Sect. 302.

*ITEM * si deux joyntenants en fee sont, et l'un lessa ceo que a luy affiert a un auter pur terme de sa vie, le tenant a terme de vie durant sa vie, et l'auter joyntenaunt que ne lessa pas, sont tenants en common. Et sur ceo case un question puit surder; † si come en tiel case mittomus que le lessor ad issue et devie vivant l'auter joyntenant son companion, et vivant le tenant a terme de vie, le question poet estre tiel: Si le reversion de la moitie ‡ que le lessor avoit discendra al issue le lessor, ou quel'auter joyntenant avera || cel reversion per le survivor? Ascuns ont dit en cest case, que l'auter joyntenant avera cel reversion per le survivor: et lour reason est tiel,* scilicet *que quant les joyntenants fueront joyntment seisies § en fee simple, &c. coment quel'un de eux fist estate de ceo que a luy affiert pur terme de ¶ sa vie, et coment que il ad sever le franktenement de ceo que a luy affiert*

ALSO if there bee two joyntenants in fee, and the one letteth that to him belongeth to another for terme of his life, the tenant for term of life during his life, and the other jointenant which did not let, are tenants in common. And upon this case a question may arise; as in such case admit that the lessor hath issue and die, living the other joyntenant his companion, and living the tenant for life, the question may be this, Whether the reversion of the moity which the lessor hath shall descend to the issue of the lessor, or that the other jointenant shall have this reversion by the survivor? Some have said in this case, that the other jointenant shall have this reversion by the survivor: and their reason is this, *scil.* That when the jointenants were jointly seised in fee simple, &c. although that the one of them make an estate of that to him belongeth for term of his life, and although that hee hath severed the

SI deux joyntenants en fee, &c.

This needeth no explanation.

Et sur ceo case un question poet surder, &c.

Vid. 33. H. 6. 4. b.

Here Littleton maketh a question, and sheweth the reasons on both sides, and concludes with a Quære. When Littleton maketh a question, and sheweth the reason on both sides, the latter is ever his owne, [a] and the better. But time hath made this question without question; for now all agree, that the joynture is severed for the time, according to the latter opinion here set down in Littleton, whose reasons are unanswerable: for many times the change of the freehold makes an alteration or change of the reversion. As if tenant in taile, or the husband seised in the right of his wife, or tenant for life, make a lease for life of the lessee, in everie of these cases the lessour doth gaine a new reversion by wrong, as shall be said more at large in the chapter of Discontinuance; and if the elder brother grant the reversion (expectant upon a freehold) for life, it shall cause *possessio fratris*, as hath beene sayd.

[a] Vide Sect. 340. 375. 439. 440. 462. 463. 464. 482. 483. 648. 720. 729. Vid. Sect. 170.

Vid. Sect. 8. 7. H. 5. (Ant. 15. a.)

Per mesme le reason le reversion que est dependant sur mesme le franktenement est sever de le joynture, &c.

7. H. 7. 9.

If two joyntenants in fee be, and they both joyne in a lease to an abbot and a secular man for term of their lives, here the reversion that is dependant upon severall freeholds is severed. And so it is if they joine in a lease to two secular men, to have and to hold the one moity to the

(Ant. 189. b.)

* *Si deux* not in Roh. but in L. and M. † *Si* not in L. and M. or Roh. ‡ *&c.* added in L. and M. and Roh. || *Cel reversion-ceo* in L. and M. and Roh. § *En—de* in L. and M. and Roh. ¶ *Sa* not in L. and M. or Roh.

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mainder, in this case, can be conveyed? it may be observed, that, supposing the reversion remains in the donor, if he and the donees join together in a common conveyance by lease and release, or bargain and sale, the estate for life of the donees will merge in the reversion, the contingent remainder be destroyed, and the fee effectually conveyed to the purchaser.—But, supposing the fee to be in abeyance;—on admitting it to be in the donor and his heirs, and supposing them not to join, the only modes of conveyance for this purpose now in use are a fine or a common recovery, in which the person entitled to the contingent fee comes in as vouchee. Lord Talbot, as was mentioned before, held, in the case of Vick v. Edwards, that the trustees joining in a fine might pass a good title to a purchaser by estoppel. It should be observed that, in this case, the word Estoppel must not be understood in its strict technical sense; all that is meant by it is, that the fine operates by way of conclusion upon, or bar to, the venders, till the contingency happens upon which the fee is to arise, and then passes it to the purchaser. This doctrine is open to objection; but it seems to be generally acquiesced in; and, perhaps, the liberality of succeeding times may think a common conveyance by lease and release, or bargain and sale, sufficient in these cases to pass the fee, without either a fine or a common recovery.

See H. Black. R. 30. 1 Blackst. R. 222. 600. Fearne on Conting. Rem. 209.

See my MS. notes & references in Vick v. Edwards, 3. Wms. 372. & my opin. 11. Feb. 1809. see also Preston's Treat. on Conveyancing 30. & Mr. Butler's new ed. of Fearne 351.

affiert per le leaſe, uncore il n'ad ſever le fee ſimple, mes le fee ſimple demurt a eux joyntment come il fuyt adevant. Et iſſint ſemble a eux, que l'auter joyntenant que ſurveſquiſt, avera le reverſion per le ſurvivour, &c. Et auters ont dit le contrarie, & ceo eſt lour reaſon, ſcilicet, *que quaunt l'un des joyntenants leſſa ceo que a luy affiert a un auter pur terme de ſa vie, per tiel leaſe le franktenement eſt ſever de le joynture. Et per meſme le reaſon le reverſion que eſt dependant ſur meſme le franktenement, eſt ſever de le joynture. Auxy ſi le leſſour uſt reſerve a luy un annuall rent ſur le leas, le leſſor ſolement averoit le rent, &c. le quel eſt un proofe que le reverſion eſt ſolement en luy, et que l'auter n'ad riens en cel reverſion, &c. Auxy ſi le tenant a term de vie fuit impleade, &c. & fiſt default apres default, donques le leſſor ſerroit de ceo ſolement receive a defender ſon droit, et*

freehold of this which to him belongs by the leaſe, yet he hath not ſevered the fee ſimple, but the fee ſimple remains to them jointly as it was before. And ſo it ſeemeth to them, that the other joyntenant which ſurviveth ſhall have the reverſion by the ſurvivor, &c. And others have ſaid the contrary, and this is their reaſon, *ſcilicet*, that when one of the join-tenants leaſeth that to him belongeth, to another for terme of his life, by ſuch leaſe the freehold is ſevered from the joynture. And by the ſame reaſon the reverſion which is depending upon the ſame freehold is ſevered from the joynture. Alſo if the leſſor had reſerved to him an annual rent upon the leaſe, the leſſor onely ſhould have had the rent, &c. the which is a proofe, that the reverſion is onely in him, and that the other hath nothing in the reverſion, &c. Alſo if the tenant for terme of life were impleaded, & maketh default after default, the leſſor ſhall be only received for this, to defend

one for life, and the other moity to the other for life, for both theſe caſes are warranted by the authority of *Littleton*.

If two joyntenants be of a leaſe for twenty one years, and the one of them letteth his part for certaine yeares, part of the terme, the joynture is ſevered, and ſurvivor holdeth not place, for a terme for a ſmall number of yeares is as high an intereſt as for many more years; and ſo was it reſolved *Hil.* 18. *El. Reginæ, in Communi Banco*, * which I myſelfe heard. (Poſt. Sect. 319. 199. a.) * Hil. 18. Eliz.

If two coparceners be in fee, and the one make a leaſe for life, this is no ſeverance of the coparcenary, for notwithſtanding the lord ſhall make one avowrie upon them both.

But if two joyntenants be, and one maketh a leaſe for life, this is a ſeverance of the joynture, as *Littleton* here taketh it, and ſeveral avowries ſhall be made upon them (1). (Ant. 167. a.)

Auxy ſi le leſſor uſt reſerve un annual rent, le leſſor ſolement avera le rent, &c. But if two joyntenants make a leaſe for life, reſerving a rent to one of them, the rent ſhall enure to them both, becauſe the reverſion remains in joynture, unles the reſervation be by deed indented, and then he onely to whom it is reſerved ſhall have it. But if they make a leaſe by deed indented, reſerving or ſaving the reverſion to one of them, that is void, becauſe they had the reverſion before, but the rent is newly created. 5. E. 4. 4. 2. 27. H. 8. 16. 2. 7. E. 4. 25. 14. Ed. 3. Br. 282. (Ant. 47. a.) (Poſt. 214. a.)

And ſo it is if ſuch a leſſee for life ſhould ſurrender to one of them, it ſhall enure to them both, for that they have a joynt reverſion. But if the leſſee grant his eſtate to one of them, no part of it ſhal enure to his companion, becauſe for the moity belonging to his companion, it is in *eſſe* in 5. E. 4. 4. (2. Rep. 66. Poſt. 214. a.) (2. Cro. 611. Perk. 31.)

(1) Upon the death of either of the leſſees, one moiety of the eſtate goes to the ſurviving leſſee or his aſſignee, and the reverſioner may enter upon the other moiety. See Dy. 67. ſir W. Jones 55. 2. P. Will. 740. But this is to be underſtood where the jointenants are for life; for if the jointenants are in fee, and the jointure is ſevered, the right of ſurvivorſhip is wholly taken away, and their ſhares go to their reſpective heirs. So if there be jointenants of a term of years, and the jointure is ſevered, their ſhares go to their reſpective perſonal repreſentatives. See 1. Salk. 158. It ſhould alſo be obſerved, that the caſe put by Littleton ſuppoſes the jointenant to grant his eſtate for his own life only; for if he grants it for a longer term than that of his own life, or for the life of any other perſon, it is a forfeiture. See 4th Leon. 236.

in him to whom the grant is made, the reversion to the other in fee.

38. H. 6. 24. b. 2. R. 3. tit. Extinguishment 3.

If two joyntenants make a lease for life, the remainder to his companion in fee, this is a good remainder of his moitie to his companion.

(4 Leo. 187.)

Donques le feoffor serra de ceo solement receive, &c.

Post. 352. b.)

Receive, *Receit*, *Receptio*, is in many cases where a person, partie to a writ, or an estranger thereunto, to whom a reversion or remainder appertaineth, shall in default of another person be received to defend his or her freehold or inheritance, the law saith, *Admittatur*, *&c.* And this admission or receipt is given by sundry statutes (*f*) (and this is that which the civilians call, *Admissio tertiæ personæ pro interesse*). *Et in casibus prædictis duæ concurrunt actiones: una inter petentem & tenentem, & alia inter tenentem, ius suum ostendentem & petentem.*

(*f*) W. 2. cap. 3. 20. E. 1. Statute de defensione Juris. 13. R. 2. cap. 16.

Pur ceo que un franktenement ne poet per nature de joynture, estre annexe a un reversion. And this is the principall reason, and of this sufficient hath beene said in the chapter of Joyntenants, *Sect.* 291.

&c. This *&c.* in the end of this section, implieth any other heir lineal or collaterall.

*son compagnion en cest case en nul manner serroit receive, le quel prove * le reversion del moity d'estre tantsolement en le lessor:* et sic per consequens, *si le lessour morust vivant le lessee per terme de vie, le reversion discendra al heire de lessour, et nemy deviendra a l'auter joyntenant per le survivor,* Ideo quære. *Mes en cest case si celuy joyntenant que ad le franktenement ad issue et devie, vivant le lessor & lessee, donques il semble, que mesme l'issue avera cest moitie en demesne, et en fee per discent, pur ceo que † un franktenement ne poet per nature de joynture est e annexe a un reversion, &c. Et il est certaine, que celuy que lessa fuit seisie de le moitie en son demesne come de fee, et nul avera ascun joynture en son franktenement,* Ergo *ceo discendra a son issue, &c.* Sed quære.

his right, and his companion in this case in no manner shall be received, the which proveth the reversion of the moitie to be onely in the lessor: and so by consequent, if the lessour dieth living the lessee for terme of life, the reversion shall descend to the heir of the lessour, and shall not come to the other joyntenant by the survivor, *Ideo quære.* But in this case if that jointenant which hath the freehold hath issue, & dies living the lessor and the lessee, then it seemeth that the same issue shall have this moity in demesne, and in fee by descent, for that a freehold cannot by nature of joynture bee annexed to a reversion, &c. And it is certaine, that hee which leased was seised of the moitie in his demesne as of fee, and none shall have any joynture in his freehold, therefore this shall descend to his issue, &c. *Sed quære.*

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

† *un* not in L. and M. or Roh.

Section

Sect. 303.

MES ſi iſſint ſoit que la ley en ceſt cas eſt tiel, que ſi le leſſor devie vivant le leſſee, & vivant l'auter joyntenant que ad le franktenement de l'auter moitie, que le reverſion diſcendra al iſſue del leſſor, donque eſt le joynture & title que aſcun de eux poit aver per le ſurvivor, & le droit de le joynture anient, et tout ouſterment defeat a touts jours. Em meſme le maner eſt, ſi celuy joyntenant que ad le franktenement devie vivant le leſſor & le leſſee, ſi la ley ſoit tiel que ſon franktenement & fee que il ad en le moitie diſſcendra a ſon iſſue, donques le joynture ſerra defeat a touts jours.

BUT if it be ſo that the law in this caſe bee ſuch, that if the leſſor die living the leſſee, and living the other joyntenant which hath the freehold of the other moity, that the reverſion ſhall deſcend to the iſſue of the leſſor, then is the joynture and title which any of them may have by the ſurvivour, and the right of the joynture taken away, and altogether defeated for ever. In the ſame manner it is, if that joyntenant which hath the freehold dye living the leſſor and the leſſee, if the law bee ſo as his freehold and fee which he hath in the moity ſhall deſcend to his iſſue, then the joynture ſhall be defeated for ever.

DOnque eſt le joynture & title, &c. & le droit de le joynture anient, &c.

And the reaſon of this is, for if the joynture be ſevered at the time of the death of him that firſt deceaſed, the benefit of ſurvivor is utterly deſtroyed for ever, as hath beene ſaid (*) afore in the chapter of Joyntenants. But in the caſe aforeſaid, if tenant for life dyeth in the life of both the joyntenants, they are joyntenants againe as they were before. (*) Vide Sect. 291. (Poſt. 214. a.)

If two joyntenants be in fee, and the one letteth his part to another for the life of the leſſor and the leſſor dieth, ſome ſay that his part ſhal ſurvive to his companion, for by his death the leaſe was determined. And others hold the contrary; and their reaſon is, firſt, for that at the time of his death the joynture was ſevered, for ſo long as he lived the leaſe continued. And ſecondly, that notwithſtanding the act of any one of the joyntenants there muſt bee equall benefit of ſurvivor as to the freehold. But here it the other joyntenant had firſt died, there had been no benefit of ſurvivor to the leſſor without queſtion.

Sect. 304.

ITEM, ſi trois joyntenants ſont, & l'un releſſa per ſon fait a un de ſes companions tout le droit que il avoit en le terre, donques ad celuy a que le releas eſt fait le tierce part de les ter-

AND if three joyntenants be, & the one releaſe by his deed to one of his companions all the right which hee hath in the land, then hath he to whom the releaſe is made the third part of

UPON this caſe theſe two things are to be obſerved (1). Firſt, that in this caſe this releaſe doth enure by way of *mitter l'eſtate*, and not (*) by way of extinguiſhment, for then the releaſe ſhould enure to his companion alſo, and he is in the *per* by him that maketh the releaſe. [a] But if hee had releaſed to the other two, then had it wrought no degree but 4. 3

(Poſt. 318. a. 6. Rep. 78. b. Ant. 185. a.)
(*) 9 Eliz. Dyer 263. 19. H. 6. 17.
[a] 40. E. 3. 41. 13. E. 3. tit. Garr. 35. E. 3. releaſe 43. 22 H. 6. 42. 14. E. 3. Briefe 28. 19. H. 6. 17. 31. H. 6. 5. 28. H. 6. a. 37. H. 8. Alienation 31. 8. H. 4. 8. 10. E.

(1) Some obſervations on Sir Edward Coke's commentary upon this and the four ſucceeding Sections will be offered in the chapter of Releaſes.

but in ſuppoſition of law, for many purpoſes they to whom the releaſe is made (as hath beene ſaid) ſhall bee ſuppoſed in from the firſt feoffor, as they ſhall deraigne the firſt warrantie for the whole. [b] The ſecond thing to bee obſerved is, that he to whom the releaſe is made hath a fee ſimple without theſe words (heires), as hath beene touched in the firſt chapter of the firſt booke; for that he to whom the releaſe is, is ſeiſed *per my*, & *per tout*, of the fee and inheritance, as hath been ſaid in the chapter of Joyntenants. And note, the like law is between coparceners: and further, if there be two coparceners, and the one hath iſſue twentie daughters and dieth, the other may releaſe to any one of the daughters her whole part, albeit ſhe to whom the releaſe is, hath not an equall part; but for the privitie, and the individed eſtate, the releaſe is good.

(Poſt. 385. a.)
[b] 9. Eliz. Dyer 263. 19. H. 6. 17.
(Ante 9. b.)

*res per force de le dit releas, & il & ſon companion teigneront les auters deux parts * en joynture. Et quant al tierce part, que il ad per force de releas, il tient cel tierce part oue luy meſme & ſon companion en common.*

the lands by force of the ſaid releaſe, and he and his companion ſhall hold the other two parts in joynture. And as to the third part, which he hath by force of the releaſe, he holdeth that third part with himſelfe and his companion in common.

But if two joyntenants be of twenty acres, and the one maketh a feoffment of his part in eighteene acres, the other cannot releaſe his entire part; but only in two acres, for that the joynture is ſevered for the reſidue.

Sect. 305.

THIS is evident upon that which hath beene ſaid before. [c] And it is to bee underſtood, that a releaſe may enure foure manner of wayes. Firſt, by way of *mitter l'eſtate*, as here it appeareth. Secondly, by way of *mitter la droit*. Thirdly, by way of extinguiſhment. Fourthly, by way of creation or inlargement of an eſtate, as hereafter in this chapter ſhall appeare. And it is to bee obſerved, that upon a releaſe that creates or inlargeth an eſtate, or enures by way of *mitter l'eſtate*, a rent may bee reſerved, but not upon a releaſe that enureth by way of *mitter le droit*, or which enures by way of extinguiſhment.

The (&c.) in the end of this ſection implieth a diverſitie

[c] 10. Eliz. Bendloes. 9. Eliz. Dier. 263.
(2. Roll. Abr. 403.)

See more of this in the chapter of Releaſes.
(Poſt. 273. b.)

10. E. 4. 8. b. 21. H. 6. 8. b.
(Ant. 144. a.)

ET eſt aſcavoir, que aſcun foits † un releas prendra effect, & urera pur mitter l'eſtate de celuy que fiſt le releas a celuy a que le releas eſt fait, ſicome en le cas avant dit, & auxy ſicome joynt eſtate ſoit fait a le baron & ſa feme, & a la tierce perſon ‡, & la tierce perſon releſſa tout ſon droit que il ad || a le baron, adonque ad le baron la moitie que le tierce avoit, & la feme de ceo n'ad riens. Et ſi en tiel caſe le tierce releſſa § a la feme nient noſmant le baron en le releas, donques ad la feme le moitie que le tierce avoit, &c. & le baron n'ad riens de ceo forſque

AND it is to be obſerved, that ſometimes a deed of releaſe ſhal take effect, & enure to put the eſtate of him which makes the releaſe to him to whom the releaſe is made, as in the caſe aforeſaid, and alſo, as if a joynt eſtate bee made to the huſband and wife, and to a third perſon, and the third perſon releaſe all his right which hee hath to the huſband, then hath the huſband the moitie which the third had, and the wife hath nothing of this. And if in ſuch caſe the third releaſe to the wife not naming the huſband in the releaſe, then hath the wife the moitie which the

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* *En joynture—jointment*, in L. and M. and Roh.
† *Un fait et*, added in L. and M. and Roh.
‡ *Que* added in L. and M.
|| *&c.* added in L. and M. and Roh.
§ *&c.* added in L. and M. and Roh.

en droit ſa feme, pur ceo que en tiel caſe le releaſe vrera de faire eſtate a celuy a que le releaſe eſt fait, de tout ceo que affiert a celuy que fait le releaſe, &c. that which belongeth to the releaſe, &c.

third had, &c. And the huſband hath nothing of this but in right of his wife, becauſe that in this caſe the releaſe ſhal enure to make an eſtate to whom the releaſe is made of all to him which maketh

between a releaſe which enures by way of *mitter l'eſtate* (whereof *Littleton* here ſpeaketh) and a releaſe that enures by way of extinguiſhment: for of a releaſe enuring by way of extinguiſhment made to the huſband, the wife ſhall take benefit, or to the wife, the huſband ſhall take benefit, as hereafter ſhall more at large be ſaid.

Sect. 306.

*ET en aſcun cas un releas vrera de mitter tout le droit que il que fait le releas ad a celuy a que le releaſe eſt fait. Sicome home ſeiſie de certain tenements eſt diſſeiſie per deux diſſeiſors, ſi le diſſeiſee per ſon fait releſſa tout ſon droit, &c. a un des diſſeiſors, donque celuy a que le releas eſt fait avera & tiendra touts les tenements a luy ſolement, et ouſtera ſon companion de cheſcun occupation de ceo. Et le cauſe eſt, pur ceo que les deux diſſeiſors fueront eins * encounter la ley, et quant un de eux happe le releas de celuy que ad droit d'entre, &c. ceſt droit en tiel cas † veſtera en celuy a que le releas eſt fait, et eſt en tiel plyte, ſicome ‡ il que avoit droit || avoit enter, et luy enfeoffa*

AND in ſome caſe a releaſe ſhal enure to put all the right which he who maketh the releaſe hath to him to whom the releaſe is made. As if a man ſeiſed of certaine tenements is diſſeiſed by two diſſeiſors, if the diſſeiſee by his deed releaſe all his right, &c. to one of the diſſeiſors, then hee to whom the releaſe is made ſhall have and hold al the tenements to him alone, and ſhal ouſt his companion of every occupation of this. And the reaſon is, for that the two diſſeiſors were in againſt the law, and when one of them happeth the releaſe of him which hath right of entry, &c. this right in ſuch caſe ſhal veſt in him to whom the releaſe is made, and he is in like plite, as hee which

HERE *Littleton* purſueth the ſecond part of his diviſion, *viz.* where a releaſe ſhall enure by way of *mitter le droit*. (2. Roll. Abr. 409 414. Poſt. 276. a.)

Diſſeiſie per deux diſſeiſors, &c. The like law is, where there bee two joynt abators or intrudors which come in meerely by wrong. But if two men doe uſurpe by a wrongfull preſentation to a church, and their clarke is admitted, inſtituted and inducted, and the rightfull patron releaſeth to one of them, this ſhall enure to them both, for that the uſurpers come not in meerely by wrong, but their clarke is in by admiſſion, and inſtitution, which are judiciall acts. (*d*) And therefore an uſurpation ſhal worke a remitter to one that hath a former right.

(*d*) Fitz. N. B. 35. in 11. R. 2. quare Imp. 142. (1 Roll. Abr. 661. 662. Poſt. 368. a. Ant. 180. b. 181. a.)

Donques celuy a que le releaſe eſt fait avera & teignera touts les tenements, &c. Here by operation of law preſently upon the deliverie of the releaſe the whole freehold and inheritance is veſted in him to whom the releaſe is made, and al the ſtate that the other diſſeiſor had, wholly deveſted: for right and wrong cannot conſiſt together, but the wrongfull eſtate giveth place to the rightfull. And the reaſon hereof is for that, as hath been ſaid, the diſſeiſor to whom the releaſe was

* *Ses tenements per tort, per eux fait*, added in L. and M. and Roh. † *Veſter-veſt* in L. and M. and Roh. ‡ *Il fil* in L. and M. and Roh. || *&c.* added, *avoit enter, et*, not in L. and M. and Roh.

(e) Brit. fol. 116. 26. Aſſ. pl. 39. 39. E. 3. 29. 21. H. 6. 41. 22. H. 6. 22. 7. E. 4. 25. 9. E. 4. 6. 11. H. 7. 12. 20. H. 7. 5. 21. H. 7. 18. 12. E. 4. tit. Diſcontin. 1. 9. H. 6. 37. 21. H. 6. 62.

was made was ſeiſed *per my & per tout*, whereunto when the right commeth it excludeth the wrong (*e*), for right which is lawfull, and wrong that is contrary to law, cannot ſtand together.

En tiel plite, ſicome il que avoit droit, avoit entrer & luy enfeoffe, &c.

&c. Et la cauſe eſt, pur ceo que il que avoit adevant eſtate per tort, ſcilicet, *per diſſeiſin, &c. ad ore per le releas un eſtate droiturel.* *

hath the right had entred & enfeoffed him, &c. And the reaſon is, for that he which before had an eſtate by wrong, *ſcilicet*, by diſſeiſin, &c. hath now by the releaſe a rightful eſtate.

This (*&c.*) doth implie that this is true *ſecundum quid*, but not *ſimpliciter*; for as to the holding out of the joynt diſſeiſor, it amounts to as much as if he had entred and infeoffed him to whom the releaſe is made, but it doth not amount to an entrie and feoffment *ſimpliciter* to all purpoſes, as ſhall be ſaid hereafter in his proper place in the chapter of Releaſes.

Sect. 307.

HERE *Littleton* ſpeaketh of the third kind of releaſes. And the reaſon of this diverſitie (implied in the (*&c.*) in the end of this ſection,) between the diſſeiſors & their feoffees, is for that the feoffees comming in by title and purchaſe, are intended in law to have a warrantie (which is much eſteemed in law); and therefore leſt the warrantie ſhould be avoided, the releaſe ſhall enure to both the feoffees in favour of purchaſors, and ſo the right and benefit of every one ſaved. (*f*) And in ancient time if the diſſeiſor had made a feoffment in fee, or a gift in taile, or a leaſe for life, and the feoffee, donee, or leſſee had continued in ſeiſin quietly a yeare and a day, the entrie of the diſſeiſee had not been lawfull upon him; and the reaſon was, for the benefit and ſafegard of the warranty (which was intended by law) ſhould have beene deſtroyed by the entrie. But hereof alſo more ſhall be ſaid in his proper place in the chapter of Releaſes.

(*f*) 2. H. 3. Aſſ. 432. 1. Aſſ. 13. 9. Aſſ. 15. 21. 21. Aſſ. 28. 27. Aſſ. 68. 32. 29. Aſſ. 54. 43. Aſſ. 17. 40. E. 3. 24. 50. E. 3. 21. 3. R. 2. entry cong. 38. 13. E. 3. tit. Aſſ. 9. 12. Aſſ. 20.

ET en aſcun cas un releas vera per voy d'extinguiſhment, et en tiel caſe tiel releas aydera le joyntenant a que le releas ne fuit fait, auxybien come † luy a que le releaſe fuit fait. Sicome ‡ un home ſoit diſſeiſie, & le diſſeiſor fait feoffiment a deux homes en fee, § ſi || le diſſeiſee releſſa per ſon fait a un de les feoffees, donques ¶ cel releaſe vrera a ambideux les feoffees, pur ceo que les feoffees ont eſtate per la ley, ſcilicet, *per feoffment, et nemy per tort fait a nulluy, &c.* (1)

AND in ſome caſe a releaſe ſhall inure by way of extinguiſhment, and in ſuch caſe ſuch releaſe ſhall aide the joyntenant to whom the releaſe was not made, as well as him to whom the releaſe was made. As if a man be diſſeiſed, and the diſſeiſor makes a feoffment to two men in fee, if the diſſeiſee releaſe by his deed to one of the feoffees, this releaſe ſhal enure to both the feoffees, for that the feoffees have an eſtate by the law, *ſcilicet*, by feoffment, and not by wrong done to any, &c.

Sect. 308.

EN meſme le maner eſt, ſi le diſſeiſor fait un leaſe a un home pur terme de ſa vie, le remain-

IN the ſame manner it is, if the diſſeiſor maketh a leaſe to a man for terme of his life, the re-

der

* *&c.* added in L. and M. and Roh. in Roh. § *Si* not in L. and M. or Roh. † *Luy a celuy* in L. and M. and Roh. || *Et* added in L. and M. and Roh. ‡ *Si* added in L. and M. but not ¶ *Cel-tiel* in L. and M. and Roh.

(1) In the 42d and 44th chapters of Britton, is much curious learning on the eſtate of a diſſeiſor, and his different ſituations previous and ſubſequent to his acquiring an eſtabliſhed poſſeſſion, and previous and ſubſequent to his acquiring a title to his eſtate, and on the conſequential differences of the ſituation and remedies of the diſſeiſee in theſe reſpects.—Theſe chapters throw great light upon Sir Edward Coke's commentary on this ſection, and ſtrongly confirm the obſervations made by Lord Mansfield, in the famous caſe of Taylor v. Horde, 1 Burr. 60.

der ouſter a un auter en fee, ſi le diſſeiſee releſſa a le tenant a terme de vie tout ſon droit, &c. cel releaſe vrera auxybien a celuy en le remainder come a la tenant a terme de vie. Et la cauſe eſt, pur ceo que le tenant a terme de vie vient a ſon eſtate per courſe de ley, & pur ceo cel releaſe vrera, et prent effect per voy d'extinguiſhment de droit de celuy que releſſa, &c. Et per cel releaſe le tenant a terme de vie n'ad pluis ample ne greinder eſtate, que il avoit devant le releaſe fait a luy, et le droit celuy que releſſa eſt tout ouſterment extinct. Et entant que ceſt releaſe ne poit enlarge l'eſtate de le tenant a terme de vie, il eſt reaſon que cel releaſe vrera a celuy en le remainder, &c.

mainder over to another in fee, if the diſſeiſee releaſe to the tenant for terme of life all his right, &c. this releaſe ſhall inure as well to him in the remainder, as to the tenant for terme of life. And the reaſon is, for that the tenant for life commeth to his eſtate by courſe of law, and therefore this releaſe ſhall enure and take effect by way of extinguiſhment of the right of him which releaſeth, &c. And by this releaſe the tenant for life hath no ampler nor greater eſtate than hee had before the releaſe made him, and the right of him which releaſeth is altogether extinct. And inaſmuch as this releaſe cannot inlarge the eſtate of the tenant for life, it is reaſon that this releaſe ſhal enure to him in the remainder, &c. (2. Roll. Abr. 400.)

Pluis ſerra dit de releaſes en le chapiter de Relcaſes.

More ſhall be ſaid of releaſes in the chapter of Releaſes.

CEſt releaſe vrera auxibien a celuy en le remainder, come a le tenant a terme de vie, &c. Of this and the reſt of this *Section*, for avoyding of repetition, more ſhall be ſaid in his proper place in the chapter of Releaſes.

Tout ſon droit, &c. Here by this (*&c.*) is implied, title, demand, and other words which may transferre the right, &c. Alſo here is implyed of in or to the land.

Sect. 309.

ITEM ſi ſoient deux parceners, & l'un alien ceo que a luy affiert a un auter, donques l'auter parcener et l'alienee ſont tenants en common.

ALSO if two parceners be, and the one alieneth that to her belongeth, to another, then the other parcener and the alienee are tenants in common.

This is evident, and needeth no explication.

Sect. 310.

ITEM nota, que tenaunts en common ſoient eſtre per † title de preſcription, ſicome l'un et ſes auncеſtors, ou ceux que eſtate il ad*

ALSO note, that tenants in common may bee by title of preſcription, as if the one and his anceſtors, or they whoſe *ad* (Ant. 114. a.)

* *Nota que* not in L. and M. or Roh.

† *Title de* not in Roh.

ad en un moity ont tenus en common . meſme le moitie, ove l'auter tenant que ad l'auter moitie & ove ſes aunceſtors ou ove ceux que eſtate il ad pro indiviſo *, *de temps dont memory ne curt, &c. Et divers auters manners poient faire et cauſer homes d'eſtre tenaunts en common, que ne ſont icy expreſſés † &c.*

eſtate hee hath in one moitie have holden in common the ſame moitie with the other tenant which hath the other moity, and with his anceſtors, or with thoſe whoſe ſtate he hath undivided, time out of minde of man. And divers other manners may make and cauſe men to be tenants in common, which are not here expreſt, &c. (1)

11 E. 3. Trans. 212. 13. E. 5. Briefe 674. 8. H. 6. 16. b. lib. intrat. 23.

OF this, beſides *Littleton*, there is good authoritie in law, as there is for all his other caſes throughout his three bookes; but joyntenants cannot be by preſcription, becauſe there is ſurvivor betweene them, but not betweene tenants in common.

The two (*&c.*) in this ſection are evident.

Sect. 311.

{Poſt. 200. Cro. Jac. 231. Noy 23. Poſt. Litt. Sect. 314.

IN this *ſection* wee learne two things: firſt, that in reall actions, and in actions alſo that are mixt with the perſonalty, tenants in common ſhall ſever in action, becauſe they have ſeveral freeholds, and claime in by ſeverall titles; and therefore as they ſhall bee ſeverally by others impleaded, ſo ſhall they ſeverally implead others in al real and mixt actions, unleſſe it be in caſe of neceſſity for a thing entire, as hereafter in this chapter ſhall appeare. And *Littleton* here putteth the caſe of the aſſiſe which is mixt with the perſonaltie, and therefore hee needed not to put any caſe of any *præcipe quod reddat*; for if it bee ſo in caſe of aſſiſe, *à fortiori* in writs of higher nature, which is neceſſarily implyed in the (*&c.*) Now of ſuits that ſound in the realty, and of perſonall actions, *Littleton* ſpeaketh hereafter in this chapter. The ſecond thing here to bee learned, is the diverſitie betweene tenants in common and joyntenants, which both of it ſelfe, and upon that which hath been ſaid, is apparant.

ITEM en aſcun cas tenants en common voyent aver de lour poſſeſſion ſeveralx actions, et en aſcun cas ils joyndront en un action. Car ſi ſont deux tenants en common, et ils ſont diſſeiſies, ils doyent aver ‡ deux aſſiſes, et nemy un aſſiſe; car cheſcun de eux covient aver un aſſiſe de ſon moitie, &c. Et la cauſe eſt, pur ceo que tenants en common fueront ſeiſies, &c. per ſeveralx titles. Mes auterment eſt de joyntenants; car ſi ſoyent vint joyntenants, et ils ſont diſſeiſies, ils averont en touts lour noſmes forſque un aſſiſe, pur ceo que ils n'ont forſque un joynt title.

ALSO in ſome caſe tenants in common ought to have of their poſſeſſion ſeveral actions, and in ſome caſes they ſhall joyne in one action. [2] For if two tenants in common be, and they be diſſeiſed, they muſt have two aſſiſes, and not one aſſiſe; for each of them ought to have one aſſiſe of his moity, &c. & the reaſon is, for that the tenants in common were ſeiſed, &c. by ſeverall titles. But otherwiſe it is of jointenants; for if twenty jointenants be, and they bee diſſeiſed, they ſhall have in al their names but one aſſiſe, becauſe they have not but one joynt title.

4. E. 4. 18. b. (Ant. 180. b.)

Sect.

* *&c.* added in Roh. † *&c.* not in Roh. ‡ *Envers le diſſiſor* added in Roh.

(1) When lands are given in undivided ſhares to two or more for particular eſtates, ſo as that upon the determination of the particular eſtates, in any of thoſe ſhares, they remain over to the other grantees, and the reverſioner or remainder-man is not let in till the determination of all the particular eſtates, then the grantees take their original ſhares as tenants in common, and the remainders limited to them on the determination of the particular eſtates, are known by the appellation of croſs remainders.—Theſe remainders may be raiſed both by deed and will: in deeds they can only be created by expreſs words, but in wills they may be raiſed by implication.—In the caſe of Gilbert v. Witty, Cro. Jac. 655, it was ſaid by Juſtice Doddridge, that croſs remainders ſhould never be raiſed by implication between more than two. This doctrine received ſome countenance from what was ſaid by the courts in the caſes of Cole v. Levingſtone 1. Ventris 224. Holmes v. Meynell, Sir Thomas Raymond 452, and ſome other caſes. But it ſeems entirely exploded by the caſes of Burden v. Burville. B. R. Eaſt. Term. 23. Geo. 3. Duke of Richmond v. Earl of Cadogan, determined in the Court of Chancery in May 1773. Wright v. Lord Cadogan, Holford, and others, B. R. Eaſter Term 1773. Cowp. 31, and ſome other ſubſequent caſes. It ſeems however to be admitted in theſe caſes, that to raiſe croſs remainders between more than two, ſtronger implication is required, than to raiſe them between two only.

(2) The reader will find what Littleton and his commentator ſay on this ſubject confirmed and exemplified by the caſes cited in Viner and Bacon's Abridgments, and Comyns's Digeſt, under the title *Conditions*.

Sect. 312.

*ITEM ſi ſoient trois joyntenants, & un releaſe a un de ſes companions tout le droit que il ad, &c. et puis les * auters deux ſont diſſeiſies de l'entiertie, &c. en ceſt caſe les deux auters averont † ſeveralx aſſiſes, &c. en ceſt forme*, ſcilicet, *ils averont en lour ambideux noſmes un aſſiſe de les deux parts, &c. pur ceo que les deux parts ils teignont jointment al temps de le diſſeiſin. Et quant a le tierce part, celuy a que le releaſe fuit fait, covient aver de ceo un aſſiſe en ſon noſme demeſne, pur ceo que ‡ il (quaunt a meſme le tierce part) eſt de ceo tenant in common, &c. pur ceo que il vient a cel ‖ tierce part per force del releaſe, et nemy tant ſolement per force del joynture.*

ALSO if three joyntenants bee, (Noy 13. Ant. 193.) and one releaſe to one of his fellowes all the right which hee hath, &c. and after the other two be diſſeiſed of the whole, &c. in this caſe the two others ſhall have ſeverall aſſiſes, &c. in this manner, *viz.* they ſhall have in both their names an aſſiſe of the two parts, &c. becauſe the two parts they held joyntly at the time of the diſſeiſin. And as to the third part, he to whom the releaſe was made, ought to have of that an aſſiſe in his owne name, for that hee (as to the ſame third part) is thereof tenant in common, &c. becauſe hee commeth to this third part by force of the releaſe, and not only by force of the joynture.

This is put for an example (which ever doth illuſtrate the rule) and is evident of it ſelfe: and the (&c.) in this ſection needeth no further explication.

Sect. 313.

*ITEM quant a ſuer des actions que touchant § le realtie, y ſont diverſities perenter parceners que ſont eins per divers diſcents, & tenaunts en common. Car ſi ¶ home ſeiſie de certaine terre en fee ad iſſue deux ** files †† et moruſt, et les files entront, &c. et cheſcun de eux ad iſſue un fits, & devieront ſauns partition fait enter eux, per que l'un moity diſcendiſt a le fits d'un parcener, & l'auter moitie diſcendiſt al fits d'auter parcener, et ils entront*

ALSO to the ſuing of actions (Ant. 164. a.) which touch their realty, there bee diverſities betweene parceners which are in by divers deſcents, and tenants in common: for if a man ſeiſed of certain land in fee, hath iſſue two daughters and dyeth, and the daughters enter, &c. and each of them hath iſſue a ſonne, and die without partition made between them, by which the one moity deſcends to the ſonne of the one parcener, and the other moity deſcends to the *entront*

* *Auters* not in Roh. † *&c.* added in Roh. ‡ *Il* not in Roh. ‖ *Tierce* not in Roh. § *En* added in Roh. ¶ *Home—deux parceners* in Roh. ** *Files—fyles* in Roh. †† *Et moruſt et les files entront, &c. et cheſcun de eux ad iſſue un fits,* not in Roh.

(8. Rep. 86. b.)

entront et occupiont en common et ſont diſſeiſies, en ceſt caſe ils averont en lour deux noſmes un aſſiſe, et nemy deux aſſiſes. Et la cauſe eſt, que coment que ils veignont eins per divers diſcents, &c. uncore ils ſont parceners, et briefe de Partitione faciendâ *giſt enter eux. Et ils ne ſont parceners, eyant regarde ou reſpect tant ſolement a * le ſeiſin et poſſeſſion de lour meres, mes ils ſont parceners pluis, eyant reſpect a l'eſtate que diſcendiſt de lour ayel a lour meres, car ils ne poyent eſtre parceners ſi lour meres ne fueront parceners adevant,† &c. Et iſſint a tiel reſpect et conſideration,* ſcilicet, *quant a le primer diſcent que fuit a lour meres, ils ont un title en parcenarie, le quel fait eux parceners. Et auxy ils ne ſont forſque come un heire a lour common aunceſtor,* ſcilicet, *a lour ayel, de que la terre diſcendiſt a lour meres. Et pur ceux cauſes devant partition enter eux, &c ils averont un aſſiſe, coment que ils veignont eins per ſeveralx diſcents‡.*

ſonne of the other parcener, and they enter and occupie in common and bee diſſeiſed, in this caſe they ſhall have in their two names one aſſiſe, and not two aſſiſes. And the cauſe is, for that albeit they come in by divers deſcents, &c. yet they are parceners, and a writ of partition lieth betweene them. And they are not parceners, having regard or reſpect onely to the ſeiſin and poſſeſſion of their mothers, but they are parceners rather, having reſpect to the eſtate which deſcended from their grandfather to their mothers, for they cannot bee parceners if their mothers were not parceners before, &c. And ſo in this reſpect and conſideration, *viz.* as to the firſt deſcent which was to their mothers, they have a title in parcenarie, the which makes them parceners. And alſo they are but as one heire to their common anceſtor, *viz.* to their grandfather, from whom the land deſcended to their mothers. And for theſe cauſes, before partition between them, &c. they ſhall have an aſſiſe, although they come in by ſeverall deſcents.

(Ant. 164. a.) Vid. Sect. 241.

This, upon that which hath beene ſaid in the chapter of Parceners, is evident: where you may reade excellent points of learning, and diverſities concerning this matter; all which are here either expreſſed or implyed, as the ſtudious and diligent reader will obſerve.

Sect. 314.

EN ceſt caſe quant a le rent et liver de pepper, ils averount deux aſſiſes, & quaunt a l'eſperver ou le chival jorſque un aſſiſe.

But for the better underſtanding hereof it is to bee knowne, that if two te-

ITEM ſi ſont deux tenants en common de certaine terre en fee, et ils doneront cel terre a un home en le taile, ou leſſeront a un home pur terme

ALSO if there bee two tenants in common of certaine lands in fee, and they give this land to a man in taile, or let it to one for terme of life, ren-

de

* *Le—lour* in Roh. † &c. not in Roh. ‡ &c. added in Roh.

de vie, rendant a eux annuelment un certaine rent, & un liver de pepper, & un eſperver ou un chival, & ils ſont ſciſies de ceſt ſervice, & puis tout le rent eſt aderere, & ils diſtreigneront pur ceo, & le tenant a eux fait reſcous. En ceſt cas quant a le rent & liver de pepper ils averont deux aſſiſes, & quant a l'eſperver ou le chival forſque un aſſiſe. Et la cauſe pur que ils averont deux aſſiſes, quant a le rent & liver de pepper, eſt ceo, entant que ils fueront tenants en common en ſeverall titles, et quant ils fieront un done en le tayle au leas pur terme de vie, ſavant a eux le reverſion, & rendant a eux certaine rent, &c. tiel reſervation eſt incident a lour reverſion, & pur ceo que lour reverſion eſt en common, & per ſeverall titles, ſicome lour poſſeſſion fuit devant le rent & outers choſes que poient eſtre ſeveres, et fueront a eux reſerves ſur le done, ou ſur le leas, queux ſont incidents per le ley a lour reverſion, tiels choſes iſſint reſerves fueront de la nature del reverſion. Et entant que le reverſion eſt a eux

dring to them yearely a certaine rent, & a pound of pepper, and a hawke or a horſe, and they bee ſeiſed of this ſervice, and afterwards the whole rent is behind, and they diſtraine for this, and the tenant maketh reſcouſe. In this caſe as to the rent and pound of pepper they ſhall have two aſſiſes, and as to the hawke or the horſe but one aſſize. And the reaſon why then they ſhall have two aſſiſes as to the rent and pound of pepper is this, inſomuch as they were tenants in common in ſeverall titles, and when they made a gift in taile or leaſe for life, ſaving to them the reverſion, and rendering to them a certaine rent, &c. ſuch reſervation is incident to their reverſion, and for that their reverſion is in common, and by ſeverall titles, as their poſſeſſion was before the rent and other things which may be ſevered, and were reſerved unto them upon the gift, or upon the leaſe, which are incidents by the law to their reverſion, ſuch things ſo reſerved were of the nature of the reverſion. And in as much as the reverſion is to them in common by ſeverall titles, it beho-

nants in common bee, and they grant a rent of 20 ſhillings *per annum* out of their land, the grantee ſhall have two rents of 20 ſhillings, for that every man's grant ſhall bee taken moſt ſtrongly againſt himſelfe, & therefore they be ſeveral grants in law. (Ante 147. b.) Pl. Com. Hill & Granges caſe 171. Vide Sect. 219. (5. Rep. 7. b. Plow. 289. b.)

But if they two make a gift in taile, a leaſe for life, &c. reſerving twenty ſhillings rent to them and their heires, they ſhall have but one 20 ſhillings, for they ſhall have no more then themſelves reſerved: and the donee or leſſee ſhal pay but 20 ſhillings according to their own expreſſe reſervation: and albeit the reſervation of rents ſeverable bee in joynt words, yet in reſpect of the ſeveral reverſions the law makes thereof a ſeverance. Now for the rent, as namely 20 ſhillings or a pound of pepper may bee ſevered, the one tenant in common may have an aſſiſe for the moity of 20 ſhillings, and the moitie of a pound of pepper, *de medietate unius libr' piperis*, but he cannot have an aſſiſe of ten ſhillings, or *de dimidio libræ piperis*. But for the hawke or horſe, albeit they be tenants in common, they ſhal joyne in an aſſiſe, for otherwiſe they ſhould bee without remedie, for one of them cannot make his plaint in aſſiſe of the moitie of a hawke, or of a horſe, for the law will never ſuffer any man to demand any thing againſt the order of nature (5. Rep. 111. Ant. 148. b.) Vide 16. Aſſ. pl. 1. 16. E. 3. Joyndre en action. 27.

Regula. Vide Sect. 129.

ture or reaſon, as before it appeareth by *Littleton, ſection* 129. *Lex enim ſpectat naturæ ordinem.* Alſo the law will never enforce a man to demand that which he cannot recover, and a man cannot recover

[l] Lib. 5. fol. 21. Regula.

[l] the moytie of a hawke, horſe, or of any other entire thing: *Lex neminem cogit ad vana, ſeu inutilia.* But in that caſe they ſhall joyne in aſſiſe, and the reaſon is, *Ne curia Domini Regis deficeret in juſtitiâ exhibendâ*, or *Lex non debet deficere conquerentibus in juſtitiâ exhibendâ.* And if they ſhould not joyne, they ſhould have *damnum & injuriam*, and yet ſhould have no remedie (*) by law, which ſhould be inconvenient, but the law will, that in every caſe where a man is wronged, and endammaged, that he ſhall have remedie. *Aliquid conceditur ne injuria remaneret impunita quod aliàs non concederetur.*

Regula.

(2. Cro. 159. Ant. 137. a. Hob. 43. 267.)

(*) 3. E. 3. 19. a. (1. Roll. Abr. 107. Noy 184. Ant. 137. 2. Rep. 68.)

38. E. 3. 35. Regula.

en common per ſeverall titles, il covient que le rent, et le liver de pepper, queux poient eſtre ſevers, ſoynt a eux en common, et per ſeverall titles. Et de ceo ils averont deux aſſiſes, et cheſcun de eux en ſon aſſiſe ferra ſon pleint de le moitie de le rent, et de le moitie del liver de pepper. Mes de l'eſperver ou de chival, que ne poyent eſtre ſevers, ils averont forſque un aſſiſe, car home ne poit faire un pleint en aſſiſe de le moitie d'un eſperver, ne de le moitie d'un chival, &c. En meſme le maner eſt d'auter rents & d'auter ſervices que tenants en common ount en groſſe per divers titles, &c.

veth that the rent & the pound of pepper which may be ſevered, be to them in common and by ſeverall titles. And of this they ſhall have two aſſiſes, and each of them in his aſſiſe ſhall make his plaint of the moitie of the rent, & of the moitie of the pound of pepper. But of the hawke or of the horſe, which cannot be ſevered, they ſhal have but one aſſiſe, for a man cannot make a plaint in an aſſiſe of the moitie of a hawke, nor of the moitie of a horſe, &c. In the ſame manner it is of other rents and of other ſervices which tenants in common have in groſſe by divers titles, &c.

[m] 5. H. 7. 8. 13. E. 2. quare imp. 170. 33. H. 6. 11. 6. E. 4. 10. 15. E. 3. darr. preſentment. 10.

[m] And tenants in common ſhall joyne in a *quare impedit*, becauſe the preſentation to the advowſon is entire.

[n] 6. H. 4. 6. 7. 45. E. 3. 10. 30. H. 6. Aſſ. 39. 18. E. 3. 56. (Moor 184. 1. Roll. Rep. 243.)

[n] Alſo tenants in common of a ſeigniory ſhall joyne in a writ of right of ward, and raviſhment of ward for the bodie, becauſe it is entire.

If two tenants in common be of the wardſhip of the bodie, and one doth raviſh the ward, and the one tenant in common releaſes to the raviſher, this ſhall goe in benefit of the other tenant in common, and he ſhall recover the whole, and this releaſe ſhall not be any barre to him. And ſo it is if two tenants in common be of an advowſon, and they bring a *quare impedit*, and the one doth releaſe, yet the other ſhall ſue forth, and recover the whole preſentment.

Two tenants in common ſhall joyne in a detinue of charters, and if the one be nonſuit, the other ſhall recover.

18. E. 3. 56.

It is ſaid that tenants in common ſhall joyne in a *Warrantia Chartæ*, but ſever in voucher.

Moitie de chival, &c. Here is implyed or any other entire rent or ſervice.

Per divers titles, &c. That is by ſeverall titles, and not by one joynt title, as hath beene ſaid.

Sect. 315.

29. E. 3. 51. 43. E. 3. 24. 46. E. 3. 27. 5. H. 4. 3. 14. H. 4. 31. 3. H. 6. 57. 12. H. 6. 22. 22. H. 6. 14. 18. E. 4. 30. 2. R. 3. 16. 10. H. 7. 27. 21. H. 7. 22. 37. H. 6. 35. 21. E. 4. 12.

AVeront tiels actions perſonells jointment en touts lour noſmes, &c. By this

ITEM, quant al actions perſonals tenants en common averont tiels actions

ALSO, as to actions perſonals tenants in common may have ſuch action per-

per

perſonals joyntment en touts lour noſmes, * *ſicome de treſpas, ou* † *de offence que touche lour tenements en common, ſicome de bruſer* ‡ *lour meaſons,* || *de enfreinder de lour cloſes, de paſture, degaſter, & de fouler* § *des herbes, de couper lour bois,* ** *de piſcher en lour piſcharie,* & hujuſmodi. †† *Et en ceſt cas tenants en common averont un action joyntment & recoverontjointment lour damages, pur ceo que l'action eſt en le perſonaltie, & nemy en le realtie,* ‡‡ *&c.*

ſonals joyntly in all their names as of treſpaſſe, or of offences which concerne their tenements in common, as for breaking their houſes, breaking their cloſes, feeding, waſting, and defowling their graſſe, cutting their woods, for fiſhing in their piſchary, and ſuch like. In this caſe tenants in common ſhall have one action joyntly, & ſhall recover jointly their damages, becauſe the action is in the perſonalty, and not in the realtie, &c.

it appeareth that tenants in common ſhall have perſonall actions joyntly. And it is to be obſerved, that where dammages are to be recovered for a wrong done to tenants in common, or parceners in a perſonall action, and one of them die, the ſurvivor of them ſhall have the action, for albeit the property or eſtate be ſeverall betweene them, yet (as it appeareth here by Littleton) the perſonall action is joynt.

(1. Sid. 157. Cro. Ja. 231. 1. Sid. 49. 2. Roll. Abr. 91. 10. Rep. 134. a.)

Et hujuſmodi. Hereby is implied a diverſity betweene a chattle in poſſeſſion, and a perſonall choſe in action belonging unto them. As if two tenants in common be of land, and one doth a treſpaſſe therein, of this action they are jointenants, and the ſurvivor ſhall hold place. So it is if two tenants in common be of a mannor, and they make a bailife thereof, and one of them dieth, the ſurvivor ſhall have the action of account, for the action given unto them for the arrerages upon the account was joint. So it is if two tenants in common ſow their land, and one doth eate the ſame with his cattle, though they have the corne in common, yet the action given to them for treſpaſſe in the ſame is joynt, and ſhall ſurvive. For the treſpaſſe and dammage done to them was joynt, all which here is implyed by Littleton, who ſaith, that they ſhall have an action joyntly, and the ſame law is of coparceners.

Vide Sect. 319. 320. 321.

(2. Cro. 19.) 22. H. 6. 12. 38. E. 3. 7. 13. E. 3. account 126. 45. E. 3. 13. 14. 37. H. 6. 32. 38. (1. Noy 135. 2. Roll. Abr. 90. Moor 40. 71. 667.)

But if two tenants in common be of goods, as of an horſe or of any other goods perſonall, there if one dye, his executors ſhall be tenant in common with the ſurvivor.

(Poſt. 200. a. 7. Rep. Hall's caſe ſub. fin. 10. Rep. 134. Ant. 185.)

Et nemy en le realtie, &c. If two tenants in common be of an advowſon, and a ſtranger uſurpe, ſo as the right is turned to an action, and they bring a writ of *Quare impedit* which concernes the realtie, the ſixe months paſſe, and the one dyeth, the writ ſhall not abate, but the ſurvivor ſhall recover, otherwiſe there ſhould be no remedie to redreſſe this wrong. And ſo it is of coparceners, and this is one exception out of our author's rule.

38. E. 3. 5. 17. E. 3. 11. 3. H. 5. Quare Imp. 71. 14. H. 4. 12. 9. H. 6. 30. 22. H. 4. 14. 37. H. 6. 9. b. 10. Eliz. Dyer 279. F. N. B. 35. 9. E. 3. 36. 37. Pl. Com. Seignior Barkley's caſe.

[*a*] But if three coparceners recover land and dammages in an aſſiſe of *Mordanceſter*, albeit the judgement be joynt, that they ſhall recover the land and dammages, yet the dammages being acceſſory, though they bee perſonall, doe in judgement of law depend upon the freehold, being the principal which is ſeverall. And though the words of the judgement be joint, yet ſhall it be taken for diſtributive. And therefore if two of them dye, the entire dammages doe not ſurvive, but the third ſhall have execution according to her portion, and this is another exception out of our author's rule. But if all three had ſued execution by force of an *Elegit*, and two of them had dyed, the third ſhould have had the whole by ſurvivor, till the whole damages be paid.

[*a*] 14. E. 3. Execution 75. 45. E. 3. 3. b. (5. Rep. 7. 2. Roll. Abr. 86. 3. Rep. 14. b. Ant. 154. b. 1. Roll. Abr. 888.)

If the aunt and niece joyne in an action of waſte, for waſte done in the life of the other ſiſter, the aunt ſhall recover the dammages onely, becauſe the ſame belongs not by law to the niece. And ſome hold the dammages in that caſe to be the principall.

45. E. 3. 3. b. 48. E. 3. 14. 11. H. 4. 16. b. 35. H. 6. 23. b. 11. E. 2. Waſt. 115. 2. Cro. 19. Ant. 53. b.

Sect. 316.

ITEM ſi deux tenants en common ſont un leaſe de

ALSO if two tenants in common make a leaſe of their te-

lour

* *Sicome—ceſt aſſavoir* in Roh. † *De* not in Roh. ‡ *De* added in Roh. || *De* not in Roh.
§ *Des—de lour* in Roh. ** *Et* added in Roh. †† *Et* not in Roh. ‡‡ *&c.* not in Roh.

(Cro. Jac. 231. 1. Sid. 49.)

*lour tenements a un auter pur terme des ans, rendant a eux certaine rent annualment durant le terme ſi le rent ſoit aderere, &c. les tenants en common averont un action de debt envers le leſſee, et nemy divers actions, pur ceo que l'action eſt en * la perſonalty.*

nements to another for terme of yeares, rendring to them a certaine rent yearely during the terme if the rent bee behind, &c. the tenants in common ſhall have an action of debt againſt the leſſee, and not divers actions, for that the action is in the perſonalty.

This upon that which hath been ſaid is evident.

Sect. † 317.

MES en avowry pur le dit rent ils covient ſever, car ceo eſt en le realtie, come le aſſiſe eſt ſupra.

BUT in an avowry for the ſaid rent they ought to ſever, for this is in the realty, as the aſſiſe is above.

Vid. 9. 3. 36. 87. Pl. Com. Scignior Barkley's caſe.

This being an addition to Littleton, albeit it be conſonant to law yet I omit it.

Sect. 318.

(Stat. 32. H. 8. Ant. 167. a. 187. a.

ITEM, tenants en common poyent bien faire partition enter eux s'ils voilent, coment que ils ‡ ne ſerront compelles de faire partition per la ley; mes s'ils font enter eux partition per lour agreement et conſent, tiel partition eſt aſſets bone, come eſt adjudge en le liver d'aſſiſes ||.

ALSO, tenants in common may well make partition between them if they will, but they ſhall not be compelled to make partition by the law; but if they make partition betweene themſelves by their agreement and conſent, ſuch partition is good enough, as is adjudged in the booke of aſſiſes.

* Vid. Sect. 259. 290. 247. 264. 19. Aſſ. p. 1. 30. Aſſ. p. 8. 47. E. 3. 22.

Of this ſufficient hath beene ſaid in * the chapter of Parceners and Joyntenants.

In le liver d'aſſiſes. This booke is of great authoritie in law, and is ſo called becauſe it principally containeth the proceeding upon writs of aſſiſe of *novel diſſeiſin*, which in thoſe dayes was *feſtinum & frequens remedium*.

Sect. 319.

*ITEM, ſi come y ſont tenants en common de terres et tenements, &c. come eſt avantdit, en meſme le manner y ſont § de chattels reals et perſonals: Si-come ** leaſe ſoit fait de certaine terres a deux homes pur terme de 20 ans, et quant ils ſont de*

ALSO, as there bee tenants in common of lands and tenements, &c. as aforeſaid, in the ſame manner there be of chattells reals and perſonals. As if a leaſe bee made of certaine lands to two men for terme of 20 yeares, and when they be of this poſſeſſed, the

ceo

* *la* not in L. and M. or Roh. † No part of this ſection in L. and M. or Roh. ‡ *Ne* not in Roh. but in L. and M. || *&c.* added in L. and M. and Roh. § *Poſſeſſions et proprietors* added in L. and M. and Roh. ** *ſi* added in L. and M. and Roh.

ceo poſſeſſes l'un de les leſſees grant ceo que a luy affiert durant le terme a un auter, donque meſme celuy a que le grant eſt fait, et l'auter tiendront et occupieront en common.

one of the leſſees grant that which to him belongeth to another during the terme, then hee to whom the grant is made and the other ſhall hold and occupie in common.

GRant ceo que a luy affiert. The ſame law it is if the one leſſee in this caſe make a leaſe of part of the terme, the ſecond leſſee and the other are tenants in common, as hath been ſaid in the chapter of Joyntenants. The (*&c.*) in this ſection, implyeth other hereditaments whereof men may be tenants in common, whereof ſufficient hath beene ſaid before. Vid. Sect. 315. (Cro. Eliz. 33. Ant. 192. a.)

Sect. 320.

*ITEM ſi deux * ont †joyntment le garde de corps & de terre d'un enfant deins age, et l'un de eux granta a un auter ceo que a luy affiert de meſme le garde, donque le grantee, et l'auter que ne granta pas, averont et tiendront ceo en common, &c.*

ALſo if two have joyntly the wardſhip of the body & land of an infant within age, & the one of them grant to another that which to himſelfe belongeth of the ſame ward, then the grantee, and the other which did not grant, ſhall have and hold this in common, &c.

HEreby it appeareth, that there may bee tenants in common as well of chattels reall entire, as wardſhip of the body, &c. as of chattels perſonal, as a hawke or a horſe. If two tenants in common be of a ſeigniory, and a ward fall, they are tenants in common of the wardſhip aſwel of the body as land. And ſo it is if the land it ſelfe eſcheat to them, they ſhall be Tenants in common thereof, and ſo it is of parceners. 16. E. 3. tit. Aid.

En common, &c. Here (*&c.*) implyeth any other entire chattell. Vid. devant. Sect. 315.

Sect. 321. (r)

EN meſme le maner eſt de chateux perſonals: Sicome deux ont ‡ joyntment per done ou per achate un chival ou boefe, &c. et l'un grant ceo que a luy affiert || de meſme le chival ou boefe a un auter: donques le grantee, & l'auter que ne granta pas, averont et poſſideront tiels chateux perſonals en common. § Et en tiels caſes, ou divers perſons ont chateux reals ou perſonels en common ¶, et per divers titles, ſi l'un de eux moruſt, les auters que ſurveſquont, n'avera ceo per le ſurvivor,

IN the ſame manner it is of chattels perſonals. As if two have joyntly by gift or by buying a horſe or an oxe, &c. and the one grant that to him belongs of the ſame horſe or oxe to another, the grantee, and the other which did not grant, ſhall have and poſſeſſe ſuch chattels perſonals in common. And in ſuch caſes where divers perſons have chattels real or perſonall in common, and by divers titles, if the one of them dieth, the others which ſurvive ſhal not have this as ſurvivor, but the exc-

* *joyntenants* added in L. and M. and Roh. † *joyntment* not in L. and M. and Roh. ‡ *joyntment--joint-eſtate*, in L. and M. and Roh. || *de meſme le chival ou boefe*, not in L. and M. and Roh. § *&c.* added in L. and M. and Roh. ¶ *&c.* added in L. and M. and Roh.

vivor, mes les executors celuy que moruſt tiendront et occupieront ceo oveſque eux que ſurveſquont, ſicome lour teſtator fiſt ou devoit en ſa vic, &c. pur ceo que lour titles & droits en ceo fueront ſeverals, &c.

cutors of him which dieth ſhall hold and occupie this with them which ſurvive, as their teſtator did or ought to have done in his life time, &c. becauſe that their titles and rights in this were ſeverall, &c.

Vid. devant, Sect. 315.

This is evident enough, and hereof ſufficient hath beene ſaid before.

Sect. 322.

(Sid. 49.)

PUR terme de ans, &c. For one yeare, halfe a yeare, &c.

L'un occupie tout & miſt l'auter hors de poſſeſſion. Theſe are words materially added, for albeit one tenant in common take the whole profits, the other have no remedie by law againſt him, for the taking of the whole profits is no ejectment: (1) But if he drive out of the land any of the cattell of the other tenant in common, or not ſuffer him to enter or occupy the land, this is an ejectment or expulſion, whereupon he may have an *ejectione firmæ*, for the one moitie, and recover damages for the entrie, but not for the meane profits.

(Hob. 120. Plo. 247. Sid. 33. Mo. 123. 375.)

(1. Rol. Abr. 741. Noy. 14.)

(Cro. Jac. 611.)

Ejectione firmæ *de la moity, &c.* Here by this and the other (*&c.*) in theſe two ſections, are to be underſtood divers diverſities between actions which concerne right and intereſt, (as of *ejectione firmæ, ej ſment de gard, quare ejecit infra terminum* of a chattell real upon an expulſion or ejectment) and actions concerning the bare taking of the profits riſing of the land or doing of treſpaſſe upon the land, as here by the examples doe appeare, for the right is ſeverall, and the taking of the profits in common. The ſecond diverſity is betweene

(2. Rep. 68. F. N. B. 197.)

21. E. 4. 11. 22. 43. E. 3. 24. 45. E. 3. 13. 22. H. 6. 50. 58. 8. H. 6. 17. 19. H. 6. 57. 32. H. 6. 16. 2. E. 4. 23. 14. E. 4. 8. 18. E. 4. 30. 37. H. 6. 33. 21. E. 3. 29. 12. Aſſ. 28. 47. E. 3. 22. b. 10. H. 7. 16. F. N. B. 117. a. 17. E. 2. Account 122.

ITEM en le caſe avantdit, ſicome deux ont eſtate en common pur terme d'ans, &c. l'un occupie tout, et miſt l'auter hors de poſſeſſion et occupation, &c. donques celuy que eſt miſe hors de occupation avera envers l'auter briefe de ejectione firmæ *de la moitie, &c.*

ALSO in the caſe aforeſayd, as if two have an eſtate in common for terme of yeares, &c. the one occupy all, and put the other out of poſſeſſion and occupation, hee which is put out of occupation ſhall have againſt the other a writ of *ejectione firmæ* of the moitie, &c.

Sect. 323.

*EN meſme le maner eſt, l'ou deux teignont le gard des terres ou tenements durant le nonage d'un enfant, ſi l'un ouſta l'auter de ſon poſſeſſion, il que eſt ouſte avera briefe de ejectment de gard de le moitie, &c. pur ceo que ceux choſes ſon chateux realx, et poyent eſtre apportions et ſevers, &c. Mes nul *action de treſpas, ceſtaſcavoir,* Quare clauſum ſuum fregit, & herbam ſuam, &c.

IN the ſame manner it is where two hold the wardſhip of lands or tenements during the nonage of an enfant, if the one ouſt the other of his poſſeſſion, he which is ouſted ſhal have a writ of *ejectment de gard* of the moitie, &c. becauſe that theſe things are chattels reals, and may be apportioned and ſevered, &c. but no action of treſpaſſe *(videlicet) Quare clauſum ſuum fregit, & herbam ſuam &c. conculcavit, & con-*

con-

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

(1) But now, by the ſtat. of the 4th of An. chap. 16. ſect. 27. actions of account may be maintained by one jointenant and tenant in common, his executors and adminiſtrators, againſt the other, as bailiff, for receiving more than comes to his ſhare and proportion, and againſt the executors and adminiſtrators of ſuch jointenant or tenant in common; and the auditors appointed by the court, where ſuch action ſhall be depending, are empowered to adminiſter an oath, and examine the parties touching the matters in queſtion, &c. See alſo 1. Leo. 219.

conculcavit & consumpsit, &c. & hujusmodi actiones, &c. *l'un ne poet aver envers l'auter, pur ceo que cheſcun de eux poet entrer et occupier en common, &c. per my et per tout, les terres & tenements * queux ils teignont en common. Mes ſi deux ſont poſſeſſes de chattels perſonalx en common per divers titles, ſicome d'un chival, ou boef, ou vache, &c. ſi l'un prent ceo tout a luy hors de poſſeſſion d'auter, l'auter n'ad nul auter remedie mes de prender ceo de luy que ad fait luy le tort pur occupier en common, &c. quant † il poet veier ſon temps, &c. En meſme le manner eſt de chattels realx, que ne poyent eſtre ſevers, ſicome en le caſe avantdit, que deux ſunt poſſeſſe d'un gard de corps d'un enfant deins age, ſi l'un prent l'enfant hors de poſſeſſion d'auter, l'auter n'ad aſcun remedie per aſcun action per la ley, mes de prendre l'enfant hors de le poſſeſſion d'auter quaunt il veit ſon temps ‡.* ſumpſit, &c. & hujuſmodi actiones, &c. the one cannot have againſt the other, for that each of them may enter & occupie in common, &c. *per my & per tout*, the lands and tenements which they hold in common. But if two be poſſeſſed of chattells perſonalls in common by divers titles, as of a horſe, an oxe, or a cowe, &c. if the one take the whole to himſelfe out of the poſſeſſion of the other, the other hath no other remedie but to take this from him who hath done to him the wrong to occupie in common, &c. when he can ſee his time, &c. In the ſame manner it is of chattels realls, which cannot be ſevered, as in the caſe aforeſaid, where two be poſſeſſed of the wardſhip of the bodie of an infant within age, if the one taketh the infant out of the poſſeſſion of the other, the other hath no other remedie by an action by the law, but to take the infant out of the poſſeſſion of the other when he ſees his time.

chattells reals that are apportionable or ſeverable, as leaſes for yeares, wardſhip of lands, intereſt of tenements by *elegit*, ſtatute merchant, ſtaple, &c. of lands and tenements, and chattels reals entire, as wardſhip of the body, a villeine for yeares, &c. for if one tenant in common take away the ward, or the villeine, &c. the other hath no remedie by action, but he may take them againe. Another diverſitie is betweene chattells realls and chattells perſonalls, for if one tenant in common take all the chattells perſonals, the other hath no remedie by action, but he may take them againe; and herein the like law is concerning chattells realls entire, and chattells perſonall for this purpoſe. But of chattels entire, as of a ſhip, horſe, or any other entire chattell, reall or perſonall, no ſurvivor ſhall be betweene them that hold them in common: and tenants in common ſhall not joyne in an *ejectione firmæ*, nor in a writ of *ejectment de gard*, or a *quare ejecit infra terminum*, &c. for that theſe actions concerne the right of lands which are ſeverall.

(Ant. 198. a.) 10. H. 4. Treſpas. 178. 11. H. 4. 3. (Sir Tho. Ray. 15. 1. Lev. 29.) 21. E. 4. 11. 12. (Ant. Sec. 311. & fol. 197. b.) † See 1 Roll. Abr. 2. Wilt. 232.

If two tenants in common be of a mannor, to the which waife and ſtray doth belong, a ſtray doth happen, they are tenants in common of the ſame, and if the one doth take the ſtray, the other hath no remedie by action, but to take him againe. But if by preſcription the one is to have the firſt beaſt happening as a ſtray, and the other the ſecond, there an action lieth if the one take that which pertaines to the other.

13. E. 3. Briefe 674. (2. Roll. Abr. 566.)

If two tenants in common be of a dove-houſe, and the one deſtroy the old doves whereby the flight is wholly loſt, the other tenant in common ſhall have an action of treſpaſſe, *quare vi & armis columbare le pl' fregit & ducentas columbas pretij* 40. *s. interfecit per quod volatum columbaris ſui totaliter amiſit:* for the whole flight is deſtroyed, and therefore hee cannot in barre

47. E. 3. 22. b.

* &c. added in L. and M. and Roh. † *il* not in L. and M. or Roh. ‡ &c. added in L. and M. but not in Roh.

barre plead tenancie all common. And ſo it is if two tenants in common bee of a parke, and one deſtroyeth all the deere, an action of treſpaſſe lieth.

4. E. 2. Treſpas 233.
[c] 1. H. 5. 1. 2. H. 5. 3.

[c] If two tenants in common be of land, and of mere ſtones *pro metis & bundis*, and the one take them up and carrie them away, the other ſhall have an action of treſpaſſe *quare vi & armis* againſt him, in like manner as he ſhall have for deſtruction of doves.

[d] 13. E. 3. Treſpas 212. 19. R. 2. Br. 927. 11. E. 3. Treſpas 212. Vi. 18. H. 6. 5.
[e] 13. H. 7. 26.

[d] If two tenants in common be of a folding, and the one of them diſturbe the other to erect hurdles, he ſhall have an action of treſpaſſe *quare vi & armis* for this diſturbance.

[e] If two ſeverall owners of houſes have a river in common betweene them, if one of them corrupt the river, the other ſhall have an action upon his caſe.

[f] F. N. B. 127. Reg. 163. (Ant. 54. b.)

[f] If two tenants in common, or jointenants, be of an houſe or mill, and it fall in decay, and the one is willing to repaire the ſame, and the other will not, he that is willing ſhall have a writ *de reparatione faciendâ*, and the writ ſaith, *Ad reparationem & ſuſtentationem ejuſdem domûs tenentur*, whereby it appeareth, that owners are in that caſe bound *pro bono publico* to mainetaine houſes and mills which are for habitation and uſe of men.

17. E. 2. tit. Account 22. 8. E. 2. Account 115. 30. E. 1. Account 127. 45. E. 3. 10. 47. E. 3. 22. b. 38. E. 3. 9. 22. E. 3. 60. 3. E. 3. 27. 39. E. 27. 82. F. N. B. 118. i. 10. H. 7. 16. 2. E. 4. 25. (Ant. 172. a. F. N. B. 118. 1. Roll. Abr. 118. 2. Inſt. 379.)
W. 3. ca. 23.

If one jointenant or tenant in common of land maketh his companion his baylife of his part, he ſhall have an action of account againſt him, as hath bin ſaid. But although one tenant in common or jointenant without being made baylife take the whole profits, no action of account lieth againſt him; for in an action of account he muſt charge him either as a guardian, baylife, or receiver, as hath beene ſaid before, which he cannot doe in this caſe, unleſſe his companion conſtitute him his bailife. And therefore all thoſe bookes which affirme that an action of account lieth by one tenant in common, or jointenant, againſt another, muſt be intended when the one maketh the other his bailife, for otherwiſe never his baylife to render an account is a good plea.

If there be two tenants in common of a wood, turbarie, piſcharie, or the like, and one of them doth waſt againſt the will of his companion, his companion ſhall have an action of waſt, and he that did the waſt before judgement, hath election either to take his part in certaintie by the ſherife and the oath of men, &c. or that he grant, that from thenceforth he ſhal not do waſt but according to his portion, &c. and if he make choice of a certain place, then the place waſted ſhall be aſſigned to him. [g] But this extends not to coparceners, becauſe they were compellable to make partition by the common law: and this, as it is ſaid, doth extend as well to tenants in common and joyntenants for life, as to an eſtate of inheritance. But if one tenant in common, or joyntenant of a dove houſe deſtroy the whole flight of doves, no action of waſt doth lie in that caſe upon the ſaid ſtatute, * as ſome doe hold.

[g] 27. H. 8. 13. 21. E. 3. 29. 29. E. 3. 39. 3. E. 2. Waſt. 35. F. N. B. 59. d. F. N. B. 49. i.

* 47. E. 3. 22. 50. E. 3. 3.

If lands be given to two, and to the heires of one of them, and the tenant for life doth waſt, he that hath the inheritance ſhall have no action of waſt by the ſtatute of *Glouceſter*, but upon the ſtatute of *W.* 2. he ſhall have an action of waſt. And it is to be knowne, that one tenant in common may infeoffe his companion, but not releaſe, becauſe the freehold is ſeverall. Jointenants may releaſe, but not infeoffe, becauſe the freehold is joynt, but coparceners may both infeoffe and releaſe, becauſe their ſeiſin to ſome intents is joynt, and to ſome ſeverall (1).

10. E. 4. 3. b. 22. H. 6. 42. 21. E. 3. 47. 17. E. 3. 47. 18. E. 4. 27. 28. E. 3. 4.
(2. Inſt. 403. 11. Rep. 49. Ant. 53. b. F. N. B. 59. d.
(2. Roll. Abr. 86. 403.
Ant. 186. b. Poſt. 335. a.)

Sect. 324.

*ITEM quant un home * voile monſtrer un feoffement fait a luy, ou un done en le taile, ou un leaſe pur terme de vie d'aſcun terres ou tenements, la il dirra, per force de quel feoffement, done ou leas il fuit ſeiſie, &c. mes l'on un voile pleade un leas ou grant fait a luy de chattel real ou perſonal, la il dirra, per force de quel il fuit poſſeſſe, &c.*

Pluis ſerra dit de tenants en common en le chapter de Releaſes † et Tenant per Elegit.

ALSO when a man will ſhew a feoffement made to him, or a gift in taile, or a leaſe for life of any lands or tenements, ther he ſhal ſay, by force of which feoffement, gift, or leaſe, he was ſeiſed, &c. but where one will plead a leaſe or grant made to him of a chatell real or perſonal, then he ſhal ſay, by force of which he was poſſeſſed, &c.

More ſhall be ſaid of tenants in common in the chapters of Releaſes and Tenant by *Elegit*.

IL fuit ſeiſie, &c. *Seiſie* is a word of art, and in pleading is onely applied to a freehold at leaſt, as *poſſeſſe* for diſtinction ſake is to a chattell reall or perſonall. As

* *en pledaunt* added in L. and M. and Roh.

† *et Confirmacions* added in L. and M. and Roh.

(1) *M.* 26. & 27. *Eliz. per cur. If one coparcener in tail levies a fine to another* ſur conuſans de droit, &c. *it does not enure by way of releaſe, but by way of grant, and it will be a diſcontinuance and alteration of the eſtate without execution, becauſe one parcener may enfeoff another, and this is a feoffment of record. But one may releaſe to another, and it enures* per mitter le droit.—Ld. Nottingh. MSS.

As if B. plead a feoffement in fee, he concludeth, *Virtute cujus prædict.' B. fuit seisitus, &c.* But if he plead a lease for yeares, he pleadeth, *Virtute cujus prædictus B. intravit, et fuit inde possessionatus*; and so of chattells personalls, *Virtute cujus fuit inde possessionatus.*

(Plow. Com. 303. a. Post. 303. a. Plow. 149. b. Post. 310. b. Noy 26.)

And this holdeth not only in case of lands or tenements which lie in liverie, but also of rents, advowsons, commons, &c. and other things that lie in grant, whereof a man hath an estate for life or inheritance.

Also when a man pleads a lease for life, or any higher estate which passeth by liverie, he is not to plead any entrie, for he is in actuall seisin by the liverie it selfe. Otherwise it is of a lease for yeares, because there he is not actually possessed untill an entrie.

Chap. 5. Of Estates upon Condition. Sect. (1) 325.

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

ESTATES which men have in lands or tenements upon condition are of two sorts, *viz.* either they have estate upon condition in deed, or upon condition in law, &c. Upon condition in deed is, as if a man by deed indented enfeoffes another in fee simple, reserving to him and his heires yearely a certaine rent payable at one feast or divers feasts *per annum*, on condition that if the rent be behind, &c. that it shall bee lawfull for the feoffor and his heires into the same lands or tenements to enter, &c. And if it happen the rent to be behind by a weeke after any day of payment of it, or by a moneth after any day of payment of it, or by halfe a yeare, &c. that then it shall be lawfull to the feof-

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

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

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

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

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

* *sur condition* not in L. and M. or Roh. † *de—en* in L. and M. or Roh. ‡ *ou* not in L. and M. or Roh.
‖ *&c.* not in L. and M. or Roh. § *simple* not in L. and M. or Roh.

(1) The doctrine of conditions is derived to us from the feudal law. The rents and services of the feudatary were considered, and are mentioned by the feudal writers as conditions annexed to his fief. If he neglected to pay his rent, or perform his service, the lord might resume the fief. But the payment of rent and the performance of feudal service were, for a long period of time, the only conditions that could be annexed to a fief; and whether they were expressed or not, they were always presumed by the law; —being incident to, and inseparable from, the estate of the feudatary. — In this sense they are called conditions in law, or implied conditions. — Afterwards, when other conditions were introduced, the estates to which they were annexed were ranked among improper fiefs. — See Sir Thomas Craig *De Jure Feudali, lib. 2. dieg. 4. sect. 1. 2. 3.* Conditions of this last sort were called express, or conventionary conditions. By an application, in some respects very much forced, of the original principle of conditions, that on the non-performance of them the lord might resume his fief, estates tail, (or rather conditional fees at common law), and some other modifications of landed property, were introduced as estates upon condition. These are often of such a nature, as to make it more natural that a stranger should have the estate on the non-performance of the condition, than the donor; — and that the lord, instead of being confined to his right of resumption, should have it in his power to compel the performance of the condition, or recover from the donee a compensation, or satisfaction, for the breach of it. But as all these estates were introduced as estates upon conditions, the law, where it still considers them as conditions, and except where it has been altered by act of parliament, confines the donor's remedy to the resumption of the estate, and gives that remedy only to the donor and his heirs. — Considered in this sense, the word Condition has, in our law, a much more contracted meaning than it has in the civil law; where it signifies, generally, all those pactions, or agreements, which regulate that which the contractors have a mind should be done, if a case, which they foresee, should come to pass. This is the definition of Domat, *lib. 1. tit. 1. sect. 4.* We shall afterwards have occasion to make some observations on the interference of courts of equity in cases of conditions.

Mir. cap. 2. ſect. 15. & 17.

eſtate void *ipſo facto*, without entrie or claime.

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

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

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

*ceo, ou per un mois apres aſcun jour de payment de ceo, ou per * un demy, &c. que adonques bien lirroit a le feoffor et a les heires d'entrer, &c.‡ En ceux caſes ſi le rent ne ſoit paie a tiel temps ou devant tiel temps limit & ſpecifie deins le condition compriſes en l'endenture, donques poit le feoffor ou ſes heires entrer en tielx terres ou tenements, & eux en ſon primer eſtate aver & tener, et de ceo ouſte le feoffee tout net. Et eſt appelle eſtate ſur condition, pur ceo que le ſtate le feoffee eſt defeaſible, ſi le condition ne ſoit performe, &c.*

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

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

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

[*b*] 40. Aſſ. 11. 20. H. 6. 30. 31. 6. 11. 7. 7. 19. H. 6. 76. 20. H. 6. 32. 22. H. 6. 46. Pl. com. Kidwely's caſe fo. 70. & Hill and Grange's caſe fol. 73. (Noy 23. 1. Roll. Abr. 459. 460.) (Perk. ſect. 827. Noy 23.)

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

Lib. 4. fol. 72. 73. Boroughe's caſe.

Secondly, The demand muſt be made upon the land, becauſe the Land is the debtor, and that is the place of demand appointed by law (1).

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

49. Aſſ. 5. 15. Eliz. Di. 329.

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

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

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

[*d*] If

* *un—demy* not in L. and M. or Roh. ‡ *Et* added in L. and M. and Roh.

(1) For the place of performing the condition, ſee Litt. ſect. 340. and the commentary on that ſection.

(*d*) If the feoffment were made of a wood only, the demand muſt be made at the gate of the wood, or at ſome high way leading through the wood or other moſt notorious place. And if one place be as notorious as another, the feoffor hath election to demand it at which hee will, and albeit the feoffee be in ſome other part of the wood redie to pay the rent, yet that ſhall not availe him. *Et ſic de ſimilibus.* [*d*] 15. Eliz. Dyer 329. (Ante 145 a.)

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

Fourthly, If the rent be reſerved to be paid at any place from the land, yet it is in law a rent, and the feoffor muſt demand it at the place appointed by the parties, obſerving that which hath beene ſaid before concerning the moſt notorious place. Lib. 4. Boroughes caſe fol. 73. Pl. Com. 70.

Fiftly, And all this is to be underſtood when the feoffee is abſent, for if the feoffee commeth to the feoffor at any place upon any part of the ground at the day of payment, and offer his rent, albeit they be not at the moſt notorious place, nor at the laſt inſtant, the feoffor is bound to receive it, or elſe he ſhall not take any advantage of any demand of the rent for that day. (1) (Poſt. 211. a.)

Sixtly, Therefore the place of demand being now known, it is further to be known what time the law hath appointed for the ſame. This partly appeareth by that which hath beene laſt ſaid. *For albeit the laſt time of demand of the rent is ſuch a convenient time before the ſunne ſetting of the laſt day of payment as the money may be numbred and received, notwithſtanding, if the tender be made to him that is to receive it upon any part of the land at any time of the laſt day of payment, and he refuſeth, the condition is ſaved for that time, for* by the expreſſe reſervation the money is to be paid on the day indefinitely, and convenient time before the laſt inſtant, is the uttermoſt time appointed by law, to the intent (2) that then both parties ſhould meet together, the one to demand and receive, and the other to pay it, ſo as the one ſhould not prevent the other. But if the parties meet upon any part of the land whatſoever on the ſame day, the tender ſhall ſave the condition for ever for that time. (7. Rep. 18.) (5. Rep. 117. b.) (2. Cro. 193. 500.)

And if the reſervation of the rent be (as here *Littleton* putteth the caſe, at certaine feaſts, with condition that if it happen the rent to be behind by the ſpace of a weeke after any day of payment, &c. in this caſe the feoffor needeth not demand it on the feaſt day, but the uttermoſt time for the demand is a convenient time (as hath beene ſaid) before the laſt day of the weeke, unleſſe before that the feoffee meet the feoffor upon the land and tender the rent as is aforeſaid. (3) Lib. 5. fol. 114. Wade's caſe. Pl. Com. Hill. et Granges caſe. 167. 172. 20. H. 6. 30. 31. 6. H. 7. 3.

If a rent be granted payable at a certaine day, and if it be behinde and demanded that the grantee ſhall diſtreine for it, in this caſe the grantee need not demand it at the day; but if he demand it at any time after he ſhall diſtreyne for it, for the grantee hath election in this caſe to demand it when he will to inable him to diſtreine. Mich. 40. & 41. Eliz. inter Stanly & Read. Lib. 7. fo. 28. Maundes caſe.

Et eux en ſon primer eſtate aver, &c. Regularly it is true that he that entreth for a condition broken ſhall be ſeiſed in his firſt eſtate, or of that eſtate which hee had at the time of the eſtate made upon condition, but yet this faileth in many caſes. 8. H. 7. 7. b.

1. In reſpect of impoſſibility. As if a man ſeiſed of lands in the right of his wife, maketh a feoffment in fee by deed indented, upon condition that the feoffee ſhould demiſe the land to the feoffor for his life, &c. the huſband dieth the condition is broken, in this caſe the heire of the huſband ſhall enter for the condition broken, but it is impoſſible for him to have the eſtate that the feoffor had at the time of the condition made: for therein he had but an eſtate in the right of his wife, which by the coverture was diſſolved. And therefore when the heire hath entred for the condition broken and defeated the feoffment, his eſtate doth vaniſh, and preſently the ſtate is veſted in the wife. 4. H. 6. 7. lib. 8. fo. 43. 44. Whittinghams caſe. 5. H. 7. 6. a. (Poſt. 297. b.)

2. In reſpect of neceſſity. If *Ceſty que uſe* after the ſtatute of *R.* 3. and before the ſtatute of 27. *H.* 8. had made a feoffment in fee upon condition, and after had entred for the condition broken; in this caſe he had but an uſe when the feoffment was made, but now he ſhall be ſeiſed of the whole ſtate of the land. So that as in the former caſe, the anceſtor had ſomewhat at the making of the condition, and the heire ſhall have nothing when he hath entred for the condition broken, ſo in this caſe the feoffor had no eſtate or intereſt in the land at the time of the condition made, but a bare uſe; yet after his entrie for the condition broken he ſhall be ſeiſed of the whole ſtate in the land, and that alſo for neceſſitie, for by the feoffment in fee of *Ceſty que uſe*, the whole eſtate and right was deveſted out of the feoffees. And therfore of neceſſitie the feoffor muſt gaine the whole eſtate by his entrie for the condition broken.

If tenant in ſpeciall taile hath iſſue, and his wife dieth, tenant in taile maketh a feoffment in fee upon condition, the iſſue dieth, the condition is broken, the feoffor re-enters, ſhe ſhall have

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

(2) Yet the rent is not due till the laſt minute of the natural day; for if the leſſor dies after ſun-ſet and before midnight, the rent ſhall go to the heir and not to the executors. 1. Saund. 287. Salk. 578. (Note to the twelfth edition.)

(3) For there is a material difference between a reſervation of a rent payable on a particular day, or within a certain time after, and a reſervation of a rent payable at a certain day, with a condition, that if it be behind by the ſpace of any given time, the leſſor ſhall enter. In both caſes, a tender on the firſt, or laſt, day of payment, or on any of the intermediate days, to the leſſor himſelf, either upon, or out of the land, is good. But in the former caſe, it is ſufficient if the leſſee attends on the firſt day of payment, at the proper place; and if the leſſor does not attend there to receive the rent, the condition is ſaved. In the latter caſe, to ſave the leaſe, it is not ſufficient that the leſſee attends on the firſt day of payment, for he muſt equally attend on the laſt day. 10. Rep. 129. a. Plow. 70. a. b. and the caſe of Cropp v. Hambledon Cro. Eliz. 48.—It is to be obſerved that it was once doubted, whether proof of actual entry and outler was neceſſary in ejectment, brought on breach of a condition of re-entry.—It was afterwards ſettled that it was not, but that, notwithſtanding the confeſſion of the re-entry, the demand of the rent muſt be proved. Anon. 1. Vent. 248.—Little v. Heaton 2d Lord Raym. 750. and 1ſt Salk. 259. and ſee Burr. 1896. 1897. But now, by the 4. Geo. 2. c. 28. ſect. 2. landlords or leſſors having a right by law to re-enter, for non-payment of rent, may, without any formal demand, or re-entry, ſerve a declaration in ejectment for the recovery of the demiſed premiſes; and ſhall recover judgment and execution, in the ſame manner as if the rent in arrear had been lawfully demanded, and re-entry made. And if the leſſee or tenant permits execution to be executed on ſuch judgment, without paying the rent and arrears, and full coſts, and without filing any bill or bills for relief in equity, within ſix calendar months after ſuch execution executed, he ſhall be barred and foreclоſed from all relief in law or equity, except by writ of error for reverſal of ſuch judgment.—By the ſame ſtatute, ſect. 4th, if the tenant, at any time before the trial in ejectment, pays or tenders to the leſſor or landlord the whole rent in arrear, with the coſts, or pays ſuch arrears and coſts into court, the proceedings in ejectment ſhall ceaſe, and the tenant ſhall be relieved in equity, and hold the lands demiſed according to the old leaſe without any new leaſe. In Archer v. Snapp, Andr. 341. lord chief juſtice Lee obſerves, that both the courts of law and the courts of equity had, previous to this ſtatute, exerciſed a diſcretionary power of ſtaying the leſſor from proceeding at law, in caſes of forfeiture for non-payment of rent, by compelling him to take the money really due to him. The ſame obſervation is made in Bull. Ni. Pri. 97. See 2. Salk. 597. 8. Mod. 345. 10. Mod. 383. and 2d Vern. 103. 1. Wilſon 75. 2 Stra. 900.

(8. Rep. 43. 44)

(Ante 103. a.)

have but an eſtate for life, as tenant in taile *apres poſſibility* of iſſue extinct by the re-entry, and yet he had an eſtate taile at the time of the feoffement, and that alſo for neceſſity.

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

15. Aſſ. 12.
(4. Rep. 9. b.)

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

8. H. 7. 7.

(Poſt. 350. b.)

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

2. H. 6. 4.
(1. Roll. Abr. 412.)

If a man make a feoffment in fee of Blacke Acre and White Acre upon condition, &c. and for breach thereof that he ſhall enter into Blacke Acre, this is good.

43. Aſſ. 47. 13. E. 4. 4. 2. H. 5. 7. b. 39. Aſſ. 15. 11. H. 5. 25. 16. Aſſ. 47.
(1. Roll. Abr. 856. Poſt. 252. a.)

If tenant for life make a feoffment in fee upon condition, and entreth for the condition broken, he ſhall be tenant for life againe, but ſubject to a forfeiture, for the ſtate is reduced, but the forfeiture is not purged. (2)

Sect. 326.

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

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

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

Sect. 327.

Vide Sect. 332.
19. E. tit. barre 280. 19. R. 2. done rent 10.
Pl. com. 524.

ET la terre tener tanque ils ſoyent ſatisfies ou paies de le rent aderere, &c.

[b] 20. E. 3. tit. covenant. 3.

By this it is implyed, that if ſuch a feoffment be made, reſerving (*b*) (for example) 8 markes rent at the feaſt of Eaſter, with ſuch a condition as is afore ſaid, the feoffor at the feaſt day demands the rent, the feoffee paieth unto him 6 markes parcell of the rent, the feoffor entreth into the lands and taketh the profits towards ſatisfaction. Afterwards the feoffee doth tender the two markes reſidue of the rent to the feoffor upon the land, who refuſeth it. It

*MES l'ou feoffiment eſt fait de certaine terres reſervant certain rent, ‡ &c. ſur tiel condition, que ſi le rent ſoit aderere, § que bien lirroit al feoffor, et || ſes heires d'entrer, ** et la terre tener tanque ils ſoient ſatisfies ou payes de le rent aderere, &c. en ceſt caſe ſi le rent ſoit aderere, & le feoffor ou ſes heires enter, le*

BUT where a feoffment is made of certaine lands reſerving a certaine rent, &c. upon ſuch condition, that if the rent be behind, that it ſhall be lawfull for the feoffor & his heires to enter, and to hold the land untill he be ſatisfied or payed the rent behinde, &c. in this caſe if the rent be behind, and the feoffor or his *feoffee*

* *a terme* added in L. and M. and Roh. † *tiel* added in L. and M. and Roh. ‡ *&c.* not in L. and M.
§ *il* added in L and M. || *a* added in L. and M. ** *en la terre tenus de eux* in L. and M.

(1) This is ſeemingly contradicted by the authorities cited in the margin. In that taken from Lord Coke's Reports, it is ſaid, that "If the lord grants his ſeignory on condition, and the tenant pays the rent to the grantee, and afterwards the condition is "broken, and the lord diſtrains for the ſervices upon reſcous made, he ſhall have aſſiſe, for the ſeiſin before *is* ſufficient."—The caſe reported in the margin from the Book of Aſſizes is to the ſame effect.—But it is to be obſerved, that when the lord diſtrains, his diſtreſs amounts to a new entry. This may ſerve to reconcile the apparent contradiction, in this inſtance, between the Commentary and the authorities cited in the margin.

See W. Serj.t Williamſon's in 1. Saund. 287.

(2) It may be further obſerved, 1ſt, That as the entry of the feoffor on the feoffee for a condition broken defeats the eſtate to which the condition was annexed, ſo it defeats all rights and incidents annexed to that eſtate, as dower, &c. and all the meſne incumbrances of the feoffee. See 1. Roll. Abr. 474. 2dly, That every condition muſt defeat the entire eſtate, and that a condition cannot be ſo framed, as to make one and the ſame eſtate in any lands ceaſe as to one perſon, and remain as to another, or ceaſe for one time, and revive afterwards. 6 Rep. 40. b. 41. a. 3dly, That a condition annexed to land, cannot be apportioned by any of the parties themſelves, ſo as to become void as to one part of the land, and to remain good as to the other. Thus in the caſe caſe cited by lord Coke, 4 Rep. 120. a. b. a leaſe was made for twenty-one years, of three manors, rendering rent for manor A. 6l. for manor B. 5l. and for manor C. 10l. to be paid on a place out of the land, with a condition of re-entry into all the three manors for default of payment of the rents. The leſſor granted the reverſion of part of the manor A. to one and his heirs: and afterwards granted the reverſion of another part to another and his heirs: it was adjudged that the ſecond grantee ſhould not enter for the condition broken, becauſe the condition was entire, and by the ſeverance of part of the reverſion was deſtroyed in all. But a condition may be apportioned by act in law. See the inſtance put by lord Coke poſt. 215. a. 4thly, That part of a condition may be good and another part of it may be void in law: as if a perſon makes a gift in tail to the donor's eldeſt ſon, remainder to his youngeſt ſon in tail, with a condition that if the eldeſt ſon alien in fee, his eſtate ſhould ceaſe, and the lands ſhould remain to the ſecond ſon in tail; that part of the condition which prohibits the alienation made by tenant in tail is good in law, but that part of it which ſays that upon ſuch alienation the lands ſhall remain over is void, and the donor may re-enter. See Litt. ſections 720. 721. 722. 723. and the Commentary page 379. b. 5thly, That if A. be tenant for life, remainder in contingency, remainder to B. in tail, and A. before the contingency happens ſurrenders his eſtate to B. his ſurrender bars the contingent remainder. But if he ſurrenders on condition, and before the contingency happens, the condition is broken, and A. enters on the eſtate, the contingent remainder is revived. See Thompſon v. Leach. 1. Lord Raym. 313.

*feoffee n'eſt pas exclude de ceo tout * net, mes le feoffor avera & tiendra la terre et prendra ent les profits tanque † il ſoit ſatisfie de le rent aderere; & quant il eſt ſatisfie, donque poit le feoffee ‡ re-entrer en meſme la terre, & ceo tener || come il tenoit adevant. Car en tiel cas le feoffor avera § la terre forſque en maner come pur un diſtres, tanque ** il ſoit ſatisfie de le rent, &c. coment †† que il prendre les profits en le meane temps ‡‡ a ſon uſe demeſne, &c.*

heires enter, the feoffee is not altogether excluded from this, but the feoffor ſhall have & hold the land, and thereof take the profits, until he be ſatisfied of the rent behinde; and when he is ſatisfied, then may the feoffee re-enter into the ſame land, and hold it as he held it before. For in this caſe the feoffor ſhal have the land but in maner as for a diſtreſſe until he be ſatisfied of the rent, &c. though he take the profits in the meane time to his owne uſe, &c.

hath beene adjudged that the feoffee upon the refuſal may enter into the land, (1) for when the feoffor is ſatisfied either by perception of the profits or by payment or tender and refuſall, or partly by the one and partly by the other, the feoffee may re-enter into the land. And this is within the words of *Littleton, viz. (untill he be ſatisfied.)* And albeit the feoffor had accepted part of his rent, yet he may enter for the condition broken and retaine the land untill he be ſatisfied of the whole. All which is worthy of obſervation.

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

Et en tiel caſe le feoffor avera la terre forſque en manner come un diſtreſſe tanque il ſoit ſatisfie de la rent, &c.

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

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

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

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

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

Sect. 328.

ITEM divers parolx (enter ||| auters) y ſont, queux per vertue de eux meſmes font eſtates ſur condition, un eſt le parol §§ ſub conditione: ſi come A. *enfeoffa* B.

ALSO divers words (amongſt others) there be which by vertue of themſelves make eſtates upon condition, one is the word *(ſub condic.)* as if *A.* infeoffe *B.* of cer-

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

(Dyer 138 b.)
Sub conditione.
[c] Marie Dyer 138. 27. H. 8. 15. 13. H. 4. entr. Cong. 57. 29. Aſſ. 7. 33. Aſſ. 11. 40. Aſſ. 13. Bracton ubi ſupra. Fleta lib. 4. ca. 9. Brit. cap. 36. & ubi ſupra.

Talem redditum, &c.

This

* *de* added in L. and M. and Roh. † *que* added in L. and M. and Roh. ‡ *Re-enter—entre* in L. and M. and Roh. || *come—coment* in L. and M. and Roh. § *avera la terre—ceo aver* in L. and M. and Roh. ** *que* added in L. and M. and Roh. †† *que* not in L. and M. or Roh. ‡‡ *a ſon uſe demeſne* not in L. and M. or Roh. ||| *les* added in L. and M. and Roh. §§ *ſub conditione—de condicion* in L. and M. and Roh.

(1) But there muſt be a previous actual demand, in the ſame manner as where the condition is general. Hob. 82. 133. Hobart was of opinion, that the feoffor, to entitle himſelf to enter by way of penalty, ſhould demand the rent not only on the day when it became due, but on the day after. Hob. 208.

(2) This is ſo, tho' the condition be that the feoffor, his heirs and aſſigns, may enter; and his intereſt goes to his executor. But he may maintain an ejectment. 1. Saun. 112. 1. Sid. 344. 345. T. Raym. 135. 158.

(3) Care muſt be taken with reſpect to conditions, or powers of entry, to diſtinguiſh between, I. a general condition that the leſſor ſhall re-enter; II. a ſpecial condition that he may enter and hold until payment or ſatisfaction; and III. a power of entry, limited by way of uſe. 1ſt, A general condition that the leſſor ſhall re-enter is the ſubject of the foregoing ſection; 2d, a ſpecial condition that he may enter, is the ſubject of the preſent ſection. The diſtinction when the profits taken by the leſſor after entry are, and when they are not, to be in ſatisfaction of the rent, is not admitted in equity, for the courts of equity will always make the leſſor account to the leſſee for the profits of the eſtate during the time of his being in poſſeſſion of it, and decree him after he is ſatisfied the rent in arrear, and the coſts, charges, and expences attending his entry and detention of the lands, to give up the poſſeſſion to the leſſee, and deliver and pay him the ſurplus of the profits of the eſtate and the money ariſing thereby. 3d, A power of entry limited by way of uſe. This takes its effect from the Statute of Uſes; as if A. by feoffment, leaſe and releaſe, fine, or common recovery, conveys an eſtate to B. and his heirs, to the uſe, intent, and purpoſe, that B. may receive, out of the lands ſo conveyed, a certain annual ſum; and to this further intent and purpoſe, that if ſuch annual ſum, or any part of it, be unpaid by a certain time, it ſhall be lawful for B. and his aſſigns to enter upon, and hold poſſeſſion of, the land, and receive the rents and profits of it, until the arrears are ſatisfied: here, as ſoon as the rent is in arrear, an uſe which is ſerved out of the original ſeiſin of the feoffee, releaſee, conuſor, or recoverer, ſprings up and veſts in the perſon to whom the power is given. This uſe is immediately transferred into poſſeſſion by the ſtatute. He has conſequently a right to take and keep that poſſeſſion till the purpoſe for which it is executed is ſatisfied, and then the uſe determines. By virtue of this eſtate he may make a leaſe for years to try his title in ejectment, either to obtain the poſſeſſion of the lands, if it be with-held from him, or to reſtore it, if it be diſturbed or diveſted; and if he aſſigns the annual ſum, this right of entry, and perception of the rents and profits of the lands charged with the payment of it, paſſes with it to the aſſignee. But a diſtinction muſt be made between this caſe and that of a grant of a rent to be iſſuing out of certain lands, with a proviſo, declaration, or covenant, that if the rent be in arrear, the grantee may enter, &c. Here there is no ſeiſin in any perſon, out of which an uſe can ariſe to the grantee on non-payment of the rent; and therefore poſſeſſion is not in him till he makes an actual entry. But an intereſt veſts in him when the rent becomes in arrear, and he may reduce it into poſſeſſion by ejectment. See Haverhill v. Hare, Cro. Jac. 520. 2. Roll. Rep. 12. Poph. 126. 147. 3. Bulſtr. 250. Jennett. v. Cowley. Sid. 223. 262. 344. Raym. 135. 158. Saund. 112.

Vid. sect. 325.

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

de certaine terre, habendum & tenendum eidem B. & hæredibus suis, sub* conditione, quòd idem B. & hæredes sui solvant seu solvi faciant præfat' A. & hæredibus suis annuatim talem redditum, &c. *En ceste case sans ascun pluis dire le feoffee ad estate sur condition.*

taine land, to have and to hold to the said B. & his heires, upon condition that the said B. and his heires do pay or cause to be paid to the aforesaid A. & his heires, yearely such a rent, &c. In this case without any more saying the feoffee hath an estate upon condition.

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Proviso. Vid. sect. 220. Dier. 28. H. 8. fol. 13. 27. H. 8. fol. 14 15. 13. H. 4. Entre Cong. 57. Seignior Cromwell's case, lib. 2. fo. 71. 72. at large. 35. H. 8. tit. conditions Br. lib. 8. 89. Frances case.

PRoviso semper, quòd B. solvat, &c.

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

(2. Rep. 70. b.)

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

(*) 27. H. 8. 15. &c. Ita quod. Fleta lib. 4. ca. 9. Bracton ubi supra. Britton ubi supra.

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

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

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

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

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

QUOD si contingat, &c.

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

D'entrer, &c. Hereby it is evident, that

ITEM auters parols sont en un fait queux causont les tenements estre conditionals. Sicome sur tiel feoff-

ALSO there bee other words in a deede which cause the tenements to be conditionall: As if upon such feoffment *ment*

* *issi* added in L. and M. and Roh. † *parols—condicions* in L. and M. and Roh. ‖ *n'ad—ad* in L. and M.

(1) Acc. 1. Roll. Abr. 410. L. 30. tho' it stands indifferent whether it be the speaking of the grantor or grantee; for in that case it shall be referred to the grantor, as no condition can be reserved or made, but on the part of the donor, lessor, or feoffor. Dyer 6. And it is immaterial in what part of the deed the word proviso stands, and tho' there be covenants before or after. 2. Rep. 70. 71. 1. Roll. Abr. 407. Dyer. 311. But when it does not introduce a new clause, and only serves to qualify or restrain the generality of a former clause, it is not a condition. Moore 307. 707.——We should carefully distinguish between a condition, a remainder, and a conditional limitation. We have seen that a condition defeats the whole estate; that none but the heir can take advantage, or enter for the breach of it; and that when he enters he is in as of his old estate. Such is the case put by Littleton of a feoffment in fee, reserving a yearly rent, with a condition that if the rent be behind, it shall be lawful for the feoffor and his heirs to enter. A remainder is defined by lord Coke, ant. 143. to be "a remnant of an estate in lands or tenements, expectant on a particular estate, created together with the same, at the same time;" so that it waits for, and only takes effect in, possession, on the natural expiration or determination of the first estate: as if a man limits an estate to A. for life, and after his decease to B. in fee, this is a remainder: it does not defeat, but it expects the natural end and expiration of the first estate limited to A. for his life; and when that event happens, not the heir, but a stranger has the advantage of it. A conditional limitation partakes of the nature both of a condition and a remainder. It is to be observed, that it was understood by the old lawyers, that whenever either the whole fee, or a particular estate, as an estate for life, or in tail, was first limited, no condition or other quality could be annexed to this prior estate to defeat it, and pass the estate to a stranger; for, as a remainder, it was void, being in abridgement or defeasance of the estate first limited; and as a condition, it was void, as no one but the donor or the heirs could take advantage of a condition broken, and the entry of the donor or his heirs unavoidably defeated the livery upon which the remainder depended. On these principles, it was impossible, by the old law, to limit, by deed, if not by will, an estate to a stranger upon any event which went to abridge or determine an estate previously limited. But the expediency and utility of such limitations, assisted by the revolution effected in our law by the statute of uses, at length forced them into use, in spite of the maxim of law, that a stranger cannot take advantage of a condition. These limitations are now become frequent, and their mixed nature has given them the appellation of conditional limitations: they so far partake of the nature of conditions, as they abridge or defeat the estates previously limited; and they are so far limitations, as upon the contingency taking place, the estate passes to a stranger. Such is the limitation to A. for life, in tail, or in fee, provided that when C. returns from Rome it shall from thenceforth remain to the use of B. in fee. Of late, however, it has been frequently argued, that the difference between a remainder, and what is generally understood by a conditional limitation, is merely verbal. See Lucas's Rep. 423. and Mr. Douglas's note to page 727. of his Reports.—In addition to what has been mentioned in the concluding note on 202. b. respecting the principle, that when a feoffor enters for a condition broken he is in as of his former estate; it may be observed, that when a tenant for life joins with a remainder man in suffering a common recovery, it is sometimes practised as a precaution against letting

*ment un rent eſt reſerve al feoffor, &c. et puis ſoit mitte, en le fait * ceſt parol,* Quòd ſi contingat redditum prædictum à retrò fore in parte vel in toto †, quòd tunc benè licebit *a le feoffor et a ſes heires d'entrer, &c. Ceo eſt un fait ſur condition.*

a rent be reſerved to the feoffor, &c. and afterward this word is put into the deed, that if it happen the aforeſaid rent to be behind in part or in all, that then it ſhall be lawful for the feoffor & his heires to enter, &c. this is a deed upon condition.

ſome words of themſelves do make a condition, and ſome other (whereof our authour here and in the next ſection * putteth an example) do not of themſelves make a condition without a concluſion and clauſe of re-entrie: and manie times *(ſi)* makes a condition, and ſometimes a limitation, as hereafter ſhall be ſaid in this chapter.

* Vid. Sect. 331.

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

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

* 4. Mar. Dyer 138. b.

Bract. ubi ſupra.

Conditio is explained before.

Modus is at this day properly taken for a modification, limitation, or qualification, for the which alſo the law hath appointed apt words; and becauſe *Littleton* ſpeaketh of this alſo in the end of this chapter, I will reſerve this matter to his proper place, where the reader ſhall perceive excellent matter of learning touching this point.

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

Pro. 24. E. 3. 34. (Hob. 41. 42. 10. Rep. 42. Plo. 141. a. 7. Rep. 9. b. 10. 28. b. Ant. 144. a. 9. Rep. 50. a. Poſt. 237. a.)

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

9. E. 4. 20. 32. E. 3. Annu. 30. 14. E. 4. 4. 15. E. 4. 2. b. 8. H. 6. 23. 5. E. 2. tit. an. 44. 41. E. 3. 19. 32. E. 1. Avowrie. 242. 21. E. 4. 49. 22. E. 4. 28. 35. H. 6. 2. 10. E. 3. 44. 5. E. 2. 9. E. 4. 20. 15. E. 4. 3.

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

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

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

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

* 12. E. 1. 1. feoffements & faits 114. F. N. B. 205. L. vid. ſect. 365 Ad faciend' ea intentione &c. Dyer 138. 7. H. 4. 22. 31. H. 8. tit. condition 19. Br. Pl. Com. 142. 38. H. 6. 33. 36. 37. Doct. & Stud. li. 2. ca. 34. 27. H. 8. 18. a. 32. E. 3. Breve. 291. (1. Roll. Abr. 407. 408. 409. 410. Moore 57. 2. Leo. 13. 3. Rep. 64. a. 10. Rep. 42. a.)

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

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

[*f*] 7. E. 6. Dier. 79. 28. H. 8. Dier. 27. a. Sub pœna foriſacturæ.

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

Quod non licebit. 3. E. 6. Dy. 65. 66. 4. Mar. 138.

[*g*] Hil. 40. Eliz. Rot. 1610. inter Browne and Ayer. Vid. Pl. Com. 142. Br. and Beſtone's caſe.

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

in the incumbrances of the remainder man, to annex a condition to the eſtate of the bargainee or releaſee, who is made tenant to the præcipe, on the non-performance of which his eſtate is to become void. For if A. be tenant for life, with remainder in tail to B. and B. executes leaſes, confeſſes judgments, or otherwiſe incumbers his eſtates; and afterwards A. and B. join in ſuffering a common recovery, all the incumbrances of B. are immediately let in upon the fee gained by the recovery; and that fee, and every eſtate derived out of it, are ſubject to them. To avoid which, A. the tenant for life, by leaſe and releaſe, or by bargain and ſale enrolled, conveys the eſtate to the intended tenant to the præcipe, to hold to him and his aſſigns during the joint lives of him and the grantor or bargainor; with a declaration, that ſuch grant and releaſe, or bargain and ſale, is made to enable the grantee or bargainee to be tenant of the freehold in the propoſed recovery; and a declaration of the uſes to which it is intended the recovery ſhall enure. Then a proviſo is inſerted, that if the bargainee or releaſee do not, within ſix months, pay the tenant for life 100,000l. or ſome other very large ſum of money, the bargain and ſale, or grant and releaſe, ſhall be void; and that it ſhall be lawful for the bargainor or grantor to enter as in his former eſtate. The money is not paid at the day appointed; and thereupon the bargain and ſale, or grant and releaſe, is void, and the bargainor or grantor becomes ſeiſed of his ancient life-eſtate. But though the bargain and ſale becomes void, yet, as at the time of ſuing the original writ and the præcipe the bargainee or releaſee was tenant of the freehold, the ſubſequent ceſſer or determination of his eſtate does not impeach the recovery. For if the perſon againſt whom the præcipe is brought, be at the time when the præcipe is ſued, or at any time before judgment, actual tenant of the freehold, it is immaterial what becomes of it afterwards. This doctrine has been carried ſo far, that where a tenant to the freehold was made by a fine, and the fine has been reverſed, yet the recovery was held good. (See Lloyd v. Evelyn. 1 Salk. 568. and ſee 1. Shower's Rep. 347. Hob. 262. Noy 126. 1. Mod. 218.) The recovery therefore in this caſe is good; the freehold upon which it was ſuffered is determined; and the bargainor or grantor comes in of his original eſtate, and of courſe avoids all the leaſes, judgments, and other incumbrances of the tenant in tail. The reaſon why the conveyance is made to the bargainee or releaſee during the joint lives of him and the grantor or bargainor, is to preſerve his powers by leaving the reverſion in him. — For ſuppoſing

Fig. on Rec. cov. 118. 119. 120.

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

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

Ils

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

poſing A. to be tenant for life, with the uſual powers of leaſing, jointuring, and charging; remainder to truſtees to preſerve contingent remainders; remainder to A.'s firſt and other ſons in tail male; remainder to his daughters as tenants in common in tail, with croſs remainders in tail between them if more than one, with remainders over; A. and his daughters may ſuffer a common recovery; and it will be good againſt A. and his daughters, and their iſſues in tail, and the remainders over. But the eſtates tail of the ſons being prior to the eſtates of the daughters, and being ſupported by the eſtate of the truſtees for preſerving contingent remainders, are not, whether veſted or contingent, at the time of the recovery affected by it.—But if A. granted his whole life eſtate to the tenant to the præcipe, it might be apprehended, that the powers relating to his eſtate, whether appendant or in groſs, would be extinguiſhed thereby (See Edwards v. Slater and Hardreſs, 4to. King v. Melling, 1. Ventris 226.), and a limitation or grant of new powers would be void againſt the ſons and the heirs male of their bodies. To prevent this queſtion being made, A. the tenant for life, conveys an eſtate to the intended tenant to the præcipe, only during his (the tenant) and the grantor or bargainor's joint lives. This continues the old reverſion in the grantor or bargainor, and preſerves the powers relating to his original eſtate.—It is cuſtomary in theſe caſes to declare, that the recovery ſhall enure in the firſt place for corroborating, ſtrengthening, and confirming the eſtate for life of the grantor or bargainor, and all other eſtates precedent to the eſtate in tail meant to be deſtroyed, and all powers and privileges annexed to ſuch eſtate for life, and other precedent eſtates.—The mode of ſuffering recoveries on a conditional eſtate of freehold, was in uſe ſo early as the end of the laſt century.

Ilz ne beſoigne per la ley de mitter tiel clauſe, &c. Quæ dubitationis cauſâ tollendæ inferuntur, communem legem non lædunt. Et expreſſio eorum quæ tacitè inſunt, nihil operatur.

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

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

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

Mortgage is derived [*c*] of two French words, *viz. mort*, that is *mortuum*, and *gage*, that is *vadium*, or *pignus*. And it is called in Latine *mortuum vadium*, or *morgagium*. Now it is called here *mortgage*, or *mortuum vadium*, both for the reaſon here expreſſed by Littleton, as alſo to diſtinguiſh it from that which is called *vivum vadium*. *Vivum autem dicitur vadium, quia nunquam moritur ex aliquâ parte quod ex ſuis proventibus acquiratur.* As if a man borrow a hundred pounds of another, and maketh an eſtate of lands unto him, untill he hath received the ſaid ſumme of the iſſues and the profits of the land, ſo as in this caſe neither money nor land dieth, or is loſt, (whereof Littleton hath ſpoken [*d*] before in this chapter) and therefore it is called *vivum vadium*.

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(1) Few parts of the law lead to the diſcuſſion of more extenſive or uſeful learning than the law of mortgages. The nature of theſe notes neither requires nor admits more than ſome few general obſervations upon the origin of mortgages;—what conſtitutes a mortgage;—the different eſtates of the mortgagor and mortgagee, and the nature of an equity of redemption.—As to the origin of mortgages;—from what is ſaid of them in this chapter, it appears, that they were introduced leſs upon the model of the Roman *pignus*, or *hypotheca*, than upon the common law doctrine of conditions. As to what conſtitutes a mortgage;—no particular words, or form of conveyance, are neceſſary for this purpoſe. It may be laid down as a general rule, and ſubject to very few exceptions, that wherever a conveyance or aſſignment of an eſtate, is originally intended as a ſecurity for money, whether this intention appears from the deed itſelf, or by any other inſtrument, it is always conſidered in equity as a mortgage, and redeemable; even though there is an expreſs agreement of the parties, that it ſhall not be redeemable, or that the right of redemption ſhall be confined to a particular time, or to a particular deſcription of perſons. See Newcomb v. Bonham, 1. Vern. 7. 214. 2. Ca. in Chan. 58. 159. Howard v. Harris, 1. Vern. 33. 190. 2. Ca. in Chanc. 147. Talbot v. Braddyl, 1. Vern. 183. 394. Barrel v. Sabine, 1. Vern. 268. Manlove v. Bell, 2. Vern. 84. Jennings v. Ward, ibid. 520. Price v. Perrie, 2. Freeman 258. Francklyn v. Fern, Barnard. Cha. 30. Clinch v. Wetherby, Caſ. temp. Finch, 376. Cooke v. Cooke, 2. Atk. 67. Mellor v. Lees, 2. Atk. 494. Cottrell v. Purchaſe, Caſ. temp. Talbot, 61. As to the nature of the eſtates of the mortgagor and mortgagee, it was not, till lately, accurately ſettled. It was formerly contended, that the mortgagor, after forfeiture of the condition, had but a mere right to reduce the eſtate back to his own poſſeſſion, by payment of the money. It is now eſtabliſhed, that the mortgagor has an actual eſtate in equity, which may be deviſed, granted, and entailed; that the entails of it may be barred by fine and recovery; but that he only holds the poſſeſſion of the land, and receives the rents of it, by the will or permiſſion of the mortgagee, who may by ejectment, without giving any notice, recover againſt him or his tenant. In this reſpect the eſtate of a mortgagee is inferior to that of a tenant at will. In equity, the mortgagee is conſidered as holding the lands only as a pledge or ſecurity for payment of his money. Hence a mortgage in fee is conſidered only as perſonal eſtate in equity, though the legal eſtate veſts in the heir in point of law. Hence alſo a mortgagee, though in poſſeſſion, will, in caſe of a living vacant, be compelled in equity to preſent the nominee of the mortgagor to it,—even though nothing but the advowſon is mortgaged to him. On the ſame principle there is a *poſſeſſio fratris*; and tenantcy by the curteſy, of an equity of redemption. Caſborne v. Scarſe, 1. Atk. 603. Keeche v. Narne,

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

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

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

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

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

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27. H. 8. 19. b.

Lib. 8. fol. 91. Frances' caſe. (1. Roll. 426.)

(Poſt. 219. b.)

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

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

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

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

Fourthly, The intent and true meaning of the condition ſhall be performed. And where it is here ſaid, that the heire maytender *al jour aſſeſſe, &c.* herein is implyed, that

ITEM, ſi feoffment ſoit fait en mortgage ſur condition, que le feoffor payera tiel ſumme a tiel jour, &c. come eſt ‡ enter eux per lour fait endent accorde & limit, coment que le feoffor moruſt devant le jour de payment, &c. uncore ſi le heire || le feoffor paya meſme le ſumme § de money a meſme le jour a le feoffee, ou tender a luy les deniers, et le feoffee ceo refuſa de receiver, donque poit l'heire entrer en le terre; et uncore le condition eſt, que ſi le feoffour payera tiel ſumme a tiel jour, &c. nient ſeaſant mention en le condition

ALSO, if a feoffment be made in morgage upon condition, that the feoffor ſhall pay ſuch a ſumme at ſuch a day, &c. as is betweene them by their deed indented agreed and limited, although the feoffor dyeth before the day of payment, &c. yet if the heire of the feoffor pay the ſame ſumme of money at the ſame day to the feoffee, or tender to him the money, and the feoffee refuſe to receive it, then may the heire enter into the land; and yet the condition is, that if the feoffor ſhall pay ſuch a ſumme at ſuch a day, &c. not making men-

d'aſcun

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

Doug. 21. Moſs v. Gallimore, ibid. 266. Amherſt v. Dawling, 2. Vern. 401. Gally v. Selby, Stran. 403. Gardner v. Griffith, 2. P. Will. 404. Mackenzie v. Robinſon, 2. Atk. 559. — In this light the legiſlature has viewed the different eſtates of mortgagor and mortgagee in the ſtatutes of the 7th of Will. and M. c. 25. and 9. Ann. c. 5. — As to the nature of an equity of redemption; — originally there was no right of redemption in the mortgagor. Lord Hale, in the caſe of Roſe Carrick v. Barton, 1. Chan. Ca. 219. ſays, that in the 14th year of Richard II. the parliament would not admit of redemption. See the printed Rolls, vol. 3. p. 259. It was, however, admitted not long after. But after its admiſſion, if the money was not paid at the time appointed, the eſtate became liable, in the hands of the mortgagee, to his legal charges, to the dower of his wife, and to eſcheat; and it was an opinion, that there was no redemption againſt thoſe who came in by the poſt. This introduced mortgages for long terms of years. Theſe are attended with this particular advantage, that on the death of the mortgagee, the term and the right in equity to receive the mortgage debt veſt in the ſame perſon: whereas, in caſes of mortgages in fee, the eſtate, on the death of the mortgagee, goes to his heir, or deviſee, and the money is payable to his executor or adminiſtrator. This produces a ſeparation of rights, that is often attended with great inconvenience, both to the mortgagor and mortgagee. On the other hand, in caſe of mortgages for years, there is this defect, that if the eſtate is foreclоſed, the mortgagee will be only intitled for his term.—To guard againſt which, it has been thought adviſeable to make the mortgagor covenant, that, on nonpayment of the money, he will not only confirm the term, but convey the freehold and inheritance to the mortgagee, or as he ſhall appoint, diſcharged of all equity of redemption. The difference between a truſt and an equity of redemption, is obſerved by lord Hale in the caſe of Powlett and the Attorney-general, Hard. 465.

(1) *V. T.* 15. *Jac. After covenant to ſtand ſeized to the uſe of B. and his heirs, with proviſo of revocation on payment to B. and his aſſigns; B. dies; he may tender to the heir, and revoke. Allen's caſe, Ley*, 55. *b.* Hal. MSS.

*d'aſcun payment d'eſtre fait per ſon heire, mes pur ceo que le heire ad intereſſe de droit en le condition, &c. et l'entent fuit forſque que les deniers ſerront paies al jour aſſeſſe, &c. & le feoffee n'ad pluis dammage, ſi il ſoit pay per l'heire, que s'il fuit pay per le pier, &c. et pur ceſt cauſe, ſi le heire paya les deniers, ou tendera les deniers a le jour aſſeſſe, &c. et l'auter ceo refuſa, il poet entrer, &c. Mes ſi un eſtranger de ſa teſte demeſne, que n'ad aſcun intereſſe, &c. voile tender les * avantdits deniers al feoffee a le jour aſſeſſe, le feoffee n'eſt † pas tenus de ceo receiver.*

tion in the condition of any payment to bee made by his heire, but for that the heire hath intereſt of right in the condition, &c. and the intent was but that the mony ſhould bee payed at the day aſſeſſed, &c. and the feoffee hath no more loſſe, if it be paid by the heir, then if it were paid by the father, &c. therefore if the heire pay the money or tender the money at the day limited, &c. and the other refuſe it, he may enter, &c. But if a ſtranger of his own head, who hath not any intereſt, &c. will tender the aforeſaid money to the feoffee at the day appointed, the feoffee is not bound to receive it.

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

[*f*] Vid. Sect. 337.

Firſt, betweene a condition annexed to a ſtate in lands or tenements upon a feoffment, gift in taile, &c. and a condition of an obligation, recognizance, or ſuch like. [*g*] For if a condition annexed to lands bee poſſible at the making of the condition, and become impoſſible by the act of God, yet the ſtate of the feoffee, &c. ſhall not bee avoyded. As if a man maketh a feoffment in fee upon condition, that the feoffor ſhall within one yeare goe to the citie of *Paris* about the affaires of the feoffee, and preſently after the feoffor dyeth, ſo as it is impoſſible by the act of God that the condition ſhould be performed, yet the eſtate of the feoffee is become abſolute; for though the condition be ſubſequent to the ſtate, yet there is a precedency before the re-entry, *viz.* the performance of the condition. And if the land ſhould by conſtruction of law be taken from the feoffee, this ſhould work a dammage to the feoffee, for that the condition is not performed which was made for his benefit. And it appeareth by Littleton, that it muſt not be to the dammage of the feoffee; and ſo it is if the feoffor ſhall appeare in ſuch a court the next tearme, and before the day the feoffor dyeth, the eſtate of the feoffee is abſolute. [*h*] But if a man be bound by recognizance or bond with condition that he ſhall appeare the next tearme in ſuch a court, and before the day the conuſee or obligor dyeth, the recognizance or obligation is ſaved; and the reaſon of the diverſitie is, becauſe the ſtate of the land is executed and ſettled in the feoffee, and cannot be redeemed back againe but by matter ſubſequent, *viz.* the performance of the condition. But the bond or recognizance is a thing in action, and executory, whereof no advantage can be taken untill there be a default in the obligor; and therefore in all caſes where a condition of a bond, recognizance, &c. is poſſible at the time of the making of the condition, and before the ſame can be performed, the condition becomes impoſſible by the act of God, or of the law, or of the obligee, &c. there the obligation, &c. is ſaved. But if the condition of a bond, &c. be impoſſible at the time of the making of the condition, the obligation, &c. is ſingle. And ſo it is in caſe of a feoffment in fee with a condition ſubſequent that is impoſſible, the ſtate of the feoffee is abſolute; but if the condition precedent be impoſſible, no ſtate

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

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

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

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

(1) Lord Coke here conſiders the effect of impoſſible conditions. 1ſt. Where they are poſſible at the time of their creation, but afterwards become impoſſible; and he diſtinguiſhes that impoſſibility which is produced by the act of God, and that which is produced by the act of the party. 2dly. When they are impoſſible at the time of their creation. 3dly. When they are againſt law, either as *mala prohibita*, or *mala in ſe*.—4thly. When they are repugnant to the grant by which they are created, or to the eſtate to which they are annexed. It ſhould be obſerved, that a condition is then only conſidered in the eye of the law as impoſſible at the time of the creation, if it cannot by any means take effect. Such is the caſe put by lord Coke, that the obligee ſhall go from the church of St. Peter at Weſtminſter to the church of St. Peter at Rome, within three hours. But if it only be in an high degree improbable, and ſuch as is beyond the power of the obligee to effect, it is not then conſidered as impoſſible. See the caſes of this nature in 1. Roll. Abr. 419. 420. — It is ſaid, that if the condition of a bond be to pay a certain ſum, or to do any other act, out of his Majeſty's dominions, the condition is void, and the bond is ſingle, becauſe the performance of it cannot be tried. See 21. Edw. 4. 10.—It was upon a ſimilar principle, that if a man profeſſed himſelf a monk in a religious houſe beyond ſeas, it was no diſability, becauſe the fact could not be tried. For the only method which the law had to know if a man was profeſſed, was to iſſue a writ in the king's name to the biſhop of the dioceſe, commanding him to certify if ſuch a monk was profeſſed in ſuch a houſe in ſuch a place within his dioceſe. But this method could not be uſed with reſpect to foreign profeſſions, as the biſhop was not bound to obey the king's writ, and might certify either true or falſe, without ſubjecting himſelf to puniſhment. For this reaſon no notice was taken in our law of foreign profeſſion. — Thus L. Rolle, 2. Abr. 43. ſays, "If an Engliſhman goes into "France, and there becomes a monk, he is, notwithſtanding, capable of a grant in England; for that ſuch profeſſion is not "triable; and alſo, for that all profeſſion is taken away by the ſtatute; and, by our religion, now received, ſuch vows and "profeſſion are held void. I have heared," continues he, "that this was in 44. Eliz. in one Ley's caſe, reſolved accordingly by all the juſtices in Chancery-lane."

ſtate or intereſt ſhall grow thereupon. And to illuſtrate theſe by examples you ſhall underſtand. If a man be bound in an obligation, &c. with condition that if the obligor doe goe from the church of *St. Peter* in *Weſtminſter* to the church of *St. Peter* in *Rome* within three hours, that then the obligation ſhall be voyd. The condition is voyde and impoſſible, and the obligation ſtandeth good.

(1. Leo. 229. 1. Roll. Abr. 420. Cro. El. 291. 864.) 14. H. 8. 28. 10. H. 7. 22. 4. H. 7. 4. 8. E. 4. 1. 28. H. 8. 25. lib. 5. fo. 22. Laughter's caſe, & 75. 39. H. 3. 5. 17. H. 6. Obligat. 18. 5. El. Dier 222.

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

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

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

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

35. H. 6. tit. barre 262. 37. H. 6. barre 60. 2. E. 3. 9. 9. Eliz. Dyer 262. 28. H. 8. 30. (8th Rep. 83. a. 92. a. Hob. 24.)

[*i*] 4. H. 7. 4. 30. H. 8. Dyer 42. 11. H. 4. 57. in protection. 10. H. 7. 18. (Doc. Pla. 230.)

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

[*k*] Vid. Bracton, Britton, Fleta ubi ſupra.

But herein the law diſtinguiſheth between a condition againſt law for the doing of any act that is *malum in ſe*, and a condition againſt law (that concerneth not any thing that is *malum in ſe*) but therefore is againſt law, becauſe it is either repugnant to the ſtate, or againſt ſome maxime or rule in law. And therefore the common opinion is to bee underſtood of conditions againſt law for the doing of ſome act that is *malum in ſe*, and yet therein alſo the law diſtinguiſheth. As if a man be bound upon condition that he ſhall kill *I. S.* the bond is voyde.

Bracton lib. 3. fol. 100. 2. H. 4. 9. 8. E. 4. 12. b. 2. E. 4. 2. & 3. 4. H. 7. 4. b. 10. H. 7. 22. 14. H. 8. 28. 42. E. 3. 6. 23. (1. Roll. Abr. 418. Plo. 64. b.) 2 H. 4. 9. (2. Ven. 109.)

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

(Pl. Com. Browning's caſe 133.

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

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

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

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

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

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

Vide ſect. 325. (5. Rep. 114.)

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

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

Vide ſect. 401. Hill. 28. Eliz. in Banco Regis inter Watkins & Aſtwick pro terris in Com. Devon. 45. E. 3. tit. Releaſe 28. 32. E. 1. tit. Annuity 51. 33. H. 6. 13. (1. Leo. 34. Moore 122. Poſt. 225. b. 225. a.)

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

36. H. 6. tit. barre 166. 33. E. 1. tit. Annuitie 51. 33. E. 3. judgement. 254.

Le feoffee n'eſt pas tenus de ceo receiver. And note that *Littleton* ſaith, that hee is not bound to receive it at a ſtranger's hand. But if any ſtranger in the name of

(1) It is obſerved in 1. P. W. 189, that "all inſtances of conditions againſt law, in a legal ſenſe, are reducible under one of theſe "three heads; either, to do *malum in ſe*, or *malum prohibitum*; 2dly, to omit the doing of ſomething that is a duty; 3dly, to encourage ſuch crimes and omiſſions. And ſuch conditions as theſe, the law will always, and without any regard to circumſtances, "defeat." It is not within the plan of theſe notes to enumerate, or diſcuſs, the various inſtances in which the conditions of bonds have been held unlawful at law, or in equity. Thoſe which chiefly deſerve conſideration are ſuch as relate to, 1ſt, Bonds given for procuring marriages, or what is uſually called marriage brokage. See Hall v. Potten, 3. Levinz. 411. Shower's Par. Cas. 76. Brown's Par. Cas. 60. Scribblehill v. Brett, Brown's Parl. Caſes 57. Heat v. Allen, 2. Vern. 588. Cole v. Gibſon, 1. Vez. 503. 2dly, Bonds reſtraining the obligor from a free exerciſe of a trade. Here, if the reſtraint be qualified, ſo as only to take in a particular place, and the breach of the condition tends apparently to the detriment of the obligee, and a conſideration is given by the obligee to the obligor for executing the bond, the condition will not be impeached either at law or in equity. See 1. P. W. 190. 191. 10th Mod. 133, 3dly, Bonds of reſignation. The validity of theſe bonds, and the propriety of their being ſupported, conſidered as a matter of policy, was moſt elaborately and ably diſcuſſed in the great cauſe of the biſhop of London and Fytche, heard on appeal in the Houſe of Lords in May 1783. A ſtate of this caſe, and of the arguments and ſpeeches of the lords, prelates, and judges who ſpoke when it was heard before the Lords, is to be found in Mr. Cunningham's Law of Simony. —It ſeems to be ſettled, that if a bond is given with a condition to do ſeveral things, and only ſome of them are againſt law, the bond ſhall be good as to the doing the things agreeable to law, and only void as to thoſe which are againſt law. Norton v. Sims, Hob. 14. Moſdell v. Middleton 237. Pearſon v. Humes, 229. Cheſman v. Nainby, lord Raymond 145.

of the morgageor or his heire (without his conſent or privity) tender the money, and the morgagee accepteth it, this is a good ſatisfaction, and the morgageor or his heire agreeing thereunto may re-enter into the land, *omnis ratihabitio retrò trahitur & mandato æquiparatur.* But the morgageor or his heire may diſagree thereunto if he will. (Ant. 180. b. Poſt. 245. a. 258. a.)

Sect. 335.

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

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

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

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

Donque le feoffee n'ad aſcun remedie d'aver le money per le common ley, &c. And the reaſon is, becauſe the money is collaterall to the land, and the feoffee hath no remedie therfore. 8. E. 2. tit. Aſſ. 389. 31. Aſſ. 32.

If an obligation of an hundred pound be made with condition for the payment of fifty pound at a day, and at the day the obligor tender the money, and the obligee refuſeth the ſame, yet in action of debt upon the obligation (2. Roll. Abr. 523. 524. Sid. 13. 364. 365.)

if the defendant plead the tender and refuſall, he muſt alſo plead that he is yet ready to pay the money, and tender the ſame in court. But if the plaintife will not then receive it, but take iſſue upon the tender, and the ſame be found againſt him, he hath loſt the money for ever. 22. H. 6. 39. 21. E. 4. 25. 22. E. 3. 5. Lib. 9. fo. 79. H. Peytoe's caſe. (2 Roll. Abr. 523. Dyer 24. b. 25. a. cont.)

If a man be bound in 200 quarters of wheat for deliverie of a 100 quarters, if the obligor tender at the day the 100 quarters, &c. he ſhall not plead *uncore priſt*, becauſe albeit it be the parcell of the condition, yet they be *bona peritura*, and it is a charge for the obligor to keep them. And the reaſon wherefore in the caſe of the obligation the ſumme mentioned in the condition is not loſt by the tender and refuſall, is not only for that it is a duty and parcel of the obligation, and therefore is not loſt by the tender and refuſall, but alſo for that the obligee hath remedy by law for the ſame. And in this caſe, *liberata pecunia non liberat offerentem.* 8. E. 2. tit. Aſſ. 389.

But if a man make a ſingle bond, or knowledge a ſtatute or recognizance, and afterwards made a defeaſance for the payment of a leſſer ſum at a day, if the obligor or conuſor tender the leſſer ſumme at the day, and the obligee or conuſee refuſeth it, he ſhall never have any remedy by law to recover it, becauſe it is no parcell of the ſum contained in the obligation, ſtatute or recognizance, being contained in the defeaſance made at the time or after the obligation, ſtatute, or recognizance. And in this caſe in pleading of the tender and refuſall the partie ſhall not be driven to plead, that he is yet ready to pay the ſame or to tender it in court: neither hath the obligee or conuſee any remedy by law to recover the ſumme contained in the defeaſance. [*a*] And ſo it is if a man make an obligation of 100 pound with condition for the deliverie of corne or timber, &c. or for the performance of an arbitrement, or the doing of any act, &c. This is collaterall to the obligation, that is to ſay, is not parcell of it, and therefore a tender and refuſall is a perpetuall barre (2). (2. Saun. 48.) 7. H. 4. 18. 5. Mar. Dier. 150. 21. E. 4. 25. 22. E. 3. 5. 33. H. 6. 2. b. 17. Aſſ. pl. 2. 20. E. 4. 1. b. 9. H. 6. 16. 36. H. 6. 26. 15. E. 4. 1. 16. H. 7. 13. 18. E. 3. 53. 7. E. 4. 4. b. 19. H. 8. 12. 27. H. 8. 1. a. 22. H. 6. 39. tit. Abatement 11. 49. E. 3. 3. 19. H. 6. 12. [*a*] Henry Peytoe's caſe, ubi ſupra. 31. Aſſ. 25. 11. H. 4. 83. 1. H. 6. 8. 1. E. 4. 17. E. 4. 3. Pl. Com. Fogaſſe's caſe, fo. 6

But if a man be bound to make a feoffment in fee to the obligee, and he make a leaſe and a releaſe to him and his heires, albeit this be a collaterall condition, yet is it well performed, becauſe this amounts in law to a feoffment (3). (Moore 36. 37. Poſt. 236. b.)

Money, moneta, legalis moneta Angliæ, lawfull money of England, either in gold or ſilver, is of two ſorts, *viz.* the Engliſh money coyned by the king's authoritie, Lib. 5. fo. 114. 115. Wade's caſe, lib. 9. fo. 78.

(1) Here the performance of the condition is excuſed by the default of the feoffee or obligee, viz. by tender and refuſal. It is alſo excuſed, 1. By his abſence in thoſe caſes where his preſence is neceſſary for the performance of the condition. 2 By his obſtructing or preventing the performance. And 3. By his neglecting to do the firſt act, if it is incumbent on him to perform it. See the caſes in 1. Roll. Abr. 457. 458. It is alſo excuſed, in ſome caſes, by his not giving notice to the feoffee or obligee. See 1. Roll. Abr. 463. 467. 468.

(2) In the 10th, 11th, and 12th editions, there is in the margin a reference to 3. Cro. 755.; but there is no ſuch page in that volume of Croke. Moſt probably it is miſprinted for 1. Cro. 755. Cotton v. Clifton, where it was held, "that where an obligation is made, and afterwards a defeaſance is made thereof, if he pays a leſs ſum; there, if he pleads the defeaſance and the tender of the leſſer ſum, he need not to ſay *tout temps priſt*; for, by the tender, he was diſcharged of all: but otherwiſe it is of an obligation with a condition to pay a leſſer ſum."

(3) None of the authorities in the margin go to this point. In Plo. 156. it is laid down that a leaſe and releaſe may be pleaded as a feoffment; and 1. Finch. 48. and 2. Finch. 68. it is ſaid that a leaſe and releaſe amounts to a feoffment. But this muſt be underſtood with ſome qualifications, as the operation of a feoffment is, in ſome inſtances, much more forcible, and of courſe may be much more beneficial to the perſon entitled to the benefit of the condition, than the operation of a leaſe and releaſe. The nature of a feoffment will be fully conſidered in one of the notes to the chapter of Releaſes.

(5. Rep. 114. Wade's caſe 2 Inſ. 579. 742. 3. Inſ. 93.)

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

Ariſtotle, lib. 5. cap. 8.

(Cro. Car. 89. Trover and Converſion lies for money out of a bag.)

Nummus, ἀπο τῦ νόμε, quia lege ſit non natura. Vide * the ſtatute of 9. *H* 5. of the noble, halfe noble, and farthing of gold, which is the fourth part of a noble, and that is twenty pence.

(*) 2. H. 5. ſtat. 2. cap. 7.

(Cro. El. 841.)

Sect. 336.

12. E. 3. Condic. 8. 13. Ed. 3. ibid. 10. 12. Aſſ. 5. Plo. 481.

ET s'il faile de pair les deniers, &c.

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

(5 Rep. 117.)

Li 5. fo. 96 97. Goodale's caſe.

Le ſecond feoffee voile tender le ſumme des deniers, &c.

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

(8. Rep. 42. b.)

(c. Cro. 9. 245.)

Li. 5. fo. 114. 115. Wade's caſe.

And it is to bee ob-

ITEM ſi feoffment ſoit fait ſur tiel condition, que ſi le feoffee paya al feoffor a tiel jour inter eux limit xxl. adonques le feoffee avera la terre a luy et a ſes heires; et s'il faile de payer les deniers a le jour † aſſeſſe, ‡ que adonque bien liſt a le feoffor ou a ſes heires d'entrer, &c. et puis devant le jour aſſeſſe, le feoffee venda la terre a un auter, et de ceo fait feoffment a luy, en c'eſt caſe ſi le ſecond feoffee voile tender le ſumme de les deniers a le jour aſſeſſe a le feoffor, et le feoffor ceo refuſa, &c. donque le ſecond feoffee ad eſtate en la terre clerement ſans condition. Et la cauſe eſt, pur ceo que le ſecond feoffee avoit intereſt en le condition pur ſalvation de || ſon tenancie. Et en ceſt caſe il ſemble que ſi le primer feoffee apres tiel vender de la terre, voile tender le money a*

ALSO if a feoffment be made on this condition, that if the feoffee pay to the feoffor at ſuch a day between them limited, twenty pounds, then the feoffee ſhal have the land to him and to his heires; and if he faile to pay the money at the day appointed, that then it ſhall be lawfull for the feoffor or his heires to enter, &c. and afterwards before the day appointed the feoffee ſel the land to another, and of this maketh a feoffement to him, in this caſe if the ſecond feoffee wil tender the ſum of money at the day appointed to the feoffor, and the feoffor refuſeth the ſame, &c. then the ſecond feoffee hath an eſtate in the land cleerely without condition. And the reaſon is, for that the ſecond feoffee hath an intereſt in the condition for the ſafegard of his tenancy. And in this caſe it ſeemes that if the firſt feoffee after ſuch ſale of the land, will tender the *le*

* *que* added in L. and M. and Roh. † *aſſeſſe*—&c. L. and M. ‡ *que* added in Roh. but not in L. and M. || *ſon*—*le* L. and M. and Roh.

(1) See the account given in Bla. Com. vol. I. ch. 7. of his majeſty's prerogative reſpecting the coin of the kingdom; and ſee 5. Mod. 7. 2. Sal. 446. For the etymology of the word Sterling, ſee Du Cange and Spelman's Gloſſaries, under the word Eſterlingus; and Mr. Leake's Hiſtorical Account of Engliſh Money, page 20. Guineas took their name from the gold brought from Guinea by the African Company, who, as an encouragement to bring over gold to be coined, were permitted, by their charter, to have their ſtamp of an elephant upon the coin made of the African gold.—By a proclamation of the 22d of December, 1717, the guinea, which till then had been current for 21 ſhillings and ſixpence, was reduced to 20 ſhillings, and half-guineas, double guineas, and five pound pieces in proportion.

(2) See note 1. fol. 216.

(3) And if at the time of the feoffment a purer or more weighty money were current, and before the day of payment coin of a baſer alloy is eſtabliſhed by proclamation, a tender of the ſum in that coin is good. Dav. Rep. 18. Note to the 11th edition.

le jour asseſſe, &c. a le feoffor, ceo ſerra aſſets bone pur ſalvation d'eſtate de le ſecond feoffee, pur ceo que le primer feoffee fuit privie a le condition, et iſſint le tender de aſcun de eux deux eſt aſſets bone, &c.

money at the day appointed, &c. to the feoffor, this ſhall be good enough for the ſafegard of the eſtate of the ſecond feoffee, becauſe the firſt feoffee was privie to the condition, and ſo the tender of either of them two is good enough, &c. (1)

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

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

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

Sect. 337.

ITEM ſi feoffement ſoit fait ſur condition, Que ſi le feoffor paya certaine ſumme d'argent al feoffee, adonques bien lirroit a feoffor et a ſes heires d'entrer : en ceſt caſe ſi le feoffor devie devant le payment fait, et l'heire voile tender al feoffee les deniers, tiel tender eſt voyd, pur ceo que le temps deins quel ceo doit eſtre fait eſt paſſe. Car quaunt le condition eſt, que ſi le feoffor paya les deniers al feoffee, &c. ceo eſt tant a dire, que ſi le feoffor durant ſa vie paya les deniers al feoffee, &c. et quant le feoffor morust, don-*

ALSO if a feoffment bee made upon condition, that if the feoffor pay a certaine ſumme of money to the feoffee, then it ſhal be lawfull to the feoffor and his heires to enter: in this caſe if the feoffor die before the payment made, and the heire wil tender to the feoffee the money, ſuch tender is void, becauſe the time within which this ought to be done is paſt. For when the condition is, that if the feoffor pay the money to the feoffee, &c. this is as much to ſay, as if the feoffor during his life pay the money to the feoffee, &c. and when the feoffor

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

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

Firſt, Betweene this caſe that *Littleton* here putteth of the condition of a feoffment in fee, for the payment of money where no time is limited, and the condition of a bond for the payment of a ſumme of money where no time is limited: for in ſuch a condition of a bond the money is to be payd preſently, that is, in convenient time. (*b*) And yet in caſe of a condition of a bond there is a diverſitie betweene a condition of an obligation, which concernes the doing of a tranſitorie act without limitation of any time, as payment of money, delivery of charters, or the like, for there the condition is to bee performed preſently, that is, in convenient time; and when by the condition of the obligation the act that is to bee done

1

41. E. 3. 9. 33. H. 6. 45. & 48. b. 4. E. 4. 29. 9. E. 4. 22. 15. E. 4. 30. 21. E. 4. 38. b. 9. H. 7. 17. b. 10. H. 7. 15. 14. H. 8. 21. a. & 29. b.

(*b*) Lib. 6. fol. 30. 31. Boothie's caſe. 33. H. 6. 47. 48.

2

(1. Roll. Abr. 436.)

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

(1) In the ſame manner equity permits all perſons to redeem, who have any eſtate or intereſt in the equity of redemption of the mortgagor; as tenant for life, remainder-man or reverſioner, jointreſs, tenant by the curtely, by elegit, ſtatute merchant, or ſtaple, &c. All theſe may redeem; and volunteers are equally admitted to redeem, as purchaſers for a valuable conſideration. Howard v. Harris, 1 Vern. 193. 2. Eq. Caſ. Abr. 594. The tenant for life and jointreſs contribute, in the proportion of one-third, towards the redemption of the mortgage debt; the remainder-man or reverſioner in the firſt caſe, and the owner of the fee in the other, contribute the other two-thirds. But the remainder-man or owner of the inheritance muſt come in to redeem in the life of the tenant for life, or jointreſs; for he cannot after their deceaſe compel a contribution from their aſſets. 1. P. Williams 640. Cornith v. Mew, 1. Cha. Ca. 271. Prec. Cha. 62. Howel v. Price, 424. —In what caſes the dowereſs will be permitted to redeem, is a queſtion which involves in it many points of great nicety. The law requires a legal ſeiſin in the huſband; and it is a ſettled point, that the wife cannot be endowed of a truſt eſtate. Upon this principle, it was generally underſtood that the wife was not intitled to her dower out of an eſtate, which, at the time of her marriage, was ſubject to a mortgage in fee. But this, perhaps, was never formally determined, till the caſe of Dixon v. Olliw, decreed by lord Loughborough, and the other lords commiſſioners, on the 13th of November 1783, againſt the wife, without hearing the counſel for the heir. But the caſe is different with reſpect to mortgages for terms of years. It may be obſerved here, 1ſt that at common law, if a leaſe be made for a term of years rendering rent, the wife is intitled to her dower of a third part of the reverſion by metes and bounds, and to a third part of the rent; and execution will not ceaſe during the term. 2dly. If the huſband makes a gift in tail, as the rent is payable out of, or in reſpect of, an eſtate of inheritance, the wife will be endowed of a third part of the rent. 3dly. If the huſband makes a leaſe for life, rendering rent, the wife is not intitled to her dower of the rent, becauſe it is not payable, in this caſe, out of, or in reſpect of, an

done to the obligee is of his owne nature locall, for there the obligor (no time being limited) hath time during his life, to performe it, as to make a feoffment, &c. if the obligee doth not haſten the ſame by requeſt. In caſe where the condition of the obligation is locall, there is alſo a diverſitie, when the concurrence of the obligor and the obligee is requiſite, (as in the ſaid caſe of the feoffment) and when the obligor may performe it in the abſence of the obligee, as to knowledge ſatisfaction in the court of Kings Bench,(*)although the knowledge of ſatisfaction is locall, yet becauſe he may doe it in the abſence of the obligee, he muſt doe it in convenient time, and hath not time during his life.

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

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

(*) Boothie's caſe, ubi ſupra. (Doc. Pla. 269. 457.)

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

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

(Vide ant. ſect. 325.) Boothie's caſe. b. 6. fo. 31. lib. 2. fo. 79. b. Seignior Cromwell's caſe. 44. E. 2. 9. 21. E. 4. 41. 2. E. 4. 3. 4. 19. H. 6. 67. 75. 76. 4. E. 4. 4. b. 26. H. 8. 9. b. (2. Rep. 59. 219. b.)

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

(Vide poſt. ſect. 352. 353. 354.)

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

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

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

Laſtly, When the obligor, feoffor, or feoffee is to doe a ſole act or labour, as to goe to Rome,

* *que* not in L. and M. nor Roh. † *donques* added in L. and M. and Roh.

*ques le temps de le tender eſt paſſé. Mes autrement eſt l'ou un jour de payment eſt limit, et le feoffor devie devaunt le jour, donque poet le heire tender les deniers come eſt avantdit, pur ceo que le temps de le tender ne fuyt paſſé per le mort del feoffor. Auxy il ſemble * que en tiel caſe l'ou le feoffor devy devant le jour de payment, ſi les executors de le feoffor tendront les deniers al feoffee al jour de payment, cel tender eſt aſſets bone; et ſi le feoffee ceo refuſe, † les heires de feoffor poient entrer, &c. Et le cauſe eſt, pur ceo que les executors repreſentont le perſon lour teſtator, &c.*

for dyeth, then the time of the tender is paſt. But otherwiſe it is where a day of payment is limited, and the feoffor die before the day, then may the heire tender the money as is aforeſaid, for that the time of the tender was not paſt by the death of the feoffor. Alſo it ſeemeth, that in ſuch caſe where the feoffor dieth before the day of payment, if the executors of the feoffor tender the money to the feoffee at the day of payment, this tender is good enough; and if the feoffee refuſe it, the heires of the feoffor may enter, &c. And the reaſon is, for that the executors repreſent the perſon of their teſtator, &c. (1)

an eſtate of inheritance. 4thly. If the huſband makes a leaſe for years, reſerving no rent, then judgment will be given for the wife, with a *ceſſet executio* during the term. This, if the term be of long duration, deprives her, virtually, of her dower. 5thly. If a perſon purchaſes an eſtate of inheritance which is in mortgage for a term of years, whether he only purchaſes the equity of redemption, or diſcharges the mortgage, the wife of the vendor will not be entitled to her dower in equity. 6thly. If a perſon dies ſeiſed in fee, ſubject to a term of years, if the term be a term in groſs, for ſecuring the payment of a ſum of money, the widow by diſcharging the money ſecured by it, or paying one third of the intereſt, will be intitled to dower. 7thly. If the term be an outſtanding ſatisfied term, ſhe will alſo be intitled to her dower againſt the heir. Ante. 32. a. Bro. Abr. Dower 44. 60. 69. 1. Roll. Abr. 678. Bodmin and Vandebendy, Shower's Caſes in Parliament, 69. Brown v. Gibbs, Precedents in Chancery, 97. Wray v. Williams, ibid. 151. Dudley v. Dudley, ibid. 201. Banks v. Sutton, 2. P. Williams 700. Hill v. Adams, 2. Atkyns, 208.—But there is a manuſcript report of this laſt caſe, under the names of Swannock v. Lafford, where the argument of lord Hardwicke is ſtated much more at large than it is in Mr. Atkyns's Report of it.—The editor begs to obſerve, that there are manuſcript reports of many caſes of the higheſt importance which either are not reported at all, or the printed reports of which are very ſhort or inaccurate; and that it would be rendering a moſt eſſential ſervice to the profeſſion to collect and publiſh the manuſcript reports of them.

(1) It has long been ſettled in equity, that mortgage money is to be paid, not to the heir but to the executor. And this holds tho' the mortgage be in fee; tho' the condition be for payment to the mortgagee, his heirs or executors; tho' there is no want of aſſets; and tho' there be no bond given, or covenant entered into by the mortgagor for payment of the money; and whether the mortgage be forfeited or not, at the death of the mortgagee; for equity conſiders a mortgage as part of the mortgagee's perſonalty. See the argument of lord keeper Finch in Thornbrough v. Baker, 1. Cha. Ca. 285. and ſee 2. Cha. Ca. 50. 51. 167. 224. 2. Vent. 348. 351.—This follows from the principle, that in equity the lands are

Rome, Jeruſalem, &c. in ſuch and the like caſes, the obligor, feoffor, or feoffee, hath time during his life, and cannot be haſtened by requeſt. And ſo it is if a ſtranger to the obligation or feoffment were to doe ſuch an act, he hath time to doe it at any time during his life.

Si les executors del feoffor tendront, &c. So as now it appeareth that either the heire of the feoffor, or his executors, may (when a day is limited) pay the money; and ſo alſo may the adminiſtrator of the feoffor doe, if the feoffor dye inteſtate [*f*]; and this may the ordinarie doe if there bee neither executor nor adminiſtrator, as hath beene ſaid. (Ant. 206. a.) Lib. 5. fol. 96. 97. Goodale's caſe. [*f*] Vid. Sect. 324. (See Heaſloe's caſe 9. Rep. 36. b.)

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

If a man be bound to *A.* in an obligation with condition to enfeoffe *B.* (who is a meere ſtranger) before a day, the obligor doth offer to enfeoffe *B.* and he refuſeth, the obligation is forfeit, for the obligor hath taken upon him to infeoff him, and his refuſall cannot ſatisfie the condition, becauſe no feoffment is made; but if the feoffment had beene by the condition to be made to the obligee, or to any other for his benefit or behoofe, a tender and refuſall ſhall ſave the bond, becauſe he himſelfe upon the matter is the cauſe wherefore the condition could not be performed, and therefore ſhall not give himſelfe cauſe of action. But if *A.* be bound to *B.* with condition that *C.* ſhall enfeoffe *D.* in this caſe if *C.* tender, and *D.* refuſe, the obligation is ſaved, for the obligor himſelfe undertaketh to doe no act, but that a ſtranger ſhall infeoffe a ſtranger. And it is holden in bookes, [*b*] that in this caſe it ſhall be intended, that the feoffment ſhould be made for the benefit of the obligee. Some to reconcile the bookes ſeeme to make a difference between an expreſſe refuſall of the ſtranger, and a readineſſe of the obligor at the day and place to make performance, and the abſence of the ſtranger: but that can make no difference. I take it rather to be the error of the reporter, and the records themſelves are neceſſary to be ſeene, for the law herein is, as it hath beene before declared. 33. H. 6. 16. 17. 36. H. 6. 8. 2. E. 4. 2. 3. 15. E. 4. 5. 6. 22. E. 4. 13. 32. E. 3. barre 264. 7. E. 3. 29. 9. H. 7. 17. 10. H. 7. 14. b. 35. H. 8. Dier. 56. lib. 5. fol. 23. Lambe's caſe. (5. Rep. 23. 1. Roll. Abr. 452. Poſt. 211. a. Ant. 206. a.) [*b*] 8. E. 4. 14. 2. E. 4. ubi ſupra.

If *I.* enfeoffe one in fee upon condition to enfeoffe *I. S.* and his heires, the feoffee tenders the feoffment to *I. S.* and he refuſeth it, the feoffor may re-enter, for by the expreſſe intent of the condition, the feoffee ſhould not have and retaine any benefit or eſtate in the land, but as it were an inſtrument to convey over the land. 19. H. 6. 34. (2. Rep. 59. 1. Roll. Abr. 452. 1. Rep. 133. b.)

But in that caſe if the condition were to make a gift in tayle to *I. S.* and he refuſeth it, and a tender and refuſall is made, there the feoffor ſhall not re-enter, for that it was intended that the feoffee ſhould have an eſtate in the land. And ſo it is if a feoffment bee made upon condition that the feoffee ſhall grant a rent charge to a ſtranger, if the feoffee tender the grant and he refuſeth, the feoffor ſhall not re-enter, becauſe the feoffee was to retaine the land, which points are worthy of due obſervation. 2. E. 4. Entrie conge 25.

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

Le perſon del teſtator, &c. This is to bee underſtood concerning goods and chattels either in poſſeſſion or in action, and the executor doth more actually repreſent the perſon of the teſtator, than the heire doth the perſon of the anceſtor. For if a man bindeth himſelfe, his executors are bound though they bee not named, but ſo it is not of the heire: furthermore, here the adminiſtrators and the ordinary alſo are implyed, as before hath beene ſaid. (Poſt. 209. b.) (2. Saun. 136.)

Sect. 338.

ET nota, que en touts caſes de condition de payment de certaine ſumme en groſſe touchant terres ou tenements, ſi loyall tender ſoit un

AND note, that in all caſes of condition for payment of a certaine ſumme in groſſe touching lands or tenements, if lawfull tender be once re-

THIS is to be underſtood, that he that ought to tender the money is of this diſcharged for ever to make any other tender; but if it were a dutie before, though the feoffor enter by force of the condition, yet the debt or dutie remayneth. As if *A.* borroweth a hundred

Vide Sect. ſequen.

are only conſidered as a pledge or ſecurity for the money lent, and the money is the principal, if not the ſole object. Still however the mortgage is conſidered as forfeited in law, and the mortgagor can only recover the mortgaged lands back, by the aid of equity:—Now, as it is among the maxims of equity, that whoever claims equity muſt do equity; and that in payment of debts, equality is the higheſt equity; it has been ſettled, that if the equity of redemption of lands of a mortgagor in fee deſcends upon the heir, it is equitable aſſetts in his hands; and debts by ſpecialty and ſimple contract are paid in equal proportion. But if the equity of redemption of lands of a mortgagor for years deſcends upon the heir, it is legal aſſetts, and the debts are then paid according to their legal priority; yet, in this latter caſe, if the creditor is obliged to pray the aid of equity, the court will direct ſimple contract and ſpecialty creditors, notwithſtanding the aſſetts are legal, to come in proportionably; and if there is not ſufficient to pay all, the loſs to fall equally on all.—See 29. C. 2. §. 10. and 12. 3. & 4. W. & M. c. 14. Bennet v. Box, 1. Cha. Caſes, 12. Wollenſtone v. Croft and Long, ib. 32. Trevor v. Perryor, ib. 148. Hexon v. Wythan, ib. 248. Anonymous, 2 Cha. Ca. 54. Girling v. Lee, 1. Vern. 63. Child v. Stephens, ib. 101. Morgan v. lord Sherrard, ib. 293. Cole v. Warden, ib. 410. Plunknett v. Kirk, ib. 411. Sawley v. Gower, 2. Vern. 61. Anonymous, ib. 405. Willſon v. Fielding, ib. 763. Car v. counteſs of Burlington, 1. P. W. 228. The creditors of ſir Charles Cox, 3 P. W. 341. and ſee 1. Roll. Abr. 920. Hob. 265. It alſo follows from the above circumſtance of the mortgaged lands being conſidered in equity as a ſecurity or pledge for the mortgage debt, that after the legal forfeiture it continues as much a debt as before: Hence, in general, the perſonal eſtate of the mortgagor is, upon his deceaſe, to be applied in diſcharge of the mortgage: and this holds equally in favour of the heir; of a general deviſee, or *heres factus*; and of a deviſee of particular lands; and whether there

(9. Rep. 79. a.)

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

foits refuſe, celuy que duiſſoit tender le money eſt de ceo aſſouth, & pleinment diſcharge per touts temps apres.

fuſed, he which ought to tender the money is of this quite and fully diſcharged for ever afterwards.

Sect. 339.

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

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

(5. Rep. 96.)

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

And by this ſection alſo it appeareth, that the executors do more repreſent the perſon of the teſtator, then the heire doth to the anceſtor; for though the executor be not named, yet the

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

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

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

is, or is not, a bond or covenant for payment of the money. Cope v. Cope, 1. Salk. 450. Howell v. Price, in Cha. 433. Pockley v. Pockley, 1. Vern. 36. Lord Winchelſea v Norcliffe, 1. Vern. 485. Bartholomew v. May, 1. Atk. 489. Galton v. Hancock, 2. Atk. 530. This doctrine has been frequently extended to the caſe of a deviſe of lands in truſt, to pay off debts; where (particularly if the perſonalty is bequeathed to the executor) the courts, notwithſtanding an expreſs deviſe of a real eſtate for the payment of debts, have directed the perſonalty to be firſt applied in payment of them. See Gower v. Mead, Prec. in Cha. 2. Dolman v. Smith, ibid. 256. 2. Vern. 117. Hall v. Brooker, Gilb. Rep. 70. See alſo Bamfield v. Wyndham, Prec. in Cha. 101. Wainwright v. Bendloe, Gilb. Rep. 12. Stapleton v. Colville, Ca. temp. Talbot, 202.—It does not appear, that the courts of equity have fixed any determinate period of time to be ſuch a length of poſſeſſion as to bar the mortgagor's right of redemption: but as, in the courts of law, twenty years is a bar to an entry or ejectment; the courts of equity (conſiſtently with their general ſyſtem, that the rules and practice of their courts ſhould bear an analogy to the rules and practice of the courts of law) have inclined to allow the ſame period of time to be a bar to a redemption.—See Cook v. Arnham, 3. P. W. 283, and the note of the editor at the end of that caſe.

*la mort le feoffee s'il moruſt devant le jour limit, * le payment doit eſtre fait al heir al jour aſſeſſe, &c.*

ſuch a day, &c. there after the death of the feoffee, if he dieth before the day limited, the payment ought to be made to the heire at the day appointed, &c.

law appoints him to receive the money, but ſo doth not the law appoint the heire to receive the money unleſſe he be named.

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

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

[*m*] 12. E. 3. Condition 8. & 10. (8. Rep. 73.)

If a man make a feoffment in fee upon condition that the feoffee ſhall pay to the feoffor his heires or aſſignes 20 pound at ſuch a day, and before the day the feoffor make his executors and dieth, the feoffee may pay the ſame either to the heire or to the executors, for they are his aſſignes in law to this intent. But if a man make a feoffment in fee upon condition that if the feoffor pay to the feoffee his heires or aſſignes 20 pound before ſuch a feaſt, and before the feaſt the feoffee maketh his executors and dyeth, the feoffor ought to pay the money to the heire, and not to the executors, for the executors in this caſe are no aſſignees in law; and the reaſon of this diverſitie is this, for that in the firſt caſe the law muſt of neceſſitie finde out aſſignes, becauſe there cannot be any aſſignes in deed, for the feoffor hath but a bare condition and no eſtate in the land which he can aſſigne over. But in the other caſe the feoffee hath an eſtate in the land which he may aſſigne over, and where there may bee aſſignees in deed, the law ſhall never ſeeke out or appoint any aſſignes in law. And albeit the feoffee made no aſſignment of the eſtate, yet the executors cannot be aſſignees, becauſe aſſignes were onely intended by the condition to be aſſignees of the eſtate; and ſo was it reſolved (*) *Mich.* 23. & 24. *Eliz.* by the two chiefe juſtices in the court of wards betweene *Randall* and *Browne*, which I obſerved.

(1 Roll. Abr. 421.)

(Hob. 9.)

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

(*) Mic. 23. & 24. Eliz. in curia Wardorum. Inter Randal & Browne. Vid 2. Eliz. Dier. 181. Pl. Com. Chapman's caſe 186. 288. Vid. Goodale's caſe lib. 5. fo. 96. 97. 17. Aſſ. pl. 2. Goodale's caſe ubi ſupra. (Mo. 243. Ant. 208. a.)

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

Sect. 340.

ITEM † ſur tiel caſe de feoffment en mortgage, queſtion ad eſte demaunde en quel lieu le feoffour eſt tenus ‡ de tender les deniers a le feoffee al jour aſſeſſe, &c. Et aſcuns ont dit, que ſur la terre iſſint § tenus en morgage, pur ceo que le condition eſt dependant ſur le terre. Et ont dit ‖ que

ALSO upon ſuch caſe of feoffment in morgage, a queſtion hath been demanded in what place the feoffor is bound to tender the money to the feoffee at the day appointed, &c. And ſome have ſaid, upon the land ſo holden in morgage, becauſe the condition is depending upon the land. And they

Item ſur tiel caſe de feoffment en morgage, queſtion ad eſte demande, &c. Here and in other places, that I may ſay once for all, where *Littleton* maketh a doubt, and ſetteth downe ſeverall opinions and the reaſons, he ever ſetteth downe (*) the better opinion and his owne laſt, and ſo he doth here. [*n*] For at this day this doubt is ſettled, having beene oftentimes reſolved, that ſeeing the money

(*) Vid. Sect. 170. 302. 375.

[*n*] 8. E. 4. 4. & 14. 11. H. 4. 62. 17. Aſſ. p. 2. 17. E. 3. 2. 21. H. 7. Keylway 74. 16. Eliz. Dier. 327. lib. 4. fo. 72. in Borough's caſe. 21. E. 4. 6.

* *donques* added in L. and M. and Roh. † *ſur—en*, L. and M. and Roh. ‡ *de—a*, L. and M. and Roh.
§ *tenus*, not in L. and M. ‖ *que* not in L. and M. but in Roh.

(1) Hob. 9. Peaſe and Styleman.— *A man was bound to pay 20l. to ſuch a perſon as he (the obligee) ſhould by his will appoint. The obligee made J. S. his executor, but made no other appointment. It was reſolved, upon demurrer, that the executor ſhould not have the 20l. for he is only an aſſignee in law, who takes to the uſe of the teſtator: but here the condition is in favour of an actuall aſſignee, who takes to his own uſe. The conuſee of a fine leaſes to the conuſor for 99 years, with condition, if the leſſee pays to the leſſor, his heirs and aſſigns, that the uſes limited to the conuſee and his heirs, by an indenture, ſhould ceaſe: the leſſor dies. Lord Nottingham was of opinion, that the uſes ſhould not ceaſe by payment to the adminiſtrator of the leſſor, becauſe he may be an aſſignee in deed, as here. 11. May, 1659, Sir Andrew Young.*—Lord Nott. MSS. notes.——Howe v. Whitebanck. Upon a fine, the uſe of land was limited to A. for 80 years, with a power to A. and his aſſigns to make leaſes for three lives, to commence after the determination of that term. A. aſſigned over to B. B. died, having made his will, and appointed C. his executor. C. aſſigned over to D.: D. in purſuance of the power, made a leaſe for life. The queſtion was, whether D. was ſuch an aſſignee of A. as to have a power to make this leaſe; or whether it ſhould extend only to the immediate aſſignees of A.? The doubt in this caſe was the greater, as there had been a deſcent upon an executor. The caſe of Peaſe and Styleman was cited, where it was ſaid, that an executor or adminiſtrator ſhould not in ſome caſes be ſaid to be a ſpecial aſſignee. But all the court ſeemed to incline to the contrary, and that D. ſhould be called an aſſignee, well enough for the purpoſe of making the leaſes in queſtion, and that ſo ſhould any perſon that came to the eſtate under the firſt leſſee, though there ſhould be twenty meſne aſſignments. And afterwards, in the Michaelmas term following, judgment was given accordingly.—1. Freem. 476.

(5. Rep. 95. 2. Cro. 423. 3. Cro. 688.)

money is a summe in grosse and collaterall to the title of the land, that the feoffor must tender the money to the person of the feoffee according to the latter opinion, and it is not sufficient for him to tender it upon the land; otherwise it is of a rent that issueth out of the land. But if the condition of a bond or feoffment be to deliver twenty quarters of wheat or twenty load of timber or such like, the obligor or feoffor is not bound to carry the same about and seeke the feoffee, but the obligor or feoffor before the day must goe to the feoffee, and know where he will appoint to receive it, and there it must bee delivered. And so note a diversitie betweene money, and things ponderous, or of great waight. If the condition of a bond or feoffment be to make a feoffment, there it is sufficient [b] for him to tender it upon the land, because the state must passe by liverie.

8. E. 4. 2. 19. R. 2. Det. 178.

(Ant. 206. b. 207. a.)

(1. Roll. 453.)

(Ant. 208.)

[b] 2. E. 4. 3.

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

Un especiall corporall service al feoffee. This is a diversity betweene a rent issuing out of land, and a corporall service issuing out of land, for it sufficeth (as hath beene

si le feoffor soit * *sur le terre la prest a paier la money al feoffee a le jour assesse, & le feoffee adonque ne soit pas la,* † *adonque le feoffor est assouth & excuse de payment de le mony, pur ceo que nul default est en luy. Mes il semble a ascuns que la ley est contrary, & que default est en luy; car il est tenus de querer le feoffee s'il soit adonque en* ‡ *ascun auter lieu deins le roialme de Engleterre. Come si home soit oblige en un obligation de* 20 *li. sur condition endorce sur mesme l' obligation, ques'il paya a celuy a que l'obligation est fait a tiel jour* 10 *li.* § *adonque l'obligation de* 20 *li. perdra sa force, & serra tenus pur nul; cest en cas il covient a celuy que fist obligation de querer celuy a que l'obligation est fait, s'il soit deins Engleterre, & al jour assesse de tender a luy les dits* 10 *li. autrement il forfeitera la summe de* 20 *li. comprise deins l' obligation,* ‖ *&c. Et issint il semble en l'auter cas, &c. Et coment que ascuns ont dit, que le condition est dependant sur la terre, uncore ceo ne prove que*

have said that if the feoffor be upon the land there ready to pay the money to the feoffee at the day set, and the feoffee bee not then there, then the feoffor is quit and excused of the payment of the money, for that no default is in him. But it seemeth to some that the law is contrary, and that default is in him; for he is bound to seeke the feoffee if hee bee then in any other place within the realm of England. As if a man be bound in an obligation of 20 pound upon condition endorsed upon the same obligation, that if he pay to him to whom the obligation is made at such a day 10 pound, then the obligation of 20 pound shall lose his force, and bee holden for nothing. In this case it behooveth him that made the obligation to seek him to whom the obligation is made if he be in England, & at the day set to tender unto him the said 10 pound, otherwise he shall forfeit the summe of 20 pound compriſed within the obligation, &c. And so it seemeth in the other case, &c. And albeit that some have

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* *sur le terre la*, not in L. and M nor Roh. † *que* added in L. and M. and Roh. ‡ *ascun—un*, L. and M. and Roh. § *que* added L. and M. and Roh. ‖ *&c.* not in L. and M. but in Roh.

(1) If A. recites by his deed, that whereas he is indebted to B. in 100l. and he covenants with B. that the 100l. shall be paid and delivered to B. or his assigns, at Rotterdam, in Holland, by C. without any suit at law, upon the first requisition which shall be made of it; in this case, the demand may be in any other place besides Rotterdam: for though payment is to be made at Rotterdam, yet the demand may be made in any place; and if the demand be made in England, or at Dort, which is 10 miles from Rotterdam, it is good, for he ought to have reasonable time to pay it after the demand, having respect to the distance of the place. But if the demand should be limited to Rotterdam, perhaps he would never come there, and so the covenant would be of no effect.—Mich. 1650. between Halsted and Vanleyden, adjudged upon a special verdict.—1 Roll. Abr. 443.

*le feasans de le condition d'estre performe, covient estre fait sur la terre, &c. nient plus que si le condition fuit que le feoffor ferra a tiel jour, &c. un especial corporall service al feoffee, nient nosmant le lieu ou tiel corporal service serra fait. En tiel cas le feoffor doit faire tiel corporal service al jour limitte al feoffee, en quecunque lieu d'Engleterre que le feoffee est, s'il voile aver advantage de le condition, &c. Issint il semble en l'auter cas. Et il semble a eux que il serroit pluis properment dit, que l'estate de la terre est dependant sur la condition, * que † a dire, que le condition est dependant sur la terre, &c.* Sed quære, &c.

said that the condition is depending upon the land, yet this proves not that the making of the condition to bee performed, ought to be made upon the land, &c. no more then if the condition were that the feoffor at such a day shall do some speciall corporall service to the feoffee, not naming the place where such corporall service shall be done. In this case the feoffor ought to do such corporall service at the day limited to the feoffee, in what place soever of England that the feoffee bee, if he will have advantage of the condition, &c. So it seemeth in the other case. And it seemes to them that it shall bee more properly said, that the estate of the land is depending upon the condition, then to say that the condition is depending upon the land, &c. *Sed quære, &c.*

said) that the rent bee tendered upon the land, (1) out of which it issueth. But homage or any other special corporal service must be done to the person of the lord, and the tenant ought by the law of conveniency to seeke him to whom the service is to bee done, in any place within England.

21. E. 3. 10. 20. H. 6. 31. 27. E. 3. 34. 21. Ass. 13. 7. E. 4. 4. 21. E. 4. 17. 20. E. Avowrie 113. 45. E. 3. 9. 46. E. 3. Barre. 216.

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

Mich. 22. & 23. Eliz. in Banke le Roy, which I myselfe heard and observed. 19. Eliz. Dier. 354. Lib. 8. fol. 92. in France's case. (Cro. Jac. 9.)

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

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

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

If *A.* be bound to *B.* with condition that *C.* shall enfeoffe *D.* on such a day, *C.* must give notice to *D.* thereof, and request him to be on the land at the day to receive the feoffment, and in that case he is bound to seeke *D.* and to give him notice. (Hob. 51. 1. Roll. Abr. 463. 2. Cro. 9.)

De tender, or *tendre*, is a word common both to the English and French, in Latine *offerre*, and in that sense, and with that Latyn word it is alwayes used in the common law. *Vide sect.* 514. the tender of the halfe marke. And before, *sect.* 333. 334. 337. (2. E. 4. 3. & 4.)

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

(1) *Otherwise when the lease is void; for there no acceptance of rent afterwards can make it have continuance.* Post. 215. a. Lord Not. MS.

Sect. 341.

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

*MES ſi feoffment en fee ſoit fait, reſervant al feoffor un anual rent, et pur default de payment un re-entrie, &c. en ceſt caſe il ne beſoigne * le tenant a tender le rent, quaunt il eſt arere, forſque ſur le terre, pur ceo que ceo eſt rent iſſuant hors de la terre, que † eſt rent ſecke. Car ſi le feoffor ſoit ſeiſie un foits de ceſt rent, et puis il vient ſur la terre, &c. et le rent luy ſoit denie, il poet aver aſſiſe de* Novel Diſſeiſin. *Car coment que il poet entrer per cauſe de le condition enfreint, &c. uncore il poet eſlier*, ſcilicet, *de relinquiſher ſon entrie, ou d'aver un aſſiſe, &c. Et iſſint eſt diverſitie, quant al tender de le rent que eſt iſſuant hors de la terre, et del tender d'auter ſumme en groſſe, que ne paſſe iſſuant hors d'aſcun terre.*

BUT if a feoffment in fee bee made, reſerving to the feoffor a yerely rent, & for default of payment a re-entrie, &c. in this caſe the tenant needeth not to tender the rent, when it is behind, but upon the land, becauſe this is a rent iſſuing out of the land, which is a rent ſecke. For if the feoffor bee ſeiſed once of this rent, and after hee commeth upon the land, &c. and the rent is denied him, he may have an aſſiſe of *Novel Diſſeiſin*. For albeit he may enter by reaſon of the condition broken, &c. yet hee may chooſe either to relinquiſh his entrie, or to have an aſſiſe, &c. And ſo there is a diverſitie as to the tender of a rent which is iſſuing out of the land, & of the tender of another ſumme in groſſe, which is not iſſuing out of any land.

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

(Ant. 145. a.) 14. E. 3. Entre congeable 45. 24. Aſſ. 11. 45. Aſſ. 5. 6. H. 7. 3. 17. E. 3. 73. Pl. com. 133. 22. H. 6. 57.

(3. Rep. 64. 65.)

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

(1. Roll. Abr. 475. poſt. 373. a. Noy. 7.)

Sect. 342.

ET pur ceo il ſerra bone et ſure choſe pur celuy que voet faire tiel feoffment en mortgage, de mitter un eſpecial lieu l'ou les deniers ſeront payes, et le pluis eſpeciall que eſt mis,

AND therefore it wil be a good & ſure thing for him that will make ſuch feoffment in morgage, to appoint an eſpecial place (1) where the money ſhall be payd, and the more ſpeciall that it bee put, the

le

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

(1). Upon the marriage of lord Angleſea with a daughter of lady Dorcheſter, a term of years was limited in his lordſhip's Iriſh eſtates, for raiſing 12000l. for the portions of the daughters. There was but one daughter of the marriage. It was made a queſtion, whether the portion was to be paid in England, without any deduction or allowance for the exchange from Ireland to England? It was determined in Chancery, that the portion ought to be paid in England, where the contract was made and the parties reſided, and not in Ireland; becauſe it was a ſum in groſs, and not a rent iſſuing out of land. Vin. Abr. vol. 5. 209.

*le melior eſt pur le feoffor. Sicome A. infeoffe B. a aver a luy et a ſes heires, ſur tiel condition, que ſi A. paya a B. en le Feaſt de Saint Michael L'Archangell procheine a vener, en eſgliſe cathedrall de Paules en Londres, deins quater heures procheine devant le heure de noone de meſme le Feaſt, a le Rood loft de * le Rood de le North doore deins meſme le eſgliſe, ou le tombe de S. Erkenwald, ou al huis de tiel chappell, ou a tiel piller, deins meſme l'eſgliſe, que adonque bien liſt al avantdit A. et a ſes heires d'entrer, &c. en tiel caſe il ne beſoigne de querer le feoffee en auter lieu, ne d'eſtre en auter lieu, forſque en le lieu compriſe en l'endenture, ne d'eſtre la pluis longe temps que le temps ſpecifie en meſme l'endenture, pur tender ou payer le money a le feoffee, &c.*

better it is for the feoffor. As if A. infeoffe B. to have to him and to his heires, upon ſuch condition, that if A. pay to B. on the Feaſt of Saint Michael the Arch-Angell next comming, in the cathedrall church of Saint Paul's in London, within foure houres next before the houre of noone of the ſame Feaſt, at the Rood loft of the Rood of the North doore within the ſame church, or at the tombe of Saint Erkenwald, or at the doore of ſuch a chappell, or at ſuch a pillar, within the ſame church, that then it ſhal be lawfull to the aforeſaid A. and his heires to enter, &c. in this caſe he needeth not to ſeek the feoffee in an other place, nor to bee in any other place, but in the place compriſed in the indenture, nor to bee there longer than the time ſpecified in the ſame indenture, to tender or pay the money to the feoffee, &c.

(1. Roll. Abr. 445. 446.)

(2. Cro. 13. 14.)

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

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

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

Sect. 343.

ITEM en tiel caſe l'ou le lieu † de payment eſt limitte, le feoffee n'eſt ‡ oblige de receiver le payment en nul auter lieu forſque en meſme le lieu iſſint

ALSO in ſuch caſe, where the place of payment is limited, the feoffee is not bound to receive the payment in any other place but in the ſame place ſo limitted.

HEREBY it appeareth that the place is but a circumſtance; and therefore if the obligee receiveth it at any other place, it is ſufficient, though he be not bound to receive it at any other place. And

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

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

And ſo it is if the mony be to be paid on ſuch a feaſt, yet if the money be tendred and received at any time before the day, it is ſufficient. (1)

limit. Mes uncore ſi il reſceivſt le payment en auter lieu, ceo eſt aſſets bone, et auxy fort pur le feoffor ſicome le receit uſt eſte en meſme le lieu iſſint limit, &c.

But yet if he doe receive the payment in another place, this is good enough & as ſtrong for the feoffor as if the receipt had beene in the ſame place ſo limited, &c.

Sect. 344.

(Dyer 1.)

3. H. 4. b. 9. H. 7. 16. 11. H. 7. 20. 21. 19. E. 4. 1. b. 47. E. 3. 24. 22. E. 4. 37. H. 6. 26. Li. 9. fo. 78. Peytoe's caſe.

(1. Roll. Rep. 296.)

12. H. 4. 23.

* Peytoe's caſe ubi ſupra.

(Ant. 207.)

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

Lib. 5. fo. 117. Pinnel's caſe.

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

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

11. R. 2. tit. Barre 3. 43.
(1. Roll. Abr. 470. 604.)

HEREUPON are many diverſities worthie of obſervation.

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

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

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

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

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

Lib. 5. fo. 117. Pinnel's caſe.

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

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

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

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

11. R. 2. tit. Barre 3. 43.
(1. Roll. Abr. 470. 604.)

If the obligor or feoffor be bound by condition to pay an hundred markes at a certaine day,

† &c. added in L. and M. and Roh.

(1) It hath been formerly doubted, Whether the defendant, in ſuch a caſe, ought not to plead ſpecially? See 1. Cro. 142. S. C. 1. Ander. 198. S. C. Mo. 267. S. C. Ow. 45. Savil 96. 1. Leon. 311. But now this point is ſettled; for, *per 4. Annæ, cap. 16. ſect. 12.* if the obligor, his heirs, executors, and adminiſtrators, have, before the action brought, paid to the obligee, his executors or adminiſtrators, the principal and intereſt due by the condition of the bond, though ſuch payment was not ſtrictly made according to the condition, yet it may be pleaded in bar of ſuch action, and ſhall be as effectual a bar thereof as if the money had been paid at the day and place, according to the condition, and had been ſo pleaded. Note to the 11th edition.

day, and at the day the parties doe account together, and for that the feoffee or obligee did owe twentie pound to the obligor or feoffor, that fumme is allowed, and the refidue of the hundred markes paid, this is a good fatisfaction, and yet the twenty pound was a choſe in action, and no payment was made thereof, but by way of retainer or diſcharge (1).

(Noy. 110. 5. Rep. 117.) 37. H. 6. 26. 46. E. 3. 33. 34. H. 6. 17. 12. H. 8. 1. b.

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

Sect. 345.

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

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

REndront a un eſtrange home un annuel rent, &c. (Dr. and Stud. cap. 20.)

This reſervation is meerely void [a] for the reaſons hereafter in this *ſection* alleadged by *Littleton*, and alſo for that no eſtate moveth from the ſtranger, and that he is not partie to the deed.

[a] Lib. 8. fol. 70. 71. (Plo. 243. fera bon in caſe le Roy. Ant. 47. a. Cro. Car. 288. Ant. 143. b.)

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

[b] 6. E. 2. entr. cong. 55. recipere. 8. Aſſ. 34. revertere. (1. Rep. 76. Godbolt 448.)

But if *A.* bee ſeiſed of certaine lands, and *A.* and *B.* joyne in a feoffment in fee reſerving a rent to them both and their heires, and the feoffee grant that it ſhall be lawfull for them and their heires to diſtreine for the

* *en fee* added L. and M. and Roh. † *que* added L. and M. and Roh. ‡ *pas* not in L. and M. || *hors* not in L. and M.

(1) In Roll. Rep. 296. it is ſaid, that the reaſon why a collateral thing cannot be ſatisfied with money, or other collateral thing, is, becauſe the collateral thing is not due, and ſo no contract can be made of it till the day of payment; and that the reaſon why money may be ſatisfied by a collateral thing is, becauſe it is of certain value.

(Ant. 148. a. Sect. 221.)

the rent, this is a good grant of a rent to them both, because hee is partie to the deed, and the clause of distresse is a grant of the rent to *A.* and *B.* as it appeareth before in the chapter of rents. But if *B.* had beene a stranger to the deed, then *B.* had taken nothing. And upon this diversitie are all the bookes [c], which *primâ facie* seeme to vary, reconciled.

[c] 18. E. 2. Aff. 381. 26. H. 8. 2. 13. E. 2. feoffments & faits 108. 31. Aff. pl. 31.

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

[d] Vide Sect. 381.

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

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

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

Sect. 346.

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

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

[e] 5. E. 3. 27. 28.

(Ant. 164 a.)

ET hic nota *deux choses: un est, que nul rent (que proprement est dit rent) poit estre reserve sur ascun feoffment, done, ou leas, forsque tantsolement al feoffor, ou al donor, ou al lessor, ou a lour heires, & en nul || maner § il poit estre reserve a ascun estrange*

AND here note two things: one is, that no rent (which is properly said a rent) may be reserved upon any feoffment, gift, or lease, but onely to the feoffor, or to the donor, or to the lessor, or to their heires, and in no manner it may bee reserved to any strange person. But if

person.

* *n'est—est*, L. and M. and Roh. ‡ *hors* not in L and M. nor Roh. † *pur ceo que nul lieu est limit l'ou le payment serra fait, et*, not in L. and M. nor Roh. || *auter* added in L. and M. and Roh. § *il* not in L. and M. nor Roh.

(1) *Plo.* 107. *If a man leases, rendering rent to the heir, it is void; for the heir takes as purchasor, and is* quasi *a stranger. Hob.* 130. *Oats v. Frith. Father seised in fee and son join in a lease to commence after the death of the father, rendering rent to the son, and dies, the reservation was adjudged void; for tho' the son proves heir by the event, that does not mend the case: but if the reservation had been to the heir of the lessor, omitting the lessor, it would have been good; for tho' the rent never was in the father to demand, yet the son would take it; not as a purchasor, but as a rent inherent in the root of the reversion, which he has by descent from his father; and in this sense the rent itself was in the father, viz. to release (by the word rent, but not action) tho' not to ask. So note the difference, (says Hobart) when in such a lease the rent is reserved to the heir first, omitting the ancestor, which is good, and where an annuity or warranty is granted against the heir, omitting the ancestor, which is not good. It appears in the case of Littleton, that tho' the reservation to a stranger be bad to carry any rent to the stranger, yet it will be good to the lessor, and that not only during his life, but generally during all the term; for when it is said, rendering to* I. S. *the words* I. S. *shall be void, in the same manner as if he had said, rendering rent generally: because, 1st, If a man leases, rendering rent to him and a stranger, it is good to him clearly, and void to the stranger.* 31. Ass. 30. *2dly, When a man leases, rendering rent to him and his heirs general, yet the law will direct it to an issue who is not his heir general, merely for congruity's sake.* Dyer 115. *b.* Sir Thomas Wyatt's *case, and before* 12. *b. Difference between a lease reserving rent to* I. S. *and a lease upon condition, that* I. S. *shall re-enter if the rent be in arrear, for there neither shall enter; not* I. S. *because he cannot by law; not the lessor, because there are no words to give re-entry to any beside* I. S. *But in the case of Doctor and Student, feoffment upon condition, that he shall pay* 20*l. to* I. S. *and that otherwise* I. S. *shall re-enter; there, tho'* I. S. *cannot re-enter, the feoffor can, for there the condition was created by the first words: and tho' he intends the advantage of this to* I. S. *it does not signify. So* 28. H 8. Dyer 33. *Devise to the prior of St.* B. *so that he pays to the Dean and Chapter of St.* Paul's, *and that if he does not so, the Dean and Chapter shall have it, that is a void condition to make it a remainder, but it is good for the devisor to re-enter. Difference between a rent upon a lease and a rent upon a feoffment: in the last case rent would be void to a stranger, and yet not good to the feoffor, because the law does not create it, and it is not so reserved; but the case of a feoffment is like to a grant of rent to* I. S. *and that if it be in arrear that* I. D. *shall distrain, there*

the

perſon. Mes ſi deux joyntenants font un leas per fait endent, reſervant a un de eux un certaine annuall rent, ceo eſt aſſets bon a luy a que le rent eſt reſerve, purceoque il eſt privy a le leaſe & nemy eſtrange a le leas, &c.

two jointenants make a leaſe by deed indented, reſerving to one of them a certain yearely rent, this is good enough to him to whom the rent is reſerved, for that hee is privie to the leaſe and not a ſtranger to the leaſe, &c. (1)

if that two joyntenants without a deed indented make a leaſe for life, reſerving a rent to one of them, it ſhall enure to them both in reſpect of the joynt reverſion. And ſo it is of a ſurrender to one of them, it ſhall enure to them both.

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

after his deceaſe, a pound of comyne to his heires, that this is good. (10. Rep. 106. Hob. 130.)

If a man make a feoffement in fee, reſerving a rent to him or his heirs, it is good [*f*] to him for tearme of his life, and void to his heire. (Ant. 47. a.)

[*f*] Lib. 5. fol. 111. Mallorie's caſe.

Mes ſi 2. joyntenants font un leaſe per fait indent, &c.

This caſe being by deed indented, is evident, and it hath been touched before; but 5. E. 4. 4. a. 27. H. 8. 16. Vide Sect. 58. (Poſt. 318. a. Ant. 47. a.)

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

Vide Sect. 58.

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

Sect. 347.

*LE ſecond choſe * eſt, que nul entrie ou reentrie (que eſt tout un) † poit etre reſerve ne done a aſcun perſon, forſque tantſolement al ſeoffor, ou al donor, ou al leſſor, ou a lour heires: & tiel ‡ reenter ne poyt eſtre grant a un auter perſon. Car ſi home leſſa || terre a un auter pur terme de vie per indenture, rendant al leſſor et a ſes heires certaine rent, & pur default de payment un reentry, &c. ſi apres le leſſor per un fait granta le reverſion de la terre a un auter en fee, et le tenant a terme de vie atturna, &c. ſi le rent a-*

THE ſecond thing is, that no entry nor reentry (which is all one) may be reſerved or given to any perſon, but only to the feoffor, or to the donor, or to the leſſor, or to their heires: and ſuch reentrie cannot be given to any other perſon. For if a man letteth land to another for tearme of life by indenture, rendring to the leſſor and to his heires a certaine rent, and for default of payment a reentry, &c. if afterward the leſſor by a deed granteth the reverſion of the land to another in fee, and the tenant for terme of life attorne, &c. if the rent be

QUE nul entrie, &c. (1. Roll. Abr. 473.)

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

Pur default de payment un reentrie,

* *eſt* not in Roh. but in L. and M. † *ne* added in L. and M. and Roh. ‡ *reenter—rent* in L. and M. and Roh. || *certeine* added in L. and M. and Roh.

(1) The principle which gave riſe to this rule is, that rent is conſidered as a retribution for the land, and is therefore payable to thoſe who would otherwiſe have had the land.—It is to be obſerved, that remainder-men in a ſettlement, being, at firſt view, neither feoffors, donors, leſſors, nor the heirs of feoffors, donors, or leſſors, there ſeems to have been, for ſome time after the ſtatute of Uſes, a doubt, whether the rents of leaſes made by virtue of powers contained in ſettlements, could be reſerved to them. In Chudleigh's caſe, 1. Rep. 139. it is poſitively ſaid, that if a feoffment in fee be made to the uſe of one for life, remainder to another in tail, with ſeveral remainders over, with a power to the tenant for life to make leaſes, reſerving the rent to the reverſioners, and the tenant for life accordingly makes leaſes, neither his heirs nor any of the remainder-men ſhall have the rent. But in Harcourt v. Pole, 1. Anderſ. 273. it was adjudged, that the remainder-men might diſtrain in theſe caſes. And in Sir Thomas Jones, 35. the *dictum* in Chudleigh's caſe is denied to be law. The determination in Harcourt v. Pole will appear incontrovertibly right, if we conſider that both the leſſees and remainder-men derive their eſtate out of the reverſion, or original inheritance of the ſettler; and therefore the law, to uſe Sir Edward Coke's expreſſion in Whitlocke's caſe, 8. Rep. 71. will diſtribute the rent to every one to whom any limitation of the uſe is made.

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the diſtreſs is of no value. 40. Aſſ. 26. *But here the words are ſufficient to create a rent, and in an entire clauſe, part may be void.* 4. E. 4. *Obligation to* I. S. *payable to* I. D. *it is good to* I. S. *Difference where the repugnancy of words appears, as here, and where it does not: as a releaſe of all actions which I have as executor, and I have none as executor; this is void, becauſe it does not appear.* 22. H. 7. Kel. 88. *b.* Ceſtuy que uſe *leaſes, rendering rent to himſelf, and dies; the heir ſhall have the rent. Yet in* 5. H. 7. 5. b. *the rent, with the reverſion, goes to the feoffees, tho' reſerved to the* ceſtuy que uſe; *yet in law the feoffees are donors; ſo it is, in effect, the feoffees leaſe, rendering rent to the* ceſtuy que uſe, *it is good for themſelves, which is ſtronger. Sir* Geo. *makes a feoffment to the uſe of himſelf for life; remainder to* William Huntley *his ſon and heir apparent and his heirs: Sir* Geo. *and* William *join in a leaſe for years, rendering rent to Sir* Geo. *his heirs and aſſigns: Sir* Geo. *dies. Reſolved, that the reſervation and the rent are determined; for* William *is not in as heir, and therefore he cannot have the rent.* Huntley's *caſe,* Palm. 485. *Lord* Nott. MSS.

(10. Rep. 42.)

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

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

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

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

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

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

This doctrine doth not hold where the freehold is made determinable on a contingency with limitation over on it, by way of opening the old estate in the way of remainder. See Plowd. 408. 2. Co. 53. b. 1. Blacket. Rep. 610. 613. The Difference between a condition & limitation in this respect deserves a note.

Pl. Com. 313. 314. in Scolaſticae's caſ. (Hob. 130.) 25. E. 4. 14. 2. 21. H. 7. 18. a. (Ant. 46. b.)

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

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

pres ſoit aderere, le grantee de le reverſion poit diſtreiner pur le rent, pur ceo que le rent eſt incident a le reverſion; mes il ne poit entrer en la terre, & ouſte le tenant, ſicome le leſſor puiſſoit ou ſes heires, ſi le reverſion uſt eſte continue en eux, &c. Et en ceſt caſe l'entrie eſt tolle a touts temps; car le grantee de le reverſion ne poit entrer, cauſâ quâ ſuprà. *Et le leſſor ne ſes heires ne poyent enter; car ſi le leſſor puiſſoit entrer, donques il covient que il ſerroit * en ſon primer eſtate, &c. et ceo ne poit eſtre, pur ceo que il ad alien de luy le reverſion.*

after behind, the grantee of a reverſion may diſtreine for the rent, becauſe that the rent is incident to the reverſion; but he may not enter into the land, and ouſte the tenant, as the leſſor might have done or his heires, if the reverſion had beene continued in them, &c. And in this caſe the entrie is taken away for ever; for the grantee of the reverſion cannot enter, *cauſâ quâ ſuprà.* And the leſſor nor his heires cannot enter; for if the leſſor might enter, then hee ought to be in his former ſtate, &c. and this may not bee, becauſe hee hath aliened from him the reverſion.

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

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

[y] If

* *en—a* in L. and M. and Roh.

(y) If *ceſtuy que uſe* had made a leaſe for yeares, &c. upon condition, the feoffees ſhould not enter for the condition broken, for they are privie in eſtate, but not privie in blood. (y) 27. H. 8. 1.

Another diverſitie is in caſe of a leaſe for yeares, where the condition is that the leaſe ſhall ceaſe, or be void, as is aforeſaid, and where the condition is, that the leſſor ſhall reenter, for there the grantee, as *Littleton* ſaith, ſhall never take benefit of the condition. (4. Rep. 52. Ant. 211. b. 1. Roll. Abr. 475. 3. Rep. 64.)

And it is to be obſerved, that where the eſtate or leaſe is *ipſo facto* voide by the condition or limitation, no acceptance of the rent after can make it to have a continuance: otherwiſe it is of an eſtate or leaſe voydable by entrie. (1) Pl. Com. Browning's caſe. 236.

Another diverſitie is betweene conditions in deed, whereof ſufficient hath beene ſaid before, and conditions in law. As if a man make a leaſe for life, there is a condition in law annexed unto it, that if the leſſee doth make a greater eſtate, &c. that then the leſſor may enter. Of this and the like conditions in law, which doe give an entrie to the leſſor, the leſſor himſelfe and his heires ſhall not onely take benefit of it, but alſo his aſſignee and the lord by eſcheat, every one for the condition in law broken in their owne time. Another diverſity there is betweene the judgement of the common law, whereof *Littleton* wrote, and the law at this day by force of the ſtatute (*) of 32. *H.* 8. cap. 34. (*a*) For by the common law no grantee or aſſignee of the reverſion could (as hath been ſaid) take advantage of a re-entrie by force of any condition. For at the common law, if a man had made a leaſe for life reſerving a rent, &c. and if the rent be behind a re-entrie, and the leſſor grant the reverſion over, the grantee ſhould take no benefit of the condition, for the cauſe before rehearſed. But now by the ſaid ſtatute of 32. *H.* 8. the grantee may take advantage therof, and upon demand of the rent, and non-payment, he may re-enter. By which act it is provided, that as well every perſon which ſhall have any grant of the king of any reverſion, &c. of any lands, &c. which pertained to monaſteries, &c. as alſo all other perſons being grantees or aſſignees, &c. to or by any other perſon or perſons, and their heires, executors, ſucceſſors, and aſſignees ſhal have like advantage againſt the leſſees, &c. by entry for non-payment of the rent, or for doing of waſte or other forfeiture, &c. as the ſaid leſſors or grantors themſelves ought or might have had. Upon this act divers reſolutions and judgements have beene given, which are neceſſary to be knowne. (1. Saun. 237. 238. 239. 240. 241.) (*) 32. H. 8. cap. 34. in le preamble. (*a*) 26. H. 6. tit. ent. cog. 49. (Plo. 175. b.)

1. That the ſaid ſtatute is generall, *viz.* (*b*) that the grantee of the reverſion of every common perſon as well as of the king ſhall take advantage of conditions. (*b*) Pl. Com. Hill and Grarge's caſe 175. 176.

2. That the ſtatute doth extend to grants made by the ſucceſſors of the king, albeit the king be only named in the act. M. 10. & 11. Eliz. 180. Dier. ibid.

3. That where the ſtatute ſpeaketh of leſſees, that the ſame doth not extend to gifts in taile. 14. Eliz. Dyer 309. Wynter's caſe.

4. That where the ſtatute ſpeakes of grantees and aſſignees of the reverſion, (*d*) that an aſſignee of part of the ſtate of the reverſion may take advantage of the condition. As if leſſee for life be, &c. and the reverſion is granted for life, &c. So if leſſee for yeares, &c. bee, and the reverſion is granted for yeares, the grantee for yeares ſhall take benefit of the condition in reſpect of this word (*executors*) in the act. (*d*) Pl. Com. Kidwellye's caſe 69. Vid. Dyer Mich. 14. & 15. Eliz. 309. (1. Roll. Abr. 472. Poſt. 385. a. Ante 148. a. 1. Roll. Abr. 471. *Mo.* 93.)

5. That a grantee of part of the reverſion ſhall not (*e*) take advantage of the condition; as if the leaſe be of three acres, reſerving a rent upon condition, and the reverſion is granted of two acres, the rent ſhall be apportioned by the act of the parties, but the condition is deſtroyed, for that it is entire and againſt common right. Vide 7. E. 3. 54. Simile adjudged in Communi Banco in the Lord Dyer's time. P. 17. Eliz. Mich. 14. & 15. Eliz. Dyer 309. adjudge Winter's caſe. (*e*) Lib. 5. fo. 54. Knight's caſe. Winter's caſe ubi ſupra. Knight's caſe ubi ſupra.

6. That in the king's caſe, the condition in that caſe is not deſtroyed, but remaines ſtill in the king. Lib. 4. fo. 120. Dumpei's caſe.

7. By act in law a condition may bee apportioned in the caſe of a common perſon; as if a leaſe for yeares be made of two acres, one of the nature of Burrough Engliſh, the other at the common law, and the leſſor having iſſue two ſonnes, dieth, each of them ſhall enter for the condition broken, and likewiſe a condition ſhall be apportioned by the act and wrong of the leſſee, as hath been ſaid in the chapter of Rents. (4. Leo. 27. 28. 29. 30. Mo. 202. 203.)

8. If a leaſe for life be made, reſerving a rent upon condition, &c. the leſſor levies a fine of the reverſion, he is grantee or aſſignee of the reverſion; but without atturnment hee ſhall not take advantage of the condition, for the makers of the ſtature intended to have all neceſſary incidents obſerved, otherwiſe it might be miſchievous to the leſſee. (2) Reſolved in Duke's caſe. Paſch. 20. Eliz. in Communi Banco. Mallorie's caſe lib. 5. 112. b.

9. There is a diverſity betweene a condition that is compulſory, and a power of revocation that is voluntary: for a man that hath a power of revocation, may by his owne act extinguiſh his power of revocation in part, as by levying of a fine of part; and yet the power ſhall remaine for the reſidue, becauſe it is in nature of a limitation, and not of a condition; and ſo it was reſolved (*b*) in the earle of Shrewſburie's caſe in the court of wards, *Paſch.* 39. *Eliz.* *and Mich.* 40 & 41. *Eliz.* (1. Roll 472. Hob. 313. Poſt. 237. 265. b. 1. Rep. 112. 113.) (*b*) 14. Eliz. Dyer 39.

10. If the leſſor bargaine and ſell the reverſion by deed indented and inrolled, the bargainee is not in the *per* by the bargainor, and yet hee is an aſſignee within the ſtatute. (1. Rep. 173. b. 4. Rep. 115. b. 1. Roll. Abr. 422.)

So

(1) Becauſe the acceptance of rent cannot make a new leaſe, and the old one was determined; but the acceptance of the rent is a ſufficient declaration, that it is the leſſor's will to continue the leaſe, for he is not entitled to the rent but by the leaſe. Note to the 11th edition. And ſee Symſon v. Butcher, Doug. Rep. 51; and the caſe of Wynn v. Humphreys; and Carter v. Butcher, reported in the notes of that caſe.

(2) Attornment being taken away per 4 & 5. Ann, c. 16, the law ſeems to be otherwiſe now. Note to the 11th edit.