

[d] Hill. 13. E. 3. coram rege in Theſaur.

(7. Rep. 15.)

In Manwood's Fore. L. ch. 4. f. 3. it is ſtated, that beaſts of foreſt & warren are hare coney pheaſant & partridge, & that none other are foreſt beaſts.

(*) 38. E. 3. rot. patent pars 1. m. 10.

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.

[e] Hill. 13. E. 3. coram rege in Theſaur.

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 Sect. 1.

Ockam cap. quid regis foreſta, ſaith, *Foreſta eſt tuta ferarum manſio non quarumlibet, ſed ſilveſtrium, non quibuſlibet in locis, ſed certis, & ad hoc idoneis; unde foreſta* E *mutata in* O, *quaſi fereſta, hoc eſt, ferarum ſtatio.*

Vide Bract. fo. 231. & 316. Britton fo. 34. Fleta lib. 2. cap. 34. 35.

Pudzeld or *Woodgeld* is to bee free from payment of money for taking of wood in any foreſt. But let us now returne to our *Littleton*.

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 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.

(9. Rep. 50. Sid. 14.)

5. E. 4. 15. b. L. 5. E. 4. 26. Pl. Com. 379. 380.

2. H. 7. 11. 30. A. 6. 38. &c. (Cro. 11. Rep. And. Curl's 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 collateral certain fee, for there the grantor may diſcharge him of his ſervice, as to be a bayly, receiver, ſurveyor,

* *ou muſtre*, added in L. and M. and Roh.

(1) Since Sir Edward Coke's time, ſeveral ſtatutes have been paſſed, particularly 25. Car. 2. Ch. 2. 13. & 14. W. 3. Ch. 6. & 1. An. Ch. 22. by which all perſons admitted into offices civil or military are to take the oaths of allegiance and ſupremacy, otherwiſe they forfeit their offices, and incur other penalties.

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. 155. 9. Rep. 50. Cro. Car. 55. 56. 59. 60. 61.)

veyor, 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.

22. H. 6. 10. 3. 6. E. 6. Dier 71.

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.

(Ant. 54. a.) 15. E. 4. 8. b. 5. E. 4. 26. 28. H. 8. Bendloe's enter eveſque de Londres & Hieron. lib. 9. fo. 50. 95. 96. 99.

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.*

[*f*] Mich. 33. E. 1. coram rege in Theſaur. L'eveſque de Durham's caſe. Pl. Com. 373. a. Sir Henric Nevill's caſe 21. E. 4. 20. 93. (1. Rep. 14. b.) Lib. 8. fo. 44. Wittingham's caſe.

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.

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, 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, and *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. 100.)

And it is to be obſerved, that a condition in law by force of a ſtatute which giveth a recovery, is in ſome caſe 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 ſhal hold the land charged

(Ant. 185. a.)

(1) But this muſt be underſtood of an alienation which diveſts the remainder or reverſion, as a feoffment, fine, or common recovery; but a conveyance by leaſe and releaſe, or bargain and ſale, is no forfeiture. Neither is it a forfeiture of the particular eſtate, if the reverſioner, or remainder-man in fee, joins with the tenant for life or years in making the alienation; nor is his grant of an advowſon, remainder, or any thing elſe which lies in grant, a forfeiture. But if a tenant for life or years claims the fee, as by joining the *miſe* upon the mere right; or if he affirms the fee to be in a ſtranger, as by accepting a fine *ſur conuſance de droit come ceo* from a ſtranger, it is a forfeiture. See poſt. 251. b. 252. a.

ed during the life of the tenant for life, but if the rent were granted after the waſte done, the leſſor ſhall avoid it.

And the reaſon wherfore 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 (Ant. 54.) be barred to recover *locum vaſtatum*, which the ſtatute giveth. (1)

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 com- (Poſt. 338. b.) mit 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 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 then 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, bailiſe, 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, bailiſe, &c. (Vid. Ant. 3. 6. 11. Rep. 89.)
5. E. 6. ca. 16. (Cro. Car. 557. Cro. Jac. 386. 3. Ins. 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 king'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, *Vade 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 auxi fort ſicome la condition fuit miſe in eſcript. And this accords with that ancient rule, *Utiquè fortior & 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 autres

IN this manner it is of grants of the offices of ſteward, conſtable, bedelarie, bayliwick, or other offices, &c. But if

S'Eneſchall. Of this I have ſpoken before. 21. E. 4. 20. Pl. Com. 379. (Ant. 61. a.)

Conſtabularie. Of this likewiſe ſomething hath beene ſpoken before. 8. E. 4. 6. (5. Rep. 59.)

(1) *For the recovery relates to the time of the waſte done, which is paramount to the grant, but it does not relate to the time of making the eſtate, to avoid charges by force of this condition in law, unleſs in the caſe of a leaſe for years, which is of neceſſity to have the place waſted.* Lord Nott. MS.

before. But a constable is often taken in the law for a warden or keeper, as *Constabularius castri de Dover & 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*, *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.

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.*

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.

(*) 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.

Sect. 380.

(1. Roll. Abr. 411. Ant. 214. b. Post. 242.)

HERE *Littleton* termeth words of limitation to be conditions in law: for his first example is,

ITE Mestates de terres ou tenements purront estre sur condition en ley, coment que sur l'estate fait ne fuit ascun mention ou reherfal 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 ceft cas ils ont estate pur terme de lour deux vies sur condition en ley, scilicet, *si un de eux devie, ou que devorce soit fait enter eux, donque bien*

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 be-

lirroit

Durant le coverture enter eux, *Durante coopertur 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. 3. E. 3. 15. 3. Ass. Pl.

Dum also maketh a limitation; as if a lease be made, *dum sola fuerit*, or *dum sola & casta vixerit*. *Dummodo* is also a word of limitation; as *dum-*

* *le grantor—il*, L. and M. and Roh.

† *le grantee* not in L. and M. nor Roh.

lirroit a le leſſor et a ſes heires d'entrer, &c. tween them, then it ſhall bee lawfull for the leſſor and his heires to enter, &c.

quamdiu the grantor ſhall bee dwelling upon the mannor, this is *geſſerit.*

modo ſolveret talem reddi-tum. Quamdiu alſo is a word of limitation, for if a man grant a rent out of the mannor of *D.* good, or *quamdiu ſe bene*

(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 be theſe words, *donec, quouſque, uſque ad, tamdiu, ubicunque.*

10. Aſſ. 4. 6. E. 3. 8. 9. 31. 8. E. 3. 18. Annuitie 40. 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.

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.

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 menſâ 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 Termino Paſch.* 30. *E.* 1. *William de Chadworthe*'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.

* 47. E. 3. 27. 39. E. 3. 32. 33. 11. H. 4. 14. 76. Bracton fo. 298. 18. E. 4. 28. 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.

A menſâ et thoro, as *cauſâ 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 *cauſâ 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.

(1. Sid. 64. 1. Roll. Abr. 341. 360. 681.)
(*) Vid. Sect. 399.
(Sid. 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 [*n*] 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)

[*n*] Tr. 2. Jac. Rot. 1032. Richard Parſons' 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*

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 *ſup-*

(1) This paſſage expoſed Sir Edward Coke to much cenſure. — It was ſtruck out of the third and every following edition to the ninth. It was reſtored to its place in that edition, and is to be found in all the ſubſequent editions. — The following account is given of this circumſtance in Burn's Eccleſiaſtical Law, vol. 3. p. 402. 3d edit.— "There are ſeveral degrees, which, "although not expreſsly named in the Levitical law, are yet prohibited by that, and by the ſtatute of 32. H. 8. c. 38. by pa-"rity of reaſon. Hence, in the caſe of Worſly and Watkinſon, a conſultation was granted, where one had married the daugh-"ter of the ſiſter of his former wife; which (as Sir John King laid the argument) is the ſame degree of proximity, as the "nephew's marrying his father's brother's wife; and this being expreſsly prohibited, the other by parity of reaſon is ſo like-"wiſe; as it had been declared E. 16. J. in Pennington's caſe, before the High Commiſſioners. Which point was again argu-"ed T. 15 An. in the caſe of Snowling and Nurſey, and conſultation granted as before, notwithſtanding the caſe of Richard "Parſons, mentioned by lord Coke, 1. Inſt. 235. in which it was firſt determined not to be within the Levitical degrees, and "prohibition granted; but a conſultation being awarded on debate, two years after, that caſe is ſaid to have been expunged "out of the Firſt Inſtitute, by order of the King and Council. And this was the very point in which (preſently after the ma-"king of the act) lord Cromwell deſired a diſpenſation for one Maſſey, who was contracted to his ſiſter's daughter of his late "wife; but the archbiſhop denied it, as contrary to the law of God, and gave for reaſon, that as ſeveral perſons are prohi-"bited, which are not expreſſed, but underſtood by like prohibition in equal degree; ſo in this caſe, it being expreſſed that "the nephew ſhall not marry his uncle's wife, it is implied, that the niece ſhall not be married to the aunt's huſband. "Gibſ. 412. 413. Much leſs can it be doubted, whether the like rule concerning parity of reaſon, doth not forbid the uncle "to

ſuppoſant per ſon briefe, quòd tenet ad terminum vitæ, &c. * *mes en ſon count il declare coment et en quel maner le leas fuit fait.*

have a writ of waſte againſt them, ſuppoſing by his writ, *quòd tenet ad terminum vitæ, &c.* but in this count he ſhall declare how and in what maner the leaſe was made.

Pl. Com. 561. b. Vid. ſect. 345. ſimile.

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.

37. H. 6. 27.

Suppoſant per ſon briefe, quòd tenet ad terminum vitæ, *&c.* This and the reſt of this ſection is evident and plaine.

Sect. 382.

Vid. Bract. lib. 5. 414.

(Plo. 242.)

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.

Reſigne ou ſoit depoſe. And ſo it is of a tranſlation and ceſſion.

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.

Sect. 383.

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.

Deviſa les tenements a vendre per ſon executor. This muſt

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*

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 *l'aun-*

* *mes—et*, L. and M. and Roh. ‡ *p.* 3. not in L. and M. nor Roh.

" to marry his niece, which, though not expreſsly forbidden, is virtually prohibited in the precept that forbids the nephew " to marry the aunt; nor is it of moment to alledge, that the firſt is a more favourable caſe, as the natural ſuperiority is pre- " ſerved; ſince the parity of *degree*, which is the proper rule of judging, is the very ſame. Gibſ. 413. But where in the caſe " of Harriſon and Burwell, T. 20. C. 2. in the ſpiritual court, one had married the wife of his great uncle, this was declared not " to be within the Levitical degrees; and accordingly, after the opinion of all the judges taken by the king's ſpecial com- " mand, a prohibition was granted. Gibſ. 413."——*Note the caſe of Richard Parſons, T. 2. Ja. Ro. 1032. where a man may marry the daughter of his wife's ſiſter, which is in the editions of 1628, and that of 29, and is here left out. See Moor 1266, Manne's caſe, 33. Eliz. in the caſe of the widow of one Rennington, who claimed a widow's eſtate, but was denied becauſe ſhe was niece to the former wife of Rennington, who had done penance for the inceſtuous marriage; but it was reſolved ſhe ſhould have her widow's eſtate, becauſe there was never any divorce had in the life of her huſband, though there was cauſe. Hob. 181. in the caſe of Howard v. Bartlett. 2. Inſt. 683. 1. Cro. 228. Vaugh. 302. Hill v. Geed, 3. Lev. 364. Vide auxy 2. Jones 118. 5. Mo. 161. and B. Stillingfleet's Life, 121.* Lord Nott. MS.

Bishop Stilling-
fleet's life was not published till
after his death; & he arrived
Lord Ch. Nottingham's many
years. Therefore the reference
to the Bishop's life cd. not come
from Lord N.

l'auncestor le plaintif 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, 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*

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, 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

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. *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

(4. Rep. 81. b.)

* *justice disoit*, not in L. and M. nor Roh. † *avenants—prevenantes*, L. and M. and Roh.

(1) 1. Co. 25. b. Porter's case. *Breach of condition assigned, because he has not performed within convenient time, viz. 8 years.—Ant. 113. cont. that where lands are devised to executors to sell, and one refuses, yet it is within 21. H. 8. though it be an interest, and though the words of the statute are, where lands are willed to be sold by executors, which gives only a power; so there was a difference between them.—49. E. 3. 17. The case was, a woman seised of lands in London devised them to be sold by her executors, and died without an heir; that devise prevented the escheat which the king pretended to have, and the executors could enter and sell, therefore more than a bare authority passed. Yet in 1651, on evidence at the bar, between Wilkinson and White, this case was started; and lord chief justice Rolls doubted of this opinion, because, he said, it was only a descent, according to the words of Littleton; and that it appeared to him, that when lands are devised to be sold by executors, there no interest passes, as in the last clause here.*—Lord Nott. MSS.

(3. Cro. 19. 21. a.)

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.*

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.)

20*l.*

See Hayles's Rep. 293. 294.

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.*

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.

Sect. 384.

(9. E. 4. 36. (5. Rep 74. 6. Rep. 38.)

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.

(Ant. 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.

†*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.*

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.

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.

More ſhall be ſaid of conditions in the next chapter, in the chapter of Releaſes, and in the chapter of Diſcontinuance.

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)

But

* *&c.* added in D. and M. and Roh. † *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 diſcents que tollent entres*, L. and M. and Roh.

(1) A power of revocation may be defeated by a defeaſance made at the ſame time, or any time after. 1. Rep. 113.—See Carth. 64. But if a thing executory on its commencement be after executed, it cannot be defeated by a ſubſequent defeaſance. 5. Rep. 90. b. In the caſe of Cottrel v. Purchaſe, lord Talbot ſaid he ſhould always diſcourage the practice of drawing an abſolute deed, and making a defeaſance, as it were the face of fraud.

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.

20. Aſſ. pl. 7. 7. E. 4. 29. Blowning and Beſton's caſe, Pl. Com. 131. 28. H. 8. Dier 6. 27. H. 8. 15. 19. R. 2. done 10. Albanie's caſe, lib. 1. 107.

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.

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.

(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.)

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. 9. fol. 143. Scrope's caſe, lib. 7. fol 12. 13. Sir Francis Engleſield's caſe.

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.

(2. Roll. Abr. 263. 1. Roll. Abr. 331.)

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.

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, &*

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

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,

Mirror, cap. 2. ſect. 5. Bracton, lib. 5. fol. 370. and 434. Britton, fol. 115. 215. Vide Sect. 5. (Sid. 198. Ant. 18. b. Ant. 163.)

* *ſont—eſt*, L. and M. and Roh.

(1) Some obſervations will be made in the notes to the chapter of Releaſes, on Powers of Revocation, and other Powers deriving their effect from the ſtatute of Uſes. —— A reference was made, in note 1, p. 216. a. to this place, for ſome obſervations on the doctrine of *Conditions precedent, and Conditions ſubſequent*. In 1. Eq. Ca. Ab. 108. it is obſerved, "That Conditions "precedent are ſuch as are annexed to eſtates, and muſt, at law, be punctually performed, before the eſtate can veſt. A condi- "tion ſubſequent is, when the eſtate is executed; but the continuance of ſuch eſtate dependeth on the breach or performance "of the condition. Though this diſtinction is often mentioned in courts of equity, yet the prevailing diſtinction there is to "relieve againſt conditions, where compenſation can be made, whether they be precedent or ſubſequent." This obſervation is illuſtrated and confirmed by the caſes collected under the title of Conditions precedent and ſubſequent, in Mr. Viner's Abridgment; — and ſee Francis's Maxims of Equity, p. 44. and Kaims's Princ. of Eq. 51, 81. ed. 1760. — One of the moſt material points of diſcuſſion, reſpecting the doctrine and different operations at law and in equity of Conditions precedent and Conditions ſubſequent, ariſes from thoſe caſes where *Conditions are annexed to Deviſes, making them void on the marriage of the deviſee without conſent*. Theſe caſes have frequently been diſcuſſed in our courts. All the learning upon them is to be found in the caſe of Harvey v. Aſton, Com. Rep. 726. 1. Atk. 361. and Reynith v. Martin, 3. Atk. 330. — The doctrine of Conditions precedent and ſubſequent, alſo frequently applies to caſes ariſing on the *veſting of portions and legacies made payable at a future time*. In general, where a legacy, payable at a future time, is charged upon perſonal eſtates only, if the perſon entitled to it dies before the time of payment, his perſonal repreſentative will be entitled to it. — On the other hand, it was laid down, in the caſe of Pawlet v. Pawlet, 2. Vent. 366. 367. that where a legacy is charged upon real eſtate, if the perſon entitled to it dies before the day of payment, it ſinks into the land for the benefit of the owner of the inheritance. The ſame rule was conſidered to be applicable to a mixed fund, conſiſting both of real and perſonal eſtate. In Hall v. Terry, 1. Atk. 502, and Van v. Clarke, 1. Atk. 510. lord Hardwicke ſeems to have thought himſelf bound by this rule, and decreed thoſe caſes accordingly. — But in Lowther and Condon, 2. Atk. 130. Sherman v. Collins, 3. Atk. 319. Hodgſon v. Rawſon, 1. Veſ. 44. his lordſhip departed

(Ant. 7. b.)

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.*

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 that by other order or meanes come to the lands, &c. as ſhall appear hereafter.

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* *.

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.

* Bracton, lib. 4. fol. 162. & 209. Britton, fol. 115. Fleta, lib. 4. cap. 2.

Nota, In ancient time * if the diſſeiſor had beene in long poſſeſſion, the diſſeiſee could not have entred upon him. [*a*] Likewiſe the diſſeiſee 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.*

[*a*] 50. E. 3. 21. 1. Aſſ. 13. 20. H. 3. Aſſ. 432. 9. Aſſ. 15. 29. Aſſ. 5. 54. 26. Aſſ. 12. 21. Aſſ. 28. 43. Aſſiſe 17.

[*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.

11. H. 7. 12. 40. E. 3. 24.

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.

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.

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.

(8. Rep. 101.)

Eſt per un auter diſſeiſie. The like law is of an abatement or intruſion, and of their feoffees, or donees, &c.

Upon the words of *Littleton* a diverſitie may be collected, that if a recoverie be had by *A.* againſt

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

parted from this rule, and perhaps the general rule, as it now ſtands, is, That when a legacy is given, charged upon a real or a mixed eſtate, and payable at a future time, and there are no expreſs words in the will to make it immediately a veſted intereſt; there, if a ſtronger implication to the contrary does not ariſe from the other parts of the will, the court conſiders its being *ſo* charged, and *ſo* payable, as circumſtances amounting to an implication, that the teſtator's intention was, that it ſhould not *veſt* till the time in which it is made *payable*. Moſt clearly it is in the teſtator's power to make it immediately veſted and tranſmiſſible, though charged upon a real or mixed eſtate, and payable at a future time, by uſing expreſs words to indicate his intention that it ſhould be ſo;—and if this can be done by expreſs words, there cannot, I conceive, be any reaſon why it may not be equally done by implication. Therefore, if there are any circumſtances or expreſſions in a will, from which the implication, that it was the teſtator's intention to make it immediately a veſted legacy, is ſtronger than the implication to the contrary, which ariſes from its being charged upon a real or a mixed fund, and payable at a future day, it is to be conſidered as a veſted and tranſmiſſible intereſt, notwithſtanding thoſe circumſtances. It may farther be obſerved, that the rule laid down in Pawlet's caſe cannot be conſidered as a poſitive rule of law or equity, but merely as a rule of conſtruction; and being ſuch, muſt neceſſarily be inapplicable to every caſe where the implication, which it tends to eſtabliſh, is repelled by a ſtill ſtronger implication ariſing from other circumſtances. Perhaps it is not going too far to ſay, that much of the difficulty attending the conſtruction of wills is owing to this circumſtance, that rules, or rather precedents of conſtruction, are too often confounded with *poſitive or fixed principles of law or equity*.

For the difference between the common-law doctrine of conditions, and that of the civil law and canon law, ſee the ſecond part of Fulbeck's Parallel, 7th Dialogue.

In the former part of theſe notes, ſome obſervations were made on the leading points of the doctrine of mortgages. The reader will find every thing relating to that comprehenſive ſubject, collected with great induſtry and ingenuity, in a recent publication on the *Law of Mortgages*, by Mr. Powell.

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. (6. Co. 51. b.) 33. E. 3. tit. 3. 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. 11. 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, everie preſentation to a church did put the rightfull patron 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. 45. E. 3. quare Imp. 139. (*o*) 8. E. 2. quare Imp. 166. (6. Co. 48.)

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*) 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.* (*p*) L'eſtatute de 32. H. 8. cap. 33. Vide Sect. 422. 426. (*q*) 37. H. 6. 1. Pl. Com. 47. in Wimbeſhe's caſe.

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. (11. Co. 46. Mo. 151.) Mich. 4. & 5. Eliz. Dier 219. acc. (Poſt. 246. a.)

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 diſſeiſſor at the time of the diſcent, as the ſtatute ſpeaketh. But if leſſee for life had died firſt, and then the diſſeiſſor 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. Vide Pl. Com. 47. ubi ſupra.

Briefe d'entrie ſur diſſeiſin, Breve de ingreſſu ſuper diſſeiſinam. Of this writ ſomewhat ſhall be ſaid in the next ſection. F. N. B. 191.

Sect. 386.

*DISCENTS en taile que tollent entries * ſont, ſicome home eſt diſſeiſie, et*

DISCENTS in tayle which take away entries are, as if a man bee diſſeiſed, and the

MORUST de tiel eſtate ſeiſie.

If a diſſeiſor make a gift in tayle, and the donee diſcontinueth in fee, and diſſeiſe the

* *ſont—eſt*, L. and M. and Roh.

(1) The outlines of the doctrine contained in this chapter are thus ſummarily mentioned by Lord Chief Baron Gilbert, in his Law of Tenures, p. 211.—"When any man is diſſeiſed, the diſſeiſor has only the naked poſſeſſion, becauſe the diſſeiſee may "enter and evict him; but againſt all other perſons the diſſeiſor has a right, and in this reſpect only can be ſaid to have the right "of poſſeſſion, for in reſpect to the diſſeiſee he has no right at all. But when a deſcent is caſt, the heir of the diſſeiſor has *jus* "*poſſeſſionis*, becauſe the diſſeiſee cannot enter upon his poſſeſſion and evict him, but is put to his real action, becauſe the free-"hold is caſt upon the heir."

(2) And ſo are the donees and feoffees of the diſſeiſor, for they come by title, though 'tis a deſeaſible one. Note to the 11th edition.

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.

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 *.

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.*

En ceſt caſe l'entrie le diſſeiſee eſt tolle.

9. H. 7. 24. (Poſt. 240.)

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.

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.)

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 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.

13. E. 3. Br. tit. Entrie Cong. 127. (Poſt. 241. a. ſect. 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.

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 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.*

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,*

14. H. 4. 40. (6. Co. 9. b.)

[a] Marlebr. cap. 29. 24. E. 3. 70.

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

graduum, ad cujufcunque manus per hujufmodi alienationes res illa devenerit, per breve originale, & per commune confilium domini regis inde providendum, &c. (1)

Now it is neceffarie to be knowne, what doth make a degree. Firft, no eftate gained by wrong doth make a degree, and therefore neither abatement, intrufion, or diffeifin upon diffeifin, doth make a degree. Neither doth everie change by lawfull title worke a degree, as if a bifhop or an abbot, or the like, diffeife one and die, where his fucceffor is in by lawfull title; for though the parfon be altered, yet the right remaines where it was, *viz.* in the church, and both of them feifed in the fame right, *viz.* in the right of the church, and therefore in that verie cafe *Bracton* [b] demands the queftion, *An faciunt gradum de abbate in abbatem ficut de hærede in hæredem? Et videtur quòd non magis quàm in computatione defcenfûs, quia et fi alternatur perfona, non propter hoc alternatur dignitas, fed femper manet.* And herewith agreeth [c] *Fleta.*

Bracton, ubi fupra. Britton, ubi fupra. Fleta, ubi fupra. 4. E. 2. brev. 790. 21. H. 6. 8. (2. Inft. 155. Stat. Marl. 30 Poft. Sec. 413.) [b] Bracton lib. 4. fol. 321. 5. E. 3. 38. 5. E. 2. entrie 66. 11. H. 4. 83. [c] Fleta, lib. 5. cap. 34. 3. H. 3. entrie 11. 22. E. 3. 7.

Alfo an eftate made to the king doth make no degree, and therefore if a diffeifor by deed inrolled convey the land to the king, and the king by his charter granteth it over, the diffeifee cannot have a writ of *entrie in le per & cui*, but in *le poft*, for the king's charter is fo high a matter of record, as it maketh no degree.

F. N. B. 191. k. (Poft. 318. a.) 5. E. 2. entrie 66. 7. E. 3. 360.

Alfo an eftate of a tenant by the curtefie, or of the lord by efcheat, or of an execution of an ufe, by the ftatute of 27 *H.* 8. or by judgement, or recoverie, or of any others that come in in the *Poft*, worke no degree. [d] But a tenancie in dower by affignement of the heire doth worke a degree, becaufe fhe is in by her hufband; but affignement of dower by a diffeifor worketh no degree, but is in the *Poft*, as hereafter fhall be faid in his proper place.

[d] 36. H. 6. dower 30.

When the degrees are paft, fo as a writ of entrie in the *Poft* doth lye, yet by event it may be brought within the degrees againe; as if the diffeifor infeoffe *A.* who infeoffes *B.* who infeoffes *C.* or if the diffeifor die feifed, and the land difcend to *A.* and from him to *C.* now are the degrees paft; and yet if *C.* infeoffe *A.* or *B.* now it is brought within the degrees againe.

44. E. 3. 4. 5. 39. E. 3. 25. 5. H. 7. 6. 3. H. 6. 38.

If the diffeifor make a leafe for life, the remainder in fee, tenant for life dieth, he in the remainder is in the *Per*, becaufe he now claimeth immediately from the diffeifor, and both thefe eftates make but one degree. (2)

50. E. 3. 27.

Note, there bee divers other writs of entrie befides this writ of entrie *fur diffeifin*, whereof *Littleton* here fpeakes; as a writ of entrie *ad terminum qui præteriit, in cafu provifo, in confimili cafu, ad communem legem, fine affenfu capituli, dum fuit infra ætatem, dum non fuit compos mentis, cui in vitâ, fur cui in vitâ, intrufion, ceffavit*, and the like; and that which hath beene faid of one, may be applyed to all.

(F. N. B. 192. a.) (8. Rep. 86.)

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ET nota, que en tiels difcents que tollent entries, il covient que home moruft feifie en fon demefne come de fee, ou en fon demefne come de fee taile. Car un morant feifie pur terme de vie, ne pur terme d'auter vie, ne unquez tollent entre.*

AND note, that in fuch difcents which take away entries, it behoveth that a man die feifed in his demefne as of fee, or in his demefne as of fee taile. For a dying feifed for terme of life, or for terme of another man's life, doth never take away an entry.

IF a diffeifor make a leafe to a man and to his heires during the life of *I. S.* and the leffee dieth, living *I. S.* this fhall not take away the entrie of the diffeifee, becaufe he that died feifed had but a freehold only, and heires in that cafe were added to prevent the occupant, for the heire in that cafe fhall not have his age, as it was adjudged in [d] Lamb's cafe (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.) he Cart: 48. [d] Pafch. 16. Eliz. in communi banco.

But if hee in the reverfion diffeife his tenant for life, and dieth feifed, this difcent fhall take away the entrie of the tenant for life (4).

(Ant. 41. b.) 3. E. 3. tit. Entr. Cong. 58. F. N. B. 145. m. 9. H. 7. 25. a.

So it is if there be tenant for life, the remainder in taile, the remainder in fee, and tenant in taile diffeifeth the tenant for life and dieth feifed, this fhall take away the entrie of the tenant for life.

9. H. 7. 25. (Hob. 323.)

But if the king's tenant for life be diffeifed, and the diffeifor die feifed, this difcent fhall not take away the entrie of the leffee for life, becaufe the diffeifor had but a bare eftate of freehold during the life of the leffee, and *Littleton* faith, that a difcent of an eftate for terme of another man's life fhall not take away an entrie (5).

(Poft. 276. a.) (Plo. 546. a.)

En fon demefne come de fee. If an infant bee diffeifed, and the diffeifor die feifed,

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

(1) The different degrees of title which a perfon difpoffeffing another of his lands acquires in them in the eye of the law (independently of any anterior right), according to the length of time and other circumftances which intervene from the time fuch difpoffeffion is made, form different degrees of prefumption in favour of the title of the difpoffeffor; and in proportion as that prefumption encreafes, his title is ftrengthened; the modes by which the poffeffion may be recovered vary; and more, or rather different proof is required from the perfon difpoffeffed, to eftablifh his title to recover. Thus if A. is diffeifed by B. while the poffeffion continues in B. it is a *mere naked poffeffion*, unfupported by any right, and A. may reftore his poffeffion, and put a total end to the poffeffion of B. by an *entry* on the lands, without any previous action: if B. dies, the poffeffion defcends on the heir by act of law. In this cafe the heir comes to the land by a lawful title, and acquires in the eye of the law an apparent *right of poffeffion*; which is fo far good againft the perfon diffeifed, that he has loft his right to recover the poffeffion by entry, and can only recover it by *an action at law*. The actions ufed in thefe cafes are called Poffeffory Actions, and the original writs by which the proceedings upon them are inftituted, are called Writs of Entry. But if A. permits the poffeffion to be with-held from him beyond a certain period of time without claiming it, or fuffers judgment in a poffeffory action to be given againft him by default, or upon the merits; or if, being tenant in tail, he makes a difcontinuance; in all thefe cafes, B.'s title in the eye of the law is ftrengthened, and A. can no longer recover by a poffeffory action, and his only remedy then is by an action on the right. Thefe laft actions are called *Droitural Actions*, in contradiftinction to *Poffeffory Actions*. They are the ultimate refource of the perfon diffeifed; fo that if he fails to bring his writ of right within the time limited for the bringing of fuch writs, he is remedilefs, and the title of the difpoffeffor is complete. The original writs by which *droitural* actions are inftituted are called Writs of Right. The dilatorinefs and niceties in thefe proceffes, introduced the Writ of Affize. The invention of this proceeding is attributed to Glanville, chief juftice to Henry II. (See Mr. Reeves's Hiftory of the Englifh Law, Part I. ch. 4.) It was found fo convenient a remedy, that perfons, to avail themfelves of it, frequently fuppofed or admitted themfelves to be diffeifed by acts which did not in ftrictnefs amount to a diffeifin. This diffeifin, being fuch only by the will of the party, is called a *diffeifin by election*, in oppofition to an *actual diffeifin*: it is only a diffeifin as between the diffeifor and the diffeifee, the diffeifee ftill continuing the freeholder as to all perfons but the diffeifor. The old books, particularly the Reports of Affize, when they mention diffeifins, generally relate to thofe cafes where the owner admits himfelf diffeifed (See 1. Burr. 111. and fee Bract. lib. 4. cap. 3.). As the proceffes upon writs of entry were fuperfeded by the affize, fo the affize and all other real actions have been fince fuperfeded by the modern procefs of ejectment. This was introduced as a mode of trying titles to lands in the reign of Henry VII. From the eafe and expedition with which the proceedings in it are conducted, it is now become the general remedy in thefe cafes. Booth, who wrote about the end of the laft century, mentions real actions as *then* worn out of ufe. It is rather fingular that this fhould be the cafe, as many cafes muft frequently have occurred in which a writ of ejectment was not a fufficient remedy. Within thefe few years paft fome attempts have been made to revive real actions: the moft remarkable of thefe are the cafe of Tiffen v. Clarke, reported in 3. Wilf. 419. 541. and that of Carlos and Shuttlewood v. lord Dorner. The writ of fummons in this laft cafe is dated the 1ft day of December, 1775. The fummons to the four knights to proceed to the election of the grand affize, is dated the 22d day of May, 1780. To this fummons the fheriff made his return; and there the matter refted. The laft inftance in which a real action was ufed, is the cafe of Sidney v. Perry. All thefe were actions on the right. That part of Sir William Blackftone's Commentary which treats upon real actions, is not the leaft valuable part of that excellent work.

(2) Booth, in his Real Actions 171, makes the firft degree to confift in the original wrong; but fir Henry Finch 262, and Mr. Juftice Blackftone, vol. 3. ch. 10. agree with fir Edward Coke. Abatement, diffeifin, efcheat, recovery, election, fucceffion, dower, judgment, and a third, and every fubfequent feoffment, are in the Poft. Finch ibid.

(3) See note 4, page 241. a.

(4) *But it will not take away the entry of a ftranger; for as to him it is but the eftate for his life, a fictitious not true defcendible eftate.* Lord Nott. MS.

(5) This is by reafon of the king's prerogative, that he cannot be diffeifed. See Hob. 322.

Temps E. 1. Reliefe 12. Dier 14. Eliz. 308. 40 E. 3. 9. b.

(*) 24. E. 3. 47. (8. Rep. 99.—)

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.

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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. 393.

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.

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 mordnt* †, *ou fee taile et franktenement al temps de ſon morant, ou autrement 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.

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 diſcent ſhall not take away the entrie. (3)

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BY this it appeareth, that a diſcent in the collateral line doth take away an entrie, as well as in the lineall.

Moront ſeiſies, &c. Here (&c.) implieth fee ſimple, or fee taile.

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.

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* &c. added in L. M. and Roh.
‡ &c. added L. and M. and Roh.
† *ou fee taile et franktenement al temps de ſon morant*, not in L. and M. nor Roh.

(1) *See* 1. *Rep.* 140. *temp. Edw. The eldeſt ſon before entry died without iſſue, the youngeſt will pay two reliefs, for the death of his father and the death of his brother; for they both were tenants to the lord. So note, the death of a perſon ſeiſed of a ſeiſin in law, is a diſcent to entitle the lord to relief.—By Thorp and Wilby, the grandfather leaſed for life and died. The father makes a feoffment of Black Acre with warranty, the ſon ſhall not render in value the term of which the reverſion deſcends upon him, becauſe the father had only a ſeiſin in law.* 24. *E.* 3. 47. L. Nott. MS.

(2) The neceſſity that there ſhould be a tenant to do the feudal duties, and the notoriety of title which the diſſeiſor acquired by being permitted to continue during his life in the peaceable poſſeſſion of the fee, and to die ſeiſed of it, are the grounds upon which the law is induced to defend the poſſeſſion of the heir of the diſſeiſor from the entry of the diſſeiſee, and to leave the diſſeiſee to his remedy by action. But when the diſſeiſor parts with the freehold, there is no vacancy in the poſſeſſion; and the poſſeſſion of the diſſeiſor, and conſequently the notoriety of it, is loſt. Thus the principles which apply to the diſcent of an eſtate in poſſeſſion, do not apply to the diſcent of an eſtate in remainder or reverſion expectant on an eſtate of freehold. But they apply when the particular eſtate is only for years; a tenant for years being conſidered merely as the bailiff of the freeholder, and to hold the poſſeſſion for him.

(3) But ſuppoſe the diſſeiſor in this caſe had conveyed the eſtate to the uſe of himſelf for life, remainder to the uſe of his firſt and other ſons in tail, with the immediate reverſion or remainder to himſelf in fee, and that he died without iſſue living at the time of his deceaſe; it ſeems to be a queſtion, whether he is to be conſidered as ſeiſed in fee at the time of his deceaſe, ſo as to entitle his wife to dower. See Cordall's caſe, Cro. El. 315. Hooker v. Hooker, Caſ. temp. Hardw. 13. Duncomb. v. Duncomb, 3. Lev. 447. In the latter caſe, between the eſtate of the tenant for life, and the limitation to his firſt and other ſons, there was interpoſed an eſtate to truſtees during the life of the tenant for life, for preſerving the remainder to the ſons. This was held to be a veſted eſtate, and that it prevented the wife from dower; and lord Hardwicke in Hooker v. Hooker admitted this reaſoning. The paſſage in the text and the three caſes cited above were mentioned, and great ſtreſs laid upon them, in the caſe between the heir and next of kin of the late lord Thomond. In that caſe, lord Thomond being tenant for life, with remainder to his firſt and other ſons in tail male, with the immediate reverſion expectant thereupon to himſelf in fee, paid off a ſum of 18,000l. charged upon the eſtate under the truſts of a term of years; and afterwards died inteſtate, and without iſſue. Now it is a rule in equity, that when a perſon, having a partial eſtate in land, is entitled to a ſum of money charged upon it, his right to the money does not merge in the land; but he may keep it as a ſubſiſting charge on the eſtate; and in ſome caſes, if he makes no particular diſpoſition of it in his life-time, it goes upon his deceaſe to his perſonal repreſentative. Upon this ground, it was contended that lord Egremont, upon whom the eſtate deſcended at lord Thomond's deceaſe as his heir at law, took the eſtate charged with the 18,000l. for the benefit of the inteſtate's repreſentatives. To this it was anſwered, that tho' lord Thomond was, at the time of his deceaſe, ſeiſed of an eſtate for life, with the immediate reverſion in fee; yet as he had no children living at the time of his deceaſe, and his heir at law immediately upon his deceaſe took the lands in fee ſimple in poſſeſſion by deſcent, he was to be conſidered as ſeiſed of an eſtate in fee ſimple in poſſeſſion, and conſequently that the 18,000l. was to be conſidered as merged in the inheritance. But lord chancellor Bathurſt, before whom the caſe was heard, was of opinion, that lord Thomond was to be conſidered as ſeiſed only for life, and that of courſe his lordſhip's perſonal repreſentatives were entitled to the 18,000l.

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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 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.

(F. N. B. 144. a.)

37 H. 6. 1. 9. H. 7. 24. b. (Poſt. 364. b.) (Ant. 238. b.)

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

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 charUPON 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. 21. H. 6. 17.

33. Aſſ. 11. 24. (Ant. 205.)

(1) When the lord comes to the land by eſcheat, the law only caſts the freehold upon him for want of a tenant. The diſſeiſee, notwithſtanding the diſſeiſin, continues the rightful tenant; and as, by his entry, he fills the poſſeſſion, the lord's title, which was only good while a tenant was wanting, muſt neceſſarily be at an end.

(2) Though by the diſſeiſin a tortious poſſeſſion is acquired, it is ſo in the preſent caſe, only as between the diſſeiſor and the diſſeiſee, and does not affect the eſtate of the feoffor on condition; the condition being ſo inſeparably annexed and inherent to the land, as to bind it, in whoſe hands ſoever it comes. See Ow. 141.